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(1921—1925.)

VOL. I.

BY

R. NARAYANASWAMI IYER, B.A., B.L.

AND

V. V. CHITALEY, B.A., LL.B.

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PREFACE.

IT is the desire of the compilers just to say a few words about the special features of the present Quinquennial Digest. If one is to make the best possible use of the Digest, a knowledge of the special features will be very helpful.

We may begin by referring to the fact that separate headnotes are given for distinct points in the same case.

Where the number of cases under a certain heading is particularly large, as, for instance, in the case of Civil Procedure Code, S. 11, Criminal Procedure Code, S. 145 or Limitation Act, Art. 144, the task of reference has been simplified by a careful system of sub-headings.

Another special feature is that statute headings are given wherever such headings can conveniently be given. The advantages of this system are obvious.

Points relating to analogous topics are always put under one comprehensive heading. Thus all cases relating to legal practitioners as such will be found under the heading Legal Practitioner, although in the particular cases they may relate to pleaders or attorneys or other classes of legal practitioners.

We may next refer to the Statute indexes enabling sections relating to particular questions being picked up easily. These indexes are provided in the appropriate places for all important Acts.

In the case of repealed or amended statutes comparative tables setting forth the corresponding sections of the statutes are given.

Last but not least, the order in which the cases on a particular point are arranged deserves special mention. The arrangement is according to the Courts in their alphabetical order except in the case of Privy Council decisions which come first. In each Court the cases are so arranged that the later decision always comes before the earlier ones.

The Publishers hope that the learned members of the legal profession will warmly welcome and appreciate the new features developed or incorporated in this issue of our Quinquennial Digest.

MYLAPORE,
20th May, 1926.

R. N.,
V. V. C.

ABBREVIATIONS EXPLAINED.

Reports.

All. or A.	Indian Law Reports, Allahabad Series.
A. L. J.	Allahabad Law Journal.
A. I. R. 1925 All. or 1925 A.	All India Reporter, 1925 Allahabad.
Bom. or B.	Indian Law Reports, Bombay Series.
Bom. L. R.	Bombay Law Reporter.
A. I. R. 1925 Bom.	All India Reporter, 1925 Bombay.
Bur. L. T.	Burma Law Times.
Bur. L. J.	Burma Law Journal.
Cal or C.	Indian Law Reports, Calcutta Series.
C. L. J.	Calcutta Law Journal.
C. W. N.	Calcutta Weekly Notes.
A. I. R. 1925 Cal.	All India Reporter, 1925 Calcutta.
Cr. L. J.	Criminal Law Journal.
I. A.	Law Reports, Indian Appeals.
I. C.	Indian Cases.
Lah or L.	Indian Law Reports, Lahore Series.
A. I. R. 1925 Lah.	All India Reporter, 1925 Lahore.
Lah. L. J. or L. L. J.	Lahore Law Journal.
L. B. R.	Lower Burma Rulings.
L. W.	Law Weekly.
Mad. or M.	Indian Law Reports, Madras Series.
M. L. J.	Madras Law Journal.
M. L. T.	Madras Law Times.
M. W. N.	Madras Weekly Notes.
A. I. R. 1925 Mad.	All India Reporter, 1925 Madras.
Mys. L. J.	Mysore Law Journal.
N. L. J.	Nagpur Law Journal.
N. L. R.	Nagpur Law Reports.
A. I. R. 1925 Nag.	All India Reporter, 1925 Nagpur.
O. & A. L. R	Oudh and Agra Law Reporter.
O. C.	Oudh Cases.
A. I. R. 1925 Oudh	All India Reporter, 1925 Oudh.
O. L. J.	Oudh Law Journal.
O. W. N.	Oudh Weekly Notes.
P. R.	Punjab Record.
P. L. R.	Punjab Law Repoter.
P. W. R.	Punjab Weekly Reporter.
Pat.	Indian Law Reports, Patna Series.
1925 P. H. C. C.	Patna Supplement to C. W. Notes.
A. I. R. 1925 P.	All India Reporter, 1925 Patna.
A. I. R. 1925 P. C.	All India Reporter, Privy Council Section.
Pat. L. R.	Patna Law Reporter.
Pat. L. J.	Patna Law Journal.
R. or Rang.	Indian Law Reports, Rangoon Series.
A. I. R. 1925 R.	All India Reporter, 1925 Rangoon.
S. L. R.	Sind Law Reporter.
A. I. R. 1925 S.	All India Reporter, 1925 Sind.
U. B. R.	Upper Burma Rulings.

Other Abbreviations.

Appl.	Applied.	Expl.	Explained.
Appr.	Approved.	Foll.	Followed.
Dist.	Distinguished.	F. B.	Full Bench.
Disc.	Discussed.	P. C.	Privy Council.
Diss.	Dissented from.	Ref.	Referred.
Cr.	Criminal.	Rev.	Revenue.

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CIVIL, CRIMINAL & REVENUE

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——**Trustee**—*See* (1) C. P. CODE, S 92.
(2) TRUSTS ACT, SS. 55—69.

——*Settled, reopening of.*

A person, who, has executed a second account and a promissory note to pay the dues under the previous account, he having first examined the previous account and acknowledged its correctness, cannot be allowed to question the settlement and reopen the accounts. (*Ryves and Gokul Prasad, JJ.*) BENAYAK PRASAD PANDE *v.* BISHUN DATT PATHAK.
L. R. 3 A. 308.

——*Settled, Re-opening of—Fraud—Error.*

Accounts settled between parties may be reopened on the ground of substantial error or fraud. If the errors are sufficient in number and importance whether caused by fraud or mistake or where the parties occupy a fiduciary relation *e. g.*, trustee, agent, guardian, etc., it is easier to re-open the account. (*Mears, C. J. and Banerji, J.*) BHAGWAN BAKSH SINGH *v.* JOSHE DAMODARJI. **42 A. 230: 59 I. C. 20: 18 A. L. J. 100.**

——*Limitation—Part time Barred—Suit for price of goods supplied from time to time—Limitation.*

Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous one, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. If all the items form but one cause of action, it cannot be contended that a part of it can be barred by limitation, and that the rest may not be so barred. (*Mulla, J.*) NAJAN AHMED HAJI ALI *v.* SALE MAHOMED PEER-MAHOMED. **77 I C. 943: 24 Bom. L. R. 998: A. I. R. 1923 Bom. 113.**

——*Settled—Re-opening of—When allowed.*

Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. But before the defendant could ask the Court to re-open the account, he is bound to allege fraud. (*Macleod, C. J. and Coyajee, J.*) SANKAL CHAND *v.* CHIMANLAL.
70 I. C. 839 : A. I. R. 1923 Bom. 16 (1).

——*Running accounts—Separate orders—Separate bills—Plaintiff treating subject-matter of bills as creating separate causes of action—No continuous account exists.*

Where separate and distinct orders were given for the items comprised in certain bills and the bills were submitted separately and the plaintiff referred in the plaint to the causes of action which arose on the various dates, clearly treating the subject-matter of the bills as giving rise to different causes of action,

Held, that there was no continuous account. (*Buckland, J.*) MAURICE MAYAHAS *v.* MORLEY.
29 C. W. N. 496 : 87 I. C. 508 : A. I. R. 1925 Cal. 937.

——*Two kinds of accounts can be claimed against trustee.*

There are two forms of account which can be claimed by a *cestique* trust against the trustee. One is an account of all such of the moneys or funds comprised in the trust deed or from time to time subject to the trusts thereof, as have been possessed or received by the trustee or by any person by his order or for his use. The other is an account, in addition to the former account, of the moneys or funds comprised in the trust deed or from time to time subject to the trusts thereof, which might without the wilful neglect or default of the trustee, have been so possessed or received. 1 M. & G. 433 (n) ref. and 4 Drewry 253 Ref. (*Mookerjee and Rankin, JJ.*) PEARY MOHAN *v.* MANOHAR MOOKERJEE. **27 C. W. N. 989 : 38 C. L. J. 255 : 74 I. C. 373 : A. I.R. 1924 Cal. 160.**

——*Settled—Re-opening of—Reasons.*

An account once taken in the presence of the parties interested and acquiesced in by them will not be lightly reopened. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 10 : 34 C. L. J. 405.**

——*Suit for—Partnership—Mode of taking—*

ACCOUNTS.

Omission to produce—Effect of.

It is obligatory on each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion in certain cases arises after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by S. 66 of the Evidence Act to produce such accounts and papers as may be in his custody. If he omits so to produce, an adverse inference would be drawn against him. Besides secondary evidence will become admissible and the person withholding the document will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of court. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 10 : 34 C. L. J. 405.**

———*Suit for—Papers necessary for preparing account with Plaintiff and not produced—Suit not maintainable.*

Where after the Naib of a Zemindar was removed from his office the Zemindar sued him for rendition of accounts for a certain period and it was proved that the papers necessary for furnishing the account were with the plaintiff and the latter would not produce the same. The suit was *held* as not maintainable. (*Richardson and Shamsul Huda, JJ.*) JATINDRA NATH DUTTA *v.* SURESH CHANDRA ROY.

59 I. C. 181 : 24 C. W. N. 922.

———*Suit for Claim to a statement of account can be granted only when the relationship between the parties makes it necessary in order to entitle claimant to assert his legal rights.*

The right to claim a statement of account can only be claimed when looking to the relationship between the parties ; it is the only relief which will make the claimant to assert his legal rights satisfactorily, such right being an unusual form of relief. (*Moti Sagar, J.*) GULAM OUTAB-UD-DIN KHAN *v.* MIA FAIZ BAKHSH. **78 I. C 959 : A. I. R. 1925 Lah. 100.**

———*Suit for—Liability of husband—Acknowledgment by widow—Effect.*

A suit for the balance due on accounts by the husband of the defendant and which after the death of the husband had been acknowledged to be due by the defendant is maintainable. (*Le Rossignol, J.*) GANPAT RAI *v.* MT. NIHAL DEVI. **89 I. C. 366.**

———*Suit for—Plaintiff must produce accounts.*

In a suit by a manager or agent against his employer for settlement of accounts, the plaintiff must produce all accounts and documents admitted or proved to be with him. Refusal to do so will lead to dismissal of suit. (*Shadi Lal, C. J. and Wilberforce, J.*) MOHAN LAL *v.* NORTH WESTERN RAILWAY CO OPERATIVE STORES ASSN., LTD. **79 I. C. 275 : 5 Lah. L. J. 19.**

———*Suit for partial account does not lie where suit for whole account is barred.*

A suit to recover plaintiff's father's share of debt due to his firm by another firm in which one partner of the creditor firm is also a partner where accounts are not settled is an action for partial account. Such a suit will no doubt lie in certain cases but when a suit for an account is barred a suit for a partial account cannot be allowed merely on the ground that defendant could claim that a general account should be taken because it would not be fair to drive him to taking an account which the law thinks cannot be properly taken owing to the lapse of time. The rule leaves it to the Court to determine under what circumstances it would be equitable to order a partial account having regard to the rights of the parties. Ordinarily when one partner seeks to make another liable for one single

ACCOUNT BOOKS.

item due to the firm, it would not be equitable to decree such a claim, when the defendant partner is not allowed to claim other items, which may be due by the plaintiff to the firm, 45 M. 378, 16 L. W. 200 P. C. and 32 M. 76 Foll. (*Phillips and Venkatasubba Rao, JJ.*) SUBRAMANIAM CHETTY *v.* LUKSHMANAN CHETTY. **13 L. W. 613 : 33 M. L. T. 71 : 76 I. C. 670 : A. I. R. 1924 Mad 161.**

———*Mutual— Account may be mutual though balance is always one way provided parties contemplated balance might shift to other side at times.*

Where practically the only credits to a party were his wages for eighteen years and there was never once a balance in his favour.

Held, that the parties never contemplated that the balance might shift to the other side. (*Baker, J. C. and Hallifax, A. J. C.*) CHITANAVIS *v.* NATHU SAO. **20 N L. R. 106 : 7 N. L. J. 170 : 79 I. C. 1002 : A. I. R. 1925 Nag. 2.**

———*Entries in—If proof of binding nature of debt.*

Where the creditor of a minor brings a suit against him and relies merely on entries in the account books to show items of consideration, the evidence is not sufficient, as he is bound to prove by independent and reliable evidence the purposes for the loan. (*Kinkhede, A. J. C.*) TULSIRAM *v.* ANUSUYA.

78 I. C. 380 : A. I. R. 1924 Nag. 360.

———*Settled, Re-opening of—Mistake can be prved.*

A person is always entitled to prove if he can that there was a mistake in the accounts and that he signed them as correct by mistake. (*Batten, J. C.*) SETH BHOJRAJ *v.* PANDA SHANKARNATH.

71 I. C. 45 : A. I. R. 1922 Nag. 265

———*Limtiation.*

Balance of account is not recoverable unless it is within limitation or there is a fresh cause of action. (*Dalal, J. C.*) MENDI LAL *v.* RAM CHANDER.

A. I. R. 1925 Oudh 632 (2).

ACCOUNT BOOKS.

———*Non-production of—Presumption.*

Where a party fails to produce his books of accoun. in Court, the Court is entitled to draw the inference that if they had been produced they would not have supported his case. (*Hasan and Misra, JJ.*) SYED HASAN BAQAR *v.* SHEO NARAIN SINGH.

3 O. W. N. 25.

———*Liability of defendants should be ascertained —Court can vary mode of taking.*

In all cases in which accounts are directed to be taken it is desirable that before ordering an account to be taken the question of principle involving the measure of liability of the defendant should always be decided. It is always permissible to the Court to vary or modify the directions already given if it should be satisfied that some mistake had been made. (*Dawson Miller, C. J and Foster, J.*) HARIHAR PRASAD *v.* KESHO PRASAD SINGH. **A. I. R. 1924 Pat. 176.**

———*Suit for—Procedure—Determination of defendant's liability—Filing of accounts.*

In a suit for accounts by a principal against his agent or a beneficiary against a trustee where the defendant disputes his liability to account, that issue must first be determined before an account is taken. In a suit for accounts the court should, in the first instance, follow the procedure of calling upon the defendant to file his accounts. (*Miller, C. J. and Mullick, J.*) RAI BAHADUR HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH. **3 Pat. L. T. 638 : 71 I. C. 911 : A. I. R. 1922 P. 598.**

———*Mutuality—Open and current account.*

An account current is an open or running account

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between two or more parties, or, an account which contains items between the parties from which the balance due to one of them is, or can be ascertained, from which it follows that such an account comes under the term of open account in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits. The test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of the other. An account which consists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account. (*Coutts and Ross, JJ.*) GOPAL RAI *v.* FIRM HARCHAND RAM. **66 I. C. 30 : 3 P. L. T. 492 : A. I. R. 1922 Pat. 364.**

———*Settled—Single fraudulent error—Re-opening must be ordered.*

Where a single fraudulent error is discovered in settled accounts the proper order to make is for the re-opening of the whole account. But the onus of proving the fraud is on the party setting up. L. R. 9 Ch. D. 529 and L. R. 9 Ch. D. 547 Foll. (*Young and Carr, JJ.*) A. RAHIM *v.* H. V. LOW & CO.

3 Rang. 1 : 89 I. C 598 : A. I. R. 1925 Rang. 210.

———*—Settled—Single important error—Leave to surcharge and falsify must be given.*

Where there is a single important error, though it may not be fraudulent and though it may not justify the ordering of the re-opening of the accounts, leave must be given to surcharge and falsify. *Gething* v. *Keighley* p 550 1829 Taml. 199, and 1 D & Warr. 557 Ref. (*Young and Carr, JJ.*) A. RAHIM *v.* H. V. LOW & CO. **3 Rang. 1 : 89 I. C. 598 : A. I. R. 1925 Rang. 210.**

———*Settled—Re-opening—Parties in fiduciary relation—Re-opening can be ordered for errors less serious than in other cases.*

In a case of principal and agent or persons standing in a fiduciary relation, the number of errors to justify the Court in opening the account altogether has to be less considerable than where the parties stand in no such relation. (*Young and Carr, JJ.*) A. RAHIM. *v.* H. V. LOW & CO. **3 Rang. 1 : 89 I. C. 598 : A. I. R. 1925 Rang. 210.**

———*Settled accounts—Overcharge paid consciously cannot be objected to subsequently.*

A principal who, with his eyes open, pays an overcharge cannot be heard to object later after accounts have been settled. (*Young and Carr, JJ.*) A. RAHIM *v.* H. V. LOW & CO. **3 Rang. 1 : 89 I. C. 598 : A. I. R. 1925 Rang. 210.**

———*Settled accounts--Commission Agency for supplying goods—Payment under each separate transaction was held to constitute settled account.*

Respondents were appellants' agents for each indent placed with them and they could at any moment discontinue the agency as regards any goods not already under order.

Held, that the payment of each pronote was an indication of a settled account with regard to the particular transaction represented by it. (*Young and Carr, JJ.*) A. RAHIM *v.* H. V. LOW & CO

3 Rang. 1 : 89 I. C. 598 : A. I. R. 1925 Rang. 210.

———*Accounts settled can be re-opened where there is mutual mistake or fraud.*

Where owing to retirement of some partners a trading partnership was dissolved and on accounts being taken, part of the retiring partner's share of profits was carried over by the other partners to a new

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account :

Held, that the action of the other partners was either due to mutual mistake or a fraud but that in either case the retiring partners were entitled to have the mistake or fraud rectified.

Held, further—that as the whole account was not impugned it was sufficient to give the retiring partner's leave to surcharge and falsify. (*Young, J.*) G. ABDOOLA *v.* T. A. MAHOMED. **75 I. C. 171 : A. I. R. 1925 Rang 99.**

———Suit for—Decree beyond pecuniary jurisdiction—If can be passed. HOTCHAND UTTAM CHAND *v.* TEJUMAL MULCHAND. **89 I. C. 353 : A. I. R. 1925 Sind 324.**

———*Cause of action--Splitting of—Test.*

If the items in an account are so connected together that it appears the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid, shall be united with another and form one continuous demand the whole together forms but one cause of action and cannot be divided.

It is a question of fact, to be determined on the merits of each case, whether there was an intention to keep only one account for all the dealings. (*Kemp, A. J. C.*) LILARAM MADHAVDAS *v.* HUSSEINBHOY KARIMJI AND SONS. **67 I. C. 44 : 15 S. L. R 207 : A. I. R. 1922 Sind 15.**

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ACCUSED—*See* CRIMINAL TRIAL : CR. P. CODE, SS. 256, 342, ETC.,

———**Effect**—*See* ACCUSED —CONSENT—EFFECT

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(2) CONTRACT ACT, S. 25.
(3) LIMITATION ACT, S. 19.
(4) MAHOMEDAN LAW—LEGITIMACY.

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See also (1) EVIDENCE ACT, S 115.
(2) EJECTMENT.
(3) LANDLORD AND TENANT.

———*Mortgagor and mortgagee— Mortgagee in possession of building on mortgagor's land—Mortgagor can sue for demolition of structure.*

The principle of acquiescence does not apply to the case of a mortgagee building on the mortgaged premises and the mortgagor can ask for demolition of such building even after 12 years. Under the Transfer of Property Act, S. 76, it is the duty of the mortgagee when he takes possession of the mortgaged property to manage it as a person of ordinary prudence would manage if it were his own. This implies that a duty is cast on him to see that the property is not lost by any encroachment. Further the same rule lays down that the mortgagee in possession is not to commit an act which is destructive or permanently injurious to the property. The mortgagee is therefore bound to protect the plaintiffs' rights. Moreover so long as the mortgagee is in possession cannot be expected that

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the mortgagors would be going about inspecting the land mortgaged in order to see that it has been well taken care of. 21 All. 496 (P. C.) Foll. (*Mukerji, J.*) DIP NARAIN SINGH *v.* JAGMOHAN AHIR.
87 I. C 15 : L. R. 6 A. Civ. 252 : A I. R. 1925 All. 576.

———*Extinction of right.*

If a man has been neglectful of his rights in certain cases that does not mean that he should be compelled to forego his remaining property. (*Mukerji, J*) ALI HUSAIN *v.* MAZAHIR HUSAIN.
L. R. 5 A. Rev. 115 : 79 I. C. 134 : A. I. R. 1924 All. 477.

———*Co-sharer- Vigilance as regards infringement of rights is greater than in case of neighbouring owner —Delay in taking legal proceedings is immaterial if remedy is not barred—Onus of proving acquiescence is on party alleging it.*

The caution and the carefulness which is expected of a co-owner with reference to an infringement of his right are greater than those expected of a neighbouring owner. But mere delay in taking legal proceeding is not acquiescence so long as the remedy is not barred by limitation. The onus of proving acquiescence is on the party alleging it. (*Mukerji, J.*) BANESWAR BANOPADHYA *v.* AMULYA CHARAN.
82 I. C. 309 : A. I. R. 1925 Cal. 288.

———*Delay—Whether amounts to.*

Mere delay in suing does not amount to a proof of acquiescence. (*Chevis, J.*) KEHR SINGH *v.* ASA SINGH. **60 I. C. 519 : 3 U. P. L.R. (Lah.) 24.**

———*Plaintiff conniving at defendant's building in plaintiff's land cannot pray for demolition of the structure—Evidence Act, S.* 115.

If a stranger builds upon the land of A. supposing it to be his own, and A remains wilfully passive, equity will not allow him to profit by the mistake. If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person who commits the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. (*Wazir Hasan, A. J. C.*) RAFIQ HUSSAIN *v.* BHAYA BISHNATH PRASAD.
11 O. L. J.677 : 84 I. C. 511 : 28 O. C. 114 : A. I. R. 1925 Oudh 258.

———*Elements necessary to constitute—Lessor and lessee—Trees.*

For a defence of acquiescence to be successful it is necessary that the deft. should have acted in good faith believing that he had a valid lease and was entitled to plant the trees and that the plaintiffs knowing that he was under this mistaken belief should have abstained from doing anything to prevent his spending money in planting the trees. 21 A. 496 P. C. ; 53 I. C. 683, Ref. (*Daniels, A. J. C.*) JAGANNATH *v.* DIN MAHOMED **8 O L. J. 474 : 65 I. C. 705.**

———*Essential elements of—Assertion of right—Knowledge.*

Where acquiescence is pleaded in bar of a claim it must be shown that the person acquiescing was aware of the matter in which he acquiesced and of the effect of such acquiescence. (*Miller, C. J. and Adami, J.*) BHONU LAL CHAUDHURI *v.* W. A. VINCENT.
3 Pat. L. T. 653 : 65 I. C. 882 : A. I. R. 1922 Pat. 619.

ACQUIRED PROPERTY—*See* HINDU LAW—JOINT FAMILY.

ACQUISITION—*See* HINDU LAW—JOINT FAMILY.

ACTS—Imperial.

———**By Government**—*See* LAND ACQUISITION ACT.

———**Of Easement**—*See* EASEMENTS ACT, SS. 47 AND 15.

ACQUITTAL—*See* (1) CR. P. CODE, SS. 403, 417 AND 439.
(2) CRIMINAL TRIAL.

ACT—Done in Official Capacity—*See* TORT.

———**Of Bankruptcy**—*See* INSOLVENCY.

———**Of God**—*See* (1) CARRIERS.
(2) CARRIERS ACT.
(3) RAILWAYS ACT, ETC.
(4) TORT.

———**Of Insolvency**—*See* INSOLVENCY ACT.

———**Of State**—*See also* C. P. CODE, S. 9.

ACTION—For Damages—*See* DAMAGES.

———**Form of**—*See* (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.

———**Framed in Tort**—*See* (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.
(4) TORT.

———**On Contract**—*See* CONTRACT.

ACTIONABLE CLAIM.

See (1) ASSIGNMENT.
(2) NEGOTIABLE INSTRUMENTS ACT.
(3) PROMISSORY NOTE.
(4) T. P. ACT, SS. 6 (e) 130 TO 137.

———**Wrong**—*See* TORT.

ACTIO PERSONALIS, ETC.

See (1) C. P. CODE, O. 22, R. 1.
(2) MAXIMS.
(3) PROBATE AND ADMINISTRATION ACT.

ACTS, CONSTRUCTION OF—*See* INTERPRETATION OF STATUTES.

ACTS—Imperial.

32 OF 1839—*See* INTEREST ACT.
18 OF 1850—*See* JUDICIAL OFFICERS PROTECTION ACT.
21 OF 1850—*See* CASTE DISABILITIES REMOVAL ACT.
13 OF 1855—*See* FATAL ACCIDENTS ACT.
9 OF 1856—*See* BILLS OF LADING ACT.
15 OF 1856—*See* HINDU WIDOWS' REMARRIAGE ACT.
35 OF 1858—*See* LUNACY ACT.
13 OF 1859—*See* WORKMEN'S BREACH OF CONTRACT ACT.
21 OF 1860—*See* SOCIETIES REGISTRATION ACT.
45 OF 1860—*See* PENAL CODE.
5 OF 1861—*See* POLICE ACT.
5 OF 1863—*See* PUBLIC CONVEYANCES ACT.
20 OF 1863—*See* RELIGIOUS ENDOWMENTS ACT.
3 OF 1864—*See* FORIEGNERS ACT.
3 OF 1865—*See* CARRIERS ACT.
10 OF 1865—*See* SUCCESSION ACT.
21 OF 1865—*See* PARSI INTESTATE SUCCESSION ACT.
21 OF 1866—*See* NATIVE CONVERTS MARRIAGE DISSOLUTION ACT.
3 OF 1867—*See* PUBLIC GAMBLING ACT.
25 OF 1867—*See* PRESS AND REGISTRATION OF BOOKS ACT.
4 OF 1869—*See* DIVORCE ACT.
7 OF 1870—*See* COURT FEES ACT.
21 OF 1870—*See* HINDU WILLS ACT.
1 OF 1871—*See* CATTLE TRESPASS ACT.
23 OF 1871—*See* PENSIONS ACT.
1 OF 1872—*See* EVIDENCE ACT.

ACTS—Imperial.

3 OF 1872—*See* SPECIAL MARRIAGE ACT.
9 OF 1872—*See* CONTRACT ACT.
8 OF 1873—*See* NORTHERN INDIA CANAL AND DRAIN ACT.
10 OF 1873—*See* OATHS ACT.
2 OF 1874—*See* ADMINISTRATOR-GENERALS' ACT.
3 OF 1874—*See* VATAN ACT.
9 OF 1875—*See* MAJORITY ACT.
1 OF 1877—*See* SPECIFIC RELIEF ACT.
1 OF 1878—*See* OPIUM ACT.
7 OF 1878—*See* FOREST ACT.
8 OF 1878—*See* SEA CUSTOMS ACT.
11 OF 1878—*See* ARMS ACT.
8 OF 1879—*See* LEGAL PRACTITIONERS ACT.
14 OF 1879—*See* HACKNEY CARRIAGES ACT.
21 OF 1879—*See* EXTRADITION ACT.
5 OF 1881—*See* PROBATE AND ADMINISTRATION ACT.
15 OF 1881—*See* FACTORIES ACT.
26 OF 1881—*See* NEGOTIABLE INSTRUMENTS ACT.
2 OF 1882—*See* TRUSTS ACT.
4 OF 1882—*See* T. P. ACT
5 OF 1882—*See* EASEMENTS ACT.
6 OF 1882—*See* COMPANIES ACT.
10 OF 1882—*See* PRESIDENCY SMALL CAUSE COURTS ACT.
12 OF 1882—*See* SALT ACT.
20 OF 1882—*See* PAPER CURRENCY ACT.
12 OF 1884—*See* AGRICULTURIST LOANS ACT.
2 OF 1886—*See* INCOME-TAX ACT.
7 OF 1887—*See* SUITS VALUATION ACT.
9 OF 1887—*See* PROVINCIAL SMALL CAUSE COURTS ACT.
7 OF 1889—*See* SUCCESSION CERTIFICATE ACT.
6 OF 1890—*See* CHARITABLE ENDOWMENTS ACT.
8 OF 1890—*See* GUARDIAN AND WARDS ACT.
9 OF 1890—*See* RAILWAYS ACT.
11 OF 1890—*See* PREVENTION OF CRUELTY TO ANIMALS ACT.
4 OF 1893—*See* PARTITION ACT.
1 OF 1894—*See* LAND ACQUISITION ACT.
8 OF 1894—*See* TARIFF ACT.
9 OF 1894—*See* PRISONS ACT.
15 OF 1895—*See* CROWN GRANTS ACT.
2 OF 1896—*See* COTTON DUTIES ACT.
12 OF 1896—*See* EXCISE ACT.
4 OF 1897—*See* PROVIDENT FUNDS ACT.
8 OF 1897—*See* REFORMATORY SCHOOLS ACT.
10 OF 1897—*See* GENERAL CLAUSES ACT.
5 OF 1898—*See* CODE OF CRIMINAL PROCEDURE.
6 OF 1898—*See* POST OFFICE ACT.
2 OF 1899—*See* STAMP ACT.
9 OF 1899—*See* ARBITRATION ACT.
2 OF 1902—*See* CANTONMENTS (HOUSE ACCOMMODATION ACT.
7 OF 1903—*See* WORKS OF DEFENCE ACT.
15 OF 1903—*See* EXTRADITION ACT.
1 OF 1904—*See* POISONS ACT.
10 OF 1904—*See* CO-OPERATIVE CREDIT SOCIETIES ACT.
3 OF 1907—*See* PROVINCIAL INSOLVENCY ACT.
5 OF 1908—*See* CODE OF CIVIL PROCEDURE.
6 OF 1908—*See* EXPLOSIVE SUBSTANCES ACT.
9 OF 1908—*See* LIMITATION ACT.
14 OF 1908—*See* CRIMINAL LAW AMENDMENT ACT.
15 OF 1908—*See* PORTS ACT.
16 OF 1908—*See* REGISTRATION ACT.
3 OF 1909—*See* PRESIDENCY TOWNS INSOLVENCY ACT.

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4 OF 1909—*See* WHIPPING ACT.
1 OF 1910—*See* PRESS ACT.
9 OF 1910—*See* ELECTRICITY ACT.
2 OF 1911—*See* PATENT AND DESIGNS ACT.
3 OF 1911—*See* CRIMINAL TRIBES ACT.
10 OF 1911—*See* PREVENTION OF SEDITIOUS MEETINGS ACT.
12 OF 1911—*See* FACTORIES ACT.
2 OF 1912—*See* CO-OPERATIVE SOCIETIES ACT.
4 OF 1912—*See* LUNACY ACT.
3 OF 1913—*See* ADMINISTRATOR-GENERALS' ACT
6 OF 1913—*See* MUSSALMAN WAQF VALIDATING ACT.
7 OF 1913—*See* COMPANIES ACT.
3 OF 1914—*See* COPYRIGHT ACT.
8 OF 1914—*See* MOTOR VEHICLES ACT.
4 OF 1915—*See* DEFENCE OF INDIA ACT.
7 OF 1916—*See* MEDICAL DEGREES ACT.
7 OF 1918—*See* INCOME-TAX ACT.
9 OF 1918—*See* INDIAN SOLDIERS' LITIGATION ACT.
9 OF 1918—*See* SOLDIERS ACT.
10 OF 1918—*See* USURIOUS LOANS ACT.
10 OF 1919—*See* EXCESS PROFITS DUTY ACT.
5 OF 1920—*See* PROVINCIAL INSOLVENCY ACT.
14 OF 1920—*See* CHARITABLE AND RELIGIOUS TRUSTS ACT.
19 OF 1920—*See* SUPER TAX ACT.
8 OF 1921—*See* HINDU TRANSFERS AND BEQUESTS ACT.
11 OF 1922—*See* INCOME-TAX ACT.

ACTS—Local—*See* under Bengal, Bombay, Burma, Calcutta, Central Provinces, Madras, Punjab and United Provinces.

ADDITIONAL DISTRICT MAGISTRATE—*See* CR. P. CODE, SS. 10, 12.

ADDITIONAL JUDGE—*See* C. P. CODE, S. 24.

ADDITION OF PARTIES.
See (1) C. P. CODE, O. 1, R. 10.
(2) LIMITATION ACT, S. 22.

ADEQUACY OF CONSIDERATION.
See (1) CONTRACT
(2) CONTRACT ACT.

ADHLAPI TENURE—*See* LAND TENURE.

AD-INTERIM INJUNCTION—*See* C.P. CODE, O. 39.

ADJOURNMENT—*See* (1) C. P. CODE, O 17, R. 1.
(2) CR. P. CODE, SS. 344 AND 526.
(3) CRIMINAL TRIAL.
(4) PRACTICE.

ADJUDICATION—*See* (1) PROV. INSOLV. ACT.
(2) PRES. TOWNS INSOLVENCY ACTS.

ADJUSTMENT—Decree—*See* C. P. CODE, O. 21, R. 2, AND O. 34.
——**—Suits**—*See* (1) C. P. CODE, O. 23, R. 3.
(2) COMPROMISE-DECREE.
(3) FAMILY ARRANGEMENT.

ADMINISTRATION—*See also* PROBATE AND ADMINISTRATION ACT.

——*Account—Suit against administrator as heir.*

Where an administrator is sued along with another as heirs for a valid debt and payment is made by him it would equally follow that the money paid in settlement would be coming out of the estate of the deceased. (*Macleod, C. J. and Coyajee, J.*) JAMASJI *v.* JAMSETJI. **A. I. R. 1922 Bom. 341.**

——*Suit for—Powers of Administrator—Decision whether the property is of the deceased.*

ADMINISTRATION.

Where in an enquiry about the assets of the estate of the deceased, any property in the possession of a person party to the suit are claimed to be so, the person appointed by the Court, to take steps for the proper administration of the estate, can decide whether the estate in possession of the person forms the assets or not. (*Macleod, C. J. and Shah, J.*) MOTIBHAI *v.* NATHUBHAI. **45 Bom. 1053 : 62 I. C. 24 : 23 Bom. L. R. 444.**

———*Suit for—Filing within 6 months from grant of probate—Good ground must be shown.*

A suit for administration can be instituted before the expiry of the period of six months from the grant of probate as otherwise an estate might be irreparably wasted but there must be some good ground for bringing it before the period of 6 months. (*Woodroffe and Cuming, JJ.*) J. N. GHOSE *v.* B. B. DASI. **A. I. R. 1922 Cal. 302.**

———*Will—Bequests to charity—Sanction of Advocate-General—Not necessary.*

Where a will makes a bequest to charity, an administration suit without sanction of Advocate-General is not bad. (*Wallis C. J. and Kumaraswamy Sastry, J.*) ANNAVARAPU NACHARAMMA *v.* MALLADI VENKATAPPAYYA. **70 I. C. 903 : 31 M. L. T. 63 : 16 L. W 922.**

———*Decree on mortgage from co-heir is not executable till administration—When realisable.*

The mortgagee from one of the heirs of the deceased obtained a decree on his mortgage against his mortgagor's share in the estate after the debts had been paid off. *Held*, he cannot apply in execution of his decree till the administration is over and the debts have been paid off. (*Miller, C. J. and Kulwant Sahay, J.*) FIRM OF SHYAM LAL GOKUL CHAND *v.* JAMIL AHMAD. **74 I. C. 487 : A. I. R. 1924 P. 110.**

———*District Judge—Jurisdiction—Release of a share.*

Pending the administration of the estate the District Judge has jurisdiction to direct the share of one of the heirs who gives an undertaking to be responsible for the share of debts, to be made over to him. Such an order of the District Judge merely operates as an order of discharge of the Receiver so far as that share is concerned. (*Coutts and Das, JJ.*) MT. DULHIN SONA KOER *v.* SAIYED SHAH MAHMUDDUL HAQUE. **1 P. 667 : 69 I. C. 654 : 4 P. L. T. 209 : A. I. R. 1922 P. 585.**

———*Suit for—Properties situate outside British India—Form of decree.*

One of the incidents of an administration suit is the partition of the estate and, where necessary, the sale thereof under the orders of the Court. Such suits cannot be filed in places other than the place where the property is situate except where the property is situate within the jurisdiction of different courts in British India, in which case the plff. is at liberty to choose his forum. Where however, a person in whose hands, are properties situate outside British India claims a share in the administration suit, the court can rightly place the condition that on his obtaining such share he will account for that portion of the estate in his hands. (*Maung Kin and Higginbotham, JJ.*) AYESHA BEE *v.* GULAM HUSAIN. **66 I. C. 530 : 11 L B. R. 188.**

———*Suit for.*

In an administration suit a decree was passed declaring shares of the heirs. A subsequent suit for distribution of shares is maintainable. (*Maung Kin, J.*) MAUNG PO THIN *v.* KO THA YE. **64 I. C 813 : 11 L. B. R. 60**

ADMINISTRATION OF ESTATE OF NATIVE ADMINISTRATOR-GENERAL'S ACT, (II OF 1874) S. 52.

CHRISTIANS ACT (7 OF 1901), S 3—*Succession Act, S.* 190.

Succession Act, S. 190 is not applicable to Karen Christians because they are Christians of Asiatic descent. (*Heald and Chari, JJ.*) MA NAN THA *v.* MA SHWE MI. **88 I. C. 609 : 4 Bur. L. J. 76 : A. I. R. 1925 Rang. 233.**

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———*Distribution for marriage—Reasonable expenses.*

Where the administrator without the authority of the court allowed ⅓ of the estate for the marriage of a girl although the direction of the testator was that all reasonable expenses should be paid out of the estate ; *Held* : what was meant was that reasonable expenses should be paid ; and ⅓ of the estate was unreasonable. (*Macleod, C. J. and Coyajee, J.*) JAMASJI *v.* JAMSETJI. **A. I. R. 1922 Bom. 341.**

———Pendente lite—*Duties and powers of—Decree in the suit—Appeal.*

The duties of an Administrator and Receiver *pendente lite* commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of. In the absence of any appeal the functions of an Administrator *pendente lite* terminate with a decree pronounced in favour of a Will and do not continue until the executors obtain probate. The case is not altered if there are no executors. (*Mookerjee and Chotzner, JJ.*) PRAMILA BALA DEVI *v.* JYOTINDRA NATH BANERJEE. **28 C. W. N. 576 : A. I. R. 1924 Cal. 631.**

———*Suit against—Misappropriation.*

The fact the accounts have been filed in the Probate Court or that they have been passed by the Court, does not relieve the Administrator from the liability in respect of sums misappropriated by him and in respect thereof, he can be sued as such. (*N. R. Chatterjee and Cuming, JJ.*) KRISHNA LAL *v.* PRAFULLA KUMAR. **22 Cr. L. J. 295: 60 I C. 791: 33 C. L. J. 252.**

———*Tenants—Wrongful collection of rents by claimant—Action in tort by administrator against claimant.*

Where the appellant, an administrator let out certain lands to tenants and the rents were collected by the respondent claiming to be the beneficial owner of the properties,

Held, that an action lay against the respondent in tort for wrongful collection of the rent which was quite distinct from the appellant's right of action against the tenants for recovery of the rent. (*Lentaigne and Carr, JJ.*) MA MA GUN *v.* MAUNG BO THAN. **3 Bur. L. J. 25 : 82 I. C. 352 : A. I. R. 1924 Rang. 282.**

———*Grant of Sale by administrator of immoveable property without sanction of court—Deceased subsequently found to be a Buddhist—Effect on antecedent transactions.*

Letters of administration had been granted in respect of the estate of a deceased person. The administrator sold immoveable property of the deceased without the permission of the Court but in the course of administration. Subsequently it was found that the deceased was a Buddhist exempted from the operation of the Succession Act. *Held* that the sale by the administrator was not thereby rendered invalid. (*Heald and Lentaigne, JJ.*) LEE LIM MA HOOK *v.* SAW MAH HONE. **2 Rang. 4 : 79 I. C. 729 : A. I. R. 1924 Rang. 221.**

ADMINISTRATOR-GENERAL'S ACT (II OF 1874).

———**S. 52**—*Commission-Administration commenced before Act of* 1913—*Value of assets is to be taken at the*

ADMIRALTY.

date of their distribution,

For the purpose of arriving at the amount of commission payable to the Administrator-General in the administration of an intestate estate in cases where the administration commenced before April 1914, the value of the assets is to be taken at the date of their distribution. (*Schwabe, C. J. and Coutts Trotter, J.*) THE ADMINISTRATOR-GENERAL, MADRAS *v.* RAMIAH. **(1922) M. W. N. 571 : 43 M. L. J. 347 : 16 L. W. 711 : 74 I. C. 182 : A. I. R. 1922 Mad. 491.**

ADMIRALTY—*See* SHIPPING.

ADMIRALTY COURT ACT (1861).

———Ss. 5 and 35 (Act of 1840) S. 6—*Interpretation Act*, 1889, *S*, 18 (2) *claim for necessaries supplied ship—Suit* in rem—*Jurisdiction.*

Claim for necessaries can be enforced in a Colonial Court of Admiralty by a suit *in rem* and such a suit can presumably be instituted in any Admiralty Court within whose jurisdiction the ship happens to be at the time when the suit is instituted. Before there can be an action *in rem* there must be a personal liability on the part of the owner. (*Heald and May Oung, JJ.*) THE OWNER OF THE STEAMSHIP *v.* BIRD & CO. **76 I. C. 458 : 1 R. 78 : A. I. R. 1923 R. 163.**

ADMIRALTY JURISDICTION—*See* JURISDICTION.

ADMISSIBILITY.

See (1) EVIDENCE.
(2) EVIDENCE ACT.

ADMISSIONS (2) *See*—(1) C. P. CODE, O. 12.
(2) EVIDENCE ACT. SS. 17 to 30 AND 115.
(3) LEGAL PRACTITIONER.

ADNA AND ALA MALIK—*See* CUSTOM—PUNJAB.

ADOPTION—*See* HINDU LAW—ADOPTION.

ADULTERATION—*See* MUNICIPAL ACTS.

ADULTERY.

See (1) DIVORCE ACT.
(2) HINDU LAW.
(3) HUSBAND AND WIFE.
(4) PENAL CODE, SS. 497, 498.
(5) RESTITUTION OF CONJUGAL RIGHTS.

AD VALOREM FEE.

See also (1) COURT-FEES ACT.
(2) TRUSTS ACT, S. 82.

ADVANCEMENT.

See also (1) BENAMI.
(2) TRUSTS ACT, S. 82.

———*Presumption of—Anglo-Indians.*

Where among Anglo-Indians, a husband obtains a conveyance in the name of his wife, there is, as in England, a presumption of advancement. 48 C. 260 Rel. (*Robinson, C. J. and May Oung, J.*) LECUN *v.* LECUN **2 Rang. 253 : 82 I. C. 686 : 3 Bur. L. J. 85: A. I. R. 1924 Rang 283.**

ADVERSE POSSESSION.

Acquisition of Title.
Animus Possidendi.
Burden of Proof.
Co-heirs.
Community.
Co-mortgagors.
Constructive.
Co-owner.
Co-parcener.
Co-sharer.
Co-tenants.
Easement.
Ejectment.
[*See* (1) **Limitatoin Act. Arts. 142, 144.**]
(2) **Landlord and Tenant.**

ADVERSE POSSESSION—Acquisition of title.

(3) Possessory Title.
Enjoyment.
Essentials of.
Evidence.
Hereditary Office.
Hindu family.
Interruption of.
Landlord and Tenant.
Lessor and Lessee.
License.
Limitation.
Limited interest.
Limited owner.
Mortgagor and Mortgagee.
Nature of.
Neighbours.
Permissive.
Plea of.
Presumption.
Religious Endowment.
Service Tenure.
Submerged Land.
Tacking of.
Test of.
Trust.
Vacant Site.
Waste Land.

Acquisition of Title.

———*Acquisition of title.*

Where a decree declares that a person has a certain title to a property but in all documents and proceedings subsequent to such decree, the person is regarded as having a different title in respect of that property, such better title recognized for a long time cannot be overthrown even in spite of the decree. (*Lord Buckmaster,*) PIRTHIPAL SINGH *v.* GANESH DIN SINGH. **44 M. L. J. 29 : 25 O. C. 396 : 9 O. L. J. 649 : 37 C. L. J. 219 : 32 M. L. T. 109 : L. R. 4 P. C. 7 : 18 L. W. 41 : 9 O. & A. L. R. 541 : 71 I. C. 641 : 50 I. A. 210 : A. I. R. 1922 P. C. 383 (P. C.).**

———*Acquisition of title—Right to open shutters and maintain weather frames is acquirable by adverse possession.*

Where the plaintiff had opened his shutters and maintained his weather-frames projecting for more than twelve years on the defendant's soil.

Held, that he acquired a right thereto by adverse possession, and was entitled to an injunction against the defendants restraining them from building,so as to interfere with the right of the plaintiff to open the shutters on the defendant's land or to interfere with the said weather frames. 3 Bom. 174 ; 28 Bom. 428 Foll. (*Taraporewalla, J.*) BAHADURMAL GURMANKHRAI *v.* MOHANLAL SURCHAND. **87 I. C. 1008 : 27 B. L.R. 536 : A. I. R. 1925 Bom. 335.**

———*Acquisition of title*—Khoti *lands—Title defective—Effect of long possession.*

The occupancy rights in some *khoti* lands were sold in execution of the decree obtained by a *khoti* sharer and the property sold in auction. Some time after, the purchaser surrendered the lands to the decree-holder-sharer, who remained in possession thereafter for 15 years and was then dispossessed by a person who claimed to be the occupancy tenant. *Held*, though it is assumed the auction-sale was in contravention of the Khoti Settlement Act, S. 9 which made the tenure inalienable the decree-holder had obtained title by adverse possession after the surrender to him. (*Fawcett and Coyajee, JJ.*) ATMARAM BHILA BHATKAR *v.* BALAJI RAGHUNATH JOSHI. **25 Bom. L. R. 1032 : 77 I. C. 307 : A. I. R. 1924 Bom. 178.**

ADVERSE POSSESSION—Acquisition of Title.

———*Acquisition of title—Invalid sale.*

A sale of a limited interest such as lease for a long term being invalid, the transferee does not acquire any better title than the transferor. (*Shah, C. J. and Crump, J.*) CHATURBHAI LALLUBHAI *v.* MOTHI BHAI BAPUJI. **24 Bom. L. R. 1315 : 77 I. C. 952 : A. I. R. 1923 Bom. 146.**

———*Acquisition of title—Unopposed possession for 12 years under an invalid will creates title.*

Where a person has been in possession of a property for over 12 years as legatee with an absolute estate under a will by a testator who had no disposing power over the property and no objection has been made by the persons entitled to the property, the person in possession acquires an absolute title to the property. (*Kumaraswami Sastri, J.*) GANSHAMDOSS NARAYAN DOSS *v.* SARASWATHI BAI. **21 L. W. 415 : 87 I. C. 621 : (1925) M. W. N. 285 : A. I. R. 1925 Mad. 861.**

———*Acquisition of title—Interruption of adverse possession—What constitutes.*

Where a person has acquired title to certain property by adverse possession he is entitled to eject any person seeking to retain possession of it against his will. The mere fact that a person against whom prescription is running comes and stays as a guest now and then with the person in adverse possession will not constitute an interruption of the adverse possession. (*Coutts Trotter and Ramesam, JJ.*) AMMAKANNUMMAL *v.* NARAYANASWAMI MUDALIAR. **17 L. W. 629 : 72 I. C. 635 : A.I. R. 1923 Mad. 633.**

———*Acquisition of title—Invalid title.*

Possession for twelve years or any other period prescribed by the law on an invalid title, cannot perfect anything but that title. (*Hallifax, A. J. C.*) DINA SINGH *v.* JAMAL SINGH. **78 I. C. 446 : A. I. R 1925 Nag. 48.**

———*Acquisition of title—Void transaction—Possession—Nature of.*

Where for some reason or other a conveyance is void *ab initio* but possession passes under it, the transferee can acquire title by adverse possession. (*Baker, J. C.*) MT. KASTURI *v.* BALIRAM. **79 I. C. 117 : A. I. R. 1924 Nag. 222.**

———*Acquisition of title—Assertion of title on basis of gift—Claim under gift subsequently failing—Possession becomes adverse from the date of assertion of title.*

Where a person who is not the heir of the deceased, obtains possession of a portion of the property belonging to the deceased under an assertion of title on the basis of a gift, his assertion is a sufficient disclaimer of the title of the heirs of the deceased and sets limitation in motion against them though the claim under the gift may not be proved : 43 Mad. 244 Foll. (*Wazir Husain, A.J.C.*) WAJID ALI *v.* MT. SALIMA BEGAM. **A. I. R. 1925 Oudh 745.**

———*Acquisition of title—Presumption that possession follows title—Acquisition of title by prescription—Burden of proof.*

Where the plaintiffs sued for possession on the strength of their title and the defendants never raised any plea of adverse possession, and the question of title was found in favour of the plaintiffs within the period of limitation, a subsisting title ought to be presumed. The burden lay on the defendants to plead and prove affirmatively that they had adverse possession for such a long period as to destroy the plaintiff's title. 39 M. 617 : 41 A. 669, Ref. 20 A. 182 not fol. (*Wazir Hasan, J. C.*) INDARPAL SINGH *v.* THAKUR DIN SINGH. **10 O. L. J. 646 : 78 I C. 895 : 27 O. C. 77 : A. I. R. 1924 Oudh 266.**

ADVERSE POSSESSION—Co-heirs.

———*Acquisition of title—Title acquired under invalid registered deed—Vendee remaining in possession for over 12 years—Title is perfected.*

Even when a registered sale-deed is found to be illegal, the purchaser gets full title to the property purchased, if he is put in possession in pursuance of the registered deed and continues to be in possession for over twelve years openly and adversely to the vendor. (*Jwala Prasad and Adami, JJ.*) MT. JASODA KUAR *v.* JANAK MISSIR. **4 Pat. 394 : A. I. R. 1925 Pat. 787.**

Animus Possidendi.

———Animus Possidendi—*Adverse possession whether absolute or limited depends on intention at start—If origin of possession is lawful no adverse possession begins until denial to knowledge of owner.*

The quality and extent of right acquired by adverse possession depends upon the claim accompanying it and upon the nature of the *animus possidendi*. Where the origin of the defendant's possession is lawful, time does not run against the owner until the denial of his right has been brought to his knowledge. Possession of mortgagee from *de facto* guardian of a Muhammadan minor will create mortgagee's interest, but if he also gets sale later on, possession will create, absolute title if continued over 12 years from date of sale by *de facto* guardian. (*Venkatasubba Rao and Jackson, JJ.*) AIYISA BIBI *v.* KALANDARASA ROWTHER. **86 I. C. 433 : A.I.R. 1925 Mad. 1020.**

Burden of Proof.

———*Burden of proof.*

Where the suit is resisted on the ground of acquisition of title by prescription it is not for the plff. to prove his title within 12 years. The burden of proof is on the defendant to prove his adverse proprietary title. (*Gokul Prasad, J.*) RAGHA MAL *v.* ABDUS SATTAR. **74 I. C. 879 : A. I. R. 1923 All. 565.**

———*Burden of proof.*

The onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. (*Macleod, C. J. and Fawcett, J.*) VASTA BALWANT *v.* SECRETARY OF STATE. **45 Bom. 789 : 61 I C. 440 : 23 Bom. L. R. 238.**

———*Burden of proof.*

When a title by adverse possession is set up, the person who sets it up must allege and establish such title. (*Mookerjee, A. C. J. and Fletcher, J.*) BEPIN BEHARI SAHA *v.* CHARU CHANDRA GHOSE. **60 I. C. 753 : 35 C. L. J. 192.**

———*Burden of proof—Possession referable to lawful origin.*

Where possession can be referred to a lawful origin the presumption is that it was acquired lawfully and the burden is on the party asserting adverse possession to prove his case. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* SHIAM BAHADUR. **9 O. L. J. 262 : A. I. R. 1922 Oudh 231.**

Co-heirs.

———*Co-heirs—Service inam lands—Divided members.*

The sole possession of inam lands by one member is not in itself adverse to the other members divided or undivided and does not deprive them of any interest they might possess. 46 Cal. 362 (P. C.) does not overrule 30 Mad. 434. (*Ayling and Odgers, JJ.*) DEVULAPALLI VENKATASUBBA RAO *v.* KOLLURI SATYANARAYANAMURTHI. **44 Mad. 179 : 12 L. W. 642 : (1920) M. W. N. 754 : 28 M. L. T. 448 : 60 I. C. 27 : 40 M. L. J. 31.**

ADVERSE POSSESSION—Community.

Community.

——*Community—Public cannot acquire right by —Long user.*

The public as such cannot acquire by prescription the ownership of land or a right of easement over it. But the user by the public may be evidence of a dedication or grant in favour of the public. (*Oldfield and Ramesam, JJ.*) USSAM KASIM SAIT *v.* SECY. OF STATE FOR INDIA. **44 M. L. J. 638 : (1923) M. W. N. 315 : 47 M. 116 : 17 L. W. 610 : 74 I. C. 25 : A. I. R. 1923 Mad. 624.**

Co-mortgagors.

——*Co-mortgagors—Entry in record of rights—Knowledge.*

A mere entry in the Record of Rights of the possession of the redeeming mortgagor, is of no effect to prove adverse possession against a co-mortgagor. But it is valuable evidence of adverse possession if the Record is one of exclusive title of one mortgagor and he proves knowledge of it by the other co-mortgagor. (*Jwala Prasad, C. J. and Das, J.*) RAM NARAYAN *v.* RAM DEVI. **63 I. C. 282 : 6 Pat. L. J. 680 : (1922) P. H. C. C. 129 : A. I. R. 1923 Pat. 98.**

——*Co-mortgagors.*

The possession of the mortgagor who redeems the mortgage does not become adverse when he recovers possession of the property on redemption. (*Jwala Prasad, C. J. and Dass, J.*) RAM NARAYAN RAI *v.* RAMA DEVI RAI. **1922 P. H. C. C. 129 : 6 Pat. L. J. 680 : 63 I. C. 282 : A. I. R. 1923 Pat. 98.**

Constructive.

——*Constructive—Adverse possession to be effective must be continuous, and actual not merely constructive or ideal.*

In order to bring a case within the statute of limitation there must be both absence of possession by the person who has the right and actual possession by another whether adverse or not If a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place. There can be no continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on the fact of use and occupation and the real owner does not discontinue his possession so long as the land is diluviated. Adverse possession to be effective must be possession adequate in continuity, in publicity and in extent of area, and must be actual, visible, exclusive and hostile ; further the doctrine of constructive possession cannot be applied in favour of a wrong-doer, whose possession is confined to the area of which he is in actual occupation. A series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if, in fact, there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession. Once in fact there has been cessation of possession the question of intention is wholly immaterial but in determining whether there has been discontinuance of possession intention cannot altogether be left out of account. For after all, the adverse character of possession must be based to a certain extent on the intention to exclude the real owner. (*Rankin and Mukerji, JJ.*) ABHOY SANKAR *v.* SATYENDRA PRASANNA. **85 I. C. 594 : A. I. R. 1925 Cal. 981.**

——*Constructive—Possession of a portion of the property—Effect of.*

ADVERSE POSSESSION—Co-owners.

Where a person is shown to have exercised acts of possession on land as it reformed and became capable of possession and all these acts of possession were all done in the assertion of claim to the land by virtue of settlements made by the Government, the possession extends to the whole of the property especially where there were circumstances to link together various portions of ground so as to make the possession of a part as it emerged amount constructively to possession of the whole. 44 C. 558, Ref. (*Newbould, Ghose and Page, JJ.*) SURESH CHANDRA MUKHERJI *v.* SHITI KANTA BANERJEE. **51 Cal 669 : 78 I. C. 679 : 28 C. W. N. 637 : A. I. R. 1924 Cal. 855**

——*Constructive—Trespasser.*

The doctrine of constructive possession cannot be applied in favour of a wrong doer whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed, only as regards the position of the land in suit, of which he proves actual possession for the statutory period. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. **66 I. C. 923 : 34 C. L. J. 465.**

——*Constructive—Possession of part if possession of whole—Trespasser.*

As a general rule possession of part is in law the possession of the whole if the whole is otherwise vacant ; but constructive possession of this kind can only be presumed when there is a claim based on title and possession by a trespasser is confined to the land actually occupied by him: 12 O. C. 58 Ref. (*Wazir Hasan, A. J. C.*) DURGA *v.* RAM PADARATH. **65 I. C. 749 : 8 O. L. J. 495.**

Co-owners.

——*Co-owners—Ouster.*

In the absence of an assertion of an adverse right the mere fact of a co-owner getting his name recorded in the Revenue Records will not amount to an ouster. The possession of one co-owner is that of all the co-owners unless there is some act of ouster by one co-owner against another. (*Banerji and Gokul Prasad, JJ.*) DEOKINANDAN *v.* ZAMIR HUSSAIN. **64 I. C. 24 : L. R. 2 A. 22 : A. I. R. 1922 All. 399.**

——*Co-owners—Ouster—Necessity for.*

Among co-owners the possession of one is the possession of all the co-owners and in the absence of an ouster or something equivalent to ouster, there is no question of adverse possession. 37 A. 203, *Corea* v. *Appuhany* (1912) App. Cas. 230 Foll. ; 38 M. L. J. 313 (P. C.) Ref. (*Stuart, J.*) LATCHMI NARAIN *alias* LALMAN *v.* NAUNHA MAL. **64 I. C. 471 (All).**

——*Co-owners*—Khoti Kashgi *lands—Division among branches—Effect.*

Members of branches of a family holding *Khoti Kashgi* lands in specific portions for the sake of convenience and before a general partition has taken place, do not hold adversely to one another. (*Macleod, C. J. and Crump, J.*) MOHIDDIN *v.* IBRAHIM. **74 I. C. 161. (Bom.) : A. I. R. 1924 Bom. 297.**

——*Co-owners—Ouster.*

The sole possession by one of two joint owners by itself is no evidence of his denial of the right of the other joint owner. Time does not run against the joint owner out of possession, until the joint owner in possession has done some act to the knowledge of the other which amounts to an ouster. The mere fact that the owner in possession redeemed a Joint mortgage even though the plaintiff was aware of it, would not amount to an ouster. (*Macleod, C. J. and Shah, J.*) CHAND BHAI *v.* HASAN BHAI. **23 Bom. L. R. 1033 : 64 I. C. 205 : 46 Bom. 213 :**

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ADVERSE POSSESSION—Co-owners.

A. I. R. 1922 Bom. 150.

———*Co-owners—Onus.*

In a suit for possession by one co-owner against another, the latter cannot succeed unless he definitely proves that he has been holding the land adversely against the world for 12 years; plaintiff having proved title, the onus is on the defendant to prove he was not entitled to property. (*Macleod, C. J. and Shah, J.*) VINAYAK KESHAV GULVE *v.* BALA SHIVRAM HINGNE. **24 Bom. L. R. 261 : 67 I. C. 176 : A. I. R 1922 Bom. 94.**

———*Co-owners—Ouster—Proof of—Essential.*

Where the parties are co-owners, in order to establish title by adverse possession in favour of one co-owner against another, it must be established by unambiguous evidence that there was a complete ouster to the knowledge of the co-sharer. The possession of one co-sharer can be said to be adverse against another, only if there is an open denial of title and limitation can run, if at all, only from that date. 43 M. 244 ; 35 C. L. J. 554, Ref. (*Mookerjee and Rankin, JJ.*) HASIM ALI *v.* ABJAL KHAN. **40 C. L. J. 30 : 82 I C. 392 : A. I. R. 1924 Cal. 1046.**

——— *Co-owners—Nature of, at inception—Receiver—Appointment of—Effect.*

The possession of a co-owner is not ordinarily adverse to the other co-owners. But where a person originally entered not as a co-owner but asserting a hostile title and then became a co-owner and exercised his possession to the exclusion of the other co-owners, he continues to be in adverse possession. The appointment of a receiver does not stop limitation running. (*Chatterjee and Panton, JJ.*) PANKAJ MOHAN BAL *v.* BIPIN BEHARY CHAKLADAR. **38 C. L. J. 220 : 76 I. C. 511 : A. I. R. 1924 Cal. 118.**

———*Co-owners—Ouster.*

Possession of land by one co-owner is not adverse to the others. Ouster in such cases to amount to adverse possession must be notorious and the intention must be established. (*Mookerjee and Buckland, JJ.*) JOYNARAIN *v.* SRIKANTHA. **26 C. W. N. 206 : 65 I. C. 8 : 33 C. L. J. 592 : A. I. R. 1922 Cal. 8.**

———*Co-owners—Trespass by stranger—Co-owner holding as lessee under trespasser—Effect of.*

Where a stranger trespasses on land and ousts all the co-owners and subsequently one of the co-owners holds the land as lessee from the trespasser for more than 12 years, the possession of the lessee is not the possession of his co-owners and it extinguishes the title of all the co-owners to the land. (*Chatterjee and Suhrawardy, JJ.*) BHOLANATH DE *v.* GOLABDI SARDAR. **64 I. C. 553 : 35 C. L. J. 164 (Cal.).**

———*Co-owners—Nature of possession of one co-owner.*

The nature of possession of one co-owner is rightful but does not imply hostility and so it cannot be presumed that such possession is adverse to other co-owners. In general it is for the benefit of the rest. (*Mookerjee, A. C. J. and Fletcher, J.*) BALARAM GURIAH *v.* SYAMACHARAN MONDAL. **33 C. L. J. 344 : 60 I. C. 298 : 24 C. W. N. 1057.**

———*Co-owners—Sale by one of specific portion in possession.*

Where the sale is made by one co-sharer of a specific portion of the joint holding, which portion is in his possession and possession of which is immediately delivered to the purchaser, the possession of such purchaser is adverse from the moment of his entry. A co-owner's possession of the area cannot be adverse to his co-sharers until he has definitely declared to them his intention of holding on his own behalf, but this principle does not apply to the alienee of a co-

ADVERSE POSSESSION—Co-sharers.

sharer and if the purchaser obtains possession of the entire area brought by him under the deed of sale that possession must be regarded as adverse to the co-sharers from its commencement. (*Broadway, J.*) ANWAR *v.* KISHEN SINGH. **71 I. C. 171 : A. I. R. 1922 Lah. 205.**

———*Co-owners—Entry in records as owner—Claim set up in suit—Effect.*

When the question was as regards title to a well and the evidence let in consisted of entries in revenue records of 1857 wherein the wells were claimed in ownership, the same being set up in a litigation of 1891 between the parties, *Held*, possession began to be adverse at least from 1891 and referred to ownership in twelve years therefrom. (*Broadway and Abdul Qadir, JJ.*) LALA *v.* KHALAS. **4 Lah. L. J 181 : A. I. R. 1922 Lah. 102.**

———*Co-owners—Joint ownership.*

The status of joint ownership with rights of survivorship cannot be acquired by prescription. (*Ayling and Odgers, JJ.*) RAJAMBAL AMMAL *v.* SHANMUGA MUDALIAR. **(1922) M. W. N. 481 : 70 I. C. 653 : A. I. R. 1923 Mad. 11.**

———*Co-owners—Possession among—Repudiation of title—Non-receipt of profits, effect of—Plea abandoned in lower appellate Court, whether can be raised before High Court.*

The ordinary presumption of law is that joint possession of co-owners is continued until there is some over tact of ouster or separation. Therefore mere non-receipt of rents and denial, in the course of previous litigation, of a party's title are not sufficient to constitute adverse possession against that party. 26 O. C. 231, 9 I. C. 425 and 20 A. L. J. 545, Ref. to. A plea abandoned in the lower appellate court cannot be raised before the High Court in second appeal. (*Neave, A. J. C.*) RAM NIDH *v.* JANKI. **1 O. W. N. 674 : 10 O. & A. L. R. 937 : A. I. R. 1925 Oudh 510.**

———*Co-owners—Possession of one owner not presumed to be adverse—Onus.*

Where one or more of several joint owners are in possession of property, they are presumed to hold that possession on behalf of the whole body of joint owners, and the burden of proving that their possession had become adverse is on them. 20 Bom. L. R. 1064 : 10 L. B. R 45, Ref. (*Heald, J.*) MA SAN HLA ME *v.* MA TUN ME. **3 Bur. L. J. 105 : 82 I. C. 821 : A. I. R. 1925 Rang. 40.**

Co-parcener.

———*Co-parceners—Possession of property under claim of co-tenancy.*

The plaintiff, a son of a member of a joint Hindu family, was in actual joint possession with his father of an undivided half share in the whole of the property. That was reduced to a third share on the birth of his half-brother. Of that third share he had been in possession since his birth, a great deal more than twelve years ago, along with his father, and later his half-brother also, but in derogation of their title to possess the whole that is to say, adversely to them. Even therefore if the property could be regarded as the self-acquired property of the father the plaintiff would still have been in adverse possession as a tenant-in-common of an undivided third share in the property for more than the statutory period and he is entitled to claim partition of that share. (*Baker, J. C. and Hallifax, A. J. C.*) JAGESHWAR *v.* PANDURANG. **7 N. L. J. 82 : 78 I. C. 840 : A. I. R. 1924 Nag. 73.**

Co-sharers.

———*Co-sharer—Denial of title.*

ADVERSE POSSESSION—Co-sharers.

Possession of one co-sharer can be said to be adverse against another, only if there is an open denial of title. Limitation can run, if at all, only from that date. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMAD ALI KHAN. **43 M. L. J. 104 : 35 C. L. J. 554 : 31 M. L. T. 94 : 20 A. L. J. 545 : 24 Bom. L. R. 951 : 67 I. C. 444 : A. I. R. 1922 P. C. 84 (P. C.).**

———*Co-sharers—One co-sharer taking lease from others—Remaining in possession even after expiry of term—Rent not paid—Possession is adverse.*

Where a co-sharer obtains a lease of the land from the other co-sharers and continues in possession of the land for a long time, even after the expiration of the period of the lease, and does not pay any rent or share of profits to the other co-sharers, the only inference possible under the circumstances is that he had the land adversely and not as co-sharer. (*Mukerji, J.*) DALMIR SINGH *v.* JOTI PRASAD. **L. R. 6 A. Civ. 254: 85 I. C. 550: A. I. R. 1925 All 698.**

———*Co-sharers—Knowledge.*

Sole possession by one of two or more joint owners is not adverse to others until the joint owner has done some act to the knowledge of the others which amounts to a denial of the latter's right. The mere execution of a registered deed affecting the property by one of the co-sharers is not notice of adverse possession to the other sharers. 48 C. 1; 46 Bom. 213; 37 A. 203 referred to. (*Daniels, J.*) SHAKUR *v.* HUSSAIN BIBI. **71 I. C. 653 : A. I. R. 1923 All. 447.**

———*Co-sharer—Possession by some of them—Mortgage—Redemption—Effect of.*

The question of adverse possession is a mixed question of law and fact. As between co-sharers unless there was some act to the knowledge of the plaintiffs by which their title was denied or repudiated, the mere fact of the plaintiffs not being in actual possession would not amount to ouster such as would extinguish their right. Similarly the fact that some of the co-sharers mortgage the property and give possession thereof to the mortgagee would not make the possession of the mortgagee adverse to the other co-sharer. (*Mears, C. J. and Banerji, J.*) HAFIZ ABDULLAH *v.* ALLI. **21 A. L. J. 204: 71 I.C. 640: L. R. 4 A. 139: A. I. R. 1923 All. 291 (1).**

———*Co-sharers—Acquiescence—Effect of—Permissive possession—Presumption.*

It is not an inflexible rule of law that a co-sharer's possession is the possession of all the co-sharers. The question depends on the circumstances of each case. Where co-owners are cousins by marriage who succeed to certain property, and one of them occupies more than his own share of the property without in any way indicating that he is doing so on behalf of the other, he really ousts the other co-sharer from possession of the portion exclusively occupied by him. A consent to usurpation of possession by another does not prevent his possession from becoming adverse. (*Walsh, J.*) MUSTAFA KHAN *v.* DULARI. **65 I. C. 75: 3 U. P. L. R. (A) 5: A. I. R. 1922 All. 433 (2).**

———*Co-sharers—Adverse possession of one of the proprietary body against others is possible.*

The plaintiffs brought the suit under S. 106, Bengal Tenancy Act to have a certain entry in the record of rights corrected. The subject-matter of the suit was a two-storeyed building with the tank and orchard round it and some tenanted lands, the area of the whole being some sixty bighas. The building and the tank were in the centre of a village which became a municipality. The record of rights treated that these lands were in the possession of the plaintiffs and that they were liable to be assessed with rent by the Zemindars. The plaintiffs themselves were fractional owners of the Zemindary. The case made by the plaintiffs was that there was an old Brahamatter grant made in 1165 B. S. to one A. that by a kobala dated 1296 B. S. their predecessor-in-interest took from the executor of A.'s (grantee's heir) estate the Niskar right which had been in this Brahmin family for a very long time.

Held, that the plaintiffs had succeeded in tracing back the possession to grantee's grandson and his possession without any stipulation for payment of rent was undoubtedly adverse to the proprietors of the estate and that the plaintiffs were not liable to pay rent. (*Rankin and Ghose, JJ.*) SAILAJA NATH ROY CHOUDHURY *v.* RAJA RESHEE CASE LAW. **51 Cal. 135: 81 I. C. 493: 39 C. L. J. 380 : A. I. R. 1924 Cal. 693.**

———*Co-sharers—Stranger in possession on behalf of co-sharer—Effect of.*

Where two sisters succeeded as co-heirs to certain properties of their deceased father and the husband of one sister was in possession and management of the land for over 40 years after which the other sister (plaintiff) sued for a declaration of her title to half of the properties: *Held* that the fact that the husband of one of the sisters was looking after the land would not make his possession adverse unless it was found that he was in possession of the land asserting his own right and not as a manager of his wife's property. If he was in possession openly asserting his own right and not that of his wife for a period of 12 years in such a manner as to amount to what is called notorious exclusion, then the plaintiff's case would fail. But if he merely possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not in possession on behalf of the plaintiff's sister then the plaintiff's suit would not be barred. (*Newbould, J.*) JOYTUN BIBI *v.* SOLIMUDDIN CHOWKIDAR. **72 I. C. 33 (C.): A. I. R. 1924 Cal. 356.**

———*Co-sharers—Ouster—Exclusive possession.*

The sole occupation by one co-sharer, of a portion of joint property, does not constitute an ouster of the other co-sharers ; and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers cannot change the nature of that possession. 43 M. 244; 28 C. L. J. 437 ; 21 C. L. J. 253; 41 C. 436 Rel. (*Mookerjee and Cuming, JJ.*) KAILASCHANDRA NAG *v.* BIJOYCHANDRA. **36 C. L. J. 434: 72 I. C. 680: A. I. R. 1923 Cal. 18.**

———*Co-sharers—Ouster—Knowledge essential to constitute possession of one co-sharer adverse to others.*

To prove dispossession by one co sharer of another, it must be shown that there was exclusion or ouster to the knowledge of the latter. The principle does not depend on whether the parties are members of a joint family but rests upon the ground that they are co-owners and applies to all cases of co-owners. There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy, and if no notice is given to the co-sharer of the denial of his right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights. 26 C. W. N. 65; 26 C. W. N. 206; 29 Bom. 300 Rel. (*Chatterjee and Pearson, JJ.*) JAGENDRA NATH *v.* RAJENDRA NATH. **26 C. W. N. 890: 68 I. C. 200: A. I. R. 1922 Cal. 54.**

ADVERSE POSSESSION—Co-sharers.

———*Co-sharers — Ouster— Evidence of— Knowledge—Erection of building.*

To establish adverse possession as between co-sharers there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others. Mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive. The erection of a substantial building on joint property by one co-owner is not conclusive evidence of ouster. If possession is such that it may be either lawful or unlawful in the absence of evidence it must be assumed to be lawful. (1912) A. C. 230, foll. (*Mukerjee and Buckland, JJ.*) JAGANNATH MARWARI *v.* CHANDNI BIBI. **67 I. C. 31: 26 C. W. N. 65: 34 C. L. J. 432.**

———*Co-sharers—Sole occupation by one is not adverse to others.*

As between co-sharers, the mere fact that one of the co-sharers is in sole occupation of the property does not, by itself, show that such possession is advere to the others. 16 C. W. N. 849; 24 C. W. N. 1057 Rel. (*Chatterjee and Cuming, JJ.*) SHEIKH SACHUNI *v.* SHEIKH BASIR. **64 I. C. 613 (C).**

———*Co-sharers—Though one co-sharer ordinarily holds on behalf of all overt act clearly showing intention to hold exclusively can make his possession adverse—Limitation cannot be stopped by affirmations of right or applications for partition but by effectual breaking of the exclusive possession.*

The possession of one co-sharer is ordinarily the possession of all the co-sharers, but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers, that in future he intends to hold for himself alone. This adverse possession so begun cannot be stopped by the other co-sharers merely by affirmations that they are co-sharers or by mere applications for partition. It is the business of those co-sharers, within limitation, actually and effectually to assert their rights and to break up the usurper's exclusive possession. (*Campbell, J.*) HIRA SINGH *v.* PUNJAB SINGH. **78 I. C. 113: A. I. R. 1925 Lah. 183.**

———*Co-sharers—Essentials.*

The possession of one co-sharer being on behalf of all, if he sets up title by adverse possession, he must show overt acts amounting to hostile possession and not as co-sharer. (*Moti Sagar, J.*) UDI *v.* MARU MAL. **78 I. C. 159 : 6 Lah. L. J. 567 : A. I. R. 1924 Lah. 682.**

———*Co-sharers —One co-sharer holding adversely to others—Entry of latter's name in Revenue Records does not affect.*

Where a co-sharer in possession of joint property has by an overt act shown to his co-sharers that he would hold adversely to them, his possession does not cease to be adverse merely because subsequently the names of his co-sharers were entered in the Revenue Records as co-sharers. Title to the Waste land will go with title to the cultivated area. 22 I. C. 805 ref. 29 I. C. 348 Dist. (*Martineau, J.*) MUHAMMAD HASSAN *v.* SOHARA. **A. I. R. 1924 Lah. 389.**

———*Co-sharers—Shamilat land—Partition.*

Where under a partition entered into by co-sharers, the shamilat land was divided and it was agreed that the lands should remain joint till Kharif 1905, the fact that some took possession of parts even before will not make it adverse. (*Le Rossignol and Harrison, JJ.*) HADAYAT KHAN *v.* SHAHAMAND. **73 I. C. 665 (Lah.) : A. I. R. 1924 Lah. 155.**

———*Co-sharers*—Adna maliks *and* Ala maliks—*Non-payment of dues—Effect of.*

Where the defendants' rights as *ala maliks* existed before the settlement of 1858 and were affirmed in that settlement, their omission to enforce their rights does not imply an abandonment of their rights. Mere failure to pay dues does not establish adversity of possession. (*Le Rossignol and Abdul Quadir, JJ.*) LEKHU RAM *v.* MAHOMED RAMZAN. **5 Lah. L. J. 196 : 69 I. C. 6 : A.I R. 1923 Lah. 122.**

———*Co-sharers—Alienee —Possession of, when adverse.*

Where a vendee from one of the co-sharers of shamilat land occupied the land and enjoyed it in the same way as his vendor, but the land was utilised by the other co-sharers for pasturing as before *held* that the possession of the alienee was not adverse to the body of co-sharers. 48 Cal. 1 ; 14 P. R. 1915 ; 39 Bom. 84 Ref. (*Broadway and Harrison, JJ.*) BIRJOO *v.* BHIKHU. **4 Lah. L. J. 3 : 64 I. C. 876 : A. I. R. 1922 Lah. 325.**

———*Co-sharers—Alienee from one holds adversely to others—Alienation accompanied by delivery of possession.*

When a sale by a co-sharer of a particular portion of the joint holding, which is in his possession, is accompanied by an immediate delivery of possession to the purchaser, the latter holds it adversely to other co-sharers from the moment of the delivery of possession. (*Broadway, J.*) ANWAR *v.* KISHEM SINGH. **71 I. C. 171 : A. I. R. 1922 Lah. 205.**

———*Co sharers— One co-sharer's possession is possession of all.*

The possession of one co-sharer is as a general rule possession of all the other co-sharers. The co-sharer in possession, in order to claim adverse possession must shew some clear and unmistakable act on his part evidencing his intention to hold possession on his own account. (*Broadway. J.*) BALMUKUND *v.* WAZIR CHAND. **79 I. C. 279 : 5 Lah. L. J. 47.**

———*Co-sharers—Long silence and inaction—Effect of.*

The mere silence and inaction of one of the co-sharers coupled with the uninterrupted enjoyment of the common property by the other co-sharers does not amount to an adverse possession on the part of the latter or an abandonment of possession by the former. (*Leslie Jones and Dundas, JJ.*) MANGAL SINGH *v.* MAKHAN SINGH. **5 Lah. L. J. 17.**

———*Co-sharers —Alienation by —Position of alienee.*

The alienee from a co-sharer stands in the shoe of the alienor and consequently the delivery of symbolical possession to an execution purchaser of the share of another co-sharer does not start adverse possession against the private purchaser. 104 P. R. 1919, foll. (*Wilberforce, J.*) MALIK KHAN *v.* NAWAB. **4 Lah. L. J. 307.**

———*Co-sharers.*

Where the defts. acted on their own behalf only in suing a trespasser for possession their adverse possession begins from the date of their possession as against their co-sharers. (*Rossignol, J.*) ZULPHI *v.* ASGHAR. **3 Lah. L. J. 441.**

———*Co-sharers — Acquisition of properties — Exclusive possession—Ouster.*

The plaintiff and defendant were brothers and Mahomedans. They inherited some properties from their father which they kept in common. The plaintiff was a trader in Rangoon and both before his father's death and after, he made periodical visits to his native place and stayed with defendant. The defendant had made acquisitions from out of the income of the common property. In a suit for partition and recovery of his share of his father's

ADVERSE POSSESSION—Co-sharers.

properties and the subsequent acquisitions, more than 12 years after the father's death, *Held*, that the possession of the defendant was not adverse to the plaintiff to his knowledge and that the suit was not barred. (*Devadoss, J.*) DADA SAHIB *v.* AZI MOHIDEEN SAHIB. **20 L. W. 670 : A. I.R. 1925 Mad. 287.**

———*Co-sharers—Transferee from co-owner—Position of.*

A transferee from a co-sharer, if he pleads that he was in adverse possession, must prove exclusion or denial of title, but in the event of his having neither actual nor constructive notice of the common character of the property, he will be on the same footing as any ordinary transferee. (*Oldfield and Ramesam, JJ.*) VENKATARAMA AIYAR *v.* SUBRAMANIA SASTRY. **20 L. W. 122 : 78 I. C. 37 : A. I. R. 1924 Mad. 741.**

———*Co-sharers—Tawazhi in Tarwad.*

When the eldest male member of a Tawazhi forming a branch of a tarwad, the adverse possession by the Tavazhi as against the Tarwad cannot be established. (*Spencer and Devadoss, JJ.*) OLIYATH VAZHAYIL ABUBAKKAR *v.* OLIYATH KUNHIKUTTIYALI. **31 M. L. J. 389 : 16 L. W. 768 : 74 I. C. 27 : A. I. R. 1923 Mad. 153.**

———*Co-sharers—Possession and enjoyment of entire profits by one co-sharer are not adverse possession against other co-sharers.*

The fact that the plaintiffs have not been in the enjoyment of the rents and profits of the property is not sufficient to establish a title by adverse possession in the defendants who have enjoyed such profits. The simple reason for his view of the law is that the fact is consistent with the legal title in the co-tenant in possession ; but having the title to possession, his act of exclusive enjoyment of the profits cannot amount to a hostile assertion on his part as against the title of the co-tenant not in possession. The facts that mutation of names in the Revenue Registers on the death of a Muhammadan was made in favour of his sons only, though this was done with the knowledge and with the consent of their sister, that neither the sister nor her heirs ever lived with the defendant, the sons, and that neither she nor her heirs ever enjoyed the fruits of the common estate do not constitute adverse possession as understood in law, in a case between co-sharers. (*Wazir Hasan, A. J. C.*) ABDUL SHAKUR KHAN *v.* MUHAMMAD ALI KHAN, **78 I. C. 282 · A I. R. 1925 Oudh 241.**

———*Co-sharers—One co-sharer in actual possession of part and other co-sharer in constructive possession of same and actual possession of rest—No adverse possession exists.*

A title by adverse possession is not established in a case where one of two co-sharers equally entitled to the property is in actual possession of a part of it and the other co-sharer is in constructive possession of the same and also in actual possession of the rest. (*Wazir Hasan, J. C.*) CHHOTEY LAL *v.* HANUMAN SINGH. **11 O. L. J. 735 : 80 I. C. 619 : A.I.R. 1925 Oudh 208.**

———*Co-sharers—Nature of possession.*

Possession of joint property by one co-sharer does not constitute adverse possession against other sharers until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former. Nature of such adverse possession discussed. Mere non-participation in the rents and profits or residence outside will not amount to such ouster. (*Kincaid, J. C. and Raymond, A. J. C.*) MT. BHAGBHARI *v.* MT. KHATUN **80 I.C. 118 : 16 S. L. R. 25.**

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Co-tenants.

———*Co-tenants—Ouster—Non-participation in profits.*

In deciding whether there has been an ouster, the Court may take into consideration, the fact that a tenant-in-common did not participate in the rents and profits for a considerable length of time and that other circumstances concur. (*Mears, C. J. and Piggott, J.*) NANHAV LAL *v.* LACHHMI NARAIN. **L. R. 3 All. 605.**

———*Co-Tenants.*

Exclusive possession of a tenant in-common is not adverse until ouster by denial of the right of the tenant-in-common is established. Therefore, exclusive enjoyments of all profits is not by itself sufficient to constitute ouster. (*Macleod, C. J. and Shah, J.*) SHIVALINGAPPA *v.* SATYAYA. **64 I. C. 552 : 23 Bom. L. R. 967.**

———*Donor and donee—Gift—Assertion of title under—Effect.*

Assertion of title on the basis of an alleged gift sets limitation running against the owner and after 12 years a title by adverse possession is acquired. (*Wazir Hasan, A. J. C.*) WAJID ALI *v.* MT. SALIMA BEGAM. **89 I. C. 473 : A. I. R. 1925 Oudh 745.**

Easement.

———*Easement—Permanent tenancy—Prescription by one tenant against another.*

In India, unlike in England, a tenant with permanent rights can acquire an easement by prescription against another tenant having the same rights. The incidents of a permanent tenancy in this country are different from the incidents of a tenant for years as they obtain in England, 19 C. W. N. 1211 followed. (*C. C. Ghose and B. B. Ghose, JJ.*) KALIPADA BOSE *v.* FANI BHUSAN ROY. **70 I. C. 173 (Cal) : A. I. R. 1924 Cal. 363.**

Enjoyment.

———*Enjoyment must be open, adequate in extent and continuous.*

A trespasser cannot perfect his title by mere occasional user of the land. The rightful owner's title cannot be extinguished where the trespasser's possession is otherwise than open, adequate in extent and continuity, etc. (*Chakravarti, J.*) HARISADHAN PATARI *v.* DINANATH BANERJEE. **82 I. C. 318 : A. I. R. 1925 Cal. 316.**

———*Enjoyment acts necessary—Vacant site.*

Where land consists of a vacant site desultory acts of possession such as storing cow dung cakes and tying cattle are insufficient to constitute adverse possession. (*William and Harrison, JJ.*) WAZIRI MAL *v.* GANGA RAM. **69 I. C. 573 : A. I. R. 1924 Lah 370.**

———*Enjoyment—Pond—Not capable of physical possession—Intermittent user—Effect of.*

Intermittent user of a pond accompanied by no assertion of right is a very common phenomenon in India and often arouses no opposition. The pond is not susceptible of actual physical possession by the legal owner and possession follows title unless the usurper can prove long and continuous exclusion of the rightful owner. (*Le Rossignol, J.*) BHURU *v.* DATU RAM. **4 Lah. L. J. 461 : A. I. R. 1922 Lah. 59 (1).**

Essentials of.

———*Essentials of.*

There can be no question of adverse possession unless the party has come into possession not only against the mortgagor but also against the mortgagee. (*Macleod, C. J. and Shah, J.*) VINAYAK KESHAV GULVE *v.* BALA SHIVRAM HINGNE.

ADVERSE POSSESSION—Essentials of.

24 Bom. L. R. 261 : 67 I. C. 176 : A. I. R. 1922 Bom. 94.

———*Essentials of—Occasional catching of fish is not continuous enjoyment.*

To prove title by adverse possession the possession required must be adequate in continuity, publicity and extent. The fishermen going into the tank catching some fish and giving them to defendant does not amount to such possession. 27 *Cal.* 943 (*P. C.*), *Foll.* (*Suhravardi and Duval, JJ.*) BEJOY CHAND MAHTAB *v.* SARAT KUMAR ROY.

A. I. R. 1925 Cal. 1253.

———*Essentials of—Isolated acts of trespass do not constitute adverse possession.*

The possession must be adequate in continuity, in publicity and in extent, in order that it may be effective to destroy the title of the true owner. Possession to be adverse must be actual, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. **66 I. C. 923: 34 C. L. J. 465.**

———*Essentials of—Adverse possession against—Government—Affirmative evidence is essential.*

To prove adverse possession against the Government it is not sufficient to prove possession for a long period but possession for the whole period of 60 years must be affirmatively proved. To hold, on mere probabilities and evidence of long possession that possession was for 60 years is not allowable. 39 *Mad.* 617 (*P.C.*) *Foll.* (*Ayling and Odgers, JJ.*) KRISHNA SASTRI *v.* SINGARAVELU. **48 M. L. J. 470 : (1925) M.W. N. 218 : A. I. R. 1925 Mad. 780.**

———*Essentials of—Occasional acts of trespass do not amount to adverse possession.*

No title by adverse possession can be presumed from a few acts of trespass committed from time to time. (*Dawson Miller, C. J. and Jwala Prasad, J.*) KEDAR NATH GOENKA *v.* AMRIT MANDAL. **88 I. C. 676 : 1925 P. H. C. C. 170 : A. I. R. 1925 P. 568.**

Evidence.

———*Evidence—Beneficial owner.*

Against a person clothed with all the insignia of beneficial ownership, strong and reliable evidence is necessary to prove dispossession or adverse possession. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMAD ALI KHAN. **43 M. L. J. 104 · 20 A. L. J, 545 : 35 C. L. J 554 : 31 M. L. T. 94 : 24 Bom. L. R. 951 : 67 I. C. 444 : A. I. R. 1922 P.C. 84 (P. C.).**

———*Evidence—Mere fact of bidding at auction of the property is not enough to refuse claim of adverse possession.*

Where the tenants of a landlord who were in possession of certain tanks belonging to the landlord bid at an auction in connection with the landlord's advertisement for tenants for the tank lands.

Held, that they might have done so from various motives and their action could not be either disturbance of the adverse possession otherwise constituted, or acknowledgment within the meaning of S. 19 of Limitation Act. (*Rankin and Ghose, JJ.*) GOLAM NAZAR *v.* ABBAS MOLLA. **40 C. L. J. 160 : 84 I. C. 657 : A. I. R. 1925 Cal. 193.**

———*Evidence—Inconclusive evidence as to possession undermines plea.*

Where the evidence as to possession itself is of an inconclusive character no finding of adverse possession for the statutory period can possibly be founded on it. (*Spencer. O. C. J. and Srinivasa Aiyangar, J.*) RANGAPPA *v.* RANGASAMI. **(1925) M. W. N. 232 : 88 I. C. 249 : A. I. R. 1925 Mad. 1005.**

ADVERSE POSSESSION—Hereditary office.

———*Evidence—Possession of part of land with defined boundaries, in assertion of claim to which is evidence of possession of whole.*

Where a party is in possession of a part of land with defined boundaries in exercise of an assertion to claim the whole, such possession is evidence of the possession of the whole. *Jones* v. *Williams.* 2 M. and W. 326 *Lord Advocate* v. *Lord Blantyre* 4 A. C. 770 ; *Clarke* v. *Elphinstone.* 6 A C. 164 and 9 Mad. 285 and 26 Bom. 410 Foll. (*Kincaid, J. C. and Rupchand Bilaram, A. J. C.*) RAMZAN *v.* FAKIR MAHOMED. **82 I. C. 861 : A. I. R.1925 Sind 201.**

Hereditary office.

———*Hereditary office—Office of Patel and Kulkarni—Adverse possession.*

The plaintiff was one of the eldest members of the family of Jaghirdars, to whom the village of Hebli was granted in Jaghir in 1748 A. D. inclusive of the confiscated lands of the Patilki and Nadgir Vatans. The latter lands had been resumed by Government prior to 1723 for non-payment of Jodi. The plaintiff's family was in possession of the bulk of those lands and exercised the rights of the service of Patilki and Kulkarniki; the lands were entered in their names as 'Kamavishi' in Government records. Somehow a small portion of the lands went into the possession of the defendants who belonged to the Nadgir family. In 1876, the defendants obtained possession of another portion of the lands from the plaintiff's family through a Civil Court; but from the date of the suit in 1868, the plaintiff's family discontinued entering the Vatan lands as 'Kamavishi,' in its books. In an inquiry under the Bombay Hereditary Offices Act, 1874 it was held by the Collector in 1906 and by the Government in 1908 that the whole of the Patilki and Kulkarniki Vatan should be entered as such in the Vatan register against the names of Nadgir defendants and that so much as was required for the emolument of the officiators should be recovered from the Jaghirdars in possession. Accordingly, a contribution was levied against the Jaghirdars in 1913. Thereupon, the plaintiff sued for a declaration that his family were Vatandar's Patils and kulkarnis by virtue of the grant; or in the alternative by their long and exclusive possession and enjoyment of the offices until 1908:—

Held that the manner in which the Vatan lands were treated both by the Government and the Jaghirdars showed that the lands had not become the absolute property of the Jaghirdars : (2) that it was not competent to the Jaghirdars to acquire the offices of Patil and Kulkarni by adverse possession : (3) that assuming that the Nadgir defendants were entitled either by agreement or by custom to get back their Vatan lands on payment of' jodi, time would not begin to run against them until they were made aware that the Jaghirdars were setting up a title to hold the Vatan lands in their own right and there was nothing to show that the Nadgirs were aware of any alteration in the method of keeping the village accounts. (*Macleod, C. J. and Shah, J.*) SHRINIVAS LINGO NADGIR *v.* SECRETARY OF STATE. **24 Bom. L. R. 214 : A. I. R. 1922 Bom. 18.**

———*Hereditary office—Title acquired by statute.*

Where a title to an office has been acquired by prescription, the title of the true owner is not revived by re-entry. (*Mookerji, A. C J. and Fletcher, J.*) KASIM HASSAN *v.* HAZRA BEGUM. **60 I. C. 165 : 32 C. L. J. 151.**

———*Hereditary office—Against lifeholder—Inam Lands held adversely against office holder create*

ADVERSE POSSESSION—Hereditary office.

prescriptive title against all successors.

Assuming that Khaji inam lands are inalienable and impartible, where inam lands are held adversely to the office-holder for more than 12 years, the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors also. 1922 P. C. 96 ; and 42 Cal. 244 ; Dist. 38 M. L. J. 320 Foll. So long as the alienation is good for the lifetime of the alienor, limitation commences to run against the successor not from the date of alienation but from the date of the alienor's death. It is otherwise when possession is adverse from the start. (*Odgers and Hughes, JJ.*) K. M. MAJAVATH ALI *v.* K. M. MUJAFAR ALI.

45 M. L. J. 791 : 18 L. W. 887 : (1924) M.W.N. 53 : 33 M. L. T. 175 : 77 I. C. 568: A. I R. 1924 Mad. 201.

———*Hereditary office—Service inam—Lands disannexed from office.*

Where service *inam* lands attached to the office of *karnam* become disannexed from the office, and are enjoyed by a person having no claim to the office, as ordinary private property, such possession is adverse to the holder of the office. (*Abdur Rahim and Ayling, JJ.*) IDARAPALLI DHANUSHKOTIRAYUDU *v.* VAKAYALA VENKATARATNAM.

59 I C. 65 : 11 L. W. 453 : 38 M. L. J. 320.

Hindu family.

———*Hindu family—Hindu widow—Family arrangement—Possession under, if adverse to other members of the family.*

Where a minor widow claims and retains possession under a family arrangement, her possession is not adverse to the other members of the family. 29 Cal. 664, Foll. (*Stuart and Sulaiman, JJ.*) RADHA DULIYA *v.* RASHIK LAL. **45 A. 1 : L. R. 3 A. 544 : 75 I. C. 14 : 20 A. L. J. 814 : A. I. R. 1923 All. 25.**

———*Hindu family—Partial partition—Effect.*

One member holding a portion of joint property after partial partition of Hindu family does not hold adversely to other members. (*Ayling and Odgers, JJ.*) RAJAGOPALA IYENGAR *v.* SOUNDARA RAJA IYENGAR. **45 M. L. J. 476 : (1923) M. W. N. 636 : 74 I. C. 1018 : A. I. R. 1924 Mad. 113.**

———*Hindu widow—Property not entitled to—Nature of.*

Where a Hindu widow who is not entitled to succeed to a certain person, takes possession of her property after her death, she does it in her own right and her possession is adverse to the real heirs. (*Dalal, J. C.*) DIRBIJOY SINGH *v.* DRIGPAL SINGH.

90 I. C. 825.

Interruption of.

———*Hindu widow— Interruption of —Possession of joint family property—Intention of the parties.*

Where the widow of a person who died as an undivided member of a joint Hindu family took possession of the family properties recorded in her deceased husband's name and dealt with the properties as her own for over the statutory period, *held* that she must be held to have prescribed for an absolute estate in the absence of proof that her claim was limited to a widow's estate. Where adverse possession commenced on the death of her husband while the property legally vested in the next surviving male co-parcener, the death of such survivor does not interrupt the running of adverse possession. 22 A. L. J. 304, Dist. 42 A. 152 ; 41 A. 729; 22 C. 445, Ref. and Foll (*Daniels and Neave, JJ.*) KALI CHARAN *v.* PEARE.

46 A. 769 : 22 A. L. J. 725 : L. R. 5 A. 677 : A. I. R. 1924 All. 740 (2).

ADVERSE POSSESSION—Interruption of.

———*Interruption of — Symbolical possession—Effect of delivery.*

Where the property is Zemindari property, is let out to tenants for cultivation and is not of a nature of which actual possession could be obtained by the purchaser, the delivery of formal possession to the plff., gives a fresh starting point of limitation to him against the defendant judgment-debtor. 19 A. L. J. 469, Dist. (*Ryves and Gokul Prasad, JJ.*) RAM LALLAN SINGH *v.* HARAKH NARAIN RAI.

20 A. L. J. 641 : 73 I. C. 920 : A. I. R. 1922 All. 463.

———*Interruption of.*

Delivery of symbolical possession is sufficient to constitute interruption of adverse possession. (*Macleod, C. J. and Shah, J.*) MAHADEVAPPA *v.* BHIMA DODDAPPA. **24 Bom L. R. 232 : 66 I. C. 320 : 46 B. 710 : A. I. R. 1922 Bom. 27 (2).**

———*Interruption of— Symbolical possession is effective only in cases recognized by the C. P. Code.*

Delivery of symbolical possession in cases not contemplated by the C. P. Code and against person not bound by the decree are ineffective to interrupt adverse possession. (*Pratt and Kanga, JJ.*) RAGHUNATH WAMAN *v.* KONDIBA BABAJI.

24 Bom. L. R 499 : 46 B. 932 : 68 I. C. 91 : A. I. R. 1922 Bom. 2.

———*Interruption of—Is not interrupted by theft of crops on land.*

Where in the 11th year of adverse possession the possessor prosecuted the opposite party for cutting or taking away the crops grown on the land and they were convicted but acquitted on appeal, *held* that it is doubtful whether the act of the accused was of such a character as to cause total dispossession of the prosecutor or it was only a case of theft of crops. (*Walmsley and Suhrawardy, JJ.*) SUKUR MAHAMED *v.* ASMOT MONDAL. **50 Cal. 978 : A. I. R. 1924 Cal. 384.**

———*Interruption of—Symbolical delivery of possession—Effect of—Decree-holder entitled to actual possession.*

Though the judgment-debtor is actually in possession and decree-holder is consequently entitled to take not merely formal possession but actual possession, yet the delivery of formal possession to the decree-holders is in the sight of law sufficient possession as against the judgment-debtor. 34 M. L. J. 97 : 6 C. L. J. 472 ; 11 C. 93 : 24 C. 715, followed. (*Mukerjee and Chotzner, JJ.*) KULADA PRASAD CHATTERJEE *v.* KUDIRAM MISRA. **27 C. W. N. 673 : 37 C. L. J. 545 : 70 I. C. 187 : A. I. R. 1923 Cal. 371.**

———*Interruption of — Symbolical possession of auction purchaser.*

Symbolical possession as against the judgment-debtor operates as actual possession and gives a fresh start of limitation even in a case coming under S. 318 of the 1882 Code corresponding to O. 21, R. 95 of the present Code. A person claiming under certified purchaser can also avail of the principle. (Case law discussed). (*Chatterjee and Pearson, JJ.*) BHULU BEG *v.* JATINDRA NATH SEN. **27 C. W. N. 24 : A. I. R. 1923 Cal. 138.**

———*Interruption of—Delivery of symbolical possession.*

Deiivery of symbolical possession does not in any way affect the possession or give start to a fresh period of limitation against persons who are not parties to a suit or execution proceedings 5 C. 584 ; 16 C. 530 ; 27 C. L. J. 191, Ref. As regards persons not so parties only actual possession can interrupt their adverse possession. The same principle has been extended to the case of purchaser at a revenue sale.

ADVERSE POSSESSION—Interruption of.

(*Mookerjee and Chotzner, JJ.*) JOBEDA KHATUN *v.* TULSI CHARAN DAS. **77 I. C. 564 : 36 C. L. J. 472 : A. I. R. 1923 Cal. 82.**

———*Interruption—Symbolical possession—Effect of.*

Symbolical possession interrupts adverse possession of a party against whom the symbolical possession is obtained. 5 Cal. 584 and 22 C. W. N. 330, followed. (*Walmsley and Ghose, JJ.*) JOGENDRA NATH BHOMICK *v.* DINANATH DASS. **A. I. R. 1922 Cal. 313.**

———*Interruption of—Attachment of land under S. 146 of Cr. P. Code interrupts adverse possession.*

There can be no continuance of adverse possession when the land is not capable of use and enjoyment by the rightful owner. The intervention of public authorities, for preservation of peace, such as an attachment under S. 146 of the Cr. P. Code operates in the same way as *vis major* of the floods and the constructive possession of the land thereafter, is in the true owner. In the eye of the law, the effect of the attachment is to interrupt the adverse possession of the wrong-doer and revive the possession of the true owner. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BHIBAHI DEBI. **66 I. C. 433 (2) : 34 C. L J. 302.**

———*Interruption of—Symbolical possession is sufficient against a party but not against a stranger to break adverse possession.*

Where the decree-holders got possession in accordance with an order by the Court and in pursuance of the order of the officer of the Court who went to deliver possession.

Held : the possession operated as a complete transfer to the decree-holder.

Held : further that possession even though symbolical would be sufficient to interrupt the adverse possession of the party to the execution proceedings but would not avail against a third party. (*Moti Sagar and Abdul Raoof, JJ.*) MUKAND LAL *v.* ILAM DIN. **6 Lah. L. J. 302 : 84 I. C. 952 : A. I. R. 1925 Lah. 61.**

———*Interruption of—Symbolical possession does not interrupt.*

The merely formal possession of immoveable property by a purchaser at a court sale cannot prevent litigation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same. (*Scott-Smith, J.*) SARDAR KHAN *v.* ABDULLA KHAN. **71 I. C. 885 (L.) : A. I. R. 1924 Lah. 30.**

———*Interruption of—Formal possession, delivery of, does not affect—Effect.*

The fact that formal possession was given by decree against a stranger does not affect the position of the adverse possessor. (*Abdul Raoof, J.*) MAHOMED RAMZAN *v.* THE MUNICIPAL COMMITTEE, ALIPUR DT. **77 I. C. 509 : A. I. R. 1923 Lah. 534.**

———*Interruption — Declaratory judgment—No interruption of possession.*

The judgment of a court declaring that one of the parties has no legal title to the properties in suit cannot have the effect of causing his possession to cease to be adverse to the opposite party from the moment of its pronouncement so long as possession remains undisturbed. (*Spencer and Venkatasubba Rao, JJ.*) SINGARAVELU MUDALIAR *v.* CHOKKA MUDALIAR. **46 Mad. 525 : 70 I. C. 994 : 16 L. W. 544 : 31 M. L. T. 298 : (1922) M. W. N. 676 : A. I. R. 1923 Mad. 88 (2) : 43 M. L. J. 737.**

———*Interruption of—Symbolical delivery of possession.*

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Symbolical delivery of possession operates to interrupt adverse possession on the part of the judgment-debtor. 34 M. L. J. 97 followed. (*Prideaux, A.J.C.*) SAWATRAM *v.* GANESHILAL. **69 I. C. 521 (1) : A. I. R. 1923 Nag. 30.**

———*Interruption of—Abandonment or relinquishment—Disclaimer.*

Where a trespasser in adverse possession of property makes a statement to the rightful owner that he disclaimed interest in the property but does not abandon or relinquish possession, the mere admission does not convert possession which was previously adverse into possession of a different character. (*Lindsay, J. C.*) MAULVI ABDUL RASHID *v.* JANKIDAS. **9 C. L. J. 2 : 4 U. P. L. R. (O. C.) 61 : 66 I. C. 941 : A. I. R. 1922 Oudh 24.**

———*Interruption of—Running of time—Abandonment of right—Evidence.*

Limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title by being in possession for the full prescriptive period. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the interruption took place. 29 C. 518 (P. C.) Ref. (*Wazir Hasan, A. J. C.*) DURGA *v.* RAM PADARATH. **65 I. C. 749 : 8 C. L. J. 495.**

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———*Landlord and Tenant—Vatandars cannot acquire title by adverse possession.*

Persons who, and their predecessors-in title, always claimed to be and were tenants of service. Vatan lands can never acquire any title to a permanent tenancy in the lands by adverse possession as against the vatandar from whom they held the lands. History of vatan legislation reviewed. (*Sir John Edge.*) MADHAV RAO VAMAN *v.* RAGHUNATH VENKATESH. **47 Bom. 798 : 25 Bom. L. R. 1005 : 33 M. L. T. 389 : 50 I. A. 255 : 74 I. C. 362 : (1923) M. W. N. 689 : 28 C. W. N. 857 : A. I. R. 1923 P. C. 205 : 47 M. L. J. 248 (P.C.).**

———*Landlord and Tenant—Rent, non-payment of, does not make possession adverse.*

Mere discontinuance or non-payment of rent does not by itself, make the possession adverse. (*Mr. Amir Ali,*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH. **(1923) M. W. N. 361 : 3 Pat. L. T. 605 : 36 C. L. J. 499 : 49 I. A. 399 : 32 M. L. T. 1 : 2 Pat. 38 : 71 I. C. 984 : 27 C. W. N. 925 : A. I. R. 1922 P. C. 272 : 45 M. L. J. 460 (P. C.).**

———*Landlord and tenant—Occupancy right—Payment of rent.*

Where a squatter has been in possession of a plot of land without the consent of the landlord his occupation for more than 12 years would not vest him with the rights of an occupancy tenant, but that occupancy rights would commence to accrue only from the date the squatter commences to pay rent. The question as to when a presumption arises that the possession of the tenant is without the consent of the landlord, depends upon the particular facts of each case and it is not a question capable of a uniform answer. (*Gokul Prasad, J.*) CHHAJJU *v.* JHABBA. **74 I.C. 681 (A) : L.R. 4 A. 221 : A.I.R. 1924 All. 293.**

———*Landlord and tenant—Principles underlying.*

If a tenant is in possession of land, and the landlord has not the immediate right of re-entry, any assertion by the tenant would not make time run against the landlord ; for the real circumstance which makes limitation run against him is that he is entitled to possession. In a suit for possession of land, a mere assertion of tenancy does not deprive the tenants from

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pleading limitation and they can plead that if tenancy was not established, as they hold possession for more than 12 years, the plaintiffs' right to recover possession was extinguished. (*Suhrawardy and Duval, JJ.*) KHATEMY CHHAIKUDDIN CHAUDHURY *v.* RAM NARAIN GHOSE. **90 I C 617.**

———*Landlord and tenant--Repudiation of tenancy.*

The possession of a tenant does not become adverse to the landlord by the mere fact of his repudiating the tenancy unless the repudiation is accepted by the landlord. Where waste land as well as cultivated land form part of one tenancy adverse possession of the cultivated land also constitutes adverse possession of the waste land. (*Martineau, J.*) MAHOMED HUSSAIN *v.* SOHARA. **71 I. C. 805 (L.) : A. I. R. 1924 Lah. 389.**

———*Landlord and Tenant—Shamilat—Occupation by one tenant.*

An occupancy tenant who occupies a portion of the shamilat land with the consent or acquiescence of the proprietors for agricultural purposes cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it was given, but if he diverts the site to other purposes as for instance to build upon and disclaiming the title of the proprietors sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the instance of the proprietors. Where there is no overt act as for instance by the erection of a building, the possession of the occupant is not adverse to the proprietors. (*Harrison, J.*) BHAG SINGH *v.* KHUSHAL SINGH. **71 I. C. 618. (L.) : A. I. R. 1924 Lah. 315.**

———*Landlord and tenant.*

Where a tenant wants to plead adverse possession, there must be a clear, positive and continued disclaimer and disavowal of the landlord's title ; the latter must have had actual notice of the claim or the acts of ownership must be open, hostile and notorious. Non-payment of rent will not do. (*Mookerjee and Walmsley, JJ.*) GIRIS CHANDRA GANGOPADHYAYA *v.* SRI KRISHNA DE NAG. **38 C. L. J. 266 : 75 I. C. 325 : A. I. R. 1924 Cal. 168.**

———*Landlord and Tenant—Ejectment—Decree conditional on payment of compensation—Decree not executed—Effect of—Subsequent suit for redemption.*

A suit for ejectment by a landlord against his tenant was decreed subject to the payment of compensation for improvements. The decree was not executed and the tenant continued in possession thereafter for more than 12 years. In a suit to eject the defendant on redemption by payment of the sum specified in the previous decrees as compensation, *Held*, that the decree in ejectment suit did not create or establish the relation of mortgagor and mortgagee between the parties to the suit and therefore a suit for redemption did not lie. Ever since the previous suit, the possession of the defendants had been adverse to the plaintiff and the present suit was, therefore, barred by time. (*Scott-Smith, J.*) FAZAL *v.* MIHAN KHAN. **15 P. L R. 1922 : 64 I. C. 352 : A. I. R. 1922 Lah. 70.**

———*Landlord and tenant.*

A tenant's possession of the lands encroached upon, can commence to be adverse only when title is asserted to the landlord's knowledge of such encroachments. (*Mookerjee and Buckland, JJ.*) JOGENDRA *v.* JAGADINDRA. **67 I. C. 170 : 34 C. L. J. 133.**

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The possession of a tenant however long such possession might be cannot be adverse to the landlord. (*N. R. Chatterjee and Grieves, JJ.*) MUNMOTHA NATH MITTER *v.* ANATH BUNDHO PAL. **61 I. C. 469 : 25 C. W. N. 106.**

———*Landlord and tenant—Person can acquire tenancy right by adverse possession against landlord.*

Where a tenant is found to be in possession for nearly fifty years as tenant he gets a statutory right to the tenancy and cannot therefore be ejected by the landlord. (*Devadoss, J.*) M. RAMA RAO *v.* APPU. **88 I. C. 924 : A. I. R. 1925 Mad. 1226.**

———*Landlord and tenant—Onus on tenant to—Prove nature of title.*

If the tenant claims adverse possession the burden is on him to prove the nature of his title, *i. e.*, he is not a tenant. (*Oldfield and Ramesam, JJ.*) SUBRAMANIYAM *v.* UTHENANTHIL. **44 M. L. J. 596 : 16 L. W. 620 : 31 M, L. T. 454 : 69 I. C. 363 (2) : A. I. R. 1922 M. 519.**

———*Landlord and tenant—Notice to quit—Continuance of tenant in possession—Effect of.*

After a service of notice to quit, a tenant becomes a trespasser and mere forbearance to sue the tenant in ejectment does not amount to acquiescence. (*Dhobley, A. J. C.*) YESHWANT *v.* SHIVAPPA. **A. I. R. 1923 Nag. 129 (2).**

———*Landlord and Tenant —Permanent tenancy claimed—Payment of rent does not affect adverseness.*

Payment of rent by persons claiming the status of permanent mokararidars cannot derogate from their position of being in adverse possession. (*Jwala Prasad A. C. J. and Kulwant Sahay, J.*) CHARAN MAHTON *v.* KAMAKHYA NARAYAN SINGH. **86 I. C. 387 : 6 P. L. T. 98 : A. I. R. 1925 P. 357.**

———*Landlord and Tenant—Permanent tenancy asserted—Marfatdari receipts granted by landlord—Yearly tenancies not created—Landlord and tenant.*

Where one party was claiming a permanent right and the other was not willing to accept that claim and asserting that the other party had no right whatsoever to remain in possession. *Held* : that the grant of Marfatdars receipts by the landlord did not create the relationship of landlord and yearly tenant between the parties. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) CHARAN MAHTON *v.* KAMAKHYA NARAYAN SINGH. **86 I. C. 387 : 6 P. L. T. 98 : A. I. R. 1925 P. 357.**

———*Landlord and Tenant—Possession by tenant's assign is adverse from date of expiration of lease—*

When a lease expires, the tenant's assign has no right to the possession of the property and if he is in possession the possession is wrongful. In the absence of evidence from which a fresh tenancy can be inferred time begins to run against the landlord from the expiration of the lease (*Jwala Prasad, A. C. J. and Macpherson, J.*) RAM RACHHYA SINGH *v.* KAMAKHYA NARAIN SINGH. **(1924) P. H. C. C. 313 : 6 P. L. T. 12 : 4 Pat. 139 : 84 I. C. 586 : A. I. R. 1925 P. 216.**

———*Landlord and tenant--Continuation of relationship of landlord and tenant by admission of parties cannot affect claims openly set up and not withdrawn by the tenant and in conflict with the continuation of any incidents of the original tenancy.*

The relationship of landlord and tenant might be continued by the admission of the parties. But when there are any claims openly asserted and not withdrawn by the tenant who is suffered to continue in possession, the admission of the parties cannot create, preserve or revive undisputed conditions of the continuous right of the relationship of the landlord and the tenant which conflict with claims asserted by the tenant such as are referred to above. (*Jwala Prasad A. C. J. and Macpherson, J.*) RAM RACHHYA SINGH

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———*Landlord and tenant.*

Mere non-payment of rent is not equivalent to an assertion of a hostile title to the knowledge of the landlord though there is no registered deed as required by S. 106. (*Das and Bucknill, JJ.*) RAM LOCHAN BAID *v.* KUMAR KAMAKHYA NARAIN.
4 P. L. T. 123 : (1923) P. H. C. C. 54 : A. I. R. 1923 Patna 201.

———*Landlord and tenant—Entry in village record or decision of Revenue Court will not start adverse title of under-proprietor in a cultivator.*

An entry in the village record or even the opinion of a Revenue Court that a person cultivating land has rights higher than those of a tenant will not start adverse title of an under-proprietor in the cultivator and not compel the landlord to seek a declaration in the Civil Court at the risk of losing his right if he did not do so within six years of the final order in the litigation the Revenue Court. Much less can a mere assertion start adverse title. 1923 *P. C.* 118 *Foll.* (*Dalal, J C.*) SULTAN *v.* HARDWARI. **A. I. R. 1925 Oudh 601.**

———*Landlord and tenant—Entry in revenue record that tenant has higher rights than those of cultivator—Decision of Revenue Court to the same effect—Title whether can be deemed adverse from the date of such entry or decision—Suit for declaration by landlord—Burden of proof.*

It is now settled law that an entry in the village record or even the opinion of a Revenue Court that a person cultivating land has rights higher than those of a tenant will not start adverse title of an under-proprietor in the cultivator and not compel the landlord to seek a declaration in the Civil Court at the risk of losing his right if he did not do so within six years of the final order in litigation. In a suit for declaration by the landlord that the defendants are tenants and not under—proprietors the burden lies on the defendants to prove that they are under-proprietors and not on the landlord. Where a person sets up a claim to property on the basis of a grant and fails to prove it, he cannot turn round and start the theory of adversity of title which can only commence if he did not lay claim to any title whatsoever for the commencement of his possession. (*Dalal, J. C.*) SULTAN KHAN *v.* HARDWARI. **1 O.W.N. 768 : A. I. R. 1925 Oudh 601.**

———*Landlord and tenant—Entries in Khasra as tenant for a long time—Possession should be presumed to be as of tenant and not adverse.*

Where the defendant in an action for possession relies upon entries in the village khasra for a large number of years as tenant of the suit plots, in the absence of any evidence to the contrary, the entries in the revenue papers must be deemed to represent correctly the relation between the parties to the effect that the claimant was tenant and not in adverse possession by right of being proprietor. 7 O. L. J. 282 and 5 O. L. J. 455 *Dist.*, 8 O. L. J. 495 *Foll.* (*Dalal, A. J. C.*) NAGESHUR SINGH *v.* BALDEO SINGH. **12 O. L. J. 160 : 87 I. C. 183 : 2 O. W. N. 148 : A. I. R. 1925 Oudh 442.**

———*Landlord and tenant—Entries in revenue records—Non-payment of rent—Effect of.*

Notwithstanding non-payment of rent a tenant entered as such in the revenue records continues to be a tenant and mere non-payment of rent does not give any higher rights. (*Wazir Hasan, A. J. C.*) DURGA *v.* RAM PADARATH. **65 I. C. 749 : 8 O. L. J. 495.**

———*Landlord and tenant—Meaning of possession.*

Possession of tenants is possession of their landlord.

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(*Kincaid, J. C. and Rupchand Bilaram, A. J. C.*) RAMZAN *v.* FAKIR MAHOMED. **82 I. C. 861 : A. I. R. 1925 Sind 201.**

———*Landlord and tenant—Mere non-payment of rent for 12 years does not create adverse possession—Tenant's heir after him continues as permissive occupant.*

Mere non-payment of rent or discontinuance of payment of rent by a tenant for twelve years would not create adverse possession against the owner. Nor would the carrying out of alterations on the property to suit his convenience be evidence of adverse possession. The possession of the tenant's heir after tenant's death would not *ipso facto* be adverse to the owner. The heir continues in possession as a permissive occupant and it is for him to show that by some subsequent act his possession became adverse to that of the owner. A tenant may acquire adverse possession without giving up possession of the property. An unequivocal assertion of title by a tenant coupled with possession for the statutory period and the non-payment of rent during such period would be enough to complete adverse possession against the landlord. 1922 P. C. 272 ; 2 All. 517 ; 4 Cal. 314 ; 4 B. H. C. A. C. 155 ; and 18 Bom. 25 : foll. 37 All. 7 Dist. (*Rupchand Bilaram, A. J. C.*) MAHOMED FARUQ *v.* SIDIK. **79 I. C. 59 : A. I. R. 1925 Sind 36.**

———*Landlord and tenant—What amounts to.*

A tenant must first surrender his tenancy and then effect forcible entry to set up a title by adverse possession. Mere failure on the part of the landlord to levy rent due would not enable the tenant to assert he was holding adversely ; nor does the fact of making structural alterations amount to a notice that the tenancy is at an end. An entry in the Municipal Records as owner is not also a clear manifestation of intention to set up adverse title. But an assertion in a public circular that he is the owner will set limitation run against the landlord. (*Kennedy, J. C. and Aston, A. J. C.*) SIDIK HAJI YACUB *v.* MAHOMED FARUQ. **90 I. C. 1007.**

Lessor and Lessee.

———*Lessor and Lessee—Lease beyond authority.*

Where the Manager of a religious endowment had granted a permanent lease in excess of his authority, the possession of the lessee was not adverse to the endowment during the life of the head who granted the lease. L. R. 48 I. A. 302. (*Mookerjee and Cuming, JJ.*) GAJENDRA *v.* ASRAF HOSSAIN. **36 C. L. J. 48 : 27 C.W.N. 159 : A.I.R. 1923 Cal. 130.**

———*Lessor and lessee—Nature of possession—Submerged land.*

Possession to be adverse, must be actual, visible, exclusive, hostile and continuous for the time necessary to create the bar. (*Mookerjee and Buckland, JJ.*) JOGENDRA *v.* JAGADINDRA. **67 I. C. 170 : 34 C. L. J. 133.**

———*Lessor and lessee—Lessee's possession is not adverse—Adverse possession.*

If a person, after taking a lease allowed his brothers to occupy the leased house along with him, it could certainly not be said that their possession was adverse to the lessor. (*Martineau, J.*) CHAUHAR *v.* MANSHA SINGH. **70 I C. 966 (2) : A. I. R. 1923 Lah. 247.**

———*Lessor and lessee.*

Possession taken during the currency of a lease cannot be adverse as against the lessor, until the lease expires. (*Chevis, J.*) GIRDHARI LAL *v.* UNDAJAN. **63 I. C. 717 (L.). : 3 Lah. L. J. 215.**

———*Lessor and lessee—Persons failing to prove*

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claim on basis of lease cannot plead adverse possession.

Where a person comes forward with a claim on the basis of a lease and fails to prove it, he cannot turn round and say that he has been holding adversely from the date on which he founded his title under a grant. Adversity of title can only be set up if he did not lay claim to any title whatsoever for the commencement of his possession. (*Dalal, J. C.*) SULTAN *v.* HARDWARI. **A. I. R. 1925 Oudh 601.**

———*Lessor and lessee—Lessee in possession for more than 12 years.*

If the lessee holds land under the lease for over 12 years on a stipulated rent and without sharing profits with the lessor, he becomes a perpetual lessee, and his act amounts to a complete ouster of the grantor and his co-sharers and the time, for a suit to deprive him of possession, runs from the date of such possession. (*Wazir Hassan, A. J. C.*) FAZ-L-HAQ *v.* RUQUAIYA KHANAM. **60 I. C. 717 : 7 O. L. J. 692.**

License.

———*License—Long possession does not create title.*

A licensee cannot claim title only from possession however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. (*Mr. Ameer Ali.*) AMBU NAIR *v.* SECY. OF STATE. **47 Mad. 572 : (1924) M.W.N. 572 : 51 I.A. 257 : 26 Bom. L.R. 639 : 20 L. W. 49 : 80 I. C. 335 : 35 M. L. T. 128 : 29 C. W. N. 365 : A. I. R. 1924 P. C. 150 : 47 M. L. J. 35 (P. C.).**

———*Licensee.*

Possession of a licensee started under an invalid license is only permissive and not adverse. (*Ramesam, J.*) RAMANUJACHARYULU *v.* P. B. MANGA RAO. **22 L. W. 485 : A. I. R. 1925 Mad. 1279 (2).**

Limitation.

———*Limitation—Decree for possession—Execution barred—Decree-holder getting into possession—Judgment-debtor, if can recover possession.*

Where a decree-holder gets into possession of the property decreed to him without execution his possession must be ascribed to the decree and the judgment-debtor can turn him only if he can show that he had acquired a good title against the world before the decree-holder got into possession When a decree for possession has been passed against a person in possession directing him to give up pessession to the successful party and the former remains in possession waiting for execution it cannot be said that that party is holding adversely to the world. (*Macleod, C. J. and Fawcett, J.*) RAKHMABAI *v.* RAMCHANDRA. **45 Bom. 943 : 61 I. C. 414 : 23 Bom. L. R. 301.**

———*Limitation—After expiry of statutory period, true owner's title is not revived by his re-entry.*

If a party who has been 12 years out of possession and whose suit is, therefore, barred, should again get into possession, he is not remitted to his old title as there is no remitter to a right for which the party had no remedy by action at all. (*Wazir Hasan, J. C. and Neave, A. J. C.*) MT. MUHMUD UNNISSA *v.* SYED ZAHID RAZA. **11 O. L. J. 466 : 84 I. C. 98 : A. I. R. 1925 Oudh 20.**

Limited Interest.

———*Limited interest—Assertion of higher interest—Lapse of time—No acquisition of title.*

It is not correct as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of 6 or 12 years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation (*Lord Salvesen.*) MD. MUMTAZ ALI KHAN *v.* MOHAN SINGH. **45 M.L.J. 623 : 45 A 419 : 21 A. L. J. 757 : 26 O. C. 231 : 33 M. L. T. 321 : L. R. 4 P. C. 1 : 74 I. C. 476 : 9 O. & A L. R. 901 : 10 O. L. J. 383 : 50 I. A. 202 : 19 L. W. 283 : 39 C. L. J. 295 : 28 C W. N. 840 : A. I. R. 1923 P. C. 118 : (P. C.).**

———*Limited interest—Adverse possession against life-tenant is not adverse possession against reversioner or remainderman.*

No adverse possession can run against a person till he becomes entitled to the possession of the property. An adverse possession for any length of time against a tenant for life is similarly in-effectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life. (*Lindsay and Kanhaiya Lal, JJ.*) NOUNIHAL SINGH *v.* A. G. SKINNER. **23 A L. J. 691 : A. I. R. 1925 All. 707.**

———*Limited interest—Tenant.*

A limited interest such as that of a tenant can be acquired by adverse possession. (*Walmsley and B. B. Ghose, JJ.*) BHAIRABENDRA NARAIN ROY *v.* RAJENDRA NARAIN ROY. **50 Cal. 487 : 74 I. C. 193 : A. I. R. 1924 Cal. 45.**

———*Limited interest—Status of tenant.*

Limited interest, such as the status of a tenant can be acquired by prescription. (*Mookerjee, A. C. J. and Fletcher, J.*) SATYENDRA NATH BANERJEE *v.* KRISHNASAKHA KAR. **35 C. L. J. 185 : 69 I. C. 67 : A. I. R. 1922 Cal. 193.**

———*Limited interest—Status of a tenant, if can be acquired by.*

The status of a tenant can be acquired by prescription on the well—recognised principle that a limited interest in property can be acquired by adverse possession. (*Mookerjee, A. C. J. and Fletcher, J.*) UJIRALI SARDAR *v.* SHADHAI BEHARA. **35 C. L. J. 182 : 68 I. C. 1003 : A. I. R. 1922 Cal. 185.**

———*Limited interest—Possession of limited interest can be adverse—But only a limited interest can be acquired by such possession.*

Possession of a limited interest, for instance, the claim to an intermediate tenure, may be just as much adverse as is adverse possession of a complete interest in the property ; consequently such possession of a limited interest may be just as much adverse for the purpose of barring a suit for the determination of that limited interest as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession of a limited interest, however, though a good plea to a suit for ejectment is good only to the extent of that interest. 2 C. L. J. 125, Foll. (*Ashutosh Mukerji and Rankin, JJ.*) SWARNAMOYI *v.* SOURINDRA NATH. **42 C. L. J. 14 : 89 I. C. 747.**

———*Limited interest could be got by adverse possession and is a defence to ejectment suit.*

Per *Venkatasubba Rao, J.* :—A mortgagee to whom possession has not been transferred suing for sale of the mortgaged property cannot establish his right by relying upon an unregistered mortgage deed and his suit will necessarily be dismissed, but where there is a transfer of possession other considerations will arise. 9 M. 244 ; 13 Mad. 467, 21 Bom. 509 : 24 Mad. 471, F. B., Foll.

Per *Ramesam, J.* :—To prove the extent of interest acquired by the defendants by adverse possession, the

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terms of the mortgage asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the unregistered deed of mortgage; for the asserted mortgage need not necessarily be, though very often it will be identical with the mortgage attempted to be created by means of the unregistered deed of mortgage. (*Ramesam, J.*) N. APPAMMA *v.* S. CHINNAVEADU.

45 M. L. J. 667 : 47 M. 203 : (1923) M. W. N. 825 : 19 L. W. 37 : 33 M. L. T. 146 : 79 I. C. 510 : A. I. R. 1924 Mad. 292.

———*Limited interest—Prescription—Liability of mortgagee to account.*

A person in possession of a property as a usufructuary mortgagee under a void mortgage for more than 12 years, acquires by prescription, the rights of a mortgagee, and inasmuch accountable to the mortgagor for the rents and profits not only of the last three years preceding the suit for redemption but for the whole period of his possession. 9 Mad. 244 foll. (*Ayling and Odgers, JJ.*) GOPALA DASU *v.* RAMI.

41 M. L. J. 194 : 44 Mad. 946 : 64 I.C. 328 : 13 L. W. 685 : (1921) M. W. N. 385.

———*Limited interest.*

There can be in law adverse possession of a limited interest. (*Baker, J. C.*) MT. KASTURI *v.* BALIRAM. **79 I. C. 117 : A. I. R. 1924 Nag. 222.**

———*Limited interest—Facts necessary to prove acquisition of such interest must be found.*

A limited interest can be acquired by adverse possession, but the facts necessary to prove such possession must be found. (*Mullick and Bucknill, JJ.*) RAMESHWAR SINGH *v.* RIT LAL SINGH.

6 P. L. T. 514 : 3 Pat. L. R. 50 : 86 I. C. 771 : A. I. R. 1925 Pat. 739.

———*Limited interest—Adverse possession of a limited interest is recognised—When such adverse possession is claimed question of payment of rent is immaterial.*

The receipt of rent does not necessarily show that the interest of a permanant tenure in the tenant was recognised by the landlord. Nor does it show that the position of a yearly tenant was accepted by the tenant. Therefore, payment or non-payment of rent is immaterial when defendant sets up plea of adverse title to limited interest or, pleads tenancy and in the alternative, possession of a limited interest. For the defendant in a suit for possession can set up a plea of adverse title to a limited interest such as an occupancy right or perpetual tenure. (*Jwala Prasad, A. C. J. and Macpherson, J.*) RAM RACHHYA SINGH *v.* KAMAKHYA NARAIN SINGH. **1924 P. H. C. C. 313 : 6 P. L. T. 12 : 4 Pat. 139 : 84 I. C. 586 : A. I. R. 1925 P. 216.**

Limited Owner.

———*Limited owner—Joint Hindu brothers—Death of one—Possession by widow of survivor is not adverse to reversioners.*

Two Hindu brothers were joint. One died shortly before the other and left a widow, surviving him. The two brothers together had owned certain property. On the death of one of them, with the consent of the other, the name of the widow was recorded with respect to half the share. On the death of the other brother the name of the widow was recorded in respect of the remaining share which stood in his name. The widow continued to be in possession of the entire share till her death. Before her death she made a transfer by way of sale of a half share in favour of another.

Held, that ordinarily a Hindu widow would claim to

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be in possession in the right of her husband. As there was absolutely nothing before the sale deed to show that there was any assertion of an adverse title by the widow, in herself namely, title adverse to her husband's estate and to the estate that would go to the reversioners, her possession previous to the sale must be held to be permissive and not adverse to the reversioners. (*Sulaiman and Mukerji, JJ.*) BRINDABAN *v.* RAM NARAIN. **L. R. 6 A. (Civ.) 127 : 85 I. C. 449 : A. I. R. 1925 All. 330.**

———*Limited owner—Hindu widow.*

Where the widow of a member of a joint family is in possession of properties for more than 12 years, unless it is shown that when she took possession she claimed only a limited interest, she acquires full title by adverse possession. The onus is on the persons who claim against her title. (*Lindsay and Sulaiman, JJ.*) UMA SHANKAR *v.* MT. AISHA KHATUN.

45 A. 729 : 74 I. C. 869 : A. I. R. 1924 A. 88.

———*Limited owner—Hindu widow—Suit by reversioners after widow's death—Compromise decree with the widow when binding on reversioners.*

Adverse possession cannot run against Hindu reversioners until after the death of the widow. In order to make the principle laid down in *Shivaganga case.* (9 M. I. A. 543 P. C.) applicable, the possession of the defendant must be by force of the decree which is binding against the widow and not in spite of the decree. (*Lindsay, J.*) JAGANNATH SINGH *v.* SARDAR SINGH. **75 I. C. 614 : A. I. R. 1923 A. 448.**

———*Limited owner—Reversioners—Widow—Adverse possession.*

Possession which commences during the life time of a Hindu widow with a limited interest cannot be adverse to the reversioners. (*Daniels and Lyle. A. J. C.*) MT. PARBATI *v.* SAIYED MOHAMED.

9 O. L. J. 304 : 1923 Oudh 31.

———*Limited owner—Reversioner.*

If the plaintiff's titl to the property commences from the death of the previous full owner limitation begins to run against him from that date notwithstanding the estate may be in the possession of the last full owner's widow under a will which he had no power to make. (*Dawson Miller, C. J. Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJ KESHAV PRASAD SINGH. **5 P. L. T (Sup). 1 : A. I. R. 1925 P. 68.**

Mortgagor and Mortgagee.

———*Mortgagor and Mortgagee—During continuance of equity of redemption mortgagee can't claim prescriptive title.*

A mortgagee is not in a position to deny the right of the mortgagors or their successors-in-interest to redeem the mortgage so long as the equity of redemption subsists. A person who lawfully comes into possession of land as a mortgagee cannot by setting up during the continuance of such relation any title adverse to that of the mortgagor inconsistent with the real legal relation between them, and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession. (25 Mad. 507; 38 All. 411 and 32 Cal. 296, Foll. (*Sulaiman and Kanhaiya Lal, JJ.*) BAKHA SINGH *v.* RAM NARAIN SINGH. **22 A. L. J. 905 : L. R. 5 A. (Civ.) 681 : 80 I. C. 935 : 47 All. 73 : A. I. R. 1925 All. 133.**

———*Mortgagor and Mortgagee—Mutation of mortgagee's name as proprietor does not constitute.*

A mere mutation entry of the mortgagee as proprietor cannot convert his possession as mortgagee into

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adverse possession. (*Daniels and Neave, JJ.*) RAM GANESH RAI *v.* B. RUP NARAIN.
L. R. 5 A. (Civ.) 542 : 80 I. C. 944 : A. I. R. 1925 All. 34.

———*Mortgagor and mortgagee —Discharge of mortgage—Mortgagee continuing in possession—Effect of.*

Where after the discharge of a usufructuary mortgage, the mortgagee continues in possession his possession is not adverse to the mortgagor. (*Neave, J.*) GOBIND RAM *v.* MT. RAM KOER. **L. R. 5 A. 421 : A. I. R. 1924 A. 522.**

———*Mortgagor and Mortgagee—Equity of redemption cannot be acquired by adverse possession—Possessory mortgage—Trespasser in possession holds adversely to mortgagee and not mortgagor.*

A possessory title to property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession. Though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee, but not to the mortgagor. 14 Bom. 176 and 18 Bom. 51 Ref. (*Macleod, C. J. and Crump, J.*) TARABAI *v* DATARAM. **49 Bom. 539 : 27 B L. R. 441 : 87 I. C. 765 : A. I. R. 1925 Bom. 465.**

———*Mortgagor and mortgagee—Void sale of equity of redemption—Effect of.*

S the owner of certain property mortgaged it in 1898 with possession. S died in 1899 and soon after his eldest son, a minor, purported to sell the equity of redemption to the defts. The vendees redeemeed the mortgage in 1908 and a younger son of S instituted a suit for redemption in 1918. The defendant contended that their possession was adverse since 1899 and that the present suit was barred. *Held*, that the sale to defts. being void, the possession of the mortgagee was on behalf of the rightful owners, the sons of the mortgagors and was not adverse to them till 1908 when the defendants obtained possession. Consequently the suit for redemption was in time and there was no acquisition of title by adverse possession on the part of the defendant, (*Shah, A. C, J. and Crump, J.*) RAMLINGAPPA *v.* DHONDI SUBRAO.
24 Bom. L. R. 1304 : 76 I. C. 145 : A. I. R. 1922 B. 451.

———*Mortgagor and mortgagee—Mortgagee acquiring rights of one mortgagor—Effect.*

If a mortgagee gets the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor, then it may be said that the right of the co-mortgagor to redeem his share will be extinguished after twelve years. The position is otherwise in the absence of knowledge of the purchase. (*Macleod, C. J. and Shah, J.*) IBHRAM GULAM HUSAIN MULNAJI *v.* MOHIDDIN BALKU MODAK.
24 Bom. L. R, 287 : 67 I. C. 219 : A. I. R. 1922 Bom. 1.

———*Mortgagor and mortgagee—Dispossession of mortgagee—Effect of.*

Where the mortgagee took possession under his mortgage and remained in possession, the dispossession of the mortgagee by the landlord, even assuming that it was done against their will cannot by itself operate as adverse possession as against the mortgagor during the continuance of the mortgage. Besides, the mortgagees by suffering dispossession and having taken a new title from the landlord cannot affect the right of the mortgagors in the property of which they were put in possession under the mortgage. (*Walmsley and Ghose, JJ.*) KAMALA KANTA *v.* ANANDA CHANDRA CHAKRABARTY. **71 I. C. 1030 (C) : A. I. R. 1924 Cal. 357.**

———*Mortgagor and mortgagee—Mortgagee found in possession as ostensible owner—Mortgagor must prove subsisting title.*

Where the heirs of an occupancy tenant sought to redeem property mortgaged with the landlord long before the date of suit and it was found that the defendants were holding as ostensible owners for a number of years.

Held, that the mortgagors, in order to succeed, must prove subsisting title to the property.

Held, further that it was immaterial when the defendants' possession became adverse. 71 P. R. 1900 Ref. (*Moti Sagar, J.*) AHMED KHAN *v.* MUZAFFAR KHAN. **A. I. R. 1925 Lah. 632.**

———*Mortgagor and mortgagee—Holding mortgaged—Two-thirds subsequently sold to another with condition to discharge the prior mortgage—Mortgagee claiming pre-emption of portion sold and getting possession—Remaining one-third not redeemed for more than 12 years—Mortgagee gets that one-third by adverse possession.*

G mortgaged certain lands to defendants. He subsequently sold two thirds to one M for Rs. 500 out of which he received Rs. 100 and the remaining Rs, 400 was to be paid to defendants to redeem the mortgage. If the mortgage had been redeemed M would have got possession of two-thirds of half the share free from mortgage and G would have got the remaining one-third of that half quite unencumbered. But Defendants Nos. 1 and 2 brought a suit for possession by pre-emption of the share sold to M and the latter admitted their claimland gave up his rights under the sale on receiving Rs. 100. G then became entitled to obtain possession of the one-third of the holding from the Defendants Nos. 1 and 2 but he never took any steps to do so, and the defendants remained in possession of the entire holding, for more than 12 years. A suit for redemption was brought.

Held, that the mortgage was redeemed when defendants got possession in pursuance of claim for pre-emption and that from that date Defendants Nos. 1 and 2 were in possession of two-thirds as owners and of the remaining one-third without any title. Their possession of the latter portion was adverse to the owner and it had ripened into title by lapse of more than 12 years. The fact that in the revenue records defendants were still shown as mortgagees did not affect their title. (*Zafar Ali, J.*) KHUSHALA *v.* BISHAN DAS. **A. I. R. 1925 Lah. 616.**

———*Mortgagor and mortgagee — Unregistered sale of the equity of redemption—Commencement of adverse possession.*

A mortgagee can set up adverse possession if his possession at the inception was that of a trespasser. Where therefore a mortgagee obtained an unregistered sale of the equity of redemption and thereafter held possession of the property as owner *held* that the unregistered sale, though inadmissible to prove the passing of title to the property as vendee, was admissible for the purposes of proving that the possession of the mortgagee thereafter was adverse to the mortgagor. 43 M. 244 : 44 M. 253, 63 I. C. 215 : 63 I. C. 284 referred to. (*Broadway and Moti Sagar, JJ.*) QADAR BAKHSH *v.* MANGHA MAL. **4 Lah. 249 : 5 Lah. L. J. 175: 73 I. C. 889 : A. I. R. 1923 Lah. 495.**

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——Mortgagor and mortgagee—Co-mortgagee.

Where the mortgage is an indivisible transaction according to its terms, any one of the co-mortgagees cannot obtain adverse possession of a particular share in it by lapse of time. The mortgagor could only redeem the whole of the mortgage by a payment of the whole of she mortgage money irrespective of the shares of the co-mortgagees *inter se* the money contributed by each being not stated in the deed. A co-mortgagee takes the place of each co-mortgagee whom he pays off; he does so as a co-mortgagee and thus his possession in his place is that of a mortgagee only and not in other capacity. (*Broadway and Zafar Ali, JJ.*) SHUJA-UD-DIN KHAN *v.* SHER MUHAMMAD KHAN.

A. I. R. 1923 Lah. 366.

——Mortgagor and mortgagee—Sale of equity of redemption—Mortgage.

The owner of the equity of redemption in certain property sold to the plaintiffs. He sold the same equity of redemption to the defendant who was an assignee of one-third of the mortgagee rights in the property. On the purchase of this equity of redemption, the defendant redeemed the remaining two-thirds of the mortgage. When the plaintiffs sued to redeem the property, the defendant set up his adverse possession from the date of the sale of the equity of redemption in his favour ; *Held* (1) that the sale of the equity of redemption which had been previously sold did not amount to adverse possession as the vendor had no rights left to him which he could sell and therefore the subsequent sale was a mere nullity in law. (2) That where a mortgagee has once got possession of the mortgaged property, he cannot alter the nature of his possession. (3) That a mortgagee in possession cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to prescribe for a title. (*Broadway and Zafar Ali, JJ.*) SHUJA UDDIN KHAN *v.* SHER MUHAMMAD KHAN. **73 I. C. 475 : A I. R. 1923 L. 366.**

——Mortgagor and Mortgagee.

The mortgagees cannot rely on the 12 years' rule of limitation in support of a plea of adverse possession unless he can prove a subsequent valid sale, of the equity of redemption. Sale of the whole property by only one co-mortgagor is not a valid sale as regards his co-mortgagors. (*Scott-Smith, J.*) AMIR *v.* NADAR ALI. **68 I. C. 733: A. I. R. 1923 Lah. 74 (1).**

——Mortgagor and Mortgagee

A mortgagee cannot set up adverse possession within the period of 60 years from the date when the mortgage money becomes due. (*Chevis, J.*) ZORA *v.* CHANDU. **68 I. C. 883: A. I. R. 1923 Lah. 71 (2).**

——Mortgagor and Mortgagee—Relationship—Creation of.

Where ejectment was decreed on paying compensation to the defendants ; *Held* that the decree did not create the relationship of mortgagor and mortgagee, and the suit for redemption is not competent. (*Scott-Smith, J.*) FAZAL *v.* MIHAN KHAN.

15 P. L. R. 1922: 64 I. C. 352: A. I. R. 1922 Lah. 70.

——Mortgagor and mortgagee— Mortgagee getting name entered in Revenue records does not get title.

Where the right to possession and the actual possession is with the mortgagee there can be no adverse possession of the equity of redemption. The mere fact that he succeeds in getting his name recorded in the Revenue Registers does not confer a title on him. (*Scott-Smith and Abdul Raoof, JJ.*) SHAH NAWAZ *v.* AHMAD. **1 Lah. 549: 59 I. C. 478: 2 L.L. J. 573.**

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——Mortgagor and mortgagee—Mutation of names.

A mortgagee is not entitled to have acquired ownership of the equity of redemption by adverse possession on the ground that his name was mutated in the Revenue Register when it is not shown that he had any manner of possession actual or constructive. 34 I. C. 171, foll. (*Scott-Smith and Abdul Raoof, JJ.*) SHAH NAWAZ *v.* SHEIKH AHMAD. **1 Lah, 549: 59 I. C. 478 : 2 L. L. J. 573.**

——Mortgagor and mortgagee—Mortgaged property purchased by usufructuary mortgagee—No delivery necessary—Even if necessary possession becomes adverse.

Where a usufructuary mortgagee purchases the property in lieu of the debt, actual delivery is not necessary and even if it is necessary, the vendee's possession from the moment of sale is adverse to the vendor. (*Ramesam and Odgers, JJ.*) DAWOOD SAHEB *v.* MOIDEEN BATCHA SAHEB. **48 M. L. J 264 : 87 I. C. 331 : 21 L. W. 327 : A. I. R. 1925 Mad. 566.**

——Mortgagor and Mortgagee—Mortgage void—Mortgagee in possession under—Sale void in favour of—Possession held under for 12 years--Effect—Rights of parties.

The first defendant was admitted into possession of immoveable property in 1893 under a mortgage executed by a person who was not the guardian of the plaintiffs, then minors, *i. e.*, under a void mortgage. While the 1st defendant was so in possession, the same person acting on behalf of the plaintiffs sold the property to the 1st defendant in 1900. This sale was like the mortgage void.

Held, that the effect of the sale was to alter the nature of the possession which 1st defendant had in the property, *viz.* from that of a mortgagee to that of an absolute owner, and that after 12 years from 1900 1st defendant acquired absolute ownership by adverse possession. (*Wallace, J.*) AIYISA BIVI AMMAL *v* KALAN DARSA ROWTHER. **46 M. L. J. 501 : 34 M. L. T. 247 : 80 I. C. 561 : A. I. R. 1924 Mad. 720.**

——Mortgagor and mortgagee.

Adverse possession against the mortgagor would not operate to the prejudice of the mortgagee, if the mortgage is simple. A trespasser's adverse possession which commences after the date of the hypothecation is not a bar to the mortgagee's right to recover the land. 48 Cal. 425 foll. (*Ayling and Venkatasubba Rao, JJ.*) TANJORE PALACE ESTATE BY ITS RECEIVER SUNDARAM IYER *v.* THIYAGARAJA PILLAI. **A. I. R. 1923 Mad. 160 (2): 50 M. L. J. 183.**

——Mortgagor and mortgagee—Decree of court declaring that relationship never existed—Possession subsequent to decree is adverse.

A decision of Court which in effect says that the relationship of mortgagor and mortgagee has come to an end renders the subsequent possession of the mortgagee adverse to the mortgagor. (*Ayling. Offg. C. J. and Odgers, J.*) OMAYURUPAGAM MUTT *v.* SIVASOORIA THEVAN. **42 M. L. J. 144: 16 L. W. 475: 70 I. C. 33 : (1921) M. W. N. 876 : A. I. R. 1922 Mad. 407 (2).**

——Mortgagor and mortgagee—Possession under void mortgage.

Where the mortgagee under a void usufructuary mortgage remained in possession for over 12 years but there was no evidence that the mortgagee ever claimed that he was prescribing for the whole interest. *Held*, that possession obtained through a transaction which is void is adverse, that a limited interest can be

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acquired by adverse possession that the mortgagee did not prescribe for any higher title than that of usufructuary mortgagee and that he could be redeemed. *held* also, that 8 years' rents and profits prior to date of suit could be recovered. (*Ayling and Odgers, JJ.*) SONTYANA GOPALA DASU *v.* INAPATALUPULA RAMI. **44 Mad 946 : 64 I. C 328 : (1921) M. W. N. 385: 13 L. W. 685 : 41 M. L. J. 194.**

———*Mortgagor and mortgagee—Subsequent agreement.*

Where subsequent to a mortgage, the mortgagee, under an agreement between the parties, agrees to give up some lands and retain others as full owner, his title to the lands ripens into full ownership by prescription and the mortgagor cannot redeem them after 12 years. (*Ayling and Odgers, JJ.*) KANDASAMI PILLAI *v.* CHINNAPPA. **40 M. L. J. 105 : 44 Mad. 253: (1921) M. W. N. 1 : 29 M. L. T. 167 : 62 I. C. 603 : 13 L. W. 423.**

———*Mortgagor and mortgagee—Agreement to relinquish equity of redemption—Document ineffective.*

As between a mortgagor and mortgagee an oral agreement to relinquish the equity of redemption is not binding, unless it is properly evidenced by a document, but it will start adverse possession against the mortgagor. (*Dalal, J. C.*) IRAD ALI *v.* DWARKA. **90 I. C. 736.**

———*Mortgagor and mortgagee— Mortgagee in possession—Receipt of rents and profits.*

So long as the mortgagee is in possession his possession is to some extent that of a trustee ; unlike ordinary lessees he is bound to preserve the right, title and interest of a mortgagor and to prevent any invasion of that right by any stranger. The mortgagor having put the mortgagee in his stead in the possession of the property enjoys immunity and believes that so far as his possession is concerned, his interest will be protected by the mortgagee. Therefore, if the mortgagee has either by his neglect or in collusion allowed any other person to come into possession of the property, there will be no invasion of the rights of the mortgagor and when the time for redemption arrives, he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession will not commence against the mortgagor unless and until the mortgagor has exercised his rights of redemption and had redeemed the property. This is the case of a complete possession where no right of possession is exercised by the mortgagor. There may, however, be cases where the mortgagor and the mortgagee are both in possession of the property in accordance with the arrangements arrived at by them and set forth in the covenant in the bond. The possession of the mortgagee consists in the appropriation of the usufruct of the property and that usufruct may be enjoyed by both mortgagor and mortgagee for the usufruct and the income of the property might far exceed the interest in lieu of which the mortgagee enjoys the possession of the property. In such a case the application of the principle will be varied; but the principle will apply to that portion of the usufruct which is supposed to be in the possession of the mortgagee. When *kakairi* or rents and profits are reserved by the mortgagee and are payable to the mortgagor there is no reason why the principle of adverse possession should not apply, though in order to take advantage of adverse possession it must satisfy all the conditions required for adverse possession namely, it must be open and hostile and to the knowledge of the mortgagor. A mere non-payment of *kakairi* or forbearance to realise it for any length of time would not create any adverse possession nor a mere payment of the same to a stranger by duress, force or compulsion, unless such payment is made with the knowledge of the mortgagor that it was being paid against his interest. (*Jwala Prasad and Ross, JJ.*) BINANAND SAWASE *v.* THUROO MAHTO. **1923 P. H. C. C. 249 : 4 Pat. L. T. 659: A. I. R. 1923 P. 592.**

———*Mortgagor and Mortgagee—Simple mortgage—Possession adverse to Mortgagor—When adverse to Mortgagee.*

When after simple mortgage has been granted a third person begins to hold adversely to the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. In the case of the grant of a mortgage by a person previously dispossessed, the adverse possession which had commenced to operate against the mortgagor would not by the grant of the mortgage be arrested but would operate equally against the mortgagee. (*Adami, J.*) KUNJ LAL *v.* KANHAI MAHTO. **68 I. C. 641 : A. I. R. 1923 P. 305.**

———*Mortgagor and Mortgagee—Equity of redemption can be acquired by adverse possession.*

Title can be acquired by adverse possession in the equity of redemption. (*Dalal, J. C.*) ANPURNA KUAR *v.* JAGESHAR MISRA. **A. I. R. 1925 Oudh 658.**

———*Mortgagor and Mortgagee—Against mortgagors can be adverse, where there are rival mortgagors.*

The possession of a mortgagee is not adverse to his mortgagor but where there are rival mortgagors the possession of their respective mortgagees is adverse against the other mortgagors. (*Kendall, A. J. C.*) RAM CHHOR BAKSH *v.* RAM SURAT. **80 I. C. 582 : A. I. R. 1925 Oudh 182.**

———*Mortgagor and Mortgagee—Against mortgagor.*

Contract of sale alone in favour of usufructuary mortgagee does not change the character of the possession of the mortgagee into adverse possession. (*Kendall and Pullan, A. J. Cs.*) SITLA SAHAI *v.* DHUM SINGH. **11 O. L. J. 543 : 82 I. C. 406 : 28 O. C. 100 : A. I. R. 1925 Oudh 114.**

———*Mortgagor and mortgagee—Possession adverse to mortgagor when adverse to mortgagee.*

Ordinarily there can be no prescription against a mortgagor unless he is entitled to immediate possession. *Contra non valenten agerenulla currit praescriptio.* The fact that he could be entitled to bring a suit for declaration is of no consequence. It is not incumbent on a party to bring a suit for declaration. (*Dalal and Simpson, A. J. Cs.*) JAI GOBIND SINGH *v.* ABHAIRAJ SINGH. **26 O. C. 308 : 9 O. & A. L. R. 651 : 10 O. L. J. 216 : 77 I. C. 125 : A. I. R. 1924 Oudh 40.**

———*Mortgagor and mortgagee.*

During the continuance of a mortgage no act of mortgagee alone can make his possession adverse but where both parties treat the mortgage as having come to an end, any continuance in possession must be deemed to be adverse. (*Daniels, A. J. C.*) BIJAI PARTAB SINGH *v.* RAGHURAJ SINGH. **9 O. L. J. 173: 4 U. P. L. R. (J. C.) 33 : 67 I. C. 572 : 25 O. C. 115 : A. I. R. 1922 Oudh 7.**

———*Mortgagor and mortgagee.*

Where an occupation is permissive, its conversion into one of an adverse nature, cannot be presumed in the absence of evidence. The mere denial by a mortgagee of the mortgagor's title cannot constitute ad-

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verse possession. But where a change in the mode of occupation is made by both parties (*e. g.*) a sale of the equity of redemption, the mortgagee's possession would become adverse to that of the mortgagor. (*Lindsay, J. C.*) MAHENDRA *v.* CHANDRAPAL.

63 I. C. 284 : 24 O. C. 155.

———*Mortgagor and mortgagee--Claim as against each other.*

As between mortgagor and mortgagee, no question of adverse possession arises, during the period with which either of them can enforce their rights and no acquiescence by the mortgagor not amounting to release of the equity of redemption can be a bar or defence to a redemption suit if the party is otherwise entitled to redeem. (*Stuart and Kanhaiya Lal, A. J. Cs.*) TILAK SINGH *v.* SHAMBHU SINGH.

7 O. L. J. 624 : 23 O. C. 269 : 60 I. C. 404 : 2 U. P. L. R. (J. C.) 163

———*Mortgagor and mortgagee — Forfeiture clause--Possession taken under.*

Where under a forfeiture clause in a mortgage deed the mortgagee takes possession of the mortgaged property and continues for over 12 years, his possession is adverse to the mortgagor and extinguishes his rights. (*Lentaigne and Carr, JJ.*) MG. SAN CHEN *v.* MA DAUNGU. **3 Bur. L. J. 95 : 82 I. C. 829 (2) : A. I. R. 1924 R. 290.**

———*Municipal Council--Occasional acts of sweeping.*

A Municipal Council cannot acquire title by adverse possession against the true owner by occasional acts of sweeping the land. (*Phillips, J.*) MUNICIPAL COUNCIL, COCHIN *v.* P. BAVU DEVUSSI.

22 L. W. 671.

Nature of.

———*Nature of—Onus.*

Possession to be adverse, must be adequate in continuity, in publicity, and in extent and this will vary according to the nature of the land. The onus of establishing such adverse possession is on the adverse possessor. Acts of possession by the person, in whom title stands, though insufficient to constitute adverse possession as against another, will be sufficient to destroy the adequate, exclusive and continuous character of the possession of the person challenging the title which the owner claims. (*Lord Shaw*). KUTHALI MOOTHAVAR *v.* KUNHARANKUTTI.

41 M.L.J. 650: 44 M. 883: 14 L.W. 721: L.R. 3 P.C. 9: (1921) M. W. N. 847 : 30 M. L. T. 42 : 48 I. A 395 : 66 I. C. 451 : 26 C. W. N, 666 : 24 Bom. L. R. 669 : A. I. R. 1922 P. C. 181 (P. C.).

———*Nature of possession—Trespassers—Tacking of adverse possession.*

Where some of the members of a joint family sue to recover possession of property on the ground that the defendant had been put in possession collusively and against the plaintiffs' wishes under a transfer, the possession of the defendant must be considered to have been adverse from the date of the transfer. One trespasser succeeding another can tack his possession on to the former's even in cases where there is no valid transfer by the former to the latter. (*Dalal and Daniels, JJ.*) BAIJNATH *v.* RAM BILAS.

L. R. 5 A. 386 : 80 I. C. 12 : A I. R. 1924 A. 738.

———*Nature of—If affected by intervention of life estate.*

Where a person takes possession of property adversely to the owner, the fact that before he acquires title by adverse possession a limited owner comes into the legal estate will not affect the nature of the possession. The reversioner cannot get a fresh starting

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point for limitation thereby. (*Abdul Qadir, J.*) KHILU RAM *v.* BHIRAMVAN RAI.

A. I. R. 1924 Lah. 292.

———*Nature of—Symbolical possession-*

When the law lays down a definite procedure for the delivery of possession which is purely symbolical that procedure must be strictly followed and any omission therein must, therefore, be regarded as material. (20 P. R. 1917), Foll. (*Moti Sagar, J.*) NIDHI RAM *v.* PARSA RAM. **5 L. L. J. 507 : 74 I. C. 1 : A. I. R. 1923 Lah. 693.**

———*Nature of right acquired— Unregistered deed—Recitals.*

Where there is an unregistered deed of gift, though it is inadmissible to prove a conveyance, the recitals in the deed can be relied upon to show the nature of the interest acquired by prescription by the donee. (*Venkatasubba Rao, J.*) NARAYANASWAMI DEVARAYAR *v.* THANGAVELU PADAYACHI. **(1924) M.W N. 571 : 82 I. C. 67 : A. I. R. 1924 Mad. 800.**

———*Nature of—Symbolical possession.*

Possession under sale in execution, though symbolical is adverse and tantamounts to dispossession of judgment-debtor. (*Kotwal, A.J.C.*) RAGHURAJ *v.* VALLABHA DAS. **A. I. R. 1923 Nag. 95.**

———*Nature of—Widow's possession—Mortgage by widow jointly with her husband's brother—Widow entered in the village records as* Sir *holder—Unhindered transfers of property by the widow—Adversity of possession to the extent of a widow's estate—Indian Limitation Act (IX of* 1908), *Arts.* 141, 144, *applicability of.*

Where a widow took possession of certain *sir* plots of land and a house, set up her own independent title, sold part of property jointly with her deceased husband's brother declaring that her defence in a previous foreclosure suit that she had no interest in the property was false, was continuously shown in the village records as *Sir* holder, realized rents and made unhindered transfers of property, *Held*, on a suit by the widow's deceased husband's brother, that the posesssion of the widow was adverse ever since she took possession. *Held* further. that under certain circumstances the possession of a widow may be adverse to the extent of a widow's estate but it is not so, where the widow has no right to a widow's estate when she takes possession and no allegation is made in the plaint that she was holding a widow's estate in the transfer made by her. (*Dalal, J. C.*) LAL BAHADUR SINGH *v.* MATHURA SINGH. **1 O. W. N. 740 : 87 I. C. 164 : A. I. R. 1925 Oudh 669.**

———*Nature of the possession—Relationship between the parties—Intention.*

Mere relationship between the parties (in this instance, aunt and nephew) does not prevent the possession of one from being adverse to the other unless it can be shown that the person in possession entered into it and continued in it under some agreement or arrangement with the legal owner and thereby admitted the nature of his possession to be permissive. (*Wazir Hasan, A.J.C.*) JAISI RAM *v.* RAJ BAHADUR KURMI. **11 O. L. J. 87 : A. I. R. 1924 Oudh 326.**

———*Nature of—Question of fact.*

The question of Adverse possession is essentially a question of facts. (*Das and Adami, JJ.*) KHUB LAL UPADHYA *v.* JAGDISH PRASAD SINGH.

1 P. 23: 69 I. C. 185 : 3 P. L. T. 795 : A. I. R. 1922 Patna 398.

Neighbours.

———*Neighbours—Mistake in boundaries--Effect.*

Where by a mutual mistake as to boundaries a

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neighbour holds possession of the others' properties for more than twelve years, his title is perfected by adverse possession. (*Heald, J.*) MA SHAN MA *v.* SOMASUNDARAM CHETTY. **1 R. 492 : 75 I. C. 217 : 2 Bur. L. J. 39 : A. I. R. 1923 Rang 246.**

——Neighbours—Possession taken under mistake is adverse.

Possession of plaintiff's land taken by an adjoining landowner under mistaken knowledge on the part of both parties as to the true boundary is adverse to the plaintiff. (*Heald, J.*) MA SHAN MA *v.* L. S. M. SOMASUNDARAM CHETTY. **1 Rang. 492 : 83 I. C. 132 : A. I. R. 1925 Rang. 111 (1).**

Permissive.

—— Permissive — Gramanatham — User by villagers of, does not create any rights.

Natham Poramboke in a village vests in the government and the latter can grant portions for building purposes. The fact that the villagers have been using portions as a threshing floor or for storing hay, paddy, manure, etc., does not create a right adverse to Government. The enjoyment is too fugitive and patently permissive to support a right by custom or prescription. (*Ayling, and Odgers, JJ.*) TALUK BOARD, DINDIGUL *v.* VENKATARAMA AIYAR. **45 M. L. J. 333 : 18 L. W. 366 : 75 I. C. 38 : 46 Mad. 866 : 33 M. L. T. 40 : A. I. R. 1924 Mad. 197.**

——Permissive—Precarious possession is only permissive possession.

A person who has acquired a precarious possession is not deemed to have judicial possession. He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to the other. The possessory relation, in such circumstances, is imperfect. It is vitiated by the duty to restore and must, therefore be deemed as equivalent to permissive possession. Permissive possession does not barely rest on an expressed agreement by means of which one party permits another to take possession of his property. It is a question of legal inference from the circumstances of a particular case. (*Wazir Hasan, A. J. C.*) MAQBUL AHMAD *v.* FARHAT ALI. **4 U. P. L. R. (J. C.) 6 : 66 I. C. 461 : 8 O. L. J. 546 : A. I. R 1922 Oudh 152.**

Plea of.

——Plea of—Second appeal.

Plea of adverse possession cannot be raised for the first time in escond appeal. (*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA. **28 C. W. N. 46 : A. I. R. 1924 Cal. 245.**

——Plea of—A question of law.

Where the question is whether from the facts found, inference can be drawn that the possession is adverse, it is a question of law and the Court can investigate it, though in general the question of adverse possession is a mixed question of law and fact. (*Mookerjee, A. C. J. and Fletcher, J.*) BALARAM GURIA *v.* SYAMA CHARAN MONDAL. **33 C. L. J. 344 : 60 I. C. 298 : 24 C. W. N. 1057.**

——Plea of—If can be raised suo motu.

The plea of adverse possession being one of limitation can be raised *suo motu* by the Court. (*Kendall, A. J. C.*) RAM CHHOR BAKSH *v.* RAM SURAT. **80 I. C. 582 : A. I. R. 1925 Oudh 182.**

Presumption.

——Presumption— Possession— Title— Evidence evenly balanced.

Where there is strong evidence of possession on the part of A opposed by evidence apparently strong also on the part of his opponent B, in estimating the weight

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due to the evidence on both sides, the presumption may well be regarded that possession went with title. (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY *v.* KALI MOHAN SAHA. **27 C. W. N. 305 : 70 I. C. 555 : 36 C. L. J. 396 : A. I. R. 1923 Cal. 228.**

——Question one of legal inference.

The question whether possession is adverse or permissive may often be one of legal inference. (*Kinkhede, A. J. C.*) YESHWANT *v.* DAULAT. **89 I. C. 663.**

Religious Endowment.

——Religious endowment—Idol—Adverse possession against shebait—Necessity for.

Adverse possession affects the right and interest of the idol as well as the right and interest of the shebait. Where adverse possession is proved, time will also run against the idol even in a case where no shebait has been appointed where a shebait has been appointed the right to sue for possession of the property with which the idol is endowed belongs to the shebait and not to the idol. Where a shebait has not been appointed, it is permissible to file a suit for possession in the name of the idol. The Court may appoint a person to act as agent for the idol pending the suit. (*Page, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* BALKISHEN MISSER. **51 C. 953 : A. I. R. 1925 Cal. 140.**

——Religious Endowment—Temple property—Adverse possession by idol.

Where on land comprised within the precincts of another temple the plaintiff had erected a temple, wherein he had installed and consecrated two idols and had had, for a period of more than fourteen years, free access and opportunity for regular participation in the worship.

Held, the idols to whom it was dedicated had acquired an indefeasible title to the site by adverse possession if the plaintiff has obtained possession of the land by force. (*Mookerjee and Chotzner, JJ.*) ANANDACHANDRA CHAKRABARTI *v.* BROJA LAL SINGHA. **36 C. L. J. 356 : 50 C. 292 : A. I. R. 1923 Cal. 142.**

——Religious endowment.

Property vested in an idol is distinct from property vested in a Mahant for a particular purpose and where the mahant alienates property not entrusted to him. Art. 134 of the Limitation Act, does not apply. (*Das and Bucknill, JJ.*) RAMRUPGIR *v.* LALCHAND MARWARI. **3 P. L.T. 352 : 1 P. 475 : 67 I. C. 401 : A I. R. 1922 P. 243.**

Service Tenure.

——Service tenure—Failure to perform services—Effect.

In the case of a service tenure, the fact that no services were performed for more than 12 years cannot make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service. (*Coutts and Ross, JJ.*) NAND LAL SAHU *v.* TIKAIT SRINIVAS HUKUM SINGH DEO. **1 P. 292 : 69 I. C. 703 : A. I. R. 1922 P. 541.**

Submerged Land.

——Submerged land—Revival of possession of true owner.

Land when submerged revives the possession of the true owner and discontinues that of the trespasser who claims adverse possession. (*Gokul Prasad and Sulaiman, JJ.*) RAM NARAIN MISIR *v.* DEOKI MISIR. **20 A.L.J. 756 : L. R. 3 A. 552 : 69 I. C. 912 : 4 U. P. L. R. (A) 129 : A. I. R. 1923 A. 75.**

——Submerged land.

Where land is submerged it becomes derelict and

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during submersion no title can be conveyed against the true owner. (*Mookerjee and Buckland, JJ.*) JOGENDRA *v.* JAGADINDRA. **67 I. C. 170 : 34 C. L. J. 133.**

———*Submerged land—Periodical flooding—Interruption of adverse possession.*

Lands after submersion become derelict, and so long as they remain submerged, no title can be made against the true owner ; this principle is applicable where the reflouding is periodical or seasonal: 29 Cal. 513, 44 Cal. 858 foll. Where land is re-submerged the possession as adverse holder and the possession of the true owner constructively revives. (*Mookerjee and Panton, JJ.*) H H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. **66 I. C. 923 : 34 C. L. J. 465.**

———*Submerged land.*

Land when submerged, becomes derelict and so long as it remains submerged no title can be made against the true owner. No distinction can be drawn where reformed land is again submerged by flood for a time and cases where the reflooding is seasonal. (*Mukerjee and Buckland, JJ.*) SECRETARY OF STATE *v.* WAZED ALI. **65 I. C. 866 : 34 C. L. J. 141.**

——— —*Submerged land—Interruption of possession.*

Where land in the possession of a trespasser is submerged on account of floods the possession of the land during the period of submersion vests in the true owner and operates as an interruption of the possession of the trespasser. (*Wazir Hazan, A. J. C.*) BACHCHA SINGH *v.* SRI KAMLAPAT PRASAD. **65 I. C. 769 : 8 O. L. J. 501.**

Tacking of.

———*Tacking—Hindu widow.*

In a joint Hindu family the possession taken by Hindu widow professing to claim but a limited estate of a widow does not extinguish the rights of the reversioners after the lapse of the statutory period. (*Lindsay and Sulaiman, JJ.*) UMA SHANKER *v.* AISHA KHATUN. **45 A. 729 : 74 I. C. 869 : A. I. R. 1924 All. 88.**

———*Tacking—Hindu family—Hindu reversioner.*

Possession adverse to nearest reversioner is not adverse to a remote reversioner. (*Scott-Smith, J.*) HASTI *v.* HIRA. **4 Lah. L. J. 201 : 77 I. C. 222 : A. I. R. 1922 Lah. 37.**

———*Tacking—Hindu widow—Reversioner if bound.*

Adverse possession against the widow is not adverse against the reversioners during the life time of the widow. (*Scott-Smith and Dundas, JJ.*) NAND SINGH *v.* MT. DHAN KAUR. **68 I. C. 299 : 2 L. L. J. 573.**

———*Tacking—Hindu widow—Possession adverse to widow not adverse to reversioner.*

Possession adverse to a Hindu widow which commences during her life-time cannot be adverse to the reversioners. (*Daniels and Lyle, A. J. Cs.*) MT. PARBATI *v.* SAIYID MAHOMED HADI. **9 O. L. J. 304 : 68 I. C. 534 : A. I. R. 1923 O. 31.**

Test of.

———*Test of—Acts necessary to constitute—Tying cattle.*

The use of land for tying cattle and maintaining cattle troughs gives the right to occupy the land, if continued for a sufficiently long time. It is not merely a temporary user. 16 B. 338 dist. (*Kanhaiya Lal, J.*) KAMLAPAT DUBEY *v.* RAM RAJ. **L. R. 4 A. 378 : A. I. R. 1924 All. 103.**

———*Test of—Joint collection of rent.*

If there is joint collection at the time then any failure to deliver to the plaintiffs their share of the rent can hardly be held to amount to assertion of adverse title or to dispossession until it is shown that the plaintiffs' title was definitely denied. (*Coutts and Das, JJ.*) KULDIP SING *v.* RAM SEWAK. **A. I. R. 1923 Patna 183.**

ADVERSE POSSESSION—Vacant Site.

Trust.

———*Trust—Ghat dedicated to public—Rights of owner when destroyed.*

The owner of a *ghat* on the banks of the Ganges dedicated the same to the public use for pious Hindus bathing in the river. Certain *ghatias* with the leave and license of the owner sat at the *ghat* and assisted the bathers and gradually began to erect platforms on the steps on which they sat. In a suit by the plff. for a declaration of his right to the *ghat* and for injunction restraining them from using the ghat, *held*, that the dedication did not destroy the plff's right as proprietor that the use of the *ghat* by the *Ghatias* did not constitute adverse possession against the plff. and that the plff. was entitled to the injunction. (*Tudball and Rafique, JJ.*) RAMA GHATIA *v.* HEMANTA KANWARI. **19 A. L. J. 483 : 63 I. C. 498 : 3 U. P. L. R. (A) 102.**

———*Trust—Scope of—*Wakf *property—Invalid mortgage - Right of mortgagee.*

A person in possession of trust property under an invalid mortgage-deed cannot acquire a valid mortgagee's right by prescription as against the trust. 24 M. 831, S. C. 15 L. W. 78 (P. C) (*Phillips and Devadoss, JJ.*) JAGGA ROW BAHADUR GARU *v.* GONHAR BIBI. **17 L. W. 521 : (1923) M. W. N. 347 : A. I. R. 1923 Mad. 545.**

Vacant site.

———*Vacant site—Starting point.*

Where it was found that the title in one-third of the land was with the plaintiffs, that the plot had been for many years lying unoccupied and that the Municipal Board had been using it for the deposit of refuse. *Held* that this use of the land by the Municipal Board did not amount to adverse possession or to the dispossession of the plaintiffs. (*Daniels, J.*) HAJI MOQBUL HUSSAIN *v.* HAFIZ AHMED HUSAIN. **A. I. R. 1923 All. 557.**

———*Vacant site—Presumption.*

Possession of open sites would naturally go with the possession of the building which they adjoin. Where plaintiff is the owner of the building as well as the site and has been in possession of the bnilding, this is one of these cases in which the fact of the plaintiff's title comes to his aid with greater force as far as the evidence goes with regard to the possession of the open sites. (*Macleod, C. J. and Coyajee, J.*) MAHAMED SAHIB IBRAHIM SAHIB *v.* TILOKCHAND. **46 B. 920 : 24 Bom. L. R. 373 : 66 I. C. 764 : A. I. R. 1922 Bom. 243.**

———*Vacant site—Temporary acts of user does not confer title.*

In the case of a vacant site which is not of any use to the owner, mere storage of bricks and wood and tethering cattle would not be considered objectionable by the proprietors of the lands and such user would not amount to an assertion of ownership, so as to confer title by adverse possession. 16 Bom. 338, Ref. to. (*Broadway, J.*) CHANDAN *v.* BAHADUR. **4 Lah. L.J. 168 : 68 I.C. 263 : 4 U.P.L.R. (L.) 106 : 35 P. W. R. (1922): 62 P. L. R. (1922) : A. I. R. 1922 Lah. 82.**

———*Vacant site—Formal delivery—Effect against true owner.*

ADVERSE POSSESSION—Vacant Site.

In the case of a vacant site possession follows title and a true owner's rights are not defeated by a person obtaining a formal delivery in execution of a decree against a person having no right to the same. (*Brasher, J.*) ABDULLAH *v.* GIRDHARI.
79 I. C. 692 : 8 P. W. R. 1923.

——*Vacant site—Possession follows title.*

In the case of vacant sites of which no effective physical possession is feasible, the presumption is that possession will follow title. (*Wallace, J.*) SRINIVASACHARIAR *v.* RAGHAVA CHARIAR.
46 M. L J 560 : 19 L. W. 621 : 79 I. C. 1011 : 34 M. L. T. 287 : (1924) M. W. N. 628 : A. I. R. 1924 Mad. 676

Waste Land.

——*Waste lands—Presumption of ownership.*

There is an undoubted presumption that forest tracts and old wastes in South Canara belong to the Government unless that presumption is displaced by positive evidence that the right has in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals or rights have been consciously allowed to grow up adversely to the Government. 3 Bom. 452 and 28 Mad. 257 Affirmed. (*Mr. Ameer Ali.*) AMBU NAIR *v.* SECY. OF STATE **47 M.L.J. 35 : 51 I.A. 257 : 47 Mad. 572 : 26 Bom. L. R. 639 : 20 L. W. 49 : 35 M. L. T. 128 : (1924) M. W. N. 572 : 80 I. C. 335 : 29 C. W. N. 365: A. I. R. 1924 P. C. 150 (P. C.)**

——*Waste land.*

Where the plot in suit was waste land which was of no immediate use to its owner the mere fact that the tenants have been enclosing it and tying their cattle upon it would not constitute adverse possession so as to deprive the owner of his ownership. Such temporary user which might be unnoticed or permitted would not amount to adverse possession. (*Gokul Prasad, J.*) LAKHU *v.* LAL SINGH. **71 I. C. 265 : A. I. R. 1923 A. 399.**

——*Waste lands.*

For possession of waste lands to become adverse, it must be adequate in continuity or publicity, and in extent of area. (*Mukerjee and Buckland, JJ.*). SECRETARY OF STATE *v.* WAZED ALI. **65 I. C. 866 : 34 C. L. J. 141.**

——*Waste land—Intermittent and temporary user are insufficient.*

In the case of waste land, mere intermittent and temporary user such as tethering of cattle and storing of fodder are insufficient to establish a title by adverse possession. 16 B. 338 foll. (*Abdul Raoof, J.*) MANSA *v.* KHUSHALI RAM. **4 Lah. L. J. 467 : 69 I. C. 4 : 58 P. L. R. 1922 : A. I. R. 1923 L. 25.**

ADVERSE TITLE.

See ADVERSE POSSESSION.
(1) LANDLORD AND TENANT.
(2) LEASE.
(3) MORTGAGOR AND MORTGAGEE.
(4) T. P. ACT, S. 111 (G).

ADVERTISEMENT.

See CONTRACT ACT, S. 2 ETC.

ADVOCACY—*See* LEGAL PRACTITIONER.

ADVOCATE—*See* LEGAL PRACTITIONER.

ADVOCATE GENERAL.

See (1) C. P. CODE, S. 92.
(2) LETTERS PATENT.

AFFIDAVIT—*See* C. P. C. O. 19, R. 3.

——*Statement made on information and belief—Source of information to be given.*

AGENCY RULES.

Where in an affidavit the declarant makes a statement of his belief or information he must give details of the person from whom he got the information. (*Miller, C. J. and Macpherson, J.*) KESHUB PRASAD SINGH *v.* HARIHAR PRASAD SINGH.
90 I. C. 703.

AFFILIATION.

See BUDDHIST LAW, BURMESE, MAHOMEDAN LAW.

AFFRAY—*See* PENAL CODE, SS. 159, 160.

AGE—Of Ceremonial Competency—*See* HINDU LAW.
—— **Of Discretion**—*See* HINDU LAW-ADOPTION.
—— **Of Majority**—*See* MAJORITY ACT.

AGENCY.

See (1) CONTRACT ACT 1872, CH. X.
(2) PRINCIPAL AND AGENT.

AGENCY RULES—(GANJAM AND VIZAGAPATAM).

——**R. 14 and 2**—*Agency Commissioner.*

The High Court can transfer case from the file of the Commissioner to its own file, but not to the file of a District Court. (*Oldfield and Venkatasubba Rao, JJ.*) MAHARAJU GURU *v.* GANGA RAJU.
45 M. L. J. 8 : 46 Mad. 726 : (1923) M. W. N 277 : 32 M. L. T. 269: 72 I. C. 745 : 17 L. W. 517 : A. I. R. 1923 M. 604.

——**Rr. 16 and 20**—*Claim procedure—Remedy by suit.*

The remedy by way of claim petition does not exist in the Agency Courts and the institution of a suit is the only remedy available to a person whose property has been attached in execution of a decree obtained against a third person. *Held*, that in the circumstances of the case, the claim petition presented to the Agent's Court could be treated as a suit and the order thereon as a decree subject to appeal or interference by the High Court under Rule 20 of the Vizagapatam Agency Rules. Miscellaneous orders by Agent or Assistant Agent are liable to be revised by Governor-in-Council. (*Oldfield and Venkatasubba Rao JJ.*) THE RANI OF TUNI *v.* THE MAHARAJAH OF JEYPORE. **42 M. L. J. 487 : 46 Mad. 35 : 30 M. L. T. 339 : 66 I C. 115 : 16 L. W. 8 : (1922) M.W. N. 314 : A. I. R. 1922 Mad. 271.**

——**Rr. 24 and 25**—*Assistant Commissioner—Order in execution is not a decree—Appeal, if maintainable—Remedy of aggrieved party.*

The order of an Assistant Commissioner in execution proceedings is not a decree and there is no provision in the Agency rules for appeals against orders passed in execution or miscellaneous proceedings. The remedy lies by way of petition under R. 24 against the order in execution of the Agency Commissioner 26 M. 266 : 41 M. 325 : 16 L. W. 8 referred to. Where a person aggrieved by an order of an Assistant Commissioner in execution proceedings preferred an appeal against it to the Agency Commissioner who rejected it on the ground that there was no appeal and the person aggrieved preferred a revision petition to the High Court :

Held that the order of the Commissioner was correct inasmuch as there was no appeal to the Commissioner from the order of the Assistant Commissioner and that even assuming the High Court might interfere in exceptional cases in the exercise of its powers of interference under S. 107 of the Government of India Act there was no ground for such interference in the particular case. (*Spencer and Venkatasubba Rao, JJ.*) VENKATANAGABUSHANAM *v.* KARELLA RAMASWAMI. **45 M. L. J. 78 : 17 L. W. 375 : 73 I C. 131 : A. I. R. 1925 Mad. 500.**

AGENCY RULES.

Agency Rules (Godavari).

——Decree passed by Court outside Agency tracts for sale of property within such area—Execution—Legality of decree—Objection to.

It is not competent to Civil Courts exercising jurisdiction outside the Agency area to pass a decree for the sale of properties situate within the area. When such a decree is sought to be executed within the Agency area, the Agency Court has a right to refuse execution on the ground that the decree is, on its face without jurisdiction and a nullity. 42 M. 813 Foll. 43 M. 675 Dist. (*Krishnan and Venkatasubba Row, JJ.*) KRUTHIVENTI PERRAZU *v.* SRI RAJAH NALLAPARAZU MEERJA SEETHARAMA CHANDRA.

16 L.W. 669 : (1922) M.W.N. 728 : A.I.R. 1923 M. 114 (1).

——Rr. 3, 2 and (3)—*Cancellation of pleader's sanad—Judicial act—Suit for declaration.*

Where the Government Agent of Godavari Agency cancelled the sanad of a pleader in the Agency tract for misconduct, and the pleader first preferred an appeal to Government who declined to interfere, and subsequently filed a suit in the Agency Court for the cancellation of the Agent's order. *Held*, the Agent acted as a Court and no suit lay against a Court for what it did as such Court. 9 Mad. 888 Dist (*Spencer and Ramesam, JJ.*) VENKATARAMAYYA *v.* SECRETARY OF STATE. **42 M. L. J. 148 : 15 L. W. 236 : (1921) M. W. N. 830 : 65 I. C. 345 : 30 M. L. T. 76 : A. I. R. 1922 Mad 1 (1).**

——Rr. 22 and 16 (4)—*Agency Munsif cannot attach property within Agency tract at the instance of British Indian Court.*

Rr. 22 and 16, cl. (4) do not confer the power on an Agency District Munsif of attaching properties before judgment at the instance of a British Court situate outside the Agency tracts nor is such power conferred upon him by R. 2, cl. (4). (*Wallace and Madhavan Nair, JJ.*) ZUBEDA BEGAM *v.* KOMMANA.

48 M.L.J. 680 : 88 I.C. 430: A.I.R. 1925 Mad. 1100.

AGENT.

See (1) CONTRACT ACT, SS. 182 to 238 and Ch. X.
(2) HUSBAND AND WIFE.
(3) POWER OF ATTORNEY.
(4) PRINCIPAL AND AGENT.

AGRAHARAM.

See (1) GRANT.
(2) INAM.
(3) LAND TENURE.
(4) MADRAS ESTATES LAND ACT.

AGRA PRE-EMPTION ACT (XI of 1922).

——S. 14—*Notice to person having pre-emptive right is not obligatory—Refusal to purchase on being informed of sale bars pre-emption suit.*

Section 14 does not make it obligatory on the vendor to give a notice to a person who has a right of pre-emption.

The vendor may, by word of mouth or in any other way, inform a person having a right of pre-emption of his intention to sell. If the person to whom that communication is made states there and then that he refuses to purchase the property, then he is disqualified from maintaining a suit for pre-emption. (*Lindsay and Kanhaiya Lal, JJ.*) SYED OON MD. *v.* MT. BINT ZOHRA. **L. R. 6 A Civ. 300 : 87 I. C. 414 : A. I. R. 1925 All. 645.**

——(1923) S. 12—*Section lays down preference inter se.*

S. 12 lays down an order of preference by which any person in class 1 is entitled to pre-empt as against any person in any of the other classes, namely, classes 2, 3, 4 and 5.

Where the pre-emptor and the vendor were co sharers in one *Khata* and the vendee was a co-sharer in another *khata* and was also a joint sharer in a third *khata* which was joint relating to *shamilat* lands.

Held: that the pre-emptor belonged to class 2 and the vendee to some class below class 2, therefore the pre-emptor had the better right. (*Kanhaiya Lal and Lindsay, JJ.*) SARJU PRASAD *v.* BHAGWATI PRASAD. **23 A. L. J. 373 : 88 I. C. 297 : L. R. 6 All. 337 (Civ.): A. I. R. 1925 All. 542.**

AGRA TENANCY ACT (II OF 1901.)

——*Suit for rent.*

It is not open to a landholder to sue a tenant in the same suit in respect of different holdings. (*Mukerji, J.*) HIRA LAL *v.* HOTI LAL. **22 A. L. J. 459 : 79 I. C. 560 : A. I. R. 1924 All. 720.**

——*Usufructuary mortgage of occupancy.*

A person who has contracted a usufructuary mortgage over an occupancy holding, in contravention of the provisions of the law, will not receive the assistance of the Courts in a suit for recovery of possession based upon title such title being *ex hypothesi* invalid. The plaintiff however can undoubtedly sue to be put back in possession under S. 9 of the Specific Relief Act without pleading his title at all. (*Piggott and Walsh, JJ.*) SHEO ZOOR KOERI *v.* MUST. KAUSILLA. **20 A. L. J. 972 : A. I. R. 1923 All. 81 (1).**

——*Relinquishment of expropriatory tenancy to be valid requires delivery of possession.*

Mere execution of a deed of relinquishment by an expropriatory tenant cannot amount to constructive fraud on behalf of the landlord. In order that the registered deed of relinquishment should operate as a valid surrender it is necessary that actual possession should be made over by the expropriatory tenant to the landlord. [7 All. 847 (F.B.) ; 20 All. 219 (F.B.) ; 27 I. C. 586 ; 31 I. C. 794.] Where according to the plaintiff's case itself as put forward in the plaint, the defendants were actually in possession but as sub-tenants and where the fact that they were in actual possession when the deed of relinquishment was executed, was nowhere denied, *held* there is no necessity for delivery of possession because the land-holders were already in actual physical possession.

Where the Revenue Court passed a decree for ejectment in favour of the plaintiff after failure of defendants to file a suit for declaration of right as proprietors, and the plaintiff was put in possession. *Held*: the decision of the question of sub-tenancy against the defendants by the Revenue Court bars the defendants from contending that they have been in possession as land-lords. The mere fact of the removal of the plaintiff's name from the revenue papers as an expropriatory tenant does not affect the question. The delivery of possession whether actual or formal to the plaintiff amounted to the plaintiff's getting possession as expropriatory tenant (the title which he had claimed) and a suit for actual possession within six months from that date, is not barred. (*Gokul Prasad, J.*) BHAGWANT *v.* MARE. **72 I. C. 1027 : A. I. R. 1923 All. 113.**

——*Occupancy holding—Mortgage—Permanent lease by the landlord—Whether Transferees of the lessee entitled to redeem the mortgage.*

The holders of a certain occupancy holding mortgaged their rights with possession before the passing of the present Tenancy Act. After they had done so they took a permanent lease of the holding from the Zamindar and transferred their rights under the lease

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to a certain person who proceeded to redeem the mortgage. *Held* : that he had a right to redeem the mortgage. (*Mears, C. J. and Stuart, J.*) MAHABIR CHAUBE *v.* DIP NARAIN. **76 I. C. 862 : 20 A. L. J. 976 : A. I. R. 1923 All. 140 (2).**

———*Occupancy holding—Suit by a tenant to eject a mortgagee in possession—Mortgage invalid—Mortgagee cannot set up adverse possession.*

The possession of the mortgagee being permissive, even though the mortgage was invalid, the occupancy tenant can sue to eject the mortgagee on paying the mortgage money. 16 A. L. J. 747 Foll. (*Kanhaiya Lal, J.*) DURGA CHOWDHURI *v.* JAGROOP. **79 I. C. 232 : A. I. R. 1923 All. 191.**

———*Lease—Registered and unregistered leases.*

After the date the zamindar executes a registered permanent lease in favour of the defendant, under which he is entitled to get possession of the holding the fact that he waits a year or more before taking possession seems really to make no difference. The mere acceptance of the rent by the lambardar from the plaintiff before the defendant took possession under the lease in no way operates as revocation of the registered lease. (*Ryves, J.*) SITA RAM *v.* CHAIT RAM. **L. R. 4 A. Rev. 291 : 71 I. C. 447 : A. I. R. 1923 All. 257.**

———*Occupancy holding—Mortgage—Surrender.*

Where an occupancy tenant relinquishes his holding in favour of the zamindar, the zemindar becomes the transferee of any mortgagor's right which might have been created on it. The zamindar therefore is entitled to redeem. (*Stuart and Ryves, JJ.*) KUMAR SANTHWAR *v.* BISHUN MOHUN. **21 A. L. J. 120 : 73 I. C. 651 : A. I. R. 1923 All. 263 (1).**

———*Trees planted with landlord's consent not transferable.*

Where it is found that trees were planted presumably with the consent of the Zemindar on the occupancy holding by the tenant, the tenant acquires no transferable right. 13 A. L. J. 833 Foll. 34 All. 545 Dist. (*Sulaiman, J.*) ABDUL RAUF *v.* MUHAMMAD SHAH. **75 I. C. 655 : A. I. R. 1923 All. 340.**

———*Perpetual rent-free tenant of a grove—Landlord not entitled to eject.*

Where the special provisions of the Tenancy Act permitting landlords to resume rent-free grants have no application, the tenant cannot be ejected so long as the land has not lost the characteristic of a grove. (*Stuart, J.*) AHMAD HUSAIN *v.* SIRAJUDDIN. **75 I. C. 616 : A. I. R. 1923 All. 372.**

———*Tenant grove-holder dying without heirs but indebted—Landlord not responsible for the debts of the last holder.*

The right of a tenant to reside in a house in the inhabited site of an agricultural village of this province and the right of a tenant grove-holder in certain villages are both limited estates. When the last holder of such a house dies without heirs, the house reverts to the landlord and in the case of certain villages when the tenant grove-holder dies without heirs, the treesandl and revert to the landlord. The landlord, however, does not succeed as heir and hence the landlord cannot be held responsible for the debt of the last holder. (*Stuart, J.*) RAMMAN BIBI *v.* MATHRA PRASAD. **75 I. C. 621 : A. I. R. 1923 All. 374.**

———*Ex-proprietary tenant—Succession.*

A daughter's son or a collateral succeeds to the ex-proprietary tenancy only if he shared in cultivation. (*Gokul Prasad, J.*) SAJJAD HUSSEIN *v.* WALI MUHAMMAD. **L. R. 5 A. (Rev.) 21 : 73 I. C. 1030 (2) : A. I. R. 1923 All. 451.**

———*Scope of.*

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Provisions of the Provincial Insolvency Act do not affect the rights of a land-holder under the Agra Tenancy Act. (*Piggott and Walsh, JJ.*) PARBATI *v.* SHYAM RIKH. **20 A. L. J. 147 : 44 A. 296 : 66 I. C 214 : L. R. 3 A. 73 · A. I. R. 1922 A. 74 : (Note : See also 62 I. C. 897 : 43 All. 510 F. B.)**

———*Act not retrospective—Succession—Death of tenant before new Act—Law applicable is Hindu Law as modified by Rent Act,*

The Agra Tenancy Act has no retrospective operation so as to affect a succession to the holding of a tenant who died before the Act. The succession is governed not by the pure Hindu law but by the Hindu Law as modified by the Rent Act. 38 A. 197 ; 16 A. L. J. 459 ; 27 A. 658 Ref. (*Ryves and Gokul Prasad, JJ.*) BECHU SINGH *v.* BALDEO SINGH. **44 A. 327 : L. R. 3 A. 93 : 20 A. L. J. 165 ; 65 I. C. 507 : 4 U. P. L. R. (A.) 12 : A. I. R. 1922 All. 84.**

———*Transfer of occupancy holding—Eviction.*

Under the Tenancy Act an occupancy tenant cannot transfer his occupancy holding. Under the law therefore the plaintiff lessee to whom a permanent lease is granted has a possessory right good against all the world except the true owner, that is, the body of zamindars, and no one who is not a member of such body can forcibly oust him from possession without being liable for damages. (*Gokul Prasad, J.*) RAMESHWAR DUBE *v.* SHEO HARAKH DUBE. **66 I. C. 529 : A. I. R. 1922 A. 277.**

———*Construction—Agreement between the Zamindar and tenant regarding payment of rent—Whether amounts to a lease—Effect of non-registration.*

Where in an ejectment, the parties compromised by the execution of an unregistered document which laid down that the tenant should pay at a specified rate and that the Zamindar should not eject him so long as the stipulated rate was paid for 20 years, *Held*, under S. 97 of the A. T. Act the compromise agreement did not operate as a lease for 20 years because it was not registered ; and the tenant could be regarded only as an ordinary tenant. (*Burn, J. M.*) NUR AHMED *v.* RAGUBAR DYAL. **L. R. 5 A 302 (Rev.).**

———*Occupancy rights—Lessee under mortgagee—Period of occupation under lease.*

Where a lessee was holding under a mortgagee and after the period of the mortgage continued to remain in possession he can count only the latter period for the acquisition of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) BOHRA JAGRAM *v.* MT. KOKILA. **L. R. 4 A. 366 (Rev.).**

———*Scope of—Not exhaustive—Contract for payment of nazrana—Neglect or failure—Rights of landlord.*

The Agra Tenancy Act is not exhaustive as to the terms and conditions on which a contract of tenancy can be made. An agreement between a landlord and tenant that the latter should pay a certain sum as nazrana and should then be immune from ejectment until the nazrana and the expenses of clearing the land were both repaid is perfectly legal and enforceable. If the tenant neglects to pay the amount of the nazrana the landlord is at liberty to rescind the contract and eject the tenant on his refunding that part of the nazrana which had been already received. (*Fremantle, J. M.*) MAHOMED RAFIQ *v.* GANGA DIN. **L. R. 3 A. 105 (Rev.).**

———*Occupancy rights—Merger—Proof.*

In considering the acquisition of occupancy right to establish a plea of merger it is necessary to show that the tenant had become complete proprietor of the holding. (*Burn, J. M.*) AJAI SINGH *v.* RAM SARUP. **L. R. 3 A. 194 (Rev.).**

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———*Mortgagee in possession—Agricultural lease —When binding on mortgagor.*

Where a mortgagee in possession of agricultural lands grants a lease of the same and there is no evidence that the rate of rent fixed was unreasonable or that the grant of the lease was collusive. *Held* that the leasing of the land was within the ordinary powers of the mortgagee as landholder, and the mortgagor was not entitled to have the lease cancelled except on proof that it was granted fraudulently, collusively, or unreasonably, the onus of establishing these grounds for cancellation being on him. (*Hopkins, S. M. and Porter, J. M.*) MT. RAM DULARI *v.* BALAK RAM. **L. R. 3 A. 313 (Rev.).**

———*Agreement relating to land—Non-admissible without registration.*

Agreements relating to land when reduced to writing and filed in any Court are inadmissible in evidence, unless they are stamped and registered according to the law in force at the date of their execution, except in so far as they relate to the subject-matter of the suit and have been embodied in any order or decree of the Court. (*Hopkins, J. M. and Porter, S. M.*) MUKTA PRASAD *v.* MOJI LAL. **L. R. 3 A. 315 (Rev.).**

———*Sir—Sale by widow—Suit to set aside by daughter compromised on vendee conveying to her half the property—Title to sir is extinguished.*

A Hindu widow sold the property after her husband's death and relinquished her sir rights in vendee's favour. Her daughter brought a suit to set aside the sale but that was compromised on an agreement that the suit should be withdrawn and vendee should convey to the daughter half of the property. *Held*, the effect of the compromise was the daughter abandoned her claim on title and accepted half the property as a transfer from the widow's alienee and that being so her claim to succeed as sir holder was lost. (*Hopkins, S. M. and Burn, J. M.*) CHETAN DAS *v.* HAR KUAR. **L. R. 2 A. 173.**

———*Sir—Joint sir—Transfer of sir and relinquishment of ex-proprietary right by each holder separately—Order under S. 36, U. P. Land Revenue Act—Date of extinction of sir rights.*

Where sir was held jointly by two persons and each of them separately transferred his sir and relinquished his ex-proprietary right in favour of the transferee at the same time but order under S. 36, U. P. Land Revenue Act was not passed till after a year of the transfer, *Held*, Sir rights in the whole of sir were extinguished not from the date of the order under S. 36 but from the date of the transfer. Had one of the holders retained his sir rights the whole of the sir would have retained its character until the demarcation of the other's share. (*Hopkins, S. M. and Fremantle, J. M.*) MUSE *v.* SURAJ BALI. **L. R. 2 All. 245.**

———*Board's Circular No. 8-11, R. 12 Proceedings under the Act—Concurrent judgment of two members of the Board is essential—Rule not* ultra vires.

Rule 12 is not *ultra vires*. Before a decree or order of any subordinate court can be reversed in respect of proceedings under the Tenancy Act, a concurrent judgment of two members of the Board is necessary. (*Ferard, S. M. and Harrison, J. M.*) MUBESHRI BEGUM *v.* TIRKHA. **3 U. P. L. R. (B. R.) 58.**

———*Distribution of Rent.*

Where it was found that out of a total of 13 Biswas and 15 Biswansis the tenant had occupancy rights in 8 Bighas and 4 Biswas and the commissioner in order to distribute the rent of the portions ascertained

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the rent of the portion held by tenant at settlement rates.

Held, that the procedure was not in accordance with law. Present rent should have been taken in consideration and split into two portions. (*Hopkins, S. M. and Porter, J. M.*) JAG PRASAD *v.* BUCHE. **3 U. P. L. R. (B. R.) 63 (1).**

———*Appeal to District Judge—Memo. returned to be presented to the Revenue Court—Order if not appealable.*

An order of a District Judge returning a memorandum of appeal for the purpose of its being presented to the Appellate Court on the Revenue side, is not appealable to the High Court. (*Walsh and Wallace, JJ.*) BANKEY LAL *v.* MEGHRAJ. **63 I. C. 951 : 19 A. L. J. 868.**

———**S. 1 (2)**—*Applicability of—Cantonment land.*

The Agra Tenancy Act has no application to cantonment lands. They are under the direct administration of the Government of India. (*Stuart, J.*) SECRETARY OF STATE *v.* MULLA. **L. R. 3 A. 169 : 66 I. C. 582 : A I. R. 1922 A. 57.**

———**S. 2**—*Sir—Mortgage before Tenancy Act Continues even after the Act.*

A mortgage of Sir with possession before the Tenancy Act remains in force after the Act under S. 2. (*Hopkins, S. M. and Porter, J. M.*) RAM SUNDAR RAI *v.* JANG BAHADUR RAI. **L. R. 2 A. 13 (Rev.) : 3 U. P. L. R. (B. R.) 70.**

———**S. 3**—*Applicability of — Mortgages and leases.*

S. 3 of the Agra Tenancy Act was meant to protect tenants against their landholders and it does not affect mortgages or Zuripeshgi leases executed between April 1901 and January 1902. (*Burn, S. M.*) BHAWANI *v.* ZAHRIA. **L. R 4 A. 34 (Rev.).**

———**S. 4**—*Rent may include payment on produce of tanks—But where parties are not landlord and tenant, payment by one to other is not rent.*

Rent may include what is paid on account of the produce of tanks, but rent is a payment by a tenant to his landlord. Where the plaintiffs are not the landlords of the defendants but the parties are proprietors in distinct mahals, the payment claimed is not rent. (*Sulaiman and Daniels, JJ.*) SANWALIA *v.* NATHI LAL. **88 I. C. 504 : 23 A. L. J. 560 : A. I. R. 1925 All. 561.**

———**S. 4**—*Land turned into grove—Ceases to be held for agricultural purposes.*

As soon as the zemindar allows the grantee to convert the land into a grove it would cease to be land held for agricultural purposes within the meaning of the definition. (*Ryves and Daniels, JJ.*) KESHEO DASS *v.* HANUMAN PANDEY. **45 All. 640 : 21 A. L. J. 576 : 74 I. C. 924 : L. R. 4 A. 208 (Rev.) : A. I. R. 1924 All. 53.**

———**S. 4**—*Land let for planting grove is not holding and rights are transferable.*

A plot neither let nor held for agricultural purposes, but let for the planting of a grove is incapable of cultivation, where a grove exists on it, and the rights of such a tenant are transferable. The plot is neither land within the meaning of the Act nor a holding. (19 A. L. J. R. 616, *Foll.*) But when the holdings themselves are not transferable they cannot become transferable after the planting of trees. (5 A. L.J.R. 99 and 14 A. L. J. R. 833, *Dist.*) (*Sulaiman, J.*) GULAB *v.* BHAGWAN DAS. **21 A. L. J. 907 : L. R. 5 A. (Rev.) 13 : 79 I. C. 577 : A. I. R. 1924 All. 229 (1).**

———**Ss. 4 and 51**—*Payment of rent—Contract as to—Effect of statute.*

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A lease by a Zemindar stipulated that the rent due thereunder should be payable irrespective of whether there was any drought or flood or any calamity by which there was no produce in the village. The lessee claimed an abatement in the rent on the ground of a Government Notification remitting land revenue for a portion of the year. *Held*, that the lessee was a tenant within the meaning of S. 4 of the Tenancy Act and that the contract between the parties was entirely overridden by S. 51 of the Agra Tenancy Act. (*Mukerji and Dalal, JJ.*) FATEH CHAND *v.* MURARI LAL. **22 A. L. J. 753 : 80 I. C. 8 : L. R. 5 A. 241 (Rev.) : 46 All. 840 : A. I. R. 1924 All. 906.**

——Ss. 4. 58 and 63—*Suit for possession of grazing land—Jurisdiction—Revenue Court.*

A suit for possession of land used for grazing cattle and for arrears of rent is in fact one for ejectment and is cognizable by Revenue Court. (*Piggott and Walsh, JJ.*) PARAM HANSMAN TEWARI *v.* DASRATHMAN TEWARI. **43 All. 445 : L. R. 2 A. (Rev.) 161 : 60 I. C. 770 : 19 A. L. J. 292.**

——S. 4—*'Tenant' may not be tenant of a holding.*

It seems quite clear from the wording of the definitions of the words "Land" and "tenant" that a man may be a 'tenant' subject to the provisions of the Act without being the tenant of a 'holding'. (*Piggott and Walsh, JJ.*) PARAM HANSMAN TEWARI *v.* DASRATHMAN TEWARI. **L. R. 2 A. Rev. 161 : 19 A. L. J. 292 : 60 I. C. 770 : 43 All. 445.**

——S. 4—*Tenant, meaning of—Tenants cannot split up tenancy without landlord's consent.*

If a proprietor collects rent from a person, by whom it is not payable it does not make the latter his tenant. Where a body of co-sharers have made a contract of tenancy for certain land they cannot, by a mere division among themselves, split up the tenant's single holding into a number of smaller holdings without his consent. (*Hopkins, S. M. and Fremantle, J. M.*) GAJRAJ LUNIA *v.* MD. SIDDIQ. **3 U. P. L. R. (B. R.) 91.**

——S. 4, cl. 2—*Land taken on payment of premium—Planting of trees—Rights of parties.*

The defendants obtained certain land from the landholder on payment of a lumpsum on premium without any agreement for the express purpose of planting trees. *Held*, that the land on which the grove stood was not "land" within the meaning of S. 4, cl. (2) of the Agra Tenancy Act that the premium was not rent in any sense of the term and that the defendants were not tenants of the landholder. (*Sulaiman and Mukerji, JJ.*) LAL BAIJNATH SINGH *v.* CHANDRAPAL SINGH. **L. R. 5 A. 255 (Rev.) : A. I. R. 1924 All. 795.**

——Ss. 4 (2) and 11—*Agricultural purposes—Letting for—Acquisition of occupancy rights.*

In view of the definition of land in S. 4 (2) of the Tenancy Act, rights may be acquired under S. 11 if the land were originally let for agricultural purposes, even though in some years subsequently the land has lain fallow or had been used for grazing. If a tenant misuses or neglects his land, landholder has a remedy in S. 57 (*b*) of the Act. (*Fremantle, S. M. and Burn, J. M.*) HUKUM SINGH *v.* BISHNATH PRASAD. **L. R. 5 A. 85 (Rev) : 10 O. & A. L. R. 417.**

——Ss. 4 (2) and 12 (d)—*Land—Agricultural land built upon without permission does not cease to be land.*

If a sub-tenant of *sir* or a non-occupancy tenant puts up a house on land from which he is liable to be ejected at any time by the landlord, he has only himself to thank for not fortifying himself with a long lease or waiting till he has got occupancy rights which he can do by lapse of time if the land is not *sir*. Simply because the house has been built upon an agricultural land it does not cease to be "land" within S. 4 (2) of the Agra Tenancy Act. (*Lovett, S. M. and Ferard, J. M.*) MT. AMIRIT BIBI *v.* MAHADEO. **L. R. 3 A. 270 (Rev.)**

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——S. 4 (3)—*Interpretation—Land—Meaning of.*

Where it is proved that the area in dispute a small plot. 14 of an acre was covered partly by buildings and partly by a bamboo clump. *Held*, that the plot did not come within any of the classes mentioned in S. 4. cl. 3 of the Tenancy Act. (*Pearson, J. M.*) BINDYACHAL PD. GOBIND RAI *v.* RUP KARMI. **L. R. 3 A. 405 (Rev.)**

——S. 4 (5)—*Landholder—Meaning.*

With reference to a sub-tenant the landholder is the occupancy tenant from whom he holds. (*Daniels, J.*) GHISWA *v.* DEO NARAIN. **L. R. 4 A. 450 (Rev.) : 73 I. C. 947 : A. I. R. 1923 All. 568.**

——Ss. 4 (5) and 11—*Acquisition of occupancy right—Period of joint tenancy if counted.*

The period during which a tenant held a holding jointly with other persons not members of a joint family with him cannot be added in computing the period necessary to give occupancy rights. (*Hopkins, S. M. and Fremantle, J. M.*) THAKUR SARDAR SINGH *v.* RAGHUNANDAN. **4 U. P. L. R. (B. R.) 89.**

——S. 4 (5) and 11—*Occupancy rights—Period of joint cultivation cannot be counted.*

Where a holding is cultivated by a person jointly with another for a certain period and thereafter singly, the former period cannot be counted for the acquisition of occupancy rights. (*Fremantle, S. M.*) GAURI DAYAL *v.* GOPAL. **L. R. 4 A. 347 (Rev).**

——S. 6—*Construction.*

Owing to the too rigid classification of tenants in S. 6 all lessees including *Thekadars* have to be included in the class of non-occupancy tenants. No adequate provision has been made for lessees holding under a sub-contract and in such cases the intention of the parties is liable to be frustrated. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. **74 I. C. 971: L. R. 5 A. 28 (Rev.): A. I. R. 1923 All. 560.**

——S. 8—*Fixed rate tenancy—Cannot be created by contract.*

A fixed rate tenancy cannot be created by contract, because a fixed rate tenant is defined in S. 8 of the Act and no person can be classed as a fixed rate tenant who does not come within the definition. 28 All. 747 Ref. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. **74 I. C. 971: L. R. 5 A. 28 (Rev.) : A. I. R. 1923 All. 560.**

——Ss. 9 and 20—*Scope of—Section applies only to disputes between Landlord and tenant—Presumption under section is conclusive.*

S. 9 of the Agra Tenancy Act is very limited in scope and applies only where the dispute is between a landlord and his tenant and relates to the nature of the tenancy. A dispute may arise in proceedings to which the landlord is not at all a party. Under S. 20 (1) of the Tenancy Act the interest of a permanent tenure-holder or of a fixed-rate tenant is heritable according to his personal law. Whereas other tenancies devolve according to the rule laid down in Section 22. A dispute may very well arise between the rival heirs of a deceased tenant and the question of the true nature of the tenancy and may have to be decided in a litigation to which the landlord is not a party. It is not open to either set of these heirs to go behind the

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entry at the last revision of records and adduce evidence to the contrary. The presumption under S. 9 is conclusive. There are many ways in which fixed rate tenancies may come to an end, *e. g.* by surrender, ejectment, express agreement with the landlord, or as in this case, by merger. I cannot therefore see how one can shut out evidence directed to show that a new position has arisen since the settlements. (*Lindsay and Sulaiman, JJ.*) SHEO NANDAN *v.* BALGOBIND MISRA. **45 A. 744: 21 A. L. J. 697: 74 I. C. 647 : L. R. 4 A. 333: A. I. R. 1924 All. 91.**

——**S. 9**—*Suit for a declaration that a revenue entry is wrong is not maintainable.*

A suit for a declaration that an entry in the Revenue Records as to the nature of a tenancy is wrong. is not maintainable in view of S. 9 of the Act. (*Walsh and Wallach, JJ.*) RAM SARAN *v.* LALJI UPADHYA. **43 All. 615: 19 A. L. J. 653 : 63 I. C. 711: 3 U. P. L. R. (A.) 79.**

——**S. 10**—*U. P. Land Revenue Act, S. 36—Less than statutory rate of rent is claimable if agreed upon —Proceedings under S. 36, Land Revenue Act, are not necessary.*

If the rent agreed on between the parties for land in respect of which an ex-proprietary tenancy has arisen is less than the statutory rate laid down in S. 10 of the Tenancy Act the rent is claimable even though formal proceedings under S. 36 of the Land Revenue Act have not been taken. (*Daniels and Neave, JJ.*) NAND RAM SINGH *v.* HARI SARAN DAS. **L. R. 5 A. Rev. 235 : 82 I. C. 296 : A. I. R. 1925 All. 100.**

——**S. 10**—*Proprietor—Right to—Khudkasht—Possession.*

Khudkasht can only be held by a proprietor who is in possession. When a proprietor makes a transfer, he loses his *sir* and *khudkasht* rights under S. 10 of the Tenancy Act even in the land which he has been cultivating for 12 years and becomes an expropriatory tenant. He obviously cannot claim *khudkasht* rights in land which he only begins to cultivate at the time when he loses his possession. (*Ryves and Daniels, JJ.*) GULAB SINGH *v.* SHIB LAL. **21 A. L. J. 331: L. R. 4 A. 206 : 74 I. C. 286 : A. I. R. 1923 All. 347.**

——**Ss. 10 and 36**—*Sale of expropriatory rights —Continuance of expropriator in sir plots—Expropriatory rights not claimed within 6 months—Effect of.*

After the sale of proprietary rights the defendant had no claim to have sir recorded in his name yet he did as a matter of fact remain in possession of the field which was formerly his sir either by realising the rent from the sub-tenant or by cultivating it himself, *Held*, in these circumstances he could not be considered to have lost his rights by failing to claim them within six months as he had been in continuous possession and had claimed them as soon as the Zemindar sought to deprive him of possession. (*Fremantle, S. M. and Burn J. M.*) BINDRA PRASAD *v.* MAHARAJA OF BENARES. **L. R. 5 A. 93 (Rev.)**

——**S. 10**—*Ex-proprietary tenant—Cannot contract himself out of the provisions of section 10.*

An ex-proprietary tenant may surrender his holding but if he does not do so, he cannot contract himself out of the provisions of S. 10. (*Hopkins, S. M., Harrison, J.M. and Porter, J.M.*) HARSARAN DAS *v.* DEBI SINGH. **60 I. C. 245: 2 U.P.L.R (B. R.) 90.**

——**S. 10**—*Mortgage of khudkasht lands—Mortgagor becomes ex-proprietary tenant.*

Where an owner of *khudkasht* lands, usufructuarily mortgages the lands, he becomes an ex-proprietary tenant and under law he is liable to pay only three-

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fourths of the rent which is ordinarily paid in respect of non-occupancy holdings. (*Sulaiman and Kanhaiya Lal, JJ.*) BALDEO SINGH *v.* CHHAIL BEHARI LAL. **59 I. C. 688 : 18 A. L. J. 944.**

——**S. 10**—*Ex-proprietary rights—Mortgage before the passing of the Tenancy Act of 1901—Lease by mortgagee to mortgagor.*

A tenant mortgaged his land while the Act XII of 1881 was in force and took a lease of it from the mortgagee. After the Agra Tenancy Act of 1901 was passed, he sold the equity of redemption. On a question arising as to whether expropriatory rights could group up while the land was under mortgage. *Held* that since at the date of the mortgage Act XII of 1881 was in force under which, expropriatory rights did not arise during mortgage the cultivation of the proprietor would be such as to allow the rights under S. 10 to arise and since the land in which those rights were now claimed was khudkasht of over 12 years when the equity of redemption was sold, the defendant had expropriatory rights. (*Fremantle, J. M.*) MURLI *v.* JUGAL KISHORE.. **L. R. 3 A. 266 (Rev.)**

——**S. 10**—*Voluntary alienation—Transfer of proprietary rights under decree for foreclosure.*

Expropriatory rights arise under S. 10 of the Agra Tenancy Act on the foreclosure of a mortgage as the transfer in such a case amounts to voluntary alienation. (*Hopkins, S. M. and Porter, J. M.*) BILAS RAI *v.* ABHIRAJMAN TIWARI. **L. R. 3 A. 327 (Rev.)**

——**S. 10**—Sir—*Transfer of a portion—Land does not lose its character as* sir.

Where a portion of *sir* land is mortgaged and then sold, it does not lose its character as *sir* until the land is specified and demarcated. (*Hopkins, S. M. and Fremantle, J. M.*) BALDEO PAL *v.* CHILLU AHUR. **4 U. P. L. R. 66 (B.R.) : L. R. 3 A. 439 (Rev.)**

——**S. 10**—*Sale of proprietary rights—Relinquishment of ex-proprietary rights—Subsequent suit for declaration—Not maintainable.*

A proprietor sold his proprietary rights and on the same day executed a deed of relinquishment of expropriatory rights. He subsequently sued for declaration of expropriatory rights. *Held* that the law applicable turned entirely on the question of fact whether plaintiff actually vacted the land and was out of possession for more than 6 months and plaintiff having given up possession the suit had to be dismissed. (*Burn, S. M.*) MESI TULLAH *v.* KALLU. **L. R. 3 A. 463 (Rev.)**

——**S. 10**—*Expropriatory right—Landlord and tenant—Khudkhasht land.*

A co-sharer would not necessarily be entitled to hold as an ex-proprietary tenant, a khudkhasht holding of 16 years' standing. (*Hopkins, S. M.*) MT. SREEMATI AUSANBATI DEBI *v.* RAM JAS. **4 U. P. L. R. 9 (Rev.)**

——**S. 10**—*Partition—Khudkasht of 16 years' standing—Allotment to another—Expropriatory right does not arise.*

Khudkasht land of 16 years' standing is not necessarily land which a co-sharer would be entitled to hold as an expropriatory tenant under S. 10 on its falling to the lot of another co-sharer at partition. (*Hopkins, S. M.*) PHEKU SINGH *v.* DEBI BAKHSH SINGH. **4 U. P. L. R. (B. R.) 9 (2) : L. R. 2 A. 216 (Rev.)**

——**S. 10 (1)**—*Gift of sir land—No ex-proprietary rights are created.*

Under S. 10 (1) no ex-proprietary rights are created where there is an alienation by gift whether the gift is between the co-sharers or in favour of a stranger. If the transfer is by way of a gift the sir must retain its character in the hands of the donee. (*Sulaiman, J.*)

AGRA TENANCY ACT (II OF 1901), S. 10.

DUNGAR *v.* JAHANGIR. **A. I. R. 1925 All. 775.**

——**S. 10, cl. 1**—*'Year'—Meaning of.*

The word 'Year' in S. 10 of the Agra Ten. Act can refer only to a calendar year or to an agricultural year as defined in S. 4. cl. 10 of the Act and it is impossible to make it equivalent to a term like cultivating period. (*Fremantle, S. M. and Burn, J. M.*) KEDAR NATH *v.* RAM KUMAR. **L. R. 5 A. 216 (Rev.)**

——**S. 11**—*Two brothers living and cultivating together—Seven years' lease taken by one—No objection by the other—Lease, if binding on the other.*

Where one of two brothers living and cultivating together, and having no separate interest, took a seven years' lease, and no objection was made by the other brother: *Held*, that the consent of the other brother was implied and that the lease was binding upon him also. (5 U. D. 283—1922 R. C. 409 followed). (*Fremantle, S. M.*) RAM LAL *v.* TIRBENI KUAR.

L. R. 6 A. 232 (Rev.).

——**S. 11**—*Ejectment suit—Appeal lies to whom.*

Appeal lies to Dist. Judge in an ejectment suit from the decision of an Assistant Collector, First Class. 22 I. C. 964 Foll. (*Stuart, J.*) RAM DIN *v.* HAR DAYAL. **A.I.R. 1923 All. 368.**

——**S 11**—*Occupancy rights—Possession of land-holder fraudulent—Tenant if acquires rights.*

Per *Walsh, J.*—A tenant who has held the same land continuously for a period of 10 years gets occupancy rights, but this only refers to a tenant to whom the landlord rightfully leases the land possessed by him. Where the landlord obtained possession of the land fraudulently by colluding with the guardians of a minor, the possession is not legal and the tenant having obtained from the land-holder possession, which in its nature was a fraudulent one, did not acquire any rights of occupancy or otherwise by holding the land continuously for 12 years. (*Walsh and Ryves, JJ.*) JAMMU *v.* MAHADEO PRASAD. **L. R. 3 A. 195: 66 I. C. 559: 4 U. P. L R. (A.) 84: A. I. R. 1922 All. 294.**

——**S. 11**—*Occupancy right—12 years' occupation creates.*

A right of occupancy is created by twelve years' continuous occupation under S. 11 of the Agra Tenancy Act and this right is not affected by the fact that the tenant was recorded as a non-occupancy tenant and did not claim a higher right. (*Stuart, J.*) PRAG NARAIN *v.* ANGAD. **L. R. 3 A. 132: 70 I. C. 495: A.I.R. 1922 All. 55 (2).**

——**S. 11**—*Acquisition of Occupancy rights—Continuous cultivation for 20 years.—No claim of rights necessary.*

The circumstance that the tenants had not claimed occupancy rights does not affect the fact that they are occupancy tenants under the provisions of S. 11. The right is created by continuous occupation for 12 years and there is no necessity to claim this right. *Mackinnon* v. *Mahant-Tilakan Chan Gir*, (XXIII Indian Cases, 417 of Board of Revenue, dissented from.) (*Stuart, J.*) PRAG NARAIN *v.* ANGAD.

L. R. 3 A. 132: (Rev) 70 I. C. 495: A. I. R. 1922 All. 55 (2).

——**S. 11**—*Rent--Cannot be enhanced by agreement.*

That the rent of an occupancy tenant is liable to enhancement by an unregistered agreement or an oral agreement, is impossible. (*Stuart, J.*) PRAG NARAIN *v.* ANGAD. **L. R. 3 A. 132 (Rev): 70 I. C. 495: A. I. R. 1922 All. 55 (2).**

——**S. 11**—*Sir land—Possession of sub-tenants—Accrual of occupancy rights.*

Ordinarily it would be correct to say that the rights of a tenant could not begin to accrue until the whole of the *sir* had been transferred or proceedings under S. 36 had been concluded. But where almost the whole of the share to which the sir appertained was transferred and from the date of the transfer the rent of the sir was paid to the transferee and there was nothing to show that the payments were made as sub-tenants, *held* that on the date of the transfer the tenant rights began to accrue and the whole period counted towards the acquisition of occupancy rights. (*Fremantle, S. M.*) HARBANS *v.* HEMAI KOERI. **L. R. 5 A. 17 (Rev.).**

AGRA TENANCY ACT (II OF 1901), S. 11.

——**Ss. 11 and 14**—*"Held," meaning of—Nominal possession—Insufficient.*

Cases of dispossession are provided for in Ss. 13 and 14. It is clear from these provisions of the law that the word "*held*" in S. 11 connotes physical possession and that nominal possession even under a genuine lease is not sufficient to enable a tenant to acquire a right of occupancy. (*Fremantle, S.M. and Burn, J. M.*) KUNWAR MAHOMED ABDUL JALIL KHAN *v.* CHANDER SEN. **L. R. 5 A. 83 (Rev.): 10 O. & A. L. R. 385.**

——**S. 11**—*Acquisition of occupancy rights—Possession as mortgagee if can be taken into account.*

Plaintiff was recorded as mortgagee up to 1328 Fasli and there was nothing to show that the plff. was regarded as tenant-in-chief in his own right until an ejectment suit was filed in 1919 against the mortgagor admitted as such. *Held*, that the plaintiff had not acquired occupancy rights. (*Fremantle, S. M.*) KALLO *v.* HANUMAN PRASAD NARAIN SINGH. **L. R. 5 A. 145 (Rev.)**

——**S. 11**—*Acquisition of occupancy rights—Separate cultivation—Period of joint cultivation if can be added.*

Where there has been a partition of the holding, the period of a joint tenancy cannot be added to the period of separate tenancy in considering the time required for acquisition of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) SHEONANDAN KURMI *v.* BADRI PATHAK. **L. R. 5 A. 224 (Rev.)**

——**S. 11**—*Acquisition of occupancy rights—Parties descended from common ancestor—Plaintiff recorded as tenant and deft. as sub-tenant.*

Plaintiff was recorded as an occupancy tenant. He sued to eject his brothers and nephews who were recorded as sub-tenants of two years. It was found that the holding belonged to the common ancestor of the parties and that the defendants had been in possession since the death of the common ancestor. *Held*, that it did not matter in these circumstances whether occupancy rights were acquired in the time of the common ancestor or after he died. The holding was that of the grandfather and the defendants were entitled to their share provided that they had been in possession of it since the death of the common ancestor. (*Fremantle, S.M. and Burn, J. M.*) MAHABIR *v.* PUSA. **L. R. 5 A. 266 (Rev.).**

——**S. 11**—*Occupancy rights cannot accrue in fallow land.*

Where it is found that before the defendant took it up for cultivation the land was fallow for many years if not for ever. *Held*, that occupancy rights cannot accrue in such land. (*Fremantle, S. M.*) MITTHO PANDEY *v.* CHATURI PANDEY.

L. R. 4 A. 251 (Rev.).

——**S. 11**—*Partition of holding—Continuity of possession depends upon the recognition by Zemindar of partition.*

A holding held jointly by two persons was partitioned by them and each entered into separate possession

of his portion. *Held*, that the question whether any of them was entitled to count the period before partition towards the acquisition of occupancy rights depended upon whether the partition had been recognised by the zemindar. If it had not been recognised then the tenants would remain jointly liable for the arrears of rent and the continuity of possession would not be broken by the partition. In the other case the Zamindar would be debarred from suing jointly for arrears of rent and the tenant before partition would be deemed to be different from the tenant after partition and the period before partition would not be counted towards the acquisition of occupancy rights. (*Fremantle, S. M.*) ANUP RAI *v.* BISHAN MOHAN.
L. R. 4 A. 263 (Rev.).

——**S. 11**—*Relinquishment—Onus of proof.*

Where a tenant has been in possession of a holding for 12 years but the revenue papers show that for one year of this period some other person was in possession, the entry is not sufficient proof of relinquishment. The party who sets up relinquishment must prove it by evidence. (*Fremantle, S. M. and Burn, J. M.*) DWARKA PRASAD *v.* JWALA PRASAD.
L. R. 4 A. 356 (Rev.).

——**S. 11**—*Acquisition of occupancy rights—Joint tenants—Relinquishment by one—Grant of 7 years' lease to the other—Effect.*

When a father and son cultivated jointly, but before acquiring occupancy rights, the father relinquished the holding and the son took under 7 years' lease, the terms of the tenancy are altered and the period cannot be counted for acquisition of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) SOTI HARNAM KUAR *v.* TILLA. **L. R. 4 All. 445 (Rev.).**

——**S. 11**—*Continuous occupation—Decree in ejectment—Acceptance of fresh lease for 7 years.*

After a decree in ejectment is passed, where the tenant is re-admitted by a 7-years' lease, the period during which the ejectment proceedings are in progress cannot be regarded as continuous occupation under S. 11 of the Agra Tenancy Act. (*Hopkins, S. M. and Fremantle, J. M.*) AJUDHIA PRASAD *v.* INDER.
L. R. 3 A. 8 (Rev.)

——**S. 11**—*Occupancy rights—Cultivator can acquire as against—Rent free grantee.*

A cultivator can acquire occupancy rights as against the rent free grantee from whom he holds. (*Hopkins, S. M. and Porter, J. M.*) LALLI *v.* BANKEY LAL.
L. R. 3 A. 321 (Rev.)

——**Ss. 11 and 13**—*Occupancy rights—Ejectment—Effect of.*

Where a land-holder ejected the father who was the recorded tenant of the disputed land and immediately gave a lease of it to the son, it is a question of fact in each case whether there was a real change of tenancy or only a change of name. The question depends upon whether the lessee had an individual capacity or was only one of a body of individuals forming a joint cultivating partnership, and whether land-holder knew that this was so. (*Hopkins, S. M. and Fremantle, J. M.*) MAHDI *v.* PANDIT MANNU LAL.
4 U. P. L. R. 12 (Rev.) : L. R. 3 A. 333 (Rev.).

——**S. 11**—*Occupancy tenancy—Contract.*

There is nothing in the Agra Ten. Act which prevents the land-holder from contracting with a tenant that the latter shall have the same rights as an occupancy tenant. (*Hopkins, S. M. and Fremantle, J.M.*) JALEHRI *v.* THE MANAGER, COURT OF WARDS, NANAK CHAND ESTATE. **L. R. 3 A. 335 (Rev.).**

——**S. 11**—*Accrual of occupancy rights—Tenant in possession—No agreement to take lease at the beginning of the cultivation—Effect of.*

A tenant was holding under a lease for 7 years given from faslis 1319 to 1325. But he had no agreement to take the lease when he started cultivation in the beginning of fasli 1319. In a suit to eject him brought in September 1911. *Held* that the lease did not prevent the accrual of occupancy rights as if it had not the effect of giving possession for 3 years. (*Pearson, J. M.*) BADRI NARAIN SINGH *v.* BISHNU PRASAD TIWARI. **L. R. 3 A. 412 (Rev.).**

——**S. 11**—*Joint tenants—Separation of holdings—Effect of.*

Where joint tenants cultivating their land jointly separate the holdings with the consent of the Zamindar, the tenant after the separation is a different person from the tenant before separation. (*Hopkins, S. M. and Fremantle, J.M.*) RAM BAHAL RAI *v.* MATA BADAL. **L. R. 3 A. 417 (Rev.).**

——**S. 11**—*Land-holder — Admission to share in occupancy tenancy.*

A land-holder can contract to admit a person to a share in an occupancy tenancy. (*Burn, S. M. and Pearson, J. M.*) KANTA PRASAD *v.* BAIJNATH SAHAI. **L. R. 3 A. 482 (Rev.)**

——**Ss. 11, 35**—*Occupancy rights—Acquisition by co-sharer.*

A co-sharer whose khudkhast land was allotted to another at partition as non-occupancy land cannot be considered a trespasser and is entitled to occupancy rights. (*Pearson, J. M.*) THAKUR RUDRAPAL SINGH *v.* RUSTAM SINGH. **L. R. 3 A. 529 (Rev.)**

——**Ss. 11 and 97**—*Unregistered lease does not bar occupancy rights.*

Where a lease is invalid for want of registration within four months it is inoperative as barring occupancy rights under S. 11 of the Tenancy Act. (*Hopkins, S. M. and Fremantle J. M.*) MOTI *v.* COLLECTOR OF COURT OF WARDS, BULANDSHAHR.
4 U. P. L. R. (B. R.) 102.

——**Ss. 11 and 157**—*Tenant of rent free grantee—Occupancy rights can be acquired by.*

A cultivator can acquire occupancy rights as against both the rent free grantee from whom he holds and the proprietor.

Under S. 157 a rent free grantee becomes a tenant from the date of the grant and he cannot under S. 11 (proviso) count towards the period, of the acquisition of the occupancy rights any term during which the land has been subject, or otherwise transferred in contravention of the provisions of Ss. 21 and 25. In case of conflict between the grantee and the actual cultivator as regards occupancy rights the claim of the latter shall prevail. (*Hopkins, S. M. and Porter, J. M.*) LAITI *v.* BANKEY LAL.
3 U. P. L. R. (B. R.) 12.

——**S. 11**—*Seven years' lease—Person relying on must produce document.*

A landholder relying on a 'seven years' lease' in barring the accrual of occupancy rights must produce it, and if he is allowed to rely on secondary evidence on the mere allegation that the lease is lost obviously the safeguards provided by law are largely nullified. (*Hopkins, S. M.*) HARBANS *v.* LEO ALEXANDER PUECH. **3 U. P. L. R. (B. R.) 31.**

——**S. 11**—*Lease for seven years—Security for 7 years not conveyed—Effect.*

A lease for 7 years with a condition that does not prevent the lessee from giving full security for 7 years is valid for the purpose of preventing accrual of occupancy rights under S. 11. (*Porter, J. M.*) MUKAND *v.* AHMAD SAID KHAN. **3 U. P. L. R. (B. R.) 35.**

——**S. 11**—*Occupancy tenant becoming usufructuary mortgagee—Reversion of original position after*

redemption—Period of usufructuary mortgage cannot be counted.

Where a tenant held the tenancy for a short time and then became a usufructuary mortgagee, but after redemption again reverted to the position of tenant.

Held, that the period during which he was such mortgagee cannot be counted towards accrual of occupancy rights in view of the word 'continuously' in S. 11. (*Ferard, S. M. and Harrison, J. M.*) ATMA RAM *v.* JODHA SINGH. **3 U. P. L. R (B. R.) 50.**

——S. 11—Proviso (a)—*Ejectment—Tenant continuing in possession—Delay in execution—Lease for 7 years.*

If occupancy rights have accrued, a subsequent execution of a lease does not destroy them. Where possession, in spite of formal ejectments, was continuous it is for the plaintiff, to show that the re-admission was in consequence of an agreement to hold under a registered lease for 7 years. (*Fremantle, S. M. and Burn, J. M.*) RAOTI *v.* RAJA SURAJ PAL SINGH. **L. R. 4 A. 116 (Rev.)**

——S. 11, Proviso (a)—*Lease for seven years—Provision for Zamindar taking leased land in exchange for other land—Acquisition of occupancy rights by tenant.*

Defendants were holding under a lease for seven years executed by the Zemindar. There was a condition in the lease that if the Zamindar took the whole or part of the land for his own purposes the lessee was to vacate the land and was to get other land instead, for the remaining term of the lease. *Held*, that the condition for dispossessing the tenant on giving other land in exchange was a disturbance to the tenant and therefore the seven years' lease did not prevent the acquisition of occupancy rights by the tenants. (*Fremantle, S. M. and Burn, J. M.*) PHULA SINGH *v.* RAJA BHAGAT CHAND. **L. R. 5 A. 249 (Rev.)**

——S. 11, Proviso (a)—*Lease for a term of seven years—No provision empowering Zamindar to shorten the term without the tenant's act or omission—Acquisition of occupancy rights.*

Where in a lease for seven years granted by a Zamindar in favour of a tenant there was no condition giving the Zamindar power to shorten the term of the lease without a definite act or omission on the part of the tenant. *Held*, that the lease did not bar the acquisition of occupancy right by the tenant. (*Fremantle, S. M. and Burn, J. M.*) MADHO PRASAD *v.* DALLU SINGH. **L. R. 5 A. 259 (Rev.)**

——Ss. 11 (a) and 95—*Kabuliyat—Seven years—Agreement to vacate—No provision for re-entry.*

Where there is a Kabuliyat for seven years and more, in the absence of a specific statement in the agreement that the tenant is liable on breach of such a condition to be ejected, the mere promise to vacate the land or the statement that the Zamindar may take it does not amount to a special contract rendering the tenant liable to be ejected within S. 57 (*c*) on the Agra Ten. Act. (*Fremantle, S. M. and Burn, J.M.*) DEBI *v.* NAWAB MD. ABDUL SAMAD KHAN. **L. R. 5 A. 372 (Rev.).**

——S. 11, Proviso (*a*)—*Tenant continuing in possession—Lease for 7 years does not take away rights.*

If occupancy rights have accrued, a subsequent execution of a lease does not destroy them. Where possession, in spite of formal ejectments, was continuous it is for the plaintiff to show that the re-admission was in consequence of an agreement to hold under a registered lease for 7 years. (*Fremantle, S. M. and Burn, J. M.*) RAOTI *v.* RAJA SURAJ PAL SINGH. **L. R. 4 A. 116 (Rev.).**

——S. 11 (a)—*Entry of tenant as holding under a lease—Occupancy rights—Bar of.*

The mere entry of a tenant as holding under a lease in the revenue papers is not sufficient evidence to prove the lease as a bar to the accrual of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) SH. JAN MAHOMED *v.* RAJA INDERJIT PARTAB. **L. R. 4 A. 408 (Rev.).**

——S. 11 (a)—*Lease for seven years—Period during which lease is to run—Evidence.*

Where under an agreement of a lease for seven years the tenancy commences from the beginning of the agricultural year but the formal execution and registration of the deed are delayed, the land would be deemed to have been held under a registered deed for the whole of that agricultural year. If the tenancy does not commence at the beginning of the agricultural year, a recital in a subsequent deed that the lease was to be operative from the beginning of the year would not make it so. (*Hopkins, S. M and Fremantle, J M.*) CHAJJO *v.* PANDIT RAJARAM. **4 U. P. L. R. 16 (Rev.): L. R. 3 A. 383 (Rev.): L. R. 2 A. 73 (Rev.).**

——S. 11 (a)—*Lease for 8 years—Power of re-entry on conditions—Tenancy from year to year—Ejectment of lessee.*

Where a lease for 8 years, provided for re-entry on non-payment of rent or if the landlord required the holding for his own cultivation, *held* it was not a lease for a term of not less than 7 years' within the meaning of S. 11 (a) of the Agra Tenancy Act, but only a lease from year to year. But this does not mean that the landlord can evict his lessee otherwise than according to the terms of the lease. (*Hopkins, S. M. and Fremantle, J. M.*) HIRA *v.* SYED ASKABI HUSAIN. **4 U. P. L. R. 18 (Rev.).**

——S. 12—*Grove land subsequently cultivated—Holder of grove cannot commence period until payment of rent.*

When land formerly occupied by grove becomes fit for cultivation and is cultivated the holder of grove cannot commence the period necessary to acquire occupancy rights until he begins to pay rent. Sel. Dec. 8 and 14, 1912 foll. (*Hopkins, S. M. and Fremantle, J. M.*) JALPA PRASAD *v.* THAKUR PRASAD. **L. R. 2 A. 65 (Rev.).**

——Ss. 13 and 95—*Decree for ejectment—Former delivery of possession is sufficient to destroy possession as tenant.*

Where in execution of a decree for ejectment formal possession of the property is delivered, it is sufficient to destroy the judgment-debtor's possession as a tenant. The tenant cannot after delivery of such possession maintain a suit under S. 95 of the Tenancy Act for a declaration of his occupancy right. (*Burn, J. M.*) FATEH SINGH *v.* PRAN SINGH. **L. R. 4 A. 59 (Rev.).**

——Ss. 13 and 73—*Acquisition of occupancy right—Continuous possession.*

A decree for ejectment was passed against a tenant on 27-1-1908 and executed on 11-8-1908. On 1-7-1909 the tenant was readmitted. *Held* that the tenant was out of possession for the whole year and was not readmitted within a year so as to obtain the benefit of S. 13 of the Act. (*Hopkins, S. M. and Fremantle, J. M.*) GAURI SHANKAR LAL *v.* CHANDAN AHIR. **L. R. 3 A. 60 (Rev.).**

——Ss. 13 and 58—*Joint-tenants—Ejectment—Lease to one of them—Effect of.*

Certain joint tenants were ejected from the holding and a lease was granted to one of them alone from the following year. On a question arising as to the acquisition of occupancy rights by the tenant. *Held*

that though there was no break in continuity, still the tenant having been changed he could not count his joint occupation with others as continuous holding within S. 13 of the Agra Ten. Act. (*Ferard, S. M. and Harrison, J. M.*) CHAUDHURI KARAN SINGH *v.* KALYAN SINGH. **L. R. 3 A. 294 (Rev.).**

——**S. 13**—*Lease to non-occupancy tenant—Non-cultivation—Effect of.*

Where a zemindar leased lands for 3 years in favour of a non-occupancy tenant who was his own relative and who neither took possession nor cultivated it, the lease is a nominal transaction and it cannot be allowed to override the provisions of the Ten. Act regarding the rights acquired by continuous occupation. (*Hopkins, S. M. and Fremantle, J. M.*) SHEO DAYAL KURMI *v.* THAKUR PRASAD PANDEY.

4 U. P. L. R. (B. R.) 57 : L. R. 3 A. 441 (Rev.).

——**S. 13**—*Possession should be regained within 6 months.*

S. 13 (a) does not mean that in the case of a tenant wrongfully dispossessed it is unnecessary that possession should be regained within six months. Lim. Act, S. 28 applies to such a case. (*Hopkins, S. M. and Porter, J. M.*) BHARAT SINGH CHANDARI *v.* SULAL. **L. R. 2 A. 1 (Rev.).**

——**S. 13**—*Land under water—Period can be counted.*

A tenant can count towards the acquisition of occupancy rights the years during which the land was under water, 1 U. D. 38 foll. (*Fremantle, J. M.*) KESHO PRASAD SINGH *v.* RAM CHARITAR RAI.

L.R. 2 A. 95 (Rev.).

——**S. 13**—*Occupancy rights once acquired not covered by section.*

The provisions of S. 13 do not apply to an occupancy right once acquired. ABDUL HAQ *v.* MUBARAK. **L. R. 2 A. 158 (Rev.).**

——**S. 14**—*Exchange.*

Where an adoption is proved and the father and son are cultivating together that would seem a good cause for holding that a genuine exchange had taken place. (*Burn, S. M. and Pearson, J. M.*) BHARTOO *v.* JAMBOO PRASAD. **L.R. 4 A. 15 (Rev.).**

——**Ss. 14 and 17**—*Exchange of occupancy holding—Applicability of the section—Burden of proof.*

Per *Pearson, J M.*—**S. 14 of** the Agra **Tenancy** Act lays down generally the principles on which land may be considered to have been received in exchange for other land, where a tenant has lost possession on agreement to take other land and has actually received such other land within the year. It applies to all tenants generally and not only to those dealt with under S. 11. S. 14 applies to exchange generally both before and after the acquisition of occupancy rights.

Per *Burn, J. M.*—If a landlord removes a tenant from a holding in which he has acquired occupancy rights and gives him a new holding in its place the *onus* lies on the landlord to show which part of the holding is given in exchange and which part constitutes a fresh tenancy. (*Burn, J.M. and Pearson, J.M.*) HARDON SINGH *v.* TODAR. **L. R. 4 A. 92 (Rev.).**

——**S. 14**—*Exchange—Determination of minimum area—Joint cultivation cannot be taken into account.*

The land which a tenant has cultivated jointly with others cannot be taken into account for the purpose of determining the minimum area received by him in exchange. (*Fremantle, S. M. and Burn, J. M.*) NAINOON *v.* MT. HAFIZUNNISSA. **L. R. 4 A. 290 (Rev.)**

——**S. 14**—*Exchange—Period of occupation.*

A tenant who was already in possession of certain plots was given certain other plots by the Zamindar.

Held, that it was immaterial whether the tenant

had surrendered the old plots or continued in possession of them, the question to be decided being whether he would be considered to have received the new plots in exchange. (*Fremantle, S. M. and Burn, J. M.*) BHAGELU *v.* PARSHOTAM DAS.

L.R. 4 A. 300 (Rev.).

——**Ss. 14, 10**—*Applicability—Grant of fresh holding—Burden of proof.*

S. 14 of the Agra Tenancy Act applies only to cases in which occupancy rights have not already been acquired. It does not apply to cases under S. 17 where the tenant has already acquired occupancy rights. If a landlord moves a tenant who has already acquired occupancy rights, the *onus* lies on him to show which part of the new holding is given in exchange and which part constitutes fresh tenancy. (*Fremantle, S. M.*) BHAYIA DURGA PD. SINGH *v.* JUMMAN MUSALMAN. **L.R. 4 All. 301 (Rev.).**

——**S. 14**—*Essentials—Tenant should not be out of possession for more than a year.*

The essential requisite under S. 14 of the Agra Tenancy Act is that the tenant should not be out of possession of the old lands for more than a year before getting the new. The tenant does not lose his right of exchange by reason of the overlapping of the period of the occupation of the two lands. An agreement of exchange could be implied from the conduct of the parties. (*Hopkins, S. M. and Burn, J. M.*) MULWA *v.* RAM-KISHUN. **L. R. 3 A. 100 (Rev.).**

——**S. 14**—*Exchange of holding—What constitutes.*

A tenant held a certain holding *A* up to 1315 Fasli. In 1316 Fasli according to the records he sub-let holding *A* to *T* and *N* and took another holding *B* from the landlord. In 1317 Fasli he relinquished holding *A* and retained holding *B* while *T* and *N* became tenants-in-chief in holding *A*.

Held, that the above transactions amounted to an exchange of land and there was an accrual of occupancy rights within S. 14 of the Tenancy Act. (*Hopkins, S. M.*) PANDIT KHEDPAL *v.* KHERGA.

L. R. 8 A. 434 (Rev.).

——**S. 14**—*Continuance of tenancy—Acquisition of occupancy rights.*

Some of the tenants defendants originally held one holding and the remainder a different holding. Later on a new holding was given to all of them.

Held, that the defendants could not be said to be holding in continuation of their former tenancy and they could not count the period of their prior holding towards the acquisition of occupancy rights. (*Burn, S. M. and Pearson, J. M.*) KRISHAN SINGH *v.* PATJA. **L. R. 3 A. 481 (Rev.).**

——**S. 14**—*Exchange.*

If field *A* ceases to be in the cultivation of a tenant and simultaneously field *B* comes into his possession it will be assumed that there has been an exchange by agreement :

If the tenant holds some land, not necessarily the same land, continuously for 12 years, S. 14 gives him occupancy rights. SHER SINGH *v.* ZAHARIA SINGH.

L R. 2 A. 146 (Rev.).

——**S. 14**—*Exchange, what amounts to—Continuous cultivation—Acquisition of occupancy rights.*

Where a person gives up cultivation of one holding and takes up another simultaneously it amounts to an exchange. If the admission to the new land precedes the surrender of the old, the requirements of S. 14 are satisfied. To acquire occupancy rights, the continuous cultivation need not be in respect of the same land. (*Hopkins, S. M. and Fremantle, J. M.*) SHER SINGH *v.* ZAHARIA SINGH. **4 U. P. L. R. (B.R.) 1.**

AGRA TENANCY ACT (II OF 1901), S. 14.

——S. 14—*Joint tenants—Acquisition of lease by one is no bar to acceptance of occupancy rights.*

Where two persons held lands as joint tenants and before the expiry of the period required for the acquisition of occupancy right one of them accepted a lease for less than 7 years from the landlord.

Held, (Per *Hopkins. S. M. and Fremantle, J. M dissenting*) that the lease was not binding on the other joint tenant and it was no bar to his acquisition of an occupancy right. (*Hopkins, S. M and Fremantle, J. M.*) SHEORAJ SAHU *v.* NAND KISHORE.

4 U. P. L. R. (B. R.) 3.

——S. 14—*Landlord and Tenant—Realisation of rent—Presumption—Exchange of lands.*

Where after exchange a person has been accepted as tenant by realisation of rent he has been admitted by the land-holder to the tenancy of the exchanged land. The test whether a land-holder wishes to get rid of the tenant or only to prevent his acquiring occupancy rights is that in the former case he must not readmit the tenant to occupation of the same or other lands within a year but must for that period let him have no land at all. (*Hopkins, S. M.*) MALIK MUHAMMAD RAFIQ ULLAH *v.* UAQIR.

3 U. P. L. R. (B. R.) 80.

——S. 14—*Undivided Patti—Exchange of land—No change of land-holder.*

The land-holder of an- undivided patti is the whole body of co-sharers and if there has been an exchange of land within the *patti* there is no change of land-holder. (*Hopkins, S. M.*) GHASI RAM *v.* KALWA.

3 U. P. L. R. (B. R.) 95.

——S. 14—*Widows when can add period of husband's occupation.*

Where there is nothing to show that a widow has directly succeeded to her husband's holding she cannot claim the benefit of S. 14 by adding up the period of her husband's occupation for the acquisition of occupancy rights. (*Harrison, J. M.*) DIPCHAND *v.* TOHFA. **60 I. C. 211 : 2 U. P. L. R. (B. R.) 86.**

——Ss. 14 (1) (d) and 58—"*Same land-holder*"—*Meaning of—Co-sharers of a patti or mahal—Private partition—Effect of.*

The defendant held during the years 1314 Fasli to 1321 Fasli a minimum area of 4 bighas, 8 biswas, 7 dhurs in a joint patti. Towards the end of 1321 Fasli the co-sharers in the patti arranged a private partition. Of the area held by the defendant, 1 bhiga, 8 biswas 9, dhurs fell into plaintiff's share. The remainder of the defendant's holding fell into the share of other co-sharers who took the land into their own cultivation or let it to other tenants. To make up for this in 1320 Fasli the plaintiff gave the defendant new plots of area which was 2 bighas, 4 biswas, 5 dhurs. The question arose whether the defendant was entitled to count this area as having been given him in exchange for that of which he was deprived by the other co-sharers. *Held*, that where the co-sharers of a joint patti had divided it so that the tenant's holding was split up and portions were allotted to different co-sharers in the patti, the land-holder before and after the partition should be considered to be the same for the purpose of S. 14.

The new plots were given at the beginning of 1322 Fasli by the plaintiff in lieu of the plots which the other co-sharers had taken away from the defendant and the plaintiff could not be considered "the same land-holder" under S. 14.

The term 'land-holder' is defined in the Act as 'the person to whom rent is payable' and it has been frequently held that in the case of private partition between co-sharers of an undivided mahal the co-sharer in whose share the tenant's holding lies is the person to whom rent is payable. Consequently he has authority to eject without joining other co-sharers.

Two co-sharers of a patti or mahal recorded as undivided who have made a private partition of the land among themselves cannot be regarded as the "same land-holder" for the purpose of S. 14. (*Fremantle, S. M. and Burn, J. M.*) BANSI CHAUDHURY *v.* AMIR CHAUDHURY. **L. R. 5 A. 81 (Rev.).**

——S. 14 (3)—*Interpretation of—Exchange of fields—Occupation of lands.*

S. 14 of the Agra Tenancy Act is difficult to apply when shufflings of holdings and fields goes on over a series of years. The only particable method and the one accepted by the Board of Revenue is to ascertain in which of the 12 years preceding the year in suit the land occupied by the tenant has been of lowest letting value and to take the holding of that year as the basis for determining an equivalent out of his present holding. This equivalent which has to be demarcated under S. 14 (3) is to be deemed the "Same land" under S. 14 (2) and he is entitled to occupancy rights in it. (*Ferard, S. M. and Harrison, J. M.*) MT DURGA KUAR *v.* BALDEO. **L. R. 3 A. 288 (Rev.).**

——S. 15—*Ejectment—Immediate re-admission—Break in tenancy—Rent Act.*

Under Act XII of 1881 an ejectment constituted a break in tenure even if the defendant was immediately re-admitted. (*Fremantle, S. M. and Brown, J. M.*) BALWANT SINGH *v.* HAFIZ KALLU.

L. R. 5 A. 18 (2) (Rev.).

——S. 17—*Acquisition of occupancy rights—Period, calculation of—Succession of sons—Record of names.*

The first tenant was *M.* in whose name the holding was recorded and he died in 1313 Fasli. From fasli 1313 the land was in the names of two of his three sons, the third being probably a minor. From 1320 Fasli, the holding was also recorded in the name of the third son. The evidence was clear to the effect that the sons had always cultivated together. *Held*, that the tenants were the same all through and they were entitled to occupancy rights. (*Fremantle, J. M.*) THAKUR SUJAN SINGH *v.* ISHRI.

L. R. 3 A. 400 (Rev.).

——S. 17—*Addition of Son's name is not evidence of change of tenancy.*

Where up to Fasli 1317 the father's name alone was entered and subsequently his son's name was also joined it is most unlikely that the addition of the son's name indicated any change of tenancy. (*Hopkins, S. M. and Fremantle, J. M.*) BIBI KULSUM UNNISSA *v.* NAWLA. **L. R. 3 A. 411 (Rev.).**

——S. 18—*Not exhaustive — Agreement — "Groveland."*

The methods provided by S. 18 of the Act for the extinction of an occupancy tenancy are not exhaustive, but such tenancy may be extinguished by agreement express or implied between the Zemindar and the tenant. Where a Zemindar gave permission to an occupancy tenant to plant trees, and the tenant planted trees and the land ceased to be agricultural. *Held*, that the land ceased to be an occupancy holding and became a "grove land."

The provisions of Ss. 18 and 83 of the Act are not exhaustive. They merely provide a right of surrender by a party to the tenancy against will of tne other. They do not destroy the right, by conduct or by consent, to determine the tenancy by the parties themselves. (*Walsh and Wallach, JJ.*) JALESAR SAHU *v.* RAJ MANGAL. **43 All. 606 : 63 I. C. 437 : 19 A. L. J. 606.**

AGRA TENANCY ACT (II OF 1901), S. 18.

——S. 18—*Payment of rent by sub-tenant directly to Zemindar does not extinguish tenancy.*

In the absence of proof that the occupancy rights of a tenant have been lost in one of the ways laid down in S. 18 of the Act *e. g.* by surrender, abandonment, etc. the mere payment of rent by the sub-tenants directly to the Zemindar does not extinguish the tenancy. Nor does a mere entry in the patwari's papers (which may have been collusive) that the sub-tenant was holding direct from the Zemindar annul the rights of the occupancy tenant. (*Hopkins, S. M. and Fremantle, J M.*) SITLU KOERI *v.* RAM SARUP UPADHIA. **L. R. 3 A. 158 (Rev.).**

——S. 18—*Tenant out of possession for a long time—Extinction of occupancy right.*

Notwithstanding the fact that a tenant has been out of possession of his occupancy holding for a period of 18 years, the tenancy would be presumed to continue in the absence of proof that it was extinguished in any of the ways specified in S. 18 of the Agra Ten. Act. (*Hopkins, S. M. and Fremantle, J. M.*) MT. SUGA KUNWAR SHAH *v.* MAHOMED HASAN.
L. R. 3 A. 255 (Rev.).

——S. 18 (a)—*Tenant's holding—Widow in possession—Surrender—Effect on rights of reversioners.*

A widow who has succeeded to the occupancy tenancy of her husband and therefore has only rights for her life is competent to relinquish the holding to the detriment of the reversioner's rights. (*Fremantle, S. M.*) RAM BHAROSA *v.* MD. ALI KHAN.
L. R. 5 A. 127 (Rev.).

——S. 18 (b)—*Ejectment of tenant does not necessarily extinguish mortgage created by him under express terms of lease.*

There is nothing in S. 18 of the Agra Tenancy Act to displace the general principle of law that where a tenant being expressly authorised by the terms of the lease to mortgage his land, does so, the extinction of the lease does not extinguish the mortgage unless the mortgagee has had an opportunity to prevent that extinction. Hence in such a case, when the tenant is ejected by order of a Revenue Court, it does not necessarily follow that the mortgage created by him also comes to an end. (*Sulaiman and Boys, JJ.*) BAHADUR *v.* RAJA MOTI CHAND. **88 I. C. 224 : 23 A. L. J. 409 : 47 All. 589 : L. R. 6 A. 133 (Rev.). : A. I. R. 1925 All. 580.**

——Ss. 19 and 22—*Lease before Act of* 1873—*Succession is guided by the terms of the lease.*

A tenant holding lands *naslam bad naslan* under a lease executed before the Act of 1873, is a non-occupancy tenant and succession to the tenancy is to be guided by the terms of the lease and not by S. 22 of the Act. (*Hopkins, S. M. and Fremantle, J. M.*) RAI BAHADUR MUNSHI RAVINANDAN *v.* RAGHUNATH SINGH. **4 U. P. L. R. (B. R.) 5.**

——S. 20—*Settlement between zamindar and the tenant regarding the incidents of the tenure cannot override the section.*

A fixed rate tenancy cannot be created by a contract with the zamindar; and any rights which can be granted by the zamindars must be consistent with the provisions of S. 20 of the Agra Tenancy Act, which forbid the sale of a holding in execution of decree of a Civil or Revenue Court, and also a voluntary transfer, except in favour of persons, who are co-sharers in the tenancy. The interest of a *thekadar* is not permitted by law to be transferable. *A* was the tenant of a certain holding from which the zamindars sought to eject him. A settlement was subsequently arrived at between him on the one hand and the zamindars on the other, whereby the latter granted a lease in perpetuity to him of the same holding, giving the lessee heritable and transferable rights. Some time after this lease was executed, *A* made a possessory mortgage of the holding in favour of the predecessor-in-title of the plaintiffs.

Held: that the mortgage was void even as against the zamindars who had succeeded to the interest of the mortgagor, *A*. 28 All. 747 Foll. (*Kanhaiya Lal, J.*) MEER QURBAN *v.* SHAIKH MAJID HUSAIN.
23 A. L. J. 115: 82 I. C. 289: A. I. R. 1925 All. 63.

——S. 20—*Equity of redemption—Gift of, is not invalid.*

A deed of gift which does not purport to transfer any ex-proprietary rights in mortgaged property but which merely purports to transfer the equity of redemption held by the donors in the property cannot be regarded as invalid. (*Lindsay and Kanhaiya Lal, JJ.*) KUNWAR NIHAL SINGH *v.* CHANDU KUNWAR.
47 All. 424: 23 A. L. J. 201: 86 I. C. 741: A. I. R. 1925 All. 358.

——S. 20—*Land-holder and tenant, if can contract out of the provisions of the section.*

There is nothing in the Tenancy Act to prevent a Zemindar and tenant contracting themselves out of the provisions of section 20 of the Act. Where therefore a Zemindar and tenant entered into an agreement whereby the tenant was given the right to transfer his holding:

Held, that the agreement was valid and enforcible against the Zemindar in spite of the provisions of section 20, Agra Tenancy Act. (*Fremantle, S. M. and Burn, J.M.*) SUKHNANDAN *v.* JUGAL KISHORE.
L. R. 6 A. 221 (Rev.)

——S. 20—*Transfer by will—Occupancy holding.*

Transfer in S. 20 does not include a will and an occupancy tenant cannot regulate succession to his tenancy by making a will. (*Neave, J.*) KALLU *v.* GANGA RAM. **L. R. 5 A. 179 (Rev.): A I R. 1924 All. 508.**

——Ss. 20, 31—*Resumption on death—Mortgagee from tenant—Rights of.*

Where an occupancy tenant dies without heirs and the landlords resume the holding they can do so subject to rights created by the tenant. If the tenant has created a mortgage, which has not been challenged within the time allowed by law, the landlords can get possession on paying the money due under the mortgage. (*Kanhaiya Lal, J.*) RAJRANGISINGH *v.* SHEO BARAT. **78 I. C. 531: A. I. R. 1924 All. 841.**

——S. 20—*Mortgage void—Personal covenant.*

Where a usufructuary mortgage is void of an occupancy holding a personal covenant to that effect is also unenforceable. (*Lindsay and Stuart, JJ.*) HAR PRASAD *v.* SHEO GOBIND. **20 A. L. J. 318: 67 I. C. 793: 44 A. 486: A. I. R. 1922 All. 134.**

——Ss. 20 and 79—*Occupancy tenant—Transferee—Position of—Possessory right—Ejectment.*

The transferee from an occupancy tenant has no title to the land but he has a possessory title good against all the world except the Zemindars. Consequently a person who is not a member of the Zemindari body cannot forcibly oust the transferee without incurring a liability to pay damages. (*Gokul Prasad, J.*) RAMESHWAR DUBE *v.* SHEO HARAKH DUBE.
66 I. C. 529 : 4 U. P. L. R. (A.) 87 : A. I. R. 1922 A. 277.

——S. 20—*Occupancy holding—Sale of in execution is not valid.*

A court is precluded under S. 20 of the Act from decreeing a sale of an occupancy holding and a judgment-debtor is entitled to object to it even in execution proceedings. A Court executing a decree, has no

AGRA TENANCY ACT (II OF 1901), S. 20.

jurisdiction to order such a sale. (*Banerjee, Rafique and Ryves, JJ.*) KATWARI *v.* SITA RAM.
43 All. 547: 3 U. P. L. R (A.) 99: 63 I. C. 264 (2): 19 A. L. J. 473.

——S. 20—*Occupancy holding—Mortgage—Estoppel.*

No mortgage of either occupancy or non-occupancy rights can be valid in view of S. 20, Agra Tenancy Act. Courts will not help such a mortgagee to recover his money but on the other hand they will not permit him to deny a transaction which he has entered into. (*Burn, J. M.*) CHAUDHURI KUNDAN LAI *v.* JAI SINGH. **L. R. 4 A. 342 (Rev.).**

—— S. 20—*Sir—Mortgage under old Act—Transfer of proprietary right under New Tenancy Act—Mortgagee if entitled to possession—Fixation of rent—Exproprietary rights.*

Where a proprietor executed a mortgage of his sir plots before the passing of the Tenancy Act and transferred his proprietary rights after the Act had come into force. *Held*, that until the mortgage was redeemed the mortgagee was entitled to remain in possession of the plots. The vendor was not entitled to actual possession of the exproprietary tenancy as against the vendee or to a record as an exproprietor. Neither the vendor nor the vendee could claim fixation of rent or record of rent agreed upon privately between them. The proper entry was to record the plots as the former sir of the vendor mortgaged to the mortgagee. (*Hopkins, S. M. and Porter, J. M.*) RAM SUNDAR RAI *v.* JANG BAHADUR RAI. **L. R. 2 A. 13 (Rev.)**

—— S. 20 (2)—*Joint tenants—Division of shares—One co-sharer transferring his share to the other—Transfer, legality of.*

Where the co-sharers in a tenancy divided off their shares and one of the sharers voluntarily transferred his share to the other:

Held, that the case was covered by section 20 (2) of the Tenancy Act and the transfer was perfectly legal. (*Fremantle, S. M. and Burn, J. M.*) SUKHNANDAN *v.* JUGAL KISHORE. **L. R. 6 A. 221 (Rev.).**

—— S. 20 (3)—*Appointment of receiver in execution proceedings against* thekadar, *to collect latter's arrears of rent and utilise them for satisfying decree is legal.*

In execution of a decree passed against a *thekadar* a receiver was appointed to collect rents recoverable by the *thekadar* from occupancy and non-occupancy tenants, and to utilise them in satisfying the decree against the *Thekadar*.

Held: that the appointment of the receiver did not amount to the transfer of the property from the judgment-debtor to the receiver and hence was not illegal. (*Mukerji and Dalal, JJ.*) KIRTARATH GIR *v.* MUTHARA PRASAD RAM. **81 I. C. 741: 46 A. 924: A. I. R. 1925 All. 72.**

——S. 20 (3)—*Express condition in lease makes lease transferable.*

S. 20, Sub-clause (3) of the Tenancy Act implies that if under the express condition of the lease the right is made transferable, the lease would be transferable. (*Sulaiman and Boys, JJ.*) BAHADUR *v.* RAJU MOTI CHAND. **88 I. C. 224: 23 A. L. J. 409: 47 All. 589: A. I. R. 1925 All. 580.**

——S. 20 (3)—*Thekadar's interest is heritable.*

Unless the terms of the lease provide otherwise the interest of a *thekadar* is heritable within the meaning of S. 20 (3). (*Hopkins, S. M. and Harrison, J.M.*) MT. CHUNNA *v.* KUAR ASGHAR HUSSAIN. **3 U. P. L. R. (B. R.) 96 (1).**

——S. 21—*Occupancy holding — Mortgage — Validity—Receipt of rent by mortgagor—Resumption.*

AGRA TENANCY ACT (II OF 1901), S. 22—Construction.

The mortgage of an occupancy holding is illegal and the mortgagee gets no rights thereunder. Where the mortgagor in such case receives rent from his lessee, it amounts in law to resumption of the holding. (*Banerjee, A. C. J. and Piggott, J.*) ATA HUSSAIN *v.* RAMMAN LAL. **78 I. C. 539: A. I. R. 1924 All. 719.**

——S. 22.

Chelas.
Collaterals.
Construction.
Daughter's son.
Illegitimate sons.
Interest of widow.
Sharing in cultivation—Meaning.
Sons and grandsons.
Miscellaneous.

Chelas

——S. 22—*Chelas—Sir land—Succession is governed by Hindu Law and chelas can succeed.*

S. 22 of the Tenancy Act makes special provision for succession to tenancies. Before the Act was passed succession to tenancies was governed by Hindu Law and if there were no such provision as S. 22 it would be still governed by Hindu Law. There is certainly no ground for thinking that S. 22 can apply to succession to sir rights. This must still be governed by Hindu Law and chelas therefore succeed to sir rights as they do to Zamindari rights. (*Fremantle, S. M.*) DEBI *v.* ABDUL KHALIQ. **L. R. 4 A. 210 (Rev.).**

Collaterals.

——S. 22—*Collaterals—Succession— Collaterals cannot succeed.*

Distant collaterals cannot succeed under S. 22, Agra Tenancy Act; nor can the nearer collaterals who did not share in the cultivation. (*Fremantle, S. M. and Burn, J. M.*) LALJI RAI *v.* BINDESHAR RAI. **L. R. 4 A. 181 (Rev.)**

——Ss. 22 and 83—*Collaterals—Relinquishment—Collateral's right of succession.*

Where one of a deceased tenant relinquishes the occupancy holding, it puts an end to the collaterals' right of succession even though they might have shared in cultivation with the tenant in his lifetime. (*Burn, J. M.*) HANUMAN PD. NARAIN SINGH *v.* RAMKHELAWAN. **L. R. 3 A. 489 (Rev.)**

——S. 22—*Collateral—Grandfather's brother's son—Guardian as co-sharer.*

Grandfather's brother's son can succeed under S. 22 (*e*) as he is a collateral under the section.

The question whether the guardian of a minor shared in his cultivation depends on whether the agricultural stock of the guardian of the minor were pooled and the cultivation of the two holdings carried on jointly. (*Fremantle, J. M.*) CHUNNI LAL *v.* SAMPAT. **3 U. P. L. R. (B. R.) 77.**

Construction.

—— S. 22—*Construction—Retrospective effect—N. W. P. Rent (XII of 1881), S. 9—Occupancy tenant—Succession to holding after tenant's death—Reversioners' claim to succeed before present Tenancy Act—Jointness in cultivation, necessity of.*

Where the question was whether in the case of a Hindu occupancy tenant who had died before the present Tenancy Act, [Agra Tenancy Act II of 1901] came into force succession was to be governed under the new Tenancy Act or by Hindu Law proper, or by the Rent Act [II of 1881.] *Held*: that the present Tenancy Act had no restrospective effect so as to affect a succession to the holding of such a tenant. As the succession opened out to the estate of the ori

ginal tenant when the Rent Act of 1881 was in force, it was governed by Hindu Law as modified by S. 9 of that Act and a collateral [reversioner] was not entitled to inherit his property unless he was joint in cultivation with him [1916] 14 A. L. J. R. 127. Distinguished. (*Ryves, and Gokul Prasad, JJ.*) BECHU SINGH *v.* BALDEO SINGH. **44 All. 327 : 20 A. L. J. 165 : 65 I. C. 507 : L.R. 3 A. 93 (Rev.) : 4 U. P. L. R. (A.) 12 : A. I. R. 1922 All. 84.**

——S. 22—*Construction—Interest in part of a holding—Section applies.*

S. 22 governs the devolution of interest of an occupancy tenant in part of a holding. 16 A L. J. 459 not foll. (*Piggot and Walsh JJ.*) MUTASADDI LAL *v.* DAYA SHANKAR. **L. R. 2 A. 3 (Rev.).**

——S. 22—*Construction— Joint holding—Devolution.*

The devolution of interest of an occupancy tenant of a joint holding is governed by S. 22 and his successors-in-interest cannot redeem a mortgage effected by him of his interest in the property. (*Piggott and Walsh, JJ.*) MUTASADDI LAL *v.* DAYA SHANKAR. **2 U. P. L. R. (All.) 417 : 62 I. C. 103 : L. R. 2 A. 3.**

——S. 22—*Construction— Succession under a lease executed before Act XVIII of 1873—Section does not apply.*

Succession to tenancies under a lease executed before Act XVIII of 1873 came into force shall be governed by the terms of the lease and S. 22 does not apply. MUNSHI RAVINAND *v.* RAGHUNATH SINGH. **L. R. 2 A. 177 (Rev.).**

——S. 22—*Construction— Admission of a non tenant is not a transfer of right.*

Mere admission by the successor of an occupancy tenant of a person who is not a tenant to a share in cultivation cannot transfer to the latter any right in the tenancy. (*Hopkins, S. M. and Porter, J. M.*) SHREE KRISHNA DATTA DUBE *v.* JOGESHWAR UPADHIA. **60 I. C. 250 : 2 U. P. L. R. (B. R.) 92.**

Daughter's son.

——S. 22—*Daughter's son—Sharing in cultivation—Meaning of.*

Where a tenant has more than one holding and his daughter's son claims to succeed as being a sharer in cultivation, it is enough if the daughter's son proves that he was sharing in the management of the cultivation generally. It is not necessary that he should have shared in the actual cultivation of each and every parcel of land to entitle him to succeed. (*Hopkins, S.M.*) VINDHYA CHAL PRASAD RAI *v.* UDIT AHIR. **L. R. 3 A. 53 (Rev.).**

——S. 22—*Daughter's son is not an heir.*

The interest of a tenant does not devolve upon a daughter's son who did not share in the cultivation with the deceased tenant, such a daughter's son is not in the category of heirs at all. Sub-S. (*d*) of S. 22 is meant to define one of the classes of heirs upon whom the interest of the deceased tenant devolves. The words in it can thus mean only "a daughter's son who shared in the cultivation with the deceased," and the words in sub-S. (*e*) "failing such daughter's son" can only mean "failing heirs of the class mentioned in the preceding sub section. (*Hopkins, S. M. and Burn, J. M.*) CHHOTEY LAL *v.* DURGA PRASAD. **L. R. 3 A. 353 (Rev.).**

——S. 22—*Daughter's son cannot succeed to maternal grandfather on ground of father as sharing in cultivation.*

To hold that a daughter's son can succeed to the holding of his maternal grandfather of his father or

his mother who shared with the latter's cultivation at the time of his death is to give an entirely unwarranted extension to the provisions of S. 22. DATA PRASAD *v.* BIBI KANIZ FATIMA. **L.R. 2 A. 210 (Rev.).**

Illegitimate sons.

——S. 22—*Illegitimate sons of Sudras can succeed.*

An illegitimate son of a Kayastha, who is a sudra, can succeed under S. 22 of the Agra Ten. Act. (*Fremantle, S. M. and Burn, J. M.*) BAIJ NATH PRASAD *v.* GUR PRASAD. **L. R. 4 A. 141 (Rev.)**

Interest of widow.

——S. 22—*Interest of widow—'Devolve', meaning of in case of widow.*

A widow who succeeds to an occupancy holding on the death of her husband may not have anything more than a life-interest therein, but she would be an occupancy tenant for the time being and the succession would open out on her death to the heirs of the last male-holder and would go to the persons entitled under S. 22 of the Agra Tenancy Act II of 1901 and then in existence, provided that, if those persons are the daughter's sons or collateral male relatives in the male line of descent, they must be co-sharers in the cultivation of the holding at the time when the last occupant died. Case-law discussed. (*Kanhaiyalal, J.*) BHAWANI BHIKH *v.* SIDH NARAIN. **70 I. C. 820 : A. I. R. 1923 All. 18.**

——S. 22—*Interest of widow—Tenancy Act of 1859, S.6—Occupancy right, nature of—Occupancy holding, succession to.*

The next reversioner of a widow brought a suit to recover possession of a certain occupancy holding from one Mangal Singh who held the gift of those holdings from the widow, on the allegation that the widow had no right to make the gift. On the question whether the widow got the holding from her deceased husband, who died before the Act of 1873, under ordinary rules of Hindu law of inheritance, or had acquired in her own right, the right of occupancy. *Held* the right of occupancy first created by the Act of 1859 was neither transferable nor heritable. The widow acquired the occupancy right in her own right and the succession to her would be governed by S. 22 of the Tenancy Act 1901. (*Gokul Prasad and Stuart, JJ.*) MANPAL SINGH *v.* RAJ PARTAB SINGH. **44 All. 376 : 20 A. L. J. 181 : 65 I. C. 824 : L. R. 3 A 66 (Rev) : A. I. R. 1922 All. 31 (2).**

——S. 22—*Interest of widow—Cultivation by tenant—Death of tenant—Continuation of cultivation by widow—Remarriage entails forfeiture.*

A tenant died after holding certain land for 10 years. His widow afterwards continued to hold the land for two years more and then remarried. *Held*, that the widow had acquired occupancy rights, not in her own right but as an heir to her deceased husband and consequently she forfeited them on her remarriage. (*Fremantle, S. M. and Burn, J. M.*) MT. NAWAB SULTAN *v.* MT. KISHEN DEI. **L. R. 4 A. 259 (Rev.).**

——S. 22—*Interest of widow—Hindu widow—Succession to occupancy holdings—Succession of brother of deceased on death of widow.*

A Hindu widow was in possession of her deceased husband's occupancy holding from before 1901 and she died after the Agra Ten. Act came into force. On a question arising as to the succession to the holding. *Held*, that the brother of the deceased male owner was entitled to succeed under S. 22 (*c*) of the Act though he was not a sharer in cultivation with his brother at the time of his death. (*Ferard, S. M. and*

Hopkins, J. M.) BUDHOO *v.* SAT DEO TEWARI.
L. R. 3 A. 285 (Rev.).

———S. 22—*Interest of widow—Hindu widow—Surrender extinguishes occupancy holding.*

Where a Hindu widow who has succeeded to an occupancy holding of which her deceased husband was the sole occupancy tenant, surrenders the holding under S. 18 (*c*) of the Agra Ten. Act, the occupancy right is extinguished thereby. (*Ferard, S. M. and Harrison, J. M.*) GOVIND PANDEY *v.* DIPA KOERI.
L.R. 3 A. 291 (Rev.).

———Ss. 22 and 58—*Interest of widow—Mahomedan widow—Succession to occupancy holding—Remarriage—No forfeiture.*

Where a Mahomedan widow succeeded to the occupancy holding of her deceased husband before the Agra Ten. Act (1901) was passed and remarried after that Act came into force, she does not forfeit rights on remarriage under S. 22 of the Agra Ten. Act. (*Hopkins, S. M. and Porter, J. M.*) MUSST. MARIAM *v.* KANWAL NARAIN. **L.R. 3 A. 311 (Rev.).**

Sharing in Cultivation.

———S. 22—*Co-sharing in cultivation—Minor and guardian.*

Where a guardian and a minor shared in the profits and loss of a holding, this amounts to co-sharing within the meaning of S. 22. (*Fremantle, S. M.*) RANJIT SINGH *v.* YUSUF CHAUDHURI.
L.R. 5 A. 46 (Rev.).

———S. 22—*Sharing in cultivation—What constitutes.*

Where the brothers, though separate, come together for cultivation and pooled their agricultural stock, it amounts to sharing in cultivation. (*Fremantle, S.M.*) HANUMAN PRASAD *v.* SHAMSHER
L. R. 5 A. 229 (Rev.).

———S. 22—*Sharing in cultivation—Succession of collaterals—Co-sharing with widow, is not sufficient.*

Co-sharing with widow who has only a life tenure is not sufficient for purposes of S. 22 of the Tenancy Act. Joint living and cultivation with the last male owner must be proved before collaterals can claim the holding. (*Fremantle, S. M. and Burn, J. M.*) KOLHU BARAI *a.* SITAL CHAUBE. **L. R. 4 A. 234 (Rev.).**

———S. 22—*Sharing in cultivation—Guardian or agent in possession is not a sharer in cultivation.*

Where a collateral of an absconding occupancy tenant of the suit land had cultivated the entire holding as sub-tenant or *quabi* at the time of the presumed death of the absconder, the collateral could not inherit the tenancy in the absence of proof that he was the nearest collateral. Moreover it could not be said that he shared in cultivation with the deceased. A person who manages cultivation on behalf of another whether as agent guardian, or in any other representative capacity cannot be said to share in cultivation by reason of such management. (*Hopkins, S. M. and Fremantle, J. M.*) SHYAM SUNDAR MALI *v.* SITAL SINGH. **4 U.P.L.R. (B.R.) 51 : L.R. 3 A. 359 (Rev.).**

———S. 22—*Sharing in cultivation through agent is not enough.*

Co-sharing in cultivation through an agent could not be accepted for the purposes of S. 22 of the Agra. Ten. Act. (*Pearson, J. M.*) RAM KISHORE SHUKLA *v.* SHAIK MD. HABIBULLAH. **L.R. 3 A. 408 (Rev.).**

———S. 22—*Sharing in cultivation—Help in cultivation during illness is not—Co-sharing in cultivation.*

Held that might be rendered in cultivation during the last illness of the tenant does not amount to sharing in cultivation.

In the case of persons having separate holdings stronger proof would be necessary to prove sharing in cultivation than in the case of persons who were not separate previously. (*Hopkins, S. M.*) HAROA *v.* M. PAIGAMBAR BAKHSH.
3 U. P. L. R. (B. R.) 85 (1).

Sons and Grandsons.

———S. 22—*Sons and Grandsons.*

Sons and grandsons of a deceased tenant have equal rights to the entry of their names in place of the deceased tenant. (*Hopkins, J. M. and Fremantle, S. M.*) PRAG *v.* KUNAJI. **3 U. P. L. R. (B. R) 78.**

Miscellaneous.

———S. 22—*Succession to tenancy—Tenancy in possession of mortgagee at the time of tenant's death—Prospective heir of the tenant can be said to share in cultivation.*

Although where, when the mortgagor dies, the land constituting the holding is held by the mortgagee, the next heir of the mortgagor at the date of his death can be said to have been sharing in the cultivation of the holding. (*Mukerji, J.*) LALLU SINGH *v.* RAGHUNANDAN. **A. I. R. 1925 All. 794.**

———S. 22—*Mortgage of property by female absolute owner—Mortgage is valid and husband's heirs cannot oust mortgagee after her death.*

Plaintiff sought recovery of possession as the usufructuary mortgagee of certain plots mortgaged to him under a deed executed in 1914, by a Hindu widow who was the absolute owner of the property mortgaged. She put the plaintiff into possession, and he remained in possession for six years. On the lady's death, the defendants, her heirs, being the nearest reversioners of her late husband, succeeded in ejecting the plaintiff.

Held, that plaintiff was entitled to recovery of possession. *Held*, further that ex-proprietary tenancy in favour of the lady did not necessarily come into existence from the date of the mortgage but if it did, it was certainly surrendered by her to the only person who could be treated as the land-holder that is, the plaintiff mortgagee, and if any ex-proprietary tenancy did continue up to the date of her death, it certainly did not devolve on the defendants. 1924 All. 737 Foll. (*Mears, C. J. and Piggott, J.*) RAM PRASAD SINGH *v.* NEPAL SINGH. **23 A. L. J. 368 : 88 I. C. 290 : 47 All. 600 : A. I. R. 1925 All. 420.**

———S. 22—*Inheritance— Daughter's sons and collaterals.*

Under the Agra Tenancy Act, a daughter's son or a collateral can only inherit if he shared in the cultivation of the holding at the time of the tenant's death. (*Gokul Prasad, J.*) SHAIKH SATYAD HUSSAIN *v.* SHAIKH WALI MUHAMMAD. **73 I. C. 1030 (2) : L R. 5 A. (Rev.) 21 : A.I.R. 1923 All. 451.**

———S. 22—*Succession of Widow.*

A widow who succeeds to an occupancy holding on the death of her husband may not have anything more than a life-interest therein ; but she would be an occupancy tenant for the time being and the succession would open out on her death to the heirs of the last male holder and would go to the persons entitled under S. 22 of the Agra Tenancy Act and then in existence, provided that if those persons are the daughter's sons or collateral male relatives in the male line of descent, they must be co-sharers in the cultivation of the holding at the time when the last occupant died. Case law discussed. (*Kanhaiya Lal, J.*) BHAWANI BHIKH *v* SIDH NARAIN.
70 I. C. 820 : A. I. R. 1923 All. 18.

———S. 22—*Death of occupancy tenant before Act*

—Succession by widow—Reversioners, when can succeed —Law governing—Hindu Law modified by N. W. P. Rent Act, S. 9.

An occupancy tenant died before the Agra Tenancy Act of 1901 came into force and was succeeded by his widow. She died after the Act, and the reversioners claimed to succeed: *Held*, succession must be governed by Hindu Law as modified by the N. W. P. Rent Act S. 9 and they could succeed only if they cultivated jointly with the deceased tenant. (*Ryves and Gokul Prasad, JJ.*) BECHU SINGH *v.* BALDEO SINGH.

20 A. L. J. 165 : 4 U. P. L. R. (A) 12 : 44 A. 327 : 65 I. C. 507: L. R. 3 A. 93 : A. I. R. 1922 All. 84.

——**S. 22**—*Acquisition of occupancy rights by widow—Succession—Occupancy rights if transferable and heritable.*

Under the Act X of 1859 the right of occupancy tenancy was neither transferable nor heritable and came to an end on the death of the tenant if it took place before the passing of Act XVIII of 1873. If the tenant's widow remained in possession in such case, she acquires the rights of an occupancy tenant by twelve years adverse possession. If the widow having acquired a title by prescription dies after the coming into operation of the Agra Tenancy Act, the succession to the holding is governed by S. 22 of the Act. 7 W. R. 528, 13 B. L. R. 274, Ref. (*Gokul Prasad and Stuart, JJ.*) MANPAL SINGH *v.* RAJ PARTAB SINGH. **L. R. 3 A. 66 : 44 All. 376 : 65 I. C. 824 : 20 A. L. J. 181 : A. I. R. 1922 All. 31 (2).**

——**S. 22**—*Partition among tenants—Female tenant allotted some fields —Status of tenant—Co-sharing in the fields—Effect of.*

Under a deed of private partition among themselves the tenants gave some plots to their sister-in-law. After this the defendant was admitted by the tenants to share in the cultivation of the plots in their possession. *Held*, that the temporary and private arrangement among the tenants having been made for their mutual convenience all the co-sharers continued to be tenants of the entire holding. On the death of the sister-in-law the plots that had been assigned to her reverted to the surviving co-sharers of the holding. 3 U. D. 419, Foll. The defendant, having as nearest collateral, co-shared in the cultivation of the holding to which the fields assigned to the sister-in-law were to revert after her death, his right as collateral must be deemed to extend to the whole holding. He had therefore occupancy rights on all the fields. (*Fremantle, S. M.*) RAM DAYAL *v.* GOPAL.

L. R. 5 A. 121 (Rev.).

——**S. 22**—*Death of occupancy tenant—Succession by widow—Death of widow—Rights of daughter.*

An occupancy tenant died while the Rent Act of 1881 was in force and was succeeded by his widow. In the subsequent settlement his daughter's name was added as occupancy tenant. The widow died after Act II of 1901 came into force. *Held*, that the occupancy right of the widow could not descend to the daughter, that the right of occupancy was extinguished at the widow's death, and the fact that the daughter had been recorded with her mother as occupancy tenant of the land in suit and that the Zamindar realized the share of the rents from her did not operate to give her an occupancy right. The entry at the settlement proceedings did not constitute an admission on the part of the Zamindar of her occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) SHEIKH MAHOMED SALIM *v.* MT. MAKTULA KUARI.

L. R. 5 A. 232 (Rev.).

——**S. 22**—*Succession—Personal law—Applicability of—Co-disciple of deceased tenant—Distant collateral—Preference.*

Co-disciples of a deceased tenant cannot exclude as nearest collaterals a more distant collateral who has shared in the cultivation of the deceased. Where S. 22 is not directly contrary to the Hindu law, it should be read along with the personal law of the parties. (*Fremantle, S. M.*) SABHU SINGH *v.* KHANZADA SINGH. **L. R. 5 A. 256 (Rev.).**

——**S. 22**—*Co-widows—Sale of proprietary right —Exproprietary tenancy—Survivorship.*

Where on the death of a Hindu tenant his two widows sold their proprietary rights and became exproprietary tenants in the *sir*, the widows acquired exproprietary tenure in their own rights and not as heirs of their husband. The widows must be deemed to have been joint tenants in the ex-proprietary tenure and on the death of one her interest would pass by survivorship to the other. (*Hopkins, S. M. and Burn, J. M.*) RAGHUBAR DAYAL *v.* GANGA SAHAI.

L. R. 3 A. 61 (Rev.).

——**S. 22**—*Occupancy tenancy— Devolution—Joint holding.*

The devolution of interest of an occupancy tenant of a joint holding is governed by S. 22 and his successors-in-interest cannot redeem a mortgage effected by him of his interest in the property. (*Piggott and Walsh, JJ.*) MUTASADDI LAL *v.* DAYA SHANKAR.

2 U. P. L R. (All.) 417 : 62 I. C. 103 : L. R. 2 A. 3.

——**Ss. 23 to 30**—Thekadars *are tenants.*

Thekadars are tenants for the purpose of applying the provisions of the Tenancy Act and the provisions of Ss. 23 to 30 regarding the right of sub-leasing are applicable to them. 6 A. L. J. 649, Ref. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI.

74 I. C. 971 : L. R. 5 A. 28 (Rev.). : A. I. R. 1923 All. 560.

——**Ss. 24 and 28, 58**—*Scope of—Suit in ejectment—Maintainability—Sub-lease from a non-occupancy tenant.*

Where a sub-lease was granted by a female non-occupancy tenant in her own right the Zamindar filed an ejectment suit against the sub-lessees after her death, which was opposed by the lessees. *Held*, the sub-tenant is liable to be ejected, on the ground, that under S. 58 of the Act, a non-occupancy tenant or sub-tenant is liable to be ejected before 12 years, and the contention that under S. 28, the Zamindar is bound by the leases granted by the tenant-in-chief, during his lifetime would mean a serious invasion of his rights. *Held* further, the provision in S. 28 which preserved sub-leases after the interest of the tenant-in-chief has been extinguished is subject to the proviso in S. 24, *viz.*, a tenant by sub-letting cannot be relieved from any of his liabilities to the land-holder. A non-occupancy tenant cannot make a valid transfer of interest exceeding those which he has himself. (*Fremantle, S. M. and Burn, J. M.*) MURLIDAR *v.* JABBU LAL AND OTHERS. **L. R. 5 A. 297 (Rev.).**

——**S. 25**—*Sub-lease in violation of is not enforceable.*

All agreements which are contrary to the law are void and unenforceable and no party to such an agreement can obtain any relief from the Courts. (*Lindsay, J.*) DHARMAN *v.* SUKHI. **73 I. C. 981 : L. R. 5 A. (Rev.) 31 : A. I. R. 1923 All. 453.**

——**S. 25**—*Lease—Provision for re-entry on—Non-payment of rent—Effect of.*

A condition in a lease providing for re-entry on failure to pay rent is inconsistent with the Act. (*Burn, J. M.*) GHUREY *v.* SEWA RAM. **L.R. 5 A. 125 (Rev).**

——**S. 25**—*Exproprietary holding lease or mortgage—Term of 5 years.*

AGRA TENANCY ACT (II OF 1901), S. 25.

An expropriatory tenant executed a lease of the holding for 5 years at Rs. 120 rental per year. It was stipulated that Rs. 48 should be paid out of the rental to the Zamindar and the balance was to be adjusted towards a debt due by the lessor under a document of even date, *Held*, that the transaction was a lease for 5 years and not opposed to S. 25. (*Fremantle, S.M.*) LAKHAR SINGH *v.* DAMMAR SINGH.
L. R. 5 A. 161 (Rev.).

——S. 25—*Sub-lease for more than 5 years—Rights of parties.*

The legality of the letting of an occupancy holding for more than 5 years does not affect a suit between the occupancy tenant and his *Shikmi*. It is a matter solely between the occupancy tenant and the zemindar. (*Fremantle, S. M. and Burn, J. M.*) RAGHUNANDAN *v.* SARJU PRASAD. **L. R. 4 A. 340 (Rev.).**

——S. 25—*Sub-lease—Five years—Bond for entire rent—Construction.*

Plffs. sued to eject certain occupancy tenants together with their sub-tenants on the ground of illegal sub-letting. It was found that the occupancy tenant executed a bond for Rs. 600 in favour of a certain person and on the following day executed a sub-lease of the holding to his son for a period of 5 years with an annual rental of 190 during the period. *Held*, that the sub-lease did not come within S. 25 of the Agra Ten. Act and that the tenant was liable to ejectment. (*Burn, S. M. and Pearson, J. M.*) BHUDEO *v.* MEGH SINGH. **L. R. 3 A. 505 (Rev.).**

——S. 25 (4)—*Occupancy tenancy held by males females and minors—Sub-letting is illegal.*

The exception under R. 25 (4) of the Agra Ten. Act does not apply where an occupancy tenancy held by one adult male member and certain minors and females was sub-let in the life-time of the minors and females and was again sub-let after their death but within 2 years of the former sub-letting. The sub-lease is therefore illegal. (*Fremantle, J. M.*) AJUDHIA *v.* CHANDI PRASAD. **L. R. 3 A. 83 (Rev.).**

——S. 25 (4)—*Expropriatory tenancy—Joint holding by female and males—Ejectment.*

An expropriatory tenancy was held by a female along with three males. It was sub-let for more than five years by them. *Held*, that the tenants were liable to ejectment and that the exception under S. 25 (4) of the Act did not apply. (*Lovett, S. M. and Ferard, J. M.*) CHHAB NATH *v.* DEBI PERSHAD.
L. R. 3 A. 272 (Rev.).

——S. 28—*Sub-letting by sir holder—Section does not apply.*

S 28 of the Tenancy Act applies only to cases of sub-letting by a tenant and not to cases of sub-letting by a Sir holder. Where the sub-tenants had accepted the expropriatory tenant as their land holder and had paid rent to him and not to the zemindar they could not deny that the relation of land-holder and tenant existed. (*Hopkins, S. M and Burn, J. M.*) SUNDAR LAL *v.* JEORAKHAN. **L. R. 3 A. 44 (Rev.).**

——S. 28—*Sub-lease by tenant—Death of tenant—Zemindar's rights.*

An occupancy right is not a permanent right adhering to the land. When the family, in which it is created comes to an end without legal heirs the right disappears altogether and therefore a sub-lease granted by the occupancy tenant becomes unenforceable for the simple reason that there is no one left against whom it can be enforced. To hold otherwise would be to offend against the principle of law that persons with limited interests cannot make valid transfers of interest exceeding those which they have themselves. (*Burn, S. M. and Pearson, J. M.*) SYED ABBAS ALI *v.* ADHAR SINGH. **L. R. 3 A. 501 (Rev.).**

AGRA TENANCY ACT (II OF 1901), S. 32 (2).

——S. 28—*Sub-lessee of expropriatory tenant—Extinction of expropriatory right—Sub-lessee becomes lessee of land-holders—Period towards creation of occupancy right begins after the expiry of the lease.*

A sub-lessee of an expropriatory tenant for a term becomes the lessee of the land-holder after the extinction of the expropriatory right for the unexpired term.

The period counting towards the occupancy right does not begin to run until after the expiry of the term of the lease. NANHE KHAN *v.* HAZARI LAL.
L. R. 2 A. 185 (Rev.).

——S. 31—*Inaction of landlord in getting a sub-lease declared void—Effect.*

A land-holder might accept and recognize a transfer but if he wishes to repudiate it he must do so at an early date and bring his suit within one year of the transfer. Where the landlord was found to be the sub-tenant of a transferee under an invalid lease from the expropriatory tenant, he is liable to be ejected at the instance of the expropriatory tenant. (*Gokul Prasad, J.*) MAKHAN LAL *v.* DEBI PRASAD.
A. I. R. 1923 All. 401 (2).

——Ss. 31, 25 and 57 (d)—*Applies to Sub-lease in contravention of Act.*

S. 31 of the Agra Tenancy Act applies not only to written leases but even to sub-letting in contravention of the Act. The word sub-lease is the correlative of 'sub-let' in S. 25 and a sub-letting may be oral or written. The entry in Sch. IV regarding suits under S. 31 (2) covers suits under S. 57 (*d*). (*Fremantle, S. M.*) KUAR JANG BAHADUR SINGH *v.* NOHAR KOERI. **L. R. 4 A. 182 (Rev.).**

——S. 31 (2)—*Illegal sub-letting—Suit for ejectment of a tenant must be brought within one year.*

It is not the law that a suit for ejectment of a tenant on the ground of illegal sub-letting can be brought at any time during the continuance of the sub-letting. Such a suit must be brought within one year from the date on which the illegal sub-lease was made. When there are several acts of illegal sub-letting, a fresh cause of action will arise in respect of each successive act. (*Hopkins, S. M. and Porter, J. M.*) BHARAT INDU *v.* MULTAN KHAN.
L. R. 3 A. 329 (Rev.).

——S. 32—*One sharer kept out of possession by co-tenants—Suit by him for profits or damages is not barred.*

S. 32 bars a suit for partition of a holding. It does not bar the maintenance of a suit for damages or profits where one of the parties entitled to a holding is kept out of possession by his co-tenants. 31 All. 348 (F. B.), Appl. (*Mukerji, J.*) MUNSHI RAM *v.* BHAGWANT. **A. I. R. 1925 All. 697.**

——S. 32—*Applicability.*

S. 32, Agra Tenancy Act, does not apply to a suit to recover a fractional share in a holding against a person in lawful possession. (*Daniels, J.*) RAM KISHAN RAI *v.* SHEO SAGAR PANDEY. **73 I. C. 462 : A. I. R. 1924 All. 304.**

——S. 32—*Suit for ejectment—All co-sharers not parties—Suit cannot be dismissed.*

A genuine division of a holding, though it may not bind the Zemindar, may confer on a co-sharer right to collect rents and a suit by him in ejectment cannot be dismissed merely because all the co-sharers have not been joined. (*Fremantle, S. M.*) SYED JAWAD HUSAIN KHAN *v.* RAGHUNATH SINGH.
L. R. 4 A. 195 (Rev.).

——S. 32 (2)—*Suit for possession of specific plots, against co-tenants is not barred when the holding has been divided among themselves. But such suit*

does not lie against landlord.

When once co-tenants are in separate possession of separate plots out of the holding and one of the co-tenants is dispossessed, he is entitled to sue for specific possession of the plots from which he is dispossessed so long as the suit is instituted against the co-tenants and not the landlord. Such possession does not in any way interfere with the rights of the landlord—33 All 143 Foll. 29 All. 66. 30 All. 90, 31 All. 348. Dist. (*Dalal, J.*) GHASI *v.* MT. BHARTO. **80 I. C. 941 : A. I. R. 1925 All. 53.**

——**S. 34**—*Ejectment suit not—Failure to plead S. 34 is fatal—Person in occupation without land-holder's consent can be ejected.*

Omission to plead specifically S. 34 of Agra Tenancy Act in a suit for ejectment is not necessarily fatal to suit. A person occupying land without the land-holder's consent can be ejected as a non-occupancy tenant. (*Daniels, J.*) IQBAL AHMAD *v.* SURAJ BALI. **82 I. C. 651 : A. I. R. 1925 All. 210.**

——**Ss. 34 and 199**—*Defendant can have question of proprietary right referred to Civil Court.*

In a suit for ejectment under S. 34 the defendant can ask to have the question of proprietary right referred to a Civil Court under S. 199. (*Daniels, J.*) IQBAL AHMAD *v.* SURAJ BALI. **82 I. C. 651 : A. I. R. 1925 All- 210.**

——**S. 34**—*Suit against person who came into occupation with consent of landlord—Section does not apply.*

S. 34 refers to suits brought against persons whose occupation began without the landlord's consent and not to a suit in which it is found that the defendant was initially in occupation with landlord's consent. 35 All. 123 and 8 A. L. J. 1087 Ref. (*Kanhaiya Lal, J.*) MATA DIN *v.* ANAND MADHO. **A. I. R 1925 All. 812.**

——**S. 34**—*Applicability to vendees of equity of redemption subject to mortgage of proprietary right.*

Where the transfer of redemption subject to a usufructuary mortgage of the proprietary interest was made behind the back of the original mortgagees, S. 34 was held to be applicable for the recovery of arrears of rent from vendees of equity of redemption. (*Ryves and Daniels, JJ.*) GULAB SINGH *v.* SHIB LAL. **21 A. L. J 331 : L. R. 4 A. 206 (Rev.) : 74 I. C. 286 : A. I. R. 1923 All. 347.**

——**S. 34**—*Suit for rent under—When tenable.*

A Thekadar of a village from the Zemindar sued the defendant for rent under S. 34 of the Agra Tenancy Act. Agreement for payment of rent had never been made between the parties; nor was ever any rent formally got assessed by any Court *Held*, that the suit was not tenable. 8 A. L. J. R. 1087 Ref. (*Ryves, J.*) MANNU LAL *v.* BABU RAM. **A. I. R. 1923 All. 402.**

——**S. 34**—*Person in possession for more than 12 years.*

Under S. 34 of the Tenancy Act a person who has cultivated land without the consent of the land-holder becomes a tenant when the land-holder chooses to acknowledge him to be so, either by suing for rent or by suing for ejectment. It is at the option of the landlord to treat such a person either as a trespasser and sue him in the civil courts or as a person liable to pay rent and sue him in the Revenue Courts, but until the landlord has exercised this option such a person cannot be considered to be a tenant. (*Gokul Prasad, J.*) TARIF *v.* ASA RAM. **73 I. C. 212 : A. I. R. 1923 All. 419.**

——**Ss. 34 and 177**—*Proprietary title pleaded—Appeal lies to District Court.*

Where in a suit in ejectment, the defendant sets up a proprietary title within S. 177 (*e*) of the Agra Tenancy Act, an appeal lies to the District Court. (*Daniels, J.*) NAUJADIK RAI *v.* RAM JATAN RAI. **73 I. C. 584 (1) : L. R. 5 A. 14 (Rev.) : A. I. R. 1923 All. 558.**

——**Ss. 34 and 177**—*Order of remand—No appeal lies.*

No appeal lies to the High Court from an order of remand passed by the District Judge in an appeal under the provisions of the Agra Tenancy Act from the Court of the Assistant Collector. (*Piggott and Walsh, JJ.*) JAI PRASAD *v.* DALSINGAR. **60 I. C. 991 : 19 A. L. J. 146.**

——**S. 34**—*Ejectment suit—Want of consent—Proof of.*

Where the plaintiff has sued under S. 34 he must show that the defendant had entered on the land without his consent. (*Fremantle, S. M. and Burn, J. M.*) PIRTHI *v.* BHAGWAN DAS. **L. R 5 A. 223 (Rev.).**

——**S. 34**—*Unrented land—Entry in settlement record—Consent of Zemindar.*

An entry of a plot as unrented in the settlement papers, even if attestation takes place, is insufficient to constitute an admission of consent by the Zemindar. (*Fremantle, S. M. and Burn, J. M.*) GULZARI *v.* NAWAB SYED MOHAMMAD ALI HUSSAIN KHAN. **L. R. 5 A. 246 (Rev.).**

——**S. 34**—*Decision regarding defendant's status—Whether constitutes* res judicata *in a subsequent suit for ejectment.*

In a suit under S. 34 of the Agra. Ten. Act by the plaintiffs alleging that the defendant had occupied the land without their express consent, and the latter pleaded acquisition of occupancy rights by succession and the Judge decided that defendant had not succeeded to occupancy rights. *Held*, in a subsequent suit for ejectment, against the same defendant, that the finding of the Judge as to his status in the previous suit was an essential part of the judgment and operated as *res judicata* against the defendant. (*Fremantle, S. M. and Burn, J. M.*) SYED ALI MUSI RAZU AND OTHERS *v.* JUKHI SINGH AND OTHERS. **L. R. 5 A. 300 (Rev.).**

——**S. 34**—*Suit for profits—Amount claimed as rent—Subsequent suit for ejectment under S. 34—Whether plaintiff estopped.*

In a suit for profits a decree was passed awarding a certain sum on account of the renr of a particular plot to the plaintiffs. Subsequently he brought an ejectment suit under S. 34 of the Agra Tenancy Act on the plea that there was no contract of tenancy. The defendants claimed occupancy rights.

Held, that the plaintiff was estopped from arguing that the recovery in the profits suit could not be considered as evidence of taking rent. (*Burn, J. M.*) RADHEY LAL AND OTHERS *v.* PARAMPAT. **L. R. 5 A. 311 (Rev.).**

——**S. 34**—*Ejectment—Encroachment by tenant—Fixed rate holding.*

Area added by encroachment to lands under a fixed rate holding can only be regarded as land held without the consent of the Zemindar and the tenant is liable to ejectment therefrom. (*Fremantle, S. M. and Burn, J. M.*) NAWAB MD. ABDUL MAJID *v.* BHAGWATI SINGH. **L. R. 4 A. 189 (Rev.).**

——**S. 34**—*Sub-tenant—Zamindar—Ejectment.*

The Zemindar could not be allowed to get rid of the sub-tenant by means of a nominal ejectment of the tenant in chief.

The proper remedy of the zemindar was to proceed against the sub-tenant under S. 34 of the Tenancy

Act. (*Fremantle, S. M.*) RAGHUBIR PRASAD *v.* RAMJIAWAN. **L. R. 4 A. 212 (Rev.).**

——S. 34—*Squatter—Cultivation to the knowledge of zemindar—No presumption of consent—Treating squatter as tenant—Prior cultivation cannot be availed of, for occupancy rights.*

Where a person squats up on a piece of land and holds it without the consent of the zemindar for a long period, the mere fact that the latter had knowledge of it cannot imply or raise a legal presumption of consent within the meaning of S. 34, Agra Tenancy Act. Even when the zemindar chooses to treat such a squatter as a tenant, the latter cannot under S. 34 count his previous occupation towards the accrual of occupancy rights. (*Hopkins, S. M. and Fremantle, J.M.*) RUDRA PARTAB NARAIN SINGH *v.* PARTAP NARAIN. **L. R. 3 A. 6 (Rev.).**

——S. 34—*Proprietary title—Dispute as to—Jurisdiction—Civil and Revenue Court.*

S. 34 was not meant to authorise the Revenue Courts to enquire precisely into questions of disputed title and to decide questions of a civil nature between persons who are *bona fide* claimants to the same land. The section does not apply to cases in which the evidence of long standing adverse possession is considerable. Where therefore in a case before deciding to whom the proprietary right belonged the court would have to decide two difficult questions, first, whether in the particular circumstances of the case any part of the land in suit came by gradual accretion or otherwise and secondly, whether any or all the plots in dispute have been held in adverse proprietary possession by the appellant or respondent. *Held*, that the matter was one for the decision by a Civil Court. (*Fremantle, J. M.*) RAJA SRI PRAKASH SINGH *v.* SURAJ PRASAD. **L. R. 3 A. 137 (Rev.) : 4 U. P L. R. (B. R.) 75.**

——S. 34—*Ejectment—Non-occupancy tenancy for a long period is no defence.*

The mere fact that defendant had been recorded as an occupancy tenant of 22 years' standing without payment of rent does not constitute a valid defence to a suit for ejectment by the Zemindar on the ground that he was holding without consent. (*Hopkins, S.M. and Fremantle, J. M*) GOPAL LALJI *v.* GAYA, **L. R. 3 A. 157 (Rev.).**

——S. 34—*Grove—Tenant's right to cut down—Ejectment by Zemindar.*

No length of occupation on the part of a tenant who has cut down a grove prevents the land-holder from suing him under S. 34 of the Act and ejecting him if he so desires. (*Hopkins, S. M. and Fremantle, J. M.*) MAHARAJAH OF BENARES *v.* RAM SUNDAR UPADHIYA. **L. R. 3 A. 160 (Rev.).**

——Ss. 34 and 58—*Cultivation of land—Knowledge of Zemindar—Rights of cultivator.*

Defendants had held and cultivated for over 40 years certain plots of land without the consent (though probably with the knowledge) of the Zemindar and had paid no rent for the plots. *Held* that mere knowledge on the part of the Zamindar did not imply or raise a presumption of his consent within the meaning of S. 34 of the Agra Ten. Act. It is open to the Zemindar to withold his consent as long as he pleases and when he chooses to treat the cultivator as a tenant, he cannot count his previous occupation towards the accrual of occupancy rights. (*Ferard, S. M. and Harrison, J. M.*) THAKUR MURLIDAR SINGH *v.* GYSAI RAM. **L. R. 3 A. 295 (Rev.).**

——S. 34—*Person holding a grove and cultivating the land after trees are cut down, can be treated as a tenant and ejected.*

Under S. 34 the land-holder can treat the holder of a grove who cultivates it after the trees have been cut down without making any agreement with the Zemindar as a tenant and thus eject him but until he is so treated he is a trespasser.

When land has been occupied without agreement and held without consent though with the knowledge of the Zamindar for many years the latter can hold the occupier as a tenant and eject him. (*Fremantle, J. M.*) BISHANDHARI *v.* SAGAR RAI. **L. R. 2 A. 36 (Rev.).**

——S. 34—*Order of remand passed by Dist. Judge not appealable to High Court.*

No appeal lies to the High Court from an order of remand passed by Dist. Judge in an appeal preferred to his Court under the provisions of Agra Ten. Act from the Court of Asst. Collector and the fact that the original suit was brought under the special provisions of S. 34 makes no difference. 28 A. 88 Foll. (*Piggott and Walsh, JJ.*) JAI PRASAD GANESH *v.* DALSINGAR. **L. R. 2 A. 55 (Rev.).**

——S. 34—*Land taken possession of may be cultivated or allowed to remain fallow.*

S. 34 applies to any person in possession of land whether the land is cultivated or not unless his conduct shows that he is setting up either a claim of adverse possession against the proprietor or some other *bona fide* claim against the land-holder whether proprietor or tenant involving a question of a civil nature. SHEO PUJAREY LAL *v.* AUGHAR. **L. R 2 A. 156 (Rev.).**

——S. 34—*Suit for redemption.*

Where the plaintiff (mortgagor of a share) sued for redemption without showing when he reported the redemption of the mortgage, the suit is not maintainable. (*Burn, J. M.*) SOBHA *v.* DAYAL. **4 U. P. L. R. (B. R.) 46.**

——S. 34—*Suit to eject trespasser as tenant.*

Where the landlord treats a trespasser as tenant and sues to eject him, he can do so and S. 34 applies. (*Ferard, S. M. and Harrison, J. M.*) RAM SARAN *v.* TULSHI. **60 I. C. 238 : 2 U. P L. R. (B. R.) 90.**

——S. 35—*Rate of rent—Variation in, can only be by registered agreement.*

The rent originally payable was a grain rent. In fasli 1317 one of the land-holders induced the tenant to pay a cash rent. There was however no registered agreement or decree or order of Court embodying the variation.

Held that notwithstanding the payment of cash rent for a number of years, the rent payable remained as it was before fasli 1317 under the provisions of S. 35 of the Agra Ten. Act. The presumption mentioned in that section can only be rebutted by proof of a registered agreement, decree or order. It is not rebutted by the fact that land-holders and tenants or some of them have actually received and paid rent differing in amount or kind from the rent previously payable. (*Ferard, S. M. and Hopkins, J. M*) HARDWARI *v.* SURAJBHAN. **L. R. 3 A. 279 (Rev.).**

——S. 36—*Suit by grove-holder—Wrongful appropriation of fruits—Suit lies in Civil Court.*

The plaintiff was a grove-holder and the defendant the Zemindar. The suit was brought on the allegation that the defendant being entitled to one-fourth of the fruits of the grove had wrongfully appropriated one half of the fruits. The suit was filed in the Small Cause Court claiming the value of the fruits wrongfully appropriated. The defence was that the suit was cognizable only by the Revenue Court being a suit contemplated by S. 36 of the Tenancy Act and that, therefore, the jurisdiction of the Civil Court was ousted by S. 167 of the same Act. *Held*, that the inten-

tion of the framers of the Tenancy Act was to include such a case as the present within the jurisdiction of the Civil Court, and if S. 36, as framed, does not cover it, it is merely because the possibility of such a case was not thought of at that time when the section was drafted. (*Daniels, J.*) RAJA RABI PRATAB NARAIN SINGH *v.* MAHANTH RAM PRASAD **45 A. 725 : 21 A. L. J. 646 : 74 I. C. 502 : L. R. 4 A. 331 : A. I. R. 1924 All. 125.**

——**S. 36**—*Applicability—Section does not apply to suit for recovery of value of fruits—Exact—Meaning of.*

A suit for recovering the value of the fruits of a grove misappropriated by the land-holder does not fall under S 36. Agra Ten. Act, and is cognisable by a Small Cause Court. The word 'exact' does not cover the direct appropriation of produce on the spot. (*Daniels, J.*) RAJARABI PRATAB NARAIN SINGH *v.* MAHANT RAM PRASAD. **L. R. 4 All. 331 (Rev.) : 45 All. 725 : 21 A. L. J. 646 : L. R. 4 A. (Rev.) 331 : A. I. R. 1924 All. 125.**

——**S. 36**—*Usufructuary mortgage of* sir—*Not given to mortgagee—Contract to pay interest in case possession not delivered is enforceable.*

Where the ex-proprietary tenant executed a usufructuary mortgage of his *sir* lands knowing full well that the mortgagee could not be given possession over the lands and agreed to pay rent if no possession were given and the mortgagee could not have his name mutated and failed to have rents assessed. *Held*, even though a mortgagee of *sir* land fails to have the rent assessed, he is entitled to have interest at the contract rate. (*Ryves, J.*) JANKI RAM *v.* MISRI LAL. **71 I. C. 382: A. I. R. 1923 All. 377.**

——**S. 36** — *Ex-proprietary rights — Date of accrual.*

Ex-proprietary rights arise from the date of the sale. The Collector's order under S. 36 merely specifies the land in which such right has arisen. Moreover under S. 36 (2) rent becomes payable from the date the ex-proprietary tenancy arose that is, the land becomes 'tenant' land and not *sir* from that date. (*Hopkins, S. M.*) RAM DEVA MISRA *v.* LILA HAJJAM. **3 U. P. L. R. (B. R.) 94 (1).**

——**S. 39**—*Enhancement decree—No mention as to date from which enhancement to take effect—Enhancement takes effect from date of decree.*

Where an appellate Court modifies a decree for enhancement passed by the first Court but does not direct that the enhancement should take effect from any earlier date this enhancement takes effect from the date of the appellate decree. COLLECTOR OF GHAZIPUR *v.* JAGADAMBHA SINGH. **L. R. 2 A. 179 (Rev.).**

——**S. 40**—*Entry must be made on basis of possession—Question can be re-opened on basis of title.*

S. 40 shows that where a certain person is in possession the entry must be made on the basis of possession and the question can be re-opened upon the basis of title in either a Civil or Revenue Court. (*Stuart, J.*) LALMAN *v.* FAZAL MUHOMED KHAN. **L. R. 5 A. Rev. 132 : 78 I. C. 115 : A. I. R. 1925 All. 200.**

——**Ss. 41 and 97**—*Entry of enhanced rent in Khatauni with signatures of landlord, one of the tenants, quanungo—Whether amounts to agreement to pay enhanced rent.*

The mere entry of a figure in the Khatauni with the signatures of the landlord, the tenant, and quanungo cannot be regarded as an agreement to enhance rent duly attested under the provisions of Ss. 41 and 97 of the Tenancy Act. (*Neave, J.*) RAM PRASAD *v.* RAJJAN. **82 I. C. 332 : L. R. 5 A. 316 (Rev.) : A. I. R. 1925 All. 123 (1).**

——**Ss. 41 and 95**—*Oral agreement for enhancement of rent is not enforceable.*

A claim for enhanced rent under an oral agreement or unregistered deed cannot be enforced in a revenue court. 23 I. C. 417, Ref. (*Stuart, J.*) PRAG NARAIN *v.* ANGAD. **70 I. C. 495 : L. R. 3 A. 132 ; A. I. R. 1922 All. 55 (2).**

——**S. 43**—*Exemplar land—Non-occupancy land if can be taken.*

It is doubtful whether, according to the wording of the Agra Ten. Act, it is legitimate to take into consideration the land which was not recorded as occupancy but if the enhancement is only 25 per cent. and the average rate of the new rent falls at Rs. 3-8-per bigha while the average rate paid by non-occupancy in Kharka is Rs. 6-5-11, there is no case for revision. (*Fremantle, J. M.* HARNANDON *v.* PARMADH PRASAD. **4 U. P. L. R. (B. R.) 45 : L. R. 3 A. 406.**

——**Ss. 43 and 44**—*Enhancement of rent—Basis of assessment—Exemplar area.*

Circle rates may be applied by a Settlement Officer enhancing rents during settlement under S. 87 (*b*)(ii) of the Land Rev. Act but not by an Assistant Collector trying a suit for enhancement under the Tenancy Act. The Assistant Collector must examine exemplars of his own selection and should not limit himself to those filed by the applicant. The Assistant Collector has no legal authority to fix rent at settlement rents. (*Hopkins, S. M. and Fremantle, J. M.*) RAM SWAROOP UDEY RAM. **4 U. P. L. R. (B. R.) 90.**

——**S. 43**—*Enhancement of rent—Suit by thekadar—Compromise with mukararidars no bar.*

In a suit for enhancement of rent brought by a *thekadar* from the Maharaja of Benares, a compromise giving up all rights to enhance rent entered into between the tenants and certain mukararidars who had not been authorized to enhance rents cannot be pleaded as a bar. (*Porter, J. M.*) HANUMAN *v.* NARAIN PRASAD. **4 U. P. L. R. 20 (Rev.).**

——**S. 43. cl. (1) (b)**—*Enhancement of rent—Rise in prices—Competition rates.*

In cases of enhancement of rent it is advisable to check the general conclusion as to the effect of rise in prices by competition rates but the comparison must be limited to economic holdings only. (*Pearson, S. M.*) SAHU PARSHOTTAM DAS *v.* RAGHUNANDAN BHAT. **L. R. 4 A. 48 (Rev.).**

——**S. 47**—*Enhancement of rent—Compromise decree—Registration.*

A compromise decree for enhancement of rent requires registration under S. 47, Agra Tenancy Act. (*Neave, J.*) SANTU *v.* ABHAINANDAN PRASAD. **L. R. 5 A. 292 (Rev.) : 81 I. C. 297 · A. I. R. 1925 All. 32.**

——**S. 47**—*Agreement to pay higher rent—Right to eject.*

It is not illegal for a zemindar to realise more than the rent formerly payable if the tenant pays it willingly.

Where however there is an undertaking to let him remain in possession for 5 years and on the basis of that a higher rent was agreed to the zemindar is estopped from ejecting him till the expiry of such period. (*Fremantle, S. M.*) BISHAMBAR SINGH *v.* SAHIB ALI. **L. R. 4 All. 363 (Rev.).**

——**S. 47**—*Agreement to pay enhanced rent unregistered cannot be pleaded in an ejectment suit.*

An agreement to pay enhanced rent not registered as required by S. 47 is invalid and cannot be pleaded

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in an ejectment suit. (*Ferard S. M. and Harrison, J. M.*) BHAGWATI MISIR *v.* JHALAI CHAMMER.
2 U. P. L. R. (B. R.) 94: 60 I. C. 260 : L. R. 1 A. 115. (Rev.).

——— S. 47-A—*Record of Rights—Preparation of—Slips supplied to tenants are not instruments of agreement.*

The preparation of a Record of Rights is not equivalent to execution of an instrument within the meaning of S. 47 (a) of the Agra Ten. Act. During the record operations, which are a preliminary part of settlement proceedings, slips containing extracts from the record are supplied to tenants who are then called on to attest these. It is a stretch of language to describe such a slip as an instrument evidencing an agreement between a land-holder and a tenant such as is contemplated by S. 47. The oral agreement proved by the settlement records is not sufficient to protect the tenant under S. 47. (*Burn, J. M.*) RAM SARUP *v.* AJODHIYA PRASAD. **L. R. 4 A. 151 (Rev.).**

——— S. 51—*Goverment revenue—Remission*—Biswadaran Sahiq *are entitled to benefit.*

The *biswadaran sahiq* of a village were in possession of their holdings and they were allowed to collect rent from the tenants of those holdings subject to payment of a certain rent to the proprietor 21 days before the Government revenue fell due, and there was a remission of Government revenue for a certain year. *Held*, that the *biswadaran sahiq* had a right to the benefit of the remission according to justice, equity and good conscience as according to S. 51 of the Act they were not entitled to collect any rent from the tenants from whom they used to collect rents before the remission was granted. (*Lindsay and Kanhaiya Lal, JJ.*) NATHA *v.* GOBIND RAM. **64 I. C. 153 : 19 A. L. J. 681.**

——— S. 52—*Suit under—Commutation of rent—Necessity for previous notification.*

A suit under S. 52 of the Agra Tenancy Act does not lie unless a notification as laid down in the opening words of that section has been made by the Local Government. (*Hopkins, S. M.*) MT. DEVI *v.* NANWA. **L. R. 3 A. 432 (Rev.).**

——— S. 56—*Ejectment of sub-tenant — Revenue Court.*

Where an occupancy tenant under a compromise of a suit in a Civil Court sub-let a portion of his holding to another person for a fixed rent, the latter is a tenant within the meaning of S. 56 of the Agra Ten. Act and she could be ejected only in accordance with that Act. (*Stuart, J.*) RAM GAJADHAR *v.* MT. SURTANI **71 I. C. 381 : A. I. R. 1923 All. 343.**

——— S. 57—*Occupancy holding—Lands in several villages—Suit for rent—If to be separate.*

Where the lands constituting one occupancy holding are situate in several villages, separate suits for rent should be filed with respect to the lands in the several villages. (*Stuart, J.*) BHUP NARAIN RAI *v.* SRI THAKUR RADHA. **78 I. C. 277 : L. R. 5. A. 211 (Rev.) : A. I. R. 1925 All. 193.**

——— S. 57—*Settlement entry of land as* sir—*Correctness can be questioned.*

Where land has been recorded as *sir* at the last settlement and has been continuously so recorded since, the correctness of the entry of the land as *sir* at the settlement is under S. 57, Act III of 1901, open to disproof. (*Stuart, J.*) LALMAN *v.* FAZAL. **L. R. 5 A. Rev. 132 : 78 I. C. 115 : A. I. R. 1925 All. 200.**

——— S. 57—*Occupancy tenant—Conversion of holding into grove—Ejectment.*

An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so, the land-holder has got the power to eject him for doing an act detrimental to the purpose for which the land was let. But that power can be exercised only within one year from the date of the conversion. (*Kanhaiya Lal, J.*) MAN SINGH *v.* MADHO SINGH. **22 A. L. J. 70 : L. R. 5 A. 34 (Rev.) : 79 I. C. 599 : A. I. R. 1924 All. 430.**

——— Ss. 57, 63 (a)—*Alienation by Hindu widow—Reversioners cannot institute ejectment suit.*

A Hindu widow's estate is not a life estate and it is not an estate held in trust for reversioners. She represents the estate and has power to make alienations subject to the right of reversioners to have those alienations set aside if they are found to be either not for legal necessity or not for the benefit of the estate. They do not cease to be operative. A reversioner therefore cannot institute a suit for ejectment in the Revenue Court without setting aside the alienation. (*Stuart, J.*) KANDHYA *v.* MT. BAJKUNWAR. **75 I. C. 681 (2) : A. I. R. 1923 All. 367 (2).**

——— Ss. 57 and 59—*Notice—Ejectment—Costs—Interest accruing after notice—Liability to pay.*

In proceedings under Ss. 57 and 59 of the Agra Ten. Act the notice should not require the judgment-debtor to pay the costs of ejectment or the interest accruing after the notice. Where therefore the judgment-debtor paid the full amount of the decree but not the interest and costs as aforesaid, an order directing ejectment of the judgment-debtor is *ultra vires*. (*Hopkins, S. M. and Fremantle, J. M.*) PRESHADI *v.* RAMJAS MAL. **L. R. 3 A. 258 (Rev).**

——— Ss. 57 and 59—*Arrears of rent—Failure to pay decree amount does not entail forfeiture.*

Ejectment on the ground that a decree for arrears of rent remains unsatisfied under Ss. 57 (*a*) and 59 of the Tenancy Act is not a step in execution of the decree for arrears. It is an enforcement of the forfeiture of the tenancy of the holding on the ground of breach of one of the conditions on which the tenancy is held, *viz.*, the punctual and complete payment of the rent of the holding. Under the Tenancy Act the grounds of forfeiture are those set in S. 57. The collection of sums payable under Act VIII of 1873 may be made in the same way as the collection of rents payable under the Tenancy Act; but the law nowhere provides that failure to pay such sums when decreed involves forfeiture of the holding. (*Hopkins, S. M. and Burn, J. M.*) KUNDAN SINGH *v.* KARAN SINGH. **L. R. 3 A. 345 (Rev).**

——— S. 57—*Construction of building on a portion of the land—Tenant can be ejected only from that portion.*

Where a tenant constructs a building on a part of the holding he can be ejected from the portion built upon and not from the entire holding. (*Hopkins, S. M. and Fremantle, J. M.*) MUSHTAQ *v.* HOLAS RAI. **L. R. 3 A. 429 (Rev).**

——— S. 57 (*a*)—*Non-payment of rent does not justify ejectment.*

Upon the death of K, the former Mahant, A took possession of the property claiming to be the successor of *K*. While in possession of the property he executed usufructuary mortgages of the land in dispute in favour of *R. U* instituted proceedings against *A* claiming to be successor of *K*. He succeeded and became the recognised Mahant. He then sued in a Civil Court to eject *R*. The suit was compromised on these terms:—*R* was to retain possession over the plots in dispute at a rental of Rs. 2 a bigha so long as he paid the rent; but in default of payment of the rent *U* could eject him.

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U alleging that *R* had not paid the rent applied to the Rent Court to eject him. On appeal on those proceedings it was held by the first appeal court that A could not be ejected under the provisions of S. 58 but under S. 57 (*a*). It was found on the facts by the lower appellate Court that R had paid no rent. The lower appellate Court ordered his ejectment. *Held*: On *R's* appeal that the compromise undoubtedly binds the parties but this fact does not render it possible for the appellant to be ejected for non-payment of rent in the absence of a decree against him for arrears and the order for ejectment does not mend the matter. Under the provisions of S. 57 (*a*), mere non-payment is not sufficient to justify ejectment. S. 58 does not apply to the case. (*Mears, C. J. and Piggott, J.*) KUBER DAS *v.* RAM DIN. **77 I. C. 927 : 45 All. 5 : 20 A. L. J. 769 : A. I. R. 1923 All. 14 (2).**

——S. 57 (a), (c)—*Ejectment—Mere non-payment of rent not sufficient.*

Mere non-payment of rent is not sufficient for ejectment. For the maintainability of suit a decree against the appellant for arrears of rent is required. (*Mears, C. J. and Piggott, J.*) MAHANT KUBER DAS *v.* RAM DIN KALWAR. **45 A. 5 : 20 A. L. J. 769 : 77 I. C. 927 : A. I. R. 1923 All 14 (2).**

——S. 57 (a)—*Occupancy holding—Mortgage—Suit for rent by Zamindar—Mortgagee impleaded—Subsequent suit in ejectment—Estoppel.*

Neither the joining of the names of the mortgagees of an occupancy holding as defendants in a suit for arrears of rent nor the styling of them as mortgagees in receipts for rent, amount to a recognition of their rights as such and the Zamindar is not estopped thereby from ejecting the mortgagees when the tenant himself has been ejected. Where owing to default in payment of a decree for rent a Zamindar brings a suit in ejectment under S. 57 the mortgagee of the holding is not a necessary party to the suit. The mortgagees who have not contractual relations with the Zemindar are not entitled to be joined as parties to the suit. (*Fremantle, S. M.*) RAM SUBHAG SINGH *v.* MAHARAJA KESHO PD SINGH. **L. R. 5 A. 214 (Rev.)**

——S. 57 (a)—*Construction of.*

The wording of S. 57 (a) of the Agra Tenancy Act is unhappy but its intention undoubtedly was that the tenant should not be ejected before the expiry of the year on account of which decreed arrears are due. The literal sense of the wording is that he should not be ejected, unless a decree is obtained for a given year and remains unsatisfied at the end of the year. (*Ferard, S. M. and Hopkins. J. M.*) MT. MASUM FATIMA *v.* NAJIBULLAH. **L. R. 3 A. 287 (Rev.)**

——S. 57, Cl. (b)—*Hindu widow—Permanent lease—Suit by reversioners for ejectment of the lessee in the revenue court —Maintainability of.*

Where a Hindu widow in possession of agricultural land inherited by her from her husband granted a perpetual lease of the same in favour of strangers and after the death of the widow the reversioners sued in ejectment under S. 57 alleging that the plots were agricultural land treating the defts. as non-occupancy tenants no point was raised as to the nature of the land and the character of the tenancy either in the pleadings or in issues. *Held*, that the suit was maintainable in the revenue court. The institution of a suit in ejectment was an election to treat the lease by the widow as a nullity and it was not incumbent upon him to sue in civil court for cancellation of the lease. (*Walsh, A. C. J. and Sulaiman, J.*) RAJROOP KUAR *v.* KANDHEYA. **22 A. L. J. 846 : L. R. 5 A. 313 (Rev) : 82 I. C. 238 : 1924 All. 785.**

AGRA TENANCY ACT (II OF 1901), S. 57 (d).

——Ss. 57 (b) and 65—*Ejectment suit—Decree directing removal of construction on a portion of holding by tenant—Whether plff. entitled to costs and compensation.*

In an ejectment suit a decree was passed, awarding costs, and compensation to the plaintiffs and directing the defendant that, if within one month, the constructions were not removed he could be ejected. The defendant removed the construction as per the decree aud the Court did not allow plaintiff's costs and compensation as originally decreed. *Held*, there was no reason at all for depriving plaintiff of his costs and compensation. (*Fremantle, S. M. and Burn, J. M.*) KUNDUN *v.* SHADI. **L. R. 5 A. 308 (Rev.)**

——S. 57 (b)—*Planting of trees by tenants—Rights of landlord—Suit—Limitation.*

If a tenant plants trees without the written permission of the land-holder, the land-holder has a right of suit under S. 57, cl. (b), the limitation for which is one year, and he cannot plead that the trees were planted without his written permission if he does not avail himself of this remedy. (*Hopkins, S. M.*) BHOLA KAURIA *v.* DAN PRASAD. **L. R. 3 A. 106 (Rev.)**

——S. 57 (b)—*Fixed rate tenancy—Agricultural purposes—House construction renders tenant liable to ejectment.*

The record of land as a fixed rate tenancy is conclusive proof that the land was left for agricultural purposes. The construction of a house on land in a fixed rate holding is inconsistent with the purpose of the letting and renders the tenant liable to ejectment. (*Hopkins, S. M. and Burn, J. M.*) SRI MAHARAJA PRABHU NARAIN SINGH BAHADUR *v.* PANDIT ACHUTA PRASAD DUBE. **L. R. 3 A. 401 (Rev.)**

——S. 57 (c)—*Lease for seven years—Option to enter—Suit in ejectment— Jurisdiction—Civil and Revenue Court.*

Under the terms of a lease for a period of seven years the land-holder was given power to take back all or any of the lands at his option during the period of the lease. In a suit by the land-holder to eject the tenant, *Held* that the suit fell under S. 57 (*c*) of the Agra Ten. Act and item 13 of Group B of the fourth schedule of the Ten. Act. An appeal therefore lay to the Civil Court. (*Fremantle, S. M and Burn, J. M.*) PARTAP SINGH *v.* RIRWA. **L. R. 5 A. 341 (Rev.)**

——S. 57 (c)—*Lease for seven years—Provision for re-entry does not make tenant a tenant-at-will.*

A provision for re-entry in a lease for a period of 7 years on the happening of a contingency does not have the effect of making the tenant a tenant-at-will. (*Hopkins, S. M.*) MT. SARWATI KUNWAR *v.* LALWA. **L. R. 3 A. 242 (Rev.).**

——S. 57 (d)—*Grove— Tenant grove-holder—Ejectment.*

A suit to eject tenant grove holders stand on a different footing from a suit to eject a tenant of a grove. Neither S. 57 of the Agra Tenancy Act nor any other provision of law entitles the landlord to eject a tenant grove holder. (*Stuart, J.*) SHEO PRASAD *v.* BABU RAM. **71 I. C. 350 : A. I. R. 1923 A. 168.**

——S. 57 (d)—*Illegal transfer by occupancy tenant—Effect of—Mortgage—Redemption.*

Where an occupancy tenant illegally transfers his holding, the tenancy does not cease at once, but only if the landlord sues to eject him. Where the transfer was by way of mortgage, the occupancy tenant can

AGRA TENANCY ACT (II OF 1901), S. 58.

before ejectment redeem the mortgage. (*Kanhaiya Lal, J.*) DURGA CHOWDHURI *v.* JAGROOP.
79 I. C. 232 : A. I. R. 1923 All. 191.

——S. 58—*Ejectment—Burden is on tenant to prove his tenure.*

The mere fact that the plffs. called the defts. lessees does not imply that they said or meant that the defts. were holding for a term. The burden of proof is on the tenant when he is sued by his landlord for his ejectment, to show that he has a permanent right to stay on the land and cannot be ejected by the proprietor. (*Mukerji, J.*) CHOB SINGH *v.* DARYAI SINGH. **L. R. 5 A. 163 (Rev.) : 82 I. C. 594 : A. I. R. 1924 A. 915.**

——Ss. 58, 177 (cl. c) and 198—*Suit for ejectment—Question of title raised—Appeal lies to the District Judge.*

In a suit for ejectment under S. 58 of the Agra Tenancy Act if the defendant raises a question of proprietary title, an appeal lies to the District Judge. (*Gokul Prasad, J.*) TULSI PRASAD *v.* RAMRAJ AHIR. **71 I. C. 308 : A. I. R. 1923 All. 414 (2).**

——S. 58—*Landlord and tenant—Admission to tenancy—No proof of agreement as to length of tenancy—Taking of premium—Effect.*

The taking of a premium on admission to tenancy does not ordinarily imply a contract for an indefinite or even a very long term and very seldom does it imply a term long enough to ensure the acquisition of the status of any occupancy tenant. The test to be applied is whether in all the circumstances the term of occupation is reasonably long, the implied agreement being seldom capable of satisfactory proof.

In cases where there is no proof of any agreement not to eject for a definite term the circumstances must be considered. If the amount of the premium had been large with reference to the size of the holding it might have been found that there was an implied agreement not to eject for a term sufficient to allow occupancy rights to grow up. (*Fremantle, S. M.*) SAYED JAWAD ALI SHAH *v.* UJAGIR LOHAR.
L. R. 5 A. 87 (Rev.) : 10 O. & A. L. R. 440.

——S. 58—*Lease for seven years—Execution in the middle of the year—Ejectment.*

Where a lease is executed more than two months after the commencement of the year and there is no evidence of any agreement being come to at the beginning of the year, the mere recital in the lease for 7 years that it is to come into effect from the beginning of the year will be in-operative. (*Fremantle, S. M.*) MAHOMED MOHSIN *v.* BEHARI.
L. R. 5 A. 169 (Rev.)

——S. 58—*Grove—Ejectment from—When permissible.*

It is necessary to distinguish between land which has been given to a person for the purpose of planting a grove and land in which there is already an established grove which is let to somebody. In the first case it is settled law that the land-holder cannot eject the grove-holder under S. 58 of the Tenancy Act unless there is some special custom or contract to that effect. Where however an established grove is let for rent, a suit for ejectment will lie under S. 58 of the Tenancy Act. (*Fremantle, S. M. and Burn, J. M.*) KASHI NATH *v.* DATA DIN. **L. R. 4 A. 71 (Rev.)**

——S. 58—*Grove—Suit for Ejectment—Maintainable.*

Under S. 58 of the Agra Ten. Act a suit for ejectment from a grove is maintainable though the tenant can resist on the ground that the grove had been planted with the permission, express or implied of the land-holder. (*Hopkins, S. M.*) BABBAN SINGH *v.* RAMASHANKAR. **L. R. 3 A. 88 (Rev.)**

——Ss. 58 and 177—*Question as to proprietary title—Claim that land is khudkhasht is such a question.*

Plaintiff sued as occupancy tenant-in-chief to eject S. as his sub-tenant. S pleaded that he was not plaintiff's sub-tenant, that he had held the land direct under the superior land-holder T. but had given it up and that it was now in the personal cultivation of T. T intervened and pleaded that the land was his khudkhasht. *Held* that a question of proprietary title was in issue both in the first Court and on appeal and that the appeal should be presented to the District Judge and not to the Commissioner. 12 A. L. J. 251; 16 A. L. J. 239 Rel. (*Ferard, S. M.*) TILAKDHARI SINGH *v.* RAMPHAL AHIR. **L. R. 3 A. 300 (Rev.)**

——S. 58—*Mortgage af occupancy rights—Becomes extinct on extinction of occupancy right.*

A mortgage of occupancy rights however old is extinguished on the extinction of the occupancy right. Thereafter the mortgagee becomes liable to ejectment. (*Harrison, J. M.*) RAJA RAM TEWARI *v.* BINDESHARI PRASAD. **L. R 3 A. 304 (Rev.)**

——S. 58—*Proprietary rights—Simple mortgage—Subsequent usufructuary mortgage including* sir *land—Exproprietary rights in* sir—*Acquisition of.*

Before the passing of the Agra Ten. Act (II of 1901) a proprietor had executed a simple mortgage of his proprietary rights to A. and a subsequent usufructuary mortgage of proprietary rights and Sir to B. The proprietary rights were sold in execution of a decree on the simple mortgage after the passing of the Act and the second mortgagee was at that time in possession of the Sir. *Held* that the proprietor had not acquired exproprietary rights in the sir land and therefore that second mortgagee was liable to be ejected by the purchaser. (*Ferard, S. M. and Harrison, J. M.*) DEONATH SINGH *v.* BABU MADHORI DAS.
L. R. 3 A. 305 (Rev.)

——S. 58—*Mortgagee in possession—Agricultural lease—Binding on mortgagor.*

Where a mortgagee in possession of agricultural lands grants a lease of the same and there is no evidence that the rate of rent fixed was unreasonable or that the grant of the lease was collusive *Held*, that the leasing of the land was within the ordinary powers of the mortgagee as land-holder and the mortgagor was not entitled to have the lease cancelled except on proof that it was granted fraudulently, collusively or unreasonably, the *onus* of establishing these grounds for cancellation being on him. (*Hopkins, S. M. and Porter, J. M.*) MT. RAM DULARI *v.* BALAKRAM.
L. R. 3 A. (313) (Rev.)

——S. 58—*Grove—Tenant is liable to ejectment.*

Though a grove is not agricultural land within the meaning of the Agra Ten. Act the tenant in possession of it is liable to a suit under S. 58 of the Act. A tenant is one who pays rent in cash or kind not only for land held by him but also on account of groves, tanks, rights of pasturage, or of gathering produce, forest rights, fisheries, the use of water for irrigation or the like. (*Hopkins, S. M. and Fremantle, J. M.*) KHETER MOHAN CHATTERJI *v* DOMI.
4 U. P. L. R. (B.R.) 55 L. R. 3 A. 356 (Rev.)

——S. 58—*Applicability of—Non-occupancy tenants can be ejected-Grove—Agricultural purpose—Acquisition of occupancy right.*

Under S. 58 of the Agra Ten. Act a non-occupancy tenant can be ejected from land, groves, etc., unless he has acquired occupancy rights by reason of the land

AGRA TENANCY ACT (II OF 1901), S. 58.

having been let or held for agricultural purposes. If a man has a grove part of which is fit for cultivation and lets it solely for cultivation then the land is let or held for agricultural purposes. (*Hopkins, S. M. and Fremantle, J. M.*) KRISHNAN PRASAD *v.* GOBINDA.
L. R. 3 A. 399 (Rev.)

——**S. 58** —*Holding on sufferance without payment of rent does not create right.*

A person occupying land on sufferance without paying rent does not acquire occupancy right as a tenant and can be ejected as soon as the landlord withdraws the sufferance. (*Ferard, S. M. and Harrison, J. M.*) AMEER HUSSAIN *v* ALLAHDIA.
2 U. P. L. R. (B. R.) 93 : 60 I. C. 258 : L. R. 1 A. 43 (Rev.)

——**S. 58**—*Mortgagee in possession—Duty of—He can leave out land.*

A mortgagee on possession must manage the property as a person of ordinary prudence would, if it were his own.

A lease of land for agricultural purposes being within the powers of a mortgagee a lease granted by him is not terminable on redemption at the option of the mortgagor except when it is proved that it was granted fraudulently, collusively or unreasonably. (*Hopkins, S. M. and Porter, J. M.*) MT. RAM DALARI *v.* BALALL RAM. **3 U. P. L. R. (B. R.) 9.**

——**S. 58**—*Ejectment—No limitation.*

No period of limitation is fixed for a suit for ejectment under the section.

An ejectment suit against a dead person is a nullity. (*Hopkins, S. M.*) GIRI LAL *v* DHARAM SINGH.
3 U. P. L. R. (B. R.) 32.

——**S. 58**—*Orders directing correction of papers —An administrative act would not create any right.*

Orders for the correction of the revenue papers are made in compliance with Rule 43 A, B. C 6,11. They are administrative and not judicial orders; and obviously the entries made have no greater validity than the decrees or orders on which they are based. An entry that a tenant holds under a seven years registered lease would not give any right if the lease was not in existence. (*Hopkins, S. M.*) CHIDEY KHAN *v.* MIRAD KHAN. **4 U. P. L. R. (B. R.) 83.**

——**S. 58 (a)**—*Limitation for a suit to eject occupancy tenant is 1 year from date of sub-lease.*

A suit against an occupancy tenant on the ground of illegal sub-letting must be brought within one year from the date of sub-letting. Sel. Dec. 12 of 1920 followed. (*Hopkins, S. M. and Fremantle, J. M.*) PANDIT SADANAND PANDE *v.* B. PROTAB NARAIN.
L. R. 2 A. 63 (Rev.).

——**S. 58 (b)**—*Suit for ejectment of defendant as thekadar—Defendant denying liability to ejectment —Burden of proof—Plaintiff to prove that period of theka had expired or was about to expire at end of current agricultural year.*

The plaintiff sued to eject the defendant as thekadar. The defendant denied his liability to ejectment. The evidence only showed that the defendant and his ancestors had been in possession of the land for over 90 years and they had all along been paying rent to the plaintiff and his predecessors:

Held, that the burden of proof was not on the defendant to prove that he had a permanent right to hold on, but it was on the plaintiff to prove that the term of the theka under which the defendant and his predecessor held had expired or was about to expire at the end of the current agricultural year; and, he having failed to prove it, his suit was liable to be dismissed. (*Mears, C. J. and Lindsay, J.*) DARYAI SINGH *v.* CHOB SINGH. **L. R. 6 A. 237 (Rev.).**

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——**S. 58 (b)**—*Suit triable only by Revenue Court —Appeal to District Judge or Revision is not maintainable.*

A suit under S. 58 (*b*) being triable only by a Revenue Court a District Judge has no jurisdiction to entertain an appeal, nor is an application under S. 115 of the Civil Procedure Code to the High Court maintainable. (*Ryves, J.*) SAHHEI HUSAIN *v.* NAND KISHORE. **19 A. L. J. 596 : 63 I. C. 891 : 3 U. P. L. R. (All.) 94.**

——**S. 59**—*Fraud—Suit for declaration of rights lies in Civil Court.*

If fraud is established, there is no tenancy in existence at all to which the provisions of the Tenancy Act would apply, and the argument that the Civil Court in entertaining such a suit is usurping the functions of the Revenue Court in a matter which has been exclusively entrusted to the Revenue Court by the legislature, seems to be based upon fallacy. However, the Court might, on the new facts being brought to its notice, re-open its own proceedings in the exercise of its inherent powers to do justice in the matters entrusted to it. It is a matter for the Revenue Court. But that Court certainly has no jurisdiction to grant damages in an action for deceit, and no possible ground can be imagined either in law or equity or common sense for the conclusion that, if a person has really been deceived, he cannot sue in a Civil Court to establish the facts in his own favour and to obtain a declaration of the assertion of his true rights to which he has succeeded or which he has inherited. (*Walsh and Ryves, JJ.*) JAMMU *v.* MAHADEO PRASAD.
L. R. 3 A. 195 (Rev.) : 66 I. C. 559 : 4 U. P. L. R. (A.) 84 : A. I. R. 1922 All. 294.

——**S. 59**—*Ejectment—Minor judiment-debtors—Service of notice.*

In a suit in ejectment under S. 59 the judgment-debtors were minors and one of the two guardians was not served personally. *Held*, that ejectment was not justified. (*Fremantle, S. M. and Burn J. M.*) POHAP SINGH *v.* MT. GANESH.
L. R. 5 A. 154 (Rev.)

——**S. 59**—*Ejectment breaks tenure.*

An ejectment under S. 59 of the Tenancy Act breaks the tenure even if the tenant continued to occupy the same land. (*Burn, J. M.*) MALA KHAN *v.* SHEODHAN SINGH. **L. R. 4 A. 217 (Rev.).**

——**Ss. 59 and 61**—*Proceedings for ejectment—Uncertified payment or adjustment cannot be pleaded.*

The provisions of O. 21, R. 2 of the Civil Procedure Code, which bar proof of payment of money or any other adjustment in satisfaction of a decree, which is not certified to the Court, apply to proceedings for ejectment under S. 59 of the Tenancy Act. (*Fremantle, S.M. and Burn, J. M.*) SUJAN *v.* MD. FATEH SHAH KHAN. **L. R. 4 A. 261 (Rev.).**

——**Ss. 59 and 60**—*Nature of proceedings under —Adjustment out of Court can be recognised.*

Although the proceedings under S. 59 of the Agra Ten. Act resemble those in execution and have to be instituted in the Court having power to execute the decree for arrears of rent, they are not proceedings in execution. Consequently it is open to the Assistant Collector to recognise a payment by the judgment-debtor outside Court though not certified to the Court. (*Ferard, S. M. and Harrison, J. M.*) SAMBHAR SINGH *v.* MISIR PARAS RAM. **L.R. 3 A. 297 (Rev.).**

——**S. 59**—*Ejectment—Power of Appellate Court to interfere with Lower Court's discretion—Application for review of the order before issuing of ejectment order.*

Where in the case of an application under S. 59 the

Court allows time and finally orders ejectment in its judicial discretion, the Board will not interfere in revision. Where the tenant asked for adjournment and paid a considerable sum but the Court refused further extension for the balance and ordered ejectment and refused an application to accept the balance after 4 days though *parwana* had not been issued. *Held*, the application of the tenant to accept the balance and cancel ejectment was one for review and the Court should have exercised its discretion to cancel the ejectment. THAKURI *v.* CHAUDHURI GHAN RANI.

L. R. 2 A. 235 (Rev).

——S. 61—*Ejectment—Arrears of rent decree—Habitual defaulter—No proper explanation of inability to pay.*

A notice was issued to a tenant who had been a habitual defaulter to pay the amount of rent decree within a fortnight or to show cause why he should not be ejected. After the expiry of the fortnight the tenant put in an application for time on the ground that he was unable to borrow money but no explanation was given as to how he had disposed of the produce of the holding. *Held*, that the Court had exercised a proper discretion in rejecting the application and ordering ejectment of the tenant. (*Fremantle, S. M.*) BHAGWAN DIN *v* HARPRIYA SARAN.

L.R. 5 A. 60 (Rev.).

——S. 61—*Review of order dismissing application for deposit—Order allowing, amounts to one allowing time.*

Where an application for the deposit of decretal amount was dismissed but a subsequent application to reconsider the first application was treated as an application for review and deposit was allowed to be made. *Held*, that the Court's order amounted to one allowing further time under S. 61. (*Harrison, J. M.*) KISHORI *v.* LALA MAKUND LAL.

3 U. P. L. R. (B.R.) 69.

——S. 63—*Ejectment—Co-sharer entitled to collect entire rent can eject tenant.*

A co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him, as he is a land-holder for the purpose of the Act. (*Daniels, J.*) MUNESHAR TEWARI *v.* MT. MAHESHA KUERI.

L. R. 4 A. 329 : 74 I. C. 197 : A. I. R. 1924 All. 165.

——S. 63—*Co-sharer who can collect rent can also sue in ejectment.*

The co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him. He is the land-holder for the purposes of the Act. Select Decision No. 2 of 1910 Foll. (*Daniels, J.*) MUNESHAR TEWARI *v.* MT. MAHESHA KUERI.

L. R. 4 A. 329 (Rev) : A. I. R. 1924 A. 165.

——S. 63—*Muafidars and sub-tenants.*

In a suit by plaintiffs muafidars for ejectment the defendants pleaded acquisition of occupancy rights. It was found that defendants never paid any rent to plaintiffs, nor did they ever assert their title to the land to the knowledge of plaintiffs.

Held, that the defendants were sub-tenants and liable to be ejected. (*Gokul Prasad, J.*) CHHAJJU *v.* JHABBA. **L. R. 4 A. 221 (Rev.) : 74 I. C. 681 : A. I. R. 1924 All. 293.**

——S. 63—*Ejectment suit—Party brought on record after expiry of time—Knowledge of proceedings—Effect of.*

Where a party who had full knowledge of the proceedings was brought on the record in an ejectment suit after a period fixed for filing the suit, the suit is not vitiated thereby. (*Fremantle, S. M.*) PRAG NARAIN *v.* KANCHAN SINGH. **L.R. 5 A. 126 (Rev.).**

——S. 63—*Suit for ejectment—Rule as to time of filing is very rigid.*

Suit for ejectment has to be filed at a certain time of the year, the bar being as rigid as that of limitation. (*Hopkins, S. M.*) GIRI LAL *v.* DHARAM SINGH.

3 U. P. L. R. (B. R.) 32.

——S. 63 (2)—*Suit in ejectment—Addition of party—Limitation.*

The Agra Tenancy Act fixes the particular period within which a suit for ejectment may be filed for administrative convenience only and not lay down any period of limitation in the ordinary sense of the term. A suit for ejectment cannot fail by reason of not bringing on the record all the necessary parties before the date fixed for filing such a suit. (*Fremantle, J. M.*) PARSIDH NARAIN *v.* MT. SHER KHAN.

L. R. 3 A. 392 (Rev.).

——S. 65—*Ejectment — Conditional order — Should be passed after notice.*

A conditional order of ejectment under S. 65 of the Tenancy Act should be based on an authoritative report and should be made after notice to the tenant. (*Hopkins, S. M. and Fremantle, J. M.*) MUSHTAQ *v.* HOLAS RAI. **L. R. 3 A. 429 (Rev.).**

——S. 65 (2)—*Well in a holding—Tenant using water for irrigating other plots of land—Suit for injunction and damages lies in Civil Court and not Revenue Court.*

The defendant was the ex-proprietary tenant of a certain plot of land. There was a well on the plot. The defendant was using the water from this well to irrigate adjacent fields which he held as sub-tenant from another landlord. The plaintiff brought a suit for an injunction prohibiting the defendant from using the water to irrigate any land other than the plot of which the defendant was ex-proprietary tenant and for damages.

Held, that the suit was not cognizable by the Revenue Court but should be brought in the Civil Court. (*Neave, J.*) LACHMI NARAIN *v.* MOOLI.

85 I. C. 537 : A. I. R. 1925 All. 571.

——S. 66—*Ejectment—Revision.*

In an ejectment suit the tenant raised the question that he should be allowed the benefit of S. 66 of the Agra Tenancy Act but the Commissioners did not decide the point. *Held*, there was a ground for interference in revision. (*Burn, S. M. and Pearson, J.M.*) PEARY LAL *v.* PRAG NARAIN. **L. R. 4 A. 39 (Rev.)**

——S. 66—*Benefit of the section—Right to.*

Where immediately after obtaining the benefit of S. 66 of the Agra Tenancy Act a tenant sub-let the holding again, he could not get the benefit of S. 66 a second time. (*Hopkins, S. M.*) SARJU *v.* GAJPUT SINGH. **L. R. 3 A. 435 (Rev.).**

——S. 66—*Benefit of section—Should not be given to sub-tenants for long period but may be given to tenant who was formerly a co-sharer.*

In cases of sub-leases for a long period the benefit of S. 66 should not be given but where the tenant was formerly a co-sharer in the village the benefit was allowed. MALOOK CHAND *v.* YUSUF ALI.

L. R. 2 A. 100 (Rev.).

——S. 66—*Discretion used by Lower Courts—Board will not interfere.*

The discretion in the Lower Courts under S. 66 will not be interfered with by the Board. (*Hopkins, S.M. and Porter, J. M.*) CHARITTER RAI *v.* BISHNATH PRASAD. **3 U. P. L. R. (B. R.) 62.**

——S. 67—*Ejectment—Suit for—Pleas in defence.*

The pleas that the defendant had acquired occupancy rights and that his ejectment was sued for be-

cause he had refused to agree to an enhancement of rent, can be raised as alternative defences to an ejectment suit. (*Fremantle, S. M. and Burn, J. M.*) RAM BHARASEY *v.* KALKA PRASAD.

L. R. 4 A. 249 (Rev).

——S. 73—*Acquisition of occupancy rights — Ejectment after beginning of year—Earlier portion of the year if can be tacked on.*

Ejectment after the beginning of a year had the effect of making it impossible for the ejected tenant to count the period of possession during that year for the acquisition of occupancy rights, but there is nothing in Ss. 73 and 78 of the Agra Ten. Act which would make it possible for a man admitted after the date of actual ejectment to count the earlier portion of that year during which the ejected tenant was actually in possession for acquisition of rights by the incoming tenant. (*Fremantle, S. M. and Burn, J. M.*) MT. SHIAMA DEVI *v.* BUDHWA.

L. R. 5 A. 339 (Rev.)

——S. 73—*Ejectment— Execution of decree— Date when it takes effect.*

Though the formal giving of possession in execution of an ejectment decree is postponed till shortly after the beginning of the next Fasli year the ejectment takes effect from the beginning of that year. (*Fremantle, S. M. and Burn, J. M.*) GAJADHAR PRASAD *v.* MUL CHAND. **L. R. 4 A. 68 (Rev.).**

——Ss. 73—*Decree in ejectment- When takeseffect.*

A decree in ejectment takes effect from 1st July under S. 73, Agra Tenancy Act, even if actually possession is delivered later. (*Fremantle, S. M. and Burn, J. M.*) HAFIZ AHSAN ULLA *v.* EDA.

L. R. 4 A. 334 (Rev.).

——S. 75 (2)—*Execution—Crops on holding— Tenant allowed to remain in possession—Cannot compute time for occupancy right.*

Under S. 75 (2), Agra Ten. Act, when crops are standing on the holding at the time of delivery of formal possession, the parties may agree that the tenant remains in possession till the crops are cut paying a reasonable rent. The term during which he remains in such possession cannot be computed for acquiring occupancy rights. (*Fremantle, S. M.*) BISNATH *v.* MT. BHAWANI KUAR.

L. R. 4 A. 371 (Rev.).

——S. 78—*Tenant holding under a compromise in an ejectment suit does not acquire any statute.*

In an ejectment suit the parties came to a compromise under which tenant was to retain possession till the end of the year. *Held*, that the compromise does not mean that the tenant was admitted as a tenant but that his retention of possession was an incidence in ejectment proceedings which does not give him a fresh statutory tenure. (*Fremantle, J. M.*) NIHAL SINGH *v.* BHAGWATI PRASAD SINGH MAHARAJA.

L. R. 2 A. 59 (Rev.).

——S. 79—*Sect. 79 does not apply to auction-purchaser purchasing a tenant's interest after latter's ejectment.*

S. 79 can have no application to the case of an auction-purchaser who never actually or constructively was in possession of the tenancy and who in fact acquired his interest at an auction-purchase subsequent to the ejectment. 13 A. L. J. 329 Foll. (*Sulaiman and Boys, JJ.*) BAHADUR *v.* RAJA MOTICHAND.

47 All. 589 : 88 I. C. 224 : 23 A L. J. 409 : A. I. R. 1925 All. 580.

——S. 79—*Grove is not a holding—Dispossession by zemindar for 6 months does not take away grove-holder's right.*

A grove is not a holding within the meaning of S. 79 and, therefore, dispossession of the grove-holder by the zemindar of a portion of the grove for six months cannot take away the grove-holder's right. (*Mukerji, J.*) LODAI RAM *v.* SUKHDEO KOERI.

A. I. R. 1925 All. 776.

——S. 79—*Ejectment— Landlord and tenant— Limitation.*

In a suit in ejectment the Court found that plffs. were occupancy tenants, that there was no relation of landlord and tenant between the parties and that the deft. was one of the co-sharers in the patti where the suit land was situate and that he had been in possession for 16 years without the consent of the plaintiffs. The defendant pleaded that he was a co-sharer and holding the land as kudkasht. The suit having been decreed, the defendant appealed. *Held*, that the case was one to which S. 79 or the shorter period of limitation prescribed by the Act applied. The decree was therefore correct. To make S. 79 applicable ejectment of a tenant must be by the whole body of co-sharers or by the lambardar. (*Mukerji, J.*) RANI *v.* EDAL SINGH. **L. R. 5 A. 37 (Rev.) : 22 A. L. J. 113 : 78 I. C. 1041: A. I. R. 1924 All. 431.**

——S. 79—*Rent-free grantee—Illegal ejectment —Suit for possession—Revenue Court.*

If a rent-free grantee has been wrongfully ejected by the Zamindar no suit under S. 79 can be brought in the Revenue Court. The only remedy open to a rent-free grantee is, therefore, to sue in a Civil Court. (*Sulaiman, J.*) CHAUDHRI HAR SARUP *v.* BRIJ NANDAN LAL. **L.R. 5 A. 103 (Rev.) : 79 I. C. 587 : A. I. R. 1924 All. 479.**

——S. 79—*Dispossession by one among several proprietors—Applicability of the section.*

Dispossession by one member of the proprietary body, not being the lambardar, cannot be treated as ejectment of the tenant by the land-holder within the meaning of S. 79 of the Agra Tenancy Act. (*Daniels, J.*) LAGAN RAI *v.* RAJA RAI. **L. R. 5 A. 176 (Rev.) · 79 I. C. 1025 : A. I. R. 1924 All. 507.**

——S. 79—*Undivided mahal—Suit for ejectment of tenant—Parties.*

To enable a suit to be brought under S. 79 the ejectment must have been made by the landlord, *i. e.*, by the whole of the co-parcenary body. A tenant in an undivided mahal is the tenant of the whole co-parcenary body and a suit under S. 79 cannot be brough against one of those co-parceners only. (*Walsh, A. C. J. and Neave, J.*) CHEDDA *v.* ACHHU SINGH..

46 A. 690 : 22 A. L. J. 570 : L. R. 5 A. 265 (Rev.) : A. I. R. 1924 All. 572.

——S. 79—*Ex-proprietary holding—Suit to recover possession by tenant—Jurisdiction of Civil Court —Absence of defence—Effect.*

A suit by a tenant against his landlord and a person claiming under him to recover possession of an ex-proprietary holding is one of the nature described in S. 79 and is not cognizable by a Civil Court. The fact that the Zamindar did not defend the suit is imma. terial. (*Daniels, J.*) AIDAL SINGH *v.* GYAN SINGH:

L. R. 5 A. 257 (Rev.) : 79 I. C. 318 : A. I. R. 1924 All. 615.

——S. 79—*Death of tenant—Succession—Obstruction—Dispossession—Limitation.*

The provisions of S. 79 apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy. Where a person claiming to have succeeded to a tenancy right by right of inheritance finds that on endeavouring to take possession of the same his right is denied and his possession ousted by the Zamindar, he has suffered an ejectment at the hands of the landlord within S. 79

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and his appropriate remedy is by a suit under the Tenancy Act. (*Dalal, J.*) BIDIYA MISIR *v.* MT. DARYAI KUAR. **L. R. 5 A. 184 (Rev.) : 79 I. C. 566 : A. I. R. 1924 All. 678 (1).**

——S. 79—*Agricultural lease by Zamindar in favour of defendant—Registered lease—Lambardar acknowledging plaintiff as non-occupancy tenant—Dispossession—Ejectment—Damages—Injunction—Suit if maintainable in Civil Court.*

On the death of a tenant the Zamindar granted a registered agricultural lease of the holding in favour of the defendant, but the Lambardar acknowledged the plaintiff who was the heir of the deceased tenant as a non-occupancy tenant and recovered rents from him. More than a year after the lease, the defendant dispossessed the plaintiff and cut and carried away his crops. The plaintiff thereupon sued the defendant for recovery of possession, damages, and injunction within six months of the dispossession without impleading the Zamindar as a party. The suit was filed in the Civil Court and it was objected that the Civil Court had no jurisdiction. *Held*, that there was no ejectment by the Zamindar, the defendant being merely a trespasser and that the suit as against him was maintainable in the Civil Court. The plaintiff even if he were regarded as a non-occupancy tenant was entitled to remain in possession till eviction in the course of law and that the registered lease could not supersede the plaintiff's right. (*Sulaiman and Kanhaiya Lal, JJ.*) CHET RAM *v.* SITA RAM.
46 A. 717 : 22 A. L. J. 713 : 82 I. C. 251 : L. R. 5 A. 366 (Rev.) : A. I. R. 1924 All. 678 (2).

——S. 79—*Applicability.*

S. 79 applies only to a case where there is more or less forcible ejectment and not where there is ejectment by mutual consent. (*Mukerji, J.*) BIJAI BAHADUR *v.* PARMESHWARI RAM. **78 I. C. 1026 (2) : A. I. R. 1924 All. 834.**

——Ss. 79 and 167—*Jurisdiction—Suit for possession as occupancy tenant lies only in Revenue Court and damages.*

Where the plaintiff brings a suit for possession as occupancy tenant and damages for crops forcibly cut and appropriated by the defendant claiming under a lease from the Zamindar, *held*, that the plea for possession was maintainable only in the Revenue Court and that the claim for damages must also fail. The suit was in effect an attempt to evade the provisions of the Agra Tenancy Act. The Civil Court cannot investigate, even much less find on the allegations of the plaintiff that he is for one reason or other an occupancy tenant. Nor can it for the same reason decide whether the defendants are permanent lessees. A suit for declaration between two rival tenants may be brought in a Civil Court but a suit for possession as an occupancy tenant must be brought in a Revenue Court. (*Ryves, J.*) SITA RAM *v.* CHAIT RAM.
L. R. 4 A. 291 : 71 I. C. 447 : A. I. R. 1923 All. 257.

——Ss. 79 and 81—*Suit by tenant against another tenant for dispossession must be brought within 6 months.*

A suit for possession by a tenant against a subsequent lessee from the zemindar on the ground that the latter has encroached on his fixed rate holding, must be brought within six months of the dispossession. (13 A. L. J. 295 and 27 All. 372, Ref.) (*Gokul Prasad, J.*) PARSOTAM *v.* GANPAT RAM.
L. R. 5 A. 15 (Rev.) : 75 I. C. 1012 : A. I. R. 1923 All. 517.

——S. 79—*Ejectment by landlord—Omission to recover possession within six months by tenant extinguishes his rights.*

AGRA TENANCY ACT (II OF 1901), S. 79.

The failure of a tenant to apply to recover possession of a holding from which he has been wrongfully ejected by the land-holder within the period of six months allowed by the Tenancy Act bars not only his remedy but extinguishes his rights also. 21 A. 304 : 13 A. L. J. 295, Ref. (*Gokul Prasad, J.*) BHIKHARI SINGH *v.* JOKHAN. **4 U. P. L. R. (A.) 104 : 66 I. C. 856 : A. I. R. 1922 All. 124.**

——S. 79—*Scope.*

A sub-tenant cannot claim adverse possession against the transferee to whom permanent lease has been granted by an occupancy tenant nor can he claim that the suit is barred by time. The appellant having not acquired the status of the zamindar simply because of his purchase of a fractional share in the village the appellant-defendant cannot claim the privileges of a zamindar as against the plaintiff who claims through the occupancy tenant. (*Gokul Prasad, J.*) RAMESWAR DUBE *v.* SHEO HARAKH DUBE.
4 U. P. L. R. (A.) 87 : 66 I. C. 529 : A. I. R. 1922 All. 277.

——S. 79—*Grove—Is not a holding.*

Land held for a grove is not land held for agricultural purposes and is not a 'holding' and S. 79 of the Act would not apply to a suit by a grove-holder to recover possession of the grove. (*Banerji, Tudball and Sulaiman, JJ.*) KESHO PRASAD *v.* SHEO PRASAD.
44 A. 19 : 3 U. P. L. R. (All.) 117 : 64 I. C. 248 : 19 A. L. J. 749 : A. I. R. 1922 All. 301 (F. B.).

——S. 79—*Scope.*

On the death of the tenant of an occupancy holding the names of his wife, his brother's and sister's son were recorded. On the death of the wife the brother brought the suit for a declaration that the sister's son had no concern with the holding and for perpetual injunction or in the alternative for recovery of possession if plaintiff were proved out of possession. *Held*, the suit was barred by S. 79 of the Act. 27 All. 372 followed. (*Ryves and Stuart, JJ.*) PRYAJ AHIR *v.* MAHABIR AHIR. **L. R. 3 A. 233 (Rev.) : 69 I. C. 811 : A. I. R. 1922 All. 317.**

——S. 79—*Sir land—Mortgage of—Expropriatory rights—Suit for possession against purchaser of land is maintainable.*

Persons having expropriatory rights in sir land can sue the purchaser of land under S. 79 of the Agra Tenancy Act for possession. It is immaterial that the latter was in possession as mortgagee on the date on which expropriatory rights were acquired. (*Fremantle, S. M. and Burn, J. M.*) RAM UDIT OJHA *v.* PALARAM OJHA. **L. R. 4 A. 318 (Rev).**

——Ss. 79 and 87—*Abandonment—Finding of Tahsildar is not evidence in suit for wrongful ejectment.*

A Tahsildar's finding as to abandonment on an application under S. 87 of the Ten. Act is not admissible in evidence in a suit by the tenant on the ground of wrongful ejectment under S. 79 of the Act. (*Burn, S. M. and Pearson, J. M.*) RAMCHARAN *v.* ALI BAKSH. **L. R. 3 A. 475 (Rev).**

——S. 79—*Wrongful dispossession of tenant—Omission to sue—Extinguishment of right.*

Where a tenant is wrongfully dispossessed by his land-holder and omits to sue within six months for recovery of possession, his tenancy rights are extinguished. (*Hopkins, S. M. and Fremantle, J. M.*) RIAZ-UD-DIN *v.* SHIBBA SINGH.
4 U. P. L. R. 15 (Rev.)

——S. 79—*Suit does not lie until area is defined.*

Until the area in which expropriatory rights were to be granted has been defined a suit under S. 79 would

AGRA TENANCY ACT (II OF 1901), S. 80 (1).

not lie for recovery of possession. But the time during which proceedings for specification of the exproprietary area were pending could be deducted in computing the term of 6 months provided by law. (*Hopkins, S. M. and Fremantle, J. M.*) MUSSAMMAT RACHALA KUAR *v.* SHEO GOBINDA RAI.

4 U. P. L. R. (B. R.) 33 : L. R. 2 A. 70 (Rev).

——**S. 80 (1)**—*Scope of—Appellate Court's powers to restore possession—Non-occupancy tenant.*

Where the Collector in an ejectment suit found that the defendant at the time of suit was dead, and an application for substitution of legal representatives of the defendant was refused on the ground that there was really no suit in existence, and it was contended on appeal, by the plaintiff that under S. 80 (1) of A. T. Act an appellate court, when dismissing an ejectment suit, had no power to restore a non-occupancy tenant to possession. *Held*, S. 80 (1) of the Agra Tenancy Act refers to a different class of cases and has no reference to the powers of an appellate Court to restore a non-occupancy tenant to possession, when it reverses a decree for his ejectment. (*Burn, J. M.*) KUNWAR BRIJ RAJ SARAN SINGH *v.* RAMCHANDER.

L. R. 5 A. 301 (Rev.).

——**S. 83**—*Tenant can surrender without landlord's consent by simply giving up lands—Liability for rent applies only to first year of non-occupation.*

A tenant may surrender his holding by actually giving up the lands. His liability in the circumstances would only amount to a payment of the rent for the first year of his non-occupation. (*Mukerji, J.*) KHARBAR *v.* ABDUL RAOOF. **A. I. R. 1925 All. 815.**

——**S. 87**—*Abandonment — Proof — Failure of land-holder to proceed under the section.*

It has ever been held that there is absolutely no other way of establishing abandonment by an occupancy tenant except by proceeding under S. 87. Obviously this section is not meant to provide the only means for establishing this fact as it can only be brought into operation when the tenant has left the neighbourhood. When the tenant has done so it must, of course, be held that if the land-holder fails to avail himself of this procedure. He will be considered to have neglected to take advantage of the means provided for him by law for establishing his claim definitely, and the burden must lie heavily on him : but cases do arise where it is positively to the advantage of the zemindar to allow an absconding tenant's name to remain on the papers as a means of preventing the acquisition of occupancy rights by the sub-tenant. (*Pearson, J. M.*) MAHOMED ALI NASIR KHAN *v.* GUPTAR. **L. R. 4 A. 56 (Rev.).**

——**S. 87**—*Abandonment is a question of fact.*

It is always a question of fact whether the Zemindar is to be considered as agent of the tenant-in-chief or the latter is to be held to have definitely abandoned. (*Pearson, J. M.*) NEUR AHIR *v.* KAULESHAR AHIR. **L. R. 4 A. 58 (Rev.).**

——**S. 87**—*Abandonment of land by tenant—What constitutes—Action by zemindar.*

Technical abandonment under S. 87 of the Act cannot be said to be proved where the tenant-in-chief did not leave the village. The mere entry in the patwari papers that the land has been abandoned does not make any difference. (*Fremantle, S. M.*) SHEO NATH KURMI *v.* AUTAR KURMI.

L. R. 4 A. 130 (Rev.).

——**S. 87**—*Proof of abandonment.*

In order to prove abandonment it is necessary to prove not only that the tenant has left the village but also that he has done so without making arrangements for the cultivation. (*Fremantle, S. M. and Burn, J. M.*) SAKHAWAT ALI *v.* ASAD ALI.

L. R. 4 A. 173 (Rev.).

——**S. 87**—*Abandonment—Proof.*

Proceedings under S. 87, Agra Tenancy Act, is not the only method of proving abandonment. (*Burn, J. M.*) NAINA *v.* CHAUDHURI BALWANT SINGH.

L. R. 4 A. 188 (Rev.).

——**S. 87**—*Abandonment of holding—Proof.*

The law as to abandonment of a holding by a tenant in Oudh is not the same as it is in Agra and the facts that the tenant went away and that a relative left in charge of the holding paid rent direct to the landlord on his account does not constitute abandonment. Where there is proof that when the tenant went away he made no arrangements for the cultivation of the holding then there may be an abandonment. (*Fremantle, S. M. and Burn, J. M.*) AMIR HAIDAR KHAN *v.* RAM RATAN.

L. R. 4 A. 286 (Rev.).

——**S. 87**—*Absence of tenant—Cultivation by cousin—Acquiescence of Zemindar—Effect.*

During the absence of a tenant, the land was being cultivated by his cousin. The Zemindar took no steps under S. 87 to have the tenant's name removed, but acquiesced in the cultivation by the cousin.

Held, the cousin must be recognised as holding on behalf of the absent tenant. (*Burn, J. M.*) RAJA RAGHO PRASAD NARAIN SINGH *v.* BANKEY.

L. R. 3 A. 226 (Rev.) : 4 U. P. L. R (B. R.) 58.

——**S. 88**—*Non-occupancy tenant.*

A non-occupancy tenant is not entitled to plant trees without the consent of the Zamindar in writing. (*Daniels, J.*) HAZARI *v.* RAM DULAR.

A. I. R. 1925 All. 702.

——**S. 88**—*Occupancy tenancy—Trees cannot be planted without landlord's consent.*

Under Tenancy Act, 1901, trees are mere improvements. But an occupancy tenant cannot plant trees without the consent of the Zamindar. The provision that tenants would be entitled in future to plant trees with the Zamindar's permission does not by any stretch of reasoning, amount to a grant by the Zamindars of a right to occupancy tenants to sell trees standing on the occupancy. (*Mukerji, J.*) PEERJI MOHIB ALI SHAH *v.* RAM CHANDER. **A. I. R. 1925 All. 796.**

——**S. 88**—*Occupancy tenant—Improvement made by consent of 17 out of 18 Zamindars.*

Where 17 out of 18 Zamindars consented to the making of an improvement, *held* that the Court will not compel the occupancy tenant making the improvement to destroy it at the instance of the 18th Zamindar as the benefit of that occupancy holding is the benefit of the whole village whether the plaintiff is interested in it or not. (*Stuart, J.*) RESHNA BIBI *v.* BHAWANI SARAN. **A.I. R. 1923 All. 281.**

——**S. 88**—*Mango trees planted with landlord's consent are not transferable.*

Where it is found that trees were planted presumably with the consent of the Zamindar on the occupancy holding by the tenant, the tenant acquires no transferable right. 13 A. L. J. 833 Foll. 34 All. 545 Dist. (*Sulaiman, J.*) ABDUL RAUF *v.* RAJU MUHAMMAD SHAH. **75 I. C. 655 : A. I. R. 1923 All. 340.**

——**S. 92 (1)**—*Applicability—Improvement effected over a larger area than included in the zemindari—Equitable claim to compensation.*

A land-holder sued to eject a tenant from a portion of area included in his zemindari. It was found that the tenant had constructed an embankment benefiting a larger area than that included in the zemindari with the consent of the land-holder.

AGRA TENANCY ACT (II OF 1901), S. 95.

Held, the case was not covered by S. 92 (1) but the tenant has an equitable claim to be compensated for the whole of the improvement with the deduction of an amount proportionate to the area which he retains in his possession. (*Hopkins, S. M. and Porter, J. M.*) JAGESHWAR PRASAD *v.* BRIJ BEHARI.

3 U. P. L. R. (B. R.) 34.

——S. 95—*Jurisdiction—Civil Court—Suit for declaration that deft. is sub-tenant.*

A suit for declaration that deft. is sub-tenant of the plaintiff falls under S. 95 and is not cognizable by the civil courts. (*Daniels, J.*) GHISWA *v.* DEO NARAIN.

L. R. 4 A 450 (Rev.) : 73 I. C. 947 : A. I. R. 1923 All. 568.

——S. 95—*Revenue Court - Oral agreement for enhanced rent—If enforceable.*

A claim for enhanced rent under an oral agreement or unregistered deed cannot be enforced in a Revenue Court. (*Stuart, J.*) REAG NARAIN *v.* AUGAD.

L. R. 3 A. 132 : 70 I. C. 495 : A.I.R. 1922 All. 55 (2).

——Ss. 95, 167—*Suit for declaration only in Revenue Court—Jurisdiction.*

A suit under S. 95 (*a*) or (*b*) of the Agra Tenancy Act can be filed by either party in the Revenue Court and the Civil Court has no jurisdiction to entertain the suit. An appeal against an order in a suit under S. 95 lies to the Revenue Court and the District Judge has no jurisdiction to entertain the appeal and, consequently, S. 197 of the Agra Tenancy Act does not apply. (*Mears, C. J. and Ryves, J.*) JAGANNATH *v.* BALWANT SINGH.

44 A. 692 : 20 A. L. J. 570 : 68 I. C. 247 : L. R. 3 A. 235 (Rev.) : 4 U. P. L. R. (A.) 194 : A. I. R. 1922 All. 372.

——S. 95—*Jurisdiction—Denial that plaintiff is a tenant, does not raise a plea of jurisdiction.*

The mere denial by the defendant in a suit under S. 95 of the Agra Tenancy Act that the plaintiff is a tenant, does not amount to a plea of jurisdiction. (*Rafique and Ryves, JJ.*) RATAN SINGH *v.* PRAN SUKH.

43 A. 368 : 19 A. L. J. 120 : 61 I. C. 44 : 2 U. P. L. R. (A.) 435.

——S. 95—*Suit by mortgagee for declaration of rights—Civil or Revenue Court.*

A suit by a usufructuary mortgagee of a fixed rate tenancy for a declaration of his rights is cognizable by a Civil Court and S. 95 does not apply to such a suit as there is no contract of tenancy between the mortgagee and the Zamindar. (*Walsh and Wallach, JJ.*) SAUDAGAR SINGH *v.* GANGA SINGH.

63 I. C. 274 : 19 A. L. J. 702.

——S. 95—*Landlord and tenant—Receipts in the name of occupancy tenant and a stranger—How far an admission by the Zamindar of the latter to tenancy.*

In a suit by a Zamindar for declaration under S. 95 of the Agra Tenancy Act, that K was the only occupancy tenant in his holding, and C who had been sharing in cultivation with K, had no manner of right in the holding, the latter relied on statements in rent receipts as indicating admission of C to tenancy, by the Zamindar.

Held, relying on *Shaik Habib* v. *Salamad Khan* U. D. v. 496, that statements in rent receipts were not sufficient to prove an admission by a Zamindar to a share in an occupancy holding. (*Burn, J. M.*) CHEDA *v.* SALIM-UD-DIN.

L. R. 5 A. 289 (Rev).

——S. 95—*Suit for declaration of status—Same co-sharers alone joining—Suit not bad.*

Under S. 95 Agra Tenancy Act, a suit for declaration of status is not bad because the khata is joint and some of the sharers have not joined in the suit. (*Fremantle, S. M.*) MT. AMDANI BIBI *v.* RAM CHANDRA NAIK KYLIA.

L. R. 4 All. 306 (Rev).

AGRA TENANCY ACT (II OF 1901), S. 95.

——S. 95—*Joint cultivation—Period does not count for acquisition of occupancy rights.*

Where the evidence shows that a person was cultivating jointly with another for some time and thereafter singly, the former period cannot be counted for the acquisition of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) BOHRA SALIG RAM *v.* TULSI RAM.

L. R. 4 All. 350 (Rev).

——S. 95—*Suit for declaration of ex-proprietary rights—Prior* ex parte *order based on Patwari's Report is not conclusive.*

In a suit for declaration of exproprietary rights under S. 95, Agra Tenancy Act, a prior *ex parte* order based on the patwari's report and fixing rent cannot operate as *res judicata*. (*Fremantle, S. M. and Burn, J. M.*) MT. REOTI *v.* TICA RAM.

L. R. 4 A. 374 (Rev.)

——S. 95—*Applicability—Suit for declaration of adoption is cognizable by a Revenue Court.*

Where plaintiff sued in a Revenue Court for a declaration that he was the adopted son of the deceased occupancy tenant, and shared in the cultivation with him *held*, looking at the substance rather than the wording of the claim, it fell under S. 95 of the Agra Tenancy Act and as such was cognizable by a Revenue Court. (*Hopkins, S. M.*) GRIND SINGH *v.* RAM KUNWAR.

L. R. 3 A. 5 (Rev.)

——S. 95—*Occupancy right—Rzgistered lease for 7 years—Suit for declaration of right maintainable.*

In a suit by certain tenants under S. 95 of the Agra Tenancy Act for a declaration that they were occupancy tenants it was found that they were holding the lands in question under a registered lease for 7 years though they had previously acquired occupancy rights. *Held* that the suit was not premature and the plaintiffs were entitled to the declaration sought for. (*Hopkins, S. M. and Burn, J. M.*) NABHU *v.* MT. RAM KUNWAR.

L. R. 3 A. 86 (Rev.)

——S. 95—*Record of rights—Entries in—Conclusive proof.*

In a suit for a declaration that a tenant was a tenant of *sir*, it was proved that in the last record of rights prepared before 1902 the land had been recorded as an occupancy holding and not as *sir*, while admittedly there was no case for applying cl. (b) or (c) of the definition of *sir* in S. 4 (12) of the United Provinces Land Revenue Act, 1901.

Held, that the entry in the record of rights was conclusive proof that the land was not *sir* and that evidence and inference to the contrary were unavailing. (*Ferard, S. M. and Harrison, J. M.*) RAGHUNANDAN SINGH *v.* BABU MATHURA PRASAD.

L. R. 3 All. 302 (Rev.)

——S. 95—*Jurisdiction—Suit by recorded sub-tenant that he is tenant-in-chief is maintainable in Rev. Court.*

It is open to a person recorded as sub-tenant of a holding to bring a suit in the Revenue Court against the land-holder and the recorded occupancy tenant for a declaration that he is the tenant-in-chief and that the other defendants were wrongly recorded as occupancy tenants of the holding. (*Hopkins, S. M. Fremantle, J M.*) SUKHDEO HALWAI *v.* JAMNA PRASAD SAHU.

L. R. 3 A. 363 (Rev.) : 4 U. P. L. R. (B. R.) 73.

——S. 95—*Denial by defendant does not affect jurisdiction.*

Where a suit is clearly framed under S. 95 the mere denial by defendants that the plaintiff is a tenant does not raise the plea of jurisdiction. (*Rafiq and Ryves, JJ.*) RATAN SINGH *v.* PRAN SUKH.

L. R. 2 A. 6 (Rev.)

AGRA TENANCY ACT (II OF 1901), S. 95.

——**S. 95**—*Tenancy not extinguished—Tenant out of possession—Suit by tenant under the section lies.*

A tenant can sue under S. 95 whether he is out of possession or not so long as his tenancy has not been extinguished or determined. Where certain land is sold to another and the vendor is out of possession since the date of sale no suit under S. 95 can lie by the vendor. (*Fremantle, J. M.*) RIAZUDDIN *v.* SHIBBA SINGH. **L. R. 2 A. 144 (Rev.).**

——**S. 95**—*Right to sue—Tenant out of possession can sue.*

So long as the tenancy is not extinguished, a tenant can sue, whether he is in possession or not. (*Hopkins, S. M. and Fremantle, J. M.*) RAIZUD-DIN *v.* SHIBBA SINGH. **4 U. P. L. R. 15 (Rev.)**

——**S. 95**—*Applicability.*

S. 95 refers to suits between land-holders and tenants and does not apply to a suit between an occupancy tenant and persons who are alleged to be trespassers. (*Lindsay, J.*) DAULAT SINGH *v.* INDAR SINGH. **63 I. C. 97 (All.)**

——**S. 95 (a)**—*Suit for declaration as to land-holder's name is not maintainable.*

A suit for a declaration as to the name of the land-holder of a tenant is not maintainable under S. 95 (a) of the Agra Ten. Act. (*Pearson, J. M.*) RAMADHIN RAM *v.* CHIKHURI. **L. R. 3 A. 458 (Rev.)**

——**S. 96**—*Applicability—Section does not apply to Thekadars.*

Even though a thekadar is a non-occupancy tenant under S. 19 of the Agra Tenancy Act, nevertheless S. 96 can apply only to a non-occupancy tenant of *an agricultural* holding which a Thekadar is not; consequently he cannot sue under S. 96 in a Revenue Court. His proper remedy is to bring a suit for specific performance if there was a contract for permanent lease. (*Ryves, J.*) GIRIJA NAND *v* HIS HIGHNESS THE MAHARAJA PARBHU NARAIN SINGH KASHI NARESH. **75 I. C. 605 : A. I. R. 1923 A. 398 (2).**

——**S. 96**—*Whether attestation necessary for a lease.*

S. 96 of the Agra Tenancy Act does not require that a lease should be witnessed. (*Fremantle, S. M. and Burn, J. M.*) JAGGU *v.* NIAZ AHMAD KHAN. **L. R. 5 A. 295 (Rev.)**

——**Ss. 97 and 41**—*Mere entry in the khatuni signed by landlord, tenant and qanungo is not agreement to enhance rent.*

S. 41 of the Tenancy Act provides that the rent of an occupancy tenant shall be liable to enhancement only by a registered agreement or by decree or order of a Revenue Court. S. 97 allows the substitution of the attestation of a Revenue Officer not inferior in rank to a qanungo for registration subject to such conditions as the Local Government may direct. The mere entry of a figure in the khatauni with the signatures of the landlord, the tenant and the Qanungo cannot be regarded as an agreement to enhance rent duly attested under these provisions of the Act. (*Neave, J.*) RAM PRASAD *v.* RAJJAN. **82 I. C. 332 : A. I. R. 1925 All. 123 (1).**

——**S. 97**—*Leases—Separate leases for portions of a single holding—Rent exceeding Rs.* 100—*Validity of lease.*

Where in respect of different plots composing a single holding a number of Kabuliyats were taken showing a rent of less than Rs. 100 but the aggregate rent was more than hundred rupees and the leases were attested before the Kanungo but not stamped or registered. *Held*, that the leases were invalid for want of proper stamp and registration. (*Burn, J. M.*) SHAHBUL HASAN *v.* BAZ KHAN. **L. R. 5 A. 245 (Rev.)**

AGRA TENANCY ACT (II OF 1901), S. 107.

——**S. 97**—*Attestation by Dy. Collector is sufficient.*

S. 97 declares that attestation may be effected by any Revenue Officer superior to the rank of Kanungo. Attestation by a Deputy Collector in an executive capacity is clearly adequate. (*Fremantle, S. M. and Burn, J. M.*) JAGANNATH PRASAD *v.* RAJA INDRA BIKRAM SINGH. **L. R. 4 A. 237 (Rev.).**

——**S. 97**—*Attestation—Must be made within 4 months—Registration.*

Under S. 97 of the Agra Ten. Act attestation is in lieu of registration and under S. 23 of the Registration Act, registration must be effected within 4 months. Therefore attestation like registration, to be valid must be effected within 4 months after execution. (*Ferard, S. M.*) MAHOMAD IMTIAZ ALI KHAN *v.* KALLU. **L. R. 3 A. 293 (Rev.)**

——**Ss. 102, 104 and 167**—*Rent payable in kind—Refusal of tenant to cultivate land—Suit for damages.*

A suit for payment of rent in kind, where defendant is alleged to have purposely left land fallow, is triable only by a Revenue Court. (*Ryves, J.*) RAJA NARENDRA BAHADUR PAL *v.* BAFATI. **45 A. 7 : 20 A. L. J. 771 : 68 I. C. 985 : 4 U.P.L.R. (A.) 206 : L. R. 3 A. 477 : A.I.R. 1923 All. 50.**

——**Ss. 102, 177, 185**—*Suit for arrears of rent exceeding Rs.* 100—*Dismissal for default—Restoration refused—Revisional powers of Board.*

A suit for arrears of rent exceeding Rs. 100 was dismissed by an Assistant Collector owing to the absence of the plaintiff. An application for restoration was rejected. The Collector recommended the case for revision on the ground that the Assistant Collector had not exercised a reasonable discretion in refusing to restore it. The application was rejected by one member of the Board on the ground that no revision lay under section 185 of the Tenancy Act (II of 1901). An application was then made for review of this order.

Held, that the words "suit in which a decree is appealable under section 177" do not include the proceedings on an application for the restoration of a suit dismissed in default. Those proceedings do not in any way involve a consideration of the merits of the original suit and no other remedy was open to the applicant. The Board of Revenue has revisional jurisdiction in such cases. (*Pim, J.M. and Fremantle, S. M.*) QAZI SYED ABDUL GANNI *v.* HAZARI. **L. R. 6 A. 260 (Rev.).**

——**S. 106**—*Appraisement—Procedure illegal—Revision.*

Where numerous cases of appraisement of crop were dealt with as one case without notice to the several parties and without appointing a person legally qualified as third assessor and without any inspection of the crop or a reasoned estimate of their produce or value, the procedure is entirely illegal and justifies the interference of the Board in revision. (*Hopkins, S. M. and Fremantle, J. M.*) BHAI SINGH *v.* KUNWAR MAHOMMAD ABDUL JALIL KHAN. **L.R. 3 A. 49 (Rev.).**

——**Ss. 107 and 95**—*Suit for declaration that defendant is only a tenant-at-will lies only in Revenue Court.*

Plaintiffs were Zemindars of a village in which L was an occupancy tenant of a holding. L died and on his death the defendants applied for mutation of their

names in the place of L as being entitled to succeed to his occupancy holding. While those proceedings were pending, a suit was brought by plaintiff in the Munsiff's Court for a declaration that defendants were not the grandsons of L and the defence was that the suit was not cognizable by the Civil Court. *Held*, that the suit was not cognizable by the Civil Court. The appropriate suit for the plaintiffs to have brought was for a declaration under S. 95 of the Tenancy Act. Taking the pleadings, it was admitted that the relationship of landlord subsisted between the parties and that the tenancy was still subsisting. The only dispute was as to the tenancy. Was it an occupancy tenancy as the defendants claimed or a non-occupancy tenancy from year to year as the plaintiffs asserted? Consequently, S. 95 (*a*) and (*b*) of the Agra Tenancy Act applied to the case. An appeal in a suit under S. 95 of the Act lies to the Revenue Court and not to the District Judge. 36 A. 48; 5 A. L. J. 374; 35 A. 299 Rel. (*Mears, C. J. and Ryves, J.*) JAGANNATH *v.* BALWANT SINGH. **44 A. 692 : 20 A. L. J. 570 : L. R. 3 A. 235 : 68 I. C. 247 : 4 U. P. L. R. (A.) 194 : A. I. R. 1922 All. 372.**

——**S. 131**—*Co-sharer—Partition—Ejectment of tenants.*

A co-sharer after the partition has been confirmed can sue to eject tenants allotted to his patti without waiting for the subsequent first of July on which the partition comes into force. (*Fremantle, S. M. and Burn, J. M.*) SITAL RAI *v.* LODI. **L.R. 5 A. 183 (Rev.).**

——**S. 142**—*Suit for refund of amount collected by distraint—If maintainable in Civil Court.*

A suit for arrears of rent having been decreed the landlord collected it by distraint under the Act. Subsequently the decree was reversed and a suit was brought for refund of the amount collected. *Held*, the suit was not cognizable by a Civil Court, but was provided for by S. 142. (*Piggott, J.*) MAN SINGH *v.* RAM NATH. **75 I. C. 922 : A. I. R. 1924 All. 828.**

——**S. 146**—*Suit for damages for wrongful distraint—Cause of action—Limitation.*

The cause of action of a wrongful distraint under the first clause of S. 146, Agra Tenancy Act, takes its origin on the day when it comes to an end and suit for damages may be lawfully instituted within the limitation period of 3 months from the said date. (*Piggott, Walsh and Lindsay, JJ.*) JHABBU *v.* BATUL. **45 A. 208 : 73 I. C. 299 : L. R. 4 A. 1 : A. I. R. 1923 All. 146.**

——**S. 150**—*Order rejecting petition of appeal—No revision lies.*

In a suit under the Tenancy Act the Assistant Collector passed a decree and a petition of appeal was presented to the District Judge. The suit was under Sch. IV, Group C, No. 39 of the said Act and under the provisions of Ss. 150 and 154 of the said Act. The District Judge refused to entertain the petition on the ground that he had no jurisdiction under S. 177 of the Tenancy Act. On revision to the High Court *held* that no revision lay. 14 A. L. J. 281 Ref. (*Piggott, J.*) ADYA SARAN *v.* KALI CHARAN. **45 A. 567 : 75 I. C 280 : 21 A. L. J. 524 : L. R. 4 A. 223 : A.I.R. 1923 All. 580.**

——**Ss. 150 and 151**—*Nankar land can be assessed to revenue.*

Nankar land, *i.e.*, *sir* reserved by the proprietor free of revenue on sale of his rights is liable to assessment to revenue and the provisions of Chapter X of the Agra Tenancy Act apply thereto.

A covenant made with the purchaser of such land that the revenue thereon would be paid out of the other estate of the transferor is not binding on his successor in interest. (*Hopkins, S.M. and Fremantle, J. M.*) NAWAB MUHAMMAD ABDUL MAJID *v.* AJODHYA KALWAR. **4 U. P. L. R. 21 (Rev.)**

——**S. 157**—*Rent-free grantee—Acquisition of occupancy rights—Calculation of the period.*

An ex-rent-free grantee should not be allowed to repudiate the rights which by his own action he had allowed his tenant to acquire. The grantee is to be deemed under S. 157 to have been a tenant from the date of the grant: and the class of his tenancy is to be determined in accordance with the provisions of the Act. He cannot count towards the period for the acquisition of occupancy rights any term during which the land has been sub-let or otherwise transferred in contravention of Ss. 21 and 25. (*Hopkins, S. M. and Porter, J. M.*) LALLI *v.* BANKEY LAL. **L. R. 3 A. 321 (Rev.).**

——**S. 158**—*Land Revenue Act (III of 1901) S. 78—Contracts to hold land free of Revenue, how far binding on parties and their successors—Resumption.*

Sometime before 1281 Fasli the predecessors-in-interest of the parties to this case came to an agreement by which, apparently in consideration of surrendering other claims one party received 16 bighas, 19 biswas, for the revenue of which the other party as Zamindar agreed to hold himself responsible. The grant and the conditions were entered in the wajib-ul-arz of 1281 Fasli, and no separate revenue was entered on the Khata in the settlement of that year. The question was not raised during the settlement of 1902, but a separate revenue was assessed on the Khata. In 1907 a suit was brought for three years' arrears of revenue but was dismissed and the District Judge maintained the exemption on the ground of its long existence and of the absence of any order deciding definitely which party was to bear the burden of revenue. A suit was then brought under S. 158 of the Tenancy Act:

Held following certain decisions of the Civil Courts and S. D. 4 of 1903 that the original agreement was not binding after the death of the grantor or the expiration of the term of settlement. The agreement can thus be cancelled by action under section 78 of the Land Revenue Act.

Held further following S. D. 4 of 1903 that the extent to which contracts to hold land free of revenue are valid against the proprietor who has engaged for the land revenue is subject to the law of resumption. A suit under section 158 of the Tenancy Act will therefore lie. (*Pim, J. M. and Fremantle, S. M.*) NAURANGI LAL *v.* KHOJI LAL &C. **L. R. 6 A. 263. (Rev.)**

——**S. 158**—*Rent-free grant in favour of an idol—Priest in charge of Temple cannot be regarded as a grantee.*

The particular priest who for the time being may be in charge as manager of the affairs of the temple in question, or of the worship of the idol as conducted therein cannot be regarded as himself the grantee within the meaning of S. 158 of Act II of 1901 nor can any priest who from time to time may succeed to the office be treated as a successor to the original grantee within the meaning of the same section. (*Piggott and Walsh, JJ.*) MATHURA PRASAD *v.* RAMESHWAR. **44 All. 169 : 19 A.L.J. 964 : 65 I. C. 371 : A.I.R. 1922 All. 312.**

——**S.158**—*Suit for resumption—Plea by defendant—Proprietary title.*

A plea by the defendant in a resumption suit based on S. 158 raises a question of proprietary title within S. 177 (*e*) of the Tenancy Act. (*Lindsay, J.*) LALTA PRASAD *v.* KHARGA. **45 A. 336 : L. R. 4 A. 84.**

AGRA TENANCY ACT (II OF 1901), S. 158.

21 A L. J. 189 : 71 I. C. 773 : A.I.R. 1923 All. 313.

——**S. 158**—*Sale of proprietary rights*—Sir land —*Revenue payable by vendee—Assessment of revenue.*

On the sale of proprietary rights of a co-sharer certain *sir* land was excluded from the sale deed it being provided that the revenue thereon should be paid by the vendee.

Held, that the Resumption Chapter of the Tenancy Act applied to the case and revenue was assessable on the *sir* land under S. 153 of the Act. (*Fremantle, S. M. and Burn, J. M.*) HAR PRIYA SARAN *v.* RAM NATH. **L.R. 5 A. 118 (Rev.).**

——**S. 158**—*Land recorded as free of revenue.*

In view of the fact that the land in question was recorded as *Haqqiat Mutafarriqa* and that it had never been called nankar or sankalap, there was a strong presumption that it was exempted from assessment on its own merits and that the land had not been granted by the zemindars during the period of British rule. (*Fremantle, J. M.*) KUMUDA PRASAD *v.* DEONANDAN SINGH **L. R. 3 A. 418 (Rev.).**

——**S. 159**—*Liability of co-sharer.*

The lambardar can recover from the co-sharer revenue paid by him on behalf of the co-sharer where the co-sharer paid revenue subsequently into the treasury without informing the Lambardar. (*Daniels, J.*) MT. ISHAB *v.* ABDUL GHANI. **80 I. C. 916 : A. I. R. 1925 All. 95.**

——**Ss. 159 to 162, 164 and 165**—*Appeal lies to Dt. Judge in case of question of proprietary title.*

Where the appeal raises no question of proprietary title, the appeal lies to the Commissioner, but where the cross-objection introduces a question of proprietary title as an issue in the decision of the appeal, the Commissioner must return the appeal and the cross-objection to the parties with directions to file them before the District Judge. 31 I. C. 857 Appr. (*Stuart, J.*) LALA BHAGWAN DAS *v.* MOHABAT SHAH. **A.I.R. 1923 All. 170.**

——**S. 160**—*Usufructuary mortgagee's name entered in revenue records—Suit for recovery of proportionate amount on account of that share which has been redeemed does not lie.*

Plaintiff was a usufructuary mortgagee under two mortgages ; one was redeemed but his name continued to be recorded as a mortgagee. He sued for recovery of the proportionate amount of the money which he had to pay on account of that share which had already been redeemed. *Held*, that where a person's name is entered as mortgagee lessee the revenue court was not competent to go behind the entry and to find that he was not in possession. Consequently such a suit does not lie. (*Gokul Prasad, J.*) IRSHAD MAHOMED KHAN *v.* JWALA PRASAD. **75 I. C. 663 : A. I. R. 1923 All. 344.**

——**Ss. 163 and 164**—*Suit for profits—Limitation.*

Under S. 164, Agra Tenancy Act, profits are payable when they are divisible under S. 163 and limitation begins to run from the date they are divisible. (*Ryves and Gokul Prasad, JJ.*) NAZIRUDDIN *v.* ACHCHI BEGAM. **20 A. L. J. 95 : 64 I. C. 988 : L. R. 3 A. 20 : A. I. R. 1922 All. 348.**

——**Ss. 164 and 165**—*Suit under—Amendment.*

The nature of a suit is indicated by the allegations made in the plaint and not by quoting a section which does not apply. Though there is a difference in the nature of the suits under Ss. 164 and 165 no harm could be done by amending a suit under one section into a suit coming within the other. (*Mukerjee and Dalal, JJ.*) CHANDER SEN *v.* MOHAR SINGH. **L. R. 5 A. 335 (Rev) : A. I. R. 1925 All. 538.**

AGRA TENANCY ACT (II OF 1901), S. 164.

——**S. 164**—*Co-sharer—Suit for profits—Basis of—Negligence or misconduct of lambardar—Limitation—Starting point.*

In a suit under S. 164 a co-sharer is entitled to a decree for his share of the arrears collected on account of previous years, as well as his share of the gross rental for the year in suit, in case negligence or misconduct of the Lambardar is proved. The period of limitation for a suit under S. 164 for a share of the profits in respect of arrears collected subsequently begins to run from the 1st of August following the year in which the arrears are realised. (*Walsh, A. C. J., Sulaiman, Ryves, Mukerji and Daniels, JJ.*) SHEO GHULAM *v.* SALIG RAM. **22 A. L. J. 610 (F. B.) : 46 A. 791 : L. R. 5 A. 189 (Rev.) : A. I. R 1924 All. 481 (F. B.)**

——**S. 164**—*Co-sharer— Lambardar— Collections —Suit and decree for a portion of the rental—Decree for share of rent—Interest.*

The amount of the actual collections shows that the lambardar realised 76 per cent. With regard to the rest he brought suits and obtained decrees against defaulting tenants. *Held*, the fact that some of the decrees cannot be realized is no fault of the lambardar nor can it be said to constitute negligence. No negligence of the lambardar in the collection of rents has been proved and that the decree in favour of a co-sharer for profits should proceed on the basis of actual collections, with 12 per cent. interest which is the proper rate of interest in the case up to realization. (*Rafique and Lindsay, JJ.*) RAMCHANDRA SARUP *v.* KIRPA DEVI. **4 U. P. L. R. (A.) 33 : 65 I.C. 648 : A. I. R. 1923 All. 216.**

——**S. 164**—*Suit against Lambardar for profits —Onus when shifted.*

When a co-sharer has given general evidence to show that the rents are greatly in arrears, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on the Lambardar to show that for some reason not connected with his own negligence or misconduct, he was unable to collect the rent. Collection charges should be awarded to the Lambardar, even though he does the work of collection himself. 13 A. L. J. 851 Foll. (*Sulaiman, J.*) MUSSAMMAT HIRIA *v.* RAM ADHAN SINGH. **75 I. C. 553 : A. I. R. 1923 All. 335.**

——**S. 164**—*Suit by a mortgagee against a Lambardar for profits—Suit does not lie.*

An 8 annas sharer who was also a lambardar mortgaged his 3 annas share. The mortgagee gave him a lease for 7 years. After that period the lambardar continued making collections. The mortgagee sued him for recovery of profits. *Held*, that such a suit does not lie. 14 I. C. 260 affirmed. (*Gokul Prasad, J.*) TIRBENI SAHU *v.* LACHMI PANDE. **75 I. C. 666 : A. I. R. 1923 All. 346.**

——**S. 164**—*Suit against lambardar for profits—Decree—Actual collections—Negligence.*

A co-sharer suing for his share of the profits under S. 164 of the Agra Tenancy Act can only get a decree for his share of the actual collections unless the case comes within S. 164 (2) of the Agra Tenancy Act so as to entitle him to a decree on gross rentals. Negligence on the part of the lambardar cannot be inferred from the mere fact that the rents for a particular year remained unpaid. 43 A. 129 Foll. (*Ryves and Gokul Prasad, JJ.*) JODHI RAM *v.* MT. KAUNSILLA. **20 A. L. J. 313: L. R. 3 A. 205: 4 U. P. L. R. (A.) 160 : 67 I. C. 521 : A. I. R. 1922 All. 111.**

AGRA TENANCY ACT (II OF 1901), S. 164.

——— **Ss. 164 and 163**—*Suit for profits—Limitation—When profits become payable.*

The period of limitation for a suit for profits begins to run from the date when profits become payable, *i.e.*, when they are divisible in accordance with S. 163 irrespective of the fact that the collections have been actually made at a subsequent date. (*Ryves and Gokul Prasad, JJ.*) NAZIRUDDIN *v.* ACHCHI BEGAM. **20 A. L. J. 95 : 64 I. C 988: A. I. R. 1922 All. 348.**

——— **S. 164**—*Suit for profits—Civil Court decision pending suit—Duty of Revenue Court as to decision of Civil Court.*

When as between parties to a revenue suit a Civil Court of competent jurisdiction has decided as to the title to the property, adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision. In suits for profits in Rent Courts based on entries in the *Khewat* an order or decree of a Civil Court, declaring the rights of the parties, if passed before the end of the litigation, must be followed. (*Ryves and Gokul Prasad, JJ.*) SURJAN SINGH *v.* MT. CHATURA KUNWAR. **44 All. 250 : L. R. 3 A. 17 : 20 A. L. J. 61 : 64 I. C. 964 : A. I. R. 1922 All. 356.**

——— **S.164**—*Suit for profits from lambardar lies in Revenue Court.*

A suit by a recorded co-sharer for arrears of profits from the lambardar is maintainable only in a Revenue Court. The deft. is entitled to plead and prove if he can, that he owes nothing or is only partly liable. But the suit is not liable to be defeated *in limine* by producing in evidence the decree of a Civil Court as regards the liability of the defendant. (*Ryves and Gokul Prasad, JJ.*) KUNJ BEHARI LAL *v.* GHANSHAM DAS. **4 U. P. L. R (A.) 3: 65 I.C. 530: A. I. R. 1922 All. 397.**

——— **Ss. 164 and 165**—*Suit by co sharer for share of profits—Decree on actual collections—Previous arrears.*

In cases under S. 164 of the Agra Tenancy Act, it is the duty of a Lambardar to make collections both of the rents due for the year as well as for the arrears of rent on behalf of the whole body of co-sharers. A co-sharer may either be given a decree on the basis of the gross rental or on the basis of actual collections, and if a decree is based on actual collections such collections include arrears of the previous years also. But this principle would not apply to a suit under S. 165 of the Act where it cannot be said that it was the duty of the defendants to make collections of the plff.'s share also. The defendants can be held liable only if they have collected rents in excess of their own legitimate shares. (*Sulaiman, J.*) LALA DURGA PRASAD *v* GANGA SARAN. **L. R. 3 A. 471 : 70 I.C. 763: A. I. R. 1922 All. 501.**

——— **Ss. 164 and 201**—*Suit for profits—Khewat amendment of, during pendency of suit should not be considered by Court.*

In a suit by a co-sharer for his share of the profits of a *mahal* the Court is not entitled to take into consideration an amendment of the *Khewat* subsequent to the suit by the Revenue Court directing the removal of the plaintiff's name therefrom. The amendment operates only from the date the order directing amendment was passed. (*Tudball and Sulaiman, JJ.*) LACHMAN PRASAD *v.* SHITABA KUNWAR. **43 A. 177: 18 A. L. J. 1008 : 59 I. C. 639 : 2 U. P. L. R. (A.) 386.**

——— **S. 164**—*Dismissal of suit—Subsequent suit for possession is barred.*

If a suit for profits under S. 164 is dismissed on the ground that the defendant has acquired title by adverse possession, a subsequent suit for possession is barred by *res judicata*. (*Ryves and Gokul Prasad, JJ.*) SYED MURTAZA HUSSAIN *v.* ZIAUL HASAN. **19 A. L. J. 279 : 62 I. C. 684: 3 U. P. L. R. (A.) 47.**

——— **S. 164 (a)**—*Profits should be allowed on actual collection.*

Where the question is whether the profits to a co-proprietor should be allowed on jamabandi or acquittal collection, *held*, unless negligence of the lambardar is actually proved, the profits should be allowed on actual collection. 43 All. 29 followed. (*Ryves and Gokul Prasad, JJ.*) JODHI RAM *v.* MT. KUNNSILLA **67 I. C. 521 : 20 A. L. J. 313 : A. I. R. 1922 All. 111.**

——— **S. 164 (2)**—*Suit for profits—Form of decree.*

Where a plff. claims under S. 164 (2) on the basis of gross rental for the profits for a particular year, he cannot be given a decree for arrears for past years, collected in the year in question. But if S. 164 (2) does not apply, he can be given a decree on the basis of the actual collections in that year for whatever year, past or present. He cannot, however, be given a decree on the basis of both the gross rental and actual collections. (*Ryves and Gokul Prasad, JJ.*) CHABRAJI KUAR *v.* GANGA SINGH. **43 A. 29 : 18 A. L. J. 863 : 60 I. C. 643 : 2 U. P. L. R. (A.) 272.**

——— **S. 165**—*Suit under S. 165—Person allowed by lambardar to make collections cannot be made defendant.*

A person who has been allowed by the lambardar to make collections is not a co-sharer or a legal representative or assignee of the co-sharers and therefore no suit under S. 165 can lie against him. So, such a person cannot be impleaded as a defendant to a suit for profits under S. 165. (*Neave, J.*) PURAN *v.* KHIALI RAM. **A. I. R. 1925 All. 701.**

——— **S. 165**—*Assignee of arrears of profits can sue in Revenue Court.*

An assignee of arrears of profits can sue to recover those profits in the Revenue Court. (*Sulaiman, J.*) ABHAINANDAN *v.* BHAGWAN DUTT. **A. I. R. 1925 All. 765.**

——— **S. 165**—*Suit for profits against lambardar's heirs after his death—Heirs are not liable for uncollected profits.*

The successor-in-title of a deceased lambardar in a suit which was not brought against the lambardar but brought after his death are not liable to account for profits which his predecessor had failed to collect or which he permitted to remain uncollected owing to negligence or misconduct. In such a case profits can be awarded only on the basis of collections. 40 All. 246 Dist. (*Stuart, J.*) RAM SARUP *v.* GAYA PRASAD. **A. I. R. 1925 All. 810.**

——— **S. 165**—*Suit for profits against lambardar—Ex-proprietary rent—Cannot be taken into account.*

Where exproprietary rent has not been assessed under S. 36 of the U. P. Land Rev. Act, such rent cannot be taken into account in a suit for profits against the lambardar. (*Lindsay and Kanhaiya Lal, JJ.*) KUNJ BEHARI LAL *v.* ABDUL HADI. **L. R. 3 A. 260 (Rev.) : 4 U. P. L. R. (A.) 200 : 77 I. C. 1032 : A. I. R. 1924 All. 613.**

——— **S. 165**—*Lambardar—Powers of—Right to sue co-sharers for profits.*

A *lambardar* is not merely a co-sharer but the agent of the other co-sharers and can represent them in transactions relating to the estate. He can bring a suit for rent not only against tenants but also against other co-sharers who hold *sir* and *khudkhast* in excess of

their shares for the extra profits realised. (*Kanhaiya Lal, J.*) KUNDAN LAL *v.* BASANT RAI.
75 I. C. 330 : A. I. R. 1924 All. 935 (2).

——— **Ss. 165 and 10 (5)**—*Purchaser of* khudkhast *and—Suit for profits by, is a suit for rent and is not governed by section—Rent.*

In a suit for profits by the purchaser of *khudkhast* land against the vendor, the exproprietary tenant of the plots, the other co-sharers in the village are not necessary parties. The suit is one for rent and is not governed by S. 165. But having regard to S. 10 (5) of the Agra Tenancy Act and S. 36 of the Land Revenue Act as a preliminary step to such a suit it is necessary first to have the rent assessed by the Collector. (*Ryves J.*) KISHORI MAL *v* PARASADI. **71 I. C. 382 (1)-A. I. R. 1922 All. 319.**

——— **Ss. 165 and 164**—*Nature of suit under—Account—Collection of arrears.*

In suits under S. 164, it is the duty of the *lambardar* to make collections both of the rents due for the year as well as for arrears of rent, on behalf of the whole body of co-sharers. If, therefore, a decree is to be given on actual collections, those collections must include arrears for previous years also; whereas in a suit under S. 165 against co-sharer-defendants, it cannot be said that it was the duty of the defendants to make collections of the plaintiff's share also. The defendants can be held liable only if they have collected rent in excess of their own legitimate share. That only can be the true basis of accounting between the parties. (*Sulaiman, J.*) DURGA PRASAD *v.* GANGA SARAN.
70 I. C. 763 : A. I. R. 1922 All. 501.

——— **S. 167**—*Matter within S. 167—Decision of Revenue Court—Civil Court will not try suit calculated to reverse Revenue Court's decision.*

Where during the continuance in force of an *ex parte* decree for arrears of rent in defendant's favour and against plaintiffs, plaintiffs sued in Civil Court for declaration that they were joint tenants with defendant.

Held, that as the effect of the suit was to reverse the decision of the Revenue Court, it was barred under S. 167. Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is, under S. 167 of the Tenancy Act, within the Revenue Court's exclusive jurisdiction, and if this is the substantial object of the suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form. (*Daniels, J.*) GOBIND *v.* AMNAR. **L. R. 5 A. 138 (Rev.) : 78 I. C. 628 : A. I. R. 1925 All. 194 (2).**

——— **S. 167**—*Suit for declaration that plaintiffs are joint tenants with defendants—Civil Court can try.*

Unless the fourth schedule of the Act is produced before the Court and a suit or application of a precisely similar kind (to the suit in question) and parallel in its results is shown to the Court as being a suit exclusively triable by the Revenue Court, the Civil Court will not only be within its rights in trying the suit but will be bound to determine it. A suit for declaration that the plaintiffs are joint in occupancy with the defendants is cognizable by a Civil Court. (*Mears, C. J. and Piggott, J.*) AMMUR *v.* GOVIND.
23 A. L. J. 449 : 88 I. C. 247 :A. I. R. 1925 All. 465.

——— **Ss. 167 and 199**—*Ejectment suit—Question of title raised in defence—Defendant directed to file suit in Civil Court—Suit filed after expiry of time prescribed but before the conclusion of suit in Revenue Court is not entertainable—C. P. Code. S. 10.*

If a party has been ordered by a Revenue Court to file a suit in a Civil Court within three months, he is not

at liberty to ignore the restriction and file his suit after three months although the suit in the Revenue Court may be pending. A suit instituted after the three months should be dismissed by the Civil Court. (Case-law discussed.) *Per Daniels J.*—S. 10 of the Code of Civil Proce dure will not apply because the Revenue Court, though its decision may indirectly produce the same result, could not have granted the relief asked for in the Civil Court. *Per Sulaiman, J.*—Although it is not possible to bring the case within the provisions of S. 10 of the C. P. Code, as the Revenue Court is not competent to grant the relief asked for in the civil suit, nevertheless the principle underlying that section may be of wider application. (*Sulaiman and Daniels, JJ.*) GANGA *v.* BINDESARI.
23 A. L. J. 529 : 88 I. C. 684 : A. I. R. 1925 All. 615.

——— **S. 167**—*Mortgagee a recorded co-sharer—Decree for joint possession can be passed but not for mesne profits—Jurisdiction of Civil Courts is barred in such cases.*

A mortgagee of zemindari plots who is entered as such in the *khewat* is a recorded co-sharer, and if he is obstructed in the collection of rents he is entitled to a decree for joint possession against the other co-sharers but not to a decree for mesne profits. As he is a recorded co-sharer he can only obtain his share of the profits by a suit in a rent Court. Section 167 bars the jurisdiction of the Civil Courts in the matter. 1922 All. 314 and 1922 All. 162 Foll. (*Stuart, J.*) MAHADEO PRASAD *v.* BASANT LAL. **A.I.R. 1925 All. 746.**

——— **S. 167**—Revision by High Court, agst. orders of District Court in appeal from revenue Courts. KEHU SINGH *v.* THIRPAL. **23 A. L, J. 965.**

——— **S. 167**—*Suit for declaration of occupancy rights—Cognizable only by Revenue Court.*

A suit for declaration of occupancy rights both against a Zemindar and a co-tenant, is cognizable only by a Revenue Court. (*Ryves, J.*) KHAIRUDDIN *v.* SAHU GULAB DAS **74 I. C. 220 (1) : A. I. R. 1924 All. 102.**

——— **S. 167**—*Applicability—Suit between rival claimants to tenancy—Decision of Revenue Court—If can be questioned in Civil Court.*

S. 167 does not apply to suits between rival claimants to a tenancy and such a suit lies exclusively in the Civil Courts. But once the matter has been decided by the Revenue Courts it cannot be reopened in the Civil Courts. (*Sulaiman. J.*) SURJAN SINGH *v.* UMARI SINGH.
78 I. C 1008 : A, I R. 1924 All. 609.

——— **S. 167**—*Ejectment suit in Revenue Court—Decree—Subsequent suit in Civil Court—Maintainability of.*

Plaintiff cannot by merely changing the form of his relief evade the provisions of S. 167 of the Agra Tenancy Act. Defendant ejected the plaintiff in a suit brought under the Act and decided *ex parte*. An application by the plaintiff to get the *ex parte* decree set aside, on the ground that no notice was served on him was dismissed by the Revenue Court. Plaintiff then brought a suit in the Civil Court alleging that the decree in the Revenue Court had been fraudulently obtained and should therefore be cancelled and for a declaration that the plaintiff was a grove-holder. *Held* that the Civil Court had no jurisdiction to grant the relief. The ejectment suit being before the Revenue Court, that Court had jurisdiction to decide whether the defendants in the Civil Court were agricultural tenants or not. It decided against them and its decision was under S. 167 a bar to a Civil suit on the same matter. (*Daniels and Dalal, JJ.*) KUNDAN LAL *v.*

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PRASAD. **46 A. 570 : 22 A. L. J. 466 : L. R. 5 A. 159 (Rev) : 79 I. C. 960 : A. I. R 1924 All. 744.**

——S. 167—*Wilful neglect to cultivate--Damages —Suit for—Forum—Revenue Court.*

A suit by landlord for damages for non-cultivation by tenant by which he was deprived of his *Balai* rent lies only in Revenue Court. (*Ryves, J.*) RAJA NARENDRA BAHADUR PAL *v.* BAFATI. **45 All. 7 : L. R. 3 A. 477 : 20 A. L J. 771 : 68 I. C 985 : 4 U. P. L. R. (A.) 206 : A. I. R. 1923 All. 50.**

——S. 167—*Suit for possession of trees in grove—Lies only in Civil Court.*

A suit for possession of trees in a grove does not create the question of ownership to the land on which those trees stand and hence such suit is within the jurisdiction of the Civil Courts only. (*Mears, C. J. and Stuart, J.*) RAM PRASAD *v.* SUMER NATH PANDE. **45 All. 191 : L. R. 3 A. 530 : 76 I. C. 12 : 9 O. & A. L R. 277 : 21 A. L. J. 33 : A. I. R. 1923 All. 134.**

——S. 167—*Jurisdiction—Dispute between tenants—Civil Court.*

It is a truism to say that a suit for a declaration between two rival tenants may be brought in a Civil Court, though in the more recent rulings of High Court the doctrine of the exclusive jurisdiction of the Revenue Courts in certain matters has been developed, and emphasis directed to the wording of S. 167 which says "no Court other than a Court of Revenue shall take cognizance of any dispute or matter in respect of which a suit lies under the 4th Schedule." (*Ryves, J.*) SITA RAM *v.* CHAIT RAM. **L. R. 4 A. 291 (Rev.) : 71 I. C. 447 : A. I. R. 1923 All. 257.**

——S. 167—*Civil Court cannot make a declaration of rights.*

If the object of the suit is really to prejudice if possible, the rights which the defendant rival tenant or the Zamindar may have, and which if they wish to establish, they must have recourse to the Revenue Court, *i.e.*, if it is an attempt to evade the provisions of the Tenancy Act, it offends against provisions of S. 167 of the Act. Under S. 167 of the Tenancy Act, it is beyond the jurisdiction of the Civil Court to make a declaration. The Civil Court cannot investigate even, much less find on the allegations of the plaintiffs that he is, for one reason or another, an occupancy tenant, nor for the same reasons can it decide whether the defendants are permanent lessees. (*Ryves, J.*) SITA RAM *v.* CHAIT RAM. **L.R. 4 A. 291 (Rev.) : 71 I. C. 447 : A. I. R. 1923 All. 257.**

——S. 167—*Order refusing to entertain appeal is not open to revision.*

No revision lies against an order of the District Judge refusing to entertain a petition of appeal against the decree of an Assistant Collector in a suit under Agra Tenancy Act (II of 1901). 42 All. 83, Foll. (*Piggott, J.*) ADYA SARAN *v.* KALI CHARAN. **45 All. 567 : 21 A. L. J. 524 : L. R. 4 A. 223 (Rev.) : 75 I. C. 280 : A. I. R. 1923 All. 580.**

——S. 167—*Two rival Zemindars—One fraudulently entering other's name as sub-tenant, obtaining* ex parte *decree for rent, and suing for ejectment—Civil Court not bound by decree of Revenue Court.*

A suit for ejectment was brought by a Zemindar against his rival Zemindar, after having fraudulently entered the other as sub-tenant and having obtained a decree for arrears of rent from the Revenue Court. The other Zemindar defended his proprietary possession and in the Civil Court he asked for a declaration of his proprietary title. In such a case the Revenue Court has no power to pass a decree and that the

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passing of the decree furnishes a fresh cause of action. Such a decree does not bind the Civil Court and does not estop the plff. and the findings of the Revenue Court do not bind the Court. The Civil Court can consider the case independently in accordance with the circumstances of the case. An alleged owner cannot bring a claim for declaration of title within the meaning of S. 167 of the Agra Tenancy Act. (*Walsh, J.*) RAM DHARI UPADHIA *v.* BABU LAL UPADHIA. **65 I. C. 101 : 3 U. P. L. R. (A.) 21.**

——S. 173 (g)—*Set off—Suit by assignee from co-sharer for profits—Decree in favour of lambardar—Right to set off.*

A decree for arrears of rent obtained by a lambardar against co-sharer could not be set off against a claim for profits by an assignee from the co-sharer. (*Lindsay, Sulaiman and Kanhaiya Lal, JJ.*) GOVIND RAM *v.* KUNJ BEHARI LAL. **46 A. 398 : 22 A. L. J. 217 : L. R. 5 A. 65 (Rev.) : A. I. R. 1924 All. 341 (F. B.)**

——Ss. 175 and 179—*Ejectment—Death of decree-holder--Legal representative—Revival of proceedings—Abatement.*

Where a person died after obtaining a decree for ejectment and the Assistant Collector on the application of the legal representative revived the execution proceedings and ordered ejectment overruling the objections of the judgment-debtor, *Held*, that no appeal lay to the Commissioner from the order of the Assistant Collector. The legal representative having applied within a reasonable time to revive the proceedings there was no abatement. (*Hopkins, S. M. and Fremantle, J. M.*) THE NATH CHANDRAWAT KOHS TRUST *v.* CHANDRA BALLI. **4 U.P.L. R. (B.R.) 103 : L. R. 4 A. 10 (Rev.).**

——S. 177—*Plea by tenant that he holds the land as* khudkasht *raises question of proprietary title.*

Plaintiff brought a suit for ejectment against the defendants on the allegation that the defendants were his sub-tenants. One of the defendants pleaded that he was not a sub-tenant at all but that he held possession of the land as R is *khudkasht* being himself a proprietor. *Held*, the plea raised a question of proprietary title. (*Sulaiman and Mukerji, JJ.*) GHURIYA *v.* BANESWAR. **L. R. 5 A. 251 (Rev.) : 83 I. C. 202 : A. I. R. 1925 All. 30.**

——S. 177—*Appeal from order of remand by Dt. Judge.*

Under section 177 of the Agra Tenancy Act an appeal is provided from a decree of a District Judge passed on appeal but no appeal is provided from an order passed by a District Judge. Consequently no appeal lies from an order of remand passed by him. (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THIRPAL. **23 A. L. J. 965.**

——S. 177—*Jurisdiction—Objection to—Duty of Court to enquire.*

Where an objection to jurisdiction is taken, it is the duty of the trial Court to decide whether or not the plea is *bona fide*. If the trial Court makes the enquiry treating the plea as *bona fide*, the appellate court will not interfere. (*Walsh, A. C. J. and Ryves, J.*) KHUB SINGH *v.* MOHAN SINGH. **L. R. 5 A. 183 (Rev.) : A. I. R. 1924 All. 476.**

——S. 177—*Applicability of—Appeal—Forum.*

The words "in all suits" in S. 177 of the Agra Tenancy Act would comprise suits of any description in whatever group they may be and it cannot be said that because a particular kind of suit falls in Group C, the appeal does not lie to the District Judge. (*Lindsay, J.*) LALTA PRASAD *v.* KHARGA. **45 A. 336 : 21 A. L. J. 189 : 71 I. C. 773.**

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L. R. 4 A. 84 : A. I. R. 1923 All. 313.

——**S. 177**—*Ejectment suit—Order of Asst. Collector—Appeal lies to District Judge.*

An appeal from the decision of an Assistant Collector, First Class, in an ejectment suit lies to the District Judge. 22 I. C. 964 Foll. (*Stuart, J.*) RAM DIN *v.* HAR DAYAL. **A. I. R. 1923 All. 368.**

——**Ss. 177 and 198**—*Ejectment suit—Plea of justertii—Appeal can lie to District Judge.*

The defendant in a suit for ejectment denied the landlord's title and set up that of a third person. *Held*, that there was a question of proprietary title raised in the suit and where the question was decided by the Revenue Court an appeal lay to the District Judge. The remedy under S. 198 of the Tenancy Act is an additional remedy but does not prevent an appeal lying to the District Judge under S. 177, cl. (*e*) of the Agra Tenancy Act. (*Gokul Prasad, J.*) TULSI PRASAD SAHAI *v.* RAM RAJ AHIR. **71 I. C. 308: A. I. R. 1923 All. 414 (2).**

——**S. 177**—*Appeal—Valuation of suit—Principle guiding.*

In a suit under S. 165 of the Tenancy Act the plaintiff claimed Rs. 70 and prayed that if anything more was due to her she should receive it. A decree for Rs. 158-5-1 was passed in her favour. In appeal by the defendant, the plea of the plaintiff was that no appeal lay under S. 177, Tenancy Act, as the value of the suit was Rs. 70 only. *Held*, that under the peculiar conditions of the Tenancy Act, it is obvious that in a case of this kind the valuation should be taken to be the value as found by the Court and therefore an appeal would lie. (*Stuart, J.*) MT. UMME KHAIR *v.* AZIZ ALI. **A. I. R. 1922 All. 47.**

——**S. 177**—*'Decree'—Order passed by Revenue Court under S. 144, C. P. Code—Appeal if lies to Civil Court.*

Under the whole scheme of the Tenancy Act a distinction is made between an order and a "decree" and the word 'decree' in section 177 of that Act means a decree in a suit and does not include an order which, if the definition of a decree be applied to the case, might be deemed to be a decree under the Code of Civil Procedure. An appeal lies from a decree in a suit, but an order passed by an Assistant Collector of the first class is not a decree and is not open to appeal. In a suit under the Tenancy Act the Court of first instance is the Revenue Court which hears the suit, and not the court of appeal. For recovering possession on the ground of reversal of decree the remedy is to apply under section 144 of the Code of Civil Procedure, and this application for restitution is to be made to the Court of first instance under the provisions of the section. No separate suit will lie for recovery of possession where the decree of the Court of first instance has been reversed by a higher court. An application for delivery of possession could only be made to the Court of first instance, *i.e.*, Revenue Court and not to the High Court. (*Mears, C. J. and Banerjee, J.*) KASHI PRASAD SINGH *v.* BALBHADDAR SINGH. **44 All. 283 : 20 A. L. J. 133 : L. R. 3 A. 97 : 65 I. C. 798 : A. I. R. 1922 All. 71.**

——**S. 177**—*Order refusing restitution by Revenue Court—Not a decree and not appealable.*

The word 'decree' in S. 177, Agra Tenancy Act, does not include an order refusing restitution and as such no appeal lies against such an order. 28 All. 753 Foll. (*Mears, C. J. and Banerjee, J.*) KASHI PRASAD SINGH *v.* BALBHADDAR SINGH. **44 All. 283 : 20 A. L. J. 133 : 65 I. C. 798 : L. R. 3 A. 97 : A. I. R. 1922 All. 71.**

——**Ss. 177 and 95**—*Jurisdiction, plea of, not raised or decided—Appeal—Forum is Revenue Court.*

Where no plea of jurisdiction is raised or decided, in a suit under S. 95 of the Act, an appeal lies to the Commissioner and not to the District Judge. (*Rafique and Ryves, JJ.*) RATAN SINGH *v.* PRAN SUKH. **43 All. 368 : 19 A. L. J. 120 : 61 I. C. 44 : 2 U. P. L. R. (A.) 435.**

——**S. 177**—*Appeal—Question of proprietary title—Power of Commissioner—Procedure.*

The Commissioner found that a question of proprietary title was in issue with respect to three plots of land and he gave no decision as regards these plots. He decided the appeal with regard to three other plots, with reference to which no question of ex-proprietary title had been raised. *Held*, that the procedure of the Commissioner was not correct. When he found that the question of proprietary title had been in issue in the Court of first instance and was a matter of appeal before him, he should have returned the memorandum of appeal for presentation to the District Judge. (*Fremantle. S. M. and Burn, J. M*) SANT PRASAD SINGH *v.* DEBI DIN KOERI. **L. R. 5 A. 343 (Rev.).**

——**S. 177**—Bona fide *question of proprietary title—Appeal lies to Dist. Judge.*

Where the plea of proprietary title is a *bona fide* one and not put forward merely in order to change the forum of the appeal, appeal lies to the District Judge. (*Hopkins, S. M. and Fremantle, J. M.*) PHULWARI *v.* HEMRAJ. **L. R. 3 A. 228 (Rev.).**

——**S. 177**—*Claim to hold land as* khudkasht *is a question of proprietary title.*

A plff. sued for a declaration that he was the occupancy tenant of certain land and the defence of the landholder was that the land was in his possession as *khudkasht*. The issue was whether the plff. had retained possession of the land as his occupancy holding or whether the deft., on the extinction of the plff.'s occupancy right, had taken possession of the land and cultivated it and made it his *khudkasht*. *Held*, that a question of proprietary title was involved and an appeal lay to the Dist. Judge. 12 A.L.J. 251 Foll. (*Hopkins, S. M. and Fremantle, J. M.*) HAR DUTT SINGH *v.* BARSATI NADDAF. **L. R. 3 A. 265 (Rev.).**

——**S. 177**—Mala fide *question of proprietary title does not oust jurisdiction.*

It would be absurd to hold that the defts. in a revenue suit could by formally raising an absolutely untenable plea of jurisdiction take every case from the Revenue to the Civil Court. 15 A. L. J. 319 : 16 A. L. J. 500 Ref. Where there is a substantial plea of proprietary title raised by a party before the Revenue Court, it is the duty of the Commissioner to return the appeal for presentation to the District Judge. (*Ferard, S. M. and Hopkins, J. M.*) CHAUDHARI LACHMI NARAIN *v.* MT. SARDAR KUAR. **L. R. 3 A. 274 (Rev.).**

——**S. 177**—*Appeal—Ejectment—Question of proprietary title.*

In a suit to eject defendant as a sub-tenant, the latter pleaded that he held the land as proprietor. *Held*, that a question of proprietary title was involved in the original Court, but the question not having been raised before the Commissioner he was competent to hear the appeal. (*Fremantle, J. M.*) JANGI *v.* RAM KALLA. **L. R. 3 A. 403 (Rev.)**

——**S. 177**—*Question of proprietary title—What is.*

Where the only claimants to the proprietary title were the parties in the suit and the issue was "Does the relationship of landlord and tenant exist between the parties," *Held*, there was a question of proprietary

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title raised and appeal lay to the Civil Court. RAM SARAN *v.* BISHESHAR. **L.R. 2 A. 143 (Rev.).**

——S. 177—*No question of jurisdiction—In appeal.*

An appeal under S. 177 does not lie to the District Judge in a case in which no question of jurisdiction is decided or in which it is necessary to have the issue on that question. (*Hopkins, S. M. and Harrison, J. M.*) RORU *v.* NAIDAR MAL. **60 I. C. 262 : 2 U. P. L. R. (B. R.) 95.**

——S. 177 (e)—*Proprietary title—Suit under S. 34, Agra Tenancy Act.*

The plaintiff brought the suit under S. 34 alleging that the defendant was occupying the land without his permission. The defendant pleaded that he was a mortgagee of the proprietary right. *Held*, that a question of proprietary right was involved within S. 177 (*e*). 35 All. 157 Foll. (*Daniels, J.*) MANJADIK RAI *v.* RAM JATAN. **L. R. 5 A. 14 (Rev.) : 73 I. C. 584 (1) : A. I. R 1923 All. 558.**

——S. 177 (e)—*Proprietary right—Mortgage right.*

The question whether the defendants are mortgagees of proprietary right or have no right at all in the land in dispute amounts to a question of proprietary right within Section 177 (*e*). 35 All. 157 Foll. (*Daniels, J.*) DHIRJA *v.* MITHAN LAL. **74 I. C. 914 : A. I. R 1923 All. 562.**

——S. 177 (e)—*Ejectment—Suit for—Defence of co-tenancy and proprietary title—Jurisdiction—Appeal—Civil or Revenue Court.*

The defendants in an ejectment suit pleaded by way of defence that they were either co-sharers, with the last occupancy tenant, or were holders of land by virtue of their position as mortgagees of proprietary rights in the patti. The Assistant Collector decided on the first point of defence and did not decide regarding *khudkasht*. The Commissioner on appeal decided both questions. *Held*, the Collector overlooked the provisions of S. 177 (*e*) of the Tenancy Act, and that the memo. of appeal should be returned to the appellant with orders to present it to the Civil Court. (*Fremantle, S. M. and Burn, J. M.*) GAMDAN LAL *v.* RAMRATAN LAL. **L.R. 5 A. 318 (Rev.).**

——S. 177 (e)—*Ejectment suit—Defendants claiming that their brother had proprietary rights—Claim whether frivolous—Appeal—Jurisdiction—Civil and Revenue Courts.*

The plff. sued two persons as non-occupancy tenants. They alleged that their own brother had proprietary rights and was holding as *khudkasht*. The Asst. Collector having found that the defendant's brother had obtained a decree conferring proprietary rights during the pendency of the suit, dismissed the suit. The Collector found that the decree was obtained subsequent to the filing of the present suit, and proceeded to decide on the merits. *Held*, on appeal, that the defendants' claim was not entirely frivolous and that the Collector had no *locus standi* to hear the appeal. (*Fremantle, S. M. and Burn, J. M.*) MULA *v.* KIRPA RAM. **L. R. 5 A. 319 (Rev)..**

——S. 177 (f)—"*Question of jurisdiction has been decided,*" *meaning of.*

In order to make a question of jurisdiction, which can be decided within the meaning of S. 177 (*f*) there must be a plea by the defendant that the suit as brought is not cognizable by a Revenue Court. In other words, there must be a plea that assuming the allegations made in the plaint to be true, a Revenue Court has no jurisdiction to entertain the plaint. (*Stuart, J.*) POHAP SINGH *v.* MOHAN SINGH. **70 I. C. 578 : A. I. R. 1922 All. 424 (2).**

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——S. 179—*Appealable order—Review—Order if appealable.*

Section 179 limits the orders from which appeals are admissible in cases under that Act. An order of review is thus not applicable *per se*, though the judgment giving effect to that order, on the basis of which a decree is drawn up, may be appealable. (*Burn, J. M.*) PARMA *v.* GANNU. **L.R. 5 A. 107 (Rev.).**

——S. 180 (2) (a)—*Appeal lies to District Court where a question of proprietary title is raised.*

Where in a suit in ejectment under the Agra Tenancy Act a question of proprietary title is raised, an appeal lies to the District Court. (*Gokul Prasad, J.*) SHEIKH SAJJAD HUSAIN *v.* SHEIKH WALI MOHAMMAD. **L. R.4 A. (Rev) 21 : 73 I. C. 1030 (2) : A. I. R. 1923 All. 451.**

——S. 181—*Appeal—Commissioner's omission to consider evidence—Interference by Board.*

Where the Collector has not applied his mind to the evidence, the Board is justified in varying his decision. (*Burn, S. M. and Pearson, J. M.*) BAHORI LAL *v.* GOKULA. **L. R. 3 A. 500 (Rev.).**

——S. 181—*Orders in miscellaneous proceedings—Appeal does not lie to the Board.*

Under S. 181 appeals to the Board lie only from the decree of a Commissioner and not from orders in miscellaneous proceedings. (*Harrison, J. M.*) KISHORI *v.* LALA MUKUND LAL. **3 U. P.L. R. (B. R.) 69.**

——S. 182—*Appeal to District Judge—Memo. returned to be presented to the Revenue Court—Order of return is not open to appeal.*

An order of a District Judge returning a memorandum of appeal for the purpose of its being presented to the Appellate Court on the Revenue side is not appealable to the High Court. (*Walsh and Wallace, JJ.*) BANKEY LAL *v.* MEGHRAJ. **63 I. C. 951 : 19 A. L. J. 868.**

——S. 185—*Collector cannot review decision of another Court.*

A Collector could not review the decision of another Court except on the ground of some clerical error appearing on the face of the record and he could not interfere after the 30 days allowed by the Statute Law. (*Fremantle, S. M.*) CHINKOO CHAMAR *v* ABDUL GHAFOOR. **L.R. 4 A. 146 (Rev.)**

——S. 185—*Failure to consider evidence is a ground for revision.*

Failure to consider the evidence on record judicially is a ground for revision under S. 185, Agra Tenancy Act. (*Fremantle S. M. and Burn, J. M.*) RAM CHARAN LAL *v.* RATI. **L. R. 4 A. 193 (Rev.)**

——S. 185—*Omission to consider questions raised is sufficient ground.*

Where the Court omits to consider questions which were definitely raised before, it is a sufficient ground to interfere in revision. (*Fremantle, S. M. and Burn, J. M.*) SOHAN *v.* AHMAD ALI. **L. R. 4 A. 197 (Rev.)**

——S. 185—*Failure to deal with plea—If ground for revision.*

A failure to deal with a plea that was expressly taken, is a material irregularity justifying interference in revision, (*Hopkins, S. M. and Fremantle, J. M.*) KUNWAR MUHAMMAD KARAMAT ALI KHAN *v.* JUGLA. **L.R 3 A. 208 (Rev.).**

——S. 189—*Power of Commissioner to transfer appeals to Collector—Special order, if necessary.*

S. 189 (1) allows Commissioners to transfer appeals to Collectors under a general sanction given by the Local Government. Special orders dealing with appeals then pending before the Commissioner are

unnecessary. (*Fremantle, S. M.*) PRAG NARAIN *v.* KANCHAN SINGH. **L. R. 5 A. 126 (Rev.).**

——**S. 193**—*Sale which ought to be held by Collector held by the Assistant Collector ·Sale is not vitiated.*

Where in the execution of a decree a property which ought to have been sold by Collector, is sold by an Assistant Collector, the irregularity does not vitiate the sale. (*Mukerji, J.*) NEHAL SINGH *v.* JAGANNATH DAS. **A. I. R. 1925 All. 743.**

——**S. 193**—*Scope of—Shares of profits assigned —Insolvency of sharer—Suit for profits by assignee —Pro. Ins. Act, S.* 28.

S. 193 must be construed in the sense and for the purpose for which it was intended, namely, the regulation of procedure in the Revenue Courts and it cannot be extended so as to withdraw from the cognizance and determination of these Courts pleas which do not go to procedure but substantive legal rights. Where therefore an assignee of profits from a co-sharer who had been adjudged an insolvent prior to the assignment sued the lambardar in a Revenue Court for profits accrued and the lambardar questioned the plaintiff's right to sue on the ground that his assignor had no title to convey after his insolvency, *Held*, by *Lindsay and Sulaiman, JJ.* (*Kanhaiya Lal, J. dissenting*) that the plea was not one relating to procedure but of a substantive legal right and the Revenue Court had jurisdiction to decide it. (*Lindsay, Sulaiman and Kanhaiya Lal, JJ.*) GOVIND RAM *v.* KUNJ BEHARI LAL. **46 A. 398 : 22 A. L. J. 217 : L. R. 5 A. 65 (Rev.) · A. I. R. 1924 A. 341 (F. B.).**

——**S. 193 (a)**—*Suit against occupancy tenant for arrears is not barred by S.* 16 (2) *of the Prov. Insol. Act.*

The Prov. Insol. Act does not apply to any suit or proceeding under the Agra Tenancy Act and therefore S. 16 of the Prov. Insolvency Act does not bar a suit against an occupancy tenant who has been declared insolvent for arrears of rent of the holding which therefore cannot be dealt with by an Insolvency Court. (*Tudball, Rafique and Ryves, JJ.*) KALKA DAS *v.* GAJJU SINGH. **43 All. 510 : 19 A. L. J. 439 : 62 I. C. 897 : 3 U. P. L. R. (All.) 73 (F. B.)**

——**S. 193. cl. (1)**—*Any isolated plot in a mahal is not a share of the mahal.*

Any isolated plot of land within the ambit of a mahal may be a part of a mahal, but it cannot be a share in a mahal under S. 193 (1). (*Mukerji, J.*) NEHAL SINGH *v.* JAGANNATH DAS. **A. I. R. 1925 All. 743.**

——**S. 193, cl. (g)**—*Sub tenant of ex-proprietary tenant paying off rent decree against ex-proprietary tenant—Sub-tenant cannot plead payment as set off in suit for rent against himself by ex-proprietary tenant.*

Under S. 193, cl. (*g*) only an unsatisfied decree held by a defendant can be pleaded by way of a set-off. Hence where a sub-tenant under an exproprietary tenant paid off a rent decree against the exproprietary tenant, he (the sub-tenant) cannot plead the payment as a set-off in a suit against himself for rent by the ex-proprietary tenant. (*Mukerji, J.*) BRIJ LAL *v.* MUHAMMAD IBRAHIM **A.I.R. 1925 All. 824.**

——**S. 194**—Sir *and* khudkhast *in exclusive possession of a co-sharer and let out by him—Suit to eject the sub-tenant - Other co-sharers are not necessary parties.*

Where certain plots of land have been the exclusive *sir* and *khudkhast* of a co-sharer for more than twelve years and are let out to a sub-tenant who is the exclusive co-tenant of such co-sharer, the latter is by himself entitled to eject the sub-tenant without impleading persons who though co-sharers in the

khewat of the mahal have no interest in the particular plots. (*Sulaiman, J.*) DUNGAR *v.* JAHANGIR. **A. I. R. 1925 All. 775.**

——**S. 194**—*Lambardar is* prima facie *entitled to recover rent on behalf of all co-sharers—If not so entitled, he cannot recover his share alone—Co sharers.*

In the absence of a clear indication to the contrary the lambardar is the person who would be entitled to recover the rent. 42 All. 414 Foll. Where the record of-rights gives the lambardar a right to recover the rent, the lambardar is the appointed agent of the co-sharers within the meaning of S. 194. If the lambardar is not entitled to bring a suit for arrears of rent he cannot sue to recover only his share of it, (*Mukerji, J.*) MAHOMED ABDULLAH KHAN *v.* KUNDAN. **A. I. R. 1925 All. 817.**

——**S. 194**—*Lambardar—Powers—Permission to build a house.*

A lambardar may give permission to a tenant to erect a *kucchha* house on land belonging to the joint *patti*, where there were no less than 30 co-sharers in the *patti*. *Held*, unless such authority is recognised in the lambardar it would be practically impossible for a valid permission ever to be given at all. (*Daniels, J.*) ABDUR RAOOF *v.* BACHCHOO. **73 I. C. 495 (1): L. R. 5 A. (Rev.) 33 : A I.R. 1923 All. 532 (1).**

——**S. 194**—*Right of one co sharer to sue—C. P. Code, O.* 1, *R* 8.

Where there are many co-sharers in the village an informal partition between the co-sharers is the only means by which the rent can be realised and the revenue paid and when such a partition or *phatbandi* is in existence in the village and is formally recorded in the *wajib-ul-arz* ; and it has been in force for over forty years, the co-sharer in whose share particular plots fall is perfectly entitled to collect the rents and eject the tenants of those plots, and the land is not removed from his share merely because a particular tenant happens to die without heirs. (*Daniels, J.*) JOKHU RAI *v.* BHABHUTI RAI. **A. I. R. 1923 A. 559.**

——**S. 194**—*Partition—Amalgamation of several khatas into one—Ejectment—Parties.*

At a partition several khatas owned separately by different proprietors were consolidated into one single khata. Before the partition was confirmed but after the commencement of the partition proceeding the former proprietors of one of the old khatas brought a suit to eject a tenant of a holding in that khata without joining the proprietors of the other khatas. *Held*, that the suit was maintainable. (*Fremantle, S M.*) JAGESHAR MAL *v.* RAGHUNANDAN-SAHU. **L. R. 5 A. 217 (Rev.).**

——**S. 194**—*Purchase of zemindari intere t before appeal—Effect.*

Pending the appeal in an ejectment suit the tenant purchased the Zemindari interest : *Held* the mere ground that it was probable that if the suit had been then instituted, it would be dismissed under S. 194. Agra Tenancy Act was no justification for allowing the appeal. (*Fremantle, S. M. and Burn, J. M.*) DEBI MANGAL PATHAK *v.* JAGESAR. **L. R. 4 A. 202 (Rev).**

——**S. 194**—*Lambardars— Ejectment suit by some—Maintainability.*

In a suit to eject by some only of the lambardars, the others who never took any interest in the resumption proceedings or the claiming of rent cannot intervene to protect the tenants from being ejected. (*Fremantle, S. M. and Burn, J. M.*) BADRI SINGH *v.* BHUP. **L. R. 4 All. 321 (Rev.).**

——**S. 194**—*Thekadars—Authority to collect rent —Need not be in writing.*

AGRA TENANCY ACT (II OF 1901), S. 194.

There is nothing in S. 194 of the Agra Tenancy Act to require that the authorization to collect rent by one of several *thekadars* should be in writing. (*Fremantle, S. M. and Burn, J. M.*) HAFIZ HASAN ULLYH *v.* EDA. **L. R. 4 All. 324 (Rev.).**

——S. 194—*Ejectment suit—Co-sharer refusing to sue—Suit if can be proceeded with.*

If a co-sharer refuses to join the lambardar in a suit for ejectment the latter cannot proceed with the suit by making the co-sharer a defendent, (*Hopkins, S. M.*) BUDH SINGH *v.* KALKA PRASAD. **L. R. 3 A. 29 (Rev.)**

——S. 194—*Joint proprietors—Agreement to collect separately—All must jointly eject tenant.*

Although joint proprietors may divide their rights and agree that each co-sharer shall collect his share of rent, the tenant who is thus divided can only be ejected by all proprietors acting jointly unless they have appointed an agent to act for them all. (*Burn, J. M.*) NAKKA *v.* MDISHAQ KHAN. **L. R. 3 A. 221 (Rev.)**

——S. 194—*Ejectment suit by Mortgagee from some co-sharers—Other co-sharers are necessary parties.*

A suit to eject a tenant was brought by the mortgagee of the interest of some only out of the several proprietors of a Zemindari share. On objection being taken on the ground of non joinder, *Held* that the other co-sharers were necessary parties to the suit and the suit was not maintainable. (*Hopkins S. M.*) RAM YAD LAL *v.* KHEDU SINGH. **L. R. 3 A. 253 (Rev.)**

——S. 194—*Lambardar—Power to collect rent of holdings.*

A lambardar is the manager of the common land, entitled to collect the rents, settle tenants, eject them, procure enhancements of rent and do all necessary acts relating to the management of the estate for the common benefit. (*Hopkins, S. M. and Fremantle, J. M.*) HANUMAN SINGH *v.* SYED AHMED ALI KHAN. **L. R. 3 A. 369 (Rev).**

——S. 194—*Lease of land—Owners of entire Zemindari to join—Suit in ejectment by some—Effect of.*

All the Zemindars or owners of the entire Zemindari should join together to grant a lease of land. It is open to some of the co-sharers Zemindars to sue to eject a trespasser in the Civil Court. (*Hopkins, S. M. and Fremantle, J. M.*) MUSAI SINGH *v.* MATHURA DUBE. **L. R. 3 A. 445 (Rev).**

——S. 194—*Lambardar—Powers of—Granting of Kabuliats.*

Where a kabuliat granted by the lambardar had been attested by some co-sharers and the co-sharers had from time to time accepted it and realised rents on it, the Court might infer that the lambardar had implied authority from the co-sharers to grant the kabuliyat. (*Pearson, J. M.*) BHAGWAN SINGH *v.* NABI BAKSH. **L. R. 3 A. 526 (Rev).**

——S. 194—*Non-joinder—Cannot be raised for first time in appeal.*

A plea that there were other co-sharers in the property who had not joined in the ejectment suit being a mixed issue of law and fact cannot be raised for the first time in appeal. (*Hopkins, S. M. and Porter, J. M.*) CHOTAMAL *v.* AMIN SINGH. **3 U. P. L. R. (B. R.) 63 (2).**

——S. 194 (1)—*Lambardar suing for rent or ejectment is presumed to act as co-sharers' agent—But presumption is rebuttable.*

If a lambarder sues a tenant either for the recovery of rent or for ejection, the presumption would be that he is appointed as agent to act on behalf of all the co-sharers. But it would be open to the tenant to prove that in that particular mahal the arrangement between the co-sharers was such that lambardar cannot be treated as an agent of all the co-sharers. 36 All. 441, Dist. 18 A L J 435. Foll. (*Dalal, J.*) SYED SIDDIQ ALI *v.* CHANDA. **80 I. C. 732 : A. I. R. 1925 All. 49.**

AGRA TENANCY ACT (II OF 1901), S. 196.

——S. 194 (1)—*Lambardar—Right to collect rents and eject tenant—Agreement—Custom.*

The lambardar is not by virtue of his office entitled to collect rents with reference to S. 194 (1) of the Tenancy Act. If it is sought to show that the lambardar is entitled to collect the whole of the rent and thus to eject, either an agreement of the co-sharers or a special custom must be proved. (*Burn, J. M.*) BHOLANATH *v.* BABU RAM. **L. R. 3 A. 457 (Rev.)**

——S. 194 (2)—*Suit in ejectment—Co-sharer—Non-joinder.*

Where in a suit in ejectment brought by one of the co-sharers, it was found that though there were other co-sharers in the proprietary right, the land was let to the defendants by the plaintiff alone and the plaintiff had let other holdings similarly, *Held*, that there was evidence from which a special contract could be inferred within S. 194 (2) of the Act and the suit was not bad for non-joinder of parties. (*Burn, J. M.*) JANKI PRASAD *v.* HAR PRASAD. **L.R. 5 A. 178 (Rev.)**

——S. 194 (2)—Sir *land—Tenant of—Land ceasing to be* sir—*Position of tenant—Ejectment.*

Where a tenant of *sir* land which has since ceased to be *sir* land is sought to be ejected by a proprietor who let the land to him, *Held*, that though the tenant was the tenant of the entire proprietary, body yet the suit was properly brought. (*Fremantle, S.M. and Burn, J. M.*) KASH PRASAD RAI *v.* SHEIKH GULLI. **L.R. 5 A. 182 (Rev.).**

——S. 196—*Jurisdiction—Objection to, must be raised in the first Court.*

Where an objection to jurisdiction of the Civil Court is not raised in the first Court it cannot be raised on appeal or second appeal by reason of S. 196 of the Agra Tenancy Act. But the fact that if the question of jurisdiction is not raised in the first Court the Appellate Court is to decide the suit as if it had been brought in the right court does not in any way warrant the conclusion that the limitation to be applied to that suit is not the one which would have applied if the suit had been brought in the right court but that some other rule of limitation is to be applied. (*Gokul Prasad, J.*) BHIKHARI SINGH *v.* JOKHAN. **66 I. C. 856 : 4 U. P. L. R. (A). 104 : A. I. R. 1922 All. 124.**

——Ss. 196 and 197—*Scope of.*

Ss. 196 and 197 must be read together. They both deal with a case in which an objection is taken in the Appellate Court that the suit was wrongly instituted in the court below instead of a Civil or Revenue court as the case may be. S. 196 tells the appellate court what to do if the objection was not raised in the Trial Court. S. 197 tells it what to do if the objection had been raised. Both sections assume that the Trial Court has entertained the suit and disposed of it on the merits. It is only in such a case that the Court could remand the suit or frame issues or direct additional evidence. (*Sulaiman and Daniels, JJ.*) BISESHAR PRASAD PANDEY *v.* RAGHUBIR. **90 I. C. 353 : L. R. 6 A. 255 (Rev.).**

——Ss. 196 and 197—*Applicability—Ejectment suit on ground of forfeiture—Revenue Court's decision is binding on Civil Court.*

Where the suit was based on the ground that the defendants had incurred forfeiture because of their

denial of the plaintiffs' title in the Revenue Courts. *Held* : this is not one of the grounds on which a tenant can be ejected under the provisions of the Tenancy Act. The suit was bad in its inception. No suit like this would lie at all in any Court, Revenue or Civil. The decision of the Revenue Court in the suit for arrears of rent was binding on the Civil Courts. Ss 196 and 197 have no application to suits which do not lie at all but they only contemplate suits which might have been brought in one Court but have been by mistake or otherwise brought in another. *Narain Singh* v. *Govindram* (8 A. L. J. 431) followed. (*Gokul Prasad, J.*) JANKI *v.* DEBI SHANKAR.
69 I. C. 799 : A. I. R 1922 All. 274.

——**Ss. 196 and 197**—*Applicability—Suit by co-sharer for profits—Jurisdiction—Appeal.*

In case of a suit by a co-sharer for profits for the period during which he was kept out of possession by other co-sharers, provisions of Ss. 196 and 197 apply and so, if a suit is dismissed by a Civil Court for want of jurisdiction and appeal is preferred to the District Judge, he must deal with the case in accordance with the provisions of those sections. (*Rafique and Piggott, JJ.*) SAID-UN-NISSA *v.* FIDA HUSSAIN.
61 I. C. 385 : 19 A. L. J. 194 : L. R. 2 A. 57 (Rev.)

——**Ss. 196 and 197**—*Invalid lease—Ejectment—Suit on the ground of, does not lie in Civil Court.*

A Civil Court cannot try a suit for ejectment on the plea that the person who gave the lease has no right to do so. The appellant cannot take the support of Ss. 196 and 197 of the Act in the above case for ejecting the tenant. This can alone be done by the Revenue Court exclusively. (*Stuart, J.*) LALA SUNDAR LAL *v.* KIFAYAT HASAN KHAN.
L. R 3 A. 134.

——**S. 197**—*Act does not apply to Cantonments area—Secy. of State is absolute owner of land in that area—Costs.*

The rent court has no jurisdiction in the matter where the land in dispute is situated in Cantonments which are under the direct administration of the Government of India. The Tenancy Act does not apply in the case. But where the owner of land asserts proprietary title, the appeal necessarily lies to the District Judge. S. 197 of the Tenancy Act has thus application and as all the material necessary for determination was before the High Court, it was justified in disposing of the appeal as if the suit had been in fact instituted in a Civil Court. Therefore this suit is taken as an ordinary suit for ejectment. The Secretary of state is absolute owner of all Cantonments land, unless it can be proved that he parted with it. There can be no adverse possession against him. A person occupying land, in Cantonments not specifically transferred to him by the Secretary of State, can only hold it as a licensee from him, who could eject him at will by revoking his license. But as the Secretary of State instituted the suit in a wrong Court, on a wrong cause of action and on assertions which he was unable to prove, the Court directed that he (plaintiff) should pay his own costs throughout and those of the defendant. I. L. R. 3 All. 669, I. L. R. 30 Bom. 137 followed. (*Stuart, J.*) SECY. OF STATE *v.* MULLA.
L. R. 3 A. 169 (Rev.) : 66 I. C. 582 : A. I. R. 1922 All. 57.

——**S. 197**—*Suit in Revenue Court—Cantonment land—Jurisdiction.*

Plff. sued in a Revenue Court for ejectment of deft. from land to which the Agra Tenancy Act did not apply. The deft. objected to the jurisdiction of the Court and asserted proprietary title. The Court how-

ever decreed the suit. *Held*, that the District Court to which an appeal had been preferred against the decree, ought to dispose of the appeal on the merits, since the necessary materials for the decision of the case were on record. (*Stuart, J.*) SECRETARY OF STATE *v.* MULLA.
66 I. C. 582 : L. R. 3 A. 169 : A. I. R. 1922 All. 57.

——**Ss. 197 and 196**—*Ejectment—Denial of title is no grounds for—Sections do not apply to suits which do not lie at all.*

Where a suit in ejectment was based on the ground that the defendants had incurred forfeiture because of their denial of the plaintiff's title in the Revenue Courts. *Held*, this was not one of the grounds on which a tenant could be ejected under the provisions of the Tenancy Act. The decision of Revenue Court in the suit for arrears of rent was binding on the Civil Courts. Ss. 196 and 197 have no application to suits which do not lie at all but they only contemplate suits which might have been brought in one Court but have been by mistake or otherwise brought in another. 8 A. L. J. 431 followed. (*Gokul Prasad, J.*) JANKI *v.* DEBI SHANKER.
69 I. C. 799 : A. I. R. 1922 All. 274.

——**Ss. 197 and 202**—*Applicability—Suits where deft. claims to be tenant are not within S.* 197.

In suits relating to agricultural land, in which the defendant claims to be the tenant of the plaintiff, the procedure laid down by S. 202 of the Act is compulsory and S. 197 does not apply to such cases. The fact that the defendant pleads that he is the tenant of the plaintiff along with his co-sharers does not make any difference. (*Banerji and Gokul Prasad, JJ.*) BHAUNI *v.* RAMDAYAL.
L. R. 3 A. 10 (Rev.) : 64 I. C. 426 : 19 A. L. J. 850.

——**S. 197**—*Revenue Court—Suit for profits—Nazrana and Haqchaharam—Procedure.*

A co-sharer brought a suit for profits against the Lambardar. On the plea of negligence the lower Courts maintained that the claim should be decreed on the demand and not on collections. It was held that District Judge ought to have been guided by the procedure under Sec. 197 of the Agra Tenancy Act. Regarding the claims of Nazrana and Haqchaharam the District Judge was not right in holding, that these could not be brought in the suit. (*Stuart, J.*) LALMAN *v.* DIN DAYAL.
L. R. 3 A. 149.

——**S. 198**—*Suit by landlord for arrears of rent—Tenant pleading payment in good faith to third person—Decision against landlord—Right of suit in Civil Court, is not barred.*

A landlord brought a suit for arrears of rent and the defence set up by the tenant was payment in good faith to a third person who was impleaded as a party to the suit. The title of the third person was negatived whereupon he brought a suit in a Civil Court for the declaration of his title as landlord. *Held* that the suit was not barred by S. 11, C. P. Code and that it was maintainable in a Civil Court. (*Ryves and Gakul Prasad, JJ.*) HABIB KHAN *v.* FIDA HUSAIN KHAN.
71 I. C. 1017 : L. R. 4 A. 138 (Rev.) : A. I. R. 1924 All. 270.

——**S. 198**—*Payment of money to a third person after suit and filing of defence—Section does not apply.*

Where the deft. pays the amount due to a third person, after a suit to recover arrears of rent is instituted and he has filed his defence, S. 198 does not apply. (*Ryves and Gokul Prasad, JJ.*) JEONI *v.* CALOO.
60 I. C. 837 (1) : 19 A. L. J. 298 : 43 All. 448.

——**S. 199**—*Suit under—Ownership of trees apart from the land can be determined.*

AGRA TENANCY ACT (II OF 1901), S. 199.

It is competent to a person in a suit under S. 199 of the Tenancy Act to have the question of title determined and to prove that he is the owner not of the land but of the trees on the plot. (*Lindsay and Daniels, JJ.*) LALTA PRASAD *v.* RAM BAHADUR.
21 A. L. J. 434 : 74 I. C. 349 : L. R. 4 A. 159 (Rev.) : A. I R. 1923 All 540.

——S. 199—*Powers of Civil Court to give declaration as to plaintiff's rights.*

In proceeding sent to the Civil Court in accordance with the provisions of S. 199 of the Tenancy Act, the Civil Court can give a declaration regarding the right of the plaintiff, who has not succeeded in proving himself to be the proprietor of the land but was found to be entitled to the trees. The following declaration, namely, that it be decreed that the plaintiff though not owner of the land is owner of the trees on the plots in suit should be made. (L. P. A. All. No. 44 of 1916, *Foll.*) (*Lindsay and Daniels, JJ.*) LALTA PRASAD *v.* RAM BAHADUR. **21 A. L. J. 434 : 74 I. C. 349 : L. R. 4 A. 159 (Rev.) : A. I. R. 1923 All. 540.**

——S. 199—*Decision under is* res judicata.

The decision of a Rent Court under S. 199 in the exercise of its jurisdiction to decide a question of title is *res judicata* and will prevent the trial in a subsequent suit in a Civil Court of any issue relating to the same proprietary right. (*Lindsay and Stuart, JJ.*) MT. JHAMOLA KUNWAR *v.* HANWANT SING.
20 A. L. J. 340 : 66 I.C. 915 : 4 U. P. L. R. (A) 113 : A. I. R. 1922 All. 129.

——Ss. 199 and 201—*Question of proprietary title—Decision of Revenue Court*—Res-judicata.

Ss. 199 and 201 of the Agra Tenancy Act confer special jurisdiction on the Rent Courts to try and decide questions of titles to property and when so decided their decision is *res judicata* and binding on the Civil Courts in subsequent suits, based on the same issues, filed in Civil Courts. (*Lindsay and Stuart, JJ.*) MT. JHAMOLA KUNWAR *v.* HANWANT SINGH.
4 U. P. L. R. (A.) 113 : 20 A. L. J. 340 : A. I. R. 1922 A. 129.

——S. 199—*Legal representatives—Question as to, in suit for profits—Court must decide title or refer parties to Civil Court.*

When a person claims that he is the legal representative of the deceased and as such brings a suit for recovery of profits due to his share and the defendants deny his character of legal representative, the question of title must be decided by the Court or the parties must be referred to a Civil Court by a written order under S. 199 of the Act. (*Banerji, J.*) SYED MADAD ALI *v.* SHEIKH SHAMSHER ALI.
63 I.C. 103 : 4 U. P. L. R. (A.) 9.

——Ss. 199, 200 and 201—*Decision of Revenue Court, when* res-judicata *in Civil Court.*

The decision of a Revenue Court cannot operate as *res judicata* in a Civil Court unless the case comes within the purview of Ss. 199 to 201 of the Agra Tenancy Act. In other cases the question is not one of *res jusdicata* but whether the point before the Civil Court has been decided by a Rent Court under its exclusive jurisdiction in such a manner as prevents the Civil Court having jurisdiction to decide it. 37 A. 41 Foll. Where however the point under the Tenancy Act is itself within the jurisdiction of the Civil Court, it can decide it. (*Stuart, J.*) SARABHAT MAL *v.* RAM KHELAWAN MAL. **66 I. C. 714 : 4 U. P. L. R. (A.) 90.**

——S. 199 (1)—*Decision under, on a question of title is* res judicata—*Effect of.*

The decision on a question of title under S. 199 of the Agra Tenancy Act has the force of a decision of a Civil Court and where such a decision has been arrived at by an Assistant Collector, Second Class, in the United Provinces, it will be *res judicata* when the same is attempted to be raised before an Assistant Collector, First Class. (*Daniels, J.*) AMIN-UD-DIN *v.* ABDUL SHAKOOR. **73 I. C. 460 : L. R. 5 A. 26 (Rev.) : A. I. R. 1923 All. 556.**

AGRA TENANCY ACT (II OF 1901), S. 201.

——S. 201—*Record of rights—Entry in—Presumption.*

Where notwithstanding the order of a competent authority the entries in the record of rights have not been corrected for over two years there is no presumption that the entries are correct. 33 A. 799 distinguished. (*Gokul Prasad, J.*) TIKA RAM *v.* DUBO SHIB LAL. **71 I. C. 992 . A. I. R. 1923 All. 401 (1).**

——S. 201—*Decision in question of proprietary title is* res judicata.

The decision on a question of proprietary title by a Revenue Court under Ss. 199 and 201 of the Agra Tenancy Act operates as *res judicata* and bars the trial of a subsequent suit in a Civil Court relating to the same proprietary right. (*Lindsay and Stuart, JJ.*) THAKUR HANWANT SINGH *v.* MT. JHAMOLA KUNWAR. **20 A. L. J. 340 : 4 U. P. L. R. A. 113 : 66 I. C. 915 : A. I. R. 1922 All. 95.**

——S. 201—*Suit for profits—Alteration in record—Duty of Court trying rent suit to give effect to entries in Revenue record as on the date of suit.*

Where there has been an alteration in the Revenue record prior to the institution of the suit, but made during the period for which profits are claimed, the duty of the court trying a suit for profits must be to consider the order by which the alteration was made and give effect to the intention of the said order. If, for instance, a plff. was the recorded proprietor of an 8 annas share of a mahal during the first year in respect of which profits were claimed and it were shown that after the close of that year he had been recorded as proprietor of a 4 annas share only, upon a finding that he had transferred his interest in the remaining 4 annas share after the close of the first year in suit, then the duty of the Court should be to give effect to the entries year by year calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. When however it is clear upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and it was not passed upon any alleged transfer having occurred during the years covered by the suit then the Revenue Court is bound to give effect to the entries as it stood on the date of the institution of the suit. (*Piggott and Stuart, JJ.*) MT. MUBARAK FATIMA *v.* MAHOMED WALI KHAN. **20 A. L. J. 243 : L. R. 3 A. 140 : 44 All. 413 : 66 I. C. 125 : 4 U. P. L. R. (A.) 188 : A. I. R. 1922 All. 102.**

——S. 201—*Revenue Court—Suit for profits—Record of share in revenue papers—Binding nature of.*

A Revenue Court must take the record in the revenue papers as final in a proper case to show the share of profits to which a party is entitled, but a Revenue Court is not debarred from going into the merits of the question as to whether a certain sharer is or is not holding *Sir* or *Khudkhast* in excess of his share. That is a point to be decided by the Revenue Court. Undoubtedly a sharer who holds *Sir* or *Khudkhast* in excess of his share must recoup a sharer who holds less than is due to him. There is no inflexible rule by which a man who owns a half share in the village is holding in excess if he is in possession of more than half of the

sir or more than half of the *Khudkhast*. It is open to him to show that he does not hold in excess. (*Stuart, J.*) MT. SUGHRA BIBI *v.* SHAH FAIYAZUL HASAN. **L. R. 3 A. 146 (Rev.).**

——S. 201—*Revenue Court—Suit for profits—Record of share in revenue papers—Binding nature of.*

To see the share of profits to which a party is entitled a Revenue Court must consider the evidence of the record in the revenue papers as the last word. It has also jurisdiction to enter on the issue whether a certain sharer holds *sir* or *khudkhast* in excess of his share. If he does he has to return his excess share to one who holds less. One who does not hold in excess of his share is not prevented from showing that he does not hold it in excess. (*Stuart, J.*) MT. SUGHRA BIBI *v.* SHAH FAIYAZUL HASAN.

L. R 3 A. 146.

——S. 201 (1)—*Suit against person in actual possession, by person who by mistake in record, was compelled to pay former's revenue, comes under S.* 201 (1).

The suit was one brought under the provisions of S. 160 of the Tenancy Act. The plaintiff during the years to which the suit referred stood recorded as the usufructuary mortgagee of a share of 16 biswas and odd in a certain mahal. By reason of this record he was compelled to pay the whole of the land revenue demand in respect of the said share. As a matter of fact a portion of the mortgage had been redeemed and the plaintiff was really in possession as mortgagee over a share of 8¼ biswas only. The defendant was the co-sharer in possession of remainder.

Held: that what the plaintiff had to show was that as a matter of fact he was a co-sharer who had paid arrears of revenue on account of another co-sharer. Because, the revenue record during the years in suit was incorrectly framed, the plaintiff did not on the face of that record appear to have paid any revenue except that which was due from the share recorded in his name as usufructuary mortgagee. His position therefore, was that of a co-sharer not recorded as having the particular proprietary right which would entitle him to maintain the suit brought by him. In reality his case falls under the first clause, and not under the third clause of S. 201 of the Tenancy Act. The Court had jurisdiction to inquire into this matter and to determine the question of possession. (*Mears, C. J. and Piggott, J.*) JWALA PRASAD *v.* IRSHAD MUHAMMAD KHAN. **46 A. 512 : 83 I. C. 245: A. I. R. 1925 All. 50.**

——S. 201 (3)—*Usufructuary mortgagee of mortgagor—Lambardar can sue for profits.*

Per Piggott, J.—The usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the lambardar for profits. Mere non-payment by a lambardar to any co-sharer of the said co-sharer's proper quota of the annual divisible profits of the mahal does not in the absence of evidence to the contrary constitute an ouster of the said co-sharer from possession. (*Walsh and Piggott, JJ.*) LACHMAN PANDE *v.* TRIBENI SAHU.

22 A. L. J. 518 : 79 I. C. 538 : L. R. 5 A. 174 (Rev.) A. I. R. 1924 All. 719.

——S. 201 (3)—*Presumption—Entries in Khewat—Suit for profits.*

In suits for profits brought by the plaintiff against his brother lambardar, the defendant pleaded that he and his brother were members of a joint Hindu family and that such a suit was not maintainable: *Held* the names of the parties to the suit being entered on a moiety share in each of the two mahals and having

regard to the view taken of the S. 201 (3) of the Tenancy Act by the High Court the claim of the plaintiff, whose name was entered on a moiety of the property, ought to have been decreed. There is a presumption resulting in preventing persons from pleading that the family is a joint Hindu family, as against the entries in the khewat. 32 All. 779 Ref. (*Lindsay and Gokul Prasad, JJ.*) SHEO NARAIN *v.* BALA RAO.

44 All. 616: 69 I. C. 208: 9 O & A. L. R. (H.) 150: A. I. R. 1922 All. 332 (1).

——Ss. 201 (3) and 164—*Question of title—Decision of Civil Court pending appeal from a decree of Revenue Court—Duty of the latter.*

Where during the pendency of an appeal from a decree in a suit for profits under S. 164 of the Agra Tenancy Act, the defendant obtained a decree of the Civil Court that plaintiff had no title it is the duty of the appellate court to give effect to the decision of the Civil Court and dismiss the suit. (*Ryves and Gokul Prasad, JJ.*) SURJAN SINGH *v.* CHATURA KUNWAR. **44 A. 250: 64 I. C. 964: 20 A. L. J. 61: L.R. 3 A. 17: A. I. R. 1922 All. 356.**

——S. 202—*Suit in ejectment—Plea of tenancy—Power of Civil Court.*

Where a suit for ejectment from a certain plot of agricultural land on the ground that the defendant is a trespasser is brought in the Civil Court and the defendant pleads a tenancy, it is incumbent on the Civil Court to refer the plaintiff to a Revenue Court under S. 202 of the Agra Tenancy Act. There is nothing in the section itself to require the Civil Court to decide that the claim to a tenancy is *bona fide* before applying S. 202. (*Daniels, J.*) JASRAM *v.* AMAR NATH. **71 I. C. 475 (1): L. R. 5 A. 21 (Rev.): A. I. R. 1923 All. 439.**

——S. 202—*Lease by Lambardar—Suit for cancellation by co-sharer—Plea of valid lease.*

The lambardar of a village granted a perpetual lease to the defendant of 20 bighas of land. The plaintiff, a co-sharer, brought a suit in the Civil Court for the cancellation of this lease on the ground that it was beyond the powers of the lambardar to execute. The defendant pleaded that the lease was a good and valid lease. His contention was that not only was it within the powers of the lambardar but that it was executed with the consent of all the co-sharers. *Held* that this was in substance a plea that the defendant was the tenant of the whole proprietary body including the plaintiff and that under these circumstances the Trial Court should have under S. 202 of the Agra Tenancy Act directed the defendant to file a suit in the Revenue Court within 3 months to establish the tenancy which he set up. (*Lindsay and Daniels, JJ.*) KALI DIN *v.* RAMAPAT. **L. R. 4 A. 167: 73 I. C. 953: A. I. R. 1923 All. 534.**

——S. 202—*Zemindari property is not Agricultural holding.*

A claim for Zemindari property is not a suit relating to an agricultural holding. A holding is defined in the Tenancy Act to be a parcel of land held under one engagement and it clearly indicates that it is land which is held by an ordinary agriculturist under one engagement for purposes of agriculture. That cannot be said of a person who claims to be *thekadar* of the Zemindari, and does not allege that he held any particular parcel of land under a separate engagement for purposes of agriculture. (*Mears, C. J. and Banerjee, J.*) DHANDAI KUAR *v.* CHHOTU LAL.

L. R. 3 A. 144 (Rev.): 64 I. C. 605: 19 A. L. J. 890: A. I. R. 1922 All. 442.

——S. 202—*Possession under invalid lease—Suit for ejectment of lessee lies in Civil Court.*

AGRA TENANCY ACT (II OF 1901), S. 202

Where a defendant holds under a lease which is void *ab initio* his possession is that of a trespasser and if the plff. has not acknowledged the deft. as tenant, a suit for ejecting the latter lies in the Civil Court. A lease for collection of rent and Zemindari dues is not a lease granted for agricultural purposes and S. 202 of the Agra Tenancy Act does not apply to a suit to set aside the lease. (*Lindsay and Kanhaiya Lal, JJ.*) AMINA BIBI *v.* SAIYID YUSUF.

4 U. P. L. R. (A.) 209: 20 A. L J. 731: 70 I. C. 968: 44 A. 748: A I. R. 1922 All. 449.

——S. 202—*Applicability of Suit in Civil Court for ejectment—Plea of sub-tenancy.*

A suit was brought in a Civil Court for ejectment and the plea set up in defence was one of sub-tenancy. *Held*, on the pleading S. 202 applied and the procedure laid down therein should be followed. (*Piggott and Walsh, JJ.*) SHEIKH MUHAMMAD YAKUB *v.* BECHU AHIR. **65 I C. 251: L. R. 3 All. 21 (Rev.).**

——S. 202 (2)—*Appeal does not lie from Revenue Court to Civil Court even if parties had been wrongly referred to Revenue Court originally by a Civil Court.*

Once a case has been properly referred to the Revenue Court an appeal from the Revenue Court would not come to the Civil Court. The same rule applies even if it be the case that the parties had been originally wrongly directed by a Civil Court to go to a Revenue Court, for the question can be raised again by way of appeal against the decree that will be passed by that Civil Court in accordance with the decision of the Revenue Court. That remedy if necessary, against a wrong decision of the Civil Court as to the applicability or otherwise of S. 202 of the Tenancy Act is still open. (*Mukerji, J.*) HIRDEY NARAIN RAI *v.* JAGDISH NARAIN RAI. **22 A. L. J. 909 : 82 I. C. 317 : A. I. R. 1925 All. 125.**

——Sch. 4, Art. 18—*Status of sub-tenant—Fresh letting if necessary every year.*

A sub-tenant is a tenant from year to year and remains so till ejectment or surrender. His tenancy does not come to an end at the end of the first and each successive year and there is no need for a fresh act of sub-letting to continue him in his tenancy. (*Fremantle, S. M. and Brown, J.M.*) SHEO PRASAD *v.* ANAND MADHO. **L. R. 5 A. 18 (1) (Rev.).**

——Sch. IV—Entry 18—*Ejectment suit—Zamindar getting possession of Zemindari within one year of suit—Suit not barred.*

Where a suit for ejectment was brought more than one year after sub-letting but the plaintiff had obtained possession of the Zemindari within one year of the suit. *Held* the suit was not barred. MALOOK CHAND *v.* YUSUF ALI.

L. R. 2. A. 100 (Rev).

——Sch. 4, Serial 18—*Illegal sub-letting—Suit for ejectment—Limitation is one year.*

A suit for ejectment of a tenant on the ground of illegal sub-letting must be brought within one year from the date of the illegal sub-letting. (*Hopkins, S. M. and Porter, J. M.*) B. BHART INDU *v.* MULTAN KHAN. **3 U. P. L. R. (B. R.) 15.**

——Ch. X—*Resumption—Land given for Grove cannot be resumed.*

It is only a grove and not the land given for planting a grove which can be resumed under Chapter X of the Tenancy Act. (*Fremantle, S. M.*) SURAJ BALI *v.* BRIJ NATH SHARGHA. **L. R. 4 A. 276 (Rev.).**

——Ch. X—*Co-sharer—Agreement to hold less than his share in consideration of payment of Revenue by other sharers is not governed by chapter X.*

Where a co-sharer took less than his proportionate share of common property in consideration of the

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other co-sharers paying the revenue on the entire estate, chapter X of the Tenancy Act does not apply to the case and proceedings for assessment of rent or revenue are not maintainable. (*Pearson, J. M.*) JAIKARAN SINGH *v.* DIP NARAIN.

9 O. & A. L. R. 213 : L. R. 4 A. 46 (Rev.).

——Ch. X—*Applies only to proprietors.*

A resumption suit under Ch. X of the Act can be *put in motion* only by proprietors and not by tenants. (*Harrison, J. M.*) BAJI RAM *v.* BHULAN

3 U. P. L. R. (B. R.) 57.

AGREEMENT.

See (1) CONTRACT.
(2) CONTRACT ACT.

AGRICULTURAL—Holding.

See (1) LANDLORD AND TENANT.
(2) LEASE.

——**Lease.**

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, SS. 107, 108, 116, 117.

——**Purposes.**

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) LOCAL TENANCY ACTS
(4) T. P. ACT, S. 117.

——**Tenant.**

See (1) LANDLORD AND TENANT.
(2) LEASE.

AGRICULTURISTS' LOANS ACT (XII OF 1884). S. 5

—*Claim arising out of Revenue does not lie in Civil Court—U. P. Land Revenue Act (III of* 1901), *S.* 233 (*m.*)

A claim arising out of the collection of a sum of money which is under S. 5 realizable as Revenue, is not cognizable by Civil Court by virtue of S. 233 (*m.*) (*Tudball, J.*) NIHAL CHAND *v.* KANHAI.

19 A. L. J. 360 : 62 I. C. 544 : 3 U. P. L. R. (All.) 66.

AIR AND LIGHT.—*See* EASEMENTS ACT.

AJMERE MUNICIPALITIES REGULATION (III OF 1877.)

——Ss. 6 and 9—*Pre-emption—Sale : definition of—Whether right of pre-emption arises where there is no sale-deed according to Transfer of Property Act.*

Land was sold in Ajmer, but in order to defeat a possible claim for pre-emption, no sale deed was executed as required by S. 54 of Transfer of Property Act. In all other respects the sale was complete.

Held, that the right of pre-emption arose, *Held* also that where a right of pre-emption is claimed under the statute law of Ajmer-Marwar, the principles laid down in Allahabad ruling in *Begun* v. *Muhammad Yakub* (I. L. R. 16 All. 344) should be followed. (*Piggott and Walsh, JJ.*) RAM SUKH *v.* L. E. O'NEAL. **44 A. 239 : 20 A. L. J. 59 : A. I. R. 1922 All. 46.**

ALIEN.—*See* ALIEN ENEMY.

ALIENATION.

See (1) CUSTOM—PUNJAB
(2) HINDU LAW—ALIENATION.
(3) MAHOMEDAN LAW—ALIENATION

ALIEN ENEMY.—*See* C. P. CODE, S. 83.

ALIMONY.—*See* DIVORCE ACT, S. 36.

ALIYASANTHANA LAW.—*See* MALABAR LAW.

——*Maintenance—Separate maintenance—Award of—Grounds—Inconvenience—Disputes between ejman and plaintiffs—Award on ground of—Propriety—Rate of separate maintenance—Data for fixing—Members living away with their husbands or wives*

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for portion of year—Amount equivalent to maintenance during period of absence—Claim to—Maintainability.

In a suit for maintenance brought against the *ejman* of an Aliyasantana family by some of the members thereof, the Court below awarded the plaintiffs separate maintenance on the ground that the defendant and the plaintiffs were not moving well and that a joint mess in the family house had become extremely inconvenient.

Held, that mere inconvenience was not sufficient to warrant separate maintenance.

Held further, that the existence of disputes between the *ejman* and the plaintiffs was not a ground for awarding separate maintenance when there was no evidence to show that those disputes had been of such a nature as to make it impossible or dangerous for the members to continue to live together in the same house and take meals together. The *ejman* is not bound to distribute any spare money that he has in his pocket among all the other members or even among some of them. When some members of an Aliyasantana family reside away for a portion of the year with their husbands or wives, as the case may be, they are not entitled to claim from the *ejman* a sum equivalent to their maintenance during the period of absence. In fixing the rate of separate maintenance to be awarded to members of such a family, the Court must take into account the right of the karnavan to something more than an equal share and the right of those members who continue to live jointly in the family house to enjoy the same mode of living as they formerly enjoyed subject only to the rights of those who have separated from the family. (*Phillips, J.*) CHANDAYYA HEGDE *v.* KAVERI HEGADTHI.

49 M. L. J. 727.

ALLAHABAD HIGH COURT.

———*Fees of counsel—Higher scale fees are usually awarded—Fanciful valuation is therefore to be avoided.*

Fees on higher scale are usually given in the High Court and in the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff. Obviously if a plaintiff is permitted to place any fanciful figure as the value of the suit he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his counsel and also subjects him to a continuing possible liability to pay the plaintiff an amount by way of costs far in excess of the real value of the case. A minor and less important matter is that the plaintiff may embarrass himself. (*Mears, C. J. and Piggott, J.*) UDAIRAJ SINGH *v.* SECY OF STATE.

46 All. 553 : 22 A. L. J. 446 : A. I. R. 1924 All. 652.

ALLAHABAD HIGH COURT RULES.

———*Rules for Subordinate Court, Ch. 21, r. 1—First day of hearing for purpose of filing certificate of payment of pleader's fees.*

For the purpose of determining whether a certificate of payment of pleader's fee has been filed in time the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues. (*Neave, J.*) MADHO LAL *v.* BANARSI DAS. **82 I. C. 73 : L. R. 5 A. (Civ) 582 : A. I. R. 1925 All. 98.**

———**Ch. III, R. 3**—*Second appeal—No evidence to support finding—Certificate of Counsel—Admission without such certificate—Effect of.*

No appeal from an appellate decree presented by an advocate, attorney or vakil shall be admitted on the ground of want of evidence to support a finding of fact unless such advocate, attorney or vakil certifies under his hand the memorandum of appeal that he has examined the record and that, in his opinion such a ground is well founded in fact. The rule is imperative. Unless the certificate is present, the matter cannot be argued in spite of the fact that the appeal has been admitted to hearing. (*Stuart, J.*) ISH NARAIN UPADHIA *v.* RAMESHAR LOHAR.

22 A. L. J. 244 : 78 I. C. 164 : L. R. 5 A. 91 (Rev.) : A. I. R. 1924 All. 433.

———**Ch. IV, R. 9**—*Decree transferred to Collector for execution—Jurisdiction, Civil Court.*

The Collector held a sale of property under a decree transferred to him for execution and accepted the highest bid but coming to know later on that the property is worth much more, proclaimed a resale on condition that the highest bid in the first sale would be accepted if no higher bid was made in the second sale. The auction-purchaser sued in the Civil Court against the proclamation of resale, *held*, that R. 9 barred the suit. (*Knox and Ryves, JJ.*) CHULHI *v.* BADRI.

62 I. C. 672 : 19 A. L. J. 232.

———**Ch. IV, R. 9**—*Suit for profits as Legal Representative of deceased person—Right denied—Duty of Court.*

Where a person sues in Revenue Court to recover profits due to certain deceased persons on the ground that he is their legal representative and his right is denied, the Court under S. 199 should decide the question of title as a Civil Court or refer the parties to a Civil Court by an order in writing. (*Banerji, J.*) SYED MADAD ALI *v.* SHEIKH SHAMSHER ALI.

63 I. C. 103 (All.) : 4 U. P. L. R. (A.) 9.

ALLEGATION.—

See (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.

ALLOTMENT.—

See (1) HINDU LAW.
(2) JOINT FAMILY—PARTITION.

ALLOWANCE TO BANKRUPT.

See INSOLVENCY ACT.

ALLUVIAL AND DILUVIAL LANDS.

See ALLUVION AND DILUVION.

ALLUVION AND DILUVION.—*See also* BENGAL ALLUVION AND DILUVION REGN. (XI OF 1825).

———*One river flowing into another and washing adjoining land—Accreted land still goes with ownership of bank.*

There is in Pergana Farkia a general usage whereby in lands, reformed by a gradual accretion on one bank of the Gandak and cut away from the other bank by diluvion the ownership of the land so accreted goes with the ownership of the bank and it makes no difference even where the overflow of the Gandak was brought about by the Ganges flowing into the Gandak. (*Lord Carson.*) RAJENDRA NARAIN DHANJ DEO *v.* KUMAR GANGANANDA SINGH. **52 I. A. 279 : (1925) M. W. N. 549: A. I. R. 1925 P C. 213 (P. C.).**

———*Accretion.*

The parent estate adjoining a river cannot be said to have included the increment because its boundaries extended in the river *ad medium flum*, 48 I. A. 565 Ref. to and foll. (*Lord Shaw.*) SECY. OF STATE *v.* JATINDRA NATH CHOWDHURY. **47 M L. J. 48 : 51 I. A. 241 : (1924) M. W. N. 588 : 35 M.L. T. 146 : 51 Cal. 802 : 29 C. W. N. 1 : 80 I. C. 1023 : A. I. R. 1924 P. C. 175 (P. C.)**

———*"Gradual, slow and imperceptible"—Principles how far applicable in India.*

The principle of English law is that an accretion

must be formed by gradual, slow and imperceptible degrees. The words "slow" and "imperceptible" are only qualifications of the word "gradual" and the test laid down is relative to the conditions to which it is applied. The actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India on account of the different conditions in India and in England. (*Lord Carson.*) SECY. OF STATE *v.* RAJA OF VIZIANAGARAM. **42 M. L. J. 589 : 45 Mad. 207 : 26 C. W. N. 348 : 15 L. W. 389 : 20 A. L. J. 438 . L. R. 3 P. C 105 : 35 C. L. J. 463 : 30 M. L. T. 112 : (1922) M. W. N. 381 : 67 I. C. 1 : 49 I. A. 67 : A. I. R. 1922 P. C. 105 (P. C.).**

———*Right to emerged land—Adverse possession.*

This land in suit had emerged out of the river Ganges which lay to the north of Dhanapur the village of which the defendants were the owners. To the west of that parent village was a village which had apparently been formed since 1836 and is called Arazi Dayara Dhanapur. The plaintiffs alleged in their plaint that they were the owners of the village Arazi Dayara Dhanapur but they subsequently accepted this position as mortgagees ; that the land in suit had accreted to that village and therefore formed an accession to the village ; that they had themselves become proprietors of the disputed land, and that the defendants the owners of the village Dhanapur khas had no right to the aforesaid land. They based their claim in the plaint upon the custom known as the custom of dhardhura. That custom means that the deep stream is the boundary between two villages lying on opposite banks of the stream. But in appeal they conceded that the present claim cannot be regarded as a claim based upon the custom of dhardhura. There was good deal of litigation about this and similarly accreted land between plaintiffs and defendants, the plaintiffs failing every time ; the possession of merged land was never with plaintiff ; the mortgage-deed was not produced in court *held* that plaintiffs failed to establish their right to the land. (*Banerji and Gokul Prasad, JJ.*) BIJAI SHANKER SELHER *v.* RAM CHARITRA SINGH. **21 A. L. J. 409 : 45 A. 461 : L. R. 4 A. (Civ.) 206 : 75 I. C. 35 : A. I. R. 1923 All. 500.**

———*Land Revenue—Even in case of possession by trespasserland* fasli *at Permanent Settlement cannot on re-emergence be resumed and assessed with revenue.*

Upon re-emergence after submergence subsequent to the Permanent Settlement, of lands which were fasli at the Permanent Settlement and assessed as such, revenue cannot be assessed by the Government on the lands. If the person in possession is not the rightful owner, the Government is not on that account authorized to resume and assess the land with revenue upon such re-emergence. (*Newbould and B. B. Ghose, JJ.*) SECY. OF STATE *v.* KALI NARAYAN RAO CHOUDHURI. **29 C. W. N. 119 : A. I. R. 1925 Cal. 273.**

———*Reformation* in situ—*Need not be slow and imperceptible.*

If lands are reformations *in situ* the question whether the accretion was slow and imperceptible does not arise. (*Chatterjee and Pearson, JJ.*) NAZIR AHAMAD CHOWDHURY *v.* THE SECY. OF STATE FOR INDIA. **26 C. W. N. 913 : 35 C. L. J. 580 : 69 I. C. 74 : A. I. R. 1922 Cal. 337.**

———*Submerged land is supposed to be in possession of the original owner.*

If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. Possession of the land during the period of its submersion is presumed to continue with the original owner although he may not have enjoyed the actual usufruct or the other benefits accruing from the land had it not been immersed in water. (*Kinkhede, A. J. C.*) LILADHAR *v.* KHET SINGH. **83 I. C. 8 : A. I. R. 1925 Nag. 164 (2).**

———*Change in river course—Land washed away and placed adjoining another's land—Right to remains with owner.*

The mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B could never deprive A of the lands and transfer them to B. 27 C. 738, Rel. Whoever has land, wherever it is, whatever may be the accident to which it has been exposed, the ground remains the property of the owner. (*Simpson and Wazir Hasan, A. J. Cs.*) BALBHADDAR PRASAD *v.* NARAYAN DAS. **9 O. L. J. 518 : 73 I. C. 727 ; A. I. R. 1923 Oudh 102.**

———*Acceptance of remission—If amounts to abandonment—Intention.*

Where there is division the mere fact of non-payment of rent or claiming or accepting remission is not proof of abandonment and until abandonment is proved the right to the lands remains unimpaired. The question is one of intention to be determined according to the circumstances of each case. (*Jwala Prasad and Ross, JJ.*) RAMNANDAN SAHEY *v.* JAIGOBIND PANDAY. **2 P. 839 : 75 I. C. 955 : A. I. R. 1924 P. 213.**

ALTERATION.
See (1) DEED.
(2) NEG. INSTR. ACT, S. 87.

———**of Document, etc.** *See* PENAL CODE.

———**of Judgment.** *See* CR. P. CODE, S. 369.

———**of Law.**
See (1) SPECIAL POWERS.
(2) STARE DECISIS.
(3) STATEMENT OF OBJECTS AND REASONS.
(4) STATUTORY POWER.
(5) SURPLUSAGE.
(6) TECHNICALITY.

———**of Sentence.** *See* CR. P. CODE, S. 367.

ALTERNATIVE CHARGES. *See* CR. P. CODE, SS. 235 AND 236.

———**Claims.**
See (1) C. P. CODE, O. 6, PRACTICE.
(2) PLEADINGS.

———**Pleadings.**
See (1) C. P. CODE, O. 6.
(2) PLEADINGS.
(3) PRACTICE.

———**Pleas.**
See (1) C. P. CODE, O. 6.
(2) PLEADINGS.
(3) PRACTICE.

AMBIGUITY.
See (1) DEED—CONSTRUCTION OF.
(2) EVIDENCE ACT, S. 93.
(3) INTERPRETATION OF STATUTES.

AMBIGUOUS DOCUMENTS. *See* AMBIGUITY.

AMENDMENT.
See (1) C. P. CODE, S. 151 AND O. 6, RR. 17 AND 18.
(2) DECREE.

———**of Decree.** *See* C. P. CODE, SS. 151, 152 AND 153.

———**of Pleadings.**
See (1) C. P. CODE, O. 6, R. 17.

AMENDMENT OF PLEADINGS.

(2) LIM. ACT, S. 13.
(3) PRACTICE.

ANCESTRAL PROPERTY.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW.

ANCIENT LIGHTS.

See (1) EASEMENTS.
(2) EASEMENTS ACT.

ANIMALS.

———*Wild animals—Elephants—Property in—Capture—Escape—Effect of*

When a wild animal, *e. g.*, an elephant has escaped from captivity and pursuit of it has been given up, the property which a man may have formerly had in it ceases and it becomes open to any one else to reduce the animal to his possession, and then it will, for the time become his property. An animal which has gone away and may be supposed to be likely to return to a state of captivity ceases to be a wild animal. 35 C. 413 Foll. (*Higginbotham, J.*) MAUNG YAUNG SHWE *v.* MAUNG SIN.

64 I. C. 831 : 11 L. B. R. 71.

ANIMUS POSSIDENDI.

See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ARTS. 142 AND 144.

ANNUITY.

See (1) C. P. CODE, S. 60.
(2) HINDU LAW—MAINTENANCE.
(3) T. P. ACT, SS. 6 AND 100.

ANOMALOUS MORTGAGE.—*See* T. P. ACT, SS. 58, 98, ETC.

ANTECEDENT DEBT.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW—(*a*) ALIENATION, (*b*) DEBT, (*c*) JOINT FAMILY.

ANTE-NUPTIAL AGREEMENT.

See CONTRACT ACT, SS. 23 AND 25.

ANTICIPATION—Restraint on.

See HUSBAND AND WIFE.

ANTICIPATORY ATTACHMENT.

See ATTACHMENT.

APOSTACY.

See (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW—(*a*) MARRIAGE, (*b*) SUCCESSION.
(3) MAHOMEDAN LAW.

APPEAL.

See also C. P. CODE, SS. 96 TO 105, O. 41 AND O. 43, R. 1.

—Abatement—*See* C. P. CODE, O. 22.
—Additional Evidence—*See* C. P. CODE, O. 41, R. 27.
—Against Award—*See* C. P. CODE, S. 104 AND SCH. II, PARA. 16.
—Against dead Person—*See* C. P. CODE, O. 22, R. 6.
—Against preliminary Decree—*See* C. P. CODE, S. 97.
—Amendment—*See* C. P. CODE, O. 6, R. 17.
—Competency.
—Conversion to Revision.
See (1) C. P. CODE, S. 115.
(2) PRACTICE.
—Criminal.
—Evidence.
—Forum.
—Judgment.
—New plea—*See* PRACTICE—NEW PLEA.

APPEAL—Competency.

—Question of fact—*See* C. P. CODE, S. 100.
—Right of.
—Test.

Competency.

———*Competency—Order passed without jurisdiction—Appeal lies if the order, when passed with jurisdiction, is appealable.*

Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. 13 All. 575 ; 12 A. L. J. 1113 ; and 24 C. L. J. 235, Rel. on. (*Sulaiman and Daniels, JJ.*) BILAS SINGH *v.* EMPEROR.

23 A. L. J. 845 : 89 I. C 630 : A. I. R. 1925 All. 737.

———*Competency— Conditional or Provisional order.*

An order which is either conditional or provisional and does not result in a final decree is not appealable. (*Walsh and Ryves, JJ.*) KANHAIYA *v.* KANHAIYA LAL.

46 A. 372 : 22 A. L. J. 345 : L. R. 5 A. (Civ.) 238 : 79 I. C. 363 : A. I. R. 1924 All. 376.

———*Competency—Decision wrong as being under S. 144—Appeal lies.*

Where one of the issues, which the Judge of the Court below had to decide, was whether the case was covered by S. 144 C.P.C. and he applied his mind to the question and decided it.

Held : that the appellant cannot be deprived of his right of appeal because one of his grounds for challenging the decree is that the decision on this issue was wrong. (*Daniels, J.*) CHHUTTAN *v.* JWALA PRASAD.

73 I. C. 602 : A. I. R. 1924 All. 64.

———*Competency—Offer by a party to be bound by the decision of the trial court—Offer not accepted by the opposite party.*

Even though the defendants in a suit offered to be bound by the decision of the trial court arrived at on inspection of the locality, their right of appeal is not affected when there is nothing to show that the plaintiff agreed to it. In such a case they are not estopped from questioning the correctness of the trial court. The case is different where there is an agreement of the parties agreeing to be bound by the decision of the trial court. 43 All. 266 Referred to. (*Gokul Prasad, J.*) GHULAM HUSAIN *v.* GANESH LAL.

75 I. C. 619 : A. I. R. 1923 All. 373.

———*Competency—Order returning memorandum of appeal for presentation to Revenue Court is not appealable.*

No appeal shall lie from the order of the District Judge returning a memorandum of appeal for presentation to a Revenue Appellate Court. (*Walsh and Wallace, JJ.*) BANKEY LAL *v.* MEGHRAJ.

63 I. C. 951 : 19 A. L. J. 868 : L. R. 2 A. 182 (Rev.).

———*Competency—Commissioner's report—Objections to appeal from order.*

The lower Court is incompetent to deal with directions and costs on Commissioner's report while an appeal is pending from an order on objections to the Commissioner's report. (*Macleod, C. J. and Crump, J.*) ELIAS HAJI AHMAD *v.* HAJI ESMAIL SAIT.

25 Bom. L. R. 237 : 72 I. C. 401 : A. I. R. 1923 Bom. 200.

———*Competency—Decision open to appeal—Refusal to pass decision is also appealable.*

If a decision by a Court is open to appeal, presumably its refusal to pass a decision is also appeal-

APPEAL—Competency.

able. (*Suhrawardy and Duval, JJ.*) NAYAN TARA DASI *v.* SAMBHU NATH. **52 Cal. 662 : 89 I. C. 761 : A. I. R. 1925 Cal. 932.**

———*Competency—Agreement by parties to be bound by the decisions of a Court on local inspection does not exclude right of appeal.*

Where the parties to a suit agreed to the matter being decided by the Court according to the opinion which it may entertain upon a local inspection without going into any further evidence in the suit such an agreement does not preclude any party from appealing against any decree that the Court may pass after such local inspection, excepting on the points of fact decided by the Court on its local inspection. It is only in cases where an agreement between the parties results in the Court assuming jurisdiction which otherwise it would not have or involves the Court in going so far outside its ordinary course of procedure that it is impossible for the Appellate Court properly to review its decision, that parties are not entitled to appeal against the decision of that Court. The right of appeal is a very important right and the Court will not imply a term to give up that right unless it is driven to that conclusion. The right of appeal will not be taken away when the parties agreed to mere deviations from the ordinary procedure of Courts. L. R. 5 P. C. 516; (1896) A. C. 136 Followed. 26 Mad. 76; 37 M. L. J. 100 dissented from. (*Schwabe, C J. and Wallace, J.*) SANKARANARAYANA PILLAI *v.* RAMASWAMI PILLAI. **44 M. L. J. 258 : 17 L. W. 303 : 72 I. C. 149 : (1923) M. W. N. 154 : A. I. R. 1923 Mad. 444.**

———*Competency—Decree for joint possession—One of the plaintiffs not made respondent—Bringing him on record after the death of another—Appeal is not maintainable.*

The defendants appealed against a decree for joint possession in favour of five plaintiffs to High Court but only four plaintiffs had been made respondents. *Held*, the appeal could not be heard because the decree was one for joint possession so that even if the appeal were successful it would be infructuous because the plaintiff who was not made a respondent would still be able to execute the decree. Where after the death of one of the respondents the plaintiff, who had been omitted from the category of respondents was, after the period of limitation, substituted in his place. *Held* the appeal could not be maintained. 19 C. W. N. 290 Foll. (*Coutts and Das, J.*) TEJ NARAIN SAHU *v.* DAL RAMSAHU. **1 P. 699 : 4 P. L. T. 170 : 69 I. C. 624 : A. I. R. 1922 Pat. 606.**

Criminal.

———*Criminal—Privy Council is not a Court of Criminal appeal.*

The King in Council is not a Court of Criminal Appeal and the power in the Sovereign to entertain appeals of this character is only to be exercised when there has been such a gross denial of the principles of natural justice as has been defined in numerous cases. (*Viscount Haldane.*) MURUGA GOUNDAN *v.* EMPEROR. **26 C. W. N. 57 : 30 M. L. T. 180 : 1 Pat. L. R. Cr. 31 : 69 I. C. 631 : 23 Cr. L. J. 743 : 14 L. W. 558 : A. I. R. 1922 P. C. 162 (1) (P. C.)**

———*Criminal—Dismissal for default cannot be made.*

There is no provision in Cr. P. C. for the dismissal of an appeal on account of the non-appearance of the appellant or his pleader. Having admitted the appeal and fixed a date for its hearing, the appellate Court is bound to peruse the record and to decide the

APPEAL—Evidence.

appeal judicially. 13 All. 171. Foll. (*Stuart, J.*) RAM CHANDAR *v.* EMPEROR. **21 A. L. J. 100 : 24 Cr. L. J. 662 : 73 I. C. 694 : L. R. 4 A. Cr. 7 : A. I. R. 1923 All. 175 (2).**

———*Criminal—No interference by High Court unless the omission by Judge to read some portion of evidence to jury has prejudiced the accused.*

An objection that in delivering his charge to the Jury, the Sessions Judge did not read material portions of the evidence is not in itself sufficient for the reversal of the verdict of the Jury. In each case it must be a question whether the omission to read the material portion of the evidence was such as to mislead the jury and the Court of appeal will not interfere, if it has not prejudiced the accused. (*Baker, J.C.*) RAHIMBEG *v.* EMPEROR. **7 N. L. J. 208 : A. I. R. 1925 Nag. 154.**

———*Criminal—Lower Court's finding on facts is not to be disturbed merely because a different view is also possible—The lower Court's finding can only be disturbed by proof of its being wrong.*

Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a re-hearing the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below. If all that the appellant can show is nicely balanced calculation which lead to the equal possibility of the judgment on either the one side or the other being right, he cannot succeed. (1896) 1 Q. B. 38 and *Sevage* v. *Adam*, W. N. 95, 109, Foll. (*Dawson Miller, C.J., Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJ KESHAO PRASAD SINGH. **5 P. L. T. Sup 1 : A. I. R. 1925 Pat. 568 (F.B.).**

———*Duty of appellant—Burden of proof.*

In an appeal, the appellant has a greater duty to perform than showing that on a balance of inference there is a possibility of judgment being given in his favour. The burden is on him to show that the judgment appealed against is wrong. (*Wazir Hasan, A. J. C.*) MT. MAMJAN BEGAM *v.* MT. QAMRUNNISSA BEGAM. **89 I. C. 703 (Oudh).**

Evidence.

———*Evidence—Remand—View of Court as to burden of proof.*

Where on account of a wrong view of the law the appropriate issue is not framed and tried, there is a likelihood of plaintiff being prejudiced and the case will be remanded. But such is not the case with a particular view of a court as to the burden of proof, because the weight to be attached to the evidence of a party is not governed by any such external consideration as that of the burden of proof but depends entirely on the intrinsic evidence. (*Kotwal, A. J. C.*) GOWARDHAN *v.* HARLAL RAMSUKH. **A. I. R. 1923 Nag. 62.**

———*Evidence—Appreciation of.*

In matters of evidence due regard must be had to findings of the Trial Court which is placed in a more advantageous position than the Appellate Court. But where some of the principal witnesses have been examined on commission the advantage of the Lower Court disappears. (*Raymond and Kennedy, A.J.Cs.*) HARIRAM ISARDAS *v.* MT. HAR DEVIBAI. **A. I. R. 1925 Sind 16.**

Forum.

———*Forum—Suit for possession and mesne profits valued at Rs.* 4,000 *but decreed for Rs.* 5,100.

A suit for possession of land and part of mesne profits was valued at Rs. 4,000 and instituted in the Subordinate Judge's Court. The decree amount was Rs. 5,100. *Held*, an appeal against the decree lay to the High Court and not to the District Court. (*Chatterjea and Graham, JJ.*) JOGENDRA NATH *v.* BHAGABAT. **42 C. L. J. 267.**

———*Forum—How determined—Value of the suit or value decreed.*

The forum of an appeal is determined by the value of the suit and not by the amount decreed. (*Walmsley, Ghose, Suhrawardy and Duval, JJ.*) BIDYADHAR *v.* MANINDRA.

29 C. W. N. 869 : 42 C. L. J. 49 : 89 I. C. 726 : A. I. R. 1925 Cal. 1076 (F. B.).

Judgment.

———*Judgment—Ground of appeal—No finding—Validity.*

The appellate Court did not in its judgment express a finding on one of the grounds of appeal which was as follows :—" That the lower court should have held that the deed dated the 10th September. 1894, was executed for legal necessity". The deed of the 10th September, 1894 was a mortgage of the village Pakauri granted by the widow while she was in possession of a Hindu Widow's interest in the estate. On that mortgage a decree for sale was made and at the sale the two-thirds share in the village now claimed by this appellant was purchased by some of the defendants to this suit. The trial Court had found in this suit that the mortgage was not made for necessity. The appellate court said in its judgment that : " they the defendants denied the adoption and they denied the widow's power to adopt. They also plead that even if the adoption was proved, it could not affect the interest acquired by the purchasers before the adoption ; on this last pleading no issue was framed and nothing has been said in argument in appeal. It must therefore be taken to have been dropped."

Held, the question as to whether the mortgage was or was not granted for necessity was involved in the question as to whether the purchasers at the sale under the decree had acquired title by their purchase. Under the circumstances the lower Appellate Court was justified in holding as it did, that the only question which remained for it to decide in the appeal was the question as to the validity of the adoption. (*Sir John Edge.*) BISWANATH SINGH *v.* JUGAL KISHORE. **45 M.L.J. 215 : 50 I.A. 279 : 26 O. C. 228 : 18 L.W. 28 : (1923) M.W.N. 620 : 38 C. L. J. 299 : 73 I. C. 202 (2) : 33 M. L. T. 289 : 10 O. L. J. 379 : 28 C. W. N. 790 : A. I. R. 1923 P. C. 90 (P. C.).**

———*Judgment—Dismissal on preliminary point—Supporting the judgment on grounds decided against.*

Where it was urged on behalf of defendant respondent that had the lower appellate Court not decided the appeal against the plaintiff on the preliminary point of notice, they would have supported the judgment of the first Court on grounds that had been decided against them by the first Court. *Held* : in the absence of an affidavit that such grounds would have been argued before the appellate Court, the High Court did not feel bound to hear the respondents on those points. (*Le Rossignol and Harrison, JJ.*) PARTAB SINGH *v.* NATHU. **3 L. 285 : A. I. R. 1922 Lah. 416.**

———*Judgment—Failure to refer to document—Effect.*

From the omission to refer to a document in the appellate judgment it does not follow the Court did not take it into consideration. (*Pridcaux, A. J. C.*) MT. SARASWATIBAI *v.* YADORAO.

78 I. C. 887 : A.I.R. 1924 Nag. 240.

———*Judgment—Limitation for filing—Signing of decree.*

Limitation for filing an appeal runs against an appellant only from the date of drawing up and signing the decree. (*Kinkhede, A. J. C.*) TUKARAM *v.* LAXMINARAYAN. **89 I. C 937 (Nag.).**

———*Judgment—Appellant must prove judgment appealed from, to be wrong.*

The burden of proving that the judgment appealed from is wrong lies on the appellant. If the utmost that he can show is nicely balanced calculation which leads to the equal possibility of the judgment on either the one side or the other being right, the appellant cannot succeed. (*Wazir Hasan, J.C.*) MANIN LAL *v.* MOOLCHAND. **80 I. C. 683 : A.I.R. 1925 Oudh 224.**

———*Judgment—Contents.*

The original court among a number of suits for enhancement enquired into the evidence and the details of each suit or their collection individually. The Court of appeal did not do so while reversing the judgment. *Held* that the judgment is improper. (*Das and Kulwant Sahai, JJ.*) NAND LAL CHAUBE *v.* KESHO PRASAD SINGH. **1923 P. H. C. C. 339 : A. I. R. 1924 Pat. 245.**

New plea.

———*New plea—Evidence—Objections to admission cannot for the first time be raised in appeal.*

A defendant could not, in appeal, for the first time object to the admission of a document by the lower court on the ground that the plaintiff did not list it with the plaint. (*Drake-Brockman, J. C.*) LAHANU *v.* MOTIRAM. **63 I. C. 968 (Nag.)**

———*New plea—Point given up in Court below—If can be raised.*

A point given up by a party in the Court below cannot be allowed to be raised in appeal. (*Baker, J. C.*) NARAYAN *v.* BEHARILAL. **89 I. C. 18 (Nag.).**

———*New plea—Reversing judgment—What to contain.*

An appellate court when it reverses the judgment of a trial court must come into close quarters with the Judgment of that court and meet the reasoning therein. (*Kinkhede, A. J. C.*) DATTATRAYA *v.* AMRIT. **89 I. C. 763 (Nag.).**

Right of.

———*Right to appaal not inherent right.*

The right of appeal is not an inherent right of the subject but only exists where it is expressly conferred by statute. 11 Mad. 26 : 40 Cal. 21 Ref. to. (*Lindsay Kanhaiya Lal and Daniels, JJ.*)) ABDUL RAHMAN *v.* ABDUL RAHIMAN. **23 A. L. J. 385 : L. R. 6 A. Civ. 191 : 87 I. C. 51 : 47 All. 513 : A.I.R. 1925 All. 380 (F. B.).**

———*Right of—Order of Court to be taken as it stands.*

The right of appeal does not depend on what the Court ought to have done but on what it actually did. Where what it actually did was to pass a decree on the merits though the appellant did not appear against such a decree the law allows an appeal. When the appeal comes up for decision the appellate court has then to decide whether the order passed was the proper order and one which the Court below had jurisdiction to pass. If it decides this question in the negative it will set the order aside. (*Ryves and Daniels, JJ.*) NASIK KHAN *v.* ITWARI. **21 A. L. J. 667 : 74 I. C. 905 : L. R, 5 A. 26 : 45 A. 669 : 9 O. & A. L. R. 645 : A. I. R. 1924 All. 144.**

APPEAL—Right of.

———*Right of—Appellate Court should decide at the hearing whether appellant is really affected by the order appealed from.*

When a party to a suit feels himself aggrieved by a decree or an order from which he has a right of appeal the question as to whether the decree or order appealed from is to be revised at his instance, he not being materially affected by it, is one for the Appellate Court to decide at the hearing of the appeal. (*Suhrawardy and Chotzner, JJ.*) BAHADURMULL RAMPURIA *v.* TRICUMDAS CALLIANJI. **78 I. C. 881 : A. I. R. 1925 Cal. 561.**

———*Right of appeal from interlocutory orders is merged in the right of appeal from the decree.*

The right of appeal from interlocutory orders ceases after disposal of the suits. This rule applies even to cases where there are preliminary and final decrees, and even where the decree is not formally drawn up- (*Mookerjee and Suhrawardy, JJ.*) NAINIBALA DASI *v.* ICHHAMOYEE DASI. **40 C. L. J. 291 : 84 I. C. 674 : A. I. R. 1925 Cal. 218.**

———*Right of—Transferee can appeal against decree against transferor.*

The transferee of a tenancy interest can maintain an appeal against a decree passed against his transferor, when the legality of his purchase has been questioned. (*Mookerjee and Chotzner, JJ.*) RAGHUPATHI CHATTERJEE *v.* NRISINGHA HARI DAS. **36 C. L. J. 491 : 71 I. C. 1 : A. I. R. 1923 Cal. 90.**

———*Right of—Party dismissed from record—Prejudice.*

A suit was brought for recovery of compensation for short delivery of goods against A and B. The suit was dismissed with costs. On a petition being filed by the plff. in the lower court to make C, a party deft. in place of B, B was ordered to be removed from the record and the suit was remanded for trial *de novo.* B was given costs in the primary court but no cost was awarded to him in the lower Appellate Court. B appealed to the High Court : *Held* that B was competent to question the propriety of the order by way of appeal even though he is not competent to question the propriety of the order so far as it directed C to be made a party, as the order of the lower Appellate Court was to deprive him of the costs allowed by the first Court. (*Mukerjee and Panton, JJ.*) AGENT, B. N.W. RAILWAY CO. *v.* JAGANNATH ACARWALLA. **66 I. C. 903 : 34 C.L.J. 475.**

———*Right of—Statute must clearly confer.*

A right of appeal is a creature of statute and in order to sustain an appeal, it must be clearly shown that the law confers a right of appeal. (*Shadi Lal, C. J. and Campbell, J.*) FIRM JAI NARAN *v.* FIRM NARAYAN DAS. **3 L. 296 : A. I. R. 1922 Lah. 369.**

———*Right of, does'nt exist save under expressed or implied rule.*

An expressed rule or a rule by unavoidable implication alone, can be the basis of the right of appeal. (*Wazir Hasan, A. J. C.*) SURAJ NARAIN SINGH *v.* BISHAMBHAR NATH BHAN. **78 I. C. 138 : A. I. R. 1925 Oudh 260.**

———*Right of—Party aggrieved.*

A person has a right of appeal only when he is affected by the decree though not passed against him. (*Dalal, A. J. C.*) RAJA SURAJ BAKSH SINGH *v.* MUNNU LAL. **10 O. L. J. 229 : 26 O. C. 374 : 9 O. & A. L. R. 577 : A. I. R. 1924 Oudh 52.**

———*Right of—Non-party — Determining his rights.*

Where the decree of the Munsif was in favour of defendant No. 2 and, therefore, he could not appeal and in ths first appeal by plaintiff deft. 2 was not made a party. *Held* as deft. 2 was not made a party to the first appeal by the plaintiff his rights could not be determined in that appeal nor could they be determined in the second appeal and his rights stood unaffected. (*Ross, J.*) DASICHAMAR *v.* RAM AUTAR SINGH. **71 I. C. 475 (2) : A. I. R. 1923 Patna 404**

Test.

———*Test of—Appealability of order depends upon the substance of the order.*

It is the substance and not the form of the order that should be kept in view in order to determine whether an order is appealable or not. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) KANDOTH PUTHIYADATH CHENGARU CHANDU *v.* PUTHIYADATH CHENGARA RAMAN NAIR. **(1921) M. W. N. 390 : 63 I. C. 961 : 14 L. W. 15.**

APPELLATE COURT—*See* APPEAL.

———Limitation—Not pleaded in trial Court—Duty to take note of. *See* LIM. ACT, S. 3. **90 I. C. 827.**

———Power of—Appeal from conviction on trial with assessors--Interference with finding of fact. SITLA BAKHSH SINGH *v.* EMPEROR. **2 O. W. N. 931.**

———*Practice—Oral evidence—Conflict—Demeanour of witnesses.*

Where there is direct conflict of evidence, an appellate court must give weight to the impression that the witnesses made on the Judge in whose presence they gave evidence. (*Newbould and Pearson, JJ.*) HEM CHANDRA KUNDU *v.* JNANENDRA CHANDRA KUNDU. **90 I. C. 624.**

APPELLATE ORDER.

See (1) APPEAL.
(2) C. P. CODE, O. 41.

APPLICATION.

See (1) C. P. CODE
(2) PRACTICE.

APPOINTED DAUGHTER—*See* HINDU LAW.

APPOINTMENT—*See* WILL.

APPORTIONMENT.

See (1) LEASE.
(2) MORTGAGE.
(3) T. P. ACT.

APPROPRIATION.

See also (1) ACCOUNTS.
(2) CONTRACT ACT, S. 60.

———*Loans—Repayment of—Barred debt.*

Where there are a number of loans and money is paid without indicating towards what loan it is, the creditor can appropriate it to the earliest loan, even if it is barred. (*Kinkhede, A. J. C.*) DULICHAND *v.* MT. SONI. **90 I. C. 239 (Nag.)**

APPROVER.

See (1) EVIDENCE ACT, SS. 144, 133.
(2) CR. P. C. SS. 337-339.

ARBITRATION.

See also (1) ARBITRATION ACT.
(2) C. P. CODE, SCH. 2.

Clause in Contract.
Family Settlement.
Interest.
Powers of arbitrators.
Powers of Court.
Rights of parties.
Signing by pleader.
Validity.
Miscellaneous.

ARBITRATION—Clause in Contract.

Clause in Contract.

——Clause in contract — Agreement making it obligatory to refer claims within a fixed time--Failure to do so bars any relief—Court, when can consider—Validity of award.

Where parties had contracted to refer all disputes to arbitration, and also not to recognise any claim or dispute that had not been made in writing in 60 days, the failure to do the latter disentitled the party in default to any relief from the arbitrators. When a Court is asked to file an award, it is not sitting as a Court of appeal from the arbitrators ; but the Court can certainly decide if the award sought to be filed is the production of a tribunal duly constituted under terms of a contract binding on both parties. Per *Walsh, J.*—An arbitrator cannot give himself jurisdiction by arriving at a conclusion when there is no evidence to support it or when the parties had contracted themselves out of all reliefs under certain circumstances. (*Piggott and Walsh, JJ.*) KEDAR NATH MOTI LAL *v.* SUKHAMAL BANSIDHAR.

44 A. 481 : 20 A. L. J. 385 : L. R. 3 A. 289 : 66 I.C. 691 : 4 U.P.L.R. (A) 64 : A. I. R. 1922 All. 522.

——Clause in contract—Abortive award if prevents fresh reference—Courts power to decide if there was a valid contract.

According to a contract between the parties all disputes were to be referred to arbitration, one arbitrator to be appointed by each party within a certain time. Disputes having arisen the vendors appointed an arbitrator and gave notice to the vendees to do the same. The latter refused and an award was made, which however was set aside by Court, as it was completed within the period of time allowed to the other side to nominate an arbitrator. The vendors again referred the matter to a fresh arbitration and on an application being made to enforce it, the other party objected that the prior reference having proved ineffective, the arbitration clause had spent itself. *Held* the fact that the prior proceedings had proved ineffectual, did not stand in the way of a proper arbitration proceeding. Per *Walsh, J.*—Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the Courts. (*Piggott and Walsh, JJ.*) SASHIL CHANDRA DAS *v.* SAKHAMAL BANSIDHAR.

20 A. L J. 377 : L. R. 3 A. 277 : 44 All. 472 : 67 I. C. 487 : 4 U. P. L. R. (A.) 69 : A. I. R 1922 All. 219

——Clause in contract—Award— Validity of—Award given after the expiry of the time prescribed—Effect of—Contract subject to rules of Association—Reference of disputes to arbitration—Umpire—Reference to.

The petitioner purchased on 11—9—1922, 600 bales of cotton from the respondent for September 1922 delivery. The contract was made subject to the rules of the East India Cotton Association, Limited. The respondents' contention was, that the petitioner was not a member of the Association. Among the rules of the Association one ran thus :—All questions in disputes (other than those of quality) arising out of or in relation to (*a*) contracts (whether forwards or "ready") made subject to these Rules, or (*b*) the rights and responsibilities of Commission Agents, muccadums and brokers, shall be referred to arbitration of two disinterested members, one to be chosen by each disputant, the arbitrators having power to call in an umpire who must also be a member. The arbitrators shall come to a decision within fifteen days of their appointment unless the Chairman, Vice-Chairman or General Manager shall when nominating arbitrators (in the manner prescribed below) or upon subsequent application of the arbitrators grant an extension of this period. If the two arbitrators cannot agree upon an award they shall appoint an umpire within fifteen days of the date on which the two arbitrators were originally appointed, or within such extended period as may be allowed by the Chairman, Deputy Chairman, or General Manager.

Upon application of either disputant the Chairman, Deputy Chairman or General Manager shall nominate two arbitrators having power to appoint an umpire, in any of the following cases :—

(*a*) If after one party has appointed an arbitrator the other party refuses or neglects to appoint a second arbitrator within 24 hours after service of written notice of that appointment.

(*b*) If from any cause the umpire fails to make his award within 10 days from the date of his appointment.

The arbitrators must in all cases be members or authorised representatives of members.

Disputes arose between the parties and the respondent appointed an arbitrator and called on the petitioner to appoint his. The petitioner failed to do so whereupon the Chairman of the Association at the instance of the respondent, nominated C. and M. as arbitrators. The arbitrators differed and appointed an umpire on 21st December 1922 who was not a member of the Association but a partner of a firm which was a member. The umpire, without hearing the parties and further evidence made an award on 5-1-1923. An appeal by the petitioner to the Appeal Committee of the Association was unsuccessful. Thereupon he applied to the High Court for a declaration that the award was invalid, that the appointment of the umpire was void, that not being a member of the Association he could not act as umpire, that the umpire gave his award without giving any opportunity to the petitioner to be heard and that the award was not made within 10 days from the date of his appointment. *Held*, the award not having been made within 10 days by the umpire was invalid and that the other grounds urged against the validity of the award were untenable. (*Shah, A. C. J. and Crump. J.*) CHATURBHUJ BHAGWANDAS *v.* DEO KARAN NANJI.

26 Bom. L. R. 84 : 79 I. C. 769 : A. I. R. 1924 Bom. 370.

——Legal representative of one respondent not impleaded in time in an appeal from a decree for joint possession—Appeal whether competent.

A suit was brought jointly by a number of persons for recovery of possession of property. It was decreed and pending the appeal against this decree, one of the plfs.-respondents died. His legal representatives were not brought on record in time. *Held* that the appeal was incompetent and could not be heard, as the decree was based upon a common ground of title alleged by them. *Held also* that the real test in such cases is whether the suit as framed can proceed in the absence of one of the plffs., or whether, if the plffs. were the appellants, the appeal can proceed in the absence of one of the plffs. either as appellant or respondent. (*Suhrawardy and Duval, JJ.*) MANINDRA CHANDRA NANDI *v.* BHAGABATI DEVI CHAUDURANI.

90 I. C. 986 : 30 C. W. N. 45.

——Clause in contract—Arbitration clause—Reference to arbitration before commencement of suit—Effect.

Where an action has been commenced upon a contract which contains a provision for reference to arbitration then even if a reference to arbitration has taken place before the suit is instituted and if no application

ARBITRATION—Clause in Contract.

is made to stay the suit pending the arbitration, the award is of no effect. The law will not enforce the specific performance of an agreement to refer to arbitration but if duly appealed to, it has the power, in its discretion, to refuse to a party the alternative of having the dispute settled by a Court of law and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant do so not ask it to do so, the Court has seisin of the dispute and it is by its decision alone, that the rights of the parties are settled. It follows that in the latter case, the private tribunal, if it has ever come into existence, is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration, and that the action itself shall be referred. There cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. This is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. (*Mookerjee and Fletcher, JJ.*) RAM PRASAD SURAJMULL *v.* MOHAN LAL LUCHMINARAIN.

38 C. L. J. 67.

———*Clause in contract—Award in the absence of, is illegal.*

A contracted to purchase 30 bales of cloth from a firm B; the contract contained a clause as to arbitration. A then sold the same bales to C under a contract as follows:—We sold the goods as were bought by us of B, *Bhatta* (allowance), chafage, all terms according to *Bahar* (importing firms), godown dues according to *Bazaar* interest, cooly hire, according to *Bhitor*,) (*Bazar*), A then sued C in respect of 27 bales, on the ground that C wrongly refused to take delivery and referred the matter as regards the remaining 3 bales to arbitration and got an award in his favour. C then applied to cancel the award. His application was refused; he then challenged the validity of the award.

Held, that the arbitration clause contained in the contract between A & B, was not incorporated in the contract between A & C, and so the award was without jurisdiction, and that his reference as regards the remaining 3 bales only was invalid supposing that the arbitration clause was so incorporated. (*Mookerjee and Fletcher, JJ.*) CHATTURBHUJ CHUNDUNMALL *v.* BASDEO DAS DAGA. **47 Cal. 799 : 33 C. L. J. 145 : 60 I. C. 909 : 25 C. W. N. 928.**

———*Clause in contract—Breach of contract—Cause of action arises immediately on breach and is not postponed till the date fixed for performance.*

When a contract has been entered into and repudiated by one of the parties before the time for fulfilment of the contract, the repudiation will give rise to a cause of action in favour of the other party at once and it will not be necessary for such party to wait till the date fixed for the performance of the contract. A right to sue accrues whenever a person becomes clothed with the legal character entitling him to a relief which a Court of law is competent to grant. Under a contract evidenced by an award, B was at liberty to continue to pay the revenue of the lands held by A or to insist on A paying the said revenue. In the event of B electing to adopt the latter course, A was to be entited to get certain land which was in B's possession. B applied to the authorities to collect the revenue from A himself. The assessment was made and announced to A but before it could be levied, B again applied to the authorities to allow the matter to stand as before. Under these circumstances, A filed a suit for the property to which he was entitled by virtue of B having elected to get the revenue collected from A himself. *Held*: that A was entitled to succeed notwithstanding that B had withdrawn his original application to the revenue authorities for the collection of the revenue from A. A's cause of action to sue for the land arose as soon as B had violated the contract under which he was to have the disputed lands on condition of paying the assessment on the lands held by A. A was not bound to wait till the revenue was actually collected from him. (*Broadway and Campbell, JJ.*) ALI NAWAZ *v.* FAIZ ALI. **79 I. C. 165 : A. I. R. 1925 Lah. 79.**

———*Clause in contract—Reference as per clause in contract—Parties are bound by award.*

The contract in question was in writing and contained a clause providing that any claim or dispute of any sort whatever in connection therewith, unless an amicable settlement could be arrived at, must be referred to arbitration. Upon a claim being made for non-delivery of a portion of the goods contracted for, the defendants referred the matter to arbitration under provisions of this clause. The plaintiffs, however, refused to attend the arbitration, and alleged as their reason for such refusal that arbitrators are invariably a prejudiced tribunal and that such proceedings are always subject to much delay. The arbitration, thereupon, proceeded in the absence of the plaintiffs and ultimately an award was made dismissing the claim. In a suit by the plaintiffs for damages, *Held*, that in the events which have happened the arbitration clause in question was clearly applicable. The parties had, by agreement, selected their own tribunal and must be bound by its decision unless it can be impeached upon any of the well known grounds upon which such a decision can be challenged. (*Scott-Smith and Fforde, JJ.*) FIRM OF GHAMANDI LAL *v.* CHURANJI LAL. **4 Lah. 168 : 5 L. L. J. 146 : 73 I. C. 459 : A. I R. 1923 Lah. 453.**

———*Clause in contract—Provision for decision of other matter.*

An agreement to refer to arbitration is not bad merely for the reason that it included disputes other than that before the Court, if there was a distinct clause to the effect that the arbitrators would only report to the court their decision on the subject-matter of the suit. (*Broadway, J.*) MANSA RAM *v.* KARTA RAM. **76 I. C. 1007 : A. I. R. 1923 Lah. 411.**

———*Clause in contract—Validity—Absence of jurisdiction—Appearance—If amounts to waiver—Claim for moneys due under settlement.*

Where the appointment of an arbitrator is without jurisdiction, an appearance before him even without protest and without prejudice does not amount to a waiver of the right to object to jurisdiction. A reference to arbitration on the basis of an invalid submission is itself invalid. An agreement to submit disputes to arbitration must be in writing, but need not be signed. In the case of cross-contracts, if there is a clause to settle disputes by arbitration, a claim for moneys due under a settlement can be referred to arbitration. But where the money is entered as paid in the account books and a loan of the same taken then and there, the latter is an answer to a suit on the claim and bars the right to claim arbitration under the cross-contracts, (*Bilaram, A. J. C.*) FIRM OF KISHINDAS PURSUMAL *v.* FIRM OF MANGHRAJ KHIALDAS. **81 I. C. 834 : A. I.R. 1925 Sind 144.**

———*Award—Procedure—When set aside—Failure to comply with judicial procedure—Effect.*

An award cannot be set aside on the ground that the arbitrators did not follow the exact legal procedure adopted by Courts. If the arbitrators did not

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act unfairly or contrary to natural justice the award is valid. (*Heald and Rutledge, JJ.*) MAUNG SHWE HPU *v.* U MIN NYUN. **3 Rang. 387.**

Family Settlement.

———*Family settlement—Award in favour of person not party to reference—Binding nature of.*

The heirs of a deceased man submitted their disputes to arbitration and one of them wanted his share to be given to his minor son. This was accordingly done. *Held*, the arrangement could not be vitiated on the ground the minor was not a party to reference but should be upheld as a family arrangement. (*Devadoss, J.*) DADA SAHIB *v.* GAJARAJ SINGH.
47 M. L. J. 928 : 20 L. W. 854 : A. I. R. 1925 Mad. 204.

———*Family settlement—Rejection as partly invalid—If ceases to be enforceable as a family arrangement.*

Where one party to the award led another to believe to his prejudice that he is going to abide by the award he is estopped from contesting it. The fact that he signed the award does not however by itself render it more binding on him. 6 C. P. L. R. 95, Foll. It has always been the policy of Courts of equity to uphold family settlements, even when they are not in legal form. 43 All. 1 and 42 Cal. 801, Foll. (*Baker, O.J.C.*) MANOHARLAL *v.* MT. AMANO.
A. I. R. 1924 Nag. 14.

———*Family settlement—Meaning and tests of—Award is not enforceable as a family settlement.*

A family settlement implies a mutual settlement by certain contending parties belonging to the same family of some disputed claims and rights and an award of arbitrators is not a settlement of that character. It is the decision of a tribunal constituted by the contending parties for the settlement of their dispute and in so far as it is a valid and lawful award, it is binding on the parties to the arbitration proceedings and their successors. Whether such an award is binding on persons whose interests are analogous to those of the parties to the arbitration proceedings is a matter which is not capable of an inflexible answer. In each case it has to be determined whether the person who agreed to the reference to arbitration was seeking to assert a right common to himself and others and had acted fairly in representing those whose interest he had undertaken to protect. (*Kanhaiya Lal and Dalal, A.J.Cs.*) CHAUDHRAIN ZARIF UN-NISSA *v.* CHAUDHRI SHAFIQUZ ZAMIN. **26 O. C. 133 : 75 I. C. 626 : 10 O. L. J. 535 : A. I. R. 1923 Oudh 185.**

———*Family settlement—Principles are more lenient in cases of family arrangements than in arbitration awards.*

The principles under which the validity of an arbitration should be judged are more rigid than those which apply when a family agreement is under consideration. There is ample authority indicating that in some instances in which, although as an arbitration proceeding the result of an award cannot be supported, it is still capable of support on the ground that the award represented what is in effect the outcome of a family compromise. Even assuming that much greater latitude may be extended to the support of a family arrangement than is the case in maintaining an award under an arbitration, nevertheless, where a reversionary interest is in fact affected by a family arrangement, such a compromise cannot be supported. Much more so when the reversionary interest is that of

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a minor. Case law discussed. (*Bucknill and Ross, JJ.*) RAM BAHADUR SEN *v.* GANESH BHAGAT. **2 P. 554 : 73 I. C. 542 : 5 P. L. T. 255 : A. I. R. 1924 Patna 49.**

Interest.

———*Interest—Interest as damages can be awarded.*

The arbitrators have authority to make a decree for such damages as might have been assessed by the Court. (*Mukerjee and Rankin, JJ.*) BHOWANIDAS RAMGOBIND *v.* HARASUKHDAS BALKISHENDAS.
27 C. W. N. 933 : 80 I. C. 510 : A. I. R. 1924 Cal. 524.

———*Interest.*

The right to interest is a question of fact of which the arbitrator is the sole Judge, there is no rule of law on the subject. 54 Ind. Cas. 285 ; 46 Cal. 534. Foll. (*Raymond, A. J. C.*) JAMES FINDLAY & CO. *v.* GURDAYAL PAHLUJRAJ. **17 S. L R. 93 : 76 I C. 660 : A. I. R 1924 Sind 91.**

Powers of Arbitrators.

———*Powers of Arbitrators—Agreement to refer to—Arbitrators can decide what are the terms of contract.*

Where a contract *viz.*, an Advice Note—provided that disputes arising on or out of the contract should be referred to arbitration under the Rules of the Bengal Chamber of Commerce for decision, the Arbitrators, can, on a submission made to them, decide what the terms of the contract are and whether, or not a particular term was included in the contract when originally made. (*Greaves J.*) BAIJNATH KALOO RAM AND ALIBHOY MAHOMED, *In the matter of an arbitration between.* **59 I. C. 439: 24 C. W. N. 567.**

———*Powers of arbitrators—Award—Legality of—Ministerial act—Notice to parties—Necessity for—Statement of arbitrators as to what transpires before them—Conclusiveness of.*

In case the parties are at variance on the question as to what took place before the arbitrators, the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of enquiry unless there is very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence. Where an act judicial in its character is to be performed, the arbitrators are bound by the same rules as bind the courts. The arbitrators are not entitled to decide or to give their award in the absence of one or more parties to the arbitration and without notice to them. But when an act done is not of a judicial nature but merely ministerial in character it is competent to one of the arbitrators or all the arbitrators to have the act performed in the absence of one or more parties. On an application to set aside an award on the ground of misconduct on the part of the arbitrators the facts found were that both the parties did not turn up together, the petitioner turned up and the arbitrators asked him to state his case and file his documents and he gave a written statement stating what his case was and filed such documents as he had in his possession. While he was doing this the counter-petitioner turned up and the arbitrators sent for him, asked the petitioner to remain outside, and took from the counter-petitioner a written statement setting out his case and received his exhibits. Then the arbitrators having gone through these statements and exhibits called in both the parties and began the enquiry. *Held*, that the acts performed by the arbitrators before the enquiry were ministerial in character and that the absence of one of the

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parties at the time did not nullify the award of the arbitrators (*Kumaraswami Sastri, J.*) *In the matter of the* ARBITRATION ACT. **17 L. W. 648 : 75 I C. 850 : A. I. R. 1924 Mad. 274.**

——Powers of arbitrators—Mode of publishing award—Stamp—If necessary.

An award is valid as soon as the arbitrator signs it. There is nothing making its publication necessary nor is it the arbitrator's duty to stamp it. His only duty is to acquaint the parties with the fact that he has completed the award. (*Kinkhede, A. J. C.*) ANANTRAM *v.* MURLIDHAR. **78 I. C. 194: A I. R. 1924 Nag. 204.**

——Powers of arbitrator—Arbitrator may delegate ministerial work to be done by others.

It is open to the arbitrator to have ministerial and other works performed by a third person, and therefore, where in an arbitration for partition the measurements were made and the maps prepared by the amin.

Held : that it cannot be said that the partition was effected by the amin and not by the arbitrator. (*Mullick and Kulwant Sahay, JJ.*) MUHAMMAD KHALIL *v.* ABDUL RAHIM. **4 Pat. 670: A. I. R. 1925 Pat. 810**

——Powers of arbitrators—Adjective law does not apply—Principles of justice apply.

An arbitrator is ordinarily free from the fetters of adjective law, but that does not make him free from the fundamental principles of justice. (*Foster, J.*) ABDUL HALIN *v.* ISMAIL MOMIN. **3 Pat. L. R. 59 : 86 I C. 773 : 6 P. L. T. 544 : A. I. R. 1925 P. 465.**

——Powers of arbitrators—Award—Error.

Arbitrators are Judges of both law and facts and an erroneous decision on a point of law will not justify an interference with their award. (*Raymond, A. J. C.*) JAMES FINLAY & CO. *v.* GURDAYAL PAHLAJRAJ. **17 S. L. R. 93 : 76 I. C. 660 : A. I. R. 1924 Sind 91.**

Powers of Court.

——Powers of Court—Award by arbitrator chosen by parties—Claims irrecoverable in law Courts settled—Court cannot re-open the award.

Walsh, J.—If parties choose to submit their disputes informally to a mutual friend and to agree to accept and do respectively, whatever he decides it is no business of anybody else that they choose to include claims or demands which might not be recoverable in a Court of law, or which might be recoverable with great difficulty. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **47 All. 637 : 23 A. L. J. 561 : 88 I. C. 768 : A.I. R. 1925 All. 503 (F. B.).**

——Powers of Court—Decision beyond terms—Objections disallowed by Court—Revision.

Plaintiff filed a suit against the defendant for recovery of land in the Court of a Munsiff who referred the matter to an arbitrator. The arbitrator decreed the claim in favour of the plaintiff in his capacity as a trustee of the temple. The plaintiff objected on the ground that the arbitrator had travelled beyond the terms of the reference. The Munsiff overruled the objection. *Held* as the Munsiff had jurisdiction to decide the objections, the High Court has no power to interfere, even if the Munsiff has come to a wrong conclusion on a question of law or fact if he cannot be said to have acted illegally or with material irregularity. (*Abdul Raoof, J.*) SHEO NATH *v.* BEG RAJ. **73 I. C. 558: A. I. R. 1923 Lah. 194 (1).**

——Powers of Court—Award— Acceptance of award does not bar right to file objections nor can Court shorten time for filing objections.

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A Court has no power to cut short the period of limitation provided by statute for filing objections against an award.

Where the plaintiffs once agreed to the award.

Held, they were not estopped by any rule of law or procedure from filing objections to the award within the time prescribed by law for that purpose. (*Wazir Hasan, A. J. C.*) KUMPTA PERSHAD *v.* UMAN PRASAD. **76 I. C. 33: A. I. R. 1924 Oudh 344.**

——Powers of Court—Award— Objections to be decided by Court making the reference.

It is the clear intention of the Legislature that objection to the award on the ground of invalidity from any cause whatever should be decided by the Court which had made the order of reference and by no other Court. (*Daniels, A. J. C.*) SHEO PALTON *v.* SUKHDEO. **26 O. C. 107 : 74 I. A. 401 : A. I. R. 1923 Oudh 235.**

——Powers of Court—Jurisdiction—C. I. F. Contract.

Where sellers had fulfilled their part of the contract by tendering the documents of title to buyers which was done at Amritsar and no part of the cause of action arose at Karachi, *Held*, the fact of the goods lying at Karachi was immaterial so far as the seller's cause of action was concerned and the Karachi Court has no jurisdiction to file an award of arbitrators. (*Raymond, A. J. C.*) MEHTA & CO. *v.* MESSRS. PARMESHARDAS PARSHOTTAMDAS. **16 S. L. R. 293 : 80 I. C. 303 : A. I. R. 1924 Sind 4.**

——Powers of Court—Reference to arbitration—Suit impeaching contract—Injunction restraining arbitration when granted.

It is within court's jurisdiction on equitable grounds to restrain the defendants from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference. (*Raymond, A. J. C.*) FIRM OF KIRPALDAS KALIANDAS *v.* FIRM OF GAJANMAL. **70 I. C. 864 : 15 S. L. R. 5.**

Rights of Parties.

——Rights of parties—Objection about want of notice can be waived.

Where a party did not raise any objection to the award on the ground that arbitrator did not give him any opportunity of being heard.

Held, it was open to the Court to draw the inference that he had waived this particular objection to the award. For the purposes of the waiver knowledge of the essential facts is necessary. (*Shah, A. C. J. and Crump, J.*) CHATURBHUJ BHAWANIDAS *v.* DEOKARAN NANJI. **26 Bom. L. R. 84 : 79 I. C. 769 : A. I. R. 1924 Bom. 370.**

——Rights of parties—Agreement to refer to arbitration—Agreement cannot affect party's common law right to go to Court.

An agreement to refer a dispute to arbitration does not oust the jurisdiction of the Court. Notwithstanding such an agreement, at Common Law the parties or any of them or at liberty to invoke the assistance of the Court to settle the controversy which has arisen and the Court is bound to entertain the suit. The only remedy at Common Law open to a party to the agreement is to seek damages for the breach of the agreement to refer the matter to arbitration. But this remedy would usually be found to be nugatory for under the circumstances the plaintiff would not be able to prove more than nominal damages. Of course, the parties to such an agreement either before or after action is brought are at liberty to settle the dispute by submitting the subject-matter thereof to arbitration and obtaining an award thereon, But in the absence

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of such an award the Common Law right of the parties or any of them to have recourse to the Court for the purpose of Settling the dispute remains unaffected by an agreement to refer the matter to arbitration. (*Page, J.*) BHAWANIDAS RAMGOBIND *v.* PANNACHAND LACHMIPUT. **52 Cal. 453 : 88 I. C. 929 : A. I. R. 1925 Cal. 801.**

———*Rights of parties—Legality and binding nature of award—Opportunity to prove case to be given to the parties.*

Before a party can be held bound by an award it must be shown that it was a valid award and that all the requirements of the law with respect to the appointment of an arbitrator and with regard to the actual reference to arbitration had been duly fulfilled. The proceedings of the arbitrators must also be above board, and it must be shown that the arbitrator had given full opportunities to both parties to appear and represent their case to him. (*Broadway and Moti Sagar, JJ.*) FIRM OF MANSA RAM GORDHAN DAS *v.* FIRM OF MANGAL SAIN DUNI CHAND. **65 I. C. 497 : A. I. R. 1922 Lah. 149.**

———*Rights of parties—Appointment of arbitrator* uberrima Fides *all round is necessary—Each party should have every opportunity to consider whether particular person should or should not be appointed.*

Where a person is appointed by two parties to exercise judicial duties there should be *ubberrima Fides* on the part of all the parties concerned in relation to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitrament of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. (*Rupchand Bilaram, A. J. C.*) FIRM MOTHARAM DOWLATRAM *v.* FIRM MAYADAS DOWLATRAM. **78 I. C. 521 : A. I. R. 1925 Sind 150.**

———*Rights of parties—Remedy of aggrieved party —If can file suit.*

A person aggrieved by an award has got an option of remedies. He may when the other party seeks to enforce his award raise objections to the filing of the same or pursue his common law remedy under S. 9, C. P. Code, by filing a suit to have a declaration that the proceedings are invalid for valid grounds, *e.g.*, fraud. (*Raymond, A. J. C.*) TAYABALLI ABDUL HUSSAIN *v.* JAMES FINLAY & CO. **80 I. C. 969 : 17 S. L. R. 15 : A. I. R. 1924 Sind 105 (2).**

Signing by Pleader.

———*Signing by pleader—Not signed by party but by son and pleader and ratified by party, is valid.*

The arbitration award in a case, in which the reference was not signed by the party himself but by his son and his pleader. and the party subsequently appeared in the proceedings, is valid and binding, the party having by his appearance ratified the act of his son and his pleader. (*Walsh and Kanhaiya Lal, JJ.*) PARBHU LAL *v.* FIRM SHEO DIAL MAL RAM SARAN DAS. **L. R. 4 A. 472 : A. I. R. 1924 All. 457.**

———*Signing by pleader—Power to refer disputes.*

Unless the *vakalatnama* executed in favour of a pleader specially empowers him to refer the matter in the suit to arbitration, he cannot bind his client by such a course. In such cases, the Court has to see whether such a power is to be found within the four corners of the instrument either in express terms or by necessary implication. (*Kinkhede, A. J. C.*) HUSSAINBHAI BHORA *v.* BANSILAL. **79 I. C. 48 (Nag.) : A. I. R. 1924 Nag. 338.**

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Validity.

———*Validity—Award is valid until set aside.*

As between the parties and their privies an award is entitled to that respect which is due to the decision of a Court of last resort. The award is in fact a final adjudication by the Court of the party's own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award which is, on the face of it regular is binding. If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. (*Mukerjee and Chotzner, JJ.*) BAIDYANATH CHOTTOPADYA *v.* PANCHANENI DASSEE.

28 C. W. N. 140 : 72 I. C. 128 : 37 C. L. J. 542 : A. I. R. 1924 Cal. 72.

———*Validity—Award—Grounds not exclusively within the jurisdiction of arbitrators—Award is void.*

Where an award, by arbitrators are based on grounds, some which did not justify the exercise of their jurisdiction, and the Court cannot hold with certainty that the arbitrators were exclusively within their jurisdiction, the award is null and void. (*Mookerjee, C. J. and Fletcher, J.*) HURMUKHROY *v.* JAPAN COTTON CO. **34 C. L. J. 253 : 66 I. C. 342 : A. I. R. 1922 Cal. 399.**

———*Validity—Award—Award not specifying definite amount but only indicating manner of calculation is not final—Court allowing execution of such award acts without jurisdiction.*

An award not specifying a definite sum as payable by one party to other but merely indicating the manner by which the accounts should be taken by the parties is not final and is not capable of immediate execution. If on the basis of such an award, one party files an application for execution of the award against the other for a definite sum arrived at by his own calculations, and the Court proceeds to execute the decree, such order of the Court directing immediate execution is without jurisdiction and may be treated as nullity. 22 Cal. 434 Foll. 6 All. 269 : 8 Cal. 51 Dist. In such a case an order in the nature of preliminary decree would be proper. (*Robinson, C. J. Young and Brown, JJ.*) K. K. N. K. CHOKALINGAM CHETTY *v.* S. P. S. T. R. M. RAMAN CHETTY. **2 Rang 587 : 84 I. C. 824 : A. I. R 1925 Rang. 155 (F. B.).**

———*Validity—Award—Cancellation.*

On the very day on which an award was filed in the Sind Judicial Commissioner's Court, the non-applicants filed a suit at Lahore and got an *ex parte* decree cancelling the contract and holding that the reference to arbitration was invalid and restraining the applicant and the arbitrator from filing the award. On objection by the non-applicant on the basis of the Lahore decree. *Held*, that the Lahore decree operated as *res judicata* and was sufficient to justify the taking off the file of the award filed at Karachi. (*Kennedy, A. J. C.*) MOHAN SHAH *v.* MESSRS. DIWAN CHAND & CO. **81 I. C. 1024 : A. I. R. 1924 Sind 60.**

———*Validity—Award—Decision of a question of construction referred to can be set aside only if procedure is illegal, such as admitting inadmissible evidence but not on the ground of Court coming to a different conclusion.*

Where a question of construction is referred to arbitration, the decision of the arbitrator on that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion but where it appears that the arbitrator has proceeded illegally, for instance, that he has decided on evidence

which in law was not admissible then there is error in law which may be proved. (*Raymond and Rupchand Bilaram, A. C. Js.*) DUTTON MASSEY AND CO. *v.* JAMNADAS HARPRASAD. **76 I. C. 84 : A. I. R. 1924 Sind 51.**

Miscellaneous.

———*English Law—Action on award—No objection on ground of irregularity can be raised.*

The Indian law as to arbitration is irrelevant where the parties agreed in referring to an arbitration to be bound by English law and procedure and under that law an objection to the award on the ground of irregularity cannot be pleaded in answer to an action on the award. Such an objection must be taken by a motion to set aside or remit the award. An action upon the judgment recovered on an award of an arbitration cannot be maintained if the judgment had been entered in default of appearance and the action had not been tried upon its merits. (*Viscount Cave.*) OPPENHEIM AND CO. *v.* MAHOMED HANEEF.
43 M. L. J. 422 : 45 Mad. 496 : 26 C. W. N. 642 : 16 L. W. 33 : 30 M. L. T. 291 : 4 U. P. L. R. (P. C.) 36 : (1922) M. W. N. 396 : 24 Bom. L. R. 1245 : 74 I. C. 616 : L. R. 3 P. C. 185 : 49 I. A. 174 : 36 C. L. J. 444 : A. I. R. 1922 P. C. 120 (P. C.).

———*—Parties asking Court to decide by local inspection—No intention to be bound by decree—Decision is not award—Appeal lies.*

The plaintiff claimed that the plaint wall and land were his private property. He complained that the defendant interfered with his right of possession in certain ways. At the trial of the suit the counsel for the parties stated that they were not prepared to adduce any oral evidence. They suggested that the judge should inspect the locality and should decide the case on the basis of what he might see on the spot and on an examination of such documentary evidence as might be adduced by the parties up to 3 p. m. of the day on which the statement was recorded.

Held, that no intention on the part of the parties to bind themselves, by the decision that might be given by the Court could be gathered from the language used in the case; and as all that the parties did was to make a statement that they were not going to adduce oral evidence and that they requested the Court to exercise its inherent power of inspection of the locality, the Court was not constituted an arbitrator and its judgment was not an award and was open to appeal. (*Mukerji, J.*) RAGHUBIR SARAN DAS *v.* RAM DAS. **L. R. 6 A. (Civ.) 122 : 85 I. C. 608 : A. I. R. 1925 All. 348.**

———*Omission without consent of parties, to decide anything material, undertaken to be decided vitiates award—Parties' consent to omission need not be express—Consent is unnecessary for omission to do anything which was practically impossible for the arbitrators to do.*

If an arbitrator chooses to undertake the decision of a variety of matters with the consent of parties, and he deliberately, or by an oversight without the consent of the parties omits from his decision anything really material, it is sufficient to destroy the award. But if in the course of events which have happened since an arbitrator took upon him his office, it has become impossible, or no longer desirable either in the view of the arbitrator, or in the view of the parties themselves to decide anyone or another of the points originally submitted, and the parties themselves realise that the arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect. The consent for such a purpose may take various forms : an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which makes a decision impossible, or a diplomatic silence with regard to a mutual understanding. Even in absence of parties' consent, the award is not invalidated by arbitrator's omission to do a thing which was impossible for him to do. Where it was the duty of the arbitrators to divide certain villages between the parties but where it was practically impossible to go over the ground and to make the necessary partition by metes and bounds,

Held, that the omission to make the partition did not invalidate the award though the parties had not consented to the omission. (*Walsh, A. C. J. and Ryves, J.*) KHUB LAL *v.* BISHAMBHAR SAHAI. **22 A. L. J. 919 : L. R. 5 A. (Civ.) 649 : 82 I. C. 219 : A. I. R. 1925 All 103.**

———*Award—Setting aside—Arbitrator must not be examined on commission—He may be examined as to procedure adopted by him, the materials before him, etc., but not as to why or how he arrived at a decision—His decision that as a fact the parties had consented to anything is final.*

An arbitrator is not in the position of an ordinary witness. A Judge ought never to issue a commission to an arbitrator. He ought not to submit an arbitrator to a roving commission by way of examination by the parties uncontrolled by the Judge himself. When the arbitrator appears before a Judge, the Judge ought to exercise the severest possible control and circumspection over the examination. The practice of calling arbitrators indiscriminately as though they were witnesses to the issues of fact is not only an unreasonable burden upon the arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends unfortunately to lead the Judge unconsciously into a kind of re-hearing of the arbitration while from an arbitration, appeal does not legally lie. But more than that, a Judge ought to exercise a severe control over the interrogatories or the examination of the arbitrator when summoned. An arbitrator is a judicial person in respect of the matter to which he has been appointed. He is entitled to the respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say, any question of fact upon some evidence, or allegation tending to establish or disprove his own misconduct, may no doubt be put to him if he is charged with misconduct. Where an arbitrator finds as a fact that a party did withdraw or did agree to certain things, that is a finding of fact which a Court of law cannot go behind. In short an arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision, should be immediately and ruthlessly excluded as undesirable. (*O' Rourke* v. *Commissioner of Railways*, 15 A.C. 371, Foll.) (*Walsh, A.C.J. and Ryves, J.*) KHUL LAL *v.* BISHAMBAR SAHAI. **22 A. L. J. 919 : L. R. 5 A. (Civ.) 649 : 82 I. C. 219 : A. I. R 1925 All. 103.**

———*Award—Right to trusteeship of a waqf—Enforceability of award.*

Disputes between certain persons as regards the

validity of a certain waqf and the right of management of its properties as Mutawallis were referred to arbitration and the arbitrators made an award to the effect that the parties were entitled to be co Mutawallis and as such also entitled to the management and profits of the waqf property. In a suit by the plaintiff to recover his share of the profit against his co-Mutawallis, *held*, that the award was valid and binding upon the parties and the plaintiff was entitled to a decree. (*Walsh, A. C. J. and Ryves, J.*) MOZZAM ALI *v.* RAZA ALI. **22 A. L. J. 776 : L. R. 5 A. 585 : 81 I. C. 851 : 46 All. 856 : A. I. R. 1924 All. 818 (1).**

———*Legal flaw—Party securing flaw, cannot take advantage of it*

General principles of law must be applied to arbitration matters as to all others. The failure of an arbitrator to sign the award is a legal flaw, but when his refusal to sign was at the instance of one of the parties though he had agreed to the award, that party cannot take advantage of the flaw, (*Walsh and Stuart, JJ.*) RAM SUNDER TEWARI *v.* MT. KULWANTI. **20 A. L. J. 392 : L. R. 3 A. 299 : 66 I. C. 499 : 44 A. 642 : A. I. R. 1922 All. 233 (2).**

———*Award as to division of testator's property is not invalid by reason of the pendency of probate proceedings.*

Disputes as regards the division of a testator's property were referred to arbitration without the intervention of the Court when proceedings for obtaining a probate of the will were pending. The arbitrators made an award giving each of the parties certain portions of the estate and on that award being filed in Court a decree was passed thereon. On a question arising as to the validity of the award. *Held* that the arbitrators did not in any way oust the jurisdiction of the Court in which the probate proceedings were pending and that the award and decree thereon were perfectly valid. There was nothing whatever to prevent the parties going to arbitration with regard to the division of the estate, leaving the Court to decide whether or not probate should be granted of the will. That was a question entirely outside the functions of the arbitrators, while the actual questions regarding the division of properties in dispute between the parties could be properly referred to them. The test would be to consider what would have happened if the parties had waited until probate had been issued to refer to arbitration the question how the properties of the deceased should be divided. It could not possibly be said then that the submission to arbitration would be illegal. The mere fact that it was entered upon before the probate proceedings had come to an end cannot possibly affect the question of its legality. (*Macleod, C. J. and Crump, J.*) SHANKAR RAMCHANDRA *v.* RAMCHANDRA ANNAJI. **25Bom. L. R. 437 : 73 I. C. 415 : A. I. R. 1923 Bom. 365.**

———*Award—Form of—Room should not exist for further litigation.*

The award of the arbitrator is intended to be final both in fact and law, and the Courts will not interfere except on certain well-recognized principles and in certain well-defined-circumstances. An award made in a form in which it is calculated to have an effect, which is the opposite of finality, should be deemed as falling below the standard. The arbitrator ought not to include evidence or refer to or discuss authorities, making his award more like the judgment of judge which is subject to appeal than the award of an arbitrator. (*Sanderson, C.J. and Walmsley, J.*) SREELAL MANGTULULA *v.* J. F. MUNDUN. **52 Cal. 100 : 88 I.C. 49 : A. I. R. 1925 Cal. 599.**

———*Award—Accounts—No evidence let in on one item—Effect.*

In respect of one item of dispute referred to arbitration, no evidence was let in by either party and the arbitrator could not decide there was any liability from one party to the other. *Held* the effect is that the parties cannot thereafter in any subsequent proceedings make any claim with regard to it, as the award is final for all time. (*Newbould and Pearson, JJ.*) HEM CHANDRA KUNDU *v.* JNANENDRA CHANDRA KUNDU. **90 I. C. 624 (c).**

———*Misconduct—Notice to party—No appearance—Award made.*

A reference to arbitration expressly provided that if the parties, did not appear after notice the arbitrator could proceed *ex parte*. He gave notice in time of the date fixed, and one of the parties failed to appear. He gave an *ex parte* award. *Held* the award was valid and could not be objected to. (*Newbould and Pearson, JJ.*) HEM CHANDRA KUNDU *v.* JNANENDRA CHANDRA KUNDU. **90 I. C. 624 (c).**

———*Revocation—Good Cause.*

Whether there was revocation or not of an arbitration is question of fact, and such revocation would not be effective unless it was for just cause. (*Newbould and Pearson, JJ.*) HEM CHANDRA KUNDU *v.* JNANENDRA CHANDRA KUNDU. **90 I. C. 624. (c).**

———*Death of one of referring parties—Effect of.*

The death of one of the parties to an arbitration before the award is made operates as a revocation of the authority of the arbitrator and an award made subsequently is not binding on his legal representatives. But if the hearing is completed by that time and nothing remains except the delivery of the award and the intention of the parties was that their heirs also should be bound, the award would be binding. (*Moti Sagar, J.*) TEGHA *v.* RAM SINGH. **79 I. C. 67 : A. I. R. 1924 Lah. 725.**

———*Cancellation of reference by Original Court—Appellate Court cannot look into reference.*

Where the Court below had cancelled the reference to arbitration on account of the delay in making the award, it is not competent to the appellate Court to look into the award or treat it as if it were the report of a Commissioner. (*Chevis, A. C. J.*) ARUR CHAND *v.* AHMAD. **4 Lah. L.J. 48 : A. I. R. 1922 Lah. 194 (2).**

———*Notice not given—Award is illegal.*

An award given in the absence of one of the parties and without any notice as to the time or the place where the arbitrators would sit to decide the dispute, is illegal. (*Scott-Smith and Abdul Qadir, JJ.*) RAJA RAM PUNAM CHAND *v.* JOGAL KISHORE RAM RICHPAL. **65 I. C. 577 (Lah.)**

———*Guardianship proceeding can't be settled by arbitration.*

A guardianship application is not a suit *inter partes*. It is a proceeding designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment, The selection of the guardian is a matter which is not of private interest between the parties and cannot be settled by a reference to arbitrators. (30 All. 137 Full.) (*Krishnan and Wallace, JJ.*) SAMI CHETTI *v.* ADAIKALAM CHETTY. **46 M. L. J. 179 : 34 M. L. T. 15 : (1924) M. W. N. 222 : 47 M. 459 : 84 I. C. 613 : A. I. R. 1924 Mad. 484.**

———*Parties consenting to abide by Court's finding—Court's decision is final and no appeal lies,*

Where both parties agree in a particular matter to abide by the finding of the Court in respect of it, such finding is final and binding on the parties and no appeal lies against it ; the decision in such cases being in

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the nature of an arbitrator's award. (*Prideaux, A. J. C.*) SAMBA *v.* MT. PAIKI. **21 N. L. R. 84 : 90 I. C. 550 : A. I. R. 1925 Nag. 463.**

——*Award—Nature of—Direction to redeem within time fixed—Extension of time.*

An award between a mortgagor and mortgagee directed the former to get possession on paying a certain sum of money within a fixed time. *Held* it was not more than the embodiment of the agreement of the parties and the order of a third party chosen by them to ascertain its terms and equitable relief may be given by a Court in a suit to enforce its terms, by granting an extension of the time for payment. (*Kotval. A. J. C.*) BISEN SINGH *v* FATEHCHAND. **89 I. C. 829 (Nag.)**

——*Award based on personal knowledge—Validity of—Intention of parties.*

The arbitrators appointed by the parties passed an unanimous award based on their personal knowledge without taking evidence. The parties knew that they had personal knowledge and intentionally abstained from producing any evidence. *Held* the award was perfectly valid. (*Simpson, A. J. C.*) FIRM RAM LAL ASHRAFI LAL *v.* MAHADEO PRASHAD. **89 I, C. 832 : A. I. R. 1925 Oudh 741.**

——*Reference—Interpretation—Scheme of management.*

Where the arbitrators were asked to lay down a scheme of management, by which the parties to the reference should be bound and which should prevent disputes among them, but the arbitrators appointed some other persons including some of themselves as managers of temple property, *Held*, the award was not within the terms of the reference as the terms of the reference clearly did not contemplate that the arbitrators should substitute a managing body in supersession of the parties to the agreement of reference. (*Askworth and Simpson, A. J. Cs.*) SANKATA PRASAD *v.* JAGANNATH. **9 O. L. J. 410 : A. I. R. 1922 Oudh 276.**

——*Payment of money to—If amounts to payment to Court.*

Where a pending suit was referred to arbitrator and moneys were paid to him to be deposited in Court, but he did not do so, payment does not operate as deposit in Court. (*Heald and Lentaigne, JJ.*) U PO SAN *v.* MA NGWE HNIT. **3 Bur. L.J. 6 : 80 I. C. 238 : A. I. R. 1924 Rang. 263.**

——*Reference to—Signature of parties—Not necessary.*

Actual signature of the parties to a reference to arbitration is immaterial provided the agreement is in writing and there is evidence that its terms are assented to by both parties. (*Aston, A. J. C.*) MULCHAND SOBHRAJ *v.* RADHAKISHEN PARUMAL. **90 I. C. 932 (s).**

——*Waiver must be intentional and with knowledge—It must be proved by person alleging it—Acquiescence during progress of an act and that after completion of act are distinct—Appearing before an arbitrator devoid of jurisdiction, without protest, is not waiver of right to question arbitrator's jurisdiction.*

An intentional act done with full knowledge of all the facts alone will amount to waiver. The burden of proving waiver lies on the person alleging it. A distinction must be drawn between the acquiescence which takes place while the act acquiesced in, is progressing and the acquiescence which occurs after the completion of the act. When there is no dispute within the submission clause in a contract, referrable to arbitration, and therefore the appointment of an arbitrator is without jurisdiction, a mere appearance before such an arbitrator does not constitute waiver of the

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right to challenge the jurisdiction of the arbitrator to act, even in the absence of any protest or statement of the appearance being made without prejudice, made at the time of the appearance before the arbitrator. (*Rupchand Bilaram, A. J. C.*) KISHANDAS PURSUMAL *v.* MEGHRAJ KHIALDAS. **81 I. C. 834 : A. I. R. 1925 Sind 144.**

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——*Number of arbitrators may be allowed by parties.*

The Act does not limit the number of arbitrators nor does it prevent the parties to alter the number by common consent. An award made by two original and four additional arbitrators and one umpire, is good, if no objection is raised before the four additional arbitrators entered upon their duties. (*Walsh and Ryves, JJ.*) ABDUS SHAKUR *v.* MOHAMMAD YUSUF. **43 A. 456 : 19 A. L. J. 348 : 62 I. C. 426 : 3 U. P. L. R. (A.) 2.**

——*Award attacked—Duty of umpire not to refuse hearing.*

An umpire has to make his award within a month of his appointment and where he does not extend the time or make his award within such time, his award is worthless. Where questions of fact under the Arbitration Act as to the conduct of arbitrators or the umpire the procedure adopted and the instructions and so forth are raised, the Court should have evidence properly brought before it, as in the trial of a suit which was deliberately withdrawn or abandoned by the parties raising the objection to enable the Appellate Court to consider whether there really has been any grievance in the matters disposed of by it. Such questions of fact are determined upon hearing the evidence. Where a party wishes to show that the umpire had gone contrary to the established principles of justice and refused him hearing the onus is upon him to call evidence, to establish the fact in answer to the application to file the umpire's award. The party who makes an objection must prove that he objected at the time to the umpire's proceedings in making final award without hearing his witnesses. Where such a party had the opportunity of doing so and no reasonable opportunity was refused to him of doing so, his conduct amounts to acquiescence in the procedure adopted and he cannot, in law, be allowed to question the regularity, if there was any. Decision upon merits, that is to say, from the interests on the record, as to controversy arising out of a claim for damages between the parties as a matter entirely between the arbitrators and the umpire. All Courts, even Arbitration Courts, must act according to the principles of natural justice and not deliberately refuse a hearing or take evidence from one side behind the back of the other. *Prima facie* the duties of an umpire are the same as those of the arbitrators. The umpire must hear the evidence of the parties and their witnesses, if application is made to him to do so by either party notwithstanding that the same evidence had already been adduced before the arbitrators. The Umpire is not justified in the face of an objection by either party in taking any part of the evidence from the notes of the arbitrators unless there are specific provisions in the submission permitting him to do so. (*Walsh and Ryves, JJ.*) FIRM SITA RAM NATHU MAL *v.* FIRM SUSHIL CHANDRA DAS. **64 I. C. 706 : 3 U. P. L. R. (A.) 60.**

——*Award*—Ex parte *procedure of arbitrators—Notice should be given—Interest on amount found due.*

Arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not

appear. Where the arbitrators are alleged to have proceeded *ex parte* without giving special notice of their intention to do so and the award is attacked on that ground the true test is, has the complainant who has taken exception to the validity of the award been in fact prejudiced by the omission of the arbitrators to serve, the special notice on him ? If it is established that notwithstanding such warning, he would not have appeared before the arbitrators, he has really no grievance and cannot invite the Court to set aside the award on the ground of the alleged defect in procedure. Arbitrators do not exceed their authority when they allow interest after the date of the award. The arbitrators have authority to make a decree for such damages as might have been assessed by the Court. (*Mookerjee and Rankin, JJ.*) BHOWANIDAS RAMGOVIND *v.* HARSUK DAS BALKISHEN DAS.

27 C. W. N. 933 : A. I. R. 1924 Cal. 524.

———*Applicability.*

The Indian Arbitration Act does not apply to arbitrations in the course of litigation. (*Rankin, J.*) AMAR CHAND CHAMARIA *v.* BANWARI LAL.

49 Cal. 608 : 69 I. C. 808 : A. I. R. 1922 Cal. 404.

———*Scope—Suit to set aside an award.*

A person dissatisfied with an award made without the intervention of a Court of Justice is entitled to bring an action to set it aside on the ground that no contract providing for a reference to arbitration was made or that the contract if made was not enforceable by reason of fraud or misrepresentation. He is not bound to have recourse to the Court dealing with the award under the Arbitration Act. 56 I. C. 541, 47 Cal. 806, 11 U. B. R. 10, 25 B 10 Foll. 56 I. C. dist. *Obiter* : Even if the action rests on misconduct or corruption, suit is maintainable although a person has another remedy open to him under the Arbitration Act. 20 Mad. 89 Dist. 11 U. B. R. 1 Foll. (*Shadi Lal, C. J. and Campbell, J.*) FIRM JAI NARAIN *v.* FIRM NARAYAN DAS. **3 L. 296 : A. I. R. 1922 Lah. 369.**

———*Provisions are not subject to C. P. Code.*

The Arbitration Act is an independent Act and has no connection with rules relating to appeals under C.P. Code. (*Duckworth and Po Han, JJ.*) SAYA PYE U KUNDINNYA. **2 Bur. L. J. 193 : 76 I. C. 525 (2) : 1 R. 661 : A. I. R. 1924 Rang 47.**

———*Costs.*

Under the Arbitration Act all costs incurred in the process of filing the award in the Court must be determined by the Court to which the petition is presented and are outside the province of the arbitrators. (*Raymond, A. J. C.*) JAMES FINLAY & CO. *v.* GURDAYAL PAHLAJRAI. **17 S. L. R. 93 : 76 I. C. 660 : A. I R. 1924 Sind 91.**

———**S. 4**—*Bill of lading giving option to one party only to choose forum—There is no submission within S. 4.*

By a clause in a bill of lading it was provided that all claims arising under the said bill of lading shall be determined at the port of destination of the goods according to British Law, or, at the ship-owners' option, shall be determined in the United Kingdom and to the exclusion of the jurisdiction of any other country :

Held, that unless the ship-owners exercised their option the parties would be able to file proceedings in the Courts of the port of destination. The definition of submission in S. 4 of the Arbitration Act cannot be extended so as to include an agreement such as the one appearing in the bill. A submission to arbitration, according to S. 4, is a submission which provides that *either* party in case of a dispute arising on the contract is at liberty to take the necessary steps to get the

dispute decided by arbitration. 1924 Bom. 381 Dist. (*Macleod, C. J. and Coyajee, J.*) BURJOR *v.* ELLERMAN CITY LINES, LTD. **27 Bom. L. R. 1098 : 89 I. C. 866 : A. I. R. 1925 Bom 449.**

———**Ss. 4 and 19**—*Contract t refer—Suit on contract—Award pending suit is ineffective.*

Where a contract provides for reference to arbitration, and a suit is filed on the basis of the contract, the award made on such arbitration, though commenced before the suit, is ineffective unless the suit is stayed pending arbitration. If the Court refuses to stay or the deft. abstains from asking for it, the decision of the Court alone binds the parties and not the award. (*Mookerjee and Fletcher, JJ.*) RAM PRASAD SURAJMAL *v.* MOHANLAL LACHMINARAYAN. **60 I. C. 895 : 47 Cal. 752.**

———**Ss. 4 and 19**—*Reference to—Suit institution of, effect—Bengal Chamber of Commerce.*

After a reference is made to the Bengal Chamber of Commerce, the private tribunal comes into existence, and therefore the effect of the institution of the suit subsequently is that from that very moment the arbitrators become incapable of acting within Rule 8 of the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce. If the suit is stayed the Chamber can substitute and appoint new arbitrators. But the institution of the suit cannot retrospectively affect the validity of the reference when it was made or the portion of the arbitration proceedings before the suit. (*Mookerjee and Fletcher, JJ.*) JOKIRAM KAYA *v.* GHANESHAMDAS. **47 Cal. 849 : 61 I. C. 380 : 25 C. W. N. 62.**

———**S. 4**—*Agreement—Option of one of the parties—Validity.*

A written agreement to refer disputes to arbitration subject to a condition *i, e.* the exercise of the option given to one of the parties, is quite valid under S. 4. (*Aston, A. J. C.*) MULCHAND SOBHRAJ *v.* RADAKISHEN PERUMAL. **90 I. C. 932.**

———**Ss. 4 and 9**—*Appointment of arbitrator—Acceptance—Formal reference—Misconduct—Reading documents in the absence of parties—Duty of.*

Where in pursuance of an agreement, both parties appoint an arbitrator each, it is not necessary that there should be a reference in writing or that they should accept the appointment formally in writing. The fact that arbitrators peruse the relevant papers in the absence of parties does not amount to misconduct. They are judges of law and fact and an erroneous decision on a point of law will not justify interference. (*Raymond, A. J. C.*) JAMES FINLAY & CO *v.* GURDAYAL PAHLAJRAI. **17 S. L. R. 93 : 76 I C. 660 : A. I R. 1924 Sind. 91.**

———**S. 4 (b)**—*Submission—Inference from documents—Clause fixing time for appointment of arbitrator—Waiver.*

A submission is a written agreement signed by both parties to submit differences to arbitration and this agreement may be collected from a series of document even though connected by parol evidence. Where on the indent from it was shown that disputes arising between the vendor and the vendee would be referred to arbitrators one appointed by each party. *Held*, the submission was binding on them. Where the purchaser refused to make the appointment of an arbitrator, denying there was a submission whereupon the sole arbitrator appointed by the seller passed an award before the period of 20 days had elapsed *Held*, that the failure to give requisite number of days for the appointment was fatal to the award of the sole arbitrator who had no jurisdiction to pass it. The refusal and failure to appoint an arbitrator did not amount to

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the waiver of his right by the purchase as the period of 20 days had not elapsed and the awards made by the sole arbitrator was bad in law. When a Court is asked to file an award, it has to see whether it is enforceable in the same way as a decree would be enforceable if it were a decree. (*Piggott and Walsh, JJ.*) SUKHAMAL BANSIDHAR *v.* BABU LAL KHEDIA & CO. **42 A. 525 : 2 U. P. L. R. (A.) 243 : 59 I. C. 75 : 18 A. L. J. 652.**

——S. 4 (b)—*Submission to Arbitration—What amounts to.*

Where an association, at the instance of and on a claim by one member against another member, lays the matter before arbitrators and the latter member in his own hand and over his signature sent an answer to the claim, the document constituted a written agreement to submit their difference to arbitrators within S. 4 (*b*) of the Arbitration Act. (*Piggott and Walsh, JJ.*) NEINSUKH DAS *v.* GAJANAND. **43 A. 348 : 61 I. C. 269 : 19 A. L. J. 132.**

—— —— Ss. 7 and 11 to 15—*Scope—Arbitrator when becomes* functus officio—*Indian and English Law.*

There is no express provision in the English law as to what is to happen to an award, when it is made, with the single exception of the section which enables the party to enforce it as though it were a judgment. The reason for that is, that the machinery is so familiar and habitual that no provision on the subject is necessary. Either party, on receiving notice from the arbitrator that the award has been made, can take it up from him. Once the arbitrator has parted with it, he is *functus officio* and he cannot exercise the power given to him by S. 7 of Act IX of 1899 ; nonetheless the Court is able to remit to him if satisfied that an honest mistake has been made. There are express provisions to be found in S. 11 of the Act as to what is to be done by an arbitrator, if he has made his award. When the question, when an arbitrator in India becomes *functus officio* comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down in S. 11 for getting the award into Court. It is difficult to hold that an arbitrator is *functus officio* while there are still express statutory duties laid upon him by the Act. The procedure laid down by the Act seems to be that the various stages to be found in Ss.11 to 15 are to be followed in the same chronological order as the numerical order of the sections and that an application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. (*Walsh and Ryves, JJ.*) FIRM OF RAM KISHAN DASS BRIJ MOHAN *v.* FIRM OF SUSHIL CHANDRA DASS **A. I. R. 1923 All. 31.**

——S. 8—*Nomination without prejudice is not a valid nomination—In presence of willing nominated arbitrators appointment of a new arbitrator is a nullity —Refusal of the arbitrators brings S. 8 into play—Is only when the party so intends that refusal of arbitrator to act entitles parties to appoint another arbitrator —Communication in clear and unequivocal language of appointment by one party to the other or by a third to the parties as intended by them* ipso facto *confers power on the arbitrators.*

A nomination "without prejudice" is an evasion of the right or duty of a party to name an arbitrator as it is not a communication in clear and unequivocal terms. Where arbitrators who are willing to act are nominated any subsequent nomination of a new arbitrator is a nullity and does not affect the competency of the arbitrators who are previously appointed. Nomination or appointment of an arbitrator is complete when a party has communicated it in clear and unequivocal language in writing to the other party or when it is communicated to both the parties by a third person as intended by the parties themselves and by such communication authority to arbitrate is conferred *ipso facto* on the arbitrators. But if a valid nomination has been made and the arbitrator has refused to act the right of the party of a third person is exhausted and S. 8 comes into play. When the parties intend the word 'appoint' to mean 'appointment' of a willing arbitrator or when the parties make an appointment subject to acceptance, the party has the right to appoint another arbitrator if the arbitrator previously appointed refuses to act. In no other case can such a new arbitrator be appointed. (*Aston, A. J. C.*) MESSRS A. RAMJIBHAI *v.* MESSRS. YUSIFALI MAHOMEDALLI ANTRIA AND BROS. **76 I. C, 261 : A I. R. 1925 Sind 512.**

——S. 8—*Does not apply to independent appointment of second arbitrator.*

Where the proposal to refer disputes to arbitration and the nomination of first arbitrator were abandoned owing to the assurance of one party to come to an amicable settlement and as the latter proved futile, there was fresh nomination of an arbitrator.

Held, that the nomination was not in the place of first arbitrator but an independent one and S. 8 did not apply. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF KHALSA BROS. *v.* HARIRAM SRIRAM & CO. **17 S. L. R. 164 : A. I. R. 1924 Sind. 29.**

—— ——Ss. 8 (2) and 4—*Compromise—Reference to arbitration—Order under S. 1 (2) of the Act—Appeal.*

The definition of submission in S. 4 of the Arbitration Act covers a contract to refer as well as the reference, the reference amounting to delegation of authority to the arbitrator. 35 I C. 536 Ref. *Held*, on the facts of the case that the petition of compromise in a suit for accounts amounted to a submission to arbitration within the meaning of S.4 of the Arbitration Act. (*Broadway and Abdul Quadir, JJ.*) HAJI BAKSH ILAHI *v.* HAJI ABDUL RAHMAN. **71 I. C. 817 (L) : A. I. R. 1924 Lah. 405.**

——S. 9—*Provision in a contract to appoint—Arbitrators—Misconduct.*

S. 9 does not apply where the parties by their contract provide that a different course should be adopted if one of the parties fails to nominate an arbitrator as provided in the contract, and if in such a case the arbitrators appointed by one party refuse to give adjournment to move the High Court to have their appointment set aside their refusal does not amount to misconduct. (*Wallis, C. J and Ramesam, J.*) SHAW WALLACE AND CO., *v.* K. M. SUBBIER AND SONS. **40 M. L. J. 166 : (1921) M. W. N. 148 : 29 M. L. T. 245 : 62 I. C. 205 (2) : 14 L. W. 42 : 44 Mad. 406.**

—— ——S. 9 (a) and (b)—*Reference to two arbitrators one by each party—Arbitrators refusing to act, each party has right to appoint another in place of its retiring arbitrator—On refusal by one party other party can appoint sole arbitrator.*

S. 9 provides for supplying vacancy in case where the submission provides that reference shall be to two arbitrators, one to be appointed by each party. Under S. 9 (*a*), where both arbitrators refuse to act, each party has a right to appoint an arbitrator in the place of the arbitrator appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his arbitrator, the provisions of sub-section (*b*) would come into force and the party so appointing would be entitled, after giving notice to the other party, to appoint his own arbitrator

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as sole arbitrator (*Taraporewala, J.*) VALLABHDAS MEGHJI *v.* COWASJI & CO. **27 Bom. L. R. 568 : 88 I. C. 90 : A. I. R. 1925 Bom. 469.**

——— **S. 9 (b)**—*One party not appointing arbitrator —Decision by the other arbitrator alone is illegal.*

Where the agreement between the parties contained a term that on the default of either party to appoint an arbitrator in time, the chairman of the Trade Association was to appoint one on behalf of the defaulter, *held* that S. 9 (*b*) would not apply and an award made by one arbitrator alone, who was appointed by one of the parties, was without jurisdiction. (*Viscount Cave.*) SASSOON AND CO. *v.* RAMDUTT RAMKISSEN DAS. **44 M. L. J. 758 : 49 I. A. 366 : 70 I. C. 777 : 18 L.W. 537 : 50 C. 1 : 32 M.L.T. 19 : 37 C. L. J. 336 : 27 C. W. N. 660 : (1923) M. W. N. 372 : A. I. R. 1922 P. C. 374 (P. C.).**

——— **S. 9 (b)**—*Private arbitration—Bengal Chamber of Commerce—Authority to arbitrate.*

Plaintiffs were sellers and defendants were buyers of white Java sugar. The contract contained an arbitration clause which provided for arbitration under the rules of the Bengal Chamber of Commerce or at the option of the sellers, by two European sugar importers. The sellers exercised their option but did not appoint the arbitrators or take any further steps. The defendants submitted to the arbitration of the Bengal Chamber of Commerce and there was an *ex parte* award. In a suit by plaintiffs to set aside the award, *held*, that the election having been made and there being a procedure laid down by the Arbitration Act, which could and should have been followed in the absence of a different intention expressed in the submission, it was not open to the defendants to revert to arbitration by the Tribunal of Arbitration of the Bengal Chamber of Commerce. The Bengal Chamber of Commerce had no authority to arbitrate and the award must be set aside. (*Buckland, J.*) SUNDERMULL PORESHRAM *v.* TRIBHUBAN HIRA CHAND & CO. **51 Cal. 657 : 82 I. C. 769: A. I. R. 1924 Cal. 828.**

——— **Ss. 10 and 12**—*Private reference—Commission—Power of Court to issue commission for the examination of witnesses.*

Civil Courts have no power to issue a summons or commission to a witness to give evidence in a private arbitration. Consent of parties cannot confer this power. (*Martin, J.*) *Re.* S S. MARITIME, JAMES MACKINTOSH AND CO. *v.* THE SCINDIA STEAM NAVIGATION CO., LTD. **47 B. 250 : 75 I. C. 221 : 24 Bom. L. R. 853: A. I. R. 1922 Bom. 444.**

——— **S. 10**—*Umpire—Statement of case to the High Court—Not obligatory—Interest after date of award.*

It is in the discretion of an umpire to state a special case for the opinion of the Court and if he refuses to do so and decides the point of law himself, his refusal does not amount to misconduct. An umpire is not entitled to award interest on the damages awarded by him and, if he does so, the award should be returned to him for re-consideration. (*Greaves, J.*) SEWDUTRAI NARSARIA *v.* TATA SONS, LTD. **27 C. W. N. 494 : 77 I. C. 769.**

——— **S. 10**—*Disagreement between arbitrators—Umpire, duties of.*

Where an umpire is appointed owing to disagreement between arbitrators, he must re-hear the evidence if he is applied to, to that effect and, if he fails to do so, he would be guilty of misconduct, but if no application is made to that effect, he can proceed with the case and decide it on the evidence already produced. (*Raymond, A. J. C.*). MILLER *v.* FIRM OF

ARBITRATION ACT (IX OF 1899), S. 11.

DHANA SINGH RAMLAL. **63 I.C. 141 : 15 S.L.R. 68.**

——— **S. 10 (b)**—*Opinion of Court is not binding on the arbitrators nor can it operate as* res judicata.

In India arbitrators have the discretion to state a special case for the opinion of the Court, and Courts cannot compel them to do so. But if an opinion is sought by the arbitrators, that opinion of the Court does not in any case under all circumstances bind them. They still remain final judges of law and facts and they are not legally bound to follow it. However, they may not lightly flout the opinion so obtained because they would in that case run the risk of having their award set aside on the ground of dishonesty or immorality but there may exist special circumstance which may not make their conduct dishonest or immoral even if they do not act upon it. The order of the Court on application under S. 10 (*b*) is an opinion given by the Court in what is merely the consultative jurisdiction of the Court and it is not a judgment and cannot operate as *res judicata*. Further, one of the arbitrators who had not joined in seeking the opinion of the Court is certainly not bound by it. (*Lobo, A. J. C.*) ADAMJI LUKMANJI AND LOUIS DREYFUS AND CO., *In re.* **79 I. C. 986 : A. I. R. 1925 Sind 83.**

——— **Ss. 11 and 15**—*Enforceability of award—Notice of filing is not necessary*—Ex parte *procedure without notice is bad.*

An award becomes enforceable as soon as it is filed in Court and it is not necessary before it is enforced to show that notice of filing was given to the parties by the arbitrator. Where an arbitrator proceeds *ex parte*, he should give notice to the parties before he so proceeds; otherwise his award is liable to be set aside. (*Mookerjee and Fletcher, JJ.*) UDAICHAND PANNA LAL *v.* DEVIBUX JEWANRAM. **47 Cal. 951 : 60 I.C. 987.**

——— **S. 11**—*Award not signed by one arbitrator.*

Where a third arbitrator resigned because there was a majority against his view and did not sign the award, *held*, that it did not affect the validity of the award. (*Broadway, J.*) MANSA RAM *v.* KARTA RAM. **76 I. C. 1007 : A. I. R. 1923 Lah. 411.**

——— **S. 11**—*Fees of arbitrators—Taking fees before entering upon their duties—Effect of.*

Where the arbitrators take a reasonable fee for their services before entering upon their duties with a view to avoid the necessity of suing the parties in Court, their conduct in so doing, does not amount to misconduct and does vitiate the award. There is nothing in S. 11 of the Arbitration Act which precludes the arbitrators from either fixing the fee or receiving the fee beforehand. All that the section requires is that in case the award is given the arbitrators shall state in the award what amount is payable to them for their fee. (*Kumaraswami Sastri, J.*) *In the matter of* THE ARBITRATION ACT. **17 L. W. 648 : 75 I. C. 850 : A. I. R. 1924 Mad. 274.**

——— **S. 11** — *Award — Writing and signature of arbitrators—Essential.*

An award under S. 11 must be in writing and signed. Before reducing their award to writing the arbitrators must no doubt arrive at their decision; but, having done so, they are bound to make an award in writing and signing of the award is not a mere formality. (*Robinson, C. J. and May Oung, J.*) LALJEE JAISING *v.* S. P. TAWARI. **3 Bur. L. J. 102: 82 I. C. 802 : A. I. R. 1924 Rang. 319.**

——— **S. 11**—*Jurisdiction—Award—Application to file—Sale of goods.*

Where a Cawnpore firm sold to a Karachi firm some bags of linseed on "Karachi Pass Terms" under which the goods were to be delivered at Cawnpore Ry.

ARBITRATION ACT (IX OF 1899), S. 11.

Station and a receipt obtained in the name of the buyers and the goods were subject to inspection at Karachi and to rejection on certain terms, if not according to the contract. The sellers having failed to make any delivery, the buyers sought an arbitration and applied to file the award in the Karachi Court. *Held*, that the Karachi Court had jurisdiction to entertain the application. 5 S. L. R. 97 doubted. (*Kemp, A.J.C.*) C. H. PENNY *v.* ATRAUSS & CO. **15 S. L. R. 74 : 64 I. C. 674 : A. I. R. 1922 Sind 32.**

——Ss. 11 and 15—*Award—Suit pending in Court—Private reference—Validity of award.*

Per *Kennedy, J. C. and Madgavkar, A. J. C.*—While a suit is pending disposal the parties are competent to refer the matter without leave of Court to arbitration. But the Court cannot file the award as an award or pass a decree thereon under the C. P. Code or Arbitration Act, but can only treat it as an adjustment under O. 23, R. 3. In such a case the Arbitration Act does not apply and the reference is not illegal or invalid.

Per *Aston, A. J. C.*—The Court has power to file the award and pass a decree under para. 21, Schedule II, C. P. Code, or file it under Ss. 11 and 15, Arbitration Act, as a decree of Court or record it as an adjustment under O. 23, R. 3 and pass a decree in accordance therewith if the award recorded is an adjustment in the strict sense. (*Kennedy, J. C., Madgavkar and Aston, A. J. Cs.*) HAJI UMAR *v.* SHIVALDAS. **81 I. C. 653 : 16 S. L. R. 174 (F.B.).**

——S. 12—*Time for filing award cannot be extended by arbitrators themselves.*

An award is bad if arbitrators extend, having no power to do so, the time for passing of the award, when once the time for the award has expired, because under S. 12 of the Arbitration Act, the Court alone has got the power for extending the time even though the award has been completed. (*Schwabe, C.J. and Wallace, J.*) LOUIS DREYFUS CO. *v.* RAJAGOPAL AIYAR. **16 L. W. 657 : 70 I. C. 353 : A. I. R. 1923 Mad. 222.**

——S. 12—*Court must consider all circumstances of the case.*

All the circumstances of the case must be taken into consideration by the Court when deciding under S. 12 of the Arbitration Act if the arbitrator should be granted the indulgence of having the time extended for making an award. (*Rupchand Bilarom, A. J. C.*) FIRM MOTHARAM DOWLATRAM *v.* FIRM MAYADAS DOWLATRAM. **78 I. C. 521: A. I. R. 1925 Sind 150.**

——S. 13—*Remission of award—Error of law is no ground for.*

It is necessary that Courts should be very cautious in interfering with awards and the grounds on which the Court will remit the matter for reconsideration are :—(1) that the award is bad on the face of it, (2) that there has been misconduct on the part of the arbitrator, (3) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted to him, (4) where additional evidence has been discovered after the making of the award. Mere errors in law unless distinctly appearing on the face of the award or from any document accompanying or forming part of the award are not sufficient ground for remitting an award. (1893) 1 Q.B. 405 ; (1898) 78 L. T. 406 ; (1905) 2 K. B. 184 ; (1912) A. C. 673 Rel. (*Sanderson, C. J. and Richardson, J.*) U. M. CHOWDHURY & CO. *v.* JIBAN KRISHNA GHOSE. **49 Cal. 646 : 69 I. C. 995 : A. I. R. 1922 Cal. 447.**

——S. 13—*Remitting an award of grounds.*

Ordinarily an appellate Court will not interfere with the discretion of the first Court in declining to remit an award, but the discretion being a judicial one, the appellate Court will interfere where no grounds have been shown why the award should not be remitted to the arbitrators. In the absence of anything to show that the umpire was either prejudiced or was otherwise unfitted to hear and determine the case, the Court ought to remit the award to the arbitrators. (*Schwabe, C. J. and Wallace, J.*) MESSRS. LOUIS DREYFUS AND CO. *v.* R. K. RAJAGOPALA AIYAR AND BROS. **16 L. W. 657 : 70 I. C. 353 : A. I. R. 1923 Mad. 222.**

——S. 13—*Power is confined to grounds in S. 14.*

A Court's power of remitting an award under S. 13 of the Arbitration Act is limited to the grounds specified in S. 14 of the Act. Where the Court laid down the law in remitting an award though no case was stated for its opinion and had given a decision on the point which was within the competence of the arbitrators :

Held, such an order was revisable under S. 115, C.P. Code. (*Raymond and Rupchand Bilaram, A.C. Js.*) DUTTON MASSEY AND CO. *v.* JAMNADAS HARPRASAD. **76 I. C. 84 : A.I.R. 1924 Sind 51.**

——Ss. 13 (1) and 14—*Award, when remitted and when set aside—Misconduct.*

Irregularities in procedure which amount to no proper hearing of the matters in dispute, may amount to misconduct enough to vitiate the award. The Court may remit an award when the arbitrator has been guilty of misconduct in a technical sense, *i.e.*, of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him. When the misconduct is one justifying the removal of the arbitrator, the Court will not remit the award but will set it aside. (*Mookerjee and Fletcher, JJ.*) HARI SINGH *v.* KANKINARAH CO., LTD. **66 I.C. 389 : 34 C.L.J. 39.**

——S. 13 (1)—*Remand order for making fresh award not appealable.*

Order by a Court to arbitrators to make an award anew is equal to refusal to file an award and is not appealable either under the C. P. Code or the Arbitration Act. (*Duckworth and Ho Han, JJ.*) SAYA PYE *v.* U KUNDINNYA. **2 Bur. L. J. 193 : 76 I. C. 525 (2) : 1 R. 661 : A I. R 1924 Rang. 47.**

——S. 14—*Suit to set aside award when lies.*

Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought no doubt to be taken by motion to set aside the award; but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. (*Viscount Cave.*) SASSOON AND CO. *v.* RAMDUTT RAMKISSEN DAS. **44 M. L. J. 758 : 49 I. A. 366 : 18 L. W. 537 : 50 C. 1 : 32 M. L. T. 19 : 37 C. L. J. 336 : (1923) M. W. N. 372 : 27 C. W. N. 660 : 70 I. C. 777 : A. I. R. 1922 P. C. 374 (P. C)**

——S. 14—*Suit to set aside award.*

Where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in a regular suit and not in an application under S. 14 of the Arbitration Act. (*Mookerjee and Fletcher, JJ.*) MATULAL DALMIA *v.* RAM KISSENDAS. **69 I. C. 568 : 47 Cal. 806.**

——S. 14—*Suit to set aside award does not lie.*

A suit in Civil Court for declaration that the award is not binding on one of the parties, is not maintainable under S. 14 of the Arbitration Act. (*Le Rossignol and Campbell, JJ.*) HIRANAND MURLIDHAR *v.* FLEMING SHAW AND CO. **4 Lah. L. J. 12 : 68 I. C. 187 : A. I. R. 1922 Lah. 26 (1).**

——S. 14—*Award given during the pendency of suit—No application for stay of suit—Jurisdiction of Court.*

Advocate High Court Jammu & Kashmir Srinagar

ARBITRATION ACT (IX OF 1899), S. 14.

An award made after the commencement of an action in Court can be held invalid only if the action embraces the dispute decided by the arbitrator. But if the award deals with a question which is not a matter in controversy in the action, the award is well and good. Doleman and Sons *v.* Ossett Corporation (1912) 3 K. B. 257 lays down that an arbitrator has no authority to adjudicate upon a matter which has already been made the subject of an action unless the person bringing the action consents to the jurisdiction of the arbitrators. It is only when the dispute before the two tribunals is identical that a decision given by the arbitrators must be treated as *ultra vires*. A Court of law and the arbitrators can go on simultaneously if the disputes before them, though relating to the same contract, are entirely distinct. Doleman's case and the following cases, 47 Cal. 752, 47 Cal. 849, 41 Mad. 115, 56 I. C. 150 are distinguishable on the ground that the action in each case embraced all the disputes between the parties and the award also dealt with the same matter. The mere fact that a suit has been brought in respect of a contract containing a clause for reference to arbitration does not necessarily invalidate the award made in pursuance of that clause after the institution of the suit. There can be no ouster of jurisdiction if the dispute before the arbitrator is different from that before the Court. Where the award deals with matters which are not the subject-matter of the action, it cannot be said that the arbitrators in taking cognizance of those disputes encroached upon the jurisdiction of Court. An award cannot be held to be bad merely because it was made after the commencement of the action challenging the factum and the validity of the contract. The dictum of Moulton, L. J. in Doleman's case that if the Court has passed no order staying the action, the Court has seisin of the dispute and the private tribunal, if it has ever come into existence, is *functus officio* has applicability only in cases like that in which the entire disputes between the parties were brought before the Court and consequently the award could in no case come into operation. (*Shadi Lal, C.J. and Campbell, J.*) FIRM JAI NARAIN *v.* FIRM NARAYAN DAS. **3 Lah. 296 : A. I. R. 1922 Lah 369.**

——S. 14—*Acts of arbitrators in the absence of parties are valid if not judicial.*

Where the act done by arbitrators is not of a judicial nature but merely ministerial in its character, it is competent to one of the arbitrators or all the arbitrators to have those acts performed in the absence of one or more of the parties. (3 Cl. and F. 26, Ref.) Receiving statements and documents before the enquiry commences are acts purely ministerial in their character. (*Kumaraswami Sastri, J.*) *In the Matter of* THE ARBITRATION ACT.

17 L. W. 648 : 75 I. C. 850 : A.I.R. 1924 Mad. 274.

——S. 14—*Misconduct—Acting without notice to parties is.*

Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him. (*Schwabe, C. J. and Wallace, J.*) MESSRS. LOUIS DREYFUS & CO. *v* R.K. RAJAGOPALA AIYAR& BROS. **16 L. W. 657 : 70 I. C. 353 : A. I. R. 1923 Mad. 222.**

——S. 14—*Scope.*

Objections to the award within S. 14 raised and disallowed bar a suit on the very same ground. Matters falling within S. 14 are exclusively within the jurisdiction of the arbitration Court. (*Rupchand Bilaram, A. J. C.*) KHINJI *v.* NATHIBAI. **76 I. C. 953 : A. I. R. 1925 Sind 42.**

ARBITRATION ACT (IX OF 1899), S. 15.

——S. 14—*Party to contract can file suit to set aside award regarding the contract.*

A person dissatisfied with an award, made without the intervention of a Court of justice, is entitled to bring an action to set it aside on the ground that no contract providing for a reference to arbitration was made on that the contract if made was cancelled before the reference in favour of the arbitrator had been executed. 3 Lah. 296; 50 Cal. 1 (P. C.) Ref. and Foll. (*Raymond and Aston, A. J. Cs.*) DEWANCHAND *v.* MOHANSHA. **81 I. C. 782 : A. I. R. 1924 Sind 25.**

——S. 14—*Misconduct—What is—Failure to give reasonable notice to party—Duty of Court.*

The failure on the part of an arbitrator to give a reasonable opportunity to one of the parties to appear before him amounts to misconduct. But whether on account of this, the Court should set aside the award or remit it to the arbitrator, is a matter entirely in the discretion of the Court. Misconduct does not necessarily involve any moral turpitude, dishonesty, partiality or bias on the part of the arbitrator. (*Raymond, A. J. C.*) FIRM OF JAGGI & CO. *v.* FIRM OF GANGA RAM VISHENDAS. **76 I.C. 275 : A.I.R. 1924 Sind 132.**

——S. 14—*Arbitration—Contract for reference—Stay of suit—Discretion.*

In case of an agreement to allow the disputes to be tried by another tribunal, the Court will take into consideration all those grounds as in a case of submission to arbitration. A clause in a bill of lading that all disputes shall be settled by the British Consul at the port of destination is similar to a submission to arbitration. Where the plff.'s residence, place of contract, and inspection of the ship all these happen to be in one place, there are no grounds for staying the suit or refusing to entertain it at that place. (*Couch, A. J. C.*) KURESHI AND SONS *v.* SOOMAR HAJI. **15 S. L. R. 88.**

——S. 15—*Scope of—Execution of award—If bars suit.*

The fact that an award has been enforced by execution under S. 15 is not a bar to a suit to have it declared void and for consequential relief. S. 15 does not enact that award, when filed is to be deemed a decree of Court, but only that it is to be enforceable as if it were a decree. (*Viscount Cave.*) SASSOON AND CO. *v.* RAMDUTT RAMKISSEN DAS. **44 M.L.J. 758 : 18 L. W. 537 : 49 I. A 366 : 50 C. 1 : 32 M. L. T. 19 : 37 C. L. J. 336 : 27 C. W. N. 660 : 70 I. C. 777 : (1923) M. W. N. 372 : A. I. R. 1922 P. C. 374 (P. C.).**

——S. 15—*Provisions of C. P. Code, if apply.*

When the legislature provided under S. 15 of the Arbitration Act that an award on being filed was enforceable as if it were a decree of Court, its intention was that all the provisions of the C. P. Code applicable to the execution of decrees should apply to an award so filed. (*Greaves, J.*) GLADSTONE WYLLIE & CO. *v.* JOOSUB PEER MAHOMED & CO. **27 C.W.N. 666 : 77 I. C. 868 : A. I. R. 1924 Cal. 117.**

——S. 15—*C. P. Code, O. 21, R. 50, applies to awards—C. P. Code, O. 21, R. 50*

The fact that an award is enforceable as a decree would attract to itself the applicability of the provisions regarding the execution of decrees. Where the award has been made against two firms the question as to partners constituting the firms would very rightly fall within the province of the executing Court. 1924 Cal. 117; 6 S. L. R 127; 47 Cal. 29; 43 All. 394 Foll. (*Raymond, A.J.C.*) ADAMJI JAFFERJI AND CO. *v.* SHAMSUDIN IMAMDIN. **A. I. R. 1925 Sind 293.**

ARBITRATION ACT (IX OF 1899), S. 15.

——S. 15—*Award—Filing of—Effect of.*

Though the filing of an award is the act of the arbitrators, the award does not become enforceable as if it were a decree of the Court immediately on presentation to the Court. The Court allows an opportunity to the parties adversely affected by it to move to have it set aside or remitted to the arbitrators, and if, within the period allowed, no application is made to the Court for either of these purposes, the award is enforceable as if it were a decree of the Court. The objections to an award cannot be dissociated from the petition to file the award. (*Raymond, A. J. C.*) *In the Matter of* FIRM OF JAI NARAIN BABU LAL.

16 S.L.R. 79 : 66 I.C. 796 : A. I. R. 1922 Sind 6.

——S. 15—*Execution of award is not execution of order under Dek. Agri. Relief Act, S. 22.*

S. 15 makes an award directly enforceable as a decree of Court, and therefore an application to execute the award is not an application in execution of an order within S. 22 of the Dek. Agri. Relief Act. (*Fawcett, J. C. and Kennedy, A.J.C.*) UDHAV DAS *v.* UKAMAL FATAMAL. **60 I. C. 942 : 14 S. L. R. 217.**

——S. 15 (1)—"*Enforceable as if it were a decree*" *do not mean that an award filed in Court is still not equal to decree.*

The words "enforceable as if it were a decree" in S. 15 (1) do not exclude the right of decree-holder to make an application in execution periodically until 12 years have elapsed. The fact that the award is enforceable as a decree of Court makes all the actions of the successful party in enforcing his rights under the award amenable to the provisions of the C. P. Code, and the Limitation Act which governs the execution of decrees. (*Harrison, J.*) POKHAR DAS *v.* RADHA KISHEN. **6 Lah. L. J. 564 : 75 I. C 927 : A. I. R. 1924 Lah. 544.**

——S. 19—*Agreement to refer to arbitration—Omission to plead in bar of trial—Effect of.*

Where a defendant does not plead at the early stages of a trial a subsisting agreement to refer to arbitration but submits to the jurisdiction of the Court and allows the trial to proceed, he cannot afterwards raise the plea. (*Piggott and Walsh, JJ.*) KHARIDAR KAPARA CO. *v.* RUKMANAND RAMDEO.

20 A. L. J. 975 : L. R. 4 A. 22 · 71 I. C. 144 : A. I. R. 1923 All. 139.

——S. 19—*Waiver.*

Institution of suit after reference to arbitration by one of the parties and omission on the part of the other to apply for stay of suit amounts to waiver of right to arbitration. (*Piggott and Walsh, JJ.*) CHUNNI LAL PASLI MAL *v.* FIRM PHOOLCHAND FATEHCHAND. **44 A. 292 : L. R. 3 A. 96 : 20 A. L. J. 128 : 65 I. C. 795 : A.I.R. 1922 All. 48.**

——S. 19—*Order staying suit is a final one.*

An order staying a suit is a permanent one unless otherwise provided in the order itself and an order staying suit where the subject-matter was referred to arbitration and a decree was passed in terms of the award, is sufficient to finally dispose of the suit. (*Piggott and Walsh, JJ.*) STRAUSS & CO., LTD. *v.* RAGUBAR DAYAL. **43 A. 279 : 19 A. L. J. 19 : 59 I.C. 784 : 2 U. P. L. R. (A.) 387.**

——S. 19—'*Court' meaning of—Finality of order.*

'Court' in S. 19 of the Act is the one in which the proceedings or other attempts to bring a suit, are in fact, instituted Where the parties to a suit, refer their disputes to arbitration, the Court, has under S. 19, power to stay the suit absolutely and such stay is final and sufficient to dispose of the suit. ((*Walsh and Ryves, JJ.*) SITA RAM *v.* SUSHILCHANDRA.

43 All. 553 : 63 I. C. 813 : 19 A. L. J. 495.

ARBITRATION ACT (IX OF 1899), S. 19.

——S. 19—*Marine Insurance Policy.*

A policy of marine insurance provided "all disputes must be referred to in England for settlement and no legal proceedings shall be taken to enforce any claim except in England where the under-writers are alone domiciled and carry on business."

Held, that the clause amounted to a submission to arbitration. (*Macleod, C. J. and Shah, J.*) HAJI ABDULLA *v.* GEORGE REGINALD STAMP.

26 Bom. L. R. 224 : 80 I. C. 523 : A. I. R. 1924 Bom. 381.

——S. 19—"*Step in the proceedings*" *meaning of—Defendant not served and not having entered appearance, applying for copy of plaint and for leave to enter appearance—Acts were held not to be "step in proceedings."*

The plaintiff and the defendant were parties to an agreement to refer to arbitration the matter in dispute in the suit instituted by the plaintiff in spite of the agreement. The defendant not having been served, did not originally enter an appearance as directed in the summons, and the suit was placed in the undefended list. Then the defendant's attorney wrote to the plaintiff's attorney: "An order has this day been made directing our client to make an application for leave to enter an appearance herein. We shall be obliged if you will send us a copy of the plaint and the affidavit of service at once on the usual terms." Then the defendant applied for leave to enter appearance.

Held, that as regards the defendant's having applied for a copy of the plaint, a step in the proceedings meant something in the nature of an application to the Court, and not mere talk-between solicitors or the solicitors' clerks nor the writing of letters, but the taking of some step such as taking out a summons or something of that kind which was in the technical sense a step in the proceedings. Moreover to apply for a copy of the plaint was merely to seek information in order that the defendant might ascertain the nature of the plaintiff's claim. In so doing the defendant did not and was not to be deemed to indicate acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which had arisen. As regards the defendant having applied to enter an appearance, any act in the nature of an application to the Court which indicated that a party was willing that the suit should proceed, would be a step in the proceedings within S. 19 of the Indian Arbitration Act. The intention of the party was to be gathered from the nature of the application which was made, and if having regard to the form of application, the Court was of opinion that a step had been taken it would so hold notwithstanding that the party might in truth and in fact have no such intention, or that the application, was coupled with a protest that the party desired that the matters in dispute should be referred to arbitration. Applying this test the defendant's application for leave to enter an appearance was not a step in proceedings within S. 19 of the Arbitration Act. (*Page, J.*) BHOWANIDAS RAMGOBIND *v.* PANNACHAND LUCKMIPAT.

52 Cal. 453 : A. I. R. 1925 Cal. 801.

——S. 19—"*Taking a step in proceedings*"—*Oral application for time.*

An oral application for time to file a written statement by defendant's counsel in answer to a Court's question is taking a step in the proceedings within the meaning of S. 19. (*Sanderson, C. J. and Richardson, J.*) THE KARNANI INDUSTRIAL BANK, LTD. *v.* SATYA NIRANJAN SHAW. **28 C. W. N. 771 : 81 I. C. 846 : A. I. R. 1924 Cal. 789.**

——S. 19—*Stay of suit pending arbitration—*

ARBITRATION ACT (IX OF 1899), S. 19.

Discretion of Court—Charges of fraud.

Under S. 19 the Court has a discretion in the matter of staying actions pending an arbitration, which the Court is bound to exercise judicially and in accordance with certain well-settled rules. The *prima facie* leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed but the Court may, in its discretion, after considering all the circumstances of the case, refuse a stay on the ground that the matters in dispute between the parties involve the investigation of grave charges of fraud and may hold that in such circumstances arbitration is not the most suitable method of determining the questions raised between the parties. Where on the affidavits a *prima facie* case of fraud is made out, the action will be allowed to proceed, although it is the party alleging fraud that desires a public inquiry. (*Ghose, J.*) MAHARAJAH SIR MANINDRA CHANDRA NANDY *v.* H. V. LOW & CO., LTD. **39 C. L. J. 504 : A. I. R. 1924 Cal. 796.**

——— **S. 19**—*Reference—Suit—Stay of suit, when to be granted—Burden of proof.*

A contract to refer a dispute to arbitration is no bar to a suit in respect of the dispute; but the opponent may apply to the Court to stay the suit in the exercise of its discretion so as to leave the plaintiff no other remedy than to proceed to arbitration and the burden of showing that sufficient reason exists why the matter should not be referred to arbitration is upon the person opposing the application. (*Mookerjee and Fletcher, JJ.*) JOHIRAMKAYA *v.* GHANESHAMDAS. **47 Cal. 849 : 61 I. C. 380 : 25 C. W. N. 62.**

——— **S. 19**—*Stay of proceedings—Discretion—Appeal.*

It is largely in the discretion of the Court, to make an order staying proceedings in a matter and when the discretion has been exercised, the Appellate Court will interfere only when a strong case is made out. Before an order staying proceedings can be made, it must be proved that there is a valid submission, that there is no sufficient reason why the matter should not be referred according to the submission and that the applicant was and is ready to all things necessary to the proper conduct of the arbitration. (*Mookerjee and Fletcher, JJ.*) KEDARNATH BABULAL *v.* SUMPATRAM DOOGUR. **60 I. C. 951 : 47 Cal. 1020.**

——— **S. 19**—*Stay of suit.*

A stay of suit can be made under S. 19 of the Act only if the suit was instituted in respect of a matter agreed to be referred. (*Mookerjee, C. J. and Fletcher, J.*) JNANENDRA KRISHNA *v.* SINCLAIR MURRAY & CO. **66 I. C. 741 : 34 C. L. J. 173.**

——— **S. 19**—*Contract for sale of goods—Short delivery—Award—Subsequent suit—Bar.*

Where there is an arbitration clause in a contract for the sale of goods providing that any claim or dispute of any sort whatever in connection therewith must be referred to arbitration the clause applies to a case of short delivery of goods as much as to a case of non-delivery. (*Scott-Smith and Fords, JJ.*) FIRM OF GHAMANDILAL *v.* FIRM OF CHIRANJI LAL. **4 Lah. 168 : 5 Lah. L. J. 146 : 73 I. C. 459 : A. I. R. 1923 Lah. 453.**

——— **S. 19**—*Stay pending arbitration—Omission to object to long threatened litigation is no ground for refusing stay.*

Where legal proceedings were for a long time threatened against a person in respect of a contract which provided for all settlement of disputes by arbitration, and when instituted that person applied for a stay of suit pending arbitration, he can claim it as a matter of right. His failure to object to the litigation is no ground for refusing stay. (*Schwabe, C. J. and Krishnan, J.*) ANGLO PERSIAN OIL CO. *v.* PANCHAPAKESA IYER. **45 M. L. J. 653 : 18 L. W. 752 : 33 M. L. T. 103 (H. C.) : (1923) M. W. N. 772 : 47 Mad. 164 : A. I. R. 1924 Mad. 336.**

——— **S. 19**—*Suit filed before arbitration began—Award come to during suit—Stay of suit not obtained—Award is not invalid but remains suspended still stay application is disposed of.*

Where before the arbitration proceedings had begun, a suit had been filed in respect of the same matter and the award was come to during the pendency of the suit before any stay order was obtained. *Held*, that the mere fact of the suit being filed does not invalidate the arbitration proceedings, and it is for the Court to decide whether it should try the suit or not. If, however, an order under S. 19 of the Act to stay the suit is refused or if the party applying under that Act has by pleading in the suit waived his right of going into arbitration, the arbitration proceedings are invalidated and the Court alone is seized of the dispute. Therefore until the Court has made up its mind under S. 19, the arbitrators are not *functi officio*. But until that application is disposed of by Court staying the proceedings, the award could not be filed. The award of the arbitrators however is not a nullity and is not bad, but is in suspense. In such cases the correct order is to reject the award and order it to be re-presented after the Court disposes of the application under S. 19 or otherwise ceases to be seized of the case without adjudication on the merits. Per *Aston, A. J. C.*—It cannot be laid down as a principle that a party who has obtained an award after the institution of the suit and has applied for the stay of the suit, and for the filing of the award, has abandoned his rights under the arbitration, or that a Court which has refused to stay a suit has decided that it alone shall be seized of the dispute. (*Kennedy, J.C. and Aston, A. J. C.*) MITSUE BUSSAN KAISHA, LTD., KARACHI *v.* TATARAM BHAGWAN DAS. **17 S. L. R. 228 : A. I. R. 1924 Sind 146.**

——— **S. 19**—*Duty of Court—Stay of suit.*

Where parties have agreed to refer disputes to arbitration there is a *prima facie* duty cast on Courts, when a suit is filed in connection with a dispute, to act on such agreement and to stay the suit and the *onus* is on the plaintiff to show why he should not be bound by the agreement. The Court is vested with a discretion either to stay or not to say the suit, but the discretion must be guided by judicial principles. (*Raymond and Bilaram, A. J. Cs.*) MESSRS. FORBES, FORBES CAMPBELL & CO., LTD. *v.* VERSIMAL DEWANMAL. **75 I. C. 1041 : A. I. R. 1924 Sind 49.**

——— **S. 19**—*Suit not arising out of contract—Application for stay does not lie.*

Per *Kincaid, J. C.*—Where the misrepresentation or fraud alleged was something quite distinct from and previous to the contract. *Held*, that an application for the stay of suit does not lie. Plaintiff alleged that the defendants deliberately forged an interpolation in the acceptance memo after plaintiff had signed it. As that forgery could not have occurred before the completion of the contract but after, it is clearly a dispute which arises out of the contract itself. That a party misread the acceptance memo and believed it to be something different from what it was, would not vitiate the contract. Authority to decide disputes arising out of a contract necessarily confers authority to decide what were the terms of that contract. It would be impossible for any judge or arbitrator to determine whether any particular dispute

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arose out of a contract unless and until he knows what the contract is. (1916) A. C. 314 ; 24 Cal. W. N. 567, Foll. Per *Madgavakar, A. J. C.* :—An application by the defendant for the stay of the suit must, in law, be clearly distinguished from an application for a stay of the arbitration proceedings in which a different set of considerations would arise involving equitable grounds and permitting perhaps a *prima facie* view of the dispute. If the cause of action is definite misrepresentation to avoid the contract set up by the opposite party, such a dispute is not a dispute arising out of the contract within the submission clause in the contract and the Court has no power to stay. (*Kemp, A. J. C.*) SODAWATERWALA *v.* VOLKART BROS.
A. I. R. 1923 Sind 25.

——**S. 19**—*Clause for arbitration in contract—Suit to impeach is not barred.*

Where a contract contains a clause for arbitration in case of disputes and a party thereto brought a suit to impeach the clause. *Held*, that as the object of the suit was to impeach the validity of the clause and not in respect of any matter agreed to be referred to arbitration. S. 19 of the Act does not apply. (*Kemp, A. J. C.*) ATMARAM *v.* GAJANMAL.
61 I. C. 141 : 14 S. L. R. 123.

——**Sch. I, Cl. (3)**—*Delay in giving award when valid.*

Where the arbitrators delivered an award more than three months after the date of a notice calling on them to act but within three months of the day when they began to hear the reference, the award is perfectly valid. (1899) 2 Ch 80 ; L. R. 2 Q. B. 523 Ref. (*Piggott and Walsh, JJ.*) FIRM OF SARDAR MAL HARDAT RAI *v.* SHEO BAKSH RAI SRI NARAIN.
44 All. 432 : 66 I. C. 907 : 20 A. L. J. 272 : L. R. 3 A. 227 : A I. R. 1922 All. 106.

ARBITRATOR—*Acts of involved—If objectionable.*

The fact that an arbitrator appointed has to pass judgment over his own acts does not render him incompetent to act if parties knowing all those facts appointed him to arbitrate. The only desideration is that he must have an open mind, liable to be convinced on argument. (*Aston, A. J. C.*) MULCHAND SOBHRAJ *v.* RADAKISHAN PERUMAL. **90 I. C. 932.**

ARMS ACT (XI OF 1878)—*License for a weapon need not always be with the person.*

Held, that the Arms Act does not require a person who holds the license for a gun or any other weapon to carry it on his person whenever he has the weapon with him. (*Daniels, A. J. C.*) EMPEROR *v.* MAHOMED IBRAHIM. **24 O. C. 265 : 64 I. C. 275 : 22 Cr. L. J. 755.**

——**S. 4**—*Empty case of cartridges—If ammunition.*

An empty cartridge case is included in the definition of ammunition in S. 4 and possession thereof is an offence. 32 A. 152 foll. (*Sulaiman, J.*) EMPEROR *v.* ALADIN. **21 A. L. J. 879 : L. R. 5 A. 22 Cr. : 10 O. & A. L. R. 105 : 46 All. 107 : A. I. R. 1924 All. 215 (1).**

——**S. 4**—*Arms—Sharp knife with bladed edge—Possession of.*

The accused imported certain knives described as hunting knives and kept them with him. The blade tapered gradually to a point, and was attached to a cross-guard and handle. One edge was sharp up to the guard, the other only at the point. The knife could be used for stabbing and thrusting. *Held*, that the instrument fell within the category of "Arms' within S. 4. (*Greaves and Panton, JJ.*) BISHAN SINGH *v.* EMPEROR. **51 Cal. 573 : 81 I. C. 943 : 25 Cr. L. J. 1119 : A. I. R. 1924 Cal. 714.**

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——**S. 4**—*Parts of arms.*

Bolts and bars of rifles are arms within S. 4, (38 P.R. 1889 (Cr.) Ref.) In order to fall within S. 4 the weapon need not be in a serviceable condition. (21 Mad. 360 F.B. Ref.) (*Moti Sagar, J.*) KARM DIN *v.* EMPEROR. **25 Cr. L. J. 539 : 77 I. C. 1003 : A. I. R. 1923 Lah. 617.**

——**S. 4**—*Arms—Definition of*—Dahs.

The true criterion is not whether any given *dah* is an " U-Pyat " but what was the intention of the maker as regards its purpose. 5 L. B. R. 207 Ref. (*Duckworth, J.*) PO-ME *v.* EMPEROR. **68 I. C. 818 : 1 Bur. L. J. 238 : 11 L. B. R. 340 : 23 Cr. L. J. 594 : A. I. R. 1923 Rang. 23 (1).**

——**Ss. 5 and 19**—*Exemption does not apply to manufacturing* Kirpans.

The exemption only applies to *kirpans* actually in existence and possessed or carried by Sikhs and not to the manufacture of *kirpans* by Sikhs. A Sikh is not prevented by any provision in the Arms Act from dealing with a *kirpan* which he possesses in any way he likes. A Sikh, however, is not exempted by the entry in Schedule II from the operation of the prohibition as to manufacture contained in S. 5 of the Act. (*Scott-Smith and Harrison, JJ.*) EMPEROR *v.* BASTA SINGH. **25 Cr. L. J. 242 : 77 I. C. 230 : 3 Lah. 437 : A. I. R. 1923 Lah. 267.**

——**Ss. 14 and 19 (f)**—*Two empty brass* 405 *used cartridge cases found in accused's house in a locked box—Accused was held not liable.*

While the police were searching accused's house for stolen property (which was not present) they discovered in a locked box two empty brass 405 used cartridge cases which were incapable of being re-loaded in India. *Held*, that accused was not guilty. (*Stuart, J.*) AMIR *v.* EMPEROR. **23 A. L. J. 455 : 87 I. C. 927 : L. R. 6 A. 127 Cr. : 47 A. 629 : 26 Cr. L. J. 1039 : A. I. R. 1925 All. 498.**

——**Ss. 19 and 20**—*Arms hidden under the cloths—Offence.*

Where arms and ammunition are found in a bag hidden under a *chaddar* worn by the accused, the offence falls under S. 20 of the Arms Act and not merely S. 19. (*Martineau, J.*) MT. BABO *v.* EMPEROR. **26 Cr. L. J. 1459 (2) : 89 I. C. 1027 (2) :**

——**Ss. 19 and 13**—*License—Carrying a gun in possession is a breach of license.*

The accused who was a cousin of the licensee of a gun borrowed the gun and carried it in a marriage procession when he fired some shots and wounded some people accidently. The licensee was forbidden under the terms of his license from taking the gun to a public assemblage. *Held*, that the accused was guilty of an offence under S. 19 of the Arms Act. When a marriage procession emerged from private premises and goes down the public street, then it is open to the public to join the procession and the marriage procession becomes a public assemblage. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* KALYAN CHAND. **24 Bom. L. R. 487 : 22 Cr. L. J. 450 : 67 I. C. 722 : A I. R. 1923 Bom. 35.**

——**S. 19**—*Recovery not in presence of witnesses cannot be relied on.*

Where the head constable made a false report that a dacoity had been committed and that he had arrested some dacoits ; and after a delay of 3 days, as he said recovered the arms from the petitioner not in the presence of witnesses, who signed the list but who distinctly recorded that the arms were produced before them by the constable.

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Held, the petitioner was not guilty. (*Moti Sagar, J.*) ALIF DIN *v.* EMPEROR. **A. I. R. 1923 Lah. 466.**

——**S. 19**—*Kirpan—Punjab Government Notification of 11th May 1917—Burden of proof.*

Where on the ground that the sword which he carried was a *kirpan*, the accused claimed exemption from prosecution under S. 19, Arms Act, on the Notification of 11th May 1917 which permits Sikhs to carry *kirpan* with impunity. *Held*, the petitioner, the accused, who claims the benefit of an exception to the broad rule of law must establish that he comes within that exception. Though *kirpan* means sword every sword cannot be *kirpan* within the meaning of the word. (*Le Rossignol, J.*) BACCHITTAR SINGH *v.* EMPEROR.

23 Cr. L. J. 78 : 65 I. C. 430 : 8 P. W. R. 1922 (Cr.) : A. I. R. 1922 Lah. 141.

——**S. 19 (e)**—*Intention and possibility of using are essential.*

The offence of going armed with fire-arm is considerably more narrow than the offence of being in possession merely of fire-arms. The expression 'going armed' clearly indicates two things, namely, firstly an intention to use it as a fire-arm and secondly the possibility of using it. (*Srinivasa Iyengar, J.*) SONAIMUTHU AMBALAM *v.* EMPEROR **48 M. L. J. 502 : 21 L. W. 644 : 87 I. C. 916 : (1925) M. W. N. 217 : A. I. R. 1925 Mad. 585 (1).**

——**S. 19 (e)**—*Servant—Use of gun for his own purposes in the absence of master—Offence—Conviction—Confiscation of gun—Legality of order.*

There is nothing in the wording of S. 19 (*e*) to justify the view that any person who has got a license or who is exempted from taking out a license is entitled to allow any servant of his to use the gun for the latter's own purposes. If the servant carries the gun for the purposes of his master or in the presence of his master, that may not be an offence under the Act; but to go further will be going against the terms of the Act. Where the master was misled by the District Magistrate into thinking that he was entitled to allow his gun to be used by his servant, and he and his servant honestly believed that they were doing nothing wrong in allowing the servant to take the gun and to use it for the purpose of shooting game in the forest. *Held*, that the order of confiscation of the gun was wrong though the servant might be rightly convicted of an offence under S. 19 (*e*). (*Krishnan and Waller, JJ.*) VAIRAVAN SERVAI, *In re.*

46 M.L.J. 401 : 47 Mad. 438 : 19 L. W. 507 : 34 M. L. T. 97 : (1924) M.W.N. 375 : 81 I. C. 623 : 25 Cr. L. J. 975 : A.I.R. 1924 Mad. 668.

——**S. 19 (e)**—"*Armed*" *includes carrying an arm not capable of immediate use.*

A person who carries about a gun without any ammunition can be said to go 'armed' To define 'armed' as meaning "one who is equipped with an arm capable of immediate use as an arm" seems contrary to the Vernacular meaning of the word "armed" and is also not safe. (*Kincaid, J. C. and Kennedy, A. J. C.*) EMPEROR *v.* MAHOMED PUNJA. **25 Cr.L.J. 448· 77 I.C. 736: A. I. R. 1925 Sind 177 (2).**

——**Ss. 19 (f) and 20**—*Conviction under S. 19 (f) is bad if no express sanction obtained—No sanction is necessary for prosecution under S. 20.*

The appellant was in secret possession of local made guns and the cartridges. Sanction was obtained for prosecution under S. 20. He was convicted both under S. 20 and S. 19 (*f*).

Held, that conviction under S. 20 was legal but the conviction under S. 19 (*f*) was bad for want of sanction. (*May Oung, J.*) NGA THA HLA *v.* EMPEROR.

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2 Bur. L. J. 203 : 25 Cr. L. J. 203 : 76 I. C. 571 : A. I. R. 1924 Rang. 85.

——**S. 19 (f)**—*Accused's brother holding license—Accused firing blank shots to warn would—be mischief makers—Accused is not guilty.*

When communal riots were taking place in different quarters of the town, the accused, brother of a licence-holder, took out his brother's gun and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house.

Held, that the possession of the gun was on behalf of the brother and the accused was not guilty under S. 19 (*f*). 1925 All. 175. Dist. (*Mukerji, J.*) BABU RAM *v.* EMPEROR **23 A. L. J. 356 : L. R. 6 A. Cr. 121 : 87 I. C. 523 : 47 All. 606 : A. I. R. 1925 All. 396.**

——**Ss. 19 (f) 29**—*Prosecution under S. 19 (6)—Sanction of District Magistrate, necessity of.*

In the district of Bijnor and other parts of these Provinces that lie to the north of the rivers Jumna and Ganges, the sanction of the District Magistrate is not necessary for a prosecution under Section 19 of the Arms Act. (*Daniels, J.*) AMIR AHMAD *v.* EMPEROR. **L.R. 6 All. 196 (Cr.).**

——**S. 19 (f)**—*Son of a licensee (the latter not being entitled to hand over gun to retainer) was convicted for possessing father's gun for shooting birds.*

The accused's father held a license for a gun. The license which had been issued to him did not mention that he was entitled to hand over his gun to a retainer. The accused took out the gun of his father for the purpose of shooting birds. While thus possessing the gun near a pond, he was found out by an officer of the police and the Tahsildar. *Held*, that though the spirit of the law was not contravened yet, the letter was certainly contravened but that a fine of Rs. 25 would answer the purpose. (*Mukerji, J.*) MUHAMMAD HASAN *v.* EMPEROR.

22 A. L. J. 1095 : L. R. 6 A. Cr. 23 : 47 All. 267 : A. I. R. 1925 All. 175.

——**S. 19 (f)**—*Possession of sword—Sikh—Exemption.*

A Sikh possessing or wearing one sword commits no offence under S. 19 by virtue of the exemption under Sch. 11, 3 (*b*) of the Act. 65 I. C. 430, Ref. (*Scott-Smith and Harrison, JJ.*) HARI SINGH *v* EMPEROR. **5 Lah. 308 : 6 Lah. L. J. 265 : A. I. R. 1924 Lah. 600.**

——**S. 19 (f)**—*Joint possession—Benefit of doubt.*

Having regard to the fact that the *Chhavi* was found in a house admittedly in the joint possession of both the accused, it could not be said with any degree of certainty that one of them was in exclusive possession thereof. The accused must be given the benefit of doubt. (*Abdul Raoof, J.*) ALIA *v.* EMPEROR. **A. I. R. 1923 Lah. 513 (1).**

——**S. 19 (f)**—*Possession of arms—Evidence Doubtful—Conviction is illegal.*

Where it was found that the two accused were found lying on a bed in the house of another and in the bedding a *chhavi* was found wrapped in a cloth, *held*, that it was impossible to say which of the two was actually in possession even if it was proved that the owner of the house was not the owner and therefore that the conviction of the accused was illegal. (*Harrison, J.*) NARINJAN SINGH *v.* EMPEROR. **65 I. C. 447 (1) : 23 Cr. L. J. 95 (L.)**

——**Ss. 20 and 19**—*S. 20 applies only where export or import of arms is attempted.*

S. 20 applies only where the possession is such as to

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indicate an intention that such act may not be known to any public servant as defined in the Indian Penal Code, or to any person employed upon a railway or to the servant of any public carrier. The section applies only to cases where the import or export of arms is attempted and not to every case of possession or cancealment of arms. Something more than a mere ordinary concealment should be established in order to bring the possession within the meaning of S. 20. Where the gun was upon a *charpoy* upon which the accused was sitting and was covered with a *dotahi* and the accused had been convicted under S. 20, the conviction was altered into one under S. 19 (*f*) of the Arms Act. 9 P. R. 1912 Cr. 15 L. R. 18 Cr. (F. B.) and 27 Cal. 692 (Foll.). (*Scott-Smith, J.*) CHANNAN *v.* CROWN. **6 Lah. 151 : 86 I.C. 221 : 26 Cr. L.J. 733 : 7 Lah. L. J. 329 : A. I. R. 1925 Lah. 395 (2).**

——**S. 20**—*Criminal intention—Evidence.*

Where the arms were discovered on the information given by the accused, the concealment of the *chhavis* and other arms recovered from the possession of the accused is clearly with the intention referred to in section 20 of the Indian Arms Act. (*Moti Sagar, J.*) ALI AHMAD *v.* EMPEROR. **A. I. R. 1923 Lah. 434.**

——**S. 20**—*Gun placed in a corn bin—S.20 applies.*

Each case of cancealment of arms must be decided on its own facts. *Held*, on the facts proved in the case that the gun appeared to have been placed in the corn bin in order to conceal it from the Police and therefore section 20 was applicable. 8 P. R. 1915 ; Cr. 9 P. R. 1912 Cr. Not Foll. (*Abdul Qadir, J.*) SHER ALI *v.* EMPEROR. **23 Cr. L. J 609 : 68 I. C. 833 : A. I. R. 1923 Lah. 79.**

—— **Ss. 20 and 19**—*Intention to commit.*

Where the weapon which was found to fit the dang the appellant was carrying was originally concealed but the appellant voluntarily took it from its place of concealment in order to threaten a railway servant who caught him for travelling without a ticket. *Held*, it indicates an indifference as to whether the weapon was seen or not. The intention requisite for an offence under S. 20 had not been established and conviction must be altered to S. 19 of the Act. (*Brasher, J.*) SURJAN SINGH *v.* EMPEROR. **A, I. R. 1923 Lah. 10.**

——**S. 20**—*Arms—Instrument of attack and defence, and not used for domestic purposes is 'arms'.*

Whether or not any particular instrument is included in the expression "arms," used in the Arms Act, must necessarily depend on the circumstences of each case. Whatever can be used as an instrument of attack or defence and is not an ordinary implement for domestic purposes, falls within the purview of the Act. (*Wilberforce and Martineau, JJ.*) MANGAL SINGH *v.* EMPEROR. **2 Lah. 291 : 23 Cr. L. J. 63: 12 P. L. R. 1922 : 64 I. C. 847 : A. I. R. 1922 Lah. 138 (2).**

——**S. 20**—*Carrying* chhavi *concealed—Sentence.*

Merely on the ground that the weapon concealed is a *chhavi* the maximum sentence ought not to be inflicted, 8 P. R. 1915, Cr. Dist. (*Chevis, J.*) FAQIRA *v.* EMPEROR. **3 Lah. L. J. 145 : 66 I. C. 995 : 23 Cr. L. J. 339.**

——**S. 20**—*Approver's statement disclosing illegal possession of fire arms—Trial under S. 20 not legal.*

Where an approver makes a statement disclosing his illegal possession of fire arms, and is released of the pardon, it is illegal to try him under S. 20. (*Stuart, J.*) SHIAM SUNDER *v.* EMPEROR. **19 A. L. J. 717 : 22 Cr. L. J. 699 : 63 I. C. 827. L. R. 2 A. (Cr.) 107.**

——**S. 27**— *Possession of by servant — Pistol found in accused's shop.*

Though an unlicensed pistol was found in a shop the master being absent the servant in possession of the pistol alone could be convicted for the offence. The master's conviction could not be upheld. (*Ryves, J.*) CHHOTEY *v.* EMPEROR. **20 A. L. J. 855 : L. R. 3 A. 171 (Cr.) : 9 O & A. L. R. (A.) 27: 23 Or. L. J. 729 : 69 I. C. 457 : A. I. R. 1923 All. 33.**

——**S. 29** — *Sanction for prosecution.* AMIR AHMAD *v.* EMPEROR. **L.R. 6 All. 196 (Cr.).**

——**S. 30**—*Search illegal yet if evidence is conclusive conviction is proper* obiter ; *Two persons must be present at the search—One making the search and the other officer specially appointed.*

Although the search is illegal, a person can be convicted where the evidence against him is conclusive. 35 A. 75 Foll. The ordinary meaning of "in the course of any proceedings instituted" in S. 30, 'is in the course of any legal proceedings which have already begun. *Obiter* : The words "in the presence of some officer specially appointed" mean that there must be at least two persons, namely the person making the search, and the officer specially appointed, within the meaning of S. 30 who is present at the search. (*Walsh and Boys, JJ.*) EMPEROR *v.* KUTROO. **23 A.L.J. 364: 88 I. C. 280 : L. R. 6 A. (Cr.) 124 : 47 All. 575 : A. I. R. 1925 All. 434.**

——**S. 120**—*Army Assistant Surgeon—Pay if attachable.*

An Army Assistant Surgeon is a warrant Officer and his salary is not attachable, whether he was recruited in India or in England. (*Mears, C. J. and Mukerji, JJ.*) BROWNE *v.* MADAN PEARCE MILLINER. **L. R. 6 A. 578: 89 I. C. 882 : 23 A. L. J. 929.**

ARREARS.

See (1) MESNE PROFITS.
(2) LANDLORD AND TENANT.
(3) C. P. CODE, S. 60.
(4) HINDU LAW--MAINTENANCE.

ARREST.

See (1) CIV. PRO. CODE, SS. 55 TO 59 AND 134—136.
(2) CR. P. CODE, S. 54.

ARTICLED CLERK—*See* LEGAL PRACTITIONER.

ARTICLES—*See* COMPANY.

ARTIZAN.

See (1) WORKMEN'S BREACH OF CONTRACT ACT.
(2) C. P. CODE, S. 60.
(3) WORDS AND PHRASES.

ASCETICS.

See (1) HINDU LAW.
(2) SUCCESSION TO RELIGIOUS PERSON.

ASSAM LAND AND REVENUE REGULATION (I of 1886).

——**S. 97**—*Partition of estate—Lands joint with those of other estates—Jurisdiction of Revenue Court —Imperfect partition*—Modus operandi *of partition.*

Plffs. brought a suit for a declaration that the order for the partition of an estate made by the revenue authorities was without jurisdiction and was consequently inoperative in law on the ground that some of the lands of the estate sought to be partitioned were joint with the lands of other estates, and the revenue authorities were not competent under the Assam Land and Revenue Regulation, 1886, to effect a partition of lands included in several estates. *Held*, that S. 97 of the Regulation confers upon every recorded proprietor

ASSAM LAND AND REVENUE REGULATION (I OF 1886), S 154.

of a permanently settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference directly or by implication, to the mode in which the lands of the estate are held. The duty is imposed upon the Revenue Court to effect a partition of an estate on an application by a person competent to claim partition under S. 97. The first step in the performance of that duty is to ascertain the lands which constitute that estate. To carry out this preliminary step, it may conceivably be necessary to have recourse to an auxiliary measure, namely, to effect a partition ofthe joint lands ofthe several estates and thereby to ascertain the lands which belong to the estate under partition. It is a well-known rule of interpretation of statutes that where a statute confers jurisdiction. it impliedly grants also the power to do such acts, adopt such measures and employ such means, as are essentially necessary to its execution. 23 C. 514 and 24 C. 751 Ref. 46 C. 256 Ref. It cannot be maintained that the joint lands should first be divided by a Civil Court, as then the result would follow that the Civil Court would in essence be called upon to constitute an estate for the purpose of partition under S. 97 and consequently to deal with a matter which affects the Government revenue and is excluded from its jurisdiction by S. 154 (1) (*f*) of the Regulation. 32 C. 1036 Dist. (*Mookerjee and Panton, JJ.*) YASIN ALI MIRDHA *v.* RADHAGOBINDA CHOWDHURY. **26 C. W. N 381 : 69 I. C. 814 : A. I. R. 1922 Cal. 118.**

——**S. 154**—*Does not always bar a suit for partition of a revenue paying estate.*

Where the case for the plaintiff was that the specific area which he sought, to divide as between himself and the contesting defendants represented a share of the taluk and what was asserted was not that there was a previous partition of the taluk but that the persons interested in all the lands of the Taluk had by mutual arrangement, held possession of specific lands as corresponding more or less approximately to the shares held by them in the entire property.

Held, that S. 154 did not bar the partition of lands, in these circumstances, by a Civil Court, merely because the lands were comprised in a revenue paying estate. (*Mookerjee and Rankin, JJ.*) RAJENDRA NARAIN CHOWDHURY *v.* SATISH CHANDRA CHOWDHURY. **50 C 948: A. I. R. 1924 Cal. 233.**

ASSAULT—*See* (1) PENAL CODE, SS. 349—358.
(2) TORT.

ASSESSORS — *See* CR. P. CODE, S. 309.

ASSETS.
See (1) INSOLVENCY ACTS.
(2) C. P. CODE, SS. 50, 53—73.

ASSIGNMENT.

——*What is—No form of words—Intention.*

An assignment is a transfer of an estate or interest in property. No particular form of words is necessary to effect a transfer if the intention of transfer is clear from the language used. (*Moti Sagar, J.*) FIRM NANAK CHAND KISHGRI LAL *v.* FIRM SARUP GUJAR MALL **78 I. C. 163 : A. I. R. 1924 Lah. 684.**

——*Lien or charge—Assignment for purposes of collection—Rights of assignor.*

Where a person assigns to another for purposes of collection of certain arrears of rent and other dues, the assignee agreeing to pay over to the assignor half the net proceeds after deducting the costs of collection, the assignment creates in favour of the assignor a lien in the nature of a trust or charge on the moneys received thereunder and the trust can be enforced as against the receiver of the assignee's

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estate in the event of his bankruptcy. The assignor is not in a position of an ordinary, unsecurred creditor in the insolvency (1891) 1 Q. B. 737 ; 38 M. 500, Relied on. (*Phillips and Odgers, JJ.*) RACHAMA DUGU VENKATAPATHI *v.* RAMADOS RAO.
47 M. L. J. 528 : (1924) M. W. N. 701 : 82 I. C. 960 : A. I. R. 1924 Mad. 780.

——*Mistake* bona fide.

In a suit to recover money due on a promissory note, the assignee has all the rights to make good any mistakes in calculation of interest. (*Schwabe, C. J. and Wallace, J.*) SECRETARY OF STATE *v.* RADHIKA PRASAD. **44 M. L J. 685 : 74 I.C. 785 46 M. 259 : 18 L. W. 210 : A. I. R. 1923 Mad. 667.**

ASSOCIATION.
See (1) COMPANY.
(2) COMMUNITY.

ASURA MARRIAGE—*See* HINDU LAW—MARRIAGE.

ATTACHABLE PROPERTY.
See (1) ATTACHMENT.
(2) C. P. CODE, S. 60-64.

ATTACHMENT—*See* C. P. CODE, S. 60, O.21, Rr. 46, 63, O. 38, R. 5.

ATTEMPT—*See* PENAL CODE, S. 511.

ATTESTATION.
See also (1) EVIDENCE ACT, SS. 68 and 115.
(2) HINDU LAW.
(3) ALIENATION.
(4) T. P. ACT, SS. 59 AND 123.

——*Effect of—Knowledge of contents of dead if imported to attestor.*

The signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms. (*Suhrawardy and Panton, JJ.*) AHMED ALI *v.* EMPEROR. **90 I. C. 534 : 42 C. L. J 215.**

ATTESTING WITNESS.—
See (1) ATTESTATION.
(2) EVIDENCE ACT, S. 115.
(3) T. P. ACT, S. 59.

ATTORNEY.—
See (1) LEGAL PRACTITIONER.
(2) POWER OF ATTORNEY.

ATTORNEY'S CLERK—*See* LEGAL PRACTITIONER.

ATTORNMENT.—
See (1) LANDLORD AND TENANT.
(2) LESSOR AND LESSEE.
(3) T. P. ACT, S. 116.

AUCTION-PURCHASER.—
See (1) C.P. CODE, S.65 AND O.21, Rr. 62-66. 90-93
(2) EXECUTION SALE.

AUCTION SALE.

——*Bids.*

Withdrawal of bid before property is knocked down has not the affect of binding the offerer. (*Coutts-Trotter and Ramesam, JJ.*) CHAMPA LAL *v.* JEYGOPAL DAS. **43 M. L. J. 132 : 70 I. C. 977 : (1922) M. W. N. 564 : 16 L. W. 816 : 31 M. L. T. 401 : 45 M. 799 : A. I. R. 1922 Mad. 486.**

AUDITOR—*See* COMPANY.

AUTHORIZED AGENT.—
See (1) PRINCIPAL AND AGENT.
(2) CONTRACT ACT, CH. X.

AUTREFOIS ACQUIT—*See* CR. P. Code S. 403.

AUTREFOIS CONVICT, PLEA OF—*See* CRIM. PRO. CODE, S 403, CRIMINAL TRIAL

AWANS—*See* CUSTOM—PUNJAB.

AWARD.

See (1) ARBITRATION.
(2) ARBITRATION ACT.
(3) C. P. CODE, O. 23, R. 3 AND SCH. II.
(4) LAND ACQUISITION ACT.
——Registration.—*See* REGISTRATION ACT, S. 17 (2).

AZIAS—
See (1) MAHOMEDAN LAW—WAQF.

BABUANA.—
See (1) GRANT.
(2) HINDU LAW.
(3) IMPARTIBLE ESTATE.
(4) MAINTENANCE.

BAI-BIL-WAFA.—
See (1) MORTGAGE—CONSTRUCTION.
(2) T. P ACT, SS. 58 AND 98.

BAIL.—
See (1) CR. P. CODE—SS. 496 to 502.
(2) CR. TRIAL.

BAILMENT.—
See (1) CARRIER.
(2) CONTRACT ACT, S. 148.
(3) RAILWAYS ACT.

BAIRAGIS—*See* HINDU LAW —ASCETICS AND SUCCESSION.

BALANCE OF ACCOUNT.—
See (1) ACCOUNTS.
(2) LIMITATION ACT.

BALCONY—*See* MUNICIPAL ACTS.

BALLAVACHERVA GOSWAMI—*See* HINDU LAW—CUSTOM.

BANDHUS—*See* HINDU LAW—SUCCESSION.

BANK—*See* BANKER AND CUSTOMER.

BANKER AND CUSTOMER.

——Where cheques were treated as not finally cleared the money represented by the cheques is not part of the assets on liquidation—Assets on Liquidation.

The Calcutta Bankers' Clearing House is a place where an exchange of cheques etc., takes place in lieu of direct presentation at the offices of the respective Banks where such drafts are made payable. Balances are struck between each of the clearing banks in the manner provided for by Rules 7 and 9, of dishonour by it or by the drawee bank of any cheque or any other document included in the said aggregate debt or credit entry in the regulations for the Calcutta Bankers' Clearing House. The object of the arrangement is really to dispense with the use of the coin or bank notes in the settlement of large transactions that necessarily take place there. Where the Alliance Bank of Simla, Ltd., received certain cheques from their customers for the credit of their accounts which were dishonoured by the Chartered Bank and upon which the Alliance Bank reversed their original credit to their constituents' account in respect of these very cheques.

Held, the action of the Alliance Bank in reversing the credit was consistent with their having received cheques only as agents for collection and with the fact that they never placed any money to their customers' credit to draw upon. If, as a matter of fact, the proceeds of the cheques were actually collected and the relation of the banker and customer established it would not have been open to the Alliance Bank to reverse their original credit to their constituents' account. Therefore, the cheques in question must be deemed to have not been finally cleared and consequently the moneys represented by the cheques are not part of the assets of the Bank on its going into liquidation. (*Gosh, J.*) ALLIANCE BANK OF SIMLA, IN LIQUIDATION, *In re.* **40 C. L. J. 223: 84 I. C. 1018 : A. I. R. 1925 Cal. 54.**

——Letter of credit—Meaning and object—Letter of advice of credit—Bills drawn by seller of goods—Negotiation—Guarantee by banker — Liability of drawer.

A letter of credit (sometimes called a bill of credit) is an open letter of request whereby one person (usually a merchant or banker) requests some other person or persons to advance moneys or give credit to a third person named therein for a certain amount and promises that he will repay the same to the person advancing the same or accepts bills drawn upon himself for the like amount. It is called a general letter of credit when it is addressed to all merchants or other persons in general requesting such advance to a third person, and it is called a special letter of credit, when it is addressed to a particular person by name, requesting him to make such advance to a third person. While no set form of words may be necessary, yet a letter, of credit as known to the law must contain a request (general or special) to pay the bearer or person named money or sell him some commodity on credit or give him something of value and look to the drawer of the letter for recompense, and it partakes of the nature of a negotiable instrument. The rules governing bills of exchange and negotiable promissory notes are always the same, fixed and determinate, while letters of credit are to be construed with reference to particular and often varying terms in which they may be expressed, the circumstances and intentions of the parties to them and the usages of the particular trade or business contemplated. Plaintiff, a Calcutta merchant, sold goods to a buyer in England and sued the deft. bank on the strength of a document by the latter in these terms, "We beg to inform you that we are in receipt of advice by wire from our London Office that a confirmed irrevocable credit has been opened under which we are authorised to negotiate your bills, as offered on M. G. & Co. (buyers) of London to the extent of 16.875 on the following conditions: "Bills to be drawn three months after sight and to be accompanied by proper shipping document representing shipment of 2,000 bales of jute of a particular mark from Calcutta to Antwerp during November—December 1920." Among the conditions were: (1) "Please note that this advice does not release you from the liability attaching to the drawers of a bill of exchange," and (2) "under present conditions we can give no undertaking to negotiate bills drawn under this credit." *Held*, that the purpose of the document was to facilitate negotiation and not to furnish an ultimate guarantee, that the document was not intended to be an ordinary banker's credit and that the plaintiff's claim against the bank was not sustainable. (*Mukerjee and Rankin, JJ.*) CHANDANMULL BENGANEY *v.* NATIONAL BANK OF INDIA, LTD.
51 Cal. 43 : 79 I. C. 757 : A. I. R. 1924 Cal. 552.

——Banker's lien on securities.

Bankers can set off what is due from a customer on one account against what is due to him on another, though the moneys due to him may in fact belong to other persons. But no lien exists on securities delivered for a special purpose inconsistent with the lien. Bankers have a general lien on all securities deposited with them as Bankers by a customer unless there be an express contract or circumstances that show an implied contract, inconsistent with lien. A Banker is entitled to set-off what is due to a customer on one account against what is due from him on another account

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although the moneys due to him may in fact belong to other persons. But they cannot successfully claim a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed. (*Astan, A. J. C.*) ROCHALDAS GIDOOMAL & CO. *v.* MERCANTILE BANK OF INDIA LTD.
A. I. R. 1925 Sind 142.

BANKRUPTCY—*See* INSOLVENCY ACT.

BARKI SERVICE—*See* (1) GRANT.
(2) INAM.

BARRISTER—*See* LEGAL PRACTITIONER.

BARRISTER'S CLERK—*See* LEGAL PRACTITIONER.

BAR TO PROSECUTION—*See* CRIMINAL TRIAL, CRIM. PRO. CODE, S. 403.

BENAMI.

———*—Presumption—Purchase by husband in wife's name should be presumed to be for husband's benefit.*

A purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. Where a party pleads that a purchase by the husband in the name of the wife was in pursuance of an ante-nuptial agreement by the husband to make some provision for the wife, the *onus* of proof is on that party. Subsequent dealings with the property by the husband are material evidence on the point. 6 *M. I. A.* 53 ; 13 *M. I. A.* 232 and 37 *All.* 557 (*P.C.*) *Foll.* (*Sir John Edge*) SURA LAKSHMIAH CHETTY *v.* KOTHANDARAMA PILLAI. **49 M. L. J. 109 : (1925) M. W. N. 717 : 52 I. A. 286 : 23 A. L. J. 662 : 42 C. L. J. 8 : 88 I. C. 327 : 27 B. L. R. 1076 : 29 C. W. N. 1013 : A. I. R. 1925 P. C. 181 (P.C.).**

———*—Evidence—Proof of—Suspicions—Not sufficient.*

To prove a *benami* purchase there must be affirmative evidence in the case and mere suspicion is insufficient. (*Lord Phillimore*). RAI RADHA KRISHNA *v.* BISHESHWAR SAHAY. **44 M.L.J. 718 : 1 Pat. 733 : 16 L. W. 190 : 3 Pat. L. T. 529 : 21 A. L. J. 23 : 25 Bom. L. R. 630 : 31 M. L. T. 209 : 67 I.C. 914: 27 C. W. N. 294 : 37 C. L. J. 430 : 49 I. A. 312 : A. I. R 1922 P. C. 336 (P. C.).**

———*—Burden of proof.*

The burden of proving that a grant made in terms to a certain person was made benami for another lies on the person alleging it. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MOHMUD ALI KHAN. **43 M. L. J. 104: 20 A. L. J. 545 : 35 C. L. J. 554 : 24 Bom. L. R. 951 : 67 I. C. 444 : 31 M. L. T. 94 : A. I. R. 1922 P. C. 84 (P.C.).**

———*Evidence.*

Where plff. sued to recover certain property and deft. pleaded that under a certain partition deed between plff. and deft. was *benami* and plff. used to hold the land in dispute only as deft's. benamidar, *Held* that on evidence it was clear that the deed was acted upon, that it was not *benami* and that plff. was entitled to a decree. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMUD ALI KHAN. **43 M. L. J. 104 : 20 A. L. J. 545 : 24 Bom. L. R. 951 : 35 C. L. J. 554 : 67 I. C. 444 : 31 M. L. T. 94 : A. I. R. 1922 P. C. 84 (P.C.).**

———*Burden of proof—Possession of title-deeds—Evidence against—Benami character—Burden of proof*

BENAMI.

—Presumption.

Where the vendee and his father bear the relation of agents and servants of the vendor the possession of the title-deeds by these persons is not a circumstance which can carry any weight. Where the purchaser is a stranger to the vendor the fact of his possessing the title-deeds might bear a strong argument in favour of the sale-deed held by the purchaser not being a nominal document. Where the vendor was of affluent means had embarked in litigation and had been unsuccessful and a deceee was pending against her and she was apprehensive of a claim for mesne profits being put forward against her *held* : that she had a good motive for transferring the house in such a way as to enable her afterwards to protect the property. The purchaser being her servant it lay very heavily upon him to prove by cogent evidence that the transaction was above board and that no advantage had been taken of the lady's age and position. (*Banerji and Gokul Prasad, JJ.*) KEDAR NATH SINGH *v.* SHEO SHANKAR. **45 A. 515 : 21 A L. J. 421 : 76 I. C. 370 : L. R. 4 A. (civ) 512 : A. I. R. 1923 All. 613 (2).**

———*—Effect of—Suit for declaration that a portion of a transaction is genuine and the rest* benami.

Benami transactions are generally effected in order to conceal some fraud or in order to support some object of a discreditable nature. But though the Courts have in the past recognized that the ostensible owner in a *benami* transaction can be ordered to restore the property to its original owner, it is not advisable to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion. (*Macleod, C.J. and Shah, J.*) APPA *v.* BABAJI. **64 I. C. 364 : 23 Bom. L.R. 873 : 46 Bom. 85: A.I.R. 1922 Bom. 107.**

———*—Test of*—Onus *of proof.*

A court's decision as to the *benami* character of a transaction must rest not upon suspicion but upon legal grounds established by legal testimony. The court must consider circumstances such as source of purchase-money, possession of property, custody of title-deeds, adequacy of consideration and like facts and the person who claims against the tenor of the deed must prove it. (*Mookerjee and Rankin, JJ.*) ABDUL LATIF KAZI *v.* ABDUL HUQ KAZI.
28 C. W. N. 62 : A. I. R. 1924 Cal. 523.

———*—Test of—Evidence—Probabilities.*

Benami transactions being common in India slight evidence may show a transaction was of that nature. A conclusion however cannot be based on mere probabilities. The person who claims contrary to the tenor of the deed must prove and the source of the consideration is always an important test. If from lapse of time, direct evidence is not forthcoming, reasonable probabilities as are deducible from surrounding circumstances can be made the basis of decision. (*Mookerjee and Chotzner, JJ.*) BHUBANMOHINI DASI *v.* KUMUDBALA DASI. **28 C. W. N. 131 : 39 C. L. J. 140 : A. I. R. 1924 C. 467.**

———*Meaning of—Position of strangers.*

The principle, enunciated by the Judicial Committee in 27 All. 271 that a stranger to a deed which is intended to be real and inoperative between the parties thereto cannot dispute the payment or non-payment of consideration, its adequacy or inadequacy, has no bearing in a case where a deed is challenged as fictitious, never designed to operate as a real deed or to effect a transfer of title. (*Mookerjee and Rankin, JJ.*) KAMINI KUMAR DEB *v.* DURGA CHARAN NAG.
37 C. L J. 122 : A. I. R. 1923 Cal. 521.

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——*Evidence of—Source of purchase-money—Old transaction—Evidence of possession.*

Benami transactions are familiar in India and even a slight quantity of evidence to show that a transaction is *benami* may suffice. But the person who impugns the apparent character of a transaction must not rely solely on probabilities, but must show something definite to establish that it was a sham transaction, on the principle that the burden of proof lies on the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. The most important test in these cases is the source whence the consideration came. Where however from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on the reasonable probabilities and legal inferences arising from proved or admitted facts. Cases reviewed. (*Mookerjee and Chotzner, JJ*) PROMODE KUMAR ROY *v.* MADAN MOHAN SAHA. **36 C. L. J. 396 : 27 C. W. N. 305 : 70 I. C. 555 : A. I. R. 1923 C. 228.**

——*Fraudulent transfer—Right of transferor to recover—Evasion of rules for the conduct of Government servants.*

Where a person acquired property *benami* in the name of another with a view to conceal the fact of his purchase, he being a public servant : *held* that his conduct did not amount to fraud. He is not therefore precluded from recovering the property from the benamidar. (*Mookerjee and Chotzner, JJ.*) DHIRENDA KUMAR BOSE *v.* CHANDRA KANTA ROY.

36 C.L.J. 82 : 68 I. C. 648 : A I. R. 1923 Cal. 154.

——*Fraudulent transfer—Suit by fraudulent grantee for recovery of property—Fraudulent purpose carried out—Whether suit maintainable.*

One S, executed a mortgage in favour of D. This transaction was ascertained to be fictitious, and the conveyance was never intended to pass title and the mortgage was effected solely with a view to delay, if not to defeat the creditors of S. The fraudulent purpose was accomplished. D obtained a decree on the mortgage and became purchaser. The successors of D. commenced the present action for a declaration of their title by purchase at auction sale and for recovery of possession from the successors of S. *Held* the plaintiff must fail. The rules that guide the Court in the matter of fraudulent conveyances are as follows : (1) When recovery of property is claimed by the fraudulent grantor from the grantee, the modern rule is that although where intended fraud has been carried into effect, the Court will not help the owner to recover the property which he has once cast off in order to defraud others, yet if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another whose retention of it is an act of gross fraud. *Jaylore* v. *Bowers*, 1 Q.B.D. 291 Ref. (2). Where recovery of property is sought by the fraudulent grantee against the grantor, the rule is :—If a Benamidar, who has used a fraudulent transfer to defeat an execution levied by his ostensible transferor, were to seek the assistance of Court to obtain possession from the latter, the Court might well allow the transferor to plead the real facts, even though the plea involved a declaration by the defendant of his own turpitude. (20 Mad. 326, p. 332.) This is allowed, not for his own sake but on grounds of public policy. 31 Bom 405 ; 37 Bom. 217 not followed Case-Law discussed. (*Mookerjee and Chotzner, JJ.*) RAGHUPATI CHATTERJEE *v.* NRISHINGA HORI DAS.

36 C. L. J. 491 : 71 I. C. 1 : A. I. R. 1923 Cal. 90.

——*Test—Source of purchase money—Possession—Other evidence.*

BENAMI.

In a case of *benami* transactions in India the court need not approach them with that scrupulous rigour which in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. 23 C. W N. 321 Ref. In addition to considering the source from which the purchase money came and the person in possession, the court may also take into consideration the surrounding circumstances. 43 C. 660 : 37 A. 557, Ref. (*Mookerjee and Chotzner, JJ.*) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHAUDHURI.

36 C. L. J. 208 : 72 I. C. 698 : A. I. R. 1923 C. 13.

——*Evidence—Suspicion—Surrounding circumstances.*

The burden of proving that a certain conveyance standing in the name of one person is *benami* for another under whom a third person claims, lies on the person who so raises the plea of *benami*. The Court must however rest its decision not on suspicion but on legal evidence though it need not approach the transaction with that scrupulous rigour which, in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. The most important test to find out the beneficiary is the source whence the consideration came. In addition to this the court should take into consideration the question of possession and the surrounding circumstances ; 25 C. L. J. 581 ; 23 C. W. N. 321 ; 43 C. 606; 37 A. 557 ; 18 C. W. N. 428 ; 3 M. I. A. 229 ; 6 M. I. A. 53 ; 21 C. W. N. 280, Rel. (*Mookerjee and Cuming, JJ.*) JASODA LAL PAL *v.* BALARAM PODDAR. **69 I. C. 67 : 35 C. L. J. 589 : A. I. R. 1922 Cal. 488.**

——*Burden of proof*—Onus *on plaintiffs.*

The burden of proving that a bond, a suit brought thereon, and an execution sale under the decree obtained in the suit, were all benami for the plaintiff lies upon him. (*Woodroffe and Ghose, JJ.*) SHAM LAL RAI CHOWDHURY *v.* RADHA CHARAN RAI.

81 I. C. 774 : 39 C. L. J. 98.

——*Test—He who pays the money is presumed to be the owner.*

Where one person pays the price and the instrument of sale is obtained in the name of another, the presumption is that the person paying the price is the owner and the person in whose name the sale is obtained, occupies the position of a trustee only. 6 M. I. A. 53 (P. C.) ; 13 M. I. A. 232 (P.C.) and 37 All. 557 (P. C.) Foll. (*Abdul Raoof, J.*) MAQSUDAN LAL *v.* RAM CHANDER RAM RACHHPAL.

7 L. L. J. 298 : 88 I. C. 289 : A. I. R. 1925 Lah. 511.

——*Defendant purchasing benami in plaintiff's name and remaining in possession and defrauding a stranger in collusion with plaintiff—Plaintiff suing for possession—Defendant cannot successfully plead benami and fraud.*

Defendant sold part of her husband's estate purchased a house in plaintiff's name out of the proceeds and successfully deluded the reversioner into believing that the proceeds had been devoted to the payment of debts binding on the estate. Defendant was in possession of the house. In a suit by plaintiff for possession, *Held* : that it was not open to defendant to show that it was she that provided the funds for the purchase, by means of a fraud on the reversioner, to which she and plaintiff were parties on the principle that that party fails who *first* has to allege the fraud in which he participated. 32 M. L. J. 484 and 31 Bom. 405 Foll.: 1923 Cal. 90 not foll. (*Waller, J.*)

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PACHYAMMAL *v.* DEVANAIAMMAL. **22 L. W. 313 : A. I. R. 1925 Mad. 1016.**

———*Sham transfer—Benami and sham transfer are different—In former legal title is intended to be transferred—In latter no interest, legal or beneficial is transferred.*

The essence of a sham transaction is that though a registered deed is brought into existence no title of any kind, either legal or beneficial, is intended to be passed thereby to any person whatsoever, *i. e.*, the deed of transfer is not intended to effect any transfer of property. The difference between sham transactions and benami transactions is one of intention. If the deed of transfer is made with the intention of placing the property in the name of a third person, the intention clearly amounts to a transfer of the legal title, and such a transaction can scarcely be called a sham transaction, but comes directly within the meaning of benami transactions properly so called. If a sale-deed is got up to fight certain third parties, the intention to be drawn from the transaction is irresistible that the legal title at any rate was intended to be passed by the transaction from the transferor to the transferee : otherwise the very object of the transfer fails. 27 M. L. J. 445, Dist. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) RANGAPPA *v.* RANGASAMI. **1925 M. W. N. 232 : 88 I. C. 249 : A. I. R. 1925 Mad. 1005.**

———*Test—Source of purchase money or custody of documents is not conclusive criterion.*

In considering whether a purchase is benami, the source of the purchase money is only one criterion though an important criterion ; similarly, the custody of documents is not also conclusive criterion. (*Ramesam and Reilly, JJ.*) *In re* WELESWARAPU GANGAMMA. **A. I. R. 1925 Mad. 980.**

———*Presumption—Two Hindu brothers—Joint family—Purchase by one brother is not presumed to be* benami *for other.*

Where two brothers constitute a joint Hindu family there is no presumption, that one brother must necessarily buy property for the benefit of the other brother. (*Devadoss, J.*) VENKATARAMA CHETTIAR *v.* MARUTHAPPA PILLAI. **86 I. C. 886 : 21 L. W. 226 : A. I. R. 1925 Mad. 448.**

———*Test is the source of purchase-money—No presumption of advancement exists in favour of son or wife.*

The criterion is to consider from what source the purchase money comes. The presumption is that a purchase made with the money of A, in the name of B, is for the benefit of A ; and that from the purchase by a father, whether Mahomedan or Hindu in the name of his son, one is not at liberty to draw the presumption which the English Law would draw—of an advancement in favour of that son. Again the mere fact that property was purchased, not in the sole name of the son but in the name of the wife as well as of the son affords a strong argument in favour of the hypothesis that it was a *benami* purchase in the absence of such community of interest between the wife and the son as would render it probable that they had been made joint owners of the property ; and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in England. The presumption in favour of *benami* will be strengthened if almost all the property was purchased in the name of the wife and the man purchased really next to nothing in his own name. (*Spencer and Kumaraswami Sastri, JJ.*) MOLLAYA PADAYACHI *v.* KRISHNASWAMI IYER. **47 M. L. J. 622 : 21 L. W. 336 : A. I. R. 1925 Mad. 95.**

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———*Person with voidable title can give good title to the transferee—T. P. Act, S. 8.*

A person who has acquired property under a voidable title can himself give a good title to that property to a *bona fide* purchaser or mortgagee from him who deals for value and has no notice of the defects in the title. (*Schwabe, C. J. and Wallace, J.*) S. PARTHASARATHY AIYER *v.* M. SUBBARAYA GRAMANY. **45 M. L. J. 175 : 17 L. W. 763 : 72 I. C. 559 : A. I. R. 1924 Mad. 67.**

———*Doctrine—Want of notice, direct or constructive.*

It is a rule of law that in order to allow the real owner of property to recover from an alienee, the property taken from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the title or the existence of circumstances which ought to have put the purchaser on an inquiry which if prosecuted would have led to a discovery of the real view. (*Prideaux, A. J. C.*) LAL SINGH *v.* PARSHRAM. **A. I. R. 1922 Nag. 226.**

———*Fraudulent transfer—Plff. when can succeed.*

Where the purpose of a *benami* transaction is fraudulent, a party trying to avoid the transaction must show that the purpose did not go beyond the stage of mere intention, otherwise the maxim *In pari delicto* will apply. (*Mittra, Offg. A. J. C.*) ISMAIL *v.* WASUDEO. **59 I. C. 285 : 16 N. L. R. 129.**

———*Evidence—Ostensible purchaser only a school boy and minor and having no source to pay purchase money—Father all along in possession—Inference that the sale is benami is correct.*

Where by reason of the antiquity of the transaction it is not possible for the defendant to prove who actually paid the consideration money the Court is to be guided by reasonable probabilities, legal inferences, surrounding circumstances of the time, the relations between the actual purchaser and the alleged benamidar and the future dealings of the two parties with the property, 1924 Cal. 467 and 17 O. C. 173 Ref. Where it was in evidence that the ostensible purchaser was a minor and a school boy living with his father at the time of the sale and had no independent means of his own and that his father had been practically in possession of the property.

Held, that the lower Courts were right in holding that father was the real purchaser and not the son. (*Dalal, J. C.*) MT. ZAITOON BIBI *v.* SYED ABID. **86 I. C. 874 : 12 O. L. J. 142 : A. I. R. 1925 Oudh 366.**

———*Burden of proof—Property bought in wife's name—Burden of proving* benami *nature lies on party asserting it.*

The burden of proving the transaction to be a *benami* one lies on the persons alleging it to be so, when a large portion of the purchase money was paid by a husband for property bought in the name of his wife. When a long period has elapsed since the transaction the burden is greatly enhanced. (*Kendall and Pullan, A. J. Cs.*) MT. RAJ KUNWARI *v.* MT. RANI MAHARAJ KUNWAR KUNWARI. **82 I. C. 832 : A. I. R. 1925 Oudh 243.**

———*Burden of proof—Lies on person setting up.*

The *onus* of proving any transaction to be a sham or a *benami* one lies on the person asserting it to be so, but even a very small quantity of evidence is enough for such a purpose. But such a transfer cannot be considered as nothing and it is necessary for the person impugning its apparent character to show something or other to establish that it is a *benami* or sham transaction. (*Kendall and Pullan, A. J. Cs.*) MT. RAJ KUNWARI *v.* MT. RANI MAHARAJ KUNWAR KUN-

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WARI. 82 I C. 832 : A. I. R. 1925 Oudh 243.

Doctrine of advancement does not apply in India—Test is source of purchase-money where other circumstances fail.

In India the doctrine of advancement in favour of a wife or a son has no application but the test to find out whether a transaction is *benami* or not is the source from which the purchase-money is got, but even this test becomes relevant only in the absence of all other explanatory circumstances. (*Kendall and Pullan, A. J. Cs.*) MT. RAJ KUNWARI *v.* MT. RANI MAHARAJ KUNWAR KUNWARI. 82 I. C. 832 : A. I. R. 1925 Oudh 243.

———*Effect of.*

So long as the *benami* transaction does not contravene the provisions of law, the Courts are bound to give effect to it. (*Wazir Hasan and Pullan, A. J. Cs.*) BANSI DHAR *v.* AJUDHIA PRASAD. 27 O. C. 175 : 82 I. C. 333 : 11 O. L. J. 619 : A. I. R. 1925 Oudh 120.

———*Fraudulent transfer—Carrying out the fraud—Suit for recovery of property—If maintainable.*

Where in order to defeat his creditors, a debtor conveyed his property to another and when the same was attached by the creditors the transferee successfully objected to the same and got the attachment raised, the debtor cannot afterwards maintain a suit for recovering the properties on the ground the transfer was fictitious. A party guilty of entering into a fraudulent contract would be entitled to recover the property conveyed provided the fraudulent purpose has not been executed. Case-law referred to. (*Wazir Hasan and Cuming, A. J. Cs.*) RAUNAQ ALI *v.* NAZIR HUSSAIN. 78 I. C. 359 : 11 O. L. J. 92 : A. I. R. 1924 Oudh 321.

———*Contracts—Pro-note—Assignment.*

No assignment can be made in favour of a benamidar. (*Kanhaiya Lal, J. C.*) RAM SINGH *v.* MT. RAGHU BANSA. 26 O. C. 201 : 9 O. and A. L. R. 29 : 72 I. C. 877 : A. I. R. 1923 Oudh 3.

———*Burden of proof—Though slight evidence is sufficient, probabilities are not enough.*

Per *Das, J.*—As benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. (*Dawson Miller, C. J.*) HITENDRA SINGH *v.* RAMESWAR SINGH. 4 Pat. 510 : 87 I. C. 849 : 88 I. C. 141 : A. I. R. 1925 Patna 625.

———*Presumption exists that purchase is for benefit of person providing purchase money—But presumption is strong or weak according to circumstances and is rebuttable.*

Where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction is one for the benefit of the person providing the money. 6 M. I. A. 53, 42 I. A. 202, 45 I. A. 97, 46 I. A. 1, and 1923 Cal. 228 Ref. to. But apart from the fact that the presumption is rebuttable, its strength or weakness can only be gauged by reference to all the surrounding circumstances.

Per Mullick, J.—It is true the payment of the consideration money is not everything in a case of *Benami*. But after all it is a question of fact whether the payment of the money was a gift or a transaction for the benefit of the owner of the money. There is no question of presumption or of *onus* of proof ; the matter is simply one of balance of evidence.

Per *Foster, J.*—Where the cest of acquisition has a double source and is only in part traceable to the plaintiff, the Court should, in the absence of an unambiguous criterion of ownership take into consideration the surrounding circumstances, the position of the parties, and their relation to one another, the motives which could govern their actions, and their subsequent conduct including their dealings with or enjoyment of the disputed property. There is no presumption on either side. 1923 Cal. 228 ; 35 I. A. 104 ; 30 All. 258 & 14 M. I. A 433 Foll. (*Dawson Miller, Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJ KESHO PRASAD SINGH. 5 P. L. T. Sup. 1 : A. I. R. 1925 P. 68.

———*Evidence of.*

Benami transactions require conclusive evidence to prove that they are such. Mere suspicion is insufficient. (*Jwala Prasad and Kulwant Sahay, JJ.*) RAJKESWAR PRASAD NARAIN SINGH *v.* MD. KHALIL-UL-RAHMAN. 3 P. 522 : 5 P. L. T. 223 : 78 I. C. 796 : A. I. R. 1924 Patna 459.

———*Evidence of—Proof—Vendor living with vendee (his wife) and his being involved in debt is not sufficient proof.*

The circumstances that the vendor who was the husband of the vendee continued to live in the house up to his death and that he was in debts and therefore had some motives in entering into a *Benami* transaction is not sufficient to establish the *benami* character of the transaction. (*Mullick and Kulwant Sahay, JJ.*) PURAN MULL *v.* MT. DILWA. 4 P. L. T. 54 : 72 I. C. 1003 : A I. R 1924 Patna 333.

———*Effect of—The beneficial owner is the legal owner.*

In a benami purchase of land, the person who is proved, as a fact, to be the beneficial owner is the actual legal owner. (*Ross, J.*) MUNSHI GOBIND PRASAD *v.* JUGDEEP SAHAI. 1 P. L. R. 316 : 77 I. C. 252 : A. I. R. 1924 Patna 185.

———*Presumption—Intention to gift presumed when.*

Where the father purchased the property in the name of the son but with the father's money and the intention was to make a gift to son and the intention was acted upon. *Held* it is a gift to the son. (*Jwala Prasad and Adami, JJ.*) MAHOMED YAKUB *v.* ABDUL QUDDUS. 4 P. L. T. 17 : 68 I. C. 372 : A. I. R. 1923 Patna 187.

———*Effect—Benami transactions—Whether Revenue Courts can recognize—Gift—Validity.*

D executed a deed of gift to R in 1919. In 1921 there was a quarrel between R and R's son and there was a case under S. 145, Cr. P. Code. In 1921 D sided with the son and executed a cancellation deed of the gift. In 1922 R executed another deed of gift to Rk. Rk applied for registration which was refused on the ground that the transaction was benami but the Commissioner ordered the name of Rk. to be registered. The petitioner then moved the Board on revision. *Held*, Benami transactions were fraudulent and could not be recognized by a Revenue Court. The Registration Court had no business to question whether Rk's name had been rightly registered or not. *Held*, further, that S. 145, Cr. P. Code case had been decided in favour of D in 1921 which was brought during the lifetime of the late proprietor and the right to possession was declared in favour of D who was competent therefore to make a gift in favour of her daughter Rk. (*Foley*). RAJKUMAR GIRISHNANDAN

BENAMIDAR.

SINGH *v.* BABUI RAMKISHORI KUER.
2 Pat. L. R. 227 (Rev.).

——*Test of—Consideration, a debt actually due.*

A transfer in consideration of a debt which is actually due cannot be regarded as *benami*. (*Coutts and Macpherson, JJ.*) MUSSAMMAT BIBI SAIRA *v.* BIBI SALIMAN. **63 I. C. 111 : 2 Pat. L. T. 577.**

——*Test.*

One test to find out whether a transaction is *benami* is to find out the source of purchase money and another is the inference arising from the fact of possession of the property in question. (*Kincaid, J. C. and Raymond, A. J. C.*) PEWANDBAI *v.* CHETANLAL.
62 I. C. 1002 : 15 S. L. R. 84.

BENAMIDAR.

——*Decree—Suit against—Real purchasers when affected—Effect of non-joinder of real owner.*

A suit against a benamidar binds the real purchaser, even though he may not have been made a party to the suit. But the plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser had he been brought on the record. (*Sulaiman and Kanhaiya Lal, JJ.*) MT. RAM SAKHI KUAR *v.* LACHMI NARAIN LAL.
L. R. 5 A. 616 : 80 I. C. 42 : A. I. R. 1924 A. 802.

——*Right to sue—Ejectment.*

A *benamidar* can sue for ejectment for property standing in his name. 18 All. 69 ; 21 All. 380 ; 17 A. L. J. 166 Foll. (*Stuart, J.*) SHAFI-UD-DIN *v.* MT. HORMAT. **70 I. C. 849 : A. I. R. 1923 A. 10.**

——Suit by, on mortgage — Maintainability. NARAYAN KESHAV *v.* KAJI GULAM MOHIDIN.
49 Bom. 832.

——*Suit by or against benamidar binds the real owner.*

The benamidar has no beneficial interest in the property or business that stand in his name ; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. 46 *Cal.* 566 *Foll.* Suit by or against benamidar binds the real owner. (*Macleod, C. J. and Coyajee, J.*) KONDI SAVLA BACHUL *v.* BANACHAND CHENIRAM. **27 B. L. R. 667 : A. I. R. 1925 Bom. 422.**

——*Right to sue.*

A *benamidar* has no right to bring a suit claiming title and for possession when he is suing in effect the beneficial owner. 23 Cal. W. N. 521 Dist. (*Sanderson, C. J. and Ghose, J.*) DAMODAR MANDAL *v.* KARAMAT ALI. **A. I. R. 1923 Cal. 536.**

——*Right to sue.*

A *benamidar* can maintain a suit for recovery of possession. (*Newbould, J.*) MAFIZUDDIN HOWLADAR *v.* MAHOMED ISLAM CHOWDHURY.
67 I. C. 741 : A. I. R. 1923 Cal 281.

——*Right to sue—Obstruction to light and air.*

A suit by a *benamidar* for the removal of an obstruction to access of light and air in a house, is maintainable. 46 Cal. 566 Ref. (*Mookerjee and Panton, JJ.*) PANCHU GOPAL CHATTERJEE *v.* MATANGINI DEBI.
64 I. C. 581: 35 C. L. J. 43.

——*Right to sue.*

A *benamidar* mortgagee, is entitled to sue on the mortgage even though he has not added the beneficial owner as a party to the suit. (*Mookerjee and Buckland, JJ.*) KRISHNAJIBAN *v.* MAHAMMAD.
63 I. C. 244: 33 C. L. J. 369.

——*Right to sue for damages.*

A benamidar can sue for damages for breach of contract. (*Abdul Raoof, J.*) BALMOKAND *v.* SHANKAR DAS. **76 I. C. 125: A. I. R. 1925 Lah. 68.**

BENAMIDAR.

——*Right to sue—Real owner not impleaded.*

So long as the transaction does not offend any provision of law, a *benamidar* can sue in respect of property or debt standing in his name even without impleading the beneficial owner. (*Scott-Smith and Martineau, JJ.*) BHANA MAL *v.* BELI RAM.
62 I. C. 799 (Lah.)

——*Right to sue—Suit by benamidar is maintainable except against the beneficial owner.*

A true benamidar *i. e.*, a person who has merely lent his name to the transaction and is therefore a trustee holding a legal title without any beneficial interest in the property, can maintain a suit in his own name against, at any rate, all persons except the person beneficially entitled. 46 *Cal.* 566 and 42 *Mad.* 348 *Foll.* (*Spencer, Og. C. J. and Srinivasa Aiyangar, J.*) RANGAPPA *v.* RANGASAMI. **1925 M. W. N. 232 : 88 I. C. 249 : A. I. R. 1925 Mad. 1005.**

——*Suit by—Suit for ejectment is maintainable whether the transfer was supported by consideration or not.*

Per Phillips and Venkatasubbarao, JJ.—(*In the Order of Reference.*) A benamidar can bring a suit for ejectment although he is not the real owner. The rule applies whether the transaction is supported by consideration or it is only a transfer by the owner to a benamidar which was not really intended to effect a transfer. 46 C. 566 (P. C.) Foll. (*Coutts Trotter, Ramesam and Wallace, JJ.*) GOVINDA NAIDU *v.* CHENGALROYA MUDALI. **47 M. L. J. 415 : 35 M. L. T. 29: 1924 M. W. N. 733: 47 Mad. 896: 83 I. C. 74: A. I. R. 1925 Mad. 22 (F. B.)**

——*Position of—Admission of title in third party—Effect of—Conveyance.*

An admission by a benamidar that the property standing *benami* in his name belongs to a person other than the beneficial owner does not convey any title to that person. (*Phillips and Venkatasubba Rao, JJ.*) VISVANATHA AIYAR *v.* VENGAMA NAIDU.
34 M. L. T. 264 : 19 L. W. 567 : 78 I. C. 52 : A. I. R. 1924 Mad. 749.

——*Real owner.*

Payment to *benamidar* binds real owner, if made without notice and objection by him. (*Krishnan and Odgers, JJ.*) ANTHAYA HEGADE *v.* MANJAYA SHETTY. **14 L. W. 371: 41 M. L. J. 393: (1921) M. W. N. 642: 69 I. C. 642: 45 M. 84: A. I. R. 1922 Mad. 176.**

——*Right to sue—Relation to real owner—Enforceability of benami transactions.*

It is clear that benamidar can sue. 46 C. 566 ; 42 M. 348; 13 C. P. L. R. 33 Ref. This system under which property is acquired and held in names other than those of the real owner is a common practice in this country and if a *benami* transaction does not contravene the provisions of law, courts are bound to give effect to it. It has been held that a *benamidar* though he has no beneficial interest in the property represents in fact the real owner and as far as their relative position is concerned is a mere trustee for him. (*Prideaux, A. J. C.*) BALKRISHNA *v.* LAKHU.
68 I. C. 191: A. I. R. 1922 Nag. 239.

——*Real owner—Liability under lease in favour of* benamidar.

Where a lease is taken in the name of a *benamidar*, the plff. lessor is entitled to bring his suit for the *thika* rent either against the beneficial owner or his *farzidar*, and it is not necessary that the plff. should be aware at the date of the inception of the tenancy of the interest of the beneficial owner in order to maintain his

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suit against him. (*Coutts and Macpherson, JJ.*) MALIK THARAT KARIM *v.* MUSST. BAL KUART. **64 I. C. 515 : 2 P. L. T. 740.**

BENCH OF MAGISTRATES.—*See* CR. P. CODE, 1898, SS. 15, 16, etc.

BENEFICIAL—Interest.

See (1) CONTRACT—STRANGER.
(2) TRUST.
(3) TRUSTS AT.

Owner.

See (1) CONTRACT—STRANGER.
(2) TRUSTS.
(3) TRUSTS ACT.

BENEFICIARY.

See (1) CONTRACT—STRANGER.
(2) TRUST.
(3) TRUSTS ACT.

BENEFIT OF DOUBT. *See* CRIMINAL TRIAL.

BENEFIT TO ESTATE.

See (1) GUARDIAN AND WARD, ETC.
(2) HINDU LAW—JOINT FAMILY—MANAGER.
(3) MINOR.

BENGAL ALLUVIAL LANDS ACT (V OF 1920).

——— **S. 10**—*Effect.*

S. 10 negatives the implied repeal of S. 145 of the Crim. Pro. Code, so far as recently formed alluvial lands are concerned. (*Greaves and Duval, JJ.*) ABDUL JABBAR *v.* MAFIZUDDI SARKAR. **28 C W. N. 783: 81 I. C. 931: 25 Cr. L. J. 1107: A. I. R. 1924 Cal. 980.**

BENGAL ALLUVIAL LAND SETTLEMENT ACT (XXXI of 1858.)

——— **S. 1**—*Alluvial land—Settlement—Effect.*

Where alluvial land has been settled as a separate estate with jama, it ceases to have any manner of connection with the original estate. (*Mookerjee and Rankin, JJ.*) SAUDAMINI DASYA *v.* SECRETARY OF STATE. **50 Cal. 822 : 38 C. L. J. 47: A. I. R. 1924 Cal. 197.**

BENGAL ALLUVION AND DILUVION ACT (IX of 1847.)

——— *Char formed in bed included in proprietor's land is assessable.*

Char formed in the bed of river proved to have existed at the time of Decennial Settlement can be assessed with additional revenue, although the bed was included in the land of the proprietor at the time of the settlement. (1922 P. C. 6 *Foll.*) Prior to the decision in 1922 P. C. 6 a distinction had been drawn between the assessibility of chars forming in a navigable river and those forming in a non-navigable river existing at the date of the Decennial Settlement, upon the ground that if such a river was non-navigable, the bed formed part of the settled estate and must be regarded as having been taken into account at the time of the settlement. That distinction was disapproved in 1922 P. C 6, the basis of that ruling being that property is one thing and assessibility is another. (*Rankin and Page, JJ.*) SECRETARY OF STATE *v.* SARAT SUNDARI DEBI.

29 C. W. N. 195: A. I. R. 1925 Cal. 447.

——— *Construction.*

It would be an erroneous interpretation of Act IX of 1847 to hold that it rendered the Board of Revenue supreme and enabled them to make valid and effectual a proceeding on their part which the law had declared to be wholly illegal and invalid. (*Mookerjee and Chotzner, JJ.*) SREENATH ROY *v.* SECY. OF STATE. **36 C. L. J. 345: 50 C. 276: A. I. R. 1923 Cal. 233.**

——— *Applicability.*

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847), S. 1.

Lands covered by the original Decennial and Permanent Settlement are not within the scope of the Act. (*Jwala Prasad and Ross, JJ.*) RAMNANDAN SAHAY *v.* JAIGOBIND PANDAY. **2 Pat. 839 : 75 I. C. 955 : A. I. R. 1924 P. 213.**

——— **Ss. 1, 3 and 6**—*Scope and effect of—Assessment of char land—Suit to set aside—Limitation—Bengal Regulation II of* 1819, *Ss.* 24 *and* 31.

Act IX of 1847 was framed with a view to substitute, in cases of assessment of alluvial lands a simpler procedure than that embodied in Regn. II of 1819, which was intended to apply in the main to resumption of lands held free of assessment, without the sanction of the proper authorities or under illegal or invalid tenures. The expression "any such new map" in S. 6 of Act IX of 1847 refers to the new map made according to "new survey" as contemplated in S. 3. That section provides for periodical surveys at intervals of not less than ten years after a revenue survey has been completed and approved. The object of the "new survey" is to ascertain the "changes" that may have taken place since the date of the last previous survey by alluvion or dereliction (not changes by possession), S. 6 then imposes upon the revenue authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps made at an interval of not less than 10 years and each showing the revenue paying estate concerned. That estate must accordingly be in existence as a revenue-paying estate, if not before, at least on the date of the first of the two maps taken as the basis for compensation. It is only when on an inspection of the new maps it appears that land has been added, that there is legislative authority for the assessment of additional revenue. The procedure contemplated by Act IX of 1847 is fundamentally different from that provided by Regn. II of 1819. The change had been rendered feasible, chiefly by reason of the progress of the survey operations throughout the province. The survey operations conducted by Major Rennel had not been undertaken for revenue purposes; and it was only during the first half of the 19th century that surveys of different types (Khasra, Thakbust and Revenue) were systematically carried out with a view to define every estate on the Collector's rent roll and to determine the relation of land to jama or revenue by the ascertainment of the areas and boundaries of estates or mahals. The system of assessment inaugurated in 1847 could not have been even contemplated in 1819. Two such systems, so radically distinct, cannot possibly be amalgamated. A suit was instituted on 29-6-1915 for a declaration that certain land was not "added land" within S. 6 of Act IX of 1847 and that the assessment thereon was *ultra vires*. The revenue authorities had levied an assessment on the footing that the lands had been gained by alluvion from a river. The assessment was approved by the Board of Revenue on 28-11-1912 and a notice of the date 20-2-1913 was served on the plaintiffs on 15-3-1913 informing them of the assessment A petition for review put in by the plaintiffs had been rejected on 29-6-1914. It was contended for the defendant (Secretary of State) that S. 24 of Regn. II of 1819 was applicable to the case and that the suit was barred either under that section or under Art. 14 of the Lim Act. *Held*, that the suit was not based under either provision, as none of them was applicable to the case. 24 C. W. N. 813 dissented from. (*Mookerjee and Rankin, JJ.*) PEARY LAL RAY CHOW-

BENGAL ALLUVION AND DILUVION (IX OF 1847) S. 3.

DHURI *v.* SECRETARY OF STATE. **39 C. L. J. 454 : A. I. R. 1924 Cal. 913.**

——S. 3—*Accretion aud alluvion—Assessment of land revenue--Mode of—Diara survey map—Resurvey by super-imposition—Functions of Board of Revenue.*

Under Act IX of 1847, the Board of Revenue is the proper authority in all cases of accretion or alluvion and all matters of survey, measurements, boundaries, etc., of assessable land, and its decisions are final, provided that (1) there has been no fundamental irregularity in the proceedings indicative of defiance of, or non-compliance with, the essentials of legal procedure, (2) the *onus* of establishing such fundamental and essential violation, if any, of statutory requirements is upon the person alleging it, (3) any doubts on matters of fact such as inaccuracy or incompleteness of maps or surveys which are within the special province of the Board of Revenue should be promptly advanced before the Board in the course of the proceedings before it without which Courts of law will not entertain them. 19 I. A 140 ; 32 M. L. J. 505, Ref. 48 I.A. 565, Applied. (*Lord Shaw.*) SECRETARY OF STATE *v.* JATINDRA NATH CHOWDHURY.

47 M. L, J. 48 : 51 I. A. 241 : 51 C. 802 : 29 C. W. N. 1 : 80 I. C. 1023 : (1924) M. W. N. 588 : 35 M. L. T. 146 : A. I. R. 1924 P. C. 175 (P. C.)

——Ss. 3 and 6—*Surveymaps—Any such new map meaning—Comparison— Evidence— Accretion —* Onus.

The expression "any such new map" plainly refers to the "new map" made according to "new survey" as contemplated in S. 3. The section provides for periodical surveys at intervals of not less than 10 years, after a revenue survey had been completed and approved. The object of the "new survey" is to ascertain the "changes" that may have taken place since the date of the last previous survey,—that is, changes by alluvion or direliction (not changes by a possession). S. 6 then imposes upon the revenue authorities the duty to assess what may be called added land, whenever on inspection of the new map it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps, made at an interval of not less than 10 years and each showing the revenue paying estate concerned. That estate must accordingly be in existence as a revenue paying estate if not before at least on the date of the first of the two maps taken as the basis for comparison. The true position is that the revenue survey map is taken as the basis of comparison ; but the comparison of the map is not conclusive. The comparison sets the revenue authorities in motion, and they may, then, on the best materials they can procure, proceed to assess what land they deem to be assessable. What is liable to be assessed with revenue is, land not previously assessed, not land which has been formed since the revenue survey map. In the determination of the question, whether the land sought to be assessed is added land, we have to determine the land included in the estate at the time of its creation as a permanently settled estate. For this purpose, the revenue survey map is valuable but it is not conclusive evidence. (*Mookerjee and Rankin, JJ.*) SAUDAMINI DASSYA *v.* SECRETARY OF STATE FOR INDIA. **50 C. 822 : 38 C. L. J. 47 : A. I. R 1924 Cal. 197.**

——S. 6—*Imposition of assessment—Lands must be 'added' lands.*

To entitle the Crown to impose an assessment under Bengal Act IX of 1847 it must be shown that the lands which are sought to be resumed and assessed with revenue are "added" lands within the meaning of S. 6 (*i.e.*) lands not included in the original assessment. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE FOR INDIA *v.* UPENDRA NARAIN ROY.

36 C. L. J. 336 : 71 I. C. 849 : A. I. R. 1923 C. 247.

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 3,

——S. 6—*Additional assessment—Newly added lands—Burden of proof on the Crown—Revenue and thak maps—Evidentiary value of*

The object of Bengal Act IX of 1847 was to enable the Crown to impose assessment on lands gained from the sea or by alluvion or dereliction from the rivers. The expression "any such new map" in S. 6 of the Act refers to the new map according to the new survey contemplated by S. 3. The object of the new survey is to ascertain the change that may have taken place since the date of the last previous survey, that is, changes by alluvion or dereliction (not changes by possession) 5 Pat. L. J. 681 Ref. S. 6 imposes upon the revenue authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to government. There must consequently be a comparison between two maps made at an interval of not less than 10 years and each showing the revenue paying estate. If not before, at least on the date of the first of the two maps taken as the basis for comparison. (*Mookerjee and Chotzner, JJ.*) RAJA SREENATH ROY *v.* SECRETARY OF STATE FOR INDIA. **50 Cal. 276 : 70 I. C. 510 : 36 C. L. J. 345 : A. I. R. 1923 Cal. 233**

——S. 6—*Added land—Burden of proof.*

The burden of proof, lies upon the Crown to establish that the land attempted to be newly assessed is added land, that is, land not included, in the original assessment. (*Mookerjee and Chotzner, JJ.*) SREENATH ROY *v.* SECY. OF STATE. **36 C. L. J. 345 : 50 C. 276 : A. I. R. 1923 Cal. 233.**

—— S. 6—*Churs—Assessment.*

All Churs in non-navigable river flowing through permanently settled estate are assessable to public revenue- (*Viscount Cave.*) SECRETARY OF STATE *v.* MAHARAJAH OF BURDWAN. **49 Cal. 103 : 42 M. L. J. 61 : 26 C. W. N. 619 : 35 C L. J. 92 : 48 I. A. 565 : 67 I. C. 835 : 4 U. P. L. R. 1 (P. C.) : A. I. R. 1922 P. C. 6 (P. C.)**

——S. 6—*Notice—Amendment of.*

Notice served for the purposes of assessment under S. 7 of Act IX of 1847 can be amended. (*Mookerjee, A. J. C. and Fletcher, J.*) SOUDAMINI DASYA CHOUDHURANY *v.* SECRETARY OF STATE.

65 I. C. 76 (C).

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 1—*Applicability—Small and shallow private river.*

The first part of S. 1 of Regulation XI of 1825 does not apply to land forming the bed of a small and shallow river where the bed is recognized as the property of an individual. (*Cuming and Panton, JJ.*) ANDORA AKANDA *v.* NASIR AKANDA.

90 I. C. 1010 (Cal.).

——S. 3—*'Changes' means changes brought about by the action of river or sea.*

The word 'changes' in S. 3 of the Act means changes brought about by the action of the river or the sea and not changes by the act of the proprietor in annexing to his estate the property of another proprietor. Therefore a map prepared under S. 3 can never be said to be a map according to possession of parties. (*Das and Adami, JJ.*) BIBI WAKILAN *v.* DEO NANDAN PROSAD, **5 Pat. L. J. 681 : 59 I. C. 298 : 2 Pat. L. T. 81.**

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 4.

——S. 4—*Accretion—Tenure—Title—Lease of accretion by Landlord.*

Under S. 4 of the Regulation, where land is added by gradual accession it becomes an accretion to the tenure of the person to whose estate it is added. When it becomes added to an under-tenant, the subordinate tenure-holder gets a title to it and the superior landlord cannot lease such accession of land to a third party. All that he is entitled to is to an increment of rent. (*Mookerjee, C. J. and Fletcher, J.*) KARIM *v* AFAJUDDI. **64 I. C. 805 : 33 C. L. J. 531.**

——S 4 (1)—*Gradual accretion—Meaning of.*

The question as to what amounts to gradual accretion under S. 4 (1) of the Regulation, must depend upon the nature of the river, the manner of the accretion, and the quantity of the land thrown on each year. It need not be imperceptible. (*Jwala Prasad, C. J. and Das, J.*) KHUBI MAHTON *v.* LACHMI DAS. **63 I. C. 704 : 2 Pat. L. T. 599.**

——S. 4 (3)—*Chur land—Question of title.*

The question of title to a chur thrown up in a large navigable river, must be determined with reference to the condition of things at the time when the chur was first formed and the terms of S. 4 (3); but before applying this section the Court must determine whether the bed of the river in which the chur is formed belongs to the public or to some individual. *Mukherji, A. C. J. and Fletcher, J.*) SURENDRA NATH MITRA *v.* SECRETARY OF STATE. **60 I. C. 395 (Cal.).**

BENGAL, ASSAM AND AGRA CIVIL COURTS ACT (XII of 1887).

——S. 20—*The section deals with* forum *of appeal only.*

The section does not give right of appeal from every order of a Dt. Judge to the High Court. It merely deals with the *forum* of appeal. (*Dawson Miller, C. J. and Foster, J.*) BIBI WASLUHAN *v.* MIR NAWAB ALI. **3 Pat. 1018 : A. I. R. 1925 P. 138.**

BENGAL CESS ACT (IX of 1880).

——Ss. 5, 41, 52 and 64—*Arrears of cess—Sale of holding—Prior encumbrances are not affected—Rent free tenure—Liability to pay cess—Notice—Presumption.*

Where a holding is sold in execution of a decree for cess the purchaser obtains only the right, title and interest of the tenant. The purchaser does not hold the property free of encumbrances created by the tenant prior to the sale nor could he annul the encumbrance. 25 C. 179 ref. The liability to pay road cess does not by itself create a charge on the property. It is a personal liability enforceable under the Public Demands Recovery Act by the sale of the judgment-debtor's interest. 30 Cal. 778 foll. In the case of a rent free tenure the liability to pay cess to the superior landlord arises only when the requirements of Chap. IV of the Act are complied with by the publication of the extract from the valuation roll. There is no presumption under S. 114, illustration (*c*) of the Evidence Act with respect to notices prescribed by S. 52 of the Cess Act. The *onus* is on the person claiming the right to the payment of the cess to prove that the formalities prescribed by the Act have been complied with. 13 Cal. 19; 25 Cal. 727; 15 Cal. 327 foll. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHURY *v.* RAHMAT ALI. **1 Pat. 218 : 1922 P. H. C. C. 167 : 3 Pat. L. T. 282 : 65 I. C. 138 : A. I. R. 1922 P. 303.**

——S. 17—*Revaluation—Mode of enquiry.*

When the cultivated area shown in a return is less than the area shown in the Settlement Register, and

BENGAL CESS ACT, (IX OF 1880), S. 95.

the decrease is not satisfactorily explained by the maker of the return, then the Revaluation Officer should add the deficit to Part I and value it accordingly. The proprietor is of course bound by the notice under S. 17 to state the whole area of his estate, and the fact that land is temporarily diluviated does not remove it from the area to be accounted for. On the other hand, the explanation is one that ought to be properly examined, and the assessment made on the facts ascertained. (*Morshead, M. C.*) KESHO NARAIN SINGH *v.* EMPEROR. **2 Pat. L. R. 48 (Cr.).**

——S. 20—*Road cess return—Right of landlord to recover rent at a higher rate—B. T. Act, Ss.* 105 *and* 109 *A.*

S. 20 of the Cess Act, 1880, is not a bar to the landlord recovering rent at the rate settled in a proceeding under S. 105 of the Bengal Tenancy Act, 1885, when the road cess return showing a lesser rate was filed prior to such proceeding. (*Coutts and Ross, JJ.*) NAZIR RAI *v.* KESHO PRASAD SINGH. **6 Pat. L. J. 622 : 1922 P. H. C. C. 57 : 65 I. C. 3 : 3 Pat. L. T. 141 : 4 U. P. L. R. (Pat.) 23 : A. I. R. 1922 P. 55.**

——S. 41—*Patni lease.*

Parties can contract themselves out of the provisions of S. 41 of the Cess Act. (*Richardson and Suhrawardy, JJ.*) RAJA BHUPENDRA NARAYAN SINHA *v.* MIDNAPORE ZEMINDARI CO. **A. I. R. 1922 Cal 300.**

——S. 41—*Lands held on payment of rent in kind—Liability to pay cess,*

Irrespective of whether rent is payable in cash or in kind, cess is payable in respect of all lands held by a cultivating raiyat, (*Brett, J.*) JOGESH CHANDRA ROY *v.* ANNADA CHARAN CHOWDHURY. **68 I. C. 662 : 26 C. W. N. 368.**

——S. 41—*Raiyat must pay cess to landlord.*

Under the provision of S. 41 of the Cess Act every cultivating raiyat is to pay to the person, to whom his rent is payable one half of the road cess. (*Das and Ross, JJ.*) KESHEO PRASAD SINGH *v.* RAMDEA KUAR. **87 I. C. 439 : 6 P. L. T. 214 : A. I. R. 1925 P. 473 (1).**

——Ss. 41, 42—*Liability to pay cess—Determination.*

The liability to pay cess under S. 41 must be determined according to the entries in the Cess Valuation Report. Civil Courts have no jurisdiction to interfere with it. (*Ross, J.*) KESHO PRASAD SINGH *v.* RAM SWARUP AHIR. **90 I. C. 621 (Pat.).**

——S. 41—*Contract to pay cess is not illegal.*

Neither S. 41 nor any other section of the Act prohibits or renders illegal a contract to pay cess. 3 C. L. J. 337 foll. (*Jwala Prasad and Ross, JJ.*) PITAMBAR CHOWDHURY *v.* RAHMAT ALI **3 Pat. L. T. 282 : 1 Pat. 218 : 65 I. C. 138 : 1922 P. H. C. C. 167 : A. I. R. 1922 P. 303.**

——S. 54—*Notice under, is a condition precedent to recovery of cess.* (*Ross, J.*) MURLI MANOHAR *v.* RAJA NAND SINGH. **72 I. C. 1 (P.). A. I. R. 1924 Patna 205.**

——S. 93— Conclusiveness of valuation — If modified by S. 107. KESHO PRASAD SINGH BAHADUR *v* RAM SWARUP AHIR. **90 I. C. 621.**

——S. 95—*Return cannot be used in favour of person making statements therein—Evidence Act, S.* 21.

S. 95 of the Cess Act restricts the provisions of S. 21 of the Evidence Act and makes the exception to that section inapplicable to the case of these returns. A return cannot be used under any circumstances in favour of the person making it but it can be used by

BENGAL CESS ACT (IX OF 1880), S. 95.

others for a purpose not directly connected with the statements made in the return. (*Suhrawardy and Chotzner, JJ.*) CHANDRA MOHAN MAITI *v.* KINARAM MAITI. **79 I. C. 412 : A. I, R. 1925 Cal. 408.**

——S. 95—*Statement in Return that land is in khas possession of landlord is not always accurate—Evidence Act, S. 32.*

The genesis of S. 95 of the Cess Act is traceable to a tendency on the part of landlords to describe lands though in the occupation of tenants, as in their Khas possession for some possible ulterior purpose. A statement, therefore, that certain land is in the Khas possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a Return by invoking the aid of S. 32 of the Evidence Act or some other adjective law. (*Suhrawardy and Chotzner, JJ.*) CHANDRA MOHAN MAITI *v.* KINARAM MAITI. **79 I. C. 412 : A. I. R. 1925 Cal. 408.**

——S. 107—*Scope of—If modifies S. 93.*

Under S. 107, what is done under the Cess Act is done only for the purposes of that Act and has no other effect on the rights of the persons. The section does not in any way modify the conclusive effect given by S. 93 to the cess valuation. (*Ross, J.*) KESHO PRASAD SINGH BAHADUR *v.* RAM SWARUP AHIR. **90 I. C. 621 (Pat.).**

BENGAL CHOWKIDARI ACT (VI OF 1870).

——S. 51—*Chaukidari Chakran Lands, resumed by Government and transferred to Zamindars under S. 51—Plaintiff claiming possession under a prior pottah from Zamindar—Plaintiff is entitled to possession only on payment of additional rent.*

In a suit to recover possession from the Zamindar of certain villages in Putni settlement of Chaukidari Chakran lands which had been resumed by the Government under the provisions of Bengal Act VI of 1870, and were transferred to the Zamindar subject to the payment of rent assessed on the lands in accordance with S. 51 of the Act, the plaintiffs (respondents) alleged that by a pottah of a previous date the appellant Zamindar granted certain villages in Putni settlement at a certain annual rent to the plaintiffs. The defendant Zamindar contended that the plaintiffs were not entitled to get possession thereof without paying some rent in addition to the annual rent fixed in the pottah. *Held*: that the plaintiffs were entitled to obtain Khas or actual possession of the lands in suit, but that they could not do so without paying an additional rent to the Zamindar. 44 Cal. 841 (P. C.) and 46 Cal. 173 (P. C.) Expl. and Cons.; A. I. R. 1925 Cal. 651 Appr. (*Lord Carson.*) BHUPENDRA NARAYAN SINGH *v.* NARAPAT SINGH. **42 C L. J. 272 : (1925) M. W. N. 724 : A. I. R. 1925 P. C. 226 (P. C.).**

——S. 51—*Transfer of Chaukidari Chakran lands to zamindar by Government—Putnidar cannot hold rent free.*

S. 51 does not entitle a putnidar upon resumption and transfer of chaukidari chakran lands by Government to the zamindar to hold the lands rent free. Its scope is to sustain the contract between the Zamindar and the putnidar under which the putnidar is entitled to possession of the lands as part of his tenure. (*Suhrawardy and Cuming, JJ.*) PROYAMBADA DEBI *v.* MONAHAR MUKHOPADHYA. **52 Cal. 576 : 86 I. C. 781: 29 C. W. N. 328 : A. I. R. 1925 Cal. 651.**

BENGAL CIVIL COURTS ACT (XII OF 1887).

See also UNDER BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT.

——S. 13 (2)—*Civ. Pro. Code, Ss. 37 and 38—Execution of decree—Decree not transferred—Immovable property within another Court's jurisdiction as assigned by D. J—Jurisdiction of Court passing decree, as conferred by Local Government extending to the property—Latter Court can attach same.*

The District Judge cannot by any order under S. 13 (2) take away the jurisdiction of a Court to execute a decree passed by it, when (the execution case not having been transferred by it to any other Court) it is the only Court which can execute it under the provisions of S. 38 read with S. 37 of the Civil P. C. A decree was passed by a certain Munsiff's Court. The Court's territorial jurisdiction conferred by the Local Government under S. 13 (1) extended over the immoveable property sought to be attached. But the property was situate within the jurisdiction of another Munsiff's Court as assigned by the District Judge, under S. 13 (2) of the Civil Courts Act. The execution case was not transferred to any Court.

Held, that the Court which passed the decree had jurisdiction to attach the property. (*Chatterjee and Chotzner, JJ.*) ASIRUDDIN MONDAL *v.* RAM SHAKHI DEBYA. **41 C. L. J. 166 : 86 I. C. 775 : A. I. R. 1925 Cal. 679.**

BENGAL COURT FEES (AMENDMENT) ACT (IV OF 1922).

——*Grant of letters of administration—Property outside Bengal—Levy of fees—Legality.*

Under the provisions of S. 80-A. (1) of the Government of India Act, the Local Legislature has power to make laws for the peace and good government of the territories of the Province, and under S. 80 A. (2) the Local Legislature may, subject as therein mentioned, that is to say, subject to the limitations mentioned in (3), repeal or alter as to that Province any law made before or after the commencement of the Act by any authority in British India. The limitations imposed by S. 80 (3) relate (*a*) to the imposition of new taxes other than those set out in Sch. I of the Scheduled Taxes Rules. It is quite true that duties, which are collected by means of stamps are in a sense stamp duties, for instance in England, estate duty, probate duty and succession duty are stamp duties because they are so collected; but it is doubtful whether a Court-fee becomes a stamp duty within the meaning of the Scheduled Taxes Rules, Sch. I, because it is collected by means of stamps. The stamp duties referred to in Sch. I mean some such duties as are imposed by the Indian Stamp Act, and do not comprise court-fees comprised in the Court Fees Act, even although in a sense they are stamp duties as being paid by stamps. The sum charged upon a grant of probate or of letters of administration is not a tax or duty levied upon the property upon which the probate or administration operates. and it is not charged thereon as is estate duty in England, but it is merely a fee levied by the Court issuing the probate or letters of administration for the work done in this connection. This is so in spite of the fact that the fee is levied upon the value of the property. Court-fee on probate or letters of administration is rightly levied at the enhanced rate on the value of all assets whether in the province or outside. (*Greaves, J.*) GEORGE THOMAS WILLIAMS, IN THE GOODS OF. **50 Cal. 597 : 27 C. W. N. 812 : 75 I. C. 466 : A. I. R. 1924 Cal. 115.**

BENGAL COURT OF WARDS ACT (IX OF 1879).

——*Manager—Lease for more than ten years—Grant of—Conditional acceptance of rent—Effect of—Subsequent suit by wards for ejectment.*

In 1906 the General Manager of the Court of Wards granted a patta in respect of land measuring about 800 bighas in favour of the defendants. Before the grant the manager wrote to the Collector proposing a

BENGAL COURT OF WARDS ACT (IX OF 1879), S. 51.

settlement for a term of ten years with the defendants on condition that they should pay a progressive rent, construct and maintain embankments at their own expense. On a report made by the Collector, the Commissioner accorded sanction. The patta granted to the defendants by the Manager contained a clause authorising the defendants to acquire a right of occupancy in the land and giving the Court of Wards no power either to dispossess them from the land at will or to enhance the rent thereof without recourse to law. The patta also recited that the rights thereunder would vest in the heirs of the grantees. After the expiry of the term of ten years the General Manager of the Court of Wards, acting as guardian of the Wards, sued in ejectment

Held, that the lease in so far as it purported to confer permanent rights of occupancy or to create a term exceeding ten years, was void as against the plaintiffs. The Manager had no authority to grant a lease so as to enure for more than ten years and the lease was therefore void in so far as it exceeded that limit. The defendants however were entitled to compensation for the embankments they have constructed and the improvements they had effected. (*Richardson and Shamsul Huda, JJ.*) MUKBUSOR RAHAMAN CHOWDHURY *v.* RAJ LAKHI DEBYA.

81 I. C. 744 : 39 C. L. J. 102.

——S. 51—*Manager of Court of Wards—Appointment of guardian* ad litem *of minor ward.*

Where the manager of the Court of Wards applies to be appointed guardian *ad litem* of the minor ward in execution proceedings, he should forthwith be appointed. (*Newbould and Ghose, JJ.*) KHAJEH SALALUDDIN *v.* AFZAL BEGUM. **28 C. W N. 963 : 39 C. L. J. 590 : A. I. R. 1925 Cal. 23.**

——S. 60—*Relinquishment by Hindu widows—When prohibited.*

S. 60 of the Court of Wards Act constitutes a prohibition on the power of a Hindu widow to relinquish the estate in her possession without the concurrence of the Court of Wards under certain circumstances only. If the transfer is not really one of relinquishment but a voluntary act of transfer, then S. 60 will apply. (*Das and Kulwant Sahay, JJ.*) MAN SINGH *v.* NAWALAKHBATI. **2 Pat. 607 : 4 P. L. T. 335: 73 I. C. 822 : A. I. R, 1923 P. 492**

BENGAL ELECTORAL RULES.

——R. 29—*Doubt as to the rule is to be resolved by Governor.*

The power conferred on the Local Government by Rule 29 of the Bengal Electoral Rules is a discretionary one and if there be a doubt as to the true intention of that rule that doubt is to be resolved by the Governor. (*Sanderson, C. J. and Richardson, J.*) MANINDRA CHANDRA *v.* PROVAS CHANDRA.

51 Cal. 279 : 39 C. L. J 58 : 79 I. C. 1042 : A. I. R. 1924 Cal. 761.

——R. 31—*Effect of—High Courts power under S. 45, Specific Relief Act.*

Rule 31 of the Bengal Electoral Rules which provides that no election can be called in question except by way of an election petition takes away the power of the High Court under S. 45, Specific Relief Act to direct the Returning Officer to do his duty as specified. (*Sanderson, C. J. and Richardson, J.*) S. N. HALDER *v.* S. N. MALLIK.

28 C. W. N. 127 : A. I. R. 1924 C. 454.

BENGAL EMBANKMENT ACT (II OF 1882).

——S. 68—*Order of Collector for payment of lump sum without instalments is binding in Courts though erroneous.*

BENGAL ENCUMBERED ESTATES ACT (VI OF 1876).

An order for apportionment was made by the Collector as between the proprietors on the one hand and the tenure-holders on the other. This order was made after due service of notice on the tenure-holders. The order was defective inasmuch as it specified merely the amount payable by the tenure-holder and the proprietors, but did not specify the instalments and the dates on which the sum included in each instalment was to be made payable. This final order was served upon the tenure-holder. It is remarkable that no exception was taken to this order, though it was manifestly erroneous whether by the proprietors or by the tenure-holders. The proprietors paid the amount due to the Collector in one instalment in accordance with that order. They then instituted the present suit for recovery of the amount from the tenure-holders. The tenure-holders objected that they were not liable to pay the entire amount in one instalment. The Courts below have made a decree in favour of the plaintiffs, only in respect of such sums as would have been payable by the tenure holders if an order of payment by instalments had been correctly made by the Collector under section 68. *Held* the Courts below had in substance replaced the actual order of the Collector by an order which should have been made by him and that it was not open to the court below to adopt this method of giving relief to the plaintiffs. (*Mookerjee and Chotzner, JJ.*) KUMAR ARUN CHANDRA SINHA *v.* MAN MOHAN SINHA ROY.

37 C. L. J. 585 : 70 I. C. 784 (2) : A. I. R. 1924 Cal. 154.

——S. 78—*Act of accused need not be* mala fide.

In order to support a conviction under S. 78 on the ground that the accused by any wilful act destroyed or diminished the efficiency of an embankment, it is not necessary that there should be a finding that the accused acted *mala fide.* (*Newbould and B. B. Ghose, JJ.*) EXECUTIVE ENGINEER, NADIA RIVERS DIVISION *v.* ASHUTOSH.

52 Cal. 573 : A. I. R. 1925 Cal. 921.

—— S. 87—*Embankment— Disposal of land—Claim—Burden of proof.*

S. 87 applies to all public embankments inclusive of the embankments enumerated in Sch. D to the Act of 1873 and the onus lies on the person claiming the abandoned embankment to establish that the site was originally taken from his estate of tenure. If the embankment was erected after the Permanent Settlement it may be possible to raise a presumption in favour of the claimant that the site was taken out of his estate. But where nothing is known as to the time of the erection of the embankment, no presumption arises that the embankment stands on a site which was included within the estate of the defts at the time of the Permanent Settlement. (*Mookerjee and Panton, JJ.*) BHUBAN MOHAN SARDAR *v.* DHANGOPAL GHOSE.

84 I. C. 22 : 39 C. L. J. 577

BENGAL ENCUMBERED ESTATES ACT (VI OF 1876).

—*Does not apply outside Chota Nagpur.*

The Chota Nagpur Encumbered Estates Act (Bengal) (VI of 1876) does not apply to immoveable property outside Chota Nagpur. That being so, the Act cannot in any case apply to properties in the district of Midnapur. 45 I. A, 105. Foll. (*N. R. Chatterjea and Chotzner, JJ.*) PROTAPCHANDRA DEO DHANBAL DEB *v.* JAGADISHCHANDNA DEO.

40 C. L. J. 331 : 82 I. C. 886 : A. I. R. 1925 Cal. 116.

—— *Language of the Act is obscure.*

The Act is so framed as to render it not easy to construe ; the language of the Act is obscure. (*N. R.*

BENGAL ENCUMBERED ESTATES ACT (VI OF 1876).

Chatterjea and Chotzner, JJ.) PROTAPCHANDRA DEO DHANBAL DEB *v.* JAGADISHCHANDRA DEO.

40 C. L. J. 331 : 82 I. C. 886 : A. I.R. 1925 Cal. 116.

———*Object is to relieve embarrassed landholders in Chota Nagpur—Scheme and Scope explained.*

The preamble defines the purposes of the measure as the provision of relief to holders of land in Chota Nagpur who may be in debt and whose immoveable property may be subject to mortgages, charges and liens. Under S. 2 of the Act what is vested in the manager is the management of the property, and the provisions of the Act are all directed towards securing the effective control of the estate by the manager. The holder of the estate is prohibited from mortgaging, charging, leasing or alienating his immoveable property ; or entering into any contract which may involve him in pecuniary liability and the property is exempt from attachment and sale so long as such management continues. Without such prohibitions the management could not proceed nor could the scheme for discharge of the debts and liabilities be carried out. But a testamentary disposition cannot interfere with management by the manager. The Act creates a sort of administration of the immoveable estate of a debtor in some respects resembling that pursued in an administration suit but with the material difference that whereas in an administration suit, the satisfaction of the claims of the creditors is primarily in view, in proceedings under the Act, the protection of the debtor and the protection of his estate so far as practicable, in spite of its encumbered condition, is the main solicitude of the authorities concerned. Scheme and Scope of the Act explained. 20 Cal. 609 Ref. (*N. R. Chatterjea and Chotzner, JJ.*) PROTAPCHANDRA DEO DHANLAL DEB *v.* JAGADISH CHANDRA DEO. **40 C. L. J. 331 : 82 I C. 886 : A. I. R. 1925 Cal. 116.**

———*Estates in involved condition—Income not sufficient to pay interest on the debt—Government's policy.*

Though it is open to a proprietor to sell a portion of the Estate, there is no reason why the estate should be protected under the Encumbered Estates Act, if the debts can be paid by a sale.

The present policy of Government is to release all estates, the scheme of which are not satisfactory. It is impossible to protect under the Encumbered Estates Act any new estates unless satisfactory schemes can be framed for the payment of their debts. (*Foley, J.*) MADAN MOHAN SINGH, *In re.* **2 Pat.L. R. 225 (Cr.)**

———**Ss. 3 (thirdly) (b), 5 and 6**—*Decree against Manager—Notice of claim need not be given.*

In a decree against the Manager of an incumbered estate, the decree-holder need not notify his claim to the Manager as Ss. 3 (thirdly) (b) 5 and 6 does not apply to such decree. (*Dass and Ross, JJ.*) BURTON OF MIDNAPORE ZEMINDARY CO.

61 I. C. 902 (Pat.)

———**Ss. 12-A. and 3**—*Only alienations* inter vivos *and not wills are referred to.*

S. 12-A refers to alienation *inter vivos* and not to wills. And if the expression "alienate" has been used in that sense in S. 12 A, it should be taken to have that meaning in S.3 also, unless it is clear that some other meaning was intended. (*N. R. Chatterjea and Chotzner, JJ.*) PROTAPCHANDRA DEO DHANBAL DEB *v.* JAGADISHCHANDRA DEO.

40 C. L. J. 331 : 82 I.C. 886 : A.I. R. 1925 Cal. 116.

——— **Ss. 23 and 12**—*Though under the Act the estate is to be restored at end of management, only to the heir, he can be ousted through a Civil Court by a devisee.*

BENGAL ESTATES PARTITION ACT (V OF 1897), S. 5.

It is true the Act recognizes only the heir and not the devisée, and the restoration of the estate is to be made to the heir on the death of the holder. But under S. 23, the Civil Courts in Chota Nagpur have jurisdiction to entertain and dispose of suits relating to the succession to immoveable property. "Succession" would include intestate as well as testamentary succession, so that although the heir would be restored to possession and a person claiming under a testamentary disposition would have to establish such claim in the Civil Court the possession of the heir would be subject to the result of such suit. (*N. R. Chatterjea and Chotzner, JJ.*) PROTAPCHANDRA DEO DHANLAL DEB *v.* JAGADISHCHANDRA DEO.

40 C. L. J. 331 : 82 I. C. 886 : A I. R. 1925 Cal. 116.

BENGAL ESTATES PARTITION ACT (VIII OF 1876)

———**S. 119**—*Decision of Revenue authorities—Partition—Effect of.*

A partition under Act VIII of 1876 deals with the rights of proprietors and so far as *raiyati* lands are concerned, they are only entitled to a distribution of rents. It could not have been the intention of the Act that rights of tenants should be conclusively determined by the Record of Rights prepared for the purpose of partition. Decisions of Revenue authorities as to the extent or otherwise of the tenure cannot conclude questions of title in Civil Courts. (*Das and Ross, JJ.*) SUBHEDAR RAI *v.* RAMBILAS RAI. **90 I. C. 817.**

———**(V OF 1897), S. 4 (2)**—*No time limit for application to form separate estate to be jointly held.*

The terms of S. 4 (2) of the Act clearly show that it is open to one or more co-sharers to ask that their interest shall be formed into one separate estate to be held as a joint undivided estate. There is no limitation as regards the stage at which such an application can be made and therefore there is no irregularity in the Court entertaining an application even after he has made the general arrangement and given each of the co-sharers a separate block. (*Mullick and Ross, JJ.*) RADHA KANTO PARHI *v.* MATHURA MOHAN PARHI. **2 P. 403 : A. I. R. 1924 Patna 187.**

———**Ss. 5 (3), 30 and 115**—*Applicability of—Mode of partition—Right to share in entire estate and in specified* mouzas.

Sub-clause (3) of Section 5 applies only to cases where a proprietor, having an undivided share, held in common tenancy in specific *mouzas*, which formed part of the parent estate but where he has no interest which extends over the whole estate ; in other words, it applies to proprietors who have an interest in some, out of the total number of villages which constituted the estate. If he has a share in the remainder also, then it follows that he has a fractional interest in the entire estate as well as a fractional interest in a part, the latter fractional interest being the difference between the larger and the smaller interest; that is to say if he has a half share in twenty *mouzas*, and a one-sixth share in fifty-four *mouzas*, it must be held that he has a one-sixth share in the entire estate and in the twenty *mouzas* a fractional interest represented by the difference of one-half and one-sixth. A proprietor of a *mahal* comprising of two *mouzas* and who possesses a fractional interest in each, is not entitled to claim an allotment in each *mouza* representing his assets in that *mouza*; such a construction would defeat the entire principle of compactness where there are

BENGAL ESTATES PARTITION ACT (V OF 1897), S. 7.

many villages and when the proprietor holds a different fractional interest in each. (*Mullick and Ross, JJ.*) RADHAKANTO PARHI *v.* MATHURA MOHAN PARHI. **2 Pat. 403: A. I. R. 1924 P. 187.**

——S. 7—*Private partition—Large area left undivided—If bars partition by Collector.*

Where at a prior private partition, a comparatively large area was left undivided, it does not bar a subsequent partition before the Collector. (*Das and Ross, JJ.*) QAMAR HUSAIN *v.* ABBAS ALI. **3 Pat. 614: 78 I. C. 653: A. I. R. 1924 P. 594.**

——S. 7—*Formal document is not necessary to prove partition.*

The production of a formal document showing partition is not necessary to establish a previous partition. Such a partition may well be assumed from the facts proved. (*Miller, C. J. and Mullick, J.*) NARSINGH THUKUR *v.* BISHUNPERGASH. **4 Pat. L. T. 629: 1924 P. H. C. C. 21: 75 I. C. 1036: A. I. R. 1924 Patna 209.**

——S. 7—*Private partition—Settlement records—Evidence—Bar to partition by Court.*

Where lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate, no partition of the estate should be made under Act V of 1897. But the burden of proving such a private partition is on the persons setting it up. The distribution disclosed by the Settlement Record must be shown to be the result of a formal partition and not the embodiment of a mutual arrangement. (*Morshead, M. C.*) MAULVI MAHOMED *v.* BABU CHANDRA BANSI SAHAY. **2 Pat. L. R. 116 (Cr.).**

——S. 7—*Fractional sharer—Application for partition of mahal.*

The appellants who were registered for 2 *annas* 8 *dams* in village Bhusaula applied for partition. The respondents were registered for 8 *annas* 16 *dams* in the same village and they objected on the ground of a private partition of this village. The Settlement Record showed an old accepted partition. *Held*, that the principles of S. 7 should be applied because the parties concerned having specific shares in this village would under a partition receive allotments in this village only, and the objections to the disturbance of the private partition are as strong as in a case in which the whole of the estate is concerned. (*Morshead, M. C.*) SAHIB SINGH *v.* FAUJDAR SINGH. **2 Pat. L. R. 89 (Cr.).**

——S. 23—*Scope of.*

S. 23 contemplates an objection relating to a question of right or title or extent of interest as between any applicant and any other person claiming to be a proprietor of the estate. (*Das and Kulwant Sahay, JJ.*) KULDIP SAHAY *v.* RAJKUMAR SINGH. **1 Pat. L. R. 386: 4 Pat. L. T. 633: 75 I. C. 1046: A. I. R. 1924 Pat. 211.**

——S. 25—*Suit for declaration of prior valid private partition is maintainable.*

Where, in proceedings before the Collector for partition, it was objected that a prior private partition had taken place, but was disallowed and the objectors filed a suit for a declaration that on account of the prior private partition a Revenue Court had no jurisdiction to grant the same. *Held*, the suit was not barred under S. 25, Estates Partition Act. (*Das and Kulwant Sahay, JJ.*) KULDIP SAHAY *v.* RAIKUMAR SINGH. **1 Pat. L. R. 386 · 4 Pat. L. T. 633: 75 I. C. 1046: A. I. R. 1924 Pat. 211.**

BENGAL ESTATES PARTITION ACT (V OF 1897), S. 81.

——S. 25—*Applicability—Only to persons claiming right to parent estate.*

S. 25 of the Bengal Estates Partition Act is applicable only to suits by the persons claiming right or title to a parent estate mentioned in S. 23. A case where plff. claims that the Collector had no jurisdiction to partition is not governed by it. (*Miller, C. J. and Mullick, J.*) NARSINGH THAKUR *v.* BISHUNPERGASH. **4 Pat. L. T. 629: 1924 P. H. C. C. 21: 75 I. C. 1036: A. I. R. 1924 P. 209.**

——S. 25—*Declaratory suit—Section does not apply.*

S. 25 of the Act has no application to a suit for declaration that there was such a partition as is contemplated by S. 7 of the Act and that the Collector be restricted from taking further action to make the partition. (*Jwala Prasad, J.*) NAR SINGH THAKUR *v.* BISHEN PARGASH SINGH. **1 Pat. L. R. 258: 74 I. C. 642: A. I. R. 1923 P. 441.**

——S. 25—*Order under S. 29—Suit to contest must be brought within 4 months.*

Under S. 25 of the Act. a suit to contest an order under S. 29, must be brought within four months of the date of the order. (*Das and Adami, JJ.*) BADRI NARAIN *v.* SUBHAKARAN MISSER. **6 P. L. J. 41: 61 I. C. 90: 2 P. L. T. 130.**

——S. 49—*Sairat Rent—Assets—Calculation of—Record of rights.*

In view of considerable difficulty and uncertainty in realising Sairat rent, the value of Sairat rent is not equivalent to the assets of ordinary rent. Acceptance by a co-sharer of the system of valuation before the papers were adopted under S. 49 does not operate as an estoppel. Equity could only be ensured by a reasonably approximate distribution of the risk. (*Morshead, M. C.*) MEGHRAJ MARWARI *v.* MUNSHI KALI SAHAI. **1 Pat. L. R. 259 (Cr.).**

——S. 57—*Evidence of partition—Long possession and acquiescence is sufficient.*

Where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors-in-inserest were parties to the partition, Where the parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings were lost in antiquity is no reason for disturbing divisions which existed for a long period. Although no deed of partition can be produced and from lapse of time no direct evidence of partition could be given, yet very long possession and acquiescence in the separate holding of the lands in the estate are sufficient to prove that there was a complete partition. 3 P. L. J. 188 Foll. (*Jwala Prasad, J.*) NARSINGH THAKUR *v.* BISHUN PARGASH SINGH. **74 I. C. 642: 1 Pat. L. R. 258: A. I. R. 1923 P. 441.**

——S. 59 (2)—*Discrepancy between partition papers and map—Former must prevail.*

Where there is a discrepancy between the entries in the partition papers and the map, the former should be relied on, as the map can only delineate the allotments in the paper. (*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA. **28 C. W. N. 46: A. I. R. 1924 Cal. 245.**

——Ss. 81, 119—*Order under S. 81, can be set aside in a suit—It is not a nullity unless so set aside.*

A suit does lie to set aside an order made under S. 81 if it turns out that by that order a tenure or holding has not been split up but an amalgamation of tenures and holdings has been divided contrary to the meaning of section. In such a suit it would be no answer at all to say that the Deputy Collector had jurisdiction to

BENGAL ESTATES PARTITION ACT (V OF 1897). S. 82.

enquire into the facts and that if he has found the facts wrongly his order cannot be interfered with For the purposes of such a suit it seems reasonable to say that the Deputy Collector could not give himself jurisdiction under S. 81 by coming to a wrong finding of fact. On ordinary principles a suit in the Civil Court to set aside such an order would be necessary because it is an order which as between the proprietors certainly has some value and which ought only to be set aside in the presence of all the proprietors, every one of whom is vitally interested in the matter. It is going too far to say that that order is to be regarded as a mere nullity, so that, although the tenants have had notice and although the landlords have had to act upon the order for a substantial time it can be ignored or set aside as against a single landlord in answer to a suit for rent.

Per *Page, J.—Quære.*—Whether a tenant or other person aggrieved by an order under S. 81, is entitled to challenge that decision otherwise than by the methods provided in the Estates Partition Act. (*Rankin and Page, JJ.*) SATISH CHANDRA CHATTERJEE *v.* KALI CHARAN CHOWDHARI. **29 C. W. N. 221 : A. I. R. 1925 Cal. 437.**

——**S. 82**—*Order under does not bar jurisdiction of Civil Court.*

An order of a Revenue Commissioner, declaring that certain lands are not liable to partition under S.82 of the Act, is no bar to partition by a Civil Court under the general law. (*Jwala Prasad, C. J. and Ross, J.*) JITABHANDAN *v.* SUDHA KUER.

63 I. C. 361 : 2 P. L. T. 342 : 1921 P. H. C. C. 342.

——**Ss. 94 and 95**—*Partition—Effect of—Separate accounts—Contract Act, S. 56—Applicability of.*

Ss. 94 and 95 would seem to imply that the separate accounts can have no further existence after a partition, because section 94 provides for the separate liability of the separate estate for the amount of land revenue specified in the notice to be issued under that section and requires the proprietor to enter into a separate engagement for the payment of such land-revenue, and section 95 enacts that from the date of the notice each separate estate shall be separately liable for the amount of land-revenue assessed upon it under the Act. If any further protection is required by way of separate account, it would seem that a separate account must be freshly opened. A partition of an estate does not have the effect of destroying separate accounts. (*Das and Ross, JJ.*) BENARSI PRASAD *v.* MOHIUDDEEN AHMAD. **3 Pat. 581 : A. I. R. 1924 Patna 586.**

——**S. 99**—*'Portion of estate' includes a specific portion.*

The principle enunciated in the section merely follows the well-recognized principle, namely, that an encumbrance of an undivided share of an estate is transferred to the lands allotted to the share of the person who created the encumbrance on a partition with his cosharers. The words 'portion of an estate' in the section are wide enough to include cases where a specific portion of the estate is let out in putni, a co-sharer's share in any definite plots of land included in a joint estate being as much "a portion of share" as an aliquot part of a share is, though the illustrations to the section lend support to the opposite view. (*N. R. Chatterjea and Graham, JJ.*) DINA NATH SAHA ROY *v.* JADU NATH BISWAS.

29 C. W. N. 202 : A. I. R. 1925 Cal. 456.

——**S. 99**—*Applicability of—Grant of tenure right—Private partition—Partition under the Act.*

The main test of applicability of Section 99 is holding the land in severalty under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under Section 7. (*Newbould and Panton, JJ.*) PROSANNA KUMAR BEDANTA TIRTHA BHATTACHARJYA *v.* MADHU BADYA.

68 I. C. 500 : A. I. R. 1923 Cal. 279.

——**S. 99**—*Mortgage of specific property—Section does not apply—T. P. Act, S. 68 (c).*

The mortgage granted in this case was a mortgage not of the mortgagor's share in the entire estate belonging to a joint Hindu family but of specific lands of which the mortgagors were in possession by an agreement with their co-sharers. *Held* that the provisions of S. 99 of the Estates Partition Act had no application to such a case. The section which governs in the case is S. 68, clause (c) of the Transfer of Property Act which provides that where the mortgagee being entitled to possession of the property the mortgagor fails to deliver the same to him or to secure possession thereof to him without disturbance by the mortgagor or any other person then in such a case the mortgagee has a right to sue the mortgagor for the mortgage money. Where after the partition the plaintiffs mortgagees were dispossessed of the property of which they were in possession under the Zarpeshgi, they could not resist that dispossession, and therefore they were bound to give up possession, and the result is that the mortgagors have failed to secure the possession of the property to the mortgagees and in such a case the statute expressly provides that the mortgagees have a right to sue for the mortgage-money. (*Miller, C. J. and Kulwant Sakay, J.*) RAMNANDAN PARBAT *v.* DENI SAHAL. **5 P. L. T. 26 : 74 I. C. 877 : 1 Pat. L. R. 366 : A I. R. 1924 P. 91.**

——**Ss. 119 and 94**—*Collector refusing to put party to partition in possession of land allotted to him—Suit in Civil Court to recover the land can be brought.*

Where a party to a partition applies to the Collector to give effect to the partition and give him (the applicant) possession of certain land and the Collector refuses the application, the applicant can bring a suit in the Civil Court for recovering what was allotted to him at the partition (*Suhrawardy and Duval, JJ.*) SIR WASIF ALI *v.* SARADINDA NARAIN.

29 C. W. N. 839 : 89 I. C. 193 : A. I. R. 1925 Cal. 953.

——**S. 119**—*Civil Court cannot question correctness of order in partition proceedings.* (*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA. **28 C. W. N. 46 : A. I. R. 1924 Cal. 245.**

——**Ss. 119 and 49**—*Suit for possession in Civil Court—Maintainability of.*

When the Survey Record of Rights showed the plffs. as in possession of the purchased holding under S. 22 (2) of the B. T. Act, and the batwara khatian, which was based upon it under S. 49 of the Estates Partition Act, also showed them as in possession, but the possession of the lands having been delivered over to the defendants and an order under S. 144, Cr. P. Code, having also been passed against the plaintiffs they brought the present suit. *Held*, that S. 119 of the Estates Partition Act was not a bar to the maintainability of the suit. 3 P. L. W. 226 Dist. (*Jwala Prasad, A. C. J. and Das, J.*) NAND KISHORE SINGH *v.* MATHURA SAHU **65 I. C. 586 ; 3 P. L. T. 13 : A. I. R. 1922 P. 193.**

BENGAL FERRIES ACT (I OF 1885).

——**S.5**—*"Ferry"—Two points on two sides of the river for conveying persons and property are necessary.*

BENGAL FERRIES ACT (I OF 1885), S. 16.

In order to constitute a ferry such as is contemplated by the Act, it is necessary that there should be two points on both sides of the river so that people and property may be conveyed from one side of the river to the other. It must be connected on both sides with land on the bank of the river. (*Jwala Prasad, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **4 Pat. 503 : A. I. R. 1925 P. 623.**

——Ss. 16 and 28—*Only maintenance of ferry is not criminally punishable—Conveying persons and property in addition is an offence—Each trip is separate offence.*

The maintenance of a private ferry is in contravention of S. 16 of the Act for which the person maintaining it may be liable for damages and also an injunction may issue against him If, in addition, to maintaining such a prohibited private ferry he carries passengers and property for hire he is liable criminally under S. 28 of the Act and each trip as a separate offence. (*Jwala Prasad, J.*) JEOBARAN SINGH *v.* RAMKISHUN LAL. **4 Pat. 503 : A. I. R. 1925 P. 623.**

BENGAL FOOD ADULTERATION ACT (VI OF 1919)

——S. 6—*Prosecution—Chairman of Municipality cannot sanction.*

S. 44 of the Bengal Municipal Act would not empower the Chairman of the Municipality to sanction prosecution under S. 6 of the Act VI of 1919. (*Newbould and Suhrawardy, JJ.*) RAGHUNATH MODI *v.* KURSEONG MUNICIPALITY. **25 Cr. L. J. 170 : 76 I. C. 394 : A. I. R. 1923 Cal. 561.**

——S. 14 (2)—*Form of certificate not sent—Report of analyst is not evidence.*

Under S. 14 (2) the Public Analyst should submit his certificate in the form prescribed in the schedule to this Act. Where no such certificate was submitted, but the Public Analyst reported on the case by a letter in the ordinary official form. *Held* his letter was not admissible in evidence without proof of the truth of its contents (*Newbould and Suhrawardy, JJ.*) RAGHUNATH MODY *v.* KURSEONG MUNICIPALITY. **25 Cr. L. J. 170 : 76 I. C. 394 : A. I. R. 1923 Cal. 561.**

BENGAL GHATWALI LANDS ACT (V OF 1859)—*Applicability—Mineral rights—If conferred.*

Act V of 1859 applies only to *ghatwalis* within the meaning of Regulation 29 of 1814 and even with regard to them it does not confer mineral rights but merely proceeds on the assumption that they have such rights. Distinction between *ghatwali* within the Regulation and outside the Regulation discussed. (*Das and Ross, JJ.*) SATYA NIRANJAN CHAKRAWARTY *v.* SUSHILA BALA DASI. **90 I. C. 513 : 4 Pat. 799.**

BENGAL GHATWALI LAND REGULATION (XXIX OF 1814). *See* LAND TENURE, GHATWALI.

BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION (XVII OF 1806), S. 8—*Notice under—Presumption of regularity—Service of notice.*

There is no presumption that a foreclosure notice under Regulation XVII of 1806 is regular and the party who relies upon foreclosure proceedings having effected forfeiture of the estate of a mortgagor has to prove affirmatively the due performance of every condition necessary to be established under the Regulation. (*Campbell, J.*) BEHARI LAL *v.* BALMOKAND. **89 I. C. 475 (Cal).**

BENGAL LAND REGISTRATION ACT (VII OF 1876)

——*—Owner not registered—Lessee or assignee of rent can sue.*

S. 78 is no bar to a person recovering rent although the person who should have been registered as the proprietor and through whom he claims has not been so registered. S. 78 is inapplicable to the case of an assignee of rent, though the name of the assignor has not been registered under the Act. (*Greaves and Chakravarty, JJ.*) PRESANNA KUMAR DE *v.* NANIGOPAL DE. **42 C. L. J. 134 : 90 I. C. 561 : A.I.R. 1925 Cal. 1175.**

——*Mutation of names—Decision of Civil Cour—Value of.*

Where the ground upon which the previous registration was allowed namely that the family was joint has since been set aside by the decision of civil court the right course is to register the petitioner who claimed a share. (*Morshead, M. C.*) JAGDAM SAHAY *v.* RAM PRASHAD. **2 Pat. L. R. 94 (Cr.).**

——Ss. 28, 29, 42—*Application under—Not a Civil proceeding—Registration Collector not a Court—Lim. Act, S. 14—If applies.*

The term "Civil proceeding" in S. 14, Lim. Act, is not meant to cover an application under S. 28, 29 or 42 of Bengal Code, VII of 1876 nor is the Land Registration Collector a Court within the meaning of the section. Time taken in other infructuous proceedings cannot be deducted under S. 14, Lim. Act. (*Adami and Sen, JJ.*) RAMJEE PRASAD *v.* RAI BISHUNDUTT. **90 I. C. 244 (L.)**

——S. 28—*Alteration of entries by Collector—When justifiable.*

Where the father of the applicant gifted a 6 Anna share of Tauzi No 13350 in 1905 and the donee got himself registered as proprietor and the applicant applied for correction of Register D on the ground that the gift did not cover all the three villages composing the estate. *Held*, that no change had occurred, which would justify the Collector in altering the entries made in 1915. (*Grumming, M.C.*) JAIPURGASH SINGH *v.* RAMNANDAN SINGH. **1 Pat. L.R. 74 (Cr.).**

——S. 29—*Applicability.*

S. 29 of the Land Registration Act is applicable only to a case in which a person whose name is recorded, is no longer in possession of an interest and in which other persons' names have been recorded for every portion of the interest in which such persons' name was borne on the register. (*Morshead, M. C.*) BAIJNATH SINGH *v.* LACHUMAN SINGH. **1 Pat. L. R. 120 (Cr.).**

——Ss. 42 and 52—*Scope of—Powers of Collector to register.*

Reading Ss. 42 and 52 together, the Collector has the power to order the name of the applicant to be registered where, in the case of assumption of the charge, he is satisfied that the possession exists ; but in the case of succession or transfer he has no right to direct the name of the applicant to be registered unless he is satisfied first, that the succession or transfer has taken place and secondly that the applicant has acquired possession in accordance with such succession or transfer. Where each of the parties claims to have assumed charge, the only question which the Land Registration Deputy Collector has to determine is, if possession exists in favour of either of the applicants. (*Das and Bucknill, JJ.*) SYED ALI ZAMIN *v.* NAWAB SYED MAHOMED AKBAR ALI. **1 P. 68 : 3 P. L. T. 406 : 65 I. C. 135 : A. I. R. 1922 P. 315.**

——Ss. 51 and 72—*Entry by Collector in pursuance of Civil Court's orders—No appeal or review lies.*

The Land Registration Act gives no power to any Civil Court to amend or alter the entry made by the Collector in his books in pursuance of the Civil Court's orders nor to interfere with the possession of the

BENGAL LAND REGISTRATION ACT (VII OF 1876), S. 52.

successful party. As a matter of first impression it seems that S. 62 of the Land Registration Act means that there is no right of appeal or review under any enactment whatsoever against the order of the Civil Court. (*Mullick and Bucknill, JJ.*) KAPALESHWAR JHA *v.* RAGHUNANDAN PRASAD. **1 Pat. L. R. 370 : 4 Pat. L. T. 718 : 74 I. C. 474 : A. I. R. 1924 P. 134.**

——**Ss. 52 and 42**—*Question of possession—Cannot be referred to Civil Court.*

When two persons claim possession of a gift the Collector has to find out with whom the possession exists and not to refer to civil court. (*Das and Bucknill, JJ.*) ALI ZAMIN *v* MOHAMMAD AKBAR ALI. **65 I.C. 135: 1 P. 68: 3 P.L.T. 406 : A.I.R. 1922 P. 315.**

——**S. 52**—*Jurisdiction of Revenue Court—Determination of title under Civil Court sale.*

When a registration has long been completed and has become final, the Revenue authorities cannot enter into the validity of the right of another person by purchase at a civil court sale. It is a matter to be determined by the civil court. (*Morshead, M. C.*) JANARDHAN PRASAD *v.* MT. SANJHARI KUER. **1 Pat. L. R. 104 (Cr.).**

——**Ss. 52 and 55**—*Person in possession—Mutation of names—Right to.*

S. 52 of the Land Registration Act contemplates two classes of cases (1) the case in which the applicant's possession exists and (2) cases in which succession or transfer has taken place. The first class includes cases in which the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharer or manager. In such a case the Collector need satisfy himself only on the point of the possession of the applicant. Claims to joint ownership should not be indiscriminately accepted. But where the case of the applicant is that he had been in joint possession prior to the death of the deceased and has continued since, he cannot be refused registration. (*Morshead, M. C.*) BHOGRAJ SAHAY *v.* DULHIN RAMKUMARI KUER. **1 Pat. L. R. 71 (Cr.).**

——**S. 55**—*Question of possession—Right to refer to Civil Court—When arises.*

The jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute. (*Das and Bucknill, JJ.*) SYED ALI ZAMIN *v.* NAWAB SYED MAHOMED AKBAR ALI. **65 I. C. 135 : 1 P. 68 : 3 P. L. T. 406 : A. I. R. 1922 P. 315.**

——**Ss. 60 and 78**—*Tenant is not bound to pay rent to unregistered owner, but he cannot refuse payment to registered owner.*

When a person has been registered as owner of certain land under the Land Registration Act the tenant holding that land is precluded under the provisions of S. 60 from pleading that the registered owner is not the true owner. According to S. 78 of the same Act, a tenant is not bound to pay rent to a person whose name has not been registered under the Act. These two sections are complementary to each other. (*Greaves and Chakravarti, JJ.*) DEBEDRA LAL PANJA *v.* NILMONEY PRODHAN. **A. I. R. 1925 Cal. 1173.**

——**S. 78**—*Does not apply to assignees from unregistered proprietors.*

S. 78 has no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the Act. 1 C. W. N. 141 Foll. (*Chatterjee and Suhrawardy, JJ.*) PROBODH CHANDRA *v.* HARISH CHANDRA.

BENGAL LAND REVENUE SALES ACT (XI OF 1859).

27 C. W. N. 888 : A. I. R. 1924 Cal. 124.

——**S. 78**—*Disqualification in bringing rent suits only applies to estates already entered in General Register.*

The disqualification in bringing suits for rent is one which attaches only to revenue free estates already entered in the General Register if the proprietor or manager or mortgagee fails to register his name. (*Kulvant Sahay, J.*) SALEHA *v.* HALAS MAHTON. **86 I. C. 559 : A. I. R. 1925 Patna 564.**

——**S. 81**—*Ijaradar is not a proprietor and Section does not apply to him—Ijaradar—Proprietor.*

An ijaradar is merely a lessee and S. 81 has no application to a person who is not himself a proprietor but who has an interest which is subordinate to that of a proprietor. S. 81 seems to be a rider to Ss. 78 to 80 and as those sections deal with the case of proprietors there is no reason to think that S. 81 refers to cases of persons other than a proprietor. (*Chatterjee and Suhrawardy, JJ.*) PROBODH CHANDRA MITTER *v.* HARISH CHANDRA NASCAR. **27 C. W. N. 888 : A. I. R. 1924 Cal. 124**

——**S. 81**—*Applies where a party is a vendee of a contracting party.*

The provisions of S. 81 of the Act are applicable to a case where one of the parties is a vendee of one of the contracting parties. (*Chatterjea and Panton, JJ.*) MESBAHUDDIN AHMED *v.* ABDUL. **65 I. C. 839 : 34 C. L. J. 119.**

——**S. 81**—*Lease by one co-sharer—Suit by him alone for rent is maintainable.*

Where P, a co-sharer, leased his share to D for a certain rent. P and his successors-in-interest can maintain a suit against D for rent upon the written contract of lease without reference to the other co-sharer landlords. (*Chatterjee and Suhrawardy, JJ.*) PROBODH CHANDRA MITTER *v.* HARISH CHANDRA. **64 I. C. 58 : 48 C. 1078.**

——**S. 85**—*Identity of applicant—Revision.*

Several years after the registration of a person's name in the records a rival claimant made an application on the ground that he is the person preferentially entitled. There is a dispute as regards his identity, *Held* the Revenue Court may well leave the claimant to establish his claim in the Civil Court. It is largely a matter of opinion as to the circumstances in which a Commissioner's powers of revision should be exercised. (*Morshead, M. C.*) MT. MADHURANI KUER *v.* RAJLILA SINGH. **1 Pat. L. R. 261 (Cr.).**

——**S. 85**—*Revisional powers of Commissioner.*

The Commissioner has by S. 85 revisional jurisdiction over orders passed by all officers subordinate to him. The power ought to be exercised when there has been a failure of jurisdiction or a signal failure of duty or it is necessary to prevent gross abuse or injustice. The revisional powers should not be exercised where the aggrieved party has a right of appeal or a remedy by way of suit in the civil court. (*Morshead, M. C.*) TULSI RAM *v.* MT. SHAYAMPEARI KUER. **1 Pat. L. R. 246 (Cr.).**

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——*Kabuliyat showing a particular date as due date for payment of rent—Rent paid a year later under prevailing practice—Due date was held to be one recognized in practice.*

The stipulation in the kabuliyat taken by itself, meant that the rent for 1320 B. S. would be payable by the tenant on the 28th June 1913. But the plaintiff produced a jamawasilbaki kept in the Collector's office containing entries of no less than six years and

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from that the Court came to the conclusion that it was the practice of the Collector to receive the rent of each Bengal year in May or June of the following year.

Held : that in view of this practice, the rent for 1320 was not due to be paid before the 28th June 1914. (*Walmsley and B. B. Ghosh, JJ.*) AHMED YAR KHAN *v.* DINA NATH. **42 C. L. J. 69 : 90 I. C. 40 : A. I. R. 1925 Cal. 1148.**

——— *Karsha is not Revenue.*

Where a *howladar* holding a *howla* under Government asked the latter to manage during his unexpired term and during that period *karsha* fell into arrears, a sale cannot be held under the Land Revenue Sales Act to realise the same as it is not revenue. (*Walmsley and Ghose, JJ.*) UKILUDDI AKAN *v.* ASMAT ALI MUNSHI. **27 C. W. N. 723 : A. I. R. 1923 Cal. 714.**

——— *Sale under—Interest sold.*

In a sale under the Act the interest of the defaulting owner is not sold but the interest of the Crown subject to the payment of government assessment is sold. (*Mookerjee and Buckland, JJ.*) SECRETARY OF STATE FOR INDIA *v.* WAZED ALI. **65 I. C. 866 : 34 C. L. J. 141.**

——— **Ss. 2 and 3**—*Due date for paying Revenue, —Depends on contract of parties—Sale before due date is* ultra vires.

The date on which the revenue is payable depends primarily not on general or administrative considerations such as the course of business in the Collectorate or the mode in which the accounts are kept but on the contract between the parties. Where a tenure was held under a *Kabuliat* which required him to pay his rent "within the 28th day of June every year" *held* that the holding could not be sold for arrears till after June 28th of the following year and a sale before that date was before time and *ultra vires* and conferred no title on the purchaser. (*Richardson and Greaves, JJ.*) BIRENDRA CHANDRA SINGH *v.* MAHOMED SOLEMAN. **68 I. C. 491 : 26 C. W. N. 140.**

——— **Ss. 2 and 3**—*Collector cannot sell before the expiry of period fixed.*

According to Ss. 2 and 3 Government Revenue is not in arrear until the first of the following month when the Government revenue should be paid according to the original kistbandi ; and the Collector has no power to put up the estate for sale until the expiry of the latest date fixed for the payment after the estate is in arrear. (*Das and Adami, JJ.*) SURAJ NARAYAN *v.* SARASWATI BAHURIA. **6 P. L. T. 738 : 3 Pat. L. R. 237 : 88 I. C. 485 : A.I.R. 1925 Pat. 750.**

——— **Ss. 2, 3 and 33**—*Sale for revenue—Existence of arrear essential—Arrears of June kist—Improper revenue sale—Remedy of aggrieved party—Misdescription of property sold—Effect of.*

If the Government revenue is payable in June according to the original settlement and kistbandi of the mahal it does not become an arrear of revenue until the 1st of July. The Collector should not put up an estate for sale unless there is an arrear of revenue in respect of that estate and unless the latest date of payment fixed by the Board of Revenue has expired and the default has not been made good. It is impossible to take the view that the 7th June, which is the latest date fixed for payment by the Board of Revenue under S. 3 of the Act is also the date upon which the kist or instalment was payable for June according to the original settlement and *kistbandi* of the mahal. Whenever a person seeks to have a revenue sale set aside on the ground that there was no authority in the Collector to sell an estate having

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regard to the fact that the latest date fixed for payment by the Board of Revenue had not expired at the date when the property was put up for sale he should, in order to enable the Court to decide the point, give the dates of the revenue kists according to the original settlement and *kistbandi*. Where a revenue sale has been held contrary to the provisions of Ss. 3 and 6 of the Bengal Revenue Sales Law, no grounds of objection are open to the plaintiff in a suit to set aside the sale which have not been declared and specified in an appeal to the Commissioner. Where the area in one of the villages sought to be sold was not properly described in the sale notification, the misdescription does not affect the existence of the jurisdiction in the Collector to sell the property but merely affects the exercise of his jurisdiction. Though the view of the majority of the Judges in 2 Pat. L. J. 462 was erroneous still the Division Bench felt bound to follow the said opinion. (*Das and Macpherson, JJ.*) JAGDISHWAL NARAYAN *v.* MD. HAZIQ HUSSAIN. **1924 P. H. C. C. 142 : 77 I. C. 851 : 5 Pat. L. T 473 : A. I. R. 1924 P. 537.**

——— **S. 3**—*Arrears.*

Where 10th November 1862 was merely the date when the kabuliat was signed ; and the tenant in September 1862 had taken over a then existing tenancy of the estate. *Held*, the tenancy continued as before and when it was not shown that the accounts in the Collector's office were not correctly kept, the presumption was that they were correctly kept. Arrears according to the accounts were, therefore, such as would justify sale. (*Sir John Edge.*) MAHOMED SULAIMAN *v.* KUMAR BIRENDRA CHANDRA SINGH. **44 M. L. J. 388: 50 Cal. 243 : 50 I. A. 247 : 32 M. L. T. 115 : 27 C. W. N. 749 : 37 C. L. J. 561 : A. I. R. 1922 P. C. 405 (P. C.).**

——— **S. 6**—*Arrears need not be mentioned.*

Section 6 does not require the Collector to mention the arrears for which the property is put up for sale. (*Das and Adami, JJ.*) SURAJ NARAYAN *v.* SARASWATI BAHURIA. **6 P. L. T. 738 : 3 Pat. L. R. 237 : 88 I. C. 485 : A. I. R. 1925 Pat. 750.**

——— **S. 7**—*Notice under—Day of payment according to settlement need not be mentioned.*

It is necessary for the Collector to mention in the notice under S. 7 the last day fixed for payment of Government revenue under S. 3 of Act XI of 1859. It is not necessary for him to state the day on which the Government revenue should have been paid according to the settlement and kistbandi of the mahal. Care should be had in avoiding confusion between the month for which the instalments are due according to the original settlement and kistbandi of mahal and the month in which the latest dates of payment are fixed. (*Das and Adami, JJ.*) SURAJ NARAIN *v.* SARSWATI BAHURIA. **6 P. L. T. 738 : 3 Pat. L. R. 237 : 88 I. C. 485 : A. I. R. 1925 Pat. 750.**

——— **Ss. 10 and 11**—*Separate account—Share whether pokhta or kham—Proportion between total jama sadr and jama sadr assigned to the share in application for separate account determines question.*

When an application for opening a separate account is made, the relation between the total jama sadr and jama sadr assigned in the application to the share in respect of which the application is made is the determining factor as to whether the share is pokhta or kham and the Collector, in opening the separate account, ought to interpret the share according to this proportion. (*Dass and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1: 3 Pat. L. R. 66:**

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88 I. C. 465 : A. I. R. 1925 P. 681.

——— **Ss. 10 and 11**—*Statute does not authorise apportionment of arrears of revenue when separate account is opened—But such apportionment so far as it is a matter of accounts, cannot affect Collector's jurisdiction to sell share in arrears.*

There is no authority in the statute for apportioning, when a separate account is opened, the arrears of revenue, whether after taking an account or merely according to the ratio between the Government revenue assessed on the separate account and that remaining to be assessed on the residuary share. But so far as such an apportionment is a matter of accounts, it would be merely an irregularity which at the most might give ground for impugning a sale under S. 33 of the Act. But the defect in the method of dealing with the arrears cannot affect the jurisdiction of the Collector to sell a share which admittedly was in arrears and was liable to sale. (*Dass and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE.

4 Pat. 1 : 3 Pat. L. R. 66 : 88 I. C. 465 : A. I. R. 1925 P. 681.

——— **S. 12**—*Non-raising of objection on the ground of existence of arrears does not prevent party from subsequently objecting on that ground.*

The three kinds of objections specified in S. 12 are the only objections that could be made to the only statements that the application is to contain. It would seem to follow from this that if no such objection is made, the Collector is bound to open a separate account whether the share from which the separate account is to be opened is in arrears or not at the time. No inference, therefore unfavourable to the party attacking the opening of separate accounts on the ground of the existence of arrears can be drawn from the fact that when the separate accounts were opened no objection was raised on the ground of the existence of arrears. (*Dass and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1: 3 Pat. L. R. 66: 88 I.C. 465 : A. I. R. 1925 P. 681.**

——— **S. 13**—*Residuary share sold after opening of separate accounts—Onus of showing that at date of opening of separate accounts latter also were liable to sale is on party alleging so.*

The sale law contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest day of payment. Therefore where, after opening of separate accounts the balance of the residuary share is sold for arrears of revenue, the *onus* of showing that the entire estate (*i. e.*, including the separated accounts) was liable to sale at the date of the opening of the separate accounts is on the party alleging the same. (*Dass and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1 : 3 Pat. L. R. 66 : 88 I. C. 465 : A. I. R. 1925 P. 681.**

——— **S. 13**—*Separate accounts—Collector cannot sell any share from which separate accounts do not show any arrears as due—Date when estate is in general arrear determines extent of residuary share liable to be sold.*

All that the Collector has to do is to look at the separate accounts as they stand and if he finds that any separate account is not in arrear, he is not entitled to sell that share ; he can only sell the share from which according to the separate accounts an arrear of revenue is due. The Collector is not permitted to sell a share merely because that share is in arrears ; but he can only sell if the estate is in general arrear. It must be shown therefore that the estate as a whole is in arrears and liable to sale : and the date on which this liability to sale arose must be the date which will fix the extent of the residuary share of the estate to be put up for sale, if it is that share which is in arrears. It may be that the arrears shown at that date as due by the residuary share had in fact come down from an earlier period when the residuary share was larger in extent that is a matter which may give rise to a claim for contribution, but the Collector is bound by what his accounts show as they stand. (*Dass and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1 : 3 Pat. L. R. 66 : 88 I. C. 465: A. I. R. 1925 P. 681.**

——— **S. 13**—*Suit contesting sale or residuary share as covering separate accounts—Some old accounts shown—Their continued existence should be proved by plaintiff.*

In a suit impugning a sale of a residuary share for arrears, where plaintiff alleges that the sale covers also some separate accounts and where some old separate accounts are shown, it is not for the defendants or the Collector to show what became of the separate accounts. The burden is on those who challenged the sale to show that the separate accounts still exist. (*Dass and Ross, JJ.*) MADAN MOHAN LAL *v.* ABDUL RAZAQUE. **4 Pat. 1 : 3 Pat. L. R. 66: 88 I. C. 465: A. I. R. 1925 P. 681.**

——— **S. 28**—*Amendment of sale certificate—Clerical error.*

Where it was clearly the intention to sell the whole share of Nos. 17—G 3—C 1—K. and there was no question of its not being understood throughout that that was the property transferred, it is not necessary to regard the case from a strictly legal point of view and the Board may legitimately order the correction of a clerical error that has misled nobody. (*Morshead, M. C.*) RAMSUNDAR MAHTON *v.* MT. KAMAL KUER. **2 Pat. L. R. 68 (Cr.).**

——— **S. 33**—*Applicability.*

In order that S. 33 may come into operation it is necessary that there should have been a sale for arrears of revenue. (*Newbould and Ghose, JJ.*) BILAST CHANDRA ROY *v.* RAJENDRA CHANDRA DAS ROY. **51 Cal. 776 : 78 I. C. 661 : A. I. R. 1924 Cal. 839.**

——— **S. 33**—*Lim. Act, Art. 12—Neither provision applies to void sale.*

When the sale under the Sales Act, is a nullity, there is no need to set it aside, and S. 33 of the Sales Act, and Art. 12 of the Limitation Act are not applicable to such a sale. (*Walmsley and B. B. Ghose, JJ.*) AHMED YAR KHAN *v.* DINA NATH. **90 I. C. 40 : 42 C. L. J. 69.**

——— **Ss. 34 and 33**—*Revenue sale—Arrear of revenue—Legality of sale—Sale without jurisdiction.*

S. 34 of the Bengal Rev. Sales Law applies only where a sale held under Act XI of 1859 is annulled by a final decree of a civil court ; in other words, where a suit is brought under the provisions of S. 33 of the Act and a civil court annuls the sale on any of the grounds mentioned in S. 33 of the Act, an execution petition must be presented within 6 months after the date of the decree ; but where the suit is not one under the provisions of S. 33 or Act XI of 1859, S. 34 has no operation whatever. There is a clear distinction between a case where a sale is annulled and a case where the Court authoritatively recognizes that there was no sale at all, and consequently disregards it and proceeds to give a decree for possession to plff. Where the sale is authorized, but there is a direct violation of the statutory possession in conducting the sale, the suit must be one for annulment of the sale, and the Court

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has complete power to set aside the sale, provided the requirements of S. 33 are complied with. But where the sale is not authorized there is in law, no sale, and there being nothing to annul, all that the Civil Court does is to recognize that there is no sale and to pass a decree for possession in favour of plaintiff. S. 33 applies to a case where the sale is authorized, but is attended with some illegality or irregularity and S. 33 affords a complete protection to such sales, although they have been attended with illegality or irregularity, unless the conditions specified in S. 33 are fulfilled and the procedure indicated in that section is adopted. But where there is no authority whatever for the sale S. 33 has no operation; and the Court in dealing with a case where there is an entire absence of jurisdiction in the Collector to put up the property to sale does not annul the sale but recognizes authoritatively that there was no sale at all. (*Das and Ross, JJ.*) HAKIM MAHOMED IDRIS *v.* LACHMAN DAS. **1924 P H. C. C. 25 : 5 Pat. L. T. 368 : 78 I. C 303 : A. I. R. 1924 P. 504.**

——S. 36—*No applicability to person claiming through certified purchaser.*

The section ought to be construed strictly and it does not apply when a person is not a certified purchaser himself but a person claiming through a certified purchaser. (*N. R. Chatterjee and Panton, JJ.*) SRISH CHANDRA BANERJEE *v.* PROTAP CHANDRA DAS. **62 I. C. 662 (Cal.).**

——S. 37—*Revenue sale—What passes—Buildings on the land—If encumbrances—Title of the purchaser—From whom derived.*

Where property is sold at a revenue sale under Act XI of 1859, the purchaser gets only the land and not the superstructures thereon, which are not encumbrances within the meaning of S. 37. The owner of such a superstructure can remain on the land subject to paying ground rent to the purchaser.

The purchaser does not derive his title from the defaulter but from the Crown in the state in which it was at its inception at the time of the settlement. (*Walmsley and Mukerji, JJ.*) JATINDRA NATH ROY CHOWDHURY *v.* NARAYAN DAS KHETRY. **90 I. C. 901 (Cal.)**

——S. 37—*Patni—Creation of, by auction-purchaser.*

The mere creation of the Patni by an auction purchaser would not by itself be an indication to the under-tenure-holders that the option to annul the under-tenures had in fact been exercised. (*Greaves and Ghose, JJ.*) KULA MIAH *v.* NANU MIAH. **68 I. C. 449 : A. I. R. 1923 Cal. 195.**

——S 37, (Proviso)—*Revenue sale—Purchaser of entire estate—Right of occupancy.*

Where at a revenue sale under Act XI of 1859 a person purchases an entire estate is entitled thereafter to eject under-tenants with the exception of raiyats with rights of occupancy at fixed rents or at rents which can be assessed according to fixed rules under the laws in force. The "right of occupancy" in S. 37 proviso might be acquired under laws promulgated since 1859 and is not limited to the right under the Rent Recovery Act. (*Mittra and Geidt, JJ.*) SARAT CHANDRA ROY CHOWDHURY *v.* ASMAN BIBI. **35 C. L. J. 212.**

——S. 37—*"Settlement" refers to contract with Government Bajeapti Taluq.*

The word "settlement" in S. 37 of the Revenue Sales Law refers not to the Permanent Settlement of 1793 but to the contract with Government. In the case of a Bajeapti Taluq, the contract with Government is made when revenue is assessed thereon and is transformed into revenue paying estate liable to be sold for its arrears. (*Mookerjee and Panton, JJ.*) MOKBUL ALI SADAGAR *v.* BASARAT ALI. **66 I. C. 911 : 34 C. L. J. 485.**

BENGAL LICENSED WAREHOUSE AND FIRE BRIGADE ACT (I B. C. OF 1893), SS 15.

——S. 53—*Defaulting proprietor—Purchase by effect.*

When a defaulting proprietor purchases at a sale under Act XI of 1859, he acquires under S. 53 the estate subject to all its incumbrances existing at the time of sale and does not acquire any rights in respect to under-tenants or raiyats which were not possessed by the previous proprietor at the time of the sale. (*Mookerjee, A. C. J. and Fletcher, J.*) SATYENDRANATH BANERJEE *v.* KRISHNASAKHA KAR. **35 C. L. J. 185 : 69 I. C. 67 : A. I. R. 1922 Cal. 193.**

——S. 54—*Purchase at revenue sale—Nature of estate—Burden of proof.*

In a suit for *Khas* possession by the purchaser at a revenue sale, he must prove not merely that the land is within the ambit of his estate but also that it formed part of the mal assets at the time of the decennial settlement. (*Walmsley and Suhrawardy, JJ.*) SASTRI BHUSAN HAZRA *v.* KAZI ABDULLA. **28 C. W. N. 143 : A. I. R. 1924 Cal. 328.**

——S. 54—*"Incumbrance"—Tenure intermediate between the proprietor and the mukhararidar.*

The existence of a mukarari created by grant by the proprietor, does not bar the proprietor from creating an intermediate tenure between himself and the mukarraridar. Where the proprietor, therefore, granted to his wife the right of collecting rent in lieu of dower from the Mukarraridar, *Held* the grant was an incumbrance within the meaning of S. 54 9 C. W. N. 656. Foll. (*Coutts and Macpherson, JJ.*) MIR TILAWAN *v.* EMPEROR. **1 P. 38 : 3 P. L. T. 816 : A. I. R. 1922 P. 389.**

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822).

——S. 9—*Chur lands—Temporary Settlement—Enhancement of rents of tenants.*

In the case of temporary settled estates such as is chur land, it would always be open to the revenue authorities to re-assess the revenue and resettle the estate with effect from the expiry of a previous term of settlement. To enhance the rents of the tenants proceedings under Part II of Ch. X of the B. T. Act or S. 52 of the B. T. Act should be taken. (*Richardson* and *Suhrawardy, JJ.*) ASHUTOSH CHAKRABARTY *v.* DWARIKA NATH MOTA. **36 C. L. J. 192 : 27 C. W. N. 121 : 70 I. C. 119 : A. I. R. 1923 Cal. 207.**

BENGAL LICENSED WAREHOUSE AND FIRE BRIGADE ACT (I B. C. OF 1893).

——S. 7—*Application for license not disposed of—Effect.*

If an application for license under the Act is not disposed of within 30 days from the date of receipt by the Chairman, the applicant is under S. 7 exempted for liability so long as there is no final refusal. (*Newbould and Suhrawardy, JJ.*) LEGAL REMEMBRANCER, BENGAL *v.* MULL. **25 C. W. N. 960 : 66 I. C. 428 : 34 C. L. J. 203.**

——S. 15—*Refusal of license—Order by Vice-Chairman—Legality.*

Refusal of an application for license to use any building as a warehouse must be in writing and signed by the Chairman of the Commissioners and an order by the Vice-Chairman is no refusal under S. 15 of the Act. (*Newbould and Suhrawardy, JJ.*) LEGAL

BENGAL LOCAL SELF GOVERNMENT ACT (III OF 1885), S. 78.

REMEMBRANCER, BENGAL *v.* MULL.
25 C. W. N. 960 : 66 I. C. 428 : 34 C. L. J. 203.

BENGAL LOCAL SELF GOVERNMENT ACT (III OF 1885).

——**Ss. 78, 139 and 140**—*District Board has power to frame Bye-laws providing for penalty for encroachment on roads.*

The District Board has impliedly, if not expressly, power to provide for, by its bye-laws, the punishment of encroachments over its roads in order to carry out the provisions of S. 78 of the Act, *viz.*, to provide for the repairs and maintenance of its roads, etc. S. 139 of the Act empowers the District Board to make bye-laws and S. 140 empowers it to impose punishment for the breach of bye-laws. (*Jwala Prasad and Adami, JJ*) MAHESH SHAH *v.* DARBARI HUSSAIN.
3 Pat. L. T. 464 : 1 Pat. 251 : 65 I. C. 571 : 23 Cr. L. J. 139 : A. I. R. 1922 P. 545.

——**Ss. 139, 140 and 78**—*Bye-law prohibiting encroachment—Imposition of penalty—Validity.*

The District Board has impliedly, if not expressly power to provide for, by its bye-laws, the punishment for encroachment over its roads, in order to carry out the provisions of S. 78 of the Act, namely, to provide for the repair and maintenance of its road, 11 C.WN. 175 (notes) Diss. (*Jwala Prasad and Adami, JJ.*) MAHESH SHAH *v.* DARBARI HUSSAIN.
1 Pat. 251 : 3 Pat. L. T. 464 : 23 Cr. L. J. 139 : 65 I. C. 571 : A. I. R. 1922 P. 545.

BENGAL MUNICIPAL ACT (III OF 1884).

——*Sanction to prosecute for one offence—Conviction for another offence is illegal.*

A Magistrate cannot convict persons of an alternative or disjunctive offence mentioned in bye-law No. 80 when sanction was by the Municipal authorities to prosecute the accused in connection with another offence. Where sanction was given to prosecute for the offence of "singing with a high sounding instrument" a conviction for the offence of "playing on a drum" was held illegal. (*Bucknill, J.*) RAHIM *v.* EMPEROR. **1 P. L. R. Cr. 45 : 72 I. C. 894 : 24 Cr. L. J. 478 : A. I. R. 1924 Patna 377.**

——**Ss. 6 (3), 85(a)**—*Adjacent plots of land belonging to same person—One holding—Separate assessment improper—Title—Meaning of.*

Two adjacent plots of land belonging to the same person and bounded by one set of boundaries constitute a single holding, though one might have been acquired by survivorship and the other by title. The word "title" in S. 6 is not the same as "title-deed." They are liable only to one assessment and not separately. (*Mullick and Ross, JJ.*) TULSHI PRASAD RAM *v.* WILSON. **90 I. C. 74 (1) (P).**

——**S. 8-A**—Adjacent plots of land—Common boundaries — Single holding — Separate assessment improper. TULSHI PRASAD RAM *v.* WILSON.
90 I. C. 74 (1) (P).

——**S. 15**—*Rules made under—Candidate for Municipal election—Right to be present at polling station—Rule excluding such right—Suit for declaration and injunction.*

The rights of candidates or electors are rights expressly given by statute and they do not carry with them any rights not given by the statutory law. Where a candidate for a Municipal election sued for a declaration that he was entitled to be present at the recording of votes and for an injunction restraining the presiding officer from excluding him. *Held*, that the plaintiff had not shown that he had the statutory right to be present at the place where the votes were recorded or that the rule forbidding his presence in that

BENGAL MUNICIPAL ACT (III OF 1884). S 34.

particular place was *ultra vires*. As the plaintiff had asked for further relief in the form of an injunction, the suit was not barred under section 42 of the Specific Relief Act. (*Newbould and Ghose, JJ.*) THE CHAIRMAN OF THE COMMISSIONERS OF THE HOWRAH MUNICIPALITY *v.* HARIPADA ROY CHOWDHURY. **28 C. W. N. 892 : 82 I. C. 345 : A. I. R. 1924 Cal. 1070.**

——**S. 15**—*Person—Right to vote—Member of a joint Hindu family has such right.*

The members of a joint Hindu family are persons within the meaning of S. 15 of the Bengal Municipal Act, 1884. Where "a person is otherwise qualified to vote for a municipal election under S 15 of the Bengal Municipal Act he is not disqualified from voting merely because he is a member of a joint Hindu family." The right to vote conferred on every person who is qualified to vote under S. 15 of the Act cannot be cut down. (*N. R. Chatterjee and Suhrawardy, JJ.*) CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF DACCA *v.* KRISHNA DAS NAG. **64 I. C. 168: 36 C. L. J. 189.**

——**S. 15 Cl. (2)**—*Right to vote—Joint assessment to income-tax is sufficient to give.*

Where the income of both the father and the son are assessed, that fact is sufficient to qualify both of them to claim to be voters under cl 2 of S. 15, the jointness of their family notwithstanding. (*Huda, J.*) CHARU CHANDRA MAJUMDAR *v.* CHAIRMAN OF THE MUNICIPALITY OF FARIDPUR. **70 I. C. 154 : 26 C. W. N. 412.**

——**S. 15 Cl. (3)**—*Occupation—Joint living with father is not sufficient.*

It is not sufficient to constitute occupation for the purpose of franchise that a son living with his parents should be allowed the sole use of the room without contract or payment of rent. (*Huda, J.*) CHARU CHANDRA MAZUMDAR *v.* CHAIRMAN OF THE MUNICIPALITY OF FARIDPUR. **70 I. C. 154 : 26 C. W. N. 412.**

——**S. 30**—*Levy of rent or toll—Goods placed on the road—Right of Municipality.*

In the absence of a contract creating the relation of landlord and tenant, the Municipality is not entitled to levy a tax from any person. The property in the road has been vested in the Commissioners by S. 30 of the Act and the Municipality can use the road as owner of it for the purposes of the Act. (*Jwala Prasad, J.*) DHUNMUN CHOWDHURY *v.* EMPEROR.
3 Pat. L. T. 339 : 25 Cr. L. J. 114 : 76 I. C. 178 : A. I. R. 1922 Pat. 286.

——**Ss. 34, 43 and 44**—*Lease of Municipal property without sanction by resolution is void.*

A lease of Municipal property would be void unless the lease had been sanctioned by the Commissioners at a meeting. The burden clearly lies upon the defendant lessee to establish that the requirements of the statute were fulfilled. In the normal course of events, the resolution adopted at a meeting of the Commissioners must be recorded ; and S. 43 provides that minutes of the proceedings of a meeting of the Commissioners shall be entered in a book to be kept for the purpose and shall be signed by the President of the meeting, and such book shall be open to the inspection of the tax-payers. Where the minute book has been produced, and there is no trace of a resolution on the subject, the position is that there is no valid lease. Where a Corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers. (*Mookerjee and Chotzner, JJ.*) AKSHAY KUMAR CHAND *v.* THE COMMISSIONERS OF BOGRA MUNICIPALITY.

BENGAL MUNICIPAL ACT (III OF 1884), S. 37.

37 C. L. J. 589 : 75 I. C. 506 : A. I. R. 1923 Cal. 675.

——Ss. 37, 29 and 34—*Execution of deed by Municipal Council—Formalities for—Deed signed by Chairman alone—Effect of.*

The expression "signed" in S. 37 of the Bengal Mun. Act implies that the signature must be affixed for purposes of execution of the document and the insertion of a name, in any part of the writing, in a manner to authenticate the instrument, is sufficient. But if the name occurs in a document, not as authenticating the whole, but only for a particular purpose of only with reference to a part, it is not an effective signature. (*Mookerjee and Chotzner, JJ.*) J. D. EZEKIEL *v.* ANNADA CHARAN SEN. **50 C. 180 : 36 C. L. J. 109 : 70 I. C. 794 : A. I. R. 1923 C. 35.**

—— S. 44—*Prosecution under Food Adulteration Act, cannot be sanction under S. 6.*

S. 44 of the Bengal Municipal Act does not empower the Chairman of a Municipality to sanction a prosecution under S. 6 of the Bengal Food Adulteration Act. (*Newbould and Suhrawardy, JJ.*) RAGHUNATH MODY *v.* KURSEONG MUNICIPALITY. **25 Cr. L. J. 170 : 76 I. C. 394 : A. I. R. 1923 Cal. 561.**

——S. 45—*Chairman—Delegation of power.*

Under S. 45 of the Act, a Chairman cannot delegate to the Vice-Chairman, his powers under the Licensed Warehouse and Fire Brigade Act. (*Newbould and Suhrawardy, JJ.*) REMEMBRANCER OF LEGAL AFFAIRS *v.* MULL. **25 C. W. N. 960 : 66 I. C. 428 : 34 C. L. J. 203.**

——S. 60—*Municipal servant — Conviction—Appeal—District Magistrate—When debarred from hearing.*

A District Magistrate, who has merely received proceedings of a Municipality, is not debarred from hearing an appeal against the conviction of a Municipal servant unless he is in any way concerned with the Municipality. (*Jwala Prasad, J.*) TEJ NARAIN SINGH *v*, EMPEROR. **3 U. P. L. R. (Pat.) 54 : 61 I. C. 515 : 22 Cr. L. J. 387.**

——S. 85—"*Circumstances and property within the Municipality*"—*Meaning of.*

"Within the Municipality" in S. 85 govern both "circumstances"and "property" and the word"circumstances" must be interpreted as equivalent to "means." When a tax-payer resident within the Municipality brings to his residence his income, no matter where earned or from what source derived, the income thus brought, to be spent and enjoyed within the Municipality, becomes part of his "means" or "circumstances" within the Municipality and liable to assessment under S. 85 of the Act. (*Teunon and Newbould, JJ.*) CHAIRMAN OF THE COMMISSIONERS, JOYNAGAR MUNICIPALITY *v.* SAILAHALA DATTA. **48 Cal. 443 : 61 I. C. 511 : 25 C. W. N. 47.**

——Ss. 85, 86 and 103—*Owner and occupier—Meaning.*

Bare ownership of a holding within a Municipality does not mean rateable occupation, *i.e.*, every occupier is not an owner and every owner is not an occupier. To constitute rateable occupation there must be use and enjoyment capable of being beneficial. (*Mookerjee, A. C. J. and Fletcher, J.*) SHAMSUDDIN *v.* PEYARI LAL DAS. **60 I. C. 498 : 25 C. W. N. 282.**

——S. 85 (*a*)—*Applicability—Several persons—Joint holding—"Circumstances and property."*

S. 85 (*a*) of the Act is not limited to a case where only one person occupies an entire holding. Where the possession of a holding by each of the several persons is actual and as of right and where a personal

BENGAL MUNICIPAL ACT (III OF 1884), S. 202.

tax is in operation, each is subject to assessment according to his "circumstances and property" within the Municipality Where sale proceeds of tea grown outside the Municipality are brought and placed in a Bank to the credit of a corporation within the Municipality, they or their 'circumstances and property' within the Municipality are liable to be assessed to tax under S. 85 (*a*) of the Act. (*Mookerjee and Buckland, JJ.*) CHAIRMAN, JALPAIGURI MUNICIPALITY *v.* JALPAIGURI TEA CO. **34 C. L. J. 283 : 64 I. C. 649 : 26 C. W. N. 311 : A. I. R. 1922 Cal. 46.**

——S. 85 (a)—*Means outside Municipal limits should not be considered.*

In assessing tax under S. 85 (*a*), the property and means of the assessee outside the Municipal limits should not be considered. The test to measure the means is to see what is earned within the Municipality. (*Mookerjee, A. C. J. and Fletcher, J.*) DIBENDRA NATH RAI *v.* PRAVAB CHANDRA GHOSE. **32 C. L. J. 210 : 60 I. C. 284 : 25 C. W. N. 45.**

——Ss. 85 (b), 279 (3) and 322—*Co-sharer—Occupier—Rateable occupation—Water rate—Latrine fee.*

The Bengal Municipal Act defines the term "owner" but not "occupier". Occupation for purposes of assessment of rates include actual possession as its primary element, for legal possession does not of itself constitute occupation. Every owner is not an occupier just as every occupier is not an owner. In order to constitute rateable occupation, there must be a use and enjoyment, which is, or is capable of being, beneficial. Consequently, a co-sharer not in actual possession and enjoyment of a holding within the jurisdiction of the Municipality is not liable for water rate and latrine fee. (*Mukerjee and Fletcher, JJ.*) KHAJISAMSUDDIN *v.* PEARI LAL DAS. **40 C. L. J. 295.**

——S. 87—*List not showing income does not invalidate the assessment.*

Every defect in the assessment list prepared under S. 87 of the Act does not destroy the jurisdiction of the Commissioner and render the assessment *ultra vires*. Where the list does not show the income upon which the tax was assessed, it is only a defect in form and does not invalidate the assessment. (*Mookerjee and Buckland, JJ.*) CHAIRMAN, JALPAIGURI MUNICIPALITY *v.* JALPAIGURI TEA CO. **64 I. C. 649 : 34 C. L. J. 283 : 26 C. W. N. 311 : A. I. R. 1922 Cal. 46.**

——S. 101—*Waterworks—Storage and balancing tank is not machinery.*

The Corporation of Calcutta owned a reservoir and pumps for the supply of water to Calcutta. They erected a large tank called a balancing tank supported on columns so as to give its elevation. This tank could be filled by pumping from the reservoir, and when desired water could be released from it into the main supply pipe nearer Calcutta than the reservoir. The water so released flowed through the pipe by force of gravity; it not only increased the supply by its own volume, but also accelerated the velocity of the whole body of water passing through the supply pipe. The tank enabled the appellants to increase the supply during part of the day when the hourly consumption exceeded the capacity of the reservoir and pumps. *Held*, that balancing tank was not "machinery" within S. 101 of the Bengal Municipal Act. (*Lord Atkinson.*) CORPORATION OF CALCUTTA *v.* COSSIPORE AND CHITPORE MUNICIPALITY. **49 Cal. 190 : 26 C. W. N. 761 : 67 I. C. 926 : 15 L. W. 253 : 48 I. A. 435 : A. I. R. 1922 P C. 27 (P. C.).**

——S. 202—*Orders under the section without*

BENGAL MUNICIPAL ACT (III OF 1884), S. 202.

hearing parties—Orders are illegal and must be set aside.

The legislature do not intend to enable a Magistrate to deprive a person of his right to a civil action for acts done by the Commissioners in excess of their powers except by a judicial order passed after hearing the parties concerned. Where a Magistrate passed orders under S. 202 of the B. M. Act without giving the parties concerned an opportunity of being heard :

Held, that the orders were illegal since the Magistrate did not act judicially and that they must be set aside. (*Newbould and B. B. Ghose, JJ.*) NABADWAP MUNICIPALITY *v.* PURNA CHANDRA. **52 Cal. 670 : 41 C. L. J. 611 : 29 C. W. N. 817 : 88 I. C. 862 : A. I. R. 1925 Cal. 934.**

——S. 202—*Proceedings under the section are not criminal—No procedure is given by the section—Application of C. P. Code, is not wrong.*

A Magistrate exercising his power under S. 202 is not engaged in a criminal proceeding. No procedure is prescribed by the section. He would not be wrong in following so far as they seem applicable, the provisions of the Code of Civil Procedure. (*Newbould and B. B. Ghose, JJ.*) NABADWAP MUNICIPALITY *v.* PURAN CHANDRA.

52 Cal. 670 : 41 C. L. J. 611 : 29 C. W. N. 817 : 88 I. C. 862 : A. I. R. 1925 Cal. 934.

——S. 202—*Proceedings under the section is a judicial proceeding which can be revised by High Court.*

An order made by a Magistrate under S. 202 of the Bengal Municipal Act, 1884, is a judical proceeding and the High Court has power to revise the order. (*Newbould and B. B Ghose, JJ.*) NABADWAP MUNICIPALITY *v.* PURAN CHANDRA. **52 Cal 670 : 41 C. L. J. 611 : 29 C. W. N. 817 : 88 I. C. 862 : A. I. R. 1925 Cal. 934.**

——S. 202—*Applicability—Dispute as to title—High Court can interfere in revision.*

S. 202 of the Act cannot be applied where there is a dispute between any person and the Municipality with regard to the title to any land. Such a dispute must be decided in the ordinary way by a Civil Court. An order by a Magistrate under S. 202 of the Act is a judicial proceeding and the High Court has power to revise such an order. (*N. R. Chatterjea and Cuming, JJ.*) ALOKE MOHAN SAHA *v.* NARAYANAGANJ MUNICIPALITY. **59 I. C. 137 : 22 Cr. L. J. 25 (Cal.)**

——Ss. 202, 204, 218 and 353—*Non-compliance with requisition—Limitation.*

On a failure to comply with a requisition under Ss. 202, 204 of the Act the limitation of 6 months under S. 353 begins to run from the date of the expiry of the period allowed for compliance with such requisition. (*Adami and Bucknill, JJ.*) GULAM RASUL *v.* EMPEROR. **22 Cr. L. J 427 : 61 I. C. 715 : 2 Pat. L. T 390 : 6 P. L. J. 174.**

——S. 209—*Municipality accepting gift of land on condition of erecting fencing at their own cost—Donor is not guilty of breach of requisition.*

The accused was served with a requisition under S. 209 of the Municipal Act requiring him to cause a fence to be erected for the protection of passengers and pedestrians over the bank of a tank belonging to the accused. The accused disobeyed this requisition, his grounds being that in 1898 certain land on the side of the tank was made over by him to the Municipality and conditions were imposed by him on the Municipality at the time to the effect that if in future any fencing had to be erected or was required on the side of the tank the Municipality would erect such a fencing at their own cost. In 1914 the Municipality caused certain departmental estimates to be prepared

BENGAL MUNICIPAL ACT (III OF 1884), S. 241.

for fencing and for acquiring the extra strip of land on the side of the tank but that inasmuch as the funds did not permit of this work being done at once the work was left in abeyance and in September, 1922, the requisition referred to above was served on the accused under S. 209 of the Bengal Municipal Act.

Held, that there is nothing in the Municipal Act itself which can remotely suggest that the Municipality is incompetent to enter into a binding engagement of this description and therefore the Municipality is not, in the circumstances of the particular case, competent to require the accused to cause a fencing to be erected at his own cost. (*C. C. Ghose and Cuming, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* NARAYAN CHANDRA BANERJEE. **38 C. L. J. 13 : 24 Cr. L. J. 680 : 73 I. C. 776 : A. I. R. 1924 Cal. 101.**

——S. 234—*Municipality cannot lease out road.*

S. 234 of the Act is an emergency section whereby a person who wants to use a road is temporarily allowed to deposit any moveable property on it, on payment of reasonable fees to the Municipality. But under the section, the Municipality is not entitled to lease out its right for carrying on trade, etc. (*Jwala Prasad, J.*) DHUNMUN CHOWDHURY *v.* EMPEROR.

3 Pat. L. T. 339 : 76 I. C. 178 : 25 Cr. L. J. 114 : A. I. R. 1922 Pat. 286.

——S. 237—*Sanction to build—Restrictions.*

The erection of a new verandah, in the place of an old one, is liable to be demolished under S. 237 of the Act, if in contravention of Municipal sanction. A Municipal Council has no power to sanction a building with restrictions unless it has made rules for restriction. Where sanction is given with restrictions which are *ultra vires* of the Council, they can be disregarded. (*Coutts and Macpherson, JJ.*) BRIJ BEHARI LAL *v.* MUNICIPAL COMMITTEE, DALTONGUNJ.

3 Pat. L. T. 226 : 63 I. C. 355 : 1 Pat. 216 : 1921 P. H. C. C. 347 : A. I. R. 1922 Pat. 118.

——Ss. 237, 241—*Material alteration—Erection of boundary wall alone—Whether* ultra vires.

Material alteration or enlargement of any building must mean erection of anything on a site attached to or detached from any building standing on it so as to alter the structure of the house with all the buildings standing on that site. (1902) 7 C. W. N. 374 referred to. Erection of a wall apart from its erection as part of a scheme for the erection of the house itself does not fall within S. 241. When an owner is neither building nor re-building the house, the erection of a boundary wall does not fall within the scope of S. 237 ; that being so the Commissioners had no power to frame bye-law under S. 241 relating to the erection as part of the scheme of erection or re-erection of the house itself. (*Dass and Ross, JJ.*) BASANT KUMAR *v.* CHAIRMAN OF GIRIDIA MUNICIPALITY.

1 Pat. 44 : 3 Pat. L T. 143 : A. I. R. 1922 Pat. 56 (2).

——S. 238—*Notice under—Time should run from date of knowledge of building.*

There is nothing in S. 238 of Bengal Municipal Act to suggest that the period of 15 days should run from the date on which the Commissioners have knowledge of the building. The period should run from the date of the commencement of the erection of the building. (*Coutts and Macpherson, JJ.*) RAMDHANI LAL *v.* CHAIRMAN OF PATNA MUNICIPALITY.

1 P. 42 : 69 I. C 183 : 3 Pat. L. T. 779 : A. I. R. 1922 Pat. 484.

——Ss. 241, 237, 240—" *Material alteration or enlargement of any building*," *meaning of—By-law prohibiting erection of a wall*—Ultra vires.

BENGAL MUNICIPAL ACT (III OF 1884), S. 245.

A material alteration or enlargement of any building under S. 240 of the Act means erection of anything on a site attached or detached from any building standing on it, so as to alter the structure of the building on the site and therefore the erection of a boundary wall is not a material alteration or enlargement under S. 240. Consequently the Commissioners have no power to make a bye-law under S. 241 prohibiting the erection of any such boundary wall within 5 feet of any public road. (*Dass and Ross, JJ.*) BASANTA KUMAR *v.* CHAIRMAN, MUNICIPAL COMMISSIONERS OF GIRIDIA. **63 I. C. 290 : 1921 P.H.C.C. 349.**

——S. 245—*Pucca building existing in a* bustee—*Block of huts in the* bustee *can be dealt with.*

The municipality is competent to deal with collections of blocks of huts in a *bustee* under S. 245 even though within the area of the *bustee* there may be pucca buildings. (*Suhrawardy and Duval, JJ.*) NAYAN MANJURI DASSI *v.* CHAIRMAN OF THE COMMISSIONER OF THE HOWRAH MUNICIPALITY. **29 C. W. N. 445 : 86 I. C. 618 : A. I. R 1925 Cal. 676.**

——S. 261—*'Kiln'—Means a permanent structure.*

The word 'kiln' points to a structure which is of a permanent nature. The words of the section ought not to be strained unduly against the defendant. If it had been intended to prohibit the manufacture of bricks not only by means of a kiln but also by means of the older system of clamp, it would have been sufficient for the Legislature to provide that no place shall be used without a license from the Commissioners for the purposes of making bricks the words " no place shall be used as a kiln for making bricks " were advisedly used by the Legislature having regard to the ordinary meaning of the word " kiln " as distinguished from " clamps". (*Sanderson, C. J. and Panton, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* TRAILOKYA NATH CHATTERJEE. **49 Cal. 1014 : 26 C. W. N. 926 : 24 Cr. L. J. 356 : 72 I. C. 356 : 36 C. L. J. 168 : A. I. R. 1922 Cal. 194.**

——S. 261—*Scope—Section covers cases of place of business from which offensive smell may arise.*

S. 261, Bengal Municipal Act, applies not only to a manufactory or business or trade *per se* offensive or unwholesome but it also covers the case of a manufactory or place of business from which offensive or unwholesome smells may arise. There is a clear distinction between the English and the Indian statutes as the former apply only to manufactory or business *per se* offensive. *Withington Local Board of Health* v. *Corporation of Manchester* (1893) 2 Ch. 19: *Wanstead Local Board of Health* v. *William Hill*, 13 Common B. R. (new series) 479, distinguished. (*Chatterjee and Panton, JJ.*) GOVINDA CHARAN *v.* CHAIRMAN OF THE HOOGHLY CHINSURA MUNICIPALITY. **26 C. W. N. 994 : 65 I. C. 518 : A. I. R. 1922 Cal. 99.**

——S. 261—*'Wood' includes timber.*

The word " wood " in S. 261 of the Act includes timber. A timber yard requires a license under the section. (*Miller, C. J. and Coutts, J.*) EMPEROR *v.* TAR MUHAMMAD JAN. **6 Pat. L. J. 363 : 2 Pat. L. T. 722 : 63 I. C. 327 : 22 Cr. L. J. 631.**

——S. 271—*Prosecution—Disposal of the objection under S. 178 is condition precedent.*

A prosecution under S. 271 of the Act is not justified unless the objection is disposed of according to terms of the law laid down under Section 178. A person need not comply with the orders mentioned in the notice under S. 178 if he has filed an objection. If the objection is decided in his favour then the notice is cancelled. If it is decided against him, then the decision cannot have the retrospective effect of punishing him for the default committed by him with respect to the first notice. (*Jwala Prasad, J.*) RAMPARTAP LAL *v.* BARH MUNICIPALITY. **3 Pat. L. T 301 : 66 I. C. 417 : 23 Cr. L. J. 273 : A. I. R 1922 Pat. 183.**

BENGAL MUNICIPAL ACT (III OF 1884), Sch. IV.

——Ss. 290, 291, 292, 293, 295 and 297—*Rules framed by Local Government under S. 290 are not* ultra vires *and water supply can be cut off for non-payment of costs.*

Rules 4, 9 and 24 (*e*) framed by the Local Government for the Chittagong Municipality under S. 290 of the Bengal Municipal Act are *intra vires* and do not conflict with Ss. 295 and 297 of the same Act. The Municipality is, therefore, entitled to compel the occupier or owner of a house to pay for cost of water-metre to measure the amount of water consumed in the house or to cut off water supply for non-payment of the same. (*Chaudhuri and Cuming, JJ.*) NAGENDRA LAL DAS *v.* THE CHAIRMAN OF THE CHITTAGONG MUNICIPALITY. **59 I. C. 340 : 47 Cal. 426.**

——S. 350—*Sanction to prosecute for making noise—Sanction for one offence—Prosecution for another illegal.*

Where the Vice-chairman of a Municipality sanctioned the prosecution of the accused for singing at night with a high-sounding instrument and the accused were convicted of beating a drum under Bye-law 80, *held*, that the conviction was illegal. Even in a case where a valid sanction has been given by the Municipality for the prosecution of certain persons for an alleged violation of one of the bye-laws, a Magistrate is not competent to convict the accused of an offence against another. Considerable care should be exercised in putting into operation against citizens the provisions of a bye-law such as the one against making noise, which can be utilised in an unduly repressive and is unnecessarily restrictive manner. (*Bucknill, J.*) RAHIM *v.* EMPEROR. **24 Cr. L. J. 478 : 72 I. C. 894 : 1 Pat. L. R. 45 (Cr) : A. I. R. 1924 Patna 377.**

——S. 356—*Distress—Warrant—Service on person from whom taxes collected is sufficient.*

Where the house was not in the occupation of the recorded owner but his brother, and, although the Municipal taxes were levied on the owner, they were collected from his brother. *Held*, the service of the distress warrant on the brother of the owner was a proper service. (*Miller, C. J. and Ross, J.*) GOVERNMENT ADVOCATE, BIHAR AND ORISSA *v.* GANGA PRASAD. **1 Pat. 423 : 3 Pat. L. T. 559 : 75 I. C 719 : 25 Cr. L. J. 31 : A. I. R. 1922 Pat. 532.**

——S. 363—*Act done in pursuance of Act—Notice of suit is necessary.*

Where the Vice-Chairman of a Municipality acts under the direction of the Commissioners, the acts done by him are acts done under the Municipal Act and if the provisions of S. 363 of the Act as regards notice are not complied with by a person aggrieved by the act, a suit by him against the Vice-Chairman to recover damages is not maintainable. (*Mukerjee, A. C. J. and Fletcher J.*) SASANKA SEKHAR BANERJEE *v.* SUDHANGSU MOHAN GANGULI. **48 Cal. 45 : 59 I. C. 572 : 24 C. W. N. 891.**

——Sch. IV—*Warrant—Date of return need not be mentioned.*

A distress warrant issued in the form provided in Sch. IV does not require that the date of return of warrant should be mentioned. (*Miller, C. J. and Ross, J.*) GOVT. ADVOCATE, BIHAR AND ORISSA *v.* GANGA PRASAD. **1 Pat. 423 : 3 Pat. L. T. 559 : A I. R. 1922 P. 532.**

BENGAL MUNICIPAL ELECTION RULES.

——**Rr. 7, 10 and 29**—*Removal of name from list of voters by Chairman—District Magistrate can restore the name.*

A certain person's name was entered in the list of voters and there was an application under R. 7 that his name should be removed, and an application by the person that his name should be included, and the application was allowed by the Chairman. The voter applied under R. 10 to the District Magistrate who restored his name in the register, *held* that the District Magistrate had power to decide it under R. 20. (*Chatterjea and Newbould, JJ.*) SYAM CHAND BASAK *v.* NABENDRA NATH. **26 C. W. N. 147.**

BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887).

——*Valuation of suit—Valuation by plaintiff may be challenged by defendant or amended by Court, but if not so done connot be questioned in second appeal for the first time.*

Although ordinarily the valuation as made by the plaintiff is to be accepted, the plaintiff is not at liberty to make an arbitrary valuation with a view to alter the forum, either of the trial of the suit or the adjudication of the appeal. The valuation as made by the plaintsff may be challenged either by the Court of its own motion or by the defendant. In either event, there is a determination of the question of valuation. If, on such investigation, it transpires that the subject-matter of the suit has been undervalued or overvalued, the Court may call upon the plaintiff to amend the valuation of the suit. If the plaintiff does not carry out the order of the Court, the consequence described in O. 7, R. 11, followed. This is the penalty for persistence in undervaluation. If the order of the Court is carried out, the statement of valuation for purposes of jurisdiction or Court-fees are both amended, and the amended valuation thereupon becomes the valuation of the suit. When S. 31 of the Bengal Civil Courts Act refers to the value of the original suit, the reference is to the valuation as made by the plaintiff subject to such amendment as may have been made under orders of the Trial Court. The Legislature did not mean by the expression "the value of the original suit" in S. 21 the real value of the subject-matter of the original suit regardless of what may have happened in the Trial Court. Where the plaintiff stated the value of the subject-matter of the suit for purposes of jurisdiction as also of Court-fees at Rs. 3,600 and the defendant did not challenge this statement and the trial proceeded on the assumption that the valuation made by the plaintiffs was correct, *held*, that it was not competent to the defendant after they had been defeated in two successive Courts to change the forum of appeal by the assertion that the value of the subject-matter of the suit exceeds Rs. 10,000 —in other words, that if the suit had been properly valued that appeal would have lain to this Court and not to the Court of the District Judge. 34 C. 954; 23 C. 536; 18 A. L. J. 741; 45 C. 926 referred to. (*Mukerjee and Rankin, JJ.*) HARIHAR DAS *v.* RAJKUMAR MUKHERJEE. **71 I. C. 1014 : A. I. R. 1923 Cal 405.**

——**S. 8**—*Additional District Judge—Power of —Revocation of probate.*

The powers of an Additional District Judge appointed under S. 8 of the Act are the same as those of a District Judge with respect to the cases transferred to him. In the case of a matter under the Probate and Administration Act transferred to him, he can revoke a probate granted. (*Jwala Prasad and Kulwant Sahay, JJ.*) DAHO KUER *v.* TURAL DEI. **3 Pat. 609 : 78 I. C. 701 : A. I. R. 1924 P. 593**

——**S. 8 (2)**—*Additional District Judge—Assignment of function to—C. P. Code, S. 92.*

BENGAL N. W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887), S. 19.

An Addl. Dt. Judge is, by S. 8 (2), empowered to exercise the same powers as a Dt. Judge in suits under S. 92, C.P. Code. He need not, in such cases, be empowered by Local Govt. (*Chatterjea and Panton, JJ.*) MAHABUR RAHMAN *v.* ABDUR RAHIM. **62 I. C. 115 : 48 Cal. 53**

——**S. 9**—"*Civil Court*"—*Honorary Munsif—Transfer of case from Small Cause Court—Appeal from decision.*

An Honorary Munsif is a "Civil Court" within the meaning of the Act. Consequently even though a case is transferred to him from a Small Cause Court, an appeal lies from his decision to the Subordinate Judge. (*Boys, J.*) MEGI MAL *v.* HIRA LAL. **22 A. L. J. 880 : L. R. 5 A. 725: 82 I. C. 292 (1) : A.I.R. 1924 All. 761 (2).**

——**S. 13 (2)**—*Transfer of business—Assignment of business within local limits of one Court to another by District Judge is not a transfer of business—Effect of.*

An assignment of business within local limits of one Subordinate Court to another by District Judge under S. 13 (2) of the Act is not the same thing as the transfer of business under S. 150, C. P. Code. (*Chatterjea and Chotzner, JJ.*) MAHAMAD KAZEM ALI *v.* NAIMUDDIN AHMED. **26 C.W.N. 216 : 70 I. C. 210 : A.I.R. 1922 Cal. 41.**

——**S. 13 (2)**—*Redistribution of civil work in a district does not alter forum for execution of decree.*

After a mortgage decree was passed by the Sub-Judge, First Court, the Dt. Judge rearranged the civil work of the district and directed that all suits, proceedings, etc., relating to the area within which the property was situate should be filed in the Court of Sub-Judge, Third Court. The decree-holder applied for execution to the Sub-Judge, First Court, who returned the application on the ground that he had no jurisdiction. *Held*, that the Sub-Judge, First Court, was the proper Court to execute the decree. (*Jwala Prasad and Adami, JJ.*) JAGANNATH PRASAD *v.* SHEONANDAN SAHAY. **2 Pat. L.T. 374 : 62 I. C. 487 : 6 P. L. J. 304 : 1921 P. H. C. C. 186.**

——**S. 19**—*Court's jurisdiction is not ousted where mesne profits allowable under O. 20, R. 12 (2), C. P. Code, exceed its jurisdiction—Application for final decree is not a plaint and neither this application nor original plaint can be returned for want of jurisdiction—C. P. Code, S. 6—C. P. Code, O. 20, R. 12 (2).*

Per *Full Bench* (*Walmsley, J., dissenting*).—Where a Judge has in the proper exercise of his jurisdiction passed a decree for possession and also a preliminary decree for mesne profits, he must be held to have jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit. If a suit is rightly entertained as within the jurisdiction of the Judge and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. To hold that jurisdiction should depend on the amount for which the final decree should be passed would have this effect, that after the Judge passes a preliminary decree and it is found after accounts taken that the final decree must be for an amount exceeding the pecuniary limit of his jurisdiction, the entire proceedings before him including the decree passed should be considered as being without jurisdiction. The forum of appeal is determined with

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reference to the value of the suit, and not the amount decreed. The plaintiff is neither required nor bound to state any amount in his application. The application is not a plaint, and the admission of both parties that the plaint should be returned for presentation to a higher Court cannot be accepted for the reason that a preliminary decree has already been passed in the case by the Munsif on the original plaint, and the only thing that remains to be done is to give effect to the preliminary decree by a final decree. There is no provision in the law for the return of a plaint after a preliminary decree has been passed.

Per *Walmsley, J.*—Mesne profits *pendente lite* are not to be considered in determining the value of the suit for purpose of jurisdiction. A plaintiff forsakes his right to ask for an enquiry under R. 12 (1) (*c*) of O. 20 and the final decree under R. 12 (2), if the amount claimed by him makes a resort to a Court of superior jurisdiction necessary, in which case he must institute a fresh suit subject to the ordinary law of limitation. (*Walmsley, C. C. Ghose Suhrawardy, B. B. Ghose and Duval, JJ.*) BIDYADHAR BACHAR *v.* MANINDRA NATH DAS. **42 C. L. J. 49 : 29 C. W. N. 869 : 89 I. C. 726 : A. I. R. 1925 Cal. 1076 (F.B.).**

———S. 21(2)—*Decree by Munsif for mesne profits exceeding jurisdiction—Appeal lies to District Judge.*

Where the Court passing a decree for possession also passes a decree for mesne profits on enquiry though the amount of mesne profits exceeds the pecuniary jurisdiction of the Court, is a Munsif's Court, the case is appealable to the Dt. Judge under S. 21 (2). (*Das and Adami, JJ.*) DINANATH SAHAI *v.* MAYAWATHI KOER **2 Pat. L. J. 143 : 6 Pat. L. J. 54 : 60 I. C. 346 : 1921 P. H. C. C. 69.**

BENGAL PATNI REGULATION (VIII OF 1819).

———*All sections of T. P. Act cannot be applied by analogy to patni taluqs—Patnidar can lease out land for manufacturing bricks—T. P. Act—Applicability.*

Per *Chakravarti, J.*—All the provisions of the Transfer of Property Act cannot be applied by analogy to the patni taluqs and a patnidar is competent to use or lease out land for the manufacture of bricks and it is wholly consistent with a patnidar's right. (*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN *v.* BIJOYA SINGH. **52 Cal. 655 : 41 C. L. J. 527 : A. I. R. 1925 Cal. 962.**

———*Instrument not authorising brick-making does not by implication forbid it—Reservation against digging tanks is not to be construed as reservation against excavations for brick-making.*

Because the patni instrument does not authorise brick-making, it, by implication, does not forbid it and a reservation against digging tanks without permission is not to be construed as a reservation against the excavations involved in brick-making. (*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN *v.* BIJOYA SINGH. **52 Cal. 655 : 41 C. L. J. 527 : A. I. R. 1925 Cal. 962.**

———*Nature of patni taluqs.*

Per *Chakravarti, J.*—The patni taluqs are really grants of the Zemindar's interest without restrictions unless specially mentioned in the pattah. 1 Cal. 391 Ref. (*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN *v.* BIJOYA SINGH. **52 Cal. 655 : 41 C. L. J. 527 : A. I. R. 1925 Cal. 962.**

———*Relation of Zemindar and patnidar is very different from that of English owner in fee simple and a lessee for a term of years.*

The relation between a Zemindar and patnidar is not similar to the relation between the English owner in fee simple and the lessee for a term of years. (*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN *v.* BIJOYA SINGH. **52 Cal. 655 : 41 C. L. J. 527 : A. I. R. 1925 Cal. 962.**

———*Zemindar cannot complain if use of patni does not threaten complete destruction of property or such a change as will endanger rent.*

If the use of patni does not threaten the complete destruction of the property, or if it does not threaten such a change as to endanger the rent, the Zemindar has no cause for complaint. A.I.R. 1924 Cal. 56 Ref. *Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN *v.* BIJOYA SINGH. **52 Cal. 655 : 41 C. L. J. 527 : A. I. R. 1925 Cal. 962.**

———*Proceedings under are against the tenure and not patnidar—Sale—Validity of.*

Proceedings under the Bengal Patni Regulation, taken for the realisation of arrears of patni rent, are against the tenure, and the mere fact that in the application to the Collector, the Zemindar mentions the name of a deceased patnidar, which stood on his book does not make the sale held under the Regulation invalid 19 Cal. 703 referred (*Mookerjee and Rankin JJ.*) BEHARI LAL BISWAS *v.* NASIMANNESSA BIBI. **37 C. L. J. 222 : 73 I. C. 482 : A. I. R. 1923 Cal. 527.**

———*Creation of patni over the head of another is illegal—Assignment of right by patnidar to Zemindar—Rights of assignee—Sale of assignee's interest—Right to object—Creation of fresh patni—Effect of.*

The idea of a patni being created over another patni is absolutely foreign to the scheme of the Patni Regulation and the position resulting therefrom would be anomalous. In the Patni Regulation a patnidar has been given certain rights as against the Zemindars. The patnidar is described as talukdar of the first degree and a tenure cannot be created over a talukdar of the first degree. There can be no objection to the assignment of the right to the Zemindar to receive rent from the patnidar which he is entitled to get under the patni settlement. In such cases the assignee of the Zemindar's interest would be entitled to recover rent from the patnidar by virtue of the assignment. The whole scheme of the Patni Regulation is that the patnidar is the only person whose interest could be sold under the Regulation and not the interest of the so-called sub-patnidar. Where a sale under the Regulation is held without jurisdiction even a person not affected by it could question it. (*Walmsley and Ghose, JJ.*) RAJENDRA NARAIN CHAUDHURI *v.* KHAN BAHADUR MOULVI ABU NASOR AHIYA. **27 C. W. N. 189 : 71 I. C. 327 : 37 C. L. J. 141 . 50 Cal. 146 : A. I. R. 1923 Cal. 189.**

———*Setting aside—Creditors of defaulting patnidar drawing out sale proceeds—Liability to refund.*

The Zamindar, the plaintiff, brought a suit for patni-rent The patni was disposed of by Regulation VIII of 1819, as the past rents were in arrears. One Peary Mohan Roy brought it. Out of the surplus sale proceeds in this transaction some of the defendants Nos. 1 and 9 took a specified sum from the Court. These were the creditors of the defaulting patnidars. The latter sued in the meantime to cancel the sale and it was so done. The Zamindar had to pay back to the purchaser but he brought a suit to realise that amount from defendants 1 and 9 who had taken the amount out of Court. It was held, taking all facts of the suit into consideration that the plaintiff can sue defendants Nos. 1 and 9. They were tacitly bound to return the money to the Court. They failed in doing this and hence the Zamindar was obliged to pay again to the auction-purchaser which otherwise he need not have paid. It was properly the

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business of defendants Nos. 1 and 9 to give back the surplus sale proceeds to the Court. (*Rampini and Woodroffe, JJ.*) BEHARI LAL SEAL *v.* BIJOY CHAND MAHATAB. **76 I. C. 307 (2) : 38 C. L. J. 137.**

———*Proceedings under are only against the tenure —Sale under the regulation—Validity impeached.*

Proceedings taken by the Zemindar under the Regulation for recovery of his dues are not personally against the patnidar but against the tenure. Where a sale held under the Regulation is impeached, the Zemindar is not prevented from recovering the arrears for the subsequent periods by summary procedure till the proceedings impeaching the sale are over. (*Mookerjee, A. C. J. and Fletcher, J.*) BIJOY CHAND MAHATAP *v.* ASUTOSH CHAKRAVARTY.

48 Cal. 454 : 62 I. C. 73 : 25 C. W. N. 42.

———*Decree for rent—Purchaser of patnidar's right, and title after decree, if personally liable—Property passing into the hands of third person.*

Where a person purchased the right, title and interest of the patnidar of a patni mahal after a decree for rent had been passed against the patnidar. *Held*, the purchaser is not personally liable for the decree if the property passes out of his hands to a third party before the institution of the execution proceedings. For rent accruing due prior to the transfer, a transferee of a tenure is not personally liable. (*Das and Ross, JJ.*) INDER CHAND BOTHRA *v.* SURENDRA NARAIN SINGH. **1 Pat. 449 : 66 I. C. 711 : 3 Pat. L. T. 318 : (1922) P. H. C. C. 137 : A. I R. 1922 Pat. 162.**

———**S. 3**—*Kabuliyat providing for delivery of ghee and kid is in the nature of an* abwab *and is not recoverable—Effect on Reg.* V of 1812, S. 3.

Where a kabuliyat contained a stipulation that the tenant was to pay one seer of ghee and one kid every year.

Held, under the circumstances it was of the nature of an *abwab* and hence not recoverable.

The general law against *abwabs* as embodied in S. 3 of Reg. V of 1812 is not intended to be restricted by the Patni Regulation. (*Suhrawardy and Cuming, JJ.*) RAM TARAN TEWARY *v.* SM. KUMEDA DASSEE. **26 C. W. N. 634 : 68 I. C. 161 : A. I. R. 1922 Cal. 80.**

———**Ss. 8 and 10**—*Requirements of Ss.* 8 *and* 10 *in respect of contents of notice must be strictly complied with.*

Strict conformity with the requirements of the regulation in respect of contents and service of notice mentioned in Ss. 8 and 10 is essential to secure a valid sale. (*Lord Shaw*) BHUPENDRA NARAYAN SINGH *v.* MADAR BUKSH. **52 I. A. 439 : A. I. R. 1925 P. C. 297.**

———**Ss. 8 (2) and 10**—*Notice—Strict compliance with section is necessary for validity of sale.*

S. 10 of the Regulation contemplates a self-contained notice comprising not only a specification of the arrears, etc., but also a statement of the lots proposed to be sold in the order in which the sale will be held. The notice to be stuck up in the Collector's Office, like the petition, must be specified with the balance due from all that patnidars to the Zemindar and a copy or extract of the notice applying to an individual defaulter is to be sent by the Zemindar to be published at the Cutcherry or at the principal town or village on the land of the defaulter. Strict conformity with the requirements of Ss. 8 and 10 in the matter of the contents and service of the notice is essential to secure valid sale. 9 C. W. N. 619 Foll. (*Mookerjee and Panton, JJ.*) RAJA BHUPENDRA NARAIN *v.* MADAR BUX SHEIKH. **66 I. C. 793 : 34 C. L. J. 399.**

BENGAL PATNI REGULATION (VIII OF 1819), S. 14.

———**S 11**—*Construction—Interest of occupancy raiyat—When protected.*

The terms of S. 11, cl. 1 are not satisfied unless at least the right of transfer is expressly stated in the lease or other engagement to be a right to make transfers which shall not be mere encumbrances. That seems to be the natural meaning of the first paragraph of the first clause and that construction is borne out by the emphatic language of the second paragraph. No transfer is to bar the indefeasible right of the Zemindar unless it is made with the condition that it shall not amount merely to an incumbrance and such condition can only be annexed where express authority for that purpose has been received from the Zemindar or superior landlord. (*Richardson and Suhrawardy, JJ.*) GOPAL CHANDRA PODDAR *v.* DWARIKA NATH DUTTA. **69 I. C. 655 (Cal.) : A. I. R. 1924 Cal. 353 (2).**

———**S. 11**—*Khudkhast raiyat is—Protection from ejectment.*

Under S. 11 a person who is a khudkasht raiyat is protected from ejection from the holding including the part he uses for residential purposes as well as the waste land and the land he cultivates. (*Newbould, J.*) KRISHNA PRAMADA DASI *v.* RASH BEHARI DAS. **67 I. C. 709 : A. I. R. 1923 Cal. 327 (1).**

———**S. 11**—*Purchaser of patni cannot evict occupancy tenants—B. T. Act, S.* 25.

The policy of the law at the time of the enactment of the Patni Regulations seems to have been to protect from eviction those cultivating the land ; at the time of the enactment of the Patni Regulations, occupancy rights did not exist, those cultivating the lands were either khudkhast ryots, that is, ryots of the village cultivating the lands, or paikast ryots who were cultivators who came from outside the village. Consequently, S. 11 of the Patni Regulations extends protection to the only cultivating ryots of the village then known, namely, khudkhast ryots or resident and hereditary cultivators. It has been the policy of the law throughout to protect those actually on the land and cultivating it. Therefore, these occupancy tenants also must be deemed to be protected. (*Greaves and Chakravarti, JJ.*) JNANENDRA MOHAN *v.* HARENDRA KRISHNA DE. **A.I.R. 1925 Cal. 1169.**

———**S. 11 (1), (2)**—*Sub-lease by patnidar—When binding on Zemindar—"To that effect"—Meaning of.*

The phrase " to that effect " in the second sub-clause to S. 11 must by logical interpretation mean "to make such transfer by sale, etc.," as to bar the indefeasible right of the Zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent of the tenure. Sub-clause (2) requires that in order that the *Zemindar* should be bound by a sub-lease created by the *patnidar* and to defeat the former's right to hold the tenure liable, the *patni* lease must confer on the *patnidar* the right to create such an under-tenure as will bar the above indefeasible right of the Zemindar. (*Suhrawardy and Duval, JJ.*) DURLOW CHANDRA CHOWDHURI *v.* JAMIRUDDIN AHAMED CHOWDHURI. **90 I. C. 405.**

———**S. 14**—*Remedy under must be resorted to suit for refund does not lie.*

On reversal of a patni sale, the purchaser must have recourse to the remedy provided by S. 14 to the extent it is available and cannot maintain a separate suit to obtain the relief which if he had so desired might have been granted to him against the Zemindar for reversal of the sale. (*Mukerjee and Rankin, JJ.*) CHOWDHURY MAHOMED AMIN *v.* MAHARAJA OF

BENGAL PATNI REGULATION (VIII OF 1819), S. 14.

BURDWAN. **50 Cal. 756 : 75 I. C. 20 : 38 C. L. J. 192 : A. I. R. 1923 Cal. 732.**

———**S. 14**—*Scope.*

A sale under the Regulation can only be questioned by a person entitled to do so under S. 14 of the Regulation and the title of the purchaser under the Regulation sale cannot be questioned collaterally. But the sale must be held with jurisdiction. It seems that the whole scheme of the Patni Regulation is that the *patnidar* is the only person whose interest can be sold under the Regulation and not the interest of a person who is created a *patnidar* ignoring the previously created *patnidar*. (*Walmsley and B. B. Ghose, JJ.*) RAJENDRA NARAYAN *v.* MOULVI ABU NASEER. **50 C. 146 : 27 C. W. N. 189 : 37 C. L. J. 141 : A. I. R. 1923 Cal. 189.**

———**S. 14**—*Patni sale—Part of purchase money withdrawn by a holder of decree against patnidar's judgment-creditor—Sale set aside—Suit by purchaser for refund.*

A person had a decree against the judgment-creditor of a patnidar and withdrew, in execution of his decree, a part of the purchase money deposited in the Collectorate by purchaser of the patni at a sale held under S. 14, Patni Taluks Regulation. When the patni sale had been set aside by a compromise decree in a suit brought by the patnidar against the Zamindar and the purchaser ; *held*, the purchaser had a right to maintain a suit against the person who had withdrawn the portion of the purchase money, for recovery of amount withdrawn. Wigram *v.* Buckley, (1894) 3 Ch. 483, Mobaruck Ali *v.* Ameer Ali (1873) 21 W. R. 252 referred to. (*Jwala Prasad, A. J. C. and Ross, J.*) MAHARAJ BAHADUR *v.* SHAIKH ABDUL. **1 P. 5 : 3 P.L.T. 37 : A.I.R. 1922 Pat. 394.**

BENGAL PERMANENT SETTLEMENT REGULATION (I OF 1793). *Bengal Regulations* (XIX *of* 1793 *and* II *of* 1818)—*Permanently settled estate—Churs formed subsequent to settlement are liable to assessment—Non-navigable river—Ownership of the bed—Bengal Alluvion and Diluvion Act* (IX *of* 1847), *S.* 6.

Land whether cultivated or waste at the time of the settlement, but included in a permanently settled estate, are exempt from further assessment under Bengal Regulation I of 1793. But this protection extends only to lands actually in existence at the time of the settlement and specifically included in the estate as settled. Churs formed after the decennial settlement within the limits of the zemindari are to be treated as unsettled under Bengal Regulation II of 1890, even though the river-bed from which the Churs have been thrown up was the property of the Zemindar at the time of the settlement and the jumma was imposed on the zemindari as a whole. It is, therefore, competent to the Government to assess to public revenue under Bengal Act IX of 1847, Churs formed in a non-navigable river both where it flows through a permanently settled zemindari and within the middle line of the river where it is the boundary of the zemindari. The fact that the whole or half of the river-bed as the case may be, was part of the permanently settled estate does not affect the right of the Government to assess the Churs in question. 17 Cal. 590 distinguished. (*Viscount Cave.*) SECRETARY OF STATE *v.* MAHARAJA OF BURDWAN. **42 M. L. J. 61 : 49 Cal. 103 : 67 I. C. 835 : 26 C. W. N. 619 : 4 U. P. L. R. (P. C.) 1 : 35 C. L. J. 92 : 48 I.A. 565 : A. I. R 1922 P. C. 6 (P. C.).**

BENGAL POLICE ACT, Ss. 30, 32—*License for procession.*

The District Superintendent of Police has power to issue notification requiring a license for processions and assemblies which becomes as much a part of the law as any law embodied in the Statute Book. (*Mullick, Coutts and Dass, JJ.*) EMPEROR *v.* DR. ABDUL HAMID. **3 Pat. L. T. 585 : (1922) P. H. C. C. 274 : 68 I. C. 945 : 2 P. 134 : 23 Cr. L. J. 625 : 1 Pat. L. R. 199 (Cr.) : A. I. R. 1923 Pat. 1 (S. B.).**

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913)—*Demand in addition to revenue—Can be based only on statutory or contractual liability.*

Where the Government makes a demand in addition to the revenue payable in respect of a permanently settled estate from the holders thereof, such an additional demand can be recoverable if there is a special liability either statutory or contractual. Where the demand has been made and complied with for a very long time, it must be referred to some legal origin ; in other words, the inference is that at some time there was an agreement between the Government and the proprietors that the former should maintain and repair the embankments in the estate with the aid of funds contributed by the latter. 45 C. 866 ; 22 C. W. N. 823 Referred to. (*Mookerjee and Chotzner, JJ.*) NABADWIP CHANDRA NANDI *v.* SECY. OF STATE FOR INDIA. **50 Cal. 208 : A. I. R. 1923 Cal. 609.**

———*Applicability of—Certificate procedure when to be adopted.*

The certificate procedure is intended only for the recovery of sums regarding which there is no doubt of the liability of the debtor. Cases in which the debtor is likely, with some show of reason, to deny his liability should be referred with a view to the institution of Civil suits. (*Morshead, M. C.*) BHUKHUL MISSIR *v.* MAHARANI JANKI. **2 Pat. L. R. 111 (Cr.).**

———**Ss. 3 (1), 36 and 37**—*Scope of—Act is not retrospective and does not affect—Cause of action accruing under S.* 10 *of Act* I *of* 1895.

Act III of 1913 is not retrospective in its operation and does not extinguish or modify causes of action which have already accrued by failure to serve the notice under S. 10 of Act I of 1895 S. 36 of Act III of 1913 controls S. 3 (1). S. 37 of the Act bars the jurisdiction of the Civil Court only where the question relates to the making, execution, discharge or satisfaction of a certificate duly filed under the Act or relates to the confirmation or setting aside of a sale held in execution of such certificate. (*Mookerjee and Chotzner, JJ.*) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHOWDHURY. **36 C. L. J. 208 : 72 I. C. 698 : A. I. R. 1923 Cal. 13.**

———**S. 4**—*Strict compliance with form of certificate is essential.*

A certificate which contains no entry in that part of it which is really the certificate in the prescribed form giving any of the particulars in the handwriting of the officer having jurisdiction to issue such a certificate is invalid, because the form of a certificate under S 4 of the Bengal Public Demands Recovery Act should be strictly complied with. (*Greaves and Chakravart, JJ.*) ALI MIYAN *v.* WAJADDIN SIKDAR. **82 I. C. 1013 : A. I. R. 1925 Cal. 383.**

———**S. 4**—*Public demand—What is—Certificate, issue of.*

The 'Public demand' mentioned in S. 4 of the Public Demands Recovery Act includes a demand payable to the Collector by a person holding any interest in land, when such demand is a condition of the use and enjoyment of the land. S. 4 should not be so interpreted as to authorise the issue of more than one certificate in the prescribed form with regard to a single

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913), S. 10.

demand broken up into fragments. (*Mookerjee and Cuming, JJ.*) PRATAB CHANDRA JANA *v.* SECRETARY OF STATE. **49 Cal. 1026 : 35 C. L. J. 304 : 67 I. C. 375 : A. I. R. 1922 Cal. 101.**

——**S. 10**—*Notice—Omission to serve under the sale a nullity.*

Under S. 10 of the Bengal Public Demands Recovery Act the omission to serve a notice under S. 10 makes the sale a nullity. In such a case the plaintiff need not apply to set aside the sale but can sue for possession on the footing that the sale had not affected his title. The suit would be governed by Art. 142 of the Limitation Act. (*Mookerjee and Chotzner, JJ.*) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHAUDHURI. **36 C. L. J. 208 : 72 I. C. 698 : A. I. R. 1923 Cal. 13.**

——**Ss. 10 and 31**—*Notice—Service of—Death of one sharer before notice—Sale is not wholly void.*

The words " and also in some conspicuous part of the land " in S. 31 refer only to cases in which the service is effected by fixing a copy in conspicuous place in the office of the certificate officer and not to cases in which the same notice is served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business. Where the judgment-debtor could not be found at home nor could service be effected on any adult male member and the only information which could be obtained was that the persons on whom notice was to be served were in some distant town, the only alternative left is to serve by fixing the copy on the outer door of the house.

Where one of the sharers was dead prior to the serving of the notice, the sale is not wholly void. (*Coutts and Ross, JJ.*) BENI ROY *v.* BABUI BACHA KUER. **1 P. 273 : 69 I. C. 700 : 1 Pat. L. R. 196 : A. I. R. 1922 Pat. 546.**

——**Ss. 29 and 65**—*Certificate sale—Setting aside—Limitation—Delay.*

Where a pardanashin lady who had been affected by a certificate sale applied nearly seven years after the expiry of the sixty days prescribed by S. 29 (2) of the Act and the lower appellate Court set aside the sale on the ground that the lady was a pardanashin lady and might have been ignorant of the proceedings and of the requirements of the law. *Held*, that the questions of hardship and irregularity of the sale were not relevant unless there was a reasonable explanation for the delay. The lady had lost her remedy in the Civil Court by omitting to take any step for one year after she became aware of the sale and she could not re-open the sale under S. 29 of the Act. (*Morshead, M. C.*) DEO SARAN PURI *v.* BAHURIA UTTIMRA KUER. **2 Pat. L. R. 127 (Cr.).**

——**S. 31**—" *And also in some conspicuous part of the land*"—*Meaning of.*

The expression " and also in some conspicuous part of the land " in S. 31 of Bengal Public Demands Recovery Act refers only to cases in which the service is effected by fixing a copy in some conspicuous place in the office of the certificate officers and not to cases in which the notice is served by fixing a copy in the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business. (*Coutts and Ross, JJ.*) BENI ROY *v.* BABUI BACHA KUER. **1 P. 273 : 69 I. C. 700 : 1 Pat. L R. 196 : A. I. R. 1922 Pat. 546.**

——**S. 36**—*Sale of property without existence of arrears of revenue is a nullity—Suit to set aside—Bar of limitation.*

Where in 1907 the revenue authorities proceeded to sell the property in dispute for an imaginary arrear of revenue the sale is a nullity and there is an usurpation of jurisdiction on their part. 37 Cal. 107 Referred to. Thereupon a right accrued to the plaintiff under the law as it then stood to institute a suit to recover the property within 12 years from the date of dispossession. A right of this description could not be affected by the retrospective operation of a subsequent statute. (*Mookerjee and Chotzner, JJ.*) DHORENDRA KRISHNA MUKERJEE *v.* MOHENDRA NATH MUKERJEE. **27 C. W. N. 386 : 70 I. C. 869 : A. I. R. 1923 Cal. 428.**

——**Ss. 36 (b) and 23**—*Application to certificate officer—Subsequent suit—Maintainability.*

Where an application was made to set aside a sale under S. 23 of the Public Demands Recovery Act, a subsequent suit to have it declared that the sale is void on the same ground is barred by S. 36 (*b*) of the Act. (*Walmsley and Page, JJ.*) BASANTA KUMAR PAL *v.* HARENDRA NATH MUKHOPADYA. **30 C. W. N. 36.**

——**S. 37**—*Bar of suit—Irregularities relating to execution proceedings.*

Under S. 37 of the Public Demands Recovery Act all questions regarding the irregularities in the execution proceedings shall be determined not by suit by order of the certificate officer and it is settled law that where a question arises between the certificate holder and the certificate debtors or their representatives the procedure laid down by S. 37 must be adopted, notwithstanding that the purchasers under the auction sale may be impleaded as being interested parties in the suit. A certificate debtor cannot evade the provisions of S. 37 of the Act by adding a claim to the same relief upon an allegation of fraud which proves to be groundless. (*Walmsley and Page, JJ.*) BASANTA KUMAR PAL *v.* HARENDRA NATH MUKHOPADHYA. **30 C. W. N. 36.**

——**S. 37**—*Unauthorised action of revenue authorities—Does not oust jurisdiction of—Civil Courts.*

When the action of the revenue authority is wholly unauthorised, S. 37 of the Public Demands Recovery Act does not oust the jurisdiction of the Civil Courts to make a declaration, issue an injunction or to grant other adequate relief. (*Mookerjee and Cuming, JJ.*) PRATAB CHANDRA JANA *v.* SECRETARY OF STATE. **35 C. L. J. 304 : 67 I. C. 375 : 49 Cal. 1026 : A. I. R. 1922 Cal. 101.**

BENGAL PUBLIC GAMBLING ACT (II OF 1867.)—

——**Ss. 11, 11 (a)**—" *Ring game* "—*Whether a game of skill or chance is a finding of fact.*

A finding whether the " ring game " is a game of skill or chance is a finding of fact and unless there is a grave error, the High Court will not interfere. (*Jwala Prasad, J.*) DAMRI MIAN *v.* EMPEROR. **3 U. P. L. R. (Pat.) 55 : 61 I. C. 518 : 22 Cr. L. J. 390.**

——**S. 14**—*Manner of publishing the notice of sale—Irregular sale—Second sale during the pendency of proceedings to set aside the first.*

The notice of sale need not be served personally. It is sufficient if it is posted on the office of the defaulter. An irregular sale is only voidable, capable of being avoided by a suit under S. 14. If a second sale is held during the pendency of proceedings to set aside the first, the second becomes a part of the first and would stand or fall with it. (*Richardson and Shamsul Huda, JJ.*) MAHARAJADHIRAJ OF BURDWAN *v.* MRITUNJOY GHOSE. **47 Cal. 782 : 60 I. C. 182 : 24 C. W. N. 785.**

BENGAL PUBLIC GAMBLING (AMENDMENT) ACT (VI OF 1913)—*Racing in partnership—Validity.*

It cannot be held that persons who enter into partnership for the purpose of making agreements not forbidden but recognised by law, though unenforceable at law, are persons who conduct a business, the very nature of which disentitles them to have recourse to Courts of law to recover the claims otherwise sustainable. (*Buckland, J.*) LEICESTER CO. *v.* S. P. MALIK. **27 C. W. N. 442 : A. I. R. 1923 Cal. 445.**

———**S. 2**—*Gambling—Definition governs interpretation of—Calcutta Police Act* (IV *of* 1866, *S.* 45.

S. 45 of the Calcutta Police Act must be read having regard to the definition of gambling in S. 2 of the Bengal Public Gambling Act. (*Sanderson, C. J. and Richardson, J.*) BAJRANGA LAL KADIA *v.* EMPEROR. **25 C. W. N. 428 : 33 C. L. J. 287 : 62 I. C. 871 : 22 Cr. L. J. 599.**

BENGAL REGULATION (I OF 1793)—

———*—Permanent Settlement dates from Decennial Settlement of* 1790.

The Permanent Settlement does not date from the expiry of the Decennial Settlement in 1799, but from the time when the Decennial Settlement was made in 1790. (*Jwala Prasad and Ross, JJ.*) RAMANADHAN SAHAY *v.* JAIGOVIND PANDEY. **2 P. 839 : 75 I. C. 955 : A. I. R. 1924 Pat. 213.**

———**(VIII OF 1793)—S. 5 (3)**—*Rent of Taluks held long before Zamindari—If liable to be enhanced.*

The owner of taluks which were formed long before the zemindari, comes within the description of a taluqdar in S. 5 (3) of Regulation VIII of 1793 which was not repealed when the zemindari was created The rent of such a taluk cannot therefore be enhanced. (*Newbould and B. B. Ghose, JJ.*) BIRENDRA KISHORE MANIKYA BAHADUR *v.* ALI AHAMED. **39 C. L. J. 605 : A. I. R 1924 Cal. 1015.**

———**(VIII OF 1798)—S. 5**—*No separation of jama—Presumption.*

Where a talukdar is shown to have taken no steps under the regulation to obtain separation of the jama, the presumption would be that he was not an independant talukdar under S. 5 of the Regulation. (*Ameer Ali, J.*) SRINATH RAY *v.* UDAI NATH SAHAI. **33 M. L. T. 408 ; 28 C. W. N. 145 : (1923) M. W. N. 702 : A. I. R. 1923 P. C. 217 (P. C.)**

———**(XII OF 1805)**—(*Cuttack Land Revenue Regulation, S.* 34—*Scope.*

The words ' for ever ' in S. 34 merely express the intention of the paramount power not to resume the grant and does not restrict the grantee's power of alienation.

Where by terms of the sanad a grant was made to the grantee and his heirs of certain properties in the District of Cuttack. *Held*, the grantee took an absolute and hereditary interest in the property under the sanad and therefore he or his successors-in-title could as of right alienate the properties. S. 34 of Bengal Regulation, 1805 merely confirmed the grant but the grantee derived his title from the sanad. (*Das and Adami, JJ.*) GULAM NABI *v.* CHAUDHARY BASUDEO DAS. **1 P. 201 : A.I.R. 1922 Pat. 411.**

———**(XVII OF 1806)**—*Foreclosure proceedings—Mortgagee must prove that notice fulfilled all the conditions—Non-existence of notice is fatal to the proceedings.*

The Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the motgagee must prove affirmatively the due performance of every necessary condition. The mere fact of mortgagor's raising no objection to the validity of the notice does

BENGAL REGULATION (XXIX OF 1814).

not warrant the presumption that the notice fulfilled all the necessary conditions. And the non-existence of the notice does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of the Regulation. On the other hand the non existence of the notice is fatal to the validity of the foreclosure proceedings. (46 P. R. 1907, Foll.) (*Martineau and Brasher, JJ.*) MUNSHI RAM *v.* NAURANGA. **A. I. R. 1924 Lah. 176.**

———*—Anomalous mortgage—Title of mortgagee is not complete without foreclosure.*

Where there is an anomalous mortgage, *viz.*, a combined mortgage by conditional sale and usufructuary mortgage, then under the Regulation the mortgage was bound to institute proceedings for foreclosure within 12 years and the time for foreclosure does not arise till the period stipulated in the proviso for redemption had expired. A mortgagee's title must be held to be incomplete until it was confirmed by a regular suit under the regulation. Where before the expiry of the 12 years the T. P. Act came into force then the mortgage would be subject to the provisions of S. 60 of the T. P. Act. (*Prideaux, A. J. C.*) RUPA BAI *v.* RODBA. **6 N.L.J. 130 : 72 I. C. 121 : A. I. R. 1923 Nag. 274.**

——— **S. 1**—*Foreclosure—Observance of formalities must be proved by the mortgagee.*

It is settled law that the Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition. The non-existence of the notice does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of Regulation XVII of 1806. (*Martineau and Brasher, JJ.*) MUNSHI RAM *v.* NAURANGA. **72 I. C. 575 : A. I. R. 1924 Lah. 176.**

———**S. 1**—*Foreclosure proceedings—Action of District Judge if judicial or ministerial.*

Though the functions to be exercised by the District Judge under the Regulation (XVII of 1806) are ministerial and not judicial, there can also be no doubt that a District Judge assumes judicial functions when he proceeds to determine whether he has or has not the jurisdiction to issue a notice. Consequently his order issuing a notice overruling an objection to his jurisdiction is open to revision by the High Court. (*Moti Sagar, J.*) NAND KISHORE *v.* NARAIN SINGH. **6 Lah. L. J. 137 : 78 I. C. 350 : A.I.R. 1924 Lah. 471.**

———**S. 7**—*Notice to mortgagor.*

S. 7 provides either for payment or tender to the mortgagor for deposit in Court, and a notice which simply informs the mortgagor that he must pay the money within the year and says nothing of the alternatives of tenders and deposits in Court is misleading. The defect is not cured merely by the addition of words " in the manner provided for in S. 7 of the Regulation". (*Chevis, J.*) ZORA *v.* CHANDU. **68 I. C. 883 : A. I. R. 1923 Lah. 71 (2).**

———**(V OF 1812), S. 3**—Delivery of goats and ghee agreed to in a Kabuliyat is a matter. Relating to abwab and is not sanctioned by the Bengal Patni Regulation. (*Suhrawardy and Cuming, JJ.*) RAM TARAN TEWARY *v.* S. KUMEDA DASI. **68 I. C. 161 : 26 C. W. N. 634 : A. I. R. 1922 Cal. 80.**

———**(XXIX OF 1814) (Birbhum)**—*Act does not apply to Kharagpur Ghatwalis—Incidents of latter tenure—Taluka Dunri—Succession—Impartible estate—Widow and undivided brother—Preference.*

Regn. XXIX of 1814 does not apply to Kharagpur Ghatwalis. One of the main distinctions between Ghatwals of the Birbhum and of Kharagpur type is

that the former are inalienable except with the consent of Government by whom the settlements were made and to whom revenue is paid direct, whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid. The Regulation of 1814 applies to the former only. The incidents attaching to a Ghatwali of the Kharagpur type as evidenced in the case are : (1) that it is impartible, and permanent, (2) that it descends by lineal primogeniture, and (3) that it is alienable at least with the consent of the Zemindar. Unless there be some peculiar feature inherent in Ghatwali tenure which prevents the operation of the Mitakshara rule of succession in the case of impartible property, the same rule would apply. In a Mitakshara family being in commensality the inheritance even of impartible estates is confined to male members to the exclusion of females, unless the estate is the separate or self-acquired property and normal in the course of succession to Ghatwali property is not different from that which regulates succession to other impartible property. (*Miller, C. J. and Foster, J.*) THAKURAIN FULBATI KUMARI *v.* MAHARAJA KUMAR RAO MAHESHWAR PRASAD SINGH. **74 I. C. 668 : 2 P. 685 : 4 Pat. L. T. 473 : (1923) P. H. C. C. 161 : A.I.R. 1923 P. 453.**

——— **S. 5**—*Limitation.*

A suit by the purchaser of a tenure under S. 5 of Regulation XXIX of 1814 for recovery of possession is governed by 12 years period. (*Jwala Prasad and Ross, JJ.*) H. MATHEWSON *v.* SECY. OF STATE. **3 Pat. 673 : 84 I. C. 405 : A. I. R. 1924 P. 616.**

——— **S. 5**—*Validity of sale.*

Secretary of State cannot question sale for arrears of rent under S. 5. (*Jwala Prasad and Ross, JJ.*) H. MATHEWSON *v.* SECY. OF STATE. **3 P. 673 : 84 I. C. 405 : A. I. R. 1924 Pat. 616.**

——— **(XII OF 1817), Ss. 20 and 34**—*Remuneration of patwari—Jurisdiction of Civil Court.*

A patwari who has been registered under Regn. XII of 1817 can recover his dues under the Regulation only and a Civil suit for the purpose is barred by S. 34. (*Morshead, M. C.*) RAMCHANDAR LAL *v.* MAHABIR ROY. **2 Pat. L. R. 112 (Cr.).**

——— **(II OF 1819), S. 24**—*S. 24 does not apply to a suit to declare that Char lands are not added lands within S. 6 of the Bengal Alluvion Act and Art. 14, Limitation Act, does not apply to such a suit.*

Board of Revenue approved an assessment of certain additional revenue of Char lands which was made on the basis that the lands were gained from the river by alluvion on 28th November, 1912. On 15th March, 1913, a notice dated 20th February 1913, was served on the plaintiffs informing them of this assessment. Plaintiff's petition to review the decision was rejected on the 29th June, 1914. On the 29th June, 1915, plaintiffs sued for declaration that the disputed tract was not added land within the meaning of S. 6 of the Bengal Alluvion and Diluvion Act and that the assessment was consequently without jurisdiction :

Held, (1) that S. 24 of Regulation II of 1819 was not applicable, and (2) that it was not barred under Art. 14 of the Limitation Act. 24 C. W. N. 813 Diss. (*Mookerjee and Rankin, JJ.*) PEARY LAL RAY *v.* SECY. OF STATE. **39 C. L. J. 454 : 83 I. C. 446 : A. I. R. 1924 Cal. 913.**

——— **S. 103-B**—*Rent—Claim to hold free of—Contract or Old grant must be proved.*

Neither in 1838, when the summary settlement was made nor in 1839, when the three mauzas, Amarpur Jabar, Amarpur Roop and Jabarpar Khas under the Permanent Settlement were amalgamated and named

Amar Jabar, was any claim to hold free of rent on account of Malikanadari right put forward by the predecessors of the defendants. The investigations in 1839 were carried with complete thoroughness under Act II of 1819, in the final proceedings the revenue was reduced from Rs. 351 to Rs. 225. It was claimed, on behalf of defendants, that the reduction was due to their Malikanadari rights. In 1840 in the Thakbast map and Khasra entries, which have no evidential value, were made by the Amin before the preparation of the regular survey of Amarpur Jabar to the effect that certain persons held Malikanadari (co-proprietary) right in mauza Amarpur Roop and held land free of rent. No objection was raised on behalf of the landlord, as the rent was collected by the Thikkadar. The claim on behalf of the defendants-respondents was for the first time put forward in 1877 but it was resisted and disallowed on the ground that no such mauza existed. The claim was again put forward, when the matter came for the purpose of cadestral survey, *held*, it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognised by Government. 12 Moo. I. A. 331 Foll. (*Mr. Ameer Ali.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH. **45 M.L.J. 460 : 2 P. 38: 71 I.C. 984 : 32 M. L. T. 1 : (1923) M. W. N. 361 : 27 C. W. N. 925 : 3 Pat. L. T. 605 : 36 C. L J. 499 : 49 I. A. 399 : A. I. R. 1922 P. C. 272 (P. C.)**

——— **(VII OF 1822).** *See* BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822).

——— **S. 9**—*Collector can only record existing rights but cannot create any liability.*

The Collector is not empowered under S. 9 of Reg. VII of 1882 to determine any rent so as to fix the under tenant with liability to pay the amount fixed, to his landlord, but he is only to record existing rights. (*Walmsley and B. B. Ghose, JJ.*) DHIRENDRA CHANDRA RAI *v.* NAWAB KHAJA HABIBULLAH. **29 C. W. N. 505 : 87 I. C. 442 : A. I. R. 1925 Cal. 758.**

——— **(XI OF 1825).** *See also* BENGAL ALLUVION AND DILUVION REGULATION.

——— *Chur land.*

Where owner of a diluviated estate has paid revenue for the site which was under water and which subsequently reformed, he is entitled to claim the land as belonging to his estate and such land cannot be dealt with under the provisions of Regulation of 1825. (*Walmsley and M. N. Mukerjee, JJ.*) CHANDRA KUMAR AICH *v.* JIBAN KRISHNA NATH. **29 C. W. N. 290 : 80 I. C. 702 : A. I. R. 1925 Cal. 249.**

——— **S. 4 (1)**—*Accretion to tenants' holding—Bed of the river forming property of landlord—Tenant gets benefit of accretion.*

Per *Dawson Miller, C. J. and Jwala Prasad, J.*—The first clause of S. 4 of Bengal Regn. XI of 1825 applies clearly both to the case of a superior landlord, who holds from the Crown and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown and is limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and no one else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise and permit a landlord

to acquire in this manner a proprietary right in the land of his neighbour, with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what in effect would be confiscation of another man's land. This consideration does not apply where the claim is by a tenant against land of his landlord, a claim which by the proviso to cl. (1) of S. 4 is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed, and which by the same proviso carries with it the liability to pay an increase of rent. 13 M. I. A. 467 Rel.; 1 P. L. J. 536; 1 P. L. T. 229 Dist.

Per *Mullick, J.*—Bengal Regn. XI of 1825 does not provide for lands in a large and navigable river the bed of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual. The Regulation is not exhaustive. It is subject to rules of equity and justice. Therefore land gained from the river-bed by reformation *in situ* or otherwise will, if it can be identified, belong to the owner of the bed, except when otherwise expressly provided by the Regulation. This rule will preclude a tenant from acquiring a right of tenancy in an accretion from a river-bed which was not the property of his landlord before emergence. 2 C. L. J. 185; 11 W. R. 115 Ref. (*Miller, C. J. Mullick and Jwala Prasad, JJ.*) KHUBI MAHTON *v.* LECHMI DAS. **3 Pat. L. T. 513 : 67 I. C. 642 : 2 P. 18 : (1922) P. H. C. C. 258 : A. I. R. 1922 Pat. 588 (F. B.).**

———S. 4 (2)—*Identity of land not lost—Custom—'Dhardhura', meaning of.*

Where the identity of the defendant's lands is not lost by the change in the course of the river, in spite of the fact that those lands lie on the north side of the river instead of on the south where they had formed part of the defendants' villages, the title to the lands in suit would not vest in the plaintiff although the river had suddenly changed its course and the lands were cut off from the defendant's villages and were joined by the fluvial action to those of the plaintiff's. 27 Cal. 768 : 13 M. I. A. 468 Foll. Plaintiff must establish a custom which should go to the whole length of abrogating the law under which the defendants claim title to the lands in suit, and unless that is done, the general law must prevail. It would be wholly against all principles to uphold a custom by means by possible inferences or even by probable implications. Dhardhura is not a necessarily term of art, signifying necessarily, always, and under all conditions, that the deep stream constitutes a permanent boundary between the two estates on the opposite banks of the river. Indeed there are reported cases indicating possible variations in the sense of the word Dhardhura.

Held, it is not shown that the custom of dhardhura has ever been acted upon by the owners of the villages on the Cawnpore side or the Unao side under any conditions much less in the circumstances which form the special characteristics of the lands in suit in this case. In the form in which the question of custom arises for decision in the present case there is no doubt that it is a question of mixed law and fact. (*Simpson and Wazir Hasan, A. J. Cs.*) TEWARI BALBHADDAR PRASAD *v.* HAR NARAYAN DAS. **9 O. L. J. 518 : 73 I. C. 727 : A. I. R. 1923 Oudh 102.**

———(XVIII OF 1825), S. 4 (1)—*Diara lands—Accretion—Separate suit for rent—Howla tenure.*

Land accreted to a rent-free tenure is liable to the payment of rent though the tenure to which it is accreted may be rent-free. The rate of rent of land

accreted to a rent-paying tenure may not be the same as that of the original tenure having regard to the quality of the land. Where the proprietor of an estate declines to take settlement from the Government, the accreted portion must be settled with some other person and such other person must necessarily bring a separate suit for rent for the accreted land held by the tenant. When the proprietor takes a settlement from the Govt. of the accretion as a separate estate and such estate is sold away to a third person such person would certainly be entitled to maintain a separate suit for rent for the accreted portion. These considerations show the difficulty of affirming a general proposition that in no case can a separate suit for rent be maintained for the accreted lands. Where the accreted lands were formed subsequent to the creation of the parent *howla* tenure and they were not only constituted a separate estate between the Government and the proprietor but the diara lands were separated and formed into new tenancies recorded in the settlement khewats and the parties treated the accreted lands as separate tenures by suing for rents separately. *Held*, that a separate suit for rent for the accreted lands is maintainable. (*Chatterjea and Cuming, JJ.*) KALI RANJAN CHOWDHURY *v.* RAJESWAR ROY CHOWDHURY. **51 Cal. 396 : A. I. R. 1924 Cal. 649.**

——— ———(XI OF 1832), S. 4—*Accretion to be slow and gradual.*

An accretion to be gradual, must be an accretion by gradual, slow and imperceptible means. Where a field received by alluvion an area which was considerable in proportion to the area of permanent field and came under cultivation afresh in one year the accretion is not gradual. (*Fremantle, J. M.*) GAYA CHAUBE *v.* MAHARAJA KESHO PRASAD SINGH. **L. R. 5 A. 90 (Rev.).**

———(III OF 1872)—*Applicability—Property partly situated in Sonthal Parganas and partly outside—Jurisdiction of Court not situated in Sonthal Parganas to try the suit.*

The holders of the gadi of Lachmipur Estate, District Bhagalpore, comprising one of the chowrosi gadis, even supposing their origin to be non-Hindu have adopted in general not only Hindu religion and Hindu social usages, but also the Hindu law regulating the succession of landed property. (*Lord Phillimore.*) SAHDEO NARAYAN DEO *v.* KUSAM KUMARI. **44 M. L. J. 476 : 37 C. L. J. 369 : 71 I. C 769 : 32 M. L. T. 121 : 2 P. 230 : 4 P. L. T. 217 : 50 I. A. 58 : 25 Bom. L. R. 560 : 18 L. W. 597 : (1923) M. W. N. 377 : 27 C. W. N. 901 : A. I. R. 1923 P. C. 21 (P. C.).**

———S. 5—*Entry in the Record—of—Rights can be challenged on ground of fraud.*

(*Das and Adami, JJ.*) SIB SARAN SHAH *v.* RAMESWAR DEY. **2 Pat. L. T. 40 : 60 I. C. 640 : (1920) P H. C. C. 363.**

———(V OF 1893), Ss. 3 (1), 36 and 37—*Act is not retrospective—Cause of action accruing under S. 10 of Act I of 1895.*

Act III of 1913 is not retrospective in its operation and does not extinguish or modify causes of action which have already accrued by failure to serve the notice under S. 10 of Act I of 1895 and S. 36 of Act III of 1913 controls S. 3 (1). S. 37 of the act bars the jurisdiction of the Civil Court only where the question relates to the making execution discharge or satisfaction of a certificate duly filed under the Act or relates to the confirmation or setting aside of a sale held in execution of such certificate. (*Mookerjee and Chotzner, JJ.*) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHOUDHARI. **36 C. L. J. 208 : 72 I. C. 698 :**

BENGAL REGULATION (IV OF 1910), S 8.

A. I. R. 1923 Cal. 13.

——(IV OF 1910), S. 8—*Personal services of Ghatwal commuted to money payment—Ghatwali becomes alienable.*

The condition of inalienability attaching to a Ghatwali tenure ceases after the personal services, to be rendered in the past by the Ghatwalis, are commuted to a payment of money for the support of rural police.

There is no reason why an estate in which long leases can only be granted under certain conditions imposed by statute should not itself be freely alienable. 1 P. L. J. 197 1916) Ref. 1925 Patna 210 Foll. (*Das and Ross, JJ.*) BANSIDHUR SHAKIFF *v.* ASHUTOSH DEO. **4 Pat. 272 : (1925) P. H. C. C. 22 : 86 I. C. 163 : 4 Pat. 272 : 6 P. L. T. 106 : A. I. R. 1925 Pat. 346.**

——(VIII OF 1919). *Patni sale for arrears—Purchase by defaulter is only voidable.*

The purchase of a patni by one of the defaulters is, so long as the sale is not set aside, only voidable. 33 Cal. 666 Ref. (*Chatterjea and Cuming, JJ.*) NIRANKA CHANDRA *v.* ATUL KRISHNA.

28 C. W. N. 1009 : 83 I. C. 110 : 49 C. L. J. 149 : A. I. R. 1925 Cal. 67.

BENGAL RENT RECOVERY ACT, (X OF 1859). —*Non-transferable occupancy holding—Sale for arrears of rent.*

A non-transferable occupancy holding can be sold in execution of a rent decree obtained by the 16 annas landlords. (*Teunon and Newbould, JJ.*) NRIPENDRA *v.* NADIRKHAN. **66 I. C. 46 : 25 C. W. N. 554.**

——*Occupancy right*—Thikadar, *cannot acquire.*

Under this Act, the occupancy right is personal and non-transferable, and a person in possession as a *Thikadar* could not acquire such a right. (*Das and Ross, JJ.*) EDGELL *v.* BISWANATH PRASAD SINGH. **62 I. C. 59 : 2 Pat. L. T. 654.**

——S. 6—*Tenancy—Occupancy right—Construction of lease.*

A suit in 1864 by a Zamindar against his tenant claiming possession of certain Chur land, was compromised and fresh patta and kabuliyat, fixing a yearly rent for a term of 8 years, were executed. After the expiry of the term a fresh patta and kabuliyat were to be given at a fair rate to be then settled. The kabuliyat continued "if after the fair rent is settled according to the proper rate prevailing in the villages I refuse to pay that rent then you will bring the lands under your khas possession by evicting me therefrom ; and I shall not be able to make any objection to the same." Until a fresh rent was settled the tenancy was to continue at the fixed rate. In 1877 the Zamindar sued the tenant for khas possession. The tenant pleaded (1) an occupancy right, and (2) that the suit was premature. The trial Court held that there was no occupancy right but that the suit was premature. The High Court affirmed the trial Court's judgment. The Zemindar brought the present suit for khas possession of the land, after giving the necessary notice to terminate the tenancy. The tenant again claimed occupancy rights. *Held*, upon the construction of the lease, there was no right of occupancy. (*Lord Dunedin*). MIDNAPORE ZAMINDARI CO. *v.* NARESH NARAYAN. **30 M. L. T. 279 : 64 I. C. 231 : 48 I. A. 49 : A. I. R. 1922 P. C. 241 (P. C.).**

——S. 15—*Scope of.*

"Otherwise expressed in the grant" include a grant made to a person and his heirs. (*Das and Adami, JJ.*) GOLAM NABI *v.* BASUDEB DAS. **69 I. C. 849 : 1 P. 201 : A. I. R. 1922 Pat. 411.**

BENGAL TENANCY ACT (VIII OF 1885).

BENGAL REVENUE RECOVERY ACT BEN. ACT. 1890). S. 5—*Sale of estate not in arrears—Jurisdiction of Collector—Title of real owner, is not affected.*

A Collector acts without jurisdiction in selling estates which are not in arrears under the Revenue Sale Law, as his power is restricted to a sale of estates and shares which are in arrears only. The real owner's title is not affected by the sale by the Collector of an estate not in arrears. (*Coutts and Adami, JJ.*) SHAIK MOHAMMAD WAHERD *v.* MT. SUNDER BASI KUAR **A. I. R. 1922 Pat. 445.**

BENGAL REVENUE SALES LAW. *See* UNDER BENGAL LAND REVENUE SALES ACT.

BENGAL SURVEY ACT (V OF 1875), S. 40 (1)—*Order under—Nature of.*

A possessory order under S. 40 (1) of the Bengal Survey Act bears analogy to a decision under S. 34 of Regn. VIII of 1822. The order, until reversed or modified by competent authority, has the force of an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. **66 I. C. 923 : 34 C. L. J. 465.**

——**Ss. 41 and 62**—*In spite of order under S. 41 Civil Court can adjudicate question of title.*

The question of title may be determined by a Civil Court and S. 41 of the Act does not preclude it from finding as to who was in possession of the disputed land anterior to the order passed by the survey authorities. 13 Cal. 280 and 19 C W. N. 1038 Foll. (*Suhrawardy and Duval, JJ.*) SUJJAD AHAMMAD *v.* SACHINDRANATH ROY. **A. I. R. 1925 Cal. 1052.**

——**S. 41**—*Powers under—Collector can delegate to Assistant Settlement Officer.*

Revenue Officer appointed with the additional designation of a Settlement Officer is vested with the powers of a Superintendent of Survey under the Bengal Survey Act, and he has the powers of Collector under S. 41. He has power to delegate his functions to an Assistant Settlement Officer. (*Coutts and Ross, JJ.*) BABU BALGOBIND KUMAR *v.* BEHARI LAL. **3 Pat L. T. 617 : 66 I. C. 471 : (1922) P. H. C. C. 114 : A.I.R. 1923 Pat. 96 (2).**

——**S. 41**—*Order of Collector under, operates as an order of Civil Court.*

The order of a Collector under S. 41 of the Bengal Survey Act, determining the boundary of an estate, operates as the order of a Civil Court declaring the parties to be in possession of the lands in accordance with the boundary as determined by the Collector. (*Das and Adami, JJ.*) PARBHUCHARAN *v.* SECRETARY OF STATE FOR INDIA. **6 P. L. J. 51 : 61 I. C. 46 : 2 Pat. L. T. 118.**

BENGAL TENANCY ACT (VIII OF 1885)—Lease for residential purposes with right to take fruits from trees on the land and plant other fruit trees—Applicability. GOPAL *v.* BHURTNATH. **42 C. L. J. 520.**

——*Chap.* 10—*Entry in Record-of-Rights as to amount of rent of agricultural land is admissible as corroborative evidence in suit for recovery of rent.*

Non-agricultural lands are not subject to the provisions of Chap. 10 of the Bengal Tenancy Act. But in a suit for the recovery of rent an entry in the Record-of-Rights with respect to the amount of rent is admissible in evidence as corroborative of other evidence in the suit although the weight to be attached to such entry would depend on the circumstances of each case. (*Suhrawardy and Page, JJ.*) SM. RAKIMJAN *v.* AMAR KRISHNA CHAUDHURI. **78 I. C. 169 :**

BENGAL TENANCY ACT (VIII OF 1885).

A. I. R. 1925 Cal. 404 (2).

———*Non-transferable holding.*

A landlord is entitled to consideration for recognising the purchase of a non-transferable occupancy holding. (*Chakravarti, J.*) SASIKANTA ACHARJEE SHEIKH *v.* GENDA SHEIKH. **82 I. C. 970: A. I. R. 1925 Cal. 389.**

———*Abatement of rent.*

Abatement of rent can be claimed in a case under the Bengal Tenancy Act. (*Pearson and Graham, JJ.*) GOSTA BEHARI PRAMANIK *v.* HEMCHANDRA DAS DE. **51 Cal. 1022 : 29 C. W. N. 124 : 82 I. C. 315 : A. I. R. 1925 Cal. 356.**

———*Older theories do not continue alongside Act.*

In addition to the methods to be found prescribed in the Bengal Tenancy Act there do not still survive running *pari passu* with them the old method of acquisition of occupancy right. It was not intended by the Bengal Tenancy Act to keep these older doctrines alive. (*Rankin and B. B. Ghose, JJ.*) JANABALI MOLLA *v.* PORT CANNING AND LAND IMPROVEMENT CO. **40 C. L. J. 167 : 84 I. C. 735 : A. I. R. 1925 Cal. 336.**

———*Mokarari land.*

The mere fact that a certain rate is mentioned with respect to excess land that may be found in possession of the tenants does not create a presumption as to the mokrari nature of the holding. (*Suhrawardy and Duval, JJ.*) RAMIJUDDIN *v.* RAI RADHA KANTA. **80 I. C. 987 : A. I. R. 1925 Cal. 245.**

———*Whether B. T. Act or Transfer of Property Act applies depends on nature of the original tenancy and not on character of parcels included in the sub-tenancy.*

Whether a case is governed by B. T. Act or Transfer of Property Act depends upon the nature of the original tenancy and not on the character of the parcels included in the sub-tenancy. Actual origin of the tenancy need not be investigated. When tenancy was sub-let, if it was an agricultural holding, B. T. Act applies. (*Mookerjee and Rankin, JJ.*) RAMPADO SARKAR *v.* ATORE DOME. **40 C. L. J. 307 : 84 I. C 743 : A. I. R. 1925 Cal. 202.**

———*Homestead portion is on the same footing as cultivated area.*

Homestead portion of an agricultural holding is on the same footing as a portion under actual cultivation in the absence of local custom or usage. (*Mookerjee and Rankin, JJ.*) RAMPADO SARKAR *v.* ATORE DOME. **40 C. L. J. 307 : 84 I. C. 743 : A. I. R. 1925 Cal. 202.**

———*Non-transferable holding—Receiving rent after transfer—No ejectment.*

Where after transfer of a non-transferable holding dakhilas were received by transferees from plaintiffs who were then Ijaradars and after plaintiffs had become landlords by purchase of the proprietary right, and the act of the agent of plaintiffs in receiving the rent from the transferee was not repudiated by the plaintiffs, *held*, the transferee could not be ejected. (*Walmsley and Ghose, JJ.*) MAHOMED KASIRUDDIN PRODHAN *v.* BANI KANTA DAS. **A. I. R. 1923 Cal. 520.**

———*Applicability.*

The Bengal Tenancy Act does not affect rights of occupancy acquired prior to the passing of the same. (*Walmsley and Ghose, JJ.*) BHAJAN SHEIKH *v.* BALAI SARKAR. **A. I. R. 1923 Cal. 375.**

———*Applicability—Suit to eject under-tenant is governed by the Act.*

Where the jama of an under tenancy contained at the time of its creation agricultural land as well as homestead, B. T. Act applies and not T. P. Act. (*Newbould, J.*) ABHAIPADA SIRCAR *v.* ATOR DOME. **67 I. C. 66 : A. I. R. 1923 Cal. 294 (2).**

———*Interest of an* under-raiyat *in Bengal is not heritable.*

The interest of an *under-raiyat* in Bengal is not heritable. 31 Cal. 757 (F. B.), Referred to. (*Newbould and Panton, JJ.*) SUTU BIBI *v.* JAMINI SUNDARI GUHA. **A. I. R. 1922 Cal. 85.**

———Raiyati *holdings purchased before the Amendment Act, if subsists as such.*

With regard to the *raiyati* holdings acquired before the Amendment Act of 1908, came into force the occupancy right would be extinguished the holding itself subsisting as a *raiyati* holding. (*Chatterjea and Panton, JJ.*) PRAFULLA NATH TAGORE *v.* SECY. OF STATE. **63 I. C. 892 : 26 C.W. N. 100.**

———*Suit by purchaser of* patni *to eject defendants as trespasser—Burden of proof.*

In a suit by a purchaser of a *patni* at a rent-sale, to eject the defendants as a trespasser it is for the plff. to show that the Zemindar was in possession of the lands before the creation of the *patni*, and that the possession of the defendants commenced after the *patni* came into existence or that such possession was not adverse. (*N. R. Chatterjea and Greaves, JJ.*) MUNMOTHA NATH MITTER *v.* ANATH BUNDHO PAL. **61 I. C. 469 : 25 C. W. N. 106.**

———*Under-raiyat, cannot sub-let or transfer his rights.*

The Act does not give an under-raiyat a right to create a sub-lease so as to be valid against the *raiyat*. The rights of an under-raiyat are not transferable. (*Huda and Panton, JJ.*) GOPAL MOLLAH *v.* MAFIDENNESSA BIBI. **61 I. C. 200 (Cal.).**

———*Rent decree—Landlord is not bound to sue legal representatives whose names are not registered.*

The landlord is entitled to sue his recorded tenants. The death of some of the defendants previous to the decree does not in any way affect the liability of the tenure, where the landlord had no notice. (*Mullick and Bucknill, JJ.*) JAGDEO NATH SAH *v.* UDAINATH SAH DEO. **(1923) P. H C. C. 374 : 75 I. C. 321 : A. I. R. 1924 Pat. 339.**

———*Zerait land is wholly outside the scope of the Act.*

Proprietor's private lands are wholly outside the scope of the Act and settlement of these lands is governed by the codified law in the T. P. Act. Tenants holding Zerait otherwise than under a lease for a term of years or from year to year does not acquire occupancy or non-occupancy rights therein. (*Jwala Prasad, A. C. J. and Kulwant Sahai, J.*) RAMJI RAM *v.* BANSI RAUT. **6 Pat. L. T. 240 : 1924 P. H. C. C. 337 : 84 I. C. 305 : 4 Pat. 89 : A. I. R. 1925 Pat. 241.**

———*Failure to get names recorded in landlord's sherista—Liability for rent—Presumption.*

So far as tenures are concerned, the Bengal Tenancy Act makes it obligatory upon the tenants to have their names recorded in the landlord's sherista whenever they become entitled to them by succession. In the case of a tenure, where only one tenant takes the trouble to have his name recorded in the landlord's sherista and the others, either by design or negligence, fail to do so, it may be presumed that the tenants who failed to have their names recorded in the landlord's sherista consented to the tenant who had his name recorded representing them both in transactions and in suits affecting the landlord and the tenants. 10 C. 896; 26 C. 677 Ref. But other principles arise where the Court has to deal with the case of the sale of a

holding, as to which there is nothing in the Bengal Tenancy Act compelling raiyats to have their names recorded in the landlord's sherista. No presumption as to representation can be drawn by a Court where only one of the co-raiyats has his name recorded in the landlord's sherista, and the others failed or neglected to do so. 9 C. W. N. 843 Ref. It is a question of fact in each case whether the recorded tenant does in fact represent the holding in dispute and the fact that only one tenant is registered is an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord. (*Das and Adami, JJ.*) JAIDEB THAKUR *v.* JAWAHIR MISSIR.
1923 P. H. C. C. 57 : 69 I. C. 565 : 1 Pat. L. R. 47 : A. I. R. 1923 Pat. 206.

———*Rent—Immediate payment not necessary to create tenancy—Waste land.*

The immediate payment of rent is not an essential factor in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable until they are brought under cultivation. There is nothing in the Bengal Tenancy Act which prevents such an arrangement. (*Dawson Miller, C. J. and Mullick, J.*) KUMARI DEBI *v.* PRATAPDHUJ SINGH. **67 I. C. 859 : A. I. R. 1923 P. 176.**

———*Non-transferable occupancy holding—Sale in execution of money decree is valid by custom.*

The decree-holder, not being the landlord of the holding can, against the will of the judgment-debtor and without the express consent of the landlord cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money decree there being local custom of transferability. (*Dawson Miller, C. J., Das and Adami, JJ.*) SUNDAR MOHAN *v.* GHANA RAUT. **3 Pat. L. T. 205 : 1 Pat. 317 : A. I. R. 1922 P. 114 (F. B.).**

———**S. 2 (2)**—*Extension of, to Orissa—Repeals old Rent Law.*

Chapter XIV of the Bengal Tenancy Act, after its extension to Orissa repeals so much of any Act including Act VIII of 1865, as is inconsistent with it. (*Lord Dunedin.*) LAKSHMI DAR MAHANTI *v.* RATNAKAR MAHAPATRA. **40 M. L. J. 546 : 48 I. A. 123 : 25 C. W. N 1009 : 14 L. W. 358 : (1921) M. W. N. 399 : 3 U. P. L. R. (P. C.) 25 : 2 Pat. L. T. 463 : 61 I. C. 1 : 30 M. L. T 32 : 48 Cal. 811 (P. C.).**

———**S. 3**—*Successive leases—Rights of lessee—Liability to pay rent.*

Under the Bengal Tenancy Act the question of the status of a tenant is not without importance and it would introduce confusion into the administration of the Act to say that if a holding be leased by the landlord for the purpose of cultivation first to one ryot and then to another the second ryot would be entitled to collect the rent payable by the first. (*Richardson and Suhrawardy, JJ.*) SHEIKH SONGSOR ALI *v.* JAGANNATH PAL. **37 C. L. J. 263 : A. I. R. 1923 Cal. 363.**

———**S. 3**—*Suit between two tenants—Article does not apply.*

Art. 3 of Sch. III to the B. T. Act does not apply to a suit between two tenants unless the dispossession of the plaintiff tenant is attributable to the agency of the landlord. 25 C. W. N. 102 Rel. (*Richardson and Suhrawardy, JJ.*) JANAKI NATH SHAH *v.* BAIKUNTHA NATH. **36 C.L.J. 140 : 70 I. C. 602 : 27 C. W. N. 259 : A. I. R. 1922 Cal. 176.**

———**Ss. 3 (3) and 4**—*Zerait land—Lessee of, is tenant only during lease—Sections do not create rights.*

Ss. 3 (3) and 4 of the B. T. Act do not separately or conjointly create or confer upon any one any status or right. They are mere definition sections specifying the classes of tenants to which the Act applies. A lessee of Zerait land is a tenant under S. 3 (3) only during the continuance of the term on the expiry of which he becomes a trespasser. (*Sir John Edge.*) MAHANTH JAGARNATH DAS *v.* JANKI SINGH.
43 M.L.J. 55 : 26 C. W. N. 833 : 35 C. L. J. 506 : (1922) M.W.N. 410 : 1 Pat. 340 : 31 M. L. T. 231 : 66 I. C. 337 : 3 P. L. T. 197 : 49 I. A. 81 : A. I. R. 1922 P. C. 142 (P. C.).

———**Ss. 3 (9), 30, 182**—"*Holding" does not include Undivided share.*

An undivided share of land is not a 'holding' within S. 3 (9) of the Act and the word 'parcel' in that clause means entire parcel. Therefore S. 30 has no application when the tenancy of a raiyat is an undivided share of land. (*Newbould and Panton, JJ.*) BINAYAK DAS *v.* SAMINUDDI.
59 I. C. 209 : 24 C. W. N. 1022.

———**S. 4**—*Does not cover lessee of Zerait land.*

A lessee of Zerait land is a tenant of a class outside S. 4. (*Jwala Prasad, A. C. J and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT.
1924 P. H. C. C. 337 · 4 Pat.89 : 6 P. L. T. 240 : 84 I. C. 305 : A. I. R. 1925 P. 241.

———**Ss. 4 and 5**—*Occupancy ryot or tenant at a fixed rate.*

A *kabuliyat* under which the tenant held the land from 1875 did not show that it was in renewal of a previous lease and there was no evidence of the existence of any tenancy before the *kabuliyat* was executed. *Held*, that it must be regarded as indicating the inception of the tenancy, and that the tenant must therefore be an occupancy ryot and not a ryot at fixed rate. (*Ross, J.*) HENRY HILL & CO. *v.* BAWAN THAKUR. **2 Pat. L. T. 605.**

———**S. 5**—*Non-transferable holding—Sale of for residential purposes—Recognition by landlord on payment of enhanced rent—Effect of.*

Where a raiyat occupying his homestead within the residential suburb of the Naraingunj Municipality as part of his non-transferable occupancy holding first sold the rest of the holding to a certain person, and next sold his homestead to the defendant, a pleader who purchased it for the purpose of his residence and for carrying on his profession as a pleader in the local Civil Courts, was recognised by the plaintiffs-landlords, on payment of salami and was granted rent receipts in the forms prescribed in the Bengal Tenancy Act as for a kasht holding, while the rent previously paid was now quadrupled: *Held*, in a suit brought by the plaintiff for ejectment of the defendant after service of six months' notice to quit terminating with the end of a year of the tenancy that the defendant's contention that his tenancy was in continuation of the old tenancy of the outgoing raiyat was not maintainable, that the tenancy originated in a fresh settlement with the plaintiffs and that in view of the purpose of which the new tenancy was created it was governed by the provisions of the T. P. Act. 16 C. 652 ; 19 C. 489 ; 27 C. 205 ref. (*Teunon and Abdul Majid, JJ.*) HARENDRAKUMAR ROY *v* HARAKISHORE **26 C. W. N. 389 : 70 I. C. 166 : A. I. R. 1922 Cal. 201.**

———**S. 5**—*Land let out for cultivation—Lessee is not tenure-holder—Presumption under S. 5 (5) is not applicable where purpose of tenancy is known.*

S. 5 (5) has no application to the case of a person who does not hold more than one hundred standard bighas of land, there will be no presumption as to his being a tenure-holder. The true scope and meaning

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of S. 5 are that, where the purpose for which the tenancy was originally created is known and clearly proved, no other presumption as to the tenancy being otherwise than what the original purpose is, is admissible. If land is expressly leased out to a person for the purpose of cultivation and he was prohibited from making settlement of it with any other person, or granting *Shikmi patta* thereof, or using the land in any way which would interfere with cultivable nature thereof, the lessee is only a *Shikmidar* and not a tenure-holder under S. 5. (*Jwala Prasad and Bucknill, JJ.*) BENI CHAUDHURI *v.* TRILOKE NATH TEWARI. **A. I. R. 1922 P. 425.**

——Ss. 5 (3) and 48—*Mortgagor raiyat by executing kabuliyat in favour of mortgagee does not hold under a raiyat as mortgagee is not a raiyat.*

Where the sum advanced was not paid by the Zarpeshgidar as rent payable in advance for a certain period at the end of which the land was to be delivered up to the lessor and profits were to be taken as interest and the Zarpeshgidar was to remain in possession on the same conditions until the amount was repaid and the property was hypothecated for repayment of the loan in the event of the Zarpeshgidar being dispossessed.

Held, that the raiyat who executed the lease did not by executing *kabuliyat* become tenant holding immediately or mediately under a raiyat within S. 5 (3) and S. 48 did not apply. Whether Zarpeshgi and the *kabuliyat* constituted one transaction or two transactions is immaterial. (*Dawson Miller, C. J. and Mullick, J.*) TILAKDHARI SINGH *v.* CHATURGUN BIND. **3 Pat. 266 : 1924 P. H. C. C. 4 : 78 I. C. 923 : A.I.R. 1925 P. 118**

——S. 5 (5)—*Terms being unambiguous, presumption is of little importance—Subsequent conduct is admissible if terms are equivocal—Whether tenancy or tenure is created depends upon acts and circumstances.*

The presumption arising under S. 5 (5) though of considerable importance in a case where the origin of the tenancy is not known is of little consequence where the terms of grant are known and are not ambiguous. In cases where the terms of the grant are equivocal, the Court must rely upon the attendant circumstances and evidence of subsequent conduct is also admissible. What has got to be determined, if possible, is whether the right acquired was the right to hold the land for purpose of collecting rent or bringing it under cultivation by establishing tenants on it or the right to hold the land for purposes of cultivating it by oneself or by members of one's family or by hired servants or with the aid of partners. Where the outstanding features of a kabuliyat were that there was nothing stated as to the granting of sub-leases or collecting of rent from sub-tenants, nor was there anything as to establishment of tenants on the land, and the grantee was described as a raiyat enjoying right of occupancy and was required to make the land fit for cultivation by cutting jungle and erecting embankments and where he was recorded as a settled ryot in the finally published Record of Rights :

Held, that the conditions and circumstances were more consistent with an intention to confer on the grantee the right to hold the land for cultivation by himself or by members of his family or by hired servants or with the aid of partners than that he should be permitted to establish tenants on the land for purposes of cultivation and thus be a tenure holder. (*Walmsley and Mukerji, JJ.*) JOGESH CHANDRA ROY *v.* TAZAR ALI. **A.I.R. 1925 Cal. 1238**

——S. 5 (5)—*Alluvial accretion—Person occupying without engagement with Govt. is a tenant.*

BENGAL TENANCY ACT (VIII OF 1885), S. 7.

Where a person occupies alluvial accretion without entering into an engagement with the Collector before taking possession, but he is allowed to remain in possession on payment of rent, he is a tenant. 17 C.L.J. 431 ; 22 C. L. J. 132 Ref. The Revenue authorities are competent to make a malikana settlement of the lands with a third person. 34 C. L. J. 779 Ref. (*Mookerjee and Cuming, JJ.*) RANI HEMANTA KUMARI DEBI *v* THE MIDNAPUR ZAMINDARI COMPANY. **35 C. L. J. 493 : A. I. R. 1923 Cal. 25.**

——S.5 (5)—Presumption under—Tenant, whether raiyats or tenure-holders—Test—Presumption of tenancy, if rebuttable—Principles to be considered. (*Dawson Miller, C J. and Macpherson, J.*) TARNI SINGH *v.* SATNARAIN. **(1925) P. H. C. C. 281: 90 I. C. 895: 6 Pat. L. T. 787.**

——S. 6—*Applicability.*

Tenures which have been held from long before the Permanent Settlement fall within the scope of S. 6 of the Bengal Tenancy Act. (*Newbould and B. B. Ghose, JJ.*) BIRENDRA KISHORE MANIKYA BAHADUR *v.* ALI AHAMED. **39 C.L.J. 605 : A. I R. 1924 Cal. 1015.**

——S. 6 (a)—*Enhancement of rent—Burden of proof.*

S. 6 (*a*) of the B. T. Act prescribes that where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement, except upon proof that the rent is enhanceable either by local custom or by the conditions under which the tenure is held. Where there is no proof of local custom, the Court has to determine, first, whether the tenures have been held from the time of the Permanent Settlement, and secondly, what are the conditions under which the tenure is held. (*Mookerjee and Chotzner, JJ.*) NURUL HUQ *v.* MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR.
38 C. L. J 121 : 72 I. C. 979 : A. I. R. 1924 Cal. 133.

——S. 7—*Enhancement—Question of rights, cannot be raised in Second Appeal.*

Where the landlord seeks to have the rent of a tenure-holder enhanced, the first point for investigation is, whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. Where none of these matters had been investigated in the Court of First Instance nor raised there, the question could not be raised on appeal. (*Mookerjee and Cuming, JJ.*) THE MIDNAPORE ZEMINDARI CO., LTD. *v.* SRIDHAR MAHATA. **49 Cal. 866 : 36 C. L. J. 96 · 67 I. C. 775 : A.I. R. 1922 Cal. 152.**

——S. 7—*Liability to enhanced rent.*

A stipulation that the tenure-holder is to pay rent for lands besides those mentioned in the *kabuliyat* which may be under his cultivation or which may be found in excess upon measurement indicates that rent is not fixed in perpetuity and hence the same can be enhanced. (*Rampini and Sharfuddin, JJ.*) SURJA PROSAD SUKUL *v.* MIDNAPORE ZEMINDARI CO., LTD. **77 I. C. 954 : 38 C. L. J. 369.**

——S. 7 (2)—*Enhancement up to fair rent cannot be made until it is found that no customary rate exists.*

Where the landlord seeks to have the rent of a tenure-holder enhanced under S. 7, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is whether there is "a customary rate" payable by persons holding similar tenures in the

vicinity. It is only when this has been answered in the negative, that the rent can be enhanced up to such limit as the Court thinks " fair and equitable." 1922 A. I. R. Cal. 152 Foll. (*Suhrawardy and Cuming, JJ.*) JOGESH CHANDRA ROY *v.* IZZAT ALI.
40 C. L. J. 585 : A. I. R. 1925 Cal. 454.

——S. 7 (2)—*Customary rate—Finding necessary.*

Before a Court can take action under S. 7 (2) it must be definitely found that no customary rate exists. A finding that the plaintiff has failed to prove a customary rate is not sufficient to give jurisdiction to the Court to proceed to determine to what extent the rent should be enhanced. (*Suhrawardy and Cuming, JJ.*) RAM SUNDAR DAS *v.* SATINDRA MOHAN TAGORE. **89 I. C. 190 (Cal.)**

——S. 7 (2)—*What landlord must prove.*

The landlord in order to claim the benefit of S. 7 (2) must prove that there is no customary rate; and if he asserts that there is such a customary rate but fails to prove it, he is not entitled to ask the Court to determine a fair and equitable rent (*Surahwardy and Cuming, JJ.*) SATINDRA MOHAN TAGORE *v.* BAMA SUNDARI DEVI. **88 I. C. 512.**

——Ss. 11 and 18—*Holding not proved to be one with fixed rate—Sections do not apply.*

Where the holding has not been proved to be one with a fixed rate, Ss. 11 and 18 of the B. T. Act cannot apply. (*Mukerji, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY. **85 I. C. 636 : A. I. R 1925 Cal. 761.**

——S. 12—*Transfer of permanent tenure.*

A transfer of a permanent tenure by a registered document is complete under Section 12 of the Bengal Tenancy Act as soon as the document is registered. (*Ameer Ali, J.*) SURAPATI ROY *v.* RAM NARAYAN.
45 M. L. J. 219 : 50 Cal. 680 : 73 I. C. 193 : 18 L. W. 681 · 33 M. L. T. 314 : L. R. 4 P. C. 159 : 50 I. A. 155 : 39 C. L. J. 26 : 28 C. W. N. 517 : A. I. R. 1923 P. C. 88 (P. C.)

——Ss. 12, 13, 15 and 16—*Purchaser of interest of* Mokurraridar — *Application for substitution — Registration if necessary—Commutation of rent.*

There is nothing in the Land Registration Act to require a *mokurraridar* to be registered or to prevent him from realising rent pending registration. The bar to realisation of rent imposed by S. 16 does not therefore affect purchasers of a *mokurraridar's* interest pending commutation proceedings although as a matter of fact they had gone beyond the requirements of the law and had actually gone through the procedure for service of notice through the Collector, as if they had acquired the tenure by succession. Where a commutation rate fixed under a compromise was not shown to be unfair, it could not be reopened. (*Morshead, M. C.*) MAHESHRI PRASAD SINGH *v.* BHAGIRATH MAHTON. **2 Pat. L. R. 87 (Cr.)**

——Ss. 15 and 16—*Scope*

A suit for *his* share of rent is maintainable by a co-sharer landlord in presence of other co-sharers who are incompetent to realise their rent on account of the provisions of Ss. 15 and 16 of the B. T. Act, though there has been no separate collection before. (31 Cal. 707 dist.) (*Greaves and Chakravarti, JJ.*) NIBARAN CHANDRA ROY *v.* NABIN CHANDRA ROY.
40 C. L. J. 504 : A. I. R. 1925 Cal. 297.

——S. 15—*Non-compliance — Decree against on heir cannot, in the absence of representation, be executed against others.*

Failure on the part of several heirs of a tenant, to

comply with the requirements of S. 15 of the Act, does not entitle the landlord to treat one of them as representative of the entire tenancy and a decree obtained against one cannot be executed against the entire tenancy. Where a representation is established, the decree binds all the heirs even though some were not parties to the suit. (*Mukerjee, C. J. and Fletcher, J.*) FAIZANESSA *v.* GAGANESWARI.
63 I. C. 706 : 26 C. W. N. 138.

——S. 15—*Heirs of tenure-holder--Non-registration in the sherista does not affect their rights.*

The mere failure of the heirs of the recorded tenure-holder to cause their names to be registered in the landlord's sherista does not entitle the landlord to affect their interest by sale in execution issued in a suit against a person, who, to the knowledge of the landlord had no interest in the property. The sale must be one in justice and equity and should operate as a sale of the tenure. 10 Cal. 996 Rel. (*Walmsley and Buckland, JJ.*) PROVAS CHANDRA CHATTERJEE *v.* JAHARUDDIN MONDAL.
59 I. C. 49 : 32 Cal. L. J. 77

——S. 16—*Patni tenure—Interest acquired by succession — Registration is compulsory—Defaulter cannot question legality of sale.*

It is incumbent on persons, who acquire an interest in a patni tenure by succession, to get themselves registered in the books of the landlord, under S. 15 of the Bengal Tenancy Act. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Patni Regulation on the ground that their names were not mentioned in the application to the Collector. (*Mookerjee and Rankin, JJ.*) BEHARI LAL BISWAS *v.* NASIMANNESSA BIBI. **37 C. L. J. 222 : 73 I. C. 482 : A. I. R. 1923 Cal. 527.**

——S. 16—*Applicability—Construction.*

S. 16 of the Act is a penal clause and should be strictly construed. It applies only to a person claiming the rent as a tenure-holder and not to one who claims by virtue of a purchase from the person to whom rents accrued due. (*Chatterjea and Panton, JJ.*) MESBAHUDDIN AHMAD *v.* ABDUL.
65 I. C. 839 : 34 C. L. J. 119.

——S. 17—*Sale of Patni tenure for arrears of rent—Purchaser's suit for annulling incumbrances claiming lands as mal lands—Defence of the Lakhiraj tenure—Onus of proof—Incumbrance.*

Where the purchaser at Court auction of a patni taluq which was created in 1907 and sold for arrears of rent sought to evict under provisions of Bengal Tenancy Act the persons in possession of certain lands situate in the taluq claiming that the lands were Mal lands, but which the defts. claimed to be Lakhiraj, being so registered, *held*, in the absence of any indication that the holdings as revenue-free tenures originated by sufferance or grant subsequent to 1807, the presumption is that they ran back to a period prior to the creation of the taluq and that it lay upon the plff. to show an origin subsequent to the creation of the patni, *i.e.*, 1807.

Held, further, that the purchaser of the patni taluq at a Court sale for arrears of rent due, took the taluq subject to the condition in which it was created originally. (*Lord Phillimore.*) BIPRADAS *v.* KAMINI KUMAR. **49 Cal. 27 : 15 L. W. 180 : 66 I. C. 674 : 30 M. L. T. 138 : 26 C. W. N. 465 : A. I. R. 1922 P. C. 48 (P. C.).**

——S. 18 (a)—'*Transfer*'—*If includes lease.*

The term 'transfer' in cl. (*a*) of S. 18 of the Act includes a lease. (*Mookerji, C. J. and Fletcher, J.*)

BENGAL TENANCY ACT (VIII OF 1885), S. 18-B.

AMAR CHAND *v.* PRASANNA DASI.
61 I. C. 529 : 25 C. W. N. 9.

——S. 18-B—*Transfer of tenancy—Acceptance of landlord's fee by landlord is not admission of permanency of the tenancy of the transferee.*

Acceptance of landlord's fee by landlord at the time of transfer of tenancy would not operate as an admission as to its permanence under the provisions of S. 18-B of the B. T. Act ; though it would amount to a recognition of the transferee as a tenant (*Mukerji, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY. **85 I. C. 636 : A. I. R. 1925 Cal. 761.**

——S. 18-B—*Evidence — Recitals relating to tenure—Admissibility against landlord.*

Recitals in a deed of gift to which the landlord is not a party and relating to the incidents of tenure are not admissible in evidence against the landlord under S. 18, Bengal Tenancy Act. (*Mookerjee, A. C. J. and Fletcher, J.*) UJIR ALI SARDAR *v.* SHADHAI BEHARA. **35 C. L. J. 182 : 68 I. C. 1003 : A. I. R. 1922 Cal. 185.**

——Ss. 19, 20 and 21—*Occupancy rights grant.*

There is nothing in either S. 20 or S. 21 or in any other section in the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract. An occupancy right is inherent in the status of the raiyat and is not the landlord's right to grant. (*Das and Kulwant Sahay, JJ.*) KESHO PRASAD SINGH *v.* PARMESHRI PRASAD SINGH. **2 P. 414 : 71 I. C. 902 : 4 P L. T. 135 : 1923 P. H. C. C 65 : 1 P. L. R. 111 : A. I. R. 1923 Patna 276.**

——S. 20—"*Village*" *must to taken in the sense defined in S.* 3 (10).

The statutory meaning of the word "village" in the first clause of S. 20 does not give rise to any impossible construction or to any repugnance. In order that occupancy right may be acquired that land must be held in village for a period of 12 years and if the land has not been comprised in any village in the statutory sense the condition of acquisition of the occupancy right has not been complied with. (Mis. Appeal No. 18 of 1919, Foll.) (*Rankin and B B. Ghose, JJ.*) JANABALI MOLLA *v.* PORT CANNING AND LAND IMPROVEMENT CO. **40 C. L. J. 167 : 84 I. C. 735 : A. I. R. 1925 Cal. 336.**

——S. 20—*Settled Raiyat need not have held the same land for the* 12 *years.*

Raiyat means primarily a person who has acquired a right to hold land for cultivation by himself and his family or by servants or partners and also includes his successors in interest. In order that a person may be a settled raiyat, it must be proved that he held for 12 years continuously but the land held may not be the same for all the 12 years. (*Mookerji and Rankin, JJ.*) MAHARAJA BAHADUR SIR PRODYOT *v.* UMESH CHANDRA SAHA. **72 I. C. 640 : A. I. R. 1924 Cal. 367.**

——S. 20—*Zerait land leased out—Lessee inducting a tenant on the land—Tenant's possession for* 12 *years completes occupancy right.*

Where the lessee of Zerait land has title and a tenant is duly inducted by him upon the land, the tenant holds the land as a raiyat, within the meaning of S. 20 and if he holds the same for a period of more than twelve years his occupancy right is complete and the suits for ejectment must fail. (*Mullick and Bucknill, JJ.*) SHEO GOBIND RAM SAHU *v.* MAHIPAT LUSADH. **2 Pat. 913 : 1924 P. H. C. C. 191 : 5 Pat. L. T. 653 : A. I. R. 1924 P. 207.**

——S. 20—Kaimi—*raiyat is a settled ryot.*

In Behar and Orissa *kaimi* denotes a settled raiyat and not a raiyat at a fixed rent. (*Miller, C. J. and Mullick, J.*) PUNIA MAHTO *v.* SHAIKH BUNDEY ALI. **5 Pat. L. J. 387 : 1 Pat. L. T. 690 : 1921 P. H. C. C. 353.**

BENGAL TENANCY ACT, (VIII OF 1885), S. 22.

——S. 22—*Merger.*

The disputed lands were comprised in a revenue paying estate which was purchased by the plaintiffs on the 6th March 1916 at a sale for arrears of revenue. On the 11th February 1918 the plaintiffs commenced this action to eject the defendant as a trespasser. The defendant was a cultivator who had acquired the right of occupancy raiyat in the Record of Rights finally published in 1895. On the 16th July 1901 he took from the then proprietors a permanent lease under what was described as a Taluki Pottah. The plaintiffs contended that the effect of the permanent lease granted to him by the proprietors on the 11th July 1901 was to extinguish the rights of occupancy which he then possessed and that thereafter he must be deemed to have held as a tenure holder. *Held* that the occupancy right has not been affected by the subsequent acquisition of the tenure. 26 C. W. N. 565 (P.C.) Foll. (*Mookerjee and Chotzner, JJ.*) JOGENDRA KRISHNA ROY *v.* SHAFAR ALI. **76 I. C. 582 : A. I. R. 1923 Cal. 373.**

——S. 22—*Purchase of part of raiyati holding.*

Where a part of another's raiyati holding was acquired by purchase.

Held, that the purchaser did not become a raiyat. (*Ross and Sen, JJ.*) HARI MOHAN PRASAD *v.* MT. BASHIDUL HAQUE. **1924 P. H. C. C. 268 : 5 P. L. T. 616 : 84 I. C. 130 : A. I. R. 1924 Patna 780.**

——S. 22—*Acquire, meaning of—Accrual of Tenancy rights.*

The word "acquire" in respect of occupancy rights is really used in the Act ; but in the preceding S. 21, sub-section (2) the expression occurs "shall be deemed to have a right of occupancy under law then in force." But it appears to be carefully avoided in S. 22, sub-section (2) in the sentence commencing "If the occupancy right in land is transferred to a person." It would appear then, from the context, that the word "acquire" implies the accrual to a *raiyati* tenancy of rights conferred by the Statute rather than the transfer of rights by another tenant. (*Miller, C. J. and Foster, J.*) RAM DAYAN SINGH *v.* BHULOTAN SINGH. **72 I. C. 705 : A. I. R 1924 Patna 392.**

——S. 22—*Collectorate partition—Effect of—Possession.*

In all cases where there is a Collectorate partition between co-proprietors if the lands are merely the *bakaht* lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those *takhta* the particular lands iu question fall. The only exceptions are those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired. (*Miller, C. J. and Adami, J.*) QYAMUDDIN KHAN *v.* RAMYAD SINGH. **3 Pat. L. T. 419 : 1 P. 600 : 67 I C. 530 : A. I. R. 1922 P. 354.**

——S. 22—*Occupancy raiyat acquiring Mokurari right before the Act—Merger.*

If an occupancy raiyat acquired mokurari right in the lands in which he had occupancy rights, prior to the passing of the Act, his rights of occupancy merged. S. 22 of the Bengal Tenancy Act did not create a new law but merely stated the law as it then stood. 2 Pat. L. J. 225. Dist. (*Coutts and Macpherson, JJ.*) MUL-

BENGAL TENANCY ACT (VIII OF 1885), S. 22.

LICK MUKTEAR AHMAD *v.* BABU KALI CHARAN.
2 Pat. L. T. 525 : 1921 P. H. C. C. 357.

——S. 22 (a) *Joint proprietor purchasing occupancy holding—Merger—Under-raiyats—Effect on—Lessee—Right to collect rent.*

Where a joint proprietor in an estate purchases the occupancy holding, the *raiyati* interest is merged in the proprietary right. The purchaser cannot hold it as *raiyati* and *under-raiyats* on the land are automatically raised to the status of tenants. A lessee from the joint proprietor thereafter can only sue for rent, if there is a grant to him of the right to collect rent. (*Greaves and Cuming, JJ.*) HOCHANUDDI *v.* ABDUL HAKIM MOIDHA. **90 I. C. 816 (Cal.).**

——S. 22 (1)—*Doctrine of merger—Applicable to cases prior to enactment of B. T. Act.*

The doctrine of merger enunciated in S. 22 applies when an occupancy tenant who is also a co sharer landlord acquires upon partition the interest of a sole landlord in a whole or portion of his occupancy holding, which is allotted to his exclusive *takhta*. The doctrine of merger was not introduced for the first time in 1885. S. 22 only enunciated the law as it then stood and it did not create any new law. (*Coutts and Macpherson, JJ.*) MULLIK MUKTHAR AHMAD *v.* KALI CHARAN, **2 Pat. L. T. 525 : 1921 P. H. C. C 357.**

——S. 22, Cl. (2)—*Non-transferable occupancy holding—Purchased by co-sharerlandlord does not give him any title.*

Where a co-sharer landlord purchases a non-transferable occupancy holding he does not acquire title in the holding as a raiyat under S. 22, Cl. 2 of the B. T. Act before its amendment by Act I of 1907, Consequently a person to whom he let out the holding would be a raiyat and not under-raiyat. 27 C. W. N. 759. (*Walmsley and Ghose, JJ.*) ROSHANALI *v.* CHANDRA MOHAN DAS. **50 Cal. 749 : 27 C. W. N. 759 : 75 I. C. 447 : A. I. R. 1923 Cal. 701.**

——S. 22 (2)—*Occupancy holding—Purchase by part proprietor—Effect of.*

Under S. 22, sub-S. (2) of the B. T. Act on a transfer of an occupancy the holding does not cease to exist and the purchaser holds the land as a joint proprietor or joint tenure-holder, as the case may be. To put the matter briefly, the purchaser enjoys the land in his character of proprietor or tenure-holder and not as a raiyat. But as upon the disappearance of the tenant right, all the holders of the superior interest would *prima facie* be entitled to possession, that one amongst them who is allowed to keep exclusive possession of the land is made to pay his co-sharers a fair and equitable sum for such use and occupation. The co-sharers, who are deprived of the rent they had previously realised from the occupancy raiyat, are in this manner compensated for their loss. (*Mookerjee and Chotzner, JJ.*) PURNA CHANDRA ROY *v.* MATHURA MOHAN SAHA. **36 C. L. J. 89 : 70 I. C. 68 : A. I. R. 1923 Cal. 210.**

——S. 22 (2)—*Co-sharer purchasing occupancy holding and subsequently ceasing to be a co-sharer—He cannot retain possession of the holding afterwards.*

The status of a co-sharer landlord purchasing an occupancy holding is not the status of a raiyat but a peculiar status created by S. 22 (2). His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors their shares of the rent. It is not the status of a raiyat inasmuch as if he sub-lets to a third person such third person is deemed to be a raiyat in respect of the land and ordinarily a raiyat sub-letting to a third person does not confer a raiyati but an under-raiyati interest. If he ceases to be co-sharer and his proprietary interest is

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lost he has no right to retain possession of the land and it would pass on to the person who would acquire the interest of that co-sharer. 2 P. L. T. 163 and A.I.R. 1922 Patna 193 ref. to. (*Ross and Kulwant Sahay, JJ.*) LALA BAMBAHADUR LAL *v.* MT. GUNGRA KUER. **3 Pat. L. R. 138 : A. I. R. 1925 P. 547.**

——S. 22 (2)—*Occupancy holding—Purchase by co-sharer landlord—Partition by Collector—Allotment to another sharer—Effect of.*

A co-sharer landlord, who purchases an occupancy holding and becomes liable to pay proportionate rent to the other co-sharers under S. 22 (2) of the B. T. Act, cannot be ejected from the purchased holding, when it is, upon a subsequent Collectorate partition, allotted to the *takhta* of another co-proprietor. 2 P. L. T. 163, appr. The terms '*kasht*' or '*Bakasht*' are words of art introduced for the purpose of understanding the possession of lands by the proprietors and the tenants: (*Jwala Prasad, A. C. J. and Das, J.*) NANDKISHORE SINGH *v.* MATHURA SAHU.
3 Pat. L. T. 13 : 65 I. C. 586 : A. I. R. 1922 P. 193.

——S. 22 (2)—*Co-sharer landlord—Purchase of holding—Collectorate partition—Effect of holding allotted to another co-sharer—Continuance of tenancy.*

When a co-sharer purchases the holding of an occupancy raiyat, and upon a Collectorate partition the holding is allotted to the share of another co sharer, the tenancy right continues and the holding does not cease to exist. Under S. 22 (2) of the B. T. Act of 1885 the occupancy right only ceased to exist but not the holding itself. 24 Cal. 143 : 32 Cal. 386 Foll.

Quare :—What will be the position under Amending Act of 1907? (*Das and Adami, JJ.*) BASUDEO NARAIN *v.* RADHA KISHUN. **3 P. L. T. 22 : 1922 P.H. C. C. 55 : 65 I. C. 281 : A. I. R. 1922 P. 62.**

——S. 22 (2)—*Right to sue for entire rent.*

A co-sharer's right to sue for the entire rent is not affected though one co-sharer purchases a portion of the holding. (*Jwala Prasad, J.*) RAM RATTAN SINGH *v.* JANG BAHADUR SINGH. **62 I. C. 47 (P.).**

——S. 22 (2)—*Occupancy holding—Purchase by—Co-proprietor—Position of Partition—Effect.*

An occupancy holding purchased by a co-proprietor becomes the *bakhast* land of the co-sharers which the purchaser is allowed under S. 22 (2) of the Act to keep apart for himself on condition of paying rent to his co-sharers. It is liable to be allotted on a partition as *bakashat* to the co-sharer in whose *patti* it is situate and the purchasing co-sharer is not entitled to continue in possession of it. (*Adami, J.*) MATHURA SAHU *v.* CHANDRADIP SINGH. **59 I. C. 87 (P.).**

——S. 22 (3)—*Ijaradar, sub-lease by, with Landlord's consent is binding on latter.*

A let his *taluq* in *ijara* to B authorizing him to buy holdings at sales in executions for arrears of rent, and to sub-let the same. C, a tenant of a holding in the *ijara* fell into arrears. In execution the holding was purchased by B who sub let the same to C and after his death inducted upon the property of his heirs. On the expiry of the *ijara* A sued to eject C's heirs as trespassers, *held*, having regard to S. 22 (3), the holding continued that C and his heirs were under-*raiyats* and that as the sub-letting was consented to by A he took it burdened with the under-*raiyats*. (*Teunon and Newbould, JJ.*) NARANJAN *v* DURGADAS.
60 I. C. 449 : 33 C. L. J. 575.

——S. 23—*Excavations not injuriously affecting landlord are not prohibited.*

Tenants are entitled to make excavations and the provisions of S. 23 do not apply. There is nothing in the law which prevents tenants having permanent herit-

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able rights at a fixed rent from using the land in any manner they think fit so long as there is no risk to the right of the landlord to recover the rent payable, and it is now settled that unless there are any reservations, the landlord has no right in the case of such tenures other than the right to receive the stipulated rent. Without actual damage or act affecting landlord's rights to obtain rent no damages or injunction could be granted. 9 C. W. N. 255 Dist. (*Walmsley and B. B. Ghose, JJ.*) BARADA PRASAD *v.* BHUPENDRA NATH.

50 Cal. 694 : 75 I. C. 55 : A. I. R. 1924 Cal. 56.

——Ss. 23, 86 and 87—*Transfer of portion of occupancy holding does not amount to—Abandonment.*

The transfer of a portion of a non-transferable occupancy holding does not amount to an abandonment so as to entitle the landlord to re-enter upon that portion Where there are several tenants in a holding each holding a separate portion thereof each of these portions does not constitute a separate holding. (*Chatterjea and Suhrawardy, JJ.*) KARIM CHAKLADAR *v.* SAPORANESSA BIBI.

64 I. C. 330 : 25 C. W. N. 717.

——S. 23—*Rights of tenants.*

Tenants are entitled under S. 23 to use the land for any purpose consistent with the provisions of the section. (*Miller, C. J. and Adami, J.*) GRANT *v.* EKLAL JHA.

1922 P. H. C. C. 177 : 3 Pat. L. T. 386 : 67 I. C. 49 : A. I. R. 1922 P. 171.

——Ss. 23 and 90—*Occupancy right—Raiyat taking—Lease of fishery does not get.*

A raiyat taking a lease of fishery only cannot acquire an occupancy right therein, but if he takes a lease of a holding of which portions are under water then his right to the acquisition of occupancy rights in the entire holding inclusive of the portion which forms the bed of the water cannot be defeated, the landlord may reserve the right of fishery when letting out the land. (*Mullick and Ross, JJ.*) HENRY HILL & CO. *v.* SHEORAJ RAI.

3 Pat. L. T. 53 : 64 I. C. 346 : 1922 P. H. C. C. 195 : A. I. R. 1922 P. 9.

——S. 23—*Rights to trees—Custom—Record of Rights.*

Where in a suit by a landlord against his tenant for recovery of the price of two mango trees alleged to have been cut and appropriated by the defendants who were his tenants, the defendants pleaded that they were entitled by custom and to cut and appropriate the trees standing on their kasht lands and the Court below found in favour of the custom set up by the defendants relying in support on an entry in the Record of Rights which showed that the names of the tenants had been recorded against their holdings with a note " Bakabza Raiyat", *Held* that on the evidence the custom had been made out, (*Jwala Prasad, J.*) MAHARAJA SIR RAMESWAR SINGH BAHADUR *v.* SONDHARI RAJ.

1 Pat. L. R. 105.

——Ss. 25 and. 155—*Misuse of holding—Decree in ejectment, form of.*

In a suit under S. 25 for the ejectment of an occupancy tenant for the misuse of the holding, the Court should not direct in its decree the payment of compensation besides ejectment. It should under S. 155 fix the amount of compensation and a period during which it should be paid or if the misuse is capable of remedy, a period for remedying the same. In execution of such decree, ejectment is to follow when the compensation is not paid or the misuse is not remedied. (*N. R. Chatterjee and Suhrawardy, JJ.*) KARIM *v.* ASWINI KUMAR SIKDAR.

63 I. C. 236 : 25 C. W. N. 658.

——S. 26—*Occupancy right of under-raiyat is not heritable where no custom to the contrary is proved.*

Per *Greaves, J.*—The right of occupancy acquired by an under-raiyat is a right acquired by custom or usage and not by statute and in order to determine whether heritability is an incident of the custom or usage it must be ascertained by evidence as to the nature and extent of the custom or usage. Apart from statute heritability is not an invariable incident of occupancy right.

Per *Cuming, J.*—An occupancy right is a personal right. Heritability of such right is a creature of the statute created by S. 26 and outside the statute there is no right of heritability in regard to such a right. As S. 26 or any other provision of the B. T. Act does not refer to the heritability of an occupancy right held by an under-raiyat, such right is not heritable under the law. But it is open to the under-raiyat to prove that by custom or usage the occupancy right is heritable. (*Greaves and Cuming, JJ.*) SUDHANYA KUMAR *v.* SAIK ISMAIL.

29 C. W. N. 733 : A. I. R. 1925 Cal. 956.

——S. 26—*Tenant of transferable occupancy holding dying intestate without heirs—Occupancy right is extinguished—Holding reverts to landlord subject to encumbrance created by tenant.*

S. 26 seems to mean that although the other property of an occupancy *raiyat* dying intestate and without leaving any heirs, escheats to the Crown, his occupancy right does not escheat to the Crown but is extinguished. This does not mean that the holding ceases to exist but only that the occupancy right is terminated as in the case of transfer of an occupancy right to a person jointly interested in the land as proprietor. 32 Cal. 386 (F. B.) Foll. The holding is then a holding without a tenant and must revert to the landlord. 1 Cal. 391, A. I. R. 1925 Patna 57 Foll. 13 C. W. N. 12 Diss.

Where a tenant can legally alienate or encumber his holding, and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him, diminished by virtue of S. 26 by the loss of the occupancy right. 8 M. I. A. 500 and 11 M. I. A. 619 Foll. (*Mullick and Ross, JJ.*) GARBHU MAHTON *v.* KHUDI JATUNNISSA.

1925 P. H. C. C. 206 : A. I. R. 1925 P. 597.

——S. 29—*Section does not save contracts.*

The words of S. 29 are imperative and it provides that rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat. This prohibition is not qualified by any provision calculated to save a contract or agreement between the parties. A kabuliyat purported to amalgmate with the jama of a holding the *jama* of another piece of land which had no existence and the jama of which was entirely fictitious and then purported to enhance the rent within the limits permitted by S. 29 and thereby fraudulently enhanced the jama of the holdiug beyond the limits of S. 29. The jamas relating to certain other holdings were also enhanced and then the total of all the jamas including the fictitious jama was described- This total exceeded the amount to which the rent of the holdings could be enhanced under S. 29.

Held, that the landlord was entitled to recover the jamas of the holdings that were not amalgamated with the fictitious jama but that the suit with regard to the amalgamated jama was not maintainable. (*Suhrawardy and Cuming, JJ.*) JNANENDRA NATH ROY *v.* NALINI MOHAN GHOSE.

A. I. R. 1925 Cal. 1262.

——S. 29—*Does not apply to tenancy created by*

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amalgamating additional land.

A tenancy created by amalgamating additional land with an existing occupancy holding is not governed by S. 29 of the Bengal Tenancy Act. (*Chakravarty, J.*) SASI KANTA ACHARJEE BAHADUR *v.* GENDA SHEIKH. **82 I. C. 970 : A. I. R 1925 Cal. 389.**

——**Ss. 29, 105**—*Applicability—Fair and equitable rent—Settlement of.*

To an application under S. 105 to fix a fair and equitable rent, S. 29 which restricts enhancement of rent to 2 annas in the rupee has no application at all. (*Cuming and Chakravarti, JJ.*) MATHA MAJHI *v.* COPI NATH KARMAKAR. **89 I. C. 951.**

——**S. 29**—*Applicability—Purchaser of non-transferable occupancy holding—Enhancement of rent.*

S. 29, Bengal Tenancy Act, does not apply to the case of the purchaser of a non-transferable occupancy holding whose title the landlord does not recognize, but who afterwards is recognized as a tenant on agreeing to pay a fixed rent. (*Ghose, J.*)FERASAT ALI MULLICK *v.* PRIAMBODA DEVI. **69 I. C 414 (2): A. I. R. 1924 Cal. 544 (1).**

——**S. 29**—*Rate of rent--Evidence of—Rent collection papers not properly proved is not evidence.*

In coming to a conclusion as to the rate of rent the Court should not treat as independent evidence rent collection papers which are not proved by the persons who are alleged to have made the collection. (*Suhrawardy, J.*) FAIJADDIN *v.* AGNI KUMAR SARMA. **71 I. C. 300 : A. I. R. 1924 Cal. 370.**

——**S. 29**—*Permanent enhancement — Cannot be had without writing and Registration.*

The true effect of S. 29, B.T. Act, is that there is no permanent enhancement when there is an attempt to increase rent without writing registered. But still the legistature allows the landlord to realise the rent at the increased rate provided rent at that rate has been actually *paid* for a continuous period of not less than 3 years immediately preceding the period for which rent is claimed. If the landlords do not bring themselves within the precise language of the clause, they are not entitled to the benefit. (*Mookerjee and Chotzner, JJ.*) JANAKI BALLAV ROY *v.* ENAT MONDAL. **37 C. L. J. 489 : 72 I. C. 136 : A. I. R. 1923 Cal. 600.**

——**S. 29**—*' Rent ' includes rent due for previous period.*

The section is no bar to a duly registered agreement complying with the other terms of the section taking effect for a period prior to the date of execution. ' Rent,' in S. 29 may include rent for a previous period which was due but not paid. (*Newbould and Panton, JJ.*) HESENJAN CHAUDURI *v* MAHAFEDJUDDIN. **62 I. C. 619 (Cal.).**

——**S. 29**—*Consolidation of distinct holdings with separate rentals is not creation of new holding and rent can be enhanced only within the limits of S. 29.*

The Court must determine whether a new holding has been created, though it may include the land of the original holding or whether the parties had recourse to a colourable device to evade the provisions of S. 29. Where the parties held two separate holdings with specific and definite rentals which were consolidated into one holding.

Held, that there was no new holding and that rent must not be enhanced beyond the limits fixed by S. 29. (*Dawson Miller, C. J. and Mullick, J.*) W. H. MEYRICK *v.* DIPA PANDEY. **3 Pat. 825 : 84 I. C. 361 : 6 P. L. T. 537 : A. I. R. 1925 P. 185.**

——**S. 29**—*Applicability.*

S. 29 applies only to the case of an occupancy *raiyat* and hence before invoking the aid of S. 29 a tenant must prove he is an occupancy tenant in regard to the rent claimed lands. (*Das and Adami, JJ.*) RAMDHANI SINGH *v.* MT. KEWAL MANI BIBI. **90 I. C. 929.**

——**S. 29**—*Scope of—Enhancement—Realization of enhanced rent for three years—Effect.*

The rule of law contained in S. 29, B. T. Act, is intended to be a strict one which the Courts should not allow to be defeated or evaded. Enhancement of rent in a manner not allowed by S. 29 is prohibited. Even when such enhanced rent has been illegally realized for three years, it does not thereby become validated. (*Foster, J.*) MEYRICK *v.* DIPAPANDEY. **75 I. C. 22 : A. I. R. 1924 P. 820.**

——**S. 29**—*There is no presumption that an order was passed immediately after rejection of any objection.*

All objections by all persons would have to be disposed of before any order could be passed under S. 29. Therefore no presumption exists that an order was passed immediately after rejection of any particular objection. (*Miller, C. J. and Mullick, J.*) NARASINGH THAKUR *v.* BISHUNPERGASH. **4 P. L. T. 629 : 1924 P. H.C. C. 21 : 75 I. C. 1036 : A. I. R. 1924 Patna 209.**

——**Ss. 29 and 147-A**—*Enhancement in compromise in suit for ejectment of trespassers—Sections do not apply.*

Section 29 of the B. T. Act applies to the rent of an occupancy raiyat and S. 147-A applies to a suit between a landlord and a tenant as such. Where a suit was brought by the plaintiff for ejectment of the defts. on the allegation that defts. who had been holding under a time expired kabuliyat were treaspassers, there was a compromise under which defts. agreed to remain in possession of the land and were to be recognized as tenants with occupancy rights at the rents which were mentioned in the compromise. The defts. agreed to pay a lump sum of money for old arrears. There was default in the payment of the sum agreed upon and the landlord brought a suit for recovery of the amount.

Held, that the suit was not governed either by Section 29 or Section 147-A of the B. T. Act, as the prior suit which ended in a compromise was a suit between a landlord and trespasser. (*Coutts and Adami, JJ.*) SHEO GOBIND SINGH *v.* MAHABIR MISSER. **1922 P. H. C. C. 319 : 71 I. C. 143 : 4 Pat. L. T. 301 : A. I. R. 1922 P. 654.**

——**S 29**—*Applicability—Section does not apply to increased rent for increased area—" Specially ", meaning.*

Section 29 has no application to an increase in the amount of rent by reason of an increase in area. It applies only to an increase in the rate of rent. The word " specially " in the section has no reference to the quantum of the reduction of rent allowed for the consideration there mentioned but merely required that owing to special circumstances the rent is lower than it otherwise would have been. Mere proof that rent was a low rent would not be sufficient, unless it is also proved that the low rate was arrived at for a particular consideration. Conditions for bringing an enhancement within the proviso (iii) to Section 29 considered. (*Miller, C. J. and Adami, J.*) GRANT *v.* EKLAL JHA. **1922 P. H. C. C. 177 : 3 Pat. L. T. 386 : 67 I. C. 49 : A. I. R. 1922 P. 171: [On Appeal from 64 I. C 332.]**

——**S. 29 (b)**—*Enhancement of rent—Proof of previous rent by tenant—Onus on plaintiff landlord to justify enhancement.*

Where in a suit for arrears of rent at an enhanced rate by the landlord, the tenant proved the previous

rent and also that the enhancement was in excess of two annas in the rupee, the onus is upon the plff. landlord to justify the enhancement which was in excess of that allowed by S. 29 (*b*) of the B. T. Act. 36 C. 604, foll. (*Mookerjee and Cuming, JJ.*) RAJENDRA NARAIN *v.* SHEIK KALIM. **49 Cal. 875 : 26 C. W. N. 758 : 67 I. C. 813 : A. I. R. 1922 Cal. 575.**

——S. 30—*Kabuliat executed before B. T. Act—Covenant that excess rent will be charged if at next survey excess area is found does not exclude application of S. 30, B. T. Act.*

Whether mention of one contingency excludes all other contingencies is a question to be determined with reference to particular circumstances of each case. A covenant in a kabuliyat executed before passing of the B. T. Act that if at the time of any future survey any excess area is discovered the tenant should be liable to pay enhanced rent on the different kinds of land does not indicate that the only mode of enhancement was that fixed by contract and, therefore, the landlord is not entitled to claim enhancement under S. 30 for rise in the price of staple food crops. (*Suhrawardy and Cuming, JJ.*) BASANT CUMAR *v.* SATINDRA MOHUN. **A. I. R. 1925 Cal. 1209.**

——S. 30—*Retrospective effect*—Quære—*Enhancement of rent.*

It is doubtful how far court has power to make enhancement of rent retrospectively. It would be manifestly unfair in a case which has been prolonged to order any enhancement of back rents, that is to say rents from the commencement of the suit. The ordinary course is no doubt laid down in Section 154 of the Bengal Tenancy Act. (*Dawson Miller, C. J. and Foster, J.*) RAMJI RAM *v.* RAMASRE RAUT. **1924 P. H. C. C. 217 : 83 I. C. 124 : A. I. R. 1924 Patna 761.**

——Ss. 30 and 76—*Nagdi rent—Suspension of—Absence of irrigation facilities.*

Under the general law, the landlord is entitled to enhancement of rent if he provides irrigation facilities. But it cannot be argued that he is not entitled to any rent if he fails to maintain those water channels. To entitle the tenant to suspension of the *nagdi* rent on the ground that the landlord did not provide the necessary irrigation facilities some custom or contract must be proved. (*Das and Ross, JJ.*) PARTAB NARAIN SINGH *v.* NATHAN SINGH. **1924 P. H. C. C. 173 : 79 I. C. 858 : 5 Pat. L. T. 629 : A. I. R. 1924 P. 605.**

——Ss. 30, 105 and 188—*Suit for—Enhancement of rent—Non-joinder of Receiver not made a party.*

In a proceeding for enhancement of rent the co-sharer landlords shown by the record of right, to be entitled to the lands were made parties. A receiver, who had been appointed in respect of the share of one of the co-sharer landlords at the instance of a mortgagee of that share was not impleaded as a party to the proceeding, *Held*, that the omission to join the receiver as a party did not vitiate the proceeding though his joinder would have been proper. (*Adami and Bucknill, JJ.*) MADHEVA SURENDRA SAHI *v.* AWADH MISSER. **3 Pat. L. T. 316 : 65 I. C. 349 : A. I. R. 1923 P. 86.**

——S. 30—*Claim for fair rent in pasty years does not lie.*

A suit for enhancement of rent proceeds on the admission that a rent is now paid by the tenant to the landlord and asks for enhancement on any of the grounds mentioned in S. 30. A suit for the determination of a fair and equitable rent, on the other hand, proceeds on the assumption that no rent has hitherto been paid by the tenant. A suit for determination of fair and equitable rent does not lie when the landlord claims fair rent in respect of past years for which rent has been paid already accrued due and not in respect of future years. (*Das and Bucknill, JJ.*) GOBIND LAL SIJUAR *v.* RAM SARAN LALL. **68 I. C. 433 : 2 Pat. L. T. 642.**

——S. 30 (a)—*Suit for enhancement of rent—Report of Revenue Officer insufficient—Further enquiry should be directed.*

If, in a suit for enhancement of rent under S. 30 (*a*) of the Bengal Tenancy Act, the Court is not satisfied with the report of the Revenue Officer it should direct a further enquiry setting out what further materials are wanted to come to a proper decision and the fact that the suit had been pending for a long time is no ground for not taking steps to bring it to a satisfactory termination and for declining an order for further enquiry. (*Mukerji, J.*) PRANESH CHANDRA SEN *v.* BANWARI LAL SHAHA. **86 I. C. 533 : A. I. R. 1925 Cal. 898.**

——Ss. 30 (a) and 31-B—*Prevailing rates—Ascertainment of.*

The prevailing rate of rent in any local area is a question of fact depending on the actual rents existing from time to time. It increases and diminishes according to existing circumstances, the process being automatic. When the rate has been determined, it will be deemed to be the prevailing rate unless there is an increase in rent in the village or a rise in the price of staple food crops. The expression is used in the same sense in Ss. 30 and 31. B. T. Act. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) RAMJI RAM *v.* RAM KUMAR. **A. I. R. 1924 P. 326.**

——S. 30 (a)—*Enhancement—Record of rights—Entries in—Presumption.*

Under S. 30 the plaintiff was successful in showing that the holdings were non-existent in previous years as had been recorded in the Record of Rights. It was so proved under S. 30 of the Bengal Tenancy Act in a suit for the increase of rent. *Held*, that the tenants have to prove that their fields formed part of other fields which were taxed uniformly all along. (*Das and Kulwant Sahay, JJ.*) NAND LAL CHAUBE *v.* KESHO PRASAD SINGH. **1923 P. H. C. C. 339 : A. I. R. 1924 P. 245.**

——S. 30 (b)—*Enhancement can be claimed even for land yielding no crop.*

The fact that a certain holding consists of homesteads, or patit lands or lands which yield no crop is no ground for disallowing enhancement of the rent of the tenancy. A.I.R. 1922 Cal. 510, *Foll.*) (*Suhrawardy and Chotzner, JJ.*) RESHEE CASE SAW *v.* AMBIKA DASSI. **79 I. C. 567 : A. I. R. 1925 Cal. 399 (1).**

——S. 30 (b)—*Homestead land, rent of—Can be enhanced.*

The rent of an occupancy raiyat of homestead lands is liable to enhancement under S. 30 (*b*) of the Act. (*Walmsley and Ghose, JJ.*) RAJA RESHEE *v.* TRAILOKHYA MOHATA. **76 I. C. 492 : A. I. R. 1923 Cal. 370.**

——Ss. 30 (b) and 182—*Homestead land—Comes within the Section—Enhancement of rent.*

There is nothing in S. 30 of the B. T. Act to restrict it to the land actually used for cultivation. To attract the operation of the section it is sufficient that the land in question is a holding held at a money rent by an occupancy raiyat. Nor would S. 182 remove homestead lands from the operation of S. 30. It would no doubt be open to the tenant to prove that the rent of homestead land by custom or local usage

is not liable to be enhanced under S. 30 (*b*) but failing the proof of any such custom of usage homestead land would come within the operation of S. 30 (*b*). As to whether in any particular case an enhancement should be granted would depend on the circumstances of the case. (*Cuming and Panton, JJ.*) RESHEE CASE LAW *v.* CHINTAMONI. **36 C. L. J. 305 : 70 I. C. 535 : 27 C. W. N. 962 : A. I. R. 1922 Cal. 510.**

——S. 35—*Enhancement—Grounds.*

S. 35 means that the Court has to consider the facts of the particular case and the rules set out in the Act relating to the particular application and then, before it allows an enhancement it must be satisfied that the enhancement is fair and equitable, the provision being inserted for the protection of the tenant. (*Sanderson, C. J. and Richardson, J.*) ISHAN CHANDRA *v.* RAMA PROSAD. **65 I. C. 656 : 25 C. W. N. 897.**

——S. 36—*Enhancement of rent—Power of Court.*

In cases of enhancement of rent, the Court has power under S. 36 of the Act to make an order which will bear less hardly upon the tenants and to prevent the imposition of a higher rate with retrospective effect. (*Miller, C. J. and Foster, J.*) RAMJI RAM *v.* RAMASRE RAUT. **(1924) P. H. C. C. 217 : A. I. R. 1924 Pat. 761.**

——S. 38 (1)—*Right to claim abatement is not restricted to occupancy tenants.*

Obiter :—The right to claim abatement of rent in the circumstances mentioned in S. 38 is not confined only to occupancy tenants, but exists in all tenants irrespective of their status, though occupancy tenants are expressly referred to in the section. (*Jwala Prasad, A. C. J. and Ross, J.*) BABU SUKHRAJ RAI *v.* GANGA DAYAL SINGH. **63 I. C. 219 : 2 Pat. L. T. 569.**

——S. 40—*Commutation of rent—Notice to be given to parties—Order without—Jurisdiction.*

Although S. 40 of the B. T. Act does not state explicitly that no order of commutation is to be made till opportunity has been afforded to the party liable to be affected thereby to appear and contest the applications, it is obvious on first principles that no order should be made till notice of the application has been served. The object of the application for commutation is to secure an alteration of the most essential element of the tenancy, namely, the rent. It is of the utmost importance to the party whether the rent is to be paid in kind or in cash and if the rent is to be paid in cash, what sum should be taken as the proper amount payable in lieu of rent previously paid in kind. An order for commutation cannot be made without notice to the party affected and where it is so made by the Revenue Court it acts without jurisdiction and its order is *ultra vires*. An order under S. 40 made by a Revenue Court without jurisdiction does not bind the Civil Court. 45 C. 769 ; 18 C. 467 Ref. (*Mookerjee and Chotzner, JJ.*) GORA CHAND HALDAR *v.* RAKHAL CHANDRA GOPE. **37 C. L. J. 473 : 72 I. C. 37 : A. I. R. 1923 Cal. 364.**

——S. 40—*Commutation of rent.*

S. 40 allows a commutation of rent only where the rent is in reality payable in kind either wholly or partially and the tenant has the status of an occupancy *raiyat*. Where the order of the Settlement Officer commuting rent is without jurisdiction, the Civil Court was competent to declare that as a nullity. (*Mookerjee and Fletcher, JJ.*) MOHESH DUTTA SUKLA *v.* SHEIKH HURMAT. **67 I. C. 946 : 25 C. W. N. 714.**

——S. 40—*Commutation of rent—Irrigation facilities—Experiments in crop—cutting.*

On an application for commutation of rent in 1922

the trial of the case was long delayed. The Subdivisional Officer refused to allow commutation on account of irrigation involved. His orders were set aside by the Commissioner on appeal from the order of the Collector who had confirmed it on the ground that it was too late to conduct crop-cutting experiments. *Held*, that the order of the Collector was unreasonable. The Commutation Manual was intended as a rough guide for Revenue Officers, not as a Code. Where an irrigation system consists only of a village or part of a village, commutation may generally be allowed. (*B. Foley, M. C.*) MAHARAJA CHANDRA MOULESHWAR PRASAD SINGH BAHADUR *v.* JHARO GOPE. **2 Pat. L. R. 213 (Cr.).**

——S. 40—*Commutation of rent—Crop forecast—Crop-cutting experiment—Dryage — Ridges—Other allowances.*

The object of the resort to crop-cuttings in a commutation case is to estimate in the absence of reliable accounts what the average annual realisations of the landlord during the past 10 years may have been. In using the forecasts regard should be had not to the theoretical normal but to the actual normal of the preceding 10 years. Forecast estimates are of doubtful reliability and must not be rigidly applied. The rate of deduction on account of risk of season and cartage, etc., depend primarily on evidence in the case and a hard and fast rate is not one that can be safely prescribed. (*Morshead, M. C.*) KIRIT NARAIN SINGH *v.* CHANDRADHARI SINGH. **2 Pat. L. R. 191 (Cr.).**

——S. 40—*Commutation of rent—Large extent of cultivable land left uncultivated—Effect of.*

Where in a commutation case it was found that the tenants had left a large extent of cultivable land uncultivated, *held*, that commutation would give the tenants an unfair advantage and that commutation should be disallowed. (*Morshead, M. C.*) BUJHAWAN MISSER *v.* RAMGULAM SINGH. **2 Pat. L. R. 177 (Cr.).**

——S. 40—*Commutation of rent—Basis of—Rents fixed for different lands—Consideration of.*

Where in a commutation case rent receipts were produced in respect of other lands, but the Court rejected them, the action of the Court is prejudicial to the applicant. Local inspection affords only doubtful guidance as to the comparative value of the lands where the inspection was made at a time when there were no crops on the land for comparing the lands under commutation with those whose rents had been previously commuted. (*Morshead, M. C.*) CHULHAN SINGH *v.* BISHUN MAHTON. **2 Pat. L. R. 173 (Cr.).**

——S. 40—*Commutation of rent—Average—Fair rent—How fixed.*

Chauraha rents are essentially different from ordinary bhaoli rents. Cash rents and commuted bhaoli rent in the vicinity will be taken into account in commutation cases, but there is no reason why an average between them and the chauraha rents should be taken or indeed that the commuted chauraha rents need be reduced at all in consequence of a comparison. Under S. 40 of the Bengal Tenancy Act the Revenue Officer has not the power of fixing fair rents, but is bound to give the landlord what he thinks is the reasonable equivalent of what he has been receiving in produce rents. (*Foley, M. C.*) RAGHUBAR SINGH *v.* MAHABIR MAHTON. **2 Pat. L. R. 169 (Cr.).**

——S. 40—*Commutation — Basis of — Previous collections by landlord—Stack collection.*

In commutation cases it cannot be held as a general rule that the landlord is not entitled to obtain more rent after commutation than he actually obtained as

shown by the receipts granted by him to the tenants during the preceding years. If this is adopted landlords will be more inclined than they are at present to withhold receipts for produce rents. (*Foley, M.C.*) MT. SONPHUL KUER *v.* MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH. **2 Pat. L. R. 157 (Cr.).**

——S. 40—*Commutation of rent—Principle to be borne in mind—Cash rents—Actual realisations.*

The law prescribes two factors, *viz.*, actual realisations for the past 10 years and comparative cash rents to which the Revenue Officer is to have regard in making the commutation. It does not debar the consideration of other facts but it gives these two an unquestionable prominence. When a landlord has been content for 10 years or so to accept a certain sum, he is not entitled to come forward at the end of the period and say " It is true that I have only been able to collect so much all these years but I might have collected a great deal more had I looked after my interest better, instead of allowing the ryots or my servants to take advantage of me." The landlord must in ordinary cases be held to be bound by his own standard of collection. It does not matter what proportion of holdings is cultivated so long as it is known what the holding actually brought in. Of course the extent of cultivation may be a matter of considerable importance should there be evidence of systematic neglect by the raiyats to cultivate the land properly. (*Morshead, M. C.*) NAWAB CHOWDHURY *v.* HARIHAR PRASAD SINHA. **2 Pat. L. R. 147 (Cr.).**

——S. 40—*Commutation of rent—Irrigation difficulties—Objection on the ground of.*

The objection to commutation of rent on the ground that the lands concerned depend on a complicated system of irrigation which distinguishes them from other pattis in the same village could be taken at any stage of the proceedings, though it would save parties trouble and expense if it had been taken earlier. (*Morshead, M. C.*) RAMESHWAR DYAL *v.* ACHAIBAR SINHA. **2 Pat. L. R. 120 (Cr.).**

——S. 40—*Commutation—Landlord and tenant—Rent—Refusal of—Complicated system of irrigation.*

When a village is dependent upon a complicated system of irrigation there ought to be a very careful enquiry to make sure that any lands within the village covered by an application for commutation are or are not in fact dependent on the system. (*Morshead, M. C.*) BABU BHAGWAN PRASAD *v.* LOCHAN GOPE. **2 Pat. L. R. 96 (Cr.).**

——S 40—*Commutation of rent—Complicated system of irrigation—Objection.*

The villages in question were supplied with water from an unquestionably elaborate system of irrigation. Commutation had been disallowed after a personal enquiry by the Commissioner in other villages fed by the same system and the circumstances of the village concerned in these proceedings did not appear to be in any way distinguishable. *Held*, that there was a good case made out against commutation. It is not reasonable that landlords should, without good reason, allow the proceeding to go on indefinitely at the cost of trouble and expense to all concerned before putting forward this objection. (*Morshead, M. C.*) BABU RAJPATI NARAIN SINGH *v.* PARTAB MAHTON. **2 Pat. L. R. 66 (Cr.).**

——S. 40—*Commutation of rent—Objection to—Grain required for service of idol.*

An application for commutation of grain rent into cash was made in March, 1922, but it was not until January, 1923, that the landlords filed a written statement, and in this there was no reference whatever to the requirements of any idol. The proceedings then

went on with various interruptions, but without any contention even in the witnesses' statements, that commutation would affect the service of the idol. The ground was first emphasised and accepted in the Revenue Officer's final order and would appear to have been urged only at the latest stage of the proceedings. *Held*, that it was not an unreasonable inference that the objection was taken in the last resort, owing to the apprehension that commutation would result in a lower rate of rent than the landlords were willing to accept, and that commutation should be ordered. (*Morshead, M. C.*) KANHAILAL *v.* SRI THAKUR LACHMI NARAIN. **2 Pat. L. R. 64 (Cr.).**

——S. 40—*Commutation proceedings—Date from which commutation takes effect.*

In commutation proceedings it is important to discourage any tendency whereby the proceedings, which are apt to be too protracted in any case, may be exposed to further delay in the interests of either party. This danger arises if resort to rent suits, whilst commutation proceedings are in progress, is recognised as a reason for postponing the date of commutation. Where proceedings are taken up in 1327 fasli, the year 1328 is a suitable one for giving effect to the commutation order. (*Morshead, M. C.*) MISS SALONO *v.* REKHA SINGH. **2 Pat. L. R. 46 (Cr.).**

——S.40—*Commutation—Rent—Basis of—Actual realisations—Experiment in crop-cutting.*

In cases of commutation the landlord's actual realisations are the safest guide. Crop-cutting experiments need not necessarily be discredited because particulars had not been recorded in detail. A deduction of 10 per cent. from actual realisation was not an unreasonable deduction for the incidental advantages of a fixed money demand in lieu of a fluctuating claim which had to be determined afresh each year. (*Morshead, M. C.*) KANHAI MAHTON *v.* BISHUNDIAL SINGH. **2 Pat. L. R. 15 (Cr.).**

——S. 40—*Commutation of rent—Experimental cutting of crops—Notice to parties.*

In matters relating to commutation of rent, a crop-cutting experiment should not be made without due notice to the parties and the record must bear out that notice was so given. Something more than a " Partal " is required to show how these experiments were made, as for example, a report showing how the officer conducting the experiment made his selection and conducted his experiment. (*Morshead, M. C.*) RAJA HARIHAR PROSAD NARAIN SINGH *v.* SAKAL SINGH. **2 Pat. L. R. 4 (Cr.).**

——S. 40—*Commutation of rent—Mode of calculation—Price of landlord's share.*

Where in an application for commutation the original Court in calculating the average price to be adopted in respect of the paddy due to the landlord's share worked it out for the village to be Rupees 2-8-0 per maund and the Commissioner reduced it to Rupees 2-4-0 per maund on the basis of experience in previous cases. *Held* that these cases should be decided on the merits whenever possible and general standards should be resorted to only in the absence of anything more reliable to go by. (*Morshead, M. C.*) NAJMUL HUDA *v.* SEWAKA MAHTON. **1 Pat. L. R. 263 (Cr.).**

——S. 40—*Commutation of rent—Compromise between tenants and Co-sharer landlord—Effect of.*

Where the Court below held that an order requiring the tenants to pay the commuted rent to the landlords who were parties to the compromise and to continue to pay rent in kind to others, is not only very undesirable but also not warranted by the law, *held* that the view of the Court below was erroneous. It is open to

the Revenue Court to apply S. 40 of the B. T. Act or to refuse to apply for the purpose of commuting rent but, the validity of any arrangement by the proprietors or any of the proprietors with the tenants is not affected by its refusal. The determination of the validity of the compromise as between the co-sharers and the raiyats may be left to the Civil Court to settle. (*Morshead, M C.*) THAKUR SINGH *v.* RAI PERMATHO NATH MITRA. **1 Pat. L. R. 172 (Cr.).**

———**S. 40** —*Commutation of rent—Preliminary objection.*

An enquiry with a view to determining the sum to be paid as a money rent should not be undertaken before the issue of grant or refusal of commutation of rent is rightly determined since otherwise the labour and the expenses to the parties of the enquiry may be spent to no pur pose. (*Morshead, M. C.*) BHAGWAT PRASAD *In re.* **1 Pat. L. R. 92 (Cr.).**

———**S. 40**—*Commutation of rent*—Manhunda *rate.*

Where the tenants failed to apply for commutation previous to undertaking the *Manhunda* rate, they are deemed to have foregone their right to commutation when compared with cash rents of the adjoining villages. (*Dixon, C.*) RAMDIHAL KHAR *v.* BABU BALDEO LAL. **1 Pat. L. R. 76 (Cr.).**

———**S. 40**—*Commutation of rent—Deterioration in irrigation facility—Effect of.*

The consideration of the question of commutation of rent should not be restricted to the standpoint of the landlord and tenant. The public is also interested in the food supply of the country and if there is the danger of deterioration in the irrigation system of the lands it is a reasonable ground for refusing commutation. (*Morshead, M. C.*) RANI BHUBANESHWARI KUER *v.* MT. SHAM SUNDER KUER.

1 Pat. L. R. 65 (Cr.)

———**S. 40**—*Rent—Commutation—Occupancy holding—Transferability of holding—Consideration.*

On an application by the transferee of an occupancy holding for commutation of rent under S. 40 of the B. T. Act it was held that the burden lay on the applicant to establish his status as occupancy tenant which status was disputed. It is open to the applicant to establish his right by proving that occupancy holdings are transferable by custom without the consent of the landlord or that the landlord has in fact recognised the transfer. The Revenue Officer is not bound to decide the question of the custom of transferability in entertaining an application for commutation. It is a question for the Civil Court and the Revenue Court need only enquire whether the transferee has been recognised as a tenant. (*Morshead, M. C.*) KULDIP NARAIN SINGH *v.* MT. JASODA KOER.

1 Pat. L. R. 62 (Cr.).

———**S. 40 (4)**—*Commutation of rent—Basis of crop-cutting experiments—Actual realisations—Scope of the enquiry.*

The law says that in commutation cases the commuting officer shall have regard amongst other things to the actual realisations but does not say that he may not have regard to other factors or that he is bound to base his commutation on the factors specified in S. 40 (4) only. The results of crop-cutting experiments can be taken into account. (*Morshead, M. C.*) INDERDEO NARAIN SINGH *v.* G. B. SOLANO.

2 Pat. L. R. 114 (Cr.)

———**Ss. 40 (4) (b) and 69**—*Commutation of rent—Basis of—Realisation—Khasra—Value of.*

As regards the question whether commutation should be based on the landlord's actual realisations or whether it should be based on what he might reasonably demand but has not actually realised. *Held*, that the landlord could not expect to get more than what he has been in the habit of realising unless he can make out some special justification for a higher rate. Rent receipts produced by the tenants and admitted by the landlord supply a fairly substantial basis. The landlord must show some reason beyond his own control for realising less than what he might have realised before he can be entitled to a higher rent. (*Morshead, M. C.*) RAMPRIT OJHA *v.* MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH.

2 Pat. L. R. 151 (Cr.).

———**S. 40 (5), (6)**—*Appeal when lies.*

S. 40 (5) of the B. T. Act does not govern Cl. (6) of the same section. The appeal contemplated under Cl. (5) is an appeal against an order passed under Cl. (3) determining the sum to be paid as a money rent. An order refusing or allowing an application for commutation is not appealable and revision is the only remedy. (*Gruning, M. C.*) INDERDEO SINGH *v.* ANOOP SINGH. **1 Pat. L. R. 123 (Cr.).**

——— — **Ss. 44 and 47**—*Tenant holding over—Second lease executed, continuing occupation—Tenant is liable to ejectment under S.* 44.

Where after the expiry of the terms of the lease the tenant held over for about eleven months after which another lease was executed.

Held, the tenant was not admitted to occupation under the second lease but that he had been in occupation of the land and the second lease was executed with a view to the continuance of that occupation. He was therefore, not liable to ejectment under S. 44. (*Mukerjee, J.*) MUHAMMAD SULAIMAN *v.* UMACHARAN SIL. **79 I. C. 648 : A. I. R. 1925 Cal. 181.**

———**S. 44**—*Homestead land—User for agricultural purpose — Ejectment — Urban holdings—Occupancy right.*

Where homestead land ceases to be such and is let out for cultivation and both cereals and vegetables are grown upon it, the land is governed by the provisions of the B. T. Act and a lessee is a non-occupancy raiyat liable to be ejected only on any one of the grounds specified in S. 44 of the B. T. Act.

Quære : Whether the B. T. Act applies to urban holdings as for instance in the City of Patna. (*Chamier, C. J. and Sharfuddin, J.*) MT. WAJIBUNNISSA BEGAM *v.* FAKIRA MAHTON.

3 Pat. L. T. 621 : A. I. R. 1923 Pat. 94.

———— **Ss. 46 and 111**—*Suit under S.* 46 *includes the question of determining the status of tenant and falls within S.* 111.

A suit under S. 46 is not merely a suit for ejectment in the sense of ejecting a trespasser but it involves a determination by the Court of the class of the tenant and also the fixing of a fair and equitable rent. Therefore a suit under S. 46 comes under the express words of S. 111. (*Greaves and Mukerjee, JJ.*) KANAK KANTI ROY *v.* SRISHTIDAR MONDAL.

A. I. R. 1925 Cal. 1211.

———**S. 46** — *Enhancement of rent—Refusal to agree—No ejectment unless, agreement is tendered to raiyat—Suit for ejectment—Refusal to agree to enhancement of rent.*

S. 46 of the Bengal Tenancy Act provides that a non-occupancy ryot shall not be ejected by suit for refusal to agree to an enhancement of rent, unless the agreement for enhancement is tendered to the raiyat, and the rules framed by the Government prescribe the provisions of the C. P. Code relating to service of summons as applicable to the mode of service. (*Mookerjee, A. C. J. and Fletcher, J.*) BHARAM CHAND GUIN *v.* KANAK SARKAR.

26 C. W. N. 359 : 68 I. C. 991 : 35 C. L. J. 203

BENGAL TENANCY ACT (VIII OF 1885), S. 46.

——S. 46—*Enhanced rent—Date from which it is payable.*

S. 46 refers to two separate and distinct matters. The first five sub-Sections contemplate an amicable enhancement of the rent of a non-occupancy raiyat without litigation. The landlord proposes an enhanced rent and tenders to the raiyat an agreement to pay that enhanced rent which he may or may not execute at his option. If he accepts the proposal then the enhanced rent takes effect from the beginning of the next agricultural year. If he does not accept it, then the landlord may sue for ejectment. The sixth and subsequent sub-sections relate to the procedure to be adopted where a suit for ejectment has been brought. They provide that before ordering ejectment the Court shall determine what is a fair and equitable rent. If the raiyat refuses to pay the rent so found, then he may be ejected but it seems perfectly clear that he would not be liable for anything more than the original rent up to the date when he was ejected. If, on the other hand, he agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at the rent for a term of 5 years from the date of the agreement. It seems clear that the date of the agreement there mentioned is the date when he agrees to pay the rent found by the Court. There would appear to be no reason why he should pay that enhanced rent from an earlier date if he accepts it than there would be why he should pay an enhanced rent if he refuses to accept it and renders himself liable to ejectment. (*Dawson Miller, C. J. and Macpherson, J.*) MUSST. BIBI WAJIBUNNISSA BEGUM *v.* BABU LAL MAHTON. **90 I. C. 871 : 1925 P. H. C.C. 298.**

——S. 48—*Higher rate of rent fixed—Right to renewal if terms fulfilled—Payment of legal rent—If enough.*

A lease deed fixed a rate of rent higher than what could be enforced under S. 48, B.T. Act and gave the lessee a raiyat to get a renewal if the conditions thereof were fulfilled. The tenant did not pay the rent fixed but only the rate which could be legally enforced against him. *Held*, by *Graves, J.* (agreeing with *Newbould, J.*) he was entitled to a renewal.

Per *Cuming, J.* (*contra*) the right of renewal did not accrue as he has failed to abide by the terms of the contract. (*Greaves and Cuming, JJ.*) ASHRAF ALI *v.* ARMEN KHAN. **90 I. C. 893 (Cal.).**

——Ss. 48, 49—*Acquisition of occupancy rights—Long occupation and planting of trees—Proof of custom*

A custom of occupancy rights must be established independently of and apart from the cases in dispute. The mere fact of occupying the lands for over 40 years and the fact of their having planted trees upon portions of the land would not establish in law a custom conferring occupancy rights in suits for ejectment. (*Kulwant Sahay, J.*) CHAKAUKI LAL *v.* DEO CHAND MAHTON. **90 I. C. 273 (Pat.).**

——S. 48—*Lease by mortgagee in favour of mortgagor—Rent recoverable is governed by section.*

On 16-1-1917 defendants executed Zarpesgi lease of 2 bighas of Kasht land in favour of the plaintiff in consideration of Rs. 975, 18-1-1917 the defendants executed a kabuliat in favour of the plaintiff for a term of 9 years from fasli 1324 to 1333 in respect of the same land the rent reserved being Rs. 75, As. 5 per year. As they defaulted in payment of the reserved rent the plaintiff brought a suit for fasli 1325 and part of fasli 1326. The defendants pleaded that during the revisional survey the rent was recorded at Rs. 24-8-0 and that the plaintiff was not entitled to pay more. The trial Court decreed the suit at a rental of Rs. 24-7-0. The appellate Court held that the tenancy created by the kabuliyat was a new tenancy and that the defendant while executing the zarpesgi lease did not lose his original status of a raiyat and decreed the suit in full. *Held* that the transactions of mortgage and lease were independent of each other and the rent recoverable by the plaintiff was regulated by S. 48 of the B. T. Act and the plaintiff was not entitled to a greater rent than that to which he was entitled under the section. (*Ross, J.*) CHATURGUN BIND *v.* TILAKDHARI SINGH. **71 I.C. 470 : A. I. R. 1923 Pat. 402.**

BENGAL TENANCY ACT (VIII OF 1885), S. 49.

——S. 48 (a)—*Not applicable to case of rent in kind—Eviction by title paramount is a good defence to suit for rent.*

S. 48 (*a*) does not apply to cases where the rent fixed in the *kabuliyat* is rent in kind and not in cash. 29 C. L. J. 284, Ref. to.

Eviction by title paramount is a good defence to a suit for rent if the party evicting has a good title. (*Chatterjee and Newbould, JJ.*) KRISHNA KUMAR SHAHA ROY *v.* PIRU FAKIR. **35 C. L. J. 109 : A. I. R. 1922 Cal. 273.**

——S. 48 (a)—*Applicability—Rent in kind.*

Where an under *raiyati* kabuliat provides for the payment or paddy or its value, as rent, such rent is not money rent and is not governed by S. 48 (*a*) of the Act. (*Chatterjee and Newbould, JJ.*) KANTOORAM *v.* PIRU. **63 I. C. 502 (Cal.).**

——S. 49—*Ejectment—Raiyat—Homestead land.*

A lessee from a *raiyat* of homestead lands, if he holds other lands in the village as settled *raiyat*, holds the homestead lands as raiyat and is protected from ejectment. A raiyat at a fixed rate of rent can grant a permanent lease of his land. (*Cuming, J.*) PRASANNA KUMAR DATTA *v.* KEDARNATH SAMANTA. **90 I. C. 497 (Cal.).**

——S. 49—*Notice to quit—Clear and unambiguous.*

Under S. 49, B. T. Act, a notice to quit must be reasonable having regard to the nature of the tenancy and the date of the expiry of the agricultural year. The notice must be read as a whole. There is no necessity to import into the agricultural law of India the six months' notice required in the case of annual tenancies in England. (*Greaves and Mukerjee, JJ.*) BROJO NATH DAS CHAUDHURY *v.* ABDUR RAHAMAN MIA. **89 I. C. 113 (Cal.)**

——S. 49—*Consent decree is no substitute for written lease required by S. 49.*

A consent decree cannot transform tenancy which at its inception was for an unlimited time into a tenancy for a term held under a written lease within the meaning of S. 49. (15 C. L. J. 122 and 672 and 28 C. L. J. 507, *Dist.*) The tenant could be ejected only after notice under S. 49 (*b*) and in execution of a decree. (*Mookerjee and Suhrawardy, JJ.*) GANESH-CHANDRA PAL *v.* CHANDRA MOHAN DUTT. **28 C. W. N. 984 : 84 I. C. 730 : A. I. R. 1925 Cal. 199.**

——S. 49—*Agreement to lease to two tenants—Notice in ejectment to one—Validity.*

When an agreement is made to lease the property to two tenants and they enter into possession though no lease is executed, law treats them as tenants and the notice in ejectment should be served on both under S. 49, B. T. Act. But when the lessees obtained a decree for specific performance but did not execute the decree and a lease was executed only in favour of one of them, notice is not necessary. (*Chatterjee and Cuming, JJ.*) PITAMBUR GAIN *v.* RAM CHARAN MORAL. **28 C. W. N. 157 : 76 I. C. 365 : A. I. R. 1924 Cal. 483.**

——S. 49—*C. P. Code, O. 5, R. 17—Strict compliance with O. 5, R. 17 is essential.*

The rules laid down in O. 5 of the Code of Civil Procedure relating to the service of summons will apply to notices served under S. 49 of the Bengal Tenancy Act. Perhaps R. 19 does not apply to notices issued under the Bengal Tenancy Act for the rule numbered 3 of the Government rules only says that the process shall be served in the manner provided in the Civil Procedure Code. Rule 19 relates to the proof of service by the affidavit of the serving officer or his examination on oath in Court and the decision of the Court that the service was duly made. But rule 17, relating to the mode of service, applies and if it is not complied with the notice will be vitiated, 1924 Patna 446, Dist. (*Jwala Prasad, Ag. C.J. and Kulwant Sahay, J.*) MAHADEO SINGH *v.* BASGIT SINGH.

4 Pat. 135 : 1925 P. H. C. C. 106 : A. I. R. 1925 Pat. 441.

——**S. 49 (b)**—*Notice under—Formalities of—English Law not to be imported in India.*

On the 26th December, 1914 a notice was served by the plaintiffs upon the defendant. This notice was described as a notice under S.49, Bengal Tenancy Act. It stated in the first place that the plaintiffs did not admit that the defendants were under-raiyats. But it was added that if they were under-raiyats, they should vacate the land. There was no specification of the date when the defendants were required to vacate the land. The suit in ejectment was not instituted till the 7th January, 1918. On a question arising as to the validity of the notice. *Held*, that technicalities of the English Law relating to the form and contents of a notice to quit should not be introduced in connection with the provisions of S. 49, Bengal Tenancy Act. There was sufficient compliance with the requirements of S. 49 if what was served upon the tenant gave notice to quit the land at the end of the agricultural year next following and the suit was instituted after the lapse thereof. (*Mookerjee and Chotzner, JJ.*) PURNA CHANDRA DAS *v.* ALI MAHOMED.

37 C. L. J. 548 : 70 I. C. 999 : A.I.R. 1924 Cal. 520.

——**S. 49 (b)**—*Permanent sub-lease by raiyat to under-raiyat—Effect of.*

A permanent sub-lease by a raiyat (not being a raiyat holding at a fixed rate) to an under raiyat is not operative as such between them. But the grantee is an under-raiyat who holds otherwise than under a written lease, and his tenancy is liable to be determined in the manner provided by S. 49 (*b*) of the Act. Till such determination the grantor cannot treat the under-raiyat as a trespasser. (*Mookerjee, A. C. J. Fletcher, N. R. Chatterjee, Teunon and Richardson, JJ.*) CHANDRA KANTA NATH *v.* AMJAD ALI HAZI.

25 C. W. N. 4 : 61 I. C. 466 : 32 C. L. J. 296 (F. B.).

——**S. 49-K**—*Sale in contravention of—Validity—Application to set aside—Limitation.*

The sale of a tenure held by an aboriginal in execution of a money decree in contravention of S. 49-K is a nullity and not merely an irregular sale. The sale being a nullity neither Art. 12 nor Art. 166 applied to an application to set it aside. (*Chatterjee and Panton, JJ.*) JOGESHWAR MAHATAB *v.* JHAPAL SANTAL. **51 Cal. 224 : 28 C. W. N. 556 : 82 I. C. 848 : A. I. R. 1924 Cal. 638.**

——**S. 50**—*Though presumption of permanency may not arise in a particular case, defendants can prove contract against enhancement of rent.*

Even if the tenure had been held for a long period at the same rate of rent, no presumption as to its permanency could arise, if the tenure was created after the permanent settlement. But it is open to the defendants who are sued for enhancement of rent to establish on the evidence that there was a contract that the rent of the tenure should not be enhanced. (*Greaves and Cuming, JJ.*) GOPI MOHUN *v.* NAWAB OF MURSHIDABAD. **29 C. W. N. 723 : 88 I. C. 433 : A. I. R. 1925 Cal. 954.**

——**S. 50**—*Slight variation is immaterial.*

A slight variation in the rent, even though not explained, does not deprive the tenant of the benefit of the presumption under S. 50 of B. T. Act. (*Suhrawardy and Cuming, JJ.*) ALIMUDDIN MOLLAH *v.* KARIM BUX. **41 C. L. J. 135 : 86 I. C. 316 : 29 C. W. N. 500 : A. I. R. 1925 Cal. 632.**

——**S. 50**—*Presumption under S. 50 arises if entries in the record-of-rights do not comply with S. 102 and S. 115 does not apply—B. T. Act, S. 115.*

If entries in the record-of-right do not record or wrongly record particulars under S. 102 (*b*) as it stood prior to amendment the presumption under S. 50 arises and S. 115 does not apply. (*Greaves and Graham, JJ.*) MOFIZUDDIN CHOWDHURY *v.* RAJENDRA NATH SANYAL. **40 C. L. J. 248 : 29 C. W. N. 209 : 84 I. C. 989 : A.I.R. 1925 Cal. 208.**

——**S. 50**—*Rent not enhanced for 59 years—Inference of perpetual lease.*

The fact that the rent of a holding has not been altered for a period of 59 years is a factor which must be taken into account in considering if the rent has been fixed in perpetuity. But such an inference is not inevitable, as it may be due to special circumstances, such as the land being overgrown with jungle. (*Greaves and Cuming, JJ.*) SATISH CHANDRA GHOSH *v.* DEBENDRA NATH DE **90 I. C. 820 (Cal.).**

——**S. 50**—*Suit for enhancement—Variation in rent—Explanation—Burden of proof.*

In a suit for enhancement of rent under S. 50, where the evidence shows variation in the rents paid, the onus is on the tenants to explain the variation. If they cannot explain it, the inference will be that there has been a change in the rate of rent. (*Cuming and Chakravarti, JJ.*) NRISINHA CHARAN NANDI CHOUDHURI *v.* BATASI DASHI. **90 I. C. 602 (Cal.).**

——**S. 50**—*Enhancement of rent—Onus.*

Under S. 50 the initial onus lies upon the landlord to prove that the rent of the tenancy is liable to be enhanced on the ground of additional area. This onus may be shifted by proving the origin of the tenancy or a contract or other proof showing the right to claim enhancement. The onus is not shifted by merely producing *dakhilas* which mention the areas for which rent is paid. (*Suhrawardy and Duval, JJ.*) MAHAMMAD MOYENUDDIN BASUNIA *v.* BAHARUDDIN CHOUDHURI. **90 I. C. 557 (Cal.).**

——**Ss. 50 and 104 (h)**—*Presumption—None, where origin of tenancy known—Suit under S. 104 (h)—Maintainability.*

The presumption as to the fixity of rent laid down in S. 50 of the Act does not apply where the origin of a tenancy is known. It is not competent to a Civil Court to revise the rent fixed in the settlement Rent Roll. Where a person is not really affected by an entry of rent in the Record-of-Rights he would not be entitled to claim a revision of rent under S. 104 (*h*) Cl. 4 of the B. T. Act, even though his case may fall under Cl. 3 of the section. (*Woodroffe and Suhrawardy, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAM CHARAN ACHARYA.

40 C L. J. 235 : 70 I. C. 207 (Cal.) : A. I. R. 1924 Cal. 464.

——**S. 50**—*Presumption under, applies to occupancy raiyats.*

There is no rule that an occupancy raiyat is not entitled to the benefit of S. 50. (*Mookerjee and Walms-*

ley, JJ.) NARENDRA LAL *v.* BENODE BEHARI.
27 C. W. N. 740 : 80 I.C. 577 : A. I. R. 1924 Cal. 143.

——Ss. 50 and 29—*Distinction between.*

S. 50 of the B. T. Act contemplates a case where a tenancy has been held at a certain rate, while S. 29 applies only to a case where rent has been actually paid for a period of three years. (*Mookerjee and Chotzner, JJ.*) JANAKI BALLAV ROY *v.* ENAT MANDAL. **37 C. L. J. 489 : 72 I. C. 136 : A. I. R. 1923 Cal. 600.**

——S. 50—*Presumption—Sub-division or variation in Rent do not affect.*

A sub-division of a tenure does not deprive the tenant of the benefit of S. 50 of the B. T. Act, nor does it affect the continuity of the tenure. A slight variation in rent, though unexplained, does not deprive the tenant of the benefit of the presumption under S. 50 of the B.T. Act. (*Mookerjee and Chotzner, JJ.*) TARAKUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH. **36 C. L. J. 389 : 74 I. C. 383 : A. I. R. 1923 Cal. 261.**

——S. 50—*Presumption—Rebuttal—Contract of tenancy subsequently entered into between the parties.*

Where there is a uniform rate of rent for 20 years, it is open to the landlords to rebut the presumption arising in favour of the defendants by a contract of new tenancy entered into subsequently which entitles the landlords to claim rent from the tenants after the expiry of the term of the lease at the rate of rent payable for the cultivated lands of the village. (*Mookerjee and Cuming, JJ.*) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHATTACHARYA.
36 C. L. J. 333 : 70 I. C. 437 : A. I. R. 1923 Cal. 141.

——S. 50—*Applies to suits or proceedings under the Act and not to a suit in ejectment.*

S. 50 (2) is, by its terms, limited in its application to suits or proceedings under the Bengal Tenancy Act. A suit for ejectment does not fall within that description. But it has been ruled that even in cases where S. 50 is not directly applicable, the Court may act on a presumption similar to the one arising under the section, if the facts justify the necessary inference. The same principle plainly applies to suits or proceedings where the rule embodied in S. 50 is extended by analogy. (*Mookerjee and Rankin, JJ.*) MANMATHA NATH KAR *v.* PROBODH CHANDRA. **37 C. L. J. 52 : 73 I. C. 416 : A. I. R. 1923 Cal. 102.**

——S. 50—*Applicability—Rent—Partly payable in kind and partly in cash.*

Rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. It is in this sense that the expression "rent" is used in S. 50 of the B. T. Act. The substantive rule enunciated in S. 50 (1) and the presumption embodied in S. 50 (2) of the B. T. Act do not become inapplicable because a tenure-holder or raiyat holds at a rent payable partly in cash and partly in kind or entirely in kind. 12 W. R. 14 ; 14 W. R. 388 ; 15 W. R. 379 Rel. (*Mookerjee and Chotzner, JJ.*) DINA NATH PAL *v.* RAJA SATI PRASAD GARGA BAHADUR.
27 C. W. N. 115 : 36 C. L. J. 220 : 72 I. C. 663 : A. I. R. 1923 Cal. 74.

——S. 50—*Sub-division and amalgamation do not affect continuity of tenure.*

S. 50 (3) of the B. T. Act was inserted for the benefit of the ryots and not with a design to prejudice tenure-holders. The operation of S. 50 (1) and (2) is not excluded in the case of tenures merely by reason of sub-division or amalgamation. 36 C. 287 not Foll. S. 50 (1) of the B. T. Act contains the substantive rule on the subject of protection from enhancement. The sub-division of a tenure does not work a breach in the continuity of the tenure, if each fragment is held at a proportionate rent and the aggregate rent equal to the original rent. (*Mookerjee and Rankin, JJ.*) KRISHNA KAMINI DASI *v.* NILMADHAS SAHA.
36 C. L. J. 382 : 73 I. C. 312 : A. I. R 1923 Cal. 66.

——Ss. 50 and 115—*Presumption—Record-of-Rights, publication of, excludes.*

After the publication of the Record-of-Rights in respect of a tenancy under Chap. X of the B. T. Act, the tenant is precluded by S. 115 from claiming the presumption under S. 50 of the Act. (*N. R. Chatterjee and Panton, JJ.*) BAMANDAS BIDYASAGAR BHATTACHARYA *v.* SADHU MAJHI. **26 C. W. N. 945 : 64 I. C. 445 (Cal.)**

——S. 50—*After publication under S. 115 presumption under S. 50 will not apply.*

Where the Record-of-Rights has been finally published under S. 115 the presumption under S. 50 is no longer available to the tenants whether they rely upon payment of rent at a uniform rate before or after the publication of the Record-of-Rights. (*Dawson Miller, C. J. and Foster, J.*) RAMESARAN MAHTON *v.* SYED MUHAMMAD ARADUT HUSSAIN.
6 P. L. T. 221 : 80 I. C. 926 : A. I. R. 1925 Pat. 181.

——Ss. 50 101, 102 and 115—*Record-of-Rights—Entry in—Tenure-holders—Enhancement of rent—Uniform payment of rent for 20 years.*

When the Record-of-Rights was being prepared in the year 1903 there was a dispute under S. 103-A of the B. T. Act, that is, after the draft record was published but before final publication and the result of that dispute was that the Assistant Settlement Officer directed that the defendants, the tenure-holders, should be entered in the Record-of-Rights as tenure-holders and nothing more. They were so entered and no entry was made as provided in S. 102 as to whether they were permanent tenure-holders or not or whether the rent was liable to enhancement during the continuance of the tenancy. The whole question was apparently left open. The particulars referred to in S. 102 were not in fact entered in the Record-of-Rights. In the decision which was come to in that dispute under S. 103-A the Assistant Settlement Officer stated that there was no evidence of the rent being fixed for ever and under the circumstances he merely ordered the defendants' names to be entered as tenure-holders. *Held*, that the decision of the Assistant Settlement Officer could not be regarded as a substantive part of the Record-of-Rights and the Record-of-Rights could not be read as if it stated that the defendants (tenants) were not in fact tenure-holders at a fixed rate. The presumption arising under S. 50 only ceases to apply by reason of S. 115 when the particulars required by the order of the Local Government directing the survey and Record-of-Rights to be prepared have been in fact recorded. It would not be right to presume that the entry in the Record-of-Rights meant to record anything more than what was actually recorded and where the question is left open as to whether they are permanent tenure-holders or whether the rent is liable to enhancement or not there is nothing in the record itself to throw light on the matter. Where for the last 20 years and before the defendants (tenants) have been paying the same rent, it may be presumed that their rent is not liable to enhancement especially where they are recorded as tenure-holders. (*Dawson Miller, C. J. and Mullick, J.*) KAMALUDDIN AHMAD *v.* KUMAR RAMANAND SINGH. **3 Pat. 120 : 78 I. C. 605 : (1924) P. H. C. C. 1 : A. I. R. 1924 Pat. 443.**

——S. 50—*Fixed rates tenancy—Entry in Record-of-Rights against tenants—No presumption under S. 50*

arises—Payment at uniform rate.

Where the Record-of-Rights is against them, the tenants are not entitled to the benefit of the presumption afforded by S.50, Cl. 2 of the Act. Where the tenants could not have the benefit of the presumption of S. 50 (2) of the Act he has to establish by evidence that the rate of rent has not been changed from the time of Permanent Settlement ; in other words, once the Record-of-Rights shows that the tenant is not a tenant at a fixed rate of rent, it is for the tenant to establish by cogent evidence that his rent or rate of rent has not been changed from the time of the Permanent Settlement. (*Das and Adami, JJ.*) MAHARAJAH BAHADUR KESHO PD. SINGH *v.* ISSER DUBEY.

1 Pat. L. R. 32 : 71 I. C. 15 : A. I. R. 1924 Pat. 373.

——**Ss. 50 and 30 (a)**—*Enhancement of rent—Entries in Record-of-rights not consistent with previous condition—Burden is shifted on the defendants.*

If the landlord succeeds in showing that holdings, as recorded in the Record-of-Rights, were not in existence in the condition in which they were so recorded, in the previous years, the onus is shifted on the defendants to prove that their present holdings are made up of other holdings which also have borne uniform rental. (*Das and Kulwant Sahay, JJ.*) NAND LAL CHAURE *v.* KESHO PRASAD. **1923 P H. C C. 339 : 78 I. C. 593 : A. I. R. 1924 Pat. 245.**

——**S. 50**—*Presumption—Production of receipts for 33 years is insufficient to raise.*

In order to establish tenancy at fixed rent in perpetuity, the tenants would have to establish that they have been holding at the rate of rent which has not been changed since the Permanent Settlement. 45 C. 913; 1 Pat. L. J. 673, not Foll. 37 C. 30 ; 54 I. C. 672 Foll. The production of rent receipts showing payment of uniform rate of rent for 33 years is not sufficient to prove that the rate of rent has not changed since the date of the Permanent Settlement. (*Coutts and Das, JJ.*) MAHARAJA BAHADUR KESHO PD. SINGH *v.* RAM JAS PANDE. **2 P. 92 : A. I. R 1923 Pat. 324.**

——**S. 50 (1)**—*Kabuliyat—Stipulation to pay enhanced rent if land found in excess does not rebut the presumption under S. 50 (1).*

Under cl. (1) of S. 50 if the rent has not in fact been changed from the time of the Permanent Settlement then it shall not be liable to be increased. If an instrument is subsequently executed forty or fifty years later the mere fact that the rent is expressed to be variable will by itself make no difference. 22 C. W. N. 904 Foll. Where a tenant by the kabuliyat of 1868 covenanted that if after measurement land is found to be in excess he will pay rent for the same according to the prevailing rate.

Held, that this stipulation is in perfect accord with S. 50 (1) and can in no sense be said to rebut the presumption raised under S. 50. A kabuliyat containing a stipulation like agreeing to pay enhanced rent in future is only a piece of evidence which can be taken into consideration to show that the tenancy did not exist from the time of the Permanent Settlement or that it was not held at an invariable rent from that time. (*Suhrawardy and Cuming, JJ.*) SALINDRA MOHAN *v.* KAMARADDI MIJI.

A. I. R. 1925 Cal. 1133.

——**S. 50 (1)**—*Settlement of fair and equitable rent—Enhancement—Plea that defendant is a fixed rate raiyat—Evidence.*

Under S.50, sub-sec. (1) where a raiyat and his predecessors-in-interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be

liable to be increased except on the ground of alteration in the area of the holding. This embodies a substantive rule of law. Sub-sec. (2) lays down that if it is proved in any suit or other proceeding under the B T. Act, that a raiyat and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. This deals with the mode of proof and raises a rebuttable presumption. There is no reason why an occupancy raiyat should be excluded from the category of a raiyat for the purposes of this section. A raiyat at a fixed rate is not created by S. 50 which merely furnishes a rule of evidence to enable a person to prove with facility that he is a raiyat at a fixed rate. (*Mookerjee and Walmsley, JJ.*) NARENDRA LAL *v.* BENODE BEHARI. **27 C. W. N. 740 : A. I. R. 1924 Cal. 143.**

——**S. 50 (1) & (2)**—*Permanent Settlement—Presumption.*

The words " permanent settlement " in S. 50, sub-sec. (1) of the B. T. Act, relate to the Permanent Settlement of 1793. The presumption of S. 50 sub-sec. (2) of the Act applies even if the rent was permanently settled at a later date than 1793. To gain the advantage of S. 50 the defendant has to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. Even if S. 50 of the B. T. Act does not apply, the fact that uniform rent has been paid for a period of 20 years might give rise to a presumption in favour of the defendant. 13 C.L J.415, Rel. (*Greaves and Panton, JJ.*) OSMAN MANDAL *v.* RADHIKA MOHAN ROY. **50 Cal. 135 : 67 I. C. 294 : 27 C. W. N. 647 : A. I. R. 1923 Cal. 298.**

——**S. 50 (2)**—*Presumption under.*

On the construction of the kabuliyat in the case : *Held*, that it proceeded upon the basis that there were pre-existing rights, and consequently it could not be relied upon for the purpose of showing that there had been a change in the rent since the date of the Permanent Settlement. (*Lord Buckmaster.*) KUMAR PRASANNA DEB RAIKAT *v.* UDDHAB CHANDRA.

45 M. L. J. 779 : 33 M. L. T. 432 : 28 C. W. N. 752 : 18 L. W. 147 : 75 I. C. 556 : A. I. R. 1923 P. C. 86 (P. C.).

——**S. 50 (2)**—*Quinquennial Register of 1795—Want of entry of a taluq in the Register cannot rebut presumption under S. 50 (2).*

The mere fact that a certain taluq is not entered in the Quinquennial Register of 1795 is not sufficient to rebut the presumption under the B. T. Act, S. 50 (2). (*Suhrawardy and Duval, JJ.*) HEM CHANDRA ROY *v.* BENAYAK DAS ACHARJI. **A. I. R. 1925 Cal. 1037.**

——**S. 50 (2)**—*Variation in rent to rebut presumption under S. 50 (2) need not be substantial.*

There is nothing in the section which requires that any change in the rate of rent should be substantial in order to rebut the presumption raised under S. 50 (2). Where the landlords did not want to alter the rent to any substantial extent so as to cause hardship to the tenants, but they wanted for rebutting the presumption which the law raises in favour of the tenants, and in that view made a nominal alteration in the rent and this position was accepted by the tenant.

Held, that would amount to a change in the rate of rent which would destroy the presumption of the fixity of rent from the time of the Permanent Settlement. (*B. B. Ghose, J.*) DWIJADAS CHAKRAVARTHY *v.* DEARISH. **A. I. R. 1925 Cal. 1025.**

——**S. 50 (2)**—*Fact of defendant being a tenant*

must be established before seeking aid of S. 50 (2).

The presumption arising under S.50, cl. (2) can only be availed of in a suit or proceeding under the B. T. Act. Where the plaintiff sues for recovery of possession alleging that the defendant was a trespasser, and the defendant claims to be a tenant, until the fact that the defendant is a tenant is made out the suit cannot be said to be one under the B. T. Act. The fact has to be made out independently of S. 50, that the suit is against a tenant, and until that is made out S. 50 has no application. 7 C. W. N. 132 ; 9 C. L. J. 467 ; 15 C. W. N. 752 ; 13 C. L. J. 415 Ref. (*Mukerjee, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY.

85 I. C. 636 : A. I. R. 1925 Cal. 761.

——S. 50 (2)—*Cases of tenants not coming directly under Act—Principle applies—Tenancy held for several generations—Uniform rent for 55 years—Tenancy was held not proved to be permanent or one with fixed rate—Landlord and tenant.*

Although the statutory presumption cannot be availed of directly, the principle involved in S. 50 is a useful guide to the Courts which may sometimes be relied upon. But the case must be one between a landlord and his admitted tenant. The two outstanding features of the tenancy were that the tenancy had been held by the defendants for several generations and that the rent had been uniform for over 55 years.

Held, that they may be sufficient for holding that the tenancy was heritable but they are not sufficient in law, in the absence of any other circumstance, to show that the rent was fixed for ever or that the tenancy was a permanent one. 35 C. 763 ; 47 C. 280 ; 32 C. 51; 44 C 555 and 23 C W. N. 201 Ref. (*Mukerjee, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY.

85 I. C. 636 : A. I. R. 1925 Cal. 761.

——S. 50 (2)—*Sub-division of tenure does not affect the presumption to be drawn under S. 50 (2).*

The sub-division of a tenure does not operate as a breach of the continuity of the tenure ; if the different parts into which tenure is divided are held at proportionate rent and the aggregate rent equals the original rent, the tenure-holder is entitled to the benefit of the presumption under S. 50, cl. (2), Bengal Tenancy Act. A. I. R. 1923 Cal. 66 Foll. 86 Cal. 287 Dissent. (*Suhrawardy and Chotzner, JJ.*) GOUR KRISHNA SARKAR *v.* NILMADHAB SAHA.

78 I.C. 744 : A. I. R. 1925 Cal. 498.

——S. 50 (2)—*Presumption under—Purchase from tenant—Alteration of rent.*

Where a transferee for value from the original tenant of the holding produced their dakhilas of the faslis 1299, 1311 and 1323 and the rent specified in them was the same, the mere fact that there were two intervening periods of twelve years between the dates of these dakhilas is no ground for denying to the transferee the benefit of the presumption under S. 50 (2). (*Walmsley and Mookerjee, JJ.*) PURAN CHANDRA SOW *v.* KANTA MOHAN MULLICK **39 C. L. J. 437 : A. I. R. 1924 Cal. 875.**

——Ss. 50 (2), 102 (b), 111-A and 115—*Fixity of rent — Presumption—Qaimi tenure—Record-of-Rights—Payment of same rent for years.*

In a suit for enhancement of rent under S. 7 of the B.T. Act, Record-of-Rights with regard to the tenancy was finally published on 28-5-1918. The record was that it was a Qaimi tenure but not Mokarari. *Held*, that having regard to the provisions of S. 115 of the B. T. Act as it had been recorded under Ch.X of the Act, that the tenancy was not Mokarrari, the presumption under S. 50 cannot apply to the tenancy. It cannot be held in a case brought under the B. T. Act that any presumption arises as to the fixity of rent from mere payment of the same rate of rent for a number of years apart from the presumption arising under S. 50 of the Act. To hold otherwise would be to require every landlord to enhance the rent of every tenant under him at certain intervals of time which he might not himself desire to do. (*Newbould and Ghose, JJ.*) BRAJA DAS ROY *v.* BANKIM CHANDRA BHUIG.

51 Cal. 454 : A. I. R. 1924 Cal. 660.

——S. 50 (2)—*Certified copy of a paper in Collectorate not strictly fulfilling the test of S. 35, Evidence Act, is not sufficient to rebut presumption.*

In a proceeding under S. 105 of the Bengal Tenancy Act, the Zemindar filed a certified copy of an entry from a book in the Collectorate made on the footing of a return submitted by his predecessor-in-title in 1242 B. S. under Reg. VIII of 1793. S. 48 and Reg. VII of 1799, S. 158, to prove the fact that a certain taluk did not exist on that date.

Held, that the copy was of very slight weight as against the tenant, and that it was not sufficient to rebut the presumption arising under S. 50 (2) of the Bengal Tenancy Act from proof of payment of uniform rent for 20 years. (*Walmsley and Mukerjee, JJ.*) TARAK CHANDRA *v.* PRASANNA KUMAR SAHA.

28 C. W. N. 679 : 39 C. L. J. 389 : 78 I. C. 719 : A. I. R. 1924 Cal. 654.

——Ss. 50 (2) and 102 — Hajabad *tenancy—Remission or abatement of rent in years of flood—Uniform rent—Presumption.*

S. 50. cl. (2) lays down that the presumption under it would arise if it is proved in any suit or other proceeding that a tenant and his predecessor-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding. It is not necessary to prove actual payment of rent provided the tenancy is held at a uniform rent or rate of rent for 20 years before the suit. It is difficult, however, to see how it can be said that a particular rent is payable when that rent is not payable according to custom in the years of flood. In cases of pure *hajabadi* tenancies no rent is paid at all in years of flood not because the landlord does not realise it, but according to some custom he cannot realise it. The expression " rent " is defined in the Act as something lawfully payable or deliverable to the landlord for the use and occupation of the land. Under the custom the rent lawfully payable for a particular year in which there is flood is not the full rent but a lesser sum, in respect of the mixed tenancies. The landlord cannot sue the tenant in a Court of Law for rent in respect of the *hajabadi* tenancies nor the full rent of mixed tenancies in the years of flood. S. 50, cl. (2) was intended to apply to cases like these where under a custom a tenant gets an abatement of rent from the landlord. (*Chatterjee and Panton, JJ.*) BIJOY CHAND MAHATAB *v.* AKHIL BHUIA.

51 Cal. 314 : 28 C. W. N. 529 : 81 I. C. 564 : A. I. R. 1924 Cal. 648.

——S. 50 (2)—*Holding at uniform rent—Proof of payment not necessary.*

What has to be established to raise the presumption under S. 50 (2), B. T. Act, is not that rent has been actually *paid* at a uniform rate during 20 years, but that the tenant has *held* at a rent or rate of rent which has not been changed during 20 years. Such holding at a uniform rent may be established, even if it is not proved that rent has actually been paid during a portion of the 20 years. (*Mookerjee and Rankin, JJ.*) SATISH CHANDRA BISWAS *v.* NIL MADHAB SAHA.

37 C. L. J. 598 : 73 I. C. 77 : A. I. R. 1923 Cal. 665.

BENGAL TENANCY ACT (VIII OF 1885), S. 50.

——— **S. 50 (2)**—*Presumption—When arises.*

Per *Teunon, J*:—Mere demand on the part of the landlord for enhanced rent and refusal to receive or acknowledge the old rent does not enable him to deprive the tenant of the benefit of the provisions of S. 50. The rent at which a tenancy is held continues until a change has actually been effected. Such change can be affected only by consent or by proceedings in Court. The special Judges' finding that the tenants have held at rents which have not been obtained for the twenty years preceding the suit and that the presumption thus arising has not been rebutted, was affirmed in the absence of majority of *kabuliyats*.

Per *Huda, J*:—The presumption under sub-Sec. 2 of S. 50 can only arise when the tenant proves affirmatively that he has held at rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding. These words place on the tenant the burden of proving either that he has actually paid rent at a uniform rate for twenty years or that if not actually paid there has been at any rate an agreement between him and his landlord that he should hold at the old rate. Where the holding of uniform rate since the time of the Permanent Settlement has not been proved, the landlord has a right to demand an increase and in any case to refuse to receive rent at the old rate in order to prevent the presumption under sub-Sec. 2 of S. 50 arising against him. (*Teunon and Huda, JJ.*) MOHINI KANTA SAHA *v.* PREONATH NEOGY. **A. I. R. 1922 Cal. 143.**

——— **S. 50 (2)**—*Presumption — Proof of actual payment is not necessary to raise.*

Under S. 50 (2) of the B. T. Act, the tenant is not required to establish *actual payment* of rent during the twenty years at a uniform rent, he is to establish that he and his predecessors-in-interest have *held* at rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding. This involves a real distinction for a person may hold as a tenant though he does not actually pay the rent agreed upon to his landlord. When the evidence showed that rent was paid at a uniform rate from 1845-1897, but for 17 years afterwards there was no payment of rent though it had not been altered by mutual agreement or decree of Court: *Held*, the presumption under S. 50 (2) arose. (*Mookerjea, Newbould and Pearson, JJ.*) MOHINI KANTA SAHA *v.* PREONATH NEOGY. **49 Cal. 661 : 67 I. C. 381 : 35 C. L. J. 309 : A. I. R. 1922 Cal. 141.**

——— **Ss. 50 (2) and 103 (b)**—*Conflict between—Latter prevails.*

When there is a competition under S. 103 (*b*) and that under S. 50 (2) the former shall prevail, and under S. 115 the tenant cannot ask the Court to draw a presumption from any evidence establishing uniform payment or rent after the Permanent Settlement. A tenant cannot rely upon the presumption under S. 50 (2) in a suit brought by the landlord a few days prior to the final publication for the enhancement of rent when no question of status was raised in the plaint. (*Das and Bucknill, JJ.*) GOBIND LAL SUJUAR *v.* RAM SARAN LAL. **68 I. C. 433 : 2 Pat. L. T. 642.**

——— **S. 51**—*Prior decision as to amount of rent—Not* res judicata *in a subsequent suit for rent.*

The decision in a prior suit for rent as to the amount of rent payable does not operate as *res judicata* in a suit for rent for the subsequent year, although it may give rise to a presumption under S. 51 of the B.T. Act; namely, that the rent for the subsequent year remained the same. 5 C. L. J. 92; 12 C. W. N. 904; 11 C. W. N. 1100 distinguished. (*Ross, J.*) PAR-

BENGAL TENANCY ACT (VIII OF 1885), S. 52.

MESWAR PRASAD SINGH *v.* NARSING RAI. **1 Pat. L. R. 109 : 72 I. C. 138 : A. I. R. 1924 Patna 371.**

——— **S. 52**—*Claim for additional rent for accretions—Proceedings under S. 52 or settlement of rent under Ch. X are essential.*

In order to make the tenant liable for additional rent for accretions to his tenure such rent must be settled under Chap. X of the Bengal Tenancy Act or the landlord must take proper proceedings so as to bring into operation S.52 of the Act or any other appropriate provision of the law. (*Walmsley and B. B. Ghose, JJ.*) DHIRENDRA CHANDRA RAI *v.* NAWAB KHAJEE HABIBULLAH. **29 C. W. N. 505 : 87 I. C. 442 : A. I. R. 1925 Cal. 758.**

——— **S. 52**—*Lease on the basis of area—Excess rent—Claim for—Jamabandi—Admissibility.*

Excess area may be acquired by a tenant by encroaching on waste land, or by alluvion or by encroaching on a third party's land. If the tenancy originally created was according to boundaries, the area is merely description and does not affect the identity of the grant. But if the contract is for a certain area at a certain rate, the area is of the essence of the contract and if excess is found on measurement, additional rent is payable. All that the landlord has to show under S. 52 is that the present area is greater than that for which rent was last paid. The *onus* is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise.

Jamabandi papers prepared by the landlord though not binding on the tenant are admissible in evidence to show that assessment was according to area. (*Mullick A. C. J. and Kulwant Sahay, J.*) SIB SAHAI LAL *v.* BIJAI CHAND MAHTAB. **90 I. C. 862 (Pat.).**

——— **S. 52**—*Abatement of rent—Diluvion—Permanent tenure—Contract—Specification.*

In the case of a permanent tenure the parties to a lease can make a contract the result of which would be to deprive the tenant of the benefit of S. 52. Where in a kabuliyat it was stated that "there shall never be any decrease or increase of the rent fixed in the kabuliyat," *held*, that was a condition usually expressed in a permanent lease at a fixed rate of rent and that it did not deprive the tenant of his statutory advantage of an abatement of rent on diluvion. (*Newbould and Ghose, JJ.*) UMESH CHANDRA CHAKRABARTY *v.* MOTI LAL BASU ROY. **39 C L. J. 431 : A. I. R. 1924 Cal. 880.**

——— **S. 52**—*Rent claimed on basis of excess in area—Burden of proof.*

In a suit for additional rent on the basis of excess in area the landlord has to prove the excess and this implies he has also to prove what area of land was originally let. The section is concerned with cases of alteration of area and not miscalculation of area.

As the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size, a contract cannot be inferred that he is liable at any time to re-assessment upon the actual area. When a letting as the basis of management is proved, the tenant must show the rent was consolidated rent for all land within specific boundaries, but if the landlord fails to prove the original area his suit must fail. (*Rankin and Buckland, JJ.*) MANINDRA CHANDRA NANDI *v.* KAULAT SHAIK. **50 Cal. 957 : 28 C. W. N 264 : A. I. R. 1924 Cal. 374.**

——— **S. 52**—*Enhancement of rent—Excess area—Proof of—Nature of the suit.*

If the landlord can show that since the creation of

BENGAL TENANCY ACT (VIII OF 1885), S. 52.

the tenancy, rent had been assessed, and that when rent was last assessed, the assessment was on the basis of a certain area and that the defendants are in possession of land in which no rent was assessed at the time, then the landlord is entitled to increase of rent. (*Newbould and Panton, JJ.*) RAJA JOGENDRA KISHORE ROY CHOUDHURY *v.* AKTAR.
67 I. C. 998 : A. I. R. 1923 Cal. 278.

——S. 52—*Enhancement of rent—Bengal Regulation* VII *of* 1882.

It is always open to the Revenue authorities to re-assess the revenue and re-settle the estate with effect from the expiry of a previous term of settlement. If it is desired to enhance the rents of the tenants proceedings should be taken by the Revenue authorities under Part II of Chapter X of the Tenancy Act or by the plaintiffs themselves under S. 52 or some other appropriate provision of that Act, but not under Regulation VII of 1822. (*Richardson and Suhrawardy, JJ.*) ASHUTOSH *v.* DWARIKA NATH.
36 C. L. J. 192 : 27 C W. N. 121 : A. I. R. 1923 Cal. 207.

——Ss. 52 and 105—*Claim for excess rent for additional area—Enhancement of rent—Question as to, cannot be gone into.*

Where a landlord applied for excess of rent for excess area and also for enhancement of rent, and gave up his claim to the latter but a decree for enhancement of rent was passed, *held*, the Special Judge should not have considered the question of enhancement but should have confined himself to the question of fair and equitable rent having regard to the provisions of S. 52 of the Act. (*N. R. Chatterjee and Pearson, JJ.*) RAM RENU ROY *v.* MIDNAPUR ZEMINDARI CO., LTD. **67 I.C. 1001 : A.I.R. 1923 Cal. 111.**

——S. 52—*Abatement of rent—Suit for—Proof.*

In a suit for abatement of rent under S. 52, B. T. Act, plaintiff has to prove a diminution in area since the Settlement Officer settled a fair rent for the holding. (*Dawson Miller, C. J. and Mullick, J.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE. **1924 P. H. C. C.18 : 75 I. C. 670 : 5 Pat. L. T. 98 : A. I. R. 1924 Pat. 511.**

——S. 52—*Increased area—Landlord is entitled to increased rent.*

If a landlord can prove what was the area upon which rent has been paid and what is the increased area upon which he claims, the Court will give him a decree in respect of the excess. (*Mullick and Bucknill, JJ.*) RADHIKA RAMAN *v.* SATNARAIN KOERI. **74 I. C. 961 : A. I. R. 1924 Pat. 307.**

——S. 52 (a)—*Enhancement of rent on account of excess area—Claim by landlord—*Onus *of proof—Existence of prior settlement.*

The tenant's liability to pay additional rent is not limited to cases where the area is in excess of that comprised in the settlement at its inception. It extends to cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid by him under the last settlement. The settlement and record of rights defines the relationship between landlord and tenant in various respects including the area of the holdings for which rent is paid and is presumed to represent what is the relationship between them until the contrary is proved. The effect of such a settlement would be to throw the *onus* upon the party questioning it, to show that it did not accurately represent the true state of affairs. Where the subsequent settlement shows an area to be in excess of that under the settlement of 1898, the landlord has a right to claim enhancement of rent. (*Miller, C. J. and Adami, J.*) BISHAN PRAGASH

BENGAL TENANCY ACT (VIII OF 1885), S. 52.

NARAYAN SINGH *v.* ACHAIB DUSADH.
1 Pat. 459 : 66 I. C. 82 : 3 Pat. L. T. 807 : A. I. R. 1922 Pat. 215.

——S. 52 (b)—*Abatement of rent—Tenant must prove reduction in area.*

In order to claim abatement of rent tenant must prove the reduction in the area of the holding and abatement will be allowed only to the extent of reduction in area as proved by him. (*Suhrawardy and Chotzner, JJ.*) CHANDI CHURN LAW *v.* HAMID ALI. **A. I. R. 1925 Cal. 1208.**

——S. 52 (b)—*Tenant must prove reduction in previous area to claim reduction in rent.*

In order to bring the case within the scope of S. 52, cl. (*b*) of the Bengal Tenancy Act the tenant must prove that he is entitled to a reduction of rent on account of deficiency in area proved by measurement of the holding as compared with the area for which rent has been previously paid by him. (*Suhrawardy and Chotzner, JJ.*) ABDUL MANNAF *v.* SHEIKH MUSLIM. **79 I. C. 978 : A. I. R. 1925 Cal. 426.**

——Ss. 52 (b) and S. 38—*Suit for rent—Deluvion or deterioration—Tenant's claim for abatement.*

According to the ordinary rules of law if a tenant agrees to pay a certain amount of rent, he is exempt from the payment of the whole of the land be washed away or of a portion of the rent if a portion be washed away. Under S. 38 of the Act the plea of abatement can be taken in a suit for recovery of rent and it is not essentially necessary that the tenant should himself institute a suit for the abatement of his rent. S. 18 of Act (X of 1859) Referred to. (*Jwala Prasad, C. J. and Ross, J.*) SUKHRAJ RAI *v.* GANGA DAYAL. **1922 P. H. C. C. 132 : A. I. R. 1922 Pat. 169.**

——S. 52 (1) (b)—*Rent—Abatement of—Reduction of area—Settlement.*

Where the lands in the occupation of the defendants during the years in question are identical with the lands held by them in 1899, that is, *prima facie*, a fatal obstacle in the way of the defendants, for in order to bring their case within S 52, sub-section 1, clause (*b*), they must establish a deficiency in the area of their holding as compared with the area for which rent had been previously paid by them. Where there was no proof of any diminution of area, and further at the time of the original settlement the rent was fixed at a specified rate per unit of measurement or at different rates according to the quality of the land, and it was also not proved that the tenant was to pay at a specified rate or rates for all the land of which he was put in possession according to its true area but the circumstances of the case showed that the rent fixed was a consolidated one, the fact that the area of the tenancy as stated in 1899 was found to be less in 1918 did not, by itself, justify the conclusion that the tenant held at fixed rates which had to be applied to area ascertained by measurement in order to determine the rent payable by them. (*Mookerjee and Rankin, JJ.*) ALI NAWAZ *v.* KARIM BAKSH CHOUDHURY. **40 C. L. J. 62 : A.I.R. 1924 Cal. 1044.**

——S. 52 (1) (b)—*Suit for rent—Lessee not put in possession of all lands—Abatement of rent can be granted in the suit itself.*

A lessee under a patni lease did not get possession of all the lands comprised in the lease and in a suit for rent he contended that until an enquiry had been made as to the amount of reduction upon a proper apportionment, he was not liable for the rent. *Held*, that it was open to the Court in the suit itself to enquire as to what reduction of rent should be made upon a proper apportionment, by reason of the defici-

ency in area. (*Sanderson, C. J. and Chotzner, J.*) BENI MADHAB ROY *v.* KRISHNA KAMINI GUPTA.
70 I. C. 177 : 36 C. L. J. 121.

——S. 52 (1) (b)—*Suit for rent by co-sharer—Application by tenant for reduction of rent.*

Where a co-sharer landlord under an arrangement with the other co-sharer landlords and the tenants, brings a suit for recovery of his share of the rent separately, the tenants are entitled to apply for the reduction of rent on account of reduction in area. 27 C. 417 ; 21 C.L.J. 315 ; 17 C. 695 ; 33 C. 1010 Ref. to. (*Coutts and Dass, JJ.*) MAHARAJA KESHO PRASAD SINGH *v.* RAMDENI SINGH. **2 Pat. 183 : 4 Pat L. T. 689 : 74 I.C. 454 : A. I. R. 1923 Pat. 397.**

——S. 52 (6)—"*At the time the measurement on which the claim is based, was made"—Meaning of.*

The expression "at the time the measurement on which the claim is based, was made" in S. 52 (6) of the Act refers to the measurement upon which the area in excess or defect is found out before the institution of the suit and to the measurement at the time of the original settlement or the last preceding adjustment of rent. (47 C. 266 overruled) (*Mookerjee, C.J., Fletcher, Chatterjea, Richardson and Ghosh, JJ.*) NILMANI KAR *v.* SATI PRASAD GAYA. **48 Cal. 556 : 32 C. L. J. 302 : 61 I. C. 82 : 25 C.W. N 230 (F. B.)**

——Ss. 53 and 57—*Rent— Contract to pay by monthly instalments.*

A contract to pay rent in monthly instalments and in default to pay interest at 12½ per cent. per annum, entered into before the enactment of Ss. 53 and 57 of the B. T. Act, is valid. It is competent to the parties to enter into an agreement for payment of money rent in modification of the provision of four instalments. 18 C. L. J. 175 Foll. (*Mookerjee and Rankin, JJ.*) BEHARI LAL BISWAS *v.* NASIMUNNESSA BIBI.
37 C. L. J. 222 : 73 I. C. 482 : A. I. R. 1923 Cal. 527.

——S. 55—*Tender of principal sum without interest is not valid.*

S. 55 of the B. T. Act does not abrogate the rule that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. That section treats not of tender but of appropriation. Where a tenant tendered the amount of arrears of rent due without the interest thereon, the landlord is not bound to accept even the principal amount of rent. The principal and interest constitute one indivisible and entire claim. A tender must be unconditional or, at all events, free from any condition to which the creditor may rightfully object. (*Mookerjee and Rankin, JJ*) BEHARI LAL BISWAS *v.* NASIMUNNESSA BIBI.
37 C. L. J. 222 : 73 I. C. 482 : A. I. R. 1923 Cal. 527.

——S.60--*Ijaradar is not a proprietor--Section does not apply—Bengal Land Registration Act, Ss* 78, 79, 81

S. 60 of the B. T. Act deals with cases where rent is due to the proprietor of an estate. Where the rent is not due to the proprietor the plaintiff being not a proprietor but an ijaradar, and as ijaradar, the plaintiff could not get his name registered under the Land Registration Act, S. 60 has no application. No doubt "proprietor" is defined in S. 3, cl. (2) of the B. T. Act as a person owning an estate or part of an estate. But S. 60 lays down that the receipt of the person registered under the Land Registration Act "as proprietor of that estate" shall be a sufficient discharge, so that although a proprietor may be the owner of an estate or a part of an estate the section merely speaks of the proprietor of that estate which indicates an entire estate. The case where rent is payable to two or more proprietors the extent of whose interest is required to be registered under the Land Registration Act, and which is dealt in

the second part of S. 78 of that Act is not dealt with by S. 60 of the Bengal Tenancy Act. The object of S. 60 of the Bengal Tenancy Act appears to be to afford indemnity to tenants who pay rents to the person whose name is registered under the Act, and to prevent them from pleading in defence to a claim for rent by such person that the rent is due to a third person but the section does not appear to have provided for cases where the names of all the part-proprietors have been registered under the Land Registration Act. (*Chatterjee and Suhrawardy, JJ.*) PROBODH CHANDRA MITTER *v.* HARISHCHANDRA NASKAR.
27 C. W. N. 888 : 78 I. C. 7 : A. I. R. 1924 Cal. 124.

——S. 60—*Suit for apportionment of rent by registered proprietor—Plea of tenants that they paid rent for over 12 years to proprietor of adjoining estate is not tenable.*

Under S. 60 a tenant cannot plead that the registered proprietor should not get the rent apportioned on the ground that the proprietor of adjoining mahal had realised rent for over 12 years in open assertion that the lands belonged to his mahal. Nor is such a proprietor a necessary party to the suit. (*Das and Ross, JJ.*) KESHO PRASAD SINGH *v.* RAMDIAL KUAR.
6 P.L.T. 214 : 87 I.C. 439 : A.I.R. 1925 Pat. 473 (1).

——S. 60—*Suit by registered proprietor—Payment to third person is no answer.*

Where the plaintiff is a registered proprietor the defendant cannot plead discharge of the rent by payment to a third person. Payment to such third person for a long time is no answer to the claim for rent. (*Coutts and Das, JJ.*) MT. ADAYABATI *v.* JANARDHAN THAKUR. **3 Pat. L. T. 756 : 68 I. C. 288 : A. I. R. 1922 Pat. 607.**

——Ss. 60 and 149—*Registered proprietor—Suit for rent—Tenant, if can plead* jus tertii.

The meaning of S. 60 of the Act is that in a suit for rent by a registered proprietor it is not open to the tenant to plead *jes tertii*. He can only deposit the rent under S. 149 and ask that there may be an adjudication as to the claim of the person whose title he sets up. (*Mullick and Bucknill, JJ.*) NAND KOER *v.* JODHAN MAHTON. **2 P. L. T. 337 : 61 I. C. 386 : 1921 P. H. C. C. 201.**

——Ss. 61 and 62——*Deposit—One tenancy—Deposit for three tenancies—Deposits accepted by Court—Landlord, if can question validity of deposits.*

If a tenant holds in fact one tenancy under his landlord but makes three deposits in Court on the allegation that he holds three distinct tenancies, it cannot be maintained that the deposits are valid within the meaning of S. 61 of the B. T. Act. The landlord can question their validity, although they were accepted by the Court under S. 62. 20 C. L. J. 153 Dist. (*Mookerjee and Panton, JJ.*) SATISH CHANDRA DAS *v.* UMES NARAIN CHAUDHURI.
64 I. C. 696 : 34 C. L. J. 501.

——S. 61—*Deposit of rent without interest whether valid.*

Where there has been a *bona fide* deposit in respect of the whole amount due at the date of the deposit and not merely in respect of a portion thereof, the deposit is validly made under the section, even though it should turn out that the whole amount due had not been deposited. Where the tenants were contending that the rent was due at the end of the agricultural year and not kist by kist and they deposited the rent due without interest at the end of the year.

Held, that the deposit was valid under S. 61 of the Act, though it was subsequently decided that rent was payable kist by kist. (*Dawson Miller, C.J. and Macpherson, J.*) MUSST. BIBI WAJIHUNNISSA

BENGAL TENANCY ACT (VIII OF 1885), S. 62.

BEGUM *v.* BABU LAL MAHTON. **90 I. C. 871 : 1925 P. H. C. C. 298.**

——S. 62—Bona fide *deposit by raiyat in respect of the whole rent due—Suit by landlord for the balance.*

Where a *bona fide* deposit has been made by a raiyat in respect of the whole rent due and a receipt given for the sum deposited, the intention of the Legislature is that the landlord must sue within 6 months of the receipt of the notice for the balance after taking the deposit out of Court. Otherwise, the landlord cannot question the sufficiency of the amount paid into Court. (*Dawson Miller, C. J. and Macpherson, J.*) MUSST. BIBI WAJIHUNNISSA BEGUM *v.* BABU LAL MAHTON. **90 I. C. 871 : 1925 P. H. C. C. 298.**

——S. 62—*Receipt granted to tenant—Presumption is that the tenant was entitled to make deposit.*

S. 62 provides in effect that the money tendered by the tenant shall only be received by the Court if it appears to the Court that the applicant was entitled under S 61 to make the deposit and if the Court is so satisfied it shall receive the rent and give a receipt for it under the seal of the Court. Once the receipt is given under this section it is provided that it shall operate as an acquittance for the amount of rent paid by the tenant and deposited, in the same manner and to the same extent as if the amount of rent had been received by the person entitled thereto. Therefore if such receipt is produced by a tenant in a suit for arrears against him it must be presumed that the Court was satisfied at the time the receipt was given that the applicant was entitled under S. 61 to deposit the rent. (*Dawson Miller, C. J. and Poster, J.*) TOFA LAL DAS *v.* T. N. PARTRIDGE. **4 Pat. 285 : 1925 P. H. C. C. 41 : 86 I. C. 543 : 6 P. L. T. 562 : A. I. R 1924 Pat. 387.**

S.65—Scope of—Rent sale—Enforcement of charge. *See* under. B. T. Act Ss. 167 and 65. **85 C. L. J. 1 : 69 I. C. 841 : A. I. R. 1922 Cal. 39.**

——S. 65 and Chapter XIV—*Auction-purchaser—Not liable to pay antecedent arrears of rent.*

Under the Bengal Tenancy Act the auction-purchaser, purchasing the holding in execution of the decree for rent, is not liable to pay off the antecedent arrears of rent, and any mention or statement of such arrears which accrue due prior to the date of the suit is wrong, and sale will be set aside on proof of material injury. The tenant judgment-debtor is alone liable for the previous arrears of rent and not the auction-purchaser. The tenure is not liable for the arrears of rent, which accrued due prior to the institution of the suit or between the date of the suit and the date of sale. (*Mullick and Bucknill, JJ.*) SAIYID MOHAMMED JAWAD HUSSAIN *v.* MAHARAJA KUMAR GOPAL NARIN SINGH. **2 Pat. L. T. 248.**

——S. 66—*Interest provided for in Kabuliyat—Higher rate if barred.*

If the rent fell into arrears, the Kabuliyat provided "that the tenant should pay interest at six pies per rupee per mensem on the cash rent and one cotta per rupee per month on the rent payable as paddy." The landlord on the ground that the tenants were holding over since the first term of kabuliyat had expired, the rent having fallen in arrears, demanded higher rate of interest on the ground that a new contract might be deemed to have been entered into by the holding over of the tenants. *Held*, no higher rate of interest could be allowed and S. 178 does not help the appellant on the ground that there was a fresh contract. S. 66 is not limited in its application where rent is payable quarterly. There is no reason why S. 66 should not be applicable to interests on arrears of paddy rent paid annually, because the definition of arrears of rent in

BENGAL TENANCY ACT (VIII OF 1885), S. 67.

S. 54, cl. 3 is not confined to money rent. (*Newbould and Panton, JJ.*) BRAHAMOYI *v.* SOMARALI. **A. I. R. 1922 Cal. 77.**

——S. 66—*T. P. Act, S. 117—T. P. Act, S. 117 should be liberally interpreted—Intermediate tenant—Direct cultivation of some lands—Other factors—Lease was held agricultural.*

In construing the T. P. Act and B. T. Act it must be remembered that although the Bengal Tenancy Act is later in time, there were somewhat similar provisions in the Bengal Rent Acts of 1859 and 1869 and it was probably the intention of the Legislature in exempting leases for agricultural purposes from the operations of Chap. V of the Transfer of Property Act to retain in force the special provisions relating to the class of leases dealt with in those Acts, which may be compendiously described as leases for agricultural purposes. Therefore a liberal interpretation should be given to the words of S. 117. (*Dawson Miller, C.J. and Foster, J.*) W. W. BRONCKE *v.* CHATTAR KUMARI. **4 Pat. 404 : 1925 P. H. C. C. 89 : 86 I. C. 597 : 6 P. L. T. 331 : A. I. R. 1925 Pat. 421.**

——S. 67—*Lease granted in 1874—No term fixed—Transfer by tenant prohibited—After B. T. Act the tenancy is from year to year and rent can be claimed according to B. T. Act.*

A tenancy was created in 1874 and was headed as a raiyati kabuliyat and was not for any term. The tenant and his heirs were not given any right to transfer the holding by gift, sale or will, and the holding was not subject to attachment in execution of decree against the tenant or his heirs. There was a condition that if the rent was not paid according to the instalments fixed in the document every month, interest would be charged at the rate of 2 annas in the rupee per month.

Held, that the tenant had not acquired the right of occupancy, that when the B. T. Act came into operation, namely, in 1885, the lease must be considered to be a lease from year to year. That in 1885 when the B. T. Act came in force the tenant had the status of a raiyat holding the land from year to year and that if rent were claimed for any period after the termination of the lease, the claim must be governed by the provisions of the Bengal Tenancy Act. 64 I. C. 118 Foll. (*Suhrawardy and Cuming, JJ.*) RAJ KUMAR BASU *v.* GIRINDRA KUMAR BANDOPADHYA. **87 I. C. 178 : 41 C. L. J. 453 : A. I. R. 1925 Cal. 722.**

——S. 67—*Kabuliyat before the passing of the Act—Section does not apply—Rent sale—Purchaser takes holding with ordinary incidents of tenancy.*

Where a kabuliyat has been executed prior to the B. T. Act the provisions of S. 67 of the Act are not applicable to the case and the interest on arrears of rent must be calculated as provided in the contract. But where the holding has been sold in execution of a rent decree, the purchaser takes the holding with the ordinary incidents of a tenancy. A stipulation for the payment of interest at an exhorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent. The distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy notwithstanding its sale for arrears of rent. 26 C. 315 ; 24 C. 37. Rel. (*Chatterjee and Cuming, JJ.*) ANNADAMOYE DEBI *v.* SAUDAMINI DEBYA. **37 C. L. J. 333 : 27 C. W. N. 502 : 72 I. C. 719 : A. I. R. 1923 Cal. 559.**

——Ss. 67, 68 and 178—*Kabuliyat before Act—Holding over after Act—Interest cannot be claimed at Kabuliyat rate.*

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Where an agricultural lease expires before the passing of the Act and the tenant holds over he is not liable after the passing of the Act to pay interest as stipulated in the original *Kabuliyat*. In a suit for arrears of rent for a period subsequent to the passing of the Act the plaintiff claimed interest at 150 per cent. per annum as stipulated in the original lease. *Held*, that the rate was exhorbitant and could not be allowed. (*Chatterjea and Suhrawardy, JJ.*) CHANDRA NATH SARMA *v.* SHEIKH INAMDI.

64 I. C. 118 : 34 C. L. J. 369.

——S. 67—Bhaoli *holdings—No evidence as to rent being payable quarterly—No interest can be charged.*

Where the holdings are bhaoli and there is no evidence that rent is payable quarterly, interest under S. 67 of the B. T. Act is not chargeable. (*Mullick and Ross, JJ.*) GONDH SINGH *v.* JITAN MAHTO.

3 Pat. L. R. 109 : 88 I. C. 395 : A.I. R. 1925 Pat. 795.

——S. 69—*Both parties admitting that* Bhaoli *rent is payable—Dispute as to system of payment being* batai *or* danabandi *does not exclude Collector's jurisdiction.*

Where it is admitted by both the parties that *bhaoli* rent is payable, the existence of a dispute as to whether the system of payment is *batai* (by division of crops) or *danabandi* (appraisement) does not exclude the Collector's jurisdiction. (*Jwala Prasad and Kulwant Sahay, JJ.*) BHUNESHWARI KUER *v.* SUKHDEO SINGH. **85 I.C. 566: 6 P.L.T. 419: A.I.R. 1925 Pat. 505.**

——S. 69—*Appraisement—Procedure.*

An application for appraisement or division being generally made when the landlord and tenants are on bad terms. The proper course in such cases is not to depute an amin, but a responsible officer. The division or appraisment must be made by him on the spot at or very near the time when crops are ripe for harvest. (*Gruning, M. C.*) MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH *v.* KESHWAR SINGH.

1 Pat. L. R. 128 (Cr).

——S. 69— *Appraisement— Discretion—Exercise of.*

An order under S. 69, B. T. Act, for appraisement of crops depends upon the conditions of sub-clauses (1) (*a*) and (*b*) being fulfilled and thereafter upon the discretion of the Collector. In case of an allegation that the raiyats had deliberately grown a poor crop and misappropriated the same, the landlords are entitled to an enquiry into the allegation. (*Morshead, M. C.*) SHEFAYET HUSAIN *v.* NEMCHAND MAHTON.

1 Pat. L. R. 125 (Cr.).

——S. 69 (3)—*Disobedience of order of Collector —Direction for prosecution can be made by Collector.*

If an order passed by a Collector under S. 69 (3) prohibiting the removal of crops, is disobeyed, he has power to follow the procedure laid in S. 195 or S. 476, Cr. P. Code and to direct prosecution under S. 188, I.P.C. (*Teunon and Ghose, JJ.*) LAKSHAN BOR *v.* NARANARAIN HAZRAH. **48 C. 1086 : 23 Cr.L.J. 231 : 66 I. C. 71 : 25 C. W. N. 617.**

——S. 70—*Decree of Revenue Court—Power of Civil Court to depart from—Order under S. 70 of the B. T. Act—Effect of.*

Where in respect of certain faslis the Revenue Court had decided the amount of rent payable under S. 70, the Civil Court has no jurisdiction to pass a decree for the same period. To find out whether an order of the Revenue Court purporting to be passed under S. 70 of the B. T. Act is a final order enforceable as a decree, the order must be read as a whole. Where the takhmina papers were considered by the Sub-divisional Officer and the division was approved, and with regard to the landlord's share a further direction was given

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that if he did not accept it then it should be sold and the money deposited in the treasury, *held*, that the money so deposited was the sale proceeds of the landlord's share and consequently it was his money ; no further direction was necessary and the landlord would be entitled on that order to withdraw the money. That was clearly a final order enforceable as a decree and the provisions of S. 70 of the Act were fully complied with. (*Das and Ross, JJ.*) BINODE BEHARI BOSE *v.* TOKHI SINGH. **1924 P. H. C. C. 211 : 78 I. C. 465 : A. I. R. 1924 Pat. 604.**

——S. 70 (5)—*Separate decree apart from order is unnecessary.*

Cl. 5 of S. 70 does not require that a separate decree, apart from the order, should be prepared by the competent Revenue authority. It simply requires that the order shall be final and shall, on the application by the landlord or the tenants, to the Civil Court, be enforceable as a decree. In a case of appraisement the Collector does not take possession of the crops nor does he make it over to the landlord. He simply prepares an estimate of the crops under S. 69 and then reduces it into money value and declares how much is due to the landlord and how much to the tenant. In such a case the Collector's order must clearly specifiy the amount due from one party to the other so that the former may, in execution of the order in the Civil Court, receive his dues from the latter. Again in a case of division of crops, where the tenant has made himself liable to the landlord by removal of the crop or otherwise such as is provided by S. 71, the Collector's order must clearly state the amount payable to the landlord by tenant, so that the former may receive the same in execution of the order in Civil Court. But where there is a simple division of crops on the spot, each party is entitled to receive from the Collector, who takes possession of the crops, his share therein. The party taking his share from the Collector will not be liable to the opposite party and there can be no order to pay anything to the other party. If a party does not choose to take his share, his share will remain in deposit with the Collector. The only order that the Collector can pass is to deposit the share to the credit of that party. The order is capable of execution against the Collector if he does not give to the party his share. The sale proceeds in the Treasury to the credit of the party can be withdrawn any moment he likes. There will not be any necessity of execution. (*Jwala Prasad and Kulwant Sahay, JJ.*) BHUNESHWARI KUER *v.* SUKHDEO SINGH.

85 I.C. 566 : 6 P. L. T. 419 : A.I.R. 1925 Pat. 505.

——S. 70 (5)—*Finality of order.*

Under S. 70 (5) of the B. T. Act, the order of an officer having the powers of a Collector is final though it is competent the Commissioner to exercise supervision where the officer acts without jurisdiction. (*Gruning, M.C.*) MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH *v.* KESHWAR SINGH. **1 Pat.L.R. 128 (Cr.).**

——S. 71 (4)—*Claim for rent based on produce—Tenant preventing landlord from estimating crops—* Onus *is on tenant to prove actual produce—Evidence Act, S.* 106.

Where rent is claimed on the basis of the produce of the land and where the landlord has opportunity of appraising the crops and falsifies accounts in order to obtain a higher amount of rent, he is not entitled to get any decree except on proof of the produce of the land, and if he fails to prove that, he must be content with the admissions made by the defendants. But where the landlord could not make an estimate of the crops or was prevented from doing so by the tenants, his claim cannot be thrown out simply because he has

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not been able to prove the actual produce of the lands in the direct possession of the tenants. (*Jwala Prasad and Kulwant Sahay, JJ.*) BHUNESHWARI KUER *v.* SUKHDEO SINGH. **85 I. C. 566 : 6 P. L. T. 419 : A.I.R. 1925 Pat. 505.**

——S. 72—*Transferee—Right to rent.*

S. 72 of the B. T. Act, applies to a case in which a transferee claims rent and it protects the tenant to whom the transferee has given notice of the transfer. (*Coutts and Das, JJ.*) MT. ADAYABATI *v.* JANARDAN THAKUR. **3 Pat. L. T. 756 : 68 I. C. 288 : A. I. R. 1922 Pat. 607.**

——S. 74—Abwab—Dak *and* bhet *expenses--Construction of lease.*

A *Kabuliyat* must be construed as a whole to see if a certain item therein is an *abwab.* Where it provided for rent at a certain rate and a certain amount for *dak* and *bhet* expenses and the total payable in instalments, the latter are not *abwabs.* (*Suhrawardy and Page, JJ.*) NALINI BHUSAN GUPTA *v.* ALI MIA. **51 Cal. 643 : 79 I. C. 346 : A. I. R. 1924 Cal. 877.**

——S. 74—*Stipulation to pay embankment cess, costs of acquittance, etc., is void though items have been totalled into annual jama.*

All impositions upon the tenants under the denominations of abwab, mathat or other like appellations in addition to the actual rent are illegal and all stipulations and reservations for the payment of such are void. They cannot legally be exacted nor can the tenant legally bind himself by contract to pay them. Where, along with the rent (malguzari) and road cess, a lessee bound himself to pay. Embankment cess, Costs of acquittance *Dashora Chait nawami farmaish, Tika betti guru bhetti, Batchha pi jangala isimuavisi, Kathiari, Dewani dastur* and *Mahal Uprohili.*

Held, that though all the items were totalled up into an annual jama, the items other than rent and road cess were illegal abwabs and not recoverable by a landlord from his tenants, and stipulations for their payment were by S. 74 of the Bengal Tenancy Act, void. (Case law discussed.) (*Dawson Miller, C. J. and Foster, J.*) W. W. BROUCKE *v.* CHHATTAR KUMARI. **4 Pat. 404 : 1925 P. H. C. C. 89 : 86 I. C. 597 : 6 P. L. T. 331 : A.I.R. 1925 Pat. 421.**

——**Ss. 74 and 179**—*Illegal abwabs—No distinction lies between raiyats and intermediate tenants.*

As regards the imposition of illegal abwabs over and above the rent for the lands, no distinction is made in the Act between a raiyat and any intermediate tenant except in the case of a permanent mukarrari lease as provided in Cl. 3 of S. 74 and in S. 179 of the Act. (*Dawson Miller, C. J. and Foster, J.*) W. W. BROUCKE *v.* CHATTAR KUMARI. **4 Pat. 404 : 1925 P. H. C. C. 89 : 86 I. C. 597 : 6 P. L. T. 331 : A. I. R. 1925 Pat. 421.**

——**S. 85**—*Stipulation for renewing an under-ryoti lease is valid.*

In spite of the provisions of S. 85, Bengal Tenancy Act a stipulation contained in a lease granted by a raiyat to an under raiyat that after the expiry of the term for which the lease was granted the raiyat would grant the under raiyat a fresh lease is valid.

Where a stipulation for a lease for a fresh term upon the expiry of the term already settled is contained in a lease, the heirs of the lessee are competent to execute a fresh kabuliyat of the covenant. In such a case the question involved is not one of heritability but of simple contract. 20 C. W. N. 948 ; 28 C. L. J. 507 Foll. (*Suhrawardy and Chotzner, JJ.*) SHULACHANA MOZUMDAR *v.* KALI BIBI. **41 C. L. J. 604 : 79 I. C. 317 : A. I. R. 1925 Cal. 516.**

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——**S. 85**—*Raiyat at fixed rate—Can make a permanent settlement with under raiyat.*

It is competent to a ryot holding at fixed rates to make a permanent settlement with the under-raiyat or give the under-raiyat a transferable and heritable interest in the land. (*Newbould and Panton, JJ.*) PROBODH CHANDRA DAS *v.* BIRSINHA BAGANI. **71 I. C. 319 : A. I. R. 1924 Cal. 350.**

——**S. 85**—*Under-raiyat— Agreement to accept heritable tenancy is not against section.*

An under-raiyat does not violate the terms of S. 85 by agreeing to accept a heritable tenancy from his landlord and when such an agreement is entered into the landlord cannot ignore the agreement and eject the heirs of the under-raiyat on the ground that the tenancy is not heritable. (*Mookerjee, A. C. J. and Fletcher, J.*) AMINALLA CHAUDHARI *v.* MAHABA ATI. **60 I. C. 457 : 25 C. W. N. 715.**

——**S. 86 (b)**—*Surrender after—Transfer of portion of interest to third party amounts to an assignment—Effect of—Subsequent surrender.*

A surrender by the tenant after he has dealt with a portion of the holding in favour of another person amounts to no more than an assignment in favour of the landlord. But there is no reason why the landlord should be in a worse position than if the assignee were a third party and why he should not acquire all the interest which was left in the tenant at the date of the transfer. (*Chatterjea and Pearson, JJ.*) AMIRUDDIN MAHAMAD *v.* SANKAR BORMAN. **67 I. C. 91 : A. I. R. 1922 Cal. 56.**

——**S. 86, Cls. 6 and 7**—*Surrender is operative against transferee of portion of non-transferable occupancy—Sale of whole or part creates no incumbrance.*

The raiyat has an absolute right of surrender subject to clause 6 of S. 86. By that clause, where there is an incumbrance secured by a registered instrument, either the landlord or the incumbrancer can defeat the raiyat's right to surrender, but in other cases it would seem clear that neither the landlord nor the incumbrancer can object to the surrender, and the only ground upon which either of them could object is the ground mentioned in clause 6. Nor will it avail the landlord that the raiyat had expressly agreed with him in writing, not to exercise his right of surrender. Under cl. 7 the landlord and the raiyat might enter into a valid arrangement for surrender as between themselves, but this would not affect the rights of a registered incumbrancer whose interest the landlord would be bound to recognize. Under cl. 7 the consent of the landlord is necessary and he would, therefore, be in no better position than an assignee of the tenancy who could claim no greater rights than those of his assignor. In all cases, however, not governed by Cl. 6 the landlord would be bound to accept the surrender. No provision is made in the Act protecting the interest of the transferee of a part of the whole of a non-transferable holding in cases either of surrender or abandonment. The transfer of a non-transferable holding is not binding upon the landlord in the sense that it imposes upon him any obligation to recognise the transferee as his tenant. The transfer of a portion of the holding does not confer upon the landlord any right of re-entry as long as the tenant continues in possession of the remainder and pays the rent. Where there has been a transfer of a portion of the holding and a subsequent relinquishment by the raiyat, the landlord is entitled to enter and this appears to be in accordance with the provisions of the B. T. Act Unless the case falls within Cl. 6 the landlord is bound to accept the surrender and cannot object on the ground that the raiyat has created in-

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cumbrances or otherwise dealt with the land in a manner not contemplated by clause 6. But if the landlord is bound by the surrender his rights under Cl. 5 come into operation and entitles him to enter on the land and eject any one not protected under Cl. 6. A purchaser from a raiyat of a portion of a non-transferable occupancy holding without landlord's consent is not an incumbrancer. A sale of the whole or a portion of an occupancy raiyati interest creates no incumbrance upon that interest. The interest remains unimpaired; the ownership alone changes. No sub-tenancy is created between the vendor and vendee both the part transferred and the part retained remain whole and unincumbered. The word "incumbrance" implies a subsidiary interest charged upon or carved out of a parent estate, such as a lease mortgage charge easement or other interest limiting the full rights of ownership in the estate to which it appertains. It is something which affects the quality of the parent estate making it something less than it was before the incumbrance was created. A division of the estate between two or more owners does not impair its quality or incumber it in any way (Case Law reviewed.) (*Dawson Miller, C. J., Mullick, Jwala Prasad, Foster and Macpherson, JJ.*) MT. SHEORAJ KUER *v.* DHANIMIAN.

4 P.L.T. 581 : 1 Pat. L. R. 402 : 1923 P. H. C. C. 305 : 75 I. C. 790 : 3 P. 1 : A. I. R. 1924 Pat. 1 (F. B.).

——S. 87—*Transferee of non-transferable holding is only trespasser, as against landlord.*

When the interest of a tenant is inalienable but notwithstanding this, he transfers his interest and puts the transferee in possession the original tenancy may be treated as abandoned and when the transferee takes possession of the land his position is no better than that of a trespasser as against the landlord. (*Greaves, J.*) SREERAM CHUNDER BASU *v.* NAGENDRA BANERJEE. **82 I. C. 958 : A. I. R. 1925 Cal. 417.**

——S. 87—*Non-transferable occupancy holding——Transfer of—Lease by transferee to raiyat—Landlord's right to eject—Section if exhausted.*

A non-transferable occupancy holding was sold in execution of a decree against the raiyat and the latter took a sub-lease from the purchaser, remained in possession and did not pay rent to the landlord. The landlord sued the purchaser in ejectment. *Held*, there was no abandonment or repudiation of the tenancy by the raiyat and the suit in ejectment did not lie as he has no right to present possession but in a proper suit the landlord could get a declaration that the purchaser had obtained no rights as against him.

Quaere, if S. 87 is exhaustive? (*Rankin and Mukheriee, JJ.*) RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS. **28 C. W. N. 602 : 78 I. C. 497 : 39 C. L. J. 356 : A. I. R. 1924 Cal. 900.**

——S. 87—*Abandonment of occupancy holding—What constitutes—Landlord—Right to recover possession.*

It is settled law that where the transfer by an occupancy tenant of his holding is by way of usufructuary mortgage, the landlord though he has not consented is not ordinarily entitled to recover possession unless there has been (*a*) an abandonment of the holding within the meaning of S. 87, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. To constitute abandonment, the first condition is the voluntary abandonment of his residence by the *raiyat* without notice to the landlord; the landlord must also establish that he has not arranged for payment of the rent as it falls due and thirdly that the tenant has ceased to cultivate his holding either by himself or by some other person. (*Das and Adami, JJ.*) SADHU SAO *v.* AWAD BEHARI SARAN SINGH. **89 I. C. 802 (Pat.).**

BENGAL TENANCY ACT (VIII OF 1885), S. 93.

——S. 87—*If exhaustive—Abandonment—What amounts to—Mortgage by tenant.*

Apart from S. 87 there may be abandonment of a holding but in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein by means of a sale or that he has abandoned the right to retake possession in future or has either left the village without any intention of returning or done some other act which would clearly indicate that he has no longer retained the *spes recuperandi*. The fact that he has mortgaged the property under a usufructuary mortgage and given entire possession to the mortgagees continuing himself to remain in the same village affords in itself no evidence from which abandonment can be inferred. (*Dawson Miller, C. J. and Mullick, J.*) RAM LAL MANDER *v.* KULDIP NARAYAN TIWARI. **5 Pat. L. T. 407 : 75 I. C. 841 : 3 Pat. 126 : A. I. R. 1924 Pat. 440.**

——S. 87—*Abandonment—Proof of.*

Under S. 87 of the Act, a plaintiff must prove (1) that the *Raiyat* voluntarily abandoned his residence without notice, (2) that he did go without arranging for payment of his rent as it fell due, and (3) that he ceased to cultivate the holding by himself or by some other person. (*Das and Adami, JJ.*) RAMJANUN SINGH *v.* KHUB LAL SINGH. **2 Pat. L. T. 219 : 59 I. C. 908 : 1921 P. H. C. C. 151.**

——S. 88—*Thiccadar is not "agent"—Thiccadar splitting up holding* bona fide *for benefit of estate—Landlord is bound by the arrangement.*

A thiccadar is not the agent of the landlord. Consent by a thiccadar given in good faith for the benefit of the estate to an alteration of the area of the holding under him and the apportionment of rent upon the new holdings is binding upon the landlord. 2 P. L. J. 151 Foll. (*Adami and Kulwant Sahay, JJ.*) KESHEO PRASAD SINGH *v.* LAKHNATH ROY. **89 I. C. 21 : A. I. R. 1925 Pat. 796.**

——S. 93—*Common manager. appointment of—Objection by co-sharer with separate account—Objection should be taken into account.*

When a co-sharer, however small his interest may be, begins to quarrel with another co-sharer holding an equally small share, then according to the provisions of S. 93 a common manager may be appointed to take charge not only of the shares of the disputants but also of the shares of other co-sharers however large their interest may be. Not only that, if a co-sharer has opened a separate account and is in peaceful possession of his estate, he is also liable to lose possession of his separate estate although the owner of that separate account is totally unconnected with the quarrel between the other co-sharers. In cases where such a consequence is likely to follow the appointment of a common manager on the application of the small share holders should not ordinarily be made and the objection of the owner of the separate estate to the appointment of a common manager should be taken into account in exercising the discretion given by S. 93 of the Act. (*Greaves and Chakravarty, JJ.*). PROMATHA NATH MITRA *v.* MANMATHA NATH MITRA. **52 Cal. 231 : 86 I. C. 610 : A. I. R. 1925 Cal. 686.**

——S. 93—*Expediency of partition suit and appointment of Receiver—Common manager should not be appointed.*

Whenever a dispute between the co-sharers is likely to cause injury only to themselves it may be well avoided by a partition suit and by the appointment of a Receiver by a Civil Court in the course of that suit. The appointment of such a Receiver does not usually involve the consequences which the appointment of a

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common manager under S. 93 does, and if the co-sharer can easily avoid the necessity of an application under S. 93 by bringing a partition suit, the Court should not ordinarily give relief on an application under S. 93. (*Greaves and Chakravarty, JJ.*) PROMATHA NATH MITRA *v.* MANMATHA NATH MITRA. **52 Cal. 231: 86 I.C. 610: A.I.R. 1925 Cal. 686.**

——— **S. 93**—*Common manager cannot be appointed to a part of an estate—Previous appointment does not validate a later one.*

The appointment of a common manager must be to the entire estate and not to a portion thereof and former appointment of a common manager to a part only will not validate a later such appointment. (*Newbould and Suhrawardy, JJ.*) BASANTA KUMAR CHAKRAVARTHI *v.* ASHUTOSH CHAKRAVARTHI.
27 C. W. N. 1040: A. I. R. 1924 Cal. 214.

——— **Ss. 93, 95 and 98**—*Common manager—Resignation—Dt. Judge can appoint successor.*

When a common manager appointed under the Bengal Tenancy Act has been removed or has resigned or has died the District Judge has inherent power to make a proper order for the appointment of a successor for the benefit of the estate. 10 C. W. N. 437 Diss. (*Mookerjee and Panton, JJ.*) BRINDABON CHANDRA CHAKRAVARTY *v.* JNANENDRA NATH.
64 I. C. 819 : 35 C. L. J. 75.

——— **S. 93 (6)**—*Dispute between co-sharers—Loss of income is "injury".*

The loss of income to the co-sharers on account of a dispute between themselves amounts to "injury to private rights". 21 C. W. N. 240 Foll. (*Greaves and Chakravarty, JJ.*) PROMATHA NATH MITRA *v.* MANMATHA NATH MITRA. **52 Cal. 231 : 86 I. C. 610 : A. I. R. 1925 Cal. 686.**

——— **Ss. 95, 98 and 100**—*District Judge's sanction is unnecessary for suit against common manager.*

The B. T. Act contains no provision requiring the District Judge's previous sanction for bringing a suit for rent against a common manager or for executing a decree passed in such suit. (*Pearson and Graham, JJ.*) SARAT CHANDRA GHOSE *v.* RAJ KUMAR CHAKRAVARTHI. **82 I.C. 327 : A. I R. 1925 Cal. 334.**

——— **S. 95-A and 97**—*Estate includes accretions and reformations—Manager of Court of Wards can sue.*

'Estate' in S. 95 (*a*) means all that the holder is entitled to by way of reformation or accretion. Lands handed over to the Manager of the Court of Wards and lands subsequently reformed are the whole estate. S. 97 of the Act gives the Court of Wards power to sue in the case of an estate coming under S. 95 (*a*) of the Act. When the Act gives the Dt. Judge power to direct the management of an estate by the Court of Wards, that body has the same powers as it has in regard to other estates coming within the Court of Wards Act. (*Woodroffe and Cuming, JJ.*) SECY. OF STATE *v.* ANAND MOHAN ROY.
66 I. C. 287 : 34 C. L. J. 205.

——— **Ss. 95, 93**—*Common Manager—Appointment of.*

A common manager can be appointed only to an entire estate or tenure. Such a person cannot be appointed to a portion thereof. (*Newbould and Suhrawardy, JJ.*) BASANTA KUMAR CHAKRAVARTY *v.* ASHUTOSH CHAKRAVARTI.
27 C. W. N. 1040 : A. I. R. 1924 Cal. 214.

——— **S. 98**—*Execution proceedings against common manager appointed under S. 95—Dt. Judge's sanction is essential.*

The sanction of the District Judge should be obtained before proceedings are taken against the common manager appointed under S. 95 for realization of rents. (*Ross and Kulwant Sahay, JJ.*) DURGA PRASAD *v.* A. H. FORBES. **6 P. L. T. 127 : 86 I. C. 787 : 1925 P. H. C. C. 109 : A. I. R. 1925 Pat. 374.**

BENGAL TENANCY ACT (VIII OF 1885), S. 103.

——— **S. 99**—*Dispute between co-owners effectively settled—Restoration must be ordered.*

When the question arises for restoration of the estate under S. 99 of the Act, and it is alleged that the dispute is no longer existing, what the Judge has to consider is whether it has been really or effectively settled in such a way that the management will be conducted by the co-owners without inconvenience to the public or injury to private rights. If he is satisfied that the dispute has been settled, he cannot refuse to pass a restoration order, merely because there is apprehension that the co-owners will oppress the tenants or that a breach of the peace may result. (*Greaves and Mukerjee, JJ.*) ABDUL AZAHAR *v.* COLLECTOR OF BACKERGUNJ. **A.I.R. 1925 Cal. 1168.**

——— **S. 99**—*Common Manager—Application to Dt. Judge for restoration of management to co-owners.*

In an application by the co-owners under S. 99 of the B. T. Act for restoration of the management of their share, the common manager is not and cannot be made a party to the proceeding. (*Chatterjea and Panton, JJ.*) BHEGABATI DEBYA CHAUDHURANI *v.* NIL KANTHA CHATTERJEE. **59 I. C. 191 : 24 C.W.N. 927.**

——— **Ss. 101 and 111**—*Entertaining means considering.*

To entertain a suit or application within S. 111 merely means the consideration of a suit or application and it equally applies to a suit instituted before the declaration under S. 101 is made and to suits instituted after such a declaration has been made. (*Greaves and Mukerjee, JJ.*) KANAK KANTI ROY *v.* SRISHTIDAR MONDAL. **A. I. R. 1925 Cal. 1211.**

——— **S-102**—*Section is not mandatory—Entries in compliance with the section do not attract presumption under S. 50.*

Provisions of S. 102 are not mandatory. The section provides that certain matters may be included without or in addition to other particulars stated in the section. An entry of a person as a settled raiyat can be made in the record of rights under S. 102 (*b*) as it is a compliance with the section and consequently the presumption under S. 50 does not arise. (*Greaves and Graham, JJ. J.*) MOFIZUDDIN CHOWDHURY *v.* RAJANDRA NATH SANYAL. **40 C. L. J. 248 : 29 C. W. N. 209 : 84 I. C. 989 : A. I. R. 1925. Cal 208.**

——— **S. 102**—*cl. (c)—Revenue Officer is to determine existing rent and not settle a fair rent.*

The Revenue Officer is required under S. 102 (*c*) to determine the existing rent and not to settle a fair rent. 21 Cal. 38 Foll. (*Mukerjee and Rankin, JJ.*) RAMA NATH SANT *v.* OFFICIAL TRUSTEE OF BENGAL.
87 I.C 1014 : 29 C.W.N. 517 : A. I. R. 1925 Cal. 799.

——— **S. 103**—*Boundaries between adjacent estates about which dispute exists—Executive Officer cannot determine.*

An Executive Officer, acting under the provisions of S. 103 as it stood in 1896 has no power to determine the boundaries between conterminous estates as to which a *bona fide* controversy exists between the owners of such estates. 19 Cal. 643, Foll. (*Suhrawardy and Duval, JJ.*) BEJOY CHAND MAHTAB *v.* SARAT KUMAR ROY. **A. I. R. 1925 Cal. 1253.**

——— **S. 103**—*Contrary user overrides settlement entry.*

Presumption of the correctness of the entry under S. 103, B. T. Act can be sufficiently rebutted by evidence of contrary user. (*Sahrawardy and Chotzner, JJ.*) CHATTRA NATH *v.* BABAR ALI. **86 I. C. 835 : 29 C. W. N. 333 : A. I. R. 1925 Cal. 635.**

BENGAL TENANCY ACT (VIII OF 1885), S. 103.

——Ss. 103, 104—*Rent suit—Plea of dispossession of portion—Maintainable.*

Where in a suit for rent, the tenant pleads that he was dispossessed from a portion of the holding and hence the rent should be suspended he is not prevented from raising it under Ss. 103 and 104 of the B. T. Act. The correctness of the entries which is presumed under S. 103-B, the right to challenge it only by a suit under S 104-H and the conclusiveness of the entry as to area under S. 104-J is not applicable to such a plea. (*Chatterjee and Cuming, JJ.*) PRIYA NATH BASU *v.* TARA CHAND MORAL. **27 C. W.N 982 : A. I. R. 1924 Cal. 341.**

——S. 103—*Presumption does not apply to decision of A. S. O.*

Under S. 103-B of the Act the presumption applies only to the actual entries in the record of rights as finally published and not to the decision of the Assistant Settlement Officer as if it formed part of the record. (*Dawson Miller, C. J. and Mullick, J.*) KAMALUDDIN AHMAD *v.* RAMANANAND SINGH. **3 P. 120 : 1924 P. H. C. C. 1 : 78 I. C. 605 : A. I. R. 1924 Patna 443.**

——S. 103-A—*Presumption under, cannot be drawn from papers.*

The inference under S. 103-A of the Tenancy Act can only be drawn from the finally published Record of Rights and not from the khasra papers upon which the finally settled Record of Rights is founded. (*Greaves and Panton, JJ.*) ALTAP ALI CHOUDHURY *v.* SRIMATHI JARINA BIBI. **67 I. C. 871 : A. I. R. 1923 Cal. 194.**

——S. 103-B—*Presumption under—Non-agricultural land.*

Although strictly speaking the presumption under Sec. 103-B is not applicable to non-agricultural land to the extent to which it is applicable with regard to agricultural lands, still such entry raises some presumption with regard to the fact recorded in it. (*Newbould and Ghose, JJ.*) CHAND MIA MUNSHI *v.* TUKAMIA. **28 C. W. N. 516 : 80 I. C. 805 : A. I. R. 1924 Cal. 667.**

——Ss. 103-B and 106—*Record of Rights—Presumptions of correctness—Road cess returns and quinquennial register prepared under Regn.* XLVIII *of* 1793—*Admissibility of.*

In a suit by the landlords for correction of an entry in the Record of Rights to the effect that the rent of a tenure was fixed, the plffs. alleged that the rent was open to enhancement and adduced in evidence quinquennial registers prepared under Regn. XLVIII of 1793 and the tenant produced some road cess returns to prove that the rents had been unchanged for over 20 years. *Held*, the road cess returns were inadmissible in evidence having regard to provisions of the Bengal Cess Act. To start with, there was a presumption in favour of the defts. from an entry under S. 103-B of the B. T. Act. Therefore the onus of proof rested entirely on the plaintiffs landlords to negative the effect of the said presumption. Assuming the entries in the quinquennial register were admissible in evidence they were not sufficient to negative the presumption under S. 103-B of the B. T. Act (*Ghose and Chotzner, JJ.*) PROMODE CHANDRA ROY CHOWDHURY *v.* BINAYAKDAS ACHARYA. **27 C. W. N. 548 : 75 I. C. 201 : A. I. R. 1923 Cal. 611.**

——S. 103 (B)—*Record of Rights—Entry in, as to rights of tenants—Presumption of correctness.*

Entries in the Record of Rights as to the rights of tenants to appropriate fruits and timber of trees do not carry the presumption of correctness under S. 103 (b). The entry is only a piece of evidence admissible under S. 35 of the Evidence Act. (*Kulwant Sahay, J.*) DEBI DAYAL SINGH *v.* MT. GANGO KUAR. **89 I. C. 1020.**

BENGAL TENANCY ACT (VIII OF 1885), S. 103-B.

——S. 103-B—*Record of Rights—Presumption of correctness—Evidence in rebuttal of.*

Evidence of facts, documentary or oral, of a date prior to that of the publication of the Record of Rights is admissible and should be taken into consideration in determining whether the presumption under S. 103-B as amended has been rebutted or not. The Provincial Settlement Records must be considered of very high value in determining the status of the tenants and the Provincial Settlement Record is sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement Records in this case because it was conceded that there was no oral evidence in the case on the point. (*Das and Adami, JJ.*) RAGHUNATH MISRA *v.* RAM BEHARA. **1 P. 167 : 5 Pat. L T. 140 : A. I. R. 1922 Patna 548.**

——S. 103 (B)—*Record of Rights—Presumption of correctness is not rebutted by its being against the general law.*

The presumption of correctness attaching to an entry in the Record of Rights cannot merely be rebutted by showing that it is opposed to the general law. Where the question related to the ownership of trees the general law vesting the ownership of trees in the landlord was held not to rebut the entry in the Record of Rights which vested the right in the tenants. (*Dawson Miller, C. J. and Bucknill, J.*) BISHUN PRAGASH NARAIN SINGH *v.* SHEOSARAN TELI. **1 P. 368 : 64. I. C. 866 : 3 P. L. T. 818 : A. I. R. 1922 P. 497.**

——S. 103 (B) and S. 50 (2)—*Conflict between—Former prevails.*

When there is a competition under S. 103 (b) and another under S. 50 (2) the former shall prevail, and under S. 115, the tenant cannot ask the Court to draw a presumption from any evidence establishing uniform payment of rent after the permanent settlement. (*Das and Bucknill, JJ.*) GOBIND LAL SIJUAR *v.* RAM SARAN LAL. **68 I.C. 433 : 2 Pat. L. T. 642.**

——S. 103-B—*Court's finding on one-sided evidence is not legal.*

If in a suit for correcting the entry in the Survey Record of Rights, the plff. has in his favour the presumption of the Record of Rights prepared under the Estates Partition Act and the deft. has the presumption under S. 103 (b), the Court must look to the evidence of both parties and a finding of possession based on evidence adduced by deft. alone, is illegal. (*Jwala Prasad, J.*) DEBILAL SAH *v.* RAM BIBEKI SINGH. **63 I. C. 194 (Pat.).**

——S. 103-B, sub-sec. (3)—*Presumption mentioned in section may be rebutted by external or internal evidence.*

The evidence for rebutting the presumption mentioned in S. 103, sub-sec. (3) may be external to the settlement proceedings or may be apparent on the face of these proceedings.

Where the statement of his reasons by the Revenue Officer in his order showed that he did not determine the existing rent,

Held: the presumption of its correctness was rebutted. (*Mukerjee and Rankin, JJ.*) RAMA NATH SANT *v.* OFFICIAL TRUSTEE OF BENGAL. **87 I.C. 1014: 29 C. W. N. 517 : A. I. R. 1925 Cal. 799.**

——S. 103-B, (3)—*Reduction of rent in case of inundation, recorded in Record of Rights—Presumption as to correctness applies to entry.*

BENGAL TENANCY ACT (VIII OF 1885), S. 103-B.

An entry in the Record of Rights that if inundation takes place the raiyats are to get a rateable proportionate deduction of rent from the landlord is an entry of a local custom, and is not outside the purview of Chapter X, the presumption of correctness laid down in S. 103 B (3) applies to such an entry, and therefore the burden of proving that the custom recited in the entry does not exist, is upon the landlord. (*Rankin and Mukerjee, JJ.*) PROHLAD CHANDRA *v.* MAHENDRA NATH. **78 I. C. 836 : A. I. R 1925 Cal. 564.**

——**S. 103-B, sub-sec (3)**—*Record of Rights—Entry as to—Non-agricultural land—Presumption not of much weight.*

If an entry has been made in the Record of Rights with regard to land which does not come within the scope of the B. T. Act, and with regard to which the Revenue Officer, had no jurisdiction to make the entry, the presumption under S. 103-B (3) of the B. T. Act is not of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the Record of Rights. (*Sanderson, C. J. and Chotzner, J.*) RAJA SASI KANTA *v.* SANDYA MANI DASYA. **26 C. W. N. 483: 65 I. C. 4: 34 C. L. J. 504.**

——**S. 103-B, (3)**—*Record of Rights—Entries are presumed to be correct.*

Entries in a Record of Rights are presumed to be correct under S. 103-B. (3) of the Act and the burden of proving that they are incorrect, lies on the person alleging it. (*Mookerjee and Buckland, JJ.*) JOGENDRA *v.* JAGADINDRA. **67 I. C. 170: 34 C. L. J. 133.**

——**S. 104**—*Record of Rights—No presumption when Settlement Officer acts without jurisdiction.*

Though there is an irrebuttable presumption in favour of an entry in the Record of Rights under S. 104 of the B. T. Act the presumption does not apply where the proceedings of the Settlement Officer were carried on without jurisdiction. 17 C. W. N. 155; 23 C. W. N. 516 ; 46 C. 90; 23 C. W. N. 860 Rel. (*Mookerjee and Chotzner, JJ.*) JYOTI PRAKAS CHATTORAJ *v.* BAGALA KANTA CHOWDHURI. **70 I. C. 822: 36 C. L. J. 124: A. I R. 1922 Cal. 274.**

——**S. 104**—*Entry in Record of Rights is conclusive.*

An entry in a Record of Rights is conclusive unless altered by means of a suit instituted under S. 104 (2), B. T. Act within 6 months from the date of the certificate of final publication of the Record of Rights or if an appeal has been presented to a revenue authority under S. 104, then, within 6 months of the disposal of such appeal. (*Mookerjee and Cuming, JJ.*) PRATAB CHANDRA *v.* SECRETARY OF STATE. **49 C. 1026: 67 I. C. 375: 35 C. L. J. 304: A. I. R. 1922 Cal. 101.**

——**S. 104-H**—*Enhancement of rent—Settlement of fair and equitable rent—Record of Rights—Limitation.*

Where the plaintiff sues for recovery or confirmation of possession of a portion of a tenancy wrongly left out in the Record of Rights by the Settlement Officer the suit has to be brought within 6 months from the date of the final publication of the Record of Rights and if that period expires on a holiday the suit may be brought on the re-opening day. S. 104-H only contemplates a case where a person has been aggrieved so far as an entry of rent is concerned. (*Woodroffe and Suhrawardy, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAM CHARAN ACHARJI. **40 C. L. J. 235 : A. I. R. 1924 Cal. 464.**

——**S. 104-H.**—*Rent settled in Record of Rights is final.*

The section confers finality on the rent settled in the Record of Rights. A deft. in a rent suit cannot urge a plea of title contrary to the entry in the Record of Rights. (*Newbould and Panton JJ.*) MANMATA NATH *v.* KIROD GOBINDA CHOWDHURY. **60 I. C. 501 (Cal.)**

BENGAL TENANCY ACT (VIII OF 1885), S. 105.

——**S. 104-H (4)**—*Tenure-holder, rent of, not settled—Suit for settlement of fair rent.*

Where the rent of a tenure-holder has not been settled but has been fixed on the basis of rent payable by raiyats to proprietors, a suit by the tenure-holder for settlement of fair rent will lie under S. 104-H. (3), cls. (*d*) and (*e*) and the Court has, under sub-S. (4) power to settle a fair rent. (*Chatterjee and Panton, JJ.*) PROFULLA NATH TAGORE *v.* SECRETARY OF STATE. **63 I. C. 892: 26 C. W. N. 100.**

——**S. 104-J**—*Entry as to area in Record of-Rights not conclusive when rent question is not controversy.*

It is settled that an entry as to the rent settled is conclusive under S. 104-J. It may also be considered that other entries in the Record-of-Rights upon which the rent is settled cannot be challenged *so as to affect the rent settled, i.e.*, in so far as they bear upon the rent settled and for that purpose only. The fact that the suit under S. 104-H is to be instituted on the grounds mentioned in that section by a person aggrieved by an entry of a rent settled indicates that the other entries in the Record-of-Rights can be challenged under that section only for the purpose of showing the incorrectness of the entry as to the rent settled. But where, the question in controversy is not as to the rent payable but the quantity of land included in the tenure, the determination of which is necessary not for deciding the amount of rent payable for the tenure, but for deciding the question whether the rent should be suspended because the defendants had been dispossessed from a portion of the tenure, the entry as to the area is not conclusive under S. 104-J. If the contention, that as the rent of a tenancy is settled with reference to the area comprised in the tenancy, the entry as to the area as well as the rent should be held to be conclusive even in cases where the rent is not in dispute, were accepted, it must be held that other entries in the record-of-rights, such as an entry as to the status of the tenant (with reference to which also the rent is to be settled) is also conclusive even where the rent is not in dispute. Having regard to the express terms of S. 104-J which refers only to the rent settled, it follows that the entry as to the area is not conclusive for the purpose of deciding the question whether the rent should be suspended because the defendants had been dispossessed from a portion of the tenure. Such an entry only raises a presumption of correctness under S. 103-B. (*Chatterjee and Cuming, JJ.*) PRIYA NATH *v.* TARACHAND MORAL. **27 C. W. N. 982 : 80 I. C. 1034: A. I. R. 1924 Cal. 341.**

——**Ss. 105 and 110**—*Settlement of fair and equitable rent by Settlement Officer—Suit in Civil Court for back rents at this rate.*

Where a landlord applied under S. 105 of the B. T. Act for settlement of fair rent for additional area and got an order. Subsequently he brought a suit for back rents for the additional area. *Held*, that having got an order under Sec. 105 for fair rent, the landlord was bound by the terms of S. 110 which provides that such settlement of rent shall take effect from the beginning of the agricultural year next after the date of the decision fixing the rent and consequently could not sue for back rents. (*Cuming and Chakravarti, JJ.*) CHANDI CHARAN LAW *v.* MAHEN BANU. **52 C. 910.**

——**Ss. 105 and 187**—*Am-mukhtear duly empow-*

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cred can represent a landlord under S. 105.

S. 187 governs all cases of application by landlords whether as individuals or as a joint body and under S. 187 an Am-mukhtear duly empowered can represent landlord for the purposes of the application. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MAHOMED ISMAIL. **52 Cal. 139 : 86 I. C. 1035 : A. I. R. 1925 Cal. 637.**

——**Ss. 105 and 188**—*Application under S. 105 must be by all landlords.*

The Act aims at codifying the law governing the relation between the landlord and tenant and their mutual rights and liabilities. With a view to avoid multiplicity of suits and harassment to the tenant it contemplates that acts done and rights exercised must be done and exercised in concert by the entire body of landlords if there are more than one. S. 188 is enacted to secure that object. An application under S. 105 is one of the acts which a landlord is authorised to do under that Act. S. 188 read with S. 105 makes it obligatory that such application must be made by all the landlords. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MAHOMED ISMAIL. **52 Cal. 139: 86 I. C. 1035 : A. I. R. 1925 Cal. 637.**

——**Ss. 105 and 188**—*Subsequent withdrawal of one of the plaintiffs—Application is not invalidated.*

After the application is properly made under S. 105 its subsequent progress is regulated by the rules of procedure provided by the C. P. Code. The matter then passes from the control of the Bengal Tenancy Act to the dominion of the Civil Procedure Code. The subsequent withdrawal from the proceedings, of one of the landlords does not render them invalid unless they are so rendered by virtue of the Civil Procedure Code. (1923) P. H. C. C. 273 Foll. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MAHOMED ISMAIL.

52 Cal. 139 : 86 I. C. 1035 : A. I. R. 1925 Cal. 637.

——**S. 105**—*C. P. Code O. 23, R. 1 (4)—Withdrawal by one Co-plff. without consent of others is not permissible.*

The Revenue Court cannot permit one of the plaintiffs to withdraw without the consent of the other co-plaintiffs. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MAHOMED ISMAIL.

52 Cal. 139 : 86 I. C. 1035 : A. I. R. 1925 Cal. 637.

——**Ss. 105 and 105 A**—*Decision by special Judge—Question of Principle involved—Second appeal lies.*

If the decision of the Special Judge does not merely settle a rent but involves a question of principle as to the basis upon which rent is to be settled the decision of the Special Judge is appealable to the High Court. (*Greaves and Graham, JJ.*) PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA.

85 I. C. 693 : 29 C. W. N. 353 : A. I. R. 1925 Cal. 656.

——**S. 105**—*Rate in* kabuliyat *need not be adhered to.*

Where the landlord has invoked the provisions of S. 105 he cannot contend that the Judge is necessarily bound in fixing the rent to adhere to the rate mentioned in the *kabuliyat*. No doubt the Judges would take this into account but if he finds that a strict adherence to the rate mentioned in the kabuliyat would make the rent in excess of what he considers a fair and equitable rent he is bound by the terms of S. 105 to so adjust the rent irrespective of any contract between the parties, as to make it just and equitable. (*Greaves and Graham, JJ.*) PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA.

BENGAL TENANCY ACT (VIII OF 1885), S. 105.

85 I. C. 693 : 29 C W. N. 353 : A.I.R. 1925 Cal. 656.

——**Ss. 105 and 107**—*Fair and equitable rent—Decision of Revenue Officer—When conclusive.*

Under S. 105 (6) when the parties agree amongst themselves by compromise or otherwise as to the amount of the fair rent, it is incumbent upon the Revenue Officer to satisfy himself that the amount agreed upon is fair and equitable and it is only if he is so satisfied that he can record the amount agreed upon as the fair and equitable rent; if he is not so satisfied he has to settle a fair and equitable rent as provided in sub-sections (4) and (5). The decision of the Revenue Officer operates as a decree of a Civil Court in a suit between the parties; and it has the force and effect of a final decree which decides two vital elements of relationship between the parties; first that the defendants hold the land subject to the payment of rent; and that the fair rent is that fixed by the Revenue Officer. (*Mookerjee and Rankin, JJ.*) DHARANI MOHAN RAI *v.* ASHUTOSH MUKERJI.

40 C. L. J. 34 : 82 I. C. 396 : A. I. R. 1924 Cal. 907.

——**S. 105**—*Maurasi Makrari patta—Provision to assess excess land—Enhancement.*

Where a *maurasi makrari* patta is granted, a perpetual grant on a fixed rent is implied when the patta provides that excess lands as per measurement should be assessed at the rates fixed in the lease. The nature of tenancy is not altered. (*Mookerjee and Chotzner, JJ.*) BHAIRAB CHANDRA DAS *v.* MIDNAPORE ZEMINDARI CO., LTD.

38 C. L. J. 372 : A. I. R. 1924 Cal. 513.

——**S. 105**—*Proceedings under—Purchaser of rent sale bound by subsequent decision.*

Any one who buys a holding at an auction must be taken to know perfectly well that he is buying a holding, the rent of which may be enhanceable. If it is subsequently increased by proper process beyond the figure in the sale certificate of previous decree, the question of estoppel is not in point. The question is not of encumbrance created by the tenant and binding his own interest only. (*Rankin, J.*) KHETRA MOHAN DE *v.* SATISH CHANDRA GIRI.

A. I. R. 1923 Cal. 438

——**S. 105**—*Purchase of jote by landlord in execution of rent decree—Eviction of tenant not wrongful.*

In execution of a decree for rent obtained by his predecessor-in-interest a landlord caused seven jotes held by the tenant to be sold. The plots were divided into two jotes and the landlord purchased both of them. The sale as regards one of the jotes was set aside on the objection of the tenant and the sale as regards the other was made absolute as no application had been made by the tenant to set aside the sale. On a question arising as to the legality of the dispossession of the tenants consequent upon the sale, *Held*, that there was no wrongful eviction of the tenant at the instance of the landlord, as the decree for rent was valid and binding and had not been impeached. (*Ghose and Chotzner, JJ.*) DEBY PRASAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL.

37 C. L. J. 314 : 72 I. C. 1013 : A.I.R. 1923 Cal. 333.

——**S. 105**—*Rent found in previous suit—Presumption.*

A decision as to the rent payable may not be *res judicata* in the sense that it finally decided the rate of rent between the parties. But it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. The decision is sufficient to support the finding that the presumption arising from the entry in the Record of Rights has been rebutted. (*Newbould, J.*) BROJENDRA KISHORE *v.* SOMAR ALI. **A. I. R. 1923 Cal. 282 (2).**

BENGAL TENANCY ACT (VIII OF 1885), S. 105.

——— -S. 105—*Settlement of fair rent—No restrospective effect.*

The settlement of fair rent under S. 105 of the B. T. Act, has no retrospective effect on the liability for rent incurred in respect of a period prior to the decision under the section. (*Mookerjee and Cuming, JJ.*) RAJENDRA NARAIN *v.* SHEIK KALIM.

26 C. W. N. 758 : 49 Cal. 875 : 67 I. C. 813 : A. I. R. 1922 Cal. 575.

———Ss. 105, 105-A—*Lands held at fixed rate of rent—Enhancement.*

Where lands are held at a fixed rate of rent according to the terms of the deed of grant, an application for the settlement of a fair and equitable rent is not maintainable. (*Mookerjee and Chotzner, JJ.*) ABINASH CHANDRA *v.* MAJUBALI CHOUDHURI.

27 C. W. N. 328 : 70 I. C. 273 : 36 C. L. J. 196 : A. I. R. 1922 Cal. 461 (2).

———S. 105—*Permanent Tenancy—Premium not paid—Effect.*

Although no premium is paid, the tenancy is permanent, if the grantee is authorised to cultivate from generation to generation. (*Mookerjee and Panton, JJ.*) RAJA RISHIKESH LAW *v.* SATISH CHANDRA PAL.

35 C. L. J. 90 : 64 I. C. 774 : A. I. R. 1922 Cal. 123

———S. 105—*Application under—All landlords must join.*

An application under S. 105 of the Act for settlement of fair and equitable rent, must be made by all the landlords and cannot be maintained if made by some of the joint landlords even though they constitute a joint Hindu family. (*Chatterjee and Panton, JJ.*) SATI PROSAD GORGA *v.* SANATAN DHARA.

61 I. C. 549 : 25 C. W. N. 38.

———S. 105-A—*Settlement Officer may constructively decide the area of the holding.*

The question of the area of the holding is constructively a matter for the determination in proceedings for assessment of fair rent. S. 105-A empowers the Settlement Officer to raise an issue about the area of the holding but he need not frame a direct issue on the point. (*Miller, C. J. and Mullick, J.*) KESHO PRASAD SINGH *v.* BHAGWAT SARAN.

5 P. L. T. 98 : 1924 P. H. C. C. 18 : 75 I. C. 670 : A. I. R. 1924 Patna 511.

———Ss. 105 and 103—*Enhancement of rent—Proceedings for—Limitation.*

It is not necessary to sue for a declaration that an entry in the Record of Rights that the defendants were raiyats at fixed rates is wrong, before instituting a proceeding for enhancement of rent under the Bengal Tenancy Act. If a suit is substantially such a declaratory suit as is contemplated in the proviso to S. 111-A of the Bengal Tenancy Act, then the plaintiff cannot, by adding a prayer for confirmation of possession, escape the six years' rule. The point from which limitation is to run is the date of the publication of the adverse entry in the Record of Rights unless there has been any subsequent invasion of the plaintiff's right, in which case, it starts from the later date. (*Bucknill, J.*) SHEOPRATAP DUBEY *v.* SHEOGULAM LAL.

72 I. C, 781 (Pat). : A. I. R. 1924 Patna 193.

———S. 105—*Settlement of rent under, bars a civil suit except as under S. 113.*

Where a fair and equitable rent has once been settled in a proceeding under S. 105, it is a bar to any subsequent proceeding for the enhancement of rent before the expiry of the period specified in S. 113 of the Act except on the grounds mentioned in that section. (*Bucknill, J.*) SHEOPRATAP DUBEY *v.* SHEOGULAM LAL. **A. I. R. 1924 Patna 193.**

BENGAL TENANCY ACT (VIII OF 1885), S. 105.

———S. 105—*Settlement of rent—Application filed by all landlords, but signed by some—Maintainability.*

Whether proceedings under S. 105, B. T. Act are suits is open to question. An application being filed by all landlords, but withdrawn by some afterwards, the point still remains undecided as regards who desire to proceed with it. An application is not deemed void by reason of a flaw in the signature or if any one of the proprietors is not mentioned in it. (*Miller, C. J. and Kulwant Sahay, J.*) HAZAR LAL SAHU *v.* AMBICA GIR. **3 Pat. 67 : 2 Pat. L. R. 169 : 79 I. C. 5 : 1923 P. H. C. C. 273 : 5 P. L. T. 591 : A. I. R. 1924 P. 104.**

———Ss. 105 and 109—*Matters not raised nor decided are not—Not* res judicata.

It cannot be held on the analogy of the doctrine of constructive *res judicata* that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105-A. of the B. T. Act, 44 C. 783 Ref. (*Das, J.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWA SARAN PANDE.

67 I C. 710 : A. I. R. 1923 P. 174.

———Ss 105, 108 and 109—*Suit for rent—Compromise—Different rate entered in Record of Rights—Suit for rent on basis of Record of Rights*—Resjudicata.

Where in accordance with a compromise in a proceedings under S. 105 the rate of rent was fixed and in a subsequent suit for recovery of rent a lesser rate was decreed on the basis of an entry in the Record of Rights, the decision in that suit does not operate as *res judicata.* (*Coutts and Ross, JJ.*) MAHARAJA SIR RAMESHWAR SINGH BAHADUR *v.* YOUNUS MOMIN.

3 Pat. L. T. 130 : (1922) P. H. C. C. 68 : 65 I. C. 474 : 6 Pat. L. J. 588 : A. I. R. 1923 P. 101.

———S. 105—*Decision settling fair and equitable rent is not open to second appeal.*

The decision of a Special Judge setting a fair and equitable rent under S. 105 of the B. T. Act is not open to second appeal but if he decides that the proceedings are maintainable under S. 105 then his decision would be open to second appeal. (*Adami and Bucknill, JJ.*) MADHAVA SURENDRA SAHI *v.* AWADH MISSER. **3 Pat. L. T. 316 : 65 I. C. 349 : A. I. R. 1923 P. 86.**

———Ss. 105 and 109-A—*Rent settled in a proceeding under S. 105—Road cess return showing lesser rate filed prior to such proceeding—Effect of.*

The landlord has a right to recover rent at a higher rate than that entered in the road-cess returns, if subsequent to the lodging of the road-cess return rent is enhanced. S. 20 of the Cess Act is no bar to such right. (*Coutts and Ross, JJ.*) NAZIR RAI *v.* KESHO PRASAD SINGH. **6 P. L. J. 622 : 1922 P. H. C. C. 57 : 4 U. P. L. R. Pat. 23 : 3 Pat. L. T. 141 : 65 I. C. 3 : A. I. R. 1922 P. 55.**

———Ss. 105 (a) and 109—*Applicability of—Suit in Civil Court—Bar.*

In order to attract the operation of S. 109 of the Bengal Tenancy Act, which contemplates creating a bar to the jurisdiction of the Civil Courts under certain circumstances, it is essential to establish that the Civil suit had for its subject a matter which had already formed the subject of an application under S. 105 of the B. T. Act. The introduction of S. 105 (*a*) has not altered the scope of S. 109 which has to be construed on the same line as before the introduction of that sub-section. (*Bucknill, J.*) SHEOPRATAP DUBEY *v.* SHEOGULAM LAL.

72 I. C. 781 (Pat.) : A. I. R. 1924 Patna 193.

———S. 105 (3)—*Appeal from order under—Court-fee to be levied on each tenancy.*

BENGAL TENANCY ACT (VIII OF 1885). S. 106.

In an appeal from an order under S. 105 (3), B. T. Act a stamp of 8*as*. is to be levied in respect of each tenancy not in respect of each tenant who may be one of a group of tenants who holds particular tenancy. (*Mookerjee, J.*) SACHIDANANDA THAKUR *v.* MAHES CHANDRA DAS. **50 Cal. 903 : 28 C. W. N. 116 : A. I. R. 1924 Cal. 345.**

——**S.106**—*Suit under—Withdrawn with liberty to sue afresh—Suit in civil court—Maintainability.*

The statutory provisions of S. 106 should be strictly enforced and not whittled down. Where a landlord who had sued in the revenue court for correction of an entry in the Record of Rights as to the status of his tenant, withdrew the suit with liberty to sue again and did not institute a fresh suit under S. 106. *Held*, that a suit in the civil court for the same relief was not maintainable. (*Mookerjee and Walmsley, JJ.*) DENO NATH SIKDAR *v.* ANADI KRISHNA DUTT. **28 C. W. N. 703 : A. I. R. 1924 Cal. 854.**

——**S. 106**—*Suit for ejectment—Prior decision in proceedings under S. 106 of the B. T. Act*—Res Judicata.

Where a landlord brings a suit in ejectment alleging that the defendant is not a tenant but a trespasser, the decision that the defendant was his tenant in a previous proceeding by the landlord under S. 106 of the B. T. Act, operates as *res judicata*. 3 Pat. L. J. 379, followed 16 C.L.J. 67 ; 9 I. C. 651, referred ; 30 C. 339, distinguished. (*Chatterjee and Person, JJ.*) JATINDRANATH CHOWDHURY *v.* AZIZUR RAHAMAN SHANA. **71 I. C. 307 : 50 C. 79 : A. I. R. 1923 Cal. 433.**

——**Ss. 106 and 109**—*Suit withdrawn with liberty to sue afresh—Effect of.*

A suit under S. 106 of the B. T. Act allowed to be withdrawn with liberty to bring a fresh one, is to be treated as one never instituted and S. 109 is no bar to the institution of suit : 33 C. L. J. 304 ; 40 Cal. 428 ; 28 C. L. J. 254, Ref. (*N. R. Chatterjee and Suhrawardy, JJ.*) SOROJ KUMAR ACHARJI *v.* UMED ALI. **35 C. L. J. 19 : A. I. R. 1922 Cal. 251.**

——**S. 106**—*Proceedings under does not bar civil suit to rectify Record.*

The fact that a proceeding under S. 106 of the Act for correcting an entry in the Record of Rights was commenced and withdrawn is no bar to a civil suit to correct the entry in the Record of Rights. (*Greaves and Newbould, JJ.*) MAHOMMED AYEJUDDIN MIA *v.* PRODYOTH KUMAR TAGORE. **48 Cal. 359 : 61 I. C. 503 : 25 C. W. N. 13.**

——**Ss. 106 and 113**—*Rectification of Record does not bar suit under S. 113.*

The rectification of the Record of Rights as regards the existing rights according to S 106 does not amount to a settlement of rent so as to bar a suit under S. 113. (*Chaudhuri and Ghosh, JJ.*) MANINDRA CHANDRA NANDI *v.* UPENDRA CHANDRA HAZRA. **60 I. C. 959 : 47 Cal. 1006.**

——**S. 106**—*Entry in Record of Rights—Suit for amending—Question of possession alone should be decided.*

Where a suit is instituted under S. 106, B. T. Act, for amending an entry in the Record of Rights as regards the possession of a parcel of land, the only matter to be decided is the question of possession and not of title. (*Mookerjee, A. C. J. and Fletcher, J.*) GOBINDA RANI DASYA *v.* MOHIM CHANDRA ROY. **35 C. L. J. 195.**

——**Ss. 106 and 109**—*Withdrawal of suit with liberty—Fresh suit, not barred.*

Where a suit under S. 106 is withdrawn with liberty to bring a fresh suit, it should be treated as not having been brought and a fresh suit brought according to the permission of the Court is not barred under S. 105 of the Act. (*Chatterjee and Suhrawardy, JJ.*) SARAJ KUMAR ACHARJI *v.* UMED ALI. **25 C. W. N. 1022 : 63 I. C. 954 : 35 C. L. J. 19.**

BENGAL TENANCY ACT (VIII OF 1885) S. 107.

——**S. 106**—*Enhancement of rent—Old tenancy—Right of landlord.*

On an application for enhancement of rent the facts were found to be these. At the time of which any historical knowledge was available, the tenure in question was created the lands were not all cultivable and had to be reclaimed. The rent was therefore fixed not on the quantity of the lands let out but on the quantity of land that could be brought under cultivation by the Talukdar. It was specifically mentioned in the Kabuliats of 1223 (B. S.) that the rent payable at the time was to be paid on the quantity of the land under cultivation until there was a measurement. A later document of 1249 contained no terms as regards enhancement. *Held*, that the document of 1249 was merely a recognition of the original tenancy created in 1223 and the rent could be increased according to the terms embodied in the Kabuliat of 1223. (*Suhrawardy and Cuming, JJ.*) JOY CHANDRA CHAKRABURTTY *v.* SRIJUT KUMAR ARUNCHANDRA SINHA. **67 I. C. 241 (Cal.).**

——**S. 106**—*Scope of.*

A Revenue Officer deciding disputes under S. 106, is confined to the question of possession only. (*Cuming, J.*) SEBA DAS JANA *v.* NIRODA BALA DASI. **63 I. C. 602 (Cal.)**

——**S. 106**—*Suit involving question of title—Settlement Officer can't transfer.*

Under S. 106 of the B. T. Act a Revenue Officer is competent to decide the question, whether the relationship of landlord and tenant subsists, if the question is not one between neighbouring estates. Where a recorded tenure-holder brought a suit under S. 106 of the B. T. Act for declaration that the entry in the survey was wrong and that he was himself the proprietor, the suit raised a question of the title between rival proprietors. Where a Settlement Officer has no jurisdiction to entertain a suit under S. 106 of the B. T. Act ; he has no jurisdiction to transfer the case to a competent Court for trial and the Civil Court cannot try the case. (*Das and Bucknill, JJ.*) MOORE *v.* RAI BABU GULAB CHAND SAHIB. **4 Pat. L. T. 68 : 1 Pat.L. R. 157 : 73 I. C. 5 : A. I. R. 1923 P. 213.**

——**S. 106**—*Entry in Record challenged—Court should find if the evidence justifies entry.*

Where the Court has before it, the evidence upon which the record was prepared and where the plff. denies the correctness of the record, the Court must come to a finding as to the sufficiency of the evidence to justify the entry. (*Ross, J.*) JANKI KUAR *v.* USMAN SAIN. **62 I. C. 417 (Pat.).**

——**S. 106**—*Nature of suit.*

A suit under S. 106 of the Act has no legal concomitants which differentiate it from any other ordinary civil suit. (*Bucknill, J.*) JANKI KOER *v.* WALI MUHAMMAD. **61 I. C. 420 (Pat.).**

——**S. 107**—*Does not make O. 6, R. 14 C. P. Code applicable to applications under S. 105, B. T. Act.*

S. 107 of B. T. Act makes the procedure for the trial of suits laid down in the C. P. Code applicable to proceedings under S. 105 of the B. T. Act, and not to applications initiating the proceedings ; and therefore it does not make the provisions contained in the Code of Civil Procedure relating to the verification of a plaint applicable to such proceedings. (*Dawson Miller, C. J. and Kulwant Sahay, JJ.*) HAZARI LAL *v.* AMBIKA GIR.

BENGAL TENANCY ACT (VIII OF 1885), S. 109.

3 P. 67 : 1923 P. H. C. C. 273 : 2 P. L. R. 169 ; 79 I. C. 5 : 5 P. L T. 591 · A. I. R. 1924 Patna 104.

——**S. 109**—*Application under S. 105 made but withdrawn with liberty to bring suit—Suit in Civil Court for that relief is barred.*

If an application is made under S. 105 of the B. T. Act, and subsequently withdrawn whether with or without the permission of the Court to bring a suit, a fresh suit on the same subject-matter is barred by the provisions of S. 109 of the Tenancy Act.

The words 'subject of an application made' admit of only one interpreation and, that is that once an application is made, the Civil Court cannot entertain an application, or suit in respect of the same matter. It is of no consequence what happens to the application: it may be prosecuted to a conclusion, or abandoned, or dismissed for default, or withdrawn by leave of the Court or without the leave of the Court. It is the fact of the application being made, and not the manner of its disposal that has to be considered. (Suhrawardy, J. dissenting.) (*Walmsley, Newbould, C. C. Ghose, Suhrawardy and B. B. Ghose, JJ.*) BECHARAM CHOWDHARY *v.* PURNA CHANDRA CHATTERJI.

41 C. L. J. 456 : 88 I. C. 637 : 29 C. W. N. 755 (F. B.) ; A. I. R. 1925 Cal. 845.

——**S. 109**—*Second appeal—Competency of Court to settle rent.*

Where the question trial ralsed to the competency of a court to settlement and not to settling the rent itself, a second appeal lies. (*Suhrawardy and Cuming, JJ.*) RAM SUNDAR DAS *v.* SATINDRA MOHAN TAGORE. **89 I. C. 190.**

——**S. 109**—*Previous application withdrawn—Section applies.*

S. 109 operates as a bar even in cases in which the previous application was withdrawn. (*Pearson and Graham, JJ.*) BEJOY KUMAR PAL *v.* NAGENDRA NATH CHAUDHURY.

83 I. C. 876 : A. I. R. 1925 Cal. 478.

——**Ss. 109 and 106**—*Withdrawal under S. 106 bars suit in Civil Court under S. 109.*

Withdrawal of suit under S. 106 with liberty to institute a fresh suit it not barred, bars a fresh suit for the same relief in the Civil Court under S. 109. (*Mookerjee and Walmsley, JJ.*) DINO NATH SIRKAR *v.* ANADI KRISHNA DUTT. **28 C. W. N. 703 : 83 I. C. 873 : A. I. R. 1924 Cal. 854.**

——**Ss. 109 and 105**—*Withdrawal of Application for settling rent—Subsequent civil suit does not lie.*

Where after applying for the Settlement of a fair rent under S. 105, B. T. Act, before a Revenue Court, the same is withdrawn and a suit is filed for enhanced rent in a Civil Court, S. 109, B. T. Act operates as a bar. (*Walmsley and B. B. Ghose, JJ.*) SASI KANTA ACHARJA *v.* SALIM SHEIKH. **27 C. W. N. 987 : 74 I. C. 1001 : 50 Cal. 626 : A. I. R. 1923 Cal. 624.**

——**S. 109**—*Contract against section—Fair rent—Settled on basis of, cannot be enforced.*

In every case where the provisions of S. 109 (c) of the B. T. Act are invoked, there should be a strict compliance with its requirements. The Settlement Officer has to determine in thefirst place whether the terms of the agreement are really such that if they were embodied in a contract, they would not be enforced under the Act. If the conclusion is in the affirmative, he is to satisfy himself that the rent agreed upon is fair and equitable. It is only in the event of his being so satisfied, but not otherwise, that he can settle such rents as fair and equitable. Where the Revenue Officer instead of complying with the terms of S. 109 (c) passed an order in these terms "The tenant agrees. Though the increase is rather large, the attested compromised rent may be settled as fair and equitable." *Held* that S. 109 (c) did not contemplate settlement of fair and equitable rent on the basis of such an ambiguous order and in accordance with a contract, which contravenes the provisions of the B. T. Act. (*Mookerjee and Chotzner, JJ.*) MOYDHANNESSA BIBI *v.* SATIS CHANDRA GIRI.

37 C. L J. 118 : 70 I. C. 895 : A. I. R. 1923 Cal 435.

——**S. 109**—*Second appeal—Decision of special Judge is open to.*

The decision of a special Judge is substantially a decision on the question of the status of a tenant and is open to second appeal. 43 C. 603 Ref. (*Mookerjee and Cuming, JJ.*) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHUTTACHARYA.

36 C. L. J. 333 : 70 I. C. 437 : A. I. R. 1923 C. 141.

——**S. 109**—*Scope of—No bar to entertainment of defence.*

Under S. 109 of the B. T. Act what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit. (*Mookerjee and Cuming, JJ.*) RAJENDRA NARAIN *v.* SHEIKH KALIM. **49 Cal. 875 : 67 I. C. 813 : 26 C. W. N. 758 : A. I. R. 1922 Cal. 575.**

——**S. 109**—*Decision merely settling rent—Decision as to extent of area and liability to enhancement is not such.*

Where the decision of the special Judge involved a determination of two fundamental questions in connection with the tenancy held by the defendant, *viz.*, the extent of area and their liability to enhancement, it is not a decision merely settling rent within S. 109-A of the B. T. Act and a second appeal lies therefrom. (*Mookerjee and Cuming, JJ.*) THE MIDNAPUR ZEMINDARY CO., LTD. *v.* SRIDHARI MAHATA.

36 C, L. J. 96 : 49 Cal. 866 : 67 I. C. 775 : A. I, R. 1922 Cal. 152.

——**Ss. 109 and 105**—*Dismissal or withdrawal of application under S. 105 operates as a bar.*

An application for enhancement of rent under S. 105 of the Act which is withdrawn or dismissed for default is an application under S. 109 of the same Act, and a Civil Court has no jurisdiction to entertain a suit relating to the same subject-matter. (*Mookerjee, C. J. and Fletcher, J.*) ABEDA KHATUN *v.* MAJUBALI CHOWDHURI. **24 C. W. N. 1020 : 48 Cal. 157 : 59 I. C. 760 : 33 C. L. J 304.**

——**S. 109**—*Question of area—Determination—Civil Court if can question—Settlement Officer's proceedings.*

In a suit for abatement of rent the Settlement Officer's determination of the area actually held cannot be re-agitated in the Civil Court since the same has once been determined under S. 105. (*Dawson Miller, C. J. and Mullick, J.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWANT SARAN PANDE. **5 Pat L. T. 98 : 75 I. C. 670 : 1924 P. H. C. C. 18 : A. I. R. 1924 P. 511.**

——**Ss. 109 and 105**—*Constructive*—Res judicata.

Where the tenant claimed abatement of rent under S. 52 but no such question was raised or investigated in the proceeding under S. 105, on a plain and literal reading of S. 109, the position could not be maintained that the suit concerned a matter which had already been the subject of an application under S. 105. The appellant urged a wider construction to be put upon S. 11. Where it was contended that as in a case where S. 11, C. P. Code, is applicable, a question which might

and should have been raised is deemed to have been raised and decided, the High Court should hold under S. 109 that a matter has been the subject of an application under S. 105 whenever it might, if the defendant had so chosen, have been raised and decided under S. 105 read with S. 105-A. *Held*, that this contention was unsound. If the construction put forward by the appellant were accepted, words which are not found there would have to be read into S. 109. It would be held on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the Civil Court had been constructively excluded even when a point had been neither raised nor decided under S. 105-A. (*Das, J.*) MAHARAJAH BAHADUR KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE.

67 I. C. 710 : A. I. R. 1923 P. 174.

———**Ss. 109-A and 188**—*All landlords need not join in appeal under S. 109-A.*

The act authorised by the Tenancy Act in the making of the application under S. 105 and S. 109-A does not authorise a new act but merely provides that in a case under S. 105 any party aggrieved by the decision of the Revenue Officer will have a right of appeal. The concert among the landlords insisted upon by S. 188 need not exist in an appeal under S. 109-A. 38 Cal. 270 Dist. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN SINGHA *v.* MAHOMED ISMAIL.

52 Cal. 139 : 86 I. C. 1035 : A. I. R. 1925 Cal. 637.

———**S. 109-A**—*Appeal lies—Order of special Judge refusing to set aside abatement of appeal.*

S. 109 (A) of the B. T. Act is no bar to an appeal from an order of a special Judge refusing to set aside an abatement of an appeal. 45 C. 638, foll. (*Cuming and Panton JJ.*) KRISHNADAS ACHARJEE CHOWDHURY *v.* SAMSAN ALI SHEIKH.

37 C. L. J. 139 : 74 I. C. 925 : A. I. R. 1923 Cal. 431.

———**S. 110**—Settlement of fair rent under S. 105 —Suit for back rents. CHANDI CHARAN LAL *v.* MEHER BANU. **52 Cal. 910.**

———**S. 111**—*Scope and effect of—Suit for rent—Preparation of Record of Rights—Stay.*

Plaintiff instituted a suit on the 14th April 1919 for recovery of rent at an enhanced rate under S. 30 as well as for additional rent under S. 52 of the Act against the defendant who was a tenant. The defendant put in his written statement on 2nd June 1919 and subsequently on 4-7-1921 he raised an objection that the suit could not be proceeded with having regard to the provisions of S. 111 of the B. T. Act as an order had been made in June 1920 under S. 101 directing the preparation of a Record of Rights. *Held*, that under the circumstances the proper course for the trial court was to adjourn the trial of the suit until after the final publication of the Record of Rights. The expression "shall not entertain" includes the cases not only not already instituted but cases where suits have already been instituted but not tried. The object of the legislature is to avoid conflicting decisions of the Civil and the Revenue Courts on the same matters. That is why the trial of the suit or application in civil court is prohibited by the section as soon as the order for the preparation of the Record of Rights has been made. (*Chatterjee and Panton, JJ.*) PROMODE NATH ROY *v.* BASIRUDDIN QUAZI. **51 Cal 230 : 28 C. W. N. 631 : 81 I. C. 993 : 40 C. L. J. 177 : A. I. R. 1924 Cal. 704.**

———**S. 111-A**—*Suit for declaration—Cause of action—Entry in Record of Rights—Non-agricultural land.*

There was a Record of Rights of the mouzah in which a tank was situated, under Chap. X. The tank was

recorded as within the tenancy of the plaintiffs, but it was also recorded that the defendants would be entitled to rear fishes and use the water of the tank. But the plaintiffs said that the defendants have no right to rear fishes in the tank and the Record of Rights was erroneous to that extent. The suit has been brought for a declaratory decree as provided in the proviso to Sec. 111-A. The defendant No. 1 contested the suit and he pleaded that he and his predecessors before him were the proprietors of 6-annas share of the tank and another person was the proprietor of the remaining 10-annas share and he further pleaded that he and his ancestors have been exercising possession over the 6 annas share of the tank for the last 50 years by using its water and rearing and catching fishes. The lower Court dismissed the suit entirely, holding against the plaintiffs that they had no cause ot action. *Held*, that the record, if allowed to stand, restricted the absolute ownership of the plaintiffs and disentitled them from excluding the defendants from exercising some acts of possession. They had therefore the right to complain against the entry in the Record of Rights and this gave them a good cause of action. (*Newbould and Ghose, JJ.*) CHAND MIA MUNSHI *v.* TUKAMIA. **28 C. W. N. 516 : 80 I. C. 805 : A. I. R. 1924 Cal. 667.**

———**S. 111-A**—*Declaratory suit—Limitation from final publication of Record of Rights.*

S. 111-A gives plaintiffs the right to institute a suit for a declaration that they have raiyati and under raiyati rights, on the publication of the Record of Rights or in other words they had a statutory cause of action which arose on the date of the final publication. (*Newbould and Panton, JJ.*) BADAR UDDIN *v.* SARAPADDIN. **A. I. R. 1923 Cal. 307.**

———**S. 114**—*Cost of survey and settlement is an assessment on persons in respect of land.*

A *putni* lease under the plff. ran thus :—'Should any tax, toll or rent or whatever sum under whatever denomination, be assessed in future, the same should be paid by the lessee if they were assessed on the two *taluks* but it was to be payable to the lessor if it was assessed on the lessor's income.' Under Chap. X of the B. T. Act the plff. had to pay to Government his share of the cost of Cadastral Survey and Settlement under S. 114. In a suit by plff. against the deft. for the sum, *held*, that the assessment under S. 114 was not upon the land but upon certain persons in respect of the land and so was not recoverable under the *patni* lease terms. (*Mookerjee, A. C. J. and Fletcher, J.*) BEJOY SINGH DUDHURIA *v.* HEM CHANDRA CHAUDHURI. **62 I. C. 925 : 38 C.L.J. 349.**

———**Ss. 115 and 102**—*Record of Rights—Entry in—Status of tenants.*

If the entries in the Record of Rights do not record particulars under the provisions of S. 102, cl. (*b*), then the presumption under S. 50 of the Act applies and of course if the particulars to be recorded under S. 102, cl. (b) have not been rightly recorded equally then the presumption under S. 50 arises and S. 115 has no application. (*Greaves and Graham, JJ.*) MOFIZUDDIN CHOWDHURY *v.* RAJENDRA NATH SAMYAL.

40 C. L. J. 248 : 29 C. W. N. 209 : 84 I. C. 989 : A. I. R. 1925 Cal. 208.

———**S. 115**—*Scope of.*

S. 115 of the B.T. Act does not come into operation at all until all possible proceedings under Chap. X have been exhausted. If discontinuous receipts for rent produced by the tenant show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity, infer that there has been no change in the

BENGAL TENANCY ACT (VIII OF 1885), S. 115.

intervening periods. 36 C. L. J. 336, Rel. (*Mookerjee and Walmsley, JJ.*) NARENDRA LAL CHOWDHURY *v.* BENODE BEHARI SADHU KHAN.

27 C. W. N. 740 : A. I. R. 1924 Cal. 143.

——**Ss. 115 and 50**—*Clash of presumption—Presumptions as to fixity of rent—Entry in Record of Rights.*

S. 115, B. T. Act, provides against clashing of presumptions. It will not permit the presumption under S. 50 of the Act to override that raised from the record of the particulars under Chap. X. It will not be reasonable to suppose that the Legislature intended by enacting S. 115 to preclude evidence of uniform payment of rent for the statutory period in support of the entry of fixity of rent in the Record of Rights where such entry is presumably based on the evidence of such uniform payment. It will be shutting out a very valuable piece of evidence in favour of a comparatively weak one. If the tenant succeeds in proving a uniform payment of rent from the time of the Permanent Settlement, the rent shall not be liable to be increased whereas the presumption of the correctness of an entry in the Record of Rights though based on such uniform payment is only a rebuttable one. (*Richardson and Suhrawardy, JJ.*) RASH BEHARI GUHA *v.* DWARKA NATH BANDOPADHYA.

27 C. W. N. 936 : 76 I. C. 401 : A. I. R. 1923 Cal. 365.

——**Ss. 115 and 50**—*Record of Rights—Finality of—Presumption does not arise.*

Once the Record of Rights becomes final, a tenant cannot in view of the provisions of S. 115 of the B. T. Act claim the presumption under S. 50 of that Act In S. 115 the expression "thereafter" means after the particulars have been finally recorded after recourse to all the provisions contained in Chap. X for the attainment of finality in this respect. 37 C. 30, foll.; 45 C. 930 ; 51 I. C. 552, Ref. ; 12 C. W. N. 904, not Foll. (*Mookerjee and Cuming, JJ.*) PRASANNA KUMAR SEN *v.* DURGA CHARAN CHAKRABARTY.

36 C. L. J 291 : 49 C. 919 : 70 I. C. 537 : 26 C. W. N. 947 : A. I. R. 1922 Cal. 146.

——**S. 115**—*Presumption under S. 50 cannot be rebutted after publication of record.*

Rebuttal of presumption under S. 50 is permitted before the publication of Record of Rights. Tenant is precluded after the publication of the Rights under this section. (*Chatterjee and Panton, JJ.*) BAMAN DAS *v.* SADHU MAJHI. **26 C. W. N. 945 : 64 I. C. 445 (Cal.).**

——**S. 115**—*The word 'Thereafter' refers to a period subsequent to a publication of Record of Rights.*

The word "thereafter" refers to a period subsequent to the publication of the Record of Rights. But what is provided is that the presumption under sec. 50 shall not, thereafter, that is to say after the particulars mentioned in sec. 103 have been recorded, apply. (*Dawsen Miller, C. J. and Foster, J.*) RAMESARAM MAHTEN *v.* SYED MUHAMMAD ARADUT HUSSAIN.

6 P. L. T. 221 : 80 I. C. 926 : A. I. R. 1925 Pat. 181.

——**S. 115**—*Presumption under S. 50 cannot be relied on after publication of record.*

Under S. 115 a tenant cannot rely upon the presumption under S. 50 (2) after the final publication of the Record of Rights except in a suit instituted under S. 106 challenging the entry itself within three months from the date of its final publication. (*Das and Bucknill, JJ.*) GOBIND LAL SIJUAR *v.* RAM SARAN LAL.

68 I. C. 433 : 2 Pat. L. T. 642.

——**S. 116**—*Lessees from person holding for a term of years—Possession is as lessees from year to year—Occupancy rights will not accrue in their favour.*

BENGAL TENANCY ACT (VIII OF 1885), S. 120.

Persons holding under a lease for a term of years cannot make any contracts of tenancy with raiyats except contracts for a term not exceeding the period of their lease. The tenants, therefore, will be presumed to be in possession for successive terms of one year by oral lease ; S. 116 does not permit the accrual of occupancy rights in favour of such tenants. They cannot claim the rights of a non-occupancy raiyat under any part of the Bengal Tenancy Act and the special law of limitation in Sch. III of the Act does not apply ; therefore, the tenants are liable to ejectment as trespassers on the expiry of the tenancy of their lessors with which their own was co-terminous. (*Mullick and Bucknill, JJ.*) CHANCHAND MAHTON *v.* BHAGWAN. **A. I. R. 1925 Pat. 771.**

——**S. 116**—Kamat *lands—Occupancy rights.*

Kamat lands are the proprietor's private lands over which the acquisition of occupancy rights is restricted by S. 116. In cases where they are settled, but not from year to year or for a term of years, become subject to occupancy rights in the tenant and thus lose their original character. (*Miller, C.J. and Foster, J.*) TILAKDHANAL *v.* ABDUL WAHAB KHAN.

89 I. C. 913.

——**S. 116**—*No raiyati interest can be created, in zerait lands by tenants under a registered lease for a term—After the term they are tenants from year to year.*

In zerait lands tenants cannot acquire occupancy rights under S. 116 where they were inducted upon the lands under a registered lease for a term of years. The tenants cannot acquire any right or interest either occupancy or non-occupancy in the lands during the continuance of the lease. They also hold over under the same conditions as the registered leases after the expiry of the lease and they become tenants from year to year. To such a case S. 116 would apply. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT. **1924 P. H. C. C. 337 : 4 Pat. 89 : 84 I. C. 305 : 6 P. L. T. 240 : A. I. R. 1925 P. 241.**

——**S. 116**—*Tenant of Zerait land.*

Even apart from a registered lease for a term of years or from year to year no tenancy of occupancy or non-occupancy rights in Zerait lands can arise. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT. **1924 P. H. C. C. 337 : 4 Pat. 89 : 6 P. L. T. 240 : 84 I. C. 305 : A. I. R. 1925 P. 241.**

——**S. 120**—*Zerait land—Occupancy rights cannot be created by contract or grant—Evidence—Section does not exclude any evidence relevant under the Evidence Act.*

The B. T. Act does not pretend to enumerate the different modes by which rights of occupancy could be acquired at the time when the Act came into force ; it merely saves such rights as had already been acquired. The acquisition of occupancy rights by grant was, up to the passing of the B. T. Act, foreign to the law of Bengal. There is nothing in either S. 20 or S. 21 or in any other section of the B. T. Act which provides that a right of occupancy can be acquired either by grant or by contract. An occupancy right is inherent in the status of the raiyat and is not the landlord's to grant. If a landlord confers occupancy right on a tenant in zerait land that does convert the zerait into raiyati land for all time. If a question arises as to the character of the land purchased by the landlord from the tenant there must be an enquiry as to the original character of the land. If it was originally raiyati land the landlord cannot by getting *khas* possession treat it as zerait. But if it is

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proved that the land was zerait land within the meaning of S. 120 of the B. T. Act, the land regains its character as such if it comes into the possession of the landlord. The tenant with whom the land is settled subsequently cannot acquire the rights of occupancy in it. When a question arises as to whether the land which is claimed to be zerait land is in fact zerait land, an assertion of title on the part of the landlord and communicated to the tenant before 2-3-1883 will be conclusive evidence in his favour. Assertions after that date though not conclusive may be taken into consideration as evidence in favour of the landlord. There is nothing in S. 120 which tells the Civil Courts definitely and clearly that they are to exclude from their consideration that which is relevant evidence under the Evidence Act, and which they are bound to regard under S. 120 paragraph (2), of the Act (*Das and Kulwant Sahay, JJ.*) KESHO PRASAD SINGH *v.* PARAMESHRI PRASAD SINGH. **2 Pat. 414 : 1923 P. H. C. C. 65 : 4 Pat. L. T. 135 : 1 Pat. L.R. 111 : 71 I.C. 902 . A.I.R. 1923 Pat. 276.**

——S. 120—Zerait *land—Recital in Lease—Is no evidence—Survey record, presumption from, is a rebuttable one.*

A description of a land as *Zerait* in a lease will not be any evidence to show that the land was really *zerait* for there must be evidence under S. 120 to show either that the land was held in the *seer* cultivation of the landlord for 12 contiuous years immediately before the passing of the Act or that it was recognized by village usage as proprietor's Khamar, zerait, Seer Nig Jote or Kamat. Clause 2 of S. 120 allows the evidence of the land being specifically let as proprietor's private land before the 2nd of March 1883. The presumption afforded by the survey of Record-of-rights is a rebuttable one. (*Jwala Prasad and Bucknill, JJ.*) BENI CHOUDHURI *v.* TRILOKENATH TEWARI. **A. I. R. 1922 Pat. 425.**

——S. 121—*Distraint on 2nd December for rent due on 1st is valid—Penal Code, Ss.* 143, 424.

Order of distraint under S. 121, made on 2nd December for rent payable on 1st December is not illegal. Hence if the raiyat's crops are attached and he goes to the land and cuts the crops in spite of the attachment and protest of the attaching officer, he is liable to be prosecuted under Ss. 143 and 424 of the Penal Code. (*Sanderson, C. J. and Mookerjee, J.*) SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS *v.* KAJAL HOALDAR. **33 C.L.J. 24 : 25 C.W.N. 209 : 62 I. C. 187 : 22 Cr. L. J. 491.**

——S. 147-A—*Scope.*

The principle that a consent decree is not more valid than a contract itself is recognised in the section. (*Mookerjee and Suhrawardy, JJ.*) GANESH CHANDRA PAL *v.* CHANDRA MOHAN DUTT. **28 C. W. N. 984 : 84 I. C. 730 : A. I. R. 1925 Cal. 199.**

——S. 147-A—*Non-compliance with — Objection cannot be taken in execution proceedings.*

Under a compromise in a rent suit, the deft. took some more land and entire rent was fixed for the whole land, original and additional. The Court did not in passing the decree, comply with S. 147-A. *Held*, that the objection could not be taken in execution proceedings. (*N. R. Chatterjee and Newbould, JJ.*) HEMCHANDRA CHOUDHARI *v.* CHANDRA MOHAN NAMODAS. **60 I. C. 204 : 24 C. W. N. 1070.**

——S. 147-A—*Consent decree in contravention of —Not a nullity.*

A consent decree passed as between a landlord and tenant in contravention of the provision of S. 147 (*a*) of the B. T. Act is not a nullity and it cannot be set aside in a separate suit or questioned in collateral proceedings. (*Das and Adami, JJ.*) DEOLAGAN SINGH *v.* MT. GULBANSI KOER. **69 I. C. 616 : 1 Pat. L. R. 43 : A. I. R. 1924 Pat 374.**

——S. 147-A—*Compromise decree not complying with terms of the section is a nullity.*

Where the provisions of S. 147-A of the B. T. Act have not been complied with, a compromise decree fixing the rent as between a landlord and tenant is a nullity and no effect can be given to it. (17 C. W. N. 496, Ref.) The fact that the rate of rent recorded in the compromise was also recorded in the partition proceedings can make no difference. Where the original rate of rent is known or proved (as by an entry in the Record-of-Rights) it is not open to the parties to effect an enhancement of rent under the cloak of a compromise. (*Ross, J.*) KUNJ BEHARI CHAUDHURY *v.* CHARAN SINGH. **72 I.C. 40 (Pat.) : A. I. R. 1924 Pat. 204.**

——S. 147-A—*Applicability—Suit between landlord and trespasser is not governed by section.*

If a tenant who holds over after the expiration of the term of his tenancy is sued *bona fide* in ejectment as trespasser and the suit is compromised by recognition of the tenant as occupancy tenant from the date of the compromise, the enhancement is not illegal under Ss. 29 and 147 of the B. T. Act as the suit is between landlord and trespasser and not between landlord and tenant. (*Coutts and Adami, JJ.*) SHEOGOBIND SINGH *v.* MAHABIR MISSER. **4 Pat. L. T. 301 : 1922 P. H. C. C. 319 : 71 I. C. 1453 : A. I. R. 1922 Pat. 654.**

——S. 148—*Tenure extended by natural accretions—Rent suit confined to lands actually leased cannot be dismissed.*

When subsequent to the creation of the tenure there has been an accretion of lands in the bed of a contiguous river, the tenants are entitled to the accreted lands as an increment to their tenure. But the fact that the landlord does not include the accreted lands in his suit for rent but confines himself to the lands actually let does not make his suit liable to be dismissed. (*Walmsley and B. B. Ghose, JJ.*) DHIRENDRA CHANDRA RAI *v.* NAWAB KHAJA HABIBULLAH. **29 C. W. N. 505 : 87 I. C. 442 : A. I. R. 1925 Cal. 758.**

——S. 148—*A suit for plaintiff's share alone, but praying that under certain conditions, decree for the amount due to all co-sharers might be passed, is untenable.*

Where the plaintiffs sue for their share of the rent alone, and they state that a certain amount might be due to the co-sharer landlords and the prayer is that under certain conditions a decree for the total amount due might be passed, this is not in accordance with S. 148-A (1). 34 C. L. J. 462. Dist. (*Newbould and B. B. Ghose, JJ.*) GANGAMANI BISWAS *v.* RABJA ALI CHAUKIDAR. **51 Cal. 935 : 40 C. L. J. 512 : 84 I. C. 145 : A. I. R. 1925 Cal. 106.**

——S. 148—*Assignee of property with back and future rents—Right to execute decree for arrears of rent.*

An assignment of properties with all back and future rents does not entitle the assignee to execute a decree for rent subsequently obtained by the landlord when the decree itself had not been assigned to him. S. 148 does not assist the assignee, for, if at all, those provisions impose on the transferee of a rent decree a further disability which must be removed before he can apply for executing the decree as a rent decree. (*Walmsley and Mukerjee, JJ.*) MATHURAPUR ZEMINDARI CO., LTD. *v.* BHASARAM MANDAL. **28 C. W. N. 626 : 39 C. L. J. 373 : 80 I. C. 881.**

BENGAL TENANCY ACT (VIII OF 1885), S. 148.

51 Cal. 703 : A. I. R. 1924 Cal. 661.

——S. 148—*Procedure under, is summary — Questions of title may be gone into.*

The procedure under S. 148, B. T. Act is not a special but a summary one. There is no rigid rule of law that in a rent suit properly so called and filed under S. 148, a question of title may not be determined if it arises. Even if a claim which is not for rent is included in a suit tried under that section, there is no lack of jurisdiction on the part of the judge to deal with the claim. Where a suit for rent against the tenant and an alternative claim for money had, and received, was tried under the summary procedure prescribed by S. 148 the jurisdiction of the Court is not in any way affected and the decision will be binding. (*Rankin and Buckland, JJ.*) KRISHNA KUMARI BASU *v.* NAGENDRA PRASAD BASU.

27 C. W. N. 716 : 50 C. 807 : A. I. R. 1923 Cal. 699.

——S. 148-A—*Suit for rent—When lies.*

A suit to fall within S. 148-A, must be a suit to recover the whole of the rent due or the plaintiffs must be unable to ascertain whether or not the whole of the rent is due. (*Greaves and Mukerjee, JJ.*) HARI MOHAN DALAL *v.* PURENDRA NATH NAG CHOUDHURY. **90 I. C. 955.**

——S. 148-A—*Nature of suit under.*

The essential principles underlying S. 148, B. T. Act, are that the suit should in form be for the whole rent and in substance for the separate share of rent in arrears and the whole body of landlords should be impleaded with the allegation that the plff. has not been able to ascertain what rents, if any, are due to the former. In such cases the whole rent due must, in the nature of the things be always a matter of speculation for the plaintiff and he can assert that he believes that his share of the rent, due is the entire rent due and decide on the accuracy of that belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves. 27 C. L. J. 101, Diss ; 4 Pat. L. J. 500, Foll. (*Jwala Prasad and Bucknill, JJ.*) MASUD AHMAD *v.* JAGAN SINGH.

3 Pat. L. T. 439 : 68 I. C. 625 : A.I.R. 1922 Pat. 560.

——S. 148-A—*A single co-sharer's suit complying with S. 148-A makes the decree a rent decree.*

Where a co-sharer landlord in a suit for rent mentioned in his plaint rent payable in the sixteen annas share and in the different shares and the amount due for the period in suit with damages in the whole and for the shares of all the co-sharers and the amount due to the other co-sharers and the refusal by the co-sharers to let plaintiff know the amount due to the plaintiff and where the plaintiff alleged that if the co-sharer defendant wished to be added as plaintiffs on disclosing the share due to them they might be made co plaintiffs.

Held, that S. 148-A was complied with and therefore the decree in the suit was a rent decree. (*Walmsley and Suhrawardy, JJ.*) JAGBANDHU NANDI *v.* ABDUL HAMID MEA. **28 C. W. N. 757 : A. I. R. 1925 Cal. 82.**

——Ss. 148-A, 158-B and 169—*Rent sale—Occupancy holding—Auction purchaser of an interest—Co-sharer landlord suing for his share of rent—Entire body of landlords suing for rent—Auction purchaser of share not made a party—Effect of.*

Co-sharer landlords having separate realisation of rents in respect of their shares, are entitled to realise their share of rent separately. But such an arrangement expressed or implied merely affects the right to sue separately and in no other respect modifies the terms of the holding and the rights to bring the tenure to sale for arrears of rent remains intact. 35 Cal. 331 Ref. In the absence of any sub-division of the occupancy holding with the consent of all the landlords, the right of the entire body of landlords to put up the entire holding to sale is not affected by the purchase of the holding at the sale held in execution of the decree obtained by some of the co-sharer landlords for their shares of rents. A purchaser of a share of an occupancy holding in execution of a decree for rent obtained by some of the co-sharer landlords, is in the position of an unregistered transferee. 9 C. W. N. 134 Ref. He is not a necessary party to a suit brought by the entire body of landlords for entire rent. S. 148-A of the Act is an enabling section. A co-sharer landlord is given the right to proceed with the suit for his share only of the rent where he is unable to ascertain whether any amount is due to the other co-sharer. A co-sharer landlord has a right to claim the whole rent on behalf of the entire body of landlords 35 Cal. 331 (344, 345) ref. It is only in a case so framed that the decree has the effect of a rent decree. The mere fact that something was claimed that was not properly due will not make the decree any the less a rent decree. 8 C. W. N. 172 Ref. (*Chatterjee and Pearson, JJ.*) SASTRI CHARAN CHAKRABARTY *v* AKUBJAN BIBI. **26 C. W. N. 639 : 35 C. L. J. 30 · 64 I. C. 591 : A. I. R. 1922 Cal. 243:**

BENGAL TENANCY ACT (VIII OF 1885), S. 148-A.

——S. 148-A—*Nature of Suit under.*

A suit under S. 148-A of the Act should be to recover the whole of the arrears due and not the entire rent payable for the holding. 18 C.W.N. 1016 Foll. ; 27 C. L. J. 101, Dist. (*Chatterjee and Pearson, JJ.*) PROFULLA CHANDRA GHOSE *v.* BABURAM MANDAL. **65 I. C. 1 : 34 C. L. J. 462.**

——S. 148-A—*Decree for arrears of rent obtained against some tenants only is not rent decree.*

Where the tenants were a group of lohars and a kumri, and not a joint family ;

Held, the lohars could in no way represent the interest of the kumri, and the decree for rent passed against lohars cannot be declared to be a rent decree. (*Foster, J.*) RAMJAS PANDEY *v.* AWADH MAHTON, **A. I. R. 1925 Pat. 783.**

——S. 148-A—*A suit under--Co-sharer landlords made defendants and not denying plaintiff's share—Tenants not alleging payment of rent to co-sharer landlord in excess of share alleged by plaintiff to such co-sharer— Tenant cannot question plaintiff's share.*

In a suit framed according to the provisions of S. 148 A. where the tenant-defendants do not allege that any co-sharer landlord has been left out from the suit, or that they had paid rent to the co-sharer in excess of the share alleged by the plaintiffs to be held by such co-sharer, it is not open to the tenant-defendants to question the share of the rent payable to the plaintiffs landlords. 1925 Cal. 26 Dist. (*Kulwant Sahay, J.*) SALEHA *v.* HULAS MAHTON. **86 I. C. 559 : A. I. R. 1925 Pat. 564.**

——Ss. 148-A and 188—*Co-sharer landlords—Suit for rent by one when lies.*

Where a tenant makes a contract by which he is liable to pay rent to several co-sharers jointly, one co-sharer cannot maintain a suit for the whole rent. S. 188 of the B.T. Act demands that landlords shall do jointly anything which they are under the Acts required or authorised to do, but there is nothing to prevent one co-sharer from bringing a suit for the whole rent after making the co-sharers who refused to join as plaintiffs, defendants in the suit. 35 C. 331 Ref. Again if a co-sharer can prove that there is a contract express or implied by which a tenant is liable to pay him his share of the rent separately, then he may

bring a suit for that part of the rent without joining his co-sharers as defendants, but the decree obtained by him is to be executed as money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection all the co-sharers may sue jointly for the whole rent. To further facilitate the recovery of arrears of rent due to a co-sharer who is in dispute with his tenants or with his fellow landlords, the legislature enacted S. 148-A of the B. T. Act. The section requires firstly, that the co-sharer shall sue to recover the rent due to all the co-sharer landlords in respect of the entire holding, secondly, that he must make all the remaining co-sharers parties to the suit, and thirdly, that he must state that he is enable to ascertain what rent is due for the whole tenure or holding or whether the rent due to either co-sharer landlords has been paid owing to the refusal or neglect of the tenant or of all the co-sharer landlords, defendants in the suit, to furnish him with direct information on these points or on either of them. In such a case the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree-obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co-sharer landlords have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. 4 Pat. L. J. 500 Rel. (*Miller, C. J. and Mullick, J.*) RAJGIRI SINGH *v.* JADUNATH SINGH.

1922 P. H. C. C. 355 : 4 P. L. T. 39 : A. I. R. 1923 Pat. 41.

——**S. 150**—*Applicability—Rate of rent in issue.*

S. 150 does not apply where the rate of rent is in issue. (*Greaves and Cuming, JJ.*) DHIRENDRA NATH GHOSE *v.* CHARUSHASHI DEBYA.

90 I. C 431.

——**S. 150**—*Tenant pleading that he has cultivated lesser area than that for which rent is claimed—S. 150 applies.*

Irrespective of the question as to whether the burden of proof lies on the plaintiff or not, in cases where the defendant admits that money is due from him to the plaintiff on account of rent, his plea that the amount claimed is in excess of the amount due cannot be taken cognizance of by the Court unless the defendant pays into Court the amount so admitted to be due. (30 Cal. 947 Diss.) Hence where the tenant pleads that he has cultivated a lesser area than that in respect of which rent is claimed, S. 150 would apply. (*Mullick and Kulwant Sahay, JJ.*) KESHEO PRASAD SINGH *v.* TRILOKE NATH TEWARI. **86 I. C. 841 : 4 Pat. 304 : A. I. R. 1925 Pat. 489.**

——**S. 153**—*Rent decree—Execution proceedings—No appeal lies from an order of special Judge where decretal amount is less than Rs. 50.*

Under S. 153 no appeal lies against an order passed by a Special Judge on an application to set aside a sale in execution of a rent decree for an amount less than Rs. 50 on the ground of fraud. 32 Cal. 957 (F.B.) Rel. on. (*Greaves and Mukerjee, JJ.*) SHASHI KANTA ACHARJYA *v.* MANU SHEIKH.

A. I. R. 1925 Cal. 1064.

——**S. 153**—*Rent suit—Plea of non-joinder of necessary parties and of absence of separate collection—No appeal lies.*

The only objections to the plaintiff's right to recover rent were that plaintiff had other co-sharers and so the suit was bad for defect of parties and that there was no separate collection.

Held, that none of these grounds came within the

exception to the rule that in a suit for rent below a certain value no appeal lies. 17 Cal. 489 (F. B.) and 1922 Cal. 417 Dist. (*Suhrawardy and Chotzner, JJ.*) WAJUDI PRAMANIK *v.* BOLAI MORUL.

A. I. R. 1925 Cal. 1032.

——**S. 153**—*Prayer for assessment coupled with prayer for recovery of rent—Suit is not one for rent within S. 153.*

A suit where a prayer for assessment of fair rent is added to the prayer for recovery of rent is not a suit for rent within the contemplation of S. 153. (10 C. L. J. 629 Foll.) (*Chakravarti, J.*) BEJOY CHAND *v.* BENI MADHAB. **52 Cal. 689 : A. I. R. 1925 Cal. 936.**

——**S. 153**—*Suit for rent—In absence of question of amount of rent where value is below Rs. 100 no second appeal lies.*

Where the value is below 100 rupees, under S. 153 of the Bengal Tenancy Act, no second appeal lies when no question as to the amount of rent is either raised or decided in the suit for rent. (1922 Cal. 417, Dist.) (*Greaves and Chakravarti, JJ.*) BHARAT CHANDRA DHUPI *v.* HARI KRISHNA PATARI.

82 I. C. 829 : A. I. R. 1925 Cal. 395 (1).

——**S. 153**—*Expression "has decided a question of title" qualifies both decree and order—Order in execution must decide question of title.*

Under S. 153 of the Bengal Tenancy Act an order passed in execution of a decree, whether the decree is appealable or not, must be an order itself deciding a question in respect of title to or some interest in land as between parties having conflicting claims thereto. The expression 'had decided a question relating to title" etc., in S. 153 of the B. T. Act, qualifies both decree and order, (*Suhrawardy, J.*) JOYMANGAL SEN *v.* SARAFAT ALI. **78 I. C. 236 : A. I. R. 1925 Cal. 299 (2).**

——**S. 153**—*Rate of rent—Dispute as to—Second appeal.*

The defendant held under the plaintiff a parcel of land and certain fruit trees thereon. The case for the plaintiff was that the land was settled first at the rate of Rs. 5 a year and that the trees were settled thereafter at the rate of Rs. 2 a year. The plaintiff accordingly claimed rent for the suit year at the rate of Rs. 7 for the land and the trees. The defendant contended that there was no separate settlement in respect of the trees and that the rent of Rs. 5 covered both the land and the trees.

Held, that the decision on the question related to the amount of rent annually payable and that a second appeal lay. (*Mukerjee and Rankin, JJ.*) JONARDI MANDAL *v.* ANADI NATH RAY. **39 C. L. J. 334 : 81 I. C. 567 : A. I. R. 1924 Cal. 838.**

——**S. 153**—*Suit for cess—No Second appeal.*

S. 153, Bengal Tenancy Act bars a second appeal in suits for rent where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100 unless a question of special character has been decided by the decree under appeal.

Held, that in cases where the plff. has not published the notice under the Bengal Cess Act, no second appeal lies from the decision of the Dt. Judge deciding the question of the liability of the deft. to pay cess. (*Mookerjee and Chotzner, JJ.*) MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR *v.* TRAILOKHYA NATH ROY. **37 C. L. J. 521 : 74 I. C. 547 : A. I. R. 1923 Cal. 673.**

——**S. 153**—*Revisional power of District Judge—Transfer to Additional District Judge—Jurisdiction.*

An Additional District Judge to whoma District Judge transfers for disposal an application under

BENGAL TENANCY ACT (VIII OF 1885), S. 153.

S. 153, B. T. Act, is quite competent to dispose of the same, as the District Judge is empowered to assign work for him under the Civil Courts Act. (*Richardson and Ghose, JJ.*) LAL BEHARI BASAK *v.* AKHIL CHANDRA SANTRA, **27 C. W. N. 315 : 72 I. C. 794 : A. I. R. 1923 Cal. 469.**

——— S. 153—*Rent suit—Relationship of landlord and tenant—No appeal.*

Decision in a rent suit valued at less than fifty rupees deciding the question whether plaintiff is entitled to whole rent or only 2/5 as asserted by defendant decides a question of amount of rent annually payable within S. 153 and is appealable. (*Mookerjee and Panton, JJ.*) SUDHANYA SANTRA *v.* BASANTA KUMAR SARKAR. **49 Cal. 538 : 26 C. W. N. 96 : 64 I. C. 733 : A. I. R. 1922 Cal. 417. [Reversing 61 I. C. 194 (C).].**

———S. 153—*Irregularity and fraud established—Appeal lies.*

Where there are both fraud and irregularity established, the fact that they are coupled together does not exclude an appeal. Unless there is irregularity alone untainted by fraud an appeal lies. 19 C. W. N. 953 Foll. (*Greaves, J.*) GATIRAM GAYAN DAS *v.* DINONATH SAMANTHA. **A. I. R. 1922 Cal. 163.**

———S. 153—*Rent suit—Only question being the existence of relationship of landlord and tenant—No appeal lies.*

Where in a rent suit tried by a Munsif specially authorized in this behalf the sole issue decided was as to the existence of the relationship of landlord and tenant between the parties no appeal lies from the decision of the Munsif. (*Newbould, J.*) SUDHANYA SANTRA *v.* BASANTA KUMAR SARKAR. **26 C. W. N. 96 : 61 I. C. 194 : 34 C. L. J. 579. [Reversed on L. P. Appeal *See* 64 I. C. 733.]**

———S. 153—Exception—'Rent' does not include interest. (*Buckland and Cuming, JJ.*) HAFIZULLA *v.* LATEEFUNESSA. **63 I C. 529 (Cal.).**

———S. 153—*Question of amount of rent—Payment of money or in kind.*

A question as to the payment of money in default of payment in kind 'is a question of the amount of rent annually payable by a tenant" within S. 153. (*Sanderson, C. J. and Richardson, J.*) HAMED ALI *v.* RAM KUMAR. **62 I. C. 639 (Cal.).**

———S. 153—*Question relating to amount of rent—Second appeal—If lies.*

Where the question which arises in a rent suit is one relating to the amount of the rent payable the case is excepted from the provisions of S. 153, B. T. Act, and a second appeal lies. (*Dawson Miller, C. J. and Mullick, J.*) MAHARAJADHIRAJ SIR RAMESHWAR SINGH *v.* WAZUL HAQUE. **78 I. C. 463 : A. I. R. 1925 Pat. 294.**

———S. 153—*Decision on admission of rent is not Decision as to amount of rent.*

In a suit for rent the deft. did not admit the plaintiff's claim but alleged some other amount to be the rent payable. The Court, however without deciding the rate of rent gave a decree for a lump sum on the defendant's admission. *Held* there was no decision as to the amount of rent within S. 153 of the B. T. Act. 1 C. W. N. 711, Ref. (*Miller, C. J. and Mullick, J.*) RAJGIRY SINGH *v.* JADUNATH RAY. **4 P. L. T. 39 : 1922 P. H. C. C. 355 : A. I. R. 1923 Pat. 41.**

———S. 153—*C. P. Code, O. 9, R. 13 and O. 47, R. 1—Setting aside* ex parte *decree—Deposit.*

S. 153 bars an application under O. 9, R. 13 or O. 47, R 1, unless the application states the injuries sustained by the applicant on account of the decree or judgment, and he deposits in Court, the amount of rent admitted by him to be due. If no rent is admitted to be due, no deposit is needed. (*Jwala Prasad, J.*) CHANDRA DHUR DEY *v.* BHOLU RAI. **2 Pat. L. T. 372 : 62 I. C. 80 : 1921 P. H. C. C. 301.**

BENGAL TENANCY ACT (VIII OF 1885), S 158.

———S. 153 (b)—*Rent suit for less than Rs. 50 tried by Munsif specially empowered—Appeal does not lie.*

No appeal lies against the decision, in a rent suit, of a Munsif specially empowered under S. 153 (*b*) of the B. T Act, where the value of the suit does not exceed Rs. 50. (*Suhrawardy and Graham, JJ.*) SURENDRA KRISHNA ROY *v.* ABBAS ALI. **A. I. R. 1925 Cal. 1237.**

———S. 153-A, Cls. (a) and (b)—*Application to set aside* ex parte *decree—No deposit made—Procedure.*

Where an application is made to set aside an *ex parte* decree for rent and the tenant denies that any rent is due, and therefore no deposit is made under S. 153-A (*a*) the Court should not admit the application without recording under S. 150-A (*b*), in writing that it is satisfied that the deposit is not necessary. (*Beachcroft, J.*) AMANULLA *v.* AYFARJAN BIBI. **62 I. C. 444 (Cal.).**

———S. 155—*Misuse of tenancy—Notice not requiring tenant to remedy the misuse is not valid—Compensation.*

A notice under S. 155 not requiring the tenant to remedy the misuse, though it is capable of remedy, but only asking for compensation to remedy the misuse, is not valid. (*Woodroffe and Ghose, JJ.*) SHIB CHARAN CHAKRABURTHY *v.* BEPIN BEHARY CHAKRABURTHY. **27 C. W. N. 144 : A. I. R. 1923 Cal. 149 (1).**

———S. 155—*Limitation Act, Art. 32—Suit for ejectment and compensation—Former claim time-barred.*

Where in a suit for compensation and ejectment under S. 155, the claim for ejectment is time barred, the claim for compensation is maintainable only if it is in time according to Art. 32, Limitation Act as the two claims are independent of each other. (*N. R. Chatterjee and Newbould, JJ.*) KRISHNA DAS RAY *v.* MOHENDRA CHANDRA SIL. **62 I. C. 779 : 25 C. W. N. 930.**

———S. 158—*Rate of rent not ascertained at the time of application for settlement of fair rent—S. 158 applies.*

Cl. (*d*) of S. 158 entitles a Court to determine the rent payable by the tenant at the time of application, and there is no reason why this should be restricted to cases where the rate of rent has already been ascertained. If the contract is that the tenants shall pay a fair and equitable rent, then that is the existing rent payable and it is the business of the Court to ascertain it. (*Mullick and Ross, JJ.*) RAM GOBIND SINGH *v.* SHASHI SEKHAR PRASAD SINGH. **1925 P. H. C. C. 153 : A. I. R. 1925 Pat. 517.**

———Ss. 158 and 188—*S. 158 does not oust the general jurisdiction of Court under Civ. Pro. Code, S. 9 to entertain a suit for settlement of fair rent—Hence suit by some only of the co-sharers is competent.*

S. 158 is not restrictive and the right to claim a fair and equitable rent is an obligation arising out of the contract between the parties and is enforceable in the ordinary Civil Courts under the provisions of S. 9 of the Civ, Pro. Code. Hence S. 158 of the B. T. Act is no bar to the maintenance of a suit for fair and equitable rent, by plaintiffs who are not the entire body of the landlords. It cannot be held that the only jurisdiction for assessing a fair rent, where no rent has at any time

been previously assessed, is that conferred by Ss. 52, 105 and 157, 158 and similar sections of Act VIII of 1885. (*Mullick and Ross, JJ.*) RAM GOBIND SINGH *v.* SHASHI SEKHAR PRASAD SINGH.

1925 P. H. C. C. 153 : A. I. R. 1925 Pat. 517.

——**S. 158**—*Assessment of rent—Application for—Dismissal for default—Subsequent suit for compensation—Not barred.*

A claim for assessment of rent under S. 158 of the B. T. Act was dismissed for default under O. 9, R. 8, C. P. Code in the year 1915. The landlords subsequently instituted a suit against the defendant claiming compensation for occupation of the same land and a determination of the annual rent payable by the defendant. *Held* that an application under S. 158 of the B. T. Act was not a suit and its dismissal for default did not bar the subsequent claim for the determination of the annual rent payable by the defendants. (*Miller, C. J. and Mullick, J.*) JANKI RAY *v.* RAJA KALANAND SINGH. **74 I. C. 464 : 2 Pat. 192 : 4 Pat. L. T. 705 : A. I. R. 1923 Pat. 381.**

——**S. 158 (B)**—Sale contrary to—Suit for declaration of invalidity is governed by Art. 120 of the Lim. Act.

(*Dass, J.*) GHANSHYAM *v.* BASDEB JHA. **60 I. C. 529 (2) : 3 U. P. L. R. (Pat.) 27.**

——**S. 158-B**—*Notice to co-sharer landlord—Absence of—Effect.*

The omission to serve upon a co-sharer landlord the notice required by S. 158-B of the Bengal Tenancy Act need not necessarily make the rule null and void. If the co-sharer landlord adopts the sale and withdraws his portion of the purchase-money, the sale is equally valid as the provision is not based on grounds of public policy but for the benefit of the individual who can waive the same. (*Mookerjee and Chotzner, JJ.*) RAJANI KANTA GHOSE *v.* SHEIKH RAHAMAN GAZI. **27 C. W. N. 765 : 37 C. L. J. 447 : A. I. R. 1924 Cal. 408.**

——**Ss. 158-B and 159**—*Sale under Rent decree—Tenure itself passes to auction purchaser—Art. 139, Lim. Act does not apply.*

Art. 139, of the Limitation Act is applicable only where the purchaser acquires the right, title and interest of the judgment-debtor. But the rights of a purchaser at a sale under a decree for rent must be governed by the B. T. Act. When a rent decree has been properly obtained, the tenure itself passes to the purchaser and not the right title and interest of the judgment-debtor only. The rights of the purchaser must be determined by the provisions of the B. T. Act under S. 158-B and S. 159. (*Woodroffe, Walmsley and Suhrawardy, JJ.*) JANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C. W. N. 985 : A. I. R. 1922 Cal. 544.**

——**S. 158-B**—*Execution sale—Decree for consolidated rent of two holdings.*

Where a suit has been brought for the consolidated rent of two holdings upon the purchaser, no greater title is conferred upon the purchaser by a subsequent sale in execution of the decree than the right, title and interest of the judgment-debtor. There is nothing in S. 158-B of the B. T. Act which would give the purchaser the right to acquire the rights therein mentioned except by a purchase of the holding. (*Miller, C. J. and Mullick, J.*) DIPA MAHTON *v.* LALA SHEONANDAN PRASAD. **1 Pat. L. R. 467 (Civ.) : A. I. R. 1924 Pat. 342.**

——**Ss. 159 and 161**—*Encumbrance—Includes—Prescriptive title.*

Per *Woodroffe, J.*—The word encumbrance as used in Ss. 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. (*Woodroffe, Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C. W. N. 985 : A. I. R. 1924 Cal. 544.**

——**Ss. 159, 161 and 167**—*'Incumbrance—Adverse possession of a part of lands of defaulting tenure.*

The word "incumbrance" as used in Ss. 159 and 161 of the B T. Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and such incumbrance cannot be annulled in any manner other than what is provided in S. 167. (*Mookerjee and Panton, JJ.*) ISAN CHANDRA *v.* SEFATULLA, **26 C. W. N. 703 : 68 I. C. 219 : 35 C. L. J. 36 : A. I. R. 1922 Cal. 331.**

——**S. 159**—*Sale for arrears of rent—What passes.*

When in execution of a decree for arrears of rent a tenure is sold, the tenure is not extinguished, there is a transmission and not an extinction of interest. The purchaser takes the existing tenure subject to protected interests, but with power to annul incumbrances thereon by recourse to the prescribed procedure. (*Mookerjee, Newbould and Pearson, JJ.*) CHANDI *v.* KATYAYINI DEBI. **35 C. L. J. 292 : 69 I. C. 126 : 49 C. 948 : A. I. R. 1922 Cal. 87.**

——**S. 160**—*Occupancy right — Acquisition—Settled raiyat.*

If the raiyat has in the first instance the right of a raiyat at a fixed rate, and if he subsequently by continuous possession for twelve years can acquire and does acquire a right of occupancy, there is no reason why he should not be protected under S. 160. (*Sanderson, C. J. and Richardson, J.*) SARBESWAR PATRA *v.* MAHARAJ SIR BEJOY CHAND MOHATAP. **49 C. 280 : 26 C. W. N. 15 : A. I. R. 1922 Cal. 287 (2).**

——**Ss. 160, 167** — *Occupancy raiyat—Raiyat at fixed rate—Existence of both status in one person.*

A raiyat who holds at a fixed rate of rent for more than 12 years continuously, becomes "a settled raiyat of the village" and as such acquires a right of occupancy in all lands held by him as raiyat, and such right is protected uuder S. 160, and cannot be annulled by notice under S. 167 of the Act. Per *Sanderson, C. J.*—A right of occupancy and the right of a raiyat holding at a fixed rate may exist in the same person in respect of the same land at the same time. Per *Richardson, J.*—The higher status would supersede so much of the lower as might be inconsistent with it and either status might be used as a shield so far as it extends. (*Sanderson, C. J. and Richardson, J.*) SARHESWAR PATRA *v.* BIJOY CHAND MAHATAP. **26 C. W. N 15 : 63 I. C. 986 : 34 C. L. J. 233.**

——**S. 160**—*Landlord recognising person as tenant of portion of occupancy holding—The portion is "protected."*

Where a landlord recognises a person as the purchaser and tenant of a portion of a certain occupancy holding and permits the latter to pay rent in respect of such portion he gets an occupancy right in the portion of the holding, so that, that portion is a protected interest within the sense of S. 160 of the B. T. Act. (*Foster, J.*) HANKAR SONUR *v.* BASUDEO SINGH. **86 I. C. 575 : A. I. R. 1925 Pat. 556.**

——**S. 160 (b)**—*Sub tenure ceasing on the annulment of tenure by sale for arrears—Owner of sub-tenure can apply to avoid sale.*

S. 160 (*b*) refers to a temporary revenue settlement. Where on the annulment of a tenure by sale for arrears, the sub-tenure would cease with it, the owner of sub-tenure would be interested in making the pay-

ment to avoid the sale. (*Adami and Sen, JJ.*) DEBLAL JHA *v.* KUMAR DAS. **2 O. W. N. 853 : A. I. R. 1925 Oudh 737.**

———S. 160 (b)—*Auction purchase at a rent sale—Howladar and tenants—Annulment of incumbrances—Suit for recovery of possession.*

Where it was contended relying on the entries in the settlement Khatian that the howladars are protected by virtue of the provisions of S. 160 (*b*). *Held* reliance cannot be placed on the entry in the Record-of-Rights. The sale having been made, notices issued to annul the incumbrances, and the suit commenced before the Record-of-Rights was published, the entries made in the Record-of-Rights cannot affect the right of the auction purchaser purporting to have been acquired by virtue of the annulment made by the notice. (*Greaves and Ghose, JJ.*) SRIMATO JOHARA BANOO *v.* GANGA CHANDRA CHOUDHURY. **A. I. R. 1922 Cal. 222.**

———S. 160 (g)—*Patni—Mortgage—If an interest protected.*

A mortgage of a *patni* is an interest which is protected under S. 160 (*g*). (*Greaves and Mukerjee, JJ.*) HARI MOHAN DALAL *v.* PURENDRA NATH NAG CHODHURY. **90 I. C. 955.**

———S. 161—*Incumbrance—What is.*

Quære. Whether an interest not directly created by the *talukdar*, but allowed to grow up by his sufferance and negligence is an incumbrance within the definition given in S. 161 of the Act. (*Lord Phillimore.*) BIPRADAS PAL CHOWDHURY *v.* KAMINI KUMAR. **41 M. L. J. 638 : 47 Cal. 27 : 15 L. W. 180 : 30 M. L. T. 138 : 26 C. W. N 465 : 66 I. C. 674 : 4 U. P. L: R. (P. C.) 53 : 48 I. A. 499 : A. I. R. 1922 P. C. 48 (P. C.)**

———S. 161—*Incumbrance—Meaning of—What it includes.*

'Incumbrance' in S. 161 includes a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure. (*Mookerjee and Panton, JJ.*) ISAN CHANDRA *v.* SAFTULLA. **26 C. W. N. 703 : 68 I. C. 219 : 35 C. L. J. 36 : A. I. R. 1922 Cal. 331.**

———S. 161—*Incumbrance—Meaning of.*

'Incumbrances' in S. 161 is some interest created or suffered to be acquired as in the case of adverse possession by the tenant on his tenure or in limitation of his own intetest therein, and does not refer to the creation of an interest by a tenure-holder of an inferior grade. (*N. R. Chatterjee and Greaves, JJ.*) MONMOTHA NATH MITTE *v.* ANATH BUNDHU PAL. **61 I. C. 469 : 25 C. W. N. 106.**

———S. 167—*Presumption—Origin subsequent to creation of*—Patni Taluk *must beshown — Notice, where valid.*

For a plaintiff to avail himself of S. 167 of the Act and to annul the claims of tenants as incumbrances, he must show an origin subsequent to the creation of *Patni Taluk.* Otherwise the presumption would arise, that the origin ran back to a period antecedent to the creation of the Taluk and were rent free. A notice under S. 167 to be valid must be served within one year from the date of the sale or the date on which he first had notice of the incumbrance which ever was later. (*Lord Phillimore.*) BIPRADAS CHAUDHARI *v.* KAMINI KUMAR. **41. M. L. J. 638 : 66 I. C. 674 : 16 L. W. 180 : 30 M. L. T. 138 : 26 C. W. N. 465 : 49 C. 27 : 4 U. P. L. R. (P. C.) 53 : 48 I. A. 499 : A. I. R. 1922 P. C. 48 (P. C.)**

———S. 167—*Under notification of Local Government all Sub-Divisional Officers can issue notice—Due service of notice must be proved—Order sheet is not sufficient proof.*

By a notification published in the Calcutta Gazette, dated 7th January 1915 all the Sub-Divisional Officers of places to which the Bengal Tenancy Act applies are empowered to issue notices under S. 167. A mere production of the order sheet is not sufficient to prove due service of notice. It is imperative on the plaintiff asking for the annulment of an encumbrance to prove due service of notice. (*Suhrawardy and Duval, JJ.*) KRISHNA KAMINI DASI *v.* PRATAPENDRA CHANDRA. **A. I. R. 1925 Cal. 1199.**

———S. 167—*Mortgage of holding—Sale and purchase by Mortgagee—Rent decree—Purchaser—Right to possession.*

A holding was mortgaged and at a sale is execution of the mortgage decree purchased by the mortgagee. Subsequently it was sold in execution of a rent decree and the purchaser in execution sued the mortgagee purchaser for possession. The latter set up the the mortgage as an encumbrance—*Held* the mortgage having been merged in the decree, the mortgagee purchaser had become the owner and could not resist he rent decree purchaser's suit for possession. (*Greaves and Cuming, JJ.*) INDRA NARAYAN GHOSE *v.* TARINI PROSAD GUIN. **90 I. C. 746.**

———S. 167—*Annulment of encumbrance—Notice is essential.*

Before an encumbrance could be validly annulled it is essential under S. 167 of the B. T. Act that a notice should be served as provided in the section. (*Sanderson, C. J. and Ghose, J.*) JATINDRA MOHAN CHAKRAVARTHI *v.* BIJOY CHAND MAHATAB. **71 I. C. 284 (Cal.) : A. I. R. 1924 Cal. 396.**

———S. 167—*Sale of under-tenure in auction—Suit for possession by plff. purchaser—Lim. Act does not apply.*

An under-tenure held by the defendant from the plaintiff was sold in execution of a rent-decree to a stranger but the purchaser never obtained possession. In execution of rent-decree against the stranger, the under-tenure was again sold more than twelve years after and purchased by the plaintiffs who sued for possession. Per *Woodroffe, held* that none of the articles of the Limitation Act applied to the case but that the suit was barred under S. 187 B T. Act. (*Woodroffe and Suhrawardy, JJ. Contra.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C. W. N. 985 : A. I. R. 1922 Cal. 544.**

———S. 167 — *Incumbrances — Annulment of—Procedure.*

An encumbrance cannot be annulled in any manner other than what is provided in S. 167. (*Mookerjee and Panton, JJ.*) ISAN CHANDRA *v.* SAFTULLA **26 C. W. N. 703 : 68 I. C. 219 : 35 C. L. J. 36 : A. I. R. 1922 Cal. 331.**

———Ss. 167 and 65—*Incumbrance—Annulment of can be effected only by the method provided by section—Sale for arrears of rent does not cancel mortgage—Scope of—Rent sale—Enforcement of charge.*

A sale for arrears of rent does not *ipso facto* cancel a mortgage on the holding, being an incumbrance. 24 Cal. 746, Rel. The procedure provided by S. 167 of the B. T. Act is the only mode of annulling the incumbrance, and the purchaser must have recourse to the prescribed mode within the specified period, if he desires to annul the incumbrance. 22 Cal. 364, Foll. A landlord purchaser, at a rent sale is, like any other purchaser, bound to follow the provisions of S. 167. If the mortgage is not annulled on the expiry of one year from the date of the rent sale or from the date when the landlord has notice of the incumbrance, the holding in the hands of the landlord-purchaser remains

BENGAL TENANCY ACT (VIII OF 1885), S. 167.

subject to the mortgage no longer liable to be impeached or extinguished. 24 C. W. N. 961. Ref. The relative rights of the purchaser at the rent sale and the mortgagee should be determined with reference to their position at the time of the rent sale. If the purchaser at the rent sale has not availed himself of the privilege of annulling the mortgage within the prescribed period, he holds the property subject to the mortgage and is entitled to redeem. The mortgagee purchasing the property in execution of a decree obtained by him in the suit instituted on the mortgage in which the landlord-purchaser was not made a party, does not lose his right to be redeemed by the purchaser at rent sale. 14 M. I. A. 144, Ref.

S. 65 of the Act intends what is explicitly laid down in subsequent sections of the Act, that is, those in Chap. XIV, namely that the charge should be enforced by the sale of the tenure or holding free of incumbrances, and if in any case, the decree for rent either has not been or cannot be enforced by the sale of the tenure or holding, the charge created by S. 65 cannot be enforced in any other way. 22 Cal. 364 Ref. (*Mookerjee and Panton, JJ.*) SITAL CHANDRA MAJAI *v.* PARBATI CHARAN CHAKRABARTHI.

35 C. L. J. 1 : 69 I. C 841 : A. I. R. 1922 Cal. 32.

——**S. 167**—*Annulment of incumbrance.*

Where in execution of a mortgage decree, *D* purchased the interest of one of the tenants of a holding, the whole of which was subsequently purchased by *P* in execution of a rent decree, *held*, that *D* became, by his purchase, the owner of the property and could not maintain that his mortgage still remained an incumbrance thereon which *P* was bound to annul under S. 167 of the Act. (*Chatterjee and Newbould, JJ.*) SABJAN MANDAL *v.* HARIPADA SAHA.

66 I. C. 103 : 25 C. W. N. 424.

——**Ss. 167 and 161**——*What has to be annulled is the* darpatni—*Incumbrance.*

Possession as a tenant cannot be adverse and does not constitute an incumbrance which must be annulled under S. 167 of the Act. The interest of a person in adverse possession is an incumbrance only when the adverse possession has continued for the statutory period. There may be a chain of subordinate interest in a *patni* and there may be incumbrances, *e.g.*, adverse possession for the statutory period on each of these various grades of subordinate tenures but a purchaser of the *patni* at a rent sale is not to find out all these interests and serve notices upon each of them under S. 167 of the Act. The sub-tenancy created by the tenant is the *dar-patni* that is an incumbrance under S. 161 and that only has to be annulled under S. 167. What, therefore, has to be annulled under S. 167 is the sub-tenancy created by the *patnidar i.e.* the *dar-patni* as it was created and which would include all the interests created or carved out of it. (*N. R. Chatterjee and Greaves, JJ.*) MONMOTHA NATH MITTER *v.* ANATH BUNDHU PAL.

61 I. C. 469 : 25 C. W. N. 106.

——**S. 167**—*Rent decree and mortgage decree against holding—Purchaser in execution of, former decree must redeem mortgage within the time fixed by section.*

Where a holding is sold under two decrees first under a rent decree and second under a mortgage decree, the purchaser under the rent decree is entitled to possession but with the condition that he redeems the mortgage which still subsists, within the time prescribed by S. 167 of the Act. (*Chatterjee and Newbould, JJ.*) BIDHUMUKHI DASI *v.* BABA SUNDARI DASI.

59 I. C. 868 : 24 C. W. N. 961.

BENGAL TENANCY ACT (VIII OF 1885), S. 170 (3).

——**S. 167**—*Incumbrance —Annulment—Burden of proof—Service of notice—Pendency of suit.*

The fact that a mortgage suit or any other suit has been instituted by the incumbrancer cannot deprive the auction-purchaser of his right to aunul the incumbrance under the B. T. Act if the application is made within the time prescribed by the section, that is to say, within one year of the date of the sale or the date on which the purchaser first had notice of the incumbrance. Under S. 167 (3) once the Collector has issued the notice the incumbrance must be deemed to have been annulled. This does not mean that the validity of the decree and the consequent annulment of the incumbrance cannot afterwards be called in question. The effect of the section is to cast the burden of proof upon the person questioning the validity of the notice. It is incumbent on the plaintiffs (mortgagees of the occupancy holding) to prove that the landlord had in fact notice of the incumbrance more than 12 months before he made the application to the Collector. (*Dawson Miller, C. J. and Mullick J.*) NAND KISHORE CHAUDHURI *v.* MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR.

2 Pat. L. R 19 : 78 I. C. 476 : A. I. R. 1924 Pat. 515.

——**S. 167**—*Rent decree—Sale in execution—Incumbrances—If annulled.*

The mere sale of property in execution of a rent decree does not in itself without further steps being taken by the purchaser, annul any incumbrance there may be existing on the property sold. (*Dawson Miller, C. J. and Mullick, J.*) RAM LAL MANDER *v.* KULDIP NARAYAN TEWARI. **5 Pat. L. T. 407 : 75 I. C. 841 : 3 Pat. 126 : A. I. R. 1924 Pat. 440.**

——**S. 170**—*Decree for rent—Attachment of holding—Claims under O. 21, R. 58.*

When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open to the Court to ascertain the true nature of the property. The Court executing the decree can go into the question whether the decree was a decree under the provisions of the B. T. Act so as to bring into play the operation of S. 170 of the Act and prevent a claim being preferred to the property attached. (*Richardson and Ghose, JJ.*) JOTINDRA MOHAN PAL *v.* BHOLA NATH BHAKAT. **27 C. W. N. 817 : A. I. R. 1923 Cal. 715.**

——**S. 170 (2)**—*Decree-holder — Application to certify satisfaction*—Bona fides *of applicant need not be gone into.*

Under S. 170 (2) of the B. T. Act no enquiry is needed, as to whether an application by the decree-holder to certify satisfaction is *bona fide* or not. The only condition laid down is that the application should have been made before the tenure or holding is knocked down to the auction purchaser. (*Jwala Prasad, J.*) JAGDHARI RAI *v.* LANGAT GOPE.

4 Pat. L. T. 495 : 75 I. C. 676 (2): A. I. R. 1923 Pat. 572.

——**S. 170 (3)**—*Right to apply to set aside sale —Transferee of non-transferable holding.*

Where a holding has been sold in execution of a decree for rent obtained by the landlord, a transferee of a non-transferable holding who has not been recognised by his landlord cannot make a deposit of the decretal amount under S. 170 (3). 16 C L. J. 548, Not Foll. (*Newbould and Ghose, JJ.*) BARADA PRASAD ROY CHOUDHURY *v.* FOIJUDDI HALDER.

39 C. L. J. 428 : 28 C. W. N. 845 : A I. R. 1924 Cal 1005.

———S. 170 (3)—*Transferee of non-transferable occupancy holding has no right to make a deposit.*

The transferee of a non-transferable occupancy holding is not entitled under S. 107, sub-section (3) of the B. T. Act to make a deposit to avoid a sale in execution of a decree for rent. (*Panton, J.*) RADHA BENODE MONDAL *v.* NITAI CHAND SANT.

38 C. L. J. 147 : 76 I. C. 358 : A. I. R. 1924 Cal. 185.

———S. 170 (3).—*Deposit—Duty of Court.*

On an application for a deposit under S. 170 of the B. T. Act, notice must be given to the judgment-debtor and the decree-holder and it is the duty of the Court to decide whether the applicant has or has not a *locus standi* to deposit. (*Bucknill, J.*) KUNJA SINGH *v.* BARHO RAY. **4 Pat. L. T. 247 : 73 I. C. 12 : A. I. R. 1923 Pat. 353.**

———S. 170 (3)—*Right to make a deposit—Execution of decree against Hindu widow—Reversioner cannot make a deposit.*

The words "an interest in the tenure or holding voidable on the sale" in S. 170 (3) of the Bengal Tenancy Act mean "an interest which is in existance at the time of the sale and which will become liable to be avoided on the sale taking place at the option of some one." Where a decree for rent put into execution was one obtained against a Hindu widow, the reversionary heir expectant of her husband, on her death did not have an interest in the tenure or holding voidable on the sale within the meaning of S. 170 of the Bengal Tenancy Act. (*Sanderson, C. J. and Chotzner, J.*) MOHENDRA NATH *v.* BAIDYA NATH.

26 C. W. N. 167 : 70 I. C. 127 : A. I. R. 1922 Cal. 95.

———S. 171—*Rent-decree against* darpatnidar—*Deposit by* se-patnidar—*Effect.*

Where in execution of a rent decree against a *darpatnidar*, a *se-patnidar* deposits the amount due, he is entitled to possession against both the *dar-patnidar* and his representatives in interest and can set off the deposited amount, against the rent recoverable from him and is further entitled to interest on the sum deposited at 12 % per annum under S. 171 (1) (*a*) of the Act. (*Mookerjee and Buckland, JJ.*) JNANENDRA NATH SINGHA RAY *v.* BHUBONESWARI DEBI.

63 I. C. 1004 : 33 C. L. J. 494.

———S. 171—*Payment into Court—Payment direct to decree-holder.*

Where, on an application to make payment into Court under S. 171 of the B. T. Act, the Court permits the applicant to pay directly to the decree-holder, the provisions of the section have been complied with. (*Coutts and Das, JJ.*) MOSAFIR LAL DAS *v.* GANESH JHA. **4 Pat. L. T. 134 : 1922 P. H. C. C. 347 : 71 I. C. 473 : A. I. R. 1922 Pat. 6 6**

———S. 173—*Appeal lies against order under S. 173 where case falls under Civil Pro. Code, S. 47—Auction-purchaser cannot appeal—Civil Pro. Code, S. 47.*

Where the question is one which is covered by S. 47 Civil Pro. Code, an appeal is allowable from an order passed under S. 173, Bengal Tenancy Act, though no provision for appeal is made in the Act itself. The right to appeal therefore from an order passed under S. 173, Bengal Tenancy Act, depends upon the questions raised and upon the party appealing. 19 C. 683 and 24 C. 707, Dist.: 13 C. L. J. 257, Ref.; 19 C. L. J. 81 Foll. (*Suhrawardy and Duval, JJ.*) AZAM KHAN *v.* UMEDALI. **A. I. R. 1925 Cal. 1223.**

———S. 173—*Applicability of S. 47, C. P. Code and Art. 166, Lim. Act.*

An application under S. 173. B. T. Act, is cognizable under S. 47, C. P. Code, and that being so the operation of Art. 166, Lim. Act. will be attracted. (*Pearson and Graham, JJ.*) HARIPADA HALDAR *v.* BARADAPROSAD ROY CHOUDHURY.

51 Cal. 1014 : 82 I. C. 322 : A. I. R. 1925 Cal. 351.

———S. 173 *and C. P. C., O. 21, R. 90—Sale—Setting aside of.*

Where the sale to the auction-purchaser of a holding for arrears of rent was set aside on two distinct and several grounds under S. 173, B.T. Act and O. 21, R. 70, C.P.C. and the order under the latter was appealable while under the former Act it was not, *held* the sale was set aside on two distinct grounds and the fact that an appeal lay so far as one ground was concerned would not confer a right of appeal in respect of the other. 3 C.W.N. 184 Foll. (*Richardson and Ghose, JJ.*) AMAR PRASAD DEB *v.* GAGAN CHANDRA HALDAR. **A. I. R. 1922 Cal. 180.**

———S. 173 (2)—*Purchase by judgment-debtor in execution—Sale is voidable.*

Where the purchaser at the execution sale is the judgment-debtor himself, the sale is not void but only voidable. (*Mullick and Bucknill, JJ.*) SAIYID MUHAMMAD AMIRUL HASAN *v.* MUHAMMAD JEWAD HUSAIN. **5 Pat. L. T. 18 : 74 I. C. 769 : A. I. R. 1924 Pat. 318.**

———S. 173 (3)—*Sale to benamidar of judgment-debtor—If void—Discretion to set aside—Interference in revision.*

A sale to a benamidar of the judgment-debtor is not necessarily void but only voidable and it is within the discretion of the Court which ordered execution to determine whether the sale should stand or not. In the absence of prejudice, the High Court will not interfere in revision. (*Suhrawardy and Duval, JJ.*) BROJENDRA NATH MUKERJEE *v.* JADUNATH PALTA.

80 I. C. 708 : A. I. R. 1925 Cal. 293.

———S. 173 (3)—*Co-sharer purchaser of non-transferable holding cannot deposit rent decree amount under Civil. Pro. Code. O. 21, R. 89.*

A purchaser under a money decree of a non-transferable holding cannot invoke the provisions of S. 170 (3) in his aid and has therefore no *locus standi* to pay the money of the rent decree of his own co-sharers though he himself was a fractional landlord. (*Bucknill, J.*) BISHUN DAYAL *v.* GAYDISH NARAYAN.

2 P. L. R. 12 : 80 I. C. 823 : A. I. R. 1924 Pat. 513.

———S. 174—*Applicability.*

S. 174, B. T. Act, applies to a rent sale, under the Bengal Rent Recovery Act, or property in Orissa. (*Lord Dunedin.*) KSHETRABASHI MAHANTI *v.* RATNAKAR. **75 I. C. 278 : 38 C. L. J. 229 (P. C.).**

———S. 174—*Extension to Orissa—Sale for arrears of rent—S. 174, if applicable.*

After the Extension of the Act to Orissa, S. 174 applies to suits under the Old Rent Law in Revenue Courts. (*Lord Dunedin.*) LAKSHMIDAR MAHANTI *v.* RATNAKAR MAHAPATRE. **40 M. L. J. 546 : 48 I.A. 123 : 25 C. W. N. 1009 : 14 L. W. 358 : (1921) M. W. N. 399 : 3 U. P. L. R. (P. C.) 25 : 61 I. C. 1 : 2 Pat. L. T. 453 (P. C.)**

———S. 174—*Appeal—Order refusing to set aside sale.*

There is no appeal against an order dismissing for default an application to set aside a sale in execution of a rent decree by an unregistered purchaser of the holding. (*Mukerjee, J.*) DEBRANI DEBYA *v.* KUMAR SARAT KUMAR ROY.

39 C. L. J. 522 : A.I.R. 1924 Cal. 791.

———S. 174—*Judgment-debtor's holding sold in execution to third party—Payment of 5 % made within*

thirty days—Decree-holder joining with judgment-debtor in applying to set the sale aside—S. 174 was held to be not sufficiently complied with.

Where in execution of a decree of rent the tenant's holding was sold and was purchased by a third party, but within thirty days of the sale the deposit of 5 per cent. of the purchase money for payment as compensation to the auction purchaser was made in Court and the deposit was accompanied by a petition stating that the amount recoverable under the decree had been paid to the decree-holder who himself joined in this petition :

Held, that the provisions of S. 174 were not sufficiently complied with. (*Mullick and Ross, JJ.*) RAGHUNANDAN PANDEY *v.* GAJRAJ MANDAL.

1925 P. H. C. C. 183 : A. I. R. 1925 Pat. 525.

——**S. 174**—*Question between judgment-debtor and the auction purchaser—No appeal lies.*

On a question under S. 174 between the judgment-debtor and the auction purchaser no appeal lies. (*Mullick and Ross, JJ.*) RAGHUNANDAN PANDEY *v.* GAJRAJ MANDAL. **1925 P. H. C. C. 183 : A. I. R. 1925 Pat. 52.**

——**S. 174**—*Setting aside sale—Deposit of amount—Validity of deposit—Mistake.*

A judgment-debtor, who was permitted to deposit the decretal amount with costs and compensation, went to the execution moharir who drew up an account and showed that the amount paid in by the judgment-debtor petitioner was correct and on the basis of that account he deposited the sums specified. It was found that no order had been passed by the Court as to what the costs were and the judgment-debtor came well within the time allowed for the deposit and obtained the permission of the Court to deposit the amount. He also obtained an order in the order sheet from the Court that he had deposited the full decree amount with costs and compensation. He was therefore permitted to believe that he had paid the full amount until after the time allowed for the deposit had elapsed, when the decree-holder came forward and pointed out that the amount was not sufficient. *Held*, that the judgment-debtor having been misled by an honest mistake ought to be allowed to deposit the deficiency in the amount and that the sale should be set aside on such deposit being made. An executing Court is lacking in the due discharge of its duty in entertaining an application to set aside a sale until it has satisfied itself that the statutory condition provided by S. 174 of the B. T. Act have been fulfilled. It is the duty of the executing Court, before entering in the order sheet that the full decretal amount with costs and compensation had been deposited, to satisfy itself as to what were the costs to be paid by the judgment-debtor and where, owing to this neglect of duty on the part of the Court, the petitioner was lulled into security, and the amount of shortage was not very great, the judgment-debtor should not be prejudiced on account of the default on the part of the Court. (*Adami, J.*) DIDAR ALI *v.* KUSUM KUMAR. **4 Pat. L. T. 642 : 71 I. C. 925 : A. I. R. 1924 Pat. 256.**

——**S. 174**—Order under—Suit to set aside does not lie. (*Miller, C. J. and Ross, J.*) PAHLED SINGH *v.* SAJIWAN RAI. **6 Pat. L. J. 16 : 61 I. C. 126 : 2 Pat. L T. 66.**

——**S. 178**—*Object of the section is to prevent contracting out of the statute by the tenant—Agreement frustrating the object is void.*

S. 178 was enacted in order to safeguard the interests of raiyats. The scope of that section is to prevent certain contracts between landlord and tenant, the effect of which may be to place the raiyat out of the protection

afforded to him by the Bengal Tenancy Act. It therefore enacts that the rights conferred by the Bengal Tenancy Act upon the raiyat cannot be destroyed by means of any agreement. Where the effect of the agreement is to prevent the defendant who has been found to be a settled raiyat of the village acquiring the right of occupancy in the land in suit under S. 21 of the Bengal Tenancy Act, the agreement is void. The view that because at the time when a certain agreement was entered into, there was no right in the defendant, the agreement could not in any sense contravene the provisions of S. 178, Bengal Tenancy Act, is not correct. (*Suhrawardy and Duval, JJ.*) KASEM SHEIKH *v.* TARAKESHWAR DUTTA.

A. I. R. 1925 Cal. 1065.

——**S. 178**—*Tenancy on new terms—Acceptance by raiyats at fixed rates of rent.*

S. 178 of the B. T. Act does not affect the validity of a contract creating a tenancy on new terms entered into between the landlord and tenants who had the status of raiyats at a fixed rate of rent in 1890. (*Mookerjee and Cuming, JJ.*) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHATTACHARYA.

36 C. L. J. 333 : 70 I. C. 437 : A. I. R. 1923 Cal. 141.

——**S. 178**—*No raiyati interest can be created by contract, but registered lease after occupying Zerait is not illegal.*

S. 178 only bars a contract against the accrual of occupancy right. Section 178 is not contravened by the execution of registered lease after occupation of the Zerait lands for some time. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) RAMJI RAM *v.* BANSI RAUT. **1924 P. H. C. C. 337 : 4 Pat. 89 : 6 P. L T. 240 : 84 I. C. 305 : A. I. R. 1925 Pat. 241.**

——**S. 178**—*Section does not apply to a compromise concerning the very existence of occupancy right.*

Where the question in dispute in a suit was clearly whether an occupancy right existed or whether it did not and there was undoubtedly a *bona fide* dispute between the parties as to the existence of such a right and if by a compromise the parties agreed that such a right did not exist and that agreement is enforced by a decree, then it is no longer open to either of the parties to question the findings or validity of that decree and to plead the non-extinction of occupancy right by having recourse to S. 178. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) C. G. MACDONALD *v.* TEKNARAIN RAI. **75 I. C. 997 : A. I. R. 1925 Pat. 113.**

——**S. 178 (a)**—*Compensation—Land acquisition—Agreement not to claim a share of compensation.*

An agreement that an occupancy raiyat will not, in the event of acquisition by the Crown, claim a share of the compensation money, is a covenant not affecting the title or status of the raiyat and is therefore not affected by clause (*a*) of Section 178. It is therefore legal and enforceable. (*Mookerjee and Buckland, JJ.*) ASHUTOSH CHANDRA MITRA *v.* HARIPADA GANGULI.

35 C. L. J. 133 : A. I. R. 1922 Cal. 187 (1).

——**S. 178 (1)(a)**—*Contract against compensation.*

A term in contract of lease, that if the land is acquired by a public body, the tenant will not get compensation for the same is not affected by S. 178 (*a*) nor does it affect the tenant's status. (*Mookerjee and Buckland, JJ.*) ASHUTOSH CHANDRA MITRA *v.* HARIPADA GANGULI. **62 I. C. 793 (Cal.).**

——**S. 178 (1) (c)**—*Contravention.*

The landlord and the tenant cannot contract themselves out of the provisions of S. 49, B. T. Act. (*Mookerjee and Suhrawardy, JJ.*) GANESH CHANDRA PAL *v.* CHANDRA MOHAN DUTT. **28 C. W. N. 984 :**

BENGAL TENANCY ACT (VIII OF 1885), S. 178 (1) (e).

84 I. C. 730 : A. I. R. 1925 Cal. 199.

——**S. 178 (1) (e)**—*Ejectment, provision for, legality of.*

Even when a tenancy is created by a consent decree of the Court providing for a provision for ejectment, the tenant cannot be ejected under the consent decree, if it is contrary to the provisions of the Bengal Tenancy Act, under which alone, a tenant can be ejected. (*Mookerjee and Panton, JJ.*) GOPAL *v.* KIPURTH. **66 I. C. 766 : 34 C. L. J. 157.**

——**S. 178 (3)**—*Contract without consideration for enhancement of rent is void.*

An agreement to pay enhanced rent in consideration of a non existing obligation is void under S. 178 (3) of the Bengal Tenancy Act. (*Miller, C. J. and Adami, J.*) GRANT *v.* EKLAL JHA. **3 Pat. L. T. 386 : 67 I.C. 49 : 1922 P.H.C.C. 177 : A. I. R. 1922 Pat. 171.**

——**S. 179**—*Permanent* mokurrari *tenant and landlord can contract as they like—The particular lease was held to create permanent* mokurrari *tenure.*

Where the effect of an agreement and *kabuliyat* executed simultaneously was that the plaintiff let out certain land to the defendant as a *kaimi jama* (Permanent Tenancy) which was heritable, and where there were covenants in the *kabuliyat* restraining the tenant from excavating a pond or tank and cutting trees, and the tenant agreed to pay additional rent for any additional area that may be found by measurement in his possession but was not to be entitled to claim reduction of rent for diminution in area, and the tenant also undertook to pay in future any sum that might be assessed by the original *maliks* of the land or by the Government :

Held, that the effect of the documents was to create a permanent *mokurrari* tenancy and that the lease was therefore governed by S.179 of the Bengal Tenancy Act.

Held further that it was open to the parties to enter into a contract on any terms agreed upon by them. 1923 Cal. 505 Foll. (*Suhrawardy and Duval, JJ.*) KASEM SHEIKH *v.* TARAKESHWAR DUTTA. **A. I. R. 1925 Cal. 1065.**

——**S. 179**—*Interest on rent—Permanent* mokurrari *tenure.*

Where the word *mokurrari* has not been used in the document and there is no express provision in the document that the rent shall not be enhanced, but there is some indication in the document to show that the parties did not intend that there should be an enhancement of rent, and where the *kabuliyat* provides that, if there was an increase in the land on measurement, the tenant would have to pay rent separately for the excess area at the rate stipulated in the *kabuliyat*, that shows the rent was a fixed one because it could not have been intended that the tenant would pay for the excess area at the rate stipulated in the *kabuliyat* and at the same time would have to pay at an enhanced rate for the original area mentioned in the *kabuliyat*. The tenure is permanent *mokurrari* and interest is payable on rent as agreed. (*Chatterjee and Henderson, JJ.*) CHANDY CHARAN *v.* SREEMUTTY AZIZUNNESSA. **A. I. R. 1922 Cal. 18.**

——**S. 180**—" *Chur* " *is land formed by fluvial action.*

The word " chur " must be understood in its ordinary sense of land formed by fluvial action, that is to say, it is a word referring to the character of the soil and not to site of the deposit. (*Walmsley and M. N. Mukerjee, JJ.*) CHANDRA KUMAR AICH *v.* JIBAN KRISHNA NATH. **29 C. W. N. 290 : 80 I. C. 702 : A. I. R. 1925 Cal. 249.**

——**S. 182**—*Applies only when land is held as Homestead.*

S. 182 is not applicable unless the land is held as homestead ; in other words, it is not sufficient for a *raiyat* that the character of land is such as would justify its use as a homestead and must be established that the land is used by the *raiyat* as his homestead. (*Mookerjee and Rankin, JJ.*) MAHARAJAH BAHADUR SIR PRODYOT KUMAR TAGORE *v.* UMESH CHANDRA SAHA. **72 I.C. 640 : A. I. R. 1924 Cal. 367.**

——**S. 182**—*Homestead—User for keeping agricultural cattle—Ejectment.*

The deft. was found to be a settled raiyat of the village where the disputed land was situated. He was also found to have lands under cultivation ; he got these lands cultivated by hired labourers whom he supplied with his own cattle and ploughs. He had also his granary and khamar within his own homestead, *held*, on these circumstances, it was plain that as the deft. was a raiyat, the disputed land was governed by either S. 182 or by the other provisions of the B. T. Act. It cannot be maintained that because a settled raiyat takes settlement of a piece of land, adjacent to his homestead though for purposes not agricultural, the tenancy of the new plot of land is governed by S. 182 of the B.T. Act. (*Mookerjee and Cholzner, JJ.*) GIRIS CHANDRA BHATTACHARYA *v.* BHABATARAN SHAKARI. **37 C.L.J. 524 : 74 I. C. 552 : A. I. R. 1923 Cal. 667.**

——**S. 182**—*Homestead lands if subject to the operation of S. 30.*

Homestead lands are subject to the operation of S. 30 but it is open to the tenant to prove that the rent of the Homestead land by custom or local usage is not liable to be enhanced under S. 30. (*Cuming and Panton, JJ.*) RESHEECASE LAW *v.* CHINTAMONI. **36 C. L. J. 305 : 70 I. C. 535 : 27 C. W. N. 962 : A. I. R. 1922 Cal. 510.**

——**S. 182**—*Tenant holding only a portion—That portion not a part of any other holding of his—B. T. Act does not apply.*

Where the defendants had a tenancy right in a part of land which was however not a part of any other holding of theirs as a raiyat :

Held, that such tenancy is not governed by the provision of the Bengal Tenancy Act. The provisions of S. 182 are not applicable to such a case. (*Kulwant Sahay, J.*) HARIHAR PRASAD SINGH *v.* GHARBARAN KOERI. **3 Pat. L. R. 174 : 88 I. C. 553 : A. I. R. 1925 Pat. 612.**

——**S. 183**—*Under-raiyat—Status of—Acquisition of occupancy rights—Transfer of under-raiyati interest—Legality of—Consent of landlord—Estoppel.*

The B. T. Act has taken away the under raiyat's right of acquiring a right of occupancy under any condition except by local usage or custom. He is no better than a tenant at will with no tangible interest in the land except that of holding it till the end of the agricultural year. The right of an under-raiyat is not heritable or transferable. 18 C. L. J 262 ; 42 C. 751 ; 43 C. 164 ; 32 C. L. J. 46 ; 46 C. 43 Ref. The right of an under-raiyat is so unsubstantial that it gives him no title to recover possession even from a trespasser. An under-raiyat's interest is not transferable even with the consent of the raiyat. Even if it is so transferable, a consent by the raiyat given long after the transfer cannot be said to have been made with the landlord's consent. (*Suhrawardy and Graham, JJ.*) JNANENDRA NATH MUSTAPHI *v.* DUKHIRAM SANTRA. **28 C. W. N. 865 : 82 I. C. 386 : 40 C. L. J. 90 : A.I.R. 1924 Cal. 850.**

——**S. 188**—*Suit for enhancement—All co-sharers*

BENGAL TENANCY ACT (VIII OF 1885), S. 188.

must join as plaintiffs.

In a suit for enhancement of rent all co-sharer landlords must be joined as plaintiffs or at least it must be shown that those co-sharer landlords who have been joined as defendants had refused to join as plaintiffs. 38 C. 270 (P. C.) Foll. (*Suhrawardy and Page, JJ.*) SIRISH CHANDRA PAL CHAUDHURY *v.* DEBENDRA NATH SINHA ROY. **79 I. C. 369 : A. I. R. 1925 Cal. 522.**

——**S. 188**—*Saddar Malguzar is agent of the proprietors and can file suits on their behalf.*

The word " agent " in S. 188 includes agents. Bengal Tenancy Act or any other law makes no special provision to restrict the meaning of the word agent to a single individual. Therefore the Saddar Malguzars who constitute the entire body of landlords must be deemed to be agents of the proprietors whose rights remain in abeyance so long as the property is managed by the Malguzars under the regulation. The Malguzars therefore can file suits as agents. (*Suhrawardy and Duval, JJ.*) RAMJUDDIN *v.* RAI RADHA KANTA. **80 I. C. 987 : A. I. R. 1925 Cal. 245.**

——**S. 188**—*Suit in ejectment of trespassers—Section does not apply.*

S. 188, B. T. Act, applies only to cases of landlords and can have no application to a suit in ejectment against trespassers. (*Sanderson, C. J and Ghose, J.*) REAJUDDIN PATWARI *v.* SYED ABDUL JOBBAR. **69 I. C. 504 : A. I. R. 1924 Cal. 445.**

——**S. 188**—*Applicability—Suit for arrears of rent is not governed by section—Rent suit by manager of joint Hindu family—Other members are not necessary parties.*

Provisions of S. 188 have no application to the institution of a suit for arrears of rent. The tendency of modern decisions is in favour of the representative character of the manager, though, no doubt, the question must be decided in each individual case or special class of cases subject to the operation of relevant statutory provisions, if any, such as the one embodied in S. 188 of the B. T. Act. A suit for rent instituted by the managing member of a joint Mitakshara family cannot fail merely because the infant co-parceners have not been placed on the record as joint plaintiffs or as *pro forma* defts. (*Mookerjee and Chotzner, JJ.*) KALIPADA DAS *v.* RAJA SATI PRASAD GANGA. **27 C. W. N. 372 : 72 I. C. 722 : 36 C. L. J. 234 : A. I. R. 1922 Cal. 468.**

——**Ss. 188, 52 and 154**—*Suit for enhancement of rent—Parties—Suit by one co-sharer landlord—Severance of tenancy—Evidence of.*

It is not competent to one of several co-sharer landlords to sue for enhancement of rent or for additional rent in respect of additional area alleged to be comprised in a jote. The mere fact that a tenant agrees to pay a rent to one of the co-sharer landlords separately, does not constitute a severance of the tenancy. If, however, there is a separate *kabuliyat* in favour of one of the co-sharer landlords it is evidence of a separate tenancy. (*Chatterjee and Newbould, JJ.*) MONMOTHA PAUL CHAUDHURY *v.* MOHENDRA NATH BOSE. **65 I. C. 469 : A. I. R. 1922 Cal. 284**

——**S. 188**—*Rent claimed on separate holdings under separate agreement—Section does not apply.*

The right to sue for assessment is a right given by the general law and S. 188 will not apply in a case where rent is claimed for lands as forming separate holdings under separate agreements. (*Das and Adami, JJ.*) PARTAP MAHTON *v.* MT. WAZIR-UN-NISSA. **4 Pat. 604 : 6 P. L. T. 367 : 88 I. C. 687 : 1925 P. H. C. C. 125 : A. I. R. 1925 Pat. 559.**

BENGAL TENANCY ACT (VIII OF 1885), S. 188.

——**S. 188**—*Some co-sharers subsequently repudiating the application—S. 188 is not contravened.*

Where the application under S. 105, B. T. Act, appears to have been filed by all co-sharer landlords, the subsequent conduct of some of the joint landlords in repudiating the authority of the others to sign the application on their behalf and retiring from the case will not attract the provisions of S. 188 so as to defeat the application if the other joint landlords choose to proceed with it. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) HAZARI LAL *v.* AMBIKA GIR. **3 P. 67 : 1923 P. H. C. C. 273 : 2 P. L. R. 169 : 79 I. C. 5 : 5 P. L. T. 591 : A. I. R. 1924 Pat. 104.**

——**S. 188**—*Operation against tenants.*

S. 188 applies to joint landlords and applies only where the landlord is required or authorised by the Bengal Tenancy Act to do something. But it has no direct application to the tenants ; and it certainly does not touch the question whether the tenants being authorised to claim a right as against the landlords and acting together can put forward that claim in a suit by a co-sharer landlord. The principle that underlies S. 188 is that where two or more persons have a joint right, they cannot assert that right except jointly. 21 C. L. J. 315 Dissented. (*Coutts and Das, JJ.*) KESHO PRASAD *v.* RAMDENI. **2 P. 183 : 4 P. L. T. 689 : 74 I. C. 454 : A. I. R. 1923 Pat. 397.**

——**S. 188**—*Co-sharer landlords—Suit for rent by one, when lies.*

Where a tenant makes a contract by which he is liable to pay rent to several co-sharers jointly, one co-sharer cannot maintain a suit for the whole rent. S. 188 of the B. T. Act demands that landlords shall do jointly anything which they are under the Acts required or authorised to do, but there is nothing to prevent one co sharer from bringing a suit for the whole rent after making the co-sharers who refuse to join as plaintiffs, defendants in the suit. 35 Cal. 331 Ref. Again if a co-sharer can prove that there is a contract, express or implied, by which a tenant is liable to pay him his share of the rent separately, then he may bring a suit for that part of the rent without joining his co-sharers as defendants, but the decree obtained by him is to be executed as money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection all the co-sharers may sue jointly for the whole rent. To further facilitate the recovery of arrears of rent due to a co-sharer who is in dispute with his tenants or with his fellow-landlords, the legislature enacted S. 148-A of the Bengal Tenancy Act. The section requires firstly, that the co-sharer shall sue to recover the rent due to all the co-sharer landlords in respect of the entire holding ; secondly, that he must make all the remaining co-sharers parties to the suit ; and thirdly, that he must state that he is able to ascertain what rent is due for the whole tenure or holding or whether the rent due to other co-sharer landlords has been paid, owing to the refusal or neglect of the tenant or of the co-sharer landlords, defendants in the suit, to furnish him with direct information on these points or on either of them. In such a case the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co-sharer landlords have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. 4 Pat. L. J. 500 Ref. (*Miller, C. J and Mullick, J.*) RAJGIRI SINGH *v.* JADUNATH SINGH. **1922 P. H. C. C. 355 :**

BENGAL TENANCY ACT (VIII OF 1885), S. 189.

4 Pat. L. T. 39 : A. I. R. 1923 Pat. 41.

——S. 189—*Record-of-Rights—Entry in—Boundaries of neighbouring estates—Cadastral survey map—Value of.*

The entry in the Record-of-Rights operates in the same way between landlord and tenant, as between landlords of the same or of neighbouring estates or between tenant and tenant. The entry must be presumed to be correct until it is shown by the evidence to be incorrect. A Cadastral survey map is a map of very great importance. As is well known the first stage in the preparation of the Record-of-Rights is the Cadastral survey and demarcation of boundaries. The procedure for a survey though directed to be made under the provisions of the Act must be that laid down in the Bengal Survey Act and it must be conducted with all the publicity and notice to all the parties concerned as laid down in that Act. (*Das and Ross, JJ.*) MAZHARUL EKBAL *v.* RAJAGOPAL LAL.

1924 P. H. C. C. 213 : A. I. R. 1924 Pat. 719.

——S. 192—*Contract in force—Meaning of—Tenant's right to land settled with Zemindar—Contract before the passing of the B. T. Act.*

Where the intention of the parties to the contract was that the lease should comprise all the lands within it and the rent was settled at a lump sum for all the lands leased out, the tenant has a right to the lands settled with the Zemindar after resumption by Government. The words "lease or contract in force" in S. 192 of the Bengal Tenancy Act have reference to the words "lease" or "contract" in the opening lines of the section and do not affect contracts entered into before the passing of the Act. S. 192 does not, either expressly or impliedly, give power to a Revenue Officer to fix a rent so as to affect contracts entered into, before the passing of the Act. (*Chatterjee and Pearson, JJ.*) PRAFULLA NATH TAGORE *v.* T. C. TWEEDIE.

35 C. L. J. 14 : 65 I. C. 234 : A. I. R. 1922 Cal. 248.

——S. 195 (e)—*Rent decree—Sale of patni—Suit for possession by purchaser—Rights of patnidar—If affected.*

The B. T. Act does not in view of S. 195 (*e*) affect the rights of *patnidars* under the *Patni* Regulation and where the purchaser of a *patni* at a sale in execution of a rent decree sues to recover possession after giving notice under S. 167, B. T. Act, his rights under the Patni Regulation are not affected. (*Suhrawardy and Duval, JJ.*) DURLAV CHANDRA CHOWDHURI *v.* JAMIRUDDIN AHAMED CHOWDHURI.

90 I. C. 405.

——Chap. XIV—*Execution of rent decree—Objection to, can be raised by tenant—Special procedure under Chapter XIV—Effect of.*

It is competent for a tenant against whom a decree for arrears of rent has been passed to raise an objection in the execution proceeding that execution of such a decree is barred under the special provisions of Chapter XIV of the Act. Such an objection cannot be taken if the decree is executed as a decree for money under the provisions of the Civil Procedure Code. (*Chatterjee and Panton, JJ.*) ATULCHANDRA BASU *v.* ARIPSHAIK.

65 I. C. 810 (Cal.).

——Sch. III—*Real purchaser in possession for two years—Effect of.*

Where a *benami* purchaser at an execution sale is kept out of possession for a period of two years by the real purchaser, the former's title becomes extinguished under Sch. III to the Bengal Tenancy Act. (*Teunon and Newbould, JJ.*) HARISH CHANDRA GUHA *v.* NRIPENDRA COOMAR CHAKRAVARTI.

59 I. C. 719 : 24 C. W. N. 1024.

BENGAL TENANCY ACT (VIII OF 1885), Sch. III, Art. 3.

—— Sch. III, Art. 1 (a)—*Ejectment of lessee of Zerait land is not governed by the Schedule—Non-occupancy right—Limitation.*

Schedule III, Art. 1 (*a*) of the B.T. Act (as amended) does not apply to suits to eject persons who were not non-occupancy raiyats of the land under Ch. VI of the Act. To fall within the article, the non-occupancy raiyat must be a person who, before the expiry of his term, had acquired the status and rights of a non-occupancy raiyat under Ch. VI of the Act. A lessee of a proprietor's private or Zerait land is not such a non-occupancy raiyat. (*Sir John Edge*). MAHANTH JAGARNATH DAS *v.* JANKI SINGH

43 M. L. J. 55 : 49 I. A. 81 : 66 I. C. 337 : 26 C. W. N. 833 : 35 C. L. J. 506 : (1922) M. W. N. 410 : 1 Pat. 340 : 3 Pat. L. T. 197 : 31 M. L. T. 231 : A. I. R. 1922 P. C. 142 (P.C.).

——Sch. III, Art 2 (a)—*Applicability—Deposit under S. 61 of the Act.*

The limitation prescribed in Sch. III, Art. 2 (*a*) of the B. T. Act only applies to cases where the deposit has been made under S. 61 of the Act and if no deposit has been made within the meaning of this section the limitation period cannot apply. (*Dawson Miller, C.J. and Macpherson, J.*) MUSST. BIBI WAJIBUNNISSA BEGUM *v.* BABU LAL MAHTON.

90 I. C. 871 : 1925 P. H. C. C. 298.

——Sch. III, Art. 3—*Applicability—Constructive dispossession.*

The two years' period of limitation under Sch. III, Art. 3 applies only to cases of actual dispossession by the landlord of the tenant and not constructive dispossession. (*Greaves and Mukerjee, JJ.*) RAJANI KANTA BISWAS *v.* PANCHANAN MONDAL.

90 I. C. 793.

—— Sch. III, Art. 3—*Plea of special limitation may be raised by persons claiming under the landlords and so it can be inquired into in a suit in which landlords are not impleaded.*

The plea of special limitation under Art. 3, Sch. III, Bengal Tenancy Act, is available not only to the landlord but also to persons claiming under the landlord and therefore the question relating to special limitation may be inquired into even if the landlords were not parties to the suit, or if the landlords being made parties to the suit, did not appear to contest the suit but were satisfied with the order passed by the Court below and did not challenge it on appeal. 24 Cal. 40 Ref. (*Suhrawardy and Chotzner, JJ.*) ABDUL MAZID MIR *v.* GOSHAI DAS BACHAR.

79 I. C. 569 : A. I. R. 1925 Cal. 461.

——Sch. III, Art. 3—*Landlord claiming title by auction purchase—Dispossession of raiyat—Suit for possession by ryot—Limitation.*

A landlord claiming title by purchase in execution of a rent decree against a third person whom he alleged to be the tenant dispossessed plaintiff (the raiyati) of a part of his holding. It was found that the decree and sale were fraudulent and the plaintiff continued in possession even afterwards. In a suit by plaintiff for possession. *Held*, that the suit was not governed by the 2 years' rule of limitation under Sch III, Art. 3. 24 C. W. N. 382 ; 17 C. W. N. 317 Ref. (*Suhrawardy and Page, JJ.*) KEDAR NATH BISWAS *v.* KAMINI SUNDARI DASYA.

28 C. W. N. 482 : 78 I. C. 514 : A. I. R. 1924 Cal. 623.

——Sch. III, Art. 3—*Applicability.*

Art. 3 does not apply to a suit which is not a suit between the landlord and tenant. The time under the article begins to run from the decision of the first Court. (*Greaves and Ghose, JJ.*) GOPINATH JALUA

BENGAL TENANCY ACT (VIII OF 1885), Sch. III, Art. 3.

v. BHAJAHARI DAS. **68 I. C. 472 : A. I. R. 1923 Cal. 327 (2).**

——— **Sch. III, Art 3**—*Non-transferable occupancy holding—Purchaser—Recognition by some of the landlords—Dispossession by landlord not recognising—Limitation for suit.*

Art. 3 of Sch. III relates only to a suit brought by a raiyat or under-raiyat against his landlord and not to a suit by a tenant against third parties who are trespassers. 15 C 317 ; 17 C. 926 Ref. All the landlords, other than the contesting defendants accepted the plaintiff who had purchased a non-transferable occupancy holding as their tenants. The contesting defendant took possession not only of his share but of the entire holding. More than three years after the dispossession, plaintiff sued for possession. *Held*, that the suit was not barred by limitation under Sch. III, Art. 3. (*Mookerjee and Panton, JJ.*) ABDUL KADER SARKAR *v.* SHEIKH LAL MAHOMED. **84 I. C. 25 : 39 C. L. J. 581.**

——— **Sch. III, Art. 3**—*Dispossession by tenants settled by co-sharer landlords—Article applies.*

Art. 3, Sch. III of the Act is applicable where the dispossession is effected by the tenants settled upon the land by co-sharer landlords with the help of their naib. 25 C. W. N. 168 Foll. (*Chatterjee and Pearson, JJ.*) PROFULLA CHANDRA GHOSE *v.* BABURAM MANDAL. **65 I. C. 1 : 34 C. L. J. 462.**

——— **Sch. III, Art. 3**—*Dispossession of tenant by landlord and by a third person is within the article*

Where a *raiyati* tenant is dispossessed by a third person, who subsequently obtains a settlement from the landlord, the landlord having no hand in the tenant's ouster, the dispossession is not one by the landlord and the tenant's suit for possession is not governed by Art. 3. Where the landlord granted a settlement of the holding to his peons, and the *raiyati* tenant was dispossessed by them with the help of landlord's *burkundazes* and at the landlord's instigation a suit by the tenant for possession is governed by Art. 3. (*N. R. Chatterjee and Suhrawardy, JJ.*) ARMAN PEEDA *v.* MANIK SARKAR. **62 I. C. 690 (Cal.).**

——— **Sch. III, Art. 3**—*Dispossession—Grant of a new lease is not.*

Art. 3 applies only where the dispossession has been effected either by the landlord or by his agent acting within the scope of his authority. The grant of a lease to a new tenant by the landlord is not equivalent to a dispossession by the landlord. (*Mookerjee, A. C. J. and Fletcher, J.*) HARAN CHANDRA BARAI *v.* HARI CHARAN BARAI. **61 I.C. 899: 25 C.W.N. 102.**

——— **Sch. III, Art. 3**—*Applicability of—Essentials of—Shorter period of limitation.*

The shorter period of limitation prescribed by Sch. III, Art. 3 applies on proof that the plaintiff is a raiyat and that he was dispossessed by the landlords. Where the plaintiff had purchased a portion of the tenant's holding in execution of a money decree and had never obtained delivery of possession, the article does not apply. 2 Pat. L. J. 567 Dist. (*Ross and Sen, JJ.*) HARI MOHAN PRASAD CHAUDHURY *v.* MD. RASHIDUL HAQUE. **5 Pat. L. T. 616 : 1924 P. H. C. C. 268 : A. I. R. 1924 Pat. 780.**

——— **Sch. III, Art. 3**—*Essentials for—Applicability.*

The essential conditions which must be satisfied in order to attract the operation of Sch. III, Art. 3 of the B. T. Act are these : First, the decree must be obtained in a suit between landlord and tenant, and secondly, the provisions of the Bengal Tenancy Act must be applicable to them. (*Coutts and Das, JJ.*) RAGHU-

BENGAL VILLAGE SELF-GOVERNMENT ACT (V OF 1919), S. 51.

NATH SAHAY *v.* CHOWA MAHTON. **3 Pat. L. T. 525 : 67 I. C. 882 : A. I. R. 1922 Pat. 602.**

——— **Sch. III, Art. 3**—*Landlord and tenant—Settlement of land by tenant with other persons—Dispossession by landlord—Suit for recovery of possession—Limitation.*

A person to whom 1,100 bighas of nakdi Jote land had been let for cultivation settled the land with tenants. He sued for recovery of possession alleging dispossession by the landlord. *Held*, that the suit was governed by Sch. III, Art. 3. To find out whether a person is a raiyat or not within the meaning of Sch. III, Art. 3 the test is not the use which the tenant has made of the land but the purpose for which the land is leased. (*Das and Ross, JJ.*) GAYAN DAS *v.* DWARKA MANDAR. **3 Pat. 540 : 82 I. C. 79 : 1924 P. H. C. C. 269 : A. I. R. 1924 Pat. 557.**

——— **Sch. III, Art. 3**—*Applicability of—Suit for possession of portion of holding is within the article.*

Art. 3 of Sch. III to the Act applies to suits to recover possession of land claimed by an occupancy tenant and not to suits to recover possession of an occupancy 'holding', and a suit for lands forming a portion of an occupancy holding falls within the article. (*Coutts and Ross, JJ.*) JOWHAR ALI *v.* ALARAKHU. **63 I. C. 481 : 2 Pat. L. T. 615.**

——— **Sch. III, Art. 3 (1)**—*Dispossession by landlord.*

Obiter.—Where the landlord purchases the holding in execution of a rent-decree it merges in the landlord's interest and when he or a lessee from him, proceeds to take possession from the original tenant, the dispossession is one by the landlord within Art. 3 (1). (*Teunon and Abdul Majid, JJ.*) ERIDAJ ALI BISWAS *v.* ARJUN CHANDRA BISWAS. **62 I.C. 704 (Cal.)**

——— **Sch. III, Art. 6**—*Rent decree unnecessary—Prayer for declaration does not change character of decree.*

The insertion of an unnecessary prayer for declaration as to the plff.'s share in the Bhaoli produce, does not prevent the decree in a suit between landlord and tenant from being a rent decree and consequently the limitation for execution of that decree is that provided by Sch. III, Art. 6 of the B. T. Act. (*Coutts and Das, JJ.*) DARGAHI MIAN *v.* MT. MANGO KUER **1923 P. H. C. C. 5 : 3 Pat. L. T. 563 : 1 P. 779 : 67 I. C. 869 : A. I. R. 1922 Pat. 566 (2).**

——— **(AMENDMENT) ACT (II OF 1918).**

——— **S. 49 (e) (2)**—*Aboriginal—Power to mortgage—Sanction of Collector*

The power of an aboriginal to effect a mortgage of his land is restricted by the provisions of S. 49 (*e*) sub-S. (2) of the Act under which such a tenant is empowered only to make a complete usufructuary mortgage of his land and the permission of the Collector cannot enlarge the power of an aboriginal to effect a mortgage of his holding in any other way than by a complete usufructuary mortgage. (*Walmsley and Ghose, JJ.*) GANGARAM MAJHI *v.* BAMAPADA MAHAPATRA. **68 I. C. 301 : A.I.R. 1923 Cal. 313 (2).**

BENGAL VILLAGE SELF-GOVERNMENT ACT (V OF 1919)—*Rules under R. 8—Applicability—Meeting for election of President.*

R. 8 and other rules relating to meetings under S. 101 (2) (*e*) of the Act do not govern meetings of the members of a Union Board convened by a Government Officer for the purpose of electing a President after a general election. (*Suhrawardy and Duval, JJ.*) NASARUDDIN MANDAL *v* ANATH NATH CHOWDHURY. **90 I. C. 700 : 52 Cal. 943.**

——— **S. 51**—*Validity of election—Suit—If lies.*

BEQUEST.

S. 51 of Act V of 1919 does not bar the jurisdiction of a Civil Court to entertain a suit contesting the validity of an election under the Act. (*Suhrawardy and Duval, JJ.*) NASARUDDIN MANDAL *v.* ANATH NATH CHOWDHURY. **90 I. C. 700 : 52 Cal. 943.**

BEQUEST.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT AND WILLS.
(2) MAHOMEDAN LAW—WAKF AND WILLS.
(3) WILLS.

BERAR ATTENDED VILLAGES TENANCY LAW.

——S. 40—*Ante-alienation tenant—Rights of.*

The rights of an izara tenant are transferable notwithstanding any contract to the contrary and the tenant could not be ejected from his holding by his landlord as such, for any case. (*Prideaux, A. J. C.*) SHEIK IMAM *v.* RAMACHANDRA. **71 I. C. 25 : A. I. R 1923 Nag. 69 (2).**

BERAR INAM RULES (1879).

——*Deshpande allowance—Nature of—Succession to.*

Deshpande allowance is an "inam" governed by the Berar Inam Rules, 1859. Whether a certain person is entitled to succeed to it depends on the question whether they are the direct lineal heirs of the present incumbent or the incumbent to whom the inam is directed to be continued hereditarily when the rules were made. (*Kotval, A. J. C.*) CHANDRABHAGA *v.* GANESEH KESHO. **75 I. C. 932 : A. I. R. 1924 Nag. 234.**

——R. 5—*Government can alter or modify the rules.*

The Berar Inam Rules lay down the conditions which are usually to accompany an inam grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant ; and where the right of inheritance is by the certificate confined to a particular class of descendants which in its exclusion of all females from enjoyment is in terms unambiguous, there is no reason why the grant in these terms should not have effect. Where the succession of a party to the inam did not involve a re-grant by Government but was merely a continuance of the grant to him in accordance with its originally declared terms, he holds the estate burdened with the obligation of recognising the rights of the other party to the share of income declared by a decree against the party. (*Lord Blanesburgh.*) MIR SUBHAN ALI *v.* IMAMI BEGUM.
50 M. L. J. 136 : 21 N. L. R. 117 : 52 I. A. 294 : 23 A. L. J. 667 : 88 I. C. 347 : (1925) M. W. N. 535 : A. I. R. 1925 P. C. 184 (P. C.).

——R. 5—*Devolution of inam estate*—Madatmash—*Alienation of—Validity.*

The devolution and incidents of an inam estate in Berar are regulated by the Berar Inam Rules subject entirely to the *Sanad* or certificate evidencing the special terms of the grant.

Madatmash is a grant for maintenance or subsistence under R. 5 and any permanent alienation or a transaction likely to result in a permanent alienation can only be acted on during the lifetime of the then certificate holder and at his death by the order sanctioning the appointment of another *inamdar* the land passes to him free of any incumbrances imposed on the land by the last holder. (*Prideaux and Kinkhede, A. J. Cs.*) BALIRAM SINGH *v.* RAMCHANDRA.
78 I. C. 77 : A. I. R. 1924 Nag. 393.

——R. 5—*'Lineal heirs' in R. 5 refer to heirs of first grantee.*

The lineal heirs referred to in R. 5, cl. 2 (first) are the lineal heirs of the first grantee under British rule.

BERAR LAND REVENUE CODE (1896), S. 3.

(*Kotval, A. J. C.*) CHANDRABHAGA *v.* GANESH KESHAV. **75 I. C. 932 · A. I. R. 1924 Nag. 234.**

——R. 5—*Scope of.*

The Berar Inam Rules are merely instructions to Revenue Officers for the original settlement of claims to jagirs and they lay down the conditions that shall ordinarily govern each grant. (*Hallifax and Prideaux, A. J. Cs.*) SUBHAN ALI *v.* IMAMI BEGAM.
65 I. C. 194 : A. I. R 1922 Nag. 129.

——Rr. 5, 9—*Impartibility is not a condition under the section.*

The condition of impartibility is not one of the restrictions imposed by R. 5, though R. 9 provides that service grants cannot be divided. (*Dhobley, A.J. C.*) KRISHNAJI *v.* NILAKANTH. **18 N. L. R. 163 : 69 I. C. 800 : 5 N. L. J. 25 : A. I. R. 1922 Nag. 52.**

——R. 7 (2)—*Deshmukhi cash inam not within the rule.*

A Deshmukhi cash inam does not fall under Rule 7 (2) so as to be governed by Rule 5 (2). The grant is a perpetual hereditary grant for the maintenance of the dignity of the members of the family and each person entitled for the time being to a share must be held to be holding that share for his life only. (*Kotval, A. J. C.*) SHANKER RAO *v.* KHUSHAL RAO.
75 I. C. 999 : A. I. R. 1923 Nag. 329.

——*Cl. II and IV—Scope of.*

Where the Inam certificate itself does not mention the class and in the certificate the purpose of the grant is stated to be the service of the Kazi and maintenance, and the tenure to be in perpetuity conditional on service. *Held*, the grant is both a maintenance and a service grant. As a service grant the inam does fall under class II. The main purpose of the inam was the maintenance of the family and the service stipulated for is not necessarily personal service by the particular person in whose name the certificate for the time being stands, but is service by any member or members of the family of the first grantee from the British Government. (*Kotval, A. J. C.*) SYED WAZRUDDIN *v.* SHAHBUDDIN.
71 I. C. 150 : A. I. R. 1922 Nag. 254.

——Cl. III, R 5—*Inam estates in Berar—Succession—Descendants through females—Rights of.*

Subject to the special terms, if any, of the grant the devolution and incident of an inam estate in Berar are governed by the Berar Inam Rules, 1879. The recognition of a jagir or inam by the Government operates as a fresh starting point to provide conditions for its future enjoyment and devolution. 11 N. L. R. 150, Foll. It is the recognition by the Government of an inam under the Berar Inam Rules that operates as the real root of title of the grantee as against the Government. The expression "*farzandan*" means offspring or lineal descendants and includes daughters but not the children of daughters. (*Dhobley, A. J. C.*) CHOTU *v.* AKBAR ALI.
65 I. C. 72 : A. I. R. 1922 Nag. 170.

BERAR LAND REVENUE CODE (1896).

——Ss. 3, 209—*Hindu joint* Mitakshara *family—Can be co-occupant.*

The cumulative effect of the definitions of 'Occupant' and 'co-occupant', 'holder' 'holding' and 'to hold land' is that a person who is entitled to possession and enjoyment or disposal of unalienated land or a person holding such right solely on his own account or wholly or partially in trust for another person or class of persons or every one of such holders of the right, is a co-occupant.

A joint *Mitakshara* Hindu family is such a co-occupant and constitutes a single co-occupant irrespective of the number of the co-parceners constituting it.

BERAR LAND REVENUE CODE (1896), S. 56.

There is not only unity of title but unity of possession and enjoyment with all the incidents of the right of survivorship attached to it ; therefore in suits the manager is deemed to represent a joint family. In the same way, when all members join in suing, each member is deemed to sue not in his individual right but by way of enforcing a joint right. (*Kinkhede, A. J. C.*) KISAN *v.* SITARAM.

81 I. C. 1009 : A. I. R. 1925 Nag. 160 (2).

——**Ss. 56 and 4**—*Amount payable by ante-jagir tenant to Jagirdar is revenue and is a charge on the holding.*

The sum payable on account of a holding by the inferior holder, who is not a tenant is land revenue and is as such a charge on the holding whether the amount is payable to Government or not. (*Kotval, A. J. C.*) SHAMRAO *v.* SHRI SITARAM MAHARAJ.

18 N. L. R. 206 : 68 I. C. 289 : A. I. R. 1923 Nag. 5.

——**S. 78**—*Ante-alienation tenancy—What must be proved.*

To prove an ante-alienation tenancy, a tenant must establish that his ancestors or predecessors-in-title possessed the land prior to the period when the grantee got the village on payment of a fixed proportion of the revenue. The fact of the tenant having held out at survey rates for a period of forty years is not presumptive of an anti-alienation tenancy. Where there is no proof of an express agreement as to the permanency of the lease on a fixed rental or to the duration of the lease, it must be presumed that unless the tenant can establish protection against arbitrary eviction, and a right to hold on a just and reasonable rent, the normal incident of the law of the landlord and tenant holds good, and that the landlord is entitled both to enhance rent and evict after proper notice. (*Batten and Prideaux, A. J. Cs.*) GANPAT *v.* SAMBHSHIV.

4 N. L. J. 235.

——**S. 78 (2)**—*Origin—Unknown.*

If it can be proved with certainty that the tenancy did not commence till after a certain point of time then it cannot be said of such a tenancy that evidence of its commencement has been lost by reason of its antiquity. A tenant of such holding is not protected by S. 78 (2). 14 N. L. R. 111 Foll. In the absence of any proof that the tenancy was perpetual or that the defendant was an *ante-jagir* tenant, it must be assumed that he was an annual tenant. (*Dhobley, A. J. C.*) YESHWANT *v.* SHIWAPPA.

68 I. C. 178 : A. I. R. 1923 Nag. 129 (2).

——**S. 79**—*Tenancy from year to year—Notice to quit—Ejectment suit.*

In the case of a tenant from year to year, notice to quit is necessary before an ejectment suit can be filed. (*Baker, J. C.*) BALKRISHNA *v.* RAGHUNATH.

90 I. C. 43.

——**S. 96 (1)**—*Record-of Rights—Presumption of correctness.*

Under S. 96 (1) of the Berar Land Revenue Code, there is an initial presumption of correctness about the entries in a Record-of-Rights. (*Kinkhede, A. J. C.*). DATTATRAYA *v.* AMRIT.

89 I. C. 763.

——**S. 96 (1)**—*Entries in Record-of-Rights—Presumption.*

There is a presumption of correctness attached to entries in the Record-of-Rights under S. 96 (1) of the Berar Land Revenue Code and such an entry would support the title of the recorded holder of the survey number or at any rate his possession. (*Kinkhede, A.J. C.*) DAULAT *v.* RAMAPPA. **90 I. C. 196.**

——**S. 158**—*Patwari is a public servant.*

As a patwari is entrusted with the work of collecting land revenue and under S. 158 of the L. R. Code, cesses can be collected as if they are land revenue, a Patwari is a public servant within the definition in the Penal Code. (*Batten, J. C.*) LOCAL GOVT., C. P. *v.* MADHO PATWARI. **23 Cr. L. J. 557 : 68 I. C. 157 : A.I.R. 1923 Nag. 146.**

BERAR LAND REVENUE CODE (1896), S. 223.

——**S. 160 (iii)**—*Cess is payable by—Superior holder.*

Under S. 160 the cesses in an alienated village are recoverable from the superior holder, and it lies on him to show, if he throws the liability on another person how the case is taken out of the application of that section. (*Kotwal, A. J. C.*) RAMCHANDRA *v.* ISHRABHO. **64 I. C. 202 : A. I. R. 1922 Nag. 168.**

——**S. 205**—*Agreement to sell—Specific performance decreed—Pre-emption—Right of.*

An agreement to sell land does not give rise to a right of pre-emption, but where on the basis of the agreement specific performance has been decreed, the right of pre-emption can be enforced. (*Kotwal, A. J. C.*). TUKARAM *v.* UKARDA.

76 I. C. 374 : A. I. R. 1924 Nag. 327.

——**S. 205**—*Mehernama for no fixed amount is not within the section.*

A Mehernama without indicating the amount of mehr is not a sale or a relinquishment. It is the giving of the land as a family settlement. (*Prideaux, A. J. C.*) MAHATAP KHAN *v.* MT. ASHABI.

76 I. C. 668 : A. I. R. 1923 Nag. 330.

——**Ss. 205 and 211**—*Co-occupant may be a temple.*

There is nothing in the Berar Land Revenue Code to indicate that the co-occupant who is entitled to pre-empt must be a human being. A temple acting through its trustees can also pre-empt. (*Kotwal, A. J. C.*). BAKARAM *v.* HIRALAL.

71 I. C. 39 : A. I. R. 1923 Nag. 96.

——**S. 205**—*Right to pre-emption—Agreement to resell—Effect of.*

A pre-emptor's right under S. 205 of the Berar Land Revenue Code cannot be defeated by the vendee reselling to the vendor after a pre-emption decree has been passed. 2 N. L. R. 150 Foll. (*Prideaux, A.J.C.*) BAPU *v.* BHOMI. **18 N. L.R. 202 : 68 I. C. 498 : A. I. R. 1923 Nag. 26.**

——**S. 209**—*Pre-emption—Joint Hindu family—If a co-occupant.*

A joint Hindu family is a "co-occupant" within the meaning of S. 209 for the purpose of claiming rights of pre-emption. The cumulative effect of the definitions of the expression "occupant," "holder," "holding," etc., in the Code is that a person in whom the right to possession, enjoyment or disposal of unalienated land vests, or a class of persons or where there are more holders than one any one of such holders is an occupant and when there are more occupants than one in a single holding, each is a co-occupant. (*Kinkhede, A. J. C.*) KISAN *v.* SITARAM.

81 I. C. 1009 : A. I. R. 1925 Nag. 160 (2).

——**S. 210**—*Pre-emption.*

S. 210 of the Berar Land Revenue Code does not apply to the case of a sale of land by a co-occupant to his co-occupant and a stranger. (*Kotval, A.J.C.*) SAKHARAM *v.* SHEORAM. **21 N. L. R. 189.**

——**S. 220**—*Civil Court—Jurisdiction—Suit for declaring land reserved for grazing cattle.*

A suit for declaring that certain land is reserved for cattle grazing and as such cannot be let out is cognizable by a Civil Court, as it does not fall under S. 220. (*Baker, J. C.*) RAMBUX *v.* MOTI. **20 N. L. R. 70 : 78 I. C. 872 : A. I. R. 1924 Nag. 256.**

——**S. 223**—*Applicability—Tenant must have held*

BERAR MUNICIPAL LAW (1886).

prior to alienation.

S. 223 of the Berar Land Revenue Code applies only when the tenant has held from a period anterior to the alienation. The fact of the tenant having held out at survey rates for a period of forty years does not necessitate any presumption of an ante-alienation tenancy. Where there is no proof of an express agreement as to the permanency of the lease, on a fixed rental or to the duration of the lease, there is a presumption that unless the tenant can establish protection against the arbitrary eviction, and title to hold on a just and reasonable rent, the normal incident of the law of landlord and tenant is applicable and that the landlord is entitled both to enhance rent and evict after proper notice. (*Batten and Prideaux, A. J. Cs.*) GANPAT *v.* SAMBASHIV. **4 N. L J. 235.**

BERAR MUNICIPAL LAW (1886).

———*Malkapur Municipality—Taxable income.*

The income taxable is the income derived from the profession or art practised or trade carried on within the municipal limits. If the outside income is brought in and mixed with the income made within the municipality and spent there, the whole income will no doubt be taxable, but if the outside income is not at all brought in, but is kept at the place where it is earned, it cannot be taken into consideration while assessing the professional tax. (*Dhobley, A. J. C.*) MALKAPUR MUNICIPALITY *v.* AMRIT WAMAN. **18 N. L. R. 121 : 65 I. C. 532 : 5 N. L. J. 214 : A. I. R. 1922 Nag. 10.**

——— ———**Ss. 51 and 53**—*Municipal tax, legality of, can be raised in Civil Courts—Professional tax—Levy of —Subject of the tax.*

The jurisdiction of the Civil Courts is not ousted when the question is, whether a particular tax purporting to have been imposed under the Berar Municipal Law has any legal existence. When the levy and assessment of any tax by the committee, purporting to be done under the authority of the Berar Municipal Law is alleged to be *ultra vires*, the Civil Courts have jurisdiction to entertain the suit. 8 N. L. R. 107 ; 24 M. 124 ; 35 C 859, Rel. Where the committee acted *ultra vires*, and charged income not liable to tax, the Civil Court has jurisdiction to entertain the suit and to direct the refund of the amount realised in excess. It is not competent to a Municipality in Berar to assess to tax professional income derived by the assessee outside the Municipal limits, when such income is not brought into or mixed up with the income arising within the Municipality. 48 C. 443, Ref. (*Dhobley, A. J. C.*) MUNICIPAL COMMITTEE, MALKAPUR *v.* AMRIT WAMAN DALAL. **5 N. L. J. 214 : 18 N. L, R. 121 : 65 I. C. 532 : A. I. R 1922 Nag. 10.**

BERAR PATELS AND PATWARIS LAW (1900).

———*Rules—Berar Land Revenue Manual, Vol II. p. 219—Duties of Patwaris.*

The wording of the rules is not very precise, but it seems to mean that Patwari has no responsibility for any work arising outside his circle. (*Batten, J. C.*) LOCAL GOVERNMENT, C. P. *v.* MADHO PATWARI. **23 Cr. L. J. 557 : 68 I. C. 157 : A. I. R. 1923 Nag. 146.**

———**Ss. 20 and 6-A (4)**—*Suit for division of patel allowance does not lie in Civil Court.*

A suit as to the division of balance of emoluments by the patel in proportion to share under S. 6-A (4) is not triable by Civil Courts. Under S.20 of the Berar Patels and Patwaris Law a Civil Court has no jurisdiction to try a claim for a share of the arrears of allowance due to a Patel in virtue of his office. (*Kotwal, A. J. C.*) CHAMPAT *v.* GANPAT RAO.

BIHAR & ORISSA COURT-FEE AMENDMENT ACT (II OF 1922), Sch. 1, Art. 1.

68 I. C. 506 : A. I. R. 1923 Nag. 16.

BERAR TENANCY ACT.

———**S. 140**—*Ante-alienation tenant—Rights of.*

The rights of an izara tenant are transferable notwithstanding any contract to the contrary and the tenant could not be ejected from his holding by his landlord as such, for any case. (*Prideaux, A. J. C.*) SHEIKH IMAM *v.* RAMACHANDRA. **71 I. C. 251. A. I. R. 1923 Nag. 69 (2).**

BERAR WASTE LAND RULES (1865).

——— *Distinct election by the lessee followed by an application and agreement between lessee and Government and grant of* sanad *is essential for acquisition of proprietary rights.*

Where no application for proprietary rights or patelki rights was ever made during the continuance of the lease, the mere fact that on the expiry of the lease when the assessment was raised, the tenant paid the enhanced assessment for two years is not enough to constitute the proprietary rights referred to in the rules, which contemplate a distinct election by the lessee followed by an application and an agreement between the lessee and Government to abide by the conditions and then the grant of a *sanad* conferring proprietary rights. (*Baker, J. C.*) JANKIBAI *v.* PARVATI. **87 I. C. 1036 : A.I. R.1925 Nag. 353.**

BETROTHAL.

See (1) DAMAGE.
(2) HINDU LAW—MARRIAGE
(3) TORT.

BETTING.

See (1) CONTRACT ACT, S. 30.
(2) GAMBLING ACTS (LOCAL AND IMPERIAL).

BHAGDARI TENURE.

See LAND TENURE.

BIAS.

See PRACTICE—JUDGE.

BID.

See (1) C. P. CODE, O. 21, Rr. 69, 82.
(2) CONTRACT ACT, S. 2 (*a*) and (*b*).

BIDDER AND PURCHASER.

See (1) C. P. CODE, O. 21, Rr. 69, 82.
(2) CONTRACT ACT, S. 2 (*a*) and (*b*).

BIGAMY.

See PENAL CODE, SS. 494, 495.

BIHAR AND ORISSA COURT-FEE AMENDMENT ACT (II OF 1922).

——— *Appeal filed after the Act should bear new Court-Fees.*

An appeal memorandum filed after the amending Act came into force and the vakalat should be stamped under the new Court Fees Act, and the copies of judgment and decree if obtained before the Amending Act came into force, need only bear the Court-fee required by the old Court Fees Act as it stood before the amendment. (*Jwala Prasad, J.*) ANAND RAM PRAMHANS *v.* RAM GULAM SAHU. **3 Pat. L. T 820 : 71 I. C. 426 : 1922 P. H. C. C. 365 : 1 Pat. L. R. 12 : 2 Pat. 264 : A.I.R. 1923 Pat. 150.**

———**Sch. 1, Art. 1**—*Civil Procedure Code, O. 41, R. 1.*

Although the appeal could be presented on the 18th of August 1922, to the Registrar or Judge of the High Court, it was not properly presented to the Court or to the officer appointed by the Court under O. 41, R. 1, but was presented to the Assistant Registrar. ***Held***, the memorandum of appeal should be deemed to have been presented on the 23rd of October 1922 when the Court re-opened and the Registrar actually received the

BIHAR & ORISSA MUNICIPAL ACT (VII OF 1922), S. 259.

document and noted on the order sheet as having been filed on that date. The new Bihar and Orissa Court-Fees Act, which had already come into force before the 23rd of October 1922, will apply. (*Jwala Prasad, J.*) ANAND RAM *v.* RAM GULAM.

2 P. 264 : 3 P. L. T. 820 : 71 I. C. 426 : 1922 P. H. C. C. 365 : 1 P. L. R. 12 : A. I. R. 1923 Pat. 150.

BIHAR & ORISSA MUNICIPAL ACT (VII OF 1922).

——— **S. 259**—*Renewal of license refused—No reason assigned—Refusal is not illegal.*

The provisions of sub-S. (2) of S. 259 of the Municipal Act themselves supply the only reason for which refusals of certain licenses can be made. But the omission of the Commissioners to give the only reason which they could give for such refusal cannot be regarded as making their refusal illegal.

The Municipality has the right to declare that within the whole area of the municipality certain offensive or dangerous trades cannot be carried on without a license. 17 C. W. N. 531 Foll. (*Bucknill and Ross, JJ.*) MADARAN KASSAB *v.* EMPEROR. **4 Pat. 311 : 3 Pat. L. R. 150 (Cr.) : 86 I. C. 964 : 6 P. L. T. 528 : 26 Cr. L. J. 900 : A. I. R. 1925 Pat. 540.**

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1904).

——— **Ss. 10 and 45**—*Non-service of notice—Burden of proof—Sale held more than a year before the Act—Limitation.*

The burden of proving non-service of notice under S. 10 of the Bihar and Orissa Public Demands Recovery Act is upon the person applying to set aside the sale on that ground. (45 C. 496 Foll.) S. 45 of the Act does not apply to a suit to set aside a sale held more than a year before the coming into force of the Act. (*Ross, J.*) GOKARAN PRASAD SINGH *v.* WARIS ALI. **1 Pat. L. R. 285 : 71 I. C. 957 : A. I. R. 1924 Pat. 183.**

——— **S. 29 (2)**—*Application to set aside sale—Limitation—Notice.*

The proprietors of a property sold, instead of applying at first under S. 29 to have the sale set aside, resorted to the Civil Court, making the Secretary of State a party. Hearing of the legal advice given upon a statement of facts compiled on behalf of the Secretary of State in regard to the suit they made a belated resort to S. 29. The Certificate Officer then acted on the advice given to the Secretary of State. *Held*, that it was not a judicial proceeding of the nature contemplated in S. 29 of the Act, and was without jurisdiction.

A Certificate Officer is not concerned in a proceeding under S. 29 with advice tendered to Government as an interested party in a civil suit. It is his business to determine the application on the merits after giving an opportunity to all the parties affected to appear. (*Morshead, M. C.*) JUGAL KISHORE NARAYAN SINGH *v.* UDHO SINGH. **2 Pat. L. R. 91 (Cr.).**

——— **S. 32**—*Proceedings before Certificate Officer—Termination of—Proceedings if judicial.*

Proceedings before the Certificate Officer under the Bihar and Orissa Public Demands Recovery Act, 1914, terminate when the sale has been held and the proceeds realised. The only proceedings of a judicial nature contemplated by the Act after realization of the sale proceeds is an inquiry under S. 32 (2) in cases in which the certificate-debtor disputes a claim made by the certificate-holder to receive any amount which might be due to him under S. 32 (1) (*c*). (*Mullick and Bucknill, JJ.*) GHARU LAL *v.* MAHANTH MADAN DAS. **2 Pat. 257 : 74 I. C. 713 : 24 Cr. L. J. 809 : A. I. R. 1923 Pat. 410.**

BILL OF LADING.

——— **Sch. II, R. 43**—*Purchase by judgment-debtor—Validity.*

The prohibition in R. 43 against a certificate debtor bidding for or purchasing the tenure applies only to sales for arrears of rent due and not for other dues such as cess. Even such a purchase does not render the sale void but only voidable. (*Jwala Prasad and Kulwant Sahay, JJ.*) MADUSUDANLAL *v* RAMGULAM SAHU. **3 Pat. 458 : 5 Pat. L. T. 447 : 78 I. C. 807 : 1924 P. H. C. C. 240 : A I. R. 1924 Pat. 547.**

BILL OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS ACT.

BILL OF LADING.

See also SHIPPING.

——— *Exemption clause—Perils of the sea—Burden of proof—Negligence—What is—Damage by sea water—Liability for.*

Where a bill of lading contains the usual exemption clause as regards the liability for acts of God, King's enemies and the perils of the sea, in a suit by the consignee for damages for loss of goods, etc., the defendant ship-owner must plead and prove "perils of the sea" if that is his defence. If he makes out a *prima facie* case plaintiff can rebut it by proving negligence on the part of the defendant. In deciding what amounts to negligence, the mere fact that the accident might have been avoided by greater foresight does not make it negligence. If reasonable care is taken, the perils of the sea while not including the effects of mere ordinary wear and tear will include the consequences of any kind of accident ending in damage by sea water. (*Ramesam and Jackson, JJ.*) ESUFALI MAHOMEDBHOY ALLIBHOY *v.* THAHA UMMAL. **47 M. L. J. 150 : 47 M. 610 : 20 L. W. 91 : 80 I. C. 154 : (1924) M. W. N. 648 : A. I. R. 1924 Mad. 773.**

——— *Evidentiary value.*

A bill of lading is *prima facie* evidence that the condition of goods is according to the description shown therein. (*Robinson, C. J. and May Oung, J.*) BIBBY BROTHERS *v.* CHARLES COWIES AND CO. **1 R. 146 : 74 I. C. 916 : A. I. R. 1924 Rang. 25.**

——— *"At merchant's risk"—Meaning of—Exemption from general average contribution—Insertion to be conspicuous.*

The object of a Bill of Lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and it is not concerned with liabilities to contribution in general average. The question whether an exemption clause covers the liability to contribution in general average in a case of proper jettison depends on the intention of the parties. If the shipowner wishes to relieve himself, he must do so in clear words. The words "At merchant's risk" will not exempt a shipowner from liability to contribution in the case of a proper jettison but would exempt him from liability in the case of an improper jettison. It will also cover a case of loss caused by a collusion or stranding owing to the negligence of master or crew. If the shipowner wishes to introduce into the Bill of Lading a novel clause exempting him from general average contribution, he must make it clear in words pointed conspicuously so that a person of ordinary capacity and care could not fail to see it. (*Aston, A. J. C.*) DHARAMDAS THAWERDAS *v.* PERSIAN GULF STEAM NAVIGATION CO., LTD. **78 I. C. 972 : A. I. R. 1925 Sind 76.**

——— *Terms of—Binding nature—Knowledge—Presumption.*

Parties to a Bill of Lading are bound by all the

BILLS OF LADING ACT, (IX OF 1856), S. 3.

conditions contained therein even if they have not read the same. The acceptance of the document without protest amounts to a tacit acceptance of the same. Where the Bill of Lading stipulates that no other cargo is to be shipped even for the purpose of ballasting other cargo should not be shipped in lieu of ballast. (*Fawcett, A. J. C.*) THE STANDARD OIL CO. *v.* HARIDAS VALJI. **79 I. C. 456 : 16 S. L. R. 235.**

BILLS OF LADING ACT (IX OF 1856).

——S. 3—*Bills of Lading are* prima facie *evidence of articles being given to Shipping Company unless stated otherwise.*

In the absence of any proof that the Bills of Lading were granted under a misrepresentation, without any default on the part of the person signing them, and wholly due to the fault of the shipper or the holder of such Bills of Lading, the particular marks as shown in the respective Bills of Lading must be held to have been put on board. But generally in view of the difficulty of verifying particular marks on articles of a similar nature shipped on board, the Shipping Companies protect themselves by inserting a clause that the marks and numbers though shown in the Bill of Lading are unknown to them and that they do not admit that the marks or numbers shown in the Bill of Lading are correct. They also protect themselves against obliteration of marks. In such cases the *onus* is on the plaintiff to prove by evidence *aliunde* that articles bearing the particular marks are actually handed over to the Shipping Company. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) POHUMAL BROS. *v.* KARACHI PORT TRUST. **18 S. L. R. 106 : A. I. R. 1925 Sind 221.**

——S. 3—*Scope.*

S. 3 of the Bills of Lading Act is limited to the master or the person signing the bills. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) POHUMAL BROS. *v.* KARACHI PORT TRUST. **18 S. L. R. 106 · A. I. R. 1925 Sind 221.**

BIRT.

See (1) C. P. CODE, S. 60.
(2) HINDU LAW—RELIGIOUS OFFICE.
(3) T. P. ACT, S. 6.

BLINDNESS.

See HINDU LAW—SUCCESSION.

BOARD.

See DEED—CONSTRUCTION.

BOMBAY ABKARI ACT (BOM. ACT V OF 1878).

——Ss. 6 and 7—*Public servant (non-covenanted) of Government in Excise Department—Power of Commissioner of Customs to dismiss at pleasure—Statutory restrictions.*

The plaintiff was employed as Acting Inspector in the Excise Department on a salary of Rs. 125 per mensem. He was dismissed from the service by the Commissioner of Customs after making a formal inquiry into certain charges of misconduct brought against him. Plaintiff filed a suit against the Secretary of State for India for wrongful dismissal, as the inquiry in respect of charges of misconduct against him was not conducted according to the regulations framed by Government for dismissal of the non-covenanted servants and therefore claimed Rs. 50,000 as damages for wrongful loss of service and injury to his reputation. *Held*, that the plaintiff did not hold the appointment at the will and pleasure of the Government, that the plaintiff was appointed in the Excise Department by the Commissioner of Customs under S. 6 of the Bombay Abkari Act, 1878, and not by the Government direct. (1896) A. C. 575 followed.

BOM. CITY MUNICIPAL ACT (III OF 1888), S. 14.

The Legislature by statute has restricted the power of dismissal under S. 7 of 1878 and that provision under S. 7 of the Act is made for the protection of officers employed in the Excise Department. (*Kajiji, J.*) DINSHAW J. JAVERY *v.* SECY. OF STATE. **24 Bom. L. R. 210 : 67 I. C. 280 : A. I. R. 1922 Bom. 17.**

BOMBAY ACT (XI OF 1852).

——Sch. B, R. 8—*Powers of Government—Rules for resuming grants.*

The Government has power for regulating by rules the question of emoluments relating to service performed to State under Sch. B, R. 8 (5). But it has no power to frame any rules with reference to the resumption of land given as emoluments of any hereditary office. The Government have no inherent power to authorise the Collector to resume lands summarily when they appertain to the office of a village servant mentioned in R. 8. It cannot be taken as granted apart from any specific provision, that the Collector has the power to disturb the possession of third parties who may have acquired rights in respect of such lands under the operation of law. (*Shah and Kemp, JJ.*) PATDAYA MUPPAYA *v.* SECRETARY OF STATE FOR INDIA. **48 Bom. 61 : 25 Bom. L. R. 1160 : 82 I. C. 577 : A. I. R. 1924 Bom. 273.**

BOMBAY BHAGDARI ACT (V OF 1862).

——S. 1—*Separation of a portion of narva land by proprietor—Recognition of the portion by Collector as separated sub-division—Such portion must be considered as a recognised sub-division.*

Where the proprietor of a recognised sub-division of a Narva separated from that land a portion for the purposes of building, and where the Collector recognised the separation of that portion for building purposes :

Held, that such separation in no way derogated from the constitution of the narva homestead, and that the separated portion must be considered as a recognised sub-division. (*Macleod, C.J. and Coyajee, J*) BAI SAMJU *v.* LALLU BHAI. **27 Bom. L. R. 958 : 88 I. C. 1034 : A. I. R. 1925 Bom. 476.**

——S. 3—*Unrecognised sub-division—Lease of, is void—Possession of alienee is adverse.*

The property in dispute formed an unrecognised sub division of a Narva. On 28-4-1892 it was conveyed by its owners, the plaintiff's predecessors, to defts. for a long term of 500 years in consideration of a sum of money. In a suit for redemption by the plaintiffs in 1918 treating the transaction of 1892 as a mortgage, the defendants pleaded that the alienation was void in view of the Bombay Bhagdari Act and that their possession had been adverse for over 12 years. *Held*, that the transaction of 1882 was not an out and out sale but a lease for a long term and that as the alienation was void, the defendants had acquired by prescription a leasehold interest. (*Shaw, A. C. J. and Crump, J.*) CHATURBHAI LALLUBHAI PATEL *v.* MOTIBHAI BAPUJI. **24 Bom. L. R. 1315 : A. I. R. 1923 Bom. 146.**

BOMBAY CITY MUNICIPAL ACT (III OF 1888).

——S. 14—*Protection afforded under—Agreement to contrary should be strictly proved.*

As regards the protection afforded by S. 147 to the landlord, strong documentary evidence is required to show that the parties intended that however much the rateable value might be increased in the future over and above the rent payable under the lease still the landlord would have to pay the whole of the tax. (*Macleod, C.J. and Shah, J.*) DARASHAH BOMONJI *v.* LIPTON, LTD. **24 Bom. L. R. 479 : 67 I. C. 430 : A. I. R. 1923 Bom. 70.**

BOM. CITY MUN. ACT (III OF 1888), S. 16 (j).

——S. 16 (j)—*Employee in a newspaper.*

The clause does not mean that no councillor who happens to be an employee in the office of a newspaper in which advertisements relating to the affairs of the Corporation are inserted can vote at a meeting of the Corporation held to consider the question whether the fares charged by the Bombay Electric Company should or should not be increased. (*Mulla, J.*) NARIMAN *v.* MUNICIPAL CORPORATION OF BOMBAY.

47 Bom. 809 : 25 Bom. L. R. 689 : A. I. R. 1923 Bom. 305.

——S. 33—Election petition for Municipal Council dismissed by the decision of Chief Judge of the Small Cause Court is not open to revision by the High Court (*Macleod, C. J. and Crump, J.*) NAVALKAR *v.* SARAJONI NAIDU. **25 Bom. L. R. 463 : 73 I C. 133 : A. I. R. 1923 Bom. 421.**

——Ss. 36 (p) and 16 (1) (f)—*Interest, meaning—Shareholders — Trustee of a shareholder—Medallion holders—Editor with complimentary pass.*

The interest contemplated by S. 36, cl. (*p*) and by S. 16, sub-sec. (1), cl. (*f*) of the Bombay Act must not be too speculative and remote. It must not be a mere sentimental interest such as that which a father may have in the prosperity of his son. Where there is a pecuniary advantage or a reasonable expectation of a pecuniary advantage, it must be regarded as an "interest" within the meaning of the section. The interest in a contract is pecuniary ; it is immaterial that the amount involved is trifling. Even if the interest is not pecuniary it must at least be a material interest. It is clear on the language of S. 36 (*p*) that a councillor whose name stands as a shareholder on the register of the said company and who has a beneficial interest in the shares is disqualified from voting or taking part in the discussion of any matter pertaining to the said company. It is also clear that if the shares stand, not in his name, but in the name of a nominee of his, the beneficial interest being in him he is similarly disqualified.

The shares again may stand in the name of a councillor who holds them not in his own right but as a trustee for another. Where the shares stand in the name of a person who has no beneficial interest he cannot, it seems, vote at meetings of that company in a manner inconsistent with the interests of the beneficiaries. The reason is that he derives the position which he holds as a member of the company from the legal ownership of the shares. But if such person is also a member of the Corporation, he is entitled to vote and take part in the discussion of any matter relating to the company in which his name stands as a shareholder. He is under no obligation to vote in a manner beneficial to the interest of the *cestui que trust*, for he does not owe the membership of the Corporation having regard to the fact that he is a shareholder of the company. He commits no breach of contract if he votes in contravention of the interest of his beneficiary. It is no part of his duty as a trustee to vote at a meeting of the Corporation in matters affecting the company as the beneficiary would have him to do. If no such duty is imposed upon him by law it cannot be a case of conflict between two duties. Nor can it be a case of conflict between interest and duty. In a suit to decide the validity or otherwise of the votes of A and B at a meeting of the Bombay Corporation held to decide the question of increase in the tramway fares it was contended that their votes were invalid as they were the holders of a medallion from the said company. The medallion on one side bears the words "member of tramways committee of the Bombay Municipality", and on the other, the words "allowed to stand on that platform of cars where there is no room inside—Bombay Electric Supply and Tramways Co., Ltd." it was admitted that the holder of a medallion even though he had to stand when there was no room inside had to pay the usual fare like any other passenger. *Held*, that it is impossible to conceive what share or interest a holder of a medallion could have in the said company. It cannot also be said on principle that a councillor who happens also to be the editor of a newspaper and to whom as editor a complimentary pass is issued by the tramway company for correspondence purposes has an interest in the company within the meaning of S. 36 (*p*). (*Mulla, J.*) NARIMAN *v.* MUNICIPAL CORPORATION OF BOMBAY. **47 Bom. 809 : 25 Bom. L. R. 689 : A. I. R. 1923 Bom. 305.**

BOM. CITY MUN. ACT (III OF 1888), S. 147.

——S. 36 (p)—*Construction—Matter before the meeting.*

In construing S. 36, cl. (*p*), regard must be had to the "matter" before the meeting. A councillor having an interest in a lease of land within the meaning of cl. (*g*) cannot be held by reason of his having that interest only to be disqualified from voting on a question relating to a loan to the Corporation contemplated by cl. (*h*). (*Mulla, J.*) NARIMAN *v* MUNICIPAL CORPORATION OF BOMBAY. **47 Bom. 809 : 25 Bom. L. R. 689 : A. I. R. 1923 Bom. 305.**

——S. 63 (k)—*Building quarters for Municipal servants is for promoting public convenience—Such a matter is within the discretion of the Municipality and Court of law cannot interfere.*

The building of quarters for Municipal servants should be held to be a measure likely to promote public convenience. The matter lies within the discretion of the Municipal Commissioner and Corporation and a Court of law cannot interfere with the exercise of that discretion. (*Macleod, C. J. and Coyajee, J.*) MUNICIPAL CORPORATION OF BOMBAY *v.* RANCHORDAS VANDRAVANDAS.

27 Bom. L. R. 1130 : 90 I. C. 695 : A. I. R. 1925 Bom. 538.

——S. 63 (k)—*Contemplation by Municipality for utilization of the ground floor for shops cannot disentitle it from proceeding with the scheme.*

Where the Municipality had in contemplation the utilization of the ground floor of the premises to be built upon the area in suit as shops :

Held, that there was no sufficient ground for holding that the Municipality could not proceed with the scheme. (*Macleod, C. J. and Coyajee, J.*) MUNICIPAL CORPORATION OF BOMBAY *v.* RANCHORDAS VANDRAVANDAS. **27 Bom. L. R. 1130 : 90 I. C. 695 : A. I. R. 1925 Bom. 538.**

——S. 147—*Additional Municipal tax—Tenant liable to pay such tax—Notice is not necessary—Bombay Rent (War Restrictions) Act (Bom. Act II of 1918), S. 6.*

S 6 of the Bombay Rent (War Restrictions) Act, 1918 applies to an entirely different state of facts to that which was intended to be covered by the provisions of S. 147. Under S. 147 (1), where the rent paid by the tenant is less than the rateable value, the landlord can recover from the tenant the tax which he has to pay on the difference between the rent payable by the tenant and the rateable value fixed by the Municipality. The right to claim from the tenant, under S. 147 (1), payment of a certain portion of the Municipal taxes, which are primarily leviable under S. 146 from the lessor, has nothing to do with the question of rent payable by the tenant. (*Macleod, C. J. and Coyajee, J.*) SORABJI RUSTOMJI *v.* R. H. PATUCK. **27 Bom. L. R. 1092 : 89 I. C. 859 :**

BOM. CITY MUN. ACT (III OF 1888), S. 154 (2).

A. I. R. 1925 Bom. 532.

——**S. 154 (2)**—*Valuation of building—Cost of bath-tubs, lavatories and electric fittings—Machinery.*

In respect of buildings newly built in Bombay City, deductions in their rateable value should not be allowed to the owner, for the cost of bath-tubs, lavatories and electric lights and fans. Baths and lavatories must necessarily be put in before tenants can be expected to take the premises. Electric fittings installed by a landlord become part of the premises and are necessary for the user of the premises by the tenant. "They do not constitute machinery" within S. 154 (2) of the Bombay City Mun. Act. (*Macleod, C. J. and Shah, J.*) HAJI DAWOOD *v.* MUNICIPAL COMMISSIONER. **24 Bom. L. R. 476 : 67 I. C. 426 : A. I. R 1922 Bom. 386.**

——**Ss. 257 and 471**—*Storage tank—Water-closet—Notice issued to owner of premises requiring him to fill up storage tank—Non-compliance with—Offence.*

A Commissioner is not entitled to give a notice under S. 257 (1) directing the landlord to maintain the water closets in the house in good order by pumping a sufficient quantity of water into the cistern and non-compliance with the requisition contained in the notice is not punishable under S. 471. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* SALE MAHOMED HAJI. **26 Bom. L. R. 178 : 81 I. C. 616 : 25 Cr. L. J. 968 : A. I. R. 1924 Bom. 337.**

——**S. 296**—*Land acquisition—Recoupment—Acquisition of land outside street proposed to be reformed.*

It is not only open to the Municipality to acquire land for the purpose of making a street but they may also acquire, if it seems expedient, land outside the regular line of such street for purposes of recoupment provided the land is contiguous. 47 C. 500, Foll. (*Lord Dunedin.*) KHANDERAO VITHOBA KORE *v.* MUNICIPAL CORPORATION OF BOMBAY. **46 M. L. J. 169 : 48 Bom. 185 : 19 L. W. 1 : 22 A. L. J. 11 : (1924) M. W. N. 77 : 26 Bom. L. R. 193 : 33 M.L.T. 462 : 2 Pat. L. R. 108 : 28 C. W. N. 375 : 51 I. A. 14 : 10 O. & A. L. R. 121 : L. R. 5 P. C. 53 : 39 C. L. J. 201 : 1 O. W. N. 114 : 79 I. C. 948 : A. I. R. 1924 P. C. 3 (P. C.).**

——**S. 349-A**—*Building—Commissioner can allow to be erected to any height.*

The words "except with the written permission of the Commissioner" in S. 349-A of the Act form a general exception to the regulations in Ss. 349-A and 349-B and the Commissioner, if he thinks it proper, can allow building to be erected to any height. (*Scott, C. J. and Batchelor, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* ISMAIL HASHAM. **61 I. C. 143 : 23 Bom. L. R. 158.**

——**S. 349-B**—*Building—Maximum height of.*

The words "maximum prescribed by S. 349-A" in S. 349-B of the Act cover an alternative maximum, 70 feet or such other height as the Commissioner may authorize by written permit. (*Scott, C. J. and Batchelor, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* ISMAIL HASHAM. **61 I. C. 143 : 23 Bom. L. R. 158.**

——**Ss. 394 and 471**—*Storing oil without license—Wrongful refusal of Commissioner to grant license.*

A wrongful refusal by Commissioner to grant license is no defence to a charge of storing oil without license. (*Shah and Crump, JJ.*) NARANDAS KARSANDAS *v.* EMPEROR **45 Bom. 1076 : 61 I. C. 49 : 22 Cr. L. J. 321 : 23 Bom. L. R. 353.**

——**S. 515**—*Private and public nuisances can be remedied by injunction by one or all residents affected—Court can order refusal to grant license for stables but the order does not govern all cases of license for stables.*

BOM. CITY POLICE ACT (IV OF 1912), S. 40 (1).

It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay or Calcutta that any resident, who is affected by a nuisance in the manner mentioned in S. 3 (*z*) of the Municipal Act should have a right to go to a Magistrate over the head of the Commissioner or the Corporation and ask that the Commissioner should be restrained from exercising his powers so as to affect the complainant's individual right as resident by the creation of a private nuisance. If private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a complaint before the Magistrate and ask the Magistrate to decide specifically that the particular nuisance is a private nuisance affecting the residents of houses A, B and C. With regard to a public nuisance also, any resident of Bombay can ask for an order under S. 515, and, if the Court finds a public nuisance proved, the order of the Court would give relief to the public of the locality as against the nuisance, and vacating of any one or more houses would not mean an abatement of the nuisance in respect of the public. In the case of a public nuisance, no particular limits need be defined. The relief which the Court can grant, under S. 515 of the City of Bombay Municipal Act, in cases of public as well as private nuisance is, *inter alia*, abatement of the nuisance by ordering the Commissioner not to grant a license for stables, etc. But it does not follow from the Court's making an order on the Commissioner that he should not grant a license, that that order is to govern all circumstances and all cases at all times. Where the Court passes an order under S. 515 to abate a nuisance with reference to a particular house, and that house falls vacant subsequent to the passing of the order and is not to be used any more for purposes other than those connected with the stables, the order ceases to have any operation. (*Taraporewalla, J.*) ALI MAHOMED *v.* BOMBAY MUNICIPALITY. **27 Bom. L.R. 581 : 87 I. C. 771 : A. I. R 1925 Bom. 458.**

——**S. 515**—*Nuisance—Magistrate can direct Commissioner not to issue license.*

A Magistrate acting under S. 515 of Bombay City Municipal Act can direct the Municipal Commissioner not to issue a license, if the effect of the grant would be to cause nuisance to residents in the locality. S. 515 gives the power in case of such nuisance to any resident to complain to the Court about such nuisance. In such proceedings, the owner of the premises should necessarily be made a party. (*Shah, A. J. C. and Crump, J.*) THE MUNICIPAL CORPORATION, BOMBAY *v.* MALLANDAINE. **48 Bom. 241 : 25 Bom. L. R. 1321 : A. I. R. 1924 Bom. 241.**

——**Part II of Sch. M**—"*Oil (other sorts), includes sweet oil and cocoanut oil.*

The words "oil (other sorts)" in Part II of Sch. M to the City of Bombay Municipal Act include sweet oil and cocoanut oil. (*Shah and Crump, JJ.*) NARANDAS KARSANDAS *v.* EMPEROR. **45 Bom. 1076 : 23 Bom. L R. 353 : 61 I. C. 49 : 22 Cr. L. J. 321.**

BOMBAY CITY POLICE ACT (IV OF 1912).

——**Ss. 40 (1) and 55**—*Command to an unlawful assembly to disperse—Magistrate cannot give.*

Only the officer in charge of a section can command an unlawful assembly to disperse under S. 40 (1) and under S. 55 a Police Officer of superior rank if on the scene may perform this function. The Magistrate's giving the command under the directions of a competent Police Officer, who is himself present, is not sufficient (*Macleod, C. J. and Shah, J.*) EMPEROR *v.*

BOMBAY CITY POLICE ACT (IV OF 1912), S. 70.

KESHEO GOVIND. **23 Bom. L. R. 350 : 60 I. C. 1008 : 22 Cr. L. J. 320.**

——**Ss. 70, 72 and 74**—*Accused though arrested under requisition from Magistrate are in police custody*

The mere fact that the Chief Presidency Magistrate is furnished with certain information to enable him to make the requisition does not mark the completion of police investigation and the commencement of an inquiry or trial before him. Therefore accused are, when arrested, not in Magistrate's custody but are in police custody. (*Macleod, C. J. and Coyajee, J*) P. B. PONDE *v* EMPEROR. **49 Bom. 623 : 88 I. C. 605 : 27 Bom. L. R. 612 : A. I. R. 1925 Bom. 387.**

——**S. 112 (d)**—'*Reputed thief*'.

The fact of there being two previous convictions for theft suffices to make the accused a "reputed thief" within the meaning of S. 112 (*d*) of the City of Bombay Police Act. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v* CHAND MAHABOOB.

27 Bom. L. R. 1388.

BOMBAY CIVIL COURTS ACT (XIV OF 1869).

——**S. 32**—*Suit for injunction with regard to Municipal election—Secy. of State is a necessary party —Subordinate Judge cannot try the suit.*

In a suit being filed in the Court of a Subordinate Judge in Bombay for an injunction with regard to a Municipal election, the Secretary of State is both a necessary and a proper party, and hence the suit cannot be tried in that Court. (*Shah and Coyajee, JJ.*) SECRETARY OF STATE FOR INDIA *v.* NARSIBAI DADABHAI PATEL. **25 Bom. L. R. 992 : 77 I. C. 241 : 46 Bom. 43 : A. I. R. 1924 Bom. 65.**

BOMBAY CO-OPERATIVE CREDIT SOCIETIES ACT (II OF 1912).

——**S. 43**—*Rule 34 framed under—Award—Execution of—Transfer of award—Civil Procedure Code, S. 39—Jurisdiction.*

A Court which can execute an award under Rule 34 passed under S. 43 of the Bombay Co-operative Credit Societies Act can transfer it under the provisions of S. 39 of the Civil Procedure Code. (*Macleod, C.J. and Shah, J.*) KRISHNA BARDE *v.* MAHADEO PATIL.

46 B. 128 : 23 Bom. L. R. 909 : 64 I. C. 337 (1) : A. I. R. 1922 Bom. 377 (2).

BOMBAY COTTON DUTIES ACT (II OF 1896), Ss. 16 and 25—*Demand by Inspector of Cotton Excise to inspect godown—Refusal of access—Obstruction.*

An nspector of Cotton Excise went to a Cotton Mill and called upon its owner to open the store-room with a view to inspect the records of sale, accounts and samples, etc., of the cotton goods produced and issued in and from the Mill. The owner of the Mill refused to give access to the Inspector to the godown. Later on the owner of the Mill wrote to the Inspector offering to open the godown for his inspection and it was also found that all the accounts in the possession of the owner had been already produced. The accused was prosecuted for intentional obstruction of the Inspector in the exercise of his duty. *Held*, that the owner of the Mill was guilty of the offence charged inasmuch as there was an obstruction on his part to the free access to the godown by the Inspector even though the purpose for which it was wanted was not established by the complainant. (*Shah, A. C. J. and Fawcett, J.*) EMPEROR *v.* MUKUNDLAL BANSILAL.

26 Bom. L. R. 721 : 82 I. C. 353 : 25 Cr. L. J. 1281 : A. I. R. 1924 Bom. 492.

BOMBAY COURT OF WARDS ACT (I OF 1905).

——**S. 22**—*No guardian of person can be appointed by Court of Wards unless it has assumed superintendence.*

If there is a Court of Wards competent to appoint a guardian of the person of a minor, then the jurisdiction of the District Court is to that extent ousted. But the competency of the Court of Wards in Bombay Presidency depends upon S. 22 of the Bombay Court of Wards Act, and that section clearly gives power to the Court of Wards to appoint a guardian of the person only in those cases where the Court of Wards has assumed superintendence of the person, otherwise the Dt. Judge has jurisdiction to appoint a guardian of the person of the minor. (*Shah, A.C.J. and Crump, J.*) NAGAWA GURLINGAYA *v.* COLLECTOR OF BELGAUM. **25 Bom. L R. 1232 : A.I.R. 1924 Bom. 157.**

BOMBAY DT. MUNICIPAL ACT (III OF 1901).

——*Octroi Schedule—Construction*—Ad valorem *duty.*

The Municipality claimed to charge on the plaintiffs' goods, which were bales of cloth an *ad valorem* rate on the value of the maunds according to their present value and not according to the value appearing in the schedule of rates. The octroi schedule was divided into three columns· In the first column were the names of various articles. In the second column was rate per cent. load. In the third column was rate in maunds or price. For cloth the rate per cent. load was 12 annas per every Rs.100 or part of it. In the third column the price was to be taken at Rs. 500 per cent. load of 16 maunds. *Held*, that Rs.500 was the limit value of a full cart load of cloth of all sorts and articles made of cotton, silk,etc., upon which the rate of 12 annas per cent. was to be levied; otherwise the amount of Rs. 500 in the third column has no meaning. If it is considered desirable in the interests of theMunicipality that certain articles should be charged on their actual value *ad valorem*, it would certainly be necessary to add to the Schedule rules prescribing how the real value of these goods was to be ascertained. It would also be necessary to set up the proper machinery for arriving at such valuation. (*Macleod, C. J. and Crump, J.*) LAXMI CHAND JAVERMA *v.* MUNICIPAL COMMITTEE OF NANDURBAR. **74 I. C. 205 : A. I. R. 1923 Bom. 413.**

——**S. 3 (7)**—'Building' includes compound wall (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* RAMRAO ABAJI PRABHU. **45 Bom. 1151: 23 Bom. L. R. 831 : 63 I. C. 158 : 22 Cr. L.J. 622.**

——**Ss. 3 (12) and 96**—*Notice—New building—Street—Leaving of vacant space—Bye-law No.* 132.

The petitioner, the owner of a large plot of land, left its middle portion vacant for passage and built a one-storeyed house on one side of the passage. He began to build a chawl on the other side and applied for permission to the Municipality to build another storey on the existing house. As no reply was received from the Municipality for one month the petitioner commenced to add the storey. Afterwards the Municipality refused permission and when the building of the storey was nearly completed, the Municipality prosecuted the petitioner for breach of their bye-law No. 132 providing that the height of the building should not exceed the width of the street. *Held*, that the petitioner was not guilty of having contravened bye-law No. 132 since the vacant space between the two buildings was not a street within S. 3 (12). (*Macleod, C. J. and Shah, J.*) TYABALI-I MULLA *v.* EMPEROR. **26 Bom. L. R. 216 : 82 I. C. 52 : 25 Cr. L. J. 1188 : A. I. R. 1924 Bom. 365.**

——**S. 3 (12)**—*Open space accessible to others is a street though owned privately.*

An open space owned by the accused but accessible to the occupiers of other houses in the same *dehal* is a street. "All other persons" would mean persons other than the occupier of such building, and would not

BOMBAY DT. MUNICIPAL ACT (III OF 1901) S. 10 (2).

mean all occupiers of all the buildings within that space. (*Shah, A. C. J. and Crump, J.*) DAYABHAI LALLUBAI *v.* THE AHMEDABAD MUNICIPALITY.
25 Bom. L. R. 1218 : 81 I. C. 638 : 25 Cr. L. J. 990 : A. I. R. 1924 Bom. 116.

——S. 10 (2)—*Suit against nominated members for injunction not to attend meetings of the Municipality—Government is a necessary party—Act XIV of 1869, S. 32—District Judge shall try the suit.*

The plaintiffs claiming to be rate-payers and voters brought a suit contending that "the Commissioner of the Northern Division directly nominated the defendants Nos. 1 to 9. The Commissioner has got no authority to nominate in this way. And as the appointment of such nominated members is illegal, they have got no right to sit in the Municipality as members and to work therein. In spite of this plaintiffs strongly apprehend that they taking shelter of the unlawful orders of the Commissioner are about to sit in the Municipality as members and to work therein," and prayed that it might be declared that the nomination of the defendants Nos. 1 to 9 as members of the Nadiad City Municipality made by the Government was illegal, and that they might be restrained by a permanent injunction from attending the meetings of the Municipality and from doing any work on behalf of the Municipality, and that the defendant No. 10 (*i.e.* the Municipality) might be restrained by a permanent injunction from treating them as members, their nomination being illegal.

Held, that the Secretary of State was a necessary party to the suit and the Subordinate Judge had no jurisdiction to try the suit. (*Shah and Coyajee, JJ.*) SECRETARY OF STATE *v.* NARSIBHAI DADHABAI.
48 Bom. 43 : 25 Bom L.R. 992 : A.I.R. 1924 Bom. 65.

——S. 24 (2)—*Applicability—Chairman of Committee.*

The Chairman of a Committee of Management is not an official President and is not precluded from voting. (*Kennedy, J. C. and Aston, A. J. C.*) SANTDASS MANGHARAM *v.* SECRETARY OF STATE.
80 I. C. 951 : 17 S. L. R. 46.

——Ss. 36 (2) and 96—*New buildings—Permission from P. W. Committee—General Body can revoke the permission.*

The order permitting to build a new house made by the Public Works Committee of the defendant Municipality under S. 96 could be cancelled or revoked by the General Body either of its own motion or on the application of a person injuriously affected thereby, subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of S. 96. (*Macleod, C. J. and Shah, J.*) MULJI TRIBOVAN *v.* DAKOR MUNICIPALITY.
46 Bom. 663 : 24 Bom. L. R. 178 : 69 I. C. 19 : A. I. R. 1922 Bom. 247 (F. B.)

——S. 40—*Water rate under S. 71 (1) (b)—Section does not apply.*

S. 40 does not apply to water rate under S. 71 (1) (*b*) though it is a contractual charge. (*Fawcett J. C. and Kemp, A. J. C.*) COMMITTEE OF MANAGEMENT OF HYDERABAD *v.* SETH RAMCHAND.
16 S. L. R. 98 : A. I. R. 1923 Sind 1

——Ss. 42, 54 and 58—*Rules under S. 58, R. 3—Primary schools—Government inspection disallowed—Maintenance of schools, is not 'misapplication.'*

The word 'misapplication' in S. 42 means the wrong application of funds; the use of funds for purposes outside the scope of the Act. The use of funds for the maintenance of primary schools which the Government Inspectors are not allowed to inspect is not misapplication. (*Macleod, C. J. and Crump, J.*) SECY. OF STATE FOR INDIA *v.* MANILAL HARIVALLAVDAS.
27 Bom. L.R. 371 : 88 I.C. 43 : A.I.R. 1925 Bom 278.

——S. 46—*Rules and bye-laws of Ahmedabad Municipality—Rule 74 is not* ultra vires.

R. 74 of the Rules of the Ahmedabad Municipality is not *ultra vires*. Under it the Municipality is entitled, for any particular year, to such amount as house and property tax as is determined at the beginning of the year and not to any increase determined subsequently. In case of increase in contravention of R. 74, the assessee should pay only the amount fixed for the next preceding year. (*Shah and Crump, JJ.*) AMBALAL SARABHAI *v.* AHMEDABAD MUNICIPALITY.
45 Bom. 611 : 60 I. C. 578 : 23 Bom. L. R. 48.

——S. 48 (f)—*Bye-law 4—Not* ultra vires—*Bombay Primary Education Act (I of 1918), S. 18 does not curtail powers of Municipality to frame bye-laws.*

The accused was convicted for refusing to furnish information required by the Municipality under bye-law 4 framed under S. 48 (*f*) of the Bombay District Municipal Act, 1901, with regard to children of school-going age

Held, that the bye-law is in no way inconsistent with the principal Act or with the rules made by the Local Government under Act I of 1918 (Primary Education Act). The powers of the Municipality to frame bye-laws under S. 48 of the principal Act are not in any way curtailed by the powers conferred under S. 18 of that Act. (*Shah and Kajiji, JJ.*) EMPEROR *v.* PARSHOTAM JAGJIVAN.
25 Bom. L. R. 767 : 77 I. C. 186 : 25 Cr. L. J. 330 : A. I. R. 1924 Bom. 47.

——S. 48 (j)—*Octroi duty—Refund—Application for—Compliance with bye-law.*

Where octroi duty is levied from a person for keeping goods more than a fixed time within Municipal limits, and an application for refund is dismissed because it was not made within the time fixed in the bye-laws, the action of the Municipality is correct, even though the duty in applying is due to the Municipality levying octroi duty late. (*Raymond and Kennedy, A. J. Cs.*) FIRM OF NARUMAL BHAGCHAND *v.* DEHWAN MUNICIPALITY.
78 I. C. 432 : A. I. R. 1924 Sind 149.

——S. 50-A—*Claim—Adverse decision by Survey Officer—Suit against Municipality—Govt. if necessary party.*

The mere fact that Govt. has an interest in all public streets vested in Municipalities is not a ground for holding that Govt. is a necessary party to a suit by a private individual adversely affected by the decision of a Survey Officer under S. 50-A of the Bom. Dt. Mun. Act. (*Shah, A. C. J. and Crump, J.*) BAI PARVATI *v.* THE NADIAD MUNICIPALITY.
25 Bom. L. R. 63 : 47 Bom. 315 : A. I. R. 1923 Bom. 459.

——S. 50-A—*Suit under—Secretary of State is a necessary party.*

The suit contemplated by S. 50-A (2) of the Bombay Act III of 1901 is one as between a private party and the Municipality and the Secretary of State is not a necessary party thereto. In the course of a Govt. survey of a municipality under S. 50-A of the Bombay District Municipalities Act the Survey Officer decided that a certain disputed plot of land was a 'street land' within the meaning of S 3 (2) of the Act and this decision was confirmed by the Collector. The alleged owner of the land sued the Municipality for declaration of his title without impleading the Secretary of State. *Held*, that the suit was maintainable. (*Shah, A. C. J. and Crump, J.*) NATHALAL RAMDAS *v.* THE NADIAD MUNICIPALITY.
47 Bom. 306 :

BOMBAY DT. MUNICIPAL ACT (III OF 1901), S. 59

25 Bom. L. R. 58 : A. I. R. 1923 Bom. 456.

——S. 59—*Assessment to tax—Different plots of land forming parts of the same survey number leased to different tenants.*

Where a person owned two survey numbers, which he divided into several small plots and let them to different tenants who built their own houses upon the sites, *held* (1) that the Municipality could not levy a rate which would include the rate on the building and land and a second rate on the land itself but the Municipality could only levy a tax on the land and building together or on the land and the building separately, (2) that even if the Municipality levied a rate on the land, they could do so only on each plot beneath each building and not on the whole survey numbers. (*Macleod, C. J. and Shah, J.*) SHOLAPUR MUNICIPALITY *v.* SHANKAR. **23 Bom. L.R. 1018 : 64 I. C. 177 : 46 Bom. 205 : A. I. R. 1922 Bom. 158.**

——S. 59 (2)—*Vehicle plying for hire within Municipal limits—Is not liable to tax.*

A vehicle kept outside the Municipal limits but plying for hire inside the Municipal area is not liable to pay wheel-tax under S. 59, clause (2) of the Act. (*Macleod, C. J. and Heaton, J.*) SURAT MUNICIPALITY *v.* MANEKLAL ICHARAM AND CO.

22 Bom. L. R. 1104 : 59 I. C. 389.

——Ss 60, 71 (1) (b) and 46 (1)—*Water-rate—Rules—Publication.*

Plaintiff sued the committee of management of Hyderabad for the refund of charges paid for supply of water by the Municipality to a private connection to his house on the ground that the rules were not first published under S. 60. *Held*, apart from the words subject to the provisions of Chapter VII" rules under S. 46 (1) do not require preliminary publication for the purpose of inviting objections but merely require the sanction of the Governor in Council or the Commissioner under proviso (*a*) to S. 46. The words "subject to the provisions of Chapter VII" cannot in themselves make the provisions of S. 60 applicable to cases of water-rate under S. 71 (1) (*b*) which is outside the particular one dealt with, namely, the case where the Municipality proposes to impose a tax. The main provision in the rules under S. 46 (1) and S. 71 (1) is that Municipality will supply water to private persons on certain terms and this clearly makes an offer to such private persons to supply them with water on the terms laid down and the water-rate revised is a contractual charge. (*Fawcett, J.C. and Kemp, A. J. C.*) COMMITTEE OF MANAGEMENT OF HYDERABAD *v.* SETH RAMCHAND. **16 S. L. R. 98 : A. I. R. 1923 Sind 1.**

——S. 65 (1)—*Levy of sanitary cess under S. 59 (vii)—No notice under S. 65 (1) issued—Levy is not illegal.*

The levy of general sanitary cess by a Dt. Municipality under S. 59 (vii) of the Act is not illegal on the ground of want of notice under S 65 (1). (*Macleod, C. J. and Crump, J.*) KALYAN MUNICIPALITY *v.* GOVIND KURSAN RAMJI. **27 Bom. L. R. 447 : 89 I. C. 580 : A. I. R. 1925 Bom. 419.**

——S. 80—*Quaere—Is a person importing goods a merchant—If not are arrears of octroi recoverable from them.*

The merchant who takes the benefit of the clause of 31st December, 1920, cannot complain if he is exposed to certain restrictions and obstructions in case he does not comply with the terms thereof. (*Raymond and Kennedy, A. J. Cs.*) FIRM OF NARUMAL BHAGCHAND *v* DEHWAN MUNICIPALITY.

78 I. C. 432 : A. I. R. 1924 Sind 149.

BOMBAY DT. MUNICIPAL ACT (III OF 1901), S. 96

——S. 90—*Applies to old as well as new streets.*

Section 90 is not confined to new public streets alone. It applies to all public streets whether old or new. (*Raymond and Aston, A. J. Cs.*) HYDERABAD MUNICIPALITY *v.* KAZI FAKRUDIN.

17 S. L. R. 273 : : 25 Cr. L. J. 646 : 81 I. C. 134 : A. I. R. 1925 Sind 90.

——S. 90 (3)—*Manner of work must be specified.*

Where the manner in which the work is to be carried out is not attempted to be specified, the conviction must be set aside. (*Shah, A. C. J. and Crump, J.*) DAYABHAI LALLUBHAI *v.* THE AHMEDABAD MUNICIPALITY. **25 Bom. L.R. 1218 :25 Cr. L.J. 990 : 81 I. C. 638 : A. I. R. 1924 Bom. 116.**

——Ss. 96, 92 and 91 (A)—*Permission to build—Permission subject to keeping land within regular line of street unbuilt upon is legal—Building beyond the line is an offence.*

The Rander Municipality granted permission to the accused to build, subject to the condition that the house should be built after leaving open the land within the alignment of the road in front. The accused, in spite of the condition, built up his house within the alignment.

Held, that the accused had offended against S. 96 as amended in 1914; for he was bound to ask for permission to re-construct his building within the regular line of the street and the Municipality were entitled to issue such orders as they thought proper not inconsistent with the Act and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper. Under S. 92 certain powers are given to a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to the regular line of the street or the front of the adjoining building on either side. (*Macleod, C. J. and Coyajee, J.*) EMPEROR *v.* THAKORDAS MOTIRAM.

27 Bom. L. R. 1023 : 89 I. C. 1031 : A. I. R. 1925 Bom. 505.

——S. 96—*Grant of permission amounting practically to refusal—Municipality cannot order.*

The Municipality have no power on an application to build, to pass an order which practically amounts to a refusal. They would be entitled to direct that the proposed building should be set back to a certain distance from the street, but they would not be entitled to order that on each side of the building open spaces should be left with the object of preventing the applicant from building at all.

The Municipality must acquire the land in the proper way if they wish to create open spaces. (*Macleod, C. J. and Crump, J.*) AHMED SULEMAN JIVA *v.* RANDER TOWN MUNICIPALITY. **87 I. C. 948 : 27 Bom. L. R. 429 : A. I. R. 1925 Bom. 345.**

——Ss. 96 and 3 (7)—*Erection of wall on old foundation—Permission necessary.*

Rebuilding of a wall from its foundation is equivalent to "Building" under the Act and Committee's permission is necessary. (*Macleod, C. J. and Crump, J.*) THE BANDRA CITY MUNICIPALITY *v.* D'MONTE. **76 I. C. 478 : A. I. R. 1923 Bom. 407.**

——Ss. 96 and 36 (2)—*New buildings—Permission by Public Works Committee—General Board can cancel permission.*

The plff. who wished to make additions to his existing building obtained permission to build under S. 96 of the Bombay District Municipal Act, 1901, from the Public Works Committee of the deft. Municipality. On an application by the plff.'s neighbour, the permission was later on recalled by the General Board of

the Municipality. The plff. having sued for a declaration that he was entitled to build in accordance with the permission once granted :—*Held*, by *Macleod, C. J.* and *Fawcett, J.*, that the General Body of the Municipality had power to cancel or revoke the permission to build granted by the Public Works Committee either of its own motion or on the application of a person injuriously affected thereby. *Held, by Shah, J.*, concurring, that the power so exercised was subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of S. 96 of the Bombay District Municipal Act, 1901. 19 Bom. L. R. 65 ; 20 Bom. L. R. 756 ; 23 Bom. L. R. 244 Rel. (*Macleod, C. J., Shah and Fawcett, JJ.*) MULJI TRIBHOVAN SEVAK *v.* THE DAKOR MUNICIPALITY. **46 Bom. 663 : 24 Bom. L. R. 178 : 69 I. C. 18 : A. I. R. 1922 Bom. 247 (F. B.)**

——Ss. 96 and 97—*A charge of an offence under S. 96—Offence not proved—Charge altered under S. 97.*

The Magistrate, when once he had come to the conclusion that the offence of the accused of erecting huts on Municipal land without permission did not come within S. 96, could not alter the charge and treat the offence as if it was punishable under S. 97 read with S. 155. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* MATUBHAI. **46 Bom. 657 : 24 Bom. L. R. 105 : 66 I. C. 323 : 23 Cr. L. J. 259 : A. I. R. 1922 Bom. 97.**

——Ss. 96, 113—*Projections—Bigger projection built than that sanctioned—Notice to demolish—Delay—Bombay Dist. Municipal Act (VI of 1873), Ss. 33 and 42.*

The plff. obtained permission from the Municipality on 4—10—'97 to erect a projection of a certain size. He erected a projection of a larger size and so on 13—6—'98 the Municipality gave him notice to remove the projection and on his failure to comply, prosecuted him under S. 33 of the Act (VI of 1873) but the prosecution failed. The plff. asked the Municipality for cancellation of the notice but the question was left to a Sub-Committee and it did nothing ; on 23—7—'14 the Municipality again served him with a notice under Ss. 113 and 96 on which he sued the Municipality for injunction restraining them from cutting the projection. *Held*, that as the projection did not come within Ss. 11, 3 (3) and there was delay of 16 years, the injunctions should be granted, that the notice of 23—7—'14 was invalid and the Municipality had no right to remove the projection by executive action. Scope of Ss. 113 and 96 discussed. Old law on the point considered. (*Macleod, C. J. and Fawcett, J.*) AHMEDABAD MUNICIPALITY *v.* MANILAL CHAGANLAL SHAH. **62 I. C. 913 : 23 Bom. L. R. 193.**

——S. 96—*Question of title is irrelevant—Permission to build.*

Permission to build once granted under S. 96 cannot be revoked. (Per *Crump, J.*)—For the purposes of S. 96, Bombay District Municipal Act, the question of title is altogether irrelevant. Therefore a flaw in the applicant's title is no ground for refusing permission and once the permission is given it cannot be cancelled. (*Shah and Crump, JJ.*) MUNICIPALITY OF SHOLAPUR *v.* ABDUL WAHAB SHAIK CHAND. **61 I. C. 428 : 45 B. 797 : 23 Bom. L. R. 244.**

——S. 96 (5)—*Municipality bye-law—Privy—Erection without permission—User—Offence.*

The applicant applied for permission to build a house and a privy. It appeared that there was an old privy on the spot. The Municipality, however, granted permission to build the house, but refused permission to erect a privy. Some time thereafter, the applicant put up the privy in question on the site of the old privy. It was found that this was substantially a reconstruction of the privy. The applicant was prosecuted by the Municipality for having committed a breach of bye-law No. 9 of the Municipal Bye-laws, which was in these terms:—"After the completion of the privy the owner shall communicate the same to the Chairman of the Managing Committee and no person shall commence to make use of the privy unless he obtains a written order to that effect from the Chairman of the Managing Committee." *Held*, that the communication required by the bye-law in question had reference to a privy in respect of which an application had been made under Rule 7 and for which permission had been granted under Rule 8. There was in this case no obligation on the part of the applicant to communicate the fact of the completion of the privy to the Chairman, nor was he under any obligation not to commence to make use of the privy before obtaining the written order to that effect from the Chairman of the Managing Committee. (*Shah, A. C. J. and Fawcett, J.*) EMPEROR *v.* EZEKIEL MOSES. **26 Bom. L. R. 715 : 82 I. C. 362 : 25 Cr. L. J. 1290 : A. I. R. 1924 Bom. 484.**

——S. 96 (6)—*Amended—Meaning.*

The word 'amended' in S. 96 (6) is wide enough to cover any demolition necessary to alter a building to make it comply with the Act or the bye-law contravened. (*Macleod, C.J. and Fawcett, J.*) AHMEDABAD MUNICIPALITY *v.* MANILAL CHAGANLAL SHAH. **62 I. C. 913 : 23 Bom. L. R. 193.**

——Ss. 101 (1) and 107 (1)—*Distinction is difficult to make.*

A notice served upon the respondent by which he was called upon to repair two sinks on the first store so as to discharge waste water into the drainage cesspool falls under S. 101 (1) and not under S. 107. It is difficult to lay down with precision the scope of S. 107, sub-section 1 and it may not be always easy to draw the dividing line between orders coming under S. 101 (1) and those under S. 107. (*Shah and Kajiji, JJ.*) EMPEROR *v.* RAMCHANDRA. **25 Cr. L.J. 1148 : 81 I. C. 972 : A. I. R. 1924 Bom. 70.**

——S. 120—*Powers of Municipality—Private wells.*

S. 120 only gives the Municipality power to regulate an actually existing well with a view to prevent the supply of water from being dangerous, stagnant or insanitary. It confers no right to annex a private well and turn it into a public one If a private well has been filled up, the owner cannot be required to excavate it. If the public have the right to take water, the municipality has power to see it is not in a dangerous or insanitary state. (*Kennedy and Rupchand Bilaram, A. J. Cs.*) ALLAHDINO *v.* THE SHIKARPUR MUNICIPALITY. **17 S. L. R. 330 : 79 I.C. 409: A. I. R. 1924 S. 139.**

——S. 122—*Notice—Municipality cannot issue notice to remove encroachment.*

S. 122 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroachment to remove it, Although the municipality may send such a notice it is not a notice under the section. Such a notice may be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove an encroachmnnt themselves. Assuming a Municipality served a notice upon a person to remove an encroachment it was not intended that if he did not do so he might be convicted under S. 155 of the Act. (*Macleod, C. J. and Coyajee, J.*) EMPEROR *v.* ATMARAM SHAMJI. **24 Bom. L. R. 384 : 66 I. C. 817 : 23 Cr. L. J. 321 : A. I. R. 1923 Bom. 30 (1).**

BOM. DT. MUNCPL. ACT (III OF 1901), S. 122.

——S. 122—*Obstruction in a public street—Adverse possession of the obstructed land for 30 years—No action can be taken.*

The plaintiff, who encroached upon a portion of a public street by building upon it, was called upon by the defendant Municipality to remove the obstruction, after 30 years under S. 122 of the Bombay District Municipal Act. In the suit by the plaintiff to restrain the Municipality from removing the obstruction, *Held*, that the defendant Municipality could take no action under S. 122 of the Act after 30 years to remove the encroachment, it having been barred from filing a suit for the possession of the site encroached upon, the site was no longer a part of the public street but belonged to the plaintiff. 22 Bom. L. R. 951 followed. (*Macleod, C. J. and Shah, J.*) ABAJI RAGHO *v.* THE MUNICIPALITY OF JALGAON. **23 Bom. L. R. 1028 : 46 Bom. 335 : 64 I. C. 202 : A. I. R. 1922 Bom. 111.**

——S. 131—*Occupier is liable.*

An occupier of land cannot plead as a defence to a notice under S. 131, that none but the owner is responsible to remove a nuisance. (*Kennedy, J.C. and Aston, A. J. C.*) HAJI UMAR *v.* EMPEROR.
18 S. L. R. 104: 26 Cr. L. J. 952: 87 I. C. 104: A. I. R. 1925 Sind 264.

——S. 145-A—*Permission to build on old wall—Pulling down a wall—Withholding of permission.*

Plaintiff wanted to build another storey on his western wall. and got permission. According to a compromise in a dispute with his neighbours he agreed to build further back to which the Municipal Committee did not give permission. The plaintiff therefore began to follow out his old plan to which the Municipality objected. *Held*, the objection was factious. The Municipality was not entitled to object to the rebuilding of the old wall where it stood with the addition to which it had given permission. (*Macleod, C. J. and Shah, J.*) THE BANDRA MUNICIPALITY *v.* JOHN C. DE. MELLO. **A. I R. 1922 Bom. 344.**

——S. 155—*Lawful order—Notice under S. 122.*

Where the accused was served with a notice under S. 122 of the Act to remove an *otla* which he had constructed and was convicted under S. 155 for having disobeyed a lawful order; *held*, on application to the High Court that no notice need be issued under S. 122 and therefore disobedience of such a notice does not amount to disobedience of a lawful order within S. 155. (*Macleod, C. J. and Coyajee, J.*) EMPEROR *v.* ATMARAM SHAMJI. **24 Bom. L. R. 384 : 66 I.C. 817: 23 Cr. L. J. 321: A.I.R. 1923 Bom. 30 (1).**

——S. 160 (3)—*Order of District Court under—Can be executed as a decree.*

An order of the District Court under S. 160 (3) of the Bombay District Municipal Act, 1901, can be executed as a decree. It is not necessary to make an application to the Court to pass a decree in accordance with the award. (*Macleod, C. J. and Crump, J.*) THE BROACH CITY MUNICIPALITY *v.* GULAM RASUL.
25 Bom. L. R. 305: 72 I. C. 636: 47 Bom. 654: A. I. R. 1923 Bom. 289.

——Ss. 167 and 40—*Deposit by contractor—Deduction from, by Municipality—Suit to recover is governed by section.*

S. 167 governs a suit to recover the amount deducted by a District Municipality for the non-performance of a contract from the deposit made by the contractor for the due performance of his contract entered into with the Municipality. (*Macleod, C. J. and Shah, J.*) BABAN *v.* CITY MUNICIPALITY, POONA.
64 I. C. 357: 23 Bom. L. R. 881: 46 Bom. 123 : A. I. R. 1922 Bom. 380 (1).

BOM. DT. MUNCPL. ACT (I OF 1918), S. 10.

——S. 167—*An application for re-consideration by a party does not afford a fresh cause of action.*

The refusal by the Managing Committee and not its subsequent refusal to reconsider the matter is the act which affords the plaintiff his cause of action. Every application for re-consideration filed by a litigant does not afford him a fresh cause of complaint. To do so will be to render the provision of S. 167 of the Act nugatory and will enable a litigant to revive stale claims by repeating his requests. (*Rupchand Bilaram, A. J. C.*) REWA CHAND FATEH CHAND *v* KARACHI MUNICIPALITY. **90 I. C. 44 : A. I. R. 1925 Sind 322.**

——S. 167 — *Section excludes application of S. 15 (2) of the Limitation Act—Limitation Act, S. 15 (2).*

The section in plain and unambiguous terms prevents the claimant from commencing his suit after six months from the date of act complained of and thereby expressly excludes the time being extended, under S. 15, Cl. 2 of the Limitation Act. Public interests require that such suits should be instituted without any delay and the period of six months is sufficiently long to enable a claimant to comply with both the conditions precedent required by S. 167 of the Municipal Act. 32 *Cal.* 277, *Foll.* (*Rupchand Bilaram, A. J. C.*) REWA CHAND FATEH CHAND *v.* KARACHI MUNICIPALITY. **90 I. C. 44: A. I. R. 1925 Sind 322.**

——Ss. 179 and 186 (a)—*Committee of Management—Powers of.*

A Committee of Management under S. 179, Bombay District Municipal Act, is not precluded from exercising the power of the Municipality under S. 186 (*a*). The Committee is not bound to follow every letter of the Act in its entirety but should keep the spirit of the Act in view. (*Kincaid, J. C. and Aston, A. J. C.*) SANTDASS MANGHARAM *v.* SECRETARY OF STATE.
80 I. C. 951: 17 S. L. R. 46.

——S. 188 (1)—*Application for permission to build—Model reply "permission refused"—Conviction under R. 27 (5).*

Although the model reply of permission refused can be sent according to the provisions of rule 27 (3) all that the committee can do is to pass a provisional order directing that for a period which shall not be longer than one month from the date of such order the intended work shall not be proceeded with. An order refusing permission for an indefinite period cannot be passed. There is justification for the conviction under R. 27 (5) if the petitioner has given notice as required by sub-rule (1). (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* ARDESHWAR JIVANJI. **24 Bom. L. R. 102 : 66 I. C. 331: 23 Cr. L. J. 267 : A. I. R. 1922 Bom 221.**

——(I OF 1918) S. 10—*Conviction under—Essentials to be observed.*

The two necessary conditions of a valid conviction under S. 10 are : (1) there must be an order passed by the School Committee under S. 9 *i. e.*, an order passed in strict compliance with the procedure laid down in that section, (2) the parent must be shown to have failed to comply with the provisions of S. 7 *on and after the date specified* in such order. The powers conferred under the Act on the School Committee are wide. They are in curtailment of the right of the parent to give efficient instruction to his child according to his own ideas. It is therefore essential that an attendance order passed by the Committee must be shown to have been passed in strict compliance with the procedure therein prescribed, namely "after giving the parent an opportunity of being heard" and after such enquiry as it considers necessary. The second requirement of S. 10 is that it must

BOM. DT. POLICE ACT (IV OF 1890), S. 11.

be shown that the parent has failed to comply with the provisions of S. 7 *on or after the date* specified in the attendance order passed by the Committee. (*Shah, A. C. J. and Coyajee, J.*) EMPEROR *v.* NEMCHAND NATHA. **47 Bom. 942: 25 Bom. L. R. 896: 77 I. C. 869: 25 Cr. L. J. 338: A. I. R. 1924 Bom. 105.**

BOMBAY DISTRICT POLICE ACT (IV OF 1890).

——**Ss. 11, 51 (e) and 53, Sch. B**—*Police-officer aiding another officer, outside his jurisdiction, but in same district where he serves, is deemed to be on duty —Penal Code, S. 353.*

For the purposes of this Act Police-officers of every grade are appointed to an entire district in which they have to serve and are to be deemed to be on duty in all parts of that district. Although a Police-officer may be outside the area of his jurisdiction, he is bound within the limits of the district for which he is appointed to aid another Police-officer when called on by him to do so or to keep order as required under Ss. 51 (e) and 53. Therefore, any person assaulting a Police-officer while he is engaged in discharging the duty under Ss. 51 (e) and 53 is guilty of an offence under S. 353, Penal Code. 40 *All.* 28 *Dist.* (*Kincaid, J. C. and Aston, A. J. C.*) KHAIRO *v.* EMPEROR. **88 I.C. 15 : 26 Cr. L. J. 1071 : A. I. R. 1925 Sind 280.**

——**Ss. 25-A and 26**—*Notification altering previous notification not legal.*

The Government have no power under Ss. 25 and 26 to call upon A to pay for B as an agent of B. Where plaintiffs were regarded as agents, but the effect of the notification in law was clearly to impose a new tax on the plaintiffs. *Held*, so long as in substance it is a tax or rate on another class of persons living within the area concerned, it is within the legal authority of the Government. An obligatory provision in the statute cannot be allowed to be ignored without adequate grounds. Where the tax or rate may be legal its recovery by the Collector cannot be illegal. At least where it is partially legal for the Collector to collect, for the rest the direct reference to the Collector is in the nature of an irregularity, which cannot affect the legality of the tax. The express provision as to finality would apparently exclude the application of S. 21 of the General Clauses Act. It is difficult to reconcile this provision as to finality with the idea of the Collector being able to vary it from time to time. S. 25-A does not provide for any enquiry as to orders under S. 25-A (1) (*b*). The words "after such inquiry as he deems necessary" are to be found in sub-section (1), clause (*a*) and do not govern clause (*b*). The omission to hold an inquiry which was only departmentally arranged is not sufficient to vitiate the direction given by him under S. 25-A (1) (*b*). The provisions of S 79 of the District Police Act would condone such an irregularity in procedure. With the previous sanction of the Commissioner and subject again to revision by him the District Magistrate may pass a fresh order. Per *Kemp, J.*—In effect he thus obtains the revision of the reviewing authority. The scheme of the section is to make the Commissioner and not the Court the reviewing authority. The finality provided for in an order under S. 25-A, clause (4), of Bombay Act IV of 1890 means to give a final effect to the ultimate order that the District Magistrate with the previous assent of the Commissioner may, subject to revision by the Commissioner or in accordance with any such revision, pass. Cl. (4) is not intended to exclude the powers which by S. 21 of the Bombay Act I of 1904 are included in a power to issue an order. S. 25-A does not require the rate for compensation to be assessed on property although the word "rate" would seem to imply the ownership of property. S. 25-A is not intended to permit the Court to enquire into the question of who were the persons really responsible for doing the objectionable acts. (*Shah, A. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA *v.* SECRETARY OF STATE. **48 Bom. 87 : 26 Bom. L. R. 1 : A. I. R. 1924 Bom. 1.**

BOM. GENL. CLS. ACT (I OF 1904), S. 21.

——**S. 41**—*Order under is an executive order—Revision.*

The order under any of the sections in Chapter IV (including S. 41) is an executive order and not one of an inferior Court with which a High Court can interfere. The mere fact that there is an enquiry of a judicial nature cannot suffice to give the High Court jurisdiction. (1917) 11 S. L. R. 113 ; (1910) 12 B. L R. 1029 and (1911) 5 S. L. R. 54 foll.) (*Fawcett, J C. and Kincaid, A. J. C.*) SATAN *v.* EMPEROR. **15 S. L. R. 126 : 23 Cr. L. J. 39 : 64 I. C. 663 : A. I. R. 1922 Sind 21.**

——**Ss. 57 and 58 (2)**—*Finder of property—No claim by anybody.*

Property not claimed by anybody after a proclamation is issued under S. 58 (2) should be made over to the finder. (*Marten and Crump, JJ.*) *In re* MARUTI BAPUJI SONAR. **47 Bom. 71 : 24 Bom. L. R. 707 : 69 I. C. 96 : 23 Cr. L J. 656 : A. I. R. 1922 Bom. 240.**

——**S. 62**—*Extension of the Prevention of Cruelty to Animals Act, S. 1 (2)—Does not repeal S. 62.*

The mere extension of S. 1 (2) of the Prevention of Cruelty to Animals Act to a certain district does not repeal S. 62 of the District Police Act within that district. (*Shah and Crump, JJ.*) EMPEROR *v.* BHAGWAN KRISHNA. **45 Bom. 203 : 22 Cr. L J. 696 : 63 I. C. 824 : 22 Bom. L. R. 892.**

——**Ss. 80 and 81**—*Order to recover amounts not covered by the sections.*

Where the order practically directed the Collector to recover the particular amounts from a class of persons. *Held*, that does not appear to be an order to any particular class of persons to perform any duty or act or to conduct themselves in a particular manner. Besides S. 81 provides an additional remedy which the party concerned may follow ; but it does not bar a suit which may be otherwise open to the party to file. (*Shah, A. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA *v.* SECRETARY OF STATE. **48 Bom. 87 : 26 Bom. L. R. 1 : A. I. R. 1924 Bom. 1.**

BOMBAY GENERAL CLAUSES ACT (I OF 1904).

——**S. 19**—*Power to delegate.*

Sec. 19 of the Bombay General Clauses Act shows that a power given to an officer under an Act can be delegated by him to his assistant. But the delegation must be clearly shown. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* KARIM RAJMAHAMAD. **27 Bom. L. R. 1421.**

——**S. 21**—*Previous notification can be rescinded only subject to conditions governing those notifications.*

The resolution of the Municipality which purports to rescind the prior notification of 1919 must be published in the Local Government Gazette, and must have received the previous sanction of the Local Government because under S. 21 of the Bombay General Clauses Act (I of 1904) the Municipality would have the power of rescinding the notification published in 1919 subject to the sanction and conditions, to which the first notification was subject. (*Shah and Kajiji, JJ.*) EMPEROR *v.* PORSHOTAM JAGJIVAN. **25 Bom. L. R. 767: A. I. R. 1924 Bom. 47.**

BOM. HEREDITARY OFFICES ACT (III OF 1874), S. 5.

BOMBAY HEREDITARY OFFICES ACT (III of 1874).

——S. 5—*Mortgagee from Watandar is liable to pay mesne profits if he retains possession after mortgagor's death.*

Mortgagee from a watandar is liable to pay the mesne profits after the original mortgagor's death for the period between the death of the mortgagor and the time when his successor to the watan obtains possession. 44 *Bom.* 500 *Dist.* 24 *Bom.* 556 (*P. C.*) *Foll.* (*Macleod, C.J. and Coyajee, J.*) SUNDRABAI VITHAL DESHPANDE *v.* LAKSHMAN RAMACHANDRA DESHPANDE. **49 Bom. 583 : 87 I. C. 723 : 27 B. L. R. 497 : A. I. R. 1925 Bom. 325.**

——S. 5—*Ghadi vatan—Mortgage by vatandar—Rights of mortgagee—Adverse possession.*

The Government granted certain lands to a person in respect of *ghadi* services to be rendered by the grantee to the village community. The holder of the lands mortgaged them in 1900 and died in 1912. Subsequently in 1920 the widow of the holder sued to redeem the mortgage on the ground that with the death of the last male owner the mortgage had come to an end. *Held*, that the mortgagee's possession of the lands during the life time of the last holder was not adverse to him and that the suit by the widow was not barred by limitation. (*Shah, A. C. J. and Fawcett, J.*) SHIVAPPA MALLAPPA *v.* AVALI LUMANNA. **26 Bom. L.R 814: A.I.R. 1924 Bom. 521.**

——S. 5—*Decree—Execution.*

Provision for payment of mortgage amount by Vatandar mortgagor by payment of annual sum out of profits or mortgaged lands is ineffective against the Vatandar's heirs after the death of the Vatandar. (*Fawcett, J.*) GANESH EKNATH *v.* BHAUSAHEB BHAWANRAO. **46 Bom. 345 : 64 I. C. 208 : 23 Bom. L. R. 1037 : A. I. R. 1922 Bom. 110.**

——S. 5—*Mortgage decree—Provision for payment out of profits—Application in execution for recovery of whole from other property does not lie.*

Where a mortgage decree, provides satisfaction of the mortgage debt by payment of an annual amount out of the profits of the mortgaged lands it is not open to the decree-holder to apply to execute the decree, to recover the full amount by sale of other property in the hands of the judgment-debtor. (*Fawcett, J.*) GANESH *v.* BHAUSAHEB. **46 Bom. 345 : 64 I. C. 208: 23 Bom. L. R. 1037 : A.I.R. 1922 Bom. 110.**

——S. 5—*Sale in execution of a money decree against vatandar will bind reversioner.*

Where in execution of a money decree against a vatandar, his vatan lands were sold after his death and purchased by another vatandar of the same vatan, who obtained possession from the widow, *held* the sale in execution would bind the reversioners, as the alienation was a valid one for legal necessity under S. 5 of the Bombay Hereditary Offices Act. (*Macleod, C. J. and Shah, J.*) GANESH RAMCHANDRA *v.* LAXMIBAI VENKATESH NARAYAN. **46 Bom. 726 : 24 Bom. L. R. 249: 67 I. C. 209: A.I.R. 1922 Bom. 96.**

——Ss. 9, 11 and 11-A—*Alienation of Vatan—Declared void—Assessment to Revenue—Default—Forfeiture—Limitation.*

The defendant, predecessor-in-title alienated his vatan land to plaintiff and died subsequently. The defendants applied to the Collector to take proceedings for the protection of the vatan. Acting under S. 11 of the Bombay Hereditary Offices Act the Collector made a declaration on 5-10-1904, that the alienation was null and void. The Collector resolved to assess the land at a full rent and on 6-7-1908, the

BOM. HEREDITARY OFFICES ACT (III OF 1874), S. 73.

Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum. On 15-3-1915, the Collector ordered forfeiture of the land owing to the default of the plaintiff in payment of arrears of rent then due. The plaintiff sued for a declaration that the order of forfeiture was invalid on the ground that the rent was due from 6-7-1908 when the assessment was fixed and on that footing, no arrears of rent had become due. *Held*, that the assessment of land was an alternative to the summary resumption of possession and the order that the land was liable to assessment, means assessment from the date of the order; that S 9, cl. 1 of the Act provided that an order giving the vatandars profits of the vatan should have effect from the date of the Collector's order, and there was nothing in S 11-A of the Act to the contrary; and that the plaintiff's suit was barred by limitation under Art. 14 of the Limitation Act. (*Pratt and Fawcett, JJ.*) DHONDI SUBHANE *v.* SECRETARY OF STATE.

25 Bom. L. R. 785 : A. I. R. 1923 Bom. 478.

——S. 11-A—*Order of Collector is an order under—Bombay Revenue Jurisdiction Act, S. 4 (a) para. 3—High Court cannot interfere.*

An order of a Collector under S. 11 (a) of the Act directing a levy of full rent is an order within S. 4 (a) para. 3 of Revenue Jurisdiction Act and therefore the High Court has no jurisdiction to interfere with the order. (*Macleod, C. J. and Shah, J.*) DATTATRAYA KESHAV *v.* LAXUMAN CHIMNAJI.

64 I. C. 7 : 23 Bom. L. R. 561.

——S. 15—*Widow holding life interest in watan property is not 'holder.'*

A widow holding an interest in watan property for the term of her life or until her marriage is not a holder within the meaning of that term in S. 15 of the Act III of 1874. (*Macleod, C. J. and Crump, J.*) BHIKAJI LAXMAN *v.* SECY. OF STATE.

27 B. L. R. 463 : 49 Bom. 554 : A.I.R. 1925 Bom. 365.

——S. 18—*Hereditary office dispute—Maharki Vatan—Arbitration—Award.*

Under S. 18 of the Bombay Hereditary Offices Act, 1874, a dispute as regards a Maharki Vatan was referred to a Panchayat. The parties however failed to nominate the panchas and thereupon the Deputy Collector asked the Mamlatdar to appoint them but the latter in his turn issued orders to the Head Karkun to get two panchas appointed by each party and himself to act as sarpanch. The Mahars appointed their panchas but the villagers declined to do so. When this fact was brought to the notice of the Mamlatdar, he ordered the Head Karkun to appoint two panchas under S. 18. The panchas were so appointed and the panchayat thus constituted made the award which was submitted to the Mamlatdar and was in due course approved of by the Deputy Collector. In a suit questioning the validity of the award *Held*, that the Panch was not constituted according to the procedure prescribed by S. 18 of the Bombay Hereditary Offices Act and the award was invalid. Having regard to S. 18 of the Act, it is not competent to a Civil Court to entertain a suit by the Mahar Vatandars to restrain the villagers of their village from delivering the carcasses of dead animals and paying baluta to the mangs. (*Shah, A. C. J. and Crump, J.*) MAHADU KASHIB *v* KRISHNA TATYA. **47 Bom. 95 : 24 Bom. L. R 917 : 68 I. C. 746: A. I. R. 1922 Bom. 410.**

——S. 73 — *Non-compliance with the procedure laid down in S. 73 makes order* ultra vires.

If there is no record of any investigation having been made or if there is nothing to show that an opportunity

BOM. HEREDITARY OFFICES ACT (X OF 1923), S. 2.

had been given to the other members of the watan family of being heard or that any reasons were recorded by the Collector for his decision, an order directing commutation is *ultra vires*. (*Macleod, C. J. and Crump, J.*) BHIKAJI LAXMAN *v.* SECY. OF STATE FOR INDIA. **27 B. L. R. 463 : 49 Bom. 554 : A.I.R. 1925 Bom. 365.**

——(X OF 1923) S. 2—*If retrospective.*

Bombay Act X of 1923 has not been given retrospective effect. (*Macleod, C. J. and Shah, J.*) ADIVEVA FAKIRGAWDA PATIL *v.* CHANMALLGOWDA. **26 Bom. L. R. 360 : 81 I. C. 1018 : A. I. R. 1924 Bom. 393.**

BOMBAY HIGH COURT CIVIL CIRCULARS.

——Ch. I, R. 55—*Expenses of witnesses—Pleader, if entitled to special rate.*

It is open to a witness to show that there are peculiar circumstances which entitle him to demand subsistance money or travelling allowance at a higher rate. The law does not allow for any special fee for witnesses in the District Courts on account of their status. It is different if a witness is called as an expert. A pleader who is merely called to give evidence as to what had occurred in a previous suit in which he was a pleader is not entitled to any special rate of subsistance allowance. (*Macleod, C. J. and Shah, J.*) VALI ASMAL *v.* MALJI. **46 Bom. 89 : 23 Bom L.R. 898 : 64 I. C. 78 : A.I R. 1922 Bom. 116.**

——Ch. 23, R. 16—*Receivers other than official receivers—Receiver's remuneration should be proportional to the amount of dividend distributed—Prov. Ins. Act*, 1920, *S.* 56.

R. 16 of Chap. 23 of the Manual of Circulars issued by the Bombay High Court directs that the remuneration of receivers, other than official receivers, shall be in such proportion to the amounts of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of dividends and therefore, a Court is not justified in directing payment to the receivers at the rate of five per cent. on the whole amount realised (*Macleod, C. J and Coyajee, J.*) JORAPUR *v.* JOSHI. **90 I. C. 656 : 27 B. L. R. 1116 (2) : A. I. R. 1925 Bom. 472 (2).**

BOMBAY HIGH COURT RULES (ORIGINAL SIDE).

——Rule No. 484—*Does not apply where Commissioner allows an objection once disallowed.*

Where a Commissioner recorded a finding on an objection, disallowed the same but afterwards issued a warrant to review his finding and a summons was taken out for an order that Commissioner's issue of the said warrant was illegal, *Held* that rule No. 484 did not apply to the case. (*Mulla, J.*) J. P. FERNANDEZ *v.* P. D. RODRIGUES. **47 Bom. 593: 25 Bom. L. R. 280 : A. I. R. 1924 Bom. 231.**

——*Pleader, cost of—Costs before Taxing Master are not allowed.*

It is not the usual practice to allow costs of counsel attending before the Taxing Master. (*Kemp, J.*) JIVANLAL PANALAL *v.* BAI MANCHHA. **27 B. L. R. 532: 87 I. C. 1043 : A.I.R. 1925 Bom. 355.**

——*Taxation—Party taking, must pay costs — Taxing Master can make the party taking review pay costs of the other party.*

On the warrant to tax, the party taking the taxation must pay the costs of the proceedings on that warrant. But if the Taxing Master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Chamber Judge will make such order as to those costs as he thinks fit. The proper procedure in such

BOM. HIGH COURT RULES (ORIGINAL SIDE), R. 214.

a case is by summons. The costs of warrant to review should follow the event of such review. The Taxing Master not only has the power to award costs against the party taking out such a review but he has also the power to make him, in a proper case, pay the other party's costs. (*Kemp, J.*) JIVANLAL PANALAL *v* BAI MANCHHA. **27 B. L. R. 532 : 87 I. C. 1043 . A. I. R. 1925 Bom. 355.**

——R. 118—*Counter-claim—Set-off—Bar of limitation—Effect on.*

A defendant can plead set-off or counter-claim as a cross-claim but the set-off must have arisen out of the same transaction and be for an ascertained sum while counter-claim need not arise out of the same transaction. If the plff. pleads limitation in case of set-off he must prove that it was barred at the time of the institution of the suit. But in the case of counter-claim it will do if he proves that it was barred by limitation at the time of pleadings. (*Miller, J.*) NAJAN AHMED HAJI ALI *v.* SALE MAHOMED PEER MAHOMED. **24 Bom L. R. 998 : A. I. R. 1923 Bom. 113.**

——R. 118—*Set-off and counter-claim.*

Distinction between set-off and counter-claim is of the greatest importance when a claim for unascertained damages is allowed as set-off or counter-claim. (*Macleod, C. J. and Coyajee, J.*) VITHALDAS GULABDAS *v.* HYDERABAD SPINNING AND WEAVING CO., LTD. **24 Bom. L. R. 328 : 47 Bom. 182 : 67 I. C. 326 : A. I. R. 1923 Bom. 24.**

——Rr. 127, 128 and 129—*Third party notice—Deft. outside the jurisdiction of the Court— Leave of Courts—Letters Patent (Bom.), cl.* 12.

The Court on summons for directions in a third party notice does not decide any question of jurisdiction and from the fact that the Court gave direction it could not be assumed that the Court decided the point of jurisdiction. The order of the summons for directions merely enables the third party to come into the suit as he was an added party deft. and then it was open to him at the trial to raise any issue which an added deft. was entitled to raise. Leave under cl. 12 of the Letters Patent could not be presumed to have been given because, before it could be assumed that leave has been granted under clause 12, it must be proved that an application was made to the Judge under cl. 12 and if the Judge made the order, it should appear clearly on the face of it that he was giving leave under clause 12 of the Letters Patent. A successful deft. is entitled to his costs of the suit and the third party proceedings as well. Per *Macleod, C. J.*—When a deft. asks the Courts to issue a third party notice in a case in which leave has to be obtained under clause 12 an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed on a plaint. (*Macleod, C. J. and Heaton, J.*) KARIM ELAHI SHETI *v.* SHER AHMED HAJI MIR AHMED. **45 Bom. 24 : 59 I. C. 28 : 22 Bom. L. R. 863.**

——Rr. 130 and 131—*Directions to third party—Order of refusal is not a judgment—Appeal.*

An order refusing direction under Rr. 130 and 131 is not a judgment within cl. 15 of the Letters Patent and is not appealable. (*Mears, C. J. and Fawcett, J.*) CHARANDAS CHATURBHUJ *v.* C. PITAMBHARDAS. **22 Bom. L. R. 1169 : 59 I. C. 533 : 45 Bom. 428.**

——R. 214—*Originating summons — Court can grant declaration that covenant for reconveyance or pre-emption is void.*

It is open to the Court to pass a declaratory decree in an originating summons under R. 214 of the Bombay High Court Rules to the effect that a covenant for

BOM. HIGH COURT RULES (ORIGINAL SIDE), R. 215.

re-conveyance or pre-emption annexed to a sale-deed is void as infringing the rule against perpetuities. (*Macleod, C. J. and Kanga, J.*) DINKARRAO GANPATRAO *v.* NARAYAN. **24 Bom. L. R. 449 : A. I. R. 1922 Bom. 84.**

——**R. 215**—*Originating summons—Question as to existence of partnership.*

The question as to the existence of a partnership (which is denied) is not one that can be disposed of on an originating summons. (*Mulla, J.*) SUKHANAND *v.* BHIMRAJ. **25 Bom. L. R. 390 : 73 I. C. 254 : A. I. R. 1923 Bom. 394.**

——**R. 505**—*Chambers summons adjourned to the hearing—Necessity to certify for counsel.*

When a summons is adjourned to be dealt with by the Judge at the hearing of the action, it becomes merged in the hearing and the question becomes one to be dealt with as one of the questions arising at the hearing and the costs relating thereto are at the discretion of the trial Judge, consequently counsel fees can be allowed though not certified. (*Macleod, C. J. and Coyajee, J.*) PARASHURAM D. SHAMDASANI *v.* TATA INDUSTRIAL BANK. **27 Bom. L. R. 1195**

——**R. 521**—*Costs in original side—Taxation of—Review of taxation—Taxing Officer's decision on quantum—Finality.*

In questions of quantum of costs, the Court has jurisdiction to deal with them. It is open to a party objecting to show that the Taxing Officer erred on a question of principle or has omitted to take into consideration all those matters which he is required to take. The Taxing Officer is not at liberty to lay down a scale for discretionary charges which is out of all proportion to the work done. (*Macleod, C. J. and Coyajee, J.*) PARASHURAM D. SHAMDASANI *v.* TATA INDUSTRIAL BANK. **27 Bom. L. R. 1195.**

BOMBAY IRRIGATION ACT (VII OF 1879).—Ss 3, 31, 34 and 35—*Compensation for interruption of water-supply—Decision of Collector—Civil Court has no jurisdiction.*

When Government fails to supply water for crops and the claim for compensation has been already decided by the Collector under S. 35 of the Bombay Irrigation Act, Civil Courts have no jurisdiction to entertain a suit for the same relief. Scope of the Act considered. (*Macleod, C. J. and Shah, J.*) VISHNU VINAYAK VAZEE *v.* THE SECRETARY OF STATE. **46 Bom. 738 : 24 Bom. L. R. 264 : 67 I. C. 43 : A. I. R. 1922 Bom. 8.**

——**Ss. 22 and 23**—*Water supply—Control over.*

Ss. 22 and 23 give control over the supply of water from the watercourse. The right however to regulate water from a Government or public channel or canal is the right of Govt. alone. (*Fawcett, J. C. and Kemp A. J. C.*) NAWAZALI SHAH *v.* RUSTOMALI SHAH. **62 I. C. 225 : 14 S. L. R. 53.**

——**S. 23**—*Jurisdiction under—Service of summons and hearing of objections are conditions precedent.*

The service of summons and hearing of objections are conditions precedent to the exercise of jurisdiction conferrred by the S. 23, and failure to comply with those conditions makes an order made under it a nullity, nor is such an order protected by the theory of inherent jurisdiction. (*Fawcett, J. C. and Kemp, A. J. C.*) NAWAZALI SHAH *v.* RUSTOMALI SHAH. **62 I. C. 225 : 14 S. L. R. 53.**

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880)—*Terms of Kabuliyat to Government must conform to custom except as altered by Bombay Act I of 1865, Ss. 37 and 38.*

A Khot's interest in the khoti village is limited, not

BOM. KHOTI SETTLEMENT ACT (I OF 1880), S 10.

absolute. He possesses in some measure a proprietary right. He is an occupant with all rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue, while the village lands which he has to manage in accordance with the restrictions mentioned in the kabuliyat fall under three distinct items, *viz.*—(1) Dharekari lands, the tenants of which have a transferable and heritable right paying Dhara alone to the Khot, (2) Khot nisbat lands which are in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and the Government assessment, and (3) Khoti Khasgi lands, private lands in the possession of the Khot of which he can make such use as he pleases. With regard to Khot nisbat lands the right of the Khot to exact rent or Fayda in addition to the assessment is limited by the Kabuliyat which is in accordance with the decision of the Government Officer. fixing the demand of the Khot on his tenants under S. 38, Bombay Act I of 1865 Khots in the district of Kolaba are hereditary farmers of the revenue and are entitled to hold their villages as Khoti on their entering every year into the customary Kabuliyats. If the Government wish to impose upon the Khot a new form of Kabuliyat they must not infringe the customary rights of the Khots except as altered by S. 38 of Bombay Act I of 1865. A Khot of a village in the Kolaba District at first used to pass annual Kabuliyats to Government in the form which was then in use. Government offered, in 1915-16 to the plaintiff, a Kabuliyat in another form which contained several new clauses. Clause 6 empowered a permanent tenant of Khot nisbat land to compel the Khot either to consent to a transfer or to take up the land himself Clause 8 required the Khot to keep the land at the disposal of a Dharekari who had deserted. Clause 21 worded ambiguously. As the Khot objected to pass the kabuliyat in the new form the Government attached the Khoti village. *Held* that the Khot was justified in refusing to sign a Kabuliyat which contained any one of such objectionable clauses, *viz.*, 6 and 8, which were in infringement of the customary right of the Khot and that the attachment of the village for refusing such a Kabuliyat was, therefore, illegal and the Khot was entitled to mesne profits and damages. (*Macleod, C.J. and Shah, J.*) GANPATI GOPAL RISBUD *v.* SECRETARY OF STATE. **48 Bom. 599 : 26 B. L. R. 754 : 83 I. C. 370 · A. I. R. 1925 Bom. 44.**

——**Ss. 8, 10**—*Occupancy tenant—Adverse possession, against*—Khoti, *position of—Ejectment—Notice.*

An adverse possession of a *khoti* land of an occupancy tenant extinguishes the right of the occupancy tenant to actual possession but not right to relinquish his occupancy right to the *khoti* who, after due notice under S. 84 of the Bombay Land Revenue Code, is entitled to eject the person in possession. (*Macleod, C. J. and Fawcett, J.*) VISHNU BHIKAJI *v.* BABLA. **45 Bom. 1001 : 61 I. C. 594 : 23 Bom. L. R. 411.**

——**S. 9**—*Rights of occupancy tenant—Transfer—Consent of managing khoti.*

The managing khot is entitled to give consent to the transfer of a permanent tenancy which is an act required by the statute to be performed by the Khot in order to validate the transfer. (*Macleod, C. J. and Shah, J.*) EBRAHIM MOHIDIN *v.* KRISHNAJI LAXMAN. **26 Bom. L. R. 421 : 80 I. C. 458 : A. I. R. 1924 Bom. 459.**

——**S. 10**—*Transfer includes simple mo tgage.*

A simple mortgage is a transfer of the interest of the tenant within the meaning of the section. Even payment

BOM. KHOTI SETTLEMENT ACT (I OF 1880), S. 10.

by Khatedar of the mortgage amount prior to suit by Khot does not destroy the right of Khot. (*Shah and Crump, JJ.*) VASU KRISHNA *v.* MAHADHEV RAO MORESHAR. **24 Bom. L. R. 1160 : 73 I. C. 880 : A. I. R. 1923 Bom. 33 (1)**

——S. 10—*Transfer of portion of Khoti land.*

If the permanent tenant of Khoti lands transfers a portion of it without the Khot's consent only the portion so transferred, and not the entire holding, is at the disposal of the Khot under S. 10. (*Shah and Pratt, JJ.*) MADHAVRAO *v.* KRISHNAJI. **46 Bom. 470 : 24 Bom. L R. 131 : 68 I. C. 277 : A. I. R. 1922 Bom. 257 (2).**

——**Ss. 21 and 16 to 20**—*'Decision', meaning of—Entry in Botkhat.*

The Khoti Settlement Act nowhere provides that the mere entry in the Settlement Register of the name of a particular person as the occupant of the survey number is either final and conclusive or that it is binding upon all the parties concerned, unless and until it is reversed or modified by a decree of the Civil Court. What is made binding by the provision of S. 21 is the decision of the Recording Officer and not a mere entry of a person's name in the Settlement Register. Preceding sections make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the Recording Officer. An entry in Botkhat is not a decision. S. A. No. 850 of 1914 Ref. (*Macleod, C. J. and Coyajee, J.*) POTPHODE *v.* YESHWANTRAO. **24 Bom. L. R. 323 : 67 I. C. 322 : 46 B. 966 : A. I. R. 1922 Bom. 329.**

——**S 33**—*Importance of the Botkhat.*

The whole scheme of S. 33 of the Khoti Settlement Act is to prevent arrangements being made in an unauthorised way by the Khots, with the tenants contrary to the terms of the Botkhat If there is any agreement between the parties after the amounts have been fixed in the Bot khat, then the party must appear in person or by duly authorised person before the Recording Officer and consent to the entry being made altering the terms under which the tenants held the lands. (*Macleod, C. J. and Coyajee, J.*) BALSHAT *v.* HARI. **27 Bom. L. R. 1487.**

BOMBAY LAND REVENUE CODE (V OF 1879), Ex parte *grant of Sanad at City Survey confers no title.*

There is nothing in the Bombay Land Revenue Code justifying the conclusion that a person who gets a sanad at the City Survey on his *ex parte* application is entitled to turn out the person in possession of the land, unless such person proves a better title. (*Macleod, C. J. and Coyajee, J.*) TRIMBAK NARAYAN PUJARI *v.* DAMU BHAN SALI. **27 B. L. R. 656 : A. I. R. 1925 Bom. 430.**

——**S. 53**—*Rent equal to assessment—Presumption of—Occupancy Rights.*

The fact that the tenants pay the amount of assessment may not be conclusive evidence but it would afford strong presumption that the tenants have attained the occupancy rights by virtue of their long holding. The word "Miras" should not be used in case of persons who by virtue of their long holding are presumed by reason of the provision of S. 53 to have acquired fixity of tenure. In cases where a rent is equivalent to assessment it cannot be enhanced unless a right to do so is established by custom or otherwise. (*Macleod, C.J. and Crump, J.*) SITARAM SADASHIV *v.* PARSHURAM, **A. I. R. 1923 Bom. 449.**

——**S. 58**—*No receipt is necessary for the property attached by the person attaching it.*

BOM. LAND REV. CODE (V OF 1879), S. 74.

There is nothing in the Code which renders it obligatory for the person who is actually effecting attachment to give receipt for the property attached. (*Kennedy, J. C. and Aston, A. J. C.*) EMPEROR *v.* GULABRAI. **26 Cr. L. J. 195 : 83 I.C. 899 : 16 S. L. R. 161.**

——**Ss. 63 and 64**—*Alluvion—Lands sold by Government—Assessment—Right of landlord to charge rent for the alluvion.*

Defendant was a mulgeni tenant of certain lands from the plaintiff. Some alluvion having formed and accreted to the lands in question the Government granted the alluvion to the plaintiff for a price subject to the payment of annual assessment acting under S. 63. *Held*, that the plaintiff was entitled to charge a proportionate rent from the defendant for the alluvion which must be treated as a separate piece of land by reason of the operation of Ss. 63 and 64. (*Macleod, C. J. and Shah, J.*) MANJAYA SUBRAYA *v.* TIMMAYA VASUDEO. **26 Bom. L. R. 520 : 80 I. C. 427 : A. I. R. 1924 Bom. 449.**

——**S. 65**—*Application to use agricultural land for non-agricultural purpose—Procedure—Decision of Collector—Refusal without enquiry—Effect.*

Where a person wants to use agricultural land for non-agricultural purposes, he has to apply to the Collector for permission. The Collector under the Code has to acknowledge the receipt of the application and after due inquiry communicate the result in 3 months. If the applicant does not receive any reply within 3 months he can presume it is granted. Where on such an application being put in the Collector without inquiry refused it, but the applicant did not receive a reply after due inquiry within 3 months, he can take it that permission was granted. (*Macleod, C. J. and Shah, J.*) SHIVPAL SINGH BHAGWAT SINGH *v.* SECRETARY OF STATE. **26 Bom. L. R. 371: 81 I. C. 491 : A. I. R. 1924 Bom. 369.**

——**Ss. 68 and 79-A**—*Occupancy, grant of, subject to prohibition of alienation—Application for transfer of part of occupancy—Summary eviction.*

Where a grant of occupancy was made to the plff. subject to restrictions prohibiting alienation and a few years afterwards he made an application for transfer of the occupancy to the 2nd defendant, *held*, that the application amounted at most to an attempt to transfer which was never carried into effect, that there was no alienation and no breach of the conditions of the grant, that the order of the District Deputy Collector for summarily evicting the plff. was a nullity and that the Officer cannot be said to have acted in his official capacity. (*Shah and Crump, JJ.*) DHANJI JAIRAM *v.* SECRETARY OF STATE FOR INDIA. **45 Bom. 920 : 61 I. C. 347 : 23 Bom. L. R. 279.**

——**S. 74**—*Execution of Rajinama and Kabuliyat, whether has the effect of transferring ownership of property—Legal presumption—Evidence Act, S. 114.*

No legal presumption arises from the passing of a Rajinama and Kabuliyat that a transfer of ownership is intended to be effected and that, accordingly it operates, just as if it was a sale. It does not necessarily by itself amount to a transfer of the property. (*Fawcett and Madgavkar, JJ.*) RACHAPPA CHANBASAPPA *v.* NINGAPPA. **49 Bom. 847.**

——**Ss. 74 and 88**—*Notice of relinquishment—Registration Act, S. 90—Holder of alienated lands, if can receive notices of relinquishment—Rajinama in respect of such lands if requires registration.*

An *inamdar* can receive notice of relinquishment under S. 74 only where the Survey Settlement has been introduced or when the powers under S. 88 have been given to him. These notices are exempt from regis-

BOM. LAND REV. CODE (V OF 1879), S. 74.

tration under S. 90 of the Registration Act. (*Macleod, C. J. and Fawcett, J.*) SHIDRAJ BHOJRAJ DESAI *v.* DARI SANTARAM MALI. **45 Bom. 898 : 61 I. C. 464 : 23 Bom. L. R. 272.**

——S. 74—*Transfer—Rajinama and Kabuliyat, do not constitute transfer.*

A Rajinama and Kabuliyat do not by any means take the place of a sale-deed. Before they really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth, and that there was in fact an intention to transfer ownership. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of the facts proved. (*Macleod, C. J. and Heaton, J.*) CHANDANMAL HAMBIRMAL *v* BHASKAR WAMAN. **59 I. C. 114 : 22 Bom. L. R. 1079.**

——S. 81—*Action under, results only in forfeiture of interest.*

Where the Collector takes action under S. 81 of the Act and instead of selling or otherwise disposing of the occupancy right, removes the registered occupant's name from the *Khata* and substitutes the name of his co-sharer instead, the transaction results only in forfeiture of the registered occupant's interest, while his occupancy rights remain unaffected and he could recover possession on his title. (*Macleod, C. J. and Shah, J.*) VINAYAK *v.* GANESH. **46 Bom. 221 : 23 Bom. L. R. 1024 : 64 I. C. 201 : A. I. R. 1922 Bom. 198.**

——S. 83—*Presumption of annual tenancy—Landlord and tenant—Permanent tenancy—Burden of proof.*

The presumption is that a tenant is an annual tenant and the onus is on him to prove that he is something more. If he sets up permanent tenancy, in the absence of any document, he must prove antiquity of his tenure. If he succeeds, the burden is shifted to the landlord to prove the intended duration by agreement or usage. In the absence of any proof, it is presumed that the tenancy is co-extensive with the tenure of the landlord. (*Macleod, C. J. and Fawcett, J.*) MANEKLAL *v.* BAI AMBA. **45 Bom. 350 : 59 I. C. 751 : 22 Bom. L. R. 1394**

——S. 83—*Presumption from antiquity of tenancy—Rebuttal—Burden of proof.*

It lies on the parties, who wish to rebut the presumption arising from the antiquity of a tenancy to establish, first, that there is no evidence of the period of its intended duration and secondly, that there is no usage of the locality as to the duration of such tenancy. Where a tenant and his ancestors had cultivated the land as far as memory could go and paid the same amount of rent to his landlord and were in possession all along, the mere fact that he executed a rent note for one year in 1882 does not rebut the presumption of the permanency of the tenancy which arose from its antiquity. (*Macleod, C. J. and Fawcett, J.*) RAM RANCHHOD *v.* SAYED ABDUL RAHIM. **45 Bom. 303 : 59 I. C. 278 : 22 Bom. L. R. 1214.**

——S. 83—*Existence of tenancy shown for nearly 80 years—Origin not known—Tenancy should be presumed to be permanent and ancient.*

Where the plaintiff tenant put in title-deeds going as far back as 1835, in the earliest of which the land, was described as *pasaita* land, meaning 'land given in charity to Brahmins etc.' on a quit-rent of Rs. 5 and where there was no evidence to show when the tenancy was created: *Held*, that the tenant was entitled to the presumption under S. 83 of the Code that he was a permanent tenant at a fixed quit-rent. (*Marten and Fawcett, JJ.*) JUVANSINGJI MOTISINGJI *v.* DOLA CHHALA. **27 B. L. R. 890 : A.I.R. 1925 Bom. 390.**

BOM. LAND REV. CODE (V OF 1879), S. 83.

——S. 83—*Proviso—'Usage' has to be proved by landlord.*

The usage referred to in S. 83 proviso has to be proved by the landlord. Landlord's right to enhance rent by usage in the case of *mirasi* tenures in Deccan has no application to *watan* land in Gujerat. (*Marten and Fawcett, JJ.*) JUVANSINGJI MOTISINGJI *v.* DOLA CHHALA. **27 B. L. R. 890 : A. I. R. 1925 Bom. 390.**

——S. 83—*Tenancy traceable to the time of foundation of village in particular year—Origin of tenancy may yet be shown to be indefinite.*

Where once a definite commencement of a tenancy is found then there is no room for the presumption to be raised under S. 83. But it does not follow that because the defendants trace their origin and connection with the land back to the foundation of the village in a particular year, their particular tenancy or that of their ancestors began on that particular definite date. The defendants can show by means of other evidence that they had been tenants of the lands prior to that date, from some period which cannot be definitely fixed. (*Marten and Fawcett, JJ.*) AMARSANGJI INDRASANGJI *v.* RANCHHOD JETHABHAI. **27 B. L. R. 267 : A. I. R. 1925 Bom. 294.**

——S. 83—*Presumption from antiquity of tenancy—Kabuliyat, how far rebuts.*

When it has been proved that a tenant has been in occupation of certain land for so long that one cannot ascertain the commencement of the tenancy, the mere fact that during the currency of his holding he has signed a Kabuliyat which purports to be in terms an agreement for an annual tenancy may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the kabuliyat on the same rent. But each case of this class must stand entirely on its own facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of S. 83. But that can be rebutted by the landlord by the production of a kabuliyat. Again the effect of the kabuliyat can be destroyed by further evidence on the part of the tenant. The fact of the signing of the kabuliyat as merely an isolated instance in the midst of a long holding at the same rent will not necessarily prevent the tenant from succeeding. (*Macleod, C. J. and Crump, J.*) VIJBHUKHUNDAS *v.* ISHVARDAS. **25 Bom. L. R. 431 : 74 I. C. 292 : A. I. R. 1923 Bom. 397.**

——S. 83—*Duration of tenancy—Presumption as to—Commencement of the tenancy.*

The phrase "commencement of the tenancy" in S. 83 of the Bom. Land Rev. Code refers to the time and not to the terms of the tenancy. The presumption in S. 83 applies only when the time (*i. e.*) rather the date or the period of the commencement of the tenancy is not proved by satisfactory evidence. Directly it is shown that the tenancy commenced from a particular period, say between 1830 and 1850, the ordinary presumption that is now contained in S. 106 of the T. P. Act will have to be drawn. 18 Bom. 433; 23 Bom. L. R. 533; 24 Bom. L. R. 226 Rel. (*Pratt and Fawcett, JJ.*) NARAYAN RAM CHANDRA *v.* PANDURANG BALAKRISHNA. **24 Bom. L. R. 831 : 47 Bom. 4 : 76 I. C. 71 : A. I. R. 1922 Bom. 402.**

——S. 83—*Presumption does not apply where origin is known.*

S. 83 of the Bombay Land Revenue Code, 1879, does not apply to a tenancy which, though very old,

can be shown to have originated in a specified year. (*Shah and Pratt, JJ.*) CHIKKO BHAGWANT *v.* SHIDNATH. **46 Bom. 687 : 24 Bom. L. R. 226 : 66 I. C. 315 : A. I. R. 1922 Bom. 25.**

——S. 83 (2)—*Presumption—Applies only when date of origin of tenancy is unknown.*

The presumption in S. 83 (2) of the Act does not apply when the tenancy is proved to have commenced in a particular year. It is only where the date of its origin is not known that the Court must hold that the tenancy is co-extensive with the duration of the lessor's tenure. (*Macleod, C. J.*) SIDHANATH MARTAND NADGIR *v.* CHIKU BHAGVANT RAO. **63 I. C. 935 : 23 Bom. L. R. 533.**

——S. 84—*Annual tenancy—Disclaimer of landlord's title causes forfeiture—Notice to quit is unnecessary.*

A disclaimer of the lessor's title by the annual tenant of a holding to which S. 84 applies, is, if made prior to suit, a sufficient cause of action to enable the lessor to recover possession without proof of notice to quit, even where the T. P. Act does not apply. 20 Bom. 354 (F. B.) Foll. 22 Bom. L. R. 1214 Dist. (*Macleod, C. J. and Coyajee, J.*) VIDYAVARDHAK SANGH CO. *v.* AYYAPPA SANGIRIMALLAPPA. **27 Bom. L. R. 1152 : 90 I. C. 614 : A. I. R. 1925 Bom. 524.**

——S. 84—10 *days' notice is invalid.*

The words of the particular notice given by the plaintiffs were :—"You are hereby given notice that within ten days from the date of receipt hereof you should pay over to us rent of the last year and you should give in writing a kabuliyat to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate, and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law."

Held, that it cannot be implied that the notice to quit was to quit at the termination of the cultivating season and that it did not comply with S. 84.

Held further that though the form of notice referred to in S. 84 was not imperative, it still indicates the class of notice which the Indian legislature had in mind, and that notice would be very much what would be required under English Law and the notice in the present case was not a valid notice to quit. (*Marten and Fawcett, JJ.*) AMARSANGJI INDRASANGJI *v.* RANCHHOD JETHABHAI. **27 B. L. R. 267 : A I. R. 1925 Bom. 294.**

——Ss. 86 and 87 (4)—*Civil suit lies to recover money if levied in excess by superior holder but not to cancel or amend Collector's order.*

The object of Ss. 86 and 87 is to enable superior holders to recover rent or land revenue expeditiously when their title is clear by written application to the Collector, but the orders passed on such applications are neither decrees nor have they the force of a decree. Such an order is purely an executive order, and under S. 87 (4) the party dissatisfied with it can file a suit in the Civil Court not to set aside his order but the superior holder may sue to recover such amount as may be still due to him, and the inferior holder to recover the amount "levied" from him in excess of what was due. The latter's suit therefore becomes one "for the recovery of moneys had and received" and his cause of action arises when a sum in excess of what he contends is due is levied from him. It is only at this stage permissible to him to have recourse to the Civil Courts not for cancelling or amending the order of the Revenue Officer but for the refund of the amount levied from him in excess of what was actually due. (*Kennedy, J. C. and Raymond, A. J. C.*) HOTKHAN SHERKHAN *v.* PAHLUMAL UKERMAL. **17 S. L. R. 82 : 80 I. C. 955 : A. I. R. 1924 Sind 87.**

——S. 121—*Civil suit lies from decision of Survey Officer on a title dispute.*

Decision of a Settlement Officer regarding the title to certain area is open to challenge in a subsequent civil suit where the dispute did not involve any question as to boundaries. (*Shah, A. C. J. and Kincaid, J.*) NARSINGJI MEHRAMANSANJI *v.* BAI ACHRAT. **26 B. L. R. 1264 : 85 I. C. 204 : A. I. R. 1925 Bom. 151 (2).**

——S. 121—*Settlement of boundary does not affect easement rights.*

Under S. 121 of the Code the enquiry officer must settle the boundary between the lands of adjoining house owners which ordinarily is done by means of a line drawn on a plan and that line determines the rights of the landholders on either side of the boundary. But it does not determine the right which the holder of one number can claim to exercise over the land belonging to the holder of the adjoining number. The section applies also to the survey of land at a time as it applies to agricultural land. The enquiry officer cannot decide that a broad strip of land lying between two numbers is common to both the adjoining owners. (*Macleod, C. J. and Shah, J.*) GANESH *v.* RAMCHANDRA. **46 Bom. 390 : 23 Bom. L. R. 1209 : 64 I. C. 564 : A. I. R. 1922 Bom. 293.**

——S. 121—*Boundary fixed by Collector—Suit in Civil Court for recovery of portion on title by adverse possession is not barred.*

The settlement of a boundary by the Collector under S. 121 of the Code is no bar to a suit in a Civil Court for recovery of a portion of the Survey number on the ground that the plaintiff has acquired such portion by adverse possession 59 I. C. 437 Ref. (*Macleod, C. J. and Heaton, J.*) BHAGA MOTIJI *v.* DORABJI SORABJI. **45 Bom. 67 : 59 I. C. 440 : 22 Bom. L. R. 1111.**

——S. 121—*Boundaries, fixing of—Right to sue in Civil Court to recover possession on ground of adverse possession is not barred.*

The fixing of boundaries, by the Collector, of Survey numbers under S. 121 of the Code merely shows what land belongs to the persons in whose names the Survey numbers are registered. But it does not affect the right of any one of those persons to show in a Civil Court that he has acquired a title by adverse possession against a registered occupant. (*Macleod, C. J. and Heaton, J.*) MANAK *v.* NARAYAN. **59 I. C. 437 : 22 Bom. L. R. 1114 foot-note.**

——S. 133—*Sanad is a document of title—Entries in Collector's books are not much evidence of title—Sanad holder need not prove possession within 12 years of suit.*

An entry in the Collector's books that a certain person is the occupant and liable to pay revenue does not afford much evidence of title. But when a sanad is given under S. 133, after due inquiry, in the form in Schedule H, the sanad itself is a document of title.

There is a presumption in favour of the sanad holders that they were in possession, considering the nature of the land under the title given to them by the sanad, and it would lie upon anybody disputing their title to show that he had acquired a title by adverse possession. It is not incumbent upon the sanad holders, once they prove the sanad, to show that they were in possession within twelve years of the date of their suit. (*Macleod, C. J. and Coyajee, J.*) ULAWAPPA *v.* GADIGEWA. **27 Bom. L. R. 948 : 89 I. C. 894 : A. I. R. 1925 Bom. 477.**

BOM. LAND REV. CODE (V OF 1879), S. 135.

——— **S. 135**—*Record of Rights raises no presumption as to ownership.*

All that S. 135 lays down is that an entry in the Record of Rights shall be presumed to be true until the contrary is proved, but it does not raise any presumption as to the ownership of the land. (*Kennedy, J. C. and Raymond, A. J. C.*) SANT SINGH *v.* KARIBAI. **17 S. L. R. 206 : 76 I. C. 408 : A. I. R. 1924 Sind 17.**

——— **S. 135-H**—*Extracts not produced in lower Court.*

From para. 2 of the section, it appears that the High Court has power, as the trial Court has, to allow a reasonable time for the production of extracts, if not produced in the lower Court. What is or is not a reasonable time is a matter within the discretion of the High Court. (*Shah and Crump, JJ.*) GANESH BALKRISHNA *v.* VITHAL TRIMBAK.

46 Bom. 79 : 23 Bom. L. R. 745 : 64 I. C. 166 : A. I. R. 1922 Bom. 114.

——— **S. 135-H**—*Omission to file copy of record with plaint, noticed in appeal—Appellate Court should give time to produce it.*

Where, in a suit relating to land, the plaintiff omits to annex to his plaint a certified copy of the entry in the Record of Rights as provided in S. 135-H but the Court passes a decree, the Appellate Court cannot reject the plaint in appeal merely on the ground of the omission but it should give an opportunity to the plaintiff to produce the entry within a fixed time. (*Sir Norman Macleod and Shaw, JJ.*) GIRJA BAI NAGAPPA CHANDAWAR *v.* HEMRAJ VRINDAWANDAS.

45 Bom. 1339 : 64 I. C. 681 : 23 Bom. L. R. 595.

——— **S. 154**—*Applicability.*

Under the section cash and particularly Currency Notes (being moveable property and liable to sale) may be distrained and sold. (*Kennedy, J. C. and Aston, A. J. C.*) EMPEROR *v.* GULABRAI.

26 Cr. L. J. 195 : 83 I. C. 899 : 16 S. L. R. 161.

——— **S. 154** — *Distraint without warrant by Munshi.*

No warrant is necessary to enable a Munshi or a Tapedar who can read and write and who is acting under the orders of the Collector or the Mahatkari to distrain. (*Kennedy, J. C. and Aston, A. J. C.*). EMPEROR *v.* GULABRAI.

26 Cr. L. J. 195 : 83 I. C. 899 : 16 S. L. R. 161.

——— **S. 166**—*Notice containing wrong description of years valid.*

Where notice was given but there was a mistake of detail as to the years for which the land revenue was in arrears. *Held*, that it was a misdescription which in no way misled the plaintiff as he was aware that the rent was due from the date of the Collector's order in 1904. Nor this misdescription in any way involves a violation of the terms of S. 166 for the terms of that section do not make it obligatory upon the Collector to specify for what years the land revenue was in arrears. (*Pratt and Fawcett, JJ.*) DHONDI SUBHANE *v.* SECRETARY OF STATE.

25 Bom. L. R. 785 : A. I. R. 1923 Bom. 478.

——— **S. 202**—*Pasaita land settled as Pateli—Removed from office—Order under S. 202, if can be made.*

The right to hold *Pasaita* land *rent free* was allowed so long as the services of Patelship were rendered by the same person but the only effect of the removal from the office of patelship was to take away exemption to pay rent and not to put an end to the right of possession. So long as he paid the assessment to the Government, he cannot be deemed to be in wrongful possession, and the Government have no right to evict him. (*Macleod, C. J. and Shah, J.*) BHAVAN MORAR *v.* SECRETARY OF STATE.

45 Bom. 894 : 61 I. C. 267 : 23 Bom. L. R. 259.

BOM. LAND REV. CODE (V OF 1879), S. 217.

——— **Ss. 203 and 204**—*Notice of demand of assessment is not a decision or order.*

A notice of demand to pay assessment by a mamlatdar cannot be treated as a decision or order within the meaning of Ss. 203 and 204 of the Bombay Land Revenue Code. (*Macleod, C. J. and Shah, J.*) NATHURAM *v.* SECRETARY OF STATE.

46 Bom. 811 : 24 Bom. L.R. 402 : 67 I. C. 842 : A. I. R. 1922 Bom. 274.

——— **S. 216**—*Unalienated village lands are not within the section.*

Lands in an unalienated village, granted by Government, for rent wholly or partially free, do not fall within S. 216 of the Code. (*Macleod, C. J. and Fawcett, J.*) SITARAM SADASHIV *v.* TUKARAM DAJI. **45 Bom. 994 : 61 I. C. 577 : 23 Bom. L. R. 395.**

——— **Ss. 216 and 217**—*Prior suit to recover the* mamool *rates—Later Survey Settlement—Effect of.*

Where the plaintiff inamdar got a decree for the *mamool* rates for the years 1888-1890 in the year 1892 against the defendant's Khots and where survey settlement was introduced in the village in 1885-86 and where he filed a suit in 1917 for those dues for the years 1915 and 1916, *held*, that though the proper construction to be placed on S. 216 was not strictly speaking *res judicata*, still on the principle of *stare decisis* the previous construction should be adhered to. 18 Bom. 525 doubted. (*Macleod, Shah and Fawcett, JJ.*) SITHARAM *v.* LAXMAN.

45 Bom. 1260 : 64 I.C. 162 : 23 Bom. L.R. 749.

——— **S. 217**—*Section does not affect contractual rights arising before the Survey.*

With regard to an unalienated village it would be competent to Government to enter into contractual relationship with tenants or occupants. They might acquire fixity of tenure and fixity of rent. Where the village had been alienated and the alienee had entered into a contract with a person granting not only fixity of tenure but also fixity of rent, there is nothing in the provisions of S. 217 which would enable the alienees of the village to avoid their contractual liability; therefore, they could not enforce against their permanent tenants the payment of the assessment levied on occupancy land. (*Macleod, C. J. and Coyajee, J.*) SURYAJI *v.* SIDHANATH. **27 B. L. R. 645 : 89 I. C. 65 : A. I. R. 1925 Bom. 435.**

——— **S. 217**—*Applicability—Holders under special grants.*

S. 217 invites the application of the provisions applicable to the occupants in an unalienated village to the holders in an alienated village "so far as may be." The special right which a holder claims in virtue of any grant or contract between him and the inamdar is not in the slightest degree affected by S. 217 or Ss. 64 and 66 which are rendered applicable to the holders in an alienated village. 28 B. 74 Foll. (*Shah, C. J. and Pratt, J.*) DAMODAR *v.* KASHINATH.

24 Bom. L. R. 1040 : A. I. R. 1923 Bom. 79.

——— **S. 217**—Kadim *inam village—Survey Settlement with consent of inamdar—Mirasidar cannot get rent enhanced.*

Where with the consent of the *kadim inamdar* who is the grantee of the soil of a village, survey settlement is introduced, in the village, the *mirasidar* (or permanent tenant) can by virtue of S. 217 of the Code hold the lands on payment only of the assessment and the *kadimdar* cannot get that rent enhanced. (*Shah and Hayward, JJ.*) PANDU BALA JAGTAP *v.*

BOM. MAMLATDAR'S COURTS ACT (II OF 1906), S. 5.

RAMACHANDRA GANESH DESHPANDE.
45 Bom. 61 : 63 I. C. 671 : 22 Bom. L.R. 665.

BOMBAY MAMLATDAR'S COURTS ACT (II of 1906), S. 5—*Dismissal of suit by mamlatdar—Trial ordered by Collector—Mamlatdar cannot after recording evidence send the papers for orders of Collector.*

A Mamlatdar in whose Court a possessory suit was brought dismissed it on the ground that the matter could be more properly tried by the Civil Court On revision, the Collector directed the mamlatdar to proceed with the case and returned it for necessary action. The mamlatdar after recording some evidence sent the papers for orders to the Collector who heard the parties and declined to vary the original order of the mamlatdar. On an application for revision to the High Court, *held*, that immediately the case was sent back by the Collector, the mamlatdar's duty was to try the suit under the Mamlatdar's Courts Act and to give his own decision thereon ; and that the High Court in revision should direct the mamlatdar to restore the suit to his file and dispose of it according to law. (*Shah, A. C. J. and Crump, J.*) RASUL MUSA MAFAT *v.* ASMAN MUSA DADI. **24 B. L. R. 1311 : 76 I. C. 442 : A. I. R. 1923 Bom. 60.**

——**S. 5**—*Explanation—Possessory suit—Joint possession cannot be given by mamlatdar.*

A mamlatdar has no jurisdiction to award joint possession in proceedings under the Act. Any action of one co-owner who has rights over the whole property, although it may interfere with the joint ownership of the co-owner, does not amount to dispossession under S. 5. It is not intended that the ouster by one co-owner of the other can amount to dispossession within the meaning of the Act so as to entitle the mamlatdar to award joint possession. (*Macleod, C.J. and Shah, J.*) JINA *v.* MATHUR.
46 Bom. 289 : 23 Bom. L. R. 1016 : 68 I. C. 225 : A. I. R. 1922 Bom. 126.

——**S. 23**—*Order of mamlatdar—Powers of Collector in revision.*

A Collector acting under the powers given by S. 3 can set aside an order made by the Mamlatdar if he considers that it is illegal or improper. Where the Collector set aside such an order on the ground that the mamlatdar had entered upon complicated questions which were entirely outside the province of the Act and which ought to have been referred to a Civil Court *Held*, that the decision of the Collector practically deprived the mamlatdars of the power to decide who should be in possession of the disputed property until the questions in dispute have been finally determined by the Civil Court ; that the Mamlatdar was entitled to give possession to one party or another however complicated the questions may appear to be ; that the Collector exceeded his powers under the Act and that the High Court should interfere in the ends of justice (*Macleod, C. J. and Shah, J.*) JAGANNATH DEOKARAN *v.* DHONDU ANANDA. **48 Bom. 384 : 26 Bom. L. R. 265 : 80 I. C. 266 (1) : A. I. R. 1924 Bom. 352.**

——**S. 23**—*Finding of mamlatdar on misappreciation of evidence—Collector can set aside.*

When the finding of the mamlatdar is based on nothing but the unsupported allegations of the plaintiff, it must be called a finding based on a total misappreciation of what the evidence was. It is not based on evidence such as is necessary to establish a disputed claim and the error in the mamlatdar's finding amounts therefore not only to an error of fact but also an error of law. In such a case therefore the Collector is perfectly justified in setting aside the finding of the Mamlatdar. (*Kennedy, J. C. and Madgaonker, A J. C.*) MOTUMAL PARUMAL *v.* LEKHUMAL. **16 S. L. R. 106 : A I. R. 1922 Sind 18.**

——**S. 24**—*Revision—Judicial Commissioner's Court.*

Under S. 24 of the Act the Judicial Commissioner's Court has the same powers as the High Court and exercises such revisional powers over the order of the Collector in its capacity as successors to the Sadar Diwani Adalat which exercised these powers under Regulation II of 1817 and which powers were vested in the High Court by the Statute 24 and 25 Vic. Chap. 104. (*Kennedy, J. C. and Madgaonker, A. J. C.*) MOTUMAL PARUMAL *v.* LAKHUMAL.
16 S. L. R. 106 : A. I. R. 1922 Sind 18

BOMBAY MUNICIPAL ACT (III of 1888). Ss. 90, 91, 92. 296—*Acquisition of additional land—Corporation must act* bona fide.

The Corporation can, under the Act, acquire more land than is necessary for the actual construction of the new road in order that, by the resale of the surplus land, they may recoup themselves for the expenses of construction and widening. Per *Macleod, C. J.* :—The Corporation can acquire additional land or frontages whenever it seemed expedient for them to do so, the only restriction of such powers being that the decision regarding expediency must be arrived at honestly and on reasonable grounds. (*Macleod, C. J. and Fawcett, J.*) KANDARAO VITHOBA KORE *v.* THE MUNICIPAL CORPORATION OF BOMBAY.
63 I. C. 581 : 23 Bom. L. R. 361.

——**S. 91**—*Acquisition of land by Govt. for the Municipal Corporation—No transfer by Govt. is necessary.*

The section modifies the provisions of the Land Acquisition Act and vests the property in the Corporation on payment of the compensation and therefore no transfer in favour of the Corporation by the Govt. is needed. S. 31 of the Land Acqn. Act does not apply to acquisitions made under S. 91 of the City of Bom. Mun. Act. The vesting contemplated by S. 91 is such as would result from Land Acqn. Act. The interest of a monthly tenant in property which is being acquired under the Land Acqn. Act comes to an end when the property vests in the Collector under S. 16 of the Land Acqn. Act. (*Setalvad, J.*) BOMBAY MUNICIPALITY *v.* M. DAMODAR BROS. **45 Bom. 725 : 60 I. C. 571 : 23 Bom. L. R. 35.**

——**Ss. 147 and 146**—*Landlord—Taxes and rates—Liability to pay—Increase of assessment on the basis of rents obtained by sub-letting of members.*

S. 147 means this, that the lessor from whom taxes are leviable under S. 146 has a claim against a tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. Ordinarily when the lease is granted, it would be intended that the lessor should be liable to pay the taxes which would be based on the rent payable under the lease and it is difficult to think that the parties contemplated that in case of an increase in the assessment, the responsibility for paying the tax in accordance with that increased assessment should fall on the landlord and not on the tenant. (*Macleod, C. J. and Shah, J.*) DARASHAH BOMONJI *v.* LIPTON, LTD. **24 Bom. L. R. 479 : 67 I. C. 430 : A. I. R. 1923 Bom. 70.**

——**(III of 1901), S. 48 (j)**—*Rules.*

Dhewan Municipality Rules of 31st December, 1920 are not *ultra vires* or unreasonable. (*Raymond and Kennedy, A. J. Cs.*) FIRM OF NARUMAL BHAGCHAND *v.* DHEWAN MUNICIPALITY.
78 I. C. 432 : A. I. R. 1924 Sind 149.

BOM. MUNCIPL. ACT (III OF 1901), S. 96.

——S. 96 — *Any building -- Covers a private Mahla.*

The words "any building" in S. 96 are wide enough to cover a building in a private Mahla. (*Fawcett, J. C. and Kemp, A. J. C.*) EMPEROR *v.* JANUFAKIR. **15 S. L. R. 171 : 23 Cr. L. J. 343 : 66 I. C. 999 : A. I. R. 1922 Sind 22.**

——**Ss. 107 and 131**—*Notice cannot be served on a person as agent nor can he be prosecuted on such notice.*

Under S. 154, clause 2 it is open to the Municipality to issue the notice addressed to the owner of the premises without specifying his name. If they do so they can prosecute the trustee who was recovering rents from tenants of the property, as the owner of the premises under S. 3, clause 8 of the Act, but he could not be prosecuted for failure to comply with notice addressed to another person and delivered to him as the agent of that person. (*Kennedy, J. C and Rupchand Bilaram, A. J. C.*) HASSOMAL *v.* EMPEROR. **18 S. L. R. 90 : 88 I. C. 187 : 26 Cr. L. J. 1099 : A. I. R. 1925 Sind 262.**

——S. 515—*Interpretation — Magistrate may direct Municipal Commissioner to take measures in matters other than those referred to in sections mentioned in sub. S.(1)—Court is not competent to consider whether legislature should have conferred such powers on Court—Mere residence is enough qualification for complaint—Mental assurance that license would be granted does not absolve from duty not to cause nuisance inside—General considerations about public convenience should not override main purpose of section.*

Purely as a matter of construction there is nothing in the terms of the section to justify the contention that the second part of cl. (*a*) of sub-S. (2), which relates to the direction to the Municipal Commissioner to take such measures as to such Magistrate shall seem practicable and reasonable, applies only to the exercise of the powers under any one of the sections mentioned in sub-S. (1).

The scheme of the section clearly is to give the right to any person to make a complaint where there is any nuisance or where in the exercise of any of the powers conferred by the respective sections, more than the least practicable nuisance has been created. The extent of the power of the Court is indicated in sub-Sec. (2) and the whole of cl. (*a*) of sub-S. (2) applies both to the case of nuisance, as well as to the case where in the exercise of powers under certain sections of the Act more than the least practicable nuisance is created.

The argument, that the legislature could not have contemplated that a Court should control and regulate the discretion of the Municipal Commissioner as to matters, about which the Municipal Commissioner would possess special knowledge, is not acceptable. This section appears to have been enacted for the protection of persons residing in the city; and it provides a remedy which is open to any resident of the City. The extent of the power of the Court is to be found in the words of cl. (*a*) of sub-S. (2). That provision undoubtedly implies some limitation upon the powers of the Commissioner and so some control over his acts where a proper case for giving direction to him in connection with a nuisance is made out. It is not open to a Court to consider whether the legislature should have conferred such powers upon the Court or not. It may be that the absence of proceedings under this section has tended to create an impression as to the meaning and scope of this section which is not accurate.

It is open to the Court to consider whether the existence of stables, having regard to all the facts, is or may be dangerous to life or injurious to health, even apart from the question of malaria.

BOM. NATIVE PASSENGER SHIPS ACT (X OF 1887), S. 31.

Whether the complainant is a paying guest or a tenant is not material. If he resides in the house that is sufficient for the purpose of enabling him to complain of the nuisance.

Where a complaint was made against certain stables as a nuisance and the owner had incurred heavy costs in putting them up, and had sound grounds for expecting grant of licence through the support of the Municipal Commissioner, *held*, that though he may have felt assured in his mind on account of the support which he had of the Municipal Commissioner, so far as the licence was concerned, he was not absolved from the obligation to see that no nuisance was caused by him to any residents in the locality. It has also to be remembered that while under the Rent Act, he may not be able to eject his present tenants, this nuisance itself, if allowed to remain, may be an effective means of enabling him to get possession.

Where it was argued that the Commissioner's discretion should not be interfered with, so as to effect public convenience, *held*, that such general considerations cannot be allowed to override the main purposes of the section in dealing with a particular nuisance.

Per *Crump, J.*—The circumstance that the wrongdoer is in some sense a public benefactor has never been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. 2 Ch. D. 692, 2 Ch. 588 Foll. (*Shah, A. C. J. and Crump, J.*) MUNICIPAL CORPORATION OF BOMBAY *v.* L. R MALLANDAINE. **48 Bom. 241 : 25 Bom L. R. 1321 : A. I. R. 1924 Bom. 241.**

——S. 515—*Person causing nuisance should ordinarily be treated as a necessary party to the proceeding.*

The person who is said to have caused the nuisance should be made a party to the proceedings, both in the inquiry which may be made by the Magistrate under S. 515 of the Act, and on the appeal in the High Court.

Quaere.—Is the Government Pleader entitled to be heard in a matter of this kind? (*Shah, A. C. J. and Crump, J.*) MUNICIPAL CORPORATION OF BOMBAY *v.* L. R. MALLANDAINE. **48 Bom. 241 : 25 Bom. L. R. 1321 : A. I. R. 1924 Bom. 241.**

BOMBAY NATIVE PASSENGER SHIPS ACT (X OF 1887) Ss. 9, 10 and 31—*Ships carrying passenger—Absence of certificate—Voyage—Meaning of.*

A ship sailing from a port calling at coast ports, stopping a short time at each and then returning to the port from which it originally sailed continues on a single voyage the whole time within the meaning of S. 9 of the Native Passenger Ships Act. Absence of certificate will not enable the ship to sail. (*Macleod, C. J. and Shah, J.*) T. S. MACHADO *v.* EMPEROR. **46 Bom. 438 : 23 Bom. L. R. 1200 : 69 I. C. 91 : 23 Cr. L. J. 651 : A.I. R. 1922 Bom. 167.**

——**Ss. 31, 9 and 10**—*Voyage from Bombay to Goa and back is one voyage.*

The accused who plied a steamer between Bombay and Goa for conveyance of passengers had certificate 'A' as required by sections 9 and 10 of the Native Passenger Ships Act, 1887, which expired on the night of 31st May, 1921. The steamer left Bombay with passengers on the 31st May 1921 for Goa and returned to Bombay on the 2nd June, 1921. The accused was charged under section 31 with the offence of sailing a ship without a certificate; *Held*, the accused had committed no offence for the voyage from Bombay to

BOM. PLEADERS ACT (XVII OF 1920). S. 10.

Goa and back was really one voyage. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* T. S. MACHADO.
46 Bom. 438 : 23 Cr. L. J. 651 : 69 I. C. 91 : 23 Bom. L. R. 1200 : A. I. R 1922 Bom. 167.

BOMBAY PLEADERS ACT (XVII of 1920), S. 10—Ex parte *decree—Application to set aside — Pleader appearing in the suit, appearing for the application—Fresh vakalat unnecessary.*

Where a pleader files a Vakalatnama at the original hearing of a proceeding, it is not necessary for him to bring a fresh Vakalatnama for the purpose of an application to set aside an *ex parte* decree. (*Macleod, C. J. and Kanga, J.*) BACHUBAI JHIRAD *v.* IBRAHIM ISUK. **47 Bom. 11 : 24 Bom. L. R. 744 : 69 I. C. 169 : A. I. R. 1922 Bom. 207.**

———**S. 10 (1)**—*Execution proceeding—No fresh* Vakalatnama *is necessary.*

An application for execution does not require a separate *Vakalatnama* under S. 10 (1), although the Vakil is entitled to a separate fee on account of execution proceedings. (*Macleod, C. J. and Shah, J.*) ISOOB SAIHA ABDUL RAHIMAN *v.* HAIDER SAIBA.
23 Bom. L. R. 883 : 64 I. C. 55 : 46 Bom. 125 : A. I. R. 1922 Bom. 113 (2).

———**Ss. 17 to 19**—*No special agreement between pleader and client—Pleader dying before final decree —Proportionate fees on basis of* quantum meruit *only can be claimed—Legal Practitioner.*

In the absence of any special agreement, a pleader shall be entitled to receive fees allowed on taxation between himself and his client for his services until the final decree or order in the proceeding is passed. If a pleader dies before such final decree or order is passed or for any reason the engagement of his services by his client is put an end to, then the pleader will only be entitled to ask the Court to award him certain proportionate fees on the basis of a *quantum meruit.* 12 Bom. 557 Ref.

The Court in assessing the *quantum meruit* might be guided by the percentages laid down by law for the regulation of costs between party and party, but is not bound to adopt that guide where circumstances of the case would render it unjust to do so. (*Macleod, C. J. and Coyajee, J.*) MOTILAL GOPALDAS *v.* KRISHNABAI GOPALRAO. **27 Bom. L. R. 1156 : 90 I. C. 604: A. I. R. 1925 Bom. 513.**

———**S. 23**—*Execution proceedings—Pleader's fees —Bombay Regulation (II of 1827), S. 52.*

The Bombay Pleaders' Act applies to the taxation of pleader's fees in execution of a decree in an appeal which was pending when the Act came into force. (*Macleod, C. J. and Shah, J.*) BAI JAYAGAVRI *v.* RAMANLAL. **48 Bom. 355 : 26 Bom. L. R. 187 : 79 I C. 749 : A. I. R. 1924 Bom. 302.**

———**S. 25**—*Criticism pending trial in public meeting—Disciplinary action can be taken.*

While certain persons were on their trial a resolution moved by the second and supported by the third opponent was passed under the presidentship of first opponent, a Dist. Pleader congratulating them upon their sacrifice. *Held*, the main ground upon which the present opponents have transgressed the limits of proper conduct as pleaders appears to lie in the fact that they in a meeting assembled took part in the passing of a resoultion which, in its effect, would amount to a criticism of the pending proceedings. The opponents acted improperly in being parties to a resolution of this character. Anything done or said which may amount to criticism of any proceedings pending in a Court of Justice is calculated to hinder the even and impartial administration of justice. Pleaders have

BOMBAY PREVENTION OF GAMBLING ACT AMENDED (1922)

privileges, but they have responsibilities also, and a pleader who acts so as to hinder and embarrass the administration of justice is guilty of "improper conduct" within the meaning of those words as used in S. 26, Bombay Pleaders Act and such conduct furnishes "reasonable cause" for the exercise of disciplinary jurisdiction under S. 25. (*Shah, A C. J. and Crump, J.*) GOVERNMENT PLEADER, *v.* VINAYAK BALVANT. **47 Bom. 117 : 24 Bom. L. R. 1049 : A. I. R. 1922 Bom. 361.**

———*Third Schedule—Pleader's fees—Suit in ejectment—Court Fees Act (VII of 1870), section 7, clause XI, sub-clause (c).*

In a suit to eject the defendant, plaintiff's tenant, from her house, the claim for purposes of Court-fee was valued at Rs. 1,080 (the amount of rent for one year) and for purposes of jurisdiction it was valued at Rs. 15,000, the value of the house. The suit being decreed in the trial Court the defendant appealed to the High Court valuing her claim at Rs. 1,080 both for Court-fee purposes and for pleader's fees, but failed in appeal. A question having arisen how the pleader's fees should be assessed on the value of the house. (*Macleod, C. J. and Shah, J.*) BAI METHERBAI NANBHAI BANAJI *v.* MRS. P. R. DADINA.
46 Bom. 396 : A. I. R. 1922 Bom. 171.

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887), Ss. 5, 6—*Honorary First-class Magistrate —Power to issue search warrant under the Act—Gambling—What constitutes.*

An Honorary First-class Magistrate can issue a search warrant as defined in S. 5 of Act IV of 1887 provided he is a magistrate for the local area in which the premises are situate in respect of which he issues a warrant When a regular warrant is isssed, the presumption does arise that the premises were used as a common gaming house and that the persons so playing therein were guilty of an offence under S. 5. The accused can disprove that they were as a matter of fact gambling. The mere use of instruments of gambling like cards is not sufficient ; there must be some evidence that the game played was not one of skill but of chance and that in view of the number. position and income of the players the game was one where loss might be the result not of lack of skill but of lack of luck. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) TILLOCKCHAND *v.* EMPEROR. **89 I. C. 396 : 26 Cr. L. J. 1356.**

BOMBAY PREVENTION OF GAMBLING ACT AMENDED (1922).—*Common gaming house—Probability of profit to the owner is sufficient.*

To prove that a particular house, room or place is common "gaming house" it need not be established that the owner or occupier takes a fixed commission which is irrespective of the result of gaming, or that he manipulates the conditions in such a manner that he cannot possibly lose. It is sufficient if the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, *i.e.*, where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instrument of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and the expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficieut to bring the case within the scope of the definition. 23 Cr. L. J. 196 Diss. (*Shah, Ag. C. J. and Coyajee, J.*) EMPEROR *v.* DATTATRAYA SHANKAR PARANJPE.
47 Bom. 960 : 25 Bom. L. R. 1089 : 25 Cr. L. J. 531 : 77 I. C. 895 : A. I. R. 1924 Bom. 184.

BOMBAY PREVENTION OF PROSTITUTION ACT (BOMBAY ACT XI OF 1923), Ss 3 and 10 (1)—*Arrest by police officer without complaint is illegal—Magistrate has no jurisdiction to try the accused.*

A police-officer, who is not specially authorized by the Commissioner of Police as required by S. 10 (1) cannot arrest a woman under S. 10 (1) without a complaint under S. 3 of the Act, and the Magistrate has no jurisdiction under S. 190 of the Cr. P. Code, to try the woman so wrongly arrested for the offence, unless a complaint within the meaning of S. 4 (1) (*h*) is made to him. (*Marten and Fawcett, JJ.*) CHANDRI BAWOO *v.* EMPEROR. **49 Bom. 212 : 26 B. L. R 1225 : A. I. R. 1925 Bom. 131.**

BOMBAY PRIMARY EDUCATIONAL ACT (1918).

——**Ss. 9, 10 and 8 (b)**—*Provision mandatory—Right of parents to give education elsewhere not taken away—Object is that the child should get education somewhere—Instructions need not conform to standard in recognised schools.*

The words " and after such inquiry as it considers necessary " in S. 9 are not merely permissive. That expression has a compulsory force regard being had to the object of the enactment, to the wide powers conferred on the Committee in derogation of the parents' rights and to the language of S. 9 itself.

It is clearly the function of the Court when a complaint is made under S. 10 to see whether it is proved that the parent failed to send the child to a recognized shool, without reasonable cause on or after the date specified in attendance order. The Act does not inflict penalty on a parent for a mere failure to carry out an attendance order passed under S. 9, for it is not to be supposed, unless the statute clearly said so, that once attendance order is made by the school committee under S. 9, the parent is for all time deprived of the right to give efficient instruction to his own child otherwise than in a recognized primary school.

The main object of the enactment is to see that a child is not left without the benefit of education. It is sufficient if it is receiving efficient instruction elsewhere than in a recognized primary school.

It is not essential that the instruction in order to be efficient within the meaning of S.8 (*b*) should conform to the standard as adopted in the recognized primary schools. (*Shah, A.C.J. and Coyajee, J.*) EMPEROR *v.* NEMCHAND NATHA. **47 Bom. 942 : 25 Bom. L. R. 896 : 25 Cr. L. J. 338 : 77 I. C. 226 : A. I. R. 1924 Bom. 105.**

BOMBAY PUBLIC CONVEYANCE ACT (VII OF 1920), S. 22—*Carriages let for hire to approved customers are not within section.*

Under Bombay Act VII of 1920 a public conveyance is a vehicle which is used for the purpose of plying for hire for the conveyance of passengers and goods. A person who owns carriages which are let for hire to approved customers cannot be said to let them for hire within the meaning of S. 22 of the Bombay Public Conveyances Act, 1920. (*Macleod, C.J. and Crump, J.*) EMPEROR *v.* NASARVANJI BOMANJI. **25 Bom. L. R. 95 : 72 I. C. 70 : 24 Cr. L. J. 310 : A. I. R. 1923 Bom. 248.**

BOMBAY REGULATION (II of 1827).

——**S. 5**—*Powers of interference—High Court.*

Decision in a Municipal election case, on the issues whether the Government is a party and whether the Court could hear the suit is a decision in a case under S. 5 of the Regulation. (*Shah and Coyajee, JJ.*) SECRETARY OF STATE *v.* NARSEBAI DADUBAI PATEL. **25 Bom. L. R. 992 : 77 I. C. 241 : 48 Bom. 43 : A. I. R. 1924 Bom. 65.**

BOM. RENT (WAR RESTRICTIONS NO. 2) ACT (BOM. ACT II OF 1918).

——**S. 14**—*Effect and scope of—Tender—Mortgage debt if included—Partial tender—Validity of.*

In S. 14 of Bombay Regulation V of 1827 it is provided that, if a debtor can prove that he has tendered to a creditor the whole or any portion of the amount due, all further interest shall cease on the amount tendered. The word " debtor " in S. 14 is certainly wide enough to cover a debtor who has given security by way of mortgage, and this is in fact shown by S. 15 of the same Regulation, which deals with the case of a usufructuary mortgage, or pledge and speaks of a creditor of the debt. Similarly in Act No. XXVIII of 1855, which provides for the Repeal of the Usury Laws, S. 6 speaks of the lender and borrower of money upon any mortgage, so that there is no reason to suppose that S. 14 (if literally construed) would not cover the case of a mortgagor and mortgagee. S. 14 of Bombay Regulation of 1827 is still in force in the Presidency Town of Bombay, as well as the rest of the Bombay Presidency. In the case of a mortgagor who seeks to redeem the entire mortgage and tendering only a part of the mortgage-debt really due. S. 14, so far as it relates to a tender of a part of a debt can be held to apply to a case of that kind. (*Fawcett, J.*) NADERSHAW *v.* SHIRINBAI. **25 Bom. L. R. 839 : A. I. R. 1924 Bom. 264.**

——**S. 15 (3)**—*Suit for sale by mortgagee—Usufructuary mortgage.*

Unless there is a special agreement between the parties when the bond is entered into, to the effect that the property shall not be brought to sale by the mortgagee, the mortgagee has a right to institute a suit for the purpose of bringing the property to sale. (*Macleod, C. J. and Shah, J.*) NILKANTH BALWANT *v.* SHRI VIDYA SHANKAR. **26 Bom. L. R. 455 : 80 I. C. 393 : A. I. R. 1924 Bom. 387.**

BOMBAY RENT (WAR RESTRICTIONS NO. 2) ACT (BOM. ACT II OF 1918.)

——*Notice to quit given while the Act is in force—Fresh notice is not necessary after the Act ceases to apply.*

The mere fact that the tenant is entitled to retain possession while the Act remains in force is not sufficient to create any relationship of landlord and tenant between the parties as would require a fresh notice to terminate it. The right to have notice is a statutory right the limits of which are to be found in the terms of the statute ; and the moment the statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the statute gave him up to a certain period. Where a landlord has, during the continuance of the Act given a notice to his tenant asking him to quit certain premises which he was using as business premises; it is not necessary for the landlord to give the tenant a fresh notice to quit after the Rent Act has ceased to apply to the premises. (*Shah, J.*) KISHORE DAS *v.* AHMED SULEMAN. **49 Bom. 567 : 27 Bom. L. R. 1086 : A. I. R. 1925 Bom. 516.**

——*Premises occupied mainly for dwelling purposes—Tenant also carrying on business in the premises—Premises are to be deemed as used as dwelling house.*

The fact that a tenant carries on business or works in the same premises, which he uses for dwelling in cannot thereby prevent those premises coming within the category of premises used as a dwelling house (*Macleod, C. J. and Coyajee, J.*) LAKSHMAN SANTU SINTRE *v.* BALKRISHNA KESHAV SHETYE. **89 I. C. 878 : 27 B. L. R. 937 : A. I. R. 1925 Bom. 398.**

BOM. RENT (WAR RESTRICTIONS NO. 2) ACT (BOM. ACT II OF 1918), S. 2.

——S. 2—*Sub-tenant let in without landlord's consent is not a "tenant" with respect to original landlord.*

If a tenant sub-lets premises, he becomes a landlord with regard to his own tenant. But his tenant does not come in contact with the original landlord unless there has been an assignment by which the rights and liabilities of the original tenant have been transferred to his sub-tenant, so that privity of contract arises between the landlord and the sub-tenant. Consequently the sub-tenant is only a tenant under the Rent Act with regard to his own immediate landlord, and when the owner of the premises seeks to evict his own tenant, he cannot be opposed by the person who has been put in possession without his consent by his tenant. (*Macleod, C. J. and Coyajee, J.*) PERURI SURYANARAYANAN *v.* W. L. NARSIMHA. **49 Bom. 685 : 89 I. C. 881 : 27 B. L. R. 938 : A. I. R. 1925 Bom. 415.**

——S. 2—*Standard rent cannot vary as between different persons.*

By including in 'landlord' a tenant who sub-lets and in 'tenant' a sub-tenant, the benefits of the Act are extended to sub-tenants. The standard rent was not intended to be determined by different standards between landlord and tenant and tenant and sub-tenant. Standard rent must mean the rent at which the premises were originally let. It is to be fixed in relation to premises and not in relation to persons and can only be one and not varying as between different persons. (*Setalvad, J.*) CHAPSI UMERSI *v.* KESHAVJI DAMJI. **45 Bom. 744 : 60 I. C. 960 : 23 Bom. L. R 133.**

——S. 2 (1) (b)—*Act does not apply to relationship of licensor and licensee.*

The distinction between a lease and license is that in the former case there is an exclusive right to possession on the part of the tenant while in the case of a license, the licensee has not got such a right. Plaintiffs owned a stable in which there were open spaces for keeping carriages as they came in and stalls for horses. There were open spaces for motor cars as well as cubicles large and small. Deft. hired stabling accommodation for the horses, carriage and three motor cars. The carriage was kept in the open space, and the horse in the stalls. One of the motor cars was kept in the open space, another in the large cubicle along with other cars and the third in a small cubicle separately The owner of the stables wanted an enhanced rent. *Held*, that the relation between the parties was not that of landlord and tenant but merely of licensor and licensee and that the provisions of the Bombay Rent (War Restrictions) Act were no bar to enhancement of the rent. (*Fawcett, J.*) THE INDIAN HOTELS CO., LTD. *v.* PHIROZ SORABJI. **25 Bom. L. R. 84 : A. I. R. 1923 Bom. 228.**

——S. 4—*Powers of controller.*

S. 4 (a) gives the controller complete powers to determine whether any premises are or are not small premises. If the landlord or tenant objects to any finding of the controller, he has the power to appeal within 14 days to the committee. The controller's finding is final unless varied by the committee and the Court except in cases where the controller acts without jurisdiction, shall not interfere with the order. (*Kennedy, J. C and Aston, A. J. C.*) ISSAJI IBRAHIMJI *v.* SIVARAM JADAVA. **83 I. C. 335 : 16 S. L. R. 158.**

——S. 7—*Proper notice—Statement of improvements or alterations.*

Under S. 7 of the Bombay Rent (War Restrictions) Act, notice to increase the rent must be accompanied by a statement of the improvements or alterations. (*Macleod, C. J. and Coyajee, J.*) SORABJI RUSTOMJI SUBEDAR *v.* PATNAICK. **89 I. C. 859 : 27 Bom. L. R. 1092 : A. I. R. 1925 Bom. 532.**

BOM. RENT (WAR RESTRICTIONS NO. 2) ACT (BOM. ACT II OF 1918), S. 9.

——S. 8—*Act—Premium for arranging lease—If allowed.*

Where a sub-lessee of premises granted a lease for the unexpired portion of his period and agreed to get a renewal for a further period, in consideration of which he stipulated for a premium in addition to the standard rent, the agreement is contrary to S. 8 of the Bombay Rent Act, and specific performance is unenforceable. (*Shah, A. C. J. and Crump. J.*) SHAVAKSHAV DINSHAW DASAR *v.* MOTOR UNION INSURANCE CO. **25 Bom. L. R. 1313 : A. I. R. 1924 Bom. 295.**

——S. 9—*Standard rent—Statutory tenant—Full standard rent—Liability to pay.*

A tenant who holds over after notice to quit by the landlord and elects to remain in possession under S. 9 is liable to pay the standard rent to the full extent allowed by the Act. (*Macleod, C. J. and Crump, J.*) KALIANMAL TILOCKCHAND *v.* DHARAMSAY JETHA & CO. **26 Bom. L. R. 141 : 80 I. C. 253 : A. I. R. 1924 Bom. 330.**

——S. 9—*Scope and object of.*

The first part of S. 9 of Act II of 1918 points to the act of a tenant whose lease has terminated and therefore the sub-letting must have occurred after the termination of the lease ; so also in the second part of the sub-section the term of the lease must be lease fixed before the sub-letting. The object of the sub-section is to put a stop to a statutory tenancy being used as a source of profit by a tenant who does not require the premises for his own occupation. The first part refers to a tenant who holds over under S. 9 (1) and the second part to a tenant who sub-lets beyond his term in expectation of statutory tenancy. (*Pratt, J.*) MADHAVJI VIRJI *v.* LAKSHMIDAS MULJI & CO. **25 Bom. L. R. 1178 : 48 Bom. 257 : 81 I. C. 843 : A. I. R. 1924 Bom. 99.**

——S. 9—*Requirement by landlord—Reasonable and* bona fide *demand—Test of.*

The plaintiff, who carried on business in hardware in a rented shop in the Fort in the City of Bombay, was ejected by the owner of the shop premises. The plaintiff owned a house, in another locality of the city, known as Tardeo, which had seven compartments on the ground floor. Five of these compartments were already in plaintiff's possession. He sued to recover possession of the remaining two compartments in order to carry on his business in hardware on the ground floor of the house. The area of the whole of the ground floor was less than the area of the rented shop in the Fort. The trial Judge dismissed the suit on the ground that the area already in plaintiff's possession was quite enough for developing a new business in the Tardeo locality :—

Held, decreeing the claim for possession that to prevent the plaintiff from occupying a space in his own premises equal to the space previously rented by him on the ground stated by the trial Judge would be going entirely beyond the jurisdiction of the Court in cases falling under the Bombay Rent Act, 1918. (*Macleod, C. J. and Shah, J.*) NOWROJI HORMASJI PATHAK *v.* V. SRINIVAS PRABHU. **46 Bom. 632 : 24 Bom. L. R. 95 : 66 I. C. 929 : A. I. R. 1922 Bom. 222.**

——S. 9—*'Tenant' does not include sub-tenant.*

The term 'tenant' in S. 9 does not include a sub-

tenant. Unlike trespassers they come in by right but like trespassers they hold over without right and are in the same position as trespassers. (*Pratt, J.*) SUGANCHAND *v.* MOTILAL. **24 Bom. L. R. 154 : 67 I. C. 130 : A. I. R. 1922 Bom. 197.**

——— **S. 9**—*Reasonable and* bona fide *purpose.*

When the intention of the community who own the premises was to put in one of the members of the community in possession of the premises it cannot be said that the community required the premises for their own purposes reasonably and *bona fide.* (*Macleod, C. J. and Shah, J.*) ATMARAM *v.* NARAYAN. **23 Bom. L. R. 972 : 64 I. C. 555 : 46 Bom. 132 : A. I. R. 1922 Bom. 109.**

———**S. 9**—*Requirement of fraction of premises is not requirement of whole.*

A *bona fide* requirement of a small fraction of the premises leased, does not amount to a reasonable requirement of the whole of the premises, and so a landlord cannot sue to evict a tenant in such cases under S. 9 of the Act. (*Pratt, J.*) VITHALDAS BHAGWANDAS *v.* NAGUBAI M. JOSHI. **68 I. C. 330 : 23 Bom. L. R. 856.**

———**S. 9**—*Portion of premises required by landlord—Decree—Severance of tenancy.*

Where in a suit for ejectment of a tenant from a house on the ground that the landlord requires the premises for his own use, it is found that he reasonably requires a portion of the premises and the tenant is willing to occupy the remainder of the premises the decree should direct the surrender only of the portion required by the landlord. There is, under the circumstances no valid objection to the severance of a tenancy. (*Macleod, C. J. and Shah, J.*) KUNDANMAL DAULATRAM *v.* LAKHMICHAND. **45 Bom. 1294 : 63 I. C. 1007 : 23 Bom. L. R. 559.**

———**S. 9**—*Object of the Act—Landlord choosing to occupy the house himself.*

The Act provides for the case of a landlord, who ejects an existing tenant in order to let the premises to another at a higher rent or exact more rent from the same tenant with the threat of eviction. Where the owner desires to occupy the premises himself, he can do so and can occupy any portion of the house he likes provided he does not occupy more space than necessary. (*Macleod, C. J. and Shah, J.*) RUSTOMJI *v.* DOSIBAI RUSTOMJI. **45 Bom. 1236 : 63 I. C. 41 : 23 Bom. L. R. 850.**

———**S. 9**—*Landlord, rights of.*

Where the limitation upon the rights of landlord created by S. 9 are removed his previous rights revive. (*Kincaid, J. C. and Kennedy, A. J. C.*) HUSSAN LAL MUHAMMAD *v.* BACHAL HAJI NATHU. **62 I. C. 860 : 15 S. L. R. 79.**

———**Ss. 9 and 10**—*Ejectment, suit for—Court, duty of—Court can postpone execution of decree.*

It is the duty of the Court under S. 9 (2) of the Act to decide whether the landlord reasonably and *bona fide,* requires the premises for his own use. A Court has power under S. 10 of the Act to postpone execution of a decree for ejectment for a certain period with liberty to apply after the expiry of the period fixed. (*Macleod, C. J. and Faucett, J.*) BHAGWANDAS MAGANLAL *v.* KAIKHUSARU ADIJI. **45 Bom. 928 : 61 I. C. 273 : 23 Bom. L. R. 287.**

———**S. 9**—*Applicability—Act does not apply to premises acquired under the Land Acquisition Act.*

The Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. The object is to effect acquisition immediately for public purposes. The general provisions

of the Act do not override or repeal the special enactments, like the Land Acquisition Act or the Municipal Act. (*Setalvad, J.*) BOMBAY MUNICIPALITY *v.* M. DAMODAR BROS. **45 Bom. 725 : 60 I. C. 571 : 23 Bom. L. R. 35.**

——— **S. 9 (1)**—*Ejectment for non-payment of rent cannot be resisted by deposit after suit.*

The conditions in S. 9 (1) of the Bombay Rent Act are conditions precedent which must be fulfilled at the date of the cause of action. Consequently where a landlord brings a suit to eject a tenant whose rent is in arrears for a long time, the tenant cannot, by paying the arrears of rent into Court, resist the suit in ejectment. Where the tenancy is determined not by forfeiture but by a notice to quit, the Court has no power to grant relief against eviction by the landlord. (*Pratt, J.*) MATHURA DAS MAGAN LAL *v.* NATHUBAI. **25 Bom. L. R. 345 : 47 Bom. 756 : 70 I. C. 920 : A. I. R. 1923 Bom. 387.**

——— **S. 9 (2)**—*Accommodation of employees of landlord is a satisfactory cause for ejectment.*

The accommodation of a staff of employees of the landlord is a satisfactory cause within the meaning of S. 9 (2) of the Bombay Rent (War Restrictions) Act, 1918, for the ejectment of a tenant, though it does not amount to a reasonable and *bona fide* requirement by the landlord for his own occupation within the meaning of the section. (*Pratt, J.*) NIPPON MENKWA KALMSHIKI *v.* F. PORTLOCK. **24 Bom. L.R. 54 : 65 I. C. 677 : A. I. R. 1922 Bom. 70.**

——— **S. 10-A**—*Defendant applying for restoration and becoming successful on merits—Act expiring in the meantime before order was passed in his favour—Proceedings* ipso facto *terminate and defendant cannot succeed.*

Plaintiffs filed a suit on June 14th, 1923 to evict defendants on the ground that they had given them notice to quit as the plaintiffs wanted the premises for their own use and requirements. On the faith of this requisition the defendants agreed to vacate under a consent decree passed on August 24th 1923, by which they agreed to give possession by January 31st, 1924. On August 20th, 1924, defendants took out a notice of motion asking the Court to pass an order not only for the restoration of the premises to the defendants, but also for damages on the ground that the requisition on which they were evicted was *mala fide.* It was found that the requisition on which the plaint proceeded was a false requisition, and the occupation of the plaintiffs was a pretence. It was not, therefore, *bona fide* and in the ordinary circumstances the defendants would have been entitled on the notice of motion to an order for restoration, and also for an order for payment of compensation. The Bombay Rent (War Restrictions Act No. II of 1918) with reference to business premises however expired before any order was actually passed.

Held : that the defendants' right to apply to the Court for restoration, and for payment of compensation did not survive the expiration of the Act.

If proceedings taken under a temporary statute are not terminated before the period of statute expires, then on the expiration of the statute the proceedings *ipso facto* are determined. (*Macleod, C. J. and Coyajee, J.*) R. K. MODY & CO. *v.* MAHOMEDBHAI ABDUL HUSSAIN & CO. **49 Bom. 724 : 87 I.C. 793 : 27 B. L. R. 595 : A. I. R. 1925 Bom. 378.**

———**S. 10-A**—*Notice of motion—Limitation—Copy of notice filed with protonotary—Motion in Court after expiry of prescribed period—Effect of.*

The period of limitation for applications by way of

BOM. RENT (WAR RESTRICTIONS NO. 2) ACT (BOM. ACT II OF 1918), S. 10-A.

motion to the High Court is calculated from the date on which the motion is brought on in Court and not from the date on which the copy of the notice of motion is lodged with the protonotary. In cases when the motion is brought on such that an application can be said to be made to the Court, the copy of the notice of motion being lodged with the protonotary does not amount to an application ; it is only an intimation to the Court that an application is intended to be made. 31 C. 150, foll ; 17 M. L. J. 215. dist. The law will be different so far as the Madras High Court is concerned for there it is the Court that issues notice of motion. (*Pratt, J.*) NAZARALLY *v.* KANEMAR.

25 Bom. L. R. 13 : A. I. R. 1924 Bom. 289.

——S. 10-A—*Limitation for application—Starting point—Copy of notice of motion filed with protonotary within the period of limitation—Motion in Court after the expiry of the period—Limitation.*

Though it is open to a defendant for applying direct to the Court for a rule *nisi* in order to call upon the plaintiff to show cause why the relief prayed for should not be given under S. 10-A of the Rent Act, the usual procedure in a case where a party wishes to obtain a relief of an interlocutory nature, is by motion, and necessarily the first step which has to be taken is to file a notice of motion in Court. To file the notice of motion in such a case is deemed to be the application which the applicant wishes to make and though the application is moved in Court after the expiry of the prescribed period, it is not barred by limitation if it is filed in the proper office of the Court within time. (*Macleod, C. J. and Crump, J.*) KANEMAR VENKAPAIYA *v.* NAZERALLY TYABALLY.

47 Bom. 764 : 25 Bom. L. R. 484 : A. I. R. 1924 Bom. 36.

——S. 13—*House held under lease—Part of premises let out by lessee—Rent of part sub-let forms basis of standard rent.*

Where a person takes on lease for a certain sum an entire building from its owner and lets out portions of it to different tenants, the "standard rent" for the portion so let out is to be fixed on the basis of the amount at which it was let and not on the basis of the amount at which the building was taken on lease. S. 13 (a) of the Act contemplates a case, where there is no letting of the part at the period at which the basic rent has to be determined but the whole is let at that period and the basic rent or standard rent of the part has to be ascertained with reference to the letting of that whole. (*Pratt, J.*) DHANRAJGIRJI NARSINGIRJI *v.* W. G. WARD.

49 Bom 357 : 27 B. L. R. 877 : 88 I. C. 886 : A. I. R. 1925 Bom. 400.

——(XIV of 1920) S. 10-A—*Notice of motion filed within six months—Application coming before Court after six months—Application is not barred.*

When an application is to be made to the Court, it commences to be made when a notice of motion is first in the proper office of the Court. 10 Ch. 92 Foll. (*Macleod, C. J. and Crump, J.*) VENKAPAIYA *v.* NAZERALLY TYABALLY.

47 Bom. 764 : 25 Bom. L. R. 484 : A. I. R. 1924 Bom.36.

BOMBAY REVENUE JURISDICTION ACT (X of 1876.)

——Ss. 4 and 5—*Claim as Jangam—Claim to restrain levy of rent in excess of assessment.*

A suit to declare that plaintiff was *Jangam* is based under S. 4 (*a*) (2) of the Bombay Revenue Jurisdiction Act. But he can ask under S. 5 for a declaration that the Collector could not levy rent on his lands in

BOM. REV. JURISDICTION ACT (X OF 1876), S. 4.

excess of the full assessment by Government and can stop the Government from collecting the excess. (*Shah and Kemp, JJ.*) PATDAYA MUPPAYA *v.* SECRETARY OF STATE FOR INDIA.

25 Bom. L. R. 1160 : 48 Bom. 61 : A. I. R. 1924 Bom. 61.

——S. 4 (a)—*Order of commutation of watan services passed without observing Bombay Hereditary Offices Act, S. 73—Suit to set aside the order lies.*

Where a Collector orders, at the instance of the widow of the last watandar, commutation of kulkarniki services and the procedure prescribed by the Bombay Hereditary Offices Act, S. 73 is not observed by the Collector while passing the order, the order is *ultra vires.* A suit in a Civil Court to set aside the order is not barred by the provisions of the Bombay Revenue Jurisdiction Act (X of 1876) S. 4 (a). (*Macleod, C. J. and Crump, J.*) BHIKAJI LAXMAN *v.* SECRETARY OF STATE FOR INDIA.

27 B. L. R. 463 : 49 Bom. 504 : A I. R. 1925 Bom. 365.

——S. 4 (a) Para. 3—*Order of Collector under S. 11-A of Bombay Hereditary Offices Act—Revision by High Court.*

An order of a Collector under S. 11-A of the Bom. Hereditary Offices Act directing a levy of full rent is an order within S. 4 (*a*), para. 3 of the Act and therefore the High Court has no jurisdiction to interfere with the order. (*Macleod, C. J. and Shah, J.*) DATTATREYA *v.* LAXUMAN CHIMNAJI.

64 I. C. 7 : 23 Bom. L. R. 561.

——S. 4 (a)—*Construction.*

S. 4 (*a*) of the Act should be strictly construed and a refusal by the Collector to declare an alienation null and void does not prevent the Civil Court from discussing the question of binding nature of the alienation. (*Macleod, C. J., Shah and Hayward, JJ.*) DATTATREYA KESHAV *v.* TUKARAM RAGHU.

45 Bom. 1141 : 61 I.C. 572 : 23 Bom. L.R. 376. (F.B.).

——Ss. 4 (b) and 5—*Inamdar— Miraspatra—Effect—Survey settlement—Introduction of—Right to levy building fines.*

Defendants were inamdars of the village and they were grantees of the soil as well as assignees of the revenue. The plaintiffs were mirasi class of permanent tenants holding under the inamdars under comparatively recent Miraspatra of 1859 and 1864. Survey settlement was introduced into the village at the request of the inamdars and a revised assessment of agricultural land came into effect. Under S. 217 of the Bombay Land Revenue Code, all holders of land in the village became liable in respect of such lands to the provisions of the Land Revenue Code. The Collector under rules framed by the Government and at the request of the inamdar purported to levy building fines for the benefit of the Inamdar assignees of the land revenue. The plffs. sued for a declaration of their rights to hold the land free from building fines and for an injunction restraining the Inamdars from levying such fines. The Inamdars pleaded that the suit was barred under S. 4 (*b*) of the Bom. Rev. Jurisdiction Act. *Held* that the suit was not barred by S. 4 of the Bom. Rev. Jurisdiction Act, If without questioning the legality or propriety of the amount or incidence *per se* the plff.. asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Inamdar, he cannot be said to object to the amount of incidence of the assessment within the meaning of S. 4 (*b*). An objection to come within either of the two heads of cl. (*b*) of S. 4 must be an objection which reaches them directly (*i. e.*) an

BOM. REV. JURISDICTION ACT (X OF 1876), S. 4

objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence of the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or makes them inapplicable to this particular case. 28 B. 74, Ref. (*Shah, C. J. and Pratt, J.*) DAMODHAR MAHADEV *v.* KASHINATH SADASHIV. **76 I. C. 897 : 24 Bom. L. R. 1040 : A. I. R. 1923 Bom. 79.**

——S. 4 (f)—*Order for compensation for additional police by the District Magistrate not within the section.*

The section refers to cess or rate authorised by Government and not to cess or rate authorised by the District Magistrate with the previous sanction of the Commissioner. The provision cannot apply where the legality of the order of the Government is questioned. It would apply to a cess or rate which is authorised, that is legally authorised, by the Government. (*Shah, A. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA *v.* SECRETARY OF STATE. **48 Bom. 87 : 26 Bom. L. R. 1 : A. I. R. 1924 Bom. 1.**

——S. 11—*Collector's refusal to grant sanad—Suit.*

S. 11 clearly prevents the High Court from entertaining any suit on account of the Collector's refusal to grant the plaintiff a sanad, as the plaintiff has to prove, previously to filing the suit, that he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present. (*Macleod, C. J. and Crump, J.*) AMBARAM KUBERDAS *v.* SECRETARY OF STATE. **74 I. C. 196 : A. I. R. 1923 Bom. 416.**

——S. 11—*Rent free land—Demand of assessment—Notice by mamlatdar—Suit to set aside is maintainable.*

Plffs. who had been holding their lands rent free were suddenly served by the mamlatdar with a notice of demand to pay assessment. There was no order by the Collector to that effect. Plffs. filed a suit for declaration that they were entitled to hold their lands rent free.

Held that this was a case to which S. 11 of the Bombay Revenue Jurisdiction Act would not apply and that the suit as laid was maintainable. (*Macleod, C. J. and Shah, J.*) NATHURAM *v.* SECRETARY OF STATE. **24 Bom. L. R. 402 : 67 I. C. 842 : 46 Bom 811 : A. I. R. 1922 Bom. 274.**

——S. 11—*Order by Collector to remove encroachment—No appeal preferred—Suit to set aside is not maintainable.*

A person against whom an order was passed by the Collector to remove an alleged encroachment and who preferred no appeal against the order within 2 months thereof is barred under S. 11 of the Act from afterwards suing in the Civil Court, to get the order set aside. (*Macleod, C. J. and Heaton, J.*) DAYAL KUSHAL *v.* SECRETARY OF STATE. **59 I. C. 122 : 22 Bom. L. R. 1089.**

——Ss. 12 and 4—*Reference under S. 12 excluded where a claim is excluded under S. 4.*

J sued B for declaration that he, and not B was the adopted son of X and as such was entitled to his properties. B pleaded that J's adoption was not consented to by the Maharajah of Kolhapur and was void as such. The case went up to the Privy Council which finally decided in J's favour. The Maharajah of Kolhapur who was not a party to the suit took exception and made representation to the Government of Bombay that J's adoption was invalid owing to want of consent on his part. The Bombay Government then referred the matter to the High Court under S. 12 of the Act, *held* that the Maharajah had himself a claim against Government jurisdiction as to which was excluded under S. 4 and that the matter was therefore referable to the High Court. (*Viscount Haldane*). MAHARAJA OF KOLHAPUR *v.* SHRI BALA MAHARAJ. **33 M. L. T. 378 : 50 I. A. 308 : (1923) M. W. N. 638 : 77 I. C. 100 : 48 Bom. 1 : 26 Bom. L. R. 252 : 28 C. W. N. 906 : A. I. R. 1923 P. C. 194 (P. C.).**

BOM. SEA CUSTOMS ACT (VIII OF 1871), S. 30.

——S. 12—*Reference can make order as to High Court—Costs.*

On a reference to the High Court under S. 12 of the Bombay Revenue Jurisdiction Act, the High Court has powers to deal with costs, as to who should pay them and as to how they are to be ascertained. (*Macleod, C. J., Pratt and Fawcett, JJ.*) *In re* JAGANNATH VASUDEO PANDIT. **45 Bom. 1177 : 61 I. C. 271 : 23 Bom. L. R. 189.**

——S. 12—*Claim not cognizable by Civil Court can be referred to High Court.*

S. 12 of the Act gives the Government the right to refer to the High Court all the claims and objections not cognizable by a Civil Court and this right is not excluded in respect of claims not cognizable by a Civil Court even before the passing of the Act. (*Macleod, C. J., Pratt and Fawcett, JJ.*) *In re* VASUDEV HARIHAR PANDIT. **45 Bom. 463 : 61 I. C. 146 : 23 Bom. L. R. 161.**

BOMBAY SALT ACT (II of 1890).

——Ss. 11 and 47—*Contract to sub-lease salt-pan against conditions of license is unenforceable.*

The defendants leased a salt-pan from Government under a license; one of the conditions of which was that the lessee was not at liberty to sub-lease the salt-pan without the permission of the Collector. In spite of this the defendants agreed to sub-let the salt-pan to the plaintiff. The plaintiff having sued for specific performance of the agreement of sub-letting:—*Held*, dismissing the suit, that the agreement of sub-letting, which was against the condition of the license, was unenforceable at law, 33 Bom. 636 Foll. (*Macleod, C. J. and Shah, J.*) RABIA BIBI *v.* GANGADHAR VISHNU PURANIK. **24 Bom. L. R. 111 : 46 Bom. 651 : 66 I. C. 393: A. I. R. 1922 Bom. 78.**

BOMBAY SEA CUSTOMS ACT (VIII of 1871).

——S. 30 (a) and (b)—*Customs duty—Assessment—Wholesale price, meaning of—Costs of the goods to importer.*

The term "wholesale cash price" in S. 30, cl. (*a*) of the Sea Customs Act, 1878 means the whole cash price for which the goods of like kind and quality are sold or are capable of being sold at the time and place of importation. The expression indicates that it must be the price which the importers in India are able to realise on a wholesale disposal of the goods to some one after importation. It does not mean the cost of the goods to the importers on the basis that the goods should be taken as being sold to the importer at the price which it cost him to lay them down in Bombay. Clause (*b*) of S. 30 of the Sea Customs Act applies when the wholesale price is not ascertainable. This clause is added in order that the real value might be ascertained where there is no wholesale price. (*Macleod, C. J. and Shah, J.*) THE VACUUM OIL CO. *v.* THE SECRETARY OF STATE. **24 Bom. L. R. 198 : 47 Bom. 174: 67 I. C. 267 : A. I. R. 1922 Bom. 12.**

BOM. SUMMARY SETTLEMENT ACT (V of 1863).

———*Application of, to villages of* Tatya Maharaj *is valid.*

The application of the summary settlement to the villages of *Tatya Maharaj* was valid and legal. (*Macleod, C. J., Pratt and Fawcett, JJ.*) VASUDEV HARIHAR PANDIT, *In re.* **45 Bom. 463 : 61 I. C. 146 : 23 Bom. L. R. 161.**

———S. 7—*Summary Sanad—Temple lands—Description as Jat inam—Suit by Gaukar of temple for possession—Limitation Act, Arts.* 120 *and* 144.

A suit was filed by the plaintiff as representing gaukars of a village entitled to the management of a temple, against defendants who were the Devlis and Bhavnis connected with the temple and certain alienees from them for possession of lands alleged to be Devasthan lands. The lands were described as the *Jat inam* of the temple servants in a sanad issued by the Government in 1865 under the provisions of the Summary Settlement Act, 1863. One of the defendants sold a portion of the lands in 1903 but the vendees took possession in 1916. The plaintiff's suit was filed in 1916. The defendants raised the plea that the suit was barred by limitation. *Held*, the issue of the sanad to the defendants did not negative the rights of the temple and the plaintiff, could prove that the lands were really *devasthan* lands. The grant of a sanad to defts. did not furnish a cause of action to the plff. Consequently the suit was not barred, Art. 120 of the Lim. Act having no application to a suit for possession. (*Shah, A. C. J. and Crump, J.*) VITHAL DHONDYI DEVLI *v.* SURYAJI RAMCHANDRA NAIK. **24 Bom. L. R. 902: 75 I. C. 617 : A. I. R. 1922 Bom. 438.**

BOMBAY VATAN ACT (V of 1886).

———S. 2—*Succession—Daughters—Cannot claim priority over male members.*

Under the Bombay Vatan Act, neither the daughter's nor a brother's widow of the last male holder can claim priority over the male members. (*Macleod, C. J. and Crump, J.*) GAVARAWA KOM *v.* MALLANGOWDA. **76 I. C. 559 : A. I. R. 1923 Bom. 382.**

BOMBAY VILLAGE POLICE ACT (VIII of 1867).

———S. 3—*Pagis—Appointment of—Nomination by Talukdar—Liability of Jivaidar for salary—Contract Act, S.* 69.

The Chief Talukdar of a village was entitled to half of its revenue, while the remaining half belonged to the Jivaidars. The District Magistrate called upon the Jivaidar to appoint two Pagis for the village. They failed to do so and the District Magistrate appointed the Pagis nominated by the Talukdar. In a suit by the Talukdar to recover the wages paid by him to the Pagis. *Held*, that the Pagis were validly appointed by the District Magistrate and that the Jivaidars were liable to reimburse the Talukdar. (*Pratt and Fawcett, JJ.*) ACHAL SINGH *v.* DOLAT SINGH. **26 Bom. L. R. 678 : A. I. R. 1924 Bom. 470.**

BOMBAY WAGERING ACT (III of 1865).

———Ss. 1 and 2—*Wager—Pakka adatia contracts are not wagering contracts—Difference between pukka and adatia and broker pointed out.*

If the contract between a *pakka adatia* and his constituent is a contract of employment, such a contract can by its very nature not come within the definition of a wagering contract and the *pakka adatia* can sue unless the constituent can bring the contract within Bombay Act III of 1865. The difference between a *pakka adatia* and a broker is that the broker enters into the contract as agent for his client, he himself being not personally liable to the person with whom he contracts while the *adatia* does not make the contract with third parties as the agent but as principal, the constituent having no right to be brought into contract with the third parties. (*Macleod, C. J. and Fawcett, J.*) MANALAL *v.* RADHA KISSEN. **62 I. C. 361 : 22 Bom. L. R. 1018 : 45 Bom. 386.**

BONA FIDE PURCHASER.

See (1) SPECIFIC RELIEF ACT, S. 27.
(2) T. P. ACT, SS. 41 and 53, etc.

BONA FIDES—*See* CR. P. CODE, S. 133.

BOND—*Co-promisers—Only one signing—Effect of—Liability.*

Where a bond is reported to be made by two persons, but it is signed only by one of them, he is liable on the bond unless he shows that the arrangement was that he would be bound only in case the other promiser also joined in executing the bond. (*Jackson, J.*) MANEM AYYANNA *v.* VEERABHADRAM. **22 L. W. 639: A. I. R. 1926 Mad. 62.**

BOOKS OF ACCOUNT : *See* EVIDENCE ACT, S. 34.

BOUNDARIES—*Dispute as to.*

The principle of proving the affirmative applicable where the boundary line which is the subject of dispute runs through waste lands which have been the subject of definite possession. (*Chatterjee and Panton, JJ.*) RADHA KRISHNA DAS *v.* MATIAR RAHAMAN. **65 I. C. 743 (Cal.).**

BOUNDARIES AND AREAS : *See* DEED, CONSTRUCTION.

———*Miscalculation in Revenue—Returns cannot defeat title.*

If in fact the boundaries include an area greater than that referred to in revenue return, such a miscalculation or misrepresentation cannot defeat the title to the estate. (*Mookerji and Buckland, JJ.*) SECRETARY OF STATE *v.* WAYED ALI. **65 I. C. 866: 34 C. L. J. 141.**

BRAHMOTTAR—*See* GRANT.

BREACH OF CONTRACT :

See (1) CONTRACT ACT, S. 73.
(2) DAMAGES.
(3) WORKMAN'S BREACH OF CONTRACT ACT.

BREACH OF THE PEACE—*See* CR. P. CODE, (1) Ss. 106, 123, (2) S. 145.

BREACH OF TRUST :

See (1) C. P. CODE, S. 92.
(2) HINDU LAW, RELIGIOUS ENDOWMENT.
(3) PENAL CODE, S. 403, ETC.
(4) TRUST.
(5) TRUSTS ACT, S. 23.

BRIBE : *See* PENAL CODE, S. 161, ETC.

BRITISH INDIA, ABSENCE FROM :

See LIMITATION ACT, S. 13.

BROACH AND KAIRA INCUMBERED ESTATES ACT (BOM. ACT XXI of 1881), S. 28—*Estate taken under management—Disability continues even in the case of successor of the Thakur.*

The disability contained in S. 28 applies not only to the Thakur during whose life-time the estate was taken under management, but it extends to his successor also, who, however, is allowed to incur unsecured debts. (*Marten and Fawcett, JJ.*) GAURISHANKAR BHAISHANKAR THAKOR *v.* MADAVSANGJI JESANGJI. **27 B. L. R. 88 : 86 I. C. 28 : A. I. R. 1925 Bom. 175.**

BROKER :

See Also CONTRACT ACT, S. 182, *Et. Seq.*

———*Commission—When payable.*

Where the remuneration of a broker is payable on the performance by him of a definite undertaking he

BROKER.

is entitled to be paid that, as soon as he has substantially done all that he undertook to do even if the principal acquires no beneficial interest from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided it does not fall through in consequence of any act or default of the broker. The contract itself will indicate the terms. (*Mookerjee and Rankin, JJ.*) SATCHIDANANDA DUTT *v.* NRITYA NATH MITTER. **50 Cal. 878 : 27 C. W. N. 1007 : A. I. R. 1924 Cal. 517.**

——Commission—Right to—Contract not completed.

Those who bargain to receive commission for introduction of a contractor have a right to their commission as soon as they have completed their portion of the bargain irrespective of what may take place subsequently between the parties introduced and whether or not the contract is completed. Where there was a letter giving the nature of an authority to negotiate a lease and it contained a certain term that brokerage was to be nett Rs. 2,530, and it also contained a promise on the part of the defendant to pay that amount on a future date if he succeeded in getting a lessee to agree to the terms of the lease, and the lease could not be put through as the defendant had failed to make out a title to the premises. *Held* that the brokerage was payable. (*Chaudhuri, J.*) RAGHUNANDAN LAL SARMA *v.* MADAN MOHAN DASS. **76 I. C. 333 : 38 C. L. J. 139.**

BUDDHIST LAW—(Burmese).

Adoption.
Applicability.
Divorce.
Ecclesiastical Jurisdiction.
Ecclesiastical Law.
Gift.
Husband and Wife.
Joint Property.
Marriage
Partition.
Pre-emption.
Property.
Source of.
Succession.
Will.

Adoption.

——Adoption—Kittima daughter—Ceremonies.

There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety that the adoptee lived continuously in the house of adopter from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. (*Lord Parmoor.*) MA THAN THAN *v.* MA PWA THIT. **46 M. L. J. 334 : 33 M. L. T. 361 : 2 Bur. L. J. 260 : 1 Rang. 451 : 77 I. C. 63 : (1923) M. W. N. 711 : 29 C. W. N. 610 : A. I. R. 1923 P. C. 156 (P. C.).**

——Adoption—Adoption is a contract and so a minor cannot adopt.

To be able to adopt a person must be of age, and able to contract. Adoption is a contract under which a person takes another with certain objects, and confers certain rights ; and so a minor is not legally empowered to adopt any person. (*Das, J.*) MAUNG MYA DIN *v.* MAUNG YE GYI. **4 Bur. L. J. 136 : A. I. R. 1925 Rang. 350.**

——Adoption—Ceremonies—Act of Shinbuying—Presumption.

BUDDHIST LAW (Burmese)—Divorce.

Though the act of Shinbuying is, in some cases, *prima facie* evidence that the donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that anything more than a charitable intent sometimes coupled with a love of display, was in the donor's mind. Where several boys are Shinbuyed at the same time, and none of them is a carural-born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship or about the time of the ceremony. (*Robinson, C.J. and May Oung, J.*) MAUNG PO KAN *v.* DAWAT AND OTHERS. **1 Rang. 102 : A. I. R. 1923 Rang. 189.**

——Adoption—Manukye Dhammathat.

The Manukye Dhammathat requires that a kittima son or daughter should have been adopted with the intention publicly signified, of taking the adoptee as a son or daughter who will inherit. This intention may have been expressed at the time of taking or later or may be inferred from a long course of conduct making such intention public. (*Robinson, C. J. and May Oung, J.*) MAUNG PO KAN *v.* DAW AT. **1 Rang. 102 : A.I.R. 1923 Rang. 189.**

——Adoption—Adopted son becoming a monk—Subsequent abandonment of monkhood—Effect of—Inheritance to adoptive parents.

Where a person adopted by Burmese parents enters the priesthood he must be held to have severed himself from all family ties. Where after remaining as a monk for some years, he resumed civil life, was received back in his old home on the old status as adopted son and heir, he must be deemed to have resumed his position of *Kittima* son and the years spent in the monastery do not affect his right to inherit the property of his adoptive father. (*Robinson, C. J. and Buckworth, J.*) MA NYUN-SEIN *v.* MAUNG CHAN MYA. **66 I. C. 573 : 11 L. B. R. 124.**

Applicability.

——Applicability—Shan Buddhists in Burma—Marriage—Presumption from habit and repute—Strict proof required.

The personal law of Shan Buddhist resident in Burma does not appear to be in any way different from that of Burman Buddhist and the ordinary Buddhist Law applies. Bhan notions concerning sexual relationship are extremely lax and the term Ma Ya (wife) is indiscriminately applied to women kept as mere concubines as well as those properly married. The presumption of marriage arising from co-habitation must rest on habit and repute and when proof of marriage depends wholly on habit and repute, the conduct of the parties concerned is of a great importance ; the alleged husband must be shown to have clearly and unmistakably revealed his intention to confer on her the required status and the alleged wife must be shown to have acted all along in such a manner that it would be patent that she asserted that status. (*Heald and May Oung, JJ.*) MA SHWE YIN *v.* MAUNG BA TIN. **1 Rang. 343 : 2 Bur. L. J. 114 : 76 I. C. 620 : A. I. R. 1923 Rang. 218.**

Divorce.

——Divorce—Husband marrying second wife, falsely representing he had divorced first wife—Then deserting second wife and living with first wife—Second wife is entitled to divorce and partition and 2/3 share of husband's property at partition.

A wife separated from her husband. The husband then falsely representing that he had divorced the first wife married a second wife. Afterwards he deserted the second wife and lived with the first wife. *Held*, that the second wife was not a lesser wife,

that she was entitled to sue for divorce and partition on the ground of desertion and that she was entitled at such partition to two-thirds of the husband's property. (*Heald and Chari, JJ.*) MAUNG PO NYUN *v.* MA SAW TIN. **3 Rang. 160 : 88 I. C. 402 : 4 Bur. L. J. 42 : A. I. R. 1925 Rang. 242.**

———*Divorce—Adultery—Cause of action—Partition.*

The Dhammathats clearly give the husband of an adulterous wife, the right to require her to leave the house with only the cloths on her back. The husband has also a right to ask for partition or possession of all the joint property. (*Carr, J.*) MAUNG PO HAN *v.* MA SO YI. **2 Bur. L. J. 65 : 75 I. C. 6 : A. I. R. 1923 Rang. 160.**

———*Divorce*—Ex-parte *divorce—Conditions.*

A husband or wife is entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage. 2 U. B. R. (1904—1906), foll : 7 L. B. R. 79 ; 7 Bur. L. T. 83, appr. (*Pratt, J.*) MAUNG THEIN MYA *v.* MAUNG TUN HLA. **11 L. B. R. 385 : 69 I. C. 980 : 1 Bur. L. J. 127 : A. I. R. 1923 Rang. 86.**

———*Divorce—Desertion for over 12 years.*

Per *Robinson and Maung Kin, JJ* :—But even if the evidence had not been sufficient to establish a divorce by deed, there is the admitted fact that appellant's husband had deserted his wife for twelve years before her death, and that he had failed to maintain her during that period. This fact alone would be sufficient to constitute a divorce under the Burmese Buddhist Law, 3 L. B. R. 175, ref. (*Robinson, C.J. and Maung Kin, J.*) MAUNG SHWE SA *v.* MA MO. **1 Bur. L. J. 24 : A. I. R. 1922 L. B. 28.**

———*Divorce*—Payin *Property—Partition.*

In connection with a partition on a divorce by mutual consent, *payin* property is to go to the party who brought it to the marriage and this rule is still to apply even though the property may have been changed in form provided it has not been merged entirely in the jointly acquired property and so changed its character. Change of form does not affect the rule so long as the *payin* can be identified. (*Robinson and Mac Gregor, JJ.*) MAUNG SHWE THA *v.* MA WAING. **70 I. C. 562 : 11 L. B. R. 48.**

———*Divorce*—Payin *Property—Right of wife.*

Where the wife is a spinster but the husband had been previously married, where the husband brings *payin* to the marriage and the wife nothing, the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without fault and where the relation of *nissaya* and *nissita* exists. Authorities reviewed. (*Robinson, C. J. and Heald, J.*) MA NGWE HNIT *v.* MAUNG PO HMU. **64 I. C. 806 : 11 L. B. R. 52.**

———*Divorce—Frame of suit.*

Under the Burmese Buddhist Law, suits for divorce should be framed and tried in one or other of the three kinds of divorce, or in the others in the alternative, and the question of status or existence of the properties to be partitioned, should be left to a later suit. (*Heald, A. J. C.*) MAUNG NGA *v.* MA PYU. **59 I. C. 1005 : (1920) 3 U. B. R. 251.**

Ecclesiastical Jurisdiction.

———*Ecclesiastical jurisdiction — Power —Authority to decide disputes of laymen—Effect of.*

Ecclesiastical authorities in Burma cannot settle a dispute between a pongyi and a layman relating to private land and any decision arrived at must be of the nature of an arbitration. Parties who have had nothing to do with the reference to arbitration, will

not be bound by such arbitration. (*Mac Gregor, J.*) U. MEDA *v.* U. SANDIMA. **1 Rang. 494 : 76 I.C. 807 : A. I. R. 1924 Rang. 141.**

Ecclesiastical Law.

———*Ecclesiastical Law*—Pongyi *must teach or meditate—If he does not he cannot live on charity.*

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform :—

(1) To practise austerities and meditation in order to work out his own salvation ; or

(2) To learn the sacred scriptures and to impart the knowledge to others

Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha.

When a Pongyi belongs neither to the Pariyatti nor to the Patibatti, he is no longer entitled to live on the offerings of the laity, nor to receive respect from them. He has no *raison d'etre.* A Pongyi in attempting to oppose the orders of the executive not only breaks his own personal law, but sets an example to the laity. (*Rutledge and Maung Gyi, JJ.*) MAUNG TOK *v.* EMPEROR. **3 Rang. 352 : 90 I. C. 918 : A. I. R. 1925 Rang. 354.**

———*Ecclesiastical Law* — Poggalika *gift of Kyaung entitles the donee to sue for its possession even if* Kyaung *is Sanghikai property —Presiding monk can be ousted only by the body of the Sangha.*

Where a *kyaung* is dedicated to the plaintiff as his *poggalika* property and has been in his continuous possession for a long term of years he can recover its possession if he is ousted.

Even if the *kyaung* be separate property, the plaintiff if he has been all along the presiding *pongyi* can recover possession and can be ousted only by the body of Sangha. (*Robinson and Maung Gyi, JJ.*) U. WATHAWA *v.* MAUNG PO HTI. **3 Rang. 193 : 89 I. C. 589 : A. I. R. 1925 Rang. 307.**

———*Ecclesiastical Law—Monk—Poggalika property—Ownership of.*

A *pongyi* may own a Kyaung (monastery) as his poggalika property and he can in his life-time validly transfer it by gift. (*Lentaigne and Carr, JJ.*) U. PANDAWUN *v.* U. SANDIMA. **2 Rang. 131 : A.I.R 1924 Rang. 309.**

———*Ecclesiastical Law—Effect of becoming Monk —Renunciation of a monkhood—Effect.*

By becoming a monk, a person divests himself of all earthly ties of relationship and property and dies a civil death. If he afterwards renounces the monastic life he does not *ipso facto* relapse to the same position which he occupied before, with regard to his property and his relationship. Overt acts recognised by law will alone instal him in the old status. (*Duckworth, J.*) MA SHWE THE *v.* MAUNG KAN. **1 Rang. 430 : 76 I. C. 672 : A. I. R. 1924 Rang. 101.**

———*Ecclesiastical Law—Property of—Buddhist Priesthood.*

A member of the Buddhist Priesthood dies a civil death when he enters the priesthood and does not possess any property except such as is necessary for his religious life and which is held under conditions which do not make it available for any other purpose such as maintenance of a child. (*Sanders, J. C.*) MA E. SHI *v.* U. ADITSA. **72 I. C. 974 : 1 Bur. L. J. 97 : 24 Cr. L. J. 510 : A. I. R. 1922 U. B. 15.**

———*Ecclesiastical Law—Saduthanthaka property —Incidents.*

BUDDHIST LAW (Burmese)—Gift

Saduthanthaka property is property belonging jointly to four *pongyis* among whom the title passes by survivorship until the last survivor gets the whole property. On the death of one member, however, the survivors can admit a new member in his place in the joint ownership group. (*Twomey, C. J. and Robinson, J.*) U. NANDIYA *v.* U. KAW WIDA. **13 Bur. L. T 147 : 61 I. C. 778 : 10 L. B. R. 258.**

Gift.

———*Gift—Monk—Power of disposal.*

Buddhist Ecclesiastical Law permits a monk to make a gift by delivering possession without declaration. He has power to make a death-bed gift. (*Po Han, J.*) MA SE *v.* U. LUN. **2 Bur. L. J. 266 : A. I. R. 1924 Rang. 201.**

———*Gift by monk—Validity.*

A monk cannot make a valid gift whether to a layman or another monk, of a monastery or of a site for a monastery whether it has been dedicated to him personally or not. (*Mac Gregor, J.*) U. MEDA *v.* U. SANDIMA. **1 Rang. 494 : 76 I. C. 807 : A. I. R. 1924 Rang. 141.**

———*Gift to children—Effect only after death—Validity—T. P. Act, S.* 123.

Where the question at issue was regarding the validity of a deed of gift by a mother to her children to take effect after her death, the matter being one of inheritance. Buddhist Law applied to the case and being a testamentary disposition in the guise of a gift, the deed is invalid. Though possession is necessary under Buddhist Law to constitute a gift, the matter is now governed by S. 123, T. P. Act. which also gets the rule of Buddhist Law on the point. (*Robinson, C.J. and Beasley, J.*) MA THIN MYAING *v.* MAUNG GYI. **1 Rang. 351 : 75 I. C. 166 : A. I. R. 1924 Rang. 13.**

———*Gift by grand-parent to grandchild—Nature of.*

Under Buddhist Law, an actual delivery of possession is necessary to validate a gift. But a gift by a grand-parent to a grandchild is an exception to the rule and is valid without delivery of possession. Such a gift is merely contingent and the property remains absolutely under the disposal of the donor till his death, the intention of such a gift being that grandchildren, being younger, might fare badly in competition with their elder uncles and aunts and that they shall receive such share of the inheritance as the grandparents consider fair. (*Heald, A.C.J.*) MA ME I *v.* MAUNG LANK HUYA. **59 I. C. 999 : (1920) 3 U. B. R. 228.**

Husband and wife.

———*Husband and Wife—Decree against husband does not affect wife's share in the joint property.*

A loan was taken by the husband alone on a pronote for the benefit of himself and his wife. The suit was brought against the husband alone, and the wife was not made a party to the suit ; *held* that the decree in the suit does not bind her share of the joint property, especially when there was nothing to show that the husband was agent of the wife. (2 U. B: R. (1892—96), 45, 11 B. L. R. 278, *Foll.*; 7 L. B. R. 135, 10 L. B. R. 3 *Ref.*) (*Duckworth, J.*) SAW HLA AUNG *v.* MU MU NYO. **1 Rang. 555 : 77 I. C. 402 : A. I. R. 1924 Rang. 165 (1).**

———*Husband and Wife—Children of first and second marriage—Rights of.*

So long as a Burman Buddhist husband and wife are alive, their property from whatever source derived, forms one estate in which all members of the family have an interest but which is under the control of husband and wife. (*Brown, A. J. C.*) MAUNG LU

BUDDHIST LAW (Burmese)—Marriage.

GALE AND THREE OTHERS *v.* MAUNG LU PO AND TEN OTHERS. **1 Bur. L. J. 267 : 4 U. B. R. 140 : A. I. R. 1923 Rang. 110.**

———*Husband and Wife—Mortgage by husband—Consent of wife—Acquiescence.*

The question of acquiescence by the wife in a mortgage of joint property executed by her husband, depends upon the circumstances of the case. The wife's consent may be presumed, where the circumstances are such as to show that the husband is acting as the wife's agent and the husband ostensibly with the wife's assent manages the family business. (*Twomey, C. J. and Robinson, J.*) MA HLAING *v.* P. R A. R. CHETTY. **13 Bur. L. T. 129 : 61 I. C. 701 : 10 L. B. R. 267.**

Joint Property.

———*Joint property—Ancestral property—Presumption.*

Buddhist law does not say that ancestral band must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist Law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case. (*Maung Kin, J.*) MAUNG SHWE LAL *v.* MA KYWE AND OTHERS. **1 Bur. L. J. 174 : 74 I. C. 9 : A. I. R. 1923 Rang. 92.**

Marriage.

———*Marriage — Girl below 20 years cannot validly contract without guardian's consent.*

Under Burmese Buddhist Law, no minor girl under the age twenty can contract a valid marriage without the consent or against the will of her parents or guardian, or the relations under whose protection she is living. (*Robinson, C.J., Maung Gyi and Brown, JJ.*) MA E. SEIN *v.* MG. HLA MIN. **4 Bur. L. J. 123 (F. B.) : A. I. R. 1925 Rang. 280.**

———*Marriage— Divorce—Right of husband and wife—Misconduct.*

There is no right of divorce at the mere caprice of the other party to a Burmese Buddhist marriage against the will of the other party and without proof of misconduct or default on the part of the other party. Cases reviewed. (*Heald and Lentaigne, JJ.*) MA HMON *v.* MAUNG TIN KAUK. **1 Rang. 722 : 79 I. C. 705 : A. I. R. 1924 Rang. 182.**

———*Marriage — Polygamy—Rights of junior wives—Presumption—Proof.*

Polygamy is undoubtedly lawful under the Burmese Buddhist Law and a man may have at the same time two or more wives who are on equal footing. When a claim to inheritance is made by a junior wife Courts must examine closely the relations that subsisted between her and her spouse, in order to determine her true status. Wives may under the law occupy identical positions or the junior wife may not be endowed with proprietary as well as personal rights. The junior wife has to prove that she was endowed with such rights before she can succeed to her claim. No ceremony of any kind is essential for the purpose of lawful wedlock. Although there may not be sufficient evidence of actual giving and taking the conduct of the parties subsequent to their coming together may raise a strong presumption of marriage, especially when the union has lasted for a long period. (*Heald and May Oung, JJ.*) MAUNG THA DUN *v.* MA THEIN YIN. **1 Rang. 1 : 73 I. C. 1044 : A. I. R. 1924 Rang. 37.**

———*Marriage—Presumption of—Co-habitation.*

Co-habitation over a period of years where there is no impediment to marriage raises a presumption of

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marriage. (*Heald and Lentaigne, JJ.*) MAUNG PO *v.* MAY PYIT YA. **1 Rang. 161 · 2 Bur. L. J. 79: 74 I. C. 933 : A. I. R. 1923 Rang. 180.**

——— *Marriage—Dissolution—Burden of proof.*

Marriage even in Burma is ordinarily a permanent bond, which subsists until it is actually broken and the burden of proving that it has been broken is on the person alleging it. (*Heald and Lentaigne, JJ.*) MA LUN ME *v.* MAKIN. **2 Bur. L. J. 67 : 74 I. C. 1037 : A. I. R. 1923 Rang. 155.**

——— *Marriage by minor girl—Consent of guardian not required.*

A minor girl under 16 years may not take the consent of her guardan for marriage. (*Maung Kin, J.*) MAUNG SEIN TUN *v.* MG. SAN NYAM. **1 Bur. L. J. 144 : A. I. R. 1923 Rang. 76 (1).**

——— *Marriage—Re-marriage—Provision for children of first marriage.*

Among Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle on the children of the first marriage. It is most unusual for a father merely to make gifts on such an occasion but still more unusual to include in these gifts the bulk of his property. (*Duckworth and Pratt, JJ.*) MAUNG PO LUN *v.* MA E MAI. **74 I. C. 47 : 1 Bur L. J. 111 : A. I. R. 1923 Rang. 57.**

——— *Marriage—Consent obtained by pressure, if free.*

There must be free consent of the parties foı valid marriage under the Buddhist Law, and a consen reluctantly given under pressure is not such free consent as is required by that law. (*Robinson, J.*) MA TWE *v.* LWE HAIN. **13 Bur. L. T. 105 : 59 I. C. 555 : 22 Cr. L. J. 123.**

——— *Marriage—Law applicable—Lex Loci.*

The law of the place where a marriage is contracted determines the validity of a marriage. (*Robinson, J.*) MA TWE *v.* LWE HAIN. **13 Bur. L. T. 105 : 59 I. C. 555 : 22 Cr. L. J. 123.**

Partition.

——— *Partition*—Eindounggyi *with two wives — Property inherited by husband after second marriage is* lettetpwa—*Share of each of two wives in such property is one-sixth—Such share is not liable for husband's debts—Rule for couples previously unmarried applies to marriage between an* eindounggyi *and previously married husband or wife.*

Where a Burman Buddhist *eindounggyi* having two wives, inherits after the second marriage immoveable property from his father, the property is *lettetpwa* of the marriages and is joint property of the husband and wives and not *thinthi* or the separate property of the husband. The share of the two wives jointly is one-third and since they are of equal status the share of each is one-sixth. Each wife acquires a vested interest in one-sixth of the property from the date on which it is inherited and such interest is not liable for all or any part of the debts incurred by the deceased husband alone. [*Maung Shwe Ngon* v. *Ma Mi Dwe, S. J.* 110 *Dissented from*]. The rule for partition on divorce by mutual consent where neither party was at fault between an *eindounggyi* and a husband or wife who had not been previously married is the rule which applies where neither party had been married before. (*Text & Case Law discussed.*) (*Robinson, C. J., Carr & Maung Gui, JJ.*) C. T. P. V. CHETTY FIRM *v.* MAUNG THA HLAING. **3 Rang. 322 : A. I. R. 1925 Rang. 329 (F. B.)**

——— *Partition—Ancestral estate — Jointness — Burden of proof.*

BUDDHIST LAW (Burmese)—Pre-emption.

Buddhist law does not say that ancestral land must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case. (*Maung Kin, J.*) MAUNG SHWE LA *v.* MA KYWE **74 I.C. 9 : 1 Bur. L. J. 174 : A. I. R. 1923 Rang. 92**

——— *Partition—Auratha son—Joint acquisition of parents—Remarriage of father.*

On the death of the mother and the re-marriage of the father, the auratha son is entitled to get from the father one-fourth of the estate jointly acquired by him and his mother. At the same time the auratha son cannot make that claim against his father merely by reason of his mother's death and it is only the re-mariage of his father that gives him a right to the one-fourth. (*Heald, J.*) MAUNG SHWE JWET *v.* MAUNG TUN SHEIN. **66 I. C. 538 : 11 L. B. R. 199.**

——— *Partition— Partial partition* — Hnapazon *property and separate property.*

There can be separate suits for a claim of a share in *hnapazon* property and separate property as the claims are distinct. (*Maung Kin, J.*) MAUNG SAN TIN *v.* MA NWE SA. **1 Bur. L. J. 206.**

Pre-emption.

——— *Pre-emption—Offer to co-heir may precede that to stranger—Necessary conditions—If conditions are satisfied no second offer is necessary.*

The offer to the co-heirs may precede that to a stranger, but must all form part of one and the same transaction and be of the same or a smaller price than that at which it is offered to the stranger, and if these conditions are carried out, there is no necessity for a second offer to the heirs when they have once refused to buy. (*Young, J.*) MAUNG MAUNG *v* MAUNG SHWE GOE. **2 Rang. 678 : 85 I. C. 295 : A. I. R. 1925 Rang. 194.**

——— *Pre-emption—Property jointly acquired by husband and wife—Sale by husband after wife's death —Sons of the marriage and wife's sons by first husband can pre-empt.*

Where a widow with two sons by first husband married a second husband by whom she got two sons and during coverture the husband and wife acquire land jointly and where on the wife's death, the husband married again and thereafter sold the land. *Held*, the four sons of the deceased are entitled to pre-emption—4 L. B. R. 128, 8 L. B. R. 466, May Oung's Leading Cases 157 and 3 B. L. J. 21—Referred to. (*Young and Carr, JJ.*) MAUNG PO THAUNG *v.* MAUNG E. PE. **2 Rang. 529 : 3 Bur. L. J. 240 : 84 I. C. 465 : A. I. R. 1925 Rang. 85.**

——— *Pre-emption — Right of Pre-emption can be enforced only with reference to sale effected by a co-heir —A younger son can't pre-empt sale by his mother of property owned before her husband's death, by him and her.*

The right of pre-emption can be enforced only against the persons or the person who inherited the land jointly with the claimants. It is only amongst the co-heirs. (*amwesaing* or *amwesabet*) that the right can exist, that is to say, persons on whom an estate has devolved. The term includes only those who have inherited the property jointly from a common ancestor, as for instance, the children of a deceased person.

Where the properties originally belonged to a husband and wife and the husband died leaving his wife and children and the wife sold some of the properties.

Held, that the younger son could not pre-empt the sale as the wife had absolute right, subject to certain

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claims by the eldest son and the eldest daughter, to the property and as she and her children were not co-heirs. 4 L. B. R. 128 Dist. (*Duckworth, J.*) MAUNG BA CHO *v.* MAUNG SAN TIN. **2 Rang. 437: 84 I. C. 287 : A. I. R. 1925 Rang. 63.**

———*Pre-emption—Sale of undivided share by co-heir.*

The Buddhist Law of pre-emption applies to a sale by one of several co-heirs of his share of undivided ancestral property. (*Young, J.*) MAUNG PO GYI *v.* MAUNG PO SAING. **3 Bur. L. J. 21 : 80 I. C 259 (2) : A. I. R. 1924 Rang. 266.**

Property.

———*Property left by deceased husband—Sale by widow—Younger son cannot pre-empt.*

A younger son is not a co-heir, with his mother, to his deceased father's estate. So he has no right of pre-emption in respect of property left by his father. (*Duckworth, J.*) MAUNG SAN TIN *v* MA PHET PU. **2 Rang 659 : 85 I. C. 284 : A. I. R. 1925 Rang. 192.**

Source of.

———*Source of — This is a collection of rules in accordance with custom and usages of Burmese.*

Burmese Buddhist law is stated to be contained in a series of books entitled Dhamathats, which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not before. According to a distinguished Burmese jurist of the name of U. Gaung, it is a collection of rules which are in accordance with the custom and usage of the Burmese people. (*Lord Atkinson*) KIRKWOOD *alias* MA THAIN *v.* MAUNG SIN. **89 I. C. 773 : 52 I. A. 265 : 6 L. R. (P. C.) 160 : A. I. R. 1925 P. C. 216 (P. C.).**

———*Source of—Books of authority—"The Manukye" can be relied on when not in conflict with equity, justice and the present feelings of the Burmans.*

The "Manukye" is now a safe and proper guide when not in conflict with justice or equity and the present feelings of the Burmans. (*Duckworth, J.*) MA SAW WIN *v.* MAUNG GYI. **2 Rang. 328 : 84 I. C. 966 : A. I. R. 1925 Rang. 34.**

Succession.

———*Succession—Step children exclude collaterals—Right to inherit when proved entitles the heirs to property—He need not prove absence of breaking off of filial relations—Mere separate residence of minors and consequent non-conducting does not divest right to inherit.*

Once it is determined that step-children are descendants they necessarily oust collaterals for by Buddhist law the property never ascends as long as it can descend. The point of view of the Buddhist law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that in the absence of natural children the husband's or wife's children as the case may be rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations. Conduct can indeed operate as a disqualification of the right but it is in no sense a necessary qualification to obtain the right. A man who has proved that he is an heir has not further to prove that he has not broken off filial relations. Mere separate residence does not nowadays and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights. 10 L.B.R. 397 Appl. (*Lord Dunedin*). MAUNG DWE *v.* KHOO HAUNG SHEIN. **47 M. L. J. 853 : 3 Rang. 29 : 52 I. A. 73 : 29 C. W. N 824 :**

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(1925) M. W. N. 23 (2) : 3 Bur. L. J 340 : 84 I. C. 899 : A. I. R. 1925 P. C. 29 (P. C.).

———*Succession—Younger child though eldest son has no* orasa *status.*

A younger child, although the eldest son, does not acquire the status of *orasa* and does not become entitled to the privileged position allotted to the eldest or first born son. (*Mr. Ameer Ali.*) KIRWOOD *v.* MAUNG SIN. **48 M. L. J. 1 : 51 I. A. 334 : 3 Bur. L. J. 304 : 2 Rang. 693 : 29 C. W. N. 653 : A. I. R. 1924 P. C. 238 (P. C.).**

———*Succession—Children by first marriage have no share after partition.*

If after the death of the husband, the wife partitions the property with her children and marries again taking her share with her, on her death the children of her former marriage cannot claim from their step father any property which she took to the second marriage; because they have already obtained their shares.

The same rule applies when after the death of the wife, the husband marries again after having given the children their respective shares. U. Gaung's Digest of Buddhist Law, p. 273, Ref. (*Mr. Ameer Ali.*) MA THAUNG *v.* MA THAN. **46 M. L. J. 618 : 51 Cal. 374 : 19 L. W. 477 : 51 I. A. 1 : 80 I. C. 1031 : (1924) M. W. N. 662 : 3 Bur. L. J. 333 : A. I.R. 1924 P. C. 88 (P. C.).**

———*Succession—Burman marrying more than once and dying leaving Hnapazon property—No issue of last marriage—Step-children take 1/6th but only ⅛th if there is an issue of last marriage. S. J. 177* and 2 *L. B. R.* 174, *Overruled.*

Where a Burman Buddhist who has married more than once dies leaving hnapazon property of the last marriage the law of partition of that property between the pubbaka children and their step-parent is as follows: In a case where there is an issue of the last marriage the step-child or children collectively take ⅛th and the step-parent 7/8ths and that in a case where there is no issue of the last marriage the former take 1/6th and the latter 5/6th. *S. J.* 177 and 2 *L. B. R.* 174 *Overruled.* (*Rutledge, C. J Brown and Maung Ba, JJ.*) **4 Bur. L. J. 189 : 90 I. C. 341 : A. I. R. 1925 Rang. 340 (F. B.).**

———*Succession—Orasa son, doctrine of—Minor of 11 years cannot attain orasa status.*

The eldest son, if competent, is the representative of his father and in that capacity, is entitled to one-fourth of the inheritance on the death of his father. By "competent" is implied, of an age to take his father's place. The whole doctrine of the orasa son is based on his being in a position to take his father's place. A minor son of 11 years of age cannot be said to have attained the status of an orasa son. (*Pratt, J.*) U. TUN GYWE *v.* KOKO GYI. **4 Bur. L. J. 67 : A. I. R. 1925 Rang. 245.**

———*Succession—Principles of—Right of representation—Great-Grandchildren—Rights of.*

Representation is not a principle of Buddhist Law, but the basic principle is that the nearer heir excludes the mere remote. The partial representation given to grandchildren in competition with children is the only exception to the rule. Thus great grandchildren take nothing in competition with children or grandchildren. (*Carr, J.*) MAUNG SHWE YE *v.* MAUNG PO MYA. **3 Rang. 464.**

———*Succession—Step-children—Rights of—Basis of partition.*

What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual and so long as the family subsists all who are mem-

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bers of it are regarded as being entitled to partition on dissolution.

When on the death of a parent or on his re-marriage an *auratha* has taken away his share, he is still entitled to claim a share on the death of the surviving parent or step-parent unless separation is proved. Where no such share has been taken on death or re-marriage, he is certainly entitled to share in the estate of the step-parent. (*Heald and Chari, JJ.*) MAUNG PO SAN *v.* MAUNG PO THET. **3 Rang. 438.**

———*Succession—Father's younger sister excludes mother's sister's son.*

The younger sister of the father of the propositus excludes the son of the sister of the mother of the propositus. 5 *L. B. R.* 70, 6 *L. B. R.* 164 and (1905) 2 *U. B. R. Buddhist Law* 5 *Ref.* (*Heald and Chari, JJ.*) U. PE GYI *v.* U. PYO. **3 Rang. 271 : 88 I. C. 657 : 4 Bur. L. J. 88 : A. I. R. 1925 Rang. 235.**

———*Succession—Mother's half sisters exclude father's cousin.*

Mother's half sisters exclude the father's cousin *i.e.*, daughter of a sister of the grandfather, in the matter of succession under Burmese Buddhist Law. (*Heald and Chari, JJ.*) MA KYAW *v.* MAUNG PO MYIT. **3 Rang. 86 : 89 I. C. 447 : A. I. R. 1925 Rang. 231.**

———*Succession—No natural or* kittima *child—*Appathitta *child takes half and relatives take half.*

Where there is no natural or *kittima* child the *appathitta* child takes half of the estate of the adoptive parent, and the other half goes to the relatives of the adoptive parent. (*Lentaigne, J.*) MAUNG GYI *v.* MAUNG AUNG PYO. **2 Rang. 661 : 85 I. C. 286 : A. I. R. 1925 Rang. 173.**

———*Succession—Pongyi's renouncing religious vows does not revive his right to succession.*

A *Pongyi* or a *rahan* at the time of the death of any of his relations cannot inherit from any of the relations even if he subsequently renounces his religious vows. This rule is founded on the assumption that by becoming a *pongyi* or *rahan* the person is (completely severed from his family as is quite unconnected with them) as if he were dead or adopted into another family.

Thus a person succeeding at the death of another person cannot be divested of the estate by a nearer person who was a *pongyi* or *rahan* renouncing his religious vows, sometime after the death of the person. (*Brown, J. C.*) MAUNG NI *v.* MAUNG THET SHE. **4 U. B. R. 159 : 76 I. C. 161 : A. I. R. 1925 Rang. 150.**

———*Succession.*

A Burmese Buddhist woman left a son by her first marriage and the husband and a daughter of the second marriage and *lelletpwa* property.

Held, that the daughter had no right in presence of her father who along with the son of the first marriage was entitled to divide the property equally. (*Young and Carr, JJ.*) MAUNG PAW THIT *v.* MA E YIN. **2 Rang. 521 : 3 Bur. L. J. 225 : 86 I. C. 496 : A. I. R. 1925 Rang. 120.**

———*Succession — Children and grandchildren, progeny of different marriages—Grandchildren take undiminished share.*

The general rule that in a division between children and grandchildren the latter take only one-fourth of the share to which their parent would have been entitled if alive, is not applicable when the children on the one hand and the grandchildren on the other are the offsprings of different marriages. (*Young and Carr, JJ.*) MA NAN SHWE *v.* MA SEIN.

BUDDHIST LAW (Burmese)—Succession.

2 Rang 514 : 84 I. C. 918 : A. I. R. 1925 Rang. 80.

———*Succession — Grandchildren's right is not defeated by separate living.*

The requirement that the grandchildren should live with the grand parents in order that they should be entitled to inherit at all is now obsolete. (*Young and Carr, JJ.*) MA NAN SHWE *v.* MA SEIN.

2 Rang 514 : 84 I. C. 918 : A. I. R. 1925 Rang. 80.

———*Succession—Limitation runs from propositus' death though plaintiffs' grandmother on whose joint ownership amount of share depends, predeceased propositus.*

Where the plaintiffs who are Burmans sue for their share in the estate left by their grand-father the fact that the amount of their share may depend on the joint ownership of their grand-mother does not affect the question of limitation and time runs only from the propositus' death though the grand-mother has predeceased him. (*Young and Carr, JJ.*) MA NAN SHWE *v.* MA SEIN. **2 Rang. 514 : 84 I. C. 918 : A. I. R. 1925 Rang. 80.**

———*Succession—Mya-nge does not definitely mean lesser wife.*

The term Mya-nge does not necessarily mean a lesser wife. It is often used as an abuse. Where a claim is put forward by a lesser wife or by one claiming through her it must be proved that the relationship of husband and wife actually subsisted (*Heald and May Oung, JJ.*) H. MAHOMED AHMIN *v.* MA KYAN. **3 Bur. L. J. 108 : A. I. R. 1925 Rang. 41.**

———*Succession—The share of deceased married person devolves upon death of such person on the relation who was maintaining him or her during lifetime.*

The share of a married person who was severely diseased devolves upon his or her death, on the relation who was maintaining the person during his or her lifetime. (*Duckworth, J.*) MA SAW WIN *v.* MAUNG GYI. **2 Rang. 328 : 84 I.C. 966 : A.I.R. 1925 Rang. 34.**

———*Succession—Half blood and full blood—Competition.*

Under the Burmese Buddhist Law of Succession a younger half brother or half sister takes in preference to the son of an elder brother. 4 U. B. R. 20 ; 2 U.B. R. 53, Foll. (*Heald, J.*) MAUNG KYI HLAING *v.* MAUNG TUN LIN. **3 Bur. L. J. 137 : 84 I. C 279 : A. I. R. 1924 Rang. 367.**

———*Succession—Mode of distribution among heirs claiming through husband and wife is* per capita *and not* per stirpes.

It is in accordance with justice, equity and good conscience that where a married couple die under circumstances in which the relatives of both inherit the estate, the relatives of each should be regarded as inheriting half the estate and the mode of distribution is *per capita* and not *per stirpes*. (*Heald, J.*) MAUNG KYI HLAING *v.* MAUNG TAN LIN. **3 Bur. L. J. 137 : 84 I. C. 279 : A. I. R. 1924 Rang. 367.**

———*Succession*—Orasa—*Son—Rights of.*

On the death of the father, one-fourth of the joint estate vests immediately in the *orasa* son. He is not bound to demand partition but may do so at any time within the statutory period of limitation. And within that period the mother has no power of disposal of this one-fourth share. It would be contrary to the principles of justice, equity and good conscience to hold that on the death of the mother within the period of limitation and before partition, the son is divested of his already vested share. (*Lentaigne and Carr, JJ.*) ARUNACHELLAM CHETTY *v* MAUNG SAN NGWE. **2 Rang. 168 : A. I. R. 1924 Rang. 323.**

———*Succession—Children of second marriage—Rights of.*

The ordinary rule of Burmese Buddhist Law is that the widow succeeds to her husband's estate to the exclusion of all her children (except the auratha if there is an auratha) and that so long as the mother is alive and remains unmarried no child of hers (except the auratha) can claim any share of the property left by their father. There is an exception to that rule in cases where the father has been twice married, and in such a case not only the children of the first marriage but also the children of the second marriage can claim a share, at any rate in the property brought by the father to the second marriage. (*Heald and Po Han, JJ.*) MA E HMYIN *v.* MAUNG BA MAUNG.

2 Rang. 123 : A I. R. 1924 Rang. 298.

———*Succession—Inferior wife living separate has no right to inherit to her husband.*

A wife of inferior status or ordinary concubine is entitled to three shares out of seven shares and half, that is, to two-fifths, of the husband's estate, but this applies to the case of wives living together with the husband. Where the wife of an inferior status lives apart, she is allowed to retain only such property as was in her actual possession but has no right of inheritance. (*Heald and May Oung, JJ.*) MA THEIN YIN *v.* MAUNG THA DUN.

2 Bur. L. J. 292 : 2 Rang. 62 : 79 I. C. 501 : A.I R. 1924 Rang. 105.

———*Succession—Grandchildren.*

Grandchildren whose parents are dead inherit the property of their grand-parents of their own right and not as representing their parents. The division is *per stirpes* but not *per capita*. (*Robinson, C. J., May Oung and Beasley, JJ.*) MAUNG PO THU DAW *v.* MAUNG PO THAN.

1 Rang. 316 : A. I. R. 1924 Rang. 73 (F.B.).

———*Succession—Partition—*Lettetpwa *property—Right of sons of first marriage.*

Where a partition is entered into between a father and the children by his first marriage just prior to his second marriage, the latter cannot claim inheritance in the *lettetpwa* property of the father's marriage with his second wife. (*Duckworth and Po Han, JJ.*) MA TOKE *v.* MA ULE.

1 Rang. 487 : 76 I. C. 838 : A. I.R. 1924 Rang. 71.

———*Succession—Inferior wife must prove her rights.*

A husband may enter into and maintain conjugal relations with a person whose position falls short of that of his first or chief wife. But such second wife must, before she can succeed to her husband's estate, show that her connection with the deceased was such that she may be said to have been endowed with proprietary, as well as personal rights; and the proof required of her is more strict where she had prior knowledge of the existence of the first wife and lived separately from, and unknown to her. (*Heald and May Oung, JJ.*) MAUNG THA DUN *v.* MA THEIN YIN.

1 Rang. 1 : 73 I. C. 1044 : A. I. R. 1924 Rang. 37.

———*Succession—*Orasa *child—Joint residence not necessary.*

The appellant, the eldest daughter at the time of her mother's death, had been married for 27 years. During the first two years of her married life she continued to live with her parents; she then moved to a house near by and lived there for 20 years; finally she went to reside at another village, and a year later her mother died. *Held*, that the appellant was not disentitled to her share as *orasa* by reason only of the facts that she lived separately from her father and that she never assumed the duties of her deceased mother in the family. (*May Oung, J.*) MA HLA U *v.* MAUNG SHWE YIN.

2 Bur. L. J. 138 : 1 Rang. 370 : 76 I. C. 814 : A. I. R. 1923 Rang. 271.

———*Succession—Son's right in parent's estate after re-marriage not a vested one.*

The right of the eldest son (*orasa* child) to claim a quarter share from his father on the latter's re-marriage after the mother's death is not a vested one. The same view would apply to the claim, if any, of the Kanittha children. There is nothing in the Dhammathats to justify the assumption that the children in such a case are bound to content with a portion only of their parent's joint estate as would be the case if their right were a vested one. They may elect to throw in their lot with the new benefit of any possible increase in the family fortune. Should they do so they would in any case be entitled to three-fourths of their own parent's *payin* as against the step-parent and would also share in the after-acquired property. Assuming that the Kanittha children are entitled to claim partition from their surviving parent on the latter's re-marriage, their right is not a vested one and, that, if they fail to exercise it before the death of that parent the right lapses. The same rule applies to the right of the eldest son. (*May Oung, J.*) MAUNG HO *v.* MAUNG PO THEIN.

1 Rang. 363 : 2 Bur. L. J. 109 : A. I. R. 1923 Rang. 239.

———*Succession—Child of divorced wife living some time with mother and some time with father—No rupture of filial affection—Child entitled to inherit.*

There is no provision in the Dhammathats enabling a father to disinherit his child except by giving him away in adoption to another, though a child who behaves as an enemy towards his parents is debarred from inheriting. A child who merely at his father's request lives separately from him is not included amongst the six classes of children who are not entitled to inherit. The Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion, and there must be filial neglect to exclude. But if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household he is debarred from inheriting from his father. The plaintiff after her mother's divorce lived for a short time with her father and then went and lived with his sister. Later she returned and lived with her father and was doing so when he married his last wife. She continued to live with her father and her step-mother for some time and then was sent by her father to live with her mother and she continued to live with her mother until her father's death but during that time she paid two or three visits to her father. *Held*, she was entitled to inherit. (*McColl, J.*) MA NGWE KIN *v.* MA HME.

1 Rang. 42 : 74 I. C. 100 : A. I. R. 1923 Rang. 206.

———*Succession—Share of grandchild as against grandmother.*

In the estate of her deceased grandfather grandchild gets as against the step-grandmother, in the absence of issue of the second marriage, one-half of the "*payin*" and 1-8 of the *lettetpwa*.' (*Robinson, C. J. and May Oung, J.*) MA HMUN *v.* MA NGWE THIN.

1 Rang. 34 : 74 I. C. 104 : A. I. R. 1923 Rang. 171.

———*Succession—Wife living apart from husband for 8 years does not affect her right to succeed to husband.*

The mere fact that a wife has lived apart from her husband by mutual consent on account of incompati-

bility of temperament does not constitute misconduct or undutifulness entitling the husband to a divorce. Consequently the wife is not deprived of her right to inherit her husband's estate and is entitled to grant of administration in preference to the grandson. (*Robinson, C. J. and Pratt, J.*) MAUNG MAUNG TIN *v.* MA HLA U. **2 Bur. L. J. 58 : 75 I. C. 200 : A. I. R. 1923 Rang. 150.**

———*Succession—Short interval between death of wife and husband—Relations of both to succeed—"Short," measure of.*

Two months and fourteen days is too long a period to constitute a short interval so as to make the exceptional rule apply, namely that relatives of both should succeed if it is uncertain whether the husband or wife died first or the interval between the deaths of both is short. (*Maung Kin and Macgregor, JJ.*) MA PWA OH *v.* MA LAY. **11 L. B. R. 376 : 1 Bur. L. J. 253 : A. I. R. 1923 Rang. 136.**

———*Succession — Half brothers and sisters — Grand-parents.*

Inheritance shall not ascend and half brothers and sisters succeed in preference to grand-parents. 12 B. L. T. 103 ; 8 L. B. R. 1; 10 L. B. R. 107 ; 4 U.B.R. 20 Ref. (*Pratt and Heald, JJ.*) MA GYI *v.* MA KHIN SAW. **1 Bur. L. J. 263 : 11 L. B. R. 460 : 72 I. C. 4 : A. I. R. 1923 Rang. 124.**

———*Succession—Step-grandchildren and collaterals—Separate residence of child—Effect—Difference in nationality.*

Step grandchildren in the absence of real ones or heirs in the direct line exclude collaterals, except in regard to a share in undivided ancestral property which they share equally with collaterals. Step-grandchildren cannot be held to have forfeited their right to inherit their step-grandmother's estate because they have already received their grandfather's estate. The real point of view of Buddhist law is undoubtedly based on community of interest between husband and wife. So strong is the bond beween them, that in the absence of natural children husband's or wife's children, as the case may be, rank as children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations. 11 U. B R. 1892—61 ; Ref. 10 L. B R. 396 Foll. Mere separate residence does not by itself now-a-days prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights of inheritance. Burmese Buddhist Law applies even though the parties on one side are not Burmese Buddhist, and the mere fact that an heir or heirs is not of exactly the same religion or nationality is therefore immaterial. There is no provision which excludes the descendants or others who would ordinarily be entitled to rank as heirs of a Burmese Buddhist from inheritance on the ground of difference in nationality or religion. (*Pratt and Duckworth, JJ.*) KHOO NAING SEIN *v.* KHOO PEING HEO. **1 Bur. L. J. 56 : 70 I. C. 855 : A.I.R. 1922 L. B. 29.**

———*Succession* — Orasa — *Rights of sons and daughters and their children.*

Held by the Full Bench (*Pratt, J.* not fully concurring):—(1) In a family consisting of both sons and daughters a child can attain the full status of *orasa* prior to the death of its parents. (2) In such a family where the eldest child is a daughter no son can become *orasa*. (3) In such a family the question as to which is the *orasa* can be decided before the death of either parent. (4) There cannot be two *orasa* children. (5) Sons are not always preferred to daughters as *orasa*, unless the son is eldest born. (6) The eldest born son is the *orasa*. If he predeceased his parents, his children will have a right to preferential treatment. If the eldest son died before he became competent to take his father's place, a younger son, being fully qualified may become *orasa*, and if that son had predeceased his parents, his children will have a right to the same preferential treatment. (7) The eldest child being a daughter can claim on the death of her mother a quarter share as *orasa*, and if she then died before her father without having got the share, her children will have a preferential treatment. And if she then died after her father but before she had claimed her distributive share in the estate, her right of maintenance will devolve upon her children. (*Robinson, C. J. and Maung Kin, J.*) MAUNG SIN *v.* MRS. KIRKWOOD. **11 L. B. R. 220 : 68 I. C. 49 (2).**

———*Succession — Disobedience, single act of—Thuanokta son.*

The plaintiff entered into second marriage with a servant of her mother's household. On her mother's death she sued for her mother's estate and was opposed by her own children. It was contended that, her second marriage being in defiance of her mother's wishes, in consequence of which there had been a complete breach which had never been healed, between her and her mother, she was debarred from inheritance. *Held*, the texts which debar an incorrigibly disobedient child from inheriting refer to a child living with his parents and still subject to their authorities and not to an adult child like the plaintiff-respondent who had been married and had children of her own. Though by marrying, plaintiff defined her mother's wishes her marriage cannot be regarded as an act of disobedience, as she was under no obligation to obey. A single act of disobedience, however gross, does not disqualify from inheritance, unless the act is an act of perfect enmity. Both the child who behaves like an enemy by abusing and assaulting his parents or otherwise, and the child who without behaving like an enemy is incorrigibly disobedient are debarred from inheriting. (*McColl, A. J. C.*) MAUNG NYI MAUNG *v.* MA NU. **4 U. B. R. 104 : 1 Bur. L. J. 78 : 70 I. C. 904 : A. I. R. 1922 U. B. 12.**

———*Succession*—Orasa *son—Mesne profits.*

The *orasa* son becomes entitled on the death of his father to a definite one-fourth part of the estate and he can recover it with mesne profits at any subsequent date. (*Robinson, C.J. and Heald, J.*) MAUNG PA NON *v.* MAUNG TUN THA. **67 I. C. 769 : 11 L. B. R. 292.**

———*Succession—Step-mother, step-son entitled to succeed—Excludes parents of the step-mother and other collaterals.*

A step-son governed by the Burmese Buddhist Law can succeed as an heir to the separate property of his step-mother and excludes the parents of his step-mother as well as other collaterals. (*Robinson, A. C. J. and Macgregor, J.*) MAUNG SEIN THWE *v.* MA SHWE YI. **10 L. B. R. 396 : 64 I. C. 415 : 13 Bur. L. T. 216.**

———*Succession—Eldest son.*

There is no authority for the view that under the Burmese Buddhist Law, an eldest son can claim the usual ¼ share of the joint property of his parents where his father survives and does not remarry. (*Robinson, J.*) U NI TA *v.* KO MAUNG. **64 I. C. 23 : 13 Bur. L. T. 207.**

———*Succession—Step-brothers, if heirs.*

Where a woman marries twice, the sons of her second husband from a previous wife are the heirs of her son from her first husband and should be preferred to the deceased's mother's sister. (*Brown, A. J. C.*) MAUNG KYAW SEIN *v.* MA MIN YIN.

BUDDHIST LAW (BURMESE)—Succession.

63 I. C. 841 (2) : (1921) 4 U. B. R. 20.

———*Succession—Property inherited by one wife during marriage—Succession to.*

Under Burmese Buddhist Law, where a person had more than one wife, the property inherited by one wife during marriage and existing after her and her husband's death descends only to her children, and the children of the other wife or wives have no claim to it. (*Brown, A. J. C.*) MAKHIN *v.* KINKIN.

63 I. C. 814 : (1921) 4 U. B. R. 11.

———*Succession—Husband and wife dying within short interval—" Short interval ", what is.*

Under the Burmese Buddhist Law, where a husband and wife die within a short interval, the surviving parents of both share the joint acquired property of the former. ' Short interval ' for this purpose is a period not exceeding one month. (*Robinson, J.*) MA KYIN *v.* MA TOKE. **10 L. B. R. 288 : 63 I. C. 715 : 13 Bur. L. T. 194.**

———*Succession—Son of second marriage.*

A son from second marriage is entitled to ⅛ (one-eighth) share in the *hnapazon* property of the first marriage. His share is independent of the share of his mother and can be sued for in her lifetime. (*Swinhoe, J.*) MA EIN HLAING *v.* MA SHWA KIN.

63 I. C. 28 : (1920) 3 U. B. R. 272.

———*Succession—Step-child—Joint acquisition of mother and step-father.*

A step-child gets one-fourth in the property jointly acquired by his mother and step-father where there are no children of that marriage, nor any other children of the father by any other marriage, though the property is acquired during the continuance of the marriage or the step-father has married another wife. The step-child has no share in the property jointly acquired by the step-father along with another wife. (*Heald, A. J. C.*) MA NYEIN *v.* MA THA GAUNG.

60 I. C. 7 : (1920) 3 U. B. R. 237.

Will.

———*Will—Power to make will.*

A Burman Buddhist has no power to make a will. (*Lentaigne and Carr, JJ.*) MA NU *v.* MA GUN

2 Rang. 388 : 84 I. C. 385 : A. I. R. 1925 Rang. 8.

BUDDHIST LAW—CHINESE.

———*Applicability of—Burmese woman marrying Chinese Buddhist husband.*

Where a Burmese woman married to a Chinese Buddhist husband adopted her husband's form of religion becoming to all intents and purposes a Chinese Buddhist, and after the husband's death regarded herself as a Chinese Buddhist in various ways, succession to her estate would be governed by the Chinese Buddhist Law. (*Heald and Lentaigne, JJ.*) MA SEIN *v.* MA PAN NYUN. **2 Rang. 94 : 80 I. C. 749 : A. I. R. 1924 Rang. 219.**

———*Succession—Widow—If there are children widow does not inherit.*

Under Chinese customary law in cases where there are children the widow takes no share in the deceased husband's estate. She has a claim for maintenance against the estate and person ; in certain cases she has certain other claims but the estate belongs to the children. (*Lentaigne and Heald, JJ.*) BON KWI *v.* MA KYE YON. **2 Bur. L. J. 102 : A. I. R. 1923 Rang. 236.**

———*Applicability.*

There is no authority for the suggestion that the mere fact of the marriage of a Chinese Buddhist widow with a Burman alters her nationality from Chinese to Burmese. (*Heald and Lentaigne, JJ.*) MAUNG PO MAUNG *v.* MAY PYIT YA. **1 R. 161 : 2 Bur. L. J. 79 : 74 I. C. 933 : A. I. R. 1923 Rang. 180.**

BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903), S. 6.

———*Marriage—Widow can re-marry.*

A Chinese widow can marry again after the period of mourning for her first husband has elapsed. (*Heald and Lentaigne, JJ.*) MAUNG PO MAUNG *v.* MA PYIT YA. **1 R. 161 : 2 Bur. L. J. 79 : 74 I. C. 933 : A. I. R. 1923 Rang. 180.**

———*Succession—Widow—Re-marriage.*

When a man dies his property is equally divided among all his sons ; daughters succeed only in the absence of sons and the widow in the absence of both sons and daughters. When a Chinese widow re-marries a Burmese Buddhist and dies leaving both her first husband's property and subsequently acquired ones, the customary law of Chinese Buddhist will apply. The second husband would be entitled to all the property belonging to her at the time of marriage, while the first husband's children would get the property which came from their father. (*Heald and Lentaigne, JJ.*) MAUNG PO MAUNG *v.* MA PYIT YA. **1 R. 161 : 2 Bur. L. J. 79 : 74 I. C. 933 : A. I. R. 1923 Rang. 180.**

———*Adoption—Burmese girl—Rights of adopted daughter.*

A Chinese Buddhist can adopt a Burmese girl and the latter will succeed to his properties in the absence of natural children or adopted son. But where she is a stranger, she will be excluded by the agnates of the deceased. (*Twomey, C. J. and Ormond, J.*) MA PWA *v.* MA YIN. **61 I. C. 684 : 13 Bur. L. T. 132.**

BUILDING.

See (1) CO-SHARER.
(2) LANDLORD AND TENANT.
(3) T. P. ACT, S. 51.

———**Lease.**

See LEASE.

———**Sites.**

See MUNICIPAL ACTS.

BUILDING AND IMPROVING ON ANOTHER'S LAND.

See ACQUIESCENCE.

BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903).

———**S. 2**—*Trees.*

Trees apart from land are not ' land ' within S. 2. 46 A. 631 Ref (*Mukerjee, J.*) PANCHAITI AKHARA *v.* BENI BAHADUR SINGH. **L.R. 6 A. 277 (Civ.) : 87 I. C. 262 : A. I. R. 1925 All. 587.**

———**Ss. 6, 17 and 22**—*Partition of Patti by Collector—Limits of Collector's power—Lambardar—Powers of.*

There is nothing in the Bundelkhand Land Alienation Act which authorises the Collector to make a partition of the patti behind the backs or other co-sharers for the benefit of the mortgagee from a co-sharer. The Collector could only mortgage the right which the judgment-debtor has and except as regards the plots in the possession as khudhast that right was a right to receive his share on a distribution of the profits of the patti. The fact that he happened to be a lambardar at the time is irrelevant. The lambardar is the agent of the co-sharers for purposes of collection, but the fact of his being lambardar in no way increases or alters his personal rights as proprietor. The argument that the other co-sharers are in no way prejudiced is fallacious. (*Ryves and Daniels, JJ.*) PRAG NARAIN *v.* JWALA PRASAD.

45 A. 450 : 21 A. L. J. 335 : L. R. 4 A. 197 : 74 I. C. 666 : A. I. R. 1923 All. 458.

BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903), S 9.

———S. 9—*Reference is competent even after a decree is made absolute.*

A reference can be made under S. 9, sub-S. (3) even after a decree has been made absolute. (42 All. 142, Dist. ; S. A. 1457 of 1920, Ref.) (*Kanhaiya Lal, J.*) BISHNATH SINGH *v.* BASDEO SINGH. **L. R. 6 A. 101 (Civ) : 82 I. C. 1037 : A. I. R. 1925 All. 171.**

———S. 9—*Decree on mortgage—Lease for a term by Collector without objection by decree-holder—Review—Rent of* sir *if recoverable.*

Where the decree of a Civil Court had been transferred by the Civil Court to the Collector for execution, he leased the land to the mortgagee decree-holder for 4 years and an appeal by the judgment-debtor was rejected by the Commissioner. Later on the decree holder applied for review of the order of the Collector alleging that the profits on the basis of which the term of 4 years was fixed included rent for the judgment-debtor's *sir* but rent was not paid. *Held*, that the transfer being by way of lease rent on *Sir* could not be claimed and that the decree-holder's remedy was by way of appeal and not by review. (*Burn, J. M.*) SETH BRINDABAN *v.* JUGAL KISHORE. **L. R. 5 A. 207 (Rev).**

———S. 16—*Trees apart from land can be sold.*

S. 16 of the Bundelkhand Land Alienation Act is no bar to the selling by the decree-holder of the trees appertaining or belonging to the groves held by the grove-holder, judgment-debtor. (*Mukerjee, J.*) PANCHAITI AKHARA *v.* BENI BAHADUR SINGH. **L. R. 6 A. 277 (Civ.) : 87 I. C. 262 : A. I. R. 1925 All. 587.**

———(I OF 1908)—*Objection under can be taken.*

Where a decree-holder obtained a declaration against judgment-debtor after objection by the latter that the property belonged to the latter and was thus liable to attachment and sale in execution, an objection by the judgment-debtor that the property is not liable to be sold under the Bundelkhand Land Alienation Act is not barred. (*Sulaiman, J.*) SATDHAR *v.* RAMCHANDRA. **L. R. 4 A. 607 : 21 A. L. J. 917 : A. I. R. 1924 All. 261.**

BUNDELKHAND ENCUMBERED ESTATES ACT (I OF 1903).

———S. 12—*Validity.*

Where the person who was acting for plaintiff (a minor) as his next friend was also acting in the same proceedings as the agent of the opposite parties.

Held, that the proceedings were not regularly taken. (*Lindsay and Kanhaiya Lal, JJ.*) CHHIDDU *v.* DESRAJ. **21 A. L. J. 793 : L. R. 5 A. 55 (Civ.) : 77 I. C. 753 : A. I. R. 1924 All. 294.**

———S. 13—Transaction in contravention of section —Is void and cannot be enforced. (*Tudball and Sulaiman, JJ.*) BISHENNATH *v.* PEARY JU. **19 A. L. J. 645 : 63 I. C. 542 : 3 U. P. L. R. (All.) 112.**

BUNDS.

See (1) ALLUVION AND DILUVION.
(2) RIPARIAN OWNERS.

BURDEN OF PROOF.

See also EVIDENCE ACT, SS. 101 TO 105.

———*Agreement to sell — Subsequent vendee—Notice.*

Where after an agreement to sell lands in favour of a person, the land is actually sold to another, the burden of proving that the vendee had no notice of the prior agreement to sell is on him and on the person who had an agreement to sell in his favour. (*Abdul Raoof and Harrison, JJ.*) IMAM DIN *v.* MUHAMMAD DIN. **89 I.C. 422.**

BURMA ANTE-BOYCOTT ACT (V OF 1922), S. 4.

———*Cancellation of document—Suit for—Knowledge—Good faith and fairness.*

When a plaintiff sues to set aside or cancel an instrument setting out facts which entitle him to get that relief and alleging that those facts became known to him at a certain time, it is incumbent on a defendant who pleads that the suit is barred by time to allege and prove a knowledge prior to the period from which time begins to run.

The burden of proving the good faith and fairness of a transaction is on the person who claims benefit thereunder. (*Kinkhede, A. J. C.*) GUNABAI *v.* MOTILAL. **89 I. C. 625 at 629 : A. I. R. 1925 Nag. 398.**

———Consideration—Endorsement by Registrar—Presumption. **90 I. C. 229.**

———Consideration—Mortgagee's suit against purchaser of equity of redemption—Admission in bond—Effect of. **89 I. C. 927.**

———*Fraud—Setting aside* ex parte *decree.*

In a suit to set aside an *ex parte* decree on the ground that summons was not duly served on him, the burden of proof is on the plaintiff. (*Moti Sagar, J.*) MUHAMMAD DIN *v.* BERRY & CO. **89 I. C. 736.**

———*Pre-emption—Price paid alleged to be above market price—Proof of.*

In a suit for pre-emption, when the plaintiff alleges that the price mentioned in the sale deed is fictitious or inflated, the burden of proof is on him to show the property is sold for a price less than what is stated in the sale deed. Even slight evidence may be sufficient to shift the onus on to the defendant to show why he was willing to pay the price fixed. (*Kinkhede, A. J. C.*) SHIWAJI *v.* RATIRAM. **89 I. C. 768.**

———Purdanashin lady—Conveyance by—Validity of. **90 I. C. 229.**

——— Railway Company—Loss of goods consigned under Risk Note Form B—Wilful neglect—Proof of. **90 I. C. 1054 (2).**

BURIAL GROUND.

See (1) EASEMENTS ACT.
(2) MUNICIPAL ACTS.

BURMA ANTE-BOYCOTT ACT (V OF 1922).

———Ss. 3 and 9—*Sanction of Government necessary to proceed under S. 9—Nature of—Social boycott for political reasons is no offence.*

Before launching a prosecution under the Burma Boycott Act, S. 9 requires the sanction of the Government as under S. 196, Cr. P. Code. All the facts need not be stated in the sanction order. *Quaere* : Whether it is not enough to state that the accused had committed an offence under a certain section ? The boycotting of a person by failing to invite him to a social function, if due to political differences, is an offence under the Act. (*May Oung, J.*) NGA AUNG HMAN *v.* EMPEROR. **2 Bur. L. J. 196 : 76 I. C. 561 : 25 Cr. L J. 193 : A. I. R. 1924 Rang. 65.**

——— —S. 4—*Offence under—Notice board refusing to recognise certain non-members of a society.*

The accused were pongyis residing in a Kyaung in a village. At the gate of the Kyaung compound was hung a notice board on which was written in Burmese " Those who do not belong to the Thanga Thamagyi Society are not recognized : those who are not recognized by the Wungthanu, are not recognized." *Held*, that this was an offence under S. 4 of the Ante-Boycott Act and the petitioners were guilty of an offence under S. 4 of the Burma Act V of 1922. A notice

BURMA ANTE-BOYCOTT ACT (V OF 1922), S. 4.

posted on the gate of a Kyaung saying that certain persons are not recognized was in the state of feelings existing in the village a direct instigation to the villagers to boycott. (*Brown, J.*) U NANDIYA *v.* EMPEROR. **3 Bur. L. J. 186 : A. I. R. 1924 Rang. 379 (2)**

——**S. 4 (a)**—*Prosecution for offence—Sanction of Government granted for offence of a particular kind—Prosecution for different offences—Legality of the charge.*

Where the Government in their order sanction the prosecution of certain Buddhist monks for an offence under Burma Act V of 1922 and specifically refer to a particular offence, it is not competent to the prosecution to prosecute the accused in respect of an analogous offence found to have been committed by the accused. 37 Cal. 467 ; 44 M. L. J. 166 ; 2 B. L. J. 196 explained. (*Brown, J.*) U PATHADA *v.* EMPEROR. **3 Bur. L. J. 178 : A. I. R. 1924 Rang. 371.**

——**S. 4 (a)**—*Promoting commission of offence justifies joint trial—Actual instructions need not be proved—Acquittal of principal accused does not necessitate acquittal of all.*

Promoting by A and B of the commission of offence, *viz.*, the boycotting of the headman in pursuance of C's resolution at a meeting justifies joint trial. Even if the proposal by A was not proved, but the promotion of the boycott of which he was the alleged proposer was proved against A and B the fact that all the three were tried together would not render the trial illegal or be a valid reason for acquitting A and B against whom a charge under S. 4 (*c*) was brought home. (*Pratt, J.*) EMPEROR *v.* NGA AUNG GYAN. **1 R. 604 : 2 Bur. L. J. 224 : 76 I. C. 830 : 25 Cr. L. J. 270 : A. I. R. 1924 Rang. 98.**

——**Ss. 6 and 7**—*Ex-communication—Is an offence when the object is partly political.*

Where a village headman abused certain monks for making political speeches and they in return ex-communicated him the object being partly religious and partly political they commit an offence under Burma Act V of 1922 and S. 7 is no protection. (*May Oung, J.*) U TILOKA *v.* BA SEIN. **2 Bur. L. J. 221 : 25 Cr. L. J. 255 : 1 R. 629 : 76 I. C. 719 : A. I. R. 1924 Rang. 169**

——**S. 9**—*Facts incorrectly set out in the sanction—Sanction is not invalid—Cr. P. Code, Ss.* 195 *and* 196.

The provisions in the Ante-Boycott Act requiring the authority of the Government for a prosecution under the Act correspond to those in S. 196 of the Code of Criminal Procedure, which is less stringent than S. 195. Strictly the "order" or "authority" required by S. 196 is not the same as the "sanction" referred to in S. 195 and the classes of the offences dealt with by the two sections are quite distinct. Moreover, in the latter section, there is no provision corresponding to sub-section (4) of the earlier section. The intention of the legislature was to ensure that no prosecution for an offence falling within S. 196 or under the Ante-Boycott Act should be launched except on a complaint authorised by the Government, and where this intention is given effect to, it is immaterial whether or not all the facts on which the complaint was to be based were stated in the "authority" with meticulous precision ; indeed, it is doubtful if it is even necessary to set out any fact other than the alleged fact that the accused had committed an offence under a certain section of the Act. (*May Oung, J.*) NGA AUNG HMAN *v.* EMPEROR. **2 Bur. L. J. 196 : 76 I. C. 561 : 25 Cr. L. J. 193 : A. I. R. 1924 Rang. 65.**

BURMA FOREST ACT (IV OF 1902), S. 25.

BURMA COURTS ACT (IX OF 1922), Ss. 2 (f) and 7 (b)—*Case transferred from District Court to Sub-divisional Court—Enlargement of jurisdiction—Suit for accounts—Appeal—Forum.*

It is open to the plaintiff in a suit for accounts to value the suit at any figure he pleases and once he does so, the value for the purpose of jurisdiction is automatically fixed by S. 8 of the Suits Valuation Act. The expression "value" in S. 2 (*f*) of the Burma Courts Act means the value of subject-matter of the suit. 13 C. W. N. 493 ; 15 B. 1021 ; 43 C. 650, Ref. Where the value had been fixed by plaintiff at Rs. 3,100 the Sub-divisional Court could try the case but could not pass a decree for more than Rs. 5,000. An appellant could not alter the forum of appeal by increasing the value of his claim. (*Robinson, C. J. and Brown, J.*) HARDAYAL *v.* RAM DOO. **3 Bur. L. J. 207 : 2 Rang. 408 : A. I. R. 1924 Rang. 354.**

BURMA EXCISE ACT (V OF 1917)—*Conviction of accused caught in the same sampan where were found* 9 *bundles containing* 4 *bottles each of liquor was held bad.*

The accused were all caught in one sampan, and in the sampan were found thirty-six quarts of *kazaw-ye* in nine bundles of four bottles each. Conviction of them all, on the ground that they were in joint possession of thirty-six quarts was held bad. 8 L.B R. 464, Dist. (*Baguley, J.*) APPAYA *v.* KING-EMPEROR. **2 Rang. 657 : 84 I. C 551 : 3 Bur. L. J. 255 : 26 Cr. L. J. 327 : A. I. R. 1925 Rang. 135 (1).**

——**Ss. 30 (a) and 16 (3)**—*Scope.*

Applicant was manager of a Chinese store ; the firm employed 25 or 30 men ; and the 3 cases of Chinese wine were sent quite openly as such from Rangoon, just before the New Year. Kin Woon, one of the proprietors of the firm, was a Roman Catholic and observed the New Year and the anniversary of the election of Dr. Sun Yat Sen as President.

Held, in these circumstances the liquor, 48 quarts, which does not seem excessive, was intended for the *bona fide* private consumption of the firm and its employees at the New Year.

Held, further, the evidence ought to have been recorded in manner provided for summary trials with appealable sentence. (*Macgregor, J.*) CHOO KHIN *v.* EMPEROR. **1 Bur. L. J. 105 : A. I. R. 1923 Rang. 41 (1).**

BURMA FERRIES ACT (AMENDED ACT II OF 1916).

——**S. 15**—*Both points must be within limits.*

Accused conveyed paddy from Taungmint-byang, a point outside the ferry limits, to Kamyawgin, a point within the ferry limits.

Held, that on a proper construction of S. 15, if one of the two points, either departure or arrival, is outside two miles from the limits of a ferry, there can be no offence either under S. 25 or S. 27. In other words, both these points must be within the two miles limit. (*Duckworth, J.*) MAUNG THA GYAW *v.* EMPEROR. **25 Cr. L. J. 214 : 76 I. C. 646 : 1 Rang 313 : 2 Bur. L. J. 125 : A. I. R. 1923 Rang. 161.**

BURMA FOREST ACT (IV OF 1902).

——**S. 25**—*Selling timber—Selling a house built with timber.*

The accused had some timber made over to him by one P. He also had some round logs of unreserved kinds made over to him and in 1920 he got a saw-pit license to enable him to cut up these logs. With the timber so obtained he built a house in 1920. In

BURMA FOREST ACT (IV OF 1902), R. 88 (2) (iii).

1922 he sold that house to one T, whereupon the Forest authorities came down upon him, and after he had refused to pay the fine asked for by them, he was prosecuted and convicted. *Held*, that no offence was committed. (*Macgregor, J.*) NGA PO MYIT *v.* EMPEROR. **2 Bur. L. J. 12 : A. I. R. 1923 Rang. 143.**

——— **R. 88 (2) (iii)**—*Use of hammer mark by servant of licensee in contravention of Rule 88 creates liability of master for conviction.*

Any use of the marking hammer by a licensee or by his servant in contravention of any rule under the Forest Act renders the licensee liable to punishment either under the terms of the old license form No. 20 or new form No. 26, between which there is no difference in this respect. Impressing the property mark on timber other than in accordance with the rules and the license and any illegitimate use of the hammer mark is punishable. Licensee can be held criminally liable for his servant's breaches of the forest rules though it is not established that he had in some way authorised those breaches. (9 L. B. R. 112, Foll.) (*Heald, J.*) MG. TWE BWA *v.* KING-EMPEROR. **2 Bur. L. J. 214 : 76 I. C. 867 : A. I. R. 1924 Rang. 171.**

——— **(IV OF 1908). S. 64 (1)**—*Applicability.*

S. 64 only applies to cases in which any person is convicted of a forest offence. (*Baguley, J.*) MAUNG PO MAUNG *v.* KING-EMPEROR. **3 Bur. L. J. 257 : 26 Cr. L. J. 322 : 84 I. C. 546 : A. I. R. 1925 Rang. 100.**

——— **Rule 65**—*Contravention.*

A contractor who removes firewood without paying royalty to the licensee commits an offence under R. 65 notwithstanding the fact that there is a dispute about the amount of royalty. (*Heald, J.*) U THA *v.* MG. TUN PRU. **3 Bur. L. J. 198 : A. I. R. 1924 Rang 382.**

BURMA GAMBLING ACT (I OF 1899).

——— **S. 3 (2)**—*Game of Ma-chauk, is excepted.*

The game of 'Ma-chauk' or 'Sparrow' is one of those excepted under sub-section (2) of section 3. (*May Oung, J.*) AH SHEIN *v.* EMPEROR. **25 Cr. L. J. 172 : 1 Rang. 303 : 76 I. C. 396 : A. I. R. 1923 Rang. 214.**

——— **S. 7**—*Presumption against person found in gaming house—Rebuttal.*

When it is presumed that the house was a common gaming house it should be opposed by argument that the persons were inmates and they pursued their lawful business. (*Maung Kin, J.*) BA GYI *v.* EMPEROR. **13 Bur. L. T. 103.**

——— **Ss. 11 and 12**—*Game of chance—Gonnyin—Sloping ground.*

The game of "Gonnyin" is a game of pure skill. There is of course a certain element of luck in all games but it does not follow that because the ground in the particular case happened to be somewhat sloping, the game could be said to be within the purview of Ss. 11 and 12 of the Gambling Act. (*Brown, J.*) MAUNG PAW *v.* EMPEROR. **3 Bur. L. J. 166 : A. I. R. 1924 Rang. 378 (1).**

——— **S. 12**—*Mere receipt of money from player is not sufficient evidence.*

The mere receipt of a sum of money from one of the players or from the winner on a single occasion would not be sufficient to prove an offence under Section 12 without evidence of other incriminating circumstances. (*Lentaigne, J.*) NGA SAN DUN *v.* EMPEROR. **2 Bur. L. J. 8 : 75 I. C. 357 : 24 Cr. L. J. 933 : A. I. R. 1923 Rang. 144.**

BURMA HABITUAL OFFENDERS RESTRICTION ACT (II OF 1919), S. 3.

——— **S. 12**—*Knowledge cannot be presumed—Evidence necessary.*

In order to justify a conviction under S. 12 there must be actual evidence of knowledge on the part of the accused and this knowledge cannot be presumed from the mere fact that the place had been kept as a common gaming house for a month. (*May Oung, J.*) AH LIN *v.* EMPEROR. **2 Bur. L. J. 5 : 24 Cr. L. J. 871 : 75 I. C. 71 : A. I. R 1923 Rang. 141.**

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (II OF 1919).

———*Usual rules of procedure and evidence apply except modifications suggested by Cr.P.Code, S.117 (4).*

The idea that in cases under this Act the ordinary rules of Criminal Procedure and of evidence are abrogated, is entirely erroneous. In proceedings under the Act it is not everything that may be proved by evidence of general repute. The ordinary rules of evidence apply with such modification only as is made by S. 117 (4) of the Code of Criminal Procedure, which is made applicable to the Habitual Offenders' Restriction Act by S. 4 of that Act. (*Carr, J.*) SAN DUN *v.* KING-EMPEROR. **2 Rang. 641 : 84 I. C. 939 : A. I. R. 1925 Rang. 112.**

———*Applicability—The Act does not justify the restriction of the accused to a particular local area for the purpose of preventing him from going to his place of residence and business where he worries some of the residents of that place.*

Where the accused does not go out of the local area in which he lives for the purpose of committing breaches of the peace in other local areas, but merely he worries certain people in the local area in which he lives, because he is a bully, and where the only possible object in the order restricting the accused to a particular area seems to be to deport him from a certain other place which is his place of residence and business because he has made himself objectionable to certain residents of that place, and where no useful public purpose would be served by an order expressly prohibiting him from moving into other areas where he would not be likely to do any harm, or by such operation of such an order in presumably curtailing his means of livelihood it is open to question whether this is the class of cases to which the Burma Habitual Offenders' Restriction Act, 1919, is intended to apply. (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **2 Rang. 524 : 26 Cr. L. J. 417 : 85 I. C. 33 : A. I. R. 1925 Rang. 69.**

——— **S. 2**—*Applicability of—Limitation of restriction.*

An order confining a man to the four corners of his house at night is not a proper order. The narrowest limits of the restriction should be the village of the man concerned. (*Duckworth, J.*) NGA BA SEIN *v.* EMPEROR. **1 Bur. L. J. 177 : 11 L. B. R 383 : 73 I. C. 175 : 24 Cr. L. J. 559 : A. I. R. 1923 Rang. 102 (2).**

——— **Ss. 3, 7 and 18**—*Order of restriction under—When may be passed.*

The Act makes no provision for taking a bond and for demanding sureties. It merely provides for an order of restriction. The order cannot be passed except in those cases in which the Magistrate could have actad under S. 110 of the Cr. P. Code and unless the person restricted has adequate means of earning his

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (II OF 1919), S. 4, Proviso (a).

livelihood in that area. Violation of such an order is punishable under S. 18 of the Act. (*Robinson, J.*) EMPEROR *v.* PO MYA. **13 Bur. L. T. 155 : 10 L. B. R. 274 : 61 I. C. 1005 : 22 Cr. L. J. 477.**

——**S. 4, Proviso (a)**—*Term during which the proposed restriction is intended to last must be stated in the preliminary order required under S. 112 of the Cr. P. Code.*

Proviso (*a*) to S. 4 makes it essential that the preliminary order required under S. 112 of the Code of Criminal Procedure shall set forth the substance of the information received and shall state the term during which the order of restriction shall be in force. If the additional requirement as to the term during which a proposed restriction is intended to be in force is not specified in such preliminary order, no order under S. 7 of the Act should be passed. (*Lentaigne, J.*) PARSODAN *v* EMPEROR. **2 Rang. 524 : 26 Cr.L.J. 417 : 85 I. C. 33 : A. I. R. 1925 Rang. 69.**

——**S. 7**—*Omission to state the period of restriction in the preliminary order as required by S. 4, proviso (a)—Omission is an irregularity curable by S. 537, Cr. P. Code.*

Omission to state the period of restriction in the preliminary order does not render the whole proceeding void. 2 R. 524 Dist. It is only an irregularity curable by Upper Burma Criminal Justice Reg., Chap. XV. (*Carr, J.*) MAUNG THWE *v.* EMPEROR. **3 Rang. 74 : 89 I. C. 527 (2) : 26 Cr. L. J. 1391 (2) : A. I. R. 1925 Rang. 214.**

——**S. 7**—*Procedure laid down in Cr. P. Code, S. 117, with necessary modifications and additions must be followed in taking preventive action.*

The same procedure as is laid down in the Cr.P. Code, S. 117, with necessary modifications and additions must be followed where it is intended to take preventive action under S. 7 of the Burma Habitual Offenders' Restriction Act (1919). (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **2 Rang. 524 : 26 Cr. L. J 417 : 85 I. C. 33 : A. I. R. 1925 Rang. 69.**

——**S. 7**—*Conviction under—Disobedience of order—Prosecution for disobedience under S. 18—Whether Court can go behind the conviction under S. 7 in proceedings under S. 18.*

Where an offender has been convicted under S. 7, H. O. R. Act, and an order has been made restricting his movements, the validity of the conviction cannot be questioned in any subsequent proceedings launched against him for disobedience of the order under S. 18 of the same Act. To hold otherwise would be entirely subversive of the principle of the finality of judicial orders. (*Carr, J.*) ON PE *v.* EMPEROR. **3 Bur. L. J. 27 : 82 I. C. 471 : 25 Cr. L. J. 1303 : A. I. R. 1924 Rang. 295.**

——**S. 7**—*General repute—Evidence of policemen and headman is not insufficient—Cr. P. Code, S. 110.*

The rule, that in order to satisfy himself that an accused's general repute is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities, is not a rule of law and a Magistrate must, in each case, weigh the evidence and decide as to its sufficiency. 2 L. B. 166 Ref. and Expl. (*May Oung, J.*) NGA PAN YIN *v.* EMPEROR. **1 Rang. 447 : 2 Bur. L. J. 153 : 76 I. C. 709 : 25 Cr. L. J. 245 : A. I. R. 1924 Rang. 22.**

——**S. 7 (a)**—*Surety bond under S. 118, Cr. P. Code—Order also under S. 7 is illegal.*

Where a bond has been executed by an offender, with sureties, under S. 118, Cr. P. Code, it is illegal to pass an order against him under the Habitual Offenders' Restriction Act. (*Macgregor, J.*) PAN ZYAW *v.* EMPEROR. **1 Bur. L. J. 257 : 24 Cr. L. J. 735 : 73 I. C. 975 : A. I. R. 1923 Rang. 134.**

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (II OF 1919), S. 13.

——**S. 9**—*Addition of term to sentence under S. 18 is not authorised.*

S. 9 does not authorise the addition of a term of restriction to the sentence in the case of a conviction under S. 18. (*Carr, J.*) NGA THA BAY *v.* EMPEROR. **3 Rang. 167 : 89 I. C. 399 : 26 Cr. L. J. 1359 : A. I. R. 1925 Rang. 279.**

——**S. 9**—*To be old offender is not a sufficient ground for conviction.*

The mere fact that the accused is "an old offender" is not a ground on which a restriction order can be passed under S. 9. (*Carr, J.*) NGA PO THAN *v.* EMPEROR. **3 Rang. 156 : 89 I. C. 320 : 26 Cr. L. J. 1344 : A. I. R. 1925 Rang. 277.**

——**S. 10**—*Evidence—Policeman.*

Under S. 10 (1) of Act (II of 1919), a Magistrate must satisfy himself that the accused had adequate means of earning his livelihood within the area of restriction. There is no rule prohibiting a Court from acting on the evidence of policemen or village authorities. (*May Oung, J.*) PAN YIN *v.* EMPEROR. **1 Rang. 447 : 2 Bur. L. J. 153 : 76 I. C. 709 : 25 Cr. L. J. 245 : A. I. R. 1924 Rang. 22.**

——**Ss. 10 and 2**—*Police Department Notification No. 280, dated 17th November 1919, Rr. 3, 5 and 6—Order confining a person to his own house is illegal.*

An order confining a man to the four corners of his own house at night is not a proper order under the provisions of the Act. The narrowest limits of restriction should be the village of the man concerned or the limits of the village to which he is restricted, as the case may be. If in order to obtain leave from the Police Station Office the person would have to leave his village tract, and thereby offend against the order, this is contrary to the spirit of R. 5 of the Notification. The Magistrate must satisfy himself that the accused is able to earn his livelihood within the area of restriction. (*Duckworth, J.*) NGA BASEIN *v.* EMPEROR. **1 Bur. L. J. 177 : 11 L. B. R. 383 : 73 I. C. 175 : 24 Cr. L. J. 559 : A. I. R. 1923 Rang. 102 (2).**

——**S. 10**—*Order for bond—Legality of—Report to headman and to the police.*

The Burma Habitual Offenders' Restriction Act contains no provision for ordering an offender to execute a security bond. If the offender is confined to another village than his own, it must be proved that he would be able to earn his livelihood at that village. Under the Act a double report both to the headman and the police is unnecessary. (*Duckworth, J.*) EMPEROR *v.* NGA KALA. **1 Bur. L.J. 36 : 73 I.C. 157 : 24 Cr. L. J. 541 : A. I. R. 1923 Rang. 68 (2).**

——**S.13**—*Section cannot be relied on as justifying a Sub-Divisional Magistrate in not complying with the provisions of S. 4, Pro. (a) of the Act, when taking preventive action against a person under S.7 of the Act.*

Where a Sub-Divisional Magistrate takes preventive action against a person under S. 7 of the Act without complying with the provisions of S. 4, Pro. (*a*), S. 12 of the Act, 1919, cannot be relied on as justifying the special procedure of the case, because the District Magistrate is the only Magistrate empowered under that section and even the District Magistrate cannot intervene in a case unless there has been a proper preliminary order and unless the Sub-Divisional Magistrate has also previously passed his order under S. 118 of the Cr. P. Code. In such a case it would be the duty of the District Magistrate to have some good reason for the change over to the Burma Habitual Offend-

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (II OF 1919), S. 18 (2).

ers' Restriction Act, 1919; and Rule 12 of the Rules framed under that Act indicates the class of reasons which would justify such a change. (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **2 Rang. 524 : 26 Cr. L. J. 417 : 85 I. C. 33 : A. I. R. 1925 Rang. 69.**

——S. 18 (2)—*Accused absent from the tract—Exclusion of that period is not allowed.*

S. 18 (2) provides only that a period of imprisonment under S. 18 (1) is to be excluded in computing the period for which the order of restriction shall remain in force. It does not allow of the exclusion of any period during which the accused has been absent from his tract in contravention of the order or of any period during which he has been under trial. (*Carr, J.*) NGA THA BAY *v.* EMPEROR. **3 Rang. 167 : 89 I. C. 399 : 26 Cr. L. J. 1359 : A. I. R. 1925 Rang. 279.**

BURMA INSOLVENCY RULES, R. 189.

——R. 189—*Scope of.*

R. 189 framed under the Presidency Towns Insolvency Act relates both to moveable and immoveable property and is perfectly *ultra vires* (*Rutledge, J.*) *In the matter of,* L. W. NASSE. **1 Rang. 433 : 76 I. C. 669 : A. I. R. 1924 Rang. 88.**

BURMA LAND REVENUE ACT (II OF 1876).

——S. 69—*Waste land—Rubber trees planted—Subsequent notification declaring land to be grazing land—Order for removal of trees—Conviction.*

The applicant applied for the grant of an area of 13 acres of State waste land for rubber cultivation and the application was duly notified. In anticipation of sanction he brought a part of the land under cultivation. Two years after the application had been made the Deputy Commissioner refused the grant and ordered that steps should be taken to reserve the land as a grazing ground. The land was notified as a grazing ground in 1919. In 1920 the applicant objected to the notification on the ground that he had been actually assessed to revenue on his cultivation and had paid revenue to the Government but his objection was overruled. In Sept. 1920 when the applicant applied for a refund of the revenue paid by him, he was informed that he would be paid if he cleared the land of trees and delivered vacant possession. In 1923 the applicant was prosecuted for an offence under R. 69 of the Rules under Act II of 1876. *Held*, that the conviction was unjustifiable. The mere fact that trees which the applicant had planted before the grazing ground was ever constituted or thought of, remained on the ground after he had been ejected could not possibly constitute occupation of the grazing ground by him. (*Heald, J.*) MAUNG PE *v.* EMPEROR. **3 Bur. L. J. 73: 82 I.C. 272 : 25 Cr. L.J. 1264 : A.I.R. 1924 Rang. 289.**

BURMA LAWS ACT (XIII OF 1898).

——*Hindus—Migration—Effect of.*

If a twice-born Hindu migrates across the seas to Burma and marries a Burmese woman, that itself may not necessarily deprive him of the Hindu status in the eye of the law. But if he has descendants who have been born and have always lived in Burma and who have intermarried with its people, then even though they may form a community of their own which inherits many traces of Hindu usage if the usages and religion are of a character divergent from Hinduism, the community cannot be regarded as Hindu. (*Viscount Haldane.*) MA YAIT *v.* MAUNG CHIT MAUNG. **42 M. L. J. 193 : 49 Cal. 310 : 30 M. L. T. 126 : 11 L. B. R. 155 : 4 U. P. L. R. (P.C.) 45 : 66 I. C. 609 : 48 I. A. 553 : 1 Bur. L. J. 15 : A. I. R. 1922 P. C. 197 (P. C.).**

——*Alienation of land leased from Government.*

BURMA MUNICIPAL ACT (III OF 1898), S. 63.

Where land is leased from the Government, in the absence of any provisions for forfeiture and re-entry, the transfer or legacy of the grant is not void. The transferee or legatee may perhaps be ejected by the Government; but it does not follow that the transferee or legatee acquires title to the land. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJ KESHO PRASAD SINGH. **5 P. L. T. (Sup.) 1 : A. I. R. 1925 Pat. 68.**

——S. 13 (1)—*Breach of promise of marriage—Suits for damages—Appeal.*

Suits for compensation for breach of a promise to marry as between Burman Buddhists residing in Burma are suits involving questions regarding marriage and appeals in such suits would lie under S. 30 of the Lower Burma Courts Act, and not merely under S. 100, C. P. Code. (*Robinson, C. J., Maung Kin and Heald, JJ.*) MAUNG GALE *v.* MA HLA YIN. **11 L. B. R. 99 : 65 I. C. 411 : A. I. R. 1922 L. B. 6.**

BURMA—LOWER.

See LOWER BURMA ACTS.

BURMA MOTOR VEHICLE RULES.

——R. 26 (3)—*Liability of owner.*

The owner is not liable for the acts and omissions of his chauffeur who drives a motor-car in his absence with defective rear light. (*May Oung, J.*) MAHOMED SURTY *v.* EMPEROR. **1 Rang. 600 : 76 I. C. 564 : 2 Bur. L. J. 201 : 25 Cr. L. J. 196 : A. I. R. 1924 Rang. 63.**

BURMA MUNICIPAL ACT (III OF 1898).

——S. 42-A—*Permit to sell withheld illegally—Liability.*

Under the Burma Municipal Act, a Municipal Committee was held liable for damages for prohibiting a licensee from selling after granting permission once, on the licensee's making default in producing stamp paper. (*Po Hon, J.*) SAN YEIK *v.* MUNICIPAL COMMITTEE, PEGU. **2 Bur. L. J. 231 : A. I. R. 1924 Rang. 132.**

——Ss. 51 and 63—*Notification of tax—Civil Court cannot question legality of—Remedy of assessee.*

Where notification of the imposition of a tax under the Burma Municipal Act has been published, a Civil Court is debarred from enquiring whether the tax has been legally imposed. S. 51, cl. (*s*) provides that the notification shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. S. 63 gives a right to the assessee to object to the assessment before a sub-committee and provided for an appeal from their decision to the Deputy Commissioner as the case may be. He can also claim a reference to the Chief Court on the question of his liability to or the principle of, assessment. (*Pratt, J.*) CHAN HTOON AUNG *v.* THE AKYAB MUNICIPALITY. **1 Bur. L. J. 145: 74 I. C. 34 : A. I. R. 1923 Rang. 75 (1).**

——S. 51 (8)—*Imposition of tax—Public notification thereof—Effect.*

A public notification under the Burma Municipal Act that a tax has been imposed is conclusive evidence that it has been imposed in accordance with law and a Civil Court is debarred from enquiring whether the tax has been legally imposed. (*Pratt, J.*) CHAN HTOON AUNG *v.* AKYAB MUNICIPALITY. **1 Bur. L. J. 145 : 74 I. C. 34 : A. I. R. 1923 Rang. 75 (1).**

——Ss. 63—*Suit does not lie.*

A suit for injunction to restrain the Municipality from imposing and collecting a tax is not maintainable. But the assessee has the right to object to the assessment before a sub-committee and an appeal

BURMA MUNICIPAL ACT (III OF 1898), S. 92.

from its decision to the proper authority. He may also claim a reference to the Chief Court. *Municipal Committee* v. *Gurthi Lengayya* S. J. 405. (*Pratt, J.*) CHAN HTOON AUNG *v.* AKYAB MUNICIPALITY.
1 Bur. L. J. 145: 74 I. C. 34 : A. I. R. (1923) Rang. 75 (1).

——**Ss. 92 (4) and 180**—*Notice under—Whether wall is a "building" under the Act.*

The erection of a mere fence or boundary wall is not an offence under the Burma Municipal Act. But where such a wall is built so as to enable the occupier of the main house to use the enclosed area as a part of his habitation and not merely as a boundary or fence it comes within the definition of a "building" and disobedience to an order or direction to dismantle the same is an offence under the Act. (*Maung Kin, J.*) KALOO KHAN *v.* M. A. RAHIM.
1 Bur. L. J. 102: 73 I. C. 972: 24 Cr. L. J. 732: A. I. R. 1923 Rang. 65 (2).

——**S. 98**—*Night-soil, refuse, rubbish and offensive matter.*

The words night-soil, refuse rubbish and offensive matter in S. 98 (2) of the Burma Municipal Act include nightsoil. Section 98 (2) of the Act imposes on the Municipal Committee an imperative duty of providing sites and places for the deposit of night-soil. (*Twomey C. J. and Young, J. on appeal from Robinson, J.*) RANGOON MUNICIPALITY *v.* BURMA RAILWAYS CO., LTD. **13 Bur. L. T. 62 and 136: 59 I. C. 823: 10 L. B. R. 203.**

——**S. 98**—*Duty of municipality to remove night-soil is not imperative—Nuisance by Municipality can be restrained by injunction.*

Per *Twomey, C. J* and *Young, J* contra.—S. 98 of the Act does not impose an imperative duty on the Municipality to remove and dispose of night-soil. Per *Curiam*:—If a nuisance is committed by the Municipality in the act of removing or disposing of night-soil, it can be restrained by injunction from doing so. (*Twomey, C. J. and Young. J.*) RANGOON MUNICIPAL COMMITTEE *v.* BURMA RAILWAYS CO., LTD.
10 L. B. R. 203: 59 I. C. 823: 13 Bur. L. T. 62 and 136.

——**S. 142**—*Bye-Law No. 5—S. 2 (6)—Construction—To attract the application of the bye-law, some part of the building must be used in common.*

If a building is divided into separate and independent dwellings or tenements and those dwellings or tenements are such that the occupants of them do not to any extent use or occupy the building as a whole in common then even if separate tenements or some of them are actually used as lodging house, the building as a whole does not thereby become a lodging house, and only those separate and independent tenements which are used as lodging houses need to be registered and licensed. Note to S. 2 says that the buildings commonly called "tenement lodging houses" should be brought within the operation of the lodging house rules if they have kitchens, privies or other conveniences in common, that is, if the building as a whole is occupied to any extent in common by the tenants of the separate tenement, but that they do not come within the operation of the lodging house rules if each tenement is entirely independent and provided with its own kitchen and privy, that is, if the building as a whole is not occupied to any extent in common by the tenants of the separate tenements. If a building as a whole is let in lodgings or otherwise occupied to any extent in common by members of more than one family then it is a lodging house and is subject to the bye-laws. If there is no such common occupation of the building as a whole but there is such common occupation of a

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particular part of it then that particular part is a lodging house but the building as a whole is not a lodging house. If neither the building as a whole nor any part of it separately is occupied to any extent in common by members of more than one family, neither the building nor any part of it is a lodging house. (*Heald, J.*) EMPEROR *v.* P. D. SETH. **2 Bur. L. J. 298: A. I. R. 1924 Rang. 109.**

——**S. 142 (d)**—*Bye-laws for lodging houses are not* Ultra vires.

A bye-law of a Municipality requiring lodging house keepers to pay a licence fee reckoned on the maximum number of lodgers authorised is neither illegal nor *ultra vires* (*Robinson, J.*) P. S. PILLAI *v.* MOULMEIN MUNICIPALITY. **13 Bur. L. T. 107: 59 I. C. 545 : 22 Cr. L. J. 113.**

——**S. 146**—General provisions do not take away right to injunctions. (*Robinson, J.*) RANGOON MUNICIPALITY *v.* BURMA RAILWAYS CO., LTD.
13 Bur. L.T. 62 and 136 : 59 I. C. 823 : 10 L. B. R. 203.

——**S. 180**—*Wall—If a building under the Act.*

The erection of a mere fence or boundary wall is not an offence under the Act. But where such a wall is built so as to enable the occupier of the main house to use the enclosed area as part of his habitation and not merely as a boundary or fence, it comes within the definition of building and disobedience to an order or direction to dismantle it, is an offence under the Act. (*Maung Kin, J.*) KALOO KHAN *v.* RAHIM.
1 Bur. L. J. 102 : 73 I. C. 972 : 24 Cr. L. J. 732 : A. I. R. 1923 Rang. 65 (2).

BURMA OPIUM LAW AMENDMENT ACT (VII OF 1909), S. 3—*Living by unlawful sale of opium—Action against.*

A person who earned his living wholly or in part by the unlawful sale of opium, within the meaning of S. 3, Burma Opium Law Amendment Act, can be proceeded against under the Habitual Offenders' Restriction Act. (*May Oung, J.*) EMPEROR *v.* NGA KYAUNG. **2 Rang 61 : 3 Bur. L. J. 17 : 81 I.C. 546 : 25 Cr. L. J. 930 : A. I. R. 1924 Rang. 244.**

BURMA REGISTRATION MANUAL.

——*Direction does not apply to document which is a lease only within wider definition of Regtn. Act.*

Direction 46 (d) (i) of the Registration Directions does not apply in respect of a document which is not strictly speaking a lease at all, but is a lease within the wider definition in the Registration Act. (*Carr, J.*) U THA NYO *v.* MG KYAW THA.
4 Bur. L. J. 99 : 3 Rang. 379 : 90 I. C. 693 : A. I. R. 1925 Rang. 273.

BURMA TOWNS ACT (III OF 1907).

——**S. 7**—*General duties of headman.*

To provide coolies to take out a Deputy Commissioner's letters from his head-quarters does not form a part of the ordinary duty of a ward headman. (*Heald, A. J. C.*) EMPEROR *v.* NGA PO SIN.
(1920) 3 U. B. R. 234 : 60 I. C. 63 : 22 Cr. L. J. 207.

——**S. 9 (2)**—*Refusal to convey letters not illegal—Ordinary duties of headman.*

If a person residing within a ward is requested by the headman to convey letters to the Deputy Commissioner's camp and he fails, he is not guilty under S. 9 (2) as to provide coolies to convey such letters is not a part of the ordinary duty of the headman. (*Heald, A. J. C.*) EMPEROR *v.* NGA PO SIN.
(1920) 3 U. B. R. 234 : 60 I. C. 63 : 22 Cr. L. J. 207.

BURMA—UPPER. *See* UPPER BURMA.

BURMA VILLAGE ACT (III OF 1889).

——S. 12—*Disobedience of Thugy's order to reap is an offence—Reaping is public duty.*

The reaping and measuring of paddy for the purpose of revenue assessment, is a public duty within the meaning of S. 12. and it is an offence under the Act for a villager to refuse to comply with a requisition of the Headman to assist him in such work. (*Duckworth, J.*) PAN BU *v.* EMPEROR. **1 Bur. L. J. 150 : 11 L. B. R. 412 : 77 I. C. 419 : 25 Cr. L. J. 371 : A. I. R. 1923 Rang. 81.**

——(VI OF 1907), S. 19—*Disobedience to remove to another site is not an offence.*

Refusing to obey an order given them by the headman to remove to another site which had been provided for them is not an offence under S. 19. (*Mac Coll, A. J. C.*) EMPEROR *v.* NGA SEIN. **4 U. B. R. 127 : 25 Cr. L. J. 319 : 76 I. C. 1039 : A. I. R. 1923 Rang. 132.**

——S. 21 (3)—*Anyein is not pwe.*

The object of the Act is not to control all the amusements of the villagers. An ordinary *anyein*, cannot be considered to be a *pwe* within S. 21 (3), unless it is performed for profit or by travelling troups. (*Maung Kin, J.*) EMPEROR *v.* MALE. **13 Bur. L. T. 243 : 63 I. C. 865 : 22 Cr. L. J. 705.**

——S. 21 (a) *Pwe includes performance for public entertainment—Entertainment at an Ahlu comes within the section and holding Ahlu without permit is an offence.*

Pwe ordinarily includes a theatrical or dramatic performance held for public entertainment whether on public or private property. The object of requiring a permit is to ensure that the authorities get timely notice to arrange for precautionary measures. Where the performance was for public entertainment at an ahlu and the authorities had not been given any notice and a robbery took place :

Held, that though the troupe was composed of local amateurs the offence was committed under the section. (*Maung Ba, J.*) EMPEROR *v.* NGA THAN GYAUNG. **3 Rang. 514 : 4 Bur. L. J. 145 : A. I. R. 1925 Rang. 375.**

——S. 28—*Village Headman—Cannot cause hurt to or insult another person.*

A village headman is protected by section 28 of the Village Act to this extent that he cannot be prosecuted for an act or omission punishable under section 10 of the Act or for an abuse of his power similarly punishable, even though such act or omission or such abuse of power is punishable under the Indian Penal Code or some other law, unless the prosecution is instituted by order of or under authority from, the Deputy Commissioner. The village headman has no power to cause hurt to or insult another person and there appears to be no reason why a Magistrate should not enquire into the charges brought against the headman under sections 323 and 504 of the Indian Penal Code. 1 L. B. R. 336; Foll. (*Saunders, J. C.*) NGA TUNHIN *v.* EMPEROR. **1 Bur. L. J. 245 : 4 U. B. R. 101 : 73 I. C. 325 : 24 Cr. L. J. 581 : A. I. R. 1923 Rang. 27.**

BUTTWARA PROCEEDINGS.

See EVIDENCE ACT, S. 35.

BYE-BIL—WAFA.

See (1) MORTGAGE.
(2) T. P. ACT, S. 58 (c).

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS.

Appellate Side

——Ch. 9, R. 50 and Note 1 to R. 50 and R. 52—*R. 50 and Note 1 to R. 50 apply to all appeals from appellate decrees—R. 52 does not make any alteration as to contents of paper-book to which R. 50 relates.*

Note 1 of R. 50 of Ch. 9 of the Appellate Side Rules of the Calcutta High Court and R. 50 of Ch. 9 of the same rules apply to all appeals from appellate decrees whether or not exceeding Rs. 50 in value. Rule 52 does not make any alteration as to the contents of the paper-book to which R. 50 relates. It only modifies the previous R. 51 which requires printed copies of the paper-book to be prepared by the Registrar at the cost of the appellant. In the case of appeals referred to in R. 52 no printed paper-book is prepared, but instead of that, typed copies of the paper-book are prepared without any charge being levied from the parties, but the contents of the paper book remain the same in both classes of appeals. (*Newbould, J.*) ABDUL KARIM *v.* PROSANNA KUMAR. **A. I. R. 1925 Cal. 1116.**

Original Side.

——Ch. 10, R. 36.

Jurisdiction comes to an end once the order is completed. The principle that where an order has not been perfected the Judge has power to reconsider the matter applies to an order of dismissal for default under Rule 36. (*Buckland, J.*) SARUPCHAND HUKUMCHAND *v.* MADHORAM RAGHUMMALL. **28 C. W. N. 755 : 83 I. C. 128 : A. I. R. 1925 Cal. 83.**

——Ch. 10, R. 36—*Power of High Court to make the Rule—Order dismissing suit under Rule 36—Appealability—Letters Patent, Clause 15.*

Rule 36 of Chapter X of the Original Side Rules of the Calcutta High Court is perfectly *intra vires* and the Court has jurisdiction to make such a rule both under Section 129 of the C. P. Code and Clause 37 of the Letters Patent of 1865. The provisions of Section 129 of the C. P. Code should ordinarily be read as referring to the Letters Patent of 1865 which were in force when the new Code was passed. An order of a Judge on the Original Side dismissing a suit for want of prosecution under Rule 36 of the Original Side Rules is a judgment within the meaning of Clause 15 of the Letters Patent and is appealable. (*Sanderson, C. J. and Walmsley, J.*) UDOY CHAND PANNALAL *v.* KHETSIDAS. **28 C. W. N. 916 : 81 I. C. 1048 : 51 Cal. 905 : A. I. R. 1924 Cal. 1025.**

——Ch. 13, R. 9—*Lease—Covenant not to assign without Landlord's consent—Refusal of consent—Procedure.*

Certain premises were leased for 5 years on condition that the lessee may assign his interest with lessor's consent but the lessor should not unreasonably refuse consent. On an application by the lessee for such consent the lessor refused and then the lessee applied to the High Court for determining whether he could assign without lessor's consent. Lessor objected. *Held* the procedure was correct and the lessee could assign without lessors consent. (*Ghosh, J.*) DUCASSEE *v.* COHEN. **48 Cal. 176 : 60 I.C. 105 : 24 C. W. N. 1007.**

——Ch. 16, R. 27—*Requisition to draw up decree.*

The principle enunciated in 1922, P. C. 352 is equally applicable to the filing of a requisition to draw up a decree or order under r. 27, Ch. 16 of the High Court Rules. (*Sanderson, C. J. and Buckland, J.*) GOBIND LAL DUTT *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **29 C. W. N. 163 : A. I. R. 1925 Cal. 291.**

——Ch. 26, R. 77—*Attachment before judgment—Sheriff's poundage, if payable.*

Pending a suit, attachment before judgment was ordered and the sheriff effected the *interim* attach-

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS—Original Side, Ch. 34, R. 7.

ment. Thereafter, by consent of parties the *interim* attachment was withdrawn and the order *nisi* discharged. On a claim being made by the Sheriff of Calcutta for poundage due. *Held*, (1) A claim to poundage by the Sheriff must be made under the express terms of a statute rule or order and there is no common law right to reward for executing a writ ; (2) The Sheriff was not entitled to claim poundage as R. 77 is only for proceedings in which the sheriff is employed in levying sums in execution. It does not apply to cases of attachment before judgment which does not result in any execution. (*Rankin. J.*) PICKFORD *v.* JANKI NATH ROY. **70 I.C. 488 (2) : 26 C.W.N. 673.**

———Ch. 34, R. 7, Ch. 36, R. 57 (a)—*Taxation—Only one fee to be allowed in Revision applications.*

Fee to one counsel only should be allowed on taxation in an application for revision under S. 115 of the Code of Civil Procedure. In an appeal from the decision of a Judge on the Original Side dismissing an application under S. 115, C. P. Code, fee to one counsel also should be allowed under Chap. 36, R. 57 (*a*) of the Rules. In respect of costs of such appeals no refresher should be allowed to counsel. (*Greaves, J.*) SARAT CHANDRA *v.* BIRAJ MOHUN.

68 I.C. 451 (1) : 25 C. W. N. 826.

———Ch. 36, Rr. 6, 9, 32 and 72—*Solicitor—Payment of counsel's fees—Right of solicitor to retain client's moneys.*

A solicitor is entitled to retain the moneys of his client only to the extent to which he is entitled to claim against the client in accordance with the rules of the High Court. The solicitor has no right at all in law to retain any of those sums after the Taxing Master has disallowed them without having made a successful application to the Court either to review or on a reference or otherwise, to increase those sums. (*Page, J.*) JADAB CHANDRA MITTER *v.* ROMESH CHANDRA BOSE. **27 C. W. N. 537 : A. I. R. 1923 Cal. 603.**

———Ch. 36, Rr. 14 and 32—*Attorney paying money to counsel as fees—Taxation—Finality of.*

Under Rule 14 of Chapter XXXVI of the Calcutta Original Side Rules, when a bill is carried on for the purpose of taxation as between party, and party it should be lodged for taxation as between party and party and also as between attorney and client. Such taxation is conclusive subject to an application or reference to Court not only as between the parties to the litigation, but also as between attorney and client. Where attorney pays over money as fees to counsel, with the consent of the client who was expressly told it might not be allowed on taxation, the amount may in a special case be allowed as between attorney and client. (*Sanderson, C. J. and Richardson, J.*) ROMESH CH. BASU *v.* JADAB CH. MITRA.

28 C. W.N. 597 : 51 Cal. 829 : A. I. R. 1924 Cal. 753.

———Ch. 36, R. 32—*Payment of counsel's fees as between attorney and client—No reference by taxing officer—Jurisdiction of Judge to hear and determine.*

On an application for change of attorneys by the deft. in a suit on the Original Side of the High Court, the Judge ordered that deft. should pay a sum of money to his former attorney subject to re-adjustment after taxation. Upon taxation of costs a question arose as to the fees of counsel and the Taxing Officer refused to allow those fees without an order of Court. On an application to the Judge by the former attorney for an order that the Taxing Officer in the taxing of his costs as between attorney and client might do so irrespective of the taxation rules as regards payment of counsel's fees. *Held* though the matter was not raised by a

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reference from the Taxing Officer, the Judge had jurisdiction to deal with the application and decide it on its merits. The proviso in Rule 32 requiring the client's written authority or ratification for payment of the fees applies only to the jurisdiction and discretion of the Taxing Officer and not of the Court. The proviso applies only where the Court or Judge has ordered or does not order otherwise. R. 6. assuming it to refer to counsel's fees, is a direction to the Taxing Officer only and does not limit or control the jurisdiction of the Court or a Judge under R. 32. (*Sanderson, C. J. and Richardson, J.*) SAILENDRA MOHAN DUTT *v.* DHARANI MOHAN ROY.

49 Cal 618 : 26 C. W. N. 870 : 69 I. C. 823 : A. I. R. 1922 Cal. 402.

———Ch. 36, R. 69—*Application by attorney for payment order against client out of money in attorney's hand is free from the statute of Limitation.*

R. 69 of Ch. 36 of the Rules is technically free from the statute of limitation. The rule is not *ultra vires* of the High Court. The court can exercise its discretion in favour of the attorney even where a suit, if brought, will be barred under the Limitation Act. (*Rankin, J.*) RAJAH NARENDRA *v.* TARUBALA.

48 Cal. 817 : 66 I. C. 209 : 25 C. W. N. 800.

———Ch. 36 R. 93—*Costs—Exaggerated claim—Important cause—Ordinary cause.*

If the plff. puts forth a grossly exaggerated claim and gets a decree for less than 1·5 of the claim, costs should be allowed as in an 'ordinary cause.' Reasons should be recorded where costs are awarded as in an important cause. (*Asutosh Mukerji, A. C. J. and Fletcher, J.*) MANINDRA CHANDRA NANDI *v.* ASWINI KUMAR ACHAYYA. **48 Cal. 427 : 32 C. L. J. 168 : 60 I. C. 337 : 25 C. W. N. 297.**

CALCUTTA HIGH COURT RULES RELATING TO PRACTICE AND PROCEDURE IN DISTRICT COURTS.

———Ch. 1, R. 2—*Case taken upon holiday—Effect.*

The fact that a case is taken up on a holiday is only an irregularity not affecting the jurisdiction of the Court and may be cured by the consent of the parties. Where a case is taken up on a holiday with the consent of parties but is adjourned to another holiday without the consent of the parties and the suit disposed of against the plaintiff, *held*, that the proceedings were irregular and prejudiced the plaintiff and that there should be a retrial of the suit in accordance with law. (*Mookerjee, A. C. J. and Fletcher, J.*) LAMBONATH DAS *v.* SARUNATH DATTA.

61 I. C. 775 : 25 C. W. N. 330.

CALCUTTA IMPROVEMENT (APPEALS) ACT (XVIII OF 1911).

———S. 3—*Decision of Improvement Tribunal—Appeal, competency of.*

Where the matter in dispute relates to the principle upon which prospects and possibilities of future development should be valued in determining the compensation to be paid for land compulsorily acquired, there is an appeal to the High Court from the decision of the Calcutta improvement Tribunal. (*Mookerjee and Rankin, JJ.*) MANMATHA NATH MULLICK *v.* SECRETARY OF STATE. **28 C. W. N. 461 : A. I. R. 1924 Cal. 574.**

CALCUTTA IMPROVEMENT TRIBUNAL.

———President can make an order as to costs and to execute the same.

The President of the Calcutta Improvement Tribunal is a Civil Court having power to make an order for costs and an inherent power to execute such order for costs made by him. (*Chatterjee and Chotzner, JJ.*)

CAL. IMPROVEMENT TRUST ACT (V OF 1911).

BATA KRISHNA *v.* K. ROY. **65 I. C. 177 : 26 C. W. N. 30.**

CALCUTTA IMPROVEMENT TRUST ACT (V OF 1911)

——*Powers of acquisition of land.*

The legislature when it conferred powers of acquisition of land within certain well defined safe guards never intended the trust should abrogate those safeguards and acquire land indirectly through the medium of another body. (*Greaves, J.*) MANIK CHAND MAHATA *v.* THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST. **66 I. C. 600 : 48 Cal. 916.**

——**S. 54, Cl. 1**—*Corporation lands—Board of Trustees cannot acquire for improvement scheme.*

Lands situated in the Calcutta Municipality and vested in the Corporation of Calcutta were included in an improvement scheme by the Board of Trustees for the purpose of recoupment. On question arising as to the powers of the Board, *held*, that the Board was not entitled to acquire or deal with the lands under S. 54, Cl. 1 of the Act. (*Sanderson, C. J. and Richardson, J.*) CORPORATION OF CALCUTTA *v.* THE CALCUTTA IMPROVEMENT TRUST. **50 Cal. 531 : 75 I. C. 346 : A. I. R. 1924 Cal. 85.**

CALCUTTA MUNICIPAL ACT (III B. C. OF 1899).

——**Ss. 14 and 556**—*Acquisition of land for Relief of congestion—Is within the powers of the Municipality.*

The Corporation of Calcutta passed a resolution for acquiring lands adjoining a Hindu temple for the purpose of relieving congestion at the place and providing for a *dharmsala* which had been endowed by a private citizen. It was objected that the acquisition was beyond the powers of the Municipal Council.

Held, that the proceedings were within the powers conferred on the Municipal Council by Ss. 14 and 556 of the Calcutta Municipal Act and that the exercise of their discretion by the Municipal Council could not be questioned by the Civil Courts. (*Lord Shaw.*) AMULYA CHANDRA BANERJEE *v.* CORPORATION OF CALCUTTA. **43 M. L. J. 634 : 31 M. L. T. 155 : 16 L. W. 673 : 69 I. C. 114 : 49 Cal. 838 : 27 C. W. N. 125 : L. R. 3 (P. C.) 229 : 49 I. A. 255 : 21 A. L. J. 27 : 37 C. L. J. 67 : A. I. R. 1922 P. C. 333 (P. C.)**

——**Ss. 20, 357, 556 and 558**—*Acquisition of land by corporation for the Improvement Trust is not proper.*

It is not the policy of the Calcutta Municipal Act that the special powers given to the corporation to acquire land should be used to enable another body to acquire land through its medium. Hence where there was no sanctioned project of the Calcutta Corporation or any scheme of the Calcutta Improvement Trust and the land were ostensibly sought to be acquired by the former but the work to be carried out and paid for by the latter. The whole proceedings are bad. The powers of acquisition under the Act are confined to cases in which the corporation itself is to execute the work. (*Greaves, J.*) *In re* MANIKCHAND MAHATAB *v.* THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST. **66 I. C. 600 : 48 Cal. 916.**

——**S. 228**—*Rate assessed on building and land—S. 228 applies.*

The expression building or land in S. 228, includes the case of a rate assessed on a building *and* land and such an arrear of rate becomes a charge on the land and house. (*Suhrawardy and Cuming, JJ.*) NAYAN

CAL. MUNCPL. ACT (III B. C. OF 1899), S. 449.

MANJURI DASI *v.* CHAIRMAN, HOWRAH MUNICIPALITY. **A. I. R. 1925 Cal. 1067.**

——**S. 341**—*Fixtures.*

Tin sheds attached to a shop by hinges at one end, supported at the other by props forming a varandah, and hanging down straight when the props are taken away, are not fixtures within S. 341. (*N. R. Chatterjee and Cuming, JJ.*) NARAYAN KISSEN SEN *v.* CORPORATION OF CALCUTTA. **48 Cal. 602 : 33 C. L. J. 377 : 63 I. C. 155 : 22 Cr. L. J. 619.**

——**Ss. 408, 409 and 622**—*Municipal requisition—Non-compliance by owner—Occupier of a portion of the property rendering compliance impossible—Action under S. 409.*

It is unreasonable to construe S. 622, Cl. 3 of the Calcutta Municipal Act as meaning that an owner, who has not complied with a requisition for effecting improvements to any extent, is discharged from liability, merely, because the occupier of a portion of the land has rendered compliance impracticable only in part. Where though some of the tenants refused to afford facilities to the owner and thus rendered it impracticable for him to carry out completely all the improvements required by the Corporation, still the owner could have carried out some at least of the improvements, the owner is discharged from liability only to the extent that the conduct of the occupier makes the compliance impossible. Even though the General Committee of the Corporation decides to take recourse to S. 409 of the Calcutta Municipal Acts the owner is not forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under S. 401. If the requisite improvements are carried out by the General Committee under S. 409, the default on the part of the owner vanishes but till the work is completed the default remains and with it the liability for prosecution. (*Mookerjee and Rankin, JJ.*) CORPORATION OF CALCUTTA *v.* BEJOY KUMAR ADDY. **50 Cal. 813 : 38 C. L. J. 360 : 27 C.W.N. 787 : 77 I.C. 529 : A. I. R. 1924 Cal. 334.**

——**S. 449**—*As amended by Act III of 1923—Ss. 363 and 364—Order of demolition passed by a Municipal Magistrate—Absence of notice to owner—Effect — High Court's jurisdiction over inferior Criminal Courts.*

Where on account of certain unauthorised structures by an owner, a notice was served under S. 364 of Act III of 1923 (the Cal. Municipal Act of 1923 which came into force in 1924, calling upon him to show cause before the Municipal Magistrate, and although the notice purported to be under S. 364, the decision of the Magistrate was headed under S. 363, and when the Magistrate gave his decision he proceeded under S. 449 of the Calcutta Municipal Act of 1899 which he said corresponded to S. 363 of the Calcutta Municipal Act of 1923, and passed an order for demolition.

Held, that the proceedings were instituted under the Calcutta Municipal Act of 1923, and that whether the proceedings were under S. 363 or S. 364 the Corporation instituted the proceedings, and before making an application to the Magistrate, the Corporation was bound to give the person who was to be proceeded against, an opportunity of being heard, and that the Corporation constituted by the Act of 1923 did not give the petitioner any opportunity of being heard before the application by or on behalf of the Corporation was made before the Magistrate, and that there was material irregularity. (2) That the proceedings under S. 449 of the Calcutta Municipal Act III B. C. of 1899 could only be initiated by the General Committee and in respect of unauthorised structures by an owner, as the General Committee under the

CAL. MUNCPL. ACT (III B. C. OF 1899), S. 557.

Calcutta Municipal Act, was extinct after 1899, there was nobody competent to take proceedings under S. 449 of the 1899 Act. (3) That under S. 531 of the Calcutta Municipal Act a Magistrate appointed under that Act for the trial of offences would be a Criminal Court within the meaning of S. 6 of the Cr. P. Code, and his orders were subject to revision by the High Court under S. 435 and S. 439 of the Cr. P. Code. (4) That the order for demolition was a judicial order and whether made in the exercise of the Magistrate's civil or criminal jurisdiction, the High Court would have jurisdiction to interfere by way of revision under one code or another. 43 M. 146 (P. C.) Foll. (*Sanderson and Panton, JJ.*) RAM GOPAL *v.* THE CORPORATION OF CALCUTTA. **29 C. W. N. 898 : 90 I. C. 317 : 52 Cal. 962 : 26 Cr. L. J. 1533 : A. I. R. 1925 Cal. 1251.**

——**Ss. 557 cl. (*d*) and 151**—*Presumption under S. 557 applies to acquisition of entire holding — 18 times annual value was assessed owing to similar decision in a similar case.*

The presumption under S. 557, cl. (*d*) applies only when the entire holding is acquired and not when a small portion is acquired and the rest is revalued for the purposes of assessment. However, in view of S. 151 and the presumption that official acts are properly performed the annual value of the property acquired is the difference between the two annual values assessed by the Municipality. But where the presumption under S. 557 does not apply the value is to be assessed at 18 times the annual value in view of the same number of years' purchase being allowed in a similar case. (*Newbould and Ghosh, JJ.*) MAHENDRA NATH SRIMANI *v.* SECRETARY OF STATE. **28 C. W. N. 779 : 81 I. C. 1004 : A. I. R. 1925 Cal. 65.**

——**Ss. 622, 408 and 409**—*Municipal requisition—Non-compliance by owner—Occupier of a portion of the property rendering compliance impossible--Action under S. 409.*

It is unreasonable to construe S. 622, cl. 3 of the Calcutta Municipal Act as meaning that an owner, who has not complied with a requisition for effecting improvements to any extent, is discharged from liability, merely, because the occupier of a portion of the land has rendered compliance impracticable only in part. Where though some of the tenants refused to afford facilities to the owner and thus rendered it impracticable for him to carry out completely all the improvements required by the Corporation, still the owner could have carried out some at least of the improvement, the owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier. Even though the General Committee of the Corporation decides to take recourse to S. 409 of the Calcutta Municipal Act the owner is not forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under S. 401. If the requisite improvements are carried out by the General Committee under S. 409 the default on the part of the owner vanishes but till the work is completed the default remains and with it the liability for prosecution. (*Mookerjee and Rankin, JJ.*) CORPORATION OF CALCUTTA *v.* BEJOY KUMAR ADDY. **38 C. L. J. 360 : 27 C. W. N. 787 : 50 Cal. 813 : A. I. R. 1924 Cal. 334.**

——**S. 631**—*Limitation—Starts from date of obstruction.*

The limitation under S. 631 runs from the date of the first commission of the offence, *i.e.*, the date when the obstruction or projection was first placed over the street. (*N. R. Chatterji and Cuming, JJ.*) NARAYAN KISSEN SEN *v.* CORPORATION OF CALCUTTA. **48 Cal. 602 : 22 Cr. L. J. 619 : 63 I. C. 155 : 33 C. L. J. 377.**

CAL. POLICE. ACT (IV OF 1866).

——**S. 631**—*Limitation.*

The applicant was prosecuted on a complaint, dated 11—5—1920: the complaint alleged that the accused had about 5—9—1919 committed an offence under Ss. 574 and 466 of the Calcutta Municipal Act by keeping and using an unlicensed workshop for manufacturing articles of iron for purposes of trade. *Held*, that the complaint was time barred under S. 631. (*Newbould and Suhrawardy, JJ.*) N. K. SARKAR *v.* HOWRAH MUNICIPALITY. **22 Cr. L. J. 559 : 62 I. C. 575 (c).**

——**(III B. C. OF 1923.), Ss. 363, 364**—*Calcutta Municipal Act (III of 1899, B. C.), S. 449—Bengal General Clauses Act (1 of 1899, B. C.), S. 8—Effect of saving—Demolition order for building built without sanction before the new Calcutta Municipal Act, 1923—Sanction by General Committee to proceed under S. 449 of the old Municipal Act, re-affirmed by the new Corporation—Demolition order is not valid.*

A prosecution had been sanctioned by the General Committee under S. 449 of the old Act (III B. C. of 1899), but the case was actually started under the new Act (III B. C of 1923) by the new Corporation and notice upon the party was issued and an order of demolition was passed.

Held, that whether the proceedings were under S. 363 or 364 of Act III, B. C. of 1923, they were irregular and the order of the Municipal Magistrate was not justified as the party had not been heard by the Corporation before sanction for prosecution was given.

Held, further that the proceedings under S. 449 of the Calcutta Municipal Act (3 B. C. of 1899) could only be started by the General Committee and, therefore, in respect of unauthorised structures which existed before 1st April 1924, when the Calcutta Municipal Act of 1923 came into force, there was, after the passing of the latter Act, nobody competent to take proceedings under S. 449 of the Act of 1899. (*Sanderson, C.J. and Panton, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **29 C. W. N. 898 : 90 I. C. 317 : A. I. R. 1925 Cal. 1251.**

——**S. 531**—*Order of Magistrate appointed under S. 531 is revisable by High Court—Cr. P. Code, S. 6.*

The Municipal Magistrate appointed under S. 531 is a Court of inferior criminal jurisdiction within the meaning of S. 6, Cr. P. Code, and orders for demolition passed by such a Magistrate are subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. Further, an order for demolition is a judicial order and whether made in the exercise of the Magistrate's civil or criminal jurisdiction is open to revision by the High Court. 43 Mad. 146 (P. C.) Foll. (*Sanderson, C. J. and Panton, J.*) RAM GOPAL GOENKA *v.* CORPORATION OF CALCUTTA. **29 C. W. N. 898 : 90 I. C. 317 : A. I. R. 1925 Cal. 1251.**

CALCUTTA POLICE ACT (IV OF 1866).

——*D. C. in Calcutta has no power of detention for unlimited period.*

There is no power of detention for an unlimited period in the Deputy Commissioner, Calcutta, by virtue of his being a Justice of Peace. (*Mukerjee, J.*) EMPEROR *v.* PANCHKURI DUTT. **52 Cal. 67 : 29 C. W. N. 300 : 86 I. C. 414 : 26 Cr. L. J. 782 : A.I.R. 1925 Cal. 587.**

CAL. POLICE. ACT (IV OF 1866), S. 45.

——S. 45—*Bengal Public Gambling Act, (IV of 1913), S. 2—'Gaming'.*

S. 45 of the Calcutta Police Act must be read having regard to the definition of 'Gaming' in S. 2 of the Bengal Public Gambling Act. (*Sanderson, C. J. and Richardson, J.*) BAJRANGA LAL KADIA *v.* EMPEROR.
33 C. L. J. 287 : 25 C. W. N.. 428 : 22 Cr. L. J. 599 : 62 I. C. 871.

—— S. 54-A—*Condition precedent—Accused can be called upon to account for possession of property only when it is believed to be stolen.*

There must be reason to believe that the property found in the accused's possession was stolen property as a preliminary condition before the accused can be called on to account for that possession. 20 B. 348 ; 22 C. W. N. 936 and 23 C. W. N. 1053. Ref. (*Newbould and Suhrawardy, JJ*) TULSI TELINI *v.* EMPEROR. **50 Cal. 564 : 24 Cr. L. J. 372 : 72 I. C. 372 : A. I. R 1923 Cal. 596.**

——S. 54-A—*Essentials to be proved before conviction.*

For the purposes of S. 54-A of the Police Act it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained. The mere evidence of the Police that second hand articles of clothing were recovered from the house of the accused would hardly warrant one in saying that there is reason to believe that the articles found in the possession of the accused had been stolen or fraudulently obtained. (*Walmley and Suhrawardy, JJ.*) RASIK LAL *v.* EMPEROR.
26 C. W. N. 712 : 71 I. C. 503 (1) : 24 Cr. L. J. 151 : A. I. R. 1922 Cal. 492.

——S. 54-A—*Possession of article suspected—Conviction.*

To justify a conviction under S.54-A of the Calcutta Police Act, there must be reason to believe that the article has been stolen or *fraudulently* obtained. No conviction can be had in the absence of a reasonable ground for suspicion. (*Richardson and Huda, JJ.*) BAI DAS *v.* ALIM BUX KHAN. **23 C. W. N. 1053 : 59 I. C. 554 : 22 Cr. L. J. 122.**

——S. 62-A—*Carrying kirpans, exceeding nine inches in length, in the town of Calcutta is illegal—Notification of Commissioner of Police, dated 21st October, 1922.*

The carrying of a sword by calling it a kirpan, exceeding nine inches in length, in the town of Calcutta is an offence under S. 62-A read with notification of Commissioner of Police, dated 21st October, 1922. (*Ghose and Cuming, JJ.*) KIRPAL SINGH *v.* EMPEROR. **50 C. 912 : 25 Cr. L. J. 1116 (2) : 81 I. C. 940 (2) : A. I. R. 1924 Cal. 231.**

CALCUTTA PORT ACT (III B. C. OF 1890).

——S 83—*Section prohibits structures on private land and thus interferes with private rights.*

S. 83 does expressly deprive owners of property of their rights. It prohibits the erection of certain structures on private land, *i.e.*, land below high-water mark which is clearly an interference with the rights of the owners. If it were assumed that all land below high water mark is the property of the Crown to which no other person had any rights, the provisions under the Act would have been superfluous since it would not be necessary to provide a special statute for the removal of structures erected by trespassers. (*Newbould and B. B. Ghose, JJ.*) RADHA KISSEN CHAMRIA *v.* KING EMPEROR. **51 Cal. 1030 : 84 I. C. 941 : A. I. R. 1925 Cal. 404 (1).**

CAL. RENT ACT (III B. C. OF 1920), S. 2.

——S. 83—*Adding* bandh *to Hoogly river—Addition is an erection.*

If a person adds a platform or *bandh* to the existing bed of Hoogly river, within the limits of the Port of Calcutta, it is an erection within S. 83. (*Teunon and Suhrawardy, JJ.*) BENODE BEHARI BAGBI *v.* HOOK. **22 Cr. L. J. 504 : 62 I. C. 328 (Cal.)**

——S. 84 — *Conviction under — Commissioners themselves should remove obstructions.*

Where a person is convicted under S. 84 he should not be directed to remove the obstruction. The Port Commissioners should themselves remove the obstruction under S. 84 (1). (*Teunon and Suhrawardy, JJ.*) BENODE BEHARI BAGCHI *v.* HOOK.
22 Cr. L. J. 504 : 62 I. C. 328 (Cal.).

CALCUTTA RENT ACT (III B. C. OF 1920).

——*Lease including property outside Calcutta—Parties not really intending to create tenancy in respect of such property—Rent Controller has jurisdiction to fix standard rent for the property in Calcutta.*

Where a lease of property in Calcutta included also property outside Calcutta to which the Calcutta Rent Act could not apply and it was found that there was no genuine intention on the part of the lessor that the tenant should be put in possession of that property, and that such property was included in the lease to evade the provisions of the Rent Act :

Held, that the Rent Controller had jurisdiction to fix a standard rent in respect of the Calcutta property. (*Greaves and B. B. Ghose, JJ.*) L. R. COUNSELL *v.* SUKUMARI DEBI.
30 C. W. N. 114 : A. I. R. 1926 Cal. 250.

——*Premises let for more than Rs. 250 before November, 1918—Application after the Act to fix standard rent of a part of the premises—Court can find what proportion of rent should be fixed for the part.*

Where certain premises were let out before 1st November 1918 for more than Rs. 250 and after the Act an application was made to fix the standard rent of a portion of the premises originally let :

Held, that the Rent Controller has power, for the purpose of fixing standard rent, if necessary for him, to decide what portion of the rent originally paid for the entire premises was to be allocated in respect of premises in respect of which an application is made, so as to determine whether he has jurisdiction to deal with the matter. (*Greaves and Mukerjee, JJ.*) HURSUK DAS *v.* GOUR CHARAN.
87 I. C. 796 (1) : A. I. R. 1926 Cal. 372.

——*Revision of Rent Controller's decision.*

The Rent Controller's Court is a Court of civil jurisdiction and the High Court has power to revise the Controller's orders under its general power of superintendence under S. 107 of Government of India Act. (*Woodroffe and Ghose, JJ.*) ABDUL HAQ *v.* MOHAMMADDIN. **A. I. R. 1923 Cal. 311.**

——Ss. 2, 4 and 15—*Applicability of—Furnished premises—Hire of furniture—Powers of Rent Controller—Standardisation of rent—Contract rate if recoverable.*

A flat or house is certainly within the definition of " premises " in the Calcutta Rent Act but furniture is not. A furnished flat or house is not necessarily a distinct, concrete, indivisible thing, though it may be so treated either by statute or by agreement of parties. The contention that no order can be made by the Rent Controller standardising the rent of " premises " where the "premises " are comprised in furnished flat cannot be maintained. This is equally

true with regard to the certification by the Controller of the standard rent in cases where S. 2 (*f*). (*i*) and (2) apply and to cases where he fixes it under S. 15 (3). The Controller has no power to fix the hire of furniture. Though the Controller or tribunal may make an order standardising the rent to be paid in respect of premises when such premises have been let at a sum which includes payment for the use of furniture, the parties to the agreement remain under their original liability, whatever effect such order may have as between other parties or in other circumstances. (*Buckland, J.*) ELLEN EVELINE WELLS *v.* JOHN DICKINSON & CO., LTD. **28 C. W. N. 774 : 81 I. C. 853 : A. I. R. 1924 Cal. 868.**

——**S. 2 (c)**—*Definition of premises.*

To see whether a property comes within the term premises' as defined in the Act it is necessary to ascertain the purpose for which the premises were. The Rent Controller will have to determine whether the premises in question were let for the purposes mentioned in S. 2, clause (*c*) of Calcutta Rent Act, though on the question what was the purpose of the original letting the actual user of the premises may be evidence. (*Woodroffe and Ghose, JJ.*) ABDUL HAQ *v.* MOHAMMAD DIN. **A. I. R. 1923 Cal. 311.**

——**S. 2 (e)**—*Premises—Part of hut is not.*

A part of hut is not covered by the definition of premises in S. 2 (*e*) of the Calcutta Rent Act for finding a standard rent in respect of a portion of a hut cannot be maintained. (*Woodroffe and Ghose, JJ.*) RAM GOLAM KALWAR *v.* GUMTI SHAW. **69 I. C. 976 (Cal.) : A. I. R. 1924 Cal. 535 (2).**

——**Ss. 2 (e) and 15**—*'Premises'—Workshop is not—Standardisation of rent.*

A workshop does not come within the definition of 'premises' in S. 2 of the Act and the fact that the engineer used a room for retiring or for office, does not make a difference. An application for standardisation of rent, therefore, is not applicable to a workshop. (*Chatterjee and Cuming, JJ.*) INDIAN ENGINEERING CO., LTD. *v.* GLADSTONE WYLLIE & CO. **26 C. W. N. 102 : 68 I. C. 907 (2).**

——**Ss. 2 (f), (i), (ii), (iii) and 15**—*Standard rent—Fixed by the Act.*

"Standard rent" means the rent as per clauses (*i*) or clause (*ii*) or clause (*iii*) of section 2 (*f*) of the Act ; that is, it may be as described in (*i*) *or* (*ii*) *or* (*iii*) in S. (2) (*f*). It is intended by the Act that *prima facie* the standard rent mentioned in S. 2 (*f*) (*i*) should be the standard rent in the absence of any application by the landlord to fix it at a higher rate under S. 15. (*Sanderson, C. J. and Buckland, J.*) W. T. AVERY LD. *v.* KESSORAM PODDER. **30 C. W. N. 152.**

——**Ss. 2 (f), (ii) and 15**—*Portion of premises—Sub-letting—First letting—Standard rent how calculated.*

The object of including in the definition of "landlord" a tenant and in the definition of a "tenant" a sub-tenant is to extend the benefit of the Rent Act to sub-tenants. Standard means a rule or model and can only be one. The whole object of the Act is to prevent tenants being made to pay rents which the legislature considers excessive or unreasonable. Standard rent means the rent at which the premises were originally let. Consequently if a tenant sub-lets a portion of the premises, the standard rent of the portion so sub-let is to be determined according to S. 15 (3) of the Act and not under S. 2 (*f*), (*ii*) of the Calcutta Rent Act. Under S. 15 (3) the part sub-let is taken to have been

first let when the entire premises were let out to the tenant. (*Chatterjee and Cuming, JJ.*) ROBEIRO *v.* ELIAS S. M. JACOB. **27 C. W. N. 569 : A. I. R. 1923 Cal. 553.**

——**Ss. 2 (g) and 11 (5)**—*Tenant, meaning of—Suit before the Act—Non-payment of rent—Forfeiture.*

The word 'tenant' is used in a special sense in the Act of 1920 and includes a person whose tenancy has expired even before the Act. Such a tenant is entitled to the benefit of the Act even if a suit for ejectment was instituted before the Act came into operation. If the tenant does not pay rent under S. 11 (5) he is not entitled to the benefits of S. 11. (*Rankin, J.*) BITHALDAS CHANDAK *v.* LALBEHARI DUTT. **25 C. W. N. 967 : 68 I. C. 361 : 49 Cal. 369 : A. I. R. 1922 Cal. 391.**

——**Ss. 4 and 11**—*Monthly tenant under owner of premises—Statutory tenant—Standard rent—Agreement to pay increased rent to owner—Lease for two years—Illegality of object—Contract Act, S. 23.*

The defendant, a tenant, of a flat at a rent of Rs. 65 a month, under the owner of the premises, was holding as a monthly tenant. The position of the defendant while the Calcutta Rent Act was in force was that he was the statutory tenant of the flat liable to pay the standard rent defined in S. 2, cl. (*f*). The owner on 11—6—1920 wrote to the defendant refusing the defendant's tender of rent at the old rate and suggesting that the defendant should move the Rent Controller to fix the standard rents. In August, the owner gave the defendant notice to quit by the end of September on the ground suggested by S. 11, cl. 5 *i. e.* for arrears of rent. The defendant replied that he had deposited the rent with the Controller. On 26-10-1920 the owner granted to the plaintiff a lease of the flat for a term of 2 years at a monthly rent of Rs. 100 for the first year and Rs. 110 for the second year. The owner gave the defendant notice of the lease, requested him to attorn to the plaintiff as landlord till the end of October, and, thereafter, in pursuance of a notice to quit already served upon him, to give vacant possession to the plaintiff. The defendant replied claiming the protection of the Rent Act and refusing to vacate. Subsequently however he attorned to the plaintiff to the extent of depositing with the Controller rent at the old rate for payment to the plaintiff and of applying to the Controller to fix the standard rent as between the plaintiff and himself. The application was made in March 1921, and by an order, dated 30-5-1921, the Controller fixed the standard rent at Rs 85. After the order on the 31st May the plaintiff's solicitors wrote to the defendant giving him a fresh notice to quit by the end of June 1921. It was asserted that the plaintiff required the premises for his own occupation. This notice was also ineffectual and in July 1921, the plaintiff filed his suit claiming vacant possession of the flat and mesne profits at the rate of Rs. 100 per mensem. *Held*, that the object of the lease by the owner in favour of the plaintiff was clearly to avoid the provisions of the Rent Act and to get a higher rent than was allowed by the Act and that the agreement of lease was void as being opposed to public policy and the provisions of the Rent Act. (*Sanderson, C. J. and Richardson, J.*) SALEH ABRAHAM *v.* MANEKJI COWASJI. **50 Cal. 491 : 75 I. C 521 : A. I. R. 1924 Cal. 57.**

——**S. 4 (3)**—*Demise for 3 years—Provision for renewal—Revision under S. 115, C. P. Code.*

Where the demise was clearly for a period of three years the fact that there was option for renewal for a further period of three years after the expiration of the first three years does not make it a lease for five

years or upwards within the meaning of S. 4 Sub-sec. 3. If the Rent Controller has refused to exercise the Jurisdiction conferred upon him by the Calcutta Rent Act; the High Court will interfere under S. 115. (*Greaves and Ghose, JJ.*) BASANTA CHARAN SINHA *v.* RAJANI MOHAN CHATTERJI. **49 Cal. 928 : 26 C. W. N. 711 : A. I. R. 1922 Cal. 514.**

——**S. 4 (3) (iv)**—*Lease for 3 years with option to renew for like period is not one for five years and upwards.*

A lease for a period of three years reserving an option to renew it for another period of three years cannot be taken to be a lease for "five years and upwards" within the meaning of S. 4 (3) of the Calcutta Rent Act. Hence an application to standardise the rent does lie. (*Greaves and Ghose, JJ.*) BASANTA CHARAN SINHA *v.* RAJANI MOHAN CHATTERJI.
49 Cal. 928 : 39 C. L. J. 85 : 26 C. W. N. 711 : A. I. R. 1922 Cal. 514.

——**Ss. 8 and 14**—*Application for standardization of rent must be decided though relationship of landlord and tenant ceases after proceedings are begun.*

There is nothing in the Act to justify the dropping of a proceeding which has been started regularly under the Act because one of the parties was not at the date of the hearing occupying the position which he did at the commencement of the case. When a case has been regularly started there must be some direct provision in law to disqualify it from being carried to the end. (*Suhrawardy and Page, JJ.*) F. D. BELLEW *v.* T. ELKE. **51 Cal. 577 : 78 I. C. 874 : 29 C. W. N. 30: A. I. R. 1924 Cal. 715.**

——**S. 8**—*Standard Rent, increase of, by President of Tribunal—Notice is not necessary to entitle landlord to recover rent.*

A notice under S. 8 of the Rent Act is not necessary when the standard rent is fixed by the Controller and has been further increased by the President of the Tribunal, the landlord having complied with the provisions of S. 8 as regards the increase allowed by the Controller. A certificate from the Controller is not necessary in order to entitle the landlord to recover the rent so increased by the President of the Tribunal. (*Sanderson, C. J. and Richardson, J.*) COHEN *v.* DIAS. **26 C. W. N. 961 : 70 I. C. 561 : A.I. R. 1922 Cal. 475.**

——**S. 11**—*Proviso*—Bona fide *requirements of landlord—Standardisation of rent—Refusal to accept—Deposit of rent with Controller.*

A landlord who has premises sufficient for his requirements should not be allowed to eject tenants because he chooses for his own convenience or profits to deprive himself of the use of the premises which he is occupying and then to say to his other tenants "having deprived myself of the use of the premises which I hitherto occupied, I therefore require the house in which you live for my own occupation and I now propose to eject you." To allow such a plea would be to defeat the object of the Act and in such circumstances a landlord cannot be said *bona fide* to require the premises for his own occupation. It is not enough that a plff. in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises *bona fide* for his own occupation. The word in the Act is not "desire" but "require". This involves something more than a mere wish and it involves an element of need. It is not necessary for a tenant to offer rent to his landlord every month and obtain a refusal every month from him before he is entitled to pay to the rent collector. It was not intended that by the Act that such a pass should be gone through every month when the relations are such that the landlord

refuses to accept the rent and the tenant is justified in paying the rent to the Controller month by month once there has been a refusal by the landlord to accept. Where the rent had not been standardized by the Rent Controller and no agreement between the parties to pay the increased rent had been entered into, the question as to whether the tenant has paid rent to the fullest extent allowable by the Act does not arise. (*Buckland, J.*) REKHABCHAND DOOGAR *v.* J. R. D'CRUZ. **26 C. W. N. 499 : 69 I. C. 963 : A. I. R. 1923 Cal. 223.**

——**S. 11**—*Applicability.*

The Rent Act does not expressly exclude S. 114, T. P. Act and it cannot abrogate the provisions of the section. (*Greaves, J.*) AHINDRA *v.* TWISS.
49 Cal 150 : 70 I.C. 75 : A.I.R. 1922 Cal. 394.

——**S. 11**—*Benefit of section—A defaulting tenant is not entitled to it.*

The Act gives to a mere monthly tenant considerable fixity of tenure upon a condition, namely, that he is a rent-paying and not a defaulting tenant. Where the sum of money which the tenant had paid to the Rent Collector was insufficient to meet either the contractual rent or the rent allowed under S. 2 (1) of the Act or the rent ultimately fixed as the standard rent by the Controller: *Held*, the tenant was not in the circumstances a person who was entitled to the benefit of the provisions of S. 11 of the Act. (*Rankin, J.*) I. J. COHEN *v.* S. E. HOTTINGER. **49 Cal. 383 : 69 I. C. 988 : A. I. R. 1922 Cal. 380.**

——**S. 11**—*Satisfactory cause.*

Where the defendant lessee of certain premises intimated to the plff. landlord of his intention to quit the premises on the expiration of the lease, and thereupon the plff. agreed with E to let it to him from that date, *held*, that this was a cause which ought to be deemed satisfactory within S. 11 (1) of the Act. The grounds upon which a landlord can successfully claim an order for possession are not limited to the grounds mentioned in the section. The Court can exercise discretion in his favour upon any other grounds which might appear to the Court to be satisfactory. (*Ghose, J.*) MANMATHA NATH *v.* WALTER LOCKE.
68 I. C. 417 (2) : 25 C. W. N. 1012.

——**S. 11 (1)**—*Breach of covenant by tenants to repair—Removal of fixtures contrary to covenant—Tenants were held not liable to forfeit the protection of the Rent Act.*

The defendants had committed a breach of one of the covenants in that when they vacated the premises they removed certain fixtures which they had no right to remove and when they gave up possession the premises were not in good and substantial repair and condition in accordance with the terms of the lease.

Held, that the fact that the defendants had committed a breach of that covenant when they gave up possession of the premises was not sufficient to disentitle them to the protection of the Rent Act during the whole of the period during which they were holding over after the expiry of the term of their lease and that the landlord was merely entitled to damages for the breach of covenant and not to any mesne profits on the footing that the tenant's possession after the expiration of the term of the lease was wrongful. (*Sanderson, C. J. and Rankin, J.*) G. M. HAY *v.* BANOMALI MULLICK. **88 I. C. 589 : 29 C. W. N. 636 : A. I. R 1925 Cal. 791.**

——**S. 11 (4) and (5)**—*Landlord refusing rent—Rent controller's Office closed at expiry of fortnight from due date for rent—Rent paid at earliest opportunity after re-opening—S. 11 (4) and (5) are suffi-*

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ciently complied with.

Where a landlord refused to accept the rent offered by the tenant and at the expiry of a fortnight from the date on which the rent became due, the Rent Controller's Office was closed on account of some holidays and the rent was paid into his office at the earliest opportunity after the re-opening of it :

Held, that there was sufficient compliance with the section. (*Sanderson, C. J. and Rankin, J.*) G. M. HAY *v.* BANOMALI MULLICK. **29 C. W. N. 636 : 88 I. C. 589 : A.I R. 1925 Cal. 791.**

——S. 11 (5)—*Conditions for the tenant availing himself of the benefit conferred by the Act.*

The intention is to give the tenant the benefit of the section if he complied with two conditions : in the first place he must have paid any arrears of rent which might be due at the time of the passing of the Act within 3 months of the commencement of the Act ; and secondly, he must pay the rent to the full extent allowable by the Act within the time fixed by the contract with his landlord and in the absence of any such contract by the 15th day of the month next following that for which the rent is payable. (*Sanderson, C. J. and Buckland, J.*) W. & T. AVERY, LTD. *v.* KESSORAM PODDER. **30 C. W. N. 152.**

——S. 11 (5)—*Benefit of Act when claimable—Failure to pay in time—Effect—Agreement to extend time.*

Where in a suit in ejectment, the benefit of the Rent Act is claimed, the defendant must show that he has paid arrears within 3 months of the Rent Act coming into force, and subsequently paid his rent regularly within the time fixed in the contract with his landlord, or, in the absence of any such contract, by the 15th day of the following month, or in the event of the landlord refusing to accept rent, by depositing it with the Rent Controller within a fortnight of its becoming due. Where there is an agreement to extend time for payment before the rent actually becomes due under the lease, then the time within which rent has to be paid under S. 11 (5) may be the extended date, but where default has already taken place, subsequent acceptance of rent by the landlord does not take the matter out of S. 11 (5). (*Buckland, J.*) JETHA BHULCHAND *v.* GRACE. **26 C. W. N. 678 : 70 I. C. 494 (2) : A. I. R. 1923 Cal. 227.**

——S. 11 (5)—*Monthly tenant—Notice to quit before the Act—Landlord's right to eject.*

If the tenant does not pay regularly the rent chargeable under the Act, he is not entitled to the benefits of the Act and the landlord is entitled to get an order for ejectment. The Rent Act puts a tenant who complies with its conditions into much the same position as a tenant who is entitled to a term. At all events it gives him some fixity of tenure so long as the Rent Act is in force ; but that privilege is given to a tenant who pays his rent and performs the conditions and to no one else. (*Rankin, J.*) BITHAL DAS CHANDAK *v.* LALBEHARI DUTT. **49 C. 369 : 68 I. C. 361 : A. I. R. 1922 Cal. 391.**

——S. 15—*Application by tenant for standardisation of rent—Effect of ceasing to be tenant—Suit if abates—Parties.*

Where a tenant applied for standardisation of rent and before the matter came on for hearing was ejected by decree of Court, the proceedings under the Rent Act do not determine. The new tenant who has come in is not a necessary party, but can apply to be heard in fixing the rent. (*Suhrawardy and Page, JJ.*) BELLOW *v.* ELKE. **51 Cal. 577 : 78 I. C. 874 : 29 C. W. N. 30 : A. I. R. 1924 Cal. 715.**

CAL. RENT ACT (III B. C. OF 1920), S. 15.

——Ss. 15, 2 and 5—*Premises let at low rent owing to want of repairs—Standard rent—Meaning of—Rent not raised since November 1918—Effect of.*

Where the Controller of Rents has enquired into the question whether the building was let for residential purposes or for the purposes of a shop or an office, and he has come to the conclusion on ample evidence that the letting was not for the purposes of a factory, the decision must stand. The state of mind of the tenant at the time as to what he intended to try to do in future is by no means conclusive on this point. It is not for the Court to say whether or not the evidence of that witness was fully and effectively appreciated by the President and the High Court is not entitled to revise his decision even if on going through the evidence it should think that he has devoted an insufficient amount of attention or attributed an insufficient importance to one element of a question of fact. In order that it may be a question at large how much the standard rent should be, there has, first of all, to be a finding within one or other of the sub-divisions of cl. (3) of S. 15. It is suggested by the language of the second part of the proviso to S. 15 of the Calcutta Rent Act that where rent has not been increased since the 1st day of November 1918, as in the present case, the rent must be unduly low. That, however, is not an enactment but only a suggestion arising out of the provision dealing with the details of the subject and whether that suggestion is well founded in any particular case is purely a question of fact. The legislature has not thereon enacted a presumption which binds the hands of the Controller when considering whether the rent on the 1st November 1918, was or was not unduly low. The test throughout the Act is intended to be the actual rent, that is to say, the rent at which the premises were let in fact on the 1st day of November, 1918. Under cl. (*d*), the Controller has to ask himself whether that rent at that date was unduly low and the reference there is not to a hypothetical or notional state of normal repairs but to the actual condition of the premises as compared with the actual rent paid or agreed to be paid. The rent at which premises were let on 1st November 1918 cannot be treated as "unduly low" within S. 15 (3) (*d*) merely on the ground that the premises would have been let at a higher rent on that date if the repairs of the premises had not been previously neglected. (*Rankin and Page, JJ.*) BASANTI CHARAN SINHA *v.* RAJANI MOHAN. **28 C. W. N. 467 : A. I. R. 1924 Cal. 629.**

——S. 15—*Order rejecting—Application for standard rent—Interference—Government of India Act, S. 107*

The Rent Controller is a Court subordinate to the High Court which can revise orders under S. 15 of the Calcutta Rent Act in virtue of its powers of superintendence under S. 107 of the Government of India Act. Under S. 15 of the Rent Act it is obligatory on the Rent Controller to grant a certificate certifying the standard rent. Where the rooms let are certain, easily ascertainable ones and subject to no doubt, the order of the Rent Controller rejecting an application for fixing a standard rent is liable to be set aside. (*Rankin, J.*) ALLEN BROS. AND CO. *v.* BANDO AND CO. **49 Cal. 931 : 70 I. C. 371 : 26 C. W. N. 845 : A. I. R. 1923 Cal. 169.**

——S. 15—*Rent Controller—Status and functions of—Order of Rent Controller—Revision—Govt. of India Act, S. 107.*

The High Court has the power of revising the Rent Controller's orders under its original powers of superintendence under S. 107 of the Government of India Act. (*Chatterjee and Cuming, JJ.*) CHATTERJEE *v.*

CAL. RENT ACT (III B. C. OF 1920), S. 15.

TRIBEDI. **49 Cal. 528 : 26 C.W.N. 78 : 68 I. C. 274 : A. I. R. 1922 Cal. 427.**

——S. 15—*Order rejecting — Application for standard rent*—Locus standi *of applicant—Revision of rent—Controller's order.*

The petitioner a woman of the town applied to the Rent Controller under S. 15 of the Act for standardisation of the rent of the premises occupied by her. The application was dismissed on the ground that the petitioner had no *locus standi*. It appeared, however, that the landlord, the opposite party, did not set up the invalidity of the tenancy but invited the Court to fix the standard rent at a certain amount. *Held*, that in the circumstances of the case the Rent Controller should have entered the application. An application in revision against the order of the Rent Controller made under S. 15 lies on the Appellate Side of the High Court. (*Chatterjee and Pearson, JJ.*) KALI DASI *v.* KANAI LAL. **64 I. C. 709 : 26 C. W. N. 52.**

——S. 15 (1)—*Standard rent.*

Standard rent can be fixed before expiry of the lease. (*Chatterjee and Cuming, JJ.*) CHATTERJEE *v.* TRIBEDI. **49 Cal. 528 : 26 C.W.N. 78 : 68 I. C. 274 : A. I. R. 1922 Cal. 427.**

——S. 18—*New point cannot be raised before President in revision for the first time.*

Under the Act the Controller should first form his opinion whether the rent on the prescribed date was unduly low under cl (*d*) of S. 15 (3) of the Rent Act, and then he is to exercise his discretion in fixing the standard rent. When he does that it is open to the President of the Tribunal to revise that order on an application made by any of the parties, but it is a wrong application of the word "revision" to say that although the decision of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision—not revising a decision of the Rent Controller but a new decision of his own—for the first time. (*Cuming and B. B. Ghose, JJ.*) L. R. COUNSELL *v.* SUKUMARI DEBI. **42 C. L. J. 588 : 30 C. W. N. 116 : A. I. R. 1926 Cal. 305.**

——S. 18—*Sub-lease in favour of prostitutes does not affect validity of contract but where purpose of letting is continuing a brothel, contract is void and standard rent can't be fixed.*

Where the premises are rented for the purposes of continuing a brothel and are used as such, the contract becomes void and the Rent Controller will not take action on an application of a party for fixing standard rent. But the mere fact that the house in question is in the occupation of prostitutes as sub-tenants does not necessarily affect the validity of the contract between the landlord and the tenant. (*Pearson and Graham, JJ.*) RADHA KANTA DAS *v.* PONKOJINI DEVI. **51 Cal. 1005 : 80 I. C. 682 : A. I. R. 1925 Cal. 315.**

——S. 18—*Objection to Controller's jurisdiction—Revision by Improvement Tribunal—Competency.*

In a rent standardising case the landlord objected to the Controller's jurisdiction on the ground that the subject-matter of the proceedings could not come under the term 'premises'. On the objection being overruled, he applied to the President of the Improvement Tribunal for revising the order *Held*, the landlord was entitled to a decision on the question, and the fact that he objected to the jurisdiction of the Rent Controller did not disentitle him to his remedy under S. 18 of the Rent Act. (*Ghose and Panton, JJ.*) DAMANIA BROTHERS & CO. *v.* JASTON & CO. **27 C. W. N. 287 : 73 I. C. 47 : A. I. R. 1923 Cal 180.**

CAL. RENT ACT (III B. C. OF 1920), S. 24.

——S. 18—*Order of Rent Controller fixing standard rent is open to revision*

The Act contemplates fixing of the standard rent by the Controller even in cases not coming under S. 16; in other words in cases coming under S. 2 (*f*) (*i*). The order under S. 2 (*f*) (*ii*) of the Rent Controller is therefore liable to revision under S. 18 of the Act. (*Chatterjee and Panton, JJ.*) ASUTOSH CHATTERJEE *v.* UPENDRA CHANDRA AICH. **37 C. L. J. 101 : 72 I. C. 221 : 27 C. W. N. 50 : A. I. R. 1923 Cal. 33.**

——S. 18—*Calcutta Improvement Tribunal Rent Controller—Order—Revision.*

The President of the Improvement Trust Tribunal had no jurisdiction to revise the Rent Controller's order when the latter did not fix a standard rent. (*Chatterjee and Cuming, JJ.*) CHATTERJEE *v.* TRIBEDI. **49 Cal. 528 : 26 C. W. N. 78 : 68 I. C. 274 : A. I. R. 1922 Cal. 427.**

——Ss. 18, 24, 141—*Calcutta Improvement Tribunal—Power of President—Order for costs.*

The jurisdiction exercised by the President of the Calcutta Improvement Tribunal under S. 18 of the Rent Act is civil jurisdiction, so that in proceedings under the section the President is a Court of civil jurisdiction within the meaning of the Code of Civil Procedure and under S. 141 of that Code as well as under the specific provision of S. 24 of the Rent Act, the procedure laid down in the Code in regard to suits applies as far as may be to such proceedings. Thus the President is vested with powers of a Civil Court and he can pass an order for costs and enforce the same. (*Chatterjee and Chotzner, JJ.*) BATAKRISTO PRAMANIK *v.* A. K. ROY. **65 I. C. 177 : 26 C. W. N. 30.**

——S. 20—*Summary enquiry—President of Improvement Tribunal has power to hold—Criminal Procedure Code, Ss.* 5 (2) *and* 29.

The President of the Calcutta Improvement Tribunal is competent to hold the summary enquiry referred to in S. 20 of the Calcutta Rent Act under the provisions of Chapter 22 of the Criminal Procedure Code. (*Ghose and Cuming, JJ.*) ISHAN CHANDRA SARKAR *v.* MANMATHA NATH DUTTA. **37 C. L. J. 298 : 71 I. C. 611 : A. I. R. 1923 Cal. 339.**

——S. 20, R. 4—*Is* ultra vires.

S. 20 of the Calcutta Rent Act, because it constitutes a new Criminal Court is not *ultra vires* of the Governor-in-Council of Bengal and the Acts mentioned in it come within the definition of 'offence' contained in S. 4 (*o*) of Cr. P. Code and create a new offence Rule 4 under the Act is not an "enactment" under S. 5 (2) of the Cr. P. Code and is *ultra vires* of the rule-making power of the Government. (*Sanderson, C. J. and Richardson, J.*) GOBARDHONE DAS *v.* DOOLICHAND. **33 C. L. J. 551 : 25 C. W. N. 661 : 61 I. C. 210 : 22 Cr. L. J. 354.**

——S. 23, R. 24—Jurisdiction—Rent Controller's Court is one of civil jurisdiction. (*Chatterjee and Cuming, JJ.*) CHATTERJEE *v.* TRIBEDI. **49 Cal. 528 : 26 C. W. N. 78 : 68 I. C. 274 : A. I. R. 1922 Cal. 427.**

——S. 24—*Application for revision cannot be treated as suit.*

S. 24 apparently lays down that where there is a decision of the Controller on a particular question the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him, but it does not mean that the President can treat the application for revision as a suit irrespective of what was done before the Rent Controller. (*Cuming and B. B. Ghose, JJ.*) L. R. COUNSELL *v.* SUKUMARI DEBI.

CAL. RENT ACT (III B. C. OF 1920), S. 24.

42 C. L. J. 588 : 30 C. W. N. 116 : A. I. R. 1926 Cal. 305.

——**S. 24**—*Reference to the High Court—Rent Controller—Proceedings before.*

The Court of the Rent Controller is in certain respects a Court of Civil Jurisdiction, but a Rent Controller is not competent to make a reference under O. 46, R. 1, C. P. Code. (*Suhrawardy and Duval, JJ.*) TANCRED *v.* RAI BAHADUR D. N. MULLICK.

40 C. L. J. 578 : 29 C. W. N. 521 : A. I. R. 1925 Cal. 391.

——**(I OF 1924).**

——*Proceedings before President, C. I. T. not over on* 31-3-24—*Premises of higher monthly rental than Rs.* 250 *on* 1-11-18—*No appeal lies to President, C. I. T.*

By the Calcutta Rent (Amendment) Act, 1924 (Bengal Act No. 1 of 1924) the duration of the Calcutta Rent Act of 1920 was extended until the end of March 1927, but it was provided by this last amending Act that after the 31st March 1924, the principal Act should cease to apply to any premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year, on the 1st November 1918.

Held, that the President of the Calcutta Improvement Tribunal was right in holding that by virtue of this proviso he could not entertain appeals to him from decisions of the Rent Controller in cases in which the proceedings before him had not terminated on the 31st March 1924, if such proceedings related to premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year on the 1st November 1918. (*Greaves and Chakravarty, JJ.*) KUNDAMUL DALMIA *v.* W. DYER.

52 Cal. 551 : 86 I. C. 139 : 29 C. W. N. 281 : A. I. R. 1925 Cal. 571.

CALCUTTA SUBURBAN POLICE ACT (II OF 1866).

——**Ss. 18 and 51**—*Place of public resort.*

A stall on which soda-water is sold, not for the sake of consumption on the premises, is not a place of public resort within S. 18. (*Newbould and Suhrawardy, JJ.*) HEMANTA KUMAR SEN *v.* EMPEROR.

49 Cal. 451 : 34 C. L. J. 198 : 26 C. W. N. 56 : 62 I. C. 577 (1) : 22 Cr. L. J. 561 : A. I. R. 1923 Cal. 135 (1).

——**(III OF 1888).**

——**S. 47-A**—*Police diary—If privileged—Cr. P. Code, Ss.* 162, 172.

In areas covered by the Calcutta Suburban Police Act, a police officer investigating a case maintains a diary under S. 47-A of the Calcutta Suburban Police Act and hence no privilege attaches to it. (*C. C. Ghose and Cuming, JJ.*) SURESH CHANDRA GHOSE *v.* EMPEROR.

24 Cr. L. J. 757 : 74 I. C. 261 (Cal.) : A. I. R. 1924 Cal. 542.

CALCUTTA SUPPRESSION OF IMMORAL TRAFFIC ACT (1923), S. 3—*Girl over sixteen—Police have no jurisdiction.*

If a girl has attained the age of 16, the police has no further jurisdiction to exercise under the Act of 1923. (*Suhrawardy and Panton, JJ.*) MAHARANI DASI *v.* EMPEROR.

30 C. W. N. 72 : A. I. R. 1926 Cal. 339 (1).

CANCELLATION.

See (1) LIMITATION ACT, ARTS. 91 AND 95.
(2) SP. REL. ACT, S. 39.

CANTONMENT.—*See* CANTONMENT ACT.

CANTONMENTS HOUSE ACCOMMODATION ACT (II OF 1902).

——**Ss. 6 and 11**—*Lands in cantonment—Conditions as to alienation—Validity.*

CANTONMENT LAND.

Cantonment land was granted by Government to plff. on condition that the grantee wishing to alienate must take the permission of military authorities. Plaintiff wanted to sell the land to defendant and on applying for sanction, the military authorities proposed to give it on condition the defendant would let out the bungalow to a military officer when required and should not claim to live in it as owner. *Held*, the condition was perfectly justifiable and defendant was bound to complete the sale. (*Mulla, J.*) ARDESHIR FRAMJI *v.* TRICAMDASS GORDHANDAS.

25 Bom. L. R. 938 : A. I. R. 1924 Bom. 258.

——**S. 23**—*Restriction by Cantonment Magistrate that the intending purchaser must vacate the house for military officer is not illegal.*

The Cantonment Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. All that the Act says is that no notice shall be issued under S. 6 if the house is occupied by the owner. The owner, therefore, may agree that if the house is required by the military authorities, he would deliver possession thereof to them. The Cantonment Magistrate is not prohibited from entering into any such agreement with an intending purchaser or even an owner in possession. Such an agreement would not defeat the provisions of the Cantonment Act. (*Mulla, J.*) A. F. GHASVALLA *v.* T. GORDHANDAS.

25 Bom. L. R. 938 : A. I. R. 1924 Bom. 258.

——**(VI OF 1923).**

——**Ss. 30 and 7**—*Notice issued under S. 7—Person aggrieved can appeal under S.* 30—*No other remedy open.*

A person aggrieved by the issue of a notice against him under S. 7 for vacating a house in the Cantonment has only one remedy open to him, namely, to appeal under S. 30, whether the notice is legal or not. Civil Courts have no jurisdiction to entertain a suit in respect of such notice. (*Marten and Fawcett, JJ.*) NUR MAHOMED BEG MAHOMED *v.* G. MONTEATH.

49 Bom. 152 : 27 Bom. L. R. 56 : A. I. R. 1925 Bom. 162.

CANTONMENT LAND.

——*Army Regulations—Transfer of property—Restriction on—How far binding—Position of transferees and purchasers.*

The rules set forth in Appendix IV, Volume II of the Indian Army Regulations which regulated the conditions upon which the land in cantonments was granted prior to Cantonment Code of 1899 have no force as law, and cannot invalidate a transfer which is good under the ordinary law. When, however, a person takes a grant of Cantonment land subject to those rules he would be bound by them. A house was situated within the Cantonment where the Army Regulations were in force under which originally a house could not be sold to a civilian at all. Later on it could be sold only with the sanction of the Commanding Officer.

Held, that it was fair to presume, in the absence of any direct evidence as to the actual terms on which the house was originally occupied, that the permission was subject to the reservation about sanction. Each subsequent transfer made with the previous assent of the proper military authority amounted merely to the admission of a new licensee upon the conditions prevailing at the time with respect to the transfer of the houses in the Cantonment. A transfer made without such sanction being in violation of the conditions of the license, was not binding upon the Secretary of State for India and furnished a sufficient cause of

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action for a declaration to that effect. Army Regulations relied upon were held to have no statutory authority and not to have the force of law. (*Lindsay and Sulaiman, JJ.*) RAGHUBAR DAYAL *v.* SECRETARY OF STATE FOR INDIA. **46 A. 427 : L. R. 5 A. 242 : 78 I.C. 642 : 22 A. L. J. 354 : A. I. R. 1924 A. 415.**

———*Ownership of, vested in Government--Adverse possession cannot be had against Secretary of State.*

The Secretary of State is the absolute owner of all cantonment land unless it can be proved satisfactorily that he has parted with his ownership In the absence of evidence all the cantonment land belongs to the Secretary of State there can be no adverse possession against him. The only position open to a person occupying land in Cantonments which has not been specially transferred by the Secretary of State is the position of a tenant or the position of a licensee. (*Stuart, J.*) SECRETARY OF STATE *v.* MULLA. **L. R. 3 A. 169 (Rev.) : 66 I. C. 582 : A. I. R. 1922 All. 57.**

CARRIAGE.—*See* CARRIER.

CARRIER.

See also (1) CONTRACT ACT, SS. 150 to 164.
(2) RAILWAYS ACT, Ss. 72 to 77.

———*Liability of--Carriage of goods by sea—Requisition by Government—Refund of freight—Liability for—Goods carried by carrier at his expense—Right to recover compensation—Contract Act, S. 70.*

The appellants, carriers by sea, agreed to carry certain cargo consigned to the respondents from London to Cochin. The total freight in question was paid as advance freight in England and the goods were put on board of one of the steamers of the appellants. The ship duly arrived in the Bombay harbour, but when it arrived there it was commandeered by the Government of India for purposes of war and consequently the ship's voyage with cargo had to be terminated there and all its cargo was discharged in that port. After some correspondence the appellants carried the cargo and delivered it to the respondents at Cochin on the payment of further freight and other charges from Bombay to Cochin. The bill of lading expressly provided for exemption from liability for omission to carry the goods on account of "the restraints of Rulers". In a suit by the respondents against the appellants for recovery of the excess freight, *held*, (1) that under the terms of the bill of lading the appellants were relieved from all obligation to carry the goods from Bombay to Cochin by reason of the action of the Government in commandeering the ship and that the appellant was not under a liability to refund a proportionate share of the freight from Bombay to Cochin. Even if the appellant had no authority to carry the goods from Bombay to Cochin yet having regard to the correspondence between the parties, the appellant was entitled to compensation under S. 70 of the Contract Act for the services rendered by them for the respondent. (*Krishnan, J.*) CLAN LINE, LTD. *v.* SRINIVASA PAI. **20 L. W. 378 : 80 I. C. 892 : A. I. R. 1924 Mad. 885.**

———*—Bill of Lading—Special clause against liability—Shipper cannot sue—Different ink.*

Where in a bill of lading a special clause is stamped with a rubber stamp and with different ink, 'Goods within mentioned have not been tallied and it is agreed that neither the shippers nor the receivers of cargo have any claim under this bill of lading for shortage,' and the Bill is accepted by the shipper he cannot sue the shipping company for short delivery on the ground that the clause was not properly brought to his notice. (*Wallis, C. J. and Krishnan, J.*) BRITISH INDIA

CARRIERS ACT (III OF 1865), S. 9.

STEAM NAVIGATION CO. *v.* KRISHNASWAMI AIYAR. **62 I. C. 709 : 30 M. L. T. 18 (H. C.).**

———*Negligence—Common Law liability—Contract to the contract is valid.*

Under Indian Law, a common carrier by sea can contract out of the Common Law liability for negligence of himself and his servants provided the saving clause is expressed in clear and unambiguous terms. (*Twomey, C. J., Robinson and Rigg, JJ.*) B. I. S. N. CO. *v.* ALIBHAI. **62 I. C. 378 : 10 L. B. R. 292 (F.B.).**

———*Freight paid cannot be recovered.*

Where freight is paid in advance for the carriage of goods by sea to a shipowner, he gets it absolutely and the shipper of goods cannot recover it. (*Ayling and Odgers, JJ.*) KRISHNA NAIK AND SONS *v.* CAVYA IRVINE & CO. **44 Mad. 145 : 62 I. C. 372 : 13 L. W. 273 : (1921) M. W. N. 38 : 29 M. L. T. 85 : 40 M. L. J. 57.**

CARRIERS ACT (III OF 1865).

———**S. 2**—*"For all persons indiscriminately"—Meaning of—Carrier's liability.*

So far as the words "for all persons indiscriminately" are concerned, these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery. (*Lord Shaw.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. *v.* DEKHARI TEA COMPANY. **51 Cal. 304 : 26 Bom. L R. 571 : 22 A. L. J. 173 : 19 L. W. 277 : 34 M. L. T. 53 : (1924) M. W. N. 158 : 51 I. A 28 : 28 C. W. N. 302 : 80 I. C. 1038 : 1 O. W. N. 267 : 10 O. & A. L. R. 591 : L. R. 5 P. C. 121 : A. I. R. 1924 P. C. 40 (P.C.).**

———**S. 6**—*Limitation to liability.*

What is required to limit the liability in the case of a person who answers the definition under the Indian Carriers Act, *viz.*, of transporting for hire goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in different type of business from that of common carrier.

The special circumstance that goods were to be carried by a through route does not decategorise carriers from being common carriers under the statute, nor does it relieve them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that *quoad* that transaction another and different type of business had been entered on. (*Lord Shaw.*) INDIA GENERAL NAVIGATION AND RAILWAY CO. *v.* DEKHARI TEA COMPANY.

51 Cal. 304 : 26 Bom. L. R. 571 : 22 A. L. J. 173 : 19 L. W. 277 : 34 M. L. T. 53 : (1924) M. W. N. 158 : 51 I. A. 28 : 28 C. W. N. 302 : 80 I. C. 1038 : 1 O. W. N. 267 : 10 O. & A. L. R. 591 : L. R. 5 P. C. 121 : A. I. R. 1924 P. C. 40 (P. C.).

———**S. 9**—*Negligence*—Onus *of proof.*

The loss or damage to the goods is *prima facie* proof of a negligence and under S. 9 of the Act, the burden of proof as to the absence of negligence is

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thrown upon the common carrier. (*Mookerjee and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. *v.* EASTERN ASSAM COMPANY, LTD. **47 Cal. 1027 : 61 I. C. 14 : 33 C. L. J. 72.**

CASBATI—*See* LAND TENURE.

CASE LAW—*See* PRACTICE—PRESIDENT.

CASTE.

See also (1) C. P. CODE, S. 9.
(2) HINDU LAW—CASTE, CONVERSION.

———*Race distinction—Maternity is of no importance.*

It is settled that as regards the racial claim maternity is of no importance. (*Lord Phillimore.*) D. R. K. SAKLAT *v.* BALLA. **A. I. R. 1925 P. C. 298 (P.C.)**

———*Excommunication is a mode of enforcing payment of fine or is a punishment in default of payment.*

Distinctions are supposed to exist between ex-communication and fine and also between payment of a fine and giving a caste dinner. The fine imposed may be a fixed sum of money or the price of a dinner, but it is a fine in both cases. And the excommunication is merely the only means available for enforcing the payment of the fine. Every such disciplinary decision of a caste can be regarded either as a sentence of excommunication which can be set aside on payment of a fine or as a sentence of fine with excommunication in default of payment. (*Hallifax, A. J. C.*) GOKUL TELI *v.* BANIA CHAMAR. **76 I. C. 341 : A. I R. 1924 Nag. 157.**

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

———*Conversion of member of a Malabar Tarwad —Effect of.*

Apostacy from Hinduism does not entitle a member of a Malabar Tarwad to claim partition of the property and delivery to him of his share under the Removal of Caste Disabilities Act. The effect is not to enlarge the convert's interest in any property or to get rid of any condition of restriction to which it was originally subject. (1912) M.W.N. 386, Diss. from. (*Wallis, C.J., Spencer and Kumaraswami Sastri, JJ.*) PARAKKOT *v.* NAMBIAR. **44 Mad. 891 : (1921) M.W.N. 594 : 64 I.C. 676 : 14 L. W. 257 : 41 M. L. J. 243 (F.B.)**

———**S. 1**—*Conversion to Mahomedanism—Succession to.*

The Freedom of Religion Act (XXI of 1850) repeals the provision of Hindu and Mahomedan Law which inflict forfeiture of rights or property by reason of renunciation of religion, or expulsion from caste, but it does not give any person rights he never possessed under Hindu or Mahomedan Law. 33 A. 356 Referred to. (*Rigg, J.*) ASHA BIBI *v* MA KYAW YIN. **13 Bur. L. T. 217 : 64 I. C. 514 : A. I. R. 1922 L. B. 15.**

CATTLE—*See* CATTLE TRESPASS ACT.

CATTLE POUNDS—*See* CATTLE TRESPASS ACT.

CATTLE TRESPASS ACT (I OF 1871).

———**S. 10**—*Right to seize cattle subsists only until the cattle leave the land.*

The owner of the land trespassed on cannot go to the owner of the errant cattle and demand their delivery in order that he may take them to the cattle pound. Because, under S. 10 of the Cattle Trespass Act the right to take hold of cattle trespassing on land and doing damage subsists only while the cattle are on the land. It does not continue after the cattle have left the land. (*Kinkhede, A. J. C.*) BHAGWANTRAO *v.* CHAMPAT RAO. **25 Cr. L. J. 1004 : A. I. R 1925 Nag. 50.**

C. P. COURTS ACT (I OF 1918), S. 6.

———**S. 10**—*Penal Code, S. 379.*

Where the accused kept the cow in his custody for damages done overnight for the purpose of impounding unless he received compensation. *Held*, that he was legally entitled to keep it in his own custody for 24 hours before lodging it in the pound. 14 C. W. N. 238 Foll. (*Batten, J.C.*) RAMRATAN *v.* EMPEROR. **23 Cr. L. J. 511 : A. I. R. 1923 Nag. 64 (2).**

———**S. 10**—*Watchman can seize cattle, under general instruction from cultivator.*

Under section 10 of the Cattle Trespass Act a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing. (*Adami, J.*) KOKIL DUSADH *v.* SARALI DUSADH. **A. I. R. 1922 P. 317.**

———**S. 21**—*Agent authorised to file a complaint need not know all about the matter.*

For a complaint by an agent to be valid, it is not necessary that the agent must know all about the matter from what he has seen himself and not from what he has been told by others ; that is, the agent need not be a person who is capable of giving what is called direct evidence of all the circumstances and not of a part of them only. (*Hallifax, A. J. C.*) TUKARAM *v.* GANPAT. **A. I. R. 1923 Nag. 156.**

———**S. 22**—*Cr. P. Code, Ss. 408 and 413—Order for compensation—Appeal lies.*

A person directed to pay compensation under Cattle Trespass Act, S. 22, is not convicted of an offence and the compensation to be paid though recoverable as fine is not 'fine' under Penal Code or other penal statutes, and therefore an appeal lies under S. 413, Cr. P. Code. (*Macleod, C. J. and Shah, J.*) BARTHOL DUMING RODRICKS *v.* PAPA DADA. **23 Bom. L. R. 836 : 63 I. C. 160 : 22 Cr. L. J. 624.**

———**S. 22**—*Compensation—No allegation in petition—Order cannot stand.*

If no compensation was claimed in the petition of complaint and no allegation was made as to the loss caused by the seizure of the cattle, the order directing payment of compensation cannot stand. The person under whose orders the cattle were seized is liable to compensate the complainant, equally with those who directly seized them under his orders. (*Ross, J.*) BAIJNATH SAHAY *v.* EMPEROR. **4 Pat. L. T. 231 : 1 Pat. L. R. 34 (Cr.) : 1923 P. H. C. C. 96 : 72 I. C. 71 : 24 Cr. L. J. 311 : A. I. R. 1923 P. 292.**

———**S. 24**—*'Rescue'.*

Driving cattle by shouts and cries does constitute rescuing them under S. 24. (*Spencer, J.*) KAMAI KONDIAH, *In re.* **17 L. W. 546 : 32 M L. T. 365 : 24 Cr. L. J. 456 : (1923) M. W. N. 437 : 72 I. C. 616 : A. I. R. 1923 Mad. 608.**

CAUSE OF ACTION.

See (1) C. P. CODE, S. 20 AND O. 2, R. 2.
(2) DAMAGES.
(3) TORT.

CAVEAT—*See* PROB. AND ADMIN. ACT, SS. 50, 70.

CAVEAT EMPTOR.

See (1) C. P. CODE, O. 21, R. 93.
(2) T. P. ACT, S. 55.

CENTRAL PROVINCES COURTS ACT (I OF 1918), S. 6—*Rules under—R. 2 (b)—First appeal—When to be heard by Bench of two Judges.*

In order that a first appeal may be heard by a Bench of two Judges, the rules in C.P. require two conditions, *i.e.*, the value of the subject-matter of the suit which has given rise to the appeal must be Rs. 10,000 or up

C. P. COURT FEES AMENDMENT ACT (I OF 1923).

wards in the Court of first instance and the value in appeal must also be Rs. 10,000 or upwards. The fact that after the institution of the suit, by an amendment of the Court Fees Act or a notification under the Suits Valuation Act the value of the suit has been enhanced does not affect the forum of appeal. (*Findlay, O. J. C. and Wadegaonkar, A. J. C.*) CHUNNILAL *v.* KISHANDAS RAMDAS. **89 I. C. 407.**

CENTRAL PROVINCES COURT-FEES AMENDMENT ACT (I OF 1923)—*The Act has no retrospective effect.*

Neither the notification of the C. P. Local Government to the effect that in suits for possession of land the value of the land for purposes of jurisdiction would be 12½ times the annual revenue payable for the land nor the C. P. Court Fees Amendment Act (I of 1923) can have retrospective operation so as to affect the value of such land either for purposes of Court fees or for purposes of jurisdiction in suits previously instituted for possession of such land. (*Findlay, O. J. C. and Wadegaonkar, A. J. C.*) CHUNNILAL *v.* KISHANDAS RAMDAS. **89 I. C. 407 : A. I. R. 1926 Nag. 71.**

CENTRAL PROVINCES COURT OF WARDS ACT (XVII OF 1885).

——**S. 31**—*Minor—Powers of Court of Wards to bind minor's estate are not greater than those of natural guardian.*

The powers of the Court of Wards to bind the minor ward by a simple money bond executed on his behalf are no greater than those of a natural guardian. Except in so far as the Court of Wards Act gives special powers to bind the minor's estate, the powers of the Court of Wards are co-extensive with those of a natural guardian. (*Hallifax and Dhobley, A.J.Cs.*) JIWANDAS *v.* JANKI. **5 N. L. J. 49 : 65 I. C. 53 : 18 N. L. R. 145 : A. I. R. 1922 Nag. 98.**

——**S. 31**—*Effect of.*

The effect of S. 31 of the Act as amended by the Act of 1915 is to declare that the property or person of a ward is not liable for necessaries under S. 68 of the Contract Act. (*Mittra, A. J. C.*) HEMRAJ SHA *v.* PANNALAL. **61 I. C. 563 (2) : 17 N. L. R. 20.**

CENTRAL PROVINCES CRIMINAL CIRCULARS.

——**Nos. 1—28, Para. 6**—*Trial of young offenders by 2nd Class Magistrate is barred.*

The circular states that adolescents should be tried by a magistrate not below the rank of Sub-Divisional Magistrate. It does not say that a Second Class Magistrate may try an adolescent but must refer the case for punishment to the Sub-Divisional Magistrate. (*Kotval, A. J. C.*) BABA *v.* EMPEROR. **74 I. C. 66 : A. I. R. 1924 Nag. 37.**

CENTRAL PROVINCES JAIL MANUAL.

——**Rr. 235 and 300**—*Escape of prisoner—Head warder liable.*

Under R 224 of the Jail Manual the head warders shall be held primarily responsible for the escape of a convict unless they can satisfactorily prove that the escape was due to no laxity of duty on their part. Under R. 235 of the Jail Manual, it is the duty of the gatekeeper to note every change in a gang passed out of the Jail in a gate register and under R. 300 every change of a prisoner from one gang to another must be recorded in a gang-book. The record in the gang-book is essential for fixing responsibility upon the officer to whose negligence a prisoner's escape is due. (*Drake-Brockman, J.*) RAMAUTAR *v.* EMPEROR. **4 N. L. J. 171.**

C. P. LAND REVENUE ACT (II OF 1917), S. 76.

C. P. LAND REVENUE ACT (XVIII OF 1881).

——**Ss. 4 (3), 76, 132 (h) and 153**—*Cesses determined thereunder—Determination of rates also whether necessary.*

S. 76 authorizes the Settlement Officer to determine and record the village cesses, if any, which are leviable, according to village custom, and the persons by and from whom and the rates at which they are leviable, and it directs that such cesses shall, if sanctioned by the Chief Commissioner, be leviable accordingly. S. 132 (*h*) gives similar powers to the Deputy Commissioner when the settlement is not in progress. When the cesses are thus sanctioned it is not necessary for the Chief Commissioner to sanction the rates. (*Das and Adami, JJ.*) RAKHYAPAL *v.* LAL BIR. **1 P. 83 : A. I. R. 1922 P. 399.**

——**S. 69**—*Suit under—Limitation.*

Provisions of S. 6 of the Limitation Act, 1908, are not applicable to a suit brought under the first part of sub-S. 40 of S. 69 of the Central Provinces Land Revenue Act, 1881. (*Batten, A. J. C.*) BALKRISHNA *v.* BALA. **4 N. L. J. 136.**

——**S. 82**—*Every entry of the settlement is not but only entry in the Record of-Rights is presumed to be correct.*

Section 82 of the Land Revenue Act shows that when the Record-of-Rights is duly made and attested all entries therein shall be presumed to be correct until the contrary is shown. This presumption does not apply to every entry of the settlement, but as the clear wording of S. 82 shows it applies only to such entries as are to be found in the Record of Rights. The decision which the Settlement Officer has to make after the due enquiry into all claims to hold lands rent-free is required to be embodied in paragraph 8 of the wajib-ul-arz which is a part of the Record-of-Rights of the village. An entry in the jamabandi or a settlement parcha which is only a certificate given to a tenant showing the list of lands held by him is not such an entry. No presumption can therefore be attached to any of these documents in the absence of a copy of the village wajib-ul-arz. (*Kinkhede, A. J. C.*) KHUBCHAND *v.* MULLOO. **A. I. R. 1925 Nag. 452.**

——**(II OF 1917).**

——*Wajib-ul-arz agreement as to haq.*

Where the lambardar agreed not to demand his haq in consideration of the consent of the co-sharers to his appointment, *held*, any person can agree to abandon a claim to money already due to him. There is nothing invalid in an abandonment for consideration of a payment to which a person is declared entitled by the law. But future right could not be relinquished or transferred to which the holder is not declared entitled by the law, directly or indirectly. (*Hallifax, A. J. C.*) YADE PRASAD *v.* GANGARAM. **A. I. R. 1923 Nag. 211.**

——**S. 2 (17)**—*Sir right—Scope of—Accrual.*

The sir right is undoubtedly made up of two parts, one the proprietary and the other occupancy and it can accrue synthetically by the union of these two parts in the same person, and this is made clear in the proviso to section 2 (17) of the Land Revenue Act, 1917. But it must be in the same person. (*Hallifax, A. J. C.*) SHEORAM *v.* TIKARAM. **19 N. L. R. 26 : A. I. R. 1923 Nag. 93.**

——**S. 76**—*Levy and not the rate of cess—Need be sanctioned by the Board of Revenue.*

Under S. 76 of the C. P. Land Revenue Act all that the Board of Revenue has to do is to sanction the levy of a cess and not the rate at which such cess is leviable. Hence in a case where the Settlement Officer had determined the cesses and the rate at which they

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were leviable in accordance with the village custom, and the levy of cess had been sanctioned by the Board of Revenue, the cess was legally payable. (*Dass and Adami, JJ.*) RAKHYAPAL SINGH *v.* LAL BIR SURJODAY SINGH DEO. **69 I. C. 672 : 1 P. 83 : A. I. R. 1922 P. 399.**

——**Ss. 78, 83**—*Scope of—Suit under, when maintainable.*

For a suit under S. 83 of the C. P. Land Rev. Act to be maintainable in respect of a matter in the Record of Rights, it must fall within S. 78 of the Act. (*Hallifax and Kotval, A.J. Cs.*) THE ZEMINDAR OF HATTA *v.* RATAN. **64 I. C. 722 : A. I. R. 1922 Nag. 19.**

——**S. 80**—*Suit to set aside entry—Copy of* wajib-ul-arz *not produced—Copy applied for but not granted —Suit is not bad.*

Where a certified copy of the *wajib-ul-arz* was applied for but was not granted, the same not being ready, its non-production cannot vitiate a suit to set aside an entry in the Settlement Record. 13 C. P. L. R. 140 Dist. 7 N. L. R. 176 Ref. to and Foll. (*Baker, J. C.*) RAGHO *v.* R. M. DOYE. **8 N. L.J. 36 : 87 I. C. 81 : A. I. R. 1925 Nag. 324.**

——**S. 80**—*Scope.*

S. 80 applies to an entry made in accordance with the order of the Settlement Officer and not to an entry made contrary to his order. (*Baker, J. C.*) JAGANNATH *v.* BABU. **81 I. C. 1039 : A. I. R. 1925 Nag. 34.**

——**S. 80**—*Settlement Purcha—Presumption of correctness.*

Under S. 80 there is no presumption of correctness of an entry in a Settlement purcha. (*Kinkhede, A. J. C.*) TULARAM *v.* MT. SUMRATI. **79 I. C. 621: A. I. R. 1924 Nag. 422.**

——**S. 80**—*Where Revenue authorities decline to interfere no question of limitation arises.*

No question of limitation arises where the only order passed by the Revenue authorities was one declining to interfere. (*Baker, J. C.*) RAMBAX *v.* MOTI. **20 N. L. R. 70: 78 I. C. 872: A. I. R. 1924 Nag. 256.**

——**Ss. 80 (2) and 78**—*Settlement Officer's order not produced—No presumption can be made in favour of his having duly enquired into question involved.*

The lower Court had held on the evidence that the Settlement Officer had not made an enquiry on the point involved in the case. Neither party produced the order of the Settlement Officer.

Held, that although there was a presumption in favour of the Settlement Officer having passed his orders after due enquiry, yet in the absence of the order passed by him, the Court could not make any presumption that it contained or did not contain any reference to the matter in question as being passed after enquiry, because the party relying on it had not produced it either, although it would have materially strengthened his case. (*Baker, J. C.*) RAGHO *v.* R. M. DOYE. **8 N. L. J. 36 : 87 I. C. 81 : A. I. R. 1925 Nag. 324.**

——**S. 83**—*Suit under—Limitation.*

A suit for amendment of settlement entries is governed by Art. 14 and not Art. 120. (*Hallifax and Dhobley, A. J. Cs.*) ONKARLAL *v.* SHALIGRAMLAL. **5 N. L. J. 199 : 65 I. C. 970 : A. I. R. 1922 Nag. 76.**

——**Ss. 106, 78, 80 and 220**—*The Deputy Commissioner's order regarding village customs—Civil Court can set aside order.*

Where a Deputy Commissioner passed an order declaring that the tenants had the right to take water and earth free and that they could take fuel and timber, also that they were entitled to graze a number of cattle and that the excess grazing dues taken by the plaintiff should be refunded to the defendants ·

Held, that a suit lay for a declaration that the order complained of was erroneous and for a declaration of the proper rights of the defendants and for an injunction against them. (*Prideaux, A. J. C.*) MADHORAO *v.* LAXMANRAO. **A. I. R. 1925 Nag. 371.**

——**S. 109**—*Thekadars-co-sharers can have private partition so as to affect surrenders by tenants of several co-sharers.*

There is no distinction between a private partition and a partition effected under the Land Revenue Act. If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rents from those tenants whose lands fall within his share, and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his *patti* within the meaning of the Tenancy Act, and therefore if a tenant in one *patti* surrenders land to the owner of another *patti*, the surrender is not binding on the proprietor of the first *patti* who is consequently entitled to possession. (12 C. P. L. R. 66, Ref.) (*Baker, J. C.*) KHET SINGH *v.* MANMOD SINGH. **78 I. C. 134: A. I. R. 1924 Nag. 383.**

——**S 109**—*Protected thekadar—Position of—Tenure impartible.*

In the case of a protected thekadar the tenure is impartible but that does not take away the ownership of any person who has a share in it nor his right to joint possession. (*Hallifax, A. J. C.*) KHEDU SINGH *v.* BHAGWAN SINGH. **79 I. C. 400 : A. I. R. 1924 Nag. 163.**

——**S. 138**—*Surrender or transfer—Test of—Transfer of possession by tenant—Validity of.*

Surrender or transfer depends upon the intention of the parties. A surrender can only be to a landlord. The lambardar is not the only person who can receive a surrender. The whole proprietary body can receive surrender or conceivably any other co-sharer not a lambardar may take a surrender for the common benefit by authority, express or implied, from the other co-sharers. (*Joshi, H. M.*) GOPALSA *v* BULA. **6 N. L. J. 73.**

——**S. 151**—*Decision of the right of pre-emption by the executing Court.*

A co-sharer has no right to apply for pre-emption under S. 151 of the C. P. Land Revenue Act to an executing Court. The provision under S. 151 cannot be translated from its surroundings and made automatically applicable to a Civil Court executing a decree under the provisions of the Civil Procedure Code. (*Findlay, O. J. C.*) SITHARAM *v.* KANIRAM. **21 N. L. R. 157.**

——**Ss. 152, 169 and 220**—*Suit under—Limitation.*

The order of a Revenue Officer declining to make a partition or to proceed therewith until the question of partition has been decided does not amount to an order to any of the parties to file a civil suit and does not confer on a Civil Court jurisdiction which it did not previously possess. A Civil Court can enquire into the question as to whether the *Khudkhast* or *sir* lands are or are not the sole property of a person or whether they are joint property though it cannot decide whether there should be a partition or not ; the question of title may have to be decided for other purposes than for the purposes of partition. A suit for ascertaining what the titles of the parties respectively are over the lands in the Mahal is not barred by time merely because the Revenue Officer declined more than six years

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before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court. (*Batten, J. C.*) DONGAR SINGH *v.* VISHWANATH SINGH. **19 N. L. R. 11 : 71 I. C. 205 : A. I. R. 1923 Nag. 86.**

——Ss. 153 and 132 (h)—*Village cess—Suit for recovery—Entry in wajib-ul-arz.*

S. 153 of the C. P. Land Rev. Act bars a suit for the recovery of "village cesses" paid compulsorily at some time previous unless they are sanctioned by the Chief Commissioner or recorded either at the last settlement or by the Deputy Commissioner under S. 132 (*h*) of the Act. (*Hallifax and Kotwal, A. J. Cs.*) ZAMINDAR OF HATTA *v.* RATAN. **64 I. C. 722 : A. I. R. 1922 Nag. 19.**

——Ss. 159 and 220—*Suit for revenue chargeable but not assessed is for apportionment of revenue and is barred by S. 220.*

The proper course for the proprietor to recover land revenue not assessed from a person who has not paid it is to apply to the Deputy Commissioner to assess a proportionate share of the land revenue of the village on the land under S. 159 and a suit in a Civil Court is barred by S. 220 (*o*). (*Baker, J. C.*) LUXMANRAO *v.* SADASHEO. **A. I. R. 1925 Nag. 419.**

——S. 160—*Limitation for suit for agricultural profits—Mode of computation.*

The period allowed for a suit for the profits of the agricultural year which ended on 30th April 1917 by S. 160 of the C. P. Land Revenue Act, 1917, is complete only at the end of 1st May, 1920. (*Hallifax, A. J. C.*) NARAYAN PATEL *v.* ABDUL GANI. **69 I. C. 527 : A. I. R. 1922 Nag. 261.**

——S. 160 (2)—*Suit filed after the bet—Limitation.*

The period of limitation for a suit filed after the coming into force of Act II of 1917 is that provided by the Limitation Act. (*Hallifax, A. J. C.*) SHANKARGIR *v.* CHINNUJI. **6 N. L. J. 1 : 71 I. C. 140 : A. I. R. 1923 Nag. 164.**

——S. 169—*Suit under—Lim. Act, S. 14.*

In the case of suits contemplated by S. 169, the period fixed therein, *i. e.*, 6 months, cannot be extended by the application of S. 14. S. 29 of the Lim. Act excludes its operation. (*Baker, J. C. and Hallifax, A. J. C.*) LAXMAN *v.* KESHEO. **6 N. L. J. 205 : 73 I. C. 1021 : A. I. R. 1923 Nag. 306.**

——S. 169 (1)—*Limitation for suit.*

If the Deputy Commissioner elects to proceed under S. 169 (1) and enquires summarily into the merits of the question and passes orders thereon, his order is conclusive subject to a suit to be filed within 6 months to have the order set aside. (*Kinkhede, A. J. C.*) LABHUA SAO *v.* CHATAN. **20 N. L. R. 145 : 79 I. C. 161 : A. I. R. 1924 Nag. 275.**

——Ss. 173 and 175—*Imperfect partition—Land held in severalty allotted to a patti, nature of—Ss. 136 L and 136 N, Central Provinces Land Revenue Act, 1881.*

When at an imperfect partition *sir* or *khudkhast* merely held in severalty by a co-sharer and not his exclusive property is allotted to a *patti* other than his, he does not become a tenant of that land in the absence of an order to that effect by the Deputy Commissioner or he is recognised or created a tenant by the co-sharer in whose *patti* it falls. (*Hallifax, A. J. C.*) NAGESWAR *v.* KRISHNA. **17 N. L. R. 107.**

——S. 182—*Lambardar can sue for ejectment of transferee of absolute occupancy holding transferred without his consent but with consent of other co-sharers.*

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Notwithstanding consent of other co-sharers to the transfer of an absolute occupancy holding the lambardar is entitled to maintain a suit for the ejectment of the transferee when the transfer has been made without his consent. (*Prideaux, A. J. C.*) VITHAL *v.* WAMAN. **82 I. C. 495 : A. I. R. 1925 Nag. 140.**

——Ss. 187 to 189—*Lambardar of one patti—Powers in another patti.*

S. 188 (2) does concentrate in the lambardar certain powers appertaining to the whole proprietary body, which before 1917 were in almost all cases given to him by that body, sometimes expressly but more often tacitly, but which need not have been so given and could be withdrawn or modified at any time; now under the new Act the lambardar has those powers by law and his co-proprietors can neither refuse or limit them at the beginning nor withdraw or modify them subsequently. But this does by any means involve the impossibility that a lambardar appointed for a mahal should continue to exercise those powers over a separate patti in which he is not even a proprietor. (*Hallifax, A. J. C.*) RAMKRISHNAPURI *v.* TANBA. **6 N L. J. 85 . 19 N. L. R. 59 : A.I.R. 1923 Nag. 153.**

——S. 188—*Right of a co-sharer to collect rent.*

No co-sharer can arrogate to himself the right to collect rent as the lambardar is the landlord under S. 188 of the Land Revenue Act, 1917, unless the co-sharers have come to an agreement on the matter and therefore the co-sharer's collection of rent is an impertinent invasion on the right of the lambardar. (*Hallifax, A. J. C.*) MAHADEO *v.* SYED RAZA. **8 N. L. J. 119.**

——S. 188—*Section does not authorise lambardar to grant lease of land held separately by other co-sharers.*

S. 188 of the Land Revenue Act gives no authority to the lambardar to grant a lease of land already separately held by other co sharers and thus to oust them. (*Kinkhede, A. J. C.*) SHEIKH DANGU *v.* NARAYAN. **7 N. L. J. 241 : A. I. R. 1925 Nag. 181.**

——S. 188—*Lambardar can't transfer rights of other co-sharers without their consent.*

Under S. 188 of the C. P. Land Revenue Act the lambardar has authority to manage the village on behalf of the proprietors. But under that section the lambardar has no authority to dispose of the proprietary rights of other co-sharers without their consent. (*Baker, J. C.*) MT. RANGUBAI *v.* MADHORAO. **81 I. C. 276 : A. I. R. 1925 Nag. 101.**

——S. 188—*Presumption as to negligence.*

Where a lease of the sindi trees for tapping could admittedly bring in Rs. 50 a year but no such lease was given, *held*, until it is at least alleged that the actual reason was negligence it is not incumbent on the lambardar to deny or disprove it, and presumption is that it was not negligence. 15 N. L. R. 85 Ref. (*Hallifax, A. J. C.*) YADE PRASAD *v.* GANGARAM. **A. I. R. 1923 Nag. 211.**

——S. 188—*Appointment of lambardar—Unit of area in a divided mahal is the patti.*

Where a mahal has been divided the unit for the appointment of the lambardar is the patti and not the mahal. S. 188 (2) A of the Land Revenue Act embodies the case-law on the subject as it existed prior to the enactment of that Act. In other words, that clause simply enacts a rule in regard to burden of proof. It does not clothe the lambardar with higher rights than those already possessed by him. It simply gives statutory recognition to his status as the accredited agent of the proprietary body in the absence of the evidence in regard to revocation of his authority generally or with respect to a particular transaction.

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(*Hallifax, A. J. C.*) RAMKRISHNAPURI *v.* TANBA. **6 N. L. J 85 : 19 N. L. R. 59 : 71 I. C. 777 : A. I. R. 1923 Nag. 153.**

——**S. 188 (2) (a)**—*Construction—Section only gives effect to pre-existing custom.*

Before 1917 the custom of appointing the lambardar as the agent of the whole of the proprietary body was so general that it was held that he must be deemed to have been so appointed unless and until the contrary was proved, and the enactment in S. 188 (2) (*a*) of the Act II of 1917 can only have been intended to give the legislative sanction and confirmation to this view, which after all is only an inference of fact drawn in each particular case from the known facts of that case and the judge's knowledge of the common course of human conduct and public and private business. The entire proprietary body is not bound by the consent of one though he may if he has received consideration be bound by his own consent. 13 C. P L. R. 45 : 8 N. L. R. 29 Disc. (*Hallifax, A. J. C.*) LACHMAN *v.* THAKUR BALWANT SINGH. **6 N. L. J. 231 : A. I. R. 1923 Nag. 286.**

——**S. 188 (2) (b)**—*Lambardar —Consent of every co-sharer in every case not necessary.*

Where under the wazib-ul-arz of the village the lambardar was to manage the village with the consent of the co-sharers. *Held*, that the lambardar need not obtain the consent of every individual co-sharer, especially in petty cases such as allowing a cow to graze in the village. (*Baker, J. C.*) PARASRAM *v.* KANHAIYA. **A. I. R. 1923 Nag. 336.**

——**Ss. 188 (2) (c) and 160**—*Suit against Lambardar—Suit within six months.*

A suit within six months of the end of the year by co-sharers against lambardar mentioned in S. 188 (2) (*c*) is not premature in view of S. 160. (*Prideaux, A. J. C.*) SARJE RAO *v.* HARAKCHAND. **6 N. L. J. 234 : A. I. R. 1923 Nag. 287.**

——**S. 188 (2) (c)**—*Profits—Interest.*

An offer to pay about half the sum really due is clearly a refusal to pay the debt. The plaintiff is therefore entitled to interest. Interest should not be awarded in suits of this nature unless the plaintiff proves special circumstances entitling him to claim interest. (*Hallifax, A. J, C.*) YADE PRASAD *v.* GANGARAM. **A. I. R. 1923 Nag. 211.**

——**S. 188 (2) (c)**—*Tenants-in-common of a village—Suit for profits.*

Where divided members of a Hindu family being tenants-in-common put their profits into a common chest and meet expenses from the chest and this arrangement subsequently fell through and a lambardar, a member of the family, managed the village, *held* that a suit lay for village profits against the lambardar without bringing a general suit for accounts. (*Batten, J. C.*) MAKUNDRAM *v.* SHRIKRISHNA. **19 N. L. R. 24 : 73 I. C. 142 : A. I. R. 1923 Nag. 197.**

——**S. 192**—*Cost of collection.*

Even if S. 192 of the present Act does not entitle Lambardar to get 5 per cent. of the revenue payable as costs of collection in the absence of any order by the Deputy Commissioner, he is entitled to get it on general principles of equity or under S. 70 of the Contract Act. (*Hallifax, A. J. C.*) SHANKERGIR *v.* CHINNUJI. **6 N. L. J. 1 : 71 I. C. 140 : A. I. R. 1923 Nag. 164.**

——**S. 192**—*Remuneration of Lambardar.*

A lambardar is not disentitled to his remuneration simply because the Deputy Commissioner had never fixed the remuneration for the village lambardar under S. 192 of the Act of 1917. (*Hallifax, A. J. C.*)

C. P. LAND REV. ACT (II OF 1917), S. 203.

BHOLARAM *v.* TUKARAM. **66 I. C. 465 : A. I. R. 1922 Nag. 111.**

——**Ss. 192 (1), 137 and 229**—*Amending Act (VI of 1923)—Fixation of lambardar's remuneration is not a condition precedent for a suit for its recovery in Civil Court—S. 192 does not abrogate lambardar's right to recover lambardari dues fixed under rules under S. 137 where he is appointed before the new Act.*

S. 192 (1) does not say that the fixation of the remuneration payable to a lambardar is a condition precedent to his maintaining a suit for the recovery of such remuneration in a Civil Court although the section as amended by Act VI of 1923 confers exclusive jurisdiction on a Revenue Court to fix such remuneration. S. 192 does not abrogate the right of a lambardar who has been already appointed before the new Act came into force to recover his lambardari dues at the rates fixed by the rules under S. 137 of the repealed Act. S. 229 of the new Act expressly saves this right. (*Kinkhede, A. J. C.*) JANRAO *v* LAXMAN. **20 N. L. R. 142 : 83 I. C. 172 : A. I. R. 1925 Nag. 129.**

——**S. 203**—*Mortgage of a house is not necessarily abandonment—License is heritable—Burden of proof is on stranger to prove that his transferor had transferable interest.*

A license granted to a non-agriculturist labourer to occupy the *abadi* site is heritable but if the heir has never signified his intention to take it up, the malguzar cannot be presumed to have knowingly extended the license to him. A landlord has a right to demand back possession of *abadi* site from a stranger in possession of the house on it and the burden of the proof lies on the latter to establish that his transferor had a transferable interest in the *abadi* and not merely a license to occupy or that the terms of the license were such as disentitled the proprietor from re-entering on the site. Execution of a possessory mortgage-deed by an agriculturist resident of an *abadi* site does not work a forfeiture so as to give a right of re-entry to the proprietor, where there is no proof that the agriculturist has abandoned the site finally. The mere fact that the equity of redemption has not yet been foreclosed does not necessarily indicate that the mortgagor or his heirs have maintained their hold on the *abadi* site of the house. (*Kinkhède, A.J.C.*) BHAGWAN *v.* RAGHUBAR DAYAL. **A. I. R. 1925 Nag. 396.**

——**S. 203**—Abadi—*Occupation by tenant can be ended by landlord selling the land unless tenant was given the land as house site.*

A tenant occupying *abadi* site in a village is only a licensee. S. 203 of the Act does not help him unless the land is given to him as house site. If the landlord sells the land, the license will come to an end. A prescriptive title cannot be acquired by the tenant in regard to such land in the absence of any assertion of adverse title against the landlord. (*Baker, J. C.*) PUNJARAJSA *v.* CHAGANLALSA. **82 I. C. 182 : A.I.R. 1925 Nag 81.**

——**S. 203**—*Scope of*—Abadi—*Contract between proprietor and holder—Presumption.*

S. 203 merely stated the existing law and made no change in it. It does not override the provisions of the *Wazib-ul-arz* or any existing established custom. S. 203 (8) prevents that as in any case where there was no express contract an implied contract would undoubtedly have to be presumed from the existence of the custom. S. 203 (5) speaks only of the classes of persons who hold suits on the *abadi* not of the capacity in which they hold them and still less of the capacity in which they originally acquired them.

C. P LAND REV. ACT (II OF 1917), S. 203.

(*Hallifax, A. J. C.*) ABDUL AZIZ KHAN *v.* BHAIRODAN. **75 I.C. 925 : A. I. R. 1924 Nag. 225.**

——S. 203 (2)—*Mortgage by tenant does not entitle landlord to sue for re-entry.*

As a mortgage is not a transfer which permanently extinguishes a tenant's interest it affords no cause of action to a landlord to sue for re-entry. In respect of an *Abadi* site the landlord does not get any right of re-entry under S. 203 of the C. P. Land Revenue Act unless there is a permanent transfer such as a sale, etc. It is not competent for him to sue for ejectment from the *Abadi* site when there is only a temporary loss of a right of enjoyment of occupation of the site on account of an execution of a possessory mortgage (*Kinkhede, A.J.C.*) LABHCHAND *v.* DARYASINGH.

82 I. C 1056 : A. I. R. 1925 Nag. 204 (1).

——S. 212—*Ryotwari land in possession of one heir—Right of others to share therein—Rights of holder.*

S. 212 of the Land Revenue Code makes it clear that the right of a Raiyat to hold Ryotwari land devolves as if it were land. Where Ryotwari fields are in the possession of one heir, and they are entered in his name in the Revenue papers the right of other heirs to a share therein is not lost by such entry. They can sue for a share in the produce or for partition. 8 C. P. L. R. 11, Dist. (*Baker, O. J. C.*) RAGHMAT BI *v.* BHURI BI. **6 N. L. J. 161 : 73 I. C. 959 : A. I. R. 1923 Nag. 307.**

——S. 219—*Deputy Commissioner can eject but cannot decide rights.*

The right to exclude a trespasser on communal land permanently is not a matter which the Deputy Commissioner can determine under S. 219 ; he can only eject him summarily and the section itself expressly saves the jurisdiction of the Civil Court to decide the question of the right of permanent exclusion. (*Hallifax, A J. C.*) SAKHARAM *v.* RAMCHANDRA **A. I. R. 1923 Nag. 326.**

——S. 219—*Disobedience of order under—Punishment under S. 188, Penal Code.*

The Central Provinces Land Revenue Act (No. II of 1917) contains no provision for enforcing an order of summary ejectment passed under S. 219 of the Act, and the person who disobeys such an order is liable to be punished under S. 188 of the Indian Penal Code for disobedience of the order. (*Batten, O. J. C.*) HIRASINGH *v.* EMPEROR. **17 N. L. R. 88 : 23 Cr. L. J. 19 : 64 I. C. 499 : A. I. R. 1922 Nag. 209.**

——S. 220—*Suit by lambardar for arrears of his remuneration—Civil Court can try.*

A Civil Court is not precluded by anything in S. 220 of the Act from maintaining a claim by lambardar to recover the arrears of his remuneration. (*Kinkhede, A J. C.*) JANRAO *v.* LAXMAN. **20 N. L. R. 142 : 83 I. C. 172 : A. I. R. 1925 Nag 129.**

——S. 220 (n)—*Jurisdiction of Revenue Court—Limitation.*

The exclusive jurisdiction of Revenue Officers is restricted by S. 220 (*n*) only to the matter of "the partition or union of *mahals* or parties" while the liability otherwise of such property to be partitioned can be the subject-matter of a suit for declaration in a Civil Court. (*Kinkhede, A. J. C.*) LABHUA SAO *v.* CHATAN. **20 N L. R. 145 : 79 I. C. 161 : A. I. R. 1924 Nag 275.**

——S. 229—*Scope of—Remuneration of lambardars.*

S. 229 of C. P. Land Revenue Act II of 1917 continues the state of things existing under Act XVIII of 1881 in regard to the remuneration of lambardars.

C. P. MUNICIPAL ACT (XVI OF 1903), S. 35.

(*Hallifax, A. J. C.*) BHOLARAM *v.* TUKARAM. **66 I. C. 465 : A. I. R. 1922 Nag. 111.**

CENTRAL PROVINCES MUNICIPAL ACT (XVI OF 1903.)

——Ss. 2 (f) and 44—*Tax—Rent for Municipal building is not a tax and cannot be recovered by summary procedure.*

The essential quality of a tax and of those similar imposts mentioned in S. 2 (*f*) of the C. P. Municipal Act seems to be that the amounts or rates of payment are fixed by the levying authority without reference to the payer ; in regard to some of them there is option of making no payment if no benefit is taken but in none of them has the payer any option as to the amount to be paid. That essential quality is absent in a case where the amount to be paid was fixed by agreement between the two parties. A tax recoverable under S. 46 of the Act is a tax imposed under S. 35, that is to say, a tax imposed with the previous sanction of the Local Government or in special cases with that of the Governor-General in Council as well, "in the manner required by S. 39." That section requires a proposition of the tax at a special meeting, publication of details of its incidence consideration at another special meeting of any objections made, sanction of the Local Government after consideration of those objections and notification in the official Gazette of the date of the imposition of the tax. Whether therefore, the payment to be exacted from the applicant was a "market due" or not, and it certainly was a "due" or debt for using a market or exposing goods for sale in a place belonging to the Municipal Committee, it was certainly not a "market due" or tax of the kind mentioned in S. 35 of the Municipal Act, as it was never imposed in the manner prescribed by that section. It cannot therefore be recovered by the summary procedure provided by S. 44. (*Hallifax, A. J. C.*) YESHWANT RAO PANDE *v.* SECRETARY, MUNICIPAL COMMITTEE. **19 N. L. R. 122 : 24 Cr. L. J. 516 : 73 I. C. 52 : A. I. R. 1923 Nag. 264.**

——Ss. 30 and 31—*Auction sale—To be in writing.*

A sale by auction is a "contract" and under S. 31 in order to be binding it must be in writing. the word being used in Ss. 30 and 31 in its ordinary meaning. (*Baker, J. C.*) ABDUL AZIZ KHAN *v.* MUNICIPAL COMMITTEE, KHANDWA. **78 I. C. 1052 : A. I. R. 1924 Nag. 227.**

——S. 35—'*Market due,*' *meaning — Unpaid lease-money.*

At an auction held by the Municipal Committee of Nagpur of the right to sell provisions at a certain stall in the Cotton Market near the Railway-station the applicant Yeshwant made the highest bid. He paid a portion of the amount of his bid and the sale was presumably sanctioned in due course. But before Yeshwant executed the deed required of him, the Committee broke one of the conditions of the contract and he filed a suit for damages. The Committee then applied under S. 44 to a Magistrate to recover the unpaid balance of the lease-money from him by distress and sale of his moveable property. ***Held*** : that the unpaid lease-money was not a "market due" or tax of the kind mentioned in S. 35 as it was never imposed in the manner prescribed by that section and, therefore, not recoverable by the summary procedure provided by S. 44. (*Hallifax, A. J. C.*) YESHWANT *v.* NAGPUR MUNICIPALITY. **73 I. C. 52 : 19 N. L. R. 122 : 24 Cr. L. J. 516 : A. I. R. 1923 Nag. 264.**

C. P. MUNICIPAL ACT (XVI OF 1903), S. 66.

——**Ss. 66 and 139**—*Encroachment—Conviction—Imposition of daily fine in the future is not legal.*

The accused was convicted under S. 139 read with S. 66 (1) of the C. P. Municipal Act and sentenced to pay a fine of Rs. 5 in addition to Re. 1 per day from 14th August 1922 onwards, in case he did not remove the encroachment or obtain the sanction of the Municipal Committee to its continuance. *Held*, that the order imposing a daily fine in the future could not stand. No person can be sentenced to punishment for a thing which he has not done but may possibly do in the future or even is likely to do in the future. (*Hallifax, A. J. C.*) BABU RAO *v.* MUNICIPAL COMMITTEE, NAGPUR. **72 I. C. 78 · 24 Cr. L. J. 318 : A. I. R. 1924 Nag. 66.**

——**Ss. 66 (1) and 122**—*'Building'—Essentials for conviction implies structure with roof.*

A "building" within S. 66 (1) of the C. P. Mun. Act, implies a structure with a roof. *Moir* v. *Williams*, (1892) 1 Q. B. 264, Ref. Where the petitioner is convicted for encroaching upon a street in a Municipal town by putting up a new structure in the place of an old one. *Held*, in the absence of proof that the new structure occupied more space than the old one, the conviction was bad. A prosecution under the Act can only take place after a resolution passed at a meeting properly convened and conducted. (*Drake-Brockman, J.C.*) THAKURLAL *v.* SECRETARY, MUNICIPAL COMMITTEE, KHANDWA. **64 I. C. 274 : 22 Cr. L. J. 754.**

——**S. 105 (1)**—*Bye-laws under—Bye-law No. 7 and S. 139.*

Bye-law No. 7 does not apply to the case of a refusal to vacate land held for some years and subsequently found to be nazul. (*Hallifax, A. J. C.*) SHRIPATHI MARATHA *v.* SECRETARY, M. C., NAGPUR. **A. I. R. 1923 Nag. 157.**

——**Ss. 122, 67 (a) and 289**—*Encroachment by previous owner—Present owner not liable.*

S. 122 cannot be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person. The word "Obstructs" in S. 122 of the Act, applies to persons who built or caused to be built the encroachment and not to the accused who originally had nothing to do with its erection. Sub-section (2) of S. 67 read with S. 139 provides remedy in the case of an encroachment not made by the present owner. (*Prideaux, A. J. C.*) CHUNILAL *v.* MUNICIPAL COMMITTEE, ARNI. **18 N. L. R. 92 : 65 I. C. 559 : 23 Cr. L. J. 127 : A. I. R. 1922 Nag. 167 (2).**

——**S. 122**—*Conditions not communicated—Failure to comply with, is not an offence.*

Failure to comply with any conditions which are not placed on record or shown to have been actually communicated to him and subject to which, permission to build, was given to him under S. 66 of the C. P. Municipal Act, 1903, does not amount to an offence in the absence of departure from the sanctioned plan. (*Drake-Brockman, A. J.C.*) NANDLAL *v.* KHANDWA MUNICIPALITY. **4 N. L. J. 266.**

——**S. 122**—*Conviction under—Absence of proof that structure occupies more space—Notice for prosecution—Authority for sanction.*

In the absence of proof that a new structure put up occupied more space than the original one a conviction under S. 122, C. P. Municipal Act cannot be supported. Meaning of "Building," explained. A prosecution under the Act can take place only after a resolution passed at a meeting properly convened and conducted. (*Drake Brockman, J. C.*) THAKUR LAL *v.* SECRATARY. MUNICIPAL COMMITTEE, KHANDWA. **64 I. C. 274 : 22 Cr. L. J. 754 (N).**

C. P. TENANCY ACT (XI OF 1898).

——**(1922).**

——**S. 12 (1) (a)**—*Any member of joint Hindu family having an annual income of not less than Rs. 120 is entitled to vote—Explanation to cl. (a) applies only when total income exceeds Rs. 120 but not the separate income individually.*

Where a member of a joint Hindu family is clearly a person in receipt of an annual income of not less than Rs. 120, he is entitled to vote under S. 12 (1) (*a*). It matters not, whether such person pays in or does not pay in his income or part thereof to the joint family fund. He is clearly under cl (*a*) entitled to a vote. The explanation to cl. (*a*) is not a disabling provision, but only applies where the total income of a joint Hindu family exceeds Rs. 120 but the income of individual members is less than that amount. In such a case, the Legislature intended to provide that the manager of a joint Hindu family alone should have a vote in a *quasi*-representative capacity on behalf of the family. (*Findlay, A.J.C.*) SECRETARY AND PRESIDENT, MUNICIPALITY, NAGPUR *v.* DEVIDAS. **21 N. L. R. 182 : 88 I. C. 480 : A. I. R. 1926 Nag. 66.**

——**S. 98, Sub-Secs. (2) and (3)**—*Breach of Sub-S. (2)—Bye-laws framed under Sub-S. (3) enabling Municipality to prosecute party concerned are not* ultra vires.

If a person who does not give notice in writing of his intention to erect or re-erect any building as required by Sub-S. (2). erects or re-erects or commences to erect or re-erect the building without the sanction of the Committee which is necessary under Sub-S. (1) of S. 98 of the new Act, the person can be prosecuted for not giving the notice in the manner prescribed by bye-laws framed by the Committee in exercise of the power conferred under Sub-S. (3) of the said section. Such bye-laws are not *ultra vires*. (*Kinkhede, A. J. C.*) EMPEROR *v.* SHRIBALLABH. **26 Cr. L. J. 1084 : 88 I. C. 28 : A. I. R. 1925 Nag. 393.**

C P. TENANCY ACT (IX OF 1883).

——**S. 42**—*Mortgage decree—Form altered at instance of mortgagor—Estoppel.*

A decree for sale provided that cultivating rights in *sir* were included. The judgment-debtor (mortgagor) got it altered into "all actual and reputed rights in the *sir* land" it being agreed between the parties that the question whether such rights included the cultivating right should be left over. Afterwards the mortgagor contended that the decree did not comply with S. 42 of the Act, *held* that it was not open to him to assert that by reason of the alteration the rights of the mortgagee under the original decree were taken away, *held* also that the Lower Court should have decided whether the rights sold included the cultivating rights also. (*Lord Buckmaster.*) GULAB SINGH *v.* BALLABHDAS. **40 M. L. J. 418 : 48 Cal. 591 : 48 I. A. 220 : 61 I. C. 769 : 17 N. L. R. 84 : (1921) M. W. N. 310 : 3 U. P. L. R. (P. C.) 20 : 19 A. L. J. 361 : 25 C. W. N. 938 : 34 C. L. J. 1 : 14 L. W. 228 : 29 M. L. T. 348 (P. C.).**

——**(XI of 1898).**

——*A proprietor or a tenant purchasing the tenant's or proprietor's right, the result is the same in both cases.*

When the rights of co-sharer and an occupancy or absolute occupancy tenant converged in the same person he is an occupancy or absolute occupancy tenant according to the nature of the tenancy. This

C. P. TENANCY ACT (XI OF 1898), S. 32.

is because the acquisition by a proprietor of occupancy or absolute occupancy rights or the acquisition by an occupancy or by absolute occupancy tenants of proprietary rights amounts to the same thing. In either case the occupancy or absolute occupancy rights and proprietary rights are after the transfer combined in the same person. (*Baker, J. C.*) KASARBAI *v.* JAMADAR. **20 N. L. R. 162 : 82 I. C. 126 : A. I. R. 1925 Nag. 125.**

——— **S. 32**— *Improvements, compensation for—When legally due—Position of sub-tenant.*

Under S. 32 (1) a tenant can claim compensation for improvements only if the improvements were made in accordance with the Act if the tenant was an absolute occupancy or ordinary tenant. If the tenant is a sub-tenant, he can claim compensation, if the improvements have been made with the landlord's consent. (*Batten, J. C.*) BALARAM *v.* BHAGIRATHIBAI. **A. I. R. 1922 Nag. 47.**

——— **S. 35**—*Surrender by Hindu widow is binding on reversioners.*

A surrender by a Hindu widow if not impeachable for fraud or on other like-ground, is binding on the widow's husband's reversioners. (*Prideaux, A. J. C.*) MUKUND *v.* DIWAKAR. **73 I. C. 126 : A. I. R. 1924 Nag. 95.**

——— **S. 35**—*Surrender of portion of tenancy is invalid.*

There cannot be a valid surrender of a portion of the holding at the instance of a tenant. 7 N. L. R. 8 Ref. (*Prideaux, A. J. C.*) ALLIBHAI *v.* SHAM RAO. **18 N. L. R. 82 : 64 I. C. 902 : A. I. R. 1922 Nag. 216.**

——— **S 35 (4)**—*Transfer by tenant.*

An ordinary tenant is deemed to leave the holding uncultivated and the rent of it unpaid after a transfer (after which he leaves the village), even if it is cultivated by the transferee who is not a sub-tenant or the malguzar or anybody else and the rent is paid in full, and there is clearly an implied surrender. (*Hallifax, A. J. C.*) LAKSHMI PRASAD *v.* DADU. **A. I. R. 1923 Nag. 4.**

——— **S. 36**—*Female heir applying to have surrender of occupancy holding set aside—Surrender set aside and female heir placed in possession—Statutory liabilities paid from her separate funds—She does not become absolute owner—A. I. R. 1923 Nag. 34 Over-ruled.*

Where an occupancy tenant surrenders his holding to a landlord under S. 35 of the Central Provinces Tenancy Act, 1898, and the surrender is set aside upon an application made under S. 36 of the said Act, by his heir who happens to be a female, and the female heir is placed in possession of the holding upon her undertaking and paying the statutory liabilities out of her own separate funds the holding does not belong to her absolutely so as to make her a fresh stock of descent. 1923 Nag. 34 Overruled. (*Baker, J. C. and Kinkhede, A. J. C.*) WASUDEO *v.* BHIWA. **21 N. L. R. 62 : A. I. R. 1925 Nag. 306.**

——— **Ss. 36 and 47**—*Claimant was put in possession by Revenue authorities—Civil Court cannot interfere.*

Where an occupancy holding is surrendered and the heir of the person surrendering applies to the Revenue authorities to be put in possession and he is so put in possession, there is no power in any outside authority to revise the decision of the Revenue Officer and divest the claimant of the right vested in him under the order. (*Kinkhede, A. J. C.*) FAKIRA *v.* RAMKISAN. **21 N. L. R. 25 : 87 I. C. 1045 : A. I. R. 1925 Nag. 277.**

C. P. TENANCY ACT (XI OF 1898), S. 41.

——— **S. 41**—*Absolute occupancy holding—Transfer of a part—Gift—Delivery of possession—Right of landlords to eject.*

Where there is a transfer by gift and delivery of possession of a portion of an absolute occupancy holding by the tenant without the consent of the landlord to such transfer, the latter can eject the transferee in possession. (*Prideaux, A. J. C.*) GANPAT *v.* MANOHAR. **7 N. L. J. 105 : 78 I. C. 834 : A. I. R. 1924 Nag. 264.**

——— **S. 41**—*Absolute occupancy holding—Transfer of—Consent of landlord—Right of re-entry.*

A transfer without the consent of the landlord of a part of an absolute occupancy holding, even though defined and demarcated, will not give the landlord a right of re-entry under S. 41, Tenancy Act, 1898. Consent of the landlord to the transfer of an entire holding is *a fortiori* a consent to the transfer of any part of it. In consenting to the mortgage by conditional sale, the landlord would have to be regarded as having consented to the sale as well as to the mortgage. If the landlord agreed that the mortgagor agreed to make the transfer (through Court) he agreed *a fortiori* to his doing it voluntarily, as transfer under compulsion is obviously something more than a voluntary transfer, not something less and consent to the greater naturally includes consent to the less. (*Hallifax, A. J. C.*) BAPUJI *v.* RAM RAO. **7 N. L. J. 99 : 81 I. C. 664 : A. I. R. 1924 Nag. 139.**

——— **S. 41**—*Pre-emption—Right of landlord.*

S. 41 of the C. P. Ten. Act confers a right of pre-emption on the landlord whether or not the intended sale has taken place. (*Hallifax, A. J. C.*) RAI *v.* SIDAKALLI. **A. I. R. 1922 Nag. 14.**

——— **S. 41 (2)**—*Mortgage in the form of lease is inoperative against landlord.*

A document though given as a lease of an absolute occupancy holding is a mortgage where the transfer is meant to secure a debt contracted. Such a document violates the provisions of S. 41 (2) and hence is inoperative against the landlord. (*Dhobley, A. J. C.*) RAM PRASHAD *v.* CHANDULAL. **4 N. L. J. 262 : 65 I. C. 241 : A. I R. 1922 Nag. 156.**

——— **S. 41 (2)**—*Notice under—Contents and particulars of.*

A notice under S. 41 (2) of the C. P. Tenancy Act need not be worded with the accuracy of a plea. Where the information given in the notice is amply sufficient to inform the landlord of the tenant's intention to mortgage the whole of his absolute occupancy holding, it is sufficient compliance with the law. S. 41 (2) does not say that the particulars specified in that sub-section should be given in the notice but it merely states the circumstances under which the tenant must give notice, and presupposes a knowledge on the part of both landlord and tenant as to the particulars of the tenant's holding. (*Batten, A. J. C.*) RAGHOJI RAO *v.* RAJESWAR. **65 I. C. 816 : 4 N. L J. 131.**

——— **S. 41 (7) and (8)**—*With S. 6 of the new Act of 1920—Sale of absolute occupancy fields—Want of consent of—Malguzar—Suit by Malguzar.*

S. 41 of the Act of 1898 gave the landlord more than a mere right of pre-emption. The landlord had right to sue the transferee in a case where the sale had been made without his consent. S. 41 of the Act of 1898 refers to more than procedure; it gives two rights to two persons. It gives the Malguzar the right of pre-emption and ejectment and the tenant the right of re-entry. S. 6 of the Act of 1920 has no retrospective effect and does not give the landlord the power to bring the suit; but if his right to do so had already arisen under the former Act, under which

he could sue to enforce that right, the right being exercised under the former Act the tenant can, under Sub-S. 8 of S. 41 of the Act of 1898, apply to be reinstated within one year of his ejectment under the decree. (*Prideaux, A. J. C.*) VINAYAK *v.* MEHEBULLA KHAN. **A. I. R. 1923 Nag. 33.**

———**S. 41 (7)**—*Landlord and Tenant—Transfer of a part of an absolute holding—Part defined and demarcated—Whether landlord entitled to re-enter—Landlord's interest how safe-guarded.*

In order to maintain an action for ejectment a plaintiff (landlord) must be entitled to immediate entry into possession and before a landlord can eject his tenant's transferee he must prove abandonment by the tenant. A tenant's holding is one and indivisible: where it is not alleged that he has refused to pay the rent of the whole, he cannot be said to have abandoned the holding while still in possession of part. The landlord's interests are safe-guarded by recognising his right to hold the original tenant liable for the rent of the entire holding; if he fails to pay, S. 43 will enable him to sell the holding and the sale cannot be opposed by the transferee. S. A. 203 of 1905 Ref. (*Hallifax, A.J.C.*) JODHARAJ *v.* DAULAT. **18 N. L. R. 109 : A. I. R. 1922 Nag. 241.**

———**S 43**—*Charge—Suit to enforce, cannot be brought by other than the sole landlord or the representative of his co-sharers.*

No person can institute a suit to enforce a charge created by S. 43 of the Act unless he is the sole landlord or the representative of his co-sharers for collection of rent. (*Drake Brockman, J. C.*) DEOKARAN *v.* NATHU. **63 I. C. 352 : 4 N. L. J. 138 :**

———**S. 45**—*Section does not prohibit lease of ordinary tenure of* sir *lands.*

The Tenancy Act contemplates leases to ordinary tenants of *sir* lands apart from transfers of the kind provided for in S. 45 (1) which applies only to leases or other transfers of proprietary rights in *sir* fields and does not apply to agricultural leases which do not affect the proprietary rights. (*Kinkhede, A. J. C.*) DURGA PRASAD *v.* THAKUR PRASAD. **A. I. R. 1925 Nag. 377.**

———**S. 45**—*Surrender taking place 9 months after sale—Agreement to surrender entered into on the date of sale—Both are one transaction but the surrender only is void.*

If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, the agreement to surrender will be void and unenforceable. Where the surrender took place nine months after the sale but there was an agreement of even date between the parties as to the surrender. *Held* that the two were one transaction but that only the surrender was void. 39 All. 173 (P. C.) and 39 All. 645 Foll. (*Baker, J. C. and Prideaux, A. J. C.*) BHAGWAT *v.* ANADRAO. **86 I. C. 515 : A. I. R. 1925 Nag. 302.**

———**S. 45**—*Sale of trees and surrender of occupancy holding executed on the same day—Both are one transaction and are invalid.*

Where an occupancy tenant executed a sale-deed in respect of mango trees standing on the holding and on the same day surrendered the holding to the co sharer malguzar. *Held*; that the sale and the surrender together constituted a single transaction the object of which was to avoid necessity of obtaining the sanction prescribed by S.45(1), Tenancy Act and was therefore illegal and void. 39 All. 173 (*P. C.*) and 40 All. 449 Rel. on. *Held*: further that the mere fact that the vendee obtained possession did not suffice to separate

the surrender from the sale, nor does the mere fact that the sale-deed purporting to deal with the trees apart from the soil was executed first and the surrender of the soil pure and simple, followed it make any difference. In order that there could be a valid severance of interest or property in the trees, the trees must themselves have already become the separate property of a person other than the owner of the soil on which they stand, by an independent transaction, and further the interest in the trees as also in the soil must be of a nature transferable under the law applicable to the land. (*Kinkhede, A. J. C.*) FAKIRA *v.* RAMKISHAN. **21 N. L. R. 25 : 87 I. C. 1045 : A. I. R. 1925 Nag. 277.**

———**S. 45**—Sir *land—Mortgage — Sanction—Award and decree—Assignment of—Fresh sanction not necessary.*

Where sanction had been granted by the Revenue Officer for mortgaging *sir* lands and on account of disputes an arbitration took place as regards the amount due and this was made into a decree of Court, no fresh sanction is necessary for an assignment. (*Baker, O. J. C. and Prideaux, A. J. C.*) GANPATRAO *v.* MT. TULSABAI. **78 I.C. 853 : A. I. R. 1924 Nag. 419.**

———**S. 45**—Sir *land—Section does not bar registration of will in respect of.*

The section does not apply to a case of devolution by death, and therefore S. 45 (3) does not bar the registration of a Will, by which *sir* land is bequeathed. The section does not take the proprietor's right to alienate the cultivating rights in his *sir* land. It merely lays down a condition precedent to the exercise of that right *inter vivos*. The restriction on the power of alienation is imposed by the C. P. Tenancy Act and not by Hindu Law. (*Hallifax and Prideaux, A. J. Cs.*) MURLIDAR *v.* HARIDAS. **62 I. C. 246 : 4 N. L. J. 46.**

———**S. 46**—*Mortgage of occupancy land is invalid even* inter partes.

Under the C. P. Tenancy Act even as between the parties to the contract a mortgage of occupancy land is wholly invalid and it cannot operate in any way in respect of the property transferred by it. (*Baker, J. C.*) OMRAO *v.* RAMADHAR. **81 I. C. 873 : A. I. R. 1925 Nag. 130.**

———**Ss. 46 and 47**—*Transfer need not be to nearest heir.*

S. 46 does not make it obligatory that the transfer should be in favour of the nearest existing heir of the transferor at the time it is made. (*Hallifax, A. J. C.*) MT. KRISHNA BAI *v.* DEBI SINGH. **71 I. C. 409 : A. I. R. 1923 Nag. 195.**

———**S. 46**—*Personal law of inheritance—Is not affected by section.*

If a female is entitled, according to her personal law, to succeed to an occupancy holding. S. 46 of the C. P. Tenancy Act will not disqualify her from inheriting such property. The expression 'in the male line of descent' does not necessarily mean that the person at the lower end of the line must be a male. The expression 'in the male line' should be distinguished from the expression 'male lineal' and the former does not mean 'a male in the line of males' which is the meaning ascribed to the latter. (*Hallifax, A. J. C.*) SAKHUBAI *v.* HARI. **5 N. L. J. 261 : 67 I. C. 229 : A. I. R. 1922 Nag. 207 (2).**

———**Ss. 46 and 47**—*Co-proprietors dividing* sir *land—Position of.*

When two co-proprietors of a village divide up the *sir* land between them to hold portions of it separately they make an imperfect partition of that village;

each has a share a separate *patti* composing the *sir* land he holds in severalty, and the whole of the rest of the village forms what is called a *Shamilat* patti. (*Hallifax, A. J. C.*) CHUNGA PRASAD *v.* PHULWA. **67 I. C. 121 : A. I. R. 1922 Nag. 126.**

——S. 46—*Partition of holding has the effect of surrender and regrant.*

A partition of a holding with the landlord's consent cannot be distinguished from a surrender of the whole by all of them jointly and a grant of a new lease in respect of the parts to each of them separately. Each part then is a parcel of land held on a lease which is not the same as that on which the original whole was held and it cannot be the same holding. 7 N. L. R. 8; 10 N. L. R. 129 Rel. Further, if a tenant takes fresh land from the malguzar in addition to what he already holds, and the rent of the fresh lands is not kept separate, but one single sum is payable in respect of the old and the new land, then he undoubtedly has a new holding, because the new parcel is held under a different lease, and a different set of conditions from those of the old smaller parcel. (*Hallifax, A. J. C.*) SON SINGH *v.* THAKUR RAM. **18 N. L. R. 48 : 69 I. C. 359 : 5 N. L. J. 243 : A. I. R. 1922 Nag. 21.**

——S. 46 (1)—*Succession—Disqualification of near collaterals, does not give any right to the remote.*

The condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy tenure on a more remote collateral even though he may have shared in the cultivation. 15 C. P. L. R. 89 : 17 A. 33, Ref. (*Batten, A. J. C.*) AHILIA *v.* BADAN SINGH. **5 N. L. J. 270 : 65 I. C. 292 : 18 N. L. R. 105 : A. I. R. 1922 Nag. 117.**

——S. 46 (3)—*Trees standing on occupancy holding—Transfer of, is invalid.*

An occupancy tenant has the same analogous rights in the trees as he has in the holding on which they stand, and therefore he cannot transfer the trees by sale as apart from the land on which they stand. (*Kinkhede, A. J. C.*) FAKIRA *v.* RAMKISAN. **21 N. L. R. 25 : 87 I. C. 1045 : A. I. R. 1925 Nag. 277.**

——S. 46 (5)—*Trees in occupancy holding—Mortgage.*

Mortgage of trees amounts to a transfer of the rights in the occupancy tenure in a portion of the tenancy holding and the document cannot be registered in contravention of S. 46 (5) of the C. P. Tenancy Act of 1898. The mortgage is not operative as regards the other property except the trees covered by it. An instrument so registered cannot operate in respect of any part of the property ostensibly transferred by it. 13 N. L. R. 165, Foll. (*Prideaux. A. J. C.*) TUKARAM *v.* NARIBA. **70 I. C. 34 : A. I. R. 1922 Nag. 252.**

——S. 47—*Exchange not affected.*

About 1903 the defendant started to cultivate an absolute occupancy holding belonging to another and allowed him to cultivate an occupancy holding of his own in exchange, each finding the land of the other more conveniently situated than his own. The record remained unchanged and each paid rent for the land he cultivated but in the name of the other till in 1917-18 the Settlement Officer recorded each of them as the occupancy tenant of the land he was actually cultivating. *Held* if the arrangement of 1903 was an out and out exchange he lost his right to set it aside many years before he filed his suit. If it was only an arrangement by each tenant for the cultivation of land by the other, which it undoubtedly was, he has no right whatever to interfere with it. (*Hallifax, A. J. C.*) CHIMNA PATIL *v.* INDRARAJ SINGH. **A. I. R. 1923 Nag. 144.**

——Ss. 49 and 51—*Private contract is effective only up to next settlement.*

The combined effect of Ss. 49 and 51 is to make the occupancy tenant liable for the rent fixed at the settlement for the term of the settlement. A private agreement not inconsistent with the Act as to the rent payable may be given effect to only until the next settlement ; but at the next settlement the agreed rate of rent is superseded by a rate of rent fixed by the Settlement Officer. 7 N. L. R. 17 Rel. on. (*Kinkhede, A. J. C.*) KHUBCHAND *v.* MULLOO. **89 I. C. 741 : A. I. R. 1925 Nag. 452.**

——S. 49—*Lessee is not 'proprietor' within S. 49.*

A lessee, whether permanent or not, is not a proprietor within the meaning of that section, and therefore he does not retain any interest as an occupancy tenant in the *sir* land on the determination of the lease. (*Baker, J. C.*) BALWANTRAO *v.* FARID SAHEB. **21 N. L. R. 133 : 87 I. C. 253 : 8 N. L. J. 44 : A. I. R. 1925 Nag. 274.**

——Ss. 49 and 50—*Transfer in favour of next reversioner by widow without sanction of revenue authorities is invalid.*

The transfer by a widow of occupancy rights in *sir* land in favour of her next reversioner is invalid in absence of the sanction of revenue authorities. C. P. Tenancy Act, Ss. 49 and 50 do not make any exceptions in the case of a transfer of an heir and reversioner. (*Baker, J. C.*) MT. BHAGWATI BAI *v.* DADU KHUSHIRAM. **81 I. C. 878 : A. I. R. 1925 Nag. 95.**

——Ss. 50 and 70—*Sale contrary to—Rights of transferee—Dispossession—Compensation.*

Where a sale of a holding is prohibited under S. 71 of the C. P. Tenancy Act, the alienee in possession can claim compensation from the plaintiffs (seeking to set aside the sale) before they are given possession. 6 N. L. R. 12, Foll. If however the alienee had not obtained possession and he sought to enforce the sale, he could not recover the consideration paid. 6 A. L. J. 555, Ref. (*Prideaux, A. J. C.*) DHONDIBA *v.* PANDURANG. **68 I. C. 252 : A. I. R. 1923 Nag. 111.**

——S. 63—*Remission of rent.*

The respondent claimed the right to hold his tenancy field free of rent on the ground that in 1874 the then landlord agreed to allow his father to hold the field free of rent and executed an agreement to that effect. In the pattas of both the settlements, *e. g.* 1897 and 1913 a note was made to the effect that the landlord would pay the rent. *Held* : that the Settlement Officer in 1913 has not decided as he is supposed to have decided, that the terms of the original agreement would be binding on the successors of the parties, and S. 63 of the Tenancy Act, 1898, plainly enacts that no agreement for reduction or remission of rent can prevail for more than one settlement. 15 C. P. L. R. 9 Ref. (*Batten, J. C.*) MAHILAL *v.* BINDRABAN. **A. I. R. 1923 Nag. 247.**

——S. 70—*Succession—Hindu widow can accelerate, by surrender.*

In all matters of tenancy the personal law applies except in so far as it is limited or altered by the tenancy law and there is nothing in the C. P. Tenancy Act to limit a Hindu widow's power to accelerate the succession to her late husband's estate by retiring from the ownership of it by surrender. On such surrender the estate passes to the next heir not by transfer but under the law of inheritance. If the next heir is a limited owner, *e.g.*, a daughter, the heirs of the last

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male owner would succeed after the daughter's death and on default of such heirs, the malguzar can resume possession of the tenancy. In a contract creating a tenancy the parties may agree that it shall be subject to any conditions that are not forbidden by the law. (*Hallifax, A. J. C.*) SUNDAR LAL *v.* BISAMBHAR.
65 I. C. 180 : A. I. R. 1922 Nag. 24.

——**S. 70 (5)**—*Sale void—Return of consideration.*

In the case of sale made to circumvent the statute prohibiting the sale of exproprietary rights the consideration is not recoverable. Defendant, if he fails to get possession, cannot recover the consideration, on the ground that the so-called surrender was a sale in contravention of the Tenancy Act, and the Registration obtained was a fraud upon the registration statute ; he can claim compensation, if he is in possession, and the deed is admissible in evidence to prove the passing of consideration. (*Prideaux, A. J. C.*) DHONAIBA *v.* PANDURANG.
A. I. R. 1923 Nag. 111.

——**S. 89**—*Absolute occupancy holding—Gift of, by widow with consent of landlord—Surrender and regrant.*

There is no difficulty in regarding the transfer by way of gift by a widow of her absolute occupancy holding with the consent of the landlord, even though it was a subsequent consent, as a surrender to him by the widow and a fresh grant by him to the transferee. In respect of surrenders the absolute occupancy right is a tenancy and not a proprietary right. The surrender would be binding on the reversioner, for the limitations of the widow's interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. (*Hallifax, A. J. C.*) RAMCHANDRA BALAKRISHNA *v.* RAMCHANDRA.
65 I. C. 952 : A. I. R. 1922 Nag. 222.

——**Ss. 93 and 94**—*Costs not awarded by Rev. Officer—Suit does not lie in Civil Court.*

A Revenue Officer holding an enquiry under S. 93 of the C. P. Ten. Act has the powers of Civil Court in awarding costs. If he has not made an order as to costs he must be deemed to have disallowed them and fresh suit does not lie in the Civil Court for the same. (*Batten, J. C.*) MOTIRAM *v.* HARI. **65 I. C. 67 : 18 N. L. R. 65 : A. I. R. 1922 Nag. 169.**

——**S. 95**—*Applicability—Disputes between neighbouring tenants—Act does not apply.*

The object of the C.P. Ten. Act is to provide for the relations between landlords and tenants. The Act does not contain any provision for settling disputes between neighbouring tenants. The remedy is under the ordinary law in a Civil Court. (*Batten, J. C.*) MOTIRAM *v.* HARI. **18 N. L. R. 65 : 65 I. C. 67 : A. I. R. 1922 Nag. 169.**

——**S. 95**—*Jurisdiction—Dispute between tenant and former landlord—Civil and Revenue Court.*

The division of *Khud Kasht* or *sir* among co-sharers of a village to be held in severalty is undoubtedly a partial private partition of the village lands and each co-sharers separately held parcel of land is a separate *patti* of the village of which he is the sole landlord, and if he leases that land to a tenant, he is still the sole landlord. But there is nothing to prevent the co-sharers having a re-distribution of the lands held in separate ownership at any time, and either Khudkhast or tenancy land can always be transferred to another patti or to what may be called the *shamilat patti.* Of tenancy land so returned to the body of co-sharers they are the landlords and are ordinarily represented by the lambardar and the co-sharer who held the land previously in separate ownership is no

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longer the landlord. His suit between him and the tenant in respect of that, is therefore, not a suit between landlord and tenant and therefore the Judge trying such a suit need not be also a revenue officer. (*Hallifax, A. J. C.*) JAGANNATH *v.* SAHEBRAO.
65 I. C. 127: A. I. R. 1922 Nag. 27.

——(**I OF 1920**).—*Possessory mortgagee of fractional interest in village is not landlord and cannot sue for rent.*

The position assignable to a mortgagee in possession of a fractional interest in a village is that of a mere transferee of a money claim to a portion of the arrears of rent when they have been proved due to the landlord of the holdings held by tenants of the village. Therefore such mortgagee is not a landlord within the meaning of the C. P. Tenancy Act and a suit for rent against the tenants is not maintainable by him. (*Kinkhede, A. J. C.*) SETH HARBAX *v.* LACHMAN.
82 I. C. 201 : A. I. R. 1925 Nag. 183.

——*Non-agriculturist cannot transfer house and site without landlord's consent.*

A tenant or other person who is entitled to a site of a house can transfer his right to occupy and that too within narrow bounds. In the absence of an agreement to the contrary the right to occupy the house and site held by a non-agriculturist is not transferable without the consent of the malguzar. (*Hallifax, A. J. C.*) LAKSHMI PRASAD *v.* AHMAD KACHI.
80 I. C 635 : A. I. R. 1925 Nag. 39.

——*Applicability of the Hindu Law of Succession.*

The Hindu Law of Succession by survivorship and as to the vesting of a son's interest by birth is not applicable to a tenancy governed by the C. P. Tenancy Act. (*Baker, J. C.*) MT. GOWRA *v.* CHAITRAM.
78 I. C. 63 : A. I. R. 1924 Nag. 372.

——*Malguzari share—Devise of, can be made without—Sanction of Revenue authority.*

Occupancy rights in *sir* land can be devised by will along with the malguzari share to which they appertain without the sanction of the Revenue Authority. 62 I. C. 246, referred to. (*Hallifax, A. J. C.*) GADI *v.* GOVINDA. **71 I. C. 207 : A. I. R. 1923 Nag. 141.**

——**S. 4**—*Creation of the tenancy by the landlord.*

There is no reason for thinking that a landlord cannot create an absolute occupancy tenancy. (*Hallifax, A. J. C.*) RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM. **A. I. R. 1922 Nag. 222.**

——**S. 5**—*Absolute occupancy right cannot be bequeathed.*

An absolute occupancy tenant is not empowered to bequeathe any right in his holdings. 15 C. P. L. R. 1, Affr. (*Kotwal and Prideaux, A. J. Cs., then Hallifax, A. J. C.*) MT. RUPI *v.* SADASHEO.
82 I. C. 1038 : A. I. R. 1925 Nag. 190.

——**S. 5**—*Consent of Malguzar—Priority of mortgage.*

There is no authority for saying that a mortgage which has not been consented to by the malguzar must be held to be in abeyance, to have no real existence and to be in fact void until it is so consented to by the malguzar and can, until it is so consented to, have no priority against another mortgage of a later date. As between the mortgagor and mortgagee a mortgage is valid unless and until it is avoided by the malguzar. (*Batten, J. C.*) KUNJILAL *v.* PANNALAL.
19 N. L. R. 10 : A. I. R. 1923 Nag. 91 (1).

——**Ss. 6 and 10**—*Transfer under the old Act—Rights of landlord are not taken away by the new Act.*

Where there was a transfer of an absolute occupancy holding while the Act of 1898 was in force the rights of the landlord to sue in ejectment or for pre-emption

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are not taken away by the new C. P. Ten. Act, (*Prideaux, A. J. C.*) VINAYAK *v.* MAHEBULLA KHAN. **68 I. C. 427 : A. I. R. 1923 Nag. 33.**

——Ss. 6 and 89—*Hindu Widow—Transfer or surrender.*

Though a Hindu widow's interest in an absolute occupancy tenancy which has devolved on her at her husband's death is the same in all respects as the estate of a Hindu widow in land inherited from her husband, there is the important exception that the limitations of her interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. (*Hallifax, A. J. C.*). RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM.

65 I.C. 952 : A. I. R. 1922 Nag. 222.

——Ss. 11 and 12—*Non-transferable holding—Succession to—Liability to pay debts of predecessor.*

An occupancy right under C. P. Tenancy Act is an extremely limited right and is in some respects even more limited than the right of a life tenant. It is in no case available even during the life-time of the tenant for attachment and sale in satisfaction of his debts. Succession to such an untransferable right of occupancy does not create a personal liability to pay the debts of the deceased debtor. (*Wadegaonkar, A. J. C.*) BONDRU *v.* MISRIYA.

A. I. R. 1925 Nag. 449 : 89 I. C. 477.

——Ss. 11 to 14—*Occupancy holding—Devise from Hindu widow—Suit to eject—Civil Court—Jurisdiction.*

Where an occupancy holding inherited by a Hindu widow is willed by her, the landlord can sue to eject the devisee in the ordinary Civil Courts. The transfer is invalid apart from Act I of 1920 and the devisee being a mere trespasser can be ejected in the ordinary Courts of the land. The intention of the tenancy law in the C. P. was to recognize a tenant's right of a restricted character as regards its heritability, transferability, partibility etc., but it has never been understood to carry with it the incident of devisability by will. (*Kinkhede, A. J. C.*) SHEODAYAL *v.* RAMPRASAD.

90 I. C. 247.

——Ss. 12 and 13—*Transfer by occupancy tenant—Transfer valid between the parties, but for S. 12—Transfer can be avoided only in manner and to extent mentioned in S. 13—Civil Court cannot entertain suit to avoid the transfer.*

No landlord can sue in a Civil Court to evict a person to whom an occupancy tenant has made over his holding unless that person is one of those mentioned in S. 12 (1) (2) of the Tenancy Act, 1920, or holds under a lease for not more than one agricultural year granted not more than two months before the beginning of that year, without any covenant to renew being attached to it in all other cases he must apply to a Revenue Officer under S. 13 of the Act. (Case law discussed.) (*Hallifax, A. J. C.*) TIJAN *v.* GOPI

87 I. C. 826 : A. I. R 1925 Nag. 442.

——S. 12—*Mortgage of trees fully owned in occupancy fields is valid.*

Where the property mortgaged was fruit trees in occupancy fields and where the mortgagors were proprietors of the trees : *Held*, that the mortgage deed was validly registered. (*Hallitax, A. J. C.*) MURALIDHUR *v.* ANANDRAO.

8 N. L. J. 153 : A. I. R. 1925 Nag. 414.

——S. 12 (1) (ii)—*Sale of occupancy right to distant heir in presence of nearer heir is not opposed to S. 12 (1) (ii).*

The intention of the Legislature in framing S. 12 (1) (ii), was to clothe an occupancy tenant with a power to transfer his right in the holding to any

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distant heir even during the lifetime of other nearer heirs, provided the transferee is a person to whom the right is likely to go by inheritance to the transferring tenant, in the absence of nearer heirs entitled to succeed under the new Tenancy Act and therefore a sale by an occupancy tenant to a distant heir is not in contravention of S. 12 (1) (ii). (*Kinkhede, A. J. C.*) MOHAN *v.* BODHAN.

21 N. L. R. 144 : A. I. R. 1925 Nag. 421.

——Ss. 13 and 105—*Unauthorised transfer of occupancy holding—Remedy of landlord—Forum.*

When an occupancy tenant makes an unauthorised transfer of his holding, the landlord's remedy is to apply to a Revenue Officer under S. 13 of the C. P. Tenancy Act. S. 105 bars a suit in a Civil Court. (*Hallifax, A. J. C.*) BISAHU *v.* SUMER SINGH. **89 I. C 231. (Nag.)**

——S. 13—*Transfer by tenant—Lambardar not taking steps under S. 13—Lease by lambardar is illegal.*

On a tenant transferring his right to a co-sharer the lambardar does not get the right to lease the land to a third person without taking any steps under S. 13 to set the transfer aside. (*Baker, J. C.*) DHIKAL *v.* RAGHU. **8 N. L. J. 52 : 87 I. C. 115 : A. I. R. 1925 Nag. 259.**

——Ss. 13 and 105—*Surrender of tenancy—Determines sub-tenancy—Jurisdiction of Civil Court.*

Where a tenant surrenders his holding the sub-tenancy also is determined and a suit to eject the sub-tenant thereafter is one between a landlord and a trespasser. 8 N. L. R. 22 Dist. (*Baker, O. J. C.*) GOPALA *v.* SAKHARAM.

6 N. L. J. 224 : 73 I. C. 15 : A. I. R. 1923 Nag. 261.

——S. 21—*Landlord and tenant—Purchase of crops—Rights of landlord—Limitation.*

The mere purchase of standing crops by a stranger would not give any cause of action to the landlord, unless it was brought to his notice that the purchaser was appropriating the crops, and some overt act would be necessary to give the landlord notice of the claim of the purchaser. There is no reason why limitation should run from the time when all the crops were cut, as appropriation must be held to have commenced from the time when the crops began to be cut. (*Baker, J. C.*) NATHULALSA *v.* SHANKERLAL.

7 N. L. J. 80 : 81 I. C. 651 : A. I. R. 1924 Nag. 87.

——Ss. 37 and 25—*Person cultivating on partnership basis is a tenant, that in* sir *is sub-tenant and in* khudkasht *an occupancy tenant.*

The ordinary presumption is that a man who cultivates the land of the *malguzar* whether on *batai* or on payment of rent is a tenant. The status of a person cultivating the proprietor's *sir* land under S. 37 of the new Act of 1920 is that of a sub-tenant. Where *sir* land and other land is given to a person under one lease or one set of conditions so as to constitute one holding, the status of the defendant so far as the *sir* land is concerned, is that of a sub-tenant. The landlord in an ejectment suit can therefore be given a decree declaring that defendants are liable on partition by proper authorities. In the case of *khudkasht* lands the status of defendant is that of an occupancy tenant and as such he is not liable to be ejected therefrom by the landlord except under S. 25 of the said Act. (*Kinkhede, A. J. C.*) GOKUL *v.* SHYAMLAL SINGH.

90 I. C. 76 : A. I. R. 1926 Nag. 35.

——S. 45 (5)—*Lease in respect of* sir *for* 5 *years—Renewal—Sub-tenancy—Effect of Act of* 1920.

Plff. was granted a lease of *sir* lands for 5 years ending with April 1917 and put him in possession. During the term of the lease defts. granted to plff.

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another lease for 11 years commencing on the expiry of the term of the first lease. In a suit for possession by plff. after the expiry of the period of the first lease the defts. set up, that under the Tenancy Act they had become occupancy tenants of the *sir* land on the loss of their proprietary rights in the village and hence the lease which was subsequently to take effect could not be enforced being void. *Held* that the plea of the defendants was valid and that the plaintiff's suit must fail. (*Dhobley, A. J. C.*) SETH LAKSHMI CHAND *v.* BAJIRAO. **69 I. C. 870 : 5 N. L. J. 251.**

——— **S. 49**—*Applicability*—Sir *land*—*Mortgage*—*Foreclosure*—*Compromise*—*Effect on occupancy rights.*

A foreclosure decree was obtained on a mortgage of *sir* lands prior to the coming into force of C. P. Ten. Act, 1898. In a subsequent suit to have the decree set aside, a compromise decree was passed by which a part of the property passed to the mortgagee absolutely while the rest went to the mortgagor free of encumbrances. Meanwhile Act I of 1920 had been passed and the mortgagor claimed under S. 49 occupancy rights in the *sir* land. *Held*, S. 49 did not apply as the mortgagor's rights had already been lost. (*Baker, J.C. and Prideaux, A.J.C.*) GOPALA *v.* LAXMANSINGH. **90 I. C. 162.**

——— **Ss. 49 and 51**—*Effect of.*

The combined effect of Ss. 49 and 51 is to make the occupancy tenant liable for the rent fixed at the settlement for the term of the settlement. A private agreement not inconsistent with the Act as to the rent payable may be given effect to only until the next settlement; but at the next settlement the agreed rate of rent is superseded by a rate of rent fixed by the Settlement Officer. (*Kinkhede, A. J. C.*) KHUB CHAND *v.* MULLOO.
89 I. C. 741 : A. I. R. 1925 Nag. 452.

——— **S. 49**—Sir *land*—*Mortgage without sanction*—*Foreclosure*—*Lambardar*—*Powers of disposition.*

Where *sir* lands are mortgaged without sanction to transfer cultivating rights, the mortgagor becomes on foreclosure occupancy tenant of the *sir* lands. The *lambardar* after surrender has no power over the same. (*Kotwal, A. J. C.*) NANDKISHORE *v.* LAL SINGH. **78 I. C. 730 : A. I. R. 1924 Nag. 381.**

——— **S. 49**—*Foreclosure*—*Occupancy right in* Sir—*Accretions.*

A mortgagor is entitled to remain in possession as occupancy tenant of all the land that is *sir* at the time of the passing of the final decree and not merely of that which was *sir* at the date of the mortgage. (*Baker, O. J. C. and Hallifax, A. J. C.*) BHIMRAJA *v.* MOOKUNDALAL. **76 I. C. 637 : A. I. R. 1924 Nag. 155.**

——— **S. 49**—Sir *land*—*Alienation of*—*Effect of.*

The *sir* right is made up of two parts one proprietary, and the other the occupancy and it can accrue synthetically by union of these two parts in the same person. But it must be in the same person. Where a proprietor alienates ownership of land, the *sir* right in the land is a constitutent part of his ownership of the *sir* land. (*Hallifax, A. J. C.*) SHEORAM *v.* TIKARAM. **19 N. L. R. 26 : 71 I. C. 129 : A. I. R. 1923 Nag. 93.**

——— **S. 49 (1)**—*Section is not retrospective.*

The provisions of S. 49 (1) of the Tenancy Act of 1920 relating to the lapsing of the tenancy rights granted by an ex-proprietor in the *sir* land cannot have retrospective effect over the tenancy rights created by him before the passing of the Act. (*Baker, J. C.*) CHAMPALAL *v.* KUNJI LAL. **83 I. C. 752 : A. I. R. 1925 Nag. 249.**

C. P. TENANCY ACT (XI OF 1898), S. 89.

——— **S. 49 (1)**—*Not retrospective.*

The latter portion of sub-S. (1) of S. 49 of the C. P. Tenancy Act (I of 1920) cannot possibly have a retrospective effect. (*Batten, J. C.*) HINDU SINGH *v.* MANGAL. **6 N. L. J. 227 : 19 N. L. R. 110 : 72 I. C. 438 : A. I. R. 1923 Nag. 227.**

——— **S. 49 (2)—Act of (1898), S. 45 (1)**—*No applicability to devolution by death.*

S 45 of the Tenancy Act cannot possibly be applied to a case of devolution by death, and therefore sub-section (3) of that section does not forbid the registration of a Will by which *sir* land is bequeathed. Under the Hindu Law a malguzar has powers to alienate the full cultivating and proprietary rights in his *sir* land without any sanction at all. The restriction on the power of transfer is imposed only by the Tenancy Act and not by the Hindu Law. Even so S 45 of the Tenancy Act does not take away the proprietor's right to alienate the cultivating right in his *sir* land. It merely lays down a condition which must precede the exercise of that right *inter vivos*. (*Hallifax and Prideaux, A. J. Cs.*) MURLIDAS *v.* HARIDAS. **62 I. C. 246 : 4 N. L. J. 44**

——— **Ss. 50 and 12 (2)**—*Cultivating right in* Sir *is not alienable*—*Insolvency Court cannot apply under S. 50.*

A proprietor's right in *sir* land are composed of two component parts. The proprietary right is alienable and attachable but the cultivating right is neither. Under S. 12, para. 2, of the Tenancy Act 1920, a Receiver cannot be appointed to manage an occupancy holding and the tenant's right does not vest in the Court or in the Receiver under the Provincial Insolvency Act of 1907. The legislature contemplated that no one but the proprietor of *sir* land could divest himself of the occupancy rights and that the Insolvency Court cannot even apply under S. 50 of the Tenancy Act. (*Prideaux, A J. C.*) SHRIKISHAN *v.* NAGOBA. **76 I. C. 634 : A. I. R. 1924 Nag. 158.**

——— **S. 60**—*Applicability of*—*Tenancy*—*Creation of, by occupancy raiyat*—*Section not retrospective.*

S. 60 of the C. P. Ten. Act does not apply to contracts entered into before the passing of the Act. (*Mittra, A. J. C.*) MT. LAHINI *v.* BALA. **18 N. L. R. 85 : 77 I. C. 798 : A, I. R 1922 Nag 227.**

——— **S. 89**—*Surrender by Hindu widow operates only on her interest*—*Collusive surrender*—*Injunction may be granted.*

A surrender by a Hindu widow under S. 89 operates only on the widow's interest in the holding and the surrendering. Hindu female should be treated as dead as it were by a fiction of law unless the surrender may be deemed to be in the best interests of the estate which she represents. Injunction can be granted to restrain collusive surrender of tbe holding by the widow. (*Kinkhede, A, J. C.*) PANDURANG *v.* BAYAJEE. **8 N. L. J. 14 : A. I. R. 1925 Nag. 251.**

——— **S. 89**—*Surrender to some co-sharers*—*If puts an end to tenancy*—Lambardar—*If to recognize.*

A surrender made to two of the co-sharers without the intervention of the *lambardar* is only a transfer and not a surrender and does not put an end to the tenancy unless the *lambardar* chooses to recognize it. The *lambardar* can maintain a suit for recovery of rent in spite of such transfer. (*Baker, J. C.*) JAGO *v.* MADHORAO. **89 I. C. 51 (1).**

——— **S. 89**—*Surrender of undivided share by co-tenant is valid when the co-tenant's sons succeed and are accepted by the landlord.*

Where a co-tenant relinquishes his undivided share, and on such relinquishment his sons succeed and where they are recognised by the landlord as tenants

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instead of their father, the arrangement is valid (*Baker, J. C.*) SHER SING *v.* KALU SINGH.
80. I. C. 734 : A. I. R. 1925 Nag. 124.

——— **S. 89**—*Division among proprietors—Effect.*

Where the proprietors of a village decide to divide it and agree thereafter to collect rents separately from tenants in the lands allotted, they become landlords of the particular lots allotted and can make a valid surrender thereof. (*Baker, J. C.*) KHETSINGH *v.* MANMODSINGH. **78 I. C. 134 : A. I. R. 1924 Nag. 383.**

——— **S. 97**—*Trees—If can a be attached.*

The attachment of trees a part from the land on which they stand under S. 97 cannot be prohibited where the trees and the land belong to different persons. (*Baker, O. J. C.*) GULSHER KHAN *v.* RAMSWARUP. **19 N. L. R. 150 : 77 I. C. 620 : A. I. R. 1924 Nag. 42.**

——— **S. 100**—*Lease of* sir—*Subsequent sale of proprietary interest—Purchaser purchasing also lessee's interest—Purchaser becomes only a lessee from occupancy tenant.*

Where the proprietor lets out his *sir*, and then sells his proprietary interest, he becomes the occupancy tenant of the *sir*, and if the purchaser of the proprietary interest also purchases the interest of the lessees of *sir*, he still remains the lessee of the occupancy tenant, *i.e.*, the original proprietor and the original proprietor is entitled to possession as occupancy tenant on the expiration of the lease term. (*Hallifax, A. J. C.*) D. B. BALLABHDAS *v.* PUNA BAI. **88 I. C. 126 : A. I. R. 1925 Nag. 383.**

——— **Ss. 105 and 100**—*Village service tenant—Suit for possession does not lie in Civil Court.*

A suit for possession of his holding by a village service tenant asserting that he had been ejected by the landlord on 5-1-1920 is not maintainable in the Civil Court by reason of Ss. 100 and 105 of the C. P Ten. Act. (*Hallifax, A. J. C.*) BALARAM *v.* ATMARAM. **71 I. C. 48 : A. I. R. 1923 Nag. 51.**

——— **S. 105 (1)**—*Rent-free land—Suit—Civil Court's Jurisdiction.*

Where the land has been recorded rent free, and held without payment of rent and the tenant claims it to be held rent-free, S. 105 (2) applies and the suit is removed from the cognizance of the Civil Court. (*Kotwal, A.J.C.*) GANPAT *v.* MOHANLAL.
A. I. R. 1922 Nag. 207 (1).

——— **S. 106**—*Rent—Suit for, against trespasser—Forum.*

Under S. 106 suits for arrears of rent are to be heard by a Judge who is also a Revenue officer. The jurisdiction of Additional Munsiffs or Subordinate Judges who are Revenue officers should be strictly confined to suits for arrears under S. 106. (*Baker, J.C.*) GANESHDAS *v.* HARILAL. **90 I.C. 279 (N).**

——— **Ss. 109 and 100**—*Civil and Revenue Courts—Tenant may sue or apply for possession at his option.*

The rights of tenant to sue in civil Court under Specific Relief Act, S. 9, for possession or to apply to a Revenue Officer are alternative remedies, and the tenant's right to sue in civil Courts is not conditional on the rejection of his application by the Revenue Officer. (*Hallifax, A. J. C.*) BALLABHDAS *v.* PUNA BAI. **88 I. C. 126 : A. I. R. 1925 Nag. 383.**

——— **Sch. 2**—*Surrender by tenant—Limitation for suit for possession against licensee from tenant, by fresh grantee of the tenancy runs from the grant.*

On the surrender of a tenancy the license granted by the former tenant expires. In the absence of a fresh license granted by the new grantee of the tenancy, the possession of the licensee is adverse to the new tenant

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from the date on which the tenancy rights were granted to him. A suit for possession by the incoming tenant after 2 years of his becoming tenant is barred. (*Baker, J. C.*) NIYAJUDDIN KHAN *v.* JETHU.
87 I. C. 823 : A. I. R. 1926 Nag. 51.

——— **Sch. II, Art. 1**—*Article applies to suit by occupancy tenant dispossessed from part of holding.*

The period of two years limitation prescribed by Schedule II, Art. 1 applies to a suit by an occupancy tenant who is dispossessed from a part of his holding. (*Kinkhede, A. J. C.*) MANSINGH *v.* SARNA.
83 I. C. 3 (1) : A. I. R. 1925 Nag. 225 (1).

——— **Sch. II, Art. 1**—*Article applies to dispossession from part.*

There is no reason whatever for holding that the words of article (1) have reference only to an entire holding and not to a part of it. (*Hallifax, J. C.*) BUDGA *v.* CHAIN. **78 I. C. 214 : A. I. R. 1925 Nsg. 197.**

——— **Sch. II, Art. 1**—*Applies to dispossession of a tenant by any person whether the landlord or not.*

The plaintiff's suit was for recovery of possession of a holding on the ground that the plaintiff was an occupancy tenant of the holding who had been dispossessed by the defendant in July, 1920. It was the contention of the defendant that the plaintiff had been out of possession since 1918 and had surrendered his tenancy and that the malguzar had placed the defendant in possession. It was stated by the plaintiff in the course of the pleadings, through his pleader, that the plaintiff had been out of possession since the end of 1918 and that the defendant had not actually dispossessed him but that the suit was filed against him as he was in wrongful possession. It was pleaded in reply that plaintiff not having been in possession of the land within two years of the suits, Art. 1 of Sch. II to the C. P. Tenancy Act stood as a bar to his claim. On the day fixed for hearing arguments on the point of limitation the plaintiff put in an application to amend his pleadings on the ground that he had by some oversight stated that he was dispossessed in 1918 whereas he was dispossessed of two fields out of three in 1919 and of one in 1920 and the plaintiff also applied to file copies of jamabandies in support of the statement.

Held, that the plaintiff not having in his plaint relied on the jamabandies he was debarred from amending his pleadings in order to get out of the effect of his admission and that under Art. 1 of Sch. II of C. P. Tenancy Act it was not necessary that the dispossession should necessarily have been caused by the landlord and that the plaintiff's suit was undoubtedly barred under that article. (*Baker, J. C.*) RAGHUNATH SINGH *v.* GOBDOO. **80 I. C. 355 : A. I. R. 1925 Nag. 127.**

——— **Sch. II, Para. 1**—"*By any person*"—*If include trespasser.*

The words "by any person" in Sch. II, Para. 1, are not confined to a person claiming under the landlord and are wide enough to include a trespasser. (*Baker, J. C.*) MEGHRAJ *v.* RAMGOPAL. **78 I. C. 743 : 20 N. L. R. 103 : A. I. R. 1924 Nag. 249.**

CEREMONIES.

See (1) HINDU LAW—MARRIAGE.
(2) PRE-EMPTION.

CERTIFICATE.

See (1) C. P. CODE, O. 21, R. 93.
(2) EVIDENCE.
(3) EVIDENCE ACT.

CERTIFYING COUNSEL.—*See* LEGAL PRACTITIONER.

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See (1) B. T. ACT, S. 74.
(2) LANDLORD AND TENANT.
(3) MADRAS ESTATES LAND ACT, SS. 143, ETC.

CESSION OF TERRITORY.

See (1) ACT OF STATE.
(2) CROWN.
(3) GRANT.

CESTUI QUE TRUST.

See (1) TRUST.
(2) TRUSTS ACT.

CEYLON EVIDENCE ORDINANCE.

———*Ordinance is application of Evidence Act to Ceylon—Evidence Act, S.* 1.

The Evidence Ordinance of Ceylon is merely the application to Ceylon of the Indian Evidence Act, S. 1. (*Lord Darling.*) DR. VRASAPILLAI GABRIEL *v.* A. S. ELIATAMBY. **52 I. A. 372 : A. I. R. 1925 P. C. 229 (P. C.).**

———**S. 9**—*Intercepted correspondence is no evidence.*

Any intercepted correspondence between the respondents in divorce cases cannot be considered as evidence against the person to whom it is addressed for any purpose whatever. 10 B. L. R. 301 Ref. (*Lord Darling.*) DR. VRASAPILLAI GABRIEL *v.* A. S. ELIATAMBY. **52 I. A. 372 : A. I. R. 1925 P. C. 229 (P. C.).**

CHAIRMAN.

See (1) COMPANY.
(2) CORPORATION.

CHAMPERTY.—*See* CONTRACT ACT, S. 23.

———*Consideration—Legality—Test of.*

An agreement to finance a litigation in consideration of getting a share out of the property, if recovered, is not in all cases opposed to public policy. But if the value of the share to be got is out of all proportion to the money spent or to be spent for litigation, the bargain becomes unconscionable and he cannot get any relief. (*Moti Sagar, J.*) KESHO DAS *v.* TULSI DASS. **89 I. C 229.**

CHANDAWAND—*See* CUSTOM (PUNJAB).

CHARGE.

See (1) CR P. C. SS. 221—240.
(2) DEED—CONSTRUCTION.
(3) MORTGAGE.
(4) T. P. ACT, SS. 58, 95 AND 100.

CHARGE TO JURY—*See* CR. P.C., SS. 297—307.

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920).

———**S. 3**—*Persons not liable under S. 3 are not proper parties.*

In proceedings under the Act a person who has claims adversely to the trust and who is liable under S. 3 is not a proper party. (*Suhrawardy, J.*) SYED RAZA ALI *v.* KAZI NUR-UD-DIN AHMED. **78 I. C. 174 : A. I. R. 1925 Cal. 537.**

———**Ss. 10 and 11**—*Deposit of security—Order for deposit of specific sum of money is bad.*

Under S. 10 of Act XIV of 1920 the defendant has the option either to deposit money or to furnish security. The Court can order him to do one of these two things but cannot specify which he is to do. The security furnished under S. 10 of Act XIV of 1920, however relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot direct payment of this expenditure otherwise than in accordance with that section, and when security has been furnished the Court is incompetent to order execution against the surety. (*Brasher, J.*) MAHANT KRIPAL SINGH *v.* NARINJAN SINGH. **69 I. C. 658 : A. I. R. 1924 Lah. 408.**

CHARITABLE ENDOWMENTS ACT (1890).

———**S. 14** — *Charity — Managing Committee—Claim against—Suit against treasurer or* ex-officio *secretary.*

The administration of the property of a hospital was vested in the Treasurer of Charitable Endowments under S. 4 of the Charitable Endowments Act. Hence a suit could not be filed against the Secretary alone as representing the Committee. (*Daniels, J. C.*) AJODHIA NATH *v.* THE CITY MAGISTRATE OF LUCKNOW. **26 O. C. 333 : A. I. R. 1924 Oudh 128.**

CHARITY.

See (1) C. P. CODE, S. 92.
(2) CYPRESS.
(3) HINDU LAW—RELIGIOUS ENDOWMENT ; WILL.
(4) MAHOMEDAN LAW—WAKF.
(5) T. P. ACT, S. 14.
(6) WILL.

CHARTER ACT (24 AND 25 VIC., Ch. 104) *See* ALSO GOVERNMENT OF INDIA ACT. (1915), S. 107

CHARTER PARTY.

See (1) BILL OF LADING.
(2) CONTRACT

CHASTITY—*See* HINDU LAW—WIDOW.

CHAUKIDARI CHAKRAN LAND.

See BENGAL VILLAGE CHAUKIDARI ACT.

CHEATING—*See* PENAL CODE, SS. 415-420.

CHELAS.—*See* HINDU LAW—SUCCESSION.

CHEMICAL EXAMINERS REPORT—*See* CR. P. C., S. 510.

CHEQUE.

See (1) BANKER AND CUSTOMER.
(2) NEGOTIABLE INSTRUMENTS ACT.

CHIEF COURT—JURISDICTION.

See (1) JURISDICTION.
(2) C. P. CODE, S. 115.

CHILD.

See (1) CR. P. CODE, S. 488 (2).
(2) FATAL ACCIDENTS ACT.
(3) PENAL CODE, S. 317.

CHIN HILLS REGULATION.

———**Ss 4 and 12**—*An application under Section* 488, *Cr. Pro. Code is not of a civil nature—Sec.* 4, *Cl.* 1 *is qualified by Clauses* 4 *and* 5.

An application under S. 488, Cr. Pro. Code, cannot be regarded as a proceeding of a civil nature within Section 12 although the failure to maintain a child is not a criminal offence. Clause 1 of Sec. 4 is qualified by Clauses 4 & 5. The words "so far as regards persons other than Chins" in S. 4 (i) must be construed as meaning "so far as regards liabilities imposed by Law on persons other than Chins." (*MacColl, A.J.C.*) MAUNG *v.* MANG TORN. **4 U. B. R. 169 : 25 Cr. L. J. 111 : 76 I. C. 111 : A. I. R. 1925 Rang. 140 (1).**

CHIT FUND.

See also CONTRACT ACT, S. 30.

———Chit. Transaction when a lottery. (*Spencer and Madhavan Nair, JJ.*) VEERANNAN AMBALAM *v.* AYYACHI AMBALAM. **22 L. W. 772 : 1925 M. W. N. 857 : 49 M. L. J. 791.**

———Not a lottery—Pronote executed by a partner in favour of his co-partner whether enforceable.

CHIT FUND.

(*Kamesam and Venkatasubba Rao, JJ.*) SHANMUGA MUDALI *v.* KUMARASWAMY MUDALI. **48 Mad. 661 : 21 L. W. 403 : 1925 M. W. N. 655 : 90 I. C. 420 : A. I. R. 1925 Mad. 870.**

———*Bidder—Bond executed by in favour of stake-holder—Stipulations in, when a penalty—Default in payment of subsequent instalment—Right to enforce stipulations—Waiver.*

Stipulations in a bond executed by a bidder in favour of stake-holder are penal if they are so unreasonable that the parties never contemplated that they should take effect. Right to enforce stipulations revives, though once waived, in case of default in payment of subsequent instalment. (*Oldfield and Kamesam, JJ.*) VAITHINATHA AIYAR *v.* GOVINDASWAMI ODAYAR **42 M. L. J. 551 : (1922) M.W.N 203: 67 I.C. 995: A.I.R. 1922 Mad. 67.**

———Arrangement for payment of prize money every monthly casting lots illegal. (*Krishnan and Odgers, JJ.*) NAGAPPA PILLAI *v.* ARUNACHALAM CHETTY. **47 M. L. J. 876 : 85 I. C. 1016 : A. I. R. 1925 Mad. 281.**

CHOSE-IN-ACTION—*See* T. P. ACT, SS. 132 TO 137.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI of 1876).

———**Ss. 2, 3 and 21**—*Section 21 does not restrict S. 3.*

S. 21-B of the Chota Nagpur Encumbered Estates Act cannot restrict the provisions of S. 3 ; it refers to suits other than proceedings in regard to the debts or liabilities referred to in S. 2-A. (*Coutts and Mac pherson, JJ.*) BANSIDHAR DHAR *v.* TIKAIT HAR NARAYAN SINGH. **6 Pat. L. J. 685 : 65 I. C. 283 : 1922 P. H. C. C. 112 : A.I.R. 1923 Pat. 85.**

———**Ss. 2, 12**—*Mortgage suit against several persons—Suit barred as against one—Revival.*

Where in a mortgage suit against several defendants one defendant is struck out under S. 2 of the Act, the plaintiff, can revive his claim as against that person, if under S. 12 of the Act he is restored to possession and enjoyment of the estate. (*Das and Ross JJ.*) JYOTI PRASAD *v.* RANJIT SINGH. **63 I. C. 743: 6 Pat. L. J. 328 : 3 Pat L. T. 94 : 1922 P. H. C. C 152: A. I. R. 1922 Pat: 287 :**

———**Ss. 3, 12**—*Scope of—Protection of estate—Estate release of—Revival of suit.*

S. 3 of the Act gives a statutory protection to a person whose property is brought within the operation of the Act. S. 12 removes that protection when the proprietor is restored to possession and then all remedies by a creditor could be enforced against him. (*Das and Ross, JJ.*) JYOTI PRASAD *v.* RANJIT SINGH. **63 I. C. 743 : 6 Pat. L. J. 328 : 3 P. L. T. 94 : 1922 P. H. C. C. 152 : A. I. R. 1922 Pat. 287.**

———**S. 12 A**—*Sub. cl.* (1) (*b*) *and Sub-S.* (3)—*Property released on* 2-10-1915——*Mortgage on* 10-10-1915 *was held void.*

The estate was attached under the provisions of the Encumbered Estates Act: but it was released on the 2nd October 1915. On 10th October, 1915 a mortgage of the property was executed.

Held· that the mortgage was void under the provision of.Sub-S. (1), cl. (b) read with sub-S. 3 of S. 12-A of the Encumbered Estates Act. (*Das and Adami, JJ.*) LADA NARAIN SINGH *v.* GOBERDHAN DAS. **4 Pat. 478: 1925 P. H. C. C. 104: 86 I. C. 721: 6 P. L. T. 497: A. I. R. 1925 P. 470.**

———**Ss. 17 and 18**—*Contract made with Bengal Government does not bind the estate—Powers of manager under the Act discussed.*

Under the Chota-Nagpur Encumbered Estates Act the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the Manager is vested and alone vested with such powers. Therefore a contract for sale for part of such estate entered into with the Lieutenant-Governor of Bengal is neither binding on the Manager nor on the Estate. (*Lord Shah.*) HUKAM CHAND *v.* RAM BAHADUR SINGH. **47 M. L. J. 562 : 3 Pat 625: 34 M. L. T. 336: 80 I. C. 841: 21 L. W. 1: 5 Pat. L. T. 639: 51 I. A. 208: L. R. 5 P. C. 190: 1924 M. W. N. 710: 3 Pat. L. R. 157: 22 A. L J. 935: 29 C. W. N. 342: A. I. R. 1924 P. C. 156 (P. C.).**

CHOTA NAGPUR TENANCY ACT (VI OF 1908), S. 11 (4).

CHOTA NAGPUR TENANCY ACT, 1879.

———**S. 10 (b)**—*As amended by Bengal Act* 5 *of* 1903, *S.* 5 — *Section governs transfers between* 1st *January and* 4*th November* 1903.

Section 10 (b) contemplates that all transfers, whether made before the Act came into operation or not, provided they were made after the 1st of January 1903, would come within the provisions of this section; though the section is silent as regards the fate of the transfers between the 1st day of January and 4th November 1903, yet the meaning is plain and such transfers would come within the operation of the section, and would be rendered invalid by the operation of that section. Where such title is invalid, the title remains in the original tenant or his heirs. It is not permissible to add words to the section in order to construe it. The section must be construed as it stands. (*Ross and Kulwant Sahay, JJ.*) UDAI NATH SAHI DEO *v.* MAHABIR SAHU. **6 P. L. T. 500: 88 I. C, 1032 : A. I. R. 1925 Patna 741.**

———**(VI of 1908)** *Applicability of—Execution sale—Land valuation in sale proclamation—Effect of.*

Under the Act there is no provision requiring the court to assess the value of the property sought to be sold. There are no rules which require the parties to assess the value of the property sought to be sold. But where a low value is given by the decree-holder in the sale proclamation with the result that the property which was of very great value has been sold for an insignificant sum of money, there is a material irregularity which vitiates the sale. 20 A. 412 Relied on. (*Das and Ross, JJ.*) MAHARAJ KUMAR JAGAT MOHAN NATH SAHI DEO *v* JAIPAL SINGH. **3 Pat. 325: 5 Pat. L. T. 88: A. I. R. 1924 Pat. 524 (1).**

———**S. 4**—*Classification of tenants in, is not exhaustive—Tenure holders with* khunt katti rights, *position of.*

The enumeration of classes of tenants in S. 4 of the Act is not exhaustive and the fact that tenure holders had *khunt katti rights* did not exclude the possibility of their being temporary holders and liable to ejectment. (*Jwala Prasad and Ross, JJ.*) JEO LAL *v.* WAZIR NARAIN. **63 I. C. 764 : 2 Pat. L. T. 638.**

———**S. 5**—*Construction of lease—Tenure holder—Execution sale—Pattah—Raiya'.*

Where a pattah grant something more than the mere right to cultivate, in fact, where it grants all the rights save and except the right to receive the rent payable to the superior landlord, the grantee comes within the definition of tenure holder under S. 5 of the Chota Nagpur Tenancy Act. Therefore there is no bar to the sale of his interest in execution of a decree. (*Mullick and Jwala Prasad, JJ.*) BAIKUNTHA GORAIN *v.* GANGA PRASAD TRIVEDI. **70 I.C. 976 (Pat.).**

———**S. 11 (4)**—*Registration of tenure—Burden of proof.*

Under S. 11 of the Act, where the plaintiff's title

to recover rent is questioned on the ground of non-registration of his tenure, the *onus* is upon him to prove that he had got his name registered prior to the date of the suit, 23 I. C. 844 distinguished. 1917 Pat. 63, dissented from. (*Coutts and Macpherson, JJ.*) DUBEY SHIVA SAHAY RAM *v.* THAKUR SHIVA BHANJAN LAL.
2 Pat. L. T. 580: 64 I. C. 358: (1921) P. H. C. C. 355: 6 Pat. L. J. 677.

——S. 14—*Resumption, Successor—Meaning of.*

The word "successor" in Sec. 14 of the Act means not only a successor *de jure* but also a successor *de facto*. "Resumption" means an entry upon the land. Resumption is nothing more than an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter. (*Das and Ross, JJ.*) KAMAKHYA NARAIN SINGH *v.* SURAJ NATH MISRA. **3 Pat. 320: 5 Pat. L. T 85: 1924 P.H. C. C. 60: 2 Pat. L. R. 69: 78 I. C. 474: A. I. R. 1924 Pat. 449.**

——S. 14—*Resumption of Jagirs annuls all sub-tenures.*

Where a jagir is resumed in Chota Nagpur all the sub-tenures created by the previous jagirdar are annulled and become void. 27 C. 156, Foll. But land whereon a mine has been sunk is expressly exempted from annulment. A tenure holder cannot create a sub-tenure to exceed in duration the subsistence of his own tenure. The delivery of symbolical possession in respect of a large parganah consisting of several villages of a large area of *bakasht* and *zerait* lands, has the same binding force against the judgment-debtors and his representatives (*i. e.*) the under-tenure holders whose encumbrances stand annulled under S. 14 of the Act. (*Adami, J.*) MAHARAJA PRATAP UDAI NATH SAHI DEO *v.* BHAIAIN SUNDERBANS KOER. **3 Pat. L. T. 628 : 24 Cr. L. J. 279: 71 I. C. 999 : A. I R. 1923 Pat. 76.**

——Ss. 20 and 39—*Occupancy rights—Cultivation of lands in Theka does not confer.*

Mere cultivation of the lands comprised in a theka does not confer an occupancy or non-occupancy right on a thekadar if prior to the theka he had no connection with the lands. (*Adami and Bucknill, JJ.*) RAJNATH SINGH *v.* WAHID KHAN. **3 Pat. L. T. 107: A. I. R. 1922 Pat. 28.**

——S. 26—*The section does not invalidate agreements which were valid at their inception—Chota Nagpur Landlord and Tenant Procedure Act, S. 21.*

S. 26 of the Chota Nagpur Tenancy Act was not comtemplated to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of S. 21 of the Chota Nagpur Landlord and Tenant Procedure Act. (*Ross and Sen, JJ.*) BHOLE NATH MAJHI *v.* SHIVA PRASAD SINHA .
1924 P. H. C. C. 307 : 82 I. C. 988 : 6 P. L. T. 144: A. I. R. 1925 Pat. 297.

——S. 46—*Surrender of holding—Validity.*

A surrender by a tenant of his holding to the landlord for valuable consideration is valid and is not contrary to S. 46 of the Chota Nagpur Tenancy Act. (*Bucknill, J.*) BARIO SANTHAL *v.* FAKIR SANTHAL. **75 I. C. 601 : A. I. R. 1924 Pat. 793 (2).**

——S. 46 —*Mortgage — Subsequent surrender —Not invalid.*

The provisions contained in S. 72 of the Chota Nagpur Tenancy Act are similar to those contained in S. 86 of the Bengal Tenancy Act with this difference that the provisions contained in clause (6) of the Bengal Tenancy Act do not find a place in S. 72 of the Chota Nagpur Tenancy Act. A mortgage, as distinguished from a sale is an incumbrance, and where the mortgage as in the present case was secured by a registered instrument, if the Bengal Tenancy Act applied a surrender would have been invalid, unless it was made with the consent of the landlord and the mortgagee. That clause has been omitted from the Chota Nagpur Tenancy Act and the reason probably is that the legislature did not consider it desirable in the peculiar circumstances of the tenancy of the Chota Nagpur to recognise the right of transfer in the tenants with respect to their holdings. This intention is also to be gathered from the restrictions imposed upon the tenants under Chapter VIII of the Chota Nagpur Tenancy Act, namely, S. 46. A *raiyat* is not permitted to transfer his holding or a portion thereof by a mortgage or lease for a longer period than five years to sell or make a gift of his holding by any contract or agreement. Be that as it may, the absence of a provision similar to clause (6) of S. 86 of the Bengal Tenancy Act from S. 72 of the Chota Nagpur Tenancy Act leaves no power of surrender conferred by the section unhampered by the existence of any incumbrance over the property. It, therefore, logically follows that in spite of a prior sale or mortgage by a *raiyat* he is free to exercise his right of surrender of the holding in favour of the landlord, for under clause (2) of S. 46 no transfer by a raiyat of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing. A fraudulent surrender confers no right on the landlord. (*Jwala Prasad and Ross, JJ.*) RAM ORAON *v.* DOMAN KALAL. **2 Pat. 898 : 4 Pat. L. T. 562 : 1924 P. H. C. C. 117 : 75 I. C. 209 : A. I. R. 1924 Pat. 100.**

——Ss. 46 and 47—*Applicability of—Mortgage before the extension of the Act to Manbhum is not within the provisions of section.*

A mortgage bond of 4-10-09 executed in the District of Manbhum does not attract the provisions of Ss. 46 and 47 of the Chota-Nagpur Tenancy Act inasmuch as the Act had been extended to the District of Manbhum in December, 1909. The mere fact that an instalment of the mortgage money is payable after 1920 in pursuance of a compromise decree entered into after 1920 does not attract the provisions of Ss. 46 and 47 of the Act (*Mullick and Kulwant Sahay. JJ.*) ISHAN CHANDRA KUNDU *v.* NIL RATAN. **4 Pat. L. T. 311 : 1 Pat L. R. 217 : 1923 P. H. C C. 184 : 2 Pat. 538 : A. I. R. 1923 Pat. 375.**

——Ss. 64 (3) and 67—*Failure to eject*—'Korkardar'—*Occupancy rights, in* korkar *gives him lands.*

Where a landlord fails to eject a '*Korkardar*' within 2 years from the time when the latter commenced to convert lands into the '*Korkar*,' the consent of the landlord to the conversion will be presumed under S. 64 (3) of the Act and the *Korkardar* acquires under S. 67 an occupancy right in the lands from which he cannot be ejected. (*Coutts and Macpherson, JJ.*) PARASHRAM *v.* PRATAB.
63 I. C. 783 : 2 Pat. L. T. 635.

——S. 72—Surrender by raiyat—Effect on prior mortgages—B. T. Act, S. 86—Difference in the land. *See* S. 46. *supra.* RAM URAON *v.* DOMAN KALAR.
1924 P. H. C. C. 117 : A. I. R. 1924 Pat. 100.

——S. 74—*The section has no retrospective effect.*

S. 74 of the Chota Nagpur Tenancy Act apparently cannot possibly have retrospective effect inasmuch as it affects the substantive rights of parties. Therefore, all agreements entered into prior to the

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date when the Chota Nagpur Tenancy Act came into operation would obviously be beyond the scope of the section. The section contemplates only the case of a lease executed "with a view to the continuance of such occupation." (*Ross and Sen, JJ.*) BHOLA NATH MAJHI *v.* SHIVA PRASAD SINHA.

1924 P. H. C. C. 307 : 82 I. C. 988 : 6 P. L. T. 144 : A. I. R. 1925 Pat. 297.

——**S. 77**—*Chota Nagpur Landlord and Tenant Procedure Act (I of 1879), S. 6—Acquisition of occupancy rights in* ghatwali *lands.*

A person in possession of *ghatwali* lands for only ten years prior to the Chota Nagpur Tenancy Act of 1908 is not entitled to occupancy right under Act I of 1879 when Act VI of 1908 came into force S. 77 of Act VI of 1908 prevented the occupancy rights being acquired in respect of *ghatwali* land as soon as the Act came into force. (*Ross and Sen, JJ.*) LAL SINGH BHUNIJ *v.* KHRISTO KHULYA.

1924 P. H. C. C. 304 : 6 P. L. T. 534 : 84 I. C. 383 : A. I. R. 1925 Pat. 306.

——**S. 83**—*Record-of-Rights—Presumption of correctness—Rebuttal—Proceedings leading to final record are admissible.*

The pre-sumption of correctness about the entries in a Record-of-Rights arises only with the finally published Record-of-Rights, but to rebut the presumption the proceedings which resulted in the final record such as a draft record on what took place at the attestation stage are admissible in evidence. (*Miller, C. J. and Kulwant Sahay, J.*) CHAND RAY *v.* BHAGWATI CHARAN GOSWAMI.

2 Pat. 814 : A. I.R. 1924 Pat. 248.

——**S. 84 (3)**—*Entry in Record-of-Right—Evidentiary value of—Admission by Appellate Court.*

An entry in the Record-of-Rights has only a presumptive value under S. 84, cl. (3) and an Appellate Court is not bound to receive in evidence the Record of Right published after the institution and decision of the trial Court. (*Adami and Bucknill, JJ.*) RAJNATH SINGH *v.* WAHID KHAN.

3 Pat. L. T. 107 : A.I.R. 1922 Pat. 28.

——**Ss. 87 and 224 (2)**—*Decision, under is not a decree—Second appeal does not lie.*

Under S. 224 (2) there is no second appeal to the High Court from the decision of the Judicial Commissioner passed in an appeal from a decision under S. 87 of the Chota Nagpur Tenancy Act. A decision under S. 87 is not a decree and no appeal lies to the High Court under the C. P. Code. 5 Pat. L. J. 697 ; 16 C. W. N. 295, foll. ; 40 I. C. 891, not foll. (*Das and Ross, JJ.*) FOUJDAR SAHU *v.* NEMA BHOGTA.

4 U. P. L. R. (Pat.) 25 : 65 I. C. 285 : 6 Pat. L. J. 634 : 1922 P. H. C. C. 109 : A. I. R. 1923 Pat. 135.

——**Ss. 87 and 258**—*Decree of Revenue Court—Finality of*

Though S. 258 of the Chota Nagpur Tenancy Act has the object of securing to some extent finality for any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under *inter alia*, S. 87, the section does not say, as it might have done that no Court shall try any issue already decided by such a decree so as to bar a defendant in a suit brought against him from raising the issue. (*Miller, C. J. and Jwala Prasad, J.*) MAHARAJA PRATAP UDAINATH SAHI DEO *v.* GANESH NARAIN SAHAI.

70 I. C 232 : (1921) P. H. C. C. 369.

——**S. 88**—*Ijaradar—Lease of the entire mauza—Inclusion of* man *lands—Notice to quit—Necessity for.*

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Where the deft. got *ijara* of a mauza including the *man* lands from 1291-1296-F, and having also remained in possession from 1297 1305-F. he got another *ijara* from 1306-1313 and a fresh *ijara* from 1314-1323, and the plff. who was lessee of the entire *mauza* brought a suit in ejectment against the deft. who did not give up his possession over the *man* lands in which he set up a tenancy and claimed a notice to quit before ejectment.

Held, that the deft. could not claim any sort of tenancy in the *man* lands, and on the expiry of his *ijara* he was not entitled to retain possession of them, —he having neither an occupancy nor non-occupancy right therein ; and that no notice was required before the suit for ejectment was brought. The *man* lands having been held as remuneration for the collection of rents, when the period of the *ijara* expired, the *ijaradar* was bound to deliver up possession of the subject of the *ijara*, not only the lands held by the tenants but also the *man* lands. 16 C. L. J. 30, dist. (*Coutts and Macpherson, JJ.*) CHIGU CHAUDHURI *v.* SRIMABYA CHAND MONI DEBYA.

64 I. C. 695 : 2 Pat. L. T. 777.

——**Ss. 89, 83 and 258**—*Order under S. 89 of Attestation Officer can be revised by Settlement Officer and such revision bars a suit in Civil Court by reason of S. 258.*

All orders whether by *khanapuri* officers or by Attestation Officers have to be made during the preparation of the draft Record-of-Rights and all such orders passed before final publication of the Record-of-Rights are subject to revision under the provisions of S. 89 of the Act. The order of the Attestation Officer is an entry made in the draft Record-of-Rights within the meaning of S. 89 and therefore the Settlement Officer has jurisdiction to revise that entry under the provisions of S. 89 of the Act and, therefore, S. 258 which provides that such an order of revision will be final and shall have the force and effect of a decree of Civil Court, operates as a bar to the suit in Civil Court to set aside the order. (*Kulwant Sahay, J.*) GOBIND BAURI *v.* KRISTO SARDAR.

90 I. C. 489 : A. I. R. 1926 Pat. 64.

——**S. 132**—*Relates only to* Khuntkatti *lands.*

The provisions of S. 132 of the Chota Nagpur Tenancy Act relate only to *Khuntkatti* lands, and under S. 84 (3) a Record-of-Rights, is not a conclusive proof of any tenancy right. (*Adami and Bucknill, JJ.*) RAJNATH SINGH *v.* WAHID KHAN.

3 Pat. L. T. 107 : A. I. R. 1922 Pat. 28.

——**S. 139**—*Section contemplates cases where relationship of landlord and tenant is admitted—Where Tenancy is not admitted—Suit for possession of occupancy holding cannot be entertained by Deputy Commissioner but can be maintained in Civil Court.*

This section contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties ; it does not contemplate cases where there is a dispute as regards title. Where the relationship of landlord and tenant is not admitted, a suit for possession of occupancy holding on the ground of defendant's denial of the Tenancy right is not cognizable by the Deputy Commissioner, and S. 139 does not operate as a bar to the maintainability of such a suit in the Civil Court. (*Kulwant Sahay, J.*) GOBINDA BAURI *v.* KRISTO SARDAR.

90 I C. 489 : A. I. R. 1926 Pat. 64.

——**S. 139** *Suit to eject non-occupancy raiyats holding over does not lie in Civil Courts.*

A Deputy Commissioner, and not Civil Court can take into consideration a suit for ejectment of non-

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occupancy raiyats holding after the lease is over. (*Miller, C.J. and Foster, J.*) MT. JAGESHWAR KOER *v.* TILAKDHARI SINGH. **2 Pat. 746 : 5 P.L.T. 422 : 77 I.C. 587 : A.I.R. 1924 Pat. 267.**

——**S. 157**—Ex parte *decree.*

A decree which has actually been passed *ex parte* is an *ex parte* decree though it does not appear as such on its face. A rent decree passed against several tenants, one of whom only appeared and admitted plff.'s claim is *ex parte* against the other tenants. (*Coutts and Macpherson, JJ.*) SHYAM NARAIN SINGH *v.* SIWACHARAN SAHU. **2 Pat. L. T. 734 : 62 I. C. 886 : 1921 P. H. C. C. 345.**

——**S. 177**—*Suit for rent—Payment to third person—Plea of—Addition of parties.*

The law has been made more stringent than before by the amendment of S. 177. That section lays down that when the claim of a third person to receive rent is pleaded, that third person should be made a party to the suit and the plea decided in his presence. (*Jwala Prasad, J.*) PAGHALAN GAROIN *v.* CHOTU KUNJA. **2 Pat. L R. 24 : 79 I. C. 601 : 5 P.L. T. 614 : A. I. R. 1924 Pat. 522.**

——**S. 177**—*Applicability—Suit for rent—Plea of payment to third person.*

A right to receive rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who is under an obligation to pay it. Where therefore in a rent suit, the tenant pleads payment to a third person, and such third person does not intervene, S. 177 of the Act does not operate. 57 I. C. 28, foll. (*Coutts and Ross, JJ.*) GHURA MANJHI *v.* PROBODH CHANDRA MOZUMDAR.

3 Pat. L. T. 131 : 6 Pat. L. J. 603 : 64 I. C. 1003 : 1922 P. H.C.C. 54 : A. I. R. 1923 Pat. 55.

——**S. 177**—*Applicability—Suit for rent—Plea of payment to third party.*

S. 177 of the Act applies when a right is claimed by or on behalf of a third person. Where in a suit for rent, the defendant pleads payment to a third party but the right to receive payment is not claimed by or on behalf of such third party, S. 177 does not apply and the third party need not be impleaded in the action. (*Das and Adami, JJ.*) BALKI LAL *v.* SURENDRA NATH ROY. **1 Pat. 255 : 69 I. C. 858 : A. I. R. 1922 Pat. 480.**

——**S. 178 (3)**—*Power to extend time—Not exercisable after execution proceedings are closed—Order of extension is appealable.*

The power under S. 178 (3) of the Act to extend time for payment of arrears of rent can be exercised only so long as the whole decree is not satisfied and cannot be exercised after execution proceedings are closed. An order under S. 178 (3) of the Act relates to the execution of the decree and an appeal from that order lies to the Court in which an appeal from the decree lies. (*Jwala Prasad and Adami, JJ.*) BISHESWAR SAHU *v.* MUHAMMAD ZAINUL.

6 Pat. L. J. 300 : 63 I. C. 779 : 1921 P. H. C.C. 195.

——**S. 178, Cl. (3)**—*Scope.*

The powers vested in a Sub-divisional Officer under Sec. 178, Cls. 2 and 3 were exercisable only as long as the decree was not fully executed. (*Jwala Prasad and Adami, JJ.*) BISESWAR SAHU *v.* MD. ZAINUL RAHMAN. **3 P. L. T. 108: A. I. R. 1922 Pat. 29.**

——**S. 181**—*Rent decree—Execution—Limitation*

Under S. 181 the period of limitation for the execution of a rent decree runs from the date when the decree is signed. (*Dass and Ross, JJ.*) BISHUN LAL *v.* BINDESHWARI SAHU. **2 Pat. L. R. 7 : 78 I. C. 224 (1) : 5 Pat. L. T. 374 : A. I. R. 1924 Pat. 712.**

CHOTA NAGPUR TENANCY ACT (VI OF 1908), S. 217.

——**S. 212**—*Rent decree—Sale of holding—Purchaser of portion of holding—Deposit of decree amount—Withdrawal by landlord—Effect of.*

Under S. 212 a purchaser of a part of a holding deposited the whole of the decretal amount due to a landlord who had brought the holding to sale in execution of a rent decree. The landlord withdrew the amount but subsequently refused to recognise the person who deposited the amount as co-tenant of the holding. *Held* that having accepted the money, it was no longer open to him to say that he did not recognise the part purchaser as a co-tenant of the holding. (*Ross and Sen, JJ.*) RAJENDRA NARAIN SINGH DEO *v.* MAHESH CHANDRA CHATTERJI. **1924 P. H. C. C. 281 : A. I R. 1924 Pat. 669.**

——**S. 213**—*Execution of rent decree—Court cannot exempt portion of property from sale—Legality of—Right to set aside sale.*

Where in execution of a decree for arrears of rent, the holding of a tenant is put for sale, the Court has no power to order that a portion of the property shall be exempt from sale. Where therefore such an order was made and in pursuance of it a sale is held and the property is purchased by the decree-holder it is open to the judgment-debtor to bring a suit for setting aside the sale and his remedy is not confined to an application under S. 213 of the Chota Nagpur Tenancy Act. (*Coutts and Das JJ.*) KUMAR RAMYAD SINGH *v.* CHHEDIA BARHI. **4 Pat L. T. 439 : 1 Pat. 750 : 71 I. C. 345 : A I. R. 1923 Pat. 64.**

——**Ss. 213, 265 and 230**—*Rent sale—Application to set aside—Death of party—Substitution not applied for within time—Application abates.*

An application to set aside a sale held in pursuance of an application for the execution of a decree is not an application for execution of decree and order. Therefore, if on the death of the person who presents such application no steps are taken within the time allowed by law for substitution of names, the application abates. (*Das and Adami, JJ.*) LAL NILMONY NATH SAHI DEO *v.* MAHARAJ PROTAP UDAI NATH SAHI DEO. **1 Pat. L. R. 55 : 2 Pat. L. T. 367 : 1922 P. H. C. C. 363 : 2 Pat. 243 : A. I. R. 1923 Pat. 29.**

——**Ss. 214, 231 and 258**—*Scope of.*

Ss. 214 and 258 do not confer a right to sue to set aside a sale of a holding but only restrict the right under the general law to cases where there is fraud or want of jurisdiction. Consequently the period of limitation fixed by S. 231 will not apply to a suit under the general law to set aside a sale on the ground of fraud. (*Kulwant Sahay, J.*) RAMESWAR NARAIN SINGH *v.* MAHABIR PRASAD. **90 I. C. 325.**

——**Ss. 217, 227 and 228**—*Rent suit*—Ex parte *decree — Application to set aside—Dismissal — No appeal lies.*

A suit for rent was tried by the Dy. Collector as Dy. Commissioner and was decreed *ex parte*. An application to set aside the decree was dismissed in default and a further application for restoring the previous one was also dismissed. In an appeal to Dy. Commissioner who set aside the decree and remanded the suit for re-trial, *Held*, on revision that (1) the second application is incompetent not being provided for in the Act, (2) that no appeal lay to the Dy. Commissioner against the order dismissing the application and therefore the Dy. Commr.'s order setting aside the *ex parte* decree was invalid but could not be revised by Revenue authorities under S. 227 but the High Court

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could revise the order and set it aside, if illegal (*Mullick and Jwala Prasad, JJ.*) MUNSHI LAL CHAUDHARI *v.* NIDHI RAM DUTT.

60 I. C. 175 : 3 U. P. L. R. Pat. 13.

——— **Ss. 218 and 224**—*Suit for rent—Valuation at less than one hundred rupees—Title to land—Intervenor made a party.*

A suit for rent for less than Rs 100 was filed before a Deputy Collector. The defendants denied plaintiff's title and stated that they paid rents to a third party. Under S.177 the third party was made a party intervenor who claimed that he was entitled to claim rent and had received rents from defendants and right to the title to the land was gone into. *Held*, that an appeal lay to the Judicial Commissioner and not to the Deputy Commissioner from the decision of the Deputy Collector under Ss. 218 and 224. Where proceedings are taken under S. 177, the Court will not come to a decision as to the respective titles of parties to the suit. But if a question of title or interest in land has been determined by the Deputy Collector in such a proceeding an appeal will lie to the Judicial Commissioner and not to the Deputy Commissioner. (*Adami, J.*) JANKI CHOWDHURY *v.* SAMBODH KURMI.

1924 P. H. C C. 278 : A. I. R. 1924 Pat. 807.

——— **Ss. 224, 113, 178 and 215, Cl. (3).**

In a suit for arrears of rent and ejectment a decree was passed by S. D. O. in the terms of S. 178. After the ejectment the S. D. O. extended the time for payment. On the question, whether an appeal lay to the Judicial Commissioner held that the suit for rent and ejectment under S. 139, Cls. (3) and (4) and consequently the appeal from an order, such as was passed in the present case, lay to the Judicial Commissioner under S 224. *Simmaman* v. *Sham Charan Ohdar* (1922) 16 C. W. N. 1090 distinguished. (*Jwala Prasad and Adami, J.*) BISSESWAR SAHU *v.* MD. ZAINAL RAHMAN.

3 P. L. T. 108 : A. I. R. 1922 Pat. 29.

——— **S. 224**—*Suit for rent against several tenants—Appeal lies if amount sued for exceeds Rs.* 100.

In a collective suit for rent against several tenants, if the amount sued for exceeds Rs. 100, S 224 applies and an appeal lies to the Judicial Commissioner whether the amount used for in respect of a particular tenant does or does not exceed Rs. 100. (*Coutts and Macpherson, JJ.*) SHYAM NARAIN SINGH *v.* SIVCHARAN SAHU. **2 Pat. L. T. 734 : 62 I. C. 886 : 1921 P. H. C. C. 345.**

——— **S. 225**—*Transfer of appeal from rent suits of less than Rs.* 100 *to Judicial Commissioner—Second appeal lies.*

Five rent suits were instituted, one of the value of above Rs. 100 and the others below that value. Appeals were preferred to the Judicial Commissioner in the former, and the Deputy Commissioner in the latter, but under S. 225 of the Chota Nagpur Tenancy Act, the latter was transferred to the Judicial Commissioner. *Held*, the appeals having been transferred and decided, second appeals lay. (*Mullick and Atkinson, JJ.*) SADANAND TEVARI *v.* DEB NATH MANJHI. **1922 P. H. C. C. 154 : A. I. R. 1922 Pat. 184.**

——— **Ss. 227, 228, and 157**—*Default—Failure to appear—Minor.*

A claim for rent against two defendants was decreed on the admission of one of them. It appeared that the other defendant who was sued as major was a minor and that he not only did not appear but did not also admit liability. *Held*, the judgment was in fact passed against the minor by default for non-appearance

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within the meaning of S. 157 and that an order under S. 227 setting aside such a judgment was final under S. 228. A decree need not appear on the face of it to have been passed *ex-parte*. So as to be within S. 157, it is sufficient if it is shown to have actually been passed *ex parte*. (*Coutts and Macphersen, JJ.*) CHAUDHURI SHYAM *v.* SHIVCHARAN. **1 Pat. 32 : A. I. R. 1922 Pat 400.**

——— **S. 231**—*Suit to set aside an execution sale on the ground of fraud is governed not by S.* 231 *but by Limitation Act, Art.* 95.

S. 214 bars a suit to set aside a sale under Chapter 16 of the Act except on the ground of fraud or want of jurisdiction. S. 258 contains a provision similar to that in S. 214. These sections do not create right to institute a suit to set aside a sale for a holding made under the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale has not been created but has been taken away under the provisions of these sections. The right exists in a person to bring a suit to set aside a sale under the general law and it was taken away by these sections except the right to bring a suit on the ground of the fraud or want of jurisdiction. Therefore a suit to set aside an execution sale on the ground of fraud is not a suit instituted under the provisions of the Chota Nagpur Tenancy Act as contemplated by S. 231 of the Act; and consequently the period of limitation is not one provided by that section but the one provided by Art. 95 of the Limitation Act and the period of limitation is three years from the time when the fraud became known to the plaintiffs. (*Kulwant Sahay, J.*) RAMESWAR NARAYAN SINGH *v.* MAHABIR PRASAD.

90 I. C. 325 : A. I. R. 1926 Pat. 47.

——— **S. 240**—*Suit against several tenants collectively—Appeal by several, where lies.*

When a rent suit is brought against several tenants or sets of tenants collectively under S. 240 of the Chota Nagpur Tenancy Act, 1908, and the total amount sued for exceeds Rs. 100, the appeal lies to the Judicial Commissioner even though the appeal relates to a tenant or a set of tenants against whom the claim does not exceed Rs. 100. (*Coutts and Macpherson, JJ.*) CHAUDHURI SHYAM *v.* SHIVCHARAN

1 Pat. 32 : A. I. R. 1922 Pat. 400.

——— **S. 270**—*Scope of—Powers of Commissioner over subordinate officers.*

S. 270 provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors. If it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioner, has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise, then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same of course would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. (*Dawson Miller, C. J. and Das, J.*) TIKAIT GANESH NARAYAN SAHI *v.* CHANDU MISTRI.

1922 P. H. C. C. 3 : A. I. R. 1923 Pat. 83.

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——— *Pattah providing for contingencies in case of sale—No express authority to make transfer contained therein—Purchaser at regulation sale was held entitled to possession—Bengal Regulation (VIII of* 1819) *L,* 11 (1).

Where the pattah by which the Chowkidari Chak

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chakran lands were granted provided "if the land be transferred by gift, sale or succession, the costs whatever may be incurred by the Raj estate for making an enquiry as to who is the person in possession for the time or whatever loss may be suffered by the Raj estate on account of the name of the present occupier not being registered shall be paid by the present occupier without objection."

Held, that these provisions cannot be construed as giving an express authority to make a transfer as contemplated by the provisions of the second paragraph of Cl. (1) of S. 11 of the Registration Act, VIII of 1819 and therefore a purchaser of the Putni Taluk at the regulation sale was entitled to the chowkidari lands. (*Walmsley and B. B. Ghose, JJ.*) SRIMATI KUNCHAN BARANI DEBI *v.* UMESH CHANDRA ROY. **41 C. L. J. 295 : 87 I. C 529 : A. I. R. 1925 Cal. 807.**

——*Resumption does not affect patni rights.*

The patni right is not disturbed on resumption of Chowkidari Chakran Lands. A suit by the patnidar for recovery of possession of these lands against the zemindar is not barred by limitation, unless for more than 12 years prior to the date of the institution of suit the possession of the zemindar had become adverse to the plaintiff. (*Ghose and Panton, JJ.*) NAGENDRABALA CHAUDRANI *v.* BEJOY CHAND MAHATEB. **28 C. W. N. 114 : 74 I. C. 153 : 50 Cal. 377 : A. I. R. 1923 Cal. 734.**

——*Resumption—Rights of patnidar and Zamindar.*

Where chowkidari chakran lands comprised in a patni are resumed, the zemindar is not entitled to a share in the profits derived from the settlement of such lands by the patnidar. To allow him to share such profits would be to vary the terms of the patni. 44 C. 841 ; 46 C. 173, Foll. ; 34 C. L. J. 275, not Foll. (*Greaves and Ghose, JJ.*) NARPAT SINGH *v.* RAJA BUPENDRA NARAIN SINGH. **26 C. W. N. 243 : 36 C. L. J. 145 : 67 I .C. 440 : A. I. R. 1922 Cal. 473.**

——Putni *lease*—Zamindar *is entitled to rent.*

Where a *putni* lease, does not contain any condition as to rent payable for the *chakran* lands to the *Zamindar*, the latter is entitled to some rent. What the amount of such rent is, depends upon the facts of each case. (*Chatterjee and Newbould, JJ.*) CHAND

CIVIL AND REVENUE COURTS.

MAHATAB *v*, KRISHNA. **34 C. L. J. 275 : 66 I. C. 357 : A. I. R. 1922 Cal. 281.**

——*Resumption by Government—Settlement with zemindar—Effect.*

If chowkidari chakran lands are resumed by Government and are settled with a zemindar, all rights created in such lands by the Chowkidar in favour of third parties comes to an end, although if a transfer has been made by the zemindar before the resumption, the transferee becomes entitled to the benefits of the settlement with the zemindar. (*Mookerjee, A. C. J. and Fletcher, J.*) SATYENDRA NATH BANERJEE *v.* KRISHNASAKHA KAR. **35 C. L. J. 185 : 69 I. C. 67 : A. I. R. 1922 Cal. 193.**

——*No reservation in the contract—Lands included in the contract—Zemindar is entitled to additional rent.*

Where there was no reservation of the chowkidari chakran lands in the contract creating the putni, it must be held that the lands are iucluded in the putni and that the Zamindar is entitled to some rent in addition to the amount payable to the chowkidari fund. Case Law Reviewed. (*Chatterjee and Newbould, JJ.*) BIJOY CHAND MOHATAP *v.* KRISHNA CHANDRA MUKHERJEE. **66 I. C. 357 : 24 C. L. J. 275.**

CHUR.

See also (1) ALLUVION AND DILUVION.
(2) BENGAL ALLUVION AND DILUVION REGN. (XI OF 1825).
(3) FISHERY.
(4) LANDLORD AND TENANT.

CHUR LANDS.

See (1) ALLUVION AND DILUVION.
(2) LANDLORD AND TENANT.

CIRCUMSTANTIAL EVIDENCE.

See (1) CRIMINAL TRIAL.
(2) EVIDENCE.

CITATION.

See PRACTICE—PRECEDENTS.

CIVIL COURT.

See (1) C. P. CODE, S. 9.
(2) JURISDICTION.

CIVIL AND REVENUECOURTS.

See (1) AGRA TENANCY ACT.
(2) JURISDICTION.
(3) MADRAS ESTATES LAND ACT.

COMPARATIVE TABLE OF THE SECTIONS OF THE CIVIL PROCEDURE CODES OF 1882 AND 1908.

C. P. Code, 1882.	C. P. Code. 1908.	C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
1 ..	S 1	10 ..	Omitted	21 ..	Omitted
2 ..	S 2	11 ..	S. 9	22 ..	Ss 22, 23 (1)
3 ..	Ss. 154, 156, 157, 158	12 ..	S. 10	23 ..	Ss. 22, 23 (2)
4 ..	S 4	13 ..	S. 11	24 paras. 1 & 3	Ss. 22, 23 (3)
4-A ..	S 5	Expln. VI	S. 14	24 para. 2 ..	Omitted
5 ..	S 7	14 ..	S. 13	25 ..	S. 24
6 paras. (*c*) and (*d*)	Omitted.	15 ..	S. 15	26 ..	O 1, rr 1, 4 (*a*)
6 last para.	S 6	16 ..	S. 16	27 ..	O 1, r 10 (1)
7 ..	*Cf* S. 4	16-A ..	S. 18	28 ..	O 1, rr 3, 4 (*b*)
8 ..	S. 8	17 ..	S. 20	29 ..	O 1, r 6
9 ..	Omitted	18 ..	S. 19	30 ..	O 1, r 8 (1)
		19 ..	S. 17	31 ..	O 1, r 9
		20 ..	Omitted		

C. P. Code, 1882	C. P. Code, 1908.	C P. Code, 1882.	C P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
32 ..	O 1, rr 8 (2), 10 (2) (3), (5), 11	93 ..	O 48, r 1	157 ..	O 17, r 2
		94 ..	S 142 ; O 48, r 2	158 ..	O 17, r 3
33 ..	O 1, r 10 (4)	95 ..	S 143	159 ..	O 16, r 1
34 ..	O 1, r 13	96 ..	O 9, r 1	160 ..	O 16, r 2
35 ..	O 1, r 12	97 ..	O 9, r 2	161 ..	O 16, r 3
36 ..	O 3, r 1	98 ..	O 9, r 3	162 ..	O 16, r 4
37 ..	O 3, r 2	99 ..	O 9, r 4	163 ..	O 16, r 5
38 ..	O 3, r 3	99-A ..	O 9, r 5	164 ..	O 16, r 6
39 ..	O 3, r 4	100 ..	O 9, r 6	165 ..	O 16, r 7
40 ..	O 3, r 5	101 ..	O 9, r 7	166 ..	O 16, r 8
41 ..	O 3, r 6	102 ..	O 9, r 8	167 ..	O 16, r 9
42 ..	O 2, r 1	103 ..	O 9, r 9	168 ..	O 16, r 10
43 ..	O 2, r 2	104 ..	Omitted	169 ..	O 16, r 11
44 ..	O 2, rr 4, 5	105 ..	O 9, r 10	170 ..	O 16, r 12
45 ..	O 2, rr 3, 6	106 ..	O 9, r 11	171 ..	O 16, r 14
46 ..	*Cf* O 2, rr 6, 7	107 ..	O 9, r 12	172 ..	O 16, r 15
47 ..	*Cf* O 2, rr 6, 7	108 ..	O 9, r 13	173 ..	O 16, r 16
48 ..	S 26 ; O 4, r 1	109 ..	O 9, r 14	174, 175 ..	O 16, rr 10 to 13, 17, 18
49 ..	*Cf* S 137	110 ..	O 8, r 1		
50 ..	O 7, rr 1, 2, 4, 5, 6	111 ..	O 8, r 6		
		112 ..	O 8, r 9	176 ..	O 16, r 19
51 ..	O 6, rr 14, 15 (1).	113 ..	O 8, r 10	177 ..	O 16, r 20
52 ..	O 6, r 15 (2), (3)	114 ..	*Cf* O 6, r 2	178 ..	O 16, r 21
53 ..	O 6, r 17 ; *Cf* O 7, r 11	115 ..	*Cf* O 6, rr 14, 15	179 ..	O 18, rr 1, 2 (1)
		116 ..	*Cf* O 6, rr 16, 17	180 ..	O 18, rr 2 (2), (3), 3
54 ..	O 7, r 11 ; *Cf* O 6, r 18	117 ..	O 10, r 1		
		118 ..	O 10, r 2	181 ..	O 18, r 4
55 ..	O 7, r 12	119 ..	O 10, r 3	182 ..	O 18, r 5
56 ..	O 7, r 13	120 ..	O 10, r 4	183 ..	O 18, r 6
57 ..	O 7, r 10	121 ..	O 11, r 1	184 ..	O 18, r 8
58 ..	O 7, r 9	122 ..	*Cf* O 48, r 2	185 ..	O 18, [illegible]
58 last para.	O 4, r 2	123 ..	O 11, r 3	185-A first and second paras	S. 138
59 ..	O 7, r 14	124 ..	O 11, r 5		
60 ..	O 7, r 15	125 ..	O 11, r 6		
61 ..	O 7, r 16	126 ..	O 11, r 8	185-A third para	O 18, r 7
62 ..	O 7, r 17	127 ..	O 11, r 11		
63 ..	O 7, r 18	128 ..	O 12, r 2	186 ..	O 18 r 10
64 ..	S 27 ; O 5, r 1	129 ..	O 11, rr 12, 13	187 ..	O 18, r 11
65 ..	O 5, r 2	130 ..	O 11, r 14	188 ..	O 18, r 12
66 ..	O 5, r 3	131 ..	O 11, r 15	189 ..	O 18, r 13
67 ..	O 5, r 4	132 ..	O 11, r 17	190 ..	O 18, r 14
68 ..	O 5, r 5	133 ..	O 11, r 18 (1)	191 ..	O 18, r 15
69 ..	O 5, r 6	134 ..	O 11, r 18 (2)	192 ..	O 18, r 16
70 ..	O 5, r 7	135 ..	O 11, r 20	193 ..	O 18, r 17
71 ..	O 5, r 8	136 ..	O 11, r 21	194 ..	O 19, r 1
72 ..	O 5, r 9	137 ..	O 13, r 10	195 ..	O 19, r 2
73 ..	O 5, r 10	138 ..	O 13, r 1 (1)	196 ..	O 19, r 3
74 ..	O 5, r 11	139 ..	O 13, r 2	197 ..	S 139
75 ..	O 5, r 12	140 ..	O 13, rr 1 (2), 3	198 ..	S 33 ; O. 20, r 1
76 ..	O 5, r 13	141 ..	O 13, r 4	199 ..	O 20, r 2
77 ..	O 5, r 14	141-A ..	O 13, r 5	200, 201 ..	*Cf* S 137
78 ..	O 5, r 15	142 ..	O 13, r 6		
79 ..	O 5, r 16	142-A ..	O 13, r 7	202 ..	O 20, r 3
80 ..	O 5, r 17	143 ..	O 13, r 8	203 ..	O 20, r 4
81 ..	O 5, r 18	144 ..	O 13, r 9	204 ..	O 20, r 5
82 ..	O 5, rr 19, 20 (1)	145 ..	O 13, r 11	205 ..	O 20, r 7
83 ..	O 5 r 20 (2)	146 ..	O 14, rr 1, 2	206 first and second paras	O 20, r 6
84 ..	O 5, r 20 (3)	147 ..	O 14, r 3		
85 ..	S 28 ; O 5, rr 21, 23	148 ..	O 14, r 4	206 third para	S 152
		149 ..	O 14, r 5		
86 ..	O 5, r 22	150 ..	O 14, r 6	207 ..	O 20, r 9
87, 88 ..	O 5, rr 24, 29	151 ..	O 14, r 7	208 ..	O 20, r 10
		152 ..	O 15, r 1	209 ..	S 34
89 ..	O 5, r 25	153 ..	O 15, r 2	210 ..	O 20, r 11
90 ..	O 5, r 26	154 ..	O 15, r 3	211, 212 ..	S. 2 (12); O. 20, r 12
91 ..	O 5, r 30 (1) (2)	155 ..	O 15, r 4		
92 ..	O 5, r 30 (3)	156 ..	O 17, r 1	213 ..	O 20, r 13

C. P. Code, 1882.	C. P. Code, 1908.
214 ..	O 20, r 14
215 ..	O 20, r 15
215-A ..	O 20, r 16
216 ..	O 20, r 19
217 ..	O 20, r 20
218, 219, 220 ..	*Cf* S 35 (1), (2)
221 ..	O 20, r 6 (3)
222 ..	*Cf.* S 35 (3)
223, first para	S 38
223 second and third paras	S 39
223, fourth para	S 41
223, fifth para	O 21, r 4
223, sixth para	O 21, r 5
224 ..	O 21, r 6
225 ..	O 21, r 7
226 ..	O 21, r 8
227 ..	O 21, r 9
228 ..	S 42
229 ..	S 43
229-A ..	S 45
229-B ..	S 44
230 first para	O 21, r 10
230 second para	O 21, r 21
230 third and fourth paras	S 48
231 ..	O 21, r 15
232 ..	O 21, r 16
233 ..	S 49
234 ..	S 50
235 ..	O 21, r 11 (2)
236 ..	O 21, r 12
237 ..	O 21, r 13
238 ..	O 21, r 14
239 ..	O 21. r 26 (1), (2)
240 ..	O 21, r 26 (3)
241 ..	O 21, r 27
242 ..	O 21, r 28
243 ..	O 21, r 29
244 ..	S 47
245 ..	O 21, r 17
245-A ..	S 56
245-B ..	O 21, r 37
246 ..	O 21, r 18
247 ..	O 21, r 19
248 ..	O 21, r 22
249 ..	O 21, r 23
250 ..	O 21, r 24 (1)
251 ..	O 21, rr 24 (2), (3), 25 (1)
252 ..	S 52
253 ..	*Cf* S 145
254 ..	O 21, r 30
255 ..	O 21, r 42
256 ..	O 21, r 11 (1)
257 ..	O 21, r 1
257-A ..	Omitted
258 ..	O 21, r 2
259 ..	O 21, r 31

C. P. Code, 1882.	C. P. Code, 1908.
260 ..	O 21. r 32
261 ..	O 21, r 34 (1) to (4)
262 ..	O 21, r 34 (5)
263 ..	O 21, r 35
264 ..	O 21, r 36
265 ..	S 54
266 ..	S 60
267 ..	O 21, r 41
268 ..	O 21, r 46
269 ..	O 21, r 73
270 ..	O 21, r 51
271 ..	S 62
272 ..	O 21, r 52
273 ..	O 21, r 53
274 ..	O 21, r 54
275 ..	O 21, r 55
276 ..	S 64
277 ..	O 21, r 56
278 ..	O 21, r 58
279 ..	O 21, r 59
280 ..	O 21, r 60
281 ..	O 21, r 61
282 ..	O 21, r 62
283 ..	O 21, r 63
284 ..	O 21, r 64
285 ..	S 63
286 ..	O 21, r 65
287 ..	O 21, rr 66, 70
288 ..	Omitted
289 ..	O 21, r 67
290 ..	O 21, r 68
291 ..	O 21, r 69
292 ..	O 21, r 73
293 ..	O 21, r 71
294 ..	O 21, r 72
295 ..	S 73
296 ..	O 21, r 76
297 ..	O 21, r 77
298 ..	O 21, r 78
299 ..	O 21, r 79 (1)
300 ..	O 21, r 79 (2)
301 ..	O 21, r 79 (3)
302 ..	O 21, r 80
303 ..	O 21, r 81
304 ..	O 21, r 82
305 ..	O 21, r 83
306 ..	O 21, r 84
307 ..	O 21, r 85
308 ..	O 21, r 86
309 ..	O 21, r 87
310 ..	O 21, r 88
310-A ..	O 21, r 89
311 ..	O 21, r 90
312 ..	O 21, r 92
313 ..	O 21, r 91
314 ..	O 21, r 92
315 ..	O 21, r 93
316 ..	S 65 ; O 21, r 94
317 ..	S 66
318 ..	O 21, r 95
319 ..	O 21, r 96
320 ..	Ss 68, 70 and 71
321 ..	Sch III, Para 1
322 ..	Do 2
322-A ..	Do 3
322-B ..	Do 4

C. P. Code, 1882.	C. P. Code, 1908.
322-C ..	Sch III, Para. 5
322-D ..	Do 6
323 ..	Do 7
324 ..	Do 8
324-A ..	Do 9
325 ..	Do 10
325-A ..	Do 11
325-B ..	Do 12
325-C ..	Do 13
326 ..	S 72
327 ..	S 67
328 ..	O 21, r 97
329 ..	O 21, r 98
330 ..	O 21, r 98
331 ..	O 21, r 99
332 ..	O 21, rr 100, 101, 103
333 ..	O 21, r 102
334 ..	O 21, rr 97, 98
335 ..	O 21, rr 97, 99, 103
336 ..	S 55
337 ..	O 21, r 38
337-A ..	O 21, r 40
338 ..	S 57
339 ..	O 21, r 39 (1) to (4)
340 ..	O 21, r 39 (5)
341, 342 ..	S 58
343 ..	O 21, r 25
344—360-A ..	Repealed by the Provincial Insolvency Act, 1907
361 ..	O 22, r 1
362 ..	O 22, r 2
363 ..	O 22, r 3 (1)
364	Omitted
365 ..	O 22, r 3 (1)
366 ..	O 22, r 3 (2)
367 ..	O 22, r 5
368 ..	O 22, r 4
369 ..	O 22, r 7
370 ..	O 22, r 8
371 ..	O 22, r 9 (1) (2)
372 ..	O 22 r 10
372-A ..	O 22, r 9 (3)
373 ..	O 23, r 1
374 ..	O 23, r 2
375 ..	O 23, r 3
375-A ..	O 23, r 4
376 ..	O 24, r 1
377 ..	O 24, r 2
378 ..	O 24, r 3
379 ..	O 24, r 4
380 ..	O 25, r 1 (1), (3)
381 ..	O 25, r 2
382 ..	O 25, r 1 (2)
383 ..	O 26, r 1
384 ..	O 26, r 2
385 ..	O 26, r 3
386 ..	S 76 ; O 26, r 4
387 ..	O 26, r 5
388 ..	O 26, r 6
389 ..	O 26, r 7
390 ..	O 26, r 8

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code 1908	C. P. Code 1882.	C. P. Code, 1908.
391 ..	S 78	455 ..	O 32, r 14	521 ..	Sch II, Para 15
392 ..	O 26, r 9	456 ..	O 32, rr 3 (2), (3), 4 (4)	522 ..	Do 16
393 ..	O 26, r 10			523 ..	Do 17
394 ..	O 26, r 11	457 ..	O 32, r 4 (1)	524 ..	Do 19
395 ..	O 26, r 12	458 ..	O 32, r 11 (1)	525 ..	Do 20
396 ..	O 26, rr 13, 14	459 ..	O 32, r 11 (2)	526 ..	Do 21
397 ..	O 26, r 15	460 ..	Omitted	527 ..	O 36, r 1
398 ..	O 26, r 16	461 ..	O 32, r 6	528 ..	O 36, r 2
399 ..	O 26, r 17	462 ..	O 32, r 7	529 ..	O 36, r 3
400 ..	O 26, r 18	463 ..	O 32, r 15	530 ..	O 36, r 4
401 ..	O 33, r 1	464 ..	O 32, r 16	531 ..	O 36, r 5
402 ..	Omitted	465 ..	O 28, r 1	532 ..	O 37, r 2
403 ..	O 33, r 2	466 ..	O 28, r 2	533 ..	O 37, r3
404 ..	O 33, r 3	467 ..	O 28, r 3	534 ..	O 37, r 4
405 ..	O 33, r 5	468 ..	O 5, rr 28. 29	535 ..	O 37. r 5
406 ..	O 33, r 4	469 ..	Omitted	536 ..	O 37, r 6
407 ..	O 33, r 5	470 ..	S 88	537 ..	O 37, r 7
408 ..	O 33, r 6	471 ..	O 35, r 1	538 ..	O 37, r 1
409 ..	O 33, r 7	472 ..	O 35, r 2	539 ..	Ss 92 and 93
410 ..	O 33, r 8	473 ..	O 35, r 4	540 ..	S 96
411 ..	O 33, r 10	474 ..	O 35, r 5	541 ..	O 41, r 1
412 ..	O 33, r 11	475 ..	O 35, r 6	542 ..	O 41, r 2
413 ..	O 33, r 15	476 ..	O 35, r 3	543 ..	O 41, r 3
414 ..	O 33, r 9	477 } ..	O 38, r 1	544 ..	O 41, r 4
415 ..	O 33, r 16	478 }		545 ..	O 41, r 5
416 ..	S 79 ; O 27, r 1	479 ..	O 38, r 2	546 ..	O 41, r 6
417 ..	O 27, r 2	480 ..	O 38, r 3	547 ..	O 41, r 7
418 ..	O 27, r 3	481 ..	O 38, r 4	548 ..	O 41, r 9
419 ..	O 27, r 4	482 ..	Omitted.	549 ..	O 41, r 10
420 ..	O 27, r 5	483 } ..	O 38, r 5	550 ..	O 41, r 13
421 ..	O 27, r 6	484 } ..		551 ..	O 41, r 11
422 ..	O 5, r 27	485 ..	O 38, r 6	552 ..	O 42, r 12
423 ..	O 27, r 7	486 ..	O 38. r 7	553 ..	O 41, r 14
424 ..	S 80	487 ..	O 38, r 8	554 ..	O 41, r 15
425 ..	Omitted [Sec. 55 sub-sec. (2)]	488 ..	O 38, r 9	555 ..	O 41, r 16
		489 ..	O 38, r 10	556 ..	O 41, r 17
426 ..	O 27, r 8 (1)	490 ..	O 38, r 11	557 ..	O 41, r 18
427 ..	O 27, r 8 (2)	491 ..	S 95	558 ..	O 41, r 19
428 .	S 81	492 ..	O 39, r 1	559 ..	O 41, r 20
429 ..	S 82	493 ..	O 39, r 2	560 ..	O 41, r 21
430 ..	S 83	494 ..	O 39, r 3	561 ..	O 41, r 22
431 ..	S 84	495 ..	O 39, r 5	562 ..	O 41, r 23
432 ..	S 85	496 ..	O 39, r 4	564 ..	Omitted.
433 ..	S 86	497 ..	S 95	565 ..	O 41, r 24
434 ..	S 87	498 ..	O 39, r 6	566 ..	O 41, r 25
435 ..	O 29, r 1	499 ..	O 39, r 7	567 ..	O 41, r 26
436 ..	O 29, rr 2, 3	500 ..	O 39, r 8	568 ..	O 41, r 27
437 ..	O 31, r 1	501 ..	O 39, r 9	569 ..	O 41, r 28
438 ..	O 31, r 2	502 ..	O 39, r 10	570 ..	O 41, r 29
439 ..	O 31, r 3	503 ..	O 40, rr 1 to 3	571 ..	O 41, r 30
440 ..	O 32, rr 1, 4 (2)	504 ..	O 40, r 5	572 } ..	*Cf* S 135
441 ..	O 32, r 5 (1)	505 ..	Omitted	573 }	
442 ..	O 32, r 2	506 ..	Sch II, Para 1	574 ..	O 41, r 31
443 ..	O 32, rr 3 (1), 4 (2)	507 ..	Do 2	575 ..	S 98
		508 ..	Do 3	576 ..	O 41. r 34
444 ..	O 32, r 5 (2)	509 ..	Do 4	577 ..	O 41, r 32
445 ..	O 32, r 4 (1)	510 ..	Do 5	578 ..	S 99
446 ..	O 32, r 9	511 ..	Do 5	579 ..	O 41, r 35
447 ..	O 32, r 8	512 ..	Do 6	580 ..	O 41, r 36
448 ..	O 32, r 10 (1)	513 ..	Do 7	581 ..	O 41, r 37
449 ..	O 32, r 10 (2)	514 ..	Do 8	582 ..	S 107 (2) ; O 22, r 11
450 ..	O 32, r 12 (1)	515 ..	Do 9		
451 ..	O 32, r 12 (2), (3)	516 ..	Do 10	582-A ..	*Cf* S 146
		517 ..	Do 11	583 ..	*Cf* S 144 (1)
452 ..	O 32, r 12 (4)	518 ..	Do 12	584 ..	*Cf* S 100
453 ..	O 33, r 12 (5)	519 ..	Do 13	585 ..	*Cf* S 101
454 ..	O 32, r 13	520 ..	Do 14	586 ..	S 102

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code 1908.
587 ..	S 108 ; O 42, r 1	610 ..	O 45, r 15	636 ..	O 49, r 1
588 ..	S 104 ; O 43, r 1	611 ..	O 45, r 16	637 ..	S 128 (2) (i)
589 ..	S 106	612 to 615 ..	Omitted	638 ..	S 120 (1) ; O 49, r 3
590 ..	S 108 ; O 43, r 2	616 ..	S 112	639 ..	S 120 (2)
591 ..	S 105	617 ..	S 113 ; O 46, r 1	640 ..	S 132
592 ..	O 44, r 1	618 ..	O 46, r 2	641 ..	S 133
593 ..	O 44, r 2	619 ..	O 46, r 3	642 ..	S 135
594 ..	O 45, r 1	620 ..	O 46, r 4	643 ..	Omitted
595 ..	S 109	621 ..	O 46, r 5	644 ..	O 48, r 4
596 ..	S 110	622 ..	S 115	645 ..	S 137
597 ..	S 111	623 ..	S 114 ; O 47, r 1	645-A ..	S 140
598 ..	O 45, r 2	624 ..	O 47, r 1	646 ..	Omitted
599 ..	Omitted	625 ..	O 47, r 3	646-A ..	O 46, r 6
600 ..	O 45, r 3	626 ..	O 47, r 4	646-B ..	O 46, r 7
601 ..	O 45, r 6	627 ..	O 47, r 5	647 ..	S 141
602 ..	O 45, r 7	628 ..	O 47, r 6	648 ..	S 136
603 ..	O 45, r 8	629 ..	O 47, rr 7, 9	649 ..	Ss 36, 37
604 ..	O 45, r 9	630 ..	O 47, r 8	650 ..	Omitted.
605 ..	O 45, r 10	631 ..	S 116	650-A ..	S 29
606 ..	O 45, r 11	632 ..	S 117	652 ..	Ss 122, 129, 130, and 131
607 ..	O 45, r 12	633 ..	S 122	653 ..	S 59
608 ..	O 45, r 13	634 ..	S 118		
609 ..	O 45, r 14	635 ..	S 119		

CIVIL PROCEDURE CODE (XIV OF 1882).

——Ss. 211 and 212—*Civil Procedure Code*, 1908, *O.* 20, *R.* 12 *and O.* 22, *R.* 12—*Proceeding for ascertainment of mesne profits—Decree under Code of* 1882 *—Proceeding must be held in execution—O.* 22, *R.* 12 *applies.*

Under the Code of 1882, a proceeding for the ascertainment of mesne profits is a proceeding in execution. Where the decree had been passed under the Code of 1882 :

Held, that the proceedings for the ascertainment of mesne profits must be held in execution and not in the suit and that therefore O. 22, R. 12 applied and substitution was not necessary. (*Lord Shaw.*) KEDARNATH GOENKA *v.* ANANT PRASAD SINGH.

48 M. L. J. 482 : 4 Pat 507 : 52 I. A. 188 : (1925) M. W. N. 313 : 2 O. W. N. 355 : 41 C. L. J. 339 : 6 P. L. T. 366 : 88 I. C. 482 : 27 Bom. L. R. 848 : 22 L. W. 7 : A. I. R. 1925 P. C. 117 (P. C.).

——S. 211—*Mesne profits—Proceeding for ascertainment of, was one in execution.*

A proceeding for the ascertainment of mesne profits was a proceeding in execution and not a proceeding in the suit under the old Code of 1882. (*Das and Ross, JJ.*) KEDAR NATH GOENKA *v.* TARINI PRASAD SINGH. **2 Pat. L. T. 245 : 61 I. C. 4 : 1921 P. H. C. C. 158.**

——S. 317—*Suit for confirmation of possession after declaration that the purchase at the court auction was benami for the plaintiff.*

A suit for *confirmation of possession* after declaration that the purchase at the Court auction was benami for the plaintiff, is barred by S. 317 of the C.P. Code. The fact that the plaintiff is in possession and asks only for confirmation of his possession does not take it out of the section. The same will be the case under S. 66 of the new Code also. (*Cuming and Chakravarthi, JJ.*) UMASASI DEB *v.* AKRUR CHANDRA MAZUMDAR. **30 C. W. N. 160.**

——S. 335—*Execution of decree—Sale—Obstruction by person not party to decree—Order directing removal of obstruction, finality of.*

CIVIL PROCEDURE CODE (XIV OF 1882), S. 443.

Where in execution of a decree to which the defendant was not a party his property was sold and purchased by the plaintiff and on the latter attempting to take possession was obstructed by the defendant, and the Court after notice to the defendant directed the removal of obstruction, *held*, that the order was final and binding on the defendant if he did not contest the same by means of a suit. (*Shah and Crump, JJ.*) BHIMAJI RAMCHANDRA *v.* BHIMABAI HIROJI.

23 Bom. L. R. 62 : 61 I. C. 764 : 45 Bom. 573.

——S. 354—*Insolvent's property—Punjab Laws Act.*

Where proceedings are taken under the C. P. Code of 1882 the whole property of the insolvent vests in the Receiver under S. 354 of the Code whether it be mentioned in the application or not and the Punjab Laws Act is inapplicable. (*Broadway and Willerforce, JJ.*) BALKISHEN DAS *v.* DEVI SARAN.

4 L. L. J. 164 : A. I. R. 1922 Lah. 103.

——Ss. 375 and 462—*Guardian appointed by Court of Wards—Compromise by leave of Court not obtained—Compromise, if valid.*

A guardian appointed by the Court of Wards under any local law, on behalf of infants, has power to compromise proceedings in which the infants are defendants, though he entered into it without leave of Court. Under S. 375 of the Code, the Court was bound to register the agreement that had been come to. (*Lord Buckmaster.*) NAKIMO DEWANI *v.* PEMBA DICHEN. **40 M. L. J. 201 : 48 Cal. 469 : 48 I. A. 27 : 19 A. L. J. 171 : (1921) M. W. N. 115 : 29 M. L. T. 202 : 33 C. L. J. 211 : 59 I. C. 911 : 23 Bom. L. R. 698 : 25 C. W. N. 797 : 14 L W. 253 (P. C.) [On appeal from 37 I. C. 971.]**

——S. 443 — *Guardian*-ad-litem — *Consent — Presumption.*

Where a certificated guardian was proposed for appointment as guardian-*ad-litem*, the Court might, under the old Code, unless he declines to accept it, presume his consent. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BHIBHABATI DEBI.

66 I. C. 433 (2) : 34 C. L. J. 302.

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C. P. CODE (V OF 1908),

——— *Interpretation—Rules as to appeals—Letters Patent Appeal.*

The Code provides generally for the mode in which the HighCourts should exercise their jurisdiction,except the Original Civil Jurisdiction. The Orders and Rules apply to High Courts unless the Code contains something inconsistent with them. They apply to the powers exercisable under Letters Patent. However they do not restrict the Letters Patent Appeal. The distinction between the rules taking away the existing right of appeal and the rules which recognise the rights but prescribe the procedure of the Appellate Court has been overlooked in 25 Mad. 555 and 27 Mad. 121. (*Lord Sumner.*) SABITRI THAKURAIN *v.* SAVI. **48 Cal. 481 : 48 I. A. 76 : 40 M. L. J. 308 : (1921) M. W. N. 159 : 19 A. L. J. 281 : 33 C. L. J. 307 : 25 C. W. N. 557 : 23 Bom. L. R. 681 : 60 I. C. 274 : 3 U. P. L. R. (P. C.) 57 : 14 L. W. 362 (P. C.).**

——— *Code applies to proceedings under Arbitration Act.*

The provisions as to arbitration as laid down in the Civ. Pro. Code do apply to proceedings under the Arbitration. Act of 1899 (*Mukerjee and Dalal, JJ.*) FIRM KACHAURI MAL KALYAN MAL *v.* FIRM WALI MUHAMMAD ABDUL LATIF. **22 A. L. J. 1031 : L.R. 5 A. (Civ.) 756: 47 All. 179: A.I.R. 1925 All. 154**

——— *Applicability.*

The provisions of the Code of Civil Procedure as to cross-objections do not apply to appeals under the Letters Patent. 21 All. 297 Foll. (*Mears, C. J, and Banerji, J.*) MT. PURNA KOER *v.* MANGAT RAI. **A. I. R. 1922 All. 55 (1)**

——— *Limitation Act* (1908)—*Both should be interpreted together.*

Das, J.:—Code of Civil Procedure and the Indian Limitation Act are the two great procedural Codes in India and they were amended in the same year and were to come into operation on the same day. They are statutes in *pari materia* and are to be taken together as forming one system, and as interpreting and enforcing each other. (1784) 1 Leach, C. C. (*Das, Ross and Kulwant Sahay, JJ.*) BAL MUKUND MARWADI *v.* BASANT KUMARI DASI. **3 Pat. 371 : 5 P. L. T. 145 : 1924 P. H. C. C. 33 . 78 I C. 200 : A. I. R. 1925 P 1 (F. B.)**

——— *Whether Judge vested with power to determine issue of law first—O.* 14, *R.* 2 *and O.* 15, *R.* 3—*Scope of.*

The Code of Civil Procedure has vested the judge with power to determine whether issues of law should be tried first. He must decide himself whether circumstances exist in each particular case calling for the exercise of that power. Both O. 14, R. 2 and O. 15, R. 3 give ample power to the Judge to try issue of

C. P. CODE (V OF 1908), S. 2.

law first. The power under O. 14, R. 2 can be exercised at the issue stage but O. 15, R. 3 gives power to the judge to proceed to determine issues of law at a stage subsequent to the issue stage. The subordinate Courts should not try piecemeal but it is a matter of judicial discretion. (*Das and Adami, JJ.*) LACHMI NARAIN *v.* RUP NARAIN. **85 I. C. 29 : 2 Pat. L. R. (Civil) 303.**

——— "*Hearing,*"—*Meaning of.*

The word "Hearing" is not defined in the Code and is used in different rules with a view to state the different purposes for which a date for hearing is fixed. (*Jwala Prasad, A.C.J. and Das, J.*) ABDUL RAHMAN *v.* SHIB LAL SAHU. **63 I.C. 570: 2 Pat.L.T. 572.**

——— **S. 2 (2), (14)**—*Decree and order; distinction between—Orders in execution proceedings amounting to decrees under the Code, if decrees under the Tenancy Act.*

In the course of execution proceedings under the Tenancy Act an order was passed falling under S. 47 (3) of the Civil Procedure Code. Such an order would be a decree under the definition given in that Code and the question at issue was whether it would be appealable to the District Judge under S. 177 of the Tenancy Act or would be subject to revision by the Revenue Court.

Held, following the decision by the High Court of Allahabad in *Zohra* v. *Mangu Lal* that in matters falling under the Tenancy Act a broad distinction must be made between orders and decrees, and even if orders in execution would be technically decrees under the Civil Procedure Code, this does not make them decrees under the Tenancy Act, an appeal against which would lie to the District Judge. (*Mc Nair, S. M. and Pim, J.M.*) SAHEB SINGH *v.* KUNWAR LAKSHMI RAJ SINGH. **L.R. 6 All. 245 (Rev.).**

——— **Ss. 2 (2), 12 and 152**—*Decree—Order substituting names—Appeal—Amendment.*

Pending an appeal, the appellant had made an application for substitution of names. But the commissioner disposed of the appeal without passing any order on the application. Subsequently on the matter being brought to his notice he ordered that the decree may be corrected without prejudice to any objection which might be made to the application. *Held*, that the order of the Commissioner was not a decree within S. 2 (2), C.P. Code, and was not therefore appealable to the Board of Revenue. (*Burn, J. M.*) SURAJ MAL *v.* KEWAL. **L. R. 5 All. 269 (Rev.)**

——— **Ss. 2 and 97**—*Deccan Agriculturists Relief Act.*

A finding on an issue whether a party to a suit was an agriculturist, preliminary to the taking of accounts under the provisions of the Deccan Agriculturists Act, is not a preliminary decree within the meaning of Ss. 2

and 97 of the C. P. Code. (*Macleod, C. J. and Kanga, J.*) JAISING RAO *v.* VENKAT RAO.
70 I. C. 728 : A. I. R. 1922 Bom. 336 (2).

——**Ss. 2, 47 and 144**—Bona fide *auction-purchaser is not a party—Order refusing restitution against him is not appealable.*

A *bona fide* auction purchaser for value is not a party to the suit within the meaning of S. 2 or S. 47 of the Civil Procedure Code and an order refusing restitution against him is not a decree and therefore not appealable. (*Moti Sagar, J.*) MT. ASGHARI BEGUM *v.* IRSHAD-UD-DIN. **79 I. C. 57 : A.I.R. 1925 Lah. 176.**

——**S. 2, O. 41, R. 19**—*Appeal—Rejection for failure to pay deficit Court-fee—Decree and not dismissal for default.*

When the appellant fails to put in the deficit Court-fee on the memorandum of appeal, the order dismissing an appeal for default is an order rejecting the memorandum of appeal. It is therefore a 'decree' under S. 2 (2) and does not fall under O. 41, R. 19 applicable to cases under O. 41, Rr. 11 (2), 17 or 18. (*Dawson Miller, C.J. and Coutts, J.*) SURAJ PAL PANDEY *v.* UTTIM PANDEY. **3 P.L.T. 117 : A.I.R. 1922 Pat. 281.**

——**S. 2 (2)**—*No appeal—Expiry of time for appeal makes decree final.*

Where there is a decree but there is no appeal, the decree becomes final on the date on which time for filing an appeal expires. (1908) A. W. N. 13 Ref. to. (*Mukerji, J.*) FAZAL HUSAIN *v.* FAZALUDDIN.
47 All. 533 : 23 A. L. J. 215 : 86 I. C. 957 : A. I. R. 1925 All. 291 (2).

——**S. 2 (2)**—"*Decree*" *includes Revenue Court decree.*

A decree may include not only a Civil Court decree but also a Revenue Court decree. (*Sulaiman and Mukerji, JJ.*) FATEH LAL *v.* SHER SINGH.
L.R. 6 A. (Civ.) 63: 85 I.C. 660: A.I.R. 1925 All. 264.

——**S. 2 (2) and O. 21, R. 71**—*Execution sale—Non-payment of purchase money—Re-sale—Application for Recovery of deficiency—Adjudication is a decree.*

An order in proceedings taken by the judgment-debtor for recovery of the loss caused by a re-sale owing to the default of the prior purchaser in depositing the purchase money is a decree and is appealable as such. 1 A. 181 ; 18 M. 439 ; 25 C. 99 ; 30 B. 329, Foll. 14 A. 201 overruled. (*Piggott, Walsh and Lindsay, JJ.*) SITA RAM *v.* JANKI RAM. **44 A. 266 : 65 I. C. 813 : 20 A.L.J. 105 : L. R. 3 A. 117 : A. I. R. 1922 All. 200 (F. B.).**

——**S. 2, cl. (2)**—*Order of abatement is not a decree.*

An order declaring that an appeal has abated is not a decree and is therefore not appealable. 17 A. 172 : 12 A.L.J. 1113, Foll. (*Ryves and Gokul Prasad, JJ.*) MAHOMED ISMAIL *v.* MANOHAR DAS.
20 A. L. J. 214 : 65 I. C. 838 : L. R. 3 A. 224 : A. I. R. 1922 All. 113 (1).

——**S. 2 (2)**—*Decree—Decision on cardinal issue in the case—Remand—Appeal.*

When one issue is settled and the case is remanded to a lower Court for the determination of another issue, the order is a decree and is appealable. (*Fremantle, S. M.*) UMRAI *v.* RAJA DURGA NARAIN SINGH.
L. R. 5 A. 156 (Rev.).

——**Ss. 2 (2), 96 and 97**—*Preliminary point decided first but no formal preliminary decree drawn up—No appeal lies.*

The drawing up of a decree or the omission to do so must be taken as conclusive on the question whether the Court has in fact passed, or not passed, a preliminary decree and this is the only proper test to apply in considering whether the provisions of S. 97 are or are not applicable. 37 B. 480 and 16 Bom. L. R. 67, Ref. Ss. 2 and 96 of the Code, upon which alone the right of appeal is based, must be construed with reference to S. 33, which distinguishes between a judgment and decree and O. 20, R. 6, which prescribes the contents of a decree. If no such formal document has been drawn up, then, no decree has been passed from which an appeal can be brought under S. 96 or S. 97. (*Fawcett and Pratt, JJ.*) VAMANACHARYA *v.* GOVIND. **25 Bom. L. R. 826 : 76 I. C. 763 and 1014 : A. I. R. 1924 Bom. 33.**

——**Ss. 2 (2), 97**—*Preliminary decree—Decision that a person is an agriculturist—Appeal lies.*

Decision that a person is an agriculturist in the preliminary decree is appealable. (*Macleod, C.J. and Coyajee, J.*) SUNDAR BAI *v.* DWARKADAS.
70 I. C. 768 : A. I. R. 1922 Bom. 336 (1).

——**S. 2 (2)**—*Finding that a party is agriculturist, is not a decree.*

The finding that a party is an agriculturist is not an adjudication resulting in a decree and hence no appeal lies from such finding although the plaint may be returned for presenting to the proper Court. A Judge should not therefore entertain an application to draw up such a finding in the form of a decree. (*Macleod, C.J. and Fawcett, J.*) DATTATREYA PURUSHOTTAM *v.* RADHABAI BALKRISHNA. **45 Bom. 627 : 60 I. C. 885 : 23 Bom. L. R. 92.**

——**S. 2 (2)**—*Scope.*

There is no distinction between a decree in a suit and a decree in a proceeding under S. 144. (*Chatterjee and Panton, JJ.*) ADWAITA CHANDRA SAHA *v.* THE CHITTAGONG CO. **28 C.W.N. 988: A.I.R. 1925 Cal. 102.**

——**S. 2 (2)**—*Every order of dismissal for default is not excluded from 'decree'—Words of Code should receive plain and obvious meaning.*

Per *Mukerjee, J.*—*Obiter.* The whole object of defining a "decree" in the Code appears to be to classify orders in order to determine whether an appeal or in certain cases a second appeal lies therefrom. Apart from that object this definition is of no value. It is not possible to reconcile either in principle or in theory why an order rejecting a plaint should stand on a different footing from orders of dismissal for default and yet one is a decree and the other is not. It is true that an order of rejection of a plaint has been expressly included in the definition of a "decree" but the legislature has included it and no analogy can be drawn therefrom. The question whether an adjudication is an order or decree is to be tested not by general principles but by the expressions of the Code and those words are to be construed in their plain and obvious sense ; only such orders of dismissal for default as are treated as such by the Code itself are excluded from the definition. 23 All. 152 (P. C.) Ref. (*Walmsley and M. N. Mukerji, JJ.*) KALIMUDDIN AHAMED *v.* ESUBAKUDDIN. **51 Cal. 715 : 39 C. L. J 399 : 28 C. W. N. 795 : 83 I. C. 220 : A. I. R. 1924 Cal. 830.**

——**S. 2 (2)**—*Suit for accounts—Preliminary decree—If there can be more than one—Appeal.*

Where in a suit for accounts, the Court after passing a preliminary decree for accounts passed a further order fixing the mode of taking accounts and the period for which it should be done, the latter is also a preliminary decree and hence an appeal lies therefrom. The legislature contemplated ordinarily only one preliminary decree in a case but there is nothing illegal in passing more than one in appropriate cases. Case-law reviewed. (*Mookerjee and Rankin, JJ.*) RAJA PEARY MOHAN MOOKERJEE *v.* MANOHAR MOOKERJEE.
27 C. W. N. 989 : 38 C. L. J. 255 : 74 I. C. 373 : A. I. R. 1924 Cal. 160.

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——S. 2 (2)—*Order declaring that a party is not liable for mesne profits is a decree.*

An order of Court finally deciding that a particular defendant was not liable for mesne profits is a decree and is appealable. 35 A. 159 ; 20 C.L.J. 476, 480, Ref. (*Newbould, J.*) NAIMUDDI SARKAR *v.* IMAMI MONDAL. **A. I. R. 1923 Cal. 308.**

——S. 2 (2)—'*Decree' includes consent decree.*

A compromise or a consent decree is a decree within S. 2 (2) of the Code. (*Mookerjee and Buckland, JJ.*) BHARAT RAMANUJA *v.* SRINATH CHANDRA. **49 Cal 220 : 34 C. L. J. 96 : 66 I. C. 273 (2) : A. I. R. 1922 Cal. 358.**

——S. 2 (2)—*Order rejecting application to make preliminary mortgage decree final is a decree.*

Order rejecting application to make a preliminary mortgage decree final on the ground that the suit had abated owing to the death of the sole judgment-debtor, is a decree and as such is open to appeal and also a second appeal. (*Newbould and Buckland, JJ.*) BHUTNATH *v.* TARA CHAND. **33 C. L. J. 115 : 59 I. C. 177 : 25 C. W. N. 595.**

——S. 2 (2), O. 22, R. 9 and O. 43, R. 1 (k)—*Suit abating against one of the defendants—Application for setting aside abatement—Court dismissing application for setting aside abatement and holding that consequently suit abated* in toto *in special circumstances of the case—Former adjudication is appealable under O. 43, R. 1 (k) and latter adjudication is appealable as a decree.*

The plaintiff instituted a suit against several defendants, one of whom died during the pendency of the suit. As the plaintiff took no steps to bring the legal representatives of the deceased defendant on to the record within the prescribed period the Court made an order declaring that the suit had abated as against that defendant. Thereupon the plaintiff made an application under O. 22, R. 9, C.P. Code, for an order to set aside the abatement. On this application, the Court, held that the plaintiff had failed to establish any sufficient cause preventing him from continuing the suit and that his application under O. 22, r. 9. C. P. Code. must therefore be dismissed and that the partial abatement caused by the plaintiff's failure to implead the legal representatives of the deceased defendant had in the special circumstances of the case resulted in the abatement of the suit *in toto*, *Held*, that the Trial Court's order in so far as it dismissed the application for setting aside the abatement was appealable as an order under O. 43, r 1 (k) of the C. P. Code. It could not be treated as a decree. *Held*, also that the adjudication on the second point *viz.*, that the suit had abated *in toto*, amounted to a decree and that the plaintiff could impugn that adjudication only upon an appeal from the decree on payment of *ad valorem* court-fee. (*Shadi Lal, C. J. and Campbell, J.*) RAGHBIR SARAM *v.* MT. SOHAN DEVI. **86 I. C. 104 : A. I. R. 1925 Lah. 456.**

——S. 2 (2) and O. 23, R, 1—Order granting leave to withdraw a suit with permission to sue is not a decree and is therefore not appealable. (*Abdul Raoof and Martineau, JJ.*) SANT RAM *v.* MST. SAHIB KUAR. **65 I. C. 719 : A. I. R. 1922 Lah. 267.**

——S. 2 (2)—*Order rejecting plaint for non-payment of Court-fee is a decree.*

An appeal memo. from an order rejecting a plaint for non-payment of extra Court-fee must bear an *ad valorem* Court fee. (*Shadilal, C. J. and Wilberforce, J.*) SHAHU *v.* BAKRI. **67 I. C. 901 : 3 Lah. L. J. 237.**

——S. 2 (2)—*Insolvency Proceedings—Order raising attachment is not a decree.*

Insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a suit and an order releasing from attachment the residential house of an insolvent in accordance with the conditions of the trust deed in respect thereof is not a decree and hence an appeal does not lie from it. (*Scott-Smith, J.*) RADHA KISHAN *v.* MADAN GOPAL. **67 I. C. 794 : 3 Lah. L. J. 338.**

——S. 2 (2)—*Decree directing delivery of possession and awarding mesne profits without directing enquiry is final and not preliminary—C. P. Code, O. 20, R. 12.*

If the Court in a suit for possession after ascertaining mesne profits passes a decree for past and future mesne profits besides directing defendant to deliver possession to plaintiff without directing an inquiry, the decree is not preliminary but final. 1922 Mad 112. Rel. on. (*Venkata Subba Rao and Madhavan Nair, JJ.*) MUTHU ALAGAPPA CHETTI *v.* AHMAD IBRAHIM ALIM SAHIB. **22 L. W. 347 : 90 I. C. 789 : A. I. R. 1925 Mad. 1276.**

——S. 2 (2)—*Order when a decree.*

Where both the claimants are not parties to the suit, an order rejecting the application of one of them is not a decree and is not appealable, 43 M. 812; 39 M. L. J. 218, dist. 39 M. 488; 28 M. L. J. 491, followed. (*Jackson, J.*) RUCKMANI AMMAL *v.* VEERASAMI AIYANGAR. **47 M. L. J. 370 : 35 M. L. T. 82 : 80 I. C. 942 : (1924) M. W. N. 763 : A. I. R. 1924 Mad. 813.**

——S. 2 (2) and O. 43, R. 1 (*k*)—*Decree—Abatement—Legal representative—Plaintiff deceased—Petitions by several persons to be brought on record as legal representatives—Grant of one, and rejection of others—Appeal from orders of rejection of latter—Maintainability—Effect—Will set up by person whose petition is rejected—Genuineness of, opinion on—Not to be expressed.*

Several persons, including the appellant, applied to be brought on record as the legal representatives of a deceased plaintiff. The application of one of them was granted, appellants' application being dismissed as out of time. *Held* that no appeal lay from the order rejecting appellants' application. Where a legal representative is brought on record ; there is no abatement within the meaning of O. 43, R. 1 (*k*) of the Code, nor is there any decree within the definition of S. 2, Cl. (2) thereof.

Held, that the Court below erred in pronouncing upon the genuineness of the will under which the appellant claimed. (*Spencer and Kumaraswami Sastri, JJ.*) KASIBHOTLA VENKATA SESHAMMA *v.* GUNNESWARA RAO. **46 M. L. J. 129 : (1924) W. N. 58 : 19 L. W. 113 : 79 I. C. 860 : A. I. R. 1924 : Mad. 622.**

——S. 2 (2)—*Partnership suit—Order referring suit to Commissioner for determining shares, is not a decree.*

The order of the Judge referring the whole suit to the Official Referee was neither a decree within the meaning of section 2, C. P. Code, nor a 'judgment' within the meaning of clause 15 of the Letters Patent and was therefore not appealable. (*Kumaraswami Sastri, J.*) ABDUL WAHAB *v.* ROKIA BIBI. **73 I. C. 903 (2) : A. I. R. 1924 Mad. 406.**

——S. 2 (2)—*Order under O. I, r. 10 (2) not an appealable order.*

An order under O. 1, r. 10 (2) discharging a defendant from a suit cannot be regarded as falling within the definition of a "decree" in S. 2 (2) and as such is not an appealable order, 42 Mad. 219 Diss. The mere drawing up a formal decree does not *ipso facto* make the corresponding order an appealable one, if it does

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not, in itself, really fall within the definition of a decree, 17 N. L. R. 66 Foll. (*Findlay, O. J. C.*) SHANKAR RAO *v.* RAGHUNATH RAO. **89 I. C. 331 : A. I. R. 1926 Nag 75 (1).**

——S. 2 (2)—*Order dismissing appeal for deficiency of court-fee is appealable.*

An order in effect dismissing an appeal for deficiency in court-fee should be treated as on the same footing with the rejection of a plaint for the purposes of determining whether it amounts to a decree or not and hence an appeal lies against the appellate order. (*Drake-Brockman, J. C.*) GABBA *v.* KANCHHED LAL **18 N. L. R. 15 : 67 I. C. 225 : A. I. R. (1922) Nag. 62.**

——S. 2 (2)—*Finding is not a decree.*

A finding is not a decree, merely because, the Judge chooses to make use of a form entirely inapplicable to that finding, unless the finding is a decree in the eye of law, and *vice versa.* (*Mitra, O. A. J. C.*) PANDURANG *v.* GAYABAI. **62 I. C. 467 : 17 N. L. R. 66.**

——S. 2 (2)—*Order rejecting husband's claim to be legal representative is not a decree.*

An order rejecting a husband's claim to be legal representative of his wife is not a decree, and so does not bar a suit for declaration, that he is the legal representative of the deceased. (*Kotwal, A. J. C.*) LAXMI *v.* GANPAT. **62 I. C. 308 : 17 N. L. R. 45.**

——S. 2 (2) and O. 9, R. 8—*Decision delivered in default of plaintiff is unappealable.*

Whenever any Court delivers a decision in default of the plaintiff that decision will be an order and not a decree and will not be appealable. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) MAHOMED ZAKA ULLAH *v.* MT. GULKANDI **85 I. C. 393 : 28 O. C. 124 : A. I. R. 1925 Oudh 485.**

——S. 2 (2)—*Decree—Decision in default of plaintiff—Appeal—Oudh Rent Act (XXII of 1886)*

Whenever any Court delivers a decision in default of the plaintiff that decision is an order and not a decree within the meaning of S. 2 (2) C. P. Code. Where the objection of a Judgment-debtor in certain execution proceedings is dismissed for default no appeal is allowed from such order either under the C. P. Code or under the Oudh Rent Act. (*Dalal, J. C., and Wazir Hasan, A. J. C.*) MAHOMED ZAKI ULLAH *v.* MT. GULKANDI. **10. W. N. 854 : 10. & A. L. R. 1207.**

——Ss. 2 (2) and 96—*Direction after Preliminary decree—Interlocutory order—Partition suit—Appeal.*

There can be only one preliminary decree in a suit for partition and where after the passing of such a decree, the Court directs the Commissioner to take a valuation of certain property, the order is an interlocutory order from which there is no appeal. (*Daniels, J. C. and Dalal, A. J. C.*) JAGMOHAN DAS *v.* INDAR PRASAD. **65 I. C. 983 (2) : 24 O. C. 366.**

——S. 2 (2)—*Decree—Partition suit—Preliminary decree—Failure to deposit commissioner's fee—Dismissal of a decree.*

The Court has no jurisdiction to dismiss the suit after a preliminary decree has been passed in a partition suit merely because there has been delay in producing the commissioner's fee. (*Ross and Kulwant Sahay, JJ.*) LACHMI NARAYAN TEWARI *v.* RAMSARAN TEWARI. **6 P. L. T. 152 : 86 I. C. 785 : A. I. R. 1925 Pat. 433.**

——S. 2 (2)—*Preliminary decree must not deal with matters proper only for final decree.*

In a partition suit, what the plaintiffs are required to do is to plead their title to and possession of and share in the property that is to be partitioned. It is not necessary for the plaintiffs to plead that particular lands purchased by the defendants at a sale in execution were liable to partition. The Court cannot direct in the preliminary decree for partition that since the plaintiffs have not claimed the lands they must be allotted to the defendants at the time of making the partition. That question must be left to be dealt with at the time of drawing up the final decree. If the preliminary decree contains such direction it will be deleted in appeal. (*Ross and Kulwant Sahay, JJ.*) LACHMI NARAYAN TEWARI *v.* RAMSARAN TEWARI. **86 I. C. 785 : 6 P. L. T. 152 : A. I. R. 1925 Pat. 433.**

——S. 2 (2)—*Order of dismissal for default—Not a decree.*

An order of dismissal of an appeal for default does not amount to a decree. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v.* PARTAP RAI. **4 Pat. L. T. 405 : 2 Pat. 739 : 75 I. C. 284 : 1923 P. H. C. C. 213 : A. I. R. 1923 Pat. 514.**

——Ss. 2 (2) and 47—*Mortgage decree—Execution—Payment of Court-fees—Appeal if lies.*

Where on a mortgage decree being put in execution, an objection was raised that execution could proceed only after payment of an additional amount of court-fee, but was negatived, *Held* an appeal lay as it was a matter relating to execution. (*Coutts and Ross, JJ.*) KAM BUJHAVAN PD. SINGH *v.* NATHO RAM. **70 I. C. 483 : 3 Pat. L. T. 146 : A. I. R. 1922 Pat. 59.**

——S. 2 (2) and O. 34, R. 6—*Hindu Law—Mortgage decree against father and personal decree against son's shares in the ancestral property not proper.*

Where in a mortgage suit against the father and sons of a Mitakshara joint family, the decree gave a mortgage-decree against the father and a money decree against the son's shares in the ancestral property, a decree under O. 34, R. 6 is necessary only for execution against the father's other properties and no personal decree under O. 34, R. 6 was required to proceed against the son's shares in the ancestral properties. (*Das and Ross, JJ.*) KRISHNA PRASAD *v.* RAM PRASAD. **64 I. C. 629 : 2 Pat. L. T. 715.**

——S. 2 (2)—*Order rejecting appeal for insufficient stamp is a decree.*

Where an appeal is presented with insufficient stamp and the deficit is not made good within the time prescribed and extended by Court, the Court should reject the appeal and should not order dismissal for default. Even if it so orders, the order is one rejecting an appeal and thus is a decree within S. 2 (2). (*Miller, C. J. and Coutts, J.*) SURAJPAL PANDEY *v.* UTIM PANDEY. **63 I. C. 99 : 1921 P. H. C. C. 337.**

——S. 2 (2)—*Order under O. 21, R. 66 is not a decree.*

An order under O. 21, R. 66 is not a decree within S. 2 (2) and is not therefore appealable. (*Jwala Prasad and Adami, JJ.*) BRAJA SUNDER DEB *v.* SIVARANJAN DEI. **59 I. C. 282 : 1 Pat. L. T. 647.**

——S. 2 (3)—*Attaching creditor.*

Decree-holder does not include an attaching creditor. (*Mukerji, J.*) RAM BADAN SINGH *v.* RAM PARGASH SINGH. **L. R. 5 A (civ.) 629 : 80 I. C. 947 : A. I. R 1925 All. 123 (2).**

——S. 2 (3)—*Decree-holder—Specific performance—Decree for—Defendant can also execute.*

A decree for specific performance is capable of being executed by the defendants as well as by the plaintiff. If this were not so, it will follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration money, the deft. is left with no remedy whatever, while owing to the decree passed against him he would still be debarred in any way from dealing with the suit property. (*Macleod, C. J. and Coyajee, J.*) BAI KARIMABIBI *v.* ABDERRAHMAN. **24 Bom. L. R. 496 :**

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67 I. C. 667 : 46 Bom. 990 : A. I. R. 1923 Bom. 26.

——Ss. 2 (11) and 50—*Hindu Law—Undivided father and son Decree against son—Son's share attached—Son dying—Father is legal representative.*

Where a father and son are co-parceners and where after the son's undivided share is attached in execution of a decree against him alone, the son dies, the equity of redemption in the property in respect of which the charge is created by the attachment vests in the father and the father is the legal representative of his deceased son and the decree can be executed against him. (*Sulaiman and Daniels JJ.*) FAQIR CHAND *v.* SANT LAL. **23 A. L. J. 877 : L. R. 6 A. Civ. 511 : 89 I. C 291 (A) : A. I. R. 1926 All. 157 (2).**

——S. 2 (11)—*Legal representative—Scope of definition—Decree against intermeddler—Effect on real heir.*

An intermeddler is included in the definition of legal representative but he is not the representative so far as succession to the property of the deceased is concerned. The definition is only for purpose of procedure and it cannot alter rules of substantive law—The mere fact an intermeddler is joined as a party to a suit will not make the decree therein binding on the real heir who is not party thereto. (*Gokul Prasad, J.*) LALSA RAI *v.* UDIT RAI. **A. I. R. 1924 All. 717.**

——S. 2 (11)—*Person in possession of estate—Execution against.*

Where a person is in possession of the estate of a deceased person after the latter's death, he is the legal representative within S. 2 (11), C. P. Code. and execution taken against him is quite legal. (*Ghose, J.*) KUSUM BANDHU CHAKRAVARTHY *v.* RAMDAYAL BHATTACHARJEE. **69 I. C. 179 : A. I. R. 1924 Cal. 362.**

——S. 2 (11) — *Legal representative —Decree against wrong person—When binding upon estate.*

The properties in suit belonged absolutely to the testatrix who by her will, dated 23-3-1872, appointed her sons J and N as trustees and directed them to maintain the relations of the testatrix and gave them during their life-time the income from the estate after meeting all the charges. On the death of J and N, their sons were to be equally entitled to, and divide the properties with no power of sale, etc. They had power however if the income of the estate was insufficient to mortgage the estate for necessary purposes, J having died issueless probate of the will was granted to N who in 1889 mortgaged the estate for necessity. N died intestate in 1891 and letters of administration of the estate were granted to his daughter. The mortgagee instituted a suit on his mortgage and obtained a decree, in 1892 impleading the daughter of N as representing the estate. In execution of the decree the property was sold and purchased by the defendants. In a suit by the daughter's son of the testatrix *held* that J and N having taken only a life estate in the properties of the testatrix, there was an intestacy on their death without male issue. Consequently on the death of N the plaintiff became the heir to the properties and decree passed against the daugher of N did not bind the estate in his hands. (*Teunon and Greaves, JJ.*) GURUDAS KUNDU CHOWDHURY *v.* KAMAL KUMAR DUTT. **70 I. C. 886 : 37 C. L. J. 90.**

——S. 2 (11)—*Legal representative.*

Where the widow of a person asserted in defence to a suit that her husband had dedicated the property in dispute to religious purposes.

Held, she acted in a representative character and that on her death her husband's step-mother for whose maintenance also provision was made by his will, became her legal representative for the purposes of the suit inasmuch as all the male heirs of the deceased had refused to recognise the dedication. (*Martineau and Campbell, JJ.*) MT. TEHL KUAR *v.* AMAR NATH. **17 P. W. R. 1923 : 79 I. C. 670 : A. I. R 1925 Lah. 2.**

——S. 2 (11) — *Legal representative —Decree against manager of a shrine—Execution against successor.*

Where the plaintiff obtained a decree against a person whom he had appointed to manage a shrine for possession of the property and the plaintiff after the death of the judgment-debtor sought to execute the decree against another person who claimed to have been appointed manager of the shrine, *Held* that the latter was not a legal representative of the deceased within S. 2 (11) C P. Code and that the decree could not be executed against him. (*Shadi Lal, C. J. and Martineau, J.*) RAM SINGH *v.* WARYAM SINGH. **5 Lah. L. J. 459 : 77 I. C 585 : A. I.R. 1924 Lah. 251.**

——S. 2 (11)—*Hindu joint family—Surviving members not legal representatives.*

There is no 'succession' in an undivided Hindu family and therefore, the surviving members after the death of a member of a Hindu family are not his 'legal representatives' within the meaning of S. 2 (11) of the Code. (*Chevis and Scott-Smith, JJ.*) DWARKA DAS *v.* KRISHAN KISHORE. **2 Lah. 114 : 61 I. C. 628 : 3 Lah. L. J. 349.**

——S. 2 (11)—*Hindu joint family—Manager dying—Succeeding manager is legal representative.*

Where a managing member sues and the suit refers to joint family estate, it is really a suit in a represent ative character for all the members of the family. When he dies, the next managing member is the person on whom would devolve the representative character and he can, therefore, come in, as the legal representative. 42 B. 504 not appr. (*Krishnan and Odgers, JJ.*) T. S. NAGAPPA NADAR *v.* T. S. KARUPPIAH NADAR. **21 L. W. 21 : 86 I. C. 178: A. I. R 1925 Mad. 456.**

——S. 2 (11) *Judgment-debtor attaining majority is not entitled to fresh notice of execution proceedings as legal representative—C. P. Code, Order 21, Rule 22*

A party becoming major during suit is not a legal representative of himself and is not entitled to fresh notice of execution proceedings. (*Oldfield and Devadoss, JJ.*) NAGAPPA CHETTY *v.* MUTHURAMAN CHETTY. **78 I. C. 12 : A. I. R. 1925 Mad. 158.**

——S. 2 (11)—*Ostensible sole heir brought on record—Decree binds whole estate.*

When a Court has issued notice to a person supposed to be the only legal representative of a deceased defendant or judgment-debtor and held that service is sufficient, the decree passed and the execution thereof will be considered sufficient to cover the entire estate including the shares of those heirs of the deceased defendant or judgment-debtor who were not brought on the record and who had not received notice. A Muhammadan mortgagor died after a preliminary decree for foreclosure had been passed against him. He left a widow and brother. His widow who was in possession and whose name was mutated with respect to the entire share in the Revenue records was alone impleaded as the legal representative ; but the brother of the deceased eventually got the Revenue Court to recognise his claim to a share of the estate.

Held, that the final decree passed against the widow was binding on the brother also. Case law fully discussed.

Per *Ashworth, A. J. C.*—In a subsequent suit a

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party in default of his, or his predecessor-in-interest, having been a party to a proceeding taken under O. 22, R. 5 can maintain that a person brought on the record in a previous suit as the legal representative of a deceased party did not sufficiently represent the estate of that deceased party for the purposes of the previous suit. The alteration of definition of 'legal representative" by the addition of the words "and includes any person who intermeddles with the estate of the deceased" was merely designed to draw attention to the fact that in some cases a mere intermeddler may, for the purposes of a particular suit, sufficiently represent the estate of a deceased person. (*Dalal, J. C. and Ashworth, A J. C.*) MT. KANIZ ABBAS *v.* LALA BALA DIN. **28 O. C. 177 : 12 O. L. J. 37 : 87 I. C. 892 : 2 O.W.N. 34 : A. I. R. 1925 Oudh 330.**

——S. 2 (11)—*Legal representative—Question relating to execution—Power of Court to decide objection.*

Where on an application to substitute the brother of the deceased judgment-debtor as his legal representative, he pleads that he is not liable to satisfy the decree as being an undivided co-parcener of the deceased, the objection must be decided by the executing Court before an order substituting him as legal representative is made. If the Court leaves the point whether the brother was liable for the decree open and undecided and makes an order of substitution it would be acting illegally. (*Jwala Prasad and Ross, JJ.*) PATAIT DINANATH SAHI *v.* PATAIT MALHIJI BAID. **3 Pat. L. T. 106 : A.I.R. 1923 Pat. 149.**

——S. 2 (12)—*See also* MESNE PROFITS.

——S. 2 (12)—*Mesne profits—Compensation for improvements—Set off.*

The person dispossessed is entitled to compensation for improvements effected and such compensation is put against mesne profits. (*Lord Buckmaster.*) BHAGWAT DAYAL SINGH *v.* RAM RATAN SAHU. **42 M. L. J. 243 : 26 C. W. N. 257 : 35 C. L. J. 121 : 3 Pat. L. T. 229 : 20 A. L. J. 26 : 65 I. C. 69 : 15 L. W. 481 : 24 Bom. L. R. 336 : (1922) M. W. N. 102 : 4 U. P. L. R. (P. C.) 7 : A. I. R. 1922 P. C. 91 (P. C.).**

——S. 2 (12)*Decree for mesne profits—Subsequent interest—Liability to pay—Decree against manager of temple—Liability of temple properties.*

In a suit by the plaintiff for partition and recovery of mesne profits against an idol represented by its manager a preliminary decree for mesne profits was passed against the said idol. Subsequently a final decree followed and the question arose in execution as regards the liability to pay interest and the liability of the endowed properties. *Held* (1) that mesne profits carried interest from the date of the preliminary decree and that they were recoverable from the endowed properties. 35 Cal. 691 ; 2 I. A. 145 referred to. (*Mookerjee and Dalal, JJ.*) SRI GANESHJI MAHARAJA *v.* LALITA PRASAD. **22 A. L. J. 768 : 82 I. C. 312 : L. R. 5 A. 583 : 46 All. 842 : A. I. R. 1924 All. 801.**

——S. 2 (12) *Mesne profits—Interest—Decree silent as to—Execution.*

Where a decree awarding mesne profits is silent as to interest, it must be deemed to carry interest at the Court rate of 6 per cent. on the mesne profits and executed accordingly. 27 C. 951 : 25 A. 275, Foll. 22 A. 262, Diss. (*Walsh and Stuart, JJ.*) LALITA PRASAD *v.* SRI GANESHJI. **20 A. L. J. 348 : L. R. 3 A. 245 : 4 U. P. L. R. (A). 144 : 67 I. C. 219 : 44 All. 579 : A. I. R. 1922 All. 117.**

——S. 2 (12)—*Premium received from a sub-tenant.*

Premium received from a sub-tenant by a tenant who was holding over after notice by plaintiff landlord, is included in the term "mesne profits". (*Macleod, C. J. and Crump, J.*) GULAM MOHIUDDIN *v.* DAYABHAI. **25 Bom. L. R. 447 : A. I. R. 1923 Bom. 398.**

——S. 2 (12) and O. 20, R 12—*Mesne profits—Liability for—Wrongful possession — Land under attachment—Non-liability for mesne profits—Point if can be raised on second appeal.*

Wrongful possession by the defendant is the very essence of a claim for mesne profits and the very foundation of a decree therefor. It is impossible to hold that during the time the lands remained under attachment by virtue of an order under S. 146, Cr. P. Code, the defendants who had no title to the lands, remained in possession. Consequently, the defendants would not be liable for mesne profits for that period. 24 C. 413 ; 5 C. W. N. 728 ; 21 W. R. 269 ; 10 C. 785 Ref. Where no decree for mesne profits had been drawn up under O. 20, R. 12 at the time when the defendant filed his cross appeal before the lower appellate court and the objection as to mesne profits was not taken, it can be allowed to be raised on second appeal. (*Walmsley and Mukerjee, JJ.*) CHHAGANMULL AGARWALLA *v.* AMANATULLA MAHOMED. **39 C. L. J. 447 : 51 Cal. 853 : A. I. R. 1924 Cal. 1010.**

——S. 2 (12)—*Mesne profits—Trespasser—Interest on mesne profits.*

All trespassers, whether *bona fide* or *mala fide*, are liable for mesne profits. The *bona fide* trespasser may be allowed to deduct collection charges, while no such concession is made in favour of the *mala fide* trespasser. 10 W. R. 486 ; 8 W. R. 479; 1 All. 518; 21 Cal. 142, ref. The annual income, the period of time and the rate of interest are the elements which should be determined before the actual amount of mesne profits can be ascertained. Interest should ordinarily be allowed on mesne profits, though the interest as well as the mesne profits are in the discretion of the Court. 27 Cal. 951, rel. (*Mookerjee and Panton, JJ.*) RAJAH SASHIKANTA *v.* RAJA SARAT CHANDRA. **70 I. C. 6 : 34 C. L. J. 415.**

——S. 2 (12)—*Mesne profits—Liability to interest—Rate of interest.*

The very definition of mesne profits includes not merely the profits of immoveable property but also interest on such profits. Where the lower Court for proper reasons awards 12 per cent. interest on mesne profits the appellate Court will not disturb it. (*Shadi Lal, C. J.*) CHHABER SINGH *v.* RADHU RAM. **68 I. C. 807 : 4 Lah. L. J. 333.**

——S. 2 (12)—*Mesne profits are in the nature of damages—Basis of calculation is amount actually realised though a higher amount must be awarded if party in possession has been proved not to have exercised due diligence.*

The defendant in a suit for mesne profits was found to have been directly in possession during nine consecutive seasons and suffered considerable loss throughout.

Held, that in such a case he cannot be said to be dealing with due diligence, for if the lands had been let out they would have fetched some rent however low it may be. But in such a case the person claiming mesne profits must produce some affirmative evidence as regards the amount for which the lands might have been reasonably let out. In the absence of such evidence it is not possible to ascertain mesne profits. The party claiming mesne profits must bear the onus of proving what profits might with diligence have been received in a year but the party in actual possession is

C. P. CODE (V OF 1908), S. 2.

bound to prove what profits he actually received when that question arises.

Mesne profits are in the nature of compensation for damages except in cases in which it can be proved that what was received or recovered actually by the party in possession was below what would have been so recovered or received if due diligence was exercised. The proper measure to award is to be determined by what the party in possession actually received. (*Spencer, O. C. J and Srinivasa Aiyanger, J.*) P. S. MUHAMMAD ABDUL GAFFUR ROWTHAN *v.* K. E. S. MUHAMMAD SAMSUDDIN ROWTHAR.

47 M. L. J. 730 : A. I. R. 1925 Mad. 297.

——S 2 (12)—*Land obtained in execution of decree—Decree reversed in appeal—Mesne profits—Delivery warrant may be relied on for extent of land taken in execution.*

Where a man takes possession of certain lands in execution of a decree which is thereafter reversed in appeal, in estimating the land taken possession of by him, the Court awarding mesne profits to the successful appellant may properly rely on the extent of the land as given in the delivery warrant. (*Spencer and Venkatasubba Rao, JJ.*) RAMAKKA *v.* V. NAGESAM.

47 Mad. 800 : 48 M. L. J. 89 : A. I. R. 1925 Mad. 145.

——S. 2 (12)—*Mesne profits—Calculation of—Cultivating profit—Collection charges.*

Where the person dispossessed by a trespasser is himself, ordinarily, a cultivator of the land in dispute, the profits to which he is entitled are those that the wrongful holder might have obtained by cultivation with due diligence. It is not open to a trespasser to dispossess and actually cultivate and then to sub let the land trespassed upon to some third person and claim to compensate the rightful occupant only to the extent of what he may have obtained by the sub-letting. Ordinarily in calculating the amount of profits, payment made by the defendants for rent, revenue or cesses, must be deducted but the court should not allow to the defendants the expenses of collecting the profits, unless they entered on the property in the exercise of a *bona fide* claim of right. (*Kinkhede, A.J.C.*) UMASHANKAR *v.* PANDIT RAMLAL.

20 N. L. R. 112 : A. I. R. 1924 Nag. 427.

——S. 2, Cl. 12—*Mesne profits—Measure of*

In calculating mesne profits the real question is what is the loss sustained by the plaintiff on account of the infringement of his right by the defendant for which he is to be compensated. In other words, what is the benefit which the plaintiff would have derived from the possession of his land during the period of his dispossession by the defendant. This benefit may be according to the circumstances either the letting in value or the cultivation profits of the land. If it is a case where cultivation profits are to be awarded they have to be ascertained according to the definition in the Code. The principle upon which the question whether letting value or cultivation profits are to be awarded depends is as follows :—The loss of the party wrongfully kept out of possession must generally be measured by the actual usufruct of the land during that time on occupation of the same character as that of the party wrongfully kept out of possession at the date of his ouster or of the last legal occupant whom the plaintiff claims to succeed to, if the plaintiff himself never entered into possession. (*Kotwal, A.J.C.*) CHHAGANLAL *v.* SARDAR.

69 I. C. 560 : A. I. R. 1923 Nag. 64 (1).

——S. 2 (12)—*Interest.*

Mesne profits now include interest ; so the decree-holder is entitled to interest up to the date of realisation of the mesne profits. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) HARAKHPAN MISSIR *v.* JUGDEE MISSIR.

4 P. 57: 5 P. L. T. 626 : 1924 P. H. C. C. 265 : 3 P. L. R. 32 : 84 I. C. 272 : A. I. R. 1924 Pat. 781.

——S. 2 (12)—*Mesne profits—Period for which allowable—Bengal Tenancy Act, S. 120.*

Mesne profits against a trespasser can be awarded from the date of his actual trespass on the land and the same principle applies where the person against whom mesne profits are awarded is an assignee from a trespasser. Such a person is not liable for the period in which he was not in possession at all. Where the land from which a person is dispossessed is his private land within S. 120 of the Bengal Tenancy Act mesne profits should be calculated on the basis of the actual price of the produce less the costs of cultivation. (*Doss and Ross, JJ.*) DAMODAR NARAYAN *v.* S. A. MILLER.

2 Pat. L. T 563 : 6 Pat. L. J. 166 : 61 I. C. 754 : 1921 P. H. C. C. 294.

——S.2 (12)—*Mesne profits must be calculated on actual outturn.*

Mesne profits must be calculated on the actual outturn in the years in suit and where the defendants have been in possession of separate plots of land within those years, mesne profits ought to be calculated as against each defendant on the basis of his possession. (*Sultan Ahmed, J.*) RAM BILAS SINGH *v.* AMIR SINGH.

61 I. C. 425 : 1 Pat. L. T. 235.

——S. 2 (17)—*Official Assignee.*

The Official Assignee is a public officer within S. 2 (17). (*Taraporewala, J.*) HARDAYAI SHIVLAL *v.* HAJI ADAM GOOLMAHOMED.

87 I. C. 1011 : 27 Bom.L.R. 545: 49 Bom. 638: A.I.R. 1925 Bom. 344.

——S. 2 (17)—*Village headman is a public officer.*

A village headman is a public officer within the meaning of S. 2. (*Heald, J.*) MAUNG SAN YA *v.* MAUNG NGWE.

2 Bur. L. J. 29 : A. I. R 1923 Rang. 250.

——Ss. 7 and 8——*Decree of Madras Small Cause Court transferred to Mofussal Dt. Munsif for execution— District Judge can hear appeal from order in execution proceedings.*

Where the decree of the Madras Small Cause Court had been transferred to the original jurisdiction of a District Munsiff's Court :

Held that the C. P. Code, was applicable to the execution of such proceedings, and that the Dt. Judge had jurisdiction to hear an appeal from the decisions of the Dt. Munsif in execution proceedings and his order was not without jurisdiction. (*Devadoss and Wallace. JJ.*) PONNAPPA REDDI *v.* P. THIRUVENGADA PILLAI.

49 M.L.J. 104 : 22 L. W. 455 : 1925 M. W. N. 713 : 90 I. C. 509 : A. I. R. 1925 Mad. 1179.

——S. 7, O. 50, and O. 38, R. 5—*Small Cause Court can attach immoveable property before judgment —C. P. Code, O. 50.*

A Small Cause Court has power to attach immoveable property before judgment under O. 38, R. 5 (*Devadoss and Wallace, JJ.*) KOTHANDARAMA CHETTIAR *v.* ANNAMALAI PILLAI.

48 Mad. 488 : 48 M. L. J. 406 : 1925 M. W. N. 169 : 87 I.C. 399: 22 L. W. 103 : A. I. R. 1925 Mad. 589.

——S. 7 (4) (c)—*Suit for refund of purchase money—Purchaser alleging fraud and inducement—Suit is in effect for cancellation of the sale deed.*

Where a purchaser sues for a refund of purchase money on the ground that he was induced to purchase the property by fraud,the main relief claimed is really the setting aside of the conveyance and the claim for

C. P. CODE (V OF 1908), S 9.

money is only ancillary to it. To such cases S. 7 (4) (c) has no application. (*Devadoss and Wallace, JJ.*) LAKSHMI AMMAL *In re*, **49 M. L. J 608 : 1925 M. W. N. 826 : A. I. R. 1926 Mad. 96. (B.)**

——S. 9—*Civil right—Right to share in temple offerings is such.*

Where the property in suit consists of a share in the offering at a certain temple, a suit by the plaintiff with regard to the share of the offering that she should be allowed to take a turn at the worship in temples so that her full share in the offerings might be secured to her is cognizable by the Civil Court. (*Mears, C.J and Banerjee, J.*) KUNJ BEHARI LAL *v.* MT. NARAINI.

45 All. 437 : 71 I.C. 1026 : A. I. R 1923 All. 425.

——S. 9—*Fixed Rate tenancy—Acquisition of.*

Where a holding was recorded as occupancy in the last revision of records which took place before 1901 and there was no judicial decision declaring it to be a fixed rate tenancy between the date and the passing of the Agra Tenancy Act, S. 9 bars the acquisition of the status of a fixed rate tenant. (*Fremantle, S. M.*) MT. AMDANI BIBI *v.* RAM CHANDRA NAIK KALIA. **L.R. 4 All. 306 (Rev.).**

——S. 9—*Suit for a declaration that a Revenue entry is wrong—Not maintainable.*

A suit for a declaration that an entry in the Revenue Records as to the nature of a tenancy is wrong is not maintainable in view of S. 9 of the Act. (*Walsh and Wallach, JJ.*) RAM SARAN *v.* LALJI UPADHYA **43 All. 615 : 19 A. L. J. 653 : L. R 2 A. 164 (Rev.) : 63 I. C. 711 : 3 U. P. L. R. (A.) 79.**

——S.9—*Birt Jaimani—Pragwal—Flag—Cause of action.*

A pragwal used a particular kind of flag to attract the notice of pilgrims. The deft. who acted as his agent, put up a similar flag so as to mislead pilgrims into the belief that he has the pragwal. *Held*, that the action of the deft. was unlawful and the plff. had a right to maintain a suit to restrain the deft. from making use of the emblem or flag. (*Piggott and Kanhaiya Lal, JJ.*) BENI MADHO PRAGWAL *v.* HIRA LAL. **59 I. C. 873 : 18 A. L. J. 679 : 2 U. P. L. R. (All.) 227.**

——S. 9—*Dispute regarding the property of a aste—Jurisdiction of the High Court.*

Where the question at issue in a suit is not matter relating to the internal administration and affairs of the caste but to the property of the caste, the Civil Court has Jurisdiction to entertain such suit. The Jurisdiction of the Court is not excluded in every case in which there has merely been a division of opinion in the caste. (*Macleod, C. J. and Coyajee, J.*) FULCHAND MOHANLAL *v.* HARILAL. **27 Bom. L. R. 1503 : A.I.R. 1926 Bom. 69.**

——S. 9—*Suit chiefly with respect to the right to receive offering and incidentally to the right to worship is maintainable.*

Plaintiff sued for an injunction permanently restraining the defendant from obstructing him in worship ping the deity in question, in doing every other business in connection with the deity and appropriating the profits at the temple of the deity, on the basis that he was entitled to all those rights to the exclusion of the defendant.

Held, that there was a dispute between the plaintiff and the defendant as to the right to the property which consisted of voluntary offerings made before the deity and that is the property with reference to which the right was to be determined, hence the suit is maintainable. It is quite clear that there is a contest substantially as to the property, and incidentally as to the right to perform the worship at the temple which is connected with the right to take the offerings. (*Shah and Coyajee, JJ.*) LAXMAN BABALING GURVA *v.* VISHRAM MAHADEV RANE. **76 I. C. 629 : A. I. R. 1925 Bom. 209.**

——S. 9—*Caste usage—Right of parties—Jurisdiction of Civil Courts.*

A claim by five of the members of a caste that they are entitled to use the *Wadi* and the vessels is one of a civil nature and Courts can adjudicate on the question; where the right is once found, the mode of exercise of the right is one for the caste to determine. (*Macleod, C. J. and Crump, J.*) CHUNILAL GULABDAS *v.* CHHOTALAL PRANJIVAN. **A. I. R. 1924 Bom. 522**

——S. 9—*Civil nature—Question as to validity of votes at a meeting—Internal management.*

The question of the validity of a vote is a question of law, and a Court of law has jurisdiction to entertain it. It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of the company acting within their powers and in fact has no jurisdiction to do so. But surely questions relating to the validity of votes are not questions relating to the internal management of a Corporation. They are questions that can be disposed of only by a Court of Law. (*Mulla, J.*) NARIMAN *v.* MUNICIPAL CORPORATION OF BOMBAY. **47 Bom. 809 : 25 Bom. L. R. 689 : A. I. R. 1923 Bom. 305.**

——S. 9—*Civil right.*

A suit for recovery of carcases of dead animals by Mahars is not maintainable in a Civil Court. (*Shah, A. C. J. and Crump, J.*) MADHU KASHIBA *v.* KRISHNA TATYA. **24 Bom. L. R. 917 : 47 Bom. 95: 68 I. C. 746 : A. I. R. 1922 Bom. 410.**

——S. 9—*Religious Question—Court cannot decide.*

The protection of the law in religious matter, is confined to the protection of religious property or religious office. The Court will not decide mere question of religious rites or ceremonies nor will it pronounce on any religious doctrine if it is not necessary to do so in determining rights to property. 5 B. 80, foll. (*Marten, J.*) THE ADVOCATE-GENERAL OF BOMBAY *v.* YUSUFALLI EBRAHIM. **24 Bom. L. R. 1060.**

——S. 9—*Religious question—Right to be carried in palanquin—Jagadguru.*

Plff.'s suit for a declaration that he, as a Jagadguru has a right to be carried in palanquin on certain days through public streets and for injunction restraining the deft. from obstructing him in the exercise of his right, is not maintainable. Civil Court will not decide disputes as to precedence or privileges between purely religious functionaries. (*Macleod, C. J. and Fawcett, J.*) ANDANISWAMI *v.* TOTADSWAMI. **45 Bom. 590 : 60 I. C. 907 : 23 Bom. L. R. 75.**

——S. 9—*Religious office*—Upadhyaya *of caste*—Vritti—*Interference—Injunction.*

The right to officiate in a *vrtti* as *Upadhyaya* of a caste and to receive the perquisites of the *vritti* is immoveable property and the holder of the office is entitled to restrain intermeddlers by an injunction from interfering with the office. Acquiescence for ten years in the interference would disentitle the plaintiff to the injunction. (*Macleod, C. J. and Fawcett, J.*) GIRJASHANKAR *v.* MURLIDHAR. **22 Bom. L. R. 1202 : 59 I. C. 271 : 45 Bom. 234.**

——S. 9—*Civil Courts are not debarred from trying a suit to contest the validity of an election by reason of S. 51 of the Bengal Village Self-Government Act—Bengal Village Self-Government Act (V of 1919), S. 51.*

C. P. CODE (V OF 1908), S. 9.

It is not the intention of the Legislature to set up the Divisional Commissioner as the person finally to decide questions of franchise to the annulment of the ordinary Civil Courts' right to decide such questions, and the Civil Courts are not debarred from exercising their ordinary powers to try all suits under their general power under S. 9, Civil P. C., including a suit to contest the validity of an election. (*Suhrawardy and Duval, JJ.*) NASARUDDIN MANDAL *v.* ANANTH NATH. **52 Cal. 943 : 90 I. C. 700 : A. I. R. 1926 Cal. 279.**

——**S. 9**—*President of the Legislative Council — Decision if can be challenged in Civil Court—Injunction—Power of a High Court to issue—Jurisdiction.*

The proceedings of a subordinate legislature like the Bengal Legislative Council can be questioned in Courts : the High Court is a superior Court of Record and *prima facie* no matter is deemed to be beyond the jurisdiction of the Court unless it is expressly shown to be so. By the word "jurisdiction" is meant the authority which the Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The President of the Bengal Legislative Council was held as not immune from the jurisdiction of High Court. (*C. C. Ghose, J.*) KUMAR SHANKAR ROY CHOWDHURI *v.* H. E. A COTTON. **40 C. L. J. 515 : A. I. R. 1925 Cal. 373.**

——**S. 9**—*Jurisdiction of Civil Court—Suit by one director against another in a Company—Injunction.*

A suit by one director against the other directors of a limited Company for an injunction restraining the latter from preventing him from acting as such is maintainable in a Civil Court. (*Newbould and Ghose, JJ.*) SARAT CHANDRA CHAKRAVARTHY *v.* TARAK CHANDRA CHATTERJI. **51 Cal. 916 : 28 C. W. N. 803 : 82 I. C. 405 : A. I. R. 1924 Cal. 982.**

——**S. 9**—*Civil right—Right to set aside award.*

Though it is open to a party dissatisfied with a private award to wait till his adversary seeks to enforce it by the summary process prescribed by the Arbitration Act (IX of 1899) and then contest it by filing such objection as are allowed by the law, that is not his sole remedy and does not take away the remedy open to him of bringing a suit to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract, if made, was not enforceable by reason of fraud or misrepresentation. (*Shadi Lal, C. J. and Campbell, J.*) JAI NARAIN BABU LAL *v.* NARAIN DAS JAINI MAL. **3 Lah. 296 : 69 I. C. 583 : A. I. R. 1922 Lah. 369.**

——**S. 9**—*Honour—Right to temple honours.*

A claim merely to establish the plff.'s right to certain temple honours as the *Gurikar* of a caste is not cognizable by Civil Court. 7 Mad. 91 ; 2 Bom. 476 ; 10 Bom. 233 ; 19 Mad. 62, Ref. (*Spencer and Ramesam, JJ.*) BAPU PUJARI *v.* THUKRA GURICARA. **41 M. L. J. 287 : 63 I. C. 115 : (1921) M. W. N. 395.**

——**S. 9**—*Debt incurred after order of adjudication, though not proveable under the Insolvency Act, can be sued on in the ordinary Civil Court—Provincial Insolvency Act* (1920), *S.* 28.

The jurisdiction of a Civil Court to try a suit in respect of a debt or liability incurred by an insolvent after the order of adjudication, is not barred by the Provincial Insolvency Act. Such a debt or liability is not proveable under the Insolvency Act (*Kinkhede, A. J. C.*) HIRALAL *v.* TULSIRAM. **80 I. C. 946 : A. I. R. 1925 Nag. 77.**

——**S. 9**—*Jurisdiction—Allegations in the plaint —To be taken as correct until trial on the merits.*

C. P. CODE (V OF 1908), S. 10.

The jurisdiction of Courts depends upon the allegations made in the plaint and not upon those which may ultimately be found true. The allegations may, after the trial of the suit, be held to be unfounded and in that case the suit would be dismissed, not because the Court had no jurisdiction, but because the allegation on which it was based were found to be untrue. At the same time the Court would have no jurisdiction merely because there was an assertion in the plaint that the act objected to was *ultra vires*. The plaint must make distinct allegations of fact or of law, how the act was *ultra vires* (*Dhobley, A. J. C.*) MUNICIPAL COMMITTEE, MALKAPUR *v.* AMRIT WAMAN DALAL. **18 N. L. R. 121 : 65 I. C. 532 : 5 N. L. J. 214 : A. I. R. 1922 Nag. 10.**

——**S. 9**—*Suit of a civil nature—Ghats or Chaukis in a sacred river—Fees paid for services rendered at—Suit for share—Maintainability.*

Chaukis are well-understood spots on the banks of a sacred river where one or other of the members of the family of priests used to sit, receive his clients and help them in the observance of their religious ceremonies connected with the river such as bathing, etc. The gains made by the performance of services at these spots are property in law and a suit for a share in the business resulting in such gains is maintainable as a claim of a civil nature within the meaning of S. 9 of the C. P. Code. 18 A. L. J. 679 ; 21 A. L. J. 358 ; 43 A. 581 Ref. (*Wazir Hasan and Neave, A. J. Cs.*) MT. RACHHPAL *v.* MT. CHANDRESAR. **27 O. C. 114 : 10 O. L. J. 595 : 78 I. C. 256 : A. I. R. 1924 Oudh 252.**

——**S. 9**—*Suit for fixing liability of defendant regarding revenue for which plaintiff is liable is a civil suit.*

Where the suit is not a suit for partition of revenue-paying lands, and the plaintiff does not ask the Court to separate the Government revenue as between the plaintiff and the defendants, but invites the Court to fix the liability of the defendants in regard to the Government revenue for which the plaintiff is liable to the Collector. *Held*, this is a suit of a civil nature. (*Das and Ross, JJ.*) GULAM CHAND *v.* DUKHI RAI. **A. I. R. 1924 Pat. 795.**

——**S. 10**—*U. P. Land Revenue Act* (*III of* 1901), *S.* 118—*Suit for partition pending in Revenue Court —Suit in Civil Court for partition of house is not barred.*

The Revenue Court has no jurisdiction to partition a house, *i. e.*, partition the buildings, at all. It can partition the site occupied by a house along with other land in a village. If in making a partition it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in possession of another co-sharer the latter can, under S. 118 of the Land Revenue Act, be allowed to retain it (the land) with the buildings thereon on condition of his paying a reasonable ground rent to the co-sharer in whose portion it may be included. Hence the pendency of a suit for perfect partition in a Revenue Court is no bar to a suit in a Civil Court for possession of a certain share of a house by partition thereof. If a house is in the occupation of one co-sharer and the site is allotted to another, it would be retained by the occupier of the house on payment of a rent to be fixed. 1924 All. 854 Foll. (*Sulaiman and Daniels, JJ.*) KULSUM BIBI *v.* MD. ISMAIL. **23 A. L. J. 585 : 89 I. C. 186 : A. I. R. 1925 All. 677.**

——**S. 10**—Khudkasht *can only be held by a proprietor in possession--Mortgage of proprietary lands—Sale of equity of redemption—Position of the vendees in respect of such land.*

C. P. CODE (V OF 1908), S. 10.

Khudkasht can only be held by a proprietor who is in possession. When a proprietor makes a transfer he loses his *sir* and *khudkasht* rights under S. 10 of the Tenancy Act even in the land which he had been cultivating for 12 years and becomes an exproprietary tenant. He obviously cannot claim *khudkasht* rights in land which he only begins to cultivate at the time when he loses his possession. (*Ryves and Daniels, JJ.*) GULAB SINGH *v.* SHIB LAL.

21 A. L. J. 331 : L. R. 4 A. 206 (Rev.) : 74 I. C. 286 : A I. R. 1923 All. 347.

——S. 10—*Interlocutory orders can be passed notwithstanding stay of suit.*

Notwithstanding an order staying suit under S. 10 interlocutory orders such as orders for receiver for an injunction or attachment before judgment could be passed. (*Macleod, C. J. and Shah, J.*) SENAJI *v.* PANNAJI. **23 Bom. L. R. 1228 : 46 Bom. 431 : 64 I. C. 580 : A. I. R. 1922 Bom. 276.**

—— —— S. 10—*Stay of suits—Connected suits — Appeal.*

S. 10 of the C. P. Code does not apply unless the previous suit is before a Court which is competent to grant the relief claimed in the subsequent suit. A landlord instituted two suits for cesses against the tenants and obtained a decree which was appealed against by the tenants. Pending the appeal, the landlord brought a suit for rent against the tenants for a subsequent period and the tenants applied for stay of the suit pending the decision of the appeals. *Held*, that this was not a case to which S. 10 of the C. P. Code applied. (*Rankin, J.*) CHOWDHURY JAMINI NATH MULLICK *v.* MIDNAPORE ZEMINDARI CO. **27 C. W. N. 772 : 75 I. C. 231 : A. I. R. 1923 Cal. 716.**

——S. 10—*Order refusing stay of suit under S. 10—Interference.*

An order refusing to stay the trial of a suit under S. 10, C. P. Code, is revisable, if the court refuses to exercise the jurisdiction vested in it by law. (*Zafar Ali, J.*) MEHTAB SHAH *v.* ALI HAIDAR SHAH. **82 I. C. 234 : A. I. R. 1925 Lah. 144.**

——S. 10—*Case decided—Order refusing to stay suit under S. 10—If capable of revision.*

An order refusing to stay a suit under S. 10, C. P. Code is not "a case decided" within the meaning of S. 115, C. P. Code and as such not open to revision. (*Abdul Raoof, J.*) BAGH SINGH *v.* BHAGWAN DAS. **A. I. R. 1924 Lah. 567.**

——S. 10—*Order refusing stay—No revision.*

An order under S 10 for stay passed is not a decision of a case within the scope of S. 115, C. P. Code. (*Martineau, J.*) THE FIRM OF ISHER DAS DHARAM CHAND *v.* THE FIRM OF BUTA MAL DURGA DAS. **4 Lah. L. J. 425 : 67 I. C. 870 : A. I. R. 1922 Lah. 54.**

——S. 10—*Applicability.*

S. 10 of the Code does not apply unless every matter in dispute is directly and substantially in issue in the two suits and the parties are the same. (*Martineau, J.*) BISHEN DEVI *v.* BISHENCHAND. **61 I. C. 830 (Lah.).**

——S 10—*Mortgage suit by insolvent's mortgagee—Application by receiver under S. 53, Provincial Insolvency Act, respecting the mortgage—Court trying the mortgage suit does not cease to have jurisdiction over the suit—Proper course is to stay mortgage suit—Application for stay should be made to the Court trying suit or any other Court having power to stay—Provincial Insolvency Act S. 53.*

The proper course, in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a declaration that the mortgage is bad under S. 53, would be to have the proceedings in the suit stayed till the disposal of the application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under S. 53. The order of the Insolvency Court under S. 53 would be binding upon the parties ; and the ordinary Civil Court would therefore not be able to execute the mortgage decree passed by it. The application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. But there is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under S. 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor. It does not follow that because a transaction is void under S. 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under S. 53 is only voidable and not void. The jurisdiction to set aside a transaction which is good against the mortgagor, but not good against the general body of creditors, is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit to decree. A mortgage which is voidable under S. 53 is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. (*Devadoss and Wallace, JJ.*) OFFICIAL RECEIVER OF COIMBATORE *v.* PALANISWAMI CHETTI. **49 M. L. J. 203 : (1925) M. W. N. 672 : 88 I. C. 934 : A. I. R. 1925 Mad. 1051.**

——S. 10—*"Matter in issue" means entire subject in controversy and not main question involved.*

"Matter in issue" should not be construed as meaning the main question involved in the suit. The real intention of the Legislature in framing S. 10 was merely to prevent later suits relating to the same subject-matter being tried before an earlier suit relating to the same subject-matter is tried and disposed of. The expression "matter in issue" has reference to the entire subject in controversy between the parties. (*Srinivasa Aiyangar, J.*) N. K. I. KUBERAN NAMBUDRI *v.* P.K. KOMAN NAIR. **48 M. L. J. 251 : 88 I. C. 421 : A I. R. 1925 Mad. 574 (1).**

——S. 10—*Stay of suit—Suit not between the same parties—Common questions.*

S. 10, C. P. Code, does not authorise the stay of a subsequently instituted suit where the prior and the subsequent suits are not between the same parties or between parties under whom they or any of them claim litigating under the same title, even though the two suits involve some common questions. 42 A. 290 ; 42 C. 926, Ref. (*Odgers, J.*) RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI. **15 L. W. 667 : 68 I. C. 167 : (1922) M. W. N. 521 : A. I. R. 1922 Mad. 321.**

——S. 10—*Stay of suit—Common issues—Same parties.*

An applicant under S. 10, C. P. Code, for stay of a suit is bound to show that the "matter in issue" in the suit is directly and substantially in issue in the previously instituted suit. It is not sufficient that there are some issues common to the two suits. The matters in issue in the two suits must be identical. The Court cannot apply S. 10 where the determination of the two suits depends not merely upon the decision of the common issue but also of other and entirely different issues. 24 C. L. J. 514 Foll. (*Venkatasubba Rao, J.*) KOTA SREERAMULU *v.* KOTA SREERAMULA. **15 L.W. 646: 70 I. C. 682 : 31 M. L. T. 360 (H. C.) : A. I. R. 1922 Mad. 304.**

C. P. CODE (V OF 1908), S. 10.

——**Ss. 10, 11, 47 and O. 34, Rr. 7 and 8**—*Mortgage—Decree for redemption—Omission to execute—Second suit for redemption on the same mortgage, whether maintainable*—Res judicata—*Remedy to the second plaintiff.*

Where a suit for redemption has been instituted by one of the mortgagors for the redemption of the entire property and a decree has been passed therein but not executed a subsequent suit by the other mortgagor for redemption of the same mortgage is barred by the rule of *res judicata*. 43 B. 334 dissented from. 5 O. L. J. 43 referred to. A suit for redemption of a mortgage by a co-mortgagor must be deemed to be a suit brought in a representative character. 1 O. W. N. 640 referred to. Where the decree for redemption passed is not executed, the suit must be taken as pending and S. 10, C. P. Code would be a bar to proceeding with a second suit. The plaintiff in the second suit however can proceed with the previous suits where it was left off. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) NARAIN *v.* GAYA DEEN. **1 O. W. N. 910 : 87 I. C. 290 : A. I. R. 1925 Oudh 696.**

——**S. 10**—*Does not bar suit nor justifies dismissal.*

A suit cannot be said to be premature under S. 10 if there is a valid cause for it. S. 10 does not bar a suit nor can a Court dismiss a suit under the section (*Jwala Prasad and Ross, JJ.*) MUSAMMAT DULJIN SONA KUER *v.* MUSAMMAT BIBI ALE FATIMA. **77 I. C. 157 : A. I. R. 1925 Pat. 201.**

——**Ss. 10 and 11**—*Applicability of—Miscellaneous proceedings—Law of procedure.*

The word "suit" in S. 10, C. P. Code, includes appeals and miscellaneous proceedings also. S. 141, C. P. Code, is wide enough to make the provisions of S. 10, C. P. Code, apply to arbitration proceedings. One of the essential conditions to attract the applicability of S. 10, C. P. Code, is, that the same party must be concerned in both the proceedings or the parties under whom any of them claim, litigating under the same title. (*Raymond, A. J. C.*) *In the matter of* FIRM OF JAINARAYAN BALU LAL. **16 S. L. R. 79 : 66 I. C 796 : A. I. R. 1922 Sind 6.**

——**S. 11.**

Adverse Finding.
Applicability and Scope.
Cause of Action.
Co-defendants.
Competent Court.
Compromise or Cousent Decree.
Connected or Cross Appeals and Suits.
Co-plaintiffs.
Directly and Substantially in Issue.
Execution Proceedings.
Ex-parte Decree.
Fraud.
Heard and Finally Decided.
Issue of Law.
Judgment *In Personam.*
Leave to withdraw Suit.
Litigating under the same Title.
Might and Ought.
Miscellaneous Proceedings.
Parties and Representatives.
Plea of.
Prior Decision.
Question of Law.
Representative Suit.

——**S. 11 (Old Section 12).**

See also C. P. CODE, O. 2, R. 2.

Adverse Finding.

——**S. 11**—*Adverse finding*—Res judicata.

C. P. CODE (V OF 1908), S. 11—Adverse Finding.

An adverse finding against the defendants in whose favour a decree is passed will not sustain a plea of *res judicata* but will lay *onus* on them of displacing the finding. (*Lord Dunedin.*) MIDNAPUR ZEMINDARI CO., LTD. *v.* NARAYAN ROY. **48 Cal. 460 : 14 L.W. 265 : 30 M L. T. 279 : 64 I. C. 231 : 48 I. A. 49 : A. I. R. 1922 P. C. 241 (P.C.).**

——**S. 11**—*Adverse finding—When operates as* res judicata.

Where a suit in ejectment is dismissed on the ground that the defendant's tenancy had not been terminated, an extra finding that the defendant had no right of occupancy in the suit land does not operate as *res judicata* in a subsequent suit. (*Fremantle, S. M. and Burn, J. M.*) SRIPAT SAHAI *v.* RAM AUTAR CHAUBE. **L. R. 5 A. 3 (Rev.).**

——**S. 11**—*Adverse finding—Decree in favour of party—Effect.*

Where a decree is one of dismissal in favour of the defendant, but there is an adverse finding against him on one point, he cannot appeal and there is no question of *res judicata*. Cases where a decree is based on two grounds either of which is sufficient to support the decree, stand on a different footing. (*Chatterjee and Pearson, JJ.*) RAJENDRA KISHORE CHOUDHURY *v.* KUMUD BAN MAHATA. **67 I. C. 271 : A. I. R. 1923 Cal. 297.**

——**S 11**—*Adverse finding—Where suit is dismissed against a deft. but judgment contains finding adverse to him, he can re-agitate the question decided on by the finding.*

Where the plaintiffs in previous suit abandoned their rights to claim a mortgage decree against the defendants and the defendants against whom the suit had been dismissed had no right of appeal upon the finding as to the nature of the debts and therefore the question was not finally decided as between the opposing parties to the suit:

Held, the question could be re-agitated. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) KUPPUSWAMI GOUNDAN *v.* MARIMUTHU GOUNDAN. **47 M.L.J. 487: 20 L. W. 783 : (1924) M. W. N. 807 : 82 I. C. 438 : A. I. R. 1925 Mad. 52.**

——**S. 11**—*Adverse finding—Party against whom suit is dismissed - How far affected by findings—Appealability — Suit for declaration and consequential relief—Form of decree.*

Where a point adversely decided against the defendant in a suit is correctly and substantially in issue in the suit and where in other proceedings the matter would be *res judicata*, he is entitled to appeal against the decision even though the suit was decided in his favour on some other ground. The true test in cases of this kind is to see not merely the forum but the substance of the decree and the judgment. In suits where declaration and consequential relief are sought and the consequential relief is refused, because the court is against the plaintiff's rights which he seeks to declare, it would be better if the decree formally embodied the result of the declaration but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused. (*Kumaraswami Sastri, J.*) NIMMAGADDA VENKATESWARALU *v.* BODAPATI LINGAYYA. **20 L. W. 63 : 47 Mad. 633 : 1924 M. W. N. 491 : A. I. R. (1924) Mad. 689.**

——**S. 11**—*Adverse finding—Decree in favour of a party—Not* res judicata.

In a suit instituted by plaintiff to eject the defendant from certain land, the latter pleaded that he had a permanent tenancy and in the alternative, that even

C. P. CODE (V OF 1908), S. 11—Adverse Finding.

if he was a yearly tenant, the tenancy had not been determined by a valid notice to quit. The trial Court found that the defendant had failed to establish a permanent tenancy but dismissed the suit holding that the defendant was a yearly tenant and there was no proper notice to quit. On appeal by the plaintiff the appellate Court upheld the dismissal of the suit on the ground of want of a notice to quit without deciding on the plea of permanent tenancy. In a subsequent suit in ejectment brought by the plaintiff after due notice, the defendant again set up a permanent tenancy. *Held*, that the decision in the prior suit did not operate as *resjudicata* and that the plea of permanent tenancy was open to the defendant in the subsequent suit. (*Krishnan and Waller, JJ.*) RAMASWAMY REDDI *v.* TALAIVASAL MARUDAI REDDI. **46 M. L. J. 198 : 47 Mad. 453 : 19 L. W. 377 : 34 M. L. T. (H. C.) 62 : (1924) M. W. N. 241 : A. I. R. 1924 Mad. 469.**

——S. 11—*Adverse finding—Heard and finally decided—Suit dismissed—Findings against successful party—If* res judicata.

A decision cannot be said to be based on a finding unless an appeal can be preferred against that finding. When a suit is decided in favour of the defendants but there is a finding adverse to them, that finding is not *res judicata* against them, as they could not have appealed against the finding. (*Baker, J. C.*) MT. GIRJABAI *v.* PURSHOTTAM DAS. **A. I. R. 1924 Nag. 333.**

Applicability and Scope.

——S. 11—*Applicability and Scope—Decision in interiocutory orders operates as* Res judicata *in subsequent stages of the same proceeding.*

A decree-holder consented to the appointment of Receiver of judgment-debtor's property but shortly after such appointment he applied for Receiver's discharge. His application was dismissed. *Held*, that this decision operated as bar to the trial of a second application for Receiver's discharge. The binding force of such a judgment depends not upon S. 11 but upon general principles of law. 11 I. A. 37 : 48 I. A. 187 Affir. (*Lord Shaw.*) RAMESHWAR SINGH BAHADUR *v.* HITENDRA SINGH. **47 M. L. J. 286 : 5 P. L. T. 491 : 20 L. W. 456 : 81 I. C. 576 : 35 M. L. T. 182 : 22 A. L. J. 968 : L. R. 5 P. C. 175 : 26 B. L. R. 1153 : 40 C. L. J. 431 : 29 C. W. N. 43 : A. I. R. 1924 P. C. 202 (P. C.).**

——S. 11—*Applicability and scope—Section is not exhaustive.*

A question at issue between the parties once heard and finally decided binds the parties at subsequent stages of the same suit, under general principles of law though not under S. 11. But for such a principle, there would be no end to litigation. 6 All. 269 (P. C.) Foll. (*Lord Buckmaster.*) GEORGE HENRY HOOK *v.* ADMINISTRATOR-GENERAL OF BENGAL. **40 M. L. J. 423 : 48 Cal. 499 : 48 I. A. 187 : 19 A. L. J. 366 : 29 M. L. T. 336 : (1921) M. W. N. 313 : 33 C. L. J. 405 : 3 U. P. L. R. (P. C.) 17 : 23 Bom. L. R. 648 : 25 C. W N. 915 : 60 I. C. 631 : 14 L. W. 221 (P. C.).**

——S. 11—*Applicability—Decision on question of law.*

On the question whether a finding on a matter of law can make the matter *res judicata* it is difficult to reconcile the decisions. But a finding on a mixed issue of law has undoubtedly the effect of *resjudicata.* (*Fremantle, S. M.*) SHEO GOVIND RAI *v.* KHAK-

C. P. CODE (V OF 1908), S. 11—Applicability and Scope.

HNU KUNJARA. **L R. 6 A. 226 (Rev.).**

——S. 11—*Applicability and scope — Decision among parties out of Court may be* res judicata.

Walsh, J.—Obiter :—A decision between the parties out of Court in the course of a suit is governed by the principles of *res judicata*, independently altogether of the special provisions of S. 11 of the Code. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **23 A. L. J. 561 : A. I. R. 1925 All. 503 (F. B.).**

——S. 11—*Applicability and scope of—Not exhaustive—Status of wife—If decision between husband and wife binding on father.*

S. 11, C. P. Code, is not exhaustive.

A decision in a suit between a husband and wife as to whether they were divorced or not cannot be re-agitated in a suit by the father against one of them. (*Mukerji, J.*) MT. KHATOON BIBI *v.* NAZIR. **A. I. R. 1924 All. 815.**

——S. 11—*Applicability and scope of.*

The pre-emptor impleaded in his suit only one out of the four brothers, alienees out of the property purchased, due to a mistake of fact. His suit was decreed, and the entire consideration having been realised by the alienee who was impleaded, he was given formal possession. His application for mutation was resisted by the three brothers of the alienees who were not impleaded and their objection was allowed except for ¼ share. In a suit for the possession of the property released in favour of the three brothers or in the alternative for a proportionate refund of the pre-emption money, it was found that the four brothers were separate. *Held*, S. 11 had obviously no application. (*Kanhaiya Lal, J.*) RAM BALI SINGH *v.* SHIAM SUNDER MISIR. **A. I. R. 1922 All. 475.**

——S. 11—*Applicability and scope of—Question as to* res judicata *should be decided with reference to S. 11 only.*

Where it is contended that an issue should not be re-tried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question has to be determined upon the provisions of S. 11 of the C. P. Code, and it is not open to rely upon the principle of finality which forms the basis of the general law of *res judicata* apart from those provisions. 5 Bom. 387 Dist. (*Mukerji, J.*) CHHADEK KARIKAR *v.* ALI KAVIRAJ. **A. I. R. 1925 Cal. 1046.**

——S. 11—*Applicability—Applies to rent suit.*

Decision in a previous rent suit whether *ex parte* or not operates as *res judicata* in a subsequent rent suit even for a different period if any question which arises in the suit or which if objections were taken by a party ought to have been decided has been decided thereby. (*Suhrawardy and Duval, JJ.*) SHIB CHANDRA TALUKDAR *v.* LAKHI PRIYA GUHA. **29 C. W. N. 253 : 40 C. L. J. 507 : A. I. R. 1925 Cal. 427.**

——S. 11—*Applicability—Appeals from preliminary and final decrees.*

An appeal against a preliminary decree filed on a date subsequent to the date of the final decree is barred but in the circumstances of the case the appeal was allowed to be converted into an appeal from final decree. (*Mookerjee and Suhrawardy, JJ.*) NANIBALA DASI *v.* ICHHAMOYEE DASI. **40 C. L. J. 291 : 84 I. C. 674 : A. I. R. 1925 Cal. 218.**

——S. 11—*Applicability—Findings on several issues—Decision how far* res judicata—*Exhaustive.*

The principle which prevents the same case from being twice litigated is of general application and is not limited by the specific words of the C. P. Code. It is a well settled rule that an estoppel is not confined to

C. P. CODE (V OF 1908), S. 11—Applicability and Scope.

the judgment but extends to all facts involved in it as necessary steps or ground work ; in other words, a judgment operates by way of estoppel as regards all findings which are essential to sustain the judgment, though not as regards all the findings which did not form the basis of the decision or were in conflict therewith. 48 I. A. 49 ; 12 B. L. R. 391 : 6 C. L. J. 621 ; 11 C. L. J. 461 : 28 M. 338 Rel. on. (*Mookerjee and Suhrawardy, JJ.*) DWIJENDRA NARAYAN ROY *v.* JOGESHCHANDRA DE. **39 C. L. J. 40 : 79 I. C. 520 : A. I. R. 1924 Cal. 600.**

——— **S. 11**—*Applicability and scope—Rent suit—Decision when* res judicata.

The decision in a rent suit is conclusive upon one point and one point alone, namely, that the defendants were not the tenants of the plaintiff during the years for which rent was then claimed. (*Mookerjee and Chotzner, JJ.*) SYAM LALL NASUA *v.* BRINDABAN CHANDRA. **72 I. C. 655 : A. I. R. 1924 Cal. 4[illegible]0.**

——— **S. 11**—*Applicability to rent suit—B. T. Act.*

Whether the decisions in the rent suits can operate as *res judicata* where the former suit was for payment of rent the new suit for fixation of fair and equitable rent under very different set of circumstances. (*C. C. Ghose and Chotzner, JJ.*) DEBI PROSAD *v.* OFFICIAL TRUSTEE. **37 C. L. J. 314 : A. I. R. 1923 Cal. 333.**

——— **S. 11**—*Applicability—Finding in unnecessary suit can create* res judicata.

A finding contained in a decree in a suit which the plaintiff was not bound to institute but which he as a fact instituted can very well operate as *res judicata*. It is not the law that a finding given in a suit which is perhaps an entirely useless suit and need not have been instituted at all does not create *res judicata* in a subsequent suit which concerns the same matter if the remaining requirements of law as found in S. 11 have been fulfilled. There is absolutely no necessity for *res judicata* to arise that the suit must be one which the plaintiff was bound to institute. The conditions as to *res judicata* are only the following. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

The parties as aforesaid must have litigated under the same title in the former suit. The Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. (*Abdul Raoof and Moti Sagar, JJ.*) HATTI KHAN *v.* MT. ALMO.

78 I. C. 3 : A. I. R. 1925 Lah. 160.

——— **S. 11**—*Applicability—Suit for rent against A and B—A alleging lessorship of B who was* ex parte *—Suit decreed against A and B—Next suit for rent of same property against C and B—C is bound by decision against B though not as* res judicata.

Defendant No. 1 in the suit was a tenant. In a previous suit for rent by the plaintiff against another tenant of the same property the defendant pleaded that he had obtained a renewal from the 2nd defendant who was also the 2nd defendant in that suit. The 2nd defendant was *ex parte*. It was decided that the 2nd defendant had no right to manage the property.

Held that the point as to the 2nd defendant's right to manage the property was *res judicata* in the subsequent suit between plaintiff and defendant 2. Also it was binding on the 1st defendant though not as *res judicata*. 13 C. L. J. 38 and 17 C. W. N. 627 Foll. and 44 M. 778 Applied. (*Venkatasubba Rao, J.*) CHERIAKKATAVAN KORAN *v.* KOROTH AMMALU.

A. I. R. 1925 Mad. 1025.

——— **S. 11**—*Applicability and scope*—Res judicata *in the same suit possible.*

The principle of *res judicata* is applicable to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit. (48 Cal. 409 (P. C.), Foll.) (*Kumaraswami Sastri, J.*) ABDUL WAHAB *v.* M. ROKIA BIBI. **A. I R. 1924 Mad. 406.**

——— **S. 11**—*Applicability—Decree for sale on mortgage—Purchase—Decision of suit after mortgage but before purchase, not* res judicata.

A purchase in auction sale in execution of a mortgage-decree for sale as also the proceedings in which the decree was obtained are part of the working out of the rights of the mortgagee under his mortgage. The rights of the purchaser are not therefore affected by *res judicata* by the decision in a suit subsequent to the mortgage though previous to the purchase. (*Oldfield and Venkatasubba Rao, JJ.*) RAYABHARAN SARAMMA *v.* DEVAPURAJALA GANGAYYA.

A. I. R. 1922 Mad. 390 (1).

——— **S. 11**—*Applicability and scope—Assignment of decree—Dismissal of execution petition by assignee —Decree-holder—Subsequent petition by assignee from the assignee.*

An assignee of a decree applied for execution ; the same was dismissed on the ground that there was no evidence to prove the assignment. Subsequently the assignee re-assigned the decree to the assignor, who assigned it to another. This person applied for execution. *Held*, that the petitioner as being the representative of the original assignee was bound by the order on the original execution petition filed by the assignee and could not maintain the petition. (*Kotval, A. J. C.*) PANDURANG *v.* SAMBHASHEO.

21 N. L. R. 159.

——— **S. 11**—*Applicability—Finding on the right to mortgage in a previous suit, whether operates as* res judicata *in a subsequent suit relating to a right to sell.*

There is an essential distinction between a transfer by way of lease or mortgage and a transfer by way of sale where different considerations apply. Therefore, a finding in a previous suit on the right to mortgage does not operate as *res judicata* in a subsequent suit where the question in issue is the right to sell rights in a grove. 15 O. C. 91 referred to. (*Neave, A. J. C.*) GANESH *v.* RAJA SURAJ BAKHSH SINGH.

2 O. W. N. 944 : L. R. 6 O. 119.

——— **S. 11, Expl. IV**—*Applicability and scope*

The failure by a defendant to raise a ground of defence which he cannot lawfully raise in a particular suit does not debar him from subsequently suing on that ground. (*Dalal, J. C.*) GANESH PRASAD *v.* JOT SINGH. **A. I. R. 1925 Oudh 719.**

——— **S. 11**—*Applicability—Property involved in the two suits need not be the same.*

For the application of the principle of *res judicata* it is not necessary that the subject-matter, in the sense of the property, involved in the two suits should be the same. (*Wazir Hasan, A. J. C.*) ALI MAHOMED SHAH *v.* GAURI SHANKAR LAL. **2 O. W. N. 430 : 12 O. L. J. 524 : A. I. R. 1925 Oudh 444.**

——— **S. 11**—*Applicability—Subject-matter need not be identical in both suits—Issue must be the same.*

It is not necessary to the application of the rule of

C. P. CODE (V OF 1908), S. 11—Applicability and Scope.

res judicata that the subject-matter of the two suits should have been identical. It is enough if the issue determined is the same. 12 I. A. 16 Foll. (*Daniels, J. C.*) MAHANT RAM DAS *v.* BHAGWAN KUNWAR. **12 O L. J. 248 : 2 O. W. N. 292 : A. I. R. 1925 Oudh 390.**

——S. 11—*Applicability and scope.*

A dismissal under O. 9, R. 3 creates no *res judicata.* (*Dalal, J. C. and Neave, A. J. C.*) MOHAMMAD HASAN *v.* ALI HOIDER. **28 O. C. 8 : 85 I. C. 509 : 12 O. L. J. 1 : A. I. R. 1925 Oudh 337.**

——S. 11—*Applicability and scope—Principle is to avoid repeated litigation as to same matter.*

The underlying general principle of the rule of *res judicata* is that persons should not be harassed by repeated litigation about the same subject-matter. (20 Cal. 79 (P. C.), Foll.) (*Wazir Hasan, A. J. C.*) GAURI MISRA *v.* MOHAN. **80 I. C. 847 : A. I. R. 1925 Oudh 118.**

——S. 11—*Applicability and scope—Decision on issue may be* res judicata—*Property need not be same.*

The fact that in the subsequent suit the property which is the subject-matter of the dispute is not identical with the property which was in dispute in the previous suit is immaterial. S. 11 of the C. P. Code makes not only the decision of a suit *res judicata* but even the decision of an issue alone if other necessary conditions are present. (*Wazir Hasan, A. J. C.*) GAURI MISRA *v.* MOHAN. **80 I. C. 847 : A. I. R. 1925 Oudh 118.**

——S. 11—*Applicability and scope not exhaustive.*

S. 11 of the C. P. Code does not exhaustively state the whole law of *res judicata.* The effect of the section is not to supersede the general principles on the subject. (*Wazir Hasan, A. J. C.*) GAURI MISRA *v.* MOHAN. **80 I. C. 847 : A. I. R. 1925 Oudh 118.**

——S. 11—*Applicability and scope—Acceptance under protest.*

Accepting a decision and acting in accordance with it under protest does not prevent its being *res judicata.* (*Dawson Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD *v.* GAJADHAR PRASAD. **1 Pat. L. T. 145 : 73 I. C. 359 : A.I.R. 1924 Pat. 362.**

——S. 11—*Applicability and scope.*

S. 11 of the Code of Civil Procedure takes no note of the fact whether the cause of action is the same or different. The only matter for investigation is whether the matter directly and substantially in issue, has been directly in issue in a former suit between the same parties or between parties under whom they or any of them claim ; and it is upon this investigation that the question of *res judicata* must, in each case, be decided. (*Das and Kulwant Sahay, JJ.*) RAM LALL MALICK *v.* DEODHARI RAI. **2 Pat. 772 : 74 I. C. 781 : 5 Pat. L. T. 7 : A.I.R. 1924 Pat. 265.**

——S. 11—*Applicability and scope*—Res judicata *and estoppel—Distinction.*

The doctrine of *res judicata* is sometimes treated as a branch of the doctrine of estoppel and is referred to as estoppel by judgment. The doctrine of estoppel properly so called is dealt with in S. 115 of the Evidence Act. There is a difference in the principle upon which the two doctrines are based. *Res judicata* in this country is founded on the principle that there should be an end to litigation as to any issue has been directly determined between them by a Court of competent jurisdiction ; and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It

C. P. CODE (V OF 1908), S 11—Cause of Action

bars fresh litigation at the outset. Estoppel is a rule of evidence based on the principle that a man, who by his acts or statements has induced another to believe a thing to be true, should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced. (*Dawson Miller, C. J. and Coutts, J.*) KALI DAYAL *v.* UMESH PRASAD. **3 Pat. L. T. 506 : 1 Pat. 174 : 67 I. C. 266 : 1922 P.H.C.C. 33 : A.I.R. 1922 Pat. 63.**

——S. 11—*Applicability and scope—Principle applies to appeals.*

The question of *res judicata* is not confined only to the provisions of S. 11. 11 I. A. 37 Ref (*Robinson, C. J. and Brown, J.*) ANWAR ALLI SOWDAGAR *v.* AMEER ALLI SOWDAGAR. **2 Rang. 633 : A. I. R. 1925 Rang. 104.**

Cause of Action.

——S. 11—*Cause of action—Property purchased in Court sale—Declaration as to the property being subject to trust—Adverse possession.*

Where it was declared in the presence of the auction purchaser that the property purchased was trust property, in a suit by trustees to recover the property, *held*, that the decree in the declaration suit had not the effect of *res judicata* against the purchaser. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property was subject to trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession ; it merely emphasised the fact that it was adverse. (*Lord Buckmaster.*) SUBBAIYA *v.* MD. MUSTAFA. **45 M. L. J. 588 : 46 Mad. 751 : 50 I. A. 295 : 21 A. L. J. 730 : 25 Bom. L. J. 1275 : 40 C. L. J. 20 : 2 Pat. L. R. 104 : 33 M. L. T. 285 : L. R. 4 P. C. 180 : 18 L. W. 903 : (1924) M. W. N. 66 : 28 C. W. N. 493 : A. I. R. 1923 P. C. 175 (P.C.).**

——S. 11—*Cause of action—Unnecessary party is not bound.*

A Hindu daughter with limited estate joining her minor son who was an unnecessary party to the suit against her cannot bind her son's interest by compromise in the suit so as to create a bar of *res judicata.* (*Ryves and Gokul Prasad, JJ.*) NARAIN SINGH *v.* RAJ KUMAR SINGH. **44 A. 428 : L. R. 3 A. 229 : 66 I. C. 62 : 20 A. L. J. 251 : A. I. R. 1922 All. 217.**

——S. 11—*Cause of action—Application to file award registered as suit, abated for non-joinder of representatives—Second suit to recover money due is not barred.*

Where a person makes an application to file an award, and it is registered as a suit, but the suit abated for plaintiff's failure to join deceased defendant's representatives, a second suit to recover the money due under the award is not barred by *res judicata.* 45 Bom. 329 Appl. (*Macleod, C. J. and Coyajee, J.*) ABDUL AZIZ *v.* CHANDU SONU. **27 Bom. L.R. 652 : A. I. R. 1925 Bom. 418.**

——S. 11—*Cause of action—Partition suit—Prior suit for partition under a will and partition deed—Dismissal.*

A prior suit for partition by metes and bounds and possession of property on the strength of a partition effected by the father of a joint Hindu family and a will made by him was dismissed on the ground that the partition was unfair and the plaintiff was refused leave to amend the plaint by claiming a general partition of joint family properties. Subsequently, the plaintiff sued for partition as a member of a joint Hindu family.

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Held, that the subsequent suit was not barred by *res judicata*. The first suit was founded on a distinct and separate cause of action, *viz.*, the partition deed, and the plaintiff was under no obligation to sue in the alternative for partition as joint family property. (*Macleod, C. J. and Crump, J.*) MAHADEVAPPA *v.* KASHI RAO. **25 Bom. L. R. 797 : 77 I. C. 92 : A. I. R. 1923 Bom. 467.**

——S. 11—*Cause of action—Suit for possession dismissed by 1st appellate Court on ground of adverse possession of defendant—In second appeal plea of adverse possession not considered but suit dismissed on ground of limitation—Second suit by plaintiff against same defendant for possession on different cause of action is not barred.*

In the first suit for possession the first appellate Court decided the appeal against the plaintiff on the ground of adverse possession by defendants. In second appeal the High Court did not express any opinion upon the question of adverse possession but decided the appeal against the plaintiff on the ground of limitation. In a subsequent suit for possession by the same plaintiff against the same defendant on a different cause of action: *Held*, that the High Court having disposed of the case merely upon the ground of limitation must be taken not to have decided any other question. When the decision of a lower Court is appealed to a superior tribunal and that tribunal for any reason does not think fit to decide the matter, it is left an open question and hence the second suit was not barred on the ground of *res judicata*. 8 Cal. 631; 24 Cal. 616 (P. C.); 7 Cal. 381; 45 Cal. 442 (P. C.) and 6 Bom. 110, Ref. (*Chatterjee and Cuming, JJ.*) NRIPENDRA NATH *v.* BASANTA KUMAR. **29 C. W. N. 861 : 89 I. C. 207 : A. I. R. 1925 Cal. 1195.**

——S. 11—*Cause of action—Suit for arrears of rent—Subsequent suit for ejectment.*

Where a suit for arrears of rent was dismissed on the ground that no relationship of tenancy existed, a subsequent suit on title for ejectment is not barred by *res judicata*, by reason of the decision in the former suit. (*Mookerjee, C. J. and Fletcher, J.*) MRIGENDRA NATH SAHA *v.* KRISHNA CHANDRA SAHA. **61 I. C. 201 : 33 C. L. J. 334.**

——S. 11—*Cause of action—Two mortgages of the same property in favour of the same person.*

Where two successive mortgages are created on the same property by the same debtor in favour of the same creditor, the creditor may either sue on the first, including the claim as to the second or sue separately on each claim and he is not debarred from adopting the latter procedure either by S. 11, Expl. IV or O. 2, R. 2. (*Asutosh Mukerji, A.C.J. and Fletcher, J.*) NILU ROY *v.* ASIRABAD MANDAL. **33 C. L. J. 232 : 60 I. C. 809: 25 C.W.N. 129.**

——S. 11—*Causes of action different—Relief claimed being same—S. 11 does not apply.*

When the causes of action are different it cannot be said from the mere fact that the same relief is claimed in both, that the later suit is barred by reason of the earlier suit. 29 Mad. 153, Foll. (*Devadoss, J.*) KARIPPAYI KATHIRI *v.* K. KANNAN. **A. I. R. 1925 Mad. 1172.**

——S. 11—*Cause of action—Trust suit—Previous suit for formation of a scheme—Subsequent suit based on events happening subsequent to the previous suit is maintainable—Prior events may be admitted in evidence to consider the proposed modification.*

Generally speaking, the cause of action in respect of a claim for the modification of a scheme is or should be the defective or unsatisfactory nature of the scheme

C. P. CODE (V OF 1908), S. 11—Cause of Action.

in force, as discovered or disclosed in the light of the events and experience during the period that has elapsed since the last modification and therefore a suit in respect of the period subsequent to the previous suit is not barred by *res judicata*. Any evidence relating to matters previous to the date of the institution of the previous suit cannot, however, properly be the basis of a cause of action, yet, evidence of matters relating to the management during the earlier period might also be taken into consideration in the light of the subsequent events in coming to a conclusion with regard to the modifications to be made in the scheme of management and also with regard to the removal of the defendants from the office of trusteeship. (*Kumaraswami Sastri, Madhavan Nair and Srinivasa Iyengar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR. **(1925) M. W. N. 505: A. I. R. 1925 Mad. 1070.**

——S. 11—*Cause of action—Religious endowment—Scheme of management—New circumstances—O. 2, R. 2.*

Though a scheme of management was asked and prepared by the trial Court in a previous suit the first appellate Court gave personal direction to the trustee by way of injunction to keep correct account and the High Court thought it sufficient. No finding was given on the question of scheme, as the High Court in that suit refused to frame any scheme. The only matter that was decided in that suit and was therefore *res judicata* was that certain shop belongs to the temple. The present suit so far as it prays for a scheme, being based on a different set of facts which came into existence at least partly after the previous suit had been filed and on a different sanction newly obtained from the Collector was held to be not barred. (*Spencer and Krishnan, JJ.*) GOVINDASWAMI NAIDU *v* UCHAPPA GOUNDAN. **(1922) M. W N. 477 : A. I. R. 1922 Mad. 413.**

——S. 11—*Cause of action—Second suit on the same cause of action.*

Under a compromise *A* and *B* were bound to pay maintenance to *C* every year. *A* paid the whole amount for two years and sued *B* for contribution. The appellate Court rejected the plaint as disclosing no cause of action because the compromise did not contain any clause as to compromise. *A* then sued again on the same cause of action and the same subject-matter. *Held*, the suit was barred. (*Sadasiva Aiyar and Napier, JJ.*) SANTHA NATH AMMAL *v.* ISSAKI SUPPAN ASSARAN. **(1920) M W. N. 616 : 60 I. C. 694 : 12 L. W. 457.**

——S. 11—*Cause of action—Mortgage suit—Questions as to rent or set-off.*

Where a mortgage has ripened, all claims relating to the mortgage between parties thereto, must be determined in one suit, whether for sale, foreclosure or redemption. Where in a mortgage suit, the deft. omits to put forward a counter-claim due to him by the mortgagee, arising out of the mortgage transaction, a separate suit for such recovery is barred. (*Sadasiva Aiyar and Spencer, JJ.*) AMSENAMMAL *v.* MEENAKSHI. **60 I. C. 226: 12 L. W. 175.**

——S. 11—*Cause of action—C. P. Code, O. 9, R. 9—Suit for declaration—Dismissal for default—Subsequent suit for possession.*

A suit for declaration that an alienation in favour of the deft. is invalid was dismissed for default. The plff. subsequently sued for partition and possession of a share. *Held*, the cause of action being different, the suit is not barred. R. 9 bars a suit where the cause of action is the same. (*Ayling and Krishnan, JJ.*) ASIA BIVI *v.* SEHU MOHAMMAD ROWTHER.

C. P. CODE (V OF 1908), S. 11—Cause of Action.

39 M. L. J. 412: 60 I. C. 201: 12 L. W. 431.

——S. 11—*Cause of action—Suits on different—Not barred.*

Where there are two agreements to sell two consignments of *mohwa* a suit for damages for failure to deliver one consignment and a decree thereon do not bar a fresh suit on the agreement to deliver the second consignment. (*Drake Brockman, J. C.*) JODHRAJ *v.* BYRAM. 7 Nag. L. J. 25 : 83 I. C. 309.

——S. 11—*Cause of action—Reversioners.*

Rejection of claim by reversioners for cancellation of gift by widow is no bar to claim as reversioners after her death. The validity of the deed of gift and its effect are distinct matters. (*Ashworth, A. J. C.*) MT. KUSEM DEI *v.* HAR DUTT. 26 O. C. 98: 74 I. C. 459: A. I. R. 1924 Oudh 129.

——S. 11—*Cause of action—Suit for restitution—Compromise—Suit for maintenance.*

The plaintiff (wife) filed a suit to recover arrears of maintenance according to agreement that she was to live separate and receive maintenance if maltreated by husband. She alleged that her husband had turned her out ; but the Court found that he had not done so, and that if the meaning of the agreement was that she was free to leave her husband at any time, then the agreement was not enforceable at law. The wife went to live with her husband but was soon turned out and she filed the present suit for maintenance. *Held*, the facts in the former suit were different. It was found there that the wife had left her husband's house for no reason, and it was held that, if she set up an agreement under which she could do that, then any such agreement was contrary to Muhammadan Law. That proposition of law is quite correct, but it does not govern the present case and therefore there is no *res judicata.* (*Simpson, A.J.C.*) BANNEY SHAIB *v.* ABIDA BEGUM. 25 O. C. 157 : A. I. R. 1922 Oudh 251.

——S. 11 and O. 2, R. 2—*Cause of action—Future mesne profits not claimed in suit for possession—Subsequent suit for such mesne profits is not barred.*

Where, in a suit for possession future mesne profits have not been claimed, a subsequent suit for the same is not barred as both in S. 11 as well as O. 2, R. 2, the issues and claims referred to are those arising out of the cause of action and not those arising out of some possible future cause of action. (*Dawson Miller, C. J. and Foster, J.*) RAMJANAM SINGH *v.* KHUB LAL SINGH. 6 Pat. L. T. 78 : 30 I. C. 710 : A. I. R. 1925 Pat. 145 (2).

——S. 11—*Cause of action—Mortgage—Interest payable monthly—Suit for interest only—Subsequent suit for principal and interest.*

Where there is a distinct and separate covenant to pay interest every month, the mortgagee can claim his principal when he wishes to do so; but meanwhile and for so long as he does not choose to exercise this option, the interest will be paid every month. The failure to pay interest every month as promised does therefore give rise to a separate cause of action. A prior suit in such a case for interest does not bar a subsequent suit for principal and interest. (*Brown, A. J. C.*) MAUNG KYIN PEIN *v.* MA PWA ME. A. I. R. 1922 U. B. 1

Co-defendants.

——S. 11—*Co-defendants*—Res judicata *applies if conflict of interest existed and if decision of suit rested on the issue.*

For *res judicata* to arise between co-defendants there must have been a conflict of interest between the co-defendants, and it must have been necessary for the decision of the suit for the Court to decide the question on which they were at issue. If the issue was one

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the decision of which was sufficient for the decision of the suit, and the issue was raised and the suit was actually in fact decided upon it, then, if that issue was one which was raised, not only between the plaintiff and the defendants, but between the co-defendants as well, the rule of *res judicata* applies as between co-defendants also. It is not necessary for an issue to operate as *res judicata* that it should have been the only ground on which the Court could have decided the case. (*Sulaiman and Daniels, JJ.*) MAHIP NARAIN PANDEY *v.* MANUM SINGH. 23 A. L. J. 453 : 88 I. C. 130 : L. R. 6 A. (C.v.) 385 : A. I. R. 1925 All. 546.

——S. 11—*Co-defendants—Proceedings for partition of co-sharer village—Rate of profits allowed to outgoing sharers is not* res judicata *as between parties continuing as co-sharers after partition.*

Where a partition of a co-sharer village took place and the present plaintiffs and defendant lambardar were on the same side and continued to be joint co-sharers in the same mahal, even after the partition, *Held*, the rate at which the profits payable to the outgoing co-sharers was calculated in the partition proceedings is not *res judicata* as between the plaintiffs and defendant *inter se* in a subsequent action for share of profits. 42 All. 309 Foll (*Walsh, Ag. C. J. and Sulaiman, J.*) KARAN SINGH *v.* RAM SAHAI. 83 I. C 231 : A. I. R. 1925 All. 246.

——S. 11—*Co-defendants—Decision on issue as to construction of will*—Res judicata—*Inconsistent decisions—Later decision to prevail.*

Where in order to ascertain the relief that the plaintiff should get, it is necessary to determine the right construction of a will and declare the rights of the plaintiff as well as the defendants *inter se*, the decision operates as *res judicata* as between the co-defendants. As regards co-defendants an adjudication which is necessary to give the proper relief to the plaintiff is *res judicata* as between the co-defendants as well, provided there is a conflict of interest. Where there are two inconsistent decisions between the same parties, the later one will prevail and operate as *res judicata.* (*Walsh and Ryves, JJ.*) RAM PRASAD *v.* MAHABIR. 46 A. 220: 22 A. L. J. 91: L. R. 5 A. 71 : 79 I. C. 803 : A. I. R. 1924 All. 310.

——S. 11—*Co-defendants.*

If the plaintiffs-respondents and the defendant-appellant were co-defendants in the previous suit but their interests were not at variance, decision in the previous suit is in no way a decision between them as parties and does not therefore operate as *res judicata.* But it is not of course impossible for a Court to arrive at a decision as between co-defendants which will operate as *res judicata* in subsequent proceedings. (*Stuart, J.*) KALI DIN *v.* MADHO. A. I. R. 1923 All. 169.

——S. 11—*Co-defendants — Partition suit*—Res judicata.

Unless it is necessary to decide an issue between the defts. themselves to grant relief to the plaintiff, decision in a prior suit does not operate as *res judicata* between co-defendants. Where in a prior suit for partition, certain parties were arranged as co-defendants and the decision in that suit did not decide any question of partition amongst them *inter se*, that decision does not operate as *res judicata* as between the co-defendants in a subsequent suit for partition. (*Mears, C. J. and Banerji, J.*) MAHOMED AHMAD *v.* ZAHUR AHMAD. 44 All. 334 : 4 U. P. L. R. (A) 55 : 67 I. C. 523 : 20 A. L. J. 193 : A. I. R 1922 All. 19.

——S. 11—*Co-defendants*—Res judicata—*Partition suit.*

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Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* among them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. The test is whether there was a necessity to decide the point, whether as a matter of fact it was ever raised between co-defendants and whether it was decided. 11 Bom. 216 Foll. Where in a partition suit none of the parties claimed or resisted partition except the plaintiff, any questions regarding partition which might thereafter arise between the defendants in that suit remains open to be decided. (*Macleod, C. J. and Crump, J.*) GANGARAM *v.* VASUDEO.

47 Bom. 534 : 73 I. C. 912 : 25 Bom. L. R. 268 : A. I. R. 1923 Bom. 203.

——— **S. 11**—*Co-defendants — Where decision is necessary between co-defendants the decision is* res judicata.

Ordinarily the doctrine of *res judicata* does not operate as between co-defendants and the Court applies the doctrine with considerable caution as between co-defendants ; this doctrine has been applied as between co-defendants ; where there is a conflict of interest as between them, where it is necessary for the Court to decide the conflict and where the judgment clearly decides the question as between those co-defendants. (36 Cal. 193 ; 31 Cal. 95 and 35 C. L. J. 173, Ref.) (*Greaves and Chakravarthi, JJ.*) HALDHAR DAS TANTI *v.* NAGENDRA NATH MANDAL.

51 Cal. 997 : 84 I. C. 846 : A. I. R. 1925 Cal. 431.

——— **S. 11**—*Co-defendants—Decision when operative as* res judicata.

A decree could not operate as *res judicata* as between co-defendants if there was no conflict of interest and no decision as between the defendants themselves. It will be an *a fortiori* case where a decision as between the defendants was not necessary to give the appropriate relief to the plaintiff in the suit. 31 C. 95 ; 25 C. L. J. 322 Ref. (*Chatterjee and Panton, JJ.*) RAJENDRA KUMAR BOSE *v.* BISWARUP DEY.

64 I. C. 603 : 35 C. L. J. 173.

——— **S. 11**—*Co-defendants arrayed as plaintiffs and defendants in subsequent suit—Point in controversy between them in previous suit is* res judicata.

Where the plaintiffs and defendants in the subsequent suit were arrayed as two sets of defts. in the previous suit and therein they contested with each other on a point of relationship : *Held*, that that point was *res judicata* in the subsequent suit. (*Campbell, J.*) MEHR DAD *v.* MAHOMED ALI SHAH.

7 Lah. L. J. 195 : A. I. R. 1925 Lah. 434.

——— **S. 11**—*Co-defendants—Decision between when* res judicata.

As regards parties arrayed on the same side, *e.g.*, as co-defendants, an adjudication between them which is necessary to give the appropriate relief to the plaintiff is *res judicata* as between them, as well as between the plaintiff and the defendants, provided there is a conflict of interests between the defendants giving rise to a distinct issue between them and a judgment defining the real rights and obligations of the defendants. In order that a finding in a case be *res judicata* between the co-defendants three things are necessary, (1) there should be a conflict of interest between co-defendants, (2) that it should be necessary to adjudicate upon the conflict in order to give appropriate relief to the plaintiff, and (3) that the judgment should in fact determine the rights and liabilities of the defendants *inter se*. (*Abdul Raoof and Moti Sagar, JJ.*) SUKH DIAL *v* MT. BHOPI.

71 I. C. 481 : A. I. R. 1923 Lah. 186.

——— **S. 11**—*Co-defendants—Conflict of interest.*

The mortgagor and the mortgagee are not bound by a decision in a suit by the reversioner for a declaration that the mortgage is not valid, though they may be parties to the suit as there is no conflict of interest between them. 103 P. R. 1912 Dist. (*Broadway and Wilberforce, JJ.*) DEWA SINGH *v.* GOKAL.

67 I. C. 881 : 3 L. L. J. 295.

——— **S. 11**—*Co-defendants in partition suit—Dismissal of suit—Adverse finding on issues raised between co-defendants—Appeal by defendant against whom adverse finding given.*

In a partition suit, certain issues were raised between the defendants *inter se*. The suit itself was dismissed but findings were given on the issues raised between the co-defendants. The defendant against whom the finding was given preferred an appeal. *Held*, that no appeal lay, as the finding was not *res judicata* between the co-defendants, the same not being necessary for the dismissal of the plaintiff's suit. (*Ramesam and Reilly, JJ.*) PANGI VENKOBACHARLU *v.* S. RADHABAYAMMA.

22 L. W. 384.

——— **S. 11**—*Co-defendants—Finding on question of title neither necessary nor embodied in decree is not* res judicata.

A finding against a co-defendant on a question of title does not operate as *res judicata* if it was not necessary for the disposal of the suit, was not embodied in the decree and no decree was passed against the co-defendant against whom it was given. (1919) M.W.N. 34 Foll. 9 L. W. 180 Diss. and 1924 Mad. 469 and 1922 P. C. 241 Foll. (*Madhavan Nair, J.*) SURYANARAYANA *v.* APPAYYA.

A. I. R. 1925 Mad. 947.

——— **S. 11**—*Co-defendants - Decree dismissing suit —Finding as between co-defendants—Not implied in decree nor embodied therein—Appeal if lies.*

Where a decree is one of dismissal of a suit, findings in the judgment as between co-defendants which are not necessarily implied in the decree or embodied therein do not operate as *res judicata* as it is not open to the party aggrieved by such findings to appeal against the decree. Case-law discussed. (*Ramesam and Reilly, JJ.*) PARIGI VENKOBACHARLU *v.* RADHABAYAMMA.

47 M. L. J. 612 : 35 M.L.T. 101 : (1924) M.W.N. 867 : A. I. R. 1924 Mad. 858.

——— **S. 11**—*Co-defendants*—Res judicata *between —Rule as to—Applicability of—Conditions—Fraudulent benami transfer—Plea of—Maintainability—Covenant for quiet enjoyment—Damages for breach of—Suit for—Plea in.*

In the course of the insolvency of C, the Official Assignee challenged, as not being *bona fide* and as being without consideration a transfer of the insolvent's property obtained by R, from a transferee from the insolvent himself, and a transfer made by R to A of the same property. A suit brought by the Official Assignee against R and A jointly for a declaration that the transfers in their favour must be set aside for want of good faith and like considerations was decreed on the ground that the transferees were not purchasers in good faith, the appellate Court in that suit also expressing the opinion that the transfers were not for consideration.

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In a suit by A against R for damages for breach of covenant for quiet enjoyment due to her having been ousted by the Official Assignee, *held*, (1) that the opinion of the Appellate Court in the prior proceeding that the transfer in favour of A was not for consideration was mere *obiter dictum* and did not operate as *res judicata* between R and A, and (2) that R could not plead that the transfer in favour of A was a benami transaction intended to cheat the creditors of C. (*Coutts-Trotter and Ramesam, JJ.*) RAMASWAMI NAICKER *v.* ALAMELU AMMAL. **46 M. L. J. 298 : (1924) M. W. N. 204 : 34 M. L. T. 301 : 78 I. C. 921 : A I. R. 1924 Mad. 604.**

——S.11—*Co-defendants*—Res judicata—*Decision when operates as.*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se.* Without necessity the judgment will not be *res judicata* amongst the defendants,nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim made against them as a group. *Cottingham* v. *Earl of Shrewsbury*, 3 Hare 627 : 11 B. 216 Foll. Subsequent to the execution of a mortgage in favour of the plff. by a Hindu father on behalf of himself and his two sons, a third son was born. In a suit for partition by the two sons against the father, the after-born son,the mortgagee and many other defendants, the trial Judge held that the mortgage was not binding on the after-born son as well as the plaintiffs in the suit and decreed a share to each of the sons. On appeal by the mortgagee impleading the father and the sons as respondents it was held that the mortgage was not binding on them. In a suit by the mortgagee against the father and sons, *held*, that the suit was barred on account of the decree in the prior suit. (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) KONGA RAMASWAMI IYER *v.* PONNUSWAMI.

(1922) M. W. N. 526 : 31 M.L.T. 370 (H. C.) : 16 L. W. 981 : 70 I. C. 769 : A. I. R. 1922 Mad. 452.

——S. 11—*Co defendants — Previous suit for ejectment—No contest between defendants—Validity of partition not questioned -Decision whether* res judicata.

The decision in a previous suit for ejecting the defendants on the ground of trespass does not operate as *res judicata* on the question of the validity of the partition deed, where there was no contest between the defendants and where it was not necessary for one of them to raise to the question of the validity of the partition. (*Kumaraswami Sastri and Devadoss, JJ.*) POTHARI ILLATH MADHAVAN NAIR *v.* CHALIKADAVATH PAKKI ISSAN THOTIYAL ABDUR RAHIMAN. **A. I. R. 1922 Mad. 404 (2).**

——S. 11—*Co-defendants—When decision is* res judicata.

For a decision to operate as *res judicata* between co-defendants there must have been an active controversy between them in the suit and a decision on that should have been necessary to give relief to the plaintiff. (*Kinkhede, A. J. C.*) LAXMAN *v.* JANOO.

20 N. L. R. 197 : A. I. R. 1924 Nag. 429.

——S. 11—*Co-defendants— Decision when* res judicata.

Where the relief given in a suit does not require or involve a decision of any case between co-defendants, the latter will not be bound as between each other by anything decided in the suit. (*Baker, J. C.*) JAGESHWAR RAO *v.* GAJAB RAO, **A.I.R. 1924 Nag. 168.**

——S. 11—*Co-defendants — Decision when* res judicata.

Where it is absolutely essential for the determination in a prior suit questions *inter se* between defendants and they were so decided, the decision is *res judicata.* (*Hallifax, A.J.C.*) MT. MUNNA *v.* SUKLAL. **A. I. R. 1924 Nag. 142.**

——S. 11—*Co-defendants*—Res judicata *between —Conflicting of interest, decision thereon and necessity for the decision must exist.*

For an adjudication to be *res judicata* as between co-defendants three conditions are necessary (1) there should be a conflict of interest between the co-defendants ; (2) it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit ; and (3) the judgment should contain a decision of the question raised as between the co defendants. 25 C. L. J. 322 ; 2 Lah. 88 and 1923 Bom. 203 Foll. (*Pratt, J.*) MA TOK *v.* MA YIN.

3 Rang. 77 : A. I. R. 1925 Rang. 228.

——S. 11—*Co-defendants—Prior mortgage suit—Appellant and respondent impleaded as co-defendants —Contest between mortgagee and appellant as to respondent's title in mortgage suit—Decision* res judicata *in subsequent suit for possession by respondent against appellant.*

Where there has been a conflict of interest between co-defendants and an adjudication was necessary to give the appropriate relief to a party or a co-defendant has a common interest with the plaintiff and has actively supported him against the other defendant, the decision will operate as *res judicata* in a subsequent suit. 29 M. 515 ; 11 B. 216 ; 3 Hare 627 ; 71 I. C. 481 ; A.I.R. (1923) Lah 186 Ref. to. (*Heald and Lentaigne, JJ.*) MAUNG THWE *v.* MA SHWE PON. **3 Bur. L. J. 54 : 82 I. C. 423 : A. I. R. 1924 Rang. 279.**

Competent Court.

——S. 11—*Competent Court — Administration proceedings.*

Directions given in an administration suit bind all parties, determine the construction to which the will gives effect and is final and conclusive. (*Lord Buckmaster.*) GOPAL LALL SUTT *v* PURNA CHANDRA BASAK. **43 M. L J. 116 : 20 A. L. J. 625 : 36 C. L. J. 57 : 24 Bom. L. R. 937 : 16 L. W. 963 : 49 I. A. 100 : 49 Cal. 459 : 67 I. C. 561 : 27 C. W. N. 174 : A. I. R 1922 P. C. 253 (P.C.).**

——S. 11—*Competent Court—Land acquisition proceedings—Decision as to title between rival claimants—Subsequent suit between parties*—Res judicata—*Plea of.*

Where in certain land acquisition proceedings a dispute arose as to apportionment of compensation between two rival claimants and the dispute is decided by the Court on the construction of the terms of a gift deed in which the land acquired was included, that decision operates as *res judicata* as between those parties or their representatives not only with reference to the extent of the money but with reference to other property covered under such title in a subsequent suit between parties though not by reason of S. 11, C. P. Code, but by reason of the general principles of *res judicata.* (1909) A. C. 623 ; 48 C. 42 Foll. 23 C. 526 ; 17 C. W. N. 935 overruled. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute and a plea of *res judicata* is not made unsustainable by the mere fact

C. P. CODE (V OF 1908), S. 11—Competent Court.

that the value of the subject-matter in the former litigation was so trifling that the parties did not think it worth their while to appeal from the decision in the former proceedings. (*Lord Buckmaster.*) RAMACHANDRA ROW *v.* RAMACHANDRA RAO.

43 M. L. J. 78 : 45 Mad. 320 : 24 Bom. L. R. 963 : 16 L. W. 1 : (1922) M. W. N. 359 : 20 A. L. J. 684 : 35 C. L. J. 545 : L. R. 3 P. C. 158 : 30 M. L. T. 154 : 67 I. C. 408 : 26 C. W. N. 713 : 49 I A. 129 : A. I. R. 1922 P. C. 30 (P.C.).

——S. 11—*Competent to try such subsequent suit —Suit for arrears of rent tried by Assistant Collector Second Class—Subsequent ejectment suit tried by Assistant Collector First Class—Finding in prior suit.*

A finding arrived at in a suit for arrears of rent tried by an Assistant Collector Second Class, is not *res judicata* in an ejectment suit before an Assistant Collector First Class, as the latter suit cannot be tried by the Court which tried the earlier one. (*Sulaiman, J.*) MT. KUMARI *v.* ADIT MISIR. **89 I. C. 379.**

——S. 11—*Competent Court—Prior suit in Small Cause Court—Damages—Dismissal of—Subsequent suit in regular side—Combining of causes of action.*

Plaintiff was the consignor of two parcels by defendant railway. He brought two suits in the Small Cause Court for damages to the goods and they were dismissed. Subsequently plaintiff sued in the Original Side of the District Munsif's Court for damages clubbing the value of the two parcels and bringing the claim above 500 rupees. *Held*, that the subsequent suit was barred both under S. 11 and under O. 2, R. 2, C. P. Code. The joining together of the subject-matter of the two previous suits was no more than a device for evading the provisions of S. 11. C. P. Code, and could not be possibly countenanced. (*Daniels and Neave, JJ.*) MANGAN LAL *v.* G. I. P. RY. CO. **22 A. L. J. 745 : L.R. 5 A. 580 : A. I. R. 1924 All. 849**

——S. 11—*Competent Court — Dispute between rival claimants once decided by Revenue Court cannot be re-opened in a Civil Court—Agra Tenancy Act, S. 167.*

Although S. 167 of the Agra Tenancy Act does not apply to suits between rival claimants to a tenancy, nevertheless once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court. This view is not based on the provisions of S. 167 nor on the principle of *res judicata* but rather on the general ground that the effect of allowing such thing to be done would be to nullify the decree of the Revenue Court which is final and binding on the parties. 41 A. 97 Foll. (*Sulaiman, J.*) SURJAN SINGH *v.* UMARI SINGH. **78 I. C. 1008 : A. I. R. 1924 All. 609,**

——S. 11— *Competent Court — Jurisdiction — Heard and decided—Decision of Revenue Court—Decision on.*

The plaintiffs claimed to be the *doblidars* of the plot in dispute. Previous to this suit the plaintiffs had brought a suit in the Revenue Court against the defendant alleging that the defendant was their tenant. The Revenue Court held that the defendant was not the plaintiff's tenant at all and directed that the plaintiffs should sue the defendant for possession in the Civil Court. *Held*, that the only point on which the judgment of the Revenue Court was conclusive was that no relation of landlord and tenant subsisted between the parties. The judgment did not decide as to whether or not plaintiffs were the rent-free grantees. (*Sulaiman, J.*) CHAUDHURI HAR SARUP *v.* BRIJ NANDAN LAL. **L. R. 5 A. 103 (Rev.) : 79 I. C. 587 : A. I. R. 1924 All. 479.**

——S. 11— *Competent Court — Jurisdiction — Revenue Court—Decision by Assistant Collector of Second Class*—Khudkhast *land—Subsequent suit in Court of Assistant Collector.*

A decision of an Assistant Collector of the second class would operate as a decision of the Civil Court in a subsequent suit in the Court of an Assistant Collector of the second class but it would have no effect in the Court of an Assistant Collector of the first class. (*Stuart, J.*) LALA SUNDER LAL *v.* BHUP SINGH. **L. R. 5 A. 105 (Rev.) : A. I. R. 1924 All. 466.**

——S. 11—*Competent Court—Rent Court—Question of tenancy.*

A Rent Court passing a decision on a question of tenancy in a previous suit for rent is not *res judicata* in a subsequent suit, in the Civil Courts for a declaration of title. (*Lindsay and Sulaiman, JJ.*) TOTA *v.* JAGGU. **21 A. L. J. 476 : L. R. 4 A. 428 : L. R. 5 A. 47 (Rev.) : A. I. R. 1924 All 163.**

——S. 11—*Competent Court—Decision of Revenue Court—Subject-matter different—Adjudication on title* —Res judicata.

In a prior suit between the parties as regards a particular plot of land the Revenue Court had decided against the plaintiff. In a subsequent suit in the Civil Court brought by the plaintiff for recovery not only of that plot of land but also of other plots to which the title was identical, *held*, that the decision of the Revenue Court was *res judicata*. (*Mears, C. J. and Banerjee, J.*) BARU MAL *v.* SUNDER LAL. **L. R. 4 A. 165 (Rev.) : 72 I. C. 15 : 21 A. L. J. 330 : A. I. R. 1924 All. 10.**

——S. 11—*Competent Court.*

Under ordinary circumstances, the decision of an Assistant Collector of the Second Class in the United Provinces would not be *res judicata* in a suit triable only by an Assistant Collector, First Class. (*Daniels, J.*) AMIN-UD-DIN *v.* ABDUL SHAKOOR. **L. R. 5 A. 26 (Rev.) : 73 I. C. 460 : A. I. R. 1923 All. 556.**

——S. 11—*Competent Court—Civil and Revenue Courts.*

If after a decision of a suit by a Revenue Court the losing party comes to the Civil Court for the same relief which would have the effect of setting aside the decree of the Revenue Court, the Civil suit would not be maintainable and would stand barred by principles of *res judicata*. 20 A. L. J. 606 ; 18 A. L. J. 1030 ; 17 A. L. J. 60 ; 16 A. L. J. 933, Ref. (*Rafique, J.*) MT. CHITTO *v.* GANGA SAHAI. **77 I. C. 638 : A. I. R. 1923 All. 527.**

——S. 11—*Competent Court.*

An Assistant Collector, Second Class, who had no power to try an ejectment suit passed a decree for rent in favour of A ; but later on an Assistant Collector, First Class, who had power to try an ejectment suit dismissed A's suit for ejectment. *Held*, that the decision of the Assistant Collector, Second Class, was no bar to the decision of the Assistant Collector, First Class. 32 A. 1 Dist. (*Stuart, J.*) RAM DIN *v.* HAR DAYAL. **A. I. R. 1923 All. 368.**

——S. 11—"*Competent Court*"—*Meaning of.*

The "Competent Court" to which reference is made in S. 11 is the Trial Court and it does not affect the question whether the decision is a decision of an appellate Court or whichever the appellate Court may be. 9 I. A. 197 Foll. (*Stuart and Sulaiman, JJ.*) KAMMOO *v.* MT. FATHIMAN **44 A. 712 : 76 I. C. 932 : A. I. R. 1922 All. 445.**

——S. 11—*Competent Court—Civil and Revenue Courts — Ejectment—Sub-tenancy— Decision of Revenue Court*—Res judicata.

The Revenue Court in a suit to eject the defendant as a sub-tenant held that he was a tenant-in-chief and

dismissed the suit. In a subsequent suit in the Civil Court for ejectment, *held*, that the decision of the Revenue Court operated as *res judicata*. 17 A. L. J. 60 Foll. (*Mears, C. J. and Gokul Prasad, J.*) RAM DAS *v.* DUBRI KOERI. **20 A. L. J. 606 : 44 A. 724 : A. I. R. 1922 All. 336.**

——— **S. 11**—*Competent Court—Revenue Court—Decision on question of proprietary title.*

The decision on a question of proprietary title by a Revenue Court under Ss. 199 and 201 of the Agra Ten. Act operates as *res judicata* and bars the trial of the same issue in a subsequent suit in the Civil Court. (*Lindsay and Stuart, JJ.*) THAKUR HANWANT SINGH *v.* MT. JHAMOLA. **4 U. P. L. R. (A.) 113 : 20 A. L. J. 340 : 66 I. C. 915 : A. I. R. 1922 All. 95.**

——— **S. 11**—*Competent Court—Settlement Officer—Enhancement of rent—Status of tenant—Decision if* res judicata.

The mere fact that in a statement laid before the Settlement Officer and accepted by him for the purpose of enhancement of rent the land was shown as held under occupancy rights does not make the matter as to the status under which the land is held *res judicata*. Misdescription of the status of the tenant does not prevent the Zemindar from afterwards contesting the occupier's status. (*Fremantle, S. M. and Burn, J. M.*) COOMBS *v.* SARDAR SUNDER SINGH. **L. R. 5 A. 337 (Rev.).**

——— **S. 11**—*Competent Court—Suit for rent.*

The earlier finding does not become final in a case where the Court that tried the prior suit for rent has no power over the claim in a subsequent suit for rent. (*Gokul Prasad, J.*) RAM DAS *v.* MAHANT PERMANAND GIR. **L. R. 3 A. 156 (Rev.).**

——— **S. 11**—*Competent Court—Decision of Revenue Court.*

A decision of Rev. Court, in a case which it has jurisdiction to decide, *e.g.*, a decision on title in a suit for profits can be interfered with by a Civil Court if the Rev. Court proceeds upon an entry of a certain person's name in the Rev. papers as conclusive on the question of title. (*Ryves and Gokul Prasad, JJ.*) SAIYAD MURTAZA HUSSAIN *v.* ZIAUL HASAN **19 A. L. J. 279 : 62 I. C. 684 : 3 U. P. L. R. (All.) 47.**

——— **S. 11**—*Competent Court—Small Cause Court—Decision in rent suit—Permanent tenancy—Finding if* res judicata.

The decision of a Small Cause Court in a suit for rent that the tenant was a permanent tenant does not operate as *res judicata* in a subsequent suit on the regular side, even though the Small Cause Judge had jurisdiction to decide the latter suit. (*Pratt and Fawcett, JJ.*) RUKMINI VITHU *v.* RAYAJI. **48 Bom. 541 : 26 Bom. L. R. 672 : A. I. R. 1924 Bom. 454.**

——— **S. 11**—*Competent Court—Meaning of—Court trying former suit must have had jurisdiction to try latter suit and not merely the issue.*

To establish the plea of *res judicata*, the Court which decided the former suit, must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the latter suit but also the latter suit itself in which the issue is subsequently raised. (*Macleod, C. J. and Shah, J.*) VYANKAT AWACHIT PATIL *v.* ONKAR NATHU. **45 Bom. 805 : 61 I. C. 276 : 23 Bom. L. R. 250.**

——— **S. 11**—*Competent Court—Rent suit—Title to land*—Res judicata.

A previous decision in a rent suit on an issue whether a certain piece of land did or did not belong to a third party is *res judicata* in a subsequent suit between the same parties. It is impossible to lay down any hard and fast rule as to whether a previous decision in a rent suit does or does not operate as *res judicata*. (*Greaves and Cuming, JJ.*) NABIN CHANDRA KAPALI *v.* GOUR MOHAN MISTIRI. **90 I. C. 756.**

——— **S. 11**—*Competent Court—Small Cause suit—Decision of, when* res judicata.

A decree for money upon covenant in a Small Cause suit does not operate as *res judicata* in a subsequent suit in the Munsif's Court on the regular side. Nor does the decision of the High Court refusing to interfere with the decree of the Small Cause Court operate as *res judicata*. (*Rankin, J. C. and Ghose, J.*) MOHINI MOHAN RAY *v.* RAM DAS PARAMHANSA. **28 C. W. N. 271 : 80 I. C. 210 : 39 C. L. J. 532 : A. I. R. 1924 Cal. 487.**

——— **S. 11** — *Competent Court — Decision of Revenue Court—Existence of relationship between landlord and tenant.*

The present suit was brought by the plaintiffs to eject the defendant from the holding in suit, the plaintiffs' case being that the tenants who held the land under them had no transferable interest in the same and had abandoned the holding after selling it to the defendant and that the latter, therefore, had acquired under his purchase no right to the holding but was merely a trespasser. The defence was that the defendant was a tenant and could not be ejected as a trespasser. Another thing was the defendant relied upon a decision in a proceeding under S. 106 of the B. T. Act in his favour. The defendant was entered in the Record-of-Rights as tenant of the lands after purchasing the holding. Plaintiffs thereupon brought a suit under S. 106 of the B. T. Act for the correction of the entry on the ground that the defendant was not a tenant. The Revenue Officer, under S. 106, decided that the defendant was a tenant and that the entry in the Record-of-Rights was correct. *Held* that the question whether the defendant was tenant or not was directly raised and decided in the proceedings under S. 106 of the B. T. Act and that it was *res judicata* in the present case. (*Chatterjee and Panton, JJ.*) ROY JATINDRA NATH CHOUDHURY *v.* AZIZAR RAHMAN SHANA. **5 O. C. 79 : 71 I. C. 307 : A. I. R. 1923 Cal. 433.**

——— **S. 11**—*Competent Court—First Munsif having no powers—Subsequent suit—Munsif with power up to Rs.* 2,000.

Where the prior suit was decided by a Munsif who had jurisdiction to try suits up to the value of Rs. 1,000 only and the later suit was laid at Rs. 1,100 and was tried by a Munsif who had jurisdiction to try suits up to the value of Rs. 2,000 : *Held*, the Munsif who tried the previous rent suits had no jurisdiction to try the later suit. 28 Cal. 78 distinguished. Where therefore the plaintiff's suit for recovery of possession and mesne profits is a *bona fide* suit because according to defendant's own case the plaintiff had good title to recover possession he therefore had good title to recover mesne profits also and the decision in the previous rent suits does not operate as *res judicata*. (*Chatterjee and Pearson, JJ.*) ASAN ALI *v.* SARADA CHARAN. **A. I. R. 1922 Cal. 138.**

——— **S. 11, Expln. II**—*Competent Court—Test of.*

It is the competency of the Court of first instance to entertain the two suits which regulates the application of the rule of *res judicata* : the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. (*Scott-Smith, J.*) PIR BAKHSH *v.* JHANDU KHAN. **A. I. R. 1924 Lah. 644.**

——— **S. 11**—*Competent Court—Jurisdiction, want of, in former case.*

C. P. CODE (V OF 1908), S. 11—Competent Court.

The original mortgagors from whom plaintiff purchased the property subject to mortgage had sued the original mortagees for redemption in 1896. That case had been tried by a Munsif, second class, who holding that the interest was a charge on the property decreed redemption on payment of Rs. 873. This decree had been varied on appeal by the Divisional Court, but the Trial Court's decree was restored by the Chief Court. Plaintiff in appeal against the decree of the Trial Court contended that the decision of the former suit by the Munsif who had power up to Rs. 500 could not be *res judicata* or estop him from urging that according to the terms of the mortgage deed itself, the interest was not a charge on the property as held by the Trial Court. *Held*, the Munsif of the second class in the former case had no jurisdiction in law to try the case. Therefore the former suit does not operate as a bar to the consideration of the question relating to interest. 6 C. L. J. 621 ; 14 C. L. J. 220 and 7 I.C 781 Dist. 54 P. R. 1912 Foll. (*Broadway and Abdul Qadir, JJ.*) MAYA DAS *v.* JINDA RAM. **5 L. L. J. 494 : 73 I. C. 8 : A I. R. 1923 Lah. 141.**

——**S. 11**—*Competent Court—"Competency of the Court" is required also in cases where S. 11 does not strictly apply but where only principle of* res judicata *applies.*

In order to make the decision of the Court final and conclusive in another Court, it must be the decision of a Court, which would have had pecuniary jurisdiction over the matter in the subsequent suit, on which the first decision is given in evidence as conclusive. There is no reason so far as the necessity for this condition is concerned, for making any distinction between a case, to which the strict rule of *res judicata* as enacted in S. 11 of the C. P. Code applies and a case in which the principles of *res judicata* such as for instance those laid down by the Privy Council in 9 M. I. A. 539 (P. C.) and 40 All. 593 (P. C.) and other cases, is sought to be availed of. (*Case-law discussed.*) (*Wallace and Madhavan Nair, JJ.*) UIRASWAMI *v.* P. NAYUDAMMA. **49 M. L. J. 430 : 22 L. W. 178 : A. I. R. 1925 Mad. 1270.**

——**S. 11**—*Competent Court—"Competency" of Court refers to value of suit.*

Competency in S. 11, C. P. Code, has reference to the value of the suit and not the territorial jurisdiction. (*Ramesam and Venkatasubba Row, JJ.*) AYISHA BIBI AMMAL. *In re.* **A. I. R. 1925 Mad. 1167.**

——**S. 11**—*Competent Court—Small Cause Court—Decision on title to property.*

The decision of a Small Cause Court on a question of title is not *res judicata* in a subsequent suit. (*Madhavan Nair, J.*) NARANO MAHAPATRO *v.* RAMCHANDRA MARDARAJA DEO GANI. **80 I. C. 724 : A. I. R. 1925 Mad. 357.**

——**S. 11**—*Competent Court—Probate proceedings—Contesting caveators are bound by the decision unless good cause under S. 50 of the Probate and Administration Act is made out.*

Decisions after contest in a probate proceeding are *res judicata* in any subsequent proceeding of any kind against the caveator who contested it. On general principles of the Probate and Administration Act grant of probate by a competent Court binds all contesting parties unless good cause under S. 50 to set it aside is made out. (*Odgers and Wallace, JJ.*) VENKATARATHNAM *v.* SATYAVATI. **46 M. L. J. 383 : 34 M. L. T. 141 : 79 I. C. 44 : A. I. R. 1924 Mad 578.**

——**S. 11**—*Competent Court—Revenue Court—Decision of—Civil Courts—Estate.*

The Revenue Court, is not the final competent authority to decide whether particular lands constitute an estate or not and a decision passed by it on that question, will not be *res judicata* in a suit in a Civil Court, for a declaration that the lands do not form an estate. (*Wallis, C. J. and Oldfield, J.*) MAHANT RAMADINA DAS *v.* BOISHAMO. **69 I. C. 938 : 14 L. W. 251.**

——**S. 11**—*Competent Court—Civil and Revenue Court—Madras Estates Land Act, S. 189 (3).*

The decision of Rev. Court, in a suit exclusively triable by it does not bind the Civil Court, though the subsequent suit could not be brought in the Rev. Court as S. 189 (3) is not more comprehensive than S. 11 of the C. P. Code. (*Sadasiva Iyer and Spencer, JJ.*) SOBHANADRI APPARAO *v.* DATHADU VENKATRAJU. **39 M. L. J. 476 : 43 Mad. 859 : (1920) M. W. N. 639 : 12 L. W. 512 : 60 I. C. 700 : 28 M. L. T. 359.**

——**S. 11**—*Competent Court—Partition proceedings—Dispute settled definitely by Revenue Court sitting as a Civil Court, cannot be opened again in a Civil Court.*

Where during partition proceedings there was dispute among several co-sharers as to who should bear the burden of the lease and the deed of gift and it was definitely decided that the burden should be borne rateably by the Revenue Court sitting as a Civil Court. *Held*, that it will be unfair to reopen the question subsequently in a Civil Court. (12 O. C. 97 ; 23 All. 324, *Dist*). (*Dalal, J. C.*) KALKA SINGH *v.* BISHUNATH SINGH. **12 O. L. J. 638 : 2 O. W N. 539 : 89 I. C. 221 : L. R. 6 Oudh. 95 : A. I. R. 1926 Oudh 72.**

——**S. 11**—*Competent Court—Rent Court—Decision on question of adverse possession.*

The decision of a Rent Court on a question of title as affected by the plea of adverse possession is not binding on a Civil Court and the latter is quite competent to come to a finding on that question independently. (*Wazir Hasan, A. J. C.*) SHAHADAT KHAN *v.* KAMDAR KHAN. **89 I. C. 810.**

——**S. 11**—*Competent Court—Decision of Revenue Court—Subsequent suit in Civil Court—Bar—Fraud vitiating decision—What constitutes.*

A Revenue Court's decision cannot be called in question in a Civil Court by a mere allegation of fraud in the pleading or evidence, when the Judge after giving full opportunities to the parties to produce their evidence, has decided rightly or wrongly in favour of one set of facts. To avoid a decision on the ground of fraud it must be shown that the plaintiff was prevented from putting his case before the Court or that some trickery or deceit was practised in connection with the proceedings. The mere fact that one of the parties did not admit something which he might in fairness have admitted in the former suit, when he was under no obligation to make the admission, would not bar the decision from being *res judicata.* (*Kendall, A. J. C.*) ASHARFI LAL *v.* DY. COMMISSIONER, GONDA. **10 O. & A. L. R. 553 : L. R. 5 O. 149 : 79 I. C. 660 : 11 O. L. J. 448 : 1 O. W. N. 8 : A. I. R 1924 Oudh 419.**

——**S. 11**—*Competent Court—Decision of Revenue Court in redemption proceedings bars civil suit for redemption later on.*

Where during settlement proceedings mortgagor applied to the Revenue Court for redemption and the Settlement Officer dismissed the application on the ground that the term within which redemption was to be made had expired and that in consequence the mortgagor had no right left in him to redeem, *held*, that the Settlement Court acted with jurisdiction and a later redemption suit of the plaintiffs can-

C. P. CODE (V OF 1908), S. 11—Competent Court.

not be sustained, whether the mortgages were executed prior to the annexation of Oudh by the British Government in 1856 or were executed subsequently. 7 O. C. 259 Foll. No. 366 of 1894, 23 Oudh Cases, 269 Ref. (*Dalal, J. C.*) CHANDAN SINGH *v.* SHEO NARAIN SINGH. **10 O. L. J. 606 : L. R. 5 O. 92 : 80 I. C. 698 : A. I. R. 1924 Oudh 245.**

——S. 11—*Competent Court—Decision by Court having no pecuniary jurisdiction—Not* res judicata.

Where the Court which tried the former suit could not, by reason of its limited pecuniary jurisdiction, have tried the present suit the question of *res judicata* does not arise. 29 M. 65, Foll. (*Simpson, A. J. C.*) UDAIRAJ SINGH *v.* RAM UDIT TEWARI. **10 O. L. J. 376 : 77 I. C. 340 : A. I. R. 1924 Oudh 147.**

——S. 11—*Competent Court—Revenue Court—*Res judicata—*Kabzadari—Claim of — Sub-settlement —Rejection of claim for want of evidence—Subsequent claim of under-proprietary right —Maintainability of.*

The plaintiff claimed rights of Kabzadari Darmiant at the sub-settlement but as he produced no evidence his claim was rejected. He subsequently claimed under-proprietary right. *Held*, that the plaintiff could have claimed under-proprietary right at the sub-settlement and he having omitted to do so a subsequent claim for such right was barred by *res judicata.* (*Fremantle, S. M. and Burn, J.M.*) SPECIAL MANAGAR, COURT OF WARDS *v.* SHER BAHADUR SINGH. **L. R. 5 O. 137.**

——S. 11—*Competent Court—Decision of Revenue Court —Correction of records—Subsequent suit for possession.*

In proceedings for correction of records the Assistant Collector decided the question of correction on a report from the Naib-Tahsildar without reference to evidence on record. *Held*, that the judgment of the Assistant Collector did not operate as *res judicata* in a subsequent suit for possession. (*Fremantle, S. M. and Burn, J. M.*) RAM PAL *v.* MT. SHUBRAJI KUNWAR. **L. R. 5 O. 127 : 10 O. & A. L. R. 846.**

——S. 11—*Competent Court—Decree by Settlement Court—Right of redemption.*

Where the Settlement Court through oversight decreed that the mortgagor had no right left in him with respect to a particular property the question of the existence of the right to redeem is final and suit for redemption by the mortgagor or his successors-in-title is barred. (*Stuart and Kanhaiya Lal, A. J. Cs.*) TILAK CHAND *v.* SHAMBHU SINGH. **23 O. C. 269 : 7 O. L. J. 524 : 60 I. C. 404 : 2 U. P. L. R. (J. C.) 163.**

——S. 11—*Competent Court—Suit dismissed but one issue decided against defendant—Defendant appearing—Appellate Court wrongly holding appeal incompetent but deciding the issue in defendant's favour—Finding is* res judicata.

An usufructuary mortgagee brought a suit against mortgagor for possession. He applied for an amendment to add alternate prayer for recovery of debt but his application was refused and his suit dismissed. Court held that consideration had passed. On appeal by defendant Court held that no consideration passed but the appeal was wrongly dismissed on the ground that defendant was successful in lower court and no appeal lay. Plaintiff brought a second suit for money decree for the debt. *Held* : that the first suit operated as *res judicata. Raghunath Kurmi* v. *Deo Narain Rai* (*S. A.* 1419 of 1916 *Patna* foll.) (*Adami and Sen, JJ.*) RAM AUTAR PANDEY *v.* SHANKAR DAYAL. **90 I. C. 622 : 1925 P. H. C. C. 338 : A. I. R. 1926 Patna. 87.**

——S 11—*Competent Court—Evidence that prior*

C. P. CODE (V OF 1908), S. 11—Compromise or Consent Decree.

Court had no jurisdiction—Admissibility—Latent and patent defect.

When there is no want of jurisdiction in the Court to try a suit, that is to say, when the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact in the knowledge of the party which he had an opportunity of bringing forward in the Court, then, if he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding. (*Das and Adami, JJ.*) DWARKA PRASAD *v.* JAI BARHAM. **67 I. C. 686 : A. I. R. 1922 Pat. 322.**

——S. 11—*Competent Court—Probate proceedings.*

In probate proceedings the question before the Court is one of representation of the estate and not of distribution and therefore an adjudication as to the latter is not binding on parties in subsequent liligation. (*Pratt and Duckworth, JJ.*) MAUNG TUN YIN *v.* MA SEIN YAN. **1 Bur. L. J. 59 : 68 I. C. 671 : 11 L. B. R. 331 : A. I. R. 1923 Rang. 9.**

——S. 11—*Competent Court—Arbitration Court —Objections to award dismissed—Suit to set aside award—If lies.*

Where the objections to an award are dismissed it is not open to the objector to re-agitate the same questions by way of a regular suit to set aside the award. (*Rupchand Bilaram, A. J. C.*) KHIMJI *v.* MT. NATHIBAI. **76 I. C. 953 : A. I. R. 1925 Sind 42.**

Compromise or Consent Decree.

——S. 11—*Compromise decree—Partition—Suit for—Dismissal of suit—Subsequent suit for partition.*

The plaintiffs, except one, subsequently born, had sued on 8—9—1919 for partition. The suit was compromised and both the parties filed a joint petition on 31—8—1920. It was to the effect :—" In the above case parties entered into a compromise at the remonstrance of a few respectable persons. The parties shall bear their own costs. The plaintiffs withdrew their claim. Hence the claim should be struck off." This petition of compromise was verified by all the parties. A decree was passed in accordance with this compromise. The order was " It is ordered and decreed that according to the compromise this case be struck off. The parties to bear their own costs." In a subsequent suit for partition by the plaintiffs, *held*, that the suit was barred by *res judicata.* (*Mukerjee and Dalal, JJ.*) RADHEY LAL *v.* MULCHAND. **46 A. 820 : 22 A. L. J. 749 : 80 I. C. 933 : L. R. 5 A. 541 : A. I. R. 1924 All. 905.**

——S. 11 — *Compromise decree—Rent decree terms of compromise not known—Decree is not* res judicata *as to rate of rent.*

A rent-decree passed in a previous suit on the basis of a compromise in the absence of the terms of the compromise, does not operate as *res judicata* in a subsequent suit between the parties with regard to the rate of rent, but only amounts to proof of an admission in respect of the amount claimed. 16 Cal. 300 (F.B.) Foll. (*Suhrawardy and Cuming. JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* SAGAR PAIK. **A. I. R. 1925 Cal. 1011.**

——S 11—*Compromise decree.*

A consent decree based on a compromise relating to matters outside suit does not operate as *res judicata.* (*Rankin, J.*) SHASHI BHUSAN SHAW *v.* HARI NARAIN SHAW. **48 Cal. 1059 : 66 I. C. 705 : 25 C. W. N. 990.**

——S. 11— *Compromise decree — Heard and decided—Admission of parties—No* res judicata.

C. P. CODE (V OF 1908), S. 11—Compromise or consent decree.

Where the parties compromise a suit and there is no express adjudication on the question of relationship set up by them, the point cannot be said to be *res judicata*. (*Shadi Lal, C. J. and Le Rossignol, J.*) NIHAL SINGH *v.* NARAIN SINGH.

6 Lah. L. J. 45 : 80 I. C. 525 : A. I. R. 1924 Lah. 469.

——— **S. 11** — *Compromise decree operates as* res judicata.

A judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment which results from the decision of the Court, after the matter has been fought out to the end, unless the compromise can be attacked in some effective manner. (1895) 1 Ch. 37, 35 M. 75 and 11 M. 191 Ref. (*Ayling and Odgers, JJ.*) CHENRAYA GOUNDAN *v.* ATHAPPA GOUNDAN.

18 L. W. 177 : (1923) M. W. N. 545 : 75 I. C. 336 : A. I. R. 1924 Mad. 88.

———**S. 11**—*Compromise decree—Proceedings under Guardians and Wards Act are not binding.*

Where under a compromise the petitioner (father) acquiesced in the retention of the custody of the minor by the respondent (mother).

Held, that the authority delegated by a natural guardian to any other person to retain the custody of the minor is revocable although the compromise has been embodied in a decree. 38 M. 808 Ref. (*Oldfield and Venkatasubba Rao, JJ.*) SATYANARAYANA VARAPRASADA RAO *v.* VENKATA LAKSHMI.

18 L. W. 173 : (1923) M. W. N. 668 : 73 I. C. 948 : A. I. R. 1924 Mad. 45.

Connected or Cross Appeals and Suits.

———**S. 11**—*Connected appeals—Two appeals in same suit—Two decrees passed—Second appeal filed from only one—Appellant not prejudiced by the other—Second appeal is not barred.*

Where there are two decrees arising out of two appeals to a subordinate appellate Court, and only one such decree is brought up in second appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata* or at all by reason of his failure to appeal from the decree which does not prejudice him. The suit was for damages. The trial Court decreed the suit for 5 years. Both parties appealed and two decrees were passed. By the decree in the plaintiff's appeal the first appellate Court increased the number of years for which damages were awarded but reduced the rate of damages. The net result was that the decree of the Trial Court in plaintiff's favour was reduced in amount. In the defendant's appeal, the lower appellate Court disallowed the defendant's objection that the whole suit should be dismissed. The defendants filed a second appeal from the decree in this appeal alone. *Held*, that the second appeal was competent. (*Sulaiman J.*) RAM NARAIN *v.* NIHAL SINGH.

L. R. 6 A. (Civ.) 222 : 87 I. C. 804 : A. I. R. 1925 All 488.

———**S. 11**—*Cross suits.*

Where there are two decrees arising out of two suits heard together or raising the same question between the same parties and arising out of two appeals to the lower appellate Court and only one of such decrees is brought before the High Court in appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by *res judicata* or by reason of his failure to appeal from the decree which does not prejudice him. (*Mears, C. J., Banerjee, Piggott, Walsh and Ryves, JJ.*) GHANSHAM *v.* BHOLA.

45 A. 506 : 21 A. L.J. 465 : 74 I. C. 411 : L. R. 4 A. 265 : A. I. R. 1923 All 490 (2) (F.B.).

———**S. 11**—*Connected suits—Appeals in one only—Effect of—Other decrees not appealable against.*

Where there were a number of cases between the same parties involving the same issue and an appeal was preferred only in one, the decision in the others having been allowed to become final. *Held*, that the hearing of the appeal was barred by *res judicata*. (*Fremantel, S. M. and Burn, J. M.*) GHAZI DIN SINGH *v* AGIL SINGH. **L. R. 5 All. 124 (Rev.).**

——— **S. 11**—*Connected suits—Appeal against one—Bar by* res judicata.

The doctrine of *res judicata* applies to all the stages of a suit till it is finally terminated and the doctrine is not confined to the Court of first instance. It applies equally to the procedure on a first as well as second appeal. The expression "former suit" means a previously decided suit and the same rule applies to appeals. It is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given whether in the action commenced first or last, it extinguishes the original cause of action and gives to the plaintiff in lieu thereof one of the higher nature. Where there were two suits in the primary Court, decided by a common judgment and an appeal is preferred only in the first suit, while none is preferred from the decree in the second suit, the decree made in the latter becomes final and operates as *res judicata*. Cases on the point reviewed. (*Mookerjee and Chotzner, JJ.*) ISUP ALI *v.* GOUR CHANDRA DEB. **37 C. L. J. 184 : 74 I. C. 591 : A. I. R. 1923 Cal. 496.**

——— **S. 11**—*Cross suits—Two suits for damages—Common issue—Joint trial—Separate judgments*—Res judicata.

Two suits for damages, by two persons, one against the other, were tried together, on the same issue of fact. One suit was dismissed and other decreed, in two separate judgments. There was an appeal against the judgment decreeing the suit but not against the one dismissing the suit. *Held*, the latter was *res judicata* in the other suit. (*Chatterjee and Pearson, JJ.*) GANGADHAR *v.* SAKALI TELNI. **34 C. L. J. 281 : 64 I. C. 574 : 27 C. W. N. 141.**

———**S. 11**—*Cross suits—Suit by principal against agent relating to certain transactions decided—Cross suit by agent in respect of the same matter is barred.*

A decision in a prior suit by principals against agents wherein the amounts due by one party to the other were settled in respect of certain transactions bars a subsequent suit by agents against the principals in respect of the same transactions. (*Shadi Lal, C. J. and Addison, J.*) FIRM SAGHRUMAL HARCHARAN DAS *v.* FIRM DHANPAT RAI. **7 Lah. L J. 420 : A. I. R. 1925 Lah. 596 (2).**

———**S. 11**—*Connected suits—Decree—Appeal in one case.*

Plaintiff instituted two suits against respondents one for a share of his deceased brother's property and the other for a share in the charity fund set apart at the time of partition between brothers which was not disposed of. Both the suits were dismissed on the ground of estoppel by virtue of a deed of relinquishment executed by the plaintiff in favour of his brothers

C. P. CODE (V OF 1908), S. 11—Connected or cross Appeals and suits.

Plaintiff appealed only in the case in which he claimed a share in the property left by his deceased brother. It was objected that as he did not appeal from the case in which he claimed a share in the charity fund, the question of estoppel was *res judicata*. *Held*, this objection is untenable, as the decision in the other case that the plaintiff was estopped by the deed of release from claiming a share in the charity fund does not affect the question whether he is estopped from claiming a share in the estate of one of his brothers, who died subsequently to the execution of that deed. (*Martineau and Campbell, JJ.*) SETH YUSAF ALI MOMOONJI *v.* SETH ALI BHOY. **A.I.R. 1923 Lah. 8.**

——S. 11 and O. 41, R. 1—*Connected appeals—Decrees—Filing of one only with memorandum*

Plaintiffs sued a widow and vendees from her, for possession of their share in two houses by partition. From the judgment of the first Court decreeing plaintiff's claim two appeals were filed in the Court of the District Judge (1) appeal by the vendees who made the plaintiffs and widow respondents, and (2) appeal by widow in which she made the plaintiffs sole respondents. The District Judge disposed of both appeals by one judgment but two separate decrees were drawn up, one in each appeal. The plaintiffs whose claim was dismissed appealed to the High Court but filed copies of the judgment and decree in appeal by widow and no copy of the decree in appeal by vendees was filed. *Held*, the appeal was not properly filed within the provisions of O. 41, R. 1, the memorandum of appeal not having been accompanied by a copy of the decree in favour of the vendees. If the High Court were to hear the present appeal and set aside the decree, there would still be subsisting the decree in favour of vendees which would operate as *res judicata* and the plaintiffs' suit would still stand dismissed as against them. (*Scott-Smith and Harrison, JJ.*) MUHAMMAD DIN *v.* MT. ZEB-UN-NISA.

3 L. 215 : A. I. R 1922 Lah. 390.

——S. 11—*Connected and cross suits.*

Where two cross suits involve directly and substantially same question and were tried together an appeal against one decree only while the other decree was not the appeal is incompetent as the decree from which no appeal is made operates as *res judicata*. 35 All. 187 Foll. (*Leslie Jones and Wilberforce, JJ.*) MAHOMED JAN *v.* DULI CHAND. **74 I. C 583 : 3 L. L. J. 473.**

——S. 11—*Connected suits—Two suits involving same matter—One decided finally bars appeal from the decree in the other.*

Section 11 of the C. P. C, or, at any rate the principle on which that section is based, will prevent an appellate Court from trying a case involving a matter decided finally by a suit heard along with the suit from which the appeal is pending. (*Ashworth, A. J. C.*) PANCHAM SINGH *v.* THAKUR SINGH.

A. I. R. 1925 Oudh 598.

——S. 11—*Connected suits—Appeals from even identical decrees are necessary, otherwise appeal from one is barred.*

Two pre-emption suits were filed by L and A with regard to the same property and in connection with the same transfer; they were jointly tried, issue being the same, and identical decrees were passed in both Both were parties to both the suits. The decrees were to the effect that L. was to pre-empt and deposit a certain amount and on his failure A was allowed to pre-empt. L appealed from the decree in his own suit but not from the decree in the suit in which he was defendant.

Held, that the decree in A's suit which had become final barred the appeal. 20 O. C. 290 Dist. (*Dalal, J. C.*) LUCHHIM KUAR *v.* UMRAO SINGH.

11 O. L. J. 22 : 81 I. C. 333 : A. I. R. 1924 Oudh 311.

——S. 11—*Connected suits—Common judgment but two decrees—Appeal against one only—If barred.*

If two suits involving common issues are tried together and disposed of by one judgment, and an appeal is preferred against the decree in one only the other decree having become final operates as *res judicata* and the appeal is barred. (*Kulwant Sahay, J.*) DHANI SINGH *v.* SRI CHANDRACHOOR DEO.

A. I. R 1924 Pat. 823.

——S. 11—*Connected appeals.*

Two cross suits were tried together with common issues but two separate decrees were drawn up and also two judgments were written one relying on the other. Appeal from one decree was dismissed.

Held, that the appeal from the other decree cannot be heard, the subject-matter of the latter appeal being already decided in the prior appeal. 33 All. 15 (F.B.) Foll. (*Robinson, C. J. and Brown, J.*) ANWAR ALLI SOWDAGAR *v.* AMEER ALLI SOWDAGAR.

2 Rang. 633 : 84 I. C. 894 : A. I. R. 1925 Rang. 104.

Co-plaintiffs.

——S. 11—*Co-plaintiffs*; Res judicata *between—Same principles as for* res judicata *between co-defendants apply.*

The same principles of *res judicata* as between co-defendants apply to *res judicata* between co-plaintiffs, and therefore if a finding as between co-plaintiffs is necessary before the Court can give any relief against the defendants that finding would be *res judicata*, as between co-plaintiffs. But where a question was not raised in the pleadings, but was only used as an argument, on one of the branches of the case as to limitation, and was not essential to give plaintiffs any relief. *Held*, that it would not be *res judicata*. The main tests to be applied are whether there was active controversy between the plaintiffs and whether that adjudication was necessary to enable the Court to grant any relief against the defendants. (*Kumaraswami Sastri, J.*) SHYAMA BHAI *v.* PURUSHOTHAMDOSS. **21 L. W. 551 : A. I. R. 1925 Mad. 645.**

——S. 11—*Co-plaintiffs—Decision when* res judicata.

In the absence of a conflict of interest between persons ranged as co-plaintiffs in a suit the suit have made in the alternative, the claim which he made in the present suit and that by reason of decision in the suit would not bind their successors as *res judicata*. (*Miller, C. J. and Jwala Prasad, J.*) MAHARAJA PRATAB UDAI NATH SAHI DEO *v.* GANESH NARAIN SAHI. **70 I. C. 232 : 1921 P. H. C. C. 369.**

Directly or substantially in issue.

——S. 11—*Directly and substantially in issue—Mere decree for share of profits does not conclude right to partition.*

Where a prior suit for share of profits was decreed and no question of rights to partition was raised or decided.

Held, in a subsequent suit that the question of partition was not *res judicata*, but the Court added a declaration to the decree by which decree-holder could execute the decree without resorting to a suit for share of yearly profits. (*Lord Blanesburgh.*) MIR SUBHAN ALI *v.* IMAM BEGUM. **52 I.A. 294 : 23 A. L. J. 667 : 88 I. C. 347 : 21 N. L. R. 117 : (1925) M. W. N. 535 : A. I. R. 1925 P. C. 184 (P.C.).**

——S. 11—*Directly in issue—Rent suit—Tenant asserting landlordship of another and payment of rent*

to him—Latter can be impleaded as party—But question of title decided between him and plaintiff is not res judicata *between them.*

In a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged to have been made by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. (*Kanhaiya Lal, J.*) SALAMAT ALI *v.* GUJ KUNWAR CHAND. **85 I. C. 302 : A. I. R. 1925 All. 574.**

——S. 11—*Directly in issue—Previous proceeding confined to question of possession—Question of title is not barred.*

In a case where the previous proceeding was confined by statute to the question of possession a subsequent proceeding in which the question of title is raised is not barred by *res judicata.* (*Stuart, J.*) LALMAN *v.* FAZAL. **L. R. 5 A. 132 (Rev.) : 78 I. C. 115 : A. I. R. 1925 All. 200.**

——S. 11—*Directly and substantially in issue—Subject matter different—No bar*

Where the subject-matter of the two suits is different and the second suit relates to a different grove land from that involved in the prior suit, there is no bar of *res judicata.* (*Neave, J.*) BHANU PRATAP SINGH *v.* BHAGWAN SINGH. **L. R. 5 A. 406 : A. I. R. 1924 All. 922.**

——S. 11—*Directly in issue—Incidental observation not binding.*

Observations not arising out of the issues which were before the Court for decision are not binding as *res judicata.* (*Mukerjee and Dalal, JJ.*) BEHARI LAL *v.* SHIV NARAIN. **22 A.L J. 866 : L. R. 5 A. (C.v.) 697 : A. I. R. 1924 All. 884.**

——S. 11—*Directly and substantially in issue—Decision on validity of sale deed.*

Where the question whether a particular sale deed was a valid document arose directly and substantially in the previous suit and the prior suit could not be determined without a decision of the issue, the decision operates as *res judicata* in a subsequent suit even though the property involved in the subsequent suit is different from the one which was the subject of the prior suit. 13 B. 25 ; 7 I. C. 388 Ref. (*Banerjee and Gokul Prasad, JJ.*) KEDAR NATH SINGH *v.* SHEO SHANKER. **45 A. 515 : 21 A. L. J. 421 : L. R. 4 A. 512 : 76 I. C. 370 : A. I. R. 1923 All. 613 (2).**

——S. 11—*Directly in issue—Declaratory suit—Suit dismissed on merits—Plaintiff out of possession.*

A plaintiff out of possession sued for declaration that he be declared an occupancy tenant ; his suit was dismissed on the ground that he did not substantiate his position as occupancy tenant. He filed another suit for possession against the defendants. *Held*, that his suit was barred by *res judicata* ; and that he could not be allowed to contend in the second suit that the Courts should not have gone into the merits in the former suit as in that suit he would have failed only on the ground that he sued for mere declaration, when he ought to have sued for possession as well. (*Rafique, J.*) KASHI RAI *v.* MT. KALI KUERI. **A. I. R. 1923 All. 554.**

——S. 11—*Directly and substantially in issue—Obiter dictum not necessary for the decision of the case.*

Where in a prior suit the Court had merely to decide the factum of a person's death at the date of suit having regard to the presumption under S. 108 of the Evidence Act, but it went further and expressed an opinion that the person was dead at a particular date relying erroneously on the supposed presumption to that effect found in S. 108, Evidence Act, the decision as to the date of death is not passed on an issue directly and substantially in question and does not constitute *res judicata.* (*Walsh and Ryves, JJ.*) REKHAB DAS *v.* MT. SHEOBAI. **45 A. 466 : 21 A. L. J. 393: L. R. 4 A. 532 : 74 I. C. 656 : A. I. R. 1923 All. 495.**

——S. 11—*Directly and substantially in issue—Suit by son to avoid execution sale of joint family property—Prior suit—Dismissal of—Effect of.*

A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the debt was tainted with immorality is barred by a similar previous suit on the ground that the property was joint family property. (*Gokul Prasad and Stuart, JJ.*) BADRI PRASAD *v.* MOHAN SINGH. **4 U.P. L. R. (A.) 15 : 65 I. C. 511 : A. I. R. 1923 All. 231.**

——S. 11—*Directly and substantially in issue—Decision depending on one issue—Other issues not* res judicata.

Plaintiffs sued defendants for an injunction restraining them from building on the disputed land alleging it to be the common property of the parties. The plea of the defendants was that the land was exclusively their own. A subsequent suit was instituted by defendants, against plaintiff in which defendants, *inter alia* claimed an injunction against plaintiffs restraining them from allowing water to flow on the disputed land to which the plaintiffs answered that they were joint owners of the land with plaintiffs and that they had a right of easement. The plaintiffs' suit was dismissed on the finding that the defendants were sole owners of the land in dispute. In the suit filed by defendants the Court found in favour of the easement alleged by the plaintiffs, and dismissed that suit. Plaintiffs appealed against the decree dismissing their suit and there was no appeal from the decree in the other suit. *Held*, that the consideration of the issue as to ownership of the land was not barred by *res judicata* since that question ceased to be substantially in issue in the second suit by reason of the finding on the question of the easement right. 33 A. 51 Dist. (*Mears, C. J. and Piggott, J.*) PEARY LAL *v.* JADO RAI. **20 A. L. J. 784 : 76 I. C. 618 : L. R. 3 A. 450 : A. I. R. 1923 All. 15.**

——S. 11—*Directly and substantially in issue—Suit for possession—Previous suit for declaration.*

The dismissal of a suit of the reversioner for a declaration that he was the next reversioner during the lifetime of the widow on the occasion of transfer by her by way of gift is no bar to a subsequent suit for possession of the property. (*Gokul Prasad, J.*) RAMJAS *v.* MR. SARTAJI. **20 A. L. J. 672 : 70 I. C. 635 : A. I. R. 1922 All. 401.**

——S. 11—*Directly in issue—Suit for profits—Civil Court's decree.*

A person purchased a share in a village. After the sale the vendor sued his co-sharer for profits and got a decree. The latter had already paid the purchaser profits and sued him for refund of the same, with costs. The dispute was referred to arbitration and by an award the suit was decreed. The purchaser then to recover his profits sued the co-sharer lambardar who resisted the suit on the ground of *res judicata* and estoppel. The first Court decreed the suit, holding that the question of profits could not be in issue in the civil suit and so S. 11, C. P. Code, could

C. P. CODE (V OF 1908), S. 11—Directly and Substantially in Issue.

not bar the suit :

Held, the co-sharer lambardar was not entitled to defeat the suit *in limine* by producing in evidence the decree of a Civil Court, several matters involved in the suit not being in issue in the previous one. (*Ryves and Gokul Prasad, JJ.*) KUNJ BEHARI LAL *v.* GHANSHAM DAS. **A. I. R. 1922 All. 397.**

——— **S. 11**—*Directly and substantially in issue—Nature of suits same—Dates different—Second suit barred.*

A subsequent suit is barred under S. 11 where the subsequent suit is exactly of the same nature as the previous suit with the difference that the date from which the accounts are asked for in the later suit is a few years later than in the previous suit. (*Macleod, C. J. and Crump, J.*) SIDAGAVADA *v.* RAM CHANDRA BABAJI. **A. I. R. 1924 Bom. 118.**

——— **S. 11**—*Directly in issue—Issue decided by trial Court—Appeal—Appellate Court deciding on other grounds and declining to decide that issue—That issue is not* res judicata.

When the judgment of a Court of first instance upon a particular issue is appealed against that judgment ceases to be *res judicata* and becomes *res subjudice*, and if the appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal 6 Bom. 110, Appl. (*Cuming, J.*) KARUNA CHARAN DAS *v.* KRISHNA SUNDAR MAJUMDAR. **90 I. C. 480 : A. I. R. 1926 Cal. 179.**

——— **S. 11**—*Directly in issue—Issue decided between same parties—Case decided on different issues—First issue is not* res judicata (*obiter*).

In a previous suit in ejectment which was *inter partes* the Munsif who tried the suit held that the defendants had no right of occupancy but he dismissed the suit on the ground of its being instituted before the expiry of the agricultural year in which the defendants' predecessor died. On appeal that decree of dismissal was affirmed on the second ground. *Held*, that the decision of the first Court on the first issue would not operate as *res judicata* in a subsequent suit for ejectment. 24 Cal. 616 (P. C.) Rel. on. (*Newbould and Graham, JJ.*) ISWAR SANT *v.* TORANDRA NATH KUILA. **42 C. L. J. 560 : A. I. R. 1926 Cal. 163.**

——— **S. 11**—*Directly in issue—Findings necessary and essential to judgment are* res judicata,

In the fist suit the plaintiff sued for a declaration of his title and recovery of possession of two plots. His title was declared to these plots, but it was held that he could not recover possession in that suit from a co-sharer, but that his remedy lay in a suit for partition. In the second suit he was suing for partition of these plots and some others having been deprived of possession by the defendants. *Held*, that as in order to decide the first suit it was necessary to decide his title to the share in the whole property the question of the plaintiff's title to these plots also must be held to be *res judicata* as between the parties. (*Suhrawardy and Cuming, JJ.*) RAJENDRA NATH *v.* BHABINI DASI. **87 I. C. 811 : A. I. R. 1926 Cal. 80.**

——— **S. 11**—*Directly in issue—Rent suit—Title in issue—Decision as to title is* res judicata.

Where in a rent-suit the title of a person is in issue for the purpose of determining his share in the rent, the decision on the issue operates as *res judicata*. (*Suhrawardy and Duval, JJ.*) GOPAL CHANDRA DUTT *v.* SURENDRA NATH DUTT. **A. I. R. 1925 Cal. 1004**

C. P. CODE (V OF 1908), S. 11—Directly and Substantially in Issue.

——— **S. 11**—*Directly in issue—Suit by some shebaits of deity against others for better management of* debutter *properties—One defendant denying* debutter *nature of properties—Question is not* res judicata *among co-defendants—Frame of suit bad—Duty of Court.*

A suit was instituted by some of the co-shebaits of a deity against the other co-shebaits for the better management of the *debutter* properties. One of the defendants in the suit denied the *debutter* character of the properties.

Held, that the question of *debutter* was not *res judicata* as between the co-defendants as it was not necessary to decide that question between them in order to give relief to the plaintiff in the suit.

Where a suit is properly framed, and the Court decides several issues, the decision on each issue is binding upon the parties. But where the Court holds that the suit as framed is not maintainable, the suit should be dismissed on that ground alone, and the Court cannot try the other issues so long as the suit is not properly framed. The decision of the Court on the other issues in such a case will not be *res judicata*. (*Chatterjee and Cuming, JJ.*) GOPAL JEW THAKUR *v.* RADHA BINODE. **41 C. L. J. 396 : 88 I. C. 616 : A. I. R. 1925 Cal. 996.**

——— **S. 11**—*Directly in issue—Decision on incidental question is not* res judicata,

Some of the co-shebaits of a deity filed a suit against other shebaits for a scheme for the better management of the *debutter* properties of the deity. One of the defendants denied the *debutter* character of the properties. *Held*, that the decision of the question of *debutter* was only incidental to the suit and did not amount to *res judicata*. (*Chatterjee and Cuming, JJ.*) GOPAL JEW THAKUR *v.* RADHA BINODE MONDAL. **41 C. L. J. 396 : 88 I. C. 616 : A. I. R. 1925 Cal. 996;**

——— **S. 11**—*Directly and substantially in issue—Previous suit for enforcement of easement—Question at issue whether plaintiff was tenant of one of the defendants—Subsequent suit by that defendant for ejectment or rent not barred.*

In a previous suit by T against C, B, and others for the enforcement of an easement, the question directly and substantially in issue was whether T was a tenant under B. B subsequently sued for ejectment of T, or, in the alternative, for rent.

Held, that the questions for investigation in the latter suit were essentially distinct in character and if at all they arose in the previous suit they arose not distinctly and substantially but incidentally and collaterally. 30 C. L. J. 13 and 31 C. L. J. 507 Foll. (*Mukerji, J.*) TARITBARANI DASI *v.* BASUMATI DEVI. **A. I. R. 1925 Cal. 985.**

——— **S. 11**—*Directly and substantially in issue—Decision on any issue, to be* res judicata *need not be basis of decree—Issue arising directly and substantially and being finally heard and determined is enough.*

In order that a decision in a previous suit on an issue should operate as *res judicata* it is not necessary that the decision of the issue should have been the basis of the decree. It is enough that the issue had been finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally), for determination, *i.e.*, that it was necessary for the determination of the suit though it may not have been ultimately made the basis of the decree. If the determination of the issue is inconsistent with the decree, it cannot be said that it was necessary for the determination of the suit, and such a finding will be

C. P. CODE (V OF 1908), S. 11—Directly and Substantially in Issue.

treated as unnecessary and will not operate as *res judicata*. It matters not that the defendant is described as *pro forma* defendant if there was a real contest, and if the contest was opened by the defendant and not the plaintiff. Case-law discussed. (*Mukerjee, J.*) TARITBRANI DASI *v.* BASUMATI DEVI.

A. I. R. 1925 Cal. 985.

——— **S. 11**—*Directly in issue—When defendants have been defeated in a previous suit as regards their contention that they are tenants in severalty the question is* res judicata *in a subsequent suit.*

Where in a suit for rent the defence was that there was a division of the tenancy with the consent and knowledge of the landlord and that the defendants were not jointly but severally liable for the rent, the plaintiffs obtained two *ex parte* rent decrees jointly against all the defendants in respect of the entire rent. *Held*, that the defendants were debarred from setting up tenancy in severalty. Per *Suhrawardy, J.*—No hard and fast rules obtain as to what questions should be recorded as questions that ought to have been raised in the previous suit. But there are several tests which have been applied from time to time when such questions have had to be decided. One of the tests is whether by raising the questions the previous decree could have been in any way varied or affected or have been defeated. (*Suhrawardy and Duval, JJ.*) SHIB CHANDRA TALUKDAR *v.* LAKHI PRIYA GUHA. **29 C. W. N. 253 : 40 C. L. J. 507 : A. I. R. 1925 Cal 427.**

——— **S. 11**—*Directly and substantially in issue—Decision that will was "wholly valid" does not bar question as to validity of its provisions regarding succession to the shebaitship, when the only question in the previous case was about the extent of bequest that operated under the will.*

The will purporting to create a religious endowment and to appoint shebaits ran as follows :—"When you all have ceased to be, he who shall be of the Hindu persuasion and senior in age amongst your legal heirs shall have the management conferred upon him." The questions raised in a previous suit *anent* the will were that the dedication was illegal and invalid and that at the most it created a religious charge on the secular properties of the testator and in a later suit it was held that in that suit (the previous one) it had been decided that the will was wholly valid and passed the entire estate to the idol. *Held*, that the suit for declaration of plaintiff's right and that of his brother to the shebaitship of the idol on the ground that on the death of all the persons living at the time of the death of the testator the office of the management of the endowed property reverted to the heirs of the testator was not barred by *res judicata* because the question had not been before the Court in the previous suits and the decision therein had only been that the will had been valid to the whole extent of the bequest and did not refer to the question raised in the present suit. (*Suhrawardy and Duval, JJ.*) PROMOTH NATH MUKERJEE *v.* ANUKUL CHANDRA BANERJI. **40 C. L. J. 564 : 29 C. W N. 17 : A. I. R. 1925 Cal. 225.**

——— **S. 11**—*Directly and substantially in issue—Incidental findings—Findings essential for judgment are also* res judicata.

Estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work, in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment though not as regards findings which did not form the basis of the decision or were in conflict therewith. The rule against reagitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however, it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties and that either may again litigate them for any other purpose as to which they may come in question provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. If both parties invoked the opinion of the Court upon the question, if it was raised by the pleadings and argued, the conclusion cannot be supported that the judgment upon it was *ultra vires* merely because an issue was not framed which, strictly construed, embraced the whole of it. Where a defendant is entitled to set up in the same answer as many defences as he has if a judgment is entered in his favour which contains no provision that it shall be without prejudice or any like limitation or restriction the estoppel raised by it will extend to every matter or fact in issue actually found by the Court in favour of the defendant. (17 All. 174, Diss.) (*Mookerjee and Suhrawardy, JJ.*) DWIJENDRA NARAIN ROY *v.* JOGESH CHANDRA. **39 C. L. J. 40 : 79 I. C. 520 : A I. R. 1924 Cal. 600.**

——— **S. 11**—*Directly in issue—Landlord if a party cannot dispute title of a tenant decided between his tenants.*

It is plainly not open to the landlord, who was a party to the previous suit, to take up a position inconsistent with the decision in the previous litigation which was pronounced in his presence, *e. g.*, that the tract then in dispute was covered by the lease of one of his two tenants and not that of the other. Where the lessee landlord could not have succeeded in the previous suit except on the footing that the tract was included in his lease and not in that of his rival it is not open to the plaintiff to have the rent and premium assessed on any portion of those lands on the basis that they are not covered by and subject to the operation of the grant in his favour. (*Mookerjee and Rankin, JJ.*) BHUPENDRA KUMAR *v.* SURAJ KANHA RAI. **38 C. L. J. 291 : 76 I. C. 917 : A. I R. 1924 Cal. 128.**

——— **S. 11**—*Directly and substantially in issue—First suit for title—Second for fixing boundaries.*

A prior suit determining a question of title regarding a certain land does not bar a subsequent suit between the same parties involving a question as to its boundaries. (*Walmsley and Ghose, JJ.*) ANANTRAM BHATTACHARJEE *v.* HEMCHANDRA KAR.

50 Cal. 475 : 72 I. C. 1041 : A. I. R. 1923 Cal. 379.

——— **S. 11**—*Directly and substantially in issue—Decision as to rate of rent in one year—Effect of.*

If in a case under S. 105, B. T. Act, the only point decided was the amount of additional rent to be allowed for the excess area, it does not constitute *res judicata* as to the rate of rent. A rent decree in a prior suit may not be *res judicata* in the sense that it finally decided the rate of rent between the parties, but it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. (*Newbould, J.*) BROJENDRA KISHORE ROY CHOWDHURY *v.* SHEIKH SOMAR ALI. **68 I. C. 298 : A. I. R. 1923 Cal. 282 (2).**

——— **S. 11**—*Directly and substantially in issue—Adjudication.*

Where both parties in a dispute about land set for-

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ward certain measurements and they came to an arrangement by which the length of the rod was taken as of more than the Naikarsha rod and the plaintiffs got more than they were entitled. *Held*, as the question of the length of rod was not a point in issue and there was no adjudication thereon the principle underlying S. 11, C. P. C., does not apply. (*Walmsley and Suhrawardy, JJ.*) SURADHANI DUTTA *v.* SITTO SHEIK. **27 C. W. N. 280 : 71 I. C. 378 : 38 C. L. J. 17 : A. I. R. 1922 Cal. 311.**

——S. 11—*Directly and substantially in issue.*

Where a pro-note was executed on account of interest due on the mortgage in question and the suit on the pro-note could not have been decreed unless the mortgage was found to be a valid mortgage,and in order to determine the validity of the consideration for the pro-note it was necessary for the Court in the previous suit to determine the validity of the mortgage. *Held*, that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and the finding that no undue influence had been established and that the consideration was proved operates as *res judicata* in the later suit. (*Martineau and Moti Sagar, JJ.*) NANAK CHAND *v* MIR MAHOMED KHAN. **A. I. R. 1924 Lah. 702.**

——S. 11—*Directly and substantially in issue.*

The real point at issue in a previous suit was whether the mortgage was for necessity or not. It was found as a fact that the mortgage was for necessity and therefore, there was no necessity to arrive at any decision upon the question whether M was the lawfully adopted son of A. *Held*, it is doubtful whether it can be said that the question of adoption was directly and substantially in issue in that suit within the meaning of S. 11, C. P. Code. (*Scott-Smith and Fforde, JJ.*) MEHAN SINGH *v.* KEHAR SINGH.

6 Lah. L. J. 39 : 75 I. C. 317 : A. I. R. 1923 Lah. 523.

——S. 11—*Directly and substantially in issue—Unnecessary finding.*

A finding not necessary to the determination of the suit is not one against which a party could have appealed and thus the question is not a matter directly and substantially in issue which was heard and finally decided. (*Campbell, J.*) SOHAN SINGH *v.* JAWALA SINGH. **73 I. C. 854 : A. I. R. 1923 Lah. 248.**

——S. 11—*Directly and substantially in issue—Pro-note—Set off.*

Where a pro-note was the subject-matter of the former suit and no set off was formally claimed in the previous suit and the defendants' liability for the sums now in suit could only have been asserted and tried if there had been a formal set-off, *held*, since the pleas in the first suit were not explicitly recorded, it cannot be said with certainty that liability for the particular sums now in dispute was directly in issue in the other suit. (*Campbell, J.*) BAIJ NATH *v.* THE FIRM RADHA RAM SHAM LAL. **A. I. R. 1923 Lah. 146.**

——S. 11—*Directly and substantially in issue—Unnecessary finding—Not* res judicata.

Where the decree could be sustained independently of the findings on a particular point and there is no decision against a party in a former litigation, the finding cannot become *res judicata.* (*Leslie Jones and Wilberforce, JJ.*) AHMAD DIN *v.* MOHAMMAD TUFFAEL. **4 Lah. L. J. 376.**

——S. 11—*Directly and substantially in issue—Incidents of* res judicata.

In order that an adjudication be *res judicata* between plffs. and defts. or the latter *inter se*, there must be a conflict of interest between the defts. and a judgment defining their rights *inter se* ; without necessity a judgment will not be *res judicata* nor will it be *res judicata* by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. (*Leslie Jones and Broadway, JJ.*) MEHARA *v.* DEVI DITTA MAL. **2 Lah. 88 : 62 I. C. 665 · 3 Lah. L. J. 223.**

——S. 11—*Directly in issue—Previous judgment contesting the right of* granthi—*Findings regarding the nature of the property.*

Where in a suit contesting the right of the then *granthi* of the Darbar Sahib (golden temple at Amritsar) to alienate a certain shop, it was held that the properties were *waqf* and attached to the *granthi* and could not be alienated by the *granthi* ; the judgment only proves that at the time also the right of the *granthi* to alienate certain property was called in question. The finding of the Court that the property was *waqf* and was attached to the *granthi* is not relevant in a subsequent suit by the successor to the office challenging the alienation by his predecessor-in-title. (*Scott-Smith and A. Raoof, JJ.*) INDAR SINGH *v.* FATEH SINGH. **59 I. C. 734 : 1 Lah. 540.**

——S. 11—*Directly in issue—Madras Hereditary Village Offices Act (III of 1805), S. 21—Suit for recovery of inam lands—Trial Court holding that Civil Court had no jurisdiction—District Court remanding, holding that lands were service inam lands and Civil Court had jurisdiction—District Court's decision concerns only the issue respecting jurisdiction and not the nature of lands.*

The plaintiffs sued for certain inam lands. When the case was first tried, the first District Munsif held that he had no jurisdiction to try the suit, as the matter fell within the purview of S. 21 of Madras Act (III of 1895). This was on the first issue "whether the lands in dispute are service inams, and whether this Court has no jurisdiction to entertain a suit with respect to the same." The District Judge considered both these points and found that the lands in question were service inams, and as the plaintiffs did not rely on any right to an office or its emoluments, the Civil Court had jurisdiction to entertain the suit, and remanded the suit to the District Munsif for disposal. The Munsif came to the conclusion that the alienation in favour of the plaintiffs was void and not enforceable. On appeal the Subordinate Judge held, disagreeing with the District Judge remanding the suit, that they were village service inams. It was contended that the Subordinate Judge had no jurisdiction to review the finding of the District Judge in his order of remand as to the character of those inams. *Held*, that the plaintiffs had the opportunity to appeal against such of the finding of the District Judge, as determined the character of the inams, and that not having done so, they would be concluded by that finding, it being a finding on a preliminary point but, what the District Judge really inrended to do and the important part of his remand order was only the finding as to the jurisdiction. (*Odgers, J.*) SUBBAIYYA *v.* S. RAMAYYA.

22 L. W. 225 : A. I. R. 1925 Mad. 1046.

——S. 11—*Directly—in issue Right to sell in dispute in subsequent suit—Right to mortgage in dispute in prior suit—Principle of S. 11 does not apply*

Before the principle of *res judicata* can be applied it must be shown that the matter for decision had been directly and substantially in issue in a previous suit between the same parties. Where in the latter case the question in issue is the right to sell and in the

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previous case it was the right to mortgage. *Held*, that different considerations apply in the two cases and that the principle does not apply. 15 O. C 91 *Ref.* (*Neave A.J. C.*) GANESH *v.* RAJA SURAJ BUX SINGH.
2 O. W. N. 944 : A. I. R. 1926 Oudh 139.

——S. 11— *Directly in issue—Admission of plaintiff's claim by one defendant and contest by another —Effect.*

In the previous suit by the plaintiff under O. 21, R. 63 of the Code of Civil Procedure, P was added as defendant and after setting out the sale by the latter to the plaintiff, the plaintiff asked for a declaration that the properties belonged to plaintiff and were not liable for the decree in execution of which they were attached. *Held*, that it cannot be said that the question was not in issue between the plaintiff and B merely by reason of the fact that B admitted plaintiff's claim, which was disputed successfully by the attaching creditor, and that the decision of the question against the plaintiff in the previous suit was *res judicata.* (*Phillips and Odgers, JJ.*) CHINNAKOZHANDAI NAINAR *v.* ANANTA VIJAYA NAINAR.
20 L. W. 979 : A I. R. 1925 Mad. 319.

——S. 11—*Directly and substantially in issue—Decision on immaterial issues—Not* res judicata.

In a suit by reversioner for a declaration that certain alienations made by the widow of a deceased Hindu were not binding on the reversioners the defence was that the suit was barred by limitation and that the properties in question were not part of the estate of the last male owner. The trial Court raised issues on both the points but dismissed the suit expressly on the ground of limitation. With a view to avoid the necessity for a remand in case the appellate Court took a different view of the question of limitation the trial Court gave a finding on the issue as to title against the plaintiffs. *Held*, that the finding on the question of title to the property was an *obiter dictum* and not *res judicata.* 4 M. 134 followed. (*Krishnan and Odgers, JJ.*) BATHULA PITCHI REDDI *v.* BHARATA SASTRI. **47 M. L. J. 532 : 20 L. W. 526 : 82 I. C 485 : (1924) M. W. N. 859 : A. I. R. 1924 Mad. 893 (2).**

——S. 11—*Directly in issue—Incidental finding.*

An incidental finding in one proceeding will be *res judicata* in another only where the issue in the second proceeding should have been raised and decided clearly in the first. (*Oldfield and Ramesam, JJ*) VATTELI KANDAR *v.* VATTOLI PUTHURAN.
41 M. L. J. 437 : 14 L. W. 702 : 69 I. C. 570 : (1921) M. W. N. 754.

——S. 11—*Directly and substantially in issue—Finding not the basis of the decree.*

In the previous suit, the plaintiff sued the defendants in ejectment as trespassers and the latter pleaded that neither the plaintiffs nor the predecessor-in-title were owners of the property and the defendants were usufructuary mortgagees from some third persons, the real owners. Both the lower Courts found against the defendant but plaintiff's suit was dismissed on the ground that the mortgage was by plaintiff's predecessor. In the present suit for redemption the defendant pleaded that the finding in the prior suit that they were mortgagees from the plaintiff's predecessor was not *res judicata. Held*, that the finding was *res judicata* though it was not the basis of the decree. 18 Cal. 647, not approved. (*Sadasiva Aiyar and Spencer, JJ.*) MUTHU PILLAI *v.* VEDA VYSACHARIAR. **60 I. C. 397 : 12 L. W. 277.**

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——S. 11—*Directly in issue.*

The mere fact that two persons were ranged on opposite sides in a prior suit will not constitute the decision thereon *res judicata*, if there was no contest, no issue and no finding between the parties. (*Kotwal, A. J. C.*) DOMA *v.* GOVIND.
A. I. R. 1924 Nag. 124.

——S. 11—*Directly and substantially in issue—Unnecessary finding.*

Where the decision as to ownership was not the basis or any part of the basis of the decree and the final decision of the whole case, that is the decree, would have been exactly the same if the decision on the point had been exactly the contrary the matter was not "directly and substantially in issue" in the former proceedings and therefore the question of ownership of the property does not operate as *res judicata* in these proceedings. (*Hallifax, A. J. C.*) GOVINDA *v.* LAXMAN.
A. I. R. 1923 Nag. 139 (1).

——S. 11—*Directly and substantially in issue—Question decided in effect though not in express terms —Rule of* res judicata *applies.*

The rule of *res judicata* extends to a question which must be taken to have been decided in effect, though not in express terms. 12 Beng. L. R. 304 ; *Gregory* v. *Molesworth* (3 Atkyns, 626) Rel on. (*Dalal and Wazir Hasan, A.J.Cs.*) BAIJ NATH SINGH *v.* RAJJU SINGH. **12 O. L. J. 571 : 2 O. W. N. 872 : A. I. R. 1926 Oudh. 101.**

——S. 11—*Directly in issue—More than one issue decided in the first case—Decision on the real ground of decision is* res judicata.

The finding which is the real ground of decision in the case operates as *res judicata* even though there may have been other issues on which the case might equally well have been decided. 5 O. L. J. 647 and 1924 P. C. 144 Foll. (*Daniels, J. C.*) MAHANT RAM DAS *v.* BHAGWAN KUNWAR. **12 O. L. J. 248 : 2 O W. N. 292 : A.I. R. 1925 Oudh 390.**

——S. 11—*Directly in issue—Unnecessary finding is not* res judicata.

The main question in the previous suit was whether the plaintiff was a co-parcener with a certain person. The Court decided two points (1) that the pedigree set up by the plaintiff was not proved, and (2) that the plaintiff was not a co-parcener with the person in question.

Held, that as the question as to the exact relationship of the plaintiff with the person in question was not essential to the decision of the previous suit, the finding was not *res judicata* in a subsequent suit on that question. (*Dalal, J. C.*) RAM BALI *v* RAM ASRE. **12 O. L. J. 105 : 86 I. C. 686 : A I. R. 1925 Oudh 386.**

——S. 11—*Directly in issue—Finding not necessary for decision.*

It is well established that no finding can operate as *res judicata* which is not necessary to the relief granted by the decree. (*Daniels, A. J. C.*) OUDH BEHARI LAL *v.* DAL SINGH. **10 O L. J. 404 : 79 I. C. 666 : A I. R. 1924 Oudh 205.**

——S. 11—*Directly and substantially in issue.*

Where in the previous suit the only question directly and substantially in issue was the validity of the mortgage, and the question of the amount which the mortgagor or his son may be called upon to pay in the event of a suit for sale being brought by the mortgagees on the basis of the mortgage deed, could not and was not directly and substantially in issue in the previous suit. *Held*, any decision as to the exact

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amount of mortgage payable in either of the two events would have been premature and hence the question of the rate of interest being excessive could not be *res judicata*. (*Simpson and Wazir Hasan, A. J. Cs.*) BASANT RAI *v.* KESHO RAM. **9 O. L. J. 612 : 74 I. C. 346 : A. I. R. 1923 Oudh 139.**

——S. 11—*Directly and substantially in issue—Question indirectly involved.*

Where a judgment or order can have no effect on subsequent litigation apart from the reasons given for it, such judgment or order cannot be said even indirectly to involve a question respecting the subject-matter of the litigation. Where the decision as to a claim under which defendant claimed one-half of property is *res judicata* against plaintiff who could not have calculated its value in fixing the value of appeal the defendant who has no claim to that half of the property cannot include it in fixing the value of subject-matter of appeal along with his own one-half share of the property. (*Ashworth and Simpson, A. J. Cs.*) BHAGWATI PRASAD *v.* ACHHAIBAR SINGH. **9 O. L. J. 531 : 26 O. C. 24 : 74 I. C. 214 : A. I. R. 1923 Oudh 93.**

——S. 11—*Directly and substantially in issue—Unnecessary issue—Withdrawal of suit.*

Plff. sued for resumption of a muafi and withdrew the suit without leave to sue afresh. The Court had raised an issue as to whether the land was liable to resumption or whether it was liable to assessment for rent. In a subsequent suit for assessment of rent by plaintiff, *held*, that in the prior suit it was unnecessary to raise an issue on the liability to assessment and consequently the prior decision did not operate as *res judicata*. (*Fremantle, S. M. and Burn. J. M.*) THE SPECIAL MANAGER, COURT OF WARDS *v.* BADRI PRASAD. **L. R. 5 O. 101.**

——S. 11—*Directly and substantially in issue—Claim of occupancy negatived in respect of certain area—Subsequent suit in respect of another area under the same grant.*

Where a claim of occupancy rights based on an old grant was decreed at settlement in respect of certain area, the decision bars a subsequent claim that another area was also held under the same grant (*Burn, J. M.*) MAHANT KUNJ BEHARI DAS *v.* BIRWA MEHNAM. **L. R. 5 O. 31.**

——S. 11—*Directly in issue—Consideration for mortgage.*

Where a person as against whom a suit is dismissed, appeal against a finding that a certain mortgage deed is genuine, but the appeal is dismissed on the ground it is incompetent, but a finding is recorded that there was no consideration for the mortgage, the finding will be *res judicata* in a subsequent suit between the parties. (*Adami and Sen, JJ.*) RAM AUTAR PANDE *v.* SHANKAR DAYAL. **90 I. C. 622 : 1925 P. H. C. C. 338.**

——S. 11 and O. 9, R. 13—*Directly and substantially in issue*—Ex parte *decree—Application to set aside—Non-service of summons—Finding as to service—Subsequent suit to set aside.*

When an application was put in to set aside an *ex parte* decree on the ground that summons was not served, but it was dismissed on the ground of service of summons, a subsequent suit to set aside the decree on the same ground will be barred. But if some other ground of fraud apart from it is alleged, it is maintainable. (*Mullick and Bucknill, JJ.*) MAHANTH RAMRUP GOSHAIN *v.* MAHABIR SHAH. **2 Pat. 833 : 74 I. C. 825 5 Pat L. T. 66 : A. I. R. 1924 Pat. 238.**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

——S. 11—*Directly and substantially in issue—Suit for rent—Effect.*

The decision in a suit for rent for a particular period is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. The prior decision may be taken to determine the rent claimed in that suit, and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. 3 P. L. J. 372 Distinguished. 6 C. W. N. 569 Followed. (*Ross, J.*) MANNOO LAL CHOUDHURY *v.* LALJI CHAUBE. **A. I. R. 1922 Pat. 213.**

——S. 11—*Directly and substantially in issue—Application to set aside* ex parte *decree—Non-service of summons—Separate suit—If lies.*

Where a party seeks to set aside an *ex parte* decree on the ground that summons was not served upon him, but the Court disbelieves him and dismisses the application, a suit to set aside the decree on the same ground is barred by *res judicata*. (*Beasley, J.*) MUSTHAN *v.* BABU MOHENDRA NATH SINGH. **1 Rang. 500 : 76 I.C. 794: A. I. R. 1924 Rang. 119.**

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——S. 11—*Execution proceedings—Order in—Not appealed against—Finality of.*

Order passed in execution proceedings and not appealed against is final. (*Sir John Edge.*) SARJU PRASAD *v.* MAKSUDHAN. **31 M. L. T. 219 : 21 A. L. J. 195 : 27 C. W. N. 275 : 73 I. C. 882 : (1922) M. W. N. 793 : A. I. R. 1922 P. C. 341 (P. C.).**

——S. 11—*Execution proceedings—Plea of limitation raised and decided—Same plea could not be raised in a late stage.*

Where a plea of limitation was raised by the judgment-debtor in a prior stage of an execution application, but was rejected and the decree-holder allowed to execute the decree, it was not competent for the Court to admit the same plea in a subsequent stage of the execution proceedings. (*Lord Moulton.*) RAJAH OF RAMNAD *v.* VELUSAMI TEVAR. **40 M. L. J. 197: 48 I. A. 45 : 19 A. L. J. 168 : 13 L. W. 290 : (1921) M. W. N. 51 : 33 C. L. J. 218 : 25 C.W.N. 581 : 23 Bom. L. R. 701 : 59 I. C. 880 : 29 M.L. T. 345 (P. C.).**

——S. 11—*Execution proceedings—Principle if applies.*

Though S. 11 cannot in terms apply to execution proceedings, on general principles a decision in the execution department will bind the parties in all subsequent proceedings. Even if a point is not directly decided but is such as must be deemed to have been necessarily decided before an execution order is passed, it cannot afterwards be agitated. (*Sulaiman and Daniels, JJ.*) DIP PRAKASH *v.* DWARKA PRASAD. **90 I. C. 83 : L. R. 6 A. 606 : A. I. R. 1926 A. 71.**

——S. 11—*Execution proceedings—Principle applies.*

The provisions of S. 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently. The transferee of a decree applied under O. 21, R. 16 for the substitution of his name. A definite order of substitution of name was

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passed by the executing Court. Later on the judgment-debtor applied to the Court that the money deposited by him may not be paid to the decree-holder on the ground that the decree-holder was not a rightful transferee. This application was not granted. *Held*, that under the circumstances the question of the validity of the transfer of the decree was *res judicata* and could not be re-agitated. Per *Mukerjee, J.*—It was incumbent on the judgment-debtor when he received the notice of the application for execution made by the assignee of the decree-holder to have come forward and raised any objection that he may have had to the execution of the decree by the assignee. (11 A. L. J. 815 ; 14 A. L. J. 370, Foll. ; 13 A L J. 162, Dist.) (*Mukerjee and Dalal, JJ.*) DWARKA DAS *v.* MUHAMMAD ASHFAQULLAH. **22 A.L.J. 928 : L.R. 5 A. (Civ). 742: 47 A. 86 : A. I. R. 1925 All. 117.**

——**S. 11**—*Execution proceedings—Decision in, when* res judicata—*Successive application against same person—Maintainability.*

There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or believed to be partners in the particular venture out of which the decree has arisen. The limitation however that is imposed on all these applications is that if there has been a previous application in which there has been a definite decision affecting a particular piece of property or particular person, and from that decision nothing has been done by way of appeal or institution of suit, if neither of these methods were available that decision is a final decision between the parties and if in any subsequent proceedings the point again becomes material, the parties are bound by that previous decision, and the matter cannot be re-opened. To that extent, and that extent only, is there limitation on the successive applications in execution. (*Mears, C. J. and Piggott, J.*) KAPURCHAND *v.* KANHAIYA LAL. **45 A. 735 : L. R. 4 A. 441 : 21 A. L. J. 641 : 74 I. C. 513 : A. I R. 1924 All. 34.**

——**S. 11**—*Execution proceedings—Constructive* res judicata.

An omission to raise the objection to a wrong claim in execution is not *res judicata* in a later execution application, as the principle of implied or constructive *res judicata* is not applicable to execution proceedings. (*Gokul Prasad and Sulaiman, JJ.*) SHEO MANGAL *v.* MT. HULSA. **19 A. L. J. 954 : 65 I. C. 377 : 44 A. 159 : A. I. R. 1922 All. 413.**

——**S. 11, Expl. IV**—*Execution proceedings.*

In execution of a decree against M. as representing a company certain properties were attached and on an objection by P. and S. brothers of M. ⅔ of the properties were released from attachment. The decree-holder thereupon applied under O. 21, R. 50 (2) for leave to execute the decree against P and S. as partners of the firm. *Held* per *Wallach, J*:—That as the issue whether P. and S. were partners had not been raised in the claim proceeding there was no bar to its being raised in this proceeding. S. 11, Expl. IV, does not extend to execution proceedings. Per *Walsh, J.*:—The previous order would operate as a bar to allow the decree-holder to enjoy a preliminary attempt to execute the decree by attachment and to reap the benefit thereof if successful and on failure thereof to fall back upon O. 21, R. 50 (2) would be contrary to the principle of the decision of the Privy Council in 6-A 269. An examination of S. 11 of the Code is beside the question in such cases. (*Walsh and Wallach, JJ,*) PHULCHAND *v.* KANHAIYA LAL.

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

19 A. L. J. 923 : 65 I. C. 295 : 44 A. 130 : L. R. 3 A. 1: A. I. R. 1922 All. 247.

——**S. 11**—*Execution proceedings—Decision after notice—Effect of.*

A decision on an application for execution after notice to the judgment-debtor, that it was not barred by limitation operates as *res judicata*, though the judgment-debtor remained *ex parte*. The failure to oppose the application precludes the judgment-debtor thereafter from contending that it is barred It is not a question of *res judicata* ; but there is a bar by a decision in the very litigation upon the same application. (*Walsh aad Ryves, JJ.*) MT. MUHAMMADI BEGAM *v.* MT. UMDA BEGAM. **66 I. C. 751 : A. I. R. 1922 All. 100 (1).**

——**S. 11**—*Execution proceedings— Objection as regards invalidity of final mortgage decree—Costs, if can be claimed later.*

A preliminary decree for sale was passed on a mortgage by the court of first instance, reversed by the appellate court, but finally restored with costs throughout by the High Court. When the decree was made final, the costs awarded by the High Court were not included therein and it was in effect the decree of the court of first instance that was made final. On an application for execution being put in, part of the decree amount was paid, and time taken for payment of the balance. As the money was not paid in time, a second execution application was put in, claiming for the first time the costs awarded by the High Court also. Two objections were raised (*i. e.*,) the final decree as passed could not be executed as the only decree that could be made final was the appellate decree of the High Court and (2) the execution court could not add the further amount claimed by way of costs. *Held*, on the first point, as the objection was not raised when the first execution application was put in it was barred by *res judicata* ; and on the second point the execution court can only add execution costs, and it cannot add to or amend the final decree which had been passed in the case. (*Ryves and Gokul Prasad, JJ.*) DAMBAR SINGH *v.* KALYAN SINGH. **20 A. L. J. 170 : L. R. 3 A. 164 : 65 I. C. 799 : 44 A. 350 : A. I. R. 1922 All. 27.**

——**Ss. 11 (Expln. IV) and 47**—*Execution proceedings*—Res judicata—*Execution sale by revenue authorities—Application to mamlatdar to set aside sale on deposit—C. P. Code, O. 21, R. 89.*

A decree was transferred for execution to the Collector who sold the property on 9—6—1914. The judgment-debtor applied under O. 21, R. 89, C.P. Code within one month of the sale to set it aside on deposit of the required amount with the mamlatdar. The Mamlatdar remitted the deposit to the Civil Court and directed the Judgment-debtor to appear before that Court on 8—8—1914. The judgment-debtor renewed his application before the Court and the auction-purchaser also agreed to the sale being set aside but the application was eventually dismissed on other grounds. On appeal the District Court ordered the lower Court to proceed with the application to set aside the sale. On further appeal the High Court confirmed the order of the District Court. Subsequently the execution sale was set aside by the Court. On appeal by the auction-purchaser the District Court allowed the appeal holding that the application made by the mamlatdar was ineffectual and that made to the Civil Court was barred by limitation. On a second appeal to the High Court by the judgment-debtor, *Held*, that the order of the Court below was appealable having regard to the prior proceedings and that the prior decision of the

C. P. CODE (V OF 1908). S. 11—Execution Proceedings.

District Court and the High Court having proceeded on the footing that the application of the judgment-debtor was within time, it was not open to the auction-purchaser now to contend that it was barred. (*Shah, A. C. J. and Fawcett, J.*) GADIGAPPA CHAN BASAPPA *v.* SHIDAPPA GURU SHIDAPPA. **48 Bom. 638 : 26 Bom. L. R. 817 : A. I. R. 1924 Bom. 495.**

——S. 11—*Execution proceedings.*

Plea decided against impliedly in suit cannot be raised again in execution proceedings. (*Shah, A. C. J. and Crump, J.*) MULJI PURSHOTTAM *v.* GOVERDHANDAS. **76 I. C. 148 : 24 Bom L. R 1291 : A.I.R. 1923 Bom. 36**

——S. 11—*Execution proceedings—Decision as to limitation—Effect on subsequent application.*

A decision on an application to execute a decree that the application is barred by limitation does not operate as *res judicata* in a subsequent application to execute the decree. 21 Bom. L. R. 344, followed. (*Macleod, C. J. and Shah, J.*) RAMCHANDRA *v.* SHRINIVAS. **66 I. C. 940 : 46 Bom. 467 : 24 Bom. L. R. 97 : A. I. R. 1922 Bom. 238.**

——S. 11—*Execution proceedings—Limitation.*

Where an intermediate execution application is ordered on notice to the judgment-debtor, it is not open to him on a subsequent execution application to plead that the intermediate application was barred by limitation and, therefore, the subsequent application was also barred. (*Macleod, C. J. and Fawcett, J.*) PRABHULINGAPPA *v.* GURUNATH.
22 Bom. L. R. 1389 : 59 I. C. 747 : 45 Bom. 453.
[N. B.—*See also* 40 M. L. J. 197 (P. C.)]

——S. 11 *Execution proceedings—Prior order—Effect of—Judgment-debtor not a party to prior proceedings not affected.*

A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation and therefore it was not in accordance with law. (*Cuming and Panton, JJ.*) SITANATH DAS *v.* RANI KANAK PROBHA DEBI. **67 I. C. 879 : A. I. R. 1923 Cal. 322 (2).**

——S. 11—*Execution proceedings—Objection petition dismissed for non-prosecution—Effect.*

Where an objection petition in an execution proceeding is dismissed for non-prosecution, there is no adjudication on the merits and hence it cannot be *res judicata.* (*Greaves and Ghose, JJ.*) BAHIR DAS PAL *v.* GIRISH CHANDRA PAL. **67 I. C. 663 : A. I. R. 1923 Cal. 287.**

——S. 11 — *Execution proceedings — Mortgage decree not made final—Decree-holder applying for execution and judgment-debtor not objecting—Judgment-debtor cannot object at a subsequent stage.*

Where a preliminary decree under O. 34, R. 4 is as such incapable of execution unless made absolute under O. 34, R. 5 but the judgment-debtor fails to raise such objection at the first application for execution he is precluded from taking the objection at a later stage of execution proceedings. (*Zafar Ali and Martineau, JJ.*) BANU MAL *v.* PARAS RAM.
7 Lah. L. J. 397 : A.I.R. 1925 Lah. 640.

——S. 11—*Execution proceedings—Appeal—Costs.*

An order for costs was passed by the Privy Council against a certain person. On an application being made for the execution of that order a decree was drawn by the High Court giving the different items of costs. After the decree, embodying the order of the Privy Council, had been drawn, the Subordinate Judge had decided on another application for execution by the same decree-holder that he was not liable to pay one item of the costs. *Held*, as the Subordinate Judge's order was passed after the decree embodying the order of the Privy Council had been drawn up by the High Court and as no appeal was preferred from it, the order became final and operated as *res judicata.* (*Martineau, J.*) GOPI CHAND *v.* BENARSI DAS.
12 P. W. R. 1923 : A. I. R. 1922 Lah. 361.

——S. 11—*Execution proceedings—Failure to object to Execution petition on the ground that it was barred by limitation.*

Where a Judgment-debtor had full opportunity of raising the question that the execution petition was barred by limitation but did not raise it, he cannot afterwards raise it. (*Jackson, J.*) VEMULAMANDA BHADRAYYA *v.* JAGGARAJU. **22 L. W. 747.**

——S. 11, Expl. IV—*Execution proceedings—Application for transfer of decree - Notice to judgment-debtor—Limitation—Failure to plead—Effect of.*

Where the assignee of a decree applies to the Court to transmit the decree to another court for execution and the judgment-debtor though served with notice fails to appear and plead that the decree could not be executed as being barred, S 11, Expln. IV, will apply and the question would be *res Judicata* in subsequent execution proceedings. 8 C. 51 ; 40 M. L J. 197 (P. C.) foll. Even in an application for transfer of a decree it is open to the judgment-debtor to plead limitation and he ought to do so. (*Phillips and Odgers, JJ.*) KALEPALLI RAJITAGIRIPATHY *v.* KALEPALLI BHAVANI SANKARAN. **47 M. L. J. 4 : 47 Mad. 641 : 80 I. C. 103 : (1924) M. W. N. 527 : 19 L. W. 650 : A. I. R. 1924 Mad 673.**

——S. 11— *Execution proceedings—Failure to object at one stage of execution proceedings does not bar objection at later stage.*

A joint-decree was transferred by one of the decree-holders after adjustment of the decree by the other decree-holders. The notice served on the latter of the application for execution filed by the transferee did not contain any indication that the Court was going to decide any question regarding settlement of the amount for which the decrees were executable and the properties liable to be sold in execution. The case proceeded *ex parte* as against them. *Held*, that they were not estopped in the subsequent proceedings from disputing their co-decree-holders' claims to execute the whole of the decrees against any of the judgment debtor's properties. 28 M. 355, Relied on. (*Spencer and Odgers, JJ.*) B. HANUMANTHA ROW *v.* A. KRISHNAMMA. **32 M. L. T. 118 : 70 I. C. 329 : A. I. R. 1924 Mad. 518.**

——S. 11— *Execution proceedings — Incidental finding.*

The mere fact that the petition in the suit itself, to have the property sold in a particular order is disallowed is no bar to the executing Court making such an order in the course of the execution. (*Schwabe, C. J. and Waller, J.*) RAGHAVACHARIAR *v.* DUVVURU KRISHNA REDDI. **46 M. L. J. 32 : 19 L. W. 23 : (1924) M. W. N. 134 : 83 I. C. 918 : A. I. R. 1924 Mad. 509.**

——S. 11—*Execution proceedings.*

Judgment-debtor can plead at a later stage non-executability though not previously pleaded where assignee of decree-holder was benamidar of judgment debtor. (*Spencer and Venkatasubba Rao, JJ.*) K. SRIRAMA RAO *v.* K. BAPAYYA. **18 L. W. 453 : 76 I. C. 845 : A. I. R. 1924 Mad. 189.**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

———S. 11 (Expl. IV)—*Execution proceedings—Failure to attend at the settlement of sale proclamation—Effect—Liability of property to attachment—If can be agitated.*

Where in spite of notice to the judgment debtor he did not attend at the settlement of a sale proclamation under O. 21, R. 66, he cannot by reason by such non-attendance be considered to be estopped by the principle of *res judicata* from contending thereafter that the property was not liable to attachment. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) V. C. T. N. CHIDAMBARAM CHETTY *v.* KANDASAMI GOUNDAN. **45 M. L. J. 346 : 46 M. 768 : (1923) M. W. N. 571 : 74 I. C. 155 : 18 L. W. 757 : A. I. R. 1924 Mad. 1 (F. B.).**

———S. 11—*Execution proceedings— Constructive* res judicata—*Omission to object in prior execution proceedings—Effect of.*

Where in a previous execution application the judgment-debtor did not take objection to executability of the decree and execution was ordered it is not open to him to object that the decree is inexecutable when a subsequent application for execution is made. The fact that the subsequent application for execution relates to different items of property does not take the case out of the operation of the rule *res judicata.* (*Spencer and Venkatasubba Rao, JJ.*) PALANCHERI GOVINDA MENON *v.* KRISHNA MANNADIAR. **45 M. L. J. 71 : 17 L. W. 566 : (1923) M. W.N. 299 : 72 I. C. 397 (2) : A. I. R. 1923 Mad. 649.**

———S. 11—*Execution proceedings—Recognition of assignment and transmission of decree—Omission to object to execution—Effect of.*

Where a decree was assigned and an application was made to the Court to recognise the assignment and transmit the decree for execution to another Court, the omission of judgment-debtor to object at that stage does not preclude him from objecting to the execution of the decree in the manner proposed by the decree-holder at a later stage of the execution proceedings. (*Spencer and Venkatasubba Rao, JJ.*) NATESA CHETTIAR *v.* ANNAMALAI CHETTIAR. **17 L. W. 319 : 32 M. L. T. 157 : 73 I. C. 213 : A. I. R. 1923 Mad. 487 (1).**

———S. 11—*Execution proceedings—O. 22, Rr. 1 and 4.*

Where one of the defendants in mortgage suit died in January 1912 after the preliminary but before the final decree, and the legal representative was brought on record in 1916 in connection with application for transfer of the decree and was served with a notice but he did not appear and brought a suit when some of the properties were brought for sale in execution.

Held, his failure to plead abatement in 1916 did not operate as *res judicata.* (*Ayling and Odgers, JJ.*) SAMI MUDALIAR *v.* MUTHIA CHETTI *alias* VEERAPPA CHETTY **43 M.L.J. 293: 16 L. W. 314 : (1922) M. W. N. 597 : A. I. R. 1923 Mad. 212.**

———S. 11—*Execution proceedings—Order made on an application.*

An order made in execution proceedings whether right or wrong bars a subsequent application when the validity of the first order is directly in question to determine whether the latter application is maintainable. (*Sadasiva Aiyar and Napier, JJ.*) DOORVASI SESHADRI AIYAR *v.* GOVINDASWAMI PILLAI. **40 M. L. J. 556 : 13 L. W. 529 : 29 M. L. T. 284 : 63 I. C. 189 : (1921) M. W. N. 344.**

———S. 11—*Execution proceedings—Order without notice.*

An order in execution passed without notice to the parties does not operate as *res judicata.* (*Krishnan, J.*) RAMUDU CHETTY *v.* VARADARAJA CHARIAR. **62 I. C. 480 : 13 L. W. 289.**

———S. 11—*Execution proceedings—Construction of decree—Executability.*

Where on an application for execution it was decided that the decree as it stood was not executable the order is binding on the decree-holder as *res judicata* and no further application for execution would lie unless the decree had been made absolute and executable. (*Oldfield and Seshagiri Aiyar, JJ.*) RAMALINGA ROWTHAN *v.* SHEIK IBRAHIM SAHIB. **59 I. C. 161 : 12 L. W. 34.**

———S. 11—*Execution proceedings—Prior orders—Effect of.*

The principle of constructive *res judicata* applies to execution proceedings and if at an earlier stage a certain objection open to a party was not raised, he cannot at a later stage raise it. (*Kinkhede, A. J.C.*) RAGHUBARPRASAD *v.* SATTOR. **89 I. C. 1009 (Nag.).**

———S. 11—*Execution proceedings — Principle applies to execution proceedings though section does not apply.*

If the judgment-debtor fails to appear and plead, at the time the proclamation for sale is settled, that the property attached is not liable to attachment and sale, he cannot be allowed to so plead at any later stage of the execution proceedings. (*Kotval, A. J. C.*) MT. RUKHMABAI *v.* RAMACHANDRA. **21 N. L. R. 23 : A. I. R. 1925 Nag. 320.**

———S. 11—*Execution proceedings—Ordering execution to proceed after limitation period, can operate as* res judicata *where the order is not set aside.*

Where judgment-debtor does not challenge by way of appeal, review or revision a wrong order of an executing court ordering issue of notice after a lapse of twelve years, he is precluded from challenging the order at any subsequent stage of the execution proceedings on principles analogous to those of *res judicata.* (*Kindhede, A.J.C.*) KHAIRULLA *v.* SHETH DHANRUPMAL. **80 I. C. 905 : A. I. R. 1925 Nag. 82.**

———S. 11—*Execution proceedings— Order that application is not time barred*—Res judicata.

Where an execution application was rejected on the ground that it was not in accordance with law and the decree-holder acquiesced in this order and did not appeal, *held* that the order was final and could not be questioned in further proceedings. Though orders in execution proceedings do not come directly within the language of what is now S. 11 of the C. P. Code, yet such orders if not appealed from are binding on the parties in subsequent proceedings on principles analogous to those of *res judicata* strictly so called. When a competent Court has decided, even though wrongly, that an execution application was not time barred, that order could not be questioned in subsequent execution proceedings. (*Batten, J. C.*) JAGANNATH *v.* BEHARI LAL. **72 I. C. 473 : A. I. R. 1923 Nag. 236.**

———S. 11—*Execution proceedings—Order in, when* res judicata—*Case struck off—Effect of.*

Where an order has been made on an application for execution expressly or by implication determining the rights of the parties to the proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re-open the question which previously has been adjudicated. 17 C.W.N. 113 Foll.; 6 A. 269, 8 C. 5 Ref. (*Batten, J C.*) MUSAMMAT PURA *v.* BEHARILAL. **68 I. C. 239 : A. I. R. 1923 Nag. 1.**

———S. 11—*Execution proceedings—Substitution*

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

under O. 22 applied for in execution—Refusal does not bar application under O. 21, R. 16.

An order refusing an application in execution proceedings for substitution under O. 22 does not operate as *res judicata* as against an application for execution under O. 21, R. 16. (*Dalal and Wazir Hasan, A. J. Cs.*) KALIMUDDIN *v.* TATA INDUSTRIAL BANK, LTD. **2 O. W. N. 352 : A. I. R. 1925 Oudh 417.**

——S. 11—*Execution proceedings—Order* ultra vires *does not operate as* res judicata *in same proceeding.*

An order of executing Court which is *ultra vires* does not operate as *res judicata* in a subsequent stage of the same execution proceedings. (*Jwala Prasad and Kulwant Sahay, JJ.*) GOJADHAR PRASAD *v.* FIRM MAMULAL JAGARNATH.
4 Pat. 440 : A. I. R. 1925 Pat. 807.

——S. 11, Expl. IV—*Execution proceedings—Execution case dismissed for default—Objection not taken that the objector was not liable for the debt—Objection is not precluded in subsequent execution case.*

Where the former execution case was dismissed for default.

Held, that the contention, that as in the previous execution case the appellant did not take the point that he was not liable for the debt, he could not take it in the present execution, could not be maintained. In the previous execution case there was no adjudication which could even by implication be held to constitute a decision adverse to the appellant. The principle which was applicable to suits upon a party's failure to raise an issue, which he might have raised, was not applicable to execution cases, but even if it were, the final order in the last execution case was made not in consequence of the conduct of the appellant but in spite of it. The doctrine of *res judicata* did not apply. (*Mullick and Ross, JJ.*) TIKAIT GAYAN NATH SAHI *v.* MALHJYI VAIDIJA. **6 P. L. T. 507 : 1925 P. H. C. C. 160 : A. I. R. 1925 Pat. 588.**

——S. 11—*Execution proceedings—Notice under O. 21, R. 66—Necessity for decision on prior application—Effect of.*

In proceedings for execution of a mortgage decree, the court held that the petitioner, a puisne mortgagee who applied to be made a party and for notice under O. 21, R. 66, C. P. Code, was not entitled to the notice being a mere *pro forma* defendant. Petitioner did not appeal against the order but after the conclusion of the execution sale applied for an order that he was not liable to be evicted from properties inasmuch as notice under O. 21, R. 66, C. P. Code, was not served upon him. *Held*, that the contention was barred by *res judicata* the same having been negatived in the prior proceedings. (*Das and Ross, JJ.*) BAIJNATH SINGH *v.* HARI PRASAD BAB.
1924 P. H. C. C. 209 : A.I.R. 1924 Pat. 628.

——S. 11—*Execution proceedings—Order made at one stage—Binding on parties.*

Where a court executing a decree passes an order after notice to the parties, that decision is unless set aside on appeal, binding upon the parties. (*Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD SAHU *v.* GAJADHAR SAHAI. **1 Pat. L. R. 145 : 73 I. C. 359 : A.I.R. 1924 Pat. 362.**

——S. 11—*Execution proceedings.*

S. 11 of the C. P. Code applies to suits and an execution case is not a suit : but it is firmly established that the principle of law underlying S. 11 applies to proceedings in execution of decree. (*Das and Kulwant Sahay, JJ.*) RAM LAL MALIK *v.* DEODHARI RAI. **2 Pat. 772 : 74 I. C. 781 : 5 Pat. L. T. 7 : A.I.R 1924 Pat. 265.**

C. P. CODE (V OF 1908), S. 11—Ex parte decree.

——S. 11—*Execution proceedings—In previous execution proceeding pleas of limitation raised, but proceedings dismissed for default—Pleas that previous proceedings were barred not maintainable.*

On the 10th November 1910 an instalment order was passed against the appellant whereby he had to pay a certain sum in 14 instalments. A number of these instalments were paid and then there was default. In 1921 the decree-holder applied for execution of the decree. In that execution case the judgment-debtor filed an objection contending that the execution was barred by limitation. The hearing of this objection in the execution case was fixed for the 8th April 1921. Upon that occasion the judgment-debtor did not appear in support of his objection and as there was nothing before the Court to show that the execution case was barred by limitation the Court dismissed the objection for default and on the same day passed an order that the decree-holder should take further steps and directed the case to be put up again on the 11th of the month for orders. On the 12th of the month no steps having been taken by the decree-holder his execution was dismissed for default. The next execution case was filed in September following that is to say well within three years of the last execution case. The appellant again objected that the case was barred by limitation on the ground that the previous execution case in which his objection was dismissed was itself barred by limitation.

Held, that the objection was no longer maintainable. 8 C. 51 and 24 A. 282 Foll. 28 C. 122 and 14 C. W. N. 114 Dist. (*Dawson Miller, C.J. and Kulwant Sahay, J.*) JAGO MAHTON *v.* KHIRAOTHAR RAM.
2 P. 759 : 74 I. C. 130 : 2 P. L. R. 163 : A.I.R. 1924 Pat. 122.

——S. 11—*Execution proceedings—Order in—When* res judicata—*Notice to parties.*

Where an order for execution of a decree is passed after due notice to the judgment-debtor but eventually the application is dismissed for default of the decree-holder, it is not open to the judgment-debtor in a subsequent application for execution to plead that the former execution was time barred. (*Jwala Prasad and Bucknill, JJ.*) GOURCHANDRA ROY *v.* JANARDHAN PRASAD THAKUR. **4 Pat. L. T. 204 : 68 I. C. 337 : A. I. R. 1923 Pat. 180.**

——S. 11, Expls. IV and V—*Execution proceedings—Doctrine, not to be applied generally to.*

Although the doctrine laid down in S. 11, C.P. Code may be applied to certain proceedings in execution arising out of the same judgment so as to put an end to the litigation and may possibly be applied in certain cases when separate suits have been brought raising points which have already been decided in execution cases brought between the same parties, the special rules laid down in the explanation to S. 11, which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally to execution cases. 37 All. 580 ; 24 Mad. 681 Foll. (*Miller, C. J. and Adami, J.*) PIRTHI MAHTON *v.* JAMSHED KHAN.
1 P. 593 : 3 Pat. L. T. 403 : 67 I. C 656 : 1922 P.H.C.C. 185 : A. I. R. 1922 Pat. 289.

——S. 11—*Execution proceedings.*

The provisions of S. 11 do not apply to execution proceedings. (*Brown, A.J C.*) MAUNG SO *v.* DEVIGYAN. **4 U. B. R. 132 : 70 I. C. 530 : A. I. R. 1923 Rang. 119 (2).**

Ex parte decree.

——S. 11—Ex parte *decree—No* prima facie *evidence—Fresh suit, if barred.*

C. P. CODE (V OF 1908), S. 11—Ex parte decree.

Where a suit was decreed *ex parte* without even *prima facie* evidence in support of the claim :

Held, that the decision could not operate as a bar to a fresh suit between the parties with respect to the same subject-matter. (*Fremantle, S. M. and Burn, J. M.*) JAGAT NARAIN *v.* SURAJ PAL.

L. R. 6 A. 229 (Rev.).

——— **S. 11**—Ex-parte *decree for rent satisfied—Decree is* res judicata *as to parties being landlord and tenant.*

An *ex parte* decree for rent which was subsequently satisfied can operate as *res judicata* on the question of the parties being landlord and tenant. (*Greaves and Chakravarti, JJ.*) UMEDALI MUNSHI *v.* GOYJADDI MOLLA. **87 I. C. 672 : A. I. R 1926 Cal. 114**

——— **S. 11**—Ex-parte *decree.*

An *ex-parte* decision can operate as *res judicata*, even in rent suits. 16 C. 300 (F.B) Not Foll (*Devadoss, J.*) GOVINDOSS KRISHNADOSS *v.* P. MANIKYANAYANIM. **82 I. C. 990 : A. I. R. 1925 Mad. 378.**

Fraud.

——— **S. 11**—*Fraud—Decree obtained by fraud and collusion if bars a fresh suit.*

A decree obtained by fraud and collusion is a nullity and cannot operate as a bar to a fresh suit between the parties with respect to the same subject matter (*Fremantle, S. M. and Burn, J. M.*) JAGAT NARAIN *v.* SURAJ PAL. **L. R. 6 A. 229 (Rev.).**

——— **S. 11**—*Fraud.*

So far as plaintiff relied on perjured evidence the suit is not maintainable. The alleged fraud having been in effect adjudicated upon, an attempt to re-open the case cannot be allowed. (*Pratt, J.*) ARLANDU *v.* SITHAMBARAM. **1 Bur. L. J. 129 : 74 I. C. 278 : A. I. R. 1923 Rang. 82 (1).**

Heard and finally decided.

——— **S. 11**—*Heard and finally decided—Question abandoned by the plaintiff but decided by Court at express request of defendant—If* res judicata.

Where the plaintiff had excluded certain question by the statement of his pleader and the first Court had therefore expressly stated that it could not decide it but the defendant, expressly urged in appeal that the Judge was wrong in not deciding that question even though his action was based on the plaintiff's adviser's statement and he asked the lower appellate Court expressly to decide it and the Court did decide it.

Held, that the question was necessary for the decision of the suit and therefore the decision thereon operated as *res judicata*. It was immaterial that the Court did not refer to that question in its judgment. (*Sir John Edge*) MIDNAPORE ZAMINDARY CO., LTD. *v.* NARESH NARAYAN ROY. **47 M. L. J. 23 : 26 Bom. L. R. 651 : L. R. 5 P. C. 137 : 51 Cal. 631 : 35 M. L. T. 169 : 80 I.C. 827 : (1924) M.W.N. 723 : 20 L. W. 770 : 23 A. L. J. 76 : 3 Pat. L. R. 193 : 29 C. W. N. 34 : 51 I. A. 293 : A. I. R. 1924 P. C. 144 (P. C.).**

——— **S. 11**—*Heard and finally decided—First suit for redemption of mortgage—Compromise decree not providing for extinction of redemption right—Second suit for redemption.*

In a suit for redemption of the usufructuary mortgage the parties entered into a compromise by which the plaintiff was to get the property redeemed on payment of a certain sum to the deft. within a certain time. The plff. did not pay. He brought a second suit for redemption.

Held, that the second suit was not barred by S. 11 of the C. P. Code, as the parties did not provide in the compromise that the plff.'s right to redeem would be extinguished absolutely. (*Sulaiman and Daniels, JJ.*) MOHAMDI BEGAM *v.* TUFAIL HASAN.

23 A. L. J. 888.

C. P. CODE (V OF 1908), S. 11—Heard and finally decided.

——— **S. 11**—*Heard and finally decided—Issue not arising on pleadings and so indistinct as not to show that parties were required to adduce any evidence—No* res judicata *arises.*

Where a particular issue does not arise on the pleadings, or in any case is so indistinct that it does not indicate that the parties knew that they had to adduce any evidence on it, any finding on such issue does not operate as *res judicata*. (*Mukerji, J.*) LALLU SINGH *v.* RAGHUNUNDAN. **A. I. R. 1925 All 794.**

——— **S. 11**—*Heard and finally decided—Point left undecided is not* res judicata.

Where a point is expressly left undecided by the Court in a suit it can be agitated in subsequent suit. (*Lindsay and Kanhaiya Lal, JJ.*) SHIAM LAL *v.* RADHA BALLABH. **L R. 6 A. (Civ.) 547 : 88 I.C. 822 : 23 A. L. J. 950 : A. I. R. 1925 All. 770.**

——— **S. 11**—*Heard and finally decided—Mortgage by Hindu widow—Mortgagor held entitled to mortgage during her life-time—Question is* res judicata *in subsequent suit.*

A mortgage was executed by a Hindu widow. A suit for possession brought by the reversioner during the widow's life-time, against the mortgagee on the ground that the mortgagor was only the mistress of the previous full owner's father and was not the full owner's true mother, and so was not entitled to succeed to his estate was dismissed on the ground that the woman was his true mother and that the suit was premature.

Held, that in a subsequent suit after the mortgagor's death, the plea that the mortgagor had no right to the property as she had been only the step-mother of the previous owner could not be raised. (*Sulaiman, J.*) RAM PRASAD SINGH *v.* BABU LAL SONAR.

L. R. 6 A. (Civ.) 182 : 86 I. C. 849 : A. I. R. 1925 All. 417.

——— **S. 11**—*Heard and finally decided—Lower Court deciding on title and possession—Appellate Court deciding on title alone—No* res judicata *regarding possession arises.*

Where the decision of the previous suit proceeded in the first Court both on the question of possession and title but the decision of the appellate Court was confined to the question of title alone.

Held, there was no *res judicata* regarding the question of possession. (*Sulaiman and Kanhaiya Lal, JJ.*) GULAB RAI *v.* SUNDAR LAL.

L. R. 5 A. (Civ.) 528 : A. I. R. 1925 All. 243.

——— **S. 11**—*Heard and finally decided—Decision on issue—Grounds therefor*—Res judicata.

It is the issue decided and not the reason for the decision which constitutes *res judicata*. (*Daniels, J.*) KUNDAN LAL *v.* JAGAT RAM. **A. I. R. 1924 All. 927.**

——— **S. 11**—*Heard and finally decided—Agreement to refer—Subsequent suit on contract is not maintainable.*

Plffs. brought a suit to recover a certain sum of money alleged to be due in respect of a contract which was entered into on 12-9-1918 for the delivery by 18-11-1918 of a bale of dhoties at a certain rate. The date fixed for payment was 27-11-1918. The goods were delivered to the defendant on the date in question but the price therefor was not paid on the due date. After this latter date, inasmuch as there had been much speculation in this class of goods, a committee of the cloth merchants of Jhansi assembled and brought out a plan by which claims for breach of

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contract of delivery of those goods or for failure to pay the price due in respect of these goods were to be settled. The plaintiffs and the defendant submitted to what might be called the award of the arbitrators and agreed that the claim which the plaintiffs had against the defendant should be settled on this basis. The plaintiffs subsequently sued on the basis of the old contract for damages. *Held*, that the suit was not maintainable. (*Lindsay and Daniels, JJ.*) RAM NATH *v* MANNU LAL. **45 A. 472 : 21 A. L. J. 380 : L R. 4 A. 216 : 72 I. C. 615 : A. I. R. 1923 All. 518.**

——S. 11—*Heard and finally decided—Mortgage suit—Decree for redemption—Fresh suit for redemption—Maintainability of.*

A mortgagor who has obtained a decree for redemption which does not contain a provision that if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and paid the decretal amount, can subsequently bring a second suit for redemption of the mortgage in respect of which such decree was obtained. The mere fact that in the previous suit the Court ordered that on default of payment of the amount of the mortgage decreed within the time fixed, the suit should stand dismissed, does not operate as a bar to a fresh suit for redemption. 24 A 44 Foll. (*Ryves and Stuart, JJ.*) HARI RAM *v.* INDRAJ **44 A. 730 : 69 I. C. 167 : 9 O. & A. L. R. 123 : L. R. 3 A. 397 : 20 A. L. J. 631 : A. I. R. 1922 All. 377.**

——S. 11—*Heard and finally decided.*

A dismissal of an appeal, for want of a copy of the first Court's judgment necessary under the Allahabad High Court rules, does not operate as *res judicata.* (*Tudball and Sulaiman, JJ.*) BINDESHRI *v.* AFZAL KHAN. **63 I. C. 344 : 19 A. L. J. 706 (2).**

——S. 11—*Heard and finally decided—Several mortgages on the same property—Mortgagor suing for accounts under S. 15-D of the Dekkhan Ag. Rel. Act under one mortgage—Mortgagee putting forth other mortgages—Court deciding suit only with respect to one mortgage—Subsequent suit on other mortgages by mortgagee is not barred.*

If a mortgagor executes several mortgages on the same property, and asks for an account on one mortgage under S. 15-D of the Dekhan Agriculturists' Relief Act, and the mortgagee claims that an account should be taken of all the mortgages existing on the property, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, and still if the Court takes an account of the one mortgage only, and decides nothing with regard to the validity of or the existence of other mortgages at the time when the account is taken, a subsequent suit by mortgagee to recover under the other mortgages is not barred under S. 11. (*Macleod, C. J. and Coyajee, J*). MAHADEV NARAIN *v.* SHRIDHURBHAT GOPALBHUT. **27 B. L. R. 488 : 87 I. C. 716 : A. I. R. 1925 Bom. 311.**

—— S. 11, Expl. V—*Heard and finally decided—Relief asked for in plaint but not referred to in judgment—Decision as to that relief found to be unnecessary—No* res judicata.

Where in a suit for specific performance of a contract of sale of land, relief as to possession was prayed for in the plaint but there was no reference to it in the judgment, *held* that that relief may be taken to have been refused but the matter was not heard and finally decided within S. 11 and hence no *res judicata* especially when it was found that there was ground to hold that a decision on that relief was not considered to be necessary in that suit. (*Shah, A. C. J. and Kincaid, J.*) KRISHNAJI BABAJI HAVAL *v.* SANGAPPA MURIGAPPA WANGI. **27 B. L. R. 42 : A. I. R. 1925 Bom. 181.**

——Ss. 11 and 47—*Heard and finally decided—Mortgagee suit—Decree not executed—Subsequent suit for redemption—Maintainability of.*

If a mortgagor brings a redemption suit and obtains a decree *nisi* which entitles him on payment of a certain sum by certain time to get back the property, and nothing further is done, and no attempt is made to get back possession, and no order is made barring the mortgagor's right to redeem, then a second suit can be brought for redemption and the same would not be barred either by S. 11 or S. 47 of the Civil Procedure Code. There is nothing in the Dekhan Agriculturists' Relief Act to prevent the operation of the above. If the first redemption decree is passed in a suit under the Act, the question whether the decree is a decree *nisi* or a decree which puts an end to the mortgage will be one depending on the facts of the case. 43 B. 334 Foll. (*Macleod, C J. and Crump, J.*) RAMCHANDRA LAXMAN *v.* BALBHIM BABAJI. **25 Bom. L R. 211 : 72 I. C. 315 : A. I. R. 1923 Bom. 287 (2).**

——S. 11—*Heard and finally decided—Suit by Hindu widow—Bar under S. 244 (old Code)—Second suit by reversioner—Not barred.*

Where a Hindu widow sued for a declaration that a certain execution sale was not valid and binding, but it was dismissed not on the merits but on the ground it was barred by S. 244 (old Code), a suit by the reversioner after the widow's death was not barred by *res judicata* as there was no adjudication on the merits in the prior suit. (*Macleod, C. J. and Shah, J.*) GANESH RAMCHANDRA *v.* LAXMIBAI VENKATESH. **46 Bom 726 : 24 Bom L. R. 249 : 67 I. C. 209 : A. I. R. 1922 Bom. 96.**

——S. 11—*Heard and finally decided—Suit against Receiver on allegations already found against plaintiff.*

Where a Court appointing a Receiver has gone into the Receiver's accounts and has passed them overruling the objections of the party impugning the accounts a suit will not lie against the Receiver for damages for negligence based on the same allegations already considered and overruled. (*Macleod, C. J. and Heaton, J.*) SHRINIWAS KUPPUSAMY MUDALIAR *v.* M. C. WAZ. **22 Bom. L. R. 1126 : 59 I. C. 421 : 45 Bom. 99.**

——S. 11—*Heard and finally decided—Matter in issue—Appeal—Issue not decided—Effect.*

Where an issue is decided one way by a trial Court, when the matter is taken up in appeal, the issue was not decided, there can be no question of *res judicata.* (*Cuming, J.*) KANUR CHARAN DAS *v.* KRISHNA SUNDAR MAJUMDAR. **90 I. C. 480 (Cal.).**

——S 11, Expl. V—*Heard and finally decided—Prayer for declaration leading up to the main relief claimed, viz., of possession—Dismissal of suit on failure of main relief—Declaration cannot be deemed to have been refused.*

Where the declaration which was claimed in the previous suit in the prayer was not a declaration under S 42 of the Specific Relief Act but a declaration which led up to the main relief claimed in the suit, namely, possession.

Held, that the prayer for declaration was merely an argumentative step towards the only decree sought, viz., possession and the Court was not entitled to make a declaration with regard to this prayer in the plaint

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after the failure of the sole cause of action, and hence the refusal of the relief cannot "be deemed to have been refused" under Expl. (V). (*Chatterjee and Cuming, JJ*). NRIPENDRA NATH *v.* BASANTA KUMAR. **29 C. W. N. 861 : 89 I. C. 207 : A. I. R. 1925 Cal 1195.**

——**S. 11**—*Heard and finally decided—Subsequent change in the law—Effect.*

A question once decided against a party cannot now be allowed to be re-agitated merely because a Special Bench of the High Court has enunciated a rule different from what was recognised in previous case. (*Mookerjee and Panton, JJ.*) ABINASH CHANDRA PAL *v.* KHETRA MOHAN DALOI. **A. I. R. 1923 Cal. 629.**

——**S. 11**—*Heard and finally decided—Wrong decision in a rent suit.*

In a suit for the recovery of arrears of rent on the basis of a *kabuliyat* the *kabuliyat* stipulated that arrears of rent should bear interest at the rate of 75 per cent. per annum. Both Courts below enforced the stipulation and decreed the plaintiff's claim as it appeared that the respondent had twice before obtained decrees for the arrears of rent on basis of this *kabuliat* with interest at the rate stipulated in 1911 and in 1915, *Held*, that the liability of the defendant-appellant to pay interest on arrears of rent at the rate provided for in the *kabuliat* is *res judicata* between the parties. 39 Cal. 848 and 32 Cal. 49 dist. (*Cuming and Panton, JJ.*) HAMID ALI *v.* MAHOMED NURERJJAMA MEAH. **76 I. C. 444 : A. I. R. 1923 Cal 361.**

——**S. 11**—*Heard and finally decided—Unnecessary finding*—Res judicata—*Decree in an ejectment suit—Absence of notice—Permanent tenancy.*

Where an ejectment suit is dismissed on the ground of absence of notice but the Courts records a finding that the permanent tenancy alleged by the deft. is not proved, under such circumstances the decree cannot operate as *res judicata* on the question whether the deft. had a permanent tenancy or not. (*Chatterjee and Pearson, JJ.*) RAJENDRA KISHORE *v.* KUMUD BAN MAHATA. **67 I. C. 271 : A. I. R. 1923 Cal. 297.**

——**S. 11**—*Heard and finally decided — Decree on award—Fresh suit on same cause of action does not lie.*

A decree under S. 526 of the old C. P. Code has the same effect as regards execution as a decree under S. 522. Consequently a decree upon an award stands precisely in the same position with regard to its execution as any other decree of court. A fresh suit does not lie on the same cause of action. 21 W. R. 248 Foll. (*Woodroffe and Ghose, JJ.*) LALIT MOHAN MOITRA *v.* RAJA SISI SEKHARESWAR. **A.I.R. 1922 Cal. 73.**

——**S. 11**—*Heard and finally decided—Judicial order—Made in one stage of a suit binding.*

The validity of a judicial order made at one stage of a suit of litigation, unless forthwith challenged, is conclusive and cannot be attacked at a later stage. (*Mookerjee and Panton, JJ.*) RAJA SASIKANTA ACHARYA *v.* SARAT CHANDRA RAI. **70 I. C. 6 : 34 C. L. J. 415.**

——**S. 11**—*Heard and finally decided—Unnecessary issue.*

A question raised at the instance of a party and decided by the Court as necessary operates as *res judicata* in a subsequent suit, even though the issue in the previous suit was in fact not necessary. (*Woodroffe and Walmsley, JJ.*) MIDNAPORE ZAMINDARI *v.* NARES NARAIN. **63 I. C. 161 : 33 C. L. J. 317.**

——**S. 11**—*Heard and finally decided—Definite order cannot be set aside except on review by the same Judge or his successor though S. 11 does not apply.*

C P. CODE (V OF 1908), S. 11—Heard and finally decided.

On general grounds when a definite decision has been given between the parties on any matter in controversy and such decision purports finally to adjudicate on such matter, it is not competent to the same Judge or his successor in office to set aside the former decision in the same proceeding. The parties, if they consider themselves aggrieved have their remedy by review or appeal to Superior Courts. 1924 P. C. 202 Foll. (*Jai Lal, J.*) SHER KHAN *v.* PRABH DAYAL. **7 L. L. J. 319 : A. I. R. 1925 Lah. 507.**

——**S. 11**—*Heard and finally decided—Dismissal for mis description of suit property does not bar subsequent suit—O. 2, r. 2.*

The dismissal of a suit on the ground of misdescription of property in suit is not a bar to a subsequent suit on the same cause of action either under S. 11 or under O. 2, r. 2. (*Scott Smith, J.*) BIKA *v.* BALANDA. **78 I. C. 579 : A. I. R. 1925 Lah. 193.**

——**S. 11**—*Heard and finally decided—Decree on mortgage—Decree not drawn up in accordance with law—Second suit to redeem mortgage if barred.*

In a suit for redemption of a mortgage the decree provided for redemption on payment of a particular sum within two months from the date of the decree. The decree went on to say that the plff, was to make up the court-fees. It was provided that on his failure to pay the money and the court-fees within the prescribed period the decree could not be executed. The decree was not drawn up in the manner prescribed by Order 34, R. 7 of the C. P. Code and did not contain any clause that if payment was not made on or before the date fixed by the Court the plaintiff should be debarred from all rights to redeem or that the mortgaged property should be sold. The plaintiff defaulted to pay the money within the time and brought a suit again for redemption. *Held*. that the second suit for redemption was not barred by *res judicata* or by S. 47 of the C. P. Code. (*Scott-Smith and Fforde, JJ.*) ARURA *v.* BUR SINGH. **5 Lah. 371 : A. I. R. 1925 Lah. 31.**

——**S. 11**—*Heard and finally decided—Dismissal of prior application as barred by limitation not* res judicata.

Decision of a point on the ground of limitation only and not on the merits does not operate as *res judicata*. (*Martineau, J.*) SHANCHI KHAN *v.* KARAM CHAND. **73 I. C. 705 : A. I. R. 1923 Lah. 150 (2).**

——**S. 11**—*Heard and finally decided—Suit—Counter-claim—Appeal preferred in suit only—Effect of.*

Plff. sued to recover a sum of money from the deft. on accounts and the latter denied the claim and counter-claimed for a sum of Rs. 46. The plff.'s suit was dismissed and the deft.'s counter-claim decreed by the first Court and the plff. thereupon filed two appeals, one against the dismissal of the suit and the other against the decree on the counter-claim. The District Court dismissed both the appeals whereupon the plff. preferred two second appeals, as in the Court below but the appeal against the decree on the counter claim was dismissed as being out of time. *Held*, the dismissal operates as *res judicata* for plff.'s claim. 16 C. 233 : 33 C. 1101 : 29 M. 333 : 3 P. R, 1897 : 31 P. R. 1895 : 85 P. R. 1905 : 33 A. 51 : 24 M. 350 : 1 Lah. 83 Ref. (*Leslie Jones and Broadway, JJ.*) GHANIYA LAL *v.* ROSHAN LAL. **4 Lah. L. J. 344.**

——**S. 11**—*Heard and finallly decided—Mortgage—Successive suits.*

A mortgagee who has sued for and obtained a decree for possession under his mortgage from the mortgagor is barred from a fresh suit for possession unless he had been dispossessed after the date of the former

C. P. CODE (V OF 1908), S. 11—Heard and finally decided.

decree. (*Leslie Jones and Dundas, JJ.*) HAR CHAND SINGH *v.* NARAIN SINGH. **67 I. C. 281 : 2 L. L. J. 678.**

——S. 11—*Heard and finally decided—Dismissal of suit to contest alienation—Subsequent suit for possession.*

A suit to declare an alienation by a widow not binding upon the reversioner and which was dismissed is *res judicata* in subsequent suit by the same reversioner for possession after the death of the widow. (*Chevis, J.*) NAWAB *v.* PUNJAB. **59 I. C. 946 (Lah.)**

——S. 11—*Heard and finally decided — Question of validity of adoption—Intricate enquiry not held—Decision is not* res judicata.

In the previous case, an application by an adopted son for a succession certificate was dismissed by the lower Court on the ground that there was no valid authority to adopt and no valid taking in adoption. The decision was confirmed by the High Court on the ground that no inquiry need be held in miscellaneous petitions into intricate questions of law and fact.

Held, that as there was no final adjudication on the validity of the adoption, the question was not *res judicata*. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*) MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **48 Mad. 1 : A. I. R. 1925 Mad. 497.**

——S. 11—*Heard and finally decided — Suit in ejectment—Claim of occupancy rights—Dismissal of suit for want of notice to quit—Occupancy right negatived—Subsequent suit for ejectment*—Res judicata.

In a previous suit by an inamdar against a tenant, the latter set up a permanent right of occupancy in the land. The first Court negatived the claim of permanent occupancy right and decreed the suit. On appeal, the appellate Court upheld the decision of the trial Court negativing the claim of permanent occupancy right set up by the tenant but dismissed the suit for want of a proper notice to quit. In a subsequent suit by the namdar to eject the tenant after service of notice the tenant set up again a permanent occupancy right. *Held*, that the defence was barred by *res judicata* by reason of the decision in the prior suit. 12 L. W. 277; 9 L. W. 180 Foll. 48 C. 460: 13 C. 17 Dist. (*Krishnan and Venkatasubba Rao, JJ.*) VEERASAMI MUDALIAR *v.* PALANIAPPAN. **46 M. L. J. 515 : 34 M. L. T. 175 : 19 L.W. 513 : (1924) M. W. N. 466 : A. I. R. 1924 Mad. 626 :**

——S. 11—*Heard and finally decided—Dismissal for default of an application for mesne profits does not bar fresh application.*

The dismissal of an application for ascertainment of mesne profits for default or as not pressed, in a suit in ejectment in which a preliminary decree for possession was passed, does not bar a fresh petition for ascertaining the mesne profits. 16 L. W. 198 ; 16 Cal L. J. 3 Dist. (*Phillips and Venkatasubba Rao, JJ.*) M. RAMACHANDRA RAJU *v.* M. P. BHUJANGA RAO **46 M. L. J. 46 : 19 L. W 69 : 33 M. L. T. 261 : (1924) M. W. N. 115 : 79 I. C. 635 : A. I. R. 1924 Mad. 473.**

——S. 11—*Heard and finally decided—Tender of patta—Decision as regards propriety of the tender—*Res judicata *in subsequent suit for rent.*

Where a suit by ryot to set aside a distraint on the ground that tender of patta is not proper, is heard and finally decided the decision as regards propriety of tender works as *res judicata* in subsequent suit for rent. (*Spencer and Krishnan, JJ.*) VARADA REDDI *v.* SRINIVASA MUDALIAR. **45 M. L. J. 199 : 72 I. C. 683 : 18 L. W. 169 : 33 M. L. T. 34 : (1923) M. W. N. 357 : A. I. R. 1924 Mad. 299.**

C. P. CODE (V OF 1908), S. 11—Heard and finally decided.

——S. 11—*Heard and finally decided—Execution proceedings—Earlier order not deciding point—Effect.*

There is no *res judicata* where an order is passed in a prior execution proceeding which does not decide the point raised in a later application. (*Spencer and Devadoss, JJ.*) KANDASWAMY CHETTIAR *v.* MARUDA PILLAY. **18 L. W. 652 : 33 M. L. T. 64 : (1923) M. W. N. 835 : 76 I. C. 761 : A. I. R. 1924 Mad. 145.**

——S. 11 (Expln. IV)—*Heard and finally decided—Dismissal of prior suit for non-joinder of parties.*

Where a prior suit for the same relief was dismissed for non-joinder of parties, the dismissal does not operate as *res judicata*. Expln. IV to S. 11, C. P. Code, deals only with a case which has been tried on the merits. (*Spencer and Krishnan, JJ.*) COTASSERI E. V. SANKARAN NIMBI *v.* KONHOLI D. ANTHERJENAM. **43 M. L. J. 572: (1922) M. W. N. 428 : 16 L. W. 26 : 73 I. C. 491 : A. I. R. 1922 Mad. 259.**

——S. 11—*Heard and finally decided—Failure to appeal against a decree for sale precludes objection to the decree in an application under O. 34, R. 6—Civ. Pro. Code, O. 34, Rr. 5 and 6.*

The correctness of the form of a previous decree for sale cannot be contested in an application under O. 34, R. 6 when the decree was not appealed against. (*Daniels, J. C.*) SRI RAM *v.* SURAJ BALI. **88 I. C. 507 : A. I. R. 1926 Oudh 27 (2).**

——S. 11—*Heard and finally decided—Suit by the nearest reversioner decreed against a rival claimant—Redemption by the rival claimant subsequent to the institution of the suit on a usufructuary mortgage existing on the property—Subsequent suit by the rival claimant to recover property—Doctrine of* res judicata *applies as redemption could have no effect, the party redeeming having no title to redeem.*

Where a suit is brought by a person as the nearest reversioner against a rival claimant and he obtains a decree for possession of property and the rival claimant either during the pendency of the suit or soon afterwards redeems a usufructuary mortgage existing on the property in suit and obtains possession, the rival claimant, in a subsequent suit brought by himself, cannot raise the defence as against the plea of *res judicata* raised by the successful reversioner that the redemption having taken place subsequent to the institution of the previous suit the decision in that suit does not operate as *res judicata*, because on the question of title the decision is clearly *res judicata* and the rival claimant cannot be allowed to go behind it by pleading the subsequent redemption for the simple reason that he had no title to redeem. (*Wasir Hasan, A. J. C.*) BHONDAI MISER *v.* RAM PRASAD. **2 O. W. N. 710 : A. I. R. 1925 Oudh 607.**

——S. 11—*Heard and finally decided.*

When the taluqdars had brought their suit for resumption of muafi they had made plaintiff and defendants 2 and 3 parties in an application claiming, as he claimed in this suit to be partner with plaintiffs and defendants 2 and 3. He was made a party but ultimately the decree was given only against plaintiffs and defendants 2 and 3. As regards the defendant No. 1 it was said that his name was not entered in the papers where he was recorded as a sub-tenant only. The question whether he was a partner was pronounced to be one for a Civil Court and he was discharged from the suit. *Held*, in plaintiff's suit, there is no *res judicata* here. What was decided by the Revenue Court was that the taluqdars were entitled to get the relief

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they sought from the plaintiffs whom they themselves had named and who were the only ones entered in the revenue papers. There was a decision that defendant had no independent rights in the plots, but the court refused to decide whether or not he had any partnership right. (*Simpson, A. J. C.*) KHALIL *v.* MOHMOD ISMILE. **9 O. L. J. 540 : 74 I. C. 195 : A. I. R. 1923 Oudh. 101.**

——S. 11—*Heard and finally decided—Express adjudication essential—Mere description insufficient.*

At the time of the partition of a mahal a tenant was treated as an occupancy tenant and was styled in the proceedings as *sakit ul melkiat manrusi quabzadar* In a subsequent suit to contest a notice of ejectment, *held*, that the proceedings did not have the effect of *res judicata*. (*Fremantle, S. M and Burn, J. M.*) GOKUL *v.* SHEO SANKAR LAL. **10 O. & A. L. R. 402: L. R 5 O. 73 : 11 O. L. J. 395.**

——S. 11—*Heard and finally decided—Rent suit —Area of holding—Record-of-rights—Entry in.*

In a prior suit for rent, the area of one holding was decided to be a certain number of bighas. *Held* in the absence of any allegation as to encroachment, increment, fraud or error, this finding will be *res judicata* in a subsequent suit for rent, though it is alleged and proved that a later record-of-rights has an entry different from what was found before as regards the area. (*Mullick and Bucknill, JJ.*) RADHIKA RAMAN *v.* SATNARAIN KOERI. **74 I. C. 961: A. I. R. 1924 Patna 307.**

——S. 11—*Heard and finally decided—Dismissal for default—Fresh one is competent.*

There is nothing in law to prevent the entertainment of a fresh appeal after the dismissal for default of a previously filed appeal, provided the latter appeal was otherwise in order and was filed within the period of limitation. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v*, PRATAP RAI. **2. Pat. 739 : 4 Pat. L. T. 405 : 75 I. C. 284 : 1923 P. H. C. C. 213 : A. I. R. 1923 Pat. 514.**

——S. 11—*Heard and finally decided—Cess—Liability to pay—Former decision.*

Inasmuch as a cess under Bengal Act IX of 1890 is a recurring charge, prior decree for cess does not operate as *res judicata* in a subsequent suit for recovery of the cess. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHURY *v.* RAHMAT ALI. **1922 P. H. C. C. 167 : 1 Pat. 218 : 3 Pat. L.T. 282 : 65 I. C. 138 : A. I. R. 1922 Pat. 303.**

——S. 11—*Heard and finally decided—Decision in proceedings for letters of administration.*

In a previous proceeding for letters of administration the present parties were rival claimants. Their evidence was taken at length as in a regular suit and the claim of the respondent was decided against her, she being held to be not the legitimate daughter of the deceased. *Held*, the decision in those proceedings barred the present suit for declaration by the respondent that she is the heir of the deceased, (*Pratt and Carr, JJ.*) MAUNG HMAT *v.* MA HTAY. **1 Rang. 258: 76 I. C. 494 (2): A.I.R. 1923 Rang. 257.**

——S. 11—*Heard and finally decided—Decree in administration suit declaring rights of parties—Suit to enforce rights—Maintainability of.*

Where in an administration suit a decree is passed declaring the shares of the heirs to the estate after payment of the charges thereon, it is open to the heirs to bring a suit for distribution of the shares declared by the decree. The subsequent suit is not barred by *res judicata* as the plaintiff could not have enforced his rights under the prior decree. 6 B. 7 : 14 A. L. J. 102 : 22 C. L. J. 272 : 6 B. H. C. R. 231 Ref. (*Maung Kin, J.*) MAUNG PO THIN *v.* KO THA YE. **64 I. C. 813 : 11 L. B. R. 60.**

C. P. CODE (V OF 1908), S. 11—Issue of Law.

Issue of law.

——S. 11—*Issue of law—Decision on a point of law is not* res judicata *if cause of action is different as in the case of recurring liability—Right to eject a tenant is a recurring liabilitye Decision in ejectment suit against a tenant is not* res judicata.

A decision on a point of law does not operate as *res judicata* if the cause of action in a subsequent suit is different from that in the former suit as often happens in the cases of recurring liability ; but if the cause of action is the same the decision would be *res judicata* The right to eject a tenant accrues afresh every year. Therefore the previous decision that an ejectment suit was not maintainable in a revenue Court cannot operate as *res judicata* (*Sulaiman, J,*) GANGA *v.* MAHMUD UNNISSA BEGAM. **A. I. R. 1925 All. 761.**

——S. 11—*Issue of law.*

Where the plaintiff inamdar got a decree for the *Mamool* rates for the years 1888, 1890 in the year 1892 against the defendant's Khots and where Survey Settlement was introduced in the village in 1855-86 and where he filed a suit in 1917 for proper construction to be placed on S.216 though not strictly speaking *res judicata* still, on the principle of *stare decisis* the previous construction should be adhered to, 18 Bom, 525 doubted.

Per Macleod, C.J.—An abstract question of law, *viz.*, construction of a section of a statute and not a concrete question such as the construction of a document is not a question of *res judicata* since at least a Full Bench will form its own opinion as to what the law is. But it is a question whether the principle of *stare decisis* would be invoked. 18 Bom 525 doubted.

Per Shah, J.—The binding character of *res judicata* does not depend on the correctness of the reasons for the conclusion. No distinction is made between issues of fact and issues of law. 18 Bom. 525 affirmed.

Per Fawcett, J.—It is doubtful whether distinction between decisions on abstract questions of law and concrete questions such as construction of a particular document can be made. At least where parties seek to litigate again the very same cause of action such distinction cannot be drawn. (*Macleod, C. J., Shah and Fawcett, JJ,*) SITARAM *v.* LAXMAN. **45 Bom. 1260 : 64 I. C. 162 : 23 Bom. L. R. 749 (F. B.).**

——S. 11—*Issue of fact—Finding on mixed question of law and fact is* res judicata *like a finding of fact.*

A finding on a mixed issue of law and fact stands on the same footing as a decision on a question of fact and operates as *res judicata*. A judgment operates as *res judicata* with regard to all the findings that are necessary and essential to the judgment. (*Sukrawardy and Cuming, JJ.*) RAJENDRA NATH *v.* BHABINI DASI. **A. I. R. 1926 Cal. 80 : 87 I. C. 811.**

——S. 11—*Issue of law—Erroneous decision on—Effect.*

A decision on a question of law may be *res judicata* but an erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a Court from deciding the same question on its arising between the same parties in a subsequent suit. (*Broadway and Abdul Quadir, JJ,*) MOTI SAGAR *v.* DHANNA MAL. **29 P. W. R; 1922 : 72 I. C. 177 : A. I, R, 1922 Lah 329.**

——S. 11—*Issue of law—Plea disallowed in previous suit owing to state of law at the time and ques,*

C. P. CODE (V OF 1908), S. 11—Issue of Law.

tion left undecided—Change in law on the subject—Question is not res judicata.

If the plaintiff's suit was not *res judicata* when it was filed, no change in law can make it *res judicata* after it was filed. The previous suit was by the defendant in the present suit and was for establishing his claim to certain property which he had purchased and which had been attached by the present plaintiff as the property of his judgment-debtor. The present plaintiff's defence to that suit was that the sale was fraudulent and voidable under the T. P. Act, S. 53. The Court held, that the sale was not a sham. Further, in accordance with the view of the law that prevailed at the time, the Court held, that unless and until the present plaintiff first sued to set aside the sale, it was not open to him to urge the plea that the sale was fraudulent, in defence. On this ground it decreed the suit by the present defendant. Subsequently the law which precluded the present plaintiff from raising the plea of fraudulent transfer was altered by a Full Bench decision.

Held, that a suit by the present plaintiff to have the sale declared fraudulent was not barred by *res judicata* as the question had not been decided at all in the previous suit. (*Wallace, J.*) RAMAKKAL *v.* GOVINDANAYAKAN PALAIYAM THIRUMAL PARIPALANA NIDHI LTD. **A. I. R. 1925 Mad. 1107.**

———**S. 11**—*Issue of law—Decision on—If* res judicata.

Even an erroneous decision on a question of law can operate as *res judicata*. (*Kinkhede, A. J. C.*) TULARAM *v.* MT. SUMRATI. **A. I. R. 1924 Nag. 422.**

———**S. 11**—*Issue of law.*

The section draws no distinction between an issue of fact and an issue of law; and an issue of law operates as *res judicata* in the same way as an issue of fact. Consequently a decision of a question of law in an execution case is *res judicata* in a subsequent application for execution of the same decree even though the view of law enunciated in the prior execution case has been since disapproved by a Full Bench. (*Das and Kulwant Sahay, JJ.*) RAM LAL MALIK *v.* DEODHARI RAI. **2 Pat. 771 : 74 I. C. 781 : 5 Pat. L. T. 7 : A. I. R. 1924 Pat. 265.**

———**S. 11**—*Issue of law—Previous decision when* res judicata.

A previous decision on a question of law which affects the subject-matter of the subsequent suit or creates a legal relation between the parties or defines the status of either of them is as binding upon them as a previous decision on a question of fact. (*Fremantle, S. M.*) MIRZA BAHADUR MAHAMAD JAFAR ALI KHAN *v.* MT. RUKMIN. **L. R. 5 O. 52. 10 O. & A. L. R. 547: 11 O. L. J. 66.**

Judgment in Personam.

———**S. 11**—*Judgment* in personam—*Judgments not* inter partes—*Relevancy of—Not* res judicata.

Former judgments not *inter partes* do not operate as a bar to the trial of a suit though they may be received as evidence in the case. In a suit by the plaintiffs against the Government for recovery of emoluments of a certain office, the Government pleaded as a bar to the maintainability of the suit, a former judgment in which the plaintiffs' claim to the office against certain contesting claimants was negatived though the Government was not a party to that litigation. *Held*, that it was open to the plaintiff to reassert his title to the office in spite of the former judgment. Distinction between the operation of judgments *in rem* and judgments *in personam* discussed. 33 Mad. 483; 36 Mad. 141, overruled. (*Wallis, C. J. Spencer and Kumaraswami Sastri, JJ.*) SECRETARY OF STATE *v.* SYED AHMAD BADSHA SAHIB. **41 M.L.J. 223 and 278 : 44 Mad. 778 : 14 L.W. 128 and 188: 67 I.C. 971 : (1921) M. W. N. 576 (F B.)**

C. P. CODE (V OF 1908), S. 11—Litigating under the same title.

———**S. 11**—*Judgment* in personam—*Decision between parties in different capacity is not* res judicata.

The decision of Court prior to Deceased Brother's Widow's Marriage Act (7 Edw. & C 47), that the widow had no *locus standi* to apply for Letters of Administration to the estate of her first husband's brother whom she married in 1916 after the former's death was held not to be is not *res judicata* and not to debar her from presenting a fresh application in 1923 for Letters of Administration since the parties to the two applications were really not the same in the legal sense. A.I.R. 1924 Patna 265; 11 C. L. J 461 Dist. (*Bucknill, J.*) A. C. LISH *v.* DAVID LISH. **1924 P. H. C. C. 138: 2 P. L. R. 125: 83 I. C. 951. A. I. R. 1924 Pat. 624.**

Leave to withdraw Suit.

———**S. 11**—*Leave to withdraw appeal—Effect of.*

The dismissal or withdrawal of an appeal has the same effect as a decision on the merits and leaves the finding of the trial Court final against the appellant for purposes of the rule of *res judicata*. (*Daniels, J.*) PARBHU DAYAL *v.* MURLIDHAR. **22 A. L. J. 365: 78 I. C. 677: L. R. 5 A. 298: 10 O. & A. L. R. 528: A. I. R. 1924 All. 867.**

———**S. 11**—*Leave to withdraw suit—Given in appeal—Effect on decision of trial Court.*

Where in appeal, permission is granted to withdraw a suit with liberty to file a fresh suit the order of the trial Court on the merits *ipso facto* falls to the ground and hence cannot operate as *res judicata*. (*Ryves, J.*) TEWARI GAJRA SINGH *v.* SRI THAKURJI MAHARAJ. **74 I. C. 894.**

———**S. 11 and O. 23, R. 1 (4)**—*Leave to withdraw suit—Withdrawal of suit by some of several co-plaintiffs—Fresh suit—Fresh suit for partition.*

Where a court allows a suit to be withdrawn in contravention of O. 23, R. 1 (4), *i. e.*, without the consent of other plaintiffs and grants leave for a fresh suit to be brought on the same cause of action, *held*, a second suit is barred. A suit for partition is however maintainable as the cause of action is recurring one (*Jwala Prasad and Ross, JJ*). MT. RAM DEI *v.* MT. BAHU RANI. **1 Pat. 228 : A.I.R. 1922 Pat. 489.**

Litigating under the same Title.

———**S. 11**—*Litigating under the same title—Prior suit as Trustee—Subsequent suit in personal capacity—No bar.*

It is not obligatory on a party seeking to protect certain property as *wakf* property from an impending sale to assert in the same suit any personal right thereto which he may afterwards find himself to be entitled in case the property in question is not found to be *wakf* property. It is immaterial whether he could have joined in the previous suit an alternative claim for the protection of the personal share he was now seeking. There was no obligation to join the two claims and the omission to set up their present title in the previous suit does not, therefore, bar the decision of that matter in the present litigation.

The right in which the relief was claimed in the previous suit was not the same in which the relief is claimed in the present suit. The former suit was brought for the protection of what was described as public property. The present suit was brought for the protection of personal or private rights. So far as the property in dispute went, the capacity in which the plaintiffs

C. P. CODE (V OF 1908), S. 11—Litigating under the same Title.

sued was not the capacity in which they were now suing. (*Kanhaiya Lal and Mukherjee, JJ.*) KANHAIYA LAL *v.* ASHRAF KHAN. **46 A. 230: 78 I. C. 402: 10 O. & A. L. R. 380: L. R. 5 A. 177: A. I. R. 1924 All. 355.**

——— **S. 11, Expln. VI**—*Litigating under the same title—Public right.*

Where the ownership of a well regarding which there is a dispute between the trustees of a mosque and the Municipality was decided against the former, they cannot in a subsequent suit by the public set up their rights to it. (*Walsh and Ryves, JJ.*) RAM CHAND *v.* MAULA BAKSH. **46 All. 110 : 21 A. L. J. 882 : L. R. 4 All. 583 : A. I. R. 1924 All. 178.**

——— **S. 11**—*Litigating under the same title—Claim in the first suit based on a different title than that on which second suit was based—Plaintiff cannot be said to be litigating under the same title in the second suit.*

Where the relief claimed by plaintiffs in the previous suit was based on a right inherited by them from their father, but the title upon which the plaintiffs instituted the second suit was a title not derived from their father but a title which they claimed as having devolved upon them as reversionary heirs of the last full owner: *Held*, the principle of *res judicata* cannot apply as the two suits were not litigated under the same title. (*Chatterjee and Cuming, JJ.*) NRIPENDRA NATH *v.* BASANTA KUMAR. **29 C. W. N. 861 : 89 I. C. 207: A. I. R. 1925 Cal. 1195.**

——— **S. 11**—*Litigating under the same title—Suit against a person setting up title of a third person—Subsequent suit impleading that person—Prior decision, if a bar.*

A sued B for a declaration that he was entitled to receive rent at a certain rate from him and that B was a tenant under C and bound to pay rent to A as part of the settlement between them. In a prior rent suit by A against B the latter had set up that he held the land not under A but under C who was not a party to that suit. The prior suit had been dismissed. *Held*, that the decision in the prior suit was no bar to the trial of the issue as to B's liability for rent. 26 C. 428 Foll. (*Greaves and Ghose, JJ.*) GOPINATH *v.* BHAJAHARI DAS. **68 I. C. 472: A. I. R. 1923 Cal. 327 (2).**

——— **S. 11**—*Litigating under the same title--Erroneous view of law—Pre-emption suit.*

In a previous suit a decision was given in favour of plaintiff pre-emptor, though a descendant of a remote ancestor of vendor, that he was entitled to inherit vendor's property. When the vendor again sold another property, plaintiff and another pre-emptor filed suits. The suit of the latter was decreed and upheld in appeal and in view of the decision the trial Court dismissed plaintiff's suit and the appellate Court decided on merits that the previous judgment was not of binding effect in determining plaintiff's status as a pre-emptor as it held the decision was wrong. *Held*, on the one hand, plaintiff and vendor *pro forma* defendant in the first case and on the other plaintiff and the present vendees in this suit, both suits being pre-emption suits, cannot be said to be parties litigating under the same title. As the vendees did not claim under the vendor, plaintiff did not and could not challenge vendee's right to own and possess the land in suit and his claim would therefore amount to asking the vendees to re-transfer in his favour the land in suit in virtue of the decision in the previous suit. The previous decision was based on the wrong view of law that a person descended from a remote ancestor of the vendor of altogether unknown degree is a person entitled to inherit the vendor's property. 34 P. W. R. 1921 Dist. (*Campbell, J.*) AHMAD KHAN *v.* JAWAHIR SINGH. **A. I. R. 1923 Lah. 16.**

C. P. CODE (V OF 1908), S. 11—Litigating under the same Title.

——— **S. 11**—*Litigating under the same title—Sale of proprietary rights—Purchase by tenants—Sale set aside—Delivery of possession—Subsequent suit for establishing occupancy rights.*

The proprietor of certain land sold it to the occupancy tenants on the land and some time after his death his successor impugned the sale on the ground that it was not supported by necessity or consideration and obtained a decree for possession. In execution of the decree the occupancy tenants were turned out of possession. Thereupon they sued for restoration of their occupancy rights. *Held*, that the suit was not barred by *res judicata* or by S. 47, C. P. Code. The occupancy tenants were litigating in different capacities in the two suits. (*Chevis and Abdul Qadir, JJ.*) SURAJ KAUR *v.* NAGINA SINGH. **4 Lah. L. J. 400 : 67 I. C. 485: A.I. R. 1922 Lah. 44.**

——— **S. 11**—*Litigating under the same title—Suit for possession under a lease—Subsequent suit on title not* res judicata.

Where a suit for possession of property based on a lease is dismissed, a subsequent suit for possession based on ownership is not *res judicata* (*Chevis, J.*) GIRIDHARI LAL *v.* UDAJAN. **63 I. C. 717: 3 Lah. L. J. 215.**

——— **S. 11—Expl. IV**—*Litigating under same title.*

Plaintiff suing to rscover property from defendants alleging his reversionary right to the last male holder —Another suit against same defendants regarding the same property as reversioner of the female holder in possession is barred. The plaintiff brought a suit to recover certain property alleging that he was the reversionary heir of one V. The property had been in the possession of N, a female relation of V. Plaintiff's suit to recover the property from the defendants who were in possession was brought after N's death. The suit was dismissed. Again a suit was brought to recover the same property from the same defendants on the ground that the plaintiff was the heir of N who had been in possession of the property. *Held*: that the second suit was barred under S. 11, Expl. 4, as the plaintiff might and ought to have put forward both his titles in the previous suit. (*Phillips, J.*) R. RAMAIAH *v.* R. LAKSHMI NARAYAN. **49 M. L. J. 701 : 23 L. W. 13 : 1926 M. W. N. 126 : A. I. R. 1926 Mad. 234.**

——— **S. 11**—*Litigating under the same title—Person added as legal representative of deceased party—Decision is not binding on him in personal capacity.*

Where a party was only added as a legal representative in the previous litigation and it was not open to him as such to raise any defences personal to himself. *Held*, that he can subsequently raise objections personal to himself. (*Krishnan and Coleridge, JJ.*) G. AKKAMMA *v.* NUNE VENKATAPATHI. **75 I. C. 623: A. I. R. 1925 Mad. 59.**

——— **S. 11**—*Litigating under the same title--One of the parties—Same in both suits—Claim by other party under different title.*

A lessor is not bound by a finding as between the lessee and a third party. 14 L. W. 387 Ref. Similarly a lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and third parties. Where the plaintiff is litigating under a title by lease obtained subsequent to that under which he litigated in the prior suit, the decision in the prior suit cannot be *res judicata* even

C. P. CODE (V OF 1908), S. 11—Litigating under the same Title.

though the other party was the identical person (*Krishnan, J.*) NALLAMUTHU PADAYACHI *v.* SRINIVASA AIYAR. **19 L. W. 369: 34 M. L. T. 160 : (1924) M. W. N. 378: A. I. R. 1924 Mad. 576.**

——— **Ss. 11 and 92**—*Litigating under the same title—Different capacity—Finding in suit for assertion of individual right—Effect on scheme suit.*

Where a suit is brought by certain persons under S. 92, C. P. Code, with the sanction of the Advocate General for a scheme a finding in a prior suit by them that the defendant was hereditary trustee does not operate as *res judicata* especially when the Court which tried the prior suit is not competent to try the subsequent suit. (*Spencer and Devadoss, JJ.*) GOPU NATARAJA CHETTY *v.* RAJAMMAL. **43 M. L. J. 448. (1922) M. W. N. 464: 31 M. L. T. 125 (H. C.): 16 L. W. 122: 69 I. C. 15: A. I. R. 1922 Mad. 394.**

Might and Ought.

Alternative claims and relief.
Cause of action.
Constructive res judicata.
Defences.
Grounds of attack.
Mortgage suit.
Omission to plead.
Partition.
Relief not claimed.
Scope of the rule.

Might and Ought—Alternative claims and relief.

——— **S. 11, Expln. IV**—*Might and ought—Alternative relief—Dekhan Agriculturists' Relief Act, S. 10-A—Inconsistent pleas.*

The plaintiff sold his property to the defendant on 16th March, 1906, but continued in possession as tenant. The defendant agreed by a *satekhat* executed on the 13th August 1906, to resell the property to the plaintiff at any time within twelve years for Rs. 395 and received Rs. 5 as earnest money. The plaintiff sued in 1911 to redeem the property under S. 10-A of the Dekhan Agriculturists' Relief Act, 1879, alleging that the sale was a mortgage. The suit failed. The plaintiff sued again in 1918 to recover the property on payment of Rs. 395 under the *satekhat*. A question having arisen whether the second suit was barred as *res judicata*, *held*, that the second suit was not barred by *res judicata* for the plaintiff was not bound in the first suit to have sued also for specific performance. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left under the *satekhat* within which he could have sued to get back the property on payment of the consideration mentioned in the *satekhat*. (*Macleod, C. J. and Shah, J.*) DOLA KHETAJI VAHIVATDAR *v.* BALYA KANOO PATEL.
24 Bom. L. R. 236 : 46 Bom. 803 : 66 I. C. 815 : A. I. R. 1922 Bom. 29.

——— **S. 11, Expln. IV**—*Might and ought—Alternative claims—Title by purchase asserted and negatived—Subsequent suit on title by heirship—Bar of.*

When plaintiff sued to recover possession of property from a trespasser on the ground that he was owner by joint purchase with two others and obtained a decree for his share, and subsequently brought a suit against the same defendant for possession of the remaining portion of the property claiming as heir to a deceased person, a title which he could have put forward in the alternative in the earlier suit but did not, the subsequent suit is barred by *res judicata*. 11 Beng. L. R. 158, 50 Cal. 1 relied on. 41 I. A. 142 Distinguished. (*Krishnan and Ramesam, JJ.*) THONA SINA NAINA MUHAMMAD ROWTHER *v.* ABDUL RAHMAN ROWTHER. **46 Mad. 135 : 72 I. C. 207 : 17 L. W. 188 : 32 M. L. T. (H. C.) 82 : (1922) M. W. N. 845 : A. I. R. 1923 Mad. 257.**

C. P. CODE (V OF 1908), S. 11—Might and Ought—Constructive res judicata.

——— **S. 11**—*Might and ought—Alternative claims—Test to determine whether the defence ought to have been raised.*

A matter which ought to be raised but which, as a matter of fact, is not raised in a suit cannot be decided in specific terms in that suit. But this fact cannot be fatal to the plea of *res judicata*. If the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, that defence must be deemed to have been finally decided against the person who ought to have raised it. Where it was open to the plaintiffs in their defence in the former suit to claim in the alternative, that they had a vested right in half the property in suit, but they were content to plead a partition whereby they became owners of the whole and in the result their defence failed and it was held that the property belonged to their father, *held*, that this decision was necessarily inconsistent with the alternative defence that might and ought to have been raised. 13 C. W. N. 513 Foll. (*May Oung, J.*) MAUNG NO *v.* MAUNG PO THEIN. **1 Rang. 363 : 2 Bur. L.J. 109 : 76 I. C. 612 : A.I.R. 1923 Rang. 239.**

——— **S. 11, Expln. IV**—*Might and ought—Alternative claims—Suit for recovery of land—Subsequent suit on different title—Bar.*

The point for determination in the case was whether the present suit was *res judicata* by reason of a former suit. Both the suits were instituted in the same Court between the same parties and the subject-matter was the same. In the former suit the plaintiff claimed title to three pieces of land as having been given to him by his father who at the time of that suit was dead. It was held that the gift was not valid. In the present suit he sued as the *aurasa* son of his father and mother, claiming a half share in the same three pieces of land. *Held*, that the plaintiff should in the former suit have made in the alternative the claim which he made in the present suit and that by reason of his omission to do so the present suit was barred by *res judicata*. (*Maung Kin, J.*) MAUNG BA THAW *v.* MA HNIT. **2 Bur. L. J. 34 : 11 L. B. R. 451 : 72 I. C. 14 : A. I. R. 1923 Rang. 122.**

Might and Ought—Cause of Action.

——— **S. 11**—*Might and ought—Cause of action—Mortgagee need not enforce separate money bond along with mortgage—C. P. Code, O. 2, R. 2.*

It cannot be contended that a mortgagee holding a separate money-bond against a mortgagor is under any obligation to enforce the money-bond along with the mortgage, or even to refer to its existence in his plaint seeking to enforce the mortgage. 38 Mad. 927 and 39 Bom. 138 Dist. (*Madhavan Nair, J.*) RAJAGOPALACHARIAR *v.* THIAGARAYA.
A. I. R. 1925 Mad. 991.

Might and Ought—Constructive res judicata.

——— **S. 11, Expln. IV**—*Might and ought—Constructive* res judicata.

The present plaintiffs were defendants in the original suit in the sense that they were members of the firm; the matter is *res judicata* if the plea now taken could have been taken by their respective fathers and grandfathers whose names were shown in the plaint (*Le Rossignol and Harrison, JJ.*) RAM RATTAN *v.* THE FIRM OF HUSSUKH ROY. **43 P. L. R. 1922 : 69 I. C. 783 : A. I. R. 1924 Lah. 26.**

C. P. CODE (V OF 1908), S. 11—Might and Ought—Constructive res judicata.

——S. 11—*Might and ought—Constructive* res judicata.

Plea not directly relevant for the decision of the question raised in the suit need not be raised and in such a case there is no bar of constructive *res judicata.* (*Madhavan Nair, J.*) PARIM MANICKYAM *v.* KODIMANGI. **(1924) M. W. N. 666 : 21 L. W. 204 : A. I. R. 1925 Mad. 226.**

——S. 11, Expln. IV—*Might and ought—Constructive* res judicata—*Deposit under Ss.* 83 *and* 84 *of the T. P. Act—Objections.*

Where the defendant (mortgagor) deposited the amount due on the mortgage under S. 83 of the T. P. Act and the mortgagee plaintiffs appeared in answer to the notice of the deposit sent to them under S. 84 of the T. P. Act, the only reason they gave for refusing to accept it as sufficient was that it did not include interest up to the date on which they were summoned to appear in Court. There was no suggestion that it was not the full amount due for principal and interest on the date on which the deposit was made. In a subsequent suit on the mortgage the plaintiffs claimed a much larger amount than was deposited as due under the mortgage. *Held*, on the principle embodied in S. 11 (Expl. 4) of the C. P. Code the plaintiffs could not be heard to say that the amount deposited was less than the sum due to them on the mortgage on that date. (*Hallifax, A. J. C.*) KESHORAM *v.* BHANGILAL. **67 I. C. 324 : A. I. R. 1922 Nag. 174.**

Might and Ought—Defences.

——S. 11—*Might and ought—Defences—Defendant having a cross-demand against plaintiff but failing to have it tried—Defendant's claim is not* res judicata.

Where in a suit by an agent against the principal, the principal had a claim for damages against the agent in respect of a certain transaction but failed to have the issue tried but the agent gave credit for a certain sum in respect of that transaction and a decree was passed on the footing that the principal was entitled to that credit.

Held, that the decree did not preclude the principal from maintaining another action for damages. (1841) 8 M. & W. 858 and (1871) L. R. 6 Q. B. 687 Foll. (*Venkatasubba Rao, J.*) SUTRAME GOVINDA RAO *v.* A. N. RUDRAYYA. **49 M. L. J. 14 : (1925) M. W. N. 228 : A. I. R. 1925 Mad. 830.**

Might and Ought—Grounds of attack.

——S. 11—*Might and ought—Grounds of attack which must have been but was not referred to in plaint cannot be the basis of another suit.*

Where the plaintiffs in a previous suit based their claim on nearness of kin but did not mention the family custom but for the proof of which, the nearness could not be proved and the suit therefore failed, *held*, that they cannot bring a fresh suit basing their claim on the family custom. (*Lord Phillimore.*) FATEH SINGH *v.* JAGANNATH BAKSH SINGH. **48 M. L. J. 64 : 52 I. A. 100 : 6 L.R.P. C. 50 : 12 O. L. J. 117 : 2 O. W. N 25 : 47 All. 158 : 27 O. C. 334 : 27 Bom. L. R. 725: 29 C. W. N. 749 : 23 A. L. J. 739 : 22 L. W. 58 : A. I. R. 1925 P. C. 55 (P. C.).**

——S. 11—*Might and ought—Grounds of attack.*

When a matter which ought to have been raised was not raised it must be held to be a matter which also must have been heard and finally decided in the previous suit. (*Suhrawardy and Duval, JJ.*) SHIB CHANDRA TALUKDAR *v.* LAKHI PRIYA GUHA.

C. P. CODE (V OF 1908), S. 11—Might and Ought—Mortgage suit.

29 C. W. N. 253 : 40 C. L. J. 507 : A. I. R. 1925 Cal. 427.

——S. 11, Expln. IV—*Might and ought—Grounds of attack.*

Matters which are substantially and directly in issue in the suit or which might and ought to have been made a ground of attack or defence in the suit cannot be allowed to be raised in execution proceedings. (*Campbell, J.*) MIR KHAN *v.* SHARFU. **5 L.L.J. 163 : 74 I. C. 577 : A. I. R. 1923 Lah. 560.**

——S. 11, Expln. IV—*Might and ought—Grounds of attack—Suit based on custom—Custom not alleged—Suit dismissed—Second suit alleging custom barred.*

A former suit was for declaration that the deed of gift by widow in favour of daughter's son was void. The plaintiffs were only remote reversioners and remote reversioners cannot sue in presence of the next reversioner unless there was a special custom that all branches of the family take equally as reversioners. The plaintiffs did not allege the custom in their plaint. During the pendency of the suit and before any evidence had been taken the widow died. Thereupon the plaintiffs made an application to be allowed to amend their plaint. They said that owing to her death they had become entitled to institute a suit for possession and that in order to show that right it was now necessary for them to plead the custom. They also asked to be allowed to sue for possession. The learned Subordinate Judge refused to allow the amendment of the plaint and as without the amendment, the plaintiffs had no *locus standi* the suit was dismissed. On a second suit by the same plaintiffs for the same relief, *held*, that the suit was barred. (*Dalal and Simpson, A. J. Cs.*) FATEH SINGH *v.* JAGANNATH BAKHSH. **10 O. L. J. 132 : 74 I. C. 549 : A. I. R. 1923 Oudh 242.**

——S. 11, Expln. IV—*Might and ought—Grounds of attack—Test.*

The test, whereby to determine whether it ought to have been matter of attack is this : are the matters so dissimilar that their union might lead to confusion ? Where the plaintiff might have, in the former suit, put in the claim, that he made in the subsequent suit as an alternative claim, and if he did so, there would have been no confusion, and all questions relating to his title in the property would have been completely and finally determined. *Held*, he ought to have made the claim that he made in the subsequent suit as a ground of attack in the former suit, and, for this reason, the subsequent suit must be held to be *res judicata.* Where plaintiff claims title to the certain property, in proving his title to that property he ought to put forward all means of attack in his armoury. S. 11 omits all references to the cause of action. A plaintiff's cause of action is a very different thing from his title; the one being something done contrary to a person's interest which obliges him to seek the aid of the Court, the other the proof that that something affords him a valid ground for relief. (1892) I. L. R. 20 C. 79, (1900) I. L. R. 25 Bom. 189 F. (*Maung Kin, J.*) MAUNG BA THAW *v.* MA HINIT. **11 L. B. R. 451 : 2 Bur. L. J. 34 : 72 I. C. 14 : A. I. R. 1923 Rang. 122.**

Might and Ought—Mortgage Suit.

——S. 11, Expln. IV—*Might and ought—Mortgage suit—Plea of paramount title not set up—Effect.*

Where the defendant in a mortgage suit had a double capacity, *i. e.*, purchaser of equity of redemption and also settlement holder of a non-transferable occupancy holding, but he failed to set up the defence

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that the mortgage could not be enforced against the property in his hands, he will afterwards be barred by *res judicata*. A question of paramount title can be enquired into in a mortgage suit in certain cases. (*Mookerjee and Chotzner, JJ.*) SRIMANTA SEAL *v* BINDUBASINI DASI. **38 C. L. J. 183 : 76 I. C. 517 : A. I. R. 1924 Cal. 138.**

——**S. 11**—*Might and ought—Mortgage suit—Two mortgages in favour of the same mortgagee, one simple and one usufructuary—Suit for redemption of usufructuary mortgage decreed—Simple mortgage not put forth in the first suit—Second suit for mortgage money by mortgagee is not barred.*

A subsequent suit by a simple mortgagee for his mortgage money is not barred, by reason of a prior suit by the mortgagor for possession and redemption of that property from the same mortgagee as usufructuary mortgagee, on the ground that the mortgagee should have put forth his mortgage in the previous suit. 60 P. W. R. 1917 relied on. (*Martineau, J.*) RELLU MAL *v.* MASITI. **87 I. C. 237 : A. I. R. 1925 Lah. 516.**

——**Ss. 11, Expln. IV and 47**—*Might and ought—Mortgage suit—Sale pursuant to prior mortgage—Rejection of an application by party to reserve his rights under hypothecation bond.*

The plaintiff had deposited Rs. 4,500 to release from a Court sale, held under a previous mortgage, the property included in his hypothecation bond. His application to reserve his rights thereunder had been rejected but he preferred no appeal. He instituted a suit later on for the recovery of the same. *Held*, there was no bar to the suit either under S. 11 or S. 47. S. 47 does not apply because the question raised in the suit cannot be said to relate to the execution, discharge or satisfaction of a decree. S 11 (Expln. IV) does not apply because in the previous suit on a prior mortgage, all that the present plaintiff as defendants in that suit could have done was to bring to the notice of the Court his own hypothecation bond and this was done; no further relief could have been asked for then. 24 All. 429 Distinguished. (*Abdul Raoof and Abdul Qadir, JJ.*) RAHIM-UD-DIN *v.* SHAFQAT ULLAH **A. I. R. 1922 Lah. 358 (2).**

——**S. 11**—*Might and ought—Mortgage suit—Suit against mortgagor, only having mortgagee rights—Subsequent suit against owner—If lies.*

A mortgagor mortgaged only the mortgagee's interest in certain lands. The mortgagee first brought a suit against the mortgagor only but not the owner of the property. *Held*, he could not bring a second suit against the owner of the property under S. 11 of the Code. (*Wallis and Seshagiri Aiyar, JJ.*) NUMBERUMAL CHETTY *v.* RAGHAVACHARIAR **71 I. C. 390 (2) : 14 L. W. 563.**

——**S. 11, Expl. IV**—*Might and ought—Mortgage suit—Prior and subsequent—Omission to claim priority—If bars suit on mortgage.*

A person mortgaged his property first to X and then to *Y*. Later on *X* took a mortgage in renewal of his earlier mortgage and brought a suit on the basis of both the mortgages impleading *Y*. *Y* remained *ex parte* and did not set up any priority. *Held*, the omission did not preclude him from afterwards suing on his own mortgage. (*Kinkhede, A. J. C.*) LAXMAN. *v.* JANOO. **20 N. L. R. 197 : A. I. R. 1924 Nag. 429.**

——**S. 11, Expln. IV**—*Might and ought—Mortgage suit—Failing to plead paramount title—Effect.*

If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor he is not bound to set up such a title by way of defence to

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the mortgage suit and the question of his title will not be *res judicata* against him. (*Prideaux, A. J. C.*) HEMRAJ *v.* SURYABHAN. **A.I.R. 1924 Nag. 408 (1).**

——**S. 11, Expln. IV**—*Might and ought—Mortgage suit—Prior mortgagee impleaded as party—Omission to set up priority—Effect—Subsequent suit—Bar.*

Where a prior mortgagee is impleaded as a defendant in an action on a subsequent mortgage and it is sought to displace his prior title and to postpone it to the title of the plaintiff it is the duty of a prior mortgagee to prove his prior mortgage. If he fails to contest the suit, the decision in the suit will operate as *res judicata* against him. (*Das and Kulwant, Sahay, JJ.*) LAL BIHARI SINGH *v.* GURPRASAD SINGH. **4 Pat. L. T. 108 : 1923 P. H. C. C. 118 : 71 I. C. 948 : 1 Pat. L. R. 238 : 2 P. 435 : A. I. R. 1923 Pat. 290.**

——**S. 11, Expln. IV**—*Might and ought—Mortgage suit—Two mortgages—Suit on latter mortgage does not bar subsequent suit on former one.*

Where a person holds two mortgages over the same property, a suit on the latter one will not bar a subsequent suit on the other. (*Maung Kin, C. J.*) MA MYIL *v.* SHARMA. **69 I. C. 897 : 10 L. B. R. 360.**

Might and Ought—Omission to plead.

——**S. 11, Expln. IV**—*Might and ought—Relief claimable in prior suit but not claimed—That omission to plead relief cannot be claimed in a subsequent suit.*

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. Where, in a previous suit on a mortgage bond the plaintiff omitted to claim relief against the person and other property of the defendants.

Held, that they cannot claim that relief in a subsequent suit relating to the same bond. (*Sir John Edge*) SOURENDRA MOHAN SINHA *v.* HARI PRASAD. **52 I. A. 418 : A. I. R. 1925 P. C. 280 (P. C.)**

——**S. 11, Expln. IV**—*Might and ought—Omission to plead—Relief claimable in prior suit but not claimed—Effect of.*

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. Where, in a previous suit on a mortgage bond, the plaintiff omitted to claim relief against the person and other property of the defendants:

Held, that they cannot claim that relief in a subsequent suit relating to the same bond. (*Sir John Edge*) SOURENDRA MOHAN SINHA *v.* HARI PRASAD SINHA **A. I. R. 1925 P. C. 280 (P. C.).**

——**S. 11**—*Might and ought—Omission to plead—Suit by reversioner against transferees from widow—Subsequent similar suit against transferees of other portions of estate—Defendants' failure in previous suit to plead that plaintiff was not next reversioner does not bar that plea in subsequent suit.*

In a previous suit brought by the plaintiff as next reversioner against a Hindu widow and against transferees from her, the widow and those transferees had failed to adopt the plea that the plaintiff was not the next reversioner. Subsequently the sons of the plaintiff in the previons suit brought another suit against the widow and transferees of some other portions of

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the estate from her.

Held, that the defendants in the subsequent suit were not debarred from raising the plea that the plaintiffs in that suit were not the next reversioners. 19 A. L. J. 749 Dist. (*Boys and Ashworth, JJ.*) KALI CHARAN SINGH *v.* BAGESHRA KUNWARI.

23 A. L. J. 653 : A. I. R. 1925 All. 585.

——**S. 11**—*Might and ought—Omission to plead—Prior suit in ejectment—Enhancement agreement—Dismissal of suit—Subsequent suit in ejectment—Plea of occupancy right.*

In an ejectment suit the Court held that the defendant was entitled to remain in possession for 5 years from the date of a certain enhancement agreement. A fresh suit for ejectment was brought against the defendant after the expiry of 5 years and he pleaded that he had acquired occupancy rights by exchange. *Held*, that in the former suit the defendant had either failed to set up his rights under the exchange or if he had set them up he had failed to prove them. In either case the prior decision operated as *res judicata* in the latter suit and no occupancy rights could be claimed. (*Burn, J. M.*) MOHAN *v.* BHANWAR SINGH. **L. R. 5 A. 119 (Rev.).**

——**S. 11, Expln. IV**—*Might and ought—Omission to plead.*

In a suit filed on the Original Side of the High Court against the defendant for rents collected by him on behalf of the plaintiffs, the defendant set up a counter-claim in which he prayed for a declaration that he was a monthly tenant of plaintiff at Rs. 185 per mensem and for an injunction restraining the plaintiffs from preventing the defendant's sub-tenants from paying rent to him. The High Court dismissed the plaintiff's suit and granted the declaration and injunction prayed for by the defendant. Plaintiffs subsequently filed a suit claiming arrears of rent at the rate of Rs. 185 per mensem and the defendant pleaded that he was liable to pay only the standard rent of Rs. 150 per mensem under the Bombay Rent Act. *Held*, that the defendant having waived the benefit of the Rent Act in the previous counter-claim and given up his right and obtained a declaration on that footing was barred by *res judicata* from setting up the plea under the Rent Act. (*Shah, A. C. J. and Crump, J.*) FATMABAI *v.* FRAMROZ. **70 I. C. 103 : 24 Bom. L. R. 1281 : A. I. R. 1923 Bom. 145.**

——**S. 11, Expln. IV**—*Might and ought—Omission to plead—Suit in ejectment—Prior suit for possession between same parties—Dimissal of—Form of claim different—Effect of.*

Properties belonging to X were in the possession of Y, a relation. After the death of X and Y, the plaintiff claiming to be the reversionary heir of X, sued in ejectment the defendants, who were in possession after the death of Y. That suit was dismissed, and thereupon a second suit was instituted by the plaintiff to recover the same properties from the same defendants on the ground that he was the heir of Y.

Held, that suit was barred under S. 11, Explanation IV, Civil Procedure Code, as the plaintiff might and ought to have put forward both his titles in the prior suit. (*Phillips, J.*) RAVIPATI RAMAIAH *v.* LAKSHMI NARAYANAN. **49 M. L. J. 701.**

——**S. 11**—*Might and ought—Omission to plead—Omission by judgment-debtor to challenge liability, where it does not affect decree-holder's position creates no estoppel.*

Omission to raise objections where it in no way affects the position of the decree-holder does not estop the judgment-debtor from contesting his liability when he has become aware of his legal position (*Martineau, J.*) GURANDITTA *v.* FIRM GURDASMAL.

7 Lah. L.J. 343 : A.I.R. 1925 Lah. 552.

C. P. CODE (V OF 1908), S. 11—Might and Ought—Partition.

——**S. 11, Expln. IV**—*Might and ought—Omission to plead—Subject-matter not the same—Effect.*

Where in a suit for rent by the purchaser at an auction sale of an undivided share in a house against another sharer the other sharer's absence of a transferable interest was not pleaded, the point will be *res judicata* in a subsequent suit for possession. The fact that the actual subject-matter in the two suits is not the same does not affect the question. (*Campbell, J.*) THAKUR DAS *v.* BRIJ LAL. **73 I. C. 457 : A. I. R. 1924 Lah. 423.**

——**S. 11, Expln. IV**—*Might and ought—Omission to plead available ground of defence.*

Where a prior suit for declaration had been decreed in the presence of the defendant who did not urge either of the pleas which he now put forward and which if proved would have been sufficient to defeat the prior suit, the decision in the prior suit operates as *res judicata* and the defendant could not raise again the pleas which he had omitted to put forward on the prior occasion. (*Le Rossignol and Harrison, JJ.*) NABI BAKSH *v.* MUHAMMAD SALAM ULLAH.

5 Lah. L. J. 251 : 72 I.C. 91 : 24 P. W. R. 1923 : A. I. R. 1924 Lah. 83.

——**S. 11**—*Might and ought—Omission to plead—Minor defendant not pleading want of proper representation*—Res judicata.

In a suit by a minor to set aside a decree and a sale in execution on the ground that the minor was not represented in the suit, it was found that the minor had previously sued through his next friend to set aside the execution sale and had failed in the previous suit. *Held*, that the ground on which the present suit was based, *viz.*, that the minor was not properly represented in suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constituted *res judicata* under Expln. IV to S. 11 of the C.P. Code. (*Krishnan and Waller, JJ.*) YEZZU MALLAYYA *v.* PONNAMMA.

46 M. L. J. 291 : 47 Mad. 476 : 34 M. L. T. 295 : 77 I. C. 628 : 19 L. W. 410 : A.I.R. 1924 Mad. 608.

——**S. 11**—*Might and ought—Omission to plead.*

When the plaintiff sued the judgment-debtor for specific performance of the contract to sell, it was open to the latter to plead that the agreement was void because the property was under attachment or in the hands of the Collector at the time. Explanation IV of S. 11 of the Civil Procedure Code will bar him from taking that plea in a subsequent suit and it will equally bar the appellant who claims under him and is litigating under the same title. (*Hallifax, A. J. C.*) AMOLAK RAO *v.* MAHIPATRAO.

A. I. R. 1922 Nag. 81.

——**S. 11**—*Might and ought—Omission to plead—In issue—Failure to set up plea open.*

Where the defendants in a suit fail to set up a plea which was open to them, it must be deemed to have been decided by necessary implication against them and is *res judicata* in subsequent execution proceedings. (*Rupchand Bilaram, A. J. C.*) LAWRENCE, PHILLIPS & CO. *v.* NAZARATH. **78 I. C. 806 : A. I. R. 1925 Sind 86.**

Might and Ought—Partition.

——**S. 11, Expln. IV and O. 2, R. 2**—*Might and ought—Partition—First suit for partition of some items of family properties—Whether a subsequent suit*

C. P. CODE (V OF 1908), S. 11—Might and Ought—Relief not claimed.

for other items maintainable—Properties lying in different jurisdictions.

Where one suit for partition of some of the joint family properties was brought and disposed of another suit for partition of the remaining properties does not lie even though the properties comprised in the latter suit are within the jurisdiction of a District Munsif other than the one in whose Court the prior suit was brought There is nothing in Ss. 16 and 17 of the Code of Civil Procedure to give a person power to bring two suits in two Courts for the partition of properties under different jurisdictions so as to contravene the principle involved in S.11, Expln. IV and O.2, R.2 of the Code. A suit for partition of joint family property is a comprehensive ascertainment of the assets including immoveable properties belonging to the family and the liabilities to be satisfied out of those assets: and it is settled law that only one suit for partition would lie. (*Oldfield and Venkatasubba Rao, JJ.*) BANKARA BASAVANA GOWD *v* BANKARA DODDA LINGAPPA. **44 M. L. J. 652 : (1923) M. W. N 294 : 72 I. C. 430 · 17 L. W. 740 : A. I. R. 1923 Mad. 584.**

Might and Ought—Relief not claimed.

——S. 11—*Might and ought—Relief not claimed—Suit to set aside sale on ground of non-receipt of consideration—Court finding that consideration was partly paid—Subsequent suit for balance of purchase money is not barred.*

Where, to ask for a certain relief in a suit would embarrass the trial of the suit or would place the plaintiff in a false position, the plaintiff will not be bound to ask for that relief in the same suit but can bring another suit for the purpose.

In the previous suit, the plaintiff asked for the setting aside of a sale deed executed by her on the ground that she had not received any consideration therefor. The Court found that she had received a part of the consideration money but held that on her returning the same within a certain time she was entitled to get back the property. The plaintiff then brought another suit for the recovery of the balance of the purchase money after deducting the sum which she had been held to have received.

Held, the subsequent suit was not barred by limitation. (*Mukerjee and Boys, JJ.*) KANDHAIYA SINGH *v.* KUNDAN. **87 I.C. 257 : 23 A. L. J. 461 : 47 All. 561 : A.I.R. 1925 All. 486.**

——S. 11, Expln. IV—*Might and ought—Relief not claimed—Suit for specific performance of a contract of sale—Relief as to possession need not be asked—Specific Relief Act, S. 42.*

In a suit for specific performance of a contract of sale though a claim for possession might be made it is not obligatory upon the plaintiff to make such a claim. Under S. 54 of the Transfer of Property Act, the contract for sale of immoveable property of itself creates no interest or charge upon the immoveable property, and until the claim for specific performance is decreed in favour of the plaintiff it cannot be said that he is entitled to possession, though for the sake of convenience, to avoid multiplicity of suits, it might be open to the plaintiff to make a claim for possession in the same suit (*Shah, A.C.J. and Kincaid, J.*) KRISHNAJI BALAJI HAVAL *v.* SANGAPPA MURIGAPPA WANGI. **27 Bom. L. R. 42 : A. I. R. 1925 Bom. 181.**

——S. 11—*Might and ought—Relief not claimed.*

Where a Subordinate Judge not only dismissed the suit of a plaintiff for possession by partition but also granted the defendant a decree for pre-emption and the plaintiffs appealed only against the dismissal of their own suit and the lower Court granted a decree in their favour, *held*, that the decree for pre-emption stood, as it was not appealed against and the question of title was directly and substantially in issue in the pre-emption case, it was *res judicata* as between the parties and the plaintiffs and therefore the decree in favour of plaintiffs given by the lower appellate Court is invalid. (*Leslie Jones and Wilberforce, JJ.*) MAHAMMAD JAN *v.* DULICHAND. **74 I. C. 533 : 3 Lah. L. J. 473.**

——S. 11—*Might and ought—Relief not claimed—Payment under decree—Suit for declaration of right—Subsequent payment—Fresh suit—No bar.*

Defendant obtained a decree on a mortgage and the judgment-debtor paid half the decree amount into court. The plaintiff thereupon sued the defendant for a declaration that he was entitled to a moiety of the amount paid into Court and obtained a decree. Subsequently the judgment-debtor paid the remaining decree amount into Court and thereupon the plaintiff brought a suit for declaration of his right to a moiety of that amount. *Held*, that the plaintiff's right to a moiety of the amount was conclusively decided by the prior suit and that the subsequent suit was not barred by O. 2, R. 2, C. P. Code, inasmuch as the plaintiff could not have sued for a share of further payments which might or might not be made. (*Pullan, A. J. C.*) LALTOO *v.* BAJRANGI LAL. **10 O. & A. L. R. 574 : 28 O. C. 2 : A. I. R. 1925 Oudh 303.**

Might and Ought—Scope of the rule.

——S. 11, Expln. IV—*Might and ought—Scope of the rule—Separate suits for possession and mesne profits against same defendants—Maintainability of.*

Where a plaintiff sued for possession of lands only, when he might have joined in the same action a claim for mesne profits and damages, it is open to him to bring a subsequent suit against same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit. (*Macleod, C. J. and Shah, J.*) RAMACHANDRA ADARAM *v.* LODHA GOURI. **26 Bom. L. R. 288 : 80 I. C. 259 (1). A. I. R. 1924 Bom. 368.**

——S. 11—*Might and ought—Scope of the rule.*

Before any argument can be advanced on the basis of Expln. IV, it must be shown that the matter sought to be concluded, not only might have been a ground of attack or defence but that it ought to have been so made. (*Dass and Adami, JJ.*) RAMAN CHOUKEY *v.* BACHA MISIR. **60 I. C. 393 : 2 Pat. L. T. 285.**

Miscellaneous Proceedings.

——S. 11—*Miscellaneous proceedings—Gujarat Talukdars' Act (Bombay Act VI of 1838), S. 16—No* res judicata *applies.*

The decision of the District Court under S. 16 of the Act does not bar a regular suit on the principle of *res judicata*. 30 Bom. 220 Approved. (*Macleod, C.J. Pratt and Crump, JJ.*) AMARSANGJI DUNGARJI *v.* DEEPASANGJI RAVABHAT. **49 Bom. 442 : 87 I. C. 588 : 27 Bom. L. R. 345 : A. I. R. 1925 Bom. 241 (F. B).**

——S. 11—*Miscellaneous proceedings—Order under S. 47.*

Decision that order on application to set aside execution sale is under S. 47 is binding on the parties so far as the proceedings taken on that application are

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concerned. (*Shah, A. C. J. and Fawcett, J.*) GADIGAPPA *v.* SHIDAPPA. **48 Bom. 638 : 26 Bom. L. R. 817 : A. I. R. 1924 Bom. 495.**

——— **S. 11 and Sch. II, paras. 20 and 21**—*Miscellaneous proceedings—Arbitration—Award order, refusing to file—If* res judicata *in a suit to enforce award.*

Proceedings under paras. 20 and 21 of Sch. II to the Code are not proceedings in a suit and therefore an application to file an award, which is refused, is not *res judicata* in a suit to enforce the award. (*Macleod, C. J. and Fawcett, J.*) RAJMAL GIRDHARLAL *v.* MAMTI SHIVRAM. **22 Bom. L. R. 1377 : 59 I. C. 755 : 45 Bom. 329.**

——— **S. 11**—*Miscellaneous proceedings—Interlocutory order—Finality of.*

The validity of an order made at one stage out of a litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. 2 I.A. 283, Foll. (*Mookerjee and Panton, JJ.*) RAJA SASHIKANTA *v.* RAJA SHARAT CHANDRA. **70 I. C. 6 : 34 C. L. J. 415.**

——— **S. 11 and O. 21, R. 66**—*Miscellaneous proceedings—Omission to appear and settle terms does not bar plea that property was not liable to attachment.*

Mere non-attendance of the non-applicant to appear for settling terms does not estop him from contending that the property was not liable to attachment in execution. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) CHIDAMBARAM CHETTI *v.* KANDASAMI GOUNDAN. **45 M. L. J. 346 : 46 Mad. 768 : (1923) M. W. N. 571 : 74 I. C 155 : 18 L. W. 757 : A. I. R. 1924 Mad. 1 (F. B.).**

——— **Ss. 11 and 47, O. 21, R. 90**—*Miscellaneous proceedings—Application under O. 21. R. 90 rejected as being too late—Defence, plea of invalidity of sale—* Res judicata.

Where a sale certificate was given in respect of lands not included in the decree and an application by the defendant under O. 21, R. 90 to set aside the sale was rejected on the ground that it was too late, *held*, in a suit by the auction-purchaser for possession of the property that the defendant was not barred by *res judicata* from raising the contention that the sale was invalid and that S. 47 was no bar to the defendant's plea being maintained. (*Ayling and Spencer, JJ.*) MUNSHI CHINA DANDUSI *v.* MUNSHI PEDDA TATTIAH. **14 L. W. 424 : (1921) M.W. N. 536 : 70 I. C. 303 : 41 M. L. J. 261.**

——— **S. 11**—*Miscellaneous proceedings—Interlocutory order.*

A point finally adjudicated upon at a previous stage cannot be reopened. (*Das and Ross, JJ.*) SURAJ PRASAD PANDAY *v.* SOMRA MAHTON. **68 I, C. 903 : 2 Pat. L. T. 648.**

Parties and Representatives.

——— **S. 11**—*Parties—Suit for determination of rent in Revenue Court—Finding that defendants held under a third person and not under plaintiff—Suit against third person for recovery of possession is not barred.*

Where the previous suit before the revenue Court was a suit brought by the plaintiff for the determination of the amount of rent to be paid by third parties on the allegation that these third parties were his exproprietary tenants, and they replied that they did not base their tenancy upon an agreement with the plaintiff but that they were holding from *S* who was a tenant of the plaintiff, and *S* intervened and took the same position. *Held* : that it was not necessary for the purpose

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of the decision of that suit to determine whether *S* was a benamidar of the plaintiff and therefore that finding to that effect was not *res judicata* in a subsequent suit by the plaintiff against *S* for possession. (*Stuart and Daniels, JJ.*) SHANKER KURMI *v.* MOHAMMAD MOGIM ALI. **88 I. C. 927 : A. I. R. 1926 All. 77.**

——— **S. 11**—*Parties — Pre-emption suit—Vender and pre-emptor were rival pre-emptors in previous suit —Interpretation of* wajib-ul-arz *in previous suit is binding in later suit.*

The present plaintiff and defendant were parties to a previous suit in which they figured as rival pre-emptors. In that suit a certain interpretation of the *wajib-ul-arz* was adopted.

Held, that that interpretation was binding between the parties in the later suit in which one of them was the vendee and the other was the pre-emptor. (*Lindsay and Kanhaiya Lal, JJ.*) JAGAT NARAIN *v.* NAGESHWAR PRASAD. **6 L. R. A. 296 (Civ.) : 88 I. C. 133 : A. I. R. 1925 All. 663.**

——— **S. 11**—*Parties and representatives—Decision by Revenue Court.*

A decision by a Court recovering thakkavat arrears that rent was not paid by the sub-tenant to the tenant in proceedings for sale of the tenure to recover takkavi paid to the tenant is not *res judicata* in a subsequent suit by the purchaser against the sub-tenant for the recovery of the rent payable by the sub-tenant. (*Mukerjee, J.*) SOBHA RAM *v.* RAM PRASAD. **5 L. R. A. 230 (Civ.) : 78 I. C. 373 : A. I. R. 1924 All. 910.**

——— **S. 11**—*Parties and representatives—Assignee before suit is not barred by decision against assignor.*

N a minor on attaining majority repudiated a mortgage of his property executed by his mother S in favour of K as his certificated guardian and himself mortgaged a portion of the property to D. K brought a suit against N and S for a declaration that his mortgage was binding on N and obtained a decree. He then brought a suit for sale on the mortgage.

Held, (1) that D who claimed under N was entitled to repudiate the mortgage of K ; (2) that the decision in the declaratory suit operated as *res judicata* in the mortgage suit and was binding on all persons claiming through him under transfers made after the suit but not on D because the mortgagee rights of D having come into existence before the declaratory decree were not affected by it and the property could only be sold in execution of decree on K's mortgage subject to these rights. (*Kanhaiya Lal and Mukerjee, JJ.*) KISHORI RAMANJI *v.* DULEY RAM. **22 A. L. J. 155 : 5 L. R. A. 77 (Civ) : 78 I. C. 226 : A. I. R. 1924 All. 474.**

——— **S. 11**—*Parties—Auction-purchaser — Execution sale—Incumbrances—Notification of.*

Purchaser is not estopped from questioning consideration for incumbrances though they were notified in the proclamation. (*Stuart and Sulaiman, JJ.*) ROSHAN LAL *v.* LALLU. **20 A L. J. 722 : L. R. 3 A. 500 : 44 A. 714 : 68 I. C. 790 : A. I. R. 1922 All. 443 (2).**

——— **S. 11**—*Parties and representatives.*

A decision in a former suit, unless tainted by fraud or procured by undue influence, against the predecessor-in-title of the plaintiff will be binding on him. (*Banerji, J.*) MUHAMMAD AHMED *v.* ZAHUR AHMED. **44 All. 334 : 20 A. L. J. 193 : A. I. R. 1922 All. 19.**

——— **S. 11**—*Parties and representatives — Prior suit against four persons—Plea that some other persons*

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were also joint tenants—Dismissal for default—Suit against all persons subsequently—Maintainability of.

The plaintiffs sued to eject six defendants describing themselves as occupancy tenants, and defendants holding without consent and without payment of rent. The defendants claimed that they were occupancy tenants jointly with the plaintiffs and they pleaded *res judicata* arising from a suit previously decided. In 1921 plaintiffs had brought a similar case against four of the defendants who made similar objections and added that the other two persons now impleaded were also joint in the cultivation. After some evidence had been recorded plaintiffs absented themselves and the suit was dismissed for default. *Held*, that the suit did not constitute *res judicata* as the defendants in the subsequent suit were not the same as in the previous case. (*Fremantle, S. M and Burn, J. M.*) HARGU LAL *v.* MUNSHI. **L. R 5 A. 329 (Rev.).**

——S. 11, Expl. VI — *Parties and representatives*—Res judicata—*Litigation between a reversioner and a Hindu widow, how far binding on another reversioner.*

The decision, favourable or otherwise, in a suit by a reversioner in the life-time of a Hindu widow to get rid of a common apprehended danger to the interests of the general body of reversioners, affects the reversioners as a body, and bars a fresh suit by another reversioner on the same cause of action, such a fresh suit being covered exactly by Explanation VI to section 11 of the Code of Civil Procedure. L. R. 42 I. A. 125 ; 38 Mad. 406 ; 29 I. C. 291 ; 9 Suth. W. R. 505 509 ; L. R. 43 I. A. 207 ; 39 Mad. 634. 1 O. W. N. 640 ; L. R. 51 I. A. 381 ; 82 I. C 962 ; 47 M. L. J. 824 ; 1924 P. C. 247 ; 21 L. W. 295 relied on. (*Mr. Ameer Ali.*) MATA PRASAD *v.* NAGESHAR SAHAI. **3 O. W. N. 1 : L. R. 6 P. C. 195 : 52 I. A. 398 · A. I. R. 1925 P. C. 272. (P. C.)**

——S. 11, Expln. VI—*Parties and representatives—Suit by manager of joint Hindu family—Binding effect of.*

As the manager of a Hindu family represents all the members of the family, they are all bound by the result of a litigation conducted by him unless there is fraud or collusion. No question of negligence will arise in such a case as in the case of the guardian of a minor. (*Sulaiman, J.*) RAM RATAN *v.* DURGA KOERI. **89 I. C. 120 : L. R. 6 A. 545.**

——S. 11—*Parties and representatives—Decision against one reversioner not* resjudicata *against another.*

A decision against one reversioner is not *res judicata* against another inasmuch as no one reversioner claims through another. (*Rafique and Stuart, JJ.*) DARBARI LAL *v.* GOBIND RAM. **19 A. L. J. 514 : 63 I. C. 524 : 43 All. 558.**

——S. 11—*Parties and their representatives—Prior suit by mortgagee for possession—Title of mortgagor found—Subsequent suit for redemption.*

In a suit for possession by the mortgagee the title of the mortgagor was disputed by a third party but found against. In a later suit for redemption, the son of the third party again disputed the title. *Held*, the decision in the prior suit was *res judicata*. (*Macleod, C. J. and Crump, J.*) BAPUJI RAO RAOJI RAO *v.* RAGUNATH RAO **74 I. C. 285 : A. I. R. 1924 Bom. 299.**

——S. 11—*Parties and representatives—Suit against a person setting up title of a third person—Subsequent suit impleading that person—Prior decision if a bar.*

A sued B for a declaration that he was entitled to receive rent at a certain rate from him and that B

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was a tenant under C and bound to pay rent to A as part of the settlement between them. In a prior rent suit by A against B the latter had set up that he held the land not under A but under C, who was not a party to that suit. The prior suit had been dismissed. *Held*, that the decision in the prior suit was no bar to the trial of the issue as to B's liability for rent. 26 C. 428 Foll. (*Greaves and Ghose, JJ.*) GOPINATH *v.* BHAJA HARI DAS. **68 I. C. 472 : A. I. R. 1923 Cal. 327 (2).**

—— S. 11—*Parties and representatives—Proceedings against benamidar binds—Real owner* — Res judicata.

In a proceeding by or against the benamidar the person beneficially entitled is affected by the rules of *res judicata*. (*Moti Sagar and Martineau, JJ.*) NANAK CHAND *v.* MUHAMMAD KHAN. **75 I. C. 1048 : A. I. R. 1924 Lah. 702.**

——S. 11—*Parties and representatives—Litigating under the same title—Decision against defendant in individual capacity does not bar suit in representative capacity.*

Where in the former suit the defendants were impleaded in their representative capacity but, were proceeded against in their individual rights the decision in the suit does not operate as *res judicata* in a subsequent suit against the defendants as representing the community (*Broadway and Abdul Qader, JJ.*) SITARAM *v.* GHANNO. **69 I. C. 528 : A. I. R. 1924 Lah. 275.**

——S. 11—*Parties and representatives—Suit against joint Hindu family—All the members bound by the judgment.*

Where a person obtains an *ex parte* decree against the managers of a joint Hindu family business, the junior members cannot subsequently sue for a declaration of their immunity on the ground that the contract on which the decree was given was a wagering contract. The managers should have raised this plea as defence to the previous suit and their omission operates as *res judicata*. (*Le Rossignol and Harrison, JJ.*) RAM RATTAN *v.* THE FIRM OF HURSUKH ROY. **43 P. L. R. 1922 : 69 I. C. 783: A. I. R. 1924 Lah. 26.**

——S. 11—*Parties and representatives.*

So far as plaintiffs were concerned it was held in a previous suit that they had agreed to the alienation which had been for their benefit and could not question it, that they could under no circumstances inherit any of the estate left by the widow and that should they survive her another reversioner would be entitled to take that portion that had been alienated and that portion which had not been sold. Plaintiff brought a subsequent suit to the effect that this sale should not affect his reversionary rights. This was dismissed in 1913. Plaintiffs with his two younger brothers again brought a suit for a portion of the land which was not alienated after the death of the widow ; *held*, the question is clearly *res judicata* as between them and the widow and her successors. (*Martineau and Harrison, JJ.*) MAULA BAKSH *v.* MT. JIWI. **A. I. R. 1923 Lah. 556.**

——S. 11— *Parties and representatives—Judgment-debtor adjudged insolvent—Official Assignee is not a representative of the judgment-debtor.*

A prior decision in execution proceedings to which the defendant was party to the effect that the suit property was liable to be attached in execution of a decree against him, does not bind the Official Assignee appointed in consequence of the defendants' insolvency as the Official Assignee cannot be deemed to be the legal representative of the insolvent-defendant within

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the meaning of S. 11, nor can he be deemed to be litigating under the same title as the defendant. 7 A. 752 Foll. (*Phillips, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* AIYU DIKSHITHAR. **48 M. L. J. 530 : 88 I. C. 85 : A. I. R. 1925 Mad. 688.**

——S. 11—*Parties and representatives—Purchase prior to suit from defendant—Decision is not* res judicata *in purchaser's favour.*

Where a suit by a mortgagee to enforce his mortgage as against a purchaser of the *hypotheca* was dismissed on the ground that the mortgage had been paid off and where a suit was subsequently filed by the plaintiff to enforce the mortgage against a person who had purchased the *hypotheca* from the defendants in the previous suit but prior to the institution of that suit. *Held*, that the decision in the prior suit was not *res judicata* and did not bar the subsequent suit. 41 M. L. J. 392 Foll. (*Madhavan Nair, J.*) DURAICHAMI TEVAR *v.* ADIMUTHU NADAN.
47 M. L. J. 728 : 20 L. W. 740 : 84 I. C. 995 : A. I. R. 1925 Mad. 358.

——S. 11—*Parties and representatives—A's suit for possession against B dismissed on oath taken by B—Suit by C against A and B dismissed on finding that property belonged to A—Suit by A's heirs against B for partition*—Res judicata.

The parties to the suit were Mahomedans. The plaintiffs' father sued for possession of certain lands from his brother. On defendant taking an oath, as agreed, the suit was dismissed. The sister's daughter of the defendant brought a suit for a share of the lands against the defendant but that suit was dismissed on the ground that the land belonged to the plaintiffs' father. On the death of their father, the plaintiffs brought the present suit for recovery of their share of the properties alleging that in the suit by the representatives of his sister, the defendant had wrongly alleged that the properties were exclusively his own. *Held*, that the decision in the prior suit by the plaintiffs' father was *res judicata* and that the plaintiffs could not in the face of that decision treat the defendant as a trespasser, or dispute his title to the suit lands. The alternative claim of the plaintiffs that the plaintiffs' father was entitled to a share of the property and not the whole ought to have been put forward in the prior suit and not having been so put forward, the plaintiffs were estopped from claiming the same in the present. The decision in the suit filed by the sister's representatives against the defendant did not wipe off the effect of the decision in the suit by the plaintiffs' father as in that suit the plaintiffs' father and the defendant were both co-defendants. 34 M. L. J. 740 Ref. (*Spencer, O. C. J.*) MAHOMED ESUF ROWTHER *v.* SULTAN ABDUL KADER. **47 M. L. J. 20 : 78 I. C. 1055 : 34 M. L. T. 147 : (1924) M. W. N. 569 : A. I. R. 1924 Mad. 711.**

——S. 11—*Parties and representatives—Decree against insolvent without impleading Official Receiver is not binding on latter.*

Where a person is adjudged an insolvent any decision obtained against him without making the Official Receiver a party to the proceedings will not be binding on him inasmuch as the property is vested in the Receiver. (*Kumaraswami Sastri, J.*) NIMMAGADDA VENKATESWARALU *v.* BODAPATI LINGAYYA.
47 Mad. 633 : 20 L.W. 63: (1924) M. W. N. 491 : A. I. R. 1924 Mad. 689.

——S. 11—*Parties and representatives—Decree in suit by Hindu widow—Reversioners when barred—Reversioners impleaded in first Court but not in appeal*

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where judgment in favour of the widow was reversed—Effect of.

To a suit by a Hindu widow for the recovery of the property of her husband from a person who claimed to be his validly adopted son, persons, who were presumptive reversionary heirs of the estate, were made parties defendants. The first Court found against the adoption and decreed the suit. The alleged adopted son preferred an appeal making the widow alone a party respondent. The appellate Court found in favour of the adoption and dismissed the widow's suit. In a subsequent suit filed after the death of the widow by the reversioners who were parties defendants to the prior suit against the adopted son: *Held*, that whatever might have been the character in which plaintiffs were impleaded in the prior suit, inasmuch as the widow represented the estate in the appeal therein, the decision in the appeal was *res judicata* in favour of the adopted son, there being no suggestion of fraud or collusion between the widow and the adopted son in the proceedings in the suit or appeal. The expression "special cause" referred to in the *Shivaganga Cases*, 9 M. I. A. 539, must be *ejusdem generis* with unfairness or irregularity in the proceedings to which explicit reference is made. 43 B. 869 Ref. (*Oldfield, and Venkatasubba Rao, JJ.*) NACHIKALAI *v.* AIYAKANNU. **43 M. L. J. 95 : 16 L. W. 94 : (1922) M. W. N. 418 : 31 M. L. T. 129 (H.C.) : 70 I. C. 387 : A. I. R. 1922 Mad. 233.**

——S. 11—*Parties and representatives—Alienee after preliminary but before final decree*—Lis pendens.

An alienee *pendente lite*, after preliminary decree but before final decree, is bound by the decree and cannot be allowed to re-open questions already decided in the suit nor can he sue for the establishment of his title. (*Baker, J. C.*) LACHIRAM *v.* BHOLU.
82 I. C. 452 : A. I. R. 1925 Nag. 132.

——S. 11—*Parties and representatives—Meaning of.*

The title by which the parties to the subsequent suit claim must for purposes of *res judicata* be subsequent to the commencement of the former suit because transferees prior to the date of such a suit are not bound by a decision in that suit. The words "between parties under whom they or any of them claim" cover a case where the latter litigant occupies by succession the same position as the former litigant. (*Kinkhede, A. J. C.*) TULARAM *v.* MT. SUMRATI.
A. I. R. 1924 Nag. 422.

——S. 11—*Parties or representatives.*

Defendants got certain property attached and sold in execution of a money decree and themselves purchased it. Plaintiffs sued for possession on the ground that the sale was not binding on them inasmuch as an injunction was issued to the Munsiff to stay the execution proceedings and the Munsiff without waiting for the Subordinate Judge's order cancelling the injunction confirmed the sale, that when he applied for a review of the order confirming the sale, the application was rejected with an order that a regular suit was necessary. *Held*, the question whether suit can lie is not *res judicata* as the defendants were not parties to or heard in the proceedings in which the order was passed. (*Kotwal, A. J. C.*) BRIJMOHAN SINGH *v.* KASTURCHAND. **68 I. C. 693 : A.I.R. 1922 Nag. 189.**

——S. 11—*Parties and representatives—Decree against mortgagor without impleading the mortgagee as a party, whether binding on the mortgagee—Mortgagor's and mortgagee's estate—Distinction.*

Upon a mortgage having been created in respect of a fee simple the legal estate at once vests in the mort-

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gagee and the mortgagor is left with nothing more than an equitable interest which is popularly described as equity of redemption. Such a mortgagor does not possess any such estate as would enable him sufficiently to represent the mortgagee in a suit instituted after the mortgage and a decree passed in such a suit will not bind the mortgagee. 40 Bom. 679 followed. Therefore, where a superior proprietor obtained a decree for arrears of rent against the original owner of under-proprietary rights at a rental which was computed with reference to the annual gross income of the tenure but did not make his mortgagee a party to such suit, *Held*, that in a subsequent suit for rent at the same rate against the mortgagee who had purchased the property in an auction sale held in execution of the decree passed on the basis of the mortgage, the rate of rent determined in the previous suit to which the mortgagee was not a party was not *res judicata* against him as the mortgagor could not represent the legal estate of the mortgagee which was absolutely defined and distinct from that of the mortgagor's interest. (*Ibid.*) (*Hasan and Gokaran Nath, JJ.*) MOHAMMAD JAIMUR KHAN *v.* RAGHUNATH SINGH. **3 O. W. N. 55.**

——S. 11—*Parties—Discharged defendant is not bound by the decree.*

Where in a previous suit certain defendants are discharged owing to a compromise between the plaintiffs of that suit and the contesting defendants the compromise decree does not operate as *res judicata* in a subsequent suit between the plaintiffs and the alienees from the discharged defendant. (*Wazir Hasan, A.J.C.*) DUNYA SINGH *v.* GANGA DHAR.
2 O. W. N. 684 : A. I. R. 1925 Oudh 650.

——S. 11—*Parties—Defence open to but not raised by guardian—Minor is not precluded from raising that defence.*

The omission of the guardian to raise any other defence on behalf of his ward which he might and ought to have raised does not preclude the ward from raising that defence in a subsequent suit, otherwise the minor would be made to suffer for the laches of his guardian. (*Wazir Hasan and Neave, A. J. Cs.*) RAMESHWAR BAKHSH SINGH *v.* RIDH KUER.
A. I. R. 1925 Oudh 633.

——S. 11—*Parties and representatives—Claim through the same person.*

There can be no *res judicata* where the parties in the subsequent litigation ranged on the opposite sides claim through the same person. (*Wazir Hasan and Neave, A. J. Cs.*) MT. RAJ DULARI *v.* MT. CHANDESAR DEI. **78 I. C. 65 : A. I. R. 1925 Oudh. 164.**

——S. 11—*Parties and representatives—Decision against mortgagee is not binding on mortgagor.*

A mortgagor does not claim under his mortgagee and a decision against a mortgagee in a suit to which the mortgagor was not a party does not operate as *res judicata* against the mortgagor or his successors-in-interest. (*Burn, J. M.*) RAJA BHAGWAN BAKSH SINGH *v.* THAKUR DIN MISIR. **L. R. 5 O. 118.**

——S. 11—*Parties and representatives—Previous suit with third party.*

The question whether or not the present plaintiffs-respondents had acquired by prescription the right to a flow of water from the defendant-appellant's land was not decided in previous suit. All that was decided was that the defendant had not at that time acquired the prescriptive right upon which the claim for damages was based. *Held*, if the defendant with the consent of third party should make a cutting through the middle of the bund so as to let the water flow on to the latter's land, it is difficult to see how anything

C. P. CODE (V OF 1908), S. 11—Prior Decision.

decided in the previous suit would give the plaintiffs any right to object. Plaintiffs could not maintain an action merely because the rights of a third party may possibly have been infringed. (*Dawson Miller, C. J. and Mullick, J.*) MT. SARBAN *v.* PHUDO SAHU.
4 P. L. T. 81 : 1922 P. H. C. C. 305 : 69 I.C. 947 : 2 P. 110 : A.I.R. 1923 Pat. 65.

——S. 11—*Parties and representatives—Auction purchaser—Execution of money-decree—Decision between decree-holder and judgment-debtor if binding on auction purchaser.*

An auction-purchaser who purchases in execution of a money decree is bound as between himself and the decree-holder by any previous litigation between the decree-holder and the judgment-debtor whose interests he has purchased. S. 11 of the Civil Procedure Code applies to the facts of the case. 22 C. 909 ; 10 C. L. J. 150 Foll. 14 M. I. A. 101 ; 7 Cal. 107 (P.C.) Dist. 14 Cal. 401 Diss. The representative of the judgment-debtor seems to be on the same footing as the person claiming under him. A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by statute or common law, he can have no better title than the person through or under whom he claims. (*Dawson Miller, C. J. and Coutts, J.*) KALI DAYAL *v.* UMESH PRASAD. **1 Pat. 174 : 67 I. C. 266 : 1922 P. H. C. C. 33 : 3 P. L. T. 506 : A. I. R. 1922 Pat. 63.**

Plea of.

——S. 11—*Plea of—Party affected—Must be given notice and opportunity.*

The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) CHIDAMBARAM CHETTY *v.* KANDASAMI GOUNDAN. **45 M. L. J 346 : 46 M. 768 : (1923) M. W. N. 571 : 18 L. W. 757 : 74 I. C. 155 : A I. R. 1924 Mad. 1 (F. B.).**

Prior Decision.

——S. 11—*Prior decision—Suit by heirs against widow for possession dismissed for non-payment of dower-debt ordered by Court to be paid by plaintiff to widow—Second suit for possession by the heirs is not barred.*

The heirs of a deceased Mahomedan sued his widow for immediate possession of his property held and retained by the widow in lieu of dower, on the ground that her dower-debt had already been satisfied. They also claimed mesne profits for some period before and during suit. The suit was decreed on condition that the plaintiffs were to pay to the widow a certain amount as the balance of dower, within a certain time. The sum was not paid and the suit thus stood dismissed. The widow thereupon gifted away the property mentioning in the gift-deed that she had become absolute owner of the property.

Held, that the effect of the non-payment by plaintiff in the prior suit had not the effect of conferring absolute estate on the widow and the decision in the prior suit did not extinguish plaintiff's right to claim possession at any future time. (*Lord Atkinson.*) MT. MAINA BIBI *v.* CHAUDHRI VAKIL AHMAD.
48 M. L. J. 667 : 52 I. A. 145 : 2 O. W. N. 180 : 47 All. 250 : 27 Bom. L. R. 796 : 23 A. L. J. 115 : L. R. 6 P. C. 25 : A. I. R. 1925 P. C. 63 (P. C.).

C. P. CODE (V OF 1908), S. 11—Prior Decision.

——S. 11—*Prior decision—Executable decree precludes fresh suit for same relief.*

Where the terms of the decree were as follows:—"It is ordered that this suit be decreed in the terms of the award annexed herewith and where the terms of the award were:—" The parties will collect rents and other profits and each of the two parties will deliver respectively to each other all the zemindari papers which they may have in their possession."

Held, that it was an executable decree and precluded a fresh suit for the possession of the properties concerned by one of the parties. (*Lord Dunedin.*) SASI SEKHARESWAR RAY *v.* LALIT MOHAN MAITRA.

48 M. L. J. 20 : 52 I. A. 79 : 52 Cal. 314 : 29 C.W.N. 633 : L. R. 6 P.C. 23 : 27 Bom. L. R. 166 : 21 L. W. 286 : 23 A. L. J. 717 : A. I. R. 1925 P. C. 34 (P. C.).

——S. 11—*Prior decision—Rent decree—Puttah and Muchilikas—Question of—Madras Estates Land Act, S.* 52 (3).

Where the appellants contended that the previous judgments are *res judicata* in the suits as they have fully gone into the question of custom relating to the different stipulations in the puttah, *Held*, their Lordships cannot sustain on legal grounds the plea of *res judicata* as suggested. The doctrine of *res judicata* is not in question, but the application of the special rules stated in S. 52 (3), Madras Estates Land Act, under which Muchilikas decreed for any revenue year remain in force, until the beginning of the year for which fresh ones are exchanged or decreed, and there is no reason for restricting the scope of the general reference to muchilikas decreed to those decreed by any particular description of Court (*Lord Shaw*) RATHAKRISHNA AYYAR *v.* SUNDER SWAMY IYER.

43 M. L. J 323 : 49 I. A. 211 : 45 Mad. 475 : 27 C. W. N. 1 : 20 A. L. J. 937 : 36 C. L. J. 450 : 16 L. W. 18 : 74 I. C. 584 : 31 M.L.T. 31 : A. I. R. 1922 P. C. 257 (P. C.).

——S. 11—*Prior decision—Ejectment suit—Cause of action accrues form year to year—Civil P. C., O.* 23 *R.* 1.

The right to sue for ejectment accrues from year to year, and therefore the withdrawal of a previous suit for ejectment does not bar a subsequent suit for ejectment against the same party. (*Sulaiman, J.*) KUMARI *v.* ADIT MISIR. **89 I. C. 379 : A. I. R 1926 All. 34.**

——S. 11—*Prior decision—Objections to application—Personal decree—Omission to raise objections—Effect of.*

A mortgage decree-holder applied for a personal decree under O. 34, R. 6 of the C. P. Code. The judgment-debtor objected that the application was barred by limitation and that the accounts furnished by the decree-holder were incorrect. The application was dismissed as barred by limitation. On appeal the appellate Court was of the contrary opinion and remanded the application for disposal on the merits. The judgment-debtor subsequently raised other objections to the maintainability of the application for personal decree. *Held*, that as the application to which the latter objections were taken was the same as that to which the previous objections were taken, the rule of *res judicata* did not apply to the case and the judgment-debtor was not debarred from taking the subsequent objections. (*Mukerjee and Dalal, JJ.*) SANTI LAL *v.* RAJ NARAIN. **L. R. 5 A. 565 : 82 I. C. 65 : A. I. R. 1924 All. 804.**

——S. 11—*Prior decision—Decision not appealed from—Effect of—Reversal in another proceeding.*

Where a decision is not appealed from but it is in effect reversed by the order made by the High Court in an appeal from another proceeding in the same suit, it does not operate as *res judicata.* (*Stuart and Ryves, JJ.*) KESHRI *v.* BHAWANI RAI.

76 I. C. 473 : A. I. R. 1923 All. 456.

——S. 11—*Prior decision—Subsequent inconsistent decision—Later decision to prevail.*

Where there are two inconsistent decisions it is the later decision that operates as *res judicata.* So held with reference to an adjudication in the course of an execution proceedings. (*Piggott and Walsh, JJ.*) LALITA PRASAD *v.* SURAJ KUMAR. **44 All. 319 : L. R. 3 A. 111 : 20 A. L. J. 185 : 65 I. C. 877 : A. I. R. 1922 All. 145.**

——Ss. 11 and 47—*Prior decision—Mortgages—Redemption—Provision in preliminary decree that if not redeemed in a certain time all rights will cease—Failure—Effect.*

Where a mortgagor is given a preliminary decree for redemption on condition that if he does not pay the amount within a certain time, he would be debarred from all rights to redeem, and if he fails so to redeem he cannot bring a second suit to redeem. (*Macleod, C. J. and Shah, J.*) KUSHABA *v.* BUDHAJI.

46 Bom. 348 : 23 Bom. L. R. 1176 : 64 I. C. 1004 : A. I. R. 1922 Bom. 127.

——S. 11—*Prior decision—Redemption previously decreed—Right to redeem reserved—Subsequent suit for redemption.*

Where the decree in a suit for redemption of a mortgage provided for payment by instalments by the mortgagor of the mortgage money in default of which the mortgagee was to remain in possession in lieu of interest, and also reserved the right to redeem, a subsequent suit for redemption is not barred. (*Macleod, C. J. and Shah, J.*) ABDUL RAJAK ALLISHA MULANI *v.* VAMAN GANESH PADLIKAR.

45 Bom. 1335 : 63 I. C. 902 : 23 Bom. L. R. 593.

——S. 11—*Prior decision—Rent Suit—Same parties, same subject-matter and same defence in both suits—First suit is* res judicata.

The judgment in a former rent suit operates as *res judicata* between the parties if the parties are the same, the areas of the lands are the same and the defence is the same, namely, a third party holding certain portion of the whole land. 21 Cal. 236 Dist. (*Greaves and Cuming, JJ.*) NABIN CHANDRA *v* GOUR MOHAN.

90 I. C. 756 : A. I. R. 1926 Cal. 369.

——S. 11 and O. 23, R. 1, or O. 6 R. 1—*Prior decision—Redemption suit—Claim for mesne profits withdrawn—Suit for mesne profits from payment under decree to delivery of possession is not barred—Civil P. C., S.* 11.

Mesne profits from the date subsequent to the decree when the money is paid into Court by the mortgagor cannot be claimed in the redemption-suit itself.

Where in a redemption suit a claim for mesne profits is withdrawn, a subsequent suit, for mesne profits from the date of payment after the decree up to the date of delivery of possession is not barred by O. 23, R. 1 or O. 6 R. 1 or S. 11 of the Civil P. C. 14 C. W. N. 1001 Foll. (*Rankin and Mukerji, JJ.*) SUDHANYA KUMAR BOSE *v.* SASI BALA BOSE.

85 I. C. 547 : A. I. R. 1926 Cal. 178.

——S. 11—*Prior decision as to title obtained against a lessor binds tenant at least as a strong piece of evidence.*

A decision as to ownership of land obtained by plaintiff, in a former suit against defendant's lessor is at least a strong piece of evidence as against the defendants in a subsequent suit, on the question as to whom the rent is payable. 15 All. 108. Dist.; 28 C. L. J.

223 and 33 Mad. 459, doubted ; 30 Cal. 556 (P. C.) Ref. (*Suhrawardy and Cuming, JJ.*) PURNA CHANDRA *v.* RAMESH CHANDRA.
A. I. R 1925 Cal. 1218.

——S. 11—*Prior decision—Previous rent decree without judgment is not* res judicata.

A previous decree in a rent suit without the judgment cannot amount to more than a strong piece of evidence regarding the amount of rent realized from year to year. (*Newbould, J.*) ABDUL KARIM *v.* PRASANNA KUMAR. **A. I. R. 1925 Cal. 1116.**

S. 11—*Prior decision—Interlocutory—Pending suit—Order made in the course of—Finality of.*

An order made in the course of a suit is final and cannot be retried by the Judge in the course of the same litigation. 48 C. 499 followed. (*Mookerjee and Rankin, JJ.*) IRRANI MUNDLE *v.* NAIMUDDIN SARDAR. **39 C. L. J. 251 : 81 I. C. 527 : A. I. R. 1924 Cal. 1006.**

——S. 11—*Prior decision—Probate proceedings.*

The order passed on compromise in previous probate proceedings cannot operate as a bar to an application for probate of the same will. (*Newbould and Ghose, JJ.*) BROJO LAL BANERJEE *v.* SHARAJUBALA DEBI. **51 Cal. 745 : A. I. R. 1924 Cal. 864.**

——S. 11—*Prior decision unappealable—Additional parties and grounds in second application—No* res judicata *arises.*

Where the previous application was to the lower Court and where the lower Court's order dismissing the application was not open to appeal, and where a fresh application for the same relief was made to the High Court by the previous applicant and another and where such application urged additional ground.

Held, that it was not barred. (*Martineau, J.*) BEHARI LAL *v.* SHANKAR DAS. **86 I. C. 246 : 7 L. L. J. 6 : A. I. R. 1925 Lah. 309.**

——S. 11—*Prior decision—Redemption—Second suit not barred.*

When a plaintiff has obtained a decree for redemption of mortgage by payment into Court of a certain sum within a certain time and when no steps have been taken by the plaintiff towards making such payment and the period fixed elapsed without any payment being made, still a second suit to redeem on payment of the self-same sum is not barred by the rule of *res judicata.*

The right of redemption could not be extinguished by the preliminary decree and could only be extinguished by a final decree. (*Campbell, J.*) SUNKA *v.* JARUN. **75 I. C 919 : A. I. R. 1923 Lah. 680.**

——S. 11—*Prior decision—In suit based on non-existent cause of action—Not* res judicata.

The decision in a suit which proceeds on a cause of action, which has no existence in the eye of the law, cannot operate as *res judicata.* (*Shadi Lal, C. J. and Wilberforce, J.*) BUTA SINGH *v.* JHANDU. **3 U. P. L. R. (Lah.) 49 : 61 I. C. 375 : 3 L. L. J. 211.**

——S. 11—*Prior decision—Adoption by widow—Suit by reversioner for declaration.*

Where a reversioner brought a suit for a declaration that an adoption by a widow is not binding on him and got a decree, the question of relationship is *res judicata* in a second suit for a declaration that a gift by her is not binding on him. (*Shadi Lal, C. J. and Leslie Jones, J.*) INDRAJ *v.* RANJI LAL. **59 I. C. 808 : 34 P. W. R. 1921**

——S. 11—*Prior decision—Father allotting some properties, others remaining undisposed of—Son getting decree declaring the sale not binding on him and for recovery of his share after father's death—Alienee subsequently suing for general partition—Matter is* res judicata *as regards properties sold but the alienee can get other properties as substitute—Hindu Law—Alienation by father.*

A father sold certain properties and some properties were not disposed of by him. After his death his son alleging that the sales made by his father were not binding on him sued for partition and recovery of his share and obtained a decree. After the termination of the litigation, the sons of the alienee sued for a general partition of the properties of the father alleging that the properties left undisposed of by the father were enough to be allotted to the share which the son is entitled to and that the whole of the properties sold to them may be allotted to the father's share and through the father to themselves, and in the alternative they prayed for the allotment of other properties as substitute if the Court held that the properties sold to them could not be allotted to them.

Held : that the matter is *res judicata* so far as the property sold is concerned and so the first part of the prayer must be disallowed, and further that as it was not in the plaintiff's power to ask for a general partition in the former suit, the suit is competent for allotment to the plaintiffs of other properties as substitute : (Case-law considered). (*Phillips and Ramesam, JJ.*) SOURIMUTHU *v.* V. P. PACHIA PILLAI. **49 M. L. J. 679 : 1925 M, W. N. 844 : A. I. R 1926 Mad. 241.**

——S. 11—*Prior decision—Final decree for sale in mortgage suit cannot bar redemption suit.*

In a suit by the mortgagee for sale the question whether the mortgagor has the right to redeem is not put in issue. In such a suit the questions for determination are whether there is a mortgage and what is the amount due to the mortgagee. So, where a final decree for sale is passed in a suit on mortgage, but is not executed for more than 3 years, S. 11 cannot bar a subsequent suit for redemption by the mortgagor. 43 Bom. 334 Foll. (*Devadoss, J.*) N NAGASAMI IYER *v.* T. ELLARUGAN **A. I. R. 1925 Mad. 1191.**

——S. 11—*Prior decision on the plea of parties being divided from the deceased is* res judicata.

Where the parties distinctly put forward the contention that the deceased was divided from them, and on that plea the Court gave a decree against his assets in their hands :

Held, that in the face of that plea and the judgment, it was not open to those parties to contend that they and the deceased were undivided in interest and that they succeeded to his property by survivorship. (*Devadoss and Wallace, JJ.*) PONNAPPA REDDI *v.* P. THIRUVENGADA PILLAI. **49 M L. J. 104 : 22 L. W. 455 : (1925) M. W. N. 713 : 90 I. C. 509 : A. I. R. 1925 Mad. 1179.**

——S. 11 (4)—*Prior decision—Redemption suit—Properties not covered by mortgage included in suit and obtained delivery of in execution of decree—Mortgagee cannot sue on the ground that properties were not included in the mortgage.*

Where mortgagor includes certain properties in his suit for redemption and obtains delivery of them in execution of a redemption decree, the mortgagee cannot bring a subsequent suit on the ground that some of the properties so delivered were not comprised in the mortgage and were wrongly delivered, S. 11, cl. 4 is a bar to such suit. 22 All. 442, Dissented from. (*Devadoss, J.*) U. P. APPALA NAIDU *v.* U. APPALA NAIDU. **A. I. R. 1925 Mad. 1148.**

——S. 11—*Prior decision—Rent suit.*

As regards rent suits the decision as regards the rent for one year precludes question as to rent for fol-

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lowing years. (*Devadoss, J.*) GOVINDOSS KRISHNADOSS *v.* P. MANIKYANAYANIM. **82 I. C. 990 : A. I. R. 1925 Mad. 378.**

——S. 11—*Prior decision as to plaintiff's right of survivorship binds him so as to preclude him from objecting to the opponent being added as legal representative in subsequent proceeding.*

Where the brother of a Hindu trustee fails in a suit against the widow of the deceased, wherein he claimed to succeed to the deceased's property by right of survivorship, it is not open to him afterwards to dispute the title of the widow as the legal representative of her husband in other proceedings. (*Phillips and Odgers, JJ.*) KOTHANDARAMASWAMI NAIDU *v.* PAPPAMMAL. **79 I. C. 891 : A. I. R. 1925 Mad. 218.**

——S. 11—*Prior decision—Decision in claim proceedings under O. 21, R. 58 not contested—Effect.*

The decree-holder in a Small Cause suit applied for attachment of a debt alleged to be due to one K, to the judgment-debtor. Notice of that application was served upon K, as garnishee and also upon the widow of the judgment-debtor as representing his estate. She did not appear but the garnishee appeared and put a counter-statement in which he alleged, that the debt had never been due to the judgment-debtor, that it had been assigned and he had promised to pay the assignee, and that the amount of the debt was not Rs. 350 but Rs. 300. That application came before the District Munsif, the garnishee appearing and the District Munsif passed an order in these words "Attachment is confirmed". In due course the debt was brought to sale and was purchased by the present plaintiff, who was himself the decree-holder. The plaintiff then sued to recover the debt, and the garnishee raised the same defences.

Held, the garnishee not having proceeded, when the claim was decided against him in execution. under O. 21, R. 63, the matter was *res judicata*. (*Schwabe. C. J. and Wallace, J.*) SUBBIER *v.* MOIDEEN PITCHARI. **44 M. L. J. 588 : 17 L. W. 582 : 32 M. L. T. 304 : (1923) M. W. N. 282 : A. I. R. 1923 Mad. 562.**

——S. 11—*Prior decision—Effect of, though erroneous—Construction of grant.*

In a prior litigation to which the plaintiff was a party it was decided that the question whether the properties in suit were *wakf* properties must be held in the affirmative by reason of *res-judicata* owing to a decision in a still prior suit. It was, however, overlooked that the plaintiff was not a party to that prior suit. *Held* that notwithstanding the mistake, the decision in the prior suit operated as *res judicata* and that the plaintiff could not raise the question of the *wakf* character of the suit property again. (*Phillips and Devadoss, JJ.*) JAGGA ROW BAHADUR GARU *v.* GONHER BIBI. **17 L. W. 521 : (1923) M. W. N. 347 : 72 I. C. 789 : A. I. R. 1923 Mad. 545.**

——S. 11—*Prior decision—Possession, nature of, declared in a previous suit*—Res judicata.

A judgment in a prior suit operates as *res judicata* in a subsequent suit between the same parties or their representatives-in-interest if it decides what was the character of the possession of any person who was a party to that suit, *e.g.*, whether it was then adverse or permissive possession or whether it was separate or joint possession. (*Spencer and Venkatasubba Rao, JJ.*) SINGARAVELU MUDALIAR *v.* CHOCKA MUDALIAR. **43 M. L. J. 737 : 16 L. W. 544 : 31 M. L. T. 298 : (1922) M. W. N. 676 : 46 Mad. 525 : 70 I. C. 994 : A.I.R. 1923 Mad. 88 (2).**

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——S. 11—*Prior decision—Not* inter partes—Res judicata.

A sued X for a declaration that he was entitled to the *Asari Sheriff* office and the suit was dismissed on the ground that A should prove his title to the office. A subsequently sued the Government for recovery of money alleged to be due to him as the person entitled to the office of *Asari Sheriff*. *Held*, that the suit was not barred by *res judicata*. Distinction between judgments *in rem* and judgments *in personam* considered. 33 M. 483 and 36 M. 141, overruled. (*Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*) SECY. OF STATE *v.* SYED AHMED BADSHA SAHIB. **41 M. L. J. 223 : 44 Mad. 778 : 14 L. W. 128 : 67 I. C. 971 : (1921) M. W. N. 576 (F.B.).**

——S. 11—*Prior decision—Judgment of Revenue Court.*

A judgment in a rent suit by the lessee for a term of a Zemindari against the tenant does not bar a subsequent suit by the Zemindar after surrender of the lease though the claim in the latter suit is one for a period covered by the lease.

Per *Krishnan, J.*—Surrender determines the tenancy and lets in the landlord's rights. (*Napier and Krishnan, JJ.*) RAJAH OF RAMNAD *v.* RAMANATHASWAMI. **41 M. L. J. 288 : 44 Mad. 514 : 29 M. L. T. 322 : 63 I. C. 205.**

——S. 11—*Prior decision—Findings on application.*

In a proceeding under a mortgage decree, the assignee decree-holder applied to the Court to be recognised as such and to pass a final decree. The Court dismissed the application holding that no final decree can be passed, as the legal representatives of the deceased deft. were not brought on record within proper time. The present application is therefore made asking for sale of the mortgaged property. *Held*, that the application is barred on the principle of *res judicata*. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) KONDU NAGAYYAN CHETTIAR *v.* SRINIVASA AIYANGAR. **62 I. C. 856 : 14 L. W. 18.**

——S. 11—*Prior decision.*

Where a claim of a third person based on a mortgage is disallowed, and also his suit for declaration of his mortgage rights is dismissed, he cannot enforce, by a regular suit, his rights under the mortgage. (*Ayling and Odgers, JJ.*) SINGARIAH CHETTY *v.* CHINNABI. **40 M. L. J. 7 : 44 Mad. 268 : 12 L. W. 725 : 28 M. L. T. 420 : 60 I. C. 780 : (1921) M. W. N. 33.**

——S. 11, Expl. IV—*Prior decision—Reduction from plaintiff's claim not claimed in prior suit bars subsequent suit therefor.*

The omission by defendant to claim a reduction in the amount for which he is being sued, which reduction the defendant can lawfully claim debars him from suing for the amount subsequently. (*Dalal, J. C.*) GANESH PRASAD *v.* JOT SINGH. **A. I. R. 1925 Oudh 719.**

——S. 11—*Prior decision—Final decree in redemption suit bars fresh redemption suit.*

Where a suit for redemption has been instituted and a decree for redemption has been passed therein but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. S. 10 would be better applicable as the former suit cannot be deemed to have been taken to a conclusion and must

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be deemed to be still pending. 25 Mad. 300, and 39 Mad. 896, Foll. 43 Bom. 334, Diss. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) NARAYAN *v.* GAYA DIN. **28 O. C. 212 : 87 I. C. 290 : A. I. R. 1925 Oudh 696.**

——S. 11—*Prior decision.*

When the *taluqdars* had brought their suit for resumption of *muafi* they had made plaintiffs and defendants 2 and 3 parties to it. Defendant No. 1 however had put in an application claiming as he claimed in this suit to be partner with plaintiffs and defendants 2 and 3. He was made a party but ultimately the decree was given only against plaintiffs and defendants 2 and 3. As regards the defendant No. 1 it was said that his name was not entered in the papers where he was recorded as a sub-tenant only. The question whether he was a partner was pronounced to be one for a Civil Court and he was discharged from the suit.

Held, in plaintiffs' suit, there is no *res judicata* here. What was decided by the Revenue Court was that the *taluqdars* were entitled to get the relief they sought from the plaintiffs whom they themselves had named, and who were the only ones entered in the revenue papers. There was a decision that Deft. No. 1 had no independent rights in these plots, but the Court refused to decide whether or not he had any partnership rights. (*Simpson, A. J. C.*) KHALIL *v.* MAHOMED ISMAIL. **9 O. L. J. 540 : 74 I. C. 195 : A. I. R. 1923 Oudh 101.**

——S. 11—*Prior decision—No finding in previous suit—Effect.*

An issue will not be *res judicata*, if, in the previous suit, there was no real finding. (*Hopkins, S. M. and Harrison, J. M.*) NARGOBIND *v.* JWALA PRASAD. **3 U. P. L. R. (B. R.) 51.**

——S. 11—*Prior decision—Wrong decision—Whether* res judicata.

A wrong decision in a previous suit bars a subsequent suit. A Settlement Court in deciding the question of title as between a mortgagor and his mortgagee lost sight of the fact that the mortgagor's right of redemption under the deed in suit had been taken away by proper foreclosure proceedings and declared the mortgagee to have acquired full proprietary rights in the property. *Held*, the decision operated as *res judicata*. 15 Cal. 800 (P.C.) Dist. (*Stuart and Kanhaiya Lal, A.J.Cs.*) TILAK CHANDA *v.* SHAMBHU SINGH. **7 O. L. J. 524 : 2 U. P. L R. (J.C.) 163 : 60 I. C. 404 : 23 O. C. 269.**

——S. 11—*Prior decision—Previous decision that holding was* bhauli *does not bar later suit for cash rent.*

The decision in a previous rent suit that rent was payable as *Bhauli* rent, does not operate as *res judicata* in a suit for the rent of the subsequent years at the cash rent system. The previous decision is merely presumptive evidence of the rent of future years and the presumption may be rebutted (*Ross, J.*) PARMESHWAR PRASAD *v.* NARSING RAI. **1 P. L. R. 109 : 72 I. C. 138 : A. I.R. 1924 Patna 371.**

Question of Law.

——S. 11—*Question of law—Question as to construction of documents.*

The vendors had failed to deliver possession to the purchaser and he was compelled to bring a suit. The plaintiff based his claim very clearly on his proprietary title as purchaser under the sale deed. The defendants in their written statement did not contest the nature of

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the deed as drawn, but pleaded however that the contract between the parties had been one of the usufructuary mortgage, and alleged that the plaintiff had fraudulently altered its terms and got a deed drawn up which did not represent the real contract between the parties. The suit was decided in plaintiff's favour. *Held*, it was doubtful whether this decree would operate as *res judicata* on the question whether the deed was a sale of mortgage, in a subsequent suit. (*Ryves and Daniels, JJ.*) BABU BISHAMBHAR NATH *v.* MUHAMMAD UBAID ULLAH KHAN. **45 A. 581 : 21 A. L. J. 503 : L. R. 4 A. 433 (Civ.) : 77 I. C. 572 : A. I. R 1923 All. 586.**

——S. 11—*Question of law decided in a particular way in previous suit—Law subsequently changed—Decision in the previous suit is not* res judicata *in a subsequent suit on the same question.*

Case must be decided upon law as it stands when the judgment is pronounced, and not upon what the law was at the date of a previous suit ; and if the said law has been altered in the meantime, and the effect of the law has been differently interpreted by the judicial decisions or altered by the statute, the decision on a particular question of law in an earlier suit would not operate as *res judicata* with regard to the same question in a subsequent suit. For instance, if in a previous suit it was held that a particular rate of interest in a *kabuliyat* was penal, but the law is subsequently changed, then in a suit for subsequent rent on the same *kabuliyat* the previous decision is not *res judicata*. 32 Cal. 749, Foll. 1 C. W. N. 687; 19 C. L. J. 34, and 31 Bom. 128, Dist. (*Greaves and Mukerjee, JJ.*) NABIN CHANDRA *v.* DUDA MIA. **30 C. W. N. 83 : 87 I. C. 767 : A. I. R. 1925 Cal. 1193.**

Representative suit.

——S. 11, Expln. VI—*Representative suit—Decision between Hindu widow and alleged adopted son regarding the ownership of the estate is binding on reversioners.*

A suit brought by widow in possession of the whole estate holding as widow's estate to challenge an alleged adoption is a representative suit and all persons having a common interest (namely, the reversioners in this case) must be deemed to have been represented through her under S. 11, Explanation 6 of the Code of Civil Procedure. (*Sulaiman and Kanhaiya Lal, JJ.*) SHIB DEO MISRA *v.* RAM PRASAD. **46 A. 637 : 22 A. L. J. 690 : A. I. R. 1925 All. 79.**

——S. 11, Expln. VI—*Representative suit—Suit against manager of family binds other members.*

Where a suit is either brought by or against a joint Hindu family, the other members of the family must be deemed to be parties to the suit through manager. 34 All. 549 ; 34 All. 572 Foll. (*Sulaiman, J.*) NAGINA RAI *v.* SANGAM RAI. **81 I.C. 737: A.I.R. 1925 All. 67.**

——S. 11—*Representative suit—Trustees—Suit by one trustee against others—Suit for protection of trust property.*

A decree obtained by one of the trustees on behalf of the trust against the other trustees either for a declaration that the property in dispute was trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust preperty is binding as much on the trustees who are parties to the suit as on all persons interested in the trust. 2 I. A. 145, 152 Ref. (*Sulaiman and Kanhaiya Lal, JJ.*) THAKUR SRI GAT ASHRAM NARAINJI *v.* JAISHTH MADHO ACHARIA. **22 A. L. J. 641 : L. R. 5 A. 410 : 80 I. C. 406 : 46 A. 651 : A. I. R. 1924 All. 504.**

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——— **S. 11, Expln. VI**—*Representative suit—Binding nature of suit.*

Where a suit is instituted in the interests of the whole estate and for the benefit of all persons who might come to inherit it, the decree in the absence of collusion or fraud has the effect of *res judicata* in a subsequent suit. (*Sulaiman, J.*) CHHAJU *v.* GOKUL. **75 I. C. 593 : A. I. R. 1923 All. 338.**

——— **S. 11, Expln. VI**—*Representative suit—Hindu Law—Alienation by widow—Nearest presumptive reversioner assailing alienation—Subsequent suit after widow's death between actual reversioner and alienee, if operates as* res judicata.

A suit by a reversioner for a declaration that an alienation made by a Hindu widow in possession is without legal necessity and inoperative beyond her lifetime, is brought by him not for his personal benefit but in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate and to remove an apprehended injury to the common interests of all the reversioners. A decree, in such a suit is, therefore, binding; if obtained after a fair contest and, in the absence of fraud and collusion, not only between the reversioner who brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in-title on the other. This is so, not because one reversioner must, in that case, be deemed to claim title through another but because the reversioner who sues represents the others and Explanation VI of S. 11 comes into operation inasmuch as the right claimed by the presumptive reversioner who sues is a right to demand that the estate be kept intact and free from danger during his enjoyment by the widow and is claimed in common for himself, and all the members of the reversionary body. (*Banerjee, Tudball and Sulaiman, JJ.*) KESHO PRASAD SINGH *v.* SHEO PRASAD. **44 A. 19 : 19 A. L. J. 749 : 3 U. P. L. R. (All.) 17 : 64 I.C. 248 : A. I. R 1922 All. 301 (F. B.)**

——— **Ss. 11, Expl. VI and 92** — *Representative suit—All persons interested in the subject-matter of a suit under S. 92 are bound by the decision in such a suit.*

A suit under S. 92 is a suit brought by the plaintiffs for themselves and as representatives of the general public. Under S. 11, Explanation VI, all persons interested in the subject-matter of such a suit would be bound by the decision in the suit if the provisions of the Explanation are satisfied. (*Newtould and Ghose, JJ.*) SYED ABU MAHOMED BARAKAT ALI *v.* ABDUR RAHIM. **80 I. C. 44 : A. I. R. 1925 Cal. 187.**

——— **S. 11**—*Representative suit--Reversioner bound by decree against widow.*

Decree passed against widow for a genuine debt due by husband binds the reversioners. (*Greaves and Cuming, JJ.*) SHASHI KUMAR *v.* CHANDRA KUMAR SAMMADAR. **35 C. L. J. 348 : 68 I. C. 322 : A. I. R. 1923 Cal. 204.**

——— **S. 11**—*Representative suit— Decree against Hindu widow—Reversioners are bound.*

The reversioner is bound by a decision against Hindu widow obtained on a fair trial and the decision operates as *res judicata* as regards the questions tried in that suit. (*Mookerjee and Buckland, JJ.*) PRAMATHA *v.* BHUBAN. **49 Cal. 45 : 25 C.W.N. 585 : 33 C.L J. 421 : 64 I. C. 980 : A. I. R. 1922 Cal. 321.**

——— **S. 11**—*Representative suit—Tenants-in-common—Decree against one*

A tenant can, under certain circumstances, so represent his tenancy that a decree against him by the landlord will bind all the persons interested with him in the tenancy. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BIBHABATI DEBI. **66 I. C. 433 (2) : 34 C. L. J. 302.**

——— **S. 11, Expl. VI**—*Representative suit*— Res judicata.

A suit by a reversioner to contest an alienation is one brought on behalf of all the reversioners who are bound by a decision therein. 38 Mad. 406 ; 39 Mad. 634; 41 M. 659, Foll. ; (*Martineau, J.*) BHARAT SINGH *v.* SHAFI MUHAMMAD. **79 I. C. 484 : A. I. R. 1925 Lah. 180 (1).**

——— **S. 11, Expl. VI** — *Representative suit — Dismissal of suit by certain reversioners for setting aside alienation by sonless proprietor bars another suit for the same purpose by other reversioners who had been co-defts. in previous suit.*

Where the plaintiffs as collaterals sued among other things to contest a sale of land and a previous suit for a similar declaration by nearer collaterals about this very sale in which the present plaintiffs were co-defendants was dismissed :

Held, that the suit was barred. (*Scott-Smith and Zafar Ali, JJ.*) KHAIR MUHAMAD *v.* UMAR DIN. **5 Lah. 421 : 84 I. C. 477 : A. I. R. 1925 Lah. 89.**

——— **S. 11**—*Representative suit—Decision that Will set up by a Hindu widow, under which she and her brother are joint legatees of her husband's property is genuine, does not bind the reversioners.*

Where a Hindu widow, in whom her husband's estate has vested, represents the estate in litigation, to which she is a party, the decision in such litigation, fairly and honestly conducted, given for or against her will bind the reversioners. [9 M. I. A. 53 (P. C.); 11 Cal. 186. (P. C.) ; and 40 All. 593 (P.C.) Foll.] The rule of *res judicata* as enacted in S. 11 of the C. P. Code is not strictly applicable, as the reversioners do not claim under the widow ; but the principle of *res judicata* applies. This rule can be applied only if the widow did, as a matter of fact, represent the estate in the prior litigation. The question, in each case, will be whether the estate was properly represented by the widow in the prior suit. If, for instance, she had litigated in assertion of an absolute right, inconsistent with her representative character, she could not, in any sense of the word, be said to have represented the estate, or the interest of the reversioners in such litigation, and a decision given therein, upholding such a contention of hers, would not obviously be held binding on them : [48 Bom. 869 : 43 Bom. 249 Foll.] Hence in contending that a Will alleged to have been left by the husband, was genuine and that she herself was a joint-legatee under it, along with her brother, she is not only not representing the estate or the interests of the reversioners in such litigation, but is setting up a case in direct opposition to their interests. It cannot, therefore, be held that the decision in the suit that the Will is genuine is binding on the reversioners. (*Wallace and Madhavan Nair, JJ.*) VIRASWAMI *v.* P. NAYUDAMMA. **49 M. L. J. 430 : 22 L. W, 78 : A. I. R. 1925 Mad. 1270.**

——— **S. 11, Expl. VI**—*Representative suit—Widow—Alienation—Suit by presumptive reversioner, challenging—Death of widow—Suit by actual reversioner for possession—If barred.*

Where a Hindu widow makes an alienation and a contingent reversioner files a suit for declaring the same to be invalid, the suit is a representative suit on behalf of all the reversioners and the decision therein is binding on all of them. Where such a declaratory suit is dismissed, a suit by the actual reversioner after

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the death of the widow for possession of the properties alienated is barred by *res judicata*. 36 M. 406; 41 M. 659; 44 All. 19; 49 Cal. 45 Foll. (*Wallace and Jackson, JJ.*) POHULA HUSSAIN REDDY *v.* VENKATA REDDY. **47 M. L. J. 545 · 20 L. W. 552 : (1924) M. W. N. 730 : A. I. R. 1925 Mad. 86.**

——S. 11—*Representative suit—Trust property represented — Decision in the suit is* res judicata *against representatives of trust in subsequent suit.*

When in a suit, where the trust is properly represented, after real and genuine contest, a decision is given, it is absurd to hold that persons not parties to the previous suit, although they may have an interest in the trust, can ask the matter to be re-opened and the question to be retried. (*Venkatasubba Rao and Madhavan Nair, JJ.*) NARSIMHA SURYANARAYANA *v.* A. LAKSHMINARASIMHAM. **49 M L. J. 746. 1926 M. W. N. 40 : A. I. R. 1926 Mad. 267.**

——S. 11—*Representative suit—Suit under S. 92, Civ. Pro. Code—Death of defendant—Application to appoint receiver—Court's remarks in proceeding on application about abatement of suit will not be* res judicata *in appeal from the order holding suit as abated.*

In an appeal against an order, declaring that the suit abated on account of the death of the defendant also tn respect of the prayer for a scheme for management under S. 92, an application was made for appointing a receiver. In the course of the hearing, the Court remarked that it was doubtful if on the plaint as it stood the suit had not abated. At the hearing of the appeal itself from the order:

Held, that the order on the receiver application was not *res judicata* because the decision was not necessary, and that there was really no decision on the question involved in the appeal. (6 All. 269 : 48 Cal 499 : A. I. R. 1924 P. C. 202, *Dist.* (*Phillips and Krishnan JJ.*) ARUMUGA THAMBIRAN *v.* NAMASIVAYA PANDARA SANNADHI. **48 Mad. 688 : 49 M. L. J. 324 : 22 L. W. 130 : 1925 M. W. N. 569 : A. I. R. 1926 Mad. 162.**

——S. 11, (Expln. VI)—*Representative suit—Joint Hindu family—Decree against father in respect of joint family properties—Sons if bound by the decree.*

When a suit is brought in respect of the family property, impleading the father as a defendant, the decree passed against the father binds the sons. The case of a managing member, other than the father, may perhaps stand on a different footing. But where there is a dispute about property, which is admittedly family property and when the father is made a party to the suit, it cannot be said that the father is made a party in his individual capacity and not as the manager of the family. Where there are a number of defendants having a common interest and the contest is carried on by some of them *bona fide* against the plaintiff, the decision is binding on all the defendants including those who were *ex parte*. 24 M. 689; 24 M. 658; 36 A 383; 30 M. 245 : 43 M. 487 Referred to. (*Spencer and Devadass, JJ.*) MEYYAPPAN SERVAI *v.* MEYYAPPAN AMBALAM. **46 M. L. J. 471 : 19 L. W. 484: 34 M. L. T 209 : A. I. R. 1924 Mad. 571.**

——S. 11, Expln. VI—*Representative suit—Hindu widow—Decision against—When binding on reversioners.*

Whether the widow represented the inheritance in a litigation against her may be gathered from the nature of the defence put forward and the issues raised, tried and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in a previous suit? Was it a claim by or against the widow personally or the inheritance which she represented? To decide these questions the Court must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them the widow must be held to be representing the estate; if not, the litigation must be deemed personal to her and not binding upon the reversioners. (*Spencer and Venkatasubba Rao, JJ.*) POTHUKUCHI RAJAGOPALAN *v.* V. RAMAMOORTHY. **18 L.W 491 · 73 I. C. 284 · A. I. R. 1924 Mad. 301.**

——S. 11, Expln. VI—*Representative suit—Rights claimed individually and in common with others—Decision when* res judicata—*Compromise decree.*

Where a prior suit was brought by four persons claiming to be trustees of a temple for recovery of certain lands belonging to the temple and the suit was compromised by two of the trustees and the compromise was found to be *bona fide*, *held*, that a subsequent suit by other persons for recovery of the same temple lands was barred by *res judicata*. It is not necessary to attract the operation of S. 11, Expln. VI, C. P. Code, that the former suit should have been instituted with the leave of the Court under O. 1, R. 8, C. P. Code. (*Ayling and Odgers, JJ.*) CHENRAYA GOUNDAN *v.* ATHAPPA GOUNDAN. **18 L. W. 177 : 75 I. C. 336 : (1923) M. W. N. 545 : A. I. R. 1924 Mad. 88.**

——S. 11, Expln. VI—*Representative suit—Leave under O. 1, R. 8, not obtained—Explanation applies.*

Explanation VI to S. 11 is not confined only to cases where leave of the Court has been granted under O. 1, R. 8. 43 M. 467 and 31 M. L. J. 26 Ref. (*Ayling and Odgers, JJ.*) CHENRAYA GOUNDAN *v.* ATHAPPA GOUNDAN. **18 L. W. 177 : (1923) M. W. N. 545 · 75 I. C. 336 : A. I. R. 1924 Mad. 88.**

——S. 11, Expln. VI—*Representative suit—Hindu joint family—Decision in suit for partition by one member of family operates as* res judicata *between all members.*

Where in a suit for partition by a member of a joint Hindu family all the members of the family are made parties and where all matters in dispute between the members of the family are decided, the suit must be regarded as a suit brought by the plaintiff in his representative capacity under Expln. VI, S. 11 of the C. P. Code and all matters decided in the suit operate as *res judicata* between the different members of the family. 32 All. 469 and 22 O. C 300 Foll. (*Dalal, J. C.*) NAGESHAR *v.* DARSHAN. **A. I. R. 1925 Oudh 506.**

——S. 11, Expln. VI—*Representative suit applies only where a common interest based on a common title is in good faith enforced or defended on behalf of all persons having such common interest—Manager of joint family cannot sue or be sued so as to bind rest of family, in respect of property inherited by collateral succession.*

In order to make Explanation VI of S. 11 applicable, there ought to be a community of interest claimed on the strength of a common title and the claim must have been made in good faith for the enforcement or defence of that common interest. The common interest may rest on the existence of a joint family, in which that interest is vested, or may rest on a joint title otherwise derived. Property inherited by right of collateral succession cannot be treated as joint family property in respect of which the manager as such could sue or

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be sued so as to bind the rest of the family. 20 O. C. 271, Foll. (*Kanhaiya Lal, J. C.*) HANSLA BAKSH SINGH *v.* RAJ BAKSH SINGH, **77 I. C. 1028 : A. I. R. 1925 Oudh 75.**

——**S. 11, Expln. VI**—*Representative suit—Scope.*

S. 11, Expl. VI applies to a common right asserted by certain persons on behalf of themselves and others, but not to rights which are not common but several and distinct. (*Kanhaiya Lal and Dalal, A. J. Cs.*) ZARIF-UN-NISSA *v.* SHAFIQ-UZ-ZAMAN.
26 O. C. 133 : 10 O. L. J. 535 : 75 I. C. 626: A. I. R. 1923 Oudh 185.

——**S. 11, Expln. VI**—*Representative suit—Suit against Hindu widow—Decree when binding on reversioners.*

When a Hindu reversioner brings a suit against a widow in possession of her husband's estate for a declaration that a will set up by her as having been executed by her husband is a forgery, the suit is brought by the reversioner to protect an interest common to the entire reversionary body. Expln. VI to S. 11, C.P. Code, is applicable and the decision if obtained after fair contest must necessarily bind all the reversioners and it is not open to the reversioner who may happen to be entitled when the succession opens to claim to have the matter reagitated. To hold otherwise would be to let in the very mischief which the Expln. was enacted to avoid. On grounds of public policy it would be highly mischievous that a question of fact which was decided after full contest as between the reversioners on the one hand and the widow on the other should be liable to be reopened as between other representatives of the same sets of rival claimants after a lapse of time. 38 M. 406 (P. C).; 39 M. 634 ; 19 A. L. J. 749; 40 A. 593 Relied on. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD. **9 O. L. J. 235 : 69 I. C. 730 : 25 O. C. 189 : A. I. R. 1922 Oudh 236.**

——**S. 11, Expln. VI**—*Representative suit.*

In a case in which the provisions of O. 1, R. 8 are not invoked by members of a community to enforce their right to worship, the decision would be binding on other members of the community. 35 All. 197 doubted. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) SADIQ HUSAIN *v.* KHAN BAHADUR HAKIM MIRZA. **9 O. L. J. 111 : A. I. R. 1922 Oudh 1.**

——**S. 11, Expln. VI**—*Representative suit—Malabar Tarwad—Suit by karnavan—Dismissal—Subsequent suit by junior members as Uralan—Bar.*

The karnavan of a tarwad brought a suit for the recovery of certain property on the ground that the tarwad was entitled to them as the heir of the last owner. The Court dismissed the suit on the ground that the last owner of the property followed the Makkathayam Law and that the plaintiff was not proper heir under that law. In a subsequent suit by the junior members of the tarwad for recovery of the property held by the last owner as Uralan, *held*, that the decision in the prior suit that the last owner followed Makkathayam Law and that therefore the plaintiff's tarwad was not the heir was *res judicata* and the present suit was therefore unsustainable. (*Schwabe, C.J. and Wallace, J.*) KOONAMVALLI UNNARA *v.* K. P. KUNHI RAMAN. **44 M. L. J. 443 : 72 I. C. 582 : 17 L. W. 322 : 32 M. L. T. 146 : A. I. R. 1923 Mad. 514.**

——**S. 11, Expln. VI**—*Representative suit—Malabar tarwad—Decision against—Decision of appellate Court operates as* res judicata.

A decree in a suit in which the karnavan of a tarwad is joined as a defendant in his representative capacity and which he honestly defends is binding on the other members of the family though not actually made parties. In considering the plea of *res judicata* it is the judgment of the appellate Court that has to be looked to. 20 M. 129 ; 3 C. 145 ; 9 L. W. 84, Ref. (*Spencer and Devadoss, JJ.*) ABUBAKKAR *v.* KUNHIKUTTYALI. **16 L. W. 768 : 31 M. L. T. 389 : 74 I. C. 27 : A. I. R. 1923 Mad. 153.**

C. P. CODE (V OF 1908), S. 13.

——**S. 11**—*Representative suit—Mortgage by Hindu widow of inalienable estate—Decree against her does not bar her heirs from contesting her right to alienate.*

Dawson Miller, C. J.—A Hindu woman cannot in a suit on a mortgage of the property executed by herself deny that she had power to alienate the property, and, therefore, the question of her power to alienate it is not in issue in the suit so as to bar it from being agitated by her heirs in a subsequent suit for possession after her death. (*Dawson Miller, C.J.*) HITENDRA SINGH *v.* RAMESWAR SINGH. **4 Pat. 510 : 87 I. C. 849 : 88 I. C. 141 : A. I. R. 1925 Pat. 625.**

——**S. 11**—*Representative suit—Suit by Hindu father for recovery of joint family land binds all co-parceners—Hindu Law—Joint family.*

All Hindu co parceners are bound by the result of a suit brought by a Hindu father for recovery of possession of joint family land. Such suit must be deemed to be a representative suit on behalf of all the co-parceners. (*Foster, J.*) HUKUM MAHTO *v.* SANT SAHO. **78 I. C. 19 : A. I. R. 1925 Pat. 308.**

——**S. 13**—*Foreign Court—Suit on judgment of—Plea of want of jurisdiction—Merits, if open.*

When a suit is brought in British India on a foreign judgment and a plea is brought forth that the foreign Court had no jurisdiction but it is found the defendants appeared and contested the claim, the plea is open. The general rule in such case is that one Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. (*Piggott and Stuart, JJ.*) GANGA PRASAD *v.* GANESHI LAL. **21 A. L. J. 890 : L. R. 4 A. 604 : 46 All. 119 : A. I. R. 1924 All. 161.**

——**Ss. 13 and 44**—*Court to which decree of foreign Court is transferred for execution can examine if decree was passed without jurisdiction.*

The provisions of S. 13 of the C. P. Code apply to decrees that are transferred to British Courts for execution under the provisions of S. 44. It is therefore open to the Court to which a decree of a foreign Court is transferred for execution to go into the question whether the decree is passed without jurisdiction. 39 Mad. 24 and 40 Bom. 551 Foll. (*Suhrawardy and Cuming, JJ.*) PANCHKARI MAJUMDAR *v.* GIRIDHARIMAL. **41 C. L. J. 508 : 89 I. C. 347 : A.I. R. 1925 Cal 955.**

——**S. 13**—*Foreign Court—Fraud—Effect of.*

Where the decision in a Foreign Court was obtained between the widow and the alleged son of the deceased, it must be held that the widow completely represented the estate and that any decision between the parties in that suit, provided there was a direct adjudication upon the point, is conclusive between them and between their successors-in-title, provided also that the judgment is not disqualified by any of the flaws set forth in S. 13 of the Code. But where the decision is obtained by fraud it is not *res judicata* between the parties. (*Le Rossignol and Martineau, JJ.*) GOOR BACHAN SINGH *v.* GIAN SINGH. **A. I. R. 1922 Lah. 175.**

——**S. 13**—*Foreign judgment—Submission to jurisdiction—Execution of power of attorney.*

C. P. CODE (V OF 1908), S. 13.

The execution of a power authorising an agent to conduct litigation in a foreign Court is a submission to the jurisdiction of that foreign Court and the decision of the foreign Court is binding on the parties. (*Phillips and Ramesam, JJ.*) ASANALLI NAGOOR MEERA *v.* MAHADU MEERA. **22 L. W. 820.**

——S. 13 (b)—*Foreign judgment—"Merits of the case".*

A decision cannot be said to be not given on the merits of the case because it was given *ex parte.* (*Phillips and Ramesam, JJ.*) ASANALLI NAGOOR MEERA *v.* MAHADU MEERA. **22 L. W. 820.**

——S. 13—*Decision* ex parte *is one on merits.*

In a case in which there is no appearance and a decree is passed *ex parte*, the decision is still a decision on merits. A. I. R. 1925 Mad 155, Foll (*Phillips and Ramesam, JJ.*) ASANALLI NAGOOR MEERA *v.* MAHADU MEERA. **22 L. W. 820.**

——S. 13—*Execution of power of attorney to defend suits in foreign Courts amounts to submission—Person submitting as plaintiff cannot deny jurisdiction as defendant.*

The execution of a power of attorney authorising an agent to conduct litigation in a foreign Court is a submission to jurisdiction. [37 Mad. 163 and A.I.R. 1925 Mad. 155 Ref.] A person who invokes the jurisdiction of a foreign Court as plaintiff cannot deny such jurisdiction as defendant. (*Phillips and Ramesam, JJ.*) ASANALLI NAGOOR MEERA *v.* MAHADU MEERA. **22 L. W. 820.**

——Ss. 13 and 44—*Judgment-debtor can object to execution on the ground that the decree is not conclusive—C. P. Code, S.* 44.

Ss. 13 and 44 should be read together, but it ought not to be forgotten that S. 13 merely lays down a rule of *res judicata* and has nothing to do whatever with the manner in which the rule of *res judicata* should be enforced. Further, S. 13 merely codifies the rules of international law, with regard to foreign judgments. Unless, therefore, under its provisions, a decree that is produced for execution is conclusive, as to the matter directly thereby adjudicated it cannot and ought not to be executed. The judgment-debtor in such cases is permitted by the very provisions of S. 13 to show how or why it is not conclusive, by showing that the case falls under one of the exceptions enumerated. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **21 L. W 330 : 86 I. C. 492 : A. I. R. 1925 Mad. 788.**

——S. 13—*Foreign Court—Submission to jurisdiction of—What amounts to—Power of attorney empowering agent to represent principal in litigation in that Court—Execution of—Effect—Foreign judgment obtained on merit—Judgment delivered* ex parte *if and when a—Notice of suit to the defendant—Irregular in service of, not a ground for attaching decree—Decision of foreign Court as to sufficiency of service—Conviction of—Presumption.*

The first defendant and his brother, who were trading in partnership in Ceylon, executed a power of attorney to R, empowering him to represent the principals in litigations either as plaintiff or as defendant. Under the provisions of that power, R appointed G as his sub-agent during his absence from Ceylon. A suit was filed on promissory notes against the first defendant, and notice thereof was served on G as first defendant's agent No appearance at all was put in on behalf of the first defendant, the case was allowed to proceed *ex parte*, and the suit was decreed. In a suit brought in British India against first defendant upon the judgment of the Ceylon Court. *Held*, (1) that the first defendant must, by reason of his having executed the power of attorney in favour of R, be deemed to have submitted to the jurisdiction of the Court of Ceylon; (2) that the judgment sued upon though delivered *ex parte*, was one obtained on the merits; (3) that the decision of the Ceylon Court that the notice of the suit to the first defendant was sufficient must be taken to be correct in the absence of any evidence to the contrary; and (4) that, if there was any irregularity in the service of the notice, that point could not be raised in British Indian Courts as a ground for questioning the validity of the foreign judgment. (*Phillips and Madhavan Nair, JJ.*) JANOO HASSAN SAIT *v.* MAHOMED OHUTHU. **47 M L. J. 356 : 47 Mad. 877 : 82 I. C. 425 : 20 L. W. 677 : A. I. R. 1925 Mad. 155.**

——S. 13—*Foreign judgment—Whether binding on a Court in British India—A step-in-aid of execution.*

Per Schwabe, C.J.—Where there has been a foreign judgment on a matter directly adjudicated upon between the same parties, under the section it is not open, whatever the High Court might have said in such cases, to an unsuccessful party to the application in the foreign Court, to contend that the law there is otherwise. (*Schwabe, C. J. and Wallace, J.*) SRINIVASA IYENGAR *v.* NARAYAN RAO. **43 M. L. J. 700 : 45 M. 1014 : (1922) M. W. N 647 : 16 L. W. 735 : A. I. R. 1923 Mad. 72.**

——S. 13 (a)—*Rules of international law govern—Submission to jurisdiction of foreign Court creates jurisdiction.*

The question whether a Court is a Court of competent jurisdiction should be determined not by the rules laid down in respect of the jurisdiction of domestic tribunals but by rules of international law. Under the rules of international law personal submission to the jurisdiction of a foreign Court gives that Court jurisdiction. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTY. **21 L. W. 330 : 86 I. C. 492 : A. I. R 1925 Mad. 788.**

——S. 13 (a)—*Submission to jurisdiction—Foreign Court.*

Execution of power of attorney in favour of another empowering him to conduct litigation in foreign Court amounts to submission to the jurisdiction of that Court and its judgment is binding on the executant (*Phillips and Madhavan Nair, JJ.*) A. JANNOO HASSAN SAIT *v.* S. N. MAHOMED OHUTHU. **47 M L. J. 356 : 47 Mad. 877 : 20 L. W. 677 : 82 I. C. 425 : A. I. R. 1925 Mad. 155.**

——S. 13 (b)—*Plaintiff's evidence taken despite plaintiff's default—Decision may be "on merits".*

Unless the judgment is given merely on default and in any case in which, in spite of the default any evidence is taken for the plaintiff, and judgment is given thereon, it may be difficult to say that it is not a decision on the merits. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **21 L. W. 330 : 86 I. C. 492 : A. I. R. 1925 Mad. 788.**

——S. 13 (b)—*Only when defence was raised and not adjudicated upon can the decree be said to be not on merits—Where defendant does not appear at all, decree should be held to be one on merits—Practice—Decision on merits.*

It is only when a defence has been raised and for some reason or other has not been adjudicated upon that the decision can be said to be not upon the merits. In other instances of *ex parte* decrees, they must be decrees passed upon the merits. Where no appearance at all was put in on behalf of the first

C. P. CODE (V OF 1908), S. 13.

defendant and the case was allowed to proceed *ex-parte*: *Held*, that it must be deemed to have been passed upon the merits. (*Phillips and Madhavan Nair, JJ.*) A. JANNOO HASSAN SAIT *v.* S. N. MAHOMED OHUTHU. **47 M.L.J. 356 · 47 Mad. 877 : 20 L. W. 677 : 82 I. C. 425 : A. I. R. 1925 Mad. 155.**

——— **S. 13 (d)**—*Irregular service of notice.*

Irregularity in the service of notice cannot be raised as a ground for questioning validity of foreign decree. (*Phillips and Madhavan Nair, JJ.*) A. JANNOO HASSAN SAIT *v.* S. N. MAHOMED OHUTHU. **47 M. L. J. 356 : 47 Mad. 877 : 20 L. W. 677 : 82 I C. 425 : A. I. R. 1925 Mad. 155.**

——— **S. 13**—*Foreign judgment— Submission to jurisdiction—What amounts to—Fraud—What is.*

Where a defendant applies to a foreign Court for an adjournment of the case and later applies to set aside an *ex parte* decree passed therein, he must be deemed to have submitted to the jurisdiction of the Court and cannot dispute the enforceability of that judgment. A fraud to vitiate a foreign judgment must be fraud practised on the defendant whereby he is prevented from defending the claim in the most advantageous manner. (*Kotval, A. J. C.*) MT. JANKI SETHANI *v.* LAXMINARAYAN. **89 I. C. 129 : A. I R. 1926 Nag 77**

——— **S. 15**—Prima facie *plaint determines jurisdiction except in cases where the result ousts the jurisdiction from the very start.*

Prima facie plaintiff's claim determines jurisdiction and the jurisdiction continues whatever be the result unless a different principle comes into operation to prevent such a result as to make the proceedings from the first abortive. Where therefore the trial Court found that the amount due to the mortgagee was above its jurisdiction and it accordingly returned the plaint · *Held*, the order was legal. (*Suhrawardy and Chotzner, JJ.*) SARODA SUNDARI BASU *v.* AKRAMANESSA KHATUN. **51 Cal. 737 : 28 C. W. N. 710 : 78 I. C. 747 : A. I. R. 1924 Cal. 783.**

——— **S. 15**—*Suit instituted in District Court—Valuation falling under Rs. 5,000 on enquiry—District Court has jurisdiction to continue hearing.*

It is imperative on the suitor under S. 15 to bring his suit in the Court of lowest grade. The word 'shall' in S. 15 is not imperative on the Courts and does not deprive the higher Court of its jurisdiction to try a suit triable by a Court of less pecuniary jurisdiction. 7 All. 230 (F. B.) Ref. (*Heald and Chari JJ.*) MAUNG SIT PAUNG *v.* MAUNG TUN. **4 Bur. L. J. 104 : A. I. R. 1925 Rang. 278.**

——— **S. 16**—*Proviso —'Defendant' includes all defendants.*

The word 'defendant' in the proviso to S. 16, C. P. Code, means all the defendants, where there are more than one defendant in the suit. 21 W. R. 303 Foll. (*Chatterjee and Panton, JJ.*) MAHOMED YASIN *v.* BIMOLA PRASAD MUKHERJEE. **73 I. C. 405 : A. I. R. 1924 Cal. 443.**

——— **S. 16**—*Transfer of place where subject-matter is situated to jurisdiction of different Court does not deprive Court, which originally entertained suit, of its jurisdiction to try it to conclusion.*

The jurisdiction of a Court consists in its power to entertain suits, and when once a suit has been properly entertained, the jurisdiction is not removed unless it is specifically so done by the order of a competent authority. Once the suit has been entertained, the remaining proceedings taken therein are not taken

C. P. CODE (V OF 1908), S. 17.

by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing the suit. Once the Court has seizin of the case it has jurisdiction to try it to its conclusion unless there is any reason for holding that that jurisdiction has been removed though the subject-matter of the suit may be transferred to another Court in the meanwhile. (*Phillips and Venkatasubba Rao, JJ.*) CHOKKALINGA PILLAY *v.* VELAYUDHA MUDALIAR. **47 M. L. J. 448 : A. I. R. 1925 Mad. 117.**

——— **S. 16**—*Mortgage decree—Suit for declaration of invalidity—Property within jurisdiction but decree obtained outside—If a suit for land.*

A mortgage decree was obtained in Benares, the lands being situated in Patna. A suit to declare the invalidity of the mortgage decree was instituted in Patna. *Held*, it was not a suit for land within the meaning of S. 16, C. P. Code. If an application to execute the decree had been put in that would constitute a cause of action within the meaning of S. 20, C. P. Code ; otherwise the lower Court has no jurisdiction to entertain the case (*Das and Macpherson, JJ.*) THE BENARES BANK, LTD. *v.* SURENDRA NARAIN SINGH. **A. I. R. 1924 Pat. 831.**

——— **Ss. 16 (d) and 20 (c)**—*Suit for declaration that a will is a forgery—Determination of right to immoveable property—Cause of action—Jurisdiction.*

A suit by a Hindu reversioner for a declaration that a will set up by the widow of the last male owner was a forgery and for its cancellation can be instituted under S. 20 (*c*), C. P. Code, in a Court having jurisdiction over any one of the places where any part of the properties dealt with by the will is situate. Such a suit is not one falling within S. 16 (*d*) of the C. P. Code. In a suit to set aside a will the plaintiff's allegation of interest and the threat to his rights are parts of his cause of action and where the properties are situate within different jurisdictions part of the cause of action arises under each jurisdiction. (*Krishnan and Venkatasubba Rao, JJ.*) NITTALA ACHAYYA *v.* NITTALA YELLAMMA. **43 M. L. J. 615 : 72 I. C. 920 : (1922) M. W. N. 834 : 16 L. W. 785 : A. I. R. 1923 Mad. 109.**

——— **S. 16 (e)**—*Suit for mesne profits—Land situated outside British India.*

A British Indian Court can entertain a suit to recover mesne profits of lands situated outside British India, against defendant residing within its jurisdiction. The proviso to S. 16 makes it clear that even although a wrong to immoveable property is alleged yet where the relief sought can be entirely obtained, through the defendant's personal obedience, then the suit can be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. (*Macleod, C. J. and Shah, J.*) MAHADEO *v.* RAMACHANDRA. **23 Bom. L. R. 903 : 46 B. 108 : 68 I. C. 510 : A. I R. 1922 Bom. 188.**

——— **Ss. 17 and 20**—*Cause of action—Sale of goods—Agreement to pay price and render account—Forum.*

Where a firm at Sialkot instituted a suit in the Sialkot Court against a commission agent carrying on business at Calcutta for sale proceeds of hides sent by the former to the latter for sale on commission, and it appeared that the money was to be payable at Sialkot and the accounts were to be rendered there, *held*, that the Court at Sialkot had jurisdiction to try the suit.

C. P. CODE (V OF 1908), S. 20—Accounts.

26 P. R. 1918 Ref. (*Broadway and Abdul Qadir, JJ.*) LAL SINGH *v.* HAJI KADIR BAKHSH.
3 Lah. L. J. 499 : 69 I. C. 424 : A. I. R. 1922 Lah. 36 (2).

——— —S. 20.
Accounts.
Cause of action.
Contract.
Debtor and Creditor.
Leave to sue.
Partnership.
Place of suit.
Residence.
Tort.

Accounts.

———S. 20 (c)—*Accounts—Principal and agent—Rendition of accounts—Forum.*

The plaintiff was a trader in grain at Bilsi in the district of Budaun in the United Provinces. The defendant was a commission agent at Bombay of the *pakka adatia* type corresponding to what is known in England as *del credere* agent, that is to say, an agent or factor who, being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to the plaintiff, his principal, the amount due after the accounts have been properly settled. The plaintiff brought a suit in Budaun for recovery of money alleged to be due from the defendant commission agent on account of profits on sales improperly retained by the defendant. *Held*, that the mere fact that payments had been made by post and statements of account sent by post to Budaun was not conclusive of the question of where payment ought, under the contract, to be made. The contract of agency having been made by correspondence and the defendant having agreed to act as plaintiff's agent by a letter sent from Bombay, the Budaun Court had no jurisdiction. Unless the contract clearly indicated the contrary, an agent of this kind who became a factor entrusted with the goods of his principal with wide powers has an eventual liability to account to his principal but the accounting must necessarily be done at the place where all the business is transacted. (*Walsh, A. C. J. and Neave, J.*) TIKA RAM *v.* DAULAT RAM. **46 A. 465 : 22 A. L. J. 591 : 80 I. C. 661 : L.R. 6 A. (Civ.) 9 : A.I.R. 1924 All. 530.**

———S. 20—*Accounts—Suit for, by principal against agent—Place where contract was made or performance was due or refusal to account took place is the place of suing.*

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place.

The plaintiffs were grain dealers at S. The defendants were commission agents doing business at K. The plaintiffs sent goods to the defendants to be sold by them as commission agents at K. They accepted the plaintiffs' drafts., paid money at their request and having sold the goods credited the amount realised to their account. Later on, the defendants at the plaintiffs' request purchased goods at K and sent them abroad according to the plaintiffs' directions to various constituents. The defendants purchased goods at K and despatched them to S. and in doing so they adopted the

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following procedure :—They drew money from the K branch of a certain Bank and handed over the railway receipts to the Bank which transmitted them to the S Branch to be handed over to the plaintiffs on payment of the price of the goods received. Sometimes the plaintiffs sent money to K and drew the same by means of hundies and *vice versa*. The defendants also used to draw hundis upon the plaintiffs. Shortly put, the defendants were put in funds by various ways, such as (*a*) actual remittance of money, (*b*) hundis sent by the plaintiffs drawn in favour of the defendants, (*c*) defendants drew upon plaintiffs and sold the hundis to the Branch at K, etc., etc. The plaintiffs instituted the suit on the following allegations :—That there were mutual dealings between the plaintiffs and the defendants and that the latter received from the plaintiffs by way of loan Rs..... out of which they paid Rs.....leaving a balance of Rs.....due to the plaintiffs. They further claimed a sum of Rs.....on account of the profits of the grain transactions.

Held, that it was a suit for an account by a principal against an agent and that the Court at S. had no jurisdiction to try the suit but that only the Court at K had the jurisdiction. (Case-law discussed.) (*Abdul Raoof and Jai Lal, JJ.*) RAM DAS UTTAM CHAND *v.* DHANPAT DIWAN CHAND.
6 Lah. 153 : A. I. R. 1925 Lah. 387.

———S. 20—*Accounts—Suit by principal to recover money from agent—Forum of suit.*

Where the principal and agent are carrying on business in different places, the former cannot call upon the latter to render accounts at his own place of business on the ground that goods were sent from such place, unless there was an agreement to that effect. A suit for money in such a place is not maintainable. (*Martineau, J.*) THE FIRM PRITHI SINGH JAMAYAT RAI *v.* THE FIRM HARSUKH DAS.
A. I. R. 1924 Lah. 593.

Cause of Action.

———S. 20—*Cause of action—Suit for refund of over-charge demanded by a foreign Railway—Cause of action partly at place where goods were consigned.*

Where the suit is for refund of over charge demanded from a consignee by a foreign Railway the cause of action arises in part at the place where the contract for carrying was made and so the Court at the latter place has jurisdiction to try the suit. (*Stuart, J.*) SRI NEWAS *v.* E. I. R. CO. **L. R. 6 A. (Civ.) 395 : 88 I. C. 575 : A. I. R. 1925 All. 823.**

———Ss. 20 and 21—*Cause of action—Suit for rent—Jurisdiction—Residence of defendant—Waiver of objection—B. T. Act, S. 144.*

Reading Ss. 20 and 21 of the C. P. Code together with S. 144 of the B. T. Act a suit for rent may be instituted in the Court within the local limits of the jurisdiction of which lies the property in respect of which a suit for possession may have been brought. This however does not exhaust all the provisions of S. 20, C. P. Code, cls. (*a*) and (*b*) of S. 20, C.P. Code allow a landlord to institute a suit for rent where the tenant resides. This must obviously be limited to cases where the landlord seeks a decree for money. Where, however, the landlord seeks a decree for rent as also ejectment under S. 66 of the B T. Act the suit must be treated as one for the recovery of immoveable property within the meaning of S. 16 (4) C. P. Code and can consequently be instituted in the Court within the local limits of whose jurisdiction the property is situate. A suit for the recovery of rents of lands situate in one district may be brought in another district

where the defendant is residing, although in such suits the plaintiff s title to the land in respect of which the rent is sought to be recovered may incidentally come in question. (*Mookerjee and Chotzner, JJ.*) KUNJA MOHAN CHAKRAVARTHY *v.* MANINDRA CHANDRA ROY CHOWDHURY.

27 C. W. N. 542 : A. I. R. 1923 Cal. 619.

——S. 20 (c)—*Cause of action—Collusive and fraudulent decree—Suit to set aside decree—Jurisdiction of Court*

Plaintiff obtained a decree against a person and attached his properties at Amritsar. The defendant who professed to have a decree of the Ferozepur Court against the same person got it transferred to Amritsar and applied for rateable distribution along with plaintiff. Thereupon the plaintiff sued for a declaration that the decree obtained by the defendant was fraudulent and collusive. *Held*, that the Amritsar Court had jurisdiction to try the suit 25 A. 48 : 37 A. 189 : 39 A. 607 Rel. (*Abdul Raoof, J.*) BALLA MAL *v.* JAGAN NATH.

72 I. C. 392 : A. I. R. 1924 Lah. 398.

——S. 20—*Cause of action—Jurisdiction—Carrying on business—Objection to jurisdiction.*

Where there has been no failure of justice an objection to the place of suing could not be entertained on appeal.

It is doubtful whether the mere letting of house property through an agent can be said to be carrying on business. A contract is concluded where it is accepted and the place of suit in respect of its breach is the place where it was concluded or the place where it ought to have been performed. The mere sending of a cheque from a particular place towards the contract does not give rise to a cause of action in that place. (*Campbell, J.*) SOHAN SINGH *v.* RIDDICK.

66 I. C. 865 : A. I. R. 1922 Lah. 164.

——S. 20 (c)—*Cause of action arising in part at a particular place—Jurisdiction of Courts to try the suit.*

In a case where plaintiff sent goods from Sialkot to defendant at Calcutta to be sold there and the money realised from the sale was payable at Sialkot, and the plaintiffs sued the Defendants for the money in Sialkot Court, *Held*, that the Court at Sialkot has jurisdiction to try the suit. 26 P. R. 1918 referred to. (*Broadway and Abdul Qadir, JJ.*) LAL SINGH *v.* FIRM OF HAJI KADIR. **3 Lah. L. J. 499 : 69 I. C. 424 : A. I. R. 1922 Lah. 36 (2).**

——S. 20 (c)—*Cause of action—Commission agent—Suit for price of goods entrusted—Jurisdiction—Offer, acceptance—Money intended to be paid to principal.*

The plaintiff, a permanent resident of a place within the jurisdiction of the District Munsif's Court of M, went to Madras where he and the defendant talked and settled about the commission to be paid to him. He told defendant in Madras that he would consign goods directly to him or to others who would be directed to deliver to him. Plaintiff sent goods to a firm at Madras with instructions to deliver them to the defendant. He also wrote to the defendant asking him to sell them and send the amount. The firm delivered the goods to the defendant, who wrote to the plaintiff stating that he would send the amount after selling the goods. In a suit instituted by the plaintiff in the Munsif's Court of M. to recover the price of the goods delivered to defendant as commission agent on behalf of plaintiff, *held* that the money was intended to be paid to the plaintiff at his native place, that part of the cause of action therefore arose within the jurisdiction of Court M., and that that Court had jurisdiction to try the suit. The making of an offer may be part of the cause of action, but this means not the posting of the offer but the receipt of the offer. The receipt of the acceptance when the contract is complete is a part of the contract. (*Ramesam, J.*) CHEMALAPATI VENCATA REDDY *v.* NATARAJA SETTI. **46 M. L. J. 371 : 19 L. W. 499: 34 M. L. T. 116 : (1924) M. W. N. 336 : A. I. R. 1924 Mad. 789.**

——S. 20 (c)—*Cause of action—Sale of goods by Calcutta Firm to Madras Firm—Payment of price by hundis—Suit for recovery of money overpaid—Forum.*

Plaintiff a firm of merchants carrying on business in Madras purchased goods from the defendants at Calcutta firm. The arrangement as regards payment of the price was that the money was to be paid by means of hundis drawn by the defendants on the plaintiffs. The hundis were to be presented at Madras along with the railway receipts for the goods. In the course of their dealings, the defendants drew a hundi in their favour for price of goods sold and endorsed it to a hundi broker in Calcutta. The hundi was eventually presented to the plaintiffs in Madras and paid off. The plaintiffs then sued the defendant at Madras for recovery of a sum of money alleged to have been overpaid by means of the hundi. On a question arising as to whether the Madras Court had jurisdiction to entertain the suit, *held*, that a part of the cause of action arose in Madras as the payment was made in Madras and that under S. 20 (*c*) of the Civil Procedure Code the suit was maintainable in the Court in which it was brought. Where a person outside Madras draws hundis, on a firm in Madras which under the contract, the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the hundi is negotiated by the drawer outside Madras but only when the payment is actually made by the firm in Madras on the hundi. (*Krishnan and Waller, JJ.*) PONNUSWAMI AIYAR AND NARAYANASWAMI AIYAR *v.* DAMODAR HUNSRAJ. **46 M. L. J. 82 : 47 Mad. 403 : 19 L. W. 168 : 34 M. L. T. 7 : (1924) M. W. N. 178 : 79 I. C. 800 : A. I. R. 1924 Mad. 464.**

——S. 20—*Cause of action—Fraud.*

Discovery of the fraud is not part of the cause of action. The cause of action is the fraud (*Schwabe, C. J. and Wallace, J.*) PARAMESWARA PATTAR *v.* VIYATHAN MAHEDEVI *alias* THE VALIA THAMBURATTI. **(1922) M. W. N 841 : 72 I. C. 982 : A. I. R. 1923 Mad. 272.**

——S. 20 (c)—*Cause of action—Meaning.*

The words 'cause of action' mean the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to obtain the relief he claims in the suit. (*Krishnan, J.*) NITTALA ACHAYYA *v.* NITTALA YELLAMMA. **16 L. W. 785: 43 M. L. T. 615: 72 I.C. 920: (1922) M.W.N. 834: A.I.R. 1923 Mad. 109.**

——S. 20 (c)—*Cause of action—Scope of.*

Where a person employs an agent to sell his goods in certain districts and in breach of their agreement he sold the goods in some of the districts through other agents, *held*, in a suit for damages for breach of contract, the sale through other agents was part of the cause of action and such a suit can be filed in the district where the wrongful sale took place. (*Oldfield and Ramesam, JJ.*) RAIPUR MANUFACTURING CO. *v.* VENKATA SUBBA RAO. **70 I. C. 284 : 14 L.W. 341.**

——S. 20 (c)—*Cause of action—What is—Goods sent for sale at place X—Suit for wrongful sale.*

The term 'Cause of action' means the whole bundle of relevant facts which a plaintiff must allege and prove to enable him to succeed.

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Where goods are sent to place *X* to be sold there and a sale takes place in contravention of instructions, a suit for damages will lie at place *X*. (*Baker, J. C. and Prideaux, A. J. C.*) FIRM JOHARMAL RUDMAL *v.* SUNDERLAL NARAYANDAS.
A. I. R. 1924 Nag. 308.

——**S. 20 (c)**—*Cause of action—Pledge—Forum.*

The place where the cause of action arises in respect of a pledge must be determined with reference to the terms of the original contract and not by subsequent negotiations thereafter. (*Kotwal, A. J. C.*) TEK CHAND *v.* MAHADEO. **65 I. C. 65 : A. I. R. 1922 Nag. 127.**

——**S. 20 (c)**—*Cause of action.*

Where several shops were owned by the plaintiffs and separate *Katas* were kept in respect of them but the transactions relating to one shop were with the defendant's consent entered in the accounts of the other shops and the whole set of transactions treated by the defendants in a cross suit filed by them as forming one cause of action and one account. *Held*, that the accounts in regard to each shop cannot properly be treated as entirely separate causes of action. (*Daniels, A. J. C.*) BANKE LAL *v.* KANHAIYA LAL. **A. I. R. 1922 Oudh 124.**

——**S. 20 (c)**—*Cause of action—Meaning of.*

A cause of action includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his rights to the judgment of the Court. (*Wazir Hasan, A. J. C.*) MAHOMED HAMIDDULLAH KHAN *v.* FAKHRJAHAN BEGAM.
8 O. L. J. 650 : 65 I. C. 452 : A. I.R. 1922 Oudh 109.

——**S. 20**—*Cause of action*—Lex loci.

The law of the place where a marriage is contracted determines the validity of a marriage. (*Robinson, J.*) MA TWE *v.* LWE HAIN. **22 Cr. L. J. 123 : 59 I. C. 555 : 13 Bur. L. T. 105.**

——**S. 20 (c)**—*Cause of action—Assignment—If part of—Vesting of properties in Official Receiver.*

Where on an order of adjudication, property of a firm vests in the Official Receiver, such vesting is part of the cause of action in a suit on behalf of the firm against a third party, inasmuch as such vesting has to be pleaded and if traversed, proved. "Cause of action" defined. (*Rupchand Bilaram, A. J. C.*) THE OFFICIAL RECEIVER *v.* NARAINDAS LOTARAM.
89 I C. 493.

——**S. 20**—*Cause of action—Conduct alleged as cause of action if determines forum.*

Where the plaint alleged that on account of defendants' dishonesty or negligent conduct and dereliction of his duty as agent, the plaintiff had suffered a loss. *Held*, the cause of action accrued at the place where the conduct complained of occurred. 6 S. L. R. 181 Dist. (1912) 1 S. L. R. 93 Foll. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF GHANDAJI KHUBAJI *v.* FIRM OF DEVJI LADHA
A. I. R. 1924 Sind 22.

Contract.

——**S. 20 (c)**—*Contract for delivery of goods—Breach.*

Where a contract was made in Bengal for delivery of goods in Bengal, the mere despatch of goods from a place in the United Provinces does not give rise to a cause of action enforceable in the courts of the United Provinces in respect of the breach of the contract. (*Ryves, J.*) PURNA CHAND AMIR CHAND *v.* JODH RAJ RAM KUMAR. **66 I. C. 501 : A. I. R. 1922 All. 448 (2).**

——**S. 20 (c)**—*Contract—Claim outside jurisdiction—Ancestral home of defendant within jurisdiction.*

Where a suit is brought on two contracts, one of which was entered into outside the jurisdiction of the Court, the portion of the plaint regarding that part of the claim was returned for presentation to the proper Court. *Held*, that the mere fact that defendants had their ancestral home within the jurisdiction of the Court though they actually resided outside such limits would not give the Court jurisdiction. (*Walsh and Wallace, JJ.*) KISHORI LAL *v.* RAM SUNDER.
64 I C. 688 (1) : 19 A. L. J. 822.

——**S. 20**—*Contract—Breach of—Property in thing purchased passing to vendee at one place—Price paid partly at another place—Vendee can sue at latter place for return of purchase money on ground of breach of warranty.*

Where a thing is purchased at *C.* and the property passes to the vendee, but where part of the purchase money is paid at *D.* to which place the article is sent, a Court at *D.* has jurisdiction to try suit by vendee for return of purchase money on the ground of breach of warranty by the vendor. (*B. B. Ghose, J.*) ADAM SAJAN & CO. *v.* ASUTOSH BANDOPADHYA.
A. I. R. 1926 Cal. 100.

——**S. 20 (c)**—*Contract—Breach of—Place of delivery—Not instituted in.*

The plaintiff firm residing in Gujranwalla arranged with defendant firm residing in Calcutta to purchase certain goods and send them to Gujranwalla ; the plaintiff-firm was to send the money to Calcutta to the defendant. The plaintiff remitted Rs. 800 to the defendant and the latter consigned the goods to itself in Gujranwalla, sending the railway receipt by value payable post for the balance of the price. The plaintiff refused to take delivery of the railway receipt through the value payable post and it was returned to the defendant. Subsequently it turned out that the goods were lost and the plaintiff sent the balance of the purchase price and asked for the delivery of goods. The defendants could not comply with the plaintiff's request. In a suit for damages instituted by the plaintiff at the Gujranwalla Court *held* that the goods had to be delivered under the contract at Gujranwalla, that the non-delivery formed a part of the cause of action and that the plaintiff's suit was maintainable in the Gujranwalla Court. 39 M. 195 ; 77 P. R. 1909 ; 65 I. C. 282 ; 43 A. 334 referred to. (*Scott-Smith, J.*) FIRM OF JAGANNATH DIWAN CHAND *v.* JAGANNATH MOTI LAL. **71 I. C. 38 : A. I. R. 1924 Lah. 349.**

——**S. 20 (c)**—*Contract for sale of goods—Place of delivery—Breach.*

Plffs. carrying on business at Amritsar brought a suit in the Court of Amritsar against a firm carrying on business at Bombay for damages for breach of a contract made in Bombay, to sell goods to plffs. *Held*, that delivery of the goods by the defts. to the Railway Company in Bombay for being despatched to Amritsar would, by S. 98 of the Contract Act, have operated as a delivery to the plaintiffs and the Railway Co. would have held the goods as agents of the plaintiffs, consequently no part of the cause of action arose at Amritsar. (*Martineau, J.*) NAND LAL DAS MAL *v.* MIAN MAHOMED ALI. **67 I. C. 188 (1) : A. I. R. 1922 Lah. 474 (2).**

——**S. 20**—*Contract—Place of suit—Contract Act, S. 2.*

Where plaintiffs from Ludhiana asked defendants at Gonda for quotations and the terms and the defendants by post card sent their terms and asked the plaintiffs to wire if they wanted goods and the plaintiffs did so.

C. P. CODE (V OF 1908), S. 20—Contract.

Held, the post card was only an invitation for an offer in the same way as a catalogue of goods sent out by any shop or business firm and not a proposal within the meaning of the Contract Act. The contract was completed at Gonda where the proposals were received by the wire acceptance signified and therefore was cognizable not by Ludhiana Court but by Gonda Court. (*Wilberforce, J.*) DURGA PARSHAD MUTSADDI LAL *v.* RULIA MAL. **4 Lah. L. J. 176 : 65 I. C. 282 : 29 P. L. R. 1922 : A. I. R. 1922 Lah. 100.**

——S. 20 (c)—*Contract—Cause of action—Place of payment.*

Where money payable to plff, is, according to the contract to be paid at one place but is made payable in another place owing to the plaintiff's own default, advantage cannot be taken of that fact to give plaintiff a choice of forum. (*Leslie Jones, J.*) FIRM OF DAMRI SHAH THAKUR RAM *v.* FIRM OF RULIA MAL DOGAR MAL. **17 P. L. R. 1922 : 64 I. C. 387 : 2 Lah. L. J. 555.**

——S. 20 (c)—*Contract—Sale of goods—Suit for price—Jurisdiction.*

Where according to the terms of a contract for sale of goods, the price is payable at a certain place, a suit for damages for breach can be maintained there. (*Kotwal, A.J.C.*) BOLTON *v.* HARJIWAN ULLABHJIVAN. **89 I. C. 181.**

——S. 20—*Contract—Refusal to take the delivery at Akola—Place of suing.*

The defendants had by wire ordered the plaintiffs to send to them at Akola certain bags of grain. The price was agreed to be paid at Khurai. The plaintiffs sent the bags by train to Akola and also sent the invoice, but as the defendants did not send the money they sent the Railway receipt to their own agent at Akola and gave a notice to defendants to take delivery of the goods and pay the money to the agent. As defendants failed to pay the money the plaintiffs ordered him to sell the goods. The goode were sold at a loss for which the plaintiffs brought the suit.

Held, that the breach of contract occurred at Akola, and therefore the cause of action arose wholly at Akola and the Court at Khurai had no jurisdiction. (*Baker, J. C.*) GANPATLAL *v.* BILASRAI RAMJIDAS. **A. I. R. 1924 Nag. 18.**

——S. 20 (c)—*Contract for sale of goods—Breach—Damages—Place of suit.*

The plaintiff was a resident of Yeotmal. The defendants carried on business in Bombay as commission agents. The plaintiff sent some bales of cotton to the defendants for sale in Bombay. He alleged that the defendants did not sell the bales on the day when they were instructed to sell them, that they described them as of a quality inferior to the real quality and that they thus failed to realise their proper value. He sued for damages occasioned by the defendant's conduct in the Court of the Subordinate Judge Yeotmal. *Held*, that suit was properly framed. (*Kotwal, A. J. C.*) CHAGAN LAL *v.* ABOOBAKAR ABDUL RAHMAN & CO., BOMBAY. **72 I. C. 465 : A. I. R. 1923 Nag. 167.**

——S. 20 (c)—*Contract—Cause of action—Performance of—Place where money is payable—Forum.*

The cause of action in suits arising out of a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suits relate was expressly or impliedly payable. (*Drake-Brockman, J.C.*) JODRAJ *v.* BYRAM. **7 N. L. J. 25 : 83 I. C. 309.**

——S. 20—*Contract—"Cause of action" meaning—Causes based on contract of insurance—Cause of action does not include damage to insured property.*

For the purposes of S. 20 of the Code, the words, 'cause of action' so far as suits on contract are concerned include the making of the contract and the performance or completion of the performance of the contract and the payment of money under the contract, and that in cases based on contract of insurance they do not include the loss or damage of the property insured, which is merely a cause of the cause, and is not even a proximate cause since the real cause of action is the failure to pay the money due under the contract and the primary cause of that cause is the contract itself, the destruction of the property being only a secondary cause which is purely accidental, being due merely to the nature of the particular kind of contract under consideration. The meaning of the expression "cause of action" in the section in question when applied to suits based on contract, should be ascertained by a consideration of the meaning of the expression in the past in the course of the development of such legislation in India and the case-law thereupon, and not by reference to any English decision on the construction of any English Statutes. (*Heald and Lentaigne, JJ.*) THE JUPITER GENERAL INSURANCE COMPANY, LTD. *v.* ABDUL AZIZ. **1 Rang. 231 : 76 I. C 482 : A. I. R. 1924 Rang. 2.**

——S. 20—*Contract—Suit for damages for breach of contract of sale of goods deliverable at Karachi though contract was made at Lyallpur can lie at Karachi.*

Cause of action consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have the right to traverse. In a suit for damages on a breach of contract the cause of action consists of the making of the contract and of its breach in a place where it ought to have been performed ; thus where the contract was to be completed at Karachi though made elsewhere, suit for damages can lie in Karachi. (*Kincaid, J.C. and Aston, A.J.C.*) KOOVERBHAN SUKHANAND *v.* LOUIS DREYFUS AND CO. **79 I. C 30 : A. I. R. 1925 Sind 132.**

——S.20—*Contract—Delivery at Karachi—Payment at Peshawar—Karachi Court has jurisdiction.*

Certain contracts for import of goods were executed at Peshawar and both the parties had their places of business there but one of them had also a branch office in Karachi. As to the mode of payment the contracts provided that the documents for the purchase of goods would come through a Bank, *i.e.*, the payment for the goods was to be made in Peshawar. The contract was for the sale and purchase of certain goods and the property in these goods passed under the terms of the contract to the applicants as soon as they arrived in the Karachi Harbour and the responsibility for any loss or damage to the goods was entirely theirs from that moment.

Held, that the parties contemplated the performance of the contracts in Karachi, a part of the cause of action therefore arose in Karachi and therefore Karachi Court had jurisdiction to entertain a suit in respect of the contract. 1 Lah. 22 Dist. (*Kennedy, J. C and Raymond, A. J C.*) FIRM OF KHALSA BROS. *v.* HARI RAM SRI RAM & CO. **17 S. L. R. 164 : A. I. R. 1924 Sind 29.**

——S.20—*Contract—Breach of—Arbitration Act, S. 11.*

J. K. Cawnpore firm sold at Cawnpore certain goods to S and Co. Karachi firm the goods being subject to inspection on arrival at Karachi in the presence of the seller's representative. There were

other terms giving the buyers the right after such inspection to reject the goods and recover the price or accept them with an allowance. J. K. failed to consign any goods. S. and Co. went to arbitration under an arbitration clause in the contract and sought to have the award filed in the District Court at Karachi.

Held, that the Court was bound by the decision in 6 S. L. R. 97 that as a suit would lie in Karachi at the instance of the buyers for breach of the contract part of which was to be performed by passing the goods in Karachi an application to file an award under S. 11 of the Arbitration Act lay in the District Court at Karachi.

(*Quaere*) Whether the part of the contract which was to be performed in Karachi was susceptible of individual performance in Karachi independently of the fate of another and distinguishable part of the contract *viz.*, to consign the goods under the railway receipt in the buyer's name and if not whether the buyers could have brought a suit in Karachi.

Whether in this respect 6 S. L. R. 97 does not require consideration. 18 I. C. 316, Ref. (*Kemp, A. J. C.*) MESSRS. C.H. PENNY *v.* MESSRS ATRAUSS AND CO., LTD. **64 I. C. 674 : 15 S. L. R. 74 : A. I. R. 1922 Sind 32.**

Debtor and Creditor.

——— **S. 20 (c)**—*Debtor and creditor—Suit for money lent—Jurisdiction—"Court within the local limits of whose jurisdiction the cause of action wholly or in part arises"—Borrower and surety resident in Hyderabad, Deccan—Lender's place of business in Secunderabad—Repayment out of borrower's monthly salary from Nizam's Treasury.*

In 1891, the Selladar of the Nizam's Prime Minister, Hyderabad, Deccan, borrowed Rs. 40,000 from a money-lender who carried on business at Secunderabad and executed a bond promising to repay the lender the said sum with interest at 1½ per cent. in the form of monthly payments of Rs. 1,000 by the Nizam's Treasury, Hyderabad. His Secretary also sent a corresponding letter to the Treasury authorising such payments by deductions from the Prime Minister's salary and also another letter to the lender to a similar effect.

On 30th March, 1904, the Minister's Private Secretary wrote a letter to the lender saying, *inter alia*, that "in future whatever money is received out of the saving will be sent to you every month from this office;" and on the 13th April, 1904, a letter to the Secretary of the "Office of Orders from Sarkar", wherein he stated that "it is also expedient that it may be settled by you what amount out of the saving of the feeding money of horses will be sent monthly towards payment to Bansilal."

In 1911, the lender instituted, in the Court of the Civil Judge, Secunderabad, a suit against the representative of the Silladar as the principal debtor, and the representative of the Prime Minister as surety for the recovery of the sums lent.

Held that, as the loan was contracted in Hyderabad and there was no promise, express or implied, by either defendant to pay at Secunderabad, the cause of action arose in Hyderabad, and the Court of the Civil Judge, Secunderabad was, therefore, not the proper forum for proceedings to recover the money under S. 20 (c) of the Code, 1908. (*Lord Blanesburgh*). FIRM OF RAI BAHADUR BANSILAL ABIRCHAND *v.* GHULAM MAHBUB KHAN. **49 M.L.J. 806 : A. I. R. 1925 P. C. 290.**

——— **S. 20**—*Debtor and creditor—Suit for price of goods or for recovery of money—Jurisdiction.*

Ordinarily, if goods are purchased or money is borrowed, the payment for the goods or repayment of the money must be presumed to have been agreed to be made at the place of residence of the seller or the lender as the case may be. (*Banerjee, J.*) BANGALI MAL *v.* GANGA RAM. **71 I. C. 431 : A.I.R. 1923 All. 465 (1).**

Leave to sue.

——— **S. 20**—*Leave to sue.*

Where leave to sue was sought for but refused under S. 20 the suit cannot go on with the defendants on the record when no permission was granted by the Court. (*Macleod, C. J. and Shah, J.*) MAHOMEDBHAI *v.* ADAMJI. **46 Bom. 229 : 23 Bom. L. R. 1086 : 64 I. C. 919 : A. I. R. 1922 Bom. 152.**

——— **S. 20 (b)**—*Leave to sue*—Ex parte *grant of.*

Leave to sue may be granted under S. 20 (*b*), C. P. Code, without previous notice to the defendant. (*Robinson, C. J. and Heald, J.*) THE INDO-BURMA OIL FIELDS *v.* BURMA OIL COMPANY, LTD. **64 I. C. 794 : 11 L. B. R. 26.**

Partnership.

——— **S. 20**—*Partnership—Carrying on business, explanation and meaning of.*

"Carrying on business" is used in S. 20, C. P. Code, as distinct from personally working; of course a man personally working in a particular place is carrying on business, but a man may carry on business and thousands of people do, in a place where he does no personal work of any kind, and a firm may be carrying on business at a particular place either through an agency or through a manager or by its servants without ever having left his own town of Delhi.

"Carrying on business" means, in the section having an interest in the business transactions at a particular place; a voice in what is done; a share in the gain or loss as the case may be; and some control, if not over the actual method of working, at any rate, upon the existence of the business. "Carrying on business" necessarily means making provision for the future.

Winding-up or disposing of goods with a view to winding-up, is just as much carrying on business while it lasts, as purchasing goods or investing capital in carrying on business. Selling of goods at a particular place is evidence of carrying on business there. Selling is the most important part of a business if any profits is desired to be made out of it. He still carries on business if with a view to winding-up his business and preventing any further losses and committing a breach of the Insolvency Law, he proceeds to dispose of his stock. (*Walsh and Wallace, JJ.*) KIRPA RAM SITA RAM *v.* MANGALSEN BISHAN MAL. **19 A.L.J. 696 : 3 U. P. L. R. (All.) 18 : 65 I. C. 93 : A. I. R. 1922 All. 367.**

——— **S. 20**—*Partnership carried on in foreign territory—Residence of defendant in British India.*

A suit for a dissolution of a partnership commenced and carried on in foreign territory is maintainable in British India if the plaintiff and the defendant were within the jurisdiction of the Court. (*Macleod, C. J. and Shah J.*) ISMAILJI HAJI HALIMBHAI *v.* ISMAIL ABDUL KADIR. **23 Bom. L. R. 543 : 63 I. C. 969 : 45 Bom. 1228.**

Place of suit.

——— **S. 20 (c)**—*Place of suit—Loan borrowed at S but repayable at H—Defendant residing at H—S. Court has no jurisdiction to try suit to recover loan.*

Where the loan was borrowed at *S*, but the defendants were residents of *H* and the loan was also repayable at *H* the Court at *S* has no jurisdiction to entertain a suit for recovery of the loan. (*Lord Blanes-*

burgh.) BUNSILAL AHIRCHAND *v.* GHULAM MAHABUL KHAN. **A. I. R 1925 P.C. 290 (P.C.).**

——S. 20—*Place of suit—False allegations—Abuse of the process of court*

Where in order to bring a suit within the jurisdiction of a court of a particular locality, the plaintiff makes false statements knowing them to be false that is a fraud on the court and the court would have no jurisdiction to entertain the suit. (*Mears, C. J and Banerjee, J.*) ABDUL GHAFUR *v.* NURUDDIN AHMAD. **71 I. C. 411 : 20 A. L. J. 984 : 45 All, 193 : L. R. 4 A. (Civ.) 28 : A.I.R. 1923 All. 137 (2).**

——S. 20—*Place of suit—Conditions to be fulfilled.*

S. 20 provides that a suit may be instituted within the local limits of whose jurisdiction each of the defendants, where there are more than one, at the time of the commencement of the suit, actually carries on business, and secondly in the alternative, within the limits of whose Jurisdiction any of the defendants at the time of the commencement of the suit, carries on business, provided that in such a case either the leave of the Court is given or a defendant who does not carry on business acquiesces in the suit being brought. (*Walsh and Wallace, JJ.*) KIRPA RAM SITA RAM *v.* MANGAL SEN BISHAL MAL. **19 A. L. J. 696 : 3 U, P. L. R. (All.) 18 : 65 I. C. 93 : A. I. R. 1922 All. 367.**

——S. 20—*Place of suit—Goods ordered by V. P. Post.*

Where A at Kasganj ordered goods of B at Delhi and the goods were sent by V. P. P. and on taking delivery A found that the parcel did not contain the goods ordered, whereupon he instituted a suit at Kasganj against B for damages, *held*, that the contract, though entered into at Delhi, was not completed till delivery was made and the goods paid for at Kasganj, that until such delivery and payment was made the goods remained the property of B at Delhi and that the Kasganj Court had jurisdiction to entertain the suit. (*Ryves and Gokul Prasad, JJ.*) RAM LAL *v.* BHOLA NATH. **42 All. 619 : 18 A. L. J. 749 : 59 I. C. 359 : 2 U. P. L. R. (All.) 254.**

——S. 20—*Place of suit—Suit for declaration that decree is void in the Court to which decree is transferred for execution.*

The defendants obtained a decree in the Small Cause Court of Calcutta. The suit was decreed *ex parte*. After obtaining the decree the defendants got it transferred to the Court of Subordinate Judge of Sylhet within whose jurisdiction the present plaintiffs resided and applied for execution of the decree against the plaintiffs. The plaintiffs thereupon instituted a suit in the Court of the Subordinate Judge of Sylhet for a declaration that the *ex parte* decree obtained by the defendants in the Calcutta Small Cause Court was obtained by fraud was void and not fit to be executed. They also applied for the issue of an in junction against the defendant No. 1 restraining him from executing the decree, *Held* the Court was entitled to issue an injunction and in order to grant relief it had the power to go into the question whether the *ex parte* decree was obtained by fraud in which case it would be inoperative. (*Chatterjee and Pearson, JJ.*) INDIAN PROVIDENT CO. *v.* GOVINDA CHANDRA DAS. **27 C. W, N. 359 : A. I. R. 1923 Cal. 425.**

——S. 20—*Place of suit—Cause of action--Hundi drawn in Cawnpore for acceptance and payment in Calcutta—Suit to recover sum paid.*

Where a Hundi drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid in Calcutta and the plaintiff sued to recover the sum so

paid, *held*, that as the cause of action, would not be complete unless he proved the fact that he had accepted the *Hundi* in Calcutta on the due date, part of the cause of action arose within the Ordinary Original Jurisdiction of the High Court of Calcutta. (*Sanderson. C J. Mookerjee and Fletcher, JJ.*) RAM CHUNDER GOURI SHANKER *v.* GANPATRAM BISWANATH. **59 I. C. 539 : 47 Cal. 583.**

——Ss. 20, 115—*Place of suit—Order as to—Revision.*

No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under S. 20 and each must be decided on its own merits. Ordinarily, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. Where the defendant is by law entitled to have the case tried at Patna it will be a grave injustice to him to insist on its trial in Jagraon in the Punjab which will put him to a very great expense merely because the trial Court has erroneously held that the Jagraon Court has jurisdiction. (*Moti Sagar, J.*) THE FIRM SITA RAM RAM DHAN *v.* THE FIRM BENARSI DAS PURAN CHAND. **77 I. C. 764 (2) : A. I. R. 1923 Lah. 565.**

——S. 20 (c)—*Place of suit—Suit to set aside* ex parte *decree obtained by fraud.*

A instituted a suit in Ferozepore against B, a resident of Lahore. The serving officer wrongly reported to the Court that B was evading summons, and an *ex parte* decree was passed against him. B, thereupon sued A in Lahore to set aside the decree on the ground of fraud, *held*, that the suit was maintainable inasmuch as, by the wrong report of the serving officer part of the cause of action arose in Lahore. 37 A. 189 F. (*Abdul Raoof, J.*) RAM LAL ISHER DAS *v.* SALIG RAM. **59 I. C. 2 : 7 P. W. R. 1921.**

——S. 20—*Place of suit—Applicability to High Court.*

The application of S. 20 to High Court in the exercise of its original jurisdiction is expressly excluded by S. 20, C. P. Code. (*Schwabe, C. J. and Wallace, J*) PARAMESWARA PATTAR *v.* VIYATHAN MAHEDEVI *alias* THE VALIA THAMBURATTI. **72 I. C. 982 : 1922 M. W. N. 841 : A. I. R. 1923 Mad. 272.**

——S. 20 (c)—*Place of suit—Contract to supply goods—Breach—Suit for damages at place where price was payable is maintainable.*

A suit for damages for the breach of a contract to supply goods can be brought at the place where the price is made payable under the terms of the contract 42 All. 619, Foll. (*Kotval, A. J. C.*) P. D. BOLTON *v.* HARJIVAN. **A. I. R. 1925 Nag. 408.**

——S. 20 (c)—*Place of suit—Decree transferred for execution—Suit to restrain execution—If can be filed in the executing court.*

Where a decree of one court is transferred to another court for execution, a suit for an injunction restraining execution can be filed in that Court as part of the cause or action arises there. (*Kinkhede. A. J. C.*) SULTANALI *v.* BALAJI. **A.I.R. 1924 Nag. 413.**

——S. 20—*Place of suit—Payment is due at creditor's place in absence of express or implied specification.*

Where the parties have not expressly or impliedly agreed on any place of payment, the creditor is entitled to be paid at his own place. Defendant selected some articles at *A* and ordered them to be sent to *B*. where he promised to purchase such of them as should be selected by his wife. The articles were accordingly sent to *B* and out of them some were selected by the defendant and the others with the price for the articles selected, were sent to *A*. After

C. P. CODE (V OF 1908), S. 20—Residence.

this, further consignments were also to *B. Held* that there was an implied contract to pay at A and that the Court at A had jurisdiction to try a suit for the balance of the price. (*Kendall, A. J. C.*) RAJA MOHANNUO MUMTAZ ALI KHAN *v.* LALA GANGA PERSHAD. **82 I. C. 122 · A. I. R. 1925 Oudh 209.**

Residence.

——S. 20—*Residence within notified area—Liability to taxation of traders.*

In every case residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year one would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of traders carrying on business outside their native place their place of residence is manifestly the place where they earn a living and do their daily work nor does that place cease to be their residence because for purposes of rest or recreation or family ties, they occasionally return to the family home where they and their families have been brought up. (*Mears, C. J. and Piggott, J.*) THE MUNICIPAL BOARD OF BARIELLY *v.* HAFIZ ALA BAKSH. **22 A. L. J. 457 : L. R. 5 All. 363 : 79 I. C. 67 (2) : A. I. R 1924 All. 669.**

——S.20 (a)—*Residence—"Carries on business"—Personal presence or effort.*

In S. 20 (a) of the Code 'carrying on business' is used as distinct from personally working. It does not involve personal presence or personal effort: It means having an interest in a business, a voice in what is done, a share in the profit or loss and some control upon the business. (*Walsh and Wallace, JJ.*) KRIPA RAM *v.* MANGAL SEN. **19 A. L J. 696 : 3 U P. L R. (All.) 18 : 65 I. C. 93 : A. I. R. 1922 All. 367.**

——S. 20—*Residence—Carrying on business at a place.*

Where the defendants had no permanent office at Amritsar but there was only a travelling agent residing at that place who secured orders for them and forwarded them to the Head Office at Calcutta, but he had no power to enter into any contract or to receive any on behalf of he defendants. *Held*, that the defendants cannot be said to be carrying on business at Amritsar. (*Moti Sagar, J.*) FIRM OF HIRA NAND MURLIDHAR *v.* FIRM OF GURMUKH RAI. **73 I. C. 205 : A. I. R .1923 Lah. 427.**

Tort.

——S. 20—*Tort—Agency for purchasing goods—Damages for agent's negligence.*

The plaintiffs at Karachi sent a telegram to their commission agent in the United Provinces to buy and send them certain specified goods. In respect of goods sent, the plaintiffs sued for damages for the agent's negligence at Karachi *Held*, the cause of action arose in U. P. and the suit was not maintainable at Karachi. Sending of quotation cards, or catalogue of price of goods is not an offer but only an invitation for offer. (*Rupchand Bilaram, A. J. C.*) FIRM PREMJI MULJI *v.* FIRM OF TARACHAND THAWER DAS. **A. I. R. 1924 S nd. 64.**

——S. 21—*Failure of justice—Conduct of party during the suit.*

An objection as to territorial jurisdiction raised before App. Court must be determined on merits as without determining it, it is not possible to ascertain whether there has been a failure of justice, in considering which, the conduct of one or other party during the suit itself ought to be considered. (*Walsh and Ryves, JJ.*) LACHHA RAM *v.* VIRJI. **19 A. L. J. 305 : 62 I. C. 399 : 3. U. P. L: R. (All.) 9.**

C. P. CODE (V OF 1908), S. 21.

——S. 21—*Interpretation—Consent.*

The provisions of S. 21, C.P. Code are an exception to the well established rule that where the Court has no inherent jurisdiction over the subject-matter of a suit its decree is a nullity even though the parties may have consented to the jurisdiction of the court. This exception cannot be so interpreted as to have a wider application than what is justified by its terms. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits when these are submitted to him. This however can be accomplished only when the parties have expressly consented to such a procedure. (*Mookerjee and Chotzner, JJ.*) KUNJA MOHAN CHAKRAVARTHY *v.* MANINDRA CHANDRA ROY CHOWDHURY. **27 C. W. N. 42 : A. I. R. 1923 Cal. 619.**

——Ss. 21 and 44—*Execution of foreign judgments—S. 21 does not apply—C P. Code, S. 44.*

S. 21 cannot be construed, as either legislating for foreign tribunals or codifying any rules of international law. The section has no application to cases of foreign judgments sought, under the provisions of S.44, C. P. Code, and on the strength of the notification in the Gazette of India by the Governor-General in Council, referred to in that section to be executed in British Indian Courts. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **86 I. C. 492 : 21 L. W. 330 : A. I. R. 1925 Mad. 788.**

——S. 21—*Appellate Court should not reverse decree on ground of jurisdiction only unless plea was raised at the earlier stage and appellant was prejudiced—Jurisdiction—Suits Valuation Act, S. 11—Practice—Plea.*

The question of jurisdiction should be raised in the Court of first instance and it should be given effect to by the appellate Court only when prejudice is caused by the trial in the first Court. (*Krishnan and Waller, JJ.*) A. CHELMAYYA *v.* A. LAKSHMI DEVAMMA. **79 I. C. 857 : A. I. R. 1925 Mad 171.**

——S. 21—*Suit to set aside decree passed without territorial jurisdiction is excluded by waiver of objection to jurisdiction—The principle underlying the section* viz. *that of waiver of jurisdiction is also applicable to a separate suit to set aside a decree passed without jurisdiction.*

Per *Venkatasubba Rao, J.*—The section in terms refers to the disallowing of the objection to jurisdiction by an appellate or revisional Court. But the principle is of general application and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. The principle underlying S. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the appellate and revisional Court but cured entirely and for all purposes. The section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. (*Phillips and Venkatasubba Rao, JJ.*) CHOKKALINGA PILLAY *v.* VELAYUDHA MUDALIAR. **47 M. L. J. 448 : A. I. R. 1925 Mad. 117.**

——S. 21—*Transfer of territorial jurisdiction—Effect on pending proceedings—Objection—Waiver—Appeal.*

In a suit on a mortgage an application for the appointment of a Receiver *pendente lite* was made.

C. P. CODE (V OF 1908), S. 21.

Issues were framed in the case and afterwards the application for a receiver was heard. Before delivery of judgment on the application the territorial jurisdiction of the Court was transferred by a notification of the Government and vested in another court. In spite of this the former court proceeded to deliver judgment appointing a Receiver, without any objection to its jurisdiction being taken by the parties. The defendants appealed against the order appointing a Receiver on the ground, *inter alia* that the Court ceased to have jurisdiction over the cause at the time when the order was made. *Held*, that S. 21, C. P. Code, governed all cases of want of territorial jurisdiction and that the appellants not having taken objection to the passing of the lower court's order must be held to have waived objection on the ground of want of jurisdiction and could not raise the same objection on appeal especially as there had been no failure of justice. (*Odgers and Wallace, JJ.*) RAMANI *v.* NARAYANASWAMI AIYAR. **47 M. L J. 192 : 34 M. L. T. 275: 20 L. W. 467 : A. I. R. 1924 Mad. 697.**

——**Ss. 21 and 37**—*Execution proceedings—Order for delivery of immoveable property after transfer of territorial jurisdiction—Objection to jurisdiction not raised in the first Court, if can be allowed on appeal.*

Pending an application for execution by delivery of possession of the properties decreed, the territorial jurisdiction of the court over the properties was taken away and vested in another Court. Notwithstanding this the court passed an order for delivery of the properties without any objection by any of the parties. Subsequently on appeal from the order of the court it was contended that the court had no jurisdiction to order delivery. *Held* that the judgment-debtor having waived all objection to territorial jurisdiction in the lower court could not be allowed to raise it on appeal. The objection being one of form and not of substance the appellate court would not allow it to be taken for the first time 43 M. 675 (F. B.) Ref. (*Spencer and Devadoss, JJ.*) MANAVIKRAMAN *v.* ANANTHANARAYANA AIYAR. **46 M. L. J. 250 : 19 L.W. 16 : (1924) M. W. N. 38 : 79 : I. C 806 : A. I. R. 1924 Mad. 4 7.**

——**S. 21 and O. 41, R. 23**—*Remand by appellate Court—Jurisdiction to try.*

The jurisdiction of the Court trying a remanded case depends entirely on the order of remand. Where therefore, the High Court remanded a case for trial by the Munisif's Court of Madura Town *held*, that the Court of Madura Taluk, which was a different Court altogether had no jurisdiction to deal with it or pass any orders in it. Neither S. 21, C.P. Code, in terms nor any principle underlying it is applicable to the case. (*Krishnan, J.*) URHUMAN AMMAL *v.* NAINA MAHOMED ROWTHER. **44 M. L J. 238 : 17 L. W. 355 : (1923) M. W. N. 194 : 32 M. L. T. (H. C.) 276 : 72 I. C. 314 : A. I R. 1923 Mad. 351.**

——**S. 21**—*Limits of applicability.*

In order to satisfy the court under S. 21 of the C. P. Code it is necessary to show not merely that the suit was decided wrongly but that its being decided wrongly was in some measure due to its having been instituted in a court of wrong local jurisdiction. (*Daniels, A, J. C.*) BANKE LAL *v.* KANHAIYA LAL. **A. I. R. 1922 Oudh 124.**

——**Ss. 21 and 99**—*Local jurisdiction—Place of suing—Objection—Prejudice.*

Before an objection to the local jurisdiction of a Civil Court can be given effect to, prejudice to the applicant in revision must have been pleaded and

C. P. CODE (V OF 1908), S. 22.

proved. (*Foster, J*) THE INDIAN GENERAL NAVIGATION & RY. CO., LTD. *v.* FIRM OF DAULAT RAM CHATURBHUJ. **2 Pat. L.R. 74 : 30 I.C. 745 : A. I. R. 1924 Pat. 527.**

——**S. 22**—*Application not presented at earliest opportunity must be rejected.*

The language of S.22 is mandatory and an application under the section not presented at the earliest possible opportunity must be rejected. (*Zafar Ali, J.*) SHIV DATT *v.* PANDIT MOTIRAM. **88 I.C. 531: 7 Lah. L.J. 93: A.I.R. 1925 Lah. 322 (1).**

——**S. 22**—*Provisions are mandatory and application should be made at or before settlement of issues.*

The provisions of S. 22, Civil Procedure Code, are mandatory and an application under the section must be made in a case where issues are settled, at or before such settlement is made. (*Broadway, J.*) FIRM BEHARI LAL KANHAYA LAL *v.* OFFICIAL RECEIVER INSOLVENT ESTATES, LAHORE. **78 I. C. 608 : A. I R. 1925 Lah. 175.**

——**Ss. 22, 23 and 24**—*Transfer—Grounds for—Transfer to Original Side of the High Court.*

The right of a plaintiff to institute a suit in a court in which the law permits him to sue should not be interfered with by the High Court in the exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the defendant would not be subjected if the suit were brought in another competent court. The mere fact that it would be more convenient to the defendant to have the suit tried in another forum is no ground for the transfer Ss. 22 and 23, C. P. Code, do not provide for the transfer of a case from a court subordinate to one High Court to the Original Side of another High Court. 12 C. W. N, 446 dist I. Pat L. T. 389 Ref. 27 M, L. J 645 approved. 44 A. 278 Ref. (*Campbell, J.*) PRAGJI SOORJI & CO., BOMBAY *v.* KALU MAL SHORI MAL & CO.. **69 I. C. 772 : A. I. R. 1924 Lah. 306.**

——**Ss 22 and 23**—*Mere inconvenience is not sufficient ground—Whether sufficient grounds exist depends upon the facts of each case.*

On the ground of mere inconvenience a suit ought not to be transferred under Ss: 22 and 23, because the plaintiff has a right to choose his own forum and it is for the Court to see in each case whether there are good grounds for exercising the discretion to transfer the case. (*Abdul Raoof, J.*) RAMJI DAS *v.* FIRM BRIJI LAL JAGAN NATH. **A. I. R. 1924 Lah. 304.**

——**Ss. 22 and 23** -*Transfer of case—Principle guiding.*

The plaintiff has always a right to choose his forum with this right. The jurisdiction conferred by Ss. 22 and 23, C P Code, is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. The mere fact that it would add to the defendant's convenience to have a transfer is no ground for transferring a case (*Shadi Lal, C.J.*) PANDIT ROOP CHAND *v.* GOKAL CHAND. **73 I. C. 860 : A. I. R. 1924 Lah. 249.**

——**Ss. 22 and 23**—*Balance of convenience.*

Where the dealings all took place at Karachi, the persons from whom goods were bought and to whom goods were sold, by the petitioners were at Karachi, and all the accounts relating to the dealings in question were at Karachi, *Held*, the balance of convenience was greatly in favour of the case being tried at Karachi. (*Martineau, J.*) BANARSI DAS *v.* KISHI LAL. **72 I. C. 592 : A I. R. 1923 Lah. 383.**

——**Ss. 22 and 23**—*Transfer of suit—Choice of forum.*

It is only when a suit may be brought in one or

C. P. CODE (V OF 1908), S. 22.

other of two courts, both of which have jurisdiction that an application can be made under Ss. 22 and 23 of the C.P. Code. Where the jurisdiction of one Court is denied an application for transfer under these sections cannot lie. 12 A. L. J. 986 followed. (*Abdul Qadir, J.*) THE NATIONAL ENGINEERING CO. *v.* THE RATTAN ENGINEERING CO. **71 I. C. 268 : A. I. R. 1923 Lah. 288 (2),**

——Ss. 22 and 23—*Plaintiff having option of choosing forum—Transfer—Convenience and expense.*

Under the terms of a promissory note the plaintiff had the option of suing in one of two places and he exerised his option by filing a suit in one place. The defendant applied to have it transferred to the other, on the ground the plaintiff himself was living there and that it would be more convenient for the parties and the witnesses who lived nearer that place. *Held*, it was a fit case for transfer. (*Neave, A. J. C.*) DUTT *v.* PANDIT SHEO BALAK PANDEY.

10 O. & A. L. R. 108 : 11 O. L. J. 377 : A. I. R. 1924 Oudh 410.

——S. 23 (3)—*"Subordinate," meaning of.*

For the purposes of transfer applications of suits from the Original Side of the High Court the Judge sitting on the original side is subordinate to the appellate side of the High Court. (*Robinson, C. J and Duckworth, J.*) V. F R. N. V. E. RAMANATHAN CHETTY *v.* V. E. R. M. N. R. RAMANATHAN CHETTY. **1 Bur. L. J. 194 · 11 L. B. R. 446 : A.I.R. 1923 Rang. 22.**

——S. 24—*"Suit" includes execution proceedings.*

The word "suit" in S. 24 will include execution proceedings. A particular execution application can be transferred under the section. (*Walsh, Ag. C. J. and Dalal, J.*) MUHAMMAD HABIBULLAH *v.* SETH TIKAM CHAND. **85 I. C. 746 : 47 All 57 : L. R. 6 A. Civ. 103 : A. I. R. 1925 All 276 (2).**

——S. 24—*High Court—Evidence concluded in one Court.*

In a suit concerning land dispute, a court which really had no territorial jurisdiction went into the case elaborately, made local inspections and recorded evidence fully, when the defect was found out. Then the plaint was returned to be presented to the proper Court. *Held*, it was a proper case in which under S. 24, the High Court should send it for disposal to the first Court itself. (*Piggott and Walsh, JJ.*) NAND RAM *v.* HIRA DEVI. **21 A. L. J. 86 : L. R. 4 A. 311 : 73 I. C. 495 (2) : A. I. R. 1923 All. 249.**

——S. 24—*Transfer—Notice not issued—Order illegal.*

An order of transfer cannot be passed without notice to the opposite party. If such an order is passed, it is without jurisdiction and can be set aside in revision. (*Mukerji, J.*) DE MELLO *v.* NEW VICTORIA MILLS CO. LTD. **L. R. 6 All. 555 : 23 A. L. J. 948 : 90 I. C. 287 (2) : A. I. R. 1926 All. 17.**

——S. 24—*Grounds for transfer—Transfer of suit from one province to another—Balance of convenience.*

When a litigant applies for the transfer of a case from one province to another the court will insist on his making out a strong case of the balance of convenience. 14 A. L. J. 242 Rel. 17 A. L. J. 371 not foll. (*Piggott and Walsh, JJ.*) INAYAT-ULLAH KHAN *v.* NISAR AHMAD KHAN. **44 A. 278 : 65 I.C. 782 : L. R. 3 A. 97 : 20 A. L. J. 118 : A. I. R. 1922 All. 65.**

——S. 24 and O. 41, R. 23—*Jurisdiction—Case remanded by High Court to Dt. Court—Power of Dt. Judge to transfer case.*

Under S. 24 a Dt. Court to which an appeal has been remanded by the High Court for disposal has power to transfer it to the Court of the Additional Dt. Judge unless the High Court's order was drawn up in express terms so as to disclose a clear intention of limiting those powers. (*Piggott and Walsh, JJ.*) RAJKALI *v.* GOPI NATH NAIK. **44 A. 211 : 20 A. L. J. 44 : 66 I.C. 317 : A. I. R. 1922 All. 35.**

C. P. CODE (V OF 1908), S. 24.

——S. 24—*High Court in insolvency jurisdiction cannot withdraw insolvency proceedings pending with a Sub-Judge in the presidency—Presy. Towns Insol. Act* (1909), *S.* 18.

The High Court in the exercise of its insolvency jurisdiction has no power to order a withdrawal of the proceedings in insolvency from the Court of the Subordinate Judge in the presidency to itself. [39 *Bom.* 604 *Appr.*] But in the exercise of the jurisdiction of the High Court in insolvency a Judge invested with that jurisdiction has power under S. 18 to stay any suit or other proceeding pending against the insolvent in a District Court or Subordinate Judge's Court in the Presidency which is subject to the superintendence of the High Court. 1922 Bom. 390 Expl. and Dist. (*Taraporewala, J.*) NAGINLAL MAGANLAL *v.* GUNVANTRAI DHIRAJLAL. **49 Bom. 788 : 27 B.L.R. 1207: A. I. R. 1925 Bom. 543.**

——S. 24—*Transfer—Refused by District Judge—Powers of High Court.*

Quaere—Where the District Judge has refused to transfer a case under S. 24 whether the High Court can exercise its concurrent jurisdiction under the same section. (*Suhrawardy and Cuming, JJ.*) SOROJ BASHINI DEBI *v.* GIRIJA PRASHAD.

87 I. C. 170 : A. I. R. 1926 Cal 326.

——S. 24—*Two suits raising same issues instituted in two different Courts—The suits may be ordered to be tried together.*

Where *A* filed a suit against *B* on a hand note and *B* filed another suit against *A* in another Court for accounts but both the suits dealt with a common issue.

Held: that both suits should be ordered to be tried together. (*Suhrawardy and Cuming, JJ.*) SOROJ BASHINI *v.* GIRIJA PRASAD. **87 I. C. 170 : A. I. R. 1926 Cal. 326.**

——S. 24—*Suit dismissed by Small Cause Court—High Court directing restoration of suit—New Judge in Small Cause Court—Value of suit exceeding his jurisdiction—Suit transferred to another Court—Latter Court has small cause jurisdiction regarding the suit—Provincial Small Cause Courts Act, S.* 35.

A Small Cause Court is established first and the Judge of that Court is appointed afterwards. Therefore, the Court does not cease to exist if at any time there should be no Judge to preside over it. Suits can be instituted in the Court even if there should be no Judge appointed for the time being. The suits so instituted would remain in the Court until they are withdrawn therefrom. A Small Cause Court dismissed a suit. The High Court in revision directed the Trial Court to re-entertain the suit. In the meanwhile a new officer came to be the Judge in the Trial Court and he was invested with Small Cause Court powers. But the value of the suit exceeded the limits of his pecuniary jurisdiction. The District Judge transferred the suit to another Court.

Held: that the Court to which the suit was transferred had small cause jurisdiction with regard to the suit. (*Martineau and Zafar Ali, JJ.*) JOGI PERSHAD *v.* AMIR BAKSH **88 I. C. 139 : 26 Punj. L. R. 308 : A. I. R. 1925 Lah. 561.**

——S. 24—*Order of transfer without notice to other party can be set aside in revision.*

Section 24 of the C. P. Code requires the

C. P. CODE (V OF 1908), S. 24.

Court to issue notice to the parties before it makes an order for transfer otherwise than of its own motion and an order of transfer made without notice to the other party can be set aside in revision and on the application of one party. (*Martineau, J.*) LABHU RAM *v.* KARTA RAM. **78 I. C. 614 : A. I. R. 1925 Lah. 189 (1).**

——— **S. 24**—*Grounds for transfer — Reasonable apprehension.*

It is true that a reasonable apprehension on the part of a litigant should receive consideration when a transfer is applied for but at the same time the apprehension must be such as a reasonable man might reasonably be expected to have. (*Broadway, J.*) KHWAJA AHAD SHAH *v.* MT. AYSHAN BEGUM. **77 I. C. 762 : A. I. R. 1923 Lah. 564.**

——— **S. 24**—*Notice—Transfer without notice is ground for setting aside* ex parte *decree.*

It is always usual to issue notices to the parties informing them that a case has been transferred from one court to another and in the absence of such a notice a party may well plead that he did not know in what court he had to appear. (*Moti Sagar, J.*) GANGA RAM *v.* GUJARMAL. **84 I. C. 238 : A. I. R. 1923 Lah. 444.**

——— **S. 24**—*Grounds for transfer—Adverse decision on a point of law in a connected suit.*

The fact that a judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case in which the same point arises. (*Martineau, J.*) FIRM OF JAI NARAIN BABULAL *v.* THE FIRM OF JOHRI MAL CHUNNA MAL OF DELHI. **67 I. C. 228 : 3 Lah. 296 : A. I. R. 1922 Lah. 369.**

——— **S. 24**—*Powers of transfer—Limitations.*

A superior court has no jurisdiction to direct the transfer of a case from a court subordinate to it to another court which is outside its jurisdiction. In such a case it is even doubtful whether it can direct the former court to return the plaint to be returned for presentation to another court outside its jurisdiction. (*Baker, J. C.*) TOPAN HARJI & CO. *v.* SINGHAI DALCHAND. **A. I. R. 1924 Nag. 152.**

——— **S. 24**—*Notice to opposite party—Transfer of case—Necessary.*

There can be no question that a District Judge should give notice to the other side when dealing with a transfer case on the application of one of the parties and not *suo motu.* His failure to do so is certainly an irregularity. (*Ashworth, J. C.*) KARIM BAKHSH *v.* ABDUL HUQ. **26 O. C. 62 : 74 I. C. 249 : A. I. R. 1923 Oudh 240.**

——— **S. 24**—*Grounds for transfer—Balance of convenience.*

A plaintiff has an undoubted right to bring his suit in any court which has jurisdiction but there is no particular sanctity to be attached to this right. If the defendants can show a clear balance of advantage in the way of convenience and expense they are entitled to have the case transferred. (*Ashworth J. C. and Simpson, A. J. C.*) THAKUR NARAINDRA BIKRAM JIT SINGH *v.* SHEO RATAN THAKURAIN. **9 O. L. J 413 : 69 I. C. 717 : 4 U. P. L. R. (O.) 112 : A. I. R. 1923 Oudh 30.**

——— **S. 24**—*Transfer of suit—Choice of forum—Plaintiff's right to.*

A plaintiff is entitled to file his suit in the Court having jurisdiction to try it and the convenience of the defendant is not a ground for transfer of the suit. (*Sharfuddin and Roe, JJ.*) RAJAKALANAND SINGH *v.* MAKSUDAN JHA. **2 Pat. L. R. 111 (Cr.)**

——— **S. 24 (4)**—*Court of Small Causes—Transfer of suit to regular jurisdiction—Appeal.*

Where a suit instituted in a Small Cause Court is transferred for trial by the District Judge to a Court not invested with such powers, there is no appeal from the decision of such court. The suit remains a small cause one in spite of the transfer. 38 M. 25 ; 27 C. L. J 461 ; 31 B. 314 (F. B.) Foll. (*Coutts and Adami, JJ.*) BHAGWAN DAS *v.* KESHWAR LAL. **1 Pat. 696 : 69 I. C. 681 (2) : 4 Pat. L. T. 259 : 1 Pat. L. R. 186 : A. I. R. 1923 Pat. 49.**

——— **S. 25**—*Judicial Commissioner of Coorg—Transfer of suit to High Court—Trial on the Original Side—Appeal.*

Where a case is transferred under S. 25, C. P. Code by the Governor-General in Council from the Court of the Judicial Commissioner of Coorg to the Original Side of the High Court of Madras and the suit is tried by the High Court, an appeal lies. (1913) A. C. 546 applied. (*Schwabe, C. J. and Odgers, J.*) KONGANDRA APPAYYA *v.* KONGANDRA KUTTAPPA. **(1922) M. W. N. 830.**

——— **S. 26**—*Plaint—Presentation at private residence of Judge is valid.*

The presentation of a plaint after the usual court hours at the private residence of the Judge is valid. A Judge has jurisdiction to receive the plaint at his residence and after the Court hours, though he is not obliged to do so. 34 A. 482 Relied on. (*Dhobley, A. J. C.*) MADHORAO *v.* MANOHAR LAL. **65 I. C. 674 : A. I. R. 1922 Nag. 167 (1).**

——— **S. 27**—*Suit duly instituted—Meaning of—Dismissal of suit for non-payment of deficit court-fee—Review without notice to other side not illegal.*

A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficit court fees not having been put in within the time fixed by the Court, the suit was dismissed. Thereafter on an application for review, the order of dismissal was set aside without any notice to the defendant and time was granted for putting in the deficit court fee :

Held that at the time the order of dismissal was set aside, there was no opposite party on whom the notice could be served, as the summons in the suit had not yet been issued on the defendant and as, until the suit was registered, the suit could not be said to have been duly instituted. The order of dismissal passed at that stage of the case, can be reviewed without notice to the defendant. 8 W. R. 304 and 14 M. L. J. 7 Ref. 43 C. 178 Appl. (*Newbould, J.*) SURENDRA PRASAD LAHIRI *v.* ATTABUDDIN AHMED. **26 C. W. N. 391 : 69 I. C. 43 : A. I. R. 1922 Cal. 234.**

——— **S. 83**—*Decree should conform to judgment—C. P. Code, O. 20, R. 6.*

The Code is clear in insisting that the decree which is drawn up by the Court shall be in accordance with the judgment. (*Walsh, A. C. J. and Ryves, J.*) BALGOBIND *v.* SHEO KUMAR. **22 A. L. J. 791 : L. R. 5 A. (Civ) 545 : 82 I. C. 184 : 46 All. 864 : A. I. R. 1924 All. 818 (2).**

——— **S. 33**—*Party need not apply for having a decree drawn up and need not apply for a copy till it is drawn up—Limitation Act, S. 12.*

There is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal. (38-B. 331, *Foll.*) Nor is there any obligation on the parties even to apply for a copy of the decree until the Court drew it up (13 C. P. L. R. 78, Dissent.) (*Kinkhede, A. J. C.*) PANDU *v.* RAJESWAR. **20 N. L. R. 131 : 78 I. C. 996 :**

C. P. CODE (V OF 1908), S. 34.

A. I. R. 1924 Nag. 271.

——S. 34—*Discretion of Court—Interest.*

Under S. 34 of the C. P. Code, the Court has a discretion as to the rate of interest to be awarded after the institution of the suit till judgment and where the courts below had awarded 8 per cent. the Privy Council refused to interfere. (*Viscount Haldane,*) PANNAH LAL *v.* NIHAL CHAND. **43 M. L. J. 66: (1922) M. W. N. 376: 26 C. W. N. 737: 16 L. W. 80: 36 C. L. J. 5: 24 Bom. L. R. 971: 31 M. L. T. 129: 67 I. C. 423: 30 P. W. R. 1922: 2 P. L. R. (P.C.) 1922: A. I. R. 1922 P. C. 46 (P.C.)**

——S. 34 *Interest—Liability to pay after period fixed for redemption.*

Where in mortgage by conditional sale the mortgagor covenanted to pay interest till the date fixed for payment after which the mortgagee was to become the absolute owner of the property and there was nothing expressed in the document to provide for payment of interest after the due date in case the mortgagee did not institute foreclosure proceedings, *held*, that having regard to the terms of the whole document, its general tenor implied an obligation on the part of the borrower on the making of default to be liable for subsequent interest at the rate mentioned in the bond. 19 A. 39; 20 A. 171; 25 C. 246 Ref. (*Mears, C. J. and Piggott, J.*) MAHADEO PRASAD *v.* RAJADHIRAJ SINGH. **44 A. 772: 77 I. C. 122: L. R. 3 A. 536: 20 A. L. J. 752: A. I. R. 1923 All. 7.**

——S. 34—*Interest subsequent to date of plaint—Discretion of Court.*

The award of interest after institution of a suit is in the discretion of the Court. Where throughout the dealings between the parties compound interest was charged and the total amount of such interest exceeded one-third of the amount of the claim, *held*, the Court would be justified in refusing future interest. (*Mears, C. J. and Banerjee, J.*) BHAGWAN BAKSH *v.* DAMODARJI JOSHI. **42 All. 230: 59 I. C. 20: 18 A. L. J. 100.**

——S. 34—*Interest on damages.*

Where a party improperly delays the ascertainment of damages for a long time he should be penalized by awarding interest from date of suit. (*Marten, J.*) COORLA SPINNING AND WEAVING MILLS CO., *v.* VALLABHDAS KALLIANJI. **27 B. L. R. 1168: A. I. R. 1925 Bom. 547.**

——S. 34—*Decree for partition and for accounts—Section does not apply.*

Where the decree is not for a definite sum of money but is one for accounts and for partition it does not fall under S. 34 and sub-S. (2) does not apply. (*Marten and Fawcett, JJ.*) KESARLAL GIRDHARLAL *v.* JOGUBHAI HIRALAL. **49 Bom 282: 27 B. L. R. 226: A. I. R. 1925 Bom. 406.**

——S. 34—*Mortgage suit—Interest allowed from date of suit only so as to make interest equal to capital—Interest also allowed in case of default in payment from date fixed for payment—Award of interest was held proper.*

There is a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit. Where the lower Court allowed interest after the date of the suit so as to make the total sum decreed for interest equal to the amount of the principal and then allowed further interest in case of default, on the total sum from the date fixed for payment under the decree up to actual realisation at 6 p. c.

Held; that plaintiff had no particular claim on the Court to award him any further amount and that the award of interest was proper. (*Macleod, C. J. and Coyajee, J.*) ACHYUT NARAYAN KHARE *v.* RAMCHANDRA KESHAV UKIDVE. **87 I. C. 719: 27 B. L. R. 492: A. I. R. 1925 Bom. 362.**

C. P. CODE (V OF 1908), S. 34.

——S. 34—*Interest on mortgage is payable at contract rate,* pendente lite *unless rate is excessive or transaction unfair — Usurious Loans Act, S. 3—C. Pr. Code, O. 34, r. 2.*

Unless the Court finds that the rate of interest stipulated in the contract is excessive or that the transaction is substantially unfair, the Court is bound to award to a mortgagee interest at the contract rate during the period the suit has been pending and up to the date fixed for payment. (*N. R. Chatterji and Graham, JJ.*) JOGENDRA NATH ROY *v.* N. MURTAZA BEGUM. **29 C. W. N. 118: A. I. R. 1925 Cal. 268 (2).**

——S. 34—*Interest—Damages—Breach of contract.*

Under S. 34, C. P. Code, the Court has a discretion to award interest on damages for breach of contract from the date of suit up to the date of decree but the court should state its reasons for so doing. (*Sanderson, C. J. and Richardson, J.*) PANNALAL SAGORE *v.* MUKHRAM RADHA KISSEN. **39 C. L. J. 77: 80 I. C. 87: A. I. R. 1924 Cal. 637.**

——S. 34—*Contract rate—Rate excessive.*

The mere finding that the rate of interest in a mortgage bond is excessive, is not sufficient reason to refuse interest at the contract rate. (*Newbould and Buckland, JJ.*) DINESH CHANDRA SHAH *v.* SAFER ALI MANDAL. **60 I. C. 693.**

——S. 34—*Suit for money representing depreciation in value of goods supplied—No interest claimable.*

In a suit for recovery of money representing the depreciation in the value of goods supplied, no interest can be claimed during the pendency of the suit as the amount is neither 'debt' nor sum certain within S. 1 but only unliquidated damages. (*Mookerjee and Fletcher, JJ.*) CREWDSON *v.* GANESH DAS HARI BUX. **60 I. C. 288: 32 C. L. J. 239.**

——S. 34—Post diem *interest—Damages—Measure.*

Where there is no express stipulation for the payment of interest after the due date, the mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties. There is no rule of law making the contract rate necessarily the measure of damages, and the Court has discretion to reduce the rate if it is found to be unusual. 17 All. 511 (P.C.); 3 Lah. 200. (F.B.) Ref. (*Scott-Smith and Fforde, JJ.*) BUDHU RAM *v.* NIAMAT RAI. **4 Lah. 406: 75 I. C. 375: A. I. R. 1923 Lah. 632.**

——S. 34—*Discretion of Court—Interest—Interest not asked for in the plaint can be awarded—C. P. Code, O. 7, R. 7.*

Having regard to the provisions of O. 7, R. 7 of the Code the Court has discretionary power to grant interest under S. 34 of the Code in a suit for money, although interest was not specifically asked for in the plaint. (*Broadway and Abdul Qadir, JJ*). RUP RAM *v.* HARPHUL. **64 I. C. 896: 2 Lah. 256.**

——S. 34—*Court can award interest up to the date fixed for redemption even where Damdupat rule is applied at the date of suit.*

Under S. 34 a Court has discretion in the matter of allowing in a redemption suit interest from the date of suit to the date fixed for redemption even in cases where the rule of Damdupat applied at the date of suit 1922 Nagpur 155 Foll. (*Kinkhede, A. J. C.*)

C. P. CODE (V OF 1908), S. 34.

WILAYAT ALI KHAN *v.* MAROTI. **78 I. C. 632 ; A. I. R. 1925 Nag 193 (2)**

——**S. 34** —*Court may in proper case award interest under S. 34 though it has ceased or is not, due for any reason—Interest—Damdupat.*

The very fact that it is within the discretion of the Court to award interest or not, and to fix the rate of interest makes it manifest that it is a statutory power which does not relate back to the contract nor comprise the enforcement of any part of the contract between the parties. The law recognizes that in claims for money there may be considerable delay between the institution of the suit and the realization of his money for which delay the plaintiff may not be responsible. If the money is carrying interest by contract till the date of payment then probably no interest under S. 209 (new S. 34) will be allowed but merely interest under the contract. But if the money carried no interest *ab initio* or for any reason had ceased to carry interest from and after the date of suit or some earlier date, then the Court may in a proper case apply S. 34 Where interest had ceased on account of rule of damdupat even before institution of suit. *Held*, that the Court had the power of applying S. 34. (*Kinkhede, A. J. C.*) MOTI LAL PRAMLAL *v.* RENI. **78. I. C. 711 : A. I. R. 1924 Nag. 348.**

——**S. 34**—*Rate of interest, a question of fact.*

The question of the rate of interest is a matter to be decided on the facts of each case. (*Baker, J.C.*) DAULATRAM *v.* GULABCHAND.

76 I. C. 131 : A. I. R. 1924 Nag. 346.

——**S. 34** —*Co-sharer —Demand.*

There is certainly no ground for granting interest where a co-sharer makes no demand for his share of the profits. (*Batten, J. C.*) MAKUNDRAM *v.* SRI KRISHNA.

19 N.L.R. : 24 : 73 I. C. 142 : A.I.R. 1923 Nag. 197.

——**S. 34**—*Discretion to be exercised reasonably.*

The Court must use its discretion reasonably in granting interest. (*Jwala Prasad and Ross, JJ*) MICHU MISSIR *v.* BALBHADRA PRASTI. **62 I.C. 116 : 2 Pat L.T. 147**

——**Ss. 34 and 151**—*Damages or interests as damages by way of restitution—No jurisdiction to allow in cases where interest not awarded by the decree.*

The Court has no inherent jurisdiction under S. 151, C. P. Code, to award interest or damages in lieu of interest on the decretal amount from the date of decree where no interest has been specifically awarded by the decree. A decree-holder is not entitled in execution proceedings to interest by way of restitution under S. 144, C.P. Code, in cases where the decretal amount has never in fact been realised, though he will be entitled to such restitution on amounts realised and reimbursed to the opposite party for the period he was kept out on the use of the money. (*Lentaigne and Carr, JJ.*) MAUNG PE *v.* MA HINT.

3 Bur. L. J. 58 : 82 I. C. 427 : A.I.R. 1924 Rang. 275.

——**S 34 (2)**—*Decree silent as to interest—Effect*

Where a decree is silent with respect to interest, the court should be deemed to have refused it. (*Spencer and Devadoss, JJ.*) AMBI *v.* PUDIA KOVILAGATH SRIDEVI. **45 M.L.J. 687 : (1923) M.W.N. 763: 18 L.W. 686 : 33 M.L.T. 101 (H.C.): 75 I.C. 566 : A.I.R. 1924 M. 102.**

——**S. 34**—*Interest cannot be claimed unless written notice demanding it is given.*

Where a plaintiff has not served any written notice of demand on defendant intimating that he would charge interest the defendant is not liable to pay the same. (*Kinkhede, A.J.C.*) SARJABAI *v.* YUDESA. **90. I.C. 58 : A.I.R. 1926 Nag. 64.**

C. P. CODE (V OF 1908), S. 35.

——**S. 34**—*Interest should not be refused without proper reasons.*

Although the award of interest pending suit is discretionary with the court it should not ordinarily be refused in the absence of proper reasons. 23 C.W.N. 336, Foll. (*Wadegaonkar, A. J. C.*) RAMDHAN *v.* PURUSHOTTUM. **88 I C. 699 : A.I.R. 1926 Nag 109.**

——**S. 35**—Contribution—Costs. *See* CONTRIBUTION.

——**S. 35**—*Respondent lodging a case but absent at hearing—Appeal dismissed—Costs up to lodging should be allowed.*

When respondents lodge a case, but do not appear at the hearing and the appeal was dismissed with costs, the costs should be paid to respondents down to the lodging of the case. (*Mr. Ameer Ali*) GAJADHAR MAHTON *v.* AMBIKA PRASAD TEWARI.

49 M L.J. 238 : 41 C.L.J. 450 : 27 B.L.R. 853 : 87 I.C. 292 : L.R. 6 P.C. 126 : (1925) M.W.N. 532 : 47 All. 459: 22 L.W. 306: A.I.R. 1925 P.C. 169. (P.C.).

——**S. 35**—*Costs—Party in an advantageous position—Equity.*

A property was leased to the Appellant on condition that the lease could not be cancelled for three years, the term of the lease the property was sold to the lessee. A creditor or rather the Receiver of his estate got the sale set aside in the High Court. He had not appeared to support the decision set aside in Privy Council *Held* ; if for commercial reasons it suited the lessees to accept the order of the Chief Court to hold the premises, during the remainder of their lease and then get out of what might by reason of changes in commerce be a bad bargain they were in a position to do so by abandoning their appeal. If on the other hand it suited them as apparently it had suited them, to re-establish their sale in this case they had only to bring their case to hearing. In these circumstances there was no hardship in making them bear their costs of the appeal to His Majesty. (*Lord Phillimore*) BEHARI LAL BULAKI RAM *v.* KUNDAN LAL.

32 M. L. T. 15 : 69 I. C. 356 : A. I. R. 1922 P. C. 361 (P. C.).

——**S. 35**—*Costs—Co-defendants—Contribution—Right of when excluded.*

Where several defendants have different antagonistic and exclusive defences there is no contribution in the absence of special contract to the contrary. (*Ryves and Stuart, JJ.*) PARSOTTAM DAS KOLAPURI *v.* LACHMI NARAIN. **L. R. 3 A. 507 : 20 A. L. J. 890 : 45 A. 99 : A I. R. 1923 All. 67**

——**S. 35**—*Divorce.*

Even although a wife's defence fails or her counter charges break down or she has been proved guilty of adultery the husband has to pay her costs. (*Walsh and Stuart, JJ.*) PATRICK NORMAN DWYER *v.* HARRIET MARY CECILIA DWYER.

A. I. R 1922 All. 243.

——**S. 35**—*Costs—Independent action for costs—Damages too remote—No action lies.*

A claim cannot be maintained for damages which are too remote. An independent action cannot be maintained to recover the balance of costs over and above that awarded by the Court which tried the matter. If under any particular proceeding the Court is not empowered to grant costs, no costs can be granted in an independent action by any other Court. (*Mears, C.J. and Banerjee J.*) RAM DAS *v.* MUHAMMAD FAQIR. **20 A. L. J. 205 : A. I. R. 1922 All. 143 (2).**

——**S. 35**—*Discretion—Interference when can be made.*

S. 35 deals with costs and vests them in the discre-

C. P. CODE (V OF 1908), S. 35.

tion of the Court, with full powers to determine by whom and to what extent such costs are to be paid. It further provides that when the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. The Court in exercising such a discretion should state the principles upon which that discretion was exercised. Such a discretion of the lower Court may be interfered with where there has been violence of any established principle, misapprehension of facts, or no real exercise of discretion. (*Walsh, J.*) HAKIM ZAHUR AHAMAD *v.* FATEH ULLAH.
64 I. C. 962 : 3 U. P. L. R. 55 (All.)

——S. 35—*When costs do not follow event, reasons must be given--Plaintiff who is not guilty of misconduct is not disentitled to his costs.*

The ordinary rule is hat costs should follow the event. It is generally necessary that, when costs do not follow the event, the particular reasons should be given why the ordinary rule should not be followed. Where there are no circumstances in a case which show that the plaintiff is in any way guilty of misconduct he should not be disentitled to his costs.(*Macleod. C. J. and Coyajee, J.*) RAMPRASAD SHIVLAL *v.* SHRINIVAS BALMUKUND. **27 B. L. R. 1142 : 90 I. C. 685 : A. I. R. 1925 Bom. 527.**

——S. 35—*Privy Council Appeal presented but not prosecuted—Costs on petition for leave to appeal to Privy Council are to be paid by appellant.*

Where a party obtained leave to appeal to the Privy Council, but took no steps to prosecute the appeal after the record reached there, and the appeal was thus dismissed for non-prosecution. *Held* : that the respondents were entitled to the cost incurred by them in the High Court on the petition to obtain a certificate for leave to appeal. (*Macleod, C. J. and Crump, J.*) VALLABHDAS *v.* RANCHHORDAS. **27 B. L. R. 699 : 89 I. C. 213 : A. I. R. 1925 Bom. 471.**

——S. 35—*No appeal lies.*

No appeal lies against an order passed by a Judge directing how costs are to be taxed. (*Macleod, C. J. and Coyajee, J.*) LAXMAN WAMAN GADRE *v.* SARASWATI GANESH GADRE. **27 B. L. R. 692 : A. I. R. 1925 Bom. 432.**

——S. 35—*Several defendants—Suit dismissed against all—Each defendant is entitled to costs on the basis of suit valuation.*

Where the plaintiff's suit is dismissed each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. (*Macleod, C. J. and Coyajee, J.*) LAXMAN WAMAN GADRE *v.* SARASWATI GANESH GADRE. **27 B. L. R. 692 : A. I. R. 1925 Bom. 432.**

——S. 35—*Costs—Order as to—Interlocutory application—Costs to be costs in the cause—Power of Court to deal with costs.*

The words "costs in the cause" in an order made in an interlocutory proceeding do not mean that the costs would inevitably follow the event but that those costs remain to be dealt with by the Court at the hearing, the judge at the trial having still power to deal with such costs. If a decree is passed in favour of one side or the other for costs then those costs must be taken as being included in the final orders unless the Judge expressly excludes them. (*Mocleod. C. J, and Shah, J.*) JIVABAI PITAMBERDAS *v.* TEJA SAMA.
26 Bom. L. R. 282 : 80 I. C. 263 : A. I. R. 1924 Bom. 398.

——S. 35—*Partition suit—Costs.*

The general rule is that in partition suits parties should have their own costs except with regard to the

C. P. CODE (V OF 1908), S. 35.

institution fee which should be borne proportionately by all the parties. (*Macleod, C. J. and Crump, J.*) KASTURIBAI MANIBAI *v.* BAI MAHALAXMI.
77 I. C. 914 : A. I. R. 1923 Bom. 464.

——S. 35—*Costs—Appellate Court.*

It may be sound exercise of discretion to refuse costs where the suit is based on a state of law which has been afterwards altered either by statute or by the decision of a superior tribunal, but this is so only if tne successful party is responsible for the litigation. Where there is an omission to consider the necessary circumstances then there cannot be a sound exercise of discretion and the Appellate Court in that case can reverse the order as to costs. (*Macleod, C. J. and Crump, J.*) KHIMCHAND *v.* SOBHAGCHAND.
47 Bom. 559 · 25 Bom. L. R. 242 : A. I. R. 1923 Bom. 206.

——S. 35—*Discretion—Costs.*

Where the court below gave reasons for awarding costs in a particular manner and it is not shown that the principle adopted is wrong the discretion exercised by the court below should not be interfered with in appeal. (*Martin and Pratt, JJ.*) SHRIDHAR LAXMAN *v.* JANARDHAN.
72 I. C. 993 : A. I. R. 1923 Bom. 37.

——S. 35—*Disallowance of—Suit filed in wrong Court.*

No order as to costs was made in this case as ejectment proceeding could have been taken in the Small Cause Court but were taken in the High Court on the Original Side. (*Macleod,. C J. and Shah, J.*) RUSTOMJI DINSHAN BILLIMRIA *v.* DOSIBAI RUSTOMJI MASTER. **23 Bom. L. R. 850 : 63 I. C. 41 : 45 Bom. 1236.**

——S. 35—*Mortgagee contesting suit as purchaser will get no costs.*

Where the defendant mortgagee contests the suit, on the ground that the transaction is a sale and not a mortgage, the ordinary rule as to the award of costs to mortgagee, will not apply. (*Shah, A. C. J.*) SHIVBASAPA *v.* BALAPA BASAPA. **2[illegible] Bom. L. R 1209 : 81 I. C. 673 · [illegible] 1924 Bom. 172.**

——S. 35—*Discretion—Pleader's fees—Opinion of the Taxing master.*

On a question of pleader's fees, the Court always allows the opinion of the Taxing Master to prevail and it will not interfere with it unless it is wrong in principle or very clearly wrong in detail. (*Pratt, J.*) SADASUKH GAMBHIRCHAND *v.* BAIJNATH HARNANDRAI. **23 Bom. L. R. 854 : 63 I. C. 37 : 45 Bom. 1234.**

——S. 35—*Principles of—Third party proceeding—Taxation of costs—Method.*

Where defendant succeeds in third party proceedings, after a decree is passed against him his costs in the suit as against the third party should be taxed as between solicitor and client and the costs of the third party proceedings should be taxed as between party and party. (*Marten, J.*) WELD AND CO *v.* SHER AHMED EKBAL AHMED. **59 I. C. 18 : 21 Bom. L. R. 808.**

——S. 35—*Discretion being exercised—Appellate Court ought not to interfere*

The Court which tries a suit has full power to determine by whom the costs are to be paid. Where this discretion was exercised with care, the Appellate Court ought not to interfere with such discretion. (*Walmsley and B. B. Ghose, JJ.*) RAKHAL CHANDRA *v.* GOUR GOPAL. **42 C. L. J. 137 : A. I. R. 1925 Cal. 1085.**

——S. 35—*Defendants absent need not be exonerated—Antecedent conduct of parties should be looked into.*

C. P. CODE (V OF 1908), S. 35.

There is no rule of law that because a suit or appeal is heard *ex parte*, the successful plaintiff or appellant is not entitled to costs against the absent defendant or respondent. The case would be different if the defendant would appear at the trial and state that he had no interest in the litigation, that there was no cause of action as against him, that he did not dispute the allegations of the plaintiffs in the plaint and that he should consequently be discharged. The Court while awarding costs is not confined to the consideration of the defendant's conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation ; in other words, to look at the antecedent conduct of the defendant which led to the apparent necessity for the plaintiff's instituting the suit. (*Mookerjee and Chotzner, JJ.*) UPENDRA NARAIN ROY *v.* BISWESWAR ROY CHOWDHURY. **86 I. C. 321 : 29 C. W. N. 297 : A. I. R. 1925 Cal. 569.**

——**S. 35**—*Costs.*

Ordinarily costs should be awarded to parties according to success or otherwise in litigation. (*Greaves and Chakrawarti, JJ.*) NIBARAN CHANDRA ROY *v.* NABINCHANDRA ROY. **40 C. L. J. 504 : A. I. R. 1925 Cal. 297.**

——**S. 35**—*Appeal—Question of principle.*

When the question is one of principle, a second appeal lies to the High Court on the question of costs only. (*Newbould and Cuming, JJ.*) RAMESH CHANDRA *v.* MOHIM CHANDRA. **68 I. C. 600 : 35 C. L. J. 156.**

——**S. 35**—*Administration proceedings—Costs of intervenor.*

Where in an administration suit the intervention of a person did not change the character of the proceeding or alter the scope of the suit and the intervenor voluntarily came into it as a prudent measure not of immediate protection but of possible personal benefit hereafter, it would be clearly unjust to make the claimant pay an additional bill of costs of the intervenor. (*Mookerjee, C.J. and Fletcher, J.*) SOURENDRAMOHAN SINHA *v.* MURARILAL SINHA. **24 C. W. N. 888 : 59 I. C. 581 : 48 C. 352.**

——**S. 35**—*Scale of—Travelling expenses of witnesses.*

Successful party is entitled to recover from his opponent, the expenses properly incurred on account of travelling charges of his witnesses. (*Greaves, J.*) HARA SUNDAR *v.* LAHABAR. **67 I. C. 277 : A. I. R. 1923 Cal. 315 (1).**

——**S. 35**—*Disallowance of costs for printing unnecessary records.*

It is the duty of the appellant to print the record of a case, and if unnecessary matter is printed owing to his default, in the exercise of a discriminating judgment, the costs for printing such records should be disallowed. (*Lord Phillimore.*) GOPAL CHANDRA CHOUDHARI *v.* RAJANIKANTA GHOSH. **46 I. A. 299 : 47 C. 415 : 76 I. C. 737 : 24 C. W. N. 553.**

——**S. 35**—*Future interest is discretionary—No improper exercise of discretion—Appellate Court will not interfere.*

Future interest is a matter which is within the discretion of the Trial Court and where it is not shown that the discretion has been improperly exercised, the appellate Court will not interfere. (*Harrison and Zafar Ali, JJ.*) BENARSI DAS *v.* HIRA LAL. **86 I.C. 240: 7 Lah. L.J. 1 : : A. I. R. 1925 Lah. 308.**

——**S. 35**—*Order—Costs to follow result.*

Costs generally abide the result for where a plaintiff's suit is practically decreed in full, costs should be awarded to him. (*Moti Sagar, J.*) AGHA MAHOMED ASLAM *v.* JODH SINGH. **A. I. R. 1923 Lah. 513 (2).**

——**S. 35**—*Order—Exceptional cases.*

Costs generally abide the result, if no valid reason has been assigned as to why an exception should be made in the case. (*Moti Sagar, J.*) DES RAJ SAWHNEY *v.* FRAYS MOTOR WORKS. **75 I. C. 64 : A. I. R. 1923 Lah. 302 (1).**

——**S. 35**—*Costs—Discretion of Court—Power of appellate court to interfere.*

Plaintiff sued defendant for settlement of accounts due by late father of the defendant who pleaded not merely that he was not personally liable but raised every other plea that could be thought of. The Court directed that as the defendant raised all sorts of pleas which had been decided against him, the defendant was personally liable for costs. *Held*, the reasons given by the lower court for making defendant personally liable for costs are perfectly sound. The Courts have discretion to make such orders as to costs as they think fit and unless that discretion is exercised unreasonably, an appellate court should not interfere. (*Chevis, J.*) JHANWAR DAS *v.* BODH RAJ. **4 L. L. J. 210 : A. I. R. 1922 Lah. 229.**

——**S. 35**—*Interest on costs—When due—Interpretation of judgment.*

Interest should not be allowed until the costs have actually been incurred. A judgment decreed a certain sum in favour of plaintiff with proportionate costs and future interest from the date of suit till realization at one per cent per month. *Held* the interest was payable only on the principal sum and not on the costs. (*Chevis, J.*) UTTAM CHAND *v.* BILAMAL. **60 I. C. 345 (Lah.).**

——**Ss. 35 and 47**—*Discretion of award of costs.*

S. 35 gives discretion as to the ordering of costs but the award of costs depends finally on S. 47 and the provisions of S. 35 are supplementary. (*Newbould and Cuming, JJ.*) RAMESH CHANDRA *v.* MOHIM CHANDRA. **68 I. C. 600 : 35 C. L. J. 156.**

——**S. 35**—*Trustee.*

A Trustee should be made to pay out of his pocket the cost of a suit or brought to his ill-feeling towards the defendant. (*Devadoss, J.*) CHITTAMBALA MUDALIAR *v.* PARTHASARATHY MUDALIAR. **47 M.L.J. 801 : 20 L.W. 659 · (1925) M.W.N. 90 : 84 I. C. 905 : A. I. R. 1925 Mad. 194.**

——**S. 35**—*Costs—Respondent—Unnecessary party—Right to costs.*

A respondent who is unnecessarily made a party to an appeal and against whom no relief is granted is entitled to his costs of the appeal. (*Krishnan and Waller, JJ.*) GANGABATTULA KANTHAMMA *v.* MANCHI RAJU REDDI PANTULU. **19 L. W. 197 : 46 M. L. J. 134 : (1924) M. W. N. 122 : 34 M. L. T. (H.C.) 358 : 78 I. C. 296 : A. I. R. 1924 Mad. 476 :**

——**S. 35**—*Conduct.*

A pleader who was in possession of documents belonging to his client, concealed the fact from him. *Held*, that (i) his conduct amounted to professional misconduct, (ii) having regard to the vindictive proceedings on the part of client, costs were disallowed though pleader's conduct was unjustifiable. (*Schwabe, C. J., Coutts-Trotter and Ramesam, JJ.*) A FIRST GRADE PLEADER, *In the matter of.* **17 L. W. 358 : 24 Cr. L. J. 585 : 73 I.C. 329 : A.I.R. 1923 Mad. 485.**

——**S. 35**—*Redemption suit decreed—Defendant not misconducting—Point not raised in first appeal—Second Appellate Court granted costs in Trial Court.*

C. P CODE (V OF 1908), S. 35.

Where a redemption suit was decreed by the Trial Court and both the appellate Courts, but in second appeal the defendant's costs of the suit were claimed on the ground that he was not guilty of any mis-conduct.

Held, that as the point had never been raised before the lower Appellate Court, he was entitled only to the costs in the Trial Court. (*Ramesam, J.*) RATNAM PILLAI *v.* KAMALAMBAL AMMAL.
48 M. L J. 213 : 86 I. C. 793 : 21 L. W. 252 : A. I. R. 1925 Mad. 778.

——S. 35—*Costs—Discretion.*

Costs are always in the discretion of the Trial Court and will not be interfered with in appeal unless the order is plainly irregular and contrary to principle. (*Simpson, A. J. C.*) GOBIND PRASAD *v.* NARBHIR SINGH. **90 I. C. 577 (1).**

——S. 35, O. 33, R. (3)—*Withdrawal of suit—Court's discretion to award costs, whether restricted—The word "shall" in O. 33, Rule 1 (3) merely directory and not mandatory—Appellate Court's power to interfere.*

Sub-rule (3) of Rule 1 of O. 33, of the Code of Civil Procedure does not impose an unavoidable obligation on the Court to award costs in all cases of withdrawal of suits. The word 'shall', as used in the context is merely directory and not mandatory. The general law as to costs as laid down in S. 35 of the Code invests the Court with a discretion in the matter of awarding costs and sub-rule (3) of Rule (1) of Order 33 has not the effect of divesting the Court of that discretion. A court has absolute discretion in the matter of costs and an appellate Court will not interfere w th an exercise of discretion of a lower Court unless it has proceeded on a manifestly wrong ground. (1899) 2 Ch. 472 and 2 Bom. L. R. 254 relied on. (*Simpson, A. J. C.*) RAM BHAROS *v.* RAMPAL SINGH.
2 O. W. N. 901 : A. I. R. 1925 Oudh 699.

——S. 35—*Appeal—Appellate Court will not interfere with discretion unless it is manifestly wrong.*

A Court has absolute discretion in the matter of costs and an appellate Court will not interfere with an exercise of discretion of a lower Court unless it has proceeded on a manifestly wrong ground such as the application of an erroneous principle or a misapprehension of the facts. So long as the discretion was in fact exercised, an appellate Court will not interfere simply because it would itself have exercised the discretion differently. 2 Bom. L. R. 254. Foll. (*Wazir Hasan and Simpson, A. J. Cs.*) RAM BHAROS *v.* RAMPAL SINGH. **2 O. W. N. 901 : A. I.R. 1925 Oudh. 699.**

——S. 35—*Appeal—Grounds loosely drafted—Appeal decreed—Appellant was ordered to pay his as well as respondent's costs.*

Where the grounds of appeal were loosely drafted consequent on a misunderstanding or want of understanding of the facts of the case, the Court disallowed the cost of the successful appellant and decreed the respondent's costs to be paid by appellant. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) SHEORAJ *v.* MT. PHULBASA. **28 O. C. 203 : 85 I. C. 445 : A. I. R. 1925 Oudh 561.**

——S. 35—*Costs—Expenses of litigation—Right to be indemnified.*

Where a person institutes a suit obtains a decree and puts it in execution and purchases the property finally, there is a *prima facie* ground for holding that he has incurred the necessary expenditure relating to those proceedings. A plaintiff claiming against him under a better title must contribute in respect of the said expenditure, unless he shows he has contributed more than his share. (*Wazir Hasan and Neave, A. J. Cs.*)

C. P. CODE (V OF 1908), S. 35.

THAKUR JAI INDAR BAHADUR SINGH *v.* THAKUR SHEO INDAR BAHADUR SINGH.
10 O. L. J. 481 : 78 I. C. 393 : A. I. R. 1924 Oudh 218.

——S. 35—*Costs—Joint liability.*

One of co-plffs, or co-defts. from whom the costs awarded jointly against them were realized can sue for contribution from others. (*Daniels and Dalal, J. Cs.*) SIDH GOPAL *v.* AVADH BIHARI LAL.
26 O. C. 196 : A. I. R. 1924 Oudh 48.

——S. 35—*Discretion—Interference on appeal.*

Where a reasonable discretion has been exercised in the matter of costs the High Court will be slow to interfere. (*Daniels, A. J. C.*) RAJENDRA NARAYAN *v.* GHAFOOR KHAN. **73 I. C. 307 : 9 O. & A. L. R. 77 · A. I. R. 1924 Oudh 110.**

——S. 35—*Costs—Court of Second Appeal—Power to interfere.*

Where the Lower Appellate Court has interfered with the order of the Court of hearing as to costs there is no reason why the legality of the lower Appellate Court's order should not be open to question in second appeal. There is no distinction made by the law between pleas based on facts and pleas based on law so far as the apportionment of costs is concerned. (*Ashworth, J.C.*) RAM KISHAN DAS *v.* JAGANNATH PRASAD. **25 O. C 385 : 10 O. L. J. 20 : 73 I. C. 222 · A. I. R. 1923 Oudh 155.**

——S. 35—*Costs—Court of second appeal.*

Where the reasons given by the Munsif for the order which he passed relating to the costs were good and the Subordinate Judge gave no reason whatsoever for interfering with the exercise of the discretion by the Court of the First instance, High Court interfered. (*Wazir Hasan, A. J. C.*) RAGHO PERSHAD *v.* SECRETARY OF STATE. **9 O. L. J. 629 : 74 I. C. 369 : A. I. R. 1923 Oudh 114.**

——S. 35—*Costs. Disallowing of—High interest.*

A Court disallowing costs on the ground that the interest claimed is very high, exercises a very proper discretion. (*Daniels, A. J. C.*). SHEIKH FAZAL AZIM *v.* LALA GIRDHARI LAL. **9 O. L. J. 442 : 69 I. C. 657 : A. I. R. 1923 Oudh 8 (1).**

——S. 35—*Costs—Minor's Contract—Cancellation.*

Where the plaintiff sued for cancellation of a bond, *held*, as the defendant could not enforce the contract being void, he was not entitled to costs. (*Simpson, A. J. C.*) MUHAMMAD ANWAR KHAN *v.* JHANDA SINGH. **9 O. L. J. 404 : 25 O. C. 237 : A. I. R. 1922 Oudh 271.**

——S. 35—*Discretion—Costs.*

Where it was found that the suit was rendered inevitable by reason of the gross mismanagement of the trust estate by the Appellant, the lower Court was held to be right in directing the Appellant to pay the costs of the suit. (*Das and Bucknill, JJ.*) MD. WAHAB *v.* ABBAS HUSSAIN. **4 P. L. T. 326 : 71 I. C. 280 : A. I. R. 1923 Pat. 420.**

——S. 35—*Costs—Order for—Several respondents.*

If costs are awarded against a number of respondents without indicating the proportion in which those costs shall be borne by the different respondents such an order is always taken to mean that the respondents are jointly and severally liable for the costs, and the order for costs may be executed against any one of them who will have a right of contribution against the others in a case of this nature. (*Dawson Miller, C. J. and Mullick, J.*) THE MIDNAPORE ZEMINDARY CO. *v.* MADAN MARWARI. **(1923) P. H. C. C. 17 : A. I. R. 1923 Pat. 215.**

——Ss. 35 and 96—*Appeal-order as to costs.*

An appeal lies against an order of costs alone; but

the Appellate Court will not interfere with this discretionary order unless a matter of principle is involved. (*Saunders, J. C.*) JALLALUDIN *v.* EBRAHIM. **63 I. C. 811 (2) : (1921) 4 U. B. R. 8.**

——S. 35—*Principles of—Appellate decree silent.*

Where the appellate decree is silent as to costs the decree of the Trial Court is the guide to determine the costs. (*Rigg, J.*) LALL LWARKADAS *v.* BURMA RAILWAY CO. **10 L. B. R. 280 : 62 I. C. 299 : 13 Bur. L. T. 173**

——S. 35—*Suit overvalued—Costs will be allowed on proper valuation.*

Where a suit has been overvalued the plaintiff is only entitled to costs as taxed in a suit valued at proper valuation. (*Rupchand Bilaram, A. J. C.*) SECY. OF STATE *v.* DINSHAW NAOROJI. **A.I.R. 1925 Sind 275.**

——S. 35—*Litigation due to vagueness of testamentary directions—Costs of all parties should come out of testator's estate.*

Where it is the fault of the testator in making the testamentary directions vague or uncertain in law or fact that is responsible for a litigation, the costs of all parties should be awarded out of the estate of the testator. (*Rupchand Bilaram, A. J. C.*) SHAMBAI *v.* GOVARDHAN. **78 I.C. 249 : A. I. R. 1925 Sind 195.**

——S. 36—*Scope.*

An order under that a mortgage in executed as previously ordered is an order which can be executed as if it were a decree under S. 36 of the code. (*Robinson, C.J. and Baguley, J.*) ALLAN BROS. & CO. *v.* SHAIK JOOMAN SONS & CO. **2 Rang. 673 : 85 I. C. 291 : 4 Bur.L. J. 32 : A. I. R 1925 Rang. 189.**

——S. 37—*Court to which business is transferred includes theCourt to which such business is transferred.*

Where the whole business of one Court has been transferred to another Court, the expression 'the Court by which the decree was passed' is so definite and precise as to create an exception to the general rule introduced by S. 150. (*Spencer and Krishnan, JJ.*) J. S. SHRINIWAS RAO *v.* HANUMANTHA RAO. **42 M. L. J. 344 : 15 L. W. 458 : (1922) M. W. N. 349 : 31 M. L. T. 79 : A. I. R. 1922 Mad. 10.**

——S. 37 (b)—*Decree passed by Additional Subordinate Court—Court abolished after decree and revived subsequently—Decree sought to be executed in the revived Court—Court which passed the decree and exercising jurisdiction over the judicial area—Jurisdiction.*

Where a decree passed by an Additional Subordinate Judge's Court is sought to be executed after its abolition and revival in the revived Court with the same designation that Court has jurisdiction to execute the decree under S. 37 (*b*), C. P. Code as being the identical court which passed the decree and as having jurisdiction over the judicial area. 4 C. L. J. 473 explained and distinguished. (*Mullick and Ross, JJ.*) MT. BIBI KHODAIYATUL KOBRA *v.* HARIHAR MISRA **4 P. 688.**

——S. 38—*Section is not exhaustive—Particular execution application may be transferred under S. 24—C. P. Code, S. 24.*

S. 38 was enacted to decide the question as to the jurisdiction of a Court when a suit is transferred. If a suit instituted in Court A is transferred to Court B and Court B decided it, S. 38 enjoins that application for execution shall be presented to Court B and not to Court A, that is, the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under S. 24. (*Walsh, Ag. C. J. and Dalal, J.*) MAHOMED HABIBULLAH *v.* TIKAM CHAND. **47 All. 57 : L. R. 6 A. (Civ.) 103 : 85 I. C. 746 : A. I. R. 1925 All. 276 (2).**

——Ss. 38, 39, 37 and 21—*Court losing jurisdiction over property during execution can't proceed with it.*

Section 38 does not make it optional to a Court to execute its own decree, or to transmit it to the Court which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. Although the words in S. 39 are "the Court may send it for execution," in all cases the Court should send its decree to the Court which has territorial jurisdiction if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court. (*Spencer and Devadoss, JJ.*) K. C. MANAVIKRAMAN *v.* N. C. ANANTHANARAYANA AYYAN. **46 M L. J. 250 : 19 L. W 16 : (1924) M. W. N. 38 : 79 I. C. 806 : A. I. R. 1924 Mad. 457.**

——Ss. 38, 37 and 150—*Execution—Jurisdiction—Money-decree—Transfer of area where judgment-debtor lived from one Court to another.*

Where subsequent to the passing of a money decree the area in which the judgment-debtor lived was transferred from the jurisdiction of the court which passed the decree to that of another Court it is open to the latter Court to execute the decree. 42 M. 821 ; 37 M. 462 Ref. (*Oldfield and Venkatasubba Rao, JJ.*) MUTHUKARUPPA CHETTY *v.* PAIYA KAVUNDAN. **45 M. L. J. 210 : (1923) M. W. N. 406 : 18 L. W. 17 : 73 I.C. 956 (2) : A. I. R. 1924 Mad. 32.**

——Ss. 38 and 47—*Execution sale—Suit to set aside.*

Under S. 38, Civil Procedure Code, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution and where the Trial Court is not the Court to which the decree is sent for execution, this section prevents it from proceeding with the suit as a matter in execution and executing the decree. (*Kotwal, A. J. C.*) BRIJ MOHAN *v.* KASTURCHAND. **68 I. C. 693 : A. I. R. 1922 Nag. 189.**

——Ss. 38 and 39—*Except in case of decree for sale of mortgaged properties, no Court can execute decree entirely affecting property beyond its jurisdiction.*

Under Ss. 38 and 39 no Court can execute a decree in which the subject-matter of the suit or of the application of the suit is property situated entirely outside the local limits of its jurisdiction, but an exception has been recognised in cases of decrees for sale of mortgaged properties. 39 Cal. 104, Foll. (*Dass and Ross, JJ.*) SHEIKH ABDUL HADI *v.* MT. KABULTUNNISSA. **6 P. L. T. 71 : 80 I .C. 901 : A I. R. 1925 Pat. 139.**

——Ss. 38 and 39—*Application to original Court after transfer to another is no step-in-aid.*

After a decree is transferred by one Court to another for execution any application made to the former Court cannot be a step-in-aid. (*Adami and Das, JJ.*) JNANENDRA NATH GHOSH *v.* KUMAR JOGENDRA NARAIN SINHA. **1924 P. H. C. C. 362 : 2 P. 247: 74 I. C. 608 : A. I. R. 1923 Pat. 384.**

——S. 39—*Transfer of decree—Award under the Co-operative Societies Act — Application to enforce award—Co-operative Societies Rules 31 and 34.*

C. P. CODE (V OF 1908), S. 39.

An award was made at Poona under the rules framed under S. 43 of the Co-operative Societies Act, 1912, whcih made it enforceable in the same manner as a decree of the Court. The party to the award next applied to the Judge of the Court of Small causes at Poona to transfer the decree to the Court of Small Causes at Bombay under S. 39, C. P. Code. *Held*, that inasmuch as the Poona Court could execute the decree as if it had passed it, it could also transfer the decree under S. 39, C. P. Code, Rule 34 of the Co-operative Societies Rules, 1919, framed under S. 43 of the Co-operative Societies Act is not clearly worded. (*Macleod, C. J. and Shah, J.*) KRISHNAJI BARLE *v.* MAHADEO PATIL. **46 B. 128 : 64 I. C. 337 (1) : A. I. R. 1922 Bom. 377 (2).**

——— **Ss. 39 and 42**—*Transfer for execution--Original Court—Powers of--Grant of certificate of non-satisfaction.*

A decree was transferred to another Court for execution. Nothing was done there, and another application was made in the original Court to transfer the decree for execution again. Certificate of non-satisfaction was issued by the Court to which it had been transferred only after the date of the second application. *Held*, the original Court had jurisdiction to entertain the application, and even if there was a defect it was cured by the subsequent granting of the certificate, the date of granting it being immaterial. (*Shadi Lal, C. J. and Harrison, J.*) FIRM HIRA LAL-ANANT RAM *v.* FIRM SHEAM MAL-CHANA MAL. **89 I. C. 958.**

———**S. 39**—*Decree of Village Munsif's Court transferred or withdrawn to District Munsif's Court for execution—District Munsif cannot transfer decree for execution.*

A District Munsif receiving by transfer a decree of a village Court under S. 66 of Madras Act I of 1889 or withdrawing execution of a decree to his own file under S. 67 has no jurisdiction to transfer it for execution to another District Munsif's Court under S. 39 of the Code of Civil Procedure. (*Oldfield and Devadoss, JJ.*) KANDOTH SANKARAN NAIR *v.* ATCHUTHAN. **44 M. L. J. 643 : 46 Mad. 734 : 32 M. L.T. 403 (H. C.) : 18 L. W. 19 : 73 I. C. 793 : (1923) M. W. N. 353 : A. I. R. 1923 Mad. 651.**

———**S. 39**—*Court passing decree having within its jurisdiction property sufficient to satisfy decree is not necessarily precluded from transferring decree.*

The jurisdiction of a Court transferring decree for execution to another Court is not confined to cases in which there is no property within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree. Under cl (*d*) of sub-section (1) of S. 39 of the C. P. Code. the Court can made the order of transfer if it "considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court." (*Wazir Hasan and Kendall, A. J. Cs.*) SADIQ ALI KHAN *v.* SHARF JAHAN BEGAM. **28 O C. 199 : 85 I. C. 411 : A. I. R. 1925 Oudh 481.**

———**S. 39**—*Execution case once transferred—Certificate under S. 41 not received—Court passing the decree cannot transfer it again to different Court.*

Once a decree is transferred under S. 39, C. P. Code, the Court which passed the decree ceases to have jurisdiction till it receives a certificate under S. 41 and therefore a second transfer of the case by the Court passing the decree to a different Court for execution is without jurisdiction. 1925 A. 276 affirmed; 1923 P. 224 Dist. 1923 P. 384 Ref. (*Dalal and Wazir Hasan, A. J. Cs.*) JANG BAHADUR *v.* BENI MADHO. **12 O. L. J. 287 : 2 O. W. N. 313 : A. I. R. 1925 Oudh 428.**

C. P. CODE (V OF 1908), S. 41.

———**S. 39**—*Court can execute decree against property entirely outside its jurisdiction if it is a mortgage decree for sale.*

Under S. 39 a Court can execute a decree for sale of the mortgaged property, though it is wholly out of its jurisdiction because a mortgage decree is practically a decree of specific performance of the contract between the mortgagor and the mortgagee. (*Das and Ross, JJ.*) SHEIKH ABDUL HADI *v.* MT. KABULTUNNISSA. **6 P. L. T. 71 : 80 I. C. 901 : A. I. R. 1925 Pat. 139.**

———**S. 39**—*Application for transfer and execution—Difference between—Fresh application for execution when necessary.*

There is nothing in law which compels a decree-holder to make a second application for execution to the Court to which a decree has been transferred for execution, when he has already made one application to the Court transferring the decree. (*Mullick and Foster, JJ.*) DUTT *v.* TARAPRASANNA ROY CHAUDHURY. **5 P. L. T 11 : 2 P. 909 : 1923 P. H. C. C. 280 : 74 I. C. 753 : A. I. R. 1924 Pat. 120.**

———**S. 39**—*Transfer of decree—Court to which decree is transferred must be one having jurisdiction.*

A decree cannot be transferred for execution to a Court which has no pecuniary jurisdiction to entertain the suit in which decree was passed. The legislative changes introduced in S. 39 (2), *i. e.* that when the Court *suo motu* transfers a decree to a subordinate Court the latter Court must be "of competent jurisdiction" does not mean that under S. 39 (1) a decree may be transferred to any Court for execution, irrespective of its pecuniary jurisdiction. (*Jwala Prasad and Bucknill, JJ.*) AMRIT LAL *v.* MURLIDHAR. **1922 P. H. C. C. 229 : 3 P. L. T. 422 : 1 Pat. 651 : 67 I. C. 538 : A. I. R. 1922 Pat. 188.**

———**S. 39 (1) (d)**—*Execution of decree—Court's power to transfer to another Court—Decree-holder's right to execute his decree, whether liable to be limited.*

The powers of a Court to transfer a decree passed by it to another Court for execution are not limited by the fact that there is not sufficient property within the local limits of the jurisdiction of that Court to satisfy the decree. A Court has no power to take away the decree-holder's legal right to execute his decree in such manner as he chooses, having regard to his own facilities and convenience.

Quaere.—Does an order of a Court transferring a decree passed by it to another Court for execution fall within the provisions of section 47 (1) C. P. Code, and amount to a decree as defined in S. 2 (2), C. P. Code; and does an appeal lie against it. (*Wazir Hasan, J. C. and Kendall, A. J. C.*) MOHAMMAD SADIQ ALI KHAN *v.* NAWAB SHARF JAHAN BEGAM. **1 O. W. N. 409.**

———**S. 39 (2)**—*Presumption under.*

The Court cannot presume when a decree is transmitted for execution to another Court, it intended the decree to be executed even against properties situated within the jurisdiction of the transmitting Court. (*Spencer and Devadoss, JJ.*) MAHARAJA OF JEYPORE *v.* RAJA LAKSHMI NARASAMMA GARU. **18 L. W. 747 : 76 I. C. 269 : A. I. R. 1924 Mad. 144.**

———**S 41**—*After issue of certificate whether rightly or wrongly, the Court to whom the decree is trans-*

C. P. CODE (V OF 1908), S. 41.

ferred cannot deal with execution matters.

The Court to which the decree is transferred under S. 39 has jurisdiction only up to the time that it issues the certificate prescribed by S. 41. After the issue of the certificate that Court ceases to have jurisdiction whether the certificate was issued rightly or wrongly. (*Dalal, J.*) SHIAM LAL *v.* KOERPAL.

22 A. L. J. 1039 : L. R 6 A. (Civ.) 28 : A. I. R 1925 All. 179.

——**S. 41**—*Decree—Transfer for execution—Certification.*

Certification is a very important step when a decree has once been transferred to another Court for its consequence is that the latter Court ceases to have jurisdiction to execute the decree. There must be a formal certification by the Court to which the decree has been transferred, for execution, to the Court which passed the decree. (*Macleod, C. J. and Shah, J.*) SHIVLINGAPPA MALLAPPA *v.* SHIDMALLAPPA,

26 Bom. L. R. 345 : 80 I. C. 752 : A. I. R. 1924 Bom. 359.

——**S. 41**—*Certificate — Execution of decree—Decree sent to another Court for execution.*

It does not follow that because one application for execution fails in a Court to which the decree has been sent for execution, that that Court is bound to send a certificate to the Court in which the decree was passed. The judgment-creditor might still be anxious to execute his decree in the former Court, and it is only when the Court to which the decree is sent has executed it or has failed to execute it that the Court is bound to send a certificate under S. 41. It was intended that there should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another and not merely a partial failure. (*Macleod, C. J. and Crump, J.*) VITHU *v.* GANESH.

25 Bom. L.R. 453 : 74 I.C. 149 ;A.I.R. 1923 Bom. 396.

——**S. 41**—*Applicability—What amounts to information.*

S. 41, C. P. Code, does not prescribe any particular way in which the Court to which a decree is sent for execution should inform the Court as regards the result of the same. Where a Court has both small cause powers and original jurisdiction and a decree passed under the former is executed under the latter and an entry of satisfaction is made in the Small Cause Register, the section has been complied with.

Per *Crump, J.* :—S. 41 contemplates two different Courts and cannot be applied strictly to such a case. (*Macleod, C. J. and Crump, J.*) MANIRAM PEERCHAND *v* VITHU RAMJI. **76 I. C. 549 : A. I. R. 1923 Bom. 371.**

——**Ss. 41, 42 and 39**—*Scope of.*

S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree,and the sending of a certificate of the latter class cannot do so at all. 37 Mad. 231 distinguished. 20 All. 129 followed. (*Batten, J.C. and Hallifax, A. J. C.*) INDRA RAJ SINGH *v.* MURAD KHAN. **18 N. L. R. 178 : 68 I. C. 657 · A. I. R. 1922 Nag. 210.**

——**S. 41**—*Court to which decree is transferred has jurisdiction till certificate of execution is sent to Court passing decree.*

C. P. CODE (V OF 1908), S. 42.

The Court to which a decree has been transferred for execution is not divested of jurisdiction until it sends the certificate under S. 41, C. P. Code to the Court which passed the decree, and until such certificate is sent the Court which passed the decree has no jurisdiction to entertain application to certify payment under the decree so as to save limitation. 39 Mad. 640 (P. C.) Foll. (*Dalal, J. C.*) MAHOMED SHAKIR *v.* JUGAL KISHORE. **28 O. C. 169 : 85 I. C. 455 : A. I. R. 1925 Oudh 492.**

——**S. 41**—*Execution of decree—Transfer of decree for execution—Jurisdiction—Certification—To which Court should be made.*

Where a decree is sent for execution to another Court by the Court which passed the decree the former Court is not divested of its jurisdiction until it sends the certificate under S. 41, C. P. Code. The meaning of Rule 172 (*a*) of the Oudh Civil Digest that the record shall be returned to the Court by which the decree was sent for execution when the decree has been executed wholly or in part by the Court to which it has been sent is that satisfaction should be such that no further satisfaction of the decree in that Court would be possible. (*Dalal, J.C. and Neave, A.J.C.*) SYED MD. SHAKIR *v.* JUGAL KISHORE.

10 O. & A. L. R. 1277.

——**S. 42**—*Transfer of decree for execution to another Court—Judgment-debtor's estate taken over by Court of Wards after passing of decree—Objection to execution of decree by Manager of the Court of Wards —Maintainability of.*

The Court of Wards took charge of the estate of a judgment-debtor which was situated at Aligarh. On the application of the decree-holder, the Collector as manager of the estate under the Court of Wards was brought on the record and the decree was transferred for execution to the Court of Aligarh without any objections taken by the Collector who had been given notice of the application. Subsequently when execution was applied for in the Aligarh Court, the Collector raised an objection on the ground that as the decree-holder had failed to notify his claim under S. 17 of U.P. Court of Wards Act,his demand must be deemed to have been satisfied under S. 18. The decree-holder contended that the question not having been raised at the time when the Collector was impleaded as a party representing the Court of Wards or at the time when the decree was transferred for execution, it could not now be raised. *Held*, that the judgment-debtor was justified in taking the plea before the Court at Aligart as neither the impleading of the Collector as a party nor the order transferring the decree for execution amounted to a decision of the question whether the decree-holder's demand must be deemed to have been satisfied under S. 11 of U P. Court of Wards Act. The executing Court had power to consider the objection. (*Mukerjee and Daniels, JJ.*) SANWAL DASS *v.* COLLECTOR OF ETAH. **46 A. 160 : 22 A. L. J. 439 : L. R. 5 A. 380 : A. I. R. 1924 All. 700.**

——**S. 42**—*Transfer to one Court—Application for further transfer.*

Where a decree is already transferred for execution by Court which passed it, an application for further transfer should be made to the court where execution is pending. (*Macleod, C. J. and Shah, J.*) RANGASWAMI SHETTI *v.* SHESHAPPA MANJAPPA.

47 B. 56 : 68 I. C. 506 : 24 Bom. L. R. 798 : A. I R. 1922 Bom. 359.

——**S. 42**—*Section is not applicable to execution proceedings of a decree by Madras Small Cause Court transferred to a Mofussal Court—But is applicable only to execution proceedings in the Madras Small*

C. P. CODE (V OF 1908), S. 42.

Cause Court.

Section 42 is not applicable to proceedings in execution of a decree of the Madras Small Cause Court transferred to a Court in the mofussal ; but it only applies to execution proceedings in the Madras Small Cause Court, whether the decree sought to be executed was passed by the Madras Small Couse Court or transferred to that Court from a Court in the mofussal. (*Devadoss and Wallace, JJ.*) PONNAPPA REDDI *v.* P. THIRUVENGADA PILLAI.

49 M. L. J. 104: 22 L. W. 455 : (1925) M. W. N. 718: 90 I. C. 509 : A. I. R. 1925 Mad. 1179.

——S. 42—*Application for execution—Civil Procedure Code, O 21, Rr. 10 and 11.*

A Court to which a decree is transferred for execution cannot execute it in absence of regular application therefor under O. 21, Rr. 10 and 11. (*Kinkhede, A. J. C.*) SULTANALI *v.* BALAJI.

80 I. C. 59 : A. I. R. 1924 Nag. 413.

——S. 42—*Transfer of decree—Order for, effect of—Jurisdiction of Court which passed the decree.*

Where a decree-holder obtains an order for the transfer of a decree by the Court which passed it to another Court for purposes of execution, but the decree is not actually sent to that Court, the Court which passed the decree has jurisdiction to execute it. (*Miller, C J. and Jwala Prasad, J.*) RAM CHANDRA MARWARI *v* KRISHNA LAL MARWARI.

1 Pat. 328 : 3 Pat. L. T. 298 : 65 I C. 332 : A. I. R. 1922 Pat. 301.

——S. 44—*Courts may refuse execution—Discretion to refuse is not limited to Ss. 13 and 14, Civil Procedure Code.*

The expression " may be executed " in S. 44 gives a discretion to the Court, to which application is made for executing a decree to refuse to execute it, though the discretion should not be capriciously exercised. That discretion is not with special reference to Ss. 13 and 14. Cases may arise where in the exercise of proper discretion, Courts of law in British India may properly refuse execution of such decrees even apart from the exceptions enumerated in S. 13. However, in practice, no case may arise where the grounds on which the Court may consider it proper to refuse execution in the exercise of its discretion are not included in one or the other of the very general exceptions engrafted in S. 13. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR.

21 L. W. 330 : 86 I. C. 492 : A. I. R. 1925 Mad. 788.

——S. 44—*Words " may be executed..... British India " refer only to mode of execution.*

The words " may be executed in British India as if they had been passed by the Courts in British India" refer only to the mode of execution. They do not mean that such decrees should for all purposes whatsoever be placed in the same position as decrees of British Indian Courts. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v* MADHAPPA CHETTIAR.

21 L. W. 330 : 86 I. C. 492 : A. I. R. 1925 Mad. 788.

——S. 44—*Notice to judgment-debtor is essential.*

When foreign decrees are sought to be executed in British Indian Courts, as an invariable rule, notice ought to be issued by the executing Court to the judgment-debtor, to appear and state his objections if any, and execution should be ordered, if deemed proper only thereafter. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR.

21 L. W. 330 : 86 I. C. 492 : A. I. R. 1925 Mad. 788.

——S. 45—*Mortgage suit—Claim for costs in such suit is not an independent claim and must follow the character and form part of the decretal amount.*

C. P. CODE (V OF 1908), S. 47—Appeal.

The costs in a mortgage suit are not to be treated as independent claims by the mortgagee irrespective of the rights under the mortgage ; but such costs should form part of the amount decreed in the mortgage suit to be realized in accordance with the procedure laid down in the Code. It makes no difference if the order for costs was passed before the final decree was drawn up. The costs awarded in a mortgage suit follow the character of the amount decreed in the suit and form part of the entire decretal amount to be realized from the mortgaged properties. 35 Cal. 431 ; 20 All. 523 (F.B.) 40 All. 109 and 30 Mad. 464, Foll. (*Suhrawardy and Graham, JJ.*) BAHADUR SINGH DURGA *v.* BASIRUDDIN AHAMMAD.

41 C. L. J. 607 : A I. R. 1925 Cal. 1135.

——S. 46—*Application under S. 46 is not application for execution.*

An application for an attachment under S. 46 cannot be regarded as an application for execution. (*Greaves and Cuming, JJ.*) KASIWAR DE *v.* ASWINI KUMAR.

90 I. C. 527 : A. I. R. 1926 Cal. 249.

——S. 46—*Scope of.*

Indeed in principle there seems to be no difference between a concurrent execution after transfer in another Court and a concurrent execution in a Court in which a decree was passed. That the present Code does not view with disfavour concurrent executions is among other sections indicated by S. 46 which is new and relates to precepts. Two applications for attachment of different properties can proceed simultaneously in execution of the same decree. There is no provision of law which prevents the Court from entertaining a fresh application for the execution of the decree by attachment of money in deposit to the credit of the judgment-debtor in the same Court or in any other Court, when another execution proceeding is going on in the same Court. (*Mullick and Kulwant Sahay, JJ.*) RAM SUMRAN PRASAD *v.* RAM BAHADUR.

2 P. 328 : 4 P. L. T. 99 : 1923 P. H. C. C. 61 : A. I. R. 1923 Pat. 224.

——S. 47.

Appeal.
Applicability.
Bar of suit.
Compromise decree.
Conversion.
Defence to a suit.
Execution sale.
Exonerated defendant.
Foreign decree.
Objection to attachment.
Parties and representatives.
Purchase of decree.
Question relating to execution.
Rateable distribution.
Restitution.
Scope of.
APPEAL.—
Application under.
Collector.
Compromise decree.
Execution.
Interlocutory Order.
Objection to attachment.
Order.
Question relating to execution.
Rateable distribution.
Receiver.
Sale proclamation.

C. P. CODE (V OF 1908), S. 47—Appeal—Application under.

Scheme.
Stay of execution.

Appeal—Application under.

——S. 47—*Appeal—Application under S. 73—Question arising in execution between parties to partition suit.*

Plaintiff and one defendant got decrees for money against the same defendant in a partition suit, plaintiff got his decree transferred to another Court and realised a certain amount in execution. Defendant applied for rateable distribution without transfer of his decree. Order on the defendant's application is covered by S. 47. (*Madhavan Nair, J.*) AYISA BIVI AMMAL *v.* JOKARA BIVI. **49 M. L. J. 375 : 22 L. W. 740 : 90 I. C. 869 : A. I. R. 1925 Mad. 1265.**

——S. 47 and O. 21, R. 103—*Appeal—Application by decree-holder auction-purchaser in execution of a mortgage decree for delivery of possession—Order on.*

The plaintiff obtained a decree on his mortgage and purchased the property himself. The defendant, the purchaser of the same properties in execution of a money decree against the mortgagor and who was in possession obstructed the plaintiff when he applied to take possession. The plaintiff applied for delivery of possession free of the obstruction by the defendant but the Court dismissed the application referring the plaintiff to a suit. *Held*, that this order was one passed under S. 47 of the C. P. Code, and as such appealable and the suit brought in pursuance of the order was not maintainable. Though a right of suit is provided by R. 103 of O. 21 of the C. P. Code, still if the order comes also under S. 47, C. P. Code, the remedy is only an appeal and not a suit (*Odgers, J.*) PACHAIAPPA CHETTI *v.* VENKATA CHARIAR. **90 I. C. 952 : (1925) M. W. N. 577.**

Appeal—Collector.

——S. 47—*Appeal—Collector—Order refusing to appoint under Dekhan Agriculturists' Relief Act.*

An order passed in execution proceedings refusing to appoint the Collector under S. 22 of the Dekhan Agriculturists' Relief Act falls under S. 47 of the Code and is appealable. (*Fawcett and Raymond, A.J.Cs.*) CHOITH RAM *v.* LALBUX. **63 I. C. 310 : 15 S. L R. 47.**

Appeal—Compromise decree.

——S. 47—*Appeal—Compromise decree—Award—Order in execution.*

An appeal lies against an order in execution of an award and for this purpose the award stands on the same footing as the decree in a suit. (*Kennedy, J.C. and Madgaonkar, A.J.C.*) DONALD GRAHAM & CO. *v.* KWEALRAM. **79 I. C. 477: 16 S. L. R. 245.**

Appeal—Execution.

——S. 47—*Appeal—Execution sale—Purchase by decree-holder—Application to set aside.*

Where in execution of a decree the decree-holder purchases the property and an application is put in to set aside the sale ostensibly under O. 21, R. 90, but which states the sale was illegal, the application also falls under S. 47 and any order passed therein amounts to a decree from which a second appeal lies. (*Sulaiman and Mukerjee, JJ.*) SUPERIOR BANK, LTD. *v.* BUDH SINGH **22 A. L. J. 413 : 10 O. & A. L. R. 639: L. R. 5 A. (Civ.) 769 : A. I. R. 1924 All. 698.**

——S. 47—*Appeal — Order not open to second Appeal—C. P. Code, O. 21, Rr. 89—92.*

C. P. CODE (V OF 1908), S. 47—Appeal—Execution.

All orders between decree-holder and judgment-debtor under S. 47 are not decrees and appealable as such. An order under O. 21, R. 92 being appealable under O. 43, R. 1. (j) a second appeal does not lie. (*Suhrawardy and Duval, JJ.*) BANSHIBADAN *v.* CHHAUNAT BIBI. **42 C. L. J. 176 : A. I. R. 1926 Cal 400.**

——S. 47 and O. 21, R. 40—*Appeal—Execution—Arrest of judgment-debtor.*

An order of the executing Court refusing to arrest the judgment-debtor in execution of a decree is an order falling within the scope of S. 47 of the C. P. Code. Such an order is therefore appealable. (*Martineau, J.*) LALA DAS *v.* MINA MAL. **4 Lah. L. J. 266 : A. I. R. 1922 Lah. 259.**

——Ss. 47 and 135—*Appeal—Execution of decree—Exemption under S. 135, Civil Procedure Code, claimed by judgment-debtor—Arrest in execution of two decrees—Legality of.*

Where judgment-debtor arrested in execution of a decree claims exemption from arrest under S. 135, Civil Procedure Code, and the Court negatives his contention, the order is one under S. 47 and is appealable. Where a Judgment-debtor has been arrested in execution of a decree and brought before the Court he is not at the time exempt from arrest in execution of another decree held by a different decree-holder. (*Wallace and Jackson, JJ.*) GOVINDASAMI ODAYAR *v.* THE UNION BANK, LTD., KUMBAKONAM. **47 M. L. J. 678 : 35 M. L. T. 102 : (1924) M. W. N. 781 · A. I. R. 1924 Mad. 900.**

——S. 47—*Appeal—Execution—Mistake —Order restoring possession to judgment-debtor.*

A conditional decree cannot necessarily be treated as a preliminary decree and the order, restoring possession to the Judgment-debtor on the ground that the possession was given to the decree-holder under a misapprehension that the decree-holder has satisfied the condition which he had not, is of the nature of a final decree. The order, however, is an order passed in the execution department from which an appeal could be preferred under the provisions of S. 47, C. P. Code. (*Daniels, J. C.*). DORAI LAL *v.* MT. JAMAGA. **72 I. C. 879 : A. I. R. 1923 Oudh 16.**

——S. 47 and O. 21, R. 90—*Appeal — Execution sale—Application to set aside — Limitation — Order overruling—Appealability.*

Every order in proceedings under S. 47, C. P. Code, is not appealable. Orders dealing with mere matters of procedure such as those directing the production of documents, or the summoning of witnesses although in a wide sense they may be said to be orders relating to the execution can hardly be said to be the determination of any question within S. 47, C. P. Code read within S. 2. The questions for determination there referred to must be those which the parties are asking the court to decide as to their rights of liabilities and not merely interlocutory questions of procedure which incidentally arise for determination in the course of the proceedings. When the rights or liabilities of the parties as to the execution, discharge or satisfaction of the decree are determined by the order, then the order is appealable as a decree. The Judgment-debtor applied to set aside an execution sale on the ground of material irregularity and fraud in conducting the sale and also on the ground that execution had been barred. The Court below held that by reason of a prior order in execution it must be held to have been impliedly decided that execution was not barred. *Held*, that the question whether or not execution was barred was a question within S. 47, C. P. Code, arising between parties to the suit and that the order of the Court

C. P. CODE (V OF 1908), S.47—Appeal—Execution.

below was appealable. (*Dawson Miller, C. J. and Foster, J.*) SHIVA NARAYAN LAL CHAUDHURY *v.* NARAYAN PRASAD. **2 Pat. L R. 222 : A.I.R. 1924 Pat. 683.**

——S. 47—*Appeal—Execution sale—Omission to serve notice under O. 21, R. 22, C. P. Code.*

Where an application to set aside an execution sale is based not only upon the failure to publish and conduct the sale according to law but also on the ground of the omission on the part of the decree-holder of the necessary notice under O. 21, R. 22, C. P. Code, the case comes under S. 47, C. P. Code, and a second appeal lies. (*Mullick and Foster, JJ.*) KISHUNDEO NARAYAN MAHTA *v.* RAMRAJAN SINGH. **1923 P. H. C. C. 298 : 5 Pat. L. T. 61 : A.I.R. 1924 Pat. 67.**

Appeal—Interlocutory Order.

——S. 47—*Appeal—Interlocutory order—Order refusing to postpone or alter terms of sale is interlocutory.*

An order refusing to postpone a sale or alter the terms of the sale proclamation, either by raising the upset price, or by dividing the property into lots, is only an interlocutory order. (*Schwabe, C. J. and Coleridge, J.*) KAVIRIBAI AMMAL *v.* B. MEHTA. **46 M. L. J. 71 : 18 L. W. 615 : 1923 M. W. N. 894: 75 I C. 901 : A. I. R. 1924 Mad 234.**

——S. 47 and O. 43, R. 1—*Appeal—Interlocutory order—Order dismissing execution application for default.*

An order dismissing an application for execution for default of the decree holder is not appealable. (*Jwala Prasad and Bucknill, JJ.*) GUR CHANDRA ROY *v.* JANARDAN PRASAD THAKUR. **4 Pat. L. T. 204 : 68 I. C. 337 : A. I. R. 1923 Pat. 180.**

Appeal—Objection to attachment.

——S. 47 and O. 21, R. 58—*Appeal—Objection to attachment.*

Where a person impleaded as a party to the suit but against whom no decree is passed objects to the attachment of the properties in her hands relying on a conveyance executed by the deceased judgment-debtor in her favour, the objection falls within S. 47, C. P. C. The decision of such a question operated as a decree under S. 2 of the Code and is appealable in the same manner as other decrees under S. 96. (*Mookerjee and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD MUKHERJEE. **67 I. C. 6 : 34 C. L. J. 477.**

——S. 47 and O. 21, R. 58—*Appeal—Objection to attachment—Claim by legal representative of judgment-debtor.*

The provisions of S. 47 C. P. Code should receive the widest interpretation. Where the legal representative of a deceased judgment-debtor raises an objection to the attachment of certain property in his hands on the ground that it is his own property and not that of the deceased, the question must be investigated under S. 47, C. P. Code. and not under O. 21, R. 58, C.P.C. There is an appeal against the order of the court on the claim petition. 17 C. 711 : 19 C. W. N. 517 Ref. (*Coutts and Das, JJ.*) NAURATAN LAL *v.* MRS. MARGARET ANNE STEPHEN. **3 Pat. L. T. 613 : 68 I.C. 369 : A. I. R. 1922 Pat. 572.**

——S. 47 and O. 21, R. 58—*Appeal—Objection to attachment—Dismissal of—Order not appealable.*

An application put in by a judgment-debtor that the property sought to be attached is *wakf* property and as such is not attachable is one falling under O. 21, R. 58 and not under S. 47. No appeal lies from any order passed on such an application. (*Coutts and Das,*

C. P. CODE (V OF 1908), S. 47—Appeal—Order.

JJ.) SHAIKH NAZIR HUSSAIN *v.* MAHOMMAD EJAZ HUSSAIN. **1 P. 637 : 3 Pat. L. T. 432 : 67 I.C. 438 A.I.R. 1922 Pat. 196.**

Appeal—Order.

——S. 47 and O. 20, R 12—*Appeal—Order that defendants are liable to account as legal representatives of deceased judgment-debtor—Amount due not determined—Order is not appealable—Civil P. C., O. 20, R. 12.*

O. 20, R. 12 enables the Court to direct an enquiry to be made as to the rents and mesne profits to which the plaintiff may be entitled. Such an enquiry is made in the course of a proceeding which is virtually a proceeding in continuation of the original suit, and under rule 12, clause (2), a final decree has to be prepared in respect of the mesne profits which may be awarded in accordance with the result of such an enquiry. From such a final decree an appeal is maintainable. But where the order of the Court below merely directs that the defendants are liable to render accounts as the legal representatives of the deceased judgment-debtor and the amount for which they are liable has not been determined, the question which has been actually determined by the Court below is merely a question relating to the substitution of the names of the defendants in the place of the deceased, and their liability to render the accounts directed by the decree as his legal representatives. It is not a question relating to the execution, satisfaction or discharge of a decree. S. 47 therefore has no application. It is at best an interlocutory order and no appeal is maintainable but the defendants can raise the plea of their non-liability in the appeal from the final decree. (*Lindsay and Kanhaiya Lal, JJ.*) RUDRA PRATAP SINGH *v.* SARDAR MAHESH PRASAD SINGH. **23 A. L. J. 458 : L. R. 6 A. Civil 359 : 87 I. C. 322 : A. I. R. 1925 All. 588.**

——S. 47—*Appeal — Order discharging surety from suretyship is decree—Surety is a party within S. 47—C. P. Code, S. 145.*

When any person has become liable as surety for the fulfilment of any condition imposed on him, such person is for the purposes of appeal a party within the meaning of S. 47 and therefore an order discharging him from the suretyship is a decree and is appealable. (*Sulaiman and Mukerjee, JJ.*) RATNI BAI *v.* GHASI RAM. **23 A. L. J. 59 : L. R. 6 A. Civil 171 : 86 I. C. 105 : A. I. R. 1925 All. 344.**

——S. 47—*Appeal—Order concerning—Cost of commission—Execution—Nature of order.*

Proceedings in execution of an order concerning costs of a commission are under S. 151, C. P. Code and do not fall under S. 47, C.P. Code. As such there is no appeal. (*Kanhaiya Lal, J.*) GOPAL DAS *v.* GAURI SHANKER PRASAD. **74 I.C. 186 : A.I.R. 1924 All. 122.**

——S. 47—*Appeal—Order refusing stay of sale.*

An order refusing to stay a sale pending an appeal falls under S. 47, C. P. Code, and is appealable. (*Scott-Smith, J.*) FIRM OF PHALLU MAL HIRA LAL *v.* BANARSI DAS. **A. I. R. 1924 Lah. 631.**

——S. 47—*Appeal—Order directing decree to be executed only against property—Decree.*

Where a Court executing a decree holds that the decree could be executed only against the property of the judgment-debtor and not against him personally, it has the force of a decree and there is an appeal and second appeal from it. (*Campbell, J.*) THE FIRM OF MUL CHAND HUT CHAND *v.* THE FIRM OF GANDA MAL RALLIA RAM. **A. I. R. 1924 Lah. 604.**

——S. 47—*Appeal—Order staying execution.*

C. P. CODE (V OF 1908), S. 47--Appeal—Order.

An order staying or refusing to stay execution of a decree falls under S. 45 and is appealable. (*Martineau, J.*) FIRM OF GOBINDRAM-RAM CHANDER *v.* FIRM RULIA RAM NAURTA RAM.
76 I. C. 174 · A. I. R. 1924 Lah. 602.

——— **Ss. 47, 151 and O. 21, R. 90**—*Appeal—Order under O. 21, R. 90—Second appeal—When lies—Auction sale set aside under inherent powers of Court—Sale contrary to order of the Court—Effect of.*

An application to set aside an auction sale was dismissed by the District Munsif on the ground that there was no evidence of fraud or material irregularity. On appeal the District Judge agreed with the findings of the Court below but holding that the sale was in contravention of a prior order of court which had become final, set aside the sale under his inherent powers. *Held*, the order of the District Judge was not one under O. 21, R. 90 but under S. 151 and an appeal lay to the High Court. In the case of an application to set aside an auction sale there is no second appeal when the court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151 there is a second appeal. 33 I. C. 692 ; 38 C. 339 : 27 M. L. J. 605 : 30 M L. J. 611 : 3 Pat. L. J. 645 referred to. Where the parties disputing the sale are parties to the suit they approach the court under S. 47 which decides the forum and not the scope of the jurisdiction. (*Jackson, J.*) AKSHIA PILLAI *v.* GOVINDARAJU CHETTY **47 M. L. J. 149: (1924) M. W. N. 842 : A. I. R. 1924 Mad 778.**

———**S. 47**—*Appeal—Order between parties to suit.*

It is only such orders as determine questions arising between parties to the suit or their representative that become appealable as decrees passed under S. 47, C. P. Code. 17 Mad. 394 : 1918 M.W.N. 507 referred to. (*Spencer and Odgers, JJ.*) BUDARAJU HANUMANTHA RAO *v.* ALLAMNENI KRISHNAMMA.
70 I. C. 329 : 32 M. L. T. 118 (2) : A. I. R 1924 Mad 518.

———**S. 47**—*Appeal—Order in which properties to be sold—If within section.*

A decision of an executing court as to the order in which properties were to be sold in execution, even though it is a question between judgment-debtors only, is one relating to execution, discharge or satisfaction and as such appealable under S. 47, C. P. Code. It is not applicable only to questions arising between parties who are opposed to each other in the suit. (*Oldfield and Devadass, JJ.*) VEDAVYASA AIYAR *v.* THE MADURA HINDU LABHA NIDHI CO., LTD.
45 M. L. J. 478 : 18 L. W. 311 : (1923) M. W. N. 662 : 77 I. C. 148 : A. I. R. 1924 Mad. 365.

———**S. 47**—*Appeal—Order allowing one of two assignees to execute.*

An order allowing one of two assignees of a decree to execute the decree to the exclusion of the other is not appealable. (*Kinkhede, A. J. C.*) RADHABAI *v.* BHIMARAO. **21 N. L. R. 34 : 82 I. C. 734 : A. I. R. 1925 Nag. 186.**

———**S. 47**—*Appeal—Order under O 9, R. 8.*

Where a Revenue Court executing a decree dismisses the judgment-debtor's objection in default of appearance no appeal lies either under the Oudh Rent Act or the Civil P. C. (*Dalal, J. C. and Wazir Hasan, A. J C.*) MAHOMED ZAKU ULLAH *v.* MT. GULKANDI. **28 O. C. 124 : 85 I. C. 393 : A. I. R. 1925 Oudh 485.**

———**S. 47 and O. 21, R. 71**—*Appeal—Order under O. 21, R. 71 is 'decree'.*

An order under O. 21, R. 71 is a decree within the meaning of S. 47. 2 O. W. N. 141 Foll. (*Daniels, J. C.*) ANGNU *v.* MIRZA MAHOMED SAJJAD ALI KHAN. **12 O. L. J. 261 : 88 I. C. 131 : 2 O. W. N. 212 : A. I. R. 1925 Oudh 397.**

——— ———**S. 47**—*Appeal—Order that properties should be sold in certain order—Order is appealable—Mortgage decree.*

Where a mortgage decree was passed against certain properties and the Court ordered that at first all except a certain item should be put up for sale and if such sale failed to fetch a sufficient sum, then the other item should be sold.

Held, that the order was a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree and was appealable. (*Mullick and Ross, JJ.*) KHIRODHAR SINGH *v.* GUJADHAR LAL. **(1925) P. H. C. C. 164 : 6 P. L. T. 393 : A. I. R. 1925 Pat. 484.**

———**S. 47 and O. 21, R. 98**—*Appeal—Order under R. 98 is appealable.*

When the decree-holder is the auction-purchaser and is resisted by the judgment-debtor an order made under R. 98 is appealable as a decree. (*Mullick and Ross, JJ.*) ASKARAN BAID *v.* RAGHUNATH PRASAD.
6 P. L. T. 351 : 88 I. C 104 : (1925) P. H. C.C. 212 : A. I. R. 1925 Pat 478.

Appeal—Question Relating to Execution.

———**S. 47**—*Appeal—Question relating to execution—Mortgage-decree—Execution—Objection as regards payment of court-fee.*

Where an executing court disallows an objection as regards insufficiency of court fee and orders the execution to proceed, the question is not purely one of admission of an execution application, but it is a question as to whether the execution can proceed or not and an appeal lies against the order. (*Coutts and Ross, JJ.*) RAM BHUJHWAN PRASAD *v.* NATHO RAM.
3 Pat. L.T. 146 : 70 I. C. 483 : A. I. R. 1922 Pat. 59.

Appeal—Rateable Distribution.

——— **Ss. 47 and 73**—*Appeal—Rateable distribution—Order dismissing application for—Nature of.*

Where the Court below dismisses an application for rateable distribution on the ground that it has not been validly presented before the money was paid out to other creditors the order is not appealable and the aggrieved party can sue. (*Oldfield and Venkatasubba Rao, JJ.*) SOMASUNDARAM CHETTIAR *v.* SUNDARESA RAO. **32 M. L. T. 155 (H. C.) : A. I. R. 1924 Mad. 97.**

Appeal—Receiver.

———**S. 47**—*Appeal—Receiver—Surety for receiver—Order to pay up moneys.*

An order against a receiver to pay up moneys can be executed against the surety and the order directing execution against such surety is appealable under S. 47 (*Twomey, C. J., and Robinson, J.*) MAUNG PO THEIN *v.* MA WAING. **13 Bur. L. T. 91 : 59 I. C. 844 : 10 L. B. R. 236.**

Appeal—Sale Proclamation.

———**S. 47**—*Appeal—Sale proclamation—Objection as to misdescription of boundaries—Order falls within the section and is appealable—Civ. Pro. Code, S. 96.*

If an order falls within S. 47 and is finally decisive it is a decree and is appealable. For determining whether an order falls within S 47, sub-section (1), we must see whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. The test in each case would be whether there had been a judicial adjudication binding on the parties in

C P. CODE (V OF 1908), S. 47—Appeal—Sale Proclamation.

a subsequent proceeding. The determination of a question relating to an application under O. 21, rule 66 may also be an order passed under S. 47. Where objection was taken to a sale proclamation on the ground of misdescription of the boundaries; *Held*, that an order passed on the objection is within S. 47 and is appealable. (*Pearson and Graham, JJ.*) DEVENDRA NATH BASU *v.* KAILASH CHANDRA KALU.
80 I. C. 861 : 29 C. W. N 556 : A. I.R. 1925 Cal. 318.

——S. 47 and O 21, R. 66—*Appeal—Sale proclamation—Order settling terms.*

An order settling the terms of a sale proclamation and directing its issue is not appealable. 16 C. W. N. 124 : 16 C. W. N. 970 Ref. (*Sanderson, C. J. and Chotzner, J.*) JOGESH CHANDRA CHOUDHRY *v.* HEMENDRA KUMAR ROY. **64 I. C. 547 : 35 C. L. J. 170 (Cal.).**

——S. 47 and O. 21, R. 66—*Appeal—Sale Proclamation—Order settling—Order in which property is to be sold—Order settling—Appeal from—Maintainability.*

A Judge acts not judicially but only administratively when he settles a sale proclamation; his order does not come within S. 47 of the Code.

Held, therefore, that no appeal lay against an order merely settling one of the terms of the sale proclamation, namely, the order in which the property was to be sold. The ruling in 27 M. 59: 14 M. L. J. 57 (F.B.) is good law even under the present Code. (*Krishnan and Waller, JJ.*) LANKA RAMA NAIDU *v.* LANKA RAMAKRISHNA NAIDU. **46 M. L. J. 192 : 19 L. W. 235 : 35 M. L. T. 275 : 78 I. C. 829 : (1924) M. W. N. 220 : A. I. R. 1924 Mad. 527.**

——S. 47 and O. 21, R. 66—*Appeal—Sale proclamation—Notification of encumbrances—Objection by judgment-debtor.*

On the application of the decree-holder encumbrances existing on the property attached were notified in the sale proclamation. The judgment-debtor applied under S. 47 for an order that the properties could not be sold subject to encumbrances. The objection was allowed and the decree-holders appealed. On a question arising as to whether the order of the court was appealable *held*, that the application of the judgment-debtor did not raise any question as to the terms on which the sale proclamation should be settled but it raised the question whether the Court could sell the property subject to the encumbrances and that the question was one relating to the execution of the decree and that the order was therefore appealable. (*Dar and Adami, JJ.*) WILLIAM MALING GRANT *v.* SURAJ MAL MARWARI. **1 Pat. L. R. 53 : 72 I. C. 860 : 1923 P. H. C. C. 76 : A. I. R. 1923 Pat. 134.**

Appeal—Scheme.

——S. 47—*Appeal—Scheme—Orders passed relating to the scheme are not orders in execution.*

Orders passed relating to a scheme formed and sanctioned by the Court in a scheme suit, are not orders in execution of a decree and are not therefore appealable (*Sir John Edge.*) SEVAK JERANCHOD BHOGILAL *v.* THE DAKORE TEMPLE COMMITTEE.
49 M. L. J. 25 : 23 A. L. J. 555 : 27 B. L. R. 872 : 2 O. W. N. 535 : 87 I. C. 313 : L. R. 6 P. C. 117 : 41 C. L. J. 628 : (1925) M.W.N. 474 : 22 L. W. 246 : A. I. R. 1925 P. C. 155 (P. C.)

——Ss. 47 and 92—*Appeal—Scheme—Order made in exercise of powers conferred by—Appealability.*

An appeal does not lie against the order made by a court exercising a power given to it by a provision in

C. P. CODE (V OF 1908), S. 47—Appeal—Stay of Execution.

the scheme, as such an order is not one made in execution. (*Spencer and Madhavan Nair, JJ.*) SIVAN PILLAI *v.* VENKATESWARA AIYAR. **22 L. W. 796.**

Appeal—Stay of Execution.

——S. 47—*Appeal—Stay of Execution.*

An order staying or refusing to stay execution of a decree by the Court is a determination of a question relating to execution within the meaning of S. 47, C.P. Code. Though a stay order falls within S. 47, C. P. Code it is not a decree because it is not a determination which has attaching to it the characteristics required by S. 2, C. P. Code, to be attached to a determination, whether in a suit or in execution, if it is to amount to a decree. A stay order is therefore not appealable as a decree and no special appeal being given against such an order, no appeal lies. Cases reviewed. (*Daniels, and Boys, JJ.*) HUSAIN BHAI *v.* BELTIE SHAH. **46 A. 733 : 22 A. L. J. 706 : L.R. 5 A. (Civ.) 482 : A.I.R. 1924 All. 808 :**

——S. 47—*Appeal—Stay of execution—Refusal to restore execution application dismissed for default.*

An order passed by an executing court is a decree only when it determines a question relating to the execution, discharge or satisfaction of the decree. An order refusing to restore an execution application dismissed for default is not a decree and is not open to appeal. Where the execution court stayed proceedings directing each party to bear his costs, the question does not relate to execution, discharge or satisfaction of the decree and there is no appeal from the order. (*Sulaiman, J.*) LACHHMI NARAIN *v.* MT. BRIJ RANI. **L. R. 5 A. 573 : 80 I. C. 39 : A.I.R. 1924 All. 794.**

——S. 47—*Appeal—Stay of Execution—Order granting.*

An order granting a stay of execution is not a decree and does not fall within S. 47 of the Code and is not appealable. (*Macleod, C. J. and Fawcett, J.*) JANARDAN TRIMBAK GODRE *v.* MARTAND TRIMBAK GODRE. **45 Bom. 241 : 59 I. C. 523 : 22 Bom. L. R. 1212.**

——S. 47—*Appeal—Stay of execution.*

All orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed, and relating to the execution thereof, and, as such appealable. (*Scott-Smith, J.*) FITZ HOLMES *v.* WARYAM SINGH. **75 I. C. 419 : A. I. R. 1923 Lah. 514.**

——S. 47—*Appeal—Stay of execution.*

All questions which determine the rights and liabilities of the parties in the matter of the execution of the decree are appealable. A decision that execution shall or shall not take place for the time being is a question relating to execution and is appealable. (*Le Rossignol, J.*) SARDAR KHAN *v.* FATEH DIN.
68 I. C. 751 : A. I. R. 1922 Lah. 480. (2).

——S. 47 and O 41, R. 5—*Appeal—Stay of execution—Refusal to stay.*

No appeal lies from an order refusing to stay execution by an appellate court. (*Harrison, J.*) KANHAIYA LAL *v.* RAM GOPAL. **68 I. C. 49 : A. I. R. 1922 Lah. 400.**

——S. 47—*Appeal—Stay of execution—Order refusing.*

An order staying or refusing to stay execution of decrees are orders determining questions relating to execution and thus appealable. (*Maung Kin, J.*) KYANKSEMA *v.* APARNA CHARAN.
62 I. C. 342 : 10 L. B. R. 326.

Applicability.

———S. 47—*Applicability—Section does not cover a dispute as to possession between auction-purchaser and judgment-debtor.*

A question between the auction-purchaser and the judgment-debtor with reference to the possession of property sold under the decree is not covered by S. 47. 31 All. 82 (F B.) Foll. A. I. R. 1924 Bom. 429 (F.B.) Ref. (*Ryves and Daniels, JJ.*) IMTIAZ-UN-NISSA *v.* CHHUTAN LAL. **22 A. L. J. 1119 : 47 All. 304 : L. R. 6 A. (Civ.) 183 : 84 I. C. 746 : A. I. R. 1925 All. 236.**

———S. 47—*Applicability—Collector is not a Court.*

Collector executing a decree transferred to him is not a Court and therefore cannot entertain an application under S. 47. (*Mukerjee and Dalal, JJ.*) BHAGWAN DAS MARWARI *v.* SURAJ PRASAD SINGH. **47 All 217 : 22 A. L. J. 1060 : L. R. 6 A. (Civ.) 89 : 84 I. C. 1031: A. I. R. 1925 All. 146.**

———S. 47—*Applicability—Question relating to execution discharge or satisfaction of the decree—Decree for possession—Waste by judgment-debtor after decree.*

Plaintiff obtained a decree for possession of the property in dispute in the suit. An appeal was filed by the defendant who remained in possession. The appeal was eventually dismissed and the plaintiff thereafter discovered that the defendants, while in possession of the property pending the appeal, committed waste by cutting trees. The plaintiff decree-holder thereupon applied in execution for ascertaining the damages alleged to have been committed by the respondents. *Held*, that the question raised was one relating to the execution, discharge or satisfaction of the decree and that it must be determined in execution and not by separate suit. (*Macleod, C. J. and Crump, J.*) HARI SHRIDHAR *v.* SAKHARAM. **25 Bom. L. R. 449: 73 I. C. 443 : A. I. R. 1923 Bom. 391.**

———S 47 and O. 21, R. 89—*Applicability—Application under O. 21, R. 89—Objection by decree-holder as to non-mention of interest in application for execution by mistake comes under S. 47.*

In an application under O 21, R. 89 to set aside an execution sale, an objection by the decree holder that interest was not mentioned in the application for execution by mistake and that, therefore, besides the principal amount, interest also should be ordered to be deposited, comes within S. 47 of the C.P. Code. (*Walmsley and B. B. Ghose, JJ.*) JADAB KRISHNA *v.* APSARADDIN SARDAR. **41 C.L.J. 391: A.I.R. 1925 Cal. 948.**

———S. 47—*Applicability—Execution refused on ground of want of jurisdiction—Order is not "decree".*

Where the Court declines to entertain application for execution at all on the ground that it has no jurisdiction, the order does neither come under S. 47 nor under the general definition of "decree". (*Chatterjee and Chotzner, JJ.*) ASIRUDDIN MONDAL *v.* RAM SHAKHI DEBYA. **41 C. L. J, 166: 86 I. C. 775: A. I. R. 1925 Cal. 679.**

———S. 47—*Applicability — Court cannot grant partition merely on execution petition by auction-purchaser.*

A Court cannot, on a mere application for execution by a Court auction-purchaser, enforce his right by an order for partition. (*Phillips, J.*) MUTHU PILLAI *v.* ALAGIRISAMI PILLAI. **22 L. W. 663: A. I. R. 1926 Mad. 232.**

———S. 47—*Applicability—Question relating to execution—Scheme suit—Direction in decree for filling up vacancies—Order, if appealable.*

On an appeal against an order passed by the Subordinate Judge's Court, Chingleput, on a petition presented to it under cl. 10 of a scheme sanctioned by a decree for the management of a Hindu temple, it was found that the petition was presented on the assumption that a vacancy had occurred among the trustees under the scheme and that, as it had not been filled by either of the two agencies primarily responsible for filling it the Lower Court must in accordance with the scheme do so The Lower Court held after enquiry that, the point disputed before it, a vacancy had occurred and directed that it should be filled in the manner provided by the rules framed by the High Court. *Held*, that though the Court was in this matter acting judicially, it was still necessary to see whether its order was one, against which under the ordinary law an appeal will lie, and that depended on whether its order was a decree within the meaning of S. 2 (2) of the Code of Civil Procedure, or more particularly whether it was the determination under S. 47 of a question relating to the execution of a decree. *Held*, that it did not satisfy the above requirements and there was no appeal against the order, (*Oldfield and Venkatasubba Rao, JJ.*) RANGANADHA THATHACHARI *v.* KRISHNASWAMI THATHACHARI. **47 M. 139:18 L. W. 237: 75 I. C. 189 : (1923) M. W. N. 664 : A. I. R. 1924 Mad. 369.**

———S. 47 and O. 21, R 103—*Applicability.*

O. 21, R. 103 of the Code only applies to cases where strangers to the decree are involved; while S. 47 governs cases where the persons concerned are parties to the suit or their representatives. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) RUKMANI AMMAL *v.* NARASIMHA IYER. **41 M. L. J. 54: 14 L. W. 85 : 63 I. C. 730: (1921) M. W. N. 487.**

———S. 47—*Applicability—Auction-purchaser and judgment-debtor—Decision as between, if appealable.*

The questions determined under S. 47 of the Code are those arising between parties opposed in interest in the suit and not between a party and his representative as between a judgment-debtor and an auction-purchaser. A decision as between the latter, is not appealable (*Rahim and Odgers, JJ.*) YAGNASAMI AIYAR *v.* CHIDAMBARANATHA MUDALIAR. **61 I. C. 961: 13 L. W. 15.**

———S. 47—*Applicability.*

Objection by a person who is both prior and puisne mortgagee after he has got a decree as prior mortgagee to the sale of property in execution of a decree by another as owner under his own decree is an objection not under S. 47 but one under O. 21, R. 58, C. P. Code.

One P mortgaged twice to K his property and subsequently mortgaged the same to G and afterwards again to K. On his two earlier mortgages K sued P and G and obtained a final decree. During the pendency of K's suit, G sued on his mortgage P and K and obtained an *ex parte* final decree. On G's application for execution of his decree, K objected on the ground of being owner on a title prior in time to G's mortgage. *Held*, that K's objection was not covered by section 47 as he was not a party to the decree and that it was covered by O. 21, R. 58 as that was a direct attack on G's decree for the sale of the property. (*Hallifax, A. J. C.*) GANGARAM *v.* KANHAIYALAL. **80 I. C. 626: A. I. R. 1925 Nag. 185.**

———S. 47—*Applicability—Joint possession under—Disturbance of—Remedy.*

Where joint possession awarded under a decree is disturbed, the aggrieved party can maintain a suit for its restoration. (*Kotval, A. J. C.*) JUGAN *v.* AMAN SINGH. **A. I. R. 1924 Nag. 345.**

———S. 47—*Applicability—Permission to bid granted to decree-holder—Permission modified in his absence*

C. P. CODE (V OF 1908), S. 47—Applicability.

—*Sale can be set aside in appeal—C. P. Code, O. 21, R. 90.*

Modifying the permission already granted to the decree-holder to bid, on an office report, behind the decree-holder's back amounts to a material irregularity which though not covered by O. 21. R. 90 is covered by S. 47, C. P. Code, and the sale is liable to be set aside in appeal. 32 M. 752, 30 A. 379 and 43 M. 107 Foll (*Daniels, A. J. C.*) ALI ABBAS *v.* NARAIN DAS. **12 O. L. J. 321· 87 I. C. 997: 2 O. W. N. 297: A. I. R. 1925 Oudh 381.**

——S. 47—*Applicability—Failure to issue notice under O. 21, R. 22—Execution sale sought to be set aside—Second appeal if lies.*

Where an execution sale is challenged on the ground that no notice was issued under O. 21, R. 22, but the Court finds that no such notice was necessary, the order is not one under S. 47. (*Mullick and Bucknill, JJ.*) MAHADEO SINGH *v.* DHOBI SINGH.
2 P. 916: 74 I. C. 838: 4 P. L. T. 721: 1923 P. H. C. C. 283: A. I. R. 1924 Pat. 111.

——S. 47—*Applicability—Order under, should not be contingent.*

An order passed under S. 47 should conclusively and finally determine the rights of the parties and should not be contingent upon future events alternative in their nature. (*Godfrey, J.*) N. K. R. R. M. CHETTY FIRM *v.* M. SUBRAYA MUDALIAR.
3 Rang. 132: A. I. R. 1925 Rang. 271.

——S. 47—*Applicability—Execution stayed—Order regarding sufficiency of security—S. 47 does not apply.*

An order relating to the sufficiency of the security tendered as a condition of the stay of execution which has been granted, is not one which comes within the purview of S. 47. 41 Cal. 160 Foll (*Heald and Chari, JJ.*) MOOLJEE DHURSEE AND CO *v.* M.E. MOOLLA.
3 Rang. 255: 4 Bur. L. J. 61: A. I. R. 1925 Rang. 225.

——S. 47—*Applicability.*

Section includes not only questions relating to the execution of a decree, but also its discharge and satisfaction and so it includes fraud in execution proceedings. (*Fawcett, J. C., Crump and Kemp, A. J. Cs.*) BARUNMAL *v.* NEWANDMAL. **83 I. C. 360 (2): 16 S. L. R. 207 (F. B.)**

Bar of suit.

——S. 47—*Bar of suit—Receiver appointed in suit by party to decree—Claim of refund against receiver—Separate suit is unnecessary.*

A suit was instituted by a defendant in a suit who had been exempted from the decree, for a declaration that certain property which had been attached in execution of the decree did not belong to the judgment-debtor. At the instance of the plaintiff, a receiver was appointed by the Court. The suit was decreed and under the decree, the Receiver disposed of the property. The decree was reversed in appeal.

Held: that the appointment of the Receiver must be deemed to have been only in the execution department and that in order to compel him to refund the value of the property no separate suit was necessary but that the executing Court itself had jurisdiction. (*Sulaiman and Mukerji, JJ.*) JWALA PRASAD *v.* SHEIKH CHATTAN. **L. R. 6 A. Civ. 36 : 85 I. C. 161: A. I. R. 1925 All. 328.**

——S. 47 and O. 21, R. 58—*Bar of suit—Section cannot bar a suit by decree-holder specifically directed to file by an order under O. 21, R. 58.*

A suit filed by decree-holder in pursuance of an order passed under O. 21, R. 58 directing him to file a separate suit to establish his title cannot be dismissed on the ground that the remedy lay under S. 47 (*Daniels and Neave, JJ.*) MATHURA DAS *v.* RAMRAJ SINGH. **L.R. 5 A. Civ. 755: A. I. R. 1925 All. 240.**

——S. 47—*Bar of suit—Suit against auction-purchaser for property sold—Judgment-debtor having no interest.*

Where property is sold in execution of a decree, but the judgment-debtor has no interest in the property sold, a suit will lie against the auction-purchaser for the recovery of the same. (*Kanhaiya Lal, J.*) BALMANT SINGH *v.* MT. LAIQA BEGUM.
75 I. C. 238: L. R. 4 A. 526: A. I. R. 1924 All. 273.

——S. 47—*Bar of suit—Sale—Agreement by one decree-holder to pay others—Failure to do so—Fraud—Suit to set aside sale.*

One of several decree-holders agreed to pay the others as a consideration for a sale of land to him their share of the decree debt but failed. The others executed the decree and sold the judgment-debtor's property. *Held*, an application to set aside the sale will not lie under S. 47, but as a suit would be maintainable. (*Gokul Prasad, J.*) NARAIN SINGH *v.* ZALIM SINGH.
74 I. C. 351 (2): A. I. R. 1923 All. 573.

——S. 47—*Bar of suit—Claim suit.*

When objections are allowed under O. 21, R. 58 of C. P. Code the decree-holder is entitled to bring a suit for declaration that the assets of the deceased debtor are liable to attachment and sale in the execution of the decree, and such a suit is not barred by Section 47 of the C. P. C (*Banerjee, J.*) BANSIDHAR *v.* SHAMLAL. **71 I. C. 1012· A. I. R. 1923 All. 292.**

——S. 47—*Bar of suit—Plea of sale of property beyond decree.*

Where the purchaser of part of the mortgaged property was a party to the mortgage suit and could have pleaded in execution that the mortgagor had mortgaged property to which he had no title, a separate suit by him for a declaration, that the decree-holder auction-purchaser is not entitled to that part does not lie. (*Stuart, J.*) RAI BAHADUR PANDIT SADANAND PANDEY *v.* SHEIKH JUFAIL AHMAD.
A. I. R. 1923 All. 115.

——S. 47—*Bar of Suit—Subsequent suit for ejectment on fresh cause of action.*

Plff.'s father obtained a decree for possession against the deft. who admitted his right after the passing of the decree and paid him all costs of the suit. Subsequently deft. set up adverse possession. *Held* that a fresh suit for possession was not barred. (*Gokul Prasad and Stuart, JJ.*) JETHU MISIR *v.* GODAVARI DUTT. **L. R. 3 A. 404 : 20 A. L. J. 619 : A I. R. 1922 All. 411.**

——S. 47—*Bar of suit—Execution barred, whether fresh suit lies.*

Where plff. failed to recover possession either privately or by execution within time after pre-emption decree in his favour though he deposited the pre-emption money in time, he cannot file a fresh suit on the basis of the former decree. 14 A. L. J. 102 overruled. (*Sulaiman and Gokul Prasad, JJ.*) RAMANAND *v.* JAIRAM **2 U. P. L. R. (All.) 379 : 18 A. L. J. 1001 : 59 I. C. 632 : 43 All. 170.**

——S 47—*Bar of suit—Suit by auction purchaser who was himself a decree-holder for possession—Not barred.*

Where a decree-holder in execution of his money-decree purchased the right, title and interest of his Judgment-debtor in certain immoveable properties a suit by the purchaser to recover possession on the strength of that title would not be barred by S. 47, C. P. Code, 35 B. 452 overruled. (*Macleod, C. J. and*

C. P. CODE (V OF 1908), S. 47—Bar of suit.

Crump, J.) HARGOBIND MULCHAND *v.* BHUDAR RAOJI. **48 Bom. 550 : 26 Bom. L. R. 601 : A. I. R, 1924 Bom. 429.**

——**S. 47**—*Bar of suit—Decree-holder auction-purchaser—Obstruction to possession by judgment-debtor as well as stranger—Remedy—Suit.*

The proper remedy of a decree-holder auction-purchaser who is resisted in trying to get possession of the property purchased, by the judgment-debtor as well as a third person claiming to have an interest in the property, is to bring a separate suit for possession both against the judgment-debtor and the stranger. S. 47 of the Code is no bar to such a suit. (*Macleod, C. J. and Heaton, J.*) GOBA NATH BAROLA *v.* SAKHARAM TEJU PATIL. **44 Bom. 977 : 59 I. C. 366 (2): 22 Bom. L. R. 1101.**

——**S. 47**—*Bar of suit—Adjustment uncertified—Suit for declaring satisfaction of decree.*

S. 47, C. P. Code, does not bar a suit for declaration that by means of an adjustment though uncertified the decree has been fully satisfied. (*Moti Sagar, J.*) BISHEN SINGH *v.* MAHINDAR SINGH. **A. I. R. 1925 Lah. 54.**

——**S. 47, and O. 21, R. 91**—*Bar of suit—Auction-purchaser dispossessed—Suit for purchase money is maintainable.*

An auction-purchaser, who has paid the full price can bring a suit to recover that money on being dispossessed of the property by a successful claimant, who had lodged an unsuccessful objection under O. 21, R. 58 and subsequently brought a suit and established his right to the property. 36 C. L. J. 205 Foll. (*Harrison and Zafar Ali, JJ.*) ASAD ULLAH KHAN *v.* KARAM CHAND. **4 Lah. 354 : 76 I. C. 605 : 6 L.L.J. 67 : A. I. R. 1924 Lah 115.**

——**S. 47**—*Bar of suit—Possession in execution proceedings—Subsequent dispossession—Remedy.*

Where in the course of execution proceedings, the decree-holder got possession of the properties though not through the Court officer, and was subsequently dispossessed by the judgment-debtor, a suit to recover possession is maintainable. (*Chevis and Harrison, JJ.*) RUP CHAND *v.* ALLAH JAUNAYA. **68 I. C 744 : A. I. R. 1922 Lah. 459 (2).**

——**S. 47**—*Bar of suit—Suit for declaration—Satisfaction of the decree.*

A suit for a declaration that a decree is satisfied and for an injunction restraining the decree-holder or his assignee, from executing the decree is barred by S. 47, C. P Code. (*Chevis, Abdul Raoof and Abdul Qadir, JJ.*) RAMLABHAYA *v.* FIRM MUKANDA MALKAPUR CHUND. **3 Lah. 319 : 67 I.C. 593: A.I.R. 1922 Lah 428 (F.B.).**

——**S. 47**—*Bar of suit.*

The plaintiff had deposited a sum to release from Court sale held under a previous mortgage. The application by the plaintiff to reserve his rights under the hypothecation bond was rejected. *Held* that there was no bar to the institution of the suit. (*Abdul Raoof and Abdul Qadir, JJ.*) RAHIM-UD-DIN *v.* SHAFQAT ULLAH. **A. I. R 1922 Lah. 358 (2).**

——**S. 47**—*Bar of suit—Legal representatives brought on record in execution—Dispute as to property of judgment-debtor—Suit, if lies.*

Where legal representatives of a deceased judgment-debtor are brought on record in execution, the questions which they might raise as to property in their hands not being the assets of the judgment-debtor in their hands, are governed by S. 47, and a separate suit by them to establish their title to the property is barred by the section. (*Abdul Raoof and Harrison, JJ.*) BHAGAT RAM *v.* NIZAM DIN.

C. P. CODE (V OF 1908), S. 47—Bar of suit.

63 I. C. 853 : 3 Lah. L. J. 406.

——**S. 47**—*Bar of suit—Stranger auction-purchaser—Sale of share in a property—Right to partition—If enforceable in execution proceedings.*

A person who purchases at an auction sale a share in an item of property cannot work out his right to partition in execution proceedings. (*Phillips, J.*) MUTHU PILLAI *v.* ALAGIRISAMI PILLAI. **22 L. W. 663.**

——**S. 47** - *Bar of suit—Whether bars to subsequent suit depends on previous decree being executable for reliefs claimed in later suit.*

Whether a subsequent suit is barred by reason of C. P. Code, S. 47 depends upon the existence of a decree which is executable for the purpose of the reliefs sought to be enforced in the subsequent suit. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) ARUNACHALLAM CHETTI *v.* RAJARAJESWARA SETHUPATHI. **22 L.W. 195 : A.I R. 1925 Mad. 1260.**

——**S. 47**—*Bar of suit—Unless judgment does not provide for execution of obligation created thereby no suit lies on an executable judgment.*

In India no separate suit can be brought on the basis of an executable judgment. The judgment creditor is left to his remedy by execution. But where a new obligation is created by a judgment without provision for execution a suit can be brought on the basis of the judgment. (6 B. H. C. R. 231 and 9 C. W. N. 952, Foll ; 27 Mad. 243 ; 8 Bom. 1 ; 20 C. W. N. 58 and 43 All. 170, Dist.) (*Ramesam and Jackson, JJ.*) RAMASWAMI NATHAN *v.* M. P. M. MUTHIAH CHETTY. **47 M. L. J. 829 : 21 L. W. 75 : 48 Mad. 482 : A. I. R. 1925 Mad. 279.**

——**S. 47**—*Bar of suit—Mistakes in execution proceedings.*

Mistakes in execution proceedings should be rectified by the executing Court and no separate suit lies. (*Ayling and Krishnan, JJ.*) JAINOLABDIN SAHIB *v.* KRISHNA CHETTIAR. **41 M. L. J. 120 : 63 I. C. 200 : (1921) M. W. N. 491 : 14 L. W. 92.**

——**S. 47**—*Bar of suit—One of two judgment-debtors not proceeded against in execution—Property sold in execution—Auction-purchaser sued subsequently by the judgment-debtor not mentioned in the execution, for recovery of the property—Suit is maintainable.*

Where of two judgment-debtors one only was proceeded against in execution proceedings as being the sole owner of the property sold in auction, a suit by the other judgment-debtor after the auction-sale for recovery of the property from the auction-purchaser is maintainable. S. 47 is not strictly applicable in such a case. (*Findlay, O.J C.*) KANHAIRAM *v.* KALICHARAM. **8 N. L. J. 184 : A. I. R. 1926 Nag. 68.**

——**S. 47**—*Bar of suit—Representative character of parties.*

Where in a suit to set aside an execution sale, the plaintiffs were the representatives of judgment-debtor and the defendants were the decree-holders in the suit in which the decree was passed and the matter related to execution of a decree. *Held*, Sec. 47 applied to the case. (*Kotwal, A. J. C.*) BRIJMOHANSINGH *v.* KASTURACHAND. **68 I. C. 693 : A. I. R. 1922 Nag. 189.**

——**S. 47**—*Bar of suit—Partition suit—Shares not specified or allotted—Separate suit if lies.*

If a decree is passed in a partition suit, the parties thereto whether arranged as plaintiffs or defendants are in the position of decree-holders. If the decree merely directed the separation of the shares of the plaintiffs and left the shares of the defendants joint among themselves the defendants cannot execute the decree and a fresh suit among them *inter se* will not

C. P. CODE (V OF 1908), S. 47—Bar of suit.

be barred. But if shares are allotted to each of the parties, their rights must be worked out not by suit but in execution. (*Mullick, A. C. J. and Kulwant Sahay, J.*) HEM CHANDRA MAHTO *v.* PREM MAHTO.
90 I. C. 739 : 1925 P. H. C. C. 330.

——S. 47—*Bar of suit—Suit by judgment-debtor for possession of property not sold in auction but wrongly taken by auction purchaser—Section does not apply.*

If the property was in fact attached and sold then the judgment-debtor's only remedy as a party to the suit would be under S. 47 of the C. P. Code and not by a separate suit. But if the property was not included either in the sale proclamation or in the sale certificate and was not in fact purchased at the auction-sale, but was wrongly taken possession of by the auction purchaser under colour of a title which he did not possess no question arises within S. 47 of the Code and the period for recovering possession of property taken under such circumstances will be 12 years from the date of dispossession. (*Dawson Miller, C.J. and Foster, J.*) LACHMI NARAIN SINGH *v.* REBATI DEBYA.
6 P. L. T. 473 : 86 I. C. 648 : 1925 P. H. C. C. 37 : A. I. R. 1925 Pat 376.

——S. 47—*Bar of suit—Decree against Hindu father Son's liability.*

A separate suit for the determination of the liability of the sons for the debt covered by the decree passed against their father would be barred by section 47. The only remedy of the decree-holder is to apply for execution of the decree against the son of the deceased judgment-debtor as his legal representative. The question as to whether the decree is capable of execution inasmuch as the debt covered by it was tainted with immorality, is one relating to the execution of the decree and the plea with respect to that must be taken and determined in the execution proceedings. (*Jwala Prasad and Adami, JJ.*) SHEIK KAROO *v.* RAMESHWAR RAO.
3 P. L. T. 43 : A. I. R. 1923 Pat. 143.

——S. 47—*Bar of suit—Decree for possession—Obstruction—Subsequent suit for declaration of title—If maintainable—Remedy of party.*

Where a decree of Court awards a person possession of properties, his duty is to proceed under the C. P. Code, and if obstructed to proceed under the provisions of O. 21, Rr. 97, 100; a subsequent suit for declaration of title is barred by S. 47. (*Das and Adami, JJ.*) SOVANJI JENA *v.* BHIMA RAY.
1 P. 157 : A. I R. 1922 Pat. 407.

——S. 47 and O. 21, R. 58—*Bar of suit—A suit by party to objection proceedings is barred.*

A suit by a person who was a party to objection proceedings under O. 21, R. 58, though as a *pro forma* defendant is barred by S. 47. (*Ashworth, A. J. C.*) SANTU CHAMAR *v.* ARJUN MISRA.
88 I. C. 842 : A. I. R. 1926 Oudh 64 (1).

——S. 47—*Bar of suit—Decree-holder purchasing property at auction-sale cannot sue separately for possession.*

Section 47 bars a separate suit for the pessession of property purchased by a decree-holder at a court-sale. For a decree-holder by purchasing property at Court-sale does not cease to be a party to the suit within the meaning of S. 47 and proceedings for the delivery of possession of property purchased by him are proceedings in execution and fall within the scope of S. 47. (*Raymond and Kennedy, A. J. Cs.*) PIRIMAL *v.* MT. SANGHAR.
18 S. L. R. 34 : 78 I. C. 930 : A. I. R. 1925 Sind 171.

——S. 47—*Bar of suit—Object of suit.*

If the object of the suit is to interfere with the execution of the decree *i. e.* by a declaration and injunction restraining the decree-holder from executing the decree or to set aside the sale in execution, no separate suit will lie; but if the suit does not relate to the execution of the decree, but to the transaction of adjustment a separate suit will lie. (*Fawcett, J. C., Crump and Kemp, A.J.Cs.*) BANUMAL *v.* NEWANDMAL.
83 I. C. 360 (2) : 16 S. L. R. 207 (F.B.).

Compromise decree.

——S. 47 and O. 23, R. 3—*Compromise decree—Execution of—Such decree can be executed only in respect of matters covered by it—Separate suit will lie for matters outside it.*

Court's power to pass a consent decree is limited to matters covered by the suit. But if the agreement refers to matters outside the suit forming consideration for the compromise or settlement of the matter compromised in the suit such terms should also be mentioned in the decree. But it does not follow that such terms can be enforced in the execution of that decree. They can be enforced only by a separate suit. Where a decree includes matters covered by the suit and also matters outside it the decree can be executed only to the extent of the matters included in the suit and not in respect of the matters outside it. (*Suhrawardy, J.*) ARJUN KAPALI *v.* ASWINI KUMAR KAPALI.
78 I. C. 317 : A. I. R. 1925 Cal. 286.

Conversion.

——S. 47—*Conversion—Suit sought to be converted into a proceeding after 12 years—Plaint misconceived—Plaintiff misled by order of Court—Conversion was not allowed.*

Where the Court while rejecting decree-holder's application under O. 21, R. 95 directed him to a suit which was filed and the party subsequently discovering after 12 years that a suit was not competent as an appeal lay from that order under S. 47, requested the Court to change the suit into a proceeding and it was found that the plaint was misconceived.

Held: that the conversion of suit into proceeding should not be allowed. (*Odgers, J.*) PACHAIAPPA CHETTI *v.* C. VENKATACHARIAR.
(1925) M.W.N. 577 : 90 I. C. 952 : A. I. R. 1925 Mad. 1198.

——Ss 47, Cl. (2) and 144—*Conversion—Power of Court.*

Where a suit is brought for restitution in spite of the provision in S. 144 of the C. P. Code it is open to the Court to treat the suits as a proceeding in execution in the exercise of its powers under S. 47, cl. (2) of the C. P. Code, 13 Bom. 485; 28 Mad. 355; 45 Bom. 1137, 25 All. 441 foll. (*Prideaux, A. J. C.*) JAMANLAL *v.* RAGHO.
67 I. C. 319 : A. I. R. 1922 Nag. 198.

——S. 47 (2) and O. 21, R. 16—*Conversion—Case between rival assignees of decree converted by Court into suit—Appeal lies.*

Where two rival assignees from a decree-holder applied for execution of the same decree and the question arose as to the validity of the assignments and the case was converted by Court into a suit under S. 47 (2) and decided.

Held: the Court acted within its jurisdiction even supposing that it acted under O. 21, R. 16, an appeal lay from the decision as from one passed in a regular suit. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUN BAHADUR SINGH *v.* BAJRANGI PRASAD SINGH.
3 Pat. 344 : 1924 P. H. C. C. 193 : 78 I. C. 495 : A. I. R. 1925 Pat. 16.

C. P. CODE (V OF 1908), S. 47—Defence to a suit.

Defence to a suit.

——S. 47—*Defence to a suit.*

An objection, which could not have been raised by plaintiff in a suit by him under S. 47, C. P. Code, can be made the ground of defence in a suit by another. 30 Cal. 946 followed. (*Walmsley and Suhrawardy, JJ.*) SURADHANI DUTTA *v.* SITTOO SHEIKH.

27 C. W. N. 280 : 71 I. C. 378 : 38 C. L. J. 17 : A. I. R. 1922 Cal. 311.

——S. 47—*Defence to a suit—Objection as to jurisdiction to try suit cannot be raised in execution.*

An objection to the jurisdiction of the Court that tried the suit is not one of the questions allowed by S. 47 to be dealt with in execution. 43 Mad. 675 (F.B.) Ref. (*Spencer, J.*) K. R. RADAKRISNHA AIYAR *v.* VINAYAKASWAMIAR. **49 M. L. J. 664 : 22 L. W. 567 : A. I. R. 1926 Mad. 128 (1).**

——S. 47—*Defence to a suit.*

S. 47 is no bar to a defendant setting up by way of defence a matter relating to the execution of a decree though, if he were the plff., he would be debarred from suing on the ground that the plea could only be gone into in execution. (*Ayling and Spencer, JJ.*) CHINA DANDUSI *v.* PEDDA TATIAH.

41 M.L.J. 261 · 14 L. W. 424 : 70 I. C. 303 : (1921) M. W. N. 536.

Execution sale.

——S. 47—*Execution sale.*

A purchase by decree-holder without obtaining leave to bid or in spite of refusal of leave is not void but voidable. (*Lord Phillimore.*) RADA KRISHNA *v.* BISHWESWAR SAHAY. **44 M. L J. 718 : 3 Pat. L. T. 529 :37 C. L. J. 430 : 31 M. L. T. 209 : 16 L. W. 190 : 25 Bom. L. R. 630 : 49 I. A. 312 : 1 P. 733 : 21 A. L. J. 23 : 27 C. W. N. 294 : 9 C. & A. L. R. 410 : 67 I. C. 914 : A. I. R. 1922 P. C. 336 (P. C.).**

——S. 47—*Execution—Sale in excess—Sale certificate.*

Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. If there is no ambiguity in the words of a certificate of sale, the object of the certificate would be defeated if it were possible to change its plain meaning by reference to other documents on which the decree is based. Under S. 47, C. P. Code, the mortgagor is at liberty to liberate, from the effects of sale, land which is by mistake included in a mortgage decree and sold at a Court sale and is then included in sale certificate. If it is too late to take such proceedings, possession being duly given under the sale certificate, the right thus acquired cannot be challenged. (*Lord Buckmaster.*) RAMABHADRA NAYADU *v.* KADIRIYASAMI NAICKER. **24 Bom. L. R. 692 : 30 M.L.T. 34 : 48 I. A. 155 : A. I. R. 1922 P. C. 252 (P. C.).**

——S. 47 and O. 21, R. 90—*Execution sale—Setting aside—Property included in decree by mistake and sold in execution—Suit for recovery of—Maintainability.*

Where property outside the suit had been included by a mistake in the decree and was sold in execution and 2 years after the sale and its confirmation the plff. sued for the recovery of the property or its value, *held*, that the suit could not lie until the court sale was set aside, it not being a nullity and that the plff. not having set aside the sale within the period prescribed by Art. 166 of the Limitation Act the suit was barred. (*Macleod, C. J. and Coyajee, J.*) NAGABHATTA *v.* NAGAPPA. **24 Bom. L. R. 423 : 46 B. 914 : 67 I. C. 857 : A. I. R. 1923 Bom. 62.**

——S. 47 and O. 21, R. 90—*Execution sale—*

C. P. CODE (V OF 1908), S. 47—Execution sale.

Setting aside—Fraud—Plea of purchaser without notice.

Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice. The fact that the Court has been successfully deceived is one which upon the issue as to the purchaser's good faith, must be of a very different value in different circumstances. In all cases the burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser This is an essential future of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value. Per *Mookerjee, J.*—The protection given to the *bona fide* purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of equity acts solely upon the conscience of litigant parties by compelling the defendant to do what, and only what, *in foro conscientiæ* he is bound to do· If the relation between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief, if the relations are not of this character then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bona fide* purchaser, therefore, simply means that from the relations subsisting between the two parties specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so the Court will not, in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf. An execution sale which has been brought about by the fraud of the decree-holder is liable to be set aside on that ground by application to the executing Court even though it is not proved that the auction-purchaser, a stranger, has participated in or been cognizant of the fraud. Subject to the conditions prescribed by O. 21, R. 90, C. P. Code, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity and exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice. 6 C. W. N. 383 ; 4 C. W. N. 538 ; 26 C. 539 referred to. (*Mookerjee and Rankin, JJ.*) BIRESWAR GHOSE *v.* PANCHCOURI GHOSE.

37 C. L. J. 145 : 27 C. W. N. 587 : 74 I. C. 975 : A. I. R. 1923 Cal. 538.

——S. 47—*Execution—Agreement prior to decree not to execute can be pleaded.*

An agreement made before the passing of the decree by which the decree was not to be executed against one of the judgment-debtors should be enquired into and decided on the merits by the executing Court. (*Madhavan Nair and Jackson, JJ.*) VELU THEVAN *v.* KRISHNASWAMI REDDI. **48 M. L. J. 277 :**

C. P. CODE (V OF 1908), S. 47—Execution sale.

87 I. C. 297 : 21 L. W. 725 : A I.R. 1925 Mad. 591.

——S. 47 and O. 21, R. 90—*Execution sale—Application to set aside—Limitation.*

Under Sec. 47 to an application to set aside an execution sale is applicable under Art. 166. Lim. Act. (*Oldfield and Venkatsubbarao, JJ.*) GANAPATHI MUDALIAR *v.* N KRISHNAMACHARI.

43 M. L. J 184 . 16 L. W. 178 : (1922) M.W.N. 514 : 70 I. C. 743 · 31 M.L.T. 135 : A.I.R. 1922 Mad. 417 (2).

——S. 47—*Execution sale—Puisne mortgagee—Compromis without reference to puisne mortgage.*

Where in a suit on a prior mortgage impleading the puisne mortgagee as a party, a compromise was effected between some of the parties without reference to the puisne mortgagee and the properties were sold in execution of the compromise decree without impleading the representatives of the puisne mortgagee who had by that time died, *held*, (1) that the compromise decree was one affecting the puisne mortgagee and hence the latter must be held to be a judgment-debtor in the suit ; (2) that the proceedings in execution without impleading the representatives of the puisne mortgagee are void and a nullity and the latter's nterests are not extinguished by the execution sale. (*Oldfield and Ramesam, JJ.*) RAGHUNATHASWAMY *v.* GOPAUL. **41 M. L. J. 547 : (1921) M. W. N. 732 : 15 L. W. 123 : A. I. R. 1922 Mad. 307.**

——S. 47—*Execution sale.*

To an application to set aside an execution sale on the ground of illegality *or* irregularity Art. 166 and not Art. 181 is applicable. (*Spencer and Krishnan, JJ.*) KONIDEVA KANNAYYA *v.* RAMAMMA.

(1922) M. W. N. 176 : 74 I. C. 458 : 16 L. W. 934 : A. I. R 1922 Mad. 95.

——S. 47 and O. 21, Rr. 92 and 103—*Execution sale—Decree-holder selling his own properties by mistake—Confirmation of sale · Remedy of decree-holder.*

Where a decree-holder under a *bona fide* mistake brought to sale in execution some of his own properties and they were purchased by a stranger and the sale was confirmed. *Held* that, thereafter the decree-holder's only remedy was by a suit under O. 21, R.103, C. P. Code, and that an application under S. 47, C. P. Code was incompetent. (*Ayling, O. C J. and Odgers, J.*) RAMASWAMI KONAN *v.* KOLANDAIVELU PILLAI. **15 L. W. 272 : 70 I. C. 569 : (1922) M. W. N. 121 : A. I. R. 1922 Mad. 63 (1).**

——S. 47 and O. 21, R. 58—*Execution sale—Objection by judgment-debtor that a certain property was not liable to be sold—Dismissal—Remedy—Suit or appeal—Objection dismissed without inquiry into merit—Error of law, effect of.*

Where a judgment debtor made an application to the executing Court that out of several properties attached and entered in the sale proclamation a certain item of property was not liable to be sold on the ground that he did not possess a saleable interest therein, *Held*, that the objection cannot be treated as one under O. 21, R. 58, C. P. Code, but must be treated as one falling under S. 47, C. P. Code, and hence an appeal lay against the order adjudicating the objection. 8 A. 146 foll. 1 O. C. Suppl. 11 distinguished. Where the Court dismissed the objection on the ground that was made too late and was not *bona fide*.

Held, that the Court ought to have inquired into the merits of it and owing to its failure to do so the order was liable to be set aside. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) LACHMAN PRASAD *v.* SRIMATI MIRNALUNI DEBI. **1 O. W. N. 857 : 85 I. C. 997 : A. I. R. 1925 Oudh 618.**

C. P. CODE (V OF 1908), S. 47—Foreign decree.

——S. 47—*Execution sale—Money decree and mortgage decree which to prevail.*

Though the sale to the defendant in execution of his money decree was earlier, the later sale to the plaintiff in execution of his mortgage decree, the mortgage-decree being in existence at the time of the defendant's purchase, is to prevail. (*Dawson Miller, C. J. and Adami, J.*) CHAMAN LAL *v.* KAMARUDDIN.

3 P. L. T. 757 : A. I. R. 1922 Pat. 655.

——S. 47 and O. 21, Rr. 90 and 92—*Execution sale—Absence of attachment—Suit to set aside—Limitation.*

An objection as to the defect or absence of the necessary attachment before an execution sale involves a substantial question as to the absence of proper notice to the judgment-debtor as to the property attached which does not come within O. 21, R. 90, C. P. Code but comes within S. 47. Consequently where an application is made to set aside an execution sale on the ground of want of attachment, a second appeal lies. An application to set aside the execution sale on the ground of the absence of a proper attachment is governed by Art. 166 of the Limitation Act. The sale does not become a nullity in the absence of attachment though it may be an irregularity. (*Lentaigne, J.*) MA PWA *v.* MAHOMED TAMBI. **1 Rang. 533 : 77 I. C. 368 : A. I. R. 1924 Rang. 124.**

Exonerated defendant.

——S. 47—*Exonerated defendant—Objection to execution of decree against property in his hands—Appeal.*

One of the defendants in a suit for sale on a mortgage was exonerated by the plaintiff and no decree was passed against him or the properties in his hands. Subsequently the plaintiff brought to sale in execution certain property which the exonerated defendant claimed to be his own.

Held, that the objection raised by the defendant to the sale of the property in his hands was one relating to the satisfaction of the decree and that the exonerated defendant was a party to the suit within S. 47, C. P Code consequently the objection was one that should be decided by the executing Court. (*Stuart and Mukerjee, JJ.*) MT. MAHADEI *v.* JAGANNATH DAS. **L. R. 5 A. 91 : 78 I. C. 225 : A. I. R. 1924 All. 313.**

——S. 47—*Exonerated defendant—Objection to attachment in execution—Appeal.*

The first defendant in a suit against whom no decree had been passed filed an application under S. 47, C. P. Code claiming that certain properties in his hands should not be attached in execution. There was no application by the decree-holder for attachment of the property. *Held* that the application was premature. It was only when his property was actually attached that the first defendant could prefer a claim petition and in such a case S. 47, C. P. Code would be applicable to him. The enquiry should be full as in the trial of a suit and not confined to affidavits. (*Macleod C. J. and Crump, J.*) CHUNI LAL ASHARAM *v.* KASHIBAI. **25 Bom. L. R. 440 : 73 I. C. 419 · A. I. R. 1923 Bom. 381.**

Foreign decree.

——Ss. 47, 44 and 21—*Foreign decree—Execution in British India—Objection to decree is allowable.*

The judgment-debtor under a foreign decree sought to be executed in a British Indian Court can raise objections to the decree. (*Srinivasa Aiyangar, J.*) B. N. KRISHNASWAMY CHETTY *v.* MADHAPPA CHETTIAR. **86 I. C. 492 : 21 L W. 330 : A. I. R. 1925 Mad. 788.**

C. P. CODE (V OF 1908), S. 47—Objection to attachment.

Objection to attachment.

——S. 47—*Objection to attachment—By judgment-debtor's representative under O. 21, R. 58—Case falls under S. 47, and decision thereon is a decree.*

Where one N was brought upon the record as a representative of the deceased judgment-debtor and he set up his own right to the property and filed objection under O. 21, R. 58:

Held, that this objection must be taken to have come under S. 47 and that O. 9, R. 13 would in terms be applicable to an *ex parte* decision passed on the objections. 39 All. 47 Foll. 41 Cal. 1 Dist. (*Walsh and Sulaiman, JJ.*) JHUNNI LAL *v.* NATHA

L. R. 6 A. (Civ.) 278 : 87 I. C. 287 : A. I. R. 1925 All. 594.

——S. 47—*Objection to attachment—Decree nullity.*

An objection can be raised in execution proceedings that the decree sought to be executed is a nullity. (*Scott-Smith and Fforde, JJ.* ANWAR-UL-HAQ *v.* NAZAR ABBAS. **6 Lah. 313 : A. I. R. 1925 Lah. 494**

——S. 47—*Objection to attachment—Party against whom suit dismissed—Objection—Order in—Remedy.*

Under S. 47, C. P. Code, a defendant against whom a suit has been dismissed is a party to the suit, and where he puts in an objection petition to an attachment and that is dismissed, he is entitled to come in by way of appeal. The fact that the petition is put in under O. 21, R. 58, does not disentitle him from pleading it was really one under S. 47. (*Moti Sagar, J.*) MT. GAURAN *v.* CHANDU LAL.

A I. R. 1924 Lah. 589.

——S. 47—*Objection to attachment by a party against whom suit was dismissed—Objection is one under S. 47 and not under O. 21, R. 58.*

Under S. 47 parties to the suit include the parties against whom the suit has been dismissed and therefore an objection by such a party that the property attached in execution is not liable to attachment is one under S. 47 and not under O. 21, R. 58 and the decision thereon is a decree. (*Mullick and Ross, JJ.*) SHAIKH KALOO *v.* BHOLANATH. **3 Pat. L. R. 90 : 87 I. C. 743 : A. I R. 1925 Pat. 482.**

——S. 47

Parties and representatives.
Auction-purchaser.
Collusive purchaser.
Custodian of property.
Exonerated Defendant.
Legal Representatives.
Meaning of.
Mortgage suit.
Parties unnecessarily impleaded.
Personal property.
Purchaser.
Question as to.
Scope of.

Parties and representatives—Auction-purchaser.

——S. 47—*Parties and representatives—Auction-purchaser.*

An auction-purchaser, in execution of a decree, obtained upon a mortgage, purchases the rights of the mortgagor and the mortgagee at the date on which the mortgage was made and any subsequent equities or liabilities which arose in respect of the mortgaged property cannot attach to him inasmuch as he acquires the property free from any such liabilities or equities. (*Mears, C J. and Banerji, J.*) KARAMAT ALI *v.* GORAKHPUR BANK, LTD.

44 A. 488 : 20 A. L. J. 337 : A. I. R. 1922 All. 495.

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Auction-purchaser

——S. 47—*Parties and representatives—Auction-purchaser—Resistance to delivery—Suit for removal of obstruction—Maintainability.*

The plaintiff, a mortgagee of an eight annas share belonging to the mortgagor and his brother obtained a decree on the mortgage and in execution the mortgagor's interest in the eight-annas share was sold and purchased by the plaintiff. The sale having been confirmed the plaintiff applied for delivery of possession but was obstructed by an alienee from the brother of the mortgagor. The court having held that the plaintiff was only entitled to joint possession of the eight-annas share along with the alienee, the plaintiff sued to recover possession of the eight-annas share beyond the expiry of one year from the date of the order in the execution proceedings. *Held*, that the plaintiff's suit for recovery of possession of the four-annas share of the mortgagor's brother having been filed after the expiry of one year from the date of the order was barred but that his claim for the remaining four-annas share was maintainable. 26 Bom. L. R. 601 Foll. (*Shah, A. C. J. and Fawcett, J.*) LAKSHMAN SADASHIV *v.* GOVIND GANESH.

26 Bom. L. R. 843 : A. I. R. 1924 Bom. 527.

——S. 47 and O. 21, R 101—*Parties and representatives—Auction-purchaser—Stranger purchaser.*

An auction-purchaser at a sale in court auction in execution of a decree is a stranger to the suit. He is not a representative of any of the parties to the suit. Any question arising between him and the parties to the suit or their representatives must be determined by a separate suit. The question as to the legality of the sale raised by the judgment-debtor is one between the parties to the suit, *i. e.*, between the decree-holder and the judgment-debtor. Even though the auction-purchaser is interested in the result of the case, the judgment-debtor cannot bring a suit to set aside the sale. 34 B. 540 Foll. (*Macleod, C.J. and Crump, J.*) BAIMANI *v.* RANCHHODLAL. **25 Bom. L. R. 147 : 72 I. C. 256 : A. I. R. 1923 Bom. 214.**

——S. 47—*Parties and representatives—Auction-purchaser—Petition of.*

A *bona fide* auction-purchaser for value in execution of a decree is not a party to the suit within the meaning of S. 47, C P. Code. (*Moti Sagar, J.*) MT. ASGHARI BEGUM *v.* IRSHAD-UD-DIN.

79 I.C 57 : A. I. R. 1925 Lah. 176.

——S. 47—*Parties and representatives—Auction-purchaser—Attachment by two Courts—Sale by inferior Court—Rights of purchaser—Application to set aside the sale.*

In execution of a decree against a judgment-debtor certain property was attached by the Munsiff's Court. Subsequently the same property was attached before judgment by a Court of the Subordinate Judge which after the passing of the decree became an attachment in execution. The property however was sold in execution by the Munsiff's Court and purchased by the appellant. The decree-holder in the Sub-Court applied to the Court to sell the property in execution of his own decree. The appellant applied to that Court that the property should not be sold inasmuch as by the execution sale in the Munsiff's Court it had become the property of the appellant and ceased to be the property of the judgment-debtor. The Sub-Court rejected the application. On appeal *held* that the appellant was the representative of the judgment-debtor and that his appeal was maintainable. (*Krishnan and Odgers, JJ.*) SREENIVASACHARIAR *v.* APPAVOO REDDY. **47 M. L. J. 720 : (1924) M. W. N. 551 : 20 L. W. 864 : A. I. R. 1924 Mad. 889.**

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Auction-purchaser.

——S. 47 and O. 21, R. 90—*Parties and representatives—Auction-purchaser, representative of whom—Person not impleaded as party, whether bound to apply.*

The auction-purchaser is a representative of the decree-holder. Where certain property belonged to two persons but one of them alone was sued as though the entire property belonged to him, a decree was obtained and the entire property attached and sold, *held*, the person who was not impleaded was not bound to apply under S. 47 and O. 21, R. 90, C. P. Code, to have the sale set aside even if he had been aware at the time that the entire property was being attached. (*Findlay, O. J. C.*) KANHAIRAM *v.* KALICHARAN. **8 N. L. J. 184. (Nag)**

—S. 47—*Parties and representatives—Auction-purchaser.*

For the purpose of an adjudication between an auction-purchaser and a judgment-debtor the auction-purchaser should be regarded as a representative of the decree-holder. (*Kinkhede, A.J.C.*) SUNDERABAI *v.* SHRIKISAN RAMDHAN. **20 N. L. R. 170 : 79 I. C. 636 : A. I. R. 1924 Nag. 328.**

——S. 47—*Parties and representatives—Auction-purchaser.*

Adjudication between auction-purchaser and judgment-debtor comes under S. 47 and is appealable. (*Kinkhede, A. J. C.*) SUNDERABAI *v.* SHRIKISAN RAMDHAN. **20 N. L. R. 170 : 79 I. C. 636 : A I. R. 1924 Nag. 328.**

——S. 47—*Parties and representatives—Auction-purchaser—Not a representative of judgment-debtor.*

An auction-purchaser is not a representative of the judgment-debtor and he cannot apply under S. 47, C. P. Code, to set aside an execution sale. 34 M. 417: 42 B. 411 Ref. (*Prideaux, A. J. C.*) BALWANT *v.* RATAN LAL. **68 I. C. 429 : A.I.R. 1923 Nag. 161 (2)**

——S. 47—*Parties and representatives—Auction-purchaser.*

An auction-purchaser is representative of the judgment-debtor and not of the decree-holder. (*Ayling and Krishnan, JJ.*) JAINULABDIN SAHIB *v.* KRISHNA CHETTIAR. **41 M.L.J. 120 · 14 L.W. 92 : 63 I. C. 200 : (1921) M. W. N. 491.**

——S. 47—*Parties and representatives—Auction-purchaser obstructed—Order refusing to remove obstruction.*

Where the decree-holder auction-purchaser in execution of a decree is obstructed in obtaining possession and the Court refuses to remove the obstruction, *held*, that the order is one under S. 47 of the Code. (*Oldfield and Seshagiri Aiyar, JJ.*) MEYAPPA CHETTY *v.* CHIDAMBARAM CHETTY. **39 M. L. J. 603 : 12 L. W. 273 : 61 I. C. 349 : (1920) M. W. N. 562.**

——S. 47 and O. 21, Rr. 98 and 99—*Parties and representatives — Auction purchaser in execution of money decree against mortgagor pending mortgage suit —Resistance to delivery of possession.*

Pending a suit on a mortgage the mortgaged properties were brought to sale in execution of a money decree against the mortgagor and were purchased by the fourth respondent. The petitioner purchased the property in execution of the mortgage decree and applied for possession but was resisted by the 4th respondent. *Held*, that the fourth respondent was a person claiming under the mortgagor judgment-debtor and against whom proceedings can be taken under S. 146 of the C. P Code and that the respondent was liable to be removed from possession under O. 21, R. 98 of the C. P. Code. 43 Mad. 107 Ref. (*Abdur Rahim and Napier, JJ.*) MANICKA GRAMANI *v.* PARASURAMA MUDALI. **(1920) M. W. N. 787 : 59 I. C. 894 : 12 L. W. 350.**

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Exonerated defendant.

Parties and representatives—Collusive purchaser.

——S. 47—*Parties and representatives—Collusive purchaser—Decree-holder and objector to attachment—Enquiry.*

Proceedings between the opposite party and the judgment-creditor as to whether the attachment is valid are proceedings under S. 47 and not under O. 21. S. 47 would be very much narrowed if it were laid down that people claiming under a purely colourable and fraudulent document are not to have their claim set aside or ignored when proceedings are taken in execution. (*Rankin, J.*) KARALI PRASAD MUKHERJI *v.* JAMINIBALA DEVI. **A. I. R. 1923 Cal. 344.**

Parties and representatives—Custodian of property.

——S. 47—*Parties and representatives—Custodian of property—Court of Wards Act, S. 6 (e)—Proprietor declared disqualified—Execution proceedings against the properties of the proprietor—Objection by Court of Wards is objection by judgment-debtor through manager, Court of Wards.*

Where under S. 6 (*e*) of the Court of Wards Act a proprietor is declared to be disqualified and the Court of Wards is in possession of his properties then under S. 47 of C. P. Code any objection taken by the manager of the Court of Wards in execution proceedings against the properties of the proprietor is an objection taken by the judgment-debtor through the general manager of the Court of Wards. (*Ross and Sen, JJ.*) LACHMI NARAYAN SHANKAR *v.* MAHOMED ABRAHIM HUSSAIN KHAN. **1924 P. H. C. C. 310 : 84 I. C. 620 : 4 Pat. 172 : 6 P. L. T. 400 : A. I. R. 1925 Pat. 179.**

Parties and representatives—Exonerated defendant.

——S. 47—*Parties and representatives—Exonerated defendant suing for declaring property attached not to be judgment-debtors—Property entrusted to stranger* pendente lite—*He disposing of it on Trial Court's decree—Decree reversed on appeal—He being ordered to refund—No appeal lies.*

During the continuance of an attachment in execution, a suit was filed by a person who had been a defendant in the suit who had been exempted by the decree, for a declaration that the property did not belong to the judgment-debtor and during this suit the property was entrusted to a third person. On the suit being decreed by the Trial Court, that person sold the property and distributed the proceeds as directed by the decree. The decree was reversed in appeal. Then the person who had been entrusted with the property in question was ordered by the Court executing the decree under which the property was originally attached, to refund the proceeds.

Held, that inasmuch as he was not aparty to the execution proceedings no appeal lay from the order.

Held, further, that even assuming the person to have been a receiver under O. 40, against whom an order was passed under O. 40 R. 4, no second appeal lay. (*Sulaiman and Mukerjee, JJ.*) JWALA PRASAD *v.* SHEIKH CHATTAN. **L.R. 6 A. (Civ) 36 : 85 I. C. 161 : A. I. R. 1925 All. 328.**

——S. 47—*Parties—Exonerated party—Party exonerated in course of suit—Party fraudulently deprived of property in execution proceedings—Remedy is in execution.*

Though a person who was once a party might be exonerated in the course of the suit and though no decree

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Exonerated defendant.

is passed against him and no relief is given against him, yet if any question by virtue of the execution of that decree between the parties arises, such a question must be determined according to the provisions of S. 47, that is to say, in execution: no separate suit will be for the purpose of agitating any question which arises by reason of the execution of the decree provided the party which raises the question was a party to the suit in which the decree was passed. 15 Mad. 226 Diss. 23 Mad. 361 (F. B.) Foll. Therefore if in execution of a decree a person who was a party to the suit is deprived fraudulently of his property his remedy is by proper application and not by suit. (*Devadoss, J.*) V. VALLABHA VALIA *v.* V M. KOVILUKATH VEDATURATH **A. I. R. 1925 Mad. 1133.**

——S. 47—*Parties and representatives—Exonerated defendant—Defendant's name struck out at plaintiff's instance but claim not dismissed against him—Defendant is not a party under the section.*

There is no formal expression of an adjudication conclusively determining the right of the parties with regard to all or any of the matters in controversy where a defendant's name is struck out from the record at the plaintiff's instance but against whom the claim is not dismissed because such defendant cannot be regarded as a party to the suit or decree within the meaning of S 47 (*Kinkhede, A. J. C.*) KANHAIYALAL KALAR *v.* LACHHI. **80 I. C. 470 : A.I.R. 1925 Nag. 118.**

Parties and representatives—Legal representatives.

——S. 47—*Parties and representatives—Legal representatives.*

Questions raised by legal representatives as to property which they claim as their own and not liable to be sold as the property of the deceased judgment-debtor fall within S. 47 and a separate suit is barred even where the proceedings in execution have come to an end. (*Raoof and Harrison, JJ.*) BHAGAT RAM *v.* NIZAM DIN. **63 I. C. 853 : 3 Lah. L. J. 406.**

Parties and representatives—Meaning of.

——S. 47—*Parties and representatives—Meaning of—Legal representative of judgment-debtor impleaded—Objection to attachment as trustee—Appeal if lies.*

Objection to attachment on the ground that the objector is a trustee does not make the objector a representative of judgment-debtor though the trust be created by the judgment-debtor and the objector an heir of his, unless of course the trust is created *pendente lite.* (*Kanhaiya Lal, J.*) BHAGWAN DAS *v.* MT. MAHOMED BANO. **L. R 4 A. 447 : 75 I. C 1053 : A. I R. 1924 All. 183 (2).**

——S.47—*Parties and representatives—Meaning of—Execution proceedings against minor—No representation—Suit to declare sale a nullity—Limitation.*

Proceedings in execution were commenced against a judgment-debtor. but on his death his minor sons were brought on record. In appointing a guardian for them, the affidavit under O.32, R. 3 was not put in. The guardian did not appear on their behalf at any stage and prior to the confirmation of the auction sale though the court specifically sent him notice to appear in court and pay up the small decree amount, the guardian did not pay any attention to the notice but actually purchased the properties himself some months later from the court auction-purchaser. In a suit by the minors to set aside the sale: *Held*, (1) the minors not being represented at all, cannot be considered parties to the proceedings and S. 47 of the C. P. Code did not bar the suit; (2) not being parties, the suit was governed by Art. 144 and not Art. 12 of the Lim. Act. (*Harrison, J.*) ALAM DIN *v.* ALLAH DAD. **5 Lah. L. J. 44 : 67 I. C. 547 · A. I. R 1922 Lah. 447.**

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Mortgage suit.

——S. 47—*Parties and representatives—Meaning of—'Parties to suit' includes parties on the same side arrayed against each other.*

The expression 'between the parties in the suit' in S.47 of the C.P.Code must not be limited to the parties arrayed against each other as plaintiff and defendant but it also applies to parties on the same side who are arrayed against each other. Therefore a question pertaining to the execution of a decree and decided in a dispute between the defendants themselves cannot be re-opened in a separate suit. 24 M. L. J. 477; A. I. R. 1924 Mad. 366, Foll. 31 M.L.J. 44 Dist. (*Madhavan Nair, J.*) S. VENKATA SASTRI *v.* Y VENKATA GOPALADU. **20 L. W. 742 : 85 I. C. 209 : A. I. R. 1925 Mad 353.**

——S. 47—*Parties to suit—Meaning of—Applicability where co-defendants are arrayed as against each other.*

Held, the expression "between parties to the suit" no doubt imports "between parties opposed to each other in the suit," but does not necessarily mean "between parties who are plaintiff and defendant respectively in the suit." It also applies to parties who are opposed to each other in the course of execution proceedings, and when an order is passed under S. 47 in execution of the decree passed therein no separate suit is maintainable by one of them to re-open the same. 24 M. L. J. 477. (*Madhavan Nair, J.*) VEDAYYASA AIYAR *v.* MADURA HINDU LABHA NIDHI CO., LTD. **45 M. L. J. 478 : 18 L. W. 311 : (1923) M. W. N. 662 : A I. R. 1924 Mad. 365.**

——S. 47—*Parties and representatives—Meaning of, transferee* pendente lite *in possession—Order of—Court removing obstruction—Appeal.*

Where a transferee *pendente lite* from a defendant obstructs delivery of possession in execution to the decree-holder and the Court orders the obstruction to be removed, *held*, that the order was one within S. 47 and is appealable. Per *Ramesam, J*:—The transferee is the representative of the transferor-defendant and hence the order of the Court is a decree. (*Oldfield and Ramesam, JJ.*) MEYYAPPA CHETTY *v.* MEYYAPPAN SERVAI. **66 I. C. 722 : (1921) M. W. N. 698.**

——S. 47—*'Parties'—Meaning of—Co decree-holders are not 'parties' within the meaning of S. 47.*

The expression "parties" in S. 47 refers to parties ranged on opposite sides and not as co-decree-holders on one side only. (*Kinkhede, A. J. C.*) RADHABAI *v.* BHIMRAO. **21 N. L. R. 34 : 82 I. C. 734 · A. I. R. 1925 Nag. 186.**

Parties and representatives—Mortgage Suit.

——S 47—*Parties and representatives—Mortgage suit—Mortgage decree against father—Execution against sons.*

A mortgagee of certain property belonging to a joint Hindu family instituted a suit against the father only to enforce the mortgage. The mortgagee obtained a decree and at a court sale in execution of the decree himself purchased the property. The decree-holder purchaser died before obtaining possession of the property and his surviving brother sued for recovery of possession of the property impleading the judgment-debtor and his sons as parties. The defendants plea-

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Mortgage suit.

ded that a separate suit was barred under S. 47, C. P. Code. *Held*, that the suit was maintainable and that so far as the sons where concerned they were not parties to the prior suit and could not be proceeded against in execution proceedings. 35 B. 452 Dist. (*Macleod, C. J. and Crump, J.*) DADA JINAPPA *v.* YESU SAKHOBA **25 Bom. L. R. 494 : 73 I. C. 402 : A. I. R. 1923 Bom. 450.**

——S. 47—*Parties and their representatives—Mortgagee of patni interest—If representative of judgment-debtor patnidar.*

A person who is bound by a decree or who is affected by it is a representative within the meaning of S. 47. Thus a mortgagee who is not a party to a rent suit against his mortgagor is a representative of the judgment-debtor. 24 Cal. 62 and 11 C W. N. 312 Foll. (*Greaves and Mukerjee, JJ.*) HARI MOHAN DALAL *v.* PURENDRA NATH CHOUDHURI. **90 I. C. 955: A. I. R. 1926 Cal. 356.**

Parties and representatives—Parties unnecessarily impleaded.

——S. 47—*Parties and representatives—Parties unnecessarily impleaded.*

Although a Court passed an opinion that A, the widow of a deceased debtor, was not a proper party in a suit by the creditor against the heirs, because she was not one of the heirs, yet she was treated as a proper party by reason of the allegation against her that she was in possession of the immoveable property of the estate. On this basis the suit was tried against her and she succeeded on the merits. *Held*, that A was a party to the suit within the meaning of S. 47 of the Code of Civil Procedure. (*Mookerjee and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD. **67 I. C. 6 : 34 C. L. J. 477.**

Parties and representatives—Personal property.

——S. 47 and O. 21, R. 58—*Parties and representatives—Personal property—Claim in execution proceedings by legal representative of judgment-debtor—Enquiry under, to be full and exhaustive*

Where the legal representative of a deceased judgment-debtor objects to the attachment of certain property in execution on the ground that it is his own property and not that of his judgment-debtor, the question falls within S. 47, C. P. Code, and the enquiry must be full and all the evidence adduced should be taken. (*Lentaigne and Carr, JJ.*) ARUNACHELLAM CHETTIAR *v.* MAUNG SAN NGWE. **2 Rang. 168 : A. I. R. 1924 Rang. 323.**

Parties and representatives—Purchaser.

——S. 47—*Parties and representatives—Purchaser of property covered by decree is not a representative of judgment-debtor unless the decree has been assigned to him—C. P. Code, O. 21, R. 16.*

After a decree for possession had been passed the decree-holder sold his interest in some of the properties of which possession was directed to be given him. He then applied for execution of his decree. His purchasers were not parties to that application. An order was made in execution under Order 21, rule 35 (1) but the Subordinate Judge held that action ought to have been taken under Order 21, rule 36, which he directed should be done, and that the possession given under Order 21, rule 35 (1) should be set aside. The purchasers sought to appeal from that order

Held, that as they were not parties to a proceeding in the lower Court they cannot appeal from the decree or order passed, when there had been no assignment in

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Scope of.

their favour and the procedure under O. 21, R. 16 was not followed.

Per *Shah, J.*—The mere fact that on the decree-holder's application the possession was in fact ordered to be given to the purchasers is not sufficient to make them parties to the proceedings or to constitute them representatives of the decree-holder within the meaning of S. 47 of the Code. (1907) A W. N. 280, Foll. (*Macleod, C.J. and Shah, J.*) VITHAL LAXMANNAIK *v.* MAHADEV RAGHUNATH. **26 Bom. L. R. 333 : A. I. R. 1924 Bom. 426.**

——S. 47—*Parties and representatives—Purchaser—Representation of judgment-debtor.*

A purchaser at a revenue sale of the interest of the judgment-debtor after a decree for sale on a mortgage had been passed against him is a representative of the judgment-debtor and as such entitled to apply to set aside the sale under O. 21, R. 99 of the C. P. Code. (*Das and Adami, JJ.*) DHAROHAR SINGH *v.* RAM PRASAD NARAYAN SAHAI. **72 I. C. 862 : 1 Pat. L. R. 139 : A. I. R. 1924 Pat. 367.**

——S. 47—*Parties and representatives—Purchaser—Purchaser from auction-purchaser decree holder.*

The purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder *qua* decree-holder His suit is therefore not barred by S. 47 as he is not a representative of the decree-holder and as the question does not relate to execution, discharge and satisfaction of a decree. A purchaser from a decree-holder auction-purchaser no doubt acquires the interest and the rights of the auction-purchaser, but he is not to be deprived of the rights of an ordinary auction-purchaser to bring a suit at any time within twelve years to recover possession. (*Robinson, C. J. and Heald, J.*) MI AH KOOK *v.* MI HLA MO WAY. **11 L. B. R. 17 : 64 I. C. 68 : A. I. R. 1922 L. B. 18.**

Parties and representatives—Question as to.

——S. 47(3)—*Parties and representatives—Question as to—Applicants claiming to be brought on record as legal representatives of deceased judgment-debtor—Claim rejected—Second appeal lies from the decision.*

Where the Court in execution adjudicates on the question of right of the applicant to be brought on record as the legal representative of the deceased judgment-debtor, the decision is a decree and a second appeal lies. (*Mukerjee and Daniels, JJ.*) KHEM SINGH *v.* RAGHUBIR SINGH. **47 All. 365 : 86 I. C. 1048 : A.I. R. 1925 All. 578.**

——S. 47 (3)—*Parties and representatives—Question as to—Question whether a party is or is not the legal representative—Decision thereon appeal lies.*

Sub-S. (3) of S. 47 in express terms includes a question arising between the parties whether any person is or is not the representative of a party, and in view of S. 2, the determination of such a question between the decree-holder and the judgment-debtor amounts to a decree and is appealable. (*Daniels, J.*) PEARE LAL *v.* JHABBA LAL. **82 I. C. 604 : L. R. 5 A. (C.v.) 668: A.I. R. 1925 All. 66.**

Parties and representatives—Scope of.

——S 47—*Parties and representatives—Scope of—Dispute between judgment-debtor and auction-purchaser—If within section.*

Disputes between a judgment-debtor and the auction-purchaser as to the extent of the land sold do not fall within S. 47, C. P. Code, as it is not between parties to the suit, but between the judgment-debtor and

C. P. CODE (V OF 1908), S. 47—Purchase of decree.

his representative the purchaser. (*Daniels, J.*) MUKHTAR AHMAD *v.* KABIR AHMAD.

A. I. R. 1924 All. 856.

Purchase of decree.

——S 47 and O. 21, R. 2 (3)—*Purchase of decree—Decree sold in execution of another decree—Judgment-debtor can plead in the execution proceeding that decree was already satisfied.*

If one decree is sold in execution of another decree it is open to the judgment-debtor, when the purchaser of such decree seeks to execute that decree against him, to plead that the decree had been satisfied by him prior to its sale although the satisfaction was not certified according to the provisions of O. 21, R. 2. R. 2 (3) does not bar the plea and the Court must enquire into it under S. 47. (*Wazir Hasan, A. J. C.*) SURJI NARAIN MISRA *v.* ULAND SINGH.

27 O. C. 277 : 78 I.C. 776 : A. I. R. 1925 Ordh 225.

——S. 47 and O. 21, R. 16—*Purchase of decree—Execution by assignee—Objection as to assignee's title can be raised*

When a decree is sought to be executed by the assignee thereof, it is competent to the Court to entertain, at the instance of the judgment-debtors and the original decree-holder, objections to the execution of the decree on the ground that the title to the decree has not passed to the assignee. (*Ross and Kulwant Sahay, JJ.*) SHEO PRASAD SINGH *v.* P. E. LALL.

4 Pat. 120 : 86 I. C 564 : A. I. R. 1925 Pat. 449.

Question relating to Execution.

Agreement.
Application.
Certificate of Payment.
Compromise.
Decree.
Delivery of Possession.
Discharge
Excess Property.
Execution Sale.
Heir of judgment-debtor.
Jurisdiction.
Legal Representatives.
Liability.
Mortgage.
Objection.
Power of Executing Court.
Preliminary Decree.
Redemption of Mortgage.
Son's liability.
Suit for Declaration.

Question relating to Execution—Agreement.

——S. 47, O. 21, R. 2 (a)—*Question relating to execution—Agreement to certify payment—Suit for damages.*

Any Court other than the Court executing the decree can recognize the payment, provided, in doing so, the court does not disobey the provisions of S. 47. And recognition of such a payment by the Court other than the Court executing the decree must necessarily be in a suit, (1) where the judgment-debtor sues for the money he has paid out of Court on the ground of failure of consideration, (2) where the judgment-debtor sues for damages for a breach of an express or implied promise of the decree-holder to certify the payment. (*Maung Kin, J.*) MAUNG MYO *v.* MAUNG KHA.

11 L. B. R. 129 · 1 Bur. L. J. 207 : 70 I. C. 115 : A. I. R. 1923 Rang. 88.

Question relating to Execution—Application.

——S. 47 and O. 21, R. 16—*Question relating to execution—Application by decree-holders to execute—*

C. P. CODE (V OF 1908), S. 47—Question relating to Execution—Compromise.

Assignment—Determination of right of assignee.

Where a decree-holder applying for execution wanted his application to be dismissed only if the assignment was considered to be binding upon the assignee so that the latter could be made liable for the money mentioned in the deed of assignment, it would be wrong to hold that while the assignment should be considered as binding upon the assignor so far as his rights under the decree are concerned the assignee should be able to wriggle out of this liability for the price of the assignment by relying upon fraud. The transaction is an undivided one and must be viewed as a whole. Where the order of the Court dismisses the application for execution, it adversely affects the rights of the decree-holder against the judgment-debtor and consequently determines a question relating to the execution or discharge or satisfaction of the decree. Such an order is therefore appealable. (*Shadi Lal, C. J.*) HARDITTA *v.* NIGHAHIA MAL

4 Lah. L. J. 259 : A. I. R. 1922 Lah. 396.

——S. 47—*Question relating to execution—Application by judgment-debtor against unlawful dispossession—Execution struck off as satisfied—If maintainable.*

A judgment-debtor's application complaining of unlawful dispossession is maintainable under S. 47 even after the execution is struck off as fully satisfied. (*Kotval, A. J. C.*) KRISHNA KUMBI *v.* VINAYAK KUMBI.

A. I. R. 1924 Nag. 122.

——S. 47—*Question relating to execution—Application.*

A question arising between the same parties but not in their capacity as decree-holder and judgment-debtor but in their capacity as landlord and tenant is not covered by S. 47 and a separate suit is necessary. (*Batten, J.C.*) RAMASA *v.* GAMBHIRCHANDRA.

6 N. L. J. 25 : A. I. R. 1923 Nag. 149.

Question relating to Execution—Certificate of payment.

——S. 47 and O. 21, R. 2—*Question relating to execution—Certificate of payment—Application for certifying payment—Order on—If appealable.*

An application by the judgment-debtor for certifying payments by him to the decree-holder out of court raises questions as to the execution and satisfaction of the decree, and as such falls under S. 47, C. P. Code. The dismissal of such an application gives a right of appeal to the judgment-debtor. (*Jwala Prasad and Bucknill, JJ.*) JADUNANDAN SINGH *v.* SHEONANDAN PRASAD.

1922 P. H. C. C. 200 : 3 Pat. L. T. 487 : 1 Pat. 644 : 68 I. C. 645 : A. I. R. 1922 Pat. 276.

——S. 47 and O. 21, R. 2—*Question relating to execution—Certificate of payment—Non-certification—Enquiry—Fraud—Effect of.*

O. 21, R. 2 of the C. P. Code does not in any way limit or affect the operation of S. 47 of the C.P. Code, and does not prevent the Court from investigating a question of fraud on the part of the decree-holder in omitting to certify satisfaction of a decree. (*Robinson and Macgregor, JJ.*) P. R. P. L. CHETTY FIRM *v.* G. LON POW.

11 L. B. R. 363 : 70 I. C. 859 : A.I.R. 1922 L. B. 31 : 1 Bur L. J. 226 : A. I. R. 1923 Rang. 103.

Question relating to Execution—Compromise.

——S. 47—*Question relating to execution of decree—Compromise—Suit for accounts.*

In a suit for accounts the parties entered into a compromise under which they agreed to a preliminary decree in accordance with the terms of the compromise. Under the compromise one of the parties was given a

C. P. CODE (V OF 1908), S. 47—Question relating to Execution—Compromise.

share of the profits of a certain contract, the profits to be determined by competent accountants ; it was also provided that any dispute relating to the share was to be referred to arbitration. On a question arising between the parties to the suit as to the share of profits, *held*, that the proceedings did not relate to the execution of a decree within S. 47, C. P. Code, and the decree in the suit did not relate to the amount now in dispute. (*Broadway and Abdul Qadir, JJ.*) HAJI BAKHSH ILAHI *v.* ABDUL RAHIMAN. **71 I. C. 817 : A. I. R. 1924 Lah. 405.**

——S. 47 and O. 23, R. 3—*Question relating to execution—Compromise—Decree—Objection to validity of—Remedy by suit.*

Where a compromise embraces matters not relating to the suit and the decree following such compromise gives reliefs which are not unlawful but which could not have been given, if the suit had been decided after trial the remedy is by way of appeal. If the objection could be taken in execution proceedings the legislature would not provide special provisions in O. 43 for an appeal. (*Maung Kin and Rigg, JJ.*) ANA PAKIRI SHA *v.* SOMASUNDARAM SERVAI. **64 I. C. 391 : 10 L.B.R. 349 : 13 Bur. L.T. 170 : A.I.R 1922 L.B. 22.**

Question relating to Execution—Decree.

——S. 47—*Question relating to execution—Decree—Construction—Title to standing crops.*

Where a pre-emption decree was silent as to standing crops, *held*, that the question whether the crops passed with the land cannot be said to have arisen in execution, discharge or satisfaction of the decree. (*Kotwal, A. J. C.*) BAPU *v.* VITHOBA. **76 I. C. 193 : A. I. R. 1923 Nag. 327.**

Question relating to Execution—Delivery of possession.

——S. 47—*Questions relating to execution—Delivery of possession—Court sale confirmed—Executing Court ceases to have jurisdiction over the property—Subsequent delivery of possession is not a proceeding in execution.*

The proceeding relating to delivery of possession after confirmation of Court sale, to the auction-purchaser, whether he be a stranger or the decree-holder, is not a proceeding in execution of a decree and any question arising in such a proceeding is not a question relating to execution, satisfaction or discharge of the decree within the meaning of S. 47, C.P. Code. 20 C. L. J. 433 Rel. on. (*Suhrawardy and Duval, JJ.*) SHYAMBALLAV SAHA *v.* BROJENDRA LAL PODDAR. **89 I. C. 196 (2) : A. I. R. 1925 Cal. 1250.**

——S. 47—*Question relating to execution—Delivery of possession to auction-purchaser—Order for.*

It may be disputed whether an order for delivery of possession to an auction-purchaser is an order relating to the execution, discharge or satisfaction of a decree, for so far as the decree-holder is concerned his decree is satisfied, and whether the auction-purchaser gets the property or not is a matter with which he is not concerned.

Per *Cuming, J.*—The delivery of possession is not a part of the satisfaction of the decree. So far as the decree-holder is concerned the decree is satisfied when the property is sold and the money paid to decree-holder. Obviously he is not concerned with the property being delivered to the purchaser. The question of the delivery of possession to the auction-purchaser is not one relating to the execution of the decree or between the parties to the suit or their representatives. It is immaterial that the auction-purchaser is also the decree holder. As an auction-purchaser he is in an entirely different capacity (*Woodroffe and Cuming, JJ.*) LAKHI PRIA GUHA *v.* NANDA KUMAR BASU. **A. I. R. 1923 Cal. 345.**

C. P. CODE (V OF 1908), S. 47—Question relating to Execution—Excess property.

——S. 47—*Question relating to execution—Delivery of possession.*

A claim by the judgment-debtor to recover property overdelivered to the auction-purchaser who was a stranger to the suit is one coming under S. 47. (*Ayling and Krishnan, JJ.*) JAINULABDIN SAHIB *v.* KRISHNA CHETTIAR. **41 M. L. J. 120 : 14 L. W. 92 : 63 I. C. 200 : (1921) M. W. N 491.**

Question relating to Execution—Discharge.

——S. 47—*Question relating to execution—Discharge—Antecedent to decree.*

Questions relating to the execution of a decree and arising between parties to a suit in which the decree was passed or their representatives must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. A claim that the debt on which the decree sought to be executed was obtained had been discharged before suit is not within S. 47, C. P. Code. (*Broadway, J.*) RAM DAS *v.* S. P. NETTO. **64 P. L. R. 1922 : 67 I. C. 753 : 4 U. P. L. R (Lah.) 93.**

——S. 47—*Question relating to execution—Discharge.*

A question whether a decree has been discharged is one relating to the execution, discharge or satisfaction of the decree and to allow one of several joint decree-holders who have already received payment to come in and apply for execution after the other decree-holders have certified discharge of the debt would open the door to fraud and defeat the object of O. 21, R. 15. A joint decree was transferred after adjustment to the other decree-holders to one of the decree-holders. The transfer was recognised after notice to the decree holders who had satisfied the decree, but there was nothing in the notice sent to them that there was any question raised as regards the validity of the transfer. On a subsequent application for execution of the decree by the transferee *held* that it was open to the other decree-holders to object to the execution on the ground that the decree had been paid off by themselves and that the transferee took the decree with the knowledge thereof. (*Spencer and Odgers, JJ.*) BUDARAJU HANUMANTHA RAO *v.* ALLAMMENI KRISHNAMMA. **32 M. L. T. 118 (2) : 70 I. C. 329 : A. I. R. 1924 Mad. 518.**

——S. 47—*Question relating to execution—Discharge—Pre-emption decree—Question of payment in time.*

The question whether payment was made in time of the money required to be deposited under a pre-emption decree is one affecting the discharge or satisfaction of a decree and as such falls under S. 47, C. P. Code. (*Kanhaiya Lal, J. C.*) NILKHANATH *v.* MAHABIR SINGH. **26 O. C. 345 : 74 I. C. 558 : 9 O. & A. L. R. 207 : A. I. R. 1924 Oudh 104.**

Question relating to Execution—Excess property.

——S. 47—*Question relating to execution—Excess property sold—Application by judgment-debtor to set aside sale—S. 47 applies.*

An application by the judgment-debtor to set aside an execution sale on the ground that the sale had taken place in contravention of the decree and the property sold was in excess of that ordered to be sold is one under S. 47 and an appeal lies from the order on the application. (*Sulaiman and Daniels, JJ.*) GANGA DEVI *v.* RAM PRASAD. **23 A. L. J. 558 : 88 I. C. 393 : L. R. 6 A. (Civ.) 464.**

C. P. CODE (V OF 1908), S. 47—Question relating to Execution—Excess property.

A. I. R. 1925 All. 551.

——S. 47—*Questions relating to execution—Excess property—Whether decree is for excess land not included in subject-matter is a question for the executing Court to decide and subsequent suit is not maintainable.*

The main object underlying the section is to prevent multiplicity of suits and to secure that all matters, which can be decided in the suit, shall be so decided. Where the decree was for land in excess of that which formed the subject of the suit, and where it included land which ought not to have been included: *Held*, that such matters are for determination by the Court executing the decree, and that looked at from that point of view a subsequent suit is bad. (*Pearson and Graham, JJ.*) KAYEM BISWAS *v.* BAHADUR KHAN. **42 C. L. J. 22 : 89 I. C. 744 : 30 C. W. N. 41 : A. I. R. 1925 Cal. 1258.**

——S. 47—*Question relating to execution—Excess property—Enquiry into extent of property attached and sold—Application by judgment-debtor.*

Where a judgment-debtor applies to the executing Court for restoration of certain property alleged to have been taken possession of by the decree-holder under colour of his decree the matter is one that ought to be enquired into by the executing Court. (*Kinkhede, A. J. C.*) KESHRI SINGH *v.* UMRAO SINGH. **20 N. L. R. 90 : 7 N. L. J. 151 : A. I. R. 1924 Nag. 246.**

——S. 47—*Question relating to execution—Excess property—Recovery of land in excess of share under partition decree—Final decree can be amended, and excess land restored without separate suit, under Ss. 47 and 151, C. P. Code.*

A separate suit is not necessary for recovering land obtained possession of by a party under a final decree for partition in excess of that which was awarded by the preliminary decree. The Court has jurisdiction in execution under Ss 47 and 151 of the C. P. Code to amend its final decree and to order the restoration of the land recovered by a party in excess of that awarded by that decree. (*Raymond and Madgavkar, A. J. Cs.*) DANDUMAL *v.* DWARKAMAL. **78 I. C. 1039 : A. I. R. 1925 Sind 126.**

Question relating to Execution—Execution sale.

——S. 47—*Question relating to execution—Execution sale—Dispute between decree-holder, auction-purchaser and judgment-debtor—Separate suit lies.*

When a question arises between auction-purchaser, decree-holder and judgment-debtor as to what was the property that was sold, the matter is one to be investigated by a separate suit and not by an application to the execution Court. A. I. R. 1923 All. 470, Foll. (*Mukerjee, J.*) JAI SINGH *v.* CHIRANJI LAL. **L. R. 6 A. (Civ.) 282 : A. I. R. 1925 All. 703.**

——S. 47—*Question relating to execution—Execution sale—Sale confirmed—Decree amended later—Sale if can be set aside.*

Where an execution sale has been confirmed, although it had taken place in execution of a decree which was incorrectly prepared, it cannot be set aside simply because the decree has been subsequently amended, especially when there is no allegation of fraud or collusion. (*Lindsay and Sulaiman, JJ.*) AGHA HUSAIN *v.* QASIM ALI. **L. R. 6 A. 580 : 89 I. C. 1018 : 23 A. L. J. 946.**

C. P. CODE (V OF 1908), S. 47—Question relating to Execution—Liability.

Question relating to Execution—Heir of judgment-debtor.

——S. 47—*Question relating to execution—Heirs of judgment-debtor—Mortgagor cannot challenge right of mortgagor to mortgage in execution proceedings.*

Per *Dawson Miller, C. J.*—The heirs of a deceased mortgagor judgment-debtor, who have been substituted in the place of a deceased in execution proceedings, cannot in those proceedings challenge the right of the mortgagor to execute the mortgage. (*Dawson Miller, C. J.*) HITENDRASINGH *v.* RAMESWAR SINGH. **4 Pat. 510 : 87 I. C. 849 : 88 I. C. 141 (2) : A. I. R. 1925 Pat. 625.**

Question relating to Execution—Jurisdiction.

——S. 47 and O. 9, R. 13—*Question relating to execution—Jurisdiction—Ex parte defendant—Objection to jurisdiction of Court, whether can be raised in execution.*

Even where a defendant was *ex parte*, an objection to the jurisdiction of Court cannot be raised in execution proceedings. The proper course is to have the *ex parte* decree set aside and the suit reheard. (*Spencer, J.*) RADHAKRISHNA AIYAR *v.* VINAYAKASWAMIAR. **49 M. L. J. 664 : 22 L. W. 567.**

——S. 47—*Question relating to execution—Jurisdiction—Objection to the jurisdiction of Court whether a question within the section.*

An objection to the jurisdiction of the Court that tried the suit is not one of the questions relating to the execution, discharge or satisfaction of the decree within S. 47, C. P. Code. (*Spencer, J.*) RADHAKRISHNA AIYAR *v.* VINAYAKASWAMIAR. **49 M. L. J. 664 : 22 L. W. 567.**

Question relating to Execution—Legal representatives.

——S. 47—*Question relating to execution—Legal representative—Liability of—Power of Court to decide objection.*

Where on an application to substitute the brother of the deceased judgment-debtor as his legal representative, he pleads that he is not liable to satisfy the decree as being an undivided co-parcener of the deceased, the objection must be decided by the executing Court before an order substituting him as legal representative is made. If the Court leaves the point whether the brother was liable for the decree open and undecided and makes an order of substitution it would be acting illegally. (*Jwala Prasad and Ross, JJ.*) PATAIT DINANATH SAHI *v.* PATAIT MALHIJI BAID. **3 Pat. L. T. 106 : A. I. R. 1923 Pat. 149.**

——S. 47—*Question relating to execution—Legal representative cannot prefer claim in individual capacity but must bring separate suit.*

A person who is party to execution proceedings as a legal representative cannot have a claim in his individual capacity enquired into under the provisions of S. 47. But he must bring a separate suit in respect of the claim because it is only as a third party that such a claim can be put forward by him. (*Raymond and Madgavkar, A. J. Cs.*) MURAD *v.* DAYARAM. **78 I. C. 49 : A. I. R. 1925 Sind 156.**

Question relating to Execution—Liability.

——Ss. 47 and 145—*Question relating to execution—Liability of surety—No personal liability.*

C. P. CODE (V OF 1908), S. 47—Question relating to Execution—Mortgage.

Security bonds hypothecating immoveable properties as security for the due performance of a decree can be enforced by execution without a separate suit for sale. Where the equity of redemption is held by the surety, the surety is the primary person from whom the amount of security can be recovered and S. 145, C. P. Code, is intended to enable the enforcement of such security. 17 A. 99 ; 38 A. 327 ; 42 A. 158 ; 41 M. 327 Ref. (*Walsh and Kanhaiya Lal, JJ.*) BETI MAHALAKSHMI BAI *v.* CHAUDHARI BADAN SINGH. **45 A. 649 : 21 A. L. J. 604 : L. R. 4 A. 3 6 : 74 I. C. 927: A. I. R. 1924 All. 105.**

Question relating to Execution—Mortgage.

——S. 47—*Question relating to execution—Mortgage—Acquisition of equity of redemption—Sale in execution of decree—Suit for possession.*

In 1906 two simple mortgages were executed over the suit property, one in favour of plaintiff and the other in favour of one Bagirath. The defendant acquired the right of Bagirath and brought the property to sale under his mortgage. The plaintiff was made a party to the suit and he had also acquired the equity of redemption from the original mortgagor and was in possession of the property in that capacity. The decree in the defendant's suit was for sale of the property subject to the prior lien of the plaintiff. On the property being brought to sale the defendant purchased it himself. He thereupon obtained possession through the Court as against the plaintiff. Subsequently the plff. brought a suit not for recovery of his mortgage money but to be restored to possession of the property. *Held*, (1) that the plff. was not entitled to possession as mortgagee because the mortgage in his favour was a simple mortgage ; he was not entitled to possession as owner because the equity of redemption had been sold and purchased by the defendant and his only right, if any, under the decree was to bring the property to sale for the enforcement of his prior lien. *Held*, also that the suit was barred under S. 47, C. P. Code. The plaintiff was a party to the decree. He had been dispossessed under the terms of the decree and his remedy for recovery of possession was by application to the execution Court. (*Daniels and Boys, JJ.*) DWARKA DAS *v.* DURGA PRASAD. **22 A. L. J. 683 : 82 I.C. 80 : L. R. 6 A. (Civ.) 15 : A. I. R. 1924 All. 752.**

——S. 47—*Questions relating to execution—Mortgage—Final decree for sale in mortgage suit cannot bar suit for redemption.*

Where a final decree for sale is passed in a suit on a mortgage, but is not executed for more than 3 years, S. 47 does not prevent the mortgagor from suing for redemption of the mortgage. 39 Mad. 896 and 25 Mad. 300, Dist. (*Devadoss, J.*) N. NAGASAMI IYER *v.* T. ELLARGAN. **A. I. R. 1925 Mad. 1191.**

——S. 47—*Question relating to execution—Mortgage—Section does not apply to proceedings for making preliminary mortgage decree final.*

A suit on a mortgage remains pending till the final decree. Questions arising in proceedings for making preliminary mortgage decree final are not covered by S. 47. That section applies only to questions regarding the satisfaction of the decree. (*Baker, J. C.*) LACHHI RAM *v.* BHOLU. **82 I. C. 452 : A. I. R. 1925 Nag. 132.**

Question relating to Execution—Objection.

——S. 47—*Question relating to execution—Objection by legal representative that decree is fraudulent—Remedy by suit.*

C. P. CODE (V OF 1908), S. 47—Question relating to Execution—Power of Executing Court.

If a judgment-debtor or a legal representative objects to the execution of a decree on the ground that the decree is not valid, because it is collusive, the question as to the validity of the decree is not one relating to the execution, discharge or satisfaction of the decree and cannot therefore be tried in execution under S. 47 of the Civil Procedure Code. Such a question can only be tried in a regular suit brought for the purpose. (*Kinkhede, A. J. C.*) BEHARI SINGH *v.* NAWAL SINGH. **20 N. L. R. 24 : 78 I. C. 136 : A. I. R. 1924 Nag. 81.**

Question relating to Execution—Power of Executing Court.

——S. 47—*Question relating to execution—Powers of executing Court—Decree for specific performance of contract for sale—Question of judgment-debtor damaging property after decree can be gone into by executing Court.*

The question with regard to waste committed by a judgment-debtor after the date of the decree is a question arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the Court executing the decree and not by a separate suit. Hence where a decree has been passed for specific performance of a contract for the sale of immoveable property, and where it is alleged that, subsequent to the decree, the judgment-debtor has damaged the property with a view to cause loss to the decree-holder, the question can be gone into by the executing Court. A.I.R. 1923 Bom. 391 Foll. (*Macleod, C. J. and Coyajee, J.*) BAI LALLU *v.* MOHUNLAL GOKALDAS. **27 B. L. R. 687 : A. I. R. 1925 Bom. 385.**

——S. 47—*Question relating to execution—Power of executing Court—Fraud—Sale—Decree for partition.*

If the plaint properties or any of them have been sold so that the partition proceedings can no longer go on, then the Court in charge of execution proceedings will have to decide what is the proper course to follow, whether to direct that the parties entitled to partition should get the sale proceeds brought into Court and divide them which would of course be the simplest way of settling the matter or to relegate he parties to separate suits. If the plaintiff alleges that some property has been fraudulently sold by other sharers, the question cannot be dealt with in execution proceedings but in a separate suit. (*Macleod, C. J. and Shah, J.*) ELLIS ENAS PAVLOO GHARRY *v.* KITTER PHILLIP GOWRYA. **46 Bom. 226 : A. I. R. 1922 Bom. 380 (2).**

——Ss. 47 and 145—*Question relating to execution—Power of executing Court—Security of immoveable property—Sale of property given as security—Suit under S. 67 of the T. P. Act, unnecessary.*

The relationship between a decree-holder and a judgment-debtor who has executed a security bond under O. 41, R. 5, C. P. Code, charging certain immoveable properties for the due performance of the decree or order that may ultimately be passed by the Appellate Court is not that of mortgagee or mortgagor, and, in the event of the appeal being dismissed, the decree-holder is entitled to realise his decretal money by sale of the properties given in security without instituting a suit under S. 67 of the T. P. Act. 41 M. 327 ; 42 A. 158 Rel. (*Chatterjee and Panton, JJ.*) JYOTI PRAKASH NANDI *v.* MUKTI PRAKASH NANDI. **51 Cal. 150 : A. I. R. 1924 Cal. 485.**

——S. 47—*Question relating to execution—Power of executing Court—Powers of—Amendment of decree.*

Advocate High Court Jammu & Kashmir Srinagar.

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Power of executing Court.

An executing Court has no power to go behind a decree or entertain any objection to its legality or correctness (*Baker, O. J. C. and Prideaux, A. J. C.*) GANPATRAO *v.* TULSABAI. **A. I R. 1924 Nag. 419.**

——**Ss. 47, 144 and 151**—*Question relating to execution—Power of Court—Attached property entrusted to custodian—Direction to produce or restore—Default—Power to proceed against custodian.*

An executing Court which entrusts to a party to the decree or to a third person as a depository or *suprat dar*, property taken by it under attachment or in execution of its process, has, either acting on its motion or at the instance of a party to the decree, power to order him to produce it for sale if necessary, even to return it to the judgment-debtor or to the objector or any other person from whose possession it was attached or taken, upon the decree being satisfied or objection being allowed or upon the termination of any proceedings in execution or for any cause whatever, and also, if necessary, to visit him with any penalty for his default in obeying its orders by proceeding against him in a summary manner, in order to prevent the abuse of its own process and for shortening the litigation or for the ends of justice. 16 Nag. 178 Dis. (*Prideaux and Kinkhede, A. J. C.*) RAMJI *v* ZIBLAJI.

20 N. L. R. 93 : 7 N. L. J. 130 : 80 I. C. 49 : A. I. R. 1924 Nag. 258.

——**S. 47, O. 21, R. 2**—*Question relating to execution—Power of executing Court.*

O. 21, R. 2 does not in any way limit or affect the operation of S. 47 and does not prevent the Court from deciding any question arising out of the execution of a decree. (*Rutledge, J.*) CHETTY FIRM *v.* G. LON POW. **11 L. B. R. 364 : 1 Bur. L. J. 43 : 70 I. C. 859 : A. I. R. 1922 L. B. 31.**

Question relating to Execution—Preliminary Decree.

——**S. 47**—*Questions relating to execution—Preliminary decree—Decree for possession of share in Ijmali Mahal—Partition—Enquiry into shares.*

A decree for possession of a share in an Ijmali Mahal can be executed against the specific lands which have been allotted in lieu of the share in partition proceedings. An enquiry as to what are the lands thus substituted is one relating to the execution of the decree and falls under S. 47. (*Sir John Edge.*) RAI BAIJNATH GOENKA *v.* RAVANESHWAR PRASAD SINGH. **43 M. L. J. 124 : 1 Pat. 378 : 20 A. L. J 650: (1922) M. W. N. 415 : 31 M. L. T. 43 : 16 L W. 128 : 36 C. L. J. 1 : 26 C. W. N. 906 : 3 Pat. L. T. 547 : L. R. 3 P. C. 146 : 24 Bom. L. R. 974 : 49 I. A. 139 : 9 O. & A. L. R. 93 : 69 I. C. 180 : A. I R. 1922 P. C. 54 (P.C.).**

Question relating to Execution—Redemption of Mortgage.

——**S. 47**—*Question relating to execution—Redemption of mortgage—Whether a property is accretion or increase in the hypothecated property for whose redemption the suit was brought and decreed, is a question within S. 47*

Where certain shares in a company were pledged and during that period of pledge, the company issued fresh shares, payable out of the dividends of the old ones, and a suit by pledgor to redeem the old shares was decreed and the pledgor in execution applied for return of the new shares also :

Held : that the question whether the new shares were accretions to the old ones was a question within S. 47. (*Ameer Ali.*) MOTILAL HIRABAI *v.* BAI MANI. **48 M. L. J. 648 : 52 I. A. 137 : 27 Bom. L. R. 455 : 49 Bom. 233 : A. I. R. 1925 P. C. 86 (P. C.).**

C. P. CODE (V OF 1908), S. 47—Rateable distribution.

Question relating to Execution—Son's liability.

——**S. 47**—*Question relating to execution—Son's liability—Hindu Law.*

Where a Hindu judgment-debtor dies before the decree is satisfied, the decree can be executed against his son to the extent of the ancestral property come to his hands. The proper procedure for the decree holder is to bring the son on the record as a separate suit to determine son's liability is barred. The question whether a decree against a Hindu father is capable of execution. the debt being tainted with immorality is one relating to the execution of decree and should be determined by the executing Court (*Jwala Prasad and Adami, JJ.*) KAROO *v.* RAMESHWAR SAO. **62 I. C. 905 : 6 P. L. J 451.**

Question relating to Execution—Suit for declaration.

——**S. 47**—*Question relating to execution—Suit for declaration—Suit on prior decree.*

A suit is not maintainable on a prior decree if the relief claimed in the suit has already been granted by the decree and could have been obtained by enforcement thereof in execution proceedings. A decree which merely declares the rights and does not direct any act to be done, is incapable to execution. In such an event a separate suit will lie to enforce the rights declared by the decree. Doobe *v.* Fowkee. 3 Agra H. C.R. 381 and 4 Mad 219. (*Mookerjee and Chotzner, JJ.*) SHYAMA CHARAN *v.* SATYA PRASAD.

36 C. L. J. 101 : A. I. R. 1923 Cal. 252.

Rateable distribution.

——**Ss. 47 and 73**—*Rateable distribution—Partnership property—Attachment of partner's share in execution of personal decree—Appeal from order in rateable distribution proceedings.*

An order under S. 73. C. P. Code, is not appealable unless it also comes under S. 47. C. P. Code and satisfies all the requirements thereof. In order to be appealable the order must decide a question arising between the decree-holder on the one hand and the judgment-debtor on the other hand. In cases where as between the parties to the suit a question relating to the execution, discharge or satisfaction of the decree passed therein has been decided by the order for rateable distribution, an appeal lies. 39 M. 570 ; 36 B. 156 Ref. (*Walmsley and Mukerji, JJ.*) DWARIKA DAS MARWARI *v.* JADAB CHANDRA GANGULY.

51 Cal. 761 : 28 C. W. N. 704 : 78 I. C. 731 : 39 C. L. J. 439 : A I. R. 1924 Cal. 801.

——**S. 47**—*Rateable distribution—Rights of mortgagee to sell hypotheca—Rights of purchaser.*

The balance of authorities is clearly in favour of the view that a mortgagee decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases and if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties in or in any of them may have subsequently become vested that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. Though every parcel of the mortgaged properties is liable rateably to its value and the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security, such an enquiry as in the rateable distribution of the mortgage debt cannot be made in

C. P. CODE (V OF 1908), S. 47—Restitution.

execution proceedings without serious complications. (*Das and Adami, JJ.*) SURJU LAL *v.* BAIJNATH PRASAD. **1923 P. H. C. C. 6 : A. I. R. 1923 Pat. 44.**

Restitution.

———**—Ss. 47 and 144**—*Restitution—Execution sale—Property alleged to have been wrongfully sold in execution.*

Where the judgment-debtors apply for restitution of property purchased by the auction-purchaser at an execution sale on the ground that the decree-holders had sold certain property not covered by the decree, *held*, that the application was not maintainable under S. 47, C. P. Code. (*Stuart and Kanhaiya Lal, JJ.*) MUNNA LAL *v.* THE COLLECTOR OF SHAHJAHANPUR. **45 All. 96: 74 I. C. 995: A. I. R. 1923 All. 470.**

———**—Ss. 47 and 144**—*Restitution - Auction purchaser—Decree declared to be invalid—Right to apply for refund of purchase money.*

An auction-purchaser of property sold in execution of a decree is not bound to look beyond the decree. When, therefore, he purchases property in execution of a decree which subsequently turns out to be invalid, he is entitled to recover it from the defendants who are in equity bound to refund it. An application for refund of the sale price can be made by the auction-purchaser under S. 47 of the Civil Procedure Code. 40 M. 299 ; 43 M. 107 ; 42 Bom. 411 ; 44 A. 256 referred to. (*Lindsay, Ryves and Daniels, JJ.*) BINDESHRI PRASAD TEWARI *v.* BADAL SINGH. **21 A. L. J. 228 : 45 A. 369 : 74 I. C. 873 : 4 L. R. A. Civ 161 : A. I. R. 1923 All. 394 (F. B.).**

———**—S. 47**—*Restitution.*

An application for mesne profits under S. 144 relates to execution, discharge or satisfaction and the Court-fee payable on the memo. of first appeal against an order on the application is 8 annas. (*Drake Brockman, J. C.*) GABBA *v.* KANCHEDI LAL. **18 N. L. R. 15 : 67 I. C. 225 : A. I. R. 1922 Nag. 62.**

———**—Ss. 47 and 144**—*Restitution—Question under C. P. Code, S. 144 is also one under S. 47—Court Fees Act (1882), S. 35 and Local Government of B. & O. Notification No. 2576 L. A 25 of 1921.*

Determination of a question arising under S. 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the First Court or of the Appellate Court. If the First Court's decree has been discharged by the Appellate Court, the question arising under S. 144 will naturally be a question as to the discharge of the decree coming under S. 47 of the C. P. Code. In an appeal under S. 47, of the C. P. Code, "A" was declared (reversing the lower Court's order) entitled to a certain share in the sale proceeds realised by the decree-holder, which were lying in Court. Subsequently the lower Court allowed also the claim of "A" for interest and damages from the date on which the decree-holder removed from the Court, the entire sale proceeds realised by him. *Held*, that the order came under S. 47, that therefore the B. and O. Government Notification No. 2576 L.A. 25 of 1921 directing under S 35 of the Court Fees Act that the fee chargeable on appeals from orders under C. P.Code S. 47 shall be limited to the amounts chargeable under Sch. II, Art. 11 of the Court Fees Act applied and therefore that an appeal from the Court's order in the present instance need not be stamped *ad valorem* but that a stamp of Rs. 4 was enough. (*Jwala Prasad, J.*) SITAL PRASAD SINGH *v.* JAGDEO SINGH. **4 Pat. 294 · A. I. R. 1925 Pat. 577.**

Scope of.

———**—S. 47**—*Scope of.*

C. P. CODE (V OF 1908), S. 47—Scope of.

That which should in reality form the basis of an independent suit cannot be introduced as a question to be tried in execution proceedings. (*Lord Phillimore.*) MANINDRA CHANDRA *v.* RAM KUMAR LAL BHAGAT **43 M. L. J 589 : 49 I. A. 220 : 4 P. L. T. 1 : 20 A. L. J. 988 : 31 M. L. T. 131 : 16 L. W. 905 : 68 I. C. 973 : 1 P. 581 : 24 Bom. L. R. 1251 : 27 C. W N. 29 : 4 L. R. P. C. 1 : 36 C. L. J. 542 : 4 U. P. L. R. (P.C.) 88 : A.I.R. 1922 P.C. 304 (P.C.).**

———**—S. 47**—*Scope of—Executing Court cannot examine validity of decree—Execution.*

It is not competent to an executing Court to investigate the validity of a decree provided that a valid decree capable of being executed is in existence. (*Pearson and Graham, JJ.*) SHRINATH CHATTERJI *v.* KEDAR NATH RAI. **82 I. C. 255 : A. I. R. 1925 Cal. 276 (2).**

———**—S. 47**—*Scope—Validity of attachment—If within section—Colourable titles—If can be ignored.*

Proceedings between the judgment-debtor and the decree holder as to whether an attachment is valid fall under S. 47 and not under O. 21, C. P. Code. The claims of people holding under a purely colourable and fraudulent document can be set aside or ignored in such proceedings. (*Rankin, J.*) KARALI PROSAD MUKERJI *v.* JAMINIBALA DEVI. **76 I. C. 316 : A. I. R. 1923 Cal. 344.**

———**—S. 47**—*Scope—Stay of execution—C. P. Code, O 41, Rr. 5 to 8.*

Matters relating to stay of execution fall within S. 47. 9 M. 541 Foll. (*Martineau J.*) SHANKAR LAL *v.* KASTURI LAL. **75 I. C. 789 : A. I. R. 1925 Lah. 69.**

———**S. 47**—*Scope of—C. P. Code, O. 2, R. 103.*

The procedure under S. 47 and under R. 103 is not cumulative and the aggrieved party cannot at his option proceed by way of suit or appeal. (*Odgers, J.*) PACHAIAPPA CHETTY *v.* C. VENKATACHARIAR. **(1925) M. W. N. 577 : 90 I. C. 952 : A. I. R. 1925 Mad. 1198.**

———**S. 47 and O 21, R. 2**—*Scope—Legal representative—Execution of decree—Agreement prior to decree if can be pleaded in bar.*

S. 47 of the C. P. Code is wide enough to permit any valid objection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or the decree-holder's legal representative. An agreement between such legal representative and the judgment-debtor prior to the decree which would preclude the legal representative from applying can be set up in bar of execution by such legal representative. 40 M. 233 Foll. (*Spencer and Devadoss, JJ.*) ARUNACHELA GOUNDAN *v.* SWAMINATHA AIYAR. **46 M. L. J. 240 : (1924) M. W. N. 144 : 77 I. C 847 : 19 L. W. 27 : A. I. R. 1924 Mad. 611 (1).**

———**S. 47**—*Scope of.*

Disputes among co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other are not questions arising between parties to a suit. Disputes between judgment-debtors *inter se* as to the possession of the property after satisfaction of a decree would not come under S. 47. To come within the category of S. 47 there must be questions arising between persons opposed in interest in the suit and not between a party to a suit and his own representative. 25 Bom. 631; 31 M. L. J. 44 referred to. Persons may be parties opposed to each other without necessarily being arrayed as plaintiff and defendant respectively in the suit. (*Spencer and Odgers, JJ.*) BUDARAJU HANUMANTHA RAO *v.* ALLAMNENI KRISHNAMMA. **70 I. C. 329 · 32 M. L. T. 118 (2) : A. I. R. 1924 Mad. 518.**

C. P. CODE (V OF 1908), S. 47—Scope of.

——S. 47—*Scope of—Executing Court cannot order sale when decree is only declaratory—Execution.*

The Court executing the decree cannot go beyond the terms of the decree and order sale of partnership property and distribution of sale proceeds where the decree merely declared partners' interest. A sale in lieu of partition is ordered only when the property is incapable of division by metes and bounds and when the equities of the case require it. (*Kennedy, J. C. and De Souza, A. J. C.*) LILARAM KHAN CHAND *v.* NIHAL CHAND KAKOOMAL.

A. I. R. 1925 Sind 318.

——S. 48—*Decree passed under old C. P. Code. (1882)—Execution sought after 1908—Bar of 12 years in S. 48 applies.*

Where a decree was passed at a time when the old C. P. Code of 1882 was in force but the application for execution of it is made at a time when the new Code of 1908 is in force, the law of procedure and limitation applicable to an application for execution would be the law actually in force at the time when the application is made, and such application is governed by the bar of 12 years contained in S. 48, C. P. Code 32 All. 499 Expl. and Dist. (*Lindsay and Sulaiman, JJ.*) MT. BEGAM SUTTAN *v.* SARVI BEGAM. **23 A. L. J. 977 : 6 L. R. A. Civ. 582 : 90 I. C. 274 : A. I. R. 1926 All. 93.**

——S. 48—*Limitation for execution—Decree—Execution—Right to apply.*

S. 48, C. P. Code. deals with the maximum limit of time prescribed for execution and does not prescribe the period within which each application for execution is to be made. The right of applying for execution in a case where money is payable within 6 months of the decree occurs from the date when default to make the payment occurs. (*Kanhaiya Lal, J.*) SURAJMAN CHAUBE *v.* ANJORE SHUKUL.

21 A. L. J. 861 : 46 All. 73 : L. R. 4 A. 591 : 9 O. & A. L. R. 959 : A. I. R. 1924 All. 263.

——S. 48—*Fraud—Frivolous and futile objections to execution.*

"Fraud" in S. 48, C. P. Code, should be understood in a large and liberal sense. The delaying of execution by frivolous, futile and dishonest objections on the part of the judgment-debtors amounts to fraud. 6 A. L. J. 401 ; 9 A. L. J. 17 Foll. 11 Q. B. D. 270 Ref. (*Piggott and Walsh, JJ.*) LALTA PRASAD *v.* SURAJ KUMAR. **44 All. 319 : L. R. 13 A. 111 : 20 A. L. J. 185 : 65 I. C. 877 : A. I. R. 1922 All. 145.**

——S. 48—*Starting point—Appeal—Execution of decree.*

The limitation provided for in S. 48 of the Code begins to run in respect of a decree appealed against from the date of the appellate decree even when it is held that no appeal lies. (*Piggott and Walsh, JJ.*) RUP NARAIN *v.* SHEO PRAKASH. **43 All. 405 : 61 I. C. 129 : 19 A. L. J. 159.**

——S. 48—*Decree passed before new Code came into force—Section applies.*

S. 48 of the C. P. Code, has retrospective effect, and governs an application for the execution of a mortgage decree passed before the new Code came into force. 22 Bom. L. R. 1420 Rel. on. (*Macleod, C. J. and Crump, J.*) GULABRAO YESHWANT *v.* MAGAN GHELABHAI. **27 Bom. L. R. 461 : 87 I. C. 769 : A. I. R. 1925 Bom. 326.**

——S. 48—*Instalment decree ceasing to be so on default—Court cannot restore decree to original status.*

Court cannot order at the instance of the judgment-creditor that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him.

C. P. CODE (V OF 1908), S. 48

1922 Bom. 170 Dist. (*Macleod, C. J. and Crump, J.*) GULABRAO YESHWANT HARPHALE *v.* MAGAN GHELABHAI. **27 Bom. L. R. 461 : 87 I. C. 769 : A. I. R. 1925 Bom. 326.**

——S. 48—*Starting point—Decree against some defendants—Surety—Decree against on appeal—Execution of original decree—Limitation.*

Plaintiff obtained a money decree in 1907 March against defts. 1 to 4, but the trial Court did not pass a decree against the 5th deft. who was impleaded as a surety. On appeal by the plaintiffs the High Court seeking to make the 5th deft. liable dismissed the appeal in 1909. The plaintiffs made several attempts to execute the decree against the defendants 1 to 4. In November 1919 the plaintiffs sought to amend a prior execution application by seeking attachment of certain properties. In 1920 the plaintiffs applied for attachment of another house belonging to defts. 1 to 4. *Held* that the applications were barred by time. As no relief was asked for against defendants Nos. 1 to 4 in the appeal to the High Court, the decree which was being executed was the decree of the trial Court and limitation began to run from the date of the decree of the trial Court and not of the High Court on appeal. (*Macleod, C.J. and Crump, J.*) KALYANCHAND *v.* BHOGILAL. **25 Bom. L. R. 371 : 73 I. C. 310 : A. I. R. 1923 Bom. 400.**

——S. 48—*Mortgage decree under Dekhan Agriculturists' Relief Act—No necessity for decree absolute—Effect of making decree absolute—Limitation.*

Where a decree is passed under the Dekhan Agriculturists' Relief Act there is no necessity to apply to the Court to make it absolute. On default of payment of any instalment, execution can be applied for and an application to have the decree made absolute would at best be considered as a step-in-aid of execution. Hence when the application for execution is put in more than 12 years from the date when the decree could have been executed though within 12 years from the date of decree absolute, it is barred under S. 48, C. P. Code. (*Macleod, C. J. and Shah, J.*) HIRACHAND KHEMCHAND GUJAR *v.* ABA LALA PATIL.

46 Bom. 761 : 24 Bom. L. R. 269 : 67 I. C. 153 : A. I. R. 1922 Bom. 95.

——S. 48—*Applicability of—Retrospective effect—Decree on mortgage.*

S. 48 has a retrospective effect, and governs an application for the execution of a mortgage decree passed before the Code came into force. Hence such an application, if presented 12 years after the date of the decree, is barred. 40 Cal. 704, Foll. 32 All. 499 Diss. (*Macleod, C. J. and Fawcett, J.*) GOPALDAS GANPATDAS *v.* TRIBHOVAN JETHIRAM.

45 Bom. 365 : 59 I. C. 790 : 22 Bom. L. R. 1420.

——S 48—*Mortgage decree—Personal decree—Execution—Limitation.*

The period of limitation provided for in S. 48 of the Code for execution in a personal mortgage decree runs from the date of such decree. (*Mookerjee and Panton, JJ.*) BARANESHI *v.* BHABADEB. **66 I. C. 708 : 34 C. L. J. 167.**

——S. 48, O. 20, R. 11—*Limitation for execution—Order for payment by instalments upon compromise—Extension of time.*

The parties agreed that the decretal amount should be paid by instalments and it appeared that the Court accepted the compromise and consequently passed an order striking off the execution proceedings. *Held*, the Court, when accepting the request of the parties, intended that the decretal amount should be payable by instalments : and the order which was passed was in

C. P. CODE (V OF 1908), S. 48.

essence and substance one made under S. 210 of the C. P. Code, which extended the period of limitation. (*Shadi Lal, C. J. and Fforde, J.*) BANARSI DAS *v.* RAMZAN RAJ BIBI. **73 I. C. 671 : A. I. R 1923 Lah. 381. On appeal from 72 I C. 477.**

——— S. 48—*Decree directing recovery of money from A on failure to recover from B—Execution against A is barred after 12 years from date of decree.*

Phillips, J. agreeing with *Devadoss, J.*—Where a decree directs that money is recoverable from a party only on failure to recover from another party, the execution of the decree becomes barred against the former after 12 years from the date of the decree. (*Wallace, J. contra.*) 48 I. A. 17 (P. C.) Dist. 22 C. W. N. 145 (P. C.) Foll. 40 Mad. 989 (F. B.) considered as overruled by 22 C. W. N. 145 (P. C.).

Wallace, J.—In a case like this the decree-holder's remedy against the former party accrues not on the date of the decree but on the date of the failure of the other party to satisfy the decree, which date must be fixed by an order of Court, and limitation begins to run in respect of that remedy from the date of that order. Such order would have the effect of a fresh decree directing the payment of money by the second party to be made from the date of its order, and S. 48 would apply to it as such ; that is, 12 years' limitation for the relief against the second party will run from the date of such an order. (*Phillips, J.*) (NAWAB) SHUJA-UL-MULK *v.* UMIR-UL-UMRA BAHADUR **49 M. L. J. 498 : 48 Mad. 846 : A. I. R. 1926 Mad. 20.**

———S. 48—*Mortgage decree for sale of properties and for recovery of balance from mortgagor's person—Limitation for execution of latter part of decree runs from date of decree.*

Where it is directed in a mortgage decree that the mortgage properties must be sold and the balance must be realised from the other properties and person of the judgment-debtor, the date from which the period of twelve years under S. 48 of the C P. Code for execution of the latter part of the decree, runs, is the date of the mortgage decree. (*Odgers, J.*) SAMINATHA ODAYAR *v.* THIAGARAJASWAMI ODAYAR. **82 I. C. 827 : A I. R. 1925 Mad. 331.**

———S. 48—*Fraud—Execution of decree—Evasion of arrest—Limitation—Extension of time.*

Where a judgment-debtor evades arrest in execution of the decree he is guilty of fraud within the meaning of S. 48, Civil Procedure Code, and the period of limitation for execution is thereby extended. 6 M. 365: 12 L. W. 710 followed (1898). 8 M. L. J. 203 not followed. (*Phillips and Odgers, JJ.*) R S. RAMANATHAN CHETTIAR *v* M. G. MOHIDEEN SAHIB. **47 M. L. J. 428 : 20 L. W. 475 : 80 I. C. 731 : (1924) M. W. N. 745 : A. I. R. 1924 Mad. 836.**

———S. 48—*Does not apply to insolvency proceedings.*

S. 48 deals only with execution and lays down that no order for execution of the decree shall be made upon an application presented after the expiration of 12 years from certain dates, but it does not mean that a decree more than 12 years old is not proveable in insolvency proceedings. (*Oldfield and Venkatasubba Rao, JJ.*) SIVASUBRAMANIA PILLAI *v.* THEETHIAPPA PILLAI. **45 M. L. J. 166 : 18 L. W. 636 : (1923) M. W. N. 895 : 75 I. C. 572 : 47 M. 120 : A. I R. 1924 Mad. 163.**

———S. 48—*Limitation for execution—Cannot be extended by Court.*

The executing Court cannot extend the period of 12 years fixed in S. 48 of the C. P. Code under S. 15, Lim. Act. (*Spencer and Ramesam, JJ.*) SUBBARAYAN *v.* NATARAJAN. **43 M. L. J. 168 : 45 M. 785 : 70 I. C. 396 : (1922) M. W. N. 424 : 16 L. W. 68 : 31 M. L. T. 140 (H. C.) : A. I. R. 1922 Mad. 268.**

———Ss. 48 and 63—*Continuation of application—Property attached by two Courts—Sale by one—Application for rateable distribution more than 12 years after decree.*

A and B obtained decrees against X in the District and the Munsif Court respectively and attached the properties of X in execution. They were ordered to be sold under S. 63 of the C. P. Code by the District Court. While B's application was pending in the Munsif's Court he applied to the District Court for rateable distribution 12 years after the date of his decree though his last application was within 12 years. *Held*, that the application to the District Court was only a continuation of the application made to the Munsif's Court. (*Odgers, J.*) RENTALA VEERA RAZU *v.* KURUVELLA SUBBARAYUDU. **41 M. L. J. 378 : (1921) M. W. N 507 : 64 I. C. 493 : 15 L. W. 245 : A. I. R. 1922 Mad. 3.**

———S. 48—*Fraud—Avoiding arrest under a warrant.*

An intentional avoiding by the judgment-debtor of arrest under a warrant by the decree-holder to avoid payment of decretal amount amounts to fraud and gives a fresh start to the period of limitation. (*Abdur Rahim and Odgers, JJ.*) AYYAVU *v.* SOMASUNDARAM CHETTIAR. **12 L. W. 710 : 60 I. C. 630 : (1920) M. W. N. 788.**

———S. 48—*The term 'fraud' is used in wider sense than in English Law—Looking house, evading arrest or payment or fictitious transfer is fraud.*

The word 'fraud' is used in much wider sense than that in which it is generally used in English Law. Thus evading arrest by any contrivance or dishonestly evading payment by evading service of warrant or locking up the house so as to prevent attachment of moveable property is a fraud within the section. So also is a fictitious transfer of property to defeat or delay the execution of a decree that may be passed against the judgment debtor. Ordinarily two things are essential for execution of a decree for money. Either the property of the judgment-debtor must be available or the person of the judgment-debtor must be available for arrest. Conduct is the best proof of intention. (*Kinkhede, A. J. C.*) KHAIRULLA *v.* SHETH DHANRUPMAL. **80 I. C. 905 : A. I. R. 1925 Nag. 82.**

———S. 48 (1) (b)—*Subsequent order means any order made by a competent Court—Order of executing Caurt allowing time for judgment-debtor to pay up the balance of decretal amount is a subsequent order and gives a fresh period for executing the decree.*

The words "any subsequent order" must not be limited as if the words "by the Court which passed the decree" were there, but mean any order made by a competent Court, and an order made by a Court executing a decree allowing a judgment-debtor time to pay up the balance of the decretal money by instalments is a subsequent order within the meaning of S. 48, and gives a fresh period to the decree-holder to execute his decree. 40 All. 198 Dissented from. (*Macleod, C. J. and Coyajee, J.*) D. S. APTE *v.* TIRMAL HANMANT. **49 Bom. 695 : 27 Bom. L. R. 961 : 88 I. C. 949 : A. I. R. 1925 Bom. 503.**

———S. 48 (1) (b)—*Limitation for execution—Order directing payment of money on a certain date—Compromise after decree.*

To render S. 48 (1) (*b*) of the C. P. Code applica-

C. P. CODE (V OF 1908), S. 48.

ble there must be an order of Court directing the payment of money on a certain date. Where there was a decree for money in a lumpsum, the fact that the parties come to some arrangement out of Court for payment in instalments would not attract the operation of this clause or prolong the period of limitation. (*Broadway, J.*) BANARSI DAS *v.* RAMZAN RAJ BIBI.
72 I. C. 477 : A. I. R. 1924 Lah. 342.

——**S. 48 (1) (b)**—*Compromise decree—Order by executing Court recording compromise—Effect—Limitation.*

An order under S. 48 (1) (*b*), C. P. Code, must be made by the Court which made the decree and not by a Court executing the decree. Where a Court executing the decree records a compromise the original decree is not altered and limitation for purposes of execution is still calculated from the date of the decree. (*Broadway, J.*) JIVAN BAKSH *v.* MUBINAL HUQ. **73 I. C. 794 : A. I. R. 1923 Lah. 678**

——**S. 49**—*Transfer of decree—Judgment-debtor if could attach money deposited for a decree against assignee.*

A decree being assigned the judgment-debtor deposited the money in Court and in execution of a decree he had against the assignee attached the sum in Court, *held*, he was entitled to do so. (*Baker, O.J.C.*) CHUNNILAL *v.* GULZARILAL. **19 N. L. R. 164 : 75 I. C. 752 . A. I. R. 1924 Nag. 46.**

——**S. 49**—*Consideration for assignment partly unpaid—Assignee's right to execute depends on parties' intention.*

The question as to whether the non-payment of a part of the consideration money would debar the assignee of a decree from executing the decree would depend on the intention of the parties as to when the title was to pass to the transferee. (*Ross and Kulwant Sahay, JJ.*) SHEO PRASAD SINGH *v.* P. E. LALL.
4 Pat. 120 : 86 I. C. 564 : A. I. R. 1925 Pat. 449.

——**S. 49**—*Assignee, benamidar for some judgment debtors—Equities against these do not bind assignee.*

The right of the assignee of a decree to execute the decree cannot be made conditional upon equities which the mortgagor judgment-debtors may have against the mortgagee judgment-debtors for whom he is said to be the benamidar, (*Ross and Kulwant Sahay, JJ.*) SHEO PRASAD SINGH *v.* P. E. LALL.
4 Pat. 120 : 86 I. C. 564 : A. I. R. 1925 Pat. 449.

——**S. 50**—*Attachment of son's undivided interest in co-parcenary property—Death of son—Effect—Father if legal representative.*

The attachment of the undivided interest of a Hindu son in co-parcenary property creates a charge on the property, which is not extinguished by his death. The father who but for the attachment would take his interest by survivorship is the legal representative of the son. (*Sulaiman and Daniels, JJ.*) FAQIR CHAND *v.* SANT LAL. **L. R. 6 A. 511 : 89 I. C. 291 : 23 A. L. J. 877.**

——**Ss. 50 and 99**—*Application for substituting legal representative's name can be made to the Court passing the decree—If it is not made to that Court, it is mere irregularity which is cured by S. 99.*

An application for the substitution of the name of the legal representative of a deceased can be made to the Court to which the decree has been transferred for execution and in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by S. 99. 22 Cal. 558 ; 35 Cal. 1047 Foll. 17 All. 431 ; 19 All. 337 and 28 Mad. 466 not Foll. (*Abdul Raoof and Fforde, JJ.*) MT. BEGAM BIBI *v.* BULAQI SHAH.

C. P. CODE (V OF 1908), S. 50.

26 P. L. R. 740 : A. I. R. 1926 Lah. 34

——**S. 50**—*Death of puisne mortgagee—Legal representatives not on record—Sale free from his charge—Validity—Limitation Act* (1908), *Art.* 166.

Where in execution of a decree in which the puisne mortgagee consented for sale free of his mortgage on the condition that the balance be paid to him after the discharge of the prior mortgage, subsequent to the order for sale but prior to the sale itself such puisne mortgagee died and his legal representative was not brought on the record and the sale was held and confirmed :

Held, as the procedure laid down by S. 50, Civil Procedure Code had not been followed the sale was a nullity and did not require to be set aside under Art. 166 of the Limitation Act, 1908. (*Oldfield and Ramesam, JJ.*) RAGHUNATHASAMY *v.* S. GOPAUL RAO.
15 L. W. 123 : A. I. R. 1922 Mad. 307

——**S. 50**—*Mortgage decree against father—Occupancy field sold and mortgage satisfied—Balance money is not assets of father in son's hands—C.P. Tenancy Act* (1920), *S.* 11 (2).

Balance of the sale proceeds of occupancy fields sold after father's death in execution of the mortgage decree against him are not assets of the father's estate in the hands of the son. To hold that succession to such an untransferable right of occupancy creates a personal liability to pay the debts of a deceased judgment-debtor would be opposed to principle and could scarcely have been intended by the legislature [9 N. L. R. 137, and 84 P. W. R. 1916. Rel. on] To fasten liability on the heir-at-law or legal representative, the right which has devolved must be property which can be disposed of for the purpose of satisfying the debt due by the deceased. (*Wadegaonkar, A. J. C.*) BONDRU *v.* MISRIYA. **A. I. R. 1925 Nag. 449.**

——**S. 50**—*Decree transferred—Execution commenced—Judgment-debtor's death—Court of transfer bringing legal representative on record—Acquiescence by legal representative—Irregularity is curable—C. P. Code, S.* 99.

When a decree is transferred to another Court for execution and after the execution proceedings are started, the judgment-debtor dies and the Court of transfer brings on the record the legal representative of the judgment-debtor and the legal representative acquiesces in the procedure and puts forward objection in the Court of transfer without challenging its jurisdiction to hear, the objections, but no application under S. 50, C. P. Code is made to the Court which passed the decree, no case of want of jurisdiction will arise but there would be an irregularity of procedure curable under the provisions of S. 99 of the C. P. Code. 28 Mad. 466 Dist. 55 I. C. 812 Foll. 22 Cal. 558 Ref to. (*Dalal, J.C. and Wazir Hasan, A. J. C.*) JANG BAHADUR *v.* BANK OF UPPER INDIA, LTD. LUCKNOW. **12 O. L J. 146 : 87 I. C. 21 : 2 O. W. N. 73 : A. I R. 1925 Oudh 448.**

——**S. 50**—*Assets—Property of deceased—Contest as regards inheritance—Acceptance of money in lieu of right to inheritance—Effect of.*

A legal representative is liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. The fact that a claimant to the inheritance of a deceased person received a sum of money from the opposing claimants who were in possession of the estate does not make the money so received assets of the deceased in the hands of the claimant. *Quaere* Whether property converted into one form different from the form which the estate originally represented could be called as the property of the deceased. (*Wazir Hasan, J. C.*)

C. P. CODE (V OF 1908), S. 50.

SHAMSHER BAHADUR SINGH *v.* MT. KAILASH BIBI **10 O. & A. L. R. 275 : 11 O. L. J. 441 : 27 O. C. 262 : A. I. R. 1924 Oudh 364.**

——— **S. 50**—*Dekhan Agriculturists' Relief Act, Ss. 74 and 22—Legal representative of deceased agriculturist—Liability of.*

Under S. 50 of the Code read with S. 74 of the Act the legal representative of deceased agriculturist, is liable for his debts to the extent which has come to his hands and has not been disposed of and S. 22 of the Act is no bar to the appointment of a Collector to manage the property in the hands of such legal representative. (*Fawcett and Raymond, A. J. Cs.*) SHOITRAM *v.* LALBUX. **63 I.C. 310 : 15 S. L. R. 47.**

——— **S. 50 (2)**—*Legal representative—Personal liability—Insufficiency of assets—Onus of proof.*

If it were shown that a deceased person left a certain amount of assets and that the legal representative had received some portion of those assets, it would be for him to explain why he did not receive the whole of the assets and if he says that he did not so receive them, it would be for him to establish what proportion of the assets, proved to have been left by the deceased, really got into his hands. Of course, the burden is on the legal representative to show that he has utilised the assets that have come into his hands, in the proper administration of the estate ; otherwise, he will make himself personally liable for the debts of the deceased to the extent of the assets shown to have been left by the deceased and presumed to have passed into his hands. From the mere fact that a person is a legal representative, it could not be strongly presumed that he got the assets of the deceased. It must be made out by the evidence in the case 30 M. L. J. 391 ; 21 M. L. J. 1096 ; 3 M. 359 Referred to. (*Krishnan and Odgers, JJ.*) ANGAVALATHAMMAL *v.* JANAKI AMMAL. **19 L. W. 119 : 79 I. C. 894 : (1924) M. W. N. 207 : A. I. R. 1924 Mad. 466.**

———**S. 51**—*Personal decree — Right to arrest judgment-debtor does not exist in every case.*

Every personal decree does not carry with it a right to arrest the judgment-debtor in execution. There are exceptions as in the case of minors, legal representatives, and females against whom a decree has been passed or is sought to be executed. (*Hallifax and Dhobley, A. J. Cs.*) JIWANDAS *v.* JANKI. **18 N. L. R. 145 : 5 N. L. J. 49 : 65 I. C. 53 : A. I. R 1922 Nag. 98.**

———**S. 51 (d) and O. 40, R. 1**—*Receiver—Appointment of—Mortgage decree—Objection of decree-holder—Effect.*

It would be stretching too far the discretion of the Court under O. 40, R. 1 in the matter of appointment of receivers, if it thereby deprives the decree-holder of his right to sell the mortgaged property under the decree. S. 51 does not apply to the case ; for it merely prescribes the mode in which the decree-holder may execute his decree, one of them being by the appointment of a receiver. The section does not give any right to the judgment-debtor to apply for the appointment of a receiver. (*Jwala Prasad and Bucknill, JJ.*) MALIK MOKHTAR AHMED *v.* MT BIBI RAHIMUNNISSA BEGUM. **4 P. L. T. 58 : 1922 P.H.C.C. 66 : 67 I C. 606 : A. I. R. 1922 Pat. 369.**

———**S. 51 (e)**—*Construction of decree—Supplementary relief.*

Cl. (*e*) of S. 51 of the C. P. Code cannot be taken as authorising a Court to read into a decree a supplementary or alternative relief which is not there. (*Ayling, O. C. J. and Odgers, J.*) MARATH SIVARAMAN NAIR *v.* SESHU PATTAR. **42 M. L. J. 356 : 16 L. W. 589 : 70 I. C. 259 : A.I.R. 1922 Mad. 299.**

C. P. CODE (V OF 1908), S. 52.

———**S. 52**—*Property of deceased—Income of, accrued since death of deceased and come into hands of representative if included in—Attachment of income—Decree holder's right of — Realisation of amount attached.*

Under S. 52 of the Code the income of landed property, which has passed from one Zemindar to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased Zemindar. Income accrued since the late Zemindar's death which has come into the hands of the new Zemindar can be attached. It is unnecessary to sell it. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. (*Schwabe, C. J., Coutts Trotter and Ramesam, JJ.*) KADIRVELUSAMI NAICKER *v.* THE EASTERN DEVELOPMENT CORPORATION, LTD. **46 M. L. J. 261 : 47 Mad. 411 : 34 M. L. T. 17 : 1924 M.W.N. 346 : 80 I. C. 163 : A. I. R. 1924 Mad. 530 (F.B.).**

——— **S. 52**—*Occupancy holding—Sale of—Balance of proceeds in the hands of heir—If assets of deceased.*

Where an occupancy holding is sold in execution of a mortgage decree after the death of the judgment-debtor, any surplus sale proceeds paid to his legal representative are not assets of the deceased in his hands, and cannot be proceeded against by a money decree holder. (*Wadegaonkar, A. J. C.*) BONDRU *v.* MISRIYA. **89 I. C. 477 : A. I. R. 1925 Nag. 449.**

———**S. 52**—*Suit against legal representatives of a deceased should not be dismissed merely on the ground that they are not in possession of any assets of the deceased—C. P. Code, S. 2 (11).*

A suit against the legal representatives of a deceased debtor should not be dismissed on the mere ground that the defendants are not in possession of any portion of the estate left by the deceased. 2 N.W.P.H. C R. 449 and 13 Bom. 653 Foll. (*Wadegaonkar, A. J. C.*) SHANKERLAL *v.* GANESH. **89 I.C. 236 (1) : A. I. R. 1926 Nag. 170.**

———**S. 52**—*Effect of.*

The practical effect of S. 52, C. P. Code, is not to make the liability of a person sued in a representative capacity any the less personal or to make the debt recoverable only from certain property ; the application of the section only converts the decree from one for a single stated sum of money into a decree for that sum or another unascertained sum if the latter should be less. (*Hallifax, A. J. C.*) BED PRASAD *v.* NAKCHHED PRASAD. **A. I. R. 1924 Nag. 410.**

———**S. 52**—*Property held by one heir as legal representative—Creditor can proceed against whole property and need not wait for partition among heirs—Purchaser in execution is not responsible for neglect on the part of heir in possession, in allowing a larger portion to be sold than necessary.*

Where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property, the creditor, in execution of decree, is entitled to attach and sell any property of the deceased in possession of the defendant independently of the fact whether the property in such possession is up to the share of the defendant in the property of the deceased or in excess thereof. This procedure gives a speedy remedy to a creditor of a deceased person and saves him the trouble of waiting until the different heirs have decided between themselves either amicably or through Court as to what property each heir is to inherit. The creditor is not concerned according to the privilege given to him by S. 52 with the rights of the heirs but is only concerned with his own right to recover his money

C. P. CODE (V OF 1908), S. 55.

debt out of the property of the deceased. Where any portion of such property is sold the purchaser cannot be held responsible for any neglect of the person in possession in allowing a larger portion to be sold than was necessary, unless any fraud or collusion is alleged. 8 O. L. J. 191 and 1925 Oudh 330 Dist. (*Dalal, J. C. and Wazir Hasan, A J. C.*) HAJI AMIS AHMAD *v.* MT. HAFIZ-UN-NISSA. **2 O. W. N. 407 : A. I. R. 1925 Oudh 515.**

———S. 52 *Personal property of the legal representative is exempt from execution.*

Decree passed against a legal representative is not a personal decree and consequently only the property of the deceased and not the property of the judgment debtor is to be proceeded against in execution of the decree. (*Wazir Hasan, J. C.*) KUNWAR JANG BAHADUR *v.* LALA GUR PRASAD. **27 O. C 238 : 11 O. L. J. 54 : 80 I.C. 600 : A.I.R. 1925 Oudh 113.**

——— S. 52—*Appropriation of assets of the deceased —Personal liability.*

Where the defendant along with another person took possession of the assets of the deceased and disposed of a portion thereof without any right and where the property disposed of was sufficient to exceed the debts, a personal decree can be passed against the defendant 20 Mad. 446 followed. (*Kanhaiya Lal, J.C.*) MIHI LAL *v.* BABU LAL. **A. I. R. 1922 Oudh 200.**

———S. 52—*Personal decree against son—Can be executed only against co parcenary property in his hands.*

A personal decree against the son after the death of his father on a hundi executed by the father in a Mitakshara Hindu family can be executed only against the co parcenary property in the hands of the son. (*Jwala Prasad and Ross, JJ.*) RAM BHUJAWAN PRASAD SINGH *v.* RAM NARAIN. **65 I. C. 224 (1) : 2 Pat. L. T. 396.**

——— S. 53—*Hindu son with ancestral property liable for the debt is legal representative.*

A decree-holder who has a decree against a Hindu father can proceed in execution after his death against the joint ancestral property in the hands of the son and can treat the son as the legal representative of his judgment-debtor provided the property is liable under the Hindu Law for the debt. (*Sulaiman and Boys, JJ.*) RUDRA PRATAP SINGH *v.* SHARADA MAHESH PRASAD SINGH. **23 A. L. J. 467 : 88 I. C. 200 : 6 L. R. A. (Civ.) 321 : A. I. R. 1925 All. 471.**

———S. 53—*Person taking property by survivorship—Legal representative—Nephew of deceased Hindu co-parcener.*

It is only in the case of a son or other descendant that a person taking property by survivorship can be joined as a legal representative under S. 53 of the Civil Procedure Code. The section has no application to a nephew. 45 A. 455 Rel. on. He can, therefore, plead that he holds the property under an independent title and cannot be joined as a party to the proceedings for the preparation of the final decree. If he fails to do so he must be held to be bound by the decree. (*Daniels, J.*) BALKARAN LAL *v.* MALIK NAMDAR. **5 L.R. A. (Civ.) 279: 78 I.C. 637: A.I.R. 1924 All. 873.**

——— S. 53—*Scope of—Section applies only to son or other descendant.*

It is only the son or lineal descendant of a deceased Hindu that comes within the scope of S. 53 of the C. P. Code and there is no obligation on the part of any other co-parcener who has acquired rights by survivorship to pay up the decree debts of the deceased co-parcener. 42 B. 54 Ref. (*Walsh and Ryves, JJ.*) JAGARNATH SINGH *v.* MOTILAL. **21 A. L. J. 303 : L. R. 4 A. 220 : 45 A. 455 : 73 I. C. 958 : A I.R. 1923 All. 539.**

C. P. CODE (V OF 1908), S. 55.

——— S. 53—*Hindu father—Decree debt—Pious obligation—Extent of.*

A Hindu son is liable for the unsatisfied decree debts of his deceased father to the extent of the ancestral properties unless he shows that the debt was contracted for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father. (*Piggott and Walsh, JJ.*) RAMANAND SHUKUL *v.* CHHOTEY LAL. **71 I. C. 417 : 20 A.L.J. 969 : 4 L.R. A. (Civ.) 31 : A I.R. 1923 All. 124.**

——— S. 53—*Applicability of—Decree for possession—Money decree—Executability against sons.*

S. 53 of the C. P. Code is not confined in its operation to money-decrees. If a decree is passed in respect of joint family property, it can be executed against the sons after the father's death. 42 B 504 not foll. (*Spencer and Devadoss, JJ.*) MEYYAPPAN SERVAI *v.* MEYYAPPAN AMBALAM. **46 M. L. J. 471 : 19 L. W. 484 : 34 M.L.T. 209 : A.I R. 1924 Mad 571.**

——— S. 53—*Decree under—Ancestral property—Liability for sale.*

The whole of the ancestral property and not merely father's share can be sold under a decree passed in terms of S. 53. (*Daniels, J. C. and Wazir Hasan, A. J. C.*) BHAGWANTI SAHAI *v.* MAHARAJ PRAG DIN. **27 I C. 111 : 10 O. & A. L. R. 313 : 11 O. L. J. 202 : 81 I. C. 15 : 1 O. W. N. 13 : A. I. R. 1924 Oudh 393.**

———Ss. 53 and 54—*Hindu father—Son's liability —Separate suit.*

Under the present law there is no necessity of any order for attachment of the property in execution of a mortgage decree. Consequently, after father's death the proceedings in execution may be continued against the son. The sons of a Mitakshara family have been made by express enactment under S. 53 of the Code of Civil Procedure, legal representatives of their father in respect of the property which descends to them under the Hindu Law and which has been made liable for the satisfaction of the decree passed by the Court. (*Jwala Prasad and Adami, JJ.*) SHEIK KAROO *v.* RAMESHWAR RAO. **3 P. L. T. 43 : A.I.R. 1923 Pat. 143.**

———S. 55—*Surety bringing judgment-debtor in Court during stay ordered in his favour—Conditions of suretyship are not fulfilled.*

Where the surety for the appearance of judgment-debtor brought the letter to Court though not so called upon an order granting stay of execution was passed in his favour and was still in force :

Held, that the conditions of suretyship were not fulfilled and he could not therefore be discharged. (*Sulaiman and Mukerji, JJ.*) RATNI BAI *v.* GHASI RAM. **23 A.L.J. 59 : 6 L. R. A. (Civ.) 171 : 86 I. C. 105 : A. I R. 1925 All. 344.**

———S. 55, cl. 4—*Failure of judgment-debtor to apply within time—Effect of—Surety liable though judgment-debtor may die after the time allowed—Scope of sub clause.*

Where the judgment-debtor failed to apply within time to be declared an insolvent, on his release on offering a surety for Rs. 500 and the Court *suo motu* issued warrant of arrest but the judgment-creditor prayed for calling upon the surety to pay the amount of the decree and praying that no warrant be issued.

Held, that execution for the amount of the decree should be allowed against the surety notwitnstanding the fact that judgment-debtor had died after the order of arrest, because the surety's liability came into existence on the failure of the judgment-debtor.

C. P. CODE (V OF 1908), S 55.

(*Macleod, C. J. and Shah, J.*) MAKANJI MAOJI *v.* BHUKHANDAS NAGARDAS. **48 Bom. 500 : 26 Bom. L. R. 415 : A. I. R. 1924 Bom. 428.**

——S. 55 (4)—*Security should continue until final order in insolvency petition.*

When a judgment-debtor furnishes security under S. 55 (4) the security should be directed to continue until a final order is made on his petition to be declared an insolvent. (*Macleod, C. J.*) ABDUL HUSSAIN *v.* MISTRAY AND CO. **23 Bom. L. R. 1263 : 64 I. C. 648 : 46 Bom. 702 : A. I. R. 1922 Bom. 340.**

—— S. 55 (4)—*Judgment-debtor not applying within one month to be declared insolvent—No charge, of failing to appear when required to do so, against Judgment-debtor—Surety is liable—Time cannot be extended.*

Under S. 55 (4) surety does not merely undertake that the judgment-debtor will appear when called upon to do so, but also that the judgment-debtor will apply to be declared an insolvent within the prescribed period. If the judgment-debtor does not apply to be declared an insolvent within the prescribed one month the surety can be proceeded against. The Court has no power to extend the period for the judgment-debtor's filing a petition to be declared an insolvent, beyond the prescribed month.

Obiter. The surety is liable even after the dismissal of the execution proceedings against the judgment-debtor. (*Jackson, J.*) VENKOBANNA *v.* FIRM MYACHAND-VENICHAND. **86 I. C. 304 : A. I. R. 1926 Mad. 286.**

——Ss. 55 (4) and 145—*Assets of judgment-debtor in execution—Surety for production of Judgment debtor and for his application in insolvency—Failure to produce Judgment-debtor—Execution against surety.*

The appellant executed a surety bond, as a result of which, the judgment-debtor who was arrested in execution of a decree against him, was released. On the dismissal of the application of the judgment-debtor to be declared insolvent, the decree-holder applied to the Court for directing the appellant to produce the Judgment debtor who was released on his surety. Notice of this application was served upon the appellant and he was directed to produce the judgment-debtor. The appellant failed to produce the judgment-debtor ; even he himself did not appear in Court. The execution was dismissed. The decree-holder now enforced the terms of the security bond executed by the appellant and proceeded to realise the decretal amount from the appellant.

Held that the liability of a surety under S. 55, C.P. Code enures for the benefit of the Court as well as for the decree-holder. The Court accepting the security may enforce it, failing which the decree-holder is equally entitled to enforce same in any way that may be open to him, for he is the ultimate beneficiary under the security bond. No doubt, under the Old Code of Civil Procedure sometimes it used to be contended that the remedy of the decree-holder against the surety was only by means of a regular suit. In order to save the decree-holder from trouble, inconvenience and expense of bringing a suit to enforce the security bond the present Code under S. 145 gives him a right and opportunity to enforce the bond in execution proceedings. Therefore if the appellant as surety in the present case made himself liable for the performance of the decree or any part thereof, the decree-holder is entitled to enforce the bond by executing the decree against him in execution proceedings. The execution proceedings referred to therein, are not in any way connected with the execution proceedings in which the surety bond was filed but it

C. P. CODE (V OF 1908), S. 60.

may be any execution proceedings. The appellant's liability, therefore, arose on account of the failure of the Judgment-debtor to appear in Court after the insolvency petition was dismissed and he was called upon to appear. (*Jwala Prasad and Kulwant Sahay, JJ.*) SHYAM PROSONO KATARI *v.* KESHAB CHANDRA RANA. **1924 P. H. C. C. 63 : 5 Pat. L. T. 336 : 81 I. C. 702 : A. I. R. 1924 Pat. 487.**

——S. 56—*Personal decree—Mode of execution—Arrest.*

A money decree does not necessarily carry with it a right to execute it by arrest of the judgment-debtor *e. g.* minor or a female, or a legal representative. (*Hallifax and Dhobley, A. J. Cs.*) JIWANDAS *v.* JANKI. **5 N. L. J. 49 : 65 I. C. 53 : 18 N. L. R. 145 : A. I. R. 1922 Nag. 98.**

——S. 60—*Pension—Saleability decided upon by the trial Court—Executing Court cannot question—Civil P. C., S. 47.*

The question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact If the point was expressly raised by the defendant concerned in the suit itself and decided against him and a decree under O. 34, R. 4, was passed for the sale of that pension, it no longer remains open to the judgment-debtor to say that the pension was of such a character as not to be saleable at all. It would not be proper for the execution Court to reopen the question which has already been decided in the original suit. In cases where no attachment is necessary and the sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property S. 60 will not be applicable to decide the saleability of the property so as to prevent the Court from selling the property. 1924 All. 328 Rel. on. (*Sulaiman and Daniels, JJ.*) MD. MAZAR ALI *v.* MT. BIJJA BEGAM. **23 A. L. J. 841 : 6 L.R. A. C v. 448 : 89 I.C. 364 : A.I.R. 1925 All. 652.**

——S. 60—*Agriculture the only source of livlihood —S. 60 applies.*

A person who has no other source of livelihood than agriculture is an agriculturist and houses in his occupation are exempt from attachment.

Per Daniels, J.—The burden of proving that the case falls under S. 60, Civil P. C. lies on the person objecting to the attachment. 41 Bom. 475 Foll. (*Mukerji and Daniels, JJ.*) MT. BHUTA *v.* BISHESHAR SINGH. **6 L. R. A. Civ. 217 : 87 I. C. 564 : A. I. R. 1925 All. 432.**

——S. 60—*House of agriculturist—If exempted from sale under mortgage decree—Simple money-decree —Destination.*

Per *Walsh and Mukerjee, JJ.* On a proper construction of S. 60 of the Civil Procedure Code, the sale of an agriculturist's house (the expression is used for the sake of brevity), not in execution of a simple money-decree in which the previous attachment is necessary, but in execution of a mortgage-decree, which has been passed on foot of a contract of mortgage specifically making the property a security for the debt, is not prohibited.

An agriculturist may make a valid mortgage of his house, there being nothing in section 60 of the Civil Procedure Code to the contrary, and after a decree for the sale of it has been made on foot of a mortgage, it may be sold in execution of the decree and the judgment-debtor is not entitled to raise the point in the execution proceedings. (*Walsh, Ryves and Mukerji, JJ.*) MUBARAK HUSAIN *v.* AHAMAD. **L. R. 5 A. 201 : 22 A. L. J. 321 : 46 A. 489 : A. I. R. 1924 All 328 (F. B.).**

——S. 60—*Pension—Exemption from attachment*

C. P. CODE (V OF 1908), S. 60.

—Burden of proof—Pensions Act (XXIII of 1871), S. 7.

A pension is not ordinarily attachable for sale. The burden of proof that a particular pension is attachable lies on the decree-holder. (*Mears, C. J. and Ryves, J.*) MAZHAR ALI KHAN *v.* MALIFUZ HASAN. **A. I. R. 1922 All. 429 (1).**

——S. 60—*Hindu widow—Life-interest in lands —Maintenance—T. P. Act, Ss. 6 and 10.*

A compromise under which a Hindu widow was allotted certain lands for her maintenance ran as follows :—" I (the widow) have taken for myself the property for the period of my life-time. I alone shall pay jodi....and I shall go on making vahivat. I shall not sell or mortgage or give it on self reducing mortgage or give it as present or in any manner give it into the possession of others. If I do so, it will not be valid. After my death, the said minor alone is owner of the said property." *Held*, that this restriction on alienation prevented the judgment-debtor from having disposing power within the meaning of S. 60, C. P. Code and the restriction being valid, the property could not be attached. 10 B 342 ; 15 M.L.J. 7 Ref. (*Marten and Fawcett, JJ.*) BASANGOWDA *v.* IRGOWDATI. **47 Bom. 597 : 25 Bom. L R. 293 : 73 I. C. 196 : A. I. R. 1923 Bom. 276.**

——S. 60—*Agriculturist, meaning of.*

The party alleging that he is an agriculturist must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour. (*Macleod, C. J. and Coyajee, J.*) RUBINE *v.* BALWANT RAI. **A. I. R. 1923 Bom. 12.**

——S. 60—*Occupancy holding is liable to attachment and sale in execution—Occupancy holding—Liability to attachment.*

The transfer for value of the whole or part of an occupancy holding, apart from custom or local usage, is operative as against the raiyat whether it is voluntary or involuntary. The principle is a general one which applies to the case of creditors other than landlords also. A. I. R. 1924 Cal. 52 and 48 Cal. 184 (F.B.) Appl. (*Suhrawardy and Duval, JJ.*) NABIN CHANDRA *v.* ABDUL AZIZ. **90 I. C 998 : A.I.R. 1926 Cal. 337 (1).**

——S. 60—*Accrued debt is attachable though its payment is deferred.*

There is a distinction between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not. A debt, in order to be attachable, need not be ascertained but must be accruing or have accrued, *a debitum in prasenti solvendum in futuro.* (*Suhrawardy and Chotzner, JJ.*) BAHADURMULL RAMPURIA *v.* TRICUMDAS CALLIANJI. **78 I. C. 881 : A. I. R. 1925 Cal. 561.**

——S. 60—*Property in the hands of mother deriving title by virtue of marriage can be attached for debts of previous male holder—Custom (Punjab).*

The estate in the hands of the mother of a deceased proprietor who derives her title by virtue of her marriage in the family is liable to attachment for payment of debts incurred by a previous male holder of the estate. (*Jai Lal, J.*) DHANPAT RAI *v.* GOPAL KUAR. **26 P. L. R. 735 : 90 I. C. 1052 : A. I. R. 1926 Lah. 7.**

——S. 60—*Crops grown by heir of tenant cannot be attached.*

Where crops are grown on a tenancy by the heir of deceased tenant, after his death such crops cannot be said to be his crops and cannot be as such liable to attachment and sale in the hands of the heir under S. 60, C. P. Code. 84 P.W.R. 1916 followed. (*Scott-Smith, J.*) ABDUL AZIZ *v* SARAB DAYAL. **69 I. C. 520 : A. I. R. 1924 Lah. 335 (1).**

C. P. CODE (V OF 1908), S. 60.

——S. 60—*House of agriculturist*—Panchotra *money—No attachment.*

The only house of an agriculturist is not liable to be attached and sold in insolvency. The income of *panchotra* is not covered by S. 60 of the C. P. Code. (*Broadway, J.*) NAND SINGH *v.* LACHMI NARAIN SINGH. **73 I. C. 928 : A. I. R. 1924 Lah. 226.**

——S. 60—*Inam—Service inam*—Swasthiwachakam *service—Grant burdened with public service—Not liable to attachment and sale in execution.*

To do *swasthiwachakam* service an inam of land is granted, which is always burdened with public service and is not liable to attachment and sale in execution. (*Schwabe, C. J., Coutts Trotter and Kumaraswami Sastri, JJ.*) NETI ANJANEYALU *v.* SRI VENUGOPAL RICE MILLS. **42 M. L. J. 477 : 15 L. W. 510 : 30 M. L. T. 255 : (1922) M. W. N. 307 : 45 M. 62 : A. I. R. 1922 Mad. 197.**

——S. 60—*Damages resulting from wrong attachment can be recovered from the decree holder though he acts in good faith.*

Generally speaking, it is not incumbent on the plaintiff to allege and prove that the person at whose instance a wrong attachment has been made acted thereupon maliciously or without probable cause. Proof of malice is not necessary when the property of a stranger, not a party to the suit, is taken in execution. The decree-holder may have acted in perfectly good faith and innocently, but is nevertheless liable if damages have been caused by his mistake. (*Findlay, O. C. J.*) LOBO *v.* BABULAL. **8 N. L J. 170 : A. I. R. 1925 Nag. 390.**

——S. 60—*Tool of artisan—Sewing machine.*

A sewing machine is a tool. There is no reason why a tool should be confined to primitive implements. (*MacNair, A. J. C.*) VITHOBA *v.* BABULAL. **19 N. L. R. 22 : 65 I. C. 416 : A. I. R. 1923 Nag. 289.**

——S. 60—*Tools of artisans—Sewing machine cannot be attached.*

Under S. 60, C.P. Code, a sewing machine owned by a tailor is a tool of an artisan and therefore exempt from attachment. (*MacNair, A.J.C.*) VITHOBA *v.* BABULAL. **65 I. C. 416 (Nag.).**

——S. 60—*Hereditary but non-transferable lease granted by Settlement Court in Oudh is not attachable under money-decree—Objection can be taken by lessee himself.*

A heritable but non-transferable lease granted by a Settlement Court in Oudh is not liable to sale in execution of money decree, but nevertheless it is not a succession of life-estates and each hereditary owner fully represents the estate. The lessee himself can raise the objection as to non-transferability against the holder of a money decree. (Case-law fully discussed.) (*Simpson, A. J. C.*) MT. MOHAN DEI *v.* BAL MOKUND. **12 O. L. J. 543 : 2 O. W. N. 737 : 90 I. C. 256 : A. I. R. 1925 Oudh 702.**

——S. 60—*Earning maintenance otherwise than by cultivation—Person is not agriculturist.*

An agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants, even if he may have some sort of interest in a field or two. (*Ashworth, A.J.C.*) LACHMAN DASS *v.* MT. PARTAPI. **85 I.C. 700 : A.I R. 1925 Oudh 365.**

——S. 60 and O. 21. R. 30—Asthan *property—Liability to attachment and sale.*

The *Asthan* property is not liable to be attached and sold in execution of a personal decree obtained against a *Mahant.* (*Lindsay, J.C.*) GOBIND DAS *v.* NARINDRA BAHADUR SINGH. **61 I. C. 757 : 8 O. L. J. 210.**

C. P. CODE (V OF 1908), S. 60.

———S. 60—*Decree assigned—Subsequent attachment of decree—Attachment is wrong unless assignment is not* bona fide.

Money deposited under decree to the credit of decree-holder, who has already assigned his interest in the decree, cannot be attached by his creditors unless the transfer is proved to be not *bona fide* (1912) M.W.N. 176 Diss. (*Das and Adami, JJ.*) RAGHUNANDAN PRASAD SINGH *v.* BHAGWAT SAHAY.

6 P. L. T. 604 : 3 Pat. L. R. 18 : 86 I. C. 626 : 1925 P.H.C.C. 43 : A. I. R. 1925 Pat. 372.

———S. 60—*Non-transferable occupancy holding, partial or whole interest in—Whether saleable in execution of a money decree obtained either by the landlord or a stranger.*

The transfer of the whole or a part of an interest in non-transferable occupancy holding is operative against the tenant whether it is made voluntarily or involuntarily, *e. g.*, in execution of a money decree obtained against him, either by the landlord or by a stranger. 43 Cal. 148 Foll. 1 P. L. J. 257 and 2 P. L. J. 530 Overruled. (*Das and Adami, JJ.*) JUGESHWAR MISRA *v.* NATH KOERI.

1922 P. H. C. C. 49 : A. I. R. 1922 Pat. 19 (F.B.).

———S. 60—*Prospective rent cannot be attached.*

An existing debt can be attached, but there is no provision of the Code under which a debt that has not yet fallen due can be attached. An attachment of rents which are only prospective is merely an attachment of a debt that has not accrued due. (*Carr and Brown, JJ.*) MAUNG THEIN ZAN *v.* S. A. S. FIRM.

3 Rang. 235 : 89 I.C. 794 : A. I. R. 1925 Rang. 318.

———S. 60 (1) and (3)—*Attachment of insolvent's pay.*

Moiety of insolvent's pay can be ordered to be given to the Receiver for benefit of creditors. (*Oldfield and Venkatasubba Rao, JJ.*) NARASIMHAM *v.* HANUMANTHRAO. (1922) **M.W.N. 717 : A.I.R. 1922 Mad. 439.**

———S. 60 (1) (b)—*Article for making jaggery—Exempted from attachment.*

Article used for making jaggery are implements of husbandry and hence are not subject to attachment. (*Shah, A. C. J. and Crump, J.*) LAKSHMAN MHASU BHAGAT *v.* NARHARI DADASA GUJAR.

25 Bom. L. R. 1211 : A. I. R. 1924 Bom. 294.

———S. 60 (c)—*Becoming Akali is not ceasing to be agriculturist.*

A judgment-debtor who is an agriculturist does not cease to be so merely because he has turned an Akali. (*Abdul Raoof, J.*) SURAIN SINGH *v.* MULA SINGH.

7 L. L. J. 95 : 88 I. C. 543 : A.I.R. 1925 Lah. 331 (1).

———S. 60 (c)—*Agriculturist—Who is.*

Where a person earns his livelihood, otherwise than by agriculture the mere fact that he has some sort of an interest in some lands, is not sufficient to entitle him to claim the exemption under S. 60, C. P. C. (*Ashworth, A. J. C.*) LACHIMAN DASS *v.* MT. PARTAPI. **10 O. & A. L. R. 1275.**

———S. 60 (e)—*Breach of contract—Right to sue for damages—If attachable.*

Where the right to sue for damages for breach of a contract is attached and sold; no title passes as the attachment is in contravention of S. 60 (*e*). (*Raymond, A. J. C.*) GORDHANDAS KALIDAS *v.* FIRM OF GOKAL KHATAOO. **78 I. C. 409 : A.I.R. 1925 Sind 98.**

———S. 60 (e)—*Mere right to sue for damages—Bankrupt.*

The mere right to sue for damages in the case of a bankrupt is restricted to damages arising from bodily or mental suffering or injury to his person or reputation as contradistinguished from injuries to his estate. (*Raymond, A. J. C.*) THE OFFICIAL ASSIGNEE OF BOMBAY *v.* FIRM OF CHANDULAL CHIMANLAL.

17 S. L. R. 52 : A. I. R. 1924 Sind. 89.

———S. 60 (f)—*Indian Articles of War—Reference to Army Act.*

The reference in S. 60 (*f*) to the Indian Articles of War must now be taken to mean the Indian Army Act (VIII of 1911). (*Mears, C. J. and Mukerji, J.*) BROWNE *v.* MADEN PEAREE MILLINER.

L. R. 6 A. 578 : 23 A. L. J. 929 : 89 I. C. 882 : A. I. R. 1926 All. 122 (2).

———S. 60 (1) (f)—*Jatribahis of a Gayawal.*

Though Jatribahis of a Gayawal are sold at fancy prices and have got a marketable value, they are not attachable and saleable in execution. They are merely entries as to the names and addresses of the pilgrims who deal with the gayaval and represent the claim of the judgment debtor to personal service. 2 Pat. L. J. 705 Ref. (*Jwala Prasad and Bucknill, JJ.*) LACHMAN LAL *v.* BALDEO LAL. **3 Pat. L. T. 603 : 1922 P. H. C. C. 228 : 1 Pat. 619 : 68 I. C 944 : A. I. R. 1922 Pat. 556.**

———S. 60 (g)—*Gratuity by University—If attachable—If a debt before it falls due.*

A gratuity paid by a University for services rendered not being a pension granted by Government is not exempt from attachment under S. 60 (*g*), C. P. Code. Such a gratuity recommended by the authorities constitutes a debt even before it becomes due and can be attached. (*Moti Sagar, J.*) MAHOMED ABDULLA *v.* JIWAN MAL. **A. I. R. 1924 Lah. 688.**

———S. 60 (g)—*Decree against assets—Gratuity given to heir of deceased employee if not part of assets.*

A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him. (*Wazir Hasan, A. J. C.*) LACHMI NARAIN KALU *v.* UMAID RAI. **26 O. C 53 : 69 I. C. 893 : 9 O. L. J. 401 : 4 U. P. L. R. (C). 96 : A. I. R. 1923 Oudh 21.**

———S. 60 (1) (k)—*Deposit under Provident Funds Act—Not attachable.*

A deposit in a provident fund which so long as the subscriber was in service was a compulsory deposit within the meaning of S. 2 (4) of the Provident Funds Act does not become attachable by a creditor the moment the subscriber retires irrespective of whether it has been drawn out or not. (*Daniels, J.*) DEVI PRASAD *v.* SECRETARY OF STATE FOR INDIA.

21 A. L. J. 454 : 74 I. C. 746 : L. R 4 A. 256 : 45 A. 554 : A.I.R. 1924 All. 68.

———S. 60 (1) (k)—*Provident Fund—State Railway—Deposit of railway official—Provident Funds Act, S. 4, sub-S. (1)—Railway Code, Vol. II, App. I, R. 30.*

Compulsory deposits made in a State Railway Provident Fund by an officer of the Railway during his employment are not liable to attachment in execution of a money decree against him even though he has ceased to be in the service of the Railway at the time of execution. The rules regulating the General Provident Fund do not apply to the State Railway Provident Fund. The fact that the deposits became repayable to the officer after he left the service did not remove them from the category of compulsory deposits. 29 B. 259 : 5 Bom. L. R. 454: 35 C. 641 : 46 C. 962, Ref. (*Richardson and Ghose, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAJ KUMAR MUKHERJEE.

50 Cal. 347 : 27 C. W. N. 472 : A. I. R. 1923 Cal. 585.

———S. 60 (n)—*Right of maintenance though not attachable, receiver can be appointed—C. P. Code, O. 40, R. 1.*

C. P. CODE (V OF 1908), S. 60.

Although the right of maintenance is in point of law not attachable and not saleable under S. 60, the proper remedy lies in a fitting case, in the appointment of a receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor, and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt. (*Lord Shaw.*) RAJENDRA NARAIN SINGH *v* MT. SUNDAR BIBI. **49 M. L. J. 244 : 47 All. 385 : 52 I. A. 262 41 C. L. J. 383 : 23 A. L. J. 634 : 27 B.L. R. 849 : 87 I. C 295 : 3 Pat. L. R. 142 : (1925) M.W.N. 630 : 22 L. W 284 : L. R. 6 P. C. 138 : A. I. R. 1925 P. C. 176 (P.C.).**

——S. 60 (1) (n), O. 21, R. 46—*Annuity granted by will—Prohibitory order can be made.*

S. 60 (*n*) contemplates the right of a particular individual to be maintained. It is purely a personal right and does not include an annuity conferred by a will especially where the allowance is not personal but heritable. Future instalments of such an allowance are not therefore exempt from attachment and a prohibitory order can be passed in respect of such allowance under O. 21, R. 46 of the Code. (*Daniels, A. J. C.*) MADAN LAL *v.* LAL AMBIKA BAKSH. **63 I. C 851 : 24 O. C. 250.**

——S. 62—*Actual residence at date of plaint—Not necessary.*

The word 'residing' for the purposes of jurisdiction does not necessarily mean keeping within the jurisdiction. If a person has a residence within the jurisdiction it is sufficient residence although he may not be staying there at the exact time when the proceedings were initiated against him. (*Walsh, A C. J. and Ryves, J.*) TAWASSUL HUSSAIN *v.* WAJID ALI. **L. R. 5 A. (C.v.) 695 : 87 I. C. 795 : A. I. R. 1925 All. 140.**

——S. 63—*Section applies only as between Civil Courts.*

S. 63 applies only as between Civil Courts—or where the section extended to Revenue Courts, as between Revenue Courts. The omission of the word "Civil" from the old definition of decree has not altered the law with respect to S. 63. Where subsequent to an attachment of property by a Civil Court, the same property was sold by a Revenue Court, the purchaser can maintain a suit for a declaration that the property was his and not liable to be sold in execution of the Civil Court's decree. (*Tudball and Sulaiman, JJ.*) ROSHAN LAL *v.* MASHKUR ALI KHAN. **43 All. 612 : 19 A. L. J. 643 : 63 I C. 909 : 3 U. P. L. R. (All.) 115.**

——S. 63—*Decree by Court of higher grade—Sale by Court of lower grade in execution—Transfer of sale proceeds to Court of higher grade for rateable distribution.*

Where a property is attached and a decree passed against its owner by the Court of a higher grade, but the property is sold by a Court of lower grade in execution of a decree passed subsequently in that Court, the Court of higher grade is entitled under S. 63 to ask that the sale proceeds as well as the execution proceedings be transferred to its Court, for rateable distribution among the decree-holders who have qualified themselves under S. 73 of the Civil Procedure Code. 46 Cal. 64 Foll. 18 Bom 458 Expl. (*Macleod, C. J. and Coyajee, J.*) DEEKAPPA MALAPPA *v.* CHANBASAPPA RACHAPPA. **49 B. 655 : 89 I. C. 980 : 27 B. L. R. 917 : A. I. R. 1925 Bom. 420.**

——S. 63 and 73—*Execution of decree stopped by superior Court—Decree-holder entitled to rateable distribution without further application under S. 73.*

The holders of the decrees of inferior Courts, whose execution had been stopped by the superior Court under S. 63, are entitled to rateable distribution under that section read with S. 73 without any further applications. 21 Cal. 200 Foll. (Case law discussed.) (*Greaves and Chakravarti, JJ.*) GIRINDRA NATH *v.* KEDAR NATH. **29 C. W. N. 575 : 87 I.C. 783 : A. I. R. 1925 Cal. 966**

——S. 63—*Sale by Court of lower grade—Not invalid.*

Where property is under attachment by two courts of different grades and the sale is held by the court of lower grade, the sale is not invalid. (*Mookerjee and Walmsley, JJ.*) GIRIS CHANDRA GANGOPADHYA *v.* SRI KRISHNA DE NAG. **38 C. L. J. 266 : 75 I. C. 325 : A. I. R. 1924 Cal. 168.**

——S. 63 (2)—*Attachment by Courts of different grades—Sale by inferior Court earlier though attachment by it later—Validity—Subsequent attempt to sell the properties in execution of a decree of superior Court—Application by purchaser in execution of decree of inferior Court to stop sale—Maintainability—Civil Procedure Code, S. 47—Enquiry on application—Scope of.*

Where property attached by a court of a higher grade is subsequently attached by a court of a lower grade and is sold by the latter court in execution of its decree, the sale is under S. 63 (2) of the Civil Procedure Code valid and passes title to the purchaser. Where, subsequent to the sale by the Munsif, the decree-holder in the suit in the Sub Court applied for the sale of the property in execution of his own decree, *held*, that the purchaser in execution of the Munsif's decree was entitled, under S. 47, Civil Procedure Code, to apply to the Sub-Court to stop the sale on the ground that the title to the property has passed to him and that it has ceased to be the property of the judgment-debtor. The purchaser in execution of the Munsif's decree is a representative of the judgment-debtor, and the matter is one relating to execution. *Held* further, that on such an application it would be open to the Court to inquire whether the decree of the Munsif was vitiated by fraud or on any other ground. (*Krishnan and Odgers, JJ.*) SRINIVASA CHARIAR *v.* APPAVOO REDDY. **47 M.L.J. 720 : (1924) M. W. N. 551. 20 L. W. 864 : A. I. R. 1924 Mad. 889:**

——S. 63 (2)—*Sale of property attached under a prior decree—Whether permissible—Effect of the rule.*

The rule protects a sale of property which is already attached under a prior decree, if it takes place without the knowledge of prior decree but does not permit a Court to hold such a sale. If the same property is attached by two Courts, and sold by that one which should not sell it, the party aggrieved should apply to the District Court to have the sale proceeds transferred to that Court which ought to have sold the property. (*Dass and Adami, JJ.*) RAMHARI LAL *v.* NATHU RAM. **2 Pat L. T. 719 : 62 I. C. 33 : 6 P. L. J. 332.**

——S. 64—*Scope.*

A transfer during the pendency of the attachment would be void only as against all claims enforceable under the attachment. It cannot be disputed that it is open to the attaching decree-holder to ignore the subsequent mortgage and to proceed to sell the whole property and not only the equity of redemption, and that if he did so, the auction-purchaser would get the whole property free from the incumbrance, the mortgage not creating any lien on the property sold. (*Stuart and Sulaiman, JJ.*) ROSHAN LAL *v.* LALLU. **44 A. 714 : 20 A. L. J. 722 : 68 I. C. 790 :**

C. P. CODE (V OF 1908), S. 64.

A. I. R. 1922 All. 443 (2).

——S. 64—*Attachment—Sale—Mortgage during attachment for satisfying a simple money decree—Validity of mortgage.*

It was contended that the mortgage deed in dispute was executed in order to pay off the money due to another attaching creditor, and that therefore this mortgage is invalid. *Held*, he did not hold any decree for sale He was a simple money decree-holder and as soon as his amount was paid out of Court, the attachment ceased to exist and would not affect the attaching decree-holder purchaser. (*Stuart and Sulaiman, JJ.*) ROSHAN LAL *v.* LALLU.

44 A. 714 : 20 A.L.J. 722 : 68 I C. 790 : A.I.R. 1922 All. 443 (2).

——S. 64—*Attachment—Another decree-holder's application for execution—Sale under first decree set aside—Mortgage by judgment-debtor—Effect.*

A's property was attached on 5—6—'12 in execution of B's decree. C, another decree-holder applied for execution on 12—12—'13. The property was sold on 25—3—'13. On 2—4—'13 A and B applied to have the sale set aside on the ground that B's decree was satisfied out of Court. The application was disallowed but the sale was set aside on 24—5—'13 as the auction-purchaser failed to pay the purchase money. On 26—5—13, A mortgaged the property to D. C attached it on 20—6—'13 and it was sold to E who sold it on 12—2—'14 to F. D now sued to enforce the mortgage against E *Held*, that the mortgage could be enforced against him. (*Tudball and Rafique, JJ.*) BOHRA BHUPAL *v.* KUNDAN LAL.

43 All. 399 : 19 A. L. J. 221 : 60 I. C. 846 : 3 U. P. L. R. (All.) 25.

——Ss. 64 and 73—*Claims enforceable under the attachment—Right to rateable distribution—Liability of transferee pending attachment.*

Where an attachment has been levied on property in execution of a decree, then any attempt by the judgment-debtor to deal thereafter with the property must be considered as contrary to the attachment and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which could be made against the property attached which by the law are not confined to claims of creditors attaching before the transfer but will also include the claims of any other execution creditors who may apply for execution before the assets are realised. Plaintiff attached certain properties of defendants 2-10 before judgment and defendants 2—10 subsequently mortgaged the properties. There was a decree in favour of the plaintiff against defendants 2—10. The defendant No. 1 filed another suit against defendants 2—10 and obtained a money decree. In execution of his decree plaintiff sold the properties free from the mortgage and brought the proceeds into Court. Defendant No. I applied for rateable distribution of the money realised by the sale. *Held*, that 1st defendant was entitled to rateable distribution. Subsequent claims for rateable distribution are claims enforceable under the original attachment within the meaning of S. 64, C. P. Code. (*Macleod, C. J. and Coyajee, J.*) CHUNILAL DEVAJI *v.* KARAM CHAND SHRI CHAND.

24 Bom. L. R. 364 : 69 I. C. 161 : 46 B. 895 : A. I. R. 1922 Bom. 241.

——S. 64—*Valid release of attachment validates prior alienation.*

If an attachment comes to an end validly, then upon a second attachment no Court can refuse to recognise an interest validly created in the meanwhile, but if an attachment is wrongly released and the right to attach is established subsequently according to law either by appeal or otherwise, the attachment will relate back to the time when it was made. (*Rankin and Page, JJ.*) NAJIMUNESSA BIBI *v.* NACHARADDIN SARDAR.

51 Cal. 548 : 39 C. L. J. 418 : 83 I. C. 233 : A. I. R. 1924 Cal. 744.

——S. 64—*Grounds to avoid private transfer.*

To make a private transfer or delivery void under S. 64 as against a claim for rateable distribution of assets the claim must be existing when the private transfer is made. The expression "claim enforceable under the attachment" in S.64 apart from the explanation refers to a claim in existence as such on the date of alienation. A private transfer contrary to an attachment is under S.64 not absolutely void but void only as against claims enforceable under the attachment, (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH MITTER *v.* MARTIN CO. **62 I. C. 167 : 33 C. L. J. 7.**

——S. 64—*Attachment does not create charge—Rights of creditor.*

An attachment creates no charge on the attached property and confers no title on the attaching creditor but it merely prevents a private alienation of the property. 25 C. 179 ; 42 C. 72 Rel. (*Martineau and Harrison, JJ.*) RAM BHAJ DATTA *v.* RAM DAS.

3 Lah. 414 : 69 I. C. 720 : A. I. R. 1923 Lah. 261.

——S. 64—*Attachment—Property belonging to Gaddinashin—Mutation in the name of the shrine—Effect of.*

Where a property has stood in the name of Gaddinashin he cannot defeat an attachment of the property by getting it mutated in the name of the shrine. If satisfaction of the decree could not be obtained by sale of the property, the gaddinashin could be arrested and imprisoned in execution. (*Chevis, J.*) FIRM OF GANDA MAL & CO. *v.* GANGA NATH.

4 L. L. J. 49 : A. I. R. 1922 Lah. 147.

——S. 64—*Attachment—Private transfer is voidable.*

A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. (*Leslie Jones and Wilberforce, JJ.*) NATHU MAL *v.* GANGA RAM.

63 I. C. 108 (L).

——S. 64—*Alienations after attachment are void and not merely voidable.*

Section 64, Civil Pro. Code, says in effect that private alienation of property after attachment shall be void as against all claims enforceable under the attachment.Such alienations therefore are not voidable merely. (*Madhavan Nair, J.*) SRINIVASA AIYANGAR *v.* VELLAYAN AMBALAM.

47 M. L. J. 913: 85 I C. 349 : A. I. R. 1925 Mad 338.

——S. 64—*Attachment—Prior contract for sale of property Subsequent suit for specific performance—Decree—Rights of purchaser.*

Property,which the 1st defendant had contracted to sell to the 2nd, was attached by the plaintiff in execution of a money decree obtained by him against the 1st defendant. After the attachment, the 2nd defendant brought a suit for specific performance and got an order for the sale from the Court and delivery of possession. He put in a claim to the property attached which was allowed.In a suit brought bythe plaintiff to set aside the order on the previous petition, *held*, that the attachment could not prevail against the 2nd defendant's decree by which he got possession of the property in pursuance of the contract for sale though it was open to the plaintiff, who was not a party to the suit for specific performance, to impugn the decree therein as being based on fraud or collusion. The plaintiff's proper course was to file a suit under S.53 of the Transfer of

C. P. CODE (V OF 1908), S. 64.

Property Act to have the transfer avoided as being intended to defeat creditors. (*Spencer, O. C. J.*) SUNKARI SITAYYA *v.* MUDARAGADDI SANYASI.
46 M. L. J. 361 : 19 L. W. 455 : 34 M. L. T. 110 : (1924) M. W. N. 329 : 80 I. C. 38 : A. I. R. 1924 Mad. 610.

——**S. 64 and O. 21 R. 57**—*Execution petition – Dismissal when attachment ceases.*

The default of the decree-holder contemplated by O. 21, R. 57, C. P. Code as a ground for dismissal of an execution application must be default in the discharge of some obligation laid on him by the Code or the rules framed under it. The omission of the decree-holder to attend the sale and his failure to bid at the sale does not constitute such default as covered by O. 21, R. 57, C. P. Code, and where an application for execution is dismissed on that ground, it does not terminate the attachment. Under a mistaken impression that an attachment of property had ceased by reason of dismissal of a prior execution application the decree-holder put in a fresh execution application and the Court ordered him to pay batta and file a schedule of the immoveable properties required to be attached. Owing to his default in furnishing the said schedule the execution application was dismissed. *Held*, that the dismissal of the execution was not one under O. 21, R. 57, C. P. Code, and that the attachment already subsisting on the property did not cease (*Oldfield and Devadoss, JJ.*) VENKATESWARAYYAN *v.* ASWATHA NARAYANAN. **45 M. L. J. 315: (1923) M. W. N. 529 : 75 I. C. 491 : A. I. R. 1923 Mad. 703.**

——**S. 64**—*Applicability—Prohibitory order restraining payee of pro-note—Not an attachment.*

A prohibitory order restraining the payee of a promissory note from receiving the money under it, has not the effect of an attachment. Such an attachment is invalid and S. 64, C. P. Code, does not apply (*Phillips and Devadoss, JJ.*) SUBRAMANIA AIYAR *v.* CHOKKALINGA MUDALIAR. **44 M. L. J. 206: 46 Mad 415 : 17 L. W. 314 : 72 I. C. 189 : (1923) M. W. N. 91 : A. I. R. 1923 Mad. 317 (2).**

——**S. 64**—*Attachment—Private sale—Agreement by decree-holder to exonerate property sold—Assignee of decree with knowledge of agreement is bound by it.*

A decree-holder after attaching certain items of property entered into an agreement for consideration with a private purchaser of a particular item that he would not bring to sale that item of property. Subsequently an assignee of the decree with knowledge of the aforesaid agreement sought to bring the property alienated to sale in execution. *Held*, that the prohibition against alienation after an attachment was one for the benefit of the decree-holder which he could waive and that an assignee from him with knowledge of such waiver stood in the same position as his assignor and could not execute the case against the property alienated. (*Krishnan and Venkatasubba Rao, JJ.*) NANDIGAM GANGAYYA *v.* MADUPALLI VENCATARAMAYYA. **44 M. L. J. 80 : 16 L. W. 988 : 31 M. L. T. (H. C.) 423 : (1923) M. W. N. 51 : 72 I. C. 839 : A. I. R. 1923 Mad. 230.**

——**S. 64 and O 21, R. 63**—*Decree creating a mortgage during a subsisting attachment—Not void against attaching decree-holder.*

Where pending an attachment of A's properties by C, certain disputes between A and B were referred to arbitration and a decree was passed in terms of the award whereby a mortgage charge in favour of B for 2 lacs of rupees was created *Held*, that the decree which embodied the award was not a private transfer within S. 64 of the Code. (*Oldfield and Ramesam, JJ.*) NARAYANA IYER *v.* BIYARI BIVI. **41 M. L. J. 557 : 14 L. W. 524 : (1921) M. W. N 808 : 68 I. C. 673 : 45 Mad 103 : A. I. R. 1922 Mad. 221.**

C. P. CODE (V OF 1908), S. 64.

——**S. 64 and O. 21, R. 63**—*Attachment of debt—Claim—Order allowing claim—Suit by defeated decree-holder and decree in his favour—Effect of decree—Revivor of attachment.*

The release from attachment on a claim being allowed is only provisional and is subject to the result of a suit which is brought under O. 21, R. 63 of the Civ. Pro. Code, if the suit succeeds the attachment is revived from the beginning against all parties to the suit whether or not they were parties to the claim proceedings. (*Krishnan and Odgers, JJ.*) ANTHAYA HEGADE *v.* MANJAIYA SHETTY. **41 M. L. J. 393 : 45 Mad 84 : 14 L. W. 371 : 69 I. C. 642 : (1921) M. W. N. 642 : A. I. R. 1922 Mad. 176.**

——**S. 64**—*Attachment before judgment—Alienation pending void—Non-compliance with O. 38, R. 5, C. P. Code - Effect of.*

An alienation of property validly attached before judgment is void under S. 64, C. P. Code. But where the attachment before judgment is *ultra vires* and has been passed without complying with the formalities prescribed by O. 38, R. 5, C. P. Code, the alienation is not void. (*Kotwal, A. J. C.*) BANSILAL *v.* SITARAM. **68 I. C. 188 : A. I. R. 1922 Nag. 238.**

——**S. 64 and O. 21, R. 58**—*Attachment—Revival of—Claim suit—Decree—Appeal.*

On a decree being made in favour of the plff. in a claim suit, the attachment was raised. But on appeal the decree was reversed and the claim dismissed. The decree-holder then applied for execution. After the raising of the attachment and before the decree on appeal the judgment debtor alienated the property. *Held*, that on the subsequent application for execution the prior attachment was revived and the transfer was void as against the decree-holder. 14 M. I. A. 543 : 20 A. 421 ; 35 B. 516 : 15 C. 771 : 25 A. 431 : 16 B. 91 : 28 M. 50 : 37 C. 796 Ref. (*Drake Brockman, J. C.*) BHURIA *v.* BALIRAM. **65 I. C 220 : A. I. R. 1922 Nag. 138.**

——**S. 64**—*Attachment if continues after dismissal of application for execution.*

It cannot be urged that decree-holder's first attachment enures beyond the dismissal of his first application for execution. If the transfer is, therefore, not made during the continuance of the attachment under which decree-holder's claim was enforced by the sale, section 64 has no application to the case. (*Hallifax, A. J. C.*) AMOLAK RAO *v.* MAHIPATRAO. **A. I. R. 1922 Nag. 81.**

——**Ss. 64 and 73**—*Claim enforceable under attachment—Rateable distribution.*

S. 64 Expln. gives priority to claims under S. 73, C. P Code, only in connection with the attachment under which they are enforceable. If an attachment is withdrawn or ceases to exist there is no right to rateable distribution. S. 64, C. P. C., refers only to claims enforceable under the attachment effected prior to the alienation and not claims enforceable under the decree in execution of which the attachment was made. (*Daniels, J. C. and Dalal, A. J. C.*) SHEIKH MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH. **66 I C. 642 : 8 O. L. J. 358.**

——**S. 64 and O. 21, Rr. 57 and 63**—*Transfer pending attachment—Cessation of attachment on dismissal of execution petition—Transfer not invalid.*

S. 64, C. P. Code, avoids an alienation made which was made while an attachment remained subsisting and enforceable and not one which might have been enforced under an attachment which has since come to an end ; consequently where an attachment ceases to

exist consequent on the dismissal of an execution application for default, a mortgage which was made pending such attachment cannot be impeached by the attaching creditor when he attaches the property on a fresh execution application. (*Miller, C.J. and Foster, J.*) BAGWAN LAL *v.* RAJENDRA PRASAD SAHI.
4 Pat. L. T. 409 : A. I. R. 1923 Pat. 564.

——— S 64—*Possession delivered and money paid before attachment—Registered deed prepared during attachment—Sale not invalid.*

What is aimed at in S. 64 is the transfer of a beneficial interest, delivery of property or any payment. Where the purchaser of a property had paid the purchase money and taken delivery of possession before attachment issued against vendor, but the formal sale deed was executed and registered during attachment :

Held, that the attachment did not effect purchaser's right. (*Rutledge and Heald, JJ.*) MAUNG SAN PWE *v.* HAMADANEE. **4 Bur. L. J. 166 : A. I. R. 1925 Rang. 382.**

——— Ss. 65 and 63—*Property sold in execution of two decrees—Sale by superior court not confirmed—Sale by inferior Court—Effect.*

Certain property was attached in execution of a decree and was sold on 28th Feb. 1917. The same property was attached and sold by another Court in execution of another decree on 3rd March 1917 and was purchased by the plff. The first sale was never confirmed. The judgment-debtor applied to set it aside under O. 21, R. 89, and ultimately it was decided by compromise that if the judgment-debtor deposited a certain amount by a certain time the sale should be set aside. The deposit was accordingly made by the judgment-debtor, on 11th Sep. 1920, and the sale was set aside and the proceedings in the first executing Court thus terminated. The sale of the second Court was duly confirmed. The judgment-debtor had obtained from defendants the necessary money to set aside the sale by the first Court. In consideration thereof he sold the property to them on 21st Sep. 1920 with certain other properties, and put the purchaser in possession thereof. The plaintiff then brought a suit to recover possession.

Held, that when the first executing Court sold the property the purchaser merely obtained a right to get the sale confirmed, and it would not be until he obtained the sale certificate, that the vesting of the property would date back to the date of the sale. When the second executing Court sold the same property, the purchaser also obtained an inchoate right which would fail to materialize if the previous sale was confirmed. When the previous sale was set aside then the right of the purchaser from the second executing Court which had been in the meanwhile in suspense, revived, and if the sale was confirmed, then his title would date back to the date of the sale. There was nothing to prevent the judgment-debtor objecting to the second sale before the certificate was issued. Therefore the plaintiff was entitled to succeed. (*Macleod, C. J. and Coyajee, J.*) VISHNU SHANKER *v.* YUSUF NUR MAHOMED. **27 Bom. L. R. 963 : 88 I. C. 962 : A. I. R. 1925 Bom. 483.**

——— S. 65—*Rights of purchaser at revenue and voluntary sale are different.*

The rights of a purchaser at a revenue sale are entirely and radically different from those of a purchaser at a voluntary sale. (*Walmsley and M. N. Mukerji, JJ.*) JATINDRA NATH *v.* NARAYAN DAS.
52 Cal. 862 : 90 I. C. 901 : A. I. R. 1926 Cal. 97.

——— S. 65—*Structures erected by defaulting proprietor do not pass to purchaser.*

The ownership of the structures or buildings which are admittedly erected by the defaulting proprietor does not pass to the purchaser. *Prima facie* and in the absence of anything else, it is the land or the share in the land which passes at the sale and not the structures or buildings on the land. (*Walmsley and M. N. Mukherji, JJ.*) JATINDRA NATH *v.* NARAYAN DAS. **52 Cal 862 : 90 I. C. 901 : A. I. R. 1926 Cal. 97.**

——— S. 65—*Validity of—Fraud of purchaser—Annulment of encumbrances.*

It is an abuse of statutory provisions for sale of tenures in execution of decrees for rent to bring about designedly a sale under such circumstances so that the right of under-tenure-holders might be destroyed, an unencumbered title conveyed to the purchaser, and the maximum of benefit conferred upon the defaulter. In such a case, the transaction is a private sale. Though the purchaser joined in the fraud after the default had been made, he cannot by reason of his entering into the agreement before the sale which was the machinery by which the fraud was to be carried out and with knowledge thereof, be permitted to enjoy to the detriment of others, the benefits which result to a purchaser at a sale for arrears of rent or revenue. 10 M.I.A. 540 ; 12 C.L.J. 336 ; 18 W. R. 240 Ref. (*Chatterjee and Panton, JJ.*) TEJENDRA CHANDRA DHAR *v.* DURGADAS DUTT. **67 I. C. 398 : A. I. R. 1923 Cal. 324.**

——— S. 65—*What passes under—Person in adverse possession must surrender possession to purchaser.*

On the failure of an owner to pay the Government assessment his estate or interest in the land is forfeited or rather determined and under a sale for arrears of revenue. What is sold is not the interest of the defaulting owner but the interest of the Crown subject to the payment of the Government assessment. A person in adverse possession who occupies the land without payment of rent to the defaulting proprietor is bound to surrender possession of that land to the revenue sale purchaser when the sale confirmed, and if the land is not so surrendered he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possesssion. (*Mookerjee and Chotzner, JJ.*) JOBEDA KHATUN *v.* TULSI CHARAN DAS. **36 C. L. J. 472 : 77 I. C. 564 : A. I R 1923 Cal 82.**

——— S. 65—*Purchaser—Rights of—Person in adverse possession.*

A purchaser at a sale for arrears of revenue does not derive his title from the defaulting proprietor but takes the estate from the person as it stood at the time of its inception as a permanently settled estate. A person in adverse possession who occupies the disputed land without paying rent to the defaulting proprietor is bound to surrender possession of the lands to the purchaser at the revenue sale if the sale is confirmed. Otherwise he would be liable for mesne profits. (*Mookerjee and Panton, JJ.*) RAJA SASHIKANTA *v.* RAJA SARAT CHANDRA. **70 I. C. 6 : 34 C. L. J. 415.**

——— S. 65—*Property sold vests in the purchaser from the date of sale—Auction-purchaser is entitled to profits and responsible for loss from the date of the sale to him.*

Section 65 lays down that when a sale has been confirmed, the immoveable property sold shall be deemed to have vested in the purchaser from the date of the sale and not from the date of the sale becoming absolute. Under the old Code the position was precisely the reverse. 1923 Mad. 635 Foll. The auction-purchaser is obviously entitled to claim profits and accretions to the property from the date of the sale to him. So the converse also holds true and he must be

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held responsible for any deterioration or loss which the property suffers in the meantime. 40 Cal. 89 Foll. (*Findlay, O. J. C.*) NIRZAMUDDIN *v.* JUMMA.
88 I. C. 693 : A. I. R. 1926 Nag. 17.

——**S. 65**—*Rights of purchaser—Property purchased subject to encumbrance—Effect of.*

Where a purchaser at an execution sale buys the property which is encumbered, he must be deemed to accept the burden of the encumbrance and cannot thereafter escape from it merely because his purchase has not been profitable. 31 M. 439 ; 40 B. 646, Ref. to. (*Hallifax. A. J. C.*) PANDURANG *v* NARAYAN.
76 I. C. 615 : 6 N. L. J. 78 : A. I. R. 1924 Nag. 111.

——**S. 65**—*Revenue sale what passes under.*

What passes to a purchaser at a revenue sale is only the right, title and interest of the defaulting proprietors. (*Jwala Prasad and Ross, JJ.*) RAM NANDAN SAHAY *v.* JAIGOBIND PANDEY. **2 Pat. 839 : 75 I. C. 955 : A. I. R. 1924 Pat. 213.**

——**S. 65**—*What passes under.*

Both in a sale in execution of money decree, and in a sale in execution of rent-decrees the right, title and interest only of the *jagirdar* in the tenure passes and consequently one who purchases first prevails against subsequent purchasers. (*Jwala Prasad and Ross, JJ.*) BINANAND SAWATI *v.* THUROO MAHTO.
1923 P. H. C. C. 249 : 4 Pat. L. T. 659 : A. I. R. 1923 Pat. 592.

——**S. 65**—*Auction-Purchaser—Mortgage.*

There is no difference between a person who purchases by private treaty and a person acquires by a sale under a mortgage decree, property from the mortgagor. The mortgagee auction-purchaser stands in no better position against a stranger than the mortgagor himself. (*Dawson-Miller, C. J. and Jwala Prasad, J.*) BASANTA KUMARI *v.* BALMAKUND.
2 P. 277 : 1923 P. H. C. C. 1 : 72 I. C. 912 : 1 P. L. R. 338 : A. I. R. 1923 Pat. 371.

——**S. 66**—*Sale Proclamation—Statement as to revenue assessed—Omission of—Effect.*

Under section 66 it is plain that the proclamation should contain the statement as to the revenue assessed upon the estate, that it is a material matter and that its omission is the omission of a matter which would enable the judgment-debtor to base an application for setting aside the sale if he could comply with the other condition that the Code provides. (*Lord Buckmaster.*) BALIRAM SINGH *v.* NARSINGDAS.
45 M. L. J. 403: 18 L. W. 137 : 33 M. L. T. 275 : L. R. 4 P. C. 197 : 28 C. W. N. 593 : (1923) M. W. N. 714 : A. I. R. 1923 P. C. 93 (P. C.).

——**S. 66**—*Applicability—Sale by Receiver—Confirmation and sale certificate.*

S. 66, C. P. Code, does not apply to a sale by a Receiver with the approval of the Court which appointed him. In such a case there is no sale certificate issued by court nor a confirmation order of the sale passed. (*Kanhaiya Lal and Lindsay, JJ.*) NARAIN DAS *v.* RAM CHANDRA. **90 I. C. 116 : L. R. 6 A. 610.**

——**S. 66**—*The section is not a bar when the certified purchaser does not contest plaintiff's claim.*

S. 66 of the Code of Civil Procedure only applies when the plaintiff attempts to assert his secret title as against a certified purchaser. But where the certified purchaser does not contest the plaintiff's claim the suit is not barred. 1923 Cal. 302, Foll. (*Neave, J.*) JAMBU DASS *v.* JAI PRAKASH **L R. 5 A. (Civ.) 671 : 82 I. C. 344 : A. I. R 1925 All. 47.**

——**S. 66**—*Applicability of.*

Where out of two joint mortgages, one alone sued making the other *pro forma* defendant, and obtained a decree in execution of which he purchased the property in his own name, and the question arose whether the other joint mortgagee can claim a share of the property purchased. *Held*, that S. 66 of the C. P. Code does not apply and he is not entitled to claim a share. 29 All. 557 and 37 All. 545 (P. C.) Dist. (*Gokul Prasad, J.*) MAKHAN LAL *v.* BADRI PRASAD.
A. I. R. 1923 All. 405.

——**S. 66**—*Sale held by Receiver is not a sale held in execution—S. 66 does not apply to such sales—C. P. Code, O. 21, R. 94.*

A sale by a Receiver is not a sale by the Court but a sale under the Court and in such cases the Court does not grant a sale certificate nor does it confirm the sale. S. 66, C. P. Code, does not apply to such sales. 16 C. W. N. 394 Foll. (*Kanhaiya Lal and Lindsay, JJ.*) NARAIN DAS *v.* RAM CHANDER.
24 A. L. J. 26 : L. R. 6 A. (Civ.) 610 : A. I. R. 1926 All. 124.

——**S. 66**—*Suit for declaration of benami nature of purchase does not lie.*

A suit by a son, who with his father constituted a joint Hindu family for a declaration that a Court auction-purchase in the name of his mother, made out of family funds, is *benami*, is not maintainable in view of S. 66 of the Code. (*Tudball and Sulaiman, JJ.*) BAIJNATH DAS *v.* BISHEN DEVI. **19 A. L. J. 787 : 3 U. P. L. R. (All.) 147 : 63 I. C. 676 : 43 A. 711.**

——**S. 66**—*Benami—Auction-purchase—Suit by real purchaser against transferee—Transfer made before but suit brought after the new Code—Effect.*

Where an auction purchase was made by a *benami* in the name of B who subsequently transferred it to C and after the new Act came into force A sued C for possession on the ground that both the auction-purchase and the transfer to C were *benami* for himself, *held*, that S. 66 of the new Code applied and that the suit was barred. (*Mears, C. J. and Knox, J.*) ABDUL JALIL KHAN *v.* UBEDULLAH. **43 All. 416 : 62 I. C. 725 : 19 A. L. J. 227.**

——**S. 66**—*Scope of—Retrospective effect.*

S. 66 operates retrospectively and a suit cannot be maintained against the transferee of a certified *benami* purchaser though the transfer took place when the old Code of 1882 was in force. (*Mears, C. J. and Knox, J.*) ABDUL JALIL KHAN *v.* UBEDULLAH KHAN.
43 A. 416 : 62 I. C. 725 : 19 A. L. J. 227.

——**S. 66**—Suit for confirmation of possession after declaration that purchase at court auction was *benami* for plff. (*Cuming and Chakravarti, JJ.*) UMASASI DEBI *v.* AKRUR CHANDRA MAZUMDAR UMASASI. **30 C. W. N. 160.**

——**S. 66**—*Benamidar—Benamidar not claiming the property—Effect of.*

S. 66, C.P. Code, has no application in a case where the benamidar himself does not claim under the sale certificate. (*Walmsley and Suhrawardy, JJ.*) SARADINDU CHAKRAVARTHY *v.* GOSTA BEHARI.
37 C. L. J. 403 : 27 C. W. N. 208 : 75 I. C. 196 : A. I. R. 1923 Cal. 302.

——**S. 66**—*Not retrospective—Execution sale under the old Code.*

S. 66, C.P. Code, has no retrospective operation and does avail an execution-purchaser whose title was perfected under the Code of 1882. 47 C. 1108 Rel. (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY *v.* MADAN MOHAN SAHA. **36 C. L. J. 396 : 70 I. C. 555 : 27 C. W. N. 305 : A. I. R. 1923 Cal. 228.**

——**S. 66**—*Benami—Certified purchaser—Possession with real purchase.*

S. 66 of the C. P. Code should not be restricted to

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benami purchases made by or on behalf of judgment-debtors. 12 B.L.R 317 ; 22 C.L.J. 408 ref. The failure of the alleged benamidar of the certified purchaser to assert his rights against the real purchaser during the latter's possession after the auction purchase cannot be regarded as a waiver or transfer of the right. 11 Mad. 234 not foll. 23 All. 175 Foll. (*Teunon and Newbould, JJ.*) HARISH CHANDRA GUHA *v* NRIPENDRA KUMAR CHUCKRAVARTI. **59 I. C. 719 : 24 C. W. N. 1024.**

——— **S. 66**—*Manager of joint Hindu family—Benami-purchase by—Suit by other members for a share—C. P. Code of* 1882, *S.* 317.

In execution of a decree obtained by A, the manager of a joint Hindu family, with the aid of joint family funds purchased the property of the judgment debtor himself benami in the name of B a stranger without obtaining leave of the Court to bid. In a suit for partition by A's son against the other members of the family and B. *Held* that S. 66, C. P. C. was no bar to the plaintiff's claim to a partition of the property purchased in the name of B. on the ground that B was only a benamidar for A and that the property was joint family property. The purchase was not one made on behalf of the plaintiff within the meaning of S. 66 (1) C. P. Code. 6 M. 135 ; 9 M. L. J. 298 : 20 M. 349; 40 A. 159 Ref. (*Schwabe, C. J. and Coutts Trotter, J.*) NATARAJA MUDALIAR *v.* RAMASWAMI MUDALIAR. **43 M. L. J. 363 : (1922) M. W. N. 584 : 16 L W. 358 : 73 I. C. 479 : 45 M. 856 : A. I. R. 1922 Mad. 481.**

———**S. 66**—*Third person purchasing property disregarding decree holder's instructions to obtain leave and bid for him Decree-holder can't sue for possession.*

S. 66 of the Civ Pro. Code will stand in the way of a decree-holder suing for possession of property from a person who purchases the property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining the Court's permission, because the purchase in such case will be *benami* for the decree-holder. (Case-law discussed.) (*Baker, J. C.*) MAHARAJ BAHADUR *v* NAWAL KISHORE **82 I. C. 41 : A I. R. 1925 Nag. 41.**

———**S. 66**—*Applicability of—Agreement with auction-purchaser—Specific performance of contract—No bar.*

A suit claiming specific performance of an agreement to sell made by a purchaser cannot be described as a suit brought on the ground that the purchase was made on behalf of the plaintiff, i. e., *benami*. The purchase is made on behalf of the purchaser with whom the title remains until the plaintiff obtains specific performance of the contract. The object of the section appears to be to prevent the executing Court being led to believe that a person who is not the purchaser is the purchaser. If the plaintiff proves the original contract and fails to prove the subsequent contract, he is entitled to fall back on the original contract. 43 Mad. 643 (P. C.) at 649 and 42 Mad. 615 Ref. (*Batten, J. C.*) ABDULLA KHAN *v.* JALAM SINGH. **A. I. R. 1923 Nag. 11 (2.)**

———**S. 66**—*Does not exclude evidence as to auction purchaser being* benami *for another where such evidence is relevant.*

S. 66 of the C.P. Code, makes a suit founded on the ground mentioned therein not maintainable. It does not go further ; it has not the effect of excluding evidence as to the auction-purchaser being a *benami* for another wherever such evidence is relevant. Where the suit is founded on title by prescription in determining that title, the fact of the purchaser being *benami* for another may be taken into consideration. (*Wazir Hasan, J. C. and Neave, A. J. C.*) MT. MUHAMMAD UNNISSA *v.* SYED ZAHED RAZA. **11 O. L. J. 466 : 84 I. C. 98 : A. I. R. 1925 Oudh 20.**

C. P. CODE (V OF 1908), S. 68.

———**S. 66**—*Applicability of—Title of person beneficially interested in the purchase—Not affected.*

S. 66 of the C. P. Code was designed merely to create a check on the practice of making *benami* purchases at execution sale, for benefit of the judgment-debtors but in no way affected the title of persons otherwise beneficially interested in the purchase. (*Wazir Hasan and Neave, A J. Cs.*) THAKUR JAI INDAR BAHADUR SINGH *v.* THAKUR INDAR BAHADUR SINGH. **10 O. L. J. 481 : 78 I. C. 393 : A. I. R. 1924 Oudh 218.**

——**S. 66**—*Benami—Jurisdiction of Civil Court.*

S. 66 does not avoid *benami* purchases or render them illegal, but when such purchases are made at Court sales, it bars the legal remedies by which they can otherwise be enforced The section does not bar a Civil Court from dealing with a cause of action based on a contract between the parties on the equities arising out of the contract. The Court is not barred from decreeing specific performance in the case where before an auction purchase a contract is made between the plaintiff and defendant that the property should be purchased by the defendant in his own name and subsequent to the purchase the defendant should convey a certain share to the plaintiff. (*Das, J*) BIKRAM AHIR *v.* RAJPATILAL. **62 I. C. 720 : 1921 P. H. C C. 21.**

———**S. 67**—*Act* I *of* 1914—*Sanction of Commissioner to sale by Receiver of insolvent's agricultural lands.*

Where the Local Government has not issued notification under S. 3 of Act I of 1914, that special rules under S.327 of the old C. P. Code were in force, the insolvent's land can be sold by the Receiver without the sanction of Commissioner. (*Scott-Smith, J.*) FAKIR MUHAMMED *v.* AMIR CHAND. **66 I. C. 893 : 3 Lah. L. J. 5.**

———**S. 68**—*Transfer of decree to Collector for execution—Sale—Purchase by decree-holder—Discovery of encumbrances by purchaser—Re-sale—Powers of Collector—Jurisdiction of Civil Court.*

A decree holder who had obtained a mortgage decree made an enquiry in the Sub-Registrar's Office and declared that the property to be sold in execution was ancestral and free from encumbrances. The decree was thereafter transferred to the Collector for execution with a note that there were no encumbrances over the property. The property was sold by the Collector and purchased by the decree-holder himself. He gave a certificate of satisfaction of his own decree and had under the rules to pay the balance. He then discovered that there was heavy encumbrance over the property, the date of which being more than twelve years prior to the date of the sale was not shown in the Sub-Registrar's certificate for twelve years. The decree-holder did not put in the balance of the purchase money and asked the Collector to re-sell the property declaring the encumbrance which he discovered. The Assistant Collector who was in charge of sale, refused to hear him, being of opinion that he could not go behind the orders of the Civil Court. *Held* that the order of the Court below was erroneous because the decree having been sent to the Collector for execution proceedings, in spite of the sale having taken place, it was for the Collector to decide whether he would resell the property or not in order to realise the balance of the purchase money. (*Mukerji and Daniels, JJ.*) SHAHZAD SINGH *v* HANUMAN RAI. **46 A. 562 : 22 A. L. J. 452 : L. R. 5 A. 350 : A. I. R. 1924 A. 704.**

C. P. CODE (V OF 1908), S. 68.

——— **S. 68 and Sch. III**—*Execution sale—Ancestral property sold as non-ancestral property, whether can be set aside.*

Where with the knowledge of the judgment-debtor, ancestral property was sold by the Court in execution of a decree in the manner prescribed for the sale of non-ancestral property a subsequent suit by the judgment-debtor to set aside the execution sale on account of that irregularity is not maintainable. 28 A. 273, 42 A. 58 foll. (*Piggott and Walsh, JJ.*) BHATELAY CHUNNI LAL *v.* CHAKKERPAN. **44 A. 380 : 20 A. L. J. 281 : 67 I. C. 934 : L. R. 3 A. 167 : A. I. R. 1922 All. 56.**

——— **S. 68**—*Rules framed under R. 17 of the Bombay High Court—Transfer of decrees for execution.*

R. 17 of the Bombay High Court, which regulates the procedure to be followed when decrees are transferred for execution, provides that if an application to set aside a sale is made to the Collector, within the prescribed time, he shall refer the applicant to a Civil Court: In every proclamation for sale, it should be notified that a person wishing to set aside a sale under O. 21, C. P. Code, must apply to the Court and not to the Collector within 30 days of the date of sale, and if an applicant still applies to the Collector, he should be referred to the Civil Court without a moment's delay. (*Macleod, C. J. and Shah, J.*) SHANTMURTI DEVAPPA *v.* NARAYANA RAMACHANDRA. **45 Bom. 1132 : 62 I. C. 221 : 23 Bom. L. R. 476.**

——— **Ss. 68 and 69**—*Agriculturist—Power of civil court to order temporary alienation.*

A Civil Court can order the temporary alienation of the land of an agricultural tribe in satisfaction of a money decree. (*Scott-Smith and Dundas, JJ.*) SAIN DITTA *v.* NUR AHMAD. **74 I C. 194 : 4 Lah. L.J. 476.**

——— **S. 73**—*Rival decree-holders—Right of one decree-holder to impeach his rival's decree as being fraudulent.*

An executing Court, when rateably distributing the proceeds of a sale in execution, cannot go into the question whether the decree under which distribution is claimed has been obtained by fraud. 13 Bom. 154, overruled. (*Macleod, C. J., Shah and Fawcett, JJ.*) DATTATRAYA GOVINDSETH LUBRI *v.* PURSHOTTAM NARAYANSETH DALI. **46 Bom. 635 : 24 Bom. L. R. 1 : A. I. R. 1922 Bom. 31 (F.B.).**

——— **S 73**—*Attachment not sufficient—Execution application necessary.*

A mere application for attachment of property is not sufficient to entitle the applicant to share in the rateable distribution of the assets. He must make an application in execution to the court before assets are received. (*Greaves and Cuming, JJ.*) KASIWAR DE *v.* ASWINI KUMAR PAL. **90 I. C. 527 : A. I. R. 1926 Cal. 249.**

——— **S. 73**—*Properties sold in separate lots—Realisation of assets is separate in case of each lot.*

Where the properties were sold separate and their sale proceeds were realised separately. *Held*: that the sale of each lot was at any rate completed when the whole of the balance of the purchase money for that lot was deposited in Court, and that a person who had applied for rateable distribution after the properties began to be sold was not entitled to rateable distribution of the sale proceeds of the whole of the properties but only of the sale proceeds of the properties that were sold subsequent to his application. (*Greaves and Chakravarti, JJ.*) GIRINDRA NATH *v.* KEDAR NATH. **29 C. W. N. 575 : 87 I. C. 783 : A. I. R. 1925 Cal. 966.**

C. P. CODE (V OF 1908), S. 73.

——— **S. 73**—*Mere deposit of earnest money is not assets realised by sale.*

The mere deposit of the earnest money cannot be said to be the assets realised by the sale of any property until the balance of the purchase money is deposited and the sale becomes a concluded transaction. 14 C. W. N. 396 and 15 C. W. N. 872 Foll. (*Greaves and Chakravarti, JJ.*) GIRINDRA NATH *v.* KEDAR NATH. **29 C. W. N. 575 : 87 I. C. 783 : A. I. R. 1925 Cal. 966.**

——— **S. 73**—*Scope.*

Order for rateable distribution of assets cannot be made in anticipation of assets being realised. (*Chatterjea and Panton, JJ.*) ADWIT CHANDRA SAHA *v.* CHITTAGONG CO., LTD. **28 C. W. N. 988 : 84 I. C. 747 : A. I. R. 1925 Cal. 102.**

——— **S. 73**—*Right to—Rateable distribution—Partner's property—Attachment of partner's share in execution of a personal decree—Consent of other partners—Effect of Contract Act, S. 262.*

There were two decrees against a person one in his personal capacity and the other against him and his partner in respect of partnership debts. In execution of the personal decree, his half share in the partnership moveables was attached with the consent of the other partner. Subsequently the whole of the moveables including the half share already attached were attached for the decree against partnership. Both the attaching decree-holders consented to rateably divide among themselves the proceeds of sale of the moveables but the other partner objected, *Held*, that the other partner having consented to the attachment of a half share of the moveables, they ceased to be partnership property and were liable to be distributed for the debts of the other partners.

Per Mukerji, J.—An application for rateable distribution would be maintainable even though the two Judgment-debtors of the two decrees were not precisely the same. (*Walmsley and Mukerji, JJ.*) DWARIKA DAS MARWARI *v.* JADAB CHANDRA GANGULY. **51 Cal. 761 : 28 C. W. N. 704 : 78 I. C. 731 : 39 C. L. J. 439 : A. I. R. 1924 Cal. 801.**

——— **S. 73**—*Avoidance of multiplicity of execution proceedings and placing all decree-holders on the same footing are the two objects of the section—Word 'passed' has made no change in law prior to 1908.*

The insertion of the word "passed" does not make any change in the law prior to C. P. C. 1908. 'The object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceeding, to obviate in a case where there are many decree-holders each competent to execute his decree by attachment and sale of a particular property the necessity of each and every one separately attaching and separately getting the property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property. Principle enunciated in the Full Bench decision in the case of *Ganesh Das Bagria* v. *Shiva Lakshman Bhakat*. 30 C. 583 is not affected by the alteration of the law. (*Walmsley and M. N. Mukerji, JJ.*) DWARKA DAS MARWARI *v.* JADAB CHANDRA. **51 Cal. 761 : 39 C. L. J. 439 · 28 C. W. N. 704 . 78 I. C. 731 : A. I. R. 1924 Cal. 801.**

——— **Ss. 73 and 115**—*Assets—Money deposited by sureties for release of an attachment before Judgment—Rateable distribution of such money—Interference in revision.*

C. P. CODE (V OF 1908), S. 73.

In a money-suit certain property belonging to the defendant was attached before judgment and then released on two persons standing sureties for the amount of the claim. The suit was ultimately decreed and the decree holder applied for execution, whereupon the sureties deposited the decretal amount in Court. On that very day just before the deposit was made, the petitioner who also held a money-decree against the same judgment-debtor, applied for execution of his decree and prayed for rateable distribution of the amount deposited. The application was refused by the trial Court and the money paid out to the attaching creditor on the latter giving an undertaking to refund the amount in case the High Court reversed the order rejecting the petitioner's application of rateable distribution. *Held*, that the amount deposited was subject to rateable distribution under S. 73, C. P. Code. The natural interpretation of the wide language of the section would include any assets in the possession of the Court and at the disposal of the Court for the purpose of satisfying a decree against a judgment-debtor. There is no reason why it should be restricted to what is paid in by virtue of a process taken in execution. Besides, the assets in the present case though not strictly speaking realized in process of execution were realized by a process in the nature of an anticipatory execution. 40 Cal. 619 : 36 Bom. 156 referred to. 41 Mad. 616 discussed. In cases like these where no appeal is allowed, it has been the practice of the High Court to interfere under the powers conferred by S. 115 of C. P. Code. (*Richardson, J.*) GHISULAL *v.* TODARMULL. **26 C. W. N. 169 : 70 I. C. 539 : A. I. R. 1922 Cal. 19.**

——S. 73—*Assets—Meaning of—Change in Code.*

The omission of the words "realized by sale or otherwise in execution" and the substitution of "assets held by the court" must have been deliberate and the intention of the legislature was that the term 'assets' should now include any assets held by the court irrespective of the manner in which they came into possession of the court. The scope of the section has been purposely broadened. (*Cuming, J.*) HARI CHARAN ROY CHAUDHURI *v.* BIRENDRA NATH SAHA. **70 I. C. 541 : 35 C. L. J. 327.**

——S. 73—*Right to rateable distribution—Application in two Courts for execution—Assets realised by Superior Court.*

A held two decrees against D obtained on different dates and under both, attached his goods before judgment. B also held a decree against him and attached his goods between the dates of the two attachments by A. All the three decrees were passed by the Small Cause Court, Calcutta. A applied to the Munsiff at N and B applied to the Sub-Judge at D for execution by whom the goods were sold. A applied for rateable distribution to the Sub-Judge at D but the application was disallowed. *Held*, that as regards the decree, the attachment due to which was prior to that of B- he was entitled to rateable distribution and as regards the other, he had no right. (*N. R. Chatterji and Newbould, JJ.*) KRISHNA KUMAR GHOSE *v.* MAKHANLAL BANNERJI. **63 I.C. 11 : 25 C. W. N. 740.**

——S. 73—*Right to rateable distribution—Duty of creditor.*

A creditor, to get a right to rateable distribution, must have applied to the Court which holds the assets, before the receipt of such assets, for the execution of an unsatisfied decree for the payment of money passed against the same judgment-debtor. (*Mookerjee A. C. J. and Fletcher, J.*) BARENDRA NATH MITTER *v.* MARTIN & CO. **62 I. C. 167 : 33 C. L. J. 7.**

C. P. CODE (V OF 1908), S. 73.

——S. 73—*Priority—Points to be determined.*

To determine the question of priority the material point of time is not the date of sale of the mortgaged property but the date of receipt of assets by the Court. Where a subsequent encumbrancer claims the benefit of S. 73 (1) (*c*), the Court must satisfy itself that he is lawfully entitled to priority over the holders of decrees for the payment of money mentioned in the fourth category. (*Mookerjee, A. C. J and Fletcher, J.*) BARENDRA NATH MITTER *v.* MARTIN & CO. **62 I. C. 167 : 33 C. L. J. 7.**

——S. 73—*Assets—Money paid to Sheriff in execution of a decree—Costs of previous execution—Right to.*

Where a decree-holder applied for execution and money was paid by the judgment-debtor to the Sheriff who paid it into Court and two other creditors who had previously applied for execution asked for rateable distribution. *Held*, that the money so lying in Court was assets available for rateable distribution. The right to rateable distribution is limited to the amount due under the decree and does not apply to costs of a previous application for execution. 36 Bom. 156 Diss. 40 Cal. 619, ref. (*Rankin. J.*) NOOR MAHOMED DAWOOD *v.* BILASIRAM TAKURSIDASS. **59 I. C. 458 : A. I. R. 47 Cal. 515.**

——S. 73—*Assets held by Court—Right to rateable distribution.*

Although the respondents had actually had the money attached before judgment this fact would not entitle them to an order for the rateable distribution when they had not obtained their decree before the money was realised. 21 C. L. J. 614 Ref. Where money was wrongly paid over to the petitioners, *Held*, even if the petitioners had not been entitled to receive the money the respondents could not compel them to refund it without bringing a suit in accordance with the provisions of S. 73. (*Martineau, J.*) KAHNA MAL BENARSI DAS *v.* KAHNA MAL NATHU MAL. **40 P.L.R. 1922 : 69 I. C. 718 : A. I. R. 1924 Lah. 70.**

——S. 73—*Revision.*

The High Court will not interfere in revision with orders disallowing or allowing claim for rateable distribution except in very exceptional circumstances. (*Chevis, J.*) BHAGAT RAM KALYAN DAS *v.* MANGAT RAM SHIBBU RAM. **60 I. C. 371 (Lah.).**

——S. 73—*Rateable distribution—Right to—Conditions—Execution application praying for a relief which the Court could not grant—If a ground for rejecting that decree-holder's application under S. 73.*

Only two conditions must be fulfilled to entitle a person to rateable distribution under S. 73, Civil Procedure Code. He must have a money decree against the same person of which satisfaction has not been obtained ; and he must have applied for execution of that decree before the assets were realised. It is not necessary to entitle him to join in the rateable distribution, that his execution application should be such as would have ended in his successfully obtaining satisfaction of his decree. *Held*, therefore, that the execution application of a decree-holder was for the arrest of a person who could not have been arrested, because he was outside the jurisdiction, was quite immaterial so far as S. 73 was concerned. (*Krishnan, J.*) SUBRAMANIAM CHETTY *v.* RAMASWAMI CHETTY. **49 M. L. J. 753 : 22 L. W. 744 : 91 I. C. 11 : A. I. R. 1926 Mad. 179.**

——S. 73—*Revision is allowed though remedy by suit is available—C.P. Code, S. 115.*

The special remedy by way of suit under S. 73 does not prevent a Court from interfering under S. 115 where there is a manifest error in the order under

S. 73, and putting that error correct as otherwise the parties will be driven to unnecessary litigation. (*Krishnan, J.*) SUBRAMANIAN CHETTY *v.* RAMASWAMI CHETTI. **49 M.L.J. 753 : 22 L.W. 744 : (1926) M.W.N 27 : A. I. R. 1926 Mad. 179.**

——**S. 73**—*Rateable distribution applied for after realisation of assets—Application cannot be rejected.*

Presentation after realisation of assets is no ground for refusing an application for rateable distribution, provided that execution of decree has been applied for before realisation of assets. (*Srinivasa Aiyangar. J.*) KARPAGA NIDHI, LTD. *v.* COIMBATORE VANIA VILASA NIDHI, LTD. **48 M. L. J. 489 : 21 L. W. 518 : 87 I. C. 390 : (1925) M.W.N. 173 : A. I. R. 1925 Mad. 587.**

——**S. 73**—*Right to rateable distribution—Conditions to be satisfied.*

In a suit by S against defendant in the Court of the District Munsif certain properties were attached before judgment and their sale proceeds were deposited in Court to the credit of the suit on 11-4-1917. Subsequently N brought a suit against the same defendant in the same Court and attached the money in Court deposit to the credit of the prior suit. N obtained a decree on 19—4—1917 and on 7—6—1917 he applied in S's suit for payment out to him of the money in Court. While this application was pending S got a decree on 2—7—1917 and on the next day applied for payment out to him. In the meantime one R had brought a suit in the same Court against the same defendant, obtained a decree and applied for payment of the money in Court on 29—6—1917. On a question arising as to which of the plaintiffs S. N. and R. was entitled to be paid the sum in Court, *held*, that under S. 73, C. P. Code the money in Court was liable to be rateably distributed among the three decree-holders S. N. and R. 44 M. 100 : 39 M. L. J. 608 Relied on. 42 M. 692 Diss. (*Schwabe, C. J., Krishnan and Wallace, JJ.*) NACHIAPPA CHETTIAR *v.* SUBBIER. **44 M. L. J. 413 : 46 Mad. 506 : 17 L. W. 390 : 72 I. C. 820 · 32 M. L. T. (H. C.) 198 : A. I. R. 1923 Mad. 505. [On appeal from 70 I. C. 20 (2)].**

——**S. 73 and O. 38, R. 11**—*Rival decree-holders—Several attachments—Attachment before judgment—Effect of.*

Where there are several attachments before judgment and the moneys are realised before any of the plaintiffs obtains a decree, the moneys should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees. (*Kumaraswami Sastri, J.*) SUBRAMANIAM CHETTY *v.* SANKARA AIYAR. **15 L. W. 531 : (1922) M. W. N. 262 : 31 M. L. T. 70 (H. C.) : 68 I. C. 714 : A. I. R.1922 Mad. 236 (1).**

——**Ss. 73 and 47**—*Rival decree-holder—Order for rateable distribution.*

Where an order for rateable distribution is made among rival decree-holders on a decision of the disputes among them without any objection on the part of the judgment-debtor or without in any way affecting his rights, the order is not one under S. 47, C. P. C. or a decree within the meaning of S. 144, C. P. Code. If the order for rateable distribution is set aside on appeal, there is no power to order restitution under S. 144, C. P. Code. (*Ayling and Venkatasubba Row, JJ.*) VARADA RAMASWAMI *v.* UMMA VENKATARATNAM. **42 M. L. J. 473 : 30 M. L. T. 178 : (1922) M. W. N. 184 : 15 L. W. 421 : 67 I. C. 546 : A. I. R. 1922 Mad. 99.**

——**S. 73**—*Fund in Court—Order for rateable distribution—Payment not made—Ownership of the fund.*

Where moneys have been allowed to various decree-holders by an order for rateable distribution and stand to the credit of their respective suits, those moneys are no longer the property of the judgment-debtor, but they remain the properties of the various decree-holders even though the amounts have not been paid out to them (*Ayling, O. C. J. and Odgers, J.*) OFFICIAL RECEIVER OF TANJORE *v.* VENKATARAMA IYER. **42 M. L. J. 361 : (1922) M. W. N. 51 : 30 M. L. T. 67 : 15 L. W. 37 : 68 I. C. 512 : A. I. R. 1922 Mad. 31.**

——**S. 73**—*'Assets held in Court'—Meaning of.*

'Assets held by a Court' mean assets levied in execution or paid into Court in satisfaction of the decree under execution. A mere order of attachment does not of itself effect a transfer of the money standing to the credit of another suit from that credit to the credit of the suit in which the attachment took place. S. A. No. 662 of 1919 (F B.) Foll. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) SUBBIER *v.* NACHIAPPA CHETTIAR. **14 L. W. 582 : 70 I. C. 20 (2) : (1921) M. W. N. 817.**

——**S. 73**—*Right to rateable distribution—Deposit in Court to the credit of judgment-debtor.*

Money paid in Court to the credit of judgment-debtor before any decree-holder applies to have it paid in satisfaction of his decree, is liable to rateable distribution among decree-holders who apply for execution either before or after such money is paid into Court. (*Wallis, C. J., Ayling, Sadasiva Aiyar, Napier and Krishnan, JJ.*) VISVANATHAN CHETTY *v.* ARUNACHELAM CHETTY. **39 M. L. J. 608 : 44 Mad. 100 : 12 L. W. 744 : 28 M. L. T. 412 : 60 I. C. 302 : (1921) M. W. N. 14. (F. B.).**

——**S. 73 and O. 21, R. 52**—*Fund in Court—Attachment—Rival decree-holders—Priority—Receipt of assets.*

When a Court in execution of a decree attaches a fund in the Court the latter Court holds the fund subject to the direction of the executing Court and to transfer it to that Court. The fund as soon as it is transferred to the execution Court becomes "assets held by that Court" within S. 73 of the C.P. Code. All decree holders who have applied for execution to the executing Court before the receipt of such assets are entitled to rateable distribution. If the executing Court and the custody Court are the same, the fund becomes the assets within S. 73 of the C. P. Code by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which the execution is sought. (*Wallis, C. J., Ayling, Sadasiva Airar, Napier and Krishnan, JJ.*) VISVANATHAN CHETTI *v.* ARUNACHELLAM CHETTY. **39 M. L. J. 608 : 44 Mad. 100 : (1921) M. W N. 14 : 12 L. W. 744 : 60 I. C 302 · 28 M. L. T. 412 (F.B.).**

——**S. 73 and O. 21, R. 72**—*Rival decree-holders—Permission to one to bid and to set-off—Right of the other decree-holders to rateable distribution not affected.*

One of two decree-holders against a common judgment-debtor got permission to bid at the auction sale and to set off his claim against the purchase money, and purchased one item of the property but did not deposit the purchase money. Another item was sold to a stranger who deposited the purchase money whereupon the other decree-holder applied for rateable distribution. *Held*, that he was entitled to rateable distribution in respect of both the purchases as the permission to set off granted to the other decree-holder did not affect the right to such distribution. (*Seshagiri Aiyar, J.*) ARUNACHALAM CHETTY *v.* SOMA-

C. P. CODE (V OF 1908), S. 73.

SUNDARAM CHETTY. **59 I. C. 86 : 12 L. W. 328.**

——**S. 73**—*Application for execution is essential.*

Before a person is entitled to rateable distribution under S. 73 an application for execution must be made. Where no regular applications for execution have been made and the prayer is only for rateable distribution of the assets, no rateable distribution can be ordered. 1924 Nag. 39 Ref. 17 N. L. R. 143 Foll. (*Baker, J. C.*) ALI MAHOMED *v.* MAHOMED NOOR. **A. I. R. 1925 Nag. 382.**

——**S. 73**—*The section does not apply to deposits by judgment-debtor for a particular decree-holder.*

Civil Procedure Code, S. 73, applies to a case where money is realised in execution by process of the Court and not when the judgment-debtor deposits in Court for payment to a particular decree-holder. (*Kinkhede, A. J. C.*) FIRM OF HAJI UMAR SHARIF *v.* RODBA. **81 I. C. 7 : A. I. R. 1925 Nag. 157.**

——**S. 73**—*Applicability—Nature of proceedings—Inquiry into* bona fides *of decree.*

The proceedings under S. 73, C. P. Code are of non-judicial character and the Court cannot inquire into the validity or otherwise of the decrees under which payments are claimed. (*Kotval, A. J. C.*) MAGENMAL *v.* RAGHUNATH RAO. **19 N. L. R. 172 : 75 I C. 749 : A. I. R. 1924 Nag. 39.**

——**S. 73 and O. 21, R. 11**—*Application for execution—Application for rateable distribution is not.*

Before a decree-holder can claim rateable distribution he must, before the receipt of the assets, have applied to the Court by which the assets are held for the execution of his decree, and such application must be in the form prescribed by O. 21, R. 11, (2) C. P. Code. An application for rateable distribution is not an application for execution. (*Kotwal, A. J. C.*) DWARKADAS *v.* GHASI RAM. **64 I. C. 53 : 17 N. L. R. 143.**

——**S. 73**—*Where set-off is claimed under O. 21, R. 72, application under S. 73 must be made before decree-holder's application for set off.*

In a case where an application for set-off is made and there are no obstacles to the granting of it, that is to say, no application exists under S. 73 for rateable distribution at the time of making the application for set-off, the Court will ordinarily be bound to grant the set-off, and if that is done there can be no receipt of assets by the Court within S. 73. An order allowing a set-off under O. 21, R. 72, is not equivalent to receipt of the assets. It is a disposal of the purchase-money over which the Court re-acquired dominion on the date of the sale. (*Wazir Hasan, J. C.*) MOHAN LAL *v.* AMAR NATH. **80 I. C. 40 : A I. R. 1925 Oudh 287.**

——**S. 73**—*Right to rateable distribution.*

Claims enforceable under the attachment cease to have effect on withdrawal of attachment. (*Daniels and Dalal, A. J. Cs.*) MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH. **66 I. C. 642 : 8 O. L. J. 358.**

——**S. 73**—*Applicability—Identity of judgment-debtors not necessary.*

S. 73, C. P. Code, is imperative and does not imply that an application for execution is necessary to obtain the benefit of it. It is not necessary that all the judgment-debtors in the several decrees should be identical, and the fact that in one there is an extra judgment-debtor does not make the section inapplicable. The addition of the word "passed" in 1908 has not restricted the application of the section. (*Jwala Prasad and Ross, JJ.*) MT. INDERBASI KUER *v.* SAT NARAYAN SINGH. **4 Pat. L. T. 373 : 74 I. C. 626 : 1923 P. H. C. C. 216 : A. I. R. 1923 Pat. 521.**

C. P. CODE (V OF 1908), S. 73, (1) (b).

——**S. 73**—*Right to rateable distribution—Property sold free of mortgage—Rights of mortgagee.*

When property liable to be sold in execution of a decree is sold free from mortgage under S. 73 (1) of the Code of Civil Procedure the mortgagee has that same interest in the proceeds of the sale as he had in the property sold. But to enforce his interest he must proceed by way of suit, and he cannot obtain an order for payment of the amount alleged to be due on the mortgage until he had obtained a decree. (*Robinson, Offg. C. J.*) V. P. T. REDDYAR *v.* V. R. M. ARUNACHALAM CHETTY. **13 Bur. L. T. 210 : 64 I. C. 417 : 10 L. B. R. 398.**

——**S. 73, O. 38, R. 1**—*Assets—Arrest before judgment—Money deposited to avoid arrest—Attachment by other decree-holders.*

Payment into Court by a judgment-debtor to avoid arrest is payment for a specific purpose, *viz.*, the satisfaction of the plaintiff's decree and is therefore not attachable by other judgment-creditors. (*Raymond, A. J. C.*) MAHBUBBUX *v.* BUKSH ELAHI. **61 I. C. 424 : 14 S. L. R. 164.**

——**S. 73, O. 38, R. 1**—*Right to rateable distribution—Arrest before judgment—Money paid to avoid arrest—Whether other judgment-creditors can attach it.*

Money paid into Court by a defendant under S. 73, O. 38, C. P. C. to avoid his arrest in a suit, is money paid for specific purpose and as it is intended to satisfy the plaintiff who has been instrumental in compelling the deposit he acquires a lien over it and consequently other judgment-creditors of the defendant cannot attach such money. (*Raymond, A. J. C.*) HAJI MAHBUBBUX *v.* BUKSH ELAHI. **61 I. C 424 : 14 S. L. R. 164.**

——**S. 73 (1)**—*Applicability—Proviso (b)—Scope of—If confined to immoveables.*

The words "any property" in clauses (*a*) and (*b*) of the proviso as contradistinguished from "immoveable property" in clause (*c*) shows that a mortgage of moveables is included therein. (*Mukerjee, J.*) JATINDRA CHANDRA CHOUDHURY *v.* RANGPUR TOBACCO COY. **A. I. R. 1924 Cal. 990.**

——**S. 73 (1) (*b*) and O. 21, R. 83 and O. 34, R. 6.**—*Sale in execution—Sale free from mortgage—Sale postponed to enable judgment-debtor to raise money by private alienation.*

Under S. 73 of the Civil Procedure Code where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. But it is not so in the case of a private alienation where there is absolutely no necessity to refer to the prior incumbrancer. For a private alienation all that is necessary under O. 21, R. 83, Civil Procedure Code is that the Court should be satisfied that the application is made in good faith and that the decree amount may be raised by the mortgage or sale of a part or whole of the attached property. In the present case it was represented to the Court that the decretal amount could be raised by private alienation. The decree-holder consented to time being given to the judgment-debtors for raising money by private alienation. The plaintiff was not asked to give up his mortgage lien, nor did he or his agent make any statement in Court to the effect that he would give up his mortgage lien if the judgment-debtors would satisfy the decree by private alienation.

Held, that in the absence of any express consent on the part of the plaintiff it could not be held that plain-

tiffs had given up his mortgage security and that his rights as a mortgagee had come to an end. (*Martineau and Moti Sagar, JJ.*) BENARSI DAS *v.* GOPI CHAND. **5 Lah. L. J. 279 : 76 I. C. 529 : A. I. R. 1924 Lah. 132**

——**S. 73 (1) (b)**—*Right to rateable distribution—Mortgagee holding money decree.*

S. 73 (1) (*b*) applies only to a mortgagee whose charge is valid against the executing decree-holder. When he holds a money decree apart from his mortgage, he can apply for rateable distribution. (*Mullick and Bucknill, JJ.*) BABU BISHUN MOHAN SAHAY *v.* NARAYAN PRASAD ASTHANA. **74 I. C. 140 : A. I. R. 1924 Pat. 434**

——**S. 73 (2)**—*Aggrieved decree-holder—Remedy is by suit.*

Even though the person aggrieved is the decree-holder, the remedy is by way of suit and not one under S. 47, C. P. Code, or by revision. (*Oldfield and Venkatasubba Rao, JJ.*) SOMASUNDARAM CHETTIAR *v.* SUNDARESA RAO. **32 M. L. T. 155 : A. I. R. 1924 Mad. 97.**

——**S. 73 (2)**—*Applicability—Assets not liable to be distributed—Section does not apply.*

Where the assets are not liable to be rateably distributed, S. 73 (2), C. P. Code, has no application. (*Ayling and Venkatasubba Rao, JJ.*) VARDA RAMASWAMI *v.* UMMA VENKATRATNAM. **42 M. L. J. 473 : 30 M. L. T. 178 : (1922) M. W. N. 184 : 15 L. W. 421 : 67 I. C. 546 : A. I. R. 1922 Mad. 99.**

——**S. 73 (2)**—*Erroneous distribution—Suit for recovery of money wrongly distributed.*

S. 73 (2), C. P. C., does not contain any indication that an execution sale by virtue of which assets have been made available for rateable distribution can be attached in a separate suit. The cause of action under the section arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained. (*Drake Brockman, J.C.*) LAKHMICHAND *v.* CHATURBHUJ. **65 I. C. 230 : 4 N. L. J. 274.**

——**S. 75**—*Party ordered to supply papers to Commissioner—Commissioner asked to decide whether papers supplied were adequate, and, if not, whether party was liable to pay money compensation—Order was held unobjectionable.*

Where the Court, upon the materials on the record, was unable to come to any decision and it ordered a party to submit certain papers before a Commissioner and directed the Commissioner to state in his report whether what had been submitted was adequate and also whether the party should not be ordered to pay money compensation for what had not been supplied:

Held, that, as after the Commissioner had submitted his report the matter would necessarily be considered by the Court there was no objection to the Commissioner having been asked to decide the above-mentioned points. (*Greaves and Mukerji, JJ.*) NANDALAL ROY *v.* MUKUNDALAL DE. **89 I. C. 24 : A. I. R. 1926 Cal. 57.**

——**S. 75**—*Powers of Court under.*

S. 75 does not give the Court power to issue a commission to examine anybody anywhere and before any private person whether or not any suit has been instituted. For instance, this section would not give the Court power where there was no pending suit to direct a private citizen to appear before, say, a Punchayat of some particular caste to give evidence on some caste dispute. Nor could the Court require a private citizen in a similar case to appear before the Club Committee or any other private domestic tribunal: nor for the matter of that before, say a Government departmental commission. This section must be qualified by the rules in the First Schedule subject, of course, to such further rules as may be found in the High Court Rules. (*Martin, J.*) MACKINTOSH & CO. *v.* SCINDIA STEAM NAVIGATION CO. **24 Bom. L. R. 853 : A. I. R. 1922 Bom. 444.**

——**S. 75 and O. 26**—*Commission—Issue of—Judge cannot delegate trial of material issues to Commissioner.*

S. 75, C P. Code, defines clearly the circumstances under which a commission may be issued and does not authorize a court to delegate to a commissioner the trial of any material issue which the Judge is bound to try. 16 Mad. 350 Foll. O. 26 does not in any way amplify the scope of S. 75. (*Abdul Raoof and Harrison, JJ.*) SAWAN MAL *v.* RAUNAQ MAL CHUNI LAL. **3 Lah. 209 : 68 I. C 802 : A. I. R. 1922 Lah. 47.**

——**S. 75**—*Commissioner's appointment whether to decide an only issue in the case—Whether Court can delegate its powers to Commissioner.*

Where in a suit on a mortgage the defence pleaded that the mortgagees were in possession of portion of the mortgaged property and that they had satisfied the mortgage debt out of the usufruct of the property and the Sub-Judge referred the case to a Commissioner for trial, *Held*, that if the Commissioner merely enquired into the amount of the profits from the mortgaged lands there would be no objection to the Commissioner proceeding; otherwise the Commissioner would not be empowered to take the evidence as to the plaintiffs' possession or to the extent of such possession.

Held further, that the lower Court could not delegate all its judicial powers to the Commissioner and the most a Commissioner could do would be to investigate and report on the profits arising from the mortgaged lands. (*Adami and Kulwant Sahay, JJ.*) BABU RAM CHANDER TIWARI *v.* GUDAR POTEDAR. **3 Pat. L. R. 136 : 89 I. C. 343 : A.I.R. 1925 Pat. 576.**

——**Ss. 78, 83, 107 and 118**—*Ascertained goods—Warrant.*

Where goods were purchased on condition that they would be undamaged, and subject to inspection and approval, there is an implied warranty that they are such as fall under the denomination of undamaged goods. The goods cannot be said to be ascertained until they are inspected and approved. (*Jwala Prasad and Ross, JJ.*) FIRM OF RAMDAYAL RAM NARAIN *v.* FIRM OF BHAIRO BUX GOURIDUTTA. **1 Pat. L. R. 398 : 79 I. C. 183 : 5 Pat. L. T. 558 : A. I. R. 1924 Pat. 240.**

——**S. 79**—*Railway administration under Government control—Notice of suit—Parties—Secretary of State.*

Where a railway administration is owned and worked by the Government, suits for and against the Railway should be brought in the name of Secretary of State for India in Council. (*Fawcett, J.*) SUKHANAND SHAMLAL *v.* OUDH AND ROHILKHAND RAILWAY. **48 Bom. 297 : 26 Bom. L. R. 71 : 80 I. C. 531 : A. I. R. 1924 Bom. 306.**

——**S. 80**—*Plea as to want of notice may be raised at the final hearing.*

A plea as to want of notice under S. 80 is not barred even though it is raised for the first time at the date of final hearing. (*Lindsay and Kanhaiya Lal, JJ.*) MURARI LAL *v.* E. V. DAVID. **22 A. L. J. 1116: L. R. 6 A. (Civ.) 106 : 84 I. C. 739 : 47 All. 291 : A. I. R. 1925 All. 241 (2).**

——**S. 80**—*Official Receiver cannot be sued without notice—C. P. Code, S. 2 (17)—Provincial Insolvency Act* (1920), *S.* 58.

C. P. CODE (V OF 1908), S. 80.

As soon as a receiver is appointed under the Provincial Insolvency Act, he becomes a public officer within the meaning of S. 2, sub-sec. 17 and he is protected by S. 80. An Official Receiver stands on a higher footing than a receiver appointed in a particular case and therefore no suit is maintainable against him without the requisite notice. A sanction granted by Insolvency Court *ex parte* cannot be taken as an adequate compliance with the requirements of S. 80 of the Code of Civil Procedure. (*Lindsay and Kanhaiya Lal, JJ.*) MURARI LAL *v.* E. V. DAVID.
22 A. L. J. 1116 · L. R. 6 A. (Civ.) 106 : 84 I. C. 739 : 47 All. 291 · A. I. R. 1925 All. 241 (2).

——S. 80—*Notice under—Necessity for—Act done in official capacity.*

It is not the law that S. 80, C. P. Code, has no application unless the act complained of was done in good faith. The section does not require that the act should have been done in good faith ; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the Officer in the course of his official duties and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the meaning of S. 80, C. P. Code. The motives with which the act was done do not enter into the question at all. 38 C. L. J. 104 ; 41 M. 792 Foll. (*Daniels and Neave, JJ.*) ABDUL RAHIM *v.* ABDUL RAHMAN.
22 A. L. J. 812 : L. R. 5 A. 599 : 80 I. C. 72 : 10 O. & A. L. R. 837 : 46 All. 884 : A.I.R. 1924 All. 851.

——S. 80—*Official Receiver in insolvency proceedings—Notice necessary.*

The utmost that can be said is that an Official Receiver is a public officer within S. 2, sub-clause 17 (*d*), C P. Code and notice under S. 80 is necessary before filing a suit against him (*Lindsay and Sulaiman, JJ.*) MAHRANA *v.* DAVID. **21 A. L. J. 737 : L. R. 4 A. 483 : 46 A. 16 : 77 I. C. 57 : A. I. R. 1924 All 40.**

——S. 80—'*Act purporting, etc.' refer to public officer only—Injunction proper in emergent cases—Want of notice no bar in such cases.*

Per Shah, Ag. C. J.—The words "in respect of any act purporting to be done" in S. 80, C. P Code, apply to the 'Public Officer' only and not to the Secretary of State for India in Council. But the principle underlying the decisions in 35 B. 662 and 40 B. 372 is independent of these words and is applicable to suits against the Secretary of State for India as well as to suits against public officers. The rule contained in S. 80 is a rule of procedure and does not affect in any way the cause of action or the rights of the parties. If the cause of action requires an immediate remedy by way of injunction, and if S. 80 is literally applied the party aggrieved would have no remedy. In a case where a class of persons is taxed heavily it would not be fair to treat the position as one of ordinary pecuniary liability of an individual only. Where at the date of the suit a situation had arisen which was calculated to cause serious apprehension in the minds of the plaintiffs that irremediable damage might be caused to their business as dealers in *saris* unless the enforcement of the orders were stopped at once.

Held, the remedy sought by way of injunction was appropriate and necessary to safeguard their interests under the circumstances. 35 Bom. 362 : 40 Bom. 392, Foll. 44 Bom. 555 Diss.

Per *Kemp, J.*—No suit may be instituted against the Secretary of State until the expiration of the two months' notice required by the section. The terms of the section are imperative and make no exception in the case of suits for an injunction and a Court of law is not entitled to graft on to the plain wording of the section, a qualifying clause excepting suits for an injunction, a kind of relief which must have been in the contemplation of the framers of the Code when the section was drafted and redrafted. Nor does it make any difference that the injury apprehended is immediate or irrepairable. A suit in respect of something which a public officer is going to do, not in respect of something he has done, but in respect of the further acts threatened lies without notice. No notice is necessary in a suit for injunction to prevent a threatened act against the public officer. (*Shah, A. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA *v.* SECRETARY OF STATE FOR INDIA. **48 Bom. 87 : 26 Bom. L. R. 1 : A. I. R. 1924 Bom. 1.**

——S. 80—*Suit against Official Assignee—Notice not necessary.*

Plaintiff purchased certain property from the defendant who was soon after adjudged an insolvent. The Official Assignee objected to an application by the plaintiff to have his name entered as owner in the Record-of-Rights. Plaintiff thereupon sued for declaration of title without giving notice under S. 80, C. P. Code, to the Official Assignee. *Held*, that the suit was maintainable without notice. (*Macleod, C. J. and Crump, J.*) DAMODAR JAGJIVAN *v.* GOVINDJE. **25 Bom. L. R. 378 : 73 I. C. 240 : A. I. R. 1923 Bom. 392.**

——S. 80—*Interpretation—Public Officer—Discharge of duty—Notice*—Mala fides.

It is not permissible to read the words in S. 80, C. P. Code, as if they were "in respect of any act purporting to be done by such public officer *bona fide* in his official capacity." It is not legitimate to construe the section by importing into the section words which do not appear in the section. A public officer is entitled to notice of suit under section 80 of the Civil Procedure Code, even if in the discharge of his duty he has acted *mala fide*. (*Sanderson, C. J. and Richardson, J.*) DAKSHINA RANJAN GHOSE *v.* OMAR CHAND OSWAL. **50 Cal. 992 : 28 C. W. N. 10 : 75 I. C. 173 : 38 C. L. J. 104 : A. I. R. 1924 Cal. 145.**

——S. 80—*Suit under special Law—Period of notice—Cannot be deducted.*

Where a special law of limitation applies a party is not entitled to deduct the period of two months for service of notice under S. 80 of the Code. (*Woodroffe and Cuming, JJ.*) SECRETARY OF STATE *v.* ANANDA MOHAN ROY. **66 I. C. 287 : 34 C. L. J. 205.**

——S. 80—*Action against Village Headman—Notice is necessary.*

No action for damages can lie against a village headman for an act done in his official capacity unless the requirements of S. 80 are fulfilled. A report to the S. D. O. or D. C. is not notice. (*Heald, J.*) MAUNG SAN YA *v.* MAUNG NGWE HLA. **2 Bur. L. J. 29 : A. I. R. 1923 Rang. 250.**

——S. 83—*Test of—Domicile—Commercial domicile.*

When considering questions arising with an alien enemy it is not the nationality of a person but his place of business during the war that is important. (1916) 1 K. B. 284 ; (1915) 1 K. B. 857 ; (1902) A. C. 484 Ref. (*Hallifax, A. J. C.*) MOHANLAL *v* BISHESHWARDAS DAGA. **70 I. C. 344 : A. I R. 1923 Nag. 121 (2).**

——S. 85—*Rights of purchaser—Crops on the land—Delivery of possession.*

The sale of a plot of land in execution of a decree

C. P. CODE (V OF 1908), S. 86.

would pass to the purchaser of the crops growing on the land unless they had been exempted from the sale by notification. (*Ross, J.*) DHOBI ROY *v.* MAHADEO SINGH. **4 Pat. L. T. 318 : 1 Pat. L. R. 269 : A.I.R. 1923 Pat. 355.**

——— **S. 86**—*Suit against—Ruling Chief as co-sharer—Sanction if necessary.*

In a suit against a Ruling Chief with respect to immoveable property in British India which he held as co-sharer along with plaintiffs no relief can be granted unless the consent of the Government is obtained under S. 86, C. P. Code. (*Lindsay and Ryves, JJ.*) KANHAYA LAL *v.* MAHARAJAH OF BENARES. **46 A. 355 : 22 A. L. J. 317 : 78 I. C. 559 : L. R. 5 A. 129 (Rev.) : A. I. R. 1924 All. 422.**

——— **S. 86**—*Defence of—Set off—Section not applicable.*

The section does not apply to a defence put forth as set off. Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor-General. (*Abdul Raoof and Martineau, JJ.*) SUKHDEV SINGH *v.* HAZURA MAL GOBIND RAO. **62 I. C. 778**

——— **S. 86**—*Applicability—Acquiescence by defendant bars him from questioning validity of decree.*

S. 86 of the Code becomes applicable to a suit where the defendant attains the dignity of a Ruling Chief and the suit cannot be continued without the requisite sanction. The bar is on the plaintiff and not on the Court. If the defendant acquiesces in the failure of the plaintiff to obtain the sanction he cannot after judgment question the validity of the judgment on the ground that the bar was not removed. (*Das and Ross, JJ.*) MAHARAJAH OF REWA *v.* SIVA SARAN LAL. **2 P. L. T. 180 : 6 P. L. J. 185 : 61 I. C. 989 : 1921 P. H. C. C. 136.**

——— **S. 88 and O. 35, R. 5**—*Interpleader suit—Nature of.*

Where the defendants do not claim adversely to one another, nor is the plaintiff admitting the title of one of the defendants or is willing to pay or deliver the property to him, the suit is not an interpleader suit. (*Chatterji and Pearson, JJ.*) ASAN ALI *v.* SARADA CHARAN. **A. I. R. 1922 Cal. 138.**

——— **S. 88**—*All contesting defendants are in the position of plaintiffs.*

In an interpleader suit in which each of the contesting defendants attacks the title of the other, each is virtually in the position of a plaintiff. Where an adoption was set up by one party as having taken place in 1863 and the others pleaded that the former, not having sued within 12 years to establish the adoption, its right was barred as per the Limitation Act of 1871, Art. 129 and where the others also had not sued within the period prescribed by that Act, to set aside the adoption:

Held, if the supporters of the adoption are debarred from supporting it the others will be equally debarred from getting a declaration that the adoption is invalid. (*Spencer, Offg. C J. and Kumaraswami Sastri, J.*) MAHARAJAH OF KOLHAPUR *v.* SUNDARAM AYYAR. **48 Mad. 1 : A. I. R. 1925 Mad. 497.**

——— **S. 89**—*'Any other law' in S. 89 include 2nd Schedule.*

Per Kanhaiya Lal, J.—The words 'any other law' in S. 89 do not exclude O. 23, R. 3 or any other portion of the Code of Civil Procedure applicable to such a proceeding. The object of S. 89 clearly is to give effect to the provisions of Sch. II as if they had been enacted in the body of the Code, and it cannot be said that any material change of procedure, differing from what was in force prior to the enactment of

C. P. CODE (V OF 1908), S. 91.

the present Code of Civil Procedure, 1908, was really intended.

Per Mukerji, J. (contra.)—Whatever meaning may be given to the words 'any other law for the time being in force' those words were never meant to apply to the schedule to be appended to the main Code of Civil Procedure. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **23 A. L. J. 561 : A. I. R. 1925 All. 503 (F. B.).**

——— **S. 89 with O.23, R 3 and Sch. II, paras. 20 and 21**—*Arbitration without Court's consent—Case pending—Arbitration Act.*

If in a pending suit the parties go to a private or informal arbitration without the consent of the Court the award cannot be enforced either under O. 23, R.3, C. P. Code or under the provisions of the Indian Arbitration Act. If C.P. Code is looked into as a scheme for dealing with arbitration in the course of litigation, it intends these to be under the strict conditions and stipulations of the second schedule and under the supervision of the Court. The Indian Arbitration Act does not apply to arbitrations in the course of litigation. 25 C.W.N. 127 Ref. 40 Bom. 386 ; oll. 45 Bom. 245 Diss. (*Rankin, J.*) AMAR CHAND CHAMARIA *v.* BANWARI LAL RAKSHIT. **49 C. 608 : 69 I. C. 808 : A. I. R. 1922 Cal. 404.**

——— **S. 89**—*Save in.....in force.*

The words 'save in....in force" in S. 89 do not let in O. 23, R. 3 of the Code and the words "any other law for the time being in force" refer to amendments of, or substitutions for, the Arbitration Act or other prices of legislation on that subject-matter (*Rankin, J.*) DECKARI TEA CO. *v.* ASSAM BENGAL RAILWAY. **47 Cal. 6 : 61 I. C 919 : 25 C. W. N. 127.**

——— **S. 89**—*Award without intervention during pendency of suit cannot be recorded as adjustment.*

An award made without the intervention of the Court during the pendency of a litigation cannot be recorded as an adjustment under O. 23, R. 3 of the C. P. Code and cannot be enforced under S. 89 of the C. P. Code. 37 Bom. 639 ; 26 Bom. 76 Diss (*Shodi Lal, C. J. and Leslie Jones, J.*) HARI PERSAD *v.* SOOGANI DEVI. **67 I. C. 123 : 3 Lah. L J. 162.**

——— **S. 89, and O. 23, R. 3**—*Applicability—Arbitration.*

S. 89, C. P. Code, does not preclude the application of O. 23, R. 3 to cases in which there has been a reference to arbitration. (*Spencer and Devadoss, JJ.*) CHINTALAPALLI CHINNA DORAYYA *v* VENKANNA. **76 I. C. 502 : A. I. R. 1925 Mad. 50.**

——— **Ss. 89 and 96**—*Award—Compromise modifying—Decree—Appeal.*

A Court is competent on an application under Sch. II, para. 20, C. P. Code, to pass a decree on an award as modified by a lawful compromise filed by the parties and from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) HAKIM FASAL AHMED *v.* ENAYAT AHMED. **9 O. L. J. 219 : 68 I. C. 209 : 25 O. C. 213 : A. I. R. 1922 Oudh 189.**

——— **S. 91**—*Scope of—Highway—Obstruction—Suit for compensation.*

S. 91 of the C. P. Code is a provision for procedure. It does not purport to create a right which does not exist before. It does not purport to deprive anybody of a right derived from the general law of the land. It merely prevents a person from asserting a right except in a particular way. If a plaintiff brings a suit for damages and injunction against the defendant in respect of the latter's obstruction of a highway, without reference to S. 91, C. P. Code, the plaintiff must

C. P. CODE (V OF 1908), S. 91.

prove that he has suffered a more particular kind of obstruction or inconvenience beyond that of the general public by reason of the act of the defendant. (*Walsh, A. C. J. and Ryves, J.*) MAHOMED RAZA-KHAN *v.* MAHOMED ASKARI KHAN. **46 A. 470 : 22 A L. J. 729 : A. I. R. 1924 All. 599.**

——S. 91—*Suit for removal of encroachment in public street—Plaintiff unable to prove that the rest of the street cannot be used—Suit is not maintainable.*

Plaintiff filed a suit to have declaration that the land described in the plaint was street land and to obtain a mandatory order directing defendant to remove an *otla* made by him on the land.

Held, that such a suit at the instance of a private person is not maintainable unless he is able to show that he is unable to use the road, nor can he seek the assistance of the Court to get the *otla* removed, merely because he wants to walk over that portion of the street occupied by the *otla*, unless he proves special damage. (*Macleod, C. J. and Crump, J.*) MANILAL JIBHAI *v.* ISHVARBHAI SAMABHAI. **27 Bom. L. R. 421 : 87 I.C. 934 : A.I.R. 1925 Bom. 367.**

——S. 91 and O. 1 R. 8—*S. 91 does not control or restrict O. 1, R. 8.*

Section 91 does not control or restrict the provisions of O. 1, R. 8 and therefore it does not take away the right of the plaintiffs to sue which may exist independently of its provisions. (*Suhrawardy and Duval, JJ.*) PEARY LAL MULLIK *v.* SURENDRA NATH. **A. I. R. 1925 Cal. 1233.**

——S. 91—*Relief not claimed in respect of public nuisance cannot be granted.*

No relief was sought in respect of the public nuisance and there was no claim : *held*, there can be no declaration that the place in suit is a public thoroughfare and has been obstructed as such. (*Abdul Raoof and Campbell, JJ.*) TIRATA RAM *v.* MD. ABDUL RAHIM. **73 I. C. 616 : A. I. R. 1923 Lah. 546**

——S. 92.

Abatement of suit.
Addition of parties.
Alienation of trust property.
Charitable trust.
Compromise of suit.
Forum.
Mandatory provision.
Parties.
Private trusts.
Public trusts.
Religious trust.
Removal of trustee.
Right to sue.
Sanction.
Scheme.
Scope of.
Trespasser.
Trustee De Son Tort.

Abatement of suit.

——S. 92—*Abatement of suit—Death of one plff.*

A suit under this section is prosecuted by individuals not for their own interest but as representing general public, and so it does not abate on the death of the original plffs. (*Lord Dunedin.*) RAJA ANAND RAO *v.* RAM DAS DADURAM. **48 Cal. 493 : 13 L. W. 318 : (1921) M. W. N. 24 : 17 N. L. R 37 : 48 I. A. 12 : 25 C. W. N. 794 : 62 I. C. 737 : 30 M. L. T. 194 (P. C).**

——S. 92—*Abatement of suit—Death of one of the plaintiffs obtaining sanction—Neither the suit nor an appeal therefrom abates.*

C. P. CODE (V OF 1908), S. 92—Alienation of Trust Property.

Although one of the plaintiffs obtaining the sanction for instituting the suit dies, a suit under S. 92 or an appeal therefrom does not abate. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) H. K. SAYYAD GULAM GOUSE *v.* DOST MOHAMMAD KHAN SAHIB. **47 M. L. J. 745 : 20 L. W. 882 : A. I. R. 1925 Mad. 244.**

Addition of Parties.

——S. 92—*Addition of parties—Sanction of Advocate-General obtained—Stranger may be joined as defendant.*

If a suit is brought under the sanction of the Advocate-General, the addition of a stranger as defendant does not render the suit bad. (*Newbould and Ghose, JJ.*) SYED ABU MAHOMED BARAKAT ALI *v.* ABDUR RAHIM. **80 I. C. 44 : A. I. R 1925 Cal. 187.**

Alienation of trust property.

——S. 92 (h)—*Alienation of trust property—Cl. (h) refers to reliefs* ejusdem generis *with the ones actually mentioned in S. 92—Actual possession cannot be decreed against transferees.*

In a suit under S. 92 a decree for actual possession against transferees from the trustee cannot be properly passed. The words 'granting such further or other relief as the nature of the case may require' refer to reliefs *ejusdem generis* and not to every possible relief which a Civil Court may grant. 24 Cal. 418 Diss. 28 All. 112, 35 Bom. 470 and 27 M. L. J. 266 Foll. 2 C. L. J. 431 Ref. (*Sulaiman and Boys, JJ.*) RAMSARUP GOSHAIN *v.* RAMDHARI BHAGAT. **23 A. L. J. 601 : L.R. 6 A. (Civ.) 352: 89 I.C. 40: A.I R. 1925 All. 683.**

——S. 92—*Alienation of trust property—Declaring alienations invalid comes under S 92.*

A relief which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in the suit, may be declared void comes under S. 92. (*Sulaiman and Boys, JJ.*) RAMRUP GOSHAIN *v.* RAMDHARI BHAGAT. **23 A. L. J. 601 : L. R 6 A. (Civ) 352 : 89 I.C. 40 : A. I. R. 1925 All. 683.**

——S. 92 (h)—*Alienation of trust property—Suit for declaration of invalidity—Maintainability—When granted—Scope of section.*

S. 92, C. P. Code, is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach, of any express or constructive trust, created for public purposes of a charitable or religious nature. A declaration regarding the validity of an alienation by a trustee comes within S. 92 (*h*). If the result of a declaration is not to produce any effect on the parties, but will only be a stepping-stone for further litigation, the Court ought not to exercise its discretion and grant a declaration of such a nature. (*Piggott and Walsh, JJ.*) MUFTI ALI JAFAR *v.* FAZAL HUSAIN KHAN. **44 A. 622 : 20 A.L.J. 557 : L. R. 3 A. 352 : 4 U. P. L. R. (A.) 131 : 67 I. C. 658 : A. I R. 1922 All. 349.**

——S. 92—*Alienation of trust property—Founder appointing himself to be trustee and, after his death, his heirs—Founder's widow alienating trust property—Reversioner's right to challenge alienation sanction under S. 92 removal of widow from trust from trusteeship.*

The founder of a trust appointed himself as manager during his lifetime and his heirs after his death. Founder's widow after his death alienated the trust property. The plaintiff, reversioner to the estate sued to recover property alienated by the founder's wife. *Held*, that the widow could not be transposed as plaintiff and the plaintiff could not claim to be trustee.

C. P. CODE (V OF 1908), S. 92—Alienation of rust property.

The proper remedy for the plaintiff was to sue for the removal of the widow from the trusteeship by a suit properly framed under S. 92, C. P. Code, after obtaining Advccate-General's permission.

Held, further, that plaintiff could not be allowed to do that in this suit as that would alter the nature of the suit. (*Spencer and Madhavan Nair, JJ.*) RAMASAMI GOUNDAN *v.* ALAGIA SINGAPERUMAL.

50 M. L. J. 42 : 22 L. W. 701 : (1926) M.W.N. 117 : A. I. R. 1926 Mad. 280.

——S. 92—*Alienation of trust property—Suit to recover trust property transferred by trustee—Suit under S. 92 is necessary.*

Where the trustee of charitable endowment transfers the trust property, plaintiffs cannot recover the property before first having the trustee formally removed by the Court for which purpose a suit under C. P. Code, S. 92, is necessary. (*Krishnan, J.*) MUTHUSWAMI NAIDU *v.* BAYALU NAIDU. **21 L. W. 525 : 88 I. C. 375 : A. I. R. 1925 Mad. 689.**

Charitable Trust.

——S. 92—*Charitable trust—Hereditary trustee—Advisory Board—Creation of a new body—Inexpediency of.*

Where a hereditary trustee has been appointed and the control of the charity left in him and the legislature has not thought fit to take away from him the control or administration of the trust, it is not for the Court because it may think that it is undesirable that charitable funds should be administered by one man without control or even without audit to impose a control which was not part of the original trust. But the Court has very wide powers under S. 92, C. P Code, and the circumstances under which those powers should be exercised are clearly stated by the Privy Council in 43 C. 1085, 1101 (P. C.) (*Schwabe, C. J. and Odgers, J.*) DORAIVELU MUDALIAR *v.* ADIKESAVALU NAIDU. **(1922) M. W. N. 620 : 70 I. C. 87 : A. I. R. 1922 Mad. 409.**

——S. 92—*Charitable trust—Limitation—Charities—Proper scheme of management.*

Where the plaintiffs bring a suit not to assert their own individual right but on behalf of the general public, who are interested in the institution, for the settlement of a proper scheme of management of the charities and for other reliefs, *held*, there is no limitation against such a suit. (*Spencer and Devadoss, JJ.*) GOPU NATARAJA CHETTY *v.* RAJAMMAL.

16 L. W. 122 : (1922) M.W.N. 464 : 31 M. L. T. 125 : A. I. R. 1922 Mad. 394 : 43 M. L. J. 448.

——S. 92—*Charitable trust—Bequest to charity—Administration—Suit for.*

S. 92 of the C. P. Code deals with completed trusts and is inapplicable where that stage has not yet been reached. Where the will of the deceased testator bequeaths a legacy for the constitution of a trust the proper remedy to enforce the provisions of the will is by an administration suit. A suit for the administration of the trusts of a will which contained disposition for charitable purposes is maintainable though it is not brought under S. 92, C P. Code. (*Wallis, C. J. and Kumaraswami Sastri, J.*) ANNAVARAPU NACHARAMMA *v.* MALLADI VENKATAPPAYYA.

31 M. L. T. 63 : 70 I. C. 903 : 16 L. W. 922.

Compromise of suit.

——S. 92—*Compromise of suit.*

There is nothing in law to prevent a Court passing a compromise decree in a suit under S. 92, C. P. Code. (*Newbould and Ghosh, JJ.*) ABU MAHOMED BARAKAT *v.* ABDUR RAHIM. **80 I.C. 44 : A. I. R. 1925 Cal. 187.**

C. P. CODE (V OF 1908), S. 92—Private Trusts.

Forum.

——S. 92—*Forum—Additional District Judge—Bengal Civil Courts Act, S. 8 (2)—'Any other Court empowered in that behalf by the Local Govt.'—Meaning of.*

An Addl. Dist. Judge is, by S. 8 (2), empowered to exercise the same powers as a Dist. Judge in suits under S. 92 C. P. Code. He need not, in such cases, be empowered by Local Government. The phrase "Any other Court empowered in that behalf by the Local Government" in S. 92 probably refers to Courts such as the Subordinate Judge's Courts. (*Chatterjee and Panton, JJ.*) MOHABOR RAHMAN *v.* ABDUR RAHIM. **62 I. C. 115 : 48 Cal. 53.**

—— S. 92 and O. 1, R. 8—*Leave of Court whether necessary.*

For the institution of a suit under S. 92, C. P. Code, the essential requisite is the obtaining of the sanction of the Advocate-General, and leave of Court under O. 1, R. 8, C. P. Code, is not necessary. (*Kumaraswami Sastri, Madhavan Nair and Srinivasa Aiyangar, JJ.*) VEERARAGHAVA ACHARIAR *v.* PARTHASARATHY AIYANGAR. **(1925) M. W. N. 505 : A I. R. 1925 Mad. 1070.**

Mandatory provision.

——S. 92—*Mandatory provision—Reliefs mentioned in section can only be enforced by procedure prescribed in section.*

S. 92 is mandatory and the reliefs specified in the section can only be enforced now by resort to the procedure of the section. The cases which before 1908 held to the contrary and decided that the founder of an endowment or his heirs had the right to sue the trustees for the due performance of the trust and to remove them and to appoint new trustees without invoking the aid of S. 92 are no longer good law. (*Mullick and Ross, JJ.*) DILJAN ALI *v.* AKHTAR BEGUM. **1925 P. H. C. C. 194 : A. I. R. 1925 Pat. 544.**

Parties.

——S. 92—*Parties—Transferees of trust property can be impleaded in suit.*

Third party transferees of trust property can be impleaded in a suit under S. 92. 24 Cal. 418, and 28 All. 112 Foll. (*Sulaiman and Boys, JJ.*) RAMRUP GOSHAIN *v.* RAMDHARI BHAGAT

23 A. L. J. 601 : L. R. 6 A (Civ.) 352 : 89 I. C. 40 : A. I. R. 1925 All. 683.

——S. 92—*Parties—Conduct by one relator with Advocate-General's sanction is valid where all can't join but the others must be joined as parties.*

Ordinarily sanction granted to more than two persons cannot be availed of by any two of them without the others. But the death of a single relator or the dullness or dishonesty of one or more of them will not be fatal to the validity of the suit. Therefore in cases of difference between two or more relators the conducting of a suit or an appeal by one of them with the sanction of the Advocate-General will be valid provided the opposing relators are made parties. Moreover, under O. 1, R. 10 the single relator with the sanction of the Advocate-General can apply to the Court to add another relator to the record ; this latter course should be adopted where the number of relators owing to death or other causes falls below two. (*Kennedy and Aston A. J. Cs.*) VISHONDAS *v.* DAMOMAL.

76 I. C. 345 : A. I. R. 1925 Sind 1.

Private Trusts.

——S. 92—*Private trusts.*

S. 92, C. P. Code, is not applicable to private trusts. (*Lord Buckmaster.*) GOPAL LAL SETT *v.* PURNA

C. P. CODE (V OF 1908), S. 92—Private Trusts.

CHANDRA BASAK. **49 I. A. 100 : 16 L. W. 963 : 67 I. C. 561 : 27 C. W. N. 174 : 20 A. L. J. 625 : 36 C. L. J. 57 : 49 C. 459 : 24 Bom. L. R. 937 : A. I. R. 1922 P.C. 253 : 43 M. L. J. 116 (P.C.)**

——S. 92 (9)—*Private trusts--Trust--Distinction between private and public trust.*

In the case of a temple and idol publicly constituted and publicly accessible in which the appearance may be what one may describe as ambiguous, one would expect and ought to insist upon clear evidence of permission given or license given and permission withheld because it is equally true that a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication and by conduct. There is a broad difference when one comes to construe a dedication, between conduct which shows that the owner of the property is giving express permission from time to time to particular individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission that is to say, as of right. A useful test, for a Judge to apply to see whether the evidence satisfied the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a given time, may be definitely ascertained. On the other hand public trust has for its object the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement of a private trust. (*Walsh and Ryves, JJ.*) RAM DAS *v.* MUSAMMAT BASANTI. **20 A. L. J. 789: A. I. R. 1922 All. 519.**

Public Trust.

——S. 92—*Public trust—Acharya of a temple—Constructive trustee—Suit for scheme—Maintainability of.*

A constructive trustee within the meaning of S. 92 would include a person who holds a particular fiduciary position whose obligation as such can be enforced in a court of law. *Held*, on the evidence that the Acharya of the Swaminarayan temple at Vadtal was a trustee to whom S 92 would apply. It is true that the mahant or manager of a matt is not a trustee in the strict sense of the term when used of an express or declared trust. It would be more accurate to describe him as occupying a fiduciary position. This relationship is commonly called an implied trust but the implied trustee is subject to the same obligations as the express or declared trustee. In the case of a matt as in the case of a temple the ownership is in an ideal person. In the one case it is the idol; in the other case it is the office of spiritual head. The individual holding the office is trustee for the office, the gadi or matt or the institution. The succession to the property follows the succession to the office. This is the general law as to mutts. In the case of matts the corpus and the income belongs to the institution though a shebait or head of a matt has a nearer position than a Dharmakarta. (*Marten and Pratt, JJ.*) SARIPAT PRASAD *v.* LAKSHMIDAS. **25 Bom. L. R. 747 : A.I.R. 1924 Bom. 193.**

——S. 92—*Public trust--Mosque—Private institution—Proof.*

A Mahomeden mosque is *prima facie* a public trust and in the absence of proof that it was a private mosque and that the public had no right to congregate therein without special permission, S. 92, C. P. Code, would apply. (*Broadway and Abdul Raoof, JJ.*) TAFAZZAL BEG *v.* MAJID ULLAH.

5 Lah. 59 : 79 I. C. 120 : A. I. R. 1924 Lah. 432.

——S. 92—*Public trust—Section applies.*

If a trust has been created for public purposes of a charitable or religious nature " a suit will lie for settling a "scheme" where the direction of the Court is deemed necessary for the administration of such trust" and the person who is the heir-at-law and in possession of the property which is impressed with the character of trust property has an interest in and is a proper party to such a suit. A suit against a person in possession of trust property does lie though defendant may not be a trustee either by appointment or *de son tort.* (*Spencer and Devadoss, JJ.*) SRI GADICHERLA VENKATANARASIMHA RAO *v.* NYAPATHY SUBBA RAO PANTULU GARU.

17 L. W. 31 : 32 M. L. T. 47 : (1923) M. W. N. 111 : 46 M. 300: A. I. R. 1923 Mad. 376.

——S. 92 (2)—*Public trust—Suit by trustee against co-trustees for accounts.*

A trustee of a public charity can sue his co trustee for an account without the sanction of the Advocate-General or the Collector. (*Ayling, O. C. J., Oldfield, Kumaraswami Sastri, Ramesam and Odgers, JJ.*) APPANNA *v* NARASINGA. **15 L. W. 18 : (1921) M W.N. 833: 30 M.L.T. 1: 45 M. 113: 69 I.C. 304: A.I.R. 1922 Mad. 17 : 41 M. L. J. 608 (F.B.)**

——S. 92—*Public trust—Use by the public, worship by the public and offerings by the public are the obvious indications of a public endowment.*

The indicia of a public foundation must be carefully scrutinised and the existence of the obvious tests such as the use by the public, worship by the public and offerings by the public should be found out for determining whether an endowment is a public or private endowment. (*Das and Macpherson, JJ.*) DEOKINANDAN *v.* BRIJNANDAN. **5 P. L. T. 231 : 76 I. C 89: A. I. R. 1924 Pat. 502.**

Religious Trust.

——S. 92—*Religious trust—Pujary of an idol is a servant and not a trustee.*

Where a person was put in charge as pujary of an idol in a Dharmsala, he is a servant and not a trustee and a suit under S. 92, C. P. Code, is not maintainable against him. (*Rafique and Lindsay, JJ.*) BALDEO DUTT *v.* GOPALJI. **21 A. L. J. 310 : L. R. 4 A. 190 : A. I. R. 1923 All. 247.**

——S. 92—*Religious trust—Public or private—Inference as to.*

Where the origin and founder of a temple are unknown, the facts that members of public are freely admitted, festivals are celebrated in a certain manner, and the like lead to the inference that the temple is a public one, and the inference is not rebutted by the fact that a particular mode of worship is followed, that management follows a particular line of descent in the *pujari* family, etc.. (*Abdur Rahim and Oldfield, JJ.*) PURAVIYA GOUNDAN *v.* POONACHI GOUNDAN. **62 I. C. 655 : 40 M. L. J. 289.**

——S. 92—*Religious trust—Suit by trustee to recover amount due.*

A suit by a temple trustee to recover the amount due by deft. under the terms of the trust cannot be maintained without leave as the suit is not exempt from S. 92, C. P. Code or S. 18, Religious Endowments Act. (*Ayling, Coutts-Trotter and Kumaraswami Sastri, JJ.*) SAMINATHA PILLAI *v.* SUNDARESA PILLAI. **29 M. L. T. 267: 62 I. C. 911: 14 L. W. 238.**

C. P. CODE (V OF 1908), S. 92—Religious trust.

——S. 92—*Religious trust—Suit by chela of mutt for possession of office and emoluments—Forfeiture of office by reigning mahant.*

Where the chela of an asthal claims possession of the office of a mahant and of the properties of the asthal in his own right alleging that the reigning *mahant* has forfeited the office by contracting a marriage and other irregularities, the suit is not one falling within the scope of S. 92, C. P. Code, and the sanction of the Advocate-General is not necessary therefor. (*Das and Bucknill, JJ.*) MAHANT RAGHUNATH DAS *v.* SHEO KUMAR MISSER. **A. I. R. 1923 Pat. 309.**

Removal of Trustee.

——S. 92—*Removal of trustee—Grounds of—Hindu temple.*

The Dharmakarta holds the position of a trustee and as such on assertion of private ownership in trust property and falsification of accounts, he is liable to be removed. (*Lord Shaw.*) SRINIVASA CHARIAR *v.* EVALAPPA MUDALIAR. **43 M. L. J. 536 : 31 M. L. T. 1: 49 I. A. 237 : 24 Bom. L. R. 1214: 21 A. L. J. 250: 27 C. W. N. 317 : 36 C.L.J. 524: L. R. 3 P. C. 213: 45 M. 565 : 68 I. C. 1: 16 L. W. 247 : A. I. R. 1922 P. C. 325 (P. C.).**

——S. 92—*Removal of trustee—Mutwali—Founder of trust—Removal—Power of Court.*

The Court will be guided solely by considerations of the welfare of the trust and will not hesitate to remove a trustee who has purchased the trust property or concurred in a breach of trust or has wrongfully alienated trust property or has been guilty of wanton waste and neglect of duty or shows a total lack of capacity to manage and has from old age left the management in the hands of incompetent persons. This is so even where the mutwali was the founder of the mosque. 21 M. 10; (1918) M. W. N. 552 Ref. (*Mukerjee and Rankin, JJ.*) JOYGUNNESSA BIBI *v.* MAJILULLAH MAMED PROMANIK. **28 C. W. N. 781 : 81 I. C. 850: A. I. R. 1924 Cal. 1024.**

——S. 92—*Removal of trustee—Managers putting forth absolute and adverse title in themselves must be removed.*

Where the managers vigorously contested the suit and put forward and tried to establish their own adverse and absolute title to the *waqf* property they were held liable to be removed from the management of the *waqf*. (*Harrison and Zafar Ali, JJ.*) HARJI MAL *v.* DEVI DITTA MAL. **4 Lah. 364: 77 I. C. 398 · A. I. R 1924 Lah. 107**

——S. 92—*Suit for removal of defendant from office of Pandara Sannadhi and for framing a scheme for mutt—Death of defendant pending—Cause of action if survives as regards relief for framing a scheme* —Res judicata—*Opinion in interlocutory proceedings not necessary for disposal of same if.*

Pending a suit under S. 92, C. P. Code, for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the mutt, the defendant died. The question arose whether the suit abated even with reference to the second relief prayed for, namely, the framing of the scheme. *Held*, that it did not and that the cause of action survived against the representative of the deceased defendant for the purpose of framing a scheme.

The two reliefs are distinct, though the second relief is to a certain extent dependent on the first, because it is necessary to allege a breach of trust in order to constitute the necessary cause of action.

Held, further, that the question was not *res judicata* by reason of the opinion previously expressed by the High Court in an application for the appointment of a

C. P. CODE (V OF 1908), S. 92—Removal of trustee.

receiver in the suit, the opinion being to the effect that the prayer for a scheme was not an independent relief asked for, but was only incidental to the prayer for removal of the defendant. (*Phillips and Krishnan, JJ.*) ARUMUGA THAMBIRAN *v.* NAMASIVAYA PANDARASANNADHI. **48 Mad. 688 : 49 M. L. J. 324. (1925) M. W. N. 569 : 22 L. W. 130.**

——S. 92—*Removal of trustee—Evidence not justifying removal—Trustee may be removed if the interest of institution is being served.*

Once a person accepts an office of trusteeship the one governing consideration in his mind, the ruling motive for all actions, the one principle by reference to which all his acts should be determined, is the interest of the institution and that alone. Persons who, though holding a fiduciary position, allow their actions to be prompted by any other considerations, motives or principles are as much guilty of breach of trust as persons who may be found actually guilty of misappropriating property belonging to the trust. Even though the evidence in a case against the trustees may not be sufficient to warrant, generally speaking, their removal from office on the ground of misconduct or negligence, still their removal may be ordered, if, in the opinion of the Court, such removal is necessary in the interests of the trust to be administered. *Lettersted* v. *Broers*, (1884) 9 A. C. 371 Foll. (*Kumaraswami Sastri, Madhavan Nair and Srinivasa Iyengar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR. **(1925) M. W. N. 505 : A. I. R. 1925 Mad. 1070.**

——S. 92—*Removal of trustee—Temple—Trustees who have not misappropriated any funds and who are interested in maintaining temple should not be removed.*

When it is not proved that the defendants have misappropriated any of the temple income, and when it is found that they are as much interested as any one else in maintaining the temple worship, it will not be for the benefit of the trust to remove them from office and put strangers who have no such interest in their place. 1923 Mad. 163 Foll. (*Spencer, O. C. J. and Srinivasa Iyengar, J.*) A. V. N. RAMASWAMI *v.* V. M. MUTTUKARUPPAN. **A. I. R 1925 Mad. 1011.**

——S. 92—*Removal of trustee—Stranger as a Receiver.*

In a suit under S. 92 the Court has power to appoint a receiver and take the management of the temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. (*Oldfield and Ramesam, JJ.*) C. KUPPUSWAMI MUDALIAR *v.* Y. SUBRAMANIAM CHETTIAR. **41 M. L. J. 545 : 16 L. W. 927 : (1923) M. W. N. 75 : 68 I. C. 565 : A. I. R 1923 Mad. 224.**

——S. 92—*Removal of trustee—Failure to keep accounts—Doubt as to existence of trust.*

Where there is considerable doubt as to whether there is a trust in respect of certain properties, the omission of the alleged hereditary trustees to maintain proper accounts without any wilful default on their part is no ground for their removal. (1918) M. W. N. 786 Foll. (*Spencer and Devadoss, JJ.*) JAKKAM REDDI SESHADRI REDDI *v.* SIR S SUBRAMANIA IYER. **16 L.W. 839 : 74 I. C. 35 : 32 M. L. T. 89 : A. I. R. 1923 Mad. 163.**

——S. 92—*Removal of trustee—Grounds for—Archaka and trustee same individual—Committee of supervision.*

The mere fact that the hereditary trustees of a temple are also its *archakas* is no ground for their removal though it is not desirable that the two offices

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should be combined in the same individual. It is possible to appoint a committee or some other authority to supervise their management. Where the hereditary *archaka* trustees of a Hindu Temple have long been acting *bona fide* in the belief that they were the owners of certain lands subject to the performance of services to the deity and have been appropriating the surplus income of the lands, they are not liable to removal. (*Abdur Rahim and Moore, JJ.*) MUTTEYI SRINIVASACHARYULU *v.* DINAVATI PRATYANGA RAO. **64 I.C. 816 : 30 M. L. T. 101 (H. C.).**

Right to sue.

——S. 92—*Right to sue—Plaintiff's absence of interest in trust—Advocate-General's written consent is useless.*

The Advocate-General's written consent will not entitle a party to sue unless the latter has an interest in the trust. (*Sir John Edge.*) VAIDYANATHA AYYAR *v.* SWAMINATHA AYYAR.

35 M. L. T. 189 : 47 Mad. 884 : 22 A. L. J. 983 : L. R. 6 P.C. 17 : 26 Bom. L. R. 1121 : 40 C. L. J. 454 : 29 C. W. N. 154 : 51 I. A. 282 : 20 L. W. 803 : (1924) M. W. N. 749 : 82 I. C. 804 : A. I. R. 1924 P. C. 221 (2) : 47 M. L. J. 361 (P.C.).

——S. 92—*Right to sue—Descendants in female line from founder of charity have "interest" therein although they are not directly benefited thereby.*

Descendants in the female line from the founder of the charity have an "interest" therein within the meaning of S. 92 although they may not directly obtain any benefit from it. (*Sir John Edge.*) VAIDYANATHA AYYAR *v.* SWAMINATHA AYYAR.

35 M.L.T. 189 : 47 Mad. 884 : 22 A.L.J. 983 : L. R. 6 P. C. 17 : 26 Bom. L. R. 1121 : 40 C. L. J. 454 : 29 C. W. N. 154 : 51 I. A. 282 : 20 L. W. 803 : (1924) M. W. N 749 : 82 I. C. 804 : A. I. R. 1924 P. C. 221 (2): 47 M L. J. 361 (P. C.).

——S. 92 (1) (e)—*Right to sue—Share in the offerings—Scheme already framed.*

A suit by hereditary *pujari* for a share in the offerings made to a deity falls under S. 92 (1) (*e*); but where a scheme has already been framed in respect of the property, the suit is not maintainable and the right procedure is to apply to the Court forming the scheme to give directions to the application of the fund. (*Shah and Crump, JJ.*) SAKHARAM DAJI *v.* GANU RAGHU. **45 Bom. 683 : 60 I. C. 924 : 23 Bom. L. R. 125.**

——S. 92—*Right to sue—Worshippers in a Sikh Dharmsala can sue under S. 92.*

In the case of a temple or a mosque as well as in the case of Dharmsala, persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under S. 92 of C. P. Code. Opinion of *Abdur Rahim, J.* in 42 Mad. 360 Foll. (*Abdul Raoof and Harrison, JJ.*) NARINJAN SINGH *v* KIRPAL SINGH. **5 Lah. 455 : A. I. R. 1925 Lah. 189 (2).**

——S. 92—*Right to sue—Members of caste—"Interest"—Meaning of.*

It is impossible to define with any degree of accuracy what exactly constitutes an interest as contemplated in S. 92 of the Civil Procedure Code. It need not be a direct interest in the sense that only a beneficiary can institute a suit but it must be a real substantial and existing interest. Where a trust provided for the maintenance of the widow and orphans of a certain caste and dedicated a building for the use of pilgrims as a *Dharmsala held*, a suit by some members of the caste living in the *Mohalla* in which the institution was situated could maintain a suit. (*Broadway and Harrison, JJ.*) MURLIDHAR *v.* SULTAN SINGH.

C. P. CODE (V OF 1908), S. 92—Right to sue.

73 I. C. 302 : A. I. R. 1923 Lah. 518.

——S. 92—*Right to sue—Interest—What is—Residence in the neighbourhood—Marriages celebrated in the temple—Occasional worship—If sufficient—Prior suit by trustee to recover possession of lands from archokas—Decision against trustee—If* res judicata *in suit by relators.*

In a suit under S. 92, Civil Procedure Code, the question whether the plaintiffs have an interest in the trust or not is a pure question of fact. Where the plaintiffs live within 2 or 3 miles of the suit temple and the temple owns lands at their place of residence, and the evidence shows that persons belonging to their village attend the temple on important occasions and perform their marriages there, they are persons "interested" within the meaning of S. 92. The mere circumstance that the plaintiffs do not habitually resort to the temple is not sufficient to debar them from exercising the right under the section. 42 Mad. 360: 47 Mad. 884 (P. C.) referred to. Where in a prior suit by the trustee of a temple to recover possession of certain lands from the *archakas*, a decision is given after a real and genuine contest that the lands do not belong to the temple but to the *archakas*, it is *res judicata* in a subsequent suit filed by relators under S. 92, Civil Procedure Code, for recovering possession of the same from the same *archakas*. (*Venkatasubba Rao and Madhavan Nair, JJ.*) KASTURI NARASIMHA SURYANARAYANA *v.* LAKSHMINARASIMHAM. **49 M. L. J. 746 : (1926) M. W. N. 40 : A. I. R. 1926 Mad 267.**

——S. 92—*Right to sue—Temple—Scheme suit—Contributing to funds of temple and worshipping at temple entitles one to sue—Joinder of one who is not entitled does not affect others.*

In a scheme suit in respect of a temple a person who has contributed to the funds of the temple and is a worshipper at the shrine has sufficient interest to be plaintiff. Joining a person not entitled to sue does not affect the right of others who are entitled to sue. (*Spencer Offg. C.J. and Srinivasa Iyengar, J.*) A.V. M. RAMASWAMI *v.* V. M. MUTHUKARUPPAN. **A. I. R. 1925 Mad. 1011.**

——S. 92—*Right to sue—Trustee can be a plaintiff.*

A trustee is a person interested in the trust, and there is nothing in S. 92 to prevent his being a plaintiff. (1919) M. W. N. 522 Foll. (*Wallace and Madhavan Nair, JJ.*) T.A. BALAKRISHNA ODAYAR *v.* JAGANNADA CHARIAR. **48 M. L. J. 534 : 87 I. C. 194 : A I. R. 1925 Mad. 820.**

——S. 92—*Public trust—Evidence—Devadayam—Description of Inam as—Effec.—Scheme suit for and for removal of trustees—Decree in plaintiff's favour owing to default of prosecution of defence—Setting aside of—Jurisdiction—Scheme—Decree for, when granted.*

Whether or not the word "Devadayam" implies a public endowment, there is no doubt that the use of the word "Devadayam" is a very strong piece of evidence that the inam in connection with which the word is used is a public endowment.

Held, on the evidence, that the institution in question was a mosque. Where, in a suit for framing a scheme for a mosque and for removal of the defendants from their trusteeship, it appeared that the defendants had not applied the inam granted for the mosque in the proper manner and that they had denied the title of the mosque to the inam, *held*, that the defendants ought not to be allowed to continue to manage in the same way as before and that it was necessary to frame a scheme for the management of the trust.

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Quaere: Whether when in such a suit a decree is given in favour of the plaintiffs owing to the failure of the defendants to prosecute their defence, the Court has jurisdiction to revise its original order (*Phillips and Venkatasubba Rao, JJ.*) PIR PACHA SAHEB *v.* MAHOMED RUHIMUDDIN SAHEB. **46 M. L. J. 245 : 19 L. W. 174 : (1924) M. W. N. 217 : 77 I. C. 777 : 34 M. L. T. (H. C.) 347 : A. I. R. 1924 Mad. 491.**

——S. 92—"*Persons having an interest in the trust*"—*Insertion of—Object of Legislature—Temple public—Interested persons—Mahomedan worshippers in a mosque.*

The object of the Legislature in inserting the words "Persons having an interest in the trust" in S. 92 was to prevent people interfering by virtue of the section in the administration of charitable trusts merely in the interests of others and without any real interest of their own. Reasons why the word "direct" which occurred in S. 539 of the Civil Procedure Code of 1877 was omitted in subsequent Codes. Public Hindu temples are *prima facie* to be taken to be dedicated for the use of all Hindus resorting to them. To hold that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust will defeat the object with which the Legislature inserted those words in the section. Mahomedans who worship regularly in the mosque of a village have a direct interest in the trust relating to the mosque. (*Sir John Edge.*) VAIDYANATHA AIYAR *v.* SWAMINATHA AIYAR. **47 Mad. 884 : 35 M. L. T. 189 : (1924) M. W. N. 749 : 26 Bom. L. R. 1121 : 22 A. L. J. 983 : 20 L. W. 803 : 40 C. L. J. 454 : 29 C. W. N. 154 : 1 O. W. N. 617 : 82 I. C. 804 : 10 O. & A.L.R. 1076 : A. I. R. 1924 P. C. 221 (2): 47 M. L. J. 361 (P.C.)**

——S. 92—*Right to sue—'Interest'—Meaning of.*

The fact that the plaintiffs belong to the family of the founder and are entitled to succeed to the properties thereof under certain contingencies would naturally give them an 'interest' so as to enable them to bring a suit under S. 92 of the Code. 42 M. 360, Dist. (*Abdur Rahim and Burn, JJ.*) VAITHYANATHA AIYAR *v.* TYAGARAJA AIYAR. **68 I. C. 631 : 41 M. L. J. 20.**

See ON APPEAL. **47 M.L.J. 361 : 47 M. 884 (P.C.).**

——S. 92—*Right to sue—Worshippers—Mahant, if a trustee—Right to remove Mahant from his office of trustee—Jurisdiction of Civil Court.*

Worshippers at a temple are persons having an interest in the religious trust and are entitled to sue under S. 92, C. P. Code. A mahant is a trustee and it is competent to a Court in a suit under S.92, C.P Code, to remove him from the control of a religious or charitable endowment, though it cannot interfere with his special functions as mahant. (*Wazir Hasan and Neave, A.J.Cs.*) SARABJIT BHARTI *v* BABU GAURI NATH KAKAJI. **10 O. & A. L. R. 1 : 10 O. L. J. 619 : 80 I. C. 674 : 27 O. C. 149 : A. I. R. 1924 Oudh 261.**

——S. 92—*Right to sue—A mere worshipper cannot sue for possession of trust properties.*

In respect of properties which form part of a public trust, a mere worshipper cannot have the right of suit to obtain possession of the properties. He has no right to sue for any of the reliefs mentioned in S. 92 of the Civil Procedure Code except in the manner prescribed by that Section. (Case-law referred to.) (*Heald and Chari, JJ.*) SAW DURMAY *v.* BAGGAH SINGH. **3 Rang. 213 : A. I. R. 1925 Rang. 294.**

Sanction.

——S. 92—*Sanction—Sanction granted for one kind of suit.*

A sanction granted for a suit under S. 92 means any suit which may be raised under that section and it is not confined to one of the species of suits that could be raised on the application. (*Lord Dunedin.*) RAJA ANAND RAO *v.* RAMDASS DADURAM. **48 Cal. 493 : 13 L.W. 318 : (1921) M. W. N. 24 : 17 N. L. R. 37 : 25 C. W. N. 794 : 62 I.C. 737 : 30 M. L. T. 194 : 48 I. A. 12 (P. C.).**

——S. 92—*Sanction—Hukdars of a temple—Persons in wrongful possession—Suit for accounts and directions—Necessity for sanction.*

The plaintiffs alleged that they and defendants 11 and 12 were really the Hukdars or some of the Hukdars in the income of a Hindu temple and that defendants Nos. 1 to 10 had been managing wrongfully and appropriating the proceeds of the temple. After referring to their Huk to appropriate the proceeds of the temple they claimed a declaration that they and defendants Nos. 11 and 12 were Hukdars of the temple, an account of the income received by defendants Nos. 1 to 10 and an order that the defendants should make over the income received by them to the plaintiffs. *Held*, that the suit involved an enquiry into and the taking of the accounts of the public trust and that it was not maintainable without the sanction referred to in S. 92. (*Shah, O.C. J. and Fawcett, J.*) NARAYAN *v.* VASUDEO. **26 Bom. L. R. 950 : A. I. R. 1924 Bom. 518.**

——S. 92—*Sanction obtained for some reliefs—Other reliefs joined*

Where plaintiff's suit asks for some reliefs sanctioned by Collector and others not so sanctioned, the whole suit should not be dismissed. It must be tried so far as the relief sanctioned by the Collector is concerned. (*Macleod, C.J. and Crump, J.*) SAKHARAM BALWANT *v.* LAXMAN TRIMBAK. **A. I. R. 1923 Bom. 428.**

——S. 92, O. 1, R. 8—*Sanction—Public pathway—Suit for declaration and injunction.*

The suit for declaration and injunction of pathway is one to which O. 1, R. 8 is appropriate if the Court's permission is taken, the recourse to the Advocate-General being unnecessary. (*Panton, J.*) HARISHCHANDRA SAHA *v.* PARAN NATH CHAKRAVARTY. **69 I. C. 910 : 26 C. W. N. 587.**

——Ss. 92 and 93—*Sanction—Suit omitting some reliefs for which sanction was obtained—Suit not maintainable.*

Where sanction was obtained from the Collector under S. 93, C. P. Code, to file a suit not only for removing the trustee, but also "for declaring the alienations made by him null and void" and for recovering the trust properties from the alienee, but later the plaint omitted the two latter reliefs and asked only for the removal of the trustee, who was made the sole defendant in the suit:

Held, that since the reliefs asked for, in the plaint did not precisely correspond with the reliefs mentioned in the sanction order, or, in other words, since the suit instituted differed from the one, for which sanction was given the plaint should be rejected. 11 M. 148 Foll. (*Madhavan Nair, J.*) MOHIDEEN SAHEB *v.* CHINNA FAKRUDDIN SAHIB. **21 L. W. 71 : 85 I. C. 1045 : A. I. R. 1925 Mad. 636.**

——S. 92—*Sanction—Suit against co-trustee for joint possession, scheme and accounts—Sanction not necessary.*

No sanction is required for a plaintiff suing as a trustee for obtaining a decree for an account against his co-trustees. (*Ayling, O.C.J., Oldfield, Kumaraswami Sastri, Ramesam and Odgers, JJ.*) APPANNA

C. P. CODE (V OF 1908), S. 92—Sanction.

PORICHA *v.* NARASINGHA PORICHA. **15 L. W. 18 : 30 M. L. T. 1 : 45 M. 113 : 69 I. C. 304 : (1921) M. W. N. 833 : A. I. R. 1922 Mad. 17 : 41 M. L. J. 608 (F. B.).**

——S. 92—*Sanction—Suit by trustee against co-trustee for accounts.*

A suit by a trustee against his co-trustee for accounts of management is a suit coming within S. 92, C. P.C., and sanction of the Advocate-General is necessary for the suit. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) GOVINDASAMI KADAVAKAN *v.* KALIAPERUMAL. **(1922) M. W. N. 83 : 66 I. C. 837 : 16 L. W. 155.**

——S. 92—*Sanction—Suit by one trustee against another for accounts.*

A suit by a trustee or trustees of a public charitable or religious trust against a co-trustee for accounts and for delivery of account books and other papers does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate General. 40 B. 539 Foll. 45 M. 113 and 22 B. 496 Ref. (*Kotwal and Prideaux, A.J.Cs.*) AYUB, KAREEM *v.* JAFFAR, AYUB. **6 N. L. J. 209 : 74 I. C. 45 : A. I. R. 1923 Nag. 298.**

——S. 92—*Sanction—Sanction to file suit against some defendants not obtained.*

A suit under S. 92 for declaration and injunction and settlement of a scheme in relation to certain immoveable property which was alleged to be *wakf* and dedicated to the Imams of Islam was filed with the previous sanction of the Collector of Karachi, in the names of two persons as plaintiffs against J and A, sons of M, who are referred to as his heirs and legal representatives. By their written statement defendants alleged that the property in question originally belonged to M and that on his death it became the absolute property not only of his sons, the two defendants, but of his other heirs, who were not specifically named in the written statement but their names were supplied later to the plaintiff's pleader who consented to their being brought on the record as co-defendants and applied for amendment of his plaint which was granted. Beyond this, the plaint underwent no alteration in any shape or form. The sanction of the Collector was however not obtained prior to the application for this amendment. Summonses were issued to the newly added defendants who appeared and adopted the same written statement as filed by the original defendants. When the suit came on for hearing the defendants contended as a preliminary point, that as the sanction of the Collector had not been obtained prior to the amendment of the plaint by the addition of the eight defendants referred to above the suit should stand dismissed, as not being a suit sanctioned by the Collector. *Held*, that the original sanction given by the Collector to the institution of the suit substantially authorised the plaintiffs to sue for a declaration that certain immoveable property was *wakf* and for an injunction against all that claimed an interest therein, and the mere absence of names of some of those interested in the property does not invalidate the sanction already granted or necessitate a fresh sanction before the interested parties could be brought on the record. 36 Bom. 168 Dist. (*Raymond, A. J. C.*) SAYED BACHAL SHAH *v.* JUMA SHAH. **16 S. L. R. 221 : A.I.R. 1923 Sind 35.**

Scheme.

——S. 92—*Scheme — Alteration of—Power of Court.*

Where a Court has sanctioned a scheme for the administration of a religious or charitable trust the Court can vary the scheme from time to time according to

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the exigencies of the case. A clause in a decree settling a scheme giving liberty to the persons interested to apply from time to time for modification of the scheme if necessary does not entitle the Court to vary the rules of succession to the office of high priest which had been determined in the suit according to ancient usage and custom. A variation in this respect cannot be said to be a modification within the meaning of that clause. (*Mookerjee and Rankin, JJ.*) MANADANANDA JHA *v.* TARAKANANDA JHA. **37 C. L. J. 281 : 76 I. C. 220 : A. I. R. 1924 Cal. 330.**

——S. 92—*Scheme—No express provision for removal of trustee—Remedy only by way of suit and not by way of application.*

Where a scheme does not provide expressly for the removal of a trustee, a petition for his removal does not lie. The remedy is only by way of a fresh suit. (*Spencer and Madhavan Nair, JJ.*) SIVAN PILLAI *v.* VENKATESWARA AIYAR. **22 L. W. 796.**

——S. 92—Scheme— Powers given under—Order of Court in exercise of these powers, whether an order in execution and as such appealable under S. 47. SIVAN PILLAI *v.* VENKATESWARA AIYAR. **22 L. W. 796.**

——S. 92—*Scheme — Hindu temple—Grant of land—Lands burdened with service—Absolute grant to temple—Dealing by trustees—Evidentiary value of Scheme—Framing of—Provision for permanent supervision and control by Court—Undesirability of.*

Where the question was whether a certain land was granted to a Hindu temple as an endowment or to certain Archakas (who were also its trustees) burdened with the service of maintaining the worship of the temple, *held*, that having regard to the inam title deed describing the lands as "Devadayam" and the other documentary evidence in the case the lands were granted to the deity as an endowment and not to the Archakas. The evidence of user and enjoyment, however long uninterrupted and unquestioned, would be evidence of the grant only in the absence of any reliable or cogent evidence with regard to the terms of the grant itself or in the case of any ambiguity in the grant. The fact that during a long period of time the Archakas dealt with the properties as if they were their own, and partitioned them amongst themselves is not of much evidentiary value in the absence of any parties or persons interested in setting up the rights of the temple as distinguished from the Archakas. A scheme framed under S. 92 of C. P. Code for a Hindu temple provided *inter alia* for vacancies in the office of trusteeship being filled up by the court, for the appointment of an auditor by the court annually, and for the court sanctioning mortgages or leases of temple properties and a further clause gave general liberty to apply to the court with regard to any matter arising out of the scheme or modifications thereof. *Held* that the provisions were objectionable both in principle and in practice Courts should not assume to themselves the continued supervision of institutions for the management of which they are called upon to frame schemes. (*Spencer and Srinivasa Aiyangar, JJ.*) NARAYANAMURTHI *v.* ACHAYYA SASTRULU. **47 M. L. J. 714 : 20 L. W. 687 : A. I. R. 1925 Mad. 411.**

——S. 92 and O. 22, R. 3—*Scheme Suit—Appeal—Death of one of the relator appellants—Effect of—Abatement.*

Where during the pendency of an appeal against a decree in a suit under S. 92, C. P. Code, one of the plaintiff-appellants dies there is no abatement resulting from such death. 40 M. 110 : 41 M. 237 followed. 37 All. 296 at 298 dissented from. An

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application for dismissal of the appeal on the ground the appeal had abated by reason of such death does not come within the scope of O. 22, R. 3, C. P. Code. (*Spencer and Srinivasa Iyengar, JJ.*) SAYYED GULAM GOUSE SHA SAHIB KADIRI *v.* DOST MUHAMMAD KHAN SAHIB. **47 M. L. J. 745 : 20 L.W. 882: A.I.R. 1925 Mad. 244.**

——**S. 92**—*Scheme under, is to be interpreted like an Act, and where District Court is referred to it is not the person but the tribunal that is meant.*

No distinction can be drawn between the interpretation of an Act, and that of a scheme under S. 92, C. P. Code. District Court in such a scheme means not the person but the tribunal. (*Oldfield and Venkatasubba Rao, JJ.*) M. RANGANATHA *v.* KRISHNASWAMI. **47 M. 139 : 18 L. W. 237 : (1923) M. W. N. 664 : 75 I. C. 189 : A. I. R. 1924 Mad. 369.**

——**S. 92**—*Scheme—Remedy not asked in suit but given in the Scheme cannot be or need not be asked in execution and order thereon is not appealable under S. 47, C. P. Code.*

When the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for execution of the decree or that the order granting or refusing it is appealable as one passed under S. 47. When a suit is instituted in the words of S. 92, C. P. Code, to obtain a decree settling a scheme the relief must, so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. (1923) M. W. N 133 and (1923) M. W. N 78, Foll. ; 24 B. 45, Diss. (*Oldfield and Venkatasubba Rao, JJ.*) M. RANGANATHA *v.* KRISHNASWAMI.
47 M. 139 : 18 L. W. 237 : (1923) M.W.N. 664 : 75 I. C. 189 : A. I. R. 1924 Mad. 369.

——**S. 92**—*Scheme—Kattalais—Management — Right to frame a scheme.*

A scheme should be framed where there has been gross mismanagement of the affairs of the temple and some scheme for the co-ordination of the various Kattalais and for some control over the various Kattalais in so far as it may ensure the harmonious working of the Kattalais, wherever they have to co-operate, is necessary. It cannot be said that the income of the various Kattalais belonging to a temple could be mixed up and utilised for all the purposes of the temple indiscriminately. These trusts are somewhat analogous to temple service inams, just as the latter are different from inam properties belonging to a temple, being granted to office holders on condition of rendering services in a temple and do not belong to the idol, though the idol may be interested in the rendering of the services. Similarly the incomes of the Kattalais do not belong to the idol though the idol is interested in the proper performance of the distinct duties attached to each Kattalai. A Kattalai is a distinct endowment "under a separate trustee to which specific items of expenditure are assigned as legitimate charges to be paid therefrom." Where there are numerous Kattalais a scheme has to be framed which will ensure the harmonious working of the Kattalais, when they have to co-operate in the Pagoda service, and prevent the embezzlement of the funds of the Kattalai or their diversion by the trustees contracting debts. It is very necessary that the scheme should contain stringent prohibitions against the borrowing or lending of money by the trustees from or to the trust funds, or from one Kattalai to another Kattalai. The preparation of a budget, the proper keeping of accounts in which the income and expenditure of the Kattalais may be separately shown and the periodical audit of those accounts are matters most essentially to be provided for in the regulations in order to fix the trustees with responsibility for the due performance of their trusts and to avoid waste and indebtedness. The need for supervision and co-ordination by a controlling and inspecting body is also apparent. (*Spencer and Ramesam, JJ.*) MANIKKAVACHAKA DESIKA GNANA SAMBANDA PANDARA SANNADHI *v.* VAITHILINGA MUDALIAR. **18 L. W. 247 : 74 I. C. 115 : A. I. R. 1924 Mad. 168.**

——**S. 92**—*Scheme—Successive suits—Maintainability of—Application for amendment of scheme.*

When a scheme drawn up by a Court contains a provision permitting parties or persons interested in the religious institution to apply to the Court for directions and for modifications to be made in the scheme already existing ; the proper remedy for defects discovered in the original scheme is to apply by petition to the Court that framed the scheme and not to file a regular suit : *Quaere* Whether Courts have inherent powers to alter schemes without a fresh suit being brought for the purpose when there is no provision for alteration in the scheme ? 24 B. 45 : 43 I. C. 772 Ref.

The mere fact that in a prior suit a prayer for the settlement of a scheme was not granted will not prevent a renewed attempt being made by a suit to have a scheme framed when the occasion arises at a later date. 36 M. 364 : 37 C. 870 Ref. (*Spencer and Krishnan, JJ.*) GOVINDASAMI NAIDU *v.* UCHAPPA GOUNDAN. **(1922) M. W. N. 477 : 70 I. C. 579 : A. I. R. 1922 Mad. 413.**

——**S. 92**—*Scheme—No limitation.*

Where a suit is brought by plffs. not in assertion of their individual rights but on behalf of the general public who are interested in the institution for the settlement of a proper scheme of management of the charities and for other relief there is no bar of limitation. (*Spencer and Devadoss, JJ.*) GOPU NATARAJA CHETTY *v.* RAJAMMAL. **43 M. L. J. 448 : (1922) M. W. N. 464 : 31 M. L. T. 125 (H. C.) : 16 L. W. 122 : 69 I. C. 15 : A. I. R. 1922 Mad. 394.**

——**S. 92**—*Scheme—Relief under Rel. Endowments Act—S. 14 differs from S. 92 C. P. Code—Scheme can be made only under S. 92, C. P. Code.*

The reliefs granted under S.14 of Act XX of 1863 are slightly different from those accorded under S. 92 of the C. P. C. The power of appointing a new trustee and of making a scheme for the administration of the property is restricted to S. 92 only. (*Mullick and Ross, JJ.*) DILJAN ALI *v.* AKHTAR BEGUM.
1925 P. H. C. C. 194 : A. I. R. 1925 Pat. 544.

——**S. 92**—*Scheme -- Framing of—Powers of Court—Necessity for scheme—Arrangements made by the founder—Decree—Form of.*

There is no warrant for the proposition that the Court in framing a scheme under S. 92, C. P. Code, had no power to depart from the arrangement contemplated by the author of the trust. The institution of a suit under S.92, C.P Code, attracts the jurisdiction of the Court and the Court has complete power to make such appointment as it considers proper in the circumstances even though such appointment may involve a departure from the arrangement contemplated by the author of the original constitution of the trust. There is no legal restriction in the power of the Court ; but although there is no restriction the Court ought not to depart from the arrangement contemplated by the settler except for a very strong reason. The mere fact that the trust deed does not contemplate a scheme does not mean that a scheme should not be framed

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in the case if the Court thinks that one is necessary. In a suit for the administration of a public trust it is necessary that the decree should give liberty to the parties to apply. The effect of making such a provision is that the suit is kept alive and it is possible for the parties to take the direction of the Court from time to time and so often as may be necessary. (*Das and Bucknill, JJ*) MAHOMED WAHEB HUSSAIN *v.* ABBAS HUSSAIN.

4 Pat. L. T. 326 : 71 I.C. 280 : A. I. R. 1923 Pat. 420.

——S. 92—*Scheme—Majority of worshippers of certain denomination—Number of trustees.*

Where it was found in a scheme suit that the majority of worshippers were of a certain denomination, it is fair that a majority of the trustees also are from that denomination. (*Robertson, C. J. and Lentaigne, J.*) FAZAL RAHMAN *v.* GULAM HOSSAIN ACHA. **2 Bur. L. J. 208 : 76 I. C. 788 : A. I. R. 1924 Rang. 134.**

Scope of.

——S. 92—*Scope of.*

A declaration that the properties specified are *waqf* properties is clearly within S. 92. 28 All. 112 Foll. (*Sulaiman and Boys, JJ*) RAMRUP GOSHAIN *v.* RAMDHARI BHAGAT. **23 A. L. J. 601 : L. R. 6 A. (Civ.) 352 : 89 I. C. 40 : A. I. R. 1925 All. 683.**

——S. 92—*Scope of—Suit for possession of properties from trustees removed from office.*

S. 92, C. P. Code, does not apply to a suit in which plaintiff claims to be appointed as lawful trustee and as such seeks to recover possession of the properties of the trust from the former trustees who are alleged to have been properly dismissed from office and who are therefore trespassers. (*Walsh and Ryves, JJ.*) INAYAT HUSSAIN *v.* FAIZ MAHOMED. **45 A. 335 : L. R. 4 A. 142 : 21 A.L.J. 191 : 71 I. C. 767 : A.I.R. 1923 All. 319 (1).**

——S, 92—*Scope of—Idol—Suit against trespasser on property—Sanction—Necessity for.*

A suit by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income is not governed by S. 92. C. P. Code. It is not a correct proposition to say that an idol who is being defrauded by his lawful guardian or trustee might be treated by a court of law on the footing of an infant and that any person claiming a benevolent interest in the fortunes of the said idol, would be permitted to maintain a suit in the name and as the next friend of the injured idol. (*Piggott and Walsh, JJ.*) DARSHAN LAL *v.* SHIBJI MAHARAJ BIRAJMAN. **20 A. L. 45 A. 215 J. 977 : L. R. 4 A. 50 : 71 I. C. 420 : A. I. R. 1923 All. 120**

——S. 92—*Scope of—Suit for removal of trustee—Private right to office.*

S. 92, C. P. Code, provides for the institution of a representative suit by the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme by which the object of the trust can be properly carried out. A dispute between rival claimants to the office of trustee does not fall within the section. In order to bring a case within S. 92, C. P. Code, the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust upon a cause of action alleging a breach of trust or necessity for directions as to its administration against a trustee of such express or constructive trust. Such a trustee may be a *de jure* trustee or a trustee *de son tort*. (*Lindsay and Kanhaiya Lal, JJ.*) PUTTU LAL *v.* DAYA NAND. **20 A.L.J. 712: L.R. 3 A. 455: 44 A. 721: 68 I. C. 786 : A. I. R. 1922 All. 499.**

C. P. CODE (V OF 1908), S. 92—Scope of.

——S. 92—*Scope of—Suit for declaration that defendants are not trustees of a temple.*

A suit for a declaration that defendants are not properly appointed trustees of a temple and for an injunction appropriate to that declaration does not fall within the purview of S. 92. (*Macleod, C. J. and Shah, J*) NILKANTH *v.* RAMAKRISHNA. **23 Bom. L. R. 876 : 64 I. C. 353 : 46 Bom. 101 : A. I. R 1923 Bom. 67.**

——S. 92—*Scope of—Defendant claiming under trust—Plaintiff challenging defendant's appointment as trustee—Can sue under S. 92.*

Where the defendant claims under a trust a suit under S. 92 is maintainable even though the plaintiffs challenge the appointment of the defendant as a trustee. 33 C. 789 Foll. (*Chatterjee and Chotzner, JJ.*) ABDUS SAKOOR *v.* ABDUL RAHIM. **A. I. R. 1925 Cal. 1106.**

——S. 92—*Scope of—Suit for a declaration of public right of way—Permission of Court obtained under O. 1, R. 8—Effect*

S.92, C.P.Code, need not be resorted to where a suit for a declaration of public right of way is filed with the permission of Court obtained under O. 1, R. 8. (*Panton, J*) HARISH CHANDRA SAHA *v.* PRAN NATH CHAKRABARTHY. **69 I. C. 910 : 26 C. W. N. 587.**

——S. 92—*Scope of—Suit for possession and declaration—Sanction when necessary.*

Where the worshippers of a temple sue for possession of temple property, the suit is not maintainable as *prima facie*, it is only the trustees who could claim that relief. They can however sue for a declaration that it is trust property and to such a suit S. 92 will not apply. (*Broadway and Abdul Raoof, JJ.*) SALIG RAM *v.* BASSAO MAL. **67 I. C. 320 (2) : 1 Lah. L. J. 150.**

——S. 92—*Scope of—Sanction of Advocate-General obtained—Procedure under O. 1, R. 8, need not be followed—C. P. Code, O. 1, R. 8.*

It cannot be seriously contended that the provisions of O. 1, R. 8, are not merely of an enabling character. The condition precedent to the proper institution of a suit under S.92,C.P. Code, is the obtaining of the sanction of the Advocate General and no other condition for the maintainability of a suit is to be found in the Code. Previous to the amendment of S. 92 (formerly S. 539 in the previous Code) by the Civil P. C. of 1908 no doubt the procedure under O. 1, R. 8 (formerly S. 30) was, in suits instituted otherwise than with the sanction of the Advocate-General or the Collector, deemed necessary in order to render the decree in the suit binding on all parties interested in or concerned in any manner with the trust But the amendment of the law embodied in the present S.92, C. P. Code, has obviated the necessity for a representative suit. (*Kumarasami Sastri, Madhavan Nair and Srinivasa Iyengar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR. **(1925) M. W. N. 505 : A. I. R. 1925 Mad. 1070.**

——S. 92—*Scope of—Decree under S. 92 binds all persons interested in the trust—C. P. Code, S. 11.*

Any decree passed in a suit under S. 92, C.P. Code, is binding not only on the trust and the trustees, but also on all the worshippers at the temple. (*Kumarasami Sastri, Madhavan Nair and Srinivasa Iyengar, JJ.*) S. VEERARAGHAVA ACHARIAR *v.* V. PARTHASARATHY IYENGAR. **(1925) M. W. N. 505 : A. I R. 1925 Mad. 1070.**

——S. 92—*Scope of.*

S. 92 speaks of " any express or constructive trust

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created for public purposes of a charitable or religious nature". It does not signify whether it is a charitable nature or of a religious nature provided that it is one of these two and also that it is a public purpose. (*Spencer and Devadoss, JJ.*) SRI GADICHERU VENKATANARASIMHA RAO *v.* NYAPATHY SUBBA RAO PANTULU GARU. **17 L. W. 31 : 32 M. L. T. 47 : (1923) M. W. N. 111: 46 M. 300 : A. I. R. 1923 Mad. 376.**

——S. 92—*Scope of—Suit by trustee against dismissed trustee for possession.*

S. 92 only governs suits for the vindication of the rights of the public in public charitable trusts and not suits for vindicating the plaintiff's right of management and getting possession for the purpose. Further a suit by a trustee against a person whom he alleges to have been lawfully dismissed is nonetheless outside the scope of the section because it asks for an account of the trust money and payment of the amount due. 33 Cal. 789, foll. (*Napier and Odgers, JJ.*) VENKU *v.* DORAISAMI. **14 L. W. 38 : 62 I. C. 761 (1) : (1921) M. W. N. 439.**

——S. 92—*Scope—Arbitration—Private rights—Dispute as to jurisdiction to try suit under—District Court—C. P. Courts Act, S. 17.*

A suit under S. 92, C. P. C. does not concern the private rights of the parties thereto and consequently the suit cannot be referred to arbitration. Under S. 17 of the C. P. Courts Act the District Court is the principal Civil Court of original jurisdiction and alone has jurisdiction to try suits under S. 92, C. P. Code. Where the law has given jurisdiction to determine a civil dispute to specific tribunals the jurisdiction of other tribunals is excluded. (*Prideaux and Kotwal, A.J.Cs.*) GANOBA *v.* NARAYAN. **6 N. L. J. 7 : 72 I. C. 1016 : A. I. R. 1923 Nag. 112.**

——S. 92—*Scope of—Suit between trustee and non-trustee for recovery of trust property and for submission of accounts—Preliminary formalities are unnecessary.*

A suit by an admitted trustee against one who is not a trustee for the recovery of trust property and submission of accounts is cognisable by the ordinary Civil Court without any preliminary formalities mentioned in S. 92. (*Mullick and Ross, JJ.*) DILJAN ALI *v.* AKHTARI BEGUM. **1925 P. H. C. C. 194 : A. I. R. 1925 Pat. 544.**

——S. 92—*Scope of—Suit for establishing right to office of* Mutwalli—*S. 92 does not apply.*

A suit for an establishment of the right to act as *mutwalli* is cognisable by the ordinary Civil Court without any preliminary formalities. But it is otherwise where the appointment of a trustee has been recognised and it is sought to remove him for a breach of trust. (*Mullick and Ross, JJ.*) DILJAN ALI *v.* AKHTARI BEGUM. **1925 P. H. C. C. 194 : A. I. R. 1925 Pat. 544.**

——S. 92—*Scope of—Public trust—Denial of trust and assertion of private title by trustee—Power of Court.*

In order to make S. 92, C. P. Code, applicable it is not necessary that the existence of the trust for public, charitable or religious purposes alleged by the plaintiff should be admitted by the defendant. If the trust is disputed, the question falls to be decided by the Court upon evidence. 2 C. L. J. 431 ; 9 I. C. 358 Ref. Where a trustee not only mismanages the trust property but sets up a title adverse to the trust there is no reason why S. 92, C. P. Code, should not be invoked. (*Jwala Prasad and Kulwant Sahay, JJ.*) DEO SARAN BHARTHI *v.* DEOKI. **3 Pat. 842 : 5 Pat. L. T. 305 : 80 I. C. 980 : A.I.R. 1924 Pat. 657.**

——S. 92—*Scope of—Dispute about managership of temple—If within section.*

A suit between two rival claimants as to the right of management of the temples does not fall within S. 92, C. P. Code. (*Das and Macpherson, JJ.*) DEOKINANDAN *v.* BRIJ NANDAN JHA. **5 Pat. L. T. 231 : 76 I. C. 89 : A. I. R. 1924 Pat. 502.**

——S. 92—*Suit by reversioner to recover trust property alienated by the founder's wife, during the lifetime of the founder's wife—Maintainability without sanction of the Advocate-General.*

The founder of a trust had appointed himself as manager, during his lifetime and his heirs after his death. The founder's wife who succeeded to the managership after the founder's death alienated some of the trust properties. The reversioner to the estate of the founder sued to recover the alienated properties, during the lifetime of the founder's wife. *Held*, that the suit was not maintainable, as the plaintiff could not claim to be the trustee during the lifetime of the founder's wife, and had not obtained the sanction of the Advocate-General to remove her from the trusteeship by a suit under S. 92, C. P. C. and appoint another trustee who may then sue for recovery of the alienated properties. (*Spencer and Madhavan Nair, JJ.*) RAMASAMI GOUNDAN *v.* SINGAPERUMAL KADAVUL. **22 L. W. 701.**

Trespasser.

——S. 92—*Trespasser—Though defendants are not proved to be even* de facto *trustees, still suit for appointing new trustee lies—The new trustees can elect trespassers by suit—Trespassers, though not necessary parties, are not improper parties.*

If the plaintiffs, after their evidence is closed, succeed in establishing that the defendants entered into possession as trustees, or have been acting *de facto* trustees of these properties, and that the properties are trust properties, then there can be no doubt that the suit under S. 92 would be maintainable. On the other hand, if they altogether fail to establish such a character of the possession of the defendants, even then they have a right to ask the District Judge in case they prove that the properties are trust properties, to appoint new trustees, because no trustees exist. It is not incumbent on the plaintiffs to first bring a representative suit to recover possession of the properties under O. 1, R. 8, C. P. Code, and then, having obtained possession, ask the Judge to appoint trustees for the same. Where either a breach of trust has been committed, or where the direction of the Court is necessary for the administration of such trust, persons interested in the trust can ask the Court to appoint new trustees. After such new trustees have been appointed, it would be open to them to take steps to recover possession of the property from the hands of the trespassers who may hold the properties. In a suit under S. 92 it is within the jurisdiction of the Court to first decide the question whether the property in dispute is or is not trust property. If the Court has jurisdiction to decide this question, it is obvious that such a question ought to be decided in the presence of persons who are interested in denying the trust. If trespassers in possession are made defendants they cannot be said to have been improperly impleaded, though they might not be absolutely necessary parties. Even if it be held that the properties are trust properties and that the defendants are mere trespassers and have no right to retain possession thereof, the Court cannot order their ejectment. But there can be nothing to prevent the Court

C. P. CODE (V OF 1908), S. 92—Trespasser.

from declaring that the properties are trust properties, and they vest in the newly appointed trustees. 19 A. L. J. 236, Dist ; 41 Cal. 749 ; 33 All. 660, Expl.; 35 Bom. 470, Foll. (*Sulaiman and Daniels, JJ.*) LACHMAN PRASAD *v.* MUNIA.

23 A. L. J. 795 : L. R. 6 A. (Civ.) 405 : 89 I. C. 639 : A. I. R. 1925 All. 759.

——— **S. 92**—*Trespasser—No proof that heirs of trustee were appointed as trustees.*

Where there is no allegation that the heirs of trustees were themselves appointed trustees or they took possession of the property as trustees, a suit against them for breach of trust is not maintainable if they are mere trespassers and should be proceeded against in ejectment. (*Ryves and Gokul Prasad, JJ.*) MAHAMED BUX *v.* MT. PIARI. **62 I. C. 744 : 19 A. L. J. 236.**

——— **S. 92**—*Trespasser—Suit against—Section is not applicable.*

A suit by a trustee for recovery of possession of trust properties against trespassers does not fall under S. 92, C. P. Code (*Le Rossignol and Martineau, JJ.*) GANGA PURI *v.* MOHAN LAL.

73 I. C. 645 : 4 Lah. 295 : 5 Lah. L. J. 480 : A. I. R. 1924 Lah. 131.

Trustee *de son tort.*

——— **S. 92**—*Trustee* de son tort—*Suit against—Maintainability—Advisory committee not in the possession of trustees.*

A suit under S. 92, C. P. Code, is maintainable against a trustee *de son tort.* A Hindu testator set apart certain properties for a charity and appointed his widow trustee of the charity. He directed that after her death, the person to whom she gave her own property should be trustee. The widow died intestate and the nephews of the testator entered into possession of the endowed property as being the nearest reversioners to the widow. *Held*, that on failure of the widow to nominate a trustee, the trusteeship of the charity reverted to the heirs of the founder and that the nephews of the testator must be regarded as trustees. Consequently the nephews were liable as trustees in a suit instituted under S. 92, C. P. Code, for their removal and possession and for accounts. (*Mukerjee and Dalal, JJ.*) BEHARI LAL *v.* SHIVA NARAIN. **22 A. L. J. 866 : L. R. 5 A. 697 : A. I. R. 1924 All. 884.**

——— **S. 92**—*Trustee* de son tort—*Suit against—Maintainability of.*

A suit under S. 92, C. P. Code, is maintainable against a trustee *de son tort* who has without title chosen to take upon himself the character of trustee. (*Rafique and Lindsay, JJ.*) RAM BILAS *v.* NITEA NAND. **44 A. 652 : L. R. 3 A. 365 : 69 I. C. 990 : 21 A.L.J. 105 : A.I.R. 1922 All. 542 (2).**

——— **S. 92**—*Trustee* de son *tort—Relief can be granted against but not against alienees of trust property.*

A suit under S. 92 will lie against a trustee *de son tort* who is a trustee *de facto* though not *de jure* but no relief can be granted against alienees of trust property in a suit under S. 92. (*Phillips and Venkatasubba Rao, JJ.*) P. N. MALKAJIGUNDA *v.* RAMASWAMI CHETTIAR. **78 I. C. 950 : A. I. R. 1925 Mad. 212.**

——— **S. 94 and O. 39**—*Inter-relation.*

S. 94 is governed by O. 39. (*Phillips, J.*) V. VARADACHARLU *v.* K. NARASIMHA CHARLU.

23 L. W. 85 : (1925) M. W. N. 886 : A. I. R. 1926 Mad. 258.

——— **S. 95**—*Suit for damages for attachment before judgment on insufficient grounds—Attachment not effected—No cause of action exists.*

Mere procuring of an attachment before judgment does not of itself afford a cause of action for damages. It is an essential part of the cause of action in a suit for damages, for the abuse of civil proceedings that the proceeding in which the process complained of is taken out, should have terminated in favour of the plaintiff or that the particular process complained of has been superceded or discharged. S. 95 is applicable only where the attachment is in fact effected and does not apply to a case where the attachment is applied for and has not in fact been levied. The remedy by way of a suit is allowed where the aggrieved party claims a larger compensation than Rs. 1,000. But that does not make the basis of the suit any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, excepting that in a suit something more is required than under S. 95 and not that something less is required, namely, that under S. 95 it is sufficient to prove that attachment was applied for on insufficient grounds, while in a suit the paintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause. 39 Mad. 952 Rel. on. (*Taraporewala, J.*) KEDARNATH TULSIDAS *v.* BEHARILAL JAGAMAL. **87 I. C. 1026 : 27 B. L. R. 525 : A. I. R 1925 Bom. 357.**

——— **S. 95**—*Claim for compensation—When to be awarded—Interim injunction.*

It is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found there was sufficient grounds for making it. The proper stage for making such an application would be only when the suit is heard and until then, it would be premature. (*Ramesam, J.*) CHINTAMANENI VENKATAPAYYA *v.* VENKATAPAYYA. **17 L. W. 150 : 71 I. C. 450 : A. I. R. 1923 Mad. 352.**

——— **S. 95**—*Wrongful attachment— Trespass to goods—Malice—Reasonable and probable cause—Right to damages.*

A judgment-creditor who attaches property which does not belong to his judgment-debtor but to a third person, commits a trespass for which he is responsible in damages, even though he may have acted without malice and mistakenly. 8 B. H. C. R. 177 : 3 Beng. R. 413, Ref.: 32 M. 170 : 35 M 598 : 45 M. 227, Ref. (*Beasley, J.*) K. A. ASSAN MOHOMED *v.* KADERSA ROWTHER, **2 Rang. 181 : A. I. R. 1924 Rang. 302.**

——— **S. 95 (2)**—*Whether a separate suit for damages for tortious temporary injunction lies—Whether proof of malice necessary.*

A separate suit for compensation in respect of tortious temporary injunction lies. (16 I. C. 443 followed.) Malice can be properly inferred on proof that there were no sufficient grounds for an application for temporary injunction and that the plaintiff has sustained some substantial injury ; 186 P. R. 1895, referred to : 16 I. C. 443 followed. (*Abdul Raoof and Abdul Qadir, JJ.*) L. EVANS *v.* ARTHUR MINCK.

45 P. L. R. 1922 : A. I. R. 1922 Lah. 303.

——— **S. 96**—*Consent decree—Parties agreeing to produce only documentary evidence and to be baund by the decision thereon—Decision is not open to appeal.*

Where in pursuance of an agreement between the parties the Court proceeds outside its ordinary jurisdiction, the proper inference would be that there was to be no appeal from the decision as there would be in the case if the trial were in the ordinary way. [*Burges* v. *Mortan* (1896 *A. C.* 136) *Rel on.*] But it does not

follow that unless the Court has proceeded outside its ordinary jurisdiction a right of appeal always exists. Where the parties to a suit agreed that whatever decision the Court arrives at on the documentary evidence shall be accepted and agreed to by them :

Held, that neither of them can go back upon that agreement and challenge the decision in appeal. (*Sulaiman, J.*) BALLABH DAS *v.* SHRI KISHEN. **L. R. 6 A. (Civ.) 541 : 89 I. C. 586 : A. I. R. 1926 All. 90.**

——**S. 96**—*Order determining a party's right to be the representative of a deceased party is decree and appealable.*

Sub-section (3) of S. 47 of the present Code in express terms includes a question arising between the parties as to whether any person is or is not representative of a party, and in view of S. 2 of the Code the determination of such a question as between the decree-holder or a person claiming to represent the decree-holder and the judgment-debtor amounts to a decree and is appealable as such. 36 All. 423, Ref. to. 20 All. 539, Overruled. (*Daniels, J.*) PEARE LAL *v.* JHABBA LAL. **L. R. 5 A. (Civ.) 668 : 82 I. C. 604 : A. I. R. 1925 All. 66.**

——**S. 96**—*Appeal—Costs—Order as to—Appealability of.*

An order as to costs is within the discretion of the trial Court and unless some question of principle is involved therein, an appeal will not be entertained from the order. (*Sulaiman, J.*) LACHHMI NARAIN *v.* MT. BRIJ RANI **L. R. 5 A. 573 : 80 I. C. 39 : A. I. R. 1924 All. 794.**

——**S. 96 and O. 23, R. 3**—*Order recording compromise—Decree passed thereafter—Appeal filed afterwards from order recording compromise is incompetent —C. P. Code, S. 11.*

Where a preliminary decree or order is followed by a final decree, appeal does not lie against the former after the final decree is passed. An appeal from an order recording a compromise under O. 23, R. 3 filed after a decree is prepared in pursuance of that order in accordance with the provisions of R. 3, is incompetent : A. I. R. 1925 Cal. 218 ; 36 Cal. 726 : 32 Cal. 1023 and 17 C. W. N. 868, Foll.: 10 M. I. A. 203 (P. C.) Ref. (*Suhrawardy and Cuming, JJ.*) BENGAL COAL CO., LTD. *v.* APCOR COLLIERIES, LTD. **29 C. W. N. 928 : A. I. R. 1926 Cal. 412.**

——**S. 96**—*Order under—Appeal if and when lies.*

If the determination of a question under O. 21, R. 66 is also an order passed under S. 47, *e. g.*, there had been a judicial adjudication as to the boundaries binding on parties in a subsequent proceeding and finally determining the rights of the parties, an appeal lies against the order. (*Pearson and Graham, JJ.*) DEVENDRA NATH BASU *v.* KAILASH CHANDRA KALU. **80 I. C. 861 : 29 C. W. N. 556 : A. I. R. 1925 Cal. 318.**

——**S. 96**—*Preliminary Decree—Determination of matters in controversy—Decree not drawn up—Appeal.*

Where during the trial of a suit judgment is given against some of the parties on a certain date but no decree is passed until the whole suit is disposed of, the time for purposes of appeal runs from the date of the decree and not from the date of the interlocutory judgment. (*Mookerjee and Rankin, JJ.*) IRRANI MUNDLE *v.* NAIMUDDIN SARDAR. **39 C. L. J. 251 : 81 I. C. 527 : A. I. R. 1924 Cal. 1006.**

——**S. 96**—*Decree refusing exclusive but awarding joint possession aggrieves plaintiff.*

When a person is compelled to hold land jointly with another who he alleges is not his co-sharer, he can hardly be held to be not aggrieved by the decree. (*Suhrawardy and Graham, JJ.*) JNANENDRA NATH *v.* DUKHIRAM SANTRA. **28 C.W.N. 865 : 40 C. L. J. 90 : 82 I. C. 386 ; A. I. R. 1924 Cal. 850.**

——**S. 96**—*New plea of jurisdiction—Facts not in dispute.*

A question of jurisdiction which depends on no disputed facts can be raised for the first time in appeal. (*Mookerjee and Rankin, JJ.*) RAJENDRA NARAIN CHOWDHURY *v.* SATISH CHANDRA CHOWDHURY. **50 Cal. 948 : A. I. R. 1924 Cal. 233.**

——**Ss. 96 and 100**—*Order for re-trial in appeal against dismissal of suit.*

Where an appellate court set aside the decree of the lower court and directed a re-trial of the suit with reference to the entry in the record of rights, published subsequently to the decree and such other evidence as may be adduced by the litigants : *held* such an order is made in the exercise of the inherent power of the court and not under O. 41, R. 3 and as such an appeal is competent under S. 96 read with S. 100. (*Mookerjee and Chotzner, JJ.*) BHAIRAB CHANDRA DUTT *v.* KALI KUMAR DUTT **37 C. L. J. 491 : 71 I. C. 453 : 74 I. C. 1038 : A. I. R. 1923 Cal. 606.**

——**S. 96**—*Findings of fact of trial Court—Interference of Appellate Court.*

It is a salutary rule that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the findings of fact of the Trial Judge should not be lightly disregarded but it is otherwise where the question depends upon admitted surrounding circumstances and the Trial Court has not sifted the evidence with reference thereto. (*Mookeree and Buckland, JJ.*) PRASANNA MAYI *v.* BAIKUNTHA NATH. **34 C. L. J. 384 : 25 C. W. N. 779 : 66 I. C. 782 : 49 Cal. 132 : A. I. R. 1922 Cal. 260.**

——**S. 96**—*Suit for rent—Plaintiff's title proved but tenancy disproved—Suit dismissed—Right of appeal exists.*

Where in a suit for rent the lower Court holds that though plff.'s title was proved, the relationship of landlord and tenant had not been established, and dismisses the suit, *held* that the plff. has a right of appeal against the decision and that it was immaterial whether the appeal related to the question of title or whether such decision was in favour of the plff. (*Shamsul Huda, J.*) DINABANDHU *v.* JAGABANDHU. **63 I. C. 520 : 33 C. L. J. 384.**

——**S. 96**—*Appeal from preliminary decree after final decree is passed—Not maintainable—Amendment.*

Where a final decree is passed no appeal will lie against a preliminary decree. But the Court may allow the appeal to be amended so as to convert it into one against the final decree. (*Mookerjee and Buckland, JJ.*) KULADA PRASAD *v.* RAMANAND PATNAIK. **33 C. L. J. 414 : 61 I. C. 923 : 25 C. W. N. 776 : 48 Cal. 1036.**

——**S. 96**—*Party not aggrieved— Cannot file appeal.*

Where appellant is not aggrieved by the judgment dismissing the appeal against him, he is not entitled ro prefer an appeal against it. (*Shadi Lal, C. J. and Abdul Quadir, J.*) GOPALDAS *v.* MT. ZAINALA BIBI. **77 I. C. 477 (1) : A. I. R. 1923 Lah. 504.**

——**S. 96**—*Order—Setting aside execution sale without notice to auction-purchaser—Appeal.*

An appeal lies from an order setting aside execution sale without notice to the auction purchaser at the instance of the auction-purchaser. (*Scott-Smith, J.*) GUL BANO *v.* MUHAMMED ZAKAR KHAN.

C. P. CODE (V OF 1908), S. 96.

3 Lah. L. J. 463.

——— Ss. 96 and 98—*Appeal from the mofussil—Differences of opinion between the two Judges of the High Court hearing the appeal—Confirming Judge's opinion prevails—Letters Patent (Madras) Cls.* 15, 16 *and* 36.

In appeals governed by S. 96, when the two Judges of the High Court are divided in opinion, the judgment of that Judge, who confirms the decree of the lower Court prevails. 45 Bom. 718 Expl. (*Venkatasubba Rao and Jackson, JJ.*) VENKATASUBBIAH *v.* VENKATASUBBAMMA. **21 L. W. 721 : 86 I. C. 857 : A. I. R. 1925 Mad. 1032.**

——— S. 96—*No appeal lies simply because finding on a particular matter was against appellant though suit against him was dismissed.*

There is no right of appeal vouchsafed to a party against whom a suit has been dismissed, simply because the finding on a particular matter in controversy has been against him. (*Devadoss and Jackson JJ.*) M. LATCHAYYA *v.* S. KOTTAMMA. **47 M. L. J. 743 : 20 L. W. 734 : (1925) M. W. N. 141 : 84 I. C. 945 : A. I. R. 1925 Mad. 264 (2).**

——— S. 96—*Right of appeal—Party adversely affected by decree—Water supply in ryotwari tracts——Right of Government to regulate—Right of private party to appeal against decree.*

In the Ryotwari tracts the Govt. has a right to regulate the water supply, and so the party adversely affected by a decree against the Govt. can appeal; and the decree against the Govt since it prevents the Govt. from using the channel as supply channel, and the order allowing the suit to be withdrawn as against them was illegal. 1914 M. W. N. 788, Ref. (*Ayling and Odgers, JJ.*) E. T. DHARMARAJA *v.* K. M. PETTUR RAJA. **45 M. L. J. 212 : 46 Mad. 811 : (1923) M. W. N. 677 : 18 L. W. 243 : 74 I. C. 4 : A. I. R. 1924 Mad. 79.**

——— S. 96—*Execution proceedings — Civ. Pro. Code, S.* 2.

Every order made in proceedings under S. 47 is not necessarily appealable. (*Dawson Miller, C. J. and Foster, J.*) SHIV NARAYAN *v.* NARAYAN PRASAD. **2 P. L. R. 222 : 84 I. C. 576 : A.I.R. 1924 Pat. 683.**

——— S 96—*Does not apply to execution proceedings*

S. 96 (3) C. P. Code applies only to suits and not to proceedings in execution. (*Jwala Prasad and Foster, JJ.*) LACHMAN LAL *v.* PADARATH SINGH. **4 Pat. L. T. 735 : A. I. R. 1924 Pat. 346.**

——— S. 96—"*An appeal*"—*If excludes a fresh appeal.*

The words "an appeal" in S. 96, C. P. C. do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v.* PRATAP RAI. **4 Pat. L. T. 405 : 2 Pat. 739 : 75 I. C. 284 : 1923 P. H. C. C. 213 : A.I.R. 1923 Pat. 514.**

——— S. 96 and O. 9, r. 13—*In appeal from* ex parte *decree question of service of summons cannot be considered which can be considered only under O.* 9.

In an appeal from an *ex parte* decree, the only question with which the appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree, and that the question of due service of summons is the subject-matter not of an appeal from the decree but of the special proceeding under O. 9. (39 All. 143 and 27 Cal. 738, Foll.) *Young, Offg. C. J. and Carr, J.*) RAJ CHANDRA DHAR *v.* K. D. O. C. RAY **2 Bur. L. J. 282 : 2 Rang. 108 : 79 I. C. 506 : A. I. R. 1924 Rang. 137.**

C. P. CODE (V OF 1908), S. 96 (3).

——— Ss. 96 and 97—*Unless the dates of the preliminary and the final decrees do not allow challenge of both the decrees, appeal from preliminary decree does not affect final decree.*

Where there has been a preliminary decree and a fina decree and the dates permit the appellants to challenge both the preliminary decree and the final decree within the time allowed by law it is unreasonable to allow the appellant to avoid the provisions of the Court-Fees Act and obtain a reversal of the final decree by a circuitous method. The proper course is to allow the appellant a reasonable time within which to amend his appeal. 18 Bom. L. R. 76 and 18 Bom. L. R. 80 not Foll. Where the appeal against the preliminary decree was filed before the final decree was made and the dates did not allow of an appeal against both the preliminary decree and the final decree, *Held*: the subsequent passing of the final decree did not render the appeal against the preliminary decree nugatory but that the final decree being dependent on the preliminary decree if the latter was set aside the former would fall with it. 36 A. 532, F. B. and 17 C. W. N. 868 Foll. (*Kincaid, J.C. and Aston, A.J.C.*) ISHAK *v.* FATIMA. **18 S. L. R. 133 : 78 I. C. 978 : A. I. R. 1925 Sind 178.**

——— S. 96—*Parties asking Court to inspect locality and decide—If appealable—Duty of appellate Court.*

The parties to a suit instead of leading evidence asked the Judge to have a local inspection and decide on the basis of that. The Judge did accordingly and passed a decree. The aggrieved party appealed. *Held*, the proceedings before the Judge were not *extra cursus curiæ* and as there was no agreement by the parties to treat his decision as final, he was not in the position of an arbitrator. Hence there was a right of appeal. (*Kennedy, J. C. and Raymond, A. J. C.*) TILLOOMAL JESSOMAL *v.* HARBHAGWANDAS. **76 I. C. 309 : A. I. R. 1924 Sind 134.**

——— S. 96 (2)—*What is not a consent decree.*

Where plaintiff agrees to accept a conditional decree because otherwise the Court was prepared to dismiss the suit, the decree is not a consent decree. (*Scott-Smith and Brasher, JJ.*) ALI AKBAR *v.* SULTAN-UL MULK. **A. I. R. 1923 Lah. 129.**

——— S. 96 (3)—*Consent order—Consent given under mistake of fact—Setting aside, grounds for.*

Serious and substantial injustice to the party must be shown to result from letting the order stand which was made by the consent of the pleader under a mistake of fact. (*Lord Sumner.*) JAMNABAI *v.* FAZALBHOY. **47 M. L. J. 164 : 18 L. W. 437 : 33 M. L. T. 376 : 46 M. L. J. 160 : 26 Bom. L. R. 189 : 40 C. L. J. 272 : 77 I. C. 355 : L. R. 5 P. C. 80 : A. I. R. 1928 P. C. 184 (P. C.).**

——— S. 96 (3)—*Agreement arrived at during suit and signed by both parties—Decree passed in terms of the agreement—No appeal lies—C.P. Code, O.* 23, *r.* 3.

Where during suit an agreement had been arrived at, the terms were signed by the parties and all that the Court had to do was to pass a decree according to the terms to which the parties had agreed, *Held*, that the decree was a consent decree and no appeal lay. If any party was not satisfied, it was open to him before the decree was passed to contend that a lawful agreement had not been arrived at. (*Macleod, C.J. and Madgaonkar, J.*) GULABCHAND RAMSUKH *v.* RAMSUKH RAMPROTAP. **27 Bom. L. R. 1279 : A. I. R. 1926 Bom. 39.**

——— S. 96 (3)—*Party not joining in the compro-*

C. P. CODE (V OF 1908), S. 96 (3).

mise can appeal if prejudicially affected.

When a consent decree had been made as between some of the parties to a suit, the other parties who have not assented to the compromise are entitled to appeal against the decree provided they have been prejudicially affected thereby. (*Mookerjee and Rankin, JJ.*) NIRODE CHANDRA BANERJI *v.* PROFULLA CHANDRA BANERJI. **40 C. L. J. 535 : A. I. R. 1925 Cal. 421.**

——— **Ss. 96 (3) and 104 (2)**—*Consent decree—Appeal—Decree passed—Further appeal.*

The trial court refused to record an oral compromise alleged by the defendants on the ground that all the parties to the suit had not joined the compromise. On appeal, the District Court found as a fact that all the parties had agreed to the compromise and passed a decree in terms of the compromise. On a further appeal to the High Court, *held*, that the order of the District Court was final under S. 104 (2). C. P. Code and that the decree pased by him fell under S. 96 (3), C. P. Code and was not appealable. 27 M. L. J. 173: 46 I. C. 775, diss. (*LeRossignol and Campbell, JJ.*) GURCHARAN SINGH *v.* GURDEV SINGH.

3 Lah. 175 : 66 I. C. 258 : A. I. R. 1922 Lah. 309.

——— **S. 96 (3)**—*Consent decree—No appeal.*

Held by Coutts-Trotter, J:—A decree to which the pleaders of both parties had consented is a consent decree, though subsequently at the time of passing the decree, one of the parties resiled from it. From such a decree there is no appeal. 41 M 233, not foll. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) GOVINDASAMI KADAVARAN *v.* KALIAPERUMAL.

(1922) M. W. N. 83 : 66 I. C. 837 : 16 L. W. 155.

——— **S. 97**—*Appeal against preliminary decree—Passing of final decree—Effect.*

Where pending an appeal against a preliminary decree a final decree is passed, the proper course is to file an appeal against the final decree also or in any event to inform the Court hearing the appeal against the preliminary decree that a final decree has been passed. (*Macleod, C. J. and Coyajee, J.*) CHANDULAL *v.* MOTILAL. **27 Bom. L. R. 1492 : A. I. R. 1926 Bom. 43.**

——— **S. 97**—*Appeal—Appeal from refusal to set aside* ex parte *preliminary decree cannot be filed after final decree.*

Where after the passing of the final decree in a suit, an appeal was preferred against the orders by which the lower Court dismissed (1) the appellant's application under O. 9, R. 13 to set aside the *ex parte* preliminary decree and later on (2) his application under O. 9, R. 9 for restoration of his application under O. 9, R. 13. *Held*, that the appeal was incompetent. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN DAS *v.* SATYENDRA CHANDRA GHOSH. **29 C. W N. 640 : A. I. R. 1925 Cal. 790.**

——— **S. 97** — *Final decree passed — No appeal against preliminary decree.*

An appeal against a preliminary decree is not maintainable unless there is also an appeal against the final decree passed subsequent to the preliminary decree by the Court below. 40 C. 1036 : 20 C. W. N. 231 : 18 C. L. J. 321: 10 C. L. J. 113, referred to. (*Chatterjee and Pearson, JJ.*) MONOHAR PESHAKAR *v.* HARAN CHANDRA KARMAKAR. **71 I. C. 290 : A. I. R. 1924 Cal. 543.**

——— **S. 97**—*Appeal against preliminary decree—Passing of final decree after, does not affect hearing of appeal.*

There is a difference between cases where the final decree is passed before the appeal is preferred from the final decree and cases where it is passed after the appeal is preferred. In the latter case the appellate court is competent to hear and dispose of the appeal. 25 C. W. N. 776 : 18 C. L. J. 214; 18 C.L. J. 321, Ref. (*Newbould and Panton, JJ.*) MEA HUSSA KHAN *v.* SHEIKH SAMIR. **68 I. C. 475 : A. I. R 1923 Cal. 282 (1).**

——— **S. 97**—*Preliminary and final decree—Duty of party to appeal against both.*

Where a final decree has been made, whether or not an appeal had been preferred against the preliminary decree it is the duty of the party aggrieved by the final decree to appeal against the final decree. An appeal therefore, against the preliminary decree after the passing but before the signing of the final decree and without challenging by appeal the final decree is useless and could not be entertained. 18 C. L. J. 321. 32 All. 225: 36 Cal. 762, foll. (*Broadway, J.*) GANDA RAM *v.* SUNDER LAL. **67 I. C. 278 : 2 Lah. L. J. 673.**

——— **S. 97** — *Preliminary decree not appealed against—Final decree—Appeal against—If preliminary decree can be challenged.*

Where a preliminary decree is not appealed against, S. 97 bars its correctness being challenged in an appeal against the final decree. (*Baker, O. J. C. and Prideaux, A. J. C.*) GANAPATRAO *v.* MT. TULSABAI. **A. I. R. 1924 Nag. 419.**

——— **S. 97**—*No right of appeal against preliminary decree exists after passing final decree.*

Where there are preliminary and final decrees in the same suit an appeal against the preliminary decree alone cannot be maintained unless it is instituted before the passing of the final decree. 36 Cal, 762 : 30 All. 479 : 37 Mad. 455, Ref. (*Hallifax, A. J. C.*) BIHARIDAS *v.* BAJRANGDAS. **67 I. C. 261 : A. I. R. 1922 Nag. 179.**

——— **S. 97**—*Preliminary decree.*

Appeal from preliminary decree cannot be treated as one against the final decree also. (*Dalal and Daniels, A. J. Cs.*) RAJA SETH SWAMI DAYAL *v.* MUHAMMAD SHER KHAN. **74 I. C. 485 : 9 O. & A. L. R. 205 : A. I. R. 1924 Oudh 299.**

——— **S. 98**—*Letters Patent, Cl. 36—Applicability—Judges differing in opinion.*

The natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent, While the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the civil Courts of the mofussal subject to the High Court would be the Civil Procedure Code. The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the Charter. Appeals under the Letters Patent are governed by the Letters Patent, and appeals under the Code are governed by the Code. Further the Code only deals with appeals from certain Courts and does not deal with appeals within the High Court from the decision of one judge of the Court to another. Therefore when a Bench of two Judges is hearing an appeal from the decision of a single Judge of the same High Court whether on the original side or the appellate, and they differ in opinion, the opinion of the senior judge would prevail. 26 All. (1921) : 23 Bom. L. R 623, Ref. (*Marten and Pratt, JJ.*) PANDY WALAD *v.* JAMNADAS. **A. I. R. 1923 Bom. 218.**

——— **S. 98**— *Letters Patent (Calcutta) Cl. 36—Difference of opinion between 2 Judges on the appellate side of the High Court—Affirmance of the decision of the lower Court.*

Where two judges of a High Court hearing an appeal from a subordinate Court preferred under the

C. P. CODE (V OF 1908), S. 98.

provisions of the C. P. Code differ in opinion. S. 98 of the C. P. Code applies and the decision of the Lower Court must be confirmed. Clause 36 of the Letters Patent does not apply. (*Walmsley and Page, JJ.*) PRAFULLA KAMINI ROY *v.* BHABANI NATH ROY. **52 C. 1018 : A. I. R. 1926 Cal. 121.**

——**S. 98**—*S. 98, C. P. Code, supersedes cl. 36 of Letters Patent—Letters Patent (Cal.) cl. 36.*

Per *Suhrawardy, J.* (*Walmsley, J. Contra.*)—To the extent to which S. 98, C. P. Code, is inconsistent with clause 36 of the Letters Patent the former has, by virtue of the power conferred on the Indian Legislature by clause 44 of the Letters Patent superseded or modified the latter. (*Walmsley, Newbould, C. C. Ghose, Suhrawardy and B. B. Ghose, JJ.*) BECHARAM CHOUDHURI *v.* PURNA CHANDRA CHATTERJI. **41 C. L. J. 456 : 88 I. C. 637 : 29 C. W. N. 755 : A. I. R. 1925 Cal. 845 (F.B.).**

——**S. 98**—*Reference to a third Judge—Third Judge deciding case on another point—Procedure.*

Under S. 98, C. P. Code, a third judge to whom a point of law is referred on a difference of opinion between the members of a Division Bench of the High Court cannot dispose of the appeal generally but can only dispose of the point of law referred and then decide the appeal in the manner indicated by the referring judges, having regard to the possible answers that might be given. Where the question of law actually referred to a third judge was not decided by him and the reference consequently proves infructuous, the appeal must be disposed of under S. 98 (2), C.P. Code. (*Woodroffee, Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C. W. N. 985 : A. I. R. 1922 Cal. 544.**

——**S. 98**—*There is no conflict between S. 98, C. P. Code, and Letters Patent, clause 36 of Bombay and 28 of Patna.*

Per *Das and Foster, JJ.*—There is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals ; the procedure indicated in S. 98 of the Code applies to appeals from Subordinate Courts. 43 *Bom.* 433 *Foll.* (*Dawson Miller, C. J.*) HITENDRASINGH *v.* RAMESWARSINGH. **4 Pat. 510: 87 I. C. 849 : 88 I. C. 141 : A. I. R. 1925 Pat. 625.**

——**S. 98 (2)**—*Old Code—1882—Distinction.*

Formerly the third Judge could dispose of the case generally, now he must decide the point of law referred and then dispose of the appeal, the referring Judges having indicated how it should be disposed of accordingly to the possible answers to be given. The result is that under the present Law a Judge may be asked to decide whether this or that applies when his opinion may be that neither does apply. The third Judge in this case having held that he did not concur with either of the Judges, the differing Judges dismissed the appeal under clause (2), that is, the part preceding the proviso. (*Woodroffe, Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C. W. N. 985 : A. I. R. 1922 Cal. 544.**

——**S. 99**—*Power of attorney—Institution of suit under—Defect in power—Not a general power.*

If the power of attorney, on the strength of which a suit is instituted is defective as when it is a special and not a general power, there is merely an irregularity in proceedings not affecting the merits of the case and hence is no ground for setting aside the decree appealed from on that ground. (*Shah and Crump, JJ.*) GANPATI NANA *v.* JIVANABAI. **24 Bom. L. R. 1302 : 47 Bom. 227 : 76 I. C. 34 : A. I. R. 1923 Bom. 44 (1).**

C. P. CODE (V OF 1908), S. 99.

——**S. 99**—*Section does not apply if merits are affected.*

When the merits of the case have been affected by the non-joinder of parties the section can have no application. (*Cuming and Panton, JJ.*) AADUL RAHMAN MIA *v.* SALIMANNISA BIBI. **89 I. C. 121 : A. I. R. 1926 Cal. 416.**

——**S. 99**—*Irregularity in Court below—Merits weak—Interference.*

Where the merits of an appellant are extremely weak, the High Court will not interfere even though there have been irregularities in the procedure adopted by the Court below. (*Suhrawardy and Duval, JJ.*) NIRANKA SASHI ROY *v.* SWARGANATH BANERJEE. **90 I. C. 121 : A. I. R. 1926 Cal. 95.**

——**S. 99**—*Judgment based on evidence other than inadmissible—Remand is not proper.*

Where the judgment of the lower Court is based on inadmissible evidence, remand would be proper but where apart from the inadmissible evidence the Court is mainly influenced by the absence of evidence on behalf of the defendant and the positive evidence of plaintiff's witnesses, it will serve no useful purpose to remand the case for a reconsideration of the evidence. (7 Cal. 293, *Foll.*) (*Suhrawardy, J.*) FAIJADDIN *v.* AGNI KUMAR. **71 I. C. 300 : A. I. R. 1924 Cal. 370.**

——**Ss. 99 and 96**—*Misjoinder of causes of action—Objection to be taken in trial Court.*

An objection that there cannot be a decision in a partition suit of rights subordinate to that of the co-sharers cannot be gone into for the first time in appeal. (*Woodroffe and Walmsley, JJ.*) MIDNAPORE CO. *v.* NARES NARAIN. **63 I. C. 161 : 33 C. L. J. 317.**

——**S. 99**—*Defect—Minor sued without guardian.*

Where the mother of a minor refuses to act as guardian, the Court ought to appoint one of its officers as guardian *ad litem*. An omission to appoint one is a serious defect not curable by S. 99. (*Mookerjee, A. C. J. and Fletcher, J.*) SURENDRA NATH *v.* AGHOR NATH. **62 I. C. 464 : 25 C. W. N. 525.**

——**S. 99**—*Time fixed for payment—Default—Security—Acceptance of—Extension of time—C. P. Code, S. 99.*

In a suit for pre-emption instituted on 3-11-1919 the court ordered on 11-11-1919 the deposit of one-fifth the purchase money into Court by 2-12-1919. In 2-12-1919 the case was adjourned because it was found that the process fee for summoning the defendants had not been paid. The purchase money was not paid till 23-2-1920 when the plff. put in a security bond which the Court ordered to be put on record. Subsequently the defendant applied to reject the plaint but the trial Court refused to do so and decreed the suit. *Held*, though the court had received and placed on record the security bond on 23-2-1920, that did not raise any inference that the Court had altered its previous order or extended the time within the meaning of S. 22, Sub-S (4) of the Punjab Pre-emption Act. The provisions of the section requiring the rejection of the plaint are mandatory and the trial Court's omission to comply with the terms is not an irregularity which could be cured by S. 99, C. P. Code. Consequently the plaint was rejected on second appeal by the High Court. (*Scott-Smith and Fforde, JJ.*) BAHADUR SHAH *v.* AHMAD SHAH. **5 Lah. 492 : A. I. R. 1925 Lah. 209.**

——**S. 99**—*Misjoinder—It includes non-joinder.*

Per *Schwabe, C. J.*—*Quære*, whether misjoinder in S. 99, C. P. Code, includes non-joinder. (*Schwabe, C. J. and Wallace, J.*) MOHANAVELU MUDALIAR

C. P. CODE (V OF 1908), S. 99.

v. ANNAMALAI MUDALIAR. **17 L. W. 241 : 44 M. L. J. 249 : 72 I. C. 63 : (1923) M. W. N. 89 : A. I. R. 1923 Mad. 337.**

——— **S. 99 and O. 1, R. 9**—*Objections as to non-joinder—Procedure.*

Per *Ramesam, J*:—Objections as to non-joinder should be taken at the earliest opportunity and if so taken fall under two heads :—

(1) If it is absolutely necessary to have the absent party, he ought to be added unless the plff. refused to add him, when the suit should be dismissed. If the trial Court erroneously proceeds with the suit, without following either of these courses, the objection can be repeated on appeal and the appellate Court may dispose of it in one of the two ways aforesaid. (2) If it is not a case of imperative necessity but only a matter of convenience or expediency either the absent party may be added or the suit may be tried without him. In such a case the objection if repeated in appeal may be dealt with similarly. (*Spencer and Ramesam, JJ.*) THINA SHANMUGA MOOPANAR *v.* MONA CHUNA NANA SUBBAYYA MOOPANAR.

42 M. L. J. 133 : (1922) M. W. N. 106 : 15 L. W. 283 : 70 I. C. 645 : 31 M. L. T. 266 (H. C.) : A. I. R. 1922 Mad. 317.

———**S. 99**—*Mere irregularity—Omission of Judge to sign deposition of witness.*

The deposition of a hand-writing expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge. (*Batten, J. C.*) ALAM SINGH *v.* SETH GOPALDAS.

68 I. C. 664 : A. I. R. 1923 Nag. 7 (1).

———**S. 99**—*Several cases tried together—Evidence—Trial Court dealing with case separately—Lower appellate Court dealing with all cases together—Case was remanded.*

Where the trial Court considered each case or group of cases separately and dealt with the evidence relating to those cases or groups of cases separately, but the lower appellate Court did not deal with each case or group of cases separately,

Held, that the appeals were not properly dealt with by the lower appellate Court. (*Das and Kulwant Sahay, JJ.*) NAND LAL CHAURE *v.* KESHO PRASAD. **1923 P. H. C. C. 339 : 78 I. C. 593 : A. I. R. 1924 Pat. 245.**

———**S. 99**—*Irregularity in signing vakalatnama is only formal.*

S. 99, C. P. Code, covers a case when a person authorised to instruct a pleader actually signs the vakalat for the litigant where no fault is committed and the litigant himself knows of it and acquiesces in it. It is a formal irregularity cured by the section. (*Miller, C. J. and Kulwant Sahay, JJ.*) BANWARI RAI *v.* CHETHRU LAL RAI.

2 P. L. R. 174 : 74 I. C. 1033 : A. I. R. 1924 Pat. 114.

———**S. 99**—*Defect of signature—Section applies.*

Defect of signature does not justify reversal of the decree. The mere fact that pleadings, are not duly signed does not invalidate them. (*Jwala Prasad and Adami, JJ.*) RAJA BRAJA SUNDAR DEB *v.* SIVA-RANJAN. **59 I. C. 282 : 1 Pat. L. T. 647.**

———**S. 99**—*Error as to Court-fees.*

Error as to Court-fees not affecting merits of the case or the jurisdiction of the Court does not justify reversal of decree. (*Lentaigne, J.*) D. S. ABRAHAM AND CO. *v.* IBRAHIM GORABHOY. **2 Rang. 462 : 84 I. C. 971 : A. I. R. 1925 Rang. 65.**

———**S. 99 and O. 6, R. 14**—*Failure of plaintiff to sign pleadings—No power of attorney given to agent—Objection not raised—Section 99 applies.*

C. P. CODE (V OF 1908), S. 100—Abandonment.

Where the plaintiff filed the plaint through an agent and did not even sign the plaint, and there was no power of attorney given by the plaintiff to her agent on the record and no explanation was apparently obtained for her failure to sign the plaint and no objection however appeared to have been taken. *Held*, S. 99 of the C.P. Code applies to the case. (*Mac Coll, J.*) MA NGWE KIN *v.* MA HME. **1 Rang. 42 : 74 I. C. 100 : A. I. R. 1923 Rang. 206.**

———**S. 100**—*See also* PRACTICE.

Abandonment.
Acquiescence.
Additional evidence.
Admissibility of evidence.
Adverse Possession.
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Appreciation of evidence.
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Question of fact.
Question of law.
Second Appeal.
Sufficiency of evidence.
Sustainability.
Waiver.

Abandonment.

———**S. 100**—*Abandonment—Point expressly abandoned in Court below.*

Where the appellant expressly abandons a point in the court below he ought not to be allowed to take it in second appeal. (*Mookerjee and Chotzner, JJ.*) JADU GOPAU KUNDU CHOWDHURY *v.* GOPAL CHANDRA NANDI. **69 I. C. 44 (1) : A. I. R. 1924 Cal. 541 (2).**

———**S. 100**—*Abandonment—Question of fact.*

Whether there has been an abandonment or not is in each case a question of fact. 27 C. W. N. 802, ref. to. (*C.C. Ghose and B. Ghose, JJ.*) SARAT CHANDRA MAJUMDAR *v*, PRASANNA KUMAR.

71 I. C. 304 (Cal.) : A. I. R. 1924 Cal. 366.

———**S. 100**—*Abandonment.*

A finding of non-abandonment cannot be attacked in second appeal. (*Martineau, J.*) AHMAD YAR *v.* MAHOMED ALI. **3 Lah. L. J. 445.**

———**S. 100**—*Abandonment.*

Finding as to the effectiveness of abandonment in law on the facts found could be challenged in second appeal even where there is not any ground in the memorandum of appeal. (*A. Raoof, J.*) RAJA *v.* SALABAT. **66 I. C. 935 : 3 Lah. L. J. 26.**

C. P. CODE (V OF 1908), S. 100—Abandonment.

——S. 100—*Abandonment.*

A question of fact which is abandoned before the lower appellate Court cannot be raised in second appeal. (*Neave, A. J. C.*) RAM NICH *v.* JANKI.
85 I. C. 387 : A. I. R. 1925 Oudh 510.

——S. 100—*Abandonment.*

Where a party or his pleader abandons a point in the lower appellate Court he cannot raise it in second appeal. (*Lindsay, J. C.*) MAHADEO TEWARI *v.* SITLA BAKHSH SINGH. **65 I. C. 408 : 8 O. L. J. 660 : A. I. R. 1922 Oudh 102.**

——S. 100—*Abandonment—Finding of fact.*

Question as to abandonment is one of fact. (*Ross and Kulwant Sahay, JJ.*) UDAI NATH SAHI DEO *v.* MAHADEO SAHU. **6 Pat. L. T. 500 : 88 I. C. 1032 : A. I. R. 1925 Pat. 741.**

Acquiescence.

——S. 100—*Acquiescence can be considered in second appeal.*

The question as to whether in a case there has been acquiescence is not one of fact but of legal inference from the facts found and therefore it is open to be considered in second appeal. (*Mukerji, J.*) BANESWAR BANDOPADHYA *v.* AMULYA CHARAN.
82 I. C. 309 : A. I. R. 1925 Cal. 288.

——S. 100—*Acquiescence—Question of, is one of law.*

The question of acquiescence from the facts found by the lower Court is one of law and not a question of fact. 21 A. 496 followed. (*Halifax, A. J. C.*) SHANKER *v.* RANGUBAI
71 I. C. 942 : A. I. R. 1924 Nan. 56.

——S. 100—*Acquiescence—Question of fact.*

Acquiescence is not a question of fact, but of legal inference from the facts found. (*Hallifax, A. J. C.*) RAMRATAN *v.* SHIODATTARAI. **73 I. C. 137 (Nag.)**

Additional evidence.

——S. 100—*Additional evidence rejected not in exercise of a discretion but due to supposed insuperable difficulty—Second appeal lies.*

If an appellate Court, before whom an application for admitting fresh evidence is made, exercises its discretion and refuses to admit fresh evidence, the propriety of that order would not be a good ground for entertaining a second appeal. If however the lower appellate Court does not apply its mind to the question properly before it at all and feels that it is unable to admit fresh evidence because of some supposed insuperable difficulty in its way which, in fact, does not exist, then it cannot be said that the Court in the exercise of its discretion, has refused to admit fresh evidence and second appeal will lie. (*Sulaiman and Ryves, JJ.*) BADRI DAS *v.* HOSHIAR SINGH.
47 All. 412 : L. R. 6 A. (Cv.) 85 : 23 A. L. J. 193 : 86 I. C. 761 : A. I. R. 1925 All. 288.

——S. 100—*Additional evidence whether allowed.*

There is no precedent for allowing an appellant to lead evidence, which could have been led in the Court below, in appeal. (*Macleod, C. J. and Kanga, J.*) MOTI CHAND RAOJI *v.* MANICKCHAND RAMCHAND GOJAR. **A. I. R. 1922 Bom. 147**

Admissibility of Evidence.

——S. 100—*Admissibility of evidence — Objection to —When considered on second appeal.*

It would be in the interest of administration of justice in this province if it were generally understood that questions dealing with the admissibility and the legal effect of evidence will not, as a general rule be

C. P. CODE (V OF 1908), S. 100—Admissibility of evidences.

entertained in Second Appeal in this Court if they have not been taken at least at the stage of First Appeal in the Court below. (*Kanhaiya Lal and Mukerji, JJ.*) MULANI *v.* MAULA BUX.
46 A. 260 : 22 A. L. J. 149 : L. R. 5 All. 104 : 78 I. C. 222 : A. I. R. 1924 All. 370.

——S. 100—*Admissibility of evidence—Certain evidence held inadmissible—Case should be remanded for decision on other evidence.*

Where certain evidence was held inadmissible by a second appellate Court, but there were other pieces of evidence relating to the finding by the lower Court, the second appellate Court remanded the case for decision on the other evidence, as it could not be sure that the lower Court was not influenced by the reception of the inadmissible evidence. 1922 *Cal.* 251 *Foll.* (*Suhrawardy and Cuming, JJ.*) CHOONI LALL PRAMANIK *v.* NILMADHAB BARIK. **41 C. L. J. 374: 86 I. C. 734 : A. I. R. 1925 Cal. 1034.**

——S. 100—*Admissibility of evidence—Objection as to, can be taken for first time in second appeal —Evidence Act, S. 167.*

An erroneous omission to object to inadmissible evidence does not make it admissible. The omission to take objection to the admissibility of a document becomes fatal only in cases where if the objection is taken in time, any defect in its admissibility can be cured and the document made admissible. In other cases objection as to inadmissibility can be raised even in second appeal though it was not raised in the lower Courts. 19 All. 76 P. C. Foli. (*Suhrawardy and Cuming, JJ.*) CHOONI LALL KHEMANI *v.* NILMADHAB BARIK. **86 I. C. 734 : 41 C. L. J. 374 : A. I. R. 1925 Cal. 1034.**

——S. 100—*Admissibility of evidence in lower Court.*

Although an erroneous omission in the trial court to object to an admission which was irrelevant did not make it relevant and admissible in evidence, an objection that a document that *per se* is not admissible in evidence, has been improperly admitted in evidence cannot be entertained in second appeal. (*Mookerjee and Rankin, JJ.*) SAYERUDDIN AKONDA *v.* SAMIRUDDIN AKONDA.
72 I. C. 985 : A. I.R. 1923 Cal. 378.

——S. 100—*Admissibility of evidence—Inadmissible evidence—Finding based on.*

Finding of a lower appellate Court based on inadmissible evidence can be impeached in second appeal. 2 W. R. 74 : 21 C. L. J. 45 Ref. (*Mookerjee and Chotzner, JJ.*) TARAKUMAR GHOSE *v* KUMARA ARUN CHANDRA SINGH. **74 I. C. 383 : 36 C. L. J. 389 : A. I. R. 1923 Cal. 261.**

——S. 100—*Admissibility of evidence.*

If a document is wrongly admitted in courts below the High Court in second appeal cannot decide there is other evidence to justify decree. (*Mookerjee, A.C.J. and Fletcher, J.*) UJIR ALI SARDAR *v.* SHADHAI BEHARI. **35 C. L. J. 182 : 68 I. C. 1003 : A. I. R. 1922 Cal. 185.**

——S. 100—*Admissibility of evidence—Finding based on inadmissible evidence—Second appeal.*

Where a finding of fact arrived at by the lower appellate court is based on inadmissible evidence, and there is no other evidence in support of it, the High Court will not accept the finding. (*Shadi Lal, C. J. and Le Rossignol, J.*) SRI RAM *v.* CHANDO.
6 Lah. L. J. 204 : 80 I. C. 705 (1) : A. I. R. 1924 Lah. 470.

——S. 100—*Admissibility of evidence—Evidence Act, S. 45—Comparison of handwriting.*

C. P. CODE (V OF 1908). S. 100—Admissibility of Evidence.

Comparison of signatures is one of the modes of proving handwriting and although where there is no other evidence such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error-in-law to base the conclusion on such proof alone, and a Court of second appeal would have no power to set aside a finding based on such comparison. 14 I. C. 741, Foll. (*Broadway and Moti Sagar, JJ.*) BALAK RAM *v.* MAHOMED SAID. **5 Lah. L. J. 530 : A. I. R. 1923 Lah. 695.**

——S. 100—*Admissibility of evidence—Late production—Refusal to admit.*

The refusal to admit a document produced at a late stage is a ground for second appeal, 12 C. W. N. 312 Foll. (*Ross, J.*) JAGDIP PANDEY *v.* MT. TAIBUNESSA. **A. I. R 1924 Pat. 208.**

——S. 100—*Admissibility of evidence—Relevancy of document.*

Relevancy and proof of document is a question of law and can be raised at any stage but the question as to the proof of a document is one of procedure and can be waived. (*Das and Bucknill, JJ.*) KALIKA NAND *v.* SHIVA NANDAN. **3 Pat. L. T. 149 : A. I. R. 1922 Pat. 122.**

——S. 100—*Admissibility of evidence.*

Entries in *batwara* papers are admissible in evidence. (*Das and Adami, JJ.*) JUGDEO NARAIN *v.* BULAKI GOPE. **2 P. L. T. 343 : 63 I. C. 226 (2) : 1921 P. H. C. C. 343.**

——S. 100—*Admissibility of evidence—High Court will not interfere with rejection of documents when no cause is shown at rejection time.*

The High Court will not in second appeal interfere with the order of the Court rejecting admission of documents when no reason has been shown for their non-production at the time they were rejected. (*Cuming and Chakravarty, JJ.*) NRISHINHA CHARAN *v.* BATASI DUSHI. **90 I.C. 602 : A. I. R. 1926 Cal. 106.**

——S. 100—*Admissibility of evidence—Finding based on inadmissible evidence—Open to attack.*

A finding based on inadmissible evidence is liable to be challenged in second appeal. (*Kinkhede, A. J. C.*) BALIRAM *v.* SADARAM. **89 I. C. 1019.**

——S. 100—*Inadmissible evidence—Finding partly based on—Second appeal.*

If legally inadmissible evidence is a material part of the basis of a finding of fact, that finding can be set aside in second appeal. (*Kinkhede, A. J. C.*) BANAN *v.* RANJIT SINGH. **89 I.C. 752 : A.I.R. 1926 Nag. 99.**

Adverse possession.

——S. 100—*Adverse possession—Inference from facts.*

The question whether possession is adverse or permissive may be one of legal inference from documents. The mere fact that the evidence in the case is merely documentary does not constitute the finding of the lower court findings of law. The question of the weight to be attached to the instances proved by the documentary evidence is one of fact. 29 A. 203 · 42 A. 152 Ref to. (*Daniels, J.*) MOHAMMED AHMED *v.* BABU. **71 I.C. 762 : A. I. R. 1923 All. 442.**

——S. 100—*Adverse possession—Question of fact.*

Where a house was found to be occupied by the defendant's father adversely to the plaintiff landlord for more than 12 years before suit, this finding of fact is fatal to the appeal. 41 All. 669 Dist. (*Ryves and Daniels, JJ.*) BISHESHAR NATH *v.* ABDUL WAHID. **75 I. C. 672 : A. I. R. 1923 All. 382 (1).**

——S. 100—*Adverse possession—Inference from facts.*

C. P. CODE (V OF 1908). S. 100—Ancestral property.

The question of adverse possession is a mixed question of fact and law. The facts found by the Judge must be accepted by the High Court in second appeal, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by the High Court. 19 Cal 253, 262 : 20 C. 93 : 29 C. L. J 241 : 24 C. W. N 1057 Ref. (*Chatterjee and Pearson, JJ.*) JOGENDRA NATH *v.* RAJENDRA NATH. **26 C. W. N. 890 : 68 I.C. 200 : A.I.R. 1922 Cal. 54.**

——S. 100—*Adverse possession—Prescription.*

A finding of the lower appellate court that the possession of a party to the suit has not been adverse for a continuous period of 12 years is a finding of fact which cannot be disturbed in second appeal. (*Martineau, J.*) MAHOMED AZIM KHAN *v.* SULTAN AHMED KHAN. **4 Lah. L. J. 309.**

——S. 100—*Adverse possession—Not pleaded—Decree based on—Absence of prejudice—Effect.*

Where in a suit for possession based on ownership, the court finds a title by adverse possession in the plaintiff, though the allegation was not contained in the plaint itself, and there is nothing to show the defendant was prejudiced or taken by surprise, it is not open to set up in second appeal that the plea of adverse possession was not raised in the pleadings. (*Odgers and Hughes, JJ.*) MUKAMBIKA SHETTITHI *v.* SHIDDAYA SHETTI. **18 L. W. 543 : 75 I. C. 613 : A. I. R. 1924 Mad. 116.**

——S. 100—*Adverse possession—Question as to nature of possession is one of legal inference.*

The question whether possession is adverse or permissive may often be one of legal inference from documents. 42 All. 152 (P. C) and A. I. R. 1923 P. C. 59 Foll. (*Kinkhede, A. J. C.*) YESHWANT *v.* DAULAT. **89 I. C. 663 : A. I. R. 1926 Nag. 129.**

——S. 100—*Adverse possession—Inference from facts found.*

The question of adverse possession is one of inference from facts found and is a question of law, justifying a second appeal. (*Hallifax, A. J. C.*) MT. MUNGA *v.* LACHMI PRASAD. **6 N. L. J. 70 : 74 I. C. 51 : A. I. R. 1923 Nag. 65.**

——S. 100—*Adverse possession—Finding as to, is not conclusive.*

The finding of the lower Court on the question of adverse possession is not conclusive in second appeal. (*Wazir Hasan, A.J.C.*) INDARPAL *v.* THAKUR DIN. **10 O. L. J. 646 : 27 O. C. 77 : A.I.R. 1924 Oudh 266.**

——S. 100—*Adverse possession—Hindu widow—Nature of possession—If a question of fact.*

The question whether the possession of a Hindu widow is only in lieu of maintenance or adverse is to be decided by legal inferences and is not a question of fact. (*Dalal, A. J. C.*) BHAGWAN DIN *v.* AJUDHIA. **87 I. C. 1021 : A.I.R. 1925 Oudh 429.**

Alternative Case.

——S. 100—*Alternative case—Not put forth in Courts below.*

An alternative case arising out of the decision of the lower appellate Court cannot be allowed to be raised in second appeal when that was not put forward in the Courts below. (*Das and Adami, JJ.*) RAMDHANI SINGH *v.* MT. KEWAL MANI BIBI. **90 I. C. 929 (Pat).**

Ancestral property.

——S. 100—*Ancestral property—Finding as to character of property is one of fact and as to eligibility of plaintiffs to sue is one on custom.*

Whether the property in dispute is ancestral is a finding of fact. Whether the plaintiffs as the collaterals in the sixth degree are entitled to sue is a finding on

C. P. CODE (V OF 1908), S. 100—Ancestral property.

custom and cannot be questioned in second appeal without the production of the necessary certificate under the Punjab Courts Act. (*Abdul Raoof, J.*) MAULA DAD *v.* ALI. **5 Lah. L. J. 449 : 76 I.C. 147 : A. I. R. 1924 Lah. 263 (1).**

——S. 100—*Ancestral property—Finding of fact.*

A finding by the Appellate Court that the right to the "birt" is not proved to be ancestral is one of fact and is not a matter to be decided in second appeal. (*Martineau, J.*) BISHIN DATT *v.* KRISHEN DATTA. **67 I. C. 439 : 3 Lah. L. J. 414.**

Appreciation of Evidence.

——S. 100—*Appreciation of evidence.*

Where the High Court differed from the lower Court not only in the estimate of the evidence, but also with regard to the inferences derivable from documents produced in the case and other circumstances their Lordships dealt with the case on its merits. (*Mr. Ameer Ali.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH. **45 M. L. J. 460 : (1923) M. W. N. 361 : 27 C. W. N. 925: 71 I. C. 984 : 3 Pat. L. T. 605 : 36 C. L. J. 499 : 49 I. A. 399 : 32 M. L. T. 1 : 2 P. 38 : A. I. R. 1922 P. C. 272 (P. C.)**

——S. 100—*Appreciation of evidence— Inference from admitted entries is a question of fact.*

An inference of fact from admitted entries in documents cannot be disturbed in second appeal unless the inference is perverse or illegitimate. (*Mukerji, J.*) MT. SHAM DEVI *v.* BHAGWAT DAYAL. **L. R. 6 A. (Civ.) 139 : 85 I. C. 584 : A. I.R. 1925 All. 353.**

——S. 100—*Appreciation of evidence— Question of inferences from documents other than documents of title is one of fact.*

A question as to inference of fact from voluminous documentary evidence, not being documents of title, is one of fact. A. I. R. 1923 P. C. 187 Fol. (*Sulaiman, J.*) GUPTA NAND BHARTHI *v.* HARI SHANKER. **78 I. C. 1016 : A. I. R. 1925 All. 39.**

——S. 100—*Appreciation of evidence—Question of fact.*

Where it was possible that the expert evidence given on both sides was true,

held, that the finding of the lower appellate Court could be considered afresh in second appeal. (*Sulaiman and Mukerji, JJ.*) MOHD. IBRAHIM *v.* MT. ALTAFAN. **22 A. L. J. 1045 : 83 I.C. 27 : L. R. 6 A. (Civ.) 55: 47 All. 243 : A.I.R. 1925 All. 24.**

——S.100—*Appreciation of evidence—High Court will interfere in second appeal when lower Courts go outside the foundation for determination of fraud.*

The High Court is reluctant to interfere in cases where two Courts have held that fraud has been established. But where in determining whether there has or has not been any fraud, the lower Courts have gone outside the proper foundation for determination of such a question, the High Court should interfere in second appeal. (*Fawcett and Madgavkar, JJ.*) DODBASAPPA DHARMAPPA *v.* PRADHANAPPA VENKAPPA. **27 Bom. L. R. 1318 : A.I.R. 1926 Bom. 33.**

——S. 100—*Appreciation of evidence—Inferences as to the legal standard of care taken by bailer can be considered by High Court.*

Where the facts are not in dispute the inference which the Court below draws from these facts and the legal standard of reasonable care set up by it are questions of law and the High Court can see whether the Court below was right in holding *e.g.*, that the defendant in despatching baled jute in a boat with 20 or 32 leaks, 1 or 1½ inches in length, through which water entered into the boat, the jute being left in the hold of the boat for thirty hours complied with the requirements of S. 151 of the Contract Act merely because there was continuous pumping out of the water which had only the effect of saving the boat. (*Chatterjee and Cuming, JJ.*) LAKSHMI NARAIN *v* THE SECRETARY OF STATE FOR INDIA. **27 C.W.N. 1017 : A. I. R.1924 Cal. 92.**

——S. 100—*Appreciation of evidence—Duty of appellate Court.*

The verdict of a Judge trying the case should not be lightly disregarded by the Appellate Court where the issue is simple and straightforward and the only question is, which set of the witnesses is to be believed. But where the determination of the question of genuineness of anything depends not merely upon the assertions of witnessesbut upon surrounding facts and circumstances whose existence is either admitted or indisputably proved, the judgment of the trying Judge may be vitiated by his failure to test the veracity of the witnesses by reference thereto. Two conflicting view-points have thus to be reconciled namely, on the one hand, the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences and conclusions and, on the other hand, the unquestionable weight must be attached to the opinion of the Judge of the primary court, who had the advantage of seeing the witnesses and noticing their look and manner. (*Mookerjee and Buckland, JJ.*) PRASANNAMAYI DEBI *v.* BAIKUNATH CHATTORAJ. **49 C. 132 : 66 I. C. 782 : A. I. R. 1922 Cal. 260.**

——S 100—*Appreciation of evidence—Inferences of fact—Reliability of—Entries.*

Inferences from the entries of the pocket book to the effect that the debit entries were unreliable are inferences of fact and not of law and High Court cannot interfere even if inferences are not correct. (*Moti Sagar, J.*) POKHEN MAL *v.* JAI BHAGWAN. **6 Lah. L J. 311 : A. I. R. 1924 Lah. 719.**

——S. 100—*Appreciation of evidence.*

If a finding of fact is recorded on a mis-interpretation of the evidence it can be interfered with in second appeal. (*Moti Sagar, J.*) THE FIRM JOWALA DAS PARAMANUND *v.* UTTAM CHAND. **76 I. C. 553 : A. I. R. 1923 Lah. 585.**

——S. 100—*Appreciation of evidence—Finding based on misreading of judgment.*

A finding cannot be contested in second appeal if it is based on a misreading of the first court's judgment. (*Scott Smith and Fforde, JJ.*) MT. BASANTI *v.* CHANDRA SINGH. **A. I. R. 1923 Lah. 502 (2).**

——S. 100—*Appreciation of evidence—Conclusion can be attacked.*

Although in second appeal findings of fact cannot be impugned, it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. (*Broadway and Moti Sagar, JJ.*) BAJ SINGH *v.* PARTAB SINGH. **A.I.R. 1923 Lah. 497 (2).**

——S. 100—*Appreciation of evidence—Finding of fact—Discussion of evidence—Partition.*

Where the judgment of the lower appellate Court leaves no room for doubt that the material evidence in the case has been considered, the mere fact that reference in detail is not made to every piece of evidence does not vitiate his judgment. The findings of fact would therefore be binding in second appeal. (*Broadway and Abdul Raoof, JJ.*) NATHU SHAH *v.* HAVELI SHAH. **16 P. W. R. 1922: 65 I. C. 475: 1 Lah. L.J. 72:**

C. P. CODE (V OF 1908), S. 100—Appreciation of Evidence.

A. I. R. 1922 Lah. 140.

——**S. 100**—*Appreciation of evidence.*

The High Court cannot in second appeal upset a finding of fact on the ground that the evidence on record has not been properly appreciated by the Court below. (*Chevis, A. C. J. and Abdul Raoof, J.*) JADU NATH *v.* RAMAN MAL. **4 Lah. L. J. 426.**

——**S. 100**—*Appreciation of evidence—Mortgage deed—Attesting witnesses denying that the execution was witnessed by them—High Court's power to find that it was executed in their presence.*

It is quite open to High Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution. 20 C. W. N. 192 Foll: (*Spencer and Devadoss, JJ.*) KURUKUNDI SAMA RAO *v.* LAL CHAND.

43 M. L. J. 745 : (1922) M. W. N. 708 : 32 M. L. T. 9 : 17 L. W. 661 : 46 M. 64 : 71 I. C. 153 : A. I. R. 1923 Mad. 36.

——**S. 100**—*Appreciation of evidence—Finding of lower appellate Court differing from that of trial Court and based on misappreciation of evidence is not binding.*

It is not sufficient for the lower appellate Court when it reverses the findings of the trial Court to merely differ from it as regards appreciation of only the oral evidence. It ought to consider the evidentiary value of the several documents on record filed by the parties. If it does come to any conclusion by misappreciation of evidence such finding is not binding in second appeal. (*Kinkhede, A. J. C.*) YESHWANT *v.* DAULAT. **89 I. C. 663 : A. I. R. 1926 Nag. 129.**

——**S. 100**—*Appreciation of evidence—Inference as to the right of way being as of right would not be interfered with by High Court in second appeal.*

Where from an open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part, the final Judge of fact, *i.e.*, the first Appellate Court draws an inference or presumption that it is as of right, the High Court cannot interfere with the finding. (*Kinkhede, A. J. C*) WASUDEO *v.* SHANKAR. **7 N. L. J. 232 : A. I. R. 1925 Nag. 168**

——**S. 100**—*Appreciation of evidence—Doubtful evidence—High Court will not interfere unless injustice is caused or there is misapprehension of evidence.*

Even where the evidence is doubtful, High Court will not interfere with the decision of fact in second appeal until strong reasons either of injustice or of misapprehension of evidence by the lower Court are indicated. (*Dalal, J. C.*) ANPURNA KUAR *v.* JAGESHAR MISRA. **A. I. R. 1925 Oudh 658.**

——**S. 100**—*Appreciation of evidence—Inferences of lower Court from documents cannot be questioned in second appeal though they differ from inferences of the appellate Court*

Inferences of fact drawn from documentary evidence on the record cannot be questioned in second appeal merely on the ground that if the Court of second appeal had itself considered the documents it would have arrived at different conclusions. (*Wazir Hasan A. J. C.*) MT. SITAL *v.* RAM BUKHAN. **A. I. R. 1925 Oudh 611.**

——**S.100**—*Appreciation of evidence—Trial Court disbelieving witnesses with reference to certain statements—Appellate Court believing them as to other statements—No second appeal lies.*

C. P. CODE (V OF 1908), S. 100—Appreciation of Evidence.

Where the Trial Court called certain witnesses a pack of shameless liars with reference to certain statements made by them the appellate Court can believe the witnesses with reference to some other statements and the action of the appellate Court in so believing does not call for interference in second appeal.(*Dalal, J. C.*) SANTU *v.* TURU. **85 I. C. 407 : A. I. R. 1925 Oudh 537.**

——**S. 100**—*Appreciation of evidence—Evidence not viewed legally—Question can be re-opened.*

Where the evidence in a case has not been viewed as required by law, a point of law is raised and the question can be gone into in second appeal. (*Dalal, J. C.*) ZAHID ALI *v.* MT. SHAHR BANO. **12 O. L. J. 130 : 86 I. C. 101 : 2 O. W. N. 10 : A. I. R. 1925 Oudh 384.**

——**S. 100**—*Appreciation of evidence—Recitals in a deed—Question as to weight to be attached is of fact.*

The question of weight and sufficiency to be attached to recitals in a deed as pieces of evidence is one of fact. 44 Cal. 186 (P. C.) Ref. (*Wazir Hasan, A. J. C.*) BAJU AMARPAL SINGH *v.* MT. CHANDRANI. **12 O. L. J. 134 : 86 I. C. 743 : A. I. R 1925 Oudh 367.**

——**S. 100** — *Appreciation of evidence—Giving preference to one evidence to another by lower Court is justified.*

Where the lower Courts believed the oral evidence produced on behalf of the plaintiff in preference to that of the defendant on the question of possession even though the name of the plaintiff was not entered in the Khasra (revenue papers) :

Held, that it could not be said that the Court acted wrongly in believing it in preference to the conclusion to be drawn from the absence of the plaintiff's name from the annual Khasras. (*Dalal, J. C.*) BHIM SHANKAR DUTT *v.* MANI RAM. **10 O. L. J. 643 : 80 I. C 457 : A. I. R. 1924 Oudh 265.**

——**S. 100**—*Appreciation of evidence—Even a wrong inference from facts is binding.*

In second appeal it is not the business of the High Court to assess the value of evidence relied upon by the lower Appellate Court. A wrong inference from facts does not entitle the High Court to interfere. A finding of the lower Appellate Court as to a gift being incomplete for want of acceptance, at the time of its revocation, is one of fact and binding on the High Court. (*Dalal, A. J. C.*) NANHU *v.* RAM DAYAL. **74 I. C. 818 : A. I. R. 1924 Oudh 164.**

——**S. 100**—*Appreciation of evidence.*

In second appeal the High Court will not entertain any question as regards the weight to be attached to the oral evidence in a case. (*Daniels, J. C.*) BHUDHAR SINGH *v.* BHIKAM SINGH. **65 I. C. 370 : 8 O. L. J. 629.**

——**S. 100**—*Appreciation of evidence—Inference of fraud.*

Where certain facts are found and an inference of fraud is drawn, based upon the facts so found, it is open to the Court in second appeal to consider whether, as a matter of law such an inference is justified by the facts found. If, however, the first appellate Court, which is the ultimate judge of fact refuse to draw an inference of fraud upon the facts so found by it, that decision cannot be questioned in second appeal unless the facts found necessarily amount to fraud : even if, upon a consideration of all the circumstances. High Court might have drawn a different inference and come to a different conclusion unless that inference necessarily followed from the facts proved. High Court would not be entitled to disturb the findings of the

C. P. CODE (V OF 1908), S.100—Burden of Proof.

first appellate Court.] (*Miller, C. J. and Mullick, J.*) RAMDHURI CHOWDHURI *v.* DEONANDAN.
2 P. 65 : 3 P. L. T. 501 : 1922 P. H. C. C. 269 : 1 Pat. L.R. 18 : A.I.R. 1922 Pat. 507.

Burden of Proof.

——S. 100—*Burden of proof—Second appeal—Suit in ejectment—Evidence adduced on both sides—Effect of.*

Where the initial burden of proving possession within 12 years of suit was wrongly placed on the plaintiff but nevertheless both the parties had adduced evidence, the question of *onus* loses its importance. The finding on the issue of possession is largely one of fact with which the High Court will not interfere in second appeal. (*Neave, J.*) SHIVA PRASAD SINGH *v.* MUNESHWAR DUBE. **L. R. 5 A. 358 : A. I. R. 1924 All. 924.**

——S. 100—*Burden of proof—* Onus *wrongly placed.*

Where the plaintiff has not been prejudiced in any way owing to the fact that the initial *onus* was wrongly placed upon him, *held*, that no reason for interference is made out. (*Shadi Lal, C. J. and Brasher, J.*) NAGINA SINGH *v.* MOTA SINGH. **A. I. R. 1924 Lah. 335 (2).**

——S. 100—*Burden of proof—Negotiable instrument—Want of consideration—Question of* onus *of proof—One of law.*

Question of burden of proof where defendant admits execution but denies partial or total absence of consideration is one of law. (*Broadway and Abdul Qadir, JJ.*) GURDIT SINGH *v.* KARAM DAD. **77 I. C. 246 : 4 L. L. J. 199.**

——S. 100—*Burden of proof—Custom—Necessity for certificate.*

Where a question of burden of proof clearly involves a question of custom, an appellant is not entitled to argue it on second appeal without a certificate. (*Abdul Raoof and Harrison, JJ.*) MILKHI *v.* MUSSAMMAT PUNNI. **66 I. C. 492 : 2 Lah. 348.**

——S. 100—*Burden of proof—Question of law.*

The question upon which party the *onus* of proving any particular point lies is undoubtedly a question of law on which a second appeal lies. (*Scott-Smith, J.*) MT. NAIMAT BIBI *v.* MAHOMED FAIZ. **65 I. C. 745 (Lah.).**

——S. 100—*Burden of proof—Finding of fact—Error as to—Interference.*

Defts. executed a mortgage in favour of the plaintiffs for Rs. 4,580 made up of sums due to previous mortgagees, previous debt due on account-price of buffaloes and payment of debts due to other persons. Before the Sub-Registrar the executants admitted receipt of full consideration, but at mutation they stated that the whole of the consideration had not been received. In a suit by plaintiff, for possession as mortgagee, *held*, that the question of *onus probandi* arising in this case was a question of law rendering a second appeal competent. (*Broadway and Wilberforce, JJ.*) GANGA RAM *v.* RULIA. **64 I. C. 901 : 2 Lah. 249.**

——S. 100—*Burden of proof—Finding of fact.*

A correct appreciation by an Appellate Court of a direction of the Lower Court as to the burden of proof, and a consequent arriving at a finding of fact must be accepted in second appeal. (*Sadasiva Aiyar and Spencer, JJ.*) SHANMUGA UDAYAR *v.* KANDASAMI ASARI. **59 I. C. 973 : 12 L. W. 170.**

——S. 100—*Burden of proof—Cast on wrong party—Disregarding evidence.*

C. P. CODE (V OF 1908) S. 100—Consideration of Evidence.

A fact resulting into a finding of wrong burden of proof and disregard of evidence on record is not binding in second appeal. (*Mullick and Bucknill, JJ.*) SHEOPUJAN RAI *v.* KESHO PRASAD SINGH. **2 Pat. 919 : 76 I. C. 347 : 5 Pat. L. T. 315 : A. I. R. 1924 Pat. 310.**

Concurrent Findings.

——S. 100—*Concurrent findings—Inference—High-way—Dedication.*

The evidence on which the concurrent findings were based was one of user by the public. From this evidence the Courts below inferred *animus dedicandi*. *Held*, this was a finding of fact which is not vitiated by any defect in procedure or by any wrong application of a principle of law. On the evidence of the user before it, the Courts below were quite competent to draw the inference that there was a dedication with the intention to dedicate. This is a presumption of fact which could legitimately be raised on the evidence produced. *Folkstone Corporation* v. *Brockman*, (1914) A. C. 338 and *Turner* v. *Walsh*, 6 A. C. 636 Foll. (*Wazir Hasan, A. J. C.*) RAI BAJRANG BAHADUR *v.* BADRI NATH BHARGAVA. **9 O. L. J. 497 : 70 I. C. 74 : A I. R. 1923 Oudh 26.**

——S. 100—*Concurrent findings.*

Ordinarily it is not possible on second appeal to go behind concurrent findings of fact but where not only the findings are perverse in the sense that they were opposed to the weight of the oral evidence but that was due to the fact that the trial court wholly ignored the entry in certain document whilst the first appellate court entirely failed to realise its probative value the High Court set aside the concurrent findings of fact. (*Pratt, J.*) MAUNG HLAING *v.* MAUNG CHIT SUO. **1 Rang. 135 : 76 I. C. 449 : A. I. R. 1923 Rang. 196.**

Consideration of Evidence.

——S. 100—*Consideration of evidence—Finding based on inadmissible evidence can be set aside by High Court.*

Where a finding of fact is vitiated by the consideration of inadmissible evidence, it is open to the High Court in second appeal to come to an opposite conclusion on a consideration of the evidence. (*Stuart, J.*) SAKTOO MAI *v.* GOPAL CHAND. **4 U. P. L. R. (A) 5 : 66 I. C. 313 : A. I. R. 1922 All. 439.**

——S. 100—*Consideration of evidence—Finding on inadmissible evidence—High Court, interference of.*

Where the finding of an Appellate Court is based on evidence which is inadmissible, the High Court will interfere. (*Tudball and Stuart, JJ.*) SRI THAKURJI *v.* HIRDE NARAIN. **63 I. C. 811 (1) (All).**

——S. 100—*Consideration of evidence—Document not produced at first hearing—Rejection of—Interference.*

Certain documents were not produced at the first hearing of a suit under O. 13, Rr. 1 and 2 and they were not received in evidence as the Trial Court was not satisfied with the reasons for their non-production at the earlier stage. *Held*, the High Court in second appeal will not interfere with the order of rejection. (*Cuming and Chakravarti, JJ.*) NRISINHA CHARAN NANDI CHOUDHURI *v.* BATASI DASHI. **90 I. C. 602 (Cal.)**

——S. 100—*Consideration of evidence—Finding not based on legal evidence is not binding.*

Where a plaintiff bases his claim upon a title the mere fact that the adjoining plot happened to be a courtyard or outer compound of a house and belongs to a certain person does not show that the plot on

C. P. CODE (V OF 1908), S. 100—Consideration of Evidence.

which the disputed house stands must also belong to that person. The finding to the effect being not based on legal evidence can be set aside in second appeal. (*Suhrawardy and Chotzner, JJ.*) MOULVI AHIDANNABI *v.* NAGENDRA LAL GANGOPADHYA.
80 I. C. 903 : A. I. R. 1925 Cal. 302.

——**S. 100**—*Consideration of evidence—Not adequate—Remand.*

Where the judgment of the court below is not satisfactory and the court has not come to a finding on a consideration of the whole evidence on the point, the case should be remanded for a rehearing. (*Suhrawardy and Cuming, JJ.*) ISAP ALI *v.* SATIR CHANDRA ROY. **65 I. C. 504 (Cal.).**

——**S. 100**—*Consideration of evidence—Finding of fact—Based on admissible and on inadmissible evidence.*

Where a finding of fact is based on evidence some of which is inadmissible the High Court cannot uphold the finding on the admissible evidence excluding the evidence which is inadmissible. (*Chatterjee and Suhrawardy, JJ.*) SARAJ KUMAR ACHARJI *v.* UMED ALI. **25 C. W. N. 1022 : 63 I. C. 954 : 35 C. L. J. 19.**

——**S. 100**—*Consideration of evidence—Finding of fact can be set aside when lower Court has not considered whole of evidence or finding is not reasonably deducible from the evidence.*

Where an appellate Court has arrived at a finding of fact without taking into consideration the whole of the evidence in the case or where the finding is such that it cannot reasonably be deduced from the evidence, it is liable to be set aside in second appeal. 174 P. L. R. 1914 : 48 I. C. 742 Foll. (*Moti Sagar, J.*) NAGINA SINGH *v.* JIWAN SINGH. **79 I. C. 107 : A. I. R. 1925 Lah. 87.**

——**S. 100**—*Consideration of evidence—Finding based on statement not admissible in evidence—Can be questioned in second appeal.*

As the District Judge has based his finding not on the certified copy which shows what the entries in the records are, but on a statement which is not admissible to prove the entries, the finding can be contested in second appeal. (*Martineau, J.*) RAM LAL *v.* GHANESHAM DAS. **71 I. C. 825 : A. I. R. 1923 Lah. 150 (1).**

——**S. 100**—*Consideration of evidence—Findings of fact—When open to attack in second appeal.*

Ordinarily grounds which impugn findings of fact cannot be entertained in second appeal but where an Appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon the point the finding is not binding on a court of second appeal. A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, the High Court will interfere and should interfere in Second Appeal. 58 I. C. 482 : 56 I. C. 529 : 54 I C. 768 : 65 I. C. 475, Ref. (*Broadway and Moti Sagar, JJ.*) FIRM OF MANSA RAM GORDHAN DAS *v.* FIRM OF MANGAL SAIN DUNI CHAND.
65 I. C. 497 : A. I. R. 1922 Lah. 149.

——**S. 100**—*Consideration of evidence.*

The finding of the Lower Appellate Court however erroneous, but based on the evidence of the record cannot be disturbed by High Court. (*Abdul Raoof and Harrison, JJ.*) NIRANJAN SINGH *v.* BHAGWAN SINGH. **3 Lah. L. J. 409.**

——**S. 100**—*Consideration of evidence.*

A finding of fact arrived at that the plaintiff was a minor on consideration of inadmissible evidence, can be attacked in second appeal. (*Broadway and Abdul Qadir, JJ.*) BALWANT SINGH *v.* BALDEO SINGH.
64 I. C. 929 : 2 Lah. 271.

——**S. 100**—*Consideration of evidence.*

The finding of Lower Appellate Court with respect to the market-value and the amount paid in the pre-emption suit, however erroneous, cannot be contested in second appeal. (*Chevis and Scott-Smith, JJ.*) GANPAT RAI *v.* HARI RAM. **64 I. C. 297 : 3 Lah. L. J. 108.**

——**S. 100**—*Consideration of evidence—Material evidence not considered—Finding on fact can be reversed.*

A finding on a question of fact would be binding if based on a proper consideration of all the material evidence otherwise the finding can be reversed. (*Kumaraswami Sastri and Waller, JJ.*) SECY. OF STATE *v.* NANDYAPPA SHETTY. **21 L. W. 227 : 86 I. C 919 : A. I. R. 1925 Mad. 447.**

——**S. 100**—*Consideration of evidence—Inadmissible evidence—Material part as basis of finding renders remand necessary.*

Inadmissible evidence which is at least material part of the basis of the finding, though it may not be the main part of it renders remand necessary. The admission and consideration of improper evidence would not necessitate a remand if that evidence formed no more than a negligible part of the basis of the finding resting on it, because in that case it would be possible to say that the finding would undoubtedly be the same, even if the improper evidence were excluded. (*Hallifax, A. J. C.*) RAOJI *v.* WARLU. **18 N.L R. 182 : A. I. R. 1923 Nag. 107.**

——**S. 100**—*Consideration of evidence—Finding of fact—When open to question.*

A finding of fact by the lower appellate court reached without considering material evidence in the case will not be accepted. (*Prideaux, A. J. C.*) LAL SINGH *v.* PARASHRAM. **68 I. C. 332 : A. I. R. 1922 Nag. 226.**

——**S. 100**—*Consideration of evidence—Quaint reasoning of lower Court—Finding can be reversed.*

A finding of fact based upon quaint reasoning can and must be interfered with. (*Dalal, J. C.*) RAM BALI *v.* RAM ASRE. **12 O. L. J. 105 : 86 I. C. 686 : A. I. R. 1925 Oudh 386.**

——**S. 100**—*Consideration of evidence—Interference with a decision based on something which the Record-of-Rights does not contain, is justifiable even if the Record-of-Rights is merely a document of evidence.*

If the Record-of-Rights is a document of title obviously it is open to the Court in appeal to construe that document. But it is open to the High Court in second appeal to interfere with a decision based upon the Record-of-Rights if the decision is founded on something which the Record-of-Rights does not contain even if the Record-of-Rights is not a document of title but merely a document of evidence. (*Mullick, A. C. J. and Kulwant Sahay, J.*) BHUPAL MISSIR *v.* SARBAN LAL. **A. I. R 1925 Pat. 725.**

——**S. 100**—*Consideration of evidence—Finding of fact—Kabuliyat.*

It is not proper in the second appeal generally to consider whether or not the lower courts have taken a right view of evidence in coming to findings of fact, but the construction of Kabuliyats upon which the courts below mainly based their view, that a custom was shown, can certainly be considered by the High Court in order to see whether their meaning has been rightly interpreted. (*Bucknill and Ross, JJ.*) NATHUNI

C. P. CODE (V OF 1908), S. 100—Consideration of Evidence.

RAI v. MAHARAJADHIRAJ RAMESHWAR SINGH BAHADUR. **1 Pat. L. R. 289 : 73 I. C. 629 : A. I. R. 1924 Pat. 147.**

——— **S. 100**— *Consideration of evidence—Judgment of reversal.*

In a judgment of reversal it is absolutely necessary that good grounds should be shown for coming to any finding of fact. There must be sufficient material in the judgment of Appellate Court to show the High Court that Lower Appellate Court has considered the evidence and duly considered the reasons given by the trial Courts in its judgment for coming to a contrary decision. (*Adami, J.*) BHIKHU MANDAL *v.* BHIKEHAKAR DUTTA. **2 Pat. L. R. 32 : A. I. R. 1923 Pat. 275.**

——— **S. 100**—*Consideration of evidence—Commissioner's report—Failure of lower appellate court to consider.*

The report of the commissioner in a case of a boundary dispute is an important piece of evidence and should be considered by the lower appellate court. An omission to do so justifies the second appellate court in remanding the case to the lower appellate court. (*Coutts and Das, JJ.*) MT. SONEKUAR *v.* BAIDYANATH SAHAY. **3 Pat. L. T. 483 : A. I. R. 1922 Pat. 562 (2).**

——— **S. 100**—*Consideration of evidence—Whole evidence not considered—Effect.*

A finding of fact which has been arrived at without the consideration of the entire evidence on record is not binding on the court in second appeal. (*Coutts and Das, JJ.*) GIRJA PRASAD *v.* JAGAL KISHORE. **70 I. C. 853 : A, I. R. 1922 Pat. 503**

Construction of document.

——— **S. 100**—*Construction of document—Misconstruction.*

The date, at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed, as instruments of title or mere contracts or statutes, or otherwise the direct foundation of rights. (*Lord Sumner*) MIDNAPUR ZAMINDARY CO. LTD. *v.* UMA CHARAN MANDAL. **45 M. L. J. 663 : 4 Pat. L. T. 627 : 33 M. L. T. 291 : 40 C. L. J. 16 : (1923) M. W. N. 832 : 25 Bom. L. R. 1287 : L. R. 4 P. C. 184 : 21 A. L. J. 723 : 29 C. W. N. 131 : 74 I. C. 482 : A. I. R. 1923 P. C. 187 (P. C.).**

——— **S. 100**—*Construction of document—Finding of fact based on Court's view of legal effect of an endorsement—Interference is permissible.*

A finding of fact based on the view taken by the Court as to the legal effect of a document is open to question in second appeal (*Stuart and Boys, JJ.*) MEHARBAN SINGH *v.* PANNA LAL. **23 A. L. J. 869 : L. R. 6 A. (Civ) 399 : A. I. R. 1926 All. 75.**

——— **S. 100**—*Construction of document—Question of law or fact.*

So far as the nature of the contract is to be gathered from the language used, this is a question of construction which is a question of law. So far however as it is to be gathered from external fact proved in evidence it is a question of fact (*Ryves and Daniels, JJ.*) BABU BISHAMBHAR NATH *v.* MUHAMMUD

C. P. CODE (V OF 1908), S. 100—Construction of Document.

UBAID ULLAH KHAN. **45 A. 581 : 21 A. L. J. 503 : L. R. 4 A. (Civ.) 433 : 77 I. C. 572 : A. I. R. 1923 All. 586.**

——— **S. 100**—*Construction of document—Misconstruction—When a question for second appeal.*

Where a Court of appeal has read entries in revenue papers and has simply decided to what extent the entries indicated the plaintiff's possession of certain plot of land and it has in no way interpreted these entries to indicate any legal point, his decision in interpreting these documents is a decision of fact, and not of law. Where there is sufficient evidence to support a finding of fact in second appeal it cannot be impeached on the ground that the reasoning is not accurate. (*Stuart, J.*) SHEIKH MUHAMED SHUKER *v.* ABDUL GHANI. **71 I. C. 369 : A. I. R. 1923 All. 362.**

——— **S 100**— *Construction of document—If extrinsic evidence is admissible, construction is question of fact, otherwise it is of law.*

If extrinsic evidence is necessary and therefore admissible to determine the meaning of the words used in a document the construction of the document is a question of fact which cannot be reagitated in second appeal. But if the question is one of construction of the document upon the document itself, then it is a question of law which can be considered in second appeal. (*Greaves and Graham, JJ.*) PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHU. **29 C.W.N. 353 : 85 I.C. 693 : A. I. R. 1925 Cal. 656.**

——— **S. 100**—*Construction of document—Question of law—Misconstruction of document containing admission—If one.*

Per *Mookerjee, J.*—The misconstruction of a document which is the foundation of a suit is no doubt a question of law, but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal. (*Mookerjee, A. C. J. and Fletcher, J.*) UJIR ALI SIRDAR *v.* SHADHAI BEHARA. **35 C. L. J. 182 : 68 I. C. 1003 : A. I. R. 1922 Cal. 185.**

——— **S. 100**—*Construction of documentary evidence is a question of fact.*

The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appe al. A. I. R. 1925 All. 39 Foll. (*Addison, J.*) DEVI CHAND *v.* JAI CHAND. **26 P. L. R. 605 : A. I, R. 1926 Lah. 21.**

——— **S. 100**—*Construction of document includes two things, namely meaning of words and its legal effect—The former is a question of fact and the latter one of law—Deed—Construction.*

The expression 'construction' as applied to a docutment includes two things namely, the meaning of the words and their legal effect. The meaning of the words is in all cases a question of fact and the effect of the words is a question of law. A. I. R. 1923 Lah. 626 Foll. (*Addison, J.*) DEVI CHAND *v.* JAI CHAND. **26 P. L. R. 605 : A. I. R. 1926 Lah. 21**

——— **S. 100**—*Construction of document—Finding based not on construction of deed alone but on other facts also—Finding cannot be reversed in second appeal.*

Where the lower appellate Court's finding is based, not merely on the construction of the deed, but on other facts as well the finding cannot be reversed in second appeal. (*Martineau, J.*) ISHAQ LAL *v.* PIYARI LAL. **7 L.L.J. 74 : 86 I.C. 595: A.I.R. 1925 Lah. 344.**

C. P. CODE (V OF 1908), S. 100—Construction of Document.

——S. 100—*Construction of document—Question of fact and law—Erroneous finding of fact—Interference.*

The construction of a document may bear either the meaning of the words or its legal effect. The first is a question of fact and the second a question of law. The High Court cannot entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, if the Court had before it evidence proper for its consideration in support of the finding. (*Moti Sagar, J.*) SHANKAR DAS *v.* MANSA RAM. **78 I. C. 36 : A. I. R. 1925 Lah. 150.**

——S. 100—*Construction of document—Question of fact or law.*

The expression 'construction' as applied to a document includes two things : first, the meaning of the words ; and secondly, their legal effect. The meaning of the words is in all cases a question of fact. The effect of the words is a question of law. (1891) 1 Q. B. 79 Foll. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court. (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN. **A. I. R. 1923 Lah. 626.**

——S. 100—*Construction of document—Deed open to one of two constructions.*

Where it is possible to read the words of a document in dispute either way, it is open to the lower appellate court to adopt whichever reading appears to be more reasonable to it after considering all the connected circumstances and where it has done so, its finding as to what the words in dispute really are, is a finding of fact which cannot be questioned in second appeal. (*Scott-Smith and Abdul Qadir, JJ.*) NIGAHIA RAM *v.* BHAGU ALI. **65 I. C. 580 : A. I. R. 1922 Lah. 240.**

——S. 100—*Construction of deed—Question of fact—Intention of parties.*

The question whether the parties to a deed of transfer intended that certain property should pass under the deed is one of fact and cannot be agitated in Second Appeal. (*Abdul Raoof and Moti Sagar, JJ.*) SHANKAR DAS *v.* MALI. **63 I. C. 746 (2) (L).**

——S. 100—*Construction of document—Deposition—Question of law.*

The construction of a deposition is what the Court thinks is proved by it and it is wrong to speak of it as a construction so as to make it a question of law. (*Abdul Raoof and Harrison, JJ.*) RAGGU MAL *v.* SITA RAM. **63 I. C. 575 (L).**

——S. 100—*Construction of document—Document wrongly read or misconstrued by lower Court—High Court will interfere if finding is vitiated.*

If a document has been wrongly read or misconstrued the High Court would consider whether the misconstruction has in any way vitiated the finding otherwise the High Court will not interfere with the conclusions of fact arrived at by the lower Court. (*Devadoss, J.*) RAMA RAO *v.* APPU. **88 I. C. 924 · A. I. R. 1925 Mad. 1226.**

——S. 100—*Construction of document—Deed—Material alteration—Question is not purely one of law.*

The question whether an alteration is material or not is always dependent upon the nature of each transaction and it also depends upon the nature of the alternation and its juxtaposition in the particular part of the document where it is interpolated and the new complexion the instrument is made to bear by reason of the alteration. It is not therefore a pure question of law. (*Kinkhede, A. J. C.*) HEMCHAND *v.* GOVINDA. **8 N. L. J. 1 : 86 I. C. 185 : A. I. R. 1925 Nag. 243.**

C. P. CODE (V OF 1908), S. 100—Court-fee.

——S. 100—*Construction of document.*

Interpretation of documents and inferences to be drawn from that interpretation are not mere questions of fact and even concurrent findings based on such interpretation and inferences can be set aside in second appeal. 24 C. W. N. 594. ref. (*Dhobley, A. J. C.*) RRISHNA RAO *v.* NILKANTH. **5 N. L. J. 25 : 69 I. C. 800 : 18 N. L. R. 163 : A.I.R. 1922 Nag. 52.**

——S. 100—*Construction of document—Whether* Wajib-ul-arz *entry is based on custom or contract is question of law.*

Whether an entry in the *Wajib-ul arz* is a record of an alleged custom or of a contract being a question of the construction of a document is a question of law which must be entertained in second appeal. (*Cuming, A. J. C.*) RAM KUMAR *v.* HAR PRASAD. **76 I. C. 1021 : A. I. R. 1925 Oudh 64.**

——S. 100—*Construction of document—Construction of a title deed is a question of law.*

The construction of a document of title is a point of law. (*Kulwant Sahay, J.*) GANESH LALL *v.* BISESAR PANDAY. **88 I. C. 820 : A. I. R. 1926 Pat. 49.**

——S. 100—*Construction of document—Question was held to be one of law.*

The headman of a village in Lower Burma granted a permit to occupy certain land, which formed the basis of appellant's title.

Held, that the legal effect of the document was a question of law and that Second Appeal was competent. (*Maung Gyi, J.*) ABDUL RAHIM *v.* MAHOMED CASSIM. **4 Bur. L. J. 27 : 88 I. C. 314 : A. I. R. 1925 Rang. 255.**

Cost.

——S. 100—*Costs—Lower Court interfering with discretion of first Court—Ground for interference in Second Appeal.*

Interference with the discretion of the Trial Court by the Lower Appellate Court in the matter of costs, is a ground for interference in Second Appeal under S. 100. (*Walsh, J.*) HAKIM ZAHUR AHMAD *v.* FATEH ULLAH. **64 I. C. 962 : 3 U. P. L. R. (All.) 55.**

Court-fee.

——S. 100—*Court-fee—Order rejecting memorandum of appeal—Deficiency in Court-fee—Court-Fees Act, Sch. I, Art.* 1.

After the decree-holder had obtained the possession under the final decree for foreclosure it was set aside in appeal. The application for compensation under S. 144, C. P. Code of the judgment-debtor who was restored to possession was dismissed. The District Judge, after admitting the appeal, rejected the memorandum of appeal on the ground that the judgment-debtor had paid only 8 as. Whereas *ad valorem* court-fee should have been paid under Art. 1 Sch. I of the Court Fees Act and failed to make good the deficiency in time. *Held*, decision of the District Judge that *ad valorem* court-fees was payable instead of 8 as. was wrong and that as the question of compensation related to execution, discharge or satisfaction of the decree in appeal the court-fee of 8 as. paid on the memorandum of appeal to the District Judge was sufficient. An appeal lies against the decision of the District Judge rejecting the memorandum of appeal. (*Drake-Brockman, J. C.*) GABBA *v.* KANCHEDILAL. **18 N. L. R. 15 : A. I. R. 1922 Nag. 62.**

C. P. CODE (V OF 1908), S. 100—Custom.

Custom.

——S. 100—*Custom—High Court can examine whether evidence in the case establishes a custom.*

Although the findings of the lower appellate Court so far as they are findings of fact are binding in second appeal, nevertheless it is open to a Court in second appeal to consider whether the evidence which has been found to be proved and instances which have been established do or do not establish a custom having the force of law. (*Mears, C. J. and Sulaiman, J.*) SYED TAJAMMUD HUSAIN *v.* BANWARI LAL. **L. R. 6 A. 179 : 88 I. C 752: 23 A. L. J. 932 : A. I. R. 1926 All. 43.**

——S. 100—*Custom—Tenants whether entitled to sell site of house is mixed question of law and fact.*

The question whether by custom a tenant is entitled to transfer the site of his house in the village *abadi* is a mixed question of law and fact and in the second appeal the question of sufficiency or insufficiency of the evidence in support of such a custom may be gone into. 30 All. 311, Foll. (*Mukerji, J.*) RAFIQ *v* SHANKAR LAL. **L. R. 6 A. 109 (Rev.) : 87 I. C. 749 : A. I. R. 1925 All. 718.**

——S. 100—*Custom—High Court should consider the admissibility and quantum of evidence to establish custom.*

In second appeal the Court should consider whether the evidence that is brought forward to prove custom is not only legally admissible evidence but whether the sum total of that evidence regarded from the point of quantum is of sufficient weight to justify the Court's coming to a conclusion that the custom has been proved. (*Mears, C. J. and Piggott, J.*) MT. DHOLA KUAR *v.* MATHURA SINGH. **75 I. C. 657 : A. I. R. 1923 All. 341.**

——S. 100—*Custom—Finding of fact—Power of High Court to interfere.*

Where a question arises as to the existence or non-existence of a particular custom and the lower appellate court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law and the High Court is entitled in second appeal to consider whether the finding is based on sufficient evidence. The High Court in second appeal has jurisdiction to consider the evidence given in support of an alleged custom and to determine whether or not that evidence is sufficient in point of law to establish the custom set up. Where the lower appellate court after examining the evidence legally and properly and not having rejected admissible evidence finds that the evidence is not sufficient to establish a custom, no question of law can arise. 30 A. 311 ; 37 A. 125 ; 31 A. 557 ; 45 C. 285 Ref. (*Stuart, J.*) SHAKIRA BIBI *v.* NANDAN RAI. **4 U. P. L. R. 95 : 66 I.C. 613 : A.I.R. 1922 All. 241.**

——S. 100—*Custom—Finding on—Nature of.*

A finding on a question of custom is a mixed finding of fact and law. (*Rafique and Piggott, JJ.*) SHAMSHER SINGH *v.* PYARE LAL. **20 A. L. J. 57 : 64 I. C. 956 : L. R. 3 A. 87 : A. I. R. 1922 All. 88.**

——S. 100—*Custom—Specific instance as to—Objection as to insufficiency of evidence.*

Objections based on the grounds of insufficient evidence, or improper rejection of evidence, or as to the evidence taken as a whole amounting to insufficient proof in law of local custom, may be gone into in second appeal, but whether a specified instance is properly proved or not, is a question of fact. (*Marten and Fawcett, JJ.*) RATILAL NATHALAL *v.* MOTILAL SANKAL CHAND. **27 Bom. L. R. 880 : 88 I. C. 891 : A. I. R. 1925 Bom. 380.**

C. P. CODE (V OF 1908), S. 100—Custom.

——S. 100—*Custom—Lower Court holding that no question of custom involved—Whether case involves question of custom can be considered.*

When the lower appellate Court holds that no question of custom is involved in a case and rejects an application for a certificate to enable the applicant to file a second appeal it is open to the second appellate Court to hold that a question of custom is involved and to remand the case to the lower Court to consider whether the certificate can be granted. A. I. R. 1924 Lah. 37 and 18 P R. 1918 Foll. (*Abdul Raoof and Harrison, JJ.*) HAR PHUL *v.* BHAGMAL. **79 I. C. 488 : A. I. R. 1925 Lah. 82.**

——S. 100—*Custom — Gift — Jains — Hindu Law—Certificate.*

Jains are subject to Hindu Law in matters of alienation except where a special custom is proved as a widow would not be competent to make a gift under Hindu Law ; the question whether she has this right by custom is one that cannot be raised in the absence of a certificate in second appeal. (*Broadway and Brasher, JJ.*) CHHAJU MAL *v.* KUNDAN LAL. **70 I. C. 838 : A I. R. 1923 Lah. 53.**

——S. 100—*Custom—Certificate as to—Second appeal.*

On second appeal the question of custom must be confined to that set out in the certificate granted by the lower appellate Court. (*Scott-Smith and Abdul Raoof, JJ.*) NATHU *v.* BANNA. **3 Lah. 344 : 69 I. C. 507 : A. I. R. 1922 Lah. 426.**

——S. 100—*Custom—If supported by facts found open in second appeal.*

It is not competent to a High Court in second appeal to interfere with findings of fact ; but it can consider whether the facts found are sufficient to sustain an allegation of custom. (*Baker J. C.*) MT. BASHIRAI *v.* ABDUL SATTAR. **82 I. C. 815: A. I. R. 1925 Nag. 179.**

——S. 100—*Custom—Question as to custom is not purely of fact—Second Appellate Court can enquire into sufficiency of evidence to prove a custom.*

The question of custom is one of mixed fact and law and the point whether the facts found in any given instance prove existence of the essential attributes of a custom or usage is a question of law and in second appeal an inquiry can be made whether all the attributes of a local custom had been established or not by evidence accepted by the lower Court. A. I. R. 1924 Oudh 157 Ref. There is no difference between cases where custom is accepted and those in which the existence of the custom is not accepted. 21 O. C. 334, Rel. (*Dalal, J. C.*) RAZA HUSSAIN KHAN *v.* SUBBANI. **2 O. W. N. 838 : A. I. R. 1926 Oudh 53 (2).**

——S. 100—*Custom—Question of custom of transferability of house built by tenant on village* abadi *is one of fact and law and can be taken in second appeal.*

The question whether a custom obtains enabling a tenant who has built by the Zemindar's permission, a house in the village *abadi* on a site belonging to the Zemindar and has been enjoying it to transfer it, is a mixed question of fact and law and can be raised in second appeal. (*Kendall, A. J. C.*) BHIKARI LAL *v.* HADI ALI KHAN. **11 O L. J. 738 : 82 I. C. 840 : A. I. R. 1925 Oudh 239.**

——S. 100—*Custom.*

A question of custom is a mixed question of law and fact and can be entertained for the first time in second appeal. (*Pullan, A. J. C.*) MAJID HUSAIN *v.* MT. SAFADARI BEGAM. **81 I. C. 1033 : A. I. R. 1925 Oudh 55.**

——S. 100—*Custom—Finding as to—When open to attack on second appeal—Scope of the enquiry.*

C. P. CODE (V OF 1908). S 100—Custom.

The decision of the lower appellate Court on a point of custom is liable to attack on second appeal on the ground that in the determination of the question in controversy, illegal principles or tests have been erroneously applied, for instance, that the Court has not correctly appreciated essential the attributes of a custom or usage. Consequently, the question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law, which may be discussed in second appeal. It is clear that on second appeal an enquiry must be made whether all the attributes of a local custom have been established or not by the evidence which is accepted by the lower Court. (*Dalal, J.C.*) MANNA LAL *v.* THAKUR JAI INDAR BAHADUR SINGH. **26 O. C. 386 : 76 I. C. 774 : A. I. R. 1924 Oudh 157.**

——S. 100—*Custom — Finding as to—Mixed question of law and fact.*

Where a point of custom raises a mixed question of law and fact, the Court can in second appeal go into the evidence to see whether it establishes the alleged custom. (*Simpson and Wazir Hasan, A. J. Cs.*) BALBHADDAR PRASAD *v.* NARAYAN DAS. **9 O.L.J. 518 : 73 I. C. 727 : A. I. R. 1923 Oudh 102.**

——S. 100— *Custom* — Wajib-ul-arz *rejected under erroneous view of law.*

A Court of second Appeal can interfere with the finding of the Court of the First Appeal on a point of custom where the latter Court has rejected the *wajib-ul-arz* under an erroneous view of the law. (*Daniels, J. C.*) SWAMI DAYAL *v.* RAM DAS. **64 I. C. 86 : 24 O. C. 237.**

——S. 100 - *Custom—Finding of fact—Relevancy of evidence, dispute as to.*

Where the First Appellate Court finds the evidence let in support of an alleged custom, as unreliable, but expresses an erroneous opinion as to its relevancy the High Court will not, in Second Appeal, merely on that ground re-assess its value as proof of the custom. (*Lindsay, J. C.*) SANT BAKHSH *v.* GAJADHAR **61 I.C. 781 : 8 O. L. J. 202.**

——S. 100—*Custom—Existence of custom of privacy—Finding cannot be attacked in second appeal.*

A question as to the existence of a customary right of privacy in a town is a question of fact and when the evidence on both sides has been considered by the lower appellate Court the High Court will not interfere in second appeal. 45 C. 285 46 C. 189 : 37 M.L.J. 199 Foll. (*Fawcett, J.C. and Kemp, A.J.C.*) SHAH MAHOMED *v.* RAMZAN. **66 I C. 833 Sind.**

Damages.

——S. 100—*Damages—Finding of fact.*

Ordinarily the question as to the amount of damages is a question of fact and the finding as to amount of damages arrived at by the lower appellate Court is binding on the High Court ; but when the amount is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court, (*Sulaiman, J.*) JUGAL KISHORE *v.* RAM NARAIN. **A I. R. 1923 All. 199.**

——S. 100—*Damages—Contract of sale—Condition of goods,*

Where under the terms of a contract of sale, goods were to be undamaged, and the Courts below found it to be damaged, it is a finding of fact binding in second appeal. (*Jwala Prasad and Ross, JJ.*) FIRM OF RAMDAYAL RAM NARAIN *v.* FIRM OF BHAIRO BUX GOWRIDUTTA. **5 P. L. T. 558 : 1 Pat. L. R. 398 : A.I.R, 1924 Pat. 240.**

C. P. CODE (V OF 1908), S. 100—Defective Judgment.

Defective Judgment.

——S. 100—*Defective judgment--Lower Appellate Court reversing finding of fact of primary Court must consider all important materials.*

If the lower Appellate Court means to reverse the finding of the primary Court on any point it should consider all the important materials on which that finding was based. It would be intolerable if a Court were required to give all its reasonings in its judgment, or notice, all the evidence which influences its decision. But the position is wholly different where a Court takes upon itself to reverse a finding of the Trial Court on a question of fact. (*Mukerjee, J.*) UMARAM GOGOI *v.* PURUK CHAND OSWAL. **85 I. C. 540 : A. I. R. 1925 Cal. 993.**

——S. 100—*Defective judgment.*

Finding of fact arrived at upon an erroneous conjecture as to matters not on record can be interfered within second appeal. (*Mukerjee, J.*) ABDUL SAMAD *v.* GUNENDRA KRISHNA ROY. **82 I. C. 974 : A. I. R. 1925 Cal. 452.**

——S. 100--*Defective judgment—In judgment of reversal lower appellate Court must give reasons to disbelieve the evidence and disagree with lower Court's finding.*

In a judgment of reversal it is not enough to say that, in the opinion of the appellate Court, the evidence is meagre and could not be relied on without giving any reason in support of that view. In such a case its finding of fact is not binding in second appeal. (*Suhrawardy and Chotzner, JJ.*) CHANDRA MOHAN MAITI *v.* KINARAM MAITI. **79 I. C 412 : A. I. R. 1925 Cal. 408.**

——S. 100 — *Defective judgment — Appellate Judge, duty of to arrive at clear findings.*

It is the duty of the Judge in his judgment when sitting as the final Court of fact to state clearly what his findings are, and the High Court sitting in second appeal cannot deduce from casual statements in the Judgment findings of fact which are not clearly expressed. (*Newbould and Panton, JJ.*) JOGENDRA KISHORE ROY *v.* SHEIKH AKTAR. **67 I. C. 998 : A. I. R. 1923 Cal. 278.**

——S. 100—*Defective judgment—Finding of fact based only on local investigation is not sustainable.*

The judgment of a lower appellate Court based entirely on a local investigation conducted by the Judge of the Court of first instance cannot be sustained in second appeal. 52 I. C. 241 and 39 Mad. 501 Foll. (*Martineau, J.*) RALLA *v.* HARNAM SINGH. **A. I. R. 1923 Lah. 208 (1).**

——S. 100—*Defective judgment — Certificate—Necessity of, in Punjab.*

Where it was doubtful whether the flaw in the District Judge's judgment was such as to absolve the appellant from the necessity of producing a certificate for second appeal, the benefit of doubt was given to the appellant. (*Chevis, J.*) SHER DIL *v.* GULAB. **A. I. R. 1922 Lah. 471.**

——S. 100 — *Defective judgment — Burden on appellant -- Arbitrary decision of the lower Court—Appellate Court's power.*

It is incumbent on an appellant to show that the judgment appealed from is wrong. An Appellate Court can come to an independent decision on a point when the lower Court decided it arbitrarily. (*Broadway and Martineau, JJ.*) MESSRS. PROBHU DIAL BHANWARI LAL OF DELHI *v.* DINA NATH KAPUR. **A. I. R. 1922 Lah. 127.**

——S. 100 -*Defective judgment—No evidence.*

A finding of fact on no evidence is liable to be up-

C. P. CODE (V OF 1908), S. 100—Defective Judgment.

set by High Court in second appeal. (*Wallace, J.*) SUPPAI GOUNDAN *v.* KANDASWAMY GOUNDAN.
19 L. W. 560 : 80 I. C. 567 : A. I. R. 1924 Mad. 617 (1.).

——S. 100—*Defective judgment—Evidence entirely absent—Finding will be set aside.*

If there is an entire absence of evidence on which a finding of fact by the lower appellate Court is based, the finding will be liable to be set aside as defective on a ground of law. (*Dalal, J. C.*) SHIV NARAYAN *v.* G. I. P. RAILWAY CO. **27 O. C. 331 : 85 I. C. 338 : A. I. R. 1925 Oudh 525.**

——S. 100—*Defective judgment—Trial Court's judgment reversed without considering all circumstances—Second appeal does not lie.*

A second appeal would not lie merely on the ground that the lower appellate Court in reversing the Trial Court's judgment, failed to consider all the circumstances on which the judgment of that Court was founded. (*Wazir, Hasan, A. J. C.*) SHEORAJ *v.* BECHEY LAL. **84 I. C. 470 : A. I. R. 1925 Oudh. 313.**

——S. 100 — *Defective judgment — Fraud not pleaded—Finding of fraud.*

Fraud must be expressly pleaded and positive facts and circumstances must be set out clearly giving rise to the application of fraud. Where it was not so pleaded in the case and no issue was framed as to fraud and it was never urged in the primary Court, the finding of the lower appellate Court to the effect that the surrender was actuated by "dishonest and improper motive" is not a real finding of fact binding upon the High Court in second appeal. (*Jwala Prasad and Ross, JJ.*) RAM ORAON *v.* DOMAN KALAL.
2 P. 898 : 4 P. L. T. 562 : 1924 P. H. C. C. 117: A. I. R. 1924 Pat. 100.

Discretion.

——S. 100—*Discretion—Future Interest.*

A question of the award of future interest is discretionary with the Court and is not a pure question of law. (*Moti Sagar, J.*) AGHA MAHOMED ASLAM *v.* JODH SINGH. **A. I. R. 1923 Lah. 513 (2).**

——S. 100 — *Discretion — Second Appeal — No interference in.*

Unless a very strong case is made out a Court of second appeal will not interfere with the discretion of the Court below in passing a decree for money payable in instalments, especially where a large portion of the amount decreed consists of interest. 15 C. W. N. 1088 Ref. (*Abdul Raoof and Martineau, JJ.*) BHUP CHAND *v.* UDE RAM. **27 P. W. R. 1922 : 66 I. C. 147 : A. I. R. 1922 Lah. 355.**

——S. 100—*Discretion—Rate of interest.*

In each case where the question is "what is a reasonable rate of interest" the finding as to the reasonable rate of interest is really a finding of fact, moreover if it is within the discretion of the Courts below to interfere in certain cases with the contract rate of interest, High Court sitting in appeal, would not be justified in interfering with the exercise of the lower appellate Court's discretion unless it is made to appear that this discretion was arbitrarily exercised. (*Lindsay and Gokul Prasad, JJ.*) BINDESHRI PRASAD *v.* JAG PRASAD RAI. **A. I. R. 1922 All. 335 (1).**

——S. 100—*Estoppel—A party insisting upon the adjudication of an unnecessary issue cannot in appeal be allowed to get rid of such adjudication.*

A party who has insisted upon the trial of an unnecessary issue in a case cannot at the stage of appeal be allowed to get rid of the adjudication on that issue by urging that it should not have been investigated. Neither party who has taken the chance of a favourable decision, when defeated, can ask reversal on the ground that the issue was not properly triable in that action. 33 Cal. 425 ; 9 N. L. R. 38 ; 9 W. R. 338 and 3 M. I. A. 229 (P. C.) and A. I. R. 1924 P. C. 144, Foll (*Kinkhede, A. J. C.*) RAGHUBAR PRASAD *v.* SATHU. **89 I C. 1009 : A. I. R. 1926 Nag. 164.**

C. P. CODE (V OF 1908), S. 100—Jurisdiction.

Grounds.

——S. 100—*Grounds—Plea of law not raised in the grounds—Court can allow the plea to be raised.*

In first appeal the Court upheld the finding of the trial Court that certain contract was voidable having been brought about by undue influence by the appellant and suggested to the appellant that he should get some consideration under S. 19-A, Contract Act, but after appellant's rejection of the suggestion upheld the dismissal. In second appeal no plea was raised that the first appellate Court had overlooked the second clause of S. 19-A.

Held, although the grounds of appeal did not raise any question as to the propriety of the lower appellate Court in not invoking this provision of law, High Court was entitled to allow the point to be raised. (*Boys and Ashworth, JJ.*) SUNDAR RAI *v.* SURAJ BALI. **23 A. L. J. 856 : L. R. 6 A. (Civ.) 483 : 88 I. C. 1013 : A. I. R. 1925 All. 783.**

——S. 100—*Grounds—Conjectures and presumptions—Unsafe basis for decision.*

A judgment based upon mere conjectures and presumptions was liable to be set aside even in Second Appeal. (*Scott-Smith and Hosde, JJ.*) MT. BASANTI *v.* KABUL SINGH. **6 Lah. L. J. 127 : 80 I. C 329 : A. I R. 1924 Lah. 465.**

——S. 100—*Grounds—Omission to refer to particular evidence in judgment is not sufficient ground for interference.*

The weight to be given to one particular piece of evidence is a question for the Court which deals with the facts, and the omission to refer to a particular piece of evidence in the judgment is not a sufficient ground for setting aside a finding. (*Daniels, J. C.*) SHIVA PRASAD *v.* LAL BAKSH SINGH.
88 I. C. 496 : A. I. R. 1925 Oudh 691.

Jurisdiction.

——S. 100 — *Jurisdiction — Maintainability of second appeal—Order not appealable.*

A second appeal lies in a case in which an appellate Court wrongly admits an appeal against a non-appealable order and passes a decree therein, and in such second appeal an objection to maintainability of the appeal in the lower Court can be raised for the first time. (*Kanhaiya Lal, J.*) BHAGWAN DAS *v.* MAHOMED BANO. **L. R. 4 A. (Civ.) 447 : 75 I. C. 1053 : A. I. R. 1924 All. 183 (2).**

——S. 100—*Jurisdiction—Order of abatement of appeal—Effect.*

No appeal lies from an order that an appeal pending has abated. 17 All. 172 : 12 A. L. J. 113. Foll. (*Ryves and Gokul Prasad, JJ.*) MUHAMMAD ISMAIL *v.* MANOHAR DAS.
20 A. L. J. 214 : A. I. R. 1922 All. 113 (2).

——S. 100—*Jurisdiction — First appeal entertained without jurisdiction—Second appeal lies.*

If the lower appellate Court entertains an appeal which it has no jurisdiction to do, an appeal will lie from the decree of that Court. 20 C. W. N. 967 and 45 Cal. 926 Foll. (*Suhrawardy and Chotzner, JJ.*) WAJUDI PRAMANIK *v.* BOLAI MORUL.
A. I. R. 1925 Cal. 1032.

——Ss. 100 and 96—*Jurisdiction—Forum—Execution proceedings—Suit for more than 5,000 Rupees.*

Where a decree is passed by the High Court on a

C. P. CODE (V OF 1908), S. 100—Jurisdiction.

first appeal in a suit valued at more than Rs. 5,000 an appeal from an order in execution of such a decree lies to the High Court and not to the District Court, and if the appeal is heard and decided by the District Judge the High Court will on second appeal set aside the order of the Dt. Judge and direct the appeal to be presented to itself. 16 C. L. J. 77 Ref. (*Mookerjee and Panton, JJ.*) KUMUDINI RAY *v.* KAMALA KANTO SEN. **35 C. L. J. 106 : 68 I. C. 575 : A. I. R. 1922 Cal. 247.**

——**S. 100**—*Jurisdiction.*

The question of jurisdiction can be for the first time agitated in Second Appeal. (*Broadway and Zafar Ali, JJ.*) RAM KISHAN *v.* RANSHAN. **A. I. R. 1923 Lah. 551.**

——**S. 100**—*Jurisdiction.*

Where the decision of the Special Judge does not determine merely the amount of fair and equitable rent, but is in essence a decision upon the question of the status of the tenant, it is liable to be challenged by way of second appeal to the High Court. 43 Cal. 603, Ref. (*Mukerjee and Cuming, JJ.*) SARAT CHANDRA *v.* TARAPRASANNA BHATTACHARYA. **36 C L. J. 333 : A. I. R. 1923 Mad. 141.**

Legal Necessity.

——**S. 100**—*Legal necessity —Alienation by Hindu widow—Necessity.*

Ordinarily the Court of second appeal should not go into a finding regarding necessity for an alienation by a Hindu widow, and determine whether or not there is sufficient evidence supporting the finding. (*Stuart and Sulaiman, JJ.*) UDAI BHAN SINGH *v.* GAJENDRA SINGH. **L. R. 3 A. 376 : 70 I. C. 815 : A. I. R. 1923 All. 28.**

——**S. 100**—*Legal necessity—Finding as to necessity for sale is one of fact.*

The finding of the lower appellate Court that one of the vendors was a cripple and incapable of working, and that his share of the price was required for his personal necessities, is a finding of fact and cannot be contested in second appeal. (*Martineau, J.*) RAM KISHEN *v.* KHIALI. **6 L. L. J. 313 : 78 I. C 148 : A. I. R. 1924 Lah. 685.**

——**S. 100**—*Legal necessity—Finding as to, is one of fact.*

The finding as to the existence of necessity is clearly a finding of fact and cannot be impugned in second appeal. (*Moti Sagar, J.*) DALJIT SINGH *v.* HARI CHAND. **A. I. R. 1923 Lah. 669.**

——**S. 100**—*Legal necessity—Finding as to.*

Where the lower appellate Court has decided the question as to the existence of necessity on entirely wrong principles his finding is vitiated and can be examined in second appeal. (*Broadway, J.*) ANOKH SINGH *v.* SAPURAN SINGH. **A. I. R. 1923 Lah. 660.**

——**S. 100**—*Legal necessity.*

Finding as to legal necessity cannot be questioned in second appeal. (*Moti Sagar, J.*) BALBIR SINGH *v.* GOBIND. **A. I. R. 1923 Lah. 532.**

——**S. 100**—*Legal necessity—Question of law or fact—Custom—Alienation.*

Question of necessity for an alienation may be one of fact or of law, and when the point raised is whether the Court below has infringed rules and maxims laid down by the High Court and has decided on wrong principles as to the quantum of proof of necessity required, then the question is one of law. (*Campbell, J.*) PREM DAS *v.* SARBALAND. **A.I.R. 1923 Lah. 41.**

——**S. 100**—*Legal necessity and consideration.*

Findings regarding consideration and necessity are findings of fact and not open to question on a second

C. P. CODE (V OF 1908), S. 100—Misreading of Evidence.

appeal. (*Le Rossignol and Wilberforce, JJ.*) HAKUMAT RAI *v.* WADHAWA SINGH. **4 L. L. J. 243 : A. I. R. 1922 Lah. 398.**

——**S. 100**—*Legal necessity.*

The finding of the lower appellate Court with respect to the alienation not for the benefit of the family cannot be contested in second appeal. (*Le Rossignol and Wilberforce, JJ.*) MUNSHI LAL *v.* SOHAN LAL. **66 I. C. 881 : 3 Lah. L. J. 137.**

——**S. 100**—*Legal necessity—Existence of necessity is question of fact—Whether lender should see to the application of money is a question of law.*

A finding of the existence of necessity for alienation is a finding of fact. But a finding that the lender is or is not bound to see to the application of the money is one of law. (*Simpson, A. J. C.*) SHEO BEHARI *v.* SHEO RATAN SINGH. **A. I. R. 1925 Oudh 740.**

——**S. 100**—*Legal necessity—Alienation by Hindu widow—Enquiry by alienee, as to legal necessity—Sufficiency of enquiry is question of law.*

The sufficiency of the inquiry which an alienee from a Hindu widow has made as to the necessity for the alienation is a question of law and the finding of the lower appellate Court is liable to be examined by the High Court in second appeal. (*Dalal, J. C.*) RAMAN *v.* BARATI. **27 O. C. 329 : 85 I. C. 489 : A. I. R. 1925 Oudh 557.**

Misjoinder.

——**S. 100**—*Misjoinder—Question as to whether defendant could contest a suit.*

Question whether a particular defendant was a necessary party and could contest the suit is one of law and may be raised in second appeal if it does not involve the taking of further evidence. (*Moti Sagar, J.*) SHAMAS-UD-DIN *v.* ALLAH DADKHAN. **6 L. L. J. 351 : 82 I. C. 603 : A. I. R. 1925 Lah. 65.**

Misreading of Evidence.

——**S. 100**—*Misreading of evidence.*

A finding on an issue of fact by the lower appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding upon it. 20 B. 753 Ref. (*Daniels and Neave, JJ.*) SUBEDAR *v.* DUBEY JAGAT NARAIN. **46 A. 773 : 22 A. L. J. 739 : 80 I. C. 25 : L.R. 5 A. 533 : A. I. R. 1924 All. 848.**

——**S. 100**—*Misreading of evidence—Misconception as to nature of claim—Second appeal lies.*

Where the lower appellate Court has based its judgment on a misconception as to the nature of claim put forth by plaintiff, High Court will interfere in second appeal. (*Martineau, J.*) NIRANJAN LAL *v.* GHULAM NABI. **6 L L.J. 508 : A.I.R. 1925 Lah. 251.**

——**S. 100**—*Misreading of evidence.*

Where the lower appellate Court comes to an erroneous decision owing to a misreading of the revenue records, the High Court has power to interfere in second appeal. (*Wilberforce, J.*) MALIK KHAN *v.* NAWAB. **4 Lah. L. J. 307.**

——**S. 100**—*Misreading of documentary evidence—Finding is not binding.*

Where a finding of fact is based on a piece of a documentary evidence which has been completely misread by the Court, the finding is not binding in second appeal. (*Kulwant Sahay, J.*) GANESH LALL *v.* BISESAR PANDEY. **88 I. C. 820 : A. I. R. 1926 Pat. 49.**

——**S. 100**—*Misreading of evidence.*

Misreading of the documentary evidence is not a question of law which justifies a second appeal. (*Das, J.*) MAHABIR MISSER *v.* MT. ASOKUER. **67 I. C. 435 : A. I. R. 1923 Pat. 154**

C. P. CODE (V OF 1908), S. 100—Mixed question of law and fact.

Mixed question of law and fact.

——S. 100—*Mixed question of law and fact—Tenancy, nature of.*

A decision on a question of the nature of the tenancy, *viz.*, whether it is a permanent one or a tenancy at will is a mixed question of law and fact and can be decided in second appeal. 44 Cal. 119 and 8 C. W. N. 755 Foll. (*Broadway and Abdul Quadir, JJ.*) MOTI SAGAR *v.* DHANNA MAL.
29 P.W.R. 1922 : 72 I. C. 177 : A.I.R. 1922 Lah. 329.

——S. 100—*Mixed question of law and fact—Partner or agent—Question is mixed one of law and fact and is assailable in second appeal.*

The question whether a person is a partner or agent of a firm is a mixed question of law and fact, and therefore the High Court is entitled to test the correctness of the lower Court's conclusion by an examination of the relevant evidence in the case. (*Wallace and Madhavan Nair, JJ.*) CHOKALINGA CHETTIAR *v.* MUTHUSWAMI CHETTIAR. **48 M. L. J. 518 : 87 I. C. 663 : 21 L. W. 541 : A. I. R. 1925 Mad. 768.**

——S. 100 *Mixed question of law and fact—Omission to certify adjustment—Question of fact and law mixed—Not open in second appeal for the first time.*

Whether an omission to certify an adjustment was due to any valid grounds is a mixed question of fact and law which cannot be raised for the first time in second appeal, as it involves taking fresh evidence. (*Kinkhede, A.J.C.*) RAGHUBAR PRASAD *v.* SATTOO. **89 I. C. 1009 : A. I. R. 1926 Nag. 164.**

——S. 100—*Mixed question of law and fact—Dower—Amount to be paid.*

A finding as to the amount of dower which can be claimed is one of mixed fact and law and is open to attack in second appeal. (*Neave, A. J. C.*) MT. ALIA BIBI *v.* MT. AMALIA BIBI. **89 I. C. 672 (2).**

——S. 100—*Mixed question of law and fact—Question as to jointness of Hindu joint family.*

The question whether a Hindu family is joint or separate is not a pure question of fact but is a mixed question of law and fact, and it is open to a High Court to look into evidence to find out how far the evidence let in by the parties as to the status of the family is legal evidence and justifies the conclusions arrived at by the lower Court. 44 A. 602 Ref. (*Kinkhede, A. J. C.*) GANGABAKAS *v.* NARAYAN. **86 I. C 505 : A. I. R. 1925 Nag. 284.**

——S. 100—*Mixed question of fact and law—Limitation—Question if to be raised* suo motu.

Where a question of limitation is not purely one of law but of mixed fact and law, the High Court in second appeal cannot go into the question of its own accord under S. 3, Lim. Act. (*Kinkhede, A. J. C.*) BHUWAN LAL *v.* MANHORI. **78 I. C. 960 : A. I. R. 1925 Nag. 178.**

——S 100—*Mixed question of fact and law—"Necessaries".*

The question of what are "necessaries" under S. 68, Contract Act, is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal. (*Kinkhede, A. J. C.*) TULSIRAM *v.* ANUSUYA. **A. I. R. 1924 Nag. 360.**

——S. 100—*Mixed question of fact and law—Duty of Court—Conclusion on facts found.*

In second appeal, the court can legally decide mixed questions of fact and law, but it is undesirable to dispose of the question in the absence of findings of fact by the lower appellate Court. Whether a right conclusion has been drawn on the facts found can be gone into in second appeal. (*Batten, J. C.*) POMDUSA *v.* BAHENABAI **69 I. C. 193 : A. I. R. 1923 Nag. 124.**

C. P. CODE (V OF 1908), S. 100—Nature of Tenancy.

——S. 100—*Amount of dower is a mixed question of law and fact.*

The finding as to the amount of dower which can be claimed is one of mixed law and fact. (*Neave, A. J. C.*) MT. ALIA BIBI *v.* MT. AMALIA BIBI. **89 I. C. 672 : A. I. R. 1926 Oudh 128.**

Nature of Tenancy.

——S. 100—*Nature of tenancy—Land whether* parjaut—*Finding is one of fact.*

The question whether the land is or is no *parjaut* land is one of fact and cannot be re-opened in second appeal. (*Sulaiman and Mukerjee, JJ.*) SHRI LAL GOAIKA *v.* KESHO DAS. **87 I. C. 368 : A. I. R. 1926 All. 83.**

——S. 100—*Nature of tenancy—Finding as to joint tenancy is one of fact.*

The finding that a holding was a joint holding of the parties is one of fact. (*Sulaiman, J.*) NOHUR AHIR *v.* PARTAB AHIR. **21 A.L.J. 899 : L. R. 5 A (Rev.) 1 : 79 I. C. 367 : A. I. R. 1924 All. 231.**

——S. 100—*Nature of tenancy—Recognition of tenancy by landlord—Question can be re-opened in second appeal.*

The question as to whether a landlord recognised a certain person's tenancy is a question of inference as to a state of mind on the part of the landlord and it is open to the High Court in second appeal to enquire as to whether the facts would go to prove recognition. (*Mukerjee, J.*) SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY. **85 I. C. 636 : A. I. R. 1925 Cal. 761.**

——S. 100—*Nature of tenancy.*

The question as to whether permanent tenancy can be presumed is a mixed question of fact and law. 46 Cal. 90, Foll. (*Mukerjee and Chotzner, JJ.*) MAKHAN LAL *v.* ARUN BALA. **73 I. C. 2 : A. I. R. 1924 Cal. 465.**

——S. 100—*Nature of tenancy—Permanent tenancy—Evidence.*

Where on a consideration of the entire evidence in the case the lower appellate Court comes to the decision that a permanent tenancy had not been established, it is a finding of fact which the High Court has no power to interfere in second appeal. (*Broadway and Abdul Raoof, JJ.*) RAM SAHAI *v.* MAHOMED SADIQ. **4 Lah. L. J. 311.**

——S. 100—*Nature of tenancy—Question whether tenant is tenure-holder or* raiyat *under B. T. Act ultimately depends on question of fact.*

Though a substantial question of law may, and generally does arise in determining whether a tenant is a *raiyat* or a tenure holder, the point depends ultimately on questions of fact. 46 Cal. 90 (P. C.) Foll In second appeal the High Court is not entitled to go behind the findings of fact of the lower appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure. 19 C. W. N. 270, Foll. Such findings cannot be assailed however gross and inexcusable the error therein if the lower appellate Court had before it evidence proper for its consideration in support of its finding. 18 Cal. 23 (P. C.) Foll. (*Miller, C. J. and Macpherson, J.*) TARNI SINGH *v.* SATNARAIN MAHARAJ. **1925 P. H. C. C. 281 : 6 P. L. T. 787 : A. I. R. 1926 Pat. 9.**

——S. 100—*Nature of tenancy—Question as to rent payable can be allowed in second appeal.*

Where, in defence to a suit for rent, it is pleaded by the tenant that the rent claimed by a landlord in

C. P. CODE (V OF 1908), S. 100—Negligence.

respect of fruit trees is not payable, the question is one relating to the amount of rent payable and second appeal is allowable. (*Dawson Miller. C. J. and Mullick, J.*) RAMESWAR SINGH *v.* SHEIKH WAZUL HAQUE. **78 I. C. 463 : A. I. R. 1925 Pat. 294.**

Negligence.

——**S. 100**—*Negligence—Question of Lambardar's negligence is one of fact and law.*

In a suit by co-sharers against lambardar for profits the question of negligence of lambardar is a question of mixed fact and law and it is open to review in second appeal. (*Lindsay and Kanhaiya Lal, JJ.*) KUNJ BEHARI LAL *v.* ABDUL HADI.

77 I. C. 1032 : A. I. R. 1924 All. 613.

——**S. 100**—*Negligence—Mixed question of law and fact—Whether can be reviewed in second appeal.*

The lower appellate Court has found that there was gross negligence on the part of a lambardar which involves a question of mixed fact and law and is open to review in second appeal. (*Lindsay and Kanhaiya Lal, JJ.*) ASAD ALI *v.* FAIYAZ ALI.

70 I. C. 591 : A. I. R. 1922 All. 421.

——**S. 100**—*Negligence*—Lambardar—*Agra Tenancy Act* (1901), *S.* 164.

The question whether the acts or omissions of the *Lambardar* amount to negligence or misconduct, is one of law and the High Court is not bound by a finding on that question in Second Appeal. (*Ryves and Gokul Prasad, JJ.*) CHABRAJSI KUAR *v.* GANGA SINGH.

43 All. 29 : 18 A. L. J. 863 : 60 I. C. 643 : 2 U. P. L. R. (A.) 272.

——**S. 100**—*Negligence—Finding of fact.*

The question of negligence is very largely a question of fact. (*Richardson and Suhrawardy, JJ.*) SYED SADAG REZA *v.* KHOSHMOHINI DASI.

71 I. C. 346 : A. I. R. 1922 Cal. 317.

——**S. 100**—*Negligence.*

Finding that there was wilful neglect on the part of the Railway is a finding of fact. (*Martineau, J.*) SECRETARY OF STATE *v.* CHARANJIT LAL.

6 L. L. J. 237 : 79 I. C. 428 : A. I. R. 1924 Lah. 594.

——**S. 100**—*Negligence is a mixed question of law and fact.*

What is gross negligence is a question of mixed law and fact, and the High Court can interfere with the findings of the lower appellate Court. Thus a finding of negligence attributed to the Court of Wards in representing a minor in not relying upon a previous judgment for the purpose of raising the plea of *res judicata* was set aside by the High Court. (*Devadoss, J.*) S. ANAND RAO *v.* VENKATADRI APPA RAO.

47 M. L. J. 700 : (1925) M. W. N. 75 : A. I. R. 1925 Mad. 258.

New Plea.

——**S. 100**—*New plea—Mixed question of law and fact—Not raised in the Court below—If can be raised on Second Appeal.*

A mixed question of law and fact not raised in the Courts below will not be allowed to be raised for the first time in second appeal in the High Court. (*Daniels, J.*) RAMKARAN SINGH *v.* RAJA RAM.

L. R. 5 A. 225 (Rev.): A. I. R. 1924 All. 877.

——**S. 100**—*New plea—As a general rule inadmissibility of evidence should not be raised in second appeal.*

Questions of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal in the High Court if they have not been taken at least at the stage of the first appeal in the Court below. (*Neave and Daniels. JJ.*) RADHA KISHAN *v.* KEDAR NATH.

C. P. CODE (V OF 1908), S. 100—New Plea.

46 All. 815 : 22 A. L. J. 761 : L. R. 5 A. (Civ.) 536 : 80 I. C. 874 : A. I. R. 1924 All. 845.

——**S. 100**—*New plea—Point going to the root of the whole case cannot be taking.*

The High Court may be justified in an exceptional case, in permitting a point of law to be taken in second appeal which goes to the root of the merits of the whole case. (*Stuart, J.*) RAM GAJADEER *v.* MT. SARTANI. **71 I. C. 381 : A. I. R. 1923 All. 343.**

——**S. 100**—*New plea—Point of law—Limitation—When allowed to be raised.*

A point of law which does not require any questions of fact to be determined but can be decided on the record as it stands may be allowed to be raised in second appeal for the first time. 21 A. 466 Foll. ; 42 C. 72 Dist. (*Gokul Prasad, J.*) BHIKHARI SINGH *v.* JOKKAN. **4 U. P. L. R. (A.) 104 : 66 I. C. 856 : A. I. R. 1922 All. 124.**

——**S. 100**—*New plea—Objection in Trial Court—Not urged in First Appeal.*

An objection which is taken in the Trial Court but is not urged in the lower appellate Court cannot be raised in Second Appeal. (*Rafique and Stuart, JJ.*) SHIAM SARUP *v.* NAND RAM. **43 All. 555 : 63 I. C. 366 : 19 A. L. J. 511.**

——**S. 100**—*New plea—Re-opening of the whole case.*

Where the plff. has relied on a custom he cannot be allowed to change his position in Second Appeal, and take his stand on a point which would reopen the whole case. (*Tudball and Rafique, JJ.*) MUKHLAL RAI *v.* HIRANAND SINGH. **19 A. L. J. 442 : 62 I. C. 884 : 3 U. P. L. R. (All.) 81.**

——**S. 100**—*New plea—New point of limitation when entertained.*

Though questions of limitation being questions of law are not excluded from being heard in Second Appeal when they have not been raised in the lower Court, it has always been maintained that where a question of law depends on a finding of fact on evidence and that evidence has not been led in the Trial Court, then the High Court in second appeal will not deal with the question of law. (*Macleod, C. J. and Crump, J.*) DIGAMBAR *v.* LAHYADEO.

25 Bom. L. R 245 : 72 I. C. 226 : A. I. R. 1923 Bom. 254.

——**S. 100**—*New plea—Fresh evidence required—Practice.*

A point of law which cannot be decided without further evidence should not be allowed to be raised in second appeal. 24 Bom. 260 Foll. (*Pratt and Fawcett, JJ.*) DODDAVA *v.* YELLAWA. **A. I. R. 1922 Bom. 233.**

——**S. 100**—*New plea—Point adumbrated in plaint but no issue raised nor evidence led—Point cannot be raised.*

A point, although adumbrated in the plaint but never put forward before the Courts below and on which no issue is framed and no evidence directed, cannot be allowed to be raised in second appeal. (*Suhrawardy and Duval, JJ.*) GIRISH CHANDRA *v.* GOPAL CHANDRA. **A. I. R. 1925 Cal. 1184.**

——**S. 100**—*New plea.*

New point involving determination of new questions of facts can't be raised in second appeal. (*Suhrawardy and Duval, JJ.*) PROMOTH NATH MUKHERJEE *v.* ANUKUL CHANDRA BANERJI. **40 C. L. J. 564 : 29 C. W. N. 17 : A. I. R. 1925 Cal 225.**

——**S. 100**—*New plea—Amendment of decree, point relating to, cannot be raised in second appeal.*

A point relating to an amendment of decree is not a point which can be urged in second appeal. (*C. C. Ghose and B. B. Ghose, JJ.*) KALI PADA BOSE *v.*

C. P. CODE (V OF 1908). S. 100—New Plea.

FANI BHUSAN ROY. 70 I. C. 173 : A. I. R. 1924 Cal. 363.

——S. 100—*New plea—Question as to construction of lease is not allowed in second appeal if not raised in lower Court.*

Where the question that the tenure granted to defendant No. 1 was a single tenure consisting in part of *patni* rights and in part of *dar patni* rights was not taken in the Courts below but it was assumed throughout that the superior landlord was entitled to sell the *patni* tenure separately for its own arrears, *held*, that the lease is not *prima facie* incapable of this construction and as the question may be in part a question of fact depending on the state of things in which the tenure was granted, it ought not to be allowed to be raised for the first time in second appeal. (*Richardson and Suhrawardy, JJ.*) GOPAL CHANDRA *v.* DWARIKA NATH. 69 I. C. 655 : A. I. R. 1924 Cal. 353 (2).

——S. 100—*New plea.*

Where, in the lower Courts a plea has been raised the opposite party might have produced evidence to rebut it, it is too late to raise it in second appeal. (*Newbould and Cuming, JJ.*) TUKA MIAH *v.* NABIN CHANDRA. A. I. R. 1923 Cal. 292 (2).

——S. 100—*New plea—Question involving consideration of evidence.*

Where a point of fact was not raised in the Courts below nor had any issue been framed with reference to it, it cannot be raised for the first time on second appeal. (*Greaves, J.*) SYED NAYAJAN ALI *v.* MIDNAPORE ZAMINDARI COMPANY. 67 I. C. 770 : A. I. R. 1923 Cal. 285.

——S. 100—*New plea—When allowed to be raised for the first time in appeal or second appeal.*

The court will allow a party to raise a new point of law on appeal or second appeal when no further investigation of facts is necessary and when there is no surprise to the other side. If however the new plea raises a question of fact or mixed question of fact and law, the court will not allow it to be raised. 35 A, 273 : 10 M. 1 Ref. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE FOR INDIA *v.* UPENDRA NARAIN ROY. 36 C. L. J. 336 : 71 I. C. 849 : A. I. R. 1923 Cal. 247.

——S. 100—*New plea—When can be raised.*

It is not open to the appellant to raise, for the first time in second appeal, an issue which would depend on facts. (*Suhrawardy and Cuming, JJ.*) HRIDAY NATH MONDAL *v.* TALA BEWA. 65 I. C. 706 (Cal.).

——S. 100—*New plea—Question turning on new facts.*

An appellant cannot in Second Appeal raise a new question turning of facts not investigated by the lower Courts. (*Sanderson, C. J. and Richardson, J.*) PARIKSHIT MANDOL *v.* CHANDRA MOHAN DUTTA. 62 I C 761 (2).

——S. 100—*New plea—Finding of fact—Second Appeal.*

A question of fact, not raised in the Courts below cannot be raised for the first time in Second Appeal. (*Sanderson, C J. and Woodroffe, J.*) DINESH CHANDRA BANERJEE *v.* ROMESH CHANDRA DAS. 59 I. C. 316 (Cal.).

——S. 100—*New plea—When allowed.*

A new point which is not a pure question of law cannot for the first time be taken up in second appeal. (*Teunon and Newbould, JJ.*) NILRATAN MITRA *v.* ABDUL GAFUR GAZI. 59 I. C. 3 : 32 C. L. J. 75.

——S. 100—*New point—Defendant can't raise in second appeal.*

Defendant cannot raise for the first time in second appeal a point which he did not raise in the written statement and as to which no issue was framed. (*Abdul Raoof, J.*) SHURGAN CHAND *v.* SHIKER CHAND. 6 L. L. J. 467 : A. I. R. 1925 Lah. 192.

C. P. CODE (V OF 1908).—New Plea.

——S. 100—*New plea—Technical plea nat allowed.*

A technical plea, that the suit was premature, should not be allowed to be taken for the first time in appeal. (*Broadway and Harrison, JJ.*) BUDHA MAL *v.* SHIB DAYAL. A. I. R. 1924 Lah. 328.

——S. 100—*New plea*—Res judicata—*Plea raised for the first time.*

It is open to the High Court, in second appeal to allow a plea of *res judicata* to be raised even though it had not been raised in any of the courts below or even in the memorandum of second appeal, 4 A, 69 ; 22 I. C. 12 Foll. (*Campbell, J.*) MIRKHAN *v.* SARFU. 5 Lah. L. J. 163 : 74 I. C. 577 : A. I. R. 1923 Lah. 560.

——S. 100—*New plea—When can be entertained.*

A law point which is patent upon the record even if it has not been taken at all in either of the courts below could be raised for the first time in the second appeal and must be considered. (*Campbell, J.*) SOHAN SINGH *v.* SANTA SINGH. A. I. R. 1923 Lah. 491.

——S. 100—*New plea advisedly given up before.*

Where probably advisedly a plea was given up in the first Court by the party, he cannot be allowed to set up the plea in the Court of second appeal. (*Le Rossignol and Zafar Ali, JJ.*) LAJJA RAM *v.* SHAMBHU NATH. A. I. R. 1923 Lah. 252.

——S. 100—*New plea.*

Where there is no reference to a plea in the judgments of the Courts below or in the pleadings of the parties, the point cannot be allowed to be raised in second appeal. A decree for a sum cannot be granted in second appeal, when no such relief was asked for in the Courts below. (*Shadi Lal, C. J. and Abdul Qadir, J.*) FIRM RAM DYAL SHEO PERSHAD *v.* FIRM GHAMANDI LAL NARAIN DAS. A. I. R. 1923 Lah. 56.

——S. 100—*New plea—Raising for first time.*

A point which was not raised in either of the Courts below cannot be entertained in the High Court. (*Broadway and Brasher, JJ.*) CHHAJU MAL *v.* KUNDAN LAL. 70 I. C. 838 : A. I. R. 1923 Lah. 53.

——S. 100—*New plea.*

Objections as to maintainability of suit if raised for the first time in appeal, cannot be allowed. (*Scott-Smith and Campbell, JJ.*) NARINJAN SINGH *v.* DIWAN CHARAN. 3 Lah. 239 : 68 I. C. 557 : A. I. R. 1922 Lah. 363.

——S. 100—*New plea—Question of fact—Not allowed.*

A pure question of fact unless it is at least in the memorandum of second appeal cannot be allowed to be argued for the first time in second appeal. (*Martineau, J.*) MAULA BAKSH *v.* JAFAR ALI KHAN. 4 Lah. L.J. 437.

S. 100—*New plea—Mixed question of law and fact—Not to be raised for the first time on second appeal.*

A mixed question of tact and law cannot be raised on second appeal for the first time. (*Scott-Smith and Dundas, JJ.*) JAGGA *v.* BHAG MAL. 4 Lah. L. J. 432.

——S. 100—*New plea—When allowed in second appeal.*

A point which had been the subject of an issue in the trial court and definitely given up cannot be considered again on second appeal. Simllarly a new point which was not raised in the Court below cannot be raised on second appeal. (*Scott-Smith and Harrison, JJ.*) SADHU RAM *v.* UTTAM DAS. 3 Lah. L. J. 516.

——S. 100—*New plea.*

C. P. CODE (V OF 1908), S. 100—New Plea.

The question that the defendants were entitled to the shamilat land as natural accretion to the proprietary land not having been raised in either of the lower Courts cannot be raised in second appeal. (*Shadi Lal, C. J. and Wilberforce, JJ.*) KARAM CHAND *v.* VIR SINGH. **3 Lah. L. J. 470.**

——S. 100—*New plea—Question of law—When can be raised—Change of case.*

A pure question of law arising out of the findings of the Courts below and patent on the record can be raised for the first time in second appeal. 51 I. C. 588, Foll. The suit for arrears of maintenance cannot be changed into one for contribution in second appeal. (*Broadway, J.*) DIWAN CHAND *v.* BISHEN DAS **67 I. C. 919 : 2 L. L. J. 255.**

——S. 100—*New plea.*

The contention that the parties did not constitute joint Hindu family cannot be raised for the first time in second appeal. (*Le Rossignol and Wilberforce, JJ.*) MUNSHI LAL *v.* SOHAN LAL. **66 I. C. 881 : 3 Lah. L. J. 137.**

——S. 100—*New plea— Namboodries —Special usage.*

Namboodri litigants cannot adduce evidence of special usage varying Hindu Law. for the first time in second appeal. (*Jackson J.*) T. M. NARAYANAN NAMBUDRI *v.* K. RAVUNNI NAIR. **47 M. L. J. 686 : 20 L. W. 876 : 35 M. L. T. 127 : (1924) M. W. N. 792 : 84 I. C. 973 : A. I. R. 1925 Mad. 260.**

——S. 100—*New plea—Impropriety of substitution of legal representative cannot be raised for first time in second appeal—Practice.*

In the absence of a plea as to the impropriety of a certain person having been brought on the record as the legal representative of another party in the lower Courts precludes the raising of such plea for the first time in second appeal. (*Krishnan, J.*) HARIHAR AIYAR *v.* UKKANDAN VARIAR. **81 I. C. 498 : A. I. R. 1925 Mad. 207.**

——S. 100—*New plea—Point of limitation not raised in courts below not to be allowed to be raised*

Points under the Limitation Act not taken in the court below should not ordinarily be allowed to be raised in the High Court. (*Schwabe, C. J. and Wallace, J.*) PARA DEKKAN *v* AMEERUDDIN SAHIB. **17 L. W. 169 : 72 I. C. 131 : A. I. R. 1923 Mad. 306.**

—— S. 100 *New plea.*

An objection not taken in either of the lower Courts cannot be entertained as a ground of second appeal, the more so as the respondents have had no notion in the memo of appeal that it would be urged. (*Oldfield and Ramesam, JJ.*) SUBRAMANIAN *v.* K.U. RAMAN. **16 L. W. 620 : 31 M. L. T. 454 : 69 I. C. 363 : A. I. R. 1922 Mad. 519.**

——S. 100—*New plea.*

Contention given up in lower appellate Court cannot be raised in second appeal. (*Baker, J. C.*) NARAYAN *v.* BIHARILAL. **89 I. C. 18 : A. I. R. 1926 Nag. 160.**

——S. 100—*New point—New question of law on construction of document or on facts admitted or proved beyond dispute can be and must be allowed in Court of last resort.*

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon the facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But in any case Courts ought not to follow the course unless to their satisfaction the evidence upon which they have to decide establishes beyond a shadow of doubt that the facts if fully inquired into would have sustained the new plea. (*Kinkhede, A. J. C.*) NARAYAN *v.* MT. TULSHI. **80 I. C. 607 : A. I. R. 1925 Nag. 104.**

——S 100—*New plea.*

In a partition suit, a plea on the ground of inconvenience, cannot be urged in second Appeal, if not urged in the lower Courts. (*Lindsay, J C.*) TAJA MUL HUSSAIN , BANDE RAJA. **7 C. L. J. 538 : 60 I. C. 433 : 23 O. C. 281.**

——S. 100—*New plea.*

Where before the Subordinate Judge the whole case proceeded on the common ground that there did exist a definite custom that the Mohantship and the possession of the properties of the Sitamarhi asthal were limited primarily to Chelas who were blood relatives of the deceased or the outgoing incumbent. *Held* that it is not possible to allow the respondent to raise the question as to the validity of this custom at the stage of appeal. (*Das and Bucknill, JJ*) RAGHUNATH DAS *v* SHEO KUMAR. **A. I. R. 1923 Pat. 309.**

——S. 100—*New plea—Question of limitation—Facts, necessary for, not pleaded—Entertainability of.*

Issues not raised in the written statements of defendant cannot be entertained in second appeal. (*Das and Adami, JJ.*) KULLAL UPADHYA *v.* JUGDESH PRASAD SINGH. **1 P. 23 : 69 I. C. 185 : 3 P. L. T. 795 : A. I. R. 1922 Pat. 398.**

—— S. 100—*New plea.*

The defendant cannot be allowed to raise in appeal the point of failure to prove legal necessity for the stipulated rate of interest when no such plea was taken in the Court below nor any issue raised on that point. (*Dawson Miller, C. J. and Adami, JJ.*) AINTHU *v.* KHAKKAR. **3 P. L. J. 367 : 1 P. 612 : A. I. R. 1922 Pat. 356.**

—— S. 100—*New plea—Sufficiency of tender—When can be raised.*

The question of sufficiency or insufficiency of the sum tendered cannot be allowed to be raised for the first time in second appeal. (*Coutts and Ross, JJ.*) JAG SAHU *v.* RAM SAKHI KUER. **1 Pat 350 : (1922) P H. C. C 58 : 3 Pat. L. T. 332 : 65 I. C. 666 : A. I. R. 1922 Pat. 167.**

——S. 100—*New plea— When allowed.*

An altogether new point should not be allowed to be raised for the first time in second appeal in High Court, when there is no evidence on the record and no finding to support it. (*Dawson-Miller, C. J. and Coutts, J.*) CHANDRA MOHAN DUTTA *v.* SASIBALA DASI. **3 Pat. L. T 623 : 4 U P. L R. (Pat.) 7 : 65 I C. 277 : 1922 P. H. C. C 39 : A.I.R. 1922 Pat. 68.**

Non-Joinder.

——S. 100—*Non-joinder—Objection when to be taken.*

If an objection as to non-joinder of parties is not taken in the first appellate Court, it cannot be taken for first time in second Appeal. (*Sadasiva Aiyar and Napier, JJ.*) KANDIYAL PARKUM *v.* KHOTTALI KOTTARATHIL. **40 M L. J. 282 : 44 Mad. 344 : (1921) M. W. N. 229 : 62 I. C. 386 : 14 L. W. 69.**

Powers of Courts.

—— S. 100—*Powers of Court—Inference of law from admitted facts—High Court can interfere if inference is wrong.*

If from admitted facts, logical inference, drawn by lower appellate Court which is an inference of law and not of mere fact, be wrong, High Court can inter-

C. P. CODE (V OF 1908), S. 100—Powers of Court.

fere. (*Mukerjee, J.*) PEERJI MOHIB ALI *v.* RAM CHANDER. **L. R. 6 A. 104 (Rev.) : 87 I C. 64 : A. I. R. 1925 All. 796.**

——S. 100—*Powers of Court—Finding accepted by appellant—Appellate Court—If can go behind.*

The appellate Court has no power to go behind a finding of the trial Court, when the appellant has accepted it in his ground of appeal. The carelessness of the appellant's counsel in drafting the grounds makes no difference. (*Scott-Smith, J.*) WADHAWA SINGH *v.* SUNDAR SINGH. **59 I. C. 689 : 21 P. W R. 1921.**

——S. 100—*Powers of Court—High Court can decide title, if left undecided by lower Courts.*

A Court of second appeal can decide a question of title itself if left undetermined by the lower Court whether it was a question of fact or law, under S. 103 read with O. 41, R. 25. Where the question of title rests purely on interpretation of certain documents and the legal inferences to be drawn from them, it is not a question of fact alone and the High Court can interfere and decide it itself 27 C. W. N. 245, 42 All. 152 Foll. (*Wazir Hasan, A. J. C.*) INDARPAL *v.* THAKUR DIN. **10 O. L. J. 646 : 27 O. C. 77 : A. I. R. 1924 Oudh 266.**

——S. 100—*Powers of Court — Remand—Issue determination in the lower Courts.*

Where an issue has been raised and determined, it is not within the competence of High Court in second appeal to remand the case for a rehearing upon that very issue. (*Dawson Miller, C. J. and Mullick, J.*) GANPATI RAI *v.* RAJ KUMAR SINGH. **1 P. 639 : A. I. R. 1922 Pat. 575.**

——S. 100—*Powers of Court to decide issues of fact.*

Per *Miller, C. J.*:—It is not for High Court, sitting in second appeal, even if it thought that certain evidence had been improperly rejected by the lower Court to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter, except in cases where on the evidence only one conclusion is possible for any court.

Per *Jwala Prasad, J.*—Where once a second appeal has been properly laid, the ordinary rules under O. 41 and O. 42, C. P. Code will apply When a finding of fact is set aside and the evidence on the record is sufficient, there is nothing to prevent the court from going into the evidence and determining the case finally under O. 41, R. 24. (*Miller. C. J. and Jwala Prasad, J.*) LOCHAN RAI *v.* LALA SANT PRASAD. **3 Pat. L. T. 303 : 65 I.C. 536 : A. I. R. 1922 Pat. 417.**

——S. 100—*Powers of Court—Appeal--Restoration —Erroneous order—Objection as to validity.*

If a respondent first comes to know of the erroneous order restoring the appeal without any notice upon him, he can raise objection to its validity in second appeal. (*Dawson Miller, C. J. and Coutts, J.*) SURAJ PAL PANDEY *v.* UTTIM PANDEY. **3 P. L. T. 117 : A. I. R. 1922 Pat 281.**

Presumption.

——S. 100—*Presumption — Rebuttal—Question of fact.*

The question whether the presumption of the correctness of the Record of Rights has been rebutted in a particular case is more a question of fact than of law. (*Suhrawardy and Cuming, JJ.*) YAKUB ALI CHOWDHURI *v.* RAJ KUMAR DUTTA. **65 I. C. 527 (Cal.).**

——S. 100—*Presumption—Not based on evidence but on conjecture.*

A merely conjectural finding of the lower appellate

C. P. CODE (V OF 1908), S 100—Question of fact Amount of damages.

Court that the common ancestor of the parties occupied the land in suit is liable to be set aside in second appeal. (*Martineau, J.*) KISHEN LAL *v.* KANHAYA. **79 I. C. 970 : 5 Lah. L. J. 106.**

——S. 100—*Presumption—Inference of law from facts is question of law.*

Where the lower appellate Court found as a fact that the evidence established that there had been no change of rent for 48 years and then inferred that fixity of rent could be presumed.

Held, that it was an inference of law and could be questioned in second appeal. (*Das and Adami, JJ.*) KESHO PRASAD SINGH *v.* ISSER DUBEY. **1 P. L. R. 32 : 71 I. C. 15 : A. I. R. 1924 Pat. 373.**

——S. 100—*Presumption—Rebuttal.*

It is for the final Court of fact to say whether the evidence as furnished by the *batwara* proceedings is so valuable as to rebut the presumption of the correctness of the record-of-rights. (*Das and Adami JJ.*) JUGDEO NARAIN *v.* BULAKI GOPE. **(1921) P.H.C.C. 343 : 63 I.C. 226 (2) : 2 P. L. T. 343.**

Procedure.

——S. 100—*Procedure—C. P. Code, O. 47, R. 27.*

Taking additional evidence without recording reasons and without calling upon the party to show its necessity is a substantial error in procedure and such an order of the lower appellate Court is open to second appeal. (*Rankin and Mukerjee. JJ.*) KEBAL NEMADAS *v.* RAJANI KANTA ROY. **39 C. L. J. 261 : 81 I. C. 999 : A. I. R. 1925 Cal. 98.**

——S. 100 and O. 41, R. 17—*Procedure*—Ex-parte *hearing of appeal—Interference on second appeal.*

Where the lower appellate Court has decided an appeal *ex-parte* the High Court has power to interfere in second appeal on the ground that the lower appellate Court acted irregularly in hearing the appeal *ex parte.* 30 M. 54 Foll. 1 I. C. 329 dissented. (*Martineau and Harrison. JJ.*) GULAM HAIDAR *v.* JIWAN. **3 Lah. 357 : 69 I. C. 499 : A. I. R. 1922 L. 439.**

——S. 100—Question of fact

Amount of damages.
Bona fides.
Breach of contract.
Change in contract.
Consideration.
Delay
Different inferences.
Evidence.
Finality.
Grove.
Marriage.
Minority.
Mistake or error.
Nature of property.
Notice.
Nuisance.
Partnership
Possession.
Reasonable or probable cause.
Right over property.
Status of party.
Tender.
Transfers.
Waqf.
Will.
Miscellaneous.

Adoption.

——S. 100—*Question of fact. Amount of damages.*

It is a question of fact whether or not a caste was suit up. (*Macleod, C. J. and Coyajee, J.*) FULCHAND

C. P. CODE (V OF 1908), S. 100—Finding of fact Adoption.

MOHANLAL *v.* HARILAL NANSA.
27 Bom. L. R. 1503 : A. I. R. 1926 Bom. 69.

——S. 100—*Finding of fact—Adoption—Finding capable of being interpreted both as finding of fact and of law—Untenability as finding of law—High Court is not bound to treat it as finding of fact.*

Where the finding of the lower court might mean either that there was no adoption in fact or that the adoption was not valid in law and where the view that it was not valid in law could not be supported in view of the ruling in a certain case and where therefore the High Court was asked to hold that the finding meant that there was no adoption in fact.

Held that it was not for the High Court to say that the lower Court must have meant something simply because it was the duty of the lower Court to say the same and that the finding in question was not a finding of fact. (*Mukerji, J.*) UMARAM GOGOI *v.* PURUK CHAND OSWAL. **85 I. C. 540 : A. I. R 1925 Cal. 993.**

Question of fact—Amount of damages.

——S.100—*Question of fact—Amount of damages*

Ordinarily the question as to the amount of damages is a question of fact and the finding as to amount of damages arrived at by the lower appellate Court is binding on the High Court but when the amount is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court. (*Sulaiman, J.*) JUGAL KISHORE *v.* RAM NARAIN. **A. I. R. 1923 All. 199**

Question of fact—Antecedent debt.

——S. 100—*Question of fact— Antecedent debt—Existence of.*

The question whether an antecedent debt existed is one of fact. The fact that in coming to a conclusion on the point the judge declined to accept recitals in a deed as evidence of the debt is no ground for second appeal. (*Simpson, A. J. C.*) BHAGWATI PRASAD *v* LALL BAHADUR. **90 I. C. 404 : A.I.R. 1926 Oudh 33.**

Question of fact—Bona fides.

——S. 100—*Question of fact*—Bona fides—*Question as to plaintiff's* bona fide *mistake is not one of fact.*

Question as to plaintiff having misnamed a defendant purposely or by *bona fide* mistake is not purely one of fact. (*Suhrawardy and Graham, JJ.*) KHERODAMOYI DASI *v.* HABIL SHAHA.
29 C. W N. 51: 82 I. C. 638: A. I. R. 1925 Cal. 152.

——S. 100—*Question of fact*—Bona fides *is a.*

Finding as to *bona fides* of a party in taking a certain action is a finding of fact. 75 P. R. 1916 Foll. (*Abdul Raoof, J.*) MUNICIPAL COMMITTEE, FEROZEPORE CITY *v.* MILKI RAM. **7 L. L. J. 358 : 26 Punj. L. R. 641 : A. I. R. 1925 Lah 505.**

——S. 100—*Question of fact*—Bona fides.

It is a question of fact whether a guardian is justified in entering into a compromise. (*Spencer and Odgers, JJ.*) ANNAPURNAYYA *v.* VENKATASUBRAMANIAM. **49 M. L. J. 549. 22 L. W. 560 : A. I. R. 1925 Mad 1285 :**

Question of fact—Breach of contracts.

——S. 100—*Question of fact—Breach of contract.*

A finding that it was the defendant who committed the breach of contract and not the plff. is one of fact which will not be interfered with by High Court in second appeal. (*Shadi Lal, C.J. and Wilberforce, J.*) WELD AND COMPANY *v.* HARCHARAN DAS. **4 Lah. L. J. 317.**

Question of fact—Change of contract.

——S. 100—*Question of fact—Change in contract—Real contract between parties.*

C. P. CODE (V OF 1908), S. 100—Question of fact—Different Inferences.

Where question in dispute is merely whether the real contract between the parties was something different from the contract entered in the deed, the finding on this point is clearly a finding of fact, with which the High Court will not interfere in second appeal. (*Martineau, J.*) KAPUR CHAND *v.* CHET RAM. **5 Lah. L. J. 541 : 80 I. C. 494 : A. I. R. 1924 Lah. 260.**

Question of fact—Consideration.

——S. 100—*Question of fact—Consideration.*

A finding that a pronote was executed for consideration is a finding of fact. (*Broadway and Abdul Qadir, JJ.*) MAHOMED HUSSAIN *v.* RAM LAL.
5 L. L. J. 198 : 71 I. C. 783 : A. I. R. 1924 Lah. 39.

——S. 100—*Question of fact—Consideration—Errors in—Not open to consideration on second appeal.*

Where the Lower Appellate Court in a suit to contest an alienation has found that Rs. 475 out of the sale price due on a prior oral mortgage was fictitious and in arriving at this conclusion the Lower Appellate Court has considered the evidence on record connected with this matter then the finding however erroneous cannot be challenged in second appeal. 18 C, 23 P. C. Foll. (*Abdul Raoof and Harrison, JJ.*) BHAGWAN SINGH *v.* NIRANJIN SINGH.
67 I. C. 436 : 3 L. L. J. 409.

——S. 100—*Question of fact—Consideration—Pre-emption suit—Fictitious item of consideration—Market value of the property.*

A finding in a pre-emption suit that a portion of the price mentioned in the deed of sale is fictitious though erroneous is binding upon the High Court in second appeal. So is a finding as to the market value of the property in dispute based on evidence. (*Chevis and Scott Smith, JJ*) GANPAT RAI *v.* HARI RAM. **64 I. C. 297 : 3 L. L. J. 108.**

Question of fact—Creation of Right.

——S. 100—*Question of fact—Creation of Right—Whether joint tenancy was intended to be created is.*

Question of intention to create joint tenancy is one of fact, and so long as the Judge makes no inferences which are not justified in law, the finding of intention is one which cannot be interfered with in second appeal (*Phillips, J.*) MUTHUKARUPPA MUTHIRIAN *v.* SHIVABHAGYATHAMMAL. **22 L. W. 511 : A. I. R. 1926 Mad. 33 : 49 M. L. J. 358.**

Question of fact—Delay.

——S. 100—*Question of fact—Delay—Requisite time.*

Finding as to the time required for obtaining the copies is one of fact and cannot be attacked in second appeal. 48 I, C. 31 ; 100 P. R 1918 ; 185 P. W. R. 1918 Foll. (*Martineau, J.*) BAWA SINGH *v.* THAKUR SINGH. **A. I. R. 1922 Lah 423.**

——S. 100—*Question of fact—Delay is a question of fact, but the finding that it disentitles the plaintiff from certain relief is one of law and can be examined in second appeal.*

The question whether there was delay is one of fact and a finding thereon cannot be questioned in second appeal. But the lower appellate Court's finding that the plaintiff is on that account disentitled from claiming the relief which he desires is not one of fact but of law and can be considered in second appeal. (*Kinkhede, A. J. C.*) ABDUL MAJID KHAN *v.* BALAPPA.
82 I. C. 105 : A. I. R. 1925 Nag. 58.

Question of Fact—Different Inferences.

——S. 100— *Question of fact—Different Inferences from fact.*

Where more than one inference is legally open from the evidence, the High Court cannot in second appeal

C. P. CODE (V OF 1908), S. 100—Question of fact—Different Inferences.

refuse to be bound by that inference drawn in the Court below. (*Broadway, J.*) ABDUL GHANI *v.* ISHAR SINGH. **A. I. R. 1923 Lah. 239 (1).**

———S. 100—*Question of fact—Different inferences—Another inference possible—If ground for second appeal.*

The mere fact that a court of appeal draws one of two possible inferences on a question of fact does not entitle the High Court in second appeal to interfere with finding. If only one inference is possible and that has not been drawn, it may be ground for second appeal. (*Kinkhede, A. J. C.*) MT. MATHURABAI *v.* LAL SINGH. **A. I. R. 1924 Nag 160.**

———S. 100—*Question of fact—Different inferences—Conclusion—Correctness, if can be challenged.*

In Second Appeal, findings of fact cannot be impugned, but it is open to a party to challenge the correctness of the conclusion drawn from those findings. (*Wazir Hasan, A. J. C.*) JASADHA *v.* MURALIDHAR. **61 I. C. 144: 24 O. C. 1.**

———S. 100—*Question of fact—Different Inferences from facts—Interference.*

An inference drawn from facts by the lower appellate court is a finding of fact and cannot be interfered with in second appeal. (*Miller, C. J. and Kulwant Sahay, JJ.*) BION *v.* SHEOGULAM LAL. **74 I. C. 843 : A. I. R. 1924 Pat. 305.**

———S. 100—*Question of fact—Different—Inferences.*

Inferences of fact which are not unreasonable and are justified by evidence cannot be interfered with in second appeal. (*Kincaid, J. C. and Raymond, A. J. C.*) PEWANDBAI *v.* CHETANMAL. **62 I. C. 1002 : 15 S. L. R. 84.**

Question of fact—Error.

———S. 100—*Question of fact—Error—Erroneous view of law—Interference.*

The finding of fact of a lower appellate court which proceeds on an erroneous view of the law, and which is inconsistent with the facts recited can be interfered with by the High Court. (*Piggott and Walsh, JJ.*) SABAL SINGH *v.* SALIK RAM SINGH. **44 A. 602: 20 A. L. J. 473: L. R. 3 A. 301: 67 I. C. 67 : 4 U. P. L. R. (A) 93: A.I.R. 1922 All. 188 (2).**

———S 100—*Question of fact—Error—Interference in Second Appeal.*

An erroneous finding of fact is different from an error in procedure. Where there is no error or defect in the procedure the finding of fact by the Court of First Appeal is final if that Court had before it evidence proper for its consideration in support of its finding. (*Abdul Raoof and Harrison, JJ.*) RUGGU MAL *v.* SITA RAM. **63 I C. 575 (L.)**

———S. 100—*Question of fact—Error—Though wrong will not be disturbed in second appeal.*

Where the lower Court has dealt with all the essential points in deciding the case and has also analysed the evidence and the main findings which determine the suit are warranted by the evidence on record, the Court of second appeal will not disturb his findings though they may be wrong. (*Prideaux, A. J C.*) MT. SARASWATI BAI *v.* YADORAO. **78 I. C. 887. A. I. R. 1924 Nag. 240.**

Question of fact—Evidence.

———S. 100—*Question of fact—Evidence—Witness—Opinion as to.*

In at appeal on a pure question of fact sufficient weigh snhould be given to the opinion of trial judge as regards the demeanour, intelligence, position and character of the witnesses who are brought before him. He is in a better position to form a judgment on the points

C. P. CODE (V OF 1908), S 100—Question of fact—Evidence.

than the appellate judge who has no advantage of seeking the witnesses. (*Lord Wrenbury*). BANU BAI FRAMJI *v.* MANILAL JUGALDAS. **45 M. L. J. 242: (1923) M. W. N. 580: 18 L. W. 148: L. R. 4 P. C. 147: A. I. R. 1923 P. C. 62 (P. C.).**

——— S. 100—*Question of fact—Evidence—Letters Patent Appeal—Burden on the person raising.*

In order to maintain a contention of fact in second appeal and even more so in an appeal under the Letters Patent it would be incumbent on the person raising it to plead and to show from the record that documentary evidence establishing his contention of fact had either been disregarded by the Court of first appeal or misinterpreted. (*Piggott and Walsh, JJ.*) MATHURA PRASAD *v.* RAMESHWAR. **44 A. 169: A. I. R. 1922 All. 312.**

———S. 100—*Question of fact.—Evidence.*

Where the Lower Appellate Court arrived at the finding on relevant evidence and certain-admissible registered deeds that there was a partition. *Held*, that, being a finding of fact was conclusive. (*Stuart, J.*) SYED MAHAMMED *v.* SYED MANZUR HASSAN. **69 I. C. 807 : A.I.R. 1922 All. 283 (2).**

———S. 100—*Question of fact—Evidence.*

Findings of fact cannot be interfered within second appeal, but the High Court will interfere when such findings are not borne out by evidence or are based upon evidence misunderstood. (*Rafique and Ryves, JJ.*) MATBAR SINGH *v.* RANBAZ SINGH. **19 A.L.J. 149 : 61 I. C. 65: 3 U. P. L. R. (All.). 27.**

———S. 100—*Question of fact—Evidence—Distorted view of evidence—Interference.*

Though the High Court is averse to upsetting in second appeal the decision of Court below on a question of fact, it can do so in a case where the lower court was not justified in coming to the conclusion it did. (*Macleod, C. J and Coyajee, J.*) IBABASAPPA *v.* BHADSAWA. **A. I. R. 1922 Bom. 296.**

———S. 100—*Question of fact—Evidence—Question is one of fact.*

It is not proper for a Court in second appeal to lay down whether a piece of evidence is or is not sufficient to rebut the presumption raised under S. 50, that being a question of fact, (*Suhrawardy and Cuming, JJ.*) SATINDRA MOHAN *v.* KAMAREDDI MIJI. **A I. R. 1925 Cal. 1133.**

———S. 100—*Question of fact—Evidence.*

Unless it is shown that a finding of fact is not justified by the evidence in the case it cannot be challenged in second appeal. (*Greaves and Graham, JJ.*) JINNA TENNESSA *v.* ABDUL HALIM MUNSHI. **82 I. C. 822 : A. I. R. 1925 Cal. 469.**

———S. 100—*Question of fact—Evidence—Want of evidence or erroneous view of the law are the only grounds for interference.*

In a second appeal finding of fact cannot be interfered with unless it can be shown that there was no evidence to support it or that it had been influenced by an erroneous view of the law. (*Suhrawardy and Graham, JJ.*) HARIRAM MAHATA *v.* MOHESH CHANDRA MAHATA. **80 I. C. 290: A I. R. 1925 Cal. 169.**

———S. 100—*Question of fact—Evidence—Finding based partly on inadmissible evidence—Duty of High Court.*

Where a finding of fact is arrived at by the Court below partly on the basis of inadmissible evidence, the High Court should remand the case for a fresh finding after excluding the inadmissible evidence. (*Mookerjee and Rankin, JJ.*) JAGADISH CHANDRA DE *v.* HARIHAR DE. **40 C. L. J. 39: 78 I. C. 219: A. I. R 1924 Cal. 1042.**

C. P. CODE (V OF 1908), S. 100—Question of Fact —Evidence

——S 100—*Question of fact—Evidence—Weight of evidence Thak map and survey map.*

The question with regard to the weight to be attached to *thak* maps and survey maps is a question of fact. (*Suhrawardy and Chotzner, JJ.*) KALI PROSANNA BHADURI *v.* RANI HEMANTA KUMARI DEBI. **A. I. R. 1924 Cal. 977.**

——S. 100—*Question of fact Evidence--Documeatary evidence—Inference from—Function of the High Court.*

Where in a second appeal a great many documents have to be canvassed in the course of the case, it is not true that the inferences of fact to be drawn from the numerous documents are themselves to be regarded as inferences of law. It is quite true that it is part of the duty of the High Court to see that the lower appellate Court has not omitted to take into account all the important and relevant items of evidence. (*Rankin and Ghose, JJ.*) MIDNAPORE ZEMINDAR CO., LTD. *v.* TRILOKYA NATH HALDAR. **51 Cal. 110: 31 I.C 501: 40 C. L. J. 238: A. I. R. 1924 Cal. 562.**

——S. 100—*Question of fact—Evidence—Finding of facts based on evidence cannot be contested.*

A finding of fact based upon legal evidence cannot be contested in second appeal. (*Scott-Smith and Martineau, JJ.*) FAZAL DAD *v.* UMAR BAKHSH. **7 L. L. J. 129: A. I. R. 1925 Lah. 377.**

——S. 100—*Question of fact—Evidence—When not binding on the Court of second appeal.*

When there is (i) no evidence (12 Cal. 972) or (ii) no sufficient legal evidence (16 I. C. 887) or (iii) important evidence is ignored (103 P. L. R 1915) or (iv) only a colourable pretence of considering the evidence is made (38 I. C. 561) or (v) there is no honest and complete consideration, a finding of fact can be contested in second appeal. Otherwise it is final (18 Cal. 23 P. C.) (*Scott-Smith and Abdul Raoof, JJ.*) RAM SINGH *v.* GANGA RAM. **3 Lah. 389: 70 I. C. 202: A. I R. 1922 Lah. 356 (2).**

——S. 100—*Question of fact—Evidence when open to examination.*

It is not necessary in law for Appellate Courts such as the District Judge to refer in detail to every piece of evidence on the record. In the absence of doubt that all the available evidence has been given due weight to his findings on questions of fact cannot be attacked in second appeal. Whether or not there had been a complete separation, is a question of fact. (*Broadway and Abdul Raoof, JJ.*) NATHU SHAH *v.* HAVELI SHAH. **1 Lah. L. J. 72: 16 P. W. R. 1922: 65 I. C. 475: A. I. R. 1922 Lah. 140.**

——S. 100—*Question of fact—Evidence—Inadmissible evidence—Right to question.*

A finding of fact arrived at on a consideration of evidence which is inadmissible and which proceeds partly on such evidence can be assailed in second appeal, 57 I.C. 561 Foll. (*Broadway and Abdul Qadir, JJ.*) BALWANT SINGH *v.* BALDEV SINGH. **64 I. C. 929: 2 Lah. 271.**

——S. 100—*Question of fact—Evidence—Supported by evidence can't be questioned in second appeal, however erroneous it may be.*

Provided that the finding of fact has got for its basis proper evidence however grossly erroneous or improper it may be, it cannot be challenged in second appeal. (*Kinkhede, A. J. C.*) NARAYAN *v.* LAXMAN. **80 I. C. 885: A I. R. 1925 Nag. 111.**

——S. 100—*Question of fact—Evidence—Finding without weighing evidence is not binding,*

The High Court is not bound by the findings of facts recorded by the lower appellate Court without properly weighing all the evidence on the record. (*Dalal, J C.*) MT. MAHARAJA *v.* BAJRANG BALI. **87 I. C. 1040: A. I. R. 1925 Oudh 747.**

C. P. CODE (V OF 1908), S. 100—Question of Fact—Evidence.

——S. 100—*Question of fact—Evidence.*

A pure finding of fact based on evidence cannot be disputed in second appeal. (*Lyle, A. J C.*) NIAMAT ALI *v.* ASHIQ ALI. **9 O. L. J. 127: 67 I. C. 803: A. I. R. 1922 Oudh 96.**

——S. 100—*Question of fact—Evidence--Allegation in plaint not denied specifically in written statement—Finding cannot be challenged.*

Where the allegation in plaint was not specifically denied in the written statement and was supported by evidence *Held*, that a finding in support of such allegation cannot be said to be based on no evidence and cannot be challenged in second appeal. (*Ross and Sen, JJ.*) MAHOMED ALAM *v.* NATHU SAHU. **85 I.C. 1024 : 2 Pat.L.R. 284 : A.I.R. 1925 Pat. 552.**

——S. 100—*Question of fact—Evidence—When open to attack in second appeal.*

Although the findings of fact of the lower appellate Court are not open to question in second appeal, it is always open to the High Court to consider whether there is in fact any evidence to support the findings. (*Miller, C. J. and Mullick, J.*) DHANRAJ *v.* FIRM OF SANEHI RAM PANNA LAL. **A.I.R. 1924 Pat. 687.**

——S. 100—*Question of fact—Evidence—Finding on facts can be upset where lower Court was not in a better position than the appeal Court to judge of witnesses' reliability.*

Where the District Court, had not examined the witnesses nor had it had an opportunity of observing those witnesses' demeanour and in fact, it was in no better position than the High Court, to judge of the reliability of the witnesses' evidence.

Held, that though as a rule very great value would be attached by the High Court to the finding of the District Court on facts yet, in this case its finding could be upset. (*Duckworth and Godfrey, JJ.*) MA E KHIN *v.* MAUNG SHEIN. **2 Rang 495 : A. I. R. 1925 Rang. 71.**

——S. 100—*Question of fact—Evidence—Appellate Court should not lightly disturb trial Court's verdict on facts.*

On appeal, the whole case, including the facts, are within the jurisdiction of the Appeal Court. But generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attaches to one or other of the conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on mere calculations of probabilities by the Court of appeal. This does not mean that appellate Courts have no discretion in consideration of the evidence. It only means that where the issues is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded (*Kincaid, J. C. and Aston, A. J. C.*) JOSSOMAL VALIRAM *v.* CHELLARAM BHOJRAJ. **78 I. C. 534 : 18 S. L. R. 55 : A. I. R. 1925 Sind 35.**

——S. 100—*Question of fact—Existence of antecedent debt is question of fact and cannot be disturbed in second appeal.*

The question whether antecedent debt existed is one of fact and cannot be considered in second appeal. The fact that the lower appellate Court declined to accept the recitals in a deed as evidence of antecedent

C. P. CODE (V OF 1908). S. 100—Question of Fact —Finality.

debt does not validate the findings as to its existence. (*Simpson, A. J. C.*) BHAGWATI PRASHAD *v.* LALL BAHADUR. **90 I. C. 404 : A. I. R. 1926 Oudh 33.**

——S. 100—*Question of fact—Findings of fact—Clear and specific—Conclusions from—If open to attack*

An appellate court must give clear, definite and specific findings on every issue of fact, and if there is any ambiguity or vagueness about any finding, the case must be sent back or finding called for. The soundness of conclusions from findings of fact may involve matters of law and can be questioned in second appeal. (*Lindsay and Sulaiman, JJ.*) CHANNU DUTTA VYAS *v.* GAJANANNANDJI MAHARAJ. **90 I. C. 976 : A. I. R. 1926 All. 130.**

Question of Fact—Finality.

——S. 100—*Question of fact—Finality.*

Where the first appellate court omitted to note a very important document on record, the finding cannot be considered final. (*Gokul Prasad, J.*) TIKA RAM *v.* DUBA SHIB LAL. **A. I. R. 1923 All. 401 (1).**

——S. 100—*Question of fact—Finality—Objection involving question of fact not raised in lower Court—Cannot be raised in appeal.*

An objection not taken in the lower Courts and involving a question of fact cannot be gone into in appeal (*Woodroffe and Suhrawardy, JJ.*) SASHI BHUSAN JHA *v.* AHMADULLAH. **69 I. C. 1005 : A. I. R. 1924 Cal. 372.**

——S 100—*Question of fact—Appellate Judgment—Finding of fact—When conclusive.*

A finding of fact by a court of appeal was contained in the following words "The finding of the trial court is based on evidence and consideration of the prevailing circumstances of the time and after hearing both counsel. I am not able to say that the decision is clearly wrong. It is certainly not perverse. Cogent grounds for upsetting it are not forthcoming. It must therefore prevail." *Held*, it did not amount to an independent finding of fact closing the door to a second appeal. (*Le Rossignol and Harrisan, JJ.*) NIRBHE RAM-NAGAR MAL *v.* MURARI LAL—BHAJIRAT MAL. **89 I. C. 662 (2).**

—S. 100—*Question of fact—Finality.*

A finding of fact is final in second appeal if it is based on evidence. (*Campbell, J.*) GAJJA SINGH *v.* NATHA SINGH. **7 L. L. J. 70 : 88 I. C. 588 : A. I. R. 1925 Lah. 333 (2).**

——S. 100—*Question of fact—Finality.*

A simple finding of fact arrived at by the lower appellate Court could not be disturbed on second appeal and if disturbed, the judgment of the Judge of the High Court can be reversed on Letters Patent appeal. (*Shadi Lal, C.J. and Fforde, J.*) GIRDHARI *v.* ABDULLAH. **7 P. W. R. 1923 : 73 I. C. 232 : A. I. R. 1923 Lah. 236 (1).**

——S. 100—*Question of fact—Finality.*

Issues of facts cannot be agitated in second appeal. (*Shadi Lal, C. J. and Brasher, J.*) MT. CHHOTO *v.* MT. SONA DEVI. **70 I.C. 299: A.I.R. 1923 Lah. 11(2).**

——S.100—*Finding of fact—Conclusive in second appeal.*

Given certain set of facts from which two inferences are possible, it is open to the first appellate court to draw anyone of them and his decision will not be open to challenge in second appeal. If there is evidence to be considered, the decision of a first appellate court however unsatisfactory it might be when examined, must stand final. (*Kinkhede, A. J. C.*) E. I. RY. CO. *v.* BADRILAL. **90 I. C. 209.**

——S. 100—*Question of fact—Finality.*

A decision depending entirely on a finding of fact is

C P. CODE (V OF 1908), S 100—Question of Fact—Grove.

not open to challenge in second appeal. (*Kotval, A. J. C.*) NAMDEO *v.* GANOBA. **86 I. C. 847 : 8 N. L. J. 29 : A. I. R. 1925 Nag. 271.**

——S, 100—*Question of fact—Finality—Whether can be raised for the first time—Appeal.*

Any ground of appeal raising question of fact ought to be pleaded in the Court of trial and cannot be taken at any later stage of the case. (*Simpson, A.J.C.*) MOHKAM *v.* BANSIDHAR. **9 O. L. J 350 : 68 I. C. 972 : 26 O. C. 125 : A I. R. 1923 Oudh 14.**

S. 100—*Question of fact—Finality—Erroneous decision.*

The law has deliberately laid down that on questions of fact, there should be only one appeal and that it was to the public interest that there should be an end to the litigation even at the cost of occasional error; if this rule was strictly enforced the parties would know where they were, and if a High Court every time it differed from the view of the Court below on a question of fact, was to seek out flimsy pretexts for treating the question as one of law, the whole policy of law would be defeated. (*Daniels, J. C.*) AHMAD HUSSAIN *v.* UMRAO FATIMA. **64 I. C. 223 : 24 O. C. 221.**

——S 100—*Question of fact—Finality—Second Appeal.*

A finding of fact of a trial Court ought not generally to be disturbed in appeal. (*Wazir Hasan, A. J. C.*) JAGMOHUN SINGH *v.* RAM DAYAL SINGH. **61 I. C. 135 : 8 O. L. J. 4.**

——S. 100—*Question of fact—Finality—Cannot be disturbed.*

A finding of fact upon the evidence cannot be questioned in second appeal, (*Ross and Kulwant Sahay, JJ.*) BRAHAMDEO NARAYAN PANDE *v.* SALIGRAM SAHAI PANDE. **6 P. L. T. 67 : 86 I. C. 141 : 1925 P. H. C C. 53 : A. I. R. 1925 Pat. 384.**

——S. 100—*Question of fact—Finality—Appeal—When trial Court's opinion as to witness depends not on honesty of witness but on reason not acceptable to appeal Court, trial Court's finding on fact can be disturbed.*

It is with great hesitation that an appeal Court differs with the trial Court on its estimate of witnesses whom the trial Court has had an opportunity of seeing, but where the opinion of the trial Court depends not upon the honesty of the witness but upon reasons which the appeal Court cannot accept, it is obviously the duty of the appeal Court to record its disagreement with the trial Court and to set aside the findings of fact arrived at by it. (*Dawson Miller, C.J., Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJ KESHAO PRASAD SINGH. **5 P. L. T. Sup. 1 : A. I. R. 1925 Pat. 68.**

——S. 100—*Question of fact—Foreign law.*

What a foreign law is on a particular point is a question of fact and has to be proved by the parties setting it up. (*Srinivasa Aiyangar, J.*) KHODAY GANGADARA SAH *v.* SWAMINADHA MUDALI. **22 L. W. 679 : A. I. R. 1926 Mad. 218.**

Question of Fact—Grove.

——S. 100—*Question of fact—Grove—Question whether land is a grove.*

Whether a plot is or is not grove is a mere question of fact than of law. (*Fremantle, S. M.*) DEBI SAHAI *v.* QANNAUJI. **L. R. 5 A. 94 (Rev).**

——S. 100—*Question of fact—Grove.*

Whether a particular property still retains the character of a grove is a finding of fact. (*Dalal, J. C.*) BASHIRUDDIN KHAN *v* MAHADEO SINGH. **27 O. C. 26 : 11 O. L. J. 565 : 79 I. C. 663 : A. I. R. 1924 Oudh 306.**

C. P. CODE (V OF 1908), S. 100—Question of Fact—Grow.

——S. 100—*Holding under uniform payment of rent—Finding of fact.*

The question whether a tenant has held at a uniform rate of rent for more than 20 years or back to the time of the Permanent Settlement is one of fact and not of law. (*Suhrawardy and Duval, JJ*) DUKHU MIA *v.* JAGADISH NATH ROY. **90 I. C. 564.**

Question of Fact—Marriage.

——S. 100—*Question of fact—Marriage—Privy—Council—Concurrent findings of fact— Whether the Board bound.*

Where the Judges of Appellate Court affirm the finding that the marriage was disproved, the finding being a concurrent finding of fact binds their Lordships of Privy Council. For concurrent findings to be binding on the board the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them. (*Lord Dunedin,*) HABIBUR RAHMAN *v.* ALTAF ALI CHOUDHARI. **48 I. A. 114 : 26 C. W. N. 81 : A. I. R. 1922 P. C. 159 (P. C.)**

——S. 100—*Question of fact—Marriage.*

Whether a valid marriage took place between the parties is a question of fact. (*Shadi Lal, C J. and Zafar Ali, J,*) MT. NAWAB BIBI *v.* ALLAH DITTA. **5 L.L.J. 505 : 73 I.C. 896 : A. I. R. 1924 Lah. 188 (2).**

——S. 100—*Question of fact—Marriage.*

A finding as regards the factum of marriage between the parties is a finding of fact which will not be interfered in second appeal by the High Court. (*Broadway and Martineau, JJ.*) RAM DASI *v.* MT RAMA DEVI. **5 Lah. L. J. 117.**

——S. 100—*Question of fact—Marriage—Legitimacy—Presumption of marriage.*

Though the finding on the question of legitimacy is one of fact, it would not be upheld in second appeal where the lower Appellate Court has ignored important pieces of evidence and the strong presumption of law in favour of legitimacy. (*Wilberforce and Le Rossignol, JJ.*) SULAKHAN *v.* SANTA SINGH. **60 I. C. 375 (1).**

Question of Fact—Minority

——S. 100—*Question of fact—Minority—Family arrangement—Binding nature of.*

The question whether a family arrangement is beneficial or detrimental to the interests of the minor members of a family and therefore binding or not binding upon them is a question of fact which cannot be contested in second appeal. (*Broadway and Abdul Quadir, JJ.*) THAKUR A JAWALA. **4 Lah. L. J. 40.**

——S. 100—*Question of fact—Minority—Question of party's minority cannot be re-investigated*

It is not open to the High Court in second appeal to investigate the ground upon which the lower appellate Court had come to a conclusion on a question as to whether certain person was a minor at the date of a suit. (*Das, J.*) ALI HUSSAIN *v.* FAGUNI RAI. **3 Pat. L. R. 16 : 86 I. C. 856 : A. I. R. 1925 P. 367.**

Question of Fact—Mistake or error.

——S. 100—*Question of fact—Mistake or error of fact.*

Where the finding of the lower appellate court is based on a mistake of fact it does not bind the High Court on second appeal. (*Ryves and Gokul Prasad, JJ.*) HABIBKHAN *v.* FIDA HUSAIN KHAN. **71 I.C. 1017 : L.R. 4 A. 138 : A.I.R. 1924 All. 270.**

——S. 100—*Question of fact—Mistake or error—Grossly erroneous finding of fact—No second appeal lies in absence of error in procedure, if lower Court had evidence before it.*

C P. CODE (V OF 1908), S. 100—Question of Fact—Mistake or error.

There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem tobe, and where there is no error or defect in the procedure the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. (18 Cal, 23, *Foll*). (*Moti Sagar, J.*) SHANKAR DAS *v.* MANSA RAM. **78 I. C. 36 : A. I. R. 1925 Lah. 150.**

——S. 100, O. 41, R. 23 and O. 43, R. 1 (a)—*Question of fact—Mistake—First appellate Court misunderstanding the whole case,*

In an appeal from an order of remand findings of fact cannot be examined by High Court sitting as a Court of second appeal but where the finding of the lower appellate Court appears to have been based on a misappreciation of the true controversy between the parties, a rehearing of the appeal by the lower appellate Court may be directed. 13 I. C. 445 Foll. (*Broadway, J.*) QADIR BAKSH *v.* SHAMASDIN. **73 I. C. 756 : A. I. R. 1923 Lah. 206.**

——S. 100—*Question of fact—Mistake as to—No interference.*

However erroneous and inexcusable a finding of fact may be, the High Court cannot disturb it in second appeal. (*Leslie Jones and Wilberforce, JJ.*) HAYAT *v.* FIRM OF DITU RAM KAJU RAM. **4 Lah. L. J. 464.**

——S. 100—*Question of fact—Mistake—High Court if can interfere—Suit whether collusive.*

A High Court cannot in Second Appeal interfere with finding of fact arrived at by the District Judge, not resulting from a misconstruction of a document or the misapplication of law or procedure. It is bound by the finding of the lower Court, that a suit is collusive. (*Broadway, J.*) SARJU *v.* BUDHA. **59 I. C. 885 : 3 Lah. L J. 86.**

——S. 100—*Question of fact—Mistake—Lower Court making vital mistake on simple question of law in arriving at finding—Finding can be disturbed.*

If lower Court has committed vital mistakes on simple questions of law and has made errors as to burden of proof, etc, a finding of fact arrived at in this manner will not be binding on the High Court in second appeal. (*Devadoss, J.*) DHANAMATHE AMMAL *v.* JAYAKEERTHI NAIRAN. **22 L. W. 352 · A. I. R. 1925 Mad, 973.**

——S 100—*Question of fact—Mistake or gross error—Finding is inassailable.*

Even a finding of fact which is altogether erroneous will not be disturbed in second appeal. (*Ramesam, J.*) K. KRISHNAMACHARLU *v.* S. VIJAYASARATHY. **22 L. W. 73 : 88 I. C. 646 : (1925) M.W.N. 117 : A. I. R. 1925 Mad. 823 : 48 M. L. J. 467.**

——S. 100—*Question of fact—Mistake or error—Gross or inexcusable error—Omission to consider evidence—Interference on second appeal.*

An erroneous finding of fact, however, gross or inexcusable the error may be, cannot be made the basis of a Second Appeal. The High Court would be precluded from disturbing the findings of the fact in the judgment of the Lower Appellate Court, however, strongly it may think they were opposed to any really sane view of the evidence, provided the facts found were relevant and the findings were based on evidence proper for consideration. It is not necessary that the whole of the evidence given in the case should have been considered in the Lower Appellate Court and still less that every part of it should have been mentioned in the Judgment ; interference is not justified by an apparent omission to consider some material part or even the main part of it (*Hallifax, A. J. C.*)

C P. CODE (V OF 1908), S. 100—Question of Fact—Mistake or error.

TUKARAM *v.* CHINTARAM. **20 N. L. R. 17 : A. I. R. 1924 Nag. 91.**

———S. 100—*Question of fact—Mistake—When can be challenged.*

The High Court in second appeal is bound by the findings of the lower appellate court unless it be shown that the Court went wrong in law or that there was no evidence to support the findings. (*Miller, C. J. and Mullick, J.*) RAMSUNDER KUER *v* SATRUHAN PRASAD CHAUDHURI. **A. I. R. 1924 Pat. 591.**

———S 100—*Question of fact—Mistake—When interfered with.*

Findings arrived at on a point of fact will not be disturbed in second appeal. But they will be interfered with if the inferior court either gives a wrong decision on a question of law or if evidence is not forthcoming to support it. (*Dawson Miller, C. J and Mullick, J.*) AJTI CHAUDHURI *v.* JANAK LAL CHAUDHURI. **1923 P. H. C. C. 332 : A. I. R. 1924 Pat. 336.**

Question of fact—Nature of property.

———S. 100—*Question of fact—Nature of property—Building—Moveable or immoveable property.*

It is a question of fact in each case whether a particular house and the building materials are moveable or not and the High Court will not interfere with the findings of the Court below in second appeal. 8 C. 590 Ref. (*Mears, C. J. and Banerji, J.*) JITAN TANBOLI *v.* NANKO. **L. R. 3 A. 128 : A. I. R. 1922 All. 45.**

———S. 100—*Question of fact—Nature of property—Whether properties are sufficiently described is a question of fact.*

The question whether the lands have been sufficiently specified is a question which cannot be gone into in second appeal. (*Chatterica and Cuming, JJ.*) NRIPENDRA NATH *v.* BASANTA KUMAR. **29 C. W. N. 861 : 89 I. C. 207 : A. I. R. 1925 Cal. 1195.**

———S. 100—*Question of fact—Nature of a property.*

There is abundant authority for holding that a finding as to the character of property arrived at after a full consideration of the evidence is a pure finding of fact and it cannot be impugned in second appeal. (*Moti Sagar, J.*) BALBIR SINGH *v.* GOBIND. **A. I. R. 1923 Lah. 532.**

———S. 100—*Question of fact—Nature of property—Whether a place is a town.*

The question whether a certain place is a town for the purposes of the Punjab Pre-emption Act is a question of fact and cannot be raised in second appeal. It cannot be denied that whenever such a questiou arises it is to be denied upon the evidence and the particular circumstances of each case. It is therefore, difficult to hold that it is a question of law. It is not necessary that a custom prevailing in the town should apply to the *mohallas* or suburbs. (*Abdul Raoof, J.*) DIWAN CHAND *v.* NIZAMDIN. **75 I. C. 610 : A. I. R, 1923 Lah. 443.**

———S. 100—*Finding of fact—Nature of property—Dharmasala—Binding in Second Appeal.*

The finding that a Dharmasala was always treated as private property is one of fact which cannot be attacked in second appeal. (*Wilberforce and Abdul Qadir, JJ.*) SADHU DAS *v.* MUSHTAQ SHAH SINGH. **3 Lah. L. J. 514.**

———S. 100—*Question of fact—Nature af property—Estate—Lands whether part of.*

Where both the courts below have found that the suit laads did not form part of an estate so as to oust the jurisdiction of Civil Courts, the decision is binding on the High Court. (*Ayling and Odgers, JJ.*) TOTA VARNHALIAH *v.* SRI VENKATA SURYANARAYANA. **18 L. W. 324 · (1923) M. W. N. 732 : 75 I.C. 465 : A-I.R. 1924 Mad. 117.**

C. P. CODE (V OF 1908), S. 100—Question of Fact—Partnership.

———S. 100—*Question of fact—Nature of property—Public place—In absence of dedication to public use, character and actual use determines whether place is public place or not.*

When there is a dedication of a place in any way to the use of the public, doubtless it will become a public place, but where it is under private ownership and there has been no such dedication the question whether or not it is a public place depends on the character of the place and the use to which it is actually put. (*Kinkhede, A.J.C.*) SABAMIYA *v.* EMPEROR. **25 Cr. L. J. 1073 : 81 I. C. 897 : A. I. R. 1925 Nag. 123.**

———S. 100—*Question of fact—Nature of property—Implied grant—Existence of, is a question of fact.*

Where the lower Court, on the evidence before it came to the conclusion that there was an implied grant which gave rise to a right of easement.

Held : that it was a finding of fact. (*Dawson Miller, C. J. and Macpherson, J.*) ABDUL GHANI *v.* HARNAM SINGH. **1925 P. H. C. C. 250 : 90 I.C. 356 : A. I. R. 1925 Pat. 748.**

———S.100—*Question of fact—Necessity for alienation by Hindu father.*

A finding whether there was necessity or not for an alienation by a Hindu manager is one of fact. But if the Court proceeds to add that the lender is bound to see to the application of the money, it will be open to attack in second appeal. (*Simpson, A. J. C.*) SHEO BEHARI *v.* SHEO RATAN SINGH. **90 I. C. 345 : A. I. R. 1925 Oudh 740.**

Question of fact—Notice.

———S. 100—*Question of fact—Notice.*

A finding that the subsequent purchaser had notice and knew that there was a contract of sale with the plaintiff is one of fact. (*Wilberforce and Abdul Qadir, JJ.*) ARURA *v.* GEHNA. **3 Lah. L. J. 447.**

Question of fact—Nuisance.

———S. 100—*Question of fact—Nuisance—Finding as to, existence of nuisance is one of fact.*

The finding that no nuisance has been proved is one of fact. (*Campbell, J.*) MANGTU *v.* LACHHI RAM. **7 L. L. J. 192 : A. I. R. 1925 Lah. 424.**

———S. 100—*Question of fact—Nuisance—Mixed question of law and fact.*

Where the principles of law applicable have neither been ignored nor violated, a finding as to the existence of a nuisance is binding on the court in second appeal. 31 I. C- 62 ; 106 P. R. 1888 ; 40 B. 401, Ref. (*Broadway and Abdul Qadir, JJ.*) CHIRAGH DIN *v.* KARIM. **64 I. C. 169 (L).**

———S. 100—*Question of fact—Nuisance — Existence as to nuisance is a question of fact.*

Whether a certain latrine is likely to cause pollution to the water of a well is a question of fact. (*Baker, J. C.*) ANAND RAO *v.* PRESIDENT MUNICIPAL COMMITTEE, NAGPUR. **89 I.C. 929 : A. I. R. 1926 Nag. 50.**

Question of fact—Partnership.

———S. 100—*Question of fact—Partnership not one.*

A finding that there was a partnership as defined in the Contract Act is not a finding of fact by which the High Court is bound. The findings that are final are

C. P. CODE (V OF 1908), S. 100—Question of Fact—Possession.

those on the facts from which the existence of the legal relationship of partners might or might not be inferred provided of course they are not otherwise unsound. (*Hallifax, A J. C.*) MOULA BUX *v.* MUHAMMAD AFZAL. **69 I. C. 781 : A. I. R. 1922 Nag. 96.**

Question of fact—Possession.

——**S. 100**—*Question of fact—Possession—Appeal—Legal inference or finding of fact—Adverse possession.*

Where it was urged that the finding that the possession of the daughter-in-law was adverse to the mother-in-law who had become the tenant on account of the second marriage of the daughter-in-law is a finding of fact with which High Court could not interfere. *Held* : it is however not a finding of fact but a legal inference drawn from the facts found the chief of which was the fact that mother-in-law's name was not substituted for daughter-in-law's in the Jamabandi. (*Hallifax, A. J. C.*) MT. MUNHA *v.* LACHMIPRASAD. **6 N. L. J. 70 : A. I. R. 1923 Nag. 65.**

——**S. 100**—*Question of fact—Possession.*

Where defendant does not allege dispossession but that plaintiff had never been in possession, and plaintiff proves obtaining possession under a deed of *birt*, the finding that it must be presumed that the plaintiff has continued in possession ever since, cannot be disturbed in second appeal. (*Neave, A. J. C.*) SUBDHUN PANDE *v.* MAHESH PRASAD. **81 I. C. 588 : A. I. R. 1925 Oudh 170.**

——**S. 100**—*Question of fact—Pre-emption suit—Market value.*

In a pre-emption suit, a decision as to the market value is one of fact. (*Dalal, J. C.*) HAR PERSHAD *v.* SHEO SHANKAR. **90 I. C. 679.**

——**S. 100**—*Question of fact Rate of rent—Question as to the rate of rent is a question of fact.*

The question generally, whether the tenant has held at a uniform rate of rent for more than 20 years or back to the time of the Permanent Settlement, is a question of fact and not a question of law. A I. R. 1925 Cal. 632, Appl. (*Suhrawardy and Duval, JJ.*) DUKHU MIA *v.* JAGDISH NATH. **90 I. C. 564 : A. I. R. 1926 Cal. 359.**

Question of fact—Reasonable or probable cause.

——**S. 100**—*Question of fact—Reasonable cause—Malicious prosecution—Suit for—Absence of reasonable or probable cause for prosecution is question of fact—Tort.*

In an action for malicious prosecution the question whether the prosecution was instituted against the plaintiff without any reasonable or probable cause is a question of fact. 25 Bom. 332 and 28 Cal. 591 Foll. (*Dalal. Ag. J. C.*) MAHADEO PRASAD *v.* CHUNNI LAL. **12 O. L. J. 88 : 86 I. C. 596 : 2 O. W. N. 62 : A. I R. 1925 Oudh 359.**

Question of fact—Right over Property.

——**S. 100**—*Question of fact—Right over property.*

A finding that two houses have a common entrance from the street is a finding of fact not liable to be disturbed in second appeal. (*Moti Sagar and Martineau, JJ.*) BUTA RAM *v.* HARBHAGWAN. **6 L. L. J. 284 : A. I. R. 1925 Lah. 257.**

——**S. 100**—*Question of fact—Right over property.*

A finding that no right of way was granted is a finding of fact. (*Martineau, J.*) GANGA RAM *v.* SITA RAM. **6 L. L. J. 176 : A. I. R. 1924 Lah. 488.**

——**S. 100**—*Finding of fact—Right over property*

C. P. CODE (V OF 1908), S. 100—Question of Fact—Transfers.

The finding that the right to the *birt* is not ancestral is one of fact. (*Martineau, J.*) BISHAN DATT *v.* KISHEN DATT. **67 I. C. 439 : 3 L. L. J. 414.**

Question of fact—Status of party.

——**S. 100**—*Question of fact—Status of party.*

Where a lower court, upon a review of the entire evidence, arrives at a finding as to the extent of the proprietary rights of the vendors, its decision being upon a question of fact cannot be challenged in second appeal. (*Mears. C. J. and Piggott, J.*) IQBAL HAIDAR KHAN *v.* MASI FATIMA BIBI. **74 I.C. 1004 : 45 A. 53 : A. I. R. 1923 All. 358.**

——**S. 100**—*Question of fact—Status of party—Landlord and tenant—Existence of relationship—Presumption—Entry in record-of-rights.*

Where on a consideration of the entire evidence in the case the lower appellate court has come to the conclusion that the relationship of landlord and tenant exists between the parties and that the presumption raised by an entry in the record-of-rights has been rebutted, the finding is one of fact with which the High Court cannot interfere in second appeal. (*Newbould, J.*) KARIM BUX *v.* DWARAKANATH KAR. **64 I. C. 190 (C).**

——**S. 100**—*Question of fact—Status of party—That vendees were the only reversioners of vendor is a finding of fact.*

The finding that at the time of the sale the vendees were the only reversioners of the vendors then living, so that the plaintiff, the son of one vendor, if born after the sale would have no *locus standi* was held to be one of fact. (*Martineau and Harrison, JJ.*) RATNA *v.* SAWAN SINGH. **6 L. L. J. 566 : A. I. R. 1925 Lah. 275.**

——**S. 100**—*Question of fact—Status of party.*

The finding of the Court below on the question of plaintiff's status is a finding of fact and it cannot be attacked in second appeal. (129 P. L. R. 1912. Ref.) (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN. **A. I. R. 1923 Lah. 626.**

——**S. 100**—*Question of fact—Status of party.*

The conclusion that the plaintiff was a full owner, and not merely a *dohlidar* is clearly a finding of fact and cannot be impugned in second appeal. (*Moti Sagar, J.*) CHHITRU *v.* CHAJJU. **A. I. R. 1923 Lah. 611.**

——**S. 100**—*Question of fact—Status of party—Joint Hindu family.*

Where the principles of Hindu Law applicable to the case have been correctly appreciated by the lower appellate court a finding as to whether certain persons form members of a Joint Hindu family or not is a finding of fact with which the High Court will not interfere in second appeal. (*Wilberforce and Abdul Qadir, JJ.*) MT. MAYAWANTI *v.* ISHAR SINGH. **67 I. C. 789 : 3 L L. J. 552.**

Question of fact—Tender.

——**S. 100**—*Question of fact—Tender—Finding as to tender is one of fact.*

The finding that a tender was duly made before the expiry of the time fixed is one of fact and cannot be disturbed in second appeal. (*Scott-Smith, J.*) DALIP SINGH *v.* ISHAR. **86 I. C. 250 : 7 L. L. J. 11 : A. I. R. 1925 Lah. 353.**

Question of fact—Transfers.

——**S. 100**—*Question of fact—Transfers.*

Where in second appeal the High Court accepts the lower Appellate Court's finding of fact that a gift was made by a Hindu widow for the benefit of the

C. P. CODE (V OF 1908), S. 100—Question of Fact—Transfers.

soul of her deceased husband, which finding, it holds as binding upon it and then holds that no special benefit was to accrue to his soul, the two findings are inconsistent and the High Court in a Letters Patent Appeal must interfere. (*Mears, C. J. and Walsh, J.*) GOVIND UPADHYA *v.* LAKHRANI. **43 All. 515 : 63 I. C. 221 : 19 A. L. J. 499.**

——— **S. 100**—*Question of fact—Transfers—Mahomedan Law—Marz-ul-mout.*

Whether or not a particular illness constitutes Murz ul-mout is primarily a question of fact. 14 Bom. L. R. 295 Foll. But it may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as the physical condition of the deceased at the date of execution of the deed constitute the essential elements of Marz-ul-mout as formulated by Mahomedan Jurists. 35 Cal. 1 Foll (*Mookerjee and Buckland, JJ.*) BIBI JINJIRA KHATUN *v.* MOHAMMAD FAKIRULLA MIA. **49 C. 477 : 26 C. W. N. 749 : 67 I. C. 77 : A. I. R. 1922 Cal. 429.**

——— **S. 100**—*Question of fact—Transfers—Transaction executed to defeat creditors*

Whether a transaction, *e. g.*, *hcba* is executed is breach of S. 53 of the T. P. Act, with intent to defeat or delay creditors is a question of fact and cannot be interfered with in Second Appeal. (*Sanderson, C. J. and Richardson, J.*) RAM KUMAR BANIKYA *v.* SAFIUNNESSA BIBI. **63 I. C. 169 (C).**

——— **S. 100**—*Question of fact—Transfers—Gift—Nature of.*

That a gift was an absolute one enuring for the benefit of the donee's descendants is a finding of fact with which the High Court cannot interfere. (*Scott-Smith and Abdul Raoof, JJ.*) ALLAH SWAYA *v.* ADIL JA. **4 Lah. L. J. 457.**

——— **S. 100**—*Question of fact—Transfers—Deed—Conveyance—Inclusion of shamilat land.*

The finding of the lower appellate Court that no *shamilat* rights were sold with the proprietary land is one of fact which cannot be questioned in second appeal. 3 P. R. 1917 and 85 P. R. 1919 foll. (*Shadi Lal, C. J. and Wilberforce, J.*) KHARAM CHAND *v.* VIR SING. **3 Lah. L. J. 470.**

——— **S. 100**—*Question of fact—Transfer—Mortgage—Suit by mortgagee—Actual possession, finding about—Cannot be questioned in second appeal.*

The finding of the lower appellate Court that a mortgagee has never been in actual possession of the land, being one of fact cannot be contested in second appeal. (*Abdul Raoof and Martineau, JJ.*) NARAIN DAS *v.* GANAT RAIBI. **67 I. C. 152 (Lah.)**

——— **S. 100**—*Question of fact—Transfer—Finding that a transfer was intended to defeat creditors.*

A finding that a transfer was intended to defraud, defeat or delay the creditors is one of fact. (*Scott-Smith, J.*) ATTAR SINGH *v.* GULAM MOHAMMAD. **60 I C. 527 (Lah.)**

——— **S. 100**—*Question of fact—Transfers.*

Question as to whether a transaction amounts to a mortgage by conditional sale or to an absolute sale is not a pure question of fact. (*Wallace, J.*) C. GANESH MUDALIAR *v.* V. GNANASIKHA MUDALIAR. **47 M. L. J. 385 : 20 L. W. 338 : 35 M. L. T. 87 : (1924) M. W. N. 643 : 84 I. C. 505 : A. I. R. 1925 Mad. 37.**

Question of fact—Waqf.

——— **S. 100**—*Question of fact—Waqf—Existence of Waqf is a question of fact.*

The finding that no waqf has been proved is a finding of fact. (*Martineau, J.*) ALI MAHOMED KHAN *v.* ALI ABKAR KHAN. **A. I. R. 1924 Lah. 382.**

——— **S. 100**—*Question of fact—Waqf—Dedication to waqf.*

That certain property is not waqf and does not belong to it is a finding of fact with which the High Court will not interfere in second appeal. (*Chevis and Dundas, JJ.*) ILAHI BAKHSH *v.* KALA RAM. **5 L. L. J. 11.**

Question of fact—Will.

——— **S. 100**—*Question of fact—Will.*

Question as to whether oral will was executed is one of fact. (*Hallifax, A. J. C.*) BHAVANI RAM *v.* DAMMAR SINGH. **66 I. C. 413 : 5 N. L. J. 183 : A. I. R. 1922 Nag. 46.**

Question of fact—Miscellaneous.

——— **S. 100**—*Question of fact—Meaning of a particular word in a particular place is question of fact.*

The question as to whether a particular word bears a particular meaning in a particular place is a question more of fact than of law. (*Suhrawardy and Cuming, JJ.*) BASANT KUMAR *v.* SATINDRA MOHUN. **A. I. R. 1925 Cal. 1209.**

——— **S. 100**—*Question of fact—B. T. Act, S. 50—Proof of uniform rent for 20 years is a.*

The question as to whether the tenant has held the land for more than 20 years at a uniform rent is a question of fact. (*Suhrawardy and Cuming, JJ.*) ALIMUDDIN MOLLAH *v.* KARIM BUX. **41 C. L. J. 135 : 86 I. C. 316 : 29 C. W. N. 500 : A. I. R. 1925 Cal. 632.**

——— **S. 100**—*Question of fact—Time if essence of contract*

The question whether time is or is not of the essence of a contract is one of fact and a finding thereon cannot be assailed on second appeal. (*Scott-Smith and Abdul Qadir, JJ.*) FAZAL ILAHI *v.* THE IMPERIAL CHEMICAL COMPANY. **67 I. C. 157 (Lah.)**

Question of Law.

——— **S. 100**—*Question of law—Question purely legal is open.*

A pure question of law can be raised for first time in second appeal. (*Lindsay and Kanhaiya Lal, JJ.*) NADIR HUSAIN *v.* SADIQ HUSAIN. **47 All. 324 : 23 A. L. J. 138 : L. R. 6 A. (Civ.) 19 : 86 I. C. 589 : A. I. R. 1925 All. 361.**

——— **S. 100**—*Question of Law—Transfer of Property Act, S. 41.*

The question whether a particular section of an Act does or does not apply to the facts as found in a question of law. (*Walsh and Ryves, JJ.*) MUL RAJ *v.* FAZAL IMAM. **45 A. 520 : 21 A.L.J. 424 : L.R. 4 A. (Civ.) 234: 74 I.C. 307: A.I.R. 1923 All. 583**

——— **S. 100**—*Question of law—Words—Meaning of.*

The meaning of words is a question of fact in all cases ; the effect of the words is a question of law. (*Stuart, J.*) BADRI PRASAD *v.* RAI KUNWAR. **75 I. C. 686 : A. I. R. 1923 All. 337.**

——— **S. 100**—*Question of law—If can be raised for the first time in second appeal.*

A Court of Second Appeal is not bound to entertain a question of law raised for the first time before it. It can however take the point of itself or if some good cause is shown it may permit that point to be argued. (*Banerji, Piggott and Walsh, JJ.*) SHEODAN KURMI *v.* BALKARAN KURMI. **43 All. 193 : 59 I. C. 116: 18 A.L.J. 1033: 2 U. P L R. (All.) 392 : (F. B.).**

C. P. CODE (V OF 1908), S. 100—Question of law.

——S. 100—*Question of law—When allowed to be newly raised on second appeal.*

If there is a point of law arising on the issues as framed and on the evidence as led in the trial Court, the second appellate court would entertain that point though not raised in the lower Courts. But where the point of law could not be decided without remanding the case for further evidence, the point of law is not competent. (*Macleod, C. J. and Shah, J.*) KALAPPA MALLAPPA *v.* KALAPPA NINGAPPA.

26 Bom. L. R. 494 : A. I. R. 1924 Bom. 469.

——S. 100—*Question of law—Point involving evidence.*

The appellant cannot in second appeal take a point of law which involves the taking of additional evidence. (*Marten and Pratt, JJ.*) SHRIDHAR LAXMAN *v.* JANARDHAN.

72 I. C. 993 : A. I. R. 1923 Bom. 37.

——S. 100—*Question of law—Meaning of word.*

Whether a word is used in a restricted sense is a point of law. (*Macleod, C. J. and Shah, J.*) E. I. RAILWAY COMPANY *v.* DAYABHAI.

47 Bom. 18 : 24 Bom. L. R. 416 : A. I. R. 1922 Bom. 416

——S. 100—*Question of law—Validity of gift.*

If, for the first time, in second appeal various questions of law are raised but in order to decide these questions of law evidence would have to be taken, points of law of that description are not admissible. A deed of gift to be valid must be accepted by the donee ; but where it was never suggested in the Court below that the deed was invalid, because it had not been accepted. *Held*, it is not competent in second appeal for the appellant to urge the invalidity of the gift on the ground of non-acceptance. (*Macleod, C.J. and Shah, J.*) TRIKAM LAL *v.* NAGENDAS JETH LAL.

A. I. R. 1922 Bom. 148.

——S. 100—*Question of law—Whether tenancy is proved or not is a question of law.*

The question of status of the tenant is a matter of inference as to whether certain legal conditions had been made out or not. 8 C. W. N. 774 (F. B.) Foll. 16 C.W.N. 725 Dist. (*Walmsley and Mukerjee, JJ.*) JOGESH CHANDRA *v.* TAZAR ALI.

A. I. R. 1925 Cal. 1238.

——S. 100—*Question of law—Question of admissibility for want of registration or irrelevancy of document can be raised at any stage—Civil Procedure Code, S. 100.*

The question as to whether a document is admissible or not for want of registration or irrelevancy is eligible to be raised at any stage of the case. (*Chakravarti, J.*) SABDI BEPARI *v.* SHEIKH BUDHAI.

82 I. C. 949 : A. I. R. 1925 Cal. 370.

——S. 100—*Question of law—Construction of Commissioner's Report—If question of law.*

The misconstruction of a report and map prepared by a Commissioner is not a misconstruction of a document involving an error of law and it is no ground for second appeal. (*Simpson, A. J. C.*) SUMER SINGH *v.* DALTHOMAN SINGH. **90 I. C. 911.**

——S. 100—*Question of law—Documentary evidence—Inference from—Not a question for second appeal.*

A second appeal does not lie, because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which special appeal will lie if it is connected with other evidence affecting its construction. The mis-

C. P. CODE (V OF 1908), S. 100—Question of law.

construction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title, is allowed to be a ground for second appeal. (*Mukerjee and Chotzner, JJ.*) PRANKISHORE TARAFDAR *v.* SARADA PRASAD PAKRAS.

37 C. L. J. 580 : 72 I. C. 55 : A. I. R. 1923 Cal. 308.

——S. 100—*Question of Law—Consideration—Passing of.*

Finding as to passing of consideration and existence of legal necessity is not one of fact. (*Moti Sagar, J.*) TARA CHAND *v.* RAHMAN SHAH.

A. I. R. 1924 Lah. 689.

——S. 100—*Question of law—Burden of proof—Second Appeal.*

The question of *onus* is one of law and so can be taken up in second appeal. (*Broadway, J.*) HAYAT *v.* ALI MOHAMMAD. **A. I. R. 1924 Lah. 195.**

——S. 100—*Question of law—Second appeal.*

The question of *onus probandi* is a question of law rendering a second appeal competent. (*Broadway and Wilberforce, JJ.*) GANGA RAM *v.* RULIA.

64 I. C. 901 : 2 Lah. 249.

——S.100—*Question of law—Legal inference from proved fact—Finding of fact and inferences from facts—Liability to be disturbed in second appeal.*

While the District Court's decision as to the effect of the evidence must stand final as to the facts the soundness of the conclusions from those facts may involve matters of law and may be questioned by a Court of second appeal. The proper legal effect of a proved fact is essentially a question of law. 20 Cal. 93 and 46 Cal. 189 Foll. (*Broadway, J.*) PURAN *v.* LALA. **73 I. C. 795 : A. I. R. 1923 Lah. 216.**

——S.100—*Question of law—Different inferences from facts.*

Legal inferences drawn from facts may be examined in second appeal. 20 Cal 93 Foll. (*Broadway and Abdul Qadir, JJ.*) GIRDIT SINGH *v.* MT. ISHAR KAUR. **3 Lah. 207 : 68 I. C. 551 : A. I. R. 1922 Lah. 392.**

——S. 100—*Question of law—Whether ala malik has rights in* shamilat *is not a question of law.*

The question that an *ala malik* must be presumed to have rights in the *shamilat* is not a question of law. 35 P. R. 1919 : 36 P. R. 1919 : 68 P. R. 1916 Appl. (*Addison, J.*) DEVICHAND *v.* JAI CHAND.

26 P. L. R. 605 : A. I. R. 1926 Lah. 21.

——S 100—*Question of law—Appeal presented out of time.*

An objection that the appeal to the lower appellate Court was presented out of time is a question of law and it may be taken on second appeal. (*Scott Smith and Abdul Qadir, JJ.*) NIGAHIA RAN *v.* BHAGU MAL. **65 I. C. 580 : A. I. R. 1922 Lah. 240.**

——S. 100—*Question of law—Abandonment.*

An appellant is entitled to question in second appeal the effectiveness of the abandonment in law on the facts found, and the Court may allow the plea to be raised even if it has not been taken in the memorandum of appeal as it involves a pure question of law. (*Abdul Raoof, J.*) RAJA *v.* SALABAT.

66 I. C. 935 : 3 Lah. L. J. 26.

——S. 100—*Question of law—Form of marriage is a question of law.*

When facts are proved the question, of what form the marriage is, becomes a question of law. (*Sulaiman and Daniels, JJ.*) MT. KISHAN DEVI *v.* SHEOFALTAN. **23 A L. J. 981 : L. R. 6 A. (Civ.) 557 : A. I. R. 1926 All 1.**

——S. 100—*Question of law—Omission by judgment-debtor to certify payment under O. 21, R. 2 is not always a pure question of law.*

C. P. CODE (V OF 1908), S. 100—Question of law.

The question of the judgment-debtor's omission to certify the adjustment within the time prescribed is not always to be considered a pure question of law. (*Kinkhede A. J. C.*) RAGHUBAR PD *v.* SATTU.
89 I. C. 1009 : A. I. R. 1926 Nag. 164.

——S. 100—*Question of law—Penalty—Stipulation in deed.*

The question whether a stipulation in a deed as to payment of interest is one by way of penalty is a question of law which is open to consideration in second appeal. (*Scott Smith, J.*) LACHHMAN *v.* SANTA.
64 I. C. 350 : 14 P. L. R. 1922.

——S. 100—*Question of law—Town or village.*

Whether certain local conditions found to exist in a place, constitute the place, a town or village is a question of law, and can be raised in second appeal. (*Le Rossignol, J.*) MANSA RAM *v.* JOTI.
62 I. C. 808 (L).

——S. 100—*Question of law—Penalty.*

The question whether any particular stipulation is only by way of compensation or by way of penalty depends upon the construction of the particular document or contract and on the circumstances of each case. (*Srinivasa Aiyangar, J.*) RAMALINGA ADAVIAR *v.* MEENAKSHISUNDARAM PILLAI.
21 L W. 54 : A. I. R. 1925 Mad. 177 : 47 M. L. J. 833

——S. 100—*Question of law—Question as to stipulation being a penalty.*

The question as to a stipulation being penal within S. 74 of the Contract Act is a question of law. (*Jackson, J.*) RAJAGOPAL PADAYACHI *v.* VARADARAJA PADAYACHI. **47 M. L. J. 605 : (1924) M. W. N. 861 : 82 I. C. 751 : A. I. R. 1925 Mad. 84.**

——S. 100—*Question of law—Plea—Nature of—When to be raised.*

Estoppel is a plea of mixed fact and law and must be raised in the trial Court. (*Kinkhede, A.J.C.*) HIRALAL *v.* TULSIRAM. **80 I. C. 946: A.I.R. 1925 Nag. 77.**

——S. 100—*Question of law—Joint Hindu family—Status of—Joint or separate—Not a finding of fact.*

A finding that there has been no disruption of a joint Hindu family is not a finding of fact but an inference of the legal effect of fact found and the inference can be challenged in second appeal but not the facts found. (*Hallifax, A. J. C.*) BED PRASAD *v.* NAKCHEED PRASAD. **A. I. R. 1924 Nag. 410**

——S. 100—*Question of law considered by Trial Court but ignored in appeal—High Court must take notice of such question.*

The High Court is bound to take notice of a question of law notwithstanding that it was not argued in the lower appellate Court though it was considered by the Trial Court. (*Misra, A.J.C.*) ASHRAF ALI *v.* CHANDRAPAL SINGH **12 O. L. J. 382 : 2 O. W. N. 529 : A. I. R. 1925 Oudh 506.**

——S. 100—*Question of law—Inferences from documents are not.*

Inferences drawn from documentary evidence are not questions of law and cannot be challenged in second appeal. (*Dalal, A. J. C.*) BINDESHRI PANDE *v.* SHEO RATAN PANDE. **9 O & A. L. R. 443 : 74 I. C. 811 : A.I.R 1924 Oudh 185.**

——S. 100—*Question of law.*

Error of law vitiating conclusions of facts should be interfered with. (*Simpson, A. J. C.*) DHAUNTAL KHAN *v.* RAM LAL KALWAR. **10 O. L. J. 412 : 75 I. C. 227 : A. I. R. 1924 Oudh 154.**

——S. 100—*Question of law—Second appeal lies from decision that appellant who had agreed to sell land and taken advance but had not conveyed registered title, had sold the land.*

C. P. CODE (V OF 1908), S. 100—Sufficiency of evidence.

Where the appellant had agreed to sell the land in dispute and recovered a small advance of purchase money but had conveyed no registered title to the land and where both the lower Courts held that the appellant had sold the land. *Held* that second appeal lay. (*Duckworth, J.*) MAUNG PO YIN *v.* MAUNG TET TU. **2 Rang 459 : A. I. R. 1925 Rang. 68.**

Second Appeal.

——S. 100—*Second appeal—Appellate order not appealed against in time—Amendment of the decree, as regards interest—Subsequent filing of appeal—Question of interest not attacked—Limitation.*

If an amendment of a mere clerical error in decree in calculation of interest is allowed after the limitation for second appeal has already expired and if after such amendment a second appeal is filed without raising any objection regarding interest, the second appeal is time barred. (*Stuart, J.*) SHIMBHU PRASAD *v.* RAMJAS. **L. R. 3 A. 27.**

——S. 100—*Second appeal—Gujarat Talukdar's Act (Bom. Act VI of 1888), S. 16—Scope.*

No second appeal lies to the High Court from a decision of the District Judge under S. 16 of the Act. 16 Bom. 408 overruled (*Macleod, C. J., Pratt and Crump, JJ.*) AMARSANGJI DUNGARJI *v.* DEEPASANGJI RAVABHAT. **49 Bom. 442 : 87 I. C 588 : 27 B. L. R. 345 : A. I. R 1925 Bom. 241 (F.B.).**

——S. 100 (2)—*Second appeal is maintainable against an* ex parte *decision, even when other remedies are open—Civil Procedure Code, O. 9, R. 13.*

When a case is decided *ex parte* the remedy open to the party affected by the decision is threefold: first, he may apply for restoration of the case, secondly, he may apply for a review of judgment, and thirdly, he may appeal from the decree. Even though other remedies are available against an *ex parte* decision to the aggrieved party second appeal can be preferred against that decision under S. 100 (2). (*Suhrawardy and Chotzner, JJ.*) KALI PRASANNA CHAKRAVARTY *v.* NAGABULLA JAMADAR.
80 I. C. 14 : A.I.R. 1925 Cal. 497.

——S. 100—*Second appeal—Interest, rate of—Finding that rate hard and unconscionable—High Court whether will interfere.*

The High Court in second appeal will not interfere with a finding of the lower Appellate Court, that the rate of interest in a mortgage bond is hard and unconscionable. (*Newbould and Panton, JJ.*) JYOTISH CHANDRA *v.* ATIT SAHA. **61 I. C. 275 (Cal.)**

——S. 100—*Interference with finding—Decision based on something which the Record-of-Rights does not contain—Document of evidence.*

If the Record-of-Rights is a document of title obviously it is open to the Court in appeal to construe that document. But it is open to the High Court in second appeal to interfere with a decision based upon the Record-of-Rights if the decision is founded on something which the Record-of-Rights does not contain even if the Record-of-Rights is not a document of title but merely a document of evidence. (*Mullick, Ag. C. J. and Kulwant Sahay, J.*) BHUPAL MISSIR *v.* SARBAN LAL. **A. I. R. 1925 Pat. 725.**

Sufficiency of Evidence.

——S. 100—*Sufficiency of evidence—Custom.*

It is always open to the High Court in second appeal to see whether an opinion or custom which has been pronounced by the Lower Court is or is not based

C. P. CODE (V OF 1908), S. 100—Sufficiency of evidence.

on sufficient evidence. 30 A 311 Ref. (*Mukerjee, J.*) ALI HUSAIN *v.* SYED MAZABIR HUSAIN.
L. R. 5 A. 115 (Rev.) : 79 I. C. 134 : A. I. R. 1924 All. 477.

——**S. 100**—*Sufficiency of rebutting evidence is a question of fact.*

Whether the evidence adduced by the plaintiffs had not been sufficiently rebutted is a question of fact and will not be interfered with in second appeal. 17 A. L. J. 345 Dist. (*Lindsay and Sulaiman, JJ.*) RAMDAS RAI *v.* ABDUL GHAFUR. **74 I. C. 297 : A. I. R. 1924 All. 146.**

——**S. 100**—*Sufficiency of evidence—Judgment based on opinions of experts open to challenge in second appeal.*

Where the findings of the Courts below are based on an examination and balancing of opinions and view of experts as to sufficiency of the facts observed and of the inferences drawn they can always be examined. Where there is a material difference of opinion their value and sufficiency even when accepted by one court or other it can be attacked in second appeal. (*Kanhaiya Lal, J.*) ALTAFAN *v.* IBRAHIM.
21 A. L. J. 811 : L. R. 4 A. 561 : 75 I. C. 502 : A. I. R. 1924 All. 116.

——**S. 100**—*Sufficiency of evidence—Whether a specific instance as to custom is proved is a question of fact—Objection as to general insufficiency of evidence may be gone into in second appeal.*

Objections based on the grounds of insufficient evidence, or improper rejection of evidence, or as to the evidence taken as a whole amounting to insufficient proof in law of local custom, may be gone into in second appeal, but whether a specified instance is properly proved or not, is a question of fact. (*Marten and Fawcett, JJ.*) RATILAL NATHALAL *v.* MOTI LAL SANKAL CHAND. **27 B. L. R. 880 : A. I. R. 1925 Bom. 380.**

——**S. 100**—*Sufficiency of evidence.*

A finding of fact cannot be attacked in second appeal on the ground of the insufficiency of evidence. (*Newbould and Panton, JJ.*) PROSANNA KUMAR BEDANTA *v.* MADHU BADYA. **68 I. C. 500 : A. I. R. 1923 Cal. 279.**

——**S. 100**—*Sufficiency of evidence—No evidence—Interference in second appeal.*

Where a finding of fact is based on no evidence whatever or on purely conjectural grounds, it can be examined by a High Court in second appeal. 47 C. 107: 33 P. L. R. 1918 Ref. (*Broadway and Abdur Qadir, JJ.*) MUNSHA SINGH *v.* UTTAM SINGH.
4 Lah. L. J. 31 : 4 U. P. L. R (Lah) 18 : 64 I. C. 428 : A. I. R. 1922 Lah. 65.

——**S. 100**—*Sufficiency of evidence—Easement.*

The mere finding that a *parnala* is old is not sufficient to prove that an easement has been established with respect thereto. (*Wilberforce, J.*) AHMAD BAKSH *v.* MUSAMMAT PALI. **66 I. C. 922 (2) : 3 Lah. L. J. 58.**

——**S. 100**—*Sufficiency of evidence—No ground for interference.*

It is not for the High Court in second appeal to interfere on the ground of weakness or meagreness of the evidence. (*Kotval, A. J. C.*) NAMDEO *v.* GANOBA. **8 N. L. J. 29 : 86 I. C. 847 : A. I. R. 1925 Nag. 271.**

——**S. 100**—*Sufficiency of evidence—Whether alleged custom is supported by facts found can be considered.*

It is not competent to a High Court in second appeal to interfere with findings of fact ; but it can consider whether the facts found are sufficient to sustain an allegation of custom. (*Baker, J. C.*) MT. BASBIRBI *v.* ABDUL SATTAR. **82 I. C. 815 : A. I. R. 1925 Nag. 179.**

C. P. CODE (V OF 1908), S. 102.

——**S. 100**—*Sufficiency of evidence—Proof of custom.*

Though the High Court cannot interfere with the findings of fact of the Court below in second appeal it can consider whether the facts found are sufficient to support a custom alleged. 41 M. L. J. 437 ref. (*Dhobley, A. J. C.*) KRISHNA RAO *v.* NILKANTH.
5 N. L. J. 25 : 69 I. C. 800 : 18 N. L. R. 163 : A. I. R. 1922 Nag. 52.

——**S. 100**—*Sufficiency of evidence—Evidence—Absence of.*

The question whether there is any evidence in support of a finding of fact is a question of law with which it is competent to the High Court to interfere in second appeal. 23 C. W. N. 315 ref. (*Wazir Hasan, A.J.C.*) GHULAM SARWAR KHAN *v.* MAHOMED ALI KHAN.
65 I. C. 398 : 8 O. L J. 609 : A.I.R. 1922 Oudh 98.

Sustainability.

——**S. 100**—*Sustainability—Order passed in execution proceedings—Amount of the subject-matter to be considered.*

In determining whether a second appeal lies against an order passed in execution proceedings, the amount of the subject-matter of the suit and not the amount sought to be recovered in execution must be taken into consideration. (*Broadway and Martineau, JJ.*) MOHNAMAL *v.* TULSI RAM. **3 Lah. 141: 67 I.C. 718: 28 P. W. R. 1922 : A. I. R. 1922 Lah. 290 (2).**

——**S. 100**—*Sustainability.*

In second appeal, the question for the High Court is not to determine whether the weight of evidence is in favour of the appellant or the respondent, but whether there is any evidence to justify the finding. (*Dawson Miller, C. J. and Coutts, J.*) MUNSHI LALL *v.* RAMASAIS. **1 P. 246 : 3 P. L. T. 343 : A. I. R. 1922 Pat. 384.**

Waiver.

——**S. 100**—*Waiver—Question of fact.*

The question whether there is a waiver in a particular case is a question of fact and the finding on that question cannot be challenged in Second Appeal. (*Kincaid, A. J. C.*) BAHADUR *v.* GELOMAL.
59 I. C. 607 : 14 S. L. R. 128.

——**S. 102**—*Second appeal—Mortgagee abandoning claim on mortgage—Money decree.*

Where a mortgagee suing on a hypothecation bond expressly abandons all claim against the mortgaged property and frames his suit purely as a money suit for the recovery of Rs. 252 and odd, S. 102, C. P. Code, applies to the case and no Second Appeal lies. (*Daniels, J.*) LAKHAN SINGH *v.* LAL SINGH.
L. R. 5 A. (Civ.) 293 : 78 I. C. 652 : A. I. R. 1925 All. 205.

——**S. 102**—*Competent Court—Small Cause Judge trying original suits—Relief of injunction—Effect.*

A suit is not one of Small Cause nature if it includes a plea for a mandatory injunction. (*Stuart, J.*) SHAKIRA BIBI *v.* NANDAN ROY.
A. I. R. 1922 All. 241.

——**S. 102**—*Suit of small cause nature—Contribution—Suit for—Second appeal.*

Plaintiff and defendant jointly borrowed money on a mortgage of their property but the plaintiff having discharged the whole debt sued the defendant for recovery of his half share of the debt which was a sum below Rs. 500. *Held*, that the suit was of a small cause nature and that no second appeal lay to the High

C. P. CODE (V OF 1908), S. 102.

Court. (*Walsh, A. C. J. and Sulaiman, J.*) GAYA PANDE *v.* AMAR DEO PANDE. **22 A L. J. 855 : L R. 5 A. 673 : A. I. R. 1924 All. 787.**

——S. 102—*Execution proceedings—Suit of a small cause nature below Rs. 500—Second appeal.*

There is no second appeal against an order in performance of a decree passed in suit of a small cause nature for less than Rs. 500 (*Kanhaiya Lal, J.*) SURAIMAN CHANBU *v.* ANJORE SHUKUL.

21 A. L. J. 861 : L. R. 4 A. 591 : 46 A. 73 : 9 O. & A. L. R. 989 : A. I. R. 1924 A. 263.

——S. 102—*Suit for refund of money wrongly distributed under S. 73—Second appeal.*

Where the subject-matter of a suit under S. 73, cl. (2) of the C. P. Code for recovery of money wrongly distributed is less than Rs. 500 no second appeal could be preferred from the decree. (*Lindsay and Daniels, JJ.*) KESHO SARAN *v.* KHAIRAT LAL.

21 A. L. J. 248 : 74 I. C. 836 : 45 A. 359 : L. R. 4 A. (Civ) 146 : A. I. R. 1923 A. 310.

——S. 102—*Suit for* haq chaharum—*If open to second appeal.*

A suit for *haq chaharum* or one-fourth share of the sale proceeds of a house, is not cognizable by a Small Cause Court and is appealable under S. 102 of the C.P. Code. (*Lindsay and Kanhaiya Lal, JJ.*) BECHAI *v.* BADRI NARAIN. **63 I. C. 292 (2) : 19 A.L.J 719.**

——S. 102—*Suit as framed not a Small Cause—Plaintiff omitting a portion of claim subsequently—Suit does not change its character.*

Where a suit as framed is not a suit of a Small Cause nature, it does not attain that character, if the plaintiff in the course of hearing gives up a part of his claim. (*Macleod, C. J. and Coyajee, J.*) GANAPPA *v.* MAMMAD SAHIBA. **49 Bom. 596 : 27 B.L. R. 637 : 89 I. C. 59 : A. I. R. 1925 Bom. 440.**

——S. 102 and O. 21, R. 71—*Suit to recover deficiency from defaulting purchaser—Amount less than Rs. 500—No second appeal.*

An order on an application under O. 21. R. 71 of the Code for recovery of the deficiency, being less than Rs. 500, from the defaulting purchaser is not open to second appeal. (*Macleod, C. J. and Fawcett, J.*) RAJACHARYA SESHACHARYA *v.* CHEMMANNA GURUSHANTAPPA. **45 Bom. 223 : 59 I. C. 192 : 22 Bom. L. R. 1193**

——S. 102—*Small Cause Court nature determined by nature of relief and amount or value of subject-matter as claimed by plaintiff if not fictitious.*

A suit is cognizable by the Small Cause Court if in respect both of its character and of the amount or value of its subject-matter it is within the jurisdiction of the Court. The value or amount is not that actually recoverable or ascertained at the trial, but that claimed by the plaintiff and set out in the plaint. (*Page, J.*) CHANDMULL KANGORIA *v.* DEBI CHAND.

51 Cal. 62 : 28 C. W. N. 6 : 80 I. C. 317 : A. I. R. 1924 Cal. 405.

——S 102—*Small Cause nature.*

Suit for compensation for removal of trees is not exempted from the cognizance of a Small Cause Court and it does not come within Art. 35 (ii), Sch. II, Pro Small Cause Courts Act (*Cuming and Panton, JJ.*) MIRSA DILBAR HUSSAIN *v.* SADARUDDIN CHOWDHURI. **27 C. W. N. 469 : A. I. R. 1923 C. 568.**

——Ss. 102 and 115—*Suit for price of fish taken from a tank is small cause.*

There is no second appeal from the decree in a suit for recovery of the price of fish removed from a tank after declaration of title when the value of the suit does not exceed Rs. 500. (*Woodroffe and Ghose, JJ.*) ARADHAN MONDAL *v.* ABHOYA CHARAN MONDAL.

C. P. CODE (V OF 1908), S. 102.

68 I. C. 626 : A. I. R. 1923 Cal. 321.

——S. 102—*Execution—Small Cause decree transferred to Original Side—Second appeal.*

An order in execution of a Small Cause Court decree passed by a Small Cause Court Judge, is final. 3 Pat. L. W. 146 Ref. But, when the decree has been transferred to the ordinary Court to be executed as if it were a decree made by that Court, the orders made in execution are appealable in the same way as orders made in execution of decrees passed by that Court, although a second appeal would be barred under S. 102 of the Code of Civil Procedure : 31 All. 11 Ref. (*Mookerjee and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD. **67 I. C. 6 : 34 C. L. J. 477.**

——S. 102—*Suit for grazing fee—Small Cause nature.*

No second appeal lies in a suit for recovery of less than five hundred rupees claimed as grazing fee. There can be no claim for rent unless there is a tenancy and there can be no tenancy unless a right to the land has been given to the grantee. 20 C. L. J. 227 Rel. (*Mookerjee, A. C. J. and Fletcher, J.*) JATINDRA MOHAN LAHIRY *v.* ABDUL AZIZ MIA.

59 I. C. 595 : 32 C. L. J. 88.

——S. 102—*Suit to recover price of coal—No second appeal.*

A suit for price of coal supplied under an agreement is in the nature of a Small Cause suit and where the amount sued for is below Rs. 500 no second appeal lies. (*N. R. Chatterjee and Panton, JJ.*) DHAR AND COMPANY *v.* SIB NARAYAN SINGH.

59 I. C. 188 (2) (c).

——S. 102—*Suit to recover tax illegally levied—If of a small cause nature—Second appeal.*

A suit to recover tax illegally levied is one of a small cause nature and where the subject-matter is less than Rs. 500 in value, no second appeal lies. (*Broadway, J.*) THE MUNICIPAL COMMITTEE, PIND DADANKHAK *v.* BHAGWAN SINGH.

A. I. R. 1924 Lah. 619.

——S.102—*Suit for damages for infringement of monopoly—No second appeal.*

A suit for damages by a holder of monopoly against an infringement by previous holder is barred for second appeal under provisions of S. 102, of C. P. Code. (*Martineau, J.*) RAMJI DAS *v.* GOPAL.

69 I. C. 431 : A. I. R. 1923 Lah. 244.

——S. 102—*Execution proceedings—Second appeal—Valuation of suit*

In the case of execution proceedings the test to find out whether a second appeal lies is the value of the suit and not the amount sought to be recovered in execution. 29 P. R. 1902 : 30 M. 212, Ref. (*Broadway and Martineau, JJ.*) MOHNA MAL *v.* TULSI RAM.

3 Lah. 141 : 67 I. C. 718 : 28 P. W. R. 1922: A. I. R. 1922 Lah. 290 (2).

——S. 102—*Suit on agreement to share proceeds of a tenancy is one of Small Cause nature.*

A suit based upon an agreement that defendant would pay plaintiff half of what he got from the tenancy granted by the Government is a suit of Small Cause nature. (*Abdul Raoof, J.*) GANGA RAM *v.* MAYA DAS. **67 I. C. 841 : 3 Lah. L. J. 419.**

——S. 102—*Decree in Small Cause suit passed on review—No second appeal.*

It is absurd to allow a Second Appeal against a decree in a Small Cause suit, not exceeding Rs. 500 merely because the decree has been passed on review. (*Chevis, J.*) KANSHI RAM *v.* KARAM NARAIN.

3 Lah. L. J. 166 : 60 I.C. 259 : 3 U.P.L.R. (Lah.) 65.

——S. 102—*Suit for damages for use and occupation against tenants holding over is Small Cause—*

C. P. CODE (V OF 1908), S. 102.

Prov. S. C. Courts Act, Sch. II, Arts. 8 and 11.

A suit by a landlord for damages for use and occupation on the footing that the defendants are tenants holding over and are trespassers in the eye of the law is cognizable by a Small Cause Court and if the value of the suit does not exceed Rs. 500, a second appeal does not lie in the suit. (*Ramesam and Venkatasubba Rao, JJ.*) ANNAMDEVULA THATA *v.* KHWAJA AHMADULLA KHAN. **48 M. L. J. 701 : A. I. R. 1925 Mad. 890.**

——— **S. 102**—*Small Cause Court suit—Execution—No second appeal lies.*

No second appeal lies in a matter of execution in a suit which is of a Small Cause nature. 12 Mad. 116; 30 Mad. 212; 42 All. 200; 43 All. 403, Ref. to. (*Wallace and Madhavan Nair, JJ.*) P. K. VEERARAYAN *v.* AYYAKUTTI. **48 M .L. J. 499 : A. I. R. 1925 Mad. 742.**

——— **S. 102**—*Suit of small cause nature—Test of.*

In deciding the question whether a suit is of a small cause nature or not, attention has to be paid to the nature of the suit, as it was presented in the first court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts. A suit for specific performance of a contract or for damages in the alternative is not a suit of a small cause nature. (*Madhavan Nair, J.*) SANKER PEDDAPPA *v.* VENKATAPPA. **20 L. W. 321 : (1924) M. W. N. 691: 82 I. C. 123: A. I. R. 1924 Mad 844**

——— **S. 102**—*Suit of small cause nature—Joint patta—Payment of kist and water-cess by a co-pattadar—Suit for contribution—Second appeal if lies—Provincial Small Cause Courts Act, Sch. II, Art. 41.*

Plaintiff sued for recovery of a certain sum of money on the ground that he and the defendants had divided their properties, though the property still remained under the same patta, and that his property was attached for arrears of rent and water-cess under this patta, which were due from defendants 1 to 6, they not having paid the kist on their property under the same patta and that plaintiff, to save his own property therefore, had to pay up the arrears. *Held*, (1) that the suit was not of the nature contemplated by Art. 41 of Sch. II to the Provincial SmallCause Courts Act; (2) that there was no joint property, since plaintiff and defendants, on plaintiff's own showing, were divided; (3) that the mere fact that the patta was still joint and therefore the liability under it was joint would not affect the manner in which the property was held; and (4) that there was no Second Appeal to the High Court 12 M. 349 Foll. (*Wallace, J.*) SOORAPANENI SEETHARAMA BRAHMAM *v.* SOORAPANENI KRISTABRAHMAM. **19 L. W. 547 : 80 I. C. 303 (1) : (1924) M. W, N. 478 : A. I. R. 1924 Mad. 790.**

——— **S. 102**—*Small Causes Court—Suit cognizable by—Award—Money payable under—Suit to recover—Second Appeal in—Award—Suit to enforce—If suit to enforce contract.*

A suit to recover money payable under an award is a suit of Small Cause nature, and no second appeal lies against the decree in such a suit.

Semble : A suit to enforce an award is not the same as one to enforce a contract. (*Spencer and Devadoss, JJ.*) THIRUMURTHY CHETTY *v.* PONNAN CHETTY. **46 M. L. J. 51 : 19 L. W. 210 : (1924) M. W. N. 46 : 75 I. C. 843 : A. I. R. 1924 Mad. 485 (1).**

——— **S. 102**—*Second appeal—Small cause suit—Execution proceedings.*

In a suit of a small cause nature, execution proceedings is not appealable. (*Spencer and Devadoss, JJ.*) VEMURI PITCHAYYA *v.* RAJA YARLAGADDA. **18 L.W. 739 : 33 M. L. T. 125 (H. C.) : 45 M.L.J. 651 : 76 I.C. 750 : A. I. R. 1924 Mad. 367.**

C. P. CODE (V OF 1908), S. 103.

——— **S. 102**—*Second appeal—Small Cause decree—Execution proceedings.*

There is no civil miscellaneous second appeal from proceedings in execution of a Small Cause decree. (*Oldfield and Venkatasubba Rao, JJ.*) MUTHUKARUPPA CHETTY *v.* PAIYA KAVUNDAN. **(1923) M. W. N. 406 : 45 M. L. J. 210 : 18 L. W. 17 : 73 I. C. 956 : A. I. R. 1924 Mad. 32.**

——— **S. 102**—*Suit against President, District Board, for damages—If of a Small Cause nature.*

Suit against President, District Board, for damages is one of small cause nature. (*Schwabe, C. J. and Odgers, J.*) PRESIDENT OF THE DT BOARD, SOUTH KANARA *v.* GOPALKRISHNA BHATTAR. **46 Mad. 808: 45 M. L. J. 125 : 18 L. W. 82 : 32 M. L T. (H. C.) 378 : 74 I. C. 223 : A. I. R. 1923 Mad. 689.**

——— **S. 102**—*Suit to recover arrears of* kattubadi *—Is Small Cause nature.*

A suit to recover arrears of *Kattubadi* is one of a Small Cause nature and where its value is less than Rs. 500 no second appeal lies. (*Spencer and Ramesam, JJ.*) SUBBAYYA *v.* RAJAH OF VENKATAGIRI. **14 L. W. 349 : 66 I. C. 207 : 42 M. L. J. 118: A. I. R. 1922 Mad. 302.**

——— **S. 102**—*Immoveable property—Sale—Suit for recovery of purchase-money—Small Cause nature.*

A suit for recovery of purchase money by a vendee after the sale falls through or is set aside is one of a small cause nature and where the claim is less than Rs. 500, there is no second appeal. (*Prideaux, A. J. C.*) UDAIRAM *v.* THAKUR PRASAD. **89 I. C. 933.**

——— **S. 102**—*Plaint returned for presentation to Original Side by Small Cause Court—Suit does not cease to be of Small Cause nature.*

Where in a suit for damages or for the value of trees cut by the defendant from plaintiff's land, the Small Cause Court returns the plaint for presentation on the Original Side, the suit does not cease to be of a Small Cause nature and there is no second appeal. 20 A 480; 12 A. L. J. 1032, Foll. (*Lyle, A. J. C.*) KANWAR SINGH *v.* UJAGA SINGH. **3 U. P. L. R. (J. C.) 18 : 65 I. C. 7 : 8 O. L. J. 391.**

——— **S. 102**—*Applicability of.*

Suit for rent other than house rent does not fall within the scope of S. 102. (*Mullick and Atkinson, JJ.*) SADANAND TEWARI *v.* DEBI NATH MANJHI. **1922 P. H. C. C. 154 : A. I. R. 1922 Pat. 184.**

——— **S. 102**—*Suit for rent—If of a small cause nature—Second appeal.*

A suit for rent of agricultural land does not relate to immoveable property and where the amount is less than Rs. 500, no second appeal lies. (*Heald and Rutledge, JJ.*) MA PAN *v.* MAUNG NE U. **3 Rang. 390.**

——— **S. 102**—*Award.*

A suit to enforce an award is in essence a suit for specific performance of a contract, and is not of a Small Cause nature. (*Pratt, J.*) MA HLA GYI *v.* MAUNG SEIK PO. **1 Rang. 700 : 79 I. C. 718 : A. I. R. 1924 Rang. 192.**

——— **S. 103 and O. 41, R. 25**—*Powers of High Court on second appeal—Finding of fact.*

To avoid gross miscarriage of justice resulting from the omission by the lower appellate court to determine any issue of fact or to come to definite conclusion on a set of facts, the High Court has the power of determining the issue left undetermined by the lower appellate court on the evidence on record, or of remitting the case to the lower court for a finding on that issue with liberty to the parties to adduce additional evidence. 43 M. 567 Ref. (*Mr. Ameer Ali.*) CHIDAMBARA SIVAPRAKASA *v.* VEERAMA REDDI.

C. P. CODE (V OF 1908), S. 103.

45 Mad. 586 : 43 M. L. J. 640 : (1922) M.W.N. 749 : 16 L. W. 102 : 68 I. C. 538 : 49 I. A. 286 : 31 M. L. T. 54 : 37 C. L. J. 199 : 27 C. W. N. 245 : A. I. R. 1922 P. C. 292 (P. C.).

——S. 103—*Scope.*

Where the question has been determined by the lower Court, and that decision cannot be supported because it is based in part on evidence improperly admitted, S 103 does not apply. (*Mookerjee and Rankin, JJ.*) JAGADISH CHANDRA DE *v.* HARIHAR DE. 40 C. L. J. 39 : 78 I. C. 219 : A. I. R. 1924 Cal. 1042.

——S. 103 and O. 41. R. 25—*Issue of fact—Question of title—Not decided by lower appellate Court—Power of High Court to decide—Question of law—Inference from documents.*

Where an issue of fact or law has been tried by the trial court and decided but is left undecided by the lower appellate court. it is open to the High Court in second appeal to determine that issue itself. Where the question of plaintiff's title is one purely of interpretation of certain documents and the legal inferences to be drawn therefrom the High Court could interfere in second appeal. (*Wazir Hasan, J. C.*) INDARPAL SINGH *v.* THAKURDIN SINGH. 78 I. C. 895 : 10 O. L. J. 646 : 27 O. C. 77 : A. I. R. 1924 Oudh 266.

——S. 103—*High Court can determine issue not determined by court below.*

Per *Jwala Prasad, J.*—S. 103, C. P. Code, which has been newly added, has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below. (*Miller, C. J. and Jwala Prasad, J.*) LOCHAN RAI *v.* LALA SANT PRASAD. 3 Pat. L. T. 303 : 65 I. C. 536 : A. I. R. 1922 Pat. 417.

——S. 104—*Appeal—Arbitration Act, S.* 19.

Order granting stay of suit pending arbitration is appealable. (*Mukerji and Dalal, JJ.*) FIRM KACHAURI MAL KALYAN MAL *v.* FIRM WALI MUHAMMAD ABDUL LATIF. 22 A. L. J. 1031 : L.R. 5 A. (Civ.) 756: 47 A. 186 : A.I.R. 1925 All. 154.

——S. 104 and O. 43, R. 1—*Order of Court—Right of appeal.*

Where a Court is seized with a matter under a particular rule and an order thereunder is appealable, then the order actually made by the Court in that matter is also appealable. (*Macleod, C. J. and Heaton, J.*) SHRINIWAS KUPPUSAMY MUDALIAR *v.* M. C. WAZ. 45 Bom. 99 : 59 I. C. 421 : 22 Bom. L. R. 1126.

——S. 104—*Second appeal—Question of law.*

The amount of inquiry necessary for a creditor to make when lending money to a Hindu widow is a question of law and can be examined in second appeal. (*Dalal, A. J. C.*) RAMAN *v.* BARATI. 1 O. W. N. 654 : 10 O. & A. L. R. 965 : 27 O. C. 329 : A. I. R. 1925 Oudh 557.

——S. 104—*Award filed—Right to appeal is not lost though a decree is drawn up.*

S. 104 of the Code clearly gives a right of appeal against an order to file the award, and the fact that a judgment has been pronounced and decree drawn up does not render the order to file the award incapable of appeal. 19 C. W. N. 948, Foll. (*Mullick and Kulwant Sahay, JJ.*) MAHOMED KHALIL *v.* ABDUL RAHIM. 4 Pat. 670 : A. I. R. 1925 Pat. 810.

——S. 104—*Order rejecting decree-holder's petition to withdraw execution case—Appeal.*

An appeal shall not lie against an order of a Munsif rejecting the decree-holder's petition to withdraw his execution case. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD *v.* MAHESH KANT. 1 P. 232 : 3 P.L.T. 445 : A. I. R. 1922 Pat. 525.

C. P. CODE (V OF 1908), S. 104.

——S. 104—*Order under R.* 90 *of O.* 21—*No second appeal.*

No Second Appeal lies against the order passed in appeal on an application under O. 21, R. 90 but when a Second Appeal is competent under S. 47 in respect of the allegation relating to the notice under O. 21, R. 22 the High Court will deal with the entire case; for the remedy of the losing party affected by the decision of the lower Appellate Court cannot be divided into parts, particularly when the application was *prima facie* barred by limitation. (*Jwala Prasad and Adami, JJ.*) DASS NARAYAN SINGH *v.* MIR MAHAMED. 2 Pat. L. T. 401 : 6 Pat. L.J. 319 : 61 I. C. 823.

——S. 104—*Appeal lies from order of attachment and that of arrest before judgment—C. P. Code, O.* 43, *R.* 1.

An appeal lies both from an order of arrest before judgment and from that of attachment before judgment. It is true that an order of arrest is not one of the appealable orders enumerated in O. 43, r. 1, but the right is given specifically by S. 104, C. P. Code, and being a statutory right conferred by the body of the Code is not a matter of procedure and would not be taken away by rules contained in the schedule. Moreover its omission from O. 43 does not necessarily mean that it does not exist; in fact its inclusion would be superfluous, the order not being exhaustive in its terms. (*Duckworth and Godfrey, JJ.*) SYED HOOSEIN *v.* S. R. M. M. C. T. CHETTIAR FIRM. 2 Rang 362 : 3 Bur. L. J. 159 : 84 I. C. 270 : A. I. R. 1924 Rang. 361.

——S. 104—*Arbitration Act, S.* 19—*Appeal from order.*

No appeal lies under section 104, C.P. Code from an order passed under Section 19 of the Arbitration Act staying a suit.

1 S. L. R. 86 F. B.; 28 A. 349, Foll. 45 B. 245 : 16 S. L. R. 174, Appr. (*Kincaid, J. C., Aston and Madgavkar, A. J. Cs.*) FIRM OF MENGHRAJ KHIALDAS *v.* MESSRS. LANGLEY BILLIMORIA AND CO. 17 S. L. R. 195 : A. I. R. 1923 Sind 38 (F. B.).

——S. 104—*No appeal from order under S.* 19, *Arbitration Act.*

No appeal lies from an order staying a suit under S. 19 of the Arbitration Act. (*Kemp, A. J. C.*) SODAWATERWALA *v.* VOLKART BROTHERS. A. I. R. 1923 Sind 25.

——S. 104 (1) (*a*)—*Order revoking order of reference under Para.* 17, *C. P. Code, 2nd Schedule, is not appealable—C. P. Code, Sch. II, para* 17.

Where under para 17 of 2nd Schedule, C. P. Code, order is made filing an agreement, but on finding that arbitrators were not willing to act the Court revokes the order of reference and dismisses the suit, the order is not appealable. (*Sulaiman and Daniels, JJ.*) HAFIZ ZAHUR AHMED *v.* TASLIM-UN-NISSA. 23 A. L. J. 891 : L. R. 6 A. (Civ.) 575 : A. I. R. 1926 All. 55.

——S. 104 (1) (f)—*Order refusing to file award under Arbitration Act is appealable.*

An order refusing to file an award made under the Arbitration Act is appealable under S. 104 (1) (*f*) of the Civil Procedure Code. (*Piggott and Walsh, JJ.*) NAIN SUKH DAS *v.* GAJANAND. 43 All. 348 : 61 I. C. 269 : 19 A. L. J. 132.

——S. 104 (1) (f)—*Order filing award can be implied.*

Where at the hearing of an application for filing an award under C. P. Code, Sch. II, para. 20, the objections of the opposite party are overruled and the Court eventually passes a decree in accordance with the award, though there is no order in so many words that

C. P. CODE (V OF 1908), S. 104.

the award be filed, the decision of the Court dismissing the objection must be held to amount to an order filing an award. The right conferred by the Legislature cannot be defeated by the mere fact that no express order filing the award was made. (*Shadi Lal, C. J.*) FIRM SHANKAR DAS NAND LAL *v.* FIRM AMIR CHAND LUKHIM DAS. **7 Lah. L.J 91 : I.C. 533 : 88 A. I. R. 1925 Lah. 321 (1.)**

——**S. 104** (1) (f)—*Order filing the award—What is.*

An order filing an award from which an appeal is provided for in S. 104 (*f*), C.P. Code, is one which is passed after objections to the award have been disposed of. It does not mean the order by which the arbitrators are directed to bring the award to Court. (*Harrison, J.*) GHULAM MUSTAFA *v.* GHULAM SADIQ. **73 I. C. 820 : A. I. R. 1924 Lah. 231.**

——**Ss. 104 (1) (f) and 115**—*Revision against an order open to appeal whether entertainable — Revision filed after the expiry of the period of appeal, whether can be treated as an appeal.*

Where it is open to a party to appeal against an order, a revision does not lie. An application in revision cannot be treated as an appeal where an appeal filed on the date which the application in revision bears would be beyond time. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) JAGESHAR SINGH *v.* THAKUR JWALA BUKHSH SINGH. **1 O. W. N. 802.**

——**S. 104 (1) (f), O. 9, R. 13 and O. 43, R. 1 (d)**—*Reference to arbitration—Award—Application to file—Objections—Objector not present—Decree—*Ex parte*—Setting aside—Refusal—Appeal.*

The matters in dispute between the parties were referred to the arbitration of certain persons by order of Court and the arbitrators filed their award. The defendants filed their objections and applied for time which was refused. The defendants thereupon withdrew from the contest and the Court pronounced judgment according to the award and a decree followed in accordance with law. The defendants applied to set aside the award under O. 9, R. 13 but the application was rejected. *Held*, that no appeal lay against the order. As the arbitration was with the intervention of the Court S. 104 (1) of the C. P. Code had no application. An appeal was incompetent under O. 43, R. 1 (*d*), C.P. Code inasmuch as there was no appeal from the decree and the decree itself could not be deemed to have been passed *ex parte*. The Court was bound to pass judgment according to the award when the defendants did not choose to prosecute an application under Sch. II, para. 15, C. P. Code. (*Das and Adami, JJ.*) ROSHAN LAL MARWARI *v.* FIRM OF BRIDHICHAN SRI LAL. **3 Pat. 839 : 1924 P. H. C. C. 170 : A. I. R. 1924 Patna 603.**

——**S. 104 (1) (f) and Sch. II, para. 21 (2)**—*Decision as to filing of award—Right of appeal—Distinction between the two provisions.*

The effect of section 104 (1) (*f*) seems to give a right of appeal against the decision of the Court on the question whether the award should be filed or not. Paragraph 21 (2) of the Second Schedule allows an appeal also if the decree of the Court does not correctly interpret the award and on an appeal under this provision the decree can be corrected so as to bring it in accordance with the award. But when the decree does correctly interpret the decree in other words when an award has lawfully been made there is no appeal against the decision of the arbitrators. (*Carr, J.*) MAUNG TUN *v.* MAUNG PO SHOK. **1 Rang. 265 : A. I. R. 1923 Rang. 199.**

——**Ss. 104 (2) and 109**—*Scope of—S.* 104 *does not restrict S.* 109.

C. P. CODE (V OF 1908), S. 104.

The provisions in sub-S. 2 of S. 104 deal with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge ; if any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from appellate decrees by District Judges. That section deals with decrees only while the decisions on arbitration questions are styled orders. There is therefore nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109. (*Lord Phillimore.*) RAM LAL HARGOPAL *v.* KISANCHANDRA. **51 Cal. 361 : 26 Bom. L. R. 586 : 22 A. L. J. 386 : 19 L. W. 549 : 34 M. L. T. 62 : 20 N. L. R. 33 : 51 I. A. 72 : 7 N. L. J. 62 : 28 C. W. N. 977 : L. R. 5 P. C. 216 : (1924) M. W. N. 79 : 46 M. L. J. 628 : A. I. R. 1924 P. C. 95 (P. C.).**

——**S. 104 (2)**—*Order in appeal setting aside the order for return of plaint—Further appeal does not lie.*

An order in appeal setting aside the order of the lower Court, returning the plaint for presentation to the proper Court is not open to Second Appeal nor is such order open to revision, though it may be erroneous in law or in fact. (*Piggott and Walsh, JJ.*) CHANDULAL *v.* KOKAMAL. **43 All. 334 : 61 I. C. 36 : 19 A. L. J. 110.**

——**S. 104 (2)**—*Order returning plaint—Second appeal—Maintainability.*

S. 104 (2) bars a second appeal in a case where the original appeal itself was from an order returning a plaint and not from a decree. (*Martineau, J.*) HAYAT ALI KHAN *v.* ISHAR DASS. **89 I. C. 384.**

——**S. 104 (2)**—*Scope of—Appeals under cl.* 10 *of the Letters Patent not affected.*

It was not intended by S. 104 (2), C.P. Code, to override the express provision of the Letters Patent or to take away by implication a right of appeal conferred thereunder. 14 A. 226 : 39 A. 191 : 9 C. 482 : 11 A. 375 : 26 C. 361 : 25 M. 555, Ref. (*Shadi, Lal, C. J. and Harrison, J.*) RULDU SINGH *v.* SAWAL SINGH. **3 Lah. 188 : 67 I. C. 388 : A. I. R. 1922 Lah. 380 (2).**

——**S. 104 (2)**—*Order in terms of compromise.*

Order of District Court in appeal in terms of compromise is final and is inappealable. (*Le Rossignol and Campbell, JJ.*) GURUCHARAN SINGH *v.* GURDEV SINGH. **3 Lah. 175 : 66 I. C. 258 : A. I. R. 1922 Lah. 309.**

——**S. 104 (2), O. 43, R. (1) (j)**—*Second appeal where no first appeal lay.*

There can be no second appeal to the High Court on the decision in appeal which did not lie. (*Scott Smith, J.*) GUL BANO *v.* MUHAMMAD ZEKAR KHAN. **3 Lah. L. J. 463.**

——**S. 104 (2) and O. 41, R. 1 (a) (u)**—*Order in appeal setting aside order returning plaint—No second appeal.*

There is no second appeal against an appellate order setting aside an order returning a plaint to be presented to the proper court and remanding the case for trial on the merits. 33 All. 479 and 101 P. L. R. 1913, foll. (*Broadway, J.*) FIRM OF BHAWANI SAHAI KANSHI RAM *v.* FIRM OF HARBANS SINGH GOPAL DAS. **68 I. C. 304 : 2 Lah. L. J. 587.**

——**S. 104 (2)**—*Plaint order returning—Appeal—Order not open to Second Appeal.*

An order of an Appellate Court reversing an order of the Lower Court returning a plaint for presentation

C. P. CODE (V OF 1908), S. 104.

to the proper Court is not open to Second Appeal. (*Abdul Raoof, J.*) RAM LAL ISHAR DAS *v.* SALIO RAM. **59 I. C. 2 : 7 P. W. R. 1921.**

——S. 104 (d), O. 9, R. 13, O. 43, R. 1 (d), Schedule II, Para. 16 (2) —*Arbitration—Application to set aside under O. 9, R. 13—Appeal.*

Where arbitration proceedings took place with the intervention of the Court and the defendants being absent and an award was made, an application to set aside the decree under O. 9, R. 13 was made, and the Lower Court rejected the application. *Held*, on appeal, that S. 104 (*f*) of the Code which provides an appeal from an order filing or refusing to file an award without the intervention of the Court cannot be applied in the present case, which was made with the intervention of the Court and that under O. 43, R. 1 which gives a right of appeal only to cases which are appealable only where the decree sought to be set aside is appealable and is regarded as having been passed *ex parte* and neither of the conditions is satisfied. (*Das and Ross, JJ.*) RAGUNATH RAI DISUKRAI *v.* BRIDICHA SRILAL. **3 Pat. 839 : 1924 P. H. C. C. 170 : A. I. R. 1924 Pat. 603.**

——S. 104 (f) and Sch. II, Para. 21—*No order for filing award and no decree thereon separately passed—Single order disposing of whole case—Appeal is competent.*

Where an order directing an award to be filed and a decree in accordance with the award were not separately passed but the Court disposed of the whole case by a single order:

Held, that the appeal was in substance an appeal from an order directing the award to be filed, and as such was competent. 38 All. 380 and 42 All. 185, Ref. (*Sulaiman and Daniels, JJ.*) JAGAT PANDE *v.* SARAWAR PANDE. **23 A. L. J. 440 : L. R. 6 A. (Civ.) 350: 88 I. C. 76: A.I.R. 1925 All. 404.**

——S. 104 (f)—*Arbitration Act, S. 14—Order setting aside award—No appeal lies.*

An order, under the Arbitration Act, setting aside an award is not appealable. (*Kincaid, J.C. and Kennedy, A. J. C.*) MESSRS. G. P. GUNNIS AND CO., LTD. *v.* MESSRS. AMANMAL TULSIDAS. **79 I. C. 920: A. I. R. 1925 Sind 218.**

——S. 105—*Interpretation of remand order.*

Where remand was ordered on one of the two points any one of which would have been sufficient to dispose off the case the remand order must be deemed to have confirmed the decision on the other point. (*Lord Phillimore.*) SRIPAT SINGH DUGAR *v.* RAI HARIRAM GOENKA. **31 M. L. T. 38 : 26 C. W. N. 739 : 74 I. C. 597 · 16 L. W. 447 : 4 U. P. L. R. (P. C.) 68 : (1922) M. W. N. 671 : A. I. R. 1922 P. C. 51 (P. C.).**

——S. 105—*Appeal from order impleading a person in appeal does not lie.*

An order impleading a person in appeal is not an appealable order, but can be challenged in the appeal from the order finally passed in the appellate Court. (*Sulaiman and Daniels, JJ.*) FIRM SHIAM LAL JOTI PRASAD *v.* DHANPAT RAI.

23 A. L. J. 757 : L. R. 6 A. (Civ.) 386 : 88 I.C. 493 : A. I. R. 1925 All. 768.

——S. 105—"*Decision*" *means decision upon merits.*

Per *Lindsay, J.*—The word "decision" in S. 105 (1) must necessarily be taken to mean the decision upon the merits. 22 C. 981 ; 24 A. 464 ; 25 A. 280, Foll. : 34 A. 592 Diss.

Per *Daniels, J.*—An illegal order and in consequence the illegality committed in passing that order, affects the decision of the case, if the order passed by the trial Court is one "but for which the decision might have been other than it was." Opinion of *Piggott*, J. in 43 All. 564 (F.B.) Foll. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **L. R. 6 A. 193 : 88 I. C. 447 : A. I. R. 1925 All. 610 (F.B.).**

C. P. CODE (V OF 1908), S. 105.

——S. 105—*Order in pending suit superseding award can be questioned in appeal from decree.*

An order made in a pending case, superseding an award and directing the suit to proceed on the merits can be questioned in an appeal from the decree passed in the suit. 1925 All. 458, Foll. (*Sulaiman and Daniels, JJ.*) RUDRA PRASAD PANDE *v.* MATHURA PRASAD PANDE. **23 A. L J. 656 : 87 I. C. 173 : L. R. 6 A. (Civ.) 459 : A. I. R. 1925 All. 566.**

——S. 105—*Interlocutory order—Appeal from decree—Interlocutory order cannot be attacked unless affecting merits of the case.*

Unless the interlocutory order affects the merits of the case, it cannot be challenged in an appeal against the decree in the case. Where a final decree was challenged on the sole ground that the order setting aside the abatement of the suit which (the order) preceded the decree was unjustifiable :

Held, that the order did not affect the merits of the case and that it could not be challenged in an appeal from the decree in the case. 13 A. L. J. 1089 Foll. (*Mukerjee and Boys, JJ.*) BABU RAM *v.* BANKE BEHARI LAL. **23 A. L. J. 444 : L. R. 6 A. (Civ.) 297 : 87 I.C. 211 : 47 All. 555 : A. I. R. 1925 All. 426.**

——S. 105—*Plea*—Ex parte *decree—Order set on.*

In the absence of any error, defect, or irregularity affecting the decision of the case, the propriety of an order setting aside an *ex parte* decree cannot be questioned on appeal. (*Lindsay and Sulaiman, JJ.*) BENAIK RAO *v.* PUTTAN SINGH. **L. R. 5 A. 335 : 79 I. C. 69 : A. I. R. 1924 All. 929.**

——S. 105—*Interlocutory order can be objected to—Appeal from final decree.*

Notwithstanding the dismissal of an appeal against an interlocutory order in a suit on the ground that no appeal lay against it, it is open to a party to complain of any defect or irregularity in the order in an appeal from the final decree itself. (*Walsh and Ryves, JJ.*) SHANKER LAL *v.* MAHOMED ALI. **44 All. 534 : 20 A. L. J. 349 : L. R. 3 A. 304 : 4 U.P.L.R. (A.) 97 : 66 I. C. 920: A.I.R. 1922 All. 118.**

——S. 105—*Final decree must be appealed from.*

A final decree giving directions or ordering costs of commissioner will remain effective notwithstanding the decision of the appellate Court reversing the order on objections to the commissioner's report, though the appellate Court's decision was given after the final decree and though in law the lower Court was incompetent to give directions and deal with costs until disposal of the appeal from the order on objections. (*Macleod, C.J. and Crump, J.*) ELIAS HAJI AHMAD *v.* HAJI ESMAIL SAIT. **25 Bom. L. R. 237 : A. I. R. 1923 Bom. 200.**

——S. 105—*Order setting aside abatement passed in same judgment in which decree is passed—Order cannot be questioned.*

The order setting aside the abatement of a suit cannot be questioned in appeal from the decree in the suit whether such order is passed before or simultaneously with the decree. (*Suhrawardy and Cuming, JJ.*) SAYMA BIBI *v.* MADHUSUDAN MOHANTA. **52 Cal. 472 : 29 C. W. N. 675 : A. I. R. 1925 Cal. 766.**

——S. 105 and O. 23, R. 1 (2)—*Refusal to allow withdrawal, with liberty to file fresh suit—Decree—Appeal—Refusal cannot be attacked.*

The expression 'affecting the decision of the case' means affecting the decision of the case on its merits.

C. P. CODE (V OF 1908), S. 105.

Order refusing permission to the plaintiff to withdraw his suit with liberty to bring a fresh suit is not an order which affects the decision on the merits and does not fall within the provisions of S. 105, C. P. Code. The interlocutory orders which can be challenged in an appeal against the final decree are of such a nature as would or might have induced the Court to alter its decision; for instance an order refusing to admit a document which is in law admissible, or to examine a witness or to issue a commission or some such act which is calculated ultimately to influence the decision of the Court on the merits. 22 Cal. 981 and 8 C.L. J. 308 Foll. (*Suhrawardy and Cuming, JJ.*) NISHI KANTA SARKAR *v.* UMAR LAL SARKAR.

41 C. L. J. 186 : 86 I. C. 1029 : A. I. R. 1925 Cal. 711.

——**S. 105**—*Order setting aside abatement under O. 22, R. 9 is not appealable—C.P. Code, O. 22, R. 9—C. P. Code, O. 43, R. 1 K.*

Order setting aside the abatement and allowing substitution of heirs of deceased party cannot be questioned in appeal from the decree in the suit whether such order is passed before, or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits with in S. 105. (*Suhrawardy and Cuming, JJ.*) MOHAMED NARU AMIN *v.* MONOHAR SARAN DEB MOHANTA. **40 C. L. J. 588 : 85 I. C. 100 : A. I. R. 1925 Cal. 473.**

——**S. 105**—*Appeal against final decree—Powers of appellate Court—Correctness of preliminary decree.*

It is not open to the appellants, in an appeal against the final decree,to attack the preliminary decree,which might have been directly challenged by an appeal. But the appellate Court can consider whether theprelimina-ry decree was capable of enforcement and whether it afforded a basis for the final decree as made. (*Mookerjee and Panton, JJ.*) TARAPRASANNA SARKAR *v.* KALIKA MOHAN SARKAR. **38 C. L. J. 111 : 75 I. C. 319 : A. I. R. 1924 Cal. 80.**

——**S. 105**—*Scope of.*

The policy of the Legislature in enacting S. 105, C. P. Code was to give finality to orders of remand. (*Mookerjee and Rankin, JJ.*) BISAI NATH *v.* TARA NATH DEB. **72 I. C. 588 : A. I. R. 1923 Cal. 385.**

——**S. 105**—*Appeal against preliminary decree.*

Where a final decree is passed after an appeal against the primary decree is filed, the appellate Court has jurisdiction to decide the appeal. (*Newbould and Panton, JJ.*) MEA HOSSAIN KHAN *v.* SAMIR. **A. I. R. 1923 Cal. 282 (1).**

——**S. 105, O. 6, R. 17**—*Amendment of plaint—When not to be allowed.*

Where in an action for damages and injunction the plaintiffs had alleged in their plaint title to and possession of the land in dispute but the defendants having denied the latter fact the plaintiffs applied for an amendment by addition of a prayer for declaration of title. The court of first instance did not allow the amendment but the appellate Court did and remanded the case for retrial. In the course of retrial the plaintiff applied for another amendment with a prayer for recovery of possession. An objection was taken to the amendment that it altered the character of the suit and was illegal but the objection was disallowed, and the suit was decreed and the appellate court affirmed the decision. *Held* in second appeal that the second amendment ought notto have been allowed and that the other party was not precluded from taking objection to its showing that they were prejudiced by it, even though not having appealed against the order of remand they could not question the validity of that order and consequently the validity of the first amend-

C. P. CODE (V OF 1908), S. 105.

ment. (*Chatterjee and Newbould, JJ.*) GYANENDRANATH *v.* PORESHNATHPAL. **26 C. W. N. 73 : 35 C. L. J. 25 : 65 I. C. 39 : A. I. R. 1922 Cal. 255.**

——**S. 105 and O. 9, R. 13**—*Order setting aside decree—Propriety of—Cannot be questioned.*

Not only can an order setting aside an *ex parte* decree not to be questioned on appeal from the decree but any error in the proceedings is not one affecting the decision of the case within the meaning of section 105 of the Code. (*Harrison, J.*) SUNDAR SINGH *v.* NIGAHIYA. **72 I. C. 410 : A. I.R. 1923 Lah. 425 (1).**

——**S. 105, and O. 22, R. 9**—*Abatement—Order setting asideO--bjection to in an appeal from the decree, can be made.*

Where a Court sets aside the abatement of a suit under O. 22, R. 9, C. P. Code ignoring the objections of a party it is open to him on appeal from the decree passed in the suit to object to the orders setting aside the abatement. 31 M. 345 ; 13 M. L. J. 308 ; 34 A. 562 Foll. (*Abdul Raoof and Moti Sagar, JJ.*) AJUDHIA PARSHAD *v.* IMAMUDDIN.

71 I. C. 587 : A. I. R. 1923 Lah. 230.

——**S. 105**—"*Affecting the decision of the case*"—*Meaning of.*

The phrase "affecting the decision of the case" in S. 105 means affecting the decision of the case with reference to its merits. An order superseding an arbitration is not an order affecting the decision of the case on merits and therefore even if it is erroneous, objection cannot be taken in an appeal from the final decree in the case. (*Martineau, J.*) FIRM BUDHU RAM HOUDA RAM *v.* RAMZAN. **3 Lah. L. J. 59 : 59 I. C. 676 : 33 P. W. R. 1921.**

——**S. 105**—*Trial Court dismissing suit as barred by S. 33 of local Act—Appellate Court, reversing decision holding suit barred neither by S. 33 nor by S.27 (4) of Act and remanding suit—Remand order not appealed from—S. 27 (4) cannot be pleaded in second appeal from decision after remand, as bar to suit.*

The Trial Court dismissed the suit as barred by S. 33 of Madras Act 2 of 1894. The appellate Court reversed this decision and remanded the suit. While doing so, the appellate Court also dealt with S. 27 (4) of the same Act and held that the suit was not barred by it. There was no appeal from the order.

Held, that in second appeal on decision after remand, the defendants could not raise the defence that S.27 (4) was a bar to the suit. (*Devadoss, J.*) DORAISWAMI *v.* THIRUVENGADA.

A. I. R. 1925 Mad. 916.

——**S. 105**—*In appeal from final order points decided by the preliminary order can be challenged.*

The order of the Court is the order that is embodied in the formal order drawn up and issued by the Court generally, more especially is this so with the Courts of record such as the original side of the High Court. An appeal against the final order must be deemed to include all the points decided in a preliminary order for the purpose of that order. (*Spencer, O. C. J. and Srinivasa Iyengar, J.*) P. SATYARAZU *v.* GUNTUR COTTON, JUTE AND PAPER MILLS CO., LTD.

47 M. L. J. 710 : 21 L. W. 136: 48 Mad. 267 : A. I. R. 1925 Mad. 199.

——**S. 105**—Ex-parte *decree.*

A defendant can impugn an *ex-parte* decree even in appeal where he has not moved the Court under O. 9, R. 13. (*Oldfield and Devadoss, JJ.*) BAVA LEVVAI SAHIB *v.* AMMEENAMMAL. **45 M. L. J. 805 : A.I.R. 1924 Mad. 107.**

——**S. 105**—*Scope of.*

Points decided by remand order cannot be reconsidered at final hearing. (*Krishnan and Venkatasubba*

C. P. CODE (V OF 1908), S. 105—

Rao, JJ.) VENKATARAMA AIYAR *v.* AIYASAMI AIYAR.

43 M. L. J. 340 : (1922) M. W. N. 657 : 16 L. W. 552 : 31 M. L. T. 465 : A. I. R. 1923 Mad. 67.

——S. 105—*Order of remand—Not appealed against—Effect.*

An order of remand which is not appealed against cannot afterwards be objected to. (*Kinkhede, A J. C,*) RAGHUBAR PRASAD *v.* SATTOO. **89 I C. 1009.**

——S. 105—*Order of remand—Not appealed against—Effect of—Power of Court under O. 41, R. 2.*

A party who does not appeal against an order of remand cannot afterwards challenge its correctness. But this does not take away the power that vests in a court of appeal under O. 41, R. 2 to base its decision on a point not urged in the memorandum of appeal. The only condition is that the party affected thereby must have an opportunity to meet it. (*Kinkhede, A. J. C.*) BALIRAM *v.* SADARAM. **89 I. C. 1019.**

——S. 105—*Remand of case for effecting partition on another basis—Order is not final and no appeal lies to Privy Council—C. P. Code, S. 109.*

Where the trial Court ordered partition on the basis of a certain family arrangement between the parties, but the High Court in appeal held that the family arrangement was not binding and the case was remanded to effect partition according to the personal law of the parties :

Held : that the remand order was not a final order within S. 109, that O. 43, R. 1 (*a*) does not apply to appeals to Privy Council and therefore no leave can be granted to present an appeal to Privy Council. (*Hallifax and Kotval, A. J. Cs.*) FAKHRUDDIN *v.* FARIDKHAN. **A. I. R. 1925 Nag. 349.**

——S. 105—*Order of remand.*

A party who accepts erroneous order of remand and does not appeal against it, cannot afterwards change it. (*Hallifax, A. J C.*) GANGARAM *v.* KANHAIYA LAL. **80 I. C. 626 : A. I. R. 1925 Nag. 185.**

——S. 105—*Finality of order—Point not decided beyond revisability—Remand order is not binding.*

A remand judgment is not conclusive on points not specifically decided therein beyond possibility of revision. 32 Bom. 432 Dist. (*Pullan and Ashworth, A.J. Cs.*) LACHHMIPAL SINGH *v.* BHAGWAT SINGH. **85 I. C. 468 : A. I. R. 1925 Oudh 527.**

——S. 105, O. 9, R. 13 and O. 17, R. 1—*Adjournment improperly refused and* ex-parte *decree passed—Application under O. 9, R.13 dismissed—Appeal from* ex parte *decree can be set aside on Ground of improper refusal of adjournment, apart from question of sufficient cause for defendant's non-appearance or date of passing* ex parte *decree.*

Where an adjournment is improperly refused and an *ex parte* decree is passed and where an application to set aside the *ex parte* decree is dismissed, the propriety of the order refusing adjournment can be questioned in an appeal from the *ex parte* decree and the decree can be set aside, apart from any question raised in any application under O. 9, R. 13, as to whether the defendants had sufficient cause for non-appearance on the date on which the decree was passed. (*Ross and Kulwant Sahay, JJ.*) S. N. MULLICK *v.* GANGA GOPE. **1925 P.H.C.C. 199 : A. I. R. 1925 Pat. 534.**

——S. 105—*High Court remanding case for retrial—No appeal from High Court's decision filed—Finding in remand order is binding in appeal from lower Court's decision after remand.*

Where the High Court remands a case to the lower Court for retrial and there is no appeal from the decision of the High Court, the finding of the High Court

C. P. CODE (V OF 1908), S. 105—

at the time of remand is binding in the appeal from the decision of the lower Court after remand. (*Dawson Miller, C. J. and Macpherson, J.*) PARMESHWAR SINGH *v.* MT. SUREBA KUER. **1925 P. H. C. C. 185 : 88 I. C. 495 : A. I. R. 1925 Pat. 530.**

——S. 105—*Findings how far binding.*

In the case of keeping the appeal pending in the Appellate Court and remanding the case for further findings on an issue not decided, the Court when the matter comes up for final considerations can disregard the reasons given for remanding the case ; but a decision on the point of law by a Court of co-ordinate jurisdiction is final in so far as it sets aside the decision of the lower Court and lays down the law to be followed by that Court on remand. (*Dawson Miller, C. J. and Ross, J.*) BRIJ RAJ KRISHNA *v.* CHATHU SINGH. **4 P. L. T. 35 : A. I. R. 1923 Pat. 226.**

——S. 105—*Lower Court dismissing Mahomedan widow's administration suit on ground of her having been divorced—High Court holding otherwise and remanding suit—Order of remand not appealed from—Point not precluded thereafter before P. C.*

An administration suit by a Mahomedan widow against her son was dismissed by the Original Court on the ground that she had been divorced—The High Court on appeal.

Held, that no divorce had been proved, and remanded the suit to the Original Court for decision on the merits.

Held, that the provisions of S. 105 (2) of the Code will not debar the son from raising the question before the Privy Council, when the whole case had been decided, though there had not been any appeal from the order of remand. (*Robinson, C. J. and Baguley, J.*) MA MI *v.* KALENTHAR AMMAL. **3 Bur. L. J. 248 : 84 I. C. 519 : A. I. R. 1925 Rang. 147.**

——S. 105—'*Save as otherwise expressly provided means provided in Acts other than C. P. Code.*

The words " Save as otherwise expressly provided " in S. 105 of the Code would seem to directly contemplate appeals from orders of a character provided for elsewhere than in the C. P. Code and to include appeals allowed under other laws such as the Probate and Administration Act. (*Pratt and Maccoll, JJ.*) HAJI PU *v.* TIN TIN. **2 Rang. 117 : 80 I. C. 746 : A. I. R. 1924 Rang. 237.**

——S. 105 (2)—*Decree after Remand—Appeal—Remand order cannot be questioned.*

Where a decree after remand is appealed against, the appellant cannot question the correctness of the remand order. (*Chatterjee and Panton, JJ.*) MURARI CHANDRA DE *v.* DINA NATH CHANDRA. **63 I. C. 845 (Cal.).**

——S. 105 (2)—*Order of remand—Appealability—C. P. Code, O. 41, R, 23.*

Where an order of remand purports to be made O. 41, R. 23, C. P. Code, it is the duty of a party adversely affected to appeal against the order. Otherwise the order would be final. (*Scott-Smith, J.*) MT. NIAMAT BIBI *v.* MAHOMED FAIZ. **65 I. C. 745 (Lah.).**

——S. 105 (2), O. 43, R. 1 (*u*)—*Remand, order of—Appeal, when lies.*

Where an Appellate Court confirms the dismissal of the suit by the lower Court, as to a part, and remands the case for a retrial as to the other part, such an order of remand is appealable under O. 43, R. 1 (*u*) of the Code. (*Broadway and Wilberforce, JJ.*) KARAM SINGH *v.* VIR SINGH. **3 Lah. L. J. 426 :**

C. P. CODE (V OF 1908), S. 105.

63 I. C. 776 : 2 Lah. 252.

——**S. 105 (2)**—*Question decided in remand cannot be re-agitated in appeal from decision after remand.*

A question once decided by the appellate Court in the order of remand cannot be re-agitated in the stage of appeal after the return of the finding pursuant to the remand order. (*Madhavan Nair, J.*) UDAMANTHALA NALUPURATATIL *v.* PARAMESWARA. **22 L. W. 460 : 85 I. C. 996 (2) : A. I. R. 1925 Mad. 1019.**

——**S. 105 (2)**—*Order of remand.*

Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff, S. 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. (*Hallifax, A. J. C.*) DAU *v.* RAMPRASAD.

A. I. R. 1923 Nag. 283.

——**S. 105 (2)**—*Order of remand—Failure to appeal—Effect.*

Where it was open to the persons aggrieved by an order of remand to appeal against it but they failed to do so they are precluded from further contesting the correctness of that order. (*Brown, A. J. C.*) MAUNG PO KAING *v.* MA TOK. **1 Bur. L. J. 231 : 4 U. B. R. 93 : 70 I. C. 893 : A. I. R. 1923 Rang. 29.**

——**S. 107 and O. 7, R. 10**—*Appellate Court.*

O. 7, R. 13 applies to appeals by virtue of S. 107. (*Hallifax, A. J. C.*) NARAYAN *v.* TUKARAM.

74 I. C. 33 : A. I. R. 1923 Nag. 310.

——**Ss. 109 and 110**—*Fit case—Certificate conclusive—Order in Council about—Conclusiveness repealed by another—Effect.*

The ruling provision as to certificates of value applicable, at the time the appeal was filed, was No. 2 of Sch. 1. Order in the Council of 10th April 1838, which as to the effect that the certificate shall be deemed conclusive of value and not liable to be questioned on appeal by any party. As therefore on the date of the appeal this order was operative and accordingly governed the case, so far as the Board is concerned, the certificate is conclusive. As to the certificate subsequent to the date of the Order in the Council of 9th February of 1920, it is not conclusive and the Board is free to differ from High Courts as to value of the subject-matter. (*Lord Shaw*). RATHA KRISHNA AYYAR *v.* SUNDERSWAMY IYER.

43 M. L. J. 323 : 49 I. A. 211 : 45 Mad. 475 : 27 C. W. N. 1 : 20 A. L. J. 937 : 36 C. L. J. 450 : 16 L. W. 18 : 74 I. C. 584 : 31 M. L. T. 31 : A. I. R. 1922 P. C. 257 (P. C.).

——**S. 109**—*Final Order—Remand order directing lower Court to re-hear application under O. 22, R. 9 is not a final order.*

Where an application to set aside abatement of suit by excusing delay of two days in making it was rejected and in appeal from the order, the High Court accepted the appeal and directed the lower Court to re-hear the application.

Held, that the order of remand was not a final order. *Solomon* v. *Warner*, (1891) 1 Q. B. D., 734 Foll. (*Mears, C. J. and Piggott, J.*) MAMTUZ UD-DAULA MUKURRAM ALI KHAN *v.* JAMES R. R. SKINNER. **47 All. 335 : 23 A. L. J. 12 : 86 I. C. 161 : L. R. 6 (A.) Civ. 175 : A. I. R. 1925 All. 263.**

——**S. 109**—*Final order—Order for a personal decree in mortgage suit—Appeal to Privy Council.*

In an execution appeal which arose out of a mortgage decree, the decree-holders were the appellants in the High Court. They had obtained execution of

C. P. CODE (V OF 1908), S. 109.

their mortgage decree in a somewhat uncommon but perfectly lawful manner. They had exhausted the whole of the property covered by the decree, and they alleged that a very considerable portion of the decree still remained unsatisfied. They applied to the Court below to prepare a decree covering this unsatisfied balance, under the provisions of O. 34, R. 6, of the Code of Civil Procedure. The office report prepared at the time the application was made showed that the amount due under the decree on the date of the said report, namely, the 23rd of May 1918, was Rs. 32, 119-7-6, and that the total amount realised by the sale of the mortgaged property was only Rs. 18,600. The judgment-debtors objected that the application for a decree under O. 34, R. 6 was statute-barred under appropriate article of the Indian Limitation Act. The execution Court upheld this contention and dismissed the application of the decree-holders. On appeal, a Bench of the High Court held that the application was within time. The order of the Court below, was then set aside and the execution Court was ordered to re-admit the application of the decree holders on to its file of pending applications and to dispose of it according to law. *Held*, that under the circumstances this amounted to a direction that a decree under O. 34, R. 6, should be prepared, the details of which were left for the execution Court to settle, and that the order of the High Court was a final order against which leave to appeal to the Privy Council should be granted. (*Mears, C. J. and Piggott, J.*) SANTI LAL *v.* RAJ NARAIN. **21 A. L. J. 686 : 45 A. 741 : 9 O. & A. L. R. 832 : L. R. 4 A. Civ. 577 : A. I. R. 1924 All. 119.**

——**Ss. 109 and 110**—"*Final order*"—*Meaning of.*

The word "final" in S. 109, C. P. Code is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. A suit ended in a compromise decree passed on a compromise entered into between plff. and deft. No. 2. The other defendant appealed against the order recording the compromise and the High Court on appeal set aside the order and directed a trial of the suit on the merits. On an application for leave to appeal to the Privy Council against the order. *Held*, that the order of the High Court was not a final order and that therefore leave could not be granted for an appeal to the Privy Council. (*Shah, A. C. J. and Crump, J.*) SHANKAR BHARATI *v.* NARASIMHA BHARATHI. **24 Bom. L. R. 925 : 69 I. C. 80 : 47 Bom. 106 : A.I.R. 1922 Bom. 383.**

——**S. 109—Sp. Rel. Acts. S. 45**—*Fit case—Letters Patent Bom., Cl.* 39.

Where the petitioners applied to the High Court for an order under S. 45 of the Sp. Rel. Act directing the Chief Revenue Authority to refer a case for the decision of the High Court under S. 51 of the Income Tax Act, 1918 and the application was refused by a Division Bench of the High Court, leave to appeal to the Privy Council ought to be granted, where the Division Bench entertained an appeal from the judgment of the Single Judge of the High Court. (*Macleod, C. J. and Shah, J.*) ALCOCK ASHDOWN & CO. *v.* CHIEF REVENUE AUTHORITY. **64 I. C. 959 : 23 Bom. L. R. 1132.**

——**S. 109**—*Suit dismissed due to plaintiffs' want of* locus standi—*Appeal*—Prima facie *case held as made—Case remanded for further hearing—Order is not final.*

Where the lower Court had dismissed the plaintiffs'

suit on the ground that they had no *locus standi* and the High Court on appeal held that the plaintiffs had *prima facie* sufficient interest to entitle them to an investigation of the case which they made and that the facts had not been sufficiently ascertained to justify the dismissal of the suit on the preliminary point of *locus standi* and remanded the suit.

Held, that it was only a mere order of remand under O. 41, r. 23 and not a final order within the meaning of S. 109. (*Sanderson, C.J. and Richardson, J.*) HARI NARAYAN DE *v.* HARI BHUSAN DE.

78 I. C. 117 : A. I. R. 1925 Cal. 574 (1).

——S. 109—*Final order—What is—Excusing delay in presenting an appeal under S. 5, Lim. Act—If appealable.*

An order extending the period for filing an appeal under S. 5 Lim. Act is not a final order within the meaning of S. 109, C.P. Code and is not appealable to the Privy Council. A final order within the meaning of S. 109 is an order which finally decides any matter which is directly at issue in the case in respect to the rights of the parties. (*Das and Adami, JJ.*) PERIERA *v.* EAST INDIAN RY. **90 I. C. 723.**

——S. 109—*Final Order—Suit dismissed on preliminary point.*

An order of the High Court, in an appeal from an order dismissing a suit on a preliminary point, setting aside the dismissal and remanding the suit for trial of the remaining issues, is a decree or final order within S. 109. (*Sanderson, C. J. and Richardson, J.*) KHAGENDRA NANDAN ASRAM *v.* SAHAYRAM CHAKRAVARTHI. **62 I. C. 776 : 25 C. W. N. 896.**

——S. 109—*Final order.*

An order of remand is interlocutory and therefore not subject of appeal to His Majesty in Council ; it can be a final order if it decides some cardinal point in the suit but an order of remand which merely decides that a suit is maintainable in the form in which it is brought is not final. (*Scott-Smith and Broadway, JJ.*) MEHRCHAND *v.* LABHU RAM.

60 I. C. 522 : 2 Lah. 106.

——S. 109—*Insolvency—Appeal from original side—Leave to appeal to the Privy Council.*

Where the High Court passes an order under S. 8 of the Presidency Towns Insolvency Act annulling its own prior order, the order of the High Court is appealable to the Privy Council and leave can be granted under Cl. 39 of the Letters Patent if not under S. 109 of the C.P. Code. (*Ramesam and Wallace, JJ.*) OFFICIAL ASSIGNEE OF RANGOON *v.* OFFICIAL ASSIGNEE OF MADRAS. **35 M. L. T. 57 (H. C.) : 22 L. W. 362 : A. I. R. 1925 Mad. 243.**

——S. 109—*Appeal to Privy Council against order under S. 8 of the Presidency Towns Insolvency Act.*

S. 120 (2) of the C. P. Code was repealed by Act III of 1909 with the result that all the portions of the Code applying to the Original side of the High Court also apply to insolvency matters—this result being consistent with S. 90 (1) of the Insolvency Act. Still it is doubtful whether the provisions of the C. P. Code, so made applicable include the Chapter relating to appeals to His Majesty in Council or should be confined to those relating to the procedure to be followed in the High Court. (*Ramesam and Wallace, JJ.*) OFFICIAL ASSIGNEE OF RANGOON *v.* OFFICIAL ASSIGNEE OF MADRAS. **22 L. W. 362.**

——S. 109—*Appeal to the Privy Council is not open from order directing final decree to be passed in accordance with the preliminary decree passed by the Privy Council.*

An order of the High Court passed on an application to pass a final decree according to the preliminary decree of the Privy Council, or to transfer it to the sub-Court for passing a final decree, is not a final judgment within the meaning of S. 109 of the C. P. Code and therefore no appeal lies to the Privy Council from such order. Such order is also of course, not a final decree. (*Krishnan and Odgers, J.*) S. GANGARAJU BAHADUR *v.* V. RAMACHANDRA DEO MAHARAJULUM. **20 L. W. 703 : A. I. R. 1925 Mad. 187.**

——S. 109—*Final order—Order of High Court refusing to interfere in revision.*

An order of the High Court refusing to interfere in revision with the order of a Subordinate Court restoring to file a suit which had been first disposed of upon an alleged compromise between the parties is not a "final order" within the meaning of S. 109, C. P. Code. S. 105, C. P. Code, does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in S. 109. (*Spencer, O. C.J. and Devadoss, J.*) JOHN JOSEPH BRITO *v.* BRITO. **46 M. L. J. 557 : 19 L. W. 408 : 34 M.L.T. 112: (1924) M. W. N. 380 :78 I. C. 938 : A. I. R. 1924 Mad. 701.**

——S. 109—*Order granting a review.*

An order granting a review is not a final order, and no leave to appeal to His Majesty can be granted from such an order. (*Oldfield and Ramesam, JJ.*) NARAYANA IYER *v.* BIYARI BIVI. **43 M. L. J. 559 : 16 L.W. 623 : (1922) M.W.N. 731 : 32 M. L. T. 98 : A. I. R. 1923 Mad. 57.**

——Ss. 109 and 110—*Final order—Meaning of—Suit for dissolution of partnership and accounts.*

To find out whether an order is a "final order" within S. 109, C. P. Code it is the effect of the order as determining the disputed right of a party not as formally concluding the proceedings which must be regarded as decisive. Where a suit for dissolution of partnership and accounts was dismissed as barred by limitation by the trial court but on appeal the High Court reversed that decision and remanded the case for the passing of a preliminary decree. *Held* that the order of the High Court as it finally declared plaintiff's right to an account, was a final order and was therefore appealable to the Privy Council. (*Oldfield and Ramesam, JJ.*) SATHAPPA CHETTY *v.* SUBRAMANIAN CHETTY. **16 L. W. 718 : 43 M. L. J. 758 : 71 I. C. 334 : 31 M. L. T. 385 (H. C.) : A. I. R. 1922 Mad. 510.**

——S. 109 and O. 40, R. 3—*Disciplinary jurisdiction—Order suspending vakil from practice—Leave to appeal.*

The High Court has no power to grant leave to appeal to the Privy Council in a case where an order is made by the court suspending a vakil from practice. 4 Pat. L. J. 423 ; 39 M. 128 ; 2 M. I. A. 428 Foll. (*Schwabe, C. J., Coutts-Trotter, Kumaraswami Sastri, Krishnan and Ramesam, JJ.*) E. RAGHAVA REDDI, *In the matter of.* **43 M. L. J. 382 : 31 M L. T. 173 (H. C.) : (1922) M. W. N. 530 : 16 L. W. 328 : A. I. R. 1922 Mad. 440 (F. B.).**

——S. 109—*Appeal—If lies—Test determining—Order granting review—Appeal.*

In deciding whether leave to appeal to the Privy Council should be granted, a court should be guided by the same principles as in deciding whether an appeal to the High Court if the same order had been passed by a Subordinate Court. Thus when the High Court grants an application for review it is only if any one of the three grounds referred to in O. 47, R. 7 exists that leave to appeal can be granted. (*Wasir Hasan and Simpson, A. J. Cs.*) JOGMOHAN SINGH

C. P. CODE (V OF 1908), S. 109.

v. SHEO MANGAL SINGH. 90 I. C. 332.

——Ss. 109 and 110—*Affirming judgment.*

The decision of the appellate court affirms the decision of the court below if the decree is affirmed even though the appellate court may have reached the same conclusion on different grounds. (*Daniels and Lyle, A. J. Cs.*) MAHOMED ALI KHAN *v.* GHAZANFAR ALI KHAN. 25 O. C. 277 : 70 I. C 283 : A. I. R. 1923 Oudh 49.

——S. 109—*Final order, meaning of—Order determining the competency of a person to apply is not final order.*

An order to be final must finally determine the rights of the parties. An order which only determines the competency of an incorporated body as a judicial person, to apply for probate but does not determine whether it would be entitled to a grant of it if it applies is not final within S. 109. (*Lindsay, J. C. and Wazir Hasan, A. J.C.*) SRI KRISHNA DAS *v.* BENARES HINDU UNIVERSITY. 60 I. C. 208 : 23 O. C. 324.

——S. 109—*Application for leave to appeal—Probate Proceedings—Opposite party recognising applicant to be proper party—High Court will not enquire whether applicant has any* locus standi *to appeal.*

The applicant filed a caveat in the Court of First Instance and the opposite party did not apply to have that caveat discharged. In other words, the opposite party recognized that the applicant was a proper party to the probate proceedings. The opposite party appealed to High Court and he made the applicant party respondent to the appeal, The opposite party succeeding in appeal the applicant applied for leave to appeal to Privy Council.

Held, the High Court was competent to enter upon the question whether the applicant had any *locus standi* to maintain the application. (*Das and Adami, JJ*) GENDAMONI DEBYA *v.* RAGHUNANDAN SINGH. (1925) P. H. C. C. 337 : A.I.R. 1925 Pat. 712 (1).

——Ss. 109 and 110—*Final order—Substantial question of law—Co-decree holder allowed to join as executing decree-holder.*

The High Court declined to interfere in revision with an order of the lower court allowing a co-decree holder to join in executing the decree. On an application for leave to appeal to His Majesty in Council: *Held* that the order of the High Court was not a final order determining the rights of the parties in any matter in controversy between the parties and that leave to appeal should be refused. (*Miller, C. J. and Mullick, J.*) PRAKASH CHANDRA SARKAR *v.* BRINDABAN CHANDRA SARKAR. 4 U. P. L. R. (Pat.) 93 : 3 Pat. L. T. 781 : 1922 P. H. C. C. 296 : 67 I. C. 911 : A. I. R, 1922 Pat. 611.

——S. 109—*Fit case—Legal Practitioner—Refusal to enrol.*

An order of High Court refusing to enrol a person as legal practitioner comes under its disciplinary or administrative powers and no leave to appeal to His Majesty can be granted. 4 Pat. L.J, 423 Foll. (*Miller, C. J. and Adami, J.*) SUDHANSU BALA HAZRA, *In re*, 1 Pat. 590 : 4 Pat. L. T. 229 : 70 I. C. 172 : A. I. R. 1922 Pat. 603.

——S. 109—*Applicability.*

An order made by the High Court after contest by both the parties, which decides one way or the other whether an order by a lower Court recording a compromise agreement was valid, order is not an order by consent, and therefore the case is a proper case in which to issue certificate as to the fitness of the case to be taken to the Privy Council. (*Dawson Miller, C.J. and Adami, J.*) RAI KISHORE DAS *v.* RAM GULAM SAHU. 3 P.L.J. 61: A. I. R. 1922 Pat. 256.

C. P. CODE (V OF 1908), S. 109.

——S. 109—*Fit case—Construction of statute.*

A decision upon the construction of a section of a Tenancy Act, incidentally affecting the right of those who have tenures subject to the Act, is not enough to entitle a High Court to grant special leave to appeal to His Majesty in Council under S. 109 of the Code. (*Miller, C. J. and Adami, J.*) MRITUNJOY *v.* BALMUKUND. 2 Pat. L. T, 657 : 61 I. C. 663 : 6 Pat. L. J. 125.

——S. 109—*Final order—Order of Subordinate Court dismissing a partition suit—High Court's order setting aside.*

An order of the High Court setting aside an order of the Subordinate Court dismissing a partition suit for default after preliminary decree has been passed is a final order within S. 109. (*Miller, C. J. and Adami, J.*) LACHMI NARAIN *v.* BAL MUKUND. 2 Pat. L. T. 155 : 60 I. C. 479 : 6 Pat. L. J. 116.

——S. 109—*Final order—Order dismissing an appeal.*

No appeal lies from an order dismissing an appeal in default of the appellant's compliance with the rules of the Court as to the composition of the paper book in the case. (*Miller, C. J. and B. K. Mullick, J.*) RAJENDRA KISHORE *v.* KAMA KHYA NARAIN SINGH. 2 Pat. L. T. 112 : 5 P. L. J. 719 : 60 I. C. 285 : 1921 P. H. C. C. 97.

——S. 109—*Ordinarily order of remand is merely interlocutory—But if decisive of a cardinal point in a suit, it is "final."*

Ordinarily an order of remand is merely an interlocutory order ; but, that does not finally decide the question, and if the order in question has the effect of deciding finally the cardinal point in the suit, it must be held to be a final order from which leave to appeal should be granted. Where the suit was an administration suit by a Mahomedan widow, and the defence thereto was that she had been validly divorced.

Held that the main point in dispute between the parties was whether the plaintiff had been legally divorced or not. The decision on that point in defendants' favour would put an end to the whole suit, and so the point was the cardinal point in the suit and an order of remand by the High Court, relating to the point must be held to be a final order within S. 109, Civ. Pro. Code. 38 Mad. 509 ; 33 All. 391 ; 25 All. 629; 15 Bom. 155 ; 17 All. 112; 35 Cal. 618 Foll. (*Robinson, C. J. and Bagnley, J.*) MA MI *v.* KALENTHER AMMAL. 3 Bur. L. J. 248 · 84 I. C. 519 : A I. R. 1925 Rang. 147.

——S. 109 and O. 41, R. 17—*Order of dismissal of appeal for default is not appeal.*

Order, dismissing application for restoration of the appeal dismissed for default, is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court and so no appeal lies to Privy Council from the Order. 37 I. C. 832, Foll. (*Young, Offg. C. J. and May Oung, J.*) MAUNG SAW MYAING *v.* MG. SEIN. 2 Bur. L. J. 294 : 79 I. C. 504 : A. I R. 1924 Rang. 208.

——S. 109 (a) and (b)—*Final order—Order of remand—Appeal to His Majesty in Council.*

Semble. Where the High Court on appeal reverses the decision of the Court below and directs certain accounts to be taken not because his liability was established but for the purpose of determining his liability the order is a "final order" from which an appeal would lie to His Majesty in Council (*Sir Lawrence Jenkins.*) SANYASI CHARAN MANDAL *v.* KRISHNA-

C. P. CODE (V OF 1908), S. 109.

DHAN BANERJI. 49 Cal. 560 : 43 M. L. J. 41 : 16 L. W. 536 : (1922) M. W. N. 364 : 26 C. W. N. 954 : 35 C. L. J. 498 : L. R. 3 (P.C.) 133 : 30 M. L. T. 228 : 20 A. L. J. 409 : 24 Bom. L. R. 700 : 67 I. C. 124 : 49 I.A. 108 : A. I. R. 1922 P. C. 237 (P. C.).

——S. 109 (a) and (c)—*Order passed "on appeal" —Order of High Court in Revision against an order accepting an award.*

The High Court refused to interfere in revision under S. 115 of the C. P. Code against an order of the Dt. Judge accepting an award, by an application for leave to appeal to Privy Council against the order of the High Court, *held* that leave could not be granted as the order of the High Court was not an order passed "on appeal" within S. 109 (*a*) of the C.P. Code. *Held also* that leave should not be granted under clause (*c*) as the policy of the law is to make all decisions in arbitration cases final. (*Lindsay, J, and Kanhaiya Lal, J.*) SURAJ SINGH *v.* PHOL KUMARI. 90 I. C. 904 : 23 A. L. J. 997.

——S. 109 (a)—*Final order—Interlocutory order.*

The substantial portion of the order which the applicants complained of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application, but it did not finally dispose of the rights of the parties and the suit was left at practically the stage at which it was when filed.

Held, it cannot be said that this is a final order within the meaning of S. 109 (*a*) or that it is a final judgment within the meaning of Cl. 39 of the Letters Patent. (*Shah and Crump, JJ.*) SHRINIWAS *v.* HANMAT. A. I. R. 1923 Bom. 39.

——S. 109 (a)—*Compromise not recorded and suit ordered to proceed as usual—Order is not "final."*

An order that an alleged compromise should not be recorded and that the suit should proceed in the usual way is not a "final order". 10 M. I. A. 340 Ref.

Per *Rankin, J.*—Whether the character of finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court. 13 *C. L. J.* 90 Foll. (*Sandersen, C.J. and Rankin, J.*) SOURENDRA NATH MITTER *v.* SM. TARUBALA DASSI. 29 C. W. N. 832 : A. I. R. 1925 Cal. 857.

——S. 109 (a)—*On appeal, meaning of.*

A decree of the High Court dismissing an appeal with costs on the ground that it was out of time, after refusing an application under Limitation Act, S. 5, is one 'passed on appeal'. (*Sanderson, C. J. and Woodroffe, J.*) PROMOTHO NATH ROY *v.* LEE. 62 I. C. 216 : 33 C. L. J. 128.

——S. 109 (a)—*Meaning of final order—Order of remand by High Court—If final order—Test.*

In a suit brought by the Plaintiffs under S. 92 for the removal of the defendants from the office of executors appointed under a will, and it was contended that the Plaintiffs had no *locus standi* having no interest in the trust, and the High Court remanded the case for trial holding they had *locus standi*, the defendants applied for leave to sue to the Privy Council. It was contended that the order of the High Court was not a 'final order' within the meaning of S. 109(*a*). C. P Code. *Held*, on a reference to the Full Bench *Sir Shadi Lal, C. J. Broadway and Harrison, JJ.*—Refusing application for leave to appeal under S. 107 (*a*), C. P. Code—that the principle deduced from the judgment in Rahimbhoy Nahbhoy *v.* S. A. Turner (15 Bom. 155 P. C.) *Saiyad Muzhag Hussain* v. *Mussammat Bodha Bibi*, (17 All. 112) and *Ramchand* v. *Goverdhandhas*, 47 C. 918 is to the effect, that an order comprising the decision of the High Court upon a cardinal issue in a suit and which while that decision stands cannot be disputed again is a final order for purpose of appeal to Privy Council. *Held*, further that a matter of procedure can never be treated as a cardinal point in the suit and that an order of remand in this case is not a final order and the test of finality is whether the order as made finally disposes of the rights of the parties.

Per *Broadway, J.*—It is the nature of the order sought to be appealed against that determines the right to appeal, and that an order is a final order, only, if it puts an end to the litigation between the parties or disposes of substantially the matter in issue so as to leave merely subordinate matter for decision. (*Sir Shadi Lal, C. J. Broadway and Harrison, JJ.*) SULTAN SINGH *v.* MURLIDHAR. 5 Lah. 329 : 80 I. C. 366 : 6 S. L. J. 240 : A. I. R. 1924 Lah. 571 (F. B.).

——S. 109 (a)—*Leave to appeal to the Privy Council—Order of remand.*

Where the High Court in remanding a suit merely decided that the plaintiffs had a *locus standi* to institute the suit under S. 92, C. P. Code and directed the Court below to try the other issues. *Held*, that the order of the High Court was not a final order and leave to appeal to the Privy Council could not be granted. The test of finality is whether the order as made finally disposes of the rights of parties. Cases reviewed. (*Shadi Lal, C. J., Broadway and Harrison, JJ.*) RAI BAHADUR LALA SULTAN SINGH *v.* LALA MURLI DHAR. 5 L. 329 : 6 Lah. L. J. 240 : A.I.R. 1924 Lah. 571.

——S. 109 (a)—*Final Order—Order rejecting application to appeal as pauper is not final.*

Order rejecting an application to appeal as pauper is not a final order as it is even then open to the applicant to file the appeal on payment of Court-fees. (*Daniels, J. C. and Wazir Hasan, A.J.C.*) SUNDAR BAHU *v.* MAHANDIE. 20. W. N. 393 : 88 I. C. 575 : A. I. R. 1925 Oudh 548.

——S. 109, Cl. (a) and (c)—*Fit case—Leave to appeal to the Privy Council—Order of remand—When appealable.*

Ss. 97 and 105 of the C. P. Code do not regulate the right of appeal to His Majesty in Council, for an order which the Code declares to be final may yet be open to an appeal to His Majesty in Council, if the effect of the order is to negative the right of a party to continue the suit. Such an order would have the effect of finally determining the rights of the parties. The nature of the order in each case would determine whether it was final or interlocutory. If the order finally disposes of the rights of the parties, it ought to be treated as final order, but if it did not it is an interlocutory order from which no appeal could be entertained. Where the order in question did not finally determine the rights of the parties but merely disposed of a subsidiary issue, the determination of which would require the continuation of the trial, *held* that if the suit ultimately failed on the merits an appeal to the Privy Council might become wholly unnecessary and that leave to appeal to the Privy Council could not be granted. To determine whether special leave should be given it must be borne in mind that what is contemplated in S. 109 (*c*) of the C.P.Code is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance. Cases reviewed. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*)

C. P. CODE (V OF 1908), S. 109 (a).

MAHOMED KARIM KHAN *v.* SADIQ HUSAIN.
O. L. J. 289 : 71 I. C. 339 : A. I. R. 1924 Oudh 81.

——**S. 109 (a) and (c)**—*Refusal to appoint a receiver does not come under S.109 (a)—The contingency in case receiver was appointed of two receivers being appointed by different High Courts for the same property and a conflict of jurisdiction arising therefrom was held not to invite the application of S. 109 (c).*

In a mortgage deed, the mortgagee was given the right in the event of suit being filed, to apply for the appointment of a Receiver to take possession of the land and the deed provided that he might do that without any further consent on the part of the mortgagor. Owing to certain complications due to other legal proceedings, the High Court on appeal refused to appoint a Receiver in the mortgage suit by the mortgagees.

Held that this was not a final order within the meaning of S. 109 (*a*) of C. P. Code. The appointment of a Receiver is in no way a matter which finally determines the rights of the parties. Though but for the special complications which had arisen, upon an application being made on the mortgage suit being filed the Court would have appointed a Receiver forthwith in this case, the matter is one entirely for the discretion of the Court and whichever way the Court decided it certainly does not finally determine any of the rights of the parties which have arisen out of the mortgage bond. The fact that a Receiver had already been appointed by another High Court and that therefore if another Receiver were appointed according to the mortgagee's wishes there would apparently be conflict of jurisdiction between the two Courts and therefore a question would arise as to what was to be done in such contingency was held to be not in itself sufficient to require the exercise of jurisdiction under S. 109 (*c*). 22 Cal. 928 and 13 C. L. J. 507 Ref. to. (*Dawson Miller, C. J. and Foster, J.*) MAGNI RAM BUNGAR *v.* SRIDHAR CHOUDHURY. **6 P. L. T. 119 : 82 I.C. 176 : A. I. R. 1925 Pat. 173.**

——**S. 109 (c)**—*Fit case—Certificate under—Nature.*

A certificate granted S. 109 (*c*) must show on its face that the discretion conferred by that section has in fact been exercised. (*Lord Buckmaster.*) RADHAKRISHNA AYYAR *v.* SWAMINATHA AIYAR.
40 M. L. J. 229 : 44 Mad. 293 : 48 I. A. 31 : 19 A.L.J. 161 : 23 Bom. L. R. 718 : 25 C. W. N. 630 : 33 C. L. J 277 : 13 L. W. 321 : 29 M.L.T. 418 : 60 I.C. 85 : (1921) M.W.N. 119 (P.C.).

——**S. 109 (c)**—*Order, meaning of—Fit case.*

The "order" is obviously intended to be not merely a final order and the expression is wide enough to include any order. Where there is involved a matter of real importance, namely, as to whether the Court has jurisdiction to make an order, the case is a fit one for appeal to His Majesty in Council under S 109 (*c*). (*Sanderson, C. J. and Richardson, J.*) SHIVAPRASAD SINGH *v.* RANI PRAYAG KUMARI.
26 C. W. N. 819 : 70 I. C. 519 : A. I. R. 1922 Cal. 130.

——**Ss. 109 (c) and 110**—*Leave to appeal to His Majesty in Council—"Substantial question of law"—Acknowledgment of debt.*

Where following other case previously decided, the High Court held that an acknowledgment of a debt was not given to supply evidence of such debt within the meaning of Art. 1 of Sch. I of the Stamp Act, it cannot be said that the case is of public or great private importance or such an important precedent as to justify the grant of leave to appeal to His Majesty in Council under S. 109 (*c*) of the Civil Procedure Code. 44 M. L. J. 217, Foll. (*Schwabe, C. J. and Ramesam, J.*) ANANTALAL DAMANI *v.* SURJIMULL MURLIDHAR CHANDICK. **46 M. L. J. 239 : 19 L. W. 372 : 34 M. L. T. 1 : (1924) M. W. N. 319 : 78 I. C. 165 : A. I. R. 1924 Mad. 616.**

C. P. CODE (V OF 1908), S. 109 (c).

——**S. 109 (c)**—*Fit case—Construction of agreement—Question affecting rights of considerable private importance.*

The construction of an agreement which would affect rights of great public or private importance is a matter regarding which leave to appeal to the Privy Council can be given under S. 109 (*c*). (*Schwabe, C. J. and Coleridge, J.*) NATTU KESAVA MUDALIAR *v.* U.S. GOVINDACHARIAR. **45 M.L.J. 514: 18 L.W. 348: (1924)M.W.N. 3: 76 I.C. 811 : A.I.R. 1924 Mad. 231.**

——**Ss.109 (c), 110 and O. 45, R. 4**—*Substantial question of law—Different suits involving substantially same questions—Separate judgment in the first Court—Same judgment on appeals—Latter judgment.*

Two suits involving substantially the same questions were decided by distinct judgments in the first Court. There were two appeals to the High Court which were disposed of originally by one judgment. Afterwards in one of the appeals a review petition was filed and eventually that appeal was reheard on review and another judgment was given which adopted the original judgment in appeal to the extent to which it still stood. On an application for leave to appeal to the Privy Council in the High Court in the latter case and for consolidation for the purpose of pecuniary valuation. *Held*, that consolidation could not be ordered under O. 45, R. 4 of the C. Pr. Code as the judgments which decided the suits were different in the first Court and on appeal. The fact that leave to appeal was given in the other case does not bring the latter case within the terms of S. 109 (*c*) of the Code. 5 I.C. 583 not followed. For leave to appeal to the Privy Council being granted under S. 109 (*c*) of Code some substantial question of law of general importance must be involved in the case. 24 A. 174 : 30 M. 185 Ref. to. (*Oldfield and Krishnan, JJ.*) B. RAJA RAJESWARA SETHUPATHI *alias* MUTHU RAMALINGA SETUPATTI AVERGAL *v.* ARUNACHALAM CHETTIAR. **44 M. L. J. 424 : 73 I. C. 217 (2) : A. I. R. 1923 Mad. 602 :**

——**Ss. 109 (c) and 110**—*Substantial question of law—Land tenure—Forfeiture on alienation.*

The question whether the permanent tenures known as Karamkuri and Adimayavana in Malabar have the incident of forfeiture on alienation attached to them by custom is a substantial question of law and one of general interest in Malabar sufficient to justify the grant of leave to appeal to the Privy Council even though the valuation is less than Rs. 10,000. 45 Mad. 394 Foll. (*Krishnan and Venkatasubba Rao, JJ.*) ZAMORIN OF CALICUT *v.* KANNAN NAIR.
17 L. W. 445 : 72 I C. 918 : A. I. R. 1923 Mad. 443.

——**S.109 (c)**—*Substantial question of law--What is—Costs of appeal to Privy Council—Order as to.*

S. 109 (*c*) of the Code of Civil Procedure, contemplates a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or, in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance. Where the point in issue appears to be of general importance to the appellant but not of sufficient importance to the proposed respondent to warrant the High Court in putting him to the expense of an appeal to the higest tribunal, the High Court must refuse leave to appeal to His Majesty in Council. The High Court has no power, in granting leave to appeal, to impose a condition that the appellant

C. P. CODE (V OF 1908), S. 109 (c).

should, in any event, pay all the costs of the other party. (*Schwabe, C. J., Coutts-Trotter and Kumaraswami Sastri, JJ.*) RAJA RAJESWARA SETHUPATHI *v.* TIRUNEELAKANTAM SERVAI.

44 M. L. J. 217 : 17 L.W. 775 : (1923) M.W.N. 415 : 32 M. L. T. (H. C.) 126 · 72 I. C. 250 : A.I.R. 1923 Mad. 232.

——S. 109 (c)—*Substantial question of law.*

To come within S. 109 (*c*) C. P. Code, it must be shown that the decision sought to be appealed against might result in a precedent governing numerous other cases or decides a right of great public or private importance. 21 I. C. 783 Ref. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPAN

43 M.L.J. 728 : 16 L.W 517 : (1922) M.W.N. 683 : 31 M.L.T. 335 : 69 I. C. 385 : A. I. R. 1923 Mad. 125.

——S. 109 (c)—*Fit case—Decree by nature not appealable—No certificate for fitness can be granted.*

Where a decree passed by the High Court is such that had it been passed by a Subordinate Court no appeal would have lain to the High Court, no leave would be granted for an appeal to his Majesty in Council against such a decree of the High Court. (*Wazir Hasan and Simson, A. J. Cs.*) JAGMOHAN SINGH *v.* SHEO MANGAL SINGH. **90 I. C. 332 : A. I. R. 1926 Oudh 17 (2).**

——S. 109 (c)—*Case must be of public or private importance or general interest—Discretion should be sparingly used.*

Clause (*c*) of S.109, C.P. Code was intended to meet special cases, such, for example, as those in which the point in dispute was not measurable by money, though it might be of great public or private importance. To determine whether a case is of great public or private importance, though it is left entirely in the discretion of the Court is a judicial process, which could not be performed without the special exercise of that discretion evinced by the fitting certificate. The discretion thus vested in the Court, has been always very sparingly used. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) MAHOMED KARIM KHAN *v.* MIRZA SADIQ HUSAIN. **10 O. L. J. 289 : 71 I. C. 339 : A. I. R. 1924 Oudh 81.**

——S. 109 (c)—*Fit case—Applicability—No question of general interest.*

Where there is no question of general interest but merely a question affecting the parties alone S. 109 (*c*) C. P. Code is inapplicable. (*Kanhaiya Lal and Daniels, A.J.Cs.*) SHANKAR BAKSH SINGH *v.* UDIT NARAIN SINGA. **61 I. C. 131 : 8 O.L. J. 1.**

——S. 109 (e)—*Considerations governing.*

Where the value involved in the case is very large and the decision of the High Court was based on findings of fact which reversed the findings of the Trial Court and the High Court acted on evidence which was not at all before the Trial Court and there was a question of procedure of a somewhat unusual character upon which a higher tribunal was likely to take a different view, the combined effect of these matters made the matter a fit one for certification under S. 109 (*c*), though the powers under the sub-section are to be used sparingly. (*Miller, C. J. and Mullick, J.*) RAO BAHADUR MAN SINGH *v.* NAWLAKHBATI. **5 Pat. L. T. 17 : 75 I.C. 58 : 2 Pat. L. R. 48 : A. I. R. 1924 Pat. 468.**

——S. 110.

Affirming or Reversing Judgment.
Connected appeals, Suits and Cross Appeals.
Decree or consent decree.
Construction.
Leave to appeal.

C. P. CODE (V OF 1908), S. 110—Affirming or Reversing Judgment.

Substantial question of law.
Valuation.
Affirming or Reversing Judgment.

——S. 110—*Affirming judgment—No substantial question of law need be involved if there is a small variation by the appellate Court in the lower Court's decree.*

Where the appellate Court increased the amount of maintenance payable to deft. from Rs. 800 to Rs. 1,200 a year and in other respects confirmed the lower Court's decree.

Held, for purposes of appeal to Privy Council no substantial question of law need be involved, as the lower Court's decree was not 'affirmed' but 'varied' by the appellate Court. (*Lord Dunedin.*) ANNAPURNA BAI *v.* RUPRAO. **51 Cal. 969 : 51 I. A. 319 : 86 I. C. 504 : A. I. R. 1925 P. C. 60 (P.C.).**

——S. 110—*Affirming judgment—Modification of decree in favour of party seeking to appeal—Appeal directed agains tpart which was affirmed.*

A decree on a mortgage bond which was passed by the Court of first instance was affirmed in appeal with a modification as to the rate of interest : the mortgagor claimed a right to appeal to the Privy Council on the basis of this modification, but wanted to impeach the genuineness and validity of the mortgage deed, as to which both the Courts had concurred.

Held, the subject-matter of the appeal not being the modification as regards interest, and there being an affirmance of the decree of the Court below on the question of the validity of the mortgage deed, the application for leave to appeal must fail. (*Mears, C. J. and Banerjee, J.*) KAMAL NATH *v.* BITHAL DAS.

44 A. 200 : 20 A. L. J. 9 : L. R. 3 All. 83 : 64 I. C. 916 : A. I. R. 1922 All. 89.

——S. 110—*Affirming judgment—Modification of First Court's decree is not affirmation.*

A decree of the High Court which modifies that of the Lower Court to whatsoever extent is not a decree of affirmance within S. 110 of the Code and the party prejudiced is entitled to the grant of leave to appeal to the Privy Council. (*Mears, C. J. and Gokul Prasad, J.*) BHAGWAN SINGH *v.* ALLAHABAD BANK.

43 All. 220 : 19 A.L. J. 3 : 64 I. C. 3 : 2 U. P. L R (A.) 363.

——S. 110—*Affirming judgment—High Court—Variation of decree as to costs.*

Where the High Court dismisses an appeal on the merits, but varies the Lower Court's decree as to costs, the decree is still one of affirmance and a party is not entitled to appeal to the Privy Council. (*Sanderson, C. J. and Mookerjee, J.*) CHAITANYA CHARAN *v.* MOHAMMED YUSUF. **34 C. L. J. 299 : 66 I. C. 407 : A. I. R. 1922 Cal. 316**

——S. 110—*Affirming judgment—Modification of Lower Court's decree with consent of Vakil for appellant.*

Where the High Court varied a decree of the Lower Court at the instance of the Vakil for all the appellants with the result that one of the appellants was benefited at the expense of all the appellants and it was not suggested that the Vakil in making the application made any reservation as to the rights or position of the other appellants. *Held*, that the decree was a decree of affirmance. (*Sanderson, C.J. and Richardson, J.*) UMA CHARAN *v.* KANAI LAL.

66 I. C. 621 : 25 C. W. N. 775.

——S. 110 (3)—*Affirming judgment—Variation in decree regarding costs.*

A variation, not touching the merits of the case but relating only to costs, does not make the decree any-

C. P. CODE (V OF 1908), S. 110—Affirming or revers ng Judgment.

thing other than an affirming decree. (*Spencer and Krishnan, JJ.*) VADIVELU AMMAL *v.* RAJARATNA MUDALIAR. **30 M. L. T. 337 : 16 L. W, 262 : A. I. R. 1923 Mad. 30.**

——S. 110—*Affirming judgment—Substantial question of law.*

In the case of an affirming judgment, leave to appeal to the Privy Council can be granted only if there is a substantial question of law, *i.e.*, a question of law in respect of which there may be a difference of opinion (*Baker, J. C. and Prideaux, A. J. C.*) NAGARMAL *v.* ABDUL RAHMAN. **89 I. C. 941.**

——S. 110—*Affirming judgment--Decree is 'affirmed' though the decision is based on different grounds.*

Where the High Court in dismissing an appeal proceeded, in some respects, on grounds different from those adopted by the Trial Court, the decision of the High Court amounts to an affirmation of the decree of the First Court within the meaning of S. 110, 24 O.C. 164 Foll. (*Dalal, J. C. and Neave, A. J. C.*) MD. SHER KHAN *v.* MT. KAMAL-UN-NISSA. **83 I. C. 90 : A. I. R. 1925 Oudh 219.**

——S. 110—*Affirming judgment.*

It is enough for the purpose of S. 110 of the Code, for the High Court in order "to affirm the decision of the Court below" to affirm the decree of the Trial Court, even though on grounds quite different from those of the trial Court. (*Kanhaiya Lal and Daniels, J. Cs.*) AHMAD MIRZA BEG *v.* ABADI BEGUM, **63 I. C. 292 : 24 O. C. 164 (1).**

——S. 110—*Affirming judgment—What is—Findings reversed—Effect.*

In an appeal the High Court though it affirmed the decision of the Court below, reversed many of the findings arrived at by the trial Court. *Held* even in the absence of concurrent findings, the decision of the High Court is not affirming decision for the purposes of S. 110, C. P. Code. It is not necessary that a judgment of affirmance should be based upon precisely the same reason as those given by the Court below. The term "decision" in the section means only the decree or order passed and not the reasons therefor. (*Miller, C. J. and Mullick, J.*) RAO BAHADUR MAN SINGH *v.* NAWLAKHBATI. **5 Pat. L. T. 17 : 75 I. C. 58 : 2 Pat L.R. 48 : A.I.R. 1924 Pat. 468.**

——S. 110—*Affirming judgment.*

The word decision means the decision of the suit by the Court. It is not necessary that the appellate Court should also affirm the grounds of fact upon which the judgment was based. It is immaterial that appellate Court comes to a different conclusion on the question of fact. (*Robinson, C. J. and Macgregor, J.*) SEN S. N. *v.* ABDUL AZIZ TAR MD. **1 Bur. L. J. 215 : 11 L.B.R. 410 : A.I.R. 1923 Rang. 55.**

Connected Appeals—Suits and Cross Appeals.

——S. 110 and O. 45, R. 4—*Connected suits—Privy Council appeals—Certificate.*

Where in two connected suits the points are identical but one only exceeds Rs. 10,000 in value and is certified as fit for appeal to the Privy Council, the other suit should also be similarly certified though its subject-matter is less than Rs. 10,000 in value. (*Mears, C. J. and Gokul Prasad, J.*) BHAGWAN SINGH *v.* BHAWANI DAS. **43 All. 223 : 18 A. L. J. 1119 : 59 I. C. 794 : 2 U.P.L.R. (A.) 411.**

Construction.

——S. 110—*Construction—Section need not be widely construed.*

No real mischief can arise from not allowing a very wide construction of S. 110 because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-section (*c*) of S. 109. (*Lord Dunedin.*) UDOY CHAND PANNALAL *v.* P. E. GUZDAR & CO. **49 M. L. J. 20 : 52 Cal. 650 : 52 I. A. 207 : 27 Bom. L. R. 867 : 88 I. C. 445 : 41 C. L. J. 623 : 22 L. W. 255 : A. I. R. 1925 P. C. 159 (P. C.).**

C. P. CODE (V OF 1908), S. 110—Leave to appeal.

Decree or Consent Decree.

——S. 110—*Decree or consent decree—Consent order.*

An order of the High Court passed after contest as to whether an order recording a compromise is valid, is not a consent order and if it otherwise complies with the requirements of law forms a fit subject for appeal to His Majesty in Council. (*Miller, C.J. and Adami, J.*) RAJ KISHORE DAS *v.* RAM GHULAM SAHU. **6 Pat. L. J. 171 : 62 I. C. 235 : 1921 P. H. C. C. 193.**

Leave to Appeal.

——S. 110—*Leave to appeal—Petitioner praying leave in respect of decision involving a claim of Rs. 3,900—Petition cannot be granted.*

A dispute arising out of a contract of sale was referred to arbitrators ; the arbitrators were unable to agree and *ex parte* awards were made, one in favour of the petitioner for Rs. 81,000 odd, the other in favour of the respondents for Rs. 3,900 odd. Subsequently the High Court on application of the respondents, set aside the award in favour of the petitioner. The petitioner then raised a suit to set aside the award in favour of the respondents. The High Court in its original jurisdiction set it aside, but on appeal the Appeal Court reversed and dismissed the suit. The petitioner applied for leave to appeal, but this was refused upon the ground that the sum involved was neither directly nor indirectly of the value of Rs. 10,000.

Held : that the case neither fell within para. 1 nor para. 2 of S. 110 and that the petition was rightly refused. (*Lord Dunedin.*) UDOYCHAND PANNALAL *v.* P. E. GUZDAR & CO. **49 M.L.J. 20 :22 L.W. 255 : 52 Cal. 650 : 52 I. A. 207 : 27 Bom. L. R. 867 : 88 I. C. 445 : 41 C. L. J. 623 : A. I. R. 1925 P. C. 159 : (P. C.).**

——S. 110—*Leave to appeal—Discretion—Exercise of.*

Where leave to appeal is granted the certificate granting leave should show on its face, that discretion of the Court was invoked and exercised. (*Lord Buckmaster.*) MAHARAJ BAHADUR SINGH *v.* BALCHAND CHOWDHURY. **25 C. W. N. 770 : 6 Pat. L. J. 163 : 2 P. L. T. 132 ; (1921) M. W. N. 87 : 62 I. C. 320 : 13 L. W. 365 (P. C.).**

——S. 110—*Leave to appeal—Grounds—Point not allowed to be raised for the first time in second appeal—Appeal.*

In a second appeal arising out of a suit for specific performance filed on the last day of limitation a point was for the first time raised in the High Court that specific performance ought not to be granted as there was extraordinary delay in filing the suit and also because damages had been alternatively asked for. The Court refused the point to be raised at that late stage.

Held, the question of procedure involved was not a proper one for appeal to His Majesty in Council. (*Mears, C. J. and Piggott, J.*) OUDH NARAYAN SINGH *v.* KAULESHWER SINGH. **76 I. C. 516 : A. I. R. 1923 All. 463.**

——S 110—*Leave to appeal—Decree of High Court partly affirming and partly reversing decree of lower Court.*

When a portion of the decree of the High Court

C. P. CODE (V OF 1908), S. 110—Leave to appeal.

was in reversal of the decree of the lower Court and in favour of the applicant for leave to appeal to His Majesty in Council, and the remaining portion of the decree was in confirmation of the decree of the lower Court and against the applicant for leave, he is not entitled to leave as a matter of right under S. 110, C. P. Code. 8 C. W. N. 294 : 20 A. L. J. 9 Ref. (*Mears, C. J. and Banerjee, J.*) CHANDER SEKHAR *v.* MT. AMIR BEGUM. **66 I. C. 721 : A. I. R. 1922 All. 243 (2).**

——S. 110—*Leave to appeal—Suit for declaration without consequential relief—Value given in plaint for jurisdiction must be held to be market value and where defendant applies for leave to appeal to Privy Council plaintiff cannot go behind the plaint and show value is less than Rs.* 10,000.

On an application by the defendant for leave to appeal to the Privy Council against the appellate decree in a suit where the suit was for declaration without consequential relief falling under Sch. II, cl. 17 of the Court-Fees Act, the value given in the plaint for purposes of jurisdiction must be held to be the market value of the subject-matter of the suit, and where it has been stated to be Rs. 10,000 the defendant having accepted the valuation so given, it is not open to the plaintiff to show that the value of the subject matter is less than Rs. 10,000. (*Ramesam and Venkatasubba Rao, JJ.*) RATTAYYA *v.* A. BRAHMAYYA. **49 M. L. J. 309 : A. I. R. 1925 Mad. 1223.**

——S. 110—*Leave to appeal—Execution—Further applications time barred.*

Where further applications for execution were time barred and the sum realised in execution as to which there was dispute between joint decree holders was only 1300 though the unsatisfied balance under the decree executed was Rs. 10,000 *held*, leave could not be granted to appeal to His Majesty. (*Dawson Miller, C. J. and Mullick, J.*) PRAKASH CHANDRA SARKAR *v.* BRINDABAN CH. SARKAR. **3 P. L. T. 781 : 1922 P. H. C. C. 296 : A. I. R. 1922 Pat. 611.**

——S. 110—*Leave to appeal—Defendant not taking interest in the proceedings.*

Where a defendant does not take interest in the prosecution of the suit and leaves it entirely to his co-defendant he cannot separately prefer an appeal to His Majesty in Council. (*Miller, C. J. and Adami, J.*) NIBARAN CHANDRA *v.* PRATAP UDAI NATH SAHA. **2 Pat. L. T. 173 : 60 I. C. 500 : 1921 P. H. C. C. 129.**

——S. 110—*Leave to appeal—Similar decree in both Lower Courts—Value less than Rs.* 10,000.

If the value is less than Rs. 10,000 and the would-be appellant to His Majesty in Council has lost his case in both the Lower Courts he cannot, except in very exceptional cases, get a certificate though a substantial question of law is involved. (*Robinson, C. J. and Macgregor, J.*) ALIBHAI MAHOMED *v.* B. I. S. N. CO. **62 I.C. 71 : 10 L. B. R. 307.**

Substantial question of law.

——S. 110—*Substantial question of law—Sale with option to re-purchase—Mortgage by conditional sale.*

Where broad general principles applicable to a case have already been subjected to much discussion and analysis and there is no difficulty in ascertaining what are the principles, but the difficulty arises in their application, the difficulty of application is not a matter which can come under the words "substantial question of law" in S. 110, C. P. Code. Thus the High Court refused to grant leave to appeal to the Privy Council in a case where the question was whether a transaction amounted to a mortgage by conditional sale or a sale with an option for re-purchase. (*Mears, C. J. and Piggott, J.*) BISHAMBHAR NATH *v.* MD UBAIDULLAH. **46 A. 227 : L. R. 5 A. 158 : 79 I. C. 213 : A. I. R. 1924 All. 559.**

C. P. CODE (V OF 1908), S. 110—Substantial question of law.

——S. 110—*Substantial question of law—Abatement.*

In a suit for possession by a Hindu widow the defendant pleaded that the suit was not maintainable in as much as a previous suit by the predecessor-in-interest of the plaintiff had abated under O. 22, R. 9 of the Civil Procedure Code and that the plaintiff having adopted a son during the pendency of the suit she was not competent to continue it without bringing the adopted son on record. The High Court held that the previous suit had not abated and that in view of an agreement between the widow and the father of the adopted boy by vesting the management of the estate of the widow during the minority of the boy the widow could continue the suit in her own name. *Held*, that the decision involved no substantial question of law of general importance within the meaning of the S. 110 of the Civil Procedure Code and leave to appeal to His Majesty in Council should not be granted. (*Mears, C. J. and Piggott, J.*) BU ALI KHAN *v.* RANI SUJAN KUAR. **45 A. 667 : 21 A. L. J. 665 : 75 I. C. 100 : L. R. 4 A. 298 : A. I. R. 1924 All. 66.**

——S. 110—*Substantial question of law.*

To justify the grant of a certificate for leave to appeal to the Privy Council a substantial question of law must be involved in the case, *i.e.*, question of law in respect of which there is a difference of opinion. (*Mears, C. J. and Banerji, J.*) PARSHOTTAM SARAN *v.* HARGU LAL. **43 All. 513 : 63 I. C 837 : 19 A. L. J. 462.**

——S. 110 (3)—*Substantial question of law—Discretionary matter—Practice.*

The question of rightful or wrongful exercise of its discretion by the High Court does not involve any substantial question of law within S. 110 (3) of the Civil Procedure Code. The High Court declined to grant a certificate for leave to appeal to the Privy Council, where the only appeal which the appellant could make would be to ask the Privy Council to hold that the High Court had wrongly exercised its discretion in refusing to grant leave, under cl. 12 of the Letters Patent, to file an additional statement. (*Macleod, C. J. and Shah, J.*) GOVINDLAL BANSILAL *v.* BANSILAL MOTILAL. **46 Bom. 249 : 24 Bom. L. R. 196 : A. I. R. 1922 Bom. 11.**

——S. 110 (c)—*Substantial question of law—Fit case must be clear.*

Where from the record it is not clear whether resumptions by several strangers were for exactly the same grounds as those in suit, the case does not involve questions of wide public importance. (*Sanderson, C. J. and Ghose, J.*) BHUPENDRA NARAYAN SINGH *v.* NURPUT SINGH. **27 C.W.N. 204: A.I.R. 1923 Cal. 451.**

——S. 110 (3)—*Substantial question of law—Decree of High Court dismissing appeal, yet varying decree of lower Court—Effect.*

Where the High Conrt dismissed an appeal with costs, but yet made one substantial variation which amounted to overruling the decision of the lower Court on that point, it cannot be held there was an affirmance of the decision of the Court below. Hence a substantial question of law was not necessary for appealing to the Privy Council. (*Sanderson, C. J. and Richardson, J.*) NAGENDRABALA DASI *v.* DINANATH. **26 C. W. N. 651 : 70 I. C. 933 : A. I. R. 1923 Cal. 251.**

C. P. CODE (V OF 1908), S. 110—Substantial question of law.

——S. 110—*Substantial question of law—Laches in filing paper book.*

Where the only question for the Judicial Committee was whether the High Court was right in dismissing the appeal on the ground that the appellant was guilty of laches in filing the paper book of his appeal, there is no substantial question of law. (*Sanderson, C. J. and Mookerjee, J.*, MARIUM BEGUM *v.* BANKU BEHARY BOSE. **62 I. C. 205 (1) : 33 C. L. J. 131.**

——S. 110—*Substantial question of law—Question of custom depending on evidence.*

When the Courts in India have held that a custom of pre-emption claimed in a suit had been established by overwhelming evidence and there was not a single instance where a claim of pre-emption had not been allowed, there is no substantial question of law justifying the grant of leave to appeal to the Privy Council. (*Abdul Raoof and Campbell, JJ.*) GOKAL CHAND *v.* SANWAL DAS. **5 Lah. 260 : 6 Lah. L. J. 180 : 78 I. C. 417 : A. I. R. 1924 Lah. 473.**

——S. 110—*Substantial question of law—Time to make up Court-fee.*

The Court has discretion to grant or refuse to grant time for making up deficient Court fee, and whether a Court has used proper discretion in a particular case is a substantial question of law. (*Shadi Lal, C. J. and Moti Sagar, J.*) SAGAR CHAND *v.* DEWAT RAM. **63 I. C. 222 (1) (L.).**

——S. 110 (3)—*Substantial question of law.*

What the last clause of S. 110, C. P. Code, requires is substantial questions of law and not mere question of law. (*Spencer and Krishnan, JJ.*) VADIVELU AMMAL *v.* RAJARATNA MUDALIAR. **30 M.L.T. 337 : 16 L.W. 262 : A.I.R. 1923 Mad. 30.**

——S. 110—*Substantial question of law—Evidence necessary to prove custom.*

The question whether the evidence produced in a case to establish a custom is sufficient to prove it is a question of law, but not a substantial question of law within the meaning of S. 110, C. P. Code. (*Baker, J. C.*) JAGESHWAR TUKARAM *v.* PANDURANG. **90 I. C. 270.**

——S. 110—*Substantial question of law—Question on which there is difference of opinion.*

In order to justify the grant of a certificate for leave to appeal to His Majesty in Council, the High Court must be satisfied that a substantial question of law is involved in the case ; that is to say, a question of law in respect of which there may be a difference of opinion. 43 All. 513 Ref. (*Baker, J. C. and Prideaux, A. J. C.*) NAGURMUL *v.* ABDUL RAHMAN. **89 I. C. 941 : A. I. R. 1926 Nag. 5.**

——Ss. 110 and 109 (c)—*Substantial question of law—Question of general importance.*

In order to obtain leave to appeal to the Privy Council where the valuation is not above Rs 10,000 application must show that the questions involved are generally important in the way that the decision of them will affect a large number of persons. (*Batten, J. C.*) MOHANLAL BALBHADRA *v.* BISSESARDAS. **73 I. C. 221 : A. I. R. 1923 Nag. 272.**

——S. 110—*Substantial question of law—Whether prior mortgagee in possession can apply under O. 21, R. 89 and whether T. P. Act, S. 72 (d) applies to such sale—C. P. Code, O. 21, R. 89—T. P. Act, S. 72 (b).*

Whether a prior mortgagee in possession can apply under O.21, R. 89 to set aside a sale where such a sale has taken place in pursuance of a decree obtained by a subsequent mortgagee of a simple mortgage in a suit to which the prior mortgagee was not a party and whether cl. (*b*) of S. 72, T. P. Act, applies to such a sale are substantial questions of law within the meaning of S. 110, C.P. Code. (*Wazir Hasan and Simpson, A. J. Cs.*) JAGANNATH SINGH *v.* JAG JEWAN DAS. **2 O. W. N. 860 : A. I. R 1926 Oudh 17 (1).**

——S. 110—*Substantial question of law—Decree transferred for execution—Application for substitution made to second Court—Whether application is according to law is a substantial question of law within S. 110.*

The question, whether an application made for substitution to a Court to which execution is transferred is according to law, is a substantial question of law within S. 110. (*Dalal, J. C. and Misra, A. J. C.*) JANG BAHADUR *v.* BANK OF UPPER INDIA. **88 I. C. 552 : A. I. R. 1925 Oudh 728.**

——S. 110—*Substantial question of law—General interest—Leave to appeal to His Majesty in Council.*

Where owing to the faulty procedure of the Board of Revenue a specific property belonging to a disqualified proprietor was not taken over under management by the Court of Wards and the ward gave a mortgage of that property and the High Court having held that the ward was incompetent to contract under S. 11 of the Indian Contract Act and the presumption under S. 15 of the Courts of Wards Act (III of 1899) (Local) was unrebuttable the questions involved in the appeal, though raising questions of law, were not substantial in the sense that they may be debatable, of general interest, on without previous decisions of the Privy Council to guide Indian Courts so as to justify grant of a certificate. 30 C. 539 and 26 O. C. 223 Ref. to. (*Dalal, J. C. and Neave, A. J. C.*) LALA HARI KISHUN DAS *v.* CH. MOHAMMAD SAFI JAN. **1 O. W. N. 608 : 85 I. C. 409 : 28 O. C. 34 : A. I. R. 1925 Oudh 545.**

——S. 110—*Substantial question of law—Legatees attesting the will—Question as to their intention is not a substantial one of question.*

The question whether the legatees signing the will as witnesses did not intend to attest the will is not a substantial question of law. (*Daniels, J. C. and Wazir Hasan, A. J. C.*) SHIAM SUNDAR SINGH *v.* JAGANNATH SINGH. **88 I. C. 579 : 2 O. W. N. 394 : A. I. R. 1925 Oudh 541.**

——S. 110—*Substantial question of law—Interpretation of document may amount to.*

The interpretation of a document may amount to a substantial question of law but that depends on the circumstances of every document. (*Dalal, J. C. and Neave, A. J. C.*) MD. SHER KHAN *v.* MT. KAMAL-UN-NISSA. **83 I. C. 90 : A. I. R. 1925 Oudh 219.**

——S. 110 (2)—*Substantial question of law—Construction of deed.*

Mere questions of construction of particular documents cannot be treated as questions of general importance or substantial question of law within the meaning of S. 110. (*Kanhaiya Lal, J.C. and Simpson, A. J.C.*) SARSUTI PRASAD *v.* MUHSHI EHTISHAM ALI. **25 O. C. 349 . 73 I. C. 407 : A. I. R. 1922 Oudh 214.**

——S. 110—*Substantial question of law—Exercise of discretion in S. 90 of Evidence Act.*

The exercise of discreton under S. 90 of the Evidence Act is not a substantial question of law within the meaning of S. 110 of the Code. (*Kanhaiya Lal and Daniels, A. J.Cs.*) SHANKAR BAKSH SINGH *v.* UDIT NARAIN SINGH. **61 I. C. 131 : 8 O. L. J. 1.**

S. 110—*Substantial question of law—Issue given up re-opened.*

Where an issue given up in the trial Court is allowed to be re-opened in appeal and fresh evidence let in,

C. P. CODE (V OF 1908), S. 110—Substantial question of law.

the propriety of the same is not a substantial question of law within the meaning of S.110. (*Miller, C.J. and Mullick, J.*) RAO BAHADUR MAN SINGH *v.* NAWLAKHBATI. **5 Pat. L. T. 17 : 75 I. C. 58 : 2 Pat. L. R. 48 : A. I. R. 1924 Pat. 468.**

——— **S. 110**—*Substantial question of law—Several decisions of Court—Point of law.*

There has been a number of cases beginning in the year 1868 and going down to the year 1913 all to the same effect, namely, that the claims for malikana being claims in respect of an interest in land did become barred absolutely by limitation under the provisions of the statute before the Act of 1871 and that the statutes of 1871 and 1877 did not have the effect and could not have the effect of reviving the claim which had already become barred. *Held*, that owing to this long consensus of opinion on the question the High Court would not treat it as a substantial question of law remaining to be determined but should refuse the present application for leave to appeal to the Privy Council on the ground that there is no substantial question of law, and if the appellant wished to have this question brought before their Lordships of the Privy Council he would have to make a special application to that effect. (*Miller, C.J. and Kulwant Sahay, J.*) BABU RAMNIRANJAN CHAUDHURY *v.* BABU GOBARDHAN THAKUR. **1 Pat. L. R. 314 : A. I. R. 1924 Pat. 271 (1).**

——— **S. 110**—*Substantial question of law.*

The power of co-heirs in respect of alienation of joint and undivided property is well settled and is not a question of general importance. For the grant of special leave the question involved must be not merely substantial but must be of great public or private importance which did not exist in the case. 27 A. 174, 6 B. 403, 39. Mad. 843 foll. (*Robinson, C.J. and Macgregor, J.*) MAUNG THWE *v.* A. L. A. R. CHETTY FIRM. **1 Bur. L.J. 62 : 11 L. B. R. 335 : 68 I. C. 690 : A. I. R. 1923 Rang. 71.**

Valuation.

——— **S. 110**—*Valuation—Annuity.*

S. 110 of the Code of Civil Procedure applies to the value of an annuity which is sought to be recovered, not the value of the property upon which that annuity is charged. (*Lord Atkinson.*) MIRZA ABID HUSSAIN KHAN *v.* AHMAD HUSSAIN. **45 M. L. J. 253 : (1923) M. W. N. 590 : 26 O. C. 216 : 33 M. L. T. 232 : 10 O. L. J. 288 : 9 O. & A. L. R. 484 : 28 C. W. N. 289 : 75 I. C. 502 (1) : 18 L. W. 146 : A. I. R. 1923 P. C. 102 (P. C.).**

——— **S. 110**—*Valuation—Future interest.*

Where in a suit for sale on a mortgage the plaintiff claimed Rs. 9,300 with interest pending the suit and the plaintiff got a decree for more than 10,000 rupees; the case satisfies the requirements of S. 110 C.P.Code, as regards the valuation. (*Mears, C.J. and Piggott, J.*) GAJADHAR MAHTON *v.* AMBIKA PRASAD TIWARI. **45 A. 133 : 69 I. C. 645 (1) : 20 A. L. J. 903 : A. I. R. 1923 All. 78.**

——— **S. 110**—*Valuation — Value in partnership suits is calculated on the appellant's share and on the whole property.*

On principle it can make no difference on the point of valuation for purposes of appeal to Privy Council whether a suit is a partition suit or a partnership suit. It is the value of the appellant's share and not the whole of the property that determines the value of the subject-matter. (*Shah, A. C. J and Kincaid, J.*) NARIMAN RUSTAMJI MEHTA *v.* HASHAM ISMAYAL. **49 Bom. 149: 26 B.L.R. 1261 : A.I.R. 1925 Bom. 137.**

——— **S. 110**—*Valuation.*

C. P. CODE (V OF 1908), S. 110—Valuation.

Plaintiff sued for possession of two houses and for an injunction restraining defendant from using a well and compound. He was awarded possession of one house and a portion of the other and he got a decree jointly with defendant for the user of the well and the compound. The relief with respect to the house was valued at Rs. 5,000. Though the value of the well and compound was more than Rs. 5,000 plaintiff's share in them was below 5,000 in value. On an application by the plaintiff for leave to appeal to the Privy Council, *held*, that for purposes of S. 110, C.P. Code, the value of the subject-matter was in excess of Rs. 10,000 and leave should therefore be granted. (*Macleod, C. J. and Fawcett, J.*) APPAYA PADDAYA *v.* LAKHAM GOWDA. **25 Bom. L. R. 77 : 72 I. C. 127 : A. I. R. 1923 Bom. 176.**

——— **S. 110**—*Valuation—Decree for more than Rs. 10,000—Value of the property involved less.*

The High Court reversed the decree of the trial Court and granted a declaration that the deed in question was void, and that the plaintiff was entitled to the possession of the property mentioned in the deed. *Held*, it is not necessary for the purpose of an application for leave to appeal to His Majesty to inquire into the question as to whether the property actually handed over to deft. applicant is worth Rs. 10,000 or not if whatever the value of that property may be, it is clear that the whole of the property as to which the question arose in the appeal and in respect of which the decree has been passed in High Court is worth more than Rs. 10,000. (*Shah and Crump, JJ.*) PYARI BIBI *v.* HASANALLI. **A. I. R. 1923 Bom. 59.**

——— **S. 110**—*Valuation—Proceedings under the Bombay Rent Act.*

Plffs. sought to eject their tenant in order that they might occupy the premises themselves while the tenant sought the protection of the Bombay Rent Act. The monthly rent of the premises was Rs. 275 and capitalised at 20 years, the purchase value of the property would be over Rs 10,000. The plff. got a decree and deft. applied for leave to appeal to the Privy Council. *Held*, that the decree involved directly a claim or question to or respecting property over Rs. 10,000 and leave to appeal must be granted. (*Macleod, C.J. and Coyajee, J.*) KASTURBHAI *v.* HIRALAL. **24 Bom. L.R. 350: 67 I.C. 938: A.I.R. 1923 Bom. 23(1).**

——— **S. 110**—*Valuation—Easement*

Where the subject-matter of a suit is an easement, the value of which is less than Rs. 10,000, there is no right of appeal to the Privy Council although the easement affects property worth over Rs. 10,000. (*Macleod, C. J. and Fawcett, J.*) MANILAL JUGALDAS *v.* BANUBAI FRAMJI. **63 I. C. 588 : 23 Bom. L. R. 374.**

——— **S. 110**—*Valuation—Subject-matter in a suit to recover enhanced rent of occupancy holding is not the holding but only the plaintiff's claim to enhanced rent.*

In a suit for recovery of rent at an enhanced rate under S. 30 of the Bengal Tenancy Act as well as for additional rent under S. 52 of that Act against an occupancy tenant, the holding is not the subject-matter of the suit and of the appeal. The subject-matter of the suit and of the appeal is the plaintiff's claim to recover the enhanced rent and the additional rent under S. 52. 1923 P. C. 102, Followed. Neither does such suit involve directly or indirectly a claim or question to or respecting the holding within S. 110. (*Sanderson, C.J. and Walmsley, J.*) PRAMADA NATH ROY BAHADUR *v.* BASIRUDDIN QUAZI. **82 I. C. 744 : A. I. R. 1925 Cal. 414.**

——— **S. 110**—*Valuation—Leave to appeal—Indirectly affecting property—Question of public importance.*

It is not possible to hold that a decree directly or

C. P. CODE (V OF 1908), S. 110—Valuation.

indirectly involves a claim or question respecting property of the statutory value where it is necessary to investigate the terms and conditions of leases in respect of lands which are not included in the suit. Before it could be held that a decision between a landlord and tenant involves a question of wide public importance, there should be some evidence that the rights of landlords and tenants in a locality or province are, generally speaking, dependent on the same facts as appear in the suit and that the terms of the leases regulating such leases are also similar. (*Sanderson, C. J. and Ghose, J.*) BUPENDRA NARAYAN SINGH *v.* NURPUT SINGH. **27 C. W. N. 204 : A. I. R. 1923 Cal. 451.**

——S. 110—*Valuation of—Subject-matter—Substantial question of law—Suit for rectification.*

A person who had obtained a decree on a mortgage sued for rectification of that decree on the ground that a share of the property which had been purchased by the 8th defendant in the suit had by mistake been omitted from the decree owing to a mis-description in the mortgage deed. The Court below as well as the High Court decreed the suit as brought. On an application by the 8th defendant for leave to appeal to the Privy Council the plaintiff objected that the value of the subject-matter on appeal to His Majesty in Council was the market value of the share of the property claimed by the 8th defendant which was less than Rs. 10,000. It was also objected that there was no question of law in the case. *Held*, that the claim of the plaintiff against the 8th defendant was part and parcel of the mortgage transaction and as there was no claim by title paramount set up by the 8th defendant, the value of the appeal to His Majesty in Council was not the value of the share of the 8th defendant but was the entire value of the mortgage suit which was about the appealable value. *Held*, further, that the question whether the plaintiff was entitled to have the decree rectified was a substantial question of law. (*Sanderson, C. J. and Ghose, J.*) BEPIN KRISHNA ROY *v.* PRIYABRATA BOSE. **71 I. C. 371 : A. I. R. 1923 Cal. 387.**

——S. 110—*Valuation—Must be according to market.*

The rules under the Suits Valuation Act in accordance with which the land is valued for the purposes of jurisdiction do not apply in determining the value for the purpose of S. 110 of the Civil Procedure Code, but it is the market value which has to be ascertained (*Abdul Raoof and Martineau, JJ.*) NAWAZ ALI *v.* ALLU. **6 L. L. J. 44 : 75 I. C. 520 : 4 Lah. 185 : A. I. R. 1924 Lah. 82.**

——S. 110—*Valuation—Subject-matter.*

Where the subject-matter of the suit was the question whether the applicants were permanent tenants of the site, or mere tenants at will, and the plaintiff laid no claim whatever to the buildings on the site, *held*, the matter in dispute between the parties was solely the nature of the tenancy of the site. The second paragraph of S. 110 means that the suit must involve rights and claims to property which rights and claims were worth Rs. 10,000 or upwards, nor that the rights affected properties whose value was Rs. 10,000 or more. (*Broadway and Abdul Quadir, JJ.*) DHANNA MAL *v.* RAI SAHIB LALA MOTI SAGAR. **75 I. C. 654 : A. I. R. 1923 Lah. 286 (2).**

——S. 110—*Valuation—Suit for declaration of status—Valuation fixed by plaintiff not conclusive.*

Plff. sued for a declaration that he was a Rajput by caste and valued his suit for purposes of jurisdiction at Rs. 11,000. His suit was decreed by the Subordinate Judge, but dismissed by the High Court. On an application for leave to appeal to His Majesty in Council, *held*, that the suit was not one to which any special money value could be attached, and that the value of the subject-matter of the suit could not be said to amount to Rs. 10,000 or upwards or that the decree involved directly or indirectly any claim or question to or respecting property of like amount or value. 18 Cal. 378, Foll. 60 P. R. 1905, 15 Mad. 237 (F. B.), 25 C. W. N. 269 (P. C.) Dist. (*Chevis and Scott-Smith, JJ.*) GHULAM RASUL KHAN *v.* SECRETARY OF STATE. **2 Lah. 297 : 26 P. L. R. 1922 : 69 I. C. 239 : A. I. R. 1922 Lah. 131 (2).**

——S. 110—*Valuation—Interest subsequent to suit—Inclusion.*

For the purpose of ascertaining the pecuniary value of an appeal for purposes of leave to appeal to His Majesty in Council, interest subsequent to the date of plaint and up to the date of the decree must be included in the subject-matter. 16 L. W. 18 Rel. 39 M. 843 Dist. (*Oldfield and Ramesam, JJ.*) RAGHUNATHASWAMI IYENGAR *v.* GOPAUL RAO. **43 M. L. J. 622 : 16 L. W. 682 : 74 I. C. 596 : 32 M. L. T. 1 : (1922) M. W. N. 652 : A. I. R. 1923 Mad. 135.**

——Ss. 110 and 109 (c)—*Valuation—Fit case—Question of general importance—Plaintiff if can go behind his own valuation in the plaint and appeal—Indirectly affecting property over Rs. 10,000 in value.*

To come within S. 109, (c), C. P. Code, it must be shown that the decision sought to be appealed against might result in a precedent governing numerous other cases or decides a right of great public or private importance. 27 I. C. 783, Ref. The question whether a decree involves indirectly a claim or question to property worth more than Rs. 10,000 in value must be decided with reference to actual circumstances at the time and not to circumstances which are remote, and not in particular to a mere possibility that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. 15 L. W. 140 ; 24 A. 236 ; 85 A. 445 ; 8 C. 210 ; 4 C. L. R. 125 Ref. Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for purposes of Court-fee in the Court of first instance and on appeal, they could not be allowed to change their valuation for the Privy Council. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPAN. **43 M. L. J. 728 : 16 L. W. 517 : (1922) M W. N. 683 : 31 M. L. T. 335 : 69 I. C. 385 : A I.R. 1923 Mad. 125.**

——S. 110 (1)—*Valuation—Cause of action different against defendants.*

In a suit against several persons where the cause of action against each is quite distinct and different from the others, the fact that a joint suit is brought cannot make the subject-matter of the appeal the same as that of the joint suit. The valuation will depend upon the relief claimed against the particular defendant. (*Spencer and Krishnan, JJ.*) VADIVELU AMMAL *v.* RAJARATNA MUDALIAR. **16 L. W. 262 : 30 M. L. T. 337 : A. I. R. 1923 Mad. 30.**

——S. 110—*Valuation.*

The words "must involve, directly or indirectly, some claim or question to or respecting property" of upwards of Rs. 10,000 in value in S. 110, C. P Code, evidently refer to questions arising between parties to the suit and not to questions affecting the title of one of the parties to the suit or suits that can hereafter be brought but are not now pending. (*Spencer and Kumaraswami Sastri, JJ.*) SETHUPATHI AVERGAL *v.* KAMITH RAVUTHAN. **42 M. L. J. 78 : 15 L. W. 140 : (1922) M. W. N. 46 : 30 M. L. T. 42 : A. I. R. 1922 Mad. 34.**

C. P. CODE (V OF 1908), S. 110—Valuation.

——S. 110—*Valuation—Interest on the amount decreed.*

The suit was based on a mortgage deed for Rs. 7,000 and the amount claimed was Rs. 9,776 together with interest to the date of the decree and further interest to the date of payment. The plaint was presented on the 11th December, 1916, and was returned to be signed by plaintiffs personally. It was again presented to the Subordinate Judge on the 2nd February 1917. The first hearing was on the 16th January 1917, and the suit was decided on the 17th November 1919, when a preliminary decree for sale was granted. The decree was for Rs. 9,776 and 3,451-6-3 compound interest at 9 per cent per annum up to the 17th May 1920, the day fixed for payment, together with interest on the total amount at 6 per cent per annum up to the date of the actual payment. The appeal was filed in the High Court on the 20th February 1920, and decided on the 21st December 1921. *Held*, on an application for leave to appeal to His Majesty in Council, the case satisfied the requirements of S. 110, C. P. Code, as to amount and nature, since on the date of the decree the amount to be paid on the date fixed already included together with interest an amount exceeding Rs. 10,000 and a decree including interest up to the date of the decree had been asked for in the plaint. (*Batten, J. C. and Hallifax, A. J. C.*) SETH MAGAN LAL *v.* DARBARI LAL CHOWDHURY.

72 I. C. 395 : A. I. R. 1923 Nag. 239.

——S. 110—*Valuation—Admission.*

Defendants who accept the value of property for purposes of jurisdiction cannot be heard to question that value subsequently. The value of the property is a question of fact. It is not proper for a party by an admission as to a lower valuation to suffer an appeal to be heard by a single Judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. (*Ashworth and Simpson, A. J. Cs.*) BHAGWATI PRASAD *v.* ACHHAIBAR SINGH. **9 O. L. J. 531 : 74 I. C. 214 : 26 O. C. 24 : A. I. R. 1923 Oudh 93.**

——S. 110—*Valuation—Mortgage suit.*

Plaintiff sued to redeem his mortgaged property. He claimed that all the money due had been paid from the usufruct and that there was a large surplus which was due to him. The trial Court held that the entire mortgage money had been paid and decreed plaintiff's claim for possession and for a surplus amount of Rs. 9,012-12-8. The defendant appealed to the High Court to be relieved of the surplus awarded to plaintiff and claimed a sum of Rs. 2,073 due on the mortgage. The decree of the trial Court was modified in the High Court to the extent of reducing the surplus awarded to Rs. 7,910-11-7. The defendant then applied for leave to appeal to His Majesty *Held*, that the value of the subject-matter, including the surplus awarded, *viz.*, Rs. 7,910-11-7, amounted to Rs. 983-11-7 since in the memorandum of appeal to the High Court the defendant had claimed only Rs. 2,073 on the mortgage and had not claimed possession of the property. It not being alleged that the appeal affected a question relating to property exceeding Rs. 10,000 in value, no leave to appeal could be granted under S. 110 although the decree of the High Court varied the decree of the Court below. (*Kanhaiya Lal, J.C. and Simpson, A.J.C.*) SARSUTI PRASAD *v.* MUNSHI EHTISHAM ALI.

25 O. C. 349 : 73 I. C. 407 : A. I. R. 1922 Oudh 214.

——S. 110—*Valuation—Variation on appeal.*

The trial Court decreed a suit by a Hindu reversioner to set aside an alienation by the limited owner as having been effected without justifying necessity. On appeal to the HighCourt the decision of the lower Court was varied, the Court finding that out of a total sum of Rs. 3,800 the purchase price, Rs. 1,412 was justified by legal necessity at the time of transfer. Accordingly the High Court varied the decree of the trial Court by ordering that the plff.'s title to the property in question should be declared and that he should recover possession thereof upon condition that he first paid to defts. Rs. 1,412 with interest from the date of decree. *Held*, that the value of the appeal did not come up to the statutory requirements and that leave to appeal to the Privy Council could not be granted. (*Miller, C. J. and Mullick, J.*) BISHUN PRASAD SINGH *v.* NARSINGH DAS.

3 Pat. L. T. 550 : 68 I. C. 663 : A. I. R. 1922 Pat. 555 (2).

——S. 110—*Valuation— Future mesne profits must be included.*

Future mesne profits should be taken into consideration in assessing the value of the subject-matter for the purposes of S. 110 of the Code. (*Miller, C. J. and Adami, J.*) IMAMUDDIN *v.* KISHUNDEO.

6 Pat. L. J. 246 : 63 I. C. 492 : 2 Pat. L. T. 675

——S. 110—*Valuation — Future interest not included.*

A suit was instituted to enforce a mortgage-bond for Rs. 3,000 which, with interest up to the date of decree, amounted to Rs. 9,325. The suit was decreed with interest at the contract rate up to the days of grace which was Rs. 198, the total amount being Rs. 9,523. After that period interest was calculated at 6 per cent. per annum to the date of realization. The defts. appealed and the High Court allowed the appeal. *Held*, that the provisons of S. 110.(1) were not satisfied and so S. 110 (2) did not apply. (*Miller, C. J. and Coutts, J.*) RAMNAD SINGH *v.* RAMBILAS SINGH. **2 Pat. L. T. 463 : 62 I. C. 959 : 1921 P. H. C. C. 229.**

——S. 110—*Valuation—Partition suit—Share or whole property as the basis of valuation.*

Where a decree in a partition suit affects the share of the plff. as well as of the deft. who would share the property along with plff. if his case be decreed, the value for purposes of S. 110 is the value of the whole property and not only the share claimed by the plff. (*Miller, C. J. and Adami, J.*) KULDIP NARAYAN SINGH *v.* RAGHUNANDAN SINGH.

60 I. C. 844 : 2 Pat. L. T. 386.

——S 110—*Valuation—Value how determined.*

The value of the subject-matter must be taken to be the amount or value which the plff. obtained or would have obtained had he been successful at the time when the decree was passed. (*Miller, C.J. and Adami, J.*) MATHURA PRASAD SINGH *v.* RAM PRASAD TEWARY. **3 U. P. L. R. (Pat.) 32 : 60 I. C. 523 : 2 Pat. L. T. 340.**

——S. 110—*Valuation—Subject-matter—Interest claimed in plaint—Interest up to decree.*

Where interest is claimed in the plaint, such interest as accrues during the period between the filing of the suit and the decree is part of the subject-matter of the suit for the purposes of S. 110. (*Heald and Rutledge, JJ.*) THAMASUNDASEEN *v.* S.M.A.R R.M. CHETTY FIRM. **3 Rang. 405.**

——S. 110—*Valuation—Substantial question of law.*

To enable an applicant to obtain leave to appeal to the Privy Council it must be shown that the value of the subject-matter in the Court of first instance was Rs. 10,000 at the date of the decree of that Court. A decision as regards the validity of a particular

C. P. CODE (V OF 1908), S. 110—Valuation.

alienation by a co-heir of properties worth less than Rs. 10,000 does not affect other alienations made by other co-heirs to different persons. (*Robinson, C. J. and Macgregor, J.*) MAUNG THWE *v.* A. L. A. R. CHETTY FIRM. **1 Bur. L. J. 62 : 11 L. B. R. 335 : 68 I. C. 690 : A. I. R. 1923 Rang. 71.**

——S. 110—*Valuation—Suit for damages.*

A suit for damages exceeding Rs. 10,000 was brought in respect of loss of crops caused by an inundation due to the defendant's tortious acts. The first Court decreed Rs. 8,000 and odd but on appeal the appellate Court dismissed the suit. On an application for leave to appeal, *held* that as regards the valuation and other matters the case was a fit one for appeal to the Privy Council. In granting leave the correct principle is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal, 6 Bom. L. R. 403 : 6 Pat L J, 415, 15 Moo. P. C. 181 : 3 C L J. 257 ; 35 A. 445 Foll. Per *Robinson. C. J.*—The second paragraph of S. 110, C. P. Code is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. If the decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. 39 M. 843 Foll. (*Robinson, C. J. and Duckworth, J.*) MAUNG BYA *v.* MAUNG KYI NYO. **66 I. C. 606 : 11 L. B. R. 152.**

——S. 111—*Appeal from single Judge acting in revision does not lie.*

There is no appeal to His Majesty in Council from the order made by a single Judge in revision under S. 111, C. P. Code and S. 107, Government of India Act. (*Krishnan and Wallace, JJ.*) SRI RAJAH BOMMA DEVARA VENKATA SATYANARAYANA *v.* VENKATA BHASHYAKARULU.

46 M.L.J. 117 : 46 Mad. 958 : 18 L. W. 655 : 75 I.C. 604 : (1923) M. W. N. 719 : A. I. R. 1924 Mad. 399.

——S. 113 and O. 46, R. 1—*Reasonable doubt.*

Where it was perhaps somewhat difficult to hold that the judge making the reference entertained any reasonable doubt as to what his decision should be or as to what decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large number of cases and must affect a very large amount of money, reference was entertained. (*Robinson, C. J. and May Oung, J.*) E. E. DAWOODJEE AND SONS *v.* THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON. **1 Rang. 220 : A. I. R. 1923 Rang. 193.**

——S. 114—*Review—Grounds for Reversal of High Court's decision in a connected case by the Privy Council—Not a sufficient cause.*

Reversal of High Court's decision in a connected case by the Privy Council is not a sufficient cause for review. (*Kumaraswami Sastri, J.*) GANNALATHULA VENKAMMA *v.* GANNALATHULA RANGARAO.

43 M. L. J. 33 : 15 L. W. 593 : (1922) M. W. N. 304 : 70 I.C. 741 : 31 M.L.T. 473: A. I. R. 1922 Mad. 227.

——S. 114 and O. 47, R. 1.—*Succession Act, S. 234—Probate and Administration Act, S. 50—Contested Probate proceedings—Power of review can be exercised.*

The right of review is an entirely different right from that given by S. 234 of the Succession Act or S. 50 of the Probate and Administration Act. The powers of review given by the Code of Civil Procedure can be exercised by a Court which has been dealing

C. P. CODE (V OF 1908), S. 115—Amendment of Decree.

with a contentious matter in proceedings for the grant of letters of Administration. (*Carr and Brown, JJ.*) KYONE HOE *v.* KYON SOON SUN.

3 Rang. 261 : A. I. R. 1925 Rang. 314.

——S. 115.

Addition of parties.
Amendment of decree.
Amendment of plaint.
Amendment of pleadings.
Appeal.
Award.
Case
Court-fee.
Criminal prosecution.
Delay.
Discretion.
Error of law.
High Court.
Illegality.
Interference.
Interlocutory order.
Jurisdiction.
Leave to sue.
Liberal interpretation.
Material irregularity.
Misconstruction.
New plea.
Order.
Other remedy.
Revision.
Right to apply.
Scope of.
Subordinate Court.
Withdrawal of Suit
See also C. P. Code, Ss. 107 and 151.

Addition of parties,

——S. 115 and O. 1, R. 10—*Addition of parties—Revision—Discretion*

It is not a case of failure to exercise jurisdiction justifying interference in revision if the lower Court rejects an application under O. 1, R. 10, C. P. Code, on the ground that it was made too late (*Richardson, J.*) RAMCHARAN MOHAJAN *v.* JIBAN CHANDRA SARMA.

64 I. C. 563 (Cal.).

——S. 115—*Addition of parties—Interference.*

The addition of a party under O. 1, R. 10 is ordinarily a matter within the discretion of the Court trying the suit and an erroneous exercise of discretion in a matter of procedure should not be regarded as something done illegally in the exercise of the Courts jurisdiction. But if the addition of party causes not only misjoinder of parties but also of causes of action the order can be set aside in revision. (*Spencer, J.*) MURUGAPPA CHETTIYAR *v.* L. K. S. S. FIRM. **90 I. C. 721.**

——S. 115 and O. 1, R. 10—*Addition of parties—Refusal—Interference in revision.*

Where in a suit for partition among co-sharer landlords the Court below refused to add the tenants as parties in the exercise of its discretion, *Held*, that there was no case for interference by the High Court. (*Odgers, J.*) RATNACHALAM AIYAR *v.* SIVACHIDAMBARAM PILLAI.

45 M. L. J. 703 : 18 L.W. 198: (1923) M. W. N. 403 : A. I. R. 1923 Mad. 690.

Amendment of decree.

——S. 115.—*Amendment of decree—No revision would be accepted if the lower Court has exercised discretion under S. 152 rightly.*

Where a District Judge, in the exercise of his discretion vested in him under S. 152, refused to correct

C. P. CODE (V OF 1908), S. 115—Amendment of Plaint.

a decree passed by a Court subordinate to him and confirmed by him on appeal on the ground that the applicant was guilty of laches *held*, that the discretion was rightly exercised and the High Court would not interfere. (*Mukerji and Dalal, JJ.*) KISHORI MOHAN *v.* CHHANGA LAL.

47 All. 44 : L. R. 5 A. (Civ). 753 : 82 I. C. 1030 : A. I. R. 1925 All. 187.

Amendment of Plaint.

——S. 115—*Amendment of plaint.*

Amendment of plaint if not allowed can be allowed in revision. (*Martineau, J.*) SUNDER *v.* PURAN SINGH. **10 P. W. R. 1922 : A. I. R. 1922 Lah. 394 (1).**

——S. 115—*Amendment of plaint—Improper refusal to permit amendment of plaint is revisable.*

The refusal of a Court to exercise its lawful power, so as to deprive the plaintiff of what apparently was a vital plea is a material irregularity justifying interference in revision under S. 115. Therefore the order of a court refusing to permit a plaintiff to amend his plaint by adding that at the date of the sale sought to be set aside by him on the ground of its having been brought about by undue influence and fraud, he was a minor, can be set aside in revision. ((*Jackson, J.*) SOMASUNDARA BHATTAR *v.* MUTHU THEVAR.

80 I. C. 278 : A. I. R. 1925 Mad. 188.

——S. 115—*Amendment of plaint—Order allowing—Revision.*

An amendment of the plaint is in the discretion of the Court and, if wrongly allowed. the defendant could attack the order on appeal if the decision is against him. The High Court will not interfere in revision with the order especially when it does not change the character of the suit or cause material injustice to the defendant. (*Odgers, J.*) RAMA KRISHNA PILLAI *v.* KRISHNASWAMI PILLAI.

(1922) M. W. N. 521 : 68 I. C. 167 : 15 L. W. 667 : A. I. R. 1922 Mad 321.

——S. 115—*Amendment of plaint—Case referred to arbitration—Award filed and objection raised—Jurisdiction.*

A reference to arbitration was made in a pending suit. The award was put into court and objections raised to its being made a decree of court. While these matters were pending one of the parties applied for an amendment the result of allowing which was to oust the jurisdiction of the court to try the suit. *Held*, until the reference to arbitration was superseded, the court had no jurisdiction to take up to the case and the order of amendment was *ultra vires.* (*Kinkhede, A. J. C.*) SANKAR *v.* CHUNILAL MULCHAND. **89 I. C. 782.**

——S. 115—*Amendment of plaint.*

The High Court has power to interfere under S. 115 of the Code with an order directing that a plaint should be amended as being bad for misjoinder. (*Batten, A. J. C.*) SHANKAR *v.* SONOO.

63 I. C. 419 : 4 N. L. J. 58.

Amendment of pleadings.

——S. 115—*Amendment of pleadings—Refusal to allow.*

The refusal to allow an amendment disposes of the case so far as the question of amendment is concerned and the order is capable of being revised. (*Kinkhede, A. J. C.*) SHANKAR *v.* MURARJI.

78 I. C. 510 : A. I. R. 1925 Nag. 195.

Appeal.

——S. 115—*Appeal.*

If District Court entertains appeal in non-appealable case revision lies. (*Sulaiman and Daniels, JJ.*) HAFIZ ZAHUR AHMAD *v.* TASLIM-UN-NISSA.

C. P. CODE (V OF 1908), S. 115—Award.

23 A. L. J. 891 : L. R. 6 A. (Civ.) 575 : 89 I. C. 404 : A. I. R. 1926 All. 55.

——S. 115—*Appeal—Conversion into revision—Discretion of Court.*

Where District Court hears and disposes of an appeal without jurisdiction, the High Court can interfere in revision and for this purpose convert an appeal from the decision of the District Court into a revision petition. 38 C. 421 Ref. (*Rankin and Ghose, JJ.*) MOHINI MOHAN ROY *v.* RAMDAS PARAMHANSA.

28 C. W. N. 271 : 80 I. C. 210 : 39 C. L. J. 532 : A. I. R. 1924 Cal. 487.

——S. 115—*Appeal—Conversion into revision—Interference.*

Where it would amount to a denial of justice to the appellant to refuse relief and it appears that no appeal lies against the decision of the Court below, the High Court would convert the appeal into a revision petition and interfere Where the lower Court had erroneously and without jurisdiction purported to amend a final decree, the High Court set aside the order in revision. (*Ghose and Panton, JJ.*) NAWABKHAJEH HABIBULLA *v.* GOLA ASMOTER KHATUN. **37 C.L.J. 395 : 74 I. C. 575 : 27 C. W. N. 720 : A.I.R. 1923 Cal. 612.**

——S. 115—*Appeal—Conversion into revision.*

The High Court is entitled in the exercise of its discretion to convert a second appeal into a revision and interfere. (*Teunon and Abdul Majid, JJ.*) MAHATAP DASI *v.* MADHU SUDAN SAHA.

64 I.C. 712 (Cal.).

——S. 115—*Appeal—If can be converted into one for revision.*

A petition of appeal presented to the High Court in a case where no such appeal lay may, in a proper case, be treated as an application for revision under S. 115 of the Code. (*Shamsul Huda, J.*) DINABANDHU *v.* JAGABANDHU. **63 I. C. 520 : 33 C L. J. 381.**

——S. 115—*Appeal—Can be converted into revision petition.*

A memorandum of second appeal can in proper cases as where the Courts below have exercised jurisdiction not vested in them by law be converted into a revision petition. (*Kinkhede, A. J. C.*) HARBAX *v.* LACHMAN. **82 I. C. 201 : A. I. R. 1925 Nag. 183.**

Award.

——S. 115—*Award—Decree in terms of award going beyond matters referred—Revision lies.*

A party is entitled to be protected by the law against a decision by arbitrators on points not referred to therein at all and against a decree of Court based on such a decision, all the more so because he has no right of appeal. (*Wallace and Madhavan Nair, JJ.*) RAMASWAMI CHETTIAR *v.* VENKATARAMA AIYAR.

49 M. L. J. 523 : A. I. R. 1926 Mad. 201.

——S. 115—*Award—Refusal to hear objection to award justifies interference.*

If a Court refuses to hear a valid objection properly raised before him or entertains matters which are outside his jurisdiction then the High Court can interfere under S. 115 not with the arbitrators nor with the award but with the exercise of the jurisdiction of the Court in dealing with the application. (*Walsh, A. C. J. and Ryves, J.*) GOBIND SINGH *v.* BHIRGUNATH SINGH. **46 All. 686 : 22 A. L. J. 676 : L. R. 5 A. 465 : 82 I. C. 16 : 100 & A. L. R. 820 : A. I. R. 1924 All. 788.**

——S. 115—*Award—Revision—On objection that arbitrators had made secret enquiries—Court's decision apart from award is not revisable.*

Where an award was attacked as vitiated by misconduct on the ground that the arbitrators had made

C. P. CODE (V OF 1908), S. 115—Award.

secret enquiries and the Court thereupon took up the case and proceeded to dispose of it without reference to the arbitration, *held*, no revision lay. (*Daniels, J.*) RAM LAL SINGH *v.* BEHARI SINGH.
A. I. R. 1924 All. 761 (1).

——**S. 115 and Sch. II, para. 15**—*Award—Private inquiries authorised by agreement—Not misconduct—Order superseding award—Revision.*

Where the parties to an arbitration agreed to abide by the arbitrator's decision in whatsoever manner he might see fit to arrive at it, and he made private inquiries into the dispute behind the back of the parties, *held*, it did not constitute misconduct ; in superseding the award in such a case, the Court acted illegally and with material irregularity and hence the High Court could interfere in revision. (*Piggott and Walsh, JJ.*) HUSAIN BAKHSH *v.* LACHHMAN DAS MATHRA DAS. **20 A. L. J. 125 : 64 I. C. 934 : L. R. 3 A. 106 : A. I. R. 1922 All. 69.**

——**S. 115**—*Award—Material irregularity—Extension of time for filing award.*

A Court has jurisdiction to extend the time for filing an award and such an extension is not therefore a material irregularity. The mere fact that the Court has used threatening language towards an arbitrator is not a ground for interference under S. 115 in the absence of proof that the arbitrator was thereby forced to arbitrate against his will. (*Sulaiman and Kanhaiya Lal, JJ.*) BASUDEO MAL *v.* KANHAIYA LAL.
43 All. 101 : 59 I. C. 667 : 18 A. L. J. 952.

——**S. 115**—*Award—Decree passed on an award—Revision is competent.*

An application can be entertained under S. 115 against a decree passed in terms of an award. 29 Cal. 167 Expl.; 36 Bom. 105 Foll. (*Macleod, C. J. and Crump, J.*) BHIKALAL GIRDHARLAL *v.* ACHRATLAL LALLUBHAI. **49 Bom. 535 : 87 I. C. 910 : 27 Bom. L. R. 423 : A. I. R. 1925 Bom. 341.**

——**S. 115 and Sch. II, Para. 15**—*Award—Setting aside for misconduct—Revision.*

Where a Court sets aside an award of arbitrators on the ground of misconduct on the part of the arbitrators, its order is not open to revision under S. 115, C. P. Code, 25 B. 551 Foll. (*Macleod, C. J. and Crump, J.*) CHIMANBHAI *v.* KESHAVLAL.
25 Bom. L. R. 443 : 47 Bom. 721 : 73 I. C. 464 : A. I. R 1923 Bom. 402.

——**S. 115**—*Award—Decree on—Appeal—Revision.*

The High Court has power to set aside a decree on an award under S. 115 of the Code, as no appeal lies against the decree. (*Macleod, C. J. and Fawcett, J.*) RAVJI BHAI KASHIBAI *v.* DAHYABAI ZAVERBHAI.
45 Bom. 832: 59 I. C. 811 : 22 Bom. L. R. 1454.

——**S. 115**—*Award—Award given and decree passed—Interference.*

There is no general rule to the effect that in no case in which an award has been filed and decree passed could the High Court interfere under S. 115, C. P. Code. If the arbitrators or the Court exceed jurisdiction oract with material irregularity in the conduct of the proceedings, the High Court can interfere. (*Suhrawardy and Page, JJ.*) DEBIR-UD-DIN *v.* AMINA BIBI. **78 I. C. 335 : A. I. R. 1925 Cal. 475.**

——**S. 115 and Sch. II, Para. 16**—*Award—Notice of objections not given—Effect.*

Where a Court decides the objections to an award without notice to the objector of the date of hearing, it acts with material irregularity and its order is liable to be revised. (*Abdul Raoof, J.*) DARBARI RAM *v.* BHIKHA RAM. **64 I. C. 394 (Lah.)**

——**S. 115**—*Award—Notice of filing not given—Material irregularity—Interference.*

The provisions of Sch. II, para. 10 are mandatory and parties are entitled to notice even if they have knowledge of the date on which the award is filed. The omission to give such notice is a material irregularity and is good ground for reviving decree passed on such award. (*Moti Sagar, J.*) GURDITTA MAL *v.* FIRM OF BASANTA MAL-PANNA LAL. **89 I. C. 240 : A. I. R. 1925 Lah. 619 (1).**

——**S. 115 and Sch. II, Para 16**—*Award—Revision—Competency of.*

If a Court passing a decree on an award has committed an error in procedure or has misused the jurisdiction prescribed by Sch. II, C. P. Code, there is a revision against the decree. (*Martineau, J.*) DELHI CLOTH AND GENERAL MILLS CO. *v.* FIRM KIDARI PERSHAD CHHEDI LAL. **22 P. L. R. 1922 : 64 I. C. 363 : 4 U. P. L. R. (L.) 15.**

——**S. 115**—*Award—Objection to validity of.*

Where the objection as to non-joinder is not taken in the memorandum of objections to the award presented in the lower Court and it is not shown that the parties not joined in reference were necessary parties to the suit between the plaintiff and the petitioner, the High Court will not interfere in revision. (*Spencer, J.*) (PASUMARTHI)BAGHAVANULU *v.* BOLLAM SEETHARAMASWAMI. **32 M. L. T. 298 : (1923) M. W. N. 296 : A. I. R. 1923 Mad. 502.**

——**S. 115**—*Award—Objection to, to be investigated—Jurisdiction—Revision.*

A dispute was referred to arbitration in connection with a pending suit, an award was made, and a decree was passed in accordance with the award under Para. 16 of the second schedule of the Code of Civil Procedure. Where the Court has considered the objections to the award on the merits and come to what the applicant contends is a wrong decision as to whether there had been an irregularity on the part of the arbitrator, it is clear that the case will not come within the provisions of S. 115 and that no revision will lie. It was the clear intention of the legislature that objections to the award on the ground of invalidity from any cause whatsoever should be decided by the Court which had made the order of reference and by no other Court. (*Daniels, A. J. C.*) SHEO PALTAN *v.* SUKHDEO SINGH. **26 O. C 107 : 74 I. C. 401 : A.I.R. 1923 Oudh 235.**

——**S. 115**—*Award—Order taking it off the file—No error on face of award—Interference.*

Where there is no error patent on the face of an award and a Court still directs it to be taken off the file of Court, it assumes a jurisdiction not vested in it by law, and the order is revisable. (*Kennedy and Bilaram, A.J.Cs.*) RAMJIBHOY & CO. *v.* YUSIFALI MAHOMEDALI. **A.I.R. 1924 Sind 151.**

——**S. 115**—*Award—Order of a Judge directing an award to be taken off the file.*

Per *Madgavkar, A. J. C.*—An application lies against an order directing an award to be taken off the file of Court provided it falls within the purview of S. 115 of the Civil Procedure Code. [1907] 1 S.L.R. 86 Ref. (*Kincaid, J. C., Aston and Madgavkar, A.J. Cs.*) GUNNIS & CO., LTD. *v.* AMANMAL TULSIDAS.
17 S. L. R 133 : A. I. R. 1924 Sind 75 (F.B.)

——**S. 115 and Sch. II, para 20**—*Award—Filing award without jurisdiction is a good ground.*

Filing an award by a Court having no jurisdiction to entertain a suit on the cause of action, with respect to which the award was made, is a good ground for revision. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF KHALSA BROS. *v.* HARIRAM SRI RAM & CO. **17 S. L. R. 164 : A. I. R. 1924 Sind 29.**

C. P. CODE (V OF 1908), S. 115—Award.

——S. 115—*Award—Revision—Minor parties—Want of sanction.*

The absence of Court's sanction to a reference to arbitration on behalf of certain minor parties does not, of itself, render the award void but only voidable and if the Court negatives the objection that the award is void for want of such sanction and passes decree on the award, it is not open to revision under S. 115, C. P. Code. 40 M. 793 (P.C.) Ref. (*Kennedy, J.C. and Raymond, A. J. C.*) EMNABAI *v.* FAKIR MAHOMED.
15 S. L. R 165 : 65 I C. 50 : A. I. R. 1922 Sind 1

Case.

——S. 115—*Case—Appellate order setting aside ex parte decree is "case"—Revision lies.*

The High Court can interfere in revision with an appellate order directing the setting aside of a decree *ex parte* as the order is a 'case' within S. 115 and not a mere interlocutory order.

Per *Lindsay, J.*—Where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree *ex parte* for which the legislature has provided an independent remedy or a different procedure, such proceeding may be a case within the meaning of the section. 12 O.C. 405 Appr. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **A. I. R. 1925 All. 610 (F.B.).**

——S. 115—*Case—Refusal to adjourn.*

The refusal by a Court to adjourn the hearing of a suit in order to enable the applicant to pay the Court-fee is not an order which should be revised by the High Court. (*Piggott and Walsh, JJ.*) CHAKHAN LAL *v.* KANHAIYA LAL. **45 A. 218: 20 A.L.J. 1005 : 69 I. C. 921 : 9 O. & A.L.R. 146 : A. I. R. 1923 All. 118.**

——S. 115—*Case - Minority.*

Where the defendant claimed to be a minor but refused to produce any evidence and the plaintiff swore that he was major, *held*, no revision lies from the order of the Judge in which defendant was held to be major there being before High Court no record of the suit or case decided in the Court below. (*Piggott and Walsh, JJ.*) AMOLAK CHAND *v.* BHAGWAN DAS. **A. I. R. 1922 All. 334.**

——S. 115—*"Case decided"—Meaning—Decision of a single issue.*

Per *Piggott, Ryves and Gokul Prasad, JJ.*—The decision on a single issue by a Subordinate Court in a suit which is still pending in that Court is not a 'case decided'. Per *Rafique, J.*—'Case' includes an order that deals with an issue or question raised between the parties and 'decided' includes any adjudication on such question or issue, whether the adjudication finally determines the suit or not. (*Rafique, Piggott, Walsh, Ryves and Gokul Prasad, JJ.*) BUDDHOO LAL *v.* MEWA RAM. **43 All. 564: 63 I. C. 15 : 19 A. L J. 558 (F. B.)**

——S. 115—*Case—What is—Interlocutory order—Powers of interference—Bombay Regulation II of 1827, S. 5.*

In a suit which relates to a municipal election two first preliminary issues were raised and decided whether the Government was a party. and secondly, has the Court jurisdiction to hear the suit. *Held*, the decision amounted to the decision of a case and could be raised both under S. 115 and under S. 5 of Regulation II of 1827. Case-law reviewed. (*Shah and Coyajee, JJ.*) SECRETARY OF STATE *v.* NARSIBAI DADABAI PATEL. **48 B. 43 : 25 Bom. L.R. 992: 77 I.C. 241 : A I R. 1924 Bom. 65.**

——S. 115—*Case.*

No revision lies from an order of remand by lower

C. P. CODE (V OF 1908), S. 115—Case.

appellate Court, as there is no case decided. (*Macleod, C. J. and Crump, J.*) THAKOREDAS *v.* LALLUBHAI. **25 Bom. L. R. 452: A. I. R. 1923 Bom. 401.**

——S. 115—*Case—"Decided"—New Code and old Code.*

However modified in language, the word "decided" in S. 622 of the old Code of Civil Procedure is similar in its purport to the word "decided" in S. 115. (*Greaves, J.*) UDOY CHAND *v.* MOLLA REASAT HOSSAIN. **A. I. R. 1922 Cal. 58.**

——S. 115—*Case—Order for transfer is decision of a case within the section and is revisable.*

The application for transfer is a particular branch of a case for which a special procedure is provided in the Civil Procedure Code, and the decision of such an application is a decision of a "case" and therefore can be revised. 6 All. 233 Dist.; 60 P.R. 1897 (F. B.), Foll. (*Martineau, J.*) LABHU RAM *v.* KARTA RAM. **78 I. C. 614 : A. I. R. 1925 Lah. 189 (1).**

——S. 115—*Case decided—Interlocutory orders—Revision.*

Interlocutory orders do not amount to the decision of a case within the meaning of S. 115, C.P. Code, and are not revisable. (*Shadi Lal, C J., Le Rossignol, Broadway, Abdul Raoof and Martineau, JJ.*) FIRM LAL CHAND MANGAL SAIN *v.* FIRM BEHARI LAL MEHAR CHAND. **5 Lah. 288: 6 L. L. J. 558: A. I. R. 1924 Lah. 425 (F. B.).**

——S. 115—*Case—Meaning of—Order under S. 10 of Act XIV of 1920.*

The expression "Case" in S. 115 of the C. P. Code does not necessarily mean the whole case and includes a particular branch of the case which is quite distinct. An order directing the defendant to deposit money under S. 10 of the Charitable and Religious Trusts Act is open to revision by the High Court (*Brasher, J.*) MAHANT KIRPAL SINGH *v.* NARINJAN SINGH. **69 I. C. 658: A. I. R. 1924 Lah. 408.**

——S. 115—*Case—Order under S. 10, C. P Code—Interference in revision.*

An order staying a suit under section 10 of the Civil Procedure Code is not "a decision of a case" within the meaning of section 115 of the Civil Procedure Code any more than a decision by a Subordinate Court in a case in which the only question is whether it has or has not jurisdiction to go on with a suit. In order to come to a finding as to whether the requirements of section 10, C. P. Code have or have not been fulfilled, the Court is bound to determine certain matters mentioned in the section, and, if it does, it cannot be said that the Court has acted illegally in the exercise of its jurisdiction which was vested in it by law. (*Moti Sagar, J.*) FIRM OF RAMCHAND DIVANCHAND *v.* FIRM OF PRITHVICHAND & CO. **73 I. C. 247: A. I. R. 1923 Lah. 615.**

——S. 115—*Case—Decision as to jurisdiction of the Court.*

Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit, the Court decides it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it. 40 P.W.R. 1921 : 41 A. 43 ; 42 A. 564, referred to. (*Abdul Raoof, J.*) COLONY FLOUR MILLS CO., LTD. *v.* FIRM OF SANT SINGH. **5 L. L. J. 140: 71 I. C. 487: 11 P. W. R. 1923: A I. R. 1923 Lah. 414.**

——S 115—*Case—Refusal to issue interrogatories.*

The refusal to issue interrogatories for the examination of witnesses does not amount to "a case decided" within the meaning of S. 115, C. P. Code, and hence

C. P. CODE (V OF 1908), S. 115—Case.

the order is not revisable. (*Scott-Smith, J.*) ROOPCHAND *v.* THE CHURCH MISSIONARY TRUST ASSOCIATION. **69 I. C. 417: A. I. R. 1923 Lah. 282 (2).**

——S 115—*Case—Order staying suit.*

Semble:—There is no revision against an order of the lower Court staying the trial of a suit. 42 A. 409; 42 C. 926; 27 M. L. J. 494; 15 C W. N. 666 Ref. (*Abdul Raoof, J.*) MELA RAM *v.* RIKHI SINGH.

33 P. W R. 1922 : 69 I. C. 111 : A. I. R. 1923 Lah. 69.

——S. 115—*Case—Meaning of—Order refusing stay of suit under S. 10, C. P. Code.*

An order of lower Court refusing to stay the trial of a suit under S. 10, C. P. Code, is not open to revision under S. 115, C. P Code, inasmuch as there is no 'case decided.' 42 A. 409; 60 P. R. 1897 (F. B.) Foll. (*Martineau, J.*) FIRM OF ISHAR DHARAM CHAND *v.* FIRM OF BUTA MAL DURGA DAS. **4 Lah. L. J. 425: 67 I. C. 870: A. I. R. 1922 Lah. 54.**

——S. 115—*'Case'—Meaning of—Jurisdiction—Revision.*

The word 'case' in S. 115 does not mean necessarily the whole case, but may mean a particular branch of a case, having a separate remedy or procedure. The order of a Court, deciding that it has jurisdiction to entertain a suit is not a decision of a 'case' under S. 115, and no revision lies against the order. (*Martineau, J.*) SAWANMAL *v.* KANHAIYA LAL.

59 I. C. 680: 40 P. W. R. 1921.

——Ss. 115 and 144—*Case—Decision as to payment of Court-fee.*

An order of the appellate Court directing the appellant to pay *ad valorem* Court-fee is a case decided within the meaning of S. 115, C. P. Code, and the High Court can revise the order. (*Oldfield, J.*) SUDALAIMUTHU PILLAI *v.* SUDALAIMUTHU PILLAI.

17 L. W. 623: (1922) M W. N. 831: 71 I. C. 173: A. I. R. 1923 Mad. 270.

——S. 115—*Case—Order granting adjournment—If revisable.*

An order adjourning the hearing of an application is not revisable, as there is no case decided. Nor is such a case covered by S. 151, C.P. Code. S. 115 refers only to cases of failure to exercise or improper exercise of jurisdiction. (*Baker, J.C*) RAJABAI *v.* JAGANNATH. **7 N. L. J. 183 : 78 I. C. 969 : A. I. R. 1924 Nag. 417.**

——S. 115—*Case decided—Meaning of—Question of jurisdiction—Interference.*

The word "case" must be understood in its broadest and most ordinary sense. Where a refusal to interfere with an interlocutory order on the question of jurisdiction might result in a waste of public time and parties' 'money' the Court can interfere in revision if the order is wrong. (*Prideaux and Kinkhede, A. J. Cs.*) SHEOPRATAP SHRINIVAS *v.* SUKHDEO KANHAIYALAL. **A. I. R. 1924 Nag. 292.**

——S. 115—*Case—Refusal to sue in* forma pauperis.

A refusal of leave to sue in *forma pauperis* is "a case decided" within S. 115, C. P. Code, and hence capable of being raised. (*Baker, O. J. C. and Hallifax, A. J. C.*) ACHAL SINGH *v.* JIWAN DAS.

19 N. L. R. 165 : A. I. R. 1924 Nag. 44.

——S. 115—*Case—'Decided', meaning of—Withdrawal of suit—High Court, power of.*

Where a Court allows or refuses to allow a suit to be withdrawn with liberty to bring a fresh suit, it 'decides' within the meaning of S. 115 of the Code and the High Court has jurisdiction to interfere. (*Batten, A. J. C.*) SINGHAI *v.* KANHAI.

C. P. CODE (V OF 1908), S 115—Case.

61 I. C. 584 (Nag.).

——S. 115—*Case—Order deciding finally one point in a suit is decision in a case—Court should not strike out pleadings unless the striking out is necessary for ends of justice—C. P. Code, S. 151.*

Plaintiff sued for possession of certain properties; part of them under-proprietary interest and part occupancy interest in different plots of land. The first Court granted a decree, but the appellate Court was of opinion that a suit for the recovery of occupancy land, even from strangers who are not landlords did not lie in the Civil Court. It thereupon passed an order that the plaintiff should strike out from her plaint her claim for possession of the occupancy lands. *Held*, that the order of the lower Court amounted to an order in a case because it finally settled the matter whether a suit for the possession of occupancy land did lie in the Civil Court or not and that the Judge had no jurisdiction to pass the order which he did because such an order was not necessary for the ends of justice to prevent any abuse of the process of the Court. (*Dalal, J. C.*) MT. MALUKA *v.* PATESHUR SINGH. **A. I. R. 1925 Ordh 604.**

——S. 115—*Case decided—Order directing certain issues to be tried first—Modification of—Revision.*

A Munsiff directed that the first two issues in a case were to be argued first and then only evidence to be let in on the other issues. His successor directed evidence to be let in fully on all the issues. *Held*, the order was not one which could be revised under S. 115, C. P. Code. (*Kendall, A. J. C.*) RUTLEDGE *v.* BHIKARI SINGH. **89 I. C. 772 (Ordh).**

——S. 115—*Case—Order refusing to grant leave to amend cannot be revised under S. 115—Provincial Small Cause Courts Act, S. 25.*

The application for leave to amend is not a case, and, therefore, no revision can lie against an order refusing to grant leave to amend either under S. 25 of the Provincial Small Cause Courts Act or under S. 115 of the Code of Civil Procedure. (*Wazir Hasan, A. J. C.*) BADRI PRASAD *v.* MURLIDHAR. **77 I. C. 553 : A. I. R. 1925 Oudh 254.**

——S. 115—*Case—Refusal to try a preliminary issue as such cannot be revised.*

Refusal of a Court to try the plea of *res judicata* as a preliminary issue cannot be revised as no case is decided and no question of jurisdiction is involved in the action of the Court. (*Wazir Hasan, J. C.*) GAJADHAR LAL *v.* REOTI RAMMAN. **80 I. C. 628 : A. I. R. 1925 Oudh 179 (2).**

——S. 115—*Case decided—Order fixing fee of Commissioner.*

An order fixing the fee of a Commissioner is not a case decided within the meaning of S. 115, C. P Code. Even if the Court fixes a high fee it is not an exercise of jurisdiction illegally or with material irregularity. (*Daniels and Wazir Hasan, A. J. Cs.*) GIRDHARI GOPAL *v.* LACHMI NARAYAN.

A. I. R. 1924 Oud h 348.

——S. 115—*Case—Adjournment granted on damages being paid.*

An order requiring the plaintiff to pay certain damages on condition of getting an adjournment, with an order that the case will not be taken up unless the amount is paid, does not constitute the decision of a case within the meaning of the section. If the amount is not paid and the case dismissed, there is a right of appeal and the interlocutory order can be attacked therein. (*Daniels, J.C*) NARENDRA BAHADUR SINGH PANDE *v.* PEARY LAL. **64 I. C. 211 (1) : 24 O. C. 215.**

C. P. CODE (V OF 1908), S. 115—Court-fee.

Court-fee.

——— —S. 115—*Court-fee—District Judge's refusal to consider the allegation of an applicant for probate that certain properties have been erroneously included in the schedule and not liable to Court fees is revisable —Court Fees Act, S. 19-H.*

Revision lies against the order of a District Judge refusing to enter into the matter when the applicant for probate alleges that certain properties have been erroneously included in the schedule and that they are trust properties and not part of the estate of the deceased and should therefore be excluded from the valuation. It is the duty of the District Judge in such a case to go into the matter and his failure to do so is a refusal to exercise a jurisdiction vested in him by law and, under S. 115 of the C. P. Code, his order is revisable. (*Rankin and Mukerjee, JJ.*) CHINMATH NATH PAL CHOWDHURI *v.* SECRETARY OF STATE.

78 I. C. 901 : A. I. R. 1925 Cal. 357.

———S. 115— *Court-fee— Wrong valuation is a good ground.*

The High Court will interfere where the Courts below in a pre-emption suit committed a material irregularity in assuming, as the value for purposes of jurisdiction, the market value at the time of the suit instead of that at the time of the sale. (*Scott Smith, J.*) SHER MUHAMMAD *v.* AHMAD.

A. I. R. 1924 Lah. 380.

———S. 115—*Court-fee—Decision as to category of suit for Court-fee purposes—Revision lies.*

Where the question is as to whether a suit falls under Court Fees Act S. 7, cl. 4 (*c*) or 2nd Schedule, Art. 17-A (1) and the lower Court in the course of the suit has decided the matter in one way, the High Court can interfere in revision and set aside the decision. (*Venkatasubba Rao, J.*) VENKAT RAMANI AIYAR *v.* M. NARAYANASWAMI AYYAR.

48 M. L. J. 688 : 21 L. W. 649 : 87 I. C. 660 : (1925) M. W. N. 276 : A. I. R. 1925 Mad. 713.

———S. 115—*Court-fee—Order directing payment of—Revision—Interference.*

An order of the lower Court calling upon the plaintiffs to pay *ad valorem* Court-fee, which led to the plaintiffs asking permission to contiuue the suit in *forma pauperis*. is erroneous, it is liable to be set aside in revision under S. 115, Civil Procedure Code. (*Kinkhede, A. J. C.*) MANAJI *v.* SITARAM.

7 N. L. J. 91 : 81 I. C. 643 : A. I. R. 1924 Nag. 105.

———S. 115—*Court-fee—Order that Court-fee paid is sufficient—Neither revision nor appeal lies.*

An order directing that the Court-fee paid by the plaintiff on a plaint is sufficient is open neither to appeal nor to revision. (*Adami and Macpherson, JJ.*) KANHAIYA LAL *v.* BALDEO LAL

A. I. R. 1925 Pat. 703.

Criminal prosecution.

———S. 115—*Criminal prosecution—Sanction on irrelevant evidence is illegal.*

Where the Court below grants sanction to prosecute on evidence which is legally inadmissible it acts with material irregularity and the order is open to revision by the High Court. (*Rafiq, J.*) PEARY LAL *v.* EMPEROR.

21 A. L. J. 399 : L. R 4 A. 92 (Cr.) : 75 I. C. 148 : 24 Cr. L. J. 900 : A. I. R. 1923 All. 601.

———S. 115—*Criminal prosecution— Sanction — Refused by Munsif and granted by District Judge— Revision lies.*

Where the District Munsif refused sanction to prosecute but on an application under S. 195 (6), Cr. P. Code, the District Judge granted sanction, an application for revision to the High Court lies under S. 115, C. P C. and not under S. 195 (6), Cr. P. Code. (*Lindsay, J.*) RAM NARAIN *v.* HARBANS SINGH.

71 I. C. 617 : A. I. R. 1923 All. 490 (1).

———S. 115—*Criminal prosecution— Criminal Procedure Code. S. 476—Offence under S. 193, I. P. Code—Revision of order.*

An order of a Judge passed under S. 476, Cr. P. Code, directing the trial of a person under S. 193, I.P. C. is open to revision only under S. 115, C. P. Code. (*Ryves, J.*) R. SIMEON *v.* EMPEROR. **23 Cr.L.J. 291 : 66 I. C. 515 · A. I. R. 1922 All. 438 (1).**

———S. 115—*Criminal prosecution—Government of India Act, S. 107—Order of District Judge revoking sanction revisable under—Revocation on wrong basis—No revision lies.*

The High Court can only interfere with the order of District Judge revoking the order of the Munsif granting sanction for the prosecution of a party for perjury either under S. 115, Civil Procedure Code or under S. 107 of the Government of India Act, and the ground that the learned Judge should have considered not whether the prosecution was likely to succeed but whether a *prima facie* case has been made out which was a sufficient justification of removing the bar imposed by the Legislature to a prosecution for perjury, is not one which would justify interference under either of these sections. (*Newbould and Suhrawardy, JJ.*) JAINUDDIN *v.* KERAMATULLA.

24 Cr. L. J. 179 : 71 I. C. 595 : A. I. R. 1924 Cal. 641 (1).

——— S. 115—*Criminal prosecution — Revision— Costs.*

Having regard to the accepted view that a revision against an order granting sanction to prosecute should be treated as one under S. 115 of the C. P. Code, it is competent to the Court to award costs of the petition. (*Daniels, A. J. C.*) MT. FEROZA JAN *v.* MIRZA AMIR ALI. **9 O. & A. L. R. 103 : 24 Cr. L. J. 781 : 9 O. L. J. 593 : 74 I. C. 445 : A. I. R. 1923 Oudh 119.**

———S. 115—*Criminal prosecution.*

An order directing prosecution for an offence under S. 195, Indian Penal Code, is not open to revision. (*Daniels, J. C.*) EJAZ ALI KHAN *v.* EMPEROR.

24 O. C. 367 : 66 I. C. 68 : 23 Cr. L. J. 228 : A. I. R. 1922 Oudh 220.

Delay.

———S. 115 and O. 22, R. 2—*Delay in bringing legal representatives—Revision.*

Where an application to bring on record the legal representative of a deceased defendant is presented out of time on the ground of ignorance of the death on the part of the applicant and the Court below excused the delay, *held*, that the Court ought to have considered whether the applicant's ignorance of the death was justified and afforded sufficient cause for the belated application. (*Wallace, J.*) GOPALASWAMI IYER *v.* RAMACHANDRA IYER. **44 M. L. J. 409 : (1923) M. W. N. 159: 32 M. L. T. 293 : 72 I. C. 137 : A. I. R. 1923 Mad. 503.**

———S. 115—*Delay—Limitation.*

As a general rule the High Court does not entertain revision petitions after 3 months, but the High Court may in a proper case excuse the delay in the exercise of its discretion. (*Devadoss, J.*) YAGNASWAMI AIYAR *v.* CHIDAMBARANATHA MUDALIAR.

(1922) M. W. N. 180 : 16 L. W. 760 : 65 I.C. 732 : A I. R. 1922 Mad 63 (2).

———S. 115—*Delay—Revision filed after delay of*

C. P. CODE (V OF 1908), S. 115—Delay.

more than 3 years, entertainment of.

A revision filed after an unexplained long delay of more than 3 years cannot, apart from merits, be entertained. 4 A. 154 Foll. (*Dalal, J. C.*) MAHADEO PRASAD *v.* MUSSAMMAT GANESHI. **10. W. N. 799 : A. I. R. 1925 Oudh 608.**

——S. 115—*Delay—Application filed too late will not ordinarily be allowed.*

An application for revision made more than a year after the order complained of was passed will not be accepted unless some good reason can be shown for the delay. (*Daniels, A. J. C.*) BINDA PRASAD *v.* BANARSI DAS. **10 O. L. J. 205 : 77 I. C. 115 : A. I. R. 1923 Oudh 272.**

Discretion.

——S. 115—*Discretion—Refusal to extend time—Interference.*

An order refusing to extend time for paying costs made conditional prior to setting aside a dismissal for default should not be interfered with in revision. (*Sulaiman and Daniels, JJ.*) AHMAD HUSAIN KHAN *v.* HARDIAL. **90 I. C. 243 : L. R. 6 A 586.**

——S. 115—*Discretion—Refusal to exercise discretion in one case is not relevant in another case.*

Omission to give reasons by a Court for granting instalments is after all an irregularity and the discretion exercised by the Court below in that respect ought not lightly to be interfered with. [22 C. W. N. 601 Foll.] Where the question is one of discretion the ground why it was refused in one case is not relevant in other cases. (*Kanhaiya Lal, J.*) JOKHU SINGH *v.* CHUNNO LAL. **L. R. 5 A (Civ.) 784 : 83 I. C. 133 : A. I. R. 1925 All. 218 (1).**

——S. 115—*Discretion—No limitation.*

There is no limitation for application in revision, but the Board has a discretion in entertaining them and will not intervene unless the parties use reasonable diligence. RAM PIARI MT. *v.* NAWAB MUMTAZ-UD-DAULAH. **L. R. 2 A. 248 (Rev.)**

——S. 115—*Discretion—Order setting aside sale of a holding under S. 173 (3) of Bengal Tenancy Act—No prejudice caused—Order is not revisable.*

Court has got discretion to decide whether the sale of a holding is voidable or not under S. 173 (3) of the Bengal Tenancy Act and its decision is not revisable unless serious prejudice has been caused. (*Suhrawardy and Duval, JJ.*) BROJENDRA NATH MUKERJI *v.* JADUNATH PALTA. **80 I. C. 708 : A. I. R. 1925 Cal. 293.**

——Ss. 115 and O. 41, R. 27—*Discretion—Additional evidence—Refusal to admit by appellate Court.*

Where an appellate Court in the exercise of the discretion vested in it by O. 41, R. 27 of the C. P. Code refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. (*Suhrawardy and Cuming, JJ.*) HARICHARAN KARANJAI *v.* BAHAR SHEIKH. **67 I. C. 252 (Cal.).**

——S 115—*Discretion—Order as to mesne profits.*

The High Court will not interfere in revision with the lower Court's order directing the Commissioner to ascertain mesne profits. (*Spencer, J.*) HUSSAIN SAHIB *v.* HAMMAD SAHIB. **16 L. W. 312 : 31 M. L. T 180 1922 M. W. N. 562 : 74 I. C. 812 : A. I. R. 1923 Mad. 43**

——S. 115—*Discretion—Misapplication of.*

Where a subordinate Court which has made a mistake in law but has entirely misunderstood the nature of the judicial discretion and was called upon to exercise, the High Court will interfere in revision under S. 115. (*Oldfield and Ramesam, JJ.*) SHANMUKA NADAN *v.* ARUNACHALAM CHETTIAR. **42 M. L. J. 97 : 14 L. W. 642 : (1921) M. W. N. 799 : 30 M. L. T. 172 : 69 I. C. 961 : 45 M. 194 : A. I. R. 1922 Mad. 332.**

C. P. CODE (V OF 1908), S. 115—Discretion.

——Ss. 115 and 149—*Discretion—Court's discretion for extending time for payment of deficient Court-fee cannot be questioned in revision.*

Under S. 149 the Court has discretion to grant time for payment of deficient Court-fee and the propriety of the exercise of that discretion cannot be challenged in revision. (*Wadegaonkar, A. J. C.*) MAHOMED GOLIF *v.* ABDUL RAHIM, **89 I. C. 419 : A. I. R. 1926 Nag. 156.**

——S. 115 and O. 6, R. 17—*Discretion—Court has great powers to allow amendment within its discretion.*

Where amendment was allowed, after the case had been closed for argument, on plaintiff's application, and the alternative pleas newly raised involved merely a matter of construction of the facts set out in the plaint and the amendment did not involve the introduction of any new allegation of facts and did not in any way change the character of the suit. *Held*, O. 6, R. 17, gives a Court great powers to permit either party to alter or amend his pleadings at any stage of the proceedings and, therefore, the matter of amendment is one within the discretion of the presiding Judge and it cannot be said that the Judge in this case exercised jurisdiction not vested in him by law or failed to exercise a jurisdiction so vested. nor can it be justly said that in allowing the amendment the Judge of the lower Court acted in the exercise of his jurisdiction illegally or with material irregularity. (*Prideaux, A. J. C.*) ANWAR KHAN *v.* YAKUB KHAN. **79 I. C. 911 : A. I. R. 1925 Nag. 62.**

——S. 115—*Discretion—Non-appealable cases.*

Though revision is allowed only when no other remedy is available yet the remedy is discretionary and revision may be granted though other remedy is open. (*Hallifax, A. J. C.*) NILKANTH *v.* KASUBAI. **63 I. C. 46 : 4 N. L. J. 55.**

——S. 115—*Discretion—Powers of revision by High Court are discretionary—The Court will not interfere merely because there is an irregularity, want of jurisdiction, or wrong pronouncement on a point of law.*

Under the provisions of S. 115 the interference by the High Court is discretionary. The power is one of superintendence by the High Court. Under no circumstance of want or wrong assumption of jurisdiction or of illegality, or irregularity is the Court bound to interfere even though the decision which is sought to be revised may be in conflict with any principle of law. The Court's interference will be influenced by the justice of the case and not by any mere irregularity, want of jurisdiction or wrong pronouncement on a point of law by a subordinate Court. 6 C. L. R. 234 ; 20 B. 630 ; 24 Cal. 133 ; 9 Bom. 97 ; 21 All. 152, Foll. (*Dalal, J. C. and Simpson, A. J. C.*) MAGBUL HUSSAIN *v.* ESTATE OF SHAFIQ-UZ-ZAMAN. **12 O. L. J. 626 : 2 O. W. N. 543 : 89 I. C. 225 : A. I. R. 1926 Oudh 28.**

——S. 115 and O. 23, R. 1—*Discretion—Order under O. 23, R. 1 can be revised if judicial discretion is not used.*

Where a Court below has failed to exercise a judicial discretion an order under O. 23, R. 1 can be made the subject of revision. 21 O. C. 66, Foll. (*Daniels, J. C.*) RAJINDRA PURI *v.* BENI MADHO. **11 O. L. J. 351 : 79 I. C. 1031 : A. I. R. 1925 Oudh 140.**

C. P. CODE (V OF 1908), S. 115—Error of Law.

Error of law.

——S. 115—*Error of law—Interference by High Court—When justified—Not a ground for revision.*

It is well settled that the scope of S. 115, C. P. Code, is very limited. Unless the Lower Appellate Court can be said to have exercised a jurisdiction not vested in it by law or to have acted in the exercise of its jurisdiction illegally or with material irregularity, this Court has no power to interfere in revision. It is manifest that an error of judgment on questions of law does not come under either of these categories. (*Sulaiman, J.*) LALA MATHURA PRASAD *v.* B. B. & C. I. RY. CO. **L. R. 5 A. 252 : 78 I. C. 434 : A. I. R. 1924 All. 691.**

——S 115—*Error of law—Erroneous decision on point of limitation—Interference.*

An erroneous decision on a question of limitation can be amended if the order results in an improper refusal to exercise jurisdiction, *e.g.*, to execute a decree. (*Kanhaiya Lal, J.*) SURAJMAN CHAUBE *v.* ANORE SHUKUL. **21 A. L. J. 861 : L. R. 4 A. 591 : 9 O. and A. L. R. 989 : 46 All. 73 : A. I. R. 1924 All. 263.**

——S. 115—*Error of law—No ground for revision.*

Where the Judge in the Court below has applied his mind to the question of law arising in the case but had decided it wrongly there is nothing to attract the interference of the High Court under S. 115, C. P. C. (*Daniels, J.*) BHOLA NATH *v* RAM SAHAI. **75 I. C. 472 : A. I. R. 1923 All. 465 (2).**

——S. 115—*Error of law—No ground for revision.*

Where in the exercise of its jurisdiction the lower Court commits an error of judgment this is not a matter upon which revision can lie. (*Banerji, J.*) GANESH PRASAD SAHU *v.* DUKH HARAN SAHU. **66 I. C. 509 : A. I. R. 1922 All. 441 (1).**

——S. 115—*Error of law—Refusal to order partition at instance of defendant—High Court will interfere.*

The High Court will interfere in revision where the lower Court refuses to order partition at the instance of any of the defendants in a partition suit as such a refusal amounts to a failure to exercise jurisdiction. (*Suhrawardy and Duval, JJ.*) LOKE NATH SAHA *v.* RADHA GOBINDA SHAHA. **86 I. C. 765 : A. I. R. 1926 Cal. 184.**

——S. 115—*Error of law—Notice of suit—Necessity for—Decision on if a point of jurisdiction—Railways Act, S. 77.*

It cannot be said that a Court by holding that a notice under S. 77 of the Railways Act is not necessary on the facts of the case assumes a jurisdiction which had not been vested in it by law. Even if there was an error in the decision of the suit by the Court it was an error on a point of law and the High Court would not interfere under S. 115, C. P. Code. (*Ghose, J.*) EAST INDIAN RY. CO. *v.* KANAI LAL. **28 C. W. N. 292 : 80 I. C. 205 : A. I. R. 1924 Cal. 493.**

——S. 115—*Error of law—No ground for revision.*

A mere error of law does not justify the Court in interfering under S. 115, C. P. Code. (*Greaves, J.*) GOLAM SOBHAN *v* ALI HOSSAIN BAHADUR. **65 I. C. 696 : A. I R. 1923 Cal. 322 (1).**

——S. 115—*Error of law—Not a ground of revision.*

Where a matter is entirely within the jurisdiction of the lower Court, a mere error of law in arriving at a finding is no ground for revision by High Court. 41 C. 32, Ref. (*Newbould and Panton, JJ.*) RAJENDRA NATH ROY *v*, SHEIKH ABDUL. **68 I. C. 430 : A. I. R 1923 Cal. 280.**

——S. 115—*Error of law—Interference.*

Where there is error of law, there is no ground to exercise the powers of revision under S. 115, C. P Code. (*Cuming, J.*) HARI CHARAN ROY CHAUDHURI *v.* BIRENDRA NATH SAHA. **70 I. C. 541 : 35 C. L. J. 327.**

——S. 115—*Error of law—No revision.*

Even if the lower Court had committed an error of judgment or of law the High Court cannot interfere under S. 115, C. P. Code. (*Suhrawardy and Ghose, JJ.*) GURUDAS KUNDU CHOWDHURY *v.* DASARATHI HALDAR. **65 I. C. 512 (Cal).**

——S. 115—*Error of law and burden of proof.*

There is no ground for interference in revision with the order of the lower Court on the ground that the decision on a point of law is erroneous or the decision on a question of *onus* of proof is wrong. (*Martineau, J.*) MT. BARKAT BIBI *v.* ABDUL AZIZ. **26 P. L. R. 783.**

——S. 115—*Error of law—Erroneous decision of appellate Court as to first Court's having jurisdiction over a suit, cannot be revised.*

An appellate judgment deciding (even erroneously) that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the High Court. (*Campbell, J.*) BHOGI LAL *v.* AMAR NATH. **26 P. L. R. 746 : 90 I. C. 1042 : A. I. R. 1926 Lah. 47 (1).**

——S. 115—*Error of law—No ground for interference.*

A Court directed a plaint to be returned in order to be represented to a Court having jurisdiction over the subject-matter. In appeal the order was reversed on the ground that that Court itself had jurisdiction. *Held*, even if the appellate order was wrong, it amounted only to an error of law and was no ground for interference in revision. (*Simpson, J.*) MT. HAIDRI KHANAM *v.* AHMAD ALI. **90 I. C. 430 (Lah.).**

——S. 115—*Error of law—Interference in revision.*

A mere error of law is not necessarily an illegality and is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for revision. Where an application to set aside an *ex parte* decree is on the face of it barred, but the Court still sets it aside, the order cannot be interfered with in revision. (*Moti Sagar, J.*) SURJIT SINGH *v.* TORRIE. **A. I. R. 1924 Lah. 666.**

——S. 115, O. 21, R. 89—*Error of law—Dismissal of application—Revision.*

The High Court can exercise revisional powers with respect to the dismissal of an application under O. 21, R. 89 on the ground that a person is not entitled to apply as it falls under S. 115. (*Wallis, C. J., Oldfield and Kumaraswami Sastry, JJ.*) SUNDARAM *v.* MAMSA RAVUTHAR. **40 M. L. J. 497 : 13 L. W. 498 : 29 M. L. T. 269 : (1921) M. W. N. 272 : 63 I. C. 937 : 44 Mad. 554 (F. B.).**

——S. 115—*Error of law.*

An alleged wrong view of law taken by the Court is not a ground for interference in revision. (*Batten, J. C.*) MT. BARI BAHU *v.* KUNDAN SINGH. **71 I. C. 31 : A. I. R. 1922 Nag. 264.**

——S. 115—*Error of law—Obvious mistake—Revision.*

Where the finding of the Lower Court is vitiated by an obvious error the High Court can interfere in

C. P. CODE (V OF 1908), S. 115—Error of Law.

revision. (*Drake Brockman, J. C.*) MANGU LAL *v.* MT. NANHI. **5 N. L. J. 1 : 19 N. L. R. 131 : 67 I. C. 806 : A. I. R. 1922 Nag. 104.**

——S. 115—*Error of law—Erroneous decision on a question of law is not revisable.*

Erroneous decision on a question of law is no ground for revision. Decision of the lower appellate Court on appeal from an order of trial Court directing presentation of the plaint to the proper Court is not open to revision though erroneous as it is a question of law and it had jurisdiction to try it. (*Simpson, A.J.C.*) HAIDRI KHANAM *v.* AHMAD ALI. **90 I. C. 430 : A. I. R. 1926 Oudh 31.**

——S. 115—*Error of law—Erroneous finding on a question of law is no ground for revision.*

The High Court will not ordinarily interfere with a finding of fact in revision. Erroneous decision on a question of law which the lower appellate Court has jurisdiction to try, is no ground for interference in revision. (*Simpson, A. J. C.*) GAJADHAR *v.* AULAD HUSAIN. **90 I. C. 373 : A. I. R. 1926 Oudh 80.**

——S. 115—*Error of law—Erroneous interpretation of section—No revision lies.*

An erroneous decision, whether on a point of fact or on a point of law, is not sufficient reason for revision. It is necessary under S. 115, Civil Pro. Code, at least to show that some jurisdiction has been irregularly exercised. 40 Mad. 793 (P. C.) Dist. and also Foll. An erroneous idea of the meaning of any section or enactment, such as Art. 75 of the Limitation Act, will not justify an application in revision. (*Ashworth, A. J. C.*) BANKEY LAL *v.* RAM LAL **86 I. C. 918 : 12 O L. J. 112 : A. I. R. 1925 Oudh 373.**

——S. 115—*Error of law—Wrong decision on question of* res judicata *—Revision.*

Held, further, that a wrong decision on a question of *res judicata* is not an exercise, by a Court, of jurisdiction not vested in it by law so as to entitle the person aggrieved by it to apply for revision. (*Daniels, J. C.*) KEDAR NATH *v.* SUKH NATH SINGH. **64 I. C. 209 : 24 O. C. 213.**

——S. 115—*Error of law—Subordinate Judge deciding a question following a ruling of another High Court—High Court taking different view—No revision lies.*

Where the subordinate Judge decided a question following a decision of the Madras High Court which was directly in point, the Patna High Court refused to interfere in revision although it would have taken a different view on that point. (*Das and Adami, JJ.*) RAGHUNANDAN PRASAD SINGH *v.* BHAGWAT SAHAY. **6 Pat. L. T. 504 : 3 Pat. L. R. 18 : 86 I. C. 626 : 1925 P. H. C. C. 43 : A. I. R. 1925 Pat. 372.**

——S. 115—*Error of law—No ground for revision.*

Where the Court below took a wholly erroneous view of the law of limitation, but at the same time its decision was one arrived at with jurisdiction, it cannot be reviewed under S. 115, C. P. C. (*Mullick and Bucknill, JJ.*) MT. BIBI ZAINBAB *v.* PRAS NATH. **4 Pat. L. T. 491 : 1 Pat. L. R. 361 : 2 Pat. 800 : 75 I. C. 430 : A. I. R. 1924 Pat. 37.**

——S. 115—*Error of law—Misconstruction of rules made by the High Court.*

An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate Courts is no ground for revision. (*Das and Adami, JJ.*) RAMKISHUN DAS *v.* BENI PRASAD **3 P. L. T. 314 : 65 I. C. 355 : A. I. R. 1923 Pat 90.**

——S. 115—*Error of law—Interference.*

Under S. 115 the High Court cannot interfere when

C. P. CODE (V OF 1908), S. 115—Illegality.

the lower Court commits an error of law by applying one provision instead of another. (*Coutts and Macpherson, JJ.*) MAHABIR *v.* BALKISHUN. **3 Pat. L. T. 29 : 1922 P. H. C. C. 76 : 1 P. 48 : A. I. R. 1922 Pat. 376.**

——S. 115—*Error of law.*

Where there is no mistake in computing the period of notice but error in law in holding that 15 from the 17th to the 31st days inclusive of the first were sufficient there is no sufficient ground for review. (*Adami, J.*) AKSHOY KUMAR BHATTACHARJEE *v.* M. L. AGARWALA. **A. I. R. 1922 Pat. 308 (1).**

——S. 115—*Error of law—Provisions of S. 6 (1) of Limitation Act overlooked by lower Court—Revision was allowed.*

Where the lower Court dismissed the application on the ground that the claim was barred by limitation overlooking the provisions of S. 6 (1) of the Limitation Act revision was allowed. (*Das, J.*) MA SHWE U *v.* MA SHIN. **4 Bur. L. J. 146 : A. I. R. 1925 Rang. 381.**

——S. 115—*Error of law.*

The omission by a lower Court to consider the effect of a prior decision is a good ground for revision. (*Young, J.*) MAUNG LEE GALE *v.* PROHTADO BARICKAN. **3 Bur. L. J. 127 : 84 I. C. 199 : A. I. R. 1925 Rang. 37.**

——S. 115—*Error of law—Illegality*

A mere error of law is not necessarily an illegality though a perverse and wilful error of law or fact may be. Where the Court states the law correctly but applies it to facts which are assumed to exist but which really do not exist the Court acts illegally. (*Saunders, J. C.*) MA KYAW *v.* MAUNG SAEIN GO. **63 I. C. 838 : (1921) 4 U. B. R. 16.**

High Court.

——S. 115—*High Court, practice as to—Rateable distribution.*

Where in a suit for money certain property belonging to judgment-debtor was attached before judgment but released on two persons standing as sureties and they paid the amount in Court just afrer a holder of another money decree applied for execution and for rateable distribution, *held*, that the money was liable to be distributed. In such cases where no suit lies it is the practice of the High Court to interfere in revision. (*Richardson, J.*) GHISULAL *v.* TODURMAL. **26 C. W. N. 169 : A. I. R 1922 Cal. 19.**

——S. 115—*High Court.*

Enquiry into disputes regarding election is capable of being revised by the High Court whose order is final. (*Spencer and Venkatasubba Rao, JJ.*) VENKATARAMA AIYAR *v.* JANAB HAMID SULTAN MARACAYAR. **44 M. L. J. 161 : 17 L. W. 656 : (1923) M. W. N. 78 : 70 I. C. 987 : 32 M. L. T. 114 : A. I. R. 1923 Mad. 360.**

——S. 115—*High Court—Powers of.*

High Court can interfere where a lower Court has framed and tried an issue which did not properly arise ; but before this principle can be applied it must be shown that an error of this nature has in fact been committed. (*Fawcett, J C., Crump and Kemp, A.J. Cs.*) BANUMAL *v.* NEWANDMAL. **83 I. C. 360 (2) : 16 S. L. R. 207 (F. B.)**

Illegality

——S. 115 (c)—*Illegality —Meaning of—Irregularity in procedure.*

" Acting illegally" in S. 115 (*c*), C. P. Code, does not merely imply the committing of an error of procedure such as " acting with material irregularity" does. This part of the clause was advisedly left in indefinite

C. P. CODE (V OF 1908), S. 115—Illegality.

language in order to empower the High Courts to interfere and correct gross and palpable errors of subordinate Courts the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of the injustice resulting from it. (*Walmsley and Mukerjee, JJ.*) JOGUNNESSA BIBI *v.* SATISH CHANDRA BHATTACHARJEE. **28 C. W. N. 559 : 39 C. L. J. 434 : 51 Cal. 690 : 78 I. C. 958 : A. I. R. 1924 Cal. 633.**

——S. 115—*Illegality — Refusal to decide on merits on wrong ground is revisable.*

Dismissal of suit for damages for breach of contract on the preliminary ground that plaintiff being *benamidar* is not entitled to sue is revisable as the Court has acted illegally in the exercise of jurisdiction. (*Abdul Raoof, J.*) BALMOKAND *v.* SHANKAR DAS **76 I. C. 125 : A. I. R. 1925 Lah. 68.**

——S. 115—*Illegality—Order under O. 16, Rr. 10 and 12—Revision.*

An order under O. 16, R. 10 or R. 12 of the Code is not appealable but if it is illegal, it is open to revision by the High Court under S. 115 of the Code. (*Seshagiri Iyer, J.*) RENGASAMI REDDI *v.* KONDA REDDI. **61 I. C. 967 : 29 M. L. T. 95.**

——S. 115—*Illegality—Injustice or hardship to be proved.*

Even where the order of the Court below is illegal, it will not be revised unless it has caused injustice or hardship. (*Hallifax A. J. C.*) RAMIJI PATEL *v.* KARKAJI. **A. I. R. 1924 Nag. 293.**

——S. 115—*Illegality — Inadmissible evidence admitted—Finding based on other evidence—Finding not vitiated.*

Where a Court erroneously holds that certain documents are admissible but arrives at its finding independently of such documents, its finding cannot be said to be vitiated by such admission. (*Kulwant Sahay, J.*) SHAMSHER NARAIN SINGH *v.* MAHOMED SALE. **90 I. C. 329 : A.I R. 1926 Pat. 29 (2).**

——S. 115 and O. 23, R. 1—*Illegality—Execution application—Withdrawal—Sale of property by Court notwithstanding—Revision.*

Where the Court below rejected an application by the decree-holder withdrawing the execution proceedings which he had initiated and proceeded to sell the properties in execution notwithstanding such withdrawal, the order of the Court is without jurisdiction and can be set aside in revision. The order however is not open to appeal. 4 Mad. 217 : 32 C. 146 : 28 A. 72 Foll. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD RAI *v.* MAHESH KANT CHOWDHURY. **1 P. 232 : 65 I. C. 122 : 3 P. L. T. 445 : A. I. R. 1922 Pat 525.**

——S. 115—*Illegality—Failure to note a proviso to section—Powers of interference.*

An error of misconstruction of a proviso of a section is not an illegality which justifies revision. (*Carr, J.*) MAUNG NYAN *v.* MAUNG SHWE NI. **2 Bur. L. J. 275 : A. I. R. 1924 Rang. 212 (2).**

Interference.

——S. 115—*Interference—Transfer of case without notice.*

An order of transfer passed under S. 24 without notice to the other party can be set aside in revision. (*Mukerji and Boys, JJ.*) DE MELLO *v.* THE NEW VICTORIA MILLS CO., LTD. **L. R. 6 A. 555 : 90 I. C 287 (2) : 23 A. L. J. 948.**

——S. 115—*Interference—Evidence—Not proved or admissible—When justifies interference.*

Ordinarily when a Court acts on evidence which has not been proved or which is inadmissible it does not act without jurisdiction. If it considers the question of the admissibility of a document and decides either that it is admissible or not admissible then even though the decision may be wrong the Court does not act with material irregularity or illegality. It merely commits an error of law. But if the Court does not apply its mind to the question of admissibility at all and acts on a document which has not been proved or is not admissible, it acts with material irregularity or illegality in exercising jurisdiction. (*Sulaiman, J.*) HABIB BUX *v.* SAMUEL FITZ & CO. **L. R. 6 A. 553 : 89 I. C. 22 : 23 A. L. J, 961.**

——S. 115—*Interference—Revision may be refused in the discretion of the Court.*

Under S. 115 of the Civil Pro. Code, the High Court is not bound to intervene but may refuse to exercise its discretion if the circumstances require that such discretion should not be exercised. (*Sulaiman and Mukerji, JJ.*) FATEH LAL *v.* SHER SINGH. **L. R 6 A. (Civ.) 63 : 85 I.C. 660 : A. I. R. 1925 All. 264.**

——S. 115—*Interference—Lower Court's order not clear—Case was sent back.*

Where the lower Court's order had left the matter in a muddle so much so that both the parties believed the matter to be pending, the case was sent back to the lower Court. (*Walsh and Ryves, JJ.*) GAYA PRASAD *v.* FIRM NATHU LAL BUDHA LAL. **L. R. 5 A. (Civ.) 319 : 78 I. C 1050 : A. I. R. 1925 All. 202.**

——S.115—*Interference—Interpretation of words in a document.*

On a mere question of interpretation of particular words in a document, where the words were clearly susceptible of more than one interpretation, the High Court would decline to interfere in revision. (*Piggott J.*) KRISHNA DATT *v.* BRIJ LAL. **A. I. R. 1923 All. 269.**

——S. 115—*Interference — None on technical ground.*

High Court will not interfere in revision only on technical grounds. (*Banerji, J.*) RAMRAJ SINGH *v.* RABI PROSAD. **63 I. C. 140 (All.)**

——S. 115—*Interference is discretionary and not obligatory.*

There is no obligation on the High Court to interfere on an application made under S. 115, even if facts are proved which bring the application within the section. It is purely a matter of discretion, and no rules can be laid down how that discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court, which hears the application, to decide on the particular circumstances of the case before it. (*Macleod, C. J. and Crump, J.*) BHIKALAL GIRDHARLAL *v.* ACHRATLAL LALLUBHAI. **49 Bom. 535 : 87 I. C. 910 : 27 B. L. R. 423 : A. I. R. 1925 Bom. 341.**

——S. 115—*Interference —Correct procedure not followed but justice done—No revision will be allowed.*

Where substantial justice has been done to the parties and the applicant for revision has not ben prejudiced in any way, no revision will be allowed though the lower Court has not followed the correct procedure. (*Suhrawardy and Duval, JJ.*) AZAM KHAN *v.* UMEDALI MORAL. **A. I. R. 1925 Cal. 1223.**

——S. 115—*Interference—Revision is refused where substantial justice is done.*

Where substantial justice is done the High Court will not interfere in the exercise of its revisional jurisdiction even if it is of opinion that the procedure adopted by the lower Courts is wrong (*Greaves and*

C. P. CODE (V OF 1908), S. 115—Interference.

Graham, JJ.) BHAGABAN CHANDRA ROY CHOWDHRY *v* AMIR ALI **86 I C. 756: A.I.R. 1926 Cal. 245.**

——**S. 115**—*Interference—Sale set aside after 7 years on the ground of fraud—Question of fraud not fully discussed—Order was set aside in revision.*

A sale was impeached under O. 21, R. 90 on the ground of fraud seven years after its confirmation. The lower Court did not grant the application but the Dt. Judge on appeal set it aside. The judgment of the Dt. Judge did not show that he had discussed all the points arising in the case. *Held*, that his judgment was defective and should be set aside especially because the decree-holder purchaser would have no remedy left to get the benefit of the decree if the sale were set aside so late as 7 years. 1 C. W. N. 67, Ref. (*Suhrawardy, J.*) GIRIBALA DASI *v.* TARAK NATH JATAN. **78 I. C. 149 : A. I. R. 1925 Cal. 515.**

——**S. 115**—*Interference—Order refusing restoration of review application dismissed for default.*

High Court can revise an order refusing to restore an application for review dismissed in default. (*Pearson and Graham, JJ.*) HEM SANKAR ROY CHAUDHURI *v.* NISHI KANTA DAS GUPTA.
81 I. C. 1017 : A. I. R. 1925 Cal. 430.

——**S. 115 and O. 21, R. 58**—*Interference—Claim to mortgaged property—Mortgage decree for sale—Claim once allowed but disallowed on fresh application for sale.*

A claim is not entertainable under O. 21, R. 58 of the Civil Procedure Code to property which has been ordered to be sold under a mortgage decree ; and where such a claim was once allowed but subsequently the decree-holder having again applied for execution of the decree by sale of the property, a further claim to the property by the successful claimant was disallowed by the executing Court, *held*, on an application for revision under S. 115 of the Civil Procedure Code that the High Court could not interfere. 14 Cal. 631, Ref. (*Sanderson, C. J. and Richardson, J.*) MAHABIR PRASAD SINGH *v.* JOGENDRA NATH MONDAL. **68 I. C. 271 : 26 C. W. N. 50.**

——**S. 115**—*Interference—Grounds for affidavit of pleader's clerk.*

The High Court will not interfere in revision when the applicant has suffered no prejudice and the order complained against does not affect his interests. Nor would the High Court act on the affidavit of a pleader's clerk and interfere. (*Suhrawardy and Ghose, JJ.*) SURAJ NARAIN DAS *v.* AMIRUDDIN MAHOMED. **66 I. C. 127 (C).**

——**S. 115**—*Interference—Order refusing to stay a suit pending a previous one is revisable—Civ. Pro. Code, S. 10.*

High Court can set aside an order refusing to stay suit under S. 10 pending the final decision of a suit previously instituted for the same subject-matter and between the same parties. (*Zafar Ali, J.*) MEHTAH SHAH *v.* ALI HAIDER SHAH. **82 I. C. 234 : A. I. R. 1925 Lah. 144 (2).**

——**S. 115**—*Interference—Miscarriage of justice.*

Where a decree is claimed against a person in a representative capacity and judgment is given accordingly, but in drafting the decree, a personal liability was cast on the defendant and the Court refused to amend it, the High Court can interfere in revision to prevent a gross miscarriage of justice. (*Zafar Ali, J.*) CHANDA SINGH *v.* FATEH CHAND. **A. I. R. 1924 Lah. 621.**

——**S. 115 and O. 47, R. 1**—*Interference—Review—Rejection of an application—Revision.*

Excepting cases where an obvious injustice has to be remedied the High Court need not interfere in revision with an order rejecting an application for review. 26 A. 573 : 35 P. R. 1911, Referred to. (*Broadway, J.*) TOLA RAM *v.* CHANDU MAL TOTA RAM.
71 I. C. 160 : A. I. R. 1924 Lah. 400.

C. P. CODE (V OF 1908), S. 115—Interference.

——**S. 115**—*Interference—Substantial justice—Mandatory injunction.*

The question of substantial justice arises more truly where a case has been decided and where the High Court is of opinion that any technical error, which might have been urged in an ordinary appeal, is not a sufficient ground for interference on revision unless injustice has been caused thereby or the petitioners have been prejudiced. (*Harrison, J.*) THE LAHORE ELECTRIC CO. *v.* BOMBAY MOTOR AND CYCLE CO.
67 I. C. 742 (Lah.)

——**S. 115**—*Interference—Temporary injunction granted by first Court but revoked on appeal—Revision Judge admitting the allegations in the plaint but refusing injunction on his own private opinion.*

The District Munsif granted an injunction pending the suit. On appeal, the Judge admitting the plaint allegations said that, in his own private opinion, it was not necessary to grant the injunction and hence revoked it. On revision *held*, that it was not a judicial order to be passed and must be set aside. (*Wallace, J.*) SRIRANGA NARAYANA JEER *v.* AHOBILA JEER. **22 L. W. 837.**

——**S. 115**—*Interference.*

Exercise of jurisdiction owing to a wrong interpretation of a rule is revisable. (*Devadoss and Wallace, JJ.*) VEERAPPA CHETTIAR *v.* P. G. SUNDARESA SASTRIGAL. **49 M L. J. 366 : 48 Mad. 676 : 22 L. W. 606 : A. I. R. 1925 Mad 1201.**

——**S. 115**—*Interference—Suit for damages for use and occupation against legal representative of tenant holding over—Defendant challenging plaintiff's title—Court ignoring issue—Revision should be allowed.*

The suit was for damages for use and occupation against the legal representative of a tenant holding over. The defendant in her written statement challenged the plaintiff's title. The defendant did not abandon the issue. The Court ignored the issue of title. *Held*, that the plaintiff was not absolved from the duty of proving his title and that as the defendant was prejudiced by the Court having so absolved the plaintiff, the High Court should interfere in revision. (*Devadoss and Wallace, JJ.*) KOPPA ANKI *v.* P. VENKATA SUBBAYYA. **48 M. L. J. 685 : 87 I. C. 695 : A. I. R. 1925 Mad. 884.**

——**S. 115**—*Interference—Erroneous decision—Wrong provision of law applied—Order justifiable under other provision.*

Where an order of the Lower Court which purports to be passed under a particular provision of law is not justifiable with reference to that provision but can be made under some other provision of law not invoked by the parties and where the order complained against has been passed after full enquiry into the merits of the case and does substantial justice between the parties, the High Court will not interfere in revision with that order. (*Spencer and Devadoss, JJ.*) JOHN JOSEPH BRITO *v.* S. C. BRITO. **19 L. W. 532 : 75 I. C. 888 (2) : A. I. R. 1924 Mad. 586.**

——**S. 115**—*Interference — Proceedings under S.36 of the Legal Practitioners Act—Power of High Court to interfere.*

The High Court will not interfere in revision under S. 115 to quash the pending proceedings where a Court is taking proceedings under S. 36 of the Legal Practitioners Act. (*Venkatasubba Rao, J.*) VARADACHARIAR *v.* KALYANA SUNDARAM AIYAR.
44 M. L. J. 437 : 16 L. W. 795 : 69 I. C. 433 ;

C. P. CODE (V OF 1908), S. 115—Interference.

23 Cr. L.J. 705 : A. I. R. 1923 Mad. 188 (2).

——S. 115—*Interference — Remand—Improper order—Revision—Interference by High Court.*

The High Court can interfere in revision when an improper order of remand is passed. (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU *v.* GANAPATHY RAJU. **30 M. L. T. 314 : 16 L. W. 593 : 70 I. C. 665 : A. I. R. 1923 Mad. 113.**

——S. 115—*Interference—Temporary injunction —Grant of.*

Interference in revision in granting temporary injunction is not justified under S. 115. (*Kumaraswami Sastri, J.*) KADANKOLATHIL SAIDALI KUTTI *v.* GODAN NAMBUDRI. **(1922) M. W. N. 303 : 16 L. W. 238 : 70 I. C. 713 : A. I. R. 1922 Mad. 172.**

——S. 115—*Interference—Merits of the case to be looked into.*

Where no injustice has been caused by the irregular procedure of the Court below, the High Court will not interfere in revision. (*Devadoss, J.*) YAGNASWAMI AIYAR *v.* CHIDAMBARANATHA MUDALIAR. **(1922) M. W. N. 130 : 16 L. W. 760 : 65 I. C. 732 : A. I. R. 1922 Mad. 63 (2).**

——S. 115—*Interference—No cause of action—Revision.*

Where there is no cause of action for a suit or where the cause of action is illegal, the High Court can in revision set aside the decree of the lower Court. 25 A. 209, Relied on. (*Baker, O. J. C.*) KASHI RAM *v.* BARKYA. **7 N. L. J. 13 : 77 I C. 46 : A. I. R. 1924 Nag. 101.**

——S. 115—*Interference—Decree of Small Cause Court based on question of fact—Grounds for interference in revision.*

Small Cause Courts have doubtless been given very wide powers with regard to decisions on questions of fact and in revision the High Court is always reluctant in questioning a decision on the facts. But there is no doubt that it has for good reasons power to do so. In cases where the findings of fact are based on or involve assumptions or inferences which there is nothing in fact or probability to support, or are not justified by sufficient evidence or where the finding of fact is opposed to the evidence or on flagrant misinterpretation or disregard of evidence, or if injustice would otherwise be done, the High Court has power to interfere in revision. (*Prideaux, A. J. C.*) PADAMSI *v.* SESHRAO. **19 N. L. R. 72 : 73 I. C. 1055 : A. I. R. 1923 Nag. 292.**

——S. 115—*Interference—Security—Rejection of.*

An order which finds certain security offered to be insufficient cannot be revised. (*Simpson, A. J. C.*) JAIDAT SINGH *v.* BALDEO SINGH. **90 I. C. 1051.**

——S. 115—*Interference—Errors of fact and law —Death of arbitrator—Effect.*

The High Court will not ordinarily interfere with a finding of fact in revision ; nor with a decision on a question of law which the Court below had jurisdiction to decide. Where the Court below decided that the death of one of several arbitrators did not render the award invalid, there is no ground for interference in revision. (*Simpson, A. J. C.*) GAJADHAR *v.* AULAD HUSAIN. **90 I. C. 373.**

——S. 115—*Interference—Revision lies on a point of limitation.*

Judgment of a Subordinate Court may be upset on a question of limitation in revision. 16 O. C. 45 Rel. on, (*Neave and Kendall, A. J. Cs.*) MT. MOHANYA *v.* PANNA LAL. **11 O. L. J. 513 : 79 I. C. 848 : A. I. R. 1925 Oudh 34**

——S. 115—*Interference—Revision lies though Dt. Judge acts as Rent Court—Oudh Rent Act, S. 135.*

C. P. CODE (V OF 1908), S. 115—Interference.

Even where the District Judge has acted as a Rent Court, the High Court can interfere in revision under S. 115. (*Dalal, J. C.*) JAGANNATH PERSHAD *v.* BECHU. **27 O. C. 89 : 11 O. L. J. 77 : L. R. 5 O. 78 : 80 I. C. 327 : A. I. R. 1924 Oudh 349.**

——S. 115—*Interference—Order refusing to extend time for payment fixed in decree—If revisable.*

Where a decree fixes a certain time for payment of money and an application to extend the time for payment was dismissed, there is no appeal against the order, but it is revisable. (*Wazir Hasan, A. J. C.*) TIRBHAWAN DIT SINGH *v.* SURAJ BALI. **11 O. L. J. 119 : 78 I. C. 387 : A.I.R. 1924 Oudh 330.**

——S. 115—*Interference—High Court, when will not interfere.*

Where the order of the Lower Court is good on the merits, the High Court will not interfere in revision and drive the parties to another suit even if the order of the Lower Court is irregular or illegal. (*Lindsay, J. C.*) DEO NARAIN SINGH *v.* RAM KHELWAN. **63 I. C. 545 : 8 O L. J. 307.**

——S. 115—*Interference—Joinder of parties—Refusal to add.*

An order of Court refusing to add a party as defendant cannot be revised, as there is no refusal to exercise jurisdiction, but if at all only a wrong exercise of it. Possibly S. 107, Government of India Act, will apply, if there is a denial of the right of fair trial. (*Mullick and Ross, JJ.*) KALI RAI *v.* TULSI RAI. **4 Pat. 723.**

——S. 115—*Interference*—Ex parte *order—Setting aside—Finding that applicant had no knowledge of suit till within 30 days of application—One of the plaintiffs dead—Finding that legal representatives represented by other plaintiffs—Inadmissible evidence —Conclusion apart from.*

A Munsiff set aside an *ex parte* order on finding that the applicant had no knowledge of the suit till within 30 days of the application to set aside the decree, that summons was not served on him and that though one of the plaintiffs was dead, the others represented his heirs. There was one piece of inadmissible evidence but the finding was arrived at on the rest of the evidence. *Held*, there was no scope for interference in revision. (*Kulwant Sahay, J.*) SHAMSHER NARAIN SINGH *v.* MOHAMMAD SALE. **90 I. C. 329.**

——S. 115—*Interference—Trial Court indefinitely postponing some issues of fact—Loss of evidence to parties almost certain—High Court will interfere under general powers, if not under S. 115—Govt. of India Act, S. 107.*

If the effect of an order of the trial Court indefinitely postponing the trial of an issue of fact in an almost certain loss of material testimony to plaintiff as well as defendant the High Court will interfere in the exercise of its powers of superintendence though S. 115 of the Code may not apply. (*Mullick and Ross, JJ.*) BHIMNATH *v.* JAGARNATH. **1925 P. H.C. C. 294 : A. I. R. 1925 Pat. 674.**

——S. 115—*Interference—High Court need not interfere save for aiding justice—Lower Court's order under S. 151, C. P. Code, passed without jurisdiction setting aside its own decree is not revisable where the decree would have been successfully avoided in review.*

The Court is not bound to interfere under section 115 except in aid of justice. Where the lower Court acceded to plaintiff's prayer under S. 151 to set aside a decree, *held*, that though the Court had no jurisdiction under that section to set aside its own decree, yet, as plaintiff would have succeeded had he applied under O. 47, R, 1 instead of under S. 151, High Court should not interfere. (*Das and Ross, JJ.*) RAMESWAR

C. P. CODE (V OF 1908), S. 115—Interference.

MAHTON *v.* LALA DWARKA PRASAD. **3 Pat. 778 : 6 P.L. T. 309 : 84 I. C. 320 : A. I. R. 1925 Pat. 36.**

———S. 115—*Interference—Local investigation—Commission for—Interference in revision by High Court.*

Where the issue of a commission for local investigation by the lower Court would lead to the determination of the rights of the parties on an improper basis and would inevitably and unnecessarily prolong a litigation and cause irreparable loss and expense to the parties, the High Court would interfere in revision and set aside the order. (*Miller, C. J. and Foster, J.*) RAMJI RAM *v.* RAMASRE. **1924 P. H. C. C. 217 : A. I. R. 1924 Pat. 761.**

———S. 115—*Interference—Rateable distribution—Order regarding.*

Orders under S. 73, C.P. Code, are not ordinarily revisable under S.115, C.P. Code. (*Mullick and Bucknill, JJ.*) BABU BISHUN MOHAN SAHAY *v.* NARAYAN PRASAD ASTHANA. **74 I.C. 140: A.I.R. 1924 Pat. 434.**

———S. 115—*Interference—Compromise decree—Order extending time—Revision.*

An order extending time for payment of money under a compromise decree cannot be revised under S. 115, C. P. C. (*Mullick and Bucknill, JJ.*) MT. NAND RANI KUER *v.* DURGA DAS NARAIN. **2 Pat. 906 : 1924 P. H. C. C.122 : 5 Pat. L. T. 401 : 82 I. C. 505 : A. I. R. 1924 Pat. 387.**

———S. 115 and Government of India Act (1915), S. 107—*Interference—Revenue Court, order of—Jurisdiction of High Court to revise.*

An order of a Revenue Court under S. 476 of the Cr. P. Code is open to revision by the High Court under S. 115 of the C. P. Code. or S. 107 of the Government of India Act (1915). (*Adami and Bucknill, JJ.*) RAKTU SINGH *v.* EMPEROR. **6 Pat. L.J. 178 : 61 I. C. 643 : 2 Pat. L. T. 609 : 22 Cr. L. J. 403 : 1921 P. H. C. C. 240.**

Interlocutory order.

———S. 115 and Sch. II, Para 15—*Interlocutory order—Order superseding award in pending case and directing suit to proceed—No revision lies.*

No revision lies against an order superseding an award made in a pending case and directing the suit to proceed on the merits. 43 All. 564 and 1925 All. 458 Foll. (*Sulaiman and Daniels, JJ.*) RUDRA PRASAD PANDE *v.* MATHURA PRASAD PANDE. **23 A. L. J. 656 : L. R. 6 A. (Civ.) 459 : A. I. R. 1925 All. 566.**

———S. 115—*Interlocutory order—Pending suit—No revision lies.*

Where the matter to be revised arises out of the proceedings of a pending suit there will be no revision till the suit has been decided. There were two suits, the plaintiff in one of which was the defendant in the other. The parties agreed to refer the matters in dispute to arbitration. Before the arbitrators, the parties stated that they had arrived at a compromise by which one suit should be decreed and the other suit should be dismissed. The arbitrators recommended that the Court should dispose of the two suits according to this compromise. When the matter went before the Court it set aside the award on the ground that the compromise recorded by the arbitrators has been arrived at by means of lottery. *Held*, that no revision lay from the order of the Court. (*Mukerjee and Dalal, JJ.*) SHAH MUHAMMAD FAKHRUDDIN *v.* RAHIM MULLAH SHAH. **47 A. 121 : 85 I. C. 502 : L. R. 6 A. (Civ.) 22 : A. I. R. 1925 All. 458.**

———S. 115—*Interlocutory orders are generally not revised where alternative remedy exists except where they may lead to failure of justice or irreparable injury.*

C. P. CODE (V OF 1908), S. 115—Interlocutory order.

Although the High Court interferes as little as possible with interlocutory orders where an alternative remedy exists it is not a hard and fast rule and where the orders may cause a failure of justice or irreparable injury, the High Court can and will interfere. When issues which were unnecessary and which were likely to entail an expenditure of time and money wholly out of proportion to the matter in dispute were likely to cause irreparable injury, the issues were ordered to be struck off in revision. (*Pearson and Graham, JJ.*) SM. SARAJUBALA DEBI *v.* MOHINI MOHAN GHOSH. **40 C L. J. 191 : 28 C. W. N. 991 : 82 I. C. 1008 : A. I. R. 1925 Cal. 204.**

———S. 115 and O. 26, R. 4—*Interlocutory order.*

Where the lower Court wrongly refused to grant commission for examination of witnesses, the High Court will interfere and set aside the order. (*Mookerjee and Panton, JJ.*) SHARAT KUMAR *v.* RAM CHANDRA CHATTERJEE. **35 Cal. L. J. 78 : 68 I. C. 9 : A. I. R. 1922 C. 42.**

———S. 115—*Interlocutory order not open to revision.*

Interlocutory orders cannot or at any rate should not be interfered with in revision. (*Zafar Ali, J.*) THE FIRM RAHMAT ULLAH FAKHAR-UD-DIN *v.* THE FIRM RAHIM BAKHSH AUMAR-UD-DIN. **75 I.C. 107 : A. I. R. 1923 Lah. 301 (2).**

———S. 115 and O. 6, R. 17—*Interlocutory order—Amendment—Refusal—Interference.*

Though the High Court would not generally interfere with interlocutory orders of the lower Courts yet if the interests of justice required the amendment which was refused the High Court may interfere. (*Scott-Smith, J.*) JHARIA COAL COMPANY *v.* DIWAN CHAND COMPANY. **67 I. C. 335 (Lah.).**

———S. 115—*Interlocutory order—Appeal.*

In revision the High Court is not bound to interfere even in a case of defect of jurisdiction unless it is shown that there has been a failure of justice arising from such defect. 36 P. R. 1902 Foll. There is no appeal from an interlocutory order in a suit and if the appellate Court entertains such an appeal it assumes a jurisdiction not vested in it. (*Broadway, J.*) GANDA RAM *v.* SUNDAR LAL. **67 I. C. 278 : 2 L. L. J. 673.**

———S. 115 and O. 41, R. 25—*Interlocutory order—Discretion.*

It is only in exceptional cases that revisional powers are exercised in the case of orders of an interlocutory nature and even when the order is not of an interlocutory nature the High Court should not interfere except in cases where the order is not a final order such as one under O. 41, R. 25 of the C. P. Code. (*Broadway, J.*) ALLAH BAKSH *v.* LAL KHAN. **67 I. C. 269 : 2 L. L. J. 662.**

———S. 115—*Interlocutory order.*

Unless irreparable waste not only of time and money but of the time of the trying Courts will be the result, the High Court will not interfere with an interlocutory order as an exceptional case. (*Leslie Jones, J.*) FIRM OF DAMRI SHAH *v.* FIRM OF RULLA MAL. **2 Lah. L. J. 555 : 64 I. C. 387 : 17 P. L. R. 1922.**

———S. 115—*Interlocutory order allowing a party to adduce evidence after closing case.*

Revision of interlocutory orders is justified only in cases where irremediable damage is likely to result. An order allowing a party to produce fresh evidence on an issue after closing the case was held as not open to revision in this particular case. (*Wilberforce, J.*) THE FIRM OF MAKHAN LAL TEJ PAL *v.* THE FIRM OF JAI NARAIN BRIJ RAJ. **59 I. C. 450 : 17 P. W. R. 1921.**

C. P. CODE (V OF 1908), S. 115—Interlocutory order.

——S. 115—*Interlocutory order—Revision should not be granted during pendency of suit except for strong reasons.*

Interference by the High Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good. In the present case revision was granted, partly on the ground that the lower Court had not properly understood the provisions of O. 11, R. 14 of the C. P. Code, and partly on the ground that the result of its orders might be wholly unnecessary and cause irremediable damage to the first defendant's business interests. (*Wallace, J.*) RAMACHARI *v.* KRISHNAMACHARI.
47 M. L. J. 460 : 47 M. 934 : 20 L. W. 533 : (1924) M. W. N. 863 : 80 I. C. 604 : A. I. R. 1924 Mad. 846.

——S. 115—*Interlocutory orders—Interference with, exceptional.*

Though the Court will interfere in revision with an interlocutory order, such interference should be exercised with extreme diligence, the general rule being against such interference ; it will interfere only in such cases as for example where the Court below has acted perversely or in a manner as to cause irreparable loss to the plaintiffs. (*Odgers, J.*) RATNACHALAM IYER *v.* SIVACHIDAMBARAM PILLAI. **45 M. L. J. 703 : 18 L. W. 198 : (1923) M. W. N. 403 : A. I. R. 1923 Mad. 690.**

——S. 115—*Interlocutory order—Refusal to issue commission—Interference.*

In a case where a Court refused to examine a witness on commission, when it had no discretion to refuse it, the High Court will interfere in interlocutory proceedings rather than permit a trial to go on an illegal course, which will entail unnecessary expenditure and waste of time. (*Wallace, J.*) JAGANNATHA SASTRY *v.* SARATHAMBAL AMMAL. **46 Mad. 574 : 17 L. W. 251 : (1923) M. W. N. 157 : 71 I. C. 530 : A. I. R 1923 Mad. 321 : 44 M. L J. 202.**

——S. 115—*Interlocutory orders—Appeal is proper remedy.*

A regular appeal and not revision is the proper method of challenging the correctness of interlocutory orders made in the course of trial. (*Spencer, J.*) HUSSAIN SAHIB *v.* HAMMAD SAHIB.
16 L. W. 312 : 31 M. L. T. 180 : 74 I. C. 812 : (1922) M. W. N. 562 : A. I. R. 1923 Mad. 43.

——S. 115—*Interlocutory order—Revision—Interference when justified—Posting of case for argument on preliminary issues.*

It is impossible to say that in no case whatever will the High Court interfere with an interlocutory order of the lower Court. But interference must be exercised with great diligence, the general rule being against such interference. Interference will be justified if the order sought to be revised is in fact perverse or if irreparable injury will be caused unless the revision is allowed. 9 M. 256 ; 15 M. L. T. 339 ; 5 L. W. 207 ; 12 C. L. J. 505 ; 12 C. L. J. 519 : 12 C. L. J. 525 ; 39 M. 195 (F. B.) Ref. Where the lower Court posted a case for final hearing on preliminary issues of law settled long before, the High Court refused to interfere as the party had a remedy by appeal in case of injury or inconvenience. (*Odgers, J.*) RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI.
15 L. W. 667 : (1922) M. W. N. 521 : 68 I. C. 167 : A. I. R. 1922 Mad. 321.

——S. 115—*Interlocutory order—Misjoinder of parties and causes of action—Interference.*

The powers of the High Court in revision could be exercised in cases where the lower Court held that a suit is bad for misjoinder of parties, non-joinder of parties and misjoinder of parties and causes of action. The use of the revisional powers would be justified where the lower Court has decided that the suit is not bad for misjoinder of parties and causes of action. 42 M. L. J. 43 ; 29 M. L. J. 53 ; 10 L. W. 652 ; 6 L. W. 9 ; 5 L. W. 207 Foll. (*Venkatasubba Rao, J.*) VEERAPPA NADAR *v.* CHIDAMBARA NADAR.
43 M. L. J. 277 : (1922) M. W. N. 316 : 70 I. C. 684 : 16 L. W. 186 : A. I. R. 1922 Mad. 174.

——S. 115—*Interlocutory order—Usually no revision lies.*

It is not usual to interfere in revision in the case of interlocutory orders because though there may be no immediate appeal against such an order a remedy is supplied by S. 105, C. P. Code, which provides that such orders may be made a ground of objection in the appeal against the final decree. (*Prideaux, A. J. C.*) ANWAR KHAN *v.* YAKUB KHAN.
79 I. C. 911 : A. I. R. 1925 Nag. 62.

——S. 115—*Interlocutory order—Decision as to Court-fee—Error of law—Revision.*

A decision of a Subordinate Court determining the amount of Court-fees payable by plaintiff is not open to interference in revision inasmuch as no case has been decided by the Court below. 43 A. 564 Foll. A mere error of law though a ground for second appeal does not justify revision. (*Prideaux, A. J. C,*) GOVIND *v.* DAJI. **65 I. C. 327 : A.I.R. 1922 Nag. 128.**

——S. 115—*Interlocutory order for collecting materials for decision of case is unrevisable.*

An interlocutory order which does not determine the case but which is made with the object of collecting materials upon which the case is to be determined thereafter is not revisable. (*Kendall, A. J. C.*) DHARAM NARAIN *v.* UNAO COMMERCIAL BANK.
11 O. L. J. 692 : 80 I. C. 612 : 28 O. C. 78 : A. I. R. 1925 Oudh 189 (2).

——S. 115—*Interlocutory order—Revision.*

Where a Subordinate Judge allowed a plaintiff to put in a replication conditional on the payment of a certain amount of costs and where the aggrieved party applied to the High Court in revision, *held*, that no revision lay as no case had been decided so far. (*Daniels, J. C.*) NARENDRA BAHADUR SINGH *v.* PEARY LAL. **64 I. C. 211 (1) : 24 O. C. 215.**

——S. 115—*Interlocutory order—Decision of issue as to jurisdiction.*

No revision lies from an order deciding an issue as to jurisdiction against the defendant as such an order is an interlocutory order. (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) SHYAM SUNDER *v.* SHEOAMBER BAN. **64 I. C 92 : 24 O. C. 231.**

——S. 115—*Interlocutory order is not revisable where there is other remedy unless irreparable loss will occur.*

Ordinarily an interlocutory order is not capable of revision particularly when there is another remedy available to the injured party ; but where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party, an interlocutory order may be revised under S. 115 read with S. 15 of the Charter Act. (Case-law discussed.) (*Jwala Prasad and Foster, JJ.*) MANI LAL *v.* DURGA PRASAD. **5 Pat. L. J. 425 : 1924 P. H. C. C. 254 : 3 Pat. 930 : 80 I. C. 667 (2) : A. I. R. 1924 Pat. 673.**

——S. 115—*Interlocutory order—Appeal—Revision—Interference when justified.*

Where there is a right of appeal from the decree that might be passed in the suit, the High Court will not interfere in revision with the judgment on an

C. P. CODE (V OF 1908), S. 115—Interlocutory order.

interlocutory order passed by the Court below. (*Miller, C. J. and Foster, J.*) HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH. **71 I. C. 911 : A. I. R. 1924 Pat. 176.**

——**S. 115**—*Interlocutory order—Refusal to frame issue—Revision—Interference—Government of India Act, S. 107.*

As a general rule, except upon proof of irreparable injury, the High Court will not interfere in revision under S. 115 of the Code of Civil Procedure, when there is another remedy open to the applicant. Interlocutory orders are not exempted. Where the Court below refused to raise an issue clearly arising from the pleading of the party, without assigning any reason whatever, the High Court interfered under S. 107 of the Government of India Act. (*Mullick and Ross, JJ.*) SHEO PRASAD SINGH *v.* SUKHU MAHTO. **4 Pat. L.T. 401: 1 Pat. L.R. 89: A.I.R. 1923 Pat. 518.**

——**S. 115**—*Interlocutory order.*

The High Court will not interfere in revision with interlocutory orders unless some irreparable injury is caused to any party thereby. (*Mullick and Kulwant Sahay, JJ.*) RAMJAS *v.* LINTON MOLESWORTH & CO. **A. I. R. 1923 Pat. 411.**

——**S. 115**—*Interlocutory order—Interference.*

Where the record of a case has been sent for by the High Court and the case is before it for order, it would not be exercising a wise discretion if the High Court did not dispose of the matter, the question of discretion being merely concerned with the stage at which the matter should be determined. Where considerable delay has already occurred and is likely to occur if a remand is ordered, the High Court ought to interfere even with interlocutory orders. (*Chapman and Atkinson, JJ.*) B. NAURATAN LAL *v.* W. J. STEPHENSON. **1922 P. H. C. C. 79 : A. I.R. 1922 Pat 359.**

——**S. 115**—*Interlocutory order—Trial of case piecemeal—Procedure defective.*

The High Court will interfere with an interlocutory order directing the trial of certain issues in a case before trying others, as the trial of a case piecemeal is a serious evil to the parties or might involve heavy costs in Second Appeal or any other hearing. (*Das and Adami, JJ.*) SATYA NIRANJAN CHAKRAVARTI *v.* DWARKANATH. **60 I. C. 528 · 2 Pat. L. T. 154.**

——**S. 115 and O. 26, R. 2**—*Interlocutory order—Interference in revision—Examination of witnesses.*

The High Court has power to interfere in revision with interlocutory orders not directly appealable so as to avoid irreparable damage or gross injustice. The High Court will not interfere with the discretion of the lower Court not perversely exercised. A dismissal of an application to examine witnesses on commission without considering whether their evidence would be relevant or not, is open to revision. (*Robinson, C. J. and Heald, J.*) S. R. M. M. CHETTY *v.* P. L. N. N. NARAYANAN CHETTY. **64 I. C. 821 : 11 L. B. R. 65.**

——**S. 115**—*Interlocutory order practically deciding suit but incapable of being made ground of appeal from decree—Revision lies.*

Ordinarily the High Court will not interfere in revision with interlocutory orders. But where the Judge against whose order there is an application for revision has so used his jurisdiction that the result of allowing his order to stand will be definitely to decide the case pending before him, so that all the proceedings thereafter taken would be merely infructuous and waste of time and where the interlocutory order could not be made the ground of an appeal against the final decree then the High Court can interfere in revision and set aside the order. Where the plaintiff originally prayed

C. P. CODE (V OF 1908), S. 115—Jurisdiction—Excess of.

for a declaration and injunction but when the defendants objected that they were in possession and so the suit as framed was not maintainable, the plaintiff applied to amend the plaint by adding a prayer in the alternative, for possession of the property, and where the lower Court refused to allow the amendment, *held*, that the High Court had jurisdiction to interfere with the order and set it aside if necessary. 14 S. L. R. 28 Dist. (*Kennedy, J. C. and De Souza, A. J. C.*) MUNICIPALITY OF TANDO ADAM *v.* KHAIR MAHOMED. **A. I. R. 1925 Sind 260.**

——**S. 115—JURISDICTION.**

Application under.
Excess of.
Failure to exercise.
Irregular Exercise.
Local Acts.
Order under.
Refusal of review.
Refusal to exercise.
Revenue Court.
Small Cause Court.
Jurisdiction—Application under.

——**S. 115**—*Jurisdiction—Application to set aside election—Lower Court deciding that petition disclosed grounds for holding election enquiry—High Court can interfere.*

The lower Court decided, over-ruling objections that an election petition to set aside an election disclosed grounds on which an election enquiry could be held under the Election Rules. *Held*, that the High Court could interfere because if the election petition did not disclose any ground for an enquiry, the lower Court would be exercising a jurisdiction not vested in it by holding such an enquiry and to hold it would simply lead to waste of time of the Court and of the parties. In such a case it was but right and proper that the High Court should decide whether the petition disclosed any grounds for holding an enquiry and, if it did not the High Court should say so at once and stop the enquiry at the very outset. (*Krishnan, J.*) C. JANARDHANAN *v.* N. M. VERGHESE. **48 M. L. J 451 : 87 I. C. 113 · (1925) M. W. N. 305 ; A. I. R. 1925 Mad. 707.**

——**S. 115, O. 47, R. 1 and S. 151**—*Jurisdiction—Application—Lower Court competent to extend time on a review application—Extension granted on application for extension is valid.*

If Court has jurisdiction to extend time upon an application for review there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. (*Kulwant Sahay, J.*) MT. RAM KUMARI *v.* DEONANDAN SINGH. **1925 P. H. C. C. 151 : A. I. R. 1925 Pat. 452.**

——**S. 115**—*Jurisdiction—Application under O. 21, R. 100—Misconstruction of law—Interference.*

Where the decision of a Court is the very basis and foundation of jurisdiction, the case falls within S. 115, C. P. Code. Where a Court by misconstruction of the provisions of law holds that a person is not entitled to maintain an application under O. 21, R. 100, it declines a jurisdiction vested in it by law and the matter is revisable. (*Das, J.*) RAM KISHUN SINGH *v.* DAMODAR PRASAD. **5 Pat. L. T. 107 : 75 I. C. 856 : A. I. R. 1924 Pat. 506.**

Jurisdiction—Excess of.

——**S. 115 and O. 21, R. 89**—*Jurisdiction—Excess of—Execution sale—Application to set aside—Sale of property by judgment-debtor*—Locus standi *to apply.*

After an execution sale of the properties of a judg-

C. P. CODE (V OF 1908), S. 115—Jurisdiction—Excess of.

ment-debtor he sold them to a third person and deposited the execution sale price with 5 per cent. in addition as required by O. 21, R. 89, C. P. Code. On a question arising as to whether the sale should be set aside, the first Court held that it should be set aside and the appellate Court held to the contrary. On revision to the High Court, *held*, that the Court had jurisdiction to decide the question as it did, and that no revision lay. 40 M. 793 : 43 A. 334 Referred to. 44 M.554 : 4 Pat. L.J. 340 dissented. (*Banerjee, Piggott and Walsh, JJ.*) YAD RAM *v.* SUNDAR SINGH.
45 A. 425 : 21 A.L.J. 313 : L. R. 4 A. 402 : 74 I.C. 778 : A. I. R. 1923 All. 392 (F. B.)

——S. 115—*Jurisdiction—Excess of—Point not in issue—Decision on—Effect.*

Where the Courts below decided the suit on a point not in issue between the parties, the orders are without jurisdiction and can be revised. (*Hopkins, S. M. and Fremantle, J. M.*) JAHANGIRA *v.* MT. LACHHI KUAR. **L. R. 3 A. 219 (Rev.) : 4 U. P. L. R. (B.R.) 47.**

——S. 115 — *Jurisdiction—Excess of—Proper exercise of.*

Where the Lower Court exercises jurisdiction in a proper manner, the High Court will not interfere. (*Piggott and Walsh, JJ.*) RATAN LAL *v.* HAMIDULLA KHAN. **19 A. L. J. 47 : 2 U. P.L.R. (A.) 403 : 60 I. C. 699 : L. R. 2 A. 5.**

——Ss. 115 and 102—*Jurisdiction—Excess of.*

Where it was open to the Judge to decide the question of title incidentally in so far as it was necessary for the purposes of giving relief to the plaintiffs, namely, their prayer for declaration of right to, and recovery of the price of fish but it was not within his jurisdiction at all to declare the plaintiff's title to the tank in dispute, *held*, in revision so much of the decree of the lower appellate Court must be expunged as declares the plaintiff's title to the tank in suit which was not within the Judge's jurisdiction to declare. (*Woodroffe and Ghose, JJ.*) ARADHAN MONDAL *v.* ABHOYA CHARAN. **A.I.R. 1923 Cal. 321.**

——S. 115—*Jurisdiction—Excess of—Execution sale—Deposit by person not entitled, allowed.*

Where the Court of execution allowed a reversioner to make a deposit he was not entitled to make, it exercised a jurisdiction not vested in it by law or was acting it with exercise of its jurisdiction illegally or with material irregularity within the meaning of S.115 of the Civil Procedure Code. (*Sanderson, C. J. and Chotzner, J.*) MOHENDRA NATH *v.* BAIDYA NATH TRIPATHI. **26 C. W. N. 167 : 70 I. C. 127 : A. I. R. 1922 Cal. 95.**

——S. 115—*Jurisdiction—Excess of—Appellate Court entertaining appeal in a non-appealable case—Revision lies.*

Where the appellate Court entertains an appeal from an order from which no appeal is allowed, its order is without jurisdiction and is open to revision. (*Mullick and Ross, JJ.*) RAGHUNANDAN PANDEY *v.* GAJRAJ MANDAL. **1925 P.H.C.C. 183 : A.I.R. 1925 Pat. 525**

——S. 115—*Jurisdiction— Excess of— Order without—Revision—Interference.*

Under S. 115, C. P. Code, it is competent to the High Court to act in revision *suo motu* as it is bound to set aside orders of lower Courts passed without jurisdiction. 4 M. 217 ; 32 C. 146 ; 28 A. 72 Foll. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD RAI *v.* MAHESH KANT. **3 P. L. T. 445 : 65 I. C. 122 : 1 P. 232 : A. I. R. 1922 Pat. 525.**

——S. 115—*Jurisdiction—Excess of—Want of, is a good ground for revision—Wrong decision not a ground for revision.*

On the mere ground that the decision was wrong, a High Court certainly will not interfere but where the lower Court had no jurisdiction to enquire into the question, HighCourt has power to interfere in revision. (*Carr, J.*) MAUNG TUN *v.* MAUNG PO SHOK.
1 R. 265 : 76 I. C. 504 : A. I. R. 1923 Rang. 199.

Jurisdiction—Failure to exercise.

—— — S. 115—Jurisdiction—Order dismissing suit after decree is without jurisdiction—C. P. Code, O. 17, R. 2. *See* under O. 17, R. 2, C. P. Code. (*Lord Phillimore.*) LACHMI NARAYAN MARWARY *v.* BALMAKUND MARWARY. **5 P. L. T. 623 : 81 I. C. 747 : 4 Pat. 61 : 51 I.A. 321 : L.R. 5 P.C. 171 : 20 L.W. 491 : 35 M. L. T. 143: 22 A. L. J. 990 : 26 Bom. L. R. 1129 : 40 C. L. J. 439: 29 C. W. N. 391: (1924) M.W.N. 707 : A. I. R. 1924 P. C 198 : 47 M. L. J. 441 (P. C.).**

——S. 115 (c)—*Jurisdiction—Failure to exercise—Erroneous decision of lower appellate Court as to jurisdiction of trial Court.*

The High Court has jurisdiction to interfere under Section 115 (*c*) when a lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance has or has not jurisdiction to entertain a suit. In any case the High Court can take up under section 115 (*b*) both orders of the Court below read together on the question whether the first Court has failed to exercise a jurisdiction vested in it. (*Campbell, J.*) DALIPA *v.* BARKET ALI. **76 I. C. 1010 : A. I. R. 1923 Lah. 412.**

——S. 115—*Jurisdiction—Failure to exercise—Plea of illegality.*

A Court is said to have failed to exercise a jurisdiction so vested where a Court fails to entertain a plea of illegality *suo motu*, i.e., that a certain contract is opposed to public policy, and even refuses to allow the defendant to raise it. (*Phillips, J.*) KANDASAMI GOUNDAN *v.* NARAYANASWAMI GOUNDAN,
45 M. L. J. 551 : (1923) M W.N. 566 : 76 I. C. 306 : 19 L. W. 617 : A.I.R. 1924 Mad. 159.

——S. 115—Jurisdiction—Declining of—Dismissal of execution petition is not sustainable. (*Oldfield and Venkatasubba Rao, JJ.*) MUTHUKARUPPA CHETTY *v.* PAIYA KAVUNDAN. **(1923) M.W.N. 406: 73 I.C. 956 : 18 L.W. 17 : A.I.R. 1924 Mad. 32 : 45 M.L.J. 210.**

——S. 115—*Jurisdiction—Failure to exercise—Limitation—Decision on.*

Where by reason of an erroneous decision on a question of limitation, a Court does not entertain a proceeding, it is a failure to exercise a jurisdiction vested in the Civil Court and the High Court can entertain a revision under S. 115, C. P. Code. 44 M. 554 Foll. (*Spencer and Venkatasubba Rao, JJ.*) THE BRITISH INDIA STEAM NAVIGATION CO. *v.* SHARAFALLY. **44 M.L.J 100 : 46 Mad. 938 : 17 L.W. 705 : 70 I. C 888 : A. I. R. 1923 Mad. 435.**

——S. 115 and O. 21, R. 89 (1)—*Jurisdiction—Failure to exercise—Applicant entitled to deposit—Refusal to entertain application on ground of no* locus standi *amounts to failure to exercise jurisdiction—C. P. Code, O. 21, R. 89 (1).*

Where a Court erroneously refuses to entertain an application under O.21, Rule 89 on the ground that the petitioner has no *locus standi*, it is a case where the Court fails to exercise a jurisdiction vested in it by law within the meaning of section 115 and the High Court will entertain a revision in such a case. 40 M. L. J. 497 (F.B.) Foll. But where the applicant is found as a fact to have no *locus standi*, there is no failure to exercise a jurisdiction vested in the Courts by law

C. P. CODE (V OF 1908), S. 115—Jurisdiction—Failure to exercise.

and the revision will fail on its merits. (*Kinkhede, A. J. C.*) ONKAR *v.* DHAN SINGH. **21 N.L.R. 102 : 90 I. C. 963 : A. I. R. 1926 Nag. 10 (2).**

——— **S. 115**—*Jurisdiction—Failure to exercise—Omission to decree claim admitted.*

Where the lower Court dismissed the plaintiff's suit for rent without considering whether he was entitled to a decree for the whole or a portion of the claim on the admission of the defendant, there is a failure to exercise jurisdiction with which the High Court will interfere in revision. (*Miller, C. J. and Mullick, J.*) RAJGIRI SINGH *v.* JADUNATH RAY.
1922 P. H. C. C. 355 : 4 P. L. T. 39 : A. I. R. 1923 Pat. 41.

Jurisdiction—Irregular exercise.

——— **S. 115 and O. 41, R. 5**—*Jurisdiction—Irregular exercise—Application to stay execution pending an appeal from the decree—Court exercising jurisdiction irregularly—Revision lies.*

Where the petitioner applied for stay of execution of decree from which an appeal was pending and the application was dismissed by the District Judge as being made too late:

Held (*Graham, J. dissenting*) the District Judge, though he had jurisdiction over the subject-matter, exercised the jurisdiction irregularly and High Court had jurisdiction to interfere in revision with the order of the District Judge and set aside his order.

Per *Graham, J.*—The power confirmed by O. 41, R. 5 of the C. P. Code upon the appellate Court is discretionary, though of course the discretion has to be exercised judicially. The rule contemplates that the application for stay of execution should be made as soon as possible after an appeal has been filed. (*Suhrawardy and Graham, JJ.*) BIRESH CHANDRA DAS *v.* HARI DASI BOSE. **82 I. C. 435 : A. I. R. 1925 Cal. 54.**

——— **S. 115**—*Jurisdiction—Irregular exercise—Appellate Court's decision.*

Where an appellate judgment erroneously decided that the Court of the first instance had jurisdiction to hear the suit, *held*, the High Court could interfere and could grant revision. (*Wilberforce, J.*) DURGA PARSHAD MUTSADDI LAL *v.* RULIA MAL.
4 L. L. J. 176 : 65 I. C. 282 : 29 P. L. R. 1922 : A. I. R. 1922 Lah. 100.

——— **S. 115**—*Jurisdiction—Irregular exercise—Judge deciding a case on his private opinion—Order is without jurisdiction.*

Judicial matters cannot be decided on the private opinions of the Judge nor can that opinion be substituted for decision on evidence, even though the taking of that evidence may involve much time and trouble. A decision based on such private opinion is without jurisdiction. (*Wallace, J.*) SRIRANGA NARAYANA JEER *v.* AHOBILA JEER.
22 L. W. 837 : A. I. R. 1926 Mad. 166.

——— **S. 115**—*Jurisdiction—Irregular exercise—Gross mistakes may amount to irregular exercise of jurisdiction.*

Where the mistakes committed by the lower Court are so varied and so numerous as almost to amount to material irregularity in the exercise of jurisdiction, revision may lie though there may be no excess of jurisdiction. (*Srinivasa Aiyangar, J.*) T. C. XAVIER *v.* E. C. JOSEPH. **48 M. L. J. 268 : 87 I. C. 216 : 21 L. W. 654 : A. I. R. 1925 Mad. 614.**

——— **S. 115**—*Jurisdiction—Irregular exercise—Lower Court taking wrong view of law.*

C. P. CODE (V OF 1908), S. 115—Jurisdiction—Order under.

Where the Subordinate Court assumed jurisdiction to enquire into a petition on a wrong view of the law that certain maxim *Actus curiae nominem gravabit* applied, where in fact it did not, an application in revision is maintainable. (*Krishnan, J.*) KRISHNAJI REDDIAR *v* MUTHUVEERA. **(1923) M. W. N. 199 : 18 L.W. 299 : A.I.R. 1923 Mad. 490 : 44 M. L. J. 344.**

——— **S. 115**—*Jurisdiction—Irregular exercise—Erroneous decision on point of law—Revision.*

Where a Court assumes jurisdiction to pass an order for an erroneous view of the law, in a matter where it has in fact no jurisdiction, it is a case for interference of the High Court under S. 115, C. P. Code. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* MUTHU VELAPPA GOUNDAN.
44 M. L. J. 1 : 46 Mad. 536 : (1923) M. W. N. 133 : 16 L. W. 848 : 71 I. C. 1039 : A. I. R. 1923 Mad. 192.

——— **S. 115 & O.33, R. 5**—*Jurisdiction—Irregular exercise—Court can consider matters outside the plaint and no revision lies from an order refusing application.*

In cases under O. 33, R. 5, it is the duty of the Court not merely to read through the plaint but to make a very extensive inquiry as to the facts on which the plaint is based. And if the Court after proper exercise of jurisdiction has come to a conclusion and rejected the application no revision lies, although the conclusion may be wrong. (*Neave and Kendall, A. J. Cs.*) MT. ISMAIL *v.* KARAM ALI. **11 O. L. J. 568 : 79 I. C. 922 : A. I. R. 1925 Oudh 74.**

——— **S. 115**—*Jurisdiction—Irregular exercise—Court can construe its own order—No revision lies if no irregularity occurs in exercising this power.*

A Court has jurisdiction to construe its own order and the High Court would not interfere if there is no irregularity in the exercise of that jurisdiction. (*Dawson Miller, C. J. and Mullick, J.*) TULAMAN BAID *v.* PRAYAG SAHU. **1925 P. H. C. C. 4 : 3 P. L. R. 100 : 6 P. L T. 481 : A. I R. 1925 Pat. 318.**

——— **S 115 (c)**—*Jurisdiction—Irregular exercise.*

Applying O. 25, R. 1 to a suit which is not for payment of money is an illegal exercise of jurisdiction and such an order is revisable. (*Carr, J.*) AMINA BIBI *v.* MOIDEEN KAKA. **3 Rang. 211 : A. I. R. 1925 Rang. 300.**

Jurisdiction—Local Acts.

——— **S. 115**—*Jurisdiction—Local Acts — Lower Court referring a case to Collector under local Act—Revision lies as to correct exercise of jurisdiction.*

The lower Court found that the mortgagor was a member of an agricultural tribe and referred a mortgage suit to the Collector under sub-S. 3 of S. 9 of the Bundelkhand Land Alienation Act with a view to the Collector exercising powers under sub-Ss. 1 and 2 of the section, *held*, that a revision lay to the High Court on the question whether the lower Court had exercised its jurisdiction correctly in refusing to pass a decree in favour of the plaintiff and referring the case to the Collector. (*Mukerji and Dalal, JJ.*) JASWANT RAO *v.* KASHI NATH RAO. **L. R 6 A. (Civ.) 14 : 86 I. C. 208 : A. I. R. 1925 All. 253 (1).**

——— **S. 115**—*Jurisdiction — Local Act—Failure to exercise—Interference.*

Failure to exercise jurisdiction vested by the Calcutta Rent Act can be interfered with under S. 115, C. P. Code. (*Greaves and Ghose, JJ.*) BASANTA CHARAN *v.* RAJANI MOHAN. **39 C. L. J. 85 : 26 C. W. N. 711 : 49 Cal. 928 : A. I. R. 1922 Cal. 514.**

Jurisdiction—Order under.

——— **S. 115**—*Jurisdiction—Order under O. 33*

C. P. CODE (V OF 1908), S. 115—Jurisdiction—Order under.

R. 6—Wrong exercise of—Evidence of title.

The Court is not entitled to take evidence from the parties upon the question of the plaintiff's title before coming to the conclusion whether it would grant or refuse the application under Rules 5 and 6 of O. 33. If it takes evidence on the question of title it exercises a jurisdiction not vested in it by law within S. 115. (*Banerjee and Gokul Prasad, JJ.*) MT. SHAURAN BIBI *v.* ABDUS SAMAD. **45 All. 548 : 73 I. C. 538 : 21 A.L.J. 441 : L. R. 4 A. 252 : A. I. R. 1923 All. 577.**

——**S. 115**—*Jurisdiction—Order under—S. 151 Refusal to use inherent powers vested under S. 151 is a refusal to exercise jurisdiction.*

An order dismissing an application under Ss. 151 and 152 on the ground that such application did not lie amounts to a refusal to exercise jurisdiction within S. 115. (*Suhrawardy and Chotzner, JJ.*) KABIR-UD-DIN MONDOL *v.* ENTAJ MONDOL. **79 I. C. 586 : A. I. R. 1925 Cal. 420.**

——**S. 115**—*Jurisdiction—Order under—Absence of.*

Proceedings under O. 41, R. 23 instead of under O. 41, R. 25 does not create a point of jurisdiction as to justify interference. (*Newbould, J.*) ATUL CHANDRA *v.* KOBAD ALI. **64 I. C 436 (Cal.)**

——**S. 115**—*Jurisdiction — Order under—Returning plaint for want of jurisdiction—Order upheld in appeal—Revision ordinarily does not lie.*

Interference in revision is ordinarily inadvisable from an appellate order upholding an order of the trial Court returning plaint for want of jurisdiction and should only be exercised in exceptional cases to remedy an injustice. (77 P. R 1909, Ref.) (*Scott-Smith, J.*) FIRM JAGANNATH DIWAN CHAND *v* FIRM JAGAL NATH MOTI LAL. **A. I R. 1924 Lah. 349.**

——**S. 115**—*Jurisdiction—Order of remand—Suit dismissed for want of—Remand by first appellate Court—Revision.*

Where a suit was dismissed by the Court holding that it had no jurisdiction and the lower appellate court remanded the case to the trial court for taking action under O. 7, R. 10, *held*, a revision lay from the order of remand. (*Broadway, J.*) DWARKA DAS *v.* RAHIM BAKHSH. **73 I.C 755: A.I.R. 1923 Lah. 524.**

——**Ss. 115 and 10**—*Jurisdiction—Order under S. 10—Stay of suit Refusal by lower Court.*

Where a Subordinate Court proceeds with the trial of a suit in contravention of S. 10, C.P. Code, it usurps a jurisdiction not vested in it by law and its order refusing to stay the suit, though interlocutory, is open to revision by the High Court 42 A. 409 Dist. (*Phillips, J.*) RAMACHANDRAM PILLAI *v.* NEELAMBAL ACHI. **16 L. W. 607 : 70 I. C. 5 : A. I. R. 1923 Mad. 88 (1).**

——**Ss. 115, 151, O. 6, R 16**—*Jurisdiction—Order under S. 151—Suit for recovery of occupancy and under-proprietary rights — Under-proprietary rights decreed and claim for occupancy rights to be struck out—Order whether can fall under inherent powers.*

Where a party claimed possession of certain under-proprietary and occupancy interests in different plots of land and the Court holding that the suit for recovery of occupancy land did not lie in the Civil Court, decreed the claim as regards under-proprietary rights and ordered the claim for possession of occupancy lands to be struck out from the plaint. *Held*, (1) that the order was without jurisdiction and the provisions of O. 6, R. 16, C.P. Code, did not apply to the cases as the particular pleading referred to above was not unnecessary so as to be deleted ; (2) that the order did not fall under the provisions of S. 151, C.P. Code ; (3) that the order striking off part of the claim amounted to an order in a case and was open to revision under S. 115, C. P. Code. (*Dalal, J.C.*) MUSSAMMAT MALUKA *v.* PATESHWAR SINGH. **1 O. W. N. 754 : 10 O. & A. L. R. 1062 : A. I. R. 1925 Oudh 604.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction—Refusal of review.

——**S. 115**—*Jurisdiction—Order under O. 23, R. 1—Allowing suit to be withdrawn—Conditions of O. 23, R. 1 not satisfied—Effect.*

If an order under O. 23, R. 1 is passed without the conditions required by the section being complied with, the order is without jurisdiction and can be set aside in revision. The case is different from interfering with the exercise of a judicial discretion. (*Daniels, J. C.*) DAULA *v.* DWARKA PAL. **78 I. C. 121 : A. I. R. 1925 Oudh 61.**

——**S. 115**—*Jurisdiction—Order granting—Adjournment on payment of costs.*

A Court granting an adjournment on condition costs are paid, and on failure to pay the same deciding the suit *ex-parte*, does not exceed its jurisdiction and the order is not open to revision. (*Das and Macpherson, JJ.*) CHOTU MIAN *v.* PALTO GOPE. **1 Pat. L. R. 270 : A. I. R. 1924 Pat. 529.**

——**S. 115**—*Jurisdiction — Order refusing to accept deposit.*

It is now the settled practice of the Patna High Court to treat a refusal to accept deposit tendered for the purpose of setting aside a sale as a refusal to exercise jurisdiction. (*Mullick and Macpherson, JJ.*) AULAD ALI *v.* ABDUL HAMID. **2 Pat. 715 : 74 I. C. 102 : A. I. R. 1923 Pat 490.**

——**S. 115**—*Jurisdiction—Order under O. 21, R. 66.*

When a date is appointed for the hearing of parties in order to ascertain valuation on sale proclamation, the Court acts without jurisdiction in fixing valuation at an earlier date without hearing the parties. (*Coutts and Ross, JJ.*) SULARAJ BAHADUR *v.* DEVI BUKHSH. **3 P. L T. 342 : 65 I. C. 360 : A. I. R. 1923 Pat. 102 (1).**

——**S. 115** — *Jurisdiction— Order returning—Plaint by both Munsif and by Small Cause Courts.*

Where the Small Cause Judge returned a plaint returned by the Munsif to be presented before the former and the Munsif adhered to his previous order, *held*, High Court is entitled to make such an order as would enable the plaintiff to have his action tried. (*Ross, J.*) RAZAUR RAHAMAN *v.* ATHAR HUSSAIN. **A. I. R. 1922 Pat. 368.**

——**S. 115**—*Jurisdiction—Order correcting decree—Inclusion of mortgage item—Interference.*

Where through omission one of the mortgage items was omitted in the plaint and a decree in a mortgage suit and the Court corrects the mistake under S. 152, C P. Code, there is no ground for interference in revision. (*Duckworth, J.*) MAUNG CHIT HLAING *v.* N. A. R. M. CHETTY. **74 I. C. 1020 : A. I. R. 1924 Rang. 104.**

Jurisdiction—Refusal of review.

——**S. 115**— *Jurisdiction — Refusal of review—Application.*

An appeal filed subsequent to the presenting of an application for review does not bar the jurisdiction of the Trial Court to entertain the application for review. The refusal by a Court having jurisdiction to entertain an application for review amounts to a refusal to exercise jurisdiction and the order is open to interference by High Court in revision. (*Piggott and Walsh, JJ.*) RAM PRASAD *v.* ASA RAM. **43 All. 288 : 61 I. C. 334 : 19 A. L. J. 24.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction of review.

——**S. 115**—*Jurisdiction — Refusal of review to grant—Revision.*

Where the Judge of the Court below refuses to grant a review finding that the additional evidence sought to be adduced could have been adduced at the original hearing, the High Court will not interfere in revision. (*Macleod, C. J. and Shah, J.*) LAKSHMAN MARUTI *v.* MARUTI LAXMAN. **26 Bom. L. R. 284 : A. I. R. 1924 Bom. 344.**

Jurisdiction—Refusal to exercise.

——**S. 115**—*Jurisdiction — Refusal to exercise Appellate Court concurring—Revision lies against orders of both Courts.*

Per Mukerji, J.—Where there is a refusal to exercise a jurisdiction which was undoubtedly possessed and there is an appeal to the District Judge who comes to the same conclusion as the Court below, an application in revision would lie against the orders of both the Courts. It would be different if the District Judge came to a different conclusion from that of the first Court. (*Sulaiman and Mukerjee, JJ.*) GANESHI LAL *v.* DEBI DAS. **47 All. 140 : L.R. 6 A. (Civ.) 79 : 85 I. C. 470 : A. I. R. 1925 All. 267.**

——**S. 115**—*Jurisdiction—Refusal to exercise—Revision lies where on wrong view of law jurisdiction has been refused.*

Where the Courts below upon an erroneous interpretation of the provisions of the Court-Fees Act and also Civil Courts Jurisdiction Act, came to a wrong conclusion that the suit was not triable by the Subordinate Judge ·

Held, that this is a case in which the High Court should interfere though the lower Court's order may be an interlocutory one. (*Greaves and Chakravarti, JJ.*) RAJANI KANT BAG *v.* RAJA BALA DASI. **52 Cal 128 : 29 C. W. N. 76 : A. I. R. 1925 Cal. 320.**

——**S. 115**—*Jurisdiction—Refusal to exercise—Appellate Court erroneously rejecting the suit as not maintainable—Revision lies.*

S. 115, C. P. Code, covers the case of an appellate Court rejecting a suit on the erroneous ground of its not being maintainable. The Court's act amounts to declining to give a decision on the merits. This means it refuses to exercise a jurisdiction vested in it by law, a refusal which can be rectified in revision (*Martineau, J.*) IMAM DIN *v.* DITTU. **78 I. C. 445 : A. I. R. 1925 Lah. 174 (1).**

——**S. 115**—*Jurisdiction—Refusal to exercise—High Court's enquiry as to the jurisdiction is not confined to the lower Appellate Court only, but extends even to the jurisdiction of the trial Court.*

The High Court is not confined to an enquiry as to the jurisdiction exercised by the lower appellate Court alone. But it has got power to enquire whether the Court of first instance has failed to exercise its jurisdiction or not. (*Dalal, J. C.*) ABDULLAH *v.* MAHAMMAD NAZIR. **80 I. C. 694 : A. I. R. 1925 Oudh 163.**

——**S. 115**—*Jurisdiction—Refusal to exercise.*

Refusal to receive evidence in support of application for restoration of a suit dismissed under O. 17, R. 2, on the understanding that it was dismissed under R. 3, is a refusal to exercise jurisdiction within S. 115. (*Mullick and Macpherson, JJ.*) MAHOMED MAUDOOD *v.* RAMESHWAR SINGH. **1 P. L. R 281 : A. I. R. 1923 Pat. 530.**

Jurisdiction—Revenue Court.

——**S. 115**—*Jurisdiction—Revenue Court—District Judge entertaining appeal from Revenue Court—No revision.*

C. P. CODE (V OF 1908), S. 115—Leave to sue.

Where District Judge entertains an appeal from the order of a Revenue Court in a case in which no appeal is entertainable by him, no revision lies to High Court from the order of District Judge. SAQIB HUSAIN *v.* NAND KISHORE. **L. R. 2 A. 166 (Rev.).**

Jurisdiction—Small Cause Court.

——**S. 115**—*Jurisdiction—Small Cause Court—Suit tried wrongly by Small Cause Court—No objection by parties—Interference.*

Where a Court of Small Causes disposes of a suit on the merits though it has no jurisdiction to entertain the suit, but neither of the parties objected to it or brought it to the notice of the Court, the High Court will not interfere in revision. (*Boys, J.*) RAGHURAJ SINGH *v.* MT. SHAM DEI. **L. R. 5 A. (Civ.) 685 : 81 I. C. 870 (1) : A. I. R. 1925 All. 51.**

——**S. 115**—*Jurisdiction—Small Cause Court—Suit--Small Cause nature—Appeal--Decision confirmed.*

Where a suit to recover arrears of *Kattubadi* was of a small cause nature and was tried by the Munsiff on the original side and the decision was confirmed in appeal, the High Court refused to interfere in revision and to remand the suit for re-trial on the Small Cause side. (*Spencer and Ramesam, JJ.*) B. SUBBAYA *v.* RAJA OF VENKATAGIRI. **42 M. L. J. 118 : A. I. R. 1922 Mad. 352.**

——**S. 115**—*Jurisdiction—Small Cause Court—Objection to—Trial of Small Cause suit as a regular suit without objection.*

High Court would not interfere in revision, in a suit cognizable by a Small Cause Court, but tried by a District Munsiff and appeal suit heard by the District Court without any objection. 21 C. 249 : 25 A. 135, Relied on. 33 M. 323 ; 25 B. 417, Dist. (*Baker, J. C.*) KAM RUDDIN *v.* MT. INDRANI. **19 N. L. R. 179: 75 I. C. 769 : A. I. R. 1924 Nag. 17.**

Leave to sue.

——**S. 115**—*Leave to sue—Pauperism—Failure to consider—Question of title.*

In an application for leave to sue *in forma pauperis* a Court acts without jurisdiction in going into the evidence elaborately and trying the question of title in order to see if he has a good cause of action, so also failure to take evidence on the question of pauperism amounts to not exercising a jurisdiction vested in it by law and the order can be interfered with in revision. (*Banerjee and Gokul Prasad, JJ.*) SHAURAN BIBI *v.* ABDUR SAMAD. **45 A. 548 : 21 A. L. J. 441 : L. R. 4 A. 252 : 73 I. C. 538 : A.I R. 1923 All. 577.**

——**S. 115**—*Leave to sue—Pauper application—Order granting leave.*

No application in revision lies against an order admitting an application for leave to sue *in forma pauperis.* (*Piggott and Walsh, JJ.*) KANDHAIA SINGH *v.* MT. KUNDAN. **20 A. L. J. 471 : 67 I. C. 641 : A. I. R. 1922 All. 208 (1).**

——**S. 115 and O. 33, R. 5**—*Leave to sue* in forma pauperis—*Rejection of application—Revision*

Per *Walsh, J.* (*Piggott, J. contra*) :—An order rejecting an application for leave to sue *in forma pauperis* is not open to revision. 19 A L. J. 558, Rel. (*Piggott and Walsh, JJ.*) MAHADEO SAHAI *v.* THE SECRETARY OF STATE FOR INDIA. **44 All. 248 : 20 A. L. J. 55 : 65 I. C. 255 : L. R. 3 A. 54 : A. I. R. 1922 All. 1 (1).**

——**S. 115**—*Leave to sue* in forma pauperis—*Refusal—Interference in revision.*

Where the Court below refuses to grant leave to sue *in forma pauperis*, it is open to the High Court to

C. P. CODE (V OF 1908), S. 115—Leave to sue.

interfere in revision. The order on an application for permission to sue *in forma pauperis* is a case decided within the meaning of S. 115, C. P. Code, 12 O.C. 381 Followed. 43 A. 564 : 44 A. 248 Distinguished. (*Ashworth, J. C.*) SHEO NARAYAN LAL *v* MT. MUNAQQA. **9 O. L. J. 610 : 74 I. C. 344 : A. I. R. 1923 Oudh 118.**

——S. 115—*Leave to sue* in forma pauperis—*Examination of applicant—Limitation.*

The Court could enter into the merits of the case on an application for leave to sue as a pauper under O. 33, R. 4, C. P. Code, and for that purpose the Court could examine the plaintiff seeking leave. But the Court cannot take other evidence and examine other witnesses for deciding the question of limitation or any other question arising in the case other than the applicant's pauperism. 19 M. 197 Not Foll. 46 C. 651 Foll. (*Jwala Prasad and Adami, JJ.*) SHAIK MAHOMED NASIRULLAH *v.* SHAIK MAHOMED SHUKURULLAH. **3 Pat 275 : 6 P. L. T. 209 : 1924 P. H. C. C. 134 : A. I. R. 1925 Pat. 30**

Liberal Interpretation.

——S. 115—*Liberal construction—Powers of—High Court.*

The powers of the High Court under S. 115, C. P. Code, should be liberally utilized, especially when the applicant has no remedy. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) NARAINDAS *v.* JASSOMAL. **65 I. C. 37 : 15 S. L. R. 135.**

Limitation.

——S. 115—*Limitation—Time for filing revision is 45 days in C. P. and Berar.*

The period allowed by the Nagpur Judicial Commissioner's Court for applications for revision is only 45 days. (*Prideaux, A. J. C.*) UDAIRAM *v.* THAKUR PRASAD. **89 I. C. 933 : A. I R. 1926 Nag 65.**

Material irregularity.

——S. 115—*Material irregularity—Acting on unproved or inadmissible evidence or erroneously deciding (after consideration) on admissibility is not revisable—But acting on evidence without considering admissibility is illegal and is revisable.*

Ordinarily, when a Court acts on evidence which has not been proved or which is inadmissible in evidence, it does not act without jurisdiction. Furthermore, if a Court considers the question of the admissibility of a document and decides either that it is admissible or not admissible, then, even though the decision may be wrong, the Court does not act with material irregularity or illegality. It merely commits an error of law. But, on the other hand, if the Court does not apply its mind to the question of the admissibility at all and acts on a document which has not been proved or which is not admissible without considering whether or not it is admissible, it acts with material irregularity or illegality in exercising its jurisdiction (*Sulaiman, J.*) HABIB BUX *v.* SAMUEL FITZ AND CO. **23 A. L. J. 961 : L. R. 6 A. (Civ.) 553 : 88 I. C. 22 : A. I. R. 1926 All. 161 (2).**

——S 115—*Material irregularity—Reversing order of reference.*

If the Court reverses the order of reference after the submission of award and sets aside the award on the ground of some supposed defect in the order, it amounts to material irregularity and the High Court will interfere. (*Piggott and Walsh, JJ.*) KANHAIYALAL *v.* JAGANNATH PRASAD HANUMAN PRASAD. **43 All. 305 : 60 I. C. 857 : 19 A. L. J. 33.**

——S. 115—*Material irregularity—Order on appeal—Application rejected.*

Where on appeal against an order sanctioning pro-

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secution of the appellant, an order 'The application is rejected' is made, the order amounts to a refusal to consider the question and thus is a material irregularity within S. 115. (*Gokul Prasad, J.*) ABDUL AZIZ *v.* BOHRU TARA CHAND. **22 Cr. L. J. 304 : 60 I. C. 800 : 19 A. L. J. 291.**

——S. 115—*Material irregularity—Refusal of hearing—Interference.*

Whenever the Court below has refused to hear a party on the merits without just grounds the High Court is entitled to interfere in revision. (*Macleod, C. J. and Kanga, J.*) BACHUBAI JHIRAD *v.* IBRAHIM ISAK. **47 B. 11 : 24 Bom. L. R. 744 : 69 I. C. 169 : A. I. R. 1922 Bom. 207.**

——S. 115—*Material irregularity—Point of law not raised in the lower Court.*

If a party does not raise a point of law in the lower Court, the lower Court cannot be said to have acted with material irregularity if it has not considered that point. The High Court cannot entertain a point of law not raised in the Courts below. (*Macleod, C. J. and Crump, J.*) HARIDAS CHEKUBAI *v.* RATANSAY RAGHAVJI. **46 Bom. 56 : 23 Bom. L. R. 802 : 62 I. C. 952 : A. I. R. 1922 Bom. 149 (2).**

——S. 115—*Material irregularity—Evidence not considered.*

Where the Court rejected the application to set aside a sale in execution on the ground of fraudulent suppression of process and other irregularities, merely on the deposition of the applicant and without considering all other evidence in respect of the grounds, the Court was held to have acted with material irregularity. (*Teunon and Asutosh Chowdhury, JJ.*) BHUSHAN MANI DASI *v.* PRAFULLA KRISTA DEB. **60 I. C. 801 : 48 Cal. 119.**

——S. 115 — *Material irregularity — Finding based on no evidence—Interference is justified.*

A finding based upon no evidence is not a good finding in law and can be interfered with on the revision side by the High Court. (*Moti Sagar, J.*) FIRM INDRAJ MAL JUGAL KISHORE *v.* LIJE RAM. **6 Lah. L. J. 593 : A.I.R. 1925 Lah. 278.**

——S. 115 — *Material irregularity — Setting aside* ex parte *decree—Interference.*

In an application to set aside an *ex parte* decree where the Court below fails to determine an essential point of limitation, it acts with material irregularity to justify interference in revision. (*Campbell, J.*) THE FIRM OF MAGHI MAL KHARAITI RAM *v.* THE FIRM OF GOPI RAM RAM CHAND. **A.I.R. 1924 Lah. 603.**

——S. 115— *Material irregularity—Dismissal for default—Revision.*

Where on an application to set aside a dismissal for default, the lower Court disbelieved the plaintiff's story and dismissed the application, there is no scope for revision, as the lower Court could not be said to have acted illegally or with material irregularity. (*Le Rossignol, J.*) FARIDA *v.* KHAIRA. **3 Lah. 79 : A. I. R. 1922 Lah. 290 (1).**

——S. 115—*Material irregularity—Petition under S. 44 of Act IX of 1919.*

A wrong throwing of burden of proof constitutes a material irregularity which justifies interference in revision. 102 P. R. 1912, Disapproved. (*Shadi Lal, C. J.*) JANDA RAM *v.* RENAHAH. **3 Lah. L. J. 417.**

——S. 115—*Material irregularity—Appellate judgment vitiated by irregularity—Surmises and conjectures.*

Where the judgment of the lower appellate Court is vitiated by inaccuracies and misunderstandings and it is entirely based upon them, the High Court would set it

C. P. CODE (V OF 1908), S. 115—Material Irregularity.

aside in revision, though it is reluctant to interfere on revision in arbitration cases. (*Wilberforce, J.*) THE FIRM OF KESAR MAL SHANKAR DAS *v.* THE FIRM OF HUKAM CHAND BADRI NATH. **2 Lah. L.J. 681 : 67 I. C. 260 : 69 P. L. R. 1922.**

——**S. 115**—*Material irregularity—Omission to consider a question of estoppel.*

Omission by the Appellate Court, to consider a question of estoppel amounts to a material irregularity and the High Court will interfere in revision. (*Martineau, J.*) TEG BHAN *v.* WALI DAD. **60 I. C. 716: 3 Lah. L. J. 181.**

——**S. 115**— *Material irregularity — Election Court deciding as a question of fact if the returning officer's decision regarding validity of vote was correct —No irregularity is caused justifying interference in revision.*

Where the voting papers of two votes besides the cross mark against the name of the candidate showed lines scoring out the names of the other candidates, and the Returning Officer did not take these votes into consideration in the candidates' favour apparently because of these lines, but the Election Court held them to be valid in spite of these lines. *Held* that the Election Court had jurisdiction to go behind the decision of the Returning Officer in a matter of this kind and that there was neither lack of jurisdiction nor irregular exercise of jurisdiction, which would give the High Court authority to interfere under S. 115. (*Wallace, J.*) MAMUNDI KONAR *v.* SHAMSUDDIN SAHIB. **49 M. L. J. 381: 22 L. W. 507 : A. I. R. 1925 Mad. 1207.**

——**S. 115**—*Material irregularity.*

Reversing judgment of a lower Court on a new question not raised by the parties and for which there were not sufficient materials for the Court, is acting with material irregularity. (*Madhavan Nair, J.*) NARANO MAHAPATRO *v.* SRI RAMACHANDRA MARDARAJA DEO GARU. **80 I. C. 724: A. I. R. 1925 Mad. 357.**

——**S. 115**—*Material irregularity—Order in excess of prayer.*

Where the Court below passed an order granting reliefs not prayed for, without reference to any provision of law the High Court will interfere in revision. (*Wallace, J.*) MINNEKANTI KOTAYYA *v.* T. KRISHNAYYA. **(1924) M. W. N. 547 : 20 L. W. 488: A. I. R. 1924 Mad. 911 (1).**

——**S. 115, O. 32, Rr. 2 and 3**—*Material irregularity—Minor applying to be impleaded as legal representative—Application without next friend —Dismissal —Impleading legal representative without notice to another claimant—Rival claims not adjudicated on—Orders if revisable.*

Where on the death of the plaintiff in a suit, his minor widow applied to be brought on record as legal representative without being represented by a next friend and the court rejected the application on the analogy of O. 32, R. 2, C. P. Code it cannot be held to have acted irregularly in the exercise of its jurisdiction. On the death of a party, two persons applied to be impleaded as legal representatives. The court dismissed the application of one on the ground she was a minor and was not represented by a next friend and allowed the other petition without determining the question of rival claims on the merits and without notice to the minor claimant. *Held* the mere fact of being a minor is no ground for not considering the claim of the minor and the order is revisable under S. 115, there being no right of appeal against the same. (*Jackson, J.*) RUCKMANI AMMAL *v.* VEERASAMI AIYANGAR.

C. P. CODE (V OF 1908), S. 115—Material Irregularity.

47 M. L. J. 370 : 35 M. L. T. 82 : (1924) M. W. N. 763 : 80 I. C. 942 : A. I. R. 1924 Mad. 813.

——**Ss. 115 and 152, O. 20, R. 3**—*Material irregularity—Judgment dictated in open Court—Transcript—Whether can be revised— Irregularity—Revision.*

A judge who has been empowered to pronounce his judgment by dictation to a shorthand writer in open Court should sign the transcript of the judgment so pronounced after such revision as is necessary but such revision cannot be of the effective part of the judgment and must be one relating to clerical or arithmetical mistakes arising from any accidental slips or omissions. The correction of the shorthand transcript so as to entirely change the effect of the judgment amounts to a material irregularity to the prejudice to the party affected by it and even though it can be remedied by suit under O. 21, R. 63, the High Court will interfere in revision against such judgments. (*Oldfield, J.*) HARIKRISHNA PILLAI *v.* ARUR PANDITHAR. **(1923) M. W. N. 354: 72 I. C. 688: 18 L. W. 105: A. I. R. 1923 Mad. 663.**

——**S. 115**—*Material irregularity—Wrong view as to burden of proof.*

The defendants in response to the plaintiff's petition for discovery produced certain accounts and at a later date produced further accounts. Those accounts were before the Court and the suit being for an account of the profits of properties which had been in the possession of the defendants and their father, they would have been most material in arriving at the amount, to which the plaintiffs were entitled. The plaintiff having inspected the accounts, brought to the notice of the lower Court that they did not admit their genuineness or completeness. The case standing thus the lower Court held that as the accounts have been inspected by the plaintiffs, the defendant's vakil was entitled to insist on their being exhibited in spite of the objection from the other side that they were not genuine, and ought not to be exhibited without proof. *Held* the burden of proof was on the defendants and the Court committed a material irregularity, which should be set aside. (*Oldfield and Venkatasubba Rao, JJ.*) RAJAGOPALA IYENGAR *v.* RAMANUJA IYENGAR. **(1923) M. W. N. 292 : 18 L. W. 165 : A. I. R. 1923 Mad. 607.**

——**S. 115**—*Material irregularity— Revision—Principle regarding.*

The general principle applicable in case of revision under S. 115, C.P.Code, is that when a court has taken up a point of fact or law for decision and has decided that point wrongly, it has acted with full jurisdiction regularly and legally and no revision lies unless that decision itself affects the court's own jurisdiction. But when having jurisdiction, the court has failed or refused to take up the point for decision it has exercised its jurisdiction irregularly and the more the failure or refusal affects the exercise of its jurisdiction the greater the irregularity will be. A Subordinate Judge when dealing with an election concern under the Madras Municipal election rules set aside an election merely on account of non-compliance with rules without deciding whether such non-compliance had materially affected the election *Held*, that he had acted with material irregularity and the High Court had power to interfere in revision. (*Wallace, J.*) A. K. G. AHMAD THAMBI MARICAIR *v.* V. V. S. BABASA MARACAYAR. **16 L. W. 898 : (1922) M. W. N. 813 : 72 I. C. 902 : 46 Mad. 123 : A. I. R. 1923 Mad. 254 : 44 M. L. J. 69.**

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———S. 115 and O. 9, R. 13—*Material irregularity—Dismissal for default—Setting aside—Improper refusal—Revision.*

Where a court dismissed an application to set aside an order of dismissal of a suit for default without considering the existence of sufficient cause for non-appearance of the plaintiff the order is open to revision under S. 115, C. P. Code. (*Krishnan, J.*) KOWTHA SURYANARAYANA GARU *v.* YARUDALA VENKAYYA. **16 L. W. 837 : 70 I. C. 38 : (1922) M. W. N. 822 : A. I. R. 1923 Mad. 177.**

———S. 115—*Material irregularity—Failure to add receiver as party to suit or execution proceedings.*

A receiver in a partition suit is entitled to be added as a party in execution proceedings in a mortgage suit concerning the properties in his possession and in refusing to add him as a party the court acts with material irregularity within the meaning of S. 115, C. P. Code. (*Devadoss, J.*) FRASER *v.* KRISHNASWAMI IYER. **43 M. L. J. 211: 47 M. 47: (1922) M.W.N. 745: 16 L. W. 322 : 71 I. C. 293 : 31 M. L. T. 290 : A. I. R. 1923 Mad. 144 (2).**

———S. 115 (c)—*Material irregularity—Refusal to frame issue—Court fee—Valuation—Revision.*

Where the defendant in his written statement objected that the suit was grossly undervalued but the court below instead of raising an issue thereon merely recorded the objection. *Held*, that the court below acted with material irregularity in refusing to raise an issue and decide it. (*Devadoss, J.*) VENKATACHALLAM CHETTIAR *v.* KRISHNASWAMI THEVAN. **(1922) M. W. N. 692 : 69 I. C. 542 : A. I. R. 1923 Mad. 134 (2).**

———Ss. 115, 153 and O. 21, R. 94—*Material irregularity—Sale certificate—Amendment—Notice.*

If a Court amends a sale certificate without giving notice of the application to the judgment-debtor or other persons interested it acts with material irregularity. (*Devadoss, J.*) YAGNASWAMI AIYAR *v.* CHIDAMBARANATHA MUDALIAR. **(1922) M. W. N. 130 : 16 L. W. 760 : 65 I. C. 732 : A. I. R. 1922 Mad. 63 (2).**

———S. 115 and O. 41, Rr. 23 and 27—*Material irregularity—Remand—Improper order—Revision—Interference when justified.*

Where an appellate court thinks that reasonable and sufficient opportunity has not been given to the plaintiff—appellant for adducing evidence and instead of allowing additional evidence under O. 41, R. 27, C. P. Code, remands the case for retrial, the irregularity in procedure is not such as to justify interference in revision, 44 C. 929, 37 M.L.J. 536 Ref. (*Ayling, O. C. J. and Odgers, J.*) SHEIKH MAHOMED MARACAYAR *v.* RANGASAMI NAIDU. **31 M. L. T. 182 : (H. C.). 69 I. C. 826 : 16 L. W. 515.**

———S. 115—*Material Irregularity — Petition alleging grievances—Summary rejection thereof—Order is unjustifiable and revision lies.*

If a litigant believing that he has certain valid grounds to urge against certain proceedings going on in his case, puts forward his grievance in the form of a petition, justice and equity require that the matter should be disposed of one way or the other by formal orders dealing with the points raised. It is not intended that the Courts should be so technical as to throw away the application practically without any orders. The Courts are bound to dispose of matters coming up for consideration by an adjudication in some form or the other, whether the same be an order, or a judgment, or a decree. A failure to so adjudicate is a material irregularity in the exercise of jurisdiction.

C. P. CODE (V OF 1908), S. 115—Material Irregularity.

(*Kinkhede, A. J. C.*) MADHO RAO *v.* MANOHARLAL **85 I. C. 779 : A. I. R. 1925 Nag. 289.**

———S. 115—*Material irregularity—Direct contradiction between evidence and finding.*

(*Obiter*) A direct contradiction between the evidence and the finding, constitute a material irregularity justifying interference in revision. (*Baker and Hallifax, O. J. Cs.*) ACHAL SINGH *v.* SETH JIWANDAS. **19 N. L. R. 165 : 75 I. C. 993 : A. I. R. 1924 Nag. 44.**

———S. 115 (c)—*Material irregularity—Decision on imaginary facts—Perversity.*

Where the decision of the court below was based not merely on a forced and impossible construction of the facts that were before the court but on the importation of facts which were admitted by both parties not to exist, this is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by S. 115 (*c*), C.P. Code. (*Hallifax, A. J. C.*) PANDURANG *v.* KALLU DAS. **65 I. C. 881 : A. I. R. 1923 Nag. 108.**

———Ss. 115 and 151—*Material irregularity—Orders passed under inherent power—When it could have passed an appealable order.*

Where a Subordinate Court has express jurisdiction to pass an appealable order but has gone out of its way to invent a novel form of procedure, and consequently makes an order for which no appeal is provided in the Code, the High Court will be ready to consider whether this course was really necessary, and will not hold itself precluded from setting aside the order by taking a strict view of the provisions of S. 115. (*Dalal and Simpson, A. J. Cs.*) BHAGWAN BAKHSH SINGH *v.* SURENDRA BIKRAM SINGH. **10 O. L. J. 209 : 74 I. C. 335 : A. I. R. 1924 Oudh 11.**

———S. 115—*Material irregularity — Transfer without notice is not.*

Transfer of a suit at the instance of one of the parties but without notice to the other party is not a material irregularity sufficient to justify interference in revision, 23 O. C. 216 diss. (*Ashworth, J. C.*) KARIM BAKSH *v.* ABDUL HUQ. **26 O. C. 62 : 74 I. C. 249 : A. I. R. 1923 Oudh 240.**

———S. 115—*Material irregularity—Refusal to set aside* ex-parte *decree.*

Where a court refuses to set aside an *ex-parte* decree on the ground that no sufficient cause was shown for failure to appear, there is no illegal or irrregular exercise of jurisdiction justifying interference in revision. (*Mullick and Bucknill, JJ.*) BHAI CHAND FUL CHAND *v.* DAWOOD AYUB. **A.I.R. 1924 Pat. 816.**

———S. 115—*Material irregularity — Defect of procedure—Revision.*

Where the Court disposed of a suit on a case not raised by the parties and to which evidence had not been directed, there was a substantial error or defect of procedure. (*Ross, J.*) GAYAN SAHU *v.* BALCHAND SAHU. **73 I. C 41 : A. I. R. 1924 Pat. 341.**

———S. 115 — *Material irregularity — Lower Court not considering point of limitation—Revision lies.*

Where there is nothing in the judgment of the lower court to indicate that it considered at all the point as to limitation in setting aside an *ex-parte* decree., High Court will interfere in revision. (*Das and Bucknill, JJ.*) MODE NARAIN SINGH *v.* BIKRAM SINGH. **4 P. L. T. 545 : A. I. R. 1924 Pat. 36.**

———S. 115—*Material irregularity—Wrong view as to burden of proof.*

Revision will lie where the Appellate Court take a different view as to burden of proof but does not

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give the party on whom it places the burden, opportunity to produce evidence. (*Ross, J.*) RAMPARICHAN SINGH *v.* BIRANJI PRASAD SINGH.
1923 P. H. C. C. 269 : 4 P. L. T. 245 : A. I. R. 1923 Pat. 295.

——S. 115—*Material irregularity—Rejection of evidence—Appeal—Revision—Interference.*

Where the trial Court after the examination of the witnesses for both parties was over, rejected an application of the plaintiff to call further witnesses without assigning any reasons and the lower Appellate Court on appeal disposed of the appeal without considering the ground of appeal based on such irregularity, the High Court would interfere in revision and remand the case to allow plaintiff an opportunity of producing further evidence. (*Heald, J.*) U. NGE *v.* MG. TUN HLAING. **3 Bur. L. J. 125 : A. I. R. 1924 Rang. 318.**

——S. 115—*Material irregularity—Order as if under O. 41, R. 27 without setting aside lower Court's decree—Revision lies—C. P. Code, O. 41, R. 27.*

Where in appeal against dismissal of suit under O. 17, R. 3, the appellate Court directs further evidence to be taken by the trial Court, without expressly setting aside the decree passed by the Trial Court it acts with material irregularity within S. 115, (1917) 38 Mad. 414 dist. (1922) 46 Bom. 184 ; (1919) 46 Cal. 738 foll ; (1922) 44 All. 176 ; (1922) 44 All. 492 dist (*Duckworth and Po Han, JJ.*) ASHROF ALI *v.* MAHOMED MORDEN. **1 Rang. 656 : 79 I. C. 482 : A. I. R. 1924 Rang. 177.**

——S. 115—*Material irregularity—Omission to consider point arising in the case.*

Where a Court omits to take into consideration a material point which arises in the case, its decision is liable to be revised. (*Maung Kin, J.*) SHWE HLA GYI *v* SAN DWE. **64 I. C. 361 : 10 L. B. R. 332.**

Misconstruction.

——S. 115—*Misconstruction—Omission to consider evidence—Revision.*

Where the Court below misconstrued a material document and did not consider the other evidence on the record, it is a sufficient ground for interference in revision. (*Fremantle, S. M. and Burn, J M.*) CHAUBEY GAYA PRASAD *v.* RAM LAL.
L. R. 4 A. 248 (Rev.).

——S. 115—*Misconstruction—In case of illiterate voters, rule against writing the name of either of the canditate or the voter against the space left for cross-mark is the same as for-literate voters—Revision lies if this rule is not strictly applied.*

Where the voter wrote his name against the name of the candidate instead of marking a cross and the lower Court held that the rule that voter should not write his name should not be strictly applied in the case of illiterate voters. *Held*, the rule is mandatory and omission to apply it strictly is revisable. (*Devadoss, JJ.*) Y. A. VENKATARAMIAH *v.* M. SUBBIREDDI. **22 L. W. 24 : 90 I. C. 1055 : A. I.R. 1925 Mad. 1173.**

——S. 115—*Misconstruction—An erroneous order holding applicant to be not entitled to apply under O. 21, R. 100, is revisable.*

An erroneous order based on misconstruction of the provisions of the law holding that the applicant cannot apply under R. 100 of O. 21 is a refusal to exercise jurisdiction and is revisable. (*Das, J.*) RAM KISHUN SINGH *v.* DAMODAR PROSAD. **5 P. L. T. 107 : 86 I. C. 599 : A. I. R. 1924 Pat. 506.**

——S. 115—*Misconstruction of rules made by the High Court.*

C. P. CODE (V OF 1908), S. 115—Other remedy.

An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate courts, is no ground for revision. (*Das and Adami, JJ.*) RAMKISHUN DAS *v.* BENI PROSAD. **3 Pat. L. T. 314 : 65 I. C. 355 : A. I. R. 1923 Pat. 90.**

New plea.

——S. 115—*New point involving consideration of evidence cannot be raised in revision, though involving consequently question of jurisdiction.*

A question involving a consideration of the terms of the contract between the parties was not allowed to be raised in revision though it involved consequently a question of jurisdiction. (*N. R. Chatterjee, J.*) RAHIMODDIN MOLLAH *v.* NIROD BURANI DEBI.
40 C. L. J. 197 · 84 I. C. 685 : A. I. R. 1924 Cal. 1036 (1).

——S. 115 and O. 6, R. 17—*New plea.*

Where the legal representative of a deceased plaintiff was allowed to set up a claim not open to original plaintiff, the High Court will interfere in revision and set aside the order. (*Kumaraswami Sastry, J.*) VENKATRAM ROW *v.* VENKALINGAM NAYANIN.
42 M. L. J. 43 : 30 M. L. T. 204 : (1922) M.W. N. 42 : 68 I. C. 703 : 15 L. W. 72 : A. I. R. 1922 Mad. 49.

——S. 115—*New plea—Plea of Estoppel.*

A plea of estoppel being a mixed question of law or fact cannot be entertained for the first time in revision. (*Kinkhede, A. J. C.*) HIRALAL *v.* TULSIRAM.
80 I. C. 946 : A. I. R. 1925 Nag. 77.

——S. 115—*New plea involving question of fact and law cannot be raised.*

A new point raising questions both of law as well as of fact cannot be entertained for the first time in an application in revision. (*Kulwant Sahay, J.*) SURAJ NARAIN MISSER *v.* HARDWAR SINGH.
87 I. C. 381 : 6 P. L. T. 295 · A. I. R. 1925 Pat. 461.

Order.

——S. 115—*Order—Rateable distribution—Order disallowing.*

The High Court will not interfere in revision with orders disallowing or allowing claims to rateable distribution except in very exceptional circumstances. (*Chevis, J.*) BHAGAT RAM KALYAN DAS *v.* MANGAT RAM SHIBBU RAM. **60 I. C. 371 (Lah.).**

——S. 115—*Order.*

No appeal lies from an order setting aside an order rejecting an appeal for failure of the appellant to give security for costs nor is the order open to revision when it is made in the interests of the justice. (*Piggott and Kanhaiya Lal, JJ.*) SUNDAR *v.* HABIBCHICK. **18 A. L. J 838 : 2 U. P. L. R. (All.) 283 : 60 I. C. 81 : 42 A. 626.**

——Ss. 115 and 73—*Order—Order in rateable distribution case—Revision.*

Orders in rateable distribution cases should not as a rule be interfered with in revision except when they involve any question of jurisdiction. (*Sadasiva Iyer and Coutts-Trotter, JJ.*) SUBBIER *v.* NACHIAPPA CHETTIAR. **14 L. W. 582 : 70 I C. 20 (2) : (1922) M. W. N. 817.**

Other remedy.

——S. 115—*Other remedy—Case appealable to a Court subordinate to High Court—Revision lies.*

S. 115 confers revisional jurisdiction of the High Court in cases in which no appeal lies to that Court. Its jurisdiction is not excluded by the fact that an appeal might lie to a subordinate Court, If the order of the trial Court is set aside the confirming order of

C. P. CODE (V OF 1908), S. 115—Other remedy.

the lower appellate Court must necessarily fall to the ground with it : 8 All. 111 (F. B.), Foll ; 11 All. 267 (F. B.) ; 39 All. 641 and 43 All. 405, Not foll. (*Sulaiman and Daniels, JJ.*) BISSESHAR PRASAD PANDEY *v.* RAGHUBIR. **24 A. L. J. 83 : 90 I. C. 353 : L. R. 6 All. 255 (Rev.) : A. I. R. 1926 All. 58.**

——— **S. 115**—*Other remedy—Remedy by way of suit open—Revision does not lie.*

Where a remedy by way of suit is available the High Court will not ordinarily interfere by way of revision. [(1914) M. W. N. 95 Ref.] But if the remedy is clear and is sure to result in applicant's success the parties will not necessarily be driven to another suit. 32 Mad. 334, (F. B.) Foll. (*Jackson, J.*) VEERASWAMY MUDALI *v.* P. R. VENKATACHALA MUDALI. **50 M. L. J. 102 : 22 L. W. 448 : (1925) M. W. N. 763 : A. I. R. 1926 Mad. 18.**

——— **S. 115**—*Other remedy open—Revision may lie.*

Sulaiman, J.—The existence of another remedy cannot be an insuperable obstacle in the way of interference by the High Court in revision. 43 M. 94. Foll. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **90 I. C. 180 : L. R. 6 All. 601 : A. I. R. 1925 All. 610 (F. B.).**

——— **S. 115**—*Other remedy.*

S. 115 would be inapplicable where appeal lies to the High Court. (*Sulaiman and Mukerjee, JJ.*) GANESHI LAL *v.* DEBI DAS. **47 All. 140 : L. R. 6 A. (civ.) 79 : 85 I. C. 470 : A. I. R. 1925 All. 267.**

——— **S. 115**—*Other remedy—Suit—C. P. Code, O. 21, R. 63—Revision.*

Where another remedy is open to a party, e.g., by a suit under O. 21, R. 63, C. P. Code, the Court will not entertain an application for revision. (*Banerji, J.*) BASDEO SAHAI *v.* SARASWATI. **64 I. C. 469 (All.).**

——— **S. 115**—*Other remedy—Decision of lower appellate Court is revisable where High Court (single Judge) has held that it is not appealable.*

Where a second appeal is dismissed on the ground that no appeal lies to the High Court, the decree of the lower appellate Court stands good as between the parties, and is the only decree which is capable of execution. It is also capable of revision by the High Court. (*Suhrawardy and Graham, JJ.*) SURENDRA KRISHNA *v.* ABBAS ALI. **A. I. R. 1925 Cal. 1237.**

——— **S. 115**—*Other remedy—Revision—Interference.*

The High Court will not interfere in revision when the aggrieved party has a remedy by suit open to him except in cases where there would be a very serious miscarriage of justice if the High Court did not interfere. (*Suhrawardy and Cuming, JJ.*) GIRIBALA DASI *v.* PRIANATH PAL. **65 I. C. 476 (Cal.).**

——— **S. 115**—*Other remedy—Revision does not lie when appeal lies.*

Remedy by way of revision is an exceptional remedy and is to be resorted to only when there is no other remedy available to the aggrieved party. A suit was found to be under-valued and an order was passed for amendment of plaint and for making up the deficiency in Court-fees. Thereupon an application was made to continue the suit in *forma pauperis* which was disallowed and the plaint was rejected on the ground that the party did not comply with the first order. An application having been made on the order disallowing the suit to be continued *in forma pauperis*. *Held*, that the order disallowing the application to continue the suit *in forma pauperis* had become merged in the order rejecting the plaint, and as the order rejecting the plaint amounted to a decree, an appeal ought to have been preferred against that order and a revision was not maintainable. (*Moti Sagar, J.*) MT. AZAM BIBI *v.* MT. IMTIAZ BEGUM. **78 I. C. 604 : A. I. R. 1925 Lah. 191.**

——— **S. 115**—*Other remedy open—Substantial Justice done in the Court below—No interference in revision.*

The ordinary rule is that where an applicant has other remedies by way of suit or otherwise the intervention of the High Court under Section 115 of the C. P. Code is not called for. Where a Court's order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed and where it is not shown how the party aggrieved will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. (*Moti Sagar, J.*) NAND KISHORE *v.* SARDAR NARAIN SINGH. **6 Lah. L. J. 137 : 78 I. C. 350 : A. I. R. 1924 Lah. 471.**

——— **S. 115**—*Other remedy—Interference in revision.*

Although a High Court generally does not entertain an application for revision when there is another remedy open to a petitioner, there is nothing in the law which prohibits such court from interfering where grave injustice might have been done. 10 All. 119, 36 P. R. 1887 : 71 P. R. 1884 ; 15 P. R. 1874 Ref. (*Abdul Raoof, J.*) RALLA RAM *v.* MT. RAJ. **4 Lah. L. J. 71 : 67 I. C. 945 : A. I. R. 1922 Lah. 63.**

——— **S. 115**—*Other remedy—Final decree not giving mesne profits though allowed by preliminary decree—Application under S. 151 for further final decree for mesne profits, dismissed—Appeal lies but no revision lies.*

The final decree in a partition suit omitted to give relief as to mesne profits though it had been allowed in the preliminary decree. An application for the amendment of the final decree either by way of amendment or by way of review was dismissed. Then an application was made under S. 151, 115 C.P. Code, to pass a further final decree for mesne profits. This application was also dismissed.

Held : that if the application was treated as an application for a final decree in the suit the order on such application must be treated as a decree and an appeal would lie and therefore no revision lay. (*Phillips, J.*) VEERAPPA GOUNDAN *v.* VEERAPPA GOUNDAN. **48 M. L. J. 512 : 88 I. C. 94 : A. I. R. 1925 Mad. 886.**

——— **S. 115**—*Other remedy open—Suit against trespassers by owner who have leased the land to others under Sec. 9 of the Specific Relief Act—Dismissal of suit—Revision—Remedy by suit.*

A suit under S. 9 of the Specific Relief Act against trespassers by the owners of the properties after they had leased out the properties to others was dismissed as not being maintainable. A revision was filed against this order of dismissal.

Held : that where a party has his remedy by way of suit, the High Court will not ordinarily interfere in revision ; but if the remedy is clear, the parties will not necessarily be driven to another suit. (*Jackson, J.*) VEERASWAMI MUDALI *v.* VENKATACHALA MUDALI. **22 L. W. 448 : (1925) M. W. N. 763.**

——— **S. 115**—*Other remedy—Revision.*

It is no doubt the practice of this Court not to interfere in revision, when another remedy is available, but the High Court may interfere in exceptional cases especially where it is not clear that there is in fact another remedy. (*Oldfield, J.*) HARI KRISHNA

C. P. CODE (V OF 1908), S. 115—Other remedy.

PILLAI *v.* ARUR PANDITHAR. **18 L. W. 105 : (1923) M. W. N. 354 : 72 I. C. 688 : A. I. R. 1923 Mad. 663.**

——**S. 115**—*Other remedy—High Court, if interferes.*

The High Court is slow to interfere in revision when there is a separate remedy open. (*Odgers, J.*) VENTALA VEERA RAZU *v.* KURUVELLA SUBBARAYUDU. **41 M. L. J. 378 : (1921) M. W. N. 507 : 64 I. C. 493 : 15 L. W. 245 : A. I. R. 1922 Mad. 3.**

——**S. 115**—*Other remedy—Where other remedy is open no revision lies.*

As a general rule the High Court does not interfere in revision when the applicant has another remedy open to him. (*Baker, J. C.*) SHEIKH BALDAR *v.* SHAIKH IMAM. **76 I. C. 46 : A. I. R. 1925 Nag. 31.**

——**S. 115**—*Other remedy—Revision is allowable if necessary though other remedy is not availed of.*

Though S. 115 prohibits revision in cases in which an appeal lies, and though revisions should not be granted ordinarily where some other remedy has been provided still as the exercise of the power to revision is discretionary, it must be adopted to the circumstances of each particular case and where necessary interference may be made. (*Kinkhede, A. J. C.*) VITHAL SINGH *v.* AGARCHAND. **79 I. C. 903 : A. I. R. 1925 Nag. 17.**

——**S. 115**—*Other remedy open but barred—Interference.*

There are cases in which justice requires interference in revision even where another remedy is open to the aggrieved party, much more so would interference be necessary and justifiable where another remedy is barred. (*Kinkhede, A. J. C.*) AYODHYA PRASAD *v.* SECRETARY OF STATE. **A. I. R. 1924 Nag. 298.**

——**S. 115**—*Other remedy—Interference.*

Where another and equally effective remedy is open to a party aggrieved by an order and where no grave injustice or inconvenience would follow from the refusal to act, the High Court would not interfere in revision with the order. 30 A. 331: 33 A. 647 Foll. (*Prideaux, A. J. C.*) RAMJI *v.* BALKRISHNA. **69 I. C. 719 : A. I. R. 1924 Nag. 38.**

——**S. 115**—*Other remedy—Suit—Spec. Rel. Act, S. 9—Interference in revision.*

On principle revision, should not ordinarily be granted, even in a case in which no appeal lies, if some other remedy is provided which can be called reasonably efficacious in respect of the circumstances of the particular case. But where the decree of the Court below is manifestly wrong, and the slower remedy by a regular suit would still leave the applicant suffering injustice and undue hardship, the Court should exercise the revisional powers in his favour. (*Hallifax, A. J. C.*) RAMCHANDRA *v.* SHRIDHAR. **5 N. L. J. 151 : 65 I. C. 351 : 18 N. L. R. 71 : A. I. R. 1922 Nag. 115.**

——**S. 115**—*Other remedy open—Revision does not lie.*

Where another remedy is open an application for revision is not maintainable. 12 O.C. 109, Foll. (*Simpson, A. J. C.*) MAKHDOOM BAKHSH *v.* GANGA PRASAD **2 O. W. N. 658 : A. I. R. 1925 Oudh 666.**

——**S. 115**—*Other remedy—Order returning plaint—Revision does not lie—Civil P. Code. O. 43, R. 1 (a).*

Order of an appellate Court returning a plaint being appealable, no revision lies from such an order. (*Neave, A. J. C.*) BADRI SINGH *v.* LALTA SINGH. **79 I. C. 1024 : A. I. R. 1925 Oudh 70.**

——**S. 115**—*Other remedy.*

In an appeal from final order of dismissal, interlocutory orders are open to attack under S. 105, C. P. Code. (*Daniels, J.*) NARENDRA BAHADUR *v.* PEARY LAL. **64 I. C. 211 (1) : 24 O. C. 215.**

——**S. 115**—*Other remedy—Decision on individual issue can't be revised unless it goes to the root of jurisdiction of the trial Court.*

A case should not come to High Court until all the issues are determined and the case finally disposed of; but this is upon the ground of convenience and does not bar the revisional jurisdiction of the High Court when the determination of one of the issues in the case goes to the root of the jurisdiction of the trial Court to determine the remaining issues (*Jwala Prasad and Foster, JJ.*) MANI LAL *v.* DURGA PRASAD. **5 Pat. L. T. 425 : (1924) P. H. C. C. 254 : 3 Pat. 930 : 80 I. C. 667 (2) : A. I. R. 1924 Pat. 673.**

——**S. 115**—*Other remedy—Suit—Interference by High Court in revision.*

It is the practice of the High Court where there is another remedy, not to interfere under S. 115, C. P. C. As the unsuccessful party in the present case had a right of suit, the Court refused to interfere in the exercise of its revisional powers. (*Mullick and Bucknill, JJ.*) KAPLESHWAR JHA *v.* RAGHUNANDAN PARSAD. **1 Pat. L. R. 370: 4 Pat. L. T. 718 : 74 I. C. 474 : A. I. R. 1924 Pat. 134.**

——**S. 115 and O. 17, Rr. 2 and 3**—*Other remedy Dismissal of suit—Appeal.*

Where the lower Court dismisses a suit making it clear that it is proceeding under the provisions of O. 17, R. 3, C. P. Code, and not under O. 17, R. 2, the remedy of the plaintiff is by way of appeal and not in revision to the High Court. (*Mullick and Kulwant Sahay, JJ.*) SYED BAKER HUSSAIN *v.* MIRZA HUSSAIN MIRZA. **4 Pat. L. T. 46 : 73 I. C. 373 : A. I. R. 1923 Pat. 223.**

——**S. 115**—*Other remedy—Interlocutory order—Liability for accounts—Government of India Act. S. 107.*

Where the parties have a right of appeal from the ultimate decision after the accounts are taken the High Court should not interfere in revision or superintendence, unless it were proved to its satisfaction that the Judge had given improper directions in his interlocutory order as to the mode of taking accounts to the commissioner which unless varied or set aside would result in irreparable loss to the parties. (*Miller, C. J. and Mullick, J.*) HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH. **3 P. L. T. 638 : A. I. R. 1922 Pat. 598.**

——**S. 115**—*Other remedy—Conclusion right but procedure wrong—Interference.*

Per *Das, J.*—The ordinary rules is that where an aggrieved party has other remedy available. the High Court is unwilling to interfere in revision.

Per *Bucknill, J.*—Where the right thing has been done in quite the wrong way, the sensible course is not to interfere. (*Das and Bucknill, JJ.*) SYED ALI ZAMIN *v.* NAWAB SYED MOHABAD AKBAR ALI. **1 Pat. 68 : 3 Pat. L. T. 406 : 65 I. C. 135 : A. I. R. 1922 Pat. 315.**

——**S. 115 and Sch. II, Para 16**—*Other remedy—Defect in—Interference.*

To justify interference by the High Court under S.115, C.P. Code, on the ground of want of jurisdiction the facts ousting jurisdiction must be patent on the face of the record. The High Court will be slow to interfere in revision unles the party applying to the Court has no other remedy. 44 B. 595, Foll. (*Kennedy, J.C. and Raymond, A. J. C.*) EMNABAI *v.* FAKIR MAHOMED. **15 S. L. R. 165: 65 I. C. 50 : A. I. R. 1922 Sind 1.**

C. P. CODE (V OF 1908), S. 115—Revision.

Revision.

——S. 115—*Revision—Order of remand passed by District Judge in an appeal from the revenue Court—Revision—Agra Tenancy Act, S.* 167

An order of remand passed by a District Court in an appeal from a revenue Court is revisable by the High Court and S. 167 of the Agra Tenancy Act does not preclude the High Court from entertaining revision in such cases (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THIRPAL. **23 A. L. J. 965.**

——S. 115—*Revision—Plaint returned—Order confirmed in appeal.*

Where a Court orders a plaint to be returned for presentation to a proper Court and the order is affirmed in appeal, the order of the appellate Court cannot be revised as no question of illegal exercise of jurisdiction arises. But the High Court can in a proper case revise the order of the trial Court, in spite of the fact it has been appealed against. (*Sulaiman and Daniels, JJ.*) BISHESHAR PRASAD PANDEY *v.* RAGHUBIR. **L. R. 6 A. 255 (Rev) : 90 I. C. 353.**

——S. 115—*Revision.*

No revision lies from an order of remand. (*Rafique, J.*) BISHMATH SINGH *v.* RAM SRI. **76 I. C. 525 (1) : A. I. R. 1923 All. 464 (2).**

——S. 115—*Revision—Order passed by the Political Resident at Aden granting letters of administration.*

An order passed by the Political Resident at Aden granting letters of administration is one on which an appeal would lie to the Privy Council and therefore the High Court of Bombay refuses to interfere in revision with this order. (*Macleod, C. J. and Coyajee, J.*) LEOH MOSES *v.* MEYER. **27 Bom. L. R. 1460.**

——S. 115—*Revision — Jurisdiction—Appellate reversing judgment.*

An appellate Court has jurisdiction (even if erroneously) to reverse the decision of a trial Court and it is not open to revision. (*Campbell, J.*) THE FIRM BHOGI LAL TRIKAM LAL *v.* THE FIRM AMAR NATH LAJPAT RAI. **26 Punj. L. R. 746 : 90 I. C. 1042 (1).**

——S. 115—*Revision—Question of—To try suit.*

Ordinarily interference in revision is inadvisable in cases of decisions as to jurisdiction and should only be made in exceptional cases to remedy injustice. (*Motisagar, J.*) THE FIRM SITARAM *v.* THE FIRM BANARASI DAS. **77 I. C. 764 (2) : A. I. R. 1923 Lah. 565.**

——Ss. 115 and 104 (2)—*Revision—Order on appeal from order returning plaint for presentation to proper Court.*

An order of an Appellate Court reversing an order of the Lower Court returning a plaint for presentation to the proper Court is open to revision, as no Second Appeal lies from such order. (*Abdul Raoof, J.*) RAM LAL ISHAR DAS *v.* SALIG RAM. **59 I. C. 2 : 7 P. W. R. 1921.**

——S. 115 and Sch. II, para 1—*Revision—Reference to arbitration—Interested party not committed.*

Where a District Munsif referred a case to arbitration, the agreement to refer not having been signed by one of the interested parties who was *ex parte* and passed a decree in terms of the award passed by the arbitrators. *Held*, that a revision lay against the decree in terms of the award, as the Munsif exercised a jurisdiction not vested in him by law by referring the case to arbitration without the consent of an interested party, though he was *ex parte*. (*Jackson, J.*) PARASURAMA MUDALIAR *v.* MUTHUSAMI PILLAI.

C. P. CODE (V. OF 1908), S. 115—Revision.

22 L. W. 395 : (1925) M. W. N. 744.

——S. 115—*Revision against the order of the Collector dismissing an appeal against the order of the Revenue Divisional officer refusing enhancement of rent under S.* 42 *of the Madras Estates Land Act.*

The Revenue Divisional officer refused to enhance the rent in an application made under S. 42 of the Madras Estates Land Act. An appeal was preferred to the Collector and the same was dismissed. A revision petition was filed to the Board of Revenue and another revision petition to the High Court. The Board of Revenue held that it had no power to revise the order of the Collector. *Held*, that the High Court had power to interfere in revision. *Held also* that the Board of Revenue had power to revise the order of a revenue officer if he happens to be the Dt. Collector himself. Where the Dt. Collector himself acts as appellate authority he cannot revise his own order and there is nothing in the Code to say that the Board cannot interfere. (*Kumarasami Sastry, J.*) GOPANNA MANNADIAR *v.* PALANI GOUNDAN. **(1925) M. W. N. 489.**

——S. 115—*Revision against order setting aside* ex parte *decree on the ground of the absence of the practitioner.*

The lower Court cannot be said to have acted without jurisdiction or with material irregularity in the exercise of it in regarding the absence of the pleader when the case was called on for hearing as a sufficient cause for setting aside the *ex parte* decree. (*Odgers, J.*) THIRUMALACHARIAR *v.* ATHIMOOLA KARAYALAR. **22 L. W. 695.**

——S. 115—*Revision—Court must interfere to set aside illegal order.*

When entirely without jurisdiction an order was passed, it is the bounden duty of the Court to interfere in revision and to see that the order does not remain in force. A party who resorts to the aid of law has a right to insist that the law shall be followed and that an order which contravenes the law shall be set aside. (*Wallace, J.*) V. MANICKAM PILLAI *v.* MAHUDAM BATHUMMAL. **48 M. L. J. 152 : 20 L. W. 849 : A. I. R. 1925 Mad. 209.**

——S. 115—*Revision—Final decision is revisable for want of jurisdiction*

There is no better way of directing that there shall be no appeal than by the legislature stating that the decision of a particular Court shall be final. But even a decision which is final is open to revision. (*Schwabe, C. J., Ramesam and Waller, JJ.*) K. PARTHASARADHI NAIDU *v.* C. KOTESWARA RAO. **46 M. L. J. 201 : 47 M. 369 : 19 L. W. 402 : 34 M. L. T. 50 : (1924) M. W. N. 272 : 78 I. C. 98 : A. I. R. 1924 Mad. 561 (F.B.).**

——S. 115—*Revision—Order issuing commission for examination of the plaintiff.*

If the High Court finds that the discretion of the lower Court in granting a commission has been wrongly exercised, if it sees that the case in all its bearings was not laid before the Court below, if it sees that the Court below misapprehended an important part of the case, the High Court will interfere in revision. It will interfere where the Court below seemed to have treated the matter of a commission to examine the plaintiff as if it was merely a commission to examine witnesses (*Das and Ross, JJ.*) NAWAB SYED MUHAMMAD AKBER ALI KHAN *v.* HERBERT FRANCIS. **1925 P. H. C. C. 326.**

——Ss. 115 and 4—*Revision—Oudh Rent Act, S.* 119—*No revision lies against second appellate decree of Dt. Judge in rent suits.*

The plaintiffs filed certain suits for rent which were

C. P. CODE (V OF 1908), S. 115—Revision.

heard by an Assistant Collector of the second class. On appeal his decrees were confirmed by the Collector. There were further appeals to the District Judge, which were unsuccessful. The defendant then applied in revision under S. 115, C. P. Code for the discharge of the decree passed by the District Judge. *Held*, that an application for revision to the High Court in these circumstances is not maintainable. (*Kanhaiya Lal, J. C.*) KALI BAKSH SINGH *v.* BHAGWAN DAS **10 O. L. J. 191 : 72 I. C. 1023 : L. R. 5 O. 17 : A. I. R. 1924 Oudh 16.**

——— **S. 115**—*Revision — Sanction — Refusal by Revenue Officer- Appeal to Collector—Sanction ordered —If a Court subordinate to High Court.*

Where a Collector in an appeal against an order refusing to prosecute a person for offences under Ss. 471 and 193, I. P. C., reverses the order and directs prosecution, he acts as a Court exercising judicial powers and being subject to the superintendence of the High Court, his order is revisable. (*Mullick, J.*) FAUJDAR RAI *v.* EMPEROR. **90 I. C. 445 : 26 Cr. L. J. 1565.**

——— **S. 115**—*Revision— Court— Rent Controller of Rangoon—Orders of—If revisable.*

Held by a majority of the Full Bench, (*Robinson C. J.*, dissenting) that the Rent Controller of Rangoon is not a Court and the High Court has no powers of revision over his orders under the Rangoon Rent Act. (*Robinson, C. J., Heald and Rutledge, JJ.*) MOHIDEEN *v.* BUKSHI RAM. **3 Rang. 410 (F. B.).**

——— **S. 115**—*Revision—Wrong provision of law—Application of.*

Where a Court has applied its mind to the law and decides wrongly then there is no ground for revision ; but, where it disregards some provision of law and has not applied its mind to that provision, then there is ground for revision. (*Young, J.*) RASU *v.* KATTARA. **2 Rang. 202 : 82 I. C. 6 8 : A. I R. 1924 Rang. 349.**

——— **S. 115**—*Revision—No remedy open.*

The powers of the High Court should receive a liberal rather than a narrow interpretation when the applicant has no other remedy. (*Raymond and Bilaram, A. J. Cs.*) MESSRS. FORBES, FORBES CAMPBELL & CO., LTD. *v.* VERSIMAL DIWANMAL. **A. I. R. 1924 Sind. 49.**

Right to apply.

——— **S. 115**—*Right to apply—Wrongly entering application under O. 21, R. 89.*

The High Court can interfere in revision if an application under O 21, R. 89 has been wrongly admitted on the ground that it was made by a person interested to apply. 44 Mad. 554 (F. B.,) Appl. (*Odgers, J.*) SUBBA REDDI *v.* VASIREDDI JAYARAMAYYA. **17 L. W. 680 : A. I. R. 1922 Mad. 659.**

——— **S. 115 and O. 47, R. 4**—*Right to apply—Review disallowed—No revision lies.*

No revision lies from an order rejecting an application for review. (*Wazir Hasan, A. J. C.*) SHEOCHARAN *v.* JAGWANT KUAR. **12 O. L. J 443 : 2 O. W. N. 419: 88 I. C. 582: A. I. R. 1925 Oudh 594.**

——— **S. 115**—*Right to apply—Pauper suit.*

No revision lies where Court finds on the materials before it, that the person seeking to sue as pauper is not unable to pay the Court-fees due. (*Mullick and Macpherson, JJ.*) UMAR BAHADUR *v.* MD. KARIM NAWAB. **5 P. L. T. 606 : 2 P. L. R. 276 : 79 I. C. 56 : 1923 P. H. C. C. 287 : A. I. R. 1924 Pat. 667.**

Scope of.

——— **S. 115**—*Scope of—Cr. P. Code, S. 195.*

C. P. CODE (V OF 1908), S. 115—Scope of.

Where there has been no excess of jurisdiction nor failure to exercise jurisdiction in refusing sanction under S. 195, Cr. P. C., on the facts, it is difficult to say that the case can be brought within the last clause of S. 115, C. P. C.

Per *Cuming, J.*—S 115, C. P. C., obviously refers to civil matters and civil matters only. It is found in C. P. C. and can have no application in criminal matters. (*Ghose and Cuming, JJ.*) SARAT CHANDRA *v.* RAMSASHI ROY. **36 C.L.J. 265 : 26 C.W.N. 1016 : 69 I. C. 1 3 : 23 Cr. L. J. 665 : A. I. R. 1923 Cal. 45.**

——— **S. 115**—*Scope of—Mortgage decree—Sale—Claim.*

A claim is not entertainable under O. 21, R. 58 of the C. P. Code to property. which has been ordered to be sold under a mortgage decree and where it is disallowed, no revision can lie to the High Court under S. 115 of the Code. (*Sanderson, C. J. and Richardson, J.*) MAHABIR PROSAD *v.* JOGENDRA NATH. **68 I. C. 271 : 26 C. W. N. 50.**

——— **S. 115**—*Scope of.*

S. 115, C. P. Code, which corresponds in its wordings to S. 44 of the Punjab Courts Act, applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it, and it is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. (*Moti Sagar, J.*) THE PUNJAB BANKING COMPANY, LTD. *v.* DIWAN DHANPAT RAI. **75 I.C. 487 : A. I. R. 1923 Lah. 506 (2).**

——— **S. 115**—*Scope of—Section applies to jurisdiction alone, irregular exercise or non-exercise of it or illegal assumption of it.*

S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or illegal assumption of it. An application under that section may, therefore, fall to be considered on the grounds : (1) absence of jurisdiction, (2) refusal to exercise jurisdiction and (3) where the Subordinate Court has not only had jurisdiction but has also exercised it but exercised it illegally or with material irregularity. The third ground would clearly include erroneous conclusions of fact or law reached in the exercise of jurisdiction, but it would certainly include such rules of procedure as lay down certain preliminary conditions on the fulfilment of which the exercise or jurisdiction, one way or the other, will depend. An order purporting to be passed under O. 23, R. 1, but made in disregard of the procedure presented therein is irregular exercise of jurisdiction and deserves revision. (*Wazir Hasan, J C.*) MT. EJAZ RASUL KHAN *v.* MUBARAC HUSAIN. **27 O. C. 231 : 11 O. L. J. 613 : 79 I C. 1033 : A. I. R. 1925 Oudh 291.**

——— **S. 115 (b)**—*Scope of—Appeal from non-appealable cases may be treated as application for revision—Not applicable to interlocutory orders.*

There is abundant authority for holding that where no appeal lies, an appeal to the High Court may be treated as an application for revision. S. 115 is intended merely to rule out revision of interlocutory orders. An order of remand is not an interlocutory order as it entirely disposes of the case so far as the Court disposes it for the time being. A. I. R. 1922 All. 254, 1922 All. 226, Dist. (*Ashworth, J. C.*) SHEIKH FARZAND ALI *v.* EKADASHI. **26 O. C. 10 : 10 O. L. J. 36 : 9 O. & A. L. R. 332 : 73 I. C. 591 : A. I. R. 1923 Oudh 177.**

——— **S. 115**—*Scope.*

The High Court should not exercise its power of revision except in aid of justice. (*Das, J.*) SHEIKH HAMIDUR RAHIMAN *v.* SHAHANAND DAS. **80 I. C. 575 : A. I. R. 1925 Pat. 153.**

C. P. CODE (V OF 1908), S. 115—Scope of.

——**S. 115**—*Scope of—Prov. Sm. C. C. Act, S. 25—Latter is wider in scope than former.*

S. 25 of the Small Cause Courts Act is of the widest scope in conferring discretion upon the High Court in contradistinction to the narrow terms of S. 115, Civil Procedure Code. (*Duckworth, J.*) VALAB DAS *v.* MAUNG BA THAN. **1 Rang. 372 : 2 Bur. L. J. 154 : A. I. R. 1924 Rang. 54.**

——**S. 115 (b)**—*Scope.*

It is not failure to exercise jurisdiction by the Lower Court merely because it omitted to consider *ex proprio motu* a case which is not properly raised before it. (*Fawcett, J. C., Crump and Kemp, A. J. Cs.*) BANUMAL *v.* NEWANDMAL. **83 I. C. 360 (2) : 16 S. L. R. 207 (F. B.).**

Subordinate Court.

——**S. 115**—*Subordinate Court—Order of District Judge under S. 177 of Agra Tenancy Act—Revision lies to High Court—Agra Tenancy Act, Ss. 167 and 177.*

Per *Boys, J.*—There is nothing in S. 167 precluding the hearing by the High Court under S. 115 of the Civ. Pro. Code of a revision of an order passed by a District Judge under S. 177 of the Tenancy Act ; and it is reasonable that the High Court should have such power, and to hold that it has such power is in accord with S. 193 of the Tenancy Act. (*Sulaiman and Boys, JJ.*) KEHRI SINGH *v.* THIRPAL. **23 A. L. J. 965 : A. I. R. 1926 All. 113.**

——**S. 115**—*Subordinate Court--Order of Revenue Court or District Judge, original or appellate, in reference to questions under Local Tenancy Act—Revision does not lie.*

The High Court has no power to interfere in revision under S. 115 of the Civ. Pro. Code or otherwise with any order that has been passed originally or in appeal by a Revenue Court or by a District Judge in reference to questions decided under the provisions of the Agra Tenancy Act, No. 2 of 1901. 42 All. 83, Foll. (*Stuart, J.*) MANOHAR *v.* MANGAL DAS. **A. I. R. 1925 All. 800.**

——**S. 115**—*Subordinate Court—High Court, Kumaun—If subordinate to the Allahabad High Court.*

The High Court of Kumaun is not a Court subordinate to the Allahabad High Court for purposes of revisional jurisdiction under the Code of Civil Procedure. (*Piggott, J.*) SADAR SINGH KONDARI *v.* AMAR SINGH KONDARI. **45 All. 383 : 71 I. C. 991 (2) : A. I. R. 1923 All. 291 (2).**

——**S. 115**—*Subordinate Court—Evidence and finding of fact conflicting—Revisional Court cannot revise the finding.*

In revision evidence may be looked into, to see whether the jurisdiction of the Court has been properly exercised, but if there is conflict of evidence and an issue of fact has been found in one way, the Revisional Court does not revise the finding of fact. (*Walsh and Gokul Prasad, JJ.*) MUNNA LAL *v.* SADANNU LAL. **18 A. L. J. 1104 : 76 I. C. 624 (1) : 2 U. P. L. R. (All.) 408.**

——**S. 115**—*Subordinate Court—City of Bombay Municipal Act, S. 33—Election petition—Decision of Chief Judge of Small Cause Court.*

The High Court has no jurisdiction under S. 115 of the C. P. Code to interfere with the decision of the Chief Judge of the Small Cause Court in an election petition. The Chief Judge acting under the powers given to him by S. 33 of the City of Bombay Municipal Act is a *persona designata.* (*Macleod, C. J. and Crump, J.*) NAVAL KAR *v.* MRS. SAROJINI NAIDU. **25 Bom. L. R. 463 : 73 I. C. 133 : A. I. R 1923 Bom. 421.**

C. P. CODE (V OF 1908), S. 115—Subordinate Court.

——**S. 115**—*Subordinate Court—Land Acquisition Officer—Omission to make reference—Revision.*

Where a Collector in a land acquisition proceeding refuses to make a reference to the District Court on the question of the apportionment of the compensation, the High Court has no power to interfere with the order in the exercise of its revisional jurisdiction, as the Collector is not a "Subordinate Court" to the High Court. 42 M. 231, Dis. (*Macleod, C. J. and Crump, J.*) BALKRISHNA DASI *v.* THE COLLECTOR, BOMBAY SUBURBAN. **47 Bom. 699 : 25 Bom. L. R 398 : 73 I. C. 354 : A. I. R. 1923 Bom. 290.**

——**S. 115**—*Subordinate Court—Order under Part 2, Lunacy Act, cannot be revised.*

Order of Dt. Magistrate under part 2 of the Lunacy Act with respect to reception, care and treatment of the lunatic are executive and not judicial and therefore not revisable by the High Court. (*Abdul Raoof and Harrison, JJ.*) DONALD *v* EMPEROR. **4 Lah. 1 : 73 I. C. 696 : 24 Cr. L. J. 664 : A. I. R. 1924 Lah. 55.**

——**S. 115**—*Subordinate Court—Election inquiry.*

Sub-Court holding an enquiry into election under the Madras Dt. Municipalities Act is a Court subordinate to the High Court. 16 L. W. 848 : A. I. R. 1923 M. 192, Foll. (*Wallace, J.*) AHMAD THAMBI *v.* BASAWA MARAKAYAR. **44 M. L. J. 69 : 16 L. W. 898 : (1922) M. W. N. 813 : 46 M. 123 : 72 I. C. 902 : A. I. R. 1923 Mad. 254.**

——**S. 115**—*Subordinate Court—District Judge—Trial of election.*

A District Judge trying the validity of an election under the Madras Local Boards Act XIV of 1902 is not acting as a *persona designata* but as a Court : his orders are judicial and liable to interference in revision by the High Court. The mere fact that the order of the District Judge is declared to be "final" merely means that it could not be questioned by way of appeal but it does not exclude the exercise of revisional jurisdiction by the High Court. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* MUTHU VELAPPA GOUNDAN. **44 M. L. J. 1 : 46 Mad. 536 : (1923) M. W. N. 133 : 71 I. C. 1039 : 16 L. W. 848 : A.I.R. 1923 Mad. 192.**

——**S. 115**—*Subordinate Court—Sub-Judge trying an election petition.*

A Sub-Judge trying an election petition questioning the validity of the election of a Municipal Commissioner under the Madras District Municipalities Act is not a Court subordinate to the High Court within S. 115, C. P. Code. Consequently the High Court has no jurisdiction to interfere with the order of a sub-Court refusing to try an election petition. 21 B. 279, Foll. 38 M. 581 Ref. (*Devadoss, J.*) DEIVANAYAGAM PILLAI *v.* P. T. S. DIWAN MOHIDEEN ROWTHER. **44 M. L. J. 39 : (1922) M. W. N. 818 : 16 L. W. 827 : 70 I. C. 780 : A. I. R. 1923 Mad. 169.**

——**S. 115**—*Subordinate Court—Rent Court.*

In cases where an appeal would lie to the High Court the Rent Court is a Court subordinate to the High Court within the meaning of S. 115, C. P. Code. 14 O. C. 38, Foll. (*Simpson and Wazir Hasan, A. J. Cs.*) CHANHRAJA *v.* KALKA PANDE. **9 O. L. J. 543 : 72 I. C. 394 : A. I. R. 1923 Oudh 18.**

——**S 115**—*Subordinate Court — Sub-Deputy Collector refusing application to prosecute—Collector on appeal setting aside the order and making a complaint exercises judicial powers and revision lies—Government of India Act, S. 107.*

C. P. CODE (V OF 1908), S. 115—Subordinate Court.

Where the Sub-Deputy Collector after inquiry refused the application of the opposite party for prosecution of petitioner under Penal Code, S. 471 but on appeal the Collector set aside the order of the Sub-Deputy Collector and made a formal complaint under S. 200, Crim. Pro. Code, for the prosecution of the petitioner, *held*, that the Collector was clearly acting as a Revenue Court and he was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and in making a complaint under S. 200 and was therefore subject to the superintendence of the High Court and his order is revisable under S 115, Civ. Pro. Code, as also under S. 107 of the Government of India Act. (*Mullick, J.*) FAUJDAR RAI *v.* EMPEROR. **26 Cr. L. J. 1565 : 90 I. C. 445 : A. I. R. 1926 Pat. 25.**

——**S. 115**—*Subordinate Court ordering partition—Omission of one of the properties— Parties should draw the attention of trial Court to the matter and no revision lies.*

Where a partition was to be a partition of the whole property and by oversight or for any other reason one of the properties was left unpartitioned, *Held*, that it was open to the parties to draw the attention of the trial Court to the omission and to get a direction from it in the matter and no revision lies. (*Ross, J.*) BALARAM MANJHI *v.* JAGANNATH MANJHI. **A. I. R. 1925 Pat. 760.**

——**S. 115 and Government of India Act (1915), S. 107**—*Subordinate Court—Revenue Court.*

An order of a Revenue Court under S. 476 of the Cr. P. Code is open to revision by the High Court under S. 115 of the C.P.Code or S. 107 of the Government of India Act (1915). (*Adami and Bucknill, JJ.*) RAKTU SINGH *v.* EMPEROR. **6 Pat. L. J. 178 : 2 Pat. L. T. 609 : 22 Cr. L. J. 403 : 61 I. C. 643 : 1921 P. H. C. C. 240.**

——**S. 115**—*Subordinate Court—Reference under Municipal Act—Decision of Sm. C. Court—Revision lies.*

The decisions of the Rangoon Small Cause Court in dealing with references under the Rangoon Municipal Act, 1922, are subject to revision under S. 115, C.P. Code. (*Doyle, J.*) M.A. SHAKUR *v.* MUNICIPAL CORPORATION OF RANGOON. **4 Bur L. J. 161 : A. I. R. 1925 Rang. 367.**

——**S. 115**—*Subordinate Court—First Judge of Court of Sm. Causes is subordinate to High Court.*

The First Judge of the Court of Small Causes is not merely a *persona designata* appointed for a special purpose and he must be regarded as a Civil Court and as such subordinate to the High Conrt. The High Court has, therefore, jurisdiction to entertain an application for revision from his decision. (*Robinson, C. J., Pratt and Macgregor, JJ.*) MAHOMED IBRAHIM MOOLDA *v.* S. R. JANDOSS. **1 Bur. L. J. 138 : 70 I. C. 144 : 11 L. B. R. 387 : A. I. R. 1923 Rang. 49.**

Withdrawal of suit.

——**S. 115**—*Withdrawal of suit — Permission wrongly given—Interference.*

Where a Court decides wrongly to grant permission to withdraw from a suit with liberty to bring a fresh suit, but still has applied its mind to the question whether there was a formal defect by reason of which the suit was liable to fail, the High Court cannot interfere in revision. (*Daniels, J.*) NANNHU *v.* ROSHAN SINGH. **74 I. C. 112 : A. I R, 1924 All. 121.**

C. P. CODE (V OF 1908), S 116.

——**S. 115 and O. 23, R. 1**—*Withdrawal of suit —Order without recording reasons—Revision.*

Where on an application for leave to withdraw a suit with liberty to bring a fresh suit the Court merely passed an order to the effect that it was allowed without considering or recording the grounds for granting such leave, the High Court in revision set aside the order. (*Banerjee, J.*) RAHMAT ULLAH *v.* DHARAM SINGH. **20 A. L. J. 90 : L. R. 3 A. 93 : 64 I. C. 948 : A. I. R. 1922 All. 185 (1).**

——**S. 115 and O. 23, R. 1**—*Withdrawal of suit.*

When the grant of leave to withdraw suit is improper it will be interfered with in revision. (*Richardson, J.*) KIRANMOYI *v.* RAMA NATH. **64 I.C. 556 (Cal.)**

——**S. 115**—*Withdrawal of suit—Order allowing, is open to revision.*

An order allowing a suit to be withdrawn with liberty to bring a fresh suit, if improperly made, is capable of being revised by the High Court. (*Abdul Qadir, J.*) GHULAM RASUL *v.* MT. RAMZAN BIBI. **68 I. C. 753 : A. I. R. 1923 Lah. 97 (2).**

——**S. 115, O. 33, R. 1**—*Withdrawal of suit—Evidence of both plaintiff and defendant examined—Case set down for arguments—Application for withdrawal of suit with liberty to bring a fresh suit, grant of—Irregularity—Revision.*

Where in a suit all the witnesses for the plaintiff and the defendant had been examined and the Court had fixed a date for hearing the arguments on which date the plaintiff's guardian put in an application for withdrawal of the suit with liberty to bring a fresh suit which the Court granted. *Held*, that the Court had exercised its jurisdiction with gross irregularity and the High Court was bound to set aside the decree in revision. (*Dalal, J. C.*) MUST. RABUL ARFAIN *v.* BABU RAZA. **1 O. W. N. 861 : 85 I. C. 324 : 10 O. & A L. R. 1130 : A.I.R. 1925 Oudh 596.**

——**S. 115 and O. 23, R. 1**—*Withdrawal of suit with liberty to sue—Ill-advised grant of leave—Revision.*

Where in granting leave to withdraw a suit with liberty to sue afresh the Judge never applied his mind to the merits of the application and gave no reasons for allowing the plaintiff permission to bring a fresh suit and it was quite clear that if he had considered the language of the section for a moment such a permission could never have been given. *Held* that the High Court can and will interfere in revision in such cases. (*Daniels, A. J. C.*) PULAI *v.* RANA UMANATH SINGH. **9 O & A. L. R. 3 : 72 I. C. 1034 : A. I. R. 1924 Oudh 107.**

——**S. 116**—*Pending suits—Maintainability of suit questioned—Interference is justified.*

Obiter:—If a suit is not maintainable at all, it might in some cases be advisable for the High Court in revision to interfere and thus to prevent further waste of time and money, the ground of interference being that a Court has no jurisdiction to proceed with a suit which is not maintainable in law. (*Wallace and Madhavan Nair, JJ.*) T. A. BALAKRISHNA ODAYAR *v.* V. JAGANNADA CHARIAR. **48 M. L. J. 534 : 87 I. C. 194 : A. I. R. 1925 Mad. 820.**

C. P. CODE (V OF 1908), S. 122.

——— S. 122—*High Court cannot alter period of limitation.*

The High Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to S. 122 but it has no power to alter the period of limitation provided by the Limitation Act. (*Abdul Raoof, J.*) MADAN GOPAL *v.* MALWA RAM. **68 I. C. 777 : A. I. R. 1923 Lah. 96.**

———S. 122—*Rules under—Lahore High Court.*

Under the Rules of the Lahore High Court framed under S. 122, the memo in the case of second appeal shall be accompanied by a copy of the First Court's judgment. (*Chevis, J.*) MOLU MAL *v.* SRI RAM. **63 I. C. 33 : 2 Lah. 227.**

———Ss. 122 and 125—*Scope—Rule made by High Court in conflict with the section of C. P. C. is void.*

A rule made by the High Court if it is in conflict with the provisions of a section of the C. P. C. would be *ultra vires.* (*Dalal, J. C.*) MAHOMED SAKIR *v.* JUGAL KISHORE. **28 O. C. 169 : 85 I. C. 455 : A. I R. 1925 Oudh 492.**

———S. 122—*Force of rules under—Effect of change in rules in schedule.*

In order to have the effect of varying the rules in the first schedule to the Code, the rules under S. 122 must first have been considered and submitted by a Rule Committee appointed under S. 123. (*Jwala Prasad and Ross, JJ.*) RAMDEO SINGH *v.* MAKHAN SINGH. **74 I. C. 330 : 1923 P. H. C. C. 19.**

———Ss. 122 and 123—*Rules not submitted to committee*—Ultra vires—*Application to Patna High Court.*

Ss. 122 and 123 do not apply to Patna High Court. Though the rules made by the High Court were not submitted to any Rule Committee, and though no Rule Committee exists in Patna, the rules are not *ultra vires.* (*Miller, C. J. and Mullick, J.*) RAJENDRA KISHORE *v.* KAMAKHYA NARAIN SINGH. **2 Pat. L. T. 112 : 5 Pat. L. J. 719 : 60 I. C. 285 : 1921 P. H. C. C. 97.**

———S 125—*Calcutta High Court Rules—Adoption by Patna High Court—Publication.*

Though the Patna High Court did not publish the rules which it had adopted from the Calcutta High Court, it published the rule by which the rules were adopted and this was enough 'publication' under S. 125 of the Code. (*Coutts and Ahmad, JJ.*) NANOO BABOO *v.* RAM NIVAJI. **61 I. C. 666 : 2 Pat L. T. 45.**

———S. 128—*Surety—Death of—Principal debtor—Surety not absolved.*

Where a person has rendered himself liable as a surety for any amount that might be decreed against the defendant, the fact that the principal debtor has died since, does not absolve the surety from performing his contract. 41 B. 402, referred to (*Harrison J.*) MAULA DAD *v.* WADHAWA SINGH. **14 P. W. R. 1923 : 71 I. C. 46 : A. I. R. 1924 Lah. 428.**

———S. 129—*S. 129 refers to Letters Patent of 1865.*

S. 129 of the Civ. Pro. Code, 1908, may legitimately be read as referring to the Letters Patent of 1865 which were in force at the time of the passing of that Code and not the Letters Patent of 1862. (*Sanderson, C. J. and Walmsley, J.*) UDOY CHAND PANNA LAL *v.* KHETSIDAS TILAKCHAND. **51 Cal. 905 28 C. W. N. 916 : 81 I. C. 1048 : A. I. R. 1924 Cal. 1025.**

———S. 135—*Witness—Attendance in Court—Return—Arrest—Exemption from.*

The protection given by S. 135, C.P. Code, is expressed as protection "while returning from such tribunal". It is clear that it cannot be claimed by a witness who is claiming privilege to return by any route he pleases. It is a clear that his return must be straight from the Court to the place where he came in obedience to summons. It cannot possibly be open to a witness claiming privilege to dictate as to how far out of the straight route he may or may not go. (*Boys, J.*) BEHARI SINGH *v.* EMPEROR. **L. R. 5 A. 94 (Cr) : 22 A. L. J. 638 : 46 All. 663 : A. I. R. 1924 All. 676 (2).**

C. P. CODE (V OF 1908), S. 141.

———Ss 141, 151 and O. 9—*Restoration application dismissed for default—Application to restore is entertainable.*

Where an application for setting aside dismissal of a suit for default was itself dismissed for default and a subsequent application was made to restore it :

Held : Per *Daniels, J.*—That O. 9 read with S. 141, applied to the case and that if there was no other remedy left to the applicant, S. 151 applied.

Per *Sulaiman, J.*—That though it could not be said that the case came under O. 9 read with S. 141, S. 151 applied and the Court could entertain the application under its inherent jurisdiction. (*Sulaiman and Daniels, JJ.*) GANESH PRASAD *v.* BHAGELU RAM. **23 A. L. J. 817 : L. R. 6 A. (C.v) 412 : 89 I. C. 350 : A. I. R. 1925 All. 773.**

———S.141—*Does not apply to Succession Certificate Act except so far as Ss. 19 and 26 make it applicable.*

Civ. Pro. Code does not apply to proceedings under Succession Certificate Act which is not analogous to Guardians and Wards Act or Bengal Tenancy Act to which the Civ. Pro. Code has been held to apply. Therefore S. 141 does not apply except in so far as it is expressly introduced by S. 19 (3) and as a corollary by S. 26 (3) of the Succession Certificate Act. A Succession Certificate Court has no jurisdiction to appoint a Receiver. (*Walsh and Ryves, JJ.*) KANHAIYA *v.* KANHAIYA LAL **46 All. 372 : 22 A. L. J. 345 : L. R. 5 A. (Civ.) 238 : 79 I. C. 363 : A. I. R. 1924 All. 376.**

———Ss. 141 and 144—*Restitution proceedings—Section applies.*

Proceedings under S. 144, C. P. Code, are not proceedings in execution. Consequently S. 141, C.P. Code applies to them. 40 M. 780. Diss.(*Rafique and Lindsay JJ.*) JIWA RAM *v.* NAND RAM. **20 A. L. J 226 : 44 A. 407 : 66 I. C. 144 : L. R. 3 A. 209 : A. I. R 1922 All. 223.**

———S. 141—*Section does not apply to execution proceedings.*

Execution proceedings should be excluded from those proceedings to which provisions relating to suits are extended by S. 141. (*Suhrawardy and Cuming, JJ.*) T. WANG *v.* SONU WANGDI. **52 Cal. 559 : 42 C. L. J. 26 : 87 I. C. 633 : 29 C. W. N. 886 : A. I. R. 1925 Cal. 812.**

———S. 141—*Objections made under O. 21 to the execution of a decree—Section does not apply.*

Objections made under O. 21 to the execution of a decree although numbered separately are virtually proceedings in execution and therefore S. 141 is inapplicable to them. (*Suhrawardy and Chotzner, JJ.*) NARENDRA NATH CHATTERJI *v.* RAKHAL DAS TARAFDAR. **79 I. C. 351 : 41 C. L. J. 286 : A. I. R. 1925 Cal. 510.**

———S. 141—*Permission given to* mutwalli *to lease—Order is not appealable.*

Where a Court grants permission to a *mutwalli* to lease *wakf* properties the order is passed under S. 141, C. P. Code. No appeal lies under the Code or any

other law. (*Mookerjee and Panton, JJ.*) HARIBAR RAHIMAN *v.* SAIDANNESSA BIBI. **38 C. L. J. 358 : A. I. R. 1924 Cal. 327.**

——**S. 141 and O. 9, R. 9**—*Applicability to proceedings under O. 9, R. 9—Appeal.*

It is extremely doubtful whether S. 141, C. P. Code, applies at all to proceedings under O 9, R 9 C P.Code, and even if it does apply, S. 141 cannot operate to give an appeal from an order not otherwise appealable under O. 43, R. 1. 17 A. 106, Ref. (*Sanderson, C. J. and Richardson, J.*) HARA KUMAR *v.* MURARI MOHAN. **36 C. L. J. 184 : 69 I. C. 1003 : A. I. R. 1922 Cal. 572.**

——**S. 141**—*Probate proceeding against minor—O. 32 is made applicable.*

Where a will of which probate is sought affects the interests of a minor, it is expedient to appoint a guardian *ad litem* of the minor following O. 32, C. P. C. But it does not follow that every rule in O. 32, C. P. C., is made strictly and legally applicable. (*Richardson and Huda, JJ.*) RADHASHYAM DASYA *v.* RANGA SUNDARI DASYA. **59 I. C. 664 : 24 C. W. N. 541.**

——**S. 141**—*Applicability—Execution proceedings.*

S. 141 does not apply to proceedings in execution. (*Le Rossignol, J.*) KAURA LAL *v.* THE PUNJAB NATIONAL BANK, LTD., MULTAN. **89 I. C. 360 (1) (Lah.).**

——**Ss. 141 and 151**—*Not applicable to execution proceedings.*

S. 141 of the Code of Civil Procedure is not applicable to execution proceedings, and an application for execution dismissed for default could be restored only under the provisions of S. 151 of the Code. (*Moti Sagar, J.*) THE PUNJAB BANKING CO., LTD, *v.* DIWAN DHANPAT RAI. **75 I. C. 487 : A. I. R. 1923 Lah. 506 (2).**

——**S. 141**—Not applicable to execution proceedings. (*Shadi Lal, C. J. and Wilberforce, J.*) BHOLU *v.* RAM LAL. **2 L. 66 : 60 I. C. 720 : 3 U. P. L. R. (Lah.) 29.**

——**S. 141 and O. 43, R. 1 (c)**—*Scope of—Dismissal for default—Application to set aside—Dismissal.*

The procedure laid down in the C P. Code regarding suits must be followed also in cases of application to set aside dismissal for default and as such O. 9 and O. 43, R. 1 (*c*) apply to an order of dismissal of such an application. (*Hallifax, A. J. C.*) KALICHARAN *v.* RATAN SINGH. **19 N. L. R. 119 : 75 I. C. 589 : A. I. R. 1923 Nag. 293.**

——**S. 141 and O. 9, R. 9**—*Execution proceedings—Dismissal for default—Restoration—Inherent power.*

S. 141, C. P. Code, has not the effect of extending the provisions of O. 9, R. 9, C. P. Code, to execution proceedings or of authorizing the Court to set aside a dismissal of an execution petition for default. But the Court may, in a proper case, in the exercise of its inherent power, restore the execution application and with such restoration the attachment will revive. (*Hallifax, A. J. C.*) SHANKERRAO *v.* MANIKRAO. **68 I. C. 643 : A. I. R 1923 Nag. 18.**

——**S. 141**—*Does not apply to execution proceedings.*

S. 141 of the C. P. Code is not applicable to execution proceedings, so as to empower the Court to restore to file an application in execution dismissed for default. (*Hallifax, A. J. C.*) HARILAL *v.* NARAYAN. **4 N. L. J. 118 : 64 I. C. 420 : 18 N. L. R. 152 : A. I. R. 1922 Nag. 267.**

——**S. 141 and O. 9, R. 9**—*Application to restore suit—Application to restore application.*

Having regard to the provisions of S. 141, C. P. Code, an application to set aside an order, rejecting a prior application for the revival of a suit dismissed for default is maintainable. (*Burn, J. M.*) TASADDUQ HUSAIN *v.* BHAGWAN BAKSH SINGH. **L. R. 5 O. 89 (Rev.) : 11 O. L. J. 232 : 1 O. W. N. 109 : 10 O. & A. L. R. 1134.**

——**S. 141**—*Does not apply to execution proceedings.*

S. 141, C. P. Code, is applicable only to proceedings in original suit. (*Jwala Prasad and Foster, JJ.*) LACHMAN LAL *v.* PADARATH SINGH. **4 Pat. L. T. 735 : A. I. R. 1924 Pat. 346.**

——**S. 141** — *Non-applicability to proceedings under S. 105 of the Bengal Tenancy Act.*

Proceedings under S.105, B.T. Act, are not governed by S.141, C.P. Code; because the former are to be sued in a Revenue Court before Revenue Officers. (*Miller, C. J. and Kulwant Sahay, J.*) HAZARI LAL SAHU *v.* AMBICA GIR. **3 Pat. 67 : 2 Pat. L. R. 169 : 79 I. C. 5 : 1923 P. H. C. C. 273 : 5 P. L. T. 591 : A. I. R. 1924 Pat. 104.**

——**S. 141 and O. 9, R. 4**—*Execution proceedings—Restoration.*

S. 141 of the C. P. Code does not make the provisions of O. 9, R. 4 and all cognate provisions applicable to execution proceedings. (*Das and Adami, JJ.*) SHEO NANDAN CHAUDHURY *v.* DEBI LALL CHAUDHURY. **4 Pat. L. T. 93 : 1923 P. H. C. C. 78 : 1 Pat. L. R. 134 : 2 Pat. 372 : 71 I. C. 484 : A. I. R. 1923 Pat. 239.**

——**S. 141 and O. 43, R. 1**—*Execution proceedings—Dismissal for default.*

The order in question was passed in execution of the decree on account of the default of the decree-holder to take certain steps. The order was passed in execution proceedings by virtue of section 141 of the C. P. Code ; in other words, the order was similar to what is passed in suits on account of default of plaintiffs, here the decree-holder failed to take necessary steps for the prosecution of his application in execution and it was accordingly dismissed for default. *Held*, whether such an order is an order in the suit or in the execution it is not at all appealable. (*Jwala Prasad and Bucknill, JJ.*) GOUR CHANDRA *v.* JANARDAN. **4 P. L. T. 204 : 68 I. C. 337 : A. I. R. 1923 Pat. 180.**

——**S. 141**—*Scope of—Provisions of S. 10—If apply to arbitration proceedings.*

S. 141, C. P. Code, is wide enough to make the provisions of S. 10 apply to arbitration proceedings. (*Raymond, A. J. C.*) FIRM OF JAI NARAIN BABU LAL, *In the matter of.* **16 S. L. R. 79 : 66 I. C. 796 : A. I. R. 1922 Sind 6.**

——**S. 141 and O. 9**—*Applicability to execution proceedings.*

S. 141 and O. 9 are not primarily intended to apply to proceedings in execution, under O. 21, R. 90 for disposing of applications *ex parte* ; still, a Court in the exercise of its inherent jurisdiction should have power in such cases to restore the applications to file and decide it on merits. (*Kennedy, J.C. and Madgavkar, A. J. C.*) ISSARSING *v.* UDHAVDAS. **83 I. C. 749 : 17 S. L. R. 105.**

——**S. 144**—*Execution sale—Setting aside—Repayment of purchase money—Payment of encumbrances by purchaser.*

An execution sale was confirmed by the Courts in India but set aside on appeal by the Privy Council after a lapse of 9 years. In the interval the a[illegible] purchasers had obtained possession of the pr[illegible] sold and had also paid off certain incumb[illegible] thereon. The sale price paid into Court by the a[illegible] purchasers had been distributed to various [illegible]

C. P. CODE (V OF 1908), S. 144.

holders. After the decision of the Privy Council the judgment-debtors applied for restitution under S. 144, C.P. Code. The auction-purchasers claimed a refund of the purchase money paid by them as well as the value of the incumbrances discharged by them. *Held*, that the judgment-debtors were entitled to possession only on their payment to the purchaser the amount of the purchase money less the mesne profits derived by the purchasers in the interval. The interest on mesne profits was allowed to be set off against the interest on the purchase price. The purchaser having discharged the incumbrances of their own accord and without any order of Court, they were entitled to the benefit of the security but not to a refund of the amounts as a condition precedent to their surrendering possession. (*Lord Carson.*) JAI BERHAM *v.* KEDAR NATH MARWARI **44 M. L. J. 735 : 25 Bom. L. R. 643 : L. R. 4 P. C. 117 : 69 I. C. 278 : (1923) M. W. N. 368 : 21 A. L. J. 490 : 18 L. W. 802 : 37 C. L. J. 351 : 2 P. 10 : 32 M. L. T. 10 : 4 P. L. T. 61 : 27 C. W. N. 582 : 49 I. A. 351 : A. I. R. 1922 P. C. 269 (P. C.).**

——S. 144—*Appeal—Court-fee—Court-Fees Act, Sch. II, Art. 1.*

Appeal from order under S.144 must be stamped *ad valorem.* 19 A.L.J. 771, Overruled; A.I.R. 1922 All. 238 and A. I. R. 1925 Patna 1 (F. B.) Foll. (*Daniels, J.*) BAIJNATH DAS *v.* BAL MAKUND. **47 All. 98 : 22 A.L.J. 881 : L. R. 5 A. (Civ.) 773 : 82 I. C. 321 : A. I. R. 1925 All. 137.**

—— S. 144 and 151—*Court has inherent power of restitution.*

Jurisdiction as to restitution does not arise merely under Section 144. It is inherent in the general jurisdiction of the Court to act rightly and fairly, according to the circumstances, towards all parties concerned. A. I. R. 1922 P. C. 269; A. I. R. 1923 All. 394 (F.B.) Foll. (*Mukerji and Dalal, JJ.*) TARA CHAND *v.* MT. CHAMPA. **46 All. 767 : 22 A. L. J. 673 : L. R. 5 A. (Civ.) 659 : A. I. R. 1924 All. 718.**

——S. 144—*Applicability of — Decree against minor with costs—Decree subsequently set aside in suit—Restitution—Costs.*

The plaintiff in a partition suit brought on record as the legal representative of the deceased defendant, his minor adopted son without having a guardian *ad litem* appointed for him. A decree was obtained against the minor with costs and an appeal preferred by the minor against the decree was also dismissed with costs. Subsequently, the minor sued to set aside the decree and obtained a declaration that it was null and void against him. Thereupon the minor applied under S. 144, C.P. Code, for restitution of the costs realised from him by the plaintiff. *Held*, that S 144, C. P. Code, was not in terms applicable to the case, that the Court had jurisdiction apart from S. 144 to order restitution, but that in the circumstances of the case and having regard to the conduct of the party, restitution should not be ordered. (*Mukerjee and Dalal, JJ.*) TARA CHAND *v.* CHAMPA. **22 A.L.J. 673 : L. R. 5 A. 659 : 46 All. 767 : 10 O. & A. L. R. 905 : A. I. R. 1924 All 713.**

——S. 144—*Applicability—Restitution against auction-purchaser.*

S. 144, C. P. Code, allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed in appeal. It does not allow restitution against a third party such as a stranger auction-purchaser. (*Kanhaiya Lal, J.*) BALWANT SINGH *v.* MT. LAIQA BEGAM. **L. R. 4 A. 526 : 75 I.C. 238 : A. I. R. 1924 All. 273.**

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——S. 144—*Appeal—Applicability of section impugned.*

Where one of the issues was whether S. 144 applied to the facts, and the Judges decided it one way or the other, an appeal lies even though one of the grounds of appeal is that the decision on the issue is wrong. (*Daniels, J.*) SHEIKH CHHUTAN *v.* JWALA PRASAD. **73 I. C. 602 : A.I.R. 1924 All. 64.**

——S. 144—*Suit for damages—For bringing false suit is maintainable.*

Where restitution cannot be obtained by application under S. 144 (1), C. P. Code, there is no bar to the institution of a suit. Consequently a suit for recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant is maintainable. (*Stuart and Kanhaiya Lal, JJ.*) ARJUN SINGH *v.* PARBATI. **44 All. 687 : 20 A. L. J. 636 : 69 I. C. 173 : L. R. 3 A. 408 : A.I.R. 1922 All. 465.**

——S. 144—*Proceedings under are not proceedings in execution—"Party," meaning of.*

Proceedings under S. 144, C. P. Code, are not proceedings although they are in the nature of proceedings in execution to enforce directly or indirectly the final decree. The section is very wide in terms. It includes matters which an execution Court or appellate Court could not ordinarily deal with and the word "party" is not used in the section in the sense of "party to the suit" but must mean "party to the application." (*Walsh and Ryves, JJ.*) BRIJ LAL *v.* DAMODAR DAS. **44 All. 555 : 20 A. L J. 456 : 4 U. P. L. R. (A.) 74 : 66 I. C 545 : A. I. R. 1922 All. 238.**

——Ss. 144 and 141—*Nature of restitution proceedings.*

Proceedings under S 144 of the Code are proceedings in execution of a decree. S.141, C.P.Code, applies to restitution proceedings. (*Rafique and Lindsay, JJ.*) JIWA RAM *v.* RAM NAND **L R 3 A. 209 : 66 I. C. 144 : 20 A. L. J. 226 : 44 A. 407 : A. I. R. 1922 All. 223.**

——S. 144—*Application for restitution to be made to Court which passed the decree—Separate suit, if lies.*

Where an ejectment decree is passed by a Revenue Court and duly executed, but afterwards the decree was reversed in appeal, any application for restitution must be made to the Revenue Court as "the Court of first instance". No separate suit is maintainable in respect thereof. (*Mears, C. J. and Banerjee, J.*) KASHI PRASAD SINGH *v.* BALBHADDAR SINGH. **44 A. 283 : 20 A. L. J. 133 : L. R. 3 A. 97 : 65 I. C. 798 : A. I. R. 1922 All. 71.**

——S. 144—*Order for costs reversed on appeal—Refund can be ordered with interest.*

Where in pursuance of an order for costs the defendant pays up the amount to the plaintiff and the order is reversed on appeal, the defendant is entitled not only to the refund of the money paid but also to interest thereon. (*Tudball and Sulaiman, JJ.*) GOKUL PRASAD *v.* RAM DEVI. **19 A. L. J. 771 : 63 I. C. 513 : 3 U. P. L. R. (A.) 126.**

——S. 144—*Limitation for application for restitution.*

A judgment-debtor first applied for execution against the decree-holder transferee and certain other persons who had got the money deposited in Court under the decree. The application was successful and the purchaser then appealed and got the order set aside; the judgment-debtor then made a second application for restitution against the decree-holder for loss suffered by him on account of the sale. *Held*, that the second application was a continuation of the first and

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so not time-barred. (*Walsh and Ryves, JJ.*) HANIFUNNESSA *v.* CHUNNI LAL. **19 A. L. J. 549 : 63 I. C. 184 : 3 U. P. L. R. (A.) 91.**

—— **S. 144**—*Money paid under decree by one defendant—Plaintiff pursuing his appeal against another defendant and succeeding—First defendant while withdrawing money is entitled to interest thereon.*

Plaintiff having got a decree against the 1st and 2nd defendants in the suit for the return of the earnest money and damages for breach of contract proceeded to appeal on the ground that he was entitled to specific performance of the contract against the defendant No. 3. Pending the appeal the 1st defendant paid into Court the amount which had been awarded against defendants Nos. 1 and 2. The plaintiff continued the appeal and was successful. On an application by defendants 1 and 2, for restitution and claiming interest on the money which remained in Court, *held*, that plaintiff could not resist the claim on the ground that he acquired no benefit from the money. (*Macleod, C. J. and Coyajee, J.*) HARABHAI DAHYABHAI *v.* MANEKLAL RACNHHOD. **27 Bom. L. R. 485 : 87 I. C. 713 : A. I. R. 1925 Bom. 313.**

——**S. 144**—*Limitation Act Art. 182—Application for restitution is one for execution of appellate decree.*

An application for restitution under S. 144, C. P. Code, is one for execution of decree of the Appellate Court and is thus governed by Art. 182, Lim. Act. (*Macleod, C.J. and Shah, J.*) HAMIDALLI KADAMALLI *v.* AHMEDALLI MAHIBUBALLI.

45 Bom. 1137 : 62 I. C. 233 : 23 Bom. L. R. 480.

——**S. 144**—*Decree holder being auction-purchaser sale will be set aside if decree is set aside but not where stranger is auction-purchaser or decree-holder has transferred the property purchased.*

Where a decree-holder is himself the purchaser in execution of his *ex parte* decree and the *ex parte* decree is subsequently set aside, the sale stands cancelled and any interest which has accrued to the decree-holder or any one claiming through him must also fail. But where the right of an innocent third party is injuriously affected by the conduct of the parties to the suit the sale need not fall along with the decree. For instance, where the decree-holder has parted with his interest in the property or in the greater portion of it, and thereafter he enters into a compromise with the judgment-debtor behind the back of the transferee who has come on the property in good faith, and gets the decree set aside, the right of the transferee will not be affected. (*Suhrawardy and Duval, JJ.*) BEHARI LAL AGWAN *v.* SUBALA DASI. **A. I. R. 1925 Cal. 1074.**

——**S. 144**—*Scope—C. P. Code, S. 2 (2).*

There is no distinction between a decree in suit and a decree in a proceeding under S. 144. (*Chatterjee and Panton, JJ.*) ADWIT CHANDRA SAHA *v.* CHITTAGONG CO., LTD **28 C. W N. 988 : 84 I. C. 747 : A. I. R. 1925 Cal. 102.**

——**S. 144**—*Applicability—No property taken out of applicant's possession—Act of Court.*

The appellant applied for letters of administration to the estate of one M and the respondent set up a will of the deceased. The moveable properties in dispute were at that time in the possession of the respondent. An inventory was made by the Commissioner appointed by Court and the properties were locked up in a room under seal. Letters were granted to the appellant and probate was refused to the respondent. This decision being reversed on appeal to the High Court the respondent applied for removal of the seals and for delivery of the properties to her, and the District Judge made an order accordingly. The order of the High Court granting probate was, however, reversed by His Majesty in Council. The Letters of Administration to the appellant were thereupon restored, and the appellant applied for restitution of the properties to him. *Held*, that the properties were never in the possession of the appellant, they were not taken out of his possession and made over to the respondent under any decree or order of Court, and therefore, S. 144 had no application. (*Chatterjee and Panton, JJ.*) BAIKUNTHA NATH CHOTTORAJ *v.* PROSANNA MOYI DASI. **51 Cal. 324 : 81 I. C 571 : A. I. R. 1924 Cal. 769.**

——**Ss. 144 and 151**—*Inherent power of restitution exists—Order for repayment of money mistakenly paid out can be made.*

S. 144, C.P. Code, does not define the full measure of the power of the Court to make an order for restitution. The section may be taken as a guide to determine in what class of cases an order for restitution may be made, so that complete justice may be made, between the parties concerned and they may be restored to the status *qua ante*. It is competent to the execution Court in the exercise of its inherent power, to make an order for restitution to prevent what would be essentially a miscarriage of justice, even in cases not comprised within the terms of S. 144 of the Code of Civil Procedure. 15 C. L. J. 187 Ref. The Court has inherent power to recall money improperly paid out. 11 C. L. J. 533 Ref. (*Mookerjee and Panton, JJ.*) RAI CHARAN BHUIYA *v.* DEBI PROSAD BHAGAT. **26 C. W. N. 408 : 64 I. C. 864 : 35 C. L. J. 53 : A. I. R. 1922 Cal. 28.**

——**S. 144**—*Pre-emption decree — Pre-emption money increased in appeal—Decree-holder's failure to deposit enhanced amount—He can withdraw original deposit.*

A pre-emption decree was passed conditionally on payment of Rs. 7,000. The decree-holders paid the money and obtained possession of the land in execution ; but afterwards, on the appeal of the vendee the amount payable to him was enhanced by Rs. 500, which the decree-holders were directed to pay, and it was provided in the decree of the appellate Court that if the money were not paid by a certain time the suit should stand dismissed with costs. The decree-holders did not pay the additional sum of Rs. 500 and they applied to the first Court for a refund of the Rs. 7,000 which they had paid. *Held*, the decree-holder was entitled to refund of the deposit. (76 P. R. 1902 Dist.) (*Martineau, J.*) DIWAN CHAND *v.* HIRA NAND. **78 I. C. 971 : A. I. R. 1925 Lah. 177.**

——**S. 144**—*Restitution against* bona fide *auction-purchaser cannot be obtained.*

Restitution cannot be obtained as against a *bona fide* auction-purchaser at an auction-sale held by a Court which has jurisdiction to hold the same. (14 Cal. 18 ; 10 All. 166 ; 38 All. 240, Ref.) (*Moti Sagar, J.*) MT. ASGHARI BEGUM *v.* IRSHAD-UD-DIN. **79 I. C. 57 : A. I. R. 1925 Lah. 176.**

——**S. 144**—*Restitution—Powers of Court.*

The power of a Court to grant restitution is not confined to cases covered by S. 144 but may be extended to other cases under S. 151 read along with S. 144. (*Campbell, J.*) GANGA RAM *v.* NATHA RAM. **A. I. R. 1924 Lah. 583.**

——**S. 144**—*Restitution—Execution sale—Reversal of decree—Expenses of sale—Right to refund.*

In execution of a decree for money moveable and immoveable properties of defendant were attached and sold. The defendant appealed and the decree was reversed. He then applied for restitution and the

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properties which had been purchased by the decree-holders themselves were restored and sale proceeds of properties which had been purchased by third parties refunded. The defendant now applied for mesne profits and interest for the period during which the properties and sale proceeds remained in the possession of the plaintiffs and asked for the refund of the commission paid to the auctioneer. *Held*, that the defendant was entitled to restitution of mesne profits, interest and commission paid to the auctioneer. (*Moti Sagar, J.*) RALYA SINGH *v.* TUNIA MAL. **6 L. L. J. 142 : 80 I. C. 316 : A. I. R. 1924 Lah. 486.**

——S. 144—*Limitation starts from reversal and not confirmation of the reversal.*

An application under S. 144, C. P. Code, for mesne profits is not one for execution, and as soon as the decree is reversed a right to apply for mesne profits accrues. (*Martineau, J.*) CHANDA SINGH *v.* BISHEN SINGH. **5 L. L. J. 389 : 76 I C. 701 : A. I. R. 1924 Lah. 166**

——S. 144—*Non-applicability to—Acts done prior to decree.*

The object of S. 144. C.P. Code. is that anything done in execution of a decree reversed on appeal, should, as far as possible, be undone : and that the party who has been finally victorious should be placed in the position which he would have occupied, if the erroneous decree had not been made. The section does not cover relief in respect of acts done before the decree and not under the decree. (*Shadi Lal, C. J.*) CHHABER SINGH *v.* RADHU RAM. **68 I. C. 307 : 4 L.L. J. 333.**

——S. 144—*Purchaser party to suit but getting no benefit under decree—Decree reversed on appeal—Sale should be set aside.*

A *bona fide* purchaser, who is not a party to the suit or proceeding in which the auction sale is held-is entitled to hold the property even though the decree or order in execution of which the auction sale is held is subsequently reversed or set aside. But the protection which is given to a *bona fide* purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree ; in other words, it is only a *bona fide* purchaser who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected. 10 All. 166 (P. C.) Rel. on.

Per *Wallace, J.*—This salutary principle of restitution should be enforced as the rule, and exceptions to that rule should be allowed only so far as authority by which we are bound, has allowed them. (*Devadoss and Wallace, JJ.*) VAVANAN *v.* CHETTIAPPA CHETTI. **49 M. L. J. 452 : 48 Mad. 767 : 22 L. W. 439 : A. I. R 1926 Mad. 78.**

——S. 144—*Mortgage decree—Increase of mortgage money on appeal—Rights of person in possession—May be substituted for profits—Interest.*

Interest at a sufficient rate may be substituted for the profits, which the person in possession under a mortgage decree which was subsequently varied enjoyed during the period between his execution of the first Court's decree and his giving notice that he had deposited the additional amount. 8 L. W. 179 Foll. In a suit for redemption of a *Kanom* the defendants are not entitled to recover possession from the plaintiff which he had taken in pursuance of the decree of the trial Court simply because the amount of compensation for improvements was increased on appeal. 13 L. W. 449 : 44 M. 961 Relied on. (*Spencer and Krishnan, JJ.*) NEELAKANDAN NAMBUDRI *v.* VASUDEVAN.

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45 M. L. J. 323 : 18 L. W. 30 : (1923) M. W. N. 508 : 83 M.L.T. 45 (H.C.) : 73 I.C. 1041 : A. I. R. 1924 Mad. 87.

——Ss. 144 and 151—*Execution sale—Distribution of proceeds among several decree-holders rateably—Sale subsequently set aside—No right to refund of the purchase-money.*

In execution of a decree certain properties were attached, brought to sale and purchased by the appellants who were strangers to the decree. The proceeds of the sale were rateably distributed among the respondents who were creditors holding decrees against the same judgment-debtor. Subsequently certain claimants who had unsuccessfully intervened in the execution proceedings obtained a decree in a claim suit that the properties belonged to a trust and therefore not liable to sale in execution of the decree and recovered possession of the properties with mesne profits from the appellants. The appellant thereupon applied for refund of the purchaser-money which had been distributed rateably among the various decree-holders. *Held*, neither S. 144 nor S. 151 of the C. P. Code authorised the Court to order the refund sought by the appellants and their application was unsustainable. 24 I.C 384 dist. (*Ayling, O.C.J. and Venkatasubba Rao J.*) RAJA RAO *v.* ANANTHANARAYANAN CHETTY. **42 M.L.J. 308 : 15 L. W. 303 : (1922) M. W. N. 255 : 67 I. C. 369 : A. I. R 1922 Mad. 228.**

——S. 144—*Rateable distribution.*

Where an order for rateable distribution was reversed on appeal no order for restitution of money distributed can be granted. (*Ayling and Venkatasubba Rao, JJ.*) VARADA RAM SWAMI *v.* VENKATARATNAM. **42 M. L. J. 473 : 15 L. W. 421 : 67 I. C. 546 : (1922) M. W. N. 184 : 30 M. L. T. 178 : A. I. R. 1922 Mad. 99.**

——S. 144—*Execution sale—Subsequent reduction of decree amount—Effect of.*

The sum due to a decree-holder under the decree of the first Court was Rs. 7,695. In execution of the decree, 19 items of property were sold for Rs. 10,357 in all. Five items of the property were purchased by the decree holder himself. Subsequent to the execution sale the appellate Court modified the decree by reducing the amount to Rs. 7,495. Thereupon the judgment-debtor applied for restitution by redelivery of the five items purchased by the decree-holder. It was found that the sale of every item including the last was necessary to realise the amount of the appellate decree, though if the properties had been sold in a different order and the five items had been reserved to be sold last, their sale would have been unnecessary to realise the amount of decree on appeal. *Held*, that there had been no case made out for restitution, as the position of the judgment-debtor as regards the sale of the five items was in no way affected by the variation in the decree. Such prejudice as the judgment debtor had suffered was due not to the variation in the decree, but to the terms in the order in execution regulating the order in which the items were to be sold. (*Ayling and Venkatasubba Rao, JJ.*) SUNDARA RAMA REDDI *v.* ENUGA RAGHAVA REDDI. **42 M. L. J. 315 : (1922) M. W. N. 141 : 68 I. C. 516 : 16 L. W. 355 : A. I. R. 1922 Mad. 96.**

——S. 144—*Applicability of—Restitution—Costs of separate proceedings—Direction for re-payment.*

S. 144, C. P. Code, is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal. Provided the decree is varied or reversed, the section applies, however, the reversal or variance has been effected. Where an order of abatement of the lower Court was set aside in separate

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proceedings the High Court and not on appeal, the lower Court has power to order restitution of costs paid to the representatives of the original plaintiff though such representative was not a party to the suit. (*Ayling, O. C. J. and Venkatasubba Rao, J.*) SITALAKSHMAMMAL *v.* KRISHNASWAMI IYER.
(1922) M. W. N. 186 : 65 I. C. 797 : 16 L. W. 587 : A. I. R. 1922 Mad. 70 (2).

——**S. 144**—"*Court of first instance*"—*Meaning of.*

The 'Court of first' instance referred to in S. 144 of the Code is the Court which passed the decree or the Court to which the proceedings are transferred, if the other Court ceases to exist. (*Abdur Rahim and Oldfield, JJ.*) LAKSHMANH GOUNDEN *v.* SUBRAMANIA AIYAR. **61 I. C. 962 : 13 L. W. 67.**

——**S. 144**—'*Decree' includes 'order'.*

The word "decree" in S. 144 covers an "order" and the word "Court" in the said section includes Courts of every grade. (40 Mad. 299 ; 43 Mad. 235 : 1922 P. C. 269, Foll.) (*Prideaux and Kinkhede, A. J. Cs.*) RAMJI *v.* ZIBLAJI. **20 N. L. R. 93 : 7 N. L. J. 130 : 80 I. C. 49 : A. I. R. 1924 Nag. 258 :**

——**S. 144**—*Order of remand—Order for mesne profits is not a consequential one.*

An order placing a party in possession may be properly consequential on an order of remand. But an order awarding mesne profits is not a proper consequence of an order of remand if the question, whether the party who has been in possession under the decree which the order of remand has reversed was rightly in possession or was a trespasser is still *sub-judice.* An application for mesne profits would then be premature the limitation for mesne profits will start only when the possession is decided to be wrongful. (*Macnair, A. J. C.*) SONBA *v.* PARASHARAM.
18 N. L. R. 200 : A. I. R. 1923 Nag. 101 (1).

——**S. 144**—*Scope.*

Suit for restitution can be converted into an application. (*Prideaux, A. J. C.*) JAMAN LAL *v.* RAGHO.
67 I. C. 319 : A. I. R. 1922 Nag. 198.

——**Ss. 144 and 151**—*Inherent power—If restitution exists.*

Where a judgment-debtor is dispossessed under wrong order of Court subsequently set aside, it is the duty of Court to restore him to possession. (*Kotwal, A. J. C.*) SHRIKISAN *v.* SUNDARBAI.
64 I. C. 732 : 18 N, L. R. 24 : A. I. R. 1922 Nag. 82.

——**S. 144**—Application for compensation under S. 144 by judgment-debtor was dismissed, *held* that the question relates to execution, discharge or satisfaction of decree, and so the Court fee payable on memorandum of first appeal is 8 annas. (*Drake Brockman, J. C.*) GABBA *v.* KANKHEDILAL. **18 N. L. R. 15: 67 I. C. 225 : A. I. R. 1922 Nag. 62.**

——**S. 144**—*Application for restitution under the section, whether an application for execution of the decree.*

An application under S. 144 of the Code of Civil Procedure is an application for execution of a decree passed in an appeal when that decree varies or reverses the decree of the Court of first instance, it being in substance an application made for seeking the aid of the Court in working out the final decree. (*Hasan and Raza, JJ.*) SANT SAHI *v.* CHHUTAI, KURMI. **3 O. W. N. 65.**

——**S. 144**—*Execution under mistake—Court can set right the wrong.*

The plaintiff decree-holder not having complied with the decree under which he was to make a deposit within a fortnight and the Court under the misapprehension that he had made the deposit granted him relief to which he was not entitled. *Held* it is fully within the Court's power to put right the wrong which had been done. S. 144 does not apply to a case where the original decree holds good ; but what was reversed here is an order, not the decree granting the plaintiff decree-holder execution under the erroneous impression that he had fulfilled the terms of the decree. (*Daniels, J. C.*) DORI LAL *v.* MT. JAMAGA.
72 I. C. 879 : A. I. R. 1923 Oudh 16.

——**S. 144** *Application under Is governed by Limitation Act, Art.* 181.

Das and K. Sahay, JJ.—An application for restitution is governed by Art. 181 and not Art. 182.

Per *Ross, J*—There is no reason in principle why an application for restitution should not be treated as an application for execution, and therefore such an application is governed by Art. 182. 24 C. L. J. 467 (1916) 28 Cal. 113; [1900] 16 I. C. 238 ; [1912] 11 C. L. J. 541; [1910], Foll. (*Das, Ross and Kulwant Sahay, JJ.*) BALMUKUND MARWADI *v.* BASANT KUMARI DASI. **3 Pat. 371 : 5 P. L. T 145 : 1924 P. H. C. C. 33 : 78 I. C 200 : A. I. R. 1925 P. 1 (F. B.).**

——**S. 144**—*Restitution resembles execution only superficially—Limitation Act, Art.* 182.

Das, J.—Execution presupposes a decree or order capable of being carried into effect ; restitution presupposes an act of the Court, which has done an injury to the suitors. Execution will issue as of course ; but in cases not comprehended strictly within the letter of S. 144 of the Code, restitution is not a matter of course but depends upon the discretion of the Court, and will be ordered only when the justice of the case calls for it. The jurisdiction as to restitution bears only a superficial resemblance to the jurisdiction as to execution. The jurisdiction to order restitution is inherent in the Court and that it flows, not from any power which it may have to carry into effect the decree or order of the Court, but from the recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts. (*Das, Ross and Kulwant Sahay, JJ.*) BALMUKUND MARWADI *v.* BESANT KUMARI DASI. **3 Pat. 371 : 5 P. L. T. 145 : 1924 P. H. C. C. 33 : 78 I. C. 200 : A. I. R. 1925 Pat. 1 (F. B.).**

——**Ss. 144 and 151**—*Powers of Court to order restitution—If confined to S.* 144—*Inherent power to do justice.*

A Court interpreting a decree in a certain way gave possession of the property to the decree-holder. Subsequently a higher Court held the interpretation to be erroneous. *Held*, though the decree is not reversed the Court can order restitution in the interests of justice by virtue of its inherent powers, as its power to do so is not confined to cases falling under S. 144. (*Das and Ross, JJ.*) KAMLANATH JHA *v.* UDIT NARAIN JHA. **5 Pat. L. T. 553 : 78 I. C. 310 : A. I. R. 1924 Pat. 800.**

——**S. 144**—*Application for restitution—Limitation—Art.* 182 *applicable.*

An application for restoration under S. 144 of the C. P. Code is therefore governed by Art. 182 of schedule I. to the Limitation Act. (*Miller, J.*) BALSANT KUMARI DASI *v.* BALMUKUND MARWARI.
1 P. L. R. 338 : 1923 P. H. C. C. 1 : 2 P. 277 : A. I. R. 1923 Pat. 371.

——**S. 144**—*Execution sale cancelled—Proceedings under S* 144 *are not open to the auction purchaser.*

Where a decree was reversed on appeal and an auction-sale which had taken place in execution of the decree was cancelled and the order cancelling the sale

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was allowed by the auction purchaser to become final. *Held* : that the remedy of the auction-purchaser was not by proceedings under S. 144. (*Heald and Chari, JJ.*) MA TOK *v.* MAUNG MO HNAUNG.
4 Bur. L. J. 58 : 3 Rang. 251 : A.I.R. 1925 Rang. 215.

——S. 144—*Money lying in Court and none deriving benefit from it—No interest is payable.*

Where an auction-purchaser chose to leave the purchase money in Court on the chance that if the decree which was appealed against was confirmed, he would be able to get the property purchased by him and the money was lying in Court all the time and no one had the benefit of it. *Held* : that when the decree had been reversed and the sale cancelled, the auction purchaser could not claim interest. (*Heald and Chari, JJ.*) MA TOK *v.* MAUNG MO HNAUNG.
3 Rang. 251 : 4 Bur. L. J. 58: A.I.R. 1925 Rang. 215.

——S. 144—*Restitution as against auction-purchaser—Sale not* bona fide.

While as against a decree-holder who is himself the auction-purchaser a sale can be set aside and restitution made, an innocent purchaser through Court cannot ordinarily be so disturbed. But where a stranger purchaser declined to join as defendant in a suit against decree holder to set aside the sale though expressly invited and was therefore absent in the suit by the appellant. *Held*, that he was a representative of decree-holder to that extent that he had notice of the claim and therefore restitution should be granted even as against him. 29 Bom. 435 (F. B.), Dist. (*Kennedy, J. C. and Madgavkar, A. J. C.*) JAMNOMAL GURDINOMAL *v.* GOPAL DAS. **17 S. L. R. 73 : 80 I. C. 1002: A. I. R. 1924 Sind 101.**

——S. 145—*Court cannot call on Supurtdar to produce property in a different suit*

A Court cannot call on supurtdar to produce property in a suit in which he was not appointed supurtdar. (*Daniels, J.*) CHHUTTAN *v.* JWALA PRASAD.
73 I. C. 602 : A. I. R. 1924 All. 64.

——S. 145—*Surety for production of judgment-debtor—Imprisonment of judgment-debtor—Failure to produce—Surety is liable.*

Where a surety for production of a judgment-debtor, failed to produce him, owing to the imprisonment of the latter in a criminal case, and the surety knew of the pending criminal case against the judgment-debtor, *held* that the surety could not be discharged from the obligations under the surety bond. (*Ryves and Gokul Prasad, JJ.*) RAMESWAR DAS *v.* SRI LAL. **19 A. L. J. 968 : 44 A. 174 : 65 I. C. 375 : A. I. R. 1922 All. 390.**

——S. 145—*Discretion to refuse execution.*

The Court has a discretion to refuse execution against the surety. (*Macleod, C.J.*) ABDUL HUSSEIN *v.* MISTRY & CO. **23 Bom. L. R. 1263 : 64 I. C. 648 : 46 Bom. 702 : A. I. R. 1922 Bom. 340.**

——S. 145—*Forfeiture of security to be applied in satisfaction of the decree.*

Where the security offered by a surety for the judgment-debtor, for his appearance or for filing an insolvency petition, is forfeited owing to failure of the surety to produce the judgment-debtor, the sum so forfeited will be applied in satisfaction of the decree. (*Teunon and Newbould, JJ.*) SURENDRA NATH GHOSH *v.* KESHAB LAL GHOSH. **59 I. C. 778 : 25 C. W. N. 36.**

——S. 145—Obiter—*Surety is party within S. 47 and can raise a plea of fraud in executing Court—C. P. Code, S. 47.*

A surety by virtue of S. 145 is a party within the meaning of S. 47 and a plea of fraud can be raised before the execution Court by him. (*Zafar Ali, J.*)

C. P. CODE (V OF 1908), S. 145.

KANSHI RAM *v.* FIRM PRABH DIAL.
7 Lah. L. J. 457 : A. I. R. 1925 Lah. 618.

——S. 145—*Surety is discharged if Decree-holder executes deeree contrary to his agreement.*

Where the consideration for the surety's promise is the forbearance to sue or to continue legal proceedings against the principal debtor all stipulations on the subject which constitute part of such consideration must be strictly complied with or the surety will not be bound, and total failure of the consideration for the surety's promise of guarantee will discharge him. (*Martineau, J.*) GURANDITTA *v.* FIRM GURDASMAL
7 Lah. L. J. 343 : A. I. R. 1925 Lah. 552.

——S. 145—*Surety becomes party only on application against him.*

Until an application is made for execution against the surety he does not become a party to the execution proceedings. (*Martineau, J.*) GURANDITTA *v* FIRM GURDASMAL. **7 Lah. L.J. 343 : A.I.R. 1925 Lah. 552.**

——S. 145—Sapurd dar *not producing moveable property attached and made over to him—Executing Court can attach his property.*

Certain articles belonging to a judgment-debtor were attached and made over to the *Sapurtdar* on his giving the undertaking in writing that he would produce the articles when required to do so by the Executing Court or would pay the value thereof. He failed to produce some of those articles. *Held*: that the Executing Court could order the attachment of his property to recover the value thereof. 16 N. L. R. 178 Diss; 39 M. L. J. 472, Dist. (*Zafar Ali, J.*) NAZIR AHMAD *v.* BAKHSHI RAM. **86 I. C. 173 ; A. I. R. 1925 Lah. 412.**

——S. 145—*Surety undertaking to pay decree amount if judgment-debtor fails to apply for insolvency within certain time or if surety fails to produce judgment debtors in Court when ordered to do so—Judgment-debtor applying for insolvency within time alone, will not release surety who must also produce judgment-debtor in Court, but decree cannot be executed against him unless he was first ordered to produce judgment-debtor in Court and made default.*

The surety for a judgment-debtor who was arrested in execution of a decree and brought before the Court and released on giving security, took upon himself the burden of paying the decretal amount if the judgment-debtor did not make an application for insolvency within one month or if the surety failed to produce him in Court when required to do so. *Held* that the mere fact that the judgment-debtor filed an application for insolvency within time did not release the surety from liability but that he was also bound to produce the judgment-debtor in Court when required to do so. *Held* further that the surety must be ordered to produce the judgment debtor in Court first, and only on his default, he would become liable under the bond and the decree could be ordered to be executed against him. (*Moti Sagar, J.*) DHARAM SINGH *v.* NAND SINGH. **78 I. C. 447 : A. I. R. 1925 Lah. 170.**

——Ss. 145, 55 (4) and O.21, R. 40—*Surety for judgment-debtor — Insolvency — Non-appearance of judgment-debtor—Liability of surety.*

When a Judgment-debtor was arrested in execution of his decree the respondent stood surety for him and executed a bond undertaking liability for the decretal amount in case the judgment-debtor failed to appear in Court on any hearing till the final decision of the Case. On the date of the hearing the judgment-debtor appeared and expressed his intention of applying to be declared an insolvent. The hearing was adjourned and no fresh security was taken, nor was the surety released. The Judgment-debtor failed to appear on

C. P. CODE (V OF 1908), S. 145.

the adjourned hearing and the decree-holder applied to realise the decree amount by attachment of the sureties' properties. *Held*, that the surety was liable in execution under S. 145, C. P. C. and that his properties could be attached and sold for the decree-debt. (*Moti Sagar, J.*) FIRM OF SHIV DAYAL RAM DITTA MAL *v.* MAHOMED KHAN. **6 Lah. L. J. 200 : 80 I. C. 700 : A. I. R. 1924 Lah. 490.**

——**Ss. 145 and O. 21, R. 40**—*Judgment-debtor released on giving surety for appearance—Failure to produce debtor—Effect.*

Where sureties agreed to produce the judgment debter but did not produce, without further notice they can be made liable on their bonds for their failure. (*Spencer and Devadoss, JJ.*) NAGIER *v.* KRISHNAN CHETTIAR. **(1923) M. W. N. 770 : 75 I. C. 830 : A. I. R. 1924 Mad. 241.**

——**S. 145**—*Principal and surety--Debt extinguished by merger—Surety not liable*

The liability of a surety for a debt ceases to exist when his principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor.

The plaintiffs obtained a decree for mesne profits against a person and the defendant stood surety for him under an order for stay of execution pending a Second Appeal against the decree. The judgment-debtor died and his estate became vested in the plaintiffs. On an application by plaintiffs to recover the amount from the surety, *held*, under the circumstances the plaintiffs were not entitled to recover. It does not make any difference that the surety bond in the case was executed to the Court under S. 145 of the Civil Procedure Code as the Court holds the security only for the benefit of the decree-holder. (*Spencer and Venkatasubba Rao, JJ.*) JEKKANNU SAMI AIYAR *v.* RAMSWAMI CHETTIAR. **44 M. L. J. 171 : 17 L. W. 473 : 72 I. C. 194 : (1923) M. W. N. 253 : A. I. R. 1923 Mad. 340.**

——**S. 145**—*Decree should not be executed against surety where he has substantially complied with his liability though he has produced the judgment-debtor somewhat late.*

Where sureties have substantially complied with their liabilities and have, though somewhat late, produced the judgment-debtor, the extreme step of executing the decree against their property must not be taken. (*Duckworth and Godfrey, JJ.*) TAN KIN SHAM *v.* V. CHI SI. **2 Rang 567 : 84 I. C 998 : A. I. R. 1925 Rang. 135 (2).**

——**S. 145**—*Previous notice to surety is essential before attachment of his property.*

Attachment on the property of a judgment-debtor's surety without previous notice to the surety calling upon him to show cause is *ultra vires*. (*Duckworth and Godfrey, JJ.*) TAN KIN SHAN *v.* V. CHI SI. **2 Rang 567: 84 I.C. 998: A. I. R. 1925 Rang. 135 (2).**

——**S. 145**—*Surety for production of the judgment-debtor—Affidavit of illness—False—Subsequent production of judgment-debtor.*

A surety for the production of the judgment-debtor obtained more time from the Court on the allegation made in his affidavit that the judgment-debtor was laid up with fever. The court adjourned the case to another date when the judgment-debtor duly appeared. The decree-holder filed an affidavit challenging the correctness of the affidavit filed by the surety with regard to the judgment-debtor's illness on the former occasion. *Held*, that the terms of the surety bond had been complied with and if the surety's affidavit was false that may be a ground for separate proceedings against the surety. (*Young, J.*) MA TA DIN *v.* U. K. SHIVALKAR. **3 Bur. L. J. 99: A. I. R. 1924 Rang. 347.**

C. P. CODE (V OF 1908), S. 146.

——**S. 145**—*Surety's inability owing to judgment-debtor being in jail—Surety not liable.*

Where the judgment-debtor is convicted and is in jail and hence cannot be produced as agreed in the surety bond the sureties cannot be directed to pay the agreed amount. 21 Mad. 637; 41 Cal. 50, Foll ; 3 Bur. L. T. 141, Diss. (*Mac Coll, A. J. C.*) MAUNG KYWE AND ANOTHER *v.* MAUNG SAN TIN. **1 Bur. L. J. 236: 70 I. C. 870: 4 U. B. R. 99: A. I. R. 1923 Rang. 26.**

——**S. 145**—*Surety for Receiver—Liability.*

Under S. 145 of the Code, a surety for a Receiver can be asked to pay the sum which he has bound himself to pay. (*Twomey, C. J. and Robinson, J.*) MAUNG PO THEIN *v.* MA WAING. **10 L. B. R. 236 : 59 I. C. 844 : 13 Bur. L. T. 91.**

——**S. 145**—*Procedure—If applicable to surety under Guardians and Wards Act—Remedy.*

The procedure laid down under S. 145, C.P. Code, is not applicable to the case of a surety under the Guardians and Wards Act. The only remedy against him is by way of suit under S. 35 of the G and W Act. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) KHUSHIRAM TEJBHANDAS *v.* JHALIBAI. **89 I. C. 342.**

——**S. 145**—*Surety under adjustment.*

A surety under an adjustment of an application for execution of award filed previously in Court can be proceeded against in execution under S. 145. (*Kennedy, J. C. and Madgavkar, A. J. C.*) RAMSINGH JETHSINGH *v.* REWACHAND KEWALRAM. **17 S. L. R. 257: 83 I. C. 870 : A. I. R. 1925 Sind 25.**

——**S. 146**—*Claiming under—Meaning of transferee of property covered by decree—If can execute.*

The words "claiming under" in S. 146 are wide enough to cover even cases of devolution mentioned in O. 22, R. 10. A transferee of property covered in a decree can execute the decree though the decree itself is not transferred to him. (*Oldfield and Devadass, JJ.*) MANNEM SESHADRI REDDI *v.* PUTTA VENKATA REDDY. **19 L W. 610: 76 I. C. 809: A. I. R. 1924 Mad. 709.**

——**S. 146 and O. 21, R. 89**—*Right to apply—Private purchaser after Court-auction—Dismissal of application by Judgment-debtor—Appeal, if can be continued by private purchaser.*

A private purchaser of properties after a Court sale cannot apply under O. 21, R. 89, C. P. Code to set aside the execution sale. 44 M. 554 F. B., Ref. Where the judgment-debtor had appealed against an order under O. 21, R. 89, C. P. Code refusing to set aside the execution sale and he withdrew his appeal, it is not open to the private purchaser to apply to continue the appeal in the place of judgment-debtor. 41 M. 510, Ref. (*Phillips, J.*) VENKATESA AIYAR *v.* VENKATRAMA AIYAR. **(1924) M. W. N. 62: A. I. R. 1924 Mad. 470.**

——**Ss. 146 and 50 and O. 9, R. 13**—*Legal representative not actually brought on record can apply under O. 9, R. 13.*

An application under O. 9, R. 13 is not exempted from the general provision relating to procedure contained in S. 146. A legal representative can therefore file an application to set aside an *ex parte* decree before he is actually brought on the record. (*Dalal, J. C.*) MT. DEOKI *v.* JUGAL KISHORE. **27 O. C. 299 : 85 I. C. 529: A. I. R. 1925 Oudh 370.**

——**S. 146**—*Time fixed by compromise decree—Court cannot extend.*

Where a compromise decree fixes the time for the doing of an act and does not provide that the act is to be

done with the assistance of the Court, the Court cannot extend the time on any ground, legal or equitable. (*Daniels, J. C.*) ILAHI RAZAKHAN *v.* MT. TAIBA BEGAM. **66 I. C. 273 (1) : 9 O. L. J. 53: A. I. R. 1922 Oudh 145 (1.)**

——S. 146—*Transferee of decree—Right to apply for execution—Recognition by Court—Is necessary.*

Transfer of property during pendency of a suit will not entitle the purchaser to apply for the execution of the decree unless he has taken steps to have his name substituted in the suit in the place of his vendor (*Adami and Bucknill, JJ.*) THAKURI GOPE *v.* MALIC MOTHLAYAR. **1922 P. H. C. C. 256 : 69 I. C. 959 : 3 Pat. L. T. 625 : A. I. R. 1922 Pat. 563.**

——S. 148—*Mortgage decree—Preliminary decree for foreclosure—Extension of time.*

It is open to the Court under S. 148, C. P. Code to extend the time fixed for payment by a preliminary decree for foreclosure in a mortgage suit. (*Walsh, A. C. J. and Ryves, J.*) BALGOBIND *v.* SHEOKUMAR. **L. R. 5 A. 545 : 22 A. L. J. 791: 82 I. C. 184: 46 All. 864: A. I. R. 1924 All. 818 (2).**

——S. 148—*Time fixed by decree for payment of Court-fee cannot be extended.*

Where time has been fixed by a decree of Court for payment of Court-fee, the Court has no jurisdiction to amend the decree so as to enlarge the time for payment. S. 148, C. P. Code is inapplicable to cases where time has been fixed by a decree of Court. 35 A. 582: 40 A. 579; 39 M. 876, Ref. (*Ghose and Panton, JJ.*) NAWAB KHAZEH HABIBULLA *v.* GOLA ASMOTER KHATUN. **37 C. L. J. 395: 27 C. W. N. 720: 74 I C. 575: A. I. R. 1923 Cal. 612.**

——Ss. 148 and 149—*Extension of time—Rejection of plaint—Restoration.*

Once an order rejecting a plaint is set aside in review the Court has full power, under Ss 142 and 148 of the C. P. Code, to extend the time for payment of the deficit Court-fee and the plaint having been originally filed within the period of limitation the suit was not barred. (*Newbould, J.*) SURENDRA PRASAD LAHIRI *v.* ATTABUDDIN AHMED. **26 C. W. N. 391 : 69 I. C. 43: A. I. R. 1922 Cal. 234.**

——S. 148—*Time fixed by decree of first Court—Confirmation on appeal—Time runs from date of Appellate decree.*

When time is fixed by the lower Court for payment of money and the decree of that Court is confirmed on appeal, the time for payment runs from the date of the decree of the Appellate Court, although the latter decree does not expressly provide the time for payment and it should be calculated from the date of the appellate decree. (*Mookerjee and Panton, JJ.*) RAJA SHASHIKANTA *v.* RAJA SARAT CHANDRA. **70 I. C. 6: 34 C. L. J. 415.**

——S. 148—*No applicability to—Pre-emption suit.*

S. 148, C. P. Code, does not apply to pre-emption suits. (*Broadway, J.*) KHAN MUHAMMAD *v.* AHMAN. **73 I. C. 891 : A. I. R. 1924 Lah. 359.**

——S. 148—*Setting aside* ex parte *decree—Extension of time to pay money can be given.*

Where an application to set aside an *ex parte* decree has been allowed conditionally on payment of a sum of money by a certain date, the Court has power to extend the time. (*Campbell, J.*) THE FIRM GOBIND SAHAI RUP LAL *v.* GURDAS MAL. **73 I. C. 648 (1) : A. I. R. 1924 Lah. 222**

——Ss. 148 and 149—*Conditional decree—Time fixed by, cannot be extended.*

When the Court has made a decree in plaintiff's favour conditional on his paying an extra Court-fee within a specific period and had decreed that if this extra Court-fee was not paid the suit was to stand dismissed. *Held*, that once the term of deposit had been embodied in the decree the Court itself, even if it desired, had no jurisdiction to alter its own direction save on an application for review of judgment. (*Scott-Smith, J.*) DIWAN CHAND *v.* RAM LABBAYA. **73 I. C. 922 : A. I. R. 1923 Lah. 372.**

——S. 148—*Pre-emption decree—Section not applicable—Order extending time is open to revision.*

It is not competent to a Court to extend the time fixed in pre-emption decree for payment of purchase money. 35 A. 582 Followed. An order of the Court extending the time under S. 148, C. P. Code, is not a decree and is not appealable as such But the party aggrieved by the order can apply in revision. (*Scott-Smith, J.*) LABH SINGH *v.* GANPAT. **71 I. C. 35 : A. I. R. 1923 Lah. 162.**

——S. 148—*Extension of time for paying additional Court-fee after return of plaint is ordered, is without jurisdiction.*

After the Court has ordered a return of plaint for presentation to proper Court on payment of additional Court fee, it cannot review its order and extend time previously fixed for payment of Court-fee. (*Odgers, J.*) K. RAMACHANDRAYYA *v.* V. VENKATRATNAM. **22 L. W. 582 : (1925) M. W. N. 804 : A. I. R. 1926 Mad. 133 (2).**

——S. 148—*Court can extend time for payment of money antecedent to the passing of decree under the section.*

S. 148 applies to proceedings antecedent to the passing of a decree. Where the Appellate Court passed an order for restoration of a suit which was dismissed for default by the Trial Court, on the plaintiffs paying a sum of money within a time fixed by it and where the Trial Court refused to accept the sum a day later on the ground that the money was paid after the time fixed for payment. *Held*, that the Court has jurisdiction under S. 148 to extend time for payment in such cases. (Case-law discussed.) (*Kinkhede, A. J. C.*) BULAKI CHAND *v.* AMIR ALI. **21 N. L. R. 111 : A. I. R. 1926 Nag. 44.**

——S. 148—*Mortgagee applying for final decree for foreclosure knowing mortgagor's attempt to raise decretal money—Time should be extended.*

Where after an *ex parte* preliminary decree for foreclosure was passed and the mortgagor in pursuance thereof attempted to raise money to pay off the sum but mortgagee applied for final decree immediately he was so entitled.

Held, that extension should be granted to mortgagor to make the payment. (*Hallifax and Kotval, A.J.Cs.*) AMAN SINGH *v.* KUNJ BEHARI LAL. **8 N. L. J. 6 : 86 I. C. 397 : A. I. R. 1925 Nag. 258.**

——Ss. 148 and 151—*Pre-emption decree—Court cannot extend time fixed by.*

S. 148, C. P. Code, does not enable a Court to extend time for doing acts allowed by a decree, (*e.g.*,) the time allowed by a pre-emption decree, for payment of the sale price. 35 A. 582: 39 M. 876: 40 A. 579 Rel. (*Prideaux, A. J. C.*) AMBADAS *v.* LAXMAN. **19 N. L. R. 8 : 71 I. C. 401 : A. I. R. 1923 Nag. 210.**

——S. 148—*Time fixed by decree—Court if can extend.*

Where a decree fixes a certain time for payment of money the Court has no jurisdiction to extend the time under S. 148, C. P. Code, as otherwise it would have the effect of altering the terms of a decree which has become final between the parties. (*Wazir Hasan, A. J. C.*) TRIBHUWAN DIT SINGH *v.* SURAJ BALI. **11 O. L. J. 119 : 78 I. C. 387 : 10 O. & A. L. R. 650 : A. I. R. 1924 Oudh 330.**

C. P. CODE (V OF 1908), S. 148.

——**Ss. 148 and 115**—*Extension of time fixed by decree—Revision.*

An order dismissing an application for extension of time fixed by a decree is open to revision. (*Wazir Hasan, A.J.C.*) TRIBHUWAN DUT SINGH *v.* SURAJ BALI. **11 O. L. J. 119 : 10 O. & A. L. R. 650 : A. I. R. 1924 Oudh 330.**

——**S. 148**—*Applies only to proceedings prior to decree.*

The general provisions of S. 148, C. P. Code, relate only to proceedings antecedent to the passing of a decree. After a final decree is passed, the time for payment of money cannot be extended under S. 148. (*Dalal, A. J. C.*) GANGA RATAN *v.* CHANDIKA PRASAD. **74 I. C. 573 : 9 O. & A. L. R. 319 : A. I. R. 1924 Oudh 179.**

——**S.148**—*Power of Court to extend time—Time fixed by decree.*

The Court has no power to extend the time allowed by a decree for the payment of money under S. 148, C. P. Code. If the decree provides for the payment of a certain sum of money on or before a certain date and specifies the penalty which will attach to non-payment, the enforcement of the penalty cannot be delayed or dispensed with by any order or direction issued in derogation of the decree. In other words, if it provides that the right of the decree-holder to obtain possession shall be extinguished, in case a certain condition is not carried out within a certain period that right becomes extinct on the failure to comply with that condition and cannot be revived by any subsequent act of the Court or party at fault. (*Kanhaiya Lal, J. C.*) BADAL *v.* CHHATTAR SINGH. **25 O. C. 74 : 66 I. C. 205 : A. I. R 1922 Oudh 131.**

——**S. 148**—*Date of payment of decretal amount fixed by consent of parties—Sale to be cancelled on payment of money agreed—Time is essence of the compromise and cannot be extended by the Court—Contract Act, S.* 55.

Time is the essence of the agreement, when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made between the decree-holder and judgment-debtor that on payment of the judgment debt within a prescribed period, the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. In such a case the Court has no power to extend the time fixed for payment. 33 C. L. J. 244, Foll. (*Adami and Kulwant Sahay, JJ.*) HANSRAJ SANGECHI *v.* JOGESHAR PRASAD. **6 P. L. T. 511 : 88 I. C. 1020 : A. I. R. 1925 Pat. 691.**

——**S. 148**—*Accepting deficit Court-fee after time fixed is equal to extending time—C. P. Code, S.* 149.

Where a Court accepts deficit Court fee after the time fixed for its payment and the plaint is registered, it may be inferred that the Court condones the delay and grants extension, as it has discretion to do under S. 148 or S. 149 of the C. P. Code, for, if it wanted, the Court might have rejected the plaint under O. 7. R. 11. (*Dawson Miller, C. J. and Mullick, J.*) RAGHUNANDAN SAHAY *v.* RAM SUNDAR PRASAD. **1924 P. H. C. C. 355 : 4 P. 190 : 6 P. L. T. 4 : 3 Pat. L. R. 22 : A. I. R. 1925 Pat. 299.**

——**S. 148**—*Scope.*

S. 148 only applies to cases of acts done by a party under the provisions of the Code itself. (*Das, J.*) SHEIKH HAMIDUR RAHIMAN *v.* SHAHANAND DAS. **80 I. C. 575 : A. I. R. 1925 Pat. 153.**

——**S. 148**—*Time fixed for payment of costs on payment of which appeal was accepted cannot be extended—C. P. Code, S.* 151.

Where the appellant failed to pay the costs on payment of which only appeal was to be accepted, the Court has no power to extend the time limited in the order for payment of the money either under S. 148 or 115. (*Das, J.*) SHEIKH HAMIDUR RAHIMAN *v.* SHAHANAND DAS. **80 I. C. 575 : A. I. R. 1925 Pat. 153.**

C. P. CODE (V OF 1908), S. 149.

——**S. 148**—*Extension of time given for payment of Court-fee—Expiry of time during vacation—Payment on re-opening day.*

Under an order of the Appellate Court an appellant was ordered to deposit the proper Court-fee payable on his memorandum of appeal within one month and, on default, the appeal was to stand dismissed. The month's time expired during the vacation and, on the reopening day, the appellant could not get stamp for required value from the stamp vendor. So on the next day the appellant furnished the required stamp. *Held*, that there was no laches or negligence on the part of the appellant, that the time fixed for payment of the Court-fee should be extended till the date when it was furnished and that there was sufficient cause for reinstating the appeal (*Miller, C.J, and Bucknill, J.*) AMIR MANDAL *v.* MOHAN CHANDRA MANDAL. **3 Pat. 337 : 80 I. C. 1030 · A.I.R. 1924 Pat. 663.**

——**S. 149**—*Deficiency of Court-fee—Extension of time—Effect of, on limitation.*

Under O. 7, R. 11 (*c*) and S. 149 the Court has power to extend time to pay the deficient Court-fee If the deficiency is made good within the time allowed the suit is not barred though limitation expired in the meantime. (*Ryves, J.*) RAM DIAL *v.* SHER SINGH. **L. R. 4 A. 251 : 45 A. 518 : 21 A. L. J 387 : 74 I. C. 358 : A.I.R. 1923 All. 538 (1).**

——**S. 149**—*Insufficient stamp—Rejection of appeal—Reasons to be stated*

S. 149 of the C. P. Code gives a Court discretion to extend the time for payment of Court-fees on an insufficiently stamped memorandum of appeal and where the Lower Court rejected an appeal simply on the ground that the requisite Court-fee has not been paid without calling upon the appellant to supply the deficiency or exercising any discretion in the matter, *held*, that its decision was unsustainable. (*Rafique and Lindsay, JJ.*) JAI SINGH GIR *v.* SITARAM SINGH. **21 A. L. J. 333 : L. R. 4 A. 188 : 74 I.C. 757 : A. I. R. 1923 All. 349 (1).**

——**S. 149**—*Deficient Court-fee made up after limitation—Deficiency caused unintentionally—Limitation bar excused.*

Where an appeal when filed was insufficiently stamped and the deficiency was made good after the expiry of the period of limitation but the omission to pay the proper Court-fee in the first instance was unintentional and a *bona fide* mistake :

Held, that the appeal should not be dismissed merely for such an omission. (*Martineau, J.*) MIHAN MAL *v.* INDAR SINGH. **6 Lah. L. J. 506 : 84 I. C. 946 : A. I. R. 1925 Lah. 246.**

——**S. 149**—*Deliberate under-payment—No extension to be given.*

Where the omission to pay proper Court-fee was due not to a *bona fide* mistake but was deliberate time should not be granted under S. 149, C. P. Code, to make up the deficiency. (*Broadway and Martineau, JJ.*) MUHAMMAD MAJID ULLAH KHAN *v.* MUHAMMAD HAMID ULLAH KHAN. **69 I. C. 196 : A. I. R. 1924 Lah 325.**

——**S. 149**—Bona fide *mistake in not paying full Court-fees—Deficiency made good after limitation.*

Where full Court-fee is not paid in the first instance through *bona fide* mistake, but the deficiency is made good afterwards, the appellant is entitled to the

C. P. CODE (V OF 1908), S. 149.

benefit of S. 149 and accordingly Court can extend the time. (*Martineau and Zafar Ali, JJ.*) MOTI RAM *v.* BHANU RAM. **A. I. R. 1923 Lah. 629.**

——S. 149—*Deliberate under-payment—No extension to be given.*

Where there is no *bona fide* mistake in the payment of a smaller Court-fee and the omission is deliberate, a Court should not extend time to pay up the deficiency. (*Campbell, J.*) RAMJI LAL *v.* SHIBBA.
75 I. C. 667 : A. I. R. 1923 Lah. 309.

——S. 149—*Under-valuation deliberately made—Extension of time not to be given.*

Where an appellant deliberately omits to pay the necessary Court fee and grossly undervalues his claim he is not entitled to any indulgence under S. 149, C. P. Code. 49 I. C. 871 ; 3 P. L. J. 74; 44 I. C. 398 ; 1 Lah. 234 Rel. (*Abdul Raoof and Harrison, JJ.*) TIKKAN RAM *v.* BOSA RAM. **4 U. P. L. R. (Lah.) 77 : 67 I. C. 106 : A. I. R. 1922 Lah. 440.**

——S. 149—*Pauper appeal—Court-fee.*

Under S. 149, on the payment of Court-fee within time allowed, the memorandum of appeal has the same force and effect as if the Court-fee had been paid in the first instance. The respondent is not entitled to challenge its validity on the ground of limitation. (*Le Rossignol and Campbell, JJ.*) DIYAL DAS *v.* SUNDAR DAS. **3 Lah. 35 : 65 I. C. 741 : 26 P. W. R. 1922 : A. I. R. 1922 Lah. 225.**

——S. 149—*Extension of time—Grounds.*

When the insufficiently stamped memo. of appeal is refiled, extension should not be allowed as ignorance of law or poverty is not an adequate legal ground for extension. (*Shadi Lal, C. J. and Wilberforce, J.*) SHAHU *v.* BAKRI. **67 I. C. 901 : 3 L. L. J. 237.**

——S. 149—*Extension of time to pay proper Court-fee.*

An extension of time will not be allowed for payment of Court-fee for an appeal which has been insufficiently stamped in the absence of satisfactory explanation of the mistake, if any (*Scott-Smith and Jones, JJ.*) FATTEH SINGH *v.* BABU RAO.
67 I. C. 130 (1) : 3 L. L. J. 156.

——S. 149—*Appeal filed on insufficiently stamped memo.—Deficiency made up after limitation—Extension of time.*

Where the deficiency in stamp for a memorandum of appeal is pointed out to the appellant but is nevertheless not made up till long after the appeal is barred by time he is not entitled to the benefit of S. 149, C. P. Code. (*Scott-Smith, J.*) WADHAWA SINGH *v.* SUNDAR SINGH. **59 I. C. 689 : 21 P. W. R. 1921.**

——Ss. 149 and 151—*Time fixed by decree—No extension to be given.*

Defts. judgment-debtors failed to comply with their contract and plaintiff decree-holder got a decree for specific performance on condition of deposit within a certain period. He made the payment 4 days after, but before the expiry of the period allowed, he applied for correction of the decree by the insertion of certain directions as to what was to happen in the event of his making the deposit. The Court on 20th March allowed the amendment, but in the same order stated that plaintiff decree-holder had failed to make the deposit and was not entitled to any extension of time. Two months before this order, the plaintiff decree-holder had applied for execution and was given possession of the property, the failure to make deposit not having been brought to the notice of the Court. The judgment-debtor in connection with proceedings which culminated in the order of 20th March, applied to be restored to possession and her application was granted. *Held*, in revision, where a definite time is fixed by the decree, the Court has no power to extend it, but in any case no extension having been granted, plaintiff-decree-holder was not entitled to any relief. (*Daniels, J. C.*) DORI LAL *v.* MT. JAMAGA.
72 I. C. 879 : A. I. R. 1923 Oudh 16.

C. P. CODE (V OF 1908), S. 150.

——S. 149 and O. 7, R. 11—*Deficiency of Court-fee—Subsequent payment—Effect—Difference between suit and appeal.*

Where a plaint is filed in time but with an insufficient Court-fee, and the deficiency is made good under O. 7, R. 11, no question of limitation arises. The law is otherwise as regards memoranda of appeal. 3 Pat. L. J. 74 Ref. to. (*Coutts and Macpherson, JJ.*) DEONATH SAHAI *v.* RADHA KANT PRASAD. **3 Pat. L. T. 142 : 70 I. C. 378 : A. I. R. 1922 Pat. 56 (1).**

——S. 149—*Discretion—Reasons for not filing the entire Court-fee must be considered before granting extension.*

To avail of the terms of S. 149, the permission to deposit deficit Court-fee must be given after considering the circumstances and reasons for not filing the entire Court-fee in the first instance. (*Jwala Prasad, J.*) FORZAND ALI *v.* ABDOOD HAMID. **60 I. C. 493.**

——S. 149—*Application to sue in* forma pauperis *withdrawn—Court-fee paid beyond limitation—Suit barred.*

Where the plaintiff applied for permission to sue *in forma pauperis* but withdrew his application on the ground that in another Court his application to sue *in forma pauperis* with respect to a previous suit had been rejected and paid the requisite Court-fees beyond the period of limitation, *Held*, his suit was barred and it was not a fit case for the Court to exercise discretion under S. 149. (*Young, J.*) SOOK LAL *v.* DAL CHAND. **1 Rang. 196 : 74 I. C. 835 : A. I R. 1923 Rang. 256.**

——S. 149, O. 7, R. 11—*Plaint not sufficiently stamped—Time for paying Court-fee—Payment after limitation—Power of Court.*

Where a plaint is presented on insufficiently stamped paper, the Court has discretion under S. 149 and O. 7, R. 11 to give the plaintiff time to make up the deficiency and if the deficiency is made up within the time granted, though after the expiry of the period of limitation, the suit is not barred. The exercise of the discretion cannot be challenged in revision. (*Wadegoankar, A. J. C.*) MAHOMED GALIF *v.* ABDUR RAHIM. **89 I. C. 419 : A. I. R. 1926 Nag. 156.**

——S. 150—'*Transfer of business*'—*Assignment of business within local limits of one subordinate Court to another by the Dt. Judge is not transfer of business—Bengal, Assam and N. W. P. Civil Courts Act, S. 13 (2).*

A decree was passed by the third Subordinate Judge's Court in respect of a claim, the cause of action whereof arose within certain local limits Subsequently the business arising within these limits was assigned to the fourth Subordinate Judge's Court by the District Judge under Ss. 13 (2) of the Bengal and Assam Civil Courts Act (XII of 1887). *Held*, that the fourth Subordinate Judge's Court could not entertain an application to execute the decree. An "assignment" of business under S. 13 (2) of Act XII of 1887 is not the same thing as "transfer" of business within the meaning of S. 150 of the Civil Procedure Code. (*Chatterjee and Chotzner, JJ.*) MD. KAZEM ALI *v.* NIAMUDDIN AHMED. **26 C. W. N. 216 : 70 I. C. 210 : A. I. R. 1922 Cal. 41.**

——S. 150 and O. 39, R. 2 (3)—*Injunction—Disobedience—Transfer of venue—Application for contempt.*

The Court of M. passed an injunction order under

C. P. CODE (V OF 1908), S. 150.

O. 39, R. 1, C. P. Code. Subsequently the local jurisdiction as well as the suit in which the injunction was ordered, were both transferred to the Court of D. Thereupon the applicant applied to the Court of D for punishing the opposite party for contempt for disobeying the injunction. *Held*, that the Court of D had jurisdiction to entertain the application for punishment for alleged contempt. 26 C. W. N. 216 Diss. 39 M. 907, Foll. (*Krishnan and Venkatasubba Rao, JJ.*) MOUNA GURUSAMY NAICKER *v.* SHEIKH MAHOMEDHU ROWTHER. **43 M. L. J. 713 : (1922) M. W. N. 743 : 16 L. W. 748 : 46 M. 83 : 86 I. C. 650 : A. I. R. 1923 Mad. 92.**

———S. 150 and O. 6, R. 13—*Transfer of jurisdiction—Application to set aside* ex parte *decree.*

Subsequent to the passing of an *ex parte* decree by the District Munsiff's Court, Penukonda, the properties which were the subject-matter of the suit were under a territorial re-distribution of jurisdiction transferred to the jurisdiction of the District Munsiff's Court of Anantapore. On an application made thereafter in the District Munsiff's Court of Anantapore to set aside the *ex parte* decree, *held*, that Court had jurisdiction to set aside the decree under O. 9, R. 13 read with S. 150 of the C. P. Code. The wording of O. 9, R. 13 which declares that an application to set aside an *ex parte* decree may be made to the Court which passed the decree, does not take away the power of a Court that has territorial jurisdiction over the subject-matter of a suit to set aside an *ex parte* decree passed by another Court that originally tried the suit.

Per *Krishnan, J.*—S. 150 of the C. P. Code applies not merely to cases where the whole of a business of a Court with reference to the whole of its jurisdiction is transferrred to another Court but also to cases of the partial territorial adjustment of jurisdiction and the transfer of the business with reference to that part alone to another Court. (*Spencer and Krishnan, JJ.*) SRINIVASA RAO *v.* HANUMANTHA RAO. **42 M. L. J. 344 : 65 I. C 727 : 46 M. 1 : 15 L. W. 458 : (1922) M. W. N. 349 : 31 M. L. T. 79 : A. I. R. 1922 Mad. 10.**

———S. 151.

Amendment.
Appellate Court's Power—*See* C. P. CODE, S. 107.
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Scope of.
Stay of execution of suit.
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Who can invoke.
———*See also* C. P. CODE, SS. 107, 148, 149, 150, 152 and 153.

Amendment.

——— S. 151—*Amendment—Inherent power of Court—Variance between judgment and decree—Preliminary decree not in accordance with judgment—Remedy of aggrieved party—Power of Court.*

Where the judgment of the Court contained an express direction that there was to be a preliminary decree for sale, the decree that was actually drawn up was a decree for foreclosure. The notices issued to the defendants (mortgagors) were notices to show cause why a final decree for sale should not be passed. Finally an *ex parte* final decree for foreclosure was passed. The defendants subsequently applied to set aside the *ex parte* final decree on the ground that the notices had not been served and that the preliminary decree for foreclosure not being in accordance with the judgment, all subsequent proceedings were void. The Court below rejected the application. *Held*, on appeal, that the applicants (defendants) had no proper notice of the proceedings for drawing up the final decree inasmuch as the notices were misleading documents having no relevance to the real proceeding which were contemplated and having no reference to the order eventually passed. The preliminary decree for foreclosure was not in accordance with the judgment and the mistake being due to an error on the part of the officers of the Court must be rectified by the High Court in the exercise of its inherent jurisdiction. There can be no estoppel against a litigant arising out of the wrongful acts of the Court, permitted or performed by its own officials. (*Walsh, A. J. C. and Ryves, J.*) BALGOBIND *v.* SHEO KUMAR. **22 A. L. J. 791 : L. R. 5 A. 545 : 82 I. C. 184 : 46 All. 864 : A. I. R. 1924 All. 818 (2).**

———S. 151—*Amendment—Clerical error—Court can correct.*

Where a purely clerical error is brought to the notice of a High Court when it is seized of the matter as a Court of appeal it can correct the error. (*Mears, C. J. and Piggott, J.*) IQBAL HAIDAR KHAN *v.* WASI FATIMA BIBI. **45 A. 53 : L. R. 3 A. 597 : 74 I. C. 1004 : A. I. R. 1923 All. 358.**

———S. 151—*Amendment of decree—Variance with Judgment—Refusal to award—Interference.*

Where a decree is at variance with the judgment a refusal to amend the same and bring the same into conformity with each other is a refusal to exercise a jurisdiction vested by law and can be interfered with in revision. (*Suhrawardy and Chotzner, JJ.*) KABIR-UD-DIN MONDAL *v.* ENTAJ MONDAL. **79 I. C 586 : A I. R. 1925 Cal. 420.**

———S. 151—*Amendments.*

An application in substance for substitution of the heirs of the deceased party can be allowed to be amended into one under O. 22, R. 10, if owing to misunderstanding of law, the applicant has applied for substitution instead of under O. 22, R. 10. (*Chatterjee and Pearson, JJ.*) RAJANI KANTA *v.* JYOTI PRASAD. **27 C. W. N. 710 : 75 I. C. 255 : A. I. R. 1924 Cal. 90.**

———S. 151—*Amendment of decree.*

S. 151 would enable a Court to alter a decree when it does not correctly express what theCourt actually decided or intended to decide. (*Campbell, J.*) ASA SINGH *v.* JAGJIT SINGH. **73 I.C. 679: A.I.R. 1923 Lah. 147 (2).**

C. P. CODE (V OF 1908), S. 151—Amendment.

——S. 151—*Amendment.*

Where the decree has not been signed the Court has power to make alteration to make decree consistent. (*Spencer and Devadoss, JJ.*) GOPALA AIYANGAR *v.* MUMMACHI REDDIAR. **17 L. W. 254 : 74 I. C. 416 : A. I. R. 1923 Mad. 392.**

Ss. 151 and 152——*Amendment—Decree—Executing Court*

It is not competent to a Court to amend the decree of another Court transferred to it for execution, even though the error may be obvious. (*Spencer and Ramesam, JJ.*) KORALLA BUCHILINGAM *v.* KORALLA SATYANARAYANAMURTHI. **15 L.W. 301: 65 I. C. 710 : A.I.R. 1922 Mad. 186 (1).**

——S 151—*Amendment—Pre-emption decree—Amount entered wrongly—Correct amount paid by plaintiff in time—Decree can be amended even after expiry of period fixed by decree for payment.*

Under S. 151 of the C. P. Code the Courts are given very wide powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The amount payable by the plaintiff was entered in a pre-emption decree, through a clerical error, as a sum higher than that really payable by him. The plaintiff paid the amount really due from him within the time fixed, *bona fide* ignorant of the error in the decree. On objection being raised by the defendant that the decree had not been complied with, the plaintiff applied under S. 152 for amendment of the decree. The lower Court (after expiration of the period fixed for the payment of the pre-emption amount by the decree and without giving notice to the defendant) amended the decree. *Held*, that the order of the lower Court was correct. (*Daniels, J. C.*) SURAJ BAKSH SINGH *v.* BANS BAHADUR SINGH. **12 O. L. J. 246 : 87 I C. 987 : 2 O. W. N. 218 : A. I R. 1925 Oudh 418.**

——Ss. 151 and 152—*Amendment—Intention of judgment not coinciding with order passed—Judgment can be corrected so as to agree with the intention.*

Where from the discussion of the case it appeared that the intention of the Judge was to decree the appeal and it was only by a mistake that the words "fails and is dismissed" were used, *held*, that the Court is bound to correct a clerical error such as has taken place in the judgment, and the words "is decreed" should be substituted in place of "fails and is dismissed". The provisions of Ss. 151 and 152 are much wider than the corresponding sections of the old Code. (*Dalal, A. J. C.*) MT. MAHESHA *v.* RAMESHAR. **71 I. C. 563 : A. I. R. 1924 Oudh 144.**

——S 151—*Amendment—Decree—Pendency of appeal*

Even though an appeal is pending from a decree it is open to the Court that passed the decree to amend it. (*Das and Ross, JJ.*) REVA MAHTO *v.* DALU MAHTO. **2 Pat L R. 6 : 78 I. C. 794 (1) : 5 Pat. L. T. 588 : A I. R. 1924 Pat. 528.**

——Ss. 151 and 152—*Amendment—Mistakes in plaint copied in decree—Dismissal of appeal under O. 41, R. 11, C. P. Code.*

Even though a second appeal has been dismissed under O. 41, R. 11, C. P. Code, the High Court has power to amend the plaint and decree so as to rectify a mistake in the description of the properties occurring in the plaint and copied in the decree. (*Mullick and Bucknill, JJ.*) KARTAR RAI *v.* TALEY CHOWDHURY. **1923 P. H. C. C. 46 : A. I. R. 1923 Pat. 218 (1).**

Applicability.

——S. 151—*Applicability—Exercise of inherent power when remedied by way of appeal.*

A Judge has no power to exercise his inherent power in favour of a party who has a remedy by way of appeal. (*Macleod, C J. and Coyajee J.*) VIRAPA *v.* BASAPA. **27 Bom. L. R. 1511.**

——S. 151—*Applicability—Co-plaintiff transferred as defendant—Security for costs—Power to order—Past or future.*

Per *Chatterjee, J*:—On a co-plaintiff being transferred as defendant he can call on the other plaintiff to give security for costs. The matter being one of amendment only, costs up to date of order can be ordered but not future costs.

Per *Cuming, J*:—Where as in O. 25, R. 1 and O. 41, R. 10, the C. P. Code has provided for security for costs under specific circumstances, an inherent power of Court should not be invoked in cases not falling under either of these. The Court cannot order security for costs in other cases. (*Chatterjee and Cuming, JJ.*) BHAIRABENDRA NARAIN DEB *v.* UDAI NARAIN DEB. **50 Cal. 853 : A. I. R. 1924 Cal. 251.**

——S. 151—*Applicability—Remedy barred by limitation—Section cannot help.*

S. 151 cannot be invoked to help a party who had a remedy provided by law and failed to take advantage of that remedy within the period of limitation allowed. (*Campbell, J.*) FIRM OF DUNICHAND-GOKEL CHAND *v.* PUTAM DAS. **7 Lah. L. J. 13 : 86 I. C. 256 : 26 Punj L. R. 841 : A I. R. 1925 Lah. 321 (2).**

——S. 151—*Applicability of.*

S. 151 of Civil Procedure Code does not apply where there is an express provision of law. (*Martineau, J.*) FIRM OF KAHNA MAL BENARSI DAS *v.* FIRM OF KAHNA MAL NATHU MAL. **40 P. L. R. 1922 : 69 I. C. 718 : A. I. R. 1924 Lah. 70.**

——S. 151—*Applicability—Code making express provision—S. 151 cannot be invoked.*

When the Code makes provision for a certain procedure, the Code must be deemed to be exhaustive in that respect and the provisions of S 151 cannot be invoked in opposition to those provisions. 43 Mad 94 and A.I.R. 1924 Mad. 114 Rel. on. A. I. R. 1923 Lah. 144 Dissented. (*Phillips, J.*) V. VARADACHARLU *v.* K. NARASIMHA CHARLU. **(1925) M. W. N, 886 : A. I. R. 1926 Mad. 258.**

——S. 151—*Applicability—Preliminary decree awarding mesne profits—Final decree omitting the relief—No appeal filed—Review petition dismissed—Subsequent application to pass further final decree in respect of that relief is not maintainable.*

The final decree in a partition suit had omitted to give relief as to mesne profits though it had been allowed in the preliminary decree. No appeal was filed and an application for review was dismissed. Subsequently an application was put in under S. 151 of the C. P. Code asking for further final decree for mesne profits awarded in the preliminary decree. *Held*, that inasmuch as no appeal was filed and the application for review of the final decree had been dismissed, there was no authority and no sufficient ground for invoking the inherent jurisdiction of the Court. (*Phillips, J.*) VEERAPPA GOUNDAN *v.* VEERAPPA GOUNDAN. **48 M. L. J. 512 : 88 I. C. 94 : A. I. R. 1925 Mad. 886.**

——S. 151—*Applicability—Setting aside its own orders.*

S. 151 does not apply in every case in which there is no other remedy open to the party. A Court has not inherent power to set aside its own orders whenever it chooses to do so. (*Mullick and Kulwant Sahay, JJ.*) ANANT POTDAR *v.* MANGAL POTDAR.

C. P. CODE (V OF 1908), S. 151—Applicability.

4 Pat. 704 : A. I. R. 1926 Pat. 27.

——S. 151—*Applicability—Order certifying adjustment of a decree.*

When there is no application for review, a Court cannot set aside an order certifying adjustment of a decree, unless the order is prejudicial to one of the parties. (*Mullick and Sultan Ahmad, JJ.*) RAM GULAM SAHU *v.* SHAM SAHAI DAS.

1 P. L. T. 663 : 1920 P. H. C. C. 358 : 62 I. C. 234 : 5 Pat. L. J. 379.

Consolidation.

——S. 151—*Consolidation—Power to deal with two appeals together.*

In spite of the absence from the Code of Civil Procedure of any provision enabling two cross-appeals from the same decree to be consolidated, the appellate Court has inherent jurisdiction in such a case in disposing of the two appeals so to mould its decree as to merge the result of the two appeals into one decree representing the final adjustment of the rights of the parties in all the points raised. (*Mears., C.J., Banerji, Piggott, Walsh and Ryves, JJ.*) GHANSHAM SINGH *v.* BHOLA SINGH. **21 A. L. J. 465 : L. R. 4 A. 265 : 45 A. 506: 74 I. C. 411: A. I. R. 1923 All. 490 (F. B.).**

——S. 151—*Consolidation of suits—Joint promisees suing separately—Power of Court.*

Where joint promisees sue separately for the share of each in a debt due, the Court has power to consolidate the suits. (*Prideaux, A. J. C.*) KISENLAL *v.* CHENDHA. **A. I. R. 1924 Nag. 196.**

——S. 151— *Consolidation— Order declaring appeals are analogous, does not result in their consolidation—Practice—Consolidation of suits.*

The effect of an order declaring that appeals are analogous is merely that they shall be heard together. It has not the effect of consolidation and an order passed in one does not govern the other unless expressly stated. (*Dawson Miller, C. J. and Foster, J.*) TOFA LAL DAS *v* MOINUDDIN.

4 Pat. 448 : A. I. R. 1925 Pat. 765.

——S. 151—*Consolidation of suits—Consent of parties.*

A Court has inherent power to consolidate suits, and this jurisdiction can be exercised even without the consent of the parties. 17 C. W. N. 526 Ref. (*Coutts and Das, JJ.*) QAZI MAHOMED FAZAL *v.* MAHKUMAR MAHTON. **3 Pat. L. T. 584 : 1 P. 669 : 67 I. C. 1000 : A. I. R. 1922 Pat. 566 (1).**

Conversion.

——S. 151—*Conversion.*

The petition under S. 151 can be treated as one for review. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER.

43 M. L. J. 290 : (1922) M. W. N. 495 : 31 M. L. T. 132 (H. C.) : 16 L. W. 440 : 70 I. C. 425 : A. I. R. 1922 Mad. 446.

Correctness of Proceedings.

——S. 151—*Correctness of order—Remand not appealed against—Court may investigate under.*

A Court can investigate the correctness of a remand order though no appeal had been filed against it. (*Das and Ross, JJ.*) RAM RAI *v.* MAHESHWAR PRASAD SINGH. **A. I. R. 1925 Pat. 336.**

——S. 151—*Correctness of proceeding—Guardian of plaintiff giving up relief against one defendant—Application by minor to re-open—Remedy.*

Where the guardian of a minor plaintiff withdraws his claim against one defendant, he ought to get the leave of the Court under O. 32, R. 7. It is open to the minor to get it re-opened and the appropriate remedy is under S. 151 and not by way of review. It is an inherent power of every Court to correct its own proceedings where it has been misled. (*Jackson, J.*) KANAPARTHY SRINIVASA RAO *v.* VENKATANARASAMMA.

22 L. W. 629.

Costs.

——S. 151—*Costs—Defts. granted adjournment on condition of paying costs—Default in paying—Defence can be struck off—C. P. Code, O. 17, R. 1.*

Where payment of costs is made a condition precedent of adjournment granted to the defendants, it is open to the Court to strike off the defence and proceed *ex parte*, when the costs are not paid as directed (*Mukerjee, J.*) EAST INDIAN RAILWAY CO. *v.* JIT MAL KALLO MAL.

23 A. L. J. 212 : L. R. 6 A. (Civ.) 212: 86 I. C. 862 : 47 All. 538 : A. I. R. 1925 All. 280.

——S. 151—*Costs — Order directing costs of commission being realised—If one in execution under S. 47—Appeal.*

An order passed by a Court for the payment of the costs in connection with the execution of a commission recoverable from the parties is an order in favour of an officer of the Court and any proceeding taken to enforce such order is not a proceeding between the parties within the meaning of S. 47 and as such is not appealable. (*Kanhaiya Lal, J.*) GOPAL DAS *v.* GOURI SHANKER PRASAD. **74 I. C. 186 : A. I. R. 1924 All. 122.**

Dismissal for default.

——S. 151—*Dismissal for default—Restoration—Appeal.*

The Court in a proper case can readmit an appeal dismissed for default. Where the next friend of a minor appellant is of unsound mind, the minor's absence at the hearing cannot be treated as default and his appeal will be re-admitted by court in exercise of inherent powers. (*Shah and Crump, JJ.*) SONUBAI BABURAO *v.* SHIVAJIRAO.

45 Bom. 648 : 60 I. C. 919 : 23 Bom. L. R. 110

Ends of Justice.

——S. 151—*Ends of justice — Stay of suit—Inherent power—Vexatious and oppressive suit—Natural forum avoided by plaintiff—Evidence accessible outside jurisdiction.*

Appeals to the inherent jurisdiction of the Court have to be regarded with great caution. But if having exercised such caution, the Court is clearly of opinion that the jurisdiction ought to be exercised it should not be intimidated from so doing, because no case on all fours is forthcoming from the reported decisions of the High Courts. (*Marten, J.*) JETHABHAI VERSEY & CO. *v.* AMARCHAND MADHAVJI & CO.

25 Bom. L. R. 713: A. I. R. 1924 Bom. 90.

——S. 151—*Ends of justice—Stay—Court will stay suit where no injustice to plaintiff is caused but there is oppression and vexation which is avoidable by trial elsewhere.*

The Court will stay an action brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction if it is satisfied that no injustice will be done thereby to the plaintiff, and that the defendants would be subject to such injustice in defending the action as would amount to vexation and oppression to which he would not be subjected if an action were brought in another and accessible Court, where the cause of action arose. A suit may consist of two claims A and B, and be only oppressive as regards A,

C. P. CODE (V OF 1908), S. 151—Ends of Justice.

If, therefore, a defendant satisfies claim B, defendant should not be precluded from contending that claim A should be stayed. In order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other place. (*Marten, J.*) JETHABHAI VERSEY AND CO *v.* AMARCHAND MADHAVJI & CO

25 Bom. L. R. 713 : A. I. R. 1924 Bom. 90.

——**S. 151**—*Ends of justice—Stay of proceedings—Decision of another tribunal.*

The Court has inherent power to postpone the hearing of a suit pending the decision of a selected action and to make an order for stay of cross-suits on the ground of convenience. 38 C. 927; 40 C. 965 Ref. This inherent power is not to be exercised capriciously or arbitrarily and is to be exercised to facilitate that real and substantial justice for the administration of which alone Courts exist. 17 C. 272 ; 16 M. 380 ; 33 C. 927, 932; Rel. (*Mookerjee and Chotzner, JJ*) SYED ABDUL ALIM *v.* BADARUDDIN. **28 C. W. N. 295: A. I. R. 1924 Cal. 757.**

——**S. 151**—*Ends of justice—Proceedings under Cr. P. Code, S. 476 pending in lower Court—Stay can be granted.*

When the lower Court has issued notice to certain partiesto show cause why they should not be proceeded against under Cr, P. Code, S. 476, the superior Court has inherent power under S. 151 to stay the proceedings. (*Zafar Ali, J.*) HARNAM SINGH *v.* MT. ATRI. **7 L. L. J. 73 : 88 I. C. 526 : A. I. R. 1925 Lah. 323 (2)**

——**S. 151 and O. 46. R. 1**—*Ends of justice—Application for reference—Inherent power of Court.*

The applicant when he filed his suit in the Court of the Subordinate Judge was bold to go to the Court of the Munsif and when he went to the Court of the Munsif was told that the Munsif had no jurisdiction. The orders passed were very old and an application for reference did not lie under O. 46, R. 1. *Held*, at the same time the High Court could take action under S. 151, C. P. Code, and pass such orders as may be necessary for the ends of justice. (*Dalal, J. C.*) JAFAR HUSAIN KHAN *v.* MT. CHOUTI.

10 O. & A. L R. 1191: A. I. R 1925 Oudh 461

——**S. 151 and O 21, R. 89**—*Ends of justice—Parties coming to an arrangement before confirmation of the auction sale—Application made by parties to set aside sale—Court can set aside—C. P. Code, O. 21, R. 89.*

If the judgment-debtor and the auction-purchaser come to an arrangement before an auction sale is confirmed by which the decree-holder is paid off and parties apply to the Court to set aside the sale, the Court can set aside the sale under S. 151 notwithstanding that the procedure laid down in O. 21, R. 89 has not been followed. (*Wazir Hasan J. C.*) KUBER SINGH *v.* BACHNIRAM. **80 I. C. 444: A. I R. 1925 Oudh 128.**

——**S. 151**—*Ends of justice—Court can call for documents.*

Even though a document is not produced at the first hearing of a case the Court can call for the document under S. 165 of the Evidence Act. (*Ashworth, J. C.*) SHANKAR LAL *v.* MAHBUB SHAH.

25 O. C. 286: 70 I. C. 278 · A. I. R. 1923 Oudh. 59.

——**S. 151**—*Ends of justice—Decree-holder permitted to bid on conditions—Failure to fulfil conditions—Powers of Court to refuse to confirm sale.*

Where decree-holder is permitted to bid at an auction sale, subject to certain conditions being fulfilled and he fails to fulfil the condition, the Court has power to refuse to confirm the sale. (*Miller, C. J. and Coutts, J.*) MT. JANAKBATI *v.* RAMESHWAR.

1 P. 235 : 69 I. C. 872 : 1 Pat. L. R. 179: A. I. R. 1922 Pat. 511.

C. P. CODE (V OF 1908), S. 151—Execution.

——**S. 151**—*Ends of justice.*

The Court has inherent power to do justice between the parties under S. 151 of C.P Code. (*Das and Adami, JJ.*) CHINTAMONI MAHAPATRA *v.* MONMOHINI DEBI. **1 P 149 : 69 I. C. 200 : A. I. R. 1922 Pat. 409.**

——**S. 151**—*Ends of justice—Stay of execution—Leave to appeal to Privy Council not granted—Exercise of powers.*

A Court has inherent power under S. 151, C.P. Code, in appropriate circumstances to stay execution on receipt of an application for leave to appeal to the Privy Council pending the passing of orders on the application. But such inherent powers should be sparingly used and only on good grounds being established. Language of O. 45, Rr. 5 and 13 considered. (*Kincaid, J. C. and Aston, A. J. C.*) NARUMAL *v.* JAGATMAL. **82 I. C. 739: A. I. R. 1925 Sind 216.**

——**S. 151**—*Ends of justice.*

An order under S. 151, C. P. Code, is to be made when the ends of justice require it or to frustrate an abuse of the process of Court. (*Raymond, A. J. C.*) FIRM OF JAI NARAIN BABU LAL IN THE MATTER OF. **16 S. L. R. 79: 66 I.C. 796: A. I. R. 1922 Sind 6.**

Enforcement of Order.

——**S. 151**—*Enforcement of order—Variation as to details.*

Every Court has power to enforce its own orders made by consent of parties, when by the accident of circumstances the carrying out of such detail according to the agreement can no longer be achieved. If a specific Commissioner is named to do an act and he refuses to act, the Court can appoint another though the parties do not agree to it. (*Walsh and Ryves, JJ.*) PARSHOTTAM DOSS *v* SHIAM LAL.

A. I. R. 1923 All. 460 (2.)

Error of Law.

——**S. 151, O. 32, R. 3**—*Error of law—Court guardian—Appointment of.*

To appoint a guardian *ad litem* without issuing notice to the natural guardian, in contravention of O. 32, R. 3 is illegal and the Court has inherent power under S. 151 to correct the errors or mistakes committed by itself. (*Devadoss, J.*) JAMBU AMMAL *v.* NATARAJA PILLAI. **31 M. L. T. 215: 70 I. C. 867: A I. R. 1922 Mad. 485.**

Execution.

——**S. 151**—*Execution—Property sold in revenue auction—Mortgagee suing for lien on surplus sale proceeds—Surplus sale proceeds attached before judgment in mortgage suit—Auction sale set aside and remand ordered—Auction-purchaser can apply under S. 151 for withdrawal of attachment, though he was not party to mortgage suit.*

By virtue of S. 73 of the Transfer of Property Act the moment a mortgaged property is transformed into money by reason of a revenue sale the lien fastens by operation of law upon the surplus sale-proceeds. It is so, on the equitable principle that the mortgagee is entitled, for the purpose of the security, to all such interests as may be acquired in place of the mortgagor's interest. If the mortgagor's interest in the mortgaged property is re-vested in him in consequence of the sale being set aside, and the mortgagor ceases to have any interest in the sale proceeds, the mortgagee is in a position to fall back upon his original security, and has no more lien on the sale proceeds which no longer

C. P. CODE (V OF 1908), S. 151—Execution.

represent the interest of the mortgagor. The fact that by the order of attachment surplus sale proceeds had already become available to the mortgagee makes no difference; for the Court has ample powers in the exercise of its inherent jurisdiction under S. 151, C. P. Code, even to make an order for refund. Also the fact that the auction-purchaser applying for withdrawal of the attachment was not a party to the suit in which the order for attachment of the surplus sale proceeds was made does not disentitle him to apply. 1922 Cal. 28; Foll. The application being one under S. 151, Civil P. Code, invoking the inherent powers of the Court to make an order necessary for the ends of justice, the question as to the *locus standi* of the applicant can hardly arise. (*M. N. Mukerji, J.*) RASH BEHARI *v.* KASUM KUMARI. **A. I. R. 1925 Cal. 1145.**

——S. 151—*Execution—Only a chartered High Court can restrain executing Court in certain cases from executing a decree—Jurisdiction—Powers of Court.*

No Court except a chartered High Court in which a suit was instituted has power under the C. P. Code or any other statutory enactment to restrain the executing Court by an injunction from executing a decree. Only a chartered High Court has inherent powers to issue injunctions of this nature in certain cases, but other Courts do not possess any such powers. 34 Cal. 97 and 34 Cal. 101, Foll. (*Zafar Ali, J.*) KANSHI RAM *v.* FIRM PRABH DIAL.
7 L. L. J. 457 : A. I. R. 1925 Lah. 618.

——S. 151—*Execution—Decree whether can be transferred to Native State—Inherent power of Court.*

The Code does not authorise Courts in British India to transfer their decrees for execution to a Court of a Native State. But there is nothing to prevent the transmission of certified copies of the necessary documents to such a Court to enable it to execute the decree under any powers conferred by the Legislative authority of its own State. S. 151 is wide enough to cover this procedure and it is a proper course to pursue where a State has intimated its willingness to have decrees of Courts in British India executed in the Courts of the State. (*Twomey, C. J. and Ormond, J.*) SADAYAPPA *v.* ANNAMALAI. **61 I. C. 704 : 13 Bur. L. T. 145.**

Ex-parte Decree and Order.

——S. 151 and O. 9, R. 13—Ex-parte *decree—Inherent power to set aside—Application filed after time prescribed by Art.* 164, *Lim. Act.*

An application under O. 9, R. 13 to set aside an *ex parte* final decree in a mortgage suit which was filed long after the time limited by Art. 164 of the Limitation Act, was dismissed by the first Court on the ground that notice was duly served. The District Judge, while agreeing with the finding of the first Court as to the service of notice, acted under S. 151 of the Code and set aside the *ex parte* decree on the ground that when it was passed, it was barred by time. *Held*, that S. 151 of the Code cannot be used in that way. Where a definite period of limitation has been prescribed by Art. 164 of the Limitation Act for an application to set aside an *ex parte* decree, the Court would not be entitled, by purporting to act under S. 151 of the Code, in effect to extend that period. 43 Mad. 94 (F. B.) Foll. (*Coutts and Ross, JJ.*) AYODHYA MAHTON *v.* PHUL KUER. **1922 P. H. C. C. 61 : 65 I. C. 341 : 1 Pat. 277 : A. I. R. 1922 Pat. 479.**

C. P. CODE (V OF 1908), S. 151—Fraud.

——S. 151 and O. 21, R. 90—Ex parte *decree or order setting aside.*

A Court can entertain an application to set aside an *ex parte* order under O. 21, R. 90. (*Jwala Prasad, J.*) BHIKAN GIR GOSSAIN *v.* JALPADAT JHA.
62 I. C. 113 : 2 Pat. L. T. 270.

——S. 151—Ex parte *decree—Decree passed by over sight.*

A Court can set aside an *ex parte* decree passed by an oversight under O. 34, R. 6 as against a person who is not the mortgagor. (*Jwala Prasad, J.*) HANUMAN LAL *v.* RAM PEARI KOER. **60 I. C. 368 : 2 Pat. L. T. 251.**

Expunging from Record.

——S. 151—*Expunging from record.*

Where the judgment of a Subordinate Court has not been brought before the High Court on appeal or revision the High Court has no power to expunge adverse remarks on the character and credibility of a witness from the judgment of the Subordinate Court. (*Gokul Prasad and Stuart, JJ.*) C. DUM *v.* EMPEROR.
44 All. 401 : 66 I. C. 1005 : 20 A. L. J 261 : L. R. 3 A. 66 (Cr.) : 4 U. P. L. R. (A.) 165 : 23 Cr. L J. 349 : A I. R. 1922 All. 107.

Extension of time.

——S. 151 and O. 21. R. 11—*Extension of time—Execution proceedings—Power to grant time to judgment debtor for payment of decree amount.*

The Court has got an inherent power to grant time to the judgment-debtor for payment of the decree amount even after the passing of the decree and before he is arrested and brought before it in execution. (*Kumaraswami Sastri, J.*) PERURI SOORYAPRAKASAM *v.* MUNISWAMI CHETTY. **20 L. W. 175 : 84 I. C. 134 : 48 M. 494 : A. I. R. 1925 Mad. 42.**

——S. 151—*Extension of time—Costs of appeal to be paid in one week—Power to extend time.*

An appeal was allowed and the case remanded to the Court below on condition the appellant paid the respondent's costs within one week, and on default the appeal was to stand dismissed. *Held*, the Court had no power to extend the time for payment under S. 148, C. P. Code, as the section applies only to the case of an act by the party under the Code itself. (*Das, J.*) SHEIKH HAMIDHUR RAHIMAN *v.* SHAHANAND DAS. **80 I. C. 575 : A. I. R. 1925 Pat. 153.**

——S. 151—*Extension of time—Setting aside* ex parte *decree.*

No appeal lies against refusal of an application under S. 151 nor can time be extended under S. 151 for setting aside an *ex parte* decree. (*Coutts and Ross, JJ.*) AJODHYA MAHTON *v.* PHUL KUER.
1 Pat. 277 : 1922 P. H. C. C. 61 : 65 I. C. 341 : A. I. R. 1922 Pat. 479.

Fraud.

——S. 151—*Fraud—Inherent power—Compromise—Mistake—Allegations of fraud—Setting aside compromise.*

Where the Court acting on the assurance of counsel that the plaintiff has agreed to a compromise and after issuing notice to the plaintiff ordered a decree to be passed in terms of the compromise and some time later the plaintiff applied to the Court to review its order alleging that the petition of compromise and the affidavit in support thereof were put in without her knowledge, *held*, that the court was not bound to exercise its inherent power in the case and set aside the

C. P. CODE (V OF 1908). S. 151—Fraud.

compromise on an application. (*Piggott, J.*) DWARKA DHISH PRASAD SINGH, *In re.* **46 A. 245 : 22 A. L. J. 118 : L. R. 5 A. (Civ) 46 : A. I. R. 1924 All. 398.**

——S. 151—*Fraud—Inherent powers to refuse to confirm sale are invoked only when the Court is misled by misstatement or non-disclosure of facts.*

The inherent powers of the Court to refuse to confirm the auction-sale held under its order are only invoked when it is shown that the Court is misled by a mis-statement or non disclosure of relevent facts. (*Findlay, O. J. C.*) NIZAMUDDIN *v.* JUMMA. **A. I. R. 1926 Nag. 17.**

——S. 151—*Fraud— Consent decree— Setting aside—Factum of consent disputed—Fraud—Power of Court.*

A Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order, it was misled by any party. Where in a consent decree, a party alleges that its consent was obtained by fraud the Court has no inherent power to investigate into the matter. But the factum of consent can be investigated. (*Das and Kulwant Sahay, JJ.*) SADHO SARAN RAI *v.* ANANT RAI. **1923 P. H. C. C. 197 : 2 P. 731 : A.I.R. 1923 Pat. 483.**

Injunction.

——S. 151 and O. 39—*Injunction—High Court may grant injunctions irrespective of O. 39—C. P. Code, O. 39, Rr. 1 and 2.*

High Court has an inherent power to grant injunction in suitable cases irrespective of the provisions of O. 39. (*Abdul Raoof, J.*) SAMANDAR *v.* FAZAL. **78 I. C. 802 : A. I. R. 1925 Lah. 242 (2).**

——S. 151—*Injunction—Declaratory suit—Suit pending in another Court should be stayed.*

In a suit merely of a declaratory nature it is not proper to grant an injunction staying proceedings in another suit pending in another Court. (*Abdul Raoof, J.*) SAMANDAR *v.* FAZAL. **78 I. C. 802 : A. I. R. 1925 Lah. 242 (2).**

——S. 151—*Injunction restraining sale—Sale ignoring injunction.*

Pending a partition suit, the District Munsiff issued an injunction restraining an auction sale being held, and soon after refused an application of the judgment-debtor to postpone the sale. He then confirmed the sale ignoring the injunction order. On appeal the sale was set aside as illegal. *Held*, though a legal act done in breach of an injunction is still valid the sale in such circumstances would be an abuse of process of Court and should be set aside under the inherent powers of the Court. (*Oldfield and Devadoss, JJ.*) REPAKA MAMILLAYYA *v.* ADDEPALLI VENKATARATNAM. **45 M. L. J. 312 : (1923) M. W. N. 672 : 77 I. C. 12 : A. I. R. 1924 Mad. 100.**

Invention of Procedure.

——S. 151—*Invention of procedure.*

A Court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the Indian law. (*Newbould and Cuming, JJ.*) GOUR CHANDRA GOSWAMI *v.* NABADWIB MUNICIPALITY. **A. I. R. 1922 Cal. 1 (1).**

C. P. CODE (V OF 1908), S 151—Jurisdiction.

——S. 151—*Jurisdiction—Executing Court can not go behind the decree.*

A decree was passed in terms of an award. There was a clear mistake in the map filed with the award. The executing Court examined the head arbitrator who deposed that the map was incorrect. *Held*, that the procedure adopted by the executing Court was wrong and his order passed thereon must be set aside. (*Walsh and Kanhaiya Lal, JJ.*) HAR PRASAD *v.* RAGHUBAR DIAL. **45 All. 628 : 21 A. L. J. 541 : L. R. 4 A. (Civ.) 553 : 74 I. C. 817 : A. I. R 1924 All. 62.**

——S 151—*Jurisdiction — Questions removed from the jurisdiction of Court cannot be brought within the same under the inherent powers.*

Where certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction on the ground that the Court has inherent power to do what justice requires for the parties before it. 45 Bom. 512 : 24 Bom. 467 applied. (*Findlay, O. J. C.*) NIZAMUDDIN *v.* JUMMA. **88 I. C. 893 : A. I. R. 1926 Nag. 17.**

——S. 151—*Jurisdiction — Security for mesne profits—No provision is made in the Code.*

Although a plaintiff has often a reasonable fear that if he gets a decree he will fail to realise mesne profits, yet the Code has not made express provision for such an order. (*Dalal and Simpson, A. J. Cs.*) BHAGWAN BAKSH SINGH *v.* SURENDRA BIKRAM SINGH. **10 O. L. J. 209 : 74 I. C. 335 : A. I. R. 1924 Oudh 11.**

——S. 151—*Jurisdiction—Appeal in non-appealable cases.*

Under S. 151 of the Code, the Court has no inherent power to allow the appeal against the order of remand where no right of appeal is given by the Code. That section can never be invoked in any case unless a Court has jurisdiction to entertain the case. It cannot be invoked to give the Court jurisdiction, if it does not possess it otherwise. (*Ashworth, J. C.*) SHEIKH FARZAND ALI *v.* EKADASHI. **26 O. C. 10 : 10 O. L. J. 36 : 73 I. C. 591 : 9 O. & A. L. R. 332 : A. I. R. 1923 Oudh 177.**

——S. 151—*Jurisdiction—Power to alter order of predecessor in office.*

Apart from the power to correct clerical or arithmetical errors, or to review a judgment, a Court has no inherent power to alter an order passed in Court. (*Das and Foster, JJ.*) BISHESHWAR PARTAP NARAIN SAHI *v.* ASARFI SINGH. **2 Pat. L. R. 155 : 74 I. C. 110 : A. I. R. 1924 Pat. 136.**

——S. 151—*Jurisdiction — Recalling an order passed by the predecessor is beyond jurisdiction and invalid.*

If an order of a Sub-Judge in execution is erroneous the proper course for the party aggrieved is to apply to the High Court under S. 115, Civil Procedure Code It is well settled that the Court has inherent power to recall an order which has not been perfected but no power whatever to recall one which has been perfected. Therefore a successor has no power to recall the perfected order of his predecessor. 12 Ch. D. 88 and 10 C. L. J. 396 Foll. (*Coutts and Das, JJ.*) HIRO SINGH *v.* KAZI SYED AHMAD HUSSAIN. **69 I. C. 742 : A. I. R. 1922 Pat. 204.**

C. P. CODE (V OF 1908), S. 151—Jurisdiction.

——**S. 151**—*Limitation—Period—Extension of.*

Where a definite period of limitation is fixed by law, a Court is not entitled to extend such period by invoking S. 151. (*Shadi Lal, C. J.*) FIRM KUNDAN LAL-MUKANDI LAL *v.* KANSHI RAM.

89 I. C. 427 (1).

——**S. 151**—*Misappropriation of paddy by Amin deputed to attach the paddy—Inherent power of Court to direct the Amin to make good the value of the paddy misappropriated.*

Where an Amin deputed by the Court to attach a quantity of paddy in execution of a decree misappropriated a portion of it, *held*, that the Court had jurisdiction under S 151 of the C. P. Code, to order the Amin to make good the value of the paddy misappropriated by him, as the conduct of the Amin was an abuse of process of the Court. (*Madhavan Nair, J.*) AMIN MALLIKARJUNA *v.* B. BEORAN KUNHI.

22 L. W. 387 : (1925) M. W. N. 742.

Limits of.

——**S. 151**—*Limits of—Statute of limitation not to be overlooked.*

S. 151, C. P. Code, is not intended to override the express provision of law. In other words, where the law provides for a period of limitation for a particular class of application, the Court cannot ignore the provisions of the law of limitation by appealing to S. 151, C. P. Code. That section is intended for cases for which the strict letter of the law provides no remedy. 46 A. 144 : 1 Pat. 277 : 1 Lah. 263 : 42 B. 367 : 47 M. 171 Rel. (*Daniels, J.*) TOTA RAM *v.* PANNA LAL.

46 A. 631 : 22 A. L. J. 583 : L. R. 5 A. 347 : 79 I. C. 997 : A. I. R. 1924 All. 668 (2).

——**Ss. 151 and 152**—*Limits of—Inherent power is not limited to Ss. 151 and 152.*

The inherent power of the Court as vested in it by its own constitution is not limited to Ss. 151 and 152, C. P. Code. 18 C. W. N. 772 Ref. (*Suhrawardy and Chotzner, JJ.*) KABIR-UD-DIN MONDAL *v.* ENTAJ MONDAL.

79 I. C. 586 : A. I. R. 1925 Cal. 420.

——**S. 151**—*Limits of—Remedy barred by limitation—Section cannot help.*

S. 151 cannot be invoked to help a party who had a remedy provided by law and failed to take advantage of that remedy within the period of limitation allowed. (*Campbell, J.*) FIRM DUNICHAND GOKANCHAND *v.* PRITAM DAS.

7 L. L. J. 13 : 86 I. C. 256 : A. I. R. 1925 Lah. 321 (2),

——**S. 151**—*Limits of.*

S. 151, C. P. Code, cannot be called into aid to justify an act, which, instead of being necessary for the ends of justice or to prevent abuse of the process of the Court, not only causes or is likely to cause incalculable mischief, but also perpetuates injustice to third persons who are neither parties to the suit nor bound by the decree passed therein. (*Kinkhede, A. J. C.*) PANNA LAL *v.* MT. BHAGIRATHIBAI.

20 N. L. R. 11 : 78 I. C. 601 : A. I. R. 1924 Nag. 98.

——**S. 151**—*Limits of—Prohibition by positive law—C. P. Code, O. 22, R. 3.*

S. 151 cannot confer jurisdiction on Court to do what is prohibited by positive law. Where a Judge had passed an order as to Court-fees, *held*, that his successor could not alter that order save in case of arithmetical or clerical error or on review. (*Dass and Ross, JJ.*) HARIHAR PRASAD NARAIN DEO *v.* MAHESWARI PRASAD NARAIN DEO.

3 Pat. 654 : 82 I. C. 813 : A. I. R. 1925 Pat. 47.

C. P. CODE (V OF 1908), S. 151—Mistake.

Mistake.

——**S. 151**—*Mistake of Court—Court can rectify even apart from S. 151.*

Even apart from S. 151 the Court has an inherent power to rectify the mistake which had been inadvertently committed by itself. A preliminary decree for sale was passed in favour of the appellant who within three years of the passing of the preliminary decree applied to the Court to pass a final decree. Notices were issued to the judgment-debtors and the case was adjourned from time to time ; on one of the adjourned dates the applicant happened to be absent. The defendants never appeared. In the absence of the parties, the Judge passed an order dismissing the suit for default *Held*, that the order of the Court was wrong and that the Court was right in setting it aside when the mistake was brought to its notice by the party.(*Sulaiman and Mukerji, JJ.*) JODHA SINGH *v.* PADAY GOKARANDAS.

47 All. 546 : 23 A. L.J. 405 : 87 I. C. 225 : A. I. R. 1925 All. 622.

——**S. 151**—*Mistake in execution sale will not be rectified after three years so as to affect a* bona fide *purchaser.*

S. 151 cannot properly be applied, where an application to rectify a mistake in the quantity of property sold in execution was not made till more than three years after the sale, and it was substantially directed against a purchaser for value who was no party to the decree and who acquired the property in good faith on the basis of the sale certificate. (*Ryves and Daniels, JJ.*) IMTIAZ-UN-NISSA *v.* CHHUTAN LAL.

22 A.L.J. 1119 : L. R. 6 A. (Civ.) 153 : 84 I. C. 746 : 47 All. 304 : A. I. R. 1925 All. 236.

——**Ss. 151 to 153**—*Mistake—Obvious mistakes can be corrected by Court of its own motion.*

Where the Court had wrongly entered the word "probate" in its judgment instead of "letters of administration" the Court corrected the judgment at a subsequent stage of the same case on the matter having been brought to its notice. (*Mookerjee and Cuming, JJ.*) SIVADAS MOOKERJEE *v.* SURENDRA NATH CHATTERJI.

40 C. L. J. 24 : 82 I. C. 382 : A. I. R. 1925 Cal. 178.

——**S. 151 and O. 20, R. 14**—*Mistake—Failure to deposit even costs in time cannot be excused.*

Where pre-emptor was directed to pay into Court pre-emption money and costs in a certain time and he paid the money but failed to pay costs, *held*, that the mistake cannot be excused. (*Broadway, J.*) KHAN MUHAMMAD *v.* AHMAN.

A. I. R. 1924 Lah. 359.

——**S. 151**—*Mistake—Inherent powers should be exercised to correct errors—Express provision in C. P. Code is not necessary.*

It is an inherent power of every Court to correct its own proceedings where it has been misled although there may be no express provision in the C. P. Code for such correction. (*Jackson, J.*) KANAPARATHY SRINIVASA RAO *v.* V. K. VENKATANARASAMMA.

22 L. W. 629 : A. I. R. 1926 Mad. 119.

——**S. 151**—*Mistake—Court can remedy injury caused by dishonest conduct of its own officer.*

When an officer of Court deputed to execute an order issued by it conducts himself dishonestly, with the result that one of the parties to the suit in which

C. P. CODE (V OF 1908), S. 151—Mistake.

the order was issued suffers thereby, the Court, on being informed of this fact, has jurisdiction under S.151 to remedy the injury by passing necessary orders. (*Madhavan Nair, J.*) AMIN MALLIKARJUNA *v.* B. BEORAN KUNHI. **22 L.W. 387 : (1925) M.W.N. 742 : A. I. R. 1925 Mad. 1212.**

——S. 151—*Mistake—Compromise decree—Setting aside—Remedy of party.*

Where an application to set aside the decree passed in pursuance of compromise by a lady whose signature was obtained by mistake or fraud of an agent, the remedy is by way of review petition. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER. **43 M.L.J. 290 : 70 I. C. 425 : 16 L. W. 440 : (1922) M.W.N. 495 : 31 M.L.T. 132 : A.I.R. 1922 Mad. 446.**

——S. 151—*Mistake—Ignorance of fact.*

The Court has inherent power, in fact it is its duty, to rectify mistakes in judicial orders arising from the ignorance of the Court or of its subordinate officers. (*Hallifax, A.J.C.*) MAROTI SONAR *v.* CHINTAMAN SONAR. **69 I. C. 112 : A I. R. 1924 Nag. 58.**

——S. 151—*Mistake—Error deliberately introduced—Power of Court to amend.*

Where a deliberate error is introduced in the pleadings and the same creeps into the decree, the Court *ex delito justitiae* can correct it under S.151, C. P. Code, subject to safeguarding rights of third parties acquired in the interval. In such cases, the wronged party should not be left to remedy by means of a suit. (*Wazir Hasan, A. J. C.*) SHEO DARSAN SINGH *v.* MATADAR. **11 O. L. J. 227 : 78 I.C. 96 : A. I. R. 1924 Oudh 408.**

——Ss 151 and 152—*Mistake—Clerical error—Decree—Duty of Court to rectify.*

The Court which decided an appeal wrote a judgment allowing it, but in the decretal portion concluded by remarking that the appeal failed and was dismissed. *Held*, that it was incumbent upon the Court to rectify the mistake at any time that it was brought to its notice 7 A. 875, R. (*Dalal, A.J.C.*) MT. MAHESHA *v.* RAMESHAR. **26 O. C. 329 : 10 O. L. J. 24 : 71 I. C. 563 : A. I. R. 1923 Oudh 173.**

——S. 151—*Mistake—Pleader erroneously filing a different decree with appeal—Substitution of the correct one should be allowed.*

Where a pleader by mistake attached a different decree to the memo. of appeal, the names of parties in two decrees (the correct one and the one attached) being the same but in opposite order, *held*, that he should be allowed to put in the right decree in place of the one already filed. (*Young, J.*) MAUNG PO THIN *v.* MAUNG PO THIN. **3 Bur. L. J. 325 : 85 I. C. 196 : A. I. R. 1925 Rang. 188.**

——S. 151—*Mistake—Question relating to execution—Excess area in partition decree—Power to correct—Execution proceedings.*

Where the final decree in a partition suit awards an excess share to one party by mistake, it can be amended in execution proceedings, the language of S. 47 being wide enough to cover the case. Apart from S. 47 the Court can do the needful under S. 151, C. P. Code. (*Raymond and Madgavkar, A.J.Cs.*) DANDUMAL *v.* DWARKAMAL. **78 I. C. 1039 : A. I. R. 1925 Sind 126.**

Receiver.

——S. 151 and Sch. II, para 3, cl. 2—*Receiver—Court can appoint Receiver pending arbitration proceedings—C P. Code, Sch. II, para. 3, cl. 2—C. P. Code, O. XL, R. 1.*

The Court is competent to appoint a Receiver in the interval between the submission of an award and the final acceptance or rejection of it and also where an arbitrator is proceeding with a reference. But in the latter case the power of the Court should not be exercised save in exceptional circumstances. (*Kennedy, J.C.*) CHETANSING BAGASING *v.* GULIBAI. **78 I. C. 84 : A. I. R. 1925 Sind 102.**

Reconstruction of Records.

——S. 151—*Reconstruction of records—Procedure.*

Where owing to accident or other cause the records of a Court of justice have been destroyed or lost, the Court has an inherent power to reconstruct its records. An appellate Court has the same power to reconstruct the records of the Court from which an appeal lies to it. In reconstructing the record the Court may have to go very near to rehearing but the Court will always apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. Affidavits, counter-affidavits, the hearing of witnesses and admission of copies are all methods by which the Court may reconstruct the record and an appellate Court may also send the case back to the lower Court for a finding as to the state of record. The best evidence of what took place in the Trial Court would be found in the judgment of that Court if it is available. 7 W.R. 18 Ref. (*Schwabe, C.J., Oldfield, and Ramesam, JJ.*) MARAKKARUTTI *v.* VEERANKUTTY. **32 M. L. T. (H. C.) 382 : 18 L. W. 21 : (1923) M. W. N. 471 : 73 I. C. 1050 : 46 Mad. 679 : 44 M. L. J. 673 : A. I. R. 1923 Mad. 647 (F. B.)**

——S. 151—*Reconstruction of records.*

If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he read a decree can be drawn up. There is nothing in the C. P. Code to prevent that. (*MacCell, A. J. C.*) MAUNG CHIT *v.* MAUNG THA KU. **4 U. B. R. 135 : A. I. R. 1923 Rang. 113.**

Refund.

——S. 151—*Refund of Court-fee—Inherent power.*

The appellants in an appeal applied for the grant of a certificate for renewal or refund of the value of stamps worth Rs. 1,627-8-0 used on a memorandum of appeal which was returned to the appellants by the order of the High Court dated 22nd November 1922, because the memorandum of appeal was not properly stamped. An application was made to the Collector of Patna for renewal or refund of the stamps used on the memorandum of appeal, but he refused the application by his order of the 6th of December, 1922. The appellant then moved the Commissioner who by his order of the 11th January 1923 directed the petitioners to obtain a necessary certificate for renewal from the Taxing Officer of the High Court. *Held*, that even in the absence of any rule the High Court has inherent power under S. 151 of the Code of Civil Procedure to grant the certificate asked for. (*Jwala Prasad and Adami JJ.*) BHUANESHWARI PRASAD *v.* KISHEN DAYAL BHAGAT. **4 Pat. L T. 504 : 70 I. C. 405 (1) ; A. I. R. 1923 Pat. 600.**

——S. 151—*Refund.*

Deposit in Court was withdrawn by person having no right or title. Order for refund was requested and it was held that executing Court could decide the matter. (*Miller, C. J. and Jwala Prasad, J.*) GOPAL RAI *v.* RAMBHANJAN RAI. **1 P. 336 : 65 I. C. 307 : 1922 P. H. C. C. 53 3 P. L. T. 754 : A. I. R. 1922 Pat. 166**

C. P. CODE (V OF 1908), S. 151—Remand.

Remand.

——S. 151—*Remand—Case not properly understood—Appeal, Second.*

Where both the Primary and the First Appellate Court gave a decision in a case without understanding it, it is not a proper decision on the merits and the High Court should, in second appeal, act under S. 151 of the Code and remit the case for retrial. (*Lindsay and Stuart, JJ.*) RANCHHOR DAS *v.* HAR KISHEN DAS. **19 A. L. J. 553 : 63 I. C. 501 : 3 U. P. L. R. (A.) 87**

——S. 151—*Remand—Adjournment, refusal to grant—Appeal.*

An order refusing an adjournment is appealable, and the Appellate Court has power to set aside the decree and order a retrial if the adjournment had been wrongly refused. (*Macleod, C. J. and Shah, J.*) JETHA LAL *v.* VARAJLAL. **63 I. C. 478 : 23 Bom. L. R. 769.**

——S. 151—*Remand Specific provisions of Code.*

Where the Code contains specific provisions which would meet the necessities of a case, an order of remand under inherent powers should not be made. (*Sanderson, C. J. and Chakravarty, J.*) RAJANI KANTA SAHA *v.* RAJENDRA KUMAR BOSE. **82 I. C. 663 : A. I. R. 1925 Cal. 274.**

——S. 151—*Remand—Appeal—Death of respondent—Remand by appellate Court—Legality of order.*

A suit for cancellation of a sale held under the Patni Regulation was decreed in the Court of first instance, upon appeal by the two Zemindars (defendants) that judgment was reversed and the suit was dismissed. The plaintiff thereupon appealed to the High Court. They joined as respondents three sets of persons, *viz.*, (1) the auction purchaser, (2) the two Zemindars, and (3) the persons alleged to be joint tenants in the putni. During the pendency of the second appeal in the High Court the executor to the estate of one of the Zemindar respondents died on the 10th June 1916. The plaintiffs, it is now asserted, were not aware of this circumstance and the auction-purchaser as also other Zemindar respondents were equally ignorant of the event. The result was that on the 31st January 1917, when the appeal was taken up for final disposal in this Court, the hearing proceeded on the assumption that all the parties were properly represented on the record, The appeal was heard, the decree of the lower appellate Court was set aside and the case was remanded for reconsideration. When the case went before the District Judge, he was informed on the 20th December 1917, that one of the Zemindar defendants had died during the pendency of the appeal in the High Court and that the representative-in-interest of that Zamindar was not bound by the order of remand made by the High Court. Thereupon the District Judge held that the appeal could not be reheard by him. *Held*, the order of the High Court was not a nullity by reason of the death of one of the respondents, that the High Court had jurisdiction to hear the appeal and that the District Judge should have reported the case for the orders of the High Court. (*Mookerjee and Chotzner, JJ.*) ABDUL AZIZ *v.* LAKHMI CHANDRA MAJUMDAR. **37 C. L. J. 494 : 74 I. C. 545 : A. I. R. 1923 Cal. 676.**

——S. 151—*Remand—Powers of Court under Code.*

The appellate Court has no jurisdiction to remand the case to a trial Court under O. 41, R. 23, C.P.Code (*Greaves and Ghose, JJ.*) RADHAKRISHNA SAHA *v.* KAMALAKAMINI. **35 C. L. J. 345 : 70 I. C. 547 : A. I. R. 1922 Cal. 456.**

——S. 151—*Remand—Inherent powers—When to be used.*

A remand under the inherent powers of a Court can be made only when the justice of the case requires it. (*Walmsley and Ghose JJ.*) SASI MUKHI DASI *v.* ABINASH CHANDRA HOLDER. **A. I. R. 1922 Cal. 279.**

——S. 151—*Remand—Retrial—Power of Appellate Court to order—Power when to be exercised.*

An appellate Court has the power to order a retrial and this power is to be adopted in exceptional circumstances where the Code does not provide adequate procedure. (*Buckland, J.*) RADHA KANTA *v.* PRAKASH CHANDRA. **64 I. C. 599 (Cal.)**

——S. 151—*Remand.*

An appellate Court has power to make an order of remand under S 151 of the C. P. Code when O. 41, R. 23 of the Code does not apply. (*Martineau, J.*) MAHMUD SHAH *v.* JALAL HUSSAIN SHAH. **73 I. C. 915 : A. I. R. 1924 Lah 245.**

——S. 151—*Remand—All the issues fully tried and decided by trial Court—Appellate Court coming to a different conclusion on one issue—Remand — Impropriety of.*

Remand by the appellate Court coming to a different conclution on one issue though all the issues were fully tried and decided by trial Court is not proper. (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU *v* GANAPATHY RAJU. **30 M L. T. 314 : 16 L. W 593 : 70 I. C. 665 : A. I. R. 1923 Mad. 113.**

——S. 151 and O. 41, R. 23—*Remand— Order of remand affecting the whole suit, is an order under S. 151 and so not appealable.*

Where there was no question of any preliminary point and the order of remand affected the whole decision of the whole suit, *held*, that the remand must be taken to have been made under inherent powers and no appeal lies. 3 P. L. J. 253, Foll. (*Ross, J.*) BALARAM MANJHI *v.* JAGANNATH MANJHI. **A. I. R. 1925 Pat. 760.**

——S. 151—*Remand under inherent power—Appeal—Maintainability—If can be re-considered*

There is no appeal against a remand made under the inherent powers of a Court, but when the matter comes up for final disposal the Court has power to reconsider the correctness of the order. (*Das and Ross, JJ.*) BABU RAM RAI *v.* MAHESWAR PRASAD SINGH. **78 I. C 466 : A. I. R. 1925 Pat. 336.**

Restitution.

——Ss. 151 and 144—*Restitution.*

Execution Court has inherent powers to make restitution orders in cases that may not fall under S. 144, C P. Code. It has powers to direct refund of money paid out of Court. (*Mookerjee and Panton, JJ.*) RAI CHARAN *v.* DEBI PRASAD. **35 C. L. J. 53 : 26 C. W. N. 408 : 64 I. C. 864 : A. I. R. 1922 Cal. 28.**

——S. 151—*Restitution—C. P. Code, S. 144.*

Under S. 151 Court can apply the principle of S 144 to cases to which it would not ordinarily apply and can order restitution as may be necessary. (*Leslie Jones and Broadway, JJ.*) ALLAH DIN *v.* CHIRAGH DIN. **63 I. C. 43. (L).**

——S. 151—*Restitution can be ordered in exercise of inherent powers even in cases not covered by S. 144—C. P. Code S. 144.*

There is inherent power in Courts under S. 151 to apply the principle of S. 144 even in cases which do not strictly come within the terms of that section and to order such restitution as may become necessary as the result of their orders. (*Jackson, JJ.*) SUDALAIMUTHU PILLAI *v* SUDALAIMUTHU PILLAI. **83 I. C. 138 : A. I. R. 1925 : Mad. 365.**

C. P. CODE (V OF 1908), S. 151—Restitution.

——— S. 151—*Restitution—Execution sale.*

Where in an execution sale the proceeds have been distributed among several decree-holders rateably and the execution sale set aside in a claim suit, stranger purchaser has no right to refund of the purchase money, (*Ayling O. C. J. and Venkatasubba Rao, J.*) RAJARAO *v.* ANANTHANARAYANAN CHETTY.

42 M. L. J. 308 : 67 I. C. 369 : 15 L. W. 303 : (1922) M. W. N. 255 : A. I. R. 1922 M. 228.

———**Ss. 151 and 141** — *Restitution — Power of Court to order—Inherent power—Scope of.*

The inherent power of a Court to grant a restitution will be exercised in the ends of justice, that is to say, where this is the only legal method by which the applicant can obtain his dues, (*Ayling and Venkatasubba Rao, JJ.*) VARADA RAMASWAMI *v.* UMMA VENKATARATNAM. **42 M. L. J. 473 : 30 M. L. T. 178 : (1922) M. W. N. 184 : 67 I. C. 546 : 15 L. W. 421 : A. I. R 1922 Mad. 99.**

———**Ss. 151 and 144**—*Restitution — Inherent power—Delivery of possession under mistake.*

Where a judgment-debtor is dispossessed under an erroneous order of Court and that order is set aside in a proceeding to which the Court auction-purchaser is a party it is the duty of the Court to order restoration of possession to the judgment-debtor. 41 M. 467 Rel. (*Kotwal, A. J. C.*) SHRIKISAN *v.* SUNDARBAI.

18 N. L. R. 24 : 64 I. C. 732 : A. I. R. 1922 Nag. 82.

———**S. 151**—*Restitution—Power to order.*

Even in cases which are not covered by S. 144 a court has inherent power to order restitution if the interests of justice require it. (*Das and Ross, JJ.*) KAMALANATH JHA *v.* MOBIT NARAIN JHA.

5 Pat. L. T. 553 : 78 I.C 310 : A. I. R. 1924 Pat. 800.

———**S. 151 and O. 40, R. 1**—*Restitution—Improper appointment of Receiver—Refund of salary paid to Receiver.*

The plaintiff in a suit applied for and obtained the appointment of a Receiver over properties belonging to A and also properties belonging to B. B was subsequently held to have been wrongly joined and was dismissed from the suit. B thereupon applied to the Court that the plaintiff should return Receiver's commission and other charges incurred by her in respect of the Receivership. *Held*, that the Court had inherent power to order the restitution prayed for. The Receiver's possession was wrongful *ab-initio* and such restitution should be ordered as will, so far as may be, place the parties in the same position that they would have occupied if such decree had never been passed. But for the order the applicant would never have been called upon to pay to the Receiver fees for taking charge of the property and realising its profits, and she was entitled under the law to be put in the same position so far as may be as if the order had never been passed. (*Young, O. C. J. and May Oung, J.*) NAIKWAR *v.* MA AYE BYU. **1 Rang. 770 : 79 I.C. 724 : A. I. R. 1924 Rang. 181.**

Restoration.

———**S. 151**—*Restoration—Decree set aside for want of guardian—Procedure.*

Where the previous suit had failed for want of a lawful guardian, the proceedings in it including the decision are a nullity from the point when the improper appointment of the guardian was made. It is not a commencement of a fresh suit. It is not an application for rehearing, because in the eye of law there has been none. It is not an application to restore. It is an application to revive it by the appointment of a proper guardian so that from the date of such appointment it becomes a properly constituted suit in which the differences between the parties can be decided. (*Walsh and Ryves, JJ.*) KIRPU KISHAN *v.* BABULAL **45 All. 606 : 76 I. C. 765 : A. I. R. 1924 All. 225 (1).**

C. P. CODE (V OF 1908), S. 151—Restoration.

———**S. 151**—*Restoration—Inherent power—Rehearing—Decree against minor impleaded as a major.*

Plaintiff sued to eject defendant who was in fact a minor without describing him as such. A decree was passed. On an application by the minor the decree was subsequently cancelled and the case was posted for rehearing. *Held*, that the court had jurisdiction to pass the order under S. 151, C. P. Code. (*Burn, J. M.*) SHAMI *v.* JAI DEEI KUAR.

L. R. 5 A. 331 (Rev.)

———**S. 151**—*Restoration—Suit dismissed for want of letters of administration—Subsequent production of letters.*

The Court below, instead of staying a suit for production of the letters of administration, dismissed it giving liberty to the plff. to apply to have the dismissal set aside on obtaining letters. Subsequently the plaintiff obtained letters of administration and succeeded in setting aside the dismissal of the suit which was then tried and decreed. On an application in revision by defendant. *Held*, that the lower Court should have properly speaking stayed the further trial of the suit pending the production of the letters of administration, that the order of the lower Court was really a means of suspending the suit and at the same time discharging it from the list of suits on file, that the merits of the case were entirely in favour of the plaintiff and therefore the High Court would not interfere in revision. (*Macleod, C. J. and Coyajee, J.*) KHUSHAL SINGJI *v.* UMAN SINGJI. **24 Bom. L. R. 738 : 70 I. C. 910 : A. I. R. 1922 Bom. 210.**

———**S. 151**—*Restoration—Execution case erroneously dismissed for default—Application for restoration headed as under O. 47, R. 1 and S. 151—Application is for restoration and not for review.*

Where an application for restoration of an execution case wrongly dismissed for default was headed as an application under O. 47, R. 1 and also under S. 151, *Held* : the application was really one under S. 151 and hence no appeal lay. (*Suhrawardy, J.*) SARADINDU MUKERJI *v.* GIRISH CHANDRA TEWARI.

78 I. C. 816 : A. I. R. 1925 Cal. 184.

———**S. 151**—*Restoration—Execution application—Dismissal for default.*

Under S. 151, C. P. Code, a Court has inherent power to restore an application for execution which has been dismissed for default, if the applicant satisfies the court that such order is necessary in the ends of justice. Such an order is not appealable. Even viewed as an application for review of the order of dismissal for default, notice is not necessary for the opposite party (*Scott-Smith, J.*) ABDUL KARIM *v.* CHAUDHRI RAM SINGH. **69 I. C. 506 : A. I. R. 1924 Lah. 350.**

———**S. 151**—*Restoration of suit—Minor—Decree against, set aside—Effect of.*

A decree passed against a minor was set aside in a subsequent suit on the ground that the minor was not properly represented in the prior suit and that his guardian *ad-litem* had not consented to act as such. After the decree in the subsequent suit the court below purported to restore the prior suit and revive it in the exercise of its inherent powers. *Held*, that the court had no inherent power to re-open the suit. 10 L. W. 471 ; 39 A. 8 ; 5 L. W. 482 Ref. (*Spencer, J.*) ARUMUGA GOUNDAN *v.* PERIANANJIAPPA GOUNDAN **46 M.L.J. 348 : 19 L. W. 233 : (1924) M. W. N. 289 : 78 I.C. 76 : 34 M. L. T. (H. C.) 94 : A. I. R. 1924 M. 489 (1).**

C. P. CODE (V OF 1908), S. 151—Restoration.

——— **S. 151**—*Restoration—Dismissal of execution application for default.*

The executing court has inherent power to restore to file an application for execution dismissed for default and thereupon the attachment revives. 35 A. 331 ; 45 B. 648 Ref. (*Hallifax, A. J. C.*) SHANKER RAO *v.* MANIK RAO. **68 I. C. 643 : A. I. R. 1923 Nag. 18.**

——— **S. 151**—*Restoration—Execution application—Dismissed for default.*

A Court has inherent jurisdiction under S.151, C. P. Code, to restore to the file, an application for execution which has been dismissed for default if it is necessary in the interests of justice and to prevent abuse of process of Court. (*Hallifax, A. J. C.*) HARLAL *v.* NARAYAN. **18 N. L. R. 152 : 4 N. L. J. 118 : 64 I. C. 420 : A. I. R. 1922 Nag. 267.**

——— **S. 151**—*Restoration.*

Strong grounds would be required to justify an application under S. 151 for the restoration of an execution application. (*Ashworth, J. C. and Simpson, A. J. C.*) NAGESHWAR PRASAD *v.* JAI NARAIN. **73 I. C. 73 : A. I. R. 1922 Oudh 201 (2).**

——— **S.151**—*Restoration—Inherent power of court—Execution of decree—Application dismissed in default—Restoration without notice to judgment-debtor.*

An order restoring an execution application dismissed for default without issuing notice the judgment-debtor and without examining the merits cannot be maintained. In restoring an application for execution of decree dismissed in default the Court should specifically state under what section of the law the order is made. A Court acting under S.151 of the Code of Civil Procedure must state in what manner the ends of justice require the revival of the proceedings. It must satisfy itself that as strong grounds exist for acting under S. 151, C. P. Code as would be required on an application for review. (*Dalal, J. C. and Neave, A. J. C.*) SITAPAT RAM *v.* LAL MAHABIR PRASAD. **1 O. W. N. 747 : 87 I. C. 438.**

——— **Ss. 151, 148, 149 and 114 and O. 47, R. 1**—*Restoration—Deficit Court-fee not paid due to treachery of pleader's clerk—Plaint rejected—Application to restore, lies.*

If the statute says that a thing should not be done, S. 151 cannot vest the Court with the power to direct that it should be done ; but when and where there is doubt and difficulty in applying the other provisions of the Code to the facts of a particular case,S. 151 would apply. The deficit court-fee demanded by the Court was paid by the plaintiff to the pleader who handed it to his clerk to put it in Court. The clerk mis-appropriated the money and filed bogus applications for time to pay the deficit Court-fee with the result that the Court,being tired of such applications ultimately rejected the plaint. The plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file. *Held*, the suit must be restored to file. After having paid the money to a duly constituted agent and an officer of the Court under the Legal Practitioners Act and the rules of the High Court. Whose duty it was to deposit it in court the responsibility of the plaintiff ceased until he was informed of the default made by the pleader or his clerk. (*Jwala Prasad and Kulwant Sahay, JJ.*) ADIT PRASAD SINGH *v.* RAMHARUKH AHIR. **4 Pat. 180 : 1925 P. H. C. C. 147 : A. I. R. 1925 Pat. 435 (2).**

——— **S. 151 and O. 9, R. 9**—*Restoration—Dismissal for default.*

C. P. CODE (V OF 1908), S. 151—Scope of.

That there is an inherent power in the Court to set aside a dismissal for default has been repeatedly held. The power may be exercised where the claim is a substantial claim and would be barred by limitation, if the suit was not restored. (*Ross, J.*) RAM NARAIN *v.* RAMDHAN SINGH. **4 Pat. L. T. 647 : 72 I. C. 668 : 1924 P. H. C. C. 280 : A. I. R. 1924 Pat. 274.**

——— **S. 151**—*Restoration of appeal dismissed for default—Laches of advocate or careless mistake of his clerk.*

The High Court refused to exercise its inherent power to restore an appeal dismissed for default, on the ground of laches of advocate of careless mistake of his clerk. (*Pratt, J.*) MAUNG THAN *v.* ZAMIAT BIBI AND ONE. **3 Rang. 488.**

Review.

——— **S. 151**—*Review—Inherent power.*

A Court has no inherent power to review a decree which was perfectly valid when it was passed. (*Sulaiman and Boys, JJ.*) NATHU MAL *v.* RAGHUBIR SINGH. **L. R. 6 All. 569 : 89 I. C. 946 : 23 A. L. J. 1029.**

——— **S. 151**—*Review—Inherent powers—Dismissal of suit for non-payment of Court-fee—No power to restore.*

The Court has power to review its order rejecting the petition under O. 7, R. 11. (*Das and Kulwant Sahay, JJ.*) RAMESHWARDHARISINGH *v.* SADHU SARENSINGH. **2 P. 504 : 72 I. C. 629 : 4 Pat L. T. 261 : A. I. R. 1923 Pat. 354.**

——— **S. 151**—*Review applied for instead of setting aside of* ex parte *decree—Court can admit.*

Court can admit in the exercise of inherent power an application for review though the proper remedy would have been to apply to have the Judgment set aside as having been passed *ex parte*. (*Duckworth, J.*) MAUNG SAN TIN *v.* MA PHET PU. **2 Rang. 659 : 85 I. C. 284 : A. I. R. 1925 Rang. 192.**

Scope of.

——— **S. 151**—*Scope of—Abortive proceeding in lower Court.*

High Court has power not merely to set aside abortive proceeding in lower Court but to pass such order as the Court ought to have passed itself, and can if the matter be referred back, still pass. (*Walsh, A. C. J. and Ryves, J.*) BALGOBIND *v.* SHEO KUMAR. **22 A. L. J. 791 : L. R. 5 A. Civ. 545 : 82 I. C. 184 : 46 All. 864 : A. I. R. 1924 All. 818 (2).**

——— **S. 151**—*Scope of—Inherent power—Scope of—Other remedy open under the Code—Inherent power not to be invoked.*

S. 151, C. P. Code, declares the existence of an inherent jurisdiction in all Courts to go beyond the law of procedure in the ends of Justice. But S. 151 does not lay down, and could not lay down that a Court may act in defiance of the law of procedure. A judge is bound by the Code of Procedure and the law of limitation. Where the Code of Civil Procedure is silent it is possible and frequently desirable to apply the provisions of S. 151. But the following qualification should always be applied. S. 151 cannot be applied where the rule of procedure is already laid down, and where owing to the appellant's laxity they waited until it was too late to apply under that rule, and endeavour to obtain the relief they desire by ignoring the specific provisions of the law. (*Stuart, J.*) JOSHI SHIB PRAKASH *v.* JHINGURIA. **46 All. 144 : 78 I. C. 416 : A. I. R. 1924 All. 446.**

——— **S. 151**—*Scope of—Not to be used to evade law.*

C. P. CODE (V OF 1908), S. 151—Scope of.

S. 151, C. P. Code, is intended for exceptional cases for which there is no remedy except the Court's inherent powers. It is not intended to enable courts to evade or ignore the provisions of law which govern procedure. Where after passing a decree, a court *suo motu* set aside its own decree on the ground it had discovered some documentary evidence on the record, the procedure is illegal, (*Daniels, J.*) MAHADEO *v.* KALLOO. **21 A. L. J. 447 : L.R. 4 A. 365 : 73 I.C. 494 : A.I.R. 1923 All. 603 (1).**

——S. 151—*Scope of—Summoning a witness before a private person.*

To summon a private citizen to give evidence before another private citizen is not within the inherent jurisdiction of a Court. (*Martin, J.*) MACKINTOSH AND CO. *v.* SCINDIA STEAM NAVIGATION CO. **24 Bom. L. R. 853 : A. I. R. 1922 Bom. 444.**

——S. 151—*Scope of—Powers under S. 151 should not be invoked when there is express provision for review in the Code—Civ. Pro. Code, O. 47. R. 1.*

Where the power under O. 47, R. 1 is granted by the Code itself it is not necessary to invoke the inherent powers of the Court under S. 151, Civ. Pro. Code. The powers exercisable under these respective provisions are not mutually exclusive. (*Mukerjee, J.*) PROBHAS KUMAR GANGULI *v.* NITHAR LAL GANGULI. **28 C. W. N. 928 : 84 I. C. 278 : A. I. R. 1924 Cal. 1054.**

——S. 151—*Scope of—Inherent power of court.*

The doctrine of inherent power has no scope for application where there is express statutory provisions on the point in controversy, (*Martineau, J.*) FIRM OF KAHNA MAL TANARSI DASS *v.* KAHUMMAL NATHUMAL. **40 P. L. R. 1922 : 69 I. C. 718 : A. I. R. 1924 Lah. 70.**

——S. 151—*Scope of—Exercise of powers under—Discretion—Order not revisable.*

The exercise of powers under S. 151, C. P. Code is purely discretionary with a Court and if the learned subordinate Judge refused to exercise these powers their non-exercise is not a ground for revision. (*Moti Sagar, J.*) THE PUNJAB BANKING COMPANY *v.* DIVAN DHANPAT RAI. **75 I. C. 487 : A. I. R. 1923 Lah. 506 (2).**

——S. 151—*Scope of—Extension of limitation—Power of Court.*

S. 151, C. P. Code must not be used to defeat the imperative provisions of S. 3 of the Limitation Act. (*Chevis, J.*) KHAIRATI *v.* UMAR DIN. **66 I. C. 270 : A. I. R. 1922 Lah. 266.**

——S. 151—*Scope of—Court may do what is fair and equitable in absence of express prohibition.*

S. 151 would not enable the Court to act against any of the express provisions of the Code or the rules but where there is no express provision which prohibits a course or where it does not violate any of the rules there seems to be no reason why S. 151 should not be resorted to in order that the Court may do what in its opinion is fair and equitable, 33 C. 927 Ref. to (Case law discussed. (*Kumaraswami Sastri, J.*) PERURI SOORYAPRAKASAM *v.* P. I. MUNISWAMI CHETTI. **20 L. W. 175 : 84 I. C. 134 : 48 Mad. 494 : A. I. R. 1925 Mad. 42.**

——S. 151—*Scope of—Section not to be applied where specific provisions exists but is not availed of.*

Where a Code declares the law on any matter specifically dealt with, the law must be ascertained by an interpretation of the language used by the legislature, for, the essence of a Code is to be exhaustive on such matters, 43 M. 94 Foll. 45 B. 648 dissent. (*Schwabe, C. J. and Wallace, J.*) KRISHNASWAMI NAIDU *v.* CHENGALROYA NAIDU. **45 M. L. J. 813 : 18 L. W. 870 : 33 M.L.T. 207 : 47 Mad. 171 : 76 I. C. 836 : A. I. R. 1924 Mad. 114.**

——S. 151—*Scope of.*

The inherent powers of a court are not to be used in order to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation. (*Oldfield and Venkatasubba Rao, JJ.*) GANAPATHI MUDALIAR *v.* KRISHNAMACHARI. **43 M. L. J. 184 : 16 L. W. 178 : 31 M. L. T. 135 (H. C.) : (1922) M. W. N. 514 : 70 I. C. 743 : A. I. R. 1922 Mad. 417 (2).**

——S. 151—*Scope of—Inherent power—When can be invoked—Specific provision in the Code.*

A Court cannot invoke its inherent jurisdiction where there is a provision in the Code which would meet the requirements of the case. (*Baker, O. J. C.*) MT. MULIA *v.* PARTAB. **A. I. R. 1924 Nag. 325.**

——S. 151—*Scope of—Power when exercised.*

The power mentioned in S. 151, C.P. Code must be used very sparingly and only in the last resort, if only because of the great danger of mistake as to what the justice of a given case may be and the same result can here be achieved in accordance with the letter as well as the spirit of the law. By its very terms S. 151, C. P. Code does, in certain specified circumstances, nullify the clear and imperative provisions of the Code as well as those that are ambiguous or advisory, if any of the latter classes exist. The provisions which cannot be nullified by virtue of the power mentioned in that section are not those that are clear and imperative but only those whose operation in the particular case will not defeat the ends of justice or lead to abuse of the process of the court. (*Hallifax, A. J. C.*) DEBILAL *v.* KRISHNAJI. **5 N.L.J. 265 : 67 I. C. 296 : A. I. R. 1922 Nag. 125.**

——S. 151—*Scope of.*

Under S. 151 a Court can apart from considerations of law, and equity, prevent abuse of its processes where the action of the decree-holder is likely to result in undue advantage to one party. (*Dalal, J. C. and Neave, A. J. C.*) YASIN ALI KHAN *v.* ALI BAHADUR. **10 O. L. J. 443 : 79 I. C. 685 : A. I. R. 1924 Oudh 230.**

——S. 151—*Scope of—Courts not entitled to contravene distinct provisions of law.*

Held, that S. 151 of the C. P. Code was never meant to enable the Court to contravene a distinct provision of the law. (*Daniels, J. C.*) BHAGWAN SINGH *v.* SHEONATH SINGH. **64 I. C. 217 : 24 O. C. 215**

——S. 151—*Scope of—Court cannot do what is prohibited by the Code.*

A Court has no inherent jurisdiction to do that which is prohibited by the Code. So it cannot set aside its own decree save under O. 20, R. 3. (*Das and Ross, JJ.*) RAMESWAR MAHTON *v.* LALA DWARKA PRASAD. **3 Pat. 778 : 84 I. C. 320 : 6 P. L. T. 309 : A. I. R. 1925 Pat. 36.**

——S. 151—*Scope of—Suit dismissed for default in absence of both parties owing to reorganisation of Courts and change of venue—Application to restore case filed out of time—Whether Court has power under S. 151, C. P. Code, where no ground available under S. 8, Limitation to excuse delay.*

The provisions of S. 151, C. P. Code, cannot be invoked in cases in which a party has had a definite remedy open to him but has failed to resort to it within the time allowed by law and so has lost it. (*Lentaigne and Carr, JJ.*) MRS. S. G. M. SAMSON *v.* SILVARAN. **3 Bur. L. J. 47 : 82 I.C. 418 : A. I. R. 1924 Rang. 274.**

——S. 151—*Scope of—Except in very exceptional*

C. P. CODE (V OF 1908), S. 151—Stay of Execution.

circumstances no sale by court should be set aside suo motu *without proof of substantial injury.*

The Court should not, except in very exceptional circumstances and when it is necessary in the ends of justice or to prevent a gross abuse of the process of the Court, set aside a sale *suo motu* without proof of substantial injury to any party, especially when the legislature has made it incumbent on a party interested in setting aside a sale to prove that the irregularity or fraud complained of by him has resulted in substantial injury. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) RUSTOMJI CURSETJI *v.* PEROZSHAH D. MINVALA. **18 S. L. R. 130 : 86 I. C. 1045 : A. I. R. 1925 Sind 253.**

Stay of execution.

——**S. 151**—*Stay of execution—Inherent powers—Exercise of.*

The inherent power of the High Court to make an order staying execution should not be exercised in a case where such an order would merely impede the execution of the final decree without any good and sufficient cause. (*Broadway and Harrison, JJ.*) FITZHOLMES *v.* BANK OF UPPER INDIA. **89 I. C. 588.**

——**S. 151**—*Stay of execution—Fraud—No suit pending—Power of executing Courts.*

The executing court has no power to stay the execution under O. 21, R. 29, if at that time no suit is pending before it against the decree-holder on the part of the judgment-debtor, but the court has an inherent power under S. 151 of the C. P. Code to stay execution on the ground that the *ex parte* decree was obtained by fraud. (*Scott-Smith, J.*) P. W. FITZHOLMS *v.* WARYAM SINGH. **75 I. C. 419 : A. I. R. 1923 Lah. 514.**

——**S. 151**—*Stay of execution—In absence of possibility of speedy decay or depreciation in value execution should be stayed until disposal of insolvency application.*

Where property under attachment is not liable to speedy decay or where it is not of such a nature that the delay in its sale would seriously depreciate its value, the Court should, in the exercise of its inherent jurisdiction order stay of the execution proceeding till such time as the Insolvency Court either passes an order of adjudication or dismisses the application. (*Bilaram, A. J. C.*) FIRM OF LYON, LORD & CO. *v.* FIRM OF VIRBHANDAS RUTTEN CHAND. **76 I. C. 380 : A. I. R. 1924 Sind 69.**

Substitution of parties.

——**S. 151 and O. 1, R. 10**—*Substitution of parties—Appeal—Abatement.*

A suit was brought by a firm against three other firms but the names of the members of the firm were disclosed. Pending an appeal one of the members of the plff. firm died and his three sons applied under O. 30, R. 4 (2) to be added as his legal representatives and parties appellants. Their application was dismissed as time-barred. and some time after the dismissal the surviving appellants applied to add the legal representatives as respondents. *Held* that the Court has inherent power to add the legal representative as respondent and to proceed with the appeal. 3 Pat. L. J. 409. Ref. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 10 : 34 C. L. J. 405.**

——**S. 151**—*Substitution of parties—Power of appellate court to add parties—Circumscribed by O. 41, R. 20.*

An appellate Court has power to implead only such persons as parties to the appeal as were parties in the trial court and were not made parties to the appeal but not those who were complete strangers to the suit.

C. P. CODE (V OF 1908), S. 152.

Powers of a Court to implead parties under S. 151, C. P. Code are circumscribed by O. 41, R. 20 and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. (*Moti Sagar, J.*) MT. HALIMAN *v.* NUR MUHAMMAD KHAN. **73 I. C. 136 : A. I. R. 1923 Lah. 490.**

Who can invoke.

——**S. 151**—*Who can invoke—Plaintiff not clearly entitled to relief—Advancement of income cannot be granted.*

In cases where the plaintiff is not clearly entitled to some relief in the suit, Courts will refuse to make an order for advancement of income. (*Spencer, Offg. C. J. and Srinivasa Iyengar, J.*) SYED YUSUF SAHEB *v.* SUBHAN BIBI. **48 M. L. J. 395 : 21 L. W. 308 : 86 I. C. 909 : (1925) M W. N. 109 : A. I. R. 1925 Mad. 443.**

——**S. 151**—*Who can invoke—Company—Representation—Defect in—Effect of decree or order.*

Where a corporation or company is made a party to a proceeding but is not represented by a person having legal authority to do so and an order is passed adversely to it, it is competent to the proper officer to apply for vacating that order after hearing the person through whom the corporation or company can legally act. In such a case it cannot be said that the corporation or company is not a party simply because a wrong person represents it. It is open to a court to act under S. 151, C. P. Code, and set aside the order passed under the above circumstances and it is not necessary to proceed by way of separate suit. But a stranger to the litigation cannot intervene after the suit or proceedings are disposed of and claim the protection of S. 151 or appeal to the inherent powers of the court to do justice. (*Kumaraswami Sastri, J.*) PERUMAL MOOPAN *v.* VENKATACHARIAR. **42 M. L. J. 563 : 15 L. W. 586 : (1922) M. W. N. 268 : 31 M. L. T. 35 (H. C.) : 68 I. C. 910 : A. I. R. 1922 Mad. 193.**

——**S. 151**—*Who can invoke—Order for payment of amount sued for before decision of suit.*

S 151, C. P. Code saves the Court's inherent power to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the Court, but there is no rule of law or equity which requires, in the interest of justice that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed should be awarded a portion of the amount claimed before his right has been established by the suit brought for that purpose. (*Miller, C. J. and Kulwant Sahay, J.*) GOPAL SARAN NARAIN SINGH *v.* SITA DEVI. **2 Pat. L. R. 159 (Civ.) : 5 Pat. L. T. 560 : 1923 P. H. C. C. 290 : A. I. R. 1924 Pat. 69.**

——**Ss. 152 and 115**—*Court has jurisdiction to refuse amendment—Failure to exercise jurisdiction makes revision competent.*

Under S. 152 of the C. P. Code, the Court has power, under the peculiar circumstances of any case, to refuse the application for amendment of decree, if it feels inclined to do so. The Court is not bound to grant the application in every case. On the judgment-debtor satisfying a mortgage decree in full, the case was struck off. Three years afterwards, the defendant applied for amendment of the decree. *Held*, that the Court could dismiss the application if it was inclined to do so. *Held*, further that the failure by the Court to exercise this jurisdiction on the ground of its non-existence, amounted to material irregularity in

the exercise of its jurisdiction, so that revision of its order was permissible.

Per *Daniels, J.*—When a decree for money has been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment under S. 152 of the C. P. Code. (*Sulaiman and Daniels, JJ.*) PITAM LAL *v.* BALWANT SINGH. **23 A. L. J. 518 : 88 I. C. 396 : L. R. 6 A. Civ. 423 : A. I. R. 1925 All. 556.**

——S. 152—*Correction of error is discretionary.*

Under S. 152 of the C. P. Code there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case. (*Mukerjee and Dalal, JJ.*) KISHORE MOHAN *v.* CHHANGA LAL. **L. R. 5 A. Civ. 753 : 82 I. C. 1030 : 47 All. 44 : A. I. R. 1925 All, 187.**

——S. 152—*Clerical or arithmetical mistake—Mistakes in pleadings, etc.*

A mistake in the final form of an order may well be due to an original mistake made by the party or his lawyer in making the application. That is not a reason for refusing to correct a mistake ; otherwise there should be no object in the legislature giving the Courts jurisdiction to correct mistakes. Mistakes of the kind which may be described as clerical, or due to an oversight between a decree *nisi* and a decree absolute, are in the majority of cases the mistake or slip of the party who sets the Court in motion. (*Walsh and Ryves, JJ.*) ALLAH DIA *v.* RAHIMUDDIN. **22 A. L. J. 215 : L. R. 5 A. 102 : 78 I. C. 166 : A. I. R. 1924 All. 520.**

——S. 152—*Mistake, error or omission—Calculation of amount due—Overlooking of order of Court.*

In calculating the amount due on redemption, the office overlooked an order of Court directing the calculation up to date of payment, *Held*, it was a mere error or mistake under S. 152, C. P. Code and could be corrected at any time. (*Mears, C. J. and Piggott, J.*) BISHUN NARAIN *v.* MT. BIBI RAMJI. **74 I. C. 842 : A.I.R. 1924 All. 127.**

——S. 152—*Mistake in plaint.*

Where an error has crept into the record of a case owing to the mis-description of the suit property in the plaint it is incumbent on the Court to correct the error in an application under S. 152, C. P. Code. (*Piggott and Walsh, JJ.*) SURJAN SINGH *v.* WAZIR SINGH. **21 A. L. J. 328 : L. R. 4 A. 184 : 72 I. C. 483 : A. I. R. 1923 All. 349 (2).**

——S. 152—*Appellate Court can amend the decree of the First Court.*

The decree of the lower Court merges into that of the App. Court and the two become one for the sake of execution. Therefore the App. Court can amend the errors if any in the lower Court's decree. (*Tudball, J.*) MAIKU LAL *v.* MULIAM SINGH. **19 A. L. J 375 : 62 I. C. 910 : 3 U. P. L. R. (A.) 156.**

——S. 152—*Court sale under an order erroneously stating larger sum as due, cannot be set aside for the error.*

When an error has been committed, it is always within the competency of the Court if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. Thus where a property is sold at a Court sale and made over to the auction purchaser, the Court which has ordered the sale, cannot set it aside under its inherent powers under

S. 152, on the ground that the sale was ordered by a mistake for a sum larger than what was due under the decree. Hatton *v.* Harris (1892) A. C. 547, Foll. (*Macleod, C. J. and Coyajee, J.*) PANDURANG SHRIDHAR PATHAK *v.* NARHAR PANDURANG ATRE. **27 B. L. R. 657 : A. I. R. 1925 Bom. 389.**

——S. 152—*Amendment of decree—Decree passed against legal representative personally.*

To pass a decree against the legal representative of the deceased defendant so as to make him personally liable is not competent to a Court to direct. When the attention of the Court is drawn to the error, even although it might be at a rather late stage of the proceedings there is no reason why on that account the mistake should not be remedied. (*Macleod, C. J. and Crump, J.*) JAYAVANT RAO NARAYAN *v.* NARSING SAKHARAM. **A. I. R. 1923 Bom. 414.**

——S. 152—*Decree — Amendment—Discretion—Variance between judgment and decree.*

It is made obligatory on the court, if there is any variance between judgment and decree to bring them into conformity. The word " may " in S. 152 does not make it discretionary with the court to order the correction but merely enlarges the powers of the court by providing that such correction can be done at any time ; or in other words, the section simply emphasises that no lapse of time would disentitle the court to make the correction. (*Suhrawardy and Graham, JJ.*) CHANDRA KUMAR MUKHOPADHYA *v.* SUDHANSU BADANI. **28 C. W. N. 873 : 80 I. C. 55 : A. I. R. 1924 Cal. 895.**

——S. 152—*Decree not in accordance with judgment should be amended.*

Where the decree was a personal decree but the judgment intended it to be in representative capacity (as heirs).

Held : amendment of decree must be allowed. (*Zafar Ali, J.*) CHANDA SINGH *v.* FATEH CHAND. **A. I. R. 1924 Lah. 621.**

——S.152—*Order of amendment—Not appealable.*

Though an appeal can lie against an amended decree in the same way as against any other decree, there can be no appeal against an order amending a decree. The Court has power to amend clerical errors which had crept into a decree by following similar errors in the plaint, without causing the pleadings in which the errors first appeared to be amended. (*Campbell, J.*) ASA SINGH *v.* JAGIT SINGH. **73 I. C. 679 : A. I. R. 1923 Lah. 147 (2).**

——S. 152 and O. 47, R. 7—*Application.*

Even though a Court purported to act under S. 102 on an application which challenged the whole system of calculation adopted by a Court, but there was no allegation that there was any arithmetical or clercial mistake, really the order is an order under O. 47, R. 7 of the Code and an appeal lies from it. (*Wilberforce, J.*) RAYJI LAL *v.* GIYANI. **3 Lah. L. J. 341 . 66 I. C. 992 : 4 U. P. L. R. (Lah.) 54.**

——S. 152—*Court cannot amend where decree is in conformity with judgment though judgment is apparently wrong.*

A Court has no power to amend a decree when it is in conformity with the judgment, not even if there is an error apparent on the face of the judgment. 60 I. C. 368 not Foll. 3 L. W. 499. Foll. (*Hughes, J.*) LAKSHMANA IYENGAR *v.* NARAYANA IYENGAR. **18 L.W. 876 : 33 M. L. T. 221 : 76 I. C. 786 : A. I. R. 1924 Mad 225.**

——S. 152—*Amendment of decree—Discretion—Principles guiding—Intervention of rights of third parties action in good faith—Effect—Sale in execution of decree—Subsequent application for its amendment—*

C. P. CODE (V OF 1908), S. 152.

Parties—Purchase of necessary parties.

The exercise of the power to amend a decree under section 152 of the C. P. Code is discretionary and ought not to be exercised where an application to amend is made after the rights of third parties acting in good faith have intervened without those parties being made parties to the application. (*Oldfield and Ramesam, JJ.*) NARAYANA AYYAR *v.* BIYARI BIVI. **43 M.L.J. 559 : (1922) M.W.N. 731 : 16 L. W. 623 : 32 M. L. T. 98 : 69 I. C. 977 : A.I.R. 1923 Mad. 57.**

——**S. 152**—*Amendment of decree — Delay—No difference between decree and judgment—Time for review over.*

Where the time for reviewing a judgment and decree is long past and there is no difference between the decree and judgment, the objection cannot be raised in a way to take advantage of S. 152 in the absence of clerical or arthimetical errors. (*Spencer and Odgers, JJ.*) MUNIYAPPA CHETTY *v.* MANGATHYAMMAL **15 L. W. 393 : A. I. R. 1922 Mad. 192.**

——**S.152**—*Clerical error—When to be corrected*

A Court can correct a clerical error in a plaint in whatever subsequent record it is repeated by slip, or inadvertence or by mistake. (*Sadasiva Aiyar and Spencer, JJ.*) MAHABOOB BEGUM *v.* LAL BEGUM. **62 I. C. 652 : 14 L. W. 445.**

——**Ss. 152 and 151**—*Amendment—Lapse of time.*

Where the parties allowed a decree to be enforced for 6 years before attempting to amend it, it should not be amended, specially when there is no clerical or arithmetical mistake. (*Prideaux, A. J. C.*) RAJE UDAJIRAM *v.* RAJESHWAR. **67 I. C. 310 : A. I. R. 1923 Nag. 109.**

——**S. 152**—*Amendment refused to be considered on merits on ground of decree having been signed by party's pleader—Revision was allowed.*

Where an application by judgment-debtor under C. P. Code, S. 152 on the ground that a certain sum incurred as expense in summoning witnesses, was wrongly included in the decree, because none of the witnesses appeared on behalf of the decree-holder was refused to be considered on its merits for the reason that the decree as prepared had been signed by the judgment-debtor's pleader. *Held*, that in so doing the Court failed to exercise jurisdiction vested in it by law. (*Wazir Hasan, A. J. C.*) SHEO BALAK *v.* AMBIKASAHAI. **12 O. L. J. 141 : 87 I. C. 333 : A. I. R. 1925 Oudh 373 (1).**

——**S. 152**—*Error in plaint—Description of property—When can be amended—Lapse of time—Effect.*

S. 152 applies only to the correction of accidental slips or omission. If the error is made deliberately, a Court will not lend its aid to correcting the same. But even accidental errors will be not corrected if third parties have acquired rights under the judgment in the interval. Lapse of time has nothing to do with the question. (*Wazir Hasan, A. J. C.*) MATADIN *v.* SHEO DARSHAN. **11 O. L. J. 227 : 78 I. C. 96 : A. I. R. 1924 Oudh 408.**

——**S. 152**—*Mistakes in decree and judgment—Mistakes in plaint—Correction of.*

Errors in judgments and decrees can be corrected at any moment ; and if those errors follow from clerical mistakes committed in the plaint or other proceedings it is open to the Court to ascertain by enquiry whether any accidental slip has occurred and to rectify it, if the real points at issue are not affected thereby. 12 A. L. J. 185 : 17 O.C. 256 Foll. (*Kanhaiya Lal, J.C.*) PAHALWAN SINGH *v.* GANGA BAKSH SINGH. **66 I. C. 693 : 8 O. L. J. 416.**

——**S. 152**—*"Court" meaning of.*

C. P. CODE (V OF 1908), S. 153.

"Court" in S. 152 does not mean the particular presiding Judge who may have made the mistake but means the Court, whoever may be the presiding officer. (*Das, J.*) MEWA SAHU *v.* JHOUTI SINGH. **2 Pat. L. T. 296 : 63 I. C. 840.**

——**S. 152**—*Omission of one of the mortgage properties in plaint and decree—Power to correct exists.*

By a mere oversight the plaint and the decree in a mortgage suit omitted one of the items in a mortgage document, though there was no dispute between the parties as to what was included. *Held* the error can be corrected under S. 152, C. P. Code. (*Duckworth, J.*) MAUNG CHIT HLAING *v.* N. A. R. M. CHETTY. **74 I. C. 1020 : A. I. R. 1924 Rang. 104.**

——**S. 152**—*Appellate decree—Trial Court cannot amend—Notice.*

Once a decree has been confirmed on appeal, it is merged in the appellate decree and the Trial Court has no longer any jurisdiction to amend that decree. Notice must be given to opposite party before amending a decree. (*Saunders, J. C.*) MAUNG YANGIN *v.* KATHARASAN CHETTY. **63 I. C. 799 : (1921) 4 U. B. R. 1.**

——**S. 153, O. 6, R. 17**—*Plaint, amendment of suit for breach of contract—Limitation Act (1908), Art, 115.*

The plff. sued in 1913 for specific performance of the verbal agreement made in 1912 by the defendant with him for transfer of certain land for oil wells in place of the first agreement of 1903 and when the court found the verbal agreement not proved, the plaintiff applied to amend the plaint by claiming damages for breach of the contract of 1903. *Held*, the amendment could not be allowed under S. 153 and O. 6, R. 17 and it was not open to the court to permit a new case to be made out. *Held* further ; the new case as made out was in any event barred under article 115 of the Limitation Act. (*Lord Buckmaster.*) MA SHWE MYA *v.* MAUNG MO HNAUNG. **24 Bom. L. R. 682 : 30 M. L. T. 28 : 48 I. A. 214: A. I. R. 1922 P. C. 249 (P. C.)**

——**S. 153**—*Overvaluing a suit to get round a previous decision is an abuse of the court.*

Overvaluing the suit in order to get round a previous decision is an abuse of the process of the Court and the proper thing for the Court is to return the plaint for presentation to the proper Court. (*Walsh, A. C. J. and Sulaiman, J.*) MOHAN LAL *v.* BHUTESWAR. **L. R. 5 A. Civ. 709 : 83 I. C. 1 : A.I.R. 1925 All. 142.**

——**S.153**—*Court should allow parties to supply by way of amendment, signature to application—Civ. Pro Code, O. 6, R. 6.*

Under S. 153 the Court is authorised to amend any defect or error in any proceeding in a suit. An application should be allowed to be signed by parties by way of amendment where their signature is necessary but has not originally been made. (*Mukerjee and Dalal, JJ.*) SANTI LAL *v.* RAJ NARAIN. **L. R. 5 A. Civ. 565 : 82 I. C. 65 : A.I.R. 1924 All. 804.**

——**S. 153, O. 6, R. 7 and O. 21, R. 17**—*Application returned for amendment—No time fixed—Application, presentation of—Continuation or revival.*

The preliminary decree for sale was passed on the 24th September 1915. It allowed time for the payment of the decretal money till the 24th March 1916. On the 11th December 1918, an application was made by the decree-holder for the preparation of a final decree for sale. On the 13th December 1918, the Court passed an order returning the application to the decree-holder for amendment without fixing any time for its presentation after amendment. On the 6th March 1918, the Court ordered that as the application had not been filed after amendment the papers should be

C. P. CODE (V OF 1908), S. 153.

consigned to record room. *Held*, the application presented after amendment must be treated as a continuation of the previous application and is an application for the continuation or revival of the same proceeding and it was not barred by time. (*Lindsay and Kanhaiya Lal, JJ.*) KALLU MAL *v.* KASHI NATH.

20 A. L. J. 580 : A. I. R. 1922 All. 446.

——S. 153—*Appellate Court—Arithmetical mistake or obvious error in plaint and decree—Duty to amend.*

Where in a suit on a mortgage the name of the village in which the mortgaged property was situated was misdescribed and the mistake is discovered on appeal it is the duty of the appellate Court to allow an amendment of the plaint and thus rectify a clerical mistake. (*Ryves and Gokul Prasad, JJ.*) BHAGIRITH SHUKUL *v.* CHANDRA HARIHAR PATTAK.

20 A. L. J. 159 : L. R. 3 A. 115 : 66 I. C. 208 : A. I. R. 1922 All. 31.

——S. 153 and O. 6, R. 17—*Amendment of plaint—Power of Court after decree is made.*

S. 153, C. P. Code allows the Court to give leave for amendment at any time in any proceeding in a suit, and O. 6, R. 17 says that the Court may allow such amendments at any stage of the proceedings. *Prima facie* this limits the Court to allow amendments in pleadings during the actual pendency of the suit and not after the decree has been actually drawn up and sealed. But when a decree is passed, if it is final, the original Court is, generally speaking, *functus officio* and the occasion for an amendment of pleadings cannot really arise. (*Fawcett, J.*) KISHEN PRASAD AND CO., LTD. *v.* FULLUMAL HIRALAL.

25 Bom. L. R. 888 : 77 I. C. 171 : A. I. R. 1924 Bom. 166.

——S. 153—*Appeal against dead person—Cause title may be amended by inserting the name of respondent's legal representatives—Appeal is proceeding in a suit.*

If an appeal is presented against a person who was dead at the date of presentation the Court may under S. 153 permit the cause title to be amended or may return the appeal memorandum for amendment and representation. Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a proceeding in a suit and as such has full power under S. 153 to direct an amendment of the appeal memorandum. 1924 Mad. 56 Overruled. (*Spencer, C. J. Kumaraswami Sastri and Krishnan, JJ.*) GOPALAKRISHNAYYA *v.* A. LAKSHMANA RAO.

49 M. L. J. 590 : A. I. R. 1925 Mad. 1210 (F. B.).

——S. 153 and O. 1, R. 10—*Dead man—Appeal against—Addition of legal representatives is illegal.*

The respondent whose name was entered in the cause title of an appeal died before its presentation and an application was made to substitute the names of his legal representatives in his place. *Held* that the application could not be sustained. The proper course for the appellant was to file another appeal against the legal representatives and to have the delay excused. (*Oldfield and Venkatasubba Rao, JJ.*) GOVINDA KAVIRAJ PUROHITA *v.* GAURANGA SAW.

45 M. L. J. 231 : 18 L.W. 54 : (1923) M. W. N. 408 : 75 I. C. 739 : A. I. R. 1924 Mad. 56.

——S. 153—*Scope.*

Where the amendment was asked for, before any prejudice could have arisen and it would in the particular case have raised no new question of limitation, *Held*, the objection to amendment was groundless. (*Oldfield and Venkatasubbarao, JJ.*) C. GANPATHI MUDALIAR *v.* N. KRISHNAMACHARI.

C. P. CODE (V OF 1908), O. 1, R. 1.

43 M. L. J. 184 : 16 L. W. 178 : (1922) M.W.N. 514 31 M. L. T. 135 : A. I. R. 1922 Mad. 417 (2)

——S. 153—*Notice to opposite party necessary.*

Amendment of sale certificate without notice to judgment-debtor is irregularity. (*Devadoss, J.*) YAGNASWAMI IYER *v.* CHIDAMPARANATHA MUDALIAR. **(1922) M. W. N. 130 : 65 I. C. 732 : 16 L. W. 760 : A. I. R. 1922 Mad. 63 (2).**

——S. 153—*Applicability—Dismissal order.*

As the dismissal order was not an error or defect in the proceedings, S. 153 does not apply; the remedy for the aggrieved minors is to appeal against the order. (*Roe and Jwala Prasad, JJ.*) RAMGHULAM SINGH *v.* SHEODEONARAIN SINGH. **1922 P. H. C. C. 5 : 3 Pat. L. T. 149 : A. I. R. 1922 Pat. 121.**

——S. 155—*Interlocutory orders—Orders, correctness of which can be challenged in appeal from the final decree are not revisable.*

It is not usual to interfere in revision in the case of interlocutory orders against which though no appeal may lie their correctness can be challenged in an appeal against the final decree in the suit. (*Prideaux, A. J. C.*) BANOOBI *v.* YAKUBKHAN. **80 I. C. 375 : A. I. R. 1925 Nag. 108 (2).**

——O. 1, R. 1.—*See also* C. P. CODE, S. 92.

——O. 1, R. 1—*Receiver—Property in the possession of Receiver—Suit by real owner against creditor.*

Where at the instance of the creditor of an insolvent certain property which the creditor alleged to belong to the insolvent was taken possession of by the Receiver, and on objection by the real owner, was restored to him and the real owner brought a suit against the creditor for damages and wrongful seizure, *held*, that the Receiver was not a necessary party and that the suit was maintainable. (*Tudball and Rafique, JJ.*) BINDA PERSHAD *v.* RAM CHANDER.

43 All. 452 : 3 U. P. L. R. (All.) 42 : 60 I. C. 821 : 19 A. L. J. 277.

——O. 1, R. 1—*Suit for declaration that certain properties are debutter—Person interested in the worship can alone maintain.*

Only a person interested in the worship of an idol, can maintain a suit for declaration that certain properties are the debutter properties of his ancestral idol. (*Walmsley and Ghose, JJ.*) DAYAMANSI *v.* SANKAR NATH MUKHOPADHYAYA.

42 C. L. J. 30 : 87 I. C. 159 : A. I. R. 1926 Cal. 417.

——O. 1, R. 1—*Co-sharer—Manager of a holding is sufficient party—Co-sharers need not be joined.*

If the person recorded in the patwaris papers is the manager of the holding and usually pays the rent it is not necessary to implead all the co-sharers in the holding. (*Hopkins, S. M. and Fremantle, J. M.*) DATA PRASAD *v.* KANEZ FATIMA BIBI.

3 U. P. L. R. (B. R.) 92.

——O 1, R. 1—*Suit for rent by all co-sharers—One plaintiff subsequently compromising—Suit can proceed—Co-sharers.*

Where a suit for rent at an enhanced rate was instituted by the whole body of co-sharer landlords, but subsequently one of the plaintiffs compromised the suit with the defendants: *Held*: that the nature of the suit as being one instituted by the whole body of the landlords, did not alter and that notwithstanding the compromise, it was maintainable. (*Chakravarti, J.*) DURLAW MANDAL *v.* HEM CHANDRA.

89 I. C. 177 : A. I. R. 1926 Cal. 188.

——Or. 1, R. 1—*Addition of parties—Dominant owner need not make non-obstructing servient owners parties to suit for declaring right of way.*

A dominant owner has no cause of action against

servient owners who have neither caused obstruction nor raised any objection to the exercise of his right of easement. In a suit for declaration of his right of way he is not bound to make parties any servient owners other than those who have so obstructed or challenged his right. 19 C.W. N. 1211, Foll. (*Mukerji, J.*) DURGA RAM *v.* BHARAT RAM.
85 I. C. 739 : A. I. R. 1926 Cal. 92.

——— **O. 1, R. 1**—*Suit to remove obstruction to easement—Non-obstructing servient owner is not necessary party.*

In a suit for the removal of an obstruction to an easement, the servient owners who did not obstruct and consequently against whom no relief is sought are not necessary parties. "Servient owner," for the purpose of such suits is the owner who has raised objection to plaintiff's claim and does not refer to the owners of all the tenements subject to the easement. 25 C. W. N. 249, Dist. ; 19 C. W. N. 1211 Rel. on. (*Suhrawardy and Duval, JJ.*) BHOLA NATH *v.* MOHESH CHANDRA. **A. I. R. 1925 Cal. 1138.**

——— **O. 1, R. 1**—*Landlord and tenant.*

The maintainability of a suit for possession by a landlord alone of lands which had been occupied by his tenants depends on the status of the tenants. (*Suhrawardy and Chotzner, JJ.*) KALI PROSANNA *v.* HEMANTA KUMARI DEBI. **79 I. C. 1038 : A. I. R. 1924 Cal. 977.**

——— **O. 1, R. 1**—*Rent suit—Suit against tenant's heirs—Non-joinder.*

In a suit for arrears of rent against only those heirs of a tenant who are in actual possession of the holding and for the period that they were in possession, the rest of the heirs are not necessary parties. (*Teunon and Newbould, JJ.*) MEAGAN MONDAL *v.* JOGENDRA NATH. **63 I. C. 949 : 48 Cal. 518.**

——— **O. 1, R. 1**—*Rent suit—Tenancy not represented in its entirety.*

Where in a suit for arrears of rent, some of the tenants who are necessary parties are not before the Court, the plff. cannot get a decree against such of them as are before the Court. (*Mookerjee, A. C. J. and Fletcher, J.*) SURENDRA NATH *v.* AGHORE NATH. **62 I. C. 464 : 25 C. W. N. 525.**

——— **O. 1, R. 1**—*Co-plaintiffs—Joint appeal by plaintiff and defendant No. 2 against defendant No. 1, maintainable.*

The trial Court dismissed the suit as against defendant No. 1 but decreed the claim in full as against the former defendant No. 2 on the ground that he had admitted the receipt of the consideration and had not contested the plaintiff's claim. The plaintiff and the defendant No. 2 preferred a joint appeal against this decree. *Held* that the rule contained in O. 1, R. 1, applies to appeals also and the joint appeal is maintainable. (*Campbell and Motisagar, JJ.*) BULAQI MAL *v.* ABDUL RAHIM. **75 I. C. 950 : A. I. R. 1923 Lah. 638.**

——— **O. 1, R. 1**—*Necessary parties—One deft. absent on field service—Suit involving land of the remaining defts. only—Dismissal.*

The proprietor of a village sued to eject three persons who were brothers from *Shamilat* land. One brother being on field service, the plff. withdrew his claim as against him and reduced it to two-thirds of the land. The suit is not bad for non-joinder. (*Scott-Smith, J.*) BHURA *v.* MATU. **60 I. C. 6 (Lah.).**

——— **O. 1, R. 1**—*Suit against debtor—Liability of his transferee can be tried in the suit* obiter.

The liability of a transferee of a debtor's liability is a question on which the Court can adjudicate without referring the plaintiff to a separate suit. (41 Cal. 137; and 3 All. 799) Ref. (*Spencer, J.*) MURUGAPPA CHETTIAR *v.* L. K. S. S. FIRM. **90 I. C. 721 : A. I. R. 1926 Mad. 135 (2).**

——— **O. 1, R. 1**—*Right to sue trespasser—If other co-owners necessary parties.*

One co-owner can sue to eject a trespasser without joining the other co-owners parties to the action, provided the title of the others is not denied. (*Krishnan and Ramesan, JJ.*) PENDEKKALLU THIMMAYYA *v.* SIDDAPPA. **A. I. R. 1925 Mad. 63.**

——— **O. 1, R. 1**—*Necessary parties—Co-executors—Suit by some of them on behalf of the estate—Non-joinder of others—Objection by defendant—Second appeal—Addition of other parties if allowed.*

Where several executors have been appointed under a will and have entered on their duties as such, it is not open to some of them to sue on behalf of the estate without impleading the others. If a defendant is sued by one only of two persons who have a cause of action against him, he has a right to have the action dismissed unless the other is joined. 6 Cal.815, Ref. to. Where in spite of the objection of the defendant in his written statement that the suit as constituted was bad for non-joinder of the other executors, the plaintiffs proceeded with the case without taking steps to add the other executors either in the trial Court or on appeal the High Court would not, on second appeal allow the addition of the necessary parties. (*Schwabe, C.J. and Wallace, J.*) MOHANAVELU MUDALIAR *v.* ANNAMALAI MUDALIAR. **44 M. L. J. 249 : 17 L. W. 241 : 72 I. C. 63 : (1923) M. W. N. 89 : A. I. R. 1923 Mad. 337.**

——— **O. 1, Rr. 1 and 3**—*Co-plaintiffs—Different causes of action—Joinder of—All defendants not interested in relief—Effect of.*

The effect of the change of language of O. 1, Rr. 1 and 3 of the new C. P. Code is to permit different causes of action to be joined even in respect of several plaintiffs or defendants provided they satisfy the conditions of O. I, R. 1 or O. 1, R. 3 as the case may be. (*Ramesam, JJ.*) ALLU RAMALINGIER *v.* SUBRAMANIA PILLAI. **32 M. L. T. (H. C.) 46 : 17 L. W. 25 : 69 I. C. 402 : A. I. R. 1923 Mad. 331 (2).**

——— **O. 1, Rr. 1 to 3**—*Registration suit—Minor executants whether parties.*

When a document purports to be executed by certain persons it is essential that those persons even though they are minors should be brought on record in a suit to enforce registration so as to make the proceedings binding upon them in so far as the proceedings have been conducted *bona fide* by their guardians. They are clearly necessary parties to such a suit. (*Phillips and Dravadoss, JJ.*) N. APPALACHARYULU *v.* N. RAMCHANDRACHARYULU. **16 L. W. 287 : 68 I. C. 901 : A. I. R. 1923 Mda. 81.**

——— **O. 1, Rr. 1 and 2**—*Co-plaintiffs—Alternative relief—Suit by two sets of plaintiffs.*

Where the plffs. 1 and 2 claimed the entire subject-matter and their sisters plffs. 3 and 4 claimed a portion of the subject-matter of the suit in a certain contingency and the suit was prayed on the ground that the defendant was unlawfully detaining the moneys due to the plaintiffs. *Held*, that the suit was not bad for misjoinder of parties and causes of action. The right to relief claimed was in respect of or arose out of the same act *i.e.* the act of the unlawful detention of the moneys by the defendant. The right to relief was alleged to exist in the alternative in the first or second set of plffs. in regard to a portion of such relief. There was a common question of fact to be tried and

decided, the unlawful withholding of the moneys. The case therefore fell within O. 1, Rr. 1 and 2, C. P. Code. (*Venkatasubba Rao, J.*) VELAPPA NADAR *v.* CHIDAMBARA NADAR. **43 M. L. J. 277 : 16 L. W. 186 : (1922) M. W. N. 316 : 70 I. C. 684 : A. I. R. 1922 Mad. 174.**

——— **O. 1, R. 1**—*Creditor of manager of joint Hindu family suing after manager's death—All members must be impleaded in the suit if family property is to be bound by the decree—Hindu Law—Debts by manager.*

A creditor advancing money to the manager of a Hindu family and suing for the money after his death must join all the members as parties to the suit if he desires to bind the family property or the persons in possession of the property. If he impleads some members only in the suit, it is not open to him to have the other members joined in execution proceedings. (*Baker, J. C.*) PESTONJI *v.* GANPAT. **8 N. L. J. 73 : A. I. R. 1925 Nag. 288.**

——— **O. 1, R. 1**—*Reversioner's suit—Co-plaintiffs—Joinder of parties.*

Where in a suit by reversioners the 2nd plaintiff was joined as a co-plaintiff in fear that the 1st plaintiff's right as nearest reversioner would be questioned; *held*, that the suit is not bad for misjoinder of plaintiffs and the plaintiffs could not be made to elect which of them should proceed with the suit. (*Batten, A. J. C.*) SHANKAR *v.* SONOO. **63 I. C. 419 : 4 N. L. J. 58.**

——— **O. 1, R. 1**—*Refusal to join as co-plaintiff—The person may be joined as co-defendant.*

Where it is impossible to make a person join as co-plaintiff all that can be done is to make him a co-defendant. (*Pullan, A. J. C.*) INDAR PAL SINGH *v.* RAMESHWAR BAKSH SINGH. **80 I. C. 285 : A. I. R. 1925 Oudh. 71.**

——— **O. 1, R. 1**—*Ejectment suit—Persons in actual physical possession are necessary parties—Persons only receiving rents are not.*

In a suit for ejectment all persons who are actually in physical possession of the property should be made defendants. It is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the land. 21 B. 229; 6 P. L. J. 604 Ref. (*Ross, J.*) POONIT SINGH *v.* KAMAL SINGH. **A. I. R. 1924 Pat. 172.**

——— **O. 1, Rr. 1 and 3**—*Co-plaintiffs—Causes of action.*

The claim of the plaintiff No. 1 was based upon an agreement alleged to have been entered into by and between the defendants Nos. 3 and 20 and himself for sale of a land and colliery. The claim of the plaintiff No. 2 was based upon the purchase of September 1919 from the defendants Nos. 10 to 20. The plaintiff No. 1 had absolutely nothing to do with the claim of the plaintiff No. 2 so far as the possession and partition of the plaintiff No. 2's share was concerned. Similarly the plaintiff No. 2 has no concern with the relief claimed by the plaintiff No. 1. If the two plaintiffs had brought the suits separately there would not be any question of law or fact which would be common to the suits. The rights to the reliefs claimed by the two plaintiffs did not arise out of the same act or transaction, or series of acts or transactions. *Held* that the joinder of the two plaintiffs and the causes of action alleged by them was not authorised by any law or principle. (*Mullick and Kulwant Sahay, JJ.*) RAMJAS AGARWALLA *v.* LINTON MOLESWORTH & CO., LTD. **73 I.C. 71 : A. I. R. 1923 Pat. 411.**

——— **O. 1, R. 1**—*Co-suit for partition— Co-sharer vendor not necessary party.*

In a suit for partition by transferee the co-sharers

who transfer their interest are proper but not necessary parties. (*Coutts and Dass, JJ.*) NANDEKSHWAR *v.* SUDARSHAN. **A. I. R. 1923 Pat. 162.**

——— **O. 1, R. 1**—*Necessary parties—Transferee pendente lite is not such.*

In a suit for setting aside an alienation of properties belonging to a religious endowment a person to whom plaintiff had conveyed a portion of the properties at a time when he had neither title nor cause of action to sue, need not be joined as co-plaintiff in the action. Nor is a transferee *pendente lite* a necessary party to the suit. (*Das and Bucknill, JJ.*) MAHANT RAMRUP *v.* LAL CHAND MARWARI. **1 Pat. 475 : 3 Pat. L. T. 352 : 67 I. C. 401 : A.I.R. 1922 Pat. 243.**

——— **O. 1, R. 1**—*Necessary party—Remote interest.*

As a general rule a person who is only indirectly or remotely interested in the subject-matter of the suit need not be made a party thereto. (*Jwala Prasad, J.*) GAJENDRA SINGH *v.* AKAL KOER. **59 I. C. 292 (P.).**

——— **O. 1, R. 1**—*Suit by one co-trustee for rents is tenable.*

The action of only one co-trustee in trying to recover the rent due to the trust is not unreasonable even when the other co-trustee is not taking part in it. (*Po Han, J.*) MA SE *v.* U LUN. **2 Bur. L. J. 266 : 83 I. C. 329 : A. I. R. 1924 Rang. 201.**

——— **O. 1, Rr. 1 and 3**—*Advocate-General is proper though not necessary party to suit to set aside trust.*

The Advocate General is a proper party though not a necessary party to a suit for a declaration that a bequest for charity of property is void, and for injunction restraining the trustees from spending the income of the property. (*Rupchand Bilaram, A. J. C.*) SHAMBAI *v.* GOVERDHAN. **78 I. C. 249 : A. I. R. 1925 Sind 195.**

——— **O. 1, R. 1**—*Partners in a firm or joint promisees—Cause of action accruing to all jointly—All must join as plaintiffs.*

A suit cannot be maintained by one only of the partners of a firm or by one of the joint promisees in respect of a cause of action which has accrued to all jointly. 1 All. 453 : 14 All. 524, Foll. (*Kennedy, Rupchand and Bilaram, A. J. Cs.*) RALLIRAM SHEWARAM *v.* FIRM OF BUDHU RAN PARMANAND. **17 S. L. R. 324 : 79 I. C. 914 : A. I. R. 1925 Sind 181.**

——— **O. 1, Rr. 1 and 3**—*Scope.*

In a suit by a firm all the partners must be joined, because the cause of action vests in them jointly. (*Kemp, A. J. C.*) FIRM MANGHOOMAL *v.* FIRM ARATMAL. **15 S. L. R. 152 : A. I. R. 1922 Sind 13.**

——— **O. 1, R. 1**—*Receiver—Partnership—Receiver, whether necessary party—Suit against partnership.*

A Receiver, appointed in a suit for dissolution of partnership is not a necessary party in a suit by a third person against the partnership. The test is to see whether the object of the suit is to interfere with the possession of the Receiver or the jurisdiction of the Court appointing him. (*Raymond, A. J. C.*) ASUDAMAL DWARKA DAS *v.* CHOITHRAM GOPAL DAS. **60 I. C. 273 : 14 S. L. R. 171.**

——— **O. 1, R. 2**—*Interlocutory order—Misjoinder of causes of action—Revision—Interference.*

The High Court will in the exercise of its revisional jurisdiction interfere when the lower court has wrongly held a suit as bad for misjoinder of causes of action and directed him to elect which cause of action he would proceed with in the suit. 5 L. W. 207 : 6 L. W. 9 ; 42 M. L. J. 97 Foll. (*Oldfield and Venkatasubba Rao, JJ.*) ARUNACHELLAM CHETTIAR *v.* ARUNACHELLAM CHETTIAR. **43 M. L. J. 218 ;**

C. P. CODE (V OF 1908), O. 1, R. 2.

16 L. W. 175 : (1922) M. W. N. 453 : 69 I. C. 966 : A. I. R. 1922 Mad. 436.

——O. 1, R. 2—*Non-joinder—Sufficient representation—Suit not to fail.*

The plaintiff in a mortgage suit is bound to bring every person interested in the mortgage or in the equity of redemption upon the record it is obvious that there is sufficient representation of the members of the joint family, although all are not on the record, the plaintiff's suit cannot fail. 1921 P. H. C. C. 289 ; 6 P. L. J. 640, Foll. (*Jwala Prasad, C. J. and Das, J.*) SHEIKH ABDUL RAHMAN *v.* SHIB LAL SAHU. 1922 P. H. C. C. 81 : A. I. R. 1922 Pat. 252.

——O. 1, Rr. 3 and 5—*Landlord and tenant—Occupancy holding—Suit between rival claimants—Landlord if necessary party.*

The landlord is not a necessary party to a suit between rival claimants to an occupancy holding, one of whom is the mortgagor and the other is a successor to the mortgagee who took a usufructuary mortgage, who (the rival claimant) somehow got his name entered in the village papers as occupancy-holder, to which proceeding the mortgagor was not a party. (*Kanhaiya Lal, J.*) MT. DURGA DEVI *v.* GIRWAR SINGH. 70 I. C. 958 : A. I. R. 1923 All. 11 (2).

——O. 1, R. 3—*Mortgage suit—Stranger to mortgage claiming by title paramount impleaded—Misjoinder can be pleaded but on ground of inconvenience—Correct view is to see if case comes under R. 3.*

Per *Sanderson, C. J.*—Speaking generally, it may be said that a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagee are sought to be investigated, is open to objection on the ground of misjoinder and inconvenience, 38 All. 488 (P. C.), Foll. The question, however, is not one of jurisdiction, and at most the misjoinder is an irregularity or inconvenience.

Per *Rankin, J.*—The correct view in the matter is to ask whether the case does or does not come under R. 3 of O. 1. If it comes under the rule, the question of misjoinder can be raised on the ground of inconvenience but not as a matter of law. There is however need for a high degree of caution before permitting questions of paramount title to be investigated in a mortgage suit. Both as to competence and convenience there will generally be much to consider. 33 Cal. 425 and 20 C. W. N. 1279 Dist. (*Sanderson, C. J. and Rankin, J.*) BHUBAN MOHON *v.* CO-OPERATIVE BANK. 29 C. W. N. 784 : 88 I. C. 866 : A. I. R. 1925 Cal 973.

——O. 1, R. 3—*Landlord and tenant.*

In a suit for possession the tenants in occupation of the land need not necessarily be joined as defendant. (*Suhrawardy and Chotzner, JJ.*) KALI PROSANNA *v.* HEMANTA KUMARI DEBI. 79 I. C. 1038 : A. I. R. 1924 Cal. 977.

——O. 1, R. 3—*Multifariousness—Suit for accounts and for negligence.*

The plaintiffs brought a suit against the defendant No. 1, who was their cashier and defendant No. 3 who was the Sadar Naib. It was alleged that money was due by defendant No. 1 on account being taken against him that the Sadar Naib was responsible for any loss which the plaintiffs might have sustained through the action or omission of their cashier which loss had been occasioned by his negligence, his duty being amongst others to supervise the work and to sign the accounts of the Treasurer. *Held*, that the suit was bad for misjoinder of parties and causes of action. (*Woodroffe and Ghose, JJ.*) CHANDRA KUMAR BASU *v.* SASHI MUKHI DEBI. 71 I.C. 324 : A. I. R. 1924 Cal. 511.

C. P. CODE (V OF 1908), O. 1, R. 3.

——O. 1, R. 3—*Suit for compensation—Parties.*

It cannot be disputed that, as a general rule, where a person claims a right of easement on a servient tenement all the owners of the servient tenement ought to be made parties, as any decree in the absence of a necessary party declaring a right of easement would be infructuous. But there are cases which may well be taken as exception to the general rule, such as where any of the co-sharers took no part in obstructing the plaintiff's right. (*Ghose, J.*) AMRITANATH BISWAS *v.* JOGENDRA CHANDRA BHATTACHARJEE. A. I. R. 1924 Cal. 369.

——O. 1, R. 3—*Multifariousness—Cause of action against some of the defendants arising out of the jurisdiction—Effect of.*

The plaintiff had distinct and separate causes of action against the first and second defendants. The cause of action against the first defendant arose within the jurisdiction and that against the second defendant arose outside the jurisdiction of the Court in which plaintiff sued both the first and second defendants. *Held*, that the Court had no jurisdiction to try the suit as against the second defendant and that the joinder of both the defendants in the same suit was not permitted by O. 1, R. 3, C. P. Code. O. 1, R. 3, C. P. Code, relates to a joinder of parties and it assumes the existence of a suit in a proper *forum*, the Court having jurisdiction to try the suit. If the Court has such jurisdiction, then O.1, R. 3 might come into play. (*Woodroffe and Richardson, JJ.*) B. N. W. RY. CO. *v.* SADARAM BRAIRODAN. 49 Cal. 895 : 27 C. W. N. 82 : 70 I. C. 229 : A. I. R. 1922 Cal. 500.

——O. 1, R. 3—*Joinder of parties and causes of action.*

A suit is not bad for misjoinder of parties and causes of action if the right to relief against the defendants arises out of the same transaction and a common question of fact would arise, if separate actions had been brought. (*Mookerjee and Buckland, JJ.*) KRISHNA JIBAN *v.* MAHAMMAD. 63 I. C. 244 : 33 C. L. J. 369.

——O. 1, R. 3—*Non-joinder of legal representative.*

Non-joinder of respondent's legal representative, when the question in appeal is as to apportionment as between the plaintiffs, of the costs decreed to them, vitiates appeal. (*Martineau and Campbell, JJ.*) MT. TEHL KUAR *v.* AMAR NATH. 17 P. W. R. 1923 : 79 I. C. 670 : A. I. R. 1925 Lah. 2.

——O. 1, R. 3—*Suit to set aside alienation—Several alienations.*

O. 1, R. 3 is very wide and even if there is only one question common to all the cases that is sufficient to justify a joint trial. Where in a suit for a declaration that certain alienations shall not affect the plaintiff's reversionary rights, the plaintiff impleaded all the alienees as defendants, *held*, that the suit was not bad for misjoinder of parties. (*Shadi Lal, C. J. and Le Rossignol, J.*) JIWAN SINGH *v.* GARBHA SINGH. 59 I. C. 522 : 25 P. W. R. 1921.

——O. 1, R. 3—*Plaintiff aggrieved by decision of survey authorities that certain lands were not in plaintiff's village—Plaintiff suing against the decision and impleading as defendants persons in possession of different plots—Suit is not bad for multifariousness.*

The survey authorities had decided that certain plots of land were not, as alleged by the plaintiff, within the boundaries of the village of which he was

C. P. CODE (V OF 1908), O. 1, R. 3.

the proprietor. *Held*, that a suit filed against the decision of the survey authorities and in which the persons in possession of the different plots were joined as defendants, was not bad for multifariousness. It was the decision of the survey authorities that was the common cause of action. The same question in the case was whether plots in the possession of each defendant were or were not included in the village in question and a right of relief in respect of the same act or series of acts, viz., the decisions of the Survey authorities existed against them severally under O. 1, R. 3. If separate suits were brought the common question of fact would be whether the plots should be included in the village in question. (*Odgers, J.*) GOVINDA KRISHNA *v.* SRINIVASA RAMACHARLU.
49 M. L. J. 420 : (1925) M. W. N. 629 : 90 I. C. 748 : A. I. R. 1925 Mad. 1237.

——0. 1, R. 3—*Malabar Law—Maintenance suit on basis of* teer *deed*—Karnavan *is necessary party.*

The children of the donees under a *teer* deed must also be included in the tavazhi. The *karnavan* of the tavazhi is a necessary party to a suit for maintenance based on the *teer* deed, (*Ramesam, J.*) PAPPI AMMA *v.* KUNHU. **21 L. W. 432 : 87 I. C. 198 : A.I. R. 1925 Mad. 761.**

——0. 1, R. 3—*Suit against manager of Hindu joint family on allegation of trespass—Defendant claiming property for his family—Suit binds other members.*

Where in a suit the plaintiff contends that the defendant has wrongfully encroached on his land and the defendant who is the manager of a joint Hindu family contends that the land is his family property the suit cannot be said to be brought on a trespass pure and simple. If the defendant as manager of the joint family put forward a title to the plaint-property and if it is found against him, the other members of the joint family are also bound. (*Devadoss, J.*) SUBBAMMA *v.* KURNAM DHANDRA BAYAMMA. **21 L. W. 300 : 86 I. C. 498 A. I. R. 1925 Mad. 640.**

——0. 1, Rr. 3 and 9—De son tort—*Suit against—Legal representative as party to suit.*

Where an executor *de son tort* takes possession of all the assets of the deceased, a suit for general administration can be filed without joining the legal representatives and in cases where he takes possession of only a part of the assets he can be made accountable for the part he actually took possession of, without joining the legal representatives. But where administration is sought for the entire estate in cases where the executor *de son tort* has taken possession of only a part, the legal representatives would also have to be added. (*Schwabe, C.J. and Coutts Trotter and Kumaraswami Sastri, JJ.*) ZAMINDAR OF BHADRACHALLAM *v.* SRI RAJA VENKATADRI APPA ROW.
43 M. L. J. 486: (1922) M W. N. 532 : 31 M. L. T. 221 (H. C.) : 16 L. W. 369 : 46 M. 190 : A. I. R. 1922 Mad. 457 (F. B.).

——0. 1, Rr. 3 to 10—*Joinder of parties—Creditors.*

Creditors are proper parties to a suit by sons against a Hindu father for partition and for declaration that the debts contracted by the father were not valid and binding on the family. (*Oldfield aud Ramesam, JJ.*) SHANMUKA NADAN *v.* ARUNACHALAM.
42 M. L. J. 97 : 14 L. W. 642 : (1921) M. W. N. 799 : 30 M. L. T. 172 : 69 I. C. 961 : 45 M. 194 : A. I. R. 1922 Mad. 332.

——0. 1, Rr. 3 and 5—*Misjoinder of causes of action—Suit for possession—Different persons in possession of different plots.*

A plaintiff suing for recovery of possession of a single plot of land can join as defendants three different persons who claim to be in possession of three different portions of the property. The plaintiff is entitled only to claim the recovery of possession of his land as a whole and not in fragments and it matters little to him upon what grounds the different defendants in possession may seek to justify the wrongful dispossession of his property. 29 C. 871, Foll. (*Batten, J. C.*) LAXMI NARAYAN *v.* RAM RATAN.
19 N. L. R. 178 . 77 I.C. 761 : A. I. R. 1924 Nag. 55.

——0. 1, R. 3 and S. 99—*Single suit against several defendants—Misjoinder—Effect of—Duty of appellate Court.*

The lower Court consented to try a suit jointly against all the defendants and the plaintiff in course of time lost his opportunity by cause of limitation of bringing separate suits against the defendants. *Held*, that no party having been prejudiced by the joint trial, the appellate Court would not reverse the decree on account of misjoinder. It is for the reason of preventing injustice of such a character that S. 99, C. P. Code, has been enacted. (*Dalal, J. C.*) MANSADIN *v.* MANNU LAL. **27 O. C. 35 : A. I. R 1924 Oudh 337.**

——0. 1, R. 3—*All persons recorded as in possession of village are necessary parties to suit for declaration that entry in Survey Record is incorrect and for recovery of possession.*

When a suit is filed for declaration that an entry in Survey Record of Rights of a village is incorrect and for recovery of possession if the plaintiff is held to be out of possession all persons found on the record as in possession of the village and as claiming title adverse to the plaintiff are necessary parties. (*Jwala Prasad and Macpherson, JJ.*) GOPAL OJHA *v.* RAMADHAR SINGH. **82 I. C. 204 : A. I. R. 1925 Pat. 228.**

——0.1, R. 3—*Execution proceedings—Judgment-debtor's property under Court of Wards—Manager, Court of Wards, not made party—Judgment-debtor is not properly represented.*

If the property of the judgment-debtor is under the Court of Wards the ward (judgment-debtor) is not properly before the Court if the Manager of the Court of Wards is not made a party to the proceedings. (*Das and Ross, JJ.*) SIDDHESWARI PRASAD NARAIN SINGH *v.* MT. DULHIN RADHA DULAIN KUAR.
6 P. L T. 164 : 80 I. C. 716 : A. I. R. 1925 Pat. 160.

——0. 1, R. 3—*Suit not bad for misjoinder of parties.*

In a suit for partnership accounts, the plaintiff added defendant 3, whom he did not recognise as partner, but who was alleged to be a partner by defendant No. 1 in a previous litigation. *Held*, the suit was not bad for misjoinder of parties. (*Jwala Prasad and Ross, JJ.*) K. V. LIMAYA *v.* J. K. WATNE.
1923 P. H. C. C. 276 : 76 I. C. 950 : 2 P. L. R. 132 : A. I. R. 1924 Pat. 65.

——0. 1, R. 8—*Notice—Omission to issue notice and advertisement—Effect.*

The Court in granting permission to sue two plaintiffs on behalf of all the residents of a locality directed the plffs. to advertise and give notice to all the residents of the locality as regards the suit. But the notice and advertisement were not issued. *Held*, that (1) the omission to issue notice was not fatal to the suit and would not result in the dismissal of the suit ; (2) that the publication of notice was peremptory and must be complied with under O. 1, R. 8 (3) and that the case should be remanded to the trial Court for issuing of notice and retrial of the suit. (*Banerji, Piggott and Walsh, JJ.*) SHYAM LAL *v.* MT. LALLI.
44 A. 231 : 20 A. L. J. 73 : 65 I. C. 259 : L. R. 3 A. 75.

C. P. CODE (V OF 1908), O. 1, R. 8.

A. I. R. 1922 All. 16 (F. B.).

——O. 1, R. 8—*Public right—Right of way for cattle.*

A plff. suing for declaration on behalf of himself and other inhabitants of the village of their right to take their cattle through the jungle of another village cannot get a declaration unless leave of the Court obtained and proclamation issued as provided by R 8 of O. 1. (*Rafique and Piggott, JJ.*) LAL BAHADUR *v.* RAMESHWAR DAYAL. 43 All. 345 : 60 I. C. 990 : 19 A. L. J. 126.

——O. 1. R. 8—*Leave to sue—Granted after suit —Representative suit.*

The permission under O. 1, R. 8, C. P. Code, may be given even after the filing of the suit. This is a matter analogous to the addition of powers and amendment of pleadings. Notice under O. 1, R. 8, C. P. Code, is required to be given and the provisions of the Rule are mandatory. (*Mulla, J.*) NARIMAN *v.* MUNICIPAL CORPORATION OF BOMBAY. 47 Bom. 809 : 25 Bom. L. R. 689 : A. I. R. 1923 Bom. 305.

——O. 1, R. 8—*Notice—President of community when authorised cannot sue in his own name.*

A president of a community authorised to file suits cannot sue in his own name and notice under O. 1, R. 8 to all the members of the community must be given. Permission also was necessary under R. 8. (*Macleod, C. J. and Shah, J.*) ATMARAM *v.* NARAYAN. 23 Bom. L. R. 972 : 64 I. C. 555 : 46 Bom 132 : A. I. R. 1922 Bom. 109.

——O 1. R. 8—*Permission granted for representative suit—Some of several representatives not joining in the suit—Fresh permission is necessary.*

The general rule is that all persons interested in the subject-matter of a suit in respect of its object should be made parties, but in cases where there is a large class of individuals having the same interest, the Courts, for the sake of convenience, allow them to be represented by one or more of the class for himself and the others. When out of fifteen persons in whose favour permission was granted by the Court three did not join in the institution of the suit, *held*, the remaining twelve were not competent to take upon themselves the capacity with which the fifteen collectively were clothed. The remaining twelve were bound to bring the matter to the notice of the Court and it would have been for the Court to grant them a fresh permission or not, making the dissentient or non-prosecuting plaintiffs defendants to the action or taking such other steps as the Court thought just, safe and proper. (*Mukerjee, J.*) ABDUL HAKIM *v.* ABDUL GANI. 80 I. C. 26 : A. I. R. 1925 Cal. 547.

——O. 1, R. 8—*Notice is not a mere matter of formality.*

The issuing of a notice under the rule is not such a mere matter of formality as it is sometimes thought. The wording of O. 1, R. 8 shows that it is the duty of the Court to cause the service of the notice or the publication of the advertisement, on being moved for the purpose. The suit may not be dismissed on account of the failure of the Court to perform its own duty. 17 Cal. 906 Foll. (*Mukerjee, J.*) ABDUL HAKIM *v.* ABDUL GANI. 80 I. C 26 : A. I. R. 1925 Cal. 547.

——O. 1, R. 8—*Leave of Court—Grant of—Form of.*

It is not necessary that the leave of Court required under O. 1, R. 8 (1), C. P. Code, should be express. It is enough if it could be gathered from the proceedings. 21 C. 180 ; 29 C. 100, Ref. (*Mukerjee, J.*) KRISHNA KUMAR DEB *v.* ATUL CHANDRA GHOSE. 39 C. L. J. 612 : A. I. R. 1924 Cal. 998.

——O. 1, R. 8—*Public right—Suit for declaration of public right of way—Nature of special damage.*

A suit for a declaration that a certain pathway was public one, can be maintained with the permission of Court under O. 1, R. 8, C. P. Code. If permission is granted, recourse need not be had to S. 92 of the Code. Such a case is *per se* actionable proof of special damage. (*Panton, J.*) HARISH CHANDRA SAHA *v.* PRAN NATH CHAKRABARTHY. 69 I. C. 910 : 26 C. W. N. 587.

——O. 1, R. 8 and O. 22, R. 4—*Some defendants allowed to represent whole body of defendants—Some non-appearing defendants dying during suit—Legal representatives not added—Suit abates.*

An order passed under O. 1, R. 8 allowing some defendants to represent the whole body of defendants will not relieve the appellants from the necessity of impleading all those persons who were parties in the Court below and had obtained a decree in their favour, and the representatives of any of these persons who have died. The appeal will abate *in toto*, if the appellants do not bring the legal representatives of the latter on the record within the time prescribed by law. A. I. R. 1924 Lah. 124 Rel. on. (*Campbell and Moti Sagar, JJ.*) SAMAIL *v.* HAJI. 89 I. C. 378 : A. I R. 1926 Lah. 31 (2).

——O. 1, R. 8—*More than one plaintiff—Death of one does not necessitate fresh leave of Court if plaintiffs are self-constituted.*

Where four persons sued on behalf of the proprietary body of a village for an injunction for the demolition of a building erected by the defendants, on a part of the common land, but one of the plaintiffs died while case was pending : *Held*, no fresh sanction of the Court was necessary to continue the suit by the remaining plaintiffs. (*Martineau and Zafar Ali, JJ.*) RAM GOPAL *v.* HAR KISHAN. 7 Lah. L. J. 517 : 88 I. C. 478 : A. I. R. 1925 Lah. 598.

——O. 1, R. 8 and O. 22, R. 4—*Representative suit —Death of some of the respondents—Omission to implead legal representatives—Abatement.*

Where certain defendants were parties to the suit and the appeal in a representative capacity under O. 1, R. 8, C. P. Code, and some of them impleaded as respondents in second appeal die during the pendency of the second appeal the appellants are not relieved from the necessity of impleading their legal representatives within the time prescribed by law. The omission to do so in time will cause an abatement of the suit. (*Martineau and Moti Sagar, JJ.*) WALI MAHAMAD *v.* MAHLU. 6 Lah. L. J. 360 : 5 Lah. 429 : A. I. R. 1925 Lah. 124.

——O. 1, R. 8—*All the members of the body on whose behalf the suit is sought to be instituted need not be of the same opinion.*

The true principle underlying this rule is that the suit should in form be constituted into a representative suit merely to prevent the defendant from being vexed and molested, as he may well be, by similar suits by other persons of the body. For the application of this principle, it is really unnecessary to determine whether or not all the members of the body on whose behalf the suit is sought to be instituted are of the same opinion. The order only means this that all the members of the body on whose behalf the suit would, on the passing of the order, be constituted into a representative suit, would be prevented thereafter from instituting any proceedings on the cause of action alleged in the plaint : and such body being an indefinite body and the order being given only to sue in respect of all persons having the same interest, the order would have the effect only of preventing multiplicity of suits and would not be calculated in any manner or to any

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extent to prejudice the rights of any of the worshippers or of the defendant (*Srinivasa Iyengar, J.*) HAMEED LABBAI *v.* MAHAMAD. **A. I.R. 1925 Mad. 985.**

——O. 1. R 8—*Object of—Applicability—Conditions—Right to sue in original plaintiff and community of interest between him and members of the class—Suit in name of wrong plaintiff—Effect—O. 1, R. 10—Application of—Conditions—*Bona fide *mistake in institution of suit—Necessity—Pleadings—Amendment of, by introducing case of fraud—When granted and when not.*

The plaintiff describing himself as a creditor of a person who had been adjudicated an insolvent and whose estate was represented by the Official Assignee of Rangoon, sued for a declaration that a sale-deed executed by the Official Assignee in favour of the defendant was null and void. The defendant pleaded that the plaintiff was not a creditor of the insolvent and had no *locus standi* to maintain the suit. When the trial was about to commence, one K, who had all along represented the plaintiff, applied to be added as a plaintiff to obviate the technical objection raised by the defendant. *Held*, that if the plaintiff was not a creditor of the insolvent, the application was not sustainable under O. 1, R. 8, C. P. Code; that if the plaintiff was a creditor, the assumed necessity for the application did not exist and it equally failed; and that the application could not be allowed under O. 1, R. 10, as there was no allegation even that the suit was instituted originally in the name of a wrong person through a *bona fide* mistake. O. 1, R. 8; C. P. Code, presupposes the existence of a right of suit in the plaintiff who instituted the suit, and the community of interest between him and the others of the class is the pre-requisite necessary to enable him to represent the class. If the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit the suit is not a representative suit and no member of the class is constructively a party to it. *Quaere*:—Whether O 1, R. 10, C. P. Code, applies to cases falling within O. 1, R. 8? On the same date on which the abovementioned application was made, another application was made by the original plaintiff for leave to amend his plaint by saying that the defendant was a *benamidar* for the insolvent and that the agent of the Official Assignee who conducted the sale on his behalf made a pretence of selling the property by public auction but really sold the property by private contract to the insolvent, the defendant being merely a *benamidar* for the insolvent. The materials, if any, which substantiated the allegations of fraud, thus sought to be added were not referred to in the affidavits filed in support of the application. *Held*, that in the circumstances and in view of the great delay in making the application from which want of *bona fides* might be inferred, the Court below was right in rejecting the application. (*Venkatasubba Rao, J.*) KRISHNA AIYAR *v.* PACHAIYAPPA CHETTI.

47 M. L. J. 540 : (1924) M. W. N. 522 : 82 I. C. 492 : A. I. R. 1924 Mad. 883.

——O. 1, Rr. 8 and 10—*Religious endowment—Addition of plaintiffs after decree is competent.*

In a suit by three persons under S. 14 of the Religious Endowments Act, a decree for damages was passed in favour of the plaintiffs. The plaintiffs neglected to execute the decree whereupon the Court added the trustees of the temple as plaintiffs to enable them to execute the decree. *Held*, that as the suit was brought by the plaintiffs in a representative capacity it was competent to the Court under O. 1, R. 8, C. P. Code to add parties even after the passing of a decree. 24 M. L. J. 192; 33 M. 483; 20 M. L. J. 546; 28 Mad. 319, Foll. (*Spencer and Venkatasubba Rao, JJ.*) SWAMINATHA MUDALIAR *v.* KUMARASWAMI CHETTIAR.

44 M. L. J. 282 : 17 L. W. 422 : (1923) M. W. N. 239 : 72 I. C. 284 : 32 M. L. T. (H. C.) 212 : A. I. R. 1923 Mad 472 (2).

——O. 1, R. 8—*Communal property—Fluctuating body—Promise to pay money—Enforceability—Suit to enforce payment.*

A person can make himself liable to a community (like the Vysia community of a particular place) by agreeing to pay a certain sum of money to it; and a suit to recover the sum may be brought by a member of that community with leave of Court obtained under O. 1, R. 8, C. P. Code. (*Krishnan, J.*) BUDAVARAM NARASIMHULU CHETTY *v.* NOOTA IBBUNDRUM NAGASAM VARU.

44 M. L. J. 240 : (1923) M. W. N. 237 : 72 I. C. 95 : A. I. R. 1923 Mad. 434.

——O. 1, R. 8—*Religious endowment—Suit by worshippers—Sanction of Court—Necessity for.*

With the permission of the Court when there are numerous persons having the same interest in the same suit one or more such persons may sue on behalf of or for the benefit of all persons so interested. (*Schwabe, C. J. and Wallace, J.*) RANGASWAMI *v.* KRISHNASWAMI.

44 M. L. J. 116 : 17 L. W. 147 : (1923) M. W. N. 84 (2) : 32 M. L. T. 133 : 71 I. C. 463 : A. I. R. 1923 Mad. 276 (2).

——O. 1, R. 8—*Leave to sue—Caste dispute—Suit by some members—Sanction of majority.*

Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste, O. 1, R. 8, C. P. Code, applies to the case. It is not necessary for the persons asking for leave under O. 1, R. 8, C. P. Code, to obtain formally beforehand the authority of those whom they are seeking to represent. Nor need they summon a caste meeting before bringing the suit. Per *Napier J.*: *Semble*—If the plaintiffs areunable to prove that they have got a support of the majority of the caste they cannot succeed in getting the relief which they seek. Such a plea may be taken in defence. (*Napier and Krishnan, JJ.*) SIVATHAL PERIYAVA NADAR *v.* NANA CHUNA VELMURUGA NADAR.

64 I. C. 618 : 30 M. L. T. (H. C.) 47.

——O. 1, R. 8—*Communal property—Members of a community—Suit for declaration that property is* waqf *property.*

It is competent to certain persons alleging themselves to be members of the Shia community to institute a suit for a declaration that certain property in the possession of the defendants is *waqf* property over which the defendants had no proprietary right. To such a suit the sanction of the Court under O. 1, R. 8, C. P. Code, is not required. 7 All. 188; 32 All. 631; 24 Ca. 385; 35 All 197, Ref. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) SADIQ HUSAIN *v.* KHAN BAHADUR HAKIM MIRZA NAZIR HUSAIN KHAN.

9 O. L. J. 111 : 4 U. P. L. R. (J. C.) 25 : 66 I. C. 90 : A. I. R. 1922 Oudh 1.

——O. 1, R. 8—*Communal property*——Waqf—*Right of beneficiaries to sue—Remedies open to worshippers.*

A beneficiary of a trust in respect of a Muhammadan *waqf* interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of R. 8, O. 1, C. P. Code, and without suing in a representative capacity on behalf of the other beneficiaries sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the subject of trust cannot be alienated. The trust

C. P. CODE (V OF 1908), O. 1, R. 8.

property vests in God and the right of a Muhammadan who is entitled to use a mosque to bring a suit for the recovery of property belonging to it is comparable to a right of suit in respect of a private road which many persons have a right to use. Every Mussalman who derives any benefit from such a *waqf* is entitled to maintain an action against the *mutwalli* to establish his right thereto or against a trespasser to recover any portion of the *waqf* property which has been misappropriated, without joining any other person who may participate with him in the benefit. It is clear that if the *mutwalli* himself is the offender or if he is unwilling to act, the beneficiary must have the power to recover the property. (*Mullick and Ross, JJ.*) MAULAVI MAHOMED FAHIMUL HUQ *v.* JAGAT BALLAV GHOSH. **2 Pat. 391 : 4 Pat. L. T. 675 : 74 I. C. 403 : A. I. R. 1923 Pat. 475.**

——O. 1, R. 8—*Scope of.*

O. 1, R. 8 is merely permissive and is intended to provide a remedy for cases in which it might be difficult or impossible to implead all the persons it is sought to affect. But it does not bar a suit to establish a right possessed by an individual. (*Robinson, O. C. J. and Macgregor, J.*) SAKLAT *v.* BELLA. **63 I. C. 963 : 13 Bur. L. T. 183.**

——O. 1, R. 9—*Non-joinder.*

O. 1, R. 9, provides that no suit shall be defeated by reason of non-joinder of parties and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The notion that a decree-holder can seize property which belongs to a stranger and hold it by reason, for exemple, of the fact that one of his judgment-debtors is keeping out of the way so as to prevent any possibility of service being effected upon him in the suit after an order of dismissal of the claim by the execution Court, is so contrary to one's sense of justice, that one would decline to accept it as being the law. The failure to join such a party is covered by O. 1, R. 9. (*Walsh, J.*) MT. MARYAM BIBI *v.* RAM DAS. **70 I. C. 613 : A. I. R. 1922 All. 404.**

——O. 1, Rr. 9 and 10—*Dismissal of suit—Necessary party not added after being required to do so.*

Where a plaintiff is ordered to take a necessary step such as to add necessary parties and he refuses to do so the Court can dismiss the suit. (*Tudball and Sulaiman, JJ.*) BAGWATI PERSHAD *v.* BABULAL. **63 I. C. 548 (2) : 19 A. L. J. 525.**

——O. 1, R. 9—*Non-joinder—Test of—Court not to travel beyond claim made in the suit.*

In determining the question of non-joinder the Court must confine itself to the claim before it. The present deft. No. 2 had filed a suit against P. in which he obtained a decree against him. At that time the defence was that the present deft No. 1 had really paid rent to H. which was then claimed as being payable to P. but the defence was not believed and a decree was passed in favour of H. Thereafter the present plaintiff P. and his daughter, the mulgenidars of a Dewasthan, filed the present suit in the same Court to recover the rent that would be payable by deft. No. 1 to them. The Court found that the rent was due by deft. No. 1 to the plaintiffs and passed a decree against him. But as it appeared from the evidence that as a matter of fact deft. No. 1 paid this amount previously to H, the Court directed H to be joined as defendant No. 2 and after impleading him as a deft. the Court held that deft. No. 1 had paid the rent to deft. No. 2, and the ultimate decree was passed by the Court in favour of deft. No. 1 against deft. No. 2. *Held*, that the procedure of the lower

C. P. CODE (V OF 1908), O. 1, R. 9.

Court was irregular : that the only question appropriate to the suit was whether deft. No. 1 was liable for the amount claimed by the plaintiffs ; and that the questions as between deft. No. 1 and deft. No. 2 were not appropriate to the suit. (*Shah, A. C. J. and Crump, J.*) HARICHANDRA *v.* KUMMA VITHOBA. **24 Bom. L. R. 1318 : A. I. R. 1922 Bom. 454.**

——O. 1, R. 9—*Applicability to mortgage suits.*

The provisions of O. 1, R. 9 apply to proceedings under O. 34, C. P. Code. (*Suhrawardy and Graham, JJ.*) KHERODAMYI DASI *v.* HABIB SHAHA. **29 C. W. N. 51 : 82 I. C. 638 : A. I. R. 1925 Cal. 152.**

——O. 1, R. 9—*Parties to suit—Persons interested in easement—Joinder of.*

Where the plaintiffs sued for a declaration of their right to certain land as against the defendants who under a claim of easement were alleged to have obstructed plaintiffs in the enjoyment of the land : *Held*, that the contention that all persons interested in the right of easement were necessary parties to the suit was without substance. The cause of action on the pleadings was against those persons only who were alleged to have interfered with the plaintiff's right. 25 C. W. N. 249 ; 19 C. W. N. 1211 Ref. (*Suhrawardy, and Graham, JJ.*) SURJA NARAIN BERA *v.* CHANDRA BERA. **40 C. L. J. 74 : A. I. R. 1924 Cal. 1050.**

——O. 1, R. 9—*Scope.*

O. 1, R. 9, C. P. Code, applies to cases where there may be multiplicity of suits. (*Suhrawardy and Graham, JJ.*) SURJA NARAIN BERA *v.* CHANDRA BERA. **40 C. L. J. 74 : 84 I. C. 467 : A. I. R. 1924 Cal. 1050.**

——O. 1, R. 9—*Non-joinder—Effect—Form of decree.*

If two parties contract with a third party, a suit by one of them making the other co-defendant, ought not to be dismissed, merely because the plaintiff has not proved that the defendant had refused to join as a co-plaintiff. (*Mookerjee and Rankin, JJ.*) KAMINI MOHAN BASU *v.* NIBARAN CHANDRA MITRA. **76 I. C. 577 : A. I. R. 1923 Cal. 506.**

——O. 1, R. 9—*Non-joinder—Interested party not joined.*

Where in a suit for a declaration of a right of way and for removal of an obstruction, the person interested in the servient tenement is not made a party, the Court cannot make a decree, as, a decree passed would be infructuous and in such a case the suit cannot be entertained in spite of O. 1, R. 9. (*Mookerjee, A. C. J. and Fletcher, J.*) HARAN SHEIKH *v.* RAMESH CHANDRA. **62 I. C. 425 : 25 C. W. N. 249.**

——O. 1, Rr. 9, 10—*Suit against two defendants—One of them dead at the time of institution—Procedure.*

A suit was instituted against two persons, but it turned out that one of them was dead at the time the suit was filed. *Held*, the proper procedure was to strike off the name of the dead defendant and not to dismiss the suit. (*Campbell, J.*) FIRM PALA MAL NARAIN MAL *v.* FANJA SINGH. **89 I. C. 661.**

——O. 1, R. 9—*Dismissal of suit—Ejectment suit against persons jointly interested—Withdrawal against some—Effect of.*

Where the proprietors of a village sued to eject three persons from a piece of land alleged to be *shamilat* and finding it difficult to serve one of them with notice of suit withdrew their claim as against that defendant, the trial Court passed a decree for two-thirds of the lands sued for. But the appellate Court dismissed the suit on the ground of the non-joinder. *Held*, in second appeal, that the claim having been

expressly limited to the interests of the defendants on record the suit could not be dismissed on the ground of the non-joinder. (*Scott-Smith, J.*) BHURA *v.* MATU. **60 I. C. 6 (Lah.)**

——O. 1, R. 9—*Non-joinder—Objection—Procedure.*

As regards non-joinder, the objection as to procedure to be followed is disposed of by the application of the present S. 99 of the C. P. Code. (*Spencer and Ramesam, JJ.*) THINA SHANMUGA MOOPPANAR *v.* SUBBAYYA MOOPANAR. **42 M. L. J. 133 : 70 I. C. 645 : 15 L. W. 283 : (1922) M, W. N. 106 : 31 M. L. T 266 : A I. R. 1922 Mad. 317.**

——O. 1, R. 9—*Misjoinder of plaintiffs.*

Misjoinder of plaintiffs in a mortgage-suit, some of whom are not entitled to any relief, is a mere defect of form not fatal to the suit. 34 Bom. 358 Foll. (*Kinkhede, A. J. C.*) UDARAM *v.* GONDU. **A. I. R. 1925 Nag. 366.**

——O. 1, R. 9 and S. 107 (2)—*Non-joinder of parties to appeal making it impossible to deal with matter equitably and sufficiently—Non-joinder cannot be condoned.*

O. 1, R. 9 read with S. 107 (2) will not permit the non-joinder of any party being condoned by an Appellate Court when such non-joinder makes it impossible to deal equitably and sufficiently with the matter in controversy between the parties to the appeal. Where one of several defendants appealed against a decree and took up a position calculated to enhance the liability of other defendants, *held*, that the non-joinder of the latter vitiated the appeal and that after the period of limitation had expired the appellant should not be allowed to join the other defendants. (*Ashworth, A. J. C.*) PARMESHWAR *v.* CHHAB NATH. **A. I. R. 1925 Oudh 606.**

——O. 1, Rr. 9 and 10 — *Dismissal of suit — Court's power to add parties.*

A Court should not dismiss a suit for non-joinder of necessary parties but should add them, of its own motion, as parties to the suit or direct the plaintiff to do so. (*Lyle, A. J. C.*) GUR PRASAD *v.* MUHAMMAD TAQU. **63 I. C. 548 (1) : 8 O. L. J. 310.**

——O. 1, R. 9—*Suit by some of the servient owners only should not be dismissed.*

A suit by some of several servient owners for a declaration that the defendants had no right to dig and take earth from plaintiff's land is not liable to be dismissed for non-joinder of the other servient owners and there is nothing to prevent the Court from adjudicating on the rights of the parties actually before it. 14 C. W. N. 15, Dist. (*Ross, J.*) BIKOO MAHTON *v.* NARAYAN SAH . **A. I. R. 1924 Pat. 303.**

——O. 1, Rr. 9 and 10 — *Addition of parties—Necessary and proper parties — Distinction between limitation.*

The Court cannot, by its decree, affect the rights of those who are not parties to the suit. If therefore no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed. If, however, the rights of the parties actually before it can be determined in the suit bearing the rights and interest of others unaffected, there is no reason why, even if other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present. There is a distinction between necessary and proper parties to a suit. Two conditions must be satisfied in order that a defendant may be considered a necessary party, namely, first, there must be a right to some relief against him in respect of the matter involved in the suit and secondly, his presence

is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit. 16 C. L. J. 358 Rel. (*Miller, C. J. and Mullick J.*) SITAL PRASAD ROY *v.* ASHO SINGH. **1922 P. H. C. C. 326 : 2 Pat. 175 : 69 I. C. 677 : 4 Pat. L. T. 698 : A. I. R. 1922 Pat. 651.**

——O. 1, R. 9—*Necessary parties—Land recorded as* Gairmazrua Am—*Suit for declaration of title to—General public, not necessary parties.*

A suit for declaration of title to land entered in the Survey Khatian as *Gairmazrua Am* is not bad for non-joinder of parties, if the general public are not made parties to it. (*Coutts and Das, JJ.*) BABU TRILOKE PRASAD SINGH *v.* LALA UMANAND LAL. **72 I. C. 634 : A. I. R. 1922 Pat. 447.**

——O. 1, R. 9—*Non-joinder.*

The omission to implead a tenant in possession of a portion of the disputed land does not make the proceedings defective. (*Ross, J.*) RAMNARAIN *v.* DHONRAI GOPE. **3 P. L. T. 291 : A. I R. 1922 Pat. 371.**

——O. 1, R. 9 *Ejectment—Non-joinder of person under whom defendant claims title.*

A Court is not incompetent to grant a decree to the plaintiff for possession as against the person in judicial possession of the property, even if for some reason the plaintiff does not choose to claim any relief as against the party who may have put the other party in actual possession. 21 Bom. 229, Foll. (*Das and Adami, JJ.*) BHAGWAT KUAR *v.* JAGDAM SAHAY, **3 P. L. T. 429 : A. I.R. 1922 Pat. 352.**

——O. 1, R. 9—*Partition suit—Grandsons not necessary but proper parties.*

There is a distinction between the non-joinder of proper persons but not necessary parties and non-joinder of parties whose presence is essential. In a suit for partition in a joint Hindu family, the grandsons are not necessary parties and are represented by their own father. At the same time, they may be proper parties and, on an appeal, the appellate Court can direct the lower Court to bring them on record and give them separate allotments if they so desire. (*Das and Adami, JJ.*) DIGAMBAR MAHTON *v.* HANSRAJ MAHTON. **1 P. 361 : 67 I. C. 156 : 3 P. L. T. 238 : A. I. R. 1922 Pat. 96.**

——O.1, R.9—*Necessary party— Suit and appeal.*

Under O. 1, R. 9, C. P. Code, a person who is a necessary party to the suit is a necessary party to the appeal. (*Ross, J.*) JITENDRANATH CHATTERJEE *v.* JHAKU MANDAR. **3 Pat. L. T. 4.6 : 66 I. C. 780 : A.I.R. 1922 Pat. 4.**

——O. 1, R. 10—*Transposition of parties—Suit for money—Contesting claimant made defendant—If can be made plaintiff.*

Where A the plff. claims to have a sole right to a certain sum of money due from a deft. and makes B, a third person, who claims as against A, a party to the suit, B cannot be made a plff. in the place of A in the course of the suit and no decree can be passed in his favour as against a co-defendant. (*Tudball and Sulaiman, JJ.*) JARAO KUNWAR *v.* BAGWAN KUNWAR. **3 U. P. L. R. (A.) 182 : 63 I. C. 773 : 19 A. L. J. 833.**

——O. 1, R. 10—*Object of Revenue Courts.*

The power under the rule should be liberally construed and exercised in a reasonable way enabling Revenue Courts to prevent the decision of cases on narrowly technical grounds. (*Hopkins, S. M. and Porter, J. M*) SECRETARY OF STATE FOR INDIA *v.* RAGHUNANDAN KOER. **3 U. P L. R. (B. R.) 60 (2).**

——O. 1, R. 10—*Addition of parties —Redemption suit.*

C. P. CODE (V OF 1908), O. 1, R. 10.

In a suit for redemption, by some of the heirs of the mortgagor where the other heirs are not impleaded as defendants, the Court has power to add them as defendants under O. 1, R. 10. (*Macleod, C. J. and Fawcett, J.*) SHIVUBAI RAJARAM *v.* SIDESHWAR.
45 Bom. 1009 : 61 I. C. 590 : 23 Bom. L R. 405.

——**O. 1, R. 10**—*Transposition of parties.*

In a partition suit, the Court can make a defendant a plaintiff and continue the suit. (*Macleod, C. J. and Fawcett, J.*) VISHNU NARHAR SAPRE *v.* SHIRAM.
23 Bom. L R. 391 : 61 I. C. 398 : 45 B. 983

——**O. 1, R. 10**—*Person having interest in the result of suit and having right to ask Court's assistance is proper party.*

The expression "proper party" means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point in issue. (*Suhrawardy and Duval, JJ.*) BAIKUNTHA KUMAR *v.* SARAT CHANDRA NATH. **A.I.R. 1925 Cal. 1257.**

——**O.1, R. 10**—*Rent suit—Some heirs of deceased tenant not joined—Suit is not bad for non-joinder and is maintainable—Contract Act, S.* 43.

Per Curiam (*C. C. Ghose, and Mukerji, JJ., dissenting*)—A suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record.

B. B. Ghose, J.—The heirs of a deceased tenant do not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest but they take as tenants-in-common, each having a definite share in the whole which he might deal with in any way he pleases.

Mukerji, J.—When a person obtains a share of a tenure either by assignment or by inheritance he becomes a co-tenant with the other tenant or tenants in the whole tenure, and in so far as the relations between him and his landlord are concerned, he cannot be deemed to hold any estate in severalty. There is no valid reason why tenants-in-common should be in a position as regards liability for rent different from that of joint tenants. On the contrary each of the tenants-in-common has the privity of estate with the landlord in the whole of the land leased. A suit, however, against some of such tenants need not be dismissed on that ground The Court must proceed under O.1, R. 10 (2), C.P.Code, to make an order for the addition of such of these persons as are not already on the record as defendants, and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed.

Persons who are under a joint liability to pay the rent are necessary parties in a suit for rent, from more points of view than one. They are necessary for determining whether the liability which is *prima facie* joint is also joint and several, for protecting the defendant from being made to pay what may have already been paid by others, for safeguarding against the eventuality of his being defeated in a suit for contribution as the co-tenant against whom a suit for contribution is brought will not be bound by the result of the earlier suit, for preventing conflicting decisions as to the character and incidents of the same tenancy being arrived at in different suits, and for various other reasons. (*Walmsley, Greaves, C.C.Ghose, B.B. Ghose and Mukerji, JJ.*) KAILASH CHANDRA *v.* BROJENDRA K. CHAKRAVARTI. **29 C. W. N. 1000 : 42 C. L. J. 232 : A. I. R. 1925 Cal. 1056 (F. B.)**

——**O. 1, R. 10**—*Transfer of parties from one side to other should be granted where refusal would prejudicially affect the applicant.*

Plaintiffs instituted a suit for cancellation of Patni lease against the Zemindars, the auction-purchaser, and two other persons, their co-sharers whom they described as *pro-forma* defendants. The *pro forma* defendants applied to be transferred from the category of defendants to that of plaintiffs. No order was passed on this application and later on the case was settled as between the plaintiffs and the auction-purchaser. At that stage the *pro forma* defendants renewed their application to be made co plaintiffs. The Court refused the application and made a decree on the basis of the compromise between the plaintiffs and the auction-purchaser. On an appeal by the *pro forma* defendants, *held*, that if the order of refusal were allowed to stand, the only result would be that the *pro-forma* defendants would be driven to a separate suit and hence their application should be allowed. (*Mookerjee and Rankin, JJ.*) NIRODE CHANDRA BANERJEE *v.* PROFULLA CHANDRA BANERJEE.
40 C. L. J. 535 : A. I. R. 1925 Cal. 421.

——**O. 1, R. 10**—*Transfer of plaintiff as defendant.*

A Court can transfer a plaintiff from the category of plaintiffs to that of defendants under O. 1, R. 10. (*Suhrawardy and Duval, JJ.*) PADMA LOCHAN PAL *v.* KALI KAMAL PAL.
82 I. C. 649 : A. I. R. 1925 Cal. 328.

——**O. 1, R. 10 and O. 30, R. 1**—*Refusal by partner to join in suit as plaintiff—He should be made a defendant.*

Where a partner in business refuses to join as plaintiff, the correct procedure is to make him a defendant in the suit, and not to dismiss the suit altogether. (*Coldstream, J.*) BULLI MAL *v.* JHABBA.
7 L. L. J. 280 : A. I. R. 1925 Lah. 504.

——**O. 1, R. 10**—*Addition of parties—Suit against dead person*—Bona fide *mistake—Amendment not allowed.*

In a suit brought against a deceased defendant, the Court has no jurisdiction to allow the plaint to be amended by substituting the names of the representatives of the deceased even when the suit was instituted *bona fide* and in ignorance of the death of the defendant. (*Shadi Lal, C. J. and Lumsden, J.*) MT. BOONDU *v.* MOTI CHAND.
A. I R. 1923 Lah. 652 (1).

——**O. 1, Rr. 10 and 3**—*Addition of a party—Erroneous exercise of discretion under R.* 10—*No revision lies but a revision does lie if the addition results in misjoinder.*

The addition of a party under O. 1, R. 10, is ordinarily a matter within the discretion of the Court trying the suit, and erroneous exercise of discretion in a matter of procedure should not be regarded as something done illegally in the exercise of the Court's jurisdiction within S 115. 5 L. W. 207, Doubted. Where by the addition of a party, there is not only a misjoinder of parties, but a misjoinder of causes of action, a Court of Revision should interfere. A. I. R. 1922 Mad. 436 Foll. (*Spencer, J*) MURUGAPPA CHETTIAR *v.* L. K, S. S. FIRM.
90 I. C. 721 : A. I. R. 1926 Mad. 135 (2).

——**O. 1, R. 10**—*The application to be impleaded, by a son of deceased defendant in suit for dissolution of partnership, if out of time on account of amendment of Limitation Act, must be allowed.*

The Limitation Act was amended so as to reduce the period of limitation for application under Art. 177 from six months to 90 days between the death of a defendant on 30th September 1920 after the passing of the preliminary decree in a suit for dissolution of

partnership and his son applying on the 6th January 1921 to be brought on the record. *Held*, that in the circumstances of the case it was in the interests of justice necessary for all parties interested to be added under O. 1, R 10, Civil Procedure Code. (*Spencer, J.*) V. R. M RAMASWAMI CHETTIAR *v* ADAPPA CHETTIAR. **78 I. C. 168 : A I. R. 1925 Mad. 347.**

———0. 1, R. 10 and O. 22, R. 10—*Mortgage suit —Preliminary decree—Addition of parties.*

It is competent to the Court to add a person interested in the equity of redemption as a party to a suit on a mortgage even after the passing of the preliminary decree therein and to re-open the prior proceedings so far as he is concerned. *Keith* v. *Butcher*, 25 Ch. D. 750 Foll. 31 I. C. 849 Diss. from. (*Phillips and Odgers, JJ.*) KRISHNA AIYAR *v.* SUBRAMANYA AIYAR. **46 M. L. J. 368 : 34 M.L.T. 114 : (1924) M. W. N. 364 : A. I R 1924 Mad. 648.**

———0. 1, R. 10—*Suit against dead man—Application to add his legal representatives as parties—Procedure.*

Application to add his legal representatives as parties in an appeal against a dead man is covered by S 153 and O. 1, R. 10. (*Oldfield and Venkatasubba Rao, JJ.*) GOVINDA KAVIRAJ PUROHITA *v.* GOWRANGA SAW. **45 M. L. J. 231 : 18 L. W. 54 : 75 I. C. 739 : (1923) M. W. N. 408 : A. I. R. 1924 Mad. 56.**

———0. 1, R, 10—*Striking out unnecessary parties —No appeal lies.*

Where some of the defendants, who are joined for the sake of convenience, are struck out, there is no substantive right decided, nor the striking out has any effect of putting an end to the litigation and therefore no appeal lies. A I.R. 1922 Mad. 332: 45 M. 194 Foll.; 42 M. 219 and (1920)M.W.N. 467 Not Foll. (*Odgers, J.*) RATNACHALAM IYER *v*, SIVACHIDAMBARAM PILLAI. **45 M. L. J. 703 : 18 L. W. 198 : (1923) M. W. N. 403 : A. I. R. 1923 Mad. 690.**

———0. 1, R. 10—*Addition of parties.*

The Court has no power for addition of plaintiffs after the passing of the decree. (*Spencer, J.*) SWAMINATHA MUDALIAR *v.* KUMARASWAMI CHETTIAR **44 M. L. J. 282 : 72 I. C. 284 : 17 L. W. 422 : 32 M. L. T. 212 : (1923) M. W. N. 239 : A. I. R. 1923 Mad. 472 (2).**

———0. 1, R. 10 —*Appeal.*

Order under O.1, R.10 does not come within the definition of "decree" in S 2 (2) and there can be no appeal. (*Oldfield and Ramesam, JJ.*) SHANMUKA NADAN *v.* ARUNACHALAM. **45 M. 194 : 14 L.W.642 : (1921) M.W.N. 799 : 30 M. L. T. 172 : 69 I. C. 961 : A. I. R. 1922 Mad. 332 : 42 M. L. J. 97**

———0. 1, R. 10—*Transposition of parties—Withdrawal of claim as to part.*

Where in a suit for partition of immoveable and moveable property the Court passes a preliminary decree with respect to immoveable property and the party withdraws his claim as to moveable, the suit does not come to an end but the Court may transpose parties and continue the suit. (*Odgers, J.*) SURAMPALLI RAMAMURTHI *v.* SURAMPALLI REDDI. **60 I. C. 144 : 12 L. W. 563.**

———0. 1, R. 10—*Addition of party—Attaching creditor intending to challenge the validity of mortgage—Whether can be added as party.*

Although an attaching creditor has a right to redeem yet when he does not wish to be added as a defendant so that he may have an opportunity to redeem plaintiff's mortgage but his object in asking the Court to add him as a defendant is to challenge a compromise arrived at between the parties to the suit and also the mortgage in favour of the plaintiffs on the ground that it was not a valid mortgage, his application for being impleaded in the suit should be rejected. (*Findlay, O. J. C. and Wadegaonkar, A. J. C.*) BRUEL & CO., BOMBAY *v.* KESHEORAO. **89 I. C. 446 : A. I. R. 1926 Nag. 67.**

———0. 1, R. 10—*Addition of defendants—Plaintiff has the option to add—No defendant should be added against plaintiff's will even when defendant asserts that his interests will be affected by plaintiff's suit.*

Ordinarily the plaintiff who comes into Court is the *dominus litis* and it must always be left to him to choose his opponent against whom he has to claim the relief in the suit. No stranger has any business to intrude into the case and force himself upon a plaintiff who does not want him and who does not claim any relief against him. The plaintiff is the best judge of his own interest. If he seeks relief against a particular individual and impleads that individual as a soledefendant, it is not the look-out of the Court or of any other third person to see whether somebody else must be allowed to intrude into the case as a co-defendant against the plaintiff's will, simply because that third person represents to the Court that he is a person who would be affected by the decision. The first principle of law is that nobody would be bound or affected by the decision to which he is not properly made a party. It is not the intention of law to let third persons ventilate their own grievances in, and thus derive profit from a suit commenced by another, at his own cost and for his own benefit. (*Kinkhede, A. J. C.*) VITHOBA *v.* SECY. OF STATE. **A. I. R. 1925 Nag. 373.**

———0. 1, R. 10—*Subsequent mortgagee—T. P. Act S. 74.*

Subsequent mortgagee paying mortgage decree of prior mortgagee before final decree is passed can apply for final decree. (*Hallifax, A.J.C.*) SHANKAR RAO *v.* GANPAT RAO. **80 I. C. 283 : A. I. R. 1925 Nag. 15.**

———0. 1, R. 10—*Return of vakalatnama.*

The practice of not returning the vakalatnama when the plaint is returned under R. 10 is wrong. The original vakalatnama enures for the purposes of the suit in the Court in which the plaint is subsequently filed under R. 4 (2) of O. 3, even if it contains no express provision to that effect, and therefore ought in every case to be returned along with the plaint. (*Hallifax, A. J. C.*) MAHARASTRAYAJANAN KOSH *v.* BIJJULAL. **19 N. L. R. 36 : 6 N. L. J. 100 : 71 I. C. 436 : A. I. R. 1923 Nag. 182.**

———0. 1, R. 10—*Plaintiff—Major wrongly discribed as minor—Amendment of plaint—Order striking off name of plaintiff—Appeal.*

Certain reversioners sued to set aside alienations of property after the death of a Hindu widow. One of the plaintiffs was described in the plaint as a minor but he was actually a major. The defendant pointed out the defect, whereupon the Court ordered the plaint to be amended by describing the said plaintiff as a major. The order was not complied with, and the Court struck off from the record the name of that plaintiff. Eventually the suit was dismissed on the merits. *Held*, that the order of the lower Court was correct. Though the order was not appealable, its validity could be questioned on appeal from the final decree in the case. (*Simpson, A. J. C.*) LACHHMI NARAIN *v.* SALIG RAM. **11 O. L. J. 154 : A. I. R. 1924 Oudh 428.**

———0. 1, 10—*Addition of parties—Preliminary decree passed in the case—Transferee before suit—*

C. P. CODE (V OF 1908), O. 1, R. 10.

Addition of.

O. 1, R 10 of the Code of Civil Procedure gives wide powers to the Court at any stage of the proceedings to direct that the name of any person who ought to have been joined, or whose presence before the Court may be materially necessary in order to enable the Court to effectively and completely adjudicate upon the questions in issue, may be added But that power can ordinarily be exercised only in proceedings not concluded by a decree, unless the person to be added is a subsequent transferee. In a suit on a mortgage after the preliminary decree had been passed, a person who is alleged to be interested cannot be impleaded at such a late stage. Scope of O. 1, R. 10 considered. The law gives a wide discretion to add as a party to a proceeding a person interested in it, so as to affect his prospective right but not with retrospective effect. (*Kanhaiya Lal, J. C.*) BENI MADHO *v.* YUSUF HUSAIN KHAN. **26 O. C. 317 : 72 I. C. 1031 : 10 O. L. J. 232 : 9 O. & A. L. R. 826 : A. I. R. 1924 Oudh 33.**

———0. 1, R. 10 and O. 7, R. 10—*Transfer of parties—Raising value of subject-matter higher than Court's jurisdiction—Court should add parties and return the plaint.*

Where transfer of some co-defendants to the side of plaintiffs raises valuation of the suit beyond the pecuniary jurisdiction of the Court, the Court should not refuse the transfer. It should allow transfer and return the plaint for presentation to proper Court. (*Adami, J.*) RAJKISHORE LAL *v.* ALAM ARA BEGAM. **90 I. C. 82 : A. I. R. 1926 Pat. 28.**

———0. 1, R. 10—*Order under, is not appealable, but striking out defendant's name in partition suit, resulting in leaving defendant's right to share undecided, is appealable.*

An order under O. 1, R. 10 is not appealable under the Civil Procedure Code. But a partition suit differs from other suits. In that every party whether arrayed on the side of the plaintiffs, or on the side of the defendants, is in the position of a plaintiff in so far as every party whether plaintiff or defendant is entitled to ask the Court to allot a share of joint property to him. In such a case where the name of one of the defendants is struck out at the instance of the plaintiff, the order is appealable if its effect is to leave undecided the defendant's claim to a share in the partition. (*Das, J.*) RAMJI PANDEY *v.* ALAF KHAN. **6 P. L. T. 581 : 3 Pat. 859 : A. I. R. 1925 Pat. 121.**

———0.1, R. 10—*Addition of parties--Court's power.*

A Court has, under O. 1, R. 10, power to bring on record any person as a party at any stage. (*Das and Ross, JJ.*) JOHN SOLONO *v.* RAM NARAIN **61 I.C. 378 (Pat)**

———0. 1, R. 10—*Preliminary decree—Party if can be impleaded after.*

O. 1, R. 10 does not limit the powers of a Court as to joinder of parties to proceedings prior to preliminary decree in a mortgage suit but permits it at any stage of the proceedings which will include up to the passing of a final decree. (*Rupchand Bilaram, A. J. C.*) KHIMANMAL TEJUMAL *v.* LALCHAND GHANOMAL. **89 I. C. 609 : A. I. R. 1926 Sind 26.**

———0. 1, R. 10—*Applicability—Party added by Court under—Limitation Act, S. 22.*

S. 22, Lim. Act, applies even to cases where a person is added as a party at the instance of the Court under O. 1, R. 10. (*Kennedy and Bilaram, A. J. Cs.*) RALLIRAM SHEWARAM *v.* BUDHURAM PARMANAND. **17 S. L. R. 324 : 79 I. C 914 : A. I. R. 1925 Sind 181.**

———0. 1, R. 10 (1)—*Scope of—Institution of suit by person not entitled to continuance by proper persons.*

A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake. 30 M. 419; 43 M. 707, Rel. (*Spencer and Venkatasubba Rao, JJ.*) PANICHIKKAL *v.* EDATHIL. **16 L. W. 826: (1922) M. W. N. 817: 69 I. C. 413: A. I. R. 1923 Mad. 180 (1).**

———0. 1, R. 10 (2)—*Nature of suit can't be altered by addition—Party can be added if he ought to have been joined or is necessary for complete decision.*

Sub-rule (2) is to be invoked in view of the special circumstances of the particular litigation subject to the general proposition that parties cannot be added so as alter the nature of the suit. 10 W. R. 86, 24 All. 553 Foll.

A person may be added as a party to the suit only in two cases, *viz.*, when a party ought to have been joined and has not been joined or when without his presence the suit cannot be completely decided. (*Mookerjee and Suhrawardy, JJ.*) ABDUL GAFUR *v.* ALI MIAH. **28 C. W. N. 805: 82 I. C. 369: A I. R. 1925 Cal. 26.**

———0. 1, R. 10 (2)—*Scope.*

Plaintiff-purchaser from K, sued purchasers defendants 1 to 3 from a female co-tenant, of K, both of whom inherited from their father. Plaintiffs failed on the ground of limitation and therefore in second appeal defendants 4 and 5, sons of K, applied to be added as plaintiffs and plaintiff consented. *Held*, the plaintiff could succeed only on the basis that the sale by K was for legal necessity. The fourth and fifth defendants if they sued as plaintiffs could succeed only on the contradictory hypothesis that the sale was not for legal necessity and did not affect their interest as reversioners It would be necessary for the added plaintiffs to discharge the entire evidence on the record and succeed on a case which not only was not made in the first Court but was absolutely contradictory to the evidence put forward. (*Mookerjee and Cuming, JJ.*) JAGABANDHU SAHA *v.* HARIS CHANDRA SIL. **36 C. L. J. 92 : A. I. R. 1922 Cal. 459.**

———0. 1, R. 10, (2)—*Addition of parties—Court can add persons whose presence is necessary effectually and completely to adjudicate upon and settle all questions involved in the suit.*

A person who would be represented by a party on the record and bound by the decision against that party is entitled to be impleaded under O. 1, R. 10, (2), C. P. Code, to protect his interests. The plaintiff, claiming to be the son of an adopted son of S, the last male owner of the suit property, sued for the recovery of possession of the same from 1st defendant, the widow of the last male owner. Plaintiff's case was that his father had been adopted by the 1st defendant, and that he (plaintiff) had been unlawfully excluded from the plaint properties by the 1st defendant on account of an invalid agreement between her and the 2nd defendant. Certain persons, claiming to be the nearest reversioners to the last male owner, applied to be made defendants in the suit and were made defendants by the Court below. One question, and probably the most important question, in the suit was whether the plaintiff's father's adoption to the last male owner was true and valid. *Held*, that the presence of the nearest reversioners to the last male owner before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, and that the Court below was competent to make them defendants. (*Oldfield, J.*) RAJARATNAM AIYAR *v.* HALASYASUNDARAM AIYAR. **44 M. L. J. 322 :**

C. P. CODE (V OF 1908), O. 1, R. 10.

72 I. C. 156 : 17 L. W. 329 : A. I. R. 1923 Mad. 521.

———0. 1, R. 10 (2)—*Transposition of parties—Madras Estates Land Act, S. 55.*

A suit under S.55, Madras Estates Land Act, should not be dismissed for the sole reason of non-joinder of a rival claimant. In such case of non-joinder, the Court should add such a claimant as a party deft. (*Ayling and Krishnan, JJ.*) RAMANATHAM CHETTIAR *v.* ARUNACHALLAM CHETTIAR.

44 Mad. 43 : 60 I. C. 316: 39 M. L. J. 474.

———0. 1, R. 10 (2)—*Addition of parties—Court, powers of.*

O. 1, R. 10 (2) is wide enough to give a Court power to add *any person, i. e.*, whether already a party or not, so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. (*Sadasiva Aiyar and Odgers, JJ.*) MAHOMED SIRAJUDDIN *v.* GHULAM JAILANI.

59 I. C. 233 : 12 L. W. 25.

———0. 1, R. 10 (2)—*Order discharging party—If a decree—Appeal.*

An order passed under O. 1, R. 10 (2) discharging a defendant from a suit does not amount to a decree and it is not appealable. The mere drafting of the order as a decree does not make it a decree. (*Findlay, O.J. C.*) SHANKAR RAO *v.* RAGHUNATH RAO.

89 I C. 331.

———0. 1, R. 10 (2)—*Addition of parties—Order of remand by High Court—Appeal to Privy Council—Jurisdiction of High Court to add parties.*

A suit was remanded by the High Court to the lower Court and an appeal to thePrivyCouncil was filed against the remand order. *Held*, that the High Court had no power to add parties after the remand order and the lower Court having seizin of the suit had power. (*Rutledge and Heald, JJ.*) KALENTHER AMMAL *v.* MAMI.

3 Rang. 474 : A. I. R. 1926 Rang. 9.

———0. 1, R. 10 (5)—*Misdescription can always be corrected—Misdescribed party and wrong party differ from each other—But of two persons if wrong one is sued and no question of representation arises, the case is not one of misdescription.*

On the language deliberately employed by the legislature in the provision of the Code, there is no room for controversy that the proceedings as against any person added as a defendant shall be deemed to have begun only on the service of summons. Where there is a misdescription of the defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time, for in case of misdescription the Court will not have any difficulty in coming to the conclusion that the defendant had been substantially sued though under a wrongname. There is all the difference in the world between misdescribing a party intended to be sued and suing a wrong party. Where a personal decree was sought against the Agent, East Indian Railway Company, and there was no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the plaintiff migh obtain against the defendant. *Held*, no question of representation arose in such a case. When there are two known persons in existence and the plain iff brings the suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription. (*Das and Ross, JJ.*) EAST INDIAN RAILWAY CO. *v.* RAM LAKHAM RAM.

3 Pat. 230: 6 P. L. T. 415: 1924 P. H. C. C. 9: 78 I. C. 312 : A. I. R. 1925 Pat. 37

C. P. CODE (V OF 1908), O. 2, R. 1.

———0. 1, R. 11—*Suit by one trustee—Death of plaintiff—Co-trustee made plaintiff.*

One of two trustees brought a suit in respect of the trust and his co-trustee was made a deft. The plff. having died during the pendency of the suit, the Court transferred the co-trustee from the position of deft. to that of plff. *Held*, that Court had general power to do so. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) SAMINATHA PILLAI *v.* RAJAGOPALA MUDALIAR.

40 M. L. J. 208 : (1921) M. W. N. 108 : 62 I. C. 360 : 13 L. W. 148 : 29 M. L. T. 151 :

———0. 1, R. 13—*Non-joinder—Suit in ejectment by manager—Denial of title—Joinder of other family members.*

In a suit by plaintiff, as representing the senior branch of a jagirdar family to eject the defendants who had executed a lease in favour of the plff., the defendants denied the plaintiff's title and pleaded non-joinder of the members of the junior branch. *Held*, the defendants were in no way prejudiced by the plaintiff suing alone and in no case could there be any chance of their being troubled by any other suit filed by the other members of the family ; consequently there was no substance in the plea of non-joinder and the appellate Court could not interfere on that ground. (*Macleod, C. J. and Coyajee, J.*) GANGARAM *v.* BAPU SAHEB.

46 B. 1022 : 24 Bom. L. R. 826 : A.I.R. 1922 Bom. 354.

———0. 1, R. 13—*Redemption suit—Transferee of the mortgage whether a party—Limitation Act, Art. 134.*

The mortgagee defendants (1 to 7) of certain talukdari lands mortgaged some of the mortgaged properties to defendants (8 to 10) who in a suit by plaintiff mortgagor against defendants (1 to 7) took objection to their being joined as defendants, on the ground that as the defendants 1 to 7 represented that they were owners of the lands they were mortgaging, they (defendants 8 to 10) were entitled to rely on that representation for the purpose of Art. 134, Limitation Act. *Held*, there is no reason why the plaintiff-mortgagor should not join defendants 8 to 10 in a suit against defendants 1 to 7. As he was endeavouring to get possession of all the suit properties and the only result of the defendants 8 to 10 establishing their claim under Art. 134 would be that the plaintiff in order to get possession of the lands mortgaged to them would have to pay the amount due on the mortgages executed by defendants 1 to 7, there is no reason why all those questions should not have been decided in one suit. (*Macleod, C. J. and Coyajee, J.*) TALUKDHARI SETTLEMENT OFFICER *v.* AKUJI.

46 Bom. 993 : 24 Bom. L. R. 762 : A. I. R. 1922 Bom. 350.

———0. 1, R. 13—*Non-joinder—Plea not raised in written statement is barred.*

Where a defendant does not raise any plea of non-joinder when he filed his written statement he will be precluded from raising such a plea at a later stage of the litigation under O. 1, R. 13. (*Dalal, J. C.*) RAM PHER *v.* AJUDHIA SINGH.

12 O. L. J. 66 : 87 I.C. 17 : 2 O.W.N. 144 : A.I.R. 1925 Oudh 369 :

———0. 2, R. 1—*All causes of action need not be joined.*

A suit should include the whole claim arising out of the same cause of action but it is not necessary to include all causes of action in the same suit. (*N. R. Chatterjee and Duval, JJ.*) MANMATHA NATH BOSE *v.* JAGAT RAM ROY.

59 I. C. 517 (Cal.).

———0 2, R. 1—*Defendants not in possession of debtor's property—Cause of action.*

Where the defendants pleaded in clear terms that

C. P. CODE (V OF 1908), O. 2, R. 1.

the debtor left no property as he died in the lifetime of his father, and that the plaintiffs could have no cause of action against them without establishing that such property of the deceased was in their possession, and the plaintiffs failed to mention any such property, *held*, according to no rule of law could plaintiff's claim be decreed on the ground that they may be able to indicate in execution proceedings. the property, if any, left by the deceased debtor. This would amount to giving them further opportunities to harass the defendants. (*Broadway and Jafar Ali, JJ.*) FIRM OF BHAG MAL *v.* GARIMJEE MAL.

A. I. R. 1923 Lah. 471.

——**O. 2, R. 1**—*"Subjects in dispute"—Meaning of.*

The expression "subjects in dispute" in O. 2, R. 1 refers to the right which one party claims against the other and not to the cause of action alone. (*Phillips, J.*) RAVIPATI RAMAIAH *v.* LAKSHMINARAYANA.

49 M.L.J. 701 : A.I.R 1926 Mad. 234.

——**O. 2, R. 1**—*Properties attached under Cr. P. Code, S. 145 and put in Receiver's possession pending Civil Court's decision—Suit praying only for adjudication of right and no prayer for recovery of possession is properly framed—Lands lying fallow at time of attachment makes no difference—Specific Relief Act, S. 42.*

In proceedings under S. 145 of the Cr. P. Code the Magistrate found himself unable to say which party was in possession and placed the properties in the possession of a receiver pending the decision of the Civil Court in favour of one or other of the parties. A suit was brought by one of the parties for an adjudication that he was the person entitled to the properties but he did not pray for possession. *Held*, that the possession of the receiver was on behalf of the person properly entitled to the properties and that no relief by way of recovery of possession from the receiver need be asked and that the suit as framed was proper and maintainable. 15 C. W. N. 758 and 27 Mad. 591, Foll. *Held*, further, that no difference was made in the matter by the fact that at the time when the attachment of the properties was ordered by the Magistrate, they were not in the plaintiff's possession but were lying fallow owing to a dispute about possession. (*Krishnan, J.*) T. DEVARAJULU NAIDU *v.* KONDAMMAL.

20 L. W. 754 : 80 I. C. 929 : A. I. R. 1925 Mad. 427.

——**O. 2, R. 2.**

See also C. P. CODE, S. 11.

Applicability
Cause of action.
Contract.
Damages.
Declaration.
Dek. Agr. Relief Act.
Dismissal of prior suit.
Dower
Execution proceedings.
Fresh suit.
Instalment bond.
Mesne profits.
Minor.
Mortgage.
Omission of claim.
Option to sue.
Partition.
Principal and interest.
Rent suit.
Revenue Court.
Same parties.
Specific performance

C. P. CODE (V OF 1908), O. 2, R. 2—Cause of action.

Suit for possession.
Withdrawal of suit.

Applicability.

——**O. 2, R. 2**—*Applicability—Suit for a declaration that mortgage was not enforceable.*

Order 2, R. 2, only applies where the creditor brings a second suit; but the rule cannot enable the debtor to apply for a declaration that the previous suit by the creditor has extinguished his claim. (*Coutts-Trotter C. J. and Krishnan, J.*) SAWMY RAO *v.* OFFICIAL ASSIGNEE OF MADRAS.

49 M. L. J. 474 : 22 L W. 17 : 48 M. 703 : A. I. R. 1925 Mad. 1120.

——**O. 2, R. 2**,—*Applicability—Different causes of action*—Res judicata.

A plaintiff is not bound under O. 2, R. 2 to join in one suit all the causes of action he has got against the defendant but that principle is not the one applicable to the question which refers to a plaintiff's duty to bring forward all the grounds of his attack in support of the title that he is litigating.

A plaintiff is not bound to combine different causes of action in the same suit. (*Krishnan and Ramesam, JJ.*) MUHAMMAD T. S. N. ROWTHER *v.* M. M. ABDUL RAHMAN ROWTHER.

(1922) M. W. N. 845 : 17 L. W. 188 : 32 M. L. T. 82 : 46 M. 135 : 72 I. C. 207 : A. I. R. 1923 Mad. 257.

——**O. 2. R. 2**—*Applicability—Rule refers only to "Suits"—Proceedings to file or enforce award are not "suit".*

O. 2, R. 2 refers to suits and bars the second suit in respect of a claim omitted or intentionally relinquished in the first suit. Where there is no first suit, the rule does not apply. An award though enforceable as a decree under the Indian Arbitration Act is not a decree and the proceedings to file an award or to enforce it are not a suit. 24 C. W. N. 775 Foll. (*Rupchand Bilaram, A. J. C.*) FIRM OF BRIJLAL JAGANNATH *v.* FIRM OF ALLAH DITTA.

86 I C. 393 : A. I. R. 1925 Sind 242.

Cause of action.

——**O. 2, R. 2**—*Cause of action—Previous suit for wrongful conversion—Subsequent suit to obtain legacies—Different subject-matter—Suit is not barred.*

Where the previous suit had been for the wrongful conversion of goods and the subsequent suits were to obtain payment of legacies, and there was no claim in respect of any of the goods to which the previous suit related, *held*, that the subsequent suits were not barred. (*Sir John Edge.*) VENKATADRI APPA RAO BAHADUR *v.* PARTHASARATHI APPA RAO.

48 M. L. J. 627 : 48 Mad. 312 : 52 I. A. 214 : 23 A. L. J. 261 : L. R. 6 P. C. 82 : 27 Bom. L. R. 823 : 87 I.C. 324 : (1925) M. W. N. 441 : 3 Pat. L. R. 208 : 29 C.W.N. 989 : A. I. R. 1925 P. C. 105 (P. C.).

——**O 2, R. 2**—*Cause of action—Identity of—Test of—Different evidence.*

A person's cause of action can be defined as consisting of every fact which would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. One test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. 16 A. 165; 40 B. 351, Referred to. (*Ryves and Daniels, JJ.*) MAHOMED UMAR KHAN *v.* AMTUL RAHIM BIBI.

45 A. 376 : 21 A. L. J. 267 : L. R. 4 A 169 : 71 I. C. 965 : A. I. R. 1923 All. 311.

——**O. 2, R. 2**—*Causes of action—Identity of—Test.*

C. P. CODE (V OF 1908), O. 2. R. 2—Cause of action.

The question whether there is a bar by O. 2, R. 2, C. P. Code, has to be decided with reference to the identity of the causes of action in the two suits and that question has to be determined with reference to the allegations made by the plff. in either suit. In determining this question the Court is not in any way concerned with the defences which were raised in the suits or with the character of the relief which was sought. (*Lindsay and Kanhaiya Lal, JJ.*) SHAIKH ABDUL RASHID *v.* MT. QUDRAT-UN-NISSA.

L. R. 3 A. 587 : A. I. R. 1922 All. 510 (2).

——**O. 2, R. 2**—*Cause of action refers to the media upon which plaintiff seeks relief.*

A cause of action means every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action. But the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action. or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. 33 Mad. 131, Foll. (*Fawcett, J.*) YESHVADABAI *v.* JANARDHAN RAGHUNATH. **25 Bom. L. R 1172 : A. I. R. 1924 Bom. 141.**

——**O. 2, R. 2**—*Causes of action—Suit for profits—Subsequent suit for partition—Co-sharers.*

So long as a tenancy in common continues, it is open to one tenant to file a suit for partition irrespective of any suit or suits which had been filed between them for a share of the profits during the continuance of the tenancy-in-common. The cause of action for the suit for partition subsists so long as the co-tenancy continues. (*Macleod, C. J. and Crump, J.*) TIMMAPPA *v.* MANJAYA. **25 Bom. L. R. 491 : 73 I. C. 424 : A. I. R. 1923 Bom. 440.**

——**O. 2, R. 2**—*Causes of action—Splitting of—Prior suit for redemption of portion of mortgaged property—Subsequent suit for possession of remainder.*

Where in a suit for redemption of a portion of the mortgaged property the plaintiff succeeds and obtains a decree he is debarred from bringing a fresh suit for recovery of possession of the remaining portion of the mortgaged property. (*Shah, A. C. J. and Crump, J.*) BHAN DAJI *v.* PATLU MALU. **24 Bom. L. R. 115 : 73 I. C. 862 : A. I. R. 1923 Bom. 63.**

——**O. 2, R. 2**—*Cause of action—Different causes of action—Successive suits not barred.*

Under O. 2, R. 2, every suit must include the whole of the claim arising from one and the same cause of action and it is not necessary that every suit shall include every claim or every cause of action which the plaintiff might have against the defendant. The test is, whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit. If the answer be in the affirmative the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit. 8 M. 520 ; 23 C. 821, Foll. (*Mukerjee and Chotzner, JJ.*) KULADA PROSAD CHATTERJEE *v.* KHUDIRAM MISRA. **37 C. L. J. 545 : 27 C. W. N 673 : 70 I. C. 187 : A I. R. 1923 Cal. 371.**

——**O. 2, R. 2**—*Cause of action—Suit need not include every cause of action.*

If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred by O 2, R. 2 of the C. P. Code. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which plff. may have against deft. 8 Mad. 520, Foll. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN.

66 I. C. 923 : 34 C. L. J. 465.

——**O. 2, R. 2**—*Cause of action—Lease by mortgagee to mortgagor—Prior suit for rent—Subsequent suit for mortgage money not barred.*

The defendants executed a usufructuary mortgage and a lease of the same property on the same day and in the lease it was stated that the defendants took the mortgaged property from the plaintiffs on a rent of Rs. 187-8-0 per mensem for six months. Plaintiff first sued for rent and then for mortgage money and it was contended that the second suit was barred by O. 2, R. 2. *Held*, that although the mortgage deed and the lease were executed on the same day and rent was equal to the amount of interest yet in view of the facts that the mortgage-deed contained no reference to the lease and that the mortgagees were not restricted in their choice of tenants the mortgage and the lease were two distinct transactions and the institution of the former suit, which was based on the lease, is therefore no bar to the subsequent mortgage suit. 3 Lah. 1, Foll. (*Martineau and Campbell, JJ.*) RALIA RAM *v.* AMIR CHAND. **4 Lah. 52 : 5 Lah. L. J. 259 : 74 I. C. 122 : A. I. R. 1923 Lah. 203.**

——**O. 2, R. 2**—*Cause of action—Mortgage and lease—Suit for rent—Subsequent suit on mortgage bar.*

Where deft. mortgaged certain properties to plff. with possession directing him to set off the rent against the interest due on the mortgage, and the plff. sued the deft. as lessees for arrears of rent and obtained a decree, a subsequent suit on the mortgage for recovery of the mortgage money and interest for the remaining period is not barred. 19 A. 496 ; 26 M. 662, Ref. (*Le Rossignol and Campbell, JJ.*) MAHOMED HUSSAIN *v.* ABDUL GHAFUR KHAN. **3 Lah. 1 : 65 I. C. 102 : 8 P. W. R. 1922 : A. I R. 1922 Lah. 111.**

——**O 2, R. 2.**—*Cause of action—Suit by mortgagee for possession—Second suit for possession.*

Where a mortgagee obtains a decree for possession on the basis of the mortgage, no further suit for possession could be maintained unless it could be shown that possession had been taken under the decree and the judgment-creditor has been subsequently dispossessed. (*Leslie Jones and Dundas, JJ.*) HAR CHAND SINGH *v.* NARAIN SINGH. **67 I. C. 281 : 2 Lah. L. J. 678.**

——**O. 2, R. 2**—*Cause of action—Mortgage and lease—Suit for rent—Subsequent suit for principal and interest is barred.*

Where a person executed a mortgage and a lease simultaneously to another person and the lease provided that the rent would be appropriated for the interest due under the mortgage and on the rent falling into arrears, the mortgagee brought a suit and recovered the arrears, *held*, that the mortgage and lease must be treated as one transaction and that a subsequent suit by the mortgagee to recover principal and interest under the mortgage was barred by O. 2, R. 2. (*Leslie Jones and Broadway, JJ.*) BALA RAM *v.* DIWAN CHAND. **63 I. C. 928 : 36 P. W. R. 1921.**

——**O. 2, R. 2**—*Cause of action—Whole claim arising from same causes of action must be included—Suit for refund of purchase money from vendor—Previous suit for possession of property sold.*

Under O. 2, R. 2, while it is necessary that every suit must include the whole of the claim arising from one and the same cause of action, it is not necessary that every suit shall include every claim or every cause

of action which the plaintiff may have against the defendant. The test is whether the cause of action in the subsequent suit is different from the cause of action in the previous suit. If the cause of action was different it is immaterial if it was permissible to the plaintiff to join the two causes of action in the previous suit.

A suit for refund of purchase money from the vendor on the ground that he has no title to the property conveyed is not barred by a previous suit against him for possession of the property conveyed: A. I. R. 1923 Cal. 371; A. I. R. 1924 Nag. 89; 15 Cal. 51 and A. I. R. 1924 Cal. 558, Foll. (*Wadegaonkar, A. J. C.*) RAMDHAN *v.* PURUSHOTTAM.

88 I. C. 699 : A. I. R. 1926 Nag. 109.

——**0. 2, R. 2**—*Cause of action must be antecedent to the institution of the suit—A second suit is not barred if cause of action is different.*

Cause of action refers entirely to grounds set forth in the plaint as the cause of action and has no relation whatever to the defence which may be set up by the defendant; nor does it depend upon the character of the relief prayed for by the plaintiff. In other words, it refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. A cause of action must be antecedent to the institution of the suit. If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred. Where, therefore, properties are different and plaintiff's rights are infringed at different times by different acts of ouster, O. 2, R. 2 will have no application, because the object of the rule is to give effect to the maxim *interest respublicae ut sit finis li tium*. Where there is some discrepancy in the two causes of action they are different, and they need not be subject of one suit. (*Kinkhede, A. J. C.*) VENKAT BHAT *v.* MT. YAMUNA. **80 I. C. 286 : A. I. R. 1925 Nag. 54.**

——**0. 2, R. 2**—*Cause of action—Plaintiff if bound to unite in one suit—Bar.*

Where there are perfectly different causes of action, though it might be open to a plaintiff to join them in one suit he is not bound to do so and the failure to do it will not be bar under O. 2, R. 2. (*Baker, O. J. C.*) LALLU PRASAD *v.* BABU LAL.

76 I. C. 218 : A. I. R. 1924 Nag. 214.

——**0. 2, R. 2**—*Cause of action—Bundle of essential facts which plaintiff must prove in order to succeed is cause of action.*

A cause of action for a suit is the bundle of essential facts which it is necessary for the plaintiff to prove in order to succeed. A mortgagee who is entitled to possession but to whom possession is not given and who first sues for possession and fails cannot subsequently sue for the recovery of the mortgage money. (*Neave, A. J. C.*) SHEO RATAN SINGH *v.* RAM SINGH.

28 O. C. 82 : 85 I. C. 391 : A. I. R. 1925 Oudh 524.

——**0. 2, R. 2**—*Cause of action—Previous suit for setting aside mortgage as being unauthorised—Subsequent suit for redemption by plaintiff as mortgagor's heir—Clog on equity of redemption alleged—Suit is not barred.*

Where the previous suit was for the possession of the mortgaged property on the ground that the property was joint family property and that the mortgagor had no authority to transfer it. *Held*: that the cause of action in a subsequent suit for immediate redemption of the mortgage on the ground that the plaintiff was the mortgagor's heir and that the terms of the mortgage amounted to a clog on the equity of redemption was different. *Held*: further the plaintiff had not been bound to declare in the previous suit, that the terms of the mortgage were invalid. (*Dalal J. C.*) RAM BALI *v.* RAM ASRE. **12 O. L. J 105 : 86 I. C. 686 : A. I. R. 1925 Oudh 386.**

——**0. 2, R. 2**—*Cause of action—Every alienation by Hindu widow gives a separate cause of action to reversioners.*

A Hindu reversioner's right to challenge the validity of one alienation made by a Hindu widow is different from his right of impeaching the validity of a separate and independent alienation though both the rights may arise out of one and the same title. Each alienation by the widow gives rise to a separate and distinct cause of action and a suit to impeach one is no bar under O. 2, R. 2, C. P. Code, to a subsequent suit to impeach another alienation. (*Wazir Hasan, A. J. C.*) BAHADUR SINGH *v.* SULTAN HUSAIN KHAN.

8 O. L. J. 535 : 66 I. C. 455 : 3 U. P. L. R. (J. C.) 83 : A. I. R. 1922 Oudh 171.

——**0. 2, R. 2**—*Cause of action—Bar of suit—Usufructuary mortgagee—Dispossession—Suit for recovery of possession dismissed—Subsequent suit for money—If lies.*

A usufructuary mortgagee who was dispossessed sued for possession of the properties, but his suit was dismissed, as properties were joint family properties and all members had not joined in it. He then sued for a money decree. *Held* as he could have asked for a money decree in the prior suit under S. 68 (*b*) T P. Act but did not do so, the suit was barred under O. 2, R. 2. (*Adami and Sen, JJ.*) RAM AUTAR PANDE *v.* SHANKAR DAYAL **90 I. C. 622 : 1925 P. H. C. C. 338.**

——**0. 2, R. 2**—*Causes of action—Different—No bar.*

O. 2, R. 2, C. P. Code, requires that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim and every cause of action which the plaintiff may have against the defendant. Consequently if the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. The whole question for investigation, therefore is, whether the cause of action in the subsequent suit is the same as that in the first suit. (*Coutts and Das, JJ.*) MT. BHAGJOGNI *v.* SAKHI MAHTON. **1923 P. H. C. C. 234 : 77 I. C. 500 : A. I. R. 1923 Pat. 575.**

——**0. 2, R. 2**—*Cause of action—Meaning.*

The expression refers entirely to the media upon which the plff. asks the Court to arrive at a conclusion in his favour. (*Das, J.*) HARDEO *v.* BHAWANI SAHAI. **60 I. C. 496 : 1921 P. H C. C. 125.**

——**0. 2, R. 2**—*Cause of action—Suits on pro-note and for original loan are based on different causes of action.*

The suit on the promissory note and the suit for the original loan are not based on the same cause of action, though the two actions arise out of the same transaction, they are in respect of different causes of action. The section is directed to securing exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action, different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. (*Dass, J.*) M. K. M. V. CHETTY FIRM *v.* MA MYA. **4 Bur. L.J. 130: A. I. R. 1925 Rang. 304.**

——**0. 2, R. 2**—*Cause of action—Difference of—Prior suit on mortgage—Inconsistent claim in later suit.*

Where the prior suit was based on the ground that

C. P. CODE (V OF 1908), O. 2, R. 2—Contract.

the mortgaged property had been sold in execution of a simple money decree free of the mortgage, it does not bar a subsequent suit on the same mortgage on the allegation that the land was sold subject to the mortgage in execution of the money decree. (*Brown, A. J. C.*) MAUNG KYIN PEIN *v.* MA PWA ME.
4 U. B. R. (1921) 62 : 64 I. C. 953 : A. I. R. 1922 U. B. 1.

Contract.

———**O. 2, R. 2**—*Contract—Each contract for sale of goods is generally a separate one.*

Prima facie each separate order and delivery of goods in the case of sale of goods is a separate contract and a separate cause of action, but in some cases it may be a question of successive claims under a single obligation within the terms of the "Explanation" to the rule, that is, for example, when the successive claims arise under the same contract. It is open to the parties even in the latter case of a single contract to agree that successive claims for separate deliveries thereunder should be treated as separate contracts and therefore as separate causes of action; so that a prior suit for one part of the contract may not bar a subsequent suit for another part. But the more prudent lawyer should usually, as a wise precaution as far as possible, take the course of greater safety by including all transactions up to the date of suit in a single plaint. (*Lentaigne, J.*) K.E.A.K.A. SAHIB & CO. *v.* K. M. ADAMSA. **2 Rang. 66 : 81 I. C. 465 : A. I R. 1924 Rang. 249.**

———**O. 2, R. 2**—*Contract—Distinct causes of action—Contract for sale of goods—Delivery by instalments—Effect of—Distinct contracts.*

Prima facie each order and delivery of goods is a separate transaction and a separate cause of action, if not they are successive claims which arise under the same obligation within the explanation at the end of O. 2, R. 2, C.P. Code. The question is really dependent on the contract between the parties. If all the goods were delivered under a *single contract* it would be within the explanation unless there was an express stipulation that each delivery or each month's deliveries would be considered as a separate contract. The validity of such a clause has been recognised. There are numerous definitions of the expression "Cause of action" and courts have held that the meaning of the expression as used in S. 20, C.P. Code must be gathered from the previous legislation in India and not from the definition of the expression adopted in certain English decisions. Likewise the meaning of the expression as used in O. 2, R, 2, should be gathered from that rule and the authorities on that rule or on the sections of the previous Code replaced by that Rule, and it should not be assumed that the expression has the same meaning in that rule as it has either in English decisions or in decisions on questions relating to the law of Limitation. (*Heald and Lentaigne, JJ.*) K. E. A. K. AHMED SAHIB AND CO *v.* M. K. PAKIR MAHOMED ROWTHER. **2 Bur. L. J. 169: 1 Rang. 694 : A. I. R. 1924 Rang. 145.**

Damages.

———**O. 2, R. 2**—*Damages—Claim for against vendor—Dismissal of prior suit for possession.*

Where a prior suit for possession under a conveyance of immoveable property is dismissed, a subsequent suit for damages against the vendor is not barred under O. 2, R. 2, C.P. Code at any rate where claim for damages has been reserved in the previous suit. (*Mookerjee and Suhrawardy, JJ.*) LAKSHAM CHANDRA MANDAL *v.* TAKIM DHALI. **39 C. L. J. 90 : 28 C. W. N. 1033 : A. I. R. 1924 Cal. 558.**

C. P. CODE (V OF 1908), O. 2, R. 2—Dismissal of prior Suit.

Declaration.

———**O. 2, R. 2**—*Declaration—Subsequent suit for possession—Maintainability.*

Where a person entitled to claim a share in an estate sued for and obtained a mere declaration of his right and did not ask for possession, a subsequent suit for possession is barred by O. 2, R. 2 and S. 11, Expl. IV, C. P. Code. (*Hallifax and Prideaux, A. J. Cs*) SUBHAN ALI *v.* IMAMI BEGAM.
65 I. C. 194 : A. I. R. 1922 Nag. 129.

Dekkan Agriculturists Relief Act.

———**O. 2, R. 2**—*Dekkhan Agriculturists Relief Act—Suit on one of several simultaneous mortgagees—Account taken out in respect of one mortgage—Subsequent suit on another mortgage.*

To secure the balance arrived at, as due by the defts, to the plffs. in several transactions between them, the defts. executed simultaneously three mortgages to plff. and the latter brought a suit on one of the mortgages and the account taken therein was limited to the particular mortgage sued on and subsequently the plff, brought a suit on the second mortgage, *Held*, that an account taken by the Court under S. 13 of the Dekkhan Agriculturists Relief Act is taken from the earliest of the proceedings transactions between the parties to the suit and is continued right up to the date of the suit and that the suit was barred under O. 2, R. 2 C. P. C. (*Macleod C. J. and Heaton, J.*) DADUCHAND BALARAM *v.* APPI KHEMA. **45 Bom. 55 : 59 I. C. 347 : 22 Bom. L. R. 1093.**

Dismissal of Prior suit.

———**O. 2, R. 2**—*Dismissal of prior suit—Valuation deliberately inflated to get round a previous decision—Whether an abuse of process—Plaint to be returned to the proper Court.*

The plaintiff instituted a suit for rent and an ejectment suit against his tenant which were dismissed by the District Judge on the ground of want of plaintiff's title. He instituted a second suit, with a view to get over the plea of *res judicata*, for recovery of possession of the house from the tenant which was also dismissed. The District Judge on appeal, allowed the appeal, decreeing the suit on the ground that S. 11 of C.P. Code was no bar. The High Court in Second appeal, reversing the decision of the lower appellate Court *held*,

Per *Walsh, A. C. J.* that the plaintiff's attempt to dodge the previous judgment ought to be defeated and that the suit was an abuse of the process of Court within the meaning of S. 153, C. P. Code.

Per *Sulaiman, J.*—The valuation was deliberately inflated in order to provide a ground for getting round a previous decision and the proper course was to direct the plaint to be returned for presentation to the proper Court. (*Walsh, A. C. J. and Sulaiman, J.*) MOHAN LAL *v.* BHUTESHWAR. **L. R. 5 All. 709 (Civ.) : A. I. R. 1925 All. 142.**

———**O. 2, R. 2**—*Dismissal of prior suit—Plaintiff not entitled to relief sued for—Suit dismissed—Suit for relief for which plaintiff is entitled is not barred.*

A plaintiff, who sues for a relief which the Courts cannot grant him, is not debarred from subsequently bringing a suit in respect of a relief which the Courts can grant him. (*Abdul Raoof and Fforde, JJ.*) SARDARI MAL *v.* HIRDE NATH. **7 Lah. L. J. 236 : 87 I. C. 994 : A. I. R. 1925 Lah. 459 (2).**

———**O. 2, R 2 and S. 11**—*Dismissal of prior suit—Misdescription—First suit—Bar.*

Where a suit is dismissed on the ground the properties are wrongly described, there is no bar to the filing

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of a fresh suit either under S. 11 or under O. 2, R. 2, C. P. Code. (*Scott-Smith. J.*) BIKA *v.* BALANDA.

78 I. C. 579 : A. I. R. 1925 Lah. 193.

——O. 2, R. 2 (2)—*Dismissal of prior suit—Two suits filed on same date—Suit bearing subsequent number filed later.*

Two suits presented on the same day must be presumed to be presented and admitted in the order in which their numbers appear on the register. (*Duckworth and Po Han, JJ.*) STANDARD ELECTRIC AND MOTOR WORKS *v.* PICTURE PALACE.

2 Bur. L. J. 218 : 1 Rang. 682 : 76 I. C. 791 : A. I. R. 1924 Rang. 161 (2).

Dower.

——O. 2, R. 2—*Dower—Different causes of action—Suit for possession—Mahomedan heir—Suit for dower.*

A Mahomedan lady died leaving considerable property and her husband *R*, her sister *Q* and a minor daughter *K* as her heirs. The sister *Q* sued for recovery of possession of her share of certain zemindari property as heir to the deceased impleading *R* and *K* as defendants and alleging that *R* had taken possession of the whole property improperly in the name of *K*. Two years later the same plaintiff brought a suit against the same defendants alleging that as the dower debt due from *R* to the deceased lady had been unpaid on the date of her death plaintiff was entitled to a share of it for her own benefit and another share for the benefit of *K*. The defence was that the suit was barred by the provisions of O. 2, R. 2, C. P. Code. *Held*, that the causes of action for the two suits were not identical and that the second suit was not barred by O. 2, R. 2, C. P. Code. (*Mears, C. J. and Piggott, J.*) ABDUR RASHID *v.* QUDRATUNNISSA BIBI.

22 A. L. J. 432 : L. R. 5 A. 321 : 79 I. C. 338 : 46 A. 542 : A. I. R. 1924 All. 713.

——O. 2, R. 2—*Dower debt not a charge—Muhammadan Law.*

Claim for dower debt is not a charge on the property and the widow of a Muhammadan is not entitled to sue for only a portion of a dower debt. (*Ryves and Daniels, JJ.*) KANEEZ FATIMA BEGUM *v.* RAM NANDAN DHAR DUBE.

21 A. L J. 269 : 45 A. 384 : 73 I. C. 977 : L. R. 4 A. (civ) 181 : A. I. R. 1923 All. 331.

——O. 2, R. 2—*Dower—Separate suit for share of inheritance—Maintainability of.*

Per *Lindsay, J.* (*Kanhaiya Lal, J. dissenting*). A suit by an heir of a deceased Mahomedan Lady for a share of the inheritance of certain Zemindari estate is a bar to a subsequent suit against the lady's husband for a share of the dower due to the deceased. (*Lindsay and Kanhaiya Lal, JJ.*) SHEIKH ABDUL RASHID *v.* MT. QUDRAT-UN-NISSA.

L. R. 3 A. 587 : 70 I. C. 817 : A. I. R. 1922 All. 510.

Execution Proceedings.

——O. 2, R. 2—*Execution proceedings.*

The rule does not apply to proceedings in execution of decree. (*Fawcett, J. C. and Raymond, A. J. C.*) IBRAHIM *v.* GHULAM HUSSAIN. **62 I. C. 507 : 15 S. L. R. 11.**

Fresh suit.

——O. 2, R. 2—*Fresh suit—Two properties mortgaged by one deed—Suit for declaration that one of these is inalienable bars a subsequent suit in respect of the other property for similar relief.*

If two properties are mortgaged by one deed a suit for declaration that one of them belongs to joint

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family and is inalienable precludes a subsequent suit for similar relief in respect of the other property. (*Wazir Hasan and Misra, JJ.*) ABHAIDAT SINGH *v.* RAGHO INDAR PARTAB SAHAI.

3 O. W. N. 40 : A. I. R. 1926 Oudh 77.

——O. 2, R. 2 and S. 11—*Fresh suit—Suit for share in amount deposited in Court—Suit on same ground for share in amount subsequently deposited is not barred—Decision about grounds of claim in first suit is* res judicata.

Where the plaintiff sued for his share of a certain amount deposited in Court on account of a mortgage decree in favour of two other persons, on the ground that he had purchased the whole rights of one of them, *Held* : that he was not debarred from suing on the same ground for his share in sums that were subsequently deposited to the account of his vendor. *Held* also that the decree in the first suit would be *res judicata* so far as it decided about the grounds on which he claimed a share in the amounts deposited. (*Pullan, A. J. C.*) LALTU *v.* BAJARANGI LAL.

84 I. C. 263 : 28 O. C. 2 : A. I. R. 1925 Oudh 303.

——O. 2, R. 2—*Fresh suit—Different causes of action in one and the same transaction, need not be joined.*

O. 2 R. 2 does not compel a plff. to include in one and the same action different causes of action though they arise out of the same transaction. If the plaintiff on the allegations made in the plaint, can make a claim, which he does not put forward in his suit, he cannot put forward that claim in a subsequent suit. But if on the allegations he cannot put forth a claim, that claim he can put forth in a subsequent suit. (*Das, J.*) HARDEO SINGH *v.* BHAWANI SAHI.

60 I. C. 496 (2) : 1921 P. H.C. C. 125.

Instalment Bond.

——O. 2. R. 2 and O. 9, R. 4—*Instalment bond—Omission for instalments which had accrued due bars subsequent to sue suit therefor.*

On 28-6-1917 plff. brought a suit against defts. for recovery of the instalment of an annuity which had fallen due from 1-1-1914 up to 1-1-1917. On 31-7-1917 the suit was dismissed by the Court on the ground that the suit was premature because an appeal was pending with respect to a certain sale deed. The parties, however, were absent on that date. The plff. applied to the court under O. 9, R. 4, C., P. Code to set aside dismissal but the application was rejected. Against the order of rejection plff. filed an appeal but on 2-3-1918 that appeal was with drawn and dismissed. Meantime the instalment of the annuity which fell due on 1-7-1917 had become payable and a suit was brought on 22-12-1917 for its recovery and decreed on 2-4-1918. In a subsequent suit plaintiff claimed arrears of annuity from 1-1-1914 up to 1-1-1919. *Held* that when the plaintiff brought the suit on 22-12-1917 in respect of the half-yearly instalment of the annuity which had become payable on 1-7-1917 he was bound to include in his claim a claim for all the other instalments which had become due up to that date and with respect to which a claim would have been within limitation, and that the present suit was barred by O. 2, R. 2, by reason of the prior suit decreed on 2-4-1918. Plff. cannot be heard to say that he was in any way protected against the operation of O. 2, R.2, C.P. Code by the fact that he had an appeal pending in the District Court at the time the second suit was filed. After the appeal was withdrawn, any protection, which might have accrued to

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the plaintiff, by reason of the appeal having been filed was taken away and his proper course then was to apply to the court in which the suit was pending and to ask for amendment of the claim and permission to include in the claim a claim for the years 1914 to 1917. (*Lindsay and Kanhaiya Lal, JJ.*) ABDUL KARIM KHAN *v.* MAHOMED GAN. **44 A. 663 : 20 A. L. J. 590 : L. R. 3 A. 480 : 68 I. C. 970 : A. I. R. 1922 All. 379.**

——**0. 2, R. 2**—*Instalment bond—Whole amount payable on default of single instalment—Failure to pay—Suit for unpaid instalments only—Effect.*

Under a mortage executed in 1902 the principal sum borrowed was Rs. 1,200 and the sum was payable in annual instalments of 100 rupees each. On default of payment of any one instalment the whole of the balance was to be paid at once. In the years 1903 and 1904 the mortgagors paid Rs. 44 only ; in 1905 the plaintiffs filed a suit to recover the amount of the first two instalments and obtained a decree. In 1917 plaintiffs (mortgagees) filed a suit for recovery of the remaining instalments with interest. *Held* that the suit was barred by O. 2. R. 2, C. P. Code. 20 Bom. L R 773 ; 37 A 400 ; 43 A. 671, Foll. ; 39 M. 981, Diss. (*Macleod, C. J. and Crump, J.*) SHRINIVASA *v.* CHANBASAPPA GOWDA. **25 Bom. L. R 203 : 72 I. C 290 : A. I. R. 1923 Bom 201 (2).**

——**0. 2, R. 2**—*Instalment bond—Prior suit for some instalments—If bars subsequent time.*

An instalment bond gave the creditor option to enforce full payment on a single default being committed or to waive it. The creditor first sued for some instalments which had fallen due and subsequently for the balance. *Held*, he did not waive his right to the second suit by filing the prior suit. (*Halifax, A.J.C.*) KESHEO RAO *v.* SUKLIA. **19 N. L. R. 170 : 76 I. C. 122 : A. .I R. 1924 Nag. 61.**

Mesne Profits.

——**0. 2, R. 2**—*Mesne profits—Suit for possession—Subsequent suit for mesne profits.*

The law provides for the awarding of mesne profits upon the date of obtaining possession and it is open to the plaintiff not only to have asked for mesne profits up to the date the decree was passed but up to the date that he obtained possession and his omission to have done so tells against him not only up to the date that the decree was passed but up to the date that he obtained possession. A subsequent suit would be barred. (*Stuart, J*) GIRWAR SINGH *v.* MT. RAM PIARI KUNWAR. **L. R. 5 A. 223 : 78 I. C. 326 (1) : A. I. R 1924 All. 909.**

——**0. 2, R. 2**—*Mesne profits—Prior suit for possession only.*

O. 2, R. 2 does not bar a suit for mesne profits brought subsequently to a suit for possession, as a claim for mesne profits is based on a cause of action distinct from a claim for possession. (*Walsh and Sulaiman, JJ.*) MIYAN KHAN *v.* SARFARAZ KHAN. **60 I.C. 65. (All.).**

——**0. 2, R. 2 and S. 11, (Expl. 4)**— *Mesne profits prior to suit, though not claimed in a suit for possession can be separately sued for.*

Omission to sue for mesne profits prior to the date of the suit where plaintiffs sue for possession of immoveable property does not bar the second suit against the same defendants for those mesne profits. (*Macleod, C. J. and Shah, J*) RAMCHANDRA ADARAM *v.* LODHRA GOURI. **26 Bom L. R. 288 · A. I. R. 1924 Bom. 368.**

——**0, 2, R. 2**—*Mesne profits—First suit for possession—Subsequent suit for mesne profits.*

C. P. CODE (V OF 1908), O. 2, R. 2—Mortgage.

A prior suit for possession does not bar a suit for mesne profits due for a period subsequent to the institution of the prior suit. The cause of action for such mesne profits is one which has accrued subsequent to the suit for possession. (*C. C. Ghose, J.*) EQUITABLE COAL COMPANY, LTD. *v.* BAGALA SUNDARI DEBI. **71 I. C. 972 : A I. R. 1924 Cal. 442.**

——**0. 2, R. 2**—*Mesne profits—Prior suit for possession—No claim for future mesne profits—Second suit for mesne profits—If barred.*

Where in a prior suit for possession, there was no claim for future mesne profits, a subsequent suit therefor is not barred, as the cause of action is different. (*Miller, C. J, and Foster, J.*) RAM JAN SINGH *v.* KHUB LAL SINGH. **80 I. C. 710 : 6 P. L. T. 78 : A. I. R. 1925 Pat. 145 (2).**

——**0. 2, R. 2**—*Mesne profits—Might and ought—Suit for redemption and subsequent one for mesne profits* res judicata.

Where the plffs. executed a usufructuary mortgage to *X*, and subsequently applied for redemption which was refused, and afterwards got a decree in Court, and subsequently filed a suit for mesne profits, from the date of notice and it was contended that the doctrine of *res judicata* will apply. *Held*, relying on *Satya Badi Behara* v. *Harabati* 34 C. 223 and *Rukemi Bai* v. *Venkatesh*, 51 Bom 627. that even after a tender or deposit the mortgagee continues as mortgagee with a statutory liability to account for profits received by him, holding the property as a trustee for the mortgagor, and that the liabilities of the mortgagee in such a case have to be determined once and for all in the redemption suit and cannot be determined in a separate suit. A second suit for mesne profits is not maintainable under S. 11, Expl. 4, and O. 2, R. 2, C. P. Code. (*Duckworth, J.*) MA NYO TONA *v.* MAUNG HEHA BU. **2 Rang. 382 : A. I. R. 1925 Rang. 13.**

Minor.

——**0. 2, R. 2**—*Minor—Omission of claim by guardian does not bind minor.*

An omission in a suit by the next friend of a minor of a portion of the property to which the minor is entitled, will not bar a second suit by the minor for the portion omitted. (*Macleod. C. J. and Shah, J.*) VYANKAT AWACHI PATIL *v.* ONKAR NATHU. **45 Bom. 805 : 61 I. C. 276 : 23 Bom. L. R. 250.**

Mortgage.

——**0. 2, R. 2**—*Mortgage—Mortgagee, suing twice for sale.*

If the mortgage provided, as mortgages always do in England, for an independent obligation to pay the principal and the interest, then a suit brought to obtain a personal judgment in respect of the interest alone, would not prevent a subsequent claim for payment of the principal. In such a case the cause of action would be distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action, the non-payment of the interest gives rise, to two forms of relief which the Code provides shall not be split. The fact that the decree obtained by the mortgagee was not a decree for sale but in the nature of a personal judgment, does not alter the effect of his claiming a decree for money recoverable from the mortgaged property. (*Lord Buckmaster,*) KISHAN NARAIN *v.* BALA MAL. **44 M. L. J. 123 : 25 Bom. L. R. 220 : 32 M. L. T. 41 : 4 L. 32 : 50 I. A. 115 : L. R. 4 P. C. 46 : 72 I. C. 187 : 27 C. W. N. 802.**

C. P. CODE (V OF 1908). O. 2, R. 2—Mortgage.

38 C. L. J. 126 : 18 L. W. 341 : 66 P. W. R. 1923 : 9 O. & L. R. 488 : A. I. R. 1922 P. C. 412 (P. C.)

——**O. 2, R. 2**—*Mortgage—Several mortgagees, having specified shares—Single suit by all, for redemption—If can be maintained.*

Where in the mortgage-deed the share of each of the joint mortgagees is set out and specific portion of the property is made security for each, but where it is expressly provided that the mortgage money should be paid in a lump sum, all redemption proceedings having been taken together, *Held*, there is no impediment in law to the redemption of such a mortgage by one suit. The transaction does not amount to nine separate mortgages and for redemption of all these mortgages one suit is maintainable. (*Rafique and Lindsay, JJ.*) LACHMI PRASAD *v.* GOKUL. **20 A. L. J. 157 : A. I. R. 1922 All. 80.**

——**O. 2, R. 2**—*Mortgage—Two mortgages—Each can be sued on separately.*

Where two successive mortgages are created on the same property by the same debtor, in favour of the same creditor, the creditor may either sue on the first including the claim as to the second or sue separately on each claim and he is not debarred from adopting the latter procedure either by S. 11, Expl. IV or O. 2, R. 2. (*Mookerjee, A. C. J. and Fletcher, J.*) NILU ROY *v.* ASIRABAD MANDAL. **33 C. L. J. 282 : 60 I. C. 809 : 25 C. W. N. 129.**

——**O 2, R. 2**—*Mortgage and lease—Suit for rent—Suit on mortgage not barred.*

Where at the time of the execution of a mortgage deed a lease is granted in favour of the mortgagor under which the latter is to continue in possession on payment of a monthly rent, in default of which payment the mortgagor was to be ejected, the mortgage and lease do not form part of the same transaction. Consequently a suit for recovery of the rent due does not debar a suit for the principal amount of the mortgage though the rent was to be applied towards the interest on the mortgage. 69 P. R. 1918; 19 P. R. 1910. Ref. (*Abdul Raoof, J.*) BHAGWAN DAS *v.* JALAL DIN. **69 I. C. 54 : A. I R. 1924 Lah. 190.**

——**O. 2, R. 2**—*Mortgage—Prior suit for possession—Subsequent suit for redemption.*

Where mortgagors have obtained a decree for redemption and have failed to execute it, another suit to redeem will lie for the same reason that the cause of action is not the same. In 1904 the plaintiffs sued for possession ignoring a mortgage to which the plaintiffs objected *ab initio*. In that suit they were attempting to avoid it and had they prayed for redemption they would have *ipso facto* admitted their liability to redeem the mortgage; in other words; such a prayer would have cut at the roots of their claim. Subsequently they sued for redemption. *Held* that the cause of action in the present suit was the mortgage now admitted as binding on the plaintiffs plus a refusal of the mortgagees to accept redemption on the terms offered by the plffs. The second suit was not barred. (*Le Rossignol and Martineau, JJ.*) JAIMAL *v.* GANESHI MAL. **4 Lah. 187 : 5 Lah. L.J. 296 : 75 I. C. 528: A. I. R. 1924 Lah. 143.**

——**O. 2, R. 2**—*Mortgage—Suit by mortgagee for possession on default of payment of interest—Subsequent suit under S. 12 of Punjab Act II of 1913—Maintainability.*

In 1902 a mortgagee in enforcement of the terms of his mortgage sued for possession of the mortgaged property on default of payment of interest for the previous years. The mortgagee obtained a decree in 1904 but the Court refused to go into the question of

C. P. CODE (V OF 1908). O. 2, R. 2—Omission of claim.

what arrears of interest were due. The mortgagor subsequently applied to the Collector under Punjab Act II of 1913 and obtained a decision that the mortgage could be redeemed on payment of Rs.570. Thereupon the mortgagee sued for a declaration that there was a further charge on the land for Rs. 5,015 and that there could be no redemption without payment of that amount. *Held*, that the mortgagee's suit was not barred under O. 2, R. 2, C. P. Code by reason of the prior suit for possession, 66 P. R. 1912 foll.; 1 Lah. 457 (F B.), Ref. (*Martineau and Campbell, JJ.*) KHOTA RAM *v* NAWAZ. **5 Lah. L J. 238 : 4 Lah. 76 : 72 I. C. 765 : A. I. R. 1924 Lah. 21.**

——**O. 2, R. 2**—*Mortgage—Suit on—Dismissal of prior suit for possession—Subsequent suit for money.*

A subsequent suit for recovery of the principal and interest due on the mortgage is barred by the dismissal of a prior suit by a mortgagee for possession of the mortgaged land, 25 B. 161. Foll. (*Scott-Smith and Leslie Jones, JJ.*) HARNAM SINGH *v.* BHOLA SINGH. **4 Lah. L. J. 502.**

——**O. 2, R. 2**—*Mortgage and lease forming one transaction.*

Where a mortgage and the lease form one transaction and the lease is only a mode for realizing the interest due on the mortgage, a suit on the mortgage cannot be brought subsequent to a suit for rent on the lease. (*Leslie-Jones and Broadway, JJ.*) RALA RAM *v.* DIWAN CHAND. **63 I. C. 928 : 3 Lah. L. J. 390.**

——**O. 2, R. 2**—*Mortgage—Independent covenant for interest—Suit for interest does not bar suit for principal.*

Where there is a provision in the mortgage-deed for the payment of interest, different from that as to the payment of the principal, making two independent covenants, and a personal action is brought on the covenant for the payment of interest, and a decree is obtained, that would not prevent a subsequent suit being brought for the mortgage-money, and O. 2, R. 2, would have no application. 1922 P. C. 412 and 1922 P. C. 23. Foll. (*Coutts Trotter, C. J. and Krishnan, J.*) SWAMY RAO *v.* OFFICIAL ASSIGNEE OF MADRAS. **49 M.L.J. 474 : 22 L. W. 17 : A. I. R. 1925 Mad. 1120.**

——**O. 2, R. 2**—*Mortgage—Two mortgages—Suit on latter one does not bar subsequent suit on former one.*

Where a person holds two mortgages over the same property a suit on the latter one will not bar a suit subsequently brought on the former. (*Maung Kin, C.J.*) MA MYIT *v.* SHARMA. **69 I. C. 897 : 10 L. B. R. 360.**

Omission of claim.

——**O. 2, R. 2**—*Omission of claim—Suit for profits under Agra Tenancy Act for particular year—Cause of action arising on date on which suit for profits for previous years was instituted—New claim also should be included in suit.*

On the 1st of August 1916, the plaintiffs first instituted a suit for arrears of profits for the years 1321 and 1322 Faslis. The 1st of August 1916 was also the date on which, according to the notification by the Local Government under S. 163 of the Agra Tenancy Act, the profits for the year 1323 Fasli were divisible. *Held*: that the cause of action for a suit for profits for the year 1323 Fasli arose on the 1st of August 1916 and as the claim was not included in the suit instituted on that day for profits for the years 1321 and 1322, no suit could be brought subsequently for the profits for 1323 Fasli. (*Sulaiman and Boys, JJ.*) GIRDHARI LAL *v.* KHURE PRASAD. **L. R. 6 A. (Civ.) 371 : 88 I. C. 530 : A. I. R. 1925 All. 795.**

C. P. CODE (V OF 1908), O. 2, R 2—Omission of claim.

——**O. 2, R.2**—*Omission of claim—Hindu widow—Alienation—Setting aside—Successive suit by reversioners.*

A Hindu widow in possession of her husband's estate made several alienations of it in favour of the defendant. The plaintiff, a reversioner, brought a suit for recovery of some of the properties so alienated but omitted to sue for the remaining items. In a subsequent suit for possession of the items so omitted, *Held*, that the subsequent suit was barred by O. 2, R, 2, C. P. Code. (*Mukerjee and Dalal, JJ.*) DARBARI LAL *v.* GOBIND SARAN. **22 A. L. J. 753 : L. R. 5 A. 556 : 46 A. 822 : 80 I. C. 31 : A. I. R. 1924 All. 902.**

——**O. 2, R. 2**—*Omission of claim—Misapprehension—Subsequent suit—No bar.*

O. 2, R. 2 of the C. P Code, does not debar a plff. from including in his claim certain additional profits omitted in a previous suit under a misapprehension that the profits were paid annually and not, as was subsequently ascertained to be the fact, half yearly. (*Mears, C. J. and Banerji, J.*) BABU NIHAL SINGH *v.* MST. NAJUBAN. **4 U.P.L.R. (A). 16 : 65 I.C. 585 : A. I. R. 1923 All. 230.**

——**O. 2, R. 2**—*Omission of claim—Prior suit for redemption of portion of mortgaged property—Subsequent suit for possession of remainder.*

Where in a suit for redemption of a portion of the mortgaged property the plaintiff succeeds and obtains a decree he is debarred from bringing a fresh suit for recovery of possession of the remaining portion of the mortgaged property. (*Shah, A.C.J. and Crump, J.*) BHAU DAJI *v.* PATLU MALU. **73 I. C. 862 : 24 Bom. L. R. 1157 : A. I. R. 1923 Bom. 63.**

——**O. 2, R. 2**—*Omission of claim—Relief claimable but not claimed cannot be claimed in a subsequent suit.*

Relief available to a party in the previous suit or in execution of the decree in the previous suit cannot be claimed in a subsequent suit. (*Greaves and Chakravarti, JJ.*) SAROJ BAUDHU BHADURI *v.* MANIK SHEIKH. **80 I. C. 917 : A. I. R. 1925 Cal. 305.**

——**O. 2, R. 2**—*Omission of claim - Relief under S. 77 of the Registration Act cannot be joined with that for possession and mesne profits.*

So far as suits under S. 77 of the Indian Registration Act are concerned, it is well settled that no other claim such as a claim for possession and mesne profits can be coupled with the prayer to enforce registration of the document and the Court-fee leviable is separately provided for. 9 M. L. J. 107. Foll. (*Mookerjee and Suhrawardy, JJ*) DWIJENDRA NARAIN ROY *v.* JOGESH CHANDRA. **39 C. L. J. 40 : 79 I. C. 520 : A. I. R. 1924 Cal. 600.**

——**O. 2, R. 2**—*Omission of claim—Bars subsequent suit.*

Where a person alleging to be the heir of another sues for the recovery of a portion of the estate from another alleged to be in wrongful possession of the same, the omission to sue for the remainder operates as a bar to a subsequent suit for the recovery of the same. (*Kotwal, A. J. C.*) BHUDMAL SHEOLAL *v.* ZUNKARI. **18 N. L. R. 136 : 65 I. C. 338 : A. I. R 1922 Nag. 246.**

——**O. 2, R. 2**—*Omission of claim, for mesne profits made but rejected as not claimable in the prior suit does not bar suit — Intentional omission or relinquishment of claim bars a second suit.*

Where in the earlier suit there was at prayer in the plaint as follows:—"The defendants be ordered to render true and full accounts of all receipts in their hands and expenditure since the estate passed into their possession," and the Judge at the end of the judgment made a note to the effect that the relief was not to be claimed in the suit. *Held*: that if the right to mesne profits be considered as a relief, then the effect of the Judge's order would be to give the plaintiffs leave to omit the relief in the suit and to refer them to a separate suit for that purpose. But even if the right to mesne profits be considered as a claim arising out of the cause of action a fresh suit was not barred, as in the earlier case the plaintiffs had asserted their claim and prayed for a relief in respect of it. It is only when there is an omission or intentional relinquishment that a second suit is barred. (*Heald and Chari, JJ.*) MAUNG MYA *v.* MA THIN TIN. **4 Bur. L. J. 113 : A.I.R. 1925 Rang. 313.**

——**O.2, R. 2**—*Omission of claim—Cause of action not arisen at date of first suit—Second suit is not barred.*

Where the plaintiffs had no cause of action at the date of the first suit to assert a claim there can be said to have been no omission on their part to include it in the first suit. (*Rupchand Bilaram, A.J. C.*) FIRM OF BRIJLAL JAGANNATH *v.* FIRM OF ALLAH DITTA. **86 I.C. 393 : A.I.R. 1925 Sind 242.**

Option to sue.

——**O. 2, R. 2**—*Option to sue—Mortgagee authorized to sue for interest or for possession in default by mortgagor—Suit for interest—Subsequent suit for possession.*

Where by a stipulation the mortgagor authorized the mortgagee to sue him for interest or for possession in the event of the former's failure to pay interest at the stipulated time, and the mortgagee on the mortgagor's default sued only for interest, and afterwards for a subsequent default sued for possession, *held*, that the suit was not barred under O.2, R. 2, C.P. Code.(*Shadi Lal, C. J. Chevis Scott-Smith, Broadway and Wilberforce, JJ.*) PARMESHRI DAS *v.* FAKERIA. **56 P. W. R. 1920 : 59 I. C. 71 : 1 Lah. 457 (F.B.).**

Partition.

——**O. 2, R. 2**—*Partition—Decree—Subsequent suit for accounts for a period prior to partition—If lies.*

In a suit for partition a plaintiff is bound to include all the claims that he might have at the time the suit is filed, in respect of the property. He is not to file first a partition suit and then after the decree to file another for accounts for a period prior to the partition. (*Macleod, C. J. and Coyajee, J.*) VISHNU *v.* GANGADHAR. **46 Bom. 823 : 69 I.C. 399: 24 Bom. L.R. 302 : A. I. R. 1922 Bom. 9 (1).**

——**O. 2, R. 2**—*Partition—Property situate in different jurisdiction—Separate suits if maintainable.*

Sections 16 and 17 of C. P. Code do not overrice the principles of the provisions of S. 11 and O. 2, R. 2 of the Code. They simply provide for the machinery to enable litigants with property in more than one jurisdiction to adhere to these principles. (*Oldfield J.*) BANAKARA BASAVANA *v.* BANAKARA DODDA, LINGAPPA. **44 M. L. J. 652 : (1923) M.W.N. 294 : 17 L. W. 740 : 72 I. C. 430 : A. I. R. 1923 Mad. 584.**

——**O. 2, R. 2**—*Partition—First suit against members of the Family—Second suit against alienees—No bar.*

Although O. 2, R. 2, of the C. P. Code requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, still that rule does not require that every suit shall include every claim or every cause of action which the plaintiff may have against the

C. P. CODE (V OF 1908), O. 2, R. 2—Partition.

defendant. Where the former suit was a suit for partition of certain moveable and immoveable property by one member against another member of the family, the plaintiff was not bound to join in that suit his distinct cause of action against the stranger purchaser. Cases are possible where the mere fact that the partition has been effected does not by itself, in the absence of an agreement to that effect, bar the right of partition of property still undivided and in respect of which the member may retain his share in the undivided estate. The whole village or a particular community may have joint property in a common pasturage or a forest, and such common enjoyment may continue even after there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non-inclusion of such a common claim in a family partition suit. (*Kinkhede, A. J. C.*) SONBA *v.* BABYA.
20 N. L. R. 28 : 78 I. C. 376 : A. I. R. 1924 Nag. 89.

——**O. 2, R. 2**—*Partition—Different relief need not be claimed.*

A fractional co-sharer brought a suit in a Civil Court that a certain gift of plots to a party will not prevent his getting his full fractional share of the total mahal at partition and succeeded in the suit. *Held*, in a later suit he can claim that the deed of gift shall not affect the choice by the partition Court for the specific area to be assigned to him since the claim that it should not affect the choice of area is different from the claim that the deed of gift could not affect the area. (*Ashworth, A. J. C.*) MT. KUSEM DEI *v.* HAR DATT. **26 O. C. 98 : 74 I. C. 459 : A. I. R. 1924 Oudh 129.**

——**O. 2, R. 2**—*Partition—Dismissal of prior suit for possession—Subsequent suit for partition.*

Where a purchaser of the share of a co-owner in a specific plot of land brings a suit for possession of that specific land and the suit is dismissed on the ground that the partition alleged by the plaintiff as between his vendor and the defendant was not proved, a subsequent suit for partition of the entire plot is not barred by O. 2, R. 2, C. P. Code as the causes of action in the two suits were different. In the first case the cause of action was exclusion from joint possession by a co-sharer. In the second the cause of action was the right of every co-sharer to bring an action against his other co-sharers for partition. (*Twomey, C. J. and Robinson, J.*) MAUNG LU THA *v.* MAUNG PO. U. **64 I. C. 174 : 11 L. B. R. 1.**

Principal and Interest.

——**O. 2, R. 2**—*Principal and interest—Mortgagee's suit for interest—Subsequent suit for principal and further interest—Bar.*

A mortgage for a term of two years executed in 1904 provided for realisation of interest alone by the mortgagee by suit. The interest was in arrears after 1905. The mortgagee instituted a suit in 1908 for the interest then due reserving the right to sue for the principal and future interest. The suit was decreed. In 1914 he instituted a suit for the principal and interest still due. *Held*, that the suit was barred under O. 2, R. 2, C. P Code. 49 I. A. 9 Foll. (*Lord Buckmaster.*) KISHAN NARAIN *v.* PALA MAL.
32 M. L. T. 41 : 25 Bom. L. R. 220 : 44 M. L. J. 123 : L. R. 4 P. C. 46 : 4 Lah. 32 : 27 C. W. N. 802 : 38 C. L. J. 126 : 18 L. W. 341 : 9 O. & A. L. R. 488 ; 6 P. W. R. 1923 : 50 I. A. 115 : 72 I. C. 187 : A. I. R. 1922 P. C. 412 (P. C.)

——**O.2, R. 2**—*Principal and interest—Mortgage—Option to sue for interest alone—Suit for interest after expiry of term—Second suit for principal and interest.*

If a mortgagee to whom a cause of action to realise the whole mortgage security has accrued, exercises the option given to him by the document and sues for interest alone, he must be deemed to have relinquished his claim for further relief, under O. 2, R. 2 of the Code of Civil Procedure and a second suit for principal and interest is not maintainable. 15 I. A. 156 : 12 I. A. 116 ; 21 Bom. 267. Ref. (*Lord Buckmaster.*) MUHAMMAD HAFIZ *v.* MIRZA MUHAMMAD ZAKARIYA. **42 M.L.J. 248: 44 All. 121 : 20 A.L.J. 17 : 26 C. W. N. 297 : (1922) M. W. N. 89 : 35 C. L. J. 126 : 24 Bom. L. R. 341 : 15 L. W. 377 : L. R. 3 P. C. 73 : 30 M. L. T. 224 : 3 Pat. L. T. 279 : 1 P. W. R 1922 : 65 I. C. 79 : 49 I. A. 9 . A. I. R. 1922 P. C. 23 (P. C.).**

——**O. 2, R. 2**—*Principal and interest—Mortgage—Interest payable monthly— Default—Suit for interest—Subsequent suit for principal not barred.*

Where the time stipulated for payment of the principal is one year after the date of the mortgage but interest is made payable monthly, a default in the payment of interest gives rise to a cause of action and a suit for interest alone does not bar a subsequent suit for principal. (*Brown, A. J. C.*) MAUNG KYIN PEIN *v.* MA PWA ME. **4 U. B. R. (1921) 62 : 64 I. C. 953 : A. I. R. 1922 U. B. 1.**

Rent suit.

——**O. 2, R. 2**—*Rent suit.*

A prior suit for account of rents bars a subsequent suit for rent due prior to the date of the first suit. *Macleod, C. J. and Shah, J.*) MAHOMED BHAI *v.* ADAMJI. **23 Bom. L. R. 1086 : 64 I. C. 919 : 46 Bom. 229 : A. I.R. 1922 Bom. 152**

——**O. 2, R. 2**—*Rent suit—Claim for adjustment of rent for additional land in first suit does not bar similar claim for subsequent period.*

During the pendency of the first suit where a claim was made for adjustment of rent in respect of additional land, the claim for assessment of rent at the enhanced rate does not suspend the assertion of a similar claim in respect of the subsequent period covered by the second suit. (*Mookerjee and Rankin, JJ.*) MANMATH PAL CHAUDHARY *v.* SURENDRA NATH BOSE. **40 C. L. J. 538 : 85 I. C. 162 : A. I. R. 1925 Cal. 463.**

——**O. 2, R. 2**—*Rent suit—Cause of action—Cesses—Separate suits for—Maintainability.*

In a prior suit the lessor had sued the lessee for rent and obtained a decree. Subsequently the lessees had neglected to pay the cesses due on the land and the lessor was compelled to pay the same. In a subsequent suit by the lessor for recovery of the cesses so paid, *Held* that the subsequent suit was uot barred by O. 2, R. 2, C. P. Code. (*Chatterjee and Cuming, JJ.*) MAHENDRA NATH BOSE *v.* ABINAS CHANDRA BOSE. **27 C. W. N. 521 : 77 I. C. 364 : A. I. R. 1923 Cal. 615.**

——**O. 2, R. 2**—*Rent suit—Suit for ejectment of a tenant—Subsequent suit for arrears of rent.*

Under O. 2, R. 2 of the Code a subsequent suit to recover arrears of rent under the terms of the lease is not barred by a previous suit to eject a tenant holding under a lease. (*Broadway and Harrison, JJ.*) KHUSHI RAM *v.* ABDUL GHAFUR KHAN. **4 Lah. L. J. 17 : A. I. R. 1922 Lah. 118.**

Revenue Court.

——**O. 2, R. 2**—*Revenue Court—Applicability to*

C. P. CODE (V OF 1908), O. 2, R. 2—Revenue Court.

C. P. CODE (V OF 1908), O. 2, R 2—Same Parties.

proceedings in.

O. 2, R. 2, C. P. Code which requires that every suit shall include the whole of the claim which plaintiff is entitled to in respect of the Cause of action is applicable to proceedings in Revenue Courts for recovery of arrears of rent. It applies not only to cases of deliberate relinquishments but also of accidental or involuntary omission. (*Mookerjee and Cuming, JJ.*) PRATAB CHANDRA JANA *v.* SECRETARY OF STATE.

35 C. L. J. 304 : 67 I. C. 375 : 49 Cal. 1026 : A. I. R. 1922 Cal. 101.

Same parties.

——— **O. 2, R. 2**—*Same parties—Suit against defendant not party to previous suit is not barred.*

For a suit to be barred under O. 2, R. 2, a previous suit against the same defendant arising out of the same cause of action is necessary. For determining whether the cause of action was the same in the previous suit also, the Court must arrive at the actual cause of action and will not accept the cause of action which a plaintiff may choose to specify in his plaint The parties were brothers. After their father died his estate was recorded in the names of his sons. The plaintiff found that the shares recorded in his name with respect to eight of the properties were much less than those to which he was entitled. When he applied to the Revenue authorities for the correction of the entries in the Records, he was referred to the Civil Court. He then instituted a suit in the Civil Court against defendant No. 1 in respect of five of the properties and after obtaining a decree, he brought another suit against defendants Nos. 1 and 2 in respect of the three remaining properties. *Held*: that the suit was barred as against defendant No. 1 as the cause of action was the same as in the previous suit against him and that as there had been no previous suit against defendant No. 2, the suit was competent as against him. (*Dalal, J. C.*) SHEIKH MUHAMMAD IBRAHIM *v.* ASMATULLAH. **81 I. C. 562 : A. I. R. 1925 Oudh 53.**

Specific Performance.

——— **O. 2, R. 2**—*Specific performance—Suit for—Subsequent suit for earnest money is not barred.*

Plff.'s suit for specific performance of a contract of sale of immoveable property in his favour was dismissed and he subsequently brought a suit for recovery of earnest money from the defendant *Held*, that the claim for the recovery of the earnest money was based on a different cause of action from the claim for specific performance and that O. 2, R. 2, C. P. Code was no bar to the subsequent suit. 27 M. 380 referred to. (*Lindsay, J.*) MUNNI BABU *v.* KOER KAMTA SINGH. **45 A. 378 : 21 A. L. J 265 : 90. & A. L. R. 429 : 72 I. C. 86 : L. R. 4 A. 176 : A. I R. 1923 All. 321.**

——— **O. 2, R. 2**—*Specific performance—Suit for—Failure to ask for possession—Effect.*

Per *Krishnan, J.*—*Quaere*: Whether a plaintiff suing for a conveyance is not entitled to ask for possession as of right and the failure to ask for it in the first case is a bar under O. 2, R. 2. Per *Venkatasubba Rao, J.*—The true principle in such a case is that if the claim to possession in the second case is based on the contract O. 2, R. 2 bars the suit; but if it is based on the conveyance obtained in the first suit it can lie. (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAI.

45 M. L J. 431 : 18 L. W. 333 : 77 I. C. 542 : (1923) M. W. N. 726 : 47 Mad 150 : A. I. R. 1924 Mad. 360.

C. P CODE (V OF 1908), O. 2, R. 2—Withdrawal of suit.

Suit for Possession.

——— **O. 2, R. 2**—*Suit for possession—Claim for refund of purchase money—Suit for—If lies.*

Where a vendee's suit for possession is dismissed, a separate suit for refund of purchase money is not barred under O. 2, R. 2. (*Mookerjee and Suhrawardy, JJ.*) LUKHAN CHANDRA MONDAL *v.* TAKIM DHALI. **80 I. C. 357 : 28 C. W. N. 1033 : 39 C. L. J. 90 : A I. R. 1924 Cal. 558.**

——— **O. 2, R. 2**—*Suit for possession—All persons in possession should be joined.*

Where the son-in-law was in possession under a sale-deed by which half the property was sold to him by the mother-in-law and the daughter along with her husband was in joint possession under a will by which the remaining half was bequeathed to her and the previous suit, after the death of the widow was brought for possession of the portion that had been alienated dagainst the husband only *held* the present suit against the daughter is barred. Plaintiff should join all the persons in possession of the property which he claims (*Martineau and Harrison, JJ.*) MAULA BAKSH *v.* MT. JIVI. **A. I. R. 1923 Lah. 556.**

Withdrawal of suit.

——— **O. 2, R. 2**—*Withdrawal of suit—Santhal Paraganas Settlement Regulation, III of 1872—Jurisdiction of Civil Court.*

One S had two wives B and N. By B he had one son and one daughter both of whom predeceased their father. By N he had a son H. N predeceased S but B survived him S died in 1900 when H was 5 or 6 years old. After the death of S, the Settlement Officer entered the name of B and H in the Record-of-Rights. In 1909 a guardian for H was appointed when B averred that the half share entered in her name was her own. In 1911 H sued B for declaration of his right to the whole property alleging fraud on the part of B in having got the property entered as their joint property. B defended on the ground of Record-of-Rights and impugned the legitimacy of H. In April 1911, the suit was dismissed on the ground that S. 11 of Regn. III of 1872 barred the jurisdiction of the Civil Court in the case. In June an appeal to the Dist. Judge was dismissed on the same ground. H then preferred a Second Appeal. In the meantime H sued for temporary partition on 15th Aug. 1911. B resisted on the ground that the suit lands belonged to her father from whom she inherited them after her brother. In Nov. 1911 H's suit was decreed and the property was partitioned in 1912. About the 24th Aug. 1913 B died and two sons of her daughter were impleaded in the Second Appeal. On the 26th Aug. 1924 H withdrew and in 1918 sued the grandsons for declaration and possession of half the property. The defts. contended that the suit was barred by O. 2, R. 2 and also S. 11 of Regn. III of 1872. *Held*, by (F.B.) (*Mullick, J. diss.*) that the suit was not barred. (*Miller, C. J., Mullick and Bucknill, JJ.*) HARE KRISHNA SEN *v.* UMESH CHANDRA DUTT.

2 Pat. L. T. 528 : 3 U. P. L. R. (Pat.) 57: 62 I. C. 962: 6 Pat. L. J. 373 : (1921) P. H. C. C. 209 (F. B.).

——— **O. 2, R. 2—(2)**—*Withdrawal of suit—Rule does not prevent reliefs omitted in suit withdrawn with leave under O. 23, r. 1 from being added in the second suit.*

Effect of an order for the withdrawal with leave under O. 23, R. 1 (2) is to restore the parties to the position in which they would have stood if the suit had not been filed and, therefore, plaintiff can include portions of his claim in the new suit though they were

C. P. CODE (V OF 1908), O. 2, R. 3.

omitted in the first suit. (*Young, J.*) MA PO *v.* A. BUX. **3 Bur. L. J. 189 : 84 I. C. 483 : A. I. R. 1925 Rang. 118 (2).**

——O. 2, R. 3—*Joinder of causes of action.*

Two reliefs *i.e.* for setting aside an order of the execution Court and for a declaration that property could be attached in execution of the decree, can be joined in the same suit, the parties being the same. (*Stuart, J.*) SHAMBU DIYAL SINGH *v.* ISWAR SARAN. **75 I. C. 597 : A. I. R. 1923 All. 306.**

——O. 2, R. 3—*Five persons making five contracts with the same defendant—One suit by all five on the contract is not maintainable.*

Where a joint suit was brought against the same defendant by five different persons, each of whom had contracted to supply a certain number of maunds of cotton to the defendant, to recover from him the price thereof. *Held*, the suit is not maintainable and must be wholly dismissed. (*Macleod, C. J. and Coyajee, J.*) CHANDULAL SUKLAL SHET *v.* DAGDU MAHADA CHAUDHURI. **87 I. C. 435 : 27 B. L. R. 472 : A. I. R. 1925 Bom. 342.**

——O. 2, Rr 3, 4, 5—*Suit for pre-emption—Four sales of four plots of lands to different vendees on different dates—Single suit for pre-emption if maintainable.*

The vendee purchased four plots of land from different owners at different prices. The plaintiff as pre-emptor brought a single suit in respect of all the sales impleading the vendee and also the various vendors of the four sales, *Held*, that the suit was not defective by reason of misjoinder of defendants and causes of action. If the trial Court did not think fit under O 2, R. 6, of the C. P. Code to order separate trials it is not proper to interfere with its discretion in the matter in appeal and order separate trials. (*Abdul Raoof, J.*) PIARA RAM *v.* KESHO NATH. **82 I. C. 605 : 6 Lah L. J. 349 : A. I. R. 1924 Lah. 156.**

——O. 2, R. 3—*Mortgage—Want of legal necessity and consideration—Limitation as additional ground only.*

When a mortgage is attacked on the ground that it was bad for want of consideration and legal necessity and the plea of limitation is put forward as an additional ground for avoiding liability on mortgage, the suit will not fail completely only because the issue as to limitation is decided against the plaintiff. (*Shadi Lal, C. J. and Moti Sagar, J.*) INDAR SINGH *v.* BASANTA. **4 Lah. L. J. 13 : A. I. R. 1922 Lah. 91.**

——O 2, R. 3—*Connected suits decided by only one judgment—Only one defendant appealing—Other decrees are unaffected unless appellate decree affects them specifically—Practice—Connected suits—C. P. Code, S. 151.*

Several suits were decided by one judgment. Only one defendant appealed and succeeded. *Held* : that the appellate decree does not affect the other cases unless a specific direction to that effect is contained in the appellate decree : 1923 P. C. 118 (P. C.) Foll ; 1922 P.C. 383 (P. C.) Expl. (*Dalal, J. C. and Wazir Hasan, A.J. C.*) BIPIN CHANDRA *v.* DEWAN SINGH. **2 O. W. N. 894 : A. I. R. 1925 Oudh 732.**

——O 2, Rr. 3 and 6—*Suit for rescission of contract and return of earnest money—Specific performance can be claimed in the alternative.*

Rr. 3 to 6 of O. 2 allow a plaintiff to unite in the same suit several causes of action against the same defendant and to order separate trials if necessary. The Court can in a suit for rescission of contract and return of earnest money also try an alternative claim for specific preformance arising out of the same facts.

C. P. CODE (V OF 1908), O. 2, R. 5.

The scope and effect of the Judicature Act pointed out. (*Das and Macpherson, JJ.*) CHANDRIKA PRASAD *v.* HIRA LAL. **75 I. C. 433 : 5 Pat. L. T. 49 : 2 Pat. L. R. 82 : 1923 P. H. C. C. 357 : A. I. R. 1924 Pat. 280.**

O. 2, R. 3—*Suit is not bad for misjoinder of causes of action.*

In a suit by one partner against the remaining two partners for accounts, the plaintiff alleged that a certain sum thrown into the business was from a previous business carried on by plaintiff and one defendant and asked relief in respect of that sum only against that defendant.

Held that the suit was not bad for misjoinder of causes of action. (*Jwala Prasad and Ross, JJ.*) K. V. LIMAYA *v.* J. K. WATVE. **1923 P. H. C. C. 276 : 76 I. C. 950 : 2 P. L. R. 132 : A. I. R. 1924 Pat. 65.**

——O. 2, R. 3—*Joinder of causes of action—Suit for recovery of rent.*

One suit cannot be maintained for the recovery of rent in respect of different and distinct liabilities with regard to separate holdings. (*Atkinson, J.*) MAHIPAT NARAYAN SINGH *v.* KISIT SINGH. **81 I. C. 648 (1) : 1 Pat. L. R. 458.**

——O. 2, R. 3—*Misjoinder of defendants—Effect.*

A good test to see whether two suits filed separately ought to have been filed together is to see if they could have been filed as one without a misjoinder of defendants. (*Duckworth and Po Han, JJ.*) STANDARD ELECTRIC AND MOTOR WORKS *v.* PICTURE PALACE. **2 Bur. L. J. 218 : 76 I. C. 791 : 1 Rang. 682 : A. I. R. 1924 Rang. 161 (2).**

——O. 2 R, 4—*Plaintiff cannot be allowed to claim alternative titles arising out of inconsistent facts.*

Per *Mullick, J.*—A plaintiff may join as many causes of action as he pleases subject to (1) the provisions of O 2, R. 4, of the C. P. Code and (2) the general rule that though he may base his claim on alternative and inconsistent titles he should not in any event be allowed to claim on alternative titles which arises out of inconsistent facts. (*Mullick and Ross, JJ.*) BHIMNATH *v.* JAGARNATH. **1925 P. H. C. C. 294 : 89 I. C. 814 : A. I. R. 1925 Pat. 674.**

——O. 2, R. 4—*Mortgage—Suit for redemption—Persons claiming by title paramount—Question of title—Adjudication on.*

As a general rule in mortgage suits, all questions except those between mortgagor and mortgagee are to be excluded. But where defendants are in possession and set up a title paramount and are likely to obstruct plaintiff in getting possession, it is better to adjudicate on such questions also in order to prevent multiplicity of action, O. 2, R. 4, provides for leave being granted in such a case. (*Miller, C. J. and Mullick, J.*) KHUB LAL UPADHYA *v.* JHABSI KANDU. **3 Pat. 244 : 78 I. C. 885 : 5 Pat. L. T. 573 : A. I. R. 1924 Pat. 613.**

——O. 2, R. 4—*Leave of the Court may not be express.*

If the parties raise issues apart from the main cause of action and the Court acquiesces in that course and allows those issues to be tried it may well be said that the issues were raised with the leave of the Court though no express application was made, (*Dawson Miller, C. J. and Mullick, J.*) KHUB LAL *v.* JHAPSI KUNDU. **3 P. 244 : 78 I. C. 885 ; 5 P. L. T. 573 : A. I. R. 1924 Pat. 613.**

——O. 2, R. 5—*'Arises with reference to'—Construction—Partnership between plaintiff's father*

C. P. CODE (V OF 1908), O. 2, R. 6.

and defendant—Subsequent partnership between plaintiff and defendant with old assets—Plaintiff obtaining letters of administration to his father's estate—Suit by plaintiff to recover father's share in the first partnership and his own share in the second—Not bad for misjoinder.

Plaintiff's father who was divided from the plaintiff was carrying on a business in partnership with the first defendant which lasted till the plaintiff's father's death. Subsequent to the plaintiff's father's death the plaintiff and the first defendant carried on business with the old partnership assets ; the plaintiff subsequently obtained letters of administration to his father's estate. He as administrator brought the present suit for the accounts of the partnership between his father and the first defendant. He also claimed in the same suit his share in the partnership between himself and the first defendant. Such a suit does not offend the provisions of O. 2, R. 5, C. P. Code, and it comes within the exception specified in the rule as the plaintiff's personal claim in respect of the partnership with himself "arises with reference to the estate in respect of which he is suing as administrator". The words "arises with reference to" in the exception to O. 2, R. 5 are very general and cover a case where the plaintiff's personal claim can only be determined after calculating the amount due to him as administrator. The expression "arises with reference to" should not be read as being equivalent only to "arises against or on behalf of.' *Tredegar v. Roberts*, (1914) 1 K. B. 283 dist (*Oldfield and Venkatasubba Rao, JJ.*) ARUNACHELLAM CHETTIAR *v.* ARUNACHELLAM CHETTIAR. **43 M. L. J. 218 : 16 L. W. 175 : (1922) M. W. N. 453 : 69 I. C. 966 : A. I. R. 1922 Mad. 436.**

——0. 2, R. 6—*Suit for rent—Different holdings with the same tenant—Right to claim rent in one suit —Agra Tenancy Act.*

It is not competent to the plaintiff to join in one suit claims for arrears of rent in respect of occupancy and non-occupancy holdings held by the same tenant. Under the Agra Tenancy Act there should be different suits in respect of different holdings. 3 A. L. J. 603 followed. (*Mukerjee, J.*) HIRA LAL *v.* HOTI LAL. **22 A. L. J. 459 : L. R. 5 A. 155 (Rev) : 79 I. C. 560 : A. I. R. 1924 All. 720.**

——0. 2 R. 6—*Trial Court refusing to act under —Appellate Court should not interfere.*

In a case of a joinder of causes of action, where the Trial court does not think fit to act under O. 2, R. 6, it is not proper for the appellate court to interfere with the discretion. (*Abdul Raoof, J.*) PAIRA RAM *v.* KESHO NATH. **73 I. C. 892 : A.I. R. 1924 Lah. 156.**

——0. 2, R. 6—*Suit for arrears of rent and ejectment—Joinder of—Maintainability—(Oudh Rent Act XXII of 1866 as amended by Act IV of 1921).*

Per *Burn, J.M.*—O. 2, R. 6 gives powers to a Court to order separate trial when it appears that any causes of action joined in one suit cannot be disposed of conveniently together. A suit for ejectment should not be joined with one for arrears of rent since the forum of appeal is different. (*Fremantle, S. M. and Burn, J. M.*) MADHO PRASAD *v.* LACHMAN. **11 O. & A. L. R. 12 : 2 O. W. N. 19 · L. R. 6 (O) 43 (2) : 12 O. L. J. 191.**

——0, 2, R. 7—*Suit against minor—Compromise by guardian—Validity*

C. P. CODE (V OF 1908), O. 3, R. 1.

The compromise entered into by the guardian of a minor in a suit though not sanctioned by the Court is not void but only voidable the decree passed thereon is not a nullity. *Hanuman Prasad* v. *Mahmad Ishaq* (1906) 28 Allahabad 137 and *Virupakshappa* v. *Shidappa* (1902) 26 Bom 109 referred to. (*Abdul Raoof and Martineau, JJ.*) SITA SINGH *v.* MAIN SINGH **4 Lah. L. J. : 211 : A.I.R. 1922 Lah: 166.**

——0. 3.

See also LEGAL PRACTITIONER.

——0. 3—*Power of attorney—Defective for want of proper name.*

Where a vakalatnama was signed by plaintiff and accepted by the pleader, the mere fact that, in the body of vakalatnama, the name of the other pleader appeared in print and the name of the pleader actually employed was absent altogether, does not invalidate it. 43 All. 392 Foll. (*Kotwal, A. J. C.*) MULCHAND *v.* RADHABAI. **6 N. L. J. 179: 73 I. C. 251 : A. I. R. 1923 Nag. 381.**

——0. 3, Rr. 1 and 2—*Pleader appointed by recognised agent of party is a 'duly appointed pleader and an execution petition signed by him only is valid.*

Where a party to a suit authorizes an agent by special power of attorney to appoint a pleader to sign execution petitions, a pleader so empowered by the agent is a "pleader appointed to act on his (the party's) behalf," within S. 36 of the C. P. Code of 1882 and the petition signed by the pleader but not signed by the party is a duly presented petition even if neither the agent nor the pleader is a "recognised agent" within S 37 of the Code of 1882. (*Lord Atkinson.*) THIRUVENGADASWAMI AIYANGAR *v.* PAVADAI PILLAI. **41 M. L. J. 645:44 Mad. 736: 48 I. A. 534 : (1921) M. W. N. 552 : 14 L. W. 244: 30 M. L. T. 109: 26 C. W. N 376: 24 Bom. L. R. 606: A. I. R. 1922 P. C. 225 (P C.).**

——0. 3, R. 1—*One plaintiff ordered to attend personally—His failure does not entitle court to dismiss suit against all.*

Where court requires personal attendance of one of the plaintiffs but he fails to attend, the dismissal of the suit against all the plaintiffs is illegal. JUSTICES RAM RAO KRISHNA JATAN *v.* SHAMI NATH PANDEY. **L. R. 2 A. Rev 233.**

——0. 3, R. 1—*Power of attorney—Validity—Objection as to, cannot be raised for the first time in appeal.*

Where the defendant in the Court below failed to take the objection that a power of attorney constituting a recognised agent was not valid, he must be deemed to have waived the same. The objection cannot be allowed to be raised for the first time in appeal. (*Scott-Smith, J.*) GOPAL SINGH *v.* BHAGA. **69 I. C. 365: A I. R. 1924 Lah. 296.**

——0. 3, R. 1—*Plaint signed and verified by agent —Leave to sign and verify granted only subsequently—Defect is not fatal.*

Where a plaint was signed and verified by the plaintiff's agent who was only subsequently granted leave to sign and verify the plaint, *held*, that the omission or failure to obtain leave beforehand was a mere irregularity not invalidating. (*Srinivasa Aiyangar, J.*) LODD GOVINDOSS KRISHNA VARU *v.* MUTHIAH

C. P. CODE (V OF 1908), O. 3, R. 2.

CHETTY. **A. I. R. 1925 Mad. 660 : 48 M. L. J. 721**

——O. 3, R 2—*Power of attorney—Special power—Suit filed by Mukhtear—Irregularity—Immaterial defect—C. P. Code, S.* 99.

Plff. instituted a suit for recovery of possession of land from defendants and the plaint was filed by a Mukhtear holding a special power of attorney from plff. and not a general power of attorney as required by O. 3, R 2 (*a*) as amended by the Rules made by the High Court of Bombay. The defendants objected that the suit was not properly instituted, but the Courts below overruled the plea and decreed the suit. *Held*, on second appeal, that the irregularity, if any, was cured by S. 99, C. P. Code, and that the decree of the Court below should be affirmed. (1886) P. J. 63, Foll. (*Shah and Crump, JJ.*) GANAPATHY NANA *v.* JIVANABAI.

47 B. 227 : 24 Bom. L. R 1302: 76 I. C. 34 : A. I. R. 1923 Bom. 44 (1).

——O.3 R.2, cl (a)—*Bombay High Court Rules.*

O. 3, R. 2 cl. (a) as altered by the rule made by Bombay High Court enables a person holding a general power of attorney from a party not resident within the local limits of the jurisdiction of the Court within which limits the appearance is made, authorising him to appear and act on behalf of the party, to so appear and act. (*Shah and Crump. JJ.*) ACHUT SITARAM *v* TARACHAND. **72 I.C. 1003: A.I.R. 1923 Bom. 41 (1).**

——O. 3, R. 4—*Power to prosecute all litigation implies power to lodge and conduct appeal and fresh power is not necessary for appeal.*

A power of attorney authorising a Pleader to prosecute all the litigation of a suit impliedly confers upon him the power to lodge and conduct the appeal up to the High Court and fresh power is not necessary for appeal. 80 P. W. R. 1915 Foll. (*Addison*, J.) BUDHU RAM *v.* KALU RAM. **6 Lah. 461: 26 P. L. R 721: A. I. R. 1926 Lah. 32.**

——O. 3, R. 4—Vakalatnama *need not be accepted in writing by a Vakil.*

O. 3, R. 4 does not expressly state that the acceptance of a *Vakalatnamah* should be in writing. The fact that the Vakil appeared and conducted the case in the lower Court and also filed the appeal is sufficient to show that he accepted it. 1923 Lah. 402 Appr. (*Addison*, J.) BUDHU RAM *v.* KALU RAM.

6 Lah. 461: 26 P. L. R. 721 : A. I. R. 1926 Lah. 32.

——O. 3, R. 4—*Power of attorney is enough authority.*

The presentation of an appeal by a pleader who held a power of attorney which expressly authorised him to present the appeal was held valid presentation though the power was not filed with the appeal. (*Harrison, J.*) KURA *v.* UDAMI, **7 Lah L. J. 29 : 86 I C. 207 : A. I. R. 1925 Lah 331 (2).**

——O. 3, R. 4—Power of attorney—Acceptance must be in writing. (*Scott-Smith and Zafar Ali*, JJ.) THE FIRM MATHRA DAS *v.* THE FIRM RAMA LAL.

A I. R. 1923 Lah. 402.

——O. 3, R. 4—*Right of audience is not created by R. 4—R. 4 enables pleader, after accepting and filing power to conduct proceedings until client's death or end of proceedings.*

Order 3, R. 4 does not give an absolute right to a pleader to appear in a Court till the termination of the proceedings, but only provides in what manner a pleader should be appointed and till what time the appointment will be in force. It assumes that a pleader is competent to appear, plead and act in the Court in which he wishes to plead and act. If he is not competent to appear, plead and act in any Court under the rules governing the procedure in that Court, he cannot claim right of audience by virtue of O. 3, R. 4. Rule 4 is only an enabling provision by which a pleader, when he accepts an engagement and files his *vakalat* in Court, is entitled to conduct the proceedings till he or his client dies or till the termination of the proceedings. But this rule does not override the rules governing the qualifications of various classes of pleaders or the rules governing the procedure of the Courts. (*Devadoss and Wallace, JJ.*) VEERAPPA CHETTIAR *v.* P. G. SUNDARESA SASTRIGAL. **48 M. 676 : 22 L. W 606 : A I. R. 1925 Mad 1201 : 49 M. L. J. 366.**

C. P. CODE (V OF 1908), O. 3, R. 4.

——O. 3, R. 4—*Omission to sign a power of attorney by a minor's guardian can be cured by the minor subsequent to giving a fresh power.*

The omission to sign the power of attorney given by a minor's guardian to the pleaders, is similar in character to that of an agent who inadvertently fails to sign a power of attorney given by him to a pleader. The omission is an irregularity which can be cured by the minor's giving a fresh power of attorney as major to his pleaders. C. R. No. 130 of 1924, Foll. (*Kinkhede, A. J. C.*) DATTU *v.* BHANSINGH.

88 I. C. 235 : A. I. R 1926 Nag. 40.

——O. 3, R. 4—Vakalat—*Mark made by consent of executant—Ability to sign—Validity of appointment of pleader.*

Where a person who can sign his name touches the pen of a scribe who puts in his mark in a *vakalat* and there is no doubt of the intention to give a *vakalatnama* the defect is only a technical one and the acts done by the pleader so appointed are valid. (*Baker, J. C.*) GULAM MOHIUDDIN *v.* SHANKAR.

A. I. R. 1924 Nag. 159.

——O. 3, R. 4—*Pleader*—Vakalat—*Acceptance—Omission of pleader's name in* vakalat—*Effect of—Presentation of plaint, if proper.*

Where a *vakalatnama* executed without the pleader's name appearing upon it is accepted by the particular pleader who was engaged by the party and a plaint was presented by that pleader. *Held*, that the provisions of O. 3, R. 4 of C. P. Code, were sufficiently complied with and that the presentation of the plaint was proper. Once the party has delivered the *vakalatnama* to a pleader without putting a name on it he must be deemed to have impliedly authorised the pleader to fill up the necessary details and to appear for him. Even where a Court returns a plaint for presentation to a proper Court the original *vakalatnama* will continue to be in force even after the return of the plaint. O. 3, R. 4 provides that the authorisation must be in writing not that it must be in any particular form, nor that it must show the pleader's name in the main body of the document. As long as it is a writing which states that the party authorises the pleader to act for him and is signed by the party and the pleader, there is no relaxation of the provisions of the rule in accepting it. Even if there is any defect in the *vakalatnama* by reason of the omission to mention the name of the particular pleader authorised to appear, such defects can be cured by amendment (*Hallifax, A. J. C.*) MAHARASHTRAYA JNAN KOSH MANDAL *v.* BIJJULAL. **19 N. L. R. 36 : 6 N. L. J. 100: 71 I. C. 436 : A. I. R. 1923 Nag. 182**

——O. 3, R. 4—*Pleader—Authority to represent client—Return of plaint does not terminate.*

So far as the client is concerned, the appointment of a pleader is not determined until all proceedings in the suit are ended. The return of a plaint for presentation to the proper Court does not put an end to the author-

C. P. CODE (V OF 1908), O. 3, R. 4.

ity of the pleader and if the plaint is presented to the proper Court on the same day the pleader can act in the case. (*Hallifax, A. J. C.*) DEBI LAL *v* KRISHNAJI. **5 N. L. J. 265 : 67 I. C. 296 : A I. R. 1922 Nag. 125.**

——O. 3, R. 4—Vakalatnama—*One person signing for another.*

The rules as regards appointing pleaders are salutary and strict rules made with a view to prevent fraud. But in a case where no fraud has been committed and one person signs for another with the full knowledge and acquiescence of the latter, the irregularity is a formal one not affecting the merits of the case and is cured by S. 99, C. P. Code. (*Mitler, C. J. and Kulwant Sahay, J.*) BANWARI RAI *v.* CHETHRU LAL RAI. **2 Pat. L. R. 174 : 74 I. C. 1033 A. I. R. 1924 Pat. 114:**

——O. 3, R. 4 (1) and (2)—*Appointment and discharge of pleader—Leave of Court.*

Per *Curiem* :—A pleader accepting a *vakalatnama* cannot divest himself of his duty arising from such acceptance without leave of the Court. If he desires to discharge himself from a case, he must give his client reasonable notice of his intention. A pleader cannot delegate his work to another pleader without his client's consent, express or implied. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) EMPEROR *v.* RAJANI KANTA BOSE. **49 Cal. 732 : 35 C. L. J. 356 : 71 I. C. 31 : 24 Cr. L. J.33 : 26 C. W. N. 589 : A. I. R. 1922 Cal. 515 (S. B.)**

——O. 3, R. 4 (1)—*Pleader—Appointment*—Vakalat *can be accepted even after filing in Court.*

Where a pleader's name appears in a *vakalat* he is competent to sign and accept the *vakalat* even though it has already been accepted and filed in Court by another pleader also retained by the party. The Court has no power to refuse permission to the pleader whose name appears on the *vakalat* to sign it and appear for the party. R 46 (*f*) of Ch. XI of the General Rules and Circular Orders provides for a *vakalatnama* already filed in Court being subsequently accepted by a pleader or vakil whose name appears in the *vakalatnamah* at the time when it was filed. All that is necessary is that there should be an endorsement of acceptance in proof of acceptance. 5 C.W.N. 816 ; 20 C.W.N 283 ; 20 C. W. N. 287, Ref. (*Jwala Prasad, J.*) KUNJ BEHARI SINGH *v.* SHEODAHIN PANDEY. **3 Pat L. T. 447: 68 I. C. 659 : A. I. R. 1922 Pat. 504.**

——O. 3, R. 4 (2)—*Withdrawal.*

When a pleader reports no instructions whether after he has asked for an adjournment and been refused or not the pleader cannot be deemed to have appeared. (*Coutts Trotter, Ramesam and Wallace, JJ.*) V. MANICKAM PILLAI *v.* MAHUDUM BATHUMMAL. **20 L. W. 427 : 35 M. L. T. 48 : 47 Mad. 819 : 1924 M. W. N. 689 : 82 I. C. 102 : A. I. R. 1925 Mad. 21 : 47 M. L. J. 398. (F.B.)**

——O. 3, R. 4(2)—*Leave of Court can be assumed from its attitude and other circumstances.*

No formality is necessary about the leave of the Court and it may be presumed that in a case where the Court assents to the conduct of the vakil and raises no question about his withdrawal the consent of the Court has been given within the meaning of the section. (*Coutts Trotter, Ramesam and Wallace, JJ.*) V. MANICKAM *v* MAHUDEEM BATHUMMAL, **47 Mad. 819 : 20 L. W. 427 : 35 M. L. T. 48 : (1924) M. W. N. 689 : 82 I. C. 102 : A. I. R. 1925 Mad. 21 : 47 M. L. J. 398. (F. B.).**

——O. 3, R. 4 (2)—*There is no specified form for written withdrawal by pleader.*

C. P. CODE (V OF 1908), O. 4, R. 1.

The statute does not require the writing containing the withdrawal by the pleader of his *vakalat* to be in any specified form. Endorsement on the back of the plaint that he (the practitioner) had no instructions except to apply for an adjournment was held a good written withdrawal. (*Coutts Trotter C. J., Ramesam and Wallace, JJ.*) V. MANICKAM PILLAI *v.* MAHUDUM BATHUMMAL. **20 L. W. 427 : 47 Mad. 819: 35 M. L. T. 48 : (1924) M. W. N 689 : 82 I. C. 102 : A. I. R. 1925 Mad. 21 : 47 M. L. J. 398. (F.B.).**

——O. 3, R. 4, cl. (3)—*Advocate of High Court Necessity of* vakalatnama.

An Advocate unlike a pleader can be verbally appointed to act on behalf of his client and when so appointed under O. 3 R. 1, he can appear, plead and act. (*Jwala Prasad, J.*) LAURENTIUS EKKA *v.* DHUKI KOERI. **4 Pat. 766.**

——O. 3, R. 4 (3)—*Advocate of Patna High Court need not present document empowering him to act on behalf of his client.*

An Advocate of the Patna High Court is not required to present any document empowering him to act on behalf of his client because the Government of India Act repeals and re-enacts the Indian High Courts Act and therefore the reference in C P. Code O. 3, R. 4 (3) to the High Courts established under the High Courts Act of 1861 includes the Patna High Court which was established under the provisions of the Government of India Act. (*Dawson Miller, C. J. and Jwala Prasad, J.*) MT. GOBINDA KOER *v.* JAI NARAIN. **6 P. L. T. 380 : 88 I. C. 91 (1): 1925 P. H. C. C. 233 : A. I. R. 1925 Pat. 614.**

——O. 3, R. 5—*Pleader, position and duty of—Power of pleader, how determined.*

When a pleader accepts a case it is his duty to attend to his client's interest throughout the proceedings in the case unless his appointment be determined with the leave of the Court by a writing signed by him or his client filed in Court. (*Lyle, A. J. C.*) SHEO SAIK SINGH *v.* AUSAN. **25 O. C. 40 : 9 O. L. J. 170 : 67 I. C. 554 : A. I. R. 1922 Oudh 75 (1).**

——O. 3, R. 5 (d)—*Rejection of application on ground of suit matter being* res judicata *is illegal and revisable.*

To reject an application to sue as a pauper on the ground that the matter in suit between the parties was *res judicata* is illegal and apt to be revised. (*Daniels, J.*) LACHMI *v.* RAM BAHADUR. **23 A. L. J. 200 : 86 I. C. 781 : A. I. R. 1925 All. 275 (2).**

——O. 4, R.1—*Plaintiff a major—Suit instituted by next friend not valid.*

Where a plaintiff has attained majority before the institution of the suit a plaint signed and verified on his behalf by a next friend is not valid and the defect is not a mere irregularity in proceeding and cannot be cured by section 98 of the Civil Procedure Code. (*Mears C.J. and Piggott, J.*) RUHUL AMIN *v.* LALA SHANKAR LAL. **45 A. 701 : L. R. 4 A. 342: 21 A. L. J. 626 : 77 I. C. 30 : A. I. R. 1924 All. 54.**

——O. 4, R. 1—*Plaint—Vakil patra—Signed by plaintiff's servant—Plaintiff should be given opportunity to sign.*

A suit cannot be dismissed without notice to the plaintiff and an opportunity to him to sign it personally where the plaint when filed was signed by the plaintiff's servant who also empowered the pleader though the servant was not the recognized plaintiff's agent (*Macleod, C.J. and Shah, J.*) UTTARAM *v.* THAKOR DAS. **46 Bom. 150 : 68 I. C. 217 : 23 Bom. L. R. 911 : A. I. R. 1922 Bom. 113 (1).**

C. P CODE (V OF 1908), O 4, R. 1

——0. 4, R. 1—*Presentation out of office hours. being not accepted does not constitute proper presentation on the day of refusal.*

Where a plaint was presented out of office hours at 6-30 p. m. to a District Munsiff at a Club, who refused to receive it, the plaint cannot be treated as having been filed on the day on which it was actually presented. (*Jackson, J.*) SINNAPPA NAIDU *v.* SINNAMMA NAICKEN. **20 L. W. 655 : 35 M. L. T 116 : 82 I. C. 928 : A. I. R. 1925 Mad. 201.**

——0. 4, R, 1—*Presentation of plaint to Judge outside Court and out of office hours—Validity of.*

Where a Judge accepts a plaint presented to him outside Court and after the usual office hours, the suit must be deemed to have been instituted on the day on which the plaint was so presented. (*Schwabe, C. J., Coutts-Trotter and Ramesam, JJ.*) SATTAYA PADAYACHI *v.* SOUNDARATHACHI. **47 Mad. 312 : (1924) M. W. N. 162 · 19 L. W. 468 : 33 M. L. T. 278 (H. C.) : 79 I. C. 1017 : A. I. R. 1924 Mad. 448 : 46 M. L. J. 78 (F. B.).**

——0. 4, R. 1—*Presentation of plaint.*

Presentation of plaint at residence of Judge after the usual Court hours is valid. (*Dhobley, A. J. C.*) MADHORAO *v.* MANOHARLAL. **65 I. C. 674 : A. I. R. 1922 Nag. 167 (1).**

——0. 5, R. 1—Onus *of proof of service is on plaintiff.*

The *onus* of proving the service of summons on the defendant is upon the plaintiff. (*Page, J.*) BHOWANIDAS RAMGOBIND *v.* PANNACHAND LUCHMIPUT. **52 Cal. 453 : A. I. R. 1925 Cal 801.**

——0 5, R. 1 and 0. 17, R. 2—*Suppression of summons—Fraud.*

In order to charge a party with fraud in the suppression of summons it is essential to prove that the non-service was the result of some active part taken by that party in not having the summons served and thereby keeping the opposite party from the knowledge of the suit. (*Jwala Prasad and Adami, JJ.*) RANI CHHATTRA KUMARI DEBI *v.* PANDA RACHOMOHAN SINGARI. **3 P. L. T. 451 : A. I. R 1922 Pat. 291.**

——0. 5, R 9—*Service of summons outside the jurisdiction of Court issuing it—No order of the Court having jurisdiction—Service is irregular.*

The service of summons effected outside the jurisdiction of the Court issuing it and without any order of the Court having jurisdiction is irregular. (*Lentaigne, J.*) MAUNG SAN BWIN *v.* MAUNG NYI. **3 Rang. 239 : 89 I. C. 870: A. I. R. 1925 Rang 325.**

——0. 5, R. 10—*Service must be effected by an officer of the Court.*

Service of a summons is irregular if it is not made by an officer of the Court. (*Lentaigne, J.*) MAUNG SAN BWIN *v.* MAUNG NYI. **3 Rang 239 : 89 I. C. 870 : A. I. R. 1925 Rang. 325.**

——0. 5, Rr. 12, 14 and 17—Pardanashin *lady—Service of summons on husband is not proper service.*

A *pardanashin* lady executed a power of attorney in favour of her husband but there was no power given to accept service of summons on her behalf. The summons was served on the husband. *Held*, that there was no proper service under O. 5. R. 12 as the husband was not an agent duly authorised to accept service of summons. As a *pardanashin* lady is not able to accept service personally, she comes under the expression "cannot be found" under O 5, Rr. 14 and 17, and service of summons can be effected by serving it on any adult male member of the family, or affixing it on the outer door of the house in which the lady ordinarily resides. (*Jwala Prasad and Ross, JJ.*) MT. NAJMUNNISSA *v.* JAGMOHAN LALL.

C. P. CODE (V OF 1908), O. 5, R. 17.

4 Pat. L. T. 89 : 72 I. C. 910 : A. I. R. 1923 Pat. 433.

——0. 5, R. 13—*Service on cousin—No attempt to serve personally—Service not proper.*

If it is not shown that sufficient attempt was made to personally serve the summons, and if it is not shown that the person who has been described as a cousin of the appellant was a person who was sufficiently authorised to receive the summons, the appeal to set aside an *ex parte* decree must succeed on the ground of non-service of summons. (*Woodroffe and Ghose, JJ.*) ROMESH CHANDRA *v.* DURGA CHARAN. **A. I. R. 1922 Cal. 128.**

——0. 5, R. 13 and O. 30, R. 3—*Scope.*

O. 5, R. 13 applies only to suits against firms and O. 30, R. 3 also applies where persons are sued as partners in the name of their firm, and they do not apply when suits are brought against persons in their individual capacities. (*Coutts and Macpherson, JJ.*) MAHABIR *v.* BALKISUN. **3 P. L. T. 29 : 1922 P. H. C. C. 76 · 1 P. 48 : A. I R 1922 Pat. 376.**

——0. 5, R. 15 *Mode of service—Service on son when sufficient to bind father—Conditions necessary.*

Service on son is not sufficient to bind father when it is not proved that the father cannot be found and the son is not proved to be adult. (*Mookerjee, A. C. J. and Fletcher, J.*) BHARAMCHAND GUIN *v.* KANEK SARKAR. **26 C. W. N. 359 : 68 I. C. 991 . 35 C. L. J. 203.**

——0. 5, R. 17—*Service of summons by post—R. 22 of the Allahabad Rule Committee.*

Service by post or fixing to the door, in case, a person cannot be personally served, is *prima facie* sufficient ; but under R. 22 added by the Allahabad Rule Committee, to O. 7, C. P. Code, the Court is bound to direct additional service by registered post. (*Piggott and Walsh, JJ.*) MATHURA PRASAD *v.* BHOOP NARAYAN. **43 All. 411 : 61 I C. 135 : 19 A. L. J. 145.**

——0. 5 R. 17—*Defendant having two residences—Plaintiff must enquire for defendant at both.*

Where a defendant has two residences or places of business, it is not enough that the plaintiff, in order to become entitled to take advantage of the provisions for substituted service, should call once, twice or any number of times at one of those places. A plaintiff must use reasonable diligence to ascertain the whereabouts of the defendant, and where, the defendant, according to the plaintiff, resided at both places the plaintiff cannot be held to have used reasonable diligence to discover the defendant's whereabouts if he does not make enquiries for the defendant at both of these places. (*Page, J.*) BHOWANIDAS RAMGOBIND *v.* PANNACHAND LUCHMIPAT. **52 Cal. 453 : 88 I. C. 929 : A. I. R. 1925 Cal. 801.**

——0. 5, R. 17—*Deft. refusing to accept service—Affixing of summons on outer door of premises in which defendant is found but which is not his residence or place of business, is not enough.*

To affix a copy of the summons on the outer door of premises in which a defendant is found, and where the defendant has refused to accept service is not a sufficient compliance with the provisions of O. 5, R. 17, but in order duly to effect substituted service it is necessary for the proper officer to affix summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. (*Page, J.*) BHOWANIDAS RAMGOBIND *v.* PANNACHND LUCHMIPAT. **52 Cal. 453 : 88 I C. 929 : A. I, R. 1925 Cal. 801.**

——0. 5 R. 17—"*Due and reasonable diligence*".

The question of "due and reasonable diligence" in

C. P. CODE (V OF 1908). O. 5, R. 17.

O. 5, R. 17, C. P. Code is a question of fact. Where a process server went to a place on a day and hour when he expected to find the defendant there and did all that was required under the section but could not find him he must be taken to have exercised "due and reasonable diligence." (*Sanderson, C. J and Buckland, J.*) BALDEODAS LOHEA *v.* SHUBCHURNDAS GOENKA. **30 C. W. N. 104.**

——O. 5, R. 17—*All available steps to effect personal service must be made.*

All available steps to effect personal service must be made before resort is had to the provisions of O. 5. R. 17. It is not enough to attend at the ordinary places of residence or of business or the place where the defendant personally works for gain, and to conclude that substituted service may be effected merely because at the time when serving peon attends at such place the defendant does not happen to be there. It makes no difference whether the peon attends at such place once or three times. It is necessary that the serving peon, having discovered or believing that the defendant cannot be served at the time when he is attending. should institute proper enquiries to endeavour to ascertain where the defendant's whereabouts are. The serving peon before he can take advantage of the provisions of O. 5, R. 17 must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant he must take reasonable steps to discover where the defendants may happen to be. (*Page, J.*) BALDEODAS LOHIA *v.* SUBKARANDAS GOENKA. **52 Cal. 179: 88 I. C. 508 : A. I. R. 1925 Cal. 627 (2).**

——O. 5, R. 17—*Service of summons—Substituted service—Necessity for personal service.*

Where a process server is told that the persons whom he is seeking to serve, were not living at that time at the place where he seeks to serve them but at their own native place, it is his duty to endeavour to effect personal service upon them either by proceeding to that place or returning the summons to the Court with a proper endorsement so that fresh summons should be issued. Under O. 5, R. 17. C. P. Code, the service, if possible,should be personal unless there is an agent empowered to accept service and it is only if personal service cannot be effected that there is any justification for proceeding in accordance with the provisions of O. 5, R. 17. (*Greaves and Graham, JJ.*) CHOWDHURY DINA NATH PATI *v.* CHOWDHURY UPENDRA NANDAN DAS. **82 I. C. 703 : 40 C. L. J. 154 : A. I. R. 1924 Cal. 1004.**

——O. 5, R. 17—*Personal service—When can be dispensed with—Peon affixing notice at entrance of party's house—Service if valid.*

Personal service of notice should not be dispensed with unless it is unavoidable to do so or unless there is an agent empowered to accept service. Where the notice was sent for service at the place mentioned in the plaint as the plaintiffs' residence but the peon on arriving there did not find the plaintiffs or any male member of the family, but found there a servant of the plaintiffs and was told that the plaintiffs were at that time living at their own *bari* at a village some two or three miles distant : *Held*, that the affixing of the notice at the entrance of the plaintiffs' house was not good service as the peon did not use due and reasonable diligence. (*Greaves and Graham, JJ.*) DINA NATH PATI *v.* UPENDRA NANDAN DAS MAHAPATRA. **40 C. L. J. 154 : A. I. R 1924 Cal. 1004.**

——O 5, R. 17—*Summons—Service by affixture—When proper.*

Where on going to the village of the defendant the Amin learns that the defendant had gone to another village and that the time of his return was not known and that there was no adult male member in the defendant's family, affixture of the summons to the outer door of the house is not a substituted service but is good service. (*Ramesam, J.*) SYED MUHAMMAD SAHIB *v.* ALAGAPPA CHETTIAR. **22 L. W. 423 : 90 I.C. 104 (2) : A. I. R. 1926 Mad. 131 : 49 M. L. J. 445.**

——O. 5, R. 17—*Affixture to outer door—Propriety of.*

The petitioner at the hearing of an application to set aside an *ex parte* decree alleged that the summons had been affixed on the outer door of his house as stated in the return but the court refused to enquire into the matter and dismissed the petition. *Held*, that the disposal of the petition was irregular and the court must enquire and come to a conclusion on the evidence. (*Kumaraswami Sastri, J.*) KARUTHAN AMBALAM *v.* DORAISWAMI AIYANGAR. **16 L. W. 444 : A. I. R. 1923 Mad. 27.**

——O. 5, R. 17—*Service by affixture—Temporary absence.*

Service by affixture during the temporary absence of the party to be served with a notice, on the outer door of his house where his wife was living is sufficient service within the meaning of O. 5, R. 17. (*Oldfield and Ramesam, JJ.*) KASIVISVANATHAM CHETTY *v.* SOMASUNDARAM CHETTY. **(1922) M. W. N. 173 : 70 I. C. 611 : 45 M. 875 : A. I. R. 1922 Mad. 93 : 42 M. L. J. 422.**

——O. 5, R. 17—*Service of summons—Personal service—Necessity for—Diligence.*

Where there is an agent empowered to accept service on behalf of the deft. or any other person on whom service can be made, it is not incumbent on the serving officer to make such diligent efforts to effect personal service as in a case where there is nobody else on whom service can be made. (*Hallifax, A.J.C.*) MADAN SINGH *v.* KESHEO PRASAD. **5 N. L. J. 41 : 65 I. C. 44 : A. I. R. 1922 Nag. 105.**

——O. 5,R. 17—*Service by affixture—Temporary absence—Only one attempt—Effect.*

Service by affixture should not be made the very first time notice is sought to be served. If it is done and a decree is passed *ex parte* it is sufficient cause within the meaning of O. 9, R. 13 to set aside the decree. Temporary absence at the time of the process-server's call does not mean he cannot be found within the meaning of O. 5, R. 17, (*Dalal, A. J.C.*) MATHURA SINGH *v*, SHEO MOHAN PRASAD. **9 O. & A. L. R. 437 : 10 O. L. J. 337 : 74 I. C. 792 : A. I. R. 1924 Oudh 237.**

——O. 5, R 17—*Service of process—Affixture—Temporary absence of party.*

Where the process server's report was to the effect that on reaching the village, he was informed that the tenant had gone to another district, and so he served the notice by affixation. *Held* that the affixture did not invalidate the notice. The object of that rule is to make certain that the person who is to be served receives notice whereas, in the present case, he actually received it. The question whether affixation was really justified is of less importance. In the circumstances of the present case affixation does not invalidate the notice. (*Fremantle, S.M. and Burn, J. M.*) ABDULLAH KHAN *v.* MAHANT KESHO RAM. **L. R. 5 O. 43 : 10 O. & A. L. R. 348 : 11 O. L. J. 64.**

——O. 5, R. 17—*Bengal Tenancy Act, S. 49—Tender of summons—Acceptance but refusal to grant receipt—No affixture or order of Court holding service sufficient—Effect—Strict compliance is essential.*

C. P. CODE (V OF 1908), O. 5, R. 17.

The rules laid down in O. 5 of the Code of Civil Procedure relating to the service of summons will apply to notices served under S. 49 of the Bengal Tenancy Act. Perhaps R. 19 does not apply to notices issued under the Bengal Tenancy Act for the rule numbered 3 of the Government rules only says that the process shall be served in the manner provided in the C. P. Code. Rule 10 relates to the proof of service by the affidavit of the serving officer or his examination on oath in Court and the decision of the Court that the service was duly made. But rule 17, relating to the mode of service, applies and if it is not complied with, the notice will be vitiated. A.I.R. 1924 Pat. 446, Dist. (*Jwala Prasad, A.C.J. and Kulwant Sahay, J.*) MAHADEO SINGH *v.* BAGIT SINGH.
4 Pat. 135 : 1925 P.H.C.C. 106 : A.I.R. 1925 Pat. 441.

——— **O. 5, R. 17**—*Service of summons—Summons received but endorsement not made—Affixture—Necessity for.*

The summons in a case was served by delivering a copy of the summons together with a copy of the plaint to the defendant personally (the defendant being personally known to the peon). The defendant refused to grant a receipt therefor, but retained the summons and the copy of the plaint. When the defendant took the summons and the plaint, the peon had no other copy to affix upon the outer door or other conspicuous part of the house. He therefore did not affix it to the house. If the defendant had refused to take the summons and to sign the acknowledgment, in that case the peon would have a copy of the plaint and the summons to be affixed upon the house of the defendant. *Held*, that defendant by his conduct rendered it impossible to have the copies affixed on the house and he cannot be permitted to take advantage of his own wrong and to plead that the omission rendered the service invalid. The defendant was in this house and copies of the summons and the plaint were given to and left with him in his hands. Therefore the requirements of O. 5, R 17 were complied with. (*Jwala Prasad and Forbes, JJ.*) NAGESHWAR BUX ALI *v.* FEASWAR DAYAL SINGH. **3 Pat. 236 : 2 Pat. L. R. 58: 78 I. C. 889 : 5 Pat. L. T. 576 : A. I. R. 1924 Pat. 446.**

——— **O. 5, Rr. 18 and 19**—*Presumption as to service.*

It can be assumed until the contrary is proved that the summons is in fact served in the mode stated in the report of the peon, and therefore the plaintiffs must prove that the statements in the report are untrue. (*Das and Bucknill, JJ.*) DAMODHAR PRASAD *v.* RAM SARUP KUMAR. **1 P. L. R. 252 : 71 I. C. 843 : 1923 P. H. C. C. 137 : 4 P. L. T. 102 : A. I. R. 1923 Pat. 327.**

——— **O. 5, Rr. 18, 10**—*Identification of person sought to be served—Identifier need not be supplied by party.*

It is not incumbent on a party to provide an identifier for the purposes of O. 5, R. 18, C. P. Code. The identifier may be a person in the village knowing the defendant. (*Jwala Prasad and Ross, JJ.*) NAGENDRA NATH GHOSH *v.* SAMBU NATH PANDE.
3 Pat. L. T. 498 : 65 I. C. 49 : A. I. R. 1923 Pat. 114.

——— **O. 5, R. 19 and O. 9, R. 13**—Ex parte *decree—Finding that service was sufficient not recorded.*

Where a Small Cause Court without regarding any order under O. 5, R. 19, C. P. Code, and without finding that the service was sufficient decreed the suit *ex parte*. *Held*, that the *ex parte* decree must be set aside. (*Ramesam, J.*) CHIRAKKAL *v.* MULLA MITTATH. **15 L. W. 17 : A. I. R. 1922 Mad. 417 (1).**

——— **O. 5, R. 20**—*Substituted service—Mere absence from village is not sufficient ground.*

C. P. CODE (V OF 1908), O. 6.

Mere absence of the person to be served from the village is not a sufficient ground for substituted service. RANDHIRA *v.* RANI KHUSHAL KUAR.
L. R. 2 All. 244 (Rev.).

——— **O. 5, R.20**—*Substituted service through newspaper—Time to to be allowed.*

Where substituted service is ordered to be effected by means or a newspaper reasonable time to allow the newspaper to reach in addition to the time of the notice is sufficient. All that the court is required to do is to see that the judgment-debtor has had sufficient opportunity to see the newspaper. KEWAL *v.* SAJJAD HUSAIN. **L. R. 2 All. 242 (Rev.)**

——— **O. 5, R. 20**—*Substituted service—When to be ordered.*

Under O. 5, R. 20 substituted service should be ordered only when the court is satisfied that there is reason to believe that the defendant is evading service or that summons cannot be served in the ordinary way. Where the plaintiff knew all along that defendant had left a certain place two or three years before suit, it cannot be said he was evading service at that place (*Chevis, J.*) RAM KISHAN *v.* MULA.
69 I. C. 467 : A. I. R. 1924 Lah. 191

——— **O. 5, R. 20**—*Copy attached to tree near house is sufficient.*

Provided the tree to which the copy of summons is attached was reasonably near the hut, that would probably be sufficient. (*Batten, J.C. and Hallifax, A.J.C.*) PANJAB RAO *v.* BALIRAM.
69 I. C. 549 : A. I. R. 1923 Nag. 13.

——— **O. 5, R. 20**—*Service by affixture at the first time—No presumption of knowledge of proceeding to defendant can be made.*

When service is made the very first time by affixing summons to the door of the defendant's house, there can be no presumption that he had notice of the case or of the date fixed for hearing. (*Dalal, A. J. C.*) MATHURA SINCH *v.* SHEO MOHAN PRASAD.
10 O. L. J. 337 : 74 I. C. 792 : A. I. R. 1924 Oudh 237.

——— **O. 5 R. 21**—*Service outside jurisdiction—How effected.*

A service of summons on a person residing outside the jurisdiction of a Court can only be done by an officer of the Court and that with an order from a Court having jurisdiction over the place where he resides. (*Lentaigne, J.*) MAUNUG SAN BWIN *v.* MAUNG NYI. **3 Rang. 239 : 89 I. C. 870 : A. I. R. 1925 Rang. 325.**

——— **O. 5, R. 22**—*Service by post—Bombay High Court Civil Circulars*, 1912, *Chap.* I, *R.* 20.

The service of summons by post is allowed to litigants as a matter of convenience. Retrial should be ordered if, after the decree has been passed against him on evidence that the summons was sent by registered post and returned refused, when he appears and denied that the packet has ever been delivered to him by the postal authorities. (*Macleod, C.J. and Shah, J.*) SUNDER *v.* MAKAN. **23 Bom. L. R. 908 : 46 Bom. 130 : 64 I.C. 386 : A.I.R. 1922 Bom. 377 (1).**

——— **O. 5, R. 23**—*Oudh Civil Digest, S.* 115—*Certificate by* munsarim *is ineffective.*

The certificate as to whether the service was sufficient or not, if signed by the *munsarim* and not by the presiding officer of the Court, is neither legal nor of value. (*Dalal, A. J. C.*) MATHURA SINGH *v.* SHEO MOHAN PRASAD. **10 O. L. J. 337 : 74 I. C. 792 : A. I. R. 1924 Oudh 237.**

——— **O. 6**—*Pleadings—Suit for right of way—Relief based on ownership or in the alternative user—Defendant claiming ownership—Claim on the ground*

C. P. CODE (V OF 1908), O. 6, R. 1

of easement not barred.

Where the defendant contended that the case of easement could not be made out where plaintiffs put forward an allegation of ownership and the evidence in the case made it clear that the plaintiffs were using the dispute lane as a means of access to their survey number ; *Held*, the real issue in the case was whether the plaintiffs had enjoyed for the statutory period the right of way over the strip in dispute. The Court was entitled to accept the defendant's contention that lane belonged to him but that would not prevent the plaintiffs from asking the Court to protect their user or the lane. (*Macleod, C. J. and Shah, J.*) DHARAMDAS *v.* RANCHHODJI. **46 Bom. 200 : A. I. R. 1922 Bom. 199.**

——— —O. 6, R. 1—*Partition suit—Defence claiming certain lands as raiyati —Specific allegation in plaint as baksht—If necessary.*

In a suit for partition of village lands, the defence claimed some lands as *raiyati* and the court decided that as the plaint had not specifically alleged the lands were baksht, they should be allotted to defendants. *Held*, plaintiff was not bound to assert so specifically in the plaint and the question should be decided after preliminary decree but before the final decree is passed. (*Ross and Kulwant Sahay, JJ.*) LACHMAN NARAYAN TIWARI *v.* RAMSARAN TIWARI. **6 Pat. L. T. 152 : 86 I.C. 785 : A. I. R. 1925 Pat. 433.**

——— —O. 6, R. 2—*Plaint in collision cases—Frame of.*

The decision of a case, should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. In collision cases, especially, the plaint should be so framed that it sets out the circumstances of the collision, with clearness and accuracy, to enable his adversary to know the case he has to meet, and to state the particular acts of negligence that, according to him caused the collision. (*Mookerjee and Buckland, JJ.*) REES *v.* YOUNG. **25 C.W.N. 519 : 66 I.C. 745: 34 C.L.J. 178.**

——— ——O. 6. R. 2—*Denial of marriage includes denial of validity of marriage.*

The denial of a marriage ceremony in answer to a claim for restitution of conjugal rights covers the plea that, if the marriage, if performed, was otherwise invalid. (*Wilberforce and Abdul Qadir, JJ.*) RAM JAWAI *v.* GOPAL CHAND. **64 I. C. 150.**

———O. 6, R. 2—*Inconsistent pleas are not prohibited.*

O. 6, R. 2 cannot be construed as prohibiting the raising of the inconsistent pleas. A person may rely on one set of facts if he succeeds in proving them, and on another set of facts if he succeeds in proving that set of facts. (*Wazir Hasan and Pullan, A. J, Cs.*) BANSI DHAR *v.* AJUDHIA PRASAD. **27 O. C. 175 : 11 O.L.J. 619 : 82 I. C. 333: A. I. R. 1925 Oudh 120.**

———O. 6, R. 3—*Evidence has no place in pleading.*

O. 6, R. 3 states that every pleading shall contain and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be but not evidence by which they are to be proved. (*Dawson Miller, C. J and Foster, J.*) THAKUR PRASAD SAHU *v.* MAHOMED MUSA. **86 I. C. 629: 3 Pat. L. R. 36: A. I. R. 1925 Pat. 410.**

———O. 6, R. 4—*Fraud—Collusion—Nature of—Proof necessary.*

Charges of fraud and collusion must be proved by those who make them by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjectures

C P. CODE (V OF 1908), O. 6, R. 4.

are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely be unravelled and cleared up and made plain before a verdict can be properly found against him. (*Lord Atkinson.*) SATISH CHANDRA CHATTERJEE *v.* KUMAR SATISH KANTA ROY. **33 M. L. T. 325: 28 C. W. N. 327: 73 I.C. 391 : 39 C. L J. 165 : A. I. R. 1923 P.C. 73 : 45 M. L. J. 363 (P.C.).**

———O. 6, R. 4—*Fraud—Particulars—Duty to disclose—Procedure.*

Where the defendant pleads fraud in his defence in a vague position it is the duty of the pleader for the plaintiff to apply to the Court to order the defendant to deliver further and better particulars of the charge of fraud. When settling issues it is the duty of the Judge himself to require the defendant to specify with particularity the nature of the fraud alleged. Subordinate Judges should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application. Frequently the result of ordinary particulars of nebulous claims and defences will be to make it manifest that the claim or defence has no substance. A Subordinate Judge should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application ; such payment to be made on or before the delivery of the particulars. If the order is disobeyed and if the plaintiff is in default he should have his action staged ; and if the defendant is in default, his defence should be struck out. Particulars having been furnished the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original paragraph and particularly should give that as his reason. (*Mears, C. J. and Piggott, J.*) GAURI SHANKER *v.* MANKI KUNWAR. **21 A. L. J. 571: L. R. 4 A. 464: 45 A. 624: 74 I. C. 466: A. I. R. 1924 All. 17.**

———O. 6, R. 4—*Particulars of misrepresentation or fraud must be given to resist auction-purchaser's title.*

Rule 4 is clear that the auction-purchaser is entitled to particulars of the misrepresentation and fraud set up to resist his title ordinarily vesting in him under S. 65. *Wallingford* v. *Mutual Society*, 5 A.C. 685, Foll. (*Fawcett and Madgavkar, JJ.*) DODBASAPPA DHARMAPPA *v.* PRADHANAPPA VENKAPPA. **27 Bom. L. R. 1318: A. I. R. 1926 Bom. 33.**

———O. 6, R. 4—*Undue influence—Particulars as to—New case on appeal not to be allowed to be set up.*

To make out a plea of undue influence, the person alleging it must prove that another person was in a position to dominate the will and exercise influence and secondly that he actually did influence. Where there was no issue on these questions, no evidence and no findings of the trial, it will be impossible for the appellate court to adopt the suggestion of the appellant to remit the case for retrial (*Macleod, C. J. and Shah, J.*) SHIDDUBAI *v.* NILAPGAUDA. **26 Bom. L. R. 622 : 83 I. C. 616 : A. I. R. 1924 Bom. 457.**

———O. 6, R. 4—*Fraud of one kind alleged—relief on another ground cannot be given.*

In a case based on a fraud of a particular kind no relief can be given on any other ground. But the obtaining of a benefit by undue influence is a fraud of the gravest kind and when such fraud is alleged and proved the allegation that they were parts of a scheme very early conceived is, whether made out or not, of no

C. P. CODE (V OF 1908), O. 6, R 4.

material consequence. (*Mookerjee and Buckland, JJ.*) SATIS *v.* KALIDASI. **34 C. L. J. 529 : 68 I. C. 577 : 26 C. W. N. 177 : A. I. R. 1922 Cal. 203.**

——— **O. 6, R. 4**—*Allegation of custom to be specific.*

A custom should be specially pleaded and all the essential requisites to its validity and binding effect must be proved. (*Mookerjee and Panton, JJ.*) GOPALKRISHNA *v.* ABDUL. **66 I. C. 640 : 34 C. L. J. 319.**

——— **O. 6, R. 4**—*Fraud—General averment not sufficient.*

A general averment in the plaint that a survey entry has been obtained by fraud is not sufficient. It must be stated who committed the fraud and if full particulars are not given as required by R. 4, the plaint should be rejected. (*Miller, C. J., Mullick and Bucknill, JJ.*) HARE KRISHNA SEN *v.* UMESHCHANDRA DUTT. **2 Pat. L. T. 528 : 3 U. P. L. R. (Pat.) 57 : 62 I. C. 962 : 1921 P. H. C. C. 209 : 6 P. L. J. 373 (F. B.).**

——— **O. 6, Rr. 4, 5**—*Dismissal from service—Suit for damages—Particulars if can be ordered.*

In a suit for damages for wrongful dismissal from service, the defendant cannot be directed to furnish particulars of the reasons for dismissal. (*Madgavkar, A. J. C.*) COLLINS *v.* CHARLES BOOTH & CO. **80 I. C. 958 : 17 S. L. R. 9.**

——— **O. 6, R. 6**—*Condition precedent—Allegation and denial—Pleadings.*

It is for the defendant, if he contends that there was condition precedent and that it has not been duly performed to state specifically what the condition was and to plead its non-performance otherwise its due performance will be presumed (1914) 1 Ch. 920, Rel. (*Ross, J.*) MURLI MANOHAR *v.* RAJA NAND SINGH. **72 I. C. 1 : A. I. R. 1924 Pat. 205.**

——— **O. 6, R. 7**—*Illegal consideration must be specifically pleaded.*

Where in a suit on a bond, the illegality of the consideration is raised as a defence it must be definitely pleaded in the pleadings for it is a case in which particulars may be necessary. The plea cannot be raised for the time in argument. (*Harrison, J.*) NUR ILAHI *v.* MAWAZ KHAN. **7 Lah. L. J. 86 : 86 I. C. 683 : 26 Punj. L. R. 76 ; A. I. R. 1925 Lah. 345.**

——— **O. 6, R. 7**—*Admissions—Amendment for evading, effect of.*

An amendment of plaint should not be allowed where the object is to get round the effect of some admissions made by the plaintiff himself. (*Baker, J. C.*) RAGHUNATH SINGH *v.* GABDOO. **80 I. C. 355 (2) : A. I. R. 1925 Nag. 127.**

——— **O. 6, R. 10**—*Fraud—Particulars necessary.*

A person alleging fraud must state in detail the facts constituting fraud. A vague allegation of fraud cannot be accepted. A judgment-debtor applying to set aside an execution sale on the ground of fraud must clearly state in his petition as to how he was kept from the knowledge of the execution proceedings and the sale, and how this fraud was practised and how he came to know of the sale. Mere want of diligence is not fraud. (*Jwala Prasad and Adami, JJ.*) BABU DAS NARAYAN SINGH *v.* MUHAMMAD YUSUF *alias* BHEKHO. **3 U. P. L. R. (Pat.) 33 : 61 I. C. 823 : 2 Pat. L. T. 401: 1921 P. H. C. C. 181 : 6 Pat. L. J. 319.**

——— **O. 6, R. 11**—*Rule is one of procedure—Defect in signature and verification is not fatal and can be amended.*

The object of the signature to the plaint is to prevent as far as possible disputes as to whether a suit was instituted with the plaintiff's knowledge and authority or not. This authority may be established

C. P. CODE (V OF 1908), O. 6, R. 17—Addition of Party.

by other means besides the signature. The provisions of O. 6, R. 11, C. P. Code relate to a mere matter of procedure and any mistake or omission therein may be amended at any time subsequent to the institution of the suit. 22 All. 55 and 40 All. 147 Foll. (*Rupchand Bilaram, A. J. Cs.*) SECY. OF STATE *v.* DINSHAW NAVROJI. **A. I. R. 1925 Sind 275.**

——— **O. 6, R. 14**—*Plaint valid if signed by person instructed by plaintiff to sign.*

Where a plaint was signed by a person on instructions from the real and ostensible plaintiff, *held*, that the plaint was signed by a duly authorized person. (*Le Rossignol, J.*) ALI AHMAD *v.* ABDUL GHANI. **75 I. C. 880 : A. I. R. 1925 Lah. 144 (1).**

——— **O. 6, R. 14**—*Co-plaintiff is plaintiff though he may not sign.*

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. 17 C. 580 Appr. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) HAZARI LAL *v.* AMBIKA GIR. **3 P. 67 : 1923 P. H. C. C. 273 : 2 P. L. R. 169 : 79 I. C. 5 : 5 P. L. T. 591 : A. I. R. 1924 Pat 104.**

——— **O. 6, R. 15**—Verification by next friend of minor—Plaintiff really a major—Amendment of cause title—Bar of limitation—Verification by next friend if sufficient. AMRITSARIA *v.* GAMUN **89 I C. 363 (Lah.).**

——— **O. 6, R. 16**—*Exercise of powers.*

A Court should not, as a rule, decide a point as to the relevancy of matters on an application to strike out. The jurisdiction, which is given to the Court, by O. 6, R. 16, is one which ought to be exercised with great care and caution. A written statement should not be struck out unless it is clear beyond all reasonable doubt that the allegations do not afford a defence, with the result that if they are allowed to stay on the record, the trial of the suit must be unnecessarily delayed. (*Sanderson, C. J. and Rankin, J.*) ANDERSON KIRKWOOD TENNENT *v.* WALTER MITCHEL. **29 C. W. N. 670 : 88 I. C. 435 : A. I. R. 1925 Cal. 860.**

——— **O. 6, R. 17.**

Addition of party.
Addition of relief.
Alternative Case.
Appellate Court.
Cause of Action.
Declaratory Suit.
Description.
Discretion.
Inconsistent Claims and Pleas.
Late Stage.
Limitation.
Mistake.
Nature of Suit.
New Plea or Case.
Partition.
Power of Court.
Prejudice to defendant.
Refusal to amend.
Revision.
Shortening Litigation.
Subsequent cause of action.
Technical defect.

Addition of Party.

——— **O. 6, R. 17**—*Addition of party—Suit under O. 1, R. 8.*

If a suit to which O. 1, R. 8 applies is brought in the name of one person alone as plaintiff and it is otherwise good the Court will allow, if necessary, the suit

C. P. CODE (V OF 1908), O. 6, R. 17—Addition of Party.

to be amended so as to make the necessary additions with respect to parties under O. 6, R. 17 as under O. 1, R. 10. (*Mulla, J.*) NARIMAN *v.* MUNICIPAL CORPORATION OF BOMBAY. **47 Bom. 809 : 25 Bom. L. R. 689 : A. I. R 1923 Bom. 305.**

——— **O. 6, R. 17**—*Addition of party--Application to bring new plaintiff on record on date when suit would be barred—Amendment cannot be allowed.*

The plaint in a suit cannot be allowed to be amended so as to bring in a new plaintiff on record when such application is made after the lapse of the period of limitation prescribed for the suit. (*Devadoss, J.*) VENKATASUBBARAMANA *v.* PULIPULLA REDDY. **A. I. R. 1925 Mad. 917.**

Addition of Relief.

———**O. 6, R. 17**—*Addition of relief—Suit brought in respect of a portion—Amendment to allow its conversion into one respecting whole property is not wrong.*

A Court is not wrong in the exercise of its discretion in allowing an amendment so as to convert the suit brought for a portion, into one in respect of the whole property, if the amendment serves the purpose of avoiding multiplicity of suits. (*Suhrawardy and Duval, JJ.*) HEM CHANDRA *v.* SRIMANTA CHATTOPADAYA. **A. I. R. 1925 Cal. 944.**

——— **O. 6, R. 17 and Sch I, Appx. A. Form. 47**—*Addition of Relief—Suit for specific performance of an agreement to sell—Amendment allowing addition of prayer for possession—Propriety.*

It is open to a Court in a suit for specific performance of sale also to give a decree for possession and therefore a court cannot be said to have exercised its discretion wrongly in permitting the amendment of the plaint in such a suit and allowing the plff. to add a prayer for possession also. (*Coutts-Trotter, C. J. and Wallace, J.*) CHOCKALINGAM PILLAI *v.* PICHAPPA CHETTIAR **22 L. W. 579 : (1925) M.W.N. 202.**

——— **O. 6, R. 17**—*Addition of relief- Amendment of plaint—Change of date when cause of action arose and not of cause of action itself.*

Where an amendment sought for is only to change the date when cause of action arose and not to change the cause of action itself, the amendment ought to be allowed. (*Visvanatha Sastry, J.*) RAMASAMI *v.* VENKATANARAYANA. **(1925) M.W.N. 781.**

———**O 6, R 17**—*Addition of further relief—Amendment not allowed.*

Where there was a clear omission to add further relief of redemption, the plaintiff was not allowed to amend the plaint in second appeal, to add that relief (*Krishnan and Ramesam, JJ.*) (PUPOOTH *alias* KOMANCHERI) RARICHAN *alias* RAMANUNNI KURUP *v.* VAYISRAVANTH MANAKAL RAMAN. **17 L. W. 558 :32 M. L. T. 107 : (1923) M. W. N 301 : A. I. R 1923 Mad. 553 : 44 M L. J. 515.**

———**O. 6, R. 17**——*Addition of relief—Suit for injunction—Relief for possession necessary—Application for amendment of plaint, by addition of prayer for possession—Discretion.*

Where a plaintiff sued for perpetual injunction probably on the misunderstanding that the slight user of the land by the defendant, *viz.*, tying cattle, feeding them and erecting a house for himself did not amount to possession but only a nuisance which could be prevented by an injunction and after the issues were framed and before the evidence was led, he applied for amendment of the plaint by the addition of a prayer for possession which the Court refused. *Held*, that having regard to the provisions of O. 6, R. 17, C. P. Code, the Court should have allowed the amendment

C. P. CODE (V OF 1908), O. 6, R. 17—Alternative Case.

upon payment of costs by the plaintiff. (*Dolal, J.C.*) WARIS ALI *v.* SYED ABBAS ALI. **1 O. W. N. 757 : 10 O. & A. L. R. 1185 : A. I. R. 1925 Oudh 555.**

———**O. 6, R. 17**—*Addition of relief—Appellate Court—Powers of*—Bona fide *mistake—Effect.*

An amendment is not generally allowed by an appellate Court if the plaintiff has elected to go to trial on an issue whether the frame of the suit is correct notwithstanding the objection of the defendant that it offends S. 42, Specific Relief Act. But where it is framed *bona fide* believing consequential relief is not open to him, the appellate court can allow an amendment of the plaint. The rule is subject to change and that no amendment can be allowed if the plaintiff had notice in the trial court of the objection to the frame of the suit (*Mullick and Bucknill, JJ.*) SHEIPUJAN RAI *v.* MAHARAJA BAHADUR KESHO PRASAD SINGH. **2 P. 919 : 76 I. C. 347: 5 Pat. L. T. 315 : A. I. R. 1924 Pat. 310.**

———**O. 6, R. 17**—*Addition of relief—Amendment of plaint—Principles.*

If the claim sought to be introduced is an entirely different cause of action and is one that was not heard of before limitation expired the amendment ought not to be allowed but if it is nothing more than the original claim in another form and is one that the other party had already to meet no injustice is caused and the amendment ought to be allowed. (*Robinson, J.*) MA E GYE *v.* MA LE WA. **64 I.C. 29: 13 Bur.L.T. 201.**

Alternative case.

———**O. 6, R. 17**—*Alternative case—Pre-emption based on custom or contract.*

A plaintiff basing his suit on a custom of pre-emption, without even mentioning any contract of pre-emption, should not be allowed to amend the plaint at appellate stage. (*Piggott and Walsh, JJ.*) RAM GARIB TIWARI *v.* SHANKER TIWARI. **20 A. L. J. 15 : 65 I. C. 242 : L.R. 3 A. 636 : A. I. R. 1922 All. 5.**

———**O. 6, R. 17**—*Alternative case—Suit on promissory note insufficiently stamped—Original consideration.*

Where the plaintiff, whose suit based on an insufficiently stamped hundi was dismissed, applied for leave to amend his plaint as he wished to sue on the original consideration and the court refused leave, *held* in revision the amendment should have been allowed. (*Martineau, J.*) SUNDAR DAS *v.* PURAN SINGH. **10 P. W. R. 1922 : A. I. R. 1922 Lah. 394 (1).**

———**O.6, R. 17**—*Alternative case—Plaintiff claiming on basis of custom—Amendment that his title was valid even if alleged custom was not proved, must be allowed.*

Where in his plaint, a plaintiff claimed title on the basis of a custom and subsequently applied to amend the plaint by raising an alternative plea that his title held good even if the alleged custom was not established.

Held, that the application for amendment ought to be allowed. (*Dalal, J. C. and Ashworth, A. J. C.*) GHAFOOR KHAN *v.* MEHDI HASAN KHAN. **12 O. L. J. 253 : 87 I. C. 356 : A.I.R. 1925 Oudh 523.**

———**O. 6, Rr. 16, and 17**—*Alternative case—Suit for rescission of contract—Amendment asking for specific performance in the alternative can be allowed.*

In an action for rescission of a contract and for return of earnest money, the plaintiff can be allowed an amendment claiming specific performance as an alternative relief, arising out of the same facts. The court has always the power to strike out matters which tend

C. P. CODE (V OF 1908), O 6, R. 17—Alternative case.

to prejudice, embarass or delay the trial, if the occasion arises during the trial. Scope and effect of the Judicature Act pointed out. (*Das and Macpherson, JJ.*) CHANDRA PRASAD *v.* HIRA LAL.
2 Pat. L. R 82 : 5 Pat. L. T. 49 : 75 I. C. 433 : 1923 P. H. C. C. 357 : A.I.R. 1924 Pat. 280.

——**O. 6, R. 17**—*Alternative case—Buddhist Law (Burmese)—Defence raising* kittima *adoption*—Appathitta *adoption proved—Defence can be amended.*

Where the written statement raises a defence of *kittima* adoption, but the facts establish only *appathitta* adoption, the Court can under suitable circumstances permit even at the appellate stage the written statement to be amended so as to make the defence an alternative one of *appathitta* adoption, (*Lentaigne, J.*) MAUNG GYI *v.* MAUNG AUNG PYO.
2 Rang. 661 : 85 I. C. 286 : A. I. R. 1925 Rang. 178.

——**O. 6, R. 17**—*Alternative case—Grounds for.*

In a suit for specific performance or in the alternative for damages, plaintiff can be allowed to amend his plaint by giving up his claim for specific performance in view of the fact that the property had depreciated in value. It is a well recognised rule of law that under O. 6, R. 17, C. P. Code, the powers of amendment vested in the Court are very wide. (*Raymond, A.J.C.*) EANCHOSE NARSE *v.* ABDUL HUSSAIN
A.I.R. 1922 Sind 46.

Appellate Court.

——**O. 6, R. 17**—*Appellate Court—Amendment of plaint.*

A direction by an appeallate Court for amendment of a plaint can be carried out in the Appellate Court. (*Chatterjea and Panton, JJ.*) NRIPENDRANATH *v.* HEMANTA KUMAR. **63 I. C. 701 (C).**

——**O. 6, R. 17**—*Appellate Court—Powers of—Amendment of grounds of appeal.*

The court has full discretion under the C. P. Code to allow the amendment of pleadings at any stage and if the grounds of appeal are not sufficiently clean, there is no reason why an appellate Court should not direct a report on all the points raised in the applications filed by the parties in the District Judge's Court. (*Scott Smith and Abdul Raoof, J.J.*) MT. RAM PIARI *v.* SULTAN BAKSH **3 Lah. 382 : 77 I. C. 207 : A. I. R 1923 Lah. 115.**

——**O. 6, R. 17**—*Appellate Court—Amendment can be allowed in.*

Where plaintiffs alleged but failed to prove exclusive title to certain fraction of the joint estate and where the defendants asserted their exclusive title but it was found that they have no such exclusive title a decree for joint possession of joint property can be given. 29 P. R. 1918, Dist. The question whether a co-sharer occupying a portion of the joint land without denying the joint character thereof should be allowed to retain it until partition in the case of *abadi* land when that land has been reduced to a minimum area barely sufficient for the common purposes of the village was raised but was not decided. The highest court of appeal may allow an amendment of the plaint. (*Shadi Lal, C. J. and Leslie Jones, J.*) MAUJI ASHAQ ALI *v.* GHULAM MAHOMED.
3 Lah. L. J. 75.

——**O. 6, R. 18 and S. 107 (2)**—*Appellate Court—Amendment—Leave to amend plaint in appeal.*

Leave to amend a plaint may be granted by the appellate Court. (*Gokaran Nath, J.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* MAHANT HARCHARAN DASS. **3 O. W. N. 45.**

——**O. 6, R. 17**—*Appellate Court—Amendment*

C. P. CODE (V OF 1908), O. 6, R 17—Cause of action.

of plaint—Power of court—Bona fide *mistake—Objection taken in trial court—Effect.*

Appellate Court can allow amendment where plff. has omitted to seek amendment in the trial court due to a *bona fide* mistake. (*Mullick and Bucknill, J.J.*) SHEOPAYAN RAI *v* MAHARAJA BAHADUR KESHO PRASAD SINGH. **5 P. L. T. 315 : 2 Pat. 919 : A. I. R. 1924 Pat. 310.**

——**O. 6, R, 17**—*Appellate Court—Amendment.*

An amendment of pleadings can be allowed even at the stage of appeal. (*Jwala Prasad, A.J.C. and Kulwant Sahay, J.*) HARGOBIND RAI *v.* KESHWA PRASAD SINGH. **1924 P. H. C. C. 297 : 84 I. C. 386 : 6 Pat. L. T. 465 : A. I. R. 1925 Pat. 168.**

——**O. 6, R. 17**—*Appellate Court—Amendment in appeal—Change of cause of action—Alteration of claim from* kittima *adoption to* Appathitta *adoption.*

The suit was originally brought by the plff. claiming as the *kittima* adopted son of the deceased and was dismissed. On appeal, the plff. applied for amendment of plaint by the insertion of alternative claim based on an *Appathitta* adoption. The Court refused permission to award as the cause of action for each was distinct and different. (*Robinson, C. J. and Maung Ba, J.*) MAUNG BA THEIN *v.* MA THAN MYINT. **3 Rang. 483.**

Cause of action.

——**O. 6, R. 17**—*Cause of action—Amendment of plaint—Cause of action arising after filing of suit should be allowed to be added, where there is no change of jurisdiction, or undue delay in applying nor necessity for fresh enquiry on other facts.*

Events that happened, even after the filing of the suit including these that add to the title of the plaintiff, may be taken notice of, so that a cause of action that arose after the filing of the suit can be included by the amendment of a plaint. But the discretion ought not to be exercised when there is a change of jurisdiction, when there is a great delay in making the application, and may not be exercised if a fresh enquiry on other facts is necessary. But when these features do not exist, the amendment ought as a general rule, to be allowed, to avoid multiplicity of proceedings. In all such cases, the only question of consequence is one of Court-fees, a matter with which the parties are not concerned and the opposite party is not deprived of any defence which is open to him. (*Ramesam and Venkatasubba Rao, JJ.*) V. APPALASURI *v.* KANNAMMA NAYURALU. **49 M. L. J. 479 : 22 L, W. 287 : (1925) M. W. N. 622 : A. I. R. 1926 Mad. 6.**

——**O. 6, R. 17**—*Cause of action—Amendment asking for change in the date of cause of action should be allowed.*

Amendment should be allowed when there is no change in the cause of action but only a change in the date when the cause of action arose. 36 Mad. 378 Rel. upon : 36 All. 370 Expl. (*Viswanatha Sastri, J.*) A. RAMASWAMI *v.* D, VENKATANARAYANA. **(1925) M. W. N. 781 : A. I. R. 1926 Mad. 128 (2).**

——**O. 6, R. 17**—*Cause of action—Limitation.*

To disclose further details of facts which support a cause of action already sued upon is not to introduce a new relief of a new cause of action in the plaint and consequently no prejudice can result to the defendants, on the point of limitation. (*Kinkhede, A.J.C.*) SITARAM *v.* NANDRAM. **78 I. C. 234 : A. I. R. 1925 Nag. 9.**

——**O. 6, R. 17**—*Cause of action—Change of date.*

A change in the date corresponding to the verna-

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cular date which still remains the same is not the introduction of a new cause of action. (*Wazir Hasan, J.C. and Kendall, A. J. C.*) BANS BAHADUR SINGH v. MT. SAKABRAI KUAR. **11 O. L. J, 297 : 81 I. C. 484 : A. I. R. 1924 Oudh 385.**

Declaratory suit.

——O. 6, R. 17—*Declaratory suit—Amendment of plaint—Specific Relief Act, S. 42, Proviso*

The plff. appealed : *Held* (*a*) that declaration suit that a certain decree being based on fraud shall not affect the plff.'s rights and for any other relief which the Court might deem fit to grant, was one for declaration only. 20 Bom. 736 and 30 Cal. 788, Ref. ; (*b*) that a suit for a mere declaration was not competent in this case unless followed up by a prayer for consequential relief by injunction or otherwise, 38 Mad. 922 and 29 I.C. 132, Ref ; (*c*) that the Court ought to have allowed the plff. an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise ; and (*d*) that the mere prayer for general relief is not necessarily a prayer for consequential relief so as to make the suit out of the class of suits for a declaration only. (*Shadilal, C. J. and Dundas, J.*) BUA DITTA v. LADHA MAL. **65 P. W. R. 1921.**

Description.

——O 6, R 17—*Description—Amendment of plaint—Clerical error—Wrong description of mortgaged property in plaint—Amendment if alters cause of action- Application for amendment in appeal allowed.*

Amendments of clerical mistakes are allowed even in second appeals The mortgage in suit was filed along with the plaint and showed quite clearly what the property really mortgaged was, *Held* under such circumstances the amendment prayed for should be allowed. The amendment would in no way alter the cause of action of the plaintiff. (*Ryves and Gokul Prasad, JJ.*) BHAGIRATHI SHUKUL v. CHANDRA HARIHAR PATAK. **20 A. L. J. 159 · A I. R. 1922 All. 81.**

——O. 6, R. 17—*Description- Suit against Railway—Title of defendant as "agent" sought to be altered to 'Railway administration"—Plaint as a while indicating that suit was agai st Railway administration—Amendment should be allowed.*

Where the title of defendant in a suit against a railway company was sought to be altered from the agent, East Indian Railway, Calcutta, into "East Indian Railway Administration", through the Agent, Calcutta, after the expiration of the period of limitation for bringing a suit against the Railway, and the reading of the plaint as a whole clearly showed that the plaintiff's claim was against the Railway Administration as a Company and not against the Agent personally. *Held* : that the amendment should be allowed as the case was only one of misdescription of party. A I. R 1923 Bom. 452 Foll. A. I. R. 1925 Pat 37 Dist. (*Scott-Smith and Martineau, JJ.*) NANAK CHAND MUKANDI LAL v. EAST INDIAN RAILWAY. **6 Lah 2 2 : A. I. R. 1925 Lah. 441.**

——O. 6, R. 17—*Description—Majority of the plaintiff discovered on defendants objection—Amendment should be allowed—C. P. Code, O. 32, R. 2 (b) (ii).*

Where the fact of plaintiff's minority is ascertained upon objection by the defendant and an enquiry by the Court, and it is held that the plaintiff had no knowledge of his minority and no intention of deceiving the Court, an opportunity should be given on application being made to amend the plaint. (*Harrison, J.*) MT DURGA DEVI v. GUR NARAIN. **A. I. R. 1924 Lah. 157.**

Discretion.

——O. 6, R. 17—*Discretion—Suit* in forma pauperis—*Costs of application—Order for payment of.*

An order directing a plaintiff to pay in cash the costs of an amendment of the plaint, after he has been found to be a pauper is improper. *Shah, A.C.J. and Crump, J.*) AMBAJI BALWANT RAO v. HAMMANG RAO. **24 Bom. L. R. 924 : 69 I. C. 207 : 47 B. 104 : A. I. R. 1922 Bom. 385 (7).**

——O. 6, R. 17—*Discretion—Question in controversy" generally refers to question in controversy when defendant puts in his written statement.*

However the necessity, to amend, may have arisen, leave to amend should always be granted and at any stage in the proceedings in order to allow the real question at issue between the parties to be raised on the pleadings unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise. A High Court Vakil like anyone else may make a mistake or omission in his pleadings, and, if he has really done so, he is as much entitled as any one else to put the matter right by amendment in order that the real question in controversy between him and his opponent may be decided. So far from being slow to grant leave to amend pleadings or from pinning the parties to the strict letter of their pleadings, it is the duty of the Court to assist parties in bringing out clearly the real questions in issue between them. The questions in controversy between the parties which have to be brought out clearly and decided are, save in exceptional cases, the questions in controversy when the parties join issue that is, when the defendant puts in his written statement. They do not include new questions which the defendant neither wished nor intended then to dispute, but which, at a later stage, in the proceedings, either because he has changed his mind or because something has happened after he filed his written statement, he thinks it profitable to dispute. A defendant who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement cannot be allowed at a later stage in the proceedings to change his front and make a new case for himself by denying that fact. (*Ramesam and Reilly, JJ.*) SUBRAMANIA v. HITCHCOCK. **22 L. W. 26 : A. I. R. 1925 Mad. 950.**

——C. 6, R. 17—*Discretion—Amendment when allowed.*

Under O. 6, R. 17 an amendment can be allowed at any stage of the suit and the question is one for the discretion of the court, (*Prideaux, A. J. C.*) ANWAR KHAN v. JAKUB KHAN. **79 I. C. 911 : A. I. R. 1925 Nag. 62.**

——O. 6, R. 17—*Discretion—Character of suit changed.*

An amendment altering the character of the suit entirely, was under section 53 of the Old Code, expressly forbidden. But section 135, and rule 17 of order 6 of the present Code make no express restriction on the discretion of the Court provided it is judicially exercised. (*Hallifax, A. J. C.*) SHEONARAIN v. RAM PRASAD. **74 I. C. 317 : A.I.R. 1923 Nag. 241.**

——O. 6, R. 17—*Discretion Clerical error—Vakalatnama not bearing pleader's name but signature—Amendment at the time of judgment.*

C. P. CODE (V OF 1908), O. 6, R. 17—Discretion.

Where a vakalatnama did not contain a name of the pleader after the word Mr. in the printed form, but there was the pleader's signature on it. *Held*, it was a formal defect and the Court should allow it to be amended even after the case is closed. No comprehensive formula can be framed to define precisely the power of a Court to allow amendment but this much may be laid down as the cardinal rule that the allowance of amendments must in every stage of the case rest with the discretion of the court. If a limit to amendments may be laid down it is this: that they must not be allowed to prejudice the substantial rights of the party in favour of whose opponent, the amendment is allowed, but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion on the Court. (*Hallifax, A. J. C.*) MAHARASHTRAYA JNAN KESH *v.* BIJJULAL. **19 N. L. R. 36 : 6 N. L. J. 100 : 71 I. C. 436 : A. I. R. 1923 Nag. 182.**

——— **O. 6, R. 17**—*Discretion—Court's discretion is wide.*

The discretion of a Court under O. 6, R. 17, is very wide. (*Dalal, J. C.*) RAGHURAJ SINGH *v.* MAJID-UN-NISSA. **A. I. R. 1925 Oudh 692.**

———**O. 6, R. 17**—*Discretion — All amendments necessary for determining real questions in controversy should be allowed.*

The provisions of O. 6, R. 17, relating to amendment give a large discretion to the Court. The real question in controversy between the parties was whether the plaintiff had lost his possession in such a way that he could not oust the trespasser *viz.*, the defendant. Originally the plaintiff prayed for perpetual injunction against the defendant restraining him from using the plaintiff's land. Subsequently after the issues were framed plaintiff applied to amend his plaint by adding a prayer in the alternative for possession. The grounds of the claim were not changed. *Held*, that the amendment should be allowed. (*Dalal, J. C.*) WARIS ALI *v.* ABBAS ALI. **A. I. R. 1925 Oudh 555.**

———**O. 6, R. 17**—*Discretion—Ends of justice.*

In a suit for possession of property by a husband from his wife on the ground of adultery, oral application was made to amend the plaint to add a prayer for divorce. Permission to amend was refused by the trial Court on the ground that the plaintiff chose this form of suit deliberately, for the purpose of giving his wife as much annoyance as possible without at the same time giving her the satisfaction of being released from the marriage tie. *Held* the case was pre-eminently one in which an amendment of the plaint should have been allowed in order that justice might be done. Such amendment should be allowed even in second appeal. (*Carr, J.*) MAUNG PO HAN *v.* MA SO YI. **2 Bur. L. J. 65 : 75 I. C. 6 : A. I. R. 1923 Rang. 160.**

Inconsistent claims and pleas.

———**O. 6, R. 17**—*Inconsistent claims—Legal representative of deceased plaintiff cannot plead what the latter could not have pleaded.*

In a suit for redemption of a mortgage, the mortgagor being the owner of an impartible estate the plaintiff died and his legal representative sought to amend the plaint, by including a cause of action for a declaration that the mortgage was not binding on him the successor to the estate. *Held*, that the amendment could not be allowed. It is not open to the legal representative of a deceased plaintiff, to seek to

C. P. CODE (V OF 1908), O. 6, R. 17—Late stage.

include in the plaint by way of an amendment, a claim or relief, which the original plaintiff himself could not have asked for. The proper course for the legal representative is to file a separate suit for such a relief. The wide powers of amendment given under the Code of 1908 are always subject to the rule that by means of an amendment the subject matter of the suit cannot be changed, or one distinct and inconsistent cause of action cannot be substituted for another, (1921) M. W. N 396, Ref. (*Kumaraswami Sastri, J.*) INAGANTI VENKATARAMA ROW *v.* VENKATALINGAMA NAYANIM BAHADUR VARU. **(1922) M. W. N. 42 : 15 L. W. 72 · 30 M. L. T. 204 : 68 I. C. 703 : A. I. R. 1922 Mad. 49 : 42 M. L. J. 43.**

Late stage.

———**O. 6, R. 17**—*Late stage—Claim for mortgage decree only—Alternative claim for personal decree put forth at the hearing of appeal to Privy Council—Amendment was not allowed.*

Where the plaintiff first claimed only a mortgage decree and his claim was decreed by the trial Court but dismissed by the High Court and it was only when the appeal was being heard before the Privy Council that he put forth the alternative claim for personal decree. *Held* that no such decree could be made without an amendment of the plaint, and although it was in their Lordship's discretion to allow an amendment at that last stage they did not think that this was a case in which that discretion should be exercised. (*Mr Ameer Ali.*) GAJADHAR MAHTON *v.* AMBIKA PRASAD TIWARI. **41 C. L. J. 450 : 27 B. L. R. 853 · 87 I. C. 292 : L. R. 6 P. C. 126 : (1925) M. W. N. 532 : 22 L. W. 306 : 47 All. 459 : A. I. R. 1925 P. C. 169 (P. C.) : 49 M. L. J. 238.**

———**O. 6, R. 17**—*Late stage*

Where defts. based their defence on a definite plea that they were holding under a completed sale, and it was that plea that was put in issue and had been decided against them. They cannot be allowed to plead at such a late stage as second appeal an agreement to sell. It has been repeatedly pointed out that Pleadings must be strictly construed, and parties must be restricted to what they allege in their plaint or in their written statements as the case may be. (*Broadway, J.*) PALU *v.* RASILU. **75 I. C. 740 : A. I. R. 1923 Lah. 675.**

——— **O. 6, R. 17**—*Late stage.*

When there is an amendment at a very late stage it should not be allowed. (*Broadway and Wilberforce, JJ.*) SANKARI *v.* JODHA. **3 Lah. L. J. 437.**

———**O. 6, R. 17**—*Late stage—Change of case—Improper grant of leave to amend—Interference on appeal.*

When a suit for redemption of a mortgage was ready for judgment the plff. presented an application stating that he had filed the plaint in ignorance of real facts and asked the Court to allow him to amend his plaint. This prayer was granted by the Court at this late stage. In the amended plaint the plff. alleged that the mortgage deed was unlawful and was executed without consideration and necessity, and that he was entitled to get possession of the mortgaged property without paying anything to the mortgagee. *Held*, that by the amendment the nature of the suit was altogether altered and such amendment ought not to have been allowed at such a late stage. (*Broadway and Abdul Raoof, JJ.*) TOHLU MAL *v.* BUTA. **67 I. C. 132 : 3 L. L. J. 184.**

———**O. 6, R. 17**—*Late stage--Amendment of plaint.*

An amendment should be allowed at however a late stage, provided it can be made without injustice to the other side and if the other side can be compensated

C. P. CODE (V OF 1908), O. 6, R. 17—Late stage.

by costs, there is no injustice. (*Shadi Lal, C. J. and Wilberforce, J.*) DEVI DAYAL *v.* WAZIR CHAND.
61 I. C. 328 : 3 U.P.L.R. (Lah.) 44.

——O. 6, R. 17—*Late stage—Second Appeal—Conversion of suit into a representative one was disallowed.*

Amendment of plaint at the stage of second appeal, so as to convert a suit for maintenance of certain members alone of a tavazhi, into a suit on behalf of the whole tavazhi, was not allowed. (*Devadoss, J.*) K. P. P. MAYANKUTTI *v.* K. P. P. KATHIRI.
21 L. W. 224 : 86 I. C. 747 : A. I. R. 1925 Mad. 441.

——O. 6, R. 17—*Late stage—Amendment ordered after conclusion of trial is not necessary.*

In a suit for a declaration that a decree obtained against a minor was not binding on him on account of the gross-negligence of the guardian *ad litem* in the conduct of the prior suit, the plaint did not allege and the deft., did not ask for, particular of the alleged negligence. The parties, however, went to trial and it was found on the evidence that negligence had been established Subsequently the court ordered an amendment of the plaint. *Held* that the case having been tried out and a finding of negligence arrived at, no amendment was necessary. (*Krishnan and Venkatasubba Rao, JJ.*) VEERAPPAN *v.* MENNAPPAN.
31 M. L. T. 449 : 70 I. C. 335 : A. I. R. 1923 Mad. 245.

——O. 6, R. 17—*Late stage—Mere delay is no ground for refusing amendment.*

Mere delay is no ground for refusing amendment of plaint. The Court should consider the grounds of the application and deal with them in a judicial manner. Loss to the defendant due to delay in amendment can well be compensated by an order for costs in his favour. (*Wazir Hasan, J. C.*) MT. EJAZ RASUL KHAN *v.* MUBARAC HUSAIN. **27 O. C. 231 : 11 O. L. J. 613 : 79 I. C. 1033 : A. I. R. 1925 Oudh 291.**

——O. 6, R. 17—*Late stage—Opportunity already given—Prejudice to defendant.*

Where in the written statement the defts. raised a plea that the suit was badly framed inasmuch as possession had not been asked for and an issue was raised on this contention of the defts. but yet the plff. never thought of applying for the necessary amendment of the plaint and the trial Jndge allowed the plff. an opportunity of amending plaint and yet the plff. refused to amend, and it was only after the whole case was concluded and the plff. probably had suspicions as to the bent of the Judg's mind for amendment. *Held* the Court below acted quite rightly in refusing the amendment. 9 S. L R. 174 ; 26 C. 845, Foll. Where an order for amendment would operate prejudicially to the defts. so far as their evidence of possession is concerned, the Court will refuse to allow amendment of plaint. (*Kincaid, J. C. and Raymond, A. J. C.*) MANOHERDAS *v.* RAMDAS. **75 I. C. 549 : A. I. R. 1923 Sindh 17.**

Limitation.

——O. 6, R. 17—*Limitation—Amendment of plaint.*

A Court can allow a plaint to be amended, even though at the time of the amendment a new suit on the same cause of action would not be allowed. (*Mookerjee and Rankin, JJ.*) SATCHIDANANDA DUTT *v.* NRITYA NATH MITTER.
27 C. W. N. 1007 : 50 Cal. 878 : 79 I. C. 287 : A. I. R. 1924 Cal. 517.

——O. 6, R. 17—*Limitation—Correction of description of parties.*

C. P. CODE (V OF 1908), O. 6, R. 17—Mistake.

Where no substitution or addition of a new plaintiff was made by an amendment but only the description of the plaintiff was corrected, there is no question of limitation that arises. (*Kotwal, A. J. C.*) BAKARAM *v.* HIRALAL. **71 I. C. 39 : A. I.R. 1923 Nag. 96.**

——O. 6, R. 17—*Limitation.*

Amendment of plea should not be allowed if on the date when it is asked for, a fresh suit on the amended allegations would be barred by limitation. (*Lentaigne and Carr, JJ.*) HIRJEE DEORAJ & CO. *v* MAUNG NYUN SHEIN. **2 Rang. 414 : 84 I. C 295 : A. I. R. 1925 Rang. 49.**

Mistake.

——O. 6, R. 17—*Mistake—Suit instituted in name of wrong person by* bona fide *mistake—Real plaintiff's names substituted subsequently—Latter entitled to be treated as plaintiffs from start, subject to questions of limitation.*

Where owing to a *bona fide* mistake a suit was instituted in name of some persons who were not the real plffs. and the matter in dispute was referred to arbitration by order of Court and subsequently the plaint was amended by the substitution of the names of the real plffs. *Held*, that after the date of amendment of plaint the persons whose names were substituted as plaintiffs,were,subject to the question of limitation, to be treated as if they had been described as plaintiffs in the suit from the very start, and that they were entitled to take advantage of and proceed under the order of reference to arbitration made previous to the amendment of the plaint, and that the said arbitration proceedings were rightly continued after the order for amendment of plaint had been passed. (*C. C. Ghose, J.*) HOGARTH SHIPPING CO. LTD. *v.* MITSUI BUSSAN, LTD. **41 C.L.J. 511 : 88 I. C. 1029 : A. I. R. 1925 Cal. 922.**

——O. 6, R. 17—*Mistake—Amendment of plaint should be allowed in case of* bona fide *mistake by plaintiff.*

Amendment of plaint should be allowed in case of *bona fide* mistake by plaintiff. Where the plaintiff was not the original creditor and made a *bona fide* mistake in the plaint which was found out on inspection taken by defendants : *Held*, the plaintiff should be allowed to amend his plaint by inserting the facts disclosed by the inspection. (*Kinkhede, A. J. C.*) SITARAM *v.* NANDRAM. **78 I. C 234 : A. I. R. 1925 Nag. 9.**

——O. 6, R. 17—*Mistake if* bona fide *whether deliberate or not, justifies permission to amend.*

Amendments of pleadings should be allowed in suitable cases in order to overcome the effects of *bona fide* mistakes whether the assertions or omissions caused by such mistakes were deliberately made or not. (*Lentaigne, J.*) K. E. A. K. A. SAHIB AND CO *v.* K. M. ADAMSA. **2 Rang. 66 : 81 I. C 465 : A. I. R. 1924 Rang. 249.**

——O. 6, R. 17—*Mistake—Amendment—When allowed—Claim barred by limitation—Change in description of defendant.*

In allowing amendments under O. 6, R. 17 courts have to see that the case tried is consistent with the case as originally laid and the equities and grounds of relief originally pleaded and alleged are not departed from. Nor should fresh claims barred by limitation be allowed to be set up. Where however in a partnership action a *bona fide* mistake crept in, in describing the defendant and the latter knew of it, the court should allow the amendment to bring out the true state of things. (*Kincaid, J. C. and Aston, A. J. C.*) DIPCHAND DOWLAT RAM *v.* PARMANAND CHIMAN-

C. P. CODE (V OF 1908), O. 6 R. 17—Nature of suit.

DAS. **A. I. R. 1924 Sind 144.**

Nature of suit.

——**O. 6, R. 17**—*Nature of suit—Suit on allegation of tenancy failing—Plaintiff was not allowed to succeed on title.*

The plaintiffs brought a suit on the footing that the defendants were their tenants. The defendants pleaded that they were not tenants under plaintiffs. The defendants proved their case. The third party whose title was set up by the defendants was not a party to the case. That party was in possession. *Held*, that it was not open to the plaintiffs to shift their ground and claim to eject the defendants as trespassers and that the plaintiffs should not be allowed to amend or implead the said third party. (*Sulaiman and Mukerjee, JJ.*) SHIB RAM *v.* FAQIRA.

L. R. 6 A. (Civ.) 348 : 89 I. C. 103 : A. I. R. 1925 All. 705.

——**O. 6, R. 17**—*Nature of suit—Allegations in plaint determine nature of suit—Suit brought under one section -Defendant—Objecting—Offer to amend plaint to suit another section should be allowed.*

The nature of the suit is indicated by the allegations made in the plaint and not by quoting a section which does not apply. Where a suit was brought under S. 165 of Agra Tenancy Act, but on the objection by defendant the plaintiff offered to amend the plaint so as to be one under S. 164 and the Court disallowed the same. *Held*, that the amendment ought to have been allowed. (*Mukerji and Dalal, JJ.*) CHANDER SEN *v.* MOHUR SINGH,

85 I. C. 700 : A. I. R. 1925 All. 538.

——**O. 6, R. 17**—*Nature of suit.*

Amendment of plaint is not allowed if it alters the nature of the suit. (*Chatterjee and Newbould, JJ.*) GNANENDRANATH *v* PORESH NATH.

35 C. L. J. 25 : 65 I C 39 : 26 C W N 73 : A. I. R. 1922 Cal. 255.

——**O. 6, R. 17**—*Nature of suit—Amendment of plaint must be allowed when it merely amplifies and does not vary the original cause of action.*

Amendments which only amplify and develop the original cause of action and do not vary it can be allowed. Where the suit was to set aside a sale and where the plaintiff alleged that the defendants taking advantage of his youth had defrauded him and where the plaintiff afterwards applied to amend the plaint by adding that on the date of the sale he was a minor. *Held* that the amendment must be allowed as it was not such a variation of the original cause of action as would preclude permission to amend under O. 6, R. 17; 1922 Mad. 49 Foll. 1922 P. C. 249 Dist. (*Jackson, J.*) SOMASUNDARA BHATTAR *v.* MUTHU THEVAR. **80 I. C. 278 : A. I. R. 1925 Mad. 188.**

——**O 6, R. 17**—*Nature of suit—Pure redemption suit cannot be turned into ejectment suit but redemption of a usufructuary mortgage is a suit for possession.*

Where plaintiffs sued for redemption, which could not be granted as the mortgage deed was unregistered and could not be admissible to prove the terms, but which was admissible to prove the nature of possession, *held*, that plaintiffs could have applied for amendment to convert the suit into one to recover possession as owners but they cannot be allowed to so amend in appeal. (*Ramesam, J.*) N. APPAMMA *v.* S. CHINNA VEADU. **47 M. 203 : (1923) M.W.N. 825 : 19 L.W. 37 : 33 M L.T 146 : 79 I.C. 510 : A. I. R. 1924 Mad. 292 : 45 M. L. J. 667.**

——**O. 6, R. 17**—*Nature of suit—Claim under gift cannot be changed into one under inheritance.*

C. P. CODE (V OF 1908), O, 6, R. 17—New Plea or case.

Plaintiff would not be entitled in the same suit to recover possession of any part of the house as being his share where his original case was that the whole house had been his transferor's property under a gift from the transferor's father and this case has been found to be false. It is impossible to allow the plaintiff to change his case altogether from the case made in the plaint and depend on the case of the defendants for relief. (*Adami, J.*) DALPHEROO MIAN *v.* BANGALI MALI. **4 P.L. T. 397 : A. I. R. 1923 Pat. 481.**

New plea or case.

——**O. 6, R. 17**—*New case—Change of cause of action and subject-matter.*

A Court, though it has full power of amendment of pleadings, cannot allow one distinct cause of action to be substituted for another, nor to change the subject-matter of the suit nor to permit a new case to be made. (*Lord Buckmaster.*) MA SHWE MYA *v.* MAUNG MO HNAUNG. **48 Cal. 832 : (1921) M. W. N. 396 : 48 I. A. 214 : 4 U. B. R. 30 : 30 M. L. T. 28 : 24 Bom. L. R. 682 : 63 I. C. 914 : A. I. R. 1922 P. C. 249 (P. C.).**

——**O. 6, R. 17 and O. 23, R. 1**—*New case—Nature of suit and plaintiffs' title changed during suit amendment or withdrawal not necessary.*

Plaintiffs sued the defendants on the basis of a certain transfer which was challenged by the defendants as void in law. The suit was dismissed but during the pendency of appeal, plaintiffs' transferor died and plaintiffs being his heirs put forth a new plea that they claimed not as transferees but as heirs. *Held* that in view of justice plaintiffs should succeed even though they have not asked for amendment or withdrawal under O. 23, and though the nature of suit has undergone a change thereby. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. **L R. 5 A. 28 : 74 I. C. 971 : A. I. R. 1923 All. 560 (Rev.)**

——**O. 6, R. 17**—*New case—Substitution of new plaint cannot be allowed.*

A plaintiff cannot by amendment be allowed to substitute one plaint for another.

Where the plaintiff has sued as principal on a contract alleged to have been made with him by the defendants for the import of certain goods on c.i.f. terms, he cannot claim to sue on the same plaint the defendants as their agent who has, on receipt of the shipping documents, cleared and delivered the goods to them as his principals. (*Macleod, C. J. and Crump, J.*) KOKAMAL MADHORAM *v.* GULABSINGH GURU DASSINGH. **27 Bom. L. R. 277 : 87 I. C. 481 : A. I. R. 1925 Bom. 248.**

——**O. 6, R. 17**—*New case—Amendment of plaint introducing time barred cause of action cannot be allowed.*

Amendment of plaint which would have the effect of introducing a new cause of action which has become time barred should not be permitted. (*Page, J.*) MCLEOD AND COMPANY *v* IVAN JONES & CO.

87 I. C. 218 : A. I. R. 1926 Cal. 189.

——**O. 6, R. 17**—*New case—Plaint—Amendment in second appeal.*

Where the plaintiffs had full opportunity to amend their plaint in the Courts below, but never did so and there was nothing to prevent the plaintiffs from suing in the alternative in the first instance and basing their suit upon two alternative grounds and no explanation was put forward as to why the plaint was not framed in this manner, an opportunity to amend the plaint in second appeal by introducing an entirely new cause of action was refused. (*Moti Sagar, J.*) KIRPA *v.* MT.

C. P. CODE (V OF 1908), O. 6, R. 17—New Plea or case.

CHINTI. **77 I. C. 518 : A. I. R. 1923 Lah. 530.**

———O. 6, R. 17—*New plea—Pleadings—Partition by metes and bounds—Found against—Division in status.*

Where in a suit by a creditor against a Hindu father and his sons for recovery of a debt contracted by the father, the sons set up a division by metes and bounds which was found against, they could not on second appeal alter their plea into a division in status merely and escape liability on that footing. (*Venkatasubba Rao, J.*) NIDADAVOLU ACHYUTAM *v.* VEERINA SURAYYA. **(1924) M. W. N. 485 : 79 I. C. 902 : A. I. R. 1924 Mad. 845.**

———O. 6, R. 17—*New case—When not to be allowed.*

An amendment ought not to be allowed where the cause of action is materially changed and a party is prevented from setting up a plea of limitation. (*Napier and Odgers, JJ.*) SREEDHARAM VALIA RAJAH *v.* NARAYANA. **(1921) M. W. N. 639 : 71 I. C. 270 : 41 M.L.J. 525.**

———O. 6, R. 17—*New plea—Amendment of plaint should be allowed so as to include a new plea, where, even had the plea been raised earlier, defendant could not have disproved it.*

Where a plaintiff has not raised a plea in the plaint but raises the plea at the trial he should be allowed to amend his plaint, if even had the plea been raised in the plaint as originally presented, the defendant, according to his own pleading, could not have disproved the plea. (*Kennedy J. C. and Rupchand Bilaram, A. J. C.*) BHAWANJI NARSI *v.* ASSAN PITAMBARDAS. **86 I. C. 357 : A. I. R. 1925 Sind 241.**

Partition.

———O. 6, R. 17—*Partition—Partible property other than that included in the plaint can be partitioned.*

Property proved to be partible though not included in the plaint can be decreed to be partitioned without formal amendment. 29 M. 165 Appr. (*Ayling and Odgers, JJ.*) RAMASWAMI CHETTY *v.* PALANI APPA CHETTY. **18 L.W 656 : (1923) M.W.N. 841. 76 I. C. 798 : A. I. R. 1924 Mad. 354.**

Power of Court.

———O. 6, R. 17—*Power of Court—Pre-emption suit—One plaintiff not entitled—Suit dismissed—Appeal—Unentitled plaintiff's name cannot be removed.*

The Court is not entitled to resort to any powers of amendment which it has under the Code of Civil Procedure in order to allow an amendment in a case of pre-emption suit where the plaintiff, whose suit has been dismissed on the ground of his violation of the law of pre-emption by associating with himself in the suit a person not entitled to pre-emption, seeks at the appellate stage to cure the defect by striking out the name of the other plaintiff. (*Lindsay and Kanhaiya Lal, JJ.*) UMAR DARAZ *v.* SRI RAM DAS. **47 All. 450 : 23 A. L. J. 198 : 87 I. C. 55 : A. I. R. 1925 All. 355.**

———O. 6, R. 17—*Power of Court—Amendment by original Court cannot be allowed after decree.*

After a decree has been passed, the original Court cannot allow amendment of plaint. The proper course open to the plaintiffs is to apply, if possible, in view of O. 47 for review. The case is different where amendment is allowed by an appellate Court. 24 A. 456 Dist. (*Fawcett, J.*) KISHEN PRASAD & CO., LTD, *v.* FULLUMAL HIRALAL. **25 Bom. L. R. 888 : A. I. R. 1924 Bom. 166.**

———O. 6, R. 17—*Power of Court—Amendment of plaint, when permissible.*

C. P CODE (V OF 1908), O. 6, R. 17—Power of Court.

Courts will not allow amendment of pleadings except (1) where there is *bona fides* on the part of the applicant ; (2) where the amendment does not cause such prejudice to the other party as cannot be compensated by costs ; (3) where it does not convert a suit of one character to a suit of another character. (*Chatterjea and Newbould, JJ.*) GYANSUDRA *v.* PARESH NATH. **26 C. W. N. 73 : 35 C. L. J. 25 : 65 I. C. 39 : A. I. R. 1922 Cal 255.**

———O. 6, R. 17—*Power of Court—Court's power to amend plaint.*

A Court can allow amendment of a plaint to do that substantial justice for which alone it exists. (*Mookerjee and Buckland, JJ.*) SATIS *v.* KALIDASI. **34 C. L. J. 529 : 26 C. W. N. 177 : 68 I. C. 577 : A. I. R. 1922 Cal. 203.**

———O. 6, R. 17—*Power of Court—Duty of Courts to allow all amendments—Application before framing of issues.*

A Court should always grant leave to amend unless it is satisfied that the party applying was acting *mala fide* or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise. However negligent or careless may have been the omission, the amendment should be allowed if it could be made without injustice to the other side. (*Scott-Smith, J.*) JHARIA COAL COMPANY *v.* DIWAN CHAND & CO. **67 I. C. 335 (Lah.)**

———O. 6, R. 17—*Power of Court—Amendment not changing nature of suit should be allowed.*

Where an amendment does not change the nature of the suit, it should be allowed. Powers of amendment should always be liberally exercised. 1922 249 (P. C.) Foll. (*Krishnan, J.*) SATYANARAYANA VARA PRASADA RAO *v.* SANKARAHANAPALLI VENKATA TIRUMALA. **88 I. C. 65 : 22 L.W. 318 : A. I. R. 1925 Mad. 794 : 48 M.L.J. 489.**

———O. 6, R. 17—*Power of Court*—Ex parte *order—Party duly summoned but not appearing*—Ex parte *order of amendment of plaint passed—Party not entitled to impeach the order.*

A party isnot entitled to impeach an order of amendment of plaint passed *ex parte* against him if he after being duly summoned does not appear as he is not entitled to a fresh notice during the pendency of the suit. (*Prideaux, A.J.C.*) BANOOBI *v.* YAKUBKHAN. **80 I. C. 375 : A.I.R. 1925 Nag. 108 (2).**

———O. 6, R. 17 and O. 23, R. 1—*Power of Court—Order refusing to allow amendment on the ground that it will start a trial* de novo *but allowing withdrawal with permission to bring fresh suit is illegal.*

Where the lower Court refused to permit the amendment for the reason that the suit would have to be tried *de novo* if the amendment were allowed, but accepted the application for withdrawal of the suit with permission to the plaintiff to institute a fresh suit. *Held*, that it would entail a greater waste of public time if the second suit were brought, and that the order permitting the withdrawal with liberty to sue again is illegal, and must be set aside and that the application for amendment must be allowed. 1925 Oudh 291 Foll. (*Wazir Hasan, A. J. C.*) BULAQI DAS *v.* JUGAL KISHORE. **A. I. R. 1925 Oudh 718.**

———O. 6, R. 17—*Power of Court—Amendment of plaint should be freely allowed.*

In proper cases the Courts should freely allow amendments of plaints so as to ensure that justice is done to the parties and the time and the money of the parties are not wasted. (*Kennedy, J. C. and Desouza, A. J. C.*) MUNICIPALITY OF TANDO ADAM *v.* KHAIR MAHOMED. **A. I. R. 1925 Sind 260.**

C. P. CODE (V OF 1908), O. 6, R. 17—Power of Court.

——— —**O. 6, R. 17**—*Power of Court—All amendments necessary to decide points in controversy should be allowed.*

All such amendments should be allowed as may be necessary for determining the questions in controversy between the parties. (*Raymond. A. J. C.*) YUSIF MAHOMED *v.* ABUBACKER IBRAHIM.
78 I. C. 817 : A I. R. 1925 Sind 26.

Prejudice to Defendant.

———**O. 6, R. 17**—*Prejudice to defendant—Amendment cannot be allowed where a right legally accrued to defendant will thereby be taken away.*

The power of the Court to amend the plaint should not be exercised when the effect is to take away from the defendant a legal right which has accrued to him by lapse of time ; but there are cases on which that consideration may be outweighed by the special circumstances of these cases. 22 C.W.N. 10 ; 45 Cal. 305: 24 C. W. N. 749 and 1922 Cal. 255, Ref. (*Chatterjea and Cuming, JJ.*) NIRANKA CHANDRA *v.* ATUL KRISHNA. **28 C. W. N. 1009 : 83 I C. 110 : 41 C. L. J. 149 : A. I. R. 1925 Cal. 67.**

———**O. 6, R. 17**—*Prejudice to defendant—Suit against railway—Defendant described as agent—Plaint may be amended by striking out agent.*

Where a Railway Company was the real defendant in a suit, but the defendant was described as the agent of the Railway Company, and all the parties fully knew of the fact that the suit was against the Railway Company and the relief asked was against the Railway Company who defended the suit as such. *Held*, that it would not be prejudicial to any rights acquired by the company under the law of Limitation if the plaint was permitted to be amended by striking out the word " agent." (*Backer, J. C.*) BULAKIDAS *v.* AGENT B. N. RY. COMPANY **82 I.C. 177 : A. I. R. 1925 Nag. 155.**

———**O. 6, R. 17**—*Prejudice to defendant—Amendment of plaint—Extent of.*

An amendment will not be allowed which would prejudice the rights of the opposite party existing at the date of the proposed amendment, *e.g.*, a right acquired by virtue of the Statute of Limitation. (*Ross, J.*) SINEHI RAM BIHARI LALL *v.* AGENT E. I. RY. **64 I. C. 125 : 2 Pat. L. T. 679.**

——**O. 6, R. 17**—*Prejudice to defendant—Amendment resulting in introduction of new cause of action—Defendant likely to be deprived of the plea of limitation—Amendment should not be allowed.*

The powers of amendment given to Courts are very wide but they should not ordinarily be used to allow a new cause of action to be introduced where the defendant would be deprived of his plea of limitation if the amendment were granted. (*Heald and Chari, JJ.*) S. K. NAGOOR MEERA *v.* H. N. NAINAR MEERA ALI. **4 Bur. L. J. 110 : A. I R. 1925 Rang. 264.**

———**O. 6, R. 17**—*Prejudice to defendant—Under special circumstances amendment taking away right secured by lapse of time can be allowed.*

In the exercise of its jurisdiction a Court can allow an amendment under special circumstances, so as to take away from the defendant a legal right which has accrued to the defendant by lapse of time. (*Aston, A. J. C.*) FIRM OF JESSARAM BHAGWAN DAS *v.* RATANCHAND FATTEHCHAND. **78 I. C. 846 : A. I. R. 1925 Sind 173.**

Refusal to Amend.

——— —**O. 6, R. 17**—*Refusal to amend—Grounds.*

Where only the assignees of plaintiff made an affidavit withdrawing from several important allegations

C. P. CODE (V OF 1908), O. 6, R. 17—Refused to amend.

in the plaint and alleging a radically different story, amendment was held to be rightly refused. (*Lord Phillimore.*) SAHDEO NARAIN *v.* KUSUM KUMARI. **2 Pat. 230 : 50 I. A. 58 : 4 P. L. T. 217 : 32 M. L. T. 121 : 25 Bom. L. R. 560 : (1923) M. W. N 377 : 27 C. W. N. 901 : 18 M. W. N. 597 : A. I. R. 1923 P. C. 21 : 44 M. L. J. 476 (P.C.).**

———**O. 6, R. 17**—*Refusal to amend—Plaint—Valuation.*

Where the court thinks that the claim should have been for possession but the plaintiff did not choose to make that claim and if the plaint was not amended the value of the claim is not enhanced by the mere finding that it required to be amended. (*Macleod, C. J. and Coyajee, J.*) GHANASHYAMDAS *v.* LAXMI BAI. **24 Bom. L. R. 726 : A. I. R. 1922 Bom. 218.**

———**O. 6, R. 17**—*Refusal to amend—Change in cause of action.*

The plaintiff sued for money on a promissory note, which he alleged had been executed by the defendant in consideration of certain sums due. The defendant denied having executed the promissory note, but he was suspected to have substituted a forged promissory note for the one which he had written. The Finger Print Bureau at Allahabad were of the opinion that the finger printed in the document did not agree with those of the defendant. The trial Court held that the plaintiff is entitled to sue on the oral settlement made before the promissory note was given, and on the basis of that settlement it had given the plaintiff a decree for the full amount claimed. On appeal by defendant, the plaintiff had nowhere stated that he wished to change the basis of his suit and fall back on the oral settlement, nor had he asked to be allowed to amend his plaint. The suit had been passed through solely on the promissory note, *held*, when it has been found that the promissory note sued upon is a forgery, the claim must necessarily fail. (*Martineau and Zafar Ali, JJ.*) RAJINDAR SINGH *v.* TEK CHAND. **A. I. R. 1923 Lah. 628.**

——— —**O. 6, R. 17**—*Refusal to amend—Revision.*

Though orders refusing amendment have been set aside by the High Courts on revision where the lower courts have acted with material irregularity; each case must be decided on its own merits, and no hard and fast rule can be laid down that an amendment must, as a general rule be allowed where a refusal to amend would be likely to result in hardship to a party. The test to be applied is whether the amendment would or would not occasion injury to the opposite party such as cannot be recouped by costs andleave to amend should generally be refused if it would. (*Moti Sagar, J.*) SHAMSUD-DIN *v.* DEVI DAS. **77 I. C. 471 : A. I. R. 1923 Lah. 505.**

———**O. 6, R. 17**—*Refusal to amend—All amendments necessary for deciding disputed points must be allowed—Revision lies against improper refusal.*

The powers of amendment conferred on the Courts under the present law are much wider than formerly and all amendments should be allowed as would enable the Court finally to determine all matters in controversy between the parties. The High Court is entitled to set aside in revision an order of the lower Court refusing to grant amendment and to avoid the trouble, delay and expense that would otherwise be caused. (*Srinivasa Aiyangar, J.*) KARIYA GOUNDAN *v.* TIRUKKAIVELU CHETTY. **21 L. W. 639 : 87 I. C. 90 : (1925) M. W. N. 469 : A.I.R. 1925 Mad. 585 : 48 M. L. J. 349.**

———**O. 6, R. 17**—*Refusal to amend—Refusal to*

C. P. CODE (V OF 1908). O. 6, R. 17—Revision.

allow amendment of plaint is revisable—C. P. Code, S. 115.

Refusal to allow amendment disposes of the case so far as the question of amendment is concerned and such an order of refusal is revisable. 7 N. L. R. 130: 15 N. L. R. 125 Rel. on. (*Kinkhede, A. J. C.*) SHANKAR *v.* MURARJI. **78 I. C. 510: A. I. R. 1925 Nag. 195.**

Revision.

——**O. 6, R. 17**——*Revision—Plaintiff allowed to amend plaint so as to satisfy Specific Relief Act, S. 42—No revision lies.*

There is no right to apply in revision against an order permitting the plaintiff who sues for a bare declaratory decree to amend his plaint so as to include a prayer for the consequential relief of possession. (*Godfrey, J.*) MA E *v.* MA E **4 Bur. L. J. 1: 86 I. C. 509: A. I. R. 1925 Rang. 199.**

Shortening Litigation.

——**O. 6, R. 17**—*Shortening litigation—Amendment—Duty of Court to allow.*

It is the manifest duty of a Judge to try to put an end, once for all, to all questions that can arise in relation to a particular transaction. Where an amendment is necessary forthe purposes of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, the Judge should make such amendments. (*Mears, C. J. and Banerjee, J.*) NUR MAHOMED *v.* NATWAR LAL. **45 A. 220: 71 I. C 452: A. I. R. 1923 All. 112.**

——**O. 6, R. 17**—*Shortening litigation—Amendment intended to shorten litigation should be allowed.*

All amendments should be allowed which are intended to shorten the litigation and to put the case of the plaintiff more eminently and clearly if by reason of the plaintiff's case being misconceived in the first instance it has not been put in proper form. 22 C. W. N 611 Foll. (*Kinkhede, A. J. C.*) SHANKAR *v.* MURARJI. **78 I. C. 510: A. I. R. 1925 Nag. 195.**

——**O. 6, R. 17**—*Shortening litigation.*

The only object of allowing amendment of a plaint is to avoid multiplicity of suits. (*Hallifax, A. J. C.*) SHIOBAKSH SINGH *v.* JAGANNATH. **64 I. C. 99 (Nag.).**

——**O. 6, R. 17**—*Shortening litigation—Amendment should be allowed where refusal would result in another but successful suit.*

An amendment of pleadings can be allowed at any stage of the proceedings, where the sole result of a refusal would be to force the plaintiff to another suit to avoid which is one of the principal objects of the much wider rule as to amendment which has been introduced in the present Code of Civil Procedure. (*Robinson, C. J., Lentaigne and Cunliffe, JJ.*) MAUNG SHWE MYAT *v.* MAUNG PO SIN. **3 Rang. 183: 4 Bur. L. J. 141: A. I. R. 1925 Rang. 282 (F. B.).**

Subsequent Cause of Action.

——**O. 6, R. 17**——*Subsequent cause of action—Amendment—Second appeal.*

The High Court in second appeal will not allow an amendment of the plaint so as to allow the plaintiff to sue on a cause of action which has arisen subsequent to the suit. (*Sanderson, C. J. and Chotzner, J.*) MOBARAK MOLLA *v.* HECHAMUDDI MULLA. **65 I. C. 214 (Cal.).**

——**O. 6, R. 17**—*Subsequent cause of action—Change of position.*

An amendment should be allowed when it is necessary for the determination of the question at issue owing to the change of a position of parties since the suit. (*Le Rossignol and Wilberforce, JJ.*) MUMTAZ *v.* NAURANG. **3 Lah. L. J. 227.**

C. P. CODE (V OF 1908), O. 6, R. 17—Technical defect.

——**O. 6, R. 17**—*Subsequent cause of action—New plea raising title acquired after the date of the plaint—Amendment may be allowed.*

There is no general rule that an amendment cannot be allowed so as to plead a title acquired after the date of the plaint. Such an amendment ought to be allowed, in all cases where there is no question of change of jurisdiction, or great delay in making the application, or depriving the opposite party of a defence otherwise available, or the necessity of a fresh trial into facts. 21 Mad. 288 Dist. S. A. No. 1061 of 1922 Rel. on. (*Ramesam, J.*) B. GANGAYYA *v.* V. SATYANARAYANA. **22 L. W. 120: A. I. R. 1925 Mad. 1021.**

——**O. 6, R. 17**—*Subsequent cause of action—Formal amendment may sometimes be dispensed with.*

Where plaintiff had no right of suit at the date of institution but he acquired the right through inheritance opening in his favour after the filing but before disposal of the suit, *held*, that the right of suit can be recognised, even without formal amendment. (*Krishnan and Ramesam, JJ.*) P. THIMMAYYA *v.* P. SIDDAPPA. **20 L. W. 548 (2): 75 I. C. 112: A. I. R. 1925 Mad. 63.**

——**O. 6, R. 17**—*Subsequent cause of action—Declaratory relief—Prayer for possession.*

An amendment in the pleadings should be made if thereby the real and substantial question can be raised between the parties and multiplicity of legal proceedings can be avoided. If a plaintiff sues for a mere declaration and in the altered condition of things it so happens that a declaration will be useless and a second suit for possession will be necessary, it is open to the trial Court to order an amendment of the plaint by the addition of a prayer for possession. (*Simpson and Wazir Hasan, A. J. Cs.*) HAMID MIRZA BEG *v.* AHMAD MIRZA BEG. **9 O. L. J. 359: 68 I. C 986: 4 U. P. L. R. (O. C.) 89: A. I. R. 1922 Oudh 266.**

Technical Defect.

——**O. 6, R. 17**—*Technical defect—Omission to verify is a mere irregularity curable at a late stage.*

A plaint is not a void plaint merely because it does not contain the verification clause as required by the Code of Civil Procedure. The omission to verify it is a mere irregularity which could be cured even at a later stage and such a plaint therefore is deemed as presented on the date of actual presentation and not on the date of its verification. Merely on the ground of such a defect, the plaint cannot be treated as altogether invalid. The subsequent verification is not amendment of the plaint. 22 All. 55 Ref. to. (*Sulaiman and Kanhaiya Lal, JJ.*) SHIB DEO MISRA *v.* RAM PRASAD. **46 A. 637: 22 A. L. J. 690: A. I. R. 1925 All. 79.**

——**O. 6, R. 17**—*Technical defect—Description of the defendant—Limited Company.*

Where the suit for damages for loss of goods sent by the defendant Railway Company was entitled. "The Agent, Railway Company" as defendant and the Railway Company objected to this description, *held*, that the addition of the word "Agent" to the name of the Railway Company in the description of the defendant merely amounted to a misdescription and the plaintiff should be allowed to amend the plaint. If it can be said, in the interests of justice, that there has been a misdescription of a party in the title of a plaint the

C. P. CODE (V OF 1908), O. 7, R. 1.

necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. 64 I. C. 125 Dissented from. (*Macleod C. J. and Crump, J.*) THE SARASPUR MANUFACTURING CO. *v.* B. B. & C. I. RY. CO. **47 Bom. 785 : 25 Bom. L. R. 513 : 73 I. C. 1027 : A. I. R. 1923 Bom. 452.**

——**O. 7, R. 1 (b)**—*Suit by shebait—Omission to describe plaintiff as a shebait is merely misdescription and can be cured by amendment.*

The omission to describe the plaintiff in the cause title as shebait of the idol is certainly a misdescription, but it may be cured by amendment without any hardship to the defendant. (*Walmsley and Ghose, JJ.*) DAYAMAYI *v.* SANKAR NATH MUKHOPADHYAYA. **42 C. L. J. 30 : A. I. R. 1926 Cal. 417.**

——**O. 7, Rr. 1 and 6**— *Limitation as regards suit—Plaintiff to prove he is in time.*

In limitation as regards suit, plaintiff is to prove that he is in time. (*Mookerjee and Rankin, JJ.*) PROHLAD CHANDRA CHOWDHRY *v.* RAMSARAN CHOWDHURY. **38 C. L. J. 213 : A. I. R. 1924 Cal. 420.**

——**O. 7, R. 1**—*Adverse possession should be expressly pleaded at least as alternative ground.*

The requirement of the law is strict and imperative that any plaintiff who seeks to rely upon the acquisition of title by adverse possession should expressly plead it in his plaint at any rate as an alternative ground. (*Spencer, Offg. C.J. and Srinivasa Aiyangar, J.*) RANGAPPA *v.* RANGASAMI. **(1925) M. W. N. 232 : 88 I. C. 249 : A. I. R 1925 Mad. 1005.**

——**O. 7, R. 1**— *Scope.*

The provisions of O. 7, R. 1 (*f*), C. P. Code, are imperative. (*Kinkhede, A. J. C.*) SETH HARBAX *v.* LACHMAN. **82 I C. 201 : A. I. R. 1925 Nag. 183.**

——**O. 7, R. 1**—*Authority to sue is matter of principle but signing plaint is matter of practice and any defect therein may be cured at any time.*

A person who is named as a co plaintiff though he may not sign and verify the plaint may be treated as plaintiff for though a person's authority to bring a suit is a question of principle, yet the proper signing of the plaint is a matter of practice only and any mistake or omission therein may be amended at any time and the authority to institute a suit may be established by means other than the signature alone. (*Rupchand Bilaram, A. J. C.*) MOTHARAM DOWLATRAM *v.* PAHLAJRAI GOPALDAS. **80 I. C. 141 : A. I. R. 1925 Sind 159.**

——**O. 7, R. 2**—*Mesne profits from date of suit cannot be valued.*

Where mesne profits are claimed only from the date of institution of the suit it is obviously impossible to state even approximately the amount of mesne profits. (*Brown, A. J. C.*) MAUNG LU GALE *v.* MAUNG LU PO. **1 Bur. L. J. 267 : 77 I. C. 53 : 4 L. B. R. 140 : A. I. R. 1923 Rang. 110.**

——**O. 7, R. 4**— *Joint family—Suit by manager—Other members not necessary parties.*

Where the deft. passed a promissory note in favour of plff. who was the eldest member of the joint family for money due to the joint family and the plff. sued as the manager, *held*, that as the deft. dealt with the plff. alone though he knew that the loan was from joint family funds the other members of the family will not be necessary parties. 36 All. 383 P. C. and 33 All. 272 P. C., Expl. (*Fawcett, J.*) RAMNATH *v.* RAMDEO. **23 Bom. L. R. 1135 : 64 I. C. 966 : 46 Bom. 358 : A. I. R. 1922 Bom. 281.**

——**O. 7, R. 4**—*Plaint is to state the representative nature of the suit.*

C P. CODE (V OF 1908), O. 7, R. 6.

Under O. 7, R. 4 of the C. P. Code the plaint must contain a statement that the suit is brought in a representative character, whenever such is the case. (*Kinkhede, A. J. C.*) SETH HARBAX *v.* LACHMAN. **82 I. C. 201 : A. I. R. 1925 Nag. 183.**

——**O. 7, R. 5**—*Several defendants—Plaint to show cause of action against each.*

Every plaint must show how the various defendants are interested in the subject matter of the suit and the cause of action against each. (*Kinkhede, A. J. C.*) BALAJI VINAYAK BUTI *v.* VITHOBA. **A. I. R. 1924 Nag. 191.**

——**O. 7, R. 6**—*Pleadings—Ground of exemption from limitation not set up in plaint—If can be set up and proved.*

Where a plaint which is barred does not contain the ground of exemption as required by O. 7, R. 6 the plaintiff cannot afterwards rely on a ground of exemption not contained in the plaint. (*Moti Sagar and Martineau, JJ.*) NANAK CHAND *v.* MAHOMED KHAN. **A. I. R. 1924 Lah. 702.**

——**O. 7, R. 6**—*Grounds of exemption not stated.*

A suit was returned to be presented to the proper Court. When it was so presented to the later Court, it was beyond time. On the plaint no statement as required under R. 6, was made, *held* no statement was necessary as there was the endorsement of the Court returning the plaint giving the dates of original presentation and the date of return. (*Abdul Raoof and Fforde, JJ.*) SUKHBIR SINGH *v.* FIARE LAL. **A. I. R. 1923 Lah. 591.**

——**O. 7, R. 6**—*Mortgage—Suit by mortgagee for possession—Ground for extension of period of limitation set out in plaint—Plaintiff can rely on another ground.*

Under the terms of the mortgage in case of default of interest the mortgagee was to be entitled to realise interest by a separate suit or to claim possession of the mortgaged land in lieu of principal and interest. The mortgagee brought a suit in 1906 for arrears of interest for 3 years and obtained a decree on 18th August 1906. After further default on 6th June 1918 the plaintiffs instituted the present suit for possession of the mortgaged land. It was contended that the suit was barred by O. 2, R. 2, C. P. Code and by Art. 135 Limitation Act, but a Full Bench decided that the suit was not barred under O. 2, R. 2 (1). *Held*, where the plaintiff has mentioned one ground of exemption in the plaint there is no bar under the provisions of O. 7, R. 6 of the Code of Civil Procedure to take another and an inconsistent ground to avoid limitation and the acknowledgment made in the written statement in previous case could be relied on. (*Chevis and Scott Smith, JJ.*) PARMASHRI DAS *v.* FAKIRIA. **A. I. R. 1922 Lah. 230.**

——**O. 7, R. 6**—*Failure to set up acknowledgment as saving limitation is a bar.*

Where the plaintiff did not set up in his plaint, as required by O. 7, R. 6, an acknowledgment, within the meaning of S. 19 of the Limitation Act which would bring his suit within time, he cannot be allowed to raise it. (*Scott-Smith and Campbell, JJ.*) UTTAM CHAND *v.* MT. THAKUR DEVI. **4 Lah. L. J. 190 : 3 Lah. 233 : A. I. R. 1922 Lah. 39.**

——**O. 7, R. 6**—*General relief—Grant of declaration—Suit for possession.*

Where a plaintiff prays for such general relief as the court might grant if his prayer for possession is refused, the Court can grant him a declaration of his title though he fails to obtain the specific relief prayed for. (*Le Rossignol and Martineau, JJ.*) MOHAN LAL

C. P. CODE (V OF 1908), O. 7, R. 6.

v. MAYA MAL. 4 Lah. L. J. 393.

——— O. 7, R. 6—*Construction must be liberal—Ground of exemption from limitation omitted from plaint.*

R. 6 should be construed liberally and reasonably. Where the plaint does not state the ground of exemption from the Law of Limitation, the Court should allow the inclusion of that ground. Where that point is expressed in the plaint R. 6 is satisfied but in such a case plaintiff may try to get over the bar of limitation by putting forth another ground if he believes the latter to be true (*Chevis and Scott-Smith, JJ.*) PARMESHRI DAS *v.* FAKIRIA.
60 I C. 772 : 3 Lah. L. J. 22 : 2 L. 13.

——— O. 7, Rr. 6 and 11 (d)—*Setting aside order rejecting plaint—Rejection on another ground by appellate Court.*

Where it was urged that, the first Court's decision as to the insufficiency of the court-fee, on the ground of which the plaint was rejected, having been reversed the lower appellate Court ought to have remanded the case and not entertained and decided the objection on the ground of limitation. *Held*, the plaint can be rejected, if from the statement therein the suit is barred by any law. If the plaintiff does not show in the plaint the grounds of exemption for bringing the suit after the period prescribed by law as is his duty to do under R. 6, O. 7 the appellate Court can reject the plaint as the first Court can do. (*Prideaux, A. J. C.*) SAWATRAM *v.* GANESHLAL.
A. I. R. 1923 Nag. 30.

——— O. 7, R. 6—*Limitation—Exemption from—Plea of—Inconsistent averments may be allowed.*

A plaintiff fulfilling the requirements of O. 7, R. 6 of the C. P. Code by a statement of grounds showing how the plaint is within limitation, should be allowed to take another and even an inconsistent ground, for getting over the bar of limitation. (*Dhobley, A. J. C.*) ONKARLAL *v* RAJ MAHOMED.
65 I. C. 279 : 17 N. L. R. 209.

——— O. 7, R. 6—*Limitation—Saving of—Acknowledgment—Plea in defence not barred.*

It is open to the plff. to show in reply to the defence set up that his claim was within time by reason of the acknowledgments of the defendants. Such a plea in rebuttal is not inadmissible under O. 7, R. 6, C. P. Code. (*Kanhaiya Lal, J. C.*) RAM AUTAR *v.* BENI SINGH. 25 O. C. 89 : 68 I. C. 196 : A. I. R. 1922 Oudh 135.

——— O. 7, R. 6—*Scope.*

An acknowledgment of liability sufficient under S. 19 of the Limitation Act to give a fresh start to limitation from the date thereof should not be allowed in evidence unless the ground upon which exemption from limitation is claimed is pleaded specifically. (*Das and Ross, JJ.*) CHHATERDHURI MAHTO *v.* NASIB SINGH. 5 P. L. T. 551 : 78 I. C. 919 : A. I. R. 1924 Pat. 806.

——— O. 7, R. 7—*Prayer for general relief—Power of Court to grant reliefs not asked for in the plaint.*

Under O. 7, R. 7, C. P. Code, a prayer for general relief is unnecessary and a Court may always give general or other relief, as it may think just, to the same extent as if it had been asked for. All that is necessary is that the necessary foundation of facts must be laid in the plaint. (*Miller, C. J. and Foster, J.*) SATYATARAN CHAUDHURY *v.* JYOTI PRASAD SINHA DEO. (1923) P. H. C. C. 153 : 5 Pat. L T. 330: 76 I. C. 940 : A. I. R. 1923 Pat. 386.

——— O. 7, R. 9—*Institution of suit—Date of.*

A suit is instituted on the date when the plaint is filed and not on the date when it is ordered to be re-

C. P. CODE (V OF 1908), O. 7, R. 10.

gistered. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. 66 I. C. 923 : 34 C. L. J. 465.

——— O. 7, R. 10—*Court holding plaintiff's case untrue—Procedure is to dismiss the suit and not return the plaint—C. P. Code, S.* 115.

Where a Judge did not hold that on the facts alleged in the plaint he had no jurisdiction but held that the case set out in the plaint was untrue in fact. *Held*, that on this finding he ought to dismiss the suit on the merits and not return the plaint under O. 7, R. 10. If he returns the plaint, he fails to exercise jurisdiction vested in him by law and the order is open to revision. (*Sulaiman and Daniels, JJ.*) BISHESHAR PRASAD PANDEY *v.* RAGHUBIR.
24 A. L. J. 83 : A. I. R. 1926 All. 58: 90 I C. 353.

——— O. 7, R. 10 and S. 92—*Suit under S.* 92—*Claim for possession included—Plaint should not be returned.*

Where a suit under S. 92 includes a claim for possesssion, though no relief for recovery of possession can be granted in a suit under S. 92, the Court will not be justified in returning the plaint altogether. The Court may call upon the plaintiffs to amend the plaint by striking off the claim for possession or it may wait till it pronounces its judgment and may dismiss the claim with regard to that particular relief. (*Sulaiman and Boys, JJ.*) RAMRUP GOSHAIN *v.* RAMDHARI BHAGAT. 23 A. L. J. 601 : L. R. 6 A. (Civ.) 352 : 89 I. C. 40 : A. I. R. 1925 All. 683.

——— O. 7, R. 10—*Absence of jurisdiction—Return of plaint—Dismissal of suit improper.*

It is the duty of a Court to return the plaint for presentation to a proper Court and not to dismiss the suit if it holds that it has no jurisdiction to entertain it. (*Ryves and Stuart, JJ.*) RAM JAS SINGH *v.* BABU NENDAN SINGH. 44 All. 686 : 70 I. C. 98 : A. I. R. 1922 All. 424 (1).

——— O. 7, R. 10—*Scope of—Plaint consisting of claims partly within and partly without jurisdiction—Ancestral home, if a test.*

O. 7, R. 10 does not specifically state what is to be done when a plaint consists of a claim within the Court's jurisdiction and also a claim outside the jurisdiction, but it obviously means that that portion of such a plaint which is outside the jurisdiction shall be treated as though it was a distinct plaint by itself. The mere fact that the ancestral home of persons, who are really residing outside the jurisdiction is within the jurisdiction does not matter. (*Walsh and Wallach, JJ.*). KISHORI LAL *v.* RAM SUNDAR.
64 I. C. 688 (1) : 19 A. L. J. 822.

——— O. 7, R. 10—*Order under—No second appeal lies.*

Only one appeal lies from an order passed under O. 7, R. 10, ordering return of plaint for presentation to the proper Court under O. 43, R. 1 (*a*). (*Macleod, C. J. and Coyajee, J.*) NILKANT VASDEO SAMANT *v.* BALWANT PANDURANG SAMANT.
27 Bom. L. R. 635 : 88 I. C. 753 : A. I. R. 1925 Bom. 431 (1).

——— O. 7, R. 10—*Plaint returned for presentation to proper Court—Plaintiff appealing—Appeal dismissed—Plaintiff's remedy.*

Where a plaint has been returned for presentation to the proper Court, and the plaintiff appeals against the order, he is still at liberty to present the plaint to the proper Court subject to the bar of limitation. (*Macleod, C. J. and Coyajee, J.*) ABDUL AZIZ *v.* CHANDU SONU. 27 B. L. R. 652 : 89 I. C. 68 : A. I. R. 1925 Bom. 418.

C. P. CODE (V OF 1908), O. 7, R. 10.

——0. 7, R. 10—*Scope.*

Where there was nothing to prevent a suit being instituted in a Court if the proper procedure had been followed, in which case it would have been decided on merits, *held*, the only course for the Court was to dismiss the suit. As it is not a case in which the suit should have been instituted in another Court, R. 10 of O. 7 does not apply. (*Macleod, C. J. and Shah, J.*) MAHOMEDBHAI HUSENBHAI *v* ADAMJA HALIMBHAI. **46 Bom. 229 : A. I. R. 1922 Bom. 152.**

——0. 7, R. 10—*Plaint returned and then presented in proper Court—Court-Fees Act amended in the meantime—Fees according to new act must be paid—Court fee.*

When the plaint which has been returned is presented in a Court of competent jurisdiction, the suit, even for purposes of Court-fees, must be taken to be instituted on the date of such re-presentation and therefore on such plaint the Court-fee should be leviable under the law which was in force at the time when the plaint was re-presented. If the Act is amended in the meantime increasing the amount of fee payable thereunder, the plaintiff should be credited with fee originally paid. 15 C. L. J. 241 Ref. (*Newbould and Graham, JJ.*) BIMALA PRASAD *v.* LALMONI. **30 C. W. N. 90 : A. I. R. 1926 Cal. 355.**

——0. 7, R. 10—*Plaint returned by Civil Court after its return by Small Cause Court—Order is not one under R.* 10.

If a plaint has been returned under S. 23 of the Provincial Small Cause Courts Act to be presented to another Court and it is presented to an ordinary Civil Court, any order for return of the plaint by the Civil Court afterwards is not an order under O. 7, R. 10, C. P. Code, and, therefore, no appeal lies from such an order. 18 C. W. N. 380 Foll. (*B. B. Ghose, J.*) HARA MOHAN *v.* SUDHANSHU BHUSAN. **85 I C. 1002 : A. I. R. 1926 Cal. 83.**

——0. 7, R. 10—*Appeal wrongly filed without excuse was dismissed and not returned.*

An appeal presented to the High Court wrongly without any excuse, the law being clear, was dismissed, as the High Court refused to return the memorandum of appeal. (*Suhrawardy and Graham, JJ.*) CHATURBHUJ MAHESRI *v.* HARLAL AGARWALA. **80 I. C. 858 : A. I. R. 1925 Cal. 335.**

——0. 7, R. 10—*Return of appeal for presenting to a proper Court—Revision lies.*

Order returning a memorandum of appeal to be presented to the proper Court is revisable. (*Abdul Raoof, J.*) GHULAM SARWAR *v.* GHULAM MUSTAFA. **7 L. L. J. 285 : 26 Punj. L. R. 584 : 90 I. C. 603 : A. I. R. 1925 Lah. 479.**

——0. 7, R. 10—*Returning plaint for presentation to proper Court—Specific Relief Act, S.* 42—*Arbitration Act (IX of* 1899), *S.* 14.

A suit for a declaration that a certain award, not filed in Court, is not binding on the plaintiff falls under Specific Relief Act, S. 42 and not under Arbitration Act (IX of 1899), S. 14, and as such can be filed in the Sub-Judge's Court and not in the District Judge's Court. (*Le Rossignol and Campbell, JJ.*) THE FIRM OF HIRA NAND MURLIDHAR *v.* THE FIRM FLEMING SHAW & CO. **4 L. L. J. 12 : 68 I. C. 187 : A. I. R. 1922 Lah. 26 (1)**

——0. 7, R. 10—*Suit presented—Court having no jurisdiction should not dismiss it but return it for proper presentation.*

When a suit is not maintainable in the Court to which it is presented, it should not dismiss it but should return it for presentation to proper Court. (*Phillips, J.*) TRUSTEE OF THE VIZIANAGRAM ESTATE *v.* PAILA ACHANAH. **22 L. W. 522 : (1925) M. W. N. 771 : A. I. R. 1926 Mad. 140.**

C. P. CODE (V OF 1908), O. 7, R. 10.

——0. 7, R. 10—*Plaint ordered to be returned for presentation to proper Court, as the subject-matter was beyond the jurisdiction of the Court—Whether order is a final order—Subsequent order allowing the withdrawal of the claim of some items and bringing the claim within the jurisdiction of the Court.*

The Court first held that the valuation of the subject-matter was beyond the jurisdiction of the Court and ordered the plaint to be returned for presentation to the proper Court. Subsequently, the plaintiff applied to withdraw his claim to certain items and amend the plaint so as to bring the valuation within the jurisdiction of the Court and the same was allowed. *Held* that this order was not without jurisdiction and the first order was not a final order. (*Odgers, J.*) KOMMAREDDI RAMACHANDRAYYA *v.* VENKATARATNAM. **22 L. W. 582 : (1925) M. W. N. 804 : A. I. R. 1926 Mad. 133 (2).**

——0. 7, Rr. 10, 11—*A Court should reject plaint on refusal of plaintiff to pay Court-fee though for claim exceeding Court's jurisdiction.*

Where the Court directed plaintiff to pay Court-fee on market value but the plaintiff did not pay and the Court held that the subject-matter of the suit exceeded its jurisdiction and directed the return of the plaint for presentation to a superior Court, *held*, that the procedure of the Court was illegal. The Court should have first called upon the plaintiff to state the market value and then directed him to pay the proper Court-fee on his plaint and on his failure to do so rejected the plaint. If the plaintiff paid the requisite Court-fee and it was then found that the valuation of the suit went beyond the jurisdiction of the Court the plaint should have been returned for presentation to the proper Court. (*Krishnan, J.*) KANDASWAMI GOUNDAN *v.* SUBBAI GOUNDAN. **46 M. L. J. 345 : 34 M. L. T. 92 : (1924) M. W. N. 338 : 77 I. C. 781 : A. I. R. 1924 Mad. 646.**

——0. 7, R. 10—*Finding on the point—Amending the plaint giving further particulars.*

After having been found by the Court that gross negligence has been established there is no necessity whatever for amending the plaint by giving fuller particulars. The order directing amendment of the plaint is inconsistent with previous judgment and it should be set aside. (*Krishnan and Venkatasubba Rao, JJ.*) VEERAPPAN SERVAI *v.* MENNAPPAN. **70 I. C. 335: 31 M. L. T. 449: A. I. R. 1923 Mad. 245.**

——0.7, R.10—*Court finding that it has no jurisdiction to try suit—Court cannot try suit on merits.*

Where a Court decides that it has no jurisdiction to entertain a suit, but instead of returning the plaint proceeds to decide the suit on the merits and passes a decree, the decree is liable to be set aside in revision. (*Simpson, A. J. C.*) SHUKRA *v.* FARZAND ALI. **A. I. R. 1925 Oudh 735.**

——0. 7, R. 10 and S. 107 (2)—*Civil Court holding that appeal lies only to the Revenue Court should not dismiss appeal but should return it to be presented to proper Court.*

Where a Civil Court holds that it has no jurisdiction to entertain an appeal and that the appeal lies in a Revenue Court, the Civil Court should not dismiss the appeal. The right course for it to take would be to return the memorandum of appeal for presentation to the proper Court. (*Misra, A. J. C.*) KALKA *v.* RAM SUCHIT. **12 O. L. J. 362: 2 O. W. N. 499 : A. I. R. 1925 Oudh 499.**

——0. 7, R. 10—*Return of plaint—Revision.*

Where on application of the plaintiff, the plaint was

C. P. CODE (V OF 1908), O. 7, R. 10.

returned to be presented to the proper court and in revision the High Court by order refused to interfere but the lower appellate court in appeal set aside the order of the trial court returning the plaint, *held*, it would be impossible to restore the plaintiff to his prior position and it is not desirable that any further inference should be made on revision with the progress of the hearing and the order of the trial court must be confirmed. (*Kanhaiya Lal, J. C.*) KHUNAI TEWARI *v.* MT. DILL KUNWAR. **A. I. R. 1923 Oudh 38 (2).**

——— —O. 7, R. 10—*Munsiff returning plaint to be presented to Small Cause Court cannot re-entertain it on the refusal by the latter Court.*

A Munsiff's Court which has once returned the plaint on the ground that the suit was cognizable by a Court of Small Causes has no jurisdiction to entertain it again although the Small Cause Court has also returned the plaint for presentation to the Munsiff's Court, the previous order of the Munsiff being final between the parties unless set aside by a superior Court. (*Ross, J.*) RAZAUR RAHAMAN *v.* ATTAR HUSSAIN.
2 Pat. L. T. 739: 64 I. C. 496: A. I. R. 1922 Pat. 368.

———O. 7, R. 11 and S. 149—*Extension of time—Limitation.*

Under O. 7, R. 11 (*c*) read along with S. 149, C. P. Code, a Court has power in its discretion to allow a plaintiff further time in which to make good a deficiency in court-fee and if such deficiency is made good within the time prescribed, the fact that in the meantime limitation had expired would not affect the suit. (*Ryves, J.*) RAM DIAL *v.* SHER SINGH. **45 A. 518: 21 A. L. J. 387: L. R. 4 A. 251: 74 I. C. 358: A. I. R. 1923 All. 538 (1).**

———O. 7, R. 11.

Ordinarily a mortgagor or those responsible for the mortgagor's estate will not be liable to account to the beneficiaries unless it can be shown that the sale had realised sufficient to pay off the mortgage, and left a surplus, and that the surplus was in the hands of the person from whom an account was claimed. But the plaintiffs are not in a position to allege anything of the sort. *Held*, as the plaint does not disclose a cause of action, it should be rejected (*Macleod, C. J. and Shah, J.*) MAHOMEDBHAI HUSENBHAI *v.* ADAMJA HALIMBHAI. **46 Bom. 229: A. I. R. 1922 Bom. 152.**

———O.7, R. 11—*Plaint rejected for undervaluation—Plaintiff appealing, putting same value on appeal as he put on plaint—Appeal cannot be rejected as insufficiently stamped, without investigating true value of suit properties.*

Where a plaint was rejected under O. 7, R. 11 for insufficiency of Court-fee on the ground that the plaintiff had undervalued his suit and that he had failed to pay enhanced Court-fees in accordance with the real value of the property as found by the Court, and where plaintiff preferred an appeal valuing the appeal at the same value as he had put upon his plaint originally: *Held*, that the appellate Court was bound to go into the question as to the true value of the properties and that without coming to a finding on this question it could not hold that the appeal was insufficiently stamped. (*Greaves and Chakravarti, JJ.*) AMART LAL KUMAR *v.* SISIR KUMAR BASU. **87 I. C. 651: A. I. R. 1926 Cal. 427.**

———O. 7, R. 11—*Provisions of—Mandatory—Deficient Court-fee—Procedure—Objection when to be raised.*

The provisions of O 7, R. 11, C. P. Code are mandatory and they require that where a plaint is written on paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency.

C. P. CODE (V OF 1908), O. 7, R. 11.

38 B. 41, 2 Pat. L. J. 74, Ref. The fact that the objection is heard at a time subsequent to the registration of the suit is immaterial because the provisions of the rule can be brought into operation at any stage of the suit. 12 A. 553; 18 M. 338; 47 C. 376; 34 C. 20 Rel. (*Mookerjee and Cuming, JJ.*) RADHA KANTA SAHA *v.* DEBENDRA NARAYAN SAHA. **49 Cal. 880: 70 I. C. 101: 38 C. L. J. 74: 27 C. W. N. 566: A. I. R. 1922 Cal. 506.**

———O. 7, R. 11—*Suit dismissed on merits—Order for additional Court-fee is incompetent.*

Where the Court has dismissed a suit on the merits, it is not competent to order that the plaintiff should pay the additional Court-fee and that if he failed to do so the plaint would stand rejected. (*Martineau, J.*) ISMAIL SHAH *v.* SALEH MAHOMED SHAH.
7 L. L. J. 18 : 86 I. C. 266: A. I. R. 1925 Lah. 326 (2).

———O. 7, R. 11—*Cause of action arising after plaint filed—Suit should not be rejected.*

Where in a suit for money, the real cause of action arose only after the institution of the suit, the Court should not reject the plaint and drive the plaintiff to filing a fresh suit but pass a decree there itself. (*Martineau and Zafar Ali, JJ.*) KANSHI RAM *v.* JAIMAL SINGH. **6 Lah. L. J. 31: 75 I. C. 562: A. I. R. 1923 Lah. 590.**

———O. 7, R. 11 and O 17, R. 3—*Plaint rejected because plaintiff did not file amended plaint as asked to do—O. 7, R. 11 and not O. 17, R. 3 applies.*

Order 17, R. 3, applies only after a suit has been instituted and only after it has been adjourned for the purpose of giving evidence. But where a plaint is rejected on the ground that the plaintiff has not filed an amended plaint, as he was asked to do, O. 17, R. 3, does not apply, but the case falls within O. 7, R. 11, cl. (*c*). (*Madhavan Nair, J.*) K. SANKARANARAYANA IYER *v.* VENKATARAMA IYER.
86 I. C. 491 : A. I. R. 1925 Mad. 1045.

———O. 7, R. 11—*Suit to set aside decree on mortgage—Fraud regarding execution of mortgage alleged against defendants in previous suit—Continuance of fraud in conduct of previous suit need not be alleged.*

The suit was brought by the junior members of an Aliyasanthana family for declaration that a decree obtained against certain other members (including the two managers) was not binding on them. The plaintiffs were not parties to the former suit. The plaint made various allegations of fraud in connection with the execution of the mortgage deed on which the former suit was laid but made no further specific allegations of fraud in the conduct of the former suit. *Held*, that if the defendants in the former suit were different from the executants of the mortgage the plaintiff ought to have made a further allegation about the conduct of the defendants in defending the suit such as that they did not raise an obvious plea open to them or that the executants of the document were not managers at the time, conduct showing gross negligence equivalent to fraud and collusion. But as in the present case the plaint attributed initial fraud to the defendants in the suit at the stage of execution of the document it was not necessary for the plaintiff to make a redundant allegation that the fraud continued during the conduct of the suit and hence the plaint did disclose a cause of action. (*Ramesam, J.*) DURGAMMA *v.* KECHAMAYYA.
(1925) M. W. N. 162 : A. I. R. 1925 Mad. 792 : 48 M. L. J. 351.

———O. 7, R. 11—*Order under—Revision lies.*

According to the practice in the Madras High Court, an order holding that a certain Court-fee is payable is revisable. 4 Pat. L. J. 57 Dist. (*Krishnan, J.*) SUDA-

C. P. CODE (V OF 1908), O. 7, R. 11

LAIMUTHU PILLAI *v.* P. SOMASUNDARAM PILLAI.
(1925) M. W. N. 104 : 87 I. C. 25 : A. I. R. 1925 Mad. 722 : 48 M. L. J. 514.

——O. 7, R. 11—*Suit to recover bonus credited to plaintiff in two years and partly paid to the plaintiff is based either on a completed gift or on contract and therefore there is good cause of action which is not a mere promise without consideration—Contract—Consideration.*

A suit was dismissed upon demurrer on the ground that the plaint disclosed no cause of action. The plaint alleged that the plaintiff who was a godown keeper in a Mahomedan firm was credited with a bonus of Rs. 3,500 out of the profits of the firm in consideration of his good services, and that out of the bonus, which was carried to the plaintiff's credit in 1919-20 the plaintiff was allowed to draw out Rs. 420 but the balance was refused notwithstanding the demand. *Held*, [Per *Spencer, Offg. C. J.*] The plaint disclosed a case of completed gift and there was more than a mere promise though the amount originally was of the nature of a bonus.

Per *Srinivasa Aiyangar, J.*—The plaintiff's claim should be deemed to be based on a contract apart from his pleas of completed gift or the case of depositor and the depositee. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) P. KANAKASABAPATHY *v.* HAJEE OOSMAN SAHIB. **20 L. W. 910 : (1925) M. W. N. 279 : A. I. R. 1925 Mad. 192: 47 M. L. J. 791.**

——O. 7, R. 11—*Rejection of plaint—Powers of appellate Court.*

An appellate Court has the same powers of rejecting a plaint under O.7, R.11 of the C.P. Code, as the court of first instance. It is the duty of the plaintiff to show in his plaint the grounds on which he claims exemption from limitation in respect of a claim which is *prima facie* barred by limitation. If he fails to do so the appellate Court is not bound to give an opportunity to specify those grounds, (*Kotwal, A.J.C.*) VITHOBA YADEO *v.* SURYABHAN. **69 I. C. 554 (1): A. I. R. 1924 Nag. 80.**

——O. 7, R. 11 and S. 151—*Rejection of plaint—Inherent power of Court--Suit by next friend of minor.*

The instances given in O. 7, R. 11, C. P. Code, empowering the Court to reject a plaint are not exhaustive and they do not limit the powers of a Court. A Court has jurisdiction in a proper case to dismiss a suit filed by the next friend of a minor on the ground that it is not in the interests of the minor that the suit should be allowed to go on. (*Wazir Hasan and Neave, A. J. Cs.*) THAKUR HARIHAR BAKHSH SINGH *v.* THAKUR JAGANNATH SINGH. **11 O. L. J. 260 : A. I. R. 1924 Oudh 413.**

——O. 7, R. 11 and O. 9, R. 9—*Rejection of plaint—Non-payment of Court-fee—Application for restoration does not lie.*

Where a plaint has been rejected by a Court for non-payment of Court-fees and the order has been signed by the Court, the order operates as a decree and the court has no power to restore the suit under O. 9, R. 9, C. P. Code or under its inherent powers under S. 151, C. P. Code. The proper remedy of the plaintiff is by way of an application for review under O. 7, R. 11 of C. P. Code. (*Das and Kulwant Sahay, JJ.*) RAMESHWARDHARI SINGH *v.* SADHU SARAN SINGH. **2 Pat. 504 : 4 Pat. L. T. 261 : 72 I.C 629 : A. I. R. 1923 Pat. 354.**

——O. 7, R. 11—*Insufficient stamp—Time must be given to make good deficiency.*

In the case of a plaint insufficiently stamped, the Court is bound under O. 7, R. 11, to give the plaintiff time to make good the deficiency although it is found that the plaint had been deliberately filed on an insufficient Court-fee. (*Coutts and Macpherson, JJ.*) DEONATH SAHAI *v.* RADHA KANT PRASAD. **3 P. L. T. 142 : A. I. R. 1922 Pat 56 (1).**

——O. 7, R. 11—*Plaintiff entitled only to one of two reliefs sued for—Lower Court decreeing suit fully—Decree need not be vacated but may be varied.*

Where a person who is entitled to sue only for accounts sues for dissolution of partnership and for accounts, and the lower Court decrees the suit, where accounts have been taken and where defendants have not been prejudiced, the lower Court's decree need not be vacated but it is enough if it is suitably varied. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) TULSIDAS *v.* GANGARAM. **18 S L. R. 96 : 86 I. C. 944 : A. I. R. 1925 Sind 272.**

——O. 7, R. 11 (*a*)—*Power when to be exercised.*

The power to reject a plaint on the ground it does not disclose a cause of action must be exercised with great care and it is only if the court thinks that if even all the plaint allegations are proved there is no cause of action that the plaint can be rejected. (*Madgaonkar, A. J. C.*) COLLINS *v.* CHARLES BOOTH & CO. **80 I. C. 958 : 17 S. L. R. 9.**

——O. 7, R. 11 (c)—*Appeal—Memorandum insufficiently stamped—Rejection of appeal.*

An appellate court has no right to reject an appeal on the ground that it is insufficiently stamped. (*Rafique and Lindsay, JJ.*) JAI SINGH GIR *v.* SITA RAM SINGH. **21 A L. J. 333 : 74 I.C. 757 : L. R. 4 A. (Civ.) 188 : A. I. R. 1923 All. 349 (1).**

——O. 7, Rr. 14 and 18 (2)—*Documents produced by plaintiff in answer to case set up by defendants—No necessity for filing before first hearing.*

Where the plaintiff produces certain documents in rebuttal of a case set up by the defts. he need not enter them in the list prescribed by O. 7, R. 14, C. P. Code, nor need he file them before the first hearing under O.7, R.18 (2), C.P. Code. Where the trial court refused to admit certain receipts tendered in evidence to prove the plaintiff's parentage which was denied by the defendant, on the ground they were not filed under O. 7, R. 18 (2). C. P. Code. *Held*, the trial court was wrong in its procedure and it should have allowed the plaintiffs to prove the documents at the trial. (*Miller, C. J. and Mullick, J.*) MANBODH MISSIR *v.* BHAIRO MISSIR. **4 U. P. L. R. (Pat.) 97 : 4 Pat. L. T. 322 : 1922 P. H. C. C. 300 : 77 I. C. 848 : A. I. R. 1922 Pat. 569.**

——O. 7, R. 14—*Document not filed in Court when may be allowed to be used.*

Where it is made clear to the Court, that though a document is not filed or entered in the list along with the plaint, the document cannot be said to be fabricated on the face of it ; there is no reason why the party should not be allowed to use it in Court. (*Jwala Prasad, J.*) SUKAN SHAHU *v.* JHORI MAHTO. **60 I. C. 372 (Pat.).**

——O. 7, R. 16—*Suit on pro-note—Note not returned to defendant—Security.*

Where the promissory note sued on is not returned to the defendant, the deft. may become liable to third persons who may become holders of the note in due course and Courts can obtain proper security from the plaintiff before awarding him the amount found due from the defendant. (*Sadasiva Aiyar and Spencer, JJ.*) DUGGEMPUDI NAGAMMA *v.* TIRUMALA-REDDI PEDA VENKATAREDDI. **59 I. C. 363 : 12 L. W. 147.**

——O. 7, R. 18—*Failure to produce document—Effect of.*

C. P. CODE (V OF 1908). O. 7, R. 18.

Where a plaintiff who is directed to produce a certain document by a certain time fails to do it, he cannot put it in as evidence later without leave of court, but this does not entitle the court to reject his plaint. Neither O. 7, R. 11 nor O. 17, R. 3 apply to such a case. (*Abdul Raoof, J.*) MAHOMED BAKSH *v.* MALIK MUSA. **A. I. R. 1924 Lah. 608.**

——O 7, R. 18—*Certified copies of public documents may be received, though not produced with plaint.*

The C. P. Code, no doubt compels the parties to produce all the documentary evidence in their possession or power on which they intend to rely at the first hearing of the suit. The rule was enacted to prevent fraud by the late production of suspicious documents and no suspicion can attach to certified copies of public documents and such documents may be received in evidence though they have not been produced at the first hearing. (*Das and Adami, JJ.*) DWARKA PRASAD *v.* JAI BORHAM. **67 I. C. 686 : A. I. R. 1922 Pat. 322.**

——O. 8, R. 2—*Limitation under special law cannot be allowed to be raised in appeal.*

A point of limitation under the provisions of Sch. III, Art. 2 of the Bengal Tenancy Act cannot be allowed to be raised for the first time in appeal as the determination of that question depends upon the fact as to when service of notice of deposit was made on the landlord. O. 8, R. 2 requires the defendant to raise a question of special limitation. (*Ghose, J.*) SHEIKH HAJI SADAK ALI KHAN *v.* JANAKINATH SINGHA ROY. **69 I. C. 194 : A. I. R. 1924 Cal. 463.**

——O. 8, Rr. 2 and 4—*Defence to be specific.*

It is the duty of defendants to particularise in their defence all points either of law or fact which they desire to take. Evasive denials are depreciated and the points of defence must be stated specifically and clearly. (*Ghose and Panton, JJ.*) SARIFUN MANDALIN *v.* FERADOUL KHATUN. **76 I. C. 603 : A. I. R. 1923 Cal. 578.**

——O. 8, R. 2—*Limitation should be specifically pleaded.*

Limitation, where it is sought to be relied on, should be specifically pleaded, particularly where the bar is alleged to be under some special law. Points of limitation should not be decided against the parties unless attention of the parties had been drawn thereto and opportunity given them to meet it on evidence. An issue ought to be framed if necessary. (*Woodroffe and Cuming, JJ.*) SECY. OF STATE *v.* ANANDA MOHAN ROY. **66 I C. 287 : 34 C. L. J. 205.**

——O. 8, R. 2—*Question of limitation cannot be raised in appeal.*

A question of limitation cannot be raised for the first time in appeal. It must be raised by the defendant in his pleading according to O. 8, R. 2. (*Mookerji, A. C. J. and Fletcher, J.*) BHUSHAN CHANDRA PAL *v.* NARENDRA NATH KOER. **60 I. C. 280 : 32 C. L. J. 236.**

——O. 8, R. 2—*Plea of limitation.*

A general plea in the written statement that the suit is barred by limitation means that on the face of the plaint, the suit is barred. Hence a substantive plea of limitation cannot be raised unless the necessary facts are stated in the written statement. (*Das and Ross, JJ.*) HASAN IMANA *v.* DEBI PRASAD. **3 P. 546 : 5 P. L. T. 303 : 1924 P. H. C. C. 189 : 80 I. C. 956 : A. I. R. 1924 Pat. 664.**

——O. 8, R. 2—*Want of legal necessity—Plea cannot be raised for first time in appeal.*

Where a mortgage by the manager of a Hindu family is disputed on the ground that there was no necessity for a particular rate of interest, the plea cannot be raised for the first time in appeal. (*Miller, C. J. and Adami, J.*) AITHAN GOPE *v.* KHAKHAI GAHU. **3 Pat. L. T. 367 · 67 I. C. 790 : 1 Pat. 612 : A. I. R. 1922 Pat. 356.**

——O. 8, R. 3—*Fraud, etc., not set up—Absence of issue—Court's powers.*

Where the defendants admitted execution of a document but did not plead fraud or undue influence and no issue was raised regarding the same, it is not open to courts to find that the defendants were not aware of the contents of the document. (*Mullick and Atkinson, JJ.*) SADANAND TEWARI *v.* DEB NATH MANJHI. **1922 P.H.C.C. 154 : A.I.R. 1922 Pat. 184.**

——O. 8, Rr. 3 and 5—*Scope—The words "stated to be not admitted" in R. 5—Meaning of.*

Rule 5 should be read with R. 3. The words "stated to be not admitted" in R. 5 mean specifically stated to be not admitted. (*Ramesam and Reilly, JJ.*) SUBRAMANIA *v.* HITCHCOCK. **22 L. W. 26 : 85 I. C. 900 : A. I. R. 1925 Mad. 950.**

——O. 8, R. 5—*Admission by Mukhtear of a party—Right to require proof in spite of admission.*

Though prior to the framing of issues in a suit the defendant's mukhtear admits a fact alleged by the plaintiff, the admission is not conclusive in his favour and it is open to the court under O. 8, R. 5 proviso to require the facts admitted to be proved by other evidence. (*Scott-Smith, A. C. J.*) VIR SINGH *v.* BHOLA SINGH. **6 Lah. L. J. 358 : 82 I. C. 617 : A. I. R. 1924 Lah. 744.**

——O. 8, R. 5—*Allegation in pleadings—Plaint—Statement as to date of death—Denial—Sufficiency of.*

Where the reversioners of a deceased Hindu bring a suit for possession of properties alleged to have been with the widow of the last male owner and in the plaint they allege that the widow died on a particular date and the defendant in the written statement alleges that the widow did not die on that particular date and also alleges that the plaintiff's suit is barred by limitation, *held*, that it could not be said that inasmuch as the defendant did not make a counter-allegation as to what exactly the date of the death of the widow was, he must be deemed to have admitted that allegation in the plaint within the meaning of O. 8, R. 5 C. P. Code. In the present case there was no question of evasive denial for there was only one fact alleged and that had been stated to be not admitted. Whether the defendant actually knew the date of the death of the widow or not at the time they made, the pleading was not material. (*Phillips, J.*) N. C. RAJAGOPALACHARIAR *v.* BASHYACHARIAR. **20 L. W. 399 : (1924) M. W. N. 788 · 82 I. C. 584 : A. I. R. 1924 Mad. 838 : 47 M. L. J. 520.**

——O. 8, R. 5—*Fact explicitly relied on in the plaint—No denial of it in the written statement of defendant except a general denial.*

When an allegation of fact is explicitly relied on in the plaint and there is no denial of it in the written reply of the defendants except a general one, *viz.* that fact is not admitted must be proved, the general denial will not safeguard defendants unless there is something in the course of trial to justify a suspicion that the defendant was taken by surprise or there was misunderstanding. In the case of a minor defendant however there is an exception which relates to persons under disability in O. 8, R. 5, C. P. Code. (*Oldfield and Venkatasubba Rao, JJ.*) GOVINDASAMI PADAYACHI *v.* R. SAMI PADAYACHI. **16 L. W. 911 : 31 M. L. T. 258: (1923) M. W. N. 42 : A. I. R. 1923 Mad. 114 (2) : 43 M. L. J. 579:**

——O. 8, R. 5—*Discretion when to be used—*

C. P. CODE (V OF 1908), O. 8, R. 5.

Admission made collusively or to evade a rule of public policy.

The discretion under this rule should be exercised by the lower Court where it suspects an admission made collusively or to avoid a rule of public policy An allegation of fact in a plaint not specifically denied, must be deemed to have been admitted and the Appellate Court would in such case be using its discretion wrongly in requiring proof of the admission. (*Sadasiva Aiyar and Spencer, JJ.*) VENKATA REDDI *v.* MUTHU PAMBULU NAIK. **60 I. C. 554 : (1920) M. W. N. 512 : 58 I. C. 801 : 28 M. L. T. 213 : 39 M. L. J. 463.**

———**O. 8, R. 5**—*Failure to deny an oral pleading —No inference of admission can be drawn.*

Provisions expressly made applicable to allegations in plaint, and to defendant's failure to deny them should not be applied to an oral pleading of the defendant so as to infer from the absence of a reply by plaintiff, that the latter accepted it as true. (*Kinkhede, A. J. C.*) LAXMAN *v.* BABUSA. **85 I. C. 768 : A. I. R. 1925 Nag. 380.**

———**O. 8, R. 5**—*Admission in pleadings—Construction of—Qualified admission—Effect of.*

It is a general rule of law that an admission made by the opposite party in his pleadings of a fact necessary for the decision of a case dispenses with its proof. But an admission must be taken as a whole and not piecemeal. The principle upon which the latter rule is grounded is that if a party makes a qualified statement, that statement cannot be used as against him apart from that qualification. An unfair use is not to be made of a party's statement by trying to convert into a particular admission by him. that which he never intended to be such an admission. Where the defendant admits the affixing of his thumb impression in a blank paper, that does not amount to admission of execution of a promissory note which had been brought into existence over his thumb impression. (*Kinkhede, A. J. C.*) DEVIDAS *v.* MAMOOJI. **20 N. L. R. 7 : 78 I. C. 104 : A. I. R. 1924 Nag. 103.**

———**O. 8, R. 5**—*Defendant* ex parte—*Proof of plaint—Allegations when necessary—Practice.*

Under O. 8, R. 5 where the defendant does not appear at all he must be taken to have admitted all the allegations in the plaint. Therefore ordinarily in an *ex parte* case no issue arises at all and there is nothing for the plaintiff to prove. But by the proviso to O. 8, R. 5 it is left to the discretion of the Court to select some of the facts which under the rule itself must be regarded as admitted and to say that the plaintiff must prove them in spite of the implied admission. The Courts do in practice almost invariably, though often tacitly, direct that the main points alleged in the plaint are to be proved otherwise than by the implied admission of the defendants and only the minor points are to be taken as proved by that admission. But when the Court accepts certain allegations in the plaint as proved by the implied admission of the defendant and selects others as requiring proof by the plaintiff it is bound to tell the plaintiff clearly what the points are that have been so selected and the only way to do this is to state them as issues. In the majority of *ex parte* cases it is so clear to everybody what the points selected as requiring proof otherwise than by the implied admission are that it is unnecessary to state them at all, and this would seem to be the state of things for which the last paragraph of Rule 1 of O. 14 provides. But if there is any room for doubt about the matter, then the Court is bound to inform the plaintiff specifically which points he has to prove and which can be taken as proved. (*Batten, J. C. and Hallifax, A.J.C.*) MT. BHURIBHAI *v.* ISHAK HUSSAIN. **69 I. C. 619 : A. I. R. 1923 Nag. 83.**

C. P. CODE (V OF 1908), O. 8, R. 6.

———**O. 8, R. 6**—*Set off—Suit by assignee from co-sharer for profits—Decree in favour of lambardar—Right to set off.*

A decree for arrears of rent obtained by a lambardar against co-sharer could not be set off against a claim for profits by an assignee from the co-sharer. (*Lindsay, Sulaiman and Kanhaiya Lal, JJ.*) GOVIND RAM *v.* KUNJ BEHARI LAL. **22 A. L. J. 217 : L. R. 5 A. 65 (Rev.) : 83 I. C. 403 : 46 A. 398 : A. I. R. 1924 All. 341.**

———**O. 8, R. 6**—*Set off—Suit for price of goods sold and delivered—Defence that there were counter-dealings between the parties—Set off.*

Plaintiff brought a suit for the price of goods sold and delivered. The plea of the defendant was that the suit transaction formed one out of a number of similar transactions between the parties and that if the payments were to be credited on both sides a definite balance would be found payable by the plaintiff to the defendant. *Held*. that the sum claimed by the defendant was an ascertained sum and could be made the subject of a set-off within the meaning of O. 8, R. 6, C.P. Code and consequently the Court below was wrong in refusing to go into his claim. (*Daniels and Neave, JJ.*) HAR PRASAD *v.* FIRM OF RAM SARUP RADHA KISHEN. **22 A. L. J. 844 : L. R. 5 A. 734: 82 I. C. 340 : A. I. R. 1924 All. 872.**

———**O. 8, R. 6**—*Set-off—Counter-claim—Distinction—Claim for unliquidated damages—Omission to plead—Amenament.*

Under O. 8, R. 6 C. P. Code., it is not open to a defendant to claim a set-off in respect of unliquidated damages for alleged breaches of contracts. But the C P. Code does not exclude what is called an equitable set-off provided the defendant's cross-demand arises out of the same transaction as the plaintiff's claim. 2 M.H.C.R. 296, 303, Foll. Under R. 118 of the Bom. High Court Rules a defendant may set up by way of set-off or counter-claim against the claims of the plaintiffs any right or claim whether such set-off or counter-claim sounds in damages or not. Nothing which was not a good set off before the passing of the said rule can be a good set-off under the said rule, the set-off must still be for an ascertained sum or it must arise out of the same transaction, as the plaintiff's claim. A counter-claim, however, need not arise out of the same transaction. Set-off is a ground of defence and it should be pleaded in the written statement Counter-claim does not afford any defence to the plff.'s claim : it is a weapon of offence which enables a defendant to enforce a claim against the plff. as effectually as in an independent action. The above distinction between a set-off and counter-claim hasan important bearing on the question of limitation, forif the statute of limitations is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action ; it is not enough to prove that it was barred at the time when it was pleaded. In the case of a counter-claim, it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded. *Walker* v. *Clements*, (1850) 15 Q. B. 1046 ; *McGowan* v. *Middleton*, (1888) 11 Q. B. 464 : 7 A. 204 ; 42 M. 873 Rel. (*Mulla, J.*) NAJAN AHMED HAJI ALI *v.* SALE MAHOMED PEER MAHOMED. **24 Bom. L. R. 998 : 77 I. C. 943 : A. I. R. 1923 Bom. 113.**

———**O. 8, R. 6**—*Set-off—Counter-claim—Equitable set off—Difference between—Suit for dividend—Right to set off damages.*

C. P. CODE (V OF 1908), O. 8, R. 6.

A set-off and counter-claim are governed by rules or procedure, and a person can only plead by way of set-off or counter-claim that which is permitted by those rules. A set off can be pleaded as a defence and can only be raised where the claim to set-off one against the other whether by plaintiff or defendant exists in the same right. A set-off can also be the subject-matter of a separate action or a counter-claim. In a suit by a shareholder for recovery of dividends declared by the company it is not open to the directors to claim by way of set-off damages due from plaintiff in respect of alleged breaches of contract. (*Macleod, C. J. and Coyajee, J.*) VITHALDAS GULABDAS *v.* THE HYDERABAD SPINNING AND WEAVING CO., LTD. **47 Bom. 182 : 67 I. C. 326 : 24 Bom. L. R. 328 : A. I. R. 1923 Bom. 24.**

——**O. 8, R. 6**—*Scope of.*

O. 8, R. 6, C. P. Code only provides for set-off in suits for recovery of money but makes no provision for counter-claim. (*Newbould and Cuming, JJ.*) GOUR CHANDRA GOSWAMI *v.* CHAIRMAN, NABADWIP MUNICIPALITY. **A. I. R. 1922 Cal. 1 (1).**

——**O. 8, R. 6**—*Unascertained sum—O 8, R. 6 does not apply, but if cross-demands are very closely connected set off can be pleaded.*

Where the sum claimed is not an ascertained sum of money O. 8, R. 6, C. P. Code, is inapplicable. But if cross-demands arise out of one and the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of one transaction. Courts of Equity in England have held that the defendant may be allowed to plead a set-off although the amount may be unascertained. This doctrine of equitable set-off has been recognised by Indian Courts. (*Venkatasubba Rao, J.*) SUTRAME GOVINDA RAO *v.* A. N. RUDRAYYA. **(1925) M. W. N. 228 : A. I. R. 1925 Mad. 830 : 49 M. L. J. 14.**

——**O. 8, R. 6**—*Equitable set-off—Failure to plead does not bar suit.*

It is not obligatory upon a defendant to plead an equitable set-off.

The defendant who was the principal of the plaintiff had a claim against the latter for damages for the unauthorised sale of certain goods belonging to himself (defendant). But in the plaintiff's suit against the defendant, the latter chose not to have the point as to his claim tried. *Held*, that his failure to have the issue tried led to the same legal consequence as an entire omission to raise the plea: but that he was not bound to raise the plea and his omission to raise it did not preclude him from bringing a separate action on it. (*Venkatasubba Rao, J.*) SUTRAME GOVINDA RAO *v.* A. N. RUDRAYYA. **(1925) M. W. N. 228 : A. I. R. 1925 Mad. 830 : 49 M. L. J. 14.**

——**O. 8, R. 6**—*Defendant having first stated in the statement that he would make a separate counter-claim is not estopped from claiming a set-off in the same suit.*

Where plaintiff sued for price of an article and defendant stated that he never got it and that he would bring a separate suit for damages for non-delivery, due to plaintiff's negligence but subsequently changed his mind and wanted to make a counter-claim and set-off in respect of such damages *held*, that though they could not make a counter-claim still they were not precluded from claiming set-off by way of defence to the plaintiff's claim. (*Coutts Trotter, C. J. and Ramesam, J.*) ABDUL KADER BIN SALIM BASHRABIL *v.* FAROJI BIN ALI BANE MOON. **20 L. W. 531 : 83 I. C. 769 : A. I. R. 1925 Mad. 228.**

C. P. CODE (V OF 1908), O. 8, R. 6.

——**O. 8, R. 6**—*Equitable set-off—Time-barred claim by a co-parcener against joint family cannot be set-off.*

When taking accounts in a partition suit, a time-barred claim by one co-parcener against the joint family, cannot be allowed as equitable set-off. (*Spencer and Ramesam, JJ.*) SUBRAYA BHANDARY *v.* JANARDANA BHANDARY. **14 L. W. 534 : 62 I. C. 852 : 41 M. L. J. 370.**

——**O. 8, R. 6**—*Omission to plead set-off—Prior litigation—Effect of.*

In case of legal set-off, deft. is not bound to put forward his counter-claim and a separate suit by him will lie. Yet if he did put forward such a counter-claim by way of legal set-off and if the whole of that counter-claim, was within the competence of the Court to decide, he cannot afterwards sue for any portion of that claim, if he did not get a decree for that portion in the fresh suit. An equitable set-off ought always to be the basis of a counter-claim in the first suit itself. (*Sadasiva Aiyar and Spencer, JJ.*) AMEENAMMAL *v.* MINAKSHI. **60 I. C. 226 : 12 L. W. 173.**

——**O. 8, R. 6**—*Set-off—Counter-claim—Limitation.*

A set-off claimed not merely by way of defence, but made the basis of a counter-claim can in no sense be treated as a defence, and limitation in regard to its recovery must be determined with reference to the date on which the counter-claim was preferred. (*Wadegaonkar, A. J. C.*) BENI *v.* BISAN DAYAL. **89 I. C. 371 : A. I. R. 1925 Nag. 445.**

——**O. 8, R. 6**—*Set-off can be claimed if arising out of the same transaction.*

In a suit for contribution of rent due by plaintiff and defendant, the latter cannot claim by way of set off an amount due to him from plaintiff as share of profits realised by plaintiff as manager of the tenancy land. But he can make a counter-claim in respect of it. (*Kotwal, A. J. C.*) MT. ZUKKOBAI *v.* BHAL SINGH. **8 N. L. J. 205 : A. I. R. 1926 Nag. 155.**

——**O. 8, R. 6**—*Limitation Counter-claim must be within time on the date of pleadings.*

Where defendant claims certain sum against plaintiff in a suit for money not merely by way of defence but as a counter-claim, his claim must be within time on the date he files his pleadings. 7 All. 284 Dist. (*Wadegaonkar, A. J. C.*) BENI *v.* BISAN DAYAL. **A. I. R. 1925 Nag. 445.**

——**O. 8, R. 6**—*Set-off not claimed in the suit cannot be claimed in the execution proceedings.*

Where the plaintiff Bank obtained a decree in a suit in which the defendant did not claim his fixed deposit in the Bank as a set-off. *Held*, he could not claim it in execution proceedings of that decree. (*Kendall, A. J. C*). NATIONAL BANK OF UPPER INDIA, LTD. *v.* GOPAL DAS. **11 O. L. J. 517 : 27 O. C. 248 : 81 I.C. 651 : A. I. R. 1924 Oudh 434.**

——**O. 8, R. 6**—*Equitable set-off can be claimed though time-barred.*

A time-barred debt may be claimed by way of equitable set-off. 12 C. W. N. 60 and 19 C. W. N. 1183 Foll. (*Adami and Sen, JJ.*) NATHAN PRASAD SHAH *v.* KALI PRASAD SHAH. **1925 P. H. C. C. 317 : A. I. R. 1926 Pat. 77.**

——**O. 8, R. 6**—*The whole sum set-off without reference to any portion of the plaintiff's claim which defendant admits determines jurisdiction whether set-off is a legal or equitable one. But where the plaintiff admits any portion of the sum set-off, that portion should be deducted while determining jurisdiction of*

C P. CODE (V OF 1908), O. 8, R. 6.

the Court to try the set-off.

Thewords " not exceeding the pecuniary limits of the jurisdiction of the Court " must be construed as applying to the whole of the ascertained sum. That being so, the valuation of a set-off, for the purposes of jurisdiction, must be taken as relating to the whole of the ascertained sum so pleaded and without reference to any portion of the plaintiff's claim which the defendant admits. This method of valuation should be applied equally whether the set off is of the nature of a legal " set-off' or of an ' equitable set-off.' But where the plaintiff admits in the plaint any portion of the defendant's claim, that portion must be deducted from the set-off claimed while determining the jurisdiction of the Court to try the set-off. (*Lentaigne, J.*) D. S. ABRAHAM AND CO. *v.* IBRAHIM GORABHOY.
2 Rang. 462 : 84 I. C. 971 : A. I. R 1925 Rang. 65.

——**0. 8, R. 6**—*Set-off— Counter-claim — Specific performance.*

Though counter-claim is a form of suit unknown to the C. P. Code, there is nothing to prevent a Judge treating the counter-claim as the plaint in a suit and hearing the two together if the counter-claim is properly stamped. (*Young and Heald, JJ.*) SAYA BYA *v.* MAUNG KYAW SHUN. **2 Rang. 276 : 82 I. C. 721 (1) : A. I. R. 1924 Rang. 346.**

——**0. 8, R. 6** (f)—*The whole of the sum claimed as set-off should be within jurisdiction.*

The words " not exceeding the pecuniary limits of the jurisdiction of the Court" must be construed as applying to the whole of the " ascertained sum." Where plaintiff claimed Rs. 3,567-1-0 but admitted receipt of Rs. 1,600 and prayed for a decree for Rs. 1,967-1-0 and where the defendant admitted the claim for Rs. 3,567-1-0 but alleged that he had made payments to plaintiff amounting in all to Rs. 3,000 and also that plaintiff owed to him Rs. 1,573, the principal and interest due on a promissory-note and claimed Rs. 1,005-15-0 as the net balance due to him by the plaintiff, *held*, that the fact that the defendant claimed only Rs. 1,005-15 0 was not the test to be applied to ascertain whether the set-off was within the jurisdiction of the Court and that the proper test must be whether the ascertained sum or the aggregate of the ascertained sums which the defendant sought to set-off did not exceed the pecuniary jurisdiction of the Court. (*Lentaigne and Carr, JJ.*) MOE MOE *v.* I. M. SEEDAT. **2 Rang. 349 : 84 I. C. 956 : A. I. R. 1925 Rang. 22.**

——**0. 8, R. 9**—*Court's permission is necessary for filing pleadings in reply to defendant's written statement.*

Under the ordinary practice in the mofussil of Bombay it is not customary for a plaintiff to put in a reply to the defendant's written statement ; on the other hand Order 8, R. 9, requires the leave of the Court before any party can make a further pleading after the written statement has been filed. (*Marten and Fawcett, JJ.*) JUVANSINGJI MOTISINGJI *v.* DOLA CHHALA. **27 B. L. R. 890 : A. I. R. 1925 Bom. 390.**

——**0. 8, R. 10**—*Delay in filing written statement—Vakil refusing to file is sufficient cause.*

Where a Vakil refused to file a written statement on behalf of the defendant and did not consent to any other Vakil being engaged, *held*, it was sufficient cause to excuse a delay in filing a written statement after the date fixed. (*Wallis and Krishnan, JJ.*) RAJA MUTHU KRISHNA *v.* NURSE.
14 L. W. 154 : 69 I. C. 695 · (1921) M. W N. 562: 44 Mad. 978 : 41 M. L. J. 213.

——**0. 8, R. 10**—*Rule applies only if there is specific requirement by Court for written statement and not merely general direction in summons.*

Rule 10 of Order 8 applies only to a specific requirement by the Court to the filing of a written statement and not a general direction in the summons that such a written statement may be filed. (*Dalal and Wazir Hasan, A.J.Cs.*) THAKURAIN DHIRAJ KUNWAR *v.* SARJU NARAIN. **12 O. L. J. 532 : 2 O. W. N. 391 : 88 I. C. 540 : A. I. R. 1925 Oudh 567.**

C. P. CODE (V OF 1908), O. 9, R. 1.

——**0. 9**—*Applicability* —Ex parte *decree— Application to set aside—Whether affidavit compulsory—Proper procedure.*

Where the applicant, in seeking to set aside an *ex parte* decree of an appellate Court on the ground that he had no notice of the appeal, was questioned why he did not file an affidavit in support of his allegation. *Held*, there is nothing in Order 9, C. P. Code, making it compulsory on the applicant to file an affidavit. If the Court entertains any doubt as to the applicant's *bona fide* it should require the applicant to file an affidavit or examine him. (*Fremantle, S. M. and Burn, J. M.*) PREM NARAIN *v.* AHMAD SHAH. **L. R. 5 A. 325 (Civ.).**

——**0. 9**—*Applicability—Application arising out of execution proceedings —Order does not apply.*

O 9 of the Code of Civil Procedure is not applicable to applications arising out of execution proceedings. 99 C. W. N. 25 ; 41 C. 1 ; 63 I.C 655 ; 49 I.C. 617 Foll. (*Suhrawardy and Chotzner, JJ.*) NAGENDRA NATH CHATTERJI *v.* RAKHAL DAS TARAFDAR. **41 C. L. J. 286 : 79 I. C. 351 : A. I. R. 1925 Cal. 510.**

——**0. 9**—*Under O.* 9 status quo ante *is only restored.*

Under Order 9, C.P.Code, an application for restoration should be made so as to bring the suit back, as regards parties to the exact position in which it was when the suit was dismissed. After that,it is competent for a particular plaintiff or plaintiffs to apply to be dismissed from the suit or to withdraw the suit. (*Rankin and M. N. Mukerji, JJ.*) KALIDAS CHANDRA RAY *v* HRIDAY CHANDRA DAS.
39 C. L. J. 367 : 83 I. C. 958 : A. I. R. 1924 Cal. 814.

——**0. 9**—*Applicability — Proceedings connected with pauper applications.*

Quaere: If O. 9 applies to proceedings connected with pauper applications ? (*Madhavan Nair, J.*) CHINNAMMAL *v.* PAPATHI AMMAL
85 I.C. 982 : A.I.R. 1925 Mad. 986.

——**0. 9**—*Applicability—Missing of a train is no good ground for absence—Practice.*

It cannot be too emphatically laid down that the missing of a train is no sufficient ground for postponement of a case. Even if the missing of a train was proved to be for good cause parties must understand that they must leave a safe margin for appearance in cases. (*Ashworth, A.J.C.*) MT. AMMA KHATUN *v.* MAHOMED WALI. **88 I.C. 481 : A.I.R. 1926 Oudh 75.**

——**0. 9 and S. 141**—*Applicability to execution proceedings.*

S. 141 and O. 9 are not primarily intended to apply to proceedings in execution under O. 21, R 90 for disposing of applications *ex parte*, still, a court in the exercise of its jurisdiction should have power in such cases to restore the applications to file and decide it on merits. (*Kennedy, J.C. and Madgaonkar, A.J.C*). ISARSING *v.* UDHAVDAS. **83 I.C. 749: 17 S.L.R. 105.**

——**0. 9, R. 1**—Ex parte *cases—Duty of Court to require proof from plaintiff.*

Even if a case is heard *ex parte*, it is the duty of the Court to consider the interest of the absent party and not to pass a decree except on proof by the plaintiff that he is entitled to that decree. (*Newbould and*

C. P. CODE (V OF 1908), O. 9, R. 2.

Rankin, JJ.) MONMATHA KUMAR RAY *v.* JASODA LAL. **28 C. W. N. 300 : 77 I. C. 551 : A. I. R. 1924 Cal. 647.**

——0. 9, Rr. 2 and 4—*Process fee paid in sufficient time—Summons not served — Suit cannot be dismissed.*

Where the plaintiff had paid the process fee on such a date when there was sufficient time for the service of summons being effected before the date of hearing the suit cannot be dismissed under O. 9, R. 2, C. P. Code. The High Court can interfere in revision and set aside the dismissal even though the plaintiff can sue afresh. (*Abdul Raoof, J.*) RALLA RAM *v.* MT. RAJ. **4 Lah. L.J. 71: 67 I.C. 945 : A.I.R. 1922 Lah. 63.**

——0. 9, Rr. 2—4 —*Execution application dismissed under R. 2 or R. 3—Proceedings under R. 4 cannot be taken.*

When an application for execution has been dismissed for default in circumstances mentioned in Rr. 2 and 3 of O. 9 of the Code relating to suits, proceedings under R. 4 of the same order cannot be taken in respect of such an application. 17 All. 106 (P. C.) Ref. (*Dalal, J.C. and Wazir Hasan, A.J.C.*) IKBAL NARAIN *v.* MT. JAGRANI. **28 O. C. 158 : 85 I. C. 450 : A. I. R. 1925 Oudh 552.**

——0. 9, R 3—*Plaintiff and two out of three defendants absent—One defendant alone present—Dismissal of suit—Subsequent suit.*

Strictly construed, the expression "neither party" in O. 9, R. 3 of the C. P. Code would mean "not any one of two or more parties". But the word "party" in the Code in various rules refers to the party whose case is being considered. Consequently in a case where the plaintiff and two out of three defendants were absent but one defendant was present, the dismissal of the suit for default can be said to be under Order 9, R. 3 only so far as the two absent defendants are concerned but not so far as the defendant who was present was concerned. Therefore a second suit against the two absent defendants is maintainable. (*Mears, C.J. and Sulaiman, J.*) MAKUNDI SINGH *v.* PARBHU DAYAL. **90 I. C. 2 : 23 A. L. J. 993.**

——0. 9. R. 3—*Suit against several defendants—One defendant only present—Plaintiff and other defendants absent—Suit dismissed for default—Plaintiff can bring fresh suit against absent defendants for whole amount if cause of action be joint and several—Contract Act, S. 43.*

Where on the day fixed for hearing only one of several defendants appears and the plaintiff also fails to appear, and the suit is consequently dismissed for default, the plaintiff can bring a fresh suit on the same cause of action against the absent defendants and can get a decree for the whole amount if the cause of action be joint and several against all defendants. 10 N. L. R. 39 Foll. (*Kanhaiya Lal, J.*) PARBHU DAYAL SINGH *v.* TIRBHUWAN SINGH. **85 I. C 788 : A. I. R. 1925 All. 425.**

——0. 9, R. 3—*Suit not to be dismissed for plaintiff's failure to appear on date not fixed for defendant's appearance but only for plaintiff's appearance to learn the date for defendant's appearance.*

Where no date has been fixed for the appearance of the defendants within the meaning of O. 5, R. 1 the Court has no power to dismiss the suit in default under O. 9, R. 3. Where the date on which plaintiff made default was not a date fixed for hearing in the case but was a date fixed for the plaintiff to attend and find out what date had been fixed for the appearance of the defendant. *Held*, it was quite unnecessary for the plaintiff to appear on this date, and what the Court ought to have done was to fix a date for the appearance of the defendant, and to proceed with the suit under O. 9, R. 3, if on the date so fixed the plaintiff failed to put in appearance. (*Moti Sagar, J.*) ISHAR SINGH *v.* SHARAF. **78 I. C. 15 : A. I. R. 1925 Lah. 96.**

C. P. CODE (V OF 1908), O. 9 R. 4.

——0. 9, Rr. 3 and 8—*Party pleading bar of O. 9 must prove that prior dismissal was under R. 8.*

O. 9, C.P. Code, contemplates two cases of dismissal for default of appearance with distinct legal consequences attaching to each dismissal. Where the dismissal is under R. 3, O. 9 there is no bar to a fresh suit, while a dismissal under R. 8 of O. 9 precludes a second suit. Hence in seeking to apply O. 9, C.P. Code it is essential to ascertain under what rule the dismissal of the first application was made. It is incumbent on the party who relies on the bar of O. 9 to show that the dismissal of the previous application was under R. 8. (*Madhavan Nair, J.*) CHINNAMMAL *v.* PAPATHI AMMAL. **85 I. C. 982 : A. I. R. 1925 Mad. 986.**

——0. 9, R. 3—*Does not apply to O. 10, R. 4.*

O. 9 does not apply to the special set of circumstances contemplated by O. 10, R. 4. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) KANDOTH PUTHIYADATH CHENGARU CHANDU *v.* PUTHIYADATH CHENGARU RAMAN NAIR. **(1921) M. W. N. 390: 63 I. C. 961 : 14 L. W. 15.**

——0. 9, Rr. 3 and 4—*Dismissal in default of parties—Permits fresh suit.*

Where a suit has been dismissed in the absence of both the parties under O. 9, R. 3, of the C. P. Code the plaintiff can institute a fresh suit under R. 4. (*Baker. J. C.*) SHEIKH BALDAR *v.* SHEIKH IMAM. **76 I.C. 46 : A. I. R. 1925 Nag. 31.**

——0. 9, Rr. 3 and 9—*Execution proceedings—Dismissal of, for default—Setting aside dismissal.*

Where an execution application is dismissed for default, no application lies under O. 9, R. 9 to have the application restored to file and disposed of. 17 A. 106 Ref. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) IQBAL NARAIN *v.* MT. JAGRANS. **1 O. W.N. 847 : 10 O. & A. L. R. 1285 : 28 O. C. 158 : A. I. R. 1925 Oudh 552.**

——0. 9, R. 3—*Dismissal of suit under—Application for restoration—Notice to opposite side is not necessary.*

Notice of application for restoration of a suit dismissed under O. 9, R 3 in the absence of both the parties need not be sent to the other side 10 A. L. J., 399, Foll. (*Daniels, J.C.*) RAMJI LAL *v* KESHO RAM. **24 O. C. 347 : 9 O. L. J. 52 : 64 I. C 767 : A. I. R. 1923 Oudh. 55 (1.)**

——0. 9, R. 3—*Dismissal for default.*

An order dismissing the suit for default under O. 9, R. 3 on the ground that the pleader was not appearing and there was no one to examine the witness where there is a duly authorised agent, with a registered power of attorney present in Court with his witness, is illegal. (*Jwala Prasad, J.*) KUNJA BEHARI SINGH *v.* SHEODAHIN PANDEY. **3 P. L. T. 447 : A. I. R. 1922 Pat. 504.**

——0. 9, R. 3—*Application for amendment of issue—Parties absent—Suit cannot be dismissed.*

Where, on a day fixed to consider an application for amendment of issues, in a suit, neither party is present, the Court can only dismiss the application for amendment and not dismiss the suit for default. (*Das and Adami, JJ.*) SUKHDEO *v.* JUDAGI. **6 Pat. L. J. 331: 63 I. C. 746 : 2 Pat. L. T. 760 (1).**

——0. 9, R. 4—*Application—Notice of, to defendant is unnecessary.*

On an application under O. 9, R. 4 of the Code, notice to a defendant is unnecessary. 10 A. L. J. 399

C. P. CODE (V OF 1908), O. 9, R. 4.

Foll. (*Daniels, J.C.*) RAMJI LAL *v.* KESHO RAM.
24 O. C. 347 : 9 O. L. J 52 : 64 I. C. 767 : A. I. R. 1923 Oudh 55 (1).

——**O. 9, R. 4**—*Merely writing the word file on an application is neither a dismissal nor a rejection of it.*

On the 11th November 1922 the opposite party made an application under O 21, R. 100 affixing *talbana* (court-fee) for service of notice upon the opposite party. That application was headed O. 21, R. 100. On the 11th November when the application was filed the Court on the margin thereof noted. "With case on 18th November 1922". On the 18th November, 1922, the Court made the following note: "Petitioner absent. Put up on 20th November, 1922". On 20th November 1922, it was noted in the margin that "Petitioner still absent, file." The opposite party then on the 14th December 1922 made an application asking for the hearing and disposal of his original application made on the 11th November 1922. In his application the opposite party asked for the restoration of his former application. *Held*, that there was nothing to be restored, inasmuch as the first application was not disposed of in accordance with law. The Court had not rejected or dismissed it, but had simply ordered it to be filed on account of the absence of the opposite party. *Held* further that this kind of order is not sanctioned by the Code nor has it any meaning. *Held*, also that even if the Court below meant to dismiss the application by the word "File" employed by it, it had ample jurisdiction to restore it under Section 151 of the Civil Procedure Code. (*Jwala Prasad, J.*) THAKUR PRASAD *v.* SUKHLAL SINGH.
5 P. L. T. 567 : 79 I. C. 598 : A. I. R. 1924 Pat. 698.

——**O. 9, R. 4**—*Applicability—Application under O. 21, R. 100.*

An application under O. 21. R. 100 is not an application in execution, the proceedings being in the nature of a summary suit. Although the provision of O. 9, R. 4 does not apply to an application under O. 21, R. 90 it can well apply to proceedings under O. 21, R. 100. (*Das and Adami, JJ.*) SHEO NANDAN CHAUDHURY *v.* DEBI LAL CHAUDHURY. **4 Pat. L. T. 93 : 1923 P. H. C. C. 78 : 1 Pat. L. R. 134 : 71 I. C. 484 : 2 Pat. 372 : A. I. R. 1923 Pat. 239.**

——**O. 9, R. 4**—*Duly authorised agent present—Suit cannot be dismissed for default.*

Where there is a duly authorised agent with a registered power of attorney present in Court for the hearing of a suit, it is not competent to the Court, to dismiss the suit for default of appearance of the party under O. 9, R. 4, C. P. C. (*Jwala Prasad, J.*) KUNJA BEHARI SINGH *v.* SHEODHIN PANDEY.
3 Pat. L. T. 447 : 68 I. C. 659 : I.A.R. 1922 Pat. 504.

——**O. 9, R. 4**—*Default to pay process-fees for the attendance of one of several defendants—Suit cannot be dismissed against all.*

A suit should not be dismissed as against defts. who have been served and who have filed written statements, owing to the default of the plaintiff to pay process fees on the day fixed for payment in respect of some defts. The provisions of R. 4 apply to a date fixed for the hearing of the suit and not one fixed for the payment of process-fees. (*Das and Adami, JJ.*) RAMNAND SINGH *v.* CHANDRAMA SINGH.
60 I. C. 377 : 2 Pat. L. T. 256.

——**O. 9, R. 4**—*Application to sue as pauper—Dismissal for default—Fresh application.*

Fresh application can be made, although the applications to sue *in forma pauperies* is once dismissed. (*Po Han, J.*) MAUNG AUNG TUN *v.* MA E KIN.
2 Bur. L. J. 217 : 76 I. C. 785 : A. I. R. 1924 Rang. 161 (1).

——**O. 9, Rr. 5 and 4**—*Dismissal for default—Absenec of petitioner—Non service—Effect of.*

O. 9, R 5 has no application to a case where the plaintiff has failed to appear ; and the fact that the summons has been returned unserved, is no ground to set aside the order of dismissal for default of the petitioner. (*Cuming, J.*) SARBA SUNDARI DASSI *v.* PANCHANAN RAY. **90 I. C. 675 (Cal.).**

——**O. 9, Rr. 6 and 7**—*Order for* ex parte *proceeding—No necessity of setting aside the order.*

The mere fact that on a particular date on which a case had been taken up for, hearing the deft. was not present and an order was made that proceedings should be taken against him *ex parte* on that date, does not preclude him from appearing at a later stage in the suit and if decree is not passed *ex parte* against him, it is not necessary for him to have that order set aside. He can appear and defend the suit and can refer to arbitration and can authorise his pleader to do the same. (*Banerji, J.*) MAUNU *v.* TULSHI.
L. R. 3 A. 579 : 64 I. C. 958 : 20 A. L. J. 39 : A. I. R. 1922 All. 33.

——**O. 9, Rr. 6 and 7**--*Striking of defence—Order when to be passed.*

No order should be passed against a party without allowing him a reasonable opportunity of being heard and adducing evidence in his favour. A suit for partition was taken up for hearing on 12-4-1923 after several prior adjournments granted at the instance of one or other of the parties. On that date the defendant was absent and the plaintiff being ill applied for one month's time. The Court on that date passed an order as follows : "Put up on 14-4-1923 for disposal *ex parte*" The defendants appeared on the 14th April and proved that they should be allowed to defend the suit. The Court rejected their prayer examined the plaintiff and passed an *ex parte* preliminary decree. *Held* that the Court erred in making an order on 12th of April 1923 depriving the defendant of his rights to defend the suit. The Court had no statutory authority to take such a disciplinary measure and there was no question of exercise of the inherent jurisdiction of the Court. (*Mookerjee and Chotzner, JJ.*) RAI SATIYENDRA NATH SEN BAHADUR *v.* NARENDRA NATH GUPTA. **39 C. L. J. 279 : 81 I. C. 867 : A. I. R. 1924 Cal. 806.**

——**O. 9, R. 6**—Ex parte *procedure—Nature of, not specified.*

O. 9, R. 6, C. P. Code, lays down when the Court may proceed *ex parte* but there appears to be no explanation in the Code what *ex parte* procedure is. In respect of the issues, it is the accepted practice that none are framed, though the plaintiff is always called upon, expressly or impliedly but in quite general terms to prove his case. (*Batten, J. C. and Hallifax, A.J. C.*) MT. BHURIB H. A. I. *v.* ISHAK HUSSAIN.
69 I. C. 619 : A. I. R. 1923 Nag. 83.

——**O. 9, Rr. 6, 7**—*Defendant filing written statement—Subsequent withdrawal and proceedings treated as* ex parte—*If proper—Application to set aside—Sufficient cause.*

A defendant after filing his written statement withdrew from the case on the ground he could not afford to engage counsel or go on with the case himself. The court directed the proceedings to go on *ex parte*. *Held* his position was, as if he had not made any appearance at all and the court was entitled to direct the case should proceed *ex parte*.

If at a later stage he applies to set aside the order directing the case to proceed *ex parte* he must show good cause for his previous withdrawal. (*Ashworth,*

C. P. CODE (V OF 1908), O. 9, R. 6.

A. J. C.) MATADEEN *v.* RAGHUNATH PRASAD. **89 I. C. 487 : A. I. R. 1925 Oudh 717.**

——**O. 9, R. 6**—*Court can proceed on an adjourned date for compromise under R. 6.*

Where a defendant had obtained an adjournment on the ground that a compromise between him and the plaintiffs was probable and on the adjourned date he did not appear to advise the Court as to what had been done, an *ex parte* order passed on that date is proper. (*Dalal, J. C.*) MAZHAR HUSAIN *v.* RAFIQ HUSAIN. **28 O. C. 85 : 87 I. C. 222 : A. I. R. 1925 Oudh 645.**

——**O. 9, R. 6 and O. 17, R. 3**—*Setting aside of a decree—Revision.*

A suit for rent was adjourned from time to time but on the day fixed for hearing when the defendant was absent, it was decided on evidence produced by plaintiff and the Court remarked in the judgment that it was to be an *ex parte* decree. On defendant's application the decree was set aside. *Held*, in revision, the order being manifestly just there was no reason to interfere in revision. (*Simpson and Wazir Hasan, A. J. Cs.*) CHANHARJA BAKSH *v.* KALKA PANDE. **9 O. L. J. 543 : 72 I. C. 394 : A. I. R. 1923 Oudh 18.**

——**O. 9, R. 6 and O. 17, R. 2**—*Scope of—Procedure.*

Both under O. 9, R. 6 and O. 17, R. 2 the procedure is the same, where the defendant fails to appear at the first hearing, whether that hearing takes place on the day fixed in the summons as contemplated by O. 9, R. 6, or at a later date to which the hearing may be adjourned, which is contemplated by O. 17, R. 2. In either case, what is contemplated is the procedure on the first day on which the hearing of the suit, as distinguished from interlocutory proceedings, takes place. (*Dawson Miller, C. J. and Coutts, J.*) DAMODHAR DAS *v.* RAJ KUMAR DAS. **1 Pat. 188 : 69 I. C. 837 : A. I. R. 1922 Pat. 485.**

——**O. 9, R. 7**—*Declaration* ex parte—*Subsequent appearance before decree—Not barred.*

Where on the date fixed for the first hearing of the suit the deft. did not appear and the Court declared him *ex parte*, it is open to him to appear on a subsequent hearing and to ask for leave to file a written statement and to examine witnesses. (*Banerji and Stuart, JJ.*) BHAGWAT PRASAD TEWARI *v.* MAHOMED SHIBLI. **20 A. L. J. 270 : L. R. 3 A. 225 : 66 I. C. 892 : A. I. R. 1922 All. 110.**

——**O. 9, R. 7**—*Rule applies only to setting aside proceedings taken place during party's absence, but does not debar party from resuming appearance afterwards.*

O. 9, R. 7, applies to a party, who wishes to be relegated back to the position in which he would have been if he had appeared at a previous hearing at which he was absent, and who wishes the proceedings taken in his absence to be taken over again in his presence, so that he may regain the opportunities of cross-examination, etc., which he lost by his absence. Its operation cannot be extended to the subsequent hearings of the suit, so that the defendant can conduct his case from the day of his appearance : A.I.R. 1922 All. 33; A.I.R. 1922 All. 110 and A.I.R. 1924 Cal. 806, Referred. (*Wallace, J.*) VENKATASUBBIAH *v.* D. LAKSHMINARASIMHAM. **(1925) M. W. N. 647 : A. I. R. 1925 Mad. 1274 : 49 M. L. J. 273.**

——**O. 9, R. 7**—*Refusal to set aside* ex parte *order can be challenged in appeal from the decree.*

The refusal to set aside an *ex parte* order during the trial is an interlocutory order which can be brought to the test as to its justification in appeal. 21 Mad. 324, Dist. ; 12 O. C. 25 Foll. (*Dalal, J. C.*) MAZHAR HUSAIN *v.* RAFIQ HUSAIN. **28 O. C. 85 : 87 I. C. 222 : A. I. R. 1925 Oudh 645.**

C. P. CODE (V OF 1908), O. 9, R. 8.

——**O. 9, R. 7**—*Good cause not shown—Application need not be allowed.*

There is no authority for the proposition that whenever a defendant applied to be heard in a suit, the hearing of which had been adjourned *ex parte*, his application was bound to be allowed irrespective of whether he showed good cause of his previous non-appearance or not. A.I.R. 1922 A. 110, Expl. (*Ashworth, J.C.*) (SHEIKH) FARZAND ALI *v.* EKADASHI. **26 O. C. 10 : 73 I. C. 591 : 10 O. L. J. 36 : 9 O. & A. L. R. 332 : A. I. R. 1923 Oudh 177.**

——**O. 9, R. 8**—*Claim party rejected—Appeal lies.*

An appeal lies from an order dismissing a suit for default where part of the claim is rejected. (*Lord Dunedin*) KANHAIYA LAL *v.* NATIONAL BANK. **4 Lah. 284 : 33 M L. T. 349 : 25 Bom. L. R. 1248 : 50 I. A. 162 : 75 I. C. 7 : A. I. R. 1923 P. C. 114 : 45 M. L. J. 497 (P. C.).**

——**O. 9, Rr. 8 and 9**—*Plaintiff and two out of three defendants absent—Dismissal of suit—Subsequent suit.*

Where the plaintiff and two out of three defendants were absent but one defendant was present and the suit was dismissed for default, *held* that so far as the defendant was present who was concerned, the suit must be deemed to have been dismissed against him under R. 8 and the only remedy open to the plaintiff as against him was to have it set aside under R. 9 and he cannot maintain a second suit. But a second suit against the defendants who were absent is maintainable, for the dismissal as against them must be deemed to be under O. 9, R. 3 and not under O. 9 R. 8. The "partial dismissal" under R. 8 refers to the dismissal of the *claim in part* and not to a case where a suit is dismissed partly under R. 8 and partly under some other rule ; and therefore in this case, where the dismissal was partly under R. 8 and partly under R. 3, it cannot be said that the second suit against the defendants who were absent is not maintainable by virtue of Rule 9. (*Mears, C. J. and Sulaiman, J.*) MAKUNDI SINGH *v.* PARBHU DAYAL. **23 A. L. J. 993 : 90 I. C. 2 : A. I. R. 1926 All. 169.**

——**O. 9, R. 8**—*Plaintiff missing train—Suit dismissed for default—Plaintiff reaching Court and applying for restoration same day—Restoration was ordered.*

It is the business of the Court to decide the rights of the parties and not to deprive them of their rights by the mere exercise of discipline, but to use their discipline for the purpose of penalising them for their neglect and removing the results of such neglect. Where the plaintiff's claim was valued at Rs. 20,000 and on the date of the hearing the plaintiff started with his witnesses but missed the train and reaching the Court after the suit had been dismissed for default, applied for restoration on the same day. *Held* that the plaintiff's negligence in starting for the last train and missing it was human and not irreparable, that it could be repaired by paying the costs of the opposite party and that the suit should be restored. (*Walsh and Ryves, JJ.*) ANRUDH SINGH *v.* MT. RUPA KUNWAR. **L. R. 6 A. (Civ.) 221 : 87 I. C. 118 : A. I. R. 1925 All. 601.**

——**O. 9, R. 8**—*Suit for—Subsequent events—Numerous sales and as many suits, effect of dismissal of last one.*

Where as the result of numerous sales, as many suit for pre-emption were filed and were all decreed, except the last which was dismissed for default, the dismissal does not affect the prior claims. (*Lindsay*

and Sulaiman, JJ.) SRI THAKUR KADHIKA RAMAN BIHARIJI *v.* BOHRA SHIAM SUNDER LAL.
45 A. 561 : 21 A. L. J. 518 : L. R. 4 A. 257 : A. I. R. 1923 All. 526.

——**O. 9, R. 8 and O. 17, R. 2**—*Absence of plaintiff—Court cannot hear case on merits.*

Where the plaintiff and his pleader are both absent on the date of an adjourned hearing, the Court cannot hear the case on the merits under O. 17, R. 2. It can only dismiss the case under O. 9, R. 8 or postpone the hearing under O. 17, R. 2. (*Banerji, J.*) RUKAM *v.* TARA CHAND. **20 A. L. J. 123 : L. R. 3 A. 68 : 65 I. C. 775 : A. I. R. 1922 All. 68.**

——**O. 9, R. 8**—*Dismissal for default—Prior adjournments by Court—Discretion.*

Where a Deputy Collector has three times adjourned a case on account of want of time, it is all the more necessary that he should show some consideration to litigants. Where no kind of consideration was shown to the parties and the dismissal of a suit was induced by the desire merely to get rid of the case, the order of the lower court should be set aside and the case remanded for trial on the merits. (*Fremantle, S. M. and Burn, J. M.*) AJODHYA PRASAD *v.* RAM PHUL KURMI. **L. R. 5 A. 222 (Rev.).**

——**O. 9, Rr. 8 and 9 and O. 47, R. 1**—*Dismissal of suit for default—Review of the order.*

A suit dismissed for default under O. 9, R. 8 can only be restored under Rule 9, but cannot be reviewed. (*Macleod, C. J. and Coyajee, J.*) MAHADEO *v.* LAKSHMINARAYAN. **27 Bom. L. R. 1150 : 90 I. C. 610 : 49 Bom. 839 : A. I. R. 1925 Bom. 521.**

——**O. 9, R. 8**—*Plaintiff arriving late in Court but on the same day—Suit if already dismissed for default, should be restored on payment of costs if any.*

When a party arrives late before the Judge, and finds that his suit or application has been dismissed before his arrival, he is entitled to have his suit or application restored on payment of such costs as may have been incurred, by reason of his default, by the opponents. (*Macleod, C. J. and Coyajee, J.*) CHHOTALAL MOHANLAL *v.* AMBALAL HARGOVAN. **27 Bom. L.R. 685 : 89 I.C. 225 (1) : A.I.R. 1925 Bom. 423.**

——**O. 9, R. 8**—*Absence of pleader or party—Procedure.*

If a plaintiff does not appear either in person or by pleader who has instructions to go on with the suit, then the suit should be dismissed under O. 9, R. 18 and the remedy of the aggrieved party is to apply for review or get the dismissal set aside. (*Macleod, C. J. and Crump, J.*) PANDURANG VEDURAM *v.* MOHAN CHHATRABHUJ. **80 I. C. 178 : A.I.R. 1923 Bom. 395.**

——**O. 9, R. 8 and O. 17, Rr. 2 and 3**—*Scope of—Failure to appear—Procedure.*

O. 17, C. P. Code, deals generally with adjournments. Under O. 17, R. 2, where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may dispose of the suit under O. 9, C. P. Code. In all the cases which come under O. 9, C. P. Code, the party against whom a decree or order is passed in default of his appearance, can apply to the court to have the *ex parte* decree or order set aside on the ground that he can show sufficient cause for his non-appearance. Ordinarily if a case appears on the board on an adjourned date for hearing, and there is default of appearance on the part of both or either of the parties, the court must refer to O. 9, C. P. Code, so as to ascertain the proper procedure to be followed and there is no necessity whatever to have any recourse to O. 17. R. 3. Where the hearing of a suit had not commenced and the plff. did not appear on the adjourned date, the suit should be dismissed under O. 9, R. 8, C. P. Code, and not under O. 17, R. 3, C. P. Code. In the case of a dismissal under O. 17, R. 3, C. P. Code, the remedy is by way of appeal or review and in the case of a dismissal under O. 17, R. 2, the party can apply to set aside the dismissal under O. 9, R. 9 or R. 13, C. P. Code. Courts should exercise extreme caution, when, on an adjourned date the parties or any of them fail to appear. They should in the first place have recourse to O. 17, R. 2 rather than O. 17, R. 3 and even in cases where O. 17, R. 3 can be considered to apply, that is to say, where the case has been part heard and an adjournment granted, it would not be in accordance with justice to refuse a party who had failed to appear on the adjourned date at the time fixed, the chance of having the suit restored. 20 B. 736 743, Foll. (*Macleod, C. J. and Shah, J.*) RATANBAI SHIVLAL LOHAR *v.* SHANKAR DEOCHAND LOHAR.
24 Bom. L. R. 775 : 68 I. C. 514 : 46 Bom. 1026 : A. I. R. 1923 Bom. 27.

——**O. 9, R. 8**—*Adjournment refused—Vakil reporting no instructions—Dismissal.*

When the pleader for a plaintiff applies for adjournment of a suit and on its being refused states he has no further instructions, it is equivalent to absence of the party at the hearing, and any subsequent dismissal of the suit is one under O. 9, R. 8. (*Newbould and Pearson, JJ.*) MANMATHA NATH CHOUDHURY *v.* JAMINI NATH MALLIK. **90 I. C. 768 (Cal.)**

——**O. 9, Rr. 8 and 10**—*Absence of one of two plffs.—Decree in favour of both is not illegal.*

A decree in a mortgage-suit by two plffs. in favour of both, is not illegal though one plff. was absent. The Court has discretion, under R. 10, in such cases, to permit the suit to proceed in the same way as if all the plffs. had appeared. (*Newbould and Panton, JJ.*) KUBENDRA KISHORE ROY *v.* RAI KISHORE SHAH.
62 I. C. 112 : 48 Cal. 57.

——**O. 9, R. 8**—*Scope of.*

The 18th February, 1922, had been fixed for the hearing of the suits, but when the plff. arrived at Asni early that morning, he found that the presiding officer of the Court had left for Miltrankot. He at once went to Miltrankot, and learnt from the Muharrir of the court, whom he found there, that the suits had been dismissed for default and that the Munsif had left for Dera Ghazi Khan. He went to Dera Ghazi Khan and on the 20th February put in applications for the restoration of the cases. He was told that the applications would be brought up when the Munsif returned to Asni, but was not given a date. The applications were laid before the Munsif after his return on the 27th March and he directed that the records should be sent for the 11th April and that the plaintiff should produce evidence. That order, however, was passed in the plff.'s absence and was not communicated to him. He afterwards learnt from the Muharrir that the 11th April was fixed for his appearance in Court, and he appeared on that date. The Munsif then summarily rejected the applications, remarking that the plff.'s plea was absurd and that he had produced no evidence. *Held* the Munsiff's procedure was illegal. (*Martineau, J.*) RAMAL DAS *v.* IMAM BAKSH.
A. I. R. 1923 Lah. 431 (2).

——**O. 9, R. 8**—*Admissions— Co-defendants—Admission by some when binding on others.*

Where there are several defts. jointly interested in a particular matter, an admission by some of them is relevant against all the defts. 44 C. 133 ; 45 C. 159, Ref. (*Le Rossignol and Martineau, JJ.*) BHIKA MAL *v.* PURAN MAL. **69 I. C. 35 : A. I. R. 1923 Lah. 123.**

C. P. CODE (V OF 1908), O. 9, R. 8.

———O. 9, R. 8—*Dismissal for default—Improper order.*

Where the order of dismissal ran as follows: "Claim be dismissed for want of prosecution. Plff. was present but subsequently went away; but the defendant is present. After waiting for some time the plff. was called again but he remained absent." *Held*, it was wrongful to dismiss the claim for default. (*Abdul Raoof, J.*) ATRA *v.* JAGTA **3 Lah. L. J. 449.**

———O. 9, R. 8 — Ex parte *hearing—Default of appearance—Fault of party or his legal advisers—Proper course f rthe Court—Costs sufficient punishment for party in default.*

It is contrary to principles of natural justice, that cases should be decided on the hearing of one side only if the other side is ready and willing to be heard. In such case adequate punishment is to be found in the remedy of costs.

Where the defendants did not appear owing to a mistake of their Vakil and owing partly to their not having received a telegram which had been sent by their Vakil in such time that if it had been received in the normal course, he would have got them on the second day of hearing, it is not a fit case for trying the suit *ex parte* against the defendants. (*Schwabe, C. J. and Wallace, J.*) LAKSHMINARAYANA *v.* THE STANDARD OIL COMPANY, NEW YORK.
17 L. W 627 : 32 M. L. T. (H. C.) 296 : A. I R. 1923 Mad. 581 : 44 M. L. J. 488.

———O. 9, R. 8—*Dismissal under—Appeal does not lie.*

After the framing of issues in a suit, the court disposed of it in these words: "The plaintiffs are absent. The suit is dismissed with costs." The plaintiff appealed against the decision and the appellate court remanded the case for fresh disposal after taking evidence. *Held*, that the disposal of the suit by the trial court was under O. 9, R. 8 C. P. Code and that its order could be displaced only under O. 9, R. 9 or an appeal from an order under that provision. (*Oldfield and Venkatasubba Rao, JJ.*) VELAYUTHA MUDALIAR *v.* SUNDARESAM PILLAI.
(1922) M. W. N. 483 : A. I. R. 1922 Mad. 416.

———O. 9, Rr. 8 and 9 — *Adjournment refused, and suit dismissed—Pleader stating that he had no further instructions—Dismissal of a suit under R. 8 and so application under R. 9 is competent.*

When after an application for adjournment is rejected, the party's pleader states that he has no further instruction, that is equivalent to the absence of the party from the hearing, and so if the plaintiff's suit is dismissed for default, it is a dismissal under R. 8 of O. 9, and the plaintiff is entitled to make an application under O. 9, R. 9, and an appeal lies against the order refusing that application. 34 Cal. 403 Foll. (*Newbould and Pearson, JJ.*) MANMATHA NATH *v.* JAMINI NATH. **90 I. C. 768 : A I.R. 1926 Cal. 246.**

———O. 9, R. 8—*Even one different fact makes causes of action different.*

Order 9, R. 8 of the C. P. Code, prohibits the filing of a second suit on the same cause of action. Where, however, there is even a slight discrepancy arising out of a single fact among many other facts common to the two causes of action, that single fact alone makes them different causes of action. 15 Cal. 422; 16 Cal. 98; 7 N. L. R. 23; 7 N. L. R. 130 Foll. (*Kinkhede, A. J. C.*) UDARAM *v.* GONDU. **87 I. C. 35 : A. I. R. 1925 Nag. 366.**

———O. 9, R. 8—*Suit fixed for issues and not ready for hearing—Dismissal in default is not unjustified.*

On a date fixed for issues where a plaintiff makes a default in appearance even though the suit is not ready for hearing and the default is due to a mistake of his pleader, Court can dismiss the suit under O. 9, R. 8. (*Simpson, A. J. C.*) BISHAN NARAIN *v.* ABDUL MANAN. **2 O. W. N. 574 : 89 I. C. 64 : A. I R. 1925 Oudh 682.**

———O. 9, R. 8—*Legal practitioner's mistake about date—Court need not excuse default.*

It is for the party and his pleader, if they are duly notified for a day, to appear on that day, and, if they make a mistake as to the date fixed, they must take the consequences (*Simpson, A. J. C.*) BISHUN NARAIN *v.* ABDUL MANAN. **2 O. W. N. 574 : 89 I. C. 64 : A. I. R. 1925 Oudh 682.**

———O. 9, R. 8, O. 17, R. 2 and S. 115—*Plaintiff's case closed—Case adjourned for next day because defendant's evidence not completed—Plaintiff absent on next day—Suit dismissed for default—No revision lies.*

The plaintiff closed his case and the hearing of the defendant's evidence was begun. The case was then adjourned till next day for the remainder of the evidence. Next day the plaintiff and her pleader were both absent and the Court dismissed the suit under O. 9, R. 8 read with O. 17, R. 2, C. P. Code. *Held*: that it was within the competence of the Court to dismiss the suit for default, and it could not be said that in doing so the Court acted with material irregularity in the exercise of its jurisdiction. (*Daniels, J. C.*) MT. AISHA *v.* MT. CHATTA. **2 O. W. N. 432 : 89 I. C. 418 : A. I. R. 1925 Oudh 433.**

———O. 9, R. 8—*Dismissal for default—Sufficient case—Pleader sent for when case called.*

When a case was called up, plaintiff's pleader was in the bar room and his clerk went to call him. By the time the pleader came the case had been dismissed for default. *Held* it was proper case for restoration. (*Wazir Hasan, A. J. C.*) KHWAJA KARAMAT ALI *v.* HARDUWAR PANDE. **78 I. C. 123 (2) : 11 O. L. J. 243 : A. I. R. 1924 Oudh 405.**

———O. 9, R. 8—*Dismissal for default—Plaintiff dead on the date of hearing—Order is a nullity.*

Where an order purported to be passed under O. 9, R. 8, C. P. Code; but in fact the plff. was dead on that date though neither the Court nor any of the parties was aware of it, *held* that the order passed was a nullity. (*Daniels, A.J.C.*) TIRLOCHAN PRASAD SINGH *v.* BHAGWATI. **9 O. & A. L. R. 70 : 73 I. C. 230 : A. I. R. 1924 Oudh 114.**

———O. 9, R. 8——*Plaintiff present all along except on one date—Defendant admitting part of the claim—Case should not be dismissed for default.*

Where the plaintiff was all along present in Court on all hearings except one, and the Court dismissed the suit for default on that date though the defendant had admitted a part of the claim. *Held*: that the order of dismissal was not proper. (*Bucknill, J.*) SANAHI RAM *v.* GULAB CHAND. **3 Pat. L. R. 249 : 89 I. C. 614 : A. I. R. 1925 Pat. 712 (2).**

———O. 9, R. 8—*Dismissal after preliminary decree is revisable.*

An order dismissing a suit for want of prosecution, made after the passing of the preliminary decree is not appealable but is open to revision. (*Ross and Kulwant Sahay, JJ.*) LACHMI NARAYAN TEWARI *v.* RAMSURAM TEWARI. **86 I. C. 785 : 6 P.L.T. 152 : A. I. R. 1925 Pat. 433.**

———O. 9, R. 8—*Dismissal—No appeal lies—Question of jurisdiction involved—Appeal may be treated as revision petition.*

No appeal lies against an order of dismissal for default. But when it raises the question of excess of jurisdiction the appeal may be treated as an applica-

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tion for revision. (*Ross and Kulwant Sahay, JJ.*) DURGA PRASAD *v.* A. H. FORBES. **6 P. L. T. 127: 86 I. C. 787 : 1925 P. H. C. C. 109 : A. I. R. 1925 Pat. 374.**

——**O. 9, R. 8**—*Appearance—What amounts to.*

Where the party and his pleader appear, but the pleader asks for a pass over to consult his leader, and when the case is later called on, no one appears and is dismissed for default, it must be held the plaintiff had not appeared within the meaning of the rule. 3 P. L. J. 355 and 5 P. L. J. 17 foll. (*Coutts and Adami, JJ.*) BASDEO NARAIN SINGH *v.* HARAK NARAIN SINGH. **68 I. C. 942 : A. I. R. 1923 Pat. 156.**

——**O. 9, R. 8**—*Date fixed for appearance of guardian* ad litem—*Dismissal for default not proper.*

Where a suit is adjourned to a certain date for the appearance of the guardian *ad litem* a dismissal for default on account of the absence of plaintiff is not justified. (*Macpherson, J.*) THAKUR PATHAK *v.* RAGHO PATHAK. **73 I. C. 559 (Pat.).**

——**O. 9, R. 8**—*Plaintiff entitled to decree on admission of defence—Cause of action.*

The question whether there is a cause of action or not does not depend upon the admission of the defendant. Where the plaint discloses a cause of action, the plaintiff is entitled to get a decree on the admission of the defence. (*Ross, J.*) BAUL DAS MISRA *v.* DIGAMBAR KURI. **65 I.C. 644 : 1921 P. H. C. C. 297.**

——**O. 9, R. 8**—*Dismissal for default—Minor plaintiff.*

In dismissing a suit for default, a Court has no jurisdiction to provide that the order shall not prejudice a minor plaintiff. (*Das and Ross, JJ.*) KIRIT NARAYAN *v.* CHANCHAL DAS. **63 I. C. 736. 6 Pat. L. J. 317.**

——**O. 9, R. 8**—*Admission in part and counter-claim by defendant—Plaintiff absent—Procedure.*

Where a plaintiff's claim was admitted in part by the defendant subject to a counter-claim, but when the suit was called on the plaintiff being absent the suit was dismissed as a whole. *Held*, the suit ought to have been decreed to the extent the defendant admitted liability; the counter-claim can be considered only if the defendant comes forward to prove it. (*Kincaid, J. C. and Kennedy, A. J. C.*) KHEMCHAND DARYANOMAL *v.* MENGHOMAL CHUNIMAL. **66 I. C. 789 : 15 S. L. R. 172.**

——**O. 9, R. 9**—*Decree—Dismissal of suit—Appeal if any.*

After a decree has once been made in a suit the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside. (*Lord Phillimore.*) LACHMI NARAIN *v.* BALMAKUND. **4 Pat. 61 : 51 I. A. 321. 20 L.W. 491 : (1924) M.W.N. 707 : 35 M. L. T. 143 : L. R. 5 P. C. 171 : 26 Bom. L. R. 1129 : 22 A. L. J. 990 : 5 Pat. L. T. 623 : 40 C. L. J. 439 : 1 O. W. N. 629 : 29 C. W. N. 391 : 10 O. & A. L. R. 1033 : 81 I. C. 747 ; A. I. R. 1924 P. C. 198 : 47 M. L. J. 441 (P.C.).**

——**O. 9, R. 9**—*Partial dismissal under R. 3 is not covered by the section.*

The clause in R. 9, 'where a suit is wholly or partly dismissed under R. 8, obviously means a suit dismissed in part or in its entirety. It does not mean where a suit is dismissed wholly or partly under R. 8, or partly under some other rule. (*Mears, C. J. and Sulaiman, J.*) MAKUNDI SINGH *v.* PARBHU DAYAL. **23 A. L. J. 993 : 90 I. C. 2 : A. I. R. 1926 All. 169.**

C. P. CODE (V OF 1908), O. 9, R. 9.

——**O. 9, Rr. 9 and 13**—*Dismissal of suit for default—Application to set aside dismissal—Dismissed—Fresh application if maintainable.*

Although an application is called an application to restore the application to set aside the *ex parte* decree, which application had itself been dismissed for default, it really is an application to set aside the *ex parte* decree, and it may be treated as such. The application may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case. But the application has to be made within 30 days of knowledge of the *ex parte* decree or dismissal for default. (*Walsh and Ryves, JJ.*) PITAMBAR LAL *v.* DODEE SINGH. **46 A. 319 : 22 A. L. J. 191 ; L. R. 5 A. 226 : 78 I. C. 358 : A. I. R. 1924 All. 503.**

——**O. 9, R. 9**—*Execution proceedings.*

On the 15th January 1921, one D applied under S. 47 for cancellation of a sale. The application was struck off in default on the 28th May, 1921. On the 11th June 1921 D moved the Court to restore his application which was restored on the 9th July 1921: *Held* following 21 A. L. J. 135 that the order of the Munsif on the 9th July must be set aside. (*Rafique, J.*) BHIKAM KHAN *v.* DAN SINGH. **A. I. R. 1923 All. 544 (1).**

——**O. 9, R. 9**—*Applicability—Execution proceedings.*

The provisions of Order 9 of the Code of Civil Procedure have no application to execution proceedings and the decree-holder's remedy in case of dismissal of application is to make a fresh appl cation for execution of his decree. (*Piggott and Walsh, JJ.*) BHARAT INDU *v.* HAKIM ASGHAR ALI KHAN. **45 A. 148 : 21 A. L. J. 135 : 73 I. C. 453 : A. I. R. 1923 All. 460 (1).**

——**O. 9, R. 9**—*Fresh suit—When barred.*

O. 9, R. 9, C. P. Code, has a restricted application only to those cases only where a second suit is brought for the same object and on the same cause of action as the suit, which was dismissed. (*Kanhaiya Lal and Sulaiman, JJ.*) BALKISHAN *v.* RAGHUBAR DAYAL. **L. R. 3 A. 485 : 74 I. C. 991 : 45 All. 81 : A. I. R. 1923 All. 409.**

——**O. 9, R. 9**—*Restoration—Grounds for.*

When a suit was called for hearing the plaintiff who was present in Court left the Court precincts to fetch his pleader who was engaged in another Court. In the meantime the case was called and the names of the parties were called out by the Court peon. The plaintiff who was present and who must therefore have appeared went away to fetch his pleader. When the plaintiff and his pleader both arrived it was three-quarters of an hour after the case had been called and dismissed for default. *Held* that in the circumstances of the case the suit should be restored for re-hearing on condition of the plaintiff paying into the Court the costs of the defendant within a prescribed time failing which his application should stand dismissed. (*Ryves, J.*) BEHARI LAL *v.* MAQSOOD ALI. **71 I. C. 283 : A. I. R. 1923 All. 189.**

——**O. 9, R. 9**—*Restoration—Party appearing after a few minutes.*

Where a party appears a few minutes after the case has been called on and dismissed during his absence, he should be made to pay the costs of the application to restore the suit and his suit should be restored and heard on merits. (*Macleod, C. J. and Crump, J.*) IRAPPA *v.* NINGAPPA. **77 I. C. 901 (1) : A. I. R. 1923 Bom. 480.**

C. P. CODE (V OF 1908), O. 9, R. 9.

——— O. 9, R. 9 and S. 151—*Restoration—Application for restoration itself dismissedfor default.*

There is no rule in the Code that enables the Court to restore an application made under O 9, R. 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case. (*Macleod, C. J. and Crump, J.*) MANKE *v.* WALWEKAR.
A. I. R. 1923 Bom. 386.

——— O. 9, R. 9—*Dismissal of suit for default—Application for Restoration—Non-contesting defendants—Compromise by some of the parties—Effect of.*

Several plaintiffs brought a suit for setting aside a decree in a partition suit and other incidental reliefs. Some of the plaintiffs compromised the case. The remaining plaintiffs applied for an adjournment of the case and the application was rejected and the suit was dismissed for the default both against the petitioners, who were the contesting defendants and other defendants who remained *ex parte*. An application for restoration of the case was refused and on an appeal against the order of refusal to which the non-contesting defendants were not made parties, the appellate court directed the suit to be restored between the plaintiffs and the contesting as well as the non-c ntesting defendants. On an application to revise the order of the Lower Appellate Court held that its order was wrong in so far as it purported to put the non-appearing defendants back on the record. Under O. 9, C. P. Code an application for restoration should be made so as to bring the suit back as regards parties to the exact position in which it was when the suit was dismissed. After that, it is competent no doubt for a particular plaintiff or plaintiffs to apply to be dismissed from the suit or withdraw the suit and such an application can be made. There was no justification for letting out any plaintiff until first of all the costs of the present petitioners up to the date of the dismissal of the suit had been paid to them by those plaintiffs who proposed to continue the suit. Secondly, if the suit is to proceed by those plaintiffs only against the petitioners, it must be distinctly on the terms that any objections arising out of that new state of things must be capable of being raised by the present petitioners by an additional written statement if they so desire and must be dealt with in the course of the case. (*Rankin and Mukherji, JJ.*) KAILAS CHANDRA RAI *v.* HRIDAY CHANDRA DAS.
39 C. L. J. 367 : A. I. R. 1924 Cal. 814.

——— O. 9, R. 9—Ex parte *suit—Duty of Court—Burden on plaintiff to prove his case.*

The fundamental principle of law is that the plaintiff when he comes to court must prove his case to the satisfaction of the Court. His burden is not lightened because the defendant is absent ; on the other hand the responsibility is increased in one sense, for when a matter is heard *ex parte* in the absence of one of the parties who is not re presented, it is the duty of Counsel to bring to the notice of the Court adverse as well as favourable authorities. (*Mookerjee and Chotzner, JJ.*) RAI SATYENDRA NATH SEN BAHADUR *v.* NARENDRA NATH GUPTA.
39 C. L. J. 279 : 81 I. C. 867 : A. I. R. 1924 Cal. 806.

——— O. 9, R. 9. and O. 43, R. 1 (c)—*Dismissal for default—Application to set aside—Application dismissed for default—Subsequent application—Order on, not appealable.*

Where a suit is dismissed in default and an application to set aside the order is also dismissed in default, an order made on subsequent application refusing to set aside the dismissal of the previous application, is not an order refusing to set aside the dismissal of a suit in default within the meaning of the cl. (c) of R. 1 of O. 43, of the C. P. Code. Such an order is not appealable. (*Sanderson, C. J. and Richardson, J.*) HARA KUMAR *v.* MURARI MOHAN. **36 C. L. J. 184: 69 I. C. 1003 : A. I. R. 1922 Cal. 572.**

——— O. 9, R. 9—*Restoration—Order restoring suit is not appealable—Not a 'judgment' within the meaning of cl. 15 of the Letters Patent.*

O. 9, R. 9. of the Code of Civil Procedure restoring a suit dismissed for want of prosecution is not a 'judgment' within the meaning of clause 15 of the LettersPatent and is therefore not appealable. (*Sanderson, C. J. and Richardson, J.*) MAHARAJ KISHORE KHANNA *v.* KIRAN SHASHI DASI. **49 Cal. 616 : 69 I. C. 820: A. I. R. 1922 Cal. 407.**

——— O. 9, R. 9—*Applicability—Execution sale—Application to set aside—Dismissal for default—Refusal to restore—Appeal.*

O. 9, R. 9 does not apply to an application to restore a petition under O. 21, R. 90 dismissed for default. An order refusing to restore, is not appealable. (*Le Rossignol, J.*) KAURA LAL *v.* THE PUNJAB NATIONAL BANK, LTD. **89 I. C. 360 (1).**

——— O. 9, R. 9—*Application for restoration made and dismissed as time-barred—Application for review subsequent to such dismissal cannot be entertained.*

Where a suit is dismissed for default, there are two courses open to the plaintiff ; he can either make an application for restoration under O. 9, R. 9, or he can make an application for review under O. 4, R. 1. The application for restoration must be made within 30 days from the order of dismissal, but if such an application has been made and dismissed on the ground that it was barred by limitation, the rule of limitation cannot be evaded by making another application by way of review. (*Moti Sagar, J.*) ABDUL RAZAK *v.* MUHAMMAD SHARIF. **86 I. C. 616 : A. I. R. 1925 Lah. 517.**

——— O. 9, R 9—*Dismissal for default—Dismissal of an application against order dismissing an application under O. 9, R. 9 for default—Revision.*

An application lies to restore a former application which is dismissed for default. At the same time when that application is rejected, no appeal lies from the order of rejection. O. 43, R. 1 (*c*) shows that an appeal lies from an order under O. 9, R. 9 rejecting an application from an order to set aside the dismissal of a suit. This cannot be interpreted to mean that an appeal lies from an order under R. 9, O. 9, ejecting an application for an order to set aside the dismissal of an application, but a revision lies. (*Scott-Smith, J.*) LOK NATH *v.* MT. SATTAN BAI.
73 I. C. 821 : A. I. R. 1923 Lah. 302 (2).

——— O. 9, R. 9 and O. 32, R. 11—*Dismissal for default of guardian—Application for setting aside and for removal of guardian for negligence—Court must not dispose of without taking evidence.*

Where a guardian allows anappeal to be dismissed for default and afterwards an application is put in for the removal of the guardian on the ground of negligence in duty and for setting aside the dismissal for default the Court should take evidence on the question as to whether the guardian was negligent in his duty unless the respondent admits the facts of the guardian's negligence. (*Krishnan and Waller. JJ.*) RAMAPPA NAYUDU *v.* SAMBOORANATHACHI.
21 L. W. 325 : 87 I. C. 117 : A. I. R. 1925 Mad. 774.

——— O. 9, R. 9—*Does not empower Court to set aside dismissal for default as matter of grace—The fact that subsequent to restoration of suit decree has*

C. P. CODE (V OF 1908), O. 9, R. 9.

been passed against defendant is no ground against setting aside restoration.

Where there was an application for setting aside the dismissal of a suit for default and where the lower Court found that the grounds alleged were insufficient to set aside the order, but as a matter of grace, taking into consideration the fact that the suit was for nearly ten thousand rupees and the plaintiff a Mohamadan Gosha lady had recently lost her husband, set aside the dismissal. *Held*: in revision that the Court was not empowered under O. 9, R. 9, to set aside the dismissal of a suit for default of appearance as a matter of grace. Whatever may be the circumstances of the case, the order setting aside the default in this case must be quashed as being passed without jurisdiction. *Held*: further, that the fact that after the order was passed setting aside the order dismissing the suit for default, the defaulter without obtaining an order for stay of proceedings allowed the suit to be proceeded with and that a decree had been passed against the defendant was no ground against annulling the illegal order restoring the suit. (*Wallace, J.*) V. MANICKAM PILLAI *v.* MAHUDAM BATHUMMAL. **20 L. W 849 : 85 I. C. 499 : A. I. R. 1925 Mad. 209 : 48 M. L. J. 152.**

———0. 9, R. 9 and S. 141 —*Execution proceedings*

The provisions of O. 9, R. 9 do not apply to execution proceedings. (*Jackson, J.*) KAJUBURISAMI *v.* SOORYANARAYANA RAJU. **20 L. W. 192 : (1924) M. W. N. 672 : 81 I. C. 841 : A. I. R 1925 Mad. 126 · 47 M. L. J. 269.**

———0. 9, Rr. 9 and 13– *Dismissal for default—Appearance by pleader—Pleader reporting no instructions—Dismissal for default—Restoration.*

On the day on which a suit was posted for hearing the plaintiff's pleader appeared and stated he had no instructions. Thereupon the Court dismissed the suit. *Held*, that the dismissal of the suit under the above circumstances was a dismissal for default and that an order restoring the suit by the court was rightly passed. When a pleader appears and says he has no instructions he intends to inform the court that he had no instructions to conduct the case either wholly or partially in other words he tells the court that though he has filed an appearance he does not propose to appear for his client. It is a contradiction in terms to hold that a person who says he does not appear does in fact appear. 30 M. 271 followed. (*Venkatasubba Row, J.*) ARUNACHALA GOUNDAN *v.* KATHA GOUNDAN. **20 L.W. 795 : 82 I. C. 107 : (1924) M. W.N. 835 : A. I. R. 1924 Mad. 842 : 47 M. L. J. 514.**

———0. 9, R. 9—*Sufficient cause—Many adjournments at plaintiff's request—His absence at the last hearing—Dismissal for default.*

A suit was repeatedly adjourned at plaintiff's request, and he stated that he did not desire to prosecute the claim. On the day of the last hearing he was absent and his pleader had no instructions and thus the suit was dismissed for default. He then applied for restoration on the ground that he had no notice of the date of hearing. *Held*, that the application for restoration was properly dismissed under O. 9, R. 9. (*Adur Rahim and Odgers, JJ.*) RAMACHANDRA *v* RAJU. **62 I. C. 378 : 13 L. W. 334.**

———0. 9, R. 9—*Fresh suit—Cause of action—Suit for declaration—Dismissal for default.*

A suit for declaration that an alienation in favour of the defendant is invalid, was dismissed for default. The plaintiff subsequently sued for partition and possession of a share. *Held*, the causes of action being different the suit is not barred. R. 9 bars a suit where the cause of action is the same. (*Ayling and Krishnan, JJ.*) ASIA BIBI *v.* SEHU MOHAMMAD ROWTHER. **12 L. W. 431 : 60 I. C. 201 : 39 M. L. J. 412.**

———0. 9, R. 9—*Application for restoration dismissed for default—Appeal.*

Appeal lies against an order of dismissal of an application for restoration of an application dismissed in default, for Restoration of the suit dismissed in default (*Hallifax, A. J. C.*) KALICHARAN *v.* RATAN SINGH. **19 N. L. R. 119 : 75 I. C. 189 : A. I. R. 1923 Nag. 293.**

———0. 9, R. 9—*Restoration against some defendants on plaintiff's application—Restoration against others by Court after limitation is* ultra vires.

A suit was dismissed against two defendants and it was restored against one on an application made by the plaintiff. Subsequently the Court on its own initiative and beyond the period of limitation for restoration, restored the suit against the other. *Held* that the order restoring the suit against the other defendant was *ultra vires*. (*Pullan, A. J. C.*) SHAMSHAD MEHDI *v.* MAHBUL KHAN. **11 O. L. J. 573 : 80 I. C. 75 : A. I. R. 1925 Oudh 105.**

———0. 9, R. 9—*Execution proceedings—Application for final decree is not.*

O. 9, R. 9 is applicable to an application for final decree for foreclosure dismissed for default, the application for final decree for foreclosure not being a proceeding in execution. (*Ashworth and Simpson, A. J. Cs.*) BABU RAM *v.* MT. RAM DULARI DEBI. **26 O. C. 194 : 74 I. C. 701 : A. I. R. 1924 Oudh 30.**

———0. 9, R. 9—With S. 141 (1)—*Application to set aside* ex parte *decree – Dismissal of application for default—Restoration.*

Where an application to set aside an order of dismissal for default has itself been dismissed for default it is open to the Court to set aside that dismissal under O. 9, R. 9 read with S. 141, C. P. Code, 4 P. L. J 135, 44 C. 950 dissented, 23 O. C. 349 followed. (*Daniels, A. J. C.*) MT. JAMNA *v.* MT. RAMRAJ. **9 O. L. J. 627 : 9 O. & A. L. R. 32 : 74 I. C. 380 : A. I. R. 1923 Oudh 146.**

———0. 9, R. 9 and S. 151—*Execution proceedings—Strong grounds necessary.*

O. 9, R. 9 has no application to execution proceedings the reason being that fresh applications can be filed. Strong grounds would be required to justify an application under S. 151 for the restoration of an execution application as would be required for an application for review. (*Ashworth, J. C. and Simpson, A. J. C.*) NAGESHWAR PRASAD *v.* JAI NARAYAN. **73 I. C. 73 : A. I. R. 1922 Oudh 201 (2).**

———0. 9, R. 9—*Restoration—Exonerated defendants.*

Where the plff. exonerates certain defts. from liability and the suit is subsequently dismissed for default it cannot be restored as against the exonerated defts. (*Kanhaiya Lal, J. C.*) NAGESHAR *v.* BHAGY DOBEY. **25 O. C. 67 : 68 I. C. 246 : A. I. R. 1922 Oudh 160.**

———0. 9, R. 9, O. 21, R. 90—*Execution proceedings—Restoration.*

O. 9, R. 9 applies to an order dismissing for default an application under O. 21, R. 90. (*Lindsay A. J. C.*) GOWRI *v.* HINGA. **59 I. C. 575 · 23 O. C. 349.**

———0, 9, R. 9—*Sufficient cause—Illness of brother—Other grounds if can be urged under.*

Illness of a brother was held not sufficient cause to set aside a dismissal for default. In an application for restoration, it is not open to attack the order on the ground that the proper course was to reject the plaint under O. 7, R. 11, as that is a matter for appeal. (*Miller. C. J. and Kulwant Sahay, JJ.*) RAMBHANJAN SINGH *v.* PASHUPAT RAI. **2 Pat. 784 : 74 I. C. 847 : A. I. R. 1924 Pat. 271 (2).**

C. P. CODE (V OF 1908), O. 9, R. 9.

——O. 9, R. 9—*Dismissal for default.*

Where on the day of hearing, the plaintiff's pleader had instructions only to ask for adjournment which was not granted and the case dismissed, *held* the dismissal was under O. 17, R. 2 and an application for restoration under R. 9 of O. 9 was maintainable. (*Mullick and Macpherson, JJ.*) SD. SHAHA MUHAMMAD MAUDOOD *v.* MAHARAJA SIR RAMESHWAR SINGH. **1 Pat. L. R 281 : 74 I. C. 693 : A. I. R. 1923 Pat. 530.**

——O. 9, R. 9, and B. T. Act, S. 158—*Dismissal for default.*

Subsequent application for assessment of rent where the application failed for default, is not barred under S. 158 of the B. T. Act. (*Dawson Miller, C. J. and Mullick, J.*) JANKI RAY *v.* RAJA KALANAND SINGH. **2 P. 192 : 4 Pat. L. T. 705 : 74 I. C. 464 : A I. R. 1923 Pat. 381.**

——O. 9, R. 9—*Restoration — Order rejecting plaint—No power to restore.*

An order rejecting a plaint under O. 7, R. 11, (*c*) of the C.P Code, operates as a decree and once the order is perfected, there is absolutely no power in the Court under its inherent jurisdiction either to alter or to add to that order save as provided by S. 152 of the Code or on review. (*Das and Kulwant Sahay, JJ.*) RAMESHWAR DHARI SINGH *v.* SADHU SARAN SINGH. **4 Pat. L. T. 261 : 72 I. C. 629 : 2 Pat. 504 : A. I. R. 1923 Pat. 354.**

——O. 9, Rr. 9 and 13 and O. 47, R. 1—Res judicata—Ex parte *decree—Application to set aside—Dismissal for default—Subsequent application—Review.*

Where a suit was decreed *inter partes* against some defendants and *ex parte* against other defendants and the latter applied to set aside the *ex parte* decree but their application was dismissed for default. *Held*, that a further application under O. 9, R. 9 asking that the dismissal of their former application under O. 9, C.P. Code for default be set aside, is not maintainable. 4 P. L. J. 135 (F. B.) followed, O. 47, C. P. Code, does not apply when the order passed is by an officer other than the officer who made the original order, S. 153, C. P. Code, has no application as the dismissal order was not an error or defect in the proceedings. (*Roe and Jwala Prasad, JJ.*) RAMGHULAM SINGH *v.* SHEODEONARAIN SINGH. **1922 P. H. C. C. 5 : A. I. R. 1922 Pat. 121.**

——O. 9, R. 9—*Suit of minor dismissed for default—Fresh suit with new guardian.*

The provisions of O. 9, R. 9 caanot be nullified in the case of minor plaintiffs by changing the guardian *ad-litem* after the prior suit was dismissed for default. Where after a mortgagee had obtained a decree for sale against a Hindu father his minor sons first sued for partition free of the mortgage which they challenged as not binding and the same was dismissed for default, a subsequent suit for an injunction restraining the mortgagee from selling the properties is barred under O. 9, R. 9, as the cause of action in both suits is the same. What is meant by cause of action considered. (*Kennedy, J. C. and Madgavkar, A. J. C.*) VISHINDAS FATEHCHAND *v.* NARUMAL DHARAMDAS. **80 I. C. 985 : 17 S. L. R. 41.**

——O. 9, R. 9—*Sufficient cause*—Pardanashin *lady—Neglect of agent not a sufficient cause.*

Where an appeal is dismissed owing to the default of the appellant in depositing the cost of serving notices, the order of dismissal should not be set aside except for just and sufficient cause. That the default was due to the agent's neglect or misconduct, where the principal was a *pardanashin* lady is not a sufficient cause. The propriety of an *ex parte* order setting aside

C. P. CODE (V OF 1908), O. 9, R. 13—Appeal.

an order dismissing an appeal for default, may be questioned at the hearing of the appeal and can be reconsidered at the instance of the party aggrieved. (*Fawcett, J. C. and Kemp, A. J. C.*) JANAT *v.* KAMILSHAH. **60 I. C. 948 : 14 S. L. R. 239.**

——O. 9, R. 13.

Absence of Notice.
Appeal.
Appellate Court.
Co-defendants.
Conditional order.
Costs.
Effect of setting aside.
Ex-parte decree.
Final Decree.
Legal Representative.
Limitation.
Miscellaneous Proceedings.
Procedure.
Revision.
Right to apply.
Scope of.
Service of Summons.
Sufficient Cause.
Suit to set aside.

Absence of Notice.

——O. 9, R. 13—*Absence of notice—Transfer.*

Where a suit is transferred without notice to defendant, the *ex parte* decree must be set aside. (*Moti Sagar, J.*) GANGA RAM *v.* GUJAR MAL. **A. I. R. 1923 Lah. 444.**

——O. 9, R. 13—*Absence of notice—Application under—Merits of the case are not to be considered—Knowledge of particular decree on defendant's part is essential—Vague suspicion that defendant may have known of some decree is not enough to impute him with knowledge of the decree.*

In an application under O. 9, R. 13, what the Court has to find is not whether the defendant has any good defence on the merits, but whether there is proper service, and if there is proper service whether there was sufficient cause for his non-appearance. Courts even in moffusil ought not to proceed to the trial of a case until at least three services have been taken upon the defendants which is the practice in the High Court. Unless the Court finds positively that the petitioner was aware of the decree at a time which was more than a month before the petition it is not barred by limitation ; and apart from the limitation the knowledge of the suit after a decree is irrelevant for any other purpose. A vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum. A vague suspicion that the defendant must have heard of some decree is not enough to dismiss his petition on the ground that it is barred by limitation. (*Ramesam, J.*) SYED MUHAMMAD SAHIB *v.* A. P. R. L. ALAGAPPA CHETTIAR. **22 L. W. 423 : 90 I. C. 1042 (2) : A.I. R. 1926 Mad. 31 : 49 M. L. J. 445.**

Appeal.

——O. 9, R. 13—*Appeal.*

No second appeal lies against an order refusing to set aside an *ex parte* decree. (*Sulaiman and Mukerji, JJ.*) GANESHI LAL *v.* DEBI DAS. **47 All. 140 : L.R. 6 A. Civ. 79 : 85 I. C. 470 : A. I. R. 1925 All. 267.**

——O. 9, R. 13—*Appeal*—Ex parte *decree in appeal—Second appeal—Maintainability — Other remedy open—Effect.*

C. P. CODE (V OF 1908), O. 9, R. 13—Appeal.

A party whose appeal is decided *ex-parte* can maintain a second appeal against the decision, though he has two other courses open to him, *viz.*, to apply for restoration under O. 41, R. 21 or to apply for review. (*Suhrawardy and Chotzner, JJ.*) KALI PROSANNA CHAKRAVARTY *v.* NAJABULLA JAMADAR.
80 I. C. 14 : A. I. R. 1925 Cal. 497.

——**O. 9, R. 13**—*Appeal — Order setting aside* ex parte *decree—Order not affecting decision within S.* 105, *C. P. Code—Order cannot be assailed in appeal from final decision.*

An erroneous order accepting an application to set aside the *ex parte* decree is not assailable in appeal from the final decision except in so far as it accepts the decision of the case on the merits with S. 105, C. P. Code. (*Shadi Lal, C. J. and Le Rossignol, J.*) SUNDER SINGH *v.* NIGHAIYA. **6 Lah. 94 : 88 I. C. 920 : A. I. R. 1925 Lah. 466.**

——**O. 9, R. 13**—*Appeal against order setting aside* ex parte *decree.*

Not only can an order setting aside an *ex-parte* decree not be questioned on appeal but, any error, etc., made by a Court in setting aside such an *ex-parte* decree is not an error affecting the decision of the case within the meaning of section 105. (*Harrison, J.*) SUNDER SINGH *v.* NIGAHIYA.
A. I. R. 1923 Lah. 425 (1).

——**O. 9, R. 13, and O. 43, R. 1 (d)**—*Appeal—Conditional order setting aside* ex parte *decree—Condition not complied with—Application to set aside dismissal—Appeal lies from the later order alone.*

On an application to set aside an *ex-parte* decree an order was passed by the Court that the decree will be set aside if the petitioner will pay to the plaintiff his costs and deposit the decretal amount into Court within a certain period. A note was made on the order that the petition will be called for final disposal on a certain date. On the date on which the application was taken up for final disposal, petitioner applied for permission to give immoveable property as security for decretal amount. The Court dismissed the application to set aside the *ex-parte* decree on the ground that the money had not been deposited in Court. *Held*, that the first order of the trial Court was merely conditional and that, therefore, it was not open to the petitioner to prefer an appeal against that order, and that the final order dismissing the application to set aside the *ex-parte* decree was appealable under O. 43, R. 1 (*d*). (1917) M. W. N. 815, *Foll.* (*Madhavan Nair, J.*) RAJAGOPALACHARI *v.* NARSIMHA THATHACHARIAR. **88 I. C. 196 (2) : A. I. R. 1925 Mad. 1182.**

——**O. 9, R. 13**—*Appeal—Proceedings under—No decree passed—Effect—If bar right of appeal after decree.*

A person can take cross-objection by way of appeal against a decree passed *ex parte* if he files such objection within one month from the date of service of notice of the day fixed for hearing the appeal. (*Oldfield and Devadoss, JJ.*) BAVA LEVVAI SAHIB *v.* AMMEENAMMAL. **A. I. R. 1924 Mad. 107 : 45 M. L. J. 805.**

——**O. 9, R. 13**—*Appeal—Decree against defendants some of whom were* ex parte*—Appeal by contesting defendants—Application to Appellate Court to set aside* ex parte *decree if lies.*

Where a decree against several defendants some of whom were *ex parte* in the Trial Court was appealed against by the contesting defendants, impleading the *ex parte* ones as respondents, the latter cannot maintain an application in the Appellate Court to set aside the *ex parte* decree under O. 9, R. 13 of the Code.

C. P. CODE (V OF 1908), O. 9, R. 13—Appellate Court.

The proper procedure for them is to get an adjournment of the hearing of the appeal and make the application to the Trial Court. (*Oldfield and Ramesam, JJ.*) PALANIAPPA CHETTY *v.* SUBRAMANYAM CHETTY **14 L. W. 609 : (1921) M. W. N. 796: 66 I. C. 59 : 30 M. L. T. 151 : A. I. R. 1922 Mad. 33 : 42 M. L. J. 12.**

——**O. 9, R. 13**—*Appeal—Failure to take advantage of R. 7 and R. 13 precludes the plea in appeal.*

If a party failed to take advantage of O. 9, R. 7 and R. 13 he cannot raise the same point of the injustice of the *ex parte* order on an appeal under S.96 30 Mad. 54 and A.I.R. 1923 Oudh 177, Diss. 12 O. C 25, Dist. and 39 M. L. J. 697, Appr. When a specific remedy with a particular period of limitation is granted, a party must avail himself of it and cannot make it a ground of appeal under the general provision granting him a right of appeal from an *exparte* decree. 39 All. 143 Foll. (*Dalal J.C.*) MAZHAR HUSSAIN *v.* RAFIQ HUSAIN. **28 O. C. 85 : 87 I. C. 222 : A. I. R. 1925 Oudh 645.**

——**O. 9, R. 13**—*Appeal—Application under S.* 151.

Inherent powers of Court under S. 151 cannot be invoked to set aside an *ex parte* decree long after the limitation prescribed by Art. 164 has passed. An order refusing exercise of such powers by court is not appealable. (*Coutts and Ross, JJ.*) AJODHYA MAHTON *v.* PHUL KUER. **1 Pat. 277 : 65 I. C. 341 : 1922 P. H. C. C. 61 : A. I. R. 1922 Pat. 479.**

Appellate Court.

——**O. 9, R. 13 and O. 43. R. 1 (d)**—*Appellate Court—Appeal from order rejecting application for setting aside* ex parte *decree—Appellate Court cannot go beyond R.* 13.

Per *Sulaiman and Daniels, JJ.*—In an appeal from an order rejecting an application to set aside an *ex parte* decree, the appellate Court cannot go beyond the provisions contained in O. 9, R. 13 for reasons for setting aside the decree. A.I.R. 1922 All. 441 and 43 M. 94 Foll. 44 Cal. 929 Dist. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **L. R. 6 A. 601 : 90 I. C 180 : A. I. R. 1925 All. 610 (F.B.).**

——**O. 9, R. 13 and S. 105**—*Appellate Court—Application under, dismissed—Appeal from decree—Appellate Court whether can decide the cause of dismissal.*

Where an application to have an *ex parte* decree set aside has been dismissed, the question as to the propriety of dismissal cannot be re-agitated in an appeal from the decree, not is such a right given by S. 105 of the C.P. Code. 23 Mad. 445; 30 Mad. 54 ; 43 Mad. 94 (F.B.) ; 23 Mad. 260 Expl. and Dist. (*Abdur Rahim and Oldfield, JJ.*) BADVEL CHINA ASHETHU *v.* VATIPALLI KESAVAYYA.
12 L. W. 507 : 60 I. C. 215 : (1920) M. W. N. 780 : 29 M. L. T. 63 : 39 M. L. J. 697.

——**O. 9, R. 13**—*Appellate Court—Reversal of decree on the ground that* ex parte *procedure was not justified.*

Where an appeal is preferred against an *ex parte* decree, the appellate Court has jurisdiction to reverse the decree of the lower court merely on the ground that such Court was wrong in proceeding to decide the case *ex parte.* 33 M. 54, Foll. (*Ashworth, J. C.*). FARZAND ALI *v.* EKADASHI. **26 O. C. 10 : 10 O. L. J. 36 : 73 I. C. 591 : 9 O. & A. L. R. 332 : A. I. R. 1923 Oudh 177.**

——**O. 9, R. 13**—*Appellate Court—Confirmation of decree by—Trial Court can set aside the decree.*

An original suit was decided *ex parte* against one of

C. P. CODE (V OF 1908), O. 9, R. 13—Co-defendants.

the defendants. The decision was upheld in appeal. The party against whom the *ex parte* decree was passed applied to the Trial Court for setting aside the *ex parte* order. The Trial Court set aside the *ex parte* order and restored the case for hearing on the merits. *Held*, it was right. (*Daniels, J. C.*) MAHABALI PARSHAD *v.* BALBHADDAR SINGH.

64 I. C. 303 : 24 O. C. 282.

Co-defendants.

——O. 9, R. 13—*Co-defendants—Cause of action—* Ex parte *decree against several defendants, whether can be set aside at the instance of some of them alone.*

An *ex parte* decree against several defendants cannot be set aside as against all of them at the instance of some of them alone, when the cause of action against all of them is not necessarily joint and indivisible. (*Odgers, J.*) THIRUMALACHARIAR *v.* ATHIMOOLA KARAYALAR. **22 L. W. 695.**

——O. 9, R. 13—*Co-defendants*—Ex parte *decree against several defendants—Application to set aside by one—When can be set aside against all.*

Where in a suit for possession of separate items from separate sets of defendants, an *ex parte* decree is passed against all and an application is made by one to set aside the decree, *held*, that the decree is not such a joint and indivisible one as to allow its being set aside in favour of those who had made no application to set it aside, though there were some common issues in the suit in which all were interested. (*Krishnan, J.*) NARAYANASAMY AIYAR *v.* DORAISAMY.

65 I. C. 343 : (1921) M. W. N. 795.

——O. 9, R. 13—*Co-defendants— Decree-holder agreeing to the setting aside of decree against some—Court can set aside against all the defendants.*

Where an *ex parte* foreclosure decree is passed against the mortgagor and a rival claimant of mortgagee right and is set aside against the latter on the consent of decree-holder, it should be set aside altogether under the proviso to O. 9, R. 13. (*Simpson, A. J. C.*) DEBI CHARAN *v.* DEO MUKHI. **2 O. W. N. 702 : A. I. R. 1925 Oudh 621.**

——O. 9, R. 13—*Co-defendants*—Ex parte *decree—Several defts.—Similar but distinct defences*—Exparte *decree set aside on application of some defts.—Non-applicants are not benefited.*

Where an *ex parte* decree is passed against several defendants whose defences are similar but distinct, and where the *ex parte* decree is set aside on the application of some of the defendants only, the other defendants cannot claim the benefit of the decree being set aside but will still be bound by it. (*Kendall, A. J. C.*) PITAMSHAH *v.* BHOG NATH.

81 I. C. 520 : A. I. R. 1925 Oudh 181.

——O. 9, R. 13—*Co-defendants—Mortgage decree*—Ex parte *against some and on the merits against others It can be set aside as regards some only.*

Where a mortgage decree is passed *ex parte* against some defendants and on the merits against others, the liability being joint, the decree cannot be set aside as against some only of the defendants under O 9, R. 13. (*Dass and Ross, JJ.*) RAGHUBAR CHOWDHURY *v.* RAMASRAY PRASAD CHOWDHURY.

1924 P. H. C. C. 252 : 78 I. C. 408 (1) : A. I. R. 1924 Pat. 771.

Conditional order.

——O. 9, R. 13 and S. 115—*Conditional order—Order of restoration conditional on payment of costs within a certain time—Order is proper—Refusal to extend time fixed is not a failure to exercise jurisdiction.*

An order restoring a case dismissed for default on

C. P. CODE (V OF 1908), O. 9, R. 13—Effect of setting aside.

condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by O. 9, R. 13. Where an application of defendant to extend the time fixed for payment was refused, *Held* that the refusal did not amount to a failure to exercise jurisdiction against which a revision can lie. (*Sulaiman and Daniels, JJ.*) AHMAD HUSSAIN KHAN *v.* HARDIAL.

L. R. 6 A. (Civ.) 586 : 90 I. C. 243 : A. I. R. 1926 All. 142 (2).

——O. 9, R. 13—*Conditional order—Party appearing soon after decree passed—Setting aside decree.*

Where a suit is disposed of *ex parte* on account of the absence of the party or pleader at the time of hearing but later on the pleader turns up in the course of the same day, the court should after notice to the other party, restore the suit to file after imposing such conditions on the defaulting party as might meet the justice of the case. (*Macleod, C. J. and Shah, J.*) SORABJI RUSTOMJI *v.* RAMJI LAL DEVJIBHAI.

26 Bom. L. R. 321 : 80 I. C. 237 : A. I. R. 1924 Bom. 392.

——O. 9. R. 13—*Conditional order—Harsh conditions should not be imposed.*

A Court should not as a condition precedent to setting aside an *ex parte* decree require the deposit of a large sum of money, as it will work hardship on the defendant (*Dalal, J. C.*) INDAR SINGH *v.* GURDAYAL SINGH. **74 I. C. 86 : A. I. R. 1924 Oudh 229.**

Costs.

——O. 9, R. 13—*Costs—Setting aside dismissal Condition to pay costs—Legality.*

An order setting aside a dismissal for default on condition of paying costs within a fixed time is perfectly legal. If the costs are not paid and an extension of time is refused, the order is not open to revision. (*Sulaiman and Daniels, JJ.*) AHMAD HUSAIN KHAN *v.* HARDIAL. **L. R. 6 A. 586 : 90 I. C. 243.**

——O. 9, R. 13—*Costs*—Ex parte *decree set aside on payment of—Costs not paid in time—Procedure.*

On a petition to set aside an *ex parte* decree, the defendant who was ordered to deposit in Court the decree amount and costs, but he neither carried out the order of the trial court nor of the appellate court to deposit the costs within the time fixed. *Held* in revision, that the appellate Court ought to have dismissed the appeal on non-payment of costs for payment of which time should have been fixed before disposal of the appeal. (*Kanhaiya Lal, J. C.*) SUKHAI *v.* BINDA BAKSH. **A. L. R. 1922 Oudh 14.**

——O. 9 R. 13—*Costs*—Ex parte *decree—Default—Setting aside.*

When an *ex parte* decree is not challenged on the ground of irregularity entitling the applicant to have it vacated *ex debito justitiae*, but the applicant admits his default and his defence does not appear a *bona fide* one, the Court can put him on terms, such as by requiring him to deposit the amount claimed within a fixed time. (*Rupchand Bilaram, A. J. C.*) DAVID SASSON & CO., LTD. *v.* SHIVJIRAM DEVIDAS.

90 I. C. 236.

Effect of setting aside.

——O. 9, R. 13—*Effect of setting aside*—Ex parte *decree—Decree set aside—Restitution—Right to, against original plaintiff and his representatives.*

Where an *ex parte* decree is set aside, the deft. is entitled to be restored to his original position under S. 144 of the C. P. Code. (*Miller, C. J. and Jwala Prasad, J.*) BASANTA KUMARI *v.* BALMUKUNDA.

C. P. CODE (V OF 1908), O. 9, R. 13—Ex-parte Decree.

1923 P. H. C. C. 1 : 72 I. C. 912 : 2 P. 277 : 1 Pat. L. R. 338 · A. I. R. 1923 Pat. 371.

Ex-parte Decree.

——**O. 9, R. 13**—Ex parte *decree—Pleader unable to proceed—Decree not necessarily* ex parte.

At the hearing of a suit the defendant being absent the trial court proceeded under O. 17, R. 3 on the merits and decreed it. The defendant applied to have the decree set aside but the application was rejected. He then appealed from the order and the decree. The appellate court dismissed the former appeal but declared in the case of the second that the trial court had no power to decide the case on the merits in the absence of the defendant and that the decree was only an *ex parte* decree. *Held*, the order of the appellate court in the latter appeal was both in substance and in form open to question. By the pleader saying that he was unable to proceed with the hearing, it cannot be said that the pleader had withdrawn himself ; and the decree passed in that suit cannot therefore be regarded as an *ex parte* decree which could be set aside in the manner laid down in O. 9 R. 13. In form the order passed by the lower court was similarly open to objection. It was not open to the Judge, who heard the appeals, to take the view that the decree was an *ex parte* decree after he had dismissed the appeal which had been filed from an order refusing to set it aside, on the ground that the decree was one dealing with the suit on the merits. If he was satisfied that there was sufficient excuse for his absence, he could have passed an order setting aside the decree passed by the court of first instance and remanded the suit. If he was not satisfied that there was sufficient reason for his absence, it was still necessary for him to have examined the suit on the merits and determined whether the decree passed by the court of first instance was proper or not. (*Kanhaiya Lal, J.*) SARJU PRASAD *v.* GUJADHAR LAL. **2 A. I. R. 1922 All. 497.**

——**O. 9, R. 13**—Ex parte *decree—Application to set aside dismissal for default—Order refusing to restore.*

Where an application to set aside a decree was dismissed for default and the court refused to set aside the order of dismissal and restore the application. *Held* no appeal lies against the order. (*Piggott and Walsh, JJ.*) SHARIF HUSSAIN *v.* HAIDAR HUSSAIN. **20 A. L. J. 519 : 67 I. C. 320 : A. I. R. 1922 All 337 (2).**

——**O. 9, R. 13 and O. 43, R. 1. Cl. (1)**—Ex parte *decree—Application to set aside—Rejection by successor of the Judge—Appeal.*

A suit was decreed *ex parte* by a Munsif exercising Small Cause powers. His successor who was not invested with such Small Cause powers refused to set the *ex parte* decree aside on the application of the defendant. *Held*, that the decree, being final the order rejecting the application to set aside was not appealable. (*Banerji, J.*) HIRA LAL *v.* JHUNNI LAL.

20 A. L. J. 208 : L. R. 3 A. 124 : 65 I. C. 967 : A. I. R. 1922 All. 50 (1).

——**O. 9. R. 13**—Ex parte *decree against firm—Setting aside—One of the partners not served—Effect—Lim Act, Art.* 164.

An *ex parte* decree passed against a firm after it had been served in the manner contemplated by O. 30, C. P. Code, cannot be set aside on the application of a partner who alleges he was not duly served. Any application to set aside the decree must be made within the period of 30 days prescribed under Art. 164, Limitation Act. It can never be said a decree against the firm is *ex parte* against one of the partners because he has not appeared. (*Macleod, C. J. and Shah, J.*) ADIVEPPA SHIDLINGAPPA *v.* PRAGJI MOHANJI.

26 Bom. L. R. 388 : 80 I. C. 773 : A. I. R. 1924 Bom. 366.

——**O. 9, R. 13**— Ex parte *decree—Defendant absent but pleader present—If duly instructed—Taking no part in proceedings.*

Where the pleader for deft. was present but took no part in proceedings, then unless it is held that deft. appeared by duly instructed pleader, the disposal would be held *ex parte* otherwise not. If the deft. is not able to show that the pleader was not duly instructed, then it is not an *ex parte* decree. (*Shah, A. C. J. and Crump, J.*) MOTILAL RATANCHAND MARWADI *v.* NANDRAM DALPATRAM.

25 Bom. L. R. 1222 : A. I. R. 1924 Bom. 139.

——**O. 9, R. 13**—Ex parte *decree—Application to set aside—Knowledge—Proof of.*

The applicant must have knowledge that a particular decree has been passed against him in a particular court in favour of a particular person for a particular sum. (*Macleod, C. J. and Crump, J.*) BAPURAO SAKHURAM *v.* SADHU BHIRRA GHOLAP.

25 Bom. L. R 74 : 72 I. C. 130 : 47 Bom. 485 : A. I. R. 1923 Bom. 193.

——**O. 9, R. 13**—Ex parte *mortgage decree—Plaintiff appealing against interest disallowed—Decree varied—Application to set aside* ex parte *decree—If lies.*

The plaintiff obtained an *ex parte* mortgage decree, but as some interest was disallowed he appealed and got the decree varied. Thereafter the defendant applied to the Trial Court to set aside the *ex parte* decree. *Held* it should not be allowed as the decree of the Trial Court had already been superseded by the appellate decree. (*Greaves and Cuming, JJ.*) MURTAZA BEGUM *v.* JOGENDRA NATH ROY.

90 I. C. 724 (Cal).

——**O. 9, R. 13**—Ex parte *decree—Rule does not apply if the decree, on the face of it, is* inter partes.

A decree on the face of it *inter parties* cannot be treated as *ex parte* and application under O. 9, R. 13 does lie to set it aside. (*Suhrawardy and Duval, JJ.*) RAMESH CHANDRA GUHA *v.* DENISH CHANDRA GUHA. **42 C. L. J. 224 : A. I. R. 1925 Cal. 1010.**

——**O. 9, R. 13**—Ex parte *decree—Application to set aside—Non-payment of process-fee—Dismissal of application—Appeal.*

Where an application to set aside an *ex parte* decree is dismissed for failure to pay process fee this is in substance a dismissal for default and an appeal lies from the order. 21 C. L. J. 628 ; 36 I. C. 798 ; 37 I. C. 835, Rel. (*Harrison, J.*) BAHADUR SINGH *v.* WASAWA SINGH. **69 I. C. 713 : A. I. R. 1924 Lah. 281 (1).**

——**O. 9, R. 13**—Ex parte *decree when justified—Suit disposed of on day fixed for arguments on a preliminary question—Legality of.*

Where on the day fixed for hearing arguments on the question of jurisdiction the Court finding the defendant absent, heard the plaintiff's evidence and passed an *ex parte* decree, *held*, that an *ex parte* decree ought not to have been passed under the circumstances as the date was not fixed for the decision of the case. The fact that an appeal had been preferred from the *ex parte* decree does not prevent the Court from setting aside the *ex parte* decree or a Court of appeal from reversing an order of the first Court refusing to set aside the *ex parte* decree. (*Abdul Raoof, J.*)

C. P. CODE (V OF 1908), O. 9, R. 13—Ex parte Decree.

FIRM OF SETH KHUDA BAKHSH *v.* GHULAM QADIR. **72 I. C. 900 (2) : A. I. R. 1924 Lah. 224.**

——**O. 9, R. 13**—Ex parte *decree—Vakil after many hearings stating no instructions—No withdrawal in absence of statement to the effect.*

The mere fact that a vakil after having appeared for the party at many hearings says he has no instructions does not amount to his withdrawal from the undertaking in his *Vakalatnama* unless it is so stated. Where after many hearings the defendant's vakil states on the final hearing day that he has no instructions, but the Court disposes of the case on the merits, there is an appearance and O. 37, R. 3 applies to the case. The remedy of the defendant against the Court's order is by way of appeal and not by way of an application to set aside the decree as if it had been made under O. 9, R. 13. (*Phillips and Odgers, JJ.*) S. S. BALAKRISHNA AIYAR *v.* MUTHAMMAL.

82 I. C. 1028 : A. I. R. 1925 Mad. 316.

——**O. 9, R. 13**—Ex parte *decree—Decree of appellate Court.*

Where an appellate Court confirms an *ex parte* decree on an appeal by the deft., the decree of the appellate Court is not an *ex parte* decree. The deft. should apply to the appellate Court to stay appeal to enable him to apply to first Court to set aside the *ex parte* decree. (*Oldfield and Ramesam, JJ.*) PALANIAPPA CHETTY *v.* SUBRAMANIA CHETTY.

14 L.W. 609 : 66 I. C. 59 : (1921) M. W. N. 796 : 30 M. L. T. 151 : A. I. R. 1922 Mad. 33 : 42 M. L. J. 12.

——**O. 9, R. 13**—Ex parte *decree—Setting aside.*

When there is transfer of territorial jurisdiction after decree, the new Court can entertain application to set aside *ex parte* decree. (*Spencer and Krishnan, JJ.*) SRINIWAS RAO *v.* HANUMANTHA RAO.

46 Mad. 1 : 15 L. W. 458 : (1922) M. W. N. 349 : 65 I. C. 727 : 31 M.L.T. 79 · A.I.R. 1922 Mad. 10 : 42 M.L.J. 344.

——**O. 9, R. 13**—Ex parte *decree—Setting aside—Grounds for.*

A Court has no power to set aside an *ex parte* decree except on one of the grounds contemplated by O. 9, R. 13, C. P. Code 43 M. 94 Foll. (*Waller, J.*) GULLAPALLI KOTAYYA *v.* GORANTLA SUBBAYYA. **20 L. W. 490.**

——**O. 9, R. 13**—Ex parte *decree—Application to set aside—Appeal—Effect of.*

A suit was decreed *ex parte* and the defendant filed an application under O. 9, R. 13 and also subsequently preferred an appeal. The application for re-hearing was kept pending till the disposal of the appeal. The appellate Court dismissed the appeal but observed that the application for re-hearing under O. 9, R. 13 deserved consideration by the trial court, which however, held that after the appellate court had confirmed the *ex parte* decree, it had no jurisdiction to set it aside under O. 9, R. 13, and further that there was no sufficient cause for restoration. *Held* that after the *ex parte* decree had been affirmed by the appellate court, it merged in the appellate decree and the trial court had no jurisdiction to entertain the application under O. 9, R. 13, although it had been filed before the filing of the appeal. (*Bucknill, J.*) MT. AJODHYA KUAR *v.* DURGA PRASAD. **1923 P. H. C. C. 145 : 71 I. C. 383 : 4 Pat. L. T. 115 : A. I. R 1923 Pat. 331.**

Final Decree.

——**O. 9, R. 13**—*Final decree* ex parte—*Partition suit—Decree passed without notice to defendant—Setting aside.*

When a court adjourns a pending suit it is its duty to give notice of the adjourned date to the parties or their pleaders. Where after the preliminary decree in a partition suit the court appointed a commissioner for division by metes and bounds and on his report being received passed a final decree without notice to the defendant, the *ex parte* decree is bad and should be set aside. (*Piggott and Walsh, JJ.*) DURGA PRASAD *v.* HET RAM. **20 A. L. J. 912 : 77 I. C. 91 : L. R. 3 A. 626 : A. I. R. 1923 All. 79 (2).**

——**O. 9, R. 13**—*Final decree—Mortgage setting aside.*

The proceedings in a mortgage suit after the passing of a preliminary decree and a final decree are proceedings in the suit which continues until a final decree is passed. On an application by the plff. in a mortgage suit for the passing of a final decree it is not strictly necessary that notice should be given to the mortgagor-deft. If the Court passes a final decree without such notice, it is not an illegality or irregularity and the Court is not bound to set aside the *ex parte* final decree. At the same time it is open to deft. on showing sufficient cause under O. 9, R. 13 for his absence to apply to set it aside. (*Hallifax, A. J. C.*) ANNAJI *v.* FAKIRA. **67 I. C. 282 : 6 N. L. J. 27 : A. I. R. 1922 Nag. 175.**

Legal Representative.

——**O. 9, R. 13**—*Legal Representative—Heir if entitled to apply.*

Heirs of a defendant against whom an *ex parte* decree is passed before his death, have a right to apply to set aside the *ex parte* decree. 27 All. 274, doubted. (*Walsh and Ryves, JJ.*) MT. BANOO *v.* LALA HARADWARI LAL.

A. I. R. 1923 All. 30.

Limitation.

——**O. 9, R. 13**—*Limitation—Application to set aside* ex parte *decree passed must be within* 30 *days of the defendant's becoming aware of the decree.*

Where there has been no due service of summons, the Court should decide whether the application is within time from the date when the petitioner came to know of the *ex parte* decree. (*Abdul Raoof, J.*) MOHLA *v.* KAHNUN. **7 Lah. L. J. 408 : 26 Punj. L. R. 600 : A. I. R. 1925 Lah. 577.**

——**O. 9, R. 13**—*Limitation* — Onus *of proving knowledge.*

An applicant who seeks to have an *ex parte* decree set aside has to prove the application is within the time allowed by law. If he alleged that he did not know of the decree he will have to explain satisfactorily the circumstances which led to the default. (*Campbell, J.*) THE FIRM OF MAGHI MAL KHARAITTI RAM *v.* THE FIRM GOPI RAM RAM CHAND. **75 I. C. 1020 : A. I. R. 1924 Lah. 603.**

——**O. 9, R. 13**—*Limitation—Application to set aside* ex parte *decree—Delay—Power to excuse—Limitation Act, S.* 5.

The High Court has power under the combined effect of S. 5 of the Limitation Act and S. 122, C. P. Code to apply the provisions of S. 5 of the Limitation Act to applications to set aside *ex parte* decrees. Consequently the rule framed by the High Court applying S. 5 of the Limitation Act to such applications is *intra vires.* (*Coutts-Troter, C. J., Ramesam and Wallace, JJ.*) KRISNAMACHARIAR *v.* SRI RANGAMMAL. **35 M.L. T. (H. C.) 43 : 20 L. W. 332 : 80 I. C. 877 : (1924) M. W. N. 682 · 47 Mad. 824 : A. I. R. 1925 Mad 14 : 47 M.L.J. 409.**

C. P. CODE (V OF 1908), O. 9, R. 13—Limitation.

——— **O. 9, R. 13** - *Limitation— Extension of time for applying should be made on justifiable grounds.*

Under O. 9, R. 13 as amended by the Madras High Court, though time can be extended, still it should be extended on justifiable grounds. (*Oldfield and Ramesam, JJ.*) PALANIYAPPA CHETTY *v.* SUBRAMANIYA CHETTY. **14 L. W. 909 : 30 M. L. T. 151 (H. C.) : (1921) M. W. N. 796 : 66 I. C. 59 : A. I. R 1922 Mad. 33 : 42 M. L. J. 12.**

——— **O. 9, R. 13**—*Limitation—Application barred is no ground for setting aside—Inherent powers cannot be resorted to.*

The fact that a certain application which had been decreed *ex parte* was barred by time, is not a ground for setting aside the *ex parte* decree under O. 9, R. 13. The inherent powers of a court under S. 151, C. P. Code cannot be called in aid to set aside an *ex parte* decree or to extend the time therefor. 43 Mad. 94 Foll. (*Coutts and Ross, JJ.*) AJODHYA MAHTON *v.* MT. PHUL KUER. **65 I. C. 341 : 1922 P. H. C. C. 61 : 1 P. 277 : A.I.R. 1922 Pat. 479.**

Miscellaneous Proceedings.

——— **O. 9, R. 13**—*Miscellaneous proceedings—Application to set aside* ex parte *decree—Dismissal for default—Application for restoration dismissed—Appeal if lies.*

Under the C. P. Code there is no appeal provided for from an order dismissing an application which is for restoring an application for setting aside an *ex parte* decree. When O. 43 makes no provision for an appeal S. 151 cannot be resorted to as conferring a right of appeal. (*Sulaiman, J.*) CHANDRA SAHAI *v.* DURGA PRASAD. **46 A. 538 : 22 A. L. J. 427 : 79 I. C. 323 : L. R. 5 A. (Civ) 331 : A. I. R. 1924 All. 682 (2).**

——— **O. 9, R. 13**—*Miscellaneous proceedings*—Ex parte *order—Setting aside.*

Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay, and if that is the case he may be mulcted in costs. But if he does appear before the suit is heard, then he has a right to be heard. (*Macleod, C. J. and Coyajee, J.*) RADHABAI *v.* ANANT PANDURANG. **A. I. R. 1922 Bom. 345 (1).**

——— **O. 9, R. 13**—*Miscellaneous proceedings—Applicability—Order dismissing application under O. 21, R. 100.*

Quaere—If O. 9, R. 13 applies to an order dismissing for default an application under O. 21, R. 100, C. P. Code? (*Jwala Prasad, J.*) THAKUR PRASAD LAL *v.* SUKHLAL SINGH. **5 Pat. L. T. 567 : 79 I. C. 598 : A. I. R. 1924 Pat. 698.**

Procedure.

——— **O. 9, R. 13**—*Procedure* —Ex parte *decree, when to be passed.*

Where the vakil of the defendant had asked for an adjournment, and on the same being refused took no further part in the proceedings, an *ex parte* decree should be passed. (*Mears, C. J. and Piggott, J.*) KRISHNA DASS *v.* RAM UGRAH SINGH. **21 A. L. J. 500 : L. R. 4 A. 423 : 74 I. C.845 : A. I. R. 1923 All. 549.**

——— **O. 9, R. 13**—*Procedure—Forum—Appeal preferred against the decree.*

Though an appeal is pending against an *zx parte* decree, an application to set it aside should be made to the Court which passed the decree and not to the Court hearing the appeal. 30 Mad. 535, Dist., 27 Mad. 622; 39 All. 13 and 38 Cal. 394 Foll. (*Wallis, C J. and Oldfield, J.*) PALANIAPPA CHETTI *v.* SUBRAMANIA CHETTY. **44 Mad. 731 · 13 L. W. 519 : 62 I. C. 755: (1921) M. W. N. 309 : 41 M. L. J. 90.**

C. P. CODE (V OF 1908), O. 9, R. 13—Right to apply.

——— **O. 9, R. 13**—*Procedure—Notice—C. P Code, O. 3, R 5.*

Where deft. applied to have an *ex parte* decree set aside and the Court ordered payment of process-fee at once and the signature of the plff.'s pleader was taken on the order, but as the deft. paid no fee and no notice was served on plff. but the Court set aside the decree and ordered payment of Rs. 7-8-0 as costs to deft. for which the deft. got plff.'s property worth Rs. 400 sold for Rs. 150 and purchased it himself and the plff. sued for recovery of possession, *held*, that the *ex parte* decree could not be set aside without notice to plff. and that the plff.'s pleader did not represent the plff. after the *ex parte* decree was passed. (*Das and Adami, JJ.*) SHEIKH MAHOMED JAMIL *v.* MUSAMMAT BIBI TUFAILAN. **63 I. C. 47 (P).**

Revision.

——— **O. 9, R. 13**—*Revision.*

An order setting aside an *ex parte* decree cannot be set aside by the High Court in revision, for the simple reason that the validity of such an order can be attacked under S. 105 of the Code in an appeal from the final decree passed in the suit. (*Walsh and Wallach, JJ.*) SHEIKH KALLU *v.* NADIS BAKSH. **A. I. R. 1922 All. 441.**

——— **O. 9, R. 13**—*Revision against order setting aside the decree passed against all defendants—All defendants must be made parties to revision.*

If an *ex parte* decree passed against a large number of defendants be set aside on application of two of them, it is in effect set aside against all and, therefore, all of them are necessary parties to an application for revision of the order setting the *ex parte* decree aside. (*Suhrawardy, J.*) PROFFULLA CHANDRA GHOSE *v.* TARA CHANDRA GAIN. **78 I. C. 132 : A. I. R. 1925 Cal. 509.**

——— **O. 9, R. 13**— *Revision* —Ex parte *decree set aside—Revision lies.*

An application for revision lies from an order setting aside an *ex parte* decree. (*Case law reviewed.*) (*Baker, J. C.*) VISHWANATH *v.* VAIJNATH. **A. I. R. 1925 Nag. 356.**

——— **O. 9, R. 13**—*Revision — Application to set aside* ex parte *decree allowed—No revision lies.*

Where on an application to set aside an *ex parte* decree the Court considered the evidence and decided that the applicant had no knowledge of the suit and that summonses were not served upon him and that he came to know of the decree within 30 days of application and set aside the *ex parte* decree. *Held*, that no revision lay as it cannot be said that the Court committed any error, illegality or irregularity within the meaning of S. 115. (*Kulwant Sahay, J.*) SHAMSHER NARAIN SINGH *v.* MAHOMED SALE. **90 I. C. 329 : A. I. R. 1926 Pat. 29 (2).**

——— **O. 9, R. 13**—*Revision—Refusal to set aside* ex parte *decree on the ground of disbelieving a medical certificate is not revisable.*

A Court has jurisdiction to accept or reject any piece of evidence including a medical certificate, hence its order based upon such acceptance or rejection is not revisable. (*Mullick and Bucknill, JJ.*) BHAICHAND FULLCHAND *v.* HAJI DAWOOD AYUB. **A. I. R. 1924 Pat. 816.**

Right to Apply.

——— **O. 9, R. 13**—*Right to apply*—Ex parte *decree against one defendant—Appeal by the other impleading the* ex parte *defendant—Application for setting aside—If maintainable.*

C. P. CODE (V OF 1908) O. 9, R 13—Right to apply.

Where a decree is passed *ex parte* against one of two defendants, the mere fact that an appeal is pending at the instance of the respondent, impleading him as a respondent, he has a right to apply under O. 9, R. 13 for setting aside the decree. Case law reviewed. (*Sulaiman, J.*) MIRZA ABDULLA BEG *v.* RAMZAN KHAN. **21 A. L. J. 901 : L.R. 5 A. 8 : 79 I. C. 381 : A I. R. 1924 All. 173.**

———O. 9. R. 13—*Right to apply—Minor defendant not represented—Setting aside decree—Duty of Court.*

In an application under O. 9, R. 13, C. P. Code, the only point which the Court has to consider is whether the defendants were prevented by any sufficient cause from appearing. If the minor defendants were not represented there is sufficient cause for their non-appearance and the Court could set aside the *ex parte* decree. (*Daniels, J.*) PEARE LAL *v.* ASHRAF KHAN **L. R. 4 All. 137 : 71 I. C. 456 : 21 A. L. J. 185 : A. I. R. 1923 All. 213. See Contra 66 I. C. 460 (Nag.)**

———O 9, R. 13—*Right to apply—Third party.*

A Court has no jurisdiction to set aside an *ex parte* decree at the instance of a person not affected by the decision, and who has been expressly exempted from the decree. (*Walsh and Ryves, JJ.*) AJODHYA PRASAD *v.* KATORI **61 I. C. 484 : 3 U. P. L. R. (All.) 29.**

———O. 9, R. 13—*Right to apply—Application to set aside* ex parte *decree—Fresh vakalat unnecessary.*

A pleader duly appearing in a suit is not obliged to file a fresh vakalatnama for the purpose of an application to set aside an *ex parte* decree in the suit. Ch. IV of the Bombay Manual of Civil Circulars does not lay down that an application to set aside an *ex parte* decree is not an application connected with the suit. (*Macleod. C. J. and Kanga, J.*) BACHUBAI JHIRAD *v.* IBRAHIM ISAK. **24 Bom. L. R. 744 : 69 I. C. 169 : 47 B. 11 : A. I. R. 1922 Bom. 207.**

———O. 9, R. 13—*Right to apply—Appeal against decree by one defendant — Application by another—Jurisdiction to hear—Successor-in-office if can declare predecessor's order as being without jurisdiction.*

A suit for partition was instituted on 20-12-1918 against several defendants, among whom the present appellant was No. 4. Two of the defendants contested the suit, and on 22-2-1919 a preliminary decree for partition was made on contest against two of the defendants and *ex parte* against the others. The present appellant did not appear at all in the first Court, and he was one of those against whom the decree was made *ex-parte*. On 17-12-1919 the first defendant alone preferred an appeal against the decree to the High Court and three days later, *i. e.*, 20-12-1919 the appellant presented an application to the trial Court under O. 9, R. 13, C.P. Code. The application was kept pending until after the disposal of the appeal preferred by 1st defendant. The appeal in the High Court was dismissed on 5—1—1922 as having abated by reason of the omission of the appellant to implead the legal representatives of one of the deceased respondents. The record was returned to the lower Court and on 8-4-1922 a petition of compromise between the plaintiff and the appellant was presented and in accordance therewith the court ordered that the suit should be restored to its original number as against defendant No. 4 in regard to three of the items in the suit. In making this order the Court proceeded on the compromise alone without any enquiry as to the causes which prevented defendant No. 4 from appearing at the trial. In July 1922 a different Judge succeeded and on 7-7-1922 he passed an order to the effect that the order of 8-4-1922 was made without jurisdiction because there was no longer any *ex parte* decree over which the Court had any control; that the order was a nullity and utterly void so that no proceedings to set it aside were necessary, and that the fact of its being made on contest as against the plaintiff could not convert it into a valid order. *Held* that the appellant had the right to make an application under O. 9, R. 13 at the time when he did make it, although an appeal had been preferred by another defendant: that the result of the appeal could not have been to rob the Court of its jurisdiction to make an order on the application of the appellant; that the order of the High Court dismissing the appeal as having abated was not a decree in which that of the lower Court was merged; that the order of the 8th April 1922 was an order within the jurisdiction of the Judge to make whether it was legal or otherwise ; that the order must stand until proper steps were taken by the parties affected thereby to have it set aside ; and that the subsequent order of 7-7-1922 should be set aside and the suit remanded for trial.

Per *Mukerjee, J.*—Where a defendant against whom an *ex parte* decree is passed applied under O. 9, R. 13 to set it aside and at the same time prefers an appeal from it, the original Court may proceed with the application notwithstanding the pendency of the appeal. When the *ex parte* decree has been confirmed or otherwise disposed of on appeal, the Court which passed the *ex parte* decree has no longer any power to entertain the application to set it aside even though the application was made before the appeal was filed. The same principle will hold good, even if the appeal has been preferred by a party other than the defendant against whom the decree was passed *ex parte* provided the decree was one and indivisible. (*Walmsley and Mukerjee, JJ.*) KALIMUDDIN AHAMMED *v.* ESABAKUDDIN. **39 C. L. J. 399: 28 C. W. N. 795: 51 Cal. 715: A. I. R. 1924 Cal. 830.**

———O. 9, R. 13—*Right to apply—Decree against minor, not properly represented, is a nullity and suit can't be restored to file.*

If a minor is not properly represented before the Court, a decree passed against him is in effect a nullity and the Court cannot set aside the *ex parte* order and re-open the suit under O. 9, R. 13. The Court possesses no inherent power to restore a suit once disposed of and to add parties to it. who were not represented at the original trial. 39 All. 8, 5 L. W. 482. Dist.; 10 L. W. 471, Foll. (*Spencer, J.*) ARUMUGA GOUNDAN *v.* PERIAVANJIAPPA GOUNDAN. **19 L. W. 233 : 34 M. L. T. 94: (1924) M. W. N. 289: 78 I. C 76: A. I R. 1924 Mad. 489 (1.): 46 M. L. J. 348.**

———O. 9, R. 13—*Right to apply—Minor defendant — Guardian-ad litem not properly appointed—Effect of.*

Where the allegation of an applicant applying under O. 9, R. 13, C.P. Code, is that he was a minor and that he was not represented by a guardian when the *ex parte* decree was passed an application under O. 9, R. 13, C.P. Code, is incompetent. 31 A. 572; 37 M.L.J. 399; 24 A. 383; 37 A. 179; 39 A. 8, Ref. (*Kotwal, A. J. C.*) SETH PARMANAND *v.* LAKHMICHAND. **18 N.L R. 138: 66 I. C. 460: A.I R. 1922 Nag. 249 (2). See Contra A. I. R. 1923 All. 213.**

———O. 9, R. 13—*Right to apply—Guardian negligent in the conduct of suit—Minor can apply to have* ex parte *decree set aside.*

Courts will allow a minor to intervene for the purpose of setting aside an *ex parte* decree, provided he can show negligence on the part of his guardian in the conduct of the suit. 6 C. L. R. 69, Foll. (*Mullick and Ross, JJ.*) BINODINI DEBI *v.* PARMESHWAR DAYAL

C. P. CODE (V OF 1908), O. 9, R. 13—Right to apply.

SINGH. **1925 P. H. C. C. 180: 88 I. C. 987. 6 Pat. L. T. 855 : A. I. R. 1925 Pat. 512.**

———**O. 9, R. 13**—*Right to apply—B. T. Act, S.* 153.

S. 153 of the B. T. Act bars an application under O. 9, R. 13 or O. 47, R. 1, unless the application states the injuries sustained by the applicant on account of the decree or judgment, and he deposits in Court the amount of rent admitted by him to be due. If no rent is admitted to be due, no deposit is needed. (*Jwala Prasad, J.*) CHANDRA BHUR DEB *v.* BHOLA RAI. **2 Pat. L. T 372· 62 I. C. 80 : 1921 P. H. C C. 301.**

Scope of.

———**O. 9, R. 13**—*Scope of.*

There can be no *ex parte* proceedings against a defendant who has entered appearance and filed his defence. (*Lindsay and Sulaiman, JJ.*) RAM CHARAN LAL *v.* RAGHUBIR SINGH. **21 A. L. J. 495: L. R. 4 A. 294 : 75 I. C. 387 : 45 A. 618 : A. I. R. 1923 All. 551.**

———**O. 9, R. 13**—*Scope of*—Ex parte *decree - Setting aside—Conditions requisite.*

A Court can set aside an *ex parte* decree only under the provisions of O. 9, R. 13, under which the applicant has to satisfy the Court that summons was not duly served or that he was prevented by sufficient cause from appearing. In the absence of either of these conditions, the Court has no jurisdiction to set aside an *ex parte* decree. (*Walsh and Wallach, JJ.*) SHEIKH KALLU *v.* NADIR BAKSH. **19 A L. J 907: 64 I. C 527: A. I. R. 1922 All. 441 (2).**

———**O. 9, R. 13**——*Scope of—The two parts of the rule are disjunctive.*

If the Court is satisfied either that the summons was not duly served, or that the defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing the *ex parte* decree should be set aside. The two branches of the rule are distinctive and the defendant whatever his position may be in respect of one branch, is entitled to the benefit of the section if he satisfies the Court that he has made good his contention under the other branch. (*Page, J.*) BALDEODAS LOHIA *v.* SUBKARANDAS GOENKA. **52 Cal. 179: 88 I. C. 508: A. I. R. 1925 Cal 627 (2).)**

[See on appeal 30 C.W.N. 104: A. I. R. 1926 Cal. 327.]

———**O. 9, R. 13**—*Scope of—Application for setting aside decree, dismissal for default—Second application is allowable.*

An application under O. 9, R. 13 to set aside an order passed in a preceding application of the same nature lies. Proceedings under O 9, R. 13 may go on *ad infinitum.* 44 Cal. 950, Foll. Where an appeal against an order under O. 9, R. 13 is dismissed for non-prosecution, second application under O. 9, R. 13 to restore the first application may be allowed subject to terms. (*Walmsley, J.*) BHOLA NATH DE *v.* NRISHIMHA PROSAD ROY. **76 I. C. 533 : A. I. R. 1923 Cal. 552.**

———**O. 9, R. 13**—*Scope of—Inherent power.*

The appellate Court is not competent to set aside an *ex parte* decree under O. 9, R. 13 unless it was satisfied the defendant was prevented by some sufficient cause from appearing on the 4th August. A court has no power apart from the provisions of O. 9, R. 13 to set aside an *ex parte* decree made by itself, there being no inherent power to do so. 53 I. C. 847, Foll. (*Martineau, J*) JAGAN NATH *v.* ABDUL HAKIM. **73 I. C. 660: A. I. R. 1923 Lah. 147 (1).**

———**O. 9, R. 13**—*Scope of.*

C. P. CODE (V OF 1908), O. 9, R. 13—Service of summons.

The expression "the court by which the decree was passed" in O. 9, R. 13, is so definite and precise as to create an exception to the general rule introduced by S. 150 of the C. P. Code. Per *Krishnan, J.* The R. 13 of O. 9 of the C. P. Code, is an enabling one which prescribes what is to be done in the ordinary course to get an *ex parte* decree set aside. It does not say that the Court that passed the decree is the only Court that can set it aside. Nor is there anything restrictive in the meaning. (*Spencer and Krishnan, JJ.*) SRINIVAS RAO *v.* HANUMANT RAO. **(1922) M. W. N 349: 31 M. L. T. 79: 46 Mad. 1 : 15 L. W. 458: 65 I. C. 727: A. I. R. 1922 Mad. 10 : 42 M. L. J. 344**

———**O. 9, R. 13**—*Scope of—Appearance—What amounts to.*

The word "appearance" as used in the C. P. Code has a well recognised meaning and implies that the party is present at the trial either in person or through pleader for the purpose of conducting the case. Where therefore a pleader appears and asks for an adjournment, which is refused but has no instructions to represent the client for the purpose of the suit, there is no appearance within the meaning of the Code, even though the party was present in person in Court. (*Dawson Miller, C. J. and Coutts, J.*)DAMODAR DAS *v.* RAJ KUMAR. DAS. **69 I. C. 837: 1 P. 188: A. I. R. 1922 Pat. 485.**

———**O. 9, R. 13**—*Scope of—Inherent powers.*

The Court, in dealing with an application to set aside an *ex parte* decree, is restricted to the provisions of R. 13 ; it cannot consider any other valid reason for disposing of the same, nor it has inherent powers in this case. (*Raymond, A. J. C.*) FIRM OF NOTANDAS *v.* FIRM OF PRIBHDAYAL. **63 I. C. 131 : 15 S. L. R. 61.**

Service of Summons.

———**O. 9, R. 13**—*Service of summons—Summons is not duly served if it has no relevance to real proceeding which is contemplated.*

A summons cannot be said to be duly served which is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed. (*Walsh, A. C. J. and Ryves, J.*) BALGOBIND *v.* SHEO KUMAR. **22 A. L. J. 791 : L. R. 5 A. (Civ.) 545 : 82 I. C. 184 : 46 All. 864 : A. I. R. 1924 All. 818 (2).**

———**O. 9, R. 13 and O. 5, R. 20**—*Service of summons by registered letter*—Ex parte *decree.*

Service by registered post is at any time a poor substitute for personal service, which is directed by the Code. It is allowed to litigants as a matter of convenience. If defendant represents to the Court that he had not been offered the postal packet, he is entitled to retrial where an *ex parte* decree has been passed. (*Macleod, C. J. and Shah, J.*) SUNDER SPINNER *v.* MAKAN BHULA. **46 Bom. 130 : A. I. R. 1922 Bom 377 (1).**

———**O. 9, R. 13**—*Service of summons—Setting aside* ex parte *decree on ground that defendant was not duly served—Court should see that provisions of O. 5, R. 17, are really complied with.*

Before setting aside an *ex parte* decree it is necessary for the Court to be satisfied that the provisions of the second part of R. 17 of O. 5 have been really complied with. It is necessary in each case for the Court to see whether in fact the serving officer has used all due and reasonable diligence with a view to finding the defendant before the process of affixing the summons to the outer door or some conspicuous part of the house is resorted to.

C. P. CODE (V OF 1908), O. 9, R. 13—Service of summons.

Per *Buckland, J.*—It is impossible to say what is necessary by way of "reasonable and due diligence." What is due diligence in one case may not even be diligence in another case. If the process server goes to a place on a day and hour when he may expect to find the defendant there, and does all that is required under the section, and if he cannot find the defendant and he could not find him, whatever further steps he took, by reason of his absence, then it is not necessary for the process-server to repeat his attempts to effect personal service. (*Sanderson, C. J. and Buckland, J.*) BALDEODAS *v.* SHUBCHURNDAS.

30 C. W. N. 104 : A. I. R. 1926 Cal. 327. (On appeal from 52 C. 179.)

——— **O. 9, R. 13**—*Service of summons—Affixture—Temporary absence of defendant—Duty of Court.*

Mere temporary absence of the deft. does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be used, and where it cannot be said that this was done, service by affixture is improper. (*Scott-Smith, J.*) NIHALA *v.* KHAZAN SINGH. **73 I. C. 34 (1) : A. I. R. 1924 Lah. 233. (But see 42 M. L. J 422.)**

——— **O. 9. R. 13**—*Service of summons—Defendant having refused* ex parte *summons, decree cannot be set aside.*

An *ex parte* decree can only be set aside if the defendant satisfies the Court that he was not duly served or that he was prevented by some sufficient cause from appearing. This can have no application where it is found that the defendant refused the summons. In such a case the Court has no power, apart from the provisions of Order 9, rule 13, to set aside an *ex parte* decree passed by itself. 26 Mad. 597 held overruled by 43 Mad. 94 Foll. (*Baker, J.C.*) VISHWANATH *v.* VAIJNATH. **A. I. R. 1925 Nag. 356.**

——— **O. 9, R. 13**—*Service of summons.*

It is not legally necessary to give the defendant notice of an application by the plaintiff for a final decree in a mortgage suit. The summons mentioned in Rule 13 of Order 9 is the first summons issued to the defendant giving him notice of the suit filed and the failure to appear mentioned in the same rules means failure to appear at any time during the suit and not absence at some of the hearings, even if they are all the hearings after the first at which the plaintiff may have made a number of applications of various sorts. That rule does not therefore apply to the case of a defendant who is merely not served with notice of some application made in the course of the suit. (*Batten, J.C. and Hallifax, A. J. C.*) PANJAB RAO *v.* BALIRAM. **69 I. C. 549 : A. I. R. 1923 Nag. 13.**

——— **O. 9, R. 13**—*Service of summons—Burden of proving want of due service is on applicant.*

Order 9 Rule 13 requires the applicant to satisfy that the summons was not "duly served" and the *onus* is therefore upon the applicant. (*Jwala Prasad and Foster, JJ.*) NAGESHWAR BUX RAI *v.* BISESHWAR DAYAL SINGH. **3 P. 236 : 2 P. L. R. 58 : 78 I.C. 889 : 5 P. L. T. 576 : A. I. R. 1924 Pat 446.**

Sufficient Cause.

——— **O. 9, R. 13**—*Sufficient cause—Date not fixed for defendant's appearance.*

If no date has been fixed for the appearance of the deft. within O. 5, R. 1, the Court cannot dismiss the suit under O. 9, R. 13. A plff.'s failure to appear on a date fixed for him to attend and to find out what date has been fixed for the appearance of the deft. does not enable the Court to dismiss a suit for default. The Court should in such cases fix a date for the appearance of the deft. and even then if the plff. does not appear, the Court can dismiss the suit. (*Scott-Smith, J.*) INDER SINGH *v.* SHERU.

60 I. C. 475 : 22 P. W. R. 1921.

——— **O. 9, R. 13**—*Sufficient cause for setting aside* ex parte *decree—Absence of practitioner.*

The absence of a pleader when the case was called on for hearing may not be a ground for setting aside the *ex parte* decree. (*Odgers, J.*) THIRUMALACHARIAR *v.* ATHIMOOLA KARAYALAR. **22 L.W. 695.**

——— **O. 9, R. 13**—*Sufficient cause.*

On an application to set aside an *ex parte* decree the question to be considered is whether the defendant honestly intended to be present at the hearing of the suit and did his best to do so. Once the court is satisfied that he did try to be present in court in time and would have got there in time but for the intervention of an accident for which he was in no way responsible, it is the duty of the court to set aside the *ex parte* decree, mulcting in proper cases, the defendant in costs. The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside. (*Schwabe and Wallace, J.*) ARUNACHELLA AIYAR *v.* SUBARAMIAH.

46 Mad. 60 : 31 M. L. T. 257 : 16 L. W. 583 : (1922) M. W. N. 600 : 68 I. C. 971 : A. I. R. 1923 Mad. 63 : 43 M. L. J. 632.

——— **O. 9, R. 13**—*Sufficient cause—Setting aside, conditional on paying costs—Legality of—Facts to be proved.*

Before a court sets aside an *ex parte* order, it must come to a finding whether the facts on which the application is based are true or not. An order setting aside an *ex parte* decree conditional on the petitioner paying costs within a certain time is not proper. (*Simpson, A. J. C.*) SANT BAKHSH *v.* OUDH RAM. **90 I. C. 745.**

——— **O. 9, R. 13**—*Sufficient cause—Wrong date given by Small Cause Court Bench Clerk*—Ex-parte *decree—Application to set aside decree refused—Order set aside in revision.*

Where the Small Cause Court Bench clerk gave a wrong date to the petitioner (defendant) as that on which the case was fixed for hearing and an *ex parte* decree was passed in consequence. *Held*, that the procedure in the Small Cause Court under which the clerk fixed date for cases which are ripe for hearing lends itself to such a misunderstanding as was alleged by petitioner and the *ex parte* decree should have been set aside and the High Court accordingly set aside the decree and ordered a re-hearing. (*Heald, J.*) WAZIR CHAND *v.* B. M. BHARADWAZA.

3 Bur. L. J. 34 · A. I. R. 1924 Ran. 271.

Suit to set aside.

——— **O. 9, R. 13**—*Suit to set aside—Failure of one plaintiff to file affidavit of documents*—Ex parte *decree on counter-claim passed against all plaintiffs—Decree against other plaintiffs is nullity and obtaining of it is fraud on Court justifying maintainability of a suit to set it aside though application under r.* 13 *be barred.*

Plaintiff filed a suit in which defendant put in a counter-claim against plaintiff as well as other persons, alleged partners of plaintiff. Plaintiff failed to obey an order made in the suit to file his affidavit of documents, whereupon defendant applied for an order that in default of the affidavit, the plaintiffs' suit should be dismissed and that he should be held

C. P. CODE (V OF 1908), O. 9, R. 13—Suit to set as de.

entitled to an *ex parte* decree on his counter-claim not only against plaintiff but against the other defendants to the counter-claim, who were not in default ; the *ex parte* decree was thus passed. *Held* that there was a fraud on Court and the other non-defaulting parties were entitled to have the *ex parte* decree set aside. (*Macleod, C. J. and Coyajee, J.*) DEVJI PADAMSEY *v.* THOMMADRA ERIKALAPPA.

27 Bom. L. R. 1494 : A. I. R. 1926 Bom. 63.

——— **O. 9, R. 13 and S. 11**—*Suit to set aside—Dismissal of application—Matters in subsequent suit to set aside decree outside scope of R. 13—Non-service of summons is not* res judicata.

Where the subsequent suit to set aside an *ex parte* decree contained matters which could not have been raised in an application under O. 9, R. 13, which had been dismissed, *Held*, that the question of non-service of summons was not precluded by *res judicata* in the subsequent suit. (*Greaves and Mukerji, JJ.*) NALINI KANTA MUKHERJI *v.* HURI NIKARI.

41 C. L. J. 281 : 86 I. C. 779 : 29 C. W. N. 325 : A. I. R. 1925 Cal. 663.

———**O. 9, R. 13**—*Suit to set aside*—Ex parte *decree—Application to set aside—Dismissal—Subsequent suit to set aside decree on the ground of fraud—If maintainable.*

Defendants obtained an *ex parte* decree in a money suit against plaintiff. Subsequently the plaintiff applied under O. 9, R. 13, C. P. Code, to set aside the decree on the ground that he had been wrongly informed by his mukhtear of the date when the hearing was to take place. The Court disbelieved the plaintiff's case and dismissed the application. Subsequently plaintiff brought a suit against the defendant on the ground of fraud namely that the defendant and the plaintiff's mukhtear had fraudulently conspired to keep the true date of hearing from the plaintiff and the suit was therefore decreed *ex parte*. *Held*, that the matter having been the subject of decision in the previous proceeding to set aside the *ex parte* decree, could not be re-opened again in the suit. (*Miller, C. J. and Mullick, J.*) MAHABIR PRASAD CHOUDHURY *v.* CHHEDI SINGH. **1924 P. H. C. C. 155 : 81 I. C. 1035 : A. I. R 1924 Pat. 769.**

———**O. 9, R. 13**—*Suit to set aside—Application to set aside* ex parte *decree does not bar suit to set aside decree for fraud.*

An infructuous application to set aside an *ex parte* decree does not in any way bar a subsequent suit to have the decree set aside on the ground of fraud such as by non-service of summons. The questions arising in such a suit are not the same as what arises on an application under O. 9, R. 13. The issues are different and the prior decision is not *res judicata*. (*Das and Macpherson, JJ.*) MAHARANI JANKI KUER *v.* BABU THAKUR RAI. **5 Pat. L. T. 37 : 75 I. C. 343 (2) : 1923 P. H. C. C. 336 : A. I. R. 1924 Pat. 241.**

———**O. 9, R. 13**—*Suit to set aside* ex parte *decree.*

Though a suit does not lie to set aside a decree and a sale in execution of such decree on the ground that none of the processes in the suit or in execution was served upon the plaintiff, such a suit is maintainable if the allegations in the plaint amount to an attack, not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex parte* decree was obtained as being a fraud from beginning to end. 29 Cal. 395 Foll. (*Das and Adami, JJ.*) SATDEO NARAIN *v.* RAMAYAN TEWARI. **2 P. 335 : 4 P. L. T. 147 : A. I. R. 1923 Pat. 242 (2).**

C. P. CODE (V OF 1908), O. 10, R. 1.

———**O. 9 R. 13**—*Suit to set aside.*

Plaintiff obtained an *ex parte* decree and got defendant's property sold under the decree. Defendant applied under R. 13 to set aside the decree, on the ground of defective service of summons but the Court found against him and dismissed the application. He then sued to set aside the decree on the ground of fraud and perjured evidence. *Held*, that both the questions had been raised and decided in the previous litigation and so the suit was barred. (*Miller, C. J. and Ross, J.*) JANGAL CHAUDHARI *v.* LALJIT RASBAN. **1 Pat. L T. 735 : 6 Pat. L. J. 1 : 60 I. C. 124 : 3 U. P. L. R. (Pat.) 1 : 1921 P. H. C. C. 3.**

———**O. 9, R. 13**—*Suit to set aside—No application made—Suit on ground of fraud is not barred.*

A suit will lie to set aside an *ex parte* decree impeached on the ground of fraud, although application has not been made to have that decree set aside. (*Godfrey, J.*) ABDULLA RAHMAN AUDY *v.* SYED ALABI. **3 Rang. 65 : 86 I. C. 537 : 4 Bur. L. J. 18 : A. I. R. 1925 Rang. 200.**

——— **O. 9, R. 13**—*Suit to set aside—When lies—Fraud*

Where plaintiff alleged that defendant purposely served summons on a wrong person and did not give plaintiff's father's name though he knew it and impleaded plaintiff as a partner of a firm, though he knew that he was not and got an *ex parte* decree, *held*, that a separate suit will lie to set aside the *ex parte* decree. (*Madgaonker, A. J. C.*) SHIRAM *v.* DATARAM MUNSHIRAM. **16 S. L. R. 109 : 70 I. C. 852 : A. I. R. 1922 Sind 20.**

———**O. 10, R. 1 and S. 115**—*Failure to examine to ascertain real points in dispute justifies interference in revision.*

The powers which O. 10 of the C. P. Code vest in the Civil Courts to examine the parties are mainly intended to draw out by *viva voce* examination the real points in controversy between them and thus prevent the real matter in dispute remaining undecided or left out from consideration. There are other enabling provisions also in Orders 11 and 12 of the C. P. Code which the parties can avail themselves of and thus reduce the points of dispute between them and lessen the number of issues to be framed in the case. Where the Court fails to perform this duty, the High Court will interfere in revision. (*Kinkhede, A. J. C.*) BALAJI VINAYAK BUTE *v.* VITHOBA. **79 I. C. 614 : A. I. R. 1924 Nag. 191.**

———**O. 10, R. 1**—*Pleadings not clear—Duty of Court.*

The proper way of clearing up the pleadings after the plaint and written statement have been filed is that prescribed by O. 10, R. 1, C. P. Code, the provisions of which are peremptory. The Court must, under that rule, at the first hearing of the suit, ascertain from each party or his pleader whether he admits or denies the allegations of fact made by the opposite party except where such admissions or denials are already contained in the written pleadings and must record such admissions or denials. A written replication is not a substitute for this oral examination of the parties and their pleaders and it is of the utmost importance for the purpose of doing justice between the parties that this oral examination should be duly and carefully carried out by the court. (*Daniels and Lyle, A. J. Cs.*) ANJUMAN-UN-NISSA *v.* ASHIQ ALI. **8 O. L. J. 439 : 66 I. C. 222 : 3 U. P. L. R. (J. C.) 65 : A. I. R. 1922 Oudh 178.**

C. P. CODE (V OF 1908), O. 10, R. 4.

——O. 10, R. 4—*Scope of.*

O. 10, R. 4 is a self-contained Code for cases where a party is ordered to attend because the Court desires to have his evidence. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) KANDOTH PUTHIYADOTH CHENGARU CHANDU *v.* PUTHIYADOTH CHENGARA RAMAN NAIR. (1921) M. W. N. 390 : 63 I. C. 961 : 14 L. W 15.

——O. 11, R 2—*Refusal to issue interrogatories —No revision.*

A refusal to issue interrogatories for the examination of witnesses is not a ground for revision. (*Scott-Smith, J.*) ROOP CHAND AND MELA RAM *v.* THE CHURCH MISSIONARY TRUST ASSOCIATION. 69 I. C. 417 : A. I. R. 1923 Lah. 282 (2).

——O 11, Rr.12 and 14—*Documents—Production in Court—Admission in evidence.*

A document directed to be produced under O. 11, Rr. 12 and 14, does not *ipso facto* become evidence in the case. It must be proved by witnesses and then marked as an exhibit on the side of the party relying on it. (*Broadway and Abdul Raoof, JJ.*) JUGAL-KISHORE *v.* ATTRA. 4 Lah. L J. 385.

——O. 11, Rr. 12 and 14—*Order for production of documents must follow an order as to—Affidavit of documents—Procedure.*

An order for production of documents under O. 11, R. 14, C. P. Code must follow an order as to affidavit of documents under O. 11, R. 12, C. P. Code. In the absence of an order compelling defendants to file an affidavit of documents, the Court cannot on the plaintiff's application compel the defendants to produce certain account books alleged to be with them. (*Das and Kulwant Sahay, JJ.*) BAIDYANATH *v.* BHOLA-NATH ROY. 1 Pat. L. R 233 : 76 I. C. 991 : 1923 P. H. C. C. 143 : A. I. R 1923 Pat. 337.

——O. 11, Rr 14, 18 and 21—*Order of production --Effect of non-compliance—Defence cannot be struck off —Powers of Court how and when to be exercised.*

The non-compliance with an order under O. 11, R 14 for the production of account books does not warrant the striking off the defence of the party which is guilty of the non-compliance of the order. The grounds on which the discretion is given to a court for striking off the defence are given in O. 11, R. 21. An order under O. 11, R. 21 can be passed only after the court has directed discovery under O.11, R. 12 or inspection of documents under O. 11, R. 18. A strict compliance with the provisions of these later is necessary in every case before defence is struck off. (*Rafique and Piggott, JJ.*) THE LYALPUR SUGAR MILLS & CO. *v.* THE RAMCHANDRA GUR SAHAI COTTON MILLS & CO. 44 All. 565 : 20 A. L. J. 422 : L R. 2 A. 317 : 67 I. C. 73 : 4 U. P. L. R. (A) 139 : A. I. R. 1922 All 235.

——O. 11, R. 14—*Inspection of adversary's documents—Order permitting— Propriety— Condition— Notice to opposite party—Necessity—Partnership— Declaration of right as partner and taking of partnership accounts—Suit for—Inspection by plaintiff of alleged partnership accounts—Order permitting before commencement of trial—Inspection by employee in defendant's firm who had been won over by plaintiff— Revision— Interlocutory orders of Court below—Interference with--Conditions.*

Inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself but with reference also to the stage of the case at which such right is to be permitted and the right must be exercised so as to result in as little harm as possible to parties who are entitled to

C. P. CODE (V OF 1908), O. 11, R. 18.

have the protection of the court in carrying on their lawful pursuits. In a suit in which the two main contentions were (1) whether plaintiff was really a partner in 1st defendant's firm and trade and (2) whether he was therefore entitled to a taking of the partnership accounts, the defendant filed various lists of documents and produced various documents with an affidavit praying that the court should not allow inspection of any document by plaintiff without specific orders and without notice to him. Before the trial of the suit had begun the Court made an order without notice to the defendant allowing the plaintiff to inspect a number of documents produced by the defendant. *Held* in revision against the order of the Court below, that plff. could not be allowed unless and until he had established that he was a partner, to inspect any document which did not bear on the question of partnership, and that as regards documents which did bear upon it the court below must hear the defendant's objection before it passed its order. Following on the order referred to above, the court below passed a further order permitting *M*, who had obtained a power of attorney from plaintiff, to inspect all the defendant's documents. *M* was employed in the defendant's firm for at least 20 years writing up and keeping the firm's accounts ; he had left defendant and he actively reverted to plaintiff's side in the dispute between plaintiff and defendant ; and he actively supported plaintiff and was ill-disposed towards defendant. *M* was employed by the plaintiff for the purposes of inspection because of his exclusive and intimate acquaintance with the firm's business. *Held*, in revision against the said order, that unless and until the plaintiff established his plea of partnership, inspection on his behalf by *M* could not be permitted, and that such inspection as the lower court permitted must be by some one else There would be no objection to an inspection by *M*. after plaintiff established his plea of partnership. Interference by the Court in revision with proceedings of the lower Court during the pendency of a suit are to be deprecated unless strong reasons are made out. Interference in the present case was based partly on the ground that the lower Court had not properly understood the provisions of O. 11, R. 14, C. P. Code, and partly on the ground that the result of the orders of the Court below might be wholly unnecessary and irremediable damage to the defendant's business interests. (*Wallace J.*) RAMACHARI *v.* KRISHNAMACHARI. 20 L.W.533: (1924) M.W.N. 863:47 Mad. 934: 80 I. C. 604 : A. I. R. 1924 Mad. 846 : 47 M. L. J. 460.

——O. 11, Rr. 14 and 21—*Order for production of documents—Non-compliance with—Dismissal of suit.*

O. 11, R. 21 of the C. P. Code does not justify the dismissal of a suit for non-compliance with an order under O. 11 R. 14, C. P. Code, for production of documents. 65 I. C. 661 diss. (*Krishnan and Waller, JJ.*) SITHAMALLI SUBBAYYAR *v.* RAMANATHAN CHETTIAR. 19 L. W. 355 : 34 M. L. T. 23 : 77 I. C. 766 : (1924) M. W. N. 340 : A. I. R. 1924 Mad. 582 : 46 M. L. J. 350.

——O. 11, Rr. 15 and 18—*Immateriat—Documents—Inspection of, before filing written statement.*

Where the defendant did not file written statement but took out a summons asking the plaintiff to give inspection of documents casually referred to in the plaint but not material to the case the order about the summons was discharged. (*Macleod, C. J.*) RAPAPORT *v.* KALLIANJI. 23 Bom. L. R. 1255 : 66 I. C. 8 : 46 B. 866 : A. I. R. 1923 Bom. 73.

——O. 11, Rr. 18 and 21—*Order of inspection— When to grant.*

Under O. 11, R. 18 when a party applies to inspect

C. P. CODE (V OF 1908), O. 11, R. 18.

documents in the pleadings or in a previous affidavit of documents and make an affidavit for that purpose the Court ought not to make an order for inspection without giving the other side an opportunity of replying to the affidavit. In such a case, dismissal of suit for non-compliance with the terms of the order is not proper. (*Walsh and Ryves, JJ.*) FIRM OF KEDAR NATH DURGA PRASAD *v.* FIRM OF BISHWANATH LAKHMICHAND. **L. R. 5 A. 225 : 22 A. L. J. 299 : 46 A. 417 : A. I. R. 1924 All. 510.**

——— **O. 11, R. 18**—Strict compliance with provisions of the rule is necessary before an order for inspection of documents is passed. (*Rafique and Piggott, JJ.*) LYALPUR SUGAR MILLS & CO. *v.* RAMCHANDRA GURSAHAI COTTON MILLS & CO.
20 A. L. J. 422 : 67 I. C. 73 : 44 A. 565 : L. R. 3 A. 317 : 4 U. P. L. R. (A.) 139 : A. I. R. 1922 All. 235.

——— **O 11, R. 21**—Non-compliance with orders for discovery or inspection does not justify a Trial Court to strike off the defence of the party so ordered. (*Rafique and Piggott, JJ.*) LYALPUR SUGAR MILLS & CO. *v.* RAMCHANDRA GURSAHAI COTTON MILLS & CO. **20 A. L. J. 422 : 44 A. 565 : L. R. 3 A. 317 : 67 I.C. 73 : 4 U. P. L R. (A.) 139 : A. I. R. 1922 All. 235.**

——— **O. 11, R. 21**—*Documents—Striking off defence—Propriety—Failure to file affidavit of.*

A defendant is liable to have his defence struck out only when an order of the Court has not been obeyed; and even then the Court should direct that the defendant be called upon to show cause why his defence should not be struck out. The penalty will be imposed, if it can be shown that the non-compliance with the order of the Court is due to wilful default. (*Macleod, C. J. and Coyajee, J.*) DEVAKARAN BHOLARAM *v.* SANGIDAS JESIRAM.
89 I. C. 215 : 27 Bom. L. R. 694 : A. I. R. 1925 Bom. 386.

——— **O. 11, R. 21**—*Rule contemplates two orders first, for answering to interrogatories or for inspection and secondly, upon failure to comply with the first, of dismissal of suit—Dismissal should be ordered only when Court is satisfied that plaintiff avoids fair discovery.*

The terms of O. 11, R. 21 contemplate two orders being made. First, an order for the answer to the interrogatories or for the discovery or inspection of documents, as the case may be, within a specified time and, secondly, upon the failure to comply with such an order, a further order dismissing the suit. It is desirable that this course should ordinarily be followed, and it should be noted that an order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery. (*Sanderson, C. J. and Richardson, J.*) JAGANNATH MOTILAL *v.* BALA PRASAD ARJUNDAS. **78 I. C. 859 : A. I. R. 1925 Cal. 66.**

——— **O. 11, R. 21**—*Dismissal of suit under—Setting aside dismissal under O. 9, R. 9 wrong—Remedy by appeal or review.*

Where a case was fixed for the plaintiff's compliance with the direction of the Court under O. 11, R. 12, C. P. Code, and the suit dismissed for their default under O. 11, R. 21, C. P. Code. *Held*, that such a dismissal cannot be set aside by an application under O. 9, R. 9. *Held*, further, that such an order is a decree and is appealable under O. 43, R. 1 (*f*), C. P. Code, and the plaintiff's remedy is either by way of appeal or perhaps by way of review. (*Godfrey, J.*) MAUNG KHANT GYI *v.* MA THET HNIN.
3 Rang. 63 : A. I. R. 1925 Rang. 218.

C. P. CODE (V OF 1908), O. 13, R. 1.

——— **O. 12, R. 1**—*Admissions must be taken as a whole.*

Admissions must be taken as a whole or not at all. All the words of the admission must be taken even if they operate in his favour. (*Napier and Odgers, JJ.*) SREEDHARAM VALIA RAJAH *v.* NARAYANA.
(1921) M. W. N. 639 : 71 I. C. 270 : 41 M. L. J. 525.

——— **O. 12, R. 6**—*Judgment on admissions—When to be passed.*

Final judgment ought not to be passed upon admissions in a pleading or an affidavit unless the admissions are clear and unequivocal. It must further be remembered that the Court can pass judgments on admissions if it thinks fit and its exercise cannot be claimed as a matter of right. 23 C. W. N. 1017, Foll. (*Mookerjee and Rankin, JJ.*) GALSTAUN *v.* E. D. SASSOON & CO., LTD. **27 C. W. N. 783 : A. I. R. 1924 Cal. 190.**

——— **O. 12, R. 6**—*Admissions—Pleadings—How to construe.*

In construing admissions in a pleading a Court ought to look to the plaint and the pleadings as a whole. The rule is that if a party makes a qualified statement, it cannot be used against him apart from the qualification. (*Prideaux and Kinkhede, A. J.Cs.*) KRISHNABAI *v.* DHONDO RAMCHANDRA. **20 N. L. R. 63 : 78 I. C. 542 : A. I. R. 1924 Nag. 129.**

——— **O. 12, R. 6**—*The rule is permissive.*

Obiter.—O. 12, R. 6 is merely permissive ; upon an application under the rule, the Court may make such order or give such judgment as the Court may think just. The Court is not bound to pass an immediate judgment. (*Robinson, C. J. and May Oung, J.*) S. P. R. M. FIRM *v.* MAUNG PO KYA. **1 R. 580 : 77 I. C. 332 : A. I. R. 1924 Rang. 144.**

——— **O. 12, R. 6**—*Admission can't be ordinarily withdrawn in appeal if treated as basis of judgment.*

It is only in special circumstances that a consent, which formed the foundation of the judgment appealed from, is in the appeal Court to be treated open to withdrawal. (*Lord Blanesburgh.*) DIWAN CHAND KIRPA RAM & CO. *v.* WELD & CO.
(1925) M. W. N. 459 : 88 I. C. 54 : A. I. R. 1925 P. C. 150 (P. C.).

——— **O. 13, R. 1**—*Account books not produced in proper time—Power of Court to receive.*

O. 13, R. 1, C. P. Code, does not exclude the discretion of the Court to receive any documentary evidence at any subsequent stage. The appellate Court should not interfere with the discretion of the Court below unless it has been capriciously exercised. (*Chatterjee and Panton, JJ.*) RANI PRAYAG KUMARI *v.* SIVA PRASAD. **42 C. L. J. 280 at 376.**

——— **O. 13, Rr. 1 and 2**—*Documents produced by defendant after settlement of issues but at early stage of suit—Allegation in affidavit that documents could not be found earlier—No counter-affidavit by plaintiff—Summary rejection is improper and is revisable by High Court—Madras Civil Rules of Practice, R. 64.*

After issues had been settled, but at an early stage of the trial of the suit, the defendant applied to the Court to receive certain documents produced by him in evidence alleged in an affidavit in support of the petition that he was unable to find the documents earlier. There was no counter-affidavit by the plaintiff. The Judge summarily rejected the application on the ground that the reasons given for the documents not having been produced earlier could not be accepted. *Held*, that the order was improper and was liable to be set aside in revision by the High Court. R. 64 of the Civil Rules of Practice made by the Madras High Court indicates that the documents should be called

C. P. CODE (V OF 1908), O. 13, R. 1.

for on some date fixed by the Court for such documents being produced and left in the Court. (*Srinivasa Aiyangar, J.*) CHIDAMBARA CHETTIAR *v.* PARVATHI ACHI. **87 I. C 351 : A. I. R. 1925 Mad. 744.**

——O. 13, Rr. 1 and 2—*Documents filed at late stage—Admissibility—Power of Court.*

Under O. 13, Rr. 1 and 2, C.P. Code, unlike the corresponding provisions of S. 138 of the old Code, there is an absolute prohibition of the reception of documents not produced at the first hearing, unless good cause is shown for their non-production at that stage. The Court may, however, admit the evidence in the interests of justice, if the Court is of opinion that the reception of the evidence will enable the person tendering it to win a case, which he will otherwise lose and that the loss on the case would be an excessive penalty for failure to produce the evidence in time. (*Ashworth, J. C.*) SHANKAR LAL *v.* MAHBUB SHAW. **25 O. C. 286 : 70 I. C. 278 : A. I. R. 1923 Oudh 59.**

——O. 13, Rr. 1 and 2—*Filing of documents—Late stage—Admission in evidence.*

O. 13, R. 1, C. P. Code, makes it obligatory on the parties to produce all their documentary evidence at the first hearing of the suit. O. 13, R. 2 provides that no documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with O. 13, R. 1, C. P. Code, shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof. But the fact that a document sought to be admitted in evidence at a late stage is a public document is a good cause for relaxing the stringency of the rule. (*Dawson Miller, C. J. and Mullick, J.*) MT. TAIBUNNISSA BEGAM *v.* JAGDIP PANDEY. **2 Pat. L. R. 1 : 78 I. C. 489 : A. I. R. 1924 Pat. 517.**

——O. 13, Rr. 1 and 2—*Production of documents at late stage—Admission—Discretion of Court.*

Though it is left to the discretion of the trial court to admit in evidence documents produced at a late stage, still, in such matters of procedure, the Court should lean to an interpretation which advance justice, rather than to a contrary interpretation. Where certain documents had been exhibited in a case under O. 21, R. 100, C. P. Code, between the parties to the present litigation and there was, therefore, no ground for supposing that they had been fabricated and they evidently had an important bearing on the question at issue in the trial, *Held*, that the Court below erred in the exercise of its discretion in rejecting these documents. (*Ross, J.*) JAGDIP PANDEY *v.* MT. TAIBUNNISSA. **72 I. C. 397 (1) : A. I. R. 1924 Pat 208.**

——O. 13, R. 4—*Documentary evidence—How to be exhibited in a suit—Defect in procedure.*

Under O. 13, R. 4, C. P. Code it is provided that a presiding Judge shall endorse with his own hand a statement that a document proved or admitted in evidence was proved against or admitted by the person against whom it was used. Unless such procedure is followed, the documentary evidence for the Secretary of State as well as for the objector cannot be regarded as having been legally brought on the record. (*Broadway and Fforde, JJ.*) SECRETARY OF STATE *v.* SHRIMATI SARLA DEVI. **5 Lah. 227 : 79 I. C. 74 : A. I. R. 1924 Lah. 548.**

——O. 14, Rr 1 and 3—*Court cannot raise points not raised by parties.*

The Courts should confine themselves to the dispute between the parties and not go out of their way to raise fancy points, which are not raised by the parties themselves. (*Walsh, J.*) LALA LACHMAN *v.* MAJJU.

C. P. CODE (V OF 1908), O. 14, R. 2.

A. I. R. 1923 All. 167.

——O. 14, R. 1—*Framing of issues.*

An issue may be framed not merely by reference to the pleadings but also by reference to other matters. When an issue is amended, the trial is not in any way vitiated so long as the parties are not prejudiced. (*Greaves and Mukerjee, JJ.*) UMESH NARAIN CHOWDHURY *v.* SECRETARY OF STATE FOR INDIA. **87 I. C. 575 : A. I. R. 1925 Cal. 1157.**

——O. 14, R. 1—*Issues—None arise where no averment or denial.*

In the absence of averment in plaint and denial in written pleas, no issues arose as to whether the land was ancestral or self-acquired and it cannot be said that the trial Court was in error in not framing an issue which did not arise on the pleadings. (*Scott-Smith, J.*) FATEH MAHOMED *v.* IMAM-UD-DIN. **68 I. C. 106 : 2 Lah. L. J. 188.**

——O. 14, R. 1—*Framing of issues—Duty of Court—Evidence.*

The Court should frame proper issues arising from the pleadings in the case, and the litigant should produce evidence in respect of issues framed but he cannot be expected to produce evidence in respect of points not covered by the issues. (*Chevis, J.*) KASTURI MAL *v.* LAJJA RAM. **60 I. C. 751.**

——O. 14, R. 1—*Issues—Framing of.*

Issues are framed not only with reference to the pleadings but also with reference to statements made at the time they are framed. (*Krishnan, J.*) DEVARAJULU NAIDU *v.* KONDAMMAL. **20 L. W. 754 : 89 I. C. 929 : A. I. R. 1925 Mad. 427.**

——O. 14, R. 1—*Issues should be exact.*

It is hard if not impossible to decide any case properly unless the issues are carefully framed to cover only the points of difference between the parties and to cover each point once only. (*Hallifax, A. J. C.*) SALEH MAHOMED *v.* RAMRATTAN TEWARI. **78 I. C. 1015 : A.I.R. 1924 Nag. 156.**

——O. 14, R. 1—*Issues—Scope of—Power of Court.*

O. 14, C. P. Code, does not limit the Court framing issues to the matters set out in the pleadings. (*Burn, J. M.*) KAMTA SIROMAN PRASAD SINGH *v.* BIPAT KURMI. **L. R. 5 O. 121.**

——O. 14, R. 2—*Trial—Discovery—Order for—Hearing of preliminary issues.*

Where it is necessary before an order for discovery can be made that certain questions in suit should first be decided, the proper order is that the suit should be set down for the settlement of issues. The Judge would then be in a position to decide which of the issues were necessary to be determined before the question of inspection or discovery could be decided. The same procedure should be followed when one party suggested thatthe suit could be decided on the hearing of a preliminary issue. (*Macleod, C. J. and Crump, J.*) THE EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO. *v.* DINANATH. **47 Bom. 509 : 25 Bom. L. R. 164 : A. I. R. 1923 Bom. 249.**

——O. 14, R. 2 and O. 15, R. 3 (1)—*Preliminary issues of law—Trial on—Procedure.*

The power to order trial on preliminary issues is contained in O. 14, R. 2, and O. 15, R. 3 (1), C. P. Code. O. 14, R. 2, C. P. Code, clearly applies, when on settlement of issues the Court thinks there are issues of law upon which the case of some part thereof may be disposed of ; then those issues are to be tried first and settlement of issues of fact may be postponed. O. 15, R. 3 (1), C. P. Code, applies after issues have been framed and allows the Court to determine issues of law. if satisfied that no further argument or evidence than

C. P. CODE (V OF 1908), O. 14, R. 2.

the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit. There is no reason to confine the power of the Court to try certain issues as issues of law to the date of first hearing. 20 C. L. J. 426 ; 19 C. W. N. 1193, Ref. (*Odgers, J.*) RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI.

15 L. W. 667 : (1922) M. W. N. 521 : 68 I. C. 167 : A. I. R. 1922 Mad. 321.

——**O. 14, R. 2** *Issues of fact—Decision on, cannot be postponed.*

O.14, R. 2 of the Code gives the Court power where issues both of fact and of law arise in the same suit to postpone the settlement of the issues of fact until after the issues of law have been determined, if the Court is of opinion that the case or any part of it may be disposed of on the issues of law at first. There is no such power to separate the issues of fact. Per *Mullick, J.*—There is no authority under the Code for postponing the trial of an issue of fact except on the ground of embarrassment. A plaintiff is entitled to a trial of the issues of fact which he raises and the Court has no authority to refuse to try these issues if the suit is properly framed. (*Mullick and Ross, JJ.*) BHIMNATH *v.* JAGARNATH. **1925 P. H. C. C. 294 : A. I. R. 1925 Pat. 674.**

——**O 14, R. 3**—*Issues, framing of.*

Issues may be framed from other materials than the pleadings as contained in the plaint. (*Fremantle, J. M.*) BABU *v.* ABDUL HUSSAIN.

3 U. P. L. R. (B. R.) 94 (2).

——**O. 14, Rr. 3 and 5**—*Issue may be framed on other matters th n pleadings—Amendment of issue not prejudicing any party—Trial upon such amended issue cannot be declared improper.*

An issue may be framed not merely by reference to the pleadings but also by reference to other matters and so long as any amendment that is made does not prejudice the parties it cannot be said that the trial held upon the issue amended in that way was not a proper trial. (*Greaves and Mukerjee, JJ.*) UMESH NARAIN *v.* SECRETARY OF STATE.

A. I. R. 1925 Cal. 1157.

——**O. 14, R. 3**—*Court's duty.*

It is the duty of the Court primarily to frame necessary issues but the parties are entitled to be heard. (*Schwabe, C. J. and Wallace, J.*) M. KORU KUTTY *v.* VALIKATHODIYIL AHAMMAD.

78 I. C. 1 : A. I. R. 1925 Mad. 169.

——**O. 14, R. 4**—*Document produced at the instance of other party—Evidence.*

A document produced by a party under O. 14, R. 4 at the instance of his adversary need not be used in evidence all at once under S. 163, Evidence Act. (*Kinkhede, A. J. C.*) TRIMBAK *v.* SHRI SITARAM SANSTHAN. **89 I. C. 1016.**

——**O. 14, R. 5**—*Court can frame additional issues—But it should not go outside the statements of parties—Irregularity of framing additional issues at the end of trial is not cured by giving the parties opportunity to adduce additional evidence.*

A Court has under R. 5 power to frame additional issues. But the additional issues authorised by this rule are such as may be necessary for determining the matters in controversy between the parties and that is a clear indication that it was not the intention of the legislature that the Judge should travel outside the actual averments and counter-averments of the parties. What is to be considered is the case made by a party and not the case as "moulded by the astuteness of the Judge." Where the additional issues are framed after the whole trial has been finished and the case is reserved merely for judgment, *held*, that the mere fact that the parties were given an opportunity of adducing additional evidence in regard to the further issues does not suffice to validate a procedure opposed to the law. 11 Bom. 160 (Notes) ; A. I. R. 1925 P. C. 83, Foll. (*Fawcett and Madgavkar, JJ.*) DODBASAPPA DHARMAPPA *v.* PRADHANAPPA VENKAPPA.

C. P. CODE (V OF 1908), O. 16, R. 1.

27 Bom. L. R. 1318 : A. I. R. 1926 Bom. 33.

——**O. 14, R. 5**—*Special issue—Decision—S. 151.*

Where no direct issue upon a point was taken in the pleadings nor was the issue raised at the trial but the trial Judge, after the evidence had been taken and after the arguments were concluded, framed a special issue and decided the case upon it, *held*, that this is permissible and, even had there been no such express provision in the Code, every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. 45 Cal. 748, Ref. (*Miller, C. J. and Mullick, J.*) BAIJNATH SINGH *v.* BRIJRAJ KUAR. **2 P. 52 : A. I. R. 1922 Pat. 515.**

——**O. 15, R. 3**—*Scope of.*

The application of this rule is not confined to the date of first hearing. (*Odgers, J.*) S. RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI.

15 L. W. 667 : (1922) M. W. N. 521 : 68 I. C. 167 : A. I. R. 1922 Mad. 321.

——**O. 16, R. 1**—*Plaintiff applying for summons to witnesses eleven days prior to hearing—Court is bound to issue summons.*

Where the plaintiff applied for summonses to witnesses eleven days prior to the date fixed for hearing and the Court dismissed the application, *held*, the dismissal was wrong. (*Macleod, C. J. and Coyajee, J.*) SAIBAI GOVIND LAVLEKAR *v.* BALKRISHNA PANDURANG. **87 I. C. 702 : 27 Bom. L. R. 471 : A. I. R. 1925 Bom. 368.**

——**O. 16, R. 1**—*Non-service of summons is not itself proof of fraud—Fraud—Non-service of summons.*

Mere non-service of summons in ordinary cases is not sufficient to constitute fraud, but the non-service, taken together with other circumstances, may constitute fraud. (*N. R. Chatterjee and Panton, JJ.*) PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

42 C. L. J. 280 : A. I. R. 1926 Cal. 1.

——**O. 16, R. 1**—*Court cannot refuse to issue summons except in case of manifest abuse of procedure.*

The Court has, except in cases of manifest abuse of procedure, no discretion to refuse an application for summons. The circumstance that the application was made at a late stage is no ground for refusing it though the Court may, when the case is heard, refuse to adjourn the hearing. 9 Bom. 308 and 24 W. R. 290, Foll. (*Newbould and B. B. Ghose, JJ.*) KANDRU HALDAR *v.* TARAPRASANNA.

87 I. C. 355 : A. I. R. 1926 Cal. 364 (1).

——**O. 16, R. 1**—*Documents, although not mentioned in summons to be produced, should be admitted—Witness is not bound to produce a document before he is put in witness box.*

It is open to a witness to produce at the hearing documents which are not referred to in the summons requiring him to give evidence, and these documents are admissible in evidence on behalf of the party calling the witness, although they may not be mentioned in the summons addressed to the witness. There is no obligation on a witness to file the documents in his possession before he is put in the witness box, nor is there an obligation on the party summoning the witness to procure this filing ; for clearly he cannot compe

C. P. CODE (V OF 1908), O. 16, R. 1.

the witness to file beforehand the documents. (*Greaves and Cuming, JJ.*) BAI KUNTHA NATH *v.* UMA NATH. **88 I. C. 498 : A. I. R. 1925 Cal. 1149.**

——O. 16, R. 1—*Court is bound to issue summonses unless the application is not* bona fide.

So long as the application for issue of summonses is made after the institution of the suit and before its final disposal, the Court is bound to issue summonses. The only case in which the Court has power to refuse to issue summonses is where the application is not made *bona fide*, and in such a case the Court acts in the exercise of its inherent power to prevent the abuse of its own process. 15 B. 86 ; 28 M. 28, Foll. (*M. N. Mukerji, J.*) PANCHKARI MITRA *v.* PANCHKARI SAHA. **39 C. L. J. 598 : 84 I. C. 9 : A. I. R. 1924 Cal. 971.**

——O. 16, R. 1—*Adjournment cannot be refused on ground that witnesses would not be able to prove the facts in issue.*

Once a Court holds that a party is not to blame for non-attendance of his witnesses he ought to be given an opportunity of procuring the attendance of such witnesses, and the case cannot be decided on the ground that the witnesses, if produced, would not have supported the case of the party producing them. (*Campbell, J.*) MUHAMMAD HUSSAIN *v.* RADHA KISHAN. **26 Punj. L. R. 181 : 86 I. C. 1012 : A. I. R. 1925 Lah. 572.**

——O. 16 R. 1—*Witnesses not present owing to non-service of summons—Court ought to issue fresh summonses.*

Where certain witnesses are not present on the date of hearing owing to non-service of summonses upon them without fault of a party the Court ought to issue fresh summonses and it is not justified in depriving the party who wishes to produce them of his right to have the evidence of those witnesses taken. (*Abdul Raoof and Addison, JJ.*) GOPI CHAND *v.* KIRPA RAM. **26 Punj. L. R. 630 : A. I. R. 1926 Lah. 26.**

——O. 16, R. 1—*Court has no power to refuse to summon witnesses when the application to issue summons is too late ; it may refuse to adjourn the case.*

A party is entitled as of right to summonses to witnesses. So long as an application is made after the institution of the suit, the Court is bound to issue the summons. If the application is made at so late a stage of the proceedings that the witnesses cannot be present, the Court may refuse to adjourn the case for their attendance but it has no power to refuse to issue summonses. 16 All. 218 ; 9 Bom. 308, Foll. (*Moti Sagar, J.*) SARDAR LAL *v.* MOHAR SINGH. **79 I. C. 143 : A. I. R. 1925 Lah. 67.**

——O 16, R. 1—*Duty of Court—Summoning of witnesses.*

Under O. 16, R. 1 a party has an absolute right to summon witnesses and so long as he pays the necessary expenses, to insist that their attendance shall be enforced. The only case in which the Court has power to refuse to issue summons is, where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue the summons. The fact that whether the party originally undertook to bring the witnesses or applied late for issue of summons does not affect the duty of the Court. (*Abdul Raoof and Moti Sagar, JJ.*) PRITAM SINGH *v.* SOBHA SINGH. **75 I. C. 866 : A. I. R. 1924 Lah. 647.**

——O. 16, R, 1—*Witnesses—Court need not adjourn case to enable party to procure.*

Though the Court is bound to summon witnesses on an application therefor by a party, it is not bound to adjourn the hearing to procure the attendance of the witnesses. if the party is not prompt and applies late. (*Raoof, J.*) BALMOKAND *v.* JAGAT RAM. **63 I. C. 735 (Lah).**

C. P. CODE (V OF 1908), O. 16, R. 2.

——O. 16, R. 1—*Right of parties to summon witnesses—Court has no discretion to refuse.*

Under O. 16, R. 1, C. P. Code, a Court has no discretion in the matter of an application for summonses on witnesses if such application be made before the day of hearing. The hearing may not be concluded on the date fixed and an adjournment may take place in the usual course of the progress of the trial and the Court cannot refuse to allow any of the parties to reap the benefit of such an adjournment in the matter of giving evidence. 5 N. L. R. 181 ; 9 W. R. 530, Ref. There is nothing in the C. P. Code which expressly or impliedly declares that witnesses must necessarily be summoned before the day fixed for the first hearing of the suit. (*Batten, J.C. and Hallifax, A.J.C.*) BHAGCHAND *v.* MUSAJI. **68 I. C. 272 : A. I. R. 1923 Nag. 58.**

——O. 16, R. 1—*Witnesses absent—Further opportunity should be allowed.*

Where a party summoned two witnesses to give evidence in the case and they were not present on the day when the Court proceeded to try the case, *held*, the Court must give an opportunity to the petitioner to call those two witnesses. (*Das and Bucknill, JJ.*) MODE NARAIN SINGH *v.* BIKRAM SINGH. **4 Pat. L.T. 545 : A. I. R. 1924 Pat. 36.**

——O. 16, R. 2—*Pleader, summoned as witness—Subsistence allowance—Bombay High Court Civil Circulars*, 1912, *cl.* 55.

A pleader was merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader. According to the statement made by him, it appears that Courts had considered that such special fees could be paid to ordinary witnesses, and if that has been the practice in the District Courts then it must be said that there is no warrant for it in law. There is no such rule either in the Civil Procedure Code or in the Civil Circulars applicable to this case; and in the absence of any such rule, the order of the lower Court, which is based apparently upon the practice of that Court, cannot be supported. (*Macleod, C.J. and Shah, J.*) VALI ASMAL *v.* RAO BAHADUR A. U. MALJI. **46 Bom. 89 : A. I. R. 1922 Bom. 116.**

——O. 16, Rr. 2, 3 and 4—*Witness—Government or Municipal servant—Costs of.*

Government servants and persons in Municipal or private service, cited as witnesses in civil suits, cannot claim as part of their expenses the payment of the salary which they would earn in their ordinary employment for the time which they spend in attending Court. As to the servants of the Municipal bodies and private employers, *held*, the Court below was right in supposing the question depends on the provisions of Rules 2, 3 and 4 of O.16 of the Civil Procedure Code, and on the rules made by the High Court under clause (3) of Rule 2. (*Richardson and Walmsley, JJ.*) *In the matter of* REFERENCE UNDER RULE 1, O. 46, C. P. CODE. **38 C. L. J. 149 : 76 I.C. 353 (1.)**

——O. 16, R. 2—*Plaintiff repeatedly failing to pay process fees for witnesses—Witnesses absent consequently—No good reason for plaintiff's act—Suit can be dismissed.*

Where the plaintiff repeatedly fails, for two or three times, to pay process fees for summoning his witnesses and consequently the witnesses do not attend Court on the day of hearing and the plaintiff does not give any satisfactory reason for his conduct, then it is open to

C. P. CODE (V OF 1908), O. 16, R. 4.

the Court to dismiss the suit for want of evidence. (*Jai Lal, J.*) RAM BHEJA MAL *v.* BHAGWAN DAS. **7 L. L. J. 232 : A. I. R. 1925 Lah. 457.**

——**O. 16, R. 4**—*Default of payment—Only moveable property can be attached.*

O. 16, R. 4 authorises the Court in default in payment to order the expenses of a witness, to be levied by attachment and sale of only the moveable property of the party obtaining the summons. His immoveable property cannot be put up to sale. (*Chatterjee and Panton, JJ.*) MAHAMED WARISH SADAGAR *v.* RAHMAN ALI MEAH. **70 I. C. 123 : 26 C.W. N. 877.**

——**O. 16, Rr. 10 and 12**—*Proclamation or order of attachment of property are not conditions precedent to impose a fine on a defaulting witness.*

The provisions of Rr 10 to 12 of O. 16 do not mean that the issue of a proclamation or an order for attachment of property are conditions precedent to the imposition of a fine for non-attendance of a person who has been summoned to attend a Civil Court. 31 C. L. J. 363 and 57 I. C. 302 Diss. The words "such person" in R. 12 mean a person to whom a summons has been issued and who fails to attend under R. 10 (1). (*Spencer and Ramesam, JJ.*) PETA NARASAYYA, *In re.* **22 L. W. 332 : (1925) M. W. N. 767 : 90 I. C. 991 : A. I. R. 1925 Mad. 1247 : 49 M. L. J. 438.**

——**O. 16, R. 10**—*Arrest and attachment—Both cannot be ordered.*

A Court, after the issue of a warrant for arrest of a witness, for failure to produce a document, cannot afterwards order an attachment of his property. (*Seshagiri Aiyar, J.*) RANGASAMI REDDI *v* KONDA REDDI. **61 I. C. 967 : 29 M. L. T. 95.**

——**O. 16, R. 12**—*Fine.*

Where the witness appears, but is unable to produce the document, it is illegal to impose a fine upon him. (*Seshagiri Aiyar, J.*) RANGASAMI REDDI *v.* KONDA REDDI. **61 I. C. 967 : 29 M. L. T. 95.**

——**O. 16, R. 19**—*Applicability—Insolvency proceedings.*

In insolvency proceedings the Insolvency Court has power to examine witnesses resident more than 200 miles. (*Greaves, J.*) DINARAM SOMONI, *In re.* **27 C. W. N. 370 : A. I. R. 1923 Cal. 427.**

——**O. 16, Rr. 19 and 21**—*Scope of.*

These rules have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. (*Mukerjee and Panton, JJ.*) SARAT KUMAR *v.* RAM CHANDRA CHATTERJEE. **35 C. L J. 78 : 68 I. C. 9 : A. I. R. 1922 Cal. 42.**

——**O. 16, Rr 19 and 21**—*Applicability.*

Rules 19 and 21 of O. 16 do not apply where party of his own accord desires to examine himself on commission. Further, defendant's application is less strictly dealt with than plaintiffs'. (*Krishnan, J.*) VISWANATHAN CHETTY *v.* SOMASUNDARAM CHETTY. **34 M. L. T. 314 : (1924) M. W. N. 191 : 78 I. C. 407 : A. I.R. 1924 Mad. 541 : 46 M. L. J. 131.**

——**O. 17**—*Provisions of—Liberal construction.*

The provisions of O. 17, C. P. Code, should be liberally construed, particularly as there is latitude given to the trial Court to make any such order as it thinks fit, in lieu of an order of dismissal. (*Kinkhede, A.J. C.*) AYODHYA PRASAD *v.* SECRETARY OF STATE. **79 I. C. 123 : A. I. R. 1924 Nag. 298.**

——**O. 17, R. 1**—*When notice for the discovery of documents has been posted to the hearing of the suit, but on the day so fixed, no judgment is given on the notice, adjournment of hearing of the suit may be refused.*

C. P. CODE (V OF 1908), O. 17, R. 1.

Where a notice as to inspection and discovery of documents is adjourned to the hearing of the suit, though no judgment is given on the notice, the Court may proceed with the suit on the day fixed for hearing and refuse further adjournment especially where the nature of the case requires the avoidance of delay. (*Shah, A.C.J. and Fawcett, J.*) F. A. C. REBELLO *v.* CO-OPERATIVE NAVIGATION AND TRADING CO., LTD. **26 Bom L. R. 907 : 84 I. C. 363 : A. I. R. 1925 Bom. 105.**

——**O. 17, Rr. 1, 2**—*Defendant absent but pleader present—No action by pleader—Nature of decree passed.*

Where a decree was passed against a defendant, when he was absent at the hearing and his pleader being present took no part at all in the proceedings, then unless it is determined that he appeared by a pleader duly instructed, the disposal would be *ex parte* in which case, sufficient cause being shown, he can apply to have it set aside. If the defendant is unable to show that the pleader was not duly instructed then it is not an *ex parte* decree. (*Shah, A.C.J. and Crump, J.*) MOTILAL RATANCHAND MARWADI *v* NANDRAM DALPATRAM. **25 Bom. L. R. 1222 : 82 I. C. 124 : A. I. R. 1924 Bom. 139.**

——**O. 17, R. 1**—*Time should be given to party to pay costs.*

The dismissal of an application for adjournment granted with a direction to pay costs, because the applicant failed to pay the costs fixed by the Court on the same day, is wrong. The party should be given sufficient time to produce the money. Litigants are not expected to come to Court with sufficient money to meet all unforeseen contingencies. (*Suhrawardy, J.*) DELARUDDIN HALDAR *v.* DEOLAR BUN MOLLA. **78 I. C. 125 : A. I. R. 1925 Cal. 570.**

——**O. 17, R. 1**—*Adjournment is not a right on the ground that Court can be otherwise kept busy.*

There is no authority for the notion that parties whose cases are fixed have a sort of right to get adjournments without any reason being given on the ground that somebody else undertakes to keep the Court busy. (*Rankin and B. B. Ghose, JJ.*) BINDUBASHINI ROY *v.* SECY. OF STATE. **51 Cal. 70 : 40 C. L. J. 163 : 79 I. C. 745 : A. I. R. 1924 Cal. 774.**

——**O. 17, Rr. 1 and 3**—*Adjournment cannot be granted in the absence of—Due diligence.*

Where, if zeal and diligence had been shown, there would have been no difficulty about appellant's presenting and obtaining order on an application for transfer to the District Court before which similar cases were pending, before it closed for vacation, *held*, no adjournment could be granted. (*Broadway and Harrison, JJ.*) FITZ HOLMES *v.* THE BANK OF UPPER INDIA, LTD. **4 Lah. 258 : 77 I. C. 523 : 5 L. L. J. 438 : A. I. R. 1923 Lah. 548.**

——**O. 17, R. 1**—*Adjournment should be asked as early as possible.*

Applications for adjournment should not be belated but should be sufficiently early so as not to inconvenience the Judge and the opposite Counsel. (*Kinkhede, A. J. C.*) GANESH PRASAD *v.* BHANGILAL. **83 I. C. 257 : A. I. R. 1925 Nag. 236 (2).**

——**O. 17, R. 1**—*Discretion of the Court.*

Where the appellant's contention was that he ought to have been given another adjournment in the first Court for the purpose of going into the witness-box himself and procuring the attendance of other witnesses, *held*, this is a matter in the discretion of the first Court and not in that of an appellate Court and still less in that of a Court of second appeal.

C. P. CODE (V OF 1908), O. 17, R. 1.

(*Hallifax, A. J. C.*) AMOLAK RAO *v* MAHIPAT RAO. **A. I. R. 1922 Nag. 81.**

——O. 17, R. 1—*Witnesses absent—Absence not due to delay in summoning—Adjournment should be granted.*

Where summonses reached the destination before the date of the hearing but the witnesses were not to be found and they did not appear at the hearing, *Held*, that the non-appearance of the witnesses was not due to delay in the application for summoning them and that the party concerned should be granted another opportunity to prove his case. (*Wazir Hasan, A. J. C.*) DHANI RAM *v.* GAYA SINGH.

84 I. C. 173 : A. I. R. 1925 Oudh 304.

——O. 17, R. 1—*Case transferred without notice to defendant—Defendant should be granted adjournment if he pleads unpreparedness to go on.*

Where after a case has been posted for trial to a certain date, but prior to the latter date, the case is transferred to another Court, but the defendant is not informed of this, and on the date to which the case has been posted, the defendant applies for time on the ground that he was not aware of the transfer and is not prepared to go on with the case, the adjournment should be granted. (*Ross and Kulwant Sahay, JJ.*) S. N. MULLICK *v.* GANGA GOPE.

1925 P. H. C. C. 199 : A. I. R. 1925 Pat. 534.

——O. 17, R. 2—*Order dismissing suit after decree is without jurisdiction.*

In a partition suit the Court made an order dismissing a party from the array of defendants. On an appeal from this order, the suit was compromised and the suit was remitted to lower Court for further action. On a day fixed by lower Court for this purpose the plaintiff did not appear and thereupon the Court dismissed the suit apparently under O. 17, R. 2. *Held*, that O. 17, R. 2 did not apply that there could be no dismissal after decree and that the order was made without jurisdiction and was rightly set aside by the High Court. (*Lord Phillimore.*) LACHMI NARAIN MARWARY *v.* BALMAKUND MARWARY.

35 M. L. T. 143 : 4 Pat. 61 : (1924) M. W. N. 707 : 20 L. W. 491 : L. R. 5 P. C. 171 : 26 Bom. L.R. 1129 : 22 A. L. J. 990 : 29 C. W. N. 391 : 5 Pat. L. T. 623 : 40 C. L. J. 439 : 1 O W. N. 629 : 10 O. & A. L. R. 1033 : 51 I. A 321 : 81 I. C. 747 : A. I. R. 1924 P. C. 198 : 47 M. L. J. 441 (P C.)

——O. 17, R. 2—*Hearing—If includes interlocutory applications.*

Quaere: Whether the term "hearing" in O. 17, R. 2 extends to occasions when interlocutory applications are being dealt with? (*Lord Phillimore.*) LACHMI NARAIN *v.* BALMAKUND. **4 Pat. 61 : 35 M. L. T 143 : 20 L. W. 491 : L. R. 5 P. C. 171 : 26 Bom. L. R. 1129 : 22 A. L. J. 990 : 5 Pat. L. T. 623 : 81 I.C. 747 : (1924) M. W. N. 707 : 40 C. L. J. 439 : 1 O. W. N. 629 : 10 O. & A. L. R. 1033 : 29 C.W.N 391 : 51 I.A. 321 : A. I. R. 1924 P. C. 198 : 47 M. L. J. 441 (P. C.)**

——O. 17, R. 2—*Defendant taking time for producing evidence, but absent—Rule applies.*

Where a party absents himself, whether on the adjourned date or not and whether he had taken time to produce any particular evidence or not, the provisions of O. 17, R. 2 become applicable. (*Sulaiman and Mukerji, JJ.*) GANESHI LAL *v.* DEBI DAS.

47 All. 140 : L. R. 6 A. (Civ.) 79 : 85 I. C. 470 : A. I. R. 1925 All. 267.

——O. 17, Rr. 2 and 3—*Defendant absent at adjourned hearing—Order should be presumed to be under R. 2 in absence of mention otherwise.*

Where the defendant did not appear on the date to which the hearing of the case had been adjourned and judgment was pronounced on that day, *held*, that in the absence of any express mention that the order passed was under O. 17, R. 3 it must be presumed that it was an order passed under O. 17, R. 2 and therefore in deciding the case the Court must be deemed to have proceeded under the provisions of O. 9 of the Code. An application to have the decree set aside as being an *ex parte* one would lie.

Per *Mukerji, J.*—*Held*, in this particular case, inasmuch as the lower Court had passed the judgment as on contest, it should be deemed to have acted under O. 17, R. 3. (*Sulaiman and Mukerji, JJ.*) GANESHI LAL *v.* DEBI DAS. **47 All. 140 : L R. 6 A. (Civ.) 79: 85 I.C. 470 : A.I.R. 1925 All. 267.**

——O. 17, R. 2—*Wrong decision that O. 9, R. 13 did not apply—Revision lies.*

Where a Court in the case of an order under O. 17, R. 2 wrongly holds that no application under O. 9, R. 13 lies, it amounts to refusal to exercise jurisdiction and revision is competent. (*Sulaiman and Mukerji, JJ.*) FIRM GANESHI LAL-HAR NARAIN *v.* DEBI DAS. **47 All. 140 · L. R. 6 A. (Civ.) 79 : 85 I C 470 : A. I. R. 1925 All. 267.**

——O. 17, Rr. 2 and 3—*Court wrongly acting under R. 3 instead of under R. 2—Remedy is by appeal.*

The defendant had taken time for framing of issues, and on the day finally fixed he did not appear. The plaintiff was present. The Court framed issues, took evidence on behalf of the plaintiff and decided the case on that evidence. *Held*, that as the Court in fact decided the case on the merits under O. 17, R. 3, the defendant's remedy was by way of appeal if he considered himself aggrieved. The right of appeal does not depend on what a Court ought to have done but on what it actually did. If the Court acted wrongly in deciding the case on the merits, the appellate Court had full power to put things right. (*Daniels, J.*) MADHO DAS *v.* HIS HIGHNESS THE MAHARAJAH OF BENARES. **L. R 6 A. (Civ.) 152 : 84 I. C. 521 : A. I. R. 1925 All. 252.**

——O. 17, R. 2—*Even where defendant is absent on adjourned hearing, the Court ought to pass an* ex parte *decree and not a judgment on merits.*

Even where a party has taken time to produce evidence and on the date fixed for hearing of that evidence he is absent, the proper course to follow is to pass an *ex parte* decree and not an order under R. 3. The words "make such other order as it thinks fit" in R. 2 do not include an order under R. 3. A.I.R. 1923 All. 153; A. I. R. 1922 All. 68; A. I. R. 1923 All. 551, Foll. In such a case even if the Court purports to deliver judgment on merits, the order is to be treated as *ex parte* decree, for the setting aside of which the procedure in O. 9, R. 13 is to be followed. (*Mukerji and Dalal, JJ.*) RAM ADHIN *v.* RAM BHAROSE.

22 A L.J. 1041 : 47 All. 181 : L.R. 5 A. (Civ.) 740 : A. I. R. 1925 All. 182.

——O. 17, R. 2—*Applicability of.*

O. 17, R. 2 applies to the case where the hearing of a suit has been adjourned and on the adjourned date, the parties or any of them fail to appear. In such a case, O. 17, R. 2 enables the Court, if it so chooses, to deal with the case as being one under O. 9 or to make such other order as it thinks fit. (*Lindsay and Sulaiman, JJ.*) RAM CHARAN LAL *v.* RAGHUBIR SINGH.

45 A. 618 : 21 A. L. J. 495 : L. R. 4 A. 294 : 75 I. C. 387 : A. I. R. 1923 All. 551.

——O. 17, Rr. 2 and 3—*Pleader having no instructions—Order of dismissal—Construction.*

C. P. CODE (V OF 1908), O. 17, R 2.

Adjournment of a suit was granted to plaintiffs for producing witnesses : but on the adjourned date they were absent and their pleader applied for permission to withdraw the suit with liberty to file a fresh suit, which was refused. A further adjournment was then asked for and being refused, the pleader said he had no instructions to do anything further in the case, and left the Court. An order was made dismissing the suit and on an application for restoration being made, the question arose whether the dismissal was under O. 17, R. 2 or O. 17, R. 3. *Held*, Per *Walsh, J.*—Under whatever form the Judge may make an order disposing of a case or however he may misunderstand what he is doing or whatever mistaken language he may use in disposing of the case, the Court has to look at the actual facts as things were at the time and decide under which rule the order was made. Where a party does not personally appear even though his counsel originally instructed is there, if he has failed to supply his counsel with materials or funds, and the counsel states he has no further instructions, although the situation may be drawn into the express words of O. 17, R. 3, it ought to be treated as a default by the plaintiff for want of appearance under O. 17, R. 2, for the counsel no longer represents him and in that sense the counsel is not present, while the plaintiff himself is absent. *Held*, on the facts of the case, the dismissal was under O. 17, R. 3. Per *Piggott, J.*—The plaintiffs not being present and the pleader having said, he had no instructions to do anything further in the case left the Court, a point had been reached at which it was literally true that the plaintiffs were absent neither appearing in person nor by counsel authorised to act on their behalf. The dismissal was under O. 17, R. 2 and an application for restoration lay. (*Walsh and Piggott, JJ.*) LAL JANGPAL SINGH *v.* RAJA KUSHALPAL SINGH. **20 A. L. J. 97 : 70 I. C. 942 : A. I. R. 1923 All. 153.**

———O. 17, R. 2—*Absence of party.*

Plaintiff and pleader being absent on adjourned date, Court cannot hear case on the merits. (*Banerjee, J.*) RUKME *v.* TARA CHAND. **20 A. L. J. 123 : L. R. 3 A. 68 : 65 I. C. 775 : A. I. R. 1922 All. 68.**

———O. 17, Rr. 2 and 3—*Failure of plaintiff to appear at adjourned hearing—Court should proceed under R. 2—Trial Court and not the Appellate Court can consider if plaintiff had good reasons for non-appearance.*

If a party fails to appear at an adjourned hearing, the proper order for the trial Court to pass is one under R. 2 and not under R. 3, but if it proceeds under R. 3 and dismisses the suit on merits, it is the trial Court and not the appellate Court which can consider if the plaintiff had sufficient cause for non-appearance. (*Macleod, C. J. and Coyajee, J.*) BASAYYA AYAPPA *v.* ALLAYA MAHARUDRAYYA. **27 Bom. L. R. 477 : 87 I. C. 710 : A.I.R. 1925 Bom. 328.**

———O. 17, Rr. 2 and 3—*Absence of party—Court must proceed under R. 2.*

On failure of parties to appear on an adjourned date, it is the duty of Court to act under O. 17, R. 2 rather than under O. 17, R. 3, C. P. Code. (*Macleod, and Shah, JJ.*) RATAN BAI *v.* SHANKAR DEOCHAND. **24 Bom. L. R. 775 : 68 I. C. 514 : 46 Bom. 1026 : A. I. R. 1923 Bom. 27.**

———O. 17, Rr. 2 and 3—*Adjournment granted to plaintiff—Default on adjourned date—Disposal of matter on record—If regular.*

Where after the evidence in a case was complete, the case was adjourned for argument to a particular date at the request of the plaintiff and on that date he was absent and the Judge decided the case on the materials on record, the procedure is quite regular. He was not bound to proceed under O. 17, R. 2. Per *Abdul Raoof, J.*—If there was any irregularity, it was covered by S. 99, C. P. Code. (*Broadway and Abdul Raoof, JJ.*) JHANDA SINGH *v.* SADIQ MAHOMED. **5 Lah. 218 : 78 I. C. 453 : A. I. R. 1924 Lah. 545.**

———O. 17, Rr. 2 and 3—*Pleader applying for adjournment—Refusal—Court should write judgment.*

Where on the day fixed for hearing, the plaintiff appeared by a pleader who asked for an adjournment which was refused, *held*, that the proper procedure for the Court was not to dismiss the suit for default but to proceed with the case and write a judgment. O. 17, R. 2, C. P. Code, was not applicable to the case, but O. 17, R. 3 did apply. 41 M. 256, Ref. (*Odgers, J.*) VISVANATHA ASARI *v.* SAMI ASARI. **18 L. W. 209 : (1923) M. W. N. 802 : 73 I. C. 982 : A. I. R. 1924 Mad. 43.**

———O. 17, R 2 and S. 115—*Dismissal wholesale is not proper if pleader is unprepared—Court should proceed to decide on merits—Revision lies from the dismissal but no appeal.*

A pleader's unpreparedness to argue affords no ground for the Court to ignore his presence and proceed to dismiss the appeal as if there was no appearance ; he is bound to proceed to decide on merits but a revision can lie on the ground that, in dismissing an appeal, the Court clearly acts illegally and with material irregularity. 17 C. P. L. R. 1, Foll. (*Kinkhede, A. J. C.*) GANESH PRASAD *v.* BHANGILAL. **83 I. C. 257 : A. I. R. 1925 Nag. 236 (2).**

———O. 17, Rr. 2 and 3—*Party absent on adjourned date—R. 2 and not R. 3 applies.*

A case in which one of the parties fails to appear on the date to which the case is adjourned falls under O. 17, R. 2 and not R. 3, and, therefore, such a case must be disposed of under one of the modes laid down in O. 9 and cannot be considered to have been disposed of on the merits. (*Neave, A. J. C.*) PUTTU LAL *v.* MT. CHHULKO. **85 I. C. 528 : A. I. R. 1925 Oudh 360 (1).**

———O. 17, Rr. 2 and 3—*R. 2 is not distinct from O. 9—R. 3 is different—Under R. 3 Court must have material to decide case on merits.*

No valid distinction can be drawn between O. 17, R. 2 and O. 9. O. 17, R. 2. refers back to O. 9 and gives the Court permission to decide the case in one of the ways prescribed by the order. O. 17, R. 3 is different. That rule does not refer back to O. 9 in any way and therefore where the decision is given on the merits under O. 17, R. 3, the remedy of the aggrieved party is by way of an appeal from the decree. R. 3 applies where two elements combine, namely :—(1) The adjournment must have been at the instance of a party, and (2) There must be the materials on the record for the Court to proceed to decide the suit. 41 Cal. 956, Appr. (*Daniels, J. C.*) RAMESWAR DUTT SINGH *v.* H. H. MAHARAJ JAGJIT SINGH. **78 I. C. 340 : A. I. R. 1925 Oudh 278.**

———O. 17, R. 2—*Dismissal for default—Application for restoration—Duty of Court.*

When the plaintiff is absent on a date to which the suit is adjourned, and the suit is dismissed for default, an application for restoration must be decided by the Court on the merits of the allegations in the affidavit. The fact that plaintiff consented to pay Rs. 300 demanded by deft. for setting aside the order of dismissal does not entitle the Court to surrender its jurisdiction. (*Wazir Hasan, A. J. C.*) MANNI LAL *v.* SHEO SARAN. **10 O. & A. L. R. 136 : 27 O. C. 103 : 11 O. L. J. 412 : 78 I. C. 157 :**

C. P. CODE (V OF 1908), O. 17, R. 2.

A. I. R. 1924 Oudh 389.

——— O. 17, Rr. 2 and 3—*Applicability f—Absence of plaintiff on adjourned day—Dismissal of suit—Effect of.*

Where a plaintiff realising the weakness of his case absented himself on the day fixed for hearing and let the suit be dismissed for default, the decision is one under O. 9, R. 3, C. P. Code, even though the Court purported to act under O. 17, R. 3 and the decision does not bar a fresh suit. (*Dalal, J. C. and Neave, A. J. C.*) SYED MD. HASAN *v.* SYED ALI HYDER. 10 O. & A. L. R. 1239 : 1 O. W N. 803.

——— O 17, Rr. 2 and 3—*Suit adjourned for appointing guardian—Dismissal for default—Propriety of.*

An adjournment of a suit for appointing a guardian *ad litem* is not an adjournment for the hearing of the suit, and hence, on the adjourned date if the plaintiff is absent, the Court has no jurisdiction to dismiss the suit for default. (*Das and Ross, JJ.*) BALMAKUND RAM MARWARI *v.* MADHO PRASHAD.

5 Pat L. T. 424 : 78 I. C. 224 (2) : 1924 P. H. C. C. 215 : A. I. R. 1924 Pat. 714.

——— O. 17, Rr 2, 3—*Instructions only to ask for adjournment—Dismissal is one under R 2.*

Where on the day fixed for hearing the vakil of the plaintiff had only instructions to ask for an adjournment and not to go on with the case, but the same was not granted and the suit dismissed, the order was one passed under O. 17, R. 2 and not under O. 17, R. 3. An application for restoration under O. 9, R 9 is maintainable. (*Mullick and Macpherson, JJ.*) SYED SHAH MUHAMMAD MAUDOOD *v.* MAHARAJAH SIR RAMESHWAR SINGH. 1 Pat. L. R. 281 : 74 I. C. 693 : A. I. R. 1923 Pat. 530.

——— O. 17, R. 2—*Scope of.*

O. 17, R. 2 contemplates the hearing of a suit at some later date to which it has been adjourned. (*Dawson Miller, C. J. and Coutts, J.*) DAMODAR DAS *v.* RAJKUMAR DAS. 1 P. 188 : 69 I. C. 837 : A. I. R. 1922 Pat. 485.

——— O. 17, Rr. 2 and 3—*Default of plaintiff—Effect of—Failure of suit on pleadings—No jurisdiction to take defendant's evidence.*

When there are materials in the record on which the Court can decide the case, the matter falls properly under O. 17, R. 3 and not under O. 17, R. 2, C. P. Code. But where plaintiff has adduced no evidence, and his case fails on the pleadings, the Court has no business to proceed to record the defendant's evidence so as to give himself jurisdiction to act under R. 3. 34 Cal. 235, Rel Where the plaintiff's case was opened, and his witnesses being absent, a day's adjournment was allowed, and on the adjourned date a fresh adjournment was applied for and refused and the Court recorded the depositions of defendant's witnesses and dismissed the suit on the merits, *held*, that the dismissal under O. 17, R. 3 was without jurisdiction and O. 17, R. 2 was applicable to the case. (*Das and Ross, JJ.*) SASHIBHUSHAN KUMAR *v.* DWARKA PRASAD MARWARI. 3 Pat. L. T. 64 : 61 I. C 897 : 6 Pat L. J. 313 : A. I. R 1922 Pat. 2.

——— O. 17, Rr. 2 and 3—*Adjournment—Refusal—Procedure.*

Where the plaintiff applies for an adjournment and on the refusal of the application the plaintiff withdraws, the Court should proceed under R. 2 and not call upon the defendant to produce his evidence in order to give itself jurisdiction to proceed under R. 3. Where there are materials on record on which the Court can decide the case it should proceed under R. 3 and not under R. 2. (*Das and Ross, JJ.*)

C. P. CODE (V OF 1908), O. 17, R. 3.

SHASHIBHUSHAN KUMAR *v.* DWARKA PRASAD.

61 I. C. 897 : 6 Pat. L. J. 313.

——— O. 17, R. 3—*Parties agreeing to abide by oath affecting a third person to be taken in particular manner—Oath illegal under Oaths Act—Court fixing date for oath to be taken—Oath not taken on that day—O. 17, R. 3 does not apply.*

In the course of the plaintiff's evidence, the plaintiff agreed that if the defendant would take an oath holding one of his sons in his lap with his hand placed on the son's head, he would accept it. The defendant agreed to do this, and a date was fixed for the required oath to be taken and for no other purpose. On the date so fixed, the defendant failed to produce his son. The Court applied the provisions of O. 17, R. 3, and, without giving the parties an opportunity of producing any further evidence, proceeded to decide the case on the materials on the record. *Held*, that the Court acted wrongly in fixing a date for the oath in question to be taken, as under S. 8 of the Oaths Act of 1873 it was not permissible for the Court to allow an oath to be taken affecting a third person. *Held*, further, that O. 17, R. 3 had no application to the circumstances of the case and opportunity should have been given to the parties to produce all available evidence. (*Sulaiman and Daniels, JJ.*) TULASI RAM *v.* DAYA RAM. 23 A. L. J. 513 : L. R. 6 A. (C. v.) 396 : 88 I. C. 448 : A. I. R. 1925 All. 604.

——— O. 17, R. 3 and O. 9, R. 13—*Defendant absent—Decree—Application to set aside dismissal—Appeals from order and decree—First appeal dismissed and second allowed.*

At the hearing that defendant being absent the trial Court proceeded to try the suit under O. 17, R. 3 on the merits and decreed it. The defendant applied to have the decree set aside but the application was rejected. Defendant then appealed from the order and the decree. The lower appellate Court dismissed the former appeal but declared in the case of the second appeal that the trial Court had no power to decide the case on the merits in the absence of the defendant and that the decree was only an *ex parte* decree. In the trial Court the pleader of the defendant was present. He had not stated that he had no instructions to proceed with the hearing. All that he had said, according to the order sheet, was that his client had not turned up for some reason not known to him, that the witnesses summoned by him had also not attended and that he was unable to proceed with the case, the Court of first instance thereupon proceeded to decide the suit on the merits and an appeal was maintained from that decree. *Held*, the order of the appellate Court in the latter appeal was both in substance and in form open to question. By saying that he was unable to proceed with the hearing, it cannot be said that the pleader had withdrawn himself ; and the decree passed in that suit cannot therefore be regarded as an *ex parte* decree which could be set aside in the manner laid down in O. 9, R. 13. In form the order passed by the lower appellate Court was similarly open to objection. It was not open to the Judge who heard the appeals, to take the view that the decree was an *ex parte* decree after he had dismissed the appeal which had been filed from an order refusing to set it aside, on the ground that the decree was one dealing with the suit on the merits. If he was satisfied that there was sufficient excuse for his absence, he could have passed an order setting aside the decree passed by the Court of first instance and remanded the suit. If he was not satisfied that there was sufficient reason for his absence,

C. P. CODE (V OF 1908), O. 17, R 3.

it was still necessary for him to have examined the suit on the merits and determined wherher the decree passed by the Court of first instance was proper or not. (*Kanhaiya Lal, J.*) SARJU PRASAD *v.* GAJADHAR LAL. **A. I. R. 1922 All. 497.**

——**O. 17, R. 3**—*Applicability.*

A suit was adjourned to a particular date for effecting a compromise, but if it was not effected the plaintiff was directed to produce his witnesses. The compromise was not effected, but a few days before the date fixed, plaintiff paid into Court the process fee. The witnesses however could not be served. *Held* he did not act with due diligence and failed to comply with the conditions on which he could have had another adjournment, *i.e.*, the failure to effect service was due not to the negligence of the Court or the process-serving staff. The case fell within O. 17, R. 3. (*Harrison and Campbell, JJ.*) HARI KISHEN *v.* MULKH RAJ. **89 I. C 857 : A. I. R. 1926 Lah. 27.**

——**O. 17, R. 3**—*Process-fee paid in time—Service not effected—Adjournment granted, is not time granted to a party within rule.*

Held, following 51 P.R.1915, that where a party to a suit has paid the process-fee for summoning witnesses, the Court and its officers are responsible for effecting service, and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of O. 17, R.3, C.P.Code, O. 17, R. 3 merely authorises the Court to proceed to decide the suit forthwith and it does not authorise its dismissal summarily. (*Scott-Smith and Campbell, JJ.*) KARAM CHAND *v.* JINDA RAM. **71 I. C. 862 : A. I. R. 1924 Lah. 404.**

——**O. 17, R. 3**—*No default by party—Court cannot proceed under this rule.*

The hearing of a case was adjourned for a fortnight to enable plff. to summon his witnesses. Within a week of the hearing the plff. paid process-fee, but the officer of the Court finding the time to be short did not take out the summonses. On the day fixed for the hearing the Court dismissed the suit under O. 17, R. 3, C.P. Code *Held*, that having regard to the negligence of the officer of the Court there was no room for the application of the stringent provisions of O.17, R. 3, C.P. Code. (*Shadi Lal, C. J. and Brasher, J.*) LILA RAM *v.* RAMZAN. **69 I. C. 665 : A. I. R. 1924 Lah. 272.**

——**O. 17, R. 3**—*Scope*—Ex parte *decree may be passed when acting under this rule.*

Where time was not granted to the appellant at his own request for the production of evidence, O. 17, R. 3 has no application. An *ex parte* decree may be passed even in a case in which the Court acts under O.17, R.3 such a decree is nevertheless an *ex parte* decree and liable to be set aside as such. (*Abdul Raoof, J.*) MURLIDHAR *v.* DUNI CHAND AND GOKAL CHAND. **69 I. C. 368 : A. I. R. 1923 Lah. 281 (1).**

——**O. 17, R. 3 and O. 7, R. 11**—*Plaint rejected because plaintiff did not file amended plaint as asked to do—O 7, R. 11 and not O. 17, R. 3 applies.*

Order 17, R. 3 applies only after a suit has been instituted and only after it has been adjourned for the purpose of giving evidence. But where a plaint is rejected on the ground that the plaintiff has not filed an amended plaint, as he was asked to do, O. 17, R. 3, does not apply, but the case falls within O. 7, R. 11, cl. (*c*). (*Madhavan Nair, J.*) K. SANKARANARAYANA IYER *v.* V. R. VENKATARAMA IYER. **80 I. C. 491 : A. I. R. 1925 Mad. 1045.**

——**O. 17, R. 3**—*Presence of party—If amounts to appearance—Scope of rule.*

The mere presence of a party in Court is sufficient to constitute appearance within the meaning of O. 9, C. P. Code, 23 Bom. 414, Foll. O. 17, R. 3 requires a decision on the merits. 23 All, 462, Foll. (*Baker, J.C.*) ONKAR *v.* KAMAL CHAND. **A. I. R. 1924 Nag. 26.**

——**O. 17, R. 3**—*Suit decided under R. 3—R. 2 mentioned instead of R. 3 by mistake in judgment—Remedy is appeal and not rehearing.*

In no case in which a suit is decided under O. 17, R. 3 can a re-hearing be claimed even if in the judgment O. 17, R. 2 is mentioned by mistake instead of O. 17, R 3. The remedy is by way of appeal and not by way of re-hearing. (*Dalal, J.C.*) MT. MAHADEI *v.* TIRBENI. **86 I. C. 356 : A. I. R. 1925 Oudh 495.**

——**O. 17, R. 3 and O. 9, R. 6**—*Absence of defendant on date of hearing—Court should proceed under O. 17, R. 3.*

Where the deft. absents himself on the date fixed for evidence in a case, the proper procedure for a court is to proceed under O. 17, R. 3 and not under O. 9, R. 6, C.P. Code. (*Simpson and Wazir Hasan, A.J Cs.*) CHANHARJA *v.* KALKA PANDE. **9 O. L. J. 543 : 72 I. C. 394 : A. I R. 1923 Oudh 18.**

——**O. 17, R. 3**—*Dismissal of suit for failure to supply defendant with copies in a specific language is illegal.*

An order directing plaintiff to supply the defendant with copies of entries in the plaintiff's accounts book in a specific language is without jurisdiction, and the dismissal of the suit under R. 3 of O. 17 for non-compliance with such order is illegal. (*Mullick and Bucknill, JJ.*) DEBI LAL *v.* JAI PRAKASH NARAIN. **75 I. C. 1 : A. I. R. 1925 P. 316.**

——**O. 17, R. 3**—*Default in appearance is not covered by this rule.*

O. 17, R. 3 does not contemplate a case of default in appearance but a case in which a party who has appeared and has been given time to do some act in further prosecution of his case has failed to do so within the time allowed. The court may in such a case proceed with the suit notwithstanding the default, but the decision is not *ex-parte*. (*Dawson Miller, C J. and Coutts, J.*) DAMODAR DAS *v.* RAJ KUMAR DAS. **1 P. 188 : 69 I C. 837 : A. I. R. 1922 Pat. 485.**

——**O. 17, R. 3 and O. 9, R. 8**—*Day fixed for appointment of guardian—Dismissal of suit without jurisdiction*—Res judicata, *if.*

In a mortgage suit a day was fixed for the appointment of a guardian of a minor defendant. The plaintiff having failed to appear on that day the suit was dismissed. *Held*, the default of the plaintiff fell under O. 17, R. 3 and not under O. 9, R. 8 of Civil Procedure Code. As under O. 17, R. 3 it was incumbent upon the Court to fix a day on default for the disposal of the suit and inasmuch as the parties and particularly the plaintiff who suffered by the order did not know that the case would be taken up for hearing as soon as there was a default in his not taking the necessary steps for the appointment of a guardian, the order was without jurisdiction and if that is so there is no valid decree which can operate on *res judicata* so as to bar a fresh suit of the plaintiff based upon the mortgage bond in question. (*Jwala Prasad, C. J. and Das, J.*) SHEIKH ABDUL RAHMAN *v.* SHIB LAL SAHU. **1922 P. H. C. C. 81 : A. I. R. 1922 Pat. 252.**

——**O 17, R. 3**—*Date fixed for final disposal of suit and for appointment of guardian—No steps taken by plaintiff for latter—Suit cannot be dismissed.*

Where a date is fixed for evidence and final disposal of a suit and the same date is fixed for appointment of a guardian of a minor defendant and the plaintiff takes no steps to get the guardian appointed, the Court

cannot dismiss the suit without giving the plff. an opportunity to adduce evidence at least against the original defendants in the suit. If it so dismisses the suit, it acts without jurisdiction and such dismissal will not bar a fresh suit. (*Jwala Prasad, A. C. J. and Das, J.*) ABDUL RAHMAN *v.* SHIB LAL.

63 I. C. 570 : 2 Pat. L. T. 572.

——O. 17, R. 6—*Amendment can be allowed in appeal.*

An amendment under O. 17, R. 6 may be allowed at any stage of the case, *i. e.*, even in appeal. (*Jwala Prasad, A.C J. and Kulwant Sahay, J.*) HARGOBIND RAY *v.* KESHAVA PRASAD SINGH. **1924 P.H.C.C. 297: 84 I. C. 386 : A. I. R. 1925 Pat. 168.**

——O. 18, R. 1—*Right to begin—Reference to High Court under the Income-tax Act.*

Under the Income-tax Act, the objector, who questions the assessment has the right to begin and has the right to reply. (*Mookerji, Fletcher and Chaudhuri, JJ.*) KILLING VALLEY TEA CO. *v.* SECRETARY OF STATE. **48 Cal. 161: 61 I.C. 107: 32 C.L.J. 421 (F. B.)**

——O. 18, R. 1—*Applicant for mesne profits of property taken in execution of decree reversed on appeal, must begin.*

Where a person took possession of property in execution of a decree which was afterwards reversed in appeal and the successful appellant claimed mesne profits, *held*, that O. 18, R. 1, Civil Procedure Code, which is applicable to miscellaneous proceedings through section 141, lays down that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff, and that in a case like the present, the person claiming mesne profits is in the position of a plaintiff, as it is his petition that is the foundation of the proceedings and if he adduces no evidence at all, no mesne profits can be awarded to him. Section 2, clause (12), C.P. Code, defines mesne profits as those profits which a person in wrongful possession of such property actually received or might, with ordinary diligence, have received. The profit which a person actually received is a matter within the peculiar knowledge of that person and, under section 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them ; but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them. 8 Cal. 343 ; 3 W. R. Mis. 25, Dist. ; 9 C.L.R. 1, Ref. to. (*Spencer and Venkatasubba Rao JJ.*) RAMAKKA *v.* V. NAGESAM. **47 Mad. 800 : A.I.R. 1925 Mad 145 : 48 M. L. J. 89.**

——O. 18, R 2—*Written arguments—Judgment.*

A case was adjourned to a certain date for arguments, but the parties were not ready and the Judge gave them liberty to put in written arguments. Then his predecessor came in, and, after a local inspection, he delivered judgment. *Held*, the parties had sufficient opportunity to argue the case and the judgment was not vitiated. (*Harrison and Zafar Ali. JJ*) HARJI MAL *v.* DEVI DITTA MAL. **4 Lah. 364 : 77 I. C. 398 : A. I. R. 1924 Lah. 107.**

——O. 18, R. 2 (1)—*'The day fixed for the hearing of the suit.'*

In O. 18, R. 2 (1) " the day fixed for the hearing of the suit " does not mean or include the day on which issues are framed. (*Neave, J.*) MADHO LAL *v.* BANARSI DAS. **L.R. 5 A. (Civ.) 582 : 82 I. C. 73 : A. I. R. 1925 All. 98.**

——O. 18, R. 5—*Deposition of witness—Not read over to him—Admissibility of deposition in subsequent trial for perjury—Evidence Act, Ss. 80 and 91.*

Under O. 18, R. 5, C. P. Code, it is necessary that the deposition of a witness in an appealable case, in order to bind him to the statement recorded therein, should be read over to him. This provision is mandatory and not directory. The omission to do so renders the deposition inadmissible in evidence against him on his subsequent trial for perjury. S. 91 of the Evidence Act excludes oral evidence of its contents. 6 C. 762; 12 C.W.N. 845; 36 C. 955 ; 42 C. 240, Foll. 45 C.825 Not Foll. (*Suhrawardy and Cuming, JJ.*) EMPEROR *v.* NABAB ALI SARKAR. **51 Cal. 236 : 25 Cr. L. J. 1027 : 81 I. C. 803: A. I. R. 1924 Cal. 705.**

——O. 18, Rr. 5—12—*Small Cause Court—Deposition need not be read over—Admissibility in prosecution for perjury.*

O. 18, Rr. 5 to 12, have no application to Courts constituted under the Provincial Small Cause Courts Act or exercising jurisdiction thereunder. It is not incumbent in such Courts to read over to witnesses their depositions and they would be clearly admissible in evidence in a prosecution for perjury. (*Wadegaonkar, A J. C*) KALU *v.* TIKARAM. **89 I C. 390 (2) : 26 Cr. L.J. 1350 (2) : A. I R. 1925 Nag 412.**

——O. 18, Rr. 5 and 6—*Provisions directory—Penal Code, S. 193—Deposition not interpreted to and accused—Evidence Act, Ss. 80 and 90*

The provisions of O.18, Rr.5, and 6, C.P. Code, are directory, and non compliance with them does not render the deposition inadmissible at a subsequent trial of the deponent for perjury. If the deposition has not been read over to the witness in the presence of the presiding Judge, it does not prove itself under S. 80, Evidence Act but it may be proved in some other way. The Judge who recorded it can prove it or the accused can admit it. S. 91 Evidence Act, merely excludes the oral contents of a deposition but does not make it inadmissible in evidence. 28 P. R. 1918, 25 P. R. 1890 and 45 Cal. 825 Foll. 42 Mad. 561 Not Foll. (*Prideaux, A. J. C.*) MIRABUX *v.* EMPEROR, **18 N. L. R. 192 : 23 Cr. L. J. 500 : 68 I, C. 36 : A. I. R. 1923 Nag 39.**

——O. 18, R. 5 and O. 26, R. 17—*Applicability.*

The provisions of the Code as in force in Oudh shall apply to wttnesses examined on commission equally with witnesses examined in Court. (*Daniels, A,J.C.*) MT. FEROZA JAN *v.* MIRZA AMIR ALI.

9 O. L. J. 593 : 24 Cr. L. J. 781 : 74 I. C. 445 : A. I. R. 1923 Oudh 119.

——O. 18, R. 11—*Refusal to examine.*

Any particular answer, after it is given, may be ruled out as irrelevant, but no Court can say beforehand that all the evidence not yet taken is going to be irrelevant and the Court's belief that the evidence is biassed is not a valid ground for refusing to record it. (*Batten, J. C. and Hallifax, A. J. C.*) BHAGCHAND *v.* MUSAJI. **A. I. R. 1923 Nag. 58.**

——O. 18, R. 18—*Result of inspection cannot be the foundation of judgment—It should be used to test the accuracy of other evidence—It need not be recorded.*

Though the present Code empowers the Court to go on local inspection of any property in respect of which it is called upon to decide a question in controversy, it is still the duty of the Court not to make the result of such inspection the foundation of its judgment which must be based upon evidence adduced by the parties. It does not entitle the Judge to put his view obtained by means of such inspection in place of evidence. The Judge is to hold such inspection for the purpose of better following and understanding the evidence adduced before him or to test its accuracy. The Code nowhere lays down that the result of a local enquiry must be placed on record. (*Suhrawardy and Graham, JJ.*) RAJ CHANDRA BANIK *v.* ISWAR CHANDRA

C. P. CODE (V OF 1908). O. 18, R. 18.

BANIK. 80 I. C. 292 · A. I. R. 1925 Cal. 170.

——O. 18, R. 18—*Local inspection by Judge—Decision should not be based solely on.*

No decision should be based solely on local inspection of the Judge. (*Abdul Raoof and Campbell, JJ.*) TIRATH RAM *v.* MD. ABDUL RAHIM.
73 I. C. 616 : A. I. R. 1923 Lah. 546.

——O. 19, R. 3—*Affidavits should clearly specify what statements are made on knowledge and what on belief.*

Every affidavit should clearly express how much is a statement of the deponent's knowledge and how much a statement of belief, in which case the grounds of belief must be stated. Failure to distinguish between the two would be taken to mean they are swearing to facts within their own knowledge, which will entail all its necessary consequences. (*Miller, C. J. and Kulwant Sahay, J.*) CHANDRIKA PRASAD SINGH *v.* HIRA LAL. 5 Pat. L. T. 124 : 73 I. C. 721 : A. I. R 1924 Pat. 312.

——O 20—*Judgment—Contents of.*

The omission in a judgment to make special mention of oral evidence is not in itself sufficient to show that, as a matter of fact, the Judge did not consider the evidence. (*Teunon and Newbould, JJ.*) MATIWOR RASUK *v.* DHANU MOLLA. 59 I.C. 963 (Cal.).

——O. 20, R. 1—*Invalid pronouncement—Decree following—Decree should not be violated.*

Where a decree follows a judgment which was not validly pronounced, the decree cannot be violated so long as it stands. (*Kanhaiya Lal and Mukerji, JJ.*) KHARAK SINGH *v* LACCHAM SINGH.
47 All. 332 : 23 A.L.J. 145 : L. R. 6 A. (Civ.) 131 : 86 I. C. 869 : A. I. R. 1925 All. 293 (2).

——O. 20, R. 1 *Parties absent—No notice to parties—Judgment is not validly pronounced.*

A judgment signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them is not validly pronounced. (*Kanhaiya Lal and Mukerji, JJ.*) KHARAK SINGH *v.* LACCHAM SINGH. 47 All. 332 : 23 A. L. J. 145 : L. R. 6 A. (Civ.) 131 : 86 I. C. 869 : A. I. R. 1925 All. 293 (2).

——O. 20, R. 1—*Posting of notice announcing of appeal on notice board is not sufficient compliance with R.* 1.

The posting of a notice upon the notice board of the Court announcing the result of an appeal is not a sufficient compliance with the requirements of Rule 1 as to the pronouncements of judgments in open Court. The practice of omitting to pronounce judgments in open Court is both inconvenient to the parties and in direct opposition to an express provision of law. The case should be considered still pending for want of a delivered judgment. (*Spencer and Ramesam, JJ.*) TARIGOPULA *v.* KOMINENI SESHAMMA.
14 L. W. 514 : 64 I.C. 82 : (1921) M. W. N. 866 : 41 M. L. J. 385.

——O. 20, R. 2—*Judgment—Pronouncement of, can be made by successor.*

A Judge may pronounce a judgment written but not pronounced by his predecessor notwithstanding that the latter wrote it when he had ceased to be the Judge of the Court in which the case was tried. (*Tudball and Rafique, JJ.*) LILAWATI KUAR *v.* CHOTEY SINGH. 42 All. 362 : 61 I. C. 932 : 18 A. L. J. 356.

——O. 20, R. 2—*Rule if mandatory - Judgment written by predecessor—Ceasing to be a Judge—Effect.*

O. 20, R. 2 is not mandatory and a Judge may, if he sees reason to do so, refuse to pronounce a judgment written by his predecessor. The pronouncement of a judgment is the last act of the trial of a suit and is a material part of the trial. It is not an act which can be performed by any other person than a Judge of the Court in which the suit was tried. Where, however, the predecessor in office had ceased to exercise judicial functions, his order is a nullity. (*MacColl, J.C.*) MAUNG BA *v.* MAUNG YE. 4 U. B. R. 171 : 76 I. C. 170 : A. I. R. 1294 Rang. 358.

C P. CODE (V OF 1908), O. 20, R. 4.

——O. 20, R. 3 and O. 21, R. 2—*Judgment—Decree—Application for certificate of satisfaction.*

A decree though drawn up subsequent to the day on which judgment was delivered, must bear the date of the judgment and a certificate of satisfaction of the decree between the date of the judgment and the date when the decree was actually drawn up is valid. (*Pearson and Graham, JJ.*) GIRIBALA DASI *v.* BISWAMBHAR HOLDAR. 40 C. L. J. 87 : 82 I. C. 746 : A. I. R. 1924 Cal. 1064.

——O. 20, R. 3—*Judgment dictated to shorthand writer—Transcript cannot be amended.*

O. 20, R. 3 of the C. P. Code as amended by the Madras Rules does not authorise the Judge to revise the transcript and to substitute fresh words for the words which fell from his mouth to any extent he may deem necessary. Where a judgment is dictated to a shorthand-writer the revision contemplated cannot be of the effective part of the judgment and must be of the nature referred to in S. 152, and one relating to "clerical and arithmetical mistakes arising from any accidental slip or omission." (*Oldfield, J.*) HARI KRISHNA PILLAI *v.* ARUR PANDITHER. 18 L. W. 105 : 72 I C. 688 : (1923) M. W. N. 3 4 · A. I. R. 1923 Mad. 663.

——O. 20, R. 3—*Recalling.*

Court cannot recall order duly made in exercise of inherent jurisdiction save on review or under S. 152. (*Das and Ross, JJ.*) RAMCHARAN SINGH *v.* JANGA BAHADUR SINGH 5 Pat. L. T. 631 : 79 I. C. 900 : A. I. R. 1924 Pat. 696.

——O. 20, R. 4—*Judgment—Personal inspection by Judge alone is not sufficient material for.*

Where a judicial officer decides a dispute solely on knowledge gained by him on personal inspection and without any reference to the evidence in the case, the judgment is liable to be set aside in revision. (*Woodroffe and Ghose, JJ.*) ABDUL HUQ *v.* MAHOMED DIN. 67 I. C. 302 : A. I. R. 1923 Cal. 311.

——O. 20, R. 4—*Judgment—Contents of—Unsatisfactory—Remand.*

Where the judgment of a trial Court is meagre, unsatisfactory and unintelligible, the appellate Court could remand the case for the recording of a proper judgment after hearing arguments afresh. (*Shadi Lal and Wilberforce, J.*) HARBHAGWAN *v.* AHMAD.
4 Lah. L. J. 55 : A. I. R. 1922 Lah. 122 (1).

——O. 20, R. 4—*Judgment jumbling up all points together and containing statement that "all issues are found in plaintiffs' favour" does not comply with the rule.*

Where a Judge clubs together all points for determination and makes a statement merely to the effect that he finds all the issues in favour of the plaintiffs, that cannot be regarded as a compliance with the provisions of O. 20, R. 4. (*Srinivasa Aiyangar, J.*) MOIDEEN KOYA *v.* K. MOIDEEN KUTTI HAJI.
90 I. C. 968 : A. I. R. 1925 Mad 1229 : 49 M L. J. 354.

——O. 20, R. 4—*Judgment of Small Cause Court—Contents of.*

O. 20, R. 4, C. P. Code, is self-contained and a judgment of a Small Cause Court need not contain more than the points for decision and the decision thereon. 12 L. W. 285, Dissented from. (*Spencer and*

C. P. CODE (V OF 1908), O. 20, R. 4.

Krishnan, JJ.) KOMAPPA KURUP *v.* VELAYI CHETTICHIAR. **15 L. W. 642 : 31 M.L.T. 124 (H. C.) : A. I. R. 1922 Mad. 360 : 42 M. L. J. 583.**

——— O. 20, R. 4—*Small Cause Court judgment need not contain reasons for decision nor concise statement.*

A Court of Small Causes need not give reasons for its decision and need not give even a concise statement of the case. (*Simpson, A. J. C.*) SHIVA SEWAK *v.* JANGLI. **A. I. R. 1925 Oudh 648.**

——— O. 20, R. 4—*Small Cause Court's judgment must contain points for determination and decision thereon.*

The judgment of a Court of Small Causes must contain the points for determination and the decision thereon. A judgment therefore consisting only of words "the claim is decreed with costs" is liable to be set aside by the High Court in revision. (*Dalal, J. C.*) BHUDHER SINGH *v.* SHEIKH SAHAMAT. **79 I. C. 547 : A. I. R. 1925 Oudh 283.**

——— O. 20, R. 4—*Judgment of Small Cause Court*

Small Cause Court Judge can reduce his remarks to intelligible minimum containing points of determination (*Bucknill, J*) SRIMATI SURADHANI DEBI *v.* HARI CHARAN MAHTO. **1921 P. H. C. C. 298 : 3 P. L. T. 122 : A. I. R. 1922 Pat. 337.**

——— O. 20, R. 4—*Judgments of Small Cause Court should contain reasons for decision.*

As a matter of practice, it is usual even in cases tried by Courts of Small Causes, except in comparatively unimportant cases of everyday occurrence such as those for the recovery of petty debts, to say out the particulars of the suit and to give reasons for the decision arrived at, thus enabling the High Court, in revision, to satisfy itself that the decree or order was according to law without the necessity of perusing the whole record. The words "need not" in O. 20, R. 4 were not meant to be read as "shall not". (*May Oung, J.*) MAUNG SA *v.* MA U MA. **1 Rang.274 : 2 Bur. L. J 108 : 76 I. C. 600 : A. I. R. 1923 Rang. 252.**

——— O. 20, R. 4 (1)—*Provincial Small Cause Courts Act, S. 25—Judgment of Small Cause Court—Contents of*

The judgment of a Small Cause Judge should contain a brief statement of the reasons for the decision, to satisfy the High Court that the Judge did apply his mind to the matters before him. (*Seshagiri Aiyar, J.*) KANDASAMI CHETTY *v.* RAMALINGA CHETTY. **59 I. C. 906 : 12 L. W. 285.**

[But see 15 L. W. 642.]

——— O. 20, R, 7—*Date of decree.*

Where a person has the judgment of the Court that he shall have a decree, he then obtains his decree. The decree, when drawn up afterwards, relates back to that time. 17 Cal. 347, Ref. (*Chatterjee and Panton, JJ.*) RAM KANAI PAL *v.* PUNNA CHANDRA. **65 I. C. 650 : 34 C. L. J. 494.**

——— O. 20, R. 7—*Date of decree—Decree drawn up after judgment.*

The date of a decree is the date on which judgment is pronounced. This is so even if the decree is drawn up subsequently and the decree must be deemed to have come into existence on the date when the judgment was pronounced. (*Kotwal, A. J. C.*) NARAIN *v.* RAMDULARE. **66 I. C. 7 : A. I. R. 1922 Nag. 113 (1).**

——— O. 20, R. 7—*Date of decree is date of delivery of judgment.*

A judgment written and signed on a particular date but not delivered in open Court till some time later must be deemed to have been delivered on the day on which it was pronounced in open Court. The decree should bear the date on which the judgment was actually pronounced in open Court and not when it was written and signed. For purposes of limitation for appeal, time should be calculated from the date on which the judgment was actually pronounced in Court. (*Miller, C. J. and Mullick, J.*) SAGARMAL MARWARI *v.* LACHMISARAN MISIR. **1 P. 771 : 75 I. C. 879 : A. I. R. 1923 Pat. 129.**

C. P. CODE (V OF 1908), O. 20, R. 12.

——— O. 20, R. 10—*Maintenance—Suit for value of grain—Form of decree.*

Where a maintenance holder brings a suit to recover the value of the grain which under a *Karar* the defendant was bound to pay but which he failed to pay, O. 20, R. 10 does not apply and the Court is not bound to decree in the first instance payment in grain and in the alternative its money value. (*Prideaux, A. J. C.*) BHONAJEE *v.* MT. SARASWATI. **A. I. R. 1924 Nag. 176.**

——— O. 20, R. 11 and S. 48—*Order for payment by instalments upon compromise - Limitation—Extension.*

The parties agreed that the decretal amount should be paid by instalments and it appeared that the Court accepted the compromise and consequently passed an order striking off the execution proceedings. *Held*, the Court, when accepting the request of the parties, intended that the decretal amount should be payable by instalments ; and the order which was passed was in essence and substance one made under S. 210 of the C. P. Code, which extended the period of limitation. (*Shadi Lal, C. J. and Fforde, J.*) BANARSI DAS *v.* RAMZAN RAJ BIBI. **73 I.C. 671: A.I.R. 1923 Lah. 381: [On Appeal from]. 72 I. C. 477.**

——— O. 20, R. 11—*Compromise filed in execution—Payment postponed—Time for executing decree not extended.*

In execution of a decree the parties filed a compromise whereby the decretal amount was to be paid by half yearly instalments and on default of 4 instalments the decree-holder was to be at liberty to execute the decree for the full amount. The Executing Court thereupon passed the following order : "In accordance with the compromise the proceedings be filed as unsatisfied as the decree-holder says that he will now act on the new contract." *Held*, that by the filing of this compromise the time for execution of the decree was not in any way extended. Before any order could be passed under S. 210 (now O. 20, R, 11) the application on which such an order is made must be within time. 26 P. R. 1894, Foll. (*Broadway, J.*) BANARSI DAS *v.* RAMZAN. **72 I. C. 477 : A. I. R. 1924 Lah. 342.**

[See on appeal 73 I. C. 671 : A. I. R. 1923 Lah. 477.]

——— O 20, R. 11—*Instalment decree—Grounds.*

The fact that the estate of the defendants has been brought under the management of the Court of Wards is not a reason for allowing instalments. (*Martineau and Moti Sagar, JJ.*) WALID DAD KHAN *v.* MANI RAM. **5 Lah. L. J. 571 : 73 I. C. 800 : A.I.R. 1923 Lah. 256.**

——— O. 20, R. 12—*Trial Court's decree affirmed by High Court and also by P. C.—Trial Court directing award of mesne profits from date of its decree up to recovery of possession—Possession delivered within three years of Privy Council decree—Award of mesne profits from trial Court's decree to recovery of possession does not contravene R. 12.*

Where a trial Court's decree directing the award of mesne profits from the date of its decree up to recovery of possession was affirmed by the High Court in appeal and also by the Privy Council, and the date of recovery of possession was within 3 years of the decree of the Privy Council : *Held*, that the 'decree' in O. 20, R. 12 being the Privy Council decree, the order awarding

mesne profits from the trial Court's decree up to the recovery of possession was not on contravention of R 12. (*Viscount Findlay.*) BAIJNATH GONEKA *v.* NANDA KUMAR SINGH. **28 C. W. N. 50 : 84 I. C. 267 : 22 L. W. 85 : A. I. R. 1925 P. C. 113 (P. C.).**

——**O. 20, R. 12 and S. 47**—*Order that defendants are liable to account as legal representatives of deceased judgment-debtor—Amount due not determined—Order is not appealable.*

O. 20, R. 12 enables the Court to direct an enquiry to be made as to the rents and mesne profits to which the plaintiff may be entitled. Such an enquiry is made in the course of a proceeding in continuation of the original suit, and under rule 12, clause (2), a final decree is to be prepared in respect of the mesne profits which may be awarded in accordance with the result of such an enquiry. From such a final decree an appeal is maintainable. But where the order of the Court below merely directs that the defendants are liable to render accounts as the legal representatives of the deceased judgment-debtor and the amount for which they are liable has not been determined the question which has been actually determined by the Court below is merely a question relating to the substitution of the names of the defendants in the place of the deceased and their liability to render the accounts directed by the decree as his legal representatives. It is not a question relating to the execution, satisfaction or discharge of a decree. S. 47 therefore has no application. It is at best an interlocutory order and no appeal is maintainable but the defendants can raise the plea of their non-liability in the appeal from the final decree. *Lindsay and Kanhaiya Lal, JJ.*) RUDRA PRATAB *v.* SARDAK MAHESH. **23 A. L. J. 458 : L. R. 6 All. 359 : 87 I. C. 322 : 47 All. 543 : A. I. R. 1925 All. 588.**

——**O. 20, R. 12**—*Decree for possession—Plaintiff is entitled also to mesne profits.*

Where possession is decreed to a plaintiff, he is entitled to a further decree for mesne profits from the date of the suit up to the date of taking possession. (*Banerji and Tudball, JJ.*) MUHAMMAD JUNAID *v.* AULIA BIBI. **42 All. 497 : 61 I. C. 947 : 18 A. L. J. 613.**

——**O. 20, R. 12**—*Mesne profits—Application for ascertaining—Nature of.*

Under O. 20, R. 12 an application for the determination of mesne profits is an application in the suit. (*Suhrawardy and Duval, JJ.*) JANAKINATH SINGHA ROY *v.* NIRODE BARAN ROY. **90 I. C. 811.**

——**O. 20, R. 12**—*Amount of mesne profits exceeding Court's jurisdiction—Plaint should be returned.*

If the plaintiff makes an application in the suit for mesne profits in excess of the pecuniary jurisdiction of the Court, the proper procedure for the Judge is to return the plaint to the plaintiff for presentation to the proper Court for decision. 43 C. 650, Foll. (*Walmsley and B. B. Ghose, JJ.*) JOGNESWAR CHATTERJEE *v.* SURENDRA NATH. **38 C. L. J. 142 : 76 I. C. 343 : A. I. R. 1924 Cal. 167.**

——**O. 20, Rr. 12 and 18**—*Not exhaustive as to cases of preliminary decree.*

The cases mentioned in O. 20 of the C. P. Code are not exhaustive of the orders which may form the basis of final decrees. (*Mookerjee and Rankin, JJ.*) RAJA PEARE MOHAN MOOKERJEE *v.* MANOHAR MOOKERJEE. **27 C. W. N. 989 : 38 C. L. J. 255 : 74 I. C. 373 : A. I. R. 1924 Cal. 160.**

——**O. 20, R. 12**—*'Three years'—Calculation must be made from date of appellate decree*

The period of three years for payment of mesne profits after suit should be calculated from the date of the ultimate decree on appeal, which is the only decree capable of execution. In no case can the plaintiff claim mesne profits for any period subsequent to an offer by the defendant to restore him possession. (*Mookerjee and Panton, JJ.*) RAJA SASHIKANTA *v.* RAJA SARAT CHANDRA. **70 I. C. 6 : 34 C. L. J. 415.**

——**O. 20, R. 12**—*Suit for possession by heir—Enquiry into mesne profits from date of suit should be directed.*

Where a person claiming as heir to an estate obtains a decree for possession against an alienee from the widow of the last male owner, the preliminary decree should direct an enquiry into mesne profits from the date of suit till delivery of possession. (*Wilberforce and Martineau, JJ.*) MUSSAMMAT NISIB-UN-NISSA *v.* MT. AHMADI-UN-NISSA. **66 I. C. 494 (2) : 2 Lah. 383.**

——**O. 20, R. 12**—*Determination of mesne profits.*

An application for the determination of mesne profits is an application in the suit. (*Suhrawardy and Duval, JJ.*) JANAKINATH SINGHA ROY *v.* NIRODE BARAN ROY. **90 I. C. 811 : A. I. R. 1926 Cal. 175.**

——**O. 20, R. 12**—*Mesne profits (future) awarded by preliminary decree for possession—Application for ascertainment of—Maintainability* – Res judicata—*Prior execution petitions praying for same relief—Dismissal of, but not on merits—Effect.*

A preliminary decree for possession of immoveable property awarded mesne profits subsequent to suit. On an application filed by plaintiff under O. 20, R. 12, C. P. Code, for ascertainment of those profits, *held*, that the same was not barred by *res judicata* by reason of the fact that the plaintiff had previously filed execution petitions for ascertainment of those profits under the erroneous impression that they were to be ascertained in execution and that that those petitions were dismissed either because of plaintiff's laches or because he did not press that relief.

After the passing of a preliminary decree the dismissal of an application not on the merits, but owing to say, non-appearance of the plaintiff or laches on his part, cannot result in the dismissal of the suit itself. (*Phillips and Venkatasubba Rao, JJ.*) MANTINA RAMACHANDRA RAJU *v.* SRI RAJA MANTRIPRAGODA BHUJANGA RAO. **19 L. W. 69 : 79 I. C. 635 : 33 M. L. T. 261 (H. C.) : (1924) M. W. N. 115 : A. I. R. 1924 Mad. 473 : 46 M. L. J. 46.**

——**O. 20, R. 12**—*Decree for possession—Duty of appellate Court is to pass preliminary decree itself.*

In cases falling within O. 20, R. 12 of the C. P. Code, the proper course for the appellate Court to take, is not to remand the suit where it finds that a person is entitled to possession but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to the mesne profits in cases where the lower Court has not dealt with the question. Where an appellate Court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject-matter of the preliminary decree is not warranted. (*Kumaraswami Sastri and Devadoss, JJ.*) SUBBE GOUNDAN *v.* KRISHNAMACHARI. **45 Mad. 449 : 30 M. L. T. 217 : 15 L. W. 537 : (1922) M. W. N. 269 : 68 I. C. 869 : A. I. R. 1922 Mad. 112 : 42 M. L. J. 372.**

——**O. 20, R 12**—*Mesne profits—Ascertainment of—Nature of proceedings—Interest on profits.*

An application for ascertainment of mesne profits is not under the new C. P. Code an application in execution but is a part of the suit and in continuation thereof. The right to apply for mesne profits will arise either when the delivery of possession is actually given

C P. CODE (V OF 1908), O. 20, R. 12.

or three years, expire from the date of the preliminary decree. An application to ascertain mesne profits would be governed by Art. 181 of the Lim. Act. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) HARAKHPAN MISSIRIF *v.* JAGDEO MISSIRE.
4 P. 57 : 1924 P. H. C. C. 265 : 5 Pat. L. T. 626 : 84 I. C. 272 : 3 P. L. R. 32 : A. I. R. 1924 Pat. 781.

——0. 20, R. 12—*Mesne profits exceeding pecuniary jurisdiction—Court can grant decree for.*

The proper Court in which one has to institute proceedings for the ascertainment of mesne profits is the Court passing the decree even though the claim exceeds its ordinary pecuniary jurisdiction. (*Das and Ross, JJ.*) SURAJ PRASAD PANDAY *v.* SOMRA MAHTON. **68 I. C. 903 : 2 Pat. L. T. 648.**

——0. 20, R. 12—*Application for assessment of mesne profits—Dismissal for default operates as* res judicata.

Where in a suit for partition and possession together with a claim for mesne profits, the claim for partition and possession is effectively disposed of, and an application for the determination of mesne profits is dismissed for default, no fresh application for the assessment of the mesne profits can be entertained. (*Atkinson and Das, JJ.*) KAPILMAN MISSER *v.* KOKILMAN MISSER **62 I. C. 747 : 1921 P. H. C. C. 25.**

——0. 20, R. 12—*Mesne profits—Amount exceeding jurisdiction—Court has power to pass decree for.*

Under R. 12, a Court which can pass a decree for possession can also make inquiry into the mesne profits *pendente lite* and pass a decree therefor though the sum actually found due exceeds the pecuniary jurisdiction of the Court. (*Das and Adami, JJ.*) DINANATH SAHAI *v.* MAYAWATI KOER. **6 Pat. L. J. 54 : 60 I. C. 346 : 2 P. L. T. 143 : 1921 P. H. C C. 69.**

——0. 20, R. 12—*Future mesne profits—Court-fee.*

Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. (*Rigg, J.*) DAWOOD *v.* RAHMAN. **10 L. B. R. 276 : 62 I. C. 175 : 13 Bur. L. T. 165.**

——0. 20, R. 12 (1) (c)—*Nature of application under—Limitation Act, Art. 181—Applicability.*

An application for mesne profits to be ascertained under the inquiry under O. 20, R. 12 (1) (*c*) is not an application made under the Code of Civil Procedure nor an application in execution. It is an application to the Court to proceed from the stage or preliminary decree to a final decree and Art. 181 of the Limitation Act does not apply. (*Pratt and Marten, JJ.*) THANA ZALAJI *v.* DHANA JAWHRJI. **77 I. C. 497 : A. I. R. 1923 Bom. 268.**

——0. 20, R. 12 (1) (c)—*Mesne profits—Liability for period between date of judgment-debtor's relinquishment of possession with private notice to decree-holder and date of formal delivery through Court.*

Where after the passing of a decree for mesne profits against them, the judgment debtor relinquished possession with private notice to the decree-holder but the decree-holder claimed mesne profits up to the date of formal delivery of possession through Court under O. 20, R. 12 (1), *held*, that as the decree-holder did not refuse the notice unless it is given through Court, he cannot claim mesne profits in respect of the period subsequent to the relinquishment. Mesne profits include profits which the judgment-debtor "might with ordinary diligence have received" but mesne profits are in the nature of damages which the Court may mould according to the justice of the cause. (*Richardson and Huda, JJ.*) SHAMBHU NATH KHETTRI

C. P. CODE (V OF 1908), O. 20, R. 14.

v. SATISH CHANDRA. **66 I. C. 49 : 25 C. W N. 369.**

——0. 20, R. 13—*Administration suit in Rangoon High Court—Change in form of preliminary decree was recommended—Practice—Rangoon High Court.*

It is advisable that the form of preliminary decree in administration suits in the Rangoon High Court should be revised by the High Court, so that there can in future be no question as to a conflict of authority between the High Court administration suit and a District Court which had an administrator of the same estate. (*Sir John Edge.*) MA CHIT SU *v.* NATIONAL BANK OF INDIA. **L. R. 6 P. C. 185 : (1925) M W. N. 847 : A. I. R. 1925 P. C. 261 (P.C.).**

——0. 20, R. 14—*Pre-emption—Decree, form of—Date of payment to be fixed.*

The proper form of a decree for pre-emption is laid down in O. 20, R. 14 and the date by which the purchase money should be paid must be specified. It is not a compliance with this direction of the law to say that the money is to be paid within 60 days of the date on which the decree becomes final. (*Lindsay and Kanhaiya Lal, JJ.*) JAGAT NARAIN LAL *v.* SHEIKH HAWALDAR. **L. R. 6 A. 597 : 90 I. C. 287 (1).**

——0. 20, R. 14—*Construction—Time for depositing decree amount—Last day a holiday—Deposit on next day.*

Where the last day allowed to the plff. for depositing the price in a pre-emption suit expired on a holiday the plff. complies with the decree by depositing the amount on the next Court day. 41 A. 47 overruled, 3 A. 850 ; 18 C. 631, Foll. (*Piggott, Lindsay and Sulaiman, JJ.*) MAHOMED JAN *v.* SHIAM LAL.
22 A. L. J. 110 : 46 A. 328 : L. R. 5 A. 88 : 78 I. C. 1014 : A. I. R. 1924 All 218 (F. B.)

——0. 20, R. 14 — *Court can extend time for payment.*

A Court has discretion to extend the time for payment of pre-emption money in Court. Where the date fixed for payment happened to come in vacation, the money was allowed to be deposited on the day the Court opened. 13 A. 189 and 10 A. L J. 421, Ref. (*Rafique and Lindsay, JJ.*) GIRDHARI SINGH *v.* BHUPAL SINGH. **45 A. 456 : 74 I. C. 745 : A. I. R. 1923 All. 516.**

——0. 20, R. 14—*Vendee not entitled to possession—Rule does not apply.*

Where the vendee is not entitled to prevent possession the provisions of O. 20, R. 14, C. P. Code, are not applicable (*Lindsay and Daniels, JJ.*) RAGHUBIR SINGH *v.* JODHA SINGH. **45 A. 482 : 73 I. C. 646 : 21 A. L. J. 417 : L. R. 4 A. 223 : A. I. R. 1923 All. 507.**

——0. 20, R. 14—*Pre-emption—Satisfaction of decree—Limitation.*

If the decree-holder in a pre-emption suit fails to deposit the decretal amount on the last day fixed, it being Sunday, he does not comply with the decree as the payment on the next Monday is beyond time. Then automatically under O. 20, R. 14 (*b*) his suit for pre-emption stands dismissed. 41 All. 47, followed. (*Ryves, J.*) FATEH MAHOMED CHAUDHURI *v.* M. SITA CHAUDHRAIN. **A. I. R. 1922 All. 278.**

——0. 20, R. 14—*Pre-emption—Ownership begins when pre-emption money is paid in Court and not before.*

A pre-emptor acquires a right in the land pre-empted only when he has paid the money in accordance with the decree recognising his right. (*Marlineau and Moti Sagar, JJ.*) NADIR ALI SHAH *v.* WALI.
5 Lah. 486 : 85 I. C. 182 : A. I. R. 1925 Lah. 202.

——0. 20, R. 14—*Pre-emption — Decree for—*

C. P. CODE (V OF 1908), O. 20, R. 14.

Full amount not deposited—Suit stands dismissed.

A decree for pre-emption was passed in favour of the plaintiff, on payment of Rs. 381-14-3 and Rs 2-2-9 were awarded as costs. He paid Rs. 381-14-3, that is to say, he deducted the amount of costs. In appeal the amount of the price was raised to Rs. 470 by compromise. The Court passed a decree in accordance with the compromise and further ordered that parties were to bear their own costs in both the Courts below. Further, the plaintiff only deposited Rs. 86-2-0 more which, added to the amount of Rs. 381-14-3 already deposited, brought the total to Rs. 468-0-3. Therefore there was a deficiency of Rs. 2-2-9. *Held*, that the decree on appeal was not sufficiently complied with and the suit should stand dismissed. 10 A. 400 and 34 A. 593 Dist. (*Abdul Raoof, J.*) ISHAR SINGH *v.* PESHWARI RAI. **69 I. C. 516 : A. I. R. 1924 Lah. 384.**

——**O. 20, R. 14**—*Failure to deposit money by mistake.*

When the decree-holder in a pre-emption suit fails by mistake to deposit the full price in Court, the judgment-debtor is entitled to apply for possession of the property by restitution if he is already dispossessed and the contention that the mistake was made by an official of the court is unsound where it cannot be said with certainty which of the officials of the Court had made the calculation and whether it was made under the authority of the Court. (*Abdul Raoof, J.*) MEHR DIN *v.* BRIJ LAL. **A. I R. 1923 Lah. 2[illegible]0.**

——**O. 20, R. 14**—*Decree silent as to standing crops—Plaintiff entitled to them on paying money into Court.*

Where a decree was passed for possession but there was no mention as to crops in the decree, *held*, that the defendant could have removed the crops before the pre-emption money was paid into Court. After it was paid he had no right to them. As soon as the plaintiff paid the pre-emption morey he became the owner of the land with its legal incident, the crops attached to it. (*Kotval, A. J. C.*) BAPU *v.* VITHOBA. **76 I. C. 193 : A. I. R. 1923 Nag. 327.**

——**O. 20, R. 14**—*Pre-emption decree—Costs not directed to be deposited—Effect.*

Where the decree directs pre-emption on depositing a certain amount in Court and though costs are awarded, the same is made in a separate order, costs need not be deposited along with the pre-emption amount. (*Kanhaiya Lal, J. C.*) NILKANTH *v.* MAHABIR SINGH. **26 O. C. 345 : 74 I. C. 558 : 9 O. & A. L. R. 207 : A. I. R. 1924 Oudh 104.**

——**O. 20, R. 14**—*Pre-emption decree one for possession—Pre-emptor should pay encumbrances paid by vendee—Oudh Laws Act, Ch. II.*

Where a property subject to a right of pre-emption is sold and after the sale the vendee pays off encumbrances on that property, this payment ought to be included in the purchase money specified in the decree for pre-emption. 2 I. A. 7 Ref. The pre-emption decree may be moulded in accordance with the justice of the case. 17 O. C. 379 Ref. The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases, where the party in possession has satisfied an encumbrance subsisting upon the estate at the time he came into possession, which otherwise the plaintiff himself would have to meet. There may be cases in which a Court would hold that the vendee had paid off encumbrance in bad faith or improvidently, and would refuse to add this payment to the money payable under the pre-emption decree; or the interests of third parties may be involved. The general rule does apply to pre-emption decrees like other decrees for possession of property. (*Dalal and Simpson, A. J. Cs.*) BALDEO SINGH *v.* DEPUTY COMMISSIONER OF KHERI. **10 O. L. J. 112 : 74 I. C. 503 : A. I. R. 1924 Oudh 1.**

C. P. CODE (V OF 1908), O. 20, R. 16.

——**O. 20, R. 15**—*Suit for taking the accounts of a dissolved partnership—Decree in favour of defendant.*

A decree can be passed in favour of a defendant in a suit for the taking of partnership accounts under O. 20, R 15, C. P. Code, if it turns out that on taking accounts there is a balance due to the defendant instead of to the plaintiff. (*Daniels and Neave, JJ.*) RAM CHARAN *v.* BULAQI. **22 A. L. J. 783 : L. R. 5 A. 563 : 46 All. 858 : A. I. R. 1924 All. 854 (2).**

——**O. 20, Rr. 16 and 17**—*Preliminary decree not directing scope of Commissioner's examination is bad—Appointment of Commissioner is for saving public time—Directions in Rule 17 must be followed.*

A preliminary decree without any directions as to the scope of the examination by Commissioner such as the circumstances of the case require, is bound to operate to the prejudice and harassment of the defendant to which he should not be subjected, if the account papers are not due from him and he has not been called upon to explain them. It is open to objection if it delegates to the Commissioner the functions which legitimately appertain to the Court. It is to prevent waste of public time that resort is to be had to the appointment of a Commissioner, but when it is found necessary to have recourse to the provisions of O. 20, R. 16, the Judge should follow the directions contained in O. 20, R. 17 and furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary. (*Greaves and Mukerji, JJ.*) BHARAT CHANDRA *v.* KIRAN CHANDRA RAI. **52 Cal. 766: A. I. R. 1925 Cal. 1069.**

——**O. 20, R. 16 and O. 26, R. 11**—*Commissioner is to determine the* quantum *and not the* factum *of liability of an agent which is for the determination of the Court only.*

It is not open to any principal who has got all the accounts of his agent in his possession to employ the machinery of the Courts for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him. It is contrary to the spirit of O. 20, R. 16, C. P. Code, to authorise a Commissioner to determine not merely the *quantum* but the *factum* of liability of an agent, a matter which falls entirely within the province of the Court. The words of that rule as also of Rule 11 of O. 26 clearly indicate that before an order can be made for appointment of a Commissioner the examination or adjustment of accounts or the taking of accounts must be considered necessary. Where the order for examination of the accounts is made without proper findings or materials, the decree is not justified. 19 W. R 14, 1 I. A. 346 and A. O. D. No. 323 of 1875 (Unrep.), Foll. (*Greaves and Mukerji, JJ.*) BHARAT CHANDRA *v.* KIRAN CHANDRA RAI. **52 Cal. 766: A. I. R. 1925 Cal. 1069.**

——**O. 20, R. 16**—*Suit on accounts between principal and agent is within the operation of the rule.*

The rule also applies to suit on an account between a principal and the agent. The rule is wide enough to include cases where the Court instead of settling the account considers it necessary to stay its hand to ascertain the money due to or from any party by having an account taken before a Commissioner. (*Fawcett, J. C. and Raymond, A. J. C.*) HARJIMAL AND SONS *v.* DHANPATMAL DEWACHAND. **62 I.C. 537 : 15 S. L. R 16.**

C. P. CODE (V OF 1908), O. 20, R. 18.

——O. 20, R. 18—*Partition suit—Preliminary decree silent as to interest—Interest can be awarded in a proper case.*

Where in a partition suit, a preliminary decree is passed for partition and for taking accounts but the decree is silent as to interest, it is competent to the Court to award interest in a proper case. (*Marten and Fawcett, JJ.*) KESARLAL GIRDHAR LAL *v.* JAGUBHAI HIRALAL. **49 Bom. 282 : 27 Bom. L. R. 226 : A. I. R. 1925 Bom. 406.**

——O. 20, R. 18 and O. 40, R. 1—*Appointment of receiver continues till order of discharge by Court.*

A Receiver is an officer of the Court, and as long as the order appointing the receiver remains unreversed, and as long as the suit remains *lis pendens*, his functions continue until he is discharged by order of the Court. Hence the mere passing of a preliminary decree in a partition suit, declaring the shares of the parties in the estate, and directing partition of the property other than the agricultural land does not put an end to the appointment of the receiver, and, despite the provisions of O. 20, R. 18, it is legal for the Court to pass an order for *ad interim* injunction restraining interference with the receiver's possession of agricultural land. (*Shadi Lal, C. J. and Le Rossignol, J.*) SHANKAR DAS *v.* BEHARI LAL. **6 Lah. 442 : 7 Lah. L. J. 239 : 89 I. C. 932 : 26 Punj. L. R. 564 : A. I. R. 1925 Lah. 445.**

——O. 20, R. 18—*Decree covering agricultural and other land—Decree is final regarding former—Interim injunction as to such is barred.*

Where a decree had already been passed declaring the shares of the parties in the property and directing the partition of the property other than the agricultural land and taking of accounts, *Held* : that after the decree the Court was *functus officio* so far as the agricultural land was concerned and that the Court was not competent to issue an *ad interim* injunction in regard to the agricultural land after the decree had been passed. (*Martineau, J.*) BEHARI LAL *v.* LALA MOOLCHAND.
7 L. L. J. 4 : 86 I. C. 244 : A. I. R. 1925 Lah. 357 (1).

——O. 20, R. 18—*Suit for partition—Difference between old Code and new—Interlocutory order—Order ascertaining sharers and their rights—Appeal.*

Under the C. P. Code of 1882 there was but one decree in a suit for partition, the decree passed after the report of the Commissioners making the actual division. The order ascertaining the several parties interested in the property to be divided and their several rights therein, though treated as a decree in practice and styled as such, was not a preliminary decree but was only an interlocutory order. On an interlocutory application made by plaintiff in a suit for partition under the Code of 1882, for appointment of a Commissioner and for the taking of other necessary steps in the suit in pursuance of the order ascertaining the several parties interested in the suit property and their several rights therein, the Court passed an order negativing the plaintiff's right to profits in his share of the properties on the ground that the preliminary decree did not award to him such profits though he had prayed for them in the plaint. *Held* that the order was not appealable, being an interlocutory order and that the plaintiff was not therefore precluded in his appeal from the final and only decree in the suit from contesting its validity. (*Oldfield and Venkatasubba Rao, JJ.*) T. RAMASWAMI AIYAR *v.* T. SUBRAMANIA AIYAR.
16 L.W. 297: 46 M. 47: 74 I C. 804. A. I. R. 1923 Mad. 147 : 43 M. L. J. 406.

——O. 21—*No applicability to—Sale under administrative order.*

C. P. CODE (V OF 1908), O. 21, R. 1.

A sale of property under administrative orders is not governed by O. 21, C. P. Code. (*Martineau, J.*) FIRM OF KAHNA MAL BANARSI DASS *v.* KAHNA MAL NATHU MAL.
40 P. L R. 1922 : 69 I. C. 718: A. I. R. 1924 Lah. 70.

——O. 21—*Applicability—Sale by Receiver.*

O. 21 does not apply to sales by Receivers though with approval of the Court which appointed them. (*Kanhaiya Lal and Lindsay, JJ.*) NARAIN DAS *v.* RAM CHANDRA. **90 I. C. 116 : L. R. 6 A. 610.**

——O. 21, R. 1—*Court closed on the day fixed for payment—Payment made on re-opening day is valid—Limitation Act, S. 4.*

Where a decree is passed conditional on payment of money it is open to the party to deposit the money after the re-opening of the Court, if the Court was closed on the last date on which the money could be deposited. A.I.R. 1924 All. 218 (F. B.) Foll. (*Piggott and Mukerji, JJ.*) MAHOMED HASHIM *v.* RADHA KISHUN. **L. R. 6 A. (Civ.) 287: 87 I. C. 620 : A. I. R. 1925 All. 687.**

——O 21, R. 1—*Payment out of Court to the decree-holder's attaching creditor can't satisfy the decree.*

The definition of the term "decree-holder" as given in S. 2 (3) of the Code of Civil Procedure does not include an attaching creditor of the decree-holder. The payment, therefore, to the attaching creditor of the decree-holder is not payment to the decree-holder within the meaning of R. 1 (*b*) of O. 21. (*Mukerji, J.*) RAM BADAN SINGH *v.* RAM PARGASH SINGH. **L. R. 5 A (Civ.) 629 : 80 I. C. 947 : A. I. R. 1925 All. 123 (2).**

——O. 21. R. 1—*Compromise decree—Payment can be made into Court—Court closed on due date—Payment on re-opening date is valid.*

The payment in satisfaction of a compromise decree can be made either directly to the decree-holder or into the Court. If the judgment-debtor chooses to pay the money into the Court and if on the day within which the payment has to be made, the Court is closed, the judgment-debtor can deposit the money in Court at the earliest possible opportunity afterwards, *viz.*, the date of the re-opening of the Court. There is a generally recognised principle of law, under which parties, who are prevented from doing a thing, not by any default of their own, but by the Court itself, are entitled to do it, at the first subsequent opportunity. 35 Bom. 35 and 22 Mad 179, Ref. to. (*Krishnan, J.*) SANKARAN UNNI *v.* KUMMAKATTIL EZHUVAN.
21 L. W. 469 : (1925) M. W. N. 566 : 87 I.C. 560 : A.I.R. 1925 Mad. 743 : 48 M.L.J. 596.

——O. 21, R. 1—*C. P. Code, O. 21, R. 89.*

Deposit by judgment debtor of decretal amount under O. 21, R. 89, to prevent confirmation of sale, though made after 30 days of sale, can be treated as payment under O. 21, R. 1, for certification. (*Kinkhede, A. J. C.*) VITHAL SINGH *v.* AGARCHAND. **79 I. C. 903 : A I. R. 1925 Nag. 17.**

——O. 21, R. 1—*Deposit of decree amount—Court bound to order notice to and to inform decree-holder.*

Where the judgment-debtor deposists the decree amount in Court with the permission of the Court, it is the duty of the Court to give the notice required by O. 21, R. 1, cl (2) to the decree-holder. If the Judge orders notice it is then necessary for the judgment-debtor to pay the necessary process-fee. But even if he did not pay, the Court was bound to inform the decree-holder of the payment when he applies for execution of the decree. (*Hallifax, A. J. C.*) NARAYAN *v.* GANPATRAO. **67 I. C. 242 (Nag.)**

——O. 21, R. 1 (2)—*Mortgage decrees—Rule*

C. P. CODE (V OF 1908), O. 21, R. 1.

does not apply.

O. 21, R. 1 (2) is not applicable to mortgage-decrees. (*Spencer and Devadoss, JJ.*) AMBI *v.* VALIA THAMBURATI. **18 L. W. 686 : 33 M. L. T. 101 (H. C.) : (1923) M. W. N 753 : 75 I. C. 566: A. I. R. 1924 Mad. 102: 45 M. L. J. 687.**

——0. 21, R. 1 (2)—*Deposit in Court—When takes effect.*

Judgment-debtor depositing money in a Court, without notice of the assignment of the decree or of petition put in by assignee of execution, the deposit serves as discharge. (*Miller, C. J. and Kulwant Sahay, J.*) TATA IRON AND STEEL CO., LTD. *v.* BAIDYA NATH LAIK. **2 Pat. 754 : 76 I. C. 55 : A. I. R. 1924 Pat. 118.**

——0. 21, R. 2.

Adjustment and uncertified adjustment.
Certification and omission to certify.
Consent decree.
Effect of certificate.
Enquiry.
Form of certificate.
Fraud.
Limitation.
Mortgage decree.
Payment.
Refund of money.
Right to apply.
Uncertified payment.

Adjustment and Uncertified Adjustment.

——0. 21, R. 2—*Uncertified adjustment—Executory oral contract—Executing Court cannot recognise.*

An adjustment of a decree on the basis of an oral agreement set up by the judgment-debtor but denied by the decree-holder and not yet performed by either party could not be set up so as to bar execution of the decree. The remedy of the judgment-debtor was by a suit for specific performance of the alleged oral agreement. An inchoate contract cannot be pleaded in bar of execution under O. 21, R. 2 and the judgment-debtor cannot insist on the contract being completed and then plead it in bar of execution. (*Piggott and Walsh, JJ.*) LACHMI DAS *v.* BABA KALI KAMILI WALA RAMANATH. **44 A. 258 : 20 A. L. J. 65 : L. R. 3 A. 61 : 64 I. C. 990: A. I. R. 1922 All. 13.**

——0. 21, R. 2—*Adjustment.*

The executing Court is not competent to enlarge, extend or modify the decree even by consent of parties subsequent to the decree, unless it is in adjustment of the decree contemplated by O. 21, R. 2. 16 W. R. 275 Ref. to. (*Walmsley and Suhrawardy, JJ.*) SURADHANI DUTTA *v.* SITTO SHEIKH. **27 C. W. N. 280 : 71 I. C. 378 : A. I. R. 1922 Cal. 311.**

——0. 21, R. 2—*Uncertified adjustment—Plea of adjustment taken in execution after expiry of limitation period—Executing Court cannot go into the question of adjustment.*

Where the period of limitation had expired for the certification of an adjustment of payment before it was pleaded in execution of a decree, *held*, that the executing Court cannot go into the question of whether there had been an adjustment or not. (*Harrison, J.*) MULCHAND *v.* CHAMPA. **A. I. R. 1925 Lah. 566.**

——0. 21, R. 2—*Adjustment is settling decree independent of terms of decree.*

Adjustment is clearly not the same thing as satisfaction. It is some method of settling the decree which is not provided for in the decree itself. (*Wallace, J.*) T. VENKATASWAMI *v.* KOTILINGAM.

C. P. CODE (V OF 1908), O. 21, R. 2—Adjustment and uncertified adjustment.

22 L. W. 853 : A.I.R. 1926 Mad. 184 : 49 M. L. J. 730.

——0. 21, R. 2—*Adjustment of decree—Composition scheme between judgment-debtor and creditors generally—Decree-holder party to such scheme—Payment by judgment-debtor as per scheme—If adjustment of decree—Recording of full satisfaction under O. 21, R. 2—Decree-holder if can resile from scheme.*

Where a decree-holder agrees under a mutual composition scheme to accept payment of 80 per cent. of his debt in full satisfaction thereof, if paid within a reasonable time, and the debtor makes the payment within a reasonable time, there is an adjustment of the debt tantamount to full satisfaction of the decree ; and the judgment-debtor is entitled to plead that as a full defence to any execution application, and to have that full satisfaction recorded under O. 21, R. 2, Civil Procedure Code. When there has been a mutual composition scheme between the judgment-debtor and the creditors, it is not open to a single creditor to resile therefrom. (*Wallace, J.*) THUTTA VENKATASWAMI *v.* KOTILINGAM. **22 L. W. 853 : A. I. R. 1926 Mad. 184 : 49 M. L. J. 730.**

——0. 21, R. 2—*Uncertified adjustment—Effect.*

Even where an adjustment of a decree is not certified, the judgment-debtor can prove that he is discharged. (*Spencer and Venkatasubba Rao, JJ.*) KALAGARA SRIRAMA ROW *v.* BAPAYYA. **18 L. W. 453 : 76 I. C. 845 : A. I. R. 1924 Mad. 189.**

——0. 21, R 2—*Adjustment—Arrangement pending appeal that original decree should be inexecutable in part—Whether a bar to execution of appellate decree.*

An arrangement made pending an appeal that the original decree (which is the subject of appeal) should be inexecutable in part is one that cannot be pleaded in bar of execution of the appellate decree. 43 M. 725 ; 40 M. 233 Dist. (*Oldfield and Venkatasubba Rao, JJ.*) RAMANATHAN CHETTIAR *v.* VENKATACHALLAM CHETTIAR. **17 L. W. 635 : (1923) M. W. N. 297 : 32 M. L. T. (H. C.) 401 : 72 I. C. 836 : A. I. R. 1923 Mad. 619 : 44 M.L.J. 599.**

——0. 21, R. 2—*Adjustment—Transferee of decree-holder.*

The transferee must first prove his right before he can be allowed to execute the decree and it is then only that any question of adjustment will arise. (*Spencer and Venkatasubba Rao, JJ.*) SADAGOPA AYYANGAR *v.* SELLAMMAL. **16 L. W. 708 : 31 M. L. T. 463 : A. I. R. 1922 Mad. 510 (1) : 43 M. L. J. 761.**

——0. 21, R. 2 (3)—*Uncertified adjustment—Attaching Court cannot recognise.*

Where satisfaction of a decree is not certified to or recorded by the Court passing the decree it is not open to another Court attaching the decree at the instance of a third person to recognise the satisfaction and refuse to proceed with the execution. 36 M. 357 : 42 M. 338 : 10 L. W. 179 : 5 L. W. 644, Rel. (*Ramesam, J.*) ARUNACHALAM CHETTIAR *v.* PANCHALI PADAYACHI. **(1922) M. W. N 189 : 16 L. W. 290 : 65 I. C. 830 : A. I. R. 1922 Mad. 66.**

——0. 21, R. 2—*Adjustment—After passing of decree fresh decree is unnecessary when parties adjust claim.*

It is not in the contemplation of the Civil Procedure Code that when a decree has been passed, every time that an adjustment is arrived at between the parties a fresh decree must be drawn up or the original decree modified. 11 N. L. R. 16 and 17 N. L. R. 66, Ref. to. (*Baker, J. C.*) DULI CHAND *v.* GOREYLAL.

C. P. CODE (V OF 1908), O. 21, R. 2—Adjustment and uncertified adjustment.

20 N. L. R. 122 : 83 I. C. 162 : A. I. R. 1925 Nag. 49.

——**O. 21, R. 2**—*Adjustment—Evidence to prove may be oral.*

S. 92 of the Evidence Act does not bar the oral evidence to prove an agreement by way of adjustment of a decree as the R. 2 of O 21, C. P. Code, contemplates the taking of evidence to prove the adjustment. (*Mittra, O. J. C. and Hallifax, A. J. C.*) RANGLAL *v.* CHUNNI LAL. **60 I. C. 316 : 16 N. L. R. 204.**

——**O. 21, R. 2**—*Adjustment—Non-enactment of S. 257-A in the new Code—Effect—Court need not see if an adjustment is reasonable.*

The non-enactment in the Code of Civil Procedure (V of 1908) of S. 257-A of the Code of 1882 has given greater freedom to the parties in making adjustments in execution. A Court is not required to see whether the consideration for the adjustment is reasonable under the circumstances of the case or not. If the adjustment is made and certified to the Court, the provisions of the law will be fully satisfied and the decree will be deemed as capable of execution (*Dalal and Wazir Hasan, A. J. Cs.*) MT. RAJKUMAR *v.* DWARKA PRASAD.

28 O. C. 255 : 86 I. C. 907 : 12 O. L. J. 156 : A. I. R. 1925 Oudh 364.

——**O. 21, R. 2**—*Adjustment — No order of amendment of decree can be passed under the rule—The word "adjustment" signifies some kind of satisfaction of payment of decree.*

The provisions of O. 21, R. 2 only contemplate satisfaction of the decree in whole or in part or adjustment thereof which may amount to payment of whole or part of the decree. In its ordinary sense, adjustment is a word of wide significance, but obviously in O. 21, R. 2 it is used to signify some kind of satisfaction or payment of the decree. (*Dalal, J.C.*) HAIDER MIRZA *v.* KAILASH NARAIN DAR. **80 I. C. 454 : A. I. R. 1925 Oudh 136.**

——**O. 21, R. 2**—*Uncertified adjustment—Power of Court to take cognizance.*

Where an adjustment is not certified by the Court which passed the decree within the time allowed by law under O. 21, R. 2 of the C P. Code, the Court has justification to take cognizance of the alleged adjustment. (*Kanhaiya Lal, J. C. and Simpson, A. J. C.*) HARIHAR PRASAD *v.* BABU SHANKAR DAYAL.

10 O. L. J. 351 : 77 I. C. 337 : 10 O. & A. L. R. 119 : A. I. R. 1924 Oudh 208.

——**O. 21 R 2**—*Uncertified adjustment will not be recognized by executing Court.*

Where a judgment-debtor pleaded an adjustment as a bar to execution, but it was found that the adjustment was not certified: *Held*, that such adjustment will not be recognised by Court executing the decree. (*Rutledge and Heald, JJ.*) MESSRS. CHETTIAR FIRM *v.* MA TIN TIN.

4 Bur. L. J. 179 : A. I. R. 1925 Rang. 349.

——**O. 21, R. 2**—*Uncertified adjustment—Question relating to execution—Power to recognise—Fraud.*

The provisions of O. 21, R. 2 (3) are not to be rendered nugatory by the application of the general provisions of S. 47, C. P. Code. O. 21, R. 2, C. P. Code was enacted to prevent the Courts being flooded with false defences to applications for execution setting up a payment or adjustment in part or in whole, which would be made merely to gain time. The decree-holder is bound to certify an adjustment, and the judgment-debtor is also given a right to apply to the court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment-debtor, and he does not deserve the consideration of the Court if he fails to take the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court. There is no reason why this should not apply also in the case of an alleged fraud. (*Robinson, C.J. and Macgregor, J.*) P. R. P. L. CHETTY FIRM *v.* G. LON POW.

1 Bur. L. J. 226 : 11 L. B. R. 363 : A. I. R. 1923 Rang. 103.

——**O. 21, R. 2 (3)**—*Adjustment—Private satisfaction.*

The embargo under that rule is limited to a "Court executing the decree". There would be no prohibition in case where a Court, which was not executing the decree was dealing with the matter. (*Duckworth, J.*) MA MA GYI *v.* MA NYO PO.

1 Bur. L. J. 171 : A. I. R. 1923 Rang. 44 (1).

Certification and omission to certify.

——**O. 21, R. 2**—*Omission to certify.*

The provisions of O. 21, R. 2 of the C. P. Code, 1908, are not confined to money decrees "Any" decree is provided for. A decree may provide for the payment of money or for any kind of relief other than the payment of money. But if either money is paid or the decree is otherwise adjusted, then the payment or adjustment must be certified. The principle of the rule is that the Court executing the decree shall not be troubled with any disputes between parties with regard to any payment or adjustment unless the same has been duly recorded and certified. If there is a case of fraud, then the party defrauded will have his right of action. (*Macleod, C. J. and Shah, J.*) GHARRY *v.* GOWRYA. **46 Bom. 226 : 23 Bom. L. R 981 : 64 I. C 490 : A. I. R. 1922 Bom. 380 (2).**

——**O. 21, R. 2**—*Certification—Mere statement in execution application is not.*

A mere statement in an execution application that payments towards the decree have been made out of Court cannot be treated as an application for certification. (*Walmsley, J.*) DWARIKA NATH PAUL *v.* BEPIN RISHI. **64 I. C. 32 : A. I. R. 1922 Cal. 200.**

——**O. 21, R. 2**—*Certification—Part payment.*

A decree-holder may certify part payments towards a money decree in an application for execution. (*Chatterjee and Suhrawardy, JJ.*) MADAN MOHAN BANIKYA *v.* HARU LAL KANDU. **26 C. W. N. 534 : 64 I. C. 72 : 35 C. L. J. 566.**

——**O. 21, R. 2**—*Certification—Payment to be recognised should either be certified or recorded.*

Under O. 21, R. 2 in order to enable the Court to recognise payments in executing the decree the payment need not be both certified and recorded. Payment should either be certified or recorded. (*Wallace, J.*) PITCHAKKUTTIYA PILLAI *v.* DORAISWAMI MOOPANAR. **(1924) M.W.N. 815: 82 I. C. 588 : A. I. R. 1925 Mad. 230 (2) : 47 M. L. J. 498.**

——**O. 21, R. 2**—*Omission to certify—Effect.*

Failure by decree-holder to certify within a particular time where no time is fixed, cannot be treated a negligence or a breach of agreement and gives the judgment-debtor no cause of action against the former. (*Kotwal and Prideaux, A. J. Cs.*) MITSUI BUSSAN *v.* PADAMRAJ. **6 N. L. J. 217 : 72 I. C. 461 : A. I. R. 1923 Nag. 219.**

——**O. 21, R. 2**— *Certification— Admission by decree-holder—Execution of decree—Power of Court.*

Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution having disappeared, the

C. P. CODE (V OF 1908), O. 21, R. 2—Certification and omission to certify.

Court's powers in execution also cease and the confirmation of the sale, which is a proceeding in execution, should not be ordered. 35 Bom. 516 ; 10 All. 332 Ref. (*Kotwal, A. J. C.*) NILKANTH *v.* YESHWANT.
18 N. L. R. 134 : 66 I. C. 331 : A I. R. 1922 Nag. 248.

——**O. 21, R. 2**—*Omission to certify—Defect.*

Decree-holder's omission merely to certify satisfaction of the decree does not amount to fraud. (*Wazir Hasan, A. J. C.*) SURJI NARAIN MISRA *v.* ULAND SINGH. **27 O. C. 277 : 78 I. C. 776 : A. I. R. 1925 Oudh 225.**

——**O. 21, R. 2 (1)**—*Certification—Whether joint decree-holder can certify adjustment of payment as regards his own claim and other joint-decree-holders.*

It is not open to one of two joint holders of a decree to bind other decree-holders. But at the same time a joint decree-holder may certify satisfaction in respect of his own interest therein. 26 A. 313 and A.I.R. 1923 All. 494 Rel. (*Das and Adami, JJ.*) SADHO SARAN *v.* MT. SUBHADRA.
89 I. C. 195 : A. I. R. 1925 Pat. 22.

——**O. 21, R. 2**—*Certification—Application for—Dismissal appeal.*

An order dismissing an application for certifying payments out of Court is of the nature of a decree and as such is appealable. (*Jwala Prasad and Bucknill, JJ.*) JADUNANDAN SINGH *v.* SHEONANDAN PRASAD. **1922 P. H. C. C. 200 : 3 P. L. T. 487 : 1 P. 644 : 68 I. C. 645 : A. I. R. 1922 Pat. 276.**

——**O. 21, R. 2**—*Omission to certify—Procedure.*

There is no time prescribed for a decree-holder to certify any adjustment out of Court. It is his duty to state in his execution petition under O. 21, R. 11 (*e*) any such adjustment or payment. The judgment-debtor might also under O. 21, R. 2 (2) inform the Court of it. Unless it is brought to the notice of the Court within the prescribed time it cannot be recognised by the executing Court and the decree-holder can execute the decree as if no payment out of Court has been made (*Jwala Prasad and Adami, JJ*) RADHA KANT LAL *v.* PARBATI KUER. **6 P. L. J. 337 : 63 I. C. 535 : 2 Pat. L. T. 765.**

——**O. 21, R. 2**—*Certification—Failure to certify satisfaction of decree—Execution and realisation of decree—Remedy of judgment-debtor.*

Under O. 21, R. 2, where a decree has been satisfied the decree-holder shall certify the payment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly. (*Maung Kin, J.*) MAUNG MYO *v.* MAUNG KHA.
1 Bur. L. J. 207 : 11 L. B. R. 429 : 70 I. C. 115 : A. I. R. 1923 Rang. 88.

Consent Decree.

——**O. 21, R. 2**—*Consent decree—Payment to third party under terms of—If within mischief of section.*

The words of O. 21, R. 2 are very general and there is nothing in them to limit the payment to the decree-holder only. Where a compromise decree directed the payment of money to a third party and the payment was not certified to Court the same cannot be relied upon in execution. (*Ryves and Gokul Prasad, JJ.*) MAHADEO PRASAD *v.* HAMIDAN. **45 A. 304 : 21 A. L. J 97 : L. R. 4 A. 117 : 71 I. C. 457 : A. I. R. 1923 All. 271 (1).**

——**O. 21, R. 2**—*Application to record satisfaction—Dismissal—If* res judicata—*Joint decree-holders—Right of one to record satisfaction.*

The dismissal of an application by a judgment debtor to have satisfaction recorded does not operate as *res judicata* and bar an application by the decree-holder for the same purpose. One of several joint decree-holders can enter satisfaction in regard to his own share of the decree but cannot bind the other decree-holders. (*Das and Adami, JJ.*) SADHO SARAN PANDE *v.* MT. SUBHADRA.
89 I. C. 195.

C. P. CODE (V OF 1908), O 21, R. 2—Form of Certificate.

Effect of Certificate.

——**O. 21, R. 2**—*Effect of certificate—Payment made within three years of last starting point of limitation but certified after 3 years had expired takes effect from the date when it was made.*

Where a payment has been made within three years of the last starting point of limitation for an execution application, but is certified under O. 21, R. 2 after the expiry of the 3 years, the certification makes the payment entitled to recognition as a payment made on the date on which it was actually made and not as a payment on the date it was certified. (Case-law discussed) (*Boys and Banerji, JJ.*) AMAR SINGH *v.* MT. RAM DEI. **23 A.L J. 836 : L.R. 6 A. (Civ.) 409 : 89 I. C. 415 : A. I. R. 1925 All. 802.**

Enquiry.

——**O. 21, R.2**—*Enquiry—Certification by decree-holder.*

A payment out of Court can be certified by the decree-holder at any time. Where the decree-holder certifies a payment and the judgment debtor denies such payment, the Court should take evidence on the point and then come to a conclusion one way or the other. (*Macleod, C.J. and Heaton, J.*) PANDURANG BALKRISHNA *v.* JAGYA BHAU.
45 Bom 91 : 89 I. C. 399 : 22 Bom L. R. 1120.

——**O. 21, R. 2**—*Enquiry—Executing Court is not bound to record satisfaction of decree when decree-holder executed deed stating his cancellation of decree in return for certain sum received and when, actually, no money was paid but judgment-debtor merely undertook orally to pay decree-holder's certain debts and failed.*

A document was executed by the decree-holder by which he stated that he had cancelled the decree in consideration of a certain sum received from the judgment-debtor. It was found that the judgment-debtor paid no money but had orally undertaken to discharge certain debts of the decree-holder and had failed in his undertaking :

Held, that the agreement was rightly refused to be recorded as an adjustment of satisfaction and that the decree ought to be executed. (*Jackson, J.*) GANGADHARA MUDALIAR *v.* EKAMBARA MUDALIAR.
20 L. W. 849 : A. I. R. 1925 Mad. 206.

Form of Certificate.

——**O. 21, R, 2**—*Form of certificate—Statement of payment in execution petition—Sufficiency of—Limitation.*

A statement in an execution application of money having been paid by the judgment debtor is not such a certificate of payment as is contemplated by **O. 21**, R. 2, C. P. Code, and has not the effect of saving limitation for execution. O. 21, R. 2, C. P. Code, clearly contemplates a formal proceeding consisting of two steps, first an application by the decree-holder informing the Court of the payment ; and secondly, a formal order of the Court recording the payment. This proceeding must be separate from and prior to the execution proceeding in which it is desired that the payment should be recognised. Though no period of limitation has been prescribed for an application by the decree-holder to certify, the intention of the law appears to

C. P. CODE (V OF 1908), O. 21, R. 2—Form of certificate.

be that the payment should be certified within a reasonable time of its being made. It is primarily the decree-holder's duty to certify. If he fails to do so, O. 21, R. 2 (2) allows the judgment-debtor to inform the Court of the payment within 90 days. (*Daniels, and Neave, JJ.*) BRIJ NATH *v.* PANNA LAL.
22 A. L. J. 581 : L. R. 5 A. 348 : 46 A. 635 : 83 I. C. 737 : A. I. R. 1924 All. 706.

——— **O. 21, R. 2**—*Form of certificate of payment by decree-holder—Art. 181 of Lim. Act does not apply.*

In order to certify payment it is enough that the decree-holder mentions the fact of such payment in the application for execution of the decree in respect of the balance. It is not incumbent upon the decree-holder to certify payment by making an application for the purpose, and therefore Art. 181 does not apply. But the certification cannot be postponed indefinitely, for it must be made within three years before execution is applied for to save the decree from limitation under S. 20, Indian Limitation Act, or on the ground of waiver. A.I.R. 1922 Cal. 30 Diss : 45 Bom. 91 Appr. (*Suhrawardy and Cuming, JJ.*) JALIM CHAND *v.* YUSUFALI CHOUDHURI. **A. I. R. 1925 Cal. 1012.**

——— **O. 21, R. 2 (1)**—*Form of certificate.*

O. 21. R. 2 (1), C. P. Code, deals with a case where the decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor. The application need not be distinct from an application for execution of decree. (*Mookerjee and Panton, JJ.*) BALEY MAHAMMAD SAHI *v.* AIJANMAL.
35 C. L. J. 71 : 26 C. W. N. 529 : 68 I. C. 780 : A. I. R. 1922 Cal. 30.

——— **O. 21, R. 2**—*Form of certificate—Payment out of Court.*

An application for execution certifying payments already made amounts to certifying under O. 21, R. 2, which a Court is bound to take notice of. There is no particular form under O. 21, R. 2, in which a decree-holder must certify payment nor is there any rule as to the time within which or the manner in which it should be done. (*Moti Sagar, J.*) FATTU *v.* NANAK CHAND. **A. I. R. 1924 Lah. 676.**

——— **O. 21, R. 2**—*Form of certificate—Application to record adjustment—If to be written or signed.*

An application to record adjustment need not be written nor signed by the decree-holders. (*Hallifax, A. J. C.*) MT. PERABAI *v.* CHAWANI PRASAD.
A. I. R. 1924 Nag. 185.

Fraud.

——— **O. 21, R. 2 (2)** - *Fraud—Failure to certify—Remedy open to judgment-debtor—Limitation.*

Where fraud is alleged on the part of the decree holder, although there are isolated expressions which may lend support to the view that S. 47 may be invoked in cases of this description, still when the case is analysed it would appear that it cannot be laid down as a general rule that, although the period of limitation within which an application by the judgment-debtor under clause (2) of R. 2 of O. 21 is to be presented to the Court has expired, it is still open to him to secure an investigation of the very same matter and to secure an extension of time by invoking the terms of S. 47. 30 C. L. J. 248 Dist. 16 C. W. N. 923, Foll. 40 B. 333 and 5 P. L. J. 70 Cons. (*C. C. Ghose and Panton, JJ.*) MUKUNDALAL *v.* BANSIDHAR. **50 C. 468 : A. I. R. 1923 Cal. 342.**

——— **O. 21, R 2**—*Fraud—Question relating to execution to discharge or satisfaction of decree—Adjustment of decree not certified—Fraud—If can be inquired into.*

C. P. CODE (V OF 1908), O. 21, R. 2—Limitation.

Where a decree has been satisfied out of Court but it has not been certified as required by O. 21, R. 2, owing to fraud on the part of the decree-holder, the matter falls under S 47 and the question of payment and satisfaction can be enquired into in execution proceedings. (*Wazir Hasan, J. C.*) SURAJ NARAIN MISRA *v.* ULAND SINGH. **10 W. N. 218 : 78 I. C. 776 : 10 O. & A. L. R. 375 : 27 O. C. 227 : A. I. R. 1925 Oudh 225.**

——— **O. 21, R. 2**—*Fraud—Rule embodies a special rule of law which cannot be overridden by the general law as to estoppel—Decree-holder's fraud causing non-certification of payment of decree—Payment cannot be recognised by executing Court.*

It is not open to an executing Court to recognise a payment or adjustment of a decree unless it has been certified in the manner allowed by law even though the want of certification may be due to the fraudulent conduct on the part of the decree-holder. 13 S.L.R. 71 A.I.R. 1922 Bom. 380, 36 Mad. 357 and 16 C.W.N. 923 Foll. 34 Bom. 575 and 40 Bom. 333 Diss.(*Kennedy, J. C. and Raymond, A.J.C.*) MOTOOMAL *v.* TEOOMAL.
18 S. L. R. 51 : 79 I. C. 89 : A. I. R. 1925 Sind 140.

——— **O. 21, R. 2**—*Fraud—Payment not certified—Judgment-debtor committing fraud.*

Even where a judgment-debtor has been guilty of fraud, the executing Court will refuse to recognize the payment or adjustment, if it is not certified as required by R. 2. (*Kincaid, J. C. and Kennedy, A J. C.*) SOJHRO *v.* CHANGOMAL. **63 I. C. 238 : 15 S. L. R. 77.**

Limitation.

——— **O. 21, R. 2 (3)**—*Limitation.*

There is no limitation for certifying payment under O. 21, R. 2 (3) of the C. P. Code. (*Macleod, C. J. and Heaton, J.*) PANDURANG *v.* JAGYA.
22 Bom. L. R. 1120 : 59 I. C. 399 : 45 Bom. 91.

——— **O. 21, R. 2**—*Limitation—Satisfaction of decree—Record of satisfaction—Application by decree-holder.*

Art. 174 applies only to a case under O. 21, R. 2 (2), namely, where judgment-debtor seeks to inform the Court of a payment alleged to have been made by him out of Court to decree-holder. In such case, the period is 90 days, but this period does not govern an application by decree-holder himself. (*Mookerjee and Panton, JJ.*) BALEY MAHAMMAD SAHAI *v.* AIJANMAL.
26 C. W. N. 529 : 35 C. L. J. 71 : 68 I. C. 780 : A. I. R. 1922 Cal. 30.

——— **O. 21, R. 2**—*Limitation.*

The part-payments and the certification must, however, take place before the application for execution is barred by limitation. Although the decree-holder may either apply to certify payments before the execution or may do so in his application for execution, the provisions of S. 20 of the Limitation Act are in no way affected. (*N. R. Chatterjee and Suhrawardy, JJ.*) MADAN MOHAN BANIKYA *v.* HARU LAL KUNDU.
26 C. W. N. 534 : 64 I. C. 72 : 35 C. L. J. 566.

——— **O. 21, R. 2**—*Limitation—Application for certification—Execution of decree barred.*

Although no time is provided within which an application for certification of payments towards a decree must be made, such an application cannot be made after the period of limitation for execution has expired and the decree has become time-barred. A time-barred decree cannot be revived by a subsequent application under O. 21, R. 2, C. P. Code, for certification of intermediate payments which would bring the case within limitation. (*Daniels, J. C.*) MT. JAMWANTI *v.* MT. MOHAN DEI. **10 O. & A. L. R. 72 : 11 O. L. J. 379 : 79 I. C. 799 : A. I. R. 1924 Oudh 392**

C. P. CODE (V OF 1908), O. 21, R. 2—Limitation.

———O. 21, R. 2—*Limitation—Decree-holder certifying payment—Whether a step in execution—Previous application after three years from date of decree is no bar to a subsequent application after certification.*

Where the decree-holder applied for execution in 1919 and no subsequent steps were taken till 21st October, 1922, and the decree became time-barred, and in December, 1922, the petitioner applied for certifying payments made before 3 years, and it was contended that an application to certify payment is not a step in execution and it does not lie after a decree is time-barred, *held*, relying on authority 20 Cal. L. J. 131 and 46 C. 22, that an application made by decree-holder to certify payments made within 3 years from the dates of such payments (Limitation Act, S. 181) will afford the decree-holder a fresh starting point for limitation within the meaning of Art. 182 (5), Lim. Act. (*Godfrey, J.*) MAUNG LAW SAN *v.* MAUNG PO THEIN. **2 Rang. 393 : A. I. R. 1925 Rang. 26.**

Mortgage Decree.

———**O. 21, R. 2 and O. 34, Rr. 2 and 3**—*Mortgage decree—Private adjustment notified by judgment-debtor—Recognition by Court.*

O. 21, R. 2, C. P. Code, applies even to a final decree in a mortgage suit and such a decree, like any other, is capable of adjustment. Where the judgment-debtor has informed the Court that the decree has been adjusted, the Court must under O. 21, R. 2 (2) issue a notice to the decree-holder to show cause why the adjustment should not be recorded as certified. (*Batten, J. C. and Hallifax, A. J. C.*) LACHMAN SINGH *v.* MARDAN SINGH. **68 I. C. 443 : A. I. R. 1923 Nag. 20.**

Payment.

———**O. 21, R. 2**—*Payment—Satisfaction in part—Execution as regards rest.*

Though a decree for sale is passed it is open to the mortgagor to satisfy the decree in whole or in part and in the latter case the executing Court after ascertaining if there has been satisfaction can direct execution only as to the balance. (*Piggott and Walsh, JJ.*) SAHU PARSHOTTAM SARAN *v.* BRAHMA NAND.

21 A. L. J. 818 : L. R. 4 A. 574 : A. I. R. 1924 All. 297.

———**O. 21, R. 2**—*Payment—Payment to joint decree-holder.*

Payment to one of several joint decree-holders will not be even a partial satisfaction of the decree unless the payee was an agent of the others for receiving the whole amount on their behalf or unless the distinct share of each of the joint decree-holders was ascertained and known. (*Wallace, J.*) PITCHAKKUTTIYA PILLAI *v.* DORAISWAMI MOOPANAR.

(1924) M. W. N. 815 : 82 I. C. 588 : A. I. R. 1925 Mad. 230 (2) : 47 M. L. J. 498.

———**O. 21, R. 2**—*Payment—Notice of deposit in Court must be served on decree-holder.*

A notice in writing of the payment of the amount due under a decree by the judgment-debtor in Court must be served on the decree-holder like the summons. (*Kinkhede, A. J. C.*) BALIRAM *v.* GHASIRAM.

81 I. C. 1001 : A. I. R. 1925 Nag. 52.

———**O. 21, R. 2**—*Payment—Executing Court—Power to certify payment.*

There is nothing in the rule which prohibits an executing Court from treating an admission of payments in a decree-holder's application for execution as an application to certify payments. (*Fawcett, J. C., Crump and Kemp, A. J. Cs.*) BANNUMAL *v.* NEWANDMAL.

83 I. C. 360 (2) : 16 S. L. R. 207 (F.B.).

Refund of money.

———**O. 21, R. 2**—*Refund of money—Decree satisfied by one of the judgment-debtors—Payment by another judgment-debtor into Court—Money drawn out by decree-holder—Liability to refund.*

C. P. CODE (V OF 1908), O. 21, R. 2—Uncertified Payment.

Where one of the judgment debtors paid the decretal amount to the plaintiff decree-holder and had the payment certified under the provisions of O. 21, R. 2, C. P. Code, and subsequently another judgment-debtor not knowing that the decree-holder's claim had been satisfied, paid the money into Court and it was taken out by the decree-holder and having subsequently discovered that the decree had previously been satisfied by one of his co-debtors, made an application to the executing Court for a refund of the money, the lower Courts decided that as the matter had been disposed of, the executing Court had no jurisdiction. *Held*, that the executing Court had jurisdiction to entertain the application notwithstanding the fact that the decree had in fact been executed before. 24 All. 291, Foll. (*Dawson Miller, C. J. and Jwala Prasad, J.*) GOPAL RAI *v.* RAMBHANJAN RAI.

1 Pat. 336 : 3 Pat. L. T. 754 : 4 U. P. L. R. (Pat.) 17 : 65 I. C. 307 : 1922 P. H. C. C 53 : A. I. R. 1922 Pat. 166.

Right to apply.

———**O. 21, Rr. 2 and 53 (6)**—*Right to apply—Attachment of decree without notice to judgment-debtor—Decree satisfied—Effect.*

Where a decree is attached without notice to the judgment-debtor bound by it and the latter pays the decree amount to the decree-holder, he is entitled to have satisfaction entered up under R. 2 of O. 21 and it is not open to the person who attached the decree to question the entering up of satisfaction of the decree. (*Seshagiri Aiyar, J.*) NAGU REDDIAR *v.* VEERAPPA MUDALIAR. **61 I. C. 815 : 13 L. W. 34.**

———**O. 21, R. 2**—*Right to apply—Scope.*

Dismissal of an application by the judgment-debtor under R. 2 (2) does not bar the decree-holder's certifying the payment under R. 2 (1). (*Das and Adami, JJ.*) SADHO SARAN PANDEY *v.* MT. SUBHADRA.

A. I. R. 1925 Pat. 822.

———**O. 21, R. 2 (1)**—*Right to apply—Joint decree-holder can certify adjustment of payment as regards his own claim but cannot as regards other joint decree-holders.*

It is not open to one of two joint holders of a decree to certify satisfaction of the whole decree so as to bind the other decree-holder. But at the same time, a joint decree-holder may certify satisfaction in respect of his own interest therein. 26 All 318 and A. I. R. 1923 All. 494, Rel. (*Das and Adami, JJ.*) SADHO SARAN PANDEY *v.* MT. SUBHADRA.

A. I. R. 1925 Pat. 822.

Uncertified Payment.

———**O. 21, R. 2**—*Uncertified payment—Executing Court cannot recognise.*

The Court executing a decree is barred *in limine* from considering any allegation that a payment not certified has been made. 40 Bom. 333 Overruled. A. I. R. 1923 Bom. 253 affirmed. (*Macleod, C. J., Shah and Crump, JJ.*) MEHBUNNISSA BEGUM *v.* MEHEDUNISSA BEGUM. **49 Bom. 548 : 27 Bom. L.R. 403 : A. I. R. 1925 Bom. 309 (F. B.)**

———**O. 21, Rr. 2 and 16**—*Uncertified payment—Rights of assignee of decree—Recognition of assignment—Payment by judgment-debtor not certified to Court—Recognition of.*

Whether attachment proceedings are already commenced at the instance of the decree-holder or not, the assignee or transferee of the decree cannot continue

C. P. CODE (V OF 1908), O. 21 R. 2—Uncertified Payment.

any proceedings previously commenced, nor can he institute any fresh proceedings for the execution of the decree unless he makes an application under O. 21, R. 16 to the Court which passed the decree. That application will be heard by the Court not as a Court executing the decree, but as a Court which passed the decree, and until an order is made by the Court which passed the decree that execution may proceed at the instance of the transferee, it is not open to the transferee to execute the decree, nor is there any Court which is executing the decree. The provisions of O. 21, R. 2 (3) would not be applicable as that only enacts that a payment or adjustment, which has not been certified or recorded as aforesaid should not be recognised by any Court executing the decree. When an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree-holder under O. 21, R. 16, the application is made to the Court as a Court which passed the decree, and not as a Court which is executing the decree ; and it is open to the judgment-debtor to plead that the claim has already been satisfied even though the formalities prescribed by O. 21, R. 2 (1) and (2) have not been followed. 35 M. 659 ; 40 M. 296, Ref. (*Macleod, C. J. and Crump, J.*) RAGHUNATH *v.* GANGARAM. **47 Bom. 643: 25 Bom. L. R. 474 : 75 I. C 893 : A. I. R. 1923 Bom. 404.**

——O. 21, R. 2—*Uncertified payment—Not to be recognised by executing Court—Remedy of judgment-debtor.*

Where a payment by the judgment-debtor is not certified under O. 21, R. 2, C. P. Code, the Court executing the decree could take no cognizance of that payment, but if the creditor by taking out a darkhast recovered the amount again, that would not bar the judgment-debtor from seeking to recover the amount which he had paid to his creditor without its being certified. (*Macleod, C. J. and Crump, J.*) GANESH MAHADEV *v.* YESHWANT. **25 Bom L. R. 247 : A. I. R. 1923 Bom. 253 (1).**

——O. 21, R. 2—*Uncertified payment—Execution against surety of judgment-debtor.*

A surety for the judgment-debtor is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified to the Court and consequently, the surety cannot set up such payments in bar of execution against him. (*Woodroffe and Ghose, JJ.*) ONKARMAL AGARWALA *v.* NRITYA GOPAL CHAKI. **67 I. C. 885 : A. I. R. 1923 Cal. 313 (1).**

——O. 21, R. 2 and S. 47—*Uncertified payment—A suit is maintainable for restraining the decree-holder from executing the decree when payment is made but not certified.*

Although O. 21, R. 2 of the Civil Procedure Code specifically enacts that an uncertified adjustment cannot be recognised as an adjustment of the decree by any Court executing the decree, it is implied that it may be recognised as such by Court trying the matter as a regular suit, and that a suit for a declaration that the decree had been satisfied is maintainable notwithstanding that its object is to restrain the decree-holder from executing the decree. A suit for a declaration that a decree had been satisfied and should not consequently be satisfied against the judgment-debtor is competent, and S. 47 of the Code of Civil Procedure does not operate as a bar to such a suit. (*Moti Sagar, J.*) BISHEN SINGH *v.* MAHINDAR SINGH. **79 I. C. 125 : A. I. R. 1925 Lah. 54.**

C. P. CODE (V OF 1908), O. 21, R. 10.

——O. 21, R. 3—*Death of one of the appellants not brought to the notice of Court—Application not made to bring his legal representatives on record—Effect.*

One of the appellants died during the pendency of the appeal. The fact was not brought to the notice of the Court nor an application made to bring his legal representatives on record prior to hearing of the appeal. The appeal was heard as if the appellant was alive and a decree passed. *Held*, that the decree was void. (*Rafique and Piggott, JJ.*) (BABU) JENAK SINGH *v.* (BABU) AMBIKA PRASAD, **A. I. R. 1923 All. 414 (1).**

——O. 21, R. 3—*Jurisdiction to sell—None except as provided by R. 3.*

Where a Court has no jurisdiction over immoveable property, it cannot validly sell it in execution of a decree except in the one case provided by O. 21, R. 3, C. P. Code. Where a Court sells immoveable property entirely outside its jurisdiction, the sale is a nullity. (*Mukerjee and Chotzner, JJ.*) KUNJA MOHAN CHAKRAVARTHY *v.* MANINDRA CHANDRA ROY CHOWDHURY. **27 C. W. N. 542 : 77 I. C. 2.3 : A. I. R. 1923 Cal. 619.**

——O. 21, R. 6—*Certificate issued by Court passing decree—Notice of execution can be issued only by Court of transfer.*

Where under R. 6 a certificate is issued by the Court passing the decree, transferring it to another district for execution, notice to execute the decree can only be issued by the latter Court. (*Chatterjee and Newbould, JJ.*) HAZARI LAL *v.* BAIDYANATH SAHA. **63 I. C. 116 : 26 C. W. N. 292.**

——O 21 Rr. 6 and 11 and S. 39—*Transfer of execution—Fresh application to Court of transfer is not necessary.*

Where a decree has been transferred to another Court for execution, there is nothing in the law which compels the decree-holder to make a second application for execution in the Court to which the decree has been transferred, if an application has already been made to the Court which passed the decree. Where it is not known whether the application in the first Court was only for transfer or whether it was for execution, the fact that notice was issued under O. 21, R. 22 shows that it must have been in form and substance, one for execution. (*Mullick and Foster, JJ.*) DUTT *v.* TARAPRASANNA ROY CHAUDHURI. **2 Pat. 909 : 5 Pat. L. T. 11 : 1923 P. H. C. C. 280 : 74 I. C. 758 : A.I.R. 1924 Pat. 120.**

——O. 21, R. 6 (b)—*Certificate wrong—Court to which decree is transferred should construe the decree itself and proceed — It need not get the certificate amended by the Court transferring the decree.*

Under R. 6 (*b*) where no satisfaction of the decree has been obtained the certificate is to state that "satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed. But the Court has not to state the amount due under the decree or the relief to which the decree-holder is entitled. The decree will be the guide in these matters for the executing Court which is entitled to construe the decree for itself. If the Court transferring the decree puts a wrong construction on the decree in the certificate, the judgment-debtor need not be directed to approach that Court for getting it amended. Any such order passed by the executing Court is *ultra vires* and an interference in revision is justified. (*Jwala Prasad and Kulwant Sahay, JJ.*) GAJADHAR PRASAD *v.* FIRM MANULAL JAGARNATH. **4 Pat. 440 : A. I. R. 1925 Pat. 807.**

——O. 21, Rr. 10, 11 and S. 39—*Decree transferred for execution—Execution application necessary.*

C. P. CODE (V OF 1908), O. 21, R. 11.

After a decree is transferred to another Court for execution, the decree holder must apply regularly under O. 21, Rr. 10 and 11 in order to set the law of execution in motion. (*Kinkhede, A. J. C.*) SULTAN ALI *v.* BALAJI. **A. I. R. 1924 Nag. 413.**

——**0. 21, R. 11**—*Omission to state date of disposal of prior application is not a material defect, but omission to state existence of cross-decree is.*

Material defects would vitiate an application for execution. Where there had been two prior applications for execution, but the date of disposal of the first application for execution was the one stated but not that of the second, though the numbers of execution cases were stated with regard to both the previous applications; *held*, that the omission of the date of the disposal of the second previous application for execution was not a material defect. The omission to mention the existence of cross-decrees however may be a material defect. (*Chatterjee and Panton, JJ.*) PROSANNA KUMAR CHAKRAVARTI *v.* JOTINDRA NATH BOSE. **71 I. C. 104 : A. I. R. 1924 Cal. 398**

——**0. 21, R. 11**—*Execution ought to be stayed where to do so is not detrimental to decree-holder's interest—C.P. Code, O. 21, R. 40—C. P. Code, S. 151.*

In cases of applications for execution, whether against the defendant or the sureties, the primary consideration must be the interest of the decree-holder and where his interests are likely to be jeopardised by the granting of any application for time, Courts have no option but to execute the decree. But where without any detriment to the interests of the decree-holder the granting of time to the judgment-debtor or the sureties to pay would not only enable the decree amount to be paid but would prevent serious loss or ruin, I think the Court ought to have power to stay execution against the person for such time as it thinks reasonable unless there is something in the Code which prohibits such power. A surety may be perfectly solvent and may be able to pay the amount if a few days' time is given to raise the money and he may, if a merchant, be ruined by a sudden issue of process for arrest and there is no justice in refusing this request. Of course if the law is otherwise he cannot be helped. But there is nothing in the Code which prohibits such a course. (*Kumaraswami Sastri, J.*) PERURI SOORYAPRAKASAM *v.* P. I. MUNISWAMI CHETTI. **20 L. W 175 : 84 I. C. 134 : 48 M. 494 : A. I. R. 1925 Mad. 42.**

——**0. 21, R. 11 (2) (e)**—*Decree-holder is bound to state the adjustment made after the decree.*

Under R. 11 (2) (*e*) the decree-holders are bound to state whether any and what adjustment of the matter in controversy has been made between the parties subsequently to the decree. (*Kinkhede, A. J. C.*) RAGHUBAR PRASAD *v.* SATTU. **89 I. C. 1009 : A. I. R. 1926 Nag. 164.**

——**0. 21, R. 11**—*Particulars not given—Application filed on last day of limitation—Errors rectified later—If in time.*

An execution application filed on the last day of limitation which was flagrantly defective with regard to the particulars required to be given under O. 21, R. 11, and which were not rectified till much later, is barred by time. (*Adami and Kulwant Sahay, JJ.*) BHUPENDRA NARAIN MANDEL *v.* JAMESWAR MANDEL. **90 I. C. 761.**

——**0. 21, R. 11**—*Pleader authorised to appear in suit is also deemed as authorised to appear in execution proceedings—C. P. Code, O. 3, R. 4.*

Proceedings in execution are proceedings in continuation of the suit and a fresh authority is not required for a pleader to appear, act and plead on behalf of the decree-holder in the execution proceedings if he

C. P. CODE (V OF 1908), O. 21, R. 11.

was so authorised by a *vakalatnamah* in the suit itself. 16 C W. N. 736 and A. I. R. 1925 Patna 369, Foll. (*Adami and Kulwant Sahay, JJ.*) GOBIND PRASAD *v.* HRIDAY THAKUR. **1925 P. H. C. C. 234 : A. I. R. 1925 Pat. 692.**

——**0. 21. Rr. 11 and 17**—*Concurrent execution may be allowed by Court--Amendment.*

O. 21, R. 11 of the C. P. Code is no bar to the maintenance of concurrent execution. It is open to the Court to allow the amendment of the application for execution already filed by the addition of other properties to the list of the properties sought to be attached and O. 21, R. 17 does not bar any such amendment. 27 C. L. J. 398, Ref.; 17 Cal. 631, Dist. (*Mullick and Kulwant Sahay, JJ.*) RAM SUMRAN PRASAD *v.* BABURAM BAHADUR. **4 Pat. L. T. 99 : 2 Pat. 328 : 71 I. C. 741 : 1923 P. H. C. C. 61 : A.I.R. 1923 Pat. 224.**

——**0. 21, R. 11 (1) & (2)** and **0. 19, R. 2 (1)**—*Execution petition—Verification by person other than decree-holder—Legality of.*

An execution petition signed and verified by a person other than the decree-holder but who is acquainted well with the facts of the case is valid. It is not necessary that the verification should be made in open Court or after obtaining the permission of the Court thereupon. (*Newbould and Ghose, JJ.*) KHARARIA MIJAZILLA ZEMINDARI SYNDICATE, LTD. *v.* OMED SHEIKH. **28 C. W. N. 687 : 80 I. C 313 (1) : A. I. R. 1924 Cal. 811.**

——**0. 21. R. 11 (2) (j) (v)**—*Mode of relief—Rateable distribution—"Otherwise as the nature of the relief granted may require"—Meaning of.*

Under O. 21, R. 11 an application for execution must specify the mode in which the assistance of the Court is required. Under R. 30 rateable distribution is not one of the modes specified. The expression "otherwise as the nature of the relief granted may require" applies to the nature of the relief granted by the decree. (*Baker, J. C.*) ALI MAHOMED *v.* MAHOMED NOOR. **87 I. C. 1025 : A. I. R. 1925 Nag. 382.**

——**0. 21, R. 11 (2)**—*Adjustment—Omission to mention in execution application—Effect of.*

The deliberate omission to mention in an execution application an adjustment which is subsisting though it could be avoided in law, is a circumstance which vitiates the application. (*Hallifax, A. J. C.*) MT. PERABAI *v.* BHAGWANI PRASHAD. **A.I.R. 1924 Nag. 185.**

——**0. 21, R. 11 (2)**—*Decree-holder's disappearance—Nothing known as to death—Pleader can apply.*

Where a decree-holder disappears but his death cannot be legally presumed, his pleader can, under R. 11 (2) file an application for execution and deposit any money that may have been ordered to be paid by the decree holder though no person can legally be substituted for the decree-holder until his death can legally be presumed. (*Bucknill and Ross, JJ.*) GOBIND PRASAD *v.* JUGDIP SAHAY. **4 Pat. 378 : 1925 P. H. C. C. 87 : 3 Pat. L. R. 43 : 86 I. C. 358 : 6 P. L. T. 847 : A. I. R. 1925 Pat. 369.**

——**0. 21, R. 11 (2)**—*Joint decree-holders—Verification of execution application—Mode of.*

Where there are a number of decree-holders, some of whom are not acquainted with the facts of the case, all the law requires is that the application should be verified by some person proved to the satisfaction of the Court to be acquainted with the facts of the case. It would be straining the language of the rule too far to say that where there are more applicants than one, the vertification should be signed even by those who

C. P. CODE (V OF 1908), O. 21, R. 11.

are not acquainted with the facts of the case or that where one or more acquainted with the facts of the case verify, their verification is not sufficient. (*Miller, C. J. and Kulwant Sahay, J.*) BHAGWAT PRASAD SINGH *v.* DWARKA PRASAD SINGH. **2 Pat. 809 : 4 Pat. L. T. 513 : 1 Pat. L. R. 453 : 1923 P. H. C. C. 229 : 74 I. C. 174 : A. I. R. 1924 Pat. 23**

——— O. 21, R. 11 (2)—*Means of livelihood should be kept intact if the decretal amount can be otherwise satisfied.*

It is clearly the intention of the law that debtors should be compelled to pay their just debts but it is not reasonable to compel them to do so by means which will deprive them of their livelihood, if there is available an alternative method, which will be reasonably fair to the creditor. (*Heald, J.*) THOMAS A. CHAPPLE *v.* E. Y. MAMSA BROTHERS. **3 Bur. L. J. 97 : 82 I. C. 827 : A. I. R. 1925 Rang. 33.**

———O. 21, R. 11 (2)—*Non-compliance.*

Non-compliance with immaterial provisions of O. 21, R. 11 (2) will not vitiate an execution application. (*Kennedy, J. C. and Raymond, A. J. C.*) SUHIGRAM *v.* TOWER GUL. **15 S. L. R. 156 : 65 I.C. 14 : A. I. R 1922 Sind 29.**

———O. 21, Rr. 11 (2) (g) and 17, S. 151—*Execution of decree—Interest wrongly stated in application—Application for amendment.*

Order 21, Rule 17, merely requires the Court, to which an application for execution is made, to ascertain that the application complies in form with the provisions of Rules 11 to 14. It does not impose upon the Court the duty to see that the amount entered in the application as due by way of interest under R. 11 (2) (*g*) is correct. (*Das and Adami, JJ.*) CHOWDHURI *v.* SRIMATI MANMOHINI. **1 P. 149 : A.I.R. 1922 Pat. 409.**

———O. 21, Rr. 13, 17—*Execution application—Attachment of immoveable properties prayed for—List of properties not filed—List filed at a time when decree barred—Order dismissing petition—If amounts to a refusal of jurisdiction—Interference in revision.*

An application to execute a decree, dated 7th March, 1910, was filed on 28th February, 1922, and the relief asked for was the attachment of immoveable properties. The description of the properties as required by O. 21, R. 13, was not given in the petition, but was promised to be furnished later. The list was filed only on 5th April, 1922, more than twelve years after the date of the decree. The executing Court dismissed the application as time—barred. *Held*, the Court had an option under O. 21, R. 17 either to reject the application as originally presented or to allow the defect to be remedied within a time to be fixed by it. Declining to pass such a remedial order did not amount to a refusal of jurisdiction ; and as no order had been passed under O. 21, R. 17 (1) allowing the defect to be remedied within a time fixed by the Court, the execution application could date only from the time when it fully conformed to O. 21, R. 13 and that being the 5th April, 1922, the decree was barred. (*Jackson, J.*) SANKARAN NAIR *v.* AMBU. **(1925) M. W. N. 917 : 49 M. L. J. 699.**

———O. 21, R. 15—*Joint decree—Execution by one decree-holder—Reservation of rights of others—Purchase by decree holder—Effect.*

One of several mortgage decree-holders executed his portion of the decree reserving the rights of the others and purchased the property himself *Held*, it enured to the benefit of all of them. (*Sulaiman, J.*) KHUB CHAND *v.* TODAR MAL. **A. I. R. 1924 All. 813.**

C. P. CODE (V OF 1908), O. 21, R. 16.

———O. 21, R. 15—*Adjustment of rights of decree-holders—Discretion—Joint decree—Discharge cannot be given by one of the decree-holders.*

O. 21, R. 15 of the C. P. Code allows a wide discretion to the Court, which has authority to make such adjustments of the rights of the decree-holders *inter se* as it may think equitable and proper. A decree for costs passed in a partition suit in favour of several plaintiffs can only be executed by all the decree-holders jointly or by some only of the decree-holders subject to the provisions of O. 21, R. 15, C. P. Code. It is not competent to one of several joint decree-holders to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of the decree without the concurrence of all the decree-holders. (*Piggott and Walsh, JJ.*) UMRAO BEG *v.* MUKHTAR BEG. **45 A. 401 : L. R. 4 A. 516 . 21 A. L. J. 308 : 74 I. C. 687 : A. I. R. 1923 All. 494.**

———O. 21, Rr. 15 and 16—*Order under—No appeal.*

No appeal is provided against an order under O. 21, R. 15 or R. 16, C. P. Code. 23 Bom. 620. Ref. to. (*Spencer and Odgers, JJ.*) BUDARAJU HANUMANTA RAO *v.* ALLAMNENI KRISHNAMMA. **32 M. L. T. 118 (2) : 70 I. C. 329 : A.I.R. 1924 Mad. 518.**

——— O. 21, R 15—*Partition decree—Joint decree—Share awarded to defendant.*

Similarity between the rights of each of the parties does not make partition decree a joint decree in favour of co-sharers. (*Oldfield and Venkatasubba Rao, JJ.*) WASUDEV MUTHA SHASTRI *v.* VITHAL SHASTRI. **16 L. W. 292 : (1922) M. W. N. 518 : 70 I. C. 296 : 31 M. L. T. 311 : A.I.R.1922 Mad 456 : 43 M. L. J. 379.**

———O. 21, R. 15—*Court need not determine who are the other decree-holders before making order under R. 15—Order safeguarding interests of heirs of deceased decree-holder—Notice to heirs not necessary.*

Before making an order under O. 21, R. 15 it is not necessary for the Court to enquire as to who the other decree-holders are for whose benefit the execution is to proceed. Where the Court directs the execution to proceed under O. 21, R. 15 and safeguards the interests of the other decree-holders, whoever they might be, the question whether the execution could proceed without notice to the heirs of the deceased decree-holders does not arise. (*Adami and Kulwant Sahay, JJ.*) M. NAZIRUL HASAN *v.* ABDUL WAHAB KHAN. **1925 P. H. C. C. 228 : 89 I. C. 811 : A.I.R. 1925 Pat. 591.**

——— O. 21, Rr. 15 and 22—*Defective application.*

Application though defective saves limitation. (*Coutts and Das, JJ.*) GOBARDHAN DAS *v.* SATISHCHANDRA. **1 P. 609 : 69 I. C. 668 : 4 Pat. L. T. 263 : A. I. R. 1922 Pat. 597.**

———O. 21, R. 16—*Execution of decree granted—Judgment-debtor cannot afterwards say decree is not executable.*

So long as an order allowing execution of the decree at the instance of the transferee of the decree stands, the judgment-debtor cannot be heard to say that the decree is not executable. The proper time for the judgment-debtor to raise the objection is when the notice is sent to him under O. 21, R. 16, to show cause why the execution should not be granted. (*Mukerji and Boys, JJ.*) RAMCHARAN SAHU *v.* SALEKRAM SAHU. **L. R. 6 A. (Civ.) 295 : 87 I.C. 436 : A. I. R. 1925 All. 662.**

———O. 21, R. 16—*Assignment of decree—Application for recognition—Judgment-debtor—Failure to*

object—Effect.

The failure of a judgment-debtor to object when an application is put in for the recognition of an assignment of the decree bars him from raising such objection at a later stage. (*Mukerjee and Dalal, JJ.*) DWARKA DAS *v.* MUHAMMAD ASHFAGULLAH.

22 A. L. J. 928 : 80 I. C. 722 : L. R. 5 A. 744 : 47 A. 86 : A. I. R. 1925 All. 117.

——**O. 21, R. 16**—*Assignment of decree—"Transfer by assignment or operation of law"—Meaning of.*

The words "transfer by assignment in writing or by operation of law" in O. 21, R. 16 mean a transfer of all the transferor's interest in the decree. Unless the whole interest is exhausted there is not a transfer within the meaning of the rule. (*Ryves and Stuart, JJ.*) MAZHAR HUSSAIN *v.* MT. AMTUL BIBI.

L. R. 3 A 297 : 66 I. C. 679 : A. I. R. 1922 All. 101.

——**O. 21, R. 16**—*Applicability—Transferee of property but not of decree cannot apply under this rule.*

No one can execute a decree except the decree-holder or a person to whom the decree has been transferred by assignment in writing or operation of law. A transferee of the property forming the subject of a suit who has not obtained a transfer of the decree cannot execute it. 17 I. C. 512, Foll. (*Stuart, J.*) SHIB CHARAN DAS *v.* RAM CHANDER.

66 I. C. 878 : A. I. R. 1922 All. 98.

——**O. 21, R. 16**—*Purchaser of property covered by decree—Assignment not recognized by Court*—Locus standi *to intervene in execution proceedings.*

A decree-holder assigned some of the properties covered by the decree to a stranger and then applied to execute his decree without impleading his assignee. Against the order in execution the assignee appealed. *Held*, he had no *locus standi* to appeal, as he had not got his assignment recognised by Court under O. 21, R. 16, C. P. Code. (*Macleod, C. J. and Shah, J.*) VITHAL LAXMAN NAIK *v.* MAHADEV RAGHUNATH.

26 Bom. L. R. 333 : A. I. R. 1924 Bom. 426.

——**O. 21, Rr. 16 and 2**—*Transfer of decree—Proof of uncertified payment.*

When an application is made to the Court under O. 21, R. 16, C. P. Code, it must be made to the Court which passed the decree and not to the Court executing the decree, so that proof can be given of any uncertified payments. The judgment-debtor is entitled in resisting the application to plead that the debt was satisfied. (*Macleod, C. J. and Shah, J.*) GANPAYA NARNAPPA *v.* KRISHNAPPA ANNAYA.

26 Bom. L. R. 491 : 80 I. C. 423 : A. I. R. 1924 Bom. 394.

——**O. 21, R. 16**—*Revivor—Notice issued under Lim. Act, Art.* 183.

The issue of a notice under O. 21 R. 16, C. P. Code, does not operate as a revivor under Art. 183 of the Lim. Act. (*Newbould and Ghose, JJ.*) KHAJEH SALALUDDIN *v.* AFZAL BEGUM.

39 C. L J. 590 : 28 C. W. N. 963 : A. I. R. 1925 Cal. 23.

——**O. 21, R. 16**—*Contest by judgment-debtor.*

There is no need for the judgment-debtor, even if notice was served on him, to appear and contest the application made by the assignee of the decree as to his right to execute the decree until an application for execution is made. (*Newbould and B. B. Ghosh, JJ.*) KHAJEH SALALUDDIN *v.* AFZAL BEGUM.

28 C. W. N. 963 : 39 C. L. J. 590 : 84 I. C. 68 : A. I. R. 1925 Cal. 23.

——**O. 21, R. 16**—*Assignment of decree—Transferee by operation of law—Assignment of lands together with arrears of back rents—Subsequent decree for back rents—Right of assignee to execute.*

An assignment of a decree not by operation of law, to be valid, must be in writing and a transferee under an oral assignment has no *locus standi* to execute the decree. Transferees by operation of law ordinarily would be legal representatives of the deceased decree-holder or the official assignee in the case of insolvent debtor or the purchaser of a decree at a Court sale or a minor succeeding to the estate which was in the hands of an executor and other instances where there is a vesting of interest by operation of the statute. A person to whom a party agrees to transfer a decree that may be passed in a suit is not a transferee within O. 21, R. 16, C. P Code. A transfer of the property during the pendency of the suit does not entitle the purchaser to apply for the execution of the decree, unless he has taken steps to have his name substituted in the suit in the place of his vendor and O. 21, R. 16 does not apply to such a case. An assignment of properties with all its back or future rents does not enable the assignee to execute a decree for rent subsequently obtained by the landlord when the decree itself has not been assigned. (*Mukerjee and Walmsley, JJ.*) MATHURAPUR ZEMINDARY CO., LTD. *v.* BHASARAM MANDAL.

28 C. W. N. 626 : 39 C. L. J. 373 : 51 Cal. 703 : 80 I. C. 881 : A. I. R. 1924 Cal. 661.

——**O. 21, R. 16**—*Applicability—Award filed in Court.*

The provisions of O. 21, R. 16 can apply to an award filed in Court, and the assignee of such an award can apply for execution of the same and the recognition of his rights. (*Greaves, J.*) GLADSTONE WYLLIE & CO. *v.* JOOSUB PEER MAHOMED.

27 C. W. N. 666 : 77 I. C 868 : A. I. R. 1924 Cal. 117.

——**O. 21, R. 16**—*Decree-holder—Transfer to another—Right of execution.*

The holder of a decree for pre-emption who subsequently sells the property to a stranger does not by such conduct debar himself from obtaining possession, in execution of the decree. The only right of the judgment-debtor is to receive the money before handing over possession. (*Campbell, J.*) FAQIR MAHAMMAD KHAN *v.* PIRDAD KHAN.

A. I. R. 1924 Lah. 615.

——**O. 21, R. 16**—*Assignment of decree*—Bona fides—*Determination of—Application for execution.*

If the assignee of a decree does not make an application for the execution of the decree it is not the duty of the Court *suo motu* to determine the question of assignment and make the assignee a party to the decree. Where, however, no formal application for execution had been made by the assignee in the lower Court but the assignee decree-holder wanted to execute the decree, the absence of a formal application under O. 21, R. 16 is a mere irregularity and does not prevent the Court from deciding the validity of the assignment. (*Shadi Lal, C. J.*) HARDITTA *v.* NIGAHIA MAL.

4 Lah. L. J. 259 : A I. R. 1922 Lah. 396.

——**O. 21, R. 16**—*Non-compliance.*

The provisions of O. 21, R. 16 of the C. P. Code are of a mandatory nature and non-compliance with the provisions thereof renders all proceedings in execution void 36 Bom. 58 : 9 All. 46, Foll. (*Wilberforce and Abdul Qadir, JJ.*) NOTAN DAS *v.* LACHMAN SINGH.

3 Lah. L. J. 434 : 63 I. C. 884 : 2 Lah. 230.

——**O 21, R. 16**—*Application to be brought on record as transferee-decree-holder—C. P. Code, does not provide for such application.*

There is no provision in the Civil Procedure Code for an application to be brought as transferee-decree-holder. The scheme of the Code is that the transferee by assignment in writing or by operation of law merely files his application for execution of the decree setting

C. P. CODE (V OF 1908), O. 21, R. 16.

out either in it or in an affidavit he has filed in support thereof, that he is the transferee either by operation of law or by any particular instrument in writing and thereupon the Court admits the application for execution or rejects it. 21 Mad. 388 Overruled. 5 Cal. L. R. 253 Dissented from. (*Coutts-Trotter, C. J. and Srinivasa Aiyangar, J.*) PALANIAPPA CHETTY *v.* SUBRAMANIA CHETTIAR. **21 L. W. 545 : 88 I. C. 409 : A. I. R. 1925 Mad. 701 : 48 M. L. J. 419.**

——0. 21, R. 16—*Second proviso—Applicability of, to mortgage decrees.*

The second proviso to O. 21, R. 16, Civil Procedure Code, has no application to mortgage decrees for sale. 43 M. L. J. 761 Distinguished. 14 C. L. J. 639, 642 : 27 C. L. J. 110 Rel. on. (*Wallace and Jackson, JJ.*) RAJARATHNA NAIDU *v.* RAMACHANDRA NAIDU. **20 L. W. 465 : 35 M. L. T. 81 : (1924) M. W. N. 747: 82 I. C. 948 . 47 M. 948 : A. I. R. 1924 Mad. 901 (1) : 47 M. L. J. 434.**

——0. 21, R. 16 Proviso—Benami *assignee—Decree against several debtors—Assignment* benami *for one—No execution can be had against others.*

Where a decree for payment of money against several persons personally and out of the assets in the hands of another judgment-debtor is assigned to a stranger *benami* for one of the judgment-debtors, the decree is incapable of execution against the other judgment-debtors. 31 B. 308 Not Foll. O. 21, R. 2, C. P. Code, is no bar to the recognition of the adjustment of the decree in a case like the present. 40 M. 296 : 4 C. W. N. 534. Foll. (*Spencer and Venkatasubba Rao, JJ.*) SADAGOPA AIYANGAR *v.* SELLAMMAL. **16 L. W. 7 8 : 31 M. L. T. 463 : A. I. R. 1922 Mad. 510 (1) : 43 M. L. J. 761.**

——0 21, R. 16 and 0. 22, R. 10 (1)—*Applicability—Transfer of part of decree—Right of transferee to execute is not affected.*

S. 146 of the C. P. Code recognizes the validity of a transfer of a part of a decree and execution thereof by a transferee. O. 21, R. 16 is no bar to the application of the section. Such transferee is like a joint decree-holder and can, under O. 21, R. 15, protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor. An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings and may compromise the same as he thinks fit, only constitutes the transferor the agent of the transferee and the agency is revocable (*Wallis C. J. Spencer and Kumaraswami Sastri, JJ.*) MUTHIAH CHETTIAR *v.* GOVINDOSS KRISHNADOSS. **44 Mad. 919 : 69 I. C. 337 : (1921) M. W. N. 649 : 14 L. W. 287 : 41 M. L. J. 316 (F. B.).**

——0. 21, R. 16—Benami *assignee—Right to execute—Decree for money against several persons—Meaning of.*

The execution of a decree by a benamidar for one of the judgment-debtors is barred under O. 21, R. 16, C. P. Code. The expression "decree for money against several persons" is not restricted in its application to a personal decree for money against two or more defendants. (*Baker, O. J. C.*) NANHELAL *v.* MANGILAL. **19 N. L. R. 151 : 78 I. C 372 : A. I. R. 1924 Nag. 41.**

——0. 21. R. 16 and S. 42—*Legal representation—Transfer to Revenue Court—Recognition of assignment—Power to execute.*

Under O. 21, R. 16 of the C. P. Code, the heirs of a deceased decree-holder may apply for execution to the Court that passed the decree, and under S. 42 of the C. P. Code, they can do so equally to any Court to which that decree has been transferred for execution. It may also be that the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree-holder. But both these things can be done only in a Civil Court. The Tahsildar as Revenue Officer has certain powers in the execution of a decree by ejectment, but he cannot execute such a decree in favour of any one but the person named in it. When it is ordered to give possession of a holding to a certain person who is then alive, he has no more power to give possession to anybody else whom he considers to be the heir of that person than a *Mazkuri* would have in the same circumstances. (*Hallifax, A. J. C.*) MT. KRISHNA BAI *v.* DEBI SINGH. **71 I. C. 409 : A. I. R. 1923 Nag. 195.**

——0. 21, R. 16—*Bank decree-holder—Amalgamation with another Bank—Latter Bank can apply under O. 21, R. 16.*

Where the decree-holder is a Bank and during the pendency of execution proceedings, the Bank is voluntarily wound up and amalgamated with another Bank under an agreement of transfer of the assets of the former Bank to the latter, there is a valid transfer of the decree as is required by O. 21, R. 16. (*Dalal and Wazir Hasan, A. J. Cs.*) KALIMUDDIN *v.* TATA INDUSTRIAL BANK, LTD. **2 O. W. N. 352 : A. I. R. 1925 Oudh 417.**

——0. 21, R. 16—*Assignees of decree—Disputes between—Adjudication on—Revision.*

A dispute between two persons who claimed to be assignees of a decree was taken up under S. 47, C. P. Code, and was subsequently treated as a suit. An application was filed by the defeated party to revise the order. *Held*, whether it fell under S. 47 or whether it was passed in a regular suit the order was appealable. If it were to be treated as falling under O. 21, R. 16 the Court had jurisdiction to decide the dispute in favour of one of the parties. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUN BAHADUR SINGH *v.* BAJNANJIJE PRASAD SINGH. **3 Pat. 344 : 1924 P. H. C. C. 193 : 78 I. C. 495 : A. I. R. 1925 Pat. 16.**

——0. 21, R. 16—*Provisions of, mandatory—Notice to transferors—Necessity for.*

The provisions of O. 21, R. 16, C. P. Code, are mandatory and notices under the rule should be issued to the transferors and judgment-debtors. Non-compliance with O. 21, R. 16, C. P. Code renders all the proceedings in execution void. (*Adami and Bucknill, JJ.*) BHAGWANTA KOER *v.* ZAMIN AHMAD KHAN. **1924 P. H. C. C. 221 : 2 Pat. L. R. 249 : 5 P. L. T. 451 : 3 Pat. 596 : A. I. R. 1924 Pat. 576.**

——0. 21, R. 16—*If mandatory—Notice—What amounts to—Application during pendency of execution—Effect of.*

Where an order for substitution was passed in the presence of the transferors and the debtors, no notice is necessary. O. 21, R. 16 requires notice of the application for execution and not of the assignment to be given to the transferor and the judgment-debtor and,

therefore where assignee applies during the pendency of an execution case to continue it, he does not apply for fresh execution and no notice is required. The provisions of R. 16 are mandatory and non-compliance renders proceedings in execution void. (*Adami and Bucknill, JJ.*) MT. BHAGWANTA KOER *v.* ZAMIN AHMED KHAN. **5 Pat L. T. 451 : 78 I. C. 766 : 1924 P. H. C. C. 221 : 3 Pat. 596 : A. I. R. 1924 Pat. 576.**

——**0. 21, R. 16**—*Legal representation—Transfer by operation of law—Assignment not necessary.*

Where the trustee of certain lands obtained a decree for rent against certain tenants but before the execution of the decree, the trust was declared invalid and thereupon the owner of the properties applied to execute the decree, *held*, he must be deemed to have become an assignee of the decree by operation of law and was competent to execute the decree although there was no formal assignment from the ex-trustee. (*Jwala Prasad and Foster, JJ.*) GOBIND SINGH *v.* MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH. **4 P. L. T. 731 : 2 Pat. L. R. 27 : A. I. R. 1924 Pat. 343.**

——**0. 21, R. 16**—*Assignment of decree—Validity—Notice.*

An assignment of a decree debt is not valid as against the debtor until the debtor has in fact notice of the assignment and any payment to the original decree-holder is valid, against the assignee if made before notice of the assignment. (*Miller, C. J. and Kulwant Sahay, J.*) TATA IRON AND STEEL CO., LTD. *v.* BAIDYANATH LAIK. **2 Pat. 754 : A. I. R. 1924 Pat. 118.**

——**0. 21, R. 16**—*Applicability—Transfer of property which is the subject of decree—Transferee cannot apply.*

Where property forming the subject of a decree is transferred, the transferee cannot execute the decree unless his name has been substituted in the suit in the place of his vendor. O. 21, R. 16, C. P. Code, does not apply to the case nor does S. 146, C. P. Code, enable the transferee to apply for execution. 17 M.L.J. 391 ; 17 I. C. 512 : 30 I. C. 831. (*Adami and Bucknill, JJ.*) THAKURI GOPE *v.* MALIK MOKHTAR AHMAD. **3 Pat. L. T. 625 : 1922 P. H. C. C. 256 : 69 I. C. 959 : A. I. R. 1922 Pat. 563.**

——**0. 21, R. 16**—*Notice of assignment—Reasons for giving.*

The assignee must, under R. 16, give notice not of the assignment but of the execution proceedings to the judgment-debtor and transferor. (*Das and Adami, JJ.*) GOLAB SINGH *v.* MOHAMMAD ZAFFAR HASSAN KHAN. **2 Pat. L. T. 619 : 62 I. C. 30 : 6 P. L. J. 358.**

——**0. 21, R. 16**—Benami *assignee—Substitution of name.*

The Executing Court can substitute the name of the assignee of a decree and permit him to execute it, though the assignment is *benami*. (*Rigg, J.*) LALL DWARKADAS *v.* BURMA RAILWAYS CO. **10 L. B. R. 280 : 62 I. C. 299 : 13 Bur. L. T. 173.**

——**0. 21, R. 17**—*Amendment—Power of Court—Amendment after 12 years, but application within time—Effect.*

O. 21, R. 17 does not take away the power of Court to amend an application for execution at any time before its disposal. An application so amended is one in accordance with law and must be decreed to have been presented at the date of the original presentation itself. An application for execution was filed within 12 years of the decree but it required an amendment, which however was made at a time when the decree

was more than 12 years old. *Held*, nevertheless, the application is not barred under S. 48. (*Spencer and Devadoss, JJ.*) VEMURI PITCHAYYA *v.* RAJA YARLAGADDA. **18 L. W. 739 : 33 M. L. T. (H. C.) 125 : 76 I. C. 750 : A. I. R. 1924 Mad. 367 : 45 M L. J. 651.**

——**0. 21, R. 17**—*Order for amendment—Non-compliance—Rejection.*

Under R. 17 of O. 21 of the present Code, the Court is not expressly bound to reject an application not amended in accordance with its orders, as it was under S. 245 of the old Code, but the effect of the rule is that the Court is bound to reject it, unless it is duly amended within the time or the extended time allowed by the Court, or the decree-holder can show that it does not require amendment. An application that is rejected *in limine* has no more been presented than one that the applicant has taken with him into Court but has omitted to offer to the Judge or to the proper officer. (*Hallifax, A. J. C.*) MEGHRAJ *v.* ABDUL MAJID. **17 N. L. R. 179 : 63 I. C. 971 : 4 N. L. J. 71.**

——**0. 21, R. 17**—*Amendment—Inclusion of prayer for attachment of more properties is not an amendment.*

Where an execution application has been registered under O. 21, R. 17, C. P. Code, no amendment is possible thereafter. An application to file fresh list of properties against which execution is also prayed for, is not an amendment of the execution petition. (*Miller, C. J. and Kulwant Sahay, J.*) CHAURASI MAHASARICK *v.* BHAGAN SAHU. **2 Pat. 787 : 74 I. C. 144 : 1923 P. H. C. C. 209 : A. I. R. 1924 Pat. 20.**

——**0. 21, R. 17**—*Court can allow amendment or reject application for non-compliance of provisions.*

Under O. 21, R. 17. C. P. Code, whenever an execution application is put in court which does not conform to the provissions of Rules 11 to 14 of Order 21, the Court has the power either to reject the application or to allow the defect to be remedied. It does not impose upon the court the duty to calculate interest due under the decree. (*Das and Adami, JJ.*) CHOWDHURI CHINTAMONI MAHAPATRA *v.* MONMOHINI DEBI. **1 P. 149 : 69 I. C. 200 : A. I. R. 1922 Pat. 409.**

——**0. 21, R. 18**—*Attaching decree-holder.*

Attaching decree-holders are assignees within the meaning of O. 21, R. 18. (*Chatterjee and Panton, JJ.*) ADWITCHANDRA SAHA *v.* CHITTAGONG CO. LTD. **28 C. W. N. 988 : 84 I. C. 747 : A. I. R. 1925 Cal. 102.**

——**0. 21, R. 18**—*Attaching decree-holder executing decree for mesne profits passed under S. 144—C. P. Code—Court has inherent power to allow judgment-debtor to set-off decree for larger sum obtained by himself against the original holder of the decree for mesne profits—C. P. Code, S. 151.*

Where a party attaches in execution a decree for mesne profits obtained by the judgment-debtor under S. 144 of the C. P. Code against a third party though the case may not strictly fall within O. 21, R. 18, the Court has inherent power to allow such third party to set off as against the attaching decree-holder executing the decree for mesne profits against him (*i.e.*, the third party referred to) a decree which he holds for a larger sum against the original holder of he decree for mesne profits. (*Chatterjee and Panton, JJ.*) ADWITCHANDRA SAHA *v.* CHITTAGONG CO., LTD. **28 C. W. N. 988 : 84 I. C. 747 : A. I. R. 1925 Cal. 102.**

——**0. 21, R. 18**—*Scope.*

Rule 18 applies even though one decree is in a suit

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and the other is in a miscellaneous proceeding under S. 144 C. P. Code. (*Chatterjee and Panton, JJ*). ADWITCHANDRA SAHA *v.* CHITTAGONG CO., LTD. **28 C. W. N. 988 : 84 I. C. 747 : A. I. R. 1925 Cal. 102.**

——— O. 21, R. 18—*Pre-emption decree with costs—Plaintiff can set off costs against deposit amount.*

Where a suit for pre-emption is decreed and plff. is awarded costs he is entitled to deduction of costs from deposit made by him. (*Chevis and Scott-Smith, JJ.*) KUPURIA MAL *v.* WALI MUHAMMAD. **2 Lah. 294 : 4 Lah. L. J. 354 : 65 I. C. 250 : 23 P. L. R. 1922 : A. I. R. 1922 Lah. 142.**

———O. 21, R. 19—*Conditional decree for possession—Payment of costs—Right to set off—Delay in deposit—Treasury closed on the last day—Effect of.*

Plaintiff obtained a decree for possession on condition of paying a sum of Rs. 38 and odd to the defendant within thirty days and the parties were ordered to pay and receive proportionate costs. Under the decree as drawn up plaintiff was entitled to get Rs. 70 and odd from the defendant and the defendant to get Rs. 15 and odd from the plaintiff. On the thirtieth day the plaintiff tendered Rs. 39 and odd to the Court and was given a chalan to the treasury officer. By the time the plaintiff reached the treasury, it was closed and the deposit was made on the next day. On a question arising as to whether the plaintiff had fulfilled the condition in the decree, *held*, that the plaintiff must be deemed to be entitled to set off Rs. 38 and odd directed to be paid to the defendant against Rs. 70 and odd awarded to him as costs and that the condition about payment within thirty days must be deemed to have been automatically fulfilled. Apart from this, the plff. had not fulfilled the condition in the decree. (*Ryves and Mukerji, JJ.*) GULZARI *v.* LACHHMI DHAR. **L. R. 5 A. 59.**

———O. 21, R. 19—*Jurisdiction.*

Where the claim sprang from a compromise entered into between the parties, the object of which was to put an end to all disputes between them and it was never contemplated that another action should be brought in respect of any of the matters which formed the subject-matter of the settlement: *Held*, the execution Court has jurisdiction, though the decree merely declares the rights of the parties *inter se* and does not direct any act to be done. (*Shadi Lal, C.J. and Abdul Qadir, J.*) HAJI MAHOMMED TAQI *v.* HAJI ABDUL RAHMAN. **A. I. R. 1923 Lah. 151.**

———O. 21. R. 19—*Cross-claims under a decree.*

Where the plaintiff obtained a decree against the fourth defendant for a sum of money which she was entitled to as her own Stridhanam, and under the same decree she was liable to the fourth defendant for a larger amount in respect of her mother's estate as her mother's heiress, and the plaintiff's husband as the legal representative of the plaintiff to her Stridhanam sought to execute the decree for the smaller amount against the fourth defendant while the heir in respect of the plff.'s mother's estate was the first defendant, the plaintiff's brother, *held*, that the decree was inexecutable in the hands of her husband and that O. 21 R. 19. C. P. C., applied and consequently the decree was satisfied to the extent of the smaller amount. 40 Bom. 60. Ref. to. (*Oldfield and Venkatasubba Rao, JJ.*) VENKATANARAYANA *v.* PURVADA NARASIMHA ROW. **17 L. W. 643 : 32 M. L. T. (H C.) 341 : (1923) M. W. N. 474 : 72 I. C. 865 : A. I. R. 1923 Mad. 638 : 44 M. L. J 590.**

———O. 21, R. 19—*Pre-emption decree—Costs cannot be set off against deposit amount.*

A vendee against whom a decree for pre-emption has been passed subject to a certain amount being deposited, is not a person who can recover the purchase-money from the plaintiff unless he chooses to deposit it. He cannot compel the plaintiff to exercise his rights under the decree for pre-emption and the case does not fall under O. 21, R. 19. Hence costs awarded cannot be set off against the amount to be deposited as pre-emption money. (*Kanhaiya Lal, J.C.*) NILKANTH *v.* MAHABIR SINGH. **26 O. C. 345 : 74 I. C. 558 : 9 O. & A. L. R. 207 : A. I. R. 1924 Ordh 104.**

———O. 21, R. 21—*Simultaneous attachment and arrest is discretionary for Court both in execution and before judgment though limited by O. 38 in latter case—C. P. Code, O. 38.*

The power of the Court to issue simultaneously execution for arrest and attachment is entirely discretionary under the Code. It has the same power in matters before judgment, limited however by the provisions of O 38 of the Sch (7 Bom. 301, Ref.) (*Duckworth and Godfrey, JJ.*) SYED HOOSEIN *v.* S. R. M. M. C. T. CHETTIAR FIRM. **2 Rang. 362 : 3 Bur. L. J. 159 : 84 I. C. 270 : A. I. R. 1924 Rang. 361.**

———O. 21, R. 22—*Legal representative—Deceased judgment-debtor — True legal representative not brought on record—Notice to intermeddler—Objection.*

An execution creditor can serve notice on an intermeddler of the estate of the deceased judgment-debtor and that would be a service on the legal representative, but he is liable to be met with objection, afterwards, that the person who was served with notice, was not really an intermeddler or that, in fact there was a true legal representative in existence at the time. (*Macleod, C.J. and Shaw, J.*) SHANKER DAJI NAIK *v.* DATTATREYA. **45 Bom. 1186 : 63 I. C. 248 : 23 Bom. L. R. 514.**

———O. 21, R. 22—*One judgment debtor ceasing to have interest in the property—Failure to serve him with notice does not render proceedings invalid—Lim. Act, Art. 182.*

The object of the notice under R. 22 evidently is to enable the judgment-debtor to show cause, if any, why the decree should not be executed and also to give him an opportunity of satisfying the decree. (25 C. W. N. 972. Foll.) Where one of several judgment-debtors has ceased to have an interest in the property, a failure to serve him with notice does not vitiate the execution proceedings, in view of a definite provision to that effect in Art. 182 of the Lim. Act. (*Suhrawardy and Duval, JJ.*) TARA PRASANNA SINHA *v.* JNANENDRA NARAYAN. **88 I. C. 1039 : A. I. R. 1926 Cal. 86.**

———O. 21, R. 22—*One judgment-debtor dying—Some legal representatives already on record in their own capacities—Notice.*

Though the name of a judgment-debtor is entered in the execution proceedings after his death yet where his legal representatives or some of them are on the record any further notice is not necessary. (42 Cal. 72, Ref.) The omission to serve notice on some other legal representatives of the deceased is only an irregularity which cannot vitiate a sale in execution. (*Chotzner and Graham, JJ.*) AZIZANNESSA *v.* DWARIKA PROSAD. **86 I. C. 745 : A. I. R. 1925 Cal. 1227.**

———O. 21. R. 22—*Application under.*

Application for issue of notice upon the judgment-debtor or his representative, is a step-in-aid. (*Mukerjee and Panton, JJ.*) SADAY CHANDRA JANA *v.* PORESH NATH. **35 C. L. J. 82 : 65 I.C. 571 : A. I. R. 1922 Cal. 44.**

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——O. 21, R. 22—*Application for transfer of decree and for issue of notice to Judgment-debtor.*

O. 21, R. 22 provides that notice to the judgment debtor, to show cause against execution shall be issued by the Court executing the decree. The Court which transfers a decree has no power to issue the notice. An application for transfer of a decree is not an application for execution. (*Chatterjee and Newbould, JJ.*) HAZARI LAL *v.* BAIDYA NATH SAHA.
26 C. W. N. 292 : A. I. R. 1922 Cal. 3.

——O. 21, R. 22—*Notice essential—Execution proceedings without notice is a nullity.*

An order for execution without notice under S. 248 of the Code of 1882 is without jurisdiction and a nullity and the excution sale cannot stand. A mere issue of a notice is not sufficient under the section. It must be served. (*Chatterjee and Newbould, JJ.*) GURUDAS BISWAS *v.* THAKAMANI.
64 I. C. 476 : 25 C. W. N. 972.

——O. 21, R. 22—*Notice—Minor judgment-debtor—Sufficiency.*

O. 21, R. 22, is sufficiently complied with, in case of all the co-tenant judgment-debtors living in the same house if the notice is delivered to all of them at their house even if some of them be minors whose guardians *ad litem* have died and no new appointment has been made in the execution proceedings. (*Sanderson, C.J. and Richardson, J.*) FANI BHUSAN *v.* SURENDRA NATH. **64 I. C. 25 : 35 C. L. J. 9.**

——O. 21, R. 22—*Notice setting aside without—Appeal.*

An appeal lies from an order setting aside execution sale without notice to the auction-purchaser at the instance of the auction-purchaser. (*Scott-Smith, J.*) GUL BANO *v.* MUHAMMAD ZAKAR KHAN.
3 Lah. L. J. 463.

——O. 21, R. 22—*Execution sale held after judgment-debtor's death—Legal representative not brought on record—Sale is a nullity—C. P. Code, S. 50.*

Execution sale held after the death of the judgment-debtor without bringing the legal representatives on record is a nullity. 42 Cal. 72 [P. C.] Foll. 1922 Mad. 307 Appr. 1924 Mad. 130 Diss. (*Phillips, J.*) KARIPINENI RAJAYYA *v.* ANNAPURNAMMA.
22 L. W. 828 : A. I. R. 1926 Mad. 138.

——O. 21, R. 22—*Major—Execution proceedings—If legal representative.*

A major who is entitled to appear to the exclusion of the guardian appointed during his minority is not within the definition of legal representative under S. 2, C. P. Code, and is not entitled to fresh notice under O. 21, R. 22. (*Oldfield and Devadoss, JJ.*) NAGAPPA CHETTY *v.* MUTHURAMAN CHETTY. **78 I. C. 12 : A. I. R. 1925 Mad. 158.**

——O. 21, Rr. 22 and 90—*Limitation Act, Articles 166 and 181—Execution sale without notice under O. 21, R. 22, where such notice is necessary—Sale, void and not merely voidable—Application to set aside a void execution sale, governed by Art. 181 of the Limitation Act and by Art. 166—Failure to give notice under O. 21, R. 22, whether an irregularity in publishing or conducting the sale within the meaning of O. 21, R. 90.*

In cases where notice under O. 21, R. 22, of the Code of Civil Procedure has not been issued and omission is not due to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, sales held in execution are void and not merely voidable as against the persons to whom notice should have been, but was not issued. 45 M. 875 and 45 M. L. J. 413, overruled. 42 C. 72 ; 44 C. 954 Foll. 25 B. 337 and 14 IC. 18 distinguished. Where a sale in execution is void as against a party, an application to set it aside, under S. 47 of the C. P. Code or otherwise is governed by Art. 181 of the Limitation Act and not by Art. 166, 43 M. 313 App.

Per *Chief Justice and Wallace, J.*—The failure to give notice of an application for leave to attach and sell under O. 21, R. 22 of the C. P Code is not an irregularity in publishing or conducting the sale within the meaning of O. 21, R. 90 of the Code. (*Schwabe, C. J., Ramesam and Wallace, JJ.*) RAJAGOPALA IYER *v.* RAMANUJA CHARIAR.
47 Mad. 288 : 19 L. W. 179 (F. B.) : (1924) M. W. N. 182 : 80 I. C. 92 : 34 M. L. T. (H. C.) 37 : A. I. R. 1924 Mad. 431 : 46 M. L. J. 104 (F. B.).

——O. 21, Rr. 22, 90—*Dead person—Death of judgment-debtor after attachment and order for sale, but before sale—Legal representative not brought on record—Effect.*

Where after attachment and order for sale the judgment-debtor dies but without his legal representative being brought on record, the sale takes place, it is not null and void on that account. The case where want of notice under O. 21, R. 22 constitutes a material irregularity is quite different. (*Spencer and Krishnan, JJ.*) MINOR DORAISWAMY *v.* CHIDAMBARAM PILLAI. **18 L. W. 577 : 33 M. L. T. (H. C.) 25 : (1923) M. W. N. 817 : 47 Mad. 63 : 75 I. C. 46 : A. I. R. 1924 Mad. 130 : 45 M. L. J. 413.**

——O. 21, R. 22—*Notice essential—Failure to record reasons for—Illegality or irregularity.*

The provisions of O. 21, R. 23, Sub-S. (2) requiring the Court to record its reasons is only discretionary and the failure to issue a notice is necessarily fatal to the validity of the subsequent proceedings. In an appeal against an order refusing to set aside an execution sale on the ground of want of notice under O. 21, R. 22 it would ordinarily be open to the appellant to ask the appellate Court to consider the executing Court's use of its discretion on its merits. (*Oldfield and Ramesam, JJ.*) KASIVISVANATHAN CHETTY *v.* SOMASUNDARAM CHETTY. **(1922) M. W. N. 173 : 70 I. C. 611 : 45 M. 875 : A. I. R. 1922 Mad. 93 : 42 M. L. J. 422.**

——O. 21, R. 22—*Notice-essential—Non-service of notice on defendant after attaining majority—Sale in execution—Effect.*

The non-service of notice under O. 21, R. 22 upon a defendant after he attains majority is, though it does not render the subsequent proceedings a nullity, a serious irregularity which, until met by a valid defence, is sufficient to set aside the subsequent sale in execution. The burden is on the decree-holder to make out such a defence. One such defence might be established by proving that the defendant's interests were fully represented, to the knowledge of the defendant, by some other party to the proceedings. (*Sadasiva Aiyar and Napier, JJ.*) KRISHNASAMY AIYANGAR *v.* SOORIKUTTY GANAPATHY AIYAR.
(1921) M. W. N. 394 : 63 I. C. 903 : 14 L. W. 638.

——O. 21, R. 22—*Transferee of decree—R. 22 does not apply.*

The case of a transferee is not covered by the provisions of O. 21, R. 22. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) JUNG BAHADUR *v.* BANK OF UPPER INDIA, LTD., LUCKNOW. **12 O. L. J. 146 : 87 I. C. 21 : 2 O. W. N. 73 : A. I. R. 1925 Oudh 448.**

——O. 21, Rr. 22 and 23—*Notice—Attachment without notice is not invalid.*

C. P. CODE (V OF 1908), O. 21, R. 22.

The issue of an attachment before the service of the notice issued under O. 21, R. 22 of the Code of Civil Procedure, is, in the absence of any sufficient cause justifying an apprehension that the property sought to be attached would be removed or transferred, a mere irregularity and the execution proceeding is not thereby rendered invalid. If there was any reason for the issue of an attachment before an order was passed under O. 21, R. 23 of the Code, it should have been recorded at the time. The failure to record the reason does not, however, *per se* render the attachment invalid. (*Kanhaiya Lal, J. C.*) GIRWAR SAHAI *v.* MANGAL. **26 O. C. 288 : 9 O. & A. L. R. 92 : 73 I. C. 241 : A. I. R. 1924 Oudh 120 (1).**

——— O. 21, R. 22—*Limitation—Failure to plead in the previous application—Effect of.*

Where in the course of a previous execution proceeding, it was open to the judgment-debtor to plead limitation, but he failed to do so, he would be precluded from raising the same in a subsequent application which is within time from the prior application. 8 Cal. 51 ; 24 Mad. 669, Foll. (*Kanhaiya Lal, C. J.*) GANGA DIN *v.* DIP SINGH. **25 O. C. 13 : A. I. R. 1922 Oudh 117.**

——— O. 21, R. 22—*Rule applies to subsequent execution petitions and is not confined to first petition.*

The rule applies to every application for execution and not merely the first application, and therefore, in every case where the application is made more than a year after the decree and more than a year after the last order was made against the judgment-debtor in any previous execution, a fresh notice must be served. 1925 Patna 111 dissented from. (*Dawson Miller, C. J. Jwala Prasad and Das, JJ.*) ADAYA PRASAD SINGH *v.* RAM NARAYAN DAS. **1925 P. H. C. C. 121 : 87 I. C. 531 : 6 P. L. T. 290 : A. I. R. 1925 Pat. 474 (F. B.).**

——— O. 21, R. 22—*Notice—When necessary—Object of.*

O. 21, R. 22 requires the decree-holder to issue only one notice upon the Judgment-debtor or his legal representative. The object of the rule is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security. Once a notice is served, the rule does not contemplate that a fresh notice should be served for every execution application made more than one year after the last order against the judgment-debtor. (*Mullick and Bucknill, JJ.*) MAHADEO SINGH *v.* DHOBI SINGH. **2 Pat. 916 : 4 Pat. L. T. 721 : 1923 P. H. C. C. 283 : 74 I. C. 838 : A. I. R. 1924 Pat. 111.**

——— O. 21, R. 22—*Notice, when necessary—Omission to give notice, effect of.*

Under O. 21, R. 22 the executing court is required to issue the notice therein required only in cases where the application is made more than one year after the date of the decree. *Quaere*—Whether the omission to issue the notice in cases in which it has to be issued renders the sale null and void. (*Miller, C. J. and Adami, J.*) BALDEO SINGH *v.* MEGHU SINGH. **74 I. C. 202 : 1919 P. H. C. C. 386.**

——— O. 21, R. 22—*Notice essential.*

The omission to issue the notice under O. 21, R. 22 render the sale to be without, jurisdiction inasmuch as the notice under O. 21, R. 22 is the foundation of the execution of a decree presented more than a year after the date of the decree. But an irregularity in the service of the notice is quite a different thing from the absence of the issue of such notice. The former

C. P. CODE (V OF 1908), O. 21, R. 33.

relates to procedure and the latter goes to the root of the jurisdiction of the Court. (*Jwala Prasad and Adami, JJ.*) DAS NARAYAN SINGH *v.* MIR MAHAMAD YUSUF. **3 U. P. L. R. (Pat.) 33 : 61 I. C. 828 : 2 Pat. L. T. 401 : 6 P. L. J. 319 : 1921 P. H. C. C. 181.**

——— O. 21, R. 26—*Garnishee—Attaching decree-holder—Rights of.*

Attaching decree-holders cannot by means of the attachment stand in a better position as regards the garnishee than the judgment-debtors did ; in other words the decree-holder could only obtain what the judgment-debtor could honestly give him. (*Ghose, J.*) AMARENDRA NATH SAHA *v.* S. BANERJEE & CO. **40 C. L. J. 228 : A. I. R. 1924 Cal. 1068.**

——— O. 21, R. 26—*Sub-rule 3 entitles Court to demand security before making order under sub-rule.*

The judgment-debtor is not obliged to furnish security, but he may or may not furnish it as he pleases, so that the effect of the provision in sub-rule (3), by which the Court may, before making an order for staying execution require security from the judgment-debtor, is merely to empower the Court to make the stay order, which it has to pass under sub-rule (1), conditional on the giving of security. (*Martineau, J.*) GURANDITTA *v.* FIRM GURDASMAL. **7 Lah.L.J. 343 : 26 Punj. L. R. 634 : A. I. R. 1925 Lah. 552.**

——— O. 21, R. 29—*Applicability — Case coming under S. 47.*

The provisions of O. 21, R. 29 apply to cases not coming under O. 21, R. 2 (3) read with S. 47 of the Code. (*Chatterjee, J.*) A. Y. REILY *v.* GOLAP KHAN. **27 C. W. N. 575 : A. I. R. 1923 Cal. 645.**

——— O. 21, R. 29—*No suit pending—Court cannot stay execution.*

The execution Court had no power to stay the execution under O. 21, R. 29 of the C. P. Code if at that time no suit was pending before it against the decree-holder on the part of the judgment-debtor. (*Scott-Smith, J.*) FITZHOLMS *v.* WARAYAN SINGH. **75 I.C. 419 : A. I. R. 1923 Lah. 514.**

——— O. 21, R. 30—*Decree for money—Attachment when necessary.*

In the case of a decree for money when it is provided that if it is not paid by a certain date specific immoveable property should be sold, no attachment is necessary under O. 21, R. 30. It is only in cases of decrees for money which do not affect any specific immoveable property that the rule applies. (*Miller, C. J. and Kulwant Sahay, J.*) JAGANNATH SAO *v.* DEBI PRASAD DHANDHANIA. **2 Pat. 768 : 73 I. C. 598 : A. I. R. 1924 Pat. 258 (1).**

——— O. 21, R. 32—*Decree for demolition of wall—New one erected after demolition—Remedy is only by a suit.*

Where a wall is directed by a decree to be demolished as being an obstruction to a right of way, and is so demolished in execution of the decree, but the judgment-debtor erects another wall obstructing the right of way, *held*, that the proper remedy of the decree-holder is a suit for injunction. He cannot get the second wall demolished in execution of the first decree. (*Martineau, J.*) MALUKA *v.* SUNDAR SINGH. **59 I. C. 594 : 20 P. W. R. 1921.**

——— O. 21, R. 33—*Direction that wife should not be imprisoned—If can be interfered with.*

Where a court in passing a decree for restitution of conjugal rights expressly directs the wife is not to be imprisoned if she does not comply with the decree

C. P. CODE (V OF 1908), O. 21, R. 33.

an appellate court should not ordinarily interfere with the direction. (*Daniels, J.*) DHARINEE HAJJAM *v.* MT. PIARI. **A. I. R. 1924 All. 836.**

——**O. 21, R. 33**—*Decree for restitution of conjugal rights—Execution—Detention in prison should not be ordinarily ordered.*

Ordinarily a court passing a decree for restitution of conjugal rights against a wife ought, under O. 21, R. 33 of the Code, direct that the decree shall not be executed by the detention of the wife in prison. The fact that the wife had already been in jail under the sentence of a Criminal Court and that it would be no violence to her feelings to be sent to jail if she disobeys the decree is no ground to refuse to exercise the discretion to be exercised by the court under R. 33. (*Macleod, C. J. and Heaton, J.*) BAI PARAVATI *v.* MANSUKH JETHA. **44 Bom. 972 : 59 I. C. 361 : 22 Bom. L. R. 1097.**

——**O. 21, R. 33**—*Decree for restitution of conjugal rights—Women not to be ordinarily sent to jail.*

The tendency of modern legislation is against sending women to jail in civil matters. The Courts should sparingly exercise their power of sending women to jail. (*Abdul Raoof, J.*) MT. AMIR BIBI *v.* NUR MAHOMED. **73 I. C. 716 : A. I. R. 1924 Lah. 244**

——**O. 21, R. 33**—*Decree for restitution of conjugal rights—Detention of females in jail.*

Though the tendency of modern legislation is against sending women to jail in civil matters, in a case where a husband has obtained a decree for restitution of conjugal rights which the wife refuses to obey, but she persists in leading an immoral life she must be detained in jail in execution of the decree. (*Moti Sagar, J.*) JAGAN NATH *v.* BASANT RAM. **75 I. C. 24 : A. I. R. 1923 Lah. 595 (2).**

——**O. 21, R. 34**—*Decree for specific performance—Defendant can execute.*

A decree for specific performance can be executed by the defendant, (*Macleod, C. J. and Coyajee, J.*) KARIMA BIBI *v.* ABDER REHMAN. **24 Bom. L. R. 496 : 46 B. 990 : 67 I. C. 667 : A. I. R. 1923 Bom. 26.**

——**O. 21, R. 34**—*Compromise decree providing for execution of document can be enforced under this rule.*

Where a suit for a declaration of title to a property, which has been attached in execution of a decree in another suit, is compromised and a condition of the compromise was the execution of a mortgage-bond by the plaintiff in the suit to the executing decree-holder of the other suit, the decree embodying the compromise, can be enforced in the execution itself under O. 21, R. 34 and no separate suit is necessary. (*Chatterjea and Panton, JJ.*) SOUDAMINI DASSI *v.* BEHARI LAL BISWAS. **61 I. C. 530 : 25 C. W. N. 68.**

——**O. 21, R. 35**—*Adverse possession—Delivery of actual possession under decree—Effect.*

Delivery of actual possession under a decree interrupts adverse possession and gives a fresh starting point of limitation, (*Daniels, J.*) HARPAL KURMI *v.* MOHAN KURMI. **79 I. C. 1047 : A. I. R. 1924 All. 844.**

——**O. 21, R. 35**—*Joint possession—Ouster by one—Suit for possession—Decree.*

One co-sharer is entitled to a decree for joint possession and declaration of his joint rights, against the other co-sharers who have ousted him. (*Lindsay and Kanhaiya Lal, JJ.*) SARABJIT SINGH *v.* RAI KUMAR **19 A. L. J. 783 : 3 U. P. L.R. (All.) 146 : 44 A 5 : A. I. R. 1922 All. 162.**

——**O. 21, R. 35**—*Co-sharer—Possession can only be symbolical.*

C. P. CODE (V OF 1908), O. 21, R. 35.

One co-sharer can have only symbolical joint possession as is referred to in O. 21, R. 35 of the Code as against another co sharer in actual enjoyment. (*Lindsay and Kanhaiyalal, JJ.*) SARBJIT SINGH *v.* RAM KUMAR. **19 A. L. J. 783 : 63 I. C. 806 : 3 U. P. L. R. (A) 146.**

——**O. 21, Rr. 35 and 9**—*Formal delivery—Judgment-debtor in possession—Interruption of adverse possession.*

Where the judgment-debtor is in actual possession, actual possession must be given in execution in accordance with O. 21, R. 35, C. P. Code. Where merely formal possession of immoveable property is given to a purchaser at an execution sale it cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupancy of a tenant or other persons entitled to occupy the same. 43 A 520 : 36 B. 373, referred to. (*Scott-Smith, J.*) SARDARKHAN *v.* ABDULLAH KHAN. **71 I. C. 885 : A. I. R. 1924 Lah. 301.**

——**O. 21, R. 35**—*Symbolical possession—Failure to affix warrant vitiates.*

The provisions of the Code as to how symbolical delivery is to be effected must be strictly complied with. Failure to affix a copy of the warrant for delivery of possession to the place vitiates the symbolical delivery. (*Moti Sagar, J.*) NIDHI RAM *v.* PARSA RAM. **74 I. C. 1 : 5 Lah. L. J. 507 : A. I. R. 1923 Lah. 693.**

——**O. 21, Rr. 35 and 36**—*Decree for possession.*

Whose possession is not obtained subsequent suit for possession, is not maintainable. (*Martineau, J.*) RAM CHAND *v.* JANA. **3 Lah. L. J. 138 : 59 I. C. 770 : 38 P. W. R. 1921.**

——**O. 21, R. 35**—*Decree holder being entitled to actual possession but taking symbolical possession—Judgment-debtor's subsequent possession is adverse.*

Where a plaintiff is entitled to actual possession under the law, he is not entitled to get what is called symbolical possession. Symbolical possession is given in cases where he is not entitled to actual possession at the date when property is delivered to him in execution of a decree either by reason of the property being in the possession of tenants or mortgagees or other persons who are entitled to be in possession as against the judgment-debtor. The right to actual possession of the decree-holder in such a case arises only when he, the judgment-debtor, would be entitled to possession and Arts. 137 and 138 of the Limitation Act would apply in such cases. But where a judgment-debtor is actually in possession and the decree-holder is entitled to actual possession he cannot get anything less than that, and if he does not get actual possession he cannot rely upon symbolic possession ; for the law does not allow a person, who is entitled to actual possession, to get only symbolic possession (*Devadoss, J.*) KAMAYYA *v.* BHIMARASETTEI PARIDESI **86 I. C. 439 : A. I. R. 1925 Mad. 1140 : 49 M. L. J. 303.**

——**O. 21, Rr. 35 and 36**—*Applicability—Decree holder—Enjoyment of property delivered in execution—Disturbance by person without any right—Suit for damages.*

Where a decree-holder, who has obtained delivery in execution of a decree for possession of immoveable property, is disturbed in his peaceful enjoyment thereof by a person who, according to the decree-holder himself, has no right legitimately derived from any competent person to do so, his remedy is either in criminal prosecution or in a suit for damages. The person disturbing cannot be regarded as tenant against

C. P. CODE (V OF 1908), O. 21, R 35.

whom there can be an order for delivery under O. 21, R. 35, C. P Code. (*Oldfield and Venkatasubba Rao, JJ.*) IBRAHIM SAHIB *v.* KONAMMAL.
31 M. L T. 356 : 70 I. C. 75 : A. I. R. 1923 Mad. 25 : 43 M. L. J. 179.

——— **O. 21, Rr. 35 and 36**—*Symbolical possession delivered by mistake—Effect on parties.*

Though symbolical possession is delivered where actual possession should have been given, still so far as the judgment-debtor and other persons bound by the decree are concerned, it operates as delivery of actual possession. 24 C. 715 ; 17 M. L. J. 598, Rel. (*Adami, J.*) MAHARAJA PRATAP UDHI NATH SAHI DEO *v.* BHAIANI SUNDER-BANS KOER.
24 Cr. L. J. 279 : 71 I. C. 999 : 3 Pat. L. T. 628 : A. I. R. 1923 Pat. 76.

——— **O. 21, R. 35 (2)**—*Joint property—Suit for recovery of joint possession—Ouster of a co-sharer—Decree, nature of.*

A person who is entitled to possession of immoveable property jointly with others is not merely entitled to a decree declaring his rights in the land, but should be granted decree for joint possession. It makes no difference whether he was originally in possession and was subsequently dispossessed or whether he never had been in possession. (*Lindsay and Kanhaiya Lal, JJ.*) BISHESAR SINGH *v.* HANUMAN SINGH.
44 A. 1 : A. I. R. 1922 All. 314.

——— **O. 21, Rr. 35 (2) and 36**—*Compliance with—What amounts to.*

Where the persons concerned have been made aware of the delivery of possession in the course of execution proceedings and the publicity, which is the object of the provisions of the law, has been clearly achieved, it must be held that there has been substantial compliance with it. 20 P. R. 917 dist. (*Leslie Jones and Dundas, JJ.*) JUHR LAL *v.* PEMAN.
63 I. C. 182 : 2 Lah. L. J. 563.

——— **O. 21, Rr. 35 (2) and 96**—*Possession taken under is symbolical possession.*

There can be no symbolical possession as between the parties to a decree where the property, is immoveable property which is capable of immediate actual possession and comes within the scope of the direction in O. 21, R. 35 (1), C. P. Code. Either the decree-holder is put in possession or not, symbolical possession is the term properly applied where the property is of a kind which can be taken possession of in execution only under O. 21, R. 35 (2), 36 and 96. Formal delivery under the provisions of O. 21, R. 35 (1) is actual delivery. 10 N. L. R. 60, followed. (*Batten, J. C.*) PANDURANG *v.* SHRIPAT.
6 N. L. J. 157 : 72 I. C 318 : A. I. R. 1923 Nag. 237.

——— **O. 21, R. 36**—*Symbolical possession—Grant of, in a case not contemplated by the Code is not effective.*

The delivery of symbolical possession is effective only in cases where the Code recognises symbolical possession. Nor does the delivery of such possession affect persons impleaded as parties to the suit against whom however there is no decree for possession. 36 B. 273, foll.; 20 Bom. L. R. 502, P. C., dist. (*Pratt and Kanga, JJ.*) RAGHUNATH WAMAN *v.* KONDIBA BABAJI.
24 Bom. L. R. 499 : 68 I. C. 91 : 46 B. 932 : A. I. R. 1922 Bom. 2.

——— **O. 21, R. 36**—*Proclamation effected by beat of drum—No copy of warrant affixed—Possession is not properly delivered.*

Where delivery of possession was duly proclaimed by beat of drum but a copy of warrant was not affixed as required by law. *Held* : that there was no proper delivery. 20 P. R. 1917 Foll. (*Le Rossignol, J.*) YUSIF

C. P. CODE (V OF 1908), O. 21, R. 46.

ALI KHAN *v.* ABBAS ALI KHAN.
6 L. L. J. 522 : 84 I. C. 733 : 26 Punj. L. R. 27 : A. I. R. 1925 Lah. 264.

——— **O. 21, R. 37**—*No previous attachment—Application for arrest is legal*

There is nothing illegal in an application for arrest whether or no there has been a previous attachment. (*Harrison, J.*) VAISHNO DAS *v* FIRM TIRATH DAS JAMNA DAS.
7 Lah. L. J. 165 : 89 I. C. 138 : 26 Punj. L. R. 494 : A. I. R. 1925 Lah. 379.

——— **O. 21, R. 37** - *Pendency of appeal—Effect.*

The mere fact that an appeal is pending against a decree is no reason for not enforcing execution by arrest when the execution has not been stayed. (*Scott-Smith, J.*) MEHR CHAND *v.* RAM LAL.
A. I. R. 1924 Lah. 360.

——— **O. 21, R. 39**—Whole amount must be deposited within 30 days. (*Baker, J. C.*) NARAYAN *v.* RAMAKRISHNAJI.
A. I. R. 1925 Nag. 30.

——— **O. 21, R. 40**—*Arrest of judgment-debtor—Imprisonment—Property of.*

Where all the moveable and immoveable properties of the judgment-debtor had been sold in execution of decrees obtained by other persons and is not able to pay off the whole or any portion of the decree debt, it would be improper to order his imprisonment. (*Martineau, J.*) LALA DAS *v.* MINAMAL.
4 Lah. L. J. 266 : A. I. R. 1922 Lah. 259.

——— **O. 21, R. 43**—*Surety for attached moveables can be provided against in execution.*

A surety, for attached moveables, who agrees to produce it when called upon to do so, can be proceeded against in execution if he fails to so produce. R. 43 does not affect his liability. (*Gokul Prosad, J.*) MADHO PROSAD *v.* PEARI LAL.
62 I. C. 719 : 19 A. L. J. 247.

——— **O. 21, R. 43**—*Surety for attached property—Execution against—Procedure.*

Where in execution of a decree, the property is made over to a third person for safe custody on his executing a bond with sureties to produce it when required the decree-holder on failure to produce cannot proceed to enforce the bond against the sureties but should get the bond assigned to himself and sue on it. (*Abdur Rahim and Napier, JJ.*) RAJA OF VENKATAGIRI *v.* SURAKRISHNA REDDI.
12 L. W. 329 : 60 I. C. 134 : (1920) M. W. N. 784 : 39 M. L. J. 472.

——— **O. 21, Rr. 45 and 46**—*Applicability—Attachment of—Agricultural produce in the hands of third parties.*

O. 21, R. 46, C. P Code, and not R. 44 or R. 45 applies to the attachment of agricultural produce in the hands of a third party. (*Kincaid and Raymond, A. J. Cs.*) BIKCHAND *v.* SAJANDAS.
64 I. C. 1007 : 15 S. L. R. 128.

——— **O. 21, Rr. 46 and 89**—*Simple mortgage—Attachment of—Moveable property—Execution sale—Setting aside.*

A simple mortgage deed is "moveable property" not only for purposes of attachment in execution but also for the purposes of sale O. 21, R. 89 of the C. P. C. (relating to setting aside of sale of immoveable property) has no application to sale of mortgage. (*Walsh, A. C. J. and Boys, J.*) LAL UMRAO SINGH *v.* LAL SINGH.
22 A. L. J. 840 : 80 I. C. 890 ; L. R. 5 A. (Civ.) 674 : 46 All. 917 : A. I. R. 1924 All. 796.

——— **O. 21, R. 46**—*Attachment of debt—Objection by debtor allowed—Whether attachment still continues.*

The order, dismissing the decree holder's application for execution on the ground that there is no debt and

that the money therefore cannot be ordered to be deposited, puts an end to all previous proceedings whether by way of attachment before judgment or in execution, and the debtor cannot be asked again to deposit money in Court on the assumption that the attachment still subsists. (*Lindsay and Gokul Prasad, JJ.*) TULSHI RAM *v.* HARKH NARAIN BHAGAT.
A. I. R. 1922 All. 384.

——— **O. 21. R. 46**—*Money deposited by a third person as due to judgment-debtor—Payment to decree-holder—Effect of deposit.*

The decree-holder applied for attachment of a debt due to the judgment-debtor. The debtor objected to pay but admitted that on taking accounts the sum would be found due by him to the judgment-debtor. The Court directed payment of the debt into Court and on failure directed the debtor's house to be sold. The debtor, therefore, deposited the sum into Court but it was shared by the decree-holder along with another decree-holder. He then sued the decree-holders for the sum. *Held*, that as by his admission, he was bound to pay that sum to the judgment-debtor, he could not recover. (*Piggott and Walsh, JJ.*) MAHADEO PRASAD *v.* DIRGBIJAI SINGH.
43 All. 272 : 60 I. C. 881 : 19 A. L. J. 41.

——— **O. 21, Rr. 46, 76, 79 and 80**—*Company—Shares—Execution sale—Rights of purchaser.*

Where shares are sold in execution of a decree and the sale is confirmed nothing further is left to be done by the court or the transferee, the only thing left to be done is for the company either to recognise the transfer or refuse to recognise. (*Kumaraswami Sastri and Devadoss, JJ.*) NAGABHUSHANUM *v.* RAMCHANDRA RAO. **45 M. 537 : 15 L. W. 470 : (1922) M. W. N. 331 : 70 I. C. 659 : 30 M. L. T. 231 : A. I. R. 1923 Mad. 241 : 42 M. L. J. 449.**

——— **—O. 21, R. 46**—*Right to sue for damages for breach of contract is not attachable*

The sale of a right to sue for damages arising out of a breach of a contract is invalid and confers no title on the purchaser. Such a right is not a debt within the meaning of O. 21, R. 46 and is not attachable. (*Raymond, A. J. C.*) GORDHAN DAS KALI DAS *v.* FIRM OF GOKUL KHATAOO.
78 I. C. 409 : A I. R. 1925 Sind 98.

——— **O. 21, R. 46 (1) (3)**—*Garnishee's option—Jurisdiction of executing court to order deposit or to attach and sell—Proper procedure.*

Under O. 21, R. 46 (3) of the C. P. Code a debtor prohibited under cl. (1) of sub rule (1) may pay the amount of his debt into court and such payment shall discharge him as effectually as payment to the party entitled to receive the same. The wording a debtor "may" pay is quite clear and unambiguous and leaves no manner of doubt as to the meaning of the Legislature. It does not clothe the executing Court with any power to compel the garnishee to deposit the debt into Court if he denies it and informs the Court to that effect. An executing court is not bound to satisfy itself as to the existence of the debt. It can still cause it to be sold or appoint a receiver with garnishee to recover the debt from him. 18 W. R. 40 ; 11 B. 448; 28 A. 262 Ref. (*Kinkhede, A J. C.*) PANNALAL *v.* MT. BHAGIRATHIBAI. **20 N. L. R. 11 : 78 I. C. 601 : A. I. R. 1924 Nag. 98.**

——— **—O. 21, R. 50**—*Firm dissolved before decree—Firm's property can be proceeded against.*

Where the defendant firm had been dissolved before the decree was passed and the plaintiffs knew of such dissolution. *Held*, that the plaintiffs could still proceed against the firm but they could not proceed

against any partner individually if they knew the firm had been dissolved before proceedings had been taken. (*Macleod, C. J. and Shah, J.*) ADIVEPPA SHIDLINGAPPA *v.* PRAGJI MAHONJI. **26 Bom. L. R. 388 : A. I. R. 1924 Bom. 366.**

——— **—O. 21, R. 50**—*Interpretation of section—Sub-rule (4) does not affect sub-rule (2).*

O. 21, R. 50, sub rule (4) is really intended to make clear the implication of sub-rule (1). It does not in any sense affect the provisions of sub-rule (2) of that rule. The meaning of sub rule (4) is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned. O. 21, R. 54 (2) is wide enough to cover the case of a deceased partner. (*Shah, A. C. J. and Crump, J.*) JIVRAJ LALOOBHAI *v.* BHAGVANDAS. **24 Bom. L. R. 1037 : 68 I. C 627 : A. I. R. 1923 Bom. 66.**

——— **—O. 21, R. 50**—*Decree against firm—Members served individually—Firm insolvent—No application under O. 21, R. 50—Decree can be executed personally against members.*

Where a decree has been passed against a firm but all the members have been served individually, the decree can be executed against them personally though the firm has been declared insolvent and though there has been no application under O. 21, R. 50. (*Harrison, J.*) VAISHNO DAS *v.* FIRM TIRTH DAS JAMNA DAS. **7 L. L. J. 165 : 89 I. C. 138 : 26 Punj. L. R. 494 : A. I. R. 1925 Lah. 379.**

——— **O. 21, R. 50**—*Scope.*

Deputy Registrar empowered to grant leave under Rule 50 cannot determine liability of a contesting party. (*Carr and Brown, JJ.*) LIM. KAR CHANG *v.* T. S. CHETTY FIRM. **4 Bur. L. J. 116 : A. I. R 1925 Rang. 317.**

——— **O 21, R. 50**—*Special leave—Partner appearing in his own name.*

No special leave is required for executing a decree against a person who has either appeared in his own name under O. 30, Rr. 6 and 7 or who has admitted on the pleadings that he was a partner or who has been served as a partner with the summons. (*Rupchand Bilaram, A. J. C.*) FIRM OF FATEHCHAND MADAN GOPAL *v.* FIRM OF UTAMMAL JHAMANDAS.
89 I. C. 401

——— **O. 21, R. 50 and O. 30**—*O. 30 does not militate against O. 21, R. 50.*

The provisions of O. 30, C. P. Code, relating to suits by or against firms do not in any way militate against sub-R. (2) of O 21, R. 50, C. P. Code, if the latter is otherwise applicable. (*Raymond, A. J. C.*) ADAMJI JAFFERJI & CO. *v.* SHAMSUDIN IMAMDIN.
86 I. C. 1013 : A. I. R. 1925 Sind 293.

——— **O. 21, R. 50, Cls. (1) and (2)**—*Decree against a firm—Execution against partner—Summons to appear and answer.*

A decree obtained against a firm cannot be enforced, except as to partnership property, against a person alleged to be a partner and against whom an application has been made under Cl. (2) unless he has been served with a summons to appear and answer the application specified in Cl. (2) and he has had an opportunity of disputing his liability as a partner. (*Sanderson, C. J. and Buckland, J.*) JAGAT CHANDRA BHATTACHARYA *v.* GUNNY HAJEE AHMED.
30 C. W. N. 11.

——— **O. 21, R. 50 (2)**—*Transfer for execution—"Court which passed the decree" is Court of transfer.*

Where a decree is transferred by one Court to another Court for execution, the latter Court is, for the

purposes of O. 21, R. 50 (2) of the Code the "Court which passed the decree" and is competent to decide all questions arising in execution thereof. (*Piggott and Walsh, JJ.*) SITAL PRASAD *v.* CLEMENTS ROBSON & CO. **43 All. 394 : 19 A. L. J. 187 : 61 I. C. 401 : 3 U. P. L. R. (All.) 36.**

——— **O. 21. R. 50, Cl. (2)**—*Decree against firm—Execution against member of firm not served with summons.*

Where a decree had been passed against a firm alone, if a person admits he is a member of a firm, action can be taken against him under O. 21, R. 50 Cl. (2) even though he may not have been served and may not have been present when the decree was passed. (*Kennedy, J. C. and Percival, A.J.C.*) MANGALSEN *v.* LAKSHMICHAND. **18 S. L. R. 146 : 86 I. C. 435 : A. I. R. 1925 Sind 317.**

——— **O. 21. R. 50 (2)**—*Clause (2) is limited to the case of a partner living at date of decree.*

Cl. 2 of O. 21, R. 50, Civil P. C., is limited in its operation to the case of a partner who is living at the date of the decree and the property of a deceased partner in the hands of his legal representative cannot be attached under the rule. (*Rupchand Bilaram, A J. C.*) FIRM OF GOKALDAS KHATAOO *v.* FIRM OF VASUMAL WADHUMAL. **87 I. C. 992 : A. I. R. 1925 Sind 298.**

——— **O. 21, R.50 (4)**—*Decree against a firm—Execution against a partner of the firm who was not served with the summons in the suit.*

Order 21, R. 50 (4), C. P. Code, cannot be construed to mean that, unless a person who is a partner in a firm, against which a decree has been obtained, has been served with the writ of summons by which the suit was instituted, he or his private property cannot be made liable under the decree and the decree holder's right to execute the decree is limited to proceedings against the property of the partnership. (*Sanderson, C. J. and Buckland, J.*) JAGAT CHANDRA BHATTACHARYYA *v.* GUNNY HAJEE AHMED. **30 C. W. N. 11.**

——— **O. 21, R. 52**—*Moneys in Official Assignee's hands payable to judgment-debtor are attachable.*

Moneys in the hands of the Official Assignee which are payable to the judgment-debtors as creditors of the insolvent by way of dividend declared by the Official Assignee, are attachable under O. 21, R. 52 of the Civil P. C. (*Taraporewalla, J.*) HARDAYAL SHIVLAL *v.* HAJI ADAM GOOLMAHOMED. **87 I. C. 1011 : 27 B. L. R. 545 : A. I. R. 1925 Bom. 344.**

——— **O. 21, R. 52**—*Order under is judicial and not administrative.*

An order passed under O. 21, R.52 is not an administrative order but a judicial one and is binding upon the parties concerned. (*Suhrawardy and Graham, JJ.*) JITENDRA NATH SAMANTA *v.* ASUTOSH DEY. **82 I. C. 240 : A. I. R. 1925 Cal. 354.**

——— **O 21, R. 52**—*Fund in Court—Attachment—Rival decree holders—Priority—Receipt of assets—Date of.*

Where a fund in the Court is attached by another Court in execution of a decree it is the duty of the former Court to hold the fund subject to the directions of the executing Court and to transfer it to that Court. The fund, as soon as it is transferred to the execution Court becomes "assets held", by that Court within S. 73 of the C. P. Code. All decree-holders can claim rateable distribution where they have applied for execution to the executing Court before the receipts of such assets. If the executing and the custody Court are the same, the fund becomes the assets within S. 73

of the C. P. Code by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which the execution is sought. (*Wallis, C. J. Ayling, Sadasiva Aiyar, Napier and Krishnan, JJ.*) VISVANATHAN CHETTY *v.* ARUNACHELLAM CHETTY. **44 Mad. 100 : 12 L. W. 744 : 28 M. L. T. 412 : 60 I. C. 302 : (1921) M. W. N. 14 (F. B.) : 39 M. L. J. 608.**

——— **O. 21, R. 53**—*Attached decree—Court cannot sell.*

Where a decree in favour of the judgment-debtor is attached in execution of a decree against him, the Court must execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. It cannot sell the attached decree. Where, however, an attached decree was sold and was purchased by the attaching decree-holder who executed it and realised a larger amount under it than he paid for it. *Held*, that he must give credit to the judgment-debtor for the full amount realised by him. (*Macleod, C. J. and Fawcett, J.*) VITHALDAS PRABHU *v.* SUBRAYA MANJAPPA. **45 Bom. 343 : 59 I. C. 541 : 22 Bom. L. R. 1304**

——— **O. 21, R. 53**—*Attachment of decree—Payment into Court of money due under attached decree—Cessation of interest.*

Where, in execution of a decree, another decree is attached and the moneys payable under the attached decree are paid into court, interest on the amount of the attached decree as well as on the decree amount due to the attaching decree-holder, stops to run from the date of the payment into court. This fits in with the view that the holder of the decree sought to be executed by attachment of the other decree is in law, the representative of the holder of the attached decree. (*Mookerjee and Panton, JJ.*) MADAN MOHAN DEY *v.* BISHNUPADA DEY. **64 I. C. 780 : 35 C. L. J. 109.**

——— **O. 21, R. 53**—*Adjustment out of Court.*

Adjustment between the judgment-debtors in decree sought to be attached and person attaching such decree is not prohibited but only that between judgment-debtors and decree-holders in the decree sought to be attached. (*Das and Ross, JJ.*) RAMCHARAN SINGH *v.* JANGBAHADUR SINGH. **5 Pat. L. T. 631 : 79 I. C. 900 : A. I. R. 1924 P. 696.**

——— **O. 21, R. 53**—*Procedure.*

Rule 53 lays down the procedure to be followed in execution, when a money decree is attached and it has long been a settled law that a money decree cannot be sold in execution. (*Heald and Lentaigne, JJ.*) MAUNG LUN BYE *v.* MAUNG PO NYUN. **2 Bur. L. J 151 . 76 I. C. 679 : 1 R. 360 : A. I. R. 1924 Rang. 21.**

——— **O 21, R. 53 (1)**—*Proceedings as if decree not covered by Rule are only irregular.*

A Court in proceeding to attach and execute a decree which is covered by the Rule, as if it were a decree other than that covered by O. 21, R. 53, sub-cl. (1) merely commits only an irregularity and the sale of such decree is not a nullity. (*Sulaiman and Mukerji, JJ.*) FATEH LAL *v.* SHER SINGH. **85 I. C. 660 : 6 L. R. A. (Civ.) 63 : A. I. R. 1925 All. 264.**

——— **O. 21, R. 54**—*Prohibitory order—Service of—Proof—Loss of records.*

In execution of a decree certain property was attached on 25-4-1916 by means of a prohibitory order under O. 21, R. 54, C. P. Code. Subsequently on 20-6-1916 the property was privately sold. Thereafter the attached property was sold in court auction and purchased. It was found that the prohibitory order was duly served on the judgment-debtors but that portion of the record of court which would show whe-

C. P. CODE (V OF 1908), O. 21, R. 54.

ther the service was affected in the prescribed manner had been destroyed. *Held* that the court should presume that official acts were regularly performed and in view of the fact that a material portion of the record was not in existence, the burden of proving due service of notice ought not to be thrown on the Court auction-purchaser. (*Daniels and Neave, JJ.*) MAHOMED ABDUL GAFOOR KHAN *v.* AKRAM HASAN.
22 A. L. J. 703 : L. R. 5 A. 525 : 46 All. 741 : A. I. R. 1924 All. 747.

——— **O. 21, R. 54**—*Strict compliance with provisions is necessary—Site with house on—Site assessed to Revenue—Whole property is land, paying revenue to Government.*

When the law lays down a definite procedure for the doing of an act which is purely symbolical that procedure must be strictly followed, and any omission therein must, therefore, be regarded as material. 20 P. R. 1917, Foll. Where a house stands on a site which is assessed to revenue, the property is land paying revenue to Government within the meaning of O. 21, R. 54. If the order required under R 54 is not affixed in the Collector's office, the attachment is invalid.

Per Fforde. J.—The meaning of the word "land," unless otherwise controlled by the context includes everything which is above or beneath the surface. Under O. 21, R. 54 the term "land" is not declared to be used in any special or restricted sense and accordingly we must presume that it bears its ordinary meaning. Accordingly it comprises not only the site upon which a house stands, but also the building. (*Broadway and Fforde, JJ.*) NAWAB AHMAD *v.* S. K. BOSE.
A. I. R. 1925 Lah. 583.

———**O. 21, Rr. 54, 67**—*Non-compliance is material irregularity*

Under O. 21, Rr. 54 and 67, a copy of the proclamation order must be affixed on a conspicuous part of the property. Where *prima facie* from the serving officer's report, this was not done, *Held*, it is a material irregularity. (*Campbell, J.*) WISHWA NATH *v.* RAHMAT ULLAH. **A. I. R. 1923 Lah. 671.**

——— **O. 21, R. 54**—*Proclamation is necessary.*

In order to constitute a valid attachment, the proclamation described in the second portion of R. 54 of O. 21 must be carried out. (*Broadway and Harrison. JJ.*) MULA RAM *v.* JIWINDA RAM.
4 Lah. 211 : 5 Lah. L. J. 200 : 72 I. C. 452 : A. I. R 1923 Lah. 423.

———**O. 21, R. 54**—*Revenue suit—Rent payable in shrotriem village.*

Rent payable in the case of shrotriem villages is revenue within the meaning of O. 21, R. 54, C. P. Code. (*Oldfield and Devadoss, JJ.*) PAMIDIMARRI GANAMMA *v.* KETIREDDI. **46 Mad. 736 : (1923) M. W. N. 463 : 75 I. C. 869 : A. I. R. 1924 Mad. 217 : 45 M. L. J. 263.**

———**O. 21, R. 54**—*Omission to post order of attachment in Collector's office is not fatal.*

The omission to post a copy of the order of attachment of immoveable property in the office of the Collector as required by O. 21, R. 54 (2) does not render the attachment invalid, if all the other formalities prescribed by O. 21, R 54 have been observed 41 M. 844, followed (*Hallifax, A. J. C.*) JODHAN *v.* KAPILNATH. **69 I. C. 563 : A. I. R. 1923 Nag. 78.**

———**O. 21, R. 54**—*Certified copy of warrant of attachment containing bailiff's report that process-server had reported posting of notice of attachment on land etc., is not, against persons disputing attachment, legal evidence but may be used as basis of evidence—Identification of land must be proved.*

When the fact of attachment of land is disputed, identification of the land must be proved. Though a certified copy of a warrant of attachment containing a report by the bailiff that a process-server has reported the posting of attachment on the land and on the headman's house and on the notice board of the Court may be used as the basis for the reception or the evidence of the attachment; but is not, as against persons disputing the attachment, legal evidence of such attachment. (*Lentaigne, J.*) HLA BAN *v.* A. V. P. L. RAMANATHAM CHETTIAR.
3 Bur. L. J. 287 : A. I. R. 1925 Rang. 89.

C. P. CODE (V OF 1908), O. 21, R. 57.

——— **O. 21, R. 54**—Attachment—Interest of Hindu son in co-parcenary property—Effect of. *See* FAQIR CHAND *v.* LAL SANT. **89 I. C. 291.**

———**O. 21, R 54**—*Auction sale—Notice of.*

Law does not require any notice of an auction sale other than the publication provided for by O. 21, R. 54. (*Ashworth, A. J. C.*) SHER KHAN *v.* MISRI LAL.
89 I. C. 107.

———**O. 21, R. 54 (1)**—*Immoveable property—Equity of redemption is.*

The equity of redemption of a mortgagor is immoveable property within the prohibitory provision contained in R. 54 (1). (*Mookerjee, A. C. J. and Fletcher, J.*) BIRENDRA NATH MITTER *v.* MARTIN & CO. **62 I. C. 167 : 33 C. L. J. 7.**

———**O 21, R. 57**—*Execution case struck off for default — Attachment directed to subsist—Order is valid and attachment continues.*

An order of Court directing an attachment to subsist even when the execution was ordered to be struck off on account of a default on the part of the decree-holder is an improper order, but not a nullity and is binding on the parties to it. 1922 All. 62 Foll. (*Mukerji, J.*) MULAY *v.* BALGOVIND.
6 L. R. A. (Civ.) 275 : 87 I. C. 349 : A. I. R. 1925 All. 456.

———**O. 21, R. 57**—*Dismissal of application—Effect on attachment before judgment.*

O. 21, R. 57, C. P. Code, does not apply to attachment before judgment but its operation is confined to attachments in execution of a decree. O. 38, R. 9 of the C.P. Code provides as to how and when the attachment before judgment is to cease. (*Sulaiman and Kanhaiya Lall, JJ.*) BHOREY AKHEY RAM *v.* BASANT LAL. **L. R. 5 A. 605 : 80 I. C. 106 : 46 All, 894 : 22 A. L. J. 823 : A. I. R. 1924 All. 860.**

———**O. 21, R. 57**—*Dismissal of execution—Order maintaining attachment—Effect of.*

Though an order dismissing an execution case but maintaining the attachment is not a proper order for the Court to pass, once it is passed it is binding on the parties between whom it is passed. 38 Cal. 482, dist.; 41 A. 157, dist. (*Piggott and Walsh, JJ.*) MAHOMED MUBARAK HUSAIN *v.* SAHU BIMAL PRASAD.
44 A. 274 : 20 A. L J. 113 : L. R. 3 A. 52 : 65 I C. 91 : A. I. R. 1922 All. 62.

———**O. 21, R. 57**—*Striking off — Execution—Struck off—Effect on attachment.*

It is not an easy matter to decide whether property remains under attachment when the darkhast is struck off Strictly speaking if the darkhast is struck off the attachment would go with it. It seems contrary to the ordinary meaning of words that when a darkhast which is issued to attach property is dismissed, still the attachment continues. Having regard to the conduct of the judgment-creditor it was held in this case that there was no subsisting attachment at the time of the transfer. (*Macleod, C. J. and Coyajee, J.*) GANPATI *v* DEVAPPA. **24 Bom. L. R 442 : 76 I. C. 895 : 46 B. 942 : A. I. R. 1923 Bom. 30 (2).**

———**O. 21, P. 57**—*Default—What is—Execution*

C. P. CODE (V OF 1908), O. 21, R. 57

proceedings struck off—Request by decree-holder—Attachment if continues.

The word "default" in O. 21, R. 57 is not restricted to default of appearance but applies also to a failure to do what the decree-holder is bound to do. Where he failed to carry on the execution proceedings and had them struck off, the attachment ceases. (*Scott-Smith and Zafar Ali, JJ.*) LAKHPAT RAI *v.* MAYYA MAL. **A. I. R. 1924 Lah. 645.**

——0. 21, R. 57 – *Default.*

The word "default" in O. 21, R. 57 means a failure to go what the decree holder was bound to do, that is, to do on with his application and have the property sold. (*Scott Smith and Abdul Qadir, JJ.*) FATEH DIN *v.* QUTAB DIN. **3 Lah. 7 : 67 I. C. 543 : A. I. R. 1922 Lah. 108.**

——0. 21, Rr. 57, 58, 63—*Striking off—Later order on objection petition is a nullity.*

Properties being attached in execution, objections were put in under O. 21, R. 58. Pending their disposal, as the decree-holders were able to realise part of the decree amount, the proceedings were struck off—subsequently, on the representation of the objectors that the decree had been adjusted between the parties, the objection petition was allowed *ex parte.* On a question arising as to the effect of this order, *Held*, the effect of the order striking off proceedings was to raise the attachment, and with that order the court became *functus officio* and had no power to pass any further orders therein. The later order allowing the objection was therefore quite unnecessary and redundant and being a nullity in the eye of the law, there was no necessity for the decree-holders to bring a suit within one year under O. 21, R. 63. (*Scott-Smith and Abdul Quadir, JJ.*) FATEH DIN *v.* QUTAB DIN. **3 Lah. 7 : 67 I. C. 543 : A. I. R. 1922 Lah. 108.**

——0. 21, R. 57—*Attachment before judgment—Dismissal of execution application for default—Attachment whether ceases.*

Where an execution petition is dismissed for default an attachment before judgment also ceases. (*Spencer and Madhavan Nair JJ.*) SUBRAMANIA AIYAR *v.* KRISANA AIYAR. **1925 M. W. N. 887.**

——0. 21, R. 57—*Suggestion by Court to withdraw execution application and file another—First application dismissed—Attachment ceases to exist as far as strangers to proceedings are concerned.*

Where the executing Court suggested that execution petition may be withdrawn and it dismissed the same, *Held* whatever the effect of that order was between the decree-bolder and the judgment-debtor, persons who were not parties to the execution proceedings and who did not know all that passed between the Court and the decree-holder were entitled to rely on the fact that the petition was dismissed on account of the unwillingness of the decree-holder to proceed with it. The result of this was that the attachment ceased to exist and a claimant whose claim was disallowed was entitled to rely on the result of the dismissal of the earlier petition and say that the attachment had ceased to exist so far as he was concerned. (*Rameam and Venkatasubba Rao, JJ.*) KUMARA GOUNDAN *v.* THEVARAYA REDDI. **1925 M, W N. 406 : 87 I. C. 635 : A. I. R. 1925 Mad. 1113 : 48 M. L. J. 616.**

——0. 21, R. 57 and O. 38, Rr. 8 & 11—*Attachment before Judgment—Decree subsequently passed in the suit—Execution of the decree—Dismissal of execution petition owing to default of decree-holder—Attachment ceases.*

Held, (by the majority of the Full Bench. *Coutts Trotter, Ramesam and Waller, JJ. Schwabe C. J.* and

C. P. CODE (V OF 1908), O. 12, R. 57.

Wallace, J. dissenting) : Where a party obtained an attachment before judgment and subsequently a decree was passed in his suit if his execution petition is dismissed for want of due deligence in presenting the necessary papers to the Court the attachment of the property ceases. The provisions of O. 21, R. 57 apply to attachment before judgment which become converted into attachment in execution when application is made to execute the decree passed in the suit. An attachment before judgment becomes an attachment in execution when an application for executing the decree is made and admitted. 42 M. 1 : overruled 44 M. 902 ; 41 M. L. J. 256 followed. *Held* by *Schwabe, C. J. and Wallace, J.*) The provisions of O. 21, R. 57 do not apply to cases of attachments before Judgment.

Per Wallace, J. An attachment before judgment under O. 38 of the Civil Procedure Code only comes to an end by a formal order withdrawing it. (*Schwabe, C. J Coutts Trotter, Ramesam, Wallace and Waller, JJ.*) MEYYAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **34 M. L T. (H. C.) 118 : 1924 M. W. N. 392 : 79 I. C. 144 : 47 Mad. 483 : A. I R. 1924 Mad. 494 (F B) : 46 M. L. J. 415.**

——0. 21, R. 57—*Dismissal of execution—Execution transferred to Collector.*

Where the execution proceedings have been transferred to a Collector, he has power to dismiss the application under, O. 21. R. 57, C. P. Code and thereupon the attachment ceases. (*Hallifax, A. J. C.*) SHANKER RAO *v.* MANIK RAO. **68 I. C. 643 : A I. R. 1923 Nag. 18.**

——0 21, Rr. 57 and 58—*Dismissal of execution—Collector executing decree has power to dismiss.*

A Collector is invested with all the powers which the court might exercise in the execution of the decree. These include the power to dismiss under O. 21, R. 57 C P. C., but do not include the powers to investigate claims made or objections preferred under O. 21, R. 58, because such an investigat on wou'd not be "in the execution of the decree." (*Hallifax, A. J. C.*) HARLAL *v.* NARAYAN. **18 N L. R. 152 : 4 N. L. J, 118 : 64 I. C. 420 : A. I. R. 1922 Nag. 267.**

——0. 21, R. 57—*Revival of attachment—Dismissal of execution application—Restoration.*

Where an execution application dismissed for default is restored the attachment which came to an end on the dismissal of the execution application is revived and an execution sale without a fresh attachment is valid. (*Hallifax, A. J. C.*) HARLAL *v.* NARAYAN. **4 N. L. J. 118 : 18 N. L. R. 152 : 64 I. C. 420 : A. I. R. 1922 Nag. 267.**

——0. 21, R. 57—*Continuance of attachment—Order determining—Rule does not apply.*

Where there is an explicit order putting an end to the attachment the provisions of O. 21, R. 57, C. P. Code have no application nor is there anything in the rule which limits the power of the Courtto pass such an order. (*Daniels, J. C. and Dalal, A. J. C*) SHEIKH MAHOMED MUZAFFAR ALI KHAN *v.* BHAGWATI PRASAD SINGH. **66 I. C. 642 :8 O. L. J. 358.**

——0. 21, R. 57—*Dismissal of execution application—Cessation of attachment—Agreement to give time to decree-holder—Effect of.*

A decree-holder in execution of a decree attached the properties of the judgment-debtor but subsequently accepted a payment made by him towards the satisfaction of the decree and agreed to give time for payment of balance of the decree amount. Thereupon the Court dismissed the application after recording the part-payment. *Held* that the effect of the dismissal of the execution application was to put an end to the

attachment and that the dismissal was due to default of the decree-holder. No doubt the Court has no power to dismiss an application for execution unless there is default on the part of the decree-holder but, as has been held, default means a failure to do what one is legally bound to do. (*Das and Bucknill, JJ.*) JAIKRISINA *v.* BIBI SOGHRA. **4 P. L T. 418 : 71 I. C. 881 : A. I. R. 1923 P. 446.**

——O. 21, R. 58—*Applicability of—Takavi, advances—Proceedings for realisation of—Sale of rent alleged to be due to tenant from sub-tenant—Objection by sub-tenant that rent had already been paid—Dismissal for default—Suit for realisation by purchaser—Maintainability of.*

In certain proceedings for realisation of a takavi loan advanced to a tenant, certain rent alleged to be due to the tenant from his sub-tenant was attached by court. The sub-tenant objected to the attachment on the ground that the rent had already been paid and there was nothing due to the tenant, but his objection was dismissed for default. The arrear of rent was then sold by auction and purchased by the plaintiff. In a suit by the plaintiff against the sub-tenant for recovery of the rent, the sub-tenant again pleaded that he had already paid up the rents and nothing was due. *Held* that there was no warranty of title in the sale held by the government for arrears of takavi, that the dismissal of the sub-tenant's objection did not operate as *res judicata* in the subsequent suit for recovery of the rent and that the objection of the sub-tenant was not an objection to the attachment under O. 21, R. 58 of the C. P. Code and his present defence was not shut out by reason of his omission to bring a declaratory suit within the year prescribed by O. 21, R. 63, C.P. Code. (*Mukerji, J.*) SOBHA RAM *v.* RAM PRASAD. **L. R. 5 A. 263 (Rev.) : A. I. R. 1924 All. 910.**

——O. 21, R. 58—*Objection to attachment—Capacity dual—Procedure.*

An objection to attachment in execution proceedings by a person, impleaded in the proceedings as heir of the deceased debtor, on the ground of his possession as trustee, must be decided under O. 21, R. 60 and such order is conclusive subject to a suit under O. 21, R. 63. The person in his capacity as trustee is not the judgment-debtor's representative, even though the author of the trust was himself, the judgment-debtor, except in cases in which the trust has been created after the suit or after the decree passed in it. *Kanhaiya Lal, J.*) BHAGWAN DAS *v.* MT. MAHOMED BANO. **L. R. 4 A. (Civ.) 447 : 75 I. C. 1053 : A. I. R. 1924 All. 183 (2).**

——O. 21, Rr. 58 and 63—*Effect of order—Refusal to investigate claim—Suit by defeated claimant—Limitation.*

Where objections preferred by a claimant to the attachment and sale of certain property in execution of a decree were rejected without an investigation of the merits of the case and the property was ordered to be sold, which is incumbent upon the claimant to institute a suit within the period of limitation prescribed by Art. 11 of the Limitation Act. 41 M. 985, followed. (*Ryves and Gokul Prasad, JJ.*) GOBERDHAN DAS *v.* MAKUNDI LAL. **45 A. 438 : 21 A. L. J. 342 : L. R. 4 A. 185 : 74 I. C. 1024 : A. I. R. 1923 All. 435.**

——O. 21, R. 58—*Premature Application.*

The plaintiff filed a suit against two defendants, who were father and son. The suit was dismissed against the first defendant, and decreed against the second defendant. The plaintiff applied to the Court to attach the property of the son. The first defendant then applied to the Court that the Court should not execute the decree against property which, he alleged, belonged to him, but if the Court had granted execution and attached his property the attachment should be raised. *Held* that the application of defendant No. 1 was in effect *a quia timet* application to prevent that happening which he was afraid would happen if the Court after making an order for attachment of his property actually detained his property. The application was premature and ought not to have been entertained by the court. (*Macleod, C.J. and Crump, J.*) CHUNILAL *v.* KASHIBHAI **25 Bom. L. R. 440 : A. I. R. 1923 Bom. 381.**

——O. 21, Rr. 58 and 60—*Attachment of equity of redemption in usufructuary mortgage continues despite mortgagee's applying for its release.*

When property in the possession of usufructuary mortgagee is attached, if it can be inferred that the decree-holder's intention was not to attach the property itself but the equity of redemption, the attachment may be allowed to continue upon the equity of redemption and it need not be released notwithstanding that the usufructuary mortgage applies for removal of the attachment. But otherwise, upon such application by usufructuary mortgagee, the attachment of the mortgaged property at the instance of the holder of an ordinary money decree against the mortgagor must be released. (*Shurawardy and Page, JJ.*) MAHARAJ BAHADUR SINGH *v.* NOSHARAN BIBI. **80 I. C. 428 : A. I. R. 1925 Cal. 296.**

——O. 21, Rr. 58 and 63—*Small Cause Court—Attachment before judgment of immoveable property—Claim petition—Power to adjudicate.*

Small Cause Court cannot order attachment before Judgment of immoveable property or adjudicate on claim proceedings resulting from it. (*Rankin and B. B. Ghose, JJ.*) SADEK ALI *v.* SAMEED ALI. **28 C. W. N. 16 : A. I. R. 1924 Cal. 193.**

——O. 21, R. 58—*Mortgage decree for sale—Claim, if lies—Revision.*

A claim cannot be entertained under O. 21, R. 58 of the Code to property, which has been ordered to be sold under a mortgage decree, and where it is disallowed no revision lies to the High Court under S. 115 of the Code. (*Sanderson, C. J. and Richardson, J.*) MAHABIR PRASAD *v.* JOGENDRA NATH. **68 I. C. 271 : 26 C. W. N. 50.**

——O. 21, R. 58—*Application by party against whom suit is dismissed—Appeal if lies.*

Where a defendant against whom a suit is dismissed puts in an objection petition under O. 21, R. 58 and that is dismissed he is entitled to appeal against the order, as the petition is one under S. 47 though actually put in under O. 21, R. 58. (*Moti Sagar, J.*) MT. GAURAN *v.* CHANDU LAL. **A. I. R. 1924 Lah. 589.**

——O. 21, Rr. 58 and 63—*Effect of order—Attachment of debt—Dismissal of claim—Finality of order.*

Unless a suit is brought as provided by O. 21, R. 63, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceedings, the right denied to him by the order. The procedure laid down in Rr. 58 to 63 applies to a debt attached in execution of a decree, and an order made against the alleged debtor is binding upon him, if he does not institute a suit for a declaration that no debt was due from him, within a year from the date of the order passed against him. (*Shadi Lal, C. J.*) PIARA RAM *v.* GANGA RAM.

C. P. CODE (V OF 1908), O. 21, R. 58.

13 P. W. R. 1923 : 71 I. C. 45 (1) : A. I. R. 1924 Lah. 367.

——O. 21, R. 58—*Objection.*

Objection to attachment must be made first. The subsequent order after attachment is raised is unnecessary. (*Scott-Smith and Abdul Quadir, JJ.*) FATEH DIN *v.* QUATAL DIN. **3 Lah. 7 : 67 I. C. 43 : A. I. R. 1922 Lah. 108.**

——O. 21, R. 58 (1)—*Proviso—Claim petition—Registered mortgage—Sale directed to take place with notice of mortgage—Nature of order—Duty of Court to investigate.*

A mortgagee put in a claim petition under O. 21, R. 58, to have his mortgage right notified in the sale proclamation and to have the property sold subject to such right and further to stop the sale pending disposal of the claim petition. The Court passed the following order :—" The mortgage is registered and in the ordinary course should have found a place in the encumbrance certificate. The decree-holder opposes the petition as it is filed too late. Sale to take place with notice of this mor gage and that decree-holder disputes it." *Held*, the order was not one refusing to investigate into the claim, and being simply a refusal to stop the sale, did not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso to O. 21, R. 58 (1). (*Jackson, J.*) MUTHU RAMAN CHETTIAR *v.* SEETHARAMAYYA. **49 M. L. J. 706.**

——O. 21, R. 58—*Claim petition—Order disallowing petition stating that suit is inevitable and also that petition was filed too late—Petition is not dismissed on ground of delay.*

Where the order on a claim petition stated "contest is practically between the two claimants and a suit is inevitable. On the grounds that the claims have been preferred too late and the delay is not satisfactorily explained, I disallow the claim" *Held* : it was difficult to construe the judgment as one dismissing the petition on the ground of delay in spite of the express statement to that effect, and if the judgment could not be regarded as one disposing of the claim petition on the ground of delay, then the Full Bench decision in (41 Mad. 985), that refusal to investigate a claim on the ground that there was delay in filing it is an order against the claimant, did not apply. (*Ramesam and Venkatasubba Rao, JJ.*) KUMARA GOUNDAN *v.* THEVARAYA REDDI. **1925 M. W. N. 406 : 87 I. C. 635 : A. I. R. 1925 Mad. 1113 : 48 M. L. J. 616.**

——O. 21, R. 58—*Possession not decided—Revision lies.*

In cases coming under O. 21, R. 58 the Court is bound to decide the question of possession and if a case is disposed of, without deciding such question, the High Court ought to interfere under S. 115 of the Civil P. C: (*Madhavan Nair, J.*) APPASWAMY CHETTIAR *v.* N. BALKRISHNA PILLAI.

21 L. W. 230 : 1925 M. W. N. 590 : 87 I. C. 189 : A. I. R. 1925 Mad. 588 : 48 M. L. J. 603.

——O. 21, R. 58—*Direction to proceed with sale after simply notifying claim amounts to adverse order.*

An order upon a claim petition which expresses no final judgment on the right put forward but simply directs the sale after notifying the claim is an order against the claimant and he is bound to institute a suit under Art. 11 of the Limitation Act 41 M. 985 foll. (*Madhavan Nair, J.*) P. RAMALINGAPPA *v.* A. NARAYANAPPA. **82 I. C. 737 : A. I. R. 1925 Mad. 368.**

——O. 21, R. 58—*Defeated claimant cannot avail of a suit, by successful party, to reagitate his title.*

C. P. CODE (V OF 1908), O. 21, R. 58.

An order on a claim petition adverse to the defendant not having been set aside, he cannot take advantage of a suit filed by the plaintiff to re agitate the question of his title, and the fact that both the plaint and the written statement in the subsequent suit were within one year from the date of the order does not affect the question. 6 L. W. 281 Foll. (*Madhavan Nair, J.*) P. RAMLINGAPPA *v.* A. NARAYANAPPA. **82 I. C. 737 : A. I. R. 1925 Mad. 368.**

——O. 21, Rr. 58 and 63—*Claim petition—Dismissal for default—Power of court to restore.*

Where a claim preferred under O. 21, R. 58, C. P. Code is dismissed on account of the non-appearance of the claimant, the court has power to restore it to the file. O. 21, R. 63, C. P. Code does not take away the right of the party to have the order of dismissal for default set aside (*Venkatasubba Rao, J.*) RAMAPPA CHETTIAR *v.* EKAMBARA PADAYACHI.

34 M. L. T. 309 : 19 L. W. 685 : (1924) M. W. N. 479 : 47 Mad. 651 : 79 I. C. 818 (1) : A. I. R. 1924 Mad. 715 : 47 M. L. J. 13.

——O. 21, Rr. 58 and 63—*Effect of order—Order on, notifying claim to intending bidders without investigating it is improper—Limitation Act, Art. 11 does not apply.*

Plaintiff preferred a claim to property attached in execution of a decree obtained against another, stating that the judgment-debtor was entitled only to a share in the said property, and that he was entitled to the other moiety. The claim was disposed of by an order which, after reciting plaintiff's contention ran as follows : " Whatever right the defendant has will pass by the sale. The petition does not require any further investigation. The claim put forward by the petitioner will be noted in the sale proclamation. " The sale was held and the decree holder himself became the purchaser. In a suit brought by the plaintiff for the recovery of his half share of the property from the decree-holder purchaser *held* (1) that the order on the claim petition was an improper one ; (2) that it was not, however, an order against the claimant (plaintiff) within the meaning of O. 21, R. 63, C. P. C., and the suit instituted more than a year from the date thereof was not barred under Art. 11 of the Limitation Act. (*Spencer and Venkatasubba Rao, JJ.*) KACHINAMTHODI PARAMBIL SAHARABI *v.* KACHINAMTHODI PUTHIA PURAYIL SREEMAMUTTI'S SON ALI.

17 L. W. 182 : 72 I. C. 857 : A. I. R. 1923 Mad. 295 : 44 M. L. J. 141.

——O. 21, Rr. 58 and 63—*Effect of order—Claim by mortgagee—Adverse order declining to adjudicate does not bar—Suit for enforcing mortgage Limitation Conversation of mortgaged property into money—Effect of.*

Property mortgaged to plaintiff was attached and brought to sale in execution by the defendant. On the day fixed for the sale, the plaintiff preferred a claim petition that the sale proceeds should be kept in court deposit to satisfy his mortgage and not be paid over to the defendant The Court dismissed the application holding that as the sale had taken place it had no jurisdiction to hear the petition. In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant the latter pleaded that the suit was barred by Arts. 11 and 62 of the Limitation Act. *Held*, by the Chief Justice (agreeing with Spencer, J.) (1) that there was no order negativing the claim of the plaintiff and his suit was not therefore barred by Art. 11 of the Limitation Act and (2) that the suit was one to enforce a mortgage and was governed by Art. 132 and not by Art. 62 of the Limitation

C. P. CODE (V OF 1908), O. 21, R. 58.

Act, though the mortgaged property had been converted into money as a result of the court sale. 41 M. 985 (F B.) Dist.; 41 C. 654 (P.C.) Rel. (*Schwabe, C.J.* on a difference of opinion between *Spencer and Krishnan, JJ.*) ABDUL KADIR SAHAB *v* SOMASUNDARAM CHETTIAR. **16 L. W. 485 : 31 M. L. T. 441 : 45 M. 827 . 70 I. C. 648 : A. I. R. 1923 Mad. 76 : 43 M. L. J. 467.**

———0. 21, Rr. 58 to 63—*Objection—Claim under S. 34 of the Pro. Ins. Act—Limitation Act, Arts. 11 and 13.*

The Official Receiver's claim to any property where the vesting was after the attachment of that property is a statutory claim and not a claim under O. 22, Rr. 58 to 63 and the Court dealing with such claims acts under S. 151 of the C. P. Code and not under O. 21. Articles 11 and 13 of the Limitation Act do not apply to such cases. (*Sadasiva Aiyar and Spencer, JJ.*) OFFICIAL RECEIVER *v.* VEERARAGHAVAN PATTAR. **14 L. W. 335 : 45 M. 70 : 69 I. C. 326 : (1921) M. W. N. 775 : 30 M. L. T. 77 : A. I. R. 1922 Mad. 189 : 41 M. L. J. 334.**

———0. 21, R. 58 and S. 64—*Objection to attached debt allowed—Suit by decree-holder decreed—Payments by debtor after claim allowed and before decree are void.*

Where a claim to an attached debt was allowed and thereafter the attaching decree-holder brought a suit to establish his right to attack and got a decree but the debtor had made two payments to the creditor-claimant after the claim was allowed but before the decree in the claim suit, *held*, that the attachment should be taken as revived on the passing of the decree and to have continued in force since the original attachment and that the two payments are void under S. 64 of the Code against the purchaser in execution of the decree in the claim suit, (*Krishnan and Odgers, JJ.*) ANTHAYA HEGADE *v.* MANJAYYA SHETTY. **45 M. 84 : 14 L. W. 371 : 69 I. C. 642 : (1921) M. W. N. 642 : A. I. R. 1922 Mad. 176 : 41 M L. J. 393.**

———0. 21, R. 58—*Mortgage—Prior and subsequent—Prior mortgagee taking also a subsequent mortgage—Suit by puisne mortgagee—Sale--Claim by prior mortgagee.*

A person mortgaged his properties first to *X* then to *Y* and then again to *X*. *X* obtained a final decree for sale on his earlier mortgage impleading *Y* and pending the same *Y* obtained a final decree for sale in a suit in which *X* has been impleaded in his capacity of subsequent incumbrancer. When Y applied for execution *X* objected setting up his prior mortgage rights. *Held*, the objection was not one under S. 47 but under O. 21, R. 58 as by a stranger and it could not be taken in respect of a decree for sale on a mortgage. (*Hallifax, A. J. C.*) GANGARAM *v.* KANHAILAL. **80 I. C. 626 : A. I. R. 1925 Nag. 185.**

———0. 21, R. 58—*Objection by judgment-debtor to attachment on the ground that he has no saleable interest—Objection dismissed—Appeal lies from the dismissal order—C. P. Code, S. 47.*

Order of dismissal of objection by judgment-debtor stating that he has no saleable interest in the property attached is appealable. 8 All. 146 (F. B.) Foll. (*Dalal, J.C. and Wazir Hasan, A. J C.*) LACHMAN PRASAD *v* MIRNALINI DEBI. **28 O. C. 175 : 85 I. C. 997 : A. I. R. 1925 Oudh 618.**

———0. 21, Rr. 58, 60, 61 and 63—*R. 63 applies to an order passed under R. 60 or R. 61—Only the action taken under R. 62 will be notified in the sale proclamation—The intending purchaser will only look to the entry in the sale proclamation irrespective of its basis—Discretion under R. 62 may not be based on investigation into the charge—C. P. Code, O. 21, R. 62—C. P. Code, O. 21, R. 66.*

The result is the same whether a property is sold subject to a mortgage or a charge or whether simply a notice is given in the sale proclamation of such encumbrance. In both cases, merely a notice as to the judgment-debtor's indemnity against incumbrances is given. The discretion exercised by the Court in charge of execution proceedings under O. 21, R. 62 may not always be based on an investigation into the nature and validity of the charge. The Court may only decide under the rule to issue notice under R. 66 to the intending purchaser that a claim is preferred in support of the charge but the purchaser simply takes the risks of the notice. A claim or objection under O. 21, R. 58 must result in an order passed either under R. 60 or R. 61 and R. 63 applies to an order made either under R. 60 or 61. The Court under R 62 of O. 21 may either release the property or disallow the claim and may continue the attachment subject to the charge It is only the result of the Court's action under R. 62 that will be notified to the public in the sale proclamation under O. 21, R. 66, cl. (2) and the intending purchaser will look only to such entry in the sale proclamation whether the entry is based on an action of the Court under O. 21, R. 62 founded on the material supplied by the parties or on the basis of a report from the Registration Office: in both cases the entry would be the same and would have the same effect and the auction-purchaser is bound by the entry in the sale proclamation regarding encumbrances on the property to be sold in so far as his right and liability are concerned. Inasmuch as he does not come on the scene prior to the commencement of the sale he is not concerned with whether any enquiry into the validity of the encumbrance has been held or not prior to the entry in the proclamation. (*Wazir Hasan, J. C.*) SANT BUX *v.* NADIR MIRZA. **27 O. C. 308 : 81 I. C. 1013 : A. I. R. 192 Oudh 154.**

———0. 21, Rr. 58 and 63—*Mortgagee in possession—Claim—Objection to attachment—Dismissal—Suit to establish mortgage right.*

O. 21, R. 58, C. P. Code corresponding to S. 278 of the old code refers to claim or objections regarding attached property on the ground that the property is not liable to attachment. Where a mortgagee in possession intervened by way of claim to an attachment of the property in execution and asked that his mortgage should be proclamed at the time of sale but did not apply for withdrawal of the attachment *Held*, that the dismissal of his objection did not render it obligatory on the mortgagee to sue for declaration within one year and that he could sue to enforce his mortgage or resist any attempt to dispossess him on the strength of his mortgage. (*Daniels, J. C.*) BISHESHWAR *v.* CHANDRIKA PRASAD. **11 O. L. J. 240 : A. I. R. 1924 Oudh 384.**

———0. 21, R 58 and S. 115—*Objection—Rejection of claim—No revision.*

In this case certain house property was attached in execution of a decree. The objector claimed that the property in question had been purchased by him from the judgment-debtor on the 3rd August, 1921, before the passing of the decree in execution of which it was sought to be sold. The court below found that the *bona fides* of the sale-deed was doubtful and the judgment-debtor was really in possession of the said property in spite of the alleged sale. The Court rejected the claim. *Held*, there was no reason in these circumstances for interfering in revision. (*Kanhaiya Lal, J. C.*) SHYAM LAL *v.* RADHE SHYAM. **10 O. L. J. 139: 74 I. C. 546 : A. I. R. 1923 Oudh 208.**

C. P. CODE (V OF 1908), O. 21, R 58.

——O. 21, R. 58—*Question of* benami *cannot be gone into under R.* 58 *or R.* 100—*Civ. Pro. Code, S.* 100.

A question of *benami* cannot be gone into in a proceeding under O. 21, R. 58 or R. 100 and an order based on purely speculative reasons is wrong. (*Das, J.*) RAM KISHUN SINGH *v.* DAMODAR PROSHAD. **5 P. L. T. 107 : 86 I. C. 599 : A. I. R. 1924 Pat. 506.**

——O. 21, R. 58—*Objection—No jurisdiction to try suit after sale is held.*

It is obvious that after a sale is held in execution the attachment is *ipso facto* determined and the Court had no longer any jurisdiction to try the claim case. (*Mullick and Bucknill, JJ.*) MT. PUHUPDEI KUAR *v.* RAMCHARITAR BARHI. **4 P. L. T. 544 : 74 I. C. 87 : A. I. R. 1924 Pat. 76.**

——O. 21, R. 58—*Effect of order—Sale of property in execution is no bar to suit.*

O. 21, R. 58 confers a statutory right of suit and his right is not affected by the sale of the property in execution of the decree before the suit. 35 C. 202, referred. (*Jwala Prasad, J.*) MT. MANIK *v.* RAMJAS AGARWALLA. **1 Pat. L. R. 51 : 70 I. C. 332 : 3 P. L. T. 832 : A. I. R. 1923 P. 152.**

——O. 21, R. 58—Objection—Claim by legal representative of deceased judgment-debtor falls within S. 47, C. P. Code. (*Coutts and Das, JJ.*) NOWRATNAN LAL *v.* MRS. MARGARET ANNE STEPHEN. **3 P. L. T. 613 : 68 I. C. 369 : A. I. R. 1922 Pat. 572.**

——O. 21, Rr. 58, 63 and 100—*Objections—Usufructuary mortgagee cannot make—Dispossession by auction-purchaser—Application under O.* 21, *R.* 100—*Maintainability.*

A usufructuary mortgagee in possession cannot object to an attachment under O. 21, R. 58. Where such a mortgagee is dispossessed by the purchaser at an execution sale, he is entitled to apply to court under O. 21, R. 100 and his application is not barred by O. 21, R. 63 (*Das and Adami, JJ.*) BISWANATH PATRA *v.* LINGARAJ PATRA. **70 I. C. 306 : 1 P. 159 : A. I. R. 1922 Pat. 408 (1)**

——O. 21, R. 58—*Effect of order.*

Objection petition of judgment-debtor to attachment on the ground that the property is waqf is an objection under O. 21, R. 58 and an order allowing the objection is not appealable. (*Coutts and Das, JJ.*) NAZIR HUSSAIN *v.* MUHAMMAD EJOZ HUSSAIN. **1 P. 637: 67 I. C. 438: 3 P. L. T. 432: A.I.R. 1922 Pat. 196.**

——O. 21, R. 58—*Objection.*

In proceedings under R. 58, the Court cannot deal with the point whether the execution is time-barred. (*Das, J.*) JALALUDDIN *v.* MANI RAM. **60 I. C. 375: 2 Pat. L. T. 275.**

——O. 21, R. 58—*Effect of order—Attachment and sale of equity of redemption.*

On attachment and the sale of the judgment debtor's share in the equity of redemption, the auction-purchaser would acquire the right, title and interest of the judgment-debtor and nothing more. If the judgment-debtor was one of the three mortgagors, the auction-purchaser would step into his shoes and have all the rights as one of the three mortgagors. But the mortgage was one and cannot be divided. (*Broun, A. J. C.*) MAUNG SO *v* DEVIGYAN. **4 U. B R. 132: 70 I. C. 530: A. I. R. 1923 Rang. 119 (2).**

——O. 21, R. 58—*Objection—Investigation.*

In claim investigations, the duties of the Court are confined to ascertaining who was in actual possession at the time of attachment. The court will not go into the question as to whether that possession was fraudulent or void. It must be determined by a regular suit. (*Young, J.*) HO SYEW WAING *v.* P. R. P. L. CHETTY. **13 Bur. L. T. 214: 64 I. C. 66: A. I. R. 1922 L. B. 16.**

C. P. CODE (V OF 1908), O. 21, R. 61.

——O. 21, Rr. 59 to 63 and S. 115—*Execution proceeding—Failure to investigate title—Revision.*

Where investigation has been refused or an order is passed without investigation is not a proper order passed in avoidance with Order 31, Rules 59-63 the High Court should and can interfere if it is in the interests of justice under section 115. Where on the objection that the property attached was not in possession of the judgment-debtor on his own behalf but on behalf of the objector, the court failed to make investigation as to on whose behalf the property was held and inquired only into the actual possession, *held*, it acted with material irregularity and revision lay. (*Duckworth, J.*) PHOMAN SINGH *v.* A. J. WELLS. **1 R. 276 : 2 Bur. L. J. 134 : 76 I. C. 677: A. I. R. 1923 Rang. 195.**

——O. 21, Rr. 60 and 61—*Title is threshed out only incidentally.*

Per *Rankin, J.*—Rules 60 and 61 provide for a summary investigation into possession as distinct from a thorough trial of ultimate right but it is impossible to separate altogether the question of possession and of title. Thus if the judgment-debtor was in possession he may have been in possession as agent or trustee for another and this has to be enquired into. To that extent the title may be part of the enquiry in a claim case, but no ultimate questions of trust are intended to be threshed out. (*Rankin and Page, JJ.*) NAJIMUNESSA BIBI *v.* NACHARADDIN SARDAR. **51 Cal. 548: 39 C. L. J. 418: 83 I. C. 233: A. I. R. 1924 Cal. 744.**

——O. 21, Rr. 60 and 63 and S. 64—*Effect of order under R.* 60.

An order under R. 60, which makes it obligatory on the Court, to release property under attachment, is only provisional and liable to be set aside by a regular suit ; and therefore as transfer of such property, after the release order, is liable to be set aside if the order itself is set aside by a regular suit. (*Mookerjee, A. C. J. and Fletcher, J.*) PROTAB CHANDRA *v.* SARAT CHANDRA. **33 C. L. J. 201: 62 I. C. 348: 25 C. W. N. 544.**

——O. 21, Rr. 60 and 61—*Claim petition—No decision as to the possession and interest of the claimant—Revision.*

Certain property was attached in execution. A claimed interest in and possession of the property. The Court disallowed the claim but held, that he had some interest but not the entire interest. There was no finding what the nature of the interest was, nor a finding as to the person entitled to possession. *Held*, the order was illegal and liable to be set aside in revision by the High Court. (*Jwala Prasad, J.*) NAINU *v.* BHUPENDRA NATH RAKHAT. **60 I. C. 616.**

——O. 21, Rr. 60 and 63—*Release from attachment—Suit—Declaration of right to attach—Effect.*

An order releasing property from attachment is only provisional and the effect of the decree in a subsequent suit brought under the provisions of O. 21, R. 3 declaring the right to attach the property is to maintain the attachment originally made. (*Heald, J.*) MAUNG SEIN *v.* MAUNG MAUNG. **2 Bur. L. J. 113: 76 I. C. 617: A. I. R. 1923 Rang. 237.**

——O. 21, R. 61—*Claim dismissed—Attachment withdrawn—Suit by claimant for possession not necessary.*

Where a claim by a third party is dismissed, in an attachment in execution but subsequently the attach-

C. P. CODE (V OF 1908), O. 21, R. 61.

ment is raised, the claimant is not bound to bring a suit within one year of the order under Art. 13 of Limitation Act and a subsequent suit by him for possession is not barred. (*Macleod, C.J. and Fawcett, J.*) MANILAL GIRDHAR PATAL *v.* MAHASUKHRAM VYAS. **45 Bom. 561: 59 I. C. 774: 22 Bom. L. R. 1446.**

——**O. 21, R. 61**—*Effect of order—Dismissal for default—Effect.*

An order dismissing a claim for default is an order within the meaning of O. 21, R. 63 of the Code and, subject to the result of a regular suit, is conclusive. (*Chatterjee and Pearson, JJ.*) SATINDRA NATH *v.* SHIVA PRASAD. **26 C. W. N. 126 : 64 I.C. 713: A. I. R. 1922 Cal. 166.**

——**O. 21, R. 62**—*Claim petition—C. P. Code, O. 21, R. 63—C P. Code, O. 23, R. 1.*

An order recorded after the withdrawal of a claim petition under O. 21, R. 62, that "the proceedings are therefore dropped" is not an order under O. 21, R. 62, so as to become conclusive under O. 21, R. 63, but is equivalent to an order under O. 23, R 1. (*Baker, J. C and Hallifax, A. J. C.*) CHITNAVIS *v.* NATHU SAO. **20 N. L. R. 106: 7 N. L. J 170: 79 I. C. 1002: A. I. R. 1925 Nag. 2.**

——**O. 21. R. 62**—*Order for sale subject to mortgage—Decree-holder purchaser cannot challenge and mortgage.*

Where an objection is allowed and the attached property is directed to be sold subject to the mortgage of the objector, the decree-holder, merely by becoming the auction-purchaser of the property, cannot challenge the mortgage in a subsequent foreclosure-suit by the mortgagee against the decree-holder auction-purchaser. A decree-holder cannot circumvent the order in an objective case by himself becoming the auction-purchaser. (*Kotval, A. J. C.*) GOVIND *v.* DHEKLU. **19 N. L R. 15: A. I. R. 1923 Nag. 282.**

——**O. 21, R. 62**—*Mortgagee in possession—If can claim to remove attachment.*

A mortgagee in possession of property can apply under O. 21, R. 58 to have an attachment removed under O. 21, R 60, as rule 62 contemplates only the case of a mortgagee not in possession. (*Daniels, J. C.*) RAGHUNANDAN *v* AJODHIA PRASAD. **10 O. & A.L.R. 185 : 11 O.L.J. 239 : 81 I. C. 648 (2) : A.I.R. 1924 Oudh 404 (1).**

——**O. 21, R. 63**—*Suit under—Applicability—Suit for consideration.*

Where on a claim petition being dismissed, the objector whose title was negatived, brought a suit against his vendor for refund of money for failure of consideration, O. 21, R. 63 does not apply and hence the suit need not be brought within one year. (*Sulaiman, J.*) RATI RAM *v.* BURMAJIT. **21 A. L. J. 770 : L. R. 5 A. 28: 77 I. C. 82: 46 All. 45: A. I. R. 1924 All. 302.**

——**O, 21, R. 63 and S. 47**—*Suit under—Right of suit—Attachment of assets of deceased judgment-debtor—Claim—Rights of suit of decree holder.*

In execution of a decree, the decree-holder attached the assets of a judgment-debtor who had died. A reversioner who was not a party either to the decree or to the execution proceeding preferred objections under O. 21, R. 58, C. P. C. and the objections were allowed. In a suit brought by the decree-holder for a declaration of the liability of the assets to attachment and sale in execution held that the suit was not barred by S. 47, C. P. C. (*Banerji, J.*) BANSIDHAR *v.* SHAM LALL. **71 I. C. 1012: A. I. R. 1923 All. 292.**

——**O. 21, R. 63**—*Mortgage of property—Money decree was passed against mortgagor's vendor and the property was sold—Auction-purchaser was obstructed in taking possession by mortgagee—No adverse order in claim proceedings passed against mortgagor—Mortgage is valid.*

Auction purchaser of a property under a money decree cannot succeed in an action for possession against a mortgagee of that property from a vendee from the judgment-debtor under the money decree when the sale had taken place prior to the auction-purchase. The mortgage of the property is valid and enforceable in absence of evidence that the mortgagor was affected by any adverse order under Order 21, Rule 63. (*Macleod, C. J. and Coyajee, J.*) SHRINIVAS NARAYAN PRABHU *v.* SHIDDIKA MAIDIN SAIBA. **27 B L R. 931: 89 I. C. 990: A. I. R. 1925 Bom. 413.**

——**O. 21, R. 63**—*"Shall be conclusive" means that the order cannot be questioned except in that way—When attachment ceases, claimant need not bring suit to set aside adverse order.*

Per *Rankin, J.*—The meaning of the words shall be conclusive' is that the act of the Court is to be valid unless there is a suit. It means that the attachment held valid in the claim case shall be valid and the attachment removed shall be as though it never was, so far as the parties are concerned. The rule seems to mean that subject to a suit *factum valet* the act of the Court shall not be questioned save in that way. The effect of the decision as to possession in other proceedings in which that question may again arise is not the matter to which "shall be conclusive" are directly addressed. The principle is that the object of making a claim in execution is to remove the attachment, that when the attachment is withdrawn that object is gained and that if there exists no attachment, or proceeding in execution on which the order in the claim case can take effect, one is not bound to bring a suit complaining of such order. It is no answer at all to say that a decree-holder's suit under rule 63 has always to be brought after the attachment is removed. If the decree-holder succeed, he gets the attachment restored as at the date it was made and that is what he fights for.

Per *Page J.*—It is not correct to say that if a person elects to take advantage of the procedure laid down in Order 21 rules 58 to 63 of the Code of Civil Procedure, he must be content to abide by the provisions of the rules which he has invoked and that if an order is made rejecting his claim or objection, he must institute a suit within a year from the date of such order notwithstanding that the execution proceedings in respect of which his claim had been preferred have in the meantime come to an end. Whether the decree is satisfied, or set aside, or reversed, or whether the decretal amount is voluntarily withdrawn by the decree-holder or whether the order of attachment is discharged the same result follows namely the parties are put back in the same position as they were in before the execution proceedings were lodged. The object sought by the institution of a suit is to establish the right of the claimant to the property in dispute and not merely to remove the attachment. A claimant is not compelled *de bene esse* to institute a title suit under rule 63 within a year after his claim under rule 58 has been rejected when the object sought by him in making the application under 58 has been attained by the release of the property from attachment within the time limited by rule 63. In circumstances such as these Article 11 of Schedule 1 of the Limitation Act of 1908 does not apply. 15 Cal. 674 Diss. (*Rankin and Page. JJ.*) NAJIMUNISSA BIBI *v.* NACHARADDIN SARDAR. **51 Cal. 548 : 39 C. L. J. 418 :**

C. P. CODE (V OF 1908), O. 21, R. 63.

83 I. C. 233 : A. I. R. 1924 Cal. 744.

——O. 21, R. 63—*Defence—No suit brought—Defence is barred.*

Adverse decision of a claim raised under O. 21, R. 58, prevents the unsuccessful party from asserting the rights thus claimed in any capacity whether as plaintiff or as defendant except in a suit under O. 21, R. 63. (*Newbould and Panton, JJ.*) HARIPADA (BERMAN) *v.* SURENDRA NATH SAMANTHA.

A. I. R. 1922 Cal 164.

——O. 21, R. 63—*Suit under — What plaintiff must prove—Shifting of onus.*

A person who claims property which has been attached and which has been dismissed under O. 21, R. 58 must in a suit under O. 21, R. 63 give *prima facie* evidence of the genuineness of the document of sale and once he has shown a *prima facie* title, the onus shifts to the decree-holder to prove that the transfer was fraudulent and unreal. (*Scott-Smith and Fforde, JJ.*) DAULAT RAM *v.* GHULAM FATIMA.

89 I. C. 953 (1) (Lah).

——O. 21, R. 63—*Effect of order— Limitation Act, Art.* 11.

Where executing court does not adjudicate on merits of the objection, the limitation for suit does not begin till the date on which fresh objections were allowed after second execution application by decree-holder. (*Scott Smith and Abdul Qadir, JJ.*) FATEH DIN *v.* QUTAB DIN.

3 Lah. 7 : 67 I C. 543 : A. I. R. 1922 Lah. 108.

——O. 21 R 63 and O. 22, R. 4—*Claim proceedings—Rejection of objection—Suit to establish title—Failure to implead legal representatives of deceased decree-holder—Decree—Effect of.*

In claim proceedings a certain objection was rejected by the Court and the objector brought a regular suit to establish his title and obtained a decree. Before the suit was filed one of the decree-holders died and the plaintiff refused to join his legal representative as a defendant. *Held*, that the decree passed in the title suit is not binding on the legal representative of the deceased decree-holder because he was not joined as a party in that suit. That under O. 21, R. 63 of the Civ. Pro. Code the order rejecting the objection in claim proceedings had become final as against the deceased decree-holder. 12 M. L. J. 368, 150 P. L. R 1909, Dist. (*Scott Smith, J.*) PIYARA *v.* MAZHAR.

16 P. L. R. 1922 : 64 I. C. 359 : A. I. R. 1922 Lah 78.

——O. 21, R. 63—*Burden of proof— Suit by unsuccessful claimant—Fraudulent transfer—Evidence.*

In a suit under O. 21, R. 63 by an unsuccessful claimant, where the objections as to the attached properties have been disallowed by the execution Court the burden of proof to establish the ownership of the property would lie necessarily on the plaintiff. Where the circumstances disclosed by the evidence on the record lead to the conclusion that the document must have been executed with the fraudulent object of defeating and delaying the creditors, the Court may presume that the alienation was fraudulent. (*Abdul Raoof, J.*) MT. MAI BAI *v.* BHAI KHAN SINGH.

67 I. C. 876 : 3 L. L. J. 198.

——O. 21, Rr. 63 & 57—*Claim petition disallowed—Attachment ceasing under R.* 57—*Claimant not filing suit within one year—Claimant is not precluded from raising his title afterwards.*

After a claim petition has been dismissed and the attachment in respect of which claim petition was made ceases, the claimant's failure to bring a suit within one year does not preclude him from raising the question of title afterwards. (Case-law discussed.) (*Ramesam and Venkatasubba Rao, JJ.*) KUMARA GOUNDAN *v.* THEVARAYA REDDI.

(1925) M. W. N. 406 · 87 I. C. 635 : A. I. R. 1925 Mad. 1113 : 48 M. L. J. 616.

——O. 21, R. 63—*Withdrawal of a claim petition—Court endorsing as "Not pressed, dismissed"—Order is not one under the rule—Claimant not bound to bring suit within one year.*

When a petition is withdrawn it should be endorsed as 'withdrawn' and not as 'dismissed'. Where a claim petition under O. 21, R. 63 was withdrawn but the Court endorsed on it "Not pressed, dismissed". *Held* that Court's order was not under O. 21, R. 63 and the petitioner was not bound to bring the suit within a year. (*Coutts Trotter, C. J. and Ramesam, J.*) G. LAKSHMINARASAMMA *v.* NAVUGOTLA PYDANNA.

80 I. C. 233 : A. I. R. 1925 Mad. 265.

——O. 21, R. 63—*Costs of claim petition.*

Order 21, Rule 63 does not enable a Court to allow the successful party in the regular suit to have his costs of the claim petition. (*Devadoss, J.*) NAMBI VEETTIL TARWAD TAVAZHI KARNAVAN *v.* ATHIKARATH VALAPPIL TARWAD KARNAVAN. 20 L. W. 557 : 34 M. L. T. 106 : (1924) M. W. N. 757 : 83 I. C. 89 : A. I. R. 1925 Mad. 233 (1).

——O. 21, R. 63—*Claim suit—Benami transaction—Burden of proof.*

Ordinarily it will be for a party who sets up that a particular transaction is not real but benami to make out his case. But where there was a claim petition which had been decided and a regular suit is brought to set aside the order thereon it is for the plaintiffs in that suit—the defeated claimant, to establish his ownership. (*Venkatasubba Rao, J.*) MODADUGU PERAYYA *v.* PEROLI VENKAYAMMA.

19 L. W. 627 : 34 M. L. T. 201 : 79 I. C. 899 : A. I. R. 1924 Mad. 770 : 47 M. L. J. 14.

——O. 21, R. 63—*Notifying to bidders is irregular without deciding the right of claimant.*

Where objection to a sale by official receiver is brought, simply ordering that the objection should be notified to the bidders at the time of sale is an objectionable procedure 41 M. 985 and 8 L.W. 197 (F.B.) Foll. (*Spencer and Venkatasubba Rao, JJ.*) P. RAMACHANDRA RAO *v.* GURRAJU. 18 L. W. 282 : 76 I. C. 977 : A I. R. 1924 Mad. 147.

——O. 21, R. 63—*Dismissal of claim petition—Must be challenged within one year.*

Where a claim petition was dismissed without investigation on the ground of delay, but there was a rider added that the petitioner's right would not be affected by the sale, the order is one against the claimant, and must be challenged by suit within one year. On the rejection of such a claim the claimant will be estopped from pleading adverse possession, (*Odgers and Hughes, JJ.*) AISAMMA *v.* MOIDIN KUNHI BEHARI. (1923) M. W. N. 633 : 18 L. W. 520 : 33 M. L. T. 1 : 47 Mad. 160 : 77 I. C 264 : A. I. R. 1924 Mad. 111 : 45 M. L. J. 690.

——O. 21, R. 63—*Effect of order—Attachment of debts—Objection by garnishee—Confirmation of attachment—Effect of—Sale of debt—Rights of purchaser.*

In execution of a decree against a judgment-debtor a debt alleged to be due to him by a third person was attached and the garnishee objected to the attachment stating that no debt was due to the judgment-debtor the Court on enquiry confirmed the attachment and the garnishee did not take any steps to challenge the validity of the order. The decree-holder purchased the debt in Court-auction and brought a suit to recover the same. *Held*, that it was not open to the debtor to con-

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tend that there was no debt due by him to the judgment-debtor and that the order on the previous execution proceeding was final and conclusive. (*Schwabe, C. J. and Wallace, J.*) SUBBIER *v.* MOHIDEEN PITCHAI. **17 L. W. 582 : (1923) M. W. N. 282 : 32 M. L. T. (H. C.) 304 : 72 I. C. 558 : A. I. R. 1923 Mad. 562 : 44 M. L. J. 588.**

——0. 21, R. 63—*Effect of order.*

An order notifying claim to intending bidders without investigating it, is not an order against the claimant. (*Spencer, J.*) KACHINAMTHODI PARAMBIL SAHARABI *v.* KACHINAMTHODI PUTHIA PURAYI. **17 L. W. 182 : 72 I. C. 857 : A. I. R. 1923 Mad. 295 · 44 M. L. J. 141.**

——0. 21, R. 63—*Parties—Decree-holder is not a necessary party.*

Where a claim has been rejected and the properties have been sold and purchased by a stranger purchaser, the decree-holder is not a necessary party to a suit by the claimant. 7 C. 608, Rel. (*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR *v.* KANDASWAMY MUDALY. **16 L. W. 330 : (1922) M. W. N. 674 : 70 I. C. 168 : 32 M. L. T. 124 : A. I. R. 1923 Mad. 58.**

——0. 21, R. 63—*Effect of order—Order for attachment but no attachment—Claim disallowed—Suit more than a year afterwards is barred.*

In pursuance of an order of attachment, but without actual attachment, the properties of a debtor were brought to sale in execution, and a mortgagee put in a claim petition which was disallowed. The latter brought a claim suit but withdrew with permission to sue again and more than one year afterwards brought a suit on the mortgage. *Held*, that plff. having submitted to the order on the claim petition though under a mistake could not later on urge that the order was without jurisdiction and that the suit was barred. (*Oldfield and Ramesam, JJ.*) MUTHIAH CHETTY *v.* PALANIAPPA CHETTY. **(1921) M. W.N. 764 : 15 L. W. 190 : 45 Mad. 90 : 70 I. C. 432 : A. I. R. 1922 Mad. 447 : 41 M. L. J. 594.**

——0. 21, R. 63—*Effect of order—Dismissal of claim for want of jurisdiction is not one under the rule.*

An order on a claim petition declining to investigate for want of jurisdiction is not one under O. 21, R. 63 of the Code and claimant need not bring a suit within a year to set it aside. (*Spencer and Ramesam, JJ.*) LAKSHMI AMMAL *v.* KADIRESAN CHETTIAR. **(1921) M. W. N. 495 : 63 I. C. 431 : 14 L. W. 12 : 41 M. L. J 198.**

——0. 21, R. 63—*Declaratory suit—Suit dismissed—Fresh suit to enforce mortgage barred.*

Where a claim of a third person based on a mortgage is disallowed, and also his suit for declaration of his mortgage rights is dismissed, he cannot enforce, by a regular suit, his rights under the mortgage. (*Ayling and Odgers, JJ.*) SINGARIAH CHETTY *v* CHINNABI. **44 Mad. 268 : 12 L. W. 725 : 28 M. L. T. 420 : 60 I. C. 780 : (1921) M. W. N. 33 : 40 M L. J. 7.**

——0. 21, R. 63—*Defence—Fraudulent transfer.*

An attaching decree-holder can plead in defence to a suit under O. 21, R. 63, that the alienation is a fraudulent one intended to defeat or delay the creditors. 41 Mad. 612, F. B. : 30 M. L. J. 565, overruled. (*Wallis, C. J., Oldfield, Sadasiva Aiyar, Spencer and Seshagiri Aiyar, JJ.*) RAMASWAMI CHETTIAR *v.* MALLAPPA REDDIAR. **43 Mad. 760: 28 M. L. T. 170 : 12 L. W. 475 : 59 I. C. 947: (1920) M. W. N. 572 39 M L. J. 350 (F.B.). : [Overruling 41 Mad. 612 : 43 I C. 651 (F.B.). : and 34 I. C. 778 : 30 M. L. J. 565.]**

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——0. 21, R. 63—*Suit under—Scope of—Inquiry.*

What is decided by a suit under O. 21, R. 63 is the question of title arising in execution between the attaching decree-holder and the objector. 35 Mad. 35, Doubted. 35 Cal. 202, Expl. 15 Cal. 521, Foll. (*Wallis, C. J., Oldfield, Sadasiva Aiyar, Spencer and Seshagiri Aiyar, JJ.*) RAMASWAMI CHETTIAR *v.* MALLAPPA REDDIAR. **43 Mad. 760 : 28 M.L.T. 170 : 12 L. W. 475 : 59 I. C. 947 : (1920) M. W. N 572 39 M. L. J. 350 (F.B.). : [Overruling 43 I. C. 651 : 41 Mad. 612 (F. B.). : and 34 I. C. 778 : 30 M. L. J. 565.]**

——0. 21, R. 63—*Suit under—Nature of.*

The policy of the legislature in framing the rules relating to claim petition in O. 21 is to secure the speedy settlement of question of title and the finding of the court is a summary decision from which a suit allowed by O. 21, R. 63 is simply a form of appeal. The object is to give the parties an opportunity of placing their respective cases before a court because summary investigation might not have furnished sufficient material for decision. (*Kinkhede, A. J. C.*) DAULAT *v.* RAMAPPA. **90 I. C 196 (Nag.).**

——0. 21, R. 63—*Order in objection proceeding final unless suit filed by aggrieved party within one year.*

It is incumbent on the person against whom an order is made in an objection proceeding to file a suit if he feels himself aggrieved thereby ; otherwise the order in the objection suit is final. (*Findlay, O.J.C.*) LOBO *v.* BABULAL. **8 N.L.J. 170 : A.I.R. 1925 Nag. 390.**

——0. 21, R. 63—*A regular suit is continuation of claim proceedings.*

A suit under rule 63 is a continuation of claim proceedings as the suit is filed to set aside the order passed in the claim proceedings and is merely in the form of appeal in the guise of an original suit. (*Kinkhede, A. J. C.*) KHAIRULLA *v.* SETH DHANRUPMAL. **80 I. C. 905 : A. I. R. 1925 Nag. 82.**

——0. 21, R. 63—*Claim or objection—Dismissal without investigation—Subsequent suit to establish title—Limitation—Leave to withdraw claim or objection with liberty—Effect of—Grant of*

The period of limitation for a suit to set aside an order under O. 21, R. 63, C. P. Code, is one year, even if that order was passed without any investigation or consideration of the merits of the claim or objection. Where the claim or objection was withdrawn with liberty to institute fresh proceedings, there is no adverse order under O. 21, R. 63, C. P. Code to necessitate a suit within one year 41 M. 985 (F. B.) : 45 C. 785, Foll. 14 N. L. R. 66, Dist. (*Baker, J. C and Hallifax, A. J. C.*) CHITNAVIS *v.* NATH SAO. **20 N. L. R. 106 : 7 N. L. J. 170 : 79 I. C. 1002 : A. I. R. 1925 Nag. 2.**

——0. 21, R. 63—*Suit for declaration of title—Burden of proof.*

Where a party who is defeated in claim proceedings sues for a declaration of title under O. 21, R. 63, the onus is on him to prove the validity of the transaction on which his title is based. (*Prideaux, A. J. C.*) MT. SARASWATIBAI *v.* YADORAO. **A. I. R. 1924 Nag. 240.**

——0. 21, R. 63—*Purchaser subject to mortgage can challenge the mortgage.*

No order passed under S. 282, C. P. Code, precluded the purchaser at an auction sale from resisting a suit on a mortgage upheld at the time of sale on the ground that nothing is due from it. But if he gained a substantial advantage by accepting the validity of the mortgage, he cannot contest its validity. (*Baker, Offg. J. C.*) HARBHAGAT *v.* NARAYAN RAO.

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78 I. C. 338 : A. I. R. 1924 Nag. 208.

——O. 21, R. 63—*Burden of proof.*

In a suit instituted after the summary rejection of the claim under S. 278 of the C.P. Code, 1882. (O. 21, R. 58 of the new Code) the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. (*Baker, J. C.*) MULLA FAIZ ALI *v.* MT. HARKUAR.

77 I. C. 50 : A. I. R. 1923 Nag. 334.

——O. 21, R. 63—*Effect of order—Dismissal of claim without investigation of the merits—Dismissal on the ground of delay—Suit to establish title—Limitation Act, Art.* 11 *applicable.*

The period of limitation prescribed by Art. 11 of Schedule 1 to the Limitation Act is applicable to a suit to establish a right to property attached in execution of a decree brought after disallowance without investigation of an objection to such attachment. (*Prideaux, A. J. C.*) NARASAYYA *v* LAXMI NARAYAN. 6 N. L J. 66 : 19 N. L. R. 34 : 71 I. C. 404 : A. I. R. 1923 Nag. 187

——O. 21, R. 63—*Effect of order—Dismissal without investigation.*

The period of limitation for a suit to set aside an order under . 63 of O. 21 is one year, even if that order was passed without investigation and not on merits. (*Hallifax, A.J.C.*) GANGADHARA RAO *v.* ABDUL MAJID. 69 I. C. 522 : A. I. R. 1923 Nag. 69 (1).

——O. 21, R. 63—*Suit under—Proof of title.*

Appellant sued to establish her title to certain property in respect of which her claim had been disallowed. *Held*, on the evidence in the case that the appellant had proved her title to the house as real owner and that the attachment of the property as that of her paramour was invalid. (*Kinkhede, A. J. C.*) MT. SUNDAR *v.* BABU LAL. 7 N. L. J. 9.

——O. 21, R. 63—*Effect of order—Dismissal for default.*

Held, that an objection which is dismissed for default is as much final under O. 21, R. 63 subject to a regular suit being filed as if it had been dismissed after contest. (*Daniels, J. C.*) KEDAR NATH *v.* SUKH NATH SINGH. 64 I. C. 209 : 24 O. C. 213.

——O. 21, R. 63—*Suit under—Dismissal of claim without investigation.*

An order passed without investigation of the claim is an order made against the party in such a way as to render that order conclusive and thereby prohibit the institution of a suit to establish the same rights after the period of one year allowed by the Limitation Act has expired. O. 21, R. 63 of the C. P. Code of 1908 is much wider in its scope than the corresponding S. 283 of the Code of 1882, and unlike that latter section covers cases in which there has been no investigation. Orders made under R. 63, O. 21 become final if not set aside by suit within one year. (*Duckworth and Po Han, JJ.*) MAUNG PYA ON *v.* MA HLA KYU. 1 Rang. 481 : 2 Bur. L. J. 173 : 76 I. C. 841 : A I. R. 1924 Rang. 42.

——O. 21, R. 63—*Effect of order—Conclusive means final.*

The 'word conclusive' has the same meaning as final, *i. e.*, unappealable. (*Duckworth, J.*) PHOMAN SINGH *v.* A. J. WELLS. 1 R. 276 : 76 I. C. 677 : 2 Bur. L. J. 131 : A. I. R. 1923 Rang. 195.

——O. 21, R. 63—*Effect of order*—Ex parte *order for removal of attachment is final.*

Where an attachment has been removed by an order of court, the order is conclusive unless set aside by suit. It does not make any difference that the order of removal was made *ex parte* or that the proceedings were irregular. (*Pratt, J.*) MA THEIN TIN *v.* MA HTOO. 2 Bur. L. J. 60 : 75 I. C. 322 : A. I. R. 1923 Rang. 156.

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——O. 21, Rr. 63 and 103—*Unsuccessful objector must sue within a year—Otherwise he is estopped even as defendant.*

Where the summary order contemplated by O. 21, rules 63 and 103 is not overruled in a regular suit brought within a year it becomes conclusive and binding on all persons who were parties to it, or their successors-in-title and they are thereafter precluded from asserting their rights even as defendants. 22 Bom. 640, Foll. (*Raymond and Madgavkar, A. J. C.*) AZIZULLAH KHAN *v.* GHULAM HUSSEIN.

17 S. L. R. 63 : 80 I. C. 994 : A. I. R. 1924 Sind 97.

——O. 21, R. 64—*Setting aside—Absence of attachment.*

A sale does not become null and void merely by reason of the absence of an attachment which is intended for the protection of the decree-holder and to take the property out of the disposition of the judgment-debtor. (*Hallifax, A. J. C.*) HARLAL *v.* NARAYAN. 4 N. L. J. 118 : 18 Nag. L. R. 152 : A. I. R. 1922 Nag. 267.

——O. 21, Rr. 64 and 66—Surrender of possession of mortgaged property by the decree-holder or his rendering account is not necessary for execution. (*Das and Ross, JJ.*) NRIPENDRA NATH CHATTERJEE *v.* JHUMAK MANDUR. 3 P. 221 : 4 P. L. T. 694 : 2 P. L. R. 9 : 80 I. C. 588 : A. I. R. 1924 Pat. 263.

——O. 21, R. 66—*Sale proclamation—Statement as to revenue assessed—Omission of—Effect.*

Under O. 21, R. 66 of the C. P Code, the sale proclamation should contain the statement as to the revenue assessed upon the estate, that it is a material matter which would enable the judgment-debtor to base an application for setting aside the sale, if he could comply with the other condition that the Code provides. (*Lord Buckmaster.*) BALIRAM SINGH *v.* SETH NARSINGADAS. 18 L. W. 137 : L. R. 4 P. C. 197 : 28 C. W. N. 593 : 33 M. L. T. 275 : 75 I C. 546 : (1923)M.W.N. 714 : A. I. R. 1923 P. C. 93 : 45 M L. J. 403 (P. C.).

——O. 21, R. 66—*Sale proclamation—Proceedings—Nature of—Decision when* res-judicata.

Proceedings under Order 21, Rule 66 of the Civil Procedure Code are ministerial proceedings. The Court has to determine what were the properties to be sold and what were the encumbrances on the same. Any decision come to in those proceedings cannot operate as *res judicata* on the very point raised in a regular suit later on. (*Mukherjee, J.*) TOTA RAM *v.* GOURI SHANKAR. 78 I C. 582 : L. R. 5 A. 218 : A.I.R. 1924 All. 480.

——O. 21, R. 66—*Notification of incumbrances—Rights of purchaser—Estoppel.*

Under O. 21, R. 66, C. P. Code, if a mortgage deed is merely notified, that notification is in no way conclusive as between the decree-holder or the purchaser on the one hand and the holder of the incumbrance on the other as to its validity and where a sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale the auction-purchaser is not estopped from questioning the validity of the mortgage. 29 C. 154 : 20 A. 421, Dist. (*Stuart and Sulaiman, JJ.*) ROSHAN LAL *v.* LALLU. 44 All. 714 : 20 A. L. J. 722 : L. R. 3 A. 500 : 68 I. C. 790 : A. I. R. 1922 All. 443 (2).

——O. 21, R. 66—*Estoppel—Sale proclamation—Mortgage not mentioned.*

Where, in an application for execution of a money

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decree, the decree-holder mentions that the property was subject to a mortgage held by him but the sale proclamation omits it, and such omission was not due to any fraud, collusion, misconduct or misrepresentation, *held*, that he was not estopped from putting forward and enforcing his mortgage against the auction-purchaser. (*Mears, C. J. and Banerji, J.*) RAMSARUP *v.* BHARAT. **19 A. L. J. 744 : 64 I. C. 763 : 43 A. 703.**

——**O. 21, R. 66** - *Notification of mortgage—If conclusive—Right of auction-purchaser.*

A sale proclamation after proceedings under O. 21, R. 66 of Code is not conclusive between the parties or binding on the auction purchaser, who can contest the validity of a mortgage notified in the proclamation. (*Gokul Prasad and Lindsay, JJ.*) SULTANKHAN *v.* MOHABAT KHAN. **43 All. 489 : 63 I. C. 395 · 19 A. L. J. 400.**

——**O. 21, Rr. 66 and 90**—*Execution sale—Setting aside—Statement of value of the property in sale proclamation—Valuation given by both parties inserted in sale proclamation.*

Cases can be conceived when the court might rightly consider that the value of the property as stated by both parties should be mentioned though it is generally desirable that the Court should attempt to arrive at a fairly accurate value of the property to be mentioned in the sale proclamation in order to enable bidders to judge of the nature and value of the property. A Court is justified in stating both values instead of attempting itself to value the property when the property was one that it was most difficult to value accurately and to hold an enquiry would have further delayed proceedings which the judgment-debtors were obviously attempting to obstruct by every means in their power. When there is no evidence that any one was misled or deterred from bidding by the insertion of a low valuation in the sale proclamation the applicants could not have sustained substantial injury by reason of the alleged irregularity (*Newbould and Ghose, JJ.*) BEJOY SINGH DUDHURIA *v.* ASHUTOSH GOSSAMI. **28 C. W. N. 552 : A.I.R. 1924 Cal. 589.**

——**O. 21, R. 66**—*Sale proclamation—Value of the land not stated—Failure to serve sale proclamation.*

The approximate value of the land should be stated in sale proclamations but its omission is an irregularity which does not necessarily vitiate the sale unless it had a material effect upon the number of bidders and upon the price. Failure to serve the sale proclamation does not vitiate the sale when the judgment-debtor knows of it. 2 C. W. N 848, distinguished. (*Greaves and Ghosh, JJ.*) JASHIMUDDIN *v.* MANMOHINI. **A. I. R. 1922 Cal 93.**

——**O. 21, R 66**—*Notification of mortgage—Mortgage invalid—Effect of.*

If a mortgage notified in the proclamation of sale turns out to be invalid, the benefit is taken by the purchaser and the judgment-debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage. The purchaser is free to contest the reality or validity of the mortgage in a suit by the mortgagee. 31 All. 583, foll. (*Mookerjee and Buckland, JJ.*) KRISHNA *v.* NAGENDRABALA. **25 C. W. N. 942 : 66 I. C. 694 : 34 C. L. J. 333.**

——**O. 21, R. 66**—*Appeal.*

An order directing issueof sale proclamation though the Court had previously ordered stay thereof at the request of the judgment-debtor till his objection was decided is not final and therefore not appealable.

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(*Sanderson, C. J. and Chotzner, JJ.*) JOGESH CHANDRA *v.* HEMENDRA KUMAR. **64 I. C. 547 : 35 C. L. J. 170.**

——**O. 21, R. 66 and S. 47**—*Petition filed as one under R. 90, but objections to sale covered by R. 66—Second Appeal lies.*

Though petition by judgment-debtor is filed as one under O. 21, R. 90 where the objections are that the petitioner had no notice of the proclamation of sale and that there is an under-valuation of the property, they fall under O. 21, R. 66 and a second appeal is competent. 11 L. W. 59, Foll. (*Madhavan Nair, J.*) VENKATASWAMI *v.* G. NAGAYYA. **(1925) M. W. N. 701 : 87 I. C. 413 : A. I. R. 1925 Mad. 1142.**

——**O. 21, R. 66**—*Incorrect valuation in sale proclamation—Remedy of aggrieved party.*

Where a sale proclamation contains an incorrect valuation, the aggrieved party can apply to have the sale set aside, if substantial injury results as a consequence of the incorrect entry but an appeal does not lie against the order inserting the value. (*Oldfield and Devadoss, JJ.*) AVUDAINAYAGAPPA PILLAI *v.* SUNDARANANDAN PILLAY. **19 L. W. 585 : 76 I. C. 173 : A. I. R. 1924 Mad. 767.**

——**O. 21, R. 66**—*Appeal—Order settling the order in which properties are to be sold—Nature.*

Order settling the order in which properties are to be sold is appealable. (*Oldfield and Devadoss, JJ.*) VEDAVYASA AIYAR *v* THE MADURA HINDU LABHA NIDHI CO., LTD. **18 L. W. 311 : 77 I. C. 148 : (1923) M. W. N. 662 : A. I. R. 1924 Mad. 365 : 45 M. L. J. 478.**

——**O. 21, R. 66**—*Setting aside sale proclamation—If a purely ministerial act.*

Quaere.—Whether the decision of the Full Bench in 27 Mad. 259 which holds that setting aside a sale proclamation is a ministerial act, is still a good law ? (*Schwabe, C. J. and Coleridge, J.*) KAVERIBAI AMMAL *v.* MEHTA & SONS. **18 L. W. 615 : (1923) M. W. N. 894 : 75 I. C. 901 : A. I. R. 1924 Mad. 234 : 46 M. L. J. 71.**

——**O. 21, R. 66**—*Estoppel—Failure to attend at the settlement of proclamation—Effect —If estopped from raising plea of non-liability to attachment.*

Failure to attend at the settlement of proclamation estops from raising plea of non-liability to attachment. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) CHIDAMBARAM CHETTY *v.* KANDASAMI GOUNDAN. **(1923) M. W. N. 571 : 46 Mad. 768 : 74 I. C. 155 : 18 L. W. 757 : A. I. R 1924 Mad. 1 : 45 M. L. J. 346 (F. B.)**

——**O. 21, R. 66**—*Notice to judgment-debtor—Terms of proclamation settled* ex parte—*Question of liability of property.*

A decree-holder applied on attachment of immoveable property of the judgment-debtor without any effect. Judgment-debtor did not get any notice. An application was then made for the sale of the property and the judgment-debtor got a notice for settling the terms of the sale proclamation. As the latter did not attend on the date fixed, the terms of the sale proclamation were settled *ex parte*. The judgment-debtor, applied for the release of property. The decree-holder raised the question of *res judicata* as the question of the liability of the property had been decided on the hearing of the application for settling the terms of the sale proclamation ; *Held*, that, *notice* to judgment-debtor to be present at the settlement of the terms of the proclamation cannot be regarded as raising the question of the liability of the property to be attached and therefore it cannot be said, that the judgment-

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debtor was invited to object to that attachment. That being so, the order that followed cannot be implied as an implied adjudication that the property was correctly attached. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) CHIDAMBARAM CHETTY *v.* KANDASWAMI GOUNDAN. **46 M. 768 : (1923) M.W.N. 671 : 18 L. W. 777 : 74 I. C. 155 : A. I. R. 1924 Mad. 1 : 45 M. L. J. 346 (F.B.).**

——0. 21, R. 66—*Appeal—Order fixing the upset price is not open to.*

An order fixing the upset price in a sale proclamation is not appealable. 27 M. 250 ; (1917) M. W. N. 141, Rel. on. (*Oldfield and Venkatasubba Rao, JJ.*) RAMANATHAN CHETTIAR *v.* VENKATACHELLAM CHETTIAR. **(1923) M. W. N. 297 : 17 L. W. 635 : 32 M. L. T. (H. C.) 401 : 72 I. C. 836 : A. I. R. 1923 Mad. 619 : 44 M. L. J. 599.**

——0. 21, R. 66—*Property sold subject to mortgage—Entry in sale proclamation—Basis of—Effect.*

Entries in the sale proclamation of the existence of encumbrances may be based on an action of court under O. 21, R. 62 or on the basis of a report from the Registration Office. Either way the auction-purchaser is bound and he is affected by the notice conveyed thereby. (*Wazir Hasan, J. C.*) SANT BUX *v.* NADIR MIRZA. **10 O. & A. L. R. 1046 : 81 I. C. 1013 : 27 O. C. 308 : A.I.R. 1924 Oudh 154.**

——0. 21, R. 66—*Absence of plan of house does not vitiate proclamation of sale.*

A plan of the house proposed to be sold by auction being not prescribed by law, absence of the plan in a sale proclamation does not necessarily vitiate the proclamation. (*Kendall, A. J. C.*) NARINDAR BIKRAMJIT SINGH *v.* SETH SUKHAN LAL. **80 I. C. 667 : A. I. R. 1925 Oudh 150 (1).**

——0. 21, R. 66—*Notice—Omission to issue in fresh application for execution is not an irregularity.*

Where on an application for execution, notice had been issued under O. 21, R. 66 of the C. P. Code and the particulars to be entered in the proclamation of sale were settled, the omission to issue the notice under O. 21, R. 66 again on a succeeding application for execution does not constitute an irregularity. 12 A. 510; 18 C. 496; 21 Cal.66; 53 I.C. 809 Ref. (*Kanhaiya Lal, J. C.*) BASANT LAL *v.* SAIYAD HUSAIN. **65 I. C. 988 : 24 O. C. 391.**

——0. 21, R. 66—*Order under, is not final and cannot be* res judicata—*C. P. Code, S. 11.*

Order of the Court determining any of the particulars to be stated in the sale proclamation under O. 21, R. 66 is not a final order and the parties are at liberty to re-open the same question in a subsequent execution proceeding. (*Mullick, Ross and Kulwant Sahay, JJ.*) MOHIT NARAIN JHA *v.* THAKAN JHA. **6 Pat. L. T. 843 : 4 Pat. 731 : 3 Pat. L. R. 118 : 88 I. C. 332 : 1925 P. H. C. C. 189 : A. I. R. 1925 Pat. 500.**

——0. 21, R. 66—*Order refusing to notify incumbrance—Order is one under R. 66.*

Order of an executing Court refusing to notify an encumbrance in the sale proclamation is really an order under O.21, Rule 66 and is therefore not appealable. (*Mullick and Kulwant Sahay, JJ.*) MOHIT NARAIN JHA *v.* THAKAN JHA. **3 Pat. L. R. 118 : 88 I. C. 332 : 1925 P. H. C. C. 189 : 4 Pat. 731 : 6 Pat. L.T. 843 : A. I. R. 1925 Pat. 500.**

——0. 21, R. 66—*Valuation—Notice for settling sale proclamation—Failure to appeal—Effect—Estoppel*

Where the judgment-debtor had notice issued to him of the date for settling the sale proclamation and in spite of it did not attend or assist the court in fixing the valuation, he is afterwards estopped from objecting to the valuation. (*Mullick and Bucknill, JJ.*) MAHADEO SINGH *v.* DHOBI SINGH. **4 P. L. T. 721 : 74 I. C. 838 : 1923 P. H. C. C. 283 : 2 P. 916 : A. I. R. 1924 Pat. 111.**

——0. 21, R. 66—*Valuation to be fixed by court.*

The insertion of any valuation in the sale proclamation other than valuation fixed by the court, is calculated to mislead intending bidders and is therefore wrong. A sale held under such circumstances can be set aside. (*Das and Macpherson, JJ.*) DAMRUPAT SINGH *v.* RAMESWAR SINGH. **1923 P. H. C. C. 208 : 73 I. C. 317 : A. I. R. 1923 Pat. 445.**

——0. 21, R. 66—*Valuation—Fixing of.*

A Court has no jurisdiction to fix the valuation on a sale proclamation before the day fixed for hearing the parties as to the proper valuation. (*Coutts and Ross, JJ.*) SUKHRAJ BAHADUR *v.* DEBI BUKSH. **3 Pat. L. T. 342 : 65 I. C. 360 : A. I. R. 1923 Pat. 102 (1).**

——0. 21, R. 66—*Valuation of property in sale proclamation—Nature of.*

The value fixed to the Court for the preparation of sale proclamation need not be the free value of the property. It is a mere estimate, which should as far as possible be a fair estimate. (*Jwala Prasad and Ross, JJ.*) RAJ BANS SAHAY *v.* ASKARAN BAID. **1 Pat. 214 : A. I. R. 1922 Pat. 550.**

——0. 21, R. 66—*Sale proclamation.*

Verification by a person acquainted with the facts is enough. (*Jwala Prasad and Adami, JJ.*) BRAJA SUNDAR DEB *v.* SIVARANJAN DEI. **59 I. C. 282 : 1 P. L. T. 647.**

——0. 21, R. 66 and 0. 43, R. 1—*Appeal—Order under is not appealable.*

An order under O. 21, R. 66 is not appealable under O. 43, R. 1. An objection as to a defect in the signature of the verification in a petition under O. 21, R. 66 (3) must be made within the time fixed by a notice under rule 66. (*Jwala Prasad and Adami, JJ.*) BRAJA SUNDAR DEB *v.* SIVARANJAN DEI. **59 I. C. 282 : 1 Pat. L. T. 647.**

——0. 21, R. 66—*Estoppel—Notification of mortgage—Omission*

Where a decree-holder brings properties of the judgment debtor to sale in execution of his decree without disclosing the existence of a prior mortgage in his own favour, he is estopped from setting up the mortgage thereafter as against the auction purchaser. The fact that the mortgagee is a minor makes no difference. 10 C. 609 ; 22 B. 686, Ref. (*Brown, A. J. C.*) MAUNG KYIN PEIN *v.* MA PWA ME. **5 U. B. R. (1921) 62 : 64 I. C. 953 : A. I. R. 1922 U. B. 1.**

——0. 21, R. 66 (2)—*Applicability—Notice to debtor—Second proclamation.*

The issue of notice enjoined by O. 21, R. 66 (2) relates to a case where a proclamation has been drawn up. When the proclamation was drawn up originally after notice to the judgment-debtor, no notice is necessary before preparing the proclamation a second time when the sale is adjourned. (*Wazir Hasan and Simpson, A. J. Cs.*) AHMAD HASAN *v.* KODI LAL. **90 I. C. 351.**

——0. 21, R. 66 (3)—*Sale proclamation—Enquiry as to mortgages on the property sold.*

A sale cannot be set aside on the ground that in the sale proclamation the property was described as subject to two mortgages but the fact that the property was not to be redeemed, before redeeming other properties of the owner, was not described. It is not the business of the attaching creditor to see if there are

clauses restraining redemption. He is to proceed as in O. 21, R. 66 (3) and then to file an affidavit as prescribed by the Civil Rules of Practice. (*Wallis, C. J. and Seshagiri Aiyar, J.*) PONNUSWAMI *v.* ABDUL HAFIZ. **13 L. W. 444 : 62 I. C. 735 : (1921) M. W. N. 258.**

———0. 21, Rr. 68 and 90—*Publication of sale proclamation less than 33 days before sale—If vitiates sale.*

The fact that the sale proclamation was published less than 30 days before the sale does not vitiate the sale unless as the result of the irregularity, substantial injury had resulted. (*Hallifax, A. J. C.*) RAMJI PATEL *v.* KARKAJI. **A. I. R. 1924 Nag. 293.**

———0. 21, R. 69—*Order under R. 69 is merely interlocutory.*

Under O. 21, R. 69 the Court in its discretion may adjourn a sale to a specified day, and the order in the exercise of that discretion is an order of a merely interlocutory nature (*Schwabe, C .J. and Coleridge, J.*) KANIRIBAI AMMAL *v.* B. MEHTA.

18 L. W. 615 : (1923) M. W. N. 894 : 75 I. C. 901 : A. I. R. 1924 Mad. 234 : 46 M. L. J. 71.

———0. 21, R. 69—*Applicability of—Postponement of sale—Satisfaction of decree.*

Where an execution sale is postponed on the ground that the decree has been satisfied, O. 21, R. 69, C. P. Code has no application to such a case. (*Jwala Prasad, J.*) JAGDHARI RAI *v.* LANGAT GOPE.

4 Pat. L. T. 495 : 75 I. C. 676 : A. I. R. 1923 Pat. 572.

———0. 21, Rr 69 and 90—*Adjournment—Sale without fresh proclamation ought not to be held.*

The Court ordered stay of sale in execution of a mortgage decree "until further orders" and subsequently ordered the sale of the property without a fresh proclamation. *Held*, that the sale ought not to have been held without a fresh proclamation and that it should be set aside. (*Pratt, J.*) ABDUL HAKIM *v.* NGA NIGRI. **2 Bur. L. J. 54 : 75 I. C. 343 : A. I. R. 1923 Rang. 154.**

———0. 21, R. 69 (2)—*Adjournment of sale—Sale held without fresh proclamation.*

Where a sale is repeatedly postponed and is held on a subsequent date without a fresh proclamation, the procedure though irregular does not render the sale invalid. (*Piggott and Walsh, JJ.*) OFFICIAL LIQUIDATOR, KAYASTHA TRADING AND BANKING CORPORATION *v.* SANT NARAIN SINGH **43 All 433 : 60 I. C. 763 : 19 A. L. J. 262.**

———0. 21, Rr. 71, 84 and 85—*Non-payment of deposit—Fresh sale—Deficiency—Recovery of.*

Where there is default in payment of the initial deposit of 25 per cent of the purchase price under O. 21, R. 84 or in the deposit of the balance under O. 21, R. 85, the property may be resold and the deficiency of price recovered from the defaulting purchaser. (*Piggott, Walsh and Lindsay, JJ.*) SITA RAM *v.* JANKI RAM. **44 A. 266 : 20 A. L. J. 105 : 65 I. C. 813 : L. R. 3 A. 117 : A. I R. 1922 All 200 (F. B.).**

———0. 21, R. 71—*Resale on purchaser's default—Suit to recover deficiency—Second appeal.*

No second appeal lies from an order passed on an application by the decree-holder under O. 21, R. 71 of C. P. Code to recover deficiency of the price from a defaulting purchaser, when the decree for the money claimed is less than Rs. 500.(*Macleod, C. J. and Fawcett, J*) RAJACHARYA *v.* CHEMANNA.

22 Bom. L. R. 1193 : 59 I. C. 192 : 45 Bom. 223.

———0. 21, R. 71—*Defaulting purchaser not substantially prejudiced—Rule must be enforced.*

The provision in O. 21, R. 71 is a salutary one, intended to minimise the hardship resulting from the

purchaser's default and the Court should not refuse to give effect to it, unless the defaulting purchaser would be substantially prejudiced. (*Madhavan Nair, J.*) SANKARA NARAYANA PILLAY *v.* GANGAMMAL.

87 I. C. 1 : 21 L. W. 232 : A. I. R. 1925 Mad. 631.

———0. 21, R. 71—*Execution sale—Parties to contract of—Court conducting sale—Position—Deposit of 25 per cent. required by—Failure to make—Re sale on account of deficit at—Bidder's liability for—Bidder acting as agent, but not communicating fact to Court or Nazir—His liability in case of Contract Act, S. 230. Cls. (1) and (2)—Applicability—Mode of enforcing bidder's liability for deficit—Interest on deficit amount—Liability for appeal—Dismissal.*

Where in Court auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not the judgment-debtor or the decree-holder, but the Court itself. In selling property in Court auction the Court acts under the statutory powers conferred on it by the Code and not as the agent of any party, and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on one side, and the auction-purchaser whose bid is accepted on the other. A person, therefore, who bids at a Court-auction without informing the Court or its officer conducting the sale that he does so only as the agent of a principal, makes himself personally liable for the deficit caused by him in not completing the sale by depositing 25 per cent. of the purchase-money. The fact that the judgment-debtor knew that the person bidding was only bidding as an agent of a principal is quite immaterial. In such a case O. 21, R. 71 of the Code gives the Court power, at the instance of the judgment-debtor, to collect in a summary manner by way of execution the deficit that has been caused from the person bidding. Under O. 21, R. 71 the bidder who makes default is not liable for interest on the deficit amount from the date of the order directing him to pay the amount. He is, however, liable for interest after that date. (*Krishnan and Waller, JJ*) GANGABATTULA KANTHAMMA *v.* MANCHIRAJU REDDIPANTULU. **19 L. W. 197 : (1924) M. W. N. 122 : 34 M. L. T. 358 (H. C.) : 78 I. C. 296 : A. I. R. 1924 Mad. 476 : 46 M. L. J. 134.**

———0. 21, R. 71—*Loss on re-sale—Defaulting purchaser is liable.*

Where the Court acting under Prov. Insol Act, sells the insolvent's property and it is resold owing to the failure of the auction-purchaser to make up the deposit, the Court can ask the auction-purchaser to make up the difference if the proceeds of the second sale fall short and can realize the amounts under R. 71. (*Kotwal, A. J. C.*) MANAKCHAND *v.* IBRAHIM. **62 I. C. 307 : 17 N. L. R. 49.**

———0. 21, Rr. 71 and 84—*Delay in holding re-sale—Defaulting purchaser is not liable.*

The re-sale resulting in loss for which the defaulting purchaser is responsible must be a re-sale held in accordance with the law, *i.e.*, it must be a re-sale held forthwith in accordance with R. 84. If the delay which occurred was so slight that it could not possibly prejudice the deafaulter, the delay will not affect his liability. But where the re-sale is held some months afterwards, the defaulting purchaser will not be liable especially in a case where he has been prejudiced by the delay. (*Daniels, J. C.*) ANGNU *v.* MIRZA MAHOMED SAJJAD ALI KHAN. **12 O. L. J. 261 : 88 I. C. 131 : 2 O. W. N. 212 : 28 O. C. 327 : A. I. R 1925 Oudh. 397.**

———0. 21, R. 71 and S. 47—*Order under—Setting aside—Separate suit does not lie.*

C. P. CODE (V OF 1908), O. 21, R. 72.

An order under O. 21, R. 71, comes within the provision of S. 47. A separate suit cannot be brought to set aside such an order. 14 All. 201 ; 19 All. 22, Dissented from. A. I. R. 1922 All. 200 ; 23 O. C. 140 ; 23 O. C. 342 ; 18 Mad. 439; 20 Cal 599 ; 36 Bom. 329 and 45 Bom 223 Foll. (*Daniels, J. C. and Dalal, A. J. C.*) MATHURA PRASAD *v.* KUNWAR BAHADUR.
12 O. L. J. 80 : 87 I. C. 284 : 2 O. W. N. 141 : A. I. R 1925 Oudh 360.

———0. 21, Rr. 72 and 90—*Leave to bid refused—Purchase by decree-holder is voidable and not void.*

A purchase at an execution sale by the decree-holder who has not obtained leave to bid, is not void nor a nullity but is only to be avoided on the application of the judgment-debtor or some other person interested. Such a sale can only be set aside upon application and upon cause shown. The same would be the result, if the decree-holder had applied for leave to bid and had been refused such leave. (*Lord Phillimore.*) RAI RADHA KRISHNA *v.* BISHESWAR SAHAY.
16 L. W. 190 : 3 Pat. L. T. 529 : 31 M. L. T. 209 : 49 I. A. 312 : 21 A. L. J. 23 : 27 C. W. N. 294 : 1 Pat. 733 : 37 C. L. J. 430 : 25 Bom. L. R. 630 : 67 I C. 914 : 9 O. & A. L. R. 194 : A. I. R. 1922 P. C. 336 (P.C.) : 44 M. L. J. 718.

———0. 21. R. 72—*Execution of decree—Leave to bid to decree-holder—Fixing of heavy upset price—Effect of.*

A decree-holder applied for execution of his decree by sale of ginning factory belonging to judgment-debtor. On the day of sale the bids did not go up beyond Rs. 5,000. The property had been valued by a panch at Rs. 40,000. Shortly after this first bid the judgment-debtor made an application to the Court stating that the property was worth Rs. 60,000. Subsequently the decree holder made an application for leave to bid offerings to buy up the property for Rs. 20,000. The Court ordered that if the decree-holder was prepared to pay Rs. 40,000, his offer would be accepted. The decree-holder did not raise his bid to that amount and ultimately the Court disposed of the execution application on the ground there were no bidders. *Held*, that the Court should have granted the decree-holder leave to bid and made a further attempt for sale of the property. The order disposing of the execution application was set aside and the application was ordered to be restored to the file of the lower Court. (*Shah, A. C. J. and Fawcett, J.*) MOTI LAL PARSHARAM *v.* FULCHAND BALARAM.
26 Bom. L. R. 770 : 83 I. C. 379 : A. I. R 1924 Bom. 515.

———0. 21, R. 72—*Mortgage-decree—Purchase in execution without permission of Court—Voidable and not void.*

A purchase of the mortgaged property in an execution sale by the mortgagee decree-holder without the permission of the Court under O. 21, R. 72, C. P. Code, is not void but merely voidable.

Per *Suhrawardy, J.*—The defendant in possession could plead the voidable character of the purchase by the mortgagee irrespective of the question of limitation. (*Walmsley and Suhrawardy, JJ.*) SARADINDU CHAKRAVARTI *v.* GOSTA BEHARI PRAMANIK.
27 C. W. N. 208 : 37 C. L. J. 403 : 75 I. C. 196 : A. I. R. 1923 Cal. 302.

———0. 21. R. 72—*Setting aside sale—Substantial loss by judgment-debtor not necessary.*

On a sale being set aside under R. 72 on account of the decree-holder's failure to obtain permission to bid at the sale, it is not necessary to see whether the judgment-debtor has sustained substantial loss by the sale. (*Spencer and Ramesam, JJ.*) KONDAPALLI TATIREDDI *v.* RAMACHANDRA RAO UPPALURU.
13 L. W. 616: 62 I. C. 854 : (1921) M. W. N. 535.

———0. 21, R. 72—*Rateable distribution—Permission to bid and order to set off decree debt, is subject to rights of other decree-holders.*

Where a Court permits a decree-holder to bid at an auction to set off the purchase-money against his decretal amount, the rights of the rival decree-holders under S. 73 are not disturbed and they have a right to the distribution. (*Seshagiri Aiyar, J.*) ARUNACHELLAM CHETTI *v.* SOMASUNDARAM CHETTY.
59 I. C. 86 · 12 L. W. 328.

———0. 21, R. 72—*Order allowing set off—If amounts to receipt of assets within S. 73.*

An order allowing a set off under O. 21, R. 72 does not amount to a receipt of assets within the meaning of S. 73, C. P. Code. (*Wazir Hasan, J.C.*) MOHAN LAL *v.* AMAR NATH.
80 I. C. 40 : 1 O. W. N. 729 : 10 O. & A. L. R. 1168 : A. I. R. 1925 Oudh 287.

———0. 21, Rr. 72, 86 and 92—*Permission to bid given on conditions—Failure to fulfil conditions—Court can refuse confirmation of sale.*

An application for permission to bid at an execution sale was granted on terms, that a certain sum of money due to a prior charge holder should be paid in Court. The conditions were not fulfilled *in toto*, but the properties were nevertheless purchased in auction by the decree-holder: *Held*, apart altogether from O. 21, Rr. 72 and 92 the Court has power to refuse to confirm the sale under O. 21, R. 86 or under the inherent powers of Court. (*Miller, C. J. and Coutts, J.*) MT. JANAKBATI *v.* RAMESHWAR SINGH.
1 P. 235 : 69 I. C. 872 : 1 Pat L. R. 179 : A. I. R. 1922 Pat. 511.

———0. 21, Rr. 72 and 84—*Delay in deposit.*

O. 21, R, 72 applies only to the holders of decree in execution of which the property is sold. Delay to make deposit is not a material irregularity and unless substantial injury is the result, the sale is not vitiated. (*Heald and Lentaigne, JJ.*) MAUNG CHIT HLAING *v.* N. A. R. M. CHETTY FIRM.
2 Bur. L. J. 166 : A. I. R. 1924 Rang. 81.

———0. 21, R. 74—*Applicability—Sale under administrative order of Court.*

Where a sale is held under an administrative order and not in execution of a decree, the procedure contained in the C. P. Code for sales in execution of decrees does not apply. (*Martineau, J.*) FIRM OF KAHNA MAL BENARSI DAS *v.* FIRM OF KALLU MAL NATHU MAL.
69 I. C. 718 : 40 P. L. R. 1922 : A. I. R. 1924 Lah. 70.

———0. 21, R. 78—*Money—If moveable property.*

Money is not a "moveable property" within the meaning of O. 21, R. 78. (*Heald and Lentaigne, JJ.*) MAUNG LUN BYE *v.* MAUNG PO NYUN.
2 Bur. L. J. 151 : 1 Rang. 360 : 76 I. C. 679 : A. I. R. 1924 Rang. 21.

———0. 21, R. 81—*Mortgagee of moveables.*

A mortgagee of moveables cannot follow the moveable property into the hands of the auction-purchaser. 42 Mad. 59 ; 5 L. B. R. 8 ; 1 Bur. L. J. 136 Foll. (*Carr, J.*) NACHIAPPA *v.* MAHOMED SABIR.
4 Bur. L. J. 135 : A. I. R. 1925 Rang. 303.

———0. 21, R. 83—*Alienation of property with sanction of Court—Minor's property—Procedure under Ss. 29 and 30 of the Guardians and Wards Act not followed—Effect of.*

S. 29 of the Guardians and Wards Act provides that a guardian of the minor's property cannot alienate any interest in it without a sanction of Court. S. 30 makes transfers by guardian without sanction voidable at the instance of any other person affected thereby. But

C. P. CODE, (V OF 1908), O 21, R. 83.

such person must not ignore the transaction and he is bound to pay the consideration paid by the transferee. If this is not complied with, he is not entitled to have the transfer set aside. (*Mukerji and Cuming, JJ.*) VIJENDRA MOHAN SARMA *v.* MANORAMA DASI.
36 C. L. J. 326 : 49 Cal. 911 : 28 C. W. N. 57 : A. I. R. 1922 Cal. 150.

——O. 21, R. 83 (3)—*No power to extend time for redemption—Appeal.*

An application for extending the time for redemption to enable the mortgagor to raise the amount by mortgage or private sale is expressly prohibited by the Code and an appeal does not lie from an order of Court refusing to do it. (*Schwabe C.J. and Coleridge, J.*) KAVERIBAI AMMAL *v.* MEHTA & SONS.
18 L. W. 615 : (1923) M. W. N. 894 : 75 I. C. 901 : A. I. R. 1924 Mad. 234 : 46 M. L. J. 71.

——O. 21, R. 84—*Sale when complete—Acceptance of bid—Effect of deposit.*

The function of a Nazir or other appointed to officer conduct an auction-sale is of a ministerial character. If he conducts it in the presence of the presiding officer and the latter forthwith declares under O. 21, R. 64, C. P. Code, who the purchaser is and signs the formal order the sale is complete. If it is not held in his presence, it can be completed only by his order closing the bidding or an order accepting the bid under O. 21, R. 84. Where in anticipation of sanction the Nazir accepts the deposit required from the highest bidder, that is only in law an offer, and it is open to the Court to resume the sanction. (*Das and Macpherson, JJ.*) JAIBHADAR JHA *v.* MATUKHARI JHA. **2 P. 548 : 76 I. C. 113 : 4 P. L. T. 498 : 1923 P. H. C. C. 190 : A. I. R. 1923 Pat. 525.**

——O. 21, R. 85—*Joint purchase—Sale certificate issued to one alone—Suit for declaration of title by the other.*

Two persons applied jointly to purchase property at an execution sale in certain proportions and paid in the 25 per cent. deposit in that proportion. Later on one of them failed to pay his share of the balance, whereupon the other paid in the whole balance and a sale certificate was issued to him alone. *Held*, the other could sue for his share in the properties purchased. (*Greaves and Chakravarthi, JJ.*) BHABATARAN CHATTOPADHYA *v.* DURGESHNANDINI DEBI.
81 I. C. 1029 (2) : 51 Cal. 992 : A.I. R. 1925 Cal. 164.

——O. 21, R. 85—*Time for payment of the purchase-money—Extension of—No objection—Confirmation of sale.*

Though it is not open to the Court to extend the time for payment of the purchase price without the consent of the parties, still where an extension of time has been granted without objection on the part of the parties and the sale has been confirmed and the money drawn by the decree-holder, the sale cannot be set aside on account of the irregularity. (*Spencer and Ramesam, JJ.*) VARANAKKOT ILLATH SUBRAMANYAM NAMBUDIRI *v.* VYKUNDA KAMMATHI.
16 L. W. 319 : (1922) M. W. N. 707 : 69 I. C. 1001 : 31 M. L. T. 363 : A. I. R. 1923 Mad. 48 : 43 M. L. J. 477.

——O. 21, R. 86—*Purchaser making default in paying balance—Decree-holder purchasing at resale and applying for attachment of the deposit by first purchaser owing to deficiency at re-sale—Application is proper.*

Where at a Court-auction the purchaser failed to pay the balance in time and the property was resold and was purchased by the decree-holder who also applied for attachment of the deposit of 25 per cent. made by the first purchaser, owing to deficiency in re-sale. *Held*: that the application was proper and should be tried and disposed of according to law. (*Sir John Edge.*) RAMA GIRJI NEELAKANTAGIRJI *v.* ANNAVAJIHALA VENKATACHALLAM.
2 O. W. N. 308 : 27 Bom. L. R. 806 : 22 L. W. 1 : 86 I. C. 373 : A. I. R. 1925 P. C. 61 (P. C.) : 48 M. L. J. 335.

——O. 21, R. 86—*Deposit if may be refunded.*

A Court should, in its discretion under O. 21, R. 86 of the Code, refund the amount deposited by an auction purchaser in a sale in execution, on good reason shown to the satisfaction of the Court as to why he failed. (*Hallifax, A.J.C.*) GANPAT RAO *v* KESRICHAND. **59 I. C. 705 : 17 N. L. R. 15**

——O. 21. R. 86—*Leave to bid on conditions—Failure to fulfil conditions—Court can refuse confirmation.*

Where a decree-holder is permitted to bid at an auction-sale, subject to certain conditions being fulfilled and those conditions turn out not to have been fulfilled the Court can, apart altogether from R. 72 and R. 92 of O. 21 either under R. 86 of O. 21 or under its inherent power, refuse to confirm the sale and have a resale. (*Miller, C.J. and Coutts, J.*) JANAKBATI *v.* RAMESHWAR. **1 P. 235 : 69 I. C 872 : 1 P. L. R. 179 : A. I. R 1922 Pat. 511.**

——O. 21, R 86—*Delay in paying the balance does not invalidate the sale.*

The provisions of Order 21, R. 86 show that the delay in paying the balance of the purchase-money does not necessarily invalidate the sale. Where the extension of time for one month was granted by the Court as the result of an express agreement made between the auction-purchaser and the decree-holder and the sale proceeds were apparently not sufficient to pay the directed amount. *Held*, that no loss could be caused to appellant judgment-debtor by the grant of further time. (*Heald and Lentaigne, JJ.*) MAUNG CHIT HLAING *v.* N. A. R. M. CHETTY.
2 Bur. L. J. 166 : 79 I. C. 747 : A. I. R. 1924 Rang. 81.

——O. 21, R. 87—*Date of sale clear but not mentioned in proper place—Defect is irregularity, not illegality.*

Where the date of re-sale was not mentioned in its proper place but it was mentioned in the proclamation and there could be no mistake as to it, *Held*, that the omission to mention it in its proper place was no doubt an irregularity; but in the absence of any evidence to show that any possible bidder was kept away, owing to his not knowing the exact date of the sale and to connect the irregularities complained of, with the loss alleged to have resulted on account of such irregularities, the re-sale was not vitiated by any illegality. (*Madhavan Nair, J.*) SANKARA NARAYANA PILLAY *v.* GANGAMMAL. **21 L. W. 232 : 87 I. C. 1 : A. I. R. 1925 Mad, 631.**

——O. 21, R. 87—*Time and place not mentioned—No deficiency resulting—No illegality exists.*

Where the time and place of re-sale were not mentioned in the sale proclamation but it was not proved that the omission brought about a deficiency in the price of the property when it was re-sold, *Held*, that the sale was not vitiated by any illegality. (*Madhavan Nair, J.*) SANKARA NARAYANA PILLAI *v.* GANGAMMAL. **21 L. W. 232 : 87 I. C. 1 : A. I. R. 1925 Mad. 631.**

C. P. CODE (V OF 1908), O. 21, R. 89.

———O 21, Rr. 89 and 90—*Application under R. 89 heard and disposed of—Application under R. 90 is not barred.*

The proposition that an application under O. 21, R. 89, having been heard and disposed of, an application under O 21, R. 90 is not maintainable does not necessarily follow from sub Cl. (2) of R. 89. (*Sulaiman and Daniels, JJ.*) MT. SARVAI BEGAM *v.* RAM CHANDER SARUP. **23 A. L. J. 760 : L. R. 6 A. (Civ). 388 : 88 I. C. 500 : A. I. R. 1925 All. 778.**

———0.21, R.89—*Scope of—Application to set aside sale of attached property.*

A simple hypothecation bond is "moveable property, not only for the purposes of attachment but also for purposes of sale and O. 21, R. 89 has no application and there is a clear indication of the legislature that for the purposes of the Code, it should be treated as moveable property. 26 Bom. 305 Foll. (*Walsh, A. C. J. and Boys, J.*) UMRAO SINGH *v.* LAL SINGH. **L. R. 5 All. 674 : 22 A. L. J. 840 : 89 I. C. 890 : 46 All. 917 : A. I. R. 1924 All. 796.**

———0. 21, R. 89—*Right to apply—Judgment-debtor—Objections to the sale.*

Where a judgment-debtor who had preferred certain objections to the legality of an execution sale, was allowed to utilise the provisions of O. 21, R. 89, C. P. C., subject to protest. *Held* that the procedure was irregular and that the objections were not maintainable. (*Piggott and Walsh, JJ.*) RAJA DUTT PRASAD SINGH *v.* SRI NARAIN. **21 A. L. J. 340 : L. R. 4 A. 195 : 74 I. C. 557 : A. I. R. 1923 All. 503.**

———0. 21, R. 89—*Deposit—Legality of—Improper refusal to set aside sale—Interference in revision.*

Two creditors A and B obtained a decree against a common debtor and A attached his properties. B applied for rateable distribution A proclamation of sale was issued, ordering the sale of the judgment-debtor's property for the recovery of the decretal amount due to A. The judgment-debtor paid A's decree in full and the appellate Court stayed execution of the decree and sale. The Court below in disregard of the order of the appellate Court held the sale and the property was knocked down at a certain sum. The judgment-debtor tendered to the Court within 30 days the amount due on B's decree with the addition of 5 per cent. The amount deposited was more than that specified in the sale proclamation but short of a few rupees so far as B's decree was concerned. *Held* that the deposit was good under O. 21, R. 89 and the sale should have been set aside. Where the lower Court improperly refuses to set aside an execution sale under O. 21, R. 89, C. P. C. the High Court can interfere in revision. (*Piggott and Walsh, JJ.*) ABUL NASAR RASHID-UD-DIN AHMAD *v.* LALITA PRASAD. **L. R. 4 A. 121 : 21 A. L. J. 162 : 71 I. C. 1018 : A. I. R. 1923 All. 315**

———0. 21, R. 89—*Deposit—Usufructuary mortgagee.*

A usufructuary mortgagee making payment to have an execution sale set aside is not a volunteer. (*Banerji, J.*) BENI MADHO *v.* SARWAR DAT. **20 A. L. J. 42 : 64 I. C. 918 : A. I. R. 1923 All. 127.**

———0. 21, R. 89—*Judgment-debtor cannot stop limitation by presenting application to Collector or Mamlatdar though the latter may have held the sale.*

The Collector or Mamlatdar is not the Court within the meaning of O 21, R. 89 and therefore a judgment-debtor who presents his application to such officer cannot stop limitation running against him, though he may have held the sale. (*Shah, A. C J. and Fawcett, J.*) GADIGAPPA *v.* SHIDAPPA. **48 Bom. 638 : 26 Bom. L. R. 817 : A. I. R. 1924 Bom. 495.**

———0. 21, R. 89—*Alteration.*

Alteration of rule so as to permit application being presented to officer holding sale, though final disposal may rest with Court, is desirable. (*Shah, A. C. J. and Fawcett, J.*) GADIGAPPA *v.* SHIDAPPA. **48 Bom. 638 : 26 Bom. L. R. 817 : A. I R. 1924 Bom. 495.**

———0. 21, R. 89—*Deposit—Amount of—Application to set aside sale.*

The expression "any amount which may have been received by the decree-holder" in O. 21, R. 89 (*b*), C. P. Code means money actually received by the decree-holder and does not include payment of sale proceeds into Court. 23 B. 723 Foll. (*Macleod, C. J. and Crump, J.*) TOTA RAM *v.* CHHOTU. **25 Bom. L R. 446 : 73 I. C. 454 : A. I. R. 1923 Bom. 299 (2).**

———0. 21, R. 89—*Strict construction—Payment or deposit in full must be made.*

R. 89 is a concession allowed to judgment-debtors and the judgment-debtor must strictly comply with it. An undertaking to pay a certain amount is not a payment. Hence a part payment coupled with an undertaking to pay the balance, cannot be considered as payment or deposit in full within R 89. (*Macleod, C. J. and Shah, J.*) MANAJI KUVARJI *v.* ARAMITA. **23 Bom. L. R. 847 . 46 Bom. 171 : 63 I. C 39 : A. I. R. 1922 Bom. 193.**

———0. 21, R. 89—*Deposit—Voluntary and unconditional.*

A payment to set aside an auction-sale, by a person claiming to be the owner of the property sold, cannot recover the amount from the decree-holder, after the sale is set aside on the ground that the judgment-debtor had no interest in the property. (*Macleod, C. J. and Shah, J.*) NARAYAN VASUDEVACHARYA *v.* ANGUNDA MALIGUNDA. **45 Bom. 1094 : 62 I. C. 104 : 23 Bom. L. R. 455.**

———0. 21, R. 89—*Order setting aside sale and certifying satisfaction of decree is legal.*

An order under O. 21, R 89, setting aside an execution sale and certifying satisfaction of decree is legal. (*Walmsley and B B. Ghose, JJ.*) JADAB KRISHNA *v.* APSARADDIN SARDAR. **41 C. L. J. 391 : A. I. R. 1925 Cal. 948.**

———0. 21, R. 89—*Applicability of—Partition suit—Award of arbitrators directing sale of properties and payment out of proceeds—Sale can be set aside on deposit.*

In a partition suit instituted on the Original Side of the High Court, the disputes between the parties were referred to arbitration under orders of the Court. The arbitrators made an award directing the sale of one of the properties which were the subject-matter of the suit and the payment of the common debts as well as of certain sums to the plaintiff A decree was passed in terms of the award and the Registrar of the High Court sold the properties in terms of the award. The defendants applied with the plaintiff's consent for setting aside the sale under O.21, R.89, C P. Code, and it was contended that those provisions did not apply to the case. *Held*, that the sale was in enforcement of a decree on the award and the provisions of O. 21, R. 89, C.P. C., were applicable. (*Woodroffe and Suhrawardy, JJ.*) NIRODE NATH BANERJEE *v.* AMULYA DHONE. **27 C. W. N. 466 : A. I. R. 1923 Cal. 582.**

C. P. CODE (V OF 1908), O. 21, R 89.

——O. 21, R. 89—*Form of application—Auction-purchaser—If a necessary party.*

Where a petition was put in to set aside an auction-sale by depositing the decree amount in Court, but the auction-purchaser is not a made a party to the sale though his purchase is mentioned in the body of the petition, it is a sufficient compliance with the Code. Notice can issue to him as one of the parties affected by the sale, and it is not necessary he should be formally added as a party. (*Suhrawardy and Panton, JJ.*) RAJ CHANDRA DAS *v.* KALI KANTA DAS. **A. I R. 1923 Cal. 394.**

——O. 21, R. 89—*Right to apply—Sale in execution of decree—Judgment-debtor privately selling the property so sold to a third person before confirmation—Right of such purchaser to apply.*

Where a judgment-debtor, after the sale in execution of his immoveable property but before the confirmation of the sale, sold such property to a third person, and such subsequent purchaser applied to have the Court sale set aside under O. 21, R. 89, C. P. Code, *Held*, that he was not entitled to make the said application. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale. His interest, if any, was by virtue of a title acquired after such sale and consequently he was precluded by the very terms of the rule from applying under O. 21, R. 89 of the Civil Procedure Code. 24 M. L. J. 205 ; 34 All. 186 ; 4 P. L. J. 340 ; 40 Bom. 557, Rel. (*Sanderson, C. J. and Chotzner, JJ.*) SARADAKRIPA LAL *v.* HARENDRA LAL DAS. **26 C. W. N. 149 : 68 I. C. 289 : 49 C. 454 : A. I R. 1922 Cal. 271.**

——O. 21, R. 89—*Applicability—Mortgage decrees—Original Side of the Calcutta High Court.*

R. 89 applies to the sales held in execution of the mortgage decrees and to sales on the Original Side of the Calcutta High Court. (*Mukerji, A. C. J. and Fletcher, J.*) VIRJIBHUN DAS MOOLGI *v.* BISESWAR LAL HAR GOVIND. **48 Cal. 69 : 60 I. C. 406 : 24 C. W.N. 1032.**

——O. 21, R. 89—*Applicability—Sale by the original side of the High Court—Mortgage decree.*

O. 21, R. 89, C.P. Code, may apply ordinarily to sales on mortgage decrees but it does not apply to a suit on the Original Side of the High Court where, without attachment, the sale has been held by the Registrar in conformity with the rules of the Court. The practice under the rules of the High Court and the C. P. C. are not workable together in this respect. (*Woodroffe, J.*) SURENDRA KRISTO RAY *v.* GURU PRASAD GHOSH. **59 I. C. 432 : 24 C. W. N 536. [But See 24 C. W. N. 1032.]**

——O. 21, R. 89—*Right to apply—Purchaser after auction.*

A third party purchasing the property after the date of the auction-sale is debarred by O. 21, R. 89 from making an application to have the auction-sale set aside. (*Harrison, J.*) SHAM LAL OF DELHI *v.* HARI SHANKER. **A. I. R. 1922 Lah. 302.**

——O. 21, Rr. 89 and 92—*Deposit with oral application to set aside sale made in time—Order by Court confirming sale is nullity.*

Where a deposit with an oral application to set aside the sale is made in time the Court is bound to set aside the sale and where the Court confirms the sale in spite of such application, the order of confirmation is a nullity. (*Venkatasubba Rao, J.*) MURUGAPPA *v.* SHANMUGA. **86 I. C. 498 (1) : A. I. R. 1925 Mad. 909.**

——O. 21, R. 89—*Oral or written application is essential.*

C. P. CODE (V OF 1908), O. 21, R. 89.

An application oral or written made within 30 days is necessary for the purpose of O. 21, R. 89. Mere deposit of the required amount is not, enough. 7 Bom. L. R. 263, Dissented from. (*Srinivasa Aiyangar, J.*) PACHIAYAE *v.* VALLIMUTHU VELAN. **48 M. L. J 405 : 87 I. C. 437 : 1925 M. W. N. 175 : A. I. R. 1925 Mad. 639.**

——O. 21, R. 89—*Right to apply—Trespasser—"Person holding an interest in property by virtue of a title acquired before such sale"—Meaning of.*

Held Per *Venkatasubba Rao, J.* (*Oldfield, J.*, dissenting) that a trespasser, who enters on possession of property sold in a court-sale, before the sale takes place, "holds an interest in that property by virtue of a title acquired before the sale" and is entitled to apply under O. 21, R. 89, C. P. Code, to set aside the sale on making the required deposit. (*Oldfield and Venkatasubba Rao, JJ.*) POTTI NAYAKER *v.* SUPPAMMAL. **20 L. W. 31 : 79 I. C. 874 : A. I. R. 1924 Mad. 723.**

——O. 21, R. 89—*Application under—Deposit by pleader's clerk—Legality of.*

Where an application under O. 21, R. 89, C. P. Code, is made by the duly authorised pleader of a party, the fact that the required deposit is made by the pleader's clerk instead of by the pleader himself, does not vitiate the application. (*Spencer and Kumaraswami Sastri, JJ.*) THIMMARAZU VENKATA KUTUMBA RAO *v.* VENKATAPPA. **(1924) M. W. N. 137 : 19 L. W. 298 : 77 I. C. 765 : A. I. R. 1924 Mad 483 : 46 M. L. J. 119.**

——O. 21, R. 89—*Contract of sale creates no interest.*

Persons entitled under a contract for the sale of immoveable property are not persons entitled to apply under Order 21, R. 89. 23 B. 181 Foll. If the conveyance be prior to the attachment the purchasers would equally have no *locus standi* as their interests are not affected. (*Odgers, J.*) A. C. SUBBA REDDI *v.* VASIREDDI JAYARAMAYYA **17 L. W. 680 : A. I. R. 1923 Mad. 659.**

——O. 21, R. 89—*Right to apply—Prior application to pay decree amount—Dismissal—Effect of—Not* res judicata

Where a person claiming as legatee under a will applied to pay the decree amount to prevent a sale but the application was dismissed, it does not bar an application under O. 21, R. 89, C. P. Code, to set aside the sale on depositing the decree amount. The effect of the previous dismissal was merely to decide that the applicant had no right to raise the attachment on payment of the decree amount. (*Spencer and Venkatasubba Rao, JJ.*) DHANAMMAL *v.* VEERARAGHAVALU NAIDU. **32 M. L. T. (H. C.) 175 : (1923) M. W. N. 162 : 18 L. W. 296 : 72 I. C. 335 : A. I. R. 1923 Mad 487 (2) : 44 M. L. J. 325.**

——O. 21, R. 89—*Setting aside sale—Deposit of money—Formal application—Necessity for.*

Where the money required to set aside an execution sale had been paid into Court within 30 days but no formal application to set aside the sale was presented within the time prescribed, the Court cannot set aside the sale. A mere judgment schedule which does not contain a prayer to set aside the sale cannot be treated as such an application. 14 M. L. T. 534 ; 19 M. L. J. 192. (*Krishnan, J.*) VENKATASUBBA RAO *v.* NARAYANA RAO. **(1922) M. W. N. 171 : 15 L. W. 450 : 66 I. C. 44 : A. I. R. 1922 Mad. 83 (1).**

——O. 21. R. 89—*Applicability—Deposit by one judgment-debtor.*

O. 21, R. 89 of the Code has to be strictly complied

C. P. CODE (V OF 1908), O. 21, R. 89.

with and a judgment-debtor is not entitled to take advantage of any deposit made by his co-judgment-debtor, independently made. (*Krishnan, J.*) SUBBAYYAR *v.* MUTHAYAN. **14 L. W. 631 : 65 I. C. 983 : 30 M. L. T. 83 : 65 I. C. 983 : A. I. R. 1922 Mad. 54 (1) : 42 M. L. J. 71**

——O. 21, R. 89—*Applicability—Original Side Rules 75, 214—Sale in partnership suit.*

O. 21, R. 89 does not apply to a sale held in a partnership suit for the realization of partnership assets and R. 214 of the Original Side Rules only applies to cases to which O. 21, R. 89 is applicable. (*Wallis, C. J. and Krishnan, J.*) TULJARAM RAO *v.* RAMACHANDRA ROW. **14 L. W. 515 : 68 I. C. 916 : (1921) M. W. N. 736 : 41 M. L. J. 465.**

——O. 21, R. 89—*Right to apply Sale is execution—Subsequent transfer by judgment-debtor—Right to apply to set aside sale.*

Where the judgment-debtor's property has been sold in Court auction and he subsequently sells the property to another, the right to apply to have the sale set aside lies with him and not with his vendee. 38 M, 775, Overruled. (*Wallis, C.J., Oldfield and Kumaraswamy Sastri, JJ.*) SUNDARAM *v.* MAMSA MAVATHER **44 Mad. 554 : 13 L. W. 498 : 29 M. L. T. 269 : 63 I. C. 937 : (1921) M. W. N. 272 (F. B.) : 40 M. L. J. 497.**

——O. 21, Rr. 89, 58 and 63—*Words "having an interest therein" are controlled by "by virtue of title acquired before such sale"—Person failing under Rr. 58 and 63 cannot apply under R. 89.*

There is no reason to limit the words "by virtue of a title acquired before such sale" to the words "holding an interest therein" so as to read the first clause "owning such property" as if it stood by itself. Similarly, the words "having an interest therein" should be read as connected with or controlled by the words "by virtue of a title acquired before such sale" and therefore an applicant under O. 21 R. 89 must be a person who can even at the date of his application, be proved to be a person, either *owning* the property or *holding* an interest therein by virtue of a title, and further, that that title must have been a pre-existing title, that is to say, a title *acquired before* the auction-sale. It must not be a title once vesting, or sought to be established and already negatived, or declared in a Court as non-existent. If the very title be wanting or not subsisting, neither the alleged defunct ownership nor the alleged 'holding' of the 'interest' sometime in the past, is of any avail. The use of the words 'owning' or 'holding' in the above expressions indicates a present subsisting ownership or interest in the applicant, at the date of his application. Therefore a person whose claim under R. 58 and a suit under R. 63 have been dismissed cannot apply under R. 89 because an auction-purchaser is entitled to take advantage of an adjudication in the objection case and also in the regular suit under O. 21, R. 63. (*Kinkhede, A. J. C.*) ONKAR *v.* DHANSINGH. **21 N. L. R. 102 : 90 I. C. 963 : A. I. R. 1926 Nag. 10 (2).**

——O. 21, R. 89—*Whole amount must be deposited within 30 days.*

R. 89 must be strictly construed. No sale will be set aside under this rule unless the whole amount specified in sub-rule (1) is deposited by the applicant within 30 days from the date of sale. 26 C. 449, Foll. (*Baker, J. C.*) NARAYAN *v.* RAM KRISHNAJI. **78 I. C. 705 : A. I. R. 1925 Nag. 30.**

——O. 21, R. 89—*Right to apply—Persons having interest if should be disclosed—Failure to disclose—Effect.*

C. P CODE (V OF 1908), O. 21, R. 89.

The right to apply to have a sale set aside under O. 21, R. 89 on making a deposit is exercisable by a person who has acquired an interest in the property before the date of sale. R 89 does not say that no such application shall be entertained unless it discloses the nature of the interest which entitles the applicant to make the application. If such interest is not disclosed, the court can only direct the applicant to supply the particulars, and should not reject the petition. (*Kinkhede, A. J. C.*) VITTAL SINGH *v.* AGARCHAND. **79 I. C. 903 : A. I. R. 1925 Nag. 17.**

——O. 21, R. 89—*Failure to comply with terms exactly—If a mere irregularity.*

If a judgment-debtor wants to set aside an auction sale under O. 21, R. 89 he must at his peril comply with the terms of the rule, and a failure to comply with the terms is not a mere irregularity. Thus the 5 per cent. due to the purchaser must be deposited in full and he cannot rely even on a mistaken information supplied by the Court. (*Baker, J. C*) SETH BALLABHDAS *v.* SOBHA SINGH. **78 I. C. 270 : A. I. R. 1924 Nag. 216 (2).**

——O. 21, R. 89—*Decision of Sub-Divl. Officer cancelling sale is not final.*

The decision of a Sub-Divisional Officer cancelling the sale under O. 21, R. 89, and holding the decree as satisfied cannot be regarded as a final decision in view of the fact that it is subject to an appeal. (*Baker, Offg. J. C.*) BALLABHADAS *v.* SOBHA SINGH. **78 I. C. 270 : A I. R. 1924 Nag. 216 (2).**

——O. 21, R. 89—*Mortgagea property sold—No indication that only equity of redemption was sold—Mortgagee can apply under R. 89.*

The sale proclamation stated that the whole property was to be sold. At the foot of the sale proclamation a note was made to the effect that the property was subject to a mortgage. *Held*, in the circumstances of the case that it could not be said that only the equity of redemption was put up for sale and that therefore the mortgagee had no interest in the property sold. He had such interest and he could apply under O. 21, R. 89 (*Dalal and Wazir Hasan, A. J. Cs.*) JAGANNATH SINGH *v.* JAGJIVAN DAS. **28 O. C. 221 : 12 O. L. J. 289 ; 87 I. C. 829 : A. I. R. 1925 Oudh 429.**

——O. 21, R. 89—*Application oral or written is essential—Mere deposit is futile.*

An application, either written or oral is necessary for the setting aside of a sale under O. 21, R. 89 and such an application must be made within the period of limitation of 30 days. When there is no such application, the deposit, even if rightly made in the Civil Court, will be of no avail. Where the deposit was made in the treasury and after the period of limitation an oral application was made, *Held* : that the application was not competent. (*Dalal, J. C.*) RAM AUTAR *v.* SHEO PIAREY LAL. **12 O. L. J. 137 : 87 I. C. 722 : A. I. R. 1925 Oudh 411.**

——O. 21, R. 89—*Judgment-debtor mortgaging property subsequent to auction sale can apply under R. 89.*

A Judgment-debtor who subsequent to the auction sale transfers the property by means of a mortgage is a "person owning property" within the meaning of O. 21, R. 89 and can put in an application under that rule, 14 O. C. 33 and Civil Rev. No. 65 of 1921, Dist. (*Wazir Hasan, A. J. C.*) DAL CHAND *v.* BANK OF UPPER INDIA. **12 O. L J. 101 : 86 I. C. 732: A. I.R. 1925 Oudh 349 (2).**

——O. 21, R. 89—*Right to apply—Usufructuary mortgagee.*

C. P. CODE (V OF 1908) O. 21, R. 89.

It is competent to a mortgagee with possession to apply to set aside the sale of the property under O. 21 R. 89. 21 O.C. 400, Dist. 35 Bom. 288, Foll. (*Kanhaiya Lal, J. C.*) JAGMOHAN SINGH *v.* BACHCHA.
9 O. L. J. 50 : 25 O. C. 78 : 66 I. C. 929 : A. I. R. 1922 Oudh 146.

———O. 21, R. 89—*Deposit—Effect of.*

Where the mortgagor makes a deposit under R. 89 his equity of redemption subsists and the deposit has the effect of redeeming the mortgaged property. (*Daniels and Wazir Hasan, A. J.Cs.*) JAI KISHORI *v.* MUHAMAD ALI MOHAMAD KHAN, **60 I. C. 560 : 7 O. L. J. 620.**

———O. 21, R. 89—*Right to apply—Non-transferable occupancy holding—Purchaser—Deposit of decree amount.*

If a holding is a non-transferable one a purchaser under a money-decree cannot avail himself of S. 170 (3) of the B. T. Act, and the purchaser has no *locus standi* to pay in the money under O. 21, R. 89, C. P. Code, (*Bucknill, J.*) BISHUN DAYAL SINGH *v.* JAGDISH NARAYAN SINGH. **2 Pat. L. R. 12 : 80 I. C. 823 : A. I. R. 1924 Pat. 513.**

———O. 21, Rr. 89 and 92—*Deposit—Limitation—Parties to application—Notice*

Order 21, Rule 92, C.P. Code nowhere speaks of the auction-purchaser being made a party. It provides that no sale can be confirmed or set aside unless notice of application has been given to all persons affected thereby, and the rule means that the Court is incompetent to make any order at all, till such notice has been given. The duty of moving the Court to issue notices lies of course upon the applicant and all that the Court has to do is to give him reasonable opportunity for doing so. On default, the Court may dismiss the application, and there is no obligation upon the Court to issue a notice of its own motion but without the assistance of the applicant. The law requires that the application to deposit should be made within 30 days of the sale. But it does not impose any period of limitation for the issue of notice. (*Mullick and Bucknill, JJ.*) MT BIBI ZAINAB *v.* PARAS NATH. **4 P. L. T. 491 : 1 P. L. R. 361 : 2 P. 800 : 75 I. C. 430 : A. I. R. 1924 Pat. 37.**

———O. 21, R. 89—*Right to apply—Mortgagee a part owner.*

A mortgagee who has purchased equity of redemption in one portion of the mortgaged property, can apply under R. 89, to set aside the sale held under his own decree. (*Mullick and Macpherson, JJ.*) AULAD ALI *v.* ABDUL HAMID. **2 Pat. 715 : 74 I. C 102 : A. I. R. 1923 Pat. 490.**

———O. 21, Rr. 89 and 92 (2)—*Application under—Notice.*

Where an application is made under R. 89 it is necessary that notice must be given to the judgment creditor of the application and that a definite adjudication must be given as to whether the deposit can or cannot be made by those who desire to make it. (*Bucknill, J.*) KUNJA SINGH *v.* BARHO RAY.
4 P. L. T 247 : A I. R. 1923 Pat. 353.

———O, 21, R. 89—*Form of application—No prayer to set aside sale—Request to withhold payment.*

The judgment-debtor deposited the decree amount with the extra percentage under O. 21, R. 89, C.P.C., but in his application he prayed that it may not be paid to the decree-holder pending disposal of an appeal. Subsequently on the objection of the decree-holder he withdrew the prayer aforesaid. *Held*, that the object of the deposit was to set aside the sale, and though there was no specific prayer to that effect, the objection to the payment of the decree amount having been withdrawn, the court was bound to set aside the sale. 43 Bom. 735 ; 16 C.W.N. 904, Ref. (*Adami, J.*) RAM SIVENDRA NARAYAN OJHA *v* AWADH BIHARY SARAN. **4 P. L. T. 295 : 68 I. C. 629 : A. I. R. 1923 Pat. 159.**

C. P. CODE (V OF 1908), O. 21, R. 90—Appeal.

———O. 21, R. 89—*Executing Court refusing to stay a sale but not confirming a sale held—No appeal lies.*

Where the Subdivisional Court having refused to stay execution of a decree had already sold the property attached but the sale was not confirmed. *Held* that the District Court has no appellate jurisdiction in the matter, and the judgment-debtor's remedy is either by way of an application to the Subdivisional Court under Order 21, rules 89-91, or an application for revision to the High Court under S. 115 of the C. P. C. 38 Cal. 339 Foll. (*Godfrey, J.*) N. K. R. R. M. CHETTY FIRM *v.* M. SUBRAYA MUDALIAR.
3 Rang. 132 : 89 I. C. 300 : A. I. R. 1925 Rang. 271.

———O. 21, R. 90.

Appeal
Defective attachment,
Dismissal for Default.
Duty of Court.
Execution sale.
Fraud.
Limitation.
Material Irregularity.
Minor.
Notice.
Nullity.
Parties.
Publication of Sale.
Right to Apply.
Scope of.
Substantial Injury.
Under-valuation.

Appeal.

———O. 21, R. 90—*Appeal—Plaint in suit to set aside execution sale treated as application under R. 90—No second appeal lies from the order passed on the plaint.*

Where the plaint in a suit to set aside an execution sale was treated as an application under O. 21, R. 90, *Held*, that there was only one appeal allowed by law from the order passed in it. (*Greaves and Mukerji, JJ.*) NABIN CHANDRA *v.* BIPIN CHANDRA.
87 I. C. 555 : A. I. R. 1926 Cal. 229,

———O. 21, R. 90—*Appeal — Order dismissing objections to sale is not a decree.*

Order dismissing objections to sale under O. 90 is not a decree and no second appeal lies therefrom. (*Scott-Smith and Martineau, JJ.*) FARJA MAL CHANDI MAL *v.* MULCHAND MURARI LAL.
6 Lah. 250 : A.I. R. 1925 Lah. 624.

———O. 21, R. 90—*Appeal—Order under—Second appeal,*

There is no right of second appeal in the case of orders on applications under O. 21, R. 90. (*Das and Ross, JJ,*) BAIDYANATH SARKAR *v.* PRABHABATI DASI. **78 I. C. 315 : 5 Pat. L. T. 443 : A. I. R. 1924 Pat. 803.**

——— O. 21, R. 90—*Appeal—Order under.*

O. 43, R. 1 (1) expressly provides for an appeal against orders under O. 21 R. 90. (*Jwala Prasad and Foster, JJ.*) LACHMANLAL *v.* PADARATH SINGH.
4 P. L. T. 735 : 79 I. C. 594 : A. I. R. 1924 Pat. 346.

——— O. 21, R. 90—*Appeal—Failure to issue notice—Second appeal, if lies.*

Where an auction sale is sought to be set aside on

C. P. CODE (V OF 1908), O. 21, R. 90—Defective Attachment.

the ground that no notice was served as required by O. 21 R 22 but the Court finds no such notice was necessary, the order does not fall under S. 47 and hence there is no second appeal. (*Mullick and Bucknill, JJ.*) MAHADEO SINGH *v.* DHOBI SINGH.

2 Pat. 916 : 4 Pat. L. T. 721 : 1923 P. H. C. C. 283 : 74 I. C. 838 : A. I. R. 1924 Pat. 111.

Defective Attachment.

——O. 21, R. 90—*Defective attachment—Attachment ceasing owing to decree-holder's default—Sale held without fresh attachment—Application to set aside lies to executing Court under R.* 90.

Decree-holder's first application for execution was dismissed for default. He applied for sale of the property without applying for fresh attachment. Judgment-debtor applied for stopping the sale which was dismissed. He appealed. In the meantime the property was sold. *Held* : that judgment-debtor's remedy lay under R. 90 to apply to the executing Court for setting aside the sale.

Per *Madhavan Nair, J.*—Absence of attachment does not affect the jurisdiction of the executing Court to sell the property and the sale on that account is not null and void. (*Spencer and Madhavan Nair, JJ.*) S.R. SUBRAMANIA AIYAR *v.* L.A. KRISHNA AIYAR.

(1925) M. W. N. 887 : A. I. R. 1926 Mad. 211.

——O. 21, R. 90—*Defective attachment—Omission to attach*

The mere fact that there has been no attachment or that there is a defect in the attachment does not render an execution sale a nullity. It is a mere irregularity. 64 I. C. 420 : 18 M 437 : 30 M. 255, Ref. (*Hallifax, A. J. C.*) SHANKER RAO *v.* MANIK RAO.

68 I. C. 643 : A. I, R. 1923 Nag. 18.

——O. 21, R. 90—*Defective attachment—Material irregularity—Sale within* 30 *aays of the proclamation—Effect of.*

The failure to attach the property before sale although an irregularity under the C. P. Code does not render the sale null and void. 18 C. 188 : 34 C. 787 : 21 A. 311, Ref. The object of the attachment is to bring the property under the control of the Court with a view to preventing the judgment-debtor from alienating it and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree-holder. It is difficult to see why the absence of attachment which is primarily in the interests of the decree-holder can prejudice the rights of the judgment debtor who has due notice of the sale. A Court has jurisdiction to sell property without attachment. Where property is sold within 30 days of the proclamation the irregularity does not render the sale void without proof of the substantial injury thereby to the judgment-debtor. 21 C 66 Foll. (*Miller, C. J. and Mullick, J.*) RAJA WAZIR NARAIN SINGH *v.* BHIKHARI RAM.

4 U. P. L. R. (P) 100 : 68 I. C. 363 : 3 P. L. T. 765 : 1922 Pat. H. C.C.321 : 2 P. 207 : A. I. R. 1923 Pat. 45.

——O. 21, R. 90—*Defective attachment—Absence of attachment—Sale not a nullity—Application to set aside.*

An execution sale held without attachment of the property or with a defective attachment does not render the sale void but materially irregular. An application to set aside the sale on that ground is governed by

C. P. CODE (V OF 1908), O. 21, R. 90—Execution sale.

S. 47, C. P. Code, and not by O. 21, R. 90. (*Lentaigne J.*) MA PWA *v.* MAHOMED TAMBI.

1 R. 533 : 77 I. C. 368 : A. I. R. 1924 Rang. 124.

Dismissal for default.

——O. 21, Rr. 90 and 92 and O. 43, R. (1) (j)—*Dismissal for default—High Court cannot revise the order dismissing an application under R.* 90 *even for default as it is to confirm the sale under R.* 92 *and is appealable.*

The effect of the dismissal of an application under r. 90 even for default is to confirm the sale under R. 92 and hence an appeal lies against the order and the High Court has no jurisdiction to interfere with the order in revision. 9 C. W. N. 25 ; 25 C. L. J. 163 Foll. (*Suhrawardy and Chotzner, JJ.*) NARENDRA NATH CHATTERJI *v.* RAKHAL DAS TARAFDAR.

41 C. L. J. 286: 79 I. C. 351 : A. I. R. 1925 Cal. 510.

——O. 21, R. 90—*Dismissal for default.*

Order dismissing for default, an application under O. 21, R. 90 for setting aside an execution sale is appealable. (*Pearson and Graham, JJ.*) DEBENDRA NARAYAN SINGH *v.* NARENDRA NARAYAN SINGH.

80 I. C. 678 : A. I. R. 1925 Cal. 360.

——O. 21, R. 90 and O. 9, R 9—*Dismissal for default.*

O. 9, R. 9, applies to an order dismissing for default an application under O. 21. R. 90. (*Lindsay, A. J. C.*) GOURI *v.* HINGA.

59 I. C. 575 : 23 O. C. 349.

Duty of Court.

——O. 21, R. 90—*Duty of Court—Setting aside sale.*

A Court is not competent to set aside an execution sale without inquiring into the objections made. The irregularities set up must be proved and the court must also be satisfied that the person applying to have the sale set aside has sustained substantial injury by reason of such irregularity or fraud, (*Martineau, J,*) ANUP CHAND *v.* MT. KAWAL KAUR. **A. I. R. 1924 Lah 592**

——O.21, R.90--*Duty of Court—Court disregarding equities in determining order in which properties should be sold, the sale can be set aside for irregularity.*

The decree holder has primarily the right to choose the order in which the properties should be sold and the Court ultimately has the right to determine the order of the properties to be sold according to the equities affecting the parties. Where the Court disregards the equities, the sale is liable to be set aside for irregularity. (*Jwala Prasad and Foster, JJ.*) RAGHUNATH SAHAI *v.* DAROGA SAHU.

78 I. C. 609 : A. I. R. 1925 Pat. 148.

Execution Sale.

——O. 21, R. 90 and O. 23, R. 3—*Execution sale—Sale confirmed—Auction-purchaser and plaintiff agreeing to have sale set aside—Compromise merely filed—Decree-holder not a party--Case for setting aside sale dismissed for default—Plaintiff cannot sue for land.*

The plaintiff purchased by private sale, a non-transferable occupancy holding from the tenant for the time being. The holding was purchased by the defendants in execution of a decree for rent in a suit by the landlord against the original tenant. After the sale was confirmed by the Court the plaintiff and the defendant entered into a compromise by which the defendants agreed to give up the sale on taking money. The compromise was filed and the sale was prayed to be set aside. The landlord was not a party to the compromise. The petition for setting aside the sale was dismissed for plaintiff's default. The Court passed no order on the compromise. *Held* : that the Plaintiff was not entitled to sue for the holding. (*Suhrawardy*

C. P. CODE (V OF 1908), O. 21, R. 90—Execution Sale.

and Duval, JJ.) BHUPENDRA NATH LASKAR *v.* RAI CHARAN PURKAIT.

85 I. C. 529 : A. I. R. 1925 Cal. 779.

———O. 21, R. 90—*Execution Sale—Absence of application under R. 90 precludes defence of invalidity of sale in a suit by a non-transferable occupancy tenant—C.F. C., O. 21 R. 92.*

A tenant of a non-transferable occupancy holding cannot resist an ejectment suit by the purchaser, who is not the landlord, in auction in execution of a money decree on the ground that he did not know of the same which was brought about by a suppression of notices where he failed to apply under O. 21, R. 90. (*Walmsley and Suhrawardy, JJ.*) JAGNESWAR SIKDAR *v.* KAILASH MANDAL. **28 C. W. N. 821 : 78 I. C. 126 : A. I. R. 1925 Cal 81.**

———O. 21, R. 90—*Execution sale—The proper remedy to set aside an auction sale after proclamation notifying collusive decree on prior charge against judgment-debtor which decree is subsequently set aside is not by way of applying under O. 21, R. 90, but by suit.*

When an execution proceeding was pending and certain property of the judgment-debtor's was about to be sold, a collusive decree was passed *ex parte* against the judgment-debtor, declaring a pre-existing charge on the property. In the sale proclamation in connection with the earlier execution proceedings, this decree was notified, together with a rider that the decree-holder objected to the later decree as fraudulent. On account of the notification of the later decree in the sale proclamation, possible bidders were kept away from venturing to purchase the property and in the end the property was knocked down to the judgment-debtor's brother at a low price. Subsequently the judgment debtor had that later *ex parte* decree annulled and the plaintiff in that suit allowed the suit to be dismissed. Thereupon the judgment-debtor's creditor instituted a suit to vacate the auction-sale in favour of the judgment-debtor's brother on the ground of fraud and collusion.

Held, that no fraud existed in conducting and publishing the sale, that therefore the plaintiff's remedy was not by way of application under O. 21, R, 90; but that the second decree having been passed and annulled by fraud and collusion the plaintiff was entitled to have the sale set aside, and that a resale of the property after proper proclamation was necessary. (*Phillips and Venkatasubba Rao, JJ.*) VENKATA RAMA AIYAR *v.* PARAMASIVA AIYAR.

78 I. C. 108 : A. I. R. 1925 Mad 325.

———O. 21, R 90—*Execution sale—Bidders may legally combine not to bid over a certain figure.*

Per *Devadoss, J.* :—It is not illegal for a number of intending bidders to arrange among themselves not to bid above a certain figure. (*Oldfield and Devadoss, JJ*) P. GNANAMMA *v.* K. KRISHNA REDDI. **46 M. 736 : (1923) M W. N. 463 : 75 I. C. 369 : A. I. R. 1924 Mad 217 : 45 M. L. J. 263.**

———O. 21, R. 90—*Execution sale—Defect in—Onus of proof.*

Onus of proving defect in execution sale is on party assailing it. (*Jwala Prasad and Foster, JJ.*) RAGHUNATH SAHAI *v.* DAROGA SAHU.

78 I. C. 609 : A. I. R. 1925 Pat. 148.

———O. 21, R. 90—*Execution sale—What passes under—Even usufructuary mortgagee is not affected by sale in execution of money decree.*

Where the decree under execution is a money decree, then only the right, title and interest of the judgment-debtor will be sold and the interest of mortgagees including usufructuary mortgagees will subsist unaffected by the sale. (*Foster, J.*) EKNATH PANDEY *v.* SINGESHWA NATH. **5 P. L. T. 250 :**

C. P. CODE (V OF 1908), O. 21, R. 90—Fraud.

76 I. C. 168 : A. I. R. 1924 Pat. 785.

———O. 21, R. 90—*Execution sale—Setting aside—Remedy by suit—Decree against member of joint Hindu family—Sale of his share of the property in execution.*

Where in execution of a decree obtained against some members of a joint Hindu family, the property of the family is sold, it is open to any other member of the family having an interest in the property and not being bound by the decree, to institute a suit to set aside the sale and recover possession of the property without applying to set aside the sale under O. 21, R. 90 of the C. P. Code. (*Das and Kulwant Sahay, JJ.*) MEDNI PRASAD SINGH *v.* NAND KESHWAR PRASAD SINGH. **2 P. 386 : A. I. R. 1923 Pat. 451.**

———O. 21, R. 90—*Execution sale—Application to set aside—Deposit of decree amount—Deposit subject to condition subsequently withdrawn—Effect.*

On the 22nd December 1920 a sale of a certain property took place in execution of a certain decree obtained by the opposite party as against the petitioners. On the 21st January 1921 the petitioners applied for setting aside the sale under the Provisions of O. 21, R. 90. Civil Procedure Code. On the 23rd January 1921 the parties entered into a compromise, the terms of the compromise being that if the judgment-debtor paid the sum of Rs. 2,695 to the decree-holders on or before the 23rd September 1921 the sale would be set aside, but that if the sum of Rs. 2,695 was not paid to the decree-holders within the time allowed, the application for setting aside the sale would stand dismissed and the sale would be confirmed. On the 19th September 1921 the petitioners deposited the sum of Rs. 2,695 in Court and invited the Court to set aside the sale. The petitioners also applied to the Court that the money should not be paid to the decree-holders until the decision of a regular suit which the judgment debtors were about to institute against the decree-holders. It appears that such a suit was infact instituted on the 24th September 1921. On the 23rd September 1921 the decree-holders filed a petition praying that the sale should not be set aside as the deposit made by the judgment-debtors was a conditional deposit which had in effect prevented them withdrawing the money from Court. *Held* the deposit was a conditional one. It is one thing to make the deposit subject to one condition; it is another to make the deposit and to apply to the Court that the party entitled to withdraw the money from Court should not withdraw it until a particular decision is reached in a particular case. The judgment debtors through their leaders intimated to the Court that they would not object to the money being withdrawn by the decree-holders, and, as a matter of fact, they took up that position before the decree-holders made any application for withdrawal of the money from Court. Consequently the deposit was valid. (*Das and Macpherson, JJ.*) SHAM SUNDER SINGH *v.* MUSHAHEB LAL.

2 P. 434 : 72 I. C. 907 : A. I. R. 1923 Pat. 418.

Fraud.

———O. 21, R. 90—*Fraud—Suit to set aside sale—Fraud not specifically alleged—Suit, if maintainable.*

Where the plff., a purchaser in execution of a decree, sued to set aside the execution sale on the ground that he was misled by the sale proclamation which did not show any encumbrance on the property and that subsequent to the purchase it was discovered that the encumbrances on the property exceeded its value, *Held* per (*Walsh and Lindsay, JJ. contra.*) that as there was no provision in the Code to bar the suit it was maintainable on the principles of justice, equity and good conscience although fraud was not specifically alleged

C. P. CODE (V OF 1908), O. 21, R. 90—Fraud.

in the plaint, an inference of fraud having been suggested by the allegations therein. (*Walsh and Lindsay, JJ.*) GAJADAR PRASAD *v.* MD. ABDUL MAJID. **63 I. C. 425 : 19 A. L. J. 530.**

——— O. 21, R. 90—*Fraud—Acting of the bidder in such a way as to prevent best price being obtained does not amount to fraud.*

The charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price being obtained does not of itself amount to a charge of fraud nor will proof of such concert invalidate the sale to him. 23 Mad. 207, Foll. (*Fawcett and Madgavkar, JJ.*) DODBASAPPA DHARMAPPA *v.* PRADHANAPPA VENKAPPA. **27 Bom. L. R. 1318 : A. I. R. 1926 Bom. 33.**

——— O. 21, R. 90—*Fraud—A judgment-debtor allowing confirmation of sale can set up fraud in a suit by auction-purchaser for possession.*

It cannot be said that a defence is barred because a suit might be barred, or that a judgment-debtor, who has allowed the auction sale to be confirmed, cannot subsequently set up a defence of fraud. (*Fawcett and Madgavkar, JJ.*) DODBASAPPA DHARMAPPA *v.* PRADHANAPPA VENKAPPA. **27 Bom. L. R. 1318 : A. I. R. 1926 Bom. 33.**

——— O. 21, R. 90—*Fraud—Process fraudulently suppressed—Fact of sale not known to plaintiff till a few days before his filing suit to set aside sale—Plaintiff was held entitled to benefit of Limitation Act, S. 18—Limitation Act, S. 18.*

When a judgment-debtor makes an application to have an execution sale set aside under O. 21, R. 90, after the expiry of 30 days he must bring his case within S. 18 of the Limitation Act and to enable him to do so, it is not enough for him to show that the execution proceedings were irregular and fraudulent, but he must carry the fraud further and show that the existence of his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser. 1 C. W. N. 67, Foll. But in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought. 17 Bom. 341, Foll. Where in a suit to set aside an execution sale it was found that processes in connection with the execution case had been fraudulently suppressed and that the plaintiffs came to know of the fraudulent sale only seven or eight days before the institution of the suit, *Held*, that it was not an unreasonable inference to draw that as a matter of fact the fraud that had been committed in the execution proceedings continued and by reason of its continuing influence the plaintiffs were kept out of the knowledge of the sale, and the plaintiffs were entitled to the benefit of S. 18 of the Limitation Act. (*Greaves and Mukerji, JJ.*) NABIN CHANDRA *v.* BIPIN CHANDRA. **87 I. C. 555 : A. I. R. 1926 Cal. 229.**

——— O. 21, Rr. 90 and 92—*Fraud or material irregularity—Suit to set aside sale.*

After an execution sale has been confirmed under R. 92, no suit lies to set it aside on the ground of fraud or material irregularity. 38 Mad. 1076 Cons. and Dist. (*Abdur Rahim and Odgers, JJ.*) KALINADHAHOTLA *v.* MARTA APPAYYA SASTRI. **44 Mad. 351 : 13 L. W. 16 : (1921) M. W. N. 9 : 62 I. C. 203 : 29 M. L. T. 108 : 40 M. L. J. 55.**

——— O. 21, R. 90—*Fraud—Clerk of decree-holder's vakil purchasing at auction sale without informing decree-holder—Property sold for less value in consequence—Sale was set aside.*

Where the purchaser at an auction sale was the clerk of the pleader who represented the decree-holder in the suit, *held*, that he was in a position of active confidence towards the decree-holder, that his purchase without informing the decree-holder of his intention was a gross abuse of confidence and amounted to a fraud on the decree-holder and therefore the decree-holder was fully entitled to have the sale set aside. 1923 M. 635, Ref. (*Daniels, A. J. C.*) ALI ABBAS *v.* NARAIN DAS. **12 O. L. J. 321 : 87 I. C. 997 : 2 O. W. N. 297 : A. I. R. 1925 Oudh 381.**

——— O. 21, R. 90—*Fraud—Low price fetched.*

The mere fact that at an auction sale a property fetches a smaller price than it is worth raises no presumption of fraud. (*Ashworth, A. J. C.*) SHER KHAN *v.* MISRI LAL. **89 I. C. 107.**

——— O. 21, R. 90—*Fraud is essentially different from irregularity.*

Fraud is essentially different from irregularity in the conduct of sale. Where there was gross under-valuation of the property sought to be sold and the processes were not served on the judgment-debtor, *held*, that these facts alone did not by themselves constitute fraud. 16 C. W. N. 894, Foll. (*Das, J.*) BAJRANG PRASAD SINGH *v.* MT. SONIJHARI, KUER. **6 P. L. T. 567 : 85 I. C. 622 : A. I. R. 1925 Pat. 521.**

——— O. 21, R. 90—*Fraud—Limitation Act, S. 18, applies to applications under R. 90—Limitation Act, S. 18.*

The starting point for limitation is the date of the knowledge of fraud committed by the decree-holder who brought about the sale in fraud of the judgment-debtor. S. 18 applies to applications under R. 90. (*Jwala Prasad, J.*) THAKUR MAHTON *v.* JHAMAN MAHTON. **5 P. L. T. 200 : 80 I. C. 761 : A. I. R 1924 Pat. 496.**

——— O. 21, R. 90—*Fraud—Specific fraud must be proved.*

It is open to a Court to find merely upon circumstantial evidence that there has been fraud on the part of a particular party, but the finding must be based on legal evidence. It is not sufficient to make a general allegation that because there was no service of sale process or because there was irregularity in the service therefore the decree-holder must necessarily have been responsible and guilty of fraud. (*Mullick and Foster, JJ.*) KISHUNDEO NARAYAN *v.* RAMREJHAN SINGH. **1923 P. H. C. C. 298 : 5 P. L. T. 61 : 83 I. C. 747 : A. I. R. 1924 Pat. 67.**

——— O. 21, R. 90—*Fraud—Execution sale—Setting aside—Auction purchaser not party to fraud—Limitation—Extension of time.*

It is open to a Court to set aside an execution sale on the ground of fraud even though it is not proved that the auction-purchaser was a party to the fraud. 18 I. C. 715, Foll.; 24 W. R. 260, Dist. Where a judgment-debtor applying to set aside a sale proved fraud in the conduct of the sale and also the fact that he had been kept out of knowledge of the sale, *held*, that S. 18 of the Limitation Act applied to his case and the *onus* was on the other side to show that the application was barred as having been filed more than 30 days after he had knowledge of the sale. The *onus* is on the party guilty of fraud to show that its effect had been removed. 17 B. 341, Rel. 1 C. W. N. 67 ; 2 Pat. L. T. 401 ; 20 M. 10 ; 38 M. 1076, Ref. (*Ross, J.*) MAHABIR RAM *v.* RAM BAHADUR DUBEY. **4 P. L. T. 306 : 72 I. C. 625 : A. I. R. 1923 Pat. 435.**

——— O. 21, R. 90—*Fraud—Mis-statement by a decree-holder in the sale proclamation of the value of*

C. P. CODE (V OF 1908), O. 21, R. 90—Fraud.

the property—May amount to fraud—Onus of proof—Finding of fact.

A wilful mis-statement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence in particular cases to justify an inference of fraud. Where certain facts are found and an inference of fraud is drawn based upon facts so found it is open to the Court in second appeal to consider whether as a matter of law such an inference is justified by the facts found. If, however, the first appellate Court, which is the ultimate judge of fact, refuses to draw an inference of fraud upon the facts found by it, that decision cannot be questioned in second appeal unless the facts found necessarily amount to fraud. The mis-statement of value in a sale proclamation does not necessarily amount to fraud. (*Miller, C. J. and Mullick, J.*) RAMDHARI CHAUDHURY *v.* DEONANDAN PRASAD SINGH. **3 Pat. L. T. 501 : 1 P. L. R. 18 : 4 U. P. L R. (Pat.) 71 : 2 P. 65 : 1922 P. H. C. C. 269 : A. I. R. 1922 Pat. 507**

——**O. 21, R. 90**—*Fraud—Auction sale—Limitation to set aside.*

Where the sale and the irregularity affecting it has by the fraud of the decree-holder or other parties to the sale been kept concealed from the judgment debtor, he is entitled to apply under R. 90 whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him. There is nothing in O. 21, R. 90 which limits the filing of an application to the period prior to confirmation of the sale. (*Adami, J.*) RAM PERSHAD LALL *v.* CHAMARI SINGH. **70 I. C. 675 : A. I. R. 1922 Patna. 422.**

——**O. 21, R. 90**—*Fraud in conducting sale—Petition to set aside—What to be proved.*

A person alleging fraud must state in detail the fact constituting fraud. A vague allegation of fraud cannot be accepted. A judgment-debtor applying to set aside an execution sale on the ground of fraud must clearly state in his petition as to how he was kept from the knowledge of the execution proceedings and the sale, and how his fraud was practised and how he came to know of the sale. Mere want of diligence is not fraud. (*Jwala Prasad and Adami, JJ.*) BABU DAS NARAYAN SINGH *v.* MUHAMMAD YUSUF *alias* BHEKHO. **3 U. P. L. R. (Pat.) 33 : 2 P. L. T. 401: 61 I. C. 823 : 6 P. L. J. 319 : 1921 P. H. C. C. 181.**

——**O. 21, R. 90**—*Irregularity not leading to loss—Sale cannot be set aside.*

Where an illegality at an execution sale has not resulted in causing any substantial loss, the sale cannot be set aside. (*Mullick and Ross, JJ.*) AMRIT LAL SEAL *v.* JAGAT CHANDRA THAKUR, **4 Pat. 696.**

Limitation.

——**O. 21, R. 90**—*Limitation—Real purchaser not known—Effect of adding him after limitation.*

Where the person who bids at an auction sale did not disclose he was acting as an agant for another and as a result the judgment-debtor in applying to set aside the sale impleaded originally only the ostensible purchaser, but on knowing the facts impleaded the principal also, but after the period of 30 days allowed by law, the application is not time-barred. (*Stuart, J.*) MT. BHAGGO *v.* MATA PRASAD. **76 I. C. 507 : A. I. R. 1923 All. 462.**

——**O. 21, R. 90**—*Limitation—Setting aside on the ground of fraud—Starting point.*

The time for an application to set aside an execution sale on the ground of fraud begins to run not from the date when the applicant becomes aware of the sale but from the date the applicant gets a definite knowledge as to fraud, and the burden of proving that the application is time-barred is on the other side. (*Teunon and Asutosh Chaudhury, JJ.*) BHUSHANMAND DAS *v.* PRAFULLA KRISTA DEB. **60 I. C. 801 : 48 Cal. 119.**

C. P. CODE (V OF 1908), O. 21, R. 90—Material Irregularity.

——**O. 21, R. 90**—*Limitation—Sale voidable and not void.*

A sale which is bad on the ground of irregularity or fraud and thus liable to be set aside is voidable only and an application to set it aside must be made within thirty days of the sale. (*Das, J.*) GHANASHAM *v.* BASDEB JHA. **60 I. C. 529 (2): 3 U. P. L. R. 27 (Pat.)**

Material Irregularity.

——**O. 21, R. 90**—*Material irregularity—Omission of land revenue in sale proclamation.*

It is wrong to hold that the omission of the land revenue is immaterial for the purposes of R. 90 which entitles the person injured to apply on the ground of a material irregularity. (*Lord Buckmaster, J.*) BALIRAM SINGH *v.* RAI BAHADUR SETH NARASINGHDAS. **L. R. 4 P. C. 197 : 18 L. W. 137 : 28 C. W. N 593 : 33 M. L. T. 275 : (1923) M. W. N. 714 : 75 I. C. 546 : 10 O. & A. L. R. 353 : A. I. R. 1923 P. C. 93 : 45 M. L. J. 403 (P. C.)**

——**O. 21, R. 90**—*Material irregularity—Execution of mortgage decree for amount of costs only—Sale of share of mortgaged properties.*

Where a mortgage suit by B against A and D was dismissed with costs against A and decreed against D and in execution of his decree for costs A attached the decree against B and having got himself substituted as attaching decree-holder executed his decree, and a share of the mortgaged properties was sold. *Held*, that the sale though irregular was not void but could be set aside by proper proceedings. (*Chatterjee and Panton, JJ.*) KAMINI KUMAR BHOUMIK *v.* PROTAP CHANDRA. **66 I. C. 608 : 25 C. W. N. 400.**

——**O. 21, R. 90**—*Material irregularity—Execution sale held on a day other than that advertised is such.*

Where a sale in execution of a decree was held neither on the day originally advertised nor on the day to which it had been adjourned, but on some third day, *held*, it was a material irregularity in the conduct of the sale. 6 C. W. N. 44, Foll. (*Mookerjee and Panton, JJ.*) HARI SADHAN ROY *v.* SHIB GOPAL MITRA. **65 I. C. 746 : 35 C. L. J. 140.**

——**O. 21, R. 90**—*Material irregularity—Failure to issue notice for preparing sale proclamation.*

Failure to issue notice to the judgment-debtor drawing up the proclamation of sale under O. 21, R. 66 is an irregularity in conducting or publishing a sale within the meaning of O. 21, R. 90. (*Shadi Lal and Le Rossignol, JJ.*) JAGANNATH *v.* DAUD. **4 Lah. 243 : 75 I. C. 103 : A I. R. 1923 Lah. 592.**

——**O. 21, R. 90**—*Material irregularity—Omission to state value in sale proclamation—Sale when liable to be set aside.*

The mere omission to state the estimated price of the property to be sold is not a material irregularity when it is shown that the property was visible to all the purchasers who were thus in a position to frame their own estimates. Even if there had been a material irregularity in the publication or conduct of the sale that would not justify interference in the absence of proof that substantial injury to the petitioners had resulted therefrom. (*Le Rossignol, J.*) MAHOMED NIZAM-UD DIN *v.* AMIN-UD DIN. **4 Lah. L. J. 441 : 67 I. C. 885 : A. I. R. 1922 Lah. 35.**

——**O. 21, R. 90**—*Material irregularity—Madras*

C. P. CODE (V OF 1908), O. 21, R. 90—Material Irregularity.

Civil Rules of Practice, R. 153—Non-observance of formality required by R. 153 is not an irregularity in sale.

The rules only require that the other parties should be given notice of the application by the decree-holder for leave to bid. The affidavit is for the Court's information, and the decree-holder is not required by the rules to supply the other parties with a copy of it. Where there were three applications by the decree-holder on different occasions for leave to bid, but the affidavit required by R. 153 of the Civil Rules of Practice was not attached to the first two applications but only to the last one, *held*, that this did not amount to any irregularity in publishing or conducting the sale. (*Spencer and Odgers, JJ.*) KORAPALU HENGSU *v.* GOURI HENGSU. **21 L. W. 521 : 88 I. C. 228 : A. I. R. 1925 Mad. 729.**

——**O. 21, Br. 90 and 22**—*Material irregularity—Setting aside—Major defendant treated as minor—Knowledge of proceedings—Estoppel.*

One of the defts. who were the judgment-debtors under a decree attained majority after the date of the decree and before proceedings in execution for sale of the property were taken. He was nevertheless represented on the record as a minor and the sale was held with him on the record as a minor. On an application by him to set aside the sale on that ground, *held*, that the fact that he knew of the proceedings throughout afforded an answer to the objection even though the decree-holder was aware of his majority. 21 M. 167 : 6 L. W. 272 ; 39 M. 1031, Foll. (*Oldfield and Venkatasubba Rao, JJ.*) RADHAKRISHNASWANI NAIDU *v.* ANNAMALAI CHETTIAR. **31 M. L. T. 122 (H. C.) : 15 L. W. 643 : (1922) M. W. N. 655 : A. I. R. 1922 Mad. 301 : 43 M. L. J. 92.**

——**O. 21, R. 90**—*Material irregularity—Failure to give notice to judgment-debtor after his attaining majority, if merely an irregularity in publishing sale.*

Failure to give notice to judgment-debtor before sale even though he attained majority between the dates of decree and execution is merely an irregularity in publishing sale. (*Spencer and Krishnan JJ.*) K. KAMAYYA *v.* K. RAMAMMA. **(1922) M.W.N. 176 : 16 L. W. 934 : A. I. R. 1922 Mad. 95.**

——**O. 21. R. 90**—*Material irregularity—Proclamation of sale not mentioning place of sale.*

Where in a sale by the Official Referee the sale proclamation did not mention the place of sale but it was found that the sale was well attended and no possible bidder kept away on account of the non-mention of the place of sale. *Held*, that the omission was only an irregularity and as the parties were not prejudiced thereby it is no ground for setting aside the sale. (*Wallis, C. J, and Krishnan, J.*) TULJARAM ROW *v.* RAMACHANDRA RAO. **14 L. W. 515 : 68 I. C. 916 : (1921) M. W. N. 736 · 41 M. L. J. 465.**

——**O. 21, R. 90**—*Material irregularity—Sale held at a place different from that advertised.*

Where in publishing a sale proclamation the process server substituted for the selling officer and place of sale fixed by the Court in the sale proclamation, a different selling officer and a place of sale and thus the sale proclamation as framed by the Court was never published in the village, the non-publication of the sale proclamation is an illegality which invalidates the proceedings and consequently the sale is a nullity. Per *Seshagiri Aiyar, J.*—Where a substantial provision of law has been violated and that has the effect of not attracting persons who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted. 16 Cal. 794, Foll. (*Oldfield and Seshagiri Aiyar, JJ.*) JAYARAMA AIYAR *v.* VRIDHAGIRI AIYAR. **44 M. 35 : (1920) M. W. N. 490 : 59 I. C. 167 : 12 L. W. 182 : 39 M. L. J. 188.**

——**O. 21, R. 90**—*Material irregularity.*

The omission to notify existing incumbrances on the property sold entitled the auction purchaser to set aside the sale under O. 21, R. 90, C.P. Code. (*Batten, J. C.*) SHIV PRASAD *v.* SANTOOJI. **18 N. L. R. 98 : 65 I. C. 375 : 5 N.L.J. 147 : A.I.R. 1922 Nag. 113 (2).**

——**O. 21, R. 90**—*Material irregularity—Incumbrance not entered in sale proclamation—Sale officer announcing it at decree holder's request at the sale—Property sold for trifling amount—Substantial injury was held to be caused.*

Where an incumbrance of Rs. 27,000 was announced at the time of the sale by the sale officer at the instance of the decree-holder, though previous to this the decree-holder had applied to the Court seized of the execution proceedings for an order of incumbrance being shown in the sale proclamation, and the application had been rejected, and thereby decree-holder did purchase the property for a trifling sum : *Held*, that there was material irregularity causing substantial injury to judgment-debtor within R. 90. (*Dalal and Wazir Hasan, A. J. Cs.*) SITAPAT SINGH *v.* MAHABIR PRASAD. **12 O. L. J. 331 : 88 I. C. 532 : 2 O. W. N. 315 : A.I.R. 1925 Oudh 424.**

——**O. 21, R. 90**—*Material irregularity—Property attached during judgment-debtor's lifetime but sold after his death—Legal representatives not brought on record—Sale is irregular and not void.*

Where the property was attached in the lifetime of the judgment-debtor but was sold after his death, *held*, that the failure to bring the legal representatives of the judgment-debtor on the record did not make the sale null and void. It only amounted to an irregularity which would have entitled the legal representatives of the judgment-debtor to have the sale set aside if they had taken proper steps within the period of limitation prescribed by the Statute. Case-law discussed. (*Ross and Kulwant Sahay, JJ.*) BARHAMDEO NARAYAN PANDE *v.* SALIGRAM SAHAY PANDE. **6 P. L. T. 67 : 86 I. C. 141 : 1925 P. H. C. C. 53 : A I. R. 1925 Pat. 384.**

——**O. 21, R. 90**—*Material irregularity—Portion of property attached sold—If vitiates sale.*

Where the property sold is only a portion of what was attached and proclaimed for sale, there is no irregularity vitiating the sale. (*Das and Ross, JJ.*) BAIDYANATH SARKAR *v.* PROBHABATI DASI. **5 Pat. L. T. 443: 78 I. C. 315 : A. I. R. 1924 Pat. 803.**

——**O. 21, R. 90**—*Material irregularity—Decree for rent—Sale of tenure—Liability of purchaser for rent prior to purchase—Statement in sale proclamation of liability—Effect.*

A landlord cannot sue an auction purchaser of a tenure for arrears of rent due prior to the date of his purchase. Hence a statement in a sale proclamation of a tenure that the purchaser will be liable to pay such arrears amounts to a material irregularity and if it results in substantial loss the sale can be set aside. (*Mullick and Bucknill, JJ.*) MAHOMED JAWAR HUSAIN *v.* MAHARAJ KUMAR GOPAL SARAN NARAIN. **80 I. C. 223 : 2 P. L. T. 248.**

——**O. 21, R. 90**—*Material irregularity in conducting sale is ground for setting aside sale.*

Two secured creditors had obtained separate decrees for sale of the judgment-debtor's property without making each other parties. By arrangement with the

C. P. CODE (V OF 1908), O. 21, R. 90—Minor.

Nazir a single sale was arranged to be held in execution of both the decrees. But, after proclamation, merely mentioning the charge of one of the decree-holders, in execution of the decree in favour of the other creditor. the Nazir effected one sale in execution of both the decrees. *Held*, that there was a material irregularity in the sale and that it must be set aside. (*Madgavkar, A. J. C.*) RUSTAMJI *v.* PEROZSHAW.

A. I. R. 1925 Sind 101.

Minor.

——O. 21, R. 90—*Minor—No guardian* ad litem *in execution proceedings—Irregularity.*

O. 21, R. 90 is applicable to applications for setting aside a sale on the ground that in the execution proceedings the minor had no guardian *ad litem.* (*Sanderson, C. J and Richardson, J.*) FANI BHUSAN *v.* SURENDRA NATH. **64 I. C. 25 : 35 C. L. J. 9.**

Notice.

——O. 21, R. 90—*Notice—Absence of date for sale.*

Sale on a day never fixed for it and of which the judgment-debtor could have no notice is a nullity and could be set aside in revision. 39 Cal. 26, (P. C.) Dist. (*Greaves and Chatravarti, JJ.*) MOTAHAR HOSSAIN *v.* MOHAMMAD YAKUB. **40 C. L. J. 311 : 84 I. C. 700 : A. I. R. 1925 Cal. 201.**

——O. 21, R. 90—*Notice—Fresh notice is not necessary while making fresh proclamation.*

No fresh notice is necessary when a fresh proclamation is to be made under R. 69 (2). The issue of notice enjoined by sub-r. (2) of R. 66 relates to a case where a proclamation is to be drawn up. (*Wazir Hasan and Simpson, A. J. Cs.*) AHMED HASAN *v.* KODI LAL. **90 I. C. 351 : A. I. R. 1926 Oudh 76.**

——O. 21, R. 90—*Notice—Absence of.*

An order setting aside an execution sale under R. 90 without giving proper notice to the parties as required by R. 92, is without jurisdiction and is of no effect. (*Jwala Prasad, J.*) BHIKHAN GIR GOSSAIN *v.* JALPADAT JHA. **62 I. C. 113 : 2 Pat. L. T. 270.**

Nullity.

——O. 21, R. 90—*Nullity—Sale held in spite of injunction—Sale is nullity.*

Where the sale did take place in spite of injunction granted by a competent Court, *held*, that the sale amounted to a nullity. (*Dalal and Wazir Hasan, A. J. Cs.*) SITAPAT SINGH *v.* MAHABIR PRASAD. **12 O. L. J. 331 : 88 I. C. 532 : 2 O. W. N. 315 : A. I. R. 1925 Oudh 424.**

Parties.

——O. 21, R. 90—*Parties—Auction purchaser is a necessary party.*

An application to set aside an execution sale will not be entertained if the auction-purchaser who is a necessary party to the application, is not made a party within the time allowed by law for making the application. (*Ross, J.*) SUMITRA KUER *v.* DAMRI LAL. **62 I. C. 61 : 2 Pat. L. T. 336.**

Publication of sale.

——O. 21, R. 90—*Publication of sale—Defects in—Application to set aside sale.*

Where the objections of a judgment-debtor to a sale held in execution are such as had been or might have been taken in the proceedings for framing the proclamation of sale of which the judgment-debtor had notice, the Court will not set aside the sale on these grounds. Under O. 21, R. 67 read with O. 21, R. 54, C. P. Code, it is necessary that an execution sale of an enfranchised shrotriem village should be published

C. P. CODE (V OF 1908), O. 21, R. 90—Right to apply

at the Collector's Office. The judgment-debtor applied to set aside an execution sale on the ground that the sale was not proclaimed in the village or published at the Collector's Office. The Court dismissed the application holding that the same objections had been inquired into and decided against the petitioner at an earlier stage of the execution proceedings before the sale was concluded. *Held*, that there was no provision of law authorising the investigation of the objections in question before the conclusion of the sale and that the previous decision was not *res judicata.* The application was remanded for an enquiry on the merits. (*Oldfield and Devadoss, JJ.*) PAMIDIMARRI GANAMMA *v.* KETTIREDDI KRISHNA REDDI.

46 Mad. 736 : (1923) M. W. N. 463 : 75 I. C. 369 : A. I. R. 1924 Mad. 217 : 45 M. L. J. 263.

——O. 21, R. 90—*Publication of sale—Material irregularity in—Inadequate price realised—Setting aside of sale was held to be right.*

Where there was collusion between the judgment-debtors and the decree-holders, there had been material irregularity in the sale proclamation ; the value of the property as stated in the sale proclamation was grossly inadequate and the price fetched at the sale was also inadequate. *Held*, that the setting aside of the sale was right. (*Kulwant Sahay, J.*) SURAJ NARAIN MISSER *v.* HARDWAR SINGH.

6 P. L. T. 295 : 87 I. C. 381 : A. I. R. 1925 Pat. 461.

Right to Apply.

——O 21, R 90—*Right to apply—Auction-purchaser can apply under R.* 90.

An auction-purchaser is entitled to apply under O. 21, R. 90, he being included in the expression "a person whose interest is affected by the sale."

Per *Walsh, J.*—An auction-purchaser cannot bring a suit to set aside a sale on the ground of material irregularity in the publishing or conduct of the sale resulting in substantial loss to him.

Per *Sulaiman, J.*—The right of the auction-purchaser to apply under R. 90 does not mean that the door is open for a general enquiry into the title of judgment-debtors. To do so would be to call upon decree holders to prove the title of their judgment-debtors in the property which they are seeking to sell. If the decree-holder, in a *bona fide* belief that the interest which he wants to sell vests in his judgment-debtor and without any fraud, misrepresentation or concealment, puts up that interest for sale, it cannot be said that there has been a material irregularity in the omission to disclose the real fact, if a subsequent enquiry were to disclose that the judgment-debtor did not really own the entire interest which was put up for sale. The only case where a question of title can be gone into in these summary proceedings would be a case where an auction-purchaser attempts to prove that the judgment-debtor had no saleable interest whatever. 38 M. L. J. 228, Ref. to and Appr. A.I.R. 1924 Pat. 319 Diss. (*Walsh and Sulaiman, JJ.*) RANI NANDAN PRASAD *v.* JAGAR NATH SAHU.

47 All. 479 : 73 A. L. J. 233 · 87 I. C. 278 : L. R. 6 A. (Civ.) 229 : A. I. R. 1925 All. 459.

——O. 21, R. 90—*Right to apply—Judgment-debtor selling after Court sale his interest in the property sold is competent to apply under R.* 90.

All persons whose interests are affected by the sale at the time of the sale are entitled to maintain the application for setting aside sale under R. 90. A judgment-debtor who sells after the auction sale his interest in the property sold is competent to apply under R. 90. (*B. B. Ghose, J.*) SHUNDI BIBI *v.* MOBARAK ALI.

C. P. CODE (V OF 1908), O. 21, R. 90—Right to apply.

87 I. C. 94 : A. I. R. 1926 Cal. 56.

——O. 21, R. 90—*Right to apply—Creditor attaching before judgment cannot apply.*

A creditor who has obtained an attachment of property before judgment cannot apply under O. 21, R. 90, to set aside a sale in execution. 17 C. W. N. 80, Foll. (*Chakravarti, J.*) BADIAR RAHAMAN *v.* SARADA KANTA DATTA. **42 C. L. J. 37 : 89 I. C. 688 : A. I. R. 1925 Cal. 1103.**

——O. 21, R. 90—*Right to apply—Purchaser of non-transferable occupancy holding can apply under R.* 90.

The effect of a transfer of a non-transferable occupancy holding is good so far as the tenant is concerned and although the landlord is not bound to recognize the transfer, it would be good against him, unless he declines to recognize the transfer. The transferee of such a holding therefore acquires a good interest and is entitled to apply under R. 90 for setting aside a sale held in execution of a rent decree. (*Greaves and Chakravarti, JJ.*) TARINI PRASAD *v.* DEVA PRASANNA. **A. I. R. 1925 Cal. 925.**

——O. 21, R. 90—*Right to apply—Judgment-debtor duly served cannot apply under the rule.*

Where the judgment-debtor was duly served with notice of the day for fixing the details of sale proclamation he cannot be allowed to urge that there was material irregularity in settling the price of the property sold. (*Walmsley and Mukerji, JJ.*) DEVI PRASAD BHAGAT *v.* NAGENDRA KUMAR NAG. **78 I. C. 727 : A. I. R. 1925 Cal. 552.**

——O. 21, R. 90—*Right to apply—Execution sale—Setting aside—Attaching creditor.*

It is open to an attaching creditor to apply under O. 21, R. 90, C. P. Code, to set aside an execution sale of the property attached by him at the instance of another creditor who is executing his decree. Meaning of the expression "persons whose interests are affected by the sale" explained. (*Suhrawardy and Page, JJ.*) DHIRENDRA NATH ROY *v.* KAMINI KUMAR PAL. **51 C. 495 : 28 C. W. N. 899 : A. I. R. 1924 Cal. 786.**

——O. 21, R. 90—*Right to apply—Application by judgment-debtor under R.* 90 *cannot be rejected on the ground that his interest has ceased prior to sale.*

Where properties are sold as the properties of the judgment-debtor in execution of a decree against him, his application under O. 21, R. 90, cannot be rejected on the ground that prior to the execution sale he had sold the properties to a stranger and had ceased thereby to have any interest in them. (*Devadoss and Waller, JJ.*) MOHIDEEN MARACAYAR *v.* RAMANADHAN CHETTIAR. **22 L. W. 872 : A. I. R. 1926 Mad. 217.**

——O. 21, R. 90—*Right to apply—Partition suit pending between members of a joint family—Property sold in Court auction as belonging to only one member—Other members cannot apply under R.* 90.

Where during the pendency of a partition suit, the suit property was sold by auction in execution of a decree against one member alone as belonging to him only, the other members cannot apply under R. 90 to have the sale set aside. (*Findlay, O. J. C.*) KANHAIRAM *v.* KALICHARAN. **8 N. L. J. 184 : A. I. R. 1926 Nag. 68.**

——O. 21, R. 90—*Right to apply—Auction-purchaser.*

Application by auction purchaser under O. 21, R. 90 does not lie. (*Prideaux, A. J. C.*) BALWANT *v.* RATANLAL. **A. I. R. 1923 Nag. 161 (2).**

——O. 21, R. 90—*Right to apply—Auction-purchaser.*

C. P. CODE (V OF 1908), O. 21, R. 90—Scope of.

An auction-purchaser is a person "whose interests are affected by the sale" within the meaning of O. 21, R. 90, C. P. Code, and he can apply to set aside the execution sale under that rule. 20 C. 8 (P. C.), Dist. 3 Pat L. J. 516, Not Foll. 38 M. L. J. 228, Foll. (*Batten, J. C.*) SHIV PRASAD *v.* SANTOOJI. **5 N. L. J. 147 : 18 N. L. R. 98 : 65 I. C. 875 : A. I. R. 1922 Nag. 113 (2).**

——O. 21, R. 90—*Right to apply—Heir presumptive of transferee of property is not entitled to apply.*

Heir presumptive of the transferee of portion of the property is not a person whose interests are affected by the sale. (*Foster, J.*) HANKAR SONAR *v.* BASUDEO SINGH. **86 I. C. 575 : A. I. R. 1925 Pat. 556.**

——O. 21, R. 90—*Right to apply—B. T. Act, Ss.* 160, 159 *and* 158-*B—Right to apply—Sale under B. T. Act for arrears of rent—Holder of protected interest cannot apply under O.* 21, *R.* 90

A person who holds a protected interest under the B. T. Act in a holding which has been sold under that Act for arrears of rent is not entitled to apply under O. 21, R. 90 as, by Ss, 159, and 158-B of the B. T. Act, a protected interest is not affected by such sale. (*Foster, J.*) HANKAR SONAR *v.* BASUDEO SINGH. **86 I. C. 575 : A. I. R. 1925 Pat. 556.**

——O. 21, R. 90—*Right to apply—Purchaser of part of non-transferable occupancy can apply.*

A purchaser of a part of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale to have the sale of the holding set aside. 2 Pat. L. J. 457, Dist. 42 Cal. 172 Foll. (*Kulwant Sahay, J.*) SURAJ NARAIN MISSER *v.* HARDWAR SINGH. **6 P. L. T. 295 : 87 I. C. 381 : A. I. R. 1925 Pat. 461.**

——O. 21, R. 90—*Right to apply—Auction-purchaser cannot apply.*

An auction-purchaser cannot apply to have the sale set aside under O. 21, R. 90, as it does not cover the case of a person whose interest was affected by the very sale sought to be set aside. (*Mullick and Bucknill, JJ.*) KARTIK CHANDRA CHATTERJEE *v.* NAGENERA NATH ROY. **5 Pat. L. T. 41 : 74 I. C. 760 (2) : A. I. R. 1924 Pat. 319 (1).**

——O. 21, R. 90—*Right to apply—Paramount title-holder cannot apply.*

A person claiming property that had been sold by title paramount to that of the judgment-debtor could not apply to have the sale set aside. 15 Cal. 488 ; 23 Bom. 450, Foll. (*Brown, A. J. C.*) MAUNG KUN *v.* MA NAN. **4 U. B. R. 97 : 1 Bur L J. 234 : 70 I. C. 900 : A. I. R. 1922 U. B. 22.**

——O. 21, R. 90—*Right to apply—Holder of money decree.*

The holder of a money decree cannot apply for the setting aside of the Court sale in execution of a mortgage decree. (*Madgavkar, A. J. C.*) RUSTAMJI *v.* PEROZSHAW. **A. I. R. 1925 Sind 101.**

Scope of.

——O. 21, Rr. 90, 91 and 93—*Scope of—Order setting aside sale—Interest, if can be awarded.*

Where a sale is set aside under O. 21, R. 90 or R. 91, the Court has power to order interest on the purchase-money also being paid to the purchaser under R. 93. (*Viscount Cave.*) MAHARAJ BAHADUR SINGH *v.* FORBES. **48 I. A. 24 : (1921) M W. N. 26 : 13 L. W. 217 : 19 A. L. J. 101 : 33 C. L. J. 176 : 25 C. W. N. 366 : 2 P. L. T. 115 : 6 P. L. J. 129 : 59 I. C. 782 : 23 Bom. L. R. 727 : 40 M. L. J. 141 (P. C).**

——O. 21, R. 90—*Scope of—Fraud in conducting*

execution sale.

O. 21, R. 90, C. P. Code, not only covers a case of material irregularity but also a case of fraud in publishing or conducting the sale. (*Chatterjee and Panton, JJ.*) ABDUL SAMAD MONDAL *v.* BASIRUDDIN CHAUDHURY. **66 I. C. 220 (Cal.).**

——O. 21, R. 90—*Scope of—Alteration in new Code.*

The effect of adding the words "or fraud" to O. 21, R. 90 is to take the applications setting up fraud in publishing or conducting a sale out of the scope of S. 47 and bring them under the rule. (*Shadi Lal and Le Rossignol, JJ.*) JAGANNATH *v.* DAUD.
4 Lah. 243 : 75 I. C. 103 : A. I. R. 1923 Lah. 592

——O 21, R. 90—*Scope—Sale cannot be set aside by compromise between judgment-debtor and decree-holder.*

An auction-sale cannot be set aside on the ground of a compromise taking place between the decree-holder and the judgment-debtor. (*Daniels, J. C.*) BADAL SINGH *v.* GUR PRASAD. **88 I.C. 534 (2) : A. I. R. 1925 Oudh 693.**

——O. 21, R. 90—*Scope of—Proceedings under are not execution proceedings,*

A proceeding to set aside a sale under R. 90 is not a proceeding in execution as execution proceedings ordinarily end with the sale resulting from the full or part satisfaction of the decree. (*Das and Ross, JJ.*) JAGDISH MISSIR *v.* SURESWAR MISSIR. **2 Pat. L. T. 273 : 62 I. C. 608 : 6 Pat. L. J. 253.**

Substantial Injury.

——O. 21, R. 90—*Substantial injury—"Substantial loss need not be pecuniary"—Sale proclamations representing encumbered property as free—Auction purchaser can apply for setting aside sale.*

The principle of *caveat emptor* does not apply under R. 90 when the auction purchaser applies to set aside the sale, where it is shown that there has been a misdescription affecting the quality and value of the property. The expression "substantial loss" is not necessarily confined to "pecuniary loss." The proclamation described the property, which was really a leasehold interest, as a freehold estate. There was nothing in the proclamation to shew that the judgment-debtor had only a *lessee's* interest in the property. *Held*, that it was a fundamental misdescription and mis-representation of the character of the property and, that where the auction-purchaser actually was misled and suffered substantial loss, he was entitled to have the sale set aside. (*Walsh and Sulaiman, JJ.*) RAVI NANDAN PRASAD *v.* JIGARNATH SAHU.
47 All. 479: 23 A. L. J. 233: 87 I.C. 278 : L. R. 6 A. (Civ.) 229: A. I. R. 1925 All. 459.

——O. 21, R. 90—*Substantial injury necessary.*

In order to succeed in an application to set aside an auction sale, the Court has to find not only material irregularity but also substantial injury resulting therefrom. (*Sulaiman and Mukerjee, JJ.*) SUPERIOR BANK, LTD *v.* BUDH SINGH. **22 A. L. J. 413: 10 O. & A. L. R. 633: L. R. 5 A. (Civ.) 769: A. I. R. 1924 All. 698.**

——O. 21, Rr. 90, 66 and 67—*Substantial injury—Setting aside sale.*

Where the alleged irregularity in the conduct of the sale did not directly produce any serious loss, there is no ground for setting aside the sale. 32 I. C. 990; 33 I. C. 692; 67 I. C. 885; 57 I.C. 892, Foll. (*Broadway J.*) NOOR MAHOMED KHAN *v.* MALIK NOOR MAHOMED KHAN. **5 L. L. J. 30: 71 I. C. 730: A. I. R. 1923 Lah. 213.**

——O. 21, R. 90—*Substantial injury.*

Unless an applicant shows that he has sustained substantial injury, the Court cannot grant an order setting aside the sale. (*Foster, J.*) EKNATH PANDEY *v.* SINGESHWA NATH. **5 P. L. T. 250: 76 I. C. 168: A. I. R. 1924 Pat. 785.**

——O. 21, R. 90—*Substantial injury.*

There must be substantial injury by reason of irregularity or fraud. (*Brown, A. J C.*) MAUNG KUN *v.* MA NAN. **4 U. B. R. 97: 1 Bur. L. J. 234: A. I. R. 1922 U. B. 22.**

Undervaluation.

——O. 21, R. 90—*Undervaluation—No irregularity—Sale cannot be set aside.*

Mere inadequacy of price is no ground for setting aside an execution sale at the instance of the decree-holder or judgment debtor nor a ground for refusing to confirm a sale. 8 Bom. 424, Ref. The inadequacy of the price must be occasioned by some irregularity. 9 Cal. 656 (P. C.) Ref. (*Spencer and Odgers, JJ.*) KORAPALU HENGSU *v* GOWRI HENGU.
21 L.W. 521 : 88 I. C. 228 : A. I. R. 1925 Mad. 729.

——O. 21, R. 90—*Undervaluation—Execution sale cannot be set aside merely for suspicious circumstances about sale and low price, in absence of proof of fraud or material irregularity in conducting sale and of resultant substantial injury to party seeking to set aside sale.*

Mere suspicious circumstances connected with the sale and the fact that the property was sold for a low price, in absence of any connection being shown between the two, are not sufficient grounds for setting aside an execution sale, under O. 21, R. 90. Under that rule, proof of material irregularity or fraud in publishing and conducting the sale and substantial injury resultant therefrom to the party seeking to set aside the sale is necessary. (*Wallace and Madhavan Nair, JJ.*) GANAPATHIA PILLAI *v.* MALAIPERUMAL CHETTIAR. **20 L. W. 736: 85 I. C. 342: A. I. R. 1925 Mad. 202.**

——O. 21, R. 90—*Undervaluation—Price below that in sale proclamation—Effect.*

Where the value shown in the sale proclamation was fixed by consent, the fact that the price fetched at the sale was considerably less is not enough to set aside the sale. (*Jwala Prasad and Ross, JJ.*) RAJBANS SAHAY *v.* ASKARAN BAID. **1 P. 214 : A. I. R. 1922 P. 550.**

——O. 21, Rr. 91, 92—*Suit for refund of purchase-money—Does not lie on ground of no saleable interest.*

An auction-purchaser cannot maintain a suit for refund of purchase-money on the ground of absence of saleable interest in the judgment-debtor. (*Rankin and B. B. Ghose, JJ.*) BANKA BEHARI DAS *v.* GURU DAS DHAR. **40 C. L. J. 157 : 28 C. W. N. 20: A. I. R. 1924 Cal. 172.**

——O. 21, R 91—*Purchaser at a Court sale—Rights and liabilities.*

Apart from R. 91 and fraud, a purchaser at a Court-auction must suffer the results good or bad of the sale. The Court selling the property does not guarantee the title to the property. (*Richardson and Cuming, JJ.*) ABINASH CHANDRA KAR *v.* BHUBAN CHANDRA MAITY. **63 I. C. 126: 25 C. W. N. 756.**

——O. 21, R. 91—*Auction purchaser cannot file suit for refund of purchase-money.*

The doctrine of *caveat emptor* fully applies to a purchaser at a Court sale who buys the property with all risks and all defects in the judgment-debtor's title.

C. P. CODE (V OF 1908), O. 21, R. 91.

The remedy under R. 91 which has been created by the statute can only be enforced subject to the conditions and limitations imposed by the law. Apart from this statutory provision, there is no principle of law or equity which would entitle an auction purchaser to recover the purchase-money in the event of his discovering after the sale that the judgment-debtor had no saleable interest in the property. Hence, an auction purchaser is not entitled to file a suit for refund of purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold. 3 Cal. 806 Foll.; 35 Bom. 29, 41 I. C. 924 and A. I R 1923 Cal. 85 Dist.; A.I R 1924 Lah. 115 Diss. (*Shadi Lal, C. J. and Le Rossignol, JJ.*) HABIB UD-DIN *v.* HATIM MIRZA.

6 Lah. 283: 86 I. C. 622: A. I. R. 1925 Lah. 467.

——— **O. 21, Rr. 91 and 93 A**—*Suit for the recovery of purchase-money by auction purchaser does not lie but his only remedy is that laid down in R 91 of O. 21.*

An auction-purchaser cannot sue for the recovery of his money in a separate suit but his remedy is confined to the procedure laid down in R. 91 of O. 21, An auction purchaser's application under O. 21, R. 91 to set aside a sale was allowed by the lower Court which permitted him to withdraw the purchase money. The application was dismissed in appeal and the auction-purchaser was directed to pay into Court the purchase money which he had withdrawn. The auction purchaser filed a suit for declaration that he was not bound to repay the purchase-money into Court as the judgment-debtor had no saleable interest in the property. *Held*, that the suit was in effect for a refund of the purchase money and as such was not maintainable. (*Broadway, J.*) HATIM MIRZA *v.* BHAGWANA. **78 I. C. 517: A. I. R 1925 Lah. 199.**

——— **O. 21, Rr. 91, 93**—*Not exhaustive—Remedy of auction purchaser dispossessed by successful claimant—Suit if lies.*

The provisions of O.21, Rr. 91 to 93 are not exhaustive of the remedies open to an auction-purchaser who after payment of full price is dispossessed by a claimant who succeeds in a suit brought under O. 21, R. 93 in establishing that the judgment-debtor has no saleable interest in the property. The remedy is that the auction-purchaser should recover his money by bringing a suit for the same. (*Harrison and Zafar Ali, JJ.*) ASADULLAH KHAN *v.* KARAM CHAND. **4 Lah. 354: 76 I. C. 600: 6 L. L. J. 67: A. I. R. 1924 Lah. 115.**

——— **O. 21, R. 91**—*If judgment debtor has no saleable property, purchaser is entitled to relief—No remedy for purchaser in the absence of fraud.*

In execution sales, when the judgment-debtor has a saleable interest, however small, the purchaser buys at his own risk, and there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief if it does not correspond to the said descrip ion. He has, in the absence of fraud, no remedy unless the judgment-debtor has no saleable interest at all in the property sold. Even if the property is destroyed by fire at the date of the auction sale, it is absolutely impossible to affirm that there is nothing left to be sold. 17 Mad. 228; 28 Cal. 235, Foll., 23 All 355 ; 27 All. 537 applied. (*Findlay, O. J. C.*) NIZAMUDDIN *v.* JUMMA. **88 I. C. 693 : A. I. R. 1926 Nag. 17.**

——— **O. 21, R 91**—*Adjustment after sale—Decree holder applying to have sale set aside on the ground of adjustment—Court will not set aside sale at decree-holder's request.*

The only ground upon which a decree-holder can set aside the sale is that the judgment-debtor has no saleable interest in the property. There is no provision in the Code for allowing adjustments between the parties after the sale has been held. The sale is a solemn act and the Court is not competent to review it merely at the request of the parties. (*Mullick and Ross, JJ.*) SHAM NARAYAN SINGH *v.* BASDEO PRASAD SINGH. **88 I. C. 537: A. I. R. 1925 Pat. 702.**

——— **O. 21, R. 91**—*Auction purchaser—If can sue for purchase money on the basis of absence of saleable interest.*

If, after an auction sale, the purchaser finds the judgment-debtor had no saleable interest his only remedy is to apply under O. 21, R. 91 to set aside the sale and then apply for repayment of the purchase money. A suit for that purpose is not maintainable. Case law discussed and the provisions in the various Codes of Civil Procedure considered. (*Jwala Prasad and Kulwant Sahay, JJ.*) NAGENDRA NATH GHOSH *v.* SAMBHU NATH PANDEY. **3 Pat. 947: A. I. R. 1925 P. 106.**

——— **O. 21, R. 91**—*Execution sale—Setting aide—Concealment of encumbrances—Effect of.*

If a purchaser at an execution sale has bought a property the title to which is defective or he has been misled on account of fraud or omission on the part of the decree-holder, it is open to him to seek his remedy as the law allows. But there is no reason why a Court should interfere on behalf of the auction-purchaser and set aside the sale simply because an auction-purchaser has bought a bad title. Every man buys at an auction sale with his eyes open and the general principle that an auction-purchaser cannot attack his own purchase except on the ground that the judgment-debtor has no saleable interest in the property must apply. (*Das and Bucknill, JJ.*) KEDAR NATH GOENKA *v.* MAHANTH JAGAN NATH DAS. **1 P. L. R. 73: 74 I. C. 134: A. I. R. 1924 Pat. 355.**

——— **O. 21, R. 91**—*Execution sale—Setting aside—Suit at the instance of a third party—Revival of execution proceedings.*

Two lots of property were sold in execution of a money decree. Out of which No. 1 the decreeholder bought. Afterwards a third person sued the decree-holder He was the auction-purchaser of lot No. 1. He also sued the judgment-debtor for a declaration of title to lot No. 1 and possession. He obtained a decree. Its result was that the sale became invalid regarding lot No. 1. The sale of lot No 2 was also set aside at the desire of the judgment-debtor under the provisions of O.21, R.90, C.P.C., After this the decree-holder executed his de ree for the entire decretal amount. The judgment-debtor raised objections that the execution petition was barred by time. The only remedy to get back the price of lot No.1 was to submit an application under O.21, R.91, C.P.C. to have the sale annulled. Otherwise that price cannot be recovered. *Held*: both the judgment-debtor and the decree holder were parties to the suit and hence the order binds them. The execution Court need not abrogate the order. (*Mullick and Bucknill, JJ.*) RADHA KISHEN LAL *v.* KASHI LAL. **2 Pat. 829 : 1 Pat. L. R. 3 8 : 1923 P. H. C. C. 342: 76 I.C. 927: 5 Pat. L. T. 345: A.I R. 1924 Pat 273.**

——— **O. 21, R 91**—*Warranty of title—Judgment-debtor having no interest in the property sold—Purchaser's rights.*

There is no warranty in a Court-sale that the judgment-debtor has any saleable interest in the property. If the judgment-debtor has no saleable interest in the property, the auction-purchaser must apply within 30 days to set aside the sale under O.21, R. 91. He has no remedy by a regular suit against the judgment debtor to recover his purchase-money. If he

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fails so to do and the amount of the sale-proceeds is credited towards the decree ; he cannot ask the Court to treat the sale as a nullity and to allow him to execute his decree in respect of the sum represented by the sale-proceeds. The decree must, therefore, be deemed to have been satisfied to the extent of the amount of the sale-proceeds (*Maung Kin, J.*) U PAW *v.* N. R. M. A. CHETTY. **61 I. C. 805 : 13 Bur. L.T. 152.**

———**O. 21, R. 92**—*Decree amended after sale—Sale is not affected—Setting aside is revisable.*

If the property has been sold in execution of an incorrect decree the amendment of the decree does not make the sale liable to be set aside. So long as there is a valid decree standing the execution is perfectly valid and the subsequent event that decree was amended or even set aside would not necessarily nullify the sale. Setting aside the sale in such a case, as if no option were left to the Court, is liable to revision. (*Sulaiman and Mukerji, JJ.*) FATEH LAL *v.* SHER SINGH. **L. R. 6 A. (Civ.) 63 : 85 I. C. 660 : A. I. R. 1925 All. 264.**

———**O. 21, R. 92**—*Bar of suit—Property not covered by decree sold in execution—Mistake—Suit to recover.*

More than three years after an execution-sale the judgment-debtor applied for restoration to possession in respect of certain items of property which were alleged to have been sold by a mistake and not directed to be sold under the mortgage-decree. The property had been purchased by the decree-holder and transferred to another person subsequently. *Held*, that the application was barred under O, 21, R. 92, inasmuch as the judgment-debtor could have applied under O. 21, R. 90, C. P. Code, to set aside the sale. (*Ryves and Daniels, JJ.*) INTIAZ-UN-NISSA *v* CHATTAN LAL. **22 A. L. J. 1119 : 47 All. 304 : L. R. 6 A. (Civ) 153 : A. I. R. 1925 All. 236.**

———**O. 21, R. 92**—*Execution before Collector—Right of pre-emptor—Failure to appear before Collector—Order against is final.*

At an execution sale before the Collector, the same bid was made by two persons, but one of them in addition claimed to have a preferential pre emption right. The Collector before confirming the sale directed the pre-emptor to appear before him, but, as he failed to do so, confirmed the sale in favour of the other bidder In a suit by the pre-emptor for possession, *held*, under the rule corresponding to O. 21, R.92 framed by the Govt. under Ss. 68 and 70, C. P. Code, to deal with execution sales by Collectors, the order of confirmation was an order against the pre-emptor and hence final. (*Mears, C. J., Banerji and Rafique, JJ.*) BADRI SINGH *v.* TULSHI RAM. **45 A. 203 : 21 A.L. J. 53 : 4 L. R. A. (Civ,) 43 : A. I. R. 1923 All. 186. (F. B.)**

———**O. 21, R, 92**—*Sale held—Injunction—Want of notice.*

Where an injunction was granted in favour of third parties who claim the property as their own against the decree holder restraining him from executing his decree by sale but no notice of it was given to either the decree-holder or the officer conducting the sale and in consequence the sale took place. *Held*, the validity of the sale cannot be questioned and the injunction is ineffective. (*Stuart, J.*) RAMJI DAS *v.* LALA CHHAGAL LAL. **69 I. C. 745 : A. I. R. 1922 All. 282.**

———**O. 21, R. 92**—*Suit to set aside sale—Suit by minor defendant on attaining majority—Parties.*

The auction-purchaser is a necessary party to a suit to set aside a sale brought by a minor defendant after his attaining majority. (*Macleod, C.J. and Crump, J.*) BAPUJI KRISHNA *v.* JANARDHAN GOVIND. **A. I. R. 1924 Bom. 130.**

———**O. 21, R. 92**—*Formal notice is not necessary if there is actual notice otherwise.*

The object of R. 92 in insisting on notice is to entitle every party interested, to be heard. Therefore if a party has actual notice the absence of formal notice does not vitiate the proceedings. (*Suhrawardy and Duval, JJ.*) CHARAN CHANDRA GHOSH *v.* RAI BEHARI LAL MITRA BAHADUR. **80 I. C. 931 : A. I. R. 1925 Cal. 157.**

———**O. 21, R. 92**—*Execution sale—Irregularities not challenged—Suit by purchaser for possession—Irregularity if can be pleaded.*

Where properties were sold in execution and the judgment-debtor did not apply under O. 21, R. 90 to have it set aside on the ground of irregularities he cannot after confirmation of the sale plead such irregularities by way of defence to a suit by the purchaser for possession. (*Walmsley and Suhrawardy, JJ.*) JAGNESWAR SIKDAR *v.* KAILASH CHANDRA MANDAL. **28 C. W. N. 821 : 78 I. C. 126 : A. I. R. 1925 Cal. 81.**

———**O. 21, R. 92**—*Appeal against appellate order does not lie.*

An order confirming or setting aside a sale is appealable under O. 43, R. 1 (*j*) and hence under S. 104, C. P. Code, no second appeal lies in such a case. (*Shadi Lal, C. J. and Le Rossignol, J.*) JAGANNATH *v.* DAUD. **4 Lah. 243 : 75 I. C. 103 : A. I. R. 1923 Lah. 592.**

———**O. 21, R. 92**—*Order under—No second appeal.*

An order on an application seeking to set aside an auction-sale on the ground of material irregularity and fraud is not open to second appeal (*Abdul Raoof, J.*) JAGAN NATH SETHI *v.* PIR MOHAMAD. **72 I. C. 788 : A. I. R. 1923 Lah. 287.**

———**O. 21, R. 92**—*Insolvency—Attachment and sale of property as belonging to insolvent—Defeated claimant—Right of suit is not barred.*

Where a person whose claim to certain property sought to be sold as the property of the insolvent has been defeated, brings a suit to establish his right, such a suit is not barred by O. 21, R. 92, C. P. Code. (*Harrison, J.*) HARNAM *v.* GANPAT. **5 Lah. L. J. 9 : 73 I. C. 367 : A. I. R. 1923 Lah. 224.**

———**O. 21, R. 92**—*Judgment-debtor being aware of execution proceedings but not objecting to Court sale—Sale confirmed—Neither judgment-debtor nor his transferee with notice can subsequently contend that the property was inalienable—C. P. Code, S. 11—Evidence Act, S. 115—Execution.*

Under O. 21, R. 92, C.P. Code, where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under S. 65 where property is sold in execution of a decree and the sale has become absolute, the property vests in the purchaser. If the judgment-debtor objects under S.47 to the sale and his objection is overruled he is bound by the decision of the executing Court. If, being aware of the execution proceedings and having an opportunity to object, he fails to do so, he is likewise bound by the order confirming the sale, in other words, he is, in effect, in either case a party to the order by which the sale is confirmed equally with the auction-purchaser and he cannot go behind it. 9 C. W. N. 972 ; 26 Cal. 727 ; 34 Cal. 199 and 40 All. 680 Foll. Plaintiff, a trans-

feree from the auction-purchaser sued to redeem a mortgage held by the defendant subject to which the property was sold at the auction. The defendant pleaded that the property being an inam land was inalienable and therefore the sale conveyed no title to the auction-purchaser and further, that subsequent to the auction sale the land was enfranchised by the Government in the name of the judgment-debtor from whom he subsequently purchased the same. The defendant as well as the judgment-debtor had notice of the execution proceedings. *Held*, that the defendant must be considered to be bound by the order confirming the sale in favour of the auction-purchaser and that it was not open to him to question the validity of the Court. *Held*, further, that the question whether the sale of an unenfranchised inam is absolutely void did not strictly arise. (*Venkatasubba Rao and Madhavan Nair, JJ.*) V. SOMASUNDARAM *v.* BHIMISETTI KONDAYYA. **A. I. R. 1926 Mad. 12 : 49 M. L. J. 401.**

——0. 21, R. 92—*Does not oust inherent power to cancel sale.*

Per Wallace, J.—Order 21, R. 92 of the Code of Civil Procedure does not oust the inherent power of a Court to interfere to cancel the sale even though no party has applied for cancellation when the Court discovers in the course of the proceedings, that the decree-holder auction-purchaser, deliberately misled it and profited thereby to the disadvantage of the judgment-debtor or the judgment debtor's creditors. (*Schwabe, C. J. and Wallace, J.*) RAGHAVACHARIAR *v.* MURUGESA MUDALI. **46 Mad. 583 : (1923) M. W. N. 323 : 32 M. L. T (H. C.) 285 : 17 L. W. 750 : 72 I. C. 545 : A. I. R. 1923 Mad. 635 : 44 M. L. J. 680.**

——0. 21, R. 92—*Decree-holder selling own property by mistake—Remedy if by suit.*

Where a decree-holder sells his own property by mistake his only remedy is by suit. An application under S. 47 is incompetent. (*Ayling, C. J. and Odgers, J.*) RAMASWAMI KONAN *v.* KULANDAI VELU PILLAI. **15 L. W. 272: 70 I. C. 569 : (1922) M. W N. 121 : A. I. R. 1922 Mad. 63 (1.)**

——0. 21, R. 92—*Except in exceptional circumstances the Court should not refuse to confirm a sale—Destruction of property sold by accident or act of God does not empower the Court to refuse to do so—If sale is not vitiated from its inception, the Court cannot refuse to confirm the sale.*

What is sold at the auction-sale, is very clearly the right title and interest of the judgment-debtor as they then exist. What the executing Court has to consider, in deciding whether or not to confirm the sale under R. 92, is whether there is any reason with reference to Rr. 89—91 for refusing to do so. If there are not, the Court is bound in the absence of exceptional circumstances, to confirm the sale. That by an accident or by an act of God the property is destroyed in the meantime is not a circumstance which entitles the executing Court to have recourse to its inherent powers and to the application of a general equitable ruling. If there are circumstances which vitiate the sale at its inception, the executing Court is in a position to refuse to confirm the sale even apart from the contingencies contemplated in Rr. 89—91. (*Findlay, O. J. C.*) NIZAMUDDIN *v.* JUMMA. **88 I. C. 693 : A. I. R. 1926 Nag. 17.**

——0. 21, R. 92—*Execution sale — Satisfaction reported—Sale cannot be confirmed.*

Where a sale in execution is held prior to the admission of satisfaction of the decree by the decree-holder, the sale cannot be confirmed after satisfaction notified to the Court. (*Kotval, A. J.C.*) NILKANTH *v.* YESHWANT. **18 N. L. R. 134 : 65 I. C. 331 : A. I. R. 1922 Nag. 248.**

——0. 21, R. 92—*Several judgment-debtors—Sale set aside as against one—Confirmation in entirety—Cannot be made.*

A sale in execution of a decree which has been set aside as against one of the several defendants cannot be confirmed in its entirety but only against the shares of the other defendants. (*Kotval and Macnair, A. J. Cs.*) HARI RAM *v.* GOPI KISAN. **61 I. C. 571 (Nag.)**

——0. 21, R. 92—*Order under—No second appeal is permissible.*

No second appeal lies from an order passed under R. 92 on an application under R. 89. (*Daniels, J. C.*) IFTIKHAR HAIDAR *v.* IKRAM FATIMA. **12 O. L. J. 336 : 2 O. W. N. 376 : 88 I. C. 559 : A. I. R. 1925 Oudh 622.**

——0. 21, R. 92—*Sale confirmed—Suit to set aside sale—Fraud—Maintainability.*

A suit to set aside an auction sale on the ground of fraud does not lie after the sale is confirmed. (*Ashworth, A. J. C.*) SHER KHAN *v.* MISRI LAL. **89 I. C 107.**

——0. 21, R. 92—*Order setting aside sale is not open to second appeal.*

There is no second appeal from an order setting aside a sale under O. 21, R. 92 of the C. P. Code. 38 Cal. 339, Ref. (*Kanhaiya Lal, A. J. C.*) JAGMOHAN SINGH *v.* BACHCHA. **25 O. C. 78 : 9 O. L. J. 50 : 66 I. C. 929 : A. I. R. 1922 Oudh 146.**

——0. 21, R. 92—*Execution sale—Application to set aside—Addition of parties after the time prescribed—Limitation.*

An application to have an execution sale set aside was made within the time allowed by law. In that application the number of the execution case was given and certain of the decree-holders auction-purchasers were mentioned. The names of four of the decree holders were not mentioned but notice was subsequently served on them of the application. *Held*, that it was not necessary that notice of the application should be served on all persons affected by the sale within 30 days of the sale. O. 21, R. 92, C. P. Code merely provides that no sale shall be set aside until notice has been issued to all persons affect d by it. But there is no limitation provided for giving such notice. 37 B. 387, 390, Foll. (*Ashworth, A. J. C.*) ABDUR RAHMAN *v.* BABU HAR NARAYAN DAS. **9 O. L. J. 211 : 4 U. P. L. R. (O. C.) 72 : 68 I. C. 238 : A I. R. 1922 Oudh 129 (2).**

——0. 21, R. 92—*Suit by judgment-debtor for possession of property not sold in auction but wrongly taken by auction-purchaser—Rule does not apply.*

A suit for possession by a judgment-debtor after sale of his property in execution would not lie as long as the sale was not set aside and the period of limitation within which such a sale could be set aside is one year from the date of confirmation of the sale. But the rule does not apply when the property for possession of which the judgment-debtor sued was never sold at all but was wrongly taken possession of by the auction-purchaser. (*Dawson Miller, C. J. and Foster, J.*) LACHMI NARAIN SINGH *v.* REBALI DEBYA. **6 P. L. T. 473 : 86 I. C. 648 : 1925 P. H. C. C. 37 : A. I. R. 1925 Pat. 376.**

——0. 21, R. 92 & O. 22, R. 4—*Execution sale—Setting aside—Death of decree-holder—Notice to legal representative essential.*

During the pendency of an application by a judgment debtor to set aside an execution sale, the decree-holder (auction-purchaser) died and his legal represen-

tatives were not properly substituted in his place. No notice was served upon them, and the sale was set aside. *Held*, that no notice having been given to the legal representatives of the deceased decree-holder (auction-purchaser) the order setting aside the sale was liable to be set aside. Under O. 21, R. 92, clause (2) it is provided that no order shall be made setting aside a sale unless notice of application have been given to all persons affected thereby. (*Kulwant Sahay, J.*) KUMAR RAMANAND *v.* BAJIT SINGH JHA.
5 Pat. L. T. 233: 75 I. C. 863 : A. I. R. 1924 Pat. 507.

——O. 21, R. 92—*Provisions of, applies to suit to set aside sale under S.* 174 *of Bengal Tenancy Act.*

The provisions of O. 21, R. 92, C. P. Code requiring notice to be served does not apply to a suit brought by a judgment debtor to set aside a sale under S. 174 of the Bengal Tenancy Act. (*Miller, C. J. and Ross, J.*) PAHLAD SINGH *v.* SAJIVAN RAI. **6 P. L. J. 16 : 61 I. C. 126 : 2 Pat. L. T. 66.**

——O. 21, R. 92 (1)—*No application under Rr.* 89 *to* 91 *made—Court must confirm the sale.*

Under O. 21, R 92 (1) where no application has been made under Rr. 89, 90 and 91 the Court has no alternative but to confirm the sale. 31 C. 1011, Foll. (*Godfrey, J.*) N. K. R. R. M. CHETTY FIRM *v.* M. SUBRAYA MUDALIAR. **3 Rang. 132 : A. I. R. 1925 Rang. 271.**

——O. 21, R. 92 (3)—*Suit lies to set aside decision of Collector confirming a sale.*

Where a decree was transferred to Collector for execution and the Collector to whom an application to set aside the sale was made, dismissed the same and confirmed the sale : *held*, that a suit to set aside the sale on the ground of fraud covering a wider ground than the one in O. 21, R. 90 (1), *i. e.*, fraud in publishing or conducting a sale, is maintainable and is not barred by any provision of law. (*Mukerji and Dalal, JJ.*) BHAGWAN DAS MARWARI *v.* SURAJ PRASAD SINGH. **22 A. L. J. 1060 : L. R. 6 A. (C v) 89 : 84 I. C. 1031 : 47 All. 217 : A. I. R. 1925 All. 146.**

——O. 21, R. 93—*Refund of purchase money—Setting aside sale—Necessity for.*

Where a purchaser at a Court-auction seeks to get back his purchase-money, he must, as a condition precedent, have the sale set aside under O. 21, R. 91, C. P. Code. He can, however, sue the judgment-debtor on the ground of fraud or misrepresentation. 39 M. 803 ; 39 All. 114, Foll. 35 B. 29, Ref. (*Macleod, C. J. and Coyajee, J.*) BALVANT RANGANATH *v.* BALU MALU. **46 Bom. 833 : 67 I. C. 360 : 24 Bom. L. R. 308 : A. I. R. 1922 Bom. 205.**

——O. 21, R. 93—*Judgment-debtor declared to have no saleable interest in property sold by decree of Court—Suit by purchaser to recover the purchase money—Limitation runs from date of decree—Limitation Act, Art.* 97.

Where after an auction sale the judgment-debtor is declared to have no saleable interest in the property sold by a decree of Court, limitation for a suit to recover purchase-money begins from the date of such a decree and not from the date when purchaser was deprived of the possession of property purchased. 40 Cal. 187 and 46 Cal. 676 (P. C.) Foll. *Quaere* : Whether limitation Act, Art. 97 applies to such a suit. (*Greaves and B. B. Ghose, JJ.*) BIJRAJ BOYED *v.* BIJOY SINHA. **30 C. W. N. 79 : A. I. R. 1926 Cal. 297.**

——O. 21, Rr 93 and 91—*Remedy by suit—Not retrospective—Difference between the old Code and new*

Under S. 315 of the C.P. Code of 1882 the purchaser at a sale in execution of a decree was competent to maintain a suit against the decree-holder for recovery of his purchase-money when the judgment-debtor was found to have had no saleable interest in the property sold. The purchaser was not restricted to the special procedure in the execution department mentioned in S. 312. 40 A. 411 ; 22 B. 783; 37 C. 67 ; 40 M. 1009, Ref. A suit to recover the purchase-money would be governed by Art. 120 of the Lim. Act. *Semble*: The law is changed under O. 21. R. 93, C. P. C., and the remedy by suit is no longer available. 39 A. 114; 39 M. 803 ; 40 M. 1009 ; 43 A. 60, R. But the alteration in the law being of a substantial character is not retrospective and an auction purchaser whose right to obtain the purchase-money was acquired before the coming into force of the new Code is not affected and his right is not extinguished. 35 A. 419 ; 23 M. L. J. 487 ; 39 M. 803 ; 18 L. W. 639, Rel. (*Mookerjee and Chotzner, JJ.*) MAKAR ALI *v.* SARFADDIN.
36 C. L. J. 132 : 27 C. W. N. 183 : 70 I. C. 609 : 50 C. 115 : A. I. R. 1923 Cal. 85.

——O. 21, R. 93—*Remedy by suit—Sale under the old Code—Discovery of want of title.*

Where an execution sale is held under the Code of 1882 but subsequent to the passing of the new Code it is found that the judgment debtor had no title to the property sold, a suit by the purchaser for refund of the purchase-money is maintainable (*Ayling and Odgers, JJ.*) ALANJI ISECK SAHIB *v.* VENGA CHETTY.
(1920) M. W. N. 736 : 60 I. C. 66 : 12 L. W. 639.

——O. 21, R. 93 – *Rights of purchaser—Stranger purchaser in auction sale is entitled to compensation for improvements upon reversal of sale irrespective of his* bona fides.

If a man enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation therefor upon a reversal of such judgment and sale irrespective of any question of his *bona fides*. Even if the proposition is too broadly stated, at any rate the good faith required does not go beyond an honest belief in the purchaser in the validity of his title. 36 Mad. 194 Foll. (*Baker, J. C.*) NARAYAN *v.* BEHARILAL. **89 I. C. 18 : A. I. R. 1926 Nag. 160.**

——O. 21, Rr 93 and 91—*Refund of money—Right to.*

The right to obtain a refund of purchase-money when the judgment-debtor is found to be without a saleable interest, must be regarded as entirely the creature of Rr. 91 and 93 of O. 21, with the result that without getting the sale set aside through the Court and by the methods prescribed by the Code, there lies no remedy for any purchaser. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given to him by the statute. Where, however, the fraud or carelessness of a party has led to the invalidity of the sale, the matter stands on a different footing. (*Drake-Brockman, J. C.*) LAKHMICHAND *v.* CHATURBHUJ. **65 I. C. 230 : 4 N. L. J. 274.**

——O 21, Rr. 93 and 91—*Saleable interest—Judgment-debtor having none—Right to refund of purchase money.*

Where after an execution sale it is found that the judgment-debtor has no saleable interest in the property, the remedy of the auction-purchaser is to apply under O. 21, R. 91, C. P. Code, to set aside the sale and then apply for a refund of the purchase-money under O. 21, R. 93, C. P. Code. The purchaser cannot bring a suit for setting aside the sale or for recovery of the purchase-money. 39 M. 803 : 3 C. 806 : 25 B. 337 : 39 A. 114 : 36 A. 529 : 37 C. 67 : 35 B. 29 : 40 M. 1009, Ref. (*Drake-Brockman, J. C.*) LAKHMI CHAND *v.* CHATURBHUJ. **65 I. C. 230 : 4 N. L. J. 274.**

C. P. CODE (V OF 1908), O. 21, R. 93.

——O. 21, R. 93—*Suit to set aside sale compromised—Auction purchaser promised refund—Auction-purchaser can sue for refund.*

After a sale was confirmed a suit was brought by a third party claiming ⅔rds of the property by title paramount. The suit was compromised and it was agreed between the auction-purchaser, the decree-holder and the judgment-debtors that the plaintiff of that suit shall, receive possession of ⅔rds of the property, that the decree-holder shall receive ⅓rd of the money deposited by the auction-purchaser and that the balance of the money shall be removed by the auction-purchaser. *Held*, in a suit brought by the auction purchaser for the recovery of the 2/3rds of the money deposited by him, that there was a fresh contract between the decree-holder, the auction-purchaser, and the judgment-debtors, and the auction purchaser could sue on the basis of that contract. *Held*, further, that the intention of the parties should be inquired into and not what may appear on the face of a compromise like the one between the parties which must have been prepared by some pleader's clerk of small knowledge and little education and that the judgment-debtors could not take shelter behind the express terms of the contract that the money was to be removed from Court but that they were liable to refund the amount to the auction-purchaser-plaintiff. (*Dalal, A. J. C.*) GUR PRASAD *v.* LALMAN. **28 O. C. 136 : 88 I. C. 379 : 2 O. W. N. 248 : A. I. R. 1925 Oudh 404.**

——O. 21, R. 93—*No separate suit lies for recovery of purchase money on ground of judgment-debtor not having saleable interest in property C. P. Code, O. 21, R. 91.*

An auction-purchaser at an execution sale has no right to bring a regular suit for realisation of the purchase money paid by him on the ground that the judgment-debtor had no saleable interest in the property. Statute and case-law fully discussed. (*Jwala Prasad and Kulwant Sahay, JJ.*) NAGENDRA NATH GHOSH *v.* SAMBHU NATH PANDAY. **3 Pat. 947 : A. I. R 1925 Pat. 106.**

——O. 21, R. 94—*Rights of purchaser—Possession—Title.*

An auction-purchaser, under a defective execution sale, who obtains possession would have a good title until the defect is discovered and if not challenged within the time allowed to set aside the sale, his title would become absolute ; but if he does not get possession, his title would be open to any objection that may be taken by the person in possession. (*Macleod, C. J. and Shah, J.*) SHANKAR DAJI NAIK *v.* DATTATREYA. **45 Bom. 1186 · 63 I. C. 248 : 23 Bom. L. R. 514.**

——O. 21, R. 94—*Sale certificate—Error of description—Rectification.*

Where all that is essentially requisite is the rectification of the boundaries in the schedule to the sale certificate it is not material that the Court should go back behind the decree to the mortgage instrument itself. Where the clerical error becomes apparent on the result of the local enquiry held on the basis of the boundaries in the sale certificate, the investigation of the proceedings in the suit itself, antecedent to the decree, only furnishes a historical explanation, as it were, how the error arose. Where there is an error in the sale certificate, the Court has ample authority, as a Court of justice, equity and good conscience, to rectify it and mould the relief accordingly as between the original parties or their representatives-in interest (*Mookerjee and Cuming, JJ.*) NANDI LAL AGRANI *v.* JOGENDRA CHANDRA DUTTA. **28 C. W. N. 403 : 39 C. L. J. 222 : 82 I. C. 297 : A. I.R. 1924 Cal. 881**

C. P. CODE (V OF 1908), O. 21, R. 95.

——O. 21, R. 94—*Sale certificate—Issue of.*

The fact of the issue of a sale certificate is conclusive, if it is not set aside, sale certificates not being documents which can be "lightly" regarded or loosely construed. (*Spencer and Ramesam, JJ.*) V. I. S. NAMBUDRI KARNAVAN *v.* VYKUNDA KAMMATH. **16 L. W. 319 : (1922) M. W. N. 707 : 31 M. L. T. 363 : 69 I. C. 1001 : A. I. R. 1923 Mad. 48 : 43 M. L. J. 477.**

——O. 21, R. 94—*Sale certificate—Amendment—Notice to judgment-debtor necessary.*

A sale certificate should not be amended without notice to judgment-debtor. An amendment without notice is a material irregularity and the order is revisable if prejudice is caused to the judgment-debtor. (*Devadoss, J.*) YAGNASAMI IYER *v.* K. CHIDAMBARANATH. **(1922) M. W N. 130 : 16 L. W. 760 : 65 I. C. 732 · A. I. R 1922 Mad. 63 (2).**

O. 21, R. 94—*Sale cannot pass anything more than that indicated by proclamation and attachment.*

There is nothing in the Code which makes a certificate of sale conclusive as to the property sold. In granting a certificate it is the duty of the Court not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial. The sale is an offer and acceptance ; the offer is made by the Court and is advertised by the proclamation of sale and so far as concerns the identification of the property to be offered for sale, this is the only declaration which is authorized or required. Unless there is something to show that the Court sold something else than was advertised for sale, the sale proclamation is conclusive. If the petition for execution, the writ of attachment and the sale proclamation are clear and unambiguous, any discrepancy from the description of the property contained in these documents which occurs in the sale certificate can have no effect. 10 Mad. 241 (P. C.): 27 Bom. 334, and 41 Cal. 590 (P. C.), Foll. (*Mullick and Ross, JJ.*) F. F. CHRISTIAN *v.* PRASAUD RAUT. **1925 P. H. C. C 220 : 4 Pat. 760 : 90 I. C. 501 : A. I. R. 1925 Pat. 615.**

——O. 21, R. 95—*Purchaser—Remedies of—Possession obtained—Ejectment.*

Where a decree-holder brings to sale the fractional interest of his debtor and purchases it himself and thereafter in a partition suit gets that share allotted to him and obtains possession, he cannot be ejected from possession by a person having no title. An auction purchaser has two remedies open to him. He may have recourse to the summary remedy under O. 21, R. 95 or he may bring a regular suit for possession. Even if the summary remedy is barred, a suit for possession is barred only after the period of 12 years. If within this period of 12 years he somehow or other obtains possession he cannot be ousted by a person who in the eye of law has no title. (*Sulaiman, J.*) HARAKH SONAR *v.* GOPI KISHUN. **89 I. C. 134.**

——O. 21, Rr. 95, 97, 99 and 103—*Scope of—Obstruction or resistance—Claim by sons of judgment-debtor in their own right—Order upholding their claim—Effect of.*

An application under O. 21, R. 97, C. P. Code, cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in obtaining possession of the property. It is only then that he files an application complaining of such resistance or obstruction. Of course no resistance or obstruction

can be said to have taken place before any attempt to obtain possession has been made. An application under O. 21, R. 95 asking for possession against a person alleged to be holding the property on behalf of the judgment-debtor is not necessarily an application complaining that resistance or obstruction has been offered by such a person. The provisions of O. 21, R. 97 come into operation only when either the delivery of possession has been ordered by the Court or, at any rate, an attempt to obtain possession has been made by the decree-holder out of Court. (*Sulaiman and Kanhaiya Lal, JJ.*) BOHRA SOBHA RAM *v.* TURSI RAM. **22 A. L. J. 626 : L. R. 5 A. 488 : 46 A. 693 : A. I. R. 1924 All. 495 (F.B.).**

——**O 21, Rr. 95, 96**—*Delivery of possession—Time for suit by auction-purchaser.*

Where possession has been delivered to an auction-purchaser under R. 95 or R. 96, he gets a fresh start for the computation of limitation but a mere formal delivery of possession does not give such a start. (*Banerji, Ryves and Lindsay, JJ.*) JANG BAHADUR SINGH *v.* HANWAT SINGH. **43 All. 520 : 63 I. C. 212 : 19 A. L. J. 469.**

——**O. 21, R. 95**—*Adverse possession—Symbolical possession—Effect of delivery of, as between parties to a suit.*

The plaintiff sued to recover possession of land from the defendant who was in adverse possession of it from 1898, and obtained a decree in 1914. In execution of the decree, he secured symbolical possession in 1915. In 1918, the plaintiff having sued again to recover possession was met by the defendant with a plea of his adverse possession for upwards of twelve years. *Held*, that the plaintiff was entitled to succeed, since the decree of 1914 put a stop to defendant's adverse possession prior to the date of the decree, especially as the defendant was a party to the execution proceedings of 1915. 14 Bom. L. R. 115 (F. B.) doubted, in view of 20 Bom. L. R. 502. (*Macleod, C. J. and Shah, J.*) MAHADEVAPPA DUNDAPPA *v.* BHIMA DODAPPA MALED. **24 Bom. L. R. 232 : 66 I. C 320 : 46 Bom. 710 : A. I. R. 1922 Bom. 27 (2).**

——**O. 21, R. 95**—*Symbolical possession—Delivery of, gives fresh start of limitation against judgment-debtor.*

Delivery of symbolical possession instead of actual possession is effective against the judgment-debtor and gives rise to a fresh start of limitation against him. This principle avails also persons claiming under the certified purchaser. 5 C. 584 ; 16 C. 530 : 4 C. 870 : 24 C. 175, Foll. 36 B. 373 : 24 W. R. 418, Not Foll. (*Chatterjee and Pearson, JJ.*) BHULU BEG *v.* JATINDRA NATH SEN. **27 C.W.N 24 : A.I.R. 1923 Cal. 138.**

——**O. 21, R. 95**— *Order rejecting application under R. 95—No suit lies but an appeal under S. 47.*

Order rejecting an application under O. 21, R. 95, for delivery of possession, is appealable under S. 47. No suit lies from an order passed under that rule. (*Odgers, J.*) PACHAIAPPA CHETTI *v.* C. VENKATACHARIAR. **(1925) M. W. N. 577 : 90 I. C. 952 : A. I. R. 1925 Mad. 1198.**

——**O. 21, R. 95**— *Auction-purchaser—Right to retain possession.*

Prima facie an auction-purchaser is entitled to obtain possession of all the lands comprised within the writ of the Court free from any incumbrance created by the judgment-debtor, and it is for the persons claiming right to remain on the land in spite of the delivery of possession, to prove conclusively the right to set up by them. Every attempt should be made by a Criminal Court to maintain the auction-

purchaser in possession of the property unless a clear right to possession is established in any other person. (*Jwala Prasad, J.*) BHIM BAHADUR SINGH *v.* THE KING-EMPEROR. **1922 P. H. C. C. 10 : A. I. R. 1922 Pat. 265.**

——**O. 21, R. 95**—*Delivery of possession—Judgment-debtor trespassing.*

Delivery of possession under O. 21, R. 95 of the C. P. Code has the effect of making the judgment-debtor's possession after it that of a trespasser. The auction-purchaser does not commit any criminal act in going to assert his title and to take possession of the purchased property by ousting the judgment-debtor. A rightful owner is entitled to physically turn out a trespasser, but is not entitled to use more force than is reasonable to defend his possession from a trespasser. 3 Cal. 573 and 15 C. W. N. 224, Fol. (*Jwala Prasad and Coutts, JJ.*) RAM KRISHNA SINGH *v.* EMPEROR. **3 Pat. L. T. 335 : 23 Cr. L. J. 321 : 66 I. C. 817 : A. I. R. 1922 Pat. 197 (2).**

——**O. 21, R. 96**—*Property in the hands of Receiver—Leave of Court is necessary.*

O. 21, R. 96 will not apply to property in the hands of a Receiver and he can be sued only with leave of Court. (*Fawcett, J. C. and Raymond, A. J. C.*) RAMDAS *v.* AJUDHIADAS. **63 I. C. 685 : 14 S. L. R. 137.**

——**O. 21, Rr. 97, 99 and 103**—*Scope of—Obstruction or resistance—Claim by sons of judgment-debtor in their own right—Order upholding their claim—Effect of.*

An application under O. 21, R. 97, C. P. Code cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in obtaining possession of the property. It is only then that he files an application complaining of such resistance or obstruction. Of course no resistance or obstruction can be said to have taken place before any attempt to obtain possession has been made. An application under O. 21, R. 95 asking for possession against a person alleged to be holding the property on behalf of the judgment-debtor is not necessarily an application complaining that resistance or obstruction has been offered by such a person. The provisions of O. 21, R. 97 came into operation only when either the delivery of possession has been ordered by the Court, or at any rate, an attempt to obtain possession has been made by the decree-holder out of court. (*Sulaiman and Kanhaiya Lal, JJ.*) BOHRA SOBHA RAM *v.* TURSI RAM. **22 A. L. J. 626 : L. R. 5 All. 488 : 46 All. 693 : A. I. R. 1924 All. 495.**

——**O. 21, R. 97**—*Sub-tenant—Cannot resist.*

A sub-tenant cannot resist the execution and the decree for possession by the original landlord. The words "on his own account" refer to the person who claims to be in possession under his own title. A sub-tenant is not in possession on his own account. (*Macleod, C. J.*) JAIRAM *v.* NOWROJI. **46 B. 887 : 23 Bom. L. R. 1316 : 65 I. C. 212 : A. I. R. 1922 Bom. 449 (2).**

——**O. 21, R. 97**—*Sub-lessee of sub-tenant of judgment-debtor cannot obstruct.*

The sub-lessee of the sub-tenant is not entitled to obstruct the original landlord who has got a decree against the lessor of the sub-tenant as there is no privity of contract between the landlord and the sub-tenant though the sub-tenant may be entitled to protection against the immediate lessor. (*Macleod, C. J.*) JAFFERJI *v.* MIYADIN. **23 Bom. L. R. 1251 : 64 I. C. 692 : 46 Bom. 526 : A. I. R. 1922 Bom. 273.**

——**O. 21, Rr. 97 and 99**—*Covenant against sub-lease—Breach—Decree against lessee—Resistance by*

C. P. CODE (V OF 1908), O. 21, R. 97.

sub lessee in execution—Remedy is by suit.

The lessee granted a sub-lease of the premises against a covenant in the lease not to sub-let. The lessor sued the lessee for possession and got a decree, in execution of which he was resisted by the sub-lessee. The lessor then applied under R. 97. *Held*, that the lessor's remedy was to proceed by suit for possession against the sub-lessee (*Rankin, J.*) EZRA *v.* GUBBAY. **60 I. C. 969 : 47 Cal. 907.**

——— **O. 1, Rr. 97, 98**—Symbolical delivery—When effective. DHARMALA KAMAYYA *v.* BHIMARASETTI PARIDESI. **A. I. R. 1925 Mad. 1140 : 49 M. L. J. 303**

——— **O. 21, R. 97**—*Delivery of possession complete—Second application for, is not maintainable.*

The return on a warrant for delivery of immoveable property issued on an application made as against the judgment-debtor for the execution of a decree for the possession of such property was that the delivery was complete, and this statement on the return was accepted by the decree-holder. The judgment-debtor had, during the pendency of the suit, granted a lease of a portion of the property. Alleging that he was not aware of the said lease when he accepted the delivery as complete, and that the lessee under the said lease prevented him from peacefully enjoying the property delivered to him, the decree-holder applied again as against the lessee, for removal of the obstruction and for the issue, if necessary, of a warrant of delivery. *Held*, that the execution having been definitely closed by the delivery on the first application accepted by the decree-holder as complete, a second application by him for execution was in the absence of any allegation of fraud in the proceedings on the first application, incompetent. (*Oldfield and Venkatasubba Row, JJ.*) IBRAHIM SAHIB *v.* KONAMMAL. **31 M. L. T. 356 : 70 I. C. 755 : A. I. R. 1923 Mad. 25 : 43 M. L J. 179.**

——— **O. 21, R. 97**—*Investigation may be ordered even in anticipation of obstruction, i. e., before actual obstruction has been caused.*

Though O. 21, R. 97 contemplates the Court ordering the investigation after the Bailiff has been obstructed in giving possession in terms of the decree yet there is nothing wrong in anticipating the obstruction and ordering an investigation under O. 21, R. 97. (*Das, J.*) MAUNG PO SEIK *v.* U. NANDIYA. **4 Bur. L. J. 178 : A. I. R. 1925 Rang. 374.**

——— **O. 21, R. 97**—*Application for possession by auction-purchaser—"Resistance" or "obstruction"—Appellant absent at time of delivery of possession—Subsequent suit by appellant for possession—Art. 11-A. Limitation Act, inapplicable.*

The Court purported to give possession to an auction-purchaser under O. 21, R. 97 of certain land which was in possession of the appellant as purchaser from the mortgagor. The appellant was absent at the time of delivery of possession. He brought a suit for recovery of possession which was dismissed as being barred under Art. 11-A of the Limitation Act. *Held*, that the Art. 11-A did not apply to the case. The "resistance" or "obstruction" contemplated in O. 21, R. 97 is some overt act of "resistance" or "obstruction" to the giving of possession by some person who is present at the time. (*Robinson, C. J. and Heald, J.*) T. C. BOSE *v.* O. R. CHOWDHURY. **3 Bur. L. J. 71 : 82 I. C. 865 : A.I.R 1924 Rang. 261.**

——— **O. 21, R. 98**—*Purchaser* pendente lite *is judgment-debtor within R.* 98.

A purchaser *pendente lite* is a person who is bound by the decree and, therefore, comes within the definition of a judgment-debtor as mentioned in R. 98 of

C. P. CODE (V OF 1908), O. 21, R. 100.

O. 21, C. P. Code. (*B. B. Ghose, J.*) GOLAM NABI *v.* F. W. NEEDHAM. **85 I. C. 1004 : A. I. R. 1925 Cal. 1243.**

——— **O. 21, R. 98**—*Remedy by suit—Absence of saleable interest.*

No suit lies for recovery of the purchase-money when it is found that the judgment-debtor had no saleable interest in the property sold in execution. The remedy of the purchaser is by an application under O. 21, R. 93, C. P. Code. 41 I. C. 924 ; 22 C. W. N. 760 ; 39 A. 114, Rel. (*Newbould and Panton, JJ.*) BIPIN BEHARI GHOSH *v.* HARI CHARAN GHOSH. **64 I. C. 628 (Cal).**

——— **O. 21, R. 98**—*Applicability of—Presidency Small Cause Court—Order of ejectment—Obstruction—Power to remove.*

Presidency Small Cause Court can pass an order of ejectment where the obstruction is offered by the judgment-debtor and it has power to remove. (*Krishnan, J.*) DAROGA MAHOMED GHOUSE SAHIB *v.* SHEIKH MOHIDEEN SAHIB. **18 L. W. 135 : 73 I. C. 985 : (1923) M. W. N. 882 : A.I.R. 1924 Mad. 74 : 45 M. L. J 66.**

——— **O. 21, Rr. 98 and 102**—*Order to remove obstruction is appealable—Acquiescence in obstruction—Effect.*

An order under O. 21, R. 98 for removal of obstruction is appealable under S. 47, C. P. Code. Acquiescence in the obstruction to a previous attempt to obtain delivery of possession does not prevent the decree-holder from applying again in execution for possession and to obtain it by the removal of the second obstruction. (*Oldfield and Ramesam, JJ.*) MEYYAPPA CHETTY *v.* MEYYAPPAN. **66 I. C. 722 : (1921) M. W. N. 698.**

——— **O. 21, R. 98 and S. 146**—*Auction-purchaser—Is a representative of judgment debtor.*

A purchaser under a simple money decree is a representative of the judgment-debtor for the purpose of O. 21, R. 98, and proceedings can be taken against him under S. 146 of the Code. (*Abdur Rahim and Napier, JJ.*) MANICKA GRAMANY *v.* PARASURAM MUDALI. **12 L. W. 350 : 59 I. C. 894 : (1920) M. W. N. 787.**

——— **O. 21, R. 98 and S. 47**—*Decree-holder being auction-purchaser—Order under O. 21, R. 98 is appealable.*

When the decree-holder is the auction purchaser and is resisted by the judgment-debtor an order made under R. 98 is appealable as a decree. (*Mullick and Ross, JJ.*) ASKARAN BAID *v.* RAGHUNATH PRASAD. **4 Pat. 726 : 6 P. L. T. 351 : (1925) P. H. C. C. 212 : 88 I. C. 104 : A. I. R. 1925 Pat. 478.**

——— **O. 21, Rr. 100 and 101**—*Ejectment by landlord—Applicability to proceedings under Tenancy Act.*

Rules 100 and 101 of O. 21, C. P. Code, apply to proceedings under the Agra Tenancy Act and a person in possession of the property on his own account or on account of some other person other than the judgment debtor, if he is dispossessed in ejectment proceedings under the Tenancy Act can recover possession under the rules of the C. P. Code. (*Fremantle, S M. and Burn, J. M.*) DEO SARAN LAL *v.* THAKUR SRIPAL SINGH. **L. R 6 All. 143 (Rev.)**

——— **O. 21, R. 100**—*Application under—Dismissed for default—Whether O. 9, R. 13 applies for restoration to file—Proceedings under O. 21, R. 100 whether execution proceedings.*

Where an application complaining of dispossession was filed under O. 21, R. 100, which was dismissed for default of non-appearance on the part of the petitioner and was subsequently restored under O. 9, R. 13, C.

C .P. CODE (V OF 1908). O. 21, R. 100.

P. Code, by the Commissioner, *Held*, on appeal, reversing the orders of the commissioner, (1) that proceedings under O. 21, R. 100 are proceedings in execution of a decree; and (2) that R. 13 of O. 9 does not apply to such proceedings. 41 C. 1, Foll. (*Free Mantle, S. M. and Burn, J. M.*) PEAREY LAL *v.* BRIJ MOHAN DAS. **L. R. 5 All. 291 (Rev.)**

——**O. 21, R. 100**—Caveat emptor—*Mortgagee purchaser.*

Where at a sale under a mortgage decree, the mortgagee decree-holder purchased the property and got possession but was subsequently dispossessed of a portion owing to a decision upon a claim under R. 100, when he applied for compensation, *held*, that there was no warranty of title in Court sales and there was no provision in the C. P. Code for compensation. That the purchaser was mortgagee makes no difference. (*Richardson and Cuming, JJ.*) ABINASH CHANDRA KAR *v.* BHUBAN CHANDRA MAITY. **63 I. C. 126 : 25 C. W. N. 756.**

——**O. 21, R. 100**—*Order under—Is appealable.*

An appeal lies against an order under O. 21, R 100, of the Code, where the question is between parties to the suit or their representatives. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) RUKMANI AMMAL *v.* NARASIMHA AIYAR. **14 L. W. 85 : 63 I. C. 730 : (1921) M. W. N. 487 : 41 M. L. J. 54.**

——**O. 21, R. 100**—*Right to apply—Joint possession—Person claiming*—Locus standi.

Held, following 18 C. W. N. 695 and 3 M. 81, that claimant who has an interest in the land of which possession has been delivered in execution of a decree either as a member of a joint family or otherwise and who is affected by the delivery of possession can claim to be in possession of the property on his own account within the meaning of S. 331 of the C. P. Code of 1882 corresponding to O. 21, R. 100, C. P. Code, 17 B. 718, Not Foll. (*Kotval, A. J. C.*) MISS A. K. SINGH *v.* RAM PRASAD. **18 N. L. R. 206 : 68 I. C. 394 : A. I. R. 1923 Nag. 52 (2).**

——**O. 21, R. 100**—*Application under—Ordered to be filed—If proper.*

An application under O. 21, R. 100 should be registered and disposed of according to law. An order requiring it to be filed is not a proper disposal. Even if the Court meant to dismiss it by using the word "file" a Court has inherent jurisdiction to restore it. (*Jwala Prasad, J.*) THAKUR PRASAD LAL *v.* SUKHLAL SINGH. **5 Pat. L. T 567 : 79 I. C. 598 : A. I. R. 1924 Pat 698.**

——**O. 21, R. 100**—*Joint possession—Insufficient to maintain application under—Question of* benami—*If relevant.*

A person who is in joint possession along with another can be said to be in possession on his own account and can maintain an application under O. 21, R. 100. To determine the question whether the applicant was in possession in his own right the court is not entitled to go into a question of *benami*. (*Das, J.*) RAM KISHUN SINGH *v.* DAMODAR PRASAD. **5 Pat. L. T. 107 : 75 I. C. 856 : 83 I. C. 599 : A. I. R. 1924 Pat. 506.**

——**O. 21, Rr. 100 and 101**—*Scope.*

The word "judgment debtor" will include a representative of the judgment debtor, the word "representative" being taken to mean all persons who are bound by the decree. (*Adami, J.*) MAHARAJA PRATAP *v.* SUNDERBANS KOER. **3 P. L. T 628 : 71 I.C. 999: 24 Cr. L. J. 279 : A. I. R 1923 Pat. 76.**

——**O. 21, Rr. 100, 58 and 63**—*Usufructuary mortgagee—Possession disturbed by purchaser at Court auction—Application under, lies.*

C. P. CODE (V OF 1908), O. 21, R. 103.

A usufructuary mortgagee of certain property applied unde O. 21, R. 58 of the C. P. C. objecting that the property is not liable to attachment and that on being disturbed in possession by purchaser at Court auction he was entitled to bring the present application which is not barred by O. 21, R. 63 of the C. P. Code. (*Das and Adami, JJ.*) BISWANATH PATRA *v.* LINGARAJ PATRA. **1 P. 159 : 70 I. C. 306 : A. I. R. 1922 Pat. 408 (1).**

——**O. 21, R. 100**—*Scope of.*

In an action for rent the landlord obtained a decree against the tenant (purchaser from the original tenant) of a holding and purchased it. The opposite party applied under R. 100 praying that he should be restored to possession of his portion of the holding which he had purchased from the original tenant. The opposite party was therefore restored to possession. The landlord again sued the tenant for the rent of the portion in possession of the opposite party, got an *ex parte* decree and got it purchased by his servant who was given possession. The opposite party again objected under R. 100. The landlord having obtained a money decree, though the holding had not been split up, the opposite party was restored to possession. *Held* the petitioner was not a *bona fide* purchaser for value and the landlord was acting fraudulently in giving up possession to the opposite party. (*Adami, J.*) KHUB LAL DAS *v.* PATHO JHA. **A. I. R. 1922 Pat. 308 (2).**

——**O. 21, R. 101 and S. 115**—*Appeal—Incompetent appeal entertained by Appellate Court—Revision.*

Where a lower appellate Court erroneously entertains an appeal against an order under O. 21, R. 101, C. P. Code, the High Court can interfere in revision and set aside the decision of the lower appellate Court. (*Macleod, C. J. and Crump, J.*) BAI MANI *v.* RANCHODLAL. **25 Bom. L. R. 147 : 72 I. C. 256 : A. I. R. 1923 Bom. 214.**

——**O. 21, R. 101**—*Pendency of suit regarding title—Effect—Suit contesting order, if dispensed with*—Lis pendens—*Applicability of rule.*

Where an order is passed under O. 21, R. 101 against a person and a suit is not filed in one year contesting the validity of the order, it becomes final. The fact that there was a pending suit regarding the title to the property in which he had set up his title does not absolve him from the obligation under S. 103. The doctrine of *lis pendens* does not apply to an application for declaration of title, as in such a case there is no transfer of any right. (*Krishnan and Coleridge, JJ.*) KUMARAN UNNI ACHAN *v.* KUNHIKRISHNAN NAIR. **19 L. W. 394 : (1924) M. W. N. 309 (1) : 75 I. C. 814 : A. I. R. 1924 Mad. 602 (1).**

——**O. 21, R. 101**—*A joint auction-purchaser in possession can apply under R.* 100.

A person who was the auction-purchaser and who was in joint possession of the property owns the property on his own account and can apply under R. 100. (17 Bom. 718, Diss.; 18 C. W. N. 695, Foll.) (*Das, J.*) RAM KISHUN SINGH *v.* DAMODAR PROSAD. **5 P. L. T. 107 : 86 I. C. 599 : 75 I. C. 856 : A. I. R. 1924 Pat. 506.**

——**O. 21, R. 103**—*Order under R.* 95 *is not one under R.* 97 *and, therefore, R.* 103 *does not apply—O.* 21 *Rr.* 95 *and* 97.

Order passed under R. 95 is not an order under R. 99 dismissing an application complaining of resistance or obstruction. If the order is not under that rule then R. 103 will not apply, nor will Art. 11-A of the Limitation Act apply. (*Sulaiman, Kanhaiya Lal, and Mukerji, JJ.*) SOBHA RAM *v.* TURSI RAM. **22 A. L. J. 626 : L. R. 5 A. (Civ.) 488 : 83 I. C. 923 : A. I. R. 46 All. 693 ;**

C. P CODE (V OF 1908), O. 21, R. 103.

A I. R. 1924 All. 495 (F.B).

——O. 21, R. 103—*Suit under—Nature of.*

The suit contemplated by O. 21, R. 103 is by a person who is kept out of possession and who claims possession under his auction purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the defendant. The rule does not bar suits based on other causes of action. (*Suhrawardy and Duval, JJ.*) AMBIKA CHARAN BHAKTA *v.* RAM PROSAD CHATTERJEE.

30 C. W. N. 163 : 90 I. C. 575 : 42 C. L. J. 578.

——O. 21, R. 103—*Applies only where order under Rr. 98, 99 or 101 has been passed.*

O. 21, R. 103 applies only where an order under one of the Rr. 98, 99 or 101 has been passed. Where the order of the lower Court is not one passed under any of the said rules there is no disability arising under R. 103. (*Martineau, J.*) HARGO LAL *v.* CHANDU LAL. **69 I. C. 557 : A. I. R. 1923 Lah. 145.**

——O. 21, R. 103 (S. 331)—*Order without investigation is not* res judicata.

Where the claim put forward by an obstructor was not treated as a suit and no issues were framed nor evidence taken, but the matter was treated as an interlocutory proceeding, the decision could not be *res judicata* in any subsequent proceeding. 9 B.L.R. 936, Foll. (*Schwabe, C. J. and Wallace, J.*) KOONAM VELLI UNNARA *v.* K. P. KUNHI RAMAN.

17 L. W. 322 : 32 M L. T. 146 : 72 I. C. 582 : A. I. R. 1923 Mad 514 : 44 M. L. J. 443.

——O. 21, R. 103 and S. 47—*Difference.*

O. 21, R. 103 of the Code only applies to cases where strangers to the decree are involved, while, S 47 governs cases where the persons concerned are parties to the suit or their representatives. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) RUKMANI AMMAL *v.* NARASIMHA AIYAR. **14 L. W. 85 : 63 I. C. 730 : (1921) M. W. N. 487 : 41 M. L. J. 54.**

——O. 21, R. 103—*Suit to establish right to the present possession of the property—Scope of.*

A suit under O. 21, R. 103 is not only concerned with the question of possession at the date of the summary order under R. 98, or R. 99, but also with the right to possession. An unsuccessful claimant suing under R. 103 will be entitled ordinarily to succeed on his showing the fact of possession on the date of order if the decree holder fails to prove a subsisting title in him. A decree-holder may establish his right to the present possession by showing his subsisting title to the property without proving actual possession at the date of the summary order. The scope of the suit is the same whether the summary order was passed under Rr. 98 and 99 or 101. (*Wallis, C. J. and Seshagiri Aiyar, J.*) THENNUTTIL KALLINGAL UNNI MOHIDIN *v.* THENNUTTIL KALLINGAL UNNI MOHIDIN'S SON POCKER. **44 Mad. 227 : 28 M. L. T. 342 : 12 L. W. 598 : 60 I. C. 109 : (1920) M. W. N. 698 : 39 M. L. J. 626.**

——O. 22, Rr. 1, 2 and 3—*Legal representative—Right of, to continue suit or appeal—Abatement.*

When a party to a suit dies, a legal representative is appointed merely in order that the suit might proceed and a decision be arrived at. It is the original party's rights and disabilities that have to be considered and the mere fact that the legal representative could not in his individual capacity have brought a suit for the relief claimed does not render the pending suit liable to dismissal as having abated. (*Broadway and Zafar Ali, JJ.*) GULLI *v.* SAWAN. **4 Lah. 72 : 74 I. C. 146 : 5 Lah. L. J. 482 : A. I. R. 1924 Lah. 45.**

C. P. CODE (V OF 1908), O. 22, R. 1.

——O. 22, R. 1—*Malicious prosecution—Claim to recover incidental expenses for defending the prosecution does not survive.*

In a suit for damages for malicious prosecution, the plaintiff, in addition to general damages, claimed also special damages under two heads: (1) the vakil's fees; and (2) travelling and other incidental expenses for securing the attendance of witnesses in defending the prosecution launched against him. The plaintiff died during the pendency of the suit: *Held*, that the cause of action was the tortious act of the defendant and the incurring of the expenses merely go to swell the damages and therefore the claim thereto did not survive to the executor or legal representative. (*Coutts-Trotter, C. J, and Visvanatha Sastri, J.*) PALANIAPPA CHETTIAR *v.* RAJU RAJESWARA SETHUPATHI.

22 L. W. 858 : A. I. R. 1926 Mad. 243 : 50 M. L. J. 34

——O. 22, R. 1—*Suit for removal of trustee for breach and framing of scheme—Defendant dying pending suit—Suit as regards scheme does not abate—Civ. Pro. Code, S. 92.*

In a suit under S. 92, Civ. Pro Code, for removal of the defendant-Pandara Sannadhi and framing a scheme, the death of the defendant pending the suit does not cause the whole suit to abate. In order to justify a suit for a scheme under S. 92, it is necessary for the plaintiffs to allege a breach of trust and a prayer for a scheme is therefore not ancillary to a prayer for the removal of the trustee and the cause of action survives against the representative of the deceased. (*Phillips and Krishnan, JJ.*) ARUMUGA THAMBIRAN *v.* NAMASIVAYA PANDARA SANNADHI.

48 Mad. 688 : 22 L. W. 130 : (1925) M. W. N. 569 : A I. R. 1926 Mad. 162 : 49 M. L. J. 324.

——O. 22, R. 1—*Death of one of the plffs. -Malabar Tarwad—Family karar—Rights of management transferred to anandravan—Suit by Karnavan and some other members complaining of mismanagement by anandravan—Karnavan dying and defendant becoming Karnavan—Other plaintiffs can continue suit—Malabar Law.*

Under an agreement between members of a Malabar *tarwad* the *karnavan* for the time being was to forego certain rights of his as manager and the management of the tarwad property was entrusted partly to an *anandravan* of the *tarwad* and partly to another man. The *karnavan* with some other members of the tarwad filed suit against one *anandravan* complaining of his mis-management. The *karnavan* died during suit and the defendant became the *karnavan*. *Held* that the defendant was bound by agreement, that the cause of action survived and that the other members who had joined as plaintiffs had right to continue the suit. (*Phillips and Odgers, JJ.*) SANKARAN *v.* V. K. MANAKKAL SREEDHAN. **A. I. R. 1925 Mad. 894 : 90 I. C. 346 : 48 M. L. J. 691.**

——O. 22, R. 1—*Guardianship—Death of appellant pending appeal against order appointing a guardian - Right of legal representative to continue the appeal—Appointment of guardian by reference to arbitration—Legality of.*

Against an order of Court appointing a particular person as guardian of a minor, the minor's paternal uncle who opposed the appointment in the lower Court, preferred an appeal On the death of the appellant pending the appeal, his son sought to continue the appeal. Objection was taken that the right to sue did not survive and the appeal abated. *Held*, that the appeal did not abate and could be prosecuted by the son of the deceased appellant. 23 B. 719 Dist. In proceedings for the appointment of a guardian

C. P. CODE (V OF 1908), O. 22, R 1.

for a minor the Court appointed as guardian a person selected by certain arbitrators chosen by the parties without arriving at any independent conclusion as to his fitness for the appointment. *Held*, that the order was unsustainable. The matter was not of private interest between the parties and could not be settled by a reference to arbitration. 30 A. 137 Foll. (*Krishnan and Waller, JJ.*) SAMI CHETTI *v.* ADAIKKALAM CHETTI. **47 Mad. 459 : 34 M. L. T. (H. C.) 15 : (1924) M. W. N. 222 : 84 I. C. 613 : A. I. R. 1924 Mad. 484. 46 M. L. J. 179 :**

———0. 22, R 1--*Suit for partition by joint tenant.*

Defendant co-tenant being dead after preliminary decree, his personal legal representative could be brought on record though plaintiff alleges his right to whole by survivorship but plaintiff cannot get whole property in the same suit. (*Oldfield and Devadoss, JJ.*) LAKSHMI AMMAL *v.* ALAMELU AMMAL. **18 L. W. 874 : (1923) M. W N. 839 : 79 I. C. 325: A. I. R. 1924 Mad. 309 : 45 M. L. J. 811.**

———0. 22, R. 1—*Legal representatives—Application to bring on record—Delay—Sufficient case.*

Where an application is made to excuse delay for not bringing the legal representative in time the Court should consider whether the ignorance of the death was justified and affords sufficient cause for the belated application. (*Wallace, J.*) K. GOPALASWAMI AIYAR *v.* O. S. RAMCHANDRA AYYAR. **32 M.L.T. 293 : (1923) M. W. N. 159 : A.I.R. 1923 Mad. 503 : 44 M. L. J. 409.**

———0. 22, Rr. 1 and 4—*Final decree without bringing legal representatives on record—Election.*

After a preliminary decree in a mortgage suit fourth respondent died in April, 1912. The final decree was passed without bringing his legal representative on record in January 1913. Fifth Respondent as the legal representative was brought on record in 1916 when an application was made for transfer of the decree and a notice was served on him but he did not appear. The decree was transferred and certain properties were brought for sale in execution. The fifth respondent instituted a suit. *Held* the decree against the deceased was a nullity and that was not a matter which could have been gone into in execution. The present plaintiff was perfectly within his right in bringing the suit. (*Ayling and Odgers, JJ.*) SAMI MUDALIAR *v.* MUTHIAH CHETTI *alias* VEERAPPA CHETTY. **16 L. W. 314 : (1922) M. W. N. 597 : A. I. R. 1923 Mad. 212 : 43 M. L. J 293.**

——— 0. 22, R. 1—*Judgment-debtor dead—Legal representatives when to be brought on record.*

A decree-holder is bound to implead the representatives of his deceased judgment-debtor only when it necessitates execution. (*Oldfield and Ramesam, JJ.*) ANDAL AMMAL *v.* VIJIA NAIDU. **14 L. W. 632.**

———0. 22, R. 1—*Suit for malicious prosecution—Appeal—Abatement.*

An appeal by a person to whom damages are awarded in a suit for malicious prosecution, on the ground that the damages are insufficient, abates on the death of such person. (*Wallis, C. J. and Napier, J.*) MURUGAPPA CHETTIAR *v.* PONNUSWAMI PILLAI. **44 Mad. 828 : 13 L. W. 705 : 62 I. C. 757 : (1921) M. W. N. 438 : 41 M. L. J. 304.**

———0. 22, R. 1—*Suit for malicious prosecution—Death of defendant.*

Where the deft. in a suit for malicious prosecution dies more than a year after the prosecution and before judgment, the right to sue does not survive so as to prevent the abatement of suit. (*Ayling, Coutts-Trotter and Kumaraswami Sastri, JJ.*) RUSTOMJI DORABJI

C. P. CODE (V OF 1908), O. 22, R. 2.

v. NURSE. **44 Mad. 357 : (1921) M W. N. 121 : 62 I. C. 260 :29 M. L. T. 121 : 14 L. W. 200 (F. B.) : 40 M. L. J. 173.**

———0. 22, R. 1—*Appeal abating the right to costs also abates.*

If an action fails, what is incidental fails also. If an appeal abates as regards an injunction sought for, it abates as regards the costs incurred by the appellant as a consequence of the dismissal of his suit. 34 M. 78 Ref. (*Robinson, C. J. and May Oung, J.*) D. L. SAKLAT *v.* BELLA. **2 Rang. 91 : 3 Bur. L. J. 30 : 80 I. C. 744 : A. I. R. 1924 Rang. 217.**

———0. 22, R . 1—*Malicious prosecution—Suit for damages—Death of defendant.*

A suit for damages for malicious prosecution and obstruction of a right of way abates on the death of the defendant in the absence of any allegation that the estate of the wrong-doer was benefited thereby. 13 B. 677 ; 34 I. C, 249 ; 9 Bur. L. T. 38. (*Saunders, J. C.*) MA SHWE THIT *v.* MAUNG PO AUNG. **(1921) 4 U.B.R. 73 : 65 I. C. 66 : A.I.R 1922 U. B. 7.**

———0, 22, R. 2 and 0. 41, R. 4—*Several appellants—Death of one—Right to appeal surviving to others—Legal representatives not brought on record within three months—Appeal, if abates.*

Where there are more appellants than one and one of them dies, and the right to appeal survives to the other appellants, the appeal does not abate even if the legal representative of the deceased appellant are not brought on the record within three months. (1922 R. C 295 Distinguished.) (*Burn, J. M. and Fremantle, S, M.*) BENI *v.* SRI THAKURJI MAHARAJ. **L. R. 6 A. 234.**

———0. 22, Rr. 2 and 9—*Appeal decreed in ignorance of appellants' death—Decree is nullity—Only Court decreeing the appeal can deal with application under R. 9.*

Where appellant died but the appeal was decreed in ignorance of his death, it was held in second appeal that the decree was a nullity and the case was remanded to the Court decreeing the appeal to deal with an application for setting aside abatement and bringing his heirs on record. (*Marten and Fawcett, JJ.*) AMARSANGJI INDRASANGJI *v.* DESAI UMED. **27 Bom. L. R. 91 : 86 I. C. 31 : A. I. R. 1925 Bom. 290.**

———0. 22, R. 2—*Death of defendant—If one of several heirs can come on record and represent deceased.*

If a defendant dies, it is sufficient if the plaintiff puts one of his heirs on record as his legal representative who will then represent the estate for the purpose of the suit. The other heirs can come in if they wish to be represented. 26 Mad. 230, Foll. (*Macleod, C.J. and Shah, J.*) JEHRABI SADULLA KHAN *v.* BISMILLABI SADRUDDIN. **26 Bom. L. R. 375 : 80 I.C. 758 : A. I. R. 1924 Bom. 420.**

———0. 22, Rr. 2 and 3—*Suit against dead man—Addition of legal representatives is a nullity.*

A suit against a dead man is a nullity, the consequence of which is that any order made in the suit to allow amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person. 31 M. 86. Ref. (*Mulla, J.*) RAMPRATAB BRIJ MOHANDAS *v.* GAURISHANKER. **25 Bom, L. R. 7 : 85 I. C. 464 : A. I. R. 1924 Bom. 109.**

———0. 22, R. 2—*Death of one respondent—Legal representative not brought on record—Abatement.*

At the instance of a plaintiff in a suit a lease in favour of a tenant by certain co-owners was declared

C. P. CODE (V OF 1908), O. 22, R. 2.

not binding on him but he was not given *Khas* possession. During the pendency of the appeal relating to *Khas* possession, one of the co-owner respondents died and his legal representative was not brought on record. *Held*, there was no abatement as the deceased was not interested in the result of the appeal. (*Greaves and Mukerji, JJ.*) SUBASHINI DASI *v.* HABU GHOSH. **89 I. C. 100.**

———O. 22, R. 2—*Appeal—Several respondents—Death of some—Declaratory suit—No abatement.*

Where in an appeal relating to a declaration of appellant's right to an exclusive fishery, some of the respondents died and their legal representatives were not brought on record, the appeal does not abate. (*Rankin and Ghose, JJ.*) MIDNAPORE ZEMINDARY CO. LTD. *v.* TRILOKYA NATH HALDAR.
51 C. 110 : 81 I. C. 501 : 40 C. L. J. 238 : A. I. R. 1924 Cal. 562.

———O. 22, Rr. 2 and 11—*Appeal—Several respondents—Abatement in respect of one—Effect.*

If an appeal against one of several respondents abates, it abates against all, if their several interests, cannot be discriminated. (*Walmsley and Greaves, JJ.*) GOL ASMATER KHATUN *v.* HABIBULLA.
64 I. C. 49 (Cal.)

———O. 22, Rr. 2, and 3—*Appeal—Death of one respondent—Legal representative not brought on record—Order in appeal is a nullity.*

Where in an appeal against an order in execution proceedings, one of the judgment-debtors died and his legal representatives were not brought on the record, the order on appeal is a nullity so far as the deceased judgment-debtor was concerned and did not bind his legal representatives (*Broadway and Wilberforce, JJ.*) MEHTA BARKAT RAI *v.* MT. GHULAM FATIMA.
70 I. C. 929 : 5 L. L. J. 1.

———O. 22, R. 2—*Second appeal—Legal representative not brought on record—Mistake—Effect of.*

Pending an appeal in the lower Appellate Court two of the defts. died. Their legal representatives were brought on the record by that Court but by a mistake the legal representatives were not made respondents in the second appeal. The error was due to a mistake in the judgment on the part of the copying department which did not show the names of the legal representatives although they had long been brought on the record. *Held*, that there was no abatement of the appeal and even if there were, the mistake being *bona fide* the delay could be excused. (*Wilberforce, J.*) KARTAR SINGH *v.* RALLA. **67 I.C. 306 : 2 L.L.J. 44.**

———O. 22, R. 2—*Appeal—Death of respondent—Legal representative already party to appeal—No abatement.*

Where the heirs of a respondent who died pending appeal, are already parties to the appeal, the appeal will not abate notwithstanding that no fresh application is made to bring them on record as the legal representatives of the deceased. (*Abdul Raoof, J.*) KARTAR SINGH *v.* LAL SINGH. **11 P. L. R. 1921 : 59 I. C. 238 : 9 P. W. R. 1921.**

———O. 22, Rr. 2 and 5—*Death of appellant—Legal representative brought on record—Respondent can object at the hearing.*

On the death of an appellant in a pending appeal, a person alleging himself to be the legal representative of the deceased applied to continue the appeal and was brought on record as such without notice to the respondent. At the hearing the respondent objected that the alleged legal representative was not the proper legal representative and that the appeal had abated. *Held*, that the respondent was entitled to raise the objection at the hearing of the appeal. (*Krishnan and Ramesam, JJ.*) PALCHUR MAHALAKSHMAMMA *v.* VEMI REDDI.
32 M. L. T. (H. C.) 44 : 69 I. C. 529 : 17 L. W. 8 : A. I. R. 1923 Mad. 367 : 44 M L. J. 60.

———O. 22, Rr. 2 and 4—*Legal representatives already on record—No application necessary.*

If the legal representatives of a deceased respondent are already on the record as parties, it is not necessary to make an application for substitution and it is enough to make an entry on the record to that effect. O. 22, R. 4 is not applicable to the case. 32 A. 551 ; 32 A. 563, Foll. (*Daniels and Dalal, A. J. Cs.*) HAFIZ-UN-NISA *v.* JAWAHIR SINGH.
66 I. C. 24 : 24 O. C. 374.

———O. 22, Rr. 2 and 4—*Defendants jointly and severally liable—Death of one—Legal representatives not on record—Suit does not abate.*

A suit does not abate merely because one of the defendants, who are jointly and severally liable to the plaintiff, dies, and his legal representatives are not brought on record. (*Jwala Prasad, J.*) JWALA PRASAD *v.* KOPEA MUNDA. **59 I. C. 890 (Pat.)**

———O. 22, Rr. 2 and 3—*Appeal does not abate if the surviving plaintiffs appear to be the sole legal representatives, though they have not been specifically joined as such.*

Where the surviving plaintiffs appear to be the sole legal representatives of a deceased plaintiff, the appeal survives as against them, and it can proceed, even though they have not been specifically joined as the deceased's legal representatives. (*Duckworth, J.*) MAUNG PO *v.* MA SHWE MA. **2 Rang. 445 : 84 I. C. 992 : A. I. R. 1925 Rang. 95.**

———O. 22, R. 2—*Suit by Burmese husband and wife for redemption—Dismissal of suit—Appeal—Death of husband—Right of wife to continue the appeal.*

A suit for redemption instituted jointly by a Burmese husband and wife was dismissed and against the decree they filed an appeal. Pending the appeal the husband died and the wife sought to continue the appeal without bringing on record the legal representative of the deceased. *Held*, that it was competent to the wife to continue the appeal. (*Young and Baguley, JJ.*) MAUNG BYAUNG *v.* MG. SHWE BAW.
3 Bur. L. J. 171 : 2 Rang. 486 : A. I. R. 1924 Rang. 376.

———O. 22, R. 2—*Appeal.*

This rule applies to appeal—C. P. Code, S. 96. (*Young and Baguley, JJ.*) MAUNG BYAUNG *v.* MG. SHWE BAW. **2 Rang. 486 : 3 Bur. L. J. 171 : 84 I. C. 170 : A. I. R. 1924 Rang. 376.**

———O. 22, R. 2—*Suit against several defendants—Liability of each ascertained—Death of some of the defendants—Abatement.*

Where the plaintiffs sued the defendants 210 in number, to recover a war-loan bond for Rs. 75,000 or in the alternative for Rs. 75,000 with interest thereon, and plaintiffs' case was that the ticket, which won the second prize in the Burma War Loan Sweepstake, a War Loan Bond for Rs. 75,000, which had issued in the name of the first plaintiff, had been wrongly made over by the Executive Committee of the Sweepstake to the defendants on their false representations that they were purchasers of the ticket in question ; and that the defendants were liable jointly and severally to return the bond to the plaintiffs or to pay the money equivalent with interest to date and that defendants Nos. 1 to 209 had transferred the bond to defendant No. 210. The trial Court dismissed the suit and pending an appeal by the plaintiffs some of the defendants died. Their legal representatives were not brought on record. On a question arising as to

C. P. CODE (V OF 1908), O. 22, R. 3.

whether the appeal had abated, *held*, that the plaintiffs had a cause of action for the sum sued for against each of the defendants out of the proceeds of the bond which had been distributed and that the death of some of the defendants did not cause the suit to abate. (*Pratt and Macgregor, JJ.*) MAUNG MU *v.* MAUNG KAN GYI. **1 R. 618 : 77 I. C. 393 : A. I. R. 1924 Rang. 127.**

——**O. 22, R. 3**—*Suit—C. P. Code, S. 92—Death of original plaintiffs.*

A suit under this section (S. 92) is prosecuted by individuals not for their own interest but as representing general public, and so it does not abate on the death of the original plffs. (*Lord Dunedin.*) RAJA ANAND RAO *v.* RAMDAS DADURAM.
48 Cal. 493 : 13 L. W. 318 : (1921) M. W. N. 24 : 17 N. L. R. 37 : 25 C. W. N. 794 : 30 M. L. T. 194 : 62 I. C. 737 : 48 I. A. 12 (P. C.).

——**O. 22, Rr. 3 and 11**—*Death of plaintiff or appellant—Right of respondent to apply to bring on record the legal representative.*

O. 22, R. 3 read with R. 11 does not confine the right to make an application to bring on the record the legal representatives of a deceased plaintiff or appellant to them alone. Where a defendant or respondent is interested in bringing the legal representative on record, it would be open to him to do so. (*Mears, C. J. and Mukherji, J.*) KEDAR NATH *v* MT. BISMILLAH BEGAM. **90 I. C. 72 : L. R. 6 A. 614 : A. I. R. 1926 All. 156.**

——**O. 22, Rr. 3, 4 and 10, S. 141 and O. 9, R. 13**—*Applicant to set aside* ex parte *decree dying—No appeal lies from order substituting legal representative.*

No appeal lies from an order, bringing a certain person on the record as the legal representative of a deceased party, which was passed on an application to set aside an *ex parte* decree. (*Sulaiman and Daniels JJ.*) MOTILAL *v.* BISHAMBHAR NATH.
23 A. L. J. 442 : 88 I. C. 95 : L.R. 6 A. (Civ.) 361 : A. I. R. 1925 All 431.

——**O. 22, R. 3**—*Decree passed in appeal after death of one of joint plaintiffs—Decree is nullity—No legal representative on record.*

Where one of several plaintiffs prefers an appeal in which the others are also interested and a decree is passed in ignorance of the death of one of the joint plaintiffs, the judgment is a nullity. (*Rafique and Piggott, JJ.*) AMBIKA PRASAD *v.* JHINAK SINGH.
45 A. 286 : 21 A. L. J. 91 : 71 I. C. 321 : L. R. 4 A. 92 : A. I. R. 1923 All. 211.

——**O. 22, R. 3**—*Death of one of several plaintiffs—Grandson of deceased impleaded as legal representative without objection—Objection on appeal.*

One of the plaintiffs in an ejectment suit died. An application was made to bring the deceased's grandson on the record ; though the Court passed no order on the application, the grandson was treated as a party to the suit without any objection being made by the opposite party. *Held*, that the procedure was irregular but the objection not being one of substance it could not be held in Second Appeal that the Appeal in the lower Court abated. (*Fremantle, S. M.*) RAJ SINGH *v.* SITARAM KALWAR. **L. R. 5 A. 80 (Rev.).**

——**O. 22, R. 3**—*Suit by two partners—One partner dead at the date of decree—Whole suit does not abate.*

Where in a suit by two partners, a decree is passed, the decree does not become incapable of execution by the mere fact that one partner was dead at the date of decree. The suit in such a case abates so far as the deceased partner is concerned. (*Tudball, J.*) SARJU PRASAD *v.* RAM SARUP. **3 U. P. L. R. (All.) 40 : 60 I. C. 755 : 19 A. L. J. 266.**

——**O. 22, Rr. 3 and 9**—*Death of plaintiff—Application of minor son to come on record within 6 months—Act XXVI of 1920—Duty of Court.*

Where on the death of the plaintiff, his minor son applied to come on record at the end of six months but meanwhile Act XXVI of 1920 had come into force cutting down the period to 3 months, the application should be treated as one to set aside the abatement and in the interests of the minor the abatement set aside. (*Macleod, C J. and Shah, J.*) VIJAYASINGH DATTAJIRAO *v.* SHIVAJIRAO NARAYANRAO.
26 Bom. L. R. 378 : 80 I. C. 761 (1) : A. I. R. 1924 Bom. 416.

——**O. 22, Rr. 3 and 9**—*Abatement of suit—Order setting aside, propriety of.*

Where more than three months after the death of a defendant in a suit, the Court brought his legal representatives on record on an application for that purpose, on the ground that the parties were ignorant of the reduction of the time allowed by recent legislation, *held*, that the delay was properly excused. The omission to set aside the abatement was a formal defect not affecting the merits of the order. (*Shah, A. C. J. and Crump, J.*) LAKSHMI BAI JAGANNATH JOSHI *v.* YESWANT VITHAL. **24 Bom. L R. 909 : 47 B. 92 : 75 I. C. 283 : A. I. R. 1922 Bom. 449 (1).**

——**O. 22, Rr. 3, 4 and 10**—*Assignee of a party must be substituted as his legal representative upon death.*

The death of a plaintiff after the assignment of his interest does not exclude the assignee's rights to be substituted in the suit. Because where there are two devolutions—the death of party and the transfer by him of his interest in the suit—the transferee has the right to be brought on the record in place of the deceased transferor. (*Suhrawardy and Duval, JJ.*) PRAKASH CHANDRA DAS GUPTA *v.* SHAMA CHARAN DUTT. **82 I. C. 991 : A. I. R. 1925 Cal. 467.**

——**O. 22, R. 3**—Pro forma *defendant.*

Pro forma defendant need not be joined in appeal. (*M. N. Mukerji, J.*) KRISHNA KUMAR DEB *v.* ATUL CHANDRA GHOSE. **39 C. L. J. 612 : 84 I. C. 79 : A. I. R. 1924 Cal. 998.**

——**O. 22, R. 3**—*Partnership—Suit for accounts—Death of partner—Suit cannot proceed.*

A suit to take the accounts and wind up the affairs of a partnership cannot proceed in the absence of one of the partners, or in the event of his death *pendente lite*, in the absence of his legal representatives. 31 Cal. 487, Ref. Where an appeal abated in part in respect of the heirs of a deceased appellant, the result of such abatement may be to make the appeal an imperfectly constituted appeal which the Court cannot proceed to hear. 24 C. W. N. 44, Ref. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 101: 34 C. L. J. 405.**

——**O. 22, R. 3**—*Appeal—Death of a defendant—Decree should direct abatement in respect of his interest.*

Where during the pendency of an appeal, one of several defendants having separate interests, dies, and his legal representatives are not brought on record, the decree ought to direct the abatement of the appeal in respect of the interest held by the deceased. (*Walmsley and Buckland, JJ.*) BHAIRAB CHANDRA KOLEY *v.* KALICHARAN DHARA. **61 I. C. 106 (Cal.).**

——**O. 22, R. 3 and O. 1, R. 8**—*O. 22, R. 3 applies to representative suits under O. 1, R. 8.*

Order 22, R. 3 of the C. P. Code is not rendered inapplicable by the fact that the suit is brought on

C. P. CODE (V OF 1908), O. 22, R. 3.

behalf of the whole proprietary body of the village. (*Martineau and Zafar Ali, JJ.*) RAM GOPAL *v.* HAR KISHEN. **7 L. L. J. 517 : 88 I. C. 478 : A. I. R. 1925 Lah. 598.**

——0. 22, Rr. 3 and 4 and O. 1, R. 8—*C.P. Code,*

An order under, R. 8 of O. 1 will not relieve the appellants from the necessity of impleading legal representatives of deceased respondents. (*Martineau and Moti Sagar, JJ.*) WALI MOHAMMAD *v.* MAHLU. **5 Lah. 429 : 6 L. L. J. 360 : A. I. R. 1925 Lah. 124.**

——0. 22, R. 3—*Abatement—Application for legal representative—Order an, is appealable.*

Where a party to a suit dies and more than 3 months after an application is made to bring on record his legal representative, the application is one under O.22, R. 9 (2) and the order thereon is appealable under O. 43, R. 1 (*k*). (*Moti Sagar, J.*) BADLU *v.* MT. NARAINI. **74 I. C. 17 : A. I. R. 1924 Lah. 424.**

——0. 22, R. 3—*Court exercising its discretion to extend time—Appellate Court will not interfere.*

Where in its discretion a Court has substituted the representative of deceased plaintiff by extending the time for substitution, the appellate Court will not interfere with the discretion so exercised. (*Broadway and Abdul Qadir, JJ.*) GOPI MAL *v.* PANNA LAL. **A. I. R. 1924 Lah. 339.**

——0. 22, R. 3—Pro-forma *defendant's death—No abatement.*

Where the other proprietors who were joined as defendants were merely formal defendants and were not interested in the result of the suit brought by the plaintiffs and it was found that the plaintiffs were not suing in a representative capacity but they were suing on their own interest, *held*, the death of one of the proprietors who was not a necessary party to the suit is of no consequence and cannot result in the abatement of the suit either in part or in its entirety. (*Moti Sagar, J.*) LEKHA *v.* BHANI. **A. I. R. 1923 Lah. 647.**

——0.22, R. 3—*Appeal against some of the defendants only—Effect.*

Where the suit was originally filed against a number of co-promisors some of whom died, an appeal against the surviving defendant only does not fail as a whole but the right to prosecute it survives as against him, for a contract entered upon by one or more promisors can be enforced against all or any of them. (*Le Rossignol and Abdul Qadir, JJ.*) THE FIRM OF GURUDAS RAMKOTURAM *v.* BHAGWAN DAS. **68 I. C. 815 : A. I. R. 1922 Lah. 182.**

——0. 22, Rr. 3, and 4—*Scheme suit—Death of defendant—Cause of action if survives re the framing of a scheme.*

Pending a suit under S. 92, C. P. Code, for the removal of the deft. from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt, the deft. died. The question arose whether the suit abated even with reference to the second relief prayed for, namely, the framing of the scheme. *Held*, it did not and that the cause of action survived even against the representative of the deceased deft. for the purpose of framing a scheme. (*Phillips and Krishnan, JJ.*) ARUMUGA THAMBIRAN *v.* NAMASIVAYA PANDARASANNADHI. **48 Mad. 688 : (1925) M. W. N. 69 : 22 L. W. 130 : 49 M. L. J. 324.**

——0. 22, R. 3—*Necessary party.*

Where one of the appellants (defendants) is dead, the appeal will not abate though his representative is not brought on record, if the remaining appellants are independently entitled to the reliefs sought. (*Spencer, O.C.J.*) NAMINENI CHENGAMMA NAIDU *v.* N. GANGULU NAIDU. **20 L. W. 402 : (1924) M. W. N. 789 : 82 I. C. 420 : A. I. R. 1925 Mad. 235.**

——0. 22, R. 3 and O. 34, R. 2—*Mortgage suit—Death of plaintiff after preliminary decree—Abatement—Application for final decree—Limitation.*

Where after the passing of the preliminary decree in a mortgage suit the plaintiff dies and his legal representative is not brought on record within the time prescribed by law, the suit abates, and the legal representative cannot obtain a final decree without setting aside the abatement. 39 M. 488 ; 28 M. L. J. 491, Ref. 42 M. L. J. 301, Foll. (*Spencer and Odgers, JJ.*) NATESA PILLAI *v.* KANNAMMAL ANNI. **19 L. W. 173 : 78 I. C. 64 : (1924) M. W. N. 216 : A. I. R. 1924 Mad. 786 : 46 M. L. J. 181.**

——0. 22, Rr. 3 and 10—*Legal representative—Religious endowment—Suit by trustee not properly appointed—Death of plaintiff—Right of successor to continue.*

A suit brought on behalf of a mutt by a trustee not properly appointed can be continued by a properly appointed successor on whom the representation of the institution has devolved. O. 22, R. 10, and not O. 22, R. 3 applies to such a case. An application for being brought on record as the legal representative of a deceased party though made under a wrong rule, may be ordered under the proper rule, if any, applicable to the case. (*Waller, J.*) RATNAM PILLAI *v.* NATARAJA DESIKAR. **19 L W. 367 : 34 M. L. T. 31 : (1924) M. W. N. 361 : A. I. R. 1924 Mad. 615 : 46 M. L. J. 341.**

——0. 22, R. 3—*Applicability—Mortgage suit—Death of plaintiff after preliminary decree—Bequest of interest to B—Application by B to be brought on record—Limitation.*

A died on 28-4-16 after obtaining a preliminary decree, dated 30—3—16 obtained on a mortgage. The period of redemption expired on 30-7-16. B who claimed to succeed to A's interests under a will put in petition on 26-5-19 to be brought on record and to be given a final decree. *Held*, the suit had abated under O. 22, R. 3. The right to sue in O. 22, R. 3 includes in the case of mortgage suits the right to obtain a final decree after the passing of a preliminary decree. (*Ayling and Venkatasubba Rao, JJ.*) DAKOJU SUBBARAYADU *v.* MUSTI RAMADASU. **45 M. 872 : 15 L. W. 309 : (1922) M. W. N. 375 : 68 I. C. 942 : 30 M. L. T. 202 : A. I. R. 1923 Mad. 237 (1) : 42 M. L. J. 301.**

——0. 22, R. 3—*Court's discretion to allow amendments under.*

In a case where an institution is represented at different stages of the suit by different representatives and not under the other, the provision of law applicable is O. 22, R. 3 and not O. 22, R. 10 of the C. P. Code and the Courts have in such a case a wider discretion to allow amendments and new pleas to avoid multiplicity of suits provided the character of the suit is not changed and the opposite side is not prejudiced and the trial unembarrassed. (*Krishnan, J.*) SUNDARESAM CHETTIAR *v.* VISWANATH PANDARASANNADHI. **16 L. W. 83 : 45 Mad. 708 : 31 M.L. T. 66 : (1922) M.W. N. 444 : 72 I.C. 103 : A. I. R. 1922 Mad. 402 : 43 M. L. J. 147.**

——0. 22, Rr. 3, 10—*Co-widows—Will authorising adoption—Suit by one widow for partition—Death of—Alleged adopted son, if can claim to be impleaded.*

The will of a Hindu authorised his two widows to adopt a son and made provisions for the management of the properties. Sometime later one of them alleging that no adoption had taken place sued the other widow

and another heir for a specific share being given to her for convenience of enjoyment. The defendant co-widow died pending suit and then the plaintiff died and thereupon a person alleging himself to have been validly adopted claimed to be impleaded as legal representative of the plaintiff. *Held*, he could succeed neither under O. 22, R. 3 nor under R. 10, as the suit was only in her capacity as widow and not representing the estate. (*Findlay, O.J C. and Wadegaonkar, A.J. C.*) AMRITRAO *v.* SONABAI. **89 I. C. 605 : A. I. R. 1925 Nag. 423.**

——0. 22, R. 3—*Abatement of appeal—Limitation Act, Art.* 176—*C. P. Code Amending Act XXVI of* 1920—*Effect of.*

The provisions of Act XXVI of 1920 curtailing period of limitation for bringing on record the legal representative of a deceased appellant to three months from the date of his death apply also to cases where the death has taken place even before the passing of the Amending Act. (*Kotwal, A. J. C.*) NIMBA *v.* JANKI. **71 I. C. 176 : A. I. R. 1923 Nag. 166.**

——0. 22, R. 3—*Legal representative—Who is.*

The words 'legal representative' cannot be construed to mean all legal representatives. They must include any legal representative to whom the right to sue survives. (*Macnair, A. J. C.*) NARAYAN *v.* AMRITA. **18 N. L. R. 21 : 65 I. C. 542 : A. I. R. 1923 Nag. 101 (2).**

——0. 22, R. 3—*Order under O. 22, R. 3 is not appealable.*

An order under O. 22, R. 3 is not open to appeal. O 43, R. 1 (*k*), Civil Procedure Code, allows an appeal from an order under R. 9, O. 22, but no appeal is allowed against an order under R. 3. (*Daniels, A. J. C.*) TRILOCHAN PRASAD SINGH *v.* BHAGWATI. **9 O. & A.L.R. 70: 73 I.C. 230: A.I.R. 1924 Oudh. 114.**

——0. 22, R. 3—*Names substituted in appeal from interlocutory order stand for all stages of suit.*

The introduction of the plaintiff or a defendant, even if it be made in appeal from a mere interlocutory order, is an introduction for all stages of the suit, for, as a general rule, the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. (*Adami and Bucknill, JJ.*) GOBIND SAHU *v.* ZAFAR KARIM. **78 I. C. 436 : A. I. R. 1925 Pat. 145 (1).**

——0. 22, R. 3—*Suit for partition—Issue as to Court-fee—Defence of impartibility — Decision on issue as to Court-fee—Transfer pending suit—Rights of transferee.*

In a suit for partition by an younger brother against his elder brother, the defence was that the property was impartible. An issue was raised as to the sufficiency of the Court-fee and the Subordinate Judge before whom this suit originally came, decided this issue in favour of the plaintiffs holding that the suit was one for partition only. No appeal was made against this order. In the meantime the elder brother died and his sons were substituted in his place as his representatives. The plaintiffs, moreover, sold a portion of the property to other persons who were added as plaintiffs. The suit then came before another Sub ordinate Judge who took up the question as to the sufficiency of the Court-fee again and decided that the plaintiff was bound to pay an *ad valorem* Court-fee. *Held*, that the order of the prior Subordinate Judge was a judgment and could not be altered save as provided by S. 152 or on review. S 151, C.P. Code cannot confer jurisdiction on the Court to do what is prohibited by positive law. S. 152, C. P. Code, refers merely to clerical or arithmetical mistakes and was of no assistance in the case. The devolution of interest

pending the suit could make no difference in the court-fee to be paid. The plaintiffs came in the interest of their vendor, the original plaintiff, and their position was identical with his. (*Das and Ross, JJ.*) HARIHAR PRASAD NARAYAN DEO *v.* MAHESHWARI PRASAD NARAYAN DEO. **3 Pat. 654 : 82 I. C. 813 : A. I. R. 1925 Pat. 47.**

——0. 22, R. 3—*Delay in bringing on record legal representative when to be excused.*

Where the respondent a purdanashin lady died and the appellant came to know of it only when the process server reported her death, it was a fit case for excusing the delay in bringing on record the legal representative. (*Das and Macpherson, JJ.*) NATHSAHAI *v.* IMAM REZA. **74 I.C. 912 : A.I.R. 1924 Pat. 319 (2).**

——0 22, Rr. 3 and 12—*No applicability to execution proceedings.*

A proceeding for ascertainment of mesne profits under a decree under the Code of 1882 is one in execution and not in the suit and the provisions of O. 22, R. 3 of the Code of 1908 is inapplicable to such a proceeding under R. 12 of the same order. (*Das and Ross, JJ.*) KEDAR NATH GOENKA *v.* TARINI PRASAD SINGH. **2 P. L. T. 245 : 61 I. C. 4 : 1921 P. H. C. C. 158.**

——0. 22, R. 3 (2)—*Abatement takes place* ipso facto *if representative is not impleaded in time.*

There is no question of demanding or not demanding an abatement, as an abatement takes place *ipso facto* if an application for impleading the representative of the deceased party is not made within time. (*Martineau and Zafar Ali, JJ.*) RAM GOPAL *v.* HAR KISHEN. **7 L. L. J. 517 : 88 I. C. 478 (1) : 26 Punj. L. R. 732 : A. I. R. 1925 Lah. 598.**

——0. 22, R. 4.

Applicability.
Death after Preliminary decree.
Decree against dead person.
Distinct Interests.
Joint interest or liability.
Limitation.
Necessary party.
Omission of some legal representatives.
Pleas open to legal representative.
Pro-forma party.
Redemption suit.
Representative suit.
Suit aganist dead person.
Tort.
Miscellaneous.

Applicability.

——0. 22, R. 4—*Applicability—Failure to object does not alter the fact of abatement.*

Where on a party's death, no application is put in to bring in his legal representatives within the time allowed by law, the appeal abates and no failure by the persons concerned to object to action taken on an application presented after expiry of such time would alter the fact of abatement. (*Campbell, J.*) WAHID BAKHSH *v.* LALTA PERSHAD. **73 I. C. 387 : A. I. R. 1924 Lah. 316.**

——0. 22, Rr. 4 and 11—*Applicability—One of the legal representatives already on record at the date of death—Application for substitution is not dispensed with.*

The fact that one of the legal representatives of the deceased, is already on the record does not relieve the appellant or the other heirs of the deceased from making an application for substitution as legal representatives of the deceased in terms of Rule 4 of Order 22. The legal representative already on record is respondent

C. P. CODE (V OF 1908), O. 22, R. 4—Applicability.

in his own capacity. If the appellant wants him to be placed on the record as legal representative of the deceased, a proper application should be made. Therefore, the appeal will abate if the application for substitution is filed more than 90 days after the death of the deceased respondent. 10 Bom. 220: 13 I. C. 313: 13 I.C. 165, Dist. (*Jwala Prasad and Kulwant Sahay, JJ.*) LILO SONAR *v.* JHAGRU SAHU.
3 P. L. R. 97: 6 P. L. T. 313: 3 Pat. 853: A. I. R. 1925 Pat. 123.

———O. 22, R. 4—*Applicability—Death intestate of defendant pending suit—Defendant governed by Succession Act--No administrator appointed—Plaintiff must get administrator appointed first.*

In the case of a party to whom the Succession Act applies, his legal representative within R. 4 is either his executor or administrator. If therefore such a party dies pending a suit and no representation is taken out for his estate, the opposite party must move the Court to have an administrator appointed, as no right to the property of an intestate's estate can be established in a Court unless letters of administration have been first granted. (*Godfrey, J.*) BARNETT BROS. LTD. *v.* E. FOWLE. **3 Bur. L. J. 347: 3 Rang. 46: 85 I. C. 325: A. I. R. 1925 Rang. 186.**

———O. 22, R. 4—*Applicability—Mortgage suits—Death of one defendant after preliminary but before final decree—Abatement—Extent of.*

The provisions of O. 22 applies to a case where one of the mortgagors in a mortgage suit dies after the preliminary decree but before the final decree. Unless the legal representatives of the deceased mortgagor are impleaded there is an abatement of the suit in respect of his interest, but it does not abate as against the other defendants. (*Bilaram, A. J. C.*) TULSIDAS KESHOWDAS *v.* RAMZAN ABDULLA. **89 I. C. 238.**

Death after preliminary decree.

———O. 22, R. 4—*Death after preliminary decree—Applicability—Legal representatives not brought on record—Suit abates.*

A preliminary decree does not put an end to a suit which remains pending till the final decree is passed and therefore R. 4 applies where a defendent dies after the passing of a preliminary decree. Where no application is made under O. 22, R. 4 (1) for the substitution of the legal representative of the deceased within the specified time following his death, the suit abates as against him. The heirs of the deceased cannot apply for the passing of a final decree while the order of abatement remains in force. 30 A. 551, Ref. (*Stuart and Sulaiman, JJ.*) JAGAR NATH UMAR *v.* RAM KARAN SINGH. **20 A. L. J. 575: L. R. 3 A. 460: 68 I. C. 251: 4 U. P. L. R. (All.) 182: A. I. R. 1922 All. 396.**

———O. 22, R. 4—*Death after preliminary decree—Section applies to proceedings following preliminary decree in mortgage suit.*

All proceedings in a mortgage suit subsequent to the preliminary decree but previous to the final decree are proceedings in a pending suit and an application made therein is not one for execution. Whether therefore the sole judgment-debtor dies before the final decree and the decree-holder fails to apply within six months of death to have the legal representative brought on record, the suit abates under O. 22, R. 4 of the C. P. Code, (*Newbould and Buckland, JJ.*) BHUTNATH *v.* TARA CHAND. **33 C. L. J. 115: 59 I. C. 177: 25 C. W. N. 595.**

———O. 22, Rr. 4 and 10—*Death after preliminary decree—Applicability—Proceedings before final decree.*

C. P. CODE (V OF 1908), O. 22, R. 4—Distinct Interest

Death of judgment-debtor after the preliminary decree but before passing of final decree cannot have the effect against the substitution of legal representative under O. 22, R. 10, C.P. Code, applicable. (*Hallifax, A. J. C.*) TULARAM *v.* TUKARAM.
64 I. C. 307: 17 N. L. R. 81.

Decree against dead person.

———O. 22, R. 4—*Decree against dead person—Where a co-plaintiff is dead before judgment his heirs need not be substituted in appeal.*

Where a co-decree-holder had died before the decision of the lower Appellate Court and his legal representatives had not been brought on the record, *held*, no decree could have been passed *qua* his share in the land in dispute therefore he or his heirs need not have been impleaded as respondents to the second appeal. (*Abdul Raoof and Moti Sagar, JJ.*) AMIR KHAN *v.* HOWNA RAM. **76 I. C. 6: A. I. R. 1925 Lah. 37.**

———O. 22, R. 4—*Decree against dead person—Death of one party before close of hearing of arbitration—Subsequent award is not binding on the representatives if they never agreed to the submission—Arbitration.*

In a submission to arbitration if before the death of a party the hearing of the case has been completed and nothing remains to be done except the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding upon his representatives-in-interest. But where the hearing had not terminated and a great deal remained to be done before the arbitrator could come to a final decision, the representatives of a deceased party who had never agreed to the submission could not be bound by the award. (*Moti Sagar, J.*) TEGHA *v.* RAM SINGH.
A. I. R. 1924 Lah. 725.

———O. 22, R. 4—*Decree against dead person is a nullity—Retrial ordered.*

It is illegal for the Court to continue to hear a suit against a dead person, whose death has bean brought to its notice and pass a decree against that person. (*Abdul Raoof and Campbell, JJ.*) DEBI PRASAD *v.* MT. BHAGO. **5 L. L. J. 187: 74 I. C. 682: A. I. R. 1924 Lah. 33.**

Distinct Interest.

———O. 22, Rr. 4, (3) and 9 and S. 107 (2)—*Distinct interests—Appeal abating against one respondent does not necessarily abate against the other, though both may be tenants-in-common.*

During the pendency of a suit for the recovery of possession of certain land by an uncle and nephew as tenants-in-common the nephew died. Thereupon his widow was substituted as his legal representative. The plaintiffs won the suit During the pendency of the appeal by the defendant the widow died in November, 1919. Till March 1921 no steps were taken and in that month the defendants applied to bring on record the nephew's sister as his legal representative. *Held*, that as the appellants had not applied under O 22, R. 9, Sub-Rule 2 to set aside the abatement, the appeal had abated as regards the nephew and could not be revised, but it did not necessarily follow from this that the appeal abated as against the uncle also. 22 Bom. 718. Foll. (*Shah, A. C. J. and Fawcett, J.*) SHANKERBHAI MANORBHAI *v.* MOTILAL RAMDAS SHAHA. **26 Bom. L. R. 1217:**

C. P. CODE (V OF 1908), O. 22, R. 4—Distinct Interest.

49 Bom. 118 : A. I. R. 1925 Bom. 122.

——**O. 22, R. 4**—*Distinct interests—Death of one defendant—No joint interest with others—No abatement—Legal representative not brought on record.*

If on the death of one of the defendants his legal representatives are not brought on record the question whether the suit abates as a whole depends upon whether the suit can proceed in the absence of the legal representatives of the deceased defendant. Where the lands in dispute are separately held by some of the defendants and the deceased defendant had no joint interest in those plots of land, the suit does not abate. (*Chatterjee and Fearson, JJ.*) SARAT KAMINI DASI *v.* CHAITANYA CHANDRA PROKORAJ.

67 I. C. 290 : A. I. R. 1923 Cal. 289.

——**O. 22, R. 4**—*Distinct interests—Suit to contest alienation by widow—One alienee dying during appeal—Representatives not brought on record in time—Whole suit does not abate.*

Where, pending an appeal from a suit by an alleged adopted son, against the adoptive father's widow and her alienees for setting aside alienation, one of the defendants-respondents died and his legal representatives were not brought on record in time, *held*, that the appeal abated only as regard the deceased defendant. 23 P. R. 1917 Foll. (*Abdul Raoof and Jai Lal, JJ.*) RAGHBIR SARAN *v.* MT. SOHAN DEVI. **6 Lah 233 : 86 I. C. 1 : 7 L. L. J. 149 : A. I. R. 1925 Lah. 381.**

——**O. 22, R. 4**—*Distinct interests—Death of one plaintiff-respondent—No joint interest—Appeal does not abate against other respondents.*

Where the plffs. are not joint tenants of the property in suit but each one has his own separate share in it and consequently any one of them might have maintained the suit against the defendant in respect of his own share, *held*, the defendant may maintain an appeal against the surviving respondents plaintiffs. (*Le Rossignol and Zafar Ali, JJ.*) LAJJA RAM *v.* SHAMBU NATH. **5 Lah. L. J. 14 : A. I. R. 1923 Lah. 252.**

——**O. 22, R. 4**—*Distinct interests—Mortgage by several co-parceners—One co-parcener dying during pendency of suit—Representatives nat joined—Suit abates only as regards his share.*

Where a mortgage was executed by several co-parceners of a joint Hindu family and one of the co-parceners died during pendency of the mortgage suit, and his representatives were not brought on record, *held*, that the suit abated only so far as his share was concerned. 21 Mad. 64 ; 30 Cal. 755 Rel. on. 38 Mad. 682 and 31 Cal. 487 (P.C.) Dist. (*Baker, J. C.*) NARAYAN *v.* DHUDABAI. **21 N. L. R. 38 : A. I. R. 1925 Nag. 299.**

——**O. 22, R. 4**—*Distinct interests—Suit does not abate on death of one of the defendants, where liability is joint and several—Claim for rent creates such liability.*

The test is whether the liability of the defendants or the judgment-debtors is joint and several in order to determine whether the death of one of the defendants or judgment-debtors renders the entire decree null and void. A claim for rent is joint and several one as against the tenants. (*Jwala Prasad, Ag. C. J. and Macpherson, J.*) KASHINATH SINGH *v.* KAILAS SINGH. **4 Pat. 53 : A. I. R. 1925 Pat. 480.**

Joint interest or liability.

——**O. 22, R. 4**—*Joint interest or liability—Joint suit for possession—Prior compromise merely defining shares but not perfected—Decree in suit is a joint decree.*

C. P. CODE (V OF 1908), O. 22, R. 4—Joint interest or liability.

Where prior to a joint suit for possession, the co-sharers had entered into a compromise defining their shares but there was no evidence that the compromise was perfected. *Held*, that the decree passed in the suit was a joint decree. (*Neave, J.*) DAYARAM *v.* RAM NARAIN. **A. I. R. 1925 All 623.**

——**O. 22, Rr. 4 (3) and 9**—*Joint interest or liability—Death of one respondent—No legal representatives substituted—Appeal abates against all respondents where their interest is inseparable.*

Though the rule only provides that the appeal shall abate as against the deceased respondent, there are cases in which it must abate as against all the respondents. The test is whether the result of leaving the decree to stand would be to have two inconsistent or contradictory decrees relating to the same subject-matter. Where the interest of the respondents can be distinguished and separated then the appeal will abate as against the deceased respondent only ; where no such determination is possible it must abate against them all. Where sale was a joint one in favour of six defendants and where during the pendency of an appeal from a decree refusing to set aside the sale, one of the respondents died, and where no legal representatives were substituted in his stead, *held*, the appeal abated against all the respondents. (*Neave, J.*) BIKRAMJIT RAI *v.* MAHANT DARSHAN DAS. **22 A L. J. 1033 : L. R. 5 A. (Civ.) 747 : 82 I. C. 26 : A. I. R. 1925 All. 141.**

——**O. 22, R. 4**—*Joint interest or liability—Joint decree—Death of one decree-holder—Legal representative not brought on record—Effect.*

Where in an appeal against a joint decree in favour of many persons, one of them dies and his legal representatives are not brought on record, the appeal abates as against all of them. (*Daniels, J.*) GAJRAJ TEWARI *v.* BHAGIRATH PANDE. **74 I. C. 14 : A. I. R. 1924 All. 95.**

——**O. 22, R. 4**—*Joint interest or liability—Abatement of appeal—Several respondents—Joint cause of action—Death of one respondent.*

Where there is a decree for joint possession in favour of the respondents one of whom dies, the decree cannot be questioned against the legal representatives of that respondent owing to lapse of time without their being brought on record, then the whole appeal abates, for if the appeal succeeds against the respondents who remain alive, there might be conflicting decisions of the Court, that is to say, there might be the decision of the first Court, in favour of the respondent who has died, a decision which cannot be questioned and the decision of an appellate Court contrary to the decision of the first Court which cannot be called in question owing to the abatement. (*Greaves and Panton, JJ*). SHEIKH DENDOO *v.* SHEIKH SACHOO. **72 I. C. 2 : A. I. R. 1924 Cal. 399.**

——**O. 22, R. 4**—*Joint interest or liability—Joint decree—Death of one of the decree-holders—Legal representative not brought on record—Appeal abates.*

Where an appellate Court is called upon to set aside a decree for possession which enured to the benefit of four persons and one of these persons died and his representative-in-interest had not been brought on record, *held*, that the appeal had abated. Even if the appeal were to succeed, the representative-in-interest of the deceased plaintiff would not be bound by the judgment on appeal and would be at liberty to execute the decree in its entirety as one of several joint decree-holders. The appeal had consequently

C. P. CODE (V OF 1908). O. 22, R. 4—Joint interest or liability.

become infructuous. (*Mookerjee and Rankin, JJ.*) MIDNAPORE ZEMINDARY CO. *v.* ISHAN CHANDRA CHOWDHURY. **72 I. C. 479 : A. I. R. 1924 Cal. 346 (1).**

——O. 22, R. 4—*Joint interest or liability—Decree for joint possession - Appeal by defendant—Omission to substitute legal representatives of deceased respondent—Appeal abates.*

Where a joint decree for possession in favour of the several plaintiffs was passed by the trial Court and pending an appeal therefrom by the defendant, one of the plaintiffs respondents died and his legal representatives were not brought on record within time, *held*, the whole appeal abated. 24 C.W.N. 44, Foll. (*Walmsley and Suhrawardy, JJ.*) ARJAN MIRDHA *v.* KALI KUMAR CHAKERBUTTY. **68 I. C. 194 : A. I. R. 1923 Cal. 294 (1).**

——O. 22, R. 4—*Joint interest or liability—Joint decree—Appeal—Decree set aside after death of one of the respondents and without substituting his legal representatives—Appellate decree is a nullity.*

Where in an appeal from a joint decree one of the respondents dies and his legal representatives are not brought on the record, the decree passed by the appellate Court setting aside the lower Court's decree is a nullity. (*Scott-Smith and Fforde, JJ.*) ANWAR-UL-HAQ *v.* NAZAR ABBAS. **6 Lah. 313 : A. I. R. 1925 Lah. 494.**

——O. 22, Rr. 4 and 6—*Joint interest or liability—Death of one of several respondents—Relief claimed joint.*

When the appellants lived 10 miles from the respondents and no reason had been shown for holding that they were prevented by any sufficient cause from ascertaining the death of one of them, *held*, the appeal automatically abated against him and his representative at the end of six months. Where relief sought against defendants is joint and indivisible, abatement against one is abatement against all. 1 Lah. 225 and 56 I. C. 927, Foll.; 60 I. C 722, Dist. (*Broadway and Harrison, JJ.*) SARDARA *v.* ALLAHYAR. **73 I. C. 604 : A. I. R. 1923 Lah. 132.**

——O. 22, R. 4—*Joint interest or liability—Defendants sued jointly as representing the estate of their father—Indivisible liability.*

Where the defendants were sued jointly as representing the estate of their late father and their liability, if any, was joint and indivisible and where one of the defendants died when he was a respondent in the appeal, in the absence of the application to bring the legal representative within time, whole appeal would abate. (*Le Rossignol and Wilberforce, JJ.*) GURDAS MAL *v.* KALSHI RAM. **3 Lah. L. J. 64.**

——O. 22, Rr. 4 and 11—*Joint interest or liability—Mortgage decree obtained by members of Mitakshara joint family—Appeal—Failure to substitute legal representatives of deceased respondent causes whole appeal to abate.*

An appeal from a mortgage decree in which the plaintiffs are all jointly interested, wholly abates where the legal representatives of any of the deceased respondents are not brought on record. A mortgage decree obtained by the members of a Mitakshara joint family is a decree in which all the plaintiffs are jointly interested. (*Dawson Miller, C.J. and Macpherson, J.*) DAROGA SINGH *v.* RAGHUNANDAN SINGH. **6 P. L. T 451 : 88 I. C. 669 : A. I. R. 1925 Pat. 590.**

——O. 22, R. 4—*Joint interest or liability—Suit by landlords for assessment of fair rent decreed—Appeal—Abatement as against one respondent operates as abatement against all.*

C. P. CODE (V OF 1908). O. 22, R. 4—Necessary party.

Where a suit by landlords for the assessment of fair and equitable rent is decreed and during the pendency of the appeal by the tenants, one of the respondents dies, failure to bring within time his legal representatives on record causes the appeal to abate as against the other respondents also, because the decree is a joint and indivisible one. (*Mullick and Ross, JJ.*) RAM GOBIND SINGH *v.* SHASHI SEKHAR PRASAD SINGH. **1925 P. H. C. C. 153 : A. I. R. 1925 Pat. 517.**

——O. 22, R. 4—*Joint interest or liability—Several defendants—One dying—Others are not exempted.*

Where a joint decree is passed against several defendants but one of them has died before the passing of the decree, the decree is not a nullity as against all the defendants but fails only as regards the deceased defendant and his heirs. (*Dawson Miller, C. J. and Mullick, J.*) NATHUNI NARAYAN SINGH *v.* ARJUN GIR. **4 Pat. 187 : 87 I. C. 47 : 6 P. L. T. 526 : A. I. R. 1925 P. 434.**

Limitation.

——O. 22, Rr. 4 and 9—*Limitation—Application, after limitation, for substitution, of respondents, allowed* ex parte—*At hearing of appeal, other respondents not objecting but Court in ignorance of order for substitution holding appeal as abated—Appeal cannot be held to have abated.*

Where an application for the substitution of legal representatives of one of several respondents was made after expiry of limitation and was accepted *ex-parte* and the substitution was made and where at the hearing of the appeal, the other respondents did not object to the order of substitution but the Court, in ignorance of the order of substitution previously made, held that the appeal had abated, *held*, that it must be held that time had been extended and that the legal representatives had been properly brought on record so that the appeal had not abated. (*Abdul Raoof and Harrison, JJ.*) CHARAN SINGH *v.* RAM DAYAL. **A. I. R. 1925 Lah. 599 (1).**

——O. 22, R. 4—*Limitation—One plaintiff dying during suit—Plaintiff misled by Court's order and hence not applying to bring proper legal representatives on record—Plaintiff should not be made to suffer.*

Where, on the death of the executor of one of two defendants, during the pendency of suit, plaintiff applied for substitution of heirs of defendant on the record and the Court without investigating under R. 5 whether the heirs were proper representatives directed the suit to proceed but subsequently at the appellate stage it transpired that the proper legal representative was the next executor and not heir of defendant and therefore the suit was contended to have abated. *Held*, that plaintiff was misled by the order of Court allowing suit to proceed and should be entitled under S. 5 of the Limitation Act to have the abatement, if there was an abatement, set aside. (*Dawson Miller, C. J. and Foster, J.*) TOFA LAL *v.* MOINUDDIN MIRZA. **4 Pat. 448 : A. I. R. 1925 Pat. 765.**

Necessary Party.

——O. 22, R. 4—*Necessary party—Joint decree for possession passed—Appeal preferred against decree—One decree-holder dying and his representative not brought on record—Appeal abates as against his heirs only, but the appeal is imperfectly constituted and cannot be heard.*

Where a joint-decree had been obtained and the defendants, appellants had failed to bring on the record the representatives of one of joint decree-holders, who had died, *held*: that, though under Order 22, R. 4. C. P. Code, the appeal abated against

C. P. CODE (V OF 1908), O. 22, R. 4—Necessary Party.

the heirs of the deceased plaintiff only, the result of such abatement was that the appeal was imperfectly constituted and that in the absence of a necessary party the Court would not proceed to decide the appeal on the merits. 24 C.W.N. 44 Foll. (*Neave, J.*) DAYARAM *v.* RAM NARAIN. **A. I. R. 1925 All. 623.**

——— **O. 22, R. 4**—*Necessary party—Co-sharers Suit for declaration of title—Death of one-Abatement.*

Where some of the proprietors of a village sue the others for a declaration in respect of the *shamila* of the village and one of the defendants dies and his legal representatives are not brought on record within time, the whole suit abates and is liable to be dismissed. (*Chevis and Harrison, JJ.*) SHAH MAHOMED *v.* KARAM ILAHI. **65 I. C. 121 : 14 P. W. R. 1922 : A. I. R. 1922 Lah. 131 (1).**

——— **O. 22, R. 4**—*Necessary party—Appeal--Abatement—Death of one of the respondents—Effect—Test.*

In considering whether an appeal abates wholly by the legal representatives of one of the respondents not being brought on record in time, a useful test is "could the suit *ab initio* have been instituted and prosecuted with the deceased left out?" (*Prideaux, A. J.C.*) RATANLAL *v.* JAIDEO. **A. I. R. 1924 Nag. 123.**

——— **O. 22, R. 4**—*Necessary party—Abatement of appeal against one of the respondents—Abatement against other respondents.*

Where for failure to bring on record the representatives of one of the respondents who is a necessary party, the appeal abates, it also abates as against all the respondents. 35 Bom. 393 : 22 Bom. 718 : 22 All. 430 Dist. (*Maccoll, J.*) MA ZAN NYEIN *v.* MAUNG KYAW ZAN. **1 Rang. 189 : 74 I. C. 1027 : A. I. R. 1923 Rang. 258.**

Omission of some Legal Representatives.

——— **O. 22, R. 4**—*Omission of some legal representatives—Appeal—Pre emption suit—Death of one vendee—Legal representatives not impleaded—Abatement of whole appeal.*

The question whether an appeal abates entirely or only against the deceased respondent depends on the nature of the suit or rather the nature of the right to sue. Where a pre-emptor sues for pre-emption against a number of vendees and on his suit being dismissed appeals, the cause of action is one and indivisible, and on the death of one of the respondents his legal representatives are not impleaded in time, the right to sue does not survive against the remaining vendees alone. (*Lindsay and Kanhaiya Lal, JJ.*) SHABBAR HUSSAIN *v.* ABBAS ALI. **L. R. 6 A. 567 : 23 A. L. J. 935 : 90 I. C. 324 : A. I. R. 1926 All. 152.**

——— **O. 22, R. 4**—*Omission of some legal representatives—Decree for possession—Death of one of several respondents—Legal representative not brought on record—Abatement.*

In a suit for recovery of land, when one of the defendants-respondents dies and his legal representatives are not brought on record in time, the appeal will abate as a whole if the shares of the respondents are not clearly specified; but if the interest is joint, the appeal abates *in toto.* (*Mears, C. J. and Sulaiman, J.*) DARSHAN DAS *v.* BIKRAMAJIT RAI. **L. R. 6 A. 587 : 23 A. L. J. 938 : 89 I. C. 953 (2) : A. I. R. 1926 All. 128.**

——— **O. 22, R. 4**—*Omission of some legal representatives—Mortgage suit—Judgment-debtor dying between preliminary and final decrees—Decree-holder substituting honestly person believed to be sole representative—Person entitled to be co-representative cannot redeem after final decree.*

C. P. CODE (V OF 1908), O. 22, R. 4—Omission of some Legal Representatives.

When a judgment-debtor, under a preliminary decree for foreclosure, has died between the passing of the preliminary decree and the final decree and the decree-holder has honestly substituted the person whom he believes to be the sole representative of the judgment-debtor and that person has accepted the possession, and when a final decree for foreclosure has subsequently been passed, a person who had right to be a co-representative of the judgment-debtor's estate and had as such a right to redeem the property cannot enforce a right to redeem subsequent to the passing of the final decree. 26 Mad. 230 and 32 Cal. 296 (P. C.) Foll. (*Stuart and Ryves, JJ.*) DIP NARAIN RAI *v.* LACHHMAN UPADHAI. **23 A. L. J. 332 : 87 I. C. 799 : 47 All. 466 : A. I. R. 1925 All. 479.**

——— **O. 22, R. 4**—*Omission of some legal representatives—Appeal—Several respondents--Death of one-His legal representatives not brought on record—Interest of deceased such as could be determined and separated from that of others—Appeal if abates against all.*

One of the respondents in appeal in the lower appellate Court had died and there had been no substitution of heir within the prescribed period: *Held*, that the decision in 22 A. L. J. 1033, did not apply where it could clearly be shown that the interest of the deceased could be determined and separated from others. (*McNair, S. M. and Pim, J. M.*) MUHAMMAD QAMAR *v.* SHEO SHANKAR LAL. **L. R. 6 A. 242 (Rev.).**

——— **O. 22, R. 4**—*Omission of some legal representatives—Death of defendant—Person other than legal representative, cannot be impleaded.*

A plaintiff cannot apply to a Court to implead somebody other than the legal representative of a deceased defendant, as a party to the suit and such an application cannot bind the real representative. (*Banerji and Tudball, JJ.*) MUHAMMAD JUNAID *v.* AULIA BIBI. **42 All. 497 : 61 I. C. 947 : 18 A. L. J. 613.**

——— **O. 22, R. 4**—*Suit by several plaintiffs for possession decreed—Appeal preferred—One plaintiff dying but his representatives not brought on record—Whole appeal abates.*

An appeal arising out of a suit for possession of land by several plaintiffs to which one of the plaintiffs respondents is not a party cannot proceed in his absence. The test to be applied is whether the suit as framed could proceed in the absence of one of the plaintiffs, or whether, if the plaintiffs were appellants, the appeal could proceed in the absence of one of the plaintiffs either as appellant or respondent. 30 C.L J. 217 Foll. (*Suhrawardy and Duval, JJ.*) MANINDRA CHANDRA *v.* BHAGBATI DEVI. **30 C. W. N. 45 : A. I. R. 1926 Cal. 335.**

——— **O. 22, R. 4**—*Plaintiffs suing several defendants jointly for possession—Defendants' written statements precisely defining plots they individually possessed—Suit abating against some defendants does not abate wholly.*

The plaintiffs constituted the suit as against the tenant defendants as if they were joint tort feasors and asked for a decree for khas possession against them in a body. But the tenant defendants filed written statements in which they stated with precision exactly what plots they were individually and separately in possession of. *Held*, that should the plaintiffs succeed on the merits they would be entitled to a decree against the respective tenants who might be found, either upon their own admission or otherwise, to be in possession of specific plots of land provided

C. P. CODE (V OF 1908), O. 22, R. 4—Omission of some Legal Representatives.

they were not jointly interested therein with any against whom the suit might have abated. 30 C. L. J. 203 and 24 C. W. N. 44 Dist. A. I. R. 1923 Cal. 289 Foll. (*Walmsley and Mukerji, JJ.*) TARA PRASANNA *v.* RANJIT LAL. **85 I.C. 553 (2): A.I.R. 1926 Cal. 252.**

———O. 22, R. 4—*Deceased respondent not interested in the result of appeal—Failure to bring his representatives on record does not cause abatement of appeal.*

Where one of several respondents died and it was found that he had no interest in the result of the appeal: *Held* that the failure to bring his legal representatives on record did not cause the abatement of the appeal. (*Greaves and Mukerji, JJ.*) SUBASINI DASI *v.* HABU GHOSH. **89 I. C. 100 : A. I. R. 1926 Cal. 247.**

———O. 22, R. 4—*Ejectment suit—Appeal—Some of the defendants dying and their representatives not brought on record—Defendants holding distinct plots separately described in plaint—Whole appeal does not abate.*

Where pending an appeal by plaintiff landlord in ejectment suit against several defendants some of the defendants die and their representatives are not brought on the record in time: but the defendants hold distinct plots of land which have been separately described in the plaint, the whole appeal should not abate, but the claim with regard to some plots only should be dismissed. (*Newbould and B. B. Ghose, JJ.*) GOPIKA RAMAN *v.* ATUL SINGH. **85 I. C. 678 : A. I. R. 1926 Cal 193.**

———O. 22, R. 4—*Legal representatives of deceased respondent already on record—Application under R 4 (1) must still be made.*

The mere fact that the alleged legal representatives of a deceased respondent were already parties to the appeal does not relieve the appellants from the necessity of making an application under O. 22, R, 4 (1). A.I.R. 1925 Patna 123 Foll: 11 P.L.R. 1921 : 24 O.C. 374: 50 P.R. 1902 and 1925 Rang. 95 Not Foll. (*Abdul Raoof and Fforde, JJ.*) GURDITTAMAL *v.* MOHAMED KHAN. **7 Lah L. J. 544 : 26 P. L. R. 832 : 90 I. C. 41 : A. I. R. 1926 Lah. 37.**

———O. 22. Rr. 4 and 5—*Death of* pro forma *respondent in appeal—Whether whole appeal abates.*

Where a *pro forma* respondent died pending an appeal, the appeal as a whole does not abate. (*Jai Lal, J.*) RAM LABHAYA *v.* KARTAR SINGH. **7 Lah. L. J. 466 : A.I.R. 1925 Lah. 651 (2).**

———O. 22, R. 4—*Representative suits—Appeal—Death of one representative—Leave to defend on behalf of others—Abatement.*

An order passed under O. 1, R. 8 allowing certain respondents to defend the appeal on behalf of others, will not relieve the appellants from the necessity of impleading all those who were parties in the court below and had obtained a decree in their favour, and the representatives of those who have died. The appeal will abate *in toto* if no steps are taken to

C. P. CODE (V OF 1908), O. 22, R. 4—Omission of some Legal Representatives.

bring on record the legal representatives within time. (*Campbell and Moti Sagar, JJ.*) SAMAIL *v.* HAJI. **89 I. C. 378.**

———O. 22, R. 4—*Joint decree—Death of one respondent—Abatement.*

Where pending an appeal against a joint decree in favour of several respondents, one of them dies and his legal representative is not brought on record, the appeal abates *in toto* and not only *qua* the deceased respondent. (*Abdul Raoof and Martineau, JJ.*) HAJI *v.* JANUM. **89 I. C. 162 (Lah.).**

———O. 22, R. 4—*Death of certain respondents—Effect.*

Where during the pendency of an appeal in a suit relating to succession, some of the successful respondents died and their legal representatives were not brought on record the appeal did not abate *in toto* but only as regards the shares of those respondents. (*Broadway and Abdul Qadir, JJ.*) NANDOO SINGH *v.* BALJIT SINGH. **5 Lah. L. J. 203 : 69 I. C. 495 : A. I. R. 1924 Lah. 93.**

———O. 22, R. 4—*Omission of some legal representatives—Legal representative*

A plaintiff can get relief against a legal representative of a deceased defendant even if another legal representative whom he has failed to implead exists. (*Macnair, A. J. C.*) NARAYAN *v.* AMRITA. **18 N. L. R. 21 : A.I.R. 1923 Nag. 101 (2).**

———O. 22, R. 4—*Omission of some legal representatives—Only some heirs sought to be substituted—Appeal does not abate against others.*

Where a respondent dies and the appellant applies for substitution of some of the heirs alone of the respondent of whose existence alone the appellant is aware, the appeal does not abate even as against the other heirs of the respondent if the appellant applies for impleading them within time from his becoming aware of their existence. 16 All. 211: 30 All. 117 and 26 Bom 203 Dist. 3 All. 517: 12 Bom. 48: 26 M. 230 Foll. (*Jwala Prasad and Adami, JJ.*) SHIB DUTTA SINGH *v.* KARIM BAKHSH. **4 Pat. 320 : A. I. R. 1925 Pat. 551.**

———O. 22, R. 4—*Applicability—Death of one deft. after preliminary decree—Abatement—Extent.*

It is necessary to bring all the legal representatives of a deceased defendant on the record, and the failure to join all the legal representatives results in an abatement of the suit. (A. I. R. 1925 Sind 2 Foll.; 26 Mad. 230 and A. I. R. 1924 Bom. 420 Not followed). A mortgage suit does not abate against other co-mortgagors by reason of its abatement against one of the mortgagors. (*Rupchand Bilaram, A. J. C.*) TULSIDAS KESHAVDAS *v.* RAMZAN ABDULLAH. **89 I. C. 238 : A. I. R. 1926 Sind 20.**

———O. 22, R. 4—*Omission of some legal representatives—Legal representative means all legal representatives.*

The phrase "legal representatives" means all the persons on whom the estate of a deceased party devolves and does not mean a person regarded merely as a representative for the purpose of the suit. In absence of all the heirs being brought on the record the proceedings abate so far as the deceased party is concerned. In the case of Christians and Parsis 'legal representative' primarily means executor or administrator (including one *de son tort*), but in the absence of a will, means an heir or next of kin. In the case of Hindus or Mahomedans where there is a will it means the executor. In absence of will or an administrator all the heirs must be joined. (*Kennedy and Austen, A. J. Cs.*) PIR SIDIKH MUHAMMAD SHAH *v.* MT.

C. P. CODE (V OF 1908), O. 22, R. 4—Pleas open to Legal Representative.

SARAN. 76 I. C. 314 : A. I. R. 1925 Sind 2.

Pleas open to Legal Representative.

——O. 22, R. 4—*Pleas open to legal representative—Decree against—Subsequent claim against purchaser in independent title barred.*

Where the legal representatives of a mortgagor are impleaded as parties to a suit for sale by the mortgagee and a decree for sale is passed in execution of which the properties are purchased by a stranger, it is not open to the legal representatives thereafter to claim to redeem the mortgage on the strength of their own independent title as purchasers of a portion of the equity of redemption at a revenue sale. (*Ryves and Gokul Prasad, JJ.*) RAM LALLAN SINGH *v.* HAREKH NARAIN RAI. 20 A. L. J. 641 : 73 I. C. 920 : A. I. R. 1922 All. 463.

——O. 22, R. 4 (2)—*Pleas open to legal representative—Legal representative cannot alter pleadings.*

The legal representative of a party to a suit occupies the same legal character as the deceased and hence must stick to the position taken up by him in the pleadings. (*Oldfield and Ramesam, JJ.*) KOZHIKOT PATHINHARE KOVILAGATH *v.* SANKARA MENON. 73 I. C. 376 : A. I. R. 1924 Mad. 245.

Pro-forma party.

——O. 22, R. 4—Pro-forma *party—Death of—Decree passed in ignorance not void.*

The death of a *pro-forma* respondent during the pendency of an appeal and the passing of a decree without his legal representative being brought on record do not render the decree a nullity. (*Rafique and Piggott, JJ.*) AMBIKA PRASAD *v.* JHINAK SINGH. 45 All. 286 : 21 A. L. J. 91 : L. R. 4 A. 92 : 71 I. C. 321 : A. I. R. 1923 All. 211.

——O. 22, R. 4—Pro-forma *party—Representatives not brought on record—Uninterested defendant.*

When the defendant is not interested in the litigation and a decree passed in the suit would not affect him in any way, the omission to bring his legal representative on record on account of his death would not justify dismissal of the plaintiff's suit. (*Mookerjee and Chotzner, JJ.*) MOHESH CHANDRA MISRA *v.* SRIMATYA NISTARINI DASSYA. 27 C. W. N. 449 : A. I. R. 1923 Cal. 382.

——O. 22, R. 4—Pro-forma *party—Defendant.*

The abatement of an appeal as against a *pro-forma* defendant does not result in the abatement of the appeal as a whole. (*Jai Lal, J.*) RAM LABHAYA *v.* KARTAR SINGH. 7 Lah. L. J. 466 : A. I. R. 1925 Lah. 651 (2).

——O. 22, R. 4—Pro-forma *party—Death of—No abatement.*

Not bringing on record the representatives of *pro-forma* respondents does not cause abatement of the whole appeal. (*Broadway and Zafar Ali, JJ.*) ZAIDA *v.* RAJA. A. I. R. 1923 Lah. 350.

Redemption suit.

——O. 22, R. 4—*Redemption suit—Death of mortgagor—Failure to bring on record legal representative—Suit abates.*

In the course of an appeal arising from a suit by a second mortgagee to redeem the prior mortgage, the mortgagor respondent died. The effect of failing to bring his legal representative on record was the abatement of the appeal. (*Chevis and Harrison, JJ.*) NANAK CHAND *v.* RAM CHAND. 4 Lah. L. J. 189 : 77 I. C. 176 : A. I. R. 1922 Lah. 101.

——O. 22, R. 4—*Redemption suit—Death of respondent.*

C. P. CODE (V OF 1908), O. 22, R. 4—Tort.

If the legal representatives of the deceased mortgagees are not brought on records within the time the whole appeal will abate as a whole. (*Scott-Smith and Martineau, JJ.*) BHAGWAN SINGH *v.* JAMAL. 3 Lah. L. J. 252.

Representative suit.

——O. 22, R. 4—*Representative suit—Appeal—Death of one respondent—Survival of right—No abatement.*

Where in an appeal from a suit for a declaration that certain properties had been dedicated to waqf and that their alienation was void, one of the plaintiffs (respondents) dies, the appeal does not abate as against him. (*Broadway and Martineau, JJ.*) RAHIM BAKSH *v.* CHANNAH DIN. 4 Lah. L. J. 511.

——O. 22, R. 4—*Representative suit—Appeal—Order for abatement is open to—Suit in a representative capacity—No abatement.*

An order declaring the abatement of an appeal on the ground that the legal representatives are not brought on record is a decree and is appealable. Where a suit is brought in a representative capacity and some persons die during the pendency of an appeal from a decree in such suit their legal representatives need not be brought on record. (*Broadway and Abdul Raoof, JJ.*) UDMI *v.* HIRA. 1 Lah. 582 : 60 I. C. 111 : 3 L. L. J. 762.

Suit against dead person.

——O. 22, R. 4 and O. 21, R. 63—*Suit against dead person—Claim suit — Legal representative of deceased decree-holder not brought on record—Effect of.*

Where a defeated claimant files a suit under O. 21, R. 63, C. P. Code, to establish his title but without impleading the legal representative of a decree-holder who had died prior to the institution of the suit, the legal representative of the deceased decree holder is not bound by the decree in the title suit and so far as the deceased decree-holder was concerned, the order dismissing the objection in claim proceedings had become conclusive under O. 21, R. 63, C. P. C. (*Scott-Smith, J.*) PIYARA LAL *v.* MAZHAR KHAN. 16 P. L. R. 1922 : 64 I. C. 359 : 4 U. P. L. R. (Lah.) 23 : A. I. R. 1922 Lah. 78.

Tort.

——O. 22, R. 4—*Tort—Death of one of several defendants at the date of suit in a suit for damages—Suit continues against others.*

Liability of wrong-doers in tort is joint and several. Where in a suit for damages it was discovered that one of the several defendants was not alive when the suit was brought, the Court should strike his name out and allow the suit to proceed against the others, but should not dismiss the suit *in toto*. (*Campbell, J.*) MT. PHILLO *v.* GOPI. A. I. R. 1924 Lah. 348.

——O. 22, R 4—*Tort—Suit against joint tort-feasors—Legal representative of one defendant not impleaded—Effect.*

Where in a suit against joint tort-feasors one deft. dies and his legal representative is not brought on record, the suit does not abate as against others, and the decree obtained therein can be executed against the other defts. The result of such a decree is that a decree obtained against some joint tort-feasors bars action against others. (*Das and Ross, JJ.*) GAJO SINGH *v.* AMRIT NARAIN SINGH. 60 I. C. 722 : 2 P. L. T. 234.

Miscellaneous.

——0. 22, Rr. 4 and 9—*Suit against firm—Death of sole proprietor—Abatement.*

Where a suit was brought against a firm and the alleged sole proprietor died but no steps were taken to bring his legal representatives on record, *held*, the suit abated (*Ghose, J.*) RAM PRASAD CHIMONLAL *v.* ANUNDJI AND CO. **49 Cal. 524 : 69 I. C. 885 : A. I. R. 1922 Cal. 408.**

——0. 22, R. 4 (3)—*Ignorance of death of respondent—Sufficient cause.*

There was an affidavit that the appellants, one of them a minor and the other, his brother and next friend, a mere youth, were absent from Multan for the eminently laudable purpose of prosecuting their studies, and were therefore not aware of the death of the respondent. *Held*, sufficient cause was established to set aside the abatement. (*Abdul Raoof and Campbell, JJ.*) TIRATH RAM *v.* MAHOMED ABDUL RAHIM SHAH. **73 I. C. 616 : A.I.R. 1923 Lah 546.**

——0. 22, R. 4—*Appeal—Abatement of, against one of the respondents—When abates against all.*

If the interests of all the respondents are indivisible and the appeal abates against one, it abates against all. 41 P R. 1915, Dist. (*Broadway and Martineau, JJ.*) WALI *v.* MOHAMAD KHAN. **4 Lah. L. J. 221 : A. I. R. 1922 Lah. 34.**

——0. 22, Rr. 4 and 11—*Legal representative—Extension of time whether allowed.*

In a case where the appellant, though represented by counsel, does not put in a formal petition for bringing deceased respondent's representatives on the record within the time prescribed by law, it is not right to extend time to allow him to do so. (*LeRossignol, J.*) WALAYAT KHAN *v.* MUST. MALAN.
5 Lah. L. J. 119 : A. I. R. 1922 Lah. 30 (1).

——0. 22, R. 4—*Application to bring legal representatives on record in memo. of objections—Order enures for the appeal also.*

An order bringing the legal representatives of the deceased respondent on the record in the memorandum of objections enures for the whole of the proceedings including the appeal. 7 L. W. 614 Ref. (*Srinivasa Aiyangar, J.*) KANTHIMATHI AMMAL *v.* R. PERUMAL KONU. **88 I. C. 215 : A I. R. 1925 Mad. 777 : 48 M. L. J. 492.**

——0. 22, R. 4—*Death of defendant—Legal representative can himself come on record—Right to costs.*

Where a defendant dies pending a suit, it is open to his legal representative to come on record on his application notwithstanding the plaintiff's omission to implead him. In such a case the Court might award costs to the legal representative. (*Schwabe, C. J. and Ramesam, J.*) KUPPUSWAMI CHETTY *v.* SINGARAVELU CHETTY. **(1923) M. W. N. 867 : 18 L. W. 99 : 75 I. C. 848 : A. I. R. 1923 Mad. 679 : 45 M. L. J. 233.**

——0. 22, R. 4—*Appeal—Abatement on account of death of one of the appellants—Suit for redemption.*

Where two appellants filed an appeal, and one of them died, his legal representative not having been brought on record within time, the other continued the appeal. *Held*, that the appeal cannot abate entirely. (*Young and Baguley, JJ.*) MAUNG BYAUNG *v.* MAUNG SHWE BAW. **2 Rang. 486 : 3 Bur. L. J. 171 : A. I. R. 1924 Rang. 376.**

——0. 22, R. 5—*Legal representative.*

It cannot be held that, because there was any omission to take formal steps to have it declared that plaintiff who was a party to the record was for the purpose of these proceedings the legal representative of adoptive mother, the order of the Court below was bad. (*Rafique and Lindsay, JJ.*) JIWA RAM *v.* NAND RAM. **20 A. L. J. 226 : 44 All. 407 : A. I. R. 1922 All. 223.**

——0. 22, R. 5—*Legal representative—Who is.*

For the purposes of O. 22, R. 5, C. P. Code, it is sufficient if a person has succeeded in forcing recognition of his status from the deceased and has intermeddled with the deceased's estate and is actually in possession of a portion of it. (*Le Rossignol and Martineau, JJ.*) GOOR BACHAN SINGH *v.* GIAM SINGH. **A. I. R. 1922 Lah. 175.**

——0. 22, R. 5—*Legal representative—Dispute as to—Decision of question on appeal.*

A dispute arising in the course of the trial as to the representatives of a deceased party has to be decided after investigation by the trial Court and if it fails to do so, the appellate Court can decide the question. (*Broadway and Abdul Raoof, JJ.*) TAJA *v.* DEVI DITTA. **4 Lah. L. J. 314.**

——0. 22, R. 5—*Court must take evidence to decide who is legal representative—Failure to take evidence will justify interferencee in revision.*

Under O. 22, R. 5 where a question arises, as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court, and for that purpose, the Court must take evidence and then decide for itself, who has got the better claim. If the Court fails to follow this procedure the High Court will interfere in revision. (*Krishnan and Odgers, JJ.*) T. S. NAGAPPA NADAR *v.* T. S. KARUPPIAH NADAR. **21 L. W. 21 : 86 I. C. 178 : A. I. R. 1925 Mad. 456.**

——0. 22, Rr. 5 and 2—*Wrong legal representative brought on record—Proper legal representative's rights.*

Where a person who is not the legal representative is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to continue the litigation, the benefit of that litigation may be taken advantage of by the proper legal representative and the representatives on record will be accountable to him. If this is so, the legatees and creditors can proceed against the proper legal representatives if their claim is not barred. Their proper legal representatives will be in a position to get the benefit of the decree and thus to be in possession of assets. (*Schwabe, C. J., Coutts-Trotter and Kumaraswami Sastri, JJ.*) ZAMINDAR OF BHADRACHALAM *v.* RAJA VENKATADRI APPA RAO. **16 L. W. 369 : (1922) M. W. N. 532 : 70 I. C. 689 : 31 M. L. T. 221 (H. C.) : 46 Mad. 190 : A. I. R. 1922 Mad. 457 43 M. L. J. 466(F. B.).**

——0. 22, R. 5—*Admission of a person as legal representative—Effect of.*

The admission of a person as a legal representative for the purpose of prosecuting the suit does not conclusively establish his right to do so if his legal position is one of the main issues in the suit itself. Similarly the decision that a person is a legal representative only to a limited extent does not preclude him from proving in the suit what his full rights are. 27 B. 162 : 28 A. 109 Foll. (*Batten, J. C.*). MT. DHAPU *v.* RAM AUTAR. **70 I. C. 209 : A. I. R. 1923 Nag. 209.**

——0. 22, R. 5—*Death of plaintiff—Substitution—Rival claimants—Question of substitution disposed of in judgment and not by separate order—Appeal—Jurisdiction.*

During the pendency of a suit a plaintiff died and there were two sets of claimants to be substituted

C. P. CODE (V OF 1908), O. 22, R. 5.

The Court disposed of the question of substitution in its judgment and embodied the result in a decree in favour of one set of the claimants. The District Judge on appeal went into the merits and upset the decision. *Held*, on second appeal, no appeal lay at the instance of the other set and an order passed by the appellate Court on the appeal of the unsuccessful set must be set aside as having been made without jurisdiction. 16 O. C. 350 and 15 Bom. 145 followed. 13 A. L. J. 381 and 28 All. 708 referred to. 9 All. 445 and 43 Mad. 812 distinguished. (*Simpson, A. J. C.*) LALTA SINGH *v.* LACHMI KUAR. **2 O. W. N. 857.**

——O. 22, Rr. 5 and 9—*Appeal—Abatement—Setting aside—Ignorance of death.*

The Code makes it obligatory on an appellant to keep himself informed of any devolution of interest that may take place by reason of the death of any of the respondents and it is not sufficient merely to say that the applicant had no knowledge of the death of the respondent till many months after such death. The abatement of an appeal gives a very important right to the person or his heirs against whom the appeal abates and it is not without sufficient reason that the court should set aside an abatement. Mere assertion that the applicant had no knowledge of the death of the respondent is not entitled to any weight unless some reasons are assigned why the applicant did not keep himself informed of the death of the respondent. (*Das and Macpherson, JJ.*) PHULWATI KUMARI *v.* MAHESHWARI PRASAD SINGH. **5 Pat. L. T. 349 : 75 I. C. 909 : A. I. R. 1924 Pat. 607.**

——O. 22, R. 5—*" Court ", meaning of—Question of legal representative—Who to decide.*

The word " Court " in O. 22, R. 5 means the Court before whom the question arises *viz.*, the trial Court if the question arises at the trial stage or the appellate Court if the question arises in appeal. There is no provision in the Code for an appellate Court to delegate its power under the rule ; the utmost that can be done is to direct the trial Court to take evidence on the question and return the same. (*Miller, C. J. and Coutts, J.*) MT. CHANDMANI *v.* KARTIK SINGH. **3 Pat. L. T. 380 : 65 I. C. 131 : A. I. R. 1922 Pat. 197 (1).**

——O 22, R. 5—*Death of respondent—One of the legal representatives impleaded.*

Where pending an appeal, the respondent dies and only one of his legal representatives is brought on record without any objection the decision is binding on the estate. Once the Court decides that a person is the legal representative for the purposes of a suit under O. 22, R. 5, then he represents the estate and the adjudication is binding on it. (*Brown, A. J. C.*). MAUNG PO MYA *v.* MAUNG GYAN BON. **1 Bur. L. J. 272 : 72 I. C. 205 : 4 U. B. R. 150 : A. I. R. 1923 Rang. 114.**

——O. 22, R. 6—*Applicability—Defendant dying after hearing but representative brought on record before decree.*

Where after the hearing of suit a defendant died and his representative was brought on record before the decree was passed. *Held*, that R. 6 has no application as the decree as passed was not against a dead man but against a living person. O. 22, R. 6 prevents abatement when death takes place between conclusion of the hearing and the pronouncement of the judgment and the decree is passed against a dead man ; this provision of law covers cases where the Court is unaware of the death of a party and proceeds on the supposition that the parties are alive. The rule deals with a decree against a dead man and not with one against living persons. It indicates how a decree against a dead man is to be construed and can have no reference to a decree passed against a living person. (*Mukerji and Dalal, JJ.*) MT. CHAMBI *v.* TARA CHAND. **46 All. 744 : 22 A. L. J. 665 : L. R. 5 A. (Civ.) 502 : A. I. R. 1924 All. 892.**

——O. 22, R. 8—*Insolvency of appellant—No limitation for Official Assignee to apply for substitution.*

There is no limitation for the Official Assignee to appear and apply for the substitution in the place of a debtor appellant who, during the pendency of his appeal is adjudicated insolvent, or for the debtor to appear and apply for restoration of his name on the record after the annulment of his adjudication. Until an order under O. 22, R. 8 is obtained, the proceedings must be deemed to continue. (*Linasay and Kanhaiya Lal, JJ.*) KHUNNI LAL *v.* RAMESHAR. **43 All. 621 : 19 A. L. J. 685 : 64 I. C. 52 : L. R. 3 A. 40 : A. I. R. 1922 All. 361.**

——O. 22, R. 8—*Plaintiff adjudicated insolvent subsequent to suit—Notice to Official Receiver should be given.*

Where subsequent to the institution of a suit, the plaintiff is adjudged an insolvent, the Court ought to give notice to the Official Receiver to appear, and state his willingness or not to continue the suit and ought not to dismiss the suit before such notice. (*Wallis, C. J. and Sadasiva Aiyar, J.*) OFFICIAL ASSIGNEE, RANGOON *v.* CHIDAMBARAM CHETTY. **12 L. W. 551 : 61 I. C. 300 : (1920) M. W. N. 704.**

——O. 22, R. 9—*Sufficient cause.*

An appellant died and no application was made within six months to bring his heirs on the record. *Held*, the appeal abated automatically. The absence of any order of abatement does not serve as an obstacle to the making of an application for substitution of name which is in effect an application to set aside the order of abatement. O. 22, R. 9 (2) is not controlled by Cl. (3) and the " sufficient cause " mentioned in Cl. (2) is not confined to the circumstances given in S. 5 of the Limitation Act. (*Walsh, J.*) LACHMI NARAIN *v.* MOHAMMAD YUSUF. **42 All. 540 : 59 I. C. 903 : 18 A. L. J. 688.**

——O. 22, R. 9—*Tenants-in-common—Respondents—Abatement by death of one—Whole appeal if abates.*

Plaintiff who were tenants-in-common sued to recover possession of certain property and pending the suit, one of them died and his widow was added as his legal representative. The suit was decreed and while an appeal was pending at the instance of the defendants, the widow who had been impleaded as a respondent died. For nearly a year and a half the appellant did not bring on record the legal representative of the deceased widow. The Court below dismissed the whole appeal as having abated. *Held*, that though the appeal abated as against the widow and her legal representatives, it did not abate as against the other tenant-in-common. (*Shah, A. C. J. and Fawcett, J.*) SHANKARBHAI MANORBHAI *v.* MOTILAL RAMDAS. **26 Bom. L. R. 1217 : 49 Bom. 118 : A I. R. 1925 Bom. 122.**

——O. 22, R. 9— *Abatement — Setting aside—Sufficient cause.*

When an application is put in to set aside abatement, the court should first investigate if the party was lawfully prevented from making the application in time and whether in the circumstances, he was entitled to the benefit of S. 5, Lim. Act. (*Suhrawardy and Duval, JJ.*) JANAKINATH SINGA ROY *v.* NIRODE BARAN ROY. **90 I. C. 811.**

——O. 22, R. 9—*Decision affecting the merits of*

C. P. CODE (V OF 1908), O. 22, R. 9.

the case—Order setting aside abatement—Appeal.

An order setting aside an abatement and allowing substitution even though the order is passed simultaneously with the decree in the suit cannot be questioned in an appeal from the decree for it does not affect the decision of the case with reference to its merits. 22 C. 984 : 22 A. 430 Ref. (*Suhrawardy and Cuming, JJ.*) MAHOMED NURUL AMIN *v.* MONDHAR SORAN DEB MOHANTA.

40 C. L. J. 588 : A. I. R. 1925 Cal. 473.

———O. 22, R. 9—*Setting aside abatement—Sufficient cause must be shown.*

Before an abatement is set aside, the Court has to be satisfied that there was sufficient cause for not applying in time. Ignorance of death, standing by itself, may be sufficient cause but if it is accompanied by great delay and dilatoriness it would be otherwise. (*Sanderson, C. J. and Richardson, J.*) SARAT CHAND SARKAR *v.* MAIHAR STONE AND LIME CO. LTD.

49 Cal. 62 : 67 I. C. 917 : A. I. R. 1922 Cal. 335.

———O. 22, R. 9—*Death of one of the defendants—Order declaring that suit abated against the deceased—Subsequent order that this entailed the total dismissal of the suit—Application to set aside former order.*

One of the defendants in a suit died and his legal representatives were not brought on the record in time. The court passed an order that the suit abated as against him. The Court also decided at the same time that this partial abatement resulted in the total abatement of the suit. *Held* that though that portion of the order which decided that the suit had abated *in toto* may be a decree, the order declaring the partial abatement was one which could be set aside on an application under O. 22, R. 9, C. P. Code. (*Shadi Lal, C. J.*) NAND RAM *v.* MT. RALLI.

26 Punj. L. R. 650.

———O. 22, R. 9—*Sufficient ground—Recent knowledge of death.*

Where the deceased respondent was living at a place about 14 *Kos* from the appellant's village, it is not a sufficient ground to set aside an abatement that the appellant came to know of the death only some ten days before the application was put in. (*Abdul Raoof and Martineau, JJ.*) HAJI *v.* JANUM. **89 I. C. 162.**

———O. 22, R. 9—*Order holding that suit abates on account of some reason other than the non-application in time for substitution of legal representatives is decree and appealable.*

The order of the Court holding that the suit abates on account of some cause other than the absence of application in time to implead the legal representatives of a deceased party is a decree and appealable. The other causes may be when the Court holds that the right to sue does not survive or that the death of one of several defendants causes an abatement *in toto*. O. 22, R. 9 (2) is confined to cases in which abatement takes place on account of an application not having been made within time to bring on record the legal representatives of the deceased party and has no application to cases in which the suit has abated on account of some other cause. (*Moti Sagar, J.*) GENERAL TRADING CO., KAHUTA *v.* NIHAL SINGH.

78 I. C. 22 : A. I. R. 1925 Lah. 208.

———O. 22, R. 9—*Death of respondent pending appeal—Abatement—Application to set aside—Delay—Sufficient cause—Setting aside—Abatement of the whole appeal.*

The fact that the parties lived in different districts and that their residences were about 200 miles apart one from the other is not a sufficient reason in itself for failing to make an application to bring on record the legal representatives of a deceased respondent for a period of even 3 years in one case and nearly 9 months in another. The delay amounted to grave negligence on the part of the appellants who for so long a period failed to make any enquiries whatever as to the whereabouts of the most important respondents in the appeal. Where the decree appealed against is a joint decree, the appeal having abated against some of the respondents, must be dismissed against the rest. (*Broadway and Fforde, JJ.*) MUNSHI RAM *v.* RADHAKISHEN. **6 Lah. L. J. 192 : 80 I. C 694 (1) : A. I. R. 1924 Lah. 461.**

———O. 22, R. 9—*Abatement—Setting aside—Sufficient cause—Ignorance of death.*

Where it appeared that the deceased respondent had no stationary residence and that the appellants were living in a far-off native state and urgeignorance of the death of the respondent, delay in seeking to set aside the abatement could be excused. (*Scott-Smith and Fforde JJ.*) JOWALA RAM *v.* HARI KISHEN SINGH. **5 L. 70 : 80 I. C. 690 : A. I. R. 1924 Lah. 429.**

———O. 22, Rr. 9 and 3—*Act XXVI of 1920—Sufficient cause—Abatement setting aside of.*

Where the appellant had reason to suppose that the enactment of Act XXVI of 1920 would not affect the period of limitation for an application to implead the legal representative of a respondent who had died before the Act came into force, the abatement was set aside. (*Martineau and Campbell, JJ.*) NIAZ AHMAD KHAN *v.* ABDUL LATIF.

A. I. R 1923 Lah. 475.

———O. 22, R. 9—*Paying expenses of appeal will not make a person a party—Death of appellant—Legal representative not brought on record—Abatement.*

An appeal was filed by one D, the real defendant-appellant through one B. During the pendency of the appeal, D died but his representative was not brought on record. One M a trustee of D's estate, paid all the necessary expenses of the appeal but was not brought on record as the legal representative of D. On the question of abatement it was contended that no question of abatement arose. *Held*, the defraying the costs of the litigation out of the trust fund will not necessarily make him or the estate, a party, and the appeal had abated. (*Broadway and Zafar Ali, JJ.*) DAULAT RAI *v.* LILA RAM. **A. I. R. 1923 Lah. 470.**

———O. 22, R. 9—*Setting aside abatement—Sufficient cause.*

During the pendency of appeal Sheo Dayal, one of the plaintiffs respondents, was reported to have died some time before the 25th of May, 1917. An application was made by the appellants on the 9th of January, 1918, to bring his representatives on the record and stating that they had come to know of his death only on the 8th of January, 1918, as he was a resident of a distant village. On the 10th of January, 1918, Fakir Chand respondent, put in an application stating that the death of Sheo Dayal had taken place more than six months before the application of the appellants and that the appeal had consequently abated. On the 24th of June, 1918, the District Judge made an order declaring that the appeal had wholly abated as the decree in favour of the respondents was a joint decree. On the 8th of July, 1918, Sadra and Imam Din, defendants-appellants, applied under Order 22, R. 9, C. P. Code, for the setting aside of the abatement. *Held*, the ground of distant residence, and illiteracy of appellants, is not sufficient cause; the appellants should have applied on 9-1-18 to set aside the abatement, the appeal having already abated. (*Abdul Raoof and Moti Sagar, JJ.*) AJUDHIA PARSHAD *v.* IMAM-UD-DIN. **A. I. R. 1923 Lah. 230.**

C. P. CODE (V OF 1908), O. 22, R. 9.

——O. 22, R. 9—*Ignorance of death of party is not an excuse.*

Mere ignorance of the fact of death is not a sufficient excuse under O. 22, R. 9. (*Broadway and Abdul Qadir, JJ.*) CHUNI LAL *v.* KALA KHAN.
4 Lah. L. J. 171 : 67 I. C. 596 : 34 P. W. R. 1922 : A. I. R. 1922 Lah. 61 (1).

——O. 22, R. 9—*Sufficient cause*—Bona fide *mistake.*

Where owing to the mistake of the Court below in not entering the names of the legal representatives of a deceased deft. who had been added as such, the plff. filed an appeal with the name of the deft. on record though deceased, and the mistake was discovered nine months later. *Held*, that O. 22, C.P. Code, was not applicable under these circumstances. If they did apply, the mistake being a *bona fide* one there would be sufficient ground for extension of limitation period. (*Wilberforce, J.*) KARTAR SINGH *v.* RALLA.
67 I. C. 306 : 2 Lah. L. J. 44.

——O. 22, Rr. 9 and 4—*Abatement—Setting aside—Sufficient cause—Technical objections—Weight due to—Substantial justice.*

In a suit on a mortgage the defendant was dead at the time of passing the preliminary decree. The Court was ignorant of the judgment-debtor's death at the time. The plaintiffs without seeking to bring the legal representatives on record in time applied for a final decree under O. 34, R. 5, C. P. Code, mentioning the fact of the judgment-debtor's death and entering his widow as the defendant in that petition. That application was not granted. The plaintiff did not take steps till a considerable time later when he applied to set aside the abatement and to pass a final decree. The court below held that the former application may be treated as one for setting aside abatement. There was no appeal from the formerapplication but the above order was pasesd in the subsequent application only. *Held*, the lower Court was not seized of the former application and it had no jurisdiction to set aside the abatement purporting to act on such an application. Further that application not having contained any prayer to set aside the abatement it was really not an application under O. 22, R. 9. The second application was filed too late and having regard to the circumstances and the conduct of the plaintiff the indulgence of the court would not be extended to him. No doubt in the interest of justice if it is necessary to brush aside technicalities, the Court will not be too scrupulous in enforcing them but if the merits of the case are against the petitioner, the Court will not go out of the way to clear the plaintiff's path of technical obstacles. (*Odgers and Wallace, JJ.*) SESHAMMA *v.* YEERANKI PEDA VENKATA RAO.
34 M. L. T. 196 : 19 L. W. 608 : (1924) M. W. N. 633 : 80 I. C. 379 : A. I. R. 1924 Mad. 713 : 47 M. L. J. 235.

——O 22, R. 9—*Sufficient cause—Slip on the part of Vakil.*

Delay in applying to bring the legal representative on record caused by a slip on the part of the party's Vakil should be excused if the party himself is not at fault. (*Wallis, C. J. and Oldfield, J.*) VAITHYANATHA AIYAR .. GOVINDASAMI ODAYAR.
13 L. W. 522 : 62 I. C. 795 : (1921) M. W. N. 338 : 41 M. L J. 65.

——O. 22, R. 9—*Sufficient cause.*

Where the delay in bringing on record the legal representatives was due to the fact that the legal representatives were minors who would not have obtained execution without obtaining a succession certificate under Act VII of 1889, and this succession certificate

C. P. CODE (V OF 1908), O. 22, R. 9 (2).

was obtained after the expiry of time fixed for addition of legal representatives. *Held*, there is sufficient reason to excuse the delay within the meaning of S. 5 of the Indian Limitation Act, read with O. 22, R. 9, Code of Civil Procedure. (*Kanhaiya Lal, J. C.*). SYED AKHTAR HUSAIN *v.* QUDRAT ALI.
9 O. & A. L. R. 267 : 73 I. C. 215 : 26 O. C. 244 : A. I. R. 1924 Oudh 83.

——O. 22, R. 9—*Ignorance of a pardanashin lady's death in a different district is excusable where appellant is not guilty of laches—Appellant need not always be enquiring to see if respondent is dead.*

It is not the duty of the appellant to be on the lookout and to be always inquiring as to whether the respondent in the appeal is dead or not and if the appellant has done all that is necessary to bring the appeal to hearing, he cannot be punished for his ignorance of the death where there are no laches on his part so that it cannot be said that by the use of reasonable diligence, he could have come to know of the death earlier. This is especially so where the deceased respondent was a *pardanashin* lady residing in the interior of a different district. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) HIRA SARAN SINGH *v.* SYED MD. EDDAT HUSSAIN.
2 Pat. L. R. 279 : A.I.R. 1925 Pat. 162

——O. 22, Rr. 9, 4 and 5—*Abatement—Substitution of parties.*

Substitution can be made only after an abatement has been set aside on application under O 22, R. 9 (2), C. P. Code. To set aside an abatement it is necessary to prove that the petitioner was prevented by sufficient cause from continuing the suit. It is the duty of the person prosecuting a suit or an appeal to keep himself apprised of the adversary's death. A mere plea of ignorance of the death of an opposite party which took place many months or even years before is not a sufficient ground for setting aside the abatement. (*Das and Macpherson, JJ.*) MAHANTH RAMPERKASH DAS *v.* KUNJ LALL.
4 P. L. T. 567 : 79 I. C. 414 : A. I. R. 1924 Pat. 126.

——O. 22, R. 9—*Death of defendant—Abatement—Order for restitution—Limitation—Art. 177 of Limitation Act.*

Where a suit abates on account of the death of the sole defendant in the suit the abatement must be set aside under O.22, R.9, C.P.Code, before a substitution of parties could be made. The period of limitation is that prescribed by Art. 177 of the Limitation Act. (*Coutts and Das, JJ.*) MT. BIBEE KHOZAIMA *v.* THE OFFICIAL LIQUIDATOR OF THE KAYESTHA TRADING AND BANKING CORPORATION.
2 P. 168 : A. I. R. 1923 Pat. 417.

——O. 22, R. 9 (2)—*Sufficient cause.*

Applicant was a Government servant and had sent necessary papers to his Vakil 10 days before the last date of limitation but the papers came to the knowledge of the vakil only after rising of the court on the last day of limitation. It did not strike the Vakil to present them at the private house of the Judge. *Held*, that the circumstances justified the setting aside of the order of abatement. (*Mears, C. J. and Piggott, J.*) DR. SADIQ ALI *v.* ANWAR ALI.
20 A. L. J. 801 : 45 All. 66 : 70 I. C. 805 : A. I. R. 1923 All. 44.

——O. 22, R. 9 (2)—*Application under—Formal order of abatement—Necessity for.*

O 22, R. 9 (2), C. P. Code, contemplates that a formal order declaring that a suit or appeal has abated should be made before an application under the rule is made. 36 A. 235, Foll.; 42 A. 540, not foll. (*Ryves and Gokul Prasad, JJ.*) MUSSAMMAT GUJRATI *v.* SITAJ MISSER.
44 All. 459 : 66 I. C. 554 :

C. P. CODE (V OF 1908), O. 22, R. 9 (2).

A. I. R. 1922 All. 209 (2).

——O. 22, R. 9 (2)—*Legal representative—Addition of, after expiry of period of limitation without objection by opposite party—Abatement--Setting aside.*

An application for bringing on record the heirs of a deceased petitioner in proceedings to set aside a sale was allowed after the period of limitation without any objection. On appeal from the final order in the case, on the objection of the opposite side the appellate Court set aside the order for substitution and dismissed the case. *Held*, in revision, that on a proper application under O. 22, R. 9 (2), C. P. C., and on showing sufficient cause, the abatement could have been set aside. The first Court having ordered substitution without objection having been taken by the opposite party at any stage of the proceedings, the petitioners were deprived of an opportunity to make an application under O. 22, R. 9 (2), C. P C. and they were misled by the course of the proceedings that were adopted. The order for substitution made in the case should therefore be treated as being one setting aside the abatement. (*Walmsley and Mukerjee, JJ.*) JOGUNNESSA BIBI *v.* SATISH CHANDRA BHUTTACHARJEE. **28 C. W. N 559 : 39 C. L. J. 434 : 51 Cal. 690 : 78 I. C. 958 : A. I. R. 1924 Cal. 633.**

——O. 22, R. 9 (2)—*Plea of ignorance of opposite party's death is not enough.*

A mere plea of ignorance of the fact that the opposite party had died is not a sufficient cause for setting aside an order of abatement. Special circumstances which entitle the parties concerned to special indulgence must be proved. (*Neave, A. J. C.*) SANT BAKSH *v.* NABBAN SAHEB. **81 I. C. 585 : A. I. R 1925 Oudh 306 (2).**

——O. 22, R. 9 (2)—*Abatement due to not applying in time for substitution of legal representatives, was set aside when substitution was applied for within time from date of knowledge of the respondent's death.*

Where the respondent died in September in a certain year and the appellants came to know of his death in December, and after certain correspondence with the vakil who appeared for them in the case, the application was made within time from the date of knowledge of the death of the respondent for substition of the legal representatives. *Held*, that though the application was made more than 90 days from the death of the deceased, and the appeal therefore had abated, the abatement should be set aside. (*Jwala Prasad and Kulwant Sahay, JJ*) LILO SONAR *v.* JHAGRU SAHOO. **3 P. L. R. 97 : 6 P. L T. 313 : 3 Pat. 853 : A. I. R. 1925 Pat. 123.**

——O. 22, R. 10 and S. 47—*Tenancy created* pendente lite—*Joinder of tenant—Bad.*

In execution of a decree for possession and mesne profits, there was an enquiry made as to mesne profits. During the pendency of the suit the defendant had leased the property, but he had surrendered the lease as soon as he came to know of the decree. On the question arising if he could be made party in the executionapplication and made liable for mesne profits *Held*, there was no devolution of interest within the meaning of O. 22, R. 10, C. P. Code, nor would question of his liability fall under S. 47, C. P. Code. Injustice arising by adding him as party and general principles referred to. (*Lord Phillimore.*) MANINDRA CHANDRA NANDI *v.* RAM LAL BHAGAT.

31 M. L. T. 131 : 27 C. W. N. 29 : 36 C. L. J. 542 : 16 L. W. 905 : 4 U. P.L. R. (P. C.) 88 : 20 A. L. J. 988 : 24 Bom. L. R. 1251 : L. R. 4 P. C. 1 : 49 I. A. 220 : 68 I. C. 973 : 1 P. 581 : 4 P. L. T. 1 : A. I. R. 1922 P. C. 304 : 43 M. L. J. 589 (P.C.).

C. P. CODE (V OF 1908), O. 22, R. 10.

——O. 22, R. 10—*Assignment pending suit—Rights of assignee—Interlocutory order—Appeal.*

The plaintiff in an administration suit assigned his interest to the applicant but continued the suit in his own name. The trial Court refused to appoint a Receiver of the property and the plaintiff appealed to the High Court. Pending the appeal, the plaintiff died and the assignee applied to the trial Court to continue the suit but did not apply in the High Court to conninue the appeal whereupon the appeal abated. *Held*, that the trial Court had jurisdiction to entertain the application for bringing on record the assignee. Where the High Court sends for the records in an appeal from an interlocutory order the suit is still pending on the file of the trial Court and it has jurisdiction to bring on record the legal representative of a deceased plaintiff. (*Macleod, C. J. and Crump, J.*) BHOGILAL KIRPASHANKER *v.* DARASHA KOOVERJI.

25 Bom. L. R. 308 : 75 I. C. 743 : A. I. R. 1923 Bom. 303.

——O. 22, R. 10 and O. 23, R. 1—*Compromise of suit—Decree not passed—Application by purchaser to be added as a party may be allowed in the discretion of the Court.*

Where a suit is alleged to have been compromised and a document embodying the compromise has be en filed in Court, the suit does not cease to be pendi ng until the passing of a decree. Consequently it is open to a person alleging himself to be the purchaser of the property before the compromise is entitled to apply under O. 22, R. 10, C.P. Code, to be added as a party to the suit. An applicant who invokes the aid of O. 22, R. 10 is not entitled as a matter of right to an order in his favour regardless of delay or laches. The Court undoubtedly has a discretion in the matter which must be judicially exercised. Where the result of dismissing the application would beto start a fresh suit between the transferee and the assignor impeaching the compromise as not *bona fide*, the enquiry might be made in the suit itself after the transferee is made a party. 32 C. 483 ; 13 C. L. J. 487 ; 43 M. 37 ; 37 A. 326, Ref. (*Mookerjee and Rankin, JJ.*) LAKSHAN CHUNDER DEY *v.* NIKUNJAMANI DASSI.

27 C. W. N. 755 : A. I. R. 1924 Cal. 188.

——O. 22, R. 10—*Assignee* pendente lite—*Power of Court to substitute.*

O. 22, R. 10 applies not only to cases where the assignment or devolution is unchallenged but to cases where the assignment is challenged on various grounds. In such a case, the Court has power to decide the question as to the validity or otherwise of the assignment when an application is put in under O. 22, R. 10. (*Greaves and Cuming, JJ.*) SURENDRA NARAIN DEB *v.* NITYENDRA NARAIN. **90 I. C. 267.**

——O. 22. Rr. 10 and 4—*Suit for accounts—R. 4 applies also after preliminary decree.*

O. 22, R. 4 applies also after a preliminary decree has been passed in a suit for accounts. 33 C. L. J. 115 Foll. (*Greaves and M. N. Mukerji, JJ.*) MANUJENDRA DUTT *v.* JNAN RANJAN.

A. I. R. 1926 Cal. 308.

——O. 22, R. 10—*Limitation for impleading assignee.*

In the case of the death of a party after his interest has devolved on another, there is no question of bringing on record the legal representative within the period of 90 days prescribed by law, and even in a case where the devolution took place while the suit was pending in the trial Court, an application under O. 22, R. 10, C. P. Code, can be made in the appellate Court. (*Chatterjee and Pearson, JJ.*) RAJANI KANTA ROY

C. P. CODE (V OF 1908), O 22, R. 10.

v. RAJA JYOTI PRASAD. **27 C. W. N. 710 : 75 I. C. 255 : A. I. R. 1924 Cal. 90.**

——**O. 22, R. 10**—*Assignment disputed—Application for substitution of assignee made months after assignment—Application should be rejected.*

Where the factum of the assignment was disputed and the application for substitution of assignee was made months after the assignment was alleged to have been made, *Held*, that the Court should use its discretion, which it has, under the rule, properly to reject the application. (*Broadway, J.*) ALLAH JAWAYA *v.* LAJPAT RAI. **7 L. L. J. 392 : A. I. R. 1925 Lah. 574.**

——**O. 22, R 10**—*Applicability—No pending suit—Mortgagee claiming to be impleaded in proceedings relating to division of sums in Court deposit—Failure of consideration set up—Remedy by suit.*

O. 22, R. 10, C P. Code, applies only to pending suits whereby a person who derives title from a party will be entitled to be brought on record if it is shown that he has secured a good title from the party and it is to his interest to be brought on record in the suit. Where the suit has come to a termination and in pursuance of the decree passed therein a sum of money in Court deposit to the credit of the suit is being divided, a mortgagee from one of the parties cannot claim to be impleaded under O. 22, R. 10 especially when the transaction is alleged to be usurious and the mortgagor denies the passing of consideration in full. The remedy of the mortgagee in such a case is to enforce his mortgage right in the ordinary course. (*Devadoss and Waller, JJ*) SRINIVASA AIYANGAR *v.* PRATAPA SIMHA RAJAH SAHEB. **22 L. W. 860 : 49 M. L. J. 704.**

——**O. 22, Rr. 10 and 3 and S. 146**—*Deceased's heir not brought on record—Assignee from heir cannot apply under R. 10.*

The words assignment and creation indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit; 39 Mad. 488 and 1922 P. C. 304, Foll. Rule 10 only applies to cases not covered by R. 3. An assignee from the heir of a deceased plaintiff, who (the heir) was not himself brought on the record, cannot apply under O. 22, R. 10. S. 146 cannot apply to such a case as the deceased heir himself could not apply under O. 22, R 10, but could only apply under R. 3. 1922 Mad. 402, Dist. (*Wallace, J.*) KALLIAM KUTTI *v.* K. T. KURUNAVAN. **A. I. R. 1925 Mad. 1166.**

——**O. 22, R. 10**—*Person subsequently added—Assignment by—Rule does not apply—T. P. Act, S. 52.*

O. 22, R. 10 can only apply to the assignment of interest in property, by a defendant on record and not the assignment of interest, by a person, who is not a party to the suit, at the time of the assignment, but was subsequently joined. The doctrine of *lis pendens* does not apply to such assignment. (*Devadoss, J.*) AMMAYYA PILLAI *v.* NARAYANA CHETTI. **21 L. W. 125 : 86 I. C. 187 : A. I. R. 1925 Mad. 487.**

——**O. 22, R. 10**—*Applicability of.*

O. 22, R. 10 applies only to cases which do not fall under the preceding rules of the same Order. (*Ayling and Venkatasubba Rao, JJ.*) DAKOJI SUBBARAYADU *v.* MUSTI RAMADASU. **45 M. 872 : 15 L. W. 309 : (1922) M. W. N. 375 : 68 I. C 942 : 30 M. L. T. 202 : A. I. R. 1923 Mad. 237 (1) : 42 M. L. J. 301.**

——**O. 22, R. 10**—*Pendency of suit.*

Quaere : Whether the expression "the pendency of the suit" in O. 22, R. 10, C. P. Code, covers the period between the original and an amended decree. (*Oldfield and Ramesam, JJ.*) NARAYANA AIYAR *v.* BIYARI BIVI. **(1922) M. W. N. 731 : 16 L. W. 623 : 69 I. C. 977 : 32 M. L. T. 98 : A. I. R. 1923 Mad. 57 : 43 M. L. J. 559.**

C. P. CODE (V OF 1908), O. 22, R. 10.

——**O. 22, Rr. 10 and 3**—*Public trust—Death of trustee—Subsequent trustees impleaded as parties—Defences open to.*

Where a public trust is represented at different stages of a suit by different representatives, one not claiming under the other, the rule applicable to the case is O. 22, R. 10 and not O. 22, R. 3 of the C. P. Code. In a case falling under O. 22, R. 10, the Court has wider discretion to allow amendment and new pleas at the instance of a representative than it has under O. 22, R. 3 on the application of a legal representative. (*Ayling and Krishnan, JJ.*) SUNDARESAN CHETTY *v.* VISVANATHA PANDARASANNADHI AVERGAL. **45 Mad. 703 : 16 L. W. 83 : 31 M. L. T. 66 (H. C.) : (1922) M. W. N. 444 : 72 I. C. 103 : A. I. R. 1922 Mad. 402 : 43 M. L. J. 147.**

——**O. 22 R. 10**—*Order under, is appealable.*

An order purporting to be passed under O. 22. R. 10 by a Court of First Instance is appealable though on the facts the order should not have been passed under the rule. (*Wallis, C. J., Spencer and Kumaraswami Sastri JJ.*) MUTHIAH CHETTIAR *v.* GOVINDOSS KRISHNADOSS. **44 Mad. 919 : (1921) M. W. N. 649 : 69 I.C. 337 : 14 L. W. 287 : 41 M. L. J. 316 (F. B.).**

——**O. 22, Rr. 10 and 4**—*Other cases—Devolution—Pendency of a suit—Survival of right to sue.*

The devolution spoken of in R. 10 of O. 22 is not confined to devolution in ways other than by death. The first four rules of O. 22 cannot apply to a case in which the death of the defendant occurs between the passing of preliminary and final decrees in a suit, as there is then no right to sue surviving. (*Hallifax, A. J. C.*) TULARAM *v.* TUKARAM. **64 I. C. 307 : 17 N. L. R. 81.**

——**O. 22, R. 10**—*Application by alleged assignee, to be made party to the appeal must be enquired into and decided on the merits, though the assignor and the appellant deny assignment.*

When a certain person alleges that he is the assignee of property which is the subject-matter of an appeal and puts in an application to be impleaded as a party to the appeal, the fact that the assignor and the appellant deny the assignment is no ground for rejecting the appeal. The Court is bound to enquire into the genuinenessof the alleged assignment and determine the assignee's application in accordance with the result of the enquiry. (*Wazir Hasan, J. C.*) RAM LAL *v.* BHOOP. **80 I. C. 631 : A I.R. 1925 Oudh 143.**

——**O. 22, R. 10**—*Devolution of interest—Gift by father to son—Suit for pre-emption—Right to continue the suit.*

Where a father a co-sharer in a village had filed a suit for pre-emption in respect of a sale made by another co-sharer and during the pendency of the suit executed a deed of gift of all his properties in favour of his only son, *Held*, that the son was entitled as donee to maintain the suit in the place of his father. (*Simpson and Wazir Hasan, A.J. Cs.*) MIRZA SADIQ HUSAIN *v.* MAHOMED KARIM. **9 O. L. J. 456 : 70 I. C. 53 : 25 O. C. 319 : A. I. R. 1922 Oudh 289.**

——**O. 22 R. 10**—*Attaching creditor—Interest obtained by—Devolution of interest—Right to be impleaded in mortgage suit.*

As an attachment creates no lien or title but simply prevents alienation, an attaching creditor cannot under

C. P. CODE (V OF 1908), O. 22, R. 10.

O. 22, R. 10 be impleaded in a mortgage suit relating to the attached properties. (*Findlay, O. J. C. and Wadegaonkar, A. J. C.*) BRUEL & CO. BOMBAY *v.* KEHEO RAO. **89 I. C. 446.**

——O. 22, R. 10—*Irregular exercise of discretion —Interference.*

A wrong exercise of discretion on an application under O. 22, R. 10 cannot be set aside in revision (*Findlay, O. J. C. and Wadegaonkar, A. J. C.*) AMRITA RAO *v.* SONABAI. **89 I. C. 605 : A. I. R. 1925 Nag. 423.**

——O. 22, R. 12—*Decree capable of execution without final decree—Substitution of legal representatives need not be within 3 months of party's death.*

Substitution of legal representatives within 3 months of a party's death is not necessary for execution of a decree when it is not a preliminary decree but one which could be put in execution by applying for sale of the property. (*Daniels, J.*) PEARE LAL *v.* JHABBA LAL. **L. R. 5 A. (Civ.) 668 : 82 I. C. 604 : A. I. R. 1925 All. 66.**

——O. 22, R. 12—*Mortgage decree—Sale on non-payment in time—Death—If heirs to be impleaded.*

Where under a mortgage decree the property is to be sold if money is not paid in a certain time, it is not necessary that the heirs of a deceased party should be impleaded before the right of sale is exercised. (*C. C. Ghose and Panton, JJ.*) HEMENDRA LAL SINGH DEO *v.* FAKIR CHANDRA DATTA. **50 Cal. 650 : 74 I. C. 929 : 27 C. W. N. 621 : A. I. R. 1923 Cal. 626.**

——O. 22, R. 12—*Applicability—Execution proceedings—Appeal.*

The provisions of O. 22, relating to the abatement of suits and appeals do not apply to execution proceedings or to appeals from orders made in such proceedings. (*Campbell, J.*) MIR KHAN *v.* SHARFU. **5 Lah. L. J. 163 : 74 I. C. 577 : A. I. R. 1923 Lah. 560.**

——O. 22, R. 12—*Appeal from order under S. 47 —Legal representatives of one of two decree-holders not brought on record—Appeal does not abate.*

Where one of two decree-holders died during the pendency of an appeal from an order under S. 47 and his legal representatives were not brought on record. *Held* : that the appeal did not abate by reason of R. 12. (*Kinkhede, A. J. C.*) MT. SARJABAI *v.* DHANRAJ. **8 N. L. J. 9 : 86 I. C. 11 : A. I. R. 1925 Nag. 239.**

——O. 22, R. 12—*Death of Judgment-debtor during execution—Applying for substitution is not the proper procedure.*

The provisions relating to substitution of names contained in O. 22 do not apply to execution proceedings as laid down in R. 12 of that Order. Where the judgment-debtor dies during the progress of execution proceedings, the proper course is not to apply for the substitution of his legal representative but to apply for execution against the legal representative. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) JANG BAHADUR *v.* BANK OF UPPER INDIA, LTD., LUCKNOW. **12 O. L. J. 146 : 87 I. C. 21 : 2 O. W. N. 73 : A. I. R. 1925 Oudh 448.**

——O. 22, Rr. 12, 4—*Mortgage suit—Application for joinder of legal representatives after preliminary decree and before final decree is not one in execution proceedings but governed by O. 22—C. P. Code, O. 34, Rr. 4, 5.*

An application for joinder of legal representatives of the deceased defendant after preliminary decree and

C. P. CODE (V OF 1908), O. 23, R 1.

before final decree in a mortgage suit, is not an application in execution proceedings but an application in a pending suit governed by the provisions of O. 22 (37 All. 226 ; 40 All. 203. App.) (*Rupchand Bilaram, A. J. C.*) TULSIDAS KESHOWDAS *v.* RAMZAN ABDULLAH. **89 I. C. 238 : A. I. R. 1926 Sind 20.**

——O. 23—*Ejectment suit—Plea of occupancy rights—Withdrawal of suit, without liberty to file a fresh one—Legality of.*

Where a Zamindar sues to eject a tenant on the ground that he has not occupancy rights, and the tenant claims such rights, the Zamindar is barred by O. 23, C. P. Code, from bringing a suit on the same ground if he withdraws the first suit, without obtaining permission to bring a fresh suit on the same cause of action. (*Burn, J. M.*) KUNWAR BRIJ RAJ SARAN SINGH *v.* NARAIN SINGH. **L. R. 6 A. 181 (Rev.).**

——O. 23—*Ejectment suit—Compromise conferring occupancy rights—Whether order that "parties compromised—Case filed with costs" amounts to withdrawal.*

In a suit for ejectment the parties filed a compromise, which purported to confer on the defendants occupancy rights and to fix rent, and the court passed orders that "parties compromised. Case filed with costs;" no written statement was filed and no evidence was taken and the defendants were treated as non-occupancy tenants. *Held* : that the order of the Court amounted to a dismissal of the Suit—(1) and not to a withdrawal under the provision of order 23, C.P. Code (2) that as no separate Agreement was made regarding the conferment of occupancy rights, the defendants had not acquired such rights. (*Burn, J. M.*) SURJA *v.* GHASI RAM. **L.R. 5 All. 309 (Rev.).**

——O. 23—*Applicability—Ejectment filed without obtaining permission to withdraw a previous suit of the same nature—Maintainability.*

Where a suit for ejectment was brought in a succeeding year, when a former suit with regard to the same subject-matter, had been withdrawn, without obtaining permission to file a fresh suit. *Held*, the suit was barred by O 23, C.P.Code. (*Fremantle, S. M.*) KALI MISIR *v.* JAMUNA MISIR. **L. R. 5 A. 282 (2) (Rev.).**

——O. 23 and S. 92—*O. 23, applies to S. 92—C. P. Code, S. 92.*

A judge has jurisdiction to pass a decree on the basis of compromise in a suit brought under S.92, C.P.Code. O. 23 of the Code of Civil Procedure dealing with adjustment of suits does not exclude suits under S. 92. (*Newbould and Ghose, JJ.*) SYED ABU MAHOMED BARAKAT ALI *v.* ABDUR RAHIM. **80 I. C. 44 : A. I. R. 1925 Cal. 187.**

——O. 23, R. 1

Amendment.
Appellate Court.
Arbitration.
Bar of fresh suit.
Co-Plaintiff.
Effect of order.
Execution proceedings.
Finality of order.
Formal defect.
Form of order.
Grounds for.
Leave to withdraw.
Order as to costs.
Partition suit.
Probate proceedings.

C. P. CODE (OF V 1908), O. 23, R. 1—Amendment.

Public trust.
Revision.
Withdrawal without leave.

Amendment.

——O. 23, R. 1—*Amendment refused—Plaint—Withdrawal of.*

An amendment of a plaint was refused at a late stage of a trial on the ground that the suit would have to be tried *de novo* if the same was allowed but the Court gave leave to the plaintiff to withdraw his suit with liberty to bring a fresh suit. *Held*, the procedure was illegal. (*Wazir Hasan, A. J. C.*) BULAQUI DAS *v.* JUGAL KISHORE. **87 I. C. 1055 : A. I R. 1925 Oudh 718.**

Appellate Court.

——O. 23, R. 1—*Appellate Court can allow withdrawal.*

A Court of appeal has power to grant permission to withdraw a suit with liberty to file a fresh suit. (*Ryves, J.*) TEWARI GAJRAJ SINGH *v.* SRI THAKURJI MAHARAJ. **74 I. C. 894 : A. I. R. 1924 All. 260.**

——O. 23, R. 1—*Appellate Court—Leave to withdraw suit*

An appellate Court can grant leave to the plaintiff to withdraw his suit with liberty to sue again in respect of the same subject-matter. 35 Bom. 261, Dist. ; 22 Bom. L. R. 774 Foll. (*Shah and Crump, JJ.*) SHEIKH HASAN GHULAM MOHIDIN *v.* MAHOMAD ALI SHEIKH MAHOMED **22 Bom. L. R. 1183 : 59 I.C. 210 : 45 Bom. 206.**

——O. 23, R. 1 (2)—*Appellate Court—Rule applies to—But circumstances should justify reversal of trial Court's decree.*

The Court can also in appeal give permission under O. 23, C.P.Code. for withdrawing a suit with liberty to bring a fresh suit but generally this can be done only in a case where the appellate Court discovers that the suit ought to fail on the ground of some formal defect and by reason of such discovery it is of opinion that the decree of the trial Court ought to be reversed. Where the defects were those which had been embodied in the objections which had been taken in the written statement and had been made the subject of issues in the first Court, and the plaintiff being aware of those defects had gone to trial and fought the case out with a view to persuade the Court to hold that the defects which had been pointed out had not existed. *Held* : that having failed there, it did not lie in his mouth at the appellate stage to say that they were really formal defects and that, because they were so, the lower appellate Court should have given him permission to withdraw from the suit. (*Suhrawardy and Cuming, JJ.*) NISHI KANTA SARKAR *v.* UMAR LAL SARKAR. **41 C. L. J. 186 : 86 I. C. 1029 : A. I. R. 1925 Cal. 711**

——O. 23, R. 1—*Appellate Court—Powers of.*

To give an appellate Court jurisdiction to act under O. 23, R. 1, cl. (2) there must be either some formal defect or something in the nature of a formal defect *ejusdem generis* under sub-clause (b). Otherwise the Court has no jurisdiction to act under the order. (*Greaves, J.*) UDOY CHAND *v.* MULLA REASAT HOSSAIN. **A. I. R. 1922 Cal. 58.**

——O. 23, R. 1—*Appellate Court—Appeal by some defendants only—Withdrawal of suit against them in appeal leaving intact decree against non-appealing defendants should not be allowed — Effect—Ryotwari tracts—Irrigation disputes—Decree against Government—Ryots when aggrieved by—Appeal from decree against Government—Their right of.*

C. P. CODE (V OF 1908), O. 23, R. 1—Bar of fresh suit.

O. 23, R. 1, C.P.Code, which gives a plaintiff the right to withdraw his suit and abandon part of his claim is inapplicable to the case of a plaintiff respondent. Assuming that the appellate Court can in the exercise of its discretion allow a plaintiff respondent to withdraw his suit as against the defendant appelant, it will not be a sound exercise of such discretion to allow the withdrawal in a case in which some of the defendants only have appealed, and they will be aggrieved by the decree of the Court below being allowed to stand as against the other defendants who have not appealed. Ryots in ryotwari tracts whose lands are irrigated by a Government tank are prejudiciallyaffected by a decree against the Government affecting the watersupply to that tank and can appeal against the same though the Government does not choose to appeal against it. (*Ayling and Odgers, JJ.*) DHARMA RAJA *v.* PETHURAJA **18 L. W. 243 : (1923) M. W. N. 677 : 46 Mad. 811 : 74 I. C. 4 : A. I. R. 1924 Mad. 79 : 45 M. L. J. 212**

——O. 23, R. 1—*Appellate Court—Right to withdraw suit in, is not an absolute right.*

An appellant is not entitled to withdraw his suit in the appeal Court under O. 23, R. 1 (1) as a matter of course. In other words a plaintiff-appellant has no absolute right to withdraw his suit in appeal. (*Dalal, A. J. C.*) SAIYED ASHIAQ HUSSAIN *v.* SAIYED BUNYAD HUSSAIN. **9 O. & A. L. R. 415 : A. I. R. 1923 Oudh 252.**

——O. 23, R. 1—*Appellate Court, whether can allow withdrawal of suit—Jurisdiction.*

Where evidence to meet the issues framed has been adduced by both parties and on these issues a decision has been arrived at and a decree has been passed, and that decree has been upheld on appeal, the High Court in Second Appeal has no power to allow withdrawal of the suit and to deprive the defendant of the advantage he has gained from the decision of the issues in his favour. (*Adami, J.*) DEBENDRA CHANDRA *v.* CHADHURI BANDHU. **61 I. C. 831 : 2 Pat. L. T. 591.**

——O. 23, R. 1—*Applicability—Ejectment suits—Agra Tenancy Act.*

O. 23 applies to ejectment suits filed under the Agra Tenancy Act. (*Burn, J. M.*) MT. ABADI BEGAM *v.* MT. KETKI KUAR. **L. R. 6 A. 65 (Rev.)**

Arbitration.

——O. 23, R. 1—*Arbitration—Reference to arbitration pending suit—Award void due to invalid reference—Withdrawal of suit ought not to be allowed—But allowing is not void.*

Where a reference to arbitration under the second schedule Para. 1 was invalid for want of consent of one of the parties, *Held* : that the Court ought not to have allowed the plaintiff to withdraw the suit with leave to briug a fresh suit but should have proceeded with the suit but that where permission had actually been given a second suit was not barred by the existence of the void award. (*Devadoss J.*) T S. SUBBA RAO *v.* APPADURAI. **21 L.W. 498 : 86 I.C. 839 : (1925) M. W. N. 97 : A.I.R. 1925 Mad. 621 : 48 M. L. J. 142.**

Bar of fresh suit.

——O. 23, R. 1—*Bar of fresh suit—Ejectment suit—Withdrawal of—Fresh suit not barred.*

In ejectment suits, as in suits for partition, there is a cause of action recurring every year and the withdrawal of a suit in one year without leave to sue afresh is no bar to a suit in the subsequent year. (*Fremantle*

C. P. CODE (V OF 1908), O. 23, R. 1—Bar of fresh suit.

S. M.) UMRAI *v.* RAJA DURGA NARAIN SINGH. **L. R. 5 A. 156 (Rev.).**

——O. 23, R. 1 (3)—*Bar of fresh suit—Withdrawal without leave—"Subject-matter" if means "property" in suit—Suit on different cause of action.*

The words "subject-matter" used in O. 23, R. 1 (3) are not to be identified with the "property" in the suit. They mean the cause of action for a claim. A suit as a different cause of action though relating to the same property is not barred, if the suit is withdrawn without leave of Court. (*Wazir Hasan, A. J. C.*) PUTTOO KHAN *v.* AHMAD ZAMAN KHAN. **9 O. & A.L.R. 978 : 74 I. C. 56 : A. I. R. 1924 Oudh 180.**

——O. 23, R. 1—*Bar of fresh suit—Ejectment suit—Withdrawal of—Wrong survey numbers given—Fresh suit not barred.*

Where a prior suit for ejectment giving wrong survey numbers of the land was withdrawn without liberty to sue afresh, a subsequent suit for ejectment of the defendant from the correct survey number and area is not barred. (*Fremantle, S. M.*) BANDHO *v.* MT. CHAURASI. **L. R. 5 Oudh 105.**

——O. 23, R. 1—*Bar of fresh suit—Withdrawal without leave—Same cause of action—Subsequent suit with added prayer—Bar*

Where a prior suit in which the plaintiffs claimed a declaration of their title to a certain War Bond in the hands of one of the defendants was withdrawn without liberty to bring a fresh suit, and the plaintiffs brought another suit for the consequential relief of the recovery of the War Bond or its value. *Held* that O. 23, R. 1, C. P. Code, barred such a subsequent suit. (*Pratt and Macgregor, JJ.*) MAUNG MU *v.* MAUNG KYAW GYI. **1 R. 618 : 77 I. C. 393 : A. I. R. 1924 Rang. 127.**

Co-Plaintiff.

——O. 23, R. 1 (4)—*Co-plaintiffs—One of several plaintiffs—If can withdraw suit—Consent.*

One of several plaintiffs cannot withdraw from the suit without the consent of the others. (*Fremantle, S. M. and Burn, J. M.*) MAHOMED ILYAS *v.* FAQUIRA. **10 O. & A. L. R 210 : L. R. 5 A. 78 (Rev.).**

——O. 23. R. 1—*Co-plaintiffs—Withdrawal of unnecessary plffs.—Effect.*

Withdrawal by unnecessary plffs. from a suit does not necessitate the dismissal of the suit. (*Hopkins, S. M.*) PHAGOO KURMI *v* DHARMARAJ. **2 U. P. L. R. (B. R.) 105 : 60 I. C. 592.**

——O. 23, R. 1—*Co-plaintiffs—Withdrawal of some plaintiffs—Legality.*

Where the Court allows some plaintiffs to withdraw with liberty to file a firesh suit without the consent of the others, the Court acts without jurisdiction and a fresh suit is barred. (*Jwala Prasad and Ross, JJ.*) MT. RAM DEI *v.* MT. BAHU RANI. **1 P. 228 : A. I. R. 1922 Pat. 489.**

——O. 23, R. 1—*Effect of not granting permission—Bar of suit.*

When an application for permission to withdraw with liberty to file a fresh suit is disposed of by an order stating "plaint withdrawn, case to be filed," a fresh suit for the same reliefs is barred. (*Fremantle, S. M.*) MT MUNNI BIBI *v.* RAGHUBAR. **L. R. 6 A. 54 (Rev.).**

Effect of order.

——O. 23, R. 1—*Effect of order—Suit withdrawn is one as if never brought.*

Per *Suhrawardy, J.*—When a suit is allowed to be withdrawn with leave to bring a fresh suit under O. 23, C.P. Code, it should be regarded as having never been brought. It is available for no purpose. It does not

C. P. CODE (V OF 1908), O. 23 R. 1—Finality of order.

save or give fresh start to limitations; nor does it afford a fresh cause of action. (*Walmsley, Newbould, C. C. Ghose Suhrawardy and B.B. Ghose, JJ.*) BECHARAM CHOUDHURI *v* PURNA CHANDRA CHATTERJI **41 C. L. J. 456 : 88 I. C. 637 : 29 C. W. N. 755 : A.I.R. 1925 Cal. 845 (F B.)**

——O. 23, R. 1—*Effect of order—Effect of permission.*

Permission to withdraw suit does not imply recognition of maintainability of a suit nor has Court power to provide to the effect in the order. (*Oldfield and Ramesam, JJ.*) MUTHIAH CHETTY *v.* PALANIAPPA CHETTY. **45 Mad. 90 : 15 L. W. 190 : A. I. R. 1922 Mad 447**

——O. 23. R. 1—*Effect of order—Presumption—Objection to other order.*

An order under O. 23, R. 1 (2) gives rise to a rebuttable presumption that the Court passing it was satisfied that conditions mentioned in either the sub-rule (*a*) or (*b*) were fulfilled. So while questioning the validity of such an order it must be proved that none of the conditions mentioned in cls. (*a*) or (*b*) were satisfied and the mere fact that the Court did not give reasons for its order will not be a sufficient ground for an objection to the order. (*Miller, C. J., Mullick and Jwala Prasad, JJ.*) RAJ KUMAR MAHTON *v.* RAM KHELAWAN SINGH. **3 P. L. T 80 : 1922 P. H. C. C. 17 : 1 P. 90 : 64 I C. 337 : A. I. R. 1922 Pat. 44 (F. B.).**

——O. 23, R. 1—*Effect of order—Omission to sue for a portion of the claim—Withdrawal of suits with liberty to bring a fresh suit—Subsequent suit including claim previously omitted*

The plaintiff who had omitted to sue for a portion of his claim withdrew the suit with liberty to bring a fresh suit under the provisions of O. 23, R. 1, C. P. Code. Later on he brought a suit including the portion of the claim so omitted in the prior suit. *Held*, that effect of withdrawal under O. 23, R. 1 was to leave the parties in the same position as if no such suit had been instituted and that O. 2, R. 2, did not deprive the plaintiff's right to include the omitted portion of his claim in the subsequent suit. 10 M. 160; 18 All. 53 followed. (*Young, J.*) MA PO *v.* A BUX. **3 Bur. L. J 189 : A. I R. 1925 Rang. 118.**

Execution Proceedings.

——O. 23, R. 1—*Execution proceedings—Withdrawal of—Order of rejection—Appeal.*

O. 23, R. 1, C. P. Code, does not in terms apply to withdrawal and abandonment or execution proceedings but there is nothing to prevent a decree-holder from withdrawing his execution application. If the Courts persist in selling property of the judgment-debtor in spite of the prayer of the decree-holder not to proceed with execution it acts without jurisdiction. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD RAI *v.* MAHESH KANT. **1 Pat. 232 : 3 Pat. L. T. 445 : 65 I.C. 122 : A. I. R. 1922 Pat. 525.**

Finality of order.

——O. 23, R. 1—*Finality of order—Institution of subsequent suit.*

If the Court allows a suit to be withdrawn with permission to sue afresh, the Court trying the subsequent suit cannot enter into the question whether the order of the former Court was properly made. (*Chatterjee and Newbould, JJ.*) SAMADDI SHEIKH *v.* FULBASH BEWA. **65 I. C. 704 : A. I. R. 1923 Cal. 269 (1).**

——O. 23, R. 1—*Finality of order—Not open to objection in a subsequent suit.*

C. P. CODE (V OF 1908), O. 23, R. 1—Formal Defect.

If an order is passed with jurisdiction under O. 23, R. 1 (2), C. P. Code, it is not void even though it is passed improperly and it is not open to an objection in a subsequent suit between the parties regarding the subject-matter of the prior suit. (*Miller, C.J. Mullick and Jwala Prasad, JJ.*) RAJ KUMAR MAHTON *v.* RAM KHELAWAN SINGH. **1 P. 90 : 3 P. L. T. 80 : 1922 P. H. C. C. 17 : 64 I. C. 337 : A. I. R. 1922 Pat. 44 (F.B.).**

Formal Defect.

———**O. 23, R. 1 (2)**—*Formal defect—Pathway claimed as public—C. P. Code, S. 91 not followed—Special damage not proved—Defect is not formal.*

A suit for declaration of a public right of pathway, without taking recourse to S. 91, C. P. Code or Order 1, rule 8, C. P. Code and without proving special damages, does not fail by reason of "formal defect." (*Suhrawardy and Cuming, JJ.*) NISHI KANTA SARKAR *v.* UMAR LAL SARKAR. **86 I. C. 1029 : 41 C. L. J. 186 : A. I. R. 1925 Cal. 711.**

———**O. 23, R. 1**—*Formal defect—Allegation—Proof—Leave to withdraw—Revision.*

A Court ought not to grant leave to withdraw a suit with liberty to sue a fresh on a mere allegation that there is a formal defect, without satisfying itself that it does exist as a matter of fact. An order granting leave to withdraw without sufficient or proper cause can be interfered with in revision. (*Richardson, J.*) SRIMATI KIRANMOY DASI *v.* RAMA NATH PAL. **64 I. C. 556 (Cal.)**

———**O. 23, R. 1 (2)**—*Formal defect—Other sufficient grounds in R. 1 (2) (b) are* ejusdem generis *with R. 1 (2) (a).*

The words "other sufficient grounds for allowing the plaintiff to institute a fresh suit" in O. 23, Cl. 2 (b) must be taken to mean *ejusdem generis* with the words in Cl. 2 (a) that is to say, "some formal defect" (1911) 1 M. W. N. 105, Rel. on. Where the plaintiff was not ready to go on with his case, *Held*, that permission to withdraw the suit, and to institute a fresh suit should not be granted. (*Beasley, J.*) SUBEDAR NAIMATHULLA KHAN *v.* ABDUL RAZACK. **22 L. W. 535 : A. I. R. 1925 Mad. 1268.**

———**O. 23, R. 1 (12) (a)**—*Formal defect—Radical defect is not "formal"*

A defect which goes to the root of plaintiff's claim is not a "formal" defect. (*Jackson, J.*) VENKATARAMAYYA *v.* BANDI VEERASWAMI. **21 L. W, 282 : 88 I. C. 665 : A. I. R. 1925 Mad. 617.**

———**O. 23, R. 1**—*Non-inclusion of prayer for possession in declaratory suit is not formal defect.*

A suit which must fail by reason of the cause of action on which it is found not being substantiated by evidence cannot be said to fail by reason of some formal defect. The essential element of a cause of action for a declaratory relief is the fact that the plaintiff is in possession and if that fact is not established the suit fails on merits and the defect is not a formal defect though the result is attracted by the provisions of S.42 of the Specific Relief Act. Allowing withdrawal on the ground that in a declaratory suit the plaint did not contain a prayer for possession is gravely irregular as the question affects jurisdiction and is not merely one of form. (*Wazir Hasan, J. C.*) MT. EJAZ RASUL KHAN *v.* MUBARAK HUSSAIN. **27 O. C. 231 : 11 O. L. J. 613 : 79 I. C. 1033 : A. I. R. 1925 Oudh 291.**

———**O. 23, R. 1**—*Formal defect—Objections by defendant is not proof of formal defect—Court must be satisfied that there is such defect.*

C. P. CODE (V OF 1908), O. 23, R. 1—Form of order.

The fact that numerous objections have been taken by the defendant is not sufficient proof that formal defects exist. This is an utterly wrong position to take. In order to give a Court jurisdiction to act under O. 23 R 1, it is not sufficient that the defendant should allege legal defects but the Court must be satisfied either from the plaintiff's admission or otherwise that there really is some formal defect which must lead to the failure of the suit or some other sufficient cause within the meaning of the rule. (*Daniels, J. C.*) RAJINDRA PURI *v.* BENI MADHO. **11 O. L. J. 351 : 79 I. C. 1031 : 10 O. & A. L. R. 823 : 1 O. W. N. 383 : A. I. R. 1925 Oudh 140.**

———**O. 23, R. 1**—*Formal defect—Omission to obtain permission of insolvency Court is a formal defect.*

Where a suit, which was well within time, was filed, against an insolvent without the permissions of the insolvency Court. *Held*, that such omission was a formal defect and permission to withdraw and file a fresh suit with the permission of the Insolvency Court should be granted. (*Lentaigne, J.*) ROWE AND CO., LTD. *v.* TAN THEAN TAIK. **2 Rang. 643 : 84 I. C. 909 : A. I. R. 1925 Rang. 105.**

———**O. 23, R 1**—*Formal defect—Bar of O. 2, R. 2, C.P. Code—Leave to withdraw both suits with liberty to sue afresh—Mistake of law or fact.*

In respect of goods sold and delivered before a certain date plaintiff had instituted two suits for their price. Later on apprehending that the second suit would be barred by O. 2, R. 2, C. P. Code plaintiff before the framing of issues, applied for leave to withdraw them with liberty to bring a fresh suit in respect of the price of the whole quantity of goods. *Held*, that the plaintiff should be granted leave to withdraw with liberty to sue for the consolidated claim, inasmuch as his mistake was a *bona fide* one.

Lentaigne, J.—The expression "formal defects" must be given a very wide and liberal meaning and presumably as connoting defects of various kinds which are not defects affecting the merits of the case on substantial questions (including equities and estoppels) reasonably arising between the parties. It is impossible to lay down any exhaustive definition of what are sufficient grounds within the meaning of O. 23, R. 1, C. P. Code. Amendments of pleadings should equally be allowed in suitable cases in order to overcome the effects of *bona fide* mistakes whether of law or of fact, and it does not matter whether the assertions or omissions caused by such mistakes were deliberately made or not. If the Court is satisfied that there is a reasonable apprehension that the suit must fail if the permission to withdraw is not granted, the plaintiff is entitled to be given leave to withdraw. Decisions to the effect that an appellate court had not legally granted the permission to withdraw on a particular ground would not amount to an authority to the effect that such ground would not have been a proper ground for the granting of such relief if applied for at an early stage of the suit in the trial Court. (*Lentaigne, J.*) K. E. A. K. A. SAHIB & CO. *v.* K. M. ADAMSA. **2 Rang. 66 : 81 I. C. 465 . A. I. R. 1924 Rang. 249.**

Form of Order.

———**O. 23, R. 1**—*Form of order—Dismissal of suit on merits containing a permission to bring a fresh suit does not entitle plaintiff to file fresh suit, where no application under R. 1 is made.*

Where a Court in dismissing a suit made a remark that the plaintiffs were at liberty to file a fresh suit, but there was no formal application under O 23, R. 1 for withdrawal, *Held*, the remark does not amount to a permission to bring a fresh suit under O. 23, R. 1.

C. P. CODE (V OF 1908), O. 23, R. 1—Form of order.

(*Lord Phillimore.*) FATEH SINGH *v.* JAGANNATH BAKSH SINGH. **52 I. A. 100 : 6 L. R. P C. 50 : 12 O. L. J. 117 : 2 O W. N. 25 : 47 All. 158 : 27 O. C. 334 : 27 B. L. R. 725 : 29 C. W. N. 749 : 23 A. L. J. 739 : 22 L. W. 58 : A. I. R. 1925 P. C. 55 : 48 M. L. J. 64 (P. C.).**

——O. 23, R. 1—*Form of order—Plaintiff applying but Court not allowing withdrawal with liberty to bring fresh suit—Court should simply dismiss the application.*

Where the plaintiff does not desire to withdraw from the suit unless liberty to bring a fresh suit is granted and the Court considers that such liberty should not be granted the proper course is simply to dismiss the application. 32 Bom. 345, Foll. (*Newbould, J.*) KAMINI KUMAR *v.* RAJENDRA NATH. **42 C. L. J. 219 : 90 I. C. 432 : A. I. R. 1926 Cal 233.**

——O. 23, R. 1.—*Form of order—Permission need not be express.*

The permission mentioned in O.23, R. 1, C. P. Code, need not be express. It is sufficient if the grant of permission can be implied from the order, read with the application on which the order was passed. 3 P. R. 1905 and 97 P. R. 1916. Diss. The defts. cannot question the propriety of the order granting the permission which has become final, at the time of filing a fresh suit.(*Shadi Lal and Martineau, JJ.*) BANWARI LAL *v.* KISHEN DEVI. **67 I. C. 1002 : 2 L. L. J. 242.**

——O. 23, R. 1—*Form of order—Liberty to file fresh suit—Need not be expressly given.*

A court can impliedly give a plaintiff permission under O. 23, R. 1 to institute fresh suit after withdrawing a pending one. There is nothing in that rule demanding that the permission shonld be given expressly. (*Hallifax, A. J. C.*) SAVITRI *v.* MADHORAO. **A. I. R. 1924 Nag. 285.**

——O. 23, R. 1—*Form of order—Withdrawal of suit—Order of Court granting leave—Form of.*

The procedure under O. 23, R. 1, C. P. Code, is that the plaintiff withdraws his suit. The suit is not dismissed at all and the act is the act of the plaintiff, not of the Court. Where there was no application and no withdrawal and the suit was dismissed, the Court remarking that the plaintiffs might sue afresh if they chose, *Held*, that there was no grant of leave to withdraw the suit with liberty to sue afresh. (*Dalal and Simpson, A. J. Cs.*) FATEH SINGH *v.* JAGANNATH BAKHSH SINGH. **10 O. L. J. 132 : 74 I. C. 549 : A. I. R. 1923 Oudh 242.**

[See on appeal Fateh Singh] **52 I. A. 100 : 47 A. 158 · 48 M. L. J. 64 (P. C.).**

Grounds for.

——O. 23, R. 1—*Grounds for—Non-service on heirs of deceased defendant.*

The fact that notices on the heirs of a deceased defendant could not be served is no ground for allowing plaintiff to withdraw a suit with liberty to file a fresh suit. (*Shah, A. C. J. and Crump, J.*) LAKSHMIBAI JAGANNATH JOSHI *v.* YESHWANT VITHAL BAGKAR. **24 Bom. L. R. 909 : 75 I. C. 283 ; 47 Bom. 92: A. I. R 1922 Bom. 449 (1).**

——O. 23, R. 1—*Grounds for—Plaintiff's case failing owing to mistaken view of law—Withdrawal cannot be permitted.*

The fact that a plaintiff's claim has failed on account of a mistaken view of the law is not a sufficient ground for permitting withdrawal of suit in second appeal. (*Suhrawardy and Cuming, JJ.*) SITINDRA MOHAN TAGORE *v.* BAMA SUNDERI DEVI. **88 I. C. 512 : A. I. R. 1926 Cal. 432.**

——O. 23, R. 1 (2) (b)—*Grounds—Other ground must be analogous to "formal defect".*

C. P. CODE (V OF 1908), O. 23, R. 1—Grounds for.

'Other sufficient grounds' in Sub-cl. (b) O. 23, R. 1 must be *ejusdem generis* with the formal defect in sub-cl. (a). (*Jackson, J.*) VENKATARAMAYYA *v.* BANDI VEERASWAMI. **21 L. W. 282 : 88 I. C. 665 : A. I. R. 1925 Mad. 617.**

——O. 23, R. 1 (2)—*Grounds—Issues joined—Plaintiff failing to prove case—Withdrawal cannot be allowed.*

The Court has no power under the rule to grant permission to the plaintiff to withdraw from the suit, with liberty to institute fresh suit, in a case where the issues have been joined and the plaintiff fails to produce evidence in support of the issues or where evidence has been adduced, but the evidence is not such as to support the plaintiff's case. The reason is that in a case of this character the suit must fail not by reason of some formal defect, but on the merits and apprehension of failure in the suit cannot be said to constitute a sufficient ground for allowing the plaintiff to institute a fresh suit. (*Jackson, J.*) VENKATARAMAYYA *v.* BANDI VEERASWAMI. **88 I. C. 665 : 21 L. W. 282 : A. I. R. 1925 Mad. 617.**

——O. 23, R. 1—*Grounds—Does not apply where plaintiff withdraws case under fear that his allegations will fail.*

Where the plaintiff under a fear that he will fail on the case set up by him desires to withdraw so as to be able to bring another suit on completely different allegations. O. 23, R. 1 does not apply to the case. Because in such a case the failure of the suit would not be due to some formal defect but it will be on merits. (*Baker, J. C.*) MT. RANGUBAI *v.* MADHORAO. **81 I. C. 276 : A. I. R. 1925 Nag. 101.**

——O. 23, R. 1 (2) (b)—*Grounds—"Other sufficient grounds" must not be wholly dissimilar to some formal defect.*

"Other sufficient grounds" would not cover any ground wholly dissimilar to some formal defect. The interpretation of the words "other sufficient grounds" in the clause should be the same as that of the words "other sufficient reason" used by the Legislature in connection with an application for review of judgment in R. 1, sub r. (1), clause (c) of O. 47, of C. P. Code. (*Wazir Hasan, J. C.*) MT. EJAH RASUL KHAN *v.* MUBARAK HUSAIN. **27 O. C. 231 : 11 O. L. J. 613 : 79 I. C. 1033 : A. I. R. 1925 Oudh 291.**

——O. 23, R. 1—*Grounds for—Plaintiff bound to fail owing to substantial defect in plaint—Permission cannot be granted.*

The fact that upon tne case as made in the plaint the plaintiff could not succeed is no ground for allowing the plaintiff to withdraw from the suit with liberty to bring a fresh suit. Such permission can be granted only when the suit is bound to fail by reason of some formal defect or on other sufficient grounds analogous to those provided for in Sub-Cl. (a). (*Kulwant Sahay, J.*) JAGANNATH SAHU *v.* SHEO GOBIND PRASAD. **90 I. C. 217 : A. I. R 1926 Pat. 128.**

——O. 23, R. 1—*Grounds for—Improper grant of leave—Remedy of aggrieved party—Appeal—Revision—Suit.*

The circumstances contemplated by O. 23, R 1 of the Code are confined to those mentioned in Cls. (*a*) and (*b*) of R. 1, sub-r. (2) of the Order, and do not include a case where the Court making the order is not satisfied that the circumstances mentioned in cls. (*a*) or (*b*) exist. If the Court is not satisfied that the circumstances contemplated in the rule exist then it has no jurisdiction to make the order as the jurisdiction is only conferred where the court is so satisfied. If this condition is not fulfilled it is clear that the

C. P. CODE (V OF 1908), O. 23, R. 1—Grounds for.

jurisdiction does not arise. In all cases where an order under the rule is made it must be presumed in the absence of proof to the contrary that the Court was satisfied that the conditions in one or other of the cls. (*a*) and (*b*) existed. Where the court had jurisdiction to make the order it is not open to the Court in a subsequent suit to question the propriety of his decision, or to consider whether in fact there existed a formal defect or other sufficient ground for the order. Where jurisdiction is conferred to determine a particular question and the Court having jurisdiction determines it, the decision is binding upon the parties, whether right or wrong until it is set aside by some process known to the law in that suit. This may be done either by review of judgment or by appeal or revision where such procedure is permitted by law in the particular case. It cannot be done in a collateral proceeding. To hold otherwise would be to destroy the finality of all legal proceedings and to render a determination of rights by a Court of law impossible. 24 C. W. N. 723 (F. B.) foll : 3 P. L. J. 404 ; (1920) Pat. 232 overruled. (*Dawson Miller, C. J. Mullick and Jwala Prasad, JJ.*) RAJKUMAR MAHTON *v.* RAM KHELAWAN SINGH. **1 P. 90 : 3 P. L. T. 80 : 1922 P. H. C. C. 17 : 64 I. C. 337 : A. I. R. 1922 Pat. 44 (F. B.).**

———O. 23, R. 1, and S. 115—*Grounds for—Inability to produce witness, if reason for withdrawal—Revision.*

Inability to produce important evidence is not a sufficient ground, under O. 23, R. 1, Sub-R. (2), Cl. (*b*) of the Code, to allow a plaintiff to withdraw his suit with liberty to bring a fresh one and a Court which does so, acts illegally and with material irregularity, in the exercise of its jurisdiction and the order is liable to be set aside in revision. (*Das and Ross, JJ.*) UCHANT AHIR *v.* BASAWAN AHIR. **2 P. L. T. 634 · 61 I. C. 639 : 6 P. L. J. 112.**

———O. 23, R. 1—*Grounds—Apprehension that second suit would be barred under O. 2, R. 2 is good ground for allowing withdrawal--C.P. Code, O. 2, R. 2.*

Where the object of the plaintiff in withdrawing the suits under O. 23, R. 1 was to consolidate the two claims in a single suit which would avoid any danger of the second suit being held to be barred under O. 2 R. 2, *Held* : that he should be allowed to withdraw with permission to bring another suit. (1887) 10 Mad. 160, (1885) 7 All. 624, (1894) 17 All. 53 Foll. (*Lentaigne, J.*) K. E. A. K. A. SAHIB & CO. *v.* K. M. ADAMSA.

2 Rang. 66 : 81 I. C. 465 : A. I. R. 1924 Rang. 249.

——— —O. 23, R. 1—*Late stage—Suit for possession of share in* Melvaram *and* Kudivaram—*Trial almost closed—Plaintiff wishing to withdraw part of the claim without specific reasons cannot be allowed to withdraw.*

Plaintiff claimed partition and possession and a permanent injunction restraining the defendant from entering on the plaintiff's share in both the *Melvaram* and *Kudivaram* of the suit land. After defendant filed his written statement and the issues were framed, he asked for permission to withdraw the suit in respect of the *Melvaram* and to confine himself to the claim of the *Kudivaram*. No specific reasons were given for such withdrawal. The lower Court permitted the withdrawal and granted leave. *Held* that the lower Court used its discretion wrongly and that the defendant should have such order vacated without waiting for the final judgment. (*Coutts-Trotter, C. J. and Ramesam, J.*) N. M. KHAJAMYAN ROWTHER *v.* APPAVU PILLAI. **1925 M. W. N. 493 : 90 I. C. 642 : A. I. R. 1926 Mad. 126.**

C. P CODE (V OF 1908), O. 23, R. 1—Order as to costs.

Leave to withdraw.

———O. 23, R. 1—*Leave to withdraw—Conditions.*

Where some plaintiffs compromised with some defendants and suit was dismissed, contesting plaintiffs should not be allowed to get restoration of suit unless they paid to contesting defendants costs up to dismissal of suit and except on terms that the contesting defendants be allowed to put in objection is arising out of the new state due to compromise. (*Rankin and M. N. Mukerji, JJ.*) KALIDAS CHANDRA RAY *v.* HRIDAY CHANDRA DAS. **39 C. L. J. 367 : 83 I. C. 958 : A. I. R. 1924 Cal. 814.**

———O. 23, R. 1—*Leave to withdraw—Power of Revenue Court to grant.*

Quaere—If a Revenue Court can grant permission to withdraw a suit or application with liberty to file a fresh suit or application in a civil court. (*Walmsley and B. B. Ghose, JJ.*) SASI KANTA ACHARJA *v.* SALIM SHEIKH. **50 Cal. 626 : 27 C. W. N. 987 : 74 I. C. 1001 : A. I. R. 1923 Cal. 624.**

——— O. 23, R. 1—*Leave to withdraw—Decree based upon concurrent findings of fact—Second Appeal.*

Where the decree is based upon a concurrent finding of fact, the Court cannot grant leave to withdraw, as the question whether such leave should be given in Second Appeal depends upon whether the Court is satisfied that the decree against the plaintiff should be set aside. (*Sanderson, C. J. and Richardson, J.*) RAM KUMAR BANIKYA *v.* SAFIUNISSA BIBI. **63 I. C. 169 (Cal.)**

———O. 23, R. 1—*Leave to withdraw suit—Not a decree and not appealable.*

An order granting permission to the plaintiff to withdraw a suit or to abandon a part of his claim is not a decree and is not therefore appealable. 18 C. 322 ; 27 C. 362 ; 15 A. 169 ; 17 A. 97, Ref. (*Abdul Raoof and Martineau, JJ.*) SANT RAM *v.* MT. SAHIB KUER. **65 I. C. 719 : A. I. R. 1922 Lah. 267.**

———O. 23, R. 1—*Leave to withdraw—Application to withdraw suit can itself be withdrawn.* (1912) M. W. N. 997 Ref. (*Oldfield, J.*) LAKSHMANA PILLAI *v.* APPALWAR ALWAR AYYANGAR. **31 M. L. T. 451 (H. C.) : 17 L. W. 632 : 71 I. C. 288 : A. I. R. 1923 Mad. 246 : 44 M. L. J. 77.**

——— ——O. 23, R. 1—*Suit allowed to be withdrawn at the appellate stage—Order if appealable.*

No appeal lies from an order passed by an appellate Court under O. 23, R. 1. (*Wazir Hasan, A. J. C.*) BISHUNATH *v.* RAM PARSHAD. **88 I. C. 1029 (1).**

Order as to costs.

———O. 23, R. 1—*Order as to costs—Second suit dismissed for non-compliance with condition on which permission was granted—Third suit is barred.*

The plaintiff was allowed to withdraw his suit with permission to bring a fresh suit on condition that he paid the defendant's costs. The plaintiff filed the second suit but instead of paying the defendant's costs before filing the second suit he paid the same, afterwards. *Held*, that on dismissal of the second suit on the ground of his not having complied with the condition on which the permission to bring it had been granted, the plaintiff was not entitled to bring a third suit. (*Macleod, C. J. and Crump, J.*) AMBUBAI HANMATRAO *v.* SHANKARSA NAGOSA. **27 B. L. R. 243 : 87 I. C. 807 : A.I. R. 1925 Bom. 272 (1).**

——— ——O. 23, R. 1, Cl. 2—*Order as to costs—Leave to withdraw suit with liberty to bring a fresh suit—Leave granted on condition of payment of costs—Institution of fresh suit without payment of costs—Effect of.*

C. P. CODE (V OF 1908), O. 23. R. 1—Order as to costs.

Where the Court granted the plaintiff leave to withdraw a suit with liberty to institute a fresh suit on payment of costs of the first suit and the plaintiff filed a second suit without paying the costs as directed. *held*, that the plaintiff having failed to comply with the condition laid upon him as to the payment of costs before he could bring a fresh suit the first suit cannot be held to be pending until costs were paid therein. 33 M. 258; 2 C. L. J. 480 followed. 31 Cal. 965; 19 C. L. J. 529 ; 3 Patna L. J. 63 dissented from. (*Phillips, J.*) GOLLAPUDI SHESHAYYA *v.* NADENDLA SUBBAYYA. **35 M. L. T. 62 : 20 L. W. 642 : (1924) M. W. N. 887 : 82 I. C. 499· A. I. R. 1924 Mad. 877 : 47 M. L. J. 646.**

——0. 23, R. 1 (3) *Order as to costs—"Shall" in the rule is not mandatory and does not conflict with power of Court under C. P. Code*, S. 35.

Rule (1) (3) does not impose an unavoidable obligation on the Court to award costs in all cases. The word "shall," as used in the context, is merely directory and not mandatory. This rule has not the effect of divesting the Court of discretion vested in it by S. 35. (*Wazir Hasan and Simpson, A. J. Cs.*) RAM BHOWS *v.* RAMPAL SINGH. **2 O. W. N. 901 : A. I. R. 1925 Oudh 699.**

Partition Suit.

——0. 23, R. 1—*Partition suit—In some cases—Plaintiff cannot withdraw.*

As a general proposition a plaintiff can at any time withdraw a suit but that a plaintiff cannot always and in all circumstances withdraw is a proposition which is not without authority ; for instance, in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another according to O. 23, R. 1 (4). (*Crump and Coyajee, JJ.*) TUKARAM MAHADU TANDEL *v.* RAMCHANDRA MAHADU TANDEL. **49 B. 672 : 89 I. C. 984 : 27 B. L. R. 921 : A. I. R. 1925 Bom. 425.**

——0. 23, Rr. 1 and 3—*Partition Suit—Compromise effected—Subsequent withdrawal by plaintiff is not permissible.*

When in a partition suit a defendant has by a compromise with the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has consented to the compromise afterwards to annul its effect by withdrawing the suit. 29 Bom. 13 Foll. (*Crump and Coyajee, JJ.*) TUKARAM MAHADU TANDEL *v.* RAMCHANDRA MAHADU TANDEL. **27 B. L. R. 921 : 49 B. 672 : 89 I. C. 984 : A. I. R. 1925 Bom. 425.**

——0. 23, R. 1—*Partition suit—Plaintiff wishing in previous suit for division in status and in second suit, while right to partition is still subsisting, seeking to recover his share of which he had been deprived, second suit is not in respect of same subject matter*

When a member of a family has withdrawn a suit for partition, he is not precluded from bringing another suit for the possession of his share of the property by reason of O. 23, R. 1. Where in the first suit, the plaintiff wished to become divided for some reason or other, and to enforce his right to partition ; and in the second suit, while his right to a partition was still subsisting, he was dispossessed of his share and consequently treating that as the basis of his action, he sought to recover his share. *Held* : that the second suit was not in respect of the same subject-matter. (*Phillips, J.*) KRISHNASWAMI NAIDU *v.* PERUMAL. **20 L. W. 540 : (1924) M. W. N. 742 : 83 I. C. 84 : A. I. R. 1925 Mad. 112.**

C. P. CODE (V OF 1908), O. 23, R. 1—Revision.

Probate Proceedings.

——0. 23, R. 1—*Probate proceedings.*

O. 23, R. 1, C. P. Code, is not applicable to probate proceedings. 20 C W. N. 986 and 21 Bom. 335, Rel 38 Bom. 309, Dist. Even if O. 23, R. 1, C P. Code, were considered applicable the necessary permission to bring a suit was given as in the statement made by them, they said that they intended to file a regular suit, and asked for permission to withdraw from their application and plaintiff was allowed to withdraw. 34 M. L. J. 515 and 35 Cal. 990 (995), Foll. (*Shadi Lal and Martineau, JJ.*) BANWARI LAL *v.* KISHEN DEVI. **67 I. C. 1002 : 2 Lah. L. J. 242.**

Public Trust.

——0, 23, R. 1, S. 92 and O. 1, R. 10—*Public trust—Scheme suit—Withdrawal of—Court has power to transfer parties and decide the suit on its merits*

Where in a scheme suit under S. 92 of the Code, the plff, applies to withdraw the suit and it appears that his object is to prevent the Court from deciding the suit on merits, the Court can under powers given to it under O. 1, R. 10 transpose some of the defendants as plffs and proceed with the suit notwithstanding the withdrawal of the plff. (*Sadasiva Iyer and Odgers, JJ.*) MAHOMED SIRAJUDDIN *v.* GHULAM JILANI. **59 I. C 233 : 12 L. W. 25.**

Revision.

——0. 23, R. 1—*Revision—Withdrawal allowed—Questionof formal defect not considered—Order is revisable.*

Where the Court without applying its mind to the question whether there is any formal defect in the suit, allows the suit to be withdrawn with permission to the plaintiff to bring a fresh suit, and actually there is no formal defect; the Court acts with material irregularity and its order is open to revision by the High Court. (*Daniels, J*) GANGA PRASAD *v.* MT. KISHNI. **47 All. 319 : 87 I. C. 175 : L. R. 6 A. (Civ) 155 : A. I.R. 1925 All. 466.**

——0. 23, R. 1 (2)—*Revision—Withdrawal allowed but permission to bring fresh suit refused—Revision lies.*

Where in the case of an application to withdraw a suit in terms of O. 23, R. 1 (2), the Court allows the suit to be withdrawn but refuses permission to bring a fresh suit, the courts' order is liable to be set aside in revision. (*Boys, J.*) NATHJI *v.* LANGURIA. **L. R. 6 A. (Civ.) 62 : 85 I. C. 548 : A. I. R. 1925 All. 272.**

——0. 23 R 1—*Revision—Order passed without recording grounds.*

An order granting leave to withdraw without considering or recording any grounds for allowing withdrawal is a wrong exercise of jurisdiction and a revision would lie. (*Banerji, J.*) RAHMAT ULLA *v.* DHARAM SINGH. **20 A. L. J. 90 : L. R 3 A. 93 : 64 I. C. 948 : A. I. R. 1922 All. 185. (1).**

——0. 23, R. 1—*Revision—Application to withdraw Dismissal.*

Plff.'s application to withdraw with liberty to bring fresh suit was disallowed and the suit dismissed. The application was allowed on appeal on the ground that there was a formal defect in the frame of suit. *Held*, there was proper exercise of jurisdiction by the Lower Court and no revision lay. (*Figgott and Walsh, JJ.*) RATAN LAL *v.* MUHAMMAD HAMIDULLAH KHAN. **19 A. L. J. 47 : L. R. 2 A. 5 : 60 I. C. 899 : 2 U. P. L. R. (All.) 403.**

——0. 23, R. 1—*Revision—Leave to withdraw suit with liberty—Costs to follow the event—Order negativing costs of successful party—Interference on appeal.*

C. P. CODE (V OF 1908), O. 23, R. 1—Revision.

When leave to withdraw the suit with liberty is granted, costs must follow the event. Where in the matter of costs there is an omission to consider the necessary circumstances there is not a sound exercise of discretion and the High Court is entitled to interfere in revision. (*Macleod, C. J. and Crump, J.*) KHIM CHAND NARATTAMDAS *v.* SOBHACHAND BHOGILAL.
25 Bom. L. R. 242 : 47 B. 059 : 72 I. C. 324 : A. I. R. 1923 Bom. 206.

——**0. 23, R. 1 and S. 115**—*Revision—Withdrawal of suit—Order by Appellate Court—Reasons not given—Revision.*

Where an appellate court without finding any of the reasons specified in O. 23, R. 1 of the C. P. Code allows the plaintiff to withdraw his suit with liberty to bring a fresh suit in spite of the fact that the suit was fought out strenuously in the trial Court, the order of the Appellate Court is without jurisdiction and is liable to be set aside in revision, 44 C. 454 Ref. (*Suhrawardy and Chotzner, JJ.*) SUBASINI DEVI *v.* ASHUTOSH LAHIRI. **39 C L. J. 371 : A. I. R. 1924 Cal. 751.**

——**0. 23, R 1 (2)** — *Revision — Withdrawal of suit—Material irregularity.*

The object of O. 23, R. 1 (2) is not to enable a plaintiff, after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and so to prejudice the opposite party. An order, which allows a plaintiff to withdraw a suit with liberty to institute a fresh suit, will, according to its practice, be revised by the High Court. (*Batten, Offg. J. C.*) SINGHAI RAJILA *v.* KANHAI. **18 N. L. R. 30 : A. I. R. 1922 Nag. 84.**

——**0. 23, R. 1 and S. 115**—*Revision—Lower Court allowing without any justification withdrawal of suit with liberty to bring fresh suit—Defendant greatly prejudiced—High Court can interfere in revision*

The suit had gone through various stages of proceedings. All the witnesses for the plaintiff were examined and also all the witnesses for the defence. 16 months had elapsed after the institution of the suit. On the day fixed for arguments, the Court allowed the plaintiff to withdraw his suit with liberty to bring another suit in respect of the same subject-matter. *Held*, that the Court had exercised its jurisdiction with gross irregularity and that palpable injustice was done. *Held*: *also* that the High Court was entitled to interfere in revision and to set aside the order of the lower Court. It is the duty of the Court to see that justice is properly done and that a subordinate Court does not pass certain orders transparently for the purpose of avoiding the trouble of writing a judgment. (*Dalal, J.C.*) MT. RABBUL ARFIN *v.* BABU RAZA.
1 O. W. N. 861 : 10 O. & A. L. R. 1130 : 85 I. C. 324 : A. I. R. 1925 Oudh 596.

——**0. 23, R. 1**—*Revision lies if withdrawal is based on grounds other than in Rule 1—Failure to produce evidence in time is no ground for permitting withdrawal.*

The High Court can interfere on the revision side with an order passed under O. 23, R. 1, if that order proceeds on grounds other than those laid down in R. 1. Where the only ground on which leave was granted was that the plaintiffs had failed within the time allowed to them to produce sufficient evidence upon which to prove their case. *Held* : this was not covered by the rule. 40 All. 612, Diss. 40 Mad. 793 (P. C.) Dist. (*Scott-Smith, J.*) ISHAR DAS *v.* LAL SINGH. **7 Lah. L. J. 290 : A. I. R. 1925 Lah. 497.**

C P. CODE (V OF 1908), O. 23, R. 1 (2).

——**0. 23, R. 1**—*Revision—Failure to exercise judicial discretion.*

Where the court below has failed to exercise a judicial discretion, an order under O. 23, R. 1, C. P. Code can be made the subject of revision. (*Daniels, J. C.*) RAJINDRA PURI *v.* BENI MADHO.
10 O. & A. L. R. 823 : 11 O. L. J. 301 : 79 I. C. 1031 : 1 O. W. N 383 : A. I. R. 1925 Oudh 140.

——**0. 23, R. 1**—*Revision - Order allowing withdrawal for correction of survey numbers of disputed land after conclusion of evidence is without jurisdiction —C. P. Code, S. 115.*

If an order under O. 23, R. 1, is passed without the conditions required by the section being complied with, the order is without jurisdiction and may be made the subject of revision. 44 C. 367 & 21 O. C. 68 Ref. Where the real ground on which withdrawal was sought for in a suit for possession was thatthe evidence was not sufficient to identify the land in dispute with the plots belonging to the plaintiffs. *Held*, that the order allowing withdrawal was without jurisdiction. (*Daniels, J. C.*) DAULA *v.* DWARKA PAL.
78 I. C. 121 : A. I. R. 1925 Oudh 61.

——**0. 23, R. 1**—*Revision lies if lower Court grants permission without giving reason and the reasons for withdrawal do not come under Sub-cl. (2).*

Where the reasons for which withdrawal was applied for were not of the kind recognised by O. 23, R. 1 sub-clause (2), and the lower Court never applied its mind to this question at all and also it gave no reason whatever for allowing the plaintiff permission to bring a fresh suit. *Held*, the High Court should interfere in revision. (*Daniels, A. J. C.*) PULAI *v.* UMANATH SINGH. **72 I. C. 1034 : A. I. R. 1924 Oudh 107.**

Withdrawal without leave.

——**0. 23, R. 1**—*Withdrawal of a portion of a claim after written statement filed by defendant and defendant put to trouble and expense.*

The plaintiffs brought a suit in respect of both the *melvaram* and *kudivaram* of the suit properties. After written statement was filed by the defendant and the issues were framed and the trial almost over, the plaintiff prayed for permission to withdraw the suit in respect of the melvaram without assigning any reasons for the same. *Held*, that the plaintiff cannot be given liberty to withdraw. (*Coutts-Trotter, C. J. and Ramesam, J.*) KHAJA-MIYAN ROWTHER *v.* APPAVU PILLAI.
90 I. C. 642 : (1925) M. W. N. 493.

——**0 23, R. 1**—*Withdrawal without leave—Consolidation of claims*

Where a Court allows withdrawal without liberty to bring a fresh suit, but allows the plaintiff to consolidate that claim with a claim in another suit, the plaintiff cannot bring a fresh suit in respect of the matter. (*Sadasiva Aiyar and Burn, JJ.*) LAKSHMANAN CHETTY *v.* MUTHAIYA CHETTY.
62 I. C. 833 : 29 M. L. T. 189 : 40 M. L. J. 126.

——**0. 23, R. 1 (2)**—*Applicability—R. 1 (2) applies to Appellate Court—But circumstances should justify reversal of trial Court's decree.*

The Court can also in appeal give permission under O. 23, C. P. Code, for withdrawing a suit with liberty to bring a fresh suit but generally this can be done only in a case where the appellate Court discovers that the suit ought to fail on the ground of some formal defect and by reason of such discovery it is of opinion that the decree of the trial Court ought to be reversed. Where the defects were those which had been embodied in the objections which had been

C. P. CODE (V OF 1908). O. 23, R. 1 (2) (b).

taken in the written statement and had been made the subject of issues in the first Court, and the plaintiff being aware of those defects had gone to trial and fought the case out with a view to persuade the Court to hold that the defects which had been pointed out had not existed; *Held*, that having failed there it did not lie in his mouth at the appellate stage to say that they were really formal defects and that, because they were so, the lower appellate Court should have given him permission to withdraw from the suit. (*Suhrawardy and Cuming, JJ.*) NISHI KANTA *v.* KUMAR LAL. **41 C. L. J 186 : 86 I. C. 1029 : A. I. R. 1925 Cal. 711**

——O. 23, R. 1 (2) (b)—*"Other sufficient grounds"*—Ejusdem generis—*Plaintiff not ready to go on with the case.*

Where the plaintiff was not ready to go on with the case and applied for permission to withdraw the suit under O. 23, R. 1. *Held* that "other sufficient grounds" in R. 1, cl. (2) (*b*), must be taken to mean *ejusdem generis* with the words in cl. (2) (a), *viz.*, some formal defect and consequently the order allowing the plaintiff to withdraw with liberty to bring a fresh suit is wrong and must be set aside in revision. (*Beasley, J.*) SUBADAR NAIMATULLA *v.* ABDUL RAZACK. **22 L. W. 35 : A. I. R. 1925 Mad. 1268.**

——O. 23, R. 1 (3)—*Bar under the rule, application of, to suits for ejectment under the Tenancy Act.*

A suit for ejectment was withdrawn without permission to bring a fresh suit. A second suit for ejectment was brought in a subsequent year. *Held*, following the principles set forth and criteria laid down in *Achuta Menon* v. *Achutan Nayar*, Madras XXI, page 135 that the cause of action and the relief claimed are substantially the same in both suits and that O. 23, R. 1, does apply; there is a bar to the second suit if the former one has been withdrawn without permission. (*Mc Nair, S. M. and Pim, J. M.*) RAJA SRI KRISHNA DUTTA *v.* RAM ACHHAIBER RAI. **L. R. 6 All. 248 (Rev.).**

——O. 23, R. 1 (4)—*Withdrawal by one co-plaintiff without consent of others is not permissible.*

The Revenue Court cannot permit one of the plaintiffs to withdraw without the consent of the other co-plaintiffs. (*Suhrawardy and Duval, JJ.*) JOGENDRA NARAYAN *v.* MAHOMED ISMAIL. **42 Cal. 139 : 86 I. C. 1035 : A. I. R. 1925 Cal. 637.**

——O. 23, R. 3—*Adjustment—Does not apply to execution proceedings.*

The provisions contained in O. 23, R. 3, regarding adjustment of suits do not apply to execution proceedings. (*Dalal, J. C.*) HAIDER MIRZA *v.* KAILASH NARAIN DAR. **A. I. R. 1925 Oudh 136**

—— O. 23, R. 3.

Adjustment,
Appeal.
Arbitration.
Binding on Parties.
Duty of Court.
Effect of Compromise.
Execution Proceedings.
Legality of Compromise.
Matters Outside Suit.
Partial Compromise.
Pleader's Authority.
Public Trust.
Record of Compromise.

—— O. 23, R. 3.

See also (1) CONTRACT ACT, S. 74.
(2) DECREE.

Adjustment

——O. 23, R. 3—*Adjustment—Parties not understanding that the compromise is final and binding—Compromise is not valid.*

Where both parties to suit referred the dispute to the arbitration of a pleader whose verdict was to be taken as final but as appeared from the affidavit of the pleader of one of the parties, that he was not of opinion that a final and binding agreement which should commit his client to any sum or no sum had been come to. *Held*: that the parties were not *ad idem* in connection with this compromise, and that the compromise had thus failed as a settlement of the suit between the parties. (*Lord Shaw.*) JAGATPUT DUGAR *v.* PURANCHAND NAHATTA. **L. R. 5 P. C. 145 : 26 B. L. R. 772 : 34 M. L. T. 136 : 1924 M. W. N. 646 : 20 L. W. 571 : 83 I. C. 380 : A. I. R 1924 P. C. 200 (P. C.) : 47 M. L. J. 136.**

——O. 23, R. 3—*Adjustment at a meeting of share-holders.*

It is abundantly clear that whatever may take place at the shareholders' meeting, it is not an adjustment within the provisions of the Code. (*Mr Ameer Ali.*) KEVALDAS TRIBHOVANDAS *v.* SAKERLA BULAKHIDAS. **38 M. L. T. 424 : 28 C. W. N. 930 : 79 I. C. 412 : A. I. R. 1923 P. C. 178 : 45 M. L. J. 763 (P.C.)**

——O. 23, R. 3—*Adjustment.*

Statement by parties that a certain Vakil should hear the dispute and that they would accept his statement amounts to an adjustment. (*Sulaiman and Kanhaiya Lal, JJ.*) HIMANCHAL SINGH *v.* JATWAR SINGH **46 All. 710 : L. R. 5 A. (C v.) 439 : 80 I. C. 16 : A. I. R 1924 All. 570.**

——O. 23, R. 3—*Adjustment—Award—Supersession of—Subsequent reference through Court.*

In a suit for dissolution of a partnership and taking accounts the parties referred their disputes to arbitration without the intervention of the Court. An award was made and the plff. applied to the Court to file the award as an adjustment under O. 23, R. 3, C. P. Code. Subsequently both the parties applied to the Court to appoint an arbitration for settling their disputes. The Court made an order accordingly but the arbitration failed. Thereupon the plaintiff sought to proceed with his application under O. 23, R. 3, C. P. Code. *Held*, that the previous arbitration proceedings had been annulled when the parties agreed to the appointment of an arbitrator by the Court and that the prior award could not be filed as an adjustment under O. 23, R. 3, C.P. Code. (*Macleod, C.J. and Coyajee, J.*) KHIMCHAND NAROTAMDAS *v.* BHOGILAL HIRACHAND. **24 Bom. L. R. 361 : 67 I C. 913 : 46 Bom. 854 : A. I. R 1922 Bom. 436.**

Appeal.

——O. 23, R. 3—*Appeal—Party abandoning his claim voluntarily—Court may decline to allow appeal to proceed further.*

Walsh, J.—On general principles of law, independently of any provision in the Code, the High Court has an inherent discretion to decline to allow an appellant to prosecute an appeal the moment it is satisfied that the appellant by his solemn act and deed, testified to by his signature, for what he considered adequate consideration, has expressly abandoned his right and undertaken to withdraw his appeal. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **23 A. L. J. 561 : 88 I. C. 768 : 47 All. 637 : A. I. R. 1925 All. 603 (F. B.).**

——O. 23, R. 3—*Appeal—Parties agreeing not to adduce any evidence and to abide by Court's decision after local inspection—Decision after local inspection is*

C. P. CODE (V OF 1908), O. 23, R. 3—Appeal.

one based on compromise and is not appealable.

The substantial dispute between the parties was as to whether a spout in question should or should not be closed. Instead of incurring the expense involved in producing a lot of oral evidence the parties decided that they should not produce any evidence whatsoever and should abide by the decision of the Munsif after he had made a local inspection. The document which recorded their agreement did not say that any inpection notes should be prepared by the Munsif and be left on the record; nor did it say that he should necessarily refer to all the documentary evidence that was produced by the parties. The matter in dispute was left entirely to the decision of the Munsif. *Held*: that the parties could not subsequently resile from their agreement and must be bound by the decision of the Munsif arrived at after local inspection whether the decision was, as a matter of fact, right or wrong. The Munsif's judgment was not vitiated by the fact that he kept no notes of his inspection or that he made no reference in his judgment to the documents filed by the parties. The decision must be treated to have been one based on a compromise between the parties and was no longer open to appeal. 1924 All. 570 and 1925 All. 271, Foll. (*Sulaiman and Daniels, JJ.*) SITA RAM *v.* PEARL. **23 A. L. J. 525 : : 88 I. C. 611 L. R. 6 A. (Civ.) 503 : A. I. R. 1925 All. 558.**

——— **O. 23, R. 3**—*Appeal.*

Appellate Court also is bound to record compromise of even part of subject-matter of appeal. (*Campbell and Zafar Ali, JJ.*) UTTAM SINGH *v.* MUNSHI. **6 Lah. L. J. 261 : 80 I. C. 527 : A. I. R. 1925 Lah. 145.**

——— **O. 23, R. 3**—*Appeal—Duty of Court.*

If a compromise relating to the subject matter of the suit is filed in court, the court is bound to pass a decree in accordance therewith under O. 23, R. 3, if it is satisfied of the fact of compromise. It cannot accept it in part only and reject the rest An appeal lies under O. 43 R. 1 (*m*) from an order recording or refusing to record a compromise. This right is not taken away merely because subsequently a decree has been passed in the suit. (*Moti Sagar, J.*) THE FIRM OF MEGH RAJ TEJ BHAN *v.* FIRM OF TULSI RAM DEVI DITTA. **6 Lah. L. J. 187 : 80 I. C. 696 : A. I. R. 1924 Lah. 466.**

——— **O. 23, R. 3**—*Appeal—Order holding that no compromise is proved.*

R. 3 of O. 23, C. P. Code applies, as its very wording shows, only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise, or satisfaction. Consequently the order passed by the lower Court in the present case finding that there has been no compromise is not an order under R. 3 of O. 23 and is not appealable. (*Martineau, J.*) SHANTI SARUP *v.* THE FIRM OF JAHANGIR MAL BANSI MAL. **73 I. C. 177 : A. I. R. 1924 Lah. 248.**

——— **O. 23, R. 3**—*Appeal—Suit—Meaning of—Proceedings under O. 21, R. 90.*

'Suit' in R. 3 includes the appellate stages and execution proceedings following the decree. An application under O. 21, R. 90 to set aside a sale, is a suit or proceedings within O. 23, R. 3 and a compromise made therein should be recorded not under R. 2 of O. 21 but under R. 3 of O. 23. (*Das and Ross, JJ.*) JAGDISH MISSER *v.* SURESHWAR MISSER. **2 P.L. T. 278 : 62 I. C. 608 : 6 P. L. J. 253.**

C. P. CODE (V OF 1908), O. 23, R. 3—Arbitration.

——— **O. 23, R. 3**—*Applicability—Adjustment of suit—Effect of—Offer by defendant that he would consent to a decree if a witness eats food cooked by plaintiff—How far effective.*

Where a deft. offered that if a witness took food prepared by plaintiff the suit should be decreed and that offer was accepted and acted upon accurately and fully, the promise made by the defendant must be carried out by him and the suit decreed. This has nothing to do with adjustment of suits within the meaning of O. 23, R. 3 of the Code. (*Mears, C. J. and Ryves, J.*) RAM SUNDER MISRA *v.* JAI KARAN. **23 A. L. J. 201 : 47 All. 406 : 87 I. C. 174 : L. R. 6 A. 270 : A. I. R. 1925 All. 271.**

Arbitration.

——— **O. 23, R. 3**—*Arbitration*—(*Per* Mukerji, J., Walsh & Kanhaiya Lal, JJ. *Contra*) *Award is no adjustment.*

Mukerji, J.—An award which has been arrived at by a reference of the subject-matter of an appeal to arbitration pending the appeal cannot be recognised as an 'adjustment by lawful agreement' by the parties to the appeal or as a 'compromise'. R. 3 of O. 23, deals with what is generally known as a compromise of a suit. A compromise is the direct result of an agreement between the parties. The rule 3, therefors, must be taken as directed only to cases where the parties have agreed that the Court should decide a matter between themselves in a particular way. Giving the words their plain meaning, an arbitration cannot come within the purview of R. 3. An award is not an adjustment by an agreement of parties within the meaning of R.3, O. 23 and even if any contrary opinion could be entertained before the passing of Act 5 of 1908, S. 89 of the Act makes it impossible to maintain such an opinion. (Case law fully discussed.) (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **23 A. L. J. 561 : 47 A. 637 : 88 I. C. 768 : A. I. R. 1925 All. 503 (F. B.).**

——— **O. 23, R. 3**—*Arbitration—Decree not in excess of award on reference through Court is not appealable—C. P. Code, S. 104 (1) (f).*

Where the decree appealed against was not in excess of the award and where the award had been made on a reference through the Court under Schedule II to the Code of Civil Procedure, *Held*, the award cannot be treated either as a compromise under rule 3 of Order 43, or an order appealable under S. 104 (1) (f) of the C. P. Code. (*Pratt and Fawcett, JJ.*) MAHOMED VALLI ASMAL *v.* VALLI ASMAL. **26 Bom. L. R. 171 : A. I. R. 1924 Bom. 324.**

——— **O. 23, R. 3**—*Arbitration—Award—Misconduct—Jurisdiction to enquire.*

It is impossible to conceive that it was intended when an application was made to the Court under O. 23, R 3, C. P. Code, that all that the Court has to do was to satisfy itself that there had been an agreement to refer an award, and that it is bound to pass a decree in terms of the award, without considering any objection raised by one party or the other that there had been misconduct on the part of the arbitrators, such as in any other case would vitiate an award. (*Macleod, C. J. and Crump, J.*) THAKORE DAS *v.*

C. P. CODE (V OF 1908), O. 23, R. 3—Arbitration.

LALLUBHAI. **25 Bom. L. R. 452 : 75 I. C. 102 : A. I. R. 1923 Bom. 401.**

——— O. 23, R. 3—*Arbitration—Award, if can be recorded as adjustment.*

Where in a suit, a reference to arbitration is made by the parties without the intervention of the Court and an award is made thereon, it can be recorded as an adjustment under O. 23, R. 3 of the Code and a decree can be passed in terms of the award. (*Macleod, C.J. and Fawcett, J.*) MANILAL MOTILAL *v.* GOKALDOS ROWJI. **45 Bom. 245 : 59 I. C. 53 : 22 Bom. L. R. 1048.**

———O. 23, R. 3—*Arbitration—Award in a pending suit—Private arbitration—If enforceable.*

Where in a pending suit the parties submitted their disputes to private arbitration, the award cannot be enforced under O. 23, R. 3, C. P. Code. 25 C. W. N. 127 and 40 Bom. 386, followed. 45 Bom. 245 dissented from. Necessity for arbitration through Court pointed out. (*Rankin, J.*) AMAR CHAND CHAMARIA *v.* BANWARI LAL. **49 Cal. 608 : 69 I. C. 808 : A. I. R. 1922 Cal. 404.**

———O. 23, R. 3—*Arbitration in pending suit, reference to, cannot be given effect to.*

An informal reference to arbitration in a pending suit cannot be given effect to under O. 23, R. 3 of the Code or under the Arbitration Act even if there is a written submission. (*Rankin, J.*) DEKARI TEA CO. *v.* THE ASSAM BENGAL RAILWAY. **25 C. W. N. 127: 61 I. C. 919: 47 Cal. 6.**

———O. 23, R. 3—*Arbitration—Award without intervention during pendency.*

In the absence of consent an award made without the intervention of the Court during the pendency of a litigation cannot be recorded as an adjustment under O 23, R. 3 of the C. P. Code, and cannot be enforced under S. 89 of the C. P. Code. 37 Bom. 639; 26 Bom. 75, diss. (*Shadi Lal, C. J. and Leslie Jones, J.*) HARI PERSHAD *v.* SOOGAN DEVI. **3 Lah. L. J. 162.**

———O. 23, R 3—*Arbitration—Rule applies to cases referred to arbitration—C. P. Code, S. 89 and Sch. II, Para. 20.*

Section 89 does not preclude the application of O. 23, R. 3 to cases in which there has been a reference to arbitration. The power given by section 20 of Schedule II to any person interested to apply to a Court is not to be understood as overriding the general power given to parties under O. 23, R. 3 to adjust their disputes by a lawful compromise at any time after the institution of a suit. 45 B. 245 Foll. which overrules 40 B. 386. (*Spencer and Devadoss, JJ.*) C. C. DORAYYA *v.* C. VENKANNA. **76 I. C. 802 : A. I. R. 1925 Mad. 50.**

———O. 23, R. 3—*Arbitration—Partial award—Decree on—Power of Court to pass.*

Where the parties to a suit referred to arbitration to three individuals the matters in dispute between them in the suit as well as certain other matters not forming the subject of the suit, two of the arbitrators were absent and thereupon the parties agreed to abide by the decision of the third arbitrator. That arbitrator gave his decision so far as the dispute in suit was concerned and deferred an enquiry into other matters. Owing to the obstruction of the defendants the arbitrator could not pass an award in respect of the matters outside the suit. On an application to the Court to have the award on the subject-matter of the suit recorded under O. 23, R. 3, C.P. Code, *Held*, that it was open to

C. P. CODE (V OF 1908), O. 23, R 3—Binding on Parties.

the Court to record the decision of the arbitrator, and pass a decree thereon even though the award was partial. There is no rule of law that a partial award is invalid and the question has to be decided on the intention of the parties, the matter being a subject of contract between them. (*Phillips and Devadoss, JJ.*) ALAGU PILLAI *v.* VELUCHAMI. **32 M. L. T. (H. C.) 369: (1923) M. W. N. 331: 74 I. C. 609: 18 L. W. 26: (1923) M. W. N. 509: A. I. R. 1923 Mad. 576 : 45 M. L. J. 76.**

———O. 23, R. 3—*Arbitration—Award—Compromise modifying—Decree on—Power of Court to pass decree.*

It is competent to a Court on an application under Sch II, para. 20, C. P. Code, to pass a decree on an award as modified by a lawful compromise filed by the parties. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) HAKIM FAZAL AHMAD *v.* ENAYAT AHMAD. **9 O. L. J. 219 : 68 I. C. 209 : 25 O. C. 213 : A. I. R. 1922 Oudh. 189.**

———O. 23, R. 3—*Arbitration—Reference and award pleaded as an adjustment justify order to amend pleadings—Specific amount claimed under adjustment Justifies order demanding Court fee on account of claim.*

Where during the pendency of a suit a reference and award are made and pleaded as an adjustment of the disputes in the suit, the trying Court can ask the party pleading the award as an adjustment to amend his pleading accordingly and try the question of adjustments an issue and on such amendment, whether Court-fee must be paid on amount claimed under award. (*Kennedy J. C. and Aston, A. J. C.*) FIRM OF BOLMAL CHELLARAM *v.* JHAMANDAS KISHARAM. **18 S. L. R. 111 : 88 I. C. 61 : A. I. R. 1925 Sind 266.**

———O. 23, R. 3—*Arbitration—Contentious disputes about arbitration whether matters of adjustment.*

The recording of an award by consent is permissible under Order 23, Rule 3, for, although the terms of settlement there, have been arrived at by the intervention of a third party, it is by consent of both parties that the award is recorded as the adjustment of their disputes; but contentious disputes about arbitration should not be treated as matters of adjustment within the meaning of Order 23, Rule 3, but in view of 16 S. L. R. 174 F. B. they must be so treated (*Kennedy J. C. and Aston, A. J. C.*) BOLMAL-CHELLARAM, *v.* JHAMANDAS KISHARAM. **18 S. L. R 111: 88 I. C. 61: A. I. R. 1925 Sind. 266.**

———O. 23, R. 3—*Award—If falls under.*

Per *Mukerji, J.*—An award is not an adjustment by an agreement of parties within the meaning of O. 23, R. 3. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **23 A. L. J. 561 : 88 I. C. 768 : 47 All. 637 : A. I. R. 1925 All. 503 (F. B.).**

Binding on Parties.

——— O. 23, R. 3—*Binding on parties—Party abandoning his claim voluntarily—Court may decline to allow appeal to proceed further.*

Walsh, J.—On general principles of law, independently of any provision in the Code, High Court has an inherent discretion to decline to allow an appellant to prosecute an appeal the moment it is satisfied that

C. P. CODE (V OF 1908), O. 23, R. 3—Binding on Parties.

the appellant by his solemn act and deed, testified to by his signature, for what he considered adequate consideration, has expressly abandoned his right and undertaken to withdraw his appeal. (*Walsh, Kanhaiya Lal and Mukerji, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **47 All. 637 : 23 A. L. J. 561 : 88 I. C. 608 : A. I. R. 1925 All. 503 (F. B.)**

——**O 23, R. 3**—*Binding on parties—Defendant's offer that suit may be decreed if certain person ate food out of plaintiff's hands—Offer acted upon—Suit must be decreed—O. 23, R. 3 does not apply.*

Where the defendant in a suit offered that if a certain person ate food served by the plaintiff the suit may be decreed and the offer was acted upon, *Held*: the defendant cannot resile from his promise and the suit must be decreed, O. 23, R. 3 has nothing to do with such cases. (*Mears, C. J. and Ryves, J.*), RAM SUNDER MISRA *v.* JAI KARAN SINGH. **47 All. 456 : 23 A. L. J. 251 : L. R. 6 A. (Civ.) 270 : 87 I. C. 174 : A. I. R. 1925 All. 271.**

——**O. 23, R. 3**—*Binding on parties—Agreement of parties—Compliance with terms—Effect.*

Where in a redemption suit, one of the issues was about the legitimacy of a person and the parties agreed that if food cooked by that person were eaten the suit should be decreed and that was done, it would conclude the matter only so far as regards that issue. The other issues must be decided on the merits in the usual way in the case. (*Daniels, J.*) BHAWANI PRASAD MISIR *v.* RAM SUNDER. **L. R 5 A. 268 : 79 I. C. 353 : 22 A. L. J. 301 : A. I. R. 1924 All. 911.**

——**O. 23, R. 3**—*Binding on parties—Terms of agreement intelligible—Agreement cannot be avoided on ground of one party not understanding whether particular matter is included in terms or not.*

If the terms of an agreement are intelligible, and the agreement is binding between the parties it cannot be avoided by one of the parties on the ground that he does not understand whether a particular matter is included in those terms or not. (*Walmsley and B. B. Ghose, JJ.*) TARA BALA DASSI *v.* SURENDRA NATH MITRA. **41 C. L. J. 213 : 88 I. C. 369 : 29 C. W. N. 597 : A. I. R. 1925 Cal. 866.**

——**O. 23, R. 3**—*Binding on parties—Fact certified to Court by pleaders of parties.*

Where a compromise effected by the parties is conveyed to the Court by pleaders on both sides, the parties cannot object on the ground that the pleaders had no such authority. (*Abdur Rahim and Oldfield, JJ.*) PAMBAYAM CHETTY *v.* KANDASWAMI IYER. **60 I. C. 22: 12 L. W. 562.**

——**O. 23, R. 3**—*Binding on parties—Adjustment depending on future contingency—If can be resiled from.*

Where a question of legitimacy was in issue, the parties proposed that if food prepared by one of the parties was eaten by the other, the suit might be decreed. The food was actually prepared and eaten, but before that, one of the parties withdrew from the agreement—But the Court still decreed the suit. *Held*, the agreement was not an adjustment and it was open for the parties to resile from it. If the adjustment depends on a future contingency, it does not fall under O. 23, R. 3. The agreement and its performance, however, would be evidence on the issue of legitimacy. (*Wazir Hasan, J. C.*) GAURI SHANKER *v.* BANSI DUBE. **10 O. & A. L. R. 140: 78 I. C. 540 : 11 O. L. J. 306: 27 O C. 157 : 1 O. W. N. 44 : A. I. R. 1924 Oudh 367 (2).**

C. P. CODE (V OF 1908), O. 23, R 3—Effect of Compromise.

Duty of Court.

——**O. 23, R. 3**—*Duty of Court—Scope.*

If a compromise is alleged that is a question of fact for investigation. (*Rankin, J.*) JNANENDRA NATH DUTT *v.* NASEA DASI. **39 C. L J. 526: 83 I. C. 948: A. I. R. 1924 Cal. 991.**

——**O. 23, R. 3**—*Duty of Court—Consent-decree—Nature of.*

A Court making a decree by consent is performing a Judicial and not a Ministerial Act. The Court must be satisfied that the agreement is lawful and it can pass a decree in accordance therewith only in so far as it relates to the suit (*Mookerjee and Buckland, JJ.*) BHARAT RAMANUJA *v.* SRINATH CHANDRA. **25 C. W.N 806: 34 C. L. J. 96 : 49 Cal. 220: 66 I. C. 273 : A I R. 1922 Cal. 358.**

——**O. 23, R. 3**—*Duty of Court—Compromise cannot be accepted in part.*

If a compromise relating to the subject-matter of the suit is filed in court, the court is bound to pass a decree in accordance therewith under O. 23, R. 3. if it is satisfied of the fact of compromise. It cannot accept it in part only and reject the rest. (*Moti Sagar, J.*) THE FIRM OF MEGH RAJ BHAN *v.* FIRM OF TULSI RAM DEVI DITTA. **6 Lah. L. J. 187 : 80 I. C. 696 : A. I. R. 1924 Lah. 466.**

——**O. 23, R. 3**—*Duty of Court—Proof of compromise.*

It is not essential before a Court can pass a decree in accordance with a compromise that all the parties to it should assent to it before the Court. The Court can enquire if an assent had been given elsewhere and if this is proved, it can pass a decree in accordance with the compromise thus assented to. (*Scott-Smith, J.*) MAHANT RAGHBIR SINGH *v.* CHANAN SINGH. **69 I. C. 395 : A. I. R. 1923 Lah. 204.**

——**O. 23, R. 3**—*Duty of Court—Compromise—Not registered—Whether Court can act upon.*

Where a document evidencing a compromise is presented to a Court, an objection regarding registration is insufficient to prevent the Court if it accepts the compromise, from acting upon it. (*Fawcett, A. J. C. and Kennedy, J. C.*) CHELLARAM *v.* KIMATRAM. **61 I. C. 118 : 14 S. L. R. 245.**

Effect of Compromise.

——**O. 23, R. 3**—*Effect of compromise—Power of Court to go behind—Dekhan Agri. Rel. Act* (XVII *of* 1879), S. 12.

In a suit to recover the amount of a promissory note from an agriculturist, the latter admitted the note but denied consideration and prayed for an account. When the suit came on for hearing a compromise was presented to the Court under which the defendant agreed to pay the amount of the suit and costs in instalments. The defendant, when examined, said that he had agreed to the compromise though he did not understand the accounts and that he had received only a small amount from the plaintiff many years ago. The Court disregarded the compromise and dismissed the suit on the merits. On appeal :—*Held, by Macleod, C. J.*, that, on an application to record an agreement under O. 23, R. 3, Civil Procedure Code, the Court could go behind the transaction provided it was perfectly clear that the whole of the plaintiff's claim was admitted. *Held, by Shah, J.*, that, inasmuch as the defendant admitted the plaintiff's claim without full knowledge of his legal rights, the application of S. 12 of the Dekhan Agriculturists' Relief Act was not excluded by O. 23, R. 3 of the Civil Procedure Code. 8 Bom. 20; 34 Bom. 502 : 35 Bom. 120 : 37 Bom. 614t Ref. *Per Macleod, C. J.*—O. 23, R. 3 does not ous,

C. P. CODE (V OF 1908), O. 23, R 3—Effect of Compromise.

the jurisdiction of the Court in this class of cases from inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor. *Per Shah, J.*—"According to the decisions the provisions of O. 23, R. 3. C. P. Code, whenever they are applicable must be given effect to even in cases which are governed by the Dekhan Agriculturists' Relief Act. Thus if in any suit it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and pass a decree in accordance therewith so far as it relates to the suit." (*Macleod, C. J., and Shah, J.*) GOTURAM RADHAKISAN *v.* BARKU DODHU. **24 Bom. L. R 88 : 46 Bom. 560 : 67 I. C: 2 3 : A. I. R 1922 Bom 331.**

——— **O. 23, R. 3**—*Effect of compromise—Relief granted to defendants—Execution.*

Where a Court passes a decree on the basis of a compromise there is nothing to prevent it from granting a relief to a defendant which can be executed provided that relief has been agreed to by the parties and is one of the considerations on which the compromise is based. 18 Mad. 410: 30 Mad. 478: 5 C. W. N. 485, Ref. to. (*Lyle, A. J. C.*) BISHESHAR SINGH *v.* MAHOMED YASIN ALI KHAN **25 O. C. 53 : 9 O. L. J. 276 : 68 I. C. 232 : A. I. R. 1922 Oudh 150.**

——— **O. 23, R. 3**—*Effect of compromise—Authority of counsel to compromise without reference to his client—English practice—Applicability.*

A rule of practice in England which has its roots in different traditions and environments should not be applied in this country particularly in the muffusal where people never heard of any such practice. A Court of justice is not bound by the unauthorised act of a counsel and is not deprived of its general authority over justice between parties. Nealle *v.* Gordon Lennox (1902) A. C. 465 (469), Foll. (*Walmsley, and Ghose, JJ.*) TARU BALA DASI *v.* SOURENDRA NATH MITRA. **41 C. L. J. 213 : 88 I. C. 369 : 29 C. W. N 597 : A. I. R. 1925 Cal. 866.**

——— **O. 23, R. 3**—*Effect of compromise by counsel out of Court without consent of party.*

An advocate of the High Court in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as counsel and such a compromise would be valid and binding upon the parties even though it had been effected contrary to the express instructions of the client, unless the prohibition had previously been communicated to the other side. But the apparent authority of counsel is restricted to acts and admissions *coram judice or in Court*; such acts and admissions *out of Court* do not bind the client, unless in fact they are authorised by the client, or by his agent duly authorised by the client in that behalf. A compromise therefore effected by counsel out of the Court, and not assented to by the client is only binding upon the client if it is expressly authorised or subsequently ratified by the client or by his agent authorised in that behalf. (*Page, J.*) ASKARAN CHONTMAL *v.* E. I. RY. CO. **52 Cal. 386 : 88 I. C. 413 : 29 C. W N. 566 : A. I. R. 1925 Cal. 696.**

——— **O. 23, R. 3**—*Effect of compromise by pleader—Validity.*

Where a pleader has full power to compromise a case under a *vakalatnama* and compromised accordingly the action taken by the pleader cannot be challenged unless improper conduct or fraud or collusion on his part is imputed to him. (*Jwala Prasad, J.*) LAURENTIUS EKKA *v.* DHUKI KOERI. **4 Pat. 766.**

C. P. CODE (V OF 1908), O. 23, R. 3—Legality of Compromise.

Execution Proceedings.

——— **O. 23, R. 3**—*Execution proceedings—Rule does not apply.*

The provisions contained in R. 3 of O. 23, regarding adjustment of suits do not apply to execution proceedings. (*Dalal, J. C.*) HAIDER MIRZA *v.* KAILASH NARAIN DAR. **80 I. C. 454 : A. I. R. 1925 Oudh 136.**

Legality of Compromise.

——— **O. 23, R. 3**—*Legality of compromise—Compromise avoidable but not avoided—Decree can be passed—Remedy by suit.*

Compromise arrived at under undue influence, coercion or compulsion is good so long as it has not been avoided. A decree passed on it before it is avoided is not void. It can be set aside by a regular suit. (*Sulaiman and Mukerji, JJ.*) DWARKADHISH PRASAD SINGH *v.* KESHO PRASAD SINGH. **L. R. 6 All. 26 : 85 I. C 557 : A. I. R. 1925 All. 266.**

——— **O. 23, R. 3**—*Legality of compromise—Mortgage suit compromised—Compromise allowing realisation from property other than mortgaged one—Compromise is lawful.*

A compromise decree in a mortgage suit by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, in addition to the mortgaged property, is "lawful" and 'relates to the suit,' within Rule 3 so as to be embodied in the decree. 30 Mad. 478, Foll. (*Macleod, C. J. and Coyajee, J.*) VISHNU MORESHWAR *v.* SADASHIV SHIVRAM. **27 Bom. L. R. 943 : 89 I. C. 889 : A. I. R. 1925 Bom. 509.**

——— **O. 23, R. 3**—*Legality of compromise—Agriculturist — Defendant admitting claim — Dekhan Agriculturists' Relief Act, S. 12.*

Where a compromise is entered into and the defendant admits the whole of the plaintiff's claim and asks the Court to pass a decree in accordance with that admission, O. 23, R. 3 does not oust the jurisdiction of the Court under S. 12, Dekhan Agriculturists' Relief Act. The Court can go behind the transaction, and is not bound to pass decree. (*Macleod, C. J. and Shah, J.*) GOTU RAM *v.* BARKU DHOLU. **46 Bom 560 : 24 Bom. L. R. 88 : A.I.R. 1922 Bom. 331.**

——— **O. 23, R. 3**—*Legality of compromise—What constitutes—Lawful agreement.*

Before a Court records a compromise it must be satisfied that the suit has been adjusted wholly or in part by any lawful agreement or compromise. Where the parties to a compromise were not only the parties to the suit but also other persons not parties to the suit, one of whom was an infant, and the compromise purported to govern the rights and liabilities of persons not impleaded in the suit and the compromise contained many clauses which were interdependent, the performance of one of which being dependant on the performance of the other—the Court could not pass a decree in accordance with the compromise under O. 23, R. 3. But the action of the Court in refusing to pass a decree in accordance with the compromise would not prejudice the rights of the parties to enforce the agreement in other proceedings. (*Sanderson, C.J. and Richardson, J.*) DOOLYCHAND SRIMALI *v.* MOHANLAL SRIMALIY, **51 Cal. 432 : A. I. R. 1924 Cal. 722.**

——— **O. 23, R. 3**—*Legality of compromise—Compromise affecting puisne mortgagee.*

It is incumbent on a Court to pass a decree in terms of compromise only if the same is lawful, *i.e.*, enforce-

C. P. CODE (V OF 1908), O. 23, R. 3—Legality of Compromise.

able in law. One test to apply is, were the parties competent to enter into the agreement in order to gain their object. Where after a mortgage decree to which the puisne mortgagee was a party, the mortgagee and prior mortgagee put in appeal a petition of compromise which increases the amount payable to the latter, a decree cannot be passed in accordance therewith, as it undoubtedly prejudices the rights of the puisne mortgagee and hence cannot be said to be lawful. (*Mookerjee and Chotzner, JJ.*) MALCHAND BOID *v.* OSMAN ALI MANDAL. **38 C. L. J. 272 : A. I. R. 1924 Cal. 159.**

——O. 23, R. 3—*Legality of compromise or adjustment—Not assented to by all the parties—Court not bound to record.*

Where a compromise has not been assented to by all the parties it is contrary to law and the Court is justified in refusing to enforce it. (*Moti Sagar, J.*) VIR SINGH *v.* KHARATH SINGH. **6 Lah. L. J. 604 : 86 I. C. 361 : A. I. R. 1925 Lah. 280.**

——O. 23, R. 3—*Legality of compromise decree—Reliefs beyond scope of suit—Decree—validity—Objection in execution.*

A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject matter of the suit and contains other conditions. If the terms of the compromise decree which do not relate to the suit appear either directly or indirectly as considerations on which the settlement of the plaint claim was based, then such terms may be considered as part of the decree executable with it. *Quaere* :—Whether the objection that a *razinama* decree contained reliefs which were beyond the scope of the suit can be a ground for questioning the decree in execution (*Wallace and Madhavan Nair, JJ.*) RAMASWAMI NAIDU *v.* SUBBARAYA THEVAR. **(1925) M. W. N. 525 : 88 I. C. 648 (2) : A. I. R. 1925 Mad. 1101 : 49 M.L. J. 490.**

——O. 23, R. 3—*Legality of compromise—Portion of claim not within jurisdiction—Effect of.*

Where the claim is beyond the jurisdiction of the trial Court, it is not competent to the Court to pass a compromise decree. Its duty is to return the plaint under O. 7, R. 10, C.P. Code. Per *Coutts Trotter, J.*—The compromise may be regarded as an abandonment of the claim so far as it was beyond the jurisdiction of the Court and the decree on the compromise was valid. (*Sadasiva Iyer and Coutts Trotter, JJ.*) GOVINDASWAMI KADAVARAN *v.* KALIAPERUMAL. **(1922) M. W. N. 83 : 66 I. C. 837 : 16 L. W. 155.**

——O. 23, R. 3—*Legality of compromise—Decree in accordance with—Extraneous proviso.*

Where a suit is compromised and a decree passed in pursuance thereof, the decree must be in accordance with the compromise. It is not open to the parties to go behind it and ask for relief not included therein. (*Baker, J. C.*) MIRA MOTI JU DEO *v.* JANKI. **89 I. C. 926.**

——O. 23, R. 3—*Legality of compromise—Illegal or inoperative condition—Enforceability of—Executing Court.*

It is settled law that the inclusion of an invalid or illegal provision in a decree does not vitiate it. Where the parties have inserted in their decree a condition which cannot be carried out, the executing Court is right in refusing to enforce that portion of the decree. (*Prideaux, A. J. C.*) PARASHARAM *v.* SITA RAM. **20 N. L. R. 1 : 78 I. C. 357 : A. I. R. 1924 Nag. 84.**

——O. 23, R. 3—*Legality of compromise—Compromise in fraud on some of the parties—Not allowed.*

C. P. CODE (V OF 1908), O. 23, R. 3—Matters outside suit.

The Court will refuse to accept compromise between plaintiff and one defendant if the result of it would be to deprive the other defendants of the fruit of their success. (*Dalal, A. J. C.*) SAIYED ASHFAQ HUSSAIN *v.* SAIYED BUNYAD HUSSAIN. **9 O. & A. L. R. 415 : A. I. R. 1923 Oudh 252.**

——O. 23, R. 3—*Legality of compromise—Disputes settled by arbitration—If can be recorded as adjusted.*

If an arbitrator to whose arbitration the parties in a pending suit have referred their disputes without the intervention of the Court properly comes to a decision, the parties must be held to have adjusted their differences and the adjustment can be recorded under O. 23, R. 3. (*Kennedy, J. C. and Aston, A. J. C.*) FIRM OF BOLMAL CHELLARAM *v.* FIRM OF JHAMANDAS KISHARAM. **18 S. L. R. 111 : 88 I. C. 61 (2) : A. I. R. 1925 Sind 266.**

Matters outside suit.

——O. 23 R. 3—*Matters outside suit—Testamentary suit—Compromise—Validity of.*

Where in a testamentary suit, consent terms are proposed one of which falls within the testamentary jurisdiction and others do not, the decree may properly embody all the terms in a schedule for reference but its operative part should be confined to such terms as are within its jurisdiction ; and the testamentary Court should leave the parties to take separate proceedings under the ordinary original civil jurisdiction to enforce the remaining terms if necessary. (*Martin, J.*) BAI MONGHIBAI *v.* BAI RAMBHA LAXMI. **59 I. C. 344 : 22 Bom. L. R. 1286.**

——O. 23, R. 3—*Matters outside suit—Bar of suit—Compromise decree containing extraneous matters—Enforcement of.*

When a compromise decree contains provision extraneous to the subject-matter of the suit, the enforcement of the latter is not by way of execution but by way of suit. (*Suhrawardy, J.*) ARJUN KAPALI *v.* ASVINI KUMAR KAPALI. **78 I. C. 317 : A. I. R. 1925 Cal. 286.**

——O. 23, R. 3—*Matters outside suit—Compromise decree if capable of execution.*

A compromise entered into by parties to the suit contained matters outside the scope of the suit and the plaintiffs had therein withdrawn the reliefs asked for by them in the suit. When the compromise was filed in the Court the Court ordered, "It is ordered that the suit be dismissed in accordance with the terms of Solenama.....and the parties do abide by the terms of the Solenama."

Held, that the words "the parties do abide by the terms of the Solenama" must not be regarded as intended to effect the enforceability of all the terms of the Solenama in execution. 25 C. W. N. 68, Ref. (*Rankin and Ghose, JJ.*) SATIS KANTA ROY *v.* JYOTIRUPA DEVI. **A. I. R. 1924 Cal. 49.**

——O. 23, R. 3—*Matters outside suit—Decree on compromise, if can deal with.*

Where a consent decree in partition suit between brothers purported to deal with the rights in the mother's share after her death, *held*, that such a matter did not relate to the suit and the decree was without jurisdiction and did not operate as *res judicata.* The facts as a whole must be looked into to see whether matters had been introduced which did not relate to the suit. (*Rankin, J.*) SASHI BHUSAN *v.* HARI NARAYAN. **25 C. W. N. 990 : 66 I. C. 705 : 48 Cal. 1059.**

——O. 23, R. 3—*Matters outside suit affected—Decree—Form of.*

Where a compromise is not within the scope of the

C. P. CODE (V OF 1908), O. 23, R. 3—Matters outside suit.

suit, no decree could be made to give effect thereto under O. 23, R. 3, Civil Procedure Code. When the compromise has been effected between the parties, the proper course to follow is to recite the compromise in the decree completely, but to pass a decree in accordance therewith only in so far as it relates to the suit. (*Mookerjee and Panton, JJ.*) JIBAN KRISHNA CHAKRAVARTHI *v.* RAMESH CHANDRA DAS.

65 I. C. 47 : 38 C. L. J. 72.

———O. 23, R. 3—*Matters outside suit—Consideration for a compromise decree need not be limited to subject-matter of the suit itself—Decree affecting matters outside the suit can be executed with respect to extraneous matters also.*

The words "so far as it relates to the suit" cannot be said to have reference only to the subject-matter of the suit. The language used is wide and general and it is obvious that it would be highly inconvenient if the parties should not be allowed to settle their disputes on such lawful terms as they might agree to, without being restricted to such relief as one of the parties had chosen to claim in the plaint. The terms in a *razinama* decree which form consideration for the compromise of the suit must be deemed to be part of the decree and can be enforced in execution proceedings. A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject matter of the suit and contains other conditions. If those other conditions are the consideration for the compromise of the subject-matter of the suit, they must be incorporated in the decree. 30 Mad. 478, Ref. to, 5 C W. N. 485, Rel. on. 33 M. L. J. 615, 2 L. W. 608; 47 Cal. 485 (P. C.) Dist. (*Wallace and Madhavan Nair, JJ.*) RAMASWAMY NAYUDU *v.* SUBBARAYA THEVAR.

(1925), M. W. N. 525 : 88 I. C. 648 (2) : A. I. R. 1925 Mad. 1101 : 49 M. L. J. 490.

———O. 23, R. 3—*Matters outside suit—Compromise—Execution.*

Where one part of an agreement referred to a matter which did not form part of the subject-matter of the suit and therefore could not in law form part of the decree, *held*, once it is incorporated in the decree by consent of parties no party to the compromise can object to that part of the compromise which is outside the subject-matter of the suit as not binding on him. Neither party is entitled to execute the decree partially. (*Dalal, J. C. and Neave, A. J. C.*) YASIN ALI KHAN *v.* ALI BAHADUR. **10 O. L. J. 443 : 79 I. C. 685 : A. I. R. 1924 Oudh 230.**

———O. 23, R. 3—*Matters outside suit—'So far as it relates to the suit' meaning of.*

The words 'so far as it relates to the suit' mean 'so far as it relates to the adjustment or settlement of the matters litigated in the suit,' and there is nothing to prevent that settlement taking any form which is lawful and fair and which satisfies the parties. (*Maung Kin and Rigg, JJ.*) ANA PAKIRI SHA *v.* SOMASUNDARAM. **A. I. R. 1922 L. B. 22.**

Partial compromise.

———O. 23, R. 3—*Partial compromise—Some only of the parties compromising—Court may in its discretion refuse to record.*

In a case where some only of the parties to the suit join in a petition of compromise the other parties are entitled to object to the compromise being recorded, and if they show good cause the Court has discretion to refuse to grant a decree in terms of the compromise. (*Newbould and B. B. Ghose, JJ.*) GOPIKA RAMAN *v.* ATUL SINGH. **85 I. C. 678 :**

C. P CODE (V OF 1908), O. 23, R. 3—Pleader's authority.

A. I. R. 1926 Cal. 193.

———O. 23, R. 3—*Partial compromise—Partition of properties not comprised in compromise—Notice to defendants.*

Where a petition of compromise is filed by some defendants who had compromised, the Court is not competent to partition properties not included in the petition of compromise without notice to the defendants who had compromised. (*Das and Kulwant Sahay, JJ.*) SHAHDEO SHUKUL *v.* JAGESHAR PRASAD SHUKUL. **A I.R. 1923 Pat. 293.**

———O. 23, R. 3—*Partial compromise—Compromise with one deft. only.*

Where the plff. in an ejectment suit against two defts. could have maintained the suit against one only, he can enter into a compromise with one deft. only, to the effect that the result of the suit shall not affect him and that deft. with respect to a particular property involved in the suit (*Das and Adami, JJ.*) BHAGWATI KUER *v.* JAGDAM SAHAY.

62 I. C. 933 : 2 Pat. L. T. 471.

Pleader's Authority.

———O. 23, R. 3—*Pleader's authority*—Vakalatnama *express in terms.*

Where by a *vakalatnama* the plaintiffs expressly specify that the presentation to the Court of petitions relinquishing the claim, compromise and withdrawal of suit by the pleader, is binding on them, and the pleader does present a compromise, the plaintiffs are bound by his acts. (*Piggott and Walsh, JJ.*) HUKUM SINGH *v.* TANDA SINGH. **19 A. L. J. 63 : 60 I. C. 912 : L R. 2 A. 21 · 2 U. P. L. R. (All) 405.**

———O. 23, R. 3—*Pleader's authority—Compromise by counsel out of Court without consent of party is not valid—Legal Practitioner.*

An Advocate of the High Court in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as counsel and such a compromise would be valid and binding upon the parties even though it had been effected contrary to the express instructions of the client, unless the prohibition had previously been communicated to the other side. But the apparent authority of counsel is restricted to acts and admissions *coram judice* or *in Court*; such acts and admissions *out of Court* do not bind the client unless in fact they are authorised by the client, or by his agent duly authorised by the client in that behalf. A compromise therefore effected by counsel out of the Court, and not assented to by the client, is only binding upon the client if it is exprersly authorised, or subsequently ratified by the client or by his agent authorised in that behalf. (*Page, J.*) ASKARAN CHOUTMAL *v.* E. I. RY. AND CO.

52 Cal. 386 : 88 I. C. 413 : 29 C. W. N. 566 : A. I. R. 1925 Cal. 696.

———O. 23, R. 3—*Pleader's authority—Petition of compromise presented by vakils—Authority.*

Where a *razinamah* petition was presented by the vakils at the instance of the parties and was acted upon by the Court the question of the authority of the pleaders to compromise does not arise, as the compromise is by the parties and not by the pleaders. (*Abdur Rahim and Oldfield, JJ.*) PAMBAYAM CHETTY *v.* KANDASWAMI AIYAR. **60 I. C. 22 : 12 L. W. 562.**

———O. 23, R. 3—*Pleader's authority—Consent decree—Counsel acting on acquiescence of appellant's agent.*

Where the applicant challenged the consent decree on the ground that his counsel acted on misapprehension against instructions, *held* on the facts proved that the agent of the appellant acquiesced in the settlement

though under protest proposed by the counsel in the interest of his chief and that he accepted it when every to raise money necessary to satisfy plaintiff's claim attempt failed, the decree was binding on him. Two propositions are well settled first, that express authority is not needed for a counsel to enter into a compromise within the scope of the suit; and secondly where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. (*Das and Bucknill, JJ.*) NILMONI CHAUDHURI *v.* KEDAR NATH DAGA. **3 P. L. T. 37 1 : 1 P. 489 : 67 I. C. 96 : A.I. R. 1922 Pat 232.**

Public Trust.

——**O. 23, R. 3**—*Public trust—Compromise by trustee.*

A *bona fide* compromise by the trustee of a public trust relating to trust properties is a lawful compromise. (*Abdur Rahim and Oldfield, JJ.*) PAMBAYAM CHETTY *v.* KANDASWAMI AIYAR. **60 I. C. 22 : 12 L. W. 562.**

Record of Compromise.

——**O. 23, R. 3**—*Compromise—Recording of—Only as between some of the parties—Right to object.*

Where only some of the parties to a suit apply to Court to record a compromise under O. 23, R. 3, the others can object to its being recorded on showing proper grounds. (*Newbould and B. B. Ghose, JJ.*) GOPIKA RAMAN ROY *v.* ATUL SINGH. **85 I. C. 678 (Cal.).**

——**O. 23, R. 3**—*Record of compromise by guardian.*

Where the guardian of a minor auction purchaser enters into a compromise on the minor's behalf in a proceeding to set aside a sale under O. 21, R. 90, without leave of the Court, and no leave is expressly recorded, the Court ought not to record the compromise. (*N. R. Chatterjee and Panton, JJ.*) SITALA DAS MUKERJI *v.* BHUT NATH NASKER. **62 I. C. 688 (Cal.).**

——**O. 23, R. 3 and O. 43, R. 1**—*Order recording compromise—Decree in accordance therewith—Factum of compromise disputed—Appeal.*

Where a compromise alleged to have taken place between the parties to a suit is recorded by the Court on an application under O. 23, R. 3 of the C. P. Code and a decree is passed thereon an appeal lies from the order recording the compromise at the instance of the party who denies the truth of the compromise. (*Srinivasa Aiyangar, J.*) SATYANARAYANA MURTHY *v.* BUTCHAYYA. **87 I. C. 124 : A. I. R. 1925 Mad. 608 : 48 M. L. J. 249.**

——**O. 23, R. 3**—*Record of compromise—Lawfulness of agreement.*

O. 23, R. 3 which deals with the question of a Court's power to record agreements arrived at during the pendency of the suit restricts the court's power to only such agreements as are "lawful." (*Kinkhede, A. J. C.*) SHEIKH JAMA *v.* MUHAMMAD IBRAHIM. **90 I. C. 378.**

——**O. 23, R. 3**—*Record of compromise—Appeal withdrawn—Compromise not made decree of Court—Remedy of parties if conditions broken.*

Where an appeal is withdrawn as settled out of court, but the compromise itself is not made a decree, the parties cannot get the help of Court, if it afterwards turns out that one of them does not stand by the terms of the compromise. (*Baker, O. J. C.*) MT. MULIA *v.* PARTAB. **A. I. R. 1924 Nag. 325.**

——**O. 23, R. 4**—*Execution proceedings—Compromise—Legality of.*

O. 23, R. 4 of the C. P. Code is explicit in its terms

and declares O. 23 to be inapplicable to proceedings in execution of a decree or order. Consequently an arrangement entered into after decree for payment of the sum decreed in instalments is not binding and limitation for execution of the decree runs nevertheless. (*Broadway, J.*) BANARSI DAS *v.* RAMZAN. **72 I. C. 477 : A. I. R. 1924 Lah. 342.**

——**O. 25, R. 1**—*Temporary residence is not within the rule.*

Temporary residence in British India for purposes of suit is not residence within the rule. (*Macleod, C. J.*) HANIF *v.* KULSUM. **23 Bom. L. R. 1253 : 46 Bom. 589 : 64 I. C. 703 : A. I. R. 1922 Bom. 299.**

——**O. 25, R. 1**—*No inherent power apart from the rule—Rule refers to future costs—Transfer of co.-plaintiff to the array of defendants—Whether and when can be demanded.*

Per *Chatterjee, J.*—O. 25, R. 1 provides for security being taken for costs incurred as also those which are likely to be incurred by any of the defendants. In a case of transfer of one of the plaintiffs to the category of defendants the remaining co-plaintiff is not required to furnish security for future costs. It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay proceedings until it is given.

Per *Cuming, J.*—When the Code does make certain provisions for the taking of security for costs from the plaintiff, it seems that in those cases and those cases only, costs may be taken from the plaintiff. (*Chatterjee and Cuming, JJ.*) BHAIRENDRA NARAIN DEB *v.* UDAI NARAIN. **50 Cal. 853 : 79 I. C. 298 : A. I. R. 1924 Cal. 251.**

——**O. 25, R. 1**—*Pauper appeal—Security for costs—Grounds.*

Very special grounds should be required before a suit *in forma pauperis* should be required to give security for costs. A mere suggestion that somebody else is financing is not such a ground. (*Lentaigne, J.*) MA SAW *v.* MAUNG SHWE GON. **2 Bur. L. J. 78 : 75 I. C. 309 : A. I. R. 1923 Rang. 244.**

——**O. 25, R. 1 (3)**—*Suit for payment of money—Suit for dissolution of partnership accounts and recovery of stridhanam property is not.*

A suit for dissolution of partnership and account and for the recovery of the stridhanam property belonging to a female plaintiff is not a suit for payment of money within O. 25, R. 1 (3), C. P. Code. (*Greaves and Ghose, JJ.*) AMULYA SUNDARI DASSYA *v.* SYAMA SUNDARSAHA. **68 I.C. 607 : A.I.R. 1923 Cal. 316 (2).**

——**O. 25, R. 1 (3)**—*Suit for administration of estate is not one for money.*

In a suit for administration of an estate consisting largely of immoveable property, it may ultimately be necessary to sell the estate and distribute the proceeds in money, but that is not sufficient to make it a suit for the payment of money. It is in fact a suit relating to immoveable property. (*Carr, J.*) AMINA BIBI *v.* MOIDEEN KAKA. **3 Rang 211 : 89 I. C. 620 : A. I. R. 1925 Rang. 300.**

——**O. 26**—*Scope of.*

O. 26 amplifies and explains S. 75. (*Abdul Raoof and Harrison, JJ.*) SAWAN WAD *v.* RAMAQ MAL. **3 Lah. 209 : 68 I. C. 802 : A. I. R. 1922 Lah. 47.**

——**O. 26**—*Interlocutory order appointing Commissioner—Revision.*

The High Court refused to interfere in revision with an interlocutory order of the lower Court directing a Commissioner to ascertain mesne profits as the applicant had a remedy by way of appeal from the final decree. (*Spencer, J.*) HUSSAIN SAHIB *v.* HAMMAD SAHIB. **16 L. W. 312 : (1922) M. W. N. 562.**

C. P. CODE (V OF 1908), O. 26.

74 I. C. 812 : 31 M. L. T. 180 : A. I. R. 1923 Mad. 43.

——— O. 26—*Order refusing to issue commission is not appealable—Letters Patent (Rang.), cl. 13.*

An order refusing to issue a commission, however serious the ultimate results to the party, is a purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits A. I. R. 1925 Rang. 225 and 35 Mad. 1 (F. B.) Foll. (*Heald and Lentaigne, JJ.*) MAHOMED HUSSAIN *v.* HOOSAIN HAMADANEE AND CO. 3 Rang. 293 : 4 Bur. L. J. 103 : 90 I. C 967 : A. I. R. 1925 Rang. 290.

——— O. 26, R. 1—*Examination of witnesses on commission—Duty of Court—Discretion.*

Where an application is made for the examination of witnesses on commission and is opposed, it resolves into a question as to whether a Court can be said to have acted with jurisdiction in taking away from a litigant the rights which he undoubtedly has under the law of having witnesses brought before the Court and examined before the Court in accordance with the normal procedure; in other words, whether the circumstances disclosed in the case gave the Court jurisdiction to depart from the usual course prescribed by law. If the plaintiff insists on the attendance of his witnesses in Court and the witnesses apply for their examination on commission, the Court undoubtedly will have to take into consideration the grounds upon which the commission is applied for, but at the same time it cannot lose sight of the prejudice that might be caused to the plaintiff by reason of such commission being issued. If sickness or infirmity is alleged, the character and gravity of that sickness or infirmity have got to be assessed and the risk consequent upon a refusal to issue a commission will have to be taken into consideration. At the same time the importance of having the witnesses present before the Court, the advantages that would follow from their examination and cross-examination in the presence of the Court and the emergency which might arise of having them confronted or identified should not be altogether lost sight of. If all these matters are duly considered and an order is passed, then and only then can it be said that the order has been passed in the exercise of a judicial discretion. (*Mukerjee, J.*) PANCHKARI MITRA *v.* PANCHANAN SAHA. 39 C. L. J. 598 : 84 I. C. 9 : A. I. R. 1924 Cal. 971.

——— O. 26, R. 1—*Commission to examine specific witness—Witness not named examined—Effect.*

Where at the instance of one side a commission was issued for taking the evidence of a particular witness and in spite of the objection of the other side another witness was also examined, *held*, that the Court would be justified in ignoring the evidence of such person. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) RAMCHANDER GOURI SHANKER *v.* GANPATRAM BISWANATH. 89 I. C 839 : 47 Cal. 583.

——— O. 26, Rr. 1 and 2—*Plaintiff, a* gosha *lady applying to be examined on commission—Petition should be granted.*

An application made by a plaintiff for the issue of a commission to examine herself should be granted where it is based on the ground that she is a *gosha* lady who is not allowed to appear in Court or other public places according to the custom of her community. (*Srinivasa Aiyangar, J.*) VELLAI NACHIAR *v.* MEIYAPPA. 86 I. C. 513 : A. I. R. 1925 Mad. 905.

——— O. 26, Rr. 1 and 4—*"May" meaning of—Discretion to issue commission.*

In the case of a witness not under the control of the party asking for a commission, who resides beyond the limits fixed under O 16, R. 19 (*b*), a commission should issue as a matter of right, unless the Court is satisfied the party is merely abusing the Court's authority to issue process. It is not for the Court to decide whether the party will be benefited or not, as it is a matter entirely for the party. The word "may" in O. 26, Rr. 1 and 4 means "is given authority to". (*Wallace, J.*) JAGANNATHA SASTRY *v.* SARATHAMBAL AMMAL. 46 Mad. 574 : 17 L. W 251 : (1923) M. W. N. 157 : 71 I. C. 530 : A. I. R. 1923 Mad. 321 : 44 M. L. J 202.

——— O. 26, R. 1—*Commissioner can stop proceedings to take direction of Court.*

A Commissioner appointed by the Court to examine witnesses can stop proceedings to take the direction of the Court whenever he thinks that the pleader cross-examining a witness is abusing his position and exceeding the limits of propriety. A Court in appointing a Commissioner should in each case give him instructions so as to make it clear to him that he is not so powerless as it is imagined and that he should exercise his power and stop the proceedings for the purpose of taking the direction of the Court whenever he should think it is necessary to do so. (*Das and Adami, JJ.*) MT. KANIZ ZAINAB *v.* MOBARAK HUSSAIN. A. I. R. 1924 Pat. 284.

——— O. 26, R. 2—*Discretion of Court—Revision.*

Examination of witnesses on commission is in the discretion of the Court. Dismissal of application without enquiring or satisfying that evidence is unnecessary or irrelevant is sufficient for interference in revision. (*Robinson, C. J. and Heald, J.*) S. R. M. M. CHETTY *v.* P. L. N. N. NARAYAN CHETTY. 64 I. C. 821 : 11 L. B. R. 65.

——— O. 26, Rr. 2, 7 and 8—*Evidence on commission—Who can exhibit—Non-applying party.*

Evidence taken on commission may be read at the instance of any party to the suit, even if it is not he who applied for evidence being taken on commission. (*Rupchand Bilaram, A.J. C.*) FIRM OF CHOTUMAL-BULCHAND *v.* FIRM OF LILARAM-LAKHMICHAND. 90 I. C. 64.

——— O. 26, R. 4—*Place of examination—Old man of feeble health—Examination in his house.*

The C. P. Code does not place any restrictions as to the place where alone a witness can be examined on commission. In the case of an old man of feeble health, the Court can order an examination on commission at his own house. (*Suhrawardy and Chotzner, JJ.*) ANANDA CHANDRA PRODHAN *v.* SUKCHAND PRODHAN. 85 I C. 619 : A. I. R. 1925 Cal. 1118.

——— O. 26, R 4—*Examination of witnesses by commission—Rights of plaintiff and defendant—Discretion of Court—Interference—Revision.*

Where an application is made by a defendant, who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice though he resides beyond the jurisdiction of such Court. *Ross* v. *Woodford*, (1894) 1 Ch. 38 and *New* v. *Burns*, 64 L.J.Q.B. 104, Ref. In cases under O. 26, R. 4, C. P. Code, a distinction has been observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. O. 16, Rr. 19 and 21 apply to persons who are ordered to attend in person to give evidence, including persons who may be parties to a suit, but are required to give evidence as witnesses. They have no application to a case where a party to a suit desires to give evidence of his own motion in his

C. P. CODE (V OF 1908), O. 26, R. 4.

own favour. Such a case is governed by O. 26, R. 4, C. P. Code. A court of appeal should exercise great caution when invited to interfere with an order of the trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. Each case depends on its own circumstances and no rule as to the exercise of that discretion could be laid down. If the Appellate Court deems that the discretion was wrongly exercised, if it deems that the case in all its bearings was not laid before the Court below, if it sees that the Court below misapprehended an important part of the case, the Court will interfere. The High Court in revision set aside the order of the lower Court, where that Court overlooked the distinction which should be observed in the treatment of an application by the defen lant as distinguished from a similar application by the plaintiff, and ordered the defendant to be examined on commission on payment of costs to the plaintiff for cross-examination. (*Mookerjee and Panton, JJ.*) SARAT KUMAR *v.* RAM CHANDRA CHATTERJEE. **35 C. L. J. 78 : 68 I.C. 9 : A. I. R. 1922 Cal. 42**

———0. 26, R. 4—*Commission to examine defendant—Residence out of British India more than 200 miles away is a sufficient ground.*

Where the defendant is his own sole witness and applied for a commission to hear himself examined as he was living more than 200 miles away in a Native State, the application should be allowed. (*Zafar Ali, J.*) ELVERS *v.* AMERICAN MOTOR COMPANY.

73 I. C. 923 : A. I. R. 1924 Lah. 475.

———0. 26, R. 4—*Commission—Party—Examination on commission—Application for—Order disallowing—Revision against — Inference in—Application by plaintiff—Application by defendant—Difference between.*

The plaintiff and the defendant in a suit instituted in the Court of the District Munsif of Devakottah were both residents of Rangoon, and the defendant was served with summons at Rangoon. The plaintiff was allowed to examine himself on commission at Rangoon. An application by the defendant to examine himself on commission at Rangoon was, however, disallowed by the Munsif on the ground that his demeanour could not be watched by the Court. *Held*, that the Munsif acted with material irregularity in disallowing the application and that his order was liable to be set aside in revision. Difference between an application by a plaintiff to examine himself on commission and one by a defendant to examine himself on commission. (*Krishnan, J.*) VISVANATHA CHETTY *v.* SOMASUNDARAM CHETTY.

(1924) M. W. N. 191 : 34 M. L. T. 314 : 78 I. C. 407 : A. I. R. 1924 Mad. 541 : 46 M. L. J. 131.

———0. 26, R. 5—*Examination of plaintiff on commission—Jurisdiction exists but should not be granted save in extreme cases—Such caution is not needed in case of plaintiff's witnesses.*

An order for the examination of the plaintiff on commission is a very strong order to pass in any case though it is within jurisdiction. The case of the defendant stands on an entirely different footing. Where an application is made by a defendant who lawfully resides out of the jurisdiction of the Court according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a *forum* of his choice though he resides beyond the jurisdiction of such Court. Where in a money suit the lower Court had granted plaintiff's application to examine himself on commission and the suit had been filed at Patna and the plaintiff resided in London, *held*, in revision, that the application should not be

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granted. But the order was upheld so far as it concerned the plaintiff's witnesses being examined on commission. A. I. R. 1922 Cal. 42 Foll. 25 Ch D. 21 Ref. to. (*Das and Ross, JJ.*) AKBAR ALI KHAN *v.* HERBERT FRANCIS. **6 P. L. T. 520 : 3 Pat 863 : 84 I. C. 993 : 1925 P. H. C. C. 326 : A. I. R. 1925 Pat. 125.**

———0. 26, R. 9—*Sub-letting—Issue as to—Appointment of Commissioner—Legality of.*

In an ejectment suit the Assistant Collector appointed a Commissioner to determine whether the land had been sub let by the tenant. There was nothing to show that he had delegated his own powers to the Commissioner. *Held*, that the appointment of the commissioner was legal under O. 26, R. 9 of the Civil Procedure Code and there was no irregularity. (*Burn, J. M.*) ZIA-UL-HAQ *v.* MD. KARIM-UD-DIN.

L.R. 5 A. 62 (Rev.).

———0. 26, R. 9—*Local investigation to determine period of cultivation is not a proper subject for commission—Party not objecting cannot repudiate.*

Determination of the period of a tenant's cultivation is not a proper subject for local inspection, but where a party does not raise an objection to the issue of such commission and refuses to produce further evidence he cannot subsequently repudiate it. JUSTICES LACHMAN PRASAD *v.* BHAGGU CHAMAR. **L.R. 2 A. 213 (Rev.).**

———0.26, R.9 and 0.18, R. 8—*C. P. Code* (1882), *S.* 392—*Local investigatian in person.*

A Judge may make a local inspection in person at his discretion. Under the present Code, a Judge may issue a commission in any case where he deems it fit to do so, irrespective of his own convenience. S. 392 of the old Code compared. 39 Mad. 501 Cons. ; 31 Bom. 38 (P. C.). Expl. (*Spencer and Ramesam, JJ.*) SABAPATHI PATHAN *v.* PERUMAL PADAYACHI.

44 Mad. 640 : 13 L. W. 520 : 29 M. L. T. 279 : 62 I. C. 790: (1921) M. W. N. 336: 40 M. L. J. 554.

———0. 26. R. 10—*Local investigation — Commissioner for—Report of Commissioner—Weight due to.*

Interference by a court with a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. 13 M.I.A. 607 ; 15 W. R. 423 ; 60 I.C. 434, Rel. It is not safe for a Court to act as an expert and to overrule the elaborate report of Commissioner for local investigation whose report is unquestioned, whose careful and laborious execution of his task was proved by his report and who had not blindly adopted the assertions of either party. (*Mookerjee and Chotzner, JJ.*) RANI AMRITA SUNDARI DEBI *v.* MUNSHI SERAJUDDIN AHMAD CHOWDHURY. **28 C. W. N. 318 : 80 I. C. 755 : A. I. R. 1924 Cal. 620.**

———0. 26, R. 10—*Defendant not appearing before Commissioner cannot object to report.*

A deft. who does not appear before a Commissioner cannot ordinarily object to his report. ((*Mookerjee, A. C. J. and Fletcher, J.*) KAMINI KISHORE SEN *v.* PARBARTYA TIPERAH RAJ. **60 I. C. 434.**

———0. 26, R. 10—*Commissioner for ascertaining mesne profits may rely on local inspection but must record witnesses' evidence.*

Commissioner for ascertainment of mesne profits is entitled to base his report on his local inspection and also upon the crop experiment conducted by him, but any evidence that he takes should be recorded in writing. Order 26, R. 10 requires that he should reduce to writing the evidence taken by him. In formation given by witnesses which is not reduced to writing is not legal evidence upon which the Court can decide. If either of the parties desires to have the benefit of the statements of these persons from whom

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the Commissioner obtained information they should cite them as witnesses : otherwise, the Judge should come to a conclusion on the rest of the evidence before him without any reference to such unrecorded statemeets. (*Spencer and Venkatasubba Rao, JJ.*) RAMAKKA *v.* V. NAGESAM. **47 Mad. 800 : A. I. R. 1925 Mad 145 : 48 M. L. J. 89.**

——— —— **O. 26, R. 11**—*Suit to make defendants liable for loss due to their defalcation—Reference to Commissioner for taking accounts before determining liability is not warranted.*

A suit was filed by a Company against certain of its officers seeking to make them liable for certain loss which was alleged to have been incurred owing to their defalcation. Before any claim against defendants was established a reference was made by the Court to Commissioner directing certain accounts to be taken preliminary to the hearing of the suit. *Held*, the procedure was not warranted by the nature of the suit notwithstanding the provisions of O. 26, R. 11. The proper course for the Court was to try the suit in order to determine whether the defendants were liable at all to the Company. (*Greaves and Mukerji, JJ.*) J. C. DAS *v.* CACHAR NATIVE JOINT STOCK CO. **87 I. C. 764 : A. I. R. 1926 Cal. 349.**

———— **O. 26, R. 11**—*Powers of Court—Delegation to Commissioner.*

A Court cannot delegate all its powers and functions in the matter of taking evidence and determining issues to a Commissioner. (*Abdul Raoof and Martineau, JJ.*) TULSI RAM *v.* MEHTA DINA NATH. **89 I. C. 333.**

———— **O. 26, R. 11**—*Official Referee's powers are those of a Commissioner—Madras High Court Original Side Rules, O. 14-A.*

The Official Referee has no power to decide questions as to the terms of partnership, its duration or the shares of the partners. There are no provisions about his powers in the Code or in the Original Side Rules analogous to O. 36 of the Rules of the Supreme Court which deals with Referees and O. 55 which deals with the powers and duties of Masters. There is no statute constituting the office of the Official Referee, and his powers have therefore to be determined with reference to the provisions of the Civil Procedure Code and the Original Side Rules. The rules do not confer on the Official Referee any higher powers than those conferred on the Commissioners. The Official Referee is only a permanent Commissioner whose duty is to take accounts and make enquiries contemplated by the Code and the Rules. The function of the Court in such cases is to determine the rights of the parties where the rights of the parties or the terms of the partnership are disputed and to decide in what manner and from what date accounts have to be taken. The function of the Official Referee is to take accounts, having regard to the declarations of the rights of the parties made by the Judge in passing the preliminary decree and his powers to deal with the questions are not limited simply to matters of arithmetic but he has for the purposes of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at conclusions as to the state of accounts between the parties, power to take evidence and deal with matters auxiliary thereto. He is not a Judge of the Court but only a Commissioner and the adjudication by him of these questions which under the Code and the Rules form part of the functions of a Judge would be *ultra vires*. (*Kumaraswami Sastri, J.*) ABDUL WAHAB *v.* ROKIA BIBI. **A. I. R. 1924 Mad. 406.**

———— **O. 26, R. 11**—*Profits arising out of mortgaged property—Commissioner can investigate but he cannot enquire as to possession.*

Court cannot delegate all its judicial powers to the Commissioner. In a suit relating to mortgage, the most that the Commissioner can do would be to investigate and report on the profits arising from the mortgaged lands during the years in suit, but he cannot be asked to take evidence as to the possession of any party or the extent of that possession. (*Adami and Kulwant Sahay, JJ.*) RAMCHANDER TEWARY *v.* GUDAR POTEDAR. **3 Pat. L. R. 136 : 89 I. C. 343 : A. I. R. 1925 Pat. 576.**

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———— **O. 26, R. 11**—*Commissioner to take accounts—Definite lines of his work should be laid down for his work.*

As a general rule, it is better for the Court itself to settle the exact terms of the order to the Commissioner, that is, not to make him a sort of inferior Judicial Officer. It is generally the business of the Court to ascertain which books are true or false, which party is or is not keeping back the books, what documents are relevant and the like, and it is, as a general rule, desirable that these matters should be decided before a Commissioner is appointed. (*Kennedy, J. C. and Aston, A. J. C.*) ASSARMAL *v.* HUNDOMAL. **A. I. R. 1925 Sind 265.**

———— **O. 26, R. 11**—*Contracts if authorised—Question if can be referred to Commissioner—Findings of—Value.*

A question whether a certain contract is authorised or not cannot be referred to a Commissioner for taking accouuts under O. 26, R.11, C.P.Code. The report of a Commissioner is only to be treated as evidence in the case and is not a decision which has to be accepted. (*Raymond and Bilaram, A.J.Cs.*) FIRM OF SETH VISHINDAS NIHAL CHAND *v.* NAZARALI SAMJI. **17 S. L. R. 316 : A. I. R. 1924 Sind 9.**

———— **O. 26, R. 12**—*Commissioner's report—Objection to, should be heard by the Court.*

Where the report of a Commissioner appointed by Court is objected to by both parties and the Court without hearing the objections appointed a second and a third Commissioner and finally acted on the first Commissioner's report, *held*, that the course followed was improper and that the Court should have heard the objections and tried them. (*Ayling, O. C. J. and Krishnaswami Rao, J.*) THOTTAMMA *v.* SUBRAMANIYAN. **45 Mad. 79 : 14 L. W. 620 : 68 I. C. 469 : (1921) M. W. N. 843 : A. I. R. 1922 Mad. 219.**

———— **O. 26, R. 15**—*Plaintiff choosing an inconvenient forum must initially deposit costs of commission necessary for trial of the suit.*

If the Court has to appoint a Special Commissioner to go thousands of miles away and be engaged on a lengthy enquiry, cash deposit must be made in order to provide for his costs. (*Marten, J.*) JETHABHAI VERSEY AND CO. *v.* AMARCHAND MADHAVJI AND CO. **25 Bom. L.R. 713 : A. I. R. 1924 Bom. 90.**

———— **O. 26, R. 15**—*Where money is not deposited in Court an order passed on the Commissioner's application directing payment to him is covered by S. 36 and is a decree under S. 47.*

In a partition suit the appellant was appointed Commissioner to effect a partition. Some money was deposited as his remuneration ; but he did more work and he claimed more remuneration. After the appellant had done most of the work neither party appeared before the Court and the suit was dismissed for default of both the parties. On the next day the appellant applied to the Court for obtaining his remuneration and an order was passed upon it in his

C. P. CODE (V OF 1908), O. 26, R. 15.

favour. He appplied for execution of this order. *Held*, that under S. 36 C.P.Code, an order directing the payment of an amount is to be executed in the same way as a decree and consequently the provisions of S. 47 will apply to execution of an order under that Section. 10 C.W. N. 234, Dist. (*Suhrawardy and Duval, JJ.*)CHANDRA KUMAR DE *v.* KUSUM KUMARI ROY. **40 C. L. J. 180 : 84 I. C. 724 : 52 Cal. 269 : A. I. R. 1925 Cal. 57.**

——**0. 26, R. 15**—*Expenses of commission may be made as costs in the suit but cannot be realised by attachment.*

It is the duty of the Court before the commission is issued to see that the Commissioner's fee and diet money of the witness has been duly deposited. If the party at whose instance the commission is issued declines to pay, the proper thing for the Court to do is to make the amount costs of the suit and enter it in the decree. But the Court has no jurisdiction to realise such amount by attachment of the property of the party liable. (*Moti Sagar, J.*) RAM SARAN DAS *v.* **RAM LAL. 89 I.C. 47 (1): A.I.R. 1926 Lah. 62 (1).**

——**0. 26. R. 17**— *Examination of witness on commission—Reading over to witness not necessary—Effect of—Perjury.*

The provisions of O. 26, R. 17 of the C. P. Code with regard to the examination of witnesses in Court does not require that the statements of the witness after they have been recorded should be read over to them and the same procedure should be considered applicable in the case of statement of witness recorded on commission. Consequently where statements recorded on commission were not read over to the witness they are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such statements. (*Daniels, A. J. C.*) MT. FEROZA JAN *v.* MIRZA AMIR ALI. **9 O. L. J. 593 : 9 O. & A. L. R. 103 : 24 Cr. L. J. 781 : 74 I. C. 445 : A I. R. 1923 Oudh 119.**

——**0. 27, R. 1**—*Plaint--Facts to be set forth.*

A plaintiff need set forth in his plaint nothing more than the facts entitling him to the decree that he asks for. He need not allege reply to probable defences. (*Martineau and Campbell, JJ.*) NIAZ AHMAD KHAN *v.* ABDUL LATIF.
83 I.C. 807 : A. I. R. 1923 Lah, 475.

——**0. 29**—*Suit against a Railway Company—Form of —Railways Act, Ss.* 140, 141.

Neither O. 29 of the Code nor Ss. 140 and 141 of the Railways Act say anything about the manner in which a suit against a Railway Company is to be framed. The form in which a Company is to be sued is given in Sch. I. App. A. of the Code. (*Ross J.*) SINEHI RAM BIHARI LALL *v.* AGENT, E, I. RY.
64 I. C. 125 : 2 Pat. L. T. 679.

——**0. 29, R. 1**—*Unregistered body—All members must be impleaded.*

An unregistered body cannot sue or be sued as a corporation ; all its members must be impleaded and therefore a partition of property belonging to an unregistered body without issuing notice to all its members is not binding on the member not served. (*Mears, C. J., and Sulaiman, J.*) RAM SARUP *v.* ARYA SAMAJ DHAMPUR. **47 All. 342 : 23 A. L. J. 37 : 86 I. C. 255 : L. R. 6 A. 101 : A. I. R. 1925 All. 337.**

——**0. 29, R. 1 and App. A**—*Suit against Railway—Plaint describing defendant as "Agent" of the Railway—Suit is badly framed.*

The suit was against a Railway for non-delivery of certain goods to the consignee. In the plaint, the name of the defendant was given as "Agent of . . . Railway." *Held*, that the frame of the suit was

C. P. CODE (V OF 1908), O. 30.

in contravention of O. 29, R. 1 and Appendix A. (*Suhrawardy and Duval, JJ.*) AGENT, BENGAL NAGPUR RY. *v.* BEHARI LAL DUTT. **29 C.W.N. 614 : 52 Cal. 783 : 90 I. C. 426 : A. I. R. 1925 Cal. 716.**

——**0. 29, R. 1**—*Rule is not mandatory.*

Obiter.—*R.* 1, O. 29, C. P. Code, is not a mandatory rule, and if the person who signs the plaint is the duly authorised agent of the plaintiff and is acquainted with the facts of the case, there is no irregularity at all. (*Campbell, J.*) MESSRS. ALLEN BROTHERS *v.* ARURI MAL KHANNA. **7 L L. J. 66 : 88 I. C. 546 : 26 Punj. L. R. 441 : A. I. R. 1925 Lah. 338.**

——**0. 29, R. 1**—*Suit by Municipal Board with name of Chairman added—Defect is formal and is no ground for reversal of decree—U. P. Municipal Act* (1916), *S.* 6.

Where objection was taken in appeal on the ground that the Chairman of the Municipal Board of Sitapur appeared as a plaintiff in the body of the plaint and was mentioned by his name, *Held*, that as he was clearly described therein as the Chairman of the Municipal Board of Sitapur, there can be no doubt that the plaint was presented with the intention of showing that it was the Municipal Board which was suing. At the worst, it was a case where a suit had been instituted in the name of the wrong person as the plaintiff and the error could be easily corrected under the provisions of R. 10 of O. 1, and that the defect was not one of substance but merely of form and under S.99 of the Code of Civil Procedure such defect cannot be made the ground of any interference with the decree which the Court below may have passed in such a case. (*Wazir Hasan, A. J. C.*) SHAMS-UD-DIN KHAN *v* AGHA SAYID FATEH SHAH.
84 I. C. 532 : A. I. R. 1924 Oudh 309.

——**0. 29, R. 1**—*Effect of order—Suit for possession in Civil Court—Parties.*

Where the cause of action alleged in the plaint is the dispossession by the defendant on account of the proceedings under S. 145 of the Code of Criminal Procedure, and in that proceedings the defendant (the manager of a company) was declared to be in possession, the plaintiffs have got a cause of action against the person who has actually dispossessed them. Moreover, the suit cannot be defeated on account of non-joinder of the proprietors of the company who could have added them as parties, (*Das and Kulwant Sahay, JJ.*) CHATTRAPAT PRATAP BAHADUR SAHI *v.* C. G. LEES. **4 Pat. L. T. 487 : 1 Pat. L.R. 322 : 72 I. C. 648 : A. I. R. 1923 Pat. 558.**

——**0. 29, R. 2**—*Railway Company—Suit against in the name of agent—If proper.*

In a suit against a Railway Company, it should be sued in the name and style under which it carries on business. If a plaintiff deliberately chooses to sue not the company but the Agent he cannot, by any decree which he may obtain, bind the company. But if upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the company is the real defendant, then the suit may proceed against the company. (*Mullick, A. C. J. and Kulwant Sahay, J.*) RADHE LAL *v.* EAST INDIA RY. CO. **90 I. C. 680.**

——**0. 30**—*Object—Suit is in effect against individual partners —Dead partner cannot be assumed to be a party.*

O. 30, C.P. Code, is not intended to recognise a firm as a legal entity but to provide, subject to certain limitations, a convenient mode of describing the partners who compose the firm in the plaint and in the summons. The suit is in effect a suit against the

C. P. CODE (V OF 1908), O. 30, R. 1.

individual partners of the firm sued. As a dead man cannot be sued so a dead partner cannot be assumed to be a party to the action. *Ellis* v. *Wadeson*, (1899) 1 Q. B. 714, Ref. (*Rupchand Bilaram, A. J. C.*) FIRM OF GOKALDAS KHATAOO *v.* FIRM OF VASUMAL WADHUMAL. **87 I. C. 992 : A. I. R. 1925 S nd 298.**

——O. 30, R. 1—*Firm carrying on business in different places—Identity, determination of.*

In the case of firms carrying on business in different parts of the country or of the province sometimes constituted of the same people, sometimes constituted with the omission of one person who has no interest in a branch of business in one of the towns or with the addition of a new person who has an interest confined only to that branch of business, a Court should analyse the facts as thoroughly as it can in order to determine whether the firms or persons so carrying on business are really the same legal entity or person in each place. A firm without being a branch in the sense that it is subordinate to and under the control of a firm in a different town and compelled to render an account to the latter, might still be in substance the same business so as to make it carry on business in its own place, if it is transacting the business of the different firm in its own place as agent for that firm, purchasing and selling goods and obtaining orders, forwarding or receiving orders to and from that firm and merely remunerating itself by being allowed to make a definite profit out of certain transactions or a limited profit out of all transactions. (*Walsh and Wallach, JJ.*) KIRPA RAM SITA RAM *v.* MANGAL SEN BISHAN MAL. **3 U. P. L. R. (All.) 18 : 65 I. C. 93 : A. I. R. 1922 All. 367.**

——O. 30, R. 1—*Proper title of suit indicated.*

It is not correct to sue persons as partners in the name of the firm by a partner or manager. The proper title of defendant in such a suit is *A* a firm, *B*, *C*, *D*, partners in the said firm. (*Macleod, C. J. and Coyajee, J.*) AJITSING MANIBHAI *v.* GRUNING & CO. **27 Bom. L. R. 998 : A. I. R. 1925 Bom. 494.**

——O. 30, R. 1—*Suit against firm—Defendant also described as owner of firm—Mere surplusage.*

Where a suit is filed against a firm, but the defendant being shown as the owner of the firm and a question of limitation is passed by the heirs of the defendant who are subsequently impleaded, the suit must in effect be treated as one against a firm and the subsequent words of description mere surplusage. (*Shah, A.C.J. and Crump, J.*) MOTILAL JASRAJ *v.* CHANDMAL HINDUMAL. **25 Bom. L. R. 1081 : 77 I. C. 1055 : A. I. R. 1924 Bom. 155.**

——O. 30, R. 1—*Firm is no artificial person apart from its partners.*

The law of England as well as of British India knows nothing of a firm as a body or artificial person distinct from the members composing it. If a partner dies before suit, and the suit is against the firm in the firm's name, the suit is one solely against surviving partners and judgment can only be obtained as against the surviving partners, and be enforced against them and against the partnership assets. (*Mulla, J.*) RAMPRATAB BRIJMOHANDAS *v.* GAURISHANKAR KASHIRAM. **25 Bom. L. R. 7 : A. I. R. 1924 Bom. 109.**

——O. 30, R. 1—*Title of the suit—Defect in.*

The plaintiff who was a minor was described in the title of the plaint as "owner of the shop C". It was stated in para 4 of the plaint, "As the plaintiff the owner of the shop is a minor, this suit is not barred by limitation." The suit was dismissed by the trial Court holding that the plaintiff was the shop and not the minor. *Held*, the dismissal was wrong. (*Macleod, C. J. and Crump, J.*) CHANBASAPPA *v.* MALKAPPA.

C. P. CODE (V OF 1908), O. 30, R. 3.

77 I. C. 476 : A. I. R. 1923 Bom. 368.

——O. 30, R. 1—*Alienation till disposal of suit restrained—Decree passed — Alienation is not disobedience.*

Where a temporary injunction is issued against a party restraining him from alienating certain property till the disposal of a certain suit, he does not disobey the injunction if he mortgages the property, after decree is passed in the suit and while no proceedings in execution are pending. (*Le Rossignol, J.*) PARS RAM *v.* HARGOLAL AND SONS. **76 I. C. 444 : A. I. R. 1925 Lah. 258 (1).**

——O. 30, R. 1—*Suit by one firm against another—Reference to arbitration by representatives—Validity of.*

Where a suit is brought by one firm against another through their representatives they can agree to refer the dispute to arbitration and the validity of the award is not affected by the fact that the minor members of the firm did not sign the reference to arbitration. 68 I. C. 750 ; 2: I. C. 955 ; 50 I. C. 471 ; 19 I. C. 363 ; 16 A. 23, Ref. (*Broadway, J.*) FIRM OF BISHAMBAR MAL PALA MAL *v.* FIRM OF GANGA SAHAI NIHAL CHAND. **5 Lah. L. J. 5 : 71 I. C. 734 : A. I. R. 1923 Lah. 212.**

——O. 30, R. 1 and O. 32, R. 7—*Firm including a minor partner—Reference of suit to arbitration—Sanction of Court is not necessary.*

Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of O. 32. Where the matter is referred to arbitration, it is not necessary that the Court should give assent under O. 32, R. 7. (*Harrison, J.*) SUKHA NAND *v.* BEHARI RAM ISHAR DAS. **68 I. C. 750 : A. I. R. 1923 Lah. 103.**

——O. 30, R. 1—*Suit on behalf of a shop—Whether one partner can sue—Change of legal status.*

Where a suit was brought in the name of the shop, one of the partners could bring it on behalf of all the partners. It is not necessary that all the partners should have been named in the plaint as plaintiffs or should have signed the plaint. (*Dhobley, A. J. C.*) SHRIRAM SHANKARLAL *v.* MADHO PATIL. **A. I. R. 1923 Nag. 137 (1).**

——O. 30, R. 1—*Firm—Change of partners—New firm—Suit on old contract does not lie.*

The cause of action in respect of a contract with a firm vests in all the partners jointly and if after the contract, one of the partners retires and a stranger comes in, the new partnership cannot enforce the contract entered into by the old. If the new partnership brings a suit in its own name, it cannot by substituting the names of the old partners alter the period of limitation for instituting the suit and avoid the bar of limitation. (*Kemp, A. J. C.*) FIRM OF MANGOOMAL JETHANAND *v.* FIRM OF ARATMAL SATRAMDAS. **15 S. L. R. 152 : 65 I. C. 26 : A. I. R. 1922 S ndh 13.**

——O. 30, R. 2—*Suit against a firm—Dissolution before suit—Effect of.*

A suit contemplated by O. 30 of the C. P. Code may be brought by or against a firm in the firm's name even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the dissolution. The proceedings in a suit so brought continues in the name of the firm, even though the name of the partners are disclosed. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 10 : 34 C. L. J. 405.**

——O. 30, R. 3—*Proviso—Partnership dissolved*

C. P. CODE (V OF 1908), O. 30, R. 3.

to plaintiff's knowledge—One partner not served—Decree passed—Firm is liable under the decree though the partner not served is not bound.

In the case of a firm which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the plaintiff must serve each and every person whom he wants to hold liable personally in respect of the decree passed against the firm. If he does not so serve he cannot execute the decree against the partner whom he has not served personally. But the right to execute the decree against the firm is in no way affected by the proviso. (*Taraporewalla, J.*) GORDHANDAS KALYANJI BHAT *v.* GAUTAMCHAND RUPCHAND. **87 I. C. 1031 : 27 B. L. R. 541 : A. I. R. 1925 Bom. 331.**

——**O. 30, R. 3**—*Suit brought in the names of various partners of firm—Rule does not apply.*

Where a suit has been brought not merely in the firm's name but in the names of various partners of the firm, O. 30, R. 3 has no application. (*Greaves and Cuming, JJ.*) AJIT KUMAR *v.* MRITUNJOY KUNDU. **88 I. C. 489 : A. I. R. 1925 Cal. 1136.**

——**O. 30, Rr. 3 and 5**—*Suit against firm—Dissolution before suit—Leave to serve by registered post—High Court Rules, Ch. VII, R.* 11, Ex parte *decree.*

An *ex parte* decree was obtained against a firm which had been sued in the firm's name and served as such with the leave of Court, by registered post. It was alleged in an application to set aside the *ex parte* decree by the applicant that the summons was not duly served and that the firm had long ceased to carry on business as such firm but was being wound up by the applicant. *Held*, a suit can be brought against a firm in its firm name even if it be a dissolved firm provided only that the liability arose at a time when the firm was in existence. Under O 30, R. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service the control or management of the partnership business. If rule 11 of Chapter VIII of the High Court Rules is applied, it is necessary that it should be so applied as to comply with O. 30, R. 3. (*Rankin, J.*) HAKJIBANDAS *v.* BHAGWANDAS. **49 C. 394 : 69 I. C. 236 : A. I. R. 1922 Cal. 390.**

——**O. 30 Rr. 3 and 5**—*Service of summons—Appearance under protest.*

Where a person served under O. 30, R. 3 puts in an unconditional appearance, R. 5 comes into operation and he will be liable as partner of the firm. Special permission to execute the decree against him is not necessary under O. 21, R. 50. (*Rupchand Bilaram, A J. C.*) FIRM OF FATEHCHAND MADAN GOPAL *v.* FIRM OF UTANMAL JHAMANDAS. **89 I. C. 401.**

——**O. 30, R. 3**—*Suit against firm—Liability of partners.*

A firm as such has no legal existence and partners carry on business both as principals and agents for each other within the scope of the partnership business. The firm name is a mere expression and not a legal entity. When a suit is instituted against a firm in its firm name, it is in effect a suit filed against every partner of the firm and a decree against the firm has the same effect as a decree against all. The individual partners need not be separately served.

The cause of action is a joint one against all the partners though in view of S. 43, Indian Contract Act, each of the partners is jointly and severally liable for the whole of the claim. (*Rupchand Bilaram, A.J.C.*) LAKHMICHAND GHANDMAL *v.* FIRM OF GOKULDAS RANCHORDAS. **90 I. C 242.**

C. P. CODE (V OF 1908), O. 30, R. 10.

——**O. 30, Rr. 4 and 10**—*Scope of provisions.*

The effect of the provisions regarding suits against partners in the firm name is merely to give a compendious mode of describing in the writ the partners who compose the firm ; in effect the partners are sued individually. The firm name is a mere expression and not a legal entity. (*Ghose, J.*) RAM PROSAD CHIMON LAL *v.* ANUNDJI & CO. **49 Cal 524 : 69 I. C. 885 : A. I. R. 1922 Cal. 408.**

——**O. 30, R. 4 and O. 20, R. 4**—*Legal representative of deceased partner—Necessity of joining.*

Debts due to trading partnership stand on a different footing from debts due under ordinary contracts and when one of the partners in a firm dies, the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partners party to the suit, the legal representative of the deceased partner not being a necessary party to a suit brought in the name of the firm. (*Abdul Raoof and Moti Sagar, JJ.*) MOOLCHAND *v.* MUL CHAND. **4 Lah. 142 : 71 I. C. 951 : A. I. R. 1923 Lah. 197.**

——**O. 30, R. 6**—*Statements of all partners are statements of the firm—Personal defence can be put in only if he is sued personally along with the firm.*

Under O. 30, R. 6, where persons are sued as partners in the name of their firm, they shall appear individually in their own names but all subsequent proceedings shall nevertheless continue in the name of the firm. Thus each partner can put in a separate written statement, but each written statement is the written statement of the firm. However, it is only when a person is sued personally along with the firm that he may put in a personal defence. (*Macleod, C. J. and Coyajee, J.*) AJITSING MANIBHAI *v.* GRUNING & CO. **27 Bom. L. R. 998 : A. I. R. 1925 Bom. 494.**

——**O. 30, R. 8**—*Appearance under protest.*

The defendant entered appearance under protest denying that he was a partner in the defendant's firm. Plaintiff got an *ex parte* order for adjournment in order that he might serve a duplicate writ of summons on the defendants. *Held*, that the order for adjournment though objected to by the defendant should stand. But the defendant had a right to have the question whether he was a partner in the defendant's firm decided by the Court. (*Macleod, C. J.*) VITHALDAS *v.* HANSRAJ.

64 I. C. 688 (2) : 23 Bom. L. R. 1249.

——**O. 30, R, 10**—*Sole proprietor of firm—Death of—Suit in the name of firm—When can be instituted.*

On the death of the sole proprietor of a firm unless it carries on business which justifies a presumption that his heirs are its partners a suit cannot be instituted under O. 30, R. 10 in the old name of the firm. R. 10 will apply only when business is being carried on at the time when the suit is instituted. If business is not being carried on in that name at the date of the suit, then all persons who are interested in the assets ought to be impleaded. (*Sulaiman, J.*) HABIB BUX *v.* SAMUEL FITZ & CO.

L. R. 6 A. 553 : 89 I. C. 22 : 23 A. L. J. 961.

——**O. 30, R. 10**—*Suit against firm in firm's name—One man constituting the firm—Defendant dead at the date of suit—Any order in the suit is a nullity.*

When a suit is brought against a person in the name in which he carries on business, the suit is essentially one against him and he is the sole defendant in the suit. If he dies before suit, and a suit is brought against him in the name in which he carried on busi-

ness, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit, by whomsoever accepted, is also a nullity. Similarly, any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person. 12 W. R. 45, 31 M. 86, Ref. (*Mulla, J.*) RAMPRATAB BRIJMOHUNDAS *v.* GAURISHANKAR KASHIRAM.
25 Bom. L. R. 7 : A. I. R. 1924 Bom. 109.

——**O. 31, R. 1**—*Suit for rent assigned on trust—Original owner made defendant—He is merely a party.*

Where rents are assigned to the trustee for purposes of trust and he, in suits for the realisation of rents, makes the original owner a party, the original owner does not become a co-judgment-debtor with other tenants and hence he is not incapacitated from executing the decrees obtained in the suit. (*Jwala Prasad and Foster, JJ.*) GOBIND SINGH *v.* GOPAL SARAN SINGH.
4 P. L. T. 731 : 2 P. L. R. 27 : 80 I. C. 652 : A. I. R. 1924 Pat. 343.

——**O. 31, R. 1**—*Applicability—Suit for declaration of right of worship in temple and for injunction.*

O. 31, R. 1 is not applicable to a suit for a declaration of the plaintiff's right to worship in a temple and for an injunction restraining the defendant from interfering with his right. The trustee of the temple is not, therefore, a necessary party to such a suit. (*Robinson, O. C. J. and Mac Gregor, J.*) SAKLAT *v.* BELLA.
63 I. C. 963 : 13 Bur. L. T. 183.

——**O. 31, R. 2**—*Suit against temple—All trustees are necessary parties.*

In a suit against a temple all the trustees are necessary parties even though there is an agreement between them authorising one of them to represent the temple. (*Odgers and Devadoss, JJ.*) ADIRAJU ARASU KANNIKKE BALLALA *v.* PATTU.
A. I. R. 1922 Mad. 405 (1).

——**O. 32**—*Does not apply to execution proceedings.*

O. 32 does not directly apply to proceedings in execution. The '*lis*' in respect of which a minor defendant is required to be represented by a guardian, is at an end after the decree is passed and in determining whether a minor is sufficiently represented in execution proceedings a Court may look at the substance of the transaction. (*Sanderson, C. J. and Richardson, J.*) FANI BHUSAN *v.* SURENDRANATH.
64 I. C. 25 : 35 C. L. J. 9.

——**O. 32**—*Applicability—Probate proceedings.*

Until a contest arises in a probate proceedings, O. 32, has no application to the proceedings. (*Richardson, and Huda, JJ.*) RADHASHYAM DASYA *v.* RANGA SUNDARI.
59 I. C. 664 : 24 C. W. N. 541.

——**O. 32, R. 1**—*Suit against husband to recover property—Husband as natural guardian cannot resist the suit.*

A minor wife is entitled to bring a suit through her next friend according to C. P. Code to recover her own property. The only person who would be entitled to resist such a proceeding would be the person appointed as the guardian of minor's property under the Guardian and Wards Act. The husband has no title to resist the suit. (*Macleod, C. J. and Crump, J.*) MALLAWA *v.* SHIVRUDRAYA.
A. I. R 1924 Bom. 114.

——**O. 32, R. 1**—*Suit by minor* in forma pauperis *—Next friend need not be a pauper.*

A minor who is not possessed of sufficient means

within the definitions of pauperism for the purpose of O. 31 is entitled to be allowed to sue *in forma pauperis* by a next friend although the next friend is not a pauper. (*Rankin and Ghose JJ.*) NAIN BALA DASSYA *v.* JAMINI SUNDARI.
37 C. L. J. 394 : 70 I. C. 919 : A. I. R. 1923 Cal. 656.

——**O. 32, Rr. 2 and 12**—*Suit by minor without next-friend—Dismissal of suit—Propriety of—Minor attaining majority during pendency of suit.*

Where the plaintiff who was a minor brought a suit without a next-friend and his minority was not apparent on the face of the record but is proved on the trial of an issue in the suit itself, the Court ought not to dismiss the suit at once but should allow a reasonable time for a next friend to come on the record and go on with the suit and it is only if no one comes forward that it should reject the plaint. 13 C. 189, relied on. It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted but he is not bound to do so ; he could affirm the previous proceeding and continue the suit. (*Krishnan and Ramesam, JJ.*) PUPPOOTH *v.* V. M. RAMAN SOMAYAJIPAD.
32 M. L. T. 107 (H. C.) : (1923) M. W. N. 301 : 17 L. W. 558 : 74 I. C. 309 : A. I. R. 1923 Mad. 553 : 44 M. L. J. 515.

——**O. 32, Rr. 2 and 4**—*Minor cannot be next friend for other minors.*

Proceedings taken against minors under the guardianship of a minor are void of any effect and must be set aside because a minor is not competent to act as the next friend of other minors. (*Wazir Hasan, J. C.*) GUR CHARAN *v.* FASIHUDDIN.
80 I. C. 602 : A. I. R. 1925 Oudh 178.

——**O. 32, R. 2 (1)**—*Plaint by minor without next friend—Rejection of plaint not proper.*

The procedure to reject the plaint filed by a minor without a next friend is improper. The court has to grant time for doing so. (*Scott-Smith and Fforde, JJ.*) ALI AHMAD *v.* SAID MIAN.
4 Lah. 390 : 75 I. C. 1028 : A. I. R. 1924 Lah. 188 (1).

——**O. 32, Rr. 2 (1) and 1**—*Suit by minor—No next friend on record—*Ex parte *proceedings—Court should take notice of omission.*

Where a minor plaintiff sued without next friend and the defendant had not appeared, but the irregularity was apparent on the examination of the plaintiff. *Held* : that it was the duty of the Judge to take notice of the disregard of the provisions of R. 1, O. 32 and to refuse to proceed further with the case so illegally commenced (*Lentaigne, J.*) MAUNG SAN BWIN *v.* MAUNG NYI.
3 Rang. 239 : 89 I. C. 870 : A. I. R. 1925 Rang. 325.

——**O. 32, R. 3**—*Appointment irregular—No prejudice to minor—Decree is binding—Omission to appeal is not negligence.*

So long as the minor has not been prejudiced, mere irregularity in the appointment of a guardian will not be a ground for setting aside the decree. 1923 Lah. 575 and 14 A. L. J. 589 Foll. Omission by guardian to appeal in consequence of legal advice that an appeal would be unsuccessful, does not amount to negligence. (*Ryves and Daniels, JJ.*) KUBER UPADHIA *v.* RAMAKAR DAT.
47 All. 357 : 23 A. L. J. 44 : L. R. 6 A. (Civ.) 178 : 86 I. C. 86 : A. I. R. 1925 All. 351.

——**O. 32, R. 3**—*Decree against unrepresented minor defendant if nullity—Effect—Prejudice not alleged.*

A minor who was unrepresented in the suit by any guardian cannot be held to be bound by the decree passed against him although he neither alleges nor

C. P. CODE (V OF 1908), O. 32, R. 3.

proves that the decree passed against him is unjust or to his prejudice and though he regarded himself as major throughout the whole proceeding. (*Mukerji and Dalal, JJ.*) MT. CHAMBI *v.* TARA CHAND.
46 All. 744 : 22 A. L. J. 665 : L. R. 5 A. (Civ.) 502 : A. I. R. 1924 All. 892.

——**O. 32, R. 3**—*Improper appointment of guardian* ad litem—*Effect.*

The improper appointment of a guardian has the effect of invalidating the proceedings in the suit including the decision, from the point the improper appointment was made. (39 All. 8, Foll.). (*Walsh and Ryves, JJ.*) KIRPA KISHAN *v.* BABU LAL.
45 All. 606 : 76 I. C. 765 : A. I. R. 1924 All. 225 (1).

——**O. 32, R. 3**—*Irregularity—Defendant joined as a minor though in fact a major.*

If the plaint in a suit describing the defendant as a minor is not amended even after the court's finding that he was a major and the proceedings went on, the defendant appearing in Court, instructing his pleader and defending his suit, the irregularity is cured by the conduct of the parties. (*Lindsay and Sulaiman, JJ.*) THAKUR HARGOBIND SINGH *v.* HUKUM CHAND.
L. R. 4 A. 291 : 45 All 608 : 21 A. L. J. 551 : A. I. R. 1924 All. 94.

——**O. 32, R. 3**—*Decree against—Non-representation in suit.*

Where a person appointed guardian-*ad-litem* for a minor defendant refused to act and intimated to the court his unwillingness but the court refused to remove him or appoint a fresh guardian-*ad-litem*, the decree passed against the minor is not binding on him. (*Stuart and Kanhaiya Lal, JJ.*) JANGI *v.* MT. SUNDAR.
L. R. 3 A. 458 : A. I. R. 1922 All. 416.

——**O. 32, R. 3**—*Provisions mandatory—Court to take action—Parties have no discretion.*

The provisions of O. 32, R. 3 are mandatory. It is for the court to take action and the matter is not left to the discretion of the parties. RAM RAO KRISHNA *v.* JHAGROO. **L. R. 2 A. Rev. 180.**

——**O. 32, R. 3**—*Guardian* ad litem *does not continue in his office after decree.*

The guardian *ad litem* appointed in the suit does not continue as such without a fresh appointment during the execution proceeding when the Court of Wards manager appeared and asked to be appointed as guardian *ad litem* in execution proceedings. *Held*: he should have at once been so appointed under the provisions of S. 51 of the Court of Wards Act. (*Newbould and B. B. Ghosh, JJ.*) KHAJEH SALALUDDIN *v.* AFZAL BEGUM. **28 C. W. N. 963 : 39 C. L. J. 590 : 84 I. C. 68 : A. I. R. 1925 Cal. 23.**

——**O. 32, R. 3**—*Appointment of guardian* ad litem—*Consent.*

A court is not competent to appoint a person as the guardian *ad litem* of an infant without his express consent. (*Mookerjee and Rankin, JJ.*) JAGADISH CHANDRA DE *v.* HARIHAR DE. **40 C. L. J. 39 : 78 I. C. 219 : A. I. R. 1924 Cal. 1042.**

——**O. 32, R. 3**—*Failure to appoint guardian* ad litem—*Effect.*

In a suit for recovery of possession of certain land it was found that defendants Nos. 1 to 7 were landlords of the plaintiffs, and the plaintiffs were underraiyats on the disputed land. Defendants Nos. 1 to 7 constituted one body of joint landlords. Defendants Nos. 5, 6 and 7 were minors. No guardian *ad litem* having been appointed on their behalf the suit as against them was dismissed. *Held* as on the allegation of the plaintiffs, defendants Nos. 1 to 7 constituted one body of joint landlords and in as much as by reason of the plaintiffs' default the suit as against the defendants Nos. 5, 6 and 7 was dismissed. The suit as against defendants Nos. 1 to 4 who constituted only a fractional body of landlords should also be dismissed. (*C. C. Ghose and Panton, JJ.*) DURGARAM BOSE *v.* TARA PROSAD NAIK. **A. I. R. 1923 Cal. 338.**

——**O. 32, Rr. 3 and 4**—*Execution proceedings—Applicability of the rule—Minor judgment-debtor.*

The provisions of O. 32, C. P. Code, relating to "suits by or against minors" are not directly applicable to proceedings in execution, after the rights of the parties have merged in a good and valid decree. The "lis" in respect of which a minor defendant is required to be represented by a duly appointed guardian is at an end when the decree is passed. For determining whether a minor was sufficiently represented in the execution proceedings courts can look at the substance of the transaction. (*Sanderson, C. J. and Richardson, J.*) FANI BHUSAN BHUIAN *v.* SURENDRA NATH DAS. **64 I. C 25 : 35 C. L. J. 9.**

——**O. 32, R. 3**—*Suit by minor*—Bona fide *mistake—Amendment.*

Where the fact of plaintiff's minority was not apparent on the face of the plaint but was discovered only in the course of an enquiry on objection being raised by the defendant, an opportunity should be given on application being made to amend the plaint as the plaintiff had no knowledge of his minority and had no intention of leaving the Court. (*Harrison, J.*) MT. DURGA DEVI *v.* GUR NARAIN. **A. I. R. 1924 Lah. 157.**

——**O. 32, R. 3**—*Guardian* ad litem *not named—Effect.*

Where appellant does not name the guardian-ad-litem in the trial Court or any one for the minor respondent, any next friend of the minor can appeal as guardian-ad-litem against the appellate decree without removing the former guardian especially where the guardian's whereabouts are unknown. The decree of the Appellate Court is void if the minor is not properly represented. (*Broadway and Abdul Qadir, JJ.*) MT. FATIMA BEGUM *v.* HASSAN KHAN.
3 Lah. 417 : 69 I. C. 567: A. I. R. 1923 Lah. 271.

——**O. 32, R. 3**—*Natural father of adopted son.*

The natural father of a minor is his proper guardian to assert his right as adopted heir against rival claimants : 43 Mad. 288, Foll. (*Spencer and Odgers, JJ.*) ANNAPURNAYYA *v.* VENKATASUBRAMANIAM.
22 L. W. 560 : A. I. R. 1925 Mad. 1285 : 49 M. L. J. 549.

——**O. 32, R. 3**—*Officer of Court as guardian—Guardian's address and whereabouts known—Procedure illegal—Decree—Setting aside—Inherent power of Court.*

Where a Court after knowing of the existence and address of the guardian of the minor defendants in a suit, did not order fresh notice to the guardian but made the Head Clerk of the Court the guardian of the minors and proceeded with the suit in consequence of which there was no proper defence to the plaintiff's suit. *Held*, that the decree and the execution sale which followed it were illegal and not binding on the minor and that the Court had inherent power to set aside the decree and the execution sale after impleading the auction-purchaser as a party. 35 A. 331 P. C. 43 M. 94 ; 42 I. C. 711 Ref. (*Devadoss, J.*) JAMBU AMMAL *v.* NATARAJAM PILLAI.
31 M. L. T. 215 (H. C.) : A. I. R. 1922 Mad. 485.

——**O. 32, R. 3**—*Absence of formal order—Father acting as guardian—Effect.*

Where a father acted as the guardian *ad litem* of his minor son, the fact that there was no formal order of Court appointing him will not vitiate the proceed-

ings, if the minor was in no way prejudiced thereby. (*Kanhaiya Lal, J. C.*) DARSHAN SINGH *v.* RATAN LAL. **9 O & A. L R. 463 : 74 I. C. 821 : A. I. R. 1924 Oudh 178.**

——0. 32, R. 3—*Absence of formal order of appointment—Compromise—Sanction of Court.*

Where the Court by its action had given its sanction of the appearance of a person as a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings Even an omission to serve the minors concerned or their mother personally was treated as mere irregularities covered by S. 578 of the old Code of Civil Procedure and not errors fatal to the suit. The presumption is that the proceedings of the Court had been carried out regularly and in accordance with the law and this presumption is found stronger when it is found that an application and an affidavit such as is held in connection with the appointment of a person as guardian *ad litem* of a minor was on the record and that the guardian had subsequently appeared and filed a compromise on behalf of the minor to which the Court had accorded its sanction. (*Kanhaiya Lal, J. C*). MATA GHULAM SINGH *v.* SITAL PRASAD. **26 O. C. 113 : 74 I. C. 409 : A. I. R. 1923 Oudh 206.**

——0. 32, Rr. 3 4—*Minor—Guardian*-ad-litem—*Appointment of—Absence of notice—Irregularity.*

Notice was issued to some minor defendants and to their father that there was an application to appoint the latter guardian-*ad-litem*. He refused to accept the appointment whereupon the court appointed a pleader without further notice to the minors. *Held*, there was a proper representation of the defendants and in the absence of prejudice, an *ex parte* decree cannot be set aside. (*Das and Ross, JJ.*) PRITAM RAM *v.* DHARU RAM. **1924 P. H. C. C. 216 : 78 I.C. 613 : A. I. R. 1924 Pat. 772.**

——0. 32, Rr. 3, 4 and 11—*Defective appointment—Omission to consult minors' wishes is not a defect.*

Though the mother of a minor defendant is the person who should be appointed his guardian *ad litem* in the absence of the father still a decree passed against the minor represented by some other person as guardian *ad litem* is not a nullity. Though the Court should in every case consult the wishes of a minor before appointing any person as guardian *ad litem* in the suit, there is nothing in the C. P. Code, which requires it to do so in a case coming within O. 32, R. 11, C.P. Code, O. 32, R. 3, Cl. 4 applies only to cases where an application is made for the appointment of a guardian in the name of or on behalf of the minor or the plaintiff. O. 32, R. 11 empowers the Court to appoint any guardian where the guardian for the suit retires, dies or is removed by the Court pending the suit, and there is nothing which requires the Court to give notice to the minors before making the order under this rule. (*Das and Adami, JJ.*) SRI THAKUR RADHA GOPAL LALJI *v.* BABU LAKSHMI NARAYAN. **1 Pat. L. R. 86 : 2 Pat. 273 : 4 Pat. L. T. 329 : (1923) P. H. C. C. 159 : 71 I. C. 341 : A I R. 1923 P. 385.**

——0. 32, Rr. 3 and 4—*Defective appointment—*Ex parte *decree—Suit to set aside.*

A minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented or that he is represented by a guardian disqualified from acting as such guardian under express provision of the Statute the result is that the minor is not a party to the suit and a judgment rendered against the minor is without jurisdiction and is null and void. But where he is properly a party to the suit and he is properly a party if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the case against the minor is complete, and such jurisdiction will not be ousted even if the Court did not follow the appropriate procedure for the appointment of the guardian. It is the court that must decide the question of jurisdiction and where the record, on the face of it, shows that the minor was properly a party to the suit, the judgment rendered in such a suit will not be declared a nullity in a collateral proceeding brought to impeach its validity, though it may be set aside if it be shown that the defect or the irregularity in the proceedings affected the merits of the case between the parties. 30 C. 1021 followed ; 15 C. L. J. 446 ; 25 C.W N. 781 dissented ; 32 C. 296 distinguished. The contravention of the provisions of O. 32, R. 4, Cl. 3, C. P. Code, does not deprive the Court of its jurisdiction to decide the case The Court has no jurisdiction to render judgment against one who is not a party to the suit though it has jurisdiction to render judgment against one who is party to a suit but who has not been brought before it by reason of the failure on the part of the court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court ; the other affects the exercise of it. (*Das and Adami, JJ.*) PANDE SATDEO NARAIN *v.* RAMAYAN TEWARI. **4 Pat. L. T. 147 : 2 Pat. 335 : 71 I. C. 705 : A. I. R. 1923 Pat. 242 (2).**

——0. 32, Rr. 3 and 4—*Defective appointment—Duty of Court—Absence of notice to guardian—*Ex parte *decree—Decree if binding on minor.*

It is duty of the Court to appoint a guardian-*ad-litem* for a minor defendant under O. 32, R. 2, C. P. Code. No person can be appointed guardian without his consent. At the same time where the court has given sanction and approval for the appearance of a person as guardian, the absence of formal order of appointment is not always fatal to the proceedings. A mere irregularity in the appointment of a guardian-*ad-litem* will not render the decree passed against the minor null and void, unless it is proved that the minor's interests have suffered thereby. At the same time where no notice or summons is served on the guardian of the minor, and no order was made appointing a guardian for the minor and there was no appearance by the so called guardian at any stage of the proceedings, a decree passed against the minor is not binding on him. 26 C. L. J. 258 ; 37 A. 179 ; 20 C. L. J. 469 ; 2 P. L. T. 617 Relied on. (*Jwala Prasad and Adami, JJ.*) RANI CHATTRA KUMARI DEBI *v.* PANDA RADHA MOHAN SINGARI. **3 Pat. L. T. 451 : 66 I. C. 137 : A. I. R. 1922 Pat. 291.**

——0. 32, Rr. 3 and 4—*Notice to minor—Failure to give—Effect of—Minor, wishes of—Mother or grand-mother.*

An order appointing a guardian *ad litem* of a minor defendant without notice to the minor, is without jurisdiction. In appointing a guardian *ad litem* the wishes of the minor defendant, should, if possible, be considered. A mother or in her absence a grandmother may be appointed and the fact that she is a pardanashin lady is not a disqualification. (*Miller, C. J. and Ross, J.*) RAJENDRA PRASAD *v.* PROBODH CHANDRA. **2 Pat. L. T. 116 : 6 Pat. L. J. 82 : 59 I. C. 936 : 1921 P. H. C. C. 156.**

——0. 32, R. 3—*Guardian whose interest is adverse to the minor is not fit—Non-appointment of guardian* ad litem *makes a decree nullity.*

A person whose interest is adverse to that of minor is not a fit person to be appointed a guardian *ad litem.*

C. P. CODE (V OF 1908), O. 32, R. 3.

Mere permission to sign a reply to a notice to minor is not equivalent to appointment of a guardian *ad litem*.

When in a suit, a minor is not represented by a guardian *ad litem*, any decree passed in such a suit is nullity against the minor. (*Kincaid, J. C. and Kemp, A. J. C.*) JUMNOMAL *v.* GURDINOMAL.
83 I. C. 913 : 17 S. L. R. 211.

———O. 32, R. 3 (1)—*Guardian* ad litem—*Court —Duty of.*

It is obligatory on the Court under O. 32, R. 3 (1) of the Code to appoint a proper person to be guardian of a minor defendant for the suit. (*Mookerjee and Panton, JJ.*) ANNADA PROSAD *v.* UPENDRA.
34 C. L. J. 293 : 65 I. C. 18 : 26 C. W. N. 781.

———O. 32, R. 3 (3)—*Execution proceedings—Affidavit not filed—Effect.*

Where in execution proceedings against a minor legal representative of the judgment-debtor the application to appoint guardian for the minor is not accompanied by an affidavit and the guardian does not appear and act for the minor the latter does not become a party to the proceedings. (*Harrison, J.*) ALAM DIN *v.* ALLAH DIN. **5 Lah. L. J. 44 : A. I. R. 1922 Lah. 447.**

———O. 32, R. 3 (4) and S. 99—*Non-compliance with O. 32, R. 3 (4)—Minor not prejudiced—Proceedings are not vitiated.*

Failure to comply with the provisions of O. 32, R. 3 (4) is only an irregularity covered by S. 99 of the C. P. Code, and where such failure has not prejudiced the minor in any way, the proceedings are not vitiated. (*Stuart. J.*) SULTAN *v.* HARDHIYAN. **88 I. C. 294 : L. R. 6 A. (Civ.) 323 : A. I. R. 1925 All. 548.**

———O. 32, R. 3 (4)—*Notice—Absence of, to minor —Effect.*

In the absence of proof of fraud or collusion, the mere fact that notice of appointment of a guardian *ad litem* was not issued to the minor, does not entitle him to treat the proceedings as a nullity. Case Law reviewed. (*Abdul Raoof and Campbell, JJ.*) PHULLI *v.* DEBI PARSHAD. **75 I. C. 449 : 5 Lah. 38 : A. I. R. 1923 Lah. 575.**

———O. 32, Rr. 3 (4) and 4 (4)—*Officer of Court as guardian—Omission to adduce evidence when amounts to negligence.*

The father of certain minor defendants in a suit refused to be their guardian *ad litem* and thereupon the Head Clerk of the Court was appointed guardian. The plaintiff was a stranger who was not aware of the existence of any other relatives of the minors. There was no affidavit by him that there was no other person fit and willing to act as guardian of the minors. There was also no distinct notice to the father of the minors of the appointment of an officer of the Court as guardian *ad litem* but the father himself did not adduce any evidence and the suit was decreed. Subsequently the minor sued to set aside the decree on the grounds that they were not validly represented in the prior suit and that their guardian *ad litem* was grossly negligent in the conduct of the case. *Held*, that the defects, if any, in the appointment of the guardian did not vitiate the decree. 32 A. 287 ; 20 M. L. J. 591 (P. C.) ; 31 A. 572 ; 19 M. L. J. 631 (P. C.). referred to. *Held*, further, that in the absence of proof that the guardian *ad litem* could have adduced any useful evidence or was aware of such evidence being available, his omission to let in evidence in the prior suit did not constitute negligence or fraud. (*Oldfield and Ramesam, JJ.*) RAMASWAMI CHETTY *v.* DORAISWAMI.
17 L. W. 638 : 73 I. C. 409 : A. I. R. 1923 Mad. 465 : 44 M. L. J. 299.

C. P. CODE (V OF 1908), O. 32, R. 4.

———O. 32, R. 3 (5)—*Minor defendants—Guardian* ad litem—*Appointment of the head clerk of the Court—Omission of notice to persons having custody of the minors—Irregularity.*

No irregularity by way of an omission to send a notice as required by O. 32, R. 3 (5) of the C. P. Code will operate to render void the presumed representation of the minor in a suit by a guardian *ad litem* appointed for him, unless such an omission has in fact prejudiced his defence. Such prejudice is not a matter of assumption or presumption but of proof.

Consequently a decree passed in a prior suit against a minor represented by the Head Clerk of the Court as guardian *ad litem* cannot be set aside in a fresh suit on the ground of want of notice of the appointment of the guardian *ad litem* under O. 32, R. 3 (5), C. P. Code to the person having the custody of the minor unless it is shown that the minor had a good defence to the suit which by the negligence of the Court guardian, whose appointment followed on the breach of the rule, had not been put forward. 14 C. 204, 37 A. 179 : 44 M. L. J. 299 relied on. (*Wallace, J.*) KIDAMBI TIRUMALACHARYULU *v.* AMMISETTI VENKIAH. **(1924) M. W. N. 362 : 34 M. L. T. 202 : 19 L. W. 678 : 80 I. C. 541 : A. I. R. 1924 Mad. 763 : 46 M. L. J. 363.**

———O. 32, R. 4—*Where a Hindu father is appointed guardian, in a suit on the basis of* hundis *executed by him, in absence of proof of immorality or illegality the decree is binding on the sons.*

In a suit brought on the basis of *hundis* executed by a Hindu father, the father was appointed guardian of the minor son and a decree was passed against them, when subsequently the sons filed a suit to annul the decree on the ground of improper appointment of guardian and alleged but failed to substantiate that the debt was illegal or immoral. *Held* : as there was no defence open to the minors which the father would not have taken in the former suit, the minors were properly represented by their father and the decree passed against them could not be set aside. (*Daniels and Neave, JJ.*) RAJA BABU *v.* BALMUKUND. **L. R. 5 A. (Civ.) 692 : 83 I. C. 323 : A. I. R. 1925 All. 214.**

———O. 32, R. 4.—*Consent of person appointed is necessary but can be presumed where despite opportunity to object, he has not objected to the appointment.*

O. 32, R 4 of the C. P. Code. necessitates that the person appointed as guardian must give his consent to such appointment. Where, however, the guardian has had an opportunity to object to his appointment and does not do so, the consent can be presumed. (*Daniels and Neave, JJ.*) RAJA BABU *v.* BALMUKUND.
L. R. 5 A. (Civ.) 692 : 83 I. C. 323 : A. I. R. 1925 All. 214.

———O. 32, R. 4—*Irregularity and prejudice to minor are factors to be considered in cases of setting aside decree against minors for improper appointment of guardian.*

The two questions which arise in suits to set aside decrees passed against minors on the ground of improper appointment of guardian are (1) Whether the guardian was irregularly appointed and (2) whether the minors have been prejudiced. 43 All. 104 Foll. (*Daniels and Neave, JJ.*) RAJA BABU *v.* BALMUKUND. **L. R. 5 A. (Civ.) 692 : 83 I. C. 323 : A. I. R. 1925 All. 214.**

———O. 32, R. 4—*Vakil—Officer of the Court.*

A vakil is an officer of the Court for purposes of O. 32, R. 4, C. P. Code. (*Piggott and Walsh, JJ.*) MOHAN LAL *v.* GANGA PRASAD. **45 A. 395 : L. R. 4 A. 352 : A. I. R. 1923 All. 298 (1).**

C. P. CODE (V OF 1908), O. 32, R. 4.

——O. 32, R. 4—*Suit on mortgage by manager of Joint Hindu family—Minor members impleaded—Manager appointed guardian* ad litem—*Decree is a nullity.*

Where in a suit to enforce a mortgage executed by the manager of a joint Hindu family he is himself appointed guardian *ad litem* of the minor members impleaded in the suit, and a decree is passed on confession of judgment, the decree is a nullity as against the minors for the manager was not a proper person to be appointed as guardian. 25 B. 337 ; 30 C. 1021, 38 A. 315; 43 A. 104, Ref (*Lindsay and Ryves, JJ.*) MURLIDHAR *v.* PITAMBAR LAL. **44 All. 525 : 20 A. L. J. 329 : 4 U. P. L. R. (A) 170 : 66 I. C. 372 : A. I. R. 1922 All. 91.**

——O. 32, R. 4—*Claim against joint tort-feasors is indivisible—If representatives of one deceased defendant are not brought on record, the whole suit fails.*

The plaintiffs brought a suit for recovery of possession of certain plots of lands against seven defendants on the allegation that some of the defendants had dispossessed the plaintiffs from them by wrongly recording themselves in the Record-of-Rights. The first Court declared the title of the plaintiffs to two plots, but dismissed their claim for recovery of khas possession holding that, in the circumstances of the case the plaintiffs might have relief in a suit for ascertainment and recovery of rent of the lands. On appeal that decree was set aside and the appellate Court passed a decree in favour of the plaintiffs for khas possession of those plots. During the pendency of the appeal, defendant No. 1 died ; and his heirs were brought on the record five of whom were minors. These minor children of the defendant No. 1 were not properly represented. A decree as against the major defendants was passed in these words "The appeal is accordingly decreed with costs. The minor children will not be bound by this decree as they have not been properly represented in this appeal". *Held* that the decree against the defendants was a joint decree inseparable and indivisible and therefore the whole suit was liable to be dismissed. (*Suhrawardy and Chotzner, JJ.*) NEYAJADDIN *v.* AKAMAT ALI. **79 I. C 365 : A. I. R. 1925 Cal. 411 (2).**

——O. 32, R. 4—*Issue of notice under R. 22 of O. 21 raises no presumption of appointment to guardianship—C. P. Code, O. 21, R. 22.*

Under the Code of 1908 a guardian *ad litem* of a minor cannot be appointed without his consent and there can therefore be no presumption of appointment from the mere issue of notice under O. 21, R. 22, 5 C. L. J. 434 Dist. (*Newbould and B.B. Ghosh, JJ.*) KHAJEH SALALUDDIN *v.* AFZAL BEGUM. **28 C. W. N. 963 : 39 C. L. J. 590: 84 I. C. 68 : A. I. R. 1925 Cal. 23.**

——O. 32, R. 4—*Guardian* ad litem—*Appointment—Consent of proposed guardian—Absence of—Decree against minor—Legality of.*

No person can be appointed a guardian *ad litem* of an infant without his consent. In the present case the mother of the infant's was appointed without her consent. She never entered appearance and never defended the suit on behalf of the minors without a formal order for appointment. *Held* that in the events which had happened, it was plain that infants were not represented at all and they were in no sense parties to that litigation. Consequently they were not affected by the decree. When a guardian has not been validly appointed in respect of a minor, he is not a party to the suit and is not bound by the decree made against him. (*Mookerjee and Chotzner, JJ.*) UMAPATI SAMANTA *v.* SHEIKH MOSEETULLAH.

C. P. CODE (V OF 1908), O. 32, R. 4.

37 C. L. J. 496 ; A. I. R. 1923 Cal. 692.

——O. 32, R. 4—*Guardian* ad litem—*Appointment of—Consent is necessary.*

The effect of O. 32, R. 4 is that no person can be appointed a guardian *ad litem* without his express consent. The question of consent will always be one of importance, on the merits. (*Richardson and Shamsul-Huda, JJ.*) RADHASHYAM DASYA *v.* RANGA SUNDARI DASYA. **59 I. C. 664 : 24 C. W. N. 541.**

——O. 32, R. 4—*No applicability to probate proceedings.*

O. 32, R. 4 of the C. P. Code does not apply to a non-contentious proceeding in probate. Where citations are issued to minors as being concerned, the Court must see not only that a guardian is appointed but that he has taken upon himself the responsibility of protecting the interests of the minors. (*Greaves and Newbould, JJ.*) SACHINDRA NARAIN SAH *v.* HIRONMOYEE DASI. **59 I. C. 435 : 24 C. W. N. 538.**

——O. 32, R. 4—*Minor—Guardian not putting vital defence commits gross negligence—Guardian with adverse interest is no guardian—Decree is a nullity in both cases.*

Where the debt not being antecedent, and the money having been borrowed for the purpose of buying new lands, and the defence that the minors' shares were not liable ought to have prevailed if it had been set up on their behalf. *Held*, that the father as guardian showed gross negligence in not setting up this defence. A minor represented by a guardian whose interest is adverse is not legally represented at all. (*Odgers and Hughes, JJ.*) SELLAPPA GOUNDAN *v* MASA NAICKEN. **47 M. 79 · 18 L. W 838 : 33 M. L. T. 126 : (1923) M.W.N. 775 : 76 I.C. 1018 : A. I. R. 1924 Mad. 297 : 45 M. L. J. 675.**

——O. 32, R. 4—*Court guardian—Omission to record reasons for appointment of.*

The omission to record reasons under O. 32, R. 4, cl. 2 for the appointment of a Court guardian is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court. Where however the appointment of a Court guardian is secured by fraud and by false statements and concealment of material particulars the minor is not bound by the decree passed in the suit or by the sale held in execution of the decree. 37 A 179 followed. (*Krishnan and Ramesam, JJ.*) PUPPOGTH *v.* V. M. RAMAN SOMAYAJI PAD. **32 M. L. T. 107 (H. C.) : (1923) M. W. N. 301 : 17 L. W. 558 : A. I. R. 1923 Mad. 553 : 44 M. L. J. 515.**

——O. 32, R. 4—*Certificated guardian—Another guardian for suit cannot be appointed.*

In cases where a certificated guardian of a minor is appointed the appointment of another guardian for the suit is illegal and a decree obtained in such a suit is liable to be set aside. (*Sadasiva Aiyar and Spencer, JJ.*) BHIMAJI *v.* RAJABHAI HUSHIA SBSANI **43 Mad. 808 : 12 L. W. 114 : 59 I. C. 842 : 28 M. L. T. 295 : 39 M. L. J. 239.**

——O. 32, R. 4—*Defect in appointment of guardian* ad litem.

Defect in following the rule as to representation of minors is not necessarily fatal to the proceedings and does not render invalid a decree passed against the minors. (*Oldfield and Phillips, JJ.*) KUPPUSAMY AIYANGAR *v.* KAMALAMMAL. **43 Mad. 842 : 12 L. W. 243 : 59 I. C. 662 : 39 M. L. J. 375.**

——O. 32, R. 4—*Insolvent can be guardian.*

There is no law that an insolvent cannot be the guardian *ad litem* of an infant. (*Baker, J. C.*) MANIK RAO *v.* NUR HUSSAN.

C. P. CODE (V OF 1908), O. 32, R. 4.

A. I. R. 1925 Nag. 376.

——**O. 32, R. 4**—*No guardian appointed—Decree is a nullity.*

Where there is no appointment and appearance of a guardian *ad litem* for a minor, the decree passed is, as against the minor, a nullity and not binding on him. (*Coutts and Ross, JJ.*) RAMPIRIT *v.* THAKUR.

2 Pat. L. T. 617 : 63 I. C. 484 : 1921 P.H.C.C. 335.

——**O. 32, Rr. 4 (1), (2), and (3)**—*No appointment without consent of guardian.*

O. 32 (4) and (3) controls both Sub-R. (1) and Sub-R. (2) and places a material restriction upon the court exercising power thereunder. No person who is competent to act as guardian either under Sub-R. (1) or under Sub-R. (2) shall be appointed without his consent. (*Mookerjee and Panton, JJ.*) ANNADA PRASAD *v.* UPENDRA. **34 C. L. J. 293 : 65 I. C. 18 : 26 C. W. N. 781.**

——**O. 32, R. 4 (1)**—*Guardian* ad litem *not appearing in suit cannot be deemed to have consented.*

A person who is named as guardian *ad litem* of a minor defendant but does not appear in the suit cannot be said to have consented to be appointed guardian. (*Wazir Hasan and Neave, A. J. Cs.*) RAMESHWAR BAKSH SINGH *v.* RIDH KUER.

A. I. R. 1925 Oudh 633.

——**O. 32, R. 4 (3)**—*Consent—Need not be express.*

The consent of a person to be appointed guardian *ad litem* need not be express but may be implied from conduct as where notice is served on him to show cause why he should not be appointed and he does not appear in answer thereto. An irregularity in the appointment of a guardian *ad litem* is no sufficient ground for setting aside the proceedings at the instance of the minor. (*Walsh and Gokul Prasad, JJ.*) CHHATTER SINGH *v.* TEJ SINGH. **43 All. 104 : 18 A. L. J. 956 : 59 I. C. 671 : 2 U. P. L. R. (All.) 384.**

——**O. 32, R. 4 (3)**—*Guardian cannot be appointed without his consent.*

Where a proposed guardian of a minor does not signify his consent, the Court should not appoint him as guardian. The provision as to the consent is mandatory and imperative and where a person is appointed without his consent, the infant is not represented and a decree against the infant in that suit is not binding on him. (*Mookerjee and Panton, JJ.*) ANNADA *v.* UPENDRA. **34 C. L. J. 293 : 65 I. C. 18 : 26 C. W. N. 781.**

——**O. 32, R. 4 (3)**—*Consent if may be implied.*

The consent may be implied and is not necessarily to be expressed in any document on record. Where notice was not jssued because the guardian happened to be present in Court when his appointment was made and in another case notice did really issue though the guardian did not give any express consent but none of the two guardians refused to accept the appointment but remained silent and they were appointed as guardians and where they themselves were parties to the suit as defendants and were members of the same family and their interest in the suit was identical with that of the minors, *held*, that there was no defect in the appointment of the guardians. 59 I. C. 691, Foll. (*Moti Sagar, J.*) JAWAHAR SINGH *v.* SEWA SINGH. **5 Lah. L. J. 487 : A. I. R. 1924 Lah. 97.**

——**O. 32, R. 4 (3)**—*Absence of consent.*

Per *Phillips, J.*—(In the referring judgment)—Absence of consent is only an irregularity not vitiating the decree unless the merits of the case are affected.

Per *Venkatasubba Rao, J.*—(In the referring judgment)—Absence of consent renders decree null and void *ab-initio.* (*Coutts Trotter, C. J., Ramesam and Wallace, JJ.*) VASIREDDI SRIRAMULU *v.* PUTCHA LAKSHMINARAYAN. **47 Mad. 783 : 20 L. W. 248 : 35 M. L. T. 12 : 83 I. C. 312 : A. I. R. 1925 Mad. 30 (F. B.) : 47 M. L.J. 273.**

——**O. 32, R. 4 (3)**—*Guardian's Consent need not be express.*

"Consent" referred to in O. 32, R. 4, cl. (3) need not be express. It is a pure question of fact to be decided on evidence which need not necessarily be direct. (*Coutts Trotter, Ramesam and Wallace, JJ.*) VASIREDDI SRIRAMULU *v.* PUTCHA LAKSHMINARAYAN. **47 Mad. 783 : 20 L. W. 248 : 35 M. L. T. 12 : 83 I. C. 312 : A. I. R. 1925 Mad. 30 (F. B.) : 47 M. L. J. 273.**

——**O. 32, R. 4 (3)**—*Consent of guardian.*

The question whether or not a person appointed as guardian *ad litem* of a minor defendant consented to his being so appointed is a question of fact in each case. The consent of the guardian referred to in O. 32, R. 4 (3), C. P. Code, need not be expressed in writing but may be implied from the circumstances of the case. 43 All. 104, Fol. (*Krishnan and Waller, JJ.*) YEZZU MALLAYYA *v.* PUNNAMMA. **47 Mad. 476 : 77 I. C. 628 : 19 L. W. 410 : 34 M. L. T. 295 : A. I. R. 1924 Mad. 608 : 46 M. L. J. 291.**

——**O. 32, R. 4 (3)**—*Certified guardian—Duty to appoint—Appointment of another—Effect.*

A Court is bound to appoint the certificated guardian as the guardian *ad litem*, unless it considers otherwise for special reasons to be recorded. Where the guardian, however, objects, the Court must appoint some other person. There is nothing however in O. 32, R. 4, cl. (3) which requires the Court to obtain the express consent of the guardian to act before appointing him in that capacity, and where the guardian so appointed is a certificated guardian, whom the Court was bound to appoint, consent may be properly presumed when he makes no objection. Where the interests of a minor have not been prejudiced, any defect in the procedure for the appointment of his guardian is not fatal. (*Miller, C. J. and Foster, J.*) THAKUR TEJESHWAR DUTT *v.* LAKHAN PRASAD SINGH. **4 Pat. L. T. 127 : 1 Pat. L. R. 59 : 1923 P. H. C. C. 88 : 2 P. 296 : A. I. R. 1923 Pat. 231.**

——**O. 32, R. 4 (3)**—*Appointment without consent of guardian is a nullity—Prejudice of minor whether necessary for setting aside the decree.*

An appointment without his consent of a guardian for a minor in a suit is without jurisdiction. The provisions of O. 32, R. 4 (3) in respect of consent are mandatory and there is nothing in the law to suggest that, unless it is established that the minor is prejudiced, he cannot get relief. (*Coutts and Das, JJ.*) SHAIKH SAJJAD HUSSAIN *v.* SAKAI RAI. **2 P. 7 : 4 P. L. T. 575 : A. I. R. 1922 Pat. 448.**

——**O. 32, R. 4 (4)**—*Appointment of a Court guardian—Father unwilling to act—Existence of other guardians, not known to the plaintiff—Decree, whether bad for non-representation of the minor.*

Where a clerk of the Court is appointed as a Court guardian of a minor defendant after his father's expression of unwillingness to act as guardian, on an affidavit to the effect that there were no other principal guardians for the minor defendant, a decree obtained against the minor is not bad on the ground of his non-representation, if it is not shown that the plaintiff procured the appointment of the Court guardian being aware of the existence of other proper guardians on a false affidavit by reason of collusion between the Court Clerk and the plaintiff. (*Odgers*

C. P. CODE (V OF 1908), O. 32, R. 5.

and Hughes, JJ.) SRI RAJAH DANTULURI DEVI PRASADA SATYANARAYANA VEERABHADRA VENKATA LAKSHMI KANTARAJA GARU *v.* PEDA VENKATA JAGANNATHA RAJU GARU.

(1924) M. W. N. 125 : 33 M. L. J. (H. C.) 243 : 77 I. C. 464 : A. I. R. 1924 Mad. 281 : 46 M. L. J. 12.

——O. 32, R. 5—Guardian-*ad-litem—Appointment of*—Locus standi *to appeal.*

When a guardian *ad litem* has once been appointed, the same enures for the whole of the *lis* unless and until revoked by Court. He alone has the *locus standi* to file an appeal. (*Baker, J. C.*) ABDUL HUSSAIN *v.* MEGHRAJ. **7 N. L. J. 110 : A. I. R. 1924 Nag. 133.**

——O. 32, R. 5—*Application on behalf of minor to Court.*

Any application made on behalf of minors if not made by the guardian for the suit but by the previous guardian *ad litem* who long before the application was made had been discharged by the Court, must be rejected, as it contravenes the provisions of Order 32, R. 5 of the Civil Procedure Code which lays down that every application to the Court on behalf of the minor other than an application under R. 10, sub-rule (2) shall be made by his next friend or by his guardian for the suit. (*Dawson Miller, C. J. and Adami, J.*) RAI KISHORE DAS *v.* RAM GULAM SAHU.

3 P. L. J. 61 · A I. R. 1922 Pat. 256.

——O. 32, R. 6—*Elder brother cannot give discharge of a decree de t on behalf of his minor brothers—Limitation Act, S 7.*

Where two of three joint execution creditors are minors, the other execution creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minors. (*Moti Sagar, J.*) MUHAMMAD ZULFIGAR KHAN *v.* ABRAR ALI.

A. I. R. 1924 Lah. 681.

——O. 32. R. 6—*Payment to manager of joint Hindu family towards decree in favour of manager and minor co-parceners represented by manager as next friend, cannot be recognised unless sanctioned by the Court.*

Where a decree was passed in favour of the manager of the joint Hindu family and certain minor co-parceners represented by the manager as the next friend and payment was made to the manager who certified it, *held*, it cannot be recognised by the Court executing the decree unless leave of the Court had been obtained for such payments under R. 6. (*Wallace, J.*) PITCHAKKUTTIYA PILLAI *v.* DORAISWAMI MOOPANAR. **(1924) M. W. N. 815 : 82 I. C. 588 : A. I. R. 1925 Mad. 230 (2) : 47 M. L. J. 498.**

——O. 32, R. 6—*Payment of decree amount to next friend—Leave of Court not obtained—Effect—Right to claim contribution.*

O. 32, R. 6 prohibits the next friend of a minor decree-holder from realising money due under a decree without leave of Court. If one of several judgment-debtors pay the whole decree amount to the next friend without leave of Court, the decree is nevertheless subsisting and hence he is barred from claiming contribution from the other debtors. (*Phillips and Venkatasubba Rao, JJ.*) ABBOY NAIDU *v.* RAMACHANDRA NAIDU. **(1923) M. W. N. 925 : 19 L. W. 686 : A. I. R. 1924 Mad. 279.**

——O. 32, R. 6 (2)—*Security bond under R. 6 (2) or other provision of C. P. Code—Court-fee stamp as under Art. 6, Court-Fees Act, Sch. II is necessary—Stamp under Stamp Act is also necessary if bond falls under Arts. 40 and 57 of the Stamp Act.*

Security bonds executed in pursuance of an order of the Court under O. 32, R. 6 (2) or any other rule or

C. P. CODE (V OF 1908), O. 32, R. 7.

section of the Civil Procedure Code must bear a Court-fee stamp as required by Art. 6 of Sch. II of the Court-Fees Act, 1870, and they will also be chargeable under the Stamp Act, if they are of the kind described in Art. 40 or Art. 57 of Sch. I to the Stamp Act but they will not be chargeable under the Stamp Act if they fall under the residuary Art. 15. 21 C. W. N. 1150 overruled. (*Walmsley, Greaves, C. C. Ghose, B. B. Ghose and Mukerji, JJ.*) REFERENCE UNDER S. 113 READ WITH O. 46, R. 1, C. P. CODE.

42 C. L. J. 5 : 29 C. W. N. 851 : 89 I. C. 269 : A. I. R. 1925 Cal. 906 (F. B.)

——O 32, R. 7—*Decree being passed on compromise does not necessarily imply Court has sanctioned the compromise—Where guardian changes mind before grant of leave, and does not want compromise, compromise cannot be forced on minor.*

The mere fact that the decree has been passed in terms of the compromise does not necessarily justify an inference that the Court granted leave, or that it was satisfied that the compromise was for the benefit of the minor. Any compromise without the leave of the Court is a nullity. Where before any leave has been granted, the guardian himself changes his mind and does not want the compromise, it is impossible to force the compromise on the minor. 22 Mad. 378, Foll. This is much more the case where the compromise has been entered into not by the guardian but by some one else on his behalf and before leave is granted, the guardian opposes the compromise. (*Sulaiman and Daniels, JJ.*) GULAB DEI *v.* VAISH MOTOR COMPANY, ETAWAH. **23 A. L. J. 523 : 88 I. C. 429 : 47 A. 782 : L.R. 6 A. (Civ.) 390: A.I.R 1925 All. 570.**

——O. 32, R. 7—*Compromise—A paternal uncle signing on behalf of himself and his nephews major and minor, and on behalf of one of the major nephews as guardian of his minor brothers—Court's sanction is necessary.*

Where compromise was signed by the paternal uncle on behalf of all his nephews and it was stated that he also signed on behalf of one of the nephews acting as guardian of his minor brothers, *held*, that he recognised that the minors were being represented for the purposes of the litigation, by their elder brother and that he did not profess to be representing them as manager and head of the family. And that in these circumstances the leave of the Court should have been obtained and recorded. (*Neave, J.*) SANTU *v.* ABHAINANDAN PRASAD. **81 I. C. 297 : A. I. R. 1925 All. 32.**

——O. 32, R. 7—*Compromise—Minor—Leave of Court not obtained—Compromise voidable by minor—Suit to set aside—Limitation.*

A compromise decree entered into on behalf of a minor even without the leave of the Court first obtained is not void and a nullity but is voidable only. It is binding on all the parties except the minor and the only person who can call it in question is the minor himself. If the minor does not elect to avoid the decree it will be binding all round. Even as against the minor the decree will be treated as binding until it has been got rid of. The decree can only be set aside by a regular suit or by an application for review. The period of limitation for a suit of that kind is Art 120 and the plaintiff, minor, would be entitled to the benefit of Ss. 6 and 8 of the Limitation Act. (*Lindsay and Kanhaiya Lal, JJ.*) PHULWANTI KUNWAR *v.* JANESHAR DAS, **22 A. L. J. 521 : 46 All. 575 : L. R. 5 A. 785 : A. I. R. 1924 All. 625.**

——O. 32, R. 7—*Permission to refer.*

An agreement to refer in a suit is an agreement coming within O. 32, R. 7 and therefore the sanction of

C. P. CODE (V OF 1908), O. 32, R. 7.

the Court is necessary in the case of a minor party. (*Macleod, C. J. and Crump, J.*) CHIMANBHAI *v.* KESHAVLAL. **47 Bom. 721 : 25 Bom. L. R. 443 : A. I. R. 1923 Bom. 402.**

——**O. 32, R. 7**—*Arbitration—Decree on award—Objection as to invalid reference overruled—No revision lies—Per* Suhrawardy, J: *R. 7 does not apply—Per* Page, J : *When final reference is by Court want of application under R. 7 does not affect proceedings.*

Per *Suhrawardy, J.*—An agreement to refer to arbitration is not such an agreement as is contemplated by O. 32, R. 7. But even assuming that the lower Court at the time of filing an award and passing a decree thereon has committed an error of law in overruling the objection that the agreement to refer to arbitration was not validly entered into by the minor plaintiff, it cannot be said that it has committed any such irregular exercise of jurisdiction as would justify interfering in revision with the decree passed.

Per *Page, J.*—On the application for an order of reference being made it is open to a Court in its discretion either to grant or to refuse the application. The Court has jurisdiction when hearing the application for an order of reference to consider a petition under O. 32, R. 7. But whether it does so or not, the order of reference will stand, and no question can arise thereafter as to the regularity of the proceedings which were preliminary to the order of reference. The effect of the order of reference is that the arbitrators possess jurisdiction to proceed with and to complete the arbitration notwithstanding the fact that a petition has not been preferred under O. 32, R. 7. (*Suhrawardy and Page, JJ.*) DUBIR-UL-DIN *v.* AMINA BIBI. **78 I. C. 335 : A. I. R. 1925 Cal. 475.**

——**O. 32, R. 7**—*Duty of Court—Wishes of guardian or next friend—Weight due to.*

Although the Court can and must approve of a compromise on behalf of infants it cannot and will not force one upon them against the opinion of their next friend or guardian *ad litem* in the action. No doubt if the Court found that a guardian or next friend was acting improperly and against the infant's interest in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person. (*Ghose and Panton, JJ.*) HEMANGINI DASI *v.* BHAGWATI SUNDARI. **27 C. W. N. 792 : A. I. R. 1923 Cal. 685.**

——**O. 32, R. 7**—*Reference to arbitration—Suit against firm—Minor.*

Though one member of firm is minor sanction of Court is not necessary to refer a suit against that firm to arbitration. (*Harrison, J.*) SUKHANAND *v.* BEHARI RAM. **A. I. R. 1923 Lah. 103**

——**O. 32, R 7**—*Reference to arbitration—Benefit to minor—Court, duty of.*

Where the guardian of a minor party to a suit wishes to refer the matter to arbitration, the Court ought to fully apply its mind to the matter and consider the circumstances of the case and see if the reference would be for the minor's benefit. Where it accords sanction to the reference without any valid reason the reference is bad and the whole proceeding is vitiated. (*Abdul Raoof, J.*) MT. BHAKTAWAR *v.* KESHAR SINGH GURDIT SINGH. **59 I. C. 31 : 5 P. W. R. 1921.**

——**O. 32, R. 7**—*Next friend giving up claim against one of the defendants—Minor can re-open proceedings.*

If the next friend of a minor plaintiff withdraws the suit against one of the defendants, the minor has got a right to have the matter re-opened. (*Jackson, J.*) K. SRINIVASA RAO *v.* K. VENKATANARASAMMA. **22 L. W. 629 : A. I. R. 1926 Mad. 119.**

C. P. CODE (V OF 1908), O. 32, R. 7.

——**O. 32, R. 7**—*Transfer of decree passed in minor's favour—Sanction of Court is necessary.*

Sanction of the Court to a transfer by guardian *ad litem* of decree in minor's favour is necessary. 41 M.L. J. 75, Rel. on. (*Phillips, J.*) KANAKAYYA *v.* VENKATARAMAYYA. **90 I. C. 1049 : A. I. R. 1925 Mad. 1287 : 49 M. L. J. 443.**

——**O. 32, R 7**—*Only minor can avoid transfer made without Court's sanction—Third party cannot impeach.*

Order 32, R. 7 (2) does not say that a transaction in which the sanction of the Court has not been obtained shall be void, but that it shall be voidable as against all parties other than the minor. The minor can avoid the transaction on attaining majority if he thinks fit, or even earlier if some guardian on his behalf thinks fit to establish its invalidity ; but there is no ground for allowing a third party to intervene in a transaction of this sort and to plead that it is void *ab initio* when neither of the parties to the transaction accept that contention. A. I. R. 1923 Patna 375 and A. I. R. 1924 All. 525, Rel. on. (*Phillips, J*) KANAKAYYA *v.* VENKATARAMAYYA. **90 I. C. 1049 : A. I. R. 1925 Mad. 1287 : 49 M. L. J. 443.**

——**O. 32, R. 7**—*Effect of want of sanction—Decree in favour of minor—Transfer of decree by next friend is not binding on minor.*

The next friend of a minor cannot transfer to a third party, the decree in favour of the minor, without leave of the Court under O, 32, R. 7 of the Code. The word 'Suit' in the rule does not mean ouly a suit in which a decree has not been passed, and so leave of Court can be obtained at any stage. (*Spencer and Ramesam, JJ.*) KANAKAYYA *v.* KOTTAYYA. **13 L. W. 637 : 63 I. C. 285 : (1921) M. W. N. 437 : 41 M. L. J. 75.**

——**O. 32, R. 7**—*Power of natural guardian—Transfer of decree.*

Decree is property and hence the guardian can transfer a decree in favour of the minor, without the sanction of Court. (*Abdur Rahim and Odgers, JJ.*) GOVINDARAJULU NAIDU *v.* RANGA RAO. **13 L. W. 97 : (1921) M. W. N. 98 : 62 I. C. 255 : 29 M. L. T. 99 : 40 M. L. J. 124: [But see 41 M. L. J. 75.]**

——**O. 32, R. 7**—*Guardian for suit dealing with the suit property to make compromise—No sanction by Court—Transaction is not void but voidable.*

A guardian *ad litem* has power to deal with the property which is the subject-matter of the suit, but any such dealing entered into to effect a compromise must be sanctioned by the Court. But if no sanction is obtained the transaction is not void but only voidable. (*Kotval, A. J. C.*) SURYABHAN PIRTHAMJI *v.* PANDU. **21 N. L. R. 43 : 86 I. C. 375 : A. I. R. 1925 Nag. 328.**

——**O. 32, R. 7**—*Applicability—Execution proceedings—Compromise—Sanction, absence of—Collector—Powers of.*

O. 32, R. 7 applies to proceedings in execution and where, pending execution before a Collector, the guardian of a minor decree-holder compromises without the sanction of the Court, the same is voidable at the option of the minor, even if the guardian happens to be his father or the manager of his family. (*Hallifax, A. J. C.*) MT. PERABAI *v.* BHAWANI PRASAD. **A. I. R. 1924 Nag. 185.**

——**O. 32, R. 7**—*Negotiation for compromise—If require sanction of Court—Propriety of sanction—If can be questioned in later suit or split up.*

O. 32, R. 7 does not require that the sanction of the court should be obtained even before negotiations for

C. P. CODE (V OF 1908), O. 32, R. 7.

a compromise are started. It only says if a compromise is arrived at it must be sanctioned by Court in order to be binding on the minor. When a Court has sanctioned a compromise it is not open in a subsequent suit to challenge the propriety of the same or to have it split up, retaining one part and rejecting another. (*Kotwal and Prideaux, A. J. Cs.*) YADORAO *v.* MIRABAI. **A I. R. 1924 Nag. 180.**

——O. 32, R. 7—*Concealment of material facts by guardian vitiates Court's sanction.*

While on the one hand a minor will be bound by a compromise decree which is entered into on his behalf by his guardian, and which has received the sanction of the Court, on the other hand, it is the duty of a minor's guardian to place the Court in possession of all essential facts. Any concealment of material facts will amount to fraud on the Court because the Court must be put in a position to form an opinion whether a compromise ought or ought not to be sanctioned and the compromise will not bind the minor if the Court is not put in such a position. (*Wazir Hasan and Simpson, A. J. Cs.*) BISHUNPAT SINGH *v.* KEDAR NATH. **12 O L. J. 366 : 88 I. C. 804 : A. I. R. 1925 Oudh 512.**

——O. 23, R. 7—*Compromise of suit—Minor members—Joint Hindu family—Consent of next friend—Absence of.*

Where all the plaintiffs in a suit form members of a joint Hindu family and some of them are minors, the absence of the consent of the next friend of the minor plaintiffs vitiates the compromise *in toto.* (*Dalal and Simpson, JJ.*) LOOTAR RAM *v.* LAL RANJIT SINGH. **11 O. L. J. 381 : A. I. R. 1924 Oudh 85.**

——O. 32. R. 7—*Proof of sanction—Omission to have it expressly recorded—Effect of.*

In order to attract the provisions of O. 32, R. 7, C. P. Code, it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of that compromise, it must be held that the leave of the Court was expressly recorded within the meaning of O. 32. R. 7, C. P. Code, (28 A. 585, Ref.) Even if the leave of the Court is not expressly recorded that would not make the decree a nullity. It would only make the decree viodable at the option of the minor and so long as it is not avoided in aproper proceeding, no objection can be taken in the execution proceedings as regards the validity thereof. (*Mullick and Kulwant Sahay, JJ.*) ISHAN CHANDRA KUNDU *v.* NILRATAN ADHIKARI. **2 Pat. 538 : 4 Pat. L. T. 311 : 1 Pat. L, R. 217 : (1923) P. H. C. C. 184 : A. I. R. 1923 P. 375.**

——O. 32, R. 7—*Proof of sanction—Compromise—Express approval of Court whether necessary.*

The fact that the petition of compromise gave notice to court that minors interests were affected and that the Court passed a decree accordingly does not amount to sanction of Court. The attention of the Court must be expressly drawn to the fact and its approval obtained. The Court's attention is drawn only when leave is asked to settle the case on behalf of the minors. (*Das and Ross, JJ.*) RAM GULAM SAHU *v.* DURGA PERSHAD. **6 Pat. L. J. 190: 2 Pat. L. T. 325 : 60 I C. 980 : 3 U. P. L. R. (Pat.) 75 : A. I. R. (1921) Pat 235.**

C. P. CODE (V OF 1908), O. 32, R. 8.

——O. 32, R. 7—*Reference to arbitration—Minor—When void.*

Reference to arbitration on behalf of minor parties in the absence of Court's sanction is not void but voidable. Where a decree is given on award, there is neither an appeal nor a revision. (*Kennedy, J. C. and Raymond, A. J. C.*) ENNABAI *v.* FAKIR MAHOMED. **15 S. L. R. 165: A. I. R. 1922 Sind. 1.**

——O. 32, R. 7—*Award is an agreement—Courts leave is necessary to file it.*

Agreement to file an award is an agreement within Rule 7 and requires the leave of the Court expressly recorded in the proceedings. Where no such leave is given and recorded by the Court and the decree is based on such agreement, it is voidable by the minor. (*Kincaid, J. C. and Aston, A. J. C.*) GUMNOMAL *v.* GURDINOMAL. **83 I. C 913 : 17 S. L. R. 211.**

——O. 32, R. 7—*Proceedings.*

Applications for execution of a decree are proceedings in the suit itself. (*Kincaid, J. C. and Kemp, A. J, C.*) GUMNOMAL *v.* GURDINOMAL. **83 I. C. 913 : 17 S. L. R. 211.**

——O, 32, R. 7 (1) and (2)—*Breach of R. 7 (1) does not make an agreement to compromise unlawful except as provided for by R. 7 (2).*

O. 32, R. 7 (2) lays down what should be the effect of a breach of O. 32, R. 7 (1). Hence the breach of O. 32, R. 7 (1) does not itself make an agreement to compromise unlawful so as to vitiate the compromise entered into. (*Walmsley and B. B. Ghose, JJ.*) TARUBALA DASSI *v.* SOURENDRA NATH MITRA. **41 C. L. J. 213 : 88 I. C. 369 : 29 C. W. N. 597 : A. I. R. 1925 Cal. 866.**

——O. 32, R. 7 (2)—*One of the plaintiffs a minor—Defendant cannot question the agreement to compromise:*

Sub rule 2 contemplates the case of a minor on one side ranged against adults on the other, as regards the matter of compromise and it can have no reference as to the effect of any compromise as between adults, although a minor may be a party to the suit. The question as between adults must be governed by the general law and not by this sub-rule. Where, for instance one of the plaintiffs is a minor, the defendant cannot claim that the agreement to compromise which was entered into between the parties, was not lawful because the sanction of the Court had not been obtained under O. 32, R. 7. (*Walmsley and B. B. Ghose, JJ.*) TARU BALA DASSI *v.* SOURENDRA NATH MITTRA. **41 C. L. J. 213 : 88 I. C. 369 · 29 C. W. N. 597 : A. I. R. 1925 Cal. 866.**

——O. 32, R. 7 (2)—*Effect of want of sanction—Minor—Compromise.*

A compromise entered into on behalf of a minor without the leave of the Court is voidable under O. 32 R. 7 (2) of the Code. (*Fawcett and Kennedy, J. C.*) CHELLARAM *v.* KIMATRAM. **61 I. C. 118 : 14 S. L R. 245.**

——O. 32, R. 8—*Minor—Guardian* ad litem—*Appeal by another person as next friend—Maintainability.*

Where a guardian *ad litem* to a minor defendant has once been appointed such appointment continues for the whole of the *lis* or until it is revoked by Court and the guardian so appointed is the only person who can file an appeal on behalf of the minor. 41 A. 619, Foll. (*Ryves and Daniels, JJ.*) BHAGELU *v.* DHARMA. **45 A. 623 : 21 A. L. J. 591 : L. R. 4 A. 304 : A. I. R. 1924 All. 79.**

——O. 32, Rr. 8 and 9—*Pauper suit—Minor plaintiff—Costs to be paid by next friend.*

Where the next friend of a minor sues *forma*

pauperis, the Court can order the next friend to pay the costs of the defendant. (*Hallifax, A. J. C.*) MAROTI *v.* BHAGI. **A. I. R. 1923 Nag. 43.**

——**O. 32, R. 8**—*Guardian* ad litem *discharged—Application by.*

An application on behalf of a minor, made by a guardian *ad litem* discharged long before the date of application, should not be entertained. (*Miller, C. J. and Adami, J.*) RAJ KISHORE DAS *v.* RAM GHULAM SAHU. **6 Pat. L. J. 171 : 62 I. C. 235 : 1921 P. H. C. C. 193.**

——**O. 32, R. 9**—*Hindu law—Partition suit—Compromise—Father as next friend—Father's interest is not adverse to minors.*

In a partition suit among Hindu co-parceners when a compromise is entered into between the parties there is no conflict of interest between a father who is acting as next friend to his minor son and that minor son. (*Krishnan, J.*) LINGA REDDI *v.* M. CHENGALRAYA REDDI. **21 L. W. 659 : 87 I. C. 42 : A. I. R. 1925 Mad. 734 : 48 M. L. J. 417.**

——**O. 32, Rr. 9 and 10**—*Next friend—Interest adverse to the minor—Procedure.*

A Court should remove a next friend under O. 32, R. 9 if it thinks his interest is adverse to that of the minor and should stay proceedings under R. 10 until the appointment of another next friend. (*Das and Ross, JJ.*) KIRIT NARAYAN *v.* CHANCHAL DAS. **63 I. C. 736 : 6 Pat. L. J. 317.**

——**O. 32, R. 11**—*Appointment of guardian* ad litem—*Appeal from decree cannot be preferred by another next friend.*

Where a guardian *ad litem* has been once appointed by the Court for a minor deft., his appointment enures for the *lis* in the course of which it was made unless and until revoked by the Court. Consequently an appeal against a decree passed against the minor can only be preferred by him. 44 A. 35 ; 22 M. 187 ; 2 A. L. J. 482, Foll. (*Stuart and Ryves, JJ.*) SHAMBOO *v.* KANHAYAN. **44 A. 619 : 20 A. L. J. 599 : L. R. 3 A. 512 : A. I. R. 1922 All. 332 (2).**

——**O. 32, R. 11**—*Removal of guardian—Grounds.*

If a Court finds that a guardian or a next friend is acting improperly and against the infant's interest in refusing to assent to an arrangement which appears clearly beneficial to them, steps might be taken to remove him and substitute some other person. (*C. C. Ghose and Panton, JJ.*) HEMANGINI DASI *v.* BHAGWATI SUNDARI. **27 C. W. N. 792 : A. I. R. 1923 Cal. 685.**

——**O. 32, R. 11**—*Guardian once appointed must continue to be so to the end of the suit.*

The appointment of a guardian *ad litem* once made must enure for the whole *lis* in all its ramifications and must continue to subsist whether in the Court of first instance or in the Court of appeal unless the guardian takes the necessary steps to have himself discharged from that position which has been put upon him by the Court. 14 All. 35 ; 1 N. L. R. 128, Foll. (*Kinkhede, A. J. C.*) DATTU *v.* BHAOSINGH. **88 I. C. 235 : A. I. R. 1926 Nag. 40.**

——**O. 32, R. 11 (2) (*a*)**—*On the death of a guardian during pendency of a suit, new guardian must be appointed.*

Where the guardian for the suit dies during the pendency of the suit it is prescribed that the Court *shall* appoint a new guardian in his place. (*Kinkhede, A. J. C.*) DATTU *v.* BHAOSINGH. **88 I. C. 235 : A. I. R. 1926 Nag. 40.**

——**O. 32, R. 12**—*Limitation Act, Ss.* 6 *and* 8.

Minor must sue within three years of his becoming

major, even to set aside a compromise decree sanctioned by Revenue Court. (*Le Rossignol, J.*) THIRAJ *v.* KHEAUSI. **22 P. W. R. 1923 : 77 I. C. 588 : A. I. R. 1924 Lah. 427.**

——**O. 32, R. 12 (3)**—*Appeal by major through guardian under a* bona fide *mistake of his being a minor should be amended and not dismissed.*

Where an appeal is preferred by a major through a guardian *ad litem* under a *bona fide* mistake that the major is still a minor, the appeal should not be dismissed but should be amended by striking out the name of the guardian *ad litem.* (*Kinkhede, A. J. C.*) DATTU *v.* BHAOSINGH. **88 I. C. 235 : A. I. R. 1926 Nag. 40.**

——**O. 32, R. 12**—*Minor electing to continue a suit conducted by next friend, is not instituting a fresh suit.*

Where the suit was instituted on behalf of a minor by his mother as his guardian to enforce specific performance of a contract which was binding on him, *held*, by electing under O. 32, R. 12, C. P. Code, to continue the suit, the minor is not to be deemed as instituting a fresh suit. His right to claim specific performance would be determined as on the date on which the suit was originally instituted. 39 Cal. 232, Foll. (*Rupchand Bilaram, A. J. C.*) LAKHMICHAND ISARDAS *v.* FIRM OF KHUSHALDAS MANGATRAM. **18 S. L. R. 230 : 88 I. C. 916 : A. I. R. 1925 Sind 330.**

——**O. 32, R. 15**—*Defendant alleged to be of unsound mind by one party and denied by the opposite party—Judicial inquiry is necessary.*

Where the plaintiff does not allege but denies that defendant is of unsound mind or mentally infirm to defend the suit, it is desirable that there should be a judicial inquiry in the matter and that both parties be allowed to adduce evidence. (*Woodroffe and Ghose, JJ.*) RAM SUNDAR SAHA *v.* KALI NARAIN SEN. **A. I. R. 1922 Cal. 86.**

——**O. 32. R. 15**—*Person of weak mind can sue through next friend.*

Under the new Code even a person of "weak mind" can sue through a next friend. Of course, the Court is to be satisfied that by reason of mental infirmity he is incapable of protecting his interests when suing or being sued. (*Kinkhede, A. J. C.*) KRISHNA BAI *v.* KESHEORAO. **83 I. C. 253 : A. I. R. 1925 Nag. 245**

——**O. 32, R. 16**—*A guardian is not necessary when the Prince attains majority according to his personal law.*

It is not necessary to appoint a guardian *ad litem* of a ruling Prince not domiciled in British India if he has attained the age of majority according to his personal law though not according to Majority Act, under, O. 32 C. P. Code. He is not a minor according to O. 32 and he is therefore entitled to act through his manager appointed under S. 85, C. P. Code. 1 Cal. 108, Foll. (*Suhrawardy and Graham, JJ.*) RAMESH CHANDRA DAS *v.* BIRENDRA KISHORE MANIKYA. **29 C. W. N. 287 : 80 I. C. 100 : A. I. R. 1925 Cal. 513.**

——**O. 33, Rr. 1 and 5**—*Hindu minor having share in joint family property is not necessarily entitled to sue as "pauper."*

Where a minor member of a Hindu joint family sues to set aside an alienation of joint family property by his father and where there is a share which has not been transferred, the minor cannot sue as a pauper unless an attempt has been made and it has actually been found impossible for the minor to obtain funds. 25 All. 407 (P.C.) Ref. and explained. (*Sulaiman and Daniels, JJ.*) RAM PRASAD SINGH *v.* JAGTAMBA

C. P. CODE (V OF 1908), O. 33, R. 1.

PRASAD. **23 A. L. J. 512 : 88 I. C. 420 : L. R. 6 A. (Civ.) 352 : A. I. R. 1925 All. 547.**

——O. 33, R. 1—*Application on behalf of minor—Reasons of next friend immaterial.*

When a minor brings a suit *in forma pauperis* through a next friend, the inquiry into pauperism is confined to the minor and is not affected by the status of his next friend. 3 Mad. 3, Foll. (*Macleod, C. J. and Shah, J.*) NEMICHAND BHICKCHAND MARWADI *v.* KEVALCHAND JASRAJ MARWADI. **26 Bom. L. R. 380 : 80 I. C. 748 : A. I. R. 1924 Bom. 440.**

——O. 33, R. 1—*Suit* in forma pauperis—*Admission of part of the claim by defendant cannot dispauper plaintiff.*

A Hindu widow applied for leave to sue *in forma pauperis* for the recovery of maintenance and her stridhanam jewels and cash withheld by defendant. The defendant admitted liability for the jewels and cash and produced them in Court. It was found that the jewels and cash were more than sufficient to pay the Court-fee and the Court dispaupered her. *Held*, on revision that the order of the Court was improper and it could not be said that owing to the defendant's offer the plaintiff was possessed of sufficient means to pay the prescribed Court fee. In a suit where no fee is prescribed by law for the plaint, no admission or even payment into Court by the defendant can be taken into consideration. The time when the application is made to institute a suit as a pauper is the point of time when the Court has to consider when the application comes to be dealt with, and the subject matter of the suit is in no case at the disposal of the applicant for payment of fees. 10 B. 207, Diss. 34 B. 638, Foll. (*Macleod, C. J. and Crump, J.*) BAI BALAGAVRI *v.* MOTILAL. **47 Bom. 523 : 25 Bom. L. R. 199 : A. I. R. 1923 Bom. 247.**

——O. 33, R. 1—*Minor pauper—Status of next friend is immaterial.*

A minor who is not possessed of sufficient means within the definition of pauperism for the purpose of O. 33 is entitled to be allowed to sue *in forma pauperis* by a next friend although the next friend is not a pauper. In like manner the wealth or other circumstances of the minor's relation in general are not material. 3 M. 3, Foll. The law of India in this respect is very different from the law that prevailed in the Court of Chancery in England. (*Rankin and B. B. Ghose, JJ.*) NANIBALA DASSYA *v.* JAIMINI SUNDARI. **37 C. L. J. 394 : 70 I. C. 919 (1) : A. I. R. 1923 Cal. 656.**

——O. 33, Rr. 1 and 9—*Pauper's representative.*

The representative of a pauper cannot continue the suit *in forma pauperis*, if not a pauper himself. 36 Bom. 279 Foll. and 33 Cal. 1163 Ref. (*Jackson, J.*) A. S. RADHAKRISHNA IYER, *In re.* **21 L W. 550 : 88 I. C. 91 : A. I. R. 1925 Mad. 819.**

——O. 33, R. 1—*Dismissal of pauper application—Court if can extend time for payment of Court fee.*

Where pauper application is dismissed, the court can extend time for payment of Court fee. (*Krishnan, J.*) BALAGURU NAIDU *v.* MUTTU RATNAM IYER. **18 L. W. 451 : 33 M. L. T. 18 : (1923) M. W. N. 720 : A. I. R. 1924 Mad. 118 : 46 M. L. J. 254.**

——O. 33, Rr. 1, 5 and 7—*Pauper application—Applicant subsequently ceasing to be pauper—Court cannot grant leave to sue as pauper.*

Where subsequent to an application to sue as a pauper, the applicant receives a sum of money, sufficient to defray the suit expenses, the Court has no jurisdiction to grant to sue as a pauper. (*Napier, J.*)

C. P. CODE (V OF 1908), O. 33, R. 2.

MUDDAPPA *v.* RUDRAMMA. **61 I. C. 958: 13 L. W. 76.**

——O. 33, R. 1—*Occupancy holding is not "Property"—Possibility of tenant's getting sufficient means by surrendering the holding to landlord is not to be considered.*

Occupancy holding is not property for the purpose of determining whether an applicant is or is not a pauper. Further merely because an occupancy tenant's interest which is otherwise not saleable or at any rate is subject to a restriction as to alienation, may, by agreement with the landlord, be convertible into cash, it does not follow that the amount likely to be fetched becomes 'property' or 'debt' over which he might be said to have a disposing power. (*Kinkhede, A. J. C.*) CHANDAN SINGH *v.* LAXMAN. **21 N. L. R. 98 : 90 I. C. 949 : A. I. R. 1925 Nag. 438.**

——O. 33, R. 1—*Expectation on the part of applicant of getting in future sufficient means is not to be considered.*

What the law wants the intending suitor to establish is the negation of the actuality or possession of means, by him if he is seeking permission to sue *in forma pauperis*, and not of the chance of eventuality, or of a mere possibility or contingency, much less of an expectancy on his part, of getting *in future* some means sufficient to enable him to pay the prescribed fee for his plaint. (*Kinkhede, A. J. C.*) CHANDAN SINGH *v.* LAXMAN. **21 N. L. R. 98 : 90 I. C. 949 : A. I. R. 1925 Nag. 438.**

——O. 33, R. 1 and S. 115—*Rejection of application under O. 33, R. 1 is decision of case for purposes of S. 115—But mere finding on evidence cannot be disturbed in revision.*

An order rejecting an application to sue as a pauper is a decision of a case for the purposes of S. 115 of the C. P. Code, and is subject to revision by the High Court under that Section. A. I. R. 1924 Nag. 44 Foll. But where the case is one of a pure finding on evidence and where there is not any material irregularity, the High Court will not interfere in revision. It is settled law that where a Court has jurisdiction to determine a question, and it has determined that question it cannot be said to have acted illegally or with material irregularity merely because it has come to an erroneous decision. 11 Cal. 6 (P. C.) Foll. (*Baker, J. C. and Prideaux, A. J. C.*) RAMACHANDRA *v.* GAJARABAI. **88 I. C. 157 : A. I. R. 1925 Nag. 343.**

——O. 33, R. 1—*Suit to redeem—Equity of redemption—Should be excluded in calculating means.*

In a suit for redemption of mortgage property of which plaintiff is not in possession, the value of the right to redeem which is the subject-matter of the suit for the purposes of O. 33, R. 1, should be excluded in considering whether he is entitled to sue as a pauper. (*Baker, O. J. C. and Hallifax, A. J. C.*) ACHALSINGH *v.* SETH JIVANDAS. **19 N. L. R. 165 : A. I. R. 1924 Nag. 44.**

——O. 33, R. 1—*English law is different from Indian law.*

No court-fee is payable upon a bill or plaint of England and only the costs of conducting the litigation such as payment of fees to lawyers etc., has to be incurred. This circumstance has been taken into consideration in the latter portion of explanation to R. 1 of O. 33, which says that where no such fee is prescribed the pauper must show that he is not entitled to property worth one hundred rupees. (*Jwala Prasad and Ross, JJ.*) SAVITRI THAKURAIN *v.* SECRETARY OF STATE. **2 Pat. 879 : 4 Pat. L. T. 538 : A. I. R. 1924 Pat. 27.**

——O. 33, R. 2—*Contents of application—Omission to state immoveable property—Effect of.*

C. P. CODE (V OF 1908), O. 33, R. 3.

Under O. 33, R. 2 of the C. P. Code an application for permission to sue as a pauper must contain a schedule of the moveable as well as immoveable property. Where therefore an applicant omits to mention his immoveable property and also fails to submit a list of such property when required, the application is not in proper form, (*Ashworth, J. C.*) SHEO NARAIN LAL *v.* MT. MUNAQQA. **9 O. L. J. 610 : A. I. R. 1923 Oudh 118.**

——**O. 33, Rr. 3 and 5**—*Form of petition—Separate affidavit instead of verification is sufficient.*

Where the petitioner did not verify the contents of the petition at the foot of the petition, but he did so by a separate affidavit in which the statements contained in the several paragraphs of the petition were said to be true and no part of them was false and nothing had been concealed, *Held*, this affidavit being annexed to the petition must be treated as a part of it. 16 I. C. 83, Diss. (*Abdul Raoof, J.*) PIRJI ASHRAF ALI *v.* RAMESHWAR NATH. **A. I. R. 1923 Lah. 684.**

——**O. 33, R. 3**—*Pauper application—Presentation to Sheristadar—If valid—Madras Civil Rules of Practice, R. 14—If* ultra vires.

In O. 33, R. 3, C. P. Code the insistence is on the words "in person" and not on 'to the court" as meaning the judge himself. There is no reason to hold that R. 14 of the Civil Rules of Practice is *ultra vires* and the mere fact that an applicant *in forma pauperis* presented his application to the sheristadar is no ground for rejecting the same. (*Jackson, J.*) CHIDAMBARAM CHETTIAR *v.* KADAR MOHIDEEN ROWTHER. **(1924) M. W. N. 749 (1) : 20 L. W. 622 : A. I. R. 1924 Mad. 901 (2) : 47 M. L. J 522.**

——**O. 33, R. 3**—*Leave to sue* in forma pauperis—*Rejection of—Doubtful claim.*

An application for leave to sue as a pauper cannot be rejected on the ground that the claim is doubtful for such a conclusion can be reached only when the case is tried. (*Hallifax, A. J. C.*) MT. RUPIBAI *v.* SADASHIV. **75 I. C. 744 (Nag.)**

——**O. 33, R. 3**—*Rule does not apply to memo. of appeal—Memo. of appeal through pleader is not bad.*

The rule applies to the presentation of the application to appeal, as a pauper and not to the presentation of the memorandum of appeal. The presentation of the memorandum of appeal through a pleader is not a breach of the rules and does not entail the penalty of rejection of that memorandum. (*Dalal, J. C.*) SAJJAD ALI KHAN *v.* JAGMOHAN DAS. **A I. R. 1926 Oudh 13.**

——**O. 33, R. 3**—*Guardian* ad litem *not appointed—Interests represented by manager—Proceedings not ineffectual.*

Where the minors were sufficiently represented by the manager of the family, the mere fact that there was no formal order appointing the manager guardian *ad litem* will not enable them to escape the liability under the decree. 36 All. 383, Ref. to. (*Kanhaiya Lal, J. C.*) SAT DEO *v.* JAI NATH. **9 O. L. J. 141 : 4 U. P. L. R. (O. C.) 43 : A. I. R. 1922 Oudh 75 (2).**

——**O. 33, R. 5**—*Order rejecting application—No revision.*

Order rejecting application for leave to sue *in forma pauperis* is not open to revision under S. 115, C. P. Code. (*Piggott and Walsh, JJ.*) RAI MAHADEO SAHAI *v.* THE SECRETARY OF STATE IN COUNCIL. **20 A. L. J. 55 : 44 A. 248 : L. R. 3 A. 54 : 65 I. C. 255 : A. I. R. 1922 All. 1 (1).**

——**O. 33, R. 5**—*Decision as to plaint disclosing cause of action—High Court will not interfere in revision.*

C. P. CODE (V OF 1908), O. 33, R. 5.

Per *Suhrawardy, J.*—Where the plaint discloses a cause of action, however weak it may be, and the Court grants leave to sue as *pauper* the order cannot be set aside in revision on the ground that the plaint does not disclose any cause of action whether the allegations in the plaint are or are not right.

Per *Cuming, J.*—The Court has jurisdiction to decide rightly or wrongly and a wrong decision even though on a question of law can by no stretch of imagination be considered to be an illegal exercise of jurisdiction or exercise of jurisdiction with material irregularity. So where the lower Court decided that the plaint disclosed a cause of action and permitted the plaintiff to sue as pauper, the High Court cannot interfere in revision on the ground that the plaint does not disclose a cause of action. (*Suhrawardy and Cuming, JJ.*) SOURENDRA NATH MITRA *v.* JATINDRA NATH GHOSH. **87 I. C. 737 : A. I. R. 1925 Cal 990.**

——**O. 33, R. 5**—*Suit* in forma pauperis—*Complicated question of limitation.*

It is undesirable on an application for leave to sue *in forma pauperis* to go into a complicated question of limitation. (*Waller, J.*) BANGARUSWAMY NAICKER *v.* SUNDERADOSS THEVAR. **(1925) M. W. N. 779.**

——**O. 33, R. 5**—*Application to sue as pauper—Subsequent insolvency is no ground to reject.*

Order dismissing the pauper application on the sole ground that some time subsequent to the application and before the Court passed its orders petitioner became an insolvent, cannot be supported. (*Krishnan, J.*) M. CHIDAMBARAM CHETTIAR *v.* S. K. KOTHAR. **A. I. R. 1925 Mad. 791 : 87 I. C. 720 : 48 M. L. J. 491.**

——**O. 33, R. 5**—*Leave to sue* in forma pauperis—*Enquiry into the merits of the case.*

It is the duty of the Court enquiring into an application for leave to sue *in forma pauperis* not merely to read through the plaint but to make a very extensive enquiry as to the facts on which the plaint is based. 41 M. 620 Diss. (*Neave and Kendall, A. J. Cs.*) MAHOMED ISMAIL *v.* KARAM ALI. **10 O. & A. L. R. 579 : 11 O. L. J. 568 : 79 I. C. 922 : 1 O. W. N. 311 : A. I. R. 1925 Oudh 74.**

——**O 33, R 5**—*Dismissal of application on ground of limitation is revisable—C. P. Code, S. 115.*

Order of dismissal of application to sue as pauper on the ground that the suit is barred by limitation is *ultra vires* and the order of dismissal is revisable. (*Jwala Prasad and Adami, JJ.*) SHEIKH MUHAMMAD *v.* NASRULLAH. **6 P. L. T. 209 : 3 Pat. 275 : 83 I. C. 871 : 1924 P. H. C. C. 134 : A. I. R. 1925 Pat. 30.**

——**O. 33, R. 5**—*Question of valuation—Court cannot go into.*

In an application *in forma pauperis* the Court cannot investigate the question whether the applicant has overvalued his claim in order to enable him to sue as pauper. (*Das and Ross, JJ.*) TULSHI MAHATANI *v.* GAJADHAR MARWARI. **61 I. C. 891 (Pat.).**

——**O. 33, R. 5 (d)**—*Nature of inquiry—Complicated questions of law—Not to be inquired into.*

The scope of the inquiry in O. 33, C. P. Code, is limited primarily to determining the pauperism of the petitioner and the Court is not justified in determining complicated questions of law. The Court can reject the application if the allegations do not show a cause of action but it ought not to go into evidence as to the merits of the case. (*Moti Sagar, J.*) MT. BHAGWANTI *v.* BUA DITTA. **A. I. R. 1924 Lah. 659.**

C. P. CODE (V OF 1908), O 33, R. 5.

——O. 33, R. 5 (d)—*Pauper application—Enquiry into the merits of the case is not proper.*

Where an application is made for leave to sue *in forma pauperis*, it is not open to the Court to dismiss the application on the ground that though the plaint discloses a cause of action, the plaintiff's case would fail on the merits. (*Krishnan, J.*) BOLIMATI MURIGADU *v.* NALLA BAPADU. **18 L. W. 53 : (1923) M. W. N. 412 : A. I. R. 1924 Mad. 80.**

——O. 33, R. 6—*Evidence as to the plaintiff's title cannot be gone into.*

The only matter in regard to which evidence may be taken is the question of the pauperism or otherwise of the applicant. R. 6 does not empower the Court to try the question of the plff.'s title after taking evidence on that question and in fact to try the suit on the merits before the application for leave to sue is granted. 46 Cal. 651, Appl. ; 50 I. C. 521, Not Appr. ; 20 All. 299. Dist. (*Banerji and Gokul Prasad, JJ.*) MT. SHAURAN BIBI *v.* ABDUS SAMAD. **45 A. 548 : L. R. 4 A 252 : 21 A.L.J. 441 : A. I. R. 1923 All. 577.**

——O. 33, R. 6—*Acknowledgment of previous liability under mortgage in suit by Court of Wards—Whether money decree can be passed.*

In every mortgage there is a personal covenant to pay unless the contrary is expressly stated or appears by necessary implication. This necessary implication arises out of the terms of most foreclosure and many usufructuary mortgages but not out of those of a mortgage for sale. There are in practically all simple mortgages two separate contracts engrossed on one piece of paper ; one is a simple money bond and the other is a mortgage bond, hypothecating certain immoveable property as security. If a bond is executed by the guardian of a defendant during his minority for an antecedent debt due by him which could have been recovered from his estate at the time ; as the covenant made by the guardian does not impose any personal liability on the ward but merely confirmed an existing liability to which he had authority a decree for money can be passed. 26 Mad. 330 followed. 11 Bom. 551 ; 2 N. L. R. 25 and 13 N. L. R. 109 distinguished. (*Hallifax and Dhobley, A. J. Cs.*) SETH JIWANDAS *v.* MT. JANKI. **5 N. L. J. 49 : 18 N. L. R. 145 : A. I. R. 1922 Nag. 98.**

——O. 33, R. 7—*Though Government pleader reports applicant to be pauper, defendant must be allowed to prove otherwise.*

The defendant who denies that an applicant to sue *in forma pauperis* is a pauper, must be given an opportunity to prove his allegations although the Government Solicitor who appears for the Government may report that the applicant was a pauper. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) P. BABA SAH *v.* V. M. PURUSHOTAM SAH.

48 M. 700 : 85 I. C. 201 : 20 L. W. 845 : 35 M.L.T. 136: A.I.R. 1925 Mad. 167: 47 M.L.J. 932.

——O. 33, R. 7—*Suit* in forma pauperis—*Subsequent payment of Court-fee—Institution deemed to have been made on the date of the original presentation.*

Where an application for leave to sue *in forma pauperis* is presented together with the plaint and subsequently the applicant pays the full Court-fee on the plaint the suit must be deemed to have been instituted on the day on the original presentation of the plaint and not on the date when the Court-fee was paid. The payment was an admission on nothing more than that the applicant was at the time of the payment, in possession of means to make it and was no longer a pauper. The withdrawal of the application for leave to sue as a pauper must be deemed to be a submission to an order of dispauperisation and not to one of refusal of his original petition. (*Hallifax, A. J. C.*) GOPIKISHAN *v.* BULAKIDAS. **18 N. L. R. 44 : A. I. R. 1922 Nag. 160.**

C. P. CODE (V OF 1908), O. 33, R. 9.

——O. 33, R. 8—*Suit should be deemed to be instituted at the date of the presentation of the application for leave to sue as pauper and Court-fee is payable on that date.*

In the case of a pauper, a suit is instituted when his application for leave to sue as pauper is made. The Court-fee is payable from the date of the presentation of the application and it is exactly that fee to which the Court must address its mind when it considers the pauper application. 2 All. 241, (P. C.). Appl (*Jackson, J.*) KAMAN MADA *v.* MALLI. **22 L. W. 732 : A.I.R. 1926 Mad. 159: 49 M. L. J. 538.**

——O 33, R. 9—*Concealment of property—Asset of doubtful value—Insurance policy.*

A plff. was given leave to sue *in forma pauperis* in a case where otherwise he would have had to pay a Court-fee of over Rs. 500. Subsequently pending the suit the Court found that he had omitted to state in his list of assets an insurance policy whose then value was Rs. 245. Thereupon the Court dispaupered the plff., asked him to pay the full Court-fee and on his failure to do so, dismissed the suit. *Held*, in revision that even assuming that concealment of property in a particular case might amount to improper conduct, which, by itself, would entitle the Court to dispauper a plff. under O. 33, R. 9, the facts which came to light in this case only demanded a further scrutiny by the Court to ascertain whether the plff. had means, so that he ought not to be allowed to continue the suit as a pauper. If that scrutiny had been made, it would have been discovered that plff. was still unable to pay the Court-fees. (*Macleod, C. J. and Coyajee, J.*) SHANKARABHAT *v.* SHANKARABHAT. **24 Bom. L. R. 734 : 46 B. 1017 : A. I. R. 1922 Bom. 215.**

——O. 33, R. 9—*Plaintiff subsequently acquiring property and paying Court-fee—Suit is deemed as filed on the date of presentation of application.*

Where the plaintiff asks for leave to sue in *forma pauperis* the period of limitation ceases to run from the date of the presentation of such application. If, afterwards owing to the finding of the Court that he is not a pauper or by reason of his inheriting some property or of some legacy being left to him, it is proved that he is not a pauper, the Court may direct him to pay the Court-fee on the plaint. That would not enable the defendants to the suit to say that the suit is out of time, because the fee was paid after limitation. The case of course would be different if he purposely in order to avoid paying the Court-fee filed an application to sue as a pauper. (*Devadoss J.*) VEERASAMI NAIDU *v.* SIVAGURUNATHA PILLAI. **21 L. W. 111 : 86 I. C. 234 : A. I. R. 1925 Mad. 793.**

——O. 33, R. 9—*Dispaupering cannot operate retrospectively.*

Semble : Even after a plaintiff is dispaupered he could not be required to pay the Court-fee in respect of the plaint which has been by the order of Court admitted to be filed without any fee. (*Srinivasa Aiyangar, J.*) SIVAGAMI AMMAL *v.* T. S. GOPALASWAMI ODAYAR. **(1925) M.W.N. 176 : 87 I.C. 372 : A. I. R. 1925 Mad 765 : 48 M. L. J. 390 :**

——O. 33, R. 9—*Plaintiff's death—Will left—Executor cannot be dispaupered unless possessed of sufficient means as executor.*

C. P. CODE (V OF 1908), O. 33, R. 9.

The expression 'plaintiff' in R 9, O. 33, when applied to the legal representative of a deceased pauper plaintiff, refers not to the physical person before the Court but to the legal representative of the deceased pauper plaintiff. The fact that the legal representative has means in his private capacity cannot justify his being dispaupered. But if he is shown to have come into possession, in his character as legal representative and out of the estate of the deceased, of sufficient means within the meaning of clause (*b*), then he may be dispaupered even as the original plaintiff might have been. The deceased plaintiff left a will under which he had appointed his two sisters as executrixes. They were also legatees under the will. But it was not shown that in their capacity as executrixes or legatees they were in possession of sufficient means. *Held*, that on being substituted as plaintiffs in the suit, they must not be dispaupered and ordered to pay the Court-fee payable on the original plaint. 36 Bom. 279 Dissented from. Case law discussed. (*Srinivasa Aiyangar, J.*) SIVAGAMI AMMAL *v.* T. S. GOPALASWAMI ODAYAR.

(1925) M. W. N. 176 : 87 I. C. 372 : A. I. R. 1925 Mad. 765 : 48 M. L. J. 390.

——— **O. 33, R. 9 (b)**—*Dispaupering—Grounds for—Getting* ad interim *allowance barely sufficient for maintenance, having a rich relation or appearing through eminent pleader are not sufficient to dispauper.*

After the plff. was allowed to sue as pauper, she applied in the Court for *ad interim* maintenance at the rate of Rs. 3,000 per month. The Court allowed her a maintenance of Rs. 200 a month during the pendency of the litigation; a petition was then filed on behalf of Government under O 33, R. 9 (*b*) to dispauper the plff. upon the ground that by reason of her having received the sum of Rs. 5,538 as arrears and of her being allowed to receive in future Rs. 200 per month as her maintenance allowance, she had ceased to be a pauper and consequently she ought not to be allowed to continue the prosecution of her suit as a pauper. *Held*, that she was not liable to be dispaupered. The fact that she was living with her cousin a Vakil who probably was supporting her and carrying on the litigation on her behalf and also that she had appeared before the Court through eminent counsel are immaterial especially when there is nothing to show under what arrangement the learned Counsel appeared for her in the Court and there is no affidavit to show that she had incurred an expense on account of the aforesaid counsel or that her cousin was financing her, either in supporting her or in defraying the cost of the litigation. The word 'means' in cl. (b) of R. 9 is to be interpreted with the help of the definition of pauper referred to above in R. 1. 61 I. C. 958, Dist ; 1 Ch. D. 471, Not foll. (*Jwala Prasad and Ross, JJ.*) SAVITRI THAKURAIN *v.* SECRETARY OF STATE.

2 Pat. 879 : 4 Pat. L. T. 538 : A. I. R. 1924 Pat. 27.

———**O. 33, Rr. 10 and 11 and O. 21 R. 19**—*Suit* in forma pauperis—*Costs decreed to defendant exceeding claim decreed to plaintiff—Government can claim no charge.*

Where in a suit *in forma pauperis* the plff. was given a decree for Rs. 88 but was made liable to pay Rs. 191 for plaintiff's costs, *held*, that as the plaintiff was precluded under O. 21, R. 19 from taking out execution for the amount decreed to him he cannot be held to have succeeded in the suit within O. 33, R. 10 and the Government can claim no charge as the case falls under R. 11. (*Ayling, O. C. J. and Odgers, J.*) CHAKRAPANI IYENGAR *v.* THE GOVERNMENT OF

C. P. CODE (V OF 1908), O. 34.

INDIA. **14 L. W. 529 · (1921) M. W. N. 805 : 31 M. L.T. 38 : A. I. R. 1922 Mad. 125 : 42 M. L. J. 191.**

——— **O. 33, R. 15**—*Application for leave to sue* in forma pauperis—*Rejection of, for default—Fresh application, if sustainable.*

Where an application for leave to sue *in forma pauperis* is dismissed for default, it is not competent to the Court to entertain a fresh application for leave. (*Suhrawardy and Duval, JJ.*) KHONDKAR ALI AFZAL *v.* PURNA CHANDRA TEWARI.

40 C. L. J. 188 : A. I R. 1924 Cal. 1039.

———**O. 33, R. 15**—*Application* in forma p auperis *dismissed as not pressed—Bars fresh application.*

Where an application for leave to sue *in forma pauperis* is dismissed as not pressed, it bars a fresh application in respect of the same right. 20 Bom. 86, Foll. (*Abdul Raoof, J.*) MT. BEGUM *v.* JAFAR HASSAN. **A. I. R. 1924 Lah. 312.**

———**O. 33. R. 15**—*First application to sue as pauper dismissed for default of appearance—Second application is not barred.*

The dismissal of a prior application for default of appearance does not operate as a bar under O. 33, R. 15 for fresh application to sue as pauper. 52 I. C. 562 : A.I.R. 1924 Rang 161 and 3 Agra Misc. 1 Ref. (*Madhavan Nair, J.*) CHINNAMMAL *v.* PAPATHI AMMAL. **A. I. R. 1925 Mad. 986.**

———**O. 33, R. 15**—*Pauper application—Dismissal—Power of Court to grant time for payment of court-fee.*

When an application for leave to sue *in forma pauperis* is dismissed, the plaint still remains and may be validated by payment of Court fees within a time to be fixed by Court. This depends upon the discretion of the Court. (*Krishnan, J.*) BALAGURU NAIDU *v.* MUTHU RATNAM IYER. **18 L. W. 451 : 33 M. L. T. 18 (H. C.) · 76 I. C. 767 : (1923) M. W. N. 720 : A. I. R. 1924 Mad. 118 : 46 M. L. J. 254.**

———**O. 33, R. 15**—*Bar—Dismissal for default.*

Fresh application can be made if the application to sue *in forma pauperis* is dismissed. (*Po Han, J.*) MAUNG AUNG TUN *v.* MA E KIN.

2 Bur. L. J. 217 : A. I. R, 1924 Rang. 161 (1).

———**O. 33, R. 16**—*Suit* in forma pauperis—*Amendment of plaint—Costs of application.*

Where a plff. has obtained leave to sue *in forma pauperis* and thereafter applies for amendment of the plaint it is not competent to the Court to direct the plff. to pay costs of the amendment then and there and on default dismiss the suit. (*Shah, A.C.J. and Crump, J.*) AMBAJI BALWANT *v.* HANMANT RAO BAJIRAO. **24 Bom. L. R. 924 : 47 B. 104 : A. I. R. 1922 Bom 385 (1).**

———**O. 34**—*Money suit—Decree creating a charge for the money—O. 34 does not apply.*

Creation of a charge by the decree in a money suit does not convert the suit into a mortgage suit and make the provisions of O. 34 of the Code of Civil Procedure applicable. (*Wallace and Madhavan, Nair, JJ.*) RAMASWAMY NAYUDU *v.* SUBBARAYA TEVAR. **(1925) M. W. N. 525 : 88 I. C. 648 (2) : A. I. R. 1925 Mad. 1101 · 49 M. L. J. 490.**

——— **O. 34**—*Suit on mortgage—Decree—Enquiry into title of mortgagor.*

Where in a suit on the Original Side of the High Court, on a mortgage of properties situate without and within Madras, the plff. got a decree and a direction to enquire into the title of the mortgagor for the lands mortgaged, *held*, that for the purpose of granting leave to sue such an enquiry was unnecessary. Nor was it

C. P. CODE (V OF 1908), O. 34.

necessary to enable the mortgagee decree-holder to execute the decree. (*Wallis, C.J. and Seshagiri Iyer, J.*) NAMBERUMAL CHETTY *v.* RAGHAVACHARIAR. **71 I. C. 390 (2) : 14 L. W. 563.**

——— O. 34—*Mortgage suit.*

A mortgage suit is pending at any rate till a final decree is passed. 27 All. 325 not followed. (*Hallifax, A. J. C.*) SHANKAR RAO *v.* GANAPAT RAO. **80 I. C. 283 : A. I. R. 1925 Nag. 15.**

——— O. 34—*Mortgage suits—English practice is not the true guide.*

In mortgage suits in India, Courts are guided by the C. P. Code and not by the English practice. (*Simpson, A. J. C.*) ABU JAFAR *v.* RAGHOINDRA PARTAB SAHAI. **2 O. W. N. 826 : A. I. R. 1926 Oudh 113.**

——— O. 34—*Old mortgage—Decree dismissing a suit for redemption—Subsequent suit for redemption, maintainability of (Act I of 1869), S. 6—Meaning of the phrase "the said orders".*

S. 6 of Act (I of 1869) protects the interests of those mortgagors whose rights it was deemed expedient to keep alive by laying down that neither Ss. 3 to 5 of the Act, nor the terms of the *sanad* should be a bar to a suit for redemption by them. The phrase 'the said orders' used in the section refers only to the orders passed by the Governor-General and mentioned in the three preceding sections and cannot include a decree dismissing a previous redemption suit. (*Daniels, A. J. C.*) BRIJ KISHORE *v.* BAJRANG BAHADUR SINGH. **64 I. C. 271 : 24 O. C. 289.**

——— O. 34, R. 1.

See also (1) MORTGAGE.
(2) T. P. ACT, SS. 74, 75 and 91.

——— O. 34, R. 1—*Prior mortgagee—Non joinder of puisne mortgagee—Effect.*

A mortgagee who has obtained a decree in his mortgage without impleading the puisne mortgagee as a party to the suit is entitled, when afterwards sued by the puisne mortgagee on his mortgage, to use his prior mortgage as a shield in all cases in which he could have done so before the Act of 1882. T.P. Act, S. 89 compared with O. 34, R. 1. 40 All. 407, Dist. (*Lord Dunedin.*) SUKHI *v.* GHULAM SAFDAR KHAN. **43 All. 469 : 48 I A. 465 : (1921) M. W. N. 445 : 14 L. W. 162 : 26 C. W. N. 279 : 65 I. C. 151 : L. R. 3 P C. 1 : 30 M. L. T. 175 : 24 Bom. L. R. 590 : A. I. R. 1922 P. C. 11 : 42 M. L. J. 15 (P. C.).**

——— O. 34, R. 1—*Parties—Co-mortgagors.*

In the case of a mortgage by co-sharers, not only the redeeming co-sharers should be made parties but also the mortgagors who have not so far joined the suit for redemption The necessity of impleading co-mortgagors is this, that the share and the right to redeem of the plaintiff cannot be determined behind the back of the non-redeeming mortgagors. (*Mears, C. J. and Mukerji, J.*) AHMAD HUSSAIN *v.* MUHAMMAD QASIM KHAN. **90 I. C. 80 : L. R. 6 A. 598.**

——— O. 34, R. 1—*Merely an entry in village papers does not make a person a necessary party.*

Simply because a person has some title to the lands by reason of an entry in the village papers, he is not entitled to be made a party to a suit for redemption which is filed against the mortgagees (*Stuart, J.*) BHAGWAT PRASAD *v.* BALDEO PRASAD. **L. R. 6 A. (Civ) 313 : 87 I. C. 679 : A. I. R. 1925 All. 593.**

——— O. 34, R. 1—*Mortgage by Hindu co-parceners—Mortgage suit—Mortgagors impleaded but minor co-parcener not impleaded—Suit is not bad but minor is not bound—Hindu Law—Alienation.*

C. P. CODE (V OF 1908) O. 34, R. 1.

Where a mortgage is executed by two Hindu coparceners and the mortgagee sued them without impleading the minor son of one of the executants the suit is not bad for non joinder of parties but may be decreed as against the actual mortgagors. But the suit is not good on the ground that the major defendants represent the minor who has not been impleaded. The minor co-parcener can afterwards set aside the alienation on any legitimate grounds. 34 All. 549 and A.I.R. 1924 All. 908 Dist. (*Sulaiman and Ryves, JJ.*) NATHU *v.* RAM SARUP. **47 All. 427 : 23 A. L. J. 246 : 87 I. C. 700 : A. I. R. 1925 All. 335.**

——— O. 34, R. 1 and O. 1, R. 9—*Suit for sale on mortgage—Non-joinder of necessary parties—Effect of.*

The omission to bring all the necessary parties on the record in a mortgage suit has not the effect of the dismissal of the entire suit. The Court can order the sale of the defendant's interest in the property in suit. (*Dalal, J.*) SHEO KUMAR PANDEY *v.* BABU NANDAN DUBE. **L. R. 6 A. 431 : 84 I. C. 262 : A. I. R. 1924 All. 928.**

——— O. 34, R. 1—*Suit on mortgage—Parties—Joint Hindu family—Addition of junior members after expiry of period of limitation.*

In a suit for sale on a mortgage executed by the adult members of a joint Hindu family, the sons of the defendants were joined as parties after the expiry of the period of limitation prescribed for instituting the suit. *Held*, that the suit was not barred by limitation and that the added defendants were sufficiently represented by their fathers. 30 A. 549 : 34 A. 572 : 34 A. 615 Ref. (*Daniels and Neave, JJ.*) CHETAN SINGH *v.* SARTAJ SINGH. **22 A. L. J. 702 : L. R. 5 A. 480 : 46 A. 709 : 79 I. C. 1001 : A. I. R. 1924 All. 908 (1).**

——— O. 34, R. 1—*Necessary party—Non-joinder of—Powers of Court.*

The subject of O. 34, R. 1, C. P. Code is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code which include O. 1, R. 9 and it has been held that where it is possible for the Court to do justice as between the parties before it, it should do so and should not make O. 34, R. 1 a ground for dismissing the entire suit. (*Daniels, J.*) PRASADI LAL *v.* LAIQ SINGH. **L. R. 5 A. 31 : 21 A.L. J. 701 : A. I. R. 1924 All. 107**

——— O. 34, R. 1—*Necessary party—Omission to implead person entitled to equity of redemption—Subsequent suit on mortgage.*

Where a mortgagee brings a suit on his mortgage and obtains a decree thereon without impleading a person in whom the equity of redemption vested by transfer, it is open to him to sue again on the mortgage impleading the latter as a party and thus giving him an opportunity to redeem. (*Gokul Prasad and Stuart, JJ.*) RAMPIA *v.* HAZARI LAL. **A. I. R. 1923 All. 232.**

——— O. 34, R. 1—*Prior mortgagee—Suit by, without impleading puisne mortgagee—Decree—Rights of prior mortgagee.*

Where a prior mortgagee obtained a final decree for foreclosure in a suit on his own mortgage (without impleading the puisne mortgagee) as a party to the suit, it is open to the prior mortgagee who, after the foreclosure decree, represents the interest of the mortgagor to deposit in Court the money due on the puisne mortgage under S. 83 of the T.P. Act and claim to redeem the puisne mortgage. The puisue mortgagees were entitled in equity only to the payment of their mortgage

C. P. CODE (V OF 1908), O. 34, R. 1.

money. 28 B. 153 Foll. 29 I.C. 794 : 8 C.L.J. 173 Dist. (*Ryves and Gokul Prasad, JJ.*) PARASRAM SINGH *v.* PANDOHI. **20 A. L. J. 401 : L. R. 3 A. 217 : 4 U. P. L. R. (A) 145 : 44 A. 462 : A. I. R. 1922 All. 135.**

——**O. 34, R. 1**—*Scope of—Suit on mortgage—Non-production of deed—Dismissal of suit.*

The mere non-production in a suit on a mortgage of the original mortgage deed the terms of which are not disputed is no sufficient ground for dismissing the suit. (*Banerji and Gokul Prasad, JJ.*) HIKMATULLAH KHAN *v.* ABDUL AZIM KHAN.

61 I. C. 412 : 19 A. L. J 185.

——**O. 34, R. 1**—*Sub-mortgage —Redemption—Parties to suit.*

In a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a necessary party, though there is no impropriety in impleading him. (*Shah, A. C. J. and Crump, J.*) GANESH MORESHWAR *v.* VASUDEO VITHAL. **24 Bom. L. R. 911: A. I. R. 1922 Bom. 424.**

——**O. 34, R. 1**—*Equity of redemption—Owner of, not impleaded—Effect of—Execution sale—Purchase by mortgagee—Rights of purchaser.*

The possession of the purchaser at a sale by a mortgagee in execution of the decree in a suit brought by him on his mortgage, the owner of the equity of redemption not being a party to the proceedings, is not the possession of an owner of all the interests in the property. He buys subject to the equity of redemption, and therefore by virtue of his purchase, only steps into the shoes of the mortgagee. Where the mortgagee would be barred by limitation from bringing a suit to obtain possession or to have the property sold to realise the mortgage amount the purchaser would be equally barred. If the auction-purchaser did not get possession, he was bound to take proceedings to obtain the benefit of his purchase and he could not get possession unless he had that right as a successor to the original mortgagee. (*Macleod, C.J. and Coyajee, J.*) DATTATRAYA SHAYA *v.* VENKATESH.

24 Bom. L. R. 741 : A. I. R. 1922 Bom. 334.

——**O. 34, R. 1**—*Parties—Heirs of co-mortgagee—Omission to join—Defect if curable under S. 99.*

The heirs of a co-mortgagee, who may have a possible mortgage lien, are necessary parties to a suit on the mortgage and in their absence the suit is not maintainable. When the merits of the case have been affected by the non-joinder, S. 99 cannot be invoked to cure the defect. (*Cuming and Panton, JJ.*) ABDUL RAHAMAN MIA *v.* SALIMANNESSA BIBI.

89 I. C. 121.

——**O. 34, R. 1 and O 1, R. 3**—*Joinder of mortgagor's benamidars—If proper—Scope of suit.*

Per *Sanderson, C. J.*—Generally, a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagees are sought to be investigated is open to objection on the ground of misjoinder and inconvenience. The question is however not one of jurisdiction and at most the misjoinder is an irregularity or inconvenience.

Per *Rankin, J.*—The current view is to ask whether the case does or does not come under O. 1, R 3. (*Sanderson, C. J. and Rankin, J.*) BHUBAN MOHAN GHOSE *v.* CO-OPERATIVE HINDUSTAN BANK, LTD.

29 C. W. N. 784 : 88 I. C. 866 : A. I. R. 1925 Cal. 973.

——**O. 34, R. 1**—*Mortgagor dying during suit—His representative declared insolvent—Receiver is not necessary party to foreclosure suit on the mortgage—*

C. P. CODE (V OF 1908), O. 34, R. 1.

Provincial Insolvency Act, S. 16.

A secured creditor is entitled to deal with his security as though there has been no vesting in the Court or in the receiver and therefore the receiver of the mortgagor's estate is not a necessary party to a suit by mortgagee for foreclosure instituted against mortgagor in his life-time. (*Walmsley and B. B. Ghose, JJ.*) JAGANNATH MARWARI *v.* KALA CHAND BANERJEE.

41 C. L. J. 290 : 86 I. C. 1042 : 29 C. W. N. 771 : A. I. R. 1925 Cal. 785.

——**O. 34, R. 1**—*Two mortgagors—One died—Suit against other alone without joining deceased's heir is not bad, but can be decreed only proportionally to defendant's share—T.P. Act, S. 60.*

A mortgage suit in which all the persons interested in the equity of redemption have not been joined need not necessarily fail. The provisions of O. 1, R. 9, appear to be just applicable to a mortgage suit as to any other suit. 25 C.W.N. 594 ; 43 Bom. 575, 28 All. 174 (F.B.) Foll. 35 All. 441; 30 Cal 755, Ref to. A decree should be passed proportionate to the interest of the defendant impleaded. (*Suhrawardy and Graham, JJ.*) KHERODAMOYI DASI *v.* HABIB SHAHA.

29 C. W. N. 51 : 82 I. C. 638 : A. I. R. 1925 Cal. 152.

——**O. 34, R. 1**—*Mortgage bond being in the name of one mortgagee alone who sufficiently represents his co-sharers, the other mortgagees, non-joinder of the latter does not vitiate suit.*

When there were more mortgagees than one, but the mortgage bonds were in favour of one alone and he sufficiently represented the other mortgagees. *Held*, that the non-joinder of the others did not vitiate the suit. (*Newbould and B. B. Ghose, JJ.*) SHAILESH CHANDRA GUHA *v.* BECHAI GOPE.

40 C. L. J. 67 : 84 I. C. 124 : A. I. R. 1925 Cal. 94.

——**O. 34, R. 1**—*Equity of redemption—Transferee of—Failure to implead—Effect of—Rights of purchaser at execution sale.*

Where a mortgagee brings a suit for sale upon his mortgage without impleading as party to the suit a purchaser of a portion of the equity of redemption he cannot, by purchasing the property in execution, claim possession as against the purchaser of the equity of redemption. 11 C. W. N. 314 ; 19 A. 541, followed. (*Walmsley and Suhrawardy, JJ.*) KRISTOPADA ROY *v.* CHAITANYA CHARAN MANDAL.

49 Cal. 1048 : 28 C. W. N. 92 : A. I. R. 1923 Cal. 274.

——**O. 34, R. 1**—*Co-heirs—All the heirs of mortgagor not parties to suit—Effect.*

A mortgage suit in which all the heirs of the mortgagor were not made parties cannot be totally dismissed for non-joinder. A decree for the proportionate share of the mortgage money as against the heirs on record, should be passed. Even if the heirs left out could have successfully pleaded limitation that could not afford a defence in favour of persons who were joined as parties within limitation. (*Mookerjee and Fletcher, JJ.*) HARCHANDRA ROY *v.* MAHOMED HASIM. **66 I. C. 312 : 25 C. W. N. 594.**

——**O. 34, R. 1**—*Necessary party—Mortgagors, if necessary parties to suit by mortgagee of the property mortgaged by the mortgagee.*

A mortgagee by deposit of title deeds can proceed against properties mortgaged to the mortgagor though the original mortgagor is not impleaded. 27 All. 511, Diss. ; 29 All. 385 (F. B.), Foll. (*Leslie Jones and Broadway, JJ.*) FIRM MOTI RAM *v.* THE BHARAT NATIONAL BANK, LTD. **67 I. C. 421 : 3 L. L. J. 373.**

——**O. 34, R. 1**—*Prior mortgagee—Suit without*

C. P. CODE (V OF 1908), O. 34, R. 1.

impleading second mortgagee—Suit against him.

A first mortgagee who obtains a decree on his mortgage without impleading second mortgagee even though he had knowledge of it, which is presumed when the second mortgage is registered, cannot be allowed to bring a second suit against the second mortgagee on finding difficulty in executing the first decree owing to the claims put forth by the second mortgagee. If the first and second mortgagee is the same person this rule does not apply. (*Sadasiva Aiyar and Burn, JJ.*) LAKSHMANAN CHETTY *v.* MUTHAIYA CHETTY. **29 M. L. T. 189: 62 I. C. 833 : 40 M. L J. 126.**

——— O. 34, R. 1—*Prior mortgagee or purchasers of his interest are not necessary parties in a suit by subsequent mortgagee.*

Neither a prior mortgagee nor the purchasers of his rights under the mortgage is a necessary party to a suit by the subsequent mortgagee upon his mortgage as the prior mortgagee is under no obligation to redeem to keep his own rights alive. (*Hallifax, A. J. C.*) YADO RAO *v.* AMRIT RAO. **88 I. C. 803 : A. I. R. 1926 Nag 135.**

———O. 34, R. 1—*Suit by puisne mortgagee—Prior mortgagee impleaded but discharged—Purchase in execution—Suit by prior mortgagee—Puisne mortgagee not impleaded—Right of redemption.*

A puisne mortgagee brought a suit on his mortgage, impleading the prior mortgagee. The latter set up his paramount lien and was discharged. In execution of the decree the puisne mortgagee purchased the property. The prior mortgagee then brought a suit on his mortgage without impleading the puisne mortgagee, foreclosed and obtained possession before the execution sale in the prior suit. Thereupon the puisne mortgagee sued to redeem the prior mortgagee and the latter claimed to redeem the former. *Held*, as the prior mortgagee had not impleaded the other in his suit, he could not take advantage of his foreclosure proceedings and redeem the subsequent mortgagor. The latter was entitled to redeem (*Prideaux, A.J.C.*) GOVINDRAO *v.* RUKHMANAND. **A.I.R. 1924 Nag. 198.**

———O. 34, R. 1—*Person in possession of properties—If a necessary party— rior mortgagee—When to set up his rights*

It is only in a suit brought by a puisne mortgagee for the express purpose of selling the mortgaged property free of the prior incumbrance that the prior mortgagee is bound to set up and prove his mortgage. Merely because a person is in possession of the mortgage property it cannot be said to amount to an interest in the mortgage security or in the right of redemption as to the necessity of his being impleaded under O. 34, R. 1. (*Kinkhede, A. J. C.*) BALAJI VINAYAK BUTI *v.* VITHOBA. **A. I. R. 1924 Nag. 191.**

———O. 34, R. 1—*Attaching creditor—Interest in the right of redemption—T. P. Act, S. 91 (f).*

The conflict on the question whether an attaching creditor who is given a right to redeem by cl. (*f*) of S. 91 of T. P. Act has any interest in the mortgage property and is thereby entitled under S. 85 of the T. P. Act to be joined as defendant in a suit on the mortgage appears to have been completely set at rest by the amendment of S. 85 of T. P. Act by the substitution for it of R. 1 of O. 34 of the C. P. Code, whereby the interest of those to be joined in a mortgage suit is no longer restricted to an interest in the property but is stated to be an interest either in the mortgage security or in the right of redemption. These words cannot possibly exclude any person of any of the classes mentioned in S. 91 of the Transfer of Property Act whether the words of S. 85 of the

C. P. CODE (V OF 1908), O. 34, R. 1.

T. P Act did so or not and therefore every attaching creditor under a money decree against mortgagor is entitled to redeem the mortgage. (*Hallifax, A. J. C.*) MEGHRAJ MARWARI *v.* KESHEO GOPAL BUTI. **6 N. L. J. 181 : A. I. R. 1923 Nag. 311.**

——— O. 34, R. 1—*Mortgage—Subsequent lease—Rights of lessee.*

The owners of certain izara village in Berar executed a mortgage of the village in 1899. Subsequently they gave a permanent lease of some fields in the village to the defendant. The plaintiffs foreclosed in a suit to which the defendant was not a party and then sued to oust the defendant. *Held*, that the suit as laid will not lie ; the plaintiffs must file a fresh suit for foreclosure impleading the defendant. The defendant then can redeem the plaintiffs if he so chooses. 19 All 541: 30 Mad. 500 ; 6 Cal. 317, Foll. (*Macnair, A. J. C.*) SHEORAM *v.* JAMNABAI. **19 N. L. R. 18 : 65 I. C. 503 ; A. I. R. 1923 Nag. 273.**

———O. 34, R. 1—*Necessary parties not on record—Procedure.*

Where a mortgagee sues for the recovery of the full amount of the mortgage-debt by sale of the mortgaged property but omits to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit so much only of the claim should be decreed as is proportionate to the interests of the persons who are before the Court. (*Batten, J. C.*) HIRASA *v.* ONKAR. **A. I. R. 1923 Nag. 234.**

———O. 34, R. 1—*Scope of—Rule is not intended to penalise.*

Where a prior mortgagee sues the mortgagor for foreclosure without impleading the puisne mortgagee and after the suit is barred as against the puisne mortgagee the latter sues mortgagor for foreclosure without impleading the prior mortgagee and gets decree before the prior one gets possession, the prior mortgagee is entitled to a decree for possession subject to puisne mortgagee's right to redeem him because the puisne mortgagee's suit is affected by the principle of *lis pendens*. Per *Dhobley, A. J. C.*—Out of two interpretations of law the one that will avoid unjust results should be avoided. O. 34, R. 1, C. P. Code, is not intended to penalise failure to join parties whose existtence or title deeds are not known to plff. (*Hallifax, Kotval and Dhobley, A. J. Cs.*) JOGESWAR *v.* MOTI. **5 N. L. J. 157 : A. I. R. 1922 Nag. 89 (F. B.).**

———O. 34, R. 1—*Tenant—Rights of—Foreclosure of mortgage—Effect of.*

The representatives of a lessor, whose rights have been foreclosed, has, on the expiry of the lease, no right to eject or redeem the lessee, who has redeemed the mortgagee from the lessor for his own benefit. (*Mittra, A. J. C.*) GULAM NABI *v.* KANHAI SINGH. **59 I. C. 511 (2) : 16 N. L. R. 180.**

———O. 34, R. 1—*Mortgage suit—Subsequent mortgage held by the same mortgagee need not be disclosed—C. P. Code, O. 2, R. 2.*

The holder of a second mortgage, who is suing on a first mortgage, is not in the precise position of a second mortgagee who, after being made a party to a suit brought by another person as first mortgagee, fails to claim his right to redeem the prior mortgage. In such a case the puisne mortgagee is required by an express provision of law to submit to an adjudication on his rights as second mortgagee, and cannot ask for a further adjudication. Neither O. 34, R. 1 nor any other provision of law requires the holder of a first mortgage to disclose his second mortgage. There is nothing in the C. P. Code, or in the T. P. Act to prevent the holder of two independent mortgages over the same property

C. P. CODE (V OF 1908), O. 34, R. 1.

from obtaining a decree for sale on each of them in a separate suit. 6 O.L.J. 482 Dissented from. 20 All. 322 Foll. (*Wazir Hasan and Ashworth, A. J. Cs.*) BANSIDHAR *v.* JAGMOHAN DAS. **12 O. L. J. 127 : 86 I. C. 748 : A. I. R. 1925 Oudh 379.**

——O. 34, R. 1—*Paramount title—Title if can be gone into.*

A plff. mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is not in any way connected with the mortgage and who has set up a title paramount to that of a mortgagor and mortgagee. 32 Cal. 425. Foll. But where such a person is impleaded and allows the trial to go on, including the question of his title, he cannot ask for a reversal as the ground of his title was not triable. (*Simpson, J. C. and Dalal, A. J. C.*) GALSTAUN *v.* MIRZA ABID HUSAIN. **10 O. L. J. 263 : 9 O. & A. L. R. 282 : A. I. R. 1924 Oudh 19.**

——O. 34, R. 1—*Equity of redemption—Suit not founded on mortgage by conditional sale.*

The order does not contemplate an order by the Court to extinguish the right to redeem, where the mortgage suit by either party is not based on a mortgage by conditional sale. (*Daniels and Wazir Hassan, A. J. Cs.*) JAI KISHORI *v.* MUHAMMAD KHAN. **60 I. C. 560 : 7 O. L. J. 620.**

——O. 34, R. 1—*Subject to O. 1, R. 9.*

In a suit by the mortgagees against the member of a joint family for enforcement of the mortgage it was contended that the suit was bad for defect of parties. *Held*, where a bond was executed by a karta, and he and other members known to be existing are impleaded, failure to add one or two persons should not have the effect of defeating the suit, if the Court in their absence can deal with matters in controversy so far as regards the rights and interests of the parties actually before it, relying on I. L. R. 2 Pat. 175. (*Jwala Prasad and Kulwant Sahay, JJ.*) PARAMESWAR PANDEY *v.* RAJKISHORE PRASAD NARAYAN SINGH. **5 Pat. L. T. 646 : 80 I. C. 34 : 3 Pat. 829 : A. I. R. 1925 Pat. 59.**

——O. 34, R. 1—*Tenants from mortgagee can be added.*

In a redemption suit alleged tenants from mortgagees may be added as parties and possession asked even as against them. (*Dawson Miller, C. J. and Mullick, J.*) KHUB LAL *v.* JHAPSI KUNDU. **3 P. 244 : 78 I. C. 885 : 5 P. L. T. 573 : A. I. R. 1924 Pat. 613.**

——O. 34, R. 1—*Mortgage—Prior and subsequent—Suit by first mortgagee without impleading puisne mortgagee—Subsequent suit by puisne mortgagee—Rights of parties.*

Where a first mortgagee sued on his mortgage without impleading the subsequent mortgagee and in execution of his mortgage decree purchased the mortgaged property, obtained delivery of possession and the subsequent mortgagee sued on his mortgage impleading the first mortgagee-auction-purchaser, *held*, that the right of redemption possessed by the second mortgagee was not affected by the previous suit and auction-sale, and he could redeem the first mortgage, but as the first mortgagee occupied the double capacity of first mortgagee as well as the owner of the equity of redemption he was to redeem the subsequent mortgage on payment. (*Jwala Prasad and Kulwant Sahay, JJ.*) MT. DHANWANTI CHAUDHRAIN *v.* HARGOBIND PRASAD. **3 Pat. 435 : 5 Pat. L. T. 103 : A. I. R. 1924 Pat. 484.**

——O. 34, R. 1—*Parties to suit—Mortgage to some members of a joint Hindu family—Other members if necessary parties—Position of mortgagee.*

Where a mortgage document is executed to some members of a joint Hindu family, they can bring a suit on the mortgage without impleading the other members of the family in the suit. A person who is named in a mortgage deed as a mortgagee, although, in fact merely a *benamidar*, for those beneficially interested can institute a suit in his own name, either for sale or foreclosure and the suit should not be dismissed merely because the beneficial owner is not added as a party. This principle extends to a mortgage taken by some only of the members of a joint Hindu family who unlike as in the case of a benamidar have a beneficial interest themselves in addition to their authority to act on behalf of the family. (*Miller, C. J. and Kulwant Sahay, J.*) HIT LAL MAHTON *v.* JIBOO MAHTON. **5 Pat. L.T. 142 : 3 Pat. 81 : 75 I. C. 378 : A. I. R. 1924 Pat. 458.**

——O. 34, R. 1—*Parties.*

Where prior mortgagee purchasing equity of redemption after creation of subsequent mortgage, his own lien being kept alive, is not made a party to the suit by subsequent mortgagee, *Held*, he can only redeem but not resist the possession without redeeming the auction-purchaser in execution of the decree in the suit by the subsequent mortgagee. (*Jwala Prasad and Ross, JJ.*) BIRINCHI SINGH *v.* SARADO PRASAD. **3 P. 114 : 5 P. L. T. 95 : 75 I. C. 942 : A. I. R. 1924 Pat. 452.**

——O. 34, R. 1—*Scope of—Suit to redeem—Persons claiming as heirs of mortgagor—Title disputed by others claiming as heirs—If to be gone into.*

Where in a suit to redeem by persons who claimed as heirs of the mortgagor, the mortgagees put in a statement that the plaintiffs had no right to redeem but took no further steps in the case, but other defendants claiming to be heirs of the mortgagor also disputed the title of plaintiffs, the Court ought to go into the question of right to redeem and decide the same. (*Miller, C. J. and Kulwant Sahay, J.*) BASDEO PRASAD *v.* DWARIKA PANDEY. **2 Pat. 805: A. I. R. 1924 Pat. 234.**

——O. 34, R. 1—*Puisne mortgagee—Same person holding two mortgages.*

Under the present law, particularly under the explanation to O. 34, R. 1, C. P. Code, a puisne mortgagee is not required to implead the prior mortgagee as a party in a suit for foreclosure or sale. The principle will be the same if the subsequent mortgagee and the prior mortgagee happen to be one and the same person. There is nothing in law to prevent the prior mortgagee from bringing a suit to enforce his mortgage without impleading the subsequent mortgagee. There is, however, some risk, and probably the curtailment of some of the rights of the mortgagee who chooses to sue separately upon his mortgages; he may not be allowed to sell the properties in the subsequent decree when they were already sold in prior decree. (*Jwala Prasad and Ross, JJ.*) NAWABA WAZIRI BEGAM *v.* BABU SHASHI BHUSHAN ROY. **4 Pat. L. T. 546 : 2 Pat. 874 : 1923 P. H. C. C. 293 : A. I. R. 1924 Pat. 77.**

——O. 34, R. 1—*Joint Hindu family—Manager—Suit against—Junior member not necessary party.*

The omission to implead a Mitakshara son is not fatal to a mortgage suit and the father sufficiently represents the sons. (*Das and Kulwant Sahay, JJ.*) LAL BEHARI SINGH *v.* GUR PRASAD SINGH. **4 Pat. L. T. 108 : 1 P. L. R. 238 : 2 Pat. 435 : 1923 P. H. C. C. 118 : A. I R. 1923 Pat. 290.**

——O. 34, R. 1—*Prior mortgagee—Omission to set up priority on the footing of subrogation—Effect of.*

C. P. CODE (V OF 1908), O. 34, R. 1.

Where a prior mortgagee is impleaded as a defendant in a suit brought by a subsequent mortgagee who, however, claims priority on the footing of subrogation, the prior mortgagee is bound to defend the suit and get an adjudication as to his priority. The mere filing of a written statement is not sufficient. Where the decree in the suit by the subsequent mortgagee declared his priority over the prior mortgagee, who was directed to redeem the plaintiff, the suit by the prior mortgagee, in so far as it relates to the properties covered by the adjudication in the previous suit, will be barred by *res judicata*. 1 P. L. T. 629; 47 Cal. 662; 39 Cal. 527; 24 A. 429 discussed. (*Das and Kulwant Sahay, JJ.*) LAL BIHARI SINGH *v.* GUR PRASAD SINGH. **4 Pat. L. T. 108 : 1923 P. H. C. C. 118: 1 P. L. R. 238 : 2 Pat. 435 : A. I. R. 1923 Pat. 290.**

——0. 34, R. 1—*Puisne mortgagee—Suit on prior mortgage—Addition of puisne mortgagee—Limitation—C. P. Code, O. 1, R. 9.*

O. 34, R. 1, C.P. Code is subject to the provisions of O. 1, R. 9, C. P. Code and the combined effect of these rules as regards mortgages is that all persons whose rights may be adjudicated upon and determined in the suit ought to be added as parties but that failure to add one or more such persons should not have the effect of defeating the suit. The Court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. A suit by a prior mortgagee without impleading the puisne mortgagee is not unsustainable though the puisne mortgagee is a proper party. The omission to implead the puisne mortgagee as a party to the suit within limitation does not involve a dismissal of the suit. 13 A. 432; 18 C. 164, Ref. (*Miller, C. J. and Mullick, J.*) SITAL PRASAD RAY *v.* ASHO SINGH. **1922 P. H. C. C. 326 : 2 Pat. 175 : 4 Pat. L. T. 698 : A. I. R. 1922 Pat. 651.**

——0. 34, R. 1—*Non-joinder—Effect of.*

Bucknill, J.:—It would be altogether unreasonable to suggest that where a necessary party has been, not through negligence but under circumstances which are properly explicable, omitted from being made a party to the suit, such non-joinder would necessarily be a fatal bar to the progress of the action. (*Miller, C. J. and Bucknill, J.*) HARI PRASAD SINGHA *v.* BABU SOURENDRA MOHAN SINHA. **1 P. 506 : 3 Pat. L. T 709: 66 I.C. 945 : A.I.R. 1922 Pat. 450.**

——0. 34, R. 1—*Joint Hindu family—Mortgage suit—Parties—Manager of joint family—Representative capacity.*

The *karta* of a joint family can sue on a mortgage on behalf of all the members of the family. If the fact of his suing as *karta* appears from the pleadings in the case, an express mention to that effect is unnecessary. 36 I. C 542, Dist. (*Jwala Prasad, A.C.J. and Das, J.*) JAG SAH *v.* RAM CHANDRA. **2 Pat L. T. 553 : 63 I. C. 564 : 1921 P. H. C. C. 289.**

——0. 34, R. 1—*Necessary party—Puisne mortgagee—Omission to implead—Property purchased by decree-holder in Court auction—Subsequent suit for possession—Decree, form of.*

Where without impleading a puisne simple mortgagee, the prior simple mortgagee brought a suit on his mortgage, purchased the property at Court sale in execution of his decree, and subsequently brought a subsequent suit for possession against the mortgagor and the puisne mortgagee, *held*, that by his purchase the plff. obtained a right to possession and that the puisne mortgagee must be given an opportunity to redeem him, but that if he fails, a decree for possession and not for sale of the property should be passed. (*Coutts and Sultan Ahmed, JJ.*) TILAKDHARI SINGH *v.* GOUR NARAIN. **5 Pat. L. J. 715 : 2 Pat. L. T. 95 : 59 I. C. 290 : 1921 P.H.C.C. 122.**

C. P. CODE (V OF 1908), O. 34, R. 2.

——0. 34, R. 1—*Mortgage suit—Necessary parties—Prior mortgagee—Paramount title.*

A plaintiff mortgagee cannot be allowed to frame his suit so as to draw into controversy the title of a third party, who is in no way connected with the mortgage and has set up a title paramount to that of the mortgagee or the title of a puisne mortgagee. 33 C. 425, Foll. (*Pratt, J.*) MAUNG SAN MYAING *v.* U PON GYAW. **2 R. 106 : A. I. R. 1924 Rang. 240.**

——0. 34, R. 1—*Prior mortgagee in possession—Defective right.*

A first mortgagee in possession under a prior sale may always shield himself under his mortgage and purchase though his right to possession may be defective. (*Pratt and Duckworth, JJ.*) N. N. V. CHETTY FIRM *v.* K. A. P. L. CHETTY FIRM. **1 Bur. L. J. 217 : A. I. R. 1923 Rang. 107.**

——0. 34, R. 1—*Scope of—Two mortgages—Suit on later one does not bars suit on prior mortgage.*

Where a person holds two mortgages over the same property there is nothing in the C. P. Code compelling him to sue on both at the same time. A suit on the later one will not bar a subsequent suit on the other. (*Maung Kin, C.J.*) MA MYIT *v.* S.C. SARMA. **69 I. C. 897 : 10 L. B. R. 360.**

——0. 34, R. 1—*Necessary party—Persons in possession of mortgaged property as transferees from mortgagor not impleaded as parties—Decree—Execution—Rights of purchaser.*

Subsequent to the execution of a simple mortgage the mortgagor sold the property to defts. who remained in possession. Thereafter the mortgagee brought a suit on the mortgage without impleading the defts. and in execution of the decree purchased the property. *Held*, that the mortgagee-purchaser was not entitled to possession of the property against the defts. 21 M. L. J. 213; 8 L. B. R. 266; 23 I. C. 791, Foll. (*Robinson, C. J. and Duckworth, J.*) S. P. S. CHETTY FIRM *v.* MAUNG PYAN GYI. **166 I. C. 562 : 11 L. B. R. 119.**

——0. 34, Rr. 2 and 4—*Costs—Mortgage decree—Personal liability.*

In a mortgage suit it is open to a Court of appeal to direct that such costs as it may award against the unsuccessful appellant may be recoverable from him personally, but if there is no such express direction, the costs are, as a matter of ordinary practice sanctioned by O. 34, Rr. 2, 4 and 10 of the Code of Civil Procedure added to the mortgage money and are in the first instance recoverable from the mortgaged property after the decree is made final. (*Walsh and Kanhaiya Lal, JJ.*) MAHOMED IFTI KHAR ULLAH *v.* BANKE LAL. **45 A. 630 : L. R. 4 A. 301 : 21 A. L. J. 617 : A. I. R. 1924 All. 104.**

——0. 34, Rr. 2, 4 and 7—*Preliminary decree.*

It might be desirable until the rules in O. 34 and the corresponding forms are recast, that the Courts when drawing up preliminary decrees under Rules 2, 4 and 7 should add the following heading: "Preliminary Decree, which requires to be made final within the prescribed period of limitation before it can be executed." (*Macleod C. J. and Crump, J.*) HARJIVAN DEVRAJ *v.* GAJANAN KASHINATH. **25 Bom. L. R. 459 : A. I. R. 1923 Bom. 420.**

——0. 34, R. 2—*Final decree—Appeal against preliminary decree after passing of, if maintainable—Amendment.*

An appeal against a preliminary decree in a mortgage suit filed subsequent to the date of the final decree is not maintainable. But where the appellant was not aware of the passing of the final decree, he may

C. P. CODE (V OF 1908), O. 34, R. 2.

be allowed to amend his appeal so as to turn it into an appeal against the final decree. (*Mukerjee and Buckland, JJ.*) BAIKUNTHA NATH *v.* RAMANAND.
33 C. L. J. 414 : 61 I. C. 923 : 25 C. W. N. 776.

——**O. 34, R. 2**—*Date of payment—Decree allowing time for redemption—Whether fresh mortgage.*

Where in a suit for foreclosure, the parties compromise and a decree is passed putting the mortgagee in possession of the property but allowing the mortgagor one year's time to redeem part or whole of the property and he fails so to do, the effect of the decree is not to create a fresh mortgage by the decree and give a right of redemption to the mortgagor after one year, but to give ownership to the mortgagee. (*Le Rossignol, Broadway and Wilberforce, JJ.*) KARORIMAL *v.* RAMJI LAL. **2 Lah. 53 : 3 L. L. J. 68 : 59 I. C. 812 : 41 P. W. R. 1921.**

——**O. 34, Rr. 2 and 3**—*Extension of time—Mortgage decree for payment by instalments and not fixing a date—Whether decree-holder required to apply for a final decree—Court's power to enlarge time.*

When a preliminary decree for payment by instalments whether extending over 6 months or not, is passed by consent of the parties in a mortgage suit, the plaintiff is not only entitled but is bound to apply for a final decree before proceeding to execution and the Court has the same powers in regard to enlargement of time for payment allowed by such a decree as it has with any other mortgage decree. (10 C. L. J. 19 and 14 C. L. J. 648, Not Foll. (*Hallifax, A. J. C.*) NALAYAN *v.* DAULAT. **A. I. R. 1922 Nag. 182.**

——**O. 34, Rr. 2 and 3**—*Costs cannot be independently recovered.*

Costs of suit form a part of the mortgage money when a decree for foreclosure is passed. No independent order for costs can be made. 20 All. 523 (F. B.), 48 I. C. 329, 40 All. 109, Foll. 13 C. W. N. 742, Not Foll. (*Wazir Hasan, A. J. C.*) RAM PARKASH *v.* JANKI PRASAD. **12 O. L. J. 91 : 88 I. C. 203 : 2 O. W. N. 203 : A. I. R. 1925 Oudh 351.**

——**O. 34, Rr. 2 and 4**—*Judgment not giving special direction for payment of interest between institution of suit and decree-Decree granting such interest is correct—Judgment granting interest from decree to payment—Decree granting such interest beyond expiry of period of grace and up to actual payment is correct.*

In a suit on mortgage the plaintiff in his plaint claimed that an account be prepared of the principal amount and interest due under the mortgage bond and that a mortgage decree be passed for Rs..... besides costs and future interest till the day of realisation at the rate of interest entered in the bond. The material part of the judgment in which the plaintiff's suit was decreed was as follows :—"Hence it is ordered that the suit be decreed with costs..... As the interest has swelled to an abnormal amount I do not allow future interest at the bond rate. Interest at 6 per cent. per annum from this date till the date of payment." The preliminary decree and the final decree which were prepared in accordance with the judgment allowed interest at the bond rate from the institution of the suit to the date of the decree and interest at 6 per cent. from the decree to the actual realisation of the money by the decree-holder. *Held*, that with regard to the interest between the date of institution of the suit and the date of the decree, the plaintiff having succeeded in the suit was entitled to interest at the bond rate and, the decree in such circumstances, was properly drawn up allowing such interest even without any special order to that effect in the judgment and also that the decree was properly drawn up in allowing interest at 6 per cent. not only up to the expiry of the days of grace but also subsequently up to the date of the actual realisation of the money by the decree-holder. (The old law and the present law on the subject discussed and compared.) (*Dawson Miller, C. J. and Mullick, J.*) RADHAKISHUN CHAMARIA *v.* ZALIM SINGH. **2 Pat. L. R. 315 : 88 I. C. 323 : 6 P. L. T. 459 : A. I. R. 1925 Pat. 455.**

——**O. 34, R. 2 (a)**—*Applicability—Mortgage decree—Costs in mortgage suit, how recoverable—Order for costs drawn up before final decree.*

The form of a mortgage decree as given in App. No. 4 shows that costs in mortgage suits forming part of the amount decreed in the suit should be realised by the sale of the mortgaged property. O. 34, R. 2 indicates that the costs in the mortgage suit are not to be treated as independent claims by the mortgagee irrespective of the rights under the mortgage ; but that such costs should form part of the amount decreed in the mortgage suit to be realised in accordance with the procedure laid down in the C. P. Code. It makes no difference if the order for costs was passed before the final decree was drawn up. Where a decree for costs is a part of the mortgage decree, the decree-holder must first proceed against the mortgaged properties. *Held*, further, the costs awarded in a mortgage suit follow the character of the amount decreed in the suit and form part of the entire decretal amount to be realised from the mortgaged properties. (*Suhrawardy and Graham, JJ.*) MAHARAJ BAHADUR SINGH DUGAR *v.* BASIRUDDIN AHAMMAD. **41 C. L. J. 607 : A. I. R. 1925 Cal. 1135.**

——**O. 34, R. 2 (c)**—*Six months—Mode of calculation—Time fixed by original decree—Dismissal of appeal.*

Where the preliminary decree in a mortgage suit fixes a period of six months for redemption and an appeal from that decree is dismissed without extension of time by the appellate Court, the period of six months runs from the date of the first Court's decree and not from that of the appellate decree. (*Newbould and Cuming, JJ.*) BASANTA KUMAR ADAK *v.* SM. RADHA RANI DASI. **26 C. W. N. 440 : 36 C. L. J. 159 : A. I. R. 1922 Cal. 329.**

——**O. 34, R. 3**—*Mortgage decree—Preliminary decree before the new Code—Final decree after the new Code—Limitation.*

Where in a mortgage suit the preliminary decree was passed before the passing of the new C. P. Code and the final decree was passed after the new C. P. Code came into existence, the final decree is the only executable decree in the case and the provisions of the C. P. Code apply to the execution of the said decree. (*Ryves and Mukerjee, JJ.*) BOHRA TARA CHAND *v.* MURTAZA HUSAIN. **L. R. 5 A. 52 : 78 I. C. 1030 : 10 O. & A. L. R. 244 : A. I. R. 1924 All. 696 (1).**

——**O. 34, R. 3**—*Non-service on minor renders decree invalid.*

Non-service of notice on minor renders decree invalid for want of representation. 37 A. 179, Foll. A. I. R. 1923 Patna 242, Not Foll. (*Daniels and Dalal, JJ.*) CHANDRADIP TEWARI *v.* JADUNANDAN SINGH. **L. R. 5 A. (Civ.) 366 : 79 I. C. 1041 : A. I. R. 1924 All. 573.**

——**O. 34, R. 3**—*Right of redemption—Preliminary decree for foreclosure - Final decree not passed.*

The passing of a preliminary decree for foreclosure does not extinguish the right of redemption of the mortgagor. Consequently it is open to him to redeem at any time before the passing of the final decree even though the six months' time allowed by the

C. P. CODE (V OF 1908), O. 34, R. 3.

preliminary decree has passed. 16 Cal. 246; 3 C. L. J. 533, Foll. (*Chatterjee and Panton, JJ.*) YUSAF ALI *v.* KASIM ALI. **70 I. C. 152 : 26 C. W. N. 532.**

——0. 34, R. 3—*"Day fixed," meaning of—Postponement—Effect of—Limitation.*

The words "the day fixed" in O. 34, R. 3 refer to the day fixed under the preceding rule. Postponement of the day fixed for payment at defendant's request does not amount to a dismissal of the application of the plaintiff to have a final decree passed. The application must be deemed to have remained pending for final orders and the Court to have postponed the passing of such orders. No further application for a final decree is necessary and any subsequent application if made in that behalf is only for the purpose of continuing the proceeding on the original application which had been suspended. Such an application is not governed by Art. 181 and there is no limitation in respect of it. (*Kotval, A. J. C.*) CHIMMAJI RAIBHANJI *v.* SONAJI.
21 N. L. R. 47 : 88 I. C. 901 : A. I. R. 1925 Nag. 291.

——0. 34, R. 3—*Final decree—Passing of—Notice to judgment-debtor if necessary.*

Notice to the judgment-debtor is not prescribed by law before making a decree final on the application of the decree-holder but in practice it is given on the principle that it is just and proper to hear the opposite party. But the principle of *audi alteram partem* does not require a notice of the second application where notice of the first application was duly served and the mortgagor failed to appear to show cause on the day fixed for the hearing. It may reasonably be inferred in such a case that he had nothing to say and there was nothing for the Court to hear from him. A second notice under such circumstances was not required, and the fact that the second notice was not duly served is not a ground for setting aside the *ex parte* final decree. (*Kotval, A. J. C.*) BABOOJI *v.* RAMGOPAL. **19 N. L. R. 124 : A. I. R. 1923 Nag. 320.**

——0. 34, Rr. 3 and 5—*Extension of time—Mortgage decree—Confirmation on appeal.*

Where the decree of an appellate Court confirming the lower Court's final decree for foreclosure allowed the judgment-debtors two weeks for paying the balance of the decretal money and directed that if they made the said payment, they would be put back in possession of the mortgaged property, but if they failed to do so their rights in it would be extinguished. *Held*, the effect of the decree of the appellate Court was merely to grant an extension of time for payment of the decree amount and therefore the judgment-debtors were entitled to pay the decretal amount before the passing of the order absolute. (*Kanhaiya Lal, J. C.*) GOKARAN SINGH *v.* MANGLI. **66 I. C. 673 : 8 O. L. J. 407.**

——0. 34, R. 3—*Final decree.*

Application for final decree for foreclosure is governed by Art. 181, Limitation Act. (*Das and Adami, JJ.*) CHHOTEY NARAIN SINGH *v.* KEDAR NATH SINGH. **3 Pat. L. T. 565 : 1 Pat. 435 : 1922 P. H. C. C. 342 : A. I. R. 1922 Pat. 201.**

——0. 34, R. 3 (2)—*Extension of time—Appellate decree does not operate to extend time for payment of mortgage money.*

An appellate decree does not *ipso facto* operate to extend the time for payment allowed by the lower Court. If further time is required an application must be made to the appellate Court. (*Saunders, J. C.*) MAUNG YANGIN *v.* KATHIRESAN CHETTY.
63 I. C. 799 : (1921) 4 U. B. R. 1.

C. P. CODE (V OF 1908), O. 34, R. 4.

——0. 34, R. 3 (3)—*Merger—Order absolute—Effect of, on mortgage.*

On the making of an order absolute the property as well as the mortgagor's right to redeem are both extinguished. For the right of the mortgagee under his security is substituted a right of sale conferred by the decree, and any payment made after this cannot be taken to be a payment by way of redemption because there is no mortgage subsisting and consequently no charge is created in favour of the person making the payment. 40 All. 407, Foll. (*Lindsay, J. C.*) RAMNATH BAKSH *v.* GANESH PRASAD. **23 O. C. 334 : 60 I. C. 213 : 2 U. P. L. R. (J.C.) 196.**

——0. 34, R. 3 (2)—*Extension of time—Discretion—Exercise.*

In the case of decrees for foreclosure the discretion of the court to extend the time for payment of money must be exercised liberally. If by giving time money could be raised, it ought to be given. (*Simpson, A. J. C.*) BANKATESWAR RAWAN BAHADURPAL SINGH *v.* FIRM DINA NATH BALGOBIND. **90 I. C. 936.**

——0. 34, Rr. 3, 5 and 6—*Distinction—No application necessary under R. 6—Applications under Rr. 3 and 5 are governed by Lim. Act, Art. 181.*

There is a distinction between Rr. 3 and 5 and R. 6 of O. 34. Rule 6 requires no application and therefore escapes the operation of Art. 181 of the Limitation Act. Both Rr. 3 and 5 make it incumbent that the decree-holder must present an application and where an application is to be presented, the period of limitation provided for such an application by Art. 181 must apply. 42 Cal. 294, Diss.; 42 Cal. 776 (P. C.), Foll. (*Dalal, J.C.*) RUDRA PARTAB SINGH *v.* MT. SURAJ KUER. **2 O. W. N. 842 : A. I. R. 1926 Oudh 12.**

——0. 34, R. 4—*Intention—General account is to be taken—Interest is allowed on the aggregate of principal, interest and costs and not only on principal.*

The intention of the rule is that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on the fixed day and that after the expiration of that day if the property should not be redeemed the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should, thenceforth, depend not on the contents of the bond but on the directions in the decree. The interest is allowed on the aggregate sum and not merely on the principal money. No subsequent interest on subsequent costs is allowed. (*Sulaiman, J.*) BANARSI PRASAD *v.* MANMOHAN LAL. **L.R. 6 A. (Civ.) 479 : 89 I.C. 288 : A. I. R. 1926 All. 119.**

——0. 34, Rr. 4 and 5—*Decree null and void—Powers of—Mortgage decree—Death of party.*

If a decree is passed against a dead person the executing Court can treat it as a nullity. Where a decree for sale is objected to in execution on the ground that it was based on a preliminary decree passed against a dead person, the executing Court cannot treat the decree as a nullity, though it might be a good ground for setting aside the decree. (*Piggott and Walsh, JJ.*) RAM SARUP *v.* NARAIN DAS. **45 A. 198 : 9 O. & A. L. R 131 : 20 A. L. J. 1008 : L. R. 4 A. (Civ.) 34 : A. I. R. 1923 All. 144.**

——0. 34, Rr. 4 and 5—*Final decree—Application for—Plea of payment out of Court.*

Proceedings to get a final decree for sale in a mortgage suit are not proceedings by way of execution but are proceedings in the suit. 15 A. L. J. 448, Foll. Before a Court can pass a decree absolute for sale it has to find out the amount due to the decree-holder for which the decree has to be passed and in the

C. P CODE (V OF 1908), O. 34, R. 4.

course of the enquiry, the Court can recognise a payment made out of Court by the judgment-debtor even though the payment has not been certified. (*Gokul Prasad and Stuart, JJ.*) SITAL SINGH *v.* BAIJNATH PRASAD. **44 All. 668 : 20 A L. J. 602 : L. R. 3 A. 477 : A. I. R. 1922 All. 383.**

——**O. 34, R. 4**—*Payment into Court—Conditional decree—Money on prior mortgage to be paid before sale.*

When the decree in a mortgage suit provides for the payment of a prior mortgage before sale of the mortgaged property, but does not specify the date of payment, the payment should be made within six months of the date of the decree. (*Banerji and Gokul Prasad, JJ.*) GAYAN SINGH *v.* ATA HUSSAIN. **43 All. 320 : 60 I.C. 817 : 19 A. L. J. 83.**

——**O. 34, R. 4**—*Mortgage decree directing to pay amount of suit with interest and cost failing which the properties to be sold cannot be a personal decree.*

Where the decree directs the defendants to pay the amount of the claim with costs of the suit and interest within three months from the date of the decree, failing which the decree shall be made absolute and the decretal amount should be realised from the sale of the mortgaged properties, the decree cannot be considered as a personal decree against the mortgagors. (*Suhrawardy and Duval, JJ.*) ACHOLA SUNDARI DEBI *v.* DOMAN SUNDARI DEBI. **90 I. C. 774 : A. I. R. 1926 Cal. 150.**

——**O. 34, Rr. 4 and 5**—*Consent decree—Waiver of—Effect.*

It is open to the mortgagor to waive a final decree before execution can be levied. Where pending an appeal from the preliminary decree in a mortgage suit the parties compromised the suit and decree for a smaller amount payable in two years was passed with a provision that the property was to be sold in default of payment, *held*, it was the intention of the parties that the mortgagee should realise the amount by sale of the property immediately on the expiry of the two years. (*Ghose and Panton, JJ.*) RAJA HEMENDRALAL SINGH DEO *v.* FAKIR CHAND DUTT. **27 C. W. N. 621 : 50 Cal. 650 : A. I. R. 1923 Cal. 626.**

——**O. 34, R. 4**—*Nature of proceedings—Mortgage suit—Right to interest—Pendency of suit—*Ex parte *decree—Setting aside.*

Ordinarily the mortgagee in a mortgage suit should get interest at the contract rate during the pendency of the suit. Where an *ex parte* decree is set aside, the suit would be considered to be pending during the period when the proceedings to set aside the *ex parte* decree were pending. (*Chatterjee and Panton, JJ.*) SIBA PRASAD DAS CHAUDHURY *v.* KAZIMUDDIN SARKAR. **65 I. C. 709 (Cal.)**

——**O. 34, R. 4**—*Mortgage decree—Interest after date of sale—Court has discretion to grant or not.*

Court has full powers under O. 34 to allow a mortgagee decree-holder any interest beyond the date fixed for sale of the mortgaged property but it is not obligatory to grant interest after the date of sale. The matter is entirely one within the discretion of the Court. (*Harrison and Campbell, JJ.*) KANSHI RAM *v.* PREM SINGH. **26 P.L. R. 240 : A. I. R. 1926 Lah. 11.**

——**O. 34, R. 4**—*Decree not made absolute—Application for execution may be treated as one for final decree.*

An application for sale of property under a mortgage decree may be taken to be an application for an order absolute for sale though the latter has not been specifically prayed for. (*Zafar Ali and Martineau, JJ.*) BANU MAL *v.* PARAS RAM. **7 L. L. J. 397 : 26 Punj. L. R. 784 : A. I. R. 1925 Lah. 640.**

C. P. CODE (V OF 1908), O. 34, R. 4.

——**O. 34, R. 4**—*Sale of mortgaged property not prayed for in plaint—Court directing defendant to pay decretal amount within six months and on his failure for sale of the mortgaged property—Decree is a composite decree and could be executed without having made it final.*

The plaintiff's prayer in the plaint was for a decree for the money claimed with a lien on the property hypothecated and against other property and person of the defendant. There was no prayer in the plaint for sale of the land mortgaged. The defendant did not deny the claim but wanted to pay the debt by instalments. The Sub-Judge did not allow instalments and ordered as below : "I allow the defendants six months in which to pay the decree, failing which the decree shall be realized in the first instance by sale of hypothecated property. If that is not found sufficient, the decree shall be realised from the person and property of the debtor." *Held*, that this decree was not merely a preliminary decree for sale of mortgaged property, but it was what is called a composite decree, *i. e.*, a decree for the sale of the property mortgaged as well as against the person and other property of the mortgagor and therefore not governed by O. 34, R. 4. The property could therefore be sold without applying for final decree under O. 34, R. 5. 20 Mad. 107 and 28 Mad. 224, Foll. (*Zafar Ali and Martineau, JJ.*) BANU MAL *v.* PARAS RAM. **26 Punj. L.R. 784 : 7 L. L. J. 397 : A. I. R. 1925 Lah. 640.**

——**O. 34, Rr. 4 and 5**—*Usufructuary mortgagee leasing land to mortgagor—Rent falling into arrears—Mortgagee's suit for rent and ejectment—Decree allowing improvements to be set off against arrears and permitting property to be sold for balance—Decree was held executable as it was.*

A usufructuary mortgagee leased the properties to the mortgagor himself. Arrears of rent that fell due were to be a charge on the equity of redemption. When the rent fell into arrears, the mortgagee sued the mortgagor for rent and also for ejectment. Defendant pleaded he was not personally liable for the rent. It was provided in the decree that the value of improvements should be set off against the arrears and for the balance, the property might be sold. *Held*, that the decree was not a preliminary decree but was executable as it was and also that no attachment was necessary before the sale sanctioned by the decree. (*Krishnan, J.*) CHANDUKUTTI NAYAR *v.* CHANDUKUTTI NAYAR. **87 I. C. 557 : A. I. R. 1925 Mad. 1083.**

——**O. 34, Rr. 4 and 5**—*Final decree—Application for an order absolute in* 1913—*Dismissal—Whether application can be received—No second application for final decree lies—Limitation Act, Art.* 181 *applies to an application for a final decree.*

Where an application purporting to be for an order absolute in a mortgage suit is made in 1913 and dismissed, the only remedy of the party aggrieved is to appeal against the order. 42 M 52, Foll. The application which has been so dismissed cannot be revived as revival implies the pendency of the prior petition. After the dismissal of the first application, there cannot be a second application for a final decree. An application for a final decree in a mortgage suit more than 3 years after the date for payment under the preliminary decree is barred by limitation under Art. 181 of the Limitation Act. 7 L. W. 438. Foll. (*Krishnan and Ramesam, JJ.*) MUMMADI VENKATIAH *v.* BOGANATHAM VENKATA SUBBIAH. **(1922) M. W. N. 11 : 30 M. L. T. 228 : 16 L. W. 198 : A. I. R. 1922 Mad. 65 : 42 M. L. J. 51.**

——**O. 34, Rr. 4 and 5**—*Nature of proceedings—*

C. P. CODE (V OF 1908), O. 34, R. 4.

Passing of final decree without notice to defendants-mortgagors—Ex parte decree—Setting aside.

The preliminary decree in a mortgage suit must direct the payment of a certain sum of money into Court by a date to be fixed. The preliminary decree grants time to the defendant for the performance of an act necessary to the further progress of the suit. If the defendant fails to do the needful during the time thus granted, the Court will pass final decree. When the plaintiff applies for the final decree, the defendant will not be allowed to do what he has failed to do during the time granted by the preliminary decree unless he shows good cause. The section does not expressly provide for the issue of notice to the defendants-mortgagors, yet an *ex parte* decree in such a case is liable to be set aside. (*Hallifax, A. J. C.*) ANNAJI *v.* FAKIRA. **6 N. L. J. 27 : A. I R. 1922 Nag. 175.**

———**O. 34, R. 4**—*Form of decree—Interest up to realisation at Court rate means an amount inclusive of interest at contractual rate.*

When under a decree the contractual rate of interest ceases to be payable at a given date and the Court rate is substituted for it therefrom up to the date of realisation, the Court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date. (*Ashworth, J. C. and Simpson, A. J. C.*) NAWAB MIRZA FAGHFUR MIRZA *v.* KHUSHAD CHAND. **26 O. C. 59 : A. I. R 1923 Oudh 241.**

———**O. 34, R. 4**—*Sale of mortgage properties—Order in which properties should be sold—Power of Court to direct.*

Ordinarily, the right of selling a property in a particular order rests with the decree-holder and in the absence of any contract between the parties the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate his realisation of his mortgage debt. But the Court can, in the circumstances of a case and in view of the equities arising in various parties, direct the order in which the properties should be sold. Whereas the decree-holder has the right in the first instance to prescribe the order of the progress of the sale ; the final orders rest with the Court which has to adjust and determine the equities of the parties before it. (*Jwala Prasad and Kulwant Sahay, JJ.*) RAJKESHWAR PRASAD NARAIN SINGH *v.* MAHOMED KHALIL-UL-RAHMAN. **3 Pat. 522 : 5 Pat. L. T. 223 : 78 I. C. 796 : A. I. R. 1924 Pat. 459.**

———**O. 34, Rr. 4 and 5**—*Consent decree—Arbitration—Decree for money—Realisation by sale—Final decree.*

Where a mortgage suit was referred to arbitration and a decree for money was passed on the basis of the award and the same was to be realised by the sale of the hypotheca, and it was objected in execution that the same could not be executed till a final decree was passed, *held*, a final decree under O. 34, R. 5 cannot be asked for unless a preliminary decree under O. 34, R. 4 has been passed and the decree based on the award being of the same nature as a compromise decree was itself executable. (*Das and Ross, JJ.*) NRIPENDRA NATH CHATTERJEE *v.* JHUMAK MANDAR. **4 Pat. L. T. 694 : 2 Pat. L. R. 9 : 3 Pat. 221 : A. I. R. 1924 Pat. 263.**

———**O. 34, Rr. 4 and 5**—*Consent decree—Decree payable in instalments—Final decree—Necessity for—Objection in execution.*

A consent decree directing payment by instalments is a perfectly valid mortgage decree but it is not covered by O. 34, R. 5, C. P. Code. Consequently it is not necessary to make a final decree under O. 34, R. 5, C. P. Code. 10 C.L.J. 91 ; 2 Pat. L.T 38, Foll. It is open to the parties to a litigation to waive a particular procedure and to agree to a final decree being passed without a preliminary decree in the first instance. An objection to the legality of a final decree on the ground that the objector was not properly represented in compromise on which the final decree was based cannot be allowed to be taken in execution, his remedy being to get the decree set aside in proper proceedings. (*Mullick and Kulwant Sahay, JJ.*) ISHAN CHANDRA KUNDU *v.* NILRATAN ADHIKARI. **4 Pat. L. T. 311 : 1 Pat. L. R. 217 : 2 Pat. 538 : 1923 P. H. C. C. 184 : A. I. R. 1923 Pat 375.**

———**O. 34, R. 5**—*Mortgage suit—Preliminary decree on appeal—Trial Court passing final decree in the meanwhile—Trial Court can pass new final decree or amend its old decree according to the preliminary decree on appeal.*

In a mortgage suit the Court of first instance has jurisdiction to prepare either a new final decree in terms of the preliminery decree passed by a High Court on appeal or it can amend its own final decree and bring it in accordance with the High Court's preliminary decree on appeal. Such a decree is valid in either way and is executable. (*Sulaiman, J.*) MAHOMED YUSUF KHAN *v.* MAHADEV PRASAD **L. R. 6 A. (Civ.) 533 : 89 I. C. 131 : A. I. R. 1926 All. 134.**

———**O. 34, Rr. 5 and 10**—*Costs incurred in appeals from execution proceedings can be realised personally against judgment-debtor and they need not be added to the mortgage money.*

There is no provision in R. 5 that if the final decree for sale has been passed, costs incurred subsequent thereto should also be added to the mortgage-money. The mortgaged property is liable for the costs properly incurred even subsequent to the preliminary decree but all kinds of costs which are incurred after the final decree are not necessarily to be added thereto. The costs mentioned in R. 10 are costs which are properly incurred in the suit in carrying out the directions contained in the decree and are liable to be added to the mortgage-money. The costs allowed by the High Court in appeal from the order striking off the execution are costs which the decree-holder can realise separately by execution against the judgment-debtor personally and which he is not bound to add to the mortgage-money. (*Sulaiman, J.*) HET RAM *alias* UDIT NARAIN *v.* DAT PRASAD SINGH. **88 I. C. 829 · L. R. 6 A. (Civ.) 530 : A. I. R. 1927 All. 68.**

———**O. 34, R. 5**—*Plaintiff is only to apply for final decree.*

R. 5 of O. 34 of the C. P. Code requires only this much of the plaintiff that he shall tell the Court that a final decree for sale has to be prepared. (*Sulaiman and Mukerji, JJ.*) JODHA SINGH *v.* PADEY GOKARAN DAS. **47 All. 546 : 23 A. L. J. 405 : 87 I. C. 225 : A. I. R. 1925 All. 622.**

———**O. 34, R. 5**—*Consent decree—Payment out of Court.*

O. 34, R. 5, C. P. Code, does not apply to mortgage decrees based on a compromise arrived at between the parties and there is nothing in law which prohibits the payment of a compromise decree out of Court. 57 I, C. 473, Foll. (*Gokul Prasad and Stuart, JJ.*) SITAL SINGH *v.* BAIJNATH PRASAD. **44 All. 668 : 20 A. L. J. 602 : L. R. 3 A. 477 : A.I.R. 1922 All. 383.**

———**O 34, R. 5**—*Execution proceedings—Decree on prior mortgagee without impleading subsequent mortgagee—Latter cannot resist execution.*

C. P. CODE (V OF 1908), O. 34, R. 5.

The failure of a prior mortgagee to implead a subsequent mortgagee does not destroy his right as mortgagee. The puisne mortgagee is merely entitled to a decree for sale subject to his paying the amount due to the prior mortgagee and he cannot restrain the prior mortgagee from executing his decree for sale. (*Tudball, Ryves and Gokul Prasad, JJ.*) HUKUM SINGH *v.* LALLUNJEE. **43 All. 204 : 2 U. P. L. R. (A.) 365 : 61 I. C. 942 : 18 A. L. J. 1105 (F. B.).**

——**O. 34, R. 5**—*Final decree—Decree under Dekhan Agr. Relief Act, S. 15-B—If to be made final.*

A mortgage decree passed under S. 15 B of the Dekhan Agri. Relief Act need not be made final. (*Shah, A. C. J. and Crump, J.*) SUKLYA JAIRAM PATIL *v.* SUKLAL MOTICHAND VANI. **48 Bom. 172 : 25 Bom. L. R. 1214 : A. I. R. 1924 Bom. 169.**

——**O. 34, R. 5**—*Application under—Applicability of Art. 181 of the Limitation Act.*

An application for final decree under O. 34, R. 5 is governed by the residuary Art. 181. After the period of limitation has expired, the application by one of the defendants to set aside the preliminary decree does not revive the plff.'s right to apply for the final decree. 33 All. 264 (P. C.) Dist. (*Suhrawardy and Cuming, JJ.*) MAHOMED KAMAL *v.* AHMED ALI. **87 I. C. 746 : A. I. R. 1925 Cal. 1030.**

——**O. 34, R. 5**—*Right of redemption—Person having interest in mortgaged property—Not impleaded in mortgage suit—Basis of redemption—Interest—Mesne profits.*

Where a person who had an interest in the mortgaged property was not made a party in the suit brought by the mortgagee, his rights are not affected and he is still entitled to redeem. In allowing him to redeem, accounts must be taken on the footing of a mortgage which subsists and which it is sought to redeem and not merely on payment of the decree amount. 43 All. 469 (P. C.), Foll. In calculating the amount payable, interest should be made payable at the mortgage rate up to the date fixed in the decree for redemption. Where the mortgagees had obtained possession, the amount of mesne profits should not be taken as an equivalent of interest due, except with the consent of parties. (*Woodroffe and Ghose, JJ.*) JNANENDRA NATH SINGH ROY *v.* TARAB NATH. **49 Cal. 626 : A. I. R. 1922 Cal. 23.**

——**O. 34, R. 5**—*Preliminary decree confirmed on appeal can be made final within 3 years of the appellate decree—Limitation Act, Art. 181.*

Preliminary decree passed by the trial Court merges in the decree of the Court of appeal and the latter is the only decree which can be made final. Application for final decree is accordingly within time under Art. 181 if made within 3 years of the appellate decree. (*Broadway and Campbell, JJ.*) FITZHOLMES *v.* BANK OF UPPER INDIA. **5 Lah. 257 : 81 I. C. 649 : A. I. R. 1924 Lah. 582.**

——**O. 34, R. 5**—*Final decree—Bar by lapse of time—If bars suit for redemption.*

A final decree for sale if not executed within the period of time allowed by law will not bar a subsequent suit by the mortgagor to redeem. (*Devadoss, J.*) NAKONDA NAGASAMI IYER, *v.* THIRUKONDA ELLARAGAN. **86 I C 527 : A. I. R. 1925 Mad. 1191.**

——**O. 34, R. 5**—*Mortgage-decree for sale—Sale of mortgaged property in execution and purchase by stranger—Sale of portion of property in execution of money-decree against mortgagor subsequent to mortgage but prior to sale in execution of decree thereon—Purchaser not made party to the suit—Effect of rights of parties—Fresh suit for sale—Maintainability.*

The 5th defendant, a mortgagee of certain properties from the 1st defendant and the father of defendants 2 and 3, sued upon his mortgage and obtained a decree for sale. In execution of that decree all the mortgage properties were sold and purchased by the plaintiff being sufficient to discharge the mortgage debt. The 4th defendant was an auction purchaser of one-half of the mortgaged properties at a sale held subsequent to the mortgage (in favour of the 5th defendant) but prior to the sale at which plaintiff became purchaser, in execution of a money-decree obtained against the father of defendants 2 and 3. He (4th defendant) was not made a party to the suit by the 5th defendant, though the latter had notice of his (4th defendant's) rights. In a suit brought by the plaintiff against defendants 1 to 5 for the recovery from the 4th defendant of the mortgage-debt and interest from the date of the mortgage up to the date of the plaintiff's sale together with future interest and for a sale of the properties in his possession in default of payment, *held*, that plaintiff as assignee in law of the original mortgagee's rights by the virtue of his purchase in Court sale, was entitled to institute a second suit for sale on the mortgage as against persons who were not parties to the prior suit, that the only right of the 4th defendant was to redeem the mortgage, that the amount payable by him as a condition of redemption was the amount of the decree in execution of which the property was purchased by the plaintiff, and that the plaintiff was not entitled to future interest as he had been in possession of one-half of the properties purchased by him and the whole difficulty arose out of the default to make the 4th defendant a party to the original mortgage suit. The effect of the omission in O. 34, R. 5 of the present C. P. Code, of the words "and thereupon" (on an order absolute being passed) "the defendant's right to redeem and the security shall both be extinguished" is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage suit. (*Kumaraswami Sastri and Waller, JJ.*) VENKAT REDDY *v.* KUNJAPPA GOUNDAN. **20 L. W. 137 : (1924) M. W. N. 366 : 34 M. L. T. 225: 47 M. 551 : A. I. R. 1924 Mad. 650 : 46 M. L. J. 391.**

——**O. 34, R. 5**—*Court can direct order of sale if mortgagee is not prejudiced.*

In executing a mortgage decree, the Court can direct, at the instance of any person interested in some of the mortgaged items, the sale of some items of the mortgaged property first, before selling the other items provided always the mortgagee is in no way prejudiced. (*Schwabe, C.J. and Waller, J.*) RAGHAVACHARIAR *v* DUVVURU KRISHNA REDDI. **19 L. W. 23 : (1924) M. W. N 134 : 83 I. C. 918 : A. I. R. 1924 Mad. 509 : 46 M. L. J. 32.**

——**O. 34, R. 5**—*Mortgagee can sell in any order in absence of direction in decree.*

A decree-holder is entitled to execute his decree against any of the mortgaged properties where the decree is silent on the point; the judgment-debtor has no legal right to demand that the decree-holder should execute his decree in any particular manner to suit the individual judgment-debtor. (34 Cal. 13, Foll. 41 Cal. 418, 31 Mad. 419, 9 Cal. 406, Dist. (*Spencer and Odgers, JJ.*) NARAYANASWAMI CHETTY *v* VELLAPPA PILLAI. **47 M. 688: (1923) M. W. N. 831 : 38 M. L. T, 181 : 83 I. C, 852 ;**

C. P. CODE (V OF 1908), O. 34, R. 5.

A I. R 1924 Mad. 366 : 45 M. L. J. 722.

——— O. 34, R. 5—*Execution proceedings—Delivery of title deeds—Damages not provided for in decree in case of default—Execution.*

Where the preliminary and the final decree in a mortgage suit directed defendants to deliver up to plaintiffs all documents in their possession or power relating to the plaint property, but did not provide an alternative relief, *viz.*, payment of damages, in the event of non-delivery, *held*, that the Court could not grant such alternative relief by way of execution. *Quare.*—Whether the decree in the absence of specification of documents to be delivered was not too indefinite for execution? (*Ayling, O.C.J. and Odgers, J.*) MARATH SIVARAMAN NAIR *v.* SESHU PATTAR.

16 L. W. 589 : A. I. R. 1922 Mad. 299 : 42 M L. J. 356.

——— O. 34, R. 5—*Final decree—T. P. Act, S. 89—Order absolute—Effect.*

When once an order absolute for sale is made in a mortgage suit, the mortgage-deed as also the right to redeem are both extinguished so that the security cannot be the basis of a second suit. (*Sadasiva Aiyar and Burn, JJ.*) LAKSHMANAN CHETTY *v.* MUTHAIYA CHETTY. 29 M. L. T. 189 : 62 I. C. 833 : 40 M. L. J. 126.

——— O. 34, R. 5—*Application for final decree need not be in writing—Oral application may be presumed in a proper case to have been made.*

An application under O. 34, R. 5 need not be in writing. Where the order is such that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application had been made for it. 22 Bom. 722, Foll. (*Baker, J. C.*) SITARAM *v.* LAXMAN RAO.

A. I. R. 1926 Nag. 152.

——— O. 34, R. 5 and O. 21, Rr. 11 to 24—*Decree for sale of property—Mortgage—Transfer of—Necessity of registration.*

A transfer of a final decree for sale of the mortgaged property passed under O. 34, R. 5, C.P. Code, does not require registration. 35 A. 524 Foll. 8 B. 610 Dist. (*Dalal, J.C.*) DURGA PRASAD *v.* JAKHOO RAM.

2 O. W. N. 70 : 86 I. C. 591 : 12 O L. J. 109 : A I. R. 1925 Oudh 399.

——— O. 34, R. 5—*Power of Court—Court cannot extend time after final decree.*

A Court has no power to extend the time after a final decree is passed in a suit for sale. (*Dalal, A J. C.*) GANGA RATAN *v.* CHANDIKA PRASAD.

9 O. & A. L. R. 319: A I. R. 1924 Oudh 179.

——— O. 34, R. 5—*Limitation.*

Where an appeal is preferred from a preliminary decree, the right to apply for final decree accrues from the date of appellate decree. (*Das and Adami, JJ.*) SAIYAD JOWAD HUSSAIN *v.* GENDA SINGH.

1 P. 444 : 1922 P. H. C. C. 164 : 3 P. L. T. 329 : A. I. R. 1922 Pat. 205.

——— O. 34, R. 5—*Final decree—Mortgage suit—Effect of final decree—Charge not extinguished.*

It is settled law in equity that though a personal covenant is extinguished by a judgment a charge subsists notwithstanding the judgment which does not determine the security or put an end to the charge. 31 Cal. 863, Rel. Mortgagor's right to redeem remains in force till the actual sale and distribution of proceeds. (*Das and Bucknill, JJ.*) MAHOMED MUSA *v.* EDAL SINGH. 3 P. L. T. 232 : A. I. R 1922 Pat. 92.

——— O. 34, R. 5—*Final decree—Application for, necessary.*

An application for execution should not be treated as an application to make the decree final. (*Kennedy, J. C. and Madgavkar, A. J. C.*) SAKER CHAND NARSIDAS *v.* YACOOB. A. I. R. 1923 Sind 14.

C P. CODE (V OF 1908), O. 34, R. 6.

——— O. 34, R. 5 (2)—*Limitation—Suspension of right to apply.*

Plff., the third mortgagee, obtained on 31-1-'11 a preliminary decree under O. 34, R. 4 which fixed 31-7-'11 as the last date of payment by mortgagor. No payment was however made. On 10-3-'14 the second mortgagee got a decree on his mortgage and the Court opined that the third mortgagee cannot sell the property without paying the second mortgagee. Payment was made on 22-5-'15 and on 2-10-'15 applied under R.5 (2) for a decree for sale and the second mortgagee objected that the application was barred. *Held*, that the application was not barred, as the third mortgagee's right was suspended from 10-3-'14 to 22-5'-15, *i.e.*, the date of decree in favour of the second mortgagee and the date of payment. (*Mookerjee, A. C. J. and Fletcher, J.*) HEMANDRA MOHAN *v.* NORESH CHANDRA. 25 C. W. N. 376 : 62 I. C. 418 : 33 C. L. J. 260.

——— O. 34, R. 5 (2)—*Decree on mortgage before 1918—Order absolute—Final decree—Applicability of C. P. Code.*

Where prior to the passing of the C.P. Code of 1908 a decree on a mortgage had been obtained under S. 88 of the T. P. Act, further proceedings have to be continued under the T. P. Act as it stood before repeal and not under O. 34, C. P. Code. 35 M. L. J. 194, Rel. (*Schwabe, C. J. and Waller, J.*) PEDDA ASWATAPPA *v.* ANKULU GADU. 19 L. W. 290 : (1924) M. W. N. 306 : 78 I. C. 70 : A. I. R. 1924 Mad. 603.

——— O. 34, R. 6—*Decree against Hindu widow—Other properties can be attached — Hindu Law—Alienation.*

The secured creditor of a Hindu widow, on the security proving insufficient to satisfy his decree thereon is entitled to proceed against the other properties. (*Neave, J.*) JAGANNATH PRASAD *v.* JADO RAI.

L. R 6 A. (Civ.) 87 : 85 I. C. 963 : A. I. R. 1925 All. 352.

——— O. 34, R. 6—*Application for personal decree—Formalities required for.*

No formalities are required for an application for personal decree under O. 34, R. 6 of the C. P. Code and the application need not be in writing. Even if a written application were necessary, the Court may allow it to be signed at any stage by the decree-holder. (*Mukerjee and Dalal, JJ.*) SANTI LAL *v.* RAI NARAIN. L. R. 5 A. 565 : 82 I. C. 65 : A. I. R. 1924 All. 804.

——— O. 34, R. 6—*Application for personal decree—Order on—Appeal—Court to be paid* ad valorem.

A mortgage decree did not provide for the balance remaining due even after the sale of the properties and on an application being put in under O. 34, R. 6, a personal decree was passed. *Held*, on an appeal for such an order *ad valorem* Court-fees must be paid and not Rs. 2 on the basis that it was a matter in execution. (*Walsh and Ryves, JJ.*) BINDHIACHAL RAI *v.* SITA MISIR. A. I. R. 1924 All. 292.

——— O. 34, R. 6—*Right to personal decree—Money decree—Effect of not challenging.*

Where a preliminary decres for sale obtained by a mortgagee was declared invalid on the ground that the mortgagor as a member of a joint family was not entitled to mortgage the properties in the absence of a legal necessity and thereupon the mortgagee obtained a decree under O. 34, R. 6 for the money due and this was not objected to or challenged in appeal by the mortgagee, the purchaser of the property in execution

C. P. CODE (V OF 1908), O. 34, R. 6.

obtains a good title. (*Walsh and Ryves, JJ.*) TEJA *v.* TIKA RAM. **21 A.L.J. 754 : L. R. 4 A (Civ.) 522 : 46 All. 32 : A.I. R. 1924 All. 225 (2).**

———O. 34, R. 6—*Combined decree—Personal decree against mortgagor—Form of.*

Where there is a personal covenant in a mortgage deed, the proper form of the decree is to direct that if the net proceeds of the sale are insufficient to pay the amount due to the plaintiff, then the plaintiff to be at liberty to apply for a personal decree against the defendants for the amount of the deficit. It is not proper to direct that in default of payment of the decretal amount the plaintiff is to be at liberty to recover the same by applying for sale of the mortgaged property or sufficient portion thereof. (*Macleod, C. J. and Shah, J.*) KESHAV *v.* GOVIND.
24 Bom. L. R. 843 : 75 I. C. 188 : A. I. R. 1923 Bom. 32.

———O. 34, R. 6—*Right to personal decree barred—Rights of mortgagee.*

Where a mortgage decree gives the mortgagee a remedy against the mortgaged properties, the personal remedy on the money claim against the mortgagor being barred, the only way in which the mortgagee can recover the money is by sale of the mortgaged property. (*Macleod, C. J. and Coyajee, J.*) HANMANT TIMAJ DESAI *v.* RAGAVENDRA RAO.
46 Bom. 848 : 24 Bom. L. R 410 : A. I. R. 1922 Bom. 237.

———O. 34, R. 6—*Personal liability—Scope of.*

The personal liability of a mortgagor arises only after first exhausting all remedies against the person of the mortgagor but this does not mean that in a case where a portion of the mortgaged property is destroyed there can be no personal liability. (*Mookerji and Rankin, JJ.*) CHAND MALL BABU *v.* BAN BEHARI BOSE. **50 Cal. 718 : A. I. R. 1924 Cal. 209.**

———O. 34, R. 6—*Personal liability—Transfer and redemption of mortgage—Covenants for payment of debt—Appellate Court—Power to pass decree.*

Where the mortgagor covenants to transfer the hypothecated properties indefeasibly to the mortgagee, with the usual clause for redemption, and further covenants to pay the mortgage-debt with interest to the mortgagee, his heirs and assigns, the latter clause is a personal covenant to pay out of properties other than the hypothecated properties, as the latter clause would be entirely superfluous, if the parties had no intention that the mortgagor should be personally liable to pay to the mortgagee the money due to him. Therefore in such cases the mortgagee is entitled to a decree for sale but also to a personal decree against the mortgagor. 10 Cal. 740 ; 16 Cal. 540, Dist. A personal decree can be made against the mortgagor at the appellate stage. 47 Cal. 370, Foll. (*Mookerjee and Buckland, JJ.*) ASKARAN BOID *v.* GOBORDHAN KOBRA. **26 C. W. N. 318 : A. I. R. 1922 Cal. 52.**

———O. 34, R. 6—*Transfer of Property Act creates a charge on specific properties—Decree is executable against other properties if charged properties are exhausted.*

Where maintenance is awarded to a Hindu widow by a decree which charged specific properties for its payment, the decree may be executed against other properties in the event of the exhaustion of the charged ones, provided that the other properties sought to be proceeded against belonged to the widow's husband. No application under O. 34, R. 6, Code of Civil Precedure, is requisite. (*Mullick and Bucknill, JJ.*) SHACHARI PEARI *v.* RAM KISHORI KUER.
2 P. 796 : 74 I. C. 867 : A. I. R. 1924 Pat. 262.

———O. 34, R. 6—*Omission to claim personal decree.*

C. P. CODE (V OF 1908), O. 34, R. 7.

Where the cause of action is the failure to repay the principal and interest due under the bond and the relief claimable is both against the property hypothecated and against the executants of the bond on their covenant to repay. If the mortgagees omitted to sue for a personal decree against the mortgagors on the covenant, they, could not afterwards sue for that which was omitted. It is not usual or necessary to ask for a personal decree where the property is held liable for the whole of the principal debt and interest except in so far as the proceeds may be insufficient but it is quite open to the Court to pass a decree against the mortgagors on their covenant to repay the whole if a part of the claim should be held not to be chargeable on the property. (*Miller, C.J. and Bucknill, J.*) HARI PRASAD SINGHA *v.* BABU SOURENDRA MOHON SINHA. **1 P. 506 : 3 P. L. T. 709 : A.I. R. 1922 Pat. 450.**

———O. 34, R. 6—*Right to personal decree—Mortgage decree—Sale of some out of several items—Sale of others not permitted.*

A decree holder who has sold some of the mortgaged property but the net profits have proved to be insufficient to pay the amount of the decree and he is not allowed to sell the rest, he is entitled to a personal decree under O. 34, R. 6. (*Jwala Prasad and Ross, JJ.*) SAMANTA *v.* LOKENATH. **2 P. L. T. 736 : 61 I. C. 635 : 6 P. L.J. 106.**

———O. 34, R. 6—*Personal liability* — Ex parte *decree on—Court can set aside.*

A Court can set aside an *ex parte* decree, passed by oversight under O. 34, R. 6 as against that person who is not the mortgagor. (*Jwala Prasad, J.*) HANUMALAL *v.* RAM PEARI KOER. **60 I. C. 368 : 2 Pat. L. T. 251.**

———O. 34, R. 7.

See also O. 34, RR. 2 AND 4.

———O. 34, R. 7—*In redemption suits no decree for accounts can be passed previous to preliminary decree—But interlocutory order for accounts can be passed—C. P. Code, O. 20, R. 13.*

To pass first a decree for taking accounts and then a preliminary decree for redemption in a suit for redemption is an irregularity. The Court can pass an interlocutory order for accounts but not a decree for accounts. In the present case where two decrees were passed like this and the High Court decided that they should be treated as if they constituted one decree only, viz., as a preliminary decree for redemption, a later Bench of the High Court regarded the appeals from the two decrees as an appeal from a preliminary decree for redemption. (*Lindsay and Kanhaiya Lal, JJ.*) NOUNILAL SINGH *v.* A. G. SKINNER.
47 All. 803 : 23 A. L. J. 691 : A. I. R. 1925 All. 707.

———O. 34, R. 7—*Redemption suit—Decree of appellate Court—Costs being a charge on property or not depends on interpretation of decree in each case—Construction of decree should accord with R. 7.*

In a redemption suit, the trial court declared the plaintiff entitled to possession of the property on payment of Rs. 1,816-10-6. The decree of the appellate Court said that it was increasing the amount of money payable to the mortgagees by a sum of Rs. 175. Then it said that a total sum of Rs. 1,991-10-6 was payable by the plaintiff to the defendants on or before the 2nd of March, 1921. After having said so much the Court went on to say that certain costs were payable by the plaintiff to the defendant. After making these statements the decree went on to say. "If the plaintiff paid the sum aforesaid within the 2nd March" 1921 etc., etc. *Held* : (Per *Mukerji, J.*) That it was open to the appellate Court either to pass a personal decree

C. P. CODE (V OF 1908), O. 34, R. 7.

against the successful party or to make the costs payable out of the mortgage property. In every case it was a matter of interpretation what was intended by the appellate Court In the present case it was not the intention of the Court to make the costs as stated in the decree a charge on the property. *Held*: (Per *Daniels, J.*):—Even if it be possible to read the words "the aforesaid sum" as referring only to the sum of Rs. 1,991 that construction of the decree should be adopted which was in accordance with the law as laid down under O. 34, R. 7 and with the universal practice of the Courts in such cases which directs that the costs of the suit should form part of the sum payable in order to effect redemption. The costs in this case should therefore be held to have been intended to be made a charge on the property and the mortgagor was not entitled to recover possession without depositing the full amount of costs over and above the Rs. 1,991. (*Mukerji, J.*) SHEO DARSHAN SINGH *v.* BENI CHOUDHARI. **L. R. 6 All 225 : 87 I. C. 585 : A. I. R. 1925 All. 492.**

——**O. 34, Rr. 7 and 8**—*T. P. Act, S. 60—C. P. Code,, S. 11—Previous decree directing mortgagee to withdraw mortgage money deposited by mortgagor and to deliver property to mortgagor—Subsequent suit for redemption is barred*

If the right of redemption still subsists, not having been extinguished either by an act of the parties or by an order of the Court, a second suit for redemption would lie. The order that would extinguish the right of redemption need not be an order purporting to extinguish that right. All that is necessary to bar a second suit is an order of the Court which would have the effect of extinguishing the right of redemption. In the previous suit a decree was passed directing the mortgagee to take the mortgage money which had been deposited in Court by the mortgagor and to deliver the property to the mortgagor. The mortgagor applied for delivery of the property Afterwards he gifted the property to the plaintiff. The application for the delivery of the property was subsequently dismissed. The plaintiff brought another suit to redeem the property. *Held*, that the decree in the previous suit was not one under C. P. Code, O. 34, R. 7, but was a combined decree under O. 34, R. 8 and, as under it the mortgagee was permitted to withdraw the money that had been already deposited in Court, it had the effect of extinguishing the mortgage and a second suit for redemption was barred. (*Mukerji, J.*) RUDRAPAL SINGH *v.* MATABADAL SINGH. **85 I. C. 480 : L. R. 6 A. (Civ.) 241 : A. I. R. 1925 All. 484.**

——**O. 34, Rr. 7 and 8**—*Mortgage—Preliminary decree for redemption—Contents.*

There is a certain amount of inconsistency between Rr. 7 and 8 of O. 34 of the Code. A preliminary decree in a mortgage suit ought not to direct more than this, that if a plaintiff makes a default, then the mortgagee should have a right to ask for a final decree either for foreclosure or sale, as is provided for by R. 8 of O. 34 of the Code. (*Macleod, C.J.*) KUSHABA *v.* BUDHAJI. **46 Bom. 348 : 23 Bom. L. R. 1176 : A. I. R. 1922 Bom. 127.**

——**O. 34, Rr. 7 and 9**—*Suit for recovery of surplus profits from usufructuary mortgagee—Limitation Act, Sch. I, Arts. 105 and 148.*

A claim of a mortgagor for recovery of over-payment or the surplus profits received by the mortgagee is a relief included in a suit for redemption governed by Art. 148 of the Limitation Act But such a suit would be governed by Art. 105 of the Act where the mortgagee gave up possession after the mortgage debt had been satisfied and the mortgagor entered into possession otherwise than by means of a suit for redemption (*Chatterjee and Newbould, JJ.*) PRASANNO KUMAR MANDAL *v.* NILAMBAR MANDAL. **26 C. W. N. 123 : A. I. R. 1922 Cal. 189.**

——**O. 34, R. 7**—*Decree in previous redemption suit not providing that if plaintiff did not pay within prescribed time he should be debarred from all rights to redeem—Subsequent redemption suit is not barred by O. 34, R. 7 or by S. 11—C. P. Code, S. 11.*

Where it was provided in the previous decree that on plaintiff's failure to pay the money and the Court-fees within the prescribed period the decree could not be executed. But the decree was not drawn up in the manner prescribed by O. 34, R. 7 of the C. P. Code, and did not contain any clause that, if payment was not made on or before the date fixed by the Court, the plaintiff should be debarred from all right to redeem or that the mortgaged property should be sold, and where no final decree was passed under R. 8, *held* another suit for redemption was not barred either by O. 34, R. 7 or by S. 11. (*Scott-Smith and Fforde, JJ.*) ARURA *v.* BUR SINGH. **5 Lah. 371 : 84 I. C. 67 : A. I. R. 1925 Lah. 31.**

——**O. 34, R. 7**—*Redemption suit—Decree for possession on payment of money—If executable.*

A redemption decree provided that on payment of a certain sum of money within a certain time possession of the lands was to be given. *Held*, it was not a preliminary decree under O. 34, R. 7 and could be executed. (*Moti Sagar, J.*) MAHABIR PRASAD *v.* KARTAR SINGH. **A. I. R. 1924 Lah. 635.**

——**O. 34, R. 7**—*Suit for redemption—Amount declared due by the preliminary decree—Mesne profits accruing after the date of payment made according to the decree—Separate suit, whether maintainable—English practice, how far to be followed in India.*

Mesne profits accruing after the date of payment made according to a decree passed under O. 34, R. 7 can be the subject of a separate suit. A mortgagor suing for redemption must bring into account all monies due to either party in connection with the mortgage up to the day fixed under R.7 of O.34 of the Code of Civil Procedure, though he is neither obliged nor is he entitled to have any items of later date brought into account. The date so fixed is superseded by the actual payment if there is any payment. The day fixed is what is called in English Law the date of default. Either there is payment, which may be on that date or earlier, or there is default. In either case the relation of the parties is changed, in the one direction by payment, the plaintiff being then entitled to possession or at least to a final decree for possession, in the other direction by default, the plaintiff being then deprived of his right to redeem. Therefore, a separate suit lies for any items received after the mortgagor has paid into Court the full amount declared due by the preliminary decree. (*Simpson, A. J. C.*) ABU JAFAR *v.* RAGHOINDRA PARTAB SAHAI. **2 O. W. N. 826.**

——**O. 34, R. 7**—*Suit for redemption—Procedure—Preliminary decree—Direction as to taking up accounts—Procedure.*

Under O. 34, R. 7 of the C. P. Code the Court may either order that an account shall be taken of what will be due to the defendant for the principal and interest due on the mortgage, and for his costs of the suit, if any, or declare the amount due at the date of such order; but in either cases the Court should proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non-payment thereof would be. If it merely directs that an account should be taken of what

C. P. CODE (V OF 1908), O. 34, R 7.

would be due to the mortgagee for the principal and interest due on the mortgage as was originally done by the learned Subordinate Judge here, its order would be nothing more than an interlocutory order, to be followed by the making up of such an account, till which preliminary decree should not be prepared. (*Kanhaiya Lal, J.C.*) MOHKAN SINGH *v.* THAKUR CHANDRA PAL SINGH

10 O. L. J. 374 : A I. R. 1924 Oudh 140.

——O. 34, R 7 (c) and 8 (4) and O. 21, R. 89— *Decree for redemption—Failure of parties to take steps according to the decree—Parties are entitled to be restored to the same position in which they were on passing of the decree in a suit by a mortgagee for possession on mortgagors dispossessing him forcibly.*

Inasmuch as the payment by mortgagor is not barred either by the relapse of the period prescribed in the redemption decree or by Art. 181 of the Limitation Act he can save the mortgage property from sale at any time before the sale is confirmed. Where after a decree for redemption is passed under O. 34, R. 7 the mortgagor neither pays the amount of the mortgagee within the time fixed by the decree nor the mortgage applies for sale on the expiry of such period and then the mortgagee is dispossessed forcibly the parties are entitled to be restored to the same position in which they were on passing of the redemption decree in the suit brought by mortgagee for possession. It is open to them to work out the decree in terms of its directions if that is not legally barred. After the expiry of the period fixed by decree without payment of the decretal amount, the mortgagee has a right to apply under Rule 8 (4) of Order 34 for a decree for sale of the mortgage property but that does not take away mortgagor's right of redemption which he has got even after sale under R. 89, O. 21. (*Wazir Hasan, A. J. C.*) MD. BAQUAR KHAN *v.* JAGAT NARAIN LAL.

28 O. C. 46 : 80 I. C. 760 : A. I. R. 1925 Oudh 255.

—— 0. 34, R. 7 (d)— *No applicability to—Co-mortgagor redeeming whole mortgage.*

Order 34, R. 7, cl. (*d*) applies to the case of a mortgagee only and has no application to the case of a co-mortgagor who had redeemed the entire mortgage. (*Scott-Smith and Brasher, JJ.*) ALI AKBAR *v.* SULTAN-UL-MULK. **A. I. R. 1923 Lah. 129.**

——0. 34, R. 8— *Consent decree not barring plaintiff's right to redeem—Second suit for redemption is competent—Limitation Act, Art. 148.*

When under a compromise arrived at in a redemption suit the parties did not agree that plaintiff's right to redeem would be extinguished absolutely, he is not prevented from bringing a second suit for redemption. The mortgagee is still a mortgagee and does not become the absolute proprietor of the property. A. I. R. 1922 All. 377 and A. I. R. 1925 Lah. 31, Ref. (*Sulaiman and Daniels, JJ.*) MAHOMADI BEGUM *v.* TUFAIL HASAN.

23 A. L. J. 888 : A. I. R. 1926 All. 20.

——0. 34, Rr. 8, 7 and 9— *Deposit under S. 83 of T. P. Act—Final decree can be passed once for all.*

Where there is a valid mortgage and a deposit is made in the Court by the mortgagor to redeem it, the Court is not bound to first pass a preliminary and then a final decree which means the prolongation of the proceedings, if no injustice will be done to either party by the passing of the final decree at once. (*Gokul Prasad, J.*) SETH ROSHAN LAL *v.* BHURI SINGH.

A. I. R 1922 All. 479.

——0. 34, R. 8— *Order refusing to extend time—Second appeal does not lie.*

Where a petition for extension of time under O. 34, R. 8 is dismissed, an appeal lies against the order under O. 43, R. 1 (*o*) but no second appeal lies. (*Shah, A. C. J. and Kemp. J.*) DATTATRAYA VITHAL GARWARE *v.* VASUDEO ANANT GARGATE.

47 Bom. 956 : 25 Bom. L. R. 920 : A. I. R. 1924 Bom. 98.

——0. 34, R. 8— *Redemption by an unauthorised person.*

Redemption of a mortgage by an unauthorised person does not validly discharge the mortgage. (*Abdul Raoof and Abdul Qadir, JJ.*) RAGHO *v.* DWARKA DAS.

10 P. W. R. 1923 : 79 I. C. 687 : A. I. R. 1924 Lah. 738.

——0. 34, R. 8— *Right of mortgagor to pay the amount fixed by the preliminary decree for redemption at any time before final decree for sale or foreclosure.*

A preliminary decree for redemption was passed with consent of parties fixing the amount to be paid and the time within which it should be paid. More than 12 years after the time fixed for payment the mortgagor tendered the amount into Court and prayed for the passing of a final decree for redemption under O. 34, R. 8, cl. (1) of the C. P. Code. The mortgagee objected that the mortgagor had lost the right of redemption, as more than 12 years had elapsed from the due date when his possession became adverse. *Held*, that so long as no final decree for sale or foreclosure was passed, the mortgagor had the right to pay the amount due under the preliminary decree. (*Dalal, J.*) BHAWANI PRASAD SINGH *v.* RAM RATI KUNWAR. **28 O. C. 261 : 90 I. C. 418 : A. I. R. 1925 Oudh 649.**

——0. 34, R. 8— *Mortgage decree—Preliminary decree—Redemption—Money not paid in time—Effect of.*

Until the mortgagee chooses to take action and bring the property to sale, the mortgagor judgment-debtor under the decree absolute has no right to move in the matter. The intention of O. 34, R. 8, C. P. Code, is that an end should be put to the mortgage once a suit for redemption is brought, and such an intention would be defeated if the mortgagee after obtaining the decree absolute for sale is permitted not to proceed with the sale, and to prevent the mortgagor from satisfying the decree. (*Dalal, A J. C.*) HAYAT MAHOMED *v.* NAGESWARI PRASAD. **26 O. C. 306 : 9 O. & A. L. R. 315 : A. I. R. 1923 Oudh 236.**

——0. 34, R. 8— *Proviso—Extension of time—Contract rate of interest.*

Where a mortgagor seeks an extension of the time allowed by the decree for payment of the decree amount and is allowed an extension, he must pay interest at the contract rate during the extended period. (*Daniels, A. J. C.*) MT. BASHI RAM *v.* BISHAMBAR NATH.

9 O. L. J. 439 : A. I. R. 1922 Oudh 268.

——0. 34, R. 8 (4)— *Duty is on the mortgagee to apply for obtaining a decree directing sale of the mortgage property.*

The mortgagor is not required by any rules of procedure to make an application and obtain an order thereon before he can pay the amount fixed by the decree for redemption of the mortgage. On the contrary, the duty is laid on the mortgagee to make an application under O. 34, R. 8 (4) for the purpose of obtaining the decree directing the sale of the mortgage property. (*Wazir Hasan, A. J. C.*) MD. BAQUAR KHAN *v.* JAGAT NARAIN LAL. **28 O. C. 46 : 80 I. C. 760 : A. I. R. 1925 Oudh 255.**

——0. 34. R. 8 (4)— *Application under—Limitation Act, Art. 181.*

Article 181 of the Limitation Act applies to an application under O. 34, R. 8 (4). (*Wazir Hasan, A. J.*

C. P. CODE (V OF 1908), O. 34, R. 10.

C.) MT. BAQUAR KHAN *v.* JAGAT NARAIN LAL.
28 O. C. 46 : 80 I. C. 760 : A. I. R. 1925 Oudh 255.

——**0. 34, R. 10**—*Costs incurred by mortgager—Objections in execution and appeal—Liability personal.*

The costs mentioned in O. 34, R. 10 are costs which are properly incurred in the suit in carrying out the directions contained in the decree. Costs incurred in subsequent objections to execution proceedings or in appeals from orders passed in execution are not covered by R. 10, and the liability of the same is personal. (*Sulaiman, J.*) HET RAM *v.* RAJAH DAT PRASAD SINGH. **L. R. 6 A. 530 : 88 I. C. 829 : A.I.R. 1925 All. 68.**

——**0. 34, R. 10**—*Costs claimable under—Only costs in execution.*

Costs which should have been included in final decree, not claimable in execution. (*Ryves and Gokul Prasad, JJ.*) DAMBAR SINGH *v.* KALLYAN SINGH. **L. R. 3 A. 164 : 44 A. 350 : 65 I. C. 799 : 20 A. L. J. 170 : A. I. R. 1922 All. 27.**

——**0. 34, R. 13**—*Mortgagee whose final decree for sale is barred by time is not entitled to a share in the surplus—T. P. Act, S. 89.*

After a mortgagee obtains a decree for sale he becomes a decree-holder and not a mere mortgagee. If he allows his rights under that decree to become barred by time he cannot be said to be a person who still has interest in the property sold and therefore he is not entitled to any surplus of the sale proceeds of the mortgaged property sold in execution of prior mortgage decree. (*Sulaiman and Kanhaiya Lal, JJ.*) MAHAMMAD ABDUL RAHIM KHAN *v.* RAM BHAROS OJHA. **22 A. L. J. 825 : L. R. 5 A. (Civ.) 596 : 83 I. C. 1033 : A. I. R. 1925 All. 6.**

——**0. 34, R. 13**—*Applicability—Puisne mortgagee not party—Claim to surplus.*

There is nothing in O. 34, R. 13 to show that it applies only to cases where a subsequent encumbrancer is a party to the suit and the decree in execution. A puisne mortgagee who is not a party to the suit can claim to the surplus sale proceeds. (*Devadoss, J.*) KRISHNASAMI BHAGAVATAR *v.* THIRUMALAI IYER. **90 I. C. 410.**

——**0. 34, R. 14**—*Personal remedy—Mortgagee obtaining simple money decree—Property under mortgage can be sold in execution.*

A mortgagee, who has obtained a simple money-decree, is competent, to bring the mortgaged property to sale in execution of his decree, if the mortgage has ceased to be enforceable. (*Walsh and Wallach, JJ.*) TANSUKH RAI *v.* SRI GOPAL. **19 A. L. J. 728 : 63 I. C. 445 : 43 A. 677.**

——**0. 34, R. 14**—*Money decree under a different mortgage—Rule does not apply.*

Where there are simultaneous and different mortgages which could reasonably be treated as constituting one transaction the Court would be slow to allow the plaintiffs to resort to a device which would enable them to do something which it is the object of Rule 14 to prevent. But where the transactions are distinct and independent, it does not matter if the plaintiffs seek to enforce the decree against the mortgaged property so long as the claim in respect of which they have obtained a decree is not a claim under the particular mortgage. Whether the claim arises under another mortgage or is a simple money claim cannot make any difference to the application of Rule 14. (*Shah, Ag. C. J. and Kincaid, J.*) BAI NURJAN BEGAM *v.* HANSRAJ JETHUMAL AND CO.
49 Bom. 208 : 86 I. C. 370 : 27 Bom. L. R. 202 : A. I. R. 1925 Bom. 239.

C. P. CODE (V OF 1908), O. 34, R. 14.

——**0. 34, R. 14**—*Sale in contravention of—Effect of—Sale in execution of money decree—Purchase.*

Under O. 34, R. 14, C. P. Code, is confined only to claims arising under the mortgage and has no application to a case where the sale takes place in execution of a decree for money upon a claim not arising under the mortgage. 5 B. L. R. 450 ; 32 C. 296, Ref. (*Chatterjee and Pearson, JJ.*) RAJA JAGADISH CHANDRA DEO DHABAL DEB *v.* BHUBANESHWAR MITRA. **27 C. W. N. 38 : 37 C. L. J. 265 : A. I. R. 1923 Cal. 121.**

——**0. 34, Rr. 14 and 15**—*Charge on property—Claim for future maintenance—Remedy by suit—Execution.*

The mortgage charge mentioned in O. 34, R. 14, C. P. Code, is a mortgage or charge existing prior to the date of the decree and not one created by the decree. The principle that a person who holds a mortgage or charge should have recourse to a suit, is recognised for the benefit of the person against whom the mortgage or charge may have to be enforced and it is competent to such a person to waive the protection accorded to him by O. 34, R. 14, C. P. Code, or by S. 99, T. P. Act. The petition of compromise which was incorporated in the decree stated that the plff. would be entitled to a maintenance at the rate of Rs. 4 per month, and that if the amount was not paid from month to month, the plaintiff would be entitled to realise the sum from the defendant by execution of the decree. The petition finally recited that all the properties mentioned in the schedule to the plaint would remain charged for the payment of the allowance as maintenance. *Held*, that the decree-holder was entitled to recover in execution without further suits, the allowance as it accrued due. It is not competent to the judgment-debtors to resile in execution proceedings and contend that notwithstanding the express provisions of the decree, the decree-holder must be driven to a separate suit. (*Mookerjee and Panton, JJ.*) INDRAMANI DASI *v.* SURENDRA NATH MANDAL.
35 C. L. J. 61 : A. I. R. 1922 Cal. 35.

——**0. 34, R. 14**—*Applicability—Civil Procedure Code, O. 20, R. 11 (2)—Security bond given by judgment-debtor to decree-holder pursuant to order under—Enforcing of, in execution—Decree-holder's right of—Decree against father only—Bond given by father and sons—Adjudication of judgment-debtor as an insolvent subsequent to execution of bond—Effect.*

Immoveable properties given by a judgment-debtor as security pursuant to an order made under O. 20, R. 11, Cl. (2) of Civil Procedure Code can be realised by the decree-holder in execution, and he is not obliged to have recourse to a regular suit for the purpose. O. 34, R. 14 of Civil Procedure Code is no bar to the decree-holder realising such security in execution. The mortgage or charge mentioned in O. 34, R. 14, Civil Procedure Code, must obviously be a mortgage or charge existing prior to the decree and not one created by the decree itself or one created by the act of parties subsequent to the decree. The words "claim arising under the mortgage" have been substituted in O. 34, R. 14, Civil Procedure Code, for the words "any claim whether arising under the mortgage or not" in the repealed S. 99 of the Transfer of Property Act ; and the effect of this alteration is to confine the prohibition against bringing the mortgaged property to sale except by bringing a suit, to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. *Held further*, that neither the terms of the security bond by which the security referred to above was given nor the order of the Court passed as a result of the execution of such bond pre-

C. P. CODE (V OF 1908), O. 34, R. 14.

cluded the security from being enforced in execution. *Held also*, that the fact that the decree was passed against the father only while the bond was executed by him and his sons was not a bar to the security being enforced in execution. (*Venkatasubba Rao and Madhavan Nair, JJ.*) OFFICIAL RECEIVER, TANJORE *v.* NAGARATNAM. **49 M. L. J. 643.**

——O. 34, R. 14—*Mortgage and lease back in same transaction—R. 14 applies though mortgagee obtains decree for rent on the lease document alone.*

Where there was a mortgage with possession and lease back on the same day, the two documents must be treated as one. Though in the lease deed it is agreed that arrears shall be paid by the sale of the equity of redemption, this is not sufficient to justify their being treated as separate documents. Once the two documents are treated as one, although the mortgagee may obtain a decree for rent on the lease document alone, nevertheless his claim is one arising under the mortgage and within the mischief of O. 34, R. 14. (*Jackson, J.*) N. C. LAKSHI-KUTTI AMMA *v.* V. MARIA THUMMA. **20 L. W. 649 : 35 M. L. T. 118 : (1924) M. W. N. 771 : 82 I. C. 504 : A. I. R. 1925 Mad. 127 : 47 M. L. J. 798.**

——O. 34, R. 14—*Money-decree—Sale of property in execution.*

The rule does not bar the sale of the mortgaged property in execution of a money decree obtained in respect of the property, the mortgage right being extinguished by limitation, compromise or some other legal defect. (*Spencer and Ramesam, JJ.*) ARUMUGAM PILLAI *v.* ALAGAPPA CHETTIAR. **(1921) M. W. N. 376 : 62 I. C. 756 : 14 L. W. 331 : 41 M. L. J. 160.**

——O. 34, R. 14—*Decree declaring a charge on certain property of defendant—Charge can be enforced in execution—Separate suit is not necessary—Execution—Declaratory decree.*

It is not necessary that in every case where it is sought to enforce a charge created by a declaratory decree the person for whose benefit the charge is created must resort to the procedure for enforcement of claims under a mortgage. 2 P. L. J. 55, Foll; 1 P. L. W. 69, Dist, and 22 Cal. 859, Not Foll. Plaintiff obtained a decree declaring that she was entitled to a certain maintenance allowance from the defendant to be recovered from certain properties belonging to the defendant. In execution of this decree the plaintiff made an application for the recovery of a certain sum on account of arrears of maintenance by sale of the properties charged. *Held*, that although the decree obtained by the plaintiff was declaratory in form it was capable of execution and the decree obtained by the plaintiff being a money decree the interest of the judgment-debtor in the properties charged with the payment of maintenance allowance could be sold in execution of the decree. The provision of R. 14 of O. 34 of the C. P. Code, did not apply to such a case (*Mullick and Ross, JJ.*) HARI SANKAR RAI *v.* TAPAIKUER. **4 Pat. 693 : 6 P. L. T. 802 : A. I. R. 1926 Pat. 31.**

——O. 34, R. 14—*Compromise decree—Provision for payment of mortgage money in instalments—Default—Provision for sale—Effect of.*

In a suit for sale on a mortgage instead of the usual mortgage decree a compromise decree was passed which provided that the judgment-debtor should pay the decretal amount in certain instalments, and if he should fail in the payment of three consecutive instalments, then execution for the whole amount should issue against the other property of the judgment debtor and in the event of the amount not being

C. P. CODE (V OF 1908), O. 37, R. 3.

realised in that manner, against the mortgaged properties. *Held*, that the decree itself ordered, in the event of default and in the event of the other properties of the judgment-debtor proving insufficient, a sale of the mortgaged property and it was not necessary for the decree-holders to bring a suit for the sale of the property merely because the other remedy given under the decree has proved infructuous. The decree in the case was something more than a decree for the payment of the money in satisfaction of a claim arising under a mortgage and O. 34, R. 14 did not govern it. (*Miller, C. J. and Kulwant Sahay, J.*) CHAURASI MAHASARICK *v.* BHAGVAN SAHU. **1923 P. H. C. C. 209 : 2 Pat. 787 : A. I. R. 1924 Pat. 20.**

——O. 34, R. 14—*Mortgagee suing on mortgage debt cannot sell bare equity of redemption on execution.*

The object of O. 34, R. 14 is to prevent mortgagees from suing their mortgagors on the mortgage debt as such and in execution selling the bare equity of redemption depriving the mortgagor of the right of redemption that would be given to him by the decree for sale (*Raymond and Madagavkar, A. J. Cs.*) MURAD *v.* DAYARAM. **78 I. C. 49 : A. I. R. 1925 Sind. 156.**

——O. 34, R. 15—*Mortgage—Prior and puisne mortgagees—Decree obtained by one without impleading the other—Rights.*

The rule that under the new Code of Civil Procedure the puisne mortgagee can bring the mortgaged property to sale without impleading a prior mortgagee would apply in an ordinary case in which the property belongs to the mortgagor, but where the relief claimed by the puisne mortgagee is against the mortgaged property which has been sold in satisfaction of a decree on a prior mortgage to which he was not a party, the rule would not apply. He must first redeem the prior mortgage and then bring the property to sale. (*Gokul Prasad, J.*) BENARSI GOLDSMITH *v.* BHUL LAU. **A. I. R. 1923 All. 423.**

——O. 37—*Suit under on promissory note—Oral agreement as to payment of interest—Decree.*

In a suit on a promissory note instituted under Chapter 37 of the C. P. Code where no leave had been obtained to defend the suit the plaintiff is not entitled to a decree for interest at 18 per cent on the strength of an oral agreement alleged in the plaint. The plaintiff can only get interest at 6 per cent. (*Rankin, J.*) KADER BUKSH *v.* SHAIKH SERAJUDDIN. **49 Cal 716 : A. I. R. 1922 Cal. 513.**

——O. 37—*Suit under—Limitation Act, Art 5—Applicability.*

Art. 5 of the present Limitation Act does not apply to suits under O. 37 of the C. P. Code. (*C. C. Ghose, J.*) RABINDRA NATH DUTT *v.* ABDUL AHAD. **52 C. 954 : 29 C. W. N. 589 : 41 C. L. J. 368 : 88 I. C. 400: A. I. R. 1925 Cal. 781.**

——O. 37—*Defence doubted by Court—Procedure.*

Where in a suit on a pro-note under O. 37, the deft. applies for leave to appear and defend the suit, and the Court doubts the sincerity of the defence, it should grant leave on condition that the deft. should pay into Court the amount claimed. (*Wallis, C. J. and Hughes, J.*) CHAKRAPANI CHETTIAR *v.* KAMALAVALI AMMAL. **60 I. C. 639 : 12 L. W. 712.**

——O. 37, R. 3—*Where after many hearings on final hearing day defendant's vakil states he has no instructions but Court proceeds with case on merits, order is not under O. 9, R. 13 but O. 37, R. 3 applies.*

Where after many hearings the defendant's Vakil, states on the final hearing day that he has no instruc-

C. P. CODE (V OF 1908), O. 37, R. 3.

tions, but the Court disposes of the case on the merits there is an appearance and O. 37, R. 3 applies to the case. The remedy of the deft. against the Court's order is by way of appeal and not by way of an application to set aside the decree as if it had been made under O. 9, R. 13. (*Phillips and Odgers, JJ.*) BALAKRISHNA AIYAR *v.* MUTHAMMAL.

82 I. C. 1028 : A. I. R 1925 M. 316.

——— **O. 37, R. 3**—*Leave to defend—Grant of—Discretion of Court—Principles—Payment into Court or furnishing security—Condition as to—Order imposing—When proper.*

The question to be considered on application under O. 37, R. 3, C. P. Code, is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is and must, as a rule, bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting leave to defend. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases, where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time. (*Schwabe, C. J. and Ramesam, J.*) PERIYA MIYANA MARAIKAYAR *v.* SUBRAMANIA AIYAR. **19 L. W. 342 : (1924) M. W. N. 240 : 34 M. L. T. 310 : 78 I. C. 505 : A. I. R. 1924 Mad. 612: 46 M. L. J. 255.**

——— **O. 37, Rr. 7 and 8**—*Interest up to redemption.*

The parties did not complete redemption of a mortgage if it remained unredeemed on the expiry of four years from date as agreed. *Held*, the mortgagee in possession is entitled to damages and the fair measure of damages is *prima facie* the rate of interest determined by the parties in their original contract. Before the defendant can be redeemed the plaintiff must pay him interest in accordance with the terms of the contract up to the date of redemption. (*Le Rossignol and Harrison, JJ.*) MANGLI *v.* BIDHA LAL.

A. I. R. 1923 Lah. 404.

——— **O. 38**—*Small Cause Court—If can attach immoveable property.*

Small Cause Court cannot attach immoveable property. (*Rankin and B. B. Ghose, JJ.*) SADEK ALI *v.* SAMED ALI. **28 C. W. N. 16 : A. I. R. 1924 Cal. 193.**

——— **O. 38, R. 1**—*Intent to delay—Attendance in Court at another place.*

Where a person has to leave his place of residence for attendance in a Criminal Court, his departure is not with a view to delay the plaintiff or avoid the process of Court or to obstruct or delay execution. Court is not justified to issue an order under O. 38, R. 1, C. P. Code. (*Chevis, A. C. J.*) DAULAT RAM *v.* KIRPA RAM. **4 Lah. L. J. 423.**

——— **O. 38, Rr. 1 and 5**—*Arrest and attachment before judgment—Mortgaged property.*

The power of the Court to issue simultaneous execution for arrest and attachment is entirely discretionary and the Court has the same power in matters before judgment limited by the provisions of O. 38, C. P. Code. Even mortgaged property may be attached before judgment in a mortgage suit. (*Duckworth and Godfrey, JJ.*) K. O. M. SYED HOOSSEIN *v.* S. R. M. M. C. T. CHETTY FIRM. **3 Bur. L. J. 159 : 2 Rang. 362 : A. I. R. 1924 Rang. 361.**

C. P. CODE (V OF 1908), O. 38, R. 5.

——— **O. 38, R. 2 (2)**—*Surety—Extent of liability—Production of judgment-debtor.*

Where a person stands surety under O. 38, R. 2, C. P. Code, for another arrested before judgment the surety is not discharged from liability unless at the time when the judgment-debtor is produced, he can be called upon to pay up the decree amount or suffer imprisonment in default. The mere production of the debtor with a production order does not absolve the surety. (*Maung Kin, J.*) SUBRAMANIA IYER *v.* ABDUL RAHMAN. **11 L. B. R. 444 : 1 Bur. L. J. 196 : A. I. R. 1923 Rang. 98 (3).**

——— **O. 38, R. 5**—*Intent to obstruct or delay is essential.*

Intent to obstruct or to delay the execution within the terms of the rule must be clearly proved. Vague allegations about the defendant being about to remove the whole or any part of the property from the local limits of the jurisdiction of the Court will not suffice. (*Macleod, C. J. and Shah, J.*) SENAJI *v.* PANAJI. **23 Bom. L. R. 1228 : 46 Bom. 431 : A. I. R. 1922 Bom. 276.**

——— **O. 38, R. 5**—*Defendant attempting to dispose if property during pendency of suit is not enough.*

The fact that the defendant has attempted to sell some of his property during the pendency of the proceedings against him is not enough, to infer that the sale was with intent to obstruct or delay the execution of any decree that may be passed against him which is necessary to invite the application of O. 38, R. 5 of the Code. (*Macleod, C. J. and Shah, J.*) NOWROJI PUDUMJI *v.* DECCAN BANK, LTD.

45 Bom. 1256 : 63 I. C. 958 : 23 Bom. L. R. 550.

——— **O. 38, Rr. 5 and 6**—*Provincial Small Cause Court can attach immoveable property before judgment. 1923 C. 176 overruled.*

Per Curiam : A Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment.

Sanderson, C. J. :—The provisions of cl. (7) of S. 94 are not excluded by reason of S. 7 and the order for attachment there referred to must mean an order for attachment before judgment ; it follows therefore that a Provincial Small Cause Court has jurisdiction to make an order for attachment before judgment of any property including immoveable property. There is a distinction between making an order for attachment and making an attachment. It may be that if a Provincial Small Cause Court were to make an order for attachment of immoveable property before judgment it would be necessary for that Court to transmit the order to a Court of Ordinary Civil Jurisdiction for the purpose of the order being carried out and the property attached. A.I.R. 1924 Cal. 193. *Walmsley, J.* :—Small Cause Court cannot attach property whether moveable or immoveable. *Mukerji, J.*—O. 38 has not been excluded either by S. 7 read with S. 94 or by O. 50 and therefore it is applicable to a Provincial Court of Small Causes. The case in A.I.R. 1923 Cal. 176, if it purported to lay down that a Provincial Small Cause Court can attach immoveable property and not merely make an order of attachment thereof was not correctly decided, nor was the case in A.I.R. 1924 Cal. 193 correctly decided if it meant to lay down that no such order can be passed by a Provincial Court of Small Causes. (*Sanderson, C. J., Walmsley, Newbould, Mukerji and Chotzner, JJ.*) F. B. BARAD KANT RAY *v.* SHAIKH MAIJUDDI. **28 C. W. N. 1056 : 40 C. L. J. 199 : 82 I. C. 109 : A. I. R. 1925 Cal. 1 : 52 Cal. 275.**

——— **O 38, Rr. 5 and 6 and O. 43, R. 1 (q)**—*Attachment before judgment—Conditional order on failure to give security—Security furnishing—Appeal*

C. P. CODE (V OF 1908), O. 38. R. 5.

from order—Letters Patent, cl. 15.

O. 38, R. 6 of the C. P. Code, empowers the Court in the events stated to direct the attachment of the defendant's property. The power given by O. 38, R. 5 to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause why he should not furnish security carried with it as an incident the power, after hearing the defendant, to confirm the order that security be furnished. Under its general powers the Court may then, if necessary, extend the time for the furnishing of the security. Where the defendant fails to show cause why he should not furnish security the Court may, under R. 5, direct finally that security, be furnished or, in the alternative, under R. 6 direct the attachment of the defendant's property. The power of attachment also exists if the required security is not furnished. The provisions of the C.P.Code. do not contemplate an appeal from an order directing the defendant to furnish security. An appeal lies from an order of attachment made under R. 6. Where an order for attachment is made on failure of the defendant to furnish security and the defendant in fact furnishes such security, there is no operative order of attachment and the remainder of the order is merely an order for the furnishing of security not appealable either under the C.P. Code. or as a judgment under the Letters Patent. (*Sanderson, C. J and Richardson, J.*) HAJI MOHAMUDDIN AND CO. *v.* THE EASTERN JAPAN TRADING CO. **50 Cal. 215 : A I. R. 1923 Cal. 639.**

——**0. 38, R. 5**—*Small Cause Court—Immoveable property.*

It is open to a Small Cause Court to attach immoveable property before judgment under O. 38, R. 5, C. P. Code. (*Newbould and Panton, JJ.*) KADARNATH PARAMANIK *v.* HEM NATH KARMAKAR.
49 Cal. 994 : A. I. R. 1923 Cal. 176 (2).

——**0. 38, R. 5**—*Attachment before judgment—Money deposited by sureties for release of attachment—Assets held by Court—Rateable distribution.*

The attachment before judgment should restrict the rights of persons holding decrees against the defendant. Where assets are held by a Court, the intention of legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-creditor. (*Richardson, J.*) GHISULAL *v.* TODARMAL. **26 C. W. N. 169 : A. I. R. 1922 Cal. 19.**

——**0. 38, R. 5**—*Attachment before judgment—Land situated in Agency tract—Vizagapatam Court has no jurisdiction to attach—C. P. Code, S.* 1.

The Subordinate Judge of Vizagapatam has no jurisdiction in a suit pending before him to attach before judgment properties which admittedly are in the Agency tracts over which his Court has no jurisdiction. 42 M. 813 (P. C.) Rel. on. (*Wallace and Madhavan Nair, JJ.*) ZUBEDA BEGAM *v.* KOMMANA.
88 I. C. 430 : A. I. R. 1925 Mad. 1100 : 48 M. L. J. 680.

——**0. 38, R. 5**—*Attachment before judgment of immoveable property—Small Caute Court—Powers of—Provincial Small Cause Cour's Act.*

Under the present Civil Procedure Code a Court exercising the jurisdiction of a Small Cause Court can attach immoveable property before judgment under O. 38, R. 5. (1891) A. C. 407, Ref. 46 C. 717, 49 C 994, Foll. 6 M.H.C. R. 91, Dist and Expl. as good law at that time. (*Devadoss and Wallace, JJ.*) KOTHANDARAMA CHETTIAR *v.* ANNAMALAI PILLAI.
48 M. 488 : (1925) M. W. N. 169 : 22 L. W. 103 : 87 I. C. 399 : A. I. R. 1925 Mad. 589 : 48 M. L. J. 406.

C. P. CODE (V OF 1908), O. 38. R. 5.

——**0. 38, R. 5**—*The question of the security bond being available for proceedings not only in the Court to which it was given but also in the Courts of Appeal, depends on the language of the bond as construed with reference to the surrounding circumstances of the case.*

Where the security bond executed by the defendant, to the Court, in pursuance of the latter's order under R.5, O. 38 recited that the defendant had thereby given as security certain property and that in case the suit was decided in plaintiff's favour, the defendant would be responsible for the suit amount, *held*, that the bond which really took the place of the attachment before judgment was meant to give security only for the purpose of enabling the 1st Court to execute its decree in case it passed a decree. And as that Court did not pass a decree at all but dismissed the suit, the bond ceased to have any further effect, though the appellate Court decreed the suit. 42 All. 158 (P. C.), Dist. Case-law discussed. (*Krishnan and Odgers, JJ.*) D. S. .S. SUBBARAMA AYYAR *v.* SOMALINGA SUBBA AIYAR **(1924) M. W. N. 495 : 82 I. C. 461 : A. I. R. 1925 Mad. 114 : 47 M. L. J. 523.**

——**0. 38, R. 5**—*Attachment before judgment—Becomes attachment in execution on order for sale after decree.*

Attachment before judgment becomes attachment in execution when order is passed for the sale of the attached property and possibly even on the date when application is made for execution after decree. (*Krishnan and Ramesam, JJ.*) VELLAYAN ASARI *v.* SIVAGNANAM ASARI. **34 M. L. T. 193 : 79 I. C. 917 : A. I. R. 1925 Mad. 49.**

——**0. 38, R. 5**—*Position of attaching creditors.*

Schwabe, C.J.:—It is generally accepted as concluded that the fact that the property is attached, or the proceeds thereof are in the Court, does make it the property of the attaching creditor. It is available for any subsequent decree-holder against the same defendant. Under S. 60, C. P. Code, any property can be attached which belongs to the judgment-debtor or over which, or profits of which, he has a disposing power which he may exercise for his own benefits. The judgment-debtor has no power of disposing of property attached before judgment for his own benefit and it is doubtful whether such property can be said to belong to him within the meaning of S. 60 or whether it can be taken in execution so long as the Court holds it in its custody pending the decision of the suit before it. If the prevalent view of law referred to above is correct, the result is that a plaintiff, who gets an order to attach before judgment because he satisfies the Court that there is a danger of the property being made away with and that enough ought to be preserved pending his suit to satisfy any decree he may get, may find that the property he has preserved is taken away from him pending his suit by a decree-holder who is lucky enough to get a decree more quickly. Indeed it would be easy for a defendant, who wishes to take his property out of the reach of the attachment-creditor, after attachment to get or even to create, a friendly creditor for an amount large enough and allow him to take judgment and gets the property attached in execution while he delayed the suit of the original attaching creditor whose fate seems to be entirely with the discretion of the Custody Court. (*Schwabe, C. J., Krishnan and Wallace, JJ.*) NACHIAPPA CHETTIAR *v.* SUBBIER. **17 L. W. 390 : 32 M. L. T. 198 : A.I.R. 1923 Mad. 505 (F. B.) : 44 M. L. J. 413.**

——**0. 38, R. 5**—*Attachment before judgment—Non-compliance with the provisions of R.* 5—*Attachment* ultra vires—*Alienation not void.*

An attachment before judgment without complying

C. P. CODE (V OF 1908), O. 38, R. 5.

with the provisions of R. 5 is *ultra vires* and therefore such an attachment does not come in the way of alienation of that property. (*Kotwal, J.*) BANSILAL *v.* SITARAM. **A. I. R. 1922 Nag. 238.**

——O. 38, R. 5 and O. 21, R. 57—*Attachment before judgment—Dismissal of execution application ceases on.*

An attachment before judgment ceases to be operative on the dismissal of the first application for execution. 17 N. L. R. 121, Foll. (*Hallifax, A. J. C.*) AMOLAKRAO *v.* MAHIPATRAO. **A.I.R. 1922 Nag. 81.**

——O. 38, R. 5 and O. 21, R. 57—*Attachment before judgment—Becomes one in execution on application in execution.*

An attachment before judgment made under O. 38, R. 5 of the Code, becomes one in execution on an application for execution and R. 57 of O. 21 will apply to it equally with the other rules of O. 21. (*Hallifax, A. J. C.*) GANPAT *v.* MUKUNDA.
63 I.C. 712 (2): 17 N. L. R. 121.

——O. 38, R. 5—*Suit dismissed for default but restored and decreed—Surety is liable.*

Surety is liable though suit is once dismissed for default and immediately restored. 42 A. 158 (P. C.), Foll. 45 Cal. 780, Dist. (*Daniels, J. C.*) CHHOTEY LAL *v.* SOHRAB ALI. **12 O. L. J. 521 : 2 O. W. N 372 : 89 I. C. 17 : A. I. R. 1925 Oudh 592.**

——O. 38, R. 5—*Considerations guiding the applicability of the rule.*

The power given under the C. P. Code to attach before judgment should be exercised only on clear proof of the existence of the mischief aimed at. The Court must be satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him. If the Court accepts the view that defendant has no intention of alienating the property, there is no power to order attachment. (*Miller, C. J. and Kulwant Sahay, J.*) CHANDRIKA PRASHAD SINGH *v.* HIRA LAL. **5 Pat. L. T. 124 : A.I.R. 1924 Pat. 312.**

——O. 38, R. 5—*Order under—No appeal lies—Letters Patent (Rang.) cl. 13—C. P. Code, O. 43, R. 1 (q).*

An order made under the provisions of O. 38, R. 5 is not a "Judgment" within the meaning of clause 13 of the Letters Patent, because it is a mere interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit and therefore no appeal lies from that order. A. I. R. 1925, Rang. 225 Foll. 26 Mad. 502 and 32 Bom. 602, Expl. (*Heald and Lentaigne, JJ.*) MENGHA SINGH *v.* SUCHA SINGH.
4 Bur. L. J. 108 : A. I. R. 1925 Rang. 267.

——O. 38, R. 6—*Attachment before judgment continues till removed by Court.*

Attachment before judgment continues in force until it is put an end to by the Court. (*Phillips, J.*) RASAPPA PILLAI *v.* DORAISWAMI REDDIAR.
(1925) M. W. N. 486 : A. I. R. 1925 Mad. 1041 : 49 M. L. J. 88.

——O. 38, R. 6—*Mortgage suit—Properties other than the mortgaged ones may be attached before judgment where mortgaged property is likely to prove insufficient security for the loan.*

Provided that circumstances exist which satisfy the Court as to the desirability of an attachment of properties other than the mortgaged ones, before judgment, in a mortgage suit, such attachment must be ordered when it is apparent that the mortgaged property does

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not provide a sufficient security for the loan and that the mortgagee will eventually have to claim a personal decree. 46 Cal. 245, Foll. (*Das and Ross, JJ.*) JATIMOYEE DEBI *v.* RAGHUNATH PATHAK.
3 Pat. 966 : 1925 P. H. C. C. 63 : 85 I. C. 9 : 6 Pat. L. T. 823 : A. I. R 1925 Pat. 291 (1).

——O. 38, R. 9—*Attachment before judgment is not revived on reversal of decree dismissing the suit—Objector objecting to attachment need not, therefore, sue within one year if suit is dismissed within one year of adverse order—C. P. Code, O. 21, R. 63.*

It is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit and the reversal of the dismissal on appeal does not operate to revive the attachment which has been cancelled. When therefore, in execution proceedings a fresh attachment is effected objector has a right to prefer a fresh claim, and the period of one year should be counted from the date when his fresh claim is rejected. 33 C. L. J. 201 : 22 C. W. N. 297 and 13 C. L. J. 243, Foll. (*Greaves and Chakravarti, JJ.*) SAILESH CHANDRA *v.* JOY CHANDRA ROY.
87 I. C. 756 (2) : A. I. R. 1925 Cal. 1147.

——O. 38, R. 10—*Attachment before judgment—Property sold—Decree—Proceeds recovered by previous decree-holder—Suit to recover share.*

Where certain properties are attached before judgment in a suit and sold and a decree obtained later, and the decree holder does not execute his decree, he cannot afterwards bring a suit to recover his share of the proceeds, if a previous decree-holder has attached and recovered them. (*Macleod, C. J. and Fawcett, J.*) VISHNU DHONDDEV *v.* RAMPRATAP DAULATRAM.
45 Bom. 360 : 59 I. C. 713 : 22 Bom. L. R. 1407.

——O. 38, R. 10—*Attachment of interest of coparcener—Decree passed afterwards against him—Operation of survivorship is subject to satisfaction of decree.*

An attachment before judgment followed by a decree prior to the judgment-debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching creditor in the same way as an attachment after decree. The operation of survivorship is not, however, altogether stopped by reason of the attachment, whether before or after decree, for if the attaching creditor does not execute his decree, or if the entire property is not needed to satisfy the decree, then the property or the surplus, as the case may be, will go to the other co-parceners. 5 Cal. 148 (P.C.) and 26 M. L. J. 517, Foll ; 38 Bom. 105 Dissented from.

Wallace, J.—The accrual of survivorship is not prevented but operates subject to the prior rights of the attaching decree-holder and other decree-holders who are entitled to take advantage of the attachment to have their decree debts satisfied in execution proceedings against what was the share of the deceased judgment-debtor coparcener. (*Wallace and Madhavan Nair, JJ.*) SANKARLINGA *v.* OFFICIAL RECEIVER OF TINNEVELLY. **(1925) M. W. N. 832 : A. I. R. 1926 Mad. 72 : 49 M. L. J. 616.**

——O. 38, R. 10—*Effect of—Position of the attaching creditor.*

An attachment confers no sort of lien or charge upon the attached property and effective to create any sort of legal right in the attaching creditor to have the property ear marked for the satisfaction of any decree he has obtained or may obtain and it is no sense to be regarded as the inception of the execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of the other creditors seeking for decrees or for execution of decrees or for rateable distribution under S. 73. And it then can be used for one purpose only., viz to defeat and to

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render void any private alienation made during its continuance. (*Schwabe, Krishnan and Wallace, JJ.*) NACHIAPPA CHETTIAR *v.* SUBBIER.

17 L. W. 390 : 32 M. L. T. 198 : A. I. R. 1923 Mad. 505 : 44 M. L. J. 413 (F.B.).

——— **O. 38, Rr. 10 and 8 and 105**—*Attachment before judgment—Effect on survivorship.*

An attachment before judgment does not rank in the same position as an attachment after judgment. O. 38 R. 10, C. P. Code, makes it clear, and therefore an attachment before judgment will not defeat the right of a co-parcener by survivorship in a joint Hindu family. (*Jwala Prasad and Foster, JJ.*) SUNDAR LAL *v.* RAGHUNANDAN PRASAD. **3 Pat. 250 : 5 Pat. L. T. 135 : A. I. R. 1924 Pat. 465.**

——— **O. 38, R 10**—*Attachment before judgment—Property sold in execution of another decree—Attachment ceases.*

Where the attached decree is sold in execution of another decree the attachment ceases, and no further proceedings can be taken against the property on the basis of that attachment. (*Jwala Prasad and Adami, JJ.*) HARNANDAN MARWARI *v.* PRAN NATH RAY. **2 P. L. T. 240 : 61 I. C. 922 : 1921 P. H. C. C. 205.**

——— **O. 38, R. 11**—*Attachment before judgment—Sale in execution—Claim—Limitation Act, Art. 11.*

Where there is an order in execution for sale of a property attached before judgment that order proceeds in the view that the property is to be considered as attached in execution by virtue of O. 38, R. 11 of the Code and under Art. 11 of the Limitation Act, the period of limitation is one year to set aside the order. (*Wallis, C. J., Oldfield, Spencer, Ramesam and Kumaraswami Sastri, JJ.*) ARUNACHALLAM CHETTI *v.* PERIASAMI. **44 Mad. 902 : (1921) M. W. N. 956 : 70 I. C. 439 : 14 L. W. 645 : 41 M. L. J. 252 (F. B.).**

——— **O. 38, R. 11**—*Effect of attachment before judgment.*

This rule gives the same effect to an attachment before judgment after a decree is passed as an attachment after judgment. (*Das and Adami, JJ.*) RAM HARI LAL *v.* NATHU RAM. **2 P. L. T. 719 : 62 I. C. 33 : 6 P. L. J. 332.**

——— **O. 39, R. 1**—*Principles—Injunction "pending disposal of the suit"—Period for which in force.*

Where in a suit for a declaratory decree, the plaintiff got a temporary injunction restraining X from bringing the suit property to sale in execution 'pending final decision of the suit, *held*, that the injunction enured only till the decision of the suit and did not continue till the determination of the appeal preferred against the decision. (*Piggott and Walsh, JJ.*) MADHO PRASAD *v.* DRAUPADI. **43 All. 383 : 61 I. C. 417 : 19 A. L. J. 174.**

——— **O. 39, Rr. 1 and 2 and O. 40, R. 1**—*Suit for possession—Restraining execution of decree for possession—Receiver—Appointment of.*

Plffs. were owners of a bungalow which had been let to deft. on lease, which plffs. alleged expired on 30-6-1920. Meanwhile deft. had sub-let the premises or part of them, and as he could not get possession from his sub-tenants, a suit had to be filed in which there was a decree in deft.'s favour. The plffs. as owners of the property sued deft. claiming that they were entitled to possession and that the decree which the deft. had obtained against his sub-tenants was not binding upon them, and for an injunction aginst deft. not to take possession. An application was made by plffs. for a temporary injunction restraining deft. from executing his decree against the sub-tenants. *Held*, that the Court had no jurisdiction to restrain the deft.

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from seeking to get the benefit of his decree which had nothing whatever to do with the plaintiffs' claim. What the plffs. ought to have asked for was the appointment of a Receiver, so that the Court might take charge of the property through its Receiver pending the settlement of the dispute between the plff. and the deft. (*Macleod, C. J. and Coyajee, J.*) NASARVANJI CAWASJI. *v.* SHAHAJADI BEGAM. **24 Bom. (L. R.) 378 : 46 B. 939 : A. I. R. 1922 Bom. 385 (2).**

——— **O. 39, R. 1**—*Specific Relief Act does not govern temporary injunctions—Subordinate Court can grant injunction in respect of proceedings in superior Court—Specific Relief Act, S. 56.*

Specific Relief Act does not govern temporary injunction but O. 39, R. 1, governs them. Even a Subordinate Court can grant an injunction against a party in respect of proceedings in a Superior Court. Specific Relief Act, however, regulates the grant of perpetual injunctions. (*Mukerji, J.*) RAM SADAN BISWAS *v.* MATHURA MOHAN HAZRA. **81 I.C. 2 : A. I. R. 1925 Cal. 233.**

——— **O. 39, R. 1**—*Suit in Foreign Court—Injunction to restrain defendant from prosecuting action in Foreign Court.*

An application for an injunction restraining the deft. in a pending suit, from prosecuting an action in a Foreign Court must be made at a very early stage of the proceedings. (*Rankin, J.*) TIKAMCHAND SANTOKCHAND *v.* SANTOKCHAND SINGHI. **59 I. C. 218 (1) : 24 C. W. N. 735.**

——— **O. 39, R. 1**—*Injunction to stay execution proceedings.*

The High Court granted an injunction to stay execution proceedings on giving security. (*Jai Lal, J.*) JAGEY RAM *v.* RICHHPAL. **26 Punj. L. R. 753.**

——— **O. 39, R. 1**—*Temporary injunction restraining alienation of property—Property sold—Sale is not void.*

Order for an injunction differs from an order attaching the property. Where property has been attached by order of the Court, any transfer of the property in face of such an attachment is void if the attachment has been made by "actual seizure or by written order duly intimated or made known." But a temporary injunction has no such effect. *Bona fide* purchasers of property, under temporary injunction restraining alienation for valuable consideration without notice of any fraud or collusion on the part of the vendor are protected. (*Le Rossignol and Fforde, JJ.*) BELI RAM AND BROS. *v.* RAM LAL. **6 Lah. 380 : 90 I C. 937 : A. I. R. 1925 Lah. 644 (2).**

——— **O. 39, R. 1**—*Temporary injunction may be granted though perpetual one may in the end be refused.*

There is nothing in law or principle which justifies the refusal of a temporary injunction on the sole ground that the relief prayed for in the suit may be eventually refused. (*Shadi Lal, C.J. and Le Rossignol, J.*) TEJA SINGH *v.* BANI HARNAM. **89 I. C. 678 : A. I. R. 1925 Lah. 628.**

——— **O. 39, R. 1**—*'Property in dispute' means property which forms subject-matter of suit.*

The expression "property in dispute in a suit" in R. 1 means the property which is the subject-matter of the suit. (*Shadi Lal, C. J. and Le Rossignol, J.*) TEJA SINGH *v.* BANI HARNAM. **89 I. C. 678 : A. I. R. 1925 Lah. 628.**

——— **O. 39, R. 1**—*Danger to estate by extravagant alienation by the life holder apparent—Injunction should be issued.*

Where there is a substantial dispute between the parties and there is a reasonable *prima facie* appre-

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hension based upon the extravagant conduct of the defendant widow in reference to her administration of the estate of her husband that during the pendency of the suit further alienations and damage to the estate might be achieved by her, an injunction may be issued at the instance of the reversioners to prevent such further alienations. (*Shadi Lal, C.J. and Le Rossignol, J.*) TEJA SINGH *v.* BANI HARNAM.
89 I. C. 678 : A. I. R. 1925 Lah. 628.

——O. 39, R. 1—*Suit for declaration—Injunction staying proceedings in another suit—Propriety of.*

In a suit for a mere declaration it is not proper to grant an injunction staying proceedings in another suit pending in another court. (*Abdul Raoof, J.*) SAMANDAR *v.* FAZAL. **78 I.C.802 (1):A.I.R. 1925 Lah 242(2)**

——O. 39, R. 1—*In absence of fraud, collusion or fear of irreparable loss no injunction will be granted to plaintiff who is out of possession.*

Injunction will be refused, where plaintiff is out of possession of the property in suit unless there is fraud or collusion or unless the act perpetrated or threatened is so injurious as to cause irreparable loss. Irreparable injury means material injury which is not adequately reparable by damages. (*Moti Sagar, J.*) SEWARAM SINGH *v.* SARDARNI MAYA DEVI. **80 I. C. 727 : A. I. R. 1925 Lah. 167.**

——O. 39, R. 1—*Injunction when granted.*

Unless plaintiff proves by definite evidence that the defendant threatened to remove or dispose of his property with a view to defraud his creditors a temporary injunction cannot be granted. (*Moti Sagar, J.*) KALIAN SINGH *v.* MT. SHANNO ALIAS GOVIND KAUR. **6 Lah. L. J. 298 : 85 I. C. 88 (1) : A. I. R. 1924 Lah. 718 (2.)**

——O. 39, R. 1—*Temporary injunction—When granted—Principle guiding.*

A person asking the Court to exercise its discretionary jurisdiction must make out a strong *prima facie* case in support of the title which he asserts and must satisfy the court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right could be established at the trial. Being an exceptional injury, an injunction will be refused in the first instance except on a clear *prima facie* case and "upon positive averments, of the equities on which the application for relief is based." The rule of law is that the court, should, before disturbing any man's legal right or stripping him of any rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the suit. (*Moti Sagar, J.*) RAMESHWAR DAS *v.* YAKIN UD-DIN KHAN. **A. I. R. 1924 Lah. 633.**

——O. 39, R. 1—*Issue of injunction on affidavit—Validity.*

Where there is a *bona fide* dispute between the parties and the injunction relates only to such properties belonging to the deceased as are not in possession of the defendant-appellant, there is no reason to interfere. (*Broadway, J.*) MT. ISHRI *v.* SHIB RAM **A. I. R. 1923 Lah. 239 (2).**

——O. 39, R. 1—*Principles—Temporary injunction.*

When plaintiff has made out a *prima facie* case for possession and there is a real danger of damage or waste to the suit property which is in defendant's possession, an order for temporary injunction restraining defendant from using the property is good. ((*Shadi Lal, C. J. and Fforde, J.*) SUNDAR SINGH *v.* RAM SARAN DAS. **5 Lah. L. J. 262: A. I. R. 1923 Lah. 227.**

——O. 39, R. 1—*Security and accounts—Order for.*

An order to defendants to prepare an inventory and to keep accounts is not an order under the inherent powers of the Court but one under O. 39, R. 1, C. P. Code. (*Campbell, J.*) THE FIRM RAGHBIR SINGH JASWANT *v.* NARAYAN SINGH.
A. I. R. 1923 Lah. 48.

——O. 39, R. 1—*Principles—Temporary injunction.*

The granting of a temporary injunction is a matter of discretion albeit a judicial discretion. One of the principles the Court has to bear in mind is that it must first see that there is a *bona fide* contention between the parties and then, on which side in the event of success the balance of inconvenience will lie if the injunction does not issue. The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in *status quo* until that question can be finally decided.(*Broadway, J.*) KANSHI RAM *v.* SHARF DIN. **A. I. R. 1922 Lah. 356 (1).**

——O. 39, Rr. 1 and 2—*Execution—Injunction to restrain, cannot be granted.*

Injunction restraining the execution of a decree obtained by the defendant against the plaintiff cannot be granted under O. 39, Rr. 1 and 2. (*Phillips, J.*) V. VARADACHARLU *v.* K. NARASIMHA CHARLU.
1925 M. W. N. 886: A. I. R. 1926 Mad. 258.

——O. 39, R. 1—*Breach of plaintiff's right threatened—Proper course is to maintain* status quo.

In the matter of an interlocutory order where a breach of right of plaintiff is threatened the proper course for a Court is to maintain the *status quo* until the disposal of the suit. (*Wallace, J.*) SRIRANGA NARAYANA JEER *v.* AHOBILA JEER. **22 L. W. 837 : A. I. R. 1926 Mad. 166.**

——O. 39, R. 1—*Order without finding of possession or danger of waste is unsustainable.*

Order granting injunction without finding of possession or of danger of waste is unsustainable. Existence of allegation in affidavit is not enough. (*Wallace and Madhavan Nair, JJ.*) D. BUTCHAMMA *v.* D. PONNAMMA. **21 L. W. 698: A. I. R. 1925 Mad. 896.**

——O. 39, R. 1—*Injunction pending suit—Scope of.*

An injunction granted *pendente lite*, until the disposal of the suit or until further orders will end in any case on the disposal of the suit or on any earlier date, on which further orders may be passed, the reference to further order not applying to anything after the disposal of the suit. (*Oldfield and Devadoss, JJ.*) AYISA UMMA *v.* P. K. ABDULLA. **1924 M. W. N. 636: (1923) M. W. N. 670: 19 L. W. 613 : A. I. R. 1924 Mad. 178.**

——O. 39, R. 1—*Fraudulent decree—Injunction to restrain proceedings in execution—If maintainable.*

A judgment-debtor can sue for an injunction restraining the execution of a decree which he alleges to be fraudulent, even before steps are taken in execution. (*Kinkhede, A. J. C.*) SULTAN ALI *v.* BALAJI.
A. I. R. 1924 Nag. 413.

——O. 39, R. 1—*Requirements of R. 1 must be fulfilled.*

An applicant asking the Court to issue a temporary injunction must show that the requirements of R. 1 have been fulfilled, viz., that there is risk of the property being damaged or a risk of creditors being defrauded. (*Wazir Hasan and Ashworth, A. J. C.s*) AHMAD MUJTAHA KHAN *v.* PIRTHIPAL SINGH.
88 I. C. 581 (1): A. I. R. 1925 Oudh 698.

——O. 39, R. 1—*Suit dismissed for default—Application to restore to file—Pendency of—Injunction if can be passed.*

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During the pendency of an application to restore a suit to file which had been dismissed for default, a court has no jurisdiction to pass an injunction order, as there is no suit pending then. (*Neave, A. J. C.*) RAMSARUP *v.* EMPEROR. **25 Cr. L J. 350: 77 I. C. 238: A. I. R. 1924 Oudh 345.**

——O. 39, R. 1—*Execution proceedings and sale—* Prima facie *case—Defendant residing outside jurisdiction—Property within jurisdiction.*

On an application for a temporary injunction to restrain a sale in execution of a decree, pending a suit, the applicant must show a *prima facie* case. A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction against which the Court could proceed in the event of any contempt of the Court's authority. (*Mullick and Bucknill, JJ.*) MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR *v.* KUMAR GANGANAND SINGH. **75 I. C. 381: 1 Pat. L. R. 462: 5 P. L. T. 121: A. I. R. 1925 Pat. 337.**

——O. 39, R. 1—*Temporary injunction—When granted—* Prima facie *case—Balance of convenience.*

A party who asks for a temporary injunction pending suit must show a *prima facie* case on the merits of his action. The granting of the application would then depend on the balance of convenience. If the other party has already invested lots of money on the project which is sought to be restrained but he is a man of means who can easily pay any damages that may ultimately be awarded against him, no *interim* injunction should be granted. (*Mullick and Bucknill, JJ.*) KENNETH ARTHUR HILL *v.* RANJAN BARDHAN.

5 Pat. L. T. 196: 75 I. C. 859: A. I. R. 1924 Pat. 526.

——O. 39, R. 1—*Principles—Defendant residing outside jurisdiction—Acts within jurisdiction—Interference with acts of religion.*

No Court would grant an injunction against persons residing outside its jurisdiction and not subject to its jurisdiction in cases where they would have no means of enforcing the order. But where the acts complained of are acts taking place within the Court's jurisdiction and a party although a resident outside the Court's jurisdiction appears in the suit and submits personally to the jurisdiction of the Court (not under protest or to question the Court's jurisdiction) the Court has power to grant an injunction against him. Before granting a temporary injunction the Court must be satisfied in the first instance that the plaintiff applicant has a fair question to raise as to the existence of the right alleged, and further that the defendants have infringed or are threatening an infringement of these rights. No person is entitled to enforce his religious views upon another or to restrain that other from committing any lawful act or making any lawful use of his property, merely because it would not fit in with the tenets of his particular religion. The right to worship is a right in *aliena solo*, and so long as it is not interfered with, the owner can do what he would like with his own property. (*Miller, C. J. and Ross, J.*) MAHARAJAH BAHADUR SINGH *v.* HUKUM CHAND. **4 P. L. T. 48: A .I. R. 1923 Pat. 209.**

——O. 39, R. 1—*Principles.*

The general principles applicable to cases to *interim* injunctions is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed. (*Mullick and Kulwant Sahay, JJ.*) BISHUN PRASHAD PATHAK *v* SASHI BHUSAN MITRA. **2 P. L. R. 17: A. I. R. 1923 P. 133.**

——O. 39, R. 1—*Execution proceedings—Power to restrain proceeding in another Court—Jurisdiction.*

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In a case in which the defendants have submitted to the jurisdiction of a Court by entering appearance, the Court has jurisdiction to grant an injunction restraining the defts. from executing in another Court a decree which they had obtained against plaintiff—Case law referred to. (*Coutts and Ross, JJ.*) KUMAR GANGA SINGH *v.* PIRTHICHAND LAL. **1 P. 356: 4 Pat. L. T. 10: A. I. R. 1922 Pat. 34.**

——O. 39, R. 1—*Interlocutory injunction to restrain arbitration proceedings Principles—Court, duty of.*

The onus is upon the petitioner to show that his inconvenience exceeds that of the other side, and does not govern the granting or withholding an interlocutory injunction the Court considerations as to the comparative mischief or inconvenience to the parties likely to arise from granting or withholding the injunction. (*Raymond, A. J. C.*) FIRM OF KIRPALDAS KALIANDAS *v.* FIRM OF GAJANMAL BHAGWANDAS. **70 I. C. 864: 15 S. L. R. 5.**

——O. 39, R. 1—*Temporary injunctions—Principles of Specific Relief Act apply—Contract by steamship company not to employ any one as stevedore except plaintiff cannot be enforced by injunction—Specific Relief Act, Ss.* 55 *and* 57.

Where a contract forbade the defendants (a steamship company) to employ as stevedores none but the plaintiffs: *Held*, that the plaintiffs could not be granted a temporary injunction to enforce the covenant. The question of a temporary injunction is dealt with by the C. P. Code, whereas the question of a permanent injunction is dealt with under the Specific Relief Act. But the principles applicable to the two proceedings are very similar. They both derive from the Court of Chancery and they postulate that a man will be punished if he does what his conscience tells him not to do. It is, therefore, impossible in disposing of temporary injunction to exclude from one's mind the English doctrine as contained in the Specific Relief Act. Courts of equity will not give an order over the execution of which they cannot watch and which they cannot enforce. A contract by which one party is required to do numerous and delicate services for the other, the performance of which need a particular amount of skill and fidelity is one which cannot be specially enforced, by threats of penalty. Except in very special circumstances where no other redress is open to the parties, the Court will not grant specific relief in such cases both because to attempt to enforce its order would be embarrassing to the parties and because it would be derogatory to the Court itself.

Per *Rupchand Bilaram, A J. C.*—Preventive relief by way of injunction whether perpetual or temporary is within the discretion of the Court depending on the particular circumstances of each case. In order to entitle the plaintiffs to a temporary injunction pending the disposal of the suit, the plaintiffs must make out a *prima facie* strong case in support of the right they claim, and further show that irreparable damage will result to them if the injunction is not granted. Though the Court may not issue an injunction to restrain the breach of an affirmative covenant in a contract in view of S. 55, Cl. (f) of the Act, it is not precluded from enforcing by injunction a negative covenant which is coupled with such affirmative covenant and which is either express or implied. Whether the Court would enjoin the performance of a negative covenant or would infer the existence of such covenant by implication must again depend on the circumstances of each case. There are no equitable grounds for enforcing a negative covenant of an employer in a contract of employment pure and simple where the

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employee is only entitled to his remuneration. (*Case law discussed.* (*Kennedy, J. C. and Rupch and Bilaram, A. J. C.*) D. D. G. HANSA OF BREMEN *v.* FIRM OF PESTOMJI BHIKAJI. **A. I. R. 1925 Sind 347.**

——0. 39, R. 1 (r)—Interim *injunction—Order refusing—Appealability.*

An appeal lies from an order granting an injunction as well as from an order refusing an injunction. 17 C. W. N. 996 ; 35 A. 425 Ref. An order refusing an application for a temporary injunction until the disposal of the main application for injunction pending the disposal of the suit is an order under O. 39, R. 1, C. P. Code and is appealable. The Code provides in O. 43, R. 1 (*r*) for an appeal from all interlocutory and final orders passed under O. 39, R. 1 granting or refusing an injunction. (*Jwala Prasad and Kulwant Sahay, JJ.*) SHYAM BEHARI SINGH *v.* BISESWAR DAYAL.
1924 P. H. C C. 169 : A. I. R. 1924 Pat. 713.

——0. 39, R. 2—*Principles—Stay of execution proceeding in Munsiff's Court by subordinate judge—Specific Relief Act, Ss. 56 and 53.*

S.56 which occurs in the chapter relating to perpetual injunctions has no application to temporary injunctions which are, by the express words of S. 53 left to be regulated by the Code of Civil Procedure. A Sub-Judge could issue a temporary injunction staying the execution of a decree proceeding in a Munsiff's Court. The C. P. Code is not exhaustive and the Court has inherent jurisdiction to act *ex debito justitia*, in order to do that real and substantial justice for the administration of which alone it exists. 23 Cal. 351 and L. P. A. 17 of 1920 Foll. (*Shadi Lal, C. J. and Abdul Qadir, J.*) KANSHI RAM *v.* SHARAF DIN.
A. I. R. 1923 Lah. 144 (2).

——0. 39, R. 2—*Injunction can be granted only against deft.—Principles.*

A temporary injunction can only be issued to the defendant and not to any other person. A suit for a declaration that a certain person is not eligible to stand as a candidate, cannot be said to be a suit for restraining him from committing an injury of any kind. Where a person has been declared by competent authority to be eligible for standing as a candidate at the election, and as the election itself could not be stopped, it would not be right to restrain him from taking part in it. To restrain the defendant in such a case would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendant of a right to which he is really entitled. This would be a grave injustice to him for which he could not be adequately compensated afterwards. (*Scott-Smith, J.*) THE ELECTION OFFICER, GUJRAT *v.* ABDUL GHANI, ETC.
A. I. R. 1923 Lah. 47.

——0. 39, R. 2 (3) and O. 43, R. 1 (r)—*Order refusing to attach property.*

Order refusing to attach property for disobedience of an injunction is one under O. 39, R. 2 and is appealable. (*Scott-Smith, J.*) DIWAND CHAND *v.* JHARIA COAL CO. **A. I. R. 1922 Lah. 347.**

——0. 39, R. 2 (3)—*Injunction—Dis-obedience—Application for contempt—Transfer of venue.*

The Court of M. passed an injunction order under O. 39, R.1, C.P. Code. Subsequently the local jurisdiction as well as the suit in which the injunction was ordered, were both transferred to the Court of D. Thereupon the applicant applied to the Court of D. for punishing the opposite party for contempt for disobeying the injunction. *Held*, that the Court of D. had jurisdiction to entertain the application for punishment for alleged contempt. 26 C. W. N. 216, Diss. ; 39 M. 907 Foll. (*Krishnan and Venkatasubba Rao, JJ.*)

C. P. CODE (V OF 1908), O. 40.

MOUNA GURUSWAMI NAICKER *v.* SHEIKH MAHOMED KOWTHER. **46 Mad. 83 : (1922) M. W. N. 743 : 16 L. W. 748 : A. I. R. 1923 Mad. 92 : 43 M. L. J. 713.**

——0. 39, R 3—Ex parte *order.*

If the object of granting the injunction is likely to be defeated by delay, the Court may grant an *ex parte* injunction without notice to the opposite party. (*Rigg, J.*) BURMA OIL COMPANY LTD. *v.* SIMPSON.
64 I. C. 534 : 13 Bur. L. T. 227.

——0. 40 — *Execution Proceedings—Receiver, appointment of—No transfer of Judgment debtors property takes place.*

Order 40, C. P. Code, does not specifically refer to execution proceedings. When in execution proceedings a receiver is appointed he is put in the position of the judgment-debtor and there is no transfer of the property from the judgment-debtor to him. (*Mukerji and Dalal, JJ.*) KIRTARATH GIR *v.* MUTHARA PRASAD RAM. **46 A. 924 : 81 I. C. 741 : A. I. R. 1925 All. 72.**

——0. 40—*Examination* pro interesse suo—*Title suits pending—Laches on part of appllicant for examination—Examination was refused.*

When a receiver is in possession of property under the process or authority of the Court, his possession is not to be disturbed even by an ejectment under an adverse title without the leave of the Court, for the receiver's possession is deemed to be the possession of the Court and the Court will not permit itself to be made a suitor in a Court of law The proper and usual mode to be adopted under such circumstances is for the party claiming an adverse interest to apply to the court to be permitted to come in and be examined. *pro interesse suo.* 25 Ch. D. 723 Ref. to. But where the question to be tried is a pure matter of title, the Court from a sense of convenience and justice will generally authorise a suit to be brought, taking care, however, to protect the possession of the receiver by giving proper directions. 9 Ves. 3351. Jac and Walk 176 1 Cox, 422, 1 Ch. Cas. 223, 3 Hare 461 and 8 Hare 472 Ref. to. An examination *pro interesse suo* is never made unless the applicant shows diligence. Where there were two suits pending in which the applicant's title would be determined and where the applicant had not shown diligence. *Held*, that an examination *pro interesse suo* should not be made. There is power in the Court to make an order for examination *pro interesse suo* but the Court will exercise the power very sparingly and only in very special cases and under special conditions. 16 Bom. 511 and 17 Cal. 285 Ref. to. (*C. C. Ghose, J.*) SREEDHAR CHAUDHURY *v.* NILMONI CHOWDHURY.
41 C. L. J. 197 : 86 I. C. 677 : A. I. R. 1925 Cal. 681.

——0. 40—*Receiver—Appointment of—Execution against property—Omission to obtain leave of Court does not make it void.*

The rule that possession of a receiver may not be disturbed without leave, does not apply so far as third parties are concerned, until a receiver has been actually appointed and is in actual possession. Even where a receiver is in possession, a sale of property in his hands at the instance of a stranger to the suit without leave of Court is not void but only voidable. It can only be set aside by appropriate proceedings and if the persons interested do not impeach the sale, it is not open to others to do so. (*Chatterjee and Pearson, JJ.*) RAJA JAGADISH CHANDRA DEO DHABAL DEO *v.* BHUBANESWAR MITRA.
37 C. L. J. 265 : 27 C. W. N. 38 : A. I. R. 1923 Cal. 121.

——0. 40—*Sapurdar—If a receiver.*

C. P. CODE (V OF 1908), O. 40.

A *sapurdar* is not a receiver of court and the provisions of the C.P. Code, relating to a Receiver appointed by court do not apply to him. (*Zafar Ali, J.*) ALLAH DAD *v.* EMPEROR. **25 Cr. L. J. 43 : 75 I. C. 731 : A. I. R. 1924 Lah. 667 (2).**

——**O. 40**—*Landlord's decree for rent—Receiver appointed for the press in the premises to carry it on, to pay rent and to sell press for advantageous price—Mortgagee of press consenting—Rent and Receiver charges priority.*

Where in execution of a decree by A against B for arrears of rent due for a premises C was appointed Receiver of the Press mortgaged to D and located in the premises for carrying on the trade and pay rent and sell the machinery with the consent of the mortgagee, the mortgagee is not afterwards entitled to claim in priority of the landlord for rent and of the Receiver for the charges of management. *Spencer, Offg. C.J.*—The case clearly falls within S. 70 of the Contract Act which covers cases of the nature of salvage. 16 M. L. T. 375. *Bertrand* v. *Davoes* (1862) 54 E. R. 1204. When an order appointing Receiver is made by the Court for the benefit of all the parties to the litigation, the Court could deal with the property giving priority to Receiver's expenses over the mortgagee 34 Cal. 642. *Srinivasa Iyengar, J.*—When property is placed in *custodia legis* by the appointment of a Receiver all orders passed for the management will be binding on all who are either actually or constructively parties to the proceedings. (*Spencer, O. C. J. and Srinivasa Iyengar, J.*) RAJAGOPALACHARIAR *v.* JAMAL AYIBISHA BIBI. **22 L. W. 312: 90 I. C. 337 : A. I. R. 1925 Mad. 571.**

——**O. 40, R. 1.**

Appeal.
Directions to Receiver.
Discharge of Receiver.
Discretion of Court.
Effect of Appointment.
Execution.
Grounds for Appointment.
Interim Receiver.
Leave of Court.
Mortgage.
Partition Suit.
Partnership.
Possession.
Powers of Receiver.
Prima facie case.
Removal of Receiver.
Scheme Suit.
Selection of Receiver.
Suit against Receiver.
Trust.

Appeal.

——**O. 40, R. 1 and O. 43, R. 1, cl. 8**—*Appeal—It is enough to include in an appeal from interlocutory order only persons materially prejudiced by appointment of Receiver.*

If a Receiver is appointed, in an appeal from interlocutory order, the only person materially prejudiced thereby would be the person entitled to present possession. Where there is no suggestion that any of the defendants is entitled to present possession, *held*, that it is not necessary to have them on the record in the appeal. (*Mookerjee and Chotzner, JJ.*) BHUPENDRA NATH *v.* MONOHAR MUKERJEE. **28 C. W. N. 86 : 77 I. C. 783 : A. I. R. 1924 Cal. 456.**

——**O. 40, R. 1**—*Appeal—Appointment of Receiver—When liable to be set aside.*

A court of appeal will not, except in an extreme case, disturb an order as to the appointment of a Receiver by a Court below. (*Moti Sagar, J.*) DHUMI *v.* NAWAB MUHAMMAD SAJJAD ALI KHAN. **5 Lah. L. J. 533 : A. I. R. 1923 Lah. 623.**

C. P. CODE (V OF 1908), O. 40, R. 1—Directions to Receiver.

——**O. 40, R. 1 and O. 43, R. 1 (b)**—*Provisions of C.P. Code whether applicable in cases of appointment of Receivers under S. 12 of the Guardians and Wards Act—Applicability.*

A Judge before whom an application for the appointment of a guardian is pending has power to appoint a Receiver according to the provisions of the C. P. Code. S. 12 of the Guardian and Wards Act empowers a Court to make such an order for the temporary custody and protection of the person or property of the minor as it thinks proper. The court may appoint a guardian temporarily and another course open to him is to appoint a Receiver under O. 40, R. 1. An order appointing a receiver comes not under S. 12 of the Guardian & Ward's Act, but under O.40, R.1 and as such is appealable under cl. (s) of R.1 of O.43, C.P. Code. (*Coldstream, J.*) MT. CHANDRA WATI *v.* JAGANNATH. **7 Lah. L. J. 281 : 90 I. C. 611 : 26 Punj. L. R. 576 : A. I. R. 1925 Lah. 489.**

——**O. 40, R. 1 and O. 43, R. 1 (s)**—*Appeal—Dispossesssion by receiver of a third party.*

When property of a third party is interfered with by an officer of the court like the Receiver the party has ordinarily two remedies. He may apply to the court for a summary order restraining the Receiver from interfering or he may ask the leave of the court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. Where the party has adopted the summary remedy the order of the Court is an order under O. 40, R. 1 (*b*) and is appealable. 39 C. 713 : 3 Pat. L. J. 573 Rel. (*Oldfield and Venkatasubba Rao, JJ.*) RAMASWAMY PILLAI *v.* JANAKI AMMAL. **(1922) M. W. N. 725 : 16 L. W. 833 : 32 M. L. T. 96 : A. I. R. 1923 Mad. 129.**

——**O. 40, R. 1**—*Appeal—Appointment of Receiver—Order dismissing objection—Appeal.*

An order dismissing an objection to the appointment of a receiver of property, the objector not being a party falls under O. 40, R. 1 and is appealable. (*Baker, A. J. C.*) RAMSWARUP *v.* RAGHUNANDAN. **A I. R. 1924 Nag. 165.**

——**O. 40, R. 1**—*Appeal—Order appointing receiver without appointing a particular person by name.*

An order of a Court that a receiver should be appointed in a case without appointing anybody by name as receiver is appealable. (*Jwala Prasad and Bucknill, JJ.*) GOBIND RAM *v.* GANESH RAM. **4 U. P. L. R. (Pat.) 68 : 1 P. 625 : (1922) P. H. C. C. 250 : 1 Pat. L. R. 161 : 4 P. L. T. 210 : A. I. R. 1922 Pat. 577.**

Directions to Receiver.

——**O. 40, R.1 (2)**—*Directions to Receiver—Court's duty—Claim by third parties.*

Where in a petition under O. 40, R. 1 a claim of title and possession is made by the third parties the Court before directing the Receiver to take possession of the properties must make an enquiry and such enquiry cannot be delegated to the Receiver. (*Newbould and Suhrawardy, JJ.*) HAMIDA *v.* JAMILA KHATUN. **65 I. C. 837 : 34 C. L. J. 123.**

——**O. 40. R. 1**—*Directions to Receiver—Power of Court—Disposal of suit—Winding up.*

A Court which appoints a Receiver has authority to pass orders necessary to wind up his charge even though the suit has been disposed off (*Campbell, J.*)

C. P. CODE (V OF 1908), O. 40, R. 1—Directions to Receiver.

GANGA RAM *v.* NATHA RAM. **A. I. R. 1924 Lah 583.**

———0. 40, R. 1—*Directions to Receiver—A letter of instructions from Court—Appeal.*

There is no provision of law which would authorise an appeal from instructions, issuing from a Court to a receiver appointed by it. The question of the validity of the instructions is to be decided in the appeal against the appointment of the receiver. (*Broadway, J.*) MT. ISHRI *v.* SHIB RAM.

A. I. R. 1923 Lah. 239 (2).

Discharge of Receiver.

———0. 40, Rr. 1 and 4—*Discharge of Receiver—Accounts—Vouchers — Mal administration — Remedy for.*

A receiver's account must be vouched by the production of proper receipts. The vouchers will be admitted as evidence of the payment of the sums therein specified and credit given to the accounting party in the account, unless the other side shows some reasonable ground for impeaching the vouchers, but if any party objects, the affidavit or oral evidence of the person who received the money is required, and if this cannot be had, then proof must be given of his signature to the voucher. The question of bad management by the Receiver of the estate does not arise when a Receiver submits his accounts in order that it may be passed Questions with regard to the soundness or prudence of the system of management adopted by a Receiver or charges of wilful default or neglect are not matters that can be disposed of in the shape of exceptions to account. (*Mookerjee and Chotzner, JJ.*) HAJI TELLER RAHMAN *v.* GOLAM GONE. **40 C. L. J. 28 : 82 I C. 419 : A. I. R. 1924 Cal. 1063.**

———0. 40, R. 1—*Discharge of Receiver.*

A Receiver appointed in a suit for proceedings by consent of parties, may be discharged, even before the termination of the suit or proceeding, if the Court finds that it will cause no injury to the estate. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) VENKATALINGAMA *v.* VENKATARAMA RAO, **29 M. L. T. 175 : 13 L. W. 367 : 61 I. C. 562 : (1921) M. W. N. 173.**

Discretion of Court.

———0 40, R. 1—*Discretion of Court—Receiver, appointment of—Costs.*

The Appointment of a Receiver being discretionary it does not follow, that costs should follow, the granting or rejecting an application for the appointment of a Receiver. (*Piggott and Walsh, JJ.*) SHEO PARKASH *v.* NAND KISHORE. **61 I. C. 112 : 2 U. P. L. R. (A.) 389.**

———0. 40, R. 1—*Discretion of Court—Remuneration af receiver—Insolvency proceedings.*

A receiver is generally remunerated by the method of percentage or commission but there is no absolute rule that he should be so remunerated. The Court has a discretion, if it thinks fit to allow him remuneration at a fixed rate. The receiver's remuneration must come out of the estate of the insolvent and the legal representatives of the insolvent cannot be made personally liable for the same. (*Sanderson, C. J. and Richardson, J.*) SREPAT SINGH *v.* RAM SARUP SURYA PRASAD. **A. I. R. 1923 Cal. 516.**

———0.40, R. 1—*Discretion of Court—Full opportunityfor evidence against appointment must be allowed—Appointment of receiver—When interfered with in Appeal.*

The jurisdiction to appoint a Receiver must not be lightly, but must be most cautiously, exercsied. The relief is not one *ex debito justitiæ*, but one which is

C. P. CODE (V OF 1908), O. 40, R. 1—Effect of Appointment.

purely within the judicial discretion of the Court. The power to appoint a Receiver is not to be generally exercised as a matter of course, and it is not a reason for allowing an application that it can do harm to appoint a Receiver. Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver. Where a Receiver was appointed without opportunity being given to the defendants to produce evidence to rebut the case put forward by the plaintiff. *Held* : that the appointment of the Receiver should be set aside. (*Abdul Raoof ana Jai Lal, JJ.*) GURDWARA PARBANDHAK COMMITTEE, AMRITSAR *v.* MAHANT DHARAM DAS. **6 Lah. 74 : 88 I. C. 562 : 26 Punj. L. R. 228 : A. I. R. 1925 Lah. 349.**

———0. 40, R. 1—*Discretion of Court—Declaratory suit—Agricultural lands.*

Even in a case of a pure declaratory suit, where no possession is asked for, a court has power to appoint a receiver as the object of such an appointment is only to keep the property in *custodia legis* and to preserve the same. A civil court in the Punjab can make such an appointment to collect the rent even in the case of agricultural lands. (*Moti Sagar, J.*) DHUMI *v.* NAWAB MUHAMMAD SAJJAD ALI KHAN.

5 Lah. L. J. 583 : A. I. R. 1923 Lah. 623.

———0. 40, R. 1—*Discretion of Court—Appointment of receiver in a suit in which possession cannot be decreed to plaintiff.*

In a su t for specific performance of a contract to execute a simple mortgage the Court has no power to appoint a receiver of the properties pending the suit, for it cannot do by way of receivership what it would not be entitled to do even by way of decree. (*Coutts-Trotter, C. J. and Wallace, J.*) CHOCKALINGAM PILLAI *v.* PITCHAPPA CHETTIAR.

22 L. W. 579 : (1925) M. W N. 802.

———0. 40, R. 1—*Receiver— Appointment—When to be made—Parties—Right of.*

A court is competent to appoint a Receiver in a pending partition suit between co-owners or co-sharers for the protection of the property in suit or the prevention of injury to such property. It is well settled that if a case for the appointment of a Receiver is made out, the court will not appoint a party to the action as Receiver unless by consent or unless there are special circumstances justifying such appointment. (*Kennedy, J. C. and Bilaram, A. J. C.*) JAN MAHOMED *v.* GHULAM RASUL KHAN. **89 I. C. 104.**

Effect of Appointment.

———0. 40, R. 1—*Receiver appointed by High Court—Power of Subordinate Court to restrain him.*

A Subordinate Court cannot restrain a Receiver appointed by the High Court from performing his duties. The proper course is to apply to the High Court for orders. (*Greaves and Mukerji, JJ.*) NURUDDIN AHMAD *v.* SUBODH CHANDRA MITRA.

87 I. C. 808 : A. I. R. 1925 Cal. 1174.

———0. 40, R. 1—*Effect of appointment—Appointment of receiver continues till order of discharge by Court.*

A Receiver is an officer of the Court, and as long as the order appointing the receiver remains unreversed, and as long as the suit remains *lis pendens*, his functions continue until he is discharged by order of the Court. Hence the mere passing of a preliminary decree in a partition suit, declaring the shares of the parties in the estate, and directing partition of the

C. P. CODE (V OF 1908), O. 40, R. 1—Effect of Appointment.

property other than the agricultural land does not put an end to the appointment of the receiver, and, despite the provisions of O. 20, R. 18, it is legal for the Court to pass an order for *ad interim* injunction restraining interference with the receiver's possession of agricultural land. (*Shadi Lal, C. J and Le Rossignol, J.*) SHANKAR DAS *v.* BEHARI LAL. **7 Lah. L. J. 239: 26 Punj. L. R. 56 : 6 Lah. 442 : 89 I. C. 932 : A. I. R. 1925 Lah. 445.**

———0. 40, R. 1—*Effect of appointment—Mortgage suit—Final decree—Subsequent appointment of receiver—Receiver proper party to execution proceedings—Refusal to add—Revision—C. P. Code, S.* 115.

Where after the final decree on a simple mortgage is passed in a mortgage suit, and before the sale, a receiver is appointed of the properties of the mortgagor in a partition suit between them and the Receiver applies to be made a party to the execution proceedings, he ought to be made a party. The mere fact that there is a mortgage on the property in the hands of the Receiver would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of a receiver without the sanction of the Court which appointed him. Property in the possession of a receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. It is in the discretion of the Court to refuse to permit a sale of the property in its possession under a judgment though the levy was made before the Receiver was appointed. 26 C. 127, doubted. The Receiver in such a case is not a new party under O. 1, R. 10, C.P. Code and that rule does not stand in the way of the Receiver being made a party. The refusal to make the Receiver party to the execution proceedings is a material irregulatity in the exercise of the jurisdiction of the lower Court justifying the interference of the High Court under S. 115, C.P. Code. (*Devadoss, J.*) FRASER AND ROSS *v.* KRISHNASWAMI IYER. **47 Mad. 47 : (1922) M. W. N. 745 : 16 L. W. 322 : 31 M. L. T. 290 : A. I. R. 1923 Mad. 144 (2) : 43 M. L. J. 211.**

———0. 40, R. 1—*Effect of appointment.*

Where a receiver is appointed, property vests in him only when the orders under O. 40, R. 1 (*b*), (*c*) and (*d*) are made. (*Halifax, A. J. C.*) RAMAKRISHNA *v.* GANAPATI. **A. I. R. 1923 Nag. 6.**

———0. 40, R. 1—*Effect of appointment does not bar execution.*

Although there is some doubt as to whether the appointment of a Receiver is equivalent to execution and therefore to a delivery in execution the order appointing a Receiver does not operate as a stay of execution so as to disentitle the decree-holder from executing his decree in respect of the same debt in any manner provided by the C. P Code. The mere fact that the decree-holder consented to the appointment of a receiver does not estop him from subsequently seeking to enforce his decree by execution (*Das and Ross, JJ.*) RAMESWAR SINGH *v.* HITENDRA SINGH **6 Pat. L. J. 208 : 62 I. C. 469 : 2 Pat. L. T. 628.**

Execution.

———0. 40, R. 1—*Execution—Ghatwali estate—Collection of rents.*

Payments of Chowkidars, Sardars and Government dues in a Ghatwali estate do not belong to the Ghatwal ; while the rents and profits belong to the Ghatwal. If a decree is to be executed against him these can be collected by a receiver appointed therefor. (*Jwala Prasad and Ross, JJ.*) TIKAIT DAMODAR NARAIN SINGH *v.* GANGA RAM MARWARI.

C. P. CODE (V OF 1908), O. 40, R. 1—Grounds for Appo ntment.

1923 P. H. C. C. 372 : 5 P. L. T. 34 : 3 Pat. 339 : A. I. R. 1924 Pat. 269.

Grounds for Appointment.

———0. 40, R. 1—*Grounds for appointment—Principles guiding—Wakf property—Which party is in actual possession being doubtful—Receiver can be appointed.*

An order appointing a receiver will not ordinarily be made at the instance of a plaintiff having merely a shadowy claim where it has the effect of depriving a defendant of *de facto* possession, since that might cause irreparable wrong. The main object of appointing a Receiver is to protect the properties pending litigation and to preserve them for the benefit of the party lawfully entitled thereto. In an application for the appointment of a Receiver it is sufficient if a *prima facie* title to the property over which the Receiver is sought to be appointed is made out by the applicant. Where property is shown to be *in medio, i.e.*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble, and where no one seems to be in actual lawful enjoyment of the property no harm can be done to any one by taking it and preserving it for the benefit of the litigant who may prove successful.

Per *Greaves, J.*—Some actual interest in the property to be protected is necessary to support an appointment of a receiver in an interlocutory application but where it is doubtful whether the property which is wakf property is without a custodian or not, the Court will be justified in making the appointment simply for the protection of the property. (*Greaves and Graham, JJ.*) ALKAMA BIBI *v.* ISTAK HOSSAIN. **29 C. W. N. 836 : 89 I. C. 183 : A. I. R. 1925 Cal. 970.**

———0. 40, R. 1—*Grounds for appointment—Just and convenient—Meaning of—Principles guiding appointment—Merits of case—Appeal—Parties.*

The appointment of a Receiver is a matter of judicial discretion and Courts should proceed cautiously viewing all the circumstances of the case. The words "just and convenient" mean that the Court should appoint a Receiver for the protection of property or prevention of injury according to legal principles and not because it thinks it convenient to do so. They confer no arbitrary and non-regulated discretion on the Court. The Receiver appointed in an action should as a general rule be a disinterested person, but it is competent to the Court upon the consent of parties and in a proper case, without such consent to appoint a person mixed up in the subject-matter of the litigation, if it will be beneficial to the estate. In an appeal against an order refusing to appoint a receiver, the only necessary parties are those who are entitled to present possession. The order on an application under O.40,R.1 should not express an opinion on the merits of the case. (*Mookerjee and Chotzner, JJ.*) BHUPENDRA NATH MUKHERJEE *v* MANOHAR MUKERJEE. **28 C. W. N. 85 : A. I. R. 1924 Cal. 456.**

———0. 40, R. 1—*Grounds for Appointment—Impartible zemindari—Large estate—Mines and minerals.*

Where the subject of dispute between the parties to a litigation was a large impartible zemindari with valuable forests and mines and minerals and the zemindar had been long under the management of the Court of Wards, *Held* that the case was a fit one for the appointment of a receiver pending the appeal and

C. P. CODE (V OF 1908), O. 40, R. 1—Grounds for Appointment.

for stay of execution of the decree by the successful claimant. (*Mookerjee and Rankin, JJ.*) SRI PRATAB CHANDRA DEO DHABAL DEB *v.* SRI RAJA JAGADISH CHANDRA DEO. **75 I. C. 417 : 37 C. L. J. 417.**

——O. 40, R. 1—*Grounds for appointment—Notice of application—Necessity for.*

O. 40, R. 1, C. P. Code does not lay down that notice to the opposite party should be issued before appointing a Receiver and it is obvious that in many cases the object of the appointment might well be nullified if notice were issued. 22 C. 459 : 21 M. L. J 821 : 107 P. R. 1908 : 36 P. R. 1910, Dist. The question that the Courts have to see in dealing with applications for a Receiver, is whether, in the circumstances of the case, the appointment of the Receiver is just and convenient, the main object being to preserve the property. The power is discretionary with the Court' but at the same time discretion is not to be exercised arbitrarily but in a regulated manner. Where there are a large number of outstandings due to the estate of the deceased person, some of which are liable to be lost owing to the efflux of time, and the heir of the deceased is a lady and there is a *bona fide* dispute between the parties the Court is justified in appointing a Receiver to recover the outstandings and to bring the proceeds into Court. (*Broadway, J.*) MT. ISHRI *v* SHIB RAM.

A. I. R. 1923 Lah. 239 (2).

——O. 40, R. 1—*Grounds for appointment—Receiver—Mahant — Disputes regarding title—Convenience.*

Where disputes arose between two persons as to who was entitled to be *mahant* and there was something to be said regarding the claim of each and under the circumstances putting one of them into possession would give him a great advantage over the other, a proper case was made out for appointing a Receiver. (*Scott-Smith, J.*) MANOHAR DAS *v.* KALYAN DAS. **69 I. C. 361 : A. I. R. 1924 Lah. 421.**

——O. 40, R. 1—*Grounds for appointment—Discretion—Interference on appeal.*

A Court has a right to proceed under O. 40, R. 1, C.P. Code where it appears to be just and convenient to do so and the Court may make an order appointing a Receiver *suo motu.* Though a suit is brought for a mere declaration and possession of the property cannot be awarded by the Court to one party or the other, the Court has jurisdiction to appoint a Receiver to maintain the *status quo ante* pending a suit or appeal. Where a single Judge of the High Court has appointed a Receiver, the exercise of his discretion will not be lightly interfered with on appeal. (*Shadi Lal, C. J. and Abdul Qadir, J.*) AMARNATH *v.* MT. TEHAL KAUR. **4 U. P. L. R. (Lah.) 73 : A .I. R. 1922 Lah. 444.**

——O. 40, R. 1—*Grounds for appointment—Mahomedan widow in possession—Proceedure on application—Refusal to appoint Receiver at one stage—Subsequent application.*

The mere fact that a Mahomedan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a Receiver summarily without enquiry into the merits of the application. There is nothing in O. 40, R. 1, C.P. Code, to prevent the appointment of a Receiver in such a case. The mere fact that a Receiver has not been appointed at a prior stage of the suit is no ground for refusing the application at a later stage, when fresh grounds are made out. (*Batten, J. C. and Hallifax, A. J. C.*) ZAHROS SYED ALI *v.* AHMAD SYED. **A. I. R. 1923 Nag. 21.**

C. P. CODE (V OF 1908), O. 40, R. 1—Leave of Court.

——O. 40, R. 1—*Grounds of appointment—Scope.*

There is no jurisdiction in the Court to appoint a Receiver at the instance of a simple contract creditor unless the creditor establishes a special equity in the favour of such appointment. A prior mortgagee is entitled to have the Receiver obtained by a puisne mortgagee or a single contract creditor discharged and a nominee of his own substituted. Whenever a Court appoints a Receiver it ought to take care to protect the rights of persons other than the applicant. The appointment of a Receiver is an equitable relief and if the applicant does not establish a special equity in his favour it is impossible to say that it is "just and convenient" that a receiver should be appointed. The first essential condition for the appointment of Receiver is that the applicant must satisfy the Court that he has an interest in the property to be affected by the order. The fact that fraud is practised on the court is sufficient ground for the discharge of the Receiver. (*Das and Adami, JJ.*) CHOUDHURI *v.* DUTT. **3 P. L. T. 24 : A. I. R. 1922 Pat. 318.**

——O. 40, R. 1.—*Grounds for appointment—Money creditor cannot apply for Receiver.*

A Court has no jurisdiction to appoint a Receiver at the instance of a simple money creditor unless he establishes a special equity in his favour. The appointment of a Receiver is an equitable relief and will be only granted on equitable grounds. In the absence of any special equity in the applicant's favour a Receiver cannot be appointed simply on the ground that it is 'just and convenient' to grant it. The first essential condition is that the applicant must have 'an interest" in the property to be affected by the order. A Court appointing a Receiver ought to take care to protect the rights of persons other than the applicant. A prior incumbrancer desiring to take possession is entitled to have the Receiver obtained by a puisne incumbrancer, and therefore by a simple contract creditor, discharged, and a Receiver of his own substituted. (*Das and Adami, JJ.*) PRITHI CHAND LAL CHAUDHURI *v.* KALIKANAND SINGH. **61 I. C. 849 : 6 P. L. J. 366.**

Interim Receiver.

——O. 40, R. 1—Interim Receiver—*Interference with possession of third parties—Injunction.*

Where a Receiver is appointed there seems to be no valid objection to a third party, whose property is being interfered with from applying to the Court for redress and for an injunction restraining the Receiver from such trespass, It is not necessary for them to file a separate suit. (*Kumaraswami Sastri, J.*) THAVASIMUTHU NADAR *v.* BALAGURUSWAMI NADAR. **17 L. W. 64 : A. I. R. 1923 Mad. 304.**

Leave of Court.

——O. 40, R. 1—*Leave of Court—Appointment of receiver after attachment to other proceedings makes sale void without leave of Court appointing receiver.*

"The general rule is well settled that property in the hands of a Receiver is exempt from judicial process except of course to the extent permitted by the appointing Court." Though an attachment was levied on property before the appointment of the Receiver it is within the sound discretion of the appointing Court to refuse to permit a sale of the property thereunder. A purchaser in Court-auction without previous leave to sell buys at his peril, for the sale may be cancelled. 11. C. L. J. 489 ; 1923 Mad. 144 Foll. (*Krishnan and Odgers, JJ.*) THAYUMANA PILLAI *v.* RAMASWAMI CHETTIAR. **19 L. W. 681 . 79 I. C. 632 : A. I. R. 1925 Mad. 51.**

——O, 40, R. 1—*Leave of Court—Attachment of*

C. P. CODE (V OF 1908), O. 40, R. 1—Mortgage.

decree obtained by receiver—Receiver's transfer.

An act done without the Court's sanction to proceed against a receiver can subsequently be validated. Where no step had been taken to validate the irregular attachment by the time that the receiver assigned his interest as a decree-holder to the innocent purchaser, the appellant's right as an attaching creditor cannot be allowed to prevail over the rights of a *bona fide* transferee for consideration of the decree-holder's interest. (*Spencer and Venkatasubba Rao, JJ.*) KALYANASUNDARAM IYER *v.* NARASIMHA IYENGAR. **18 L. W. 280 : A. I. R. 1923 Mad. 567 : 44 M. L. J. 427.**

Mortgage.

———0. 40, R. 1—*Mortgage—Mortgage by karta of Hindu joint family—Money used for family business—Receiver can be appointed in mortgage suit—Hindu Law—Alienation.*

Where a mortgage was created by the karta of a joint family, on the family properties for securing overdrafts on the banking account of limited company of which the karta was a member, and where the adult members of the family were aware of the mortgage and the money advanced was used for the family business, *held*, that in a suit on the mortgage, a receiver could be appointed. (*Sanderson, C. J. and Walmsley, J.*) RAM KUMAR LAL *v* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA. **41 C. L. J. 203 : 87 I. C. 375 : A. I. R. 1925 Cal. 664.**

———0. 40, R. 1—*Mortgage—Receiver can be appointed in mortgage suit—Right to receive rents and profits is not requisite for exercise of power where security by itself is insufficient.*

There is nothing in R. 1 which excludes mortgage suits from its operation and a Receiver can therefore be appointed in a mortgage suit. 43 I. C. 533, Diss. O. 40, R. 1 gives the widest power to a Court to appoint a Receiver of any property whenever it appears to the Court to be just and convenient. The existence in the plaintiff of a right to receive rents and profits is not an essential pre-requisite for the exercise of this power. A Receiver can be appointed in a mortgage suit where the security is insufficient for the realisation of the decree by its sale alone. (*Moti Sagar, J.*) PARAS RAM *v* PURAN MAL. **85 I. C. 737 : A. I. R. 1925 Lah. 590.**

———0. 40, R. 1—*Mortgage.*

Appointment of a receiver should not be made where under mortgage decree the decree-holder has a right to sell the mortgage property. (*Jwala Prasad and Bucknill, JJ.*) MOKHTAR AHMAD *v.* BIBI RAHIMUNNISSA. **1922 P. H. C. C. 66 : 4 P. L. T. 58 : A. I. R. 1922 Pat. 369.**

Partition Suit.

———0. 40, R. 1—*Partition suit—Appointment—Receiver—Appeal.*

The Court should not appoint a Receiver, merely because of strained relations, except by consent and upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint and that the property in possession of defendants the opposite party, was in danger of being wasted especially where one of the defendants is presumably manager. In any case the facts, that a mere declaration is sought for the land, that the Civil Court cannot divide it, that the plaintiffs appear from the materials on the record to be out of possession and that the Court has no jurisdiction over the apportionment of the produce, make the order of the appointment of a Receiver for the agri-

C. P. CODE (V OF 1908), O. 40, R. 1—Possession.

cultural lands still less justifiable than that regarding the other property. An order of a Court that a Receiver should be appointed in a case, without appointing anybody by name as receiver, and adjourning the case to a later date for so appointing one is an order under O. 40, R. 1 and appealable under O. 43, R. 1, (*s*). (Case-law discussed). 55 I.C. 827 ; 36 P. R. 1910, Foll. (*Campbell, J.*) THE FIRM RAGHBIR SINGH JASWANT *v.* NARIJAN SINGH. **A. I. R. 1923 Lah. 48.**

———0. 40, R. 1—*Partition suit—Appointment of Receiver—Right to—Malabar tarwad.*

For the appointment of a Receiver in a suit, there must be some substantial ground for interfering with the existing rights of possession. The fact that no harm would be done by such appointment is not a sufficient ground. As regards the rights to have a Receiver appointed a member of a Malabar tarwad suing for partition of tarwad property is not in the same position as a member of a Mitakshara joint family suing for partition. (*Spencer and Devadoss, JJ.*) MELE VITTIL KUNHAN MENON *v.* KANNAN MENON. **(1924) M. W. N. 202 : 79 I. C. 561 : A. I. R. 1924 Mad. 482 : 46 M. L. J. 133.**

Partnership.

———0. 40, R. 1—*Partnership—Remuneration of Receiver.*

The managing partner of a partnership by consenting to act without remuneration as Receiver during the dissolution of the partnership does not forego his right to such remuneration as he would be entitled to for managing and carrying on the business. (*Walmsley and Mukerji, JJ.*) MAHOMED KAMIL *v.* HEDAYETULLA. **90 I.C. 492 : A. I. R. 1926 Cal. 380.**

———0. 40, R. 1—*Partnership—Interim receiver—Jurisdiction of Court denied.*

A partnership suit is not only an action in which the appointment of a receiver is usually claimed in the plaint itself, but is also one in which it is desirable, and even necessary in most cases, to appoint a receiver to preserve the property in dispute during the pendency of the suit and to prevent the partner in possession of the partnership property from taking undue advantage of his position as against the co-partners, who, in the eye of the law, are equally with him the owners of the property. When a plaint is presented and it is not rejected or returned for any of the reasons mentioned in the Civil Procedure Code, but is admitted, the Court has assumed jurisdiction, and has therefore seizin of the suit and the subject-matter thereof. This jurisdiction is assumed on the allegations in the plaint. If the Court has seizin of the suit, it must of necessity have jurisdiction to pass the necessary interlocutory orders, *e. g.*, the appointment of a receiver *pendente lite* to take charge of the partnership properties in a partnership suit, and it cannot be said that the Court is wrong in postponing the consideration of the point of jurisdiction though raised by the defendant. (*Heald and Chari, JJ.*) KIN FOO *v.* WHEE SHEIK CHENG. **3 Rang. 196 : A. I. R. 1925 Rang. 287.**

Possession.

———0. 40, R. 1—*Possession—Receiver—Position and status of—Possession of receiver enures for rightful owner.*

When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court and the possession of the court by the receiver is the possession of all parties to the action

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according to their titles. The property passes into legal custody as the receiver is in the position of a stakeholder and such custody is for the benefit of the true owner. 22 C. L. J. 283 ; 30 M. 12 ; 17 C. 814 ; 5 A. 1; 5 C. L. J. 270 Rel. (*Mookerji and Suhrawardy, JJ.*) DWIJENDRA NARAYAN ROY *v.* JOGES CHANDRA DE. **39 C. L. J. 40 : 79 I. C. 520 : A. I. R. 1924 Cal. 600.**

——0. 40, R. 1 (2)—*Possession—Subrule 2 does not prevent Court from removing party to suit from possession.*

Sub-rule (2) of R. 1 refers to the case of removal of a person other than a party to the suit and does not debar the Court from removing one of the parties to the suit from the possession of the property. 43 I C. 533 Diss. (*Moti Sagar, J.*) PARAS RAM *v.* PURAN MAL. **A. I. R. 1925 Lah. 590.**

——0. 40. R. 1 (2)—*Possession, removal from—Parties to the suit.*

The provisions of O. 40, R. 1 (2), C. P. Code, refer to the case of the removal of a person other than a party to the suit and the Court is not debarred from removing one of the parties from the possession of the property. 18 C. W. N. 537 : 24 M. L. J. 658, Foll. (*Shadi Lal, C. J. and Abdul Qadir, JJ.*) AMARNATH *v.* MT. TEHAL KAUR. **4 U. P. L. R. (Lah.) 73 : A. I. R. 1922 Lah. 444.**

——0. 40, R. 1 (2)—*Possession—Court—Jurisdiction of, to put in possession—Any person—Meaning of.*

Under O. 40, R. 1 (2) of the Code the Court has full power to put a Receiver, appointed by it, in possession of the properties removing any of the parties to the suit, but not a party to the suit cannot be so remove dunless some one or more or all of the parties have such a right. The words "any person" in O. 40, R. 1 (2) are not confined to persons who are not parties to the suit. A tenant could not be ousted to be replaced by a Receiver in an interlocutory order. (*Sadasiva Aiyar and Spencer, JJ.*) KUMARASAMI PILLAI *v.* PASUPATHIA PILLAI. **61 I. C. 605 : 12 L. W. 254.**

——0. 40, R. 1 (b)—*Possession—'Person' is other than receiver.*

The word "person" in cl. (*b*) refers to a person other than a "receiver" for cl. (*c*) shows that the property removed from the possession or custody of the person referred to in cl. (*b*) is to be committed to the possession, custody or management of the "receiver" by cl. (*c*). 20 C. W. N. 789 and 24 I. C. 862, Foll. (*Krishnan and Waller, JJ.*) RAMASWAMI NAIDU *v.* AYYALU NAIDU. **19 L. W. 247 : 34 M. L. T. 6 : 88 I. C. 625 : A. I. R. 1924 Mad. 614 : 46 M. L. J. 196.**

Powers of Receiver.

——0. 40, R. 1—*Powers of Receiver—Mortgage—Decree under O. 34, R. 4 of the Civil Procedure Code—Receiver of property under mortgage—Effect of appointment of—Action by Receiver against decree-holder for account and possession.*

In 1899 the mortgagee in the exercise of his rights under a mortgage executed in 1892 obtained the usual decree for sale of the mortgaged property (the village Jainagar). In 1910, on the application of the judgment-debtors and with the consent of the mortgagee (decree-holder) the Court appointed a Receiver of the properties of the judgment-debtors. After various subsequent proceedings the Receiver and the judgment-debtors instituted proceedings against the mortgagee for an account of his receipts from the mortgaged property, and for delivery of possession of

C. P. CODE (V OF 1908), O. 40, R. 1—Powers of Receiver.

the said village. The Subordinate Judge of Fizabad decided that the Receiver was not entitled to possession, but only to debit the mortgagee in the account with the sum of Rs. 1,471-3-5 per annum (instead of Rs. 1,600 as previously), for sums received from the property. The High Court on appeal reversed this judgment and made a decree directing the Maharaja to deliver up possession of the said village to the Receiver. *Held*, by the Privy Council (affirming the judgment of the High Court that the Receiver was entitled to *khas* possession of the village, and should in future administer and manage it as part of the estate under his charge, subject to being credited in the accounts by the mortgagee with Rs. 1,471-3 5 for collections made up to the last decree of the High Court. (*Lord Shaw.*) RAMESHAR SINGH *v.* HITENDRA SINGH. **35 M. L. T. 179 : 22 A. L.J. 968 : 40 C. L. J. 444 : 82 I. C. 794 : 24 Bom. L. R. 1161 : 20 L. W. 437 : L. R. 5 P. C. 188 : 29 C. W. N. 420 : 3 Pat. L. R. 190 : A. I. R. 1924 P. C. 206 : 47 M. L. J. 294 (P. C.)**

——0. 40, R. 1 (d)—*Powers of Receiver.*

Where the Receiver was given power to collect outstandings and do all things necessary for the realisation and preservation of the assets of a firm, *held*, the Receiver had no authority to mortgage the property of the firm. (*Lord Carson.*) SUBRAMANIAN *v.* LUTCHMAN. **50 Cal. 338 : 2 Bur. L. J. 25 : 32 M. L. T. 184 : 25 Bom. L. R. 582 : 38 C. L. J. 41 : 18 L. W. 446 : (1923) M. W. N. 762 : 28 C. W N. 1 : 1 Rang. 66 : 50 I. A. 77 : A. I. R. 1923 P. C. 50 : 44 M. L. J. 602 (P. C.)**

——0. 40, R. 1—*Powers of Receiver—Appeal against decree for maintenance—Receiver cannot be appointed for correctly ascertaining income of estate so as to enable appellate Court to fix rate of maintenance.*

Receiver cannot be appointed for the purpose of ascertaining real income of property so that correct data may be available to an appellate Court in which an appeal from a decree for maintenance is pending for fixing the rate of maintenance. (*Venkatasubba Rao and Madhavan Nair, JJ.*) RAJAMMAL *v.* TYAGARAJA AIYAR. **22 L. W. 316 : 89 I. C. 943 : A. I. R. 1925 Mad. 1245.**

——0. 40, R. 1—*Powers of Receiver—Receiver has none but expressly granted powers.*

A Receiver has no powers except what the Court grants him. He is only an officer of the Court and whatever powers he exercises are delegated powers of the Court which it expressly gives him. (*Krishnan and Odgers, JJ.*) RATNASAMI PILLAI *v.* SABAPATHI PILLAI. **82 I. C. 793 : A. I. R. 1925 Mad. 318.**

——0. 40, R. 1 and S. 51—*Powers of Receiver—Claim by Receiver outside jurisdiction.*

A Receiver appointed by a Court in execution can prosecute a cause of action outside the jurisdiction of the Court by which he was appointed Receiver. (*Wallis, C. J. and Krishnan, J.*) MUTHU K. R. V. ALAGAPPA CHETTY *v.* S. A. KRISHNASAMY IYER. **13 L. W. 150 : (1921) M. W. N. 106 : 61 I. C. 753 : 29 M. L. T. 110.**

——0. 40. R. 1—*Powers of Receiver—Appointment when takes effect—Furnishing of security.*

Where a Receiver is appointed, his title to possession accrues on the date of his appointment. The appointment of the Receiver is complete on the entry of an order of appointment although he may not be able to take actual possession of the property until security is approved. The appointment of a Receiver operates as an injunction against the parties, their agents and

C. P. CODE (V OF 1908), O. 40, R. 1—Powers of Receiver.

persons claiming under them with notice. (*Baker, O. J. C.*) DEOBAX *v.* KALU RAM.

7 N. L. J. 16 : 78 I. C. 811 : A. I. R. 1924 Nag. 136.

——————**0. 40, R. 1 (2)**—*Powers of Receiver—Mortgagee in possession whether can be removed.*

A Receiver appointed by a Court can oust a mortgagee decree-holder put in possession of the lands subsequent to his mortgage decree. (*Das and Adami, JJ.*) HITENDRA SINGH *v.* RAMESHWAR SINGH.

6 P. L. J. 37 : 61 I. C. 67 : 2 Pat. L. T. 593.

Prima Facie Case

——————**0. 40, R. 1**—Prima facie *case—Receiver—Appointment of.*

In cases where a Receiver is applied for, it is settled law that the applicant should at least present a *prima facie* case and should convince the Court that there may be a fair chance of succeeding in the suit. (*Coutts and Adami, JJ.*) BANWARI LAL *v.* MOTI LAL.

3 Pat. L. T. 466 : A. I. R. 1922 Pat. 493.

——————**0 40, R. 1**—Prima facie *case—Appointment of Receiver—When made—Principles guiding.*

A receiver of property will not be appointed under O. 40, R. 1, unless the plaintiff satisfies the Court that he has a *prima facie* case and that an order for a Receiver is necessary for the protection of the property pending litigation. The Court must act in such a case with caution and exercise a discretion to be governed by all the circumstances of the case. (*Rupchand Bilaram, A.J.C.*) JETHALAL MOHANJI *v.* DAYABHAI RAMJI. **89 I. C. 413.**

Removal of Receiver.

——————**0. 40, R. 1**—*Removal of Receiver—Receiver appointed by Court on application of judgment-debtors—Consent of decree-holder—Powers and duties of such Receiver*—Res judicata—*Civil Procedure Code*, 1908, *S.* 11—*Civil Procedure Code*, 1877 (*Act X of* 1877), *S.* 13—*Consent order.*

A Receiver appointed by Court, by consent of all parties, will not, in the absence of proof of maladministration, be removed or discharged. His powers of "realisation, management, protection, preservation and improvement of the property" include a discretionary power of sale, "to be exercised in good faith in the interests of the estate, with the approval of the Court". A consent order does not prevent a party from impugning the administration thereunder " which is of such character as either (*a*) amounts to a malfeasance, and, accordingly, releases the consenter, or (*b*) has been proved by experience to be in substance so protracted and imperfect as to be futile. 40 M.L.J. 423; 11 I.A. 37, Ref. (*Lord Shaw.*) RAMESHWAR SINGH *v.* HITENDRA SINGH. **5 Pat L. T. 491 : 20 L. W. 456 35 M. L T 182 : L R. 5 : P. C. 175 : 40 C. L. J. 431 · 1 0. W. N. 457 : 81 I. C. 576 : 26 Bom. L. R. 1153 : 29 C. W. N. 413 : 22 A. L. J. 968 : 3 Pat. L. R. 180 : A. I. R. 1924 P. C. 202 : 47 M. L. J. 286 (P. C.)**

——————**0. 40, R. 1 and 0. 43, R. 1 (s)**—*Removal of Receiver—Order refusing—Appeal—Manager appointed under—Position and rights.*

An order refusing to remove a person from his position of a receiver is not an order coming under O. 40, R. 1 or R. 4, C. P. Code, and, therefore, no appeal lies against it under O. 43, R. 1 (*s*). There is no provision in the Code for appointing a manager; when a manager is appointed, it is really another name for the appointment of a receiver under O. 40, C. P. Code. (*Krishnan and Waller, JJ.*) RAMASWAMI NAIDU *v.* AYYALU NAIDU. **19 L. W. 247 : 34 M. L. T. 6 : 78 I. C. 625 : A. I. R. 1924 Mad. 614 : 46 M. L. J. 196.**

C. P. CODE (V OF 1908), O. 40, R. 1—Suit against Receiver.

Scheme suit.

——————**0. 40, R. 1 and S. 92**—*Scheme suit—Receiver, appointment of.*

In a suit under S. 92 of the Code, the Court has power to supersede a trustee and appoint a Receiver during the pendency of the suit, notwithstanding that the trustee was appointed manager by the Temple Committee and was removeable only after regular enquiry. (*Oldfield and Ramesam, JJ.*) KUPPUSAMI MUDALIAR *v.* SUBRAMANIAM CHETTIYAR.

(1923) M. W. N. 75 : 16 L. W. 927 : A. I. R. 1923 Mad. 224 : 41 M. L. J. 545.

Selection of Receiver.

——————**0. 40, R. 1**—*Selection of Receiver—Even in partition or partnership cases party must not be appointed Receiver without opponent's consent where Court cannot rely on his honest and disinterested management.*

Except in special cases, a party shall not be appointed Receiver without the consent of the opponent. But in cases of partnership and partition, exception is made to the general rule. But the exception does not apply where the Court cannot rely on honest and disinterested management on the part of the party seeking to be appointed. 18 C. W. N. 533, Dist. *Allen* v. *Lloyd* 12 Ch. D. 447, Ref. to. (*Das and Ross, JJ.*) BHAGAWAN DAS *v.* SHEO NANDAN PRASAD SAHU.

3 Pat. 964 : 6 Pat. L. T. 778 : 85 I. C. 93 : A. I. R. 1925 Pat. 293.

Suit against Receiver.

——————**0. 40, R. 1**—*Suit against Receiver—Nature of office of Receiver.*

The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some other persons, parties to the action. A Receiver is aptly described as the hand of the Court and is not the representative or agent of the party or parties but of the Court in the sense that he acts in the interest of neither plaintiff nor defendant but, for the common benefit of all parties interested. It is also correct in the sense that as the representative of the Court he is subject to its orders and accountable to such persons and in such manner as the Court may direct. It is not, however, a proposition which can be accepted as universally correct under all circumstances ; its correctness or otherwise would depend upon the nature of the cause in which and the party on whose behalf he is appointed and also on the nature of the transaction which he enters into. 22 Cal. 960, Foll. A person who is prejudiced by the conduct of a Receiver appointed in an action ought not, without the leave of the Court, to commence an action against him for adequate reliefs ; more ordinarily would his remedy lie in an application to the Court in the course of the action itself. Where the accountability of a Receiver depends upon debatable questions not easy to be dealt with at the passing of the receiver's accounts, the Court often declines to go into the matter in such proceedings. (*Walmsley and Mukerji, JJ.*) EASTERN MORTGAGE AND AGENCY CO., LTD *v.* FAZLUL KARIM. **52 Cal. 914 : 41 C.L.J. 571 : 90 I.C. 851 : A. I. R. 1926 Cal. 385.**

C. P CODE (V OF 1908), O. 40, R. 1—Suit against Receiver.

——O. 40, R. 1—*Suit against Receiver—Accounts.*

An owner of an estate cannot sue a Tahsildar for accounts, where he is appointed a Receiver under order of Court; the suit is one of the nature of a bill of discovery and can be maintained only on proof of fiduciary relation between the parties. A Receiver can be sued if he had monies belonging to the estate on hand even after his discharge. A Receiver is not a representative of the owner but an officer of the Court. (*Mookerjee, A. C. J. and Fletcher, J.*) HARIHAR MUKERJI *v.* JAHARADDIN MANDAL.
62 I. C. 768 : 26 C. W. N. 992.

——O. 40, R. 1—*Suit against Receiver—Sanction.*

Per *Sadasiva Aiyar, J.* :—*Obiter.*—The necessity to obtain the sanction before the institution of a suit against the Receiver is imposed by the Common Law, merely to enforce due respect towards Courts of Justice and omission to do so does not affect the jurisdiction of the Courts (*Sadasiva Aiyar and Spencer, JJ.*) JAGANA SANYASIAH *v.* MYCHERLA PEDA ATCHANNA. **15 L. W. 289 : 70 I. C. 759 : 42 M. L. J. 339.**

——O. 40, R. 1—*Suit against Receiver—Sanction of Court, when to be obtained.*

The omission to obtain the previous sanction of the Court to a suit against a Receiver appointed by the Court does not affect the jurisdiction of the Court trying the suit, but is an illegality which can be cured by obtaining it during the course of litigation. (*Sadasiva Aiyar and Spencer, JJ.*) KARUTH PARAKOTE AMMUKUTTY *v.* MANAVIKRAMAN.
43 Mad. 793 : 59 I. C. 568 : 12 L. W. 331

——O. 40, R. 1—*Suit against Receiver—Acts done in official capacity—Court's leave necessary.*

It is clear law that as a Receiver is an officer of the Court he cannot be sued for acts done in his official capacity by a third party except with the leave of the Court. Ordinarily the party feeling aggrieved by the Receiver's conduct should seek redress against him in the very proceeding in which he was appointed as Receiver and any separate proceeding taken against him either in that Court or elsewhere should be with the leave of the Court under whose authority the Receiver was acting. (*Rutledge, J.*) K. K. SECUNDER *v.* J. A. M. KASAIAR & CO. **1 R. 138 : A. I. R. 1923 Rang. 208.**

Trust.

——O. 40, R. 1—*Trust—Grounds for appointment—Trustee a poor man.*

The fact that the trustee is a poor man, and that in case a decree for mesne profits is passed against him, it would be difficult to realize the decretal amount, is not a sufficient ground for his removal and appointment of Receiver in his place. (*Piggott and Walsh, JJ.*) MAHAMAD ASKARI *v* NISAR HUSAIN.
43 All. 311 : 60 I. C. 901 : 19 A. L. J. 50.

——O. 40, R. 2—*Remuneration must not exceed the income of the estate realised by Receiver.*

The remuneration fixed for receivers under the C. P. Code need not necessarily be the limit of the remuneration to be fixed in a case under S. 145, Cr. P. Code, but in all the circumstances the total amount of the remuneration should certainly, on every standard of equity and justice, be not more than the net income realised by the Receiver from the estate. (*Findlay, O. J. C.*) MT. YAMUNABAI. *v.* EMPEROR.
8 N. L. J. 167 : A. I. R. 1925 Nag. 462.

——O. 40, R. 3—*Receiver must give details of expenditure.*

C. P. CODE (V OF 1908), O. 40, R. 4 (b).

The Receiver must not merely show that he paid certain sums as litigation expenses, but also furnish details of expenditure. (*Mookerjee and Chotzner, JJ.*) HAJI TELLER RAHMAN *v.* GOLAM GONE.
40 C. L. J. 28 : 82 I. C. 419 : A. I. R. 1924 Cal. 1063.

——O. 40, Rr. 3 and 4—*Order fixing Receiver with liability—Order to levy amount from him—Appeal—Scope of.*

Where an order is passed under O. 40, R. 3, making a Receiver indebted to the estate to a certain amount, the order is not appealable but can in suitable cases be revised—when such an order is followed by an order to take coercive steps to force the Receiver to pay what is due from him under O. 40, R. 4, the order is appealable and in the appeal the propriety of the prior order under R.3 will also be open to attack; otherwise the right of appeal is of no value. (*Kennedy and Aston, A. J. Cs.*) KHAN CHAND *v.* ABDUL MAJID.
A. I. R. 1924 Sind 35.

——O. 40 R. 4 and O. 43, R. 1 (s)—*Order passing accounts of Receiver—Appealable.*

An order passing a Receiver's account is one under O. 40, R. 4 and is appealable under O. 43, R. 1 (s). (*Macleod, C. J. and Heaton, J.*) SHRINIVAS KUPPUSAMI MUDALIAR *v.* M. C. WAZ. **45 Bom. 99 : 59 I. C. 421 : 22 Bom. L. R. 1126.**

——O. 40, R. 4—*Receiver not obeying orders ought to be removed.*

Receiver who has not complied with the Court's order directing him to keep accounts, etc., ought to be removed from his office. (*Martineau, J.*) BIHARI LAL *v.* SHANKAR DAS. **7 L. L. J. 6: 86 I.C. 246 : A. I. R. 1925 Lah. 309.**

——O. 40, R. 4—*Receiver—Neglect—Account.*

An appeal from an order on an application to the Court below, to call upon a discharged receiver in a suit to render accounts and refund losses due to his neglect during the time he was in the office of a Receiver, is not competent. (*Le Rossignol and Abdul Qadir, JJ.*) GOKAL CHAND *v.* UDHERAM.
A. I. R. 1922 Lah. 224 (1).

——O. 40, R. 4—*Receiver ordered to pay damages—No appeal lies from such order—C. P. Code, O. 43. R. 1 (s).*

An order directing a Receiver to pay a sum of money by way of damages is not appealable as it does not come within the operative part of R. 4. A. I. R. 1922 Mad. 234 ; 4 Pat. L. J. 636 ; 5 Pat. L. J. 97. Appr. 45 Bom. 99 and 42 Bom. 10, Dist. (*Heald and Chari, JJ.*) ARUNACHELLAM CHETTIAR *v.* U PO U.
4 Bur. L. J. 91 : A. I. R. 1925 Rang. 266.

——O. 40, R. 4 (b)—*Appeal—Scope—Order for payment in Court—Court's duty.*

In an appeal from order under O. 40, R. 4, it is open to the Receiver to question the correctness of the amount said to be due from him. A Court should first direct the Receiver to submit his accounts for the period during which he was in possession of the properties ; and then give the plaintiff an opportunity to surcharge and falsify them and raise his objection to them. After hearing the objections, the Court should decide the exact amount which the Receiver is liable to pay. After that the Receiver should be directed to pay into Court the amount due within a certain time fixed by the Court. If he fails to pay the amount without proper reason within the time fixed, the Court can then pass an order directing the attachment of his property under R. 4. (*Krishnan and Venkatasubba Rao, JJ.*) R. M. P. PALANIAPPA CHETTI *v.* M. S. A. PL. PALANIAPPA CHETTI. **(1922) M. W. N. 741 : 16 L. W. 754 : A. I. R. 1923 Mad. 85 (2) : 43 M. L. J. 707.**

C. P. CODE (V OF 1908), O. 41.

——— **O. 41**—*Applicability.*

Order 41 has no application to appeals from the Original Side of a High Court. (*Coutts-Trotter, C. J. and Srinivasa Aiyangar, J.*) P. K. BHIMASENA RAO *v.* C. VENUGOPAL MUDALI. **21 L. W. 672 : 88 I. C. 443 : (1925) M. W. N. 190 : 48 M. 631 : A. I. R. 1925 Mad. 725 : 48 M. L. J. 384.**

——— **O. 41, R. 1**—*Appellant must show that judgment is wrong.*

In every appeal, the appellant must show some reason why the judgment appealed from should be disturbed. There must be some balance in their favour when all the circumstances are considered to justify the alteration of the judgment that stands. (*Lord Buckmaster.*) FAKRUNISSA *v.* IZARUS SADIK. **17 N. L. R. 72 : 63 I. C. 898 : 25 C. W. N. 866 (P. C.)**

——— **O. 41, R. 1**—*Two appeals against same respondent—Single judgment—One appeal—Validity.*

Where two appeals against the same respondent were disposed of by one judgment and allowed and he files a single appeal impleading both the successful appellants as respondents, the defect was only a technical one and the appeal is competent. (*Mukerji, J.*) BIJAI BAHADUR *v.* PARAMESHWARI RAM. **A. I. R. 1924 All. 834.**

——— **O. 41, R. 1**—*Valid presentation—What is.*

In cases in which a formal order is not drawn up, it is sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone, but where a separate order is drawn up both are necessary. (*Kanhaiya Lal, J.*) KEDAR NATH *v.* NANAK. **A. I. R. 1924 All. 162**

——— **O. 41, R. 1**—*Failure to file copy of order appealed from.*

The appellants before the District Judge failed to file a copy of the formal order, appealed against but the formal order was a precise copy, so far as its operative words were concerned, of the judgment of the order which they did file, *held*, that the failure mattered to nobody and the objection was futile. (*Walsh and Ryves, JJ.*) MT. KAUSILLA KUER *v.* MT. SUKHDEI. **21 A. L. J. 452 : L. R. 4 A. (Civ.) 246 : A. I. R. 1923 All. 579.**

——— **O. 41, R. 1**—*Allahabad High Court Rules, Ch. III, R. 2—Presentation of second appeal—Judgment copy of first Court not filed—Procedure.*

O. 41, R. 1 of the Code as revised by R. 2, Chap. III, of the Allahabad High Court Rules, required a copy of the first Court judgment, to be filed with the appeal and a Judge of the High Court must decline to allow an appeal to be presented without such copy nor can he extend the time for filing the same. (*Walsh, Lindsay and Sulaiman, JJ.*) BHAIRON GHULAM *v.* RAMAUTAR SINGH **19 A. L. J. 598 : 63 I. C. 338 : 3 U. P. L. R (A.) 165 (F. B.)**

——— **O. 41, R. 1**—*Appeal from award under Land Acquisition Act—Copy of award to be filed.*

Where a number of separate references under the Land Acquisition Act are heard together and disposed of by one judgment, and where distinct appeals are filed from this judgment, it is absolutely essential that a copy of the award should accompany each memorandum of appeal, and the Appellate Court has no power to dispense with such a copy. (*Scott Smith and Martineau, JJ.*) MUBARAK ALI SHAH *v.* SECY. OF STATE. **6 Lah. 218 : 26 Punj. L.R. 356 : A. I. R. 1925 Lah. 438.**

C. P. CODE (V OF 1908), O. 41, R. 1.

——— **O. 41, R. 1**—*Appeal—Copy of decree not presented—Decree not prepared—Effect of.*

Where the plaintiff's suit was dismissed by the trial Court but no decree was drawn up, it is not competent for an appellate Court to entertain an appeal from the decision of the trial Court. The proper course for the appellate Court is to adjourn the appeal to enable the plaintiff to file a copy of the decree. 19 P. R. 1919 ; 66 P. R. 1916, Foll. (*Harrison, J.*) SHER MAHOMED *v.* MAHOMED KHAN. **A. I. R. 1924 Lah 352.**

——— **O. 41, R. 1**—*Memorandum of appeal written by petition-writer—Not invalid.*

It is immaterial whether a memorandum of appeal is written by the appellant himself or by somebody else as long as it is signed by the appellant or his agent duly authorised in his behalf, and represented to the proper authority. Hence there is no valid objection to the entertainment of the appeal where the memorandum is written by a petition-writer. (*Shadi Lal, C. J. and Zafar Ali, J.*) MUSSAMMAT SHIB DEVI *v* RALLA RAM. **83 I. C. 543 (1) : A. I. R. 1923 Lah. 484.**

——— **O. 41, R. 1**—*Two appeals and two decrees in suit—Both decrees must be filed.*

Where from the decree in a suit two appeals were preferred and two decrees drawn up by the appellate Court, O. 41, R. 1, C P. Code, requires both decrees to be filed for the presentation of a second appeal to be valid. (*Scott-Smith and Harrison, JJ.*) MAHOMMAD DIN *v.* MSST. ZERUNNISSA. **3 Lah. 215. 77 I. C. 541 : A. I. R. 1922 Lah. 390.**

——— **O. 41, R. 1**—*Copy of decree not filed—No valid presentation.*

Presentation of memorandum of appeal unaccompanied by a copy of decree is no legal presentation. (*Chevis, J.*) BASHI RAM *v.* MUNICIPAL COMMITTEE, CHINIOT. **4 Lah.L.J. 193 : A.I.R. 1922 Lah. 191.**

——— **O. 41, R. 1 and O. 42, R. 1**—*Second appeal—Presentation of —Copy of interlocutory order not filed—Does not affect validity of presentation.*

Where a second appeal is filed without a copy of the interlocutory order referred to in the judgment of the Court below it does not affect the validity of the presentation, especially when the points decided by the interlocutory order do not arise in the appeal. Even if the appeal could be considered to have been presented only when the copy of the interlocutory order was filed, there was sufficient cause for excusing the delay. (*Martineau, J.*) LAKSHMI DAS *v.* ISHAR DAS. **4 Lah. L. J. 20 : A. I. R. 1922 Lah. 93.**

——— **O. 41, R. 1**—*Copy of translation of decree filed—Not a valid presentation.*

Where a second appeal was presented with an Urdu translation of the decree of the District Court and without an English copy is invalid and the Court refused to excuse the delay in filing a proper copy. (*Chevis and Le Rossignol, JJ.*) DAIM *v.* HAYAT. **4 Lah. L. J. 381.**

——— **O. 41, R. 1**—*Copy of judgment, if necessary.*

Memo. of appeal must be accompanied by a copy of the judgment appealed from and in the absence of an explanation for delay, filing the copy after the period of limitation will justify dismissal of the appeal. (*Martineau, J.*) DYALA *v.* HIRU. **67 I. C. 670 : 3 Lah. L. J. 255.**

——— **O. 41, R. 1**—*Memo. of appeal without judgment—Not valid.*

A memo. of appeal not accompanied by a copy of the first Court's judgment is not a valid memorandum.

C. P. CODE (V OF 1908), O. 41, R. 1.

(*Chevis, J.*) MOLU MAL *v.* SRI RAM.
63 I. C. 33 : 2 Lah. 227.

——O. 41, R. 1—*Second appeal—Presentation of, without copy of decree is not valid—Power to excuse delay in furnishing copies*—Ex parte *order excusing delay—Application to vacate order by respondent is competent.*

The provisions of O. 41, R. 1, C. P. Code, are imperative and the presentation of a memorandum of second appeal without a copy of the decree appealed against is not a valid presentation. 27 I. C. 447 : 16 C. L. J. 135 : 16 All. 77, Foll. It is open to the Court in the exercise of its discretion under S. 5 of the Limitation Act to excuse the delay in the presentation of the decree appealed against. 17 C. L. J. 66, Ref. to. Where an *ex parte* order is passed excusing the delay in the presentation of an appeal, it is open to the respondent to apply to have the order set aside. (*Kumara swami Sastri, J.*) SUNDARAM AIYAR *v.* RAJA RAJESWARA MUTHURAMALINGA SETHUPATHI.
(1923) M. W. N. 164 : 17 L. W. 352 : 32 M. L. T. (H. C.) 232 : A. I. R. 1923 Mad. 482 : 44 M L. J. 279.

——O. 41, R. 1—*Copy of judgment not filed—Notice issued—Effect.*

Where an appeal is filed without a copy of the judgment and the Court issues notice thereon, it amounts to dispensing with the same and it cannot be objected afterwards that the appeal was not validly presented. (*Baker, J. C and Prideaux, A. J. C.*) AGENT, G. I. P. RY. CO. *v.* JASRUP SHRINATH.
90 I. C. 135.

——O. 41, R. 1—*Copy of decree.*

An appeal unaccompanied by the copy of the decree is liable to be dismissed. (*Kinkhede, A. J. C.*) BALIRAM *v.* GHASIRAM.
81 I. C. 1001 : A. I. R. 1925 Nag. 52.

——O. 41, R. 1—*Presentation of appeal by pleader with no authority is not valid.*

The appellant engaged one pleader *A* and executed a power-of-attorney in his favour authorising him to appoint another pleader, if necessary. *A* engaged another pleader *B* but did not execute a power in his name. *B* put his own name on the power executed in favour of *A*. *Held*, the appeal was not validly presented as there was no proper appointment of *B* either by the appellant or by *A*. (*Batten, O. J. C.*) CHITTAR *v.* LAXMI NARAYAN. **62 I. C. 259 (Nag).**

——O. 41, R. 1—*Conditional order setting aside* ex parte *decree—Appeal—Order of dismissal.*

An *ex parte* decree was set aside on condition the defendant deposited in Court a large sum of money; an appeal was preferred against it, but meanwhile for non-compliance with the order, the petition had been dismissed. *Held*, the order of dismissal should also be filed. (*Dalal, J. C.*) INDAR SINGH *v.* GURDAYAL SINGH. **A. I. R. 1924 Oudh 229.**

——O. 41, R. 1—*Memorandum of appeal—Presentation.*

There is nothing to prevent the presentation of a plaint or a memorandum of appeal during a vacation or even on a Sunday, provided it is presented to a proper officer and that officer receives it. (*Jwala Prasad, J.*) ANAND RAM *v.* RAM GULAM. **2 P. 264 : 3 P. L.T. 820 : 1922 P. H C.C. 365 : 1 P. L. R. 12 : 71 I. C. 426 : A. I. R. 1923 Pat. 150.**

——O. 41, R. 1—*Several appeals from one judgment—Copies of judgment necessary with memo.*

Where there are several appeals from one judgment by different appellants, the High Court will insist under the rules to have copies of judgment filed with each memo. of appeal though where there are several appeals from the same judgment by the same appellant, he should be permitted to file one copy only of the judgment with the memorandum in one of his appeals. (*Dawson Miller, C. J. and Coutts, J.*) RIAJAN THAKUR *v.* CHARITAR THAKUR.
1 P. 670 : 4 Pat. L. T. 290 : A. I R. 1922 Pat. 580.

C. P. CODE (V OF 1908), O. 41, R. 2.

——O. 41, R. 1—*Appeal—Presentation without copy of judgment is not illegal.*

A second appeal filed without a copy of the trial Court's judgment within time is not incompetent, inasmuch as O. 41, R. 1, C. P. Code, requires that only a copy of the lower appellate Court's judgment is to be filed and does not require the filing of the judgment of the trial Court. (*Jwala Prasad and Ross, JJ.*) RAMDEO SINGH *v.* MAKHAN SINGH.
74 I. C. 330 : 1923 P. H.C C. 19.

——O. 41, R. 1—*Appeal—Copy of decree not filed—No valid presentation.*

Under O. 41, R. 1, C. P. Code, every memorandum of appeal must be accompanied by a copy of the decree appealed from and without such copy there is no valid presentation of the appeal. (*Brown, J. C.*) MAUNG PO SAUNG *v.* MA MUN. **65 I. C. 68 : (1921) 4 U. B. R. 75.**

——O. 41, R. 1—*Specific issue for each plea must be raised.*

Where a memorandum of appeal ran as follows :—"That the Court below should have decided issues 6, 7, 8, 9, 10, 12 and 13 in favour of the defendants-appellants," *held*, each plea should raise a specific issue. Appeals drawn up in this way are liable to be returned for amendments. (*Daniels, J. C.*) BANKE LAL *v.* KANHALAL. **9 O. L. J. 637 : A. I. R. 1923 Oudh 113.**

——O. 41, R. 2—*Plaintiff accepting decision of Trial Court—Cannot challenge in Second Appeal.*

A plaintiff accepting the decision of the Trial Court as to the amount due to him, and not appealing, cannot challenge its correctness in Second Appeal by means of a cross-objection. (*Tudball and Rafique, JJ.*) HARDEO PRASAD *v.* GANGA SAHAI.
61 I. C. 48 : 19 A. L. J. 155.

——O. 41, R. 2—*Presentation without copy of a decree is invalid.*

There is no proper presentation of an appeal without a copy of a decree even when there is no decree in existence. (*Shadi Lal, C. J. and Martineau, J.*) THE MUNICIPAL COMMITTEE, CHINIOT *v.* BASHI RAM. **69 I. C. 895 : A. I. R. 1922 Lah. 170.**

——O. 41, R. 2—*Alternative grounds of appeal—Power of Court to go into.*

Where alternative grounds of appeal are raised, an appellate Court can go into questions admitted for the purposes of an alternative argument and finding adversely to the appellant. (*Broadway and Martineau, JJ.*) RAM DAS *v.* MT. PANNA DEVI.
84 I. C. 1039 : 5 Lah. L. J. 117.

——O. 41, R. 2—*Appeal—New grounds—When allowed—New basis of claim.*

A plea which is not raised in the trial should not be considered by the Dist. Court. (*Leslie Jones and Broadway, JJ.*) RAMCHAND *v.* RAMA NAND.
68 I. C. 227 : 3 L. L. J. 392.

——O. 41. R. 2—Factum *of adoption not questioned—Effect.*

Where the finding of the lower appellate Court against the *factum* of adoption was not questioned on the grounds of second appeal, *held*, the validity of the adoption could not be allowed to be urged at the further proceedings. (*Ayling and Odgers, JJ.*) RAJAMBAL AMMAL *v.* SHANMUGA MUDALIAR.
(1922) M. W. N. 481 : 70 I. C. 653 :

C. P. CODE (V OF 1908), O. 41 R. 2.

A. I. R. 1923 Mad. 11.

——**O. 41, R. 2**—*Case remanded for admitting oral evidence—Oral evidence not admissible at all in the case—Order of remand not appealed against—Second appeal—Court exercised powers under R. 2 of O. 41—C. P. Code., O. 41, R. 23.*

Where the lower appellate Court remanded an appeal for admission of oral evidence when such evidence was not admissible, *held*, that it was a fit case for the exercise of the power conferred on appellate Court under O. 41, R. 2.

Where the order of remand was appealable under O. 43, R. 1, C. P. Code, but the appellant did not appeal against it and he was precluded from disputing the correctness of the order of remand in final appeal, *held*, that this preclusion of a party does not take away the power which vests in a Court of appeal under O. 41, R. 2, to base its decision upon a point not urged in the memorandum of appeal and, therefore, it can grant relief to the appellant in a fit case. (*Kinkhede, A. J. C.*) BALIRAM *v.* SADARAM.

89 I. C. 1019 : A. I. R. 1926 Nag. 147.

——**O. 41, R. 4**—*Court is not bound to pass decree in favour of non-appealing parties.*

A Court is not bound to exercise its discretion in favour of a non-appealing party under O. 41, R. 4. 36 All. 510, Foll. (*Mukerji, J.*) JAI NARAIN SINGH *v.* MANDHAI SINGH. **L. R. 6 A. (Civ.) 495 : A. I. R. 1926 All. 64.**

——**O. 41, R. 4**—*Appeal—Persons not made parties to—If can appeal from appellate decree.*

Where one of several plaintiffs prefers an appeal in which other plaintiffs are also interested, O. 41, R. 4 of the Civil Procedure Code does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. At the same time if the plaintiffs are not made parties to the appeal they have no *locus standi* to go in appeal against the decree of the appellate Court. (*Daniels, J.*) BALKARAN LAL *v.* MALIK NAMDAR. **L. R. 5 A. 279 : 78 I C. 637 : A. I. R. 1924 All. 873.**

——**O. 41, Rr. 4 and 33**—*Parties—Transposition of respondents as appellants—Power of Court.*

The trial Court passed a decree against two defendants jointly on the ground that they were equally liable. One appealed from the decree and the other filed a memorandum of cross-objections. On appeal, *held*, that as the decree of the lower Court proceeded upon a ground common to both, it was competent to the appellate Court to transpose the other defendant as an appellant and decide the appeal. (*Sulaiman and Kanhaiya Lal, JJ.*) EAST INDIAN RY. CO. *v.* LALA JANKI PRASAD. **L. R. 5 A. 586 : 80 I.C. 737 : A. I. R. 1924 All. 605.**

——**O. 41, R. 4**—*Joint plaintiffs—Appeal by one—All must be made parties.*

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, O. 41, R. 4 does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. (*Rafique and Piggott, JJ.*) AMBIKA PRASAD *v.* JHINAK SINGH. **45 A. 286 : 21 A. L. J. 91 : L. R. 4 A. 92 : 71 I. C. 321 : A. I. R. 1923 All. 211.**

——**O. 41, R. 4**—*Power of appellate Court to vary joint decree of lower Court in the absence of one of the plffs. respondents—Rule limited to the case of appellants.*

O. 41, R. 4 C.P.Code, is limited to the case of appellants. Where pending an appeal against a joint decree for possession in favour of the plffs. one of the plffs. respondents died and his legal representatives were not brought on record in time, *held*, that the Court cannot proceed under O. 41 R. 4, C. P Code. (*Suhrawardy and Duval, JJ.*) MANINDRA CHANDRA NANDI *v.* BHAGABATI DEVI CHAUDURANI.

90 I. C. 986 : 30 C. W. N. 45.

C. P. CODE (V OF 1908), O. 41, R. 4.

——**O. 41, R. 4**—*Scope.*

A judgment-debtor who did not appeal but who filed an application in the lower Court consenting to the decree being executed as against him on which no order was passed can be given the benefit of the appeal preferred by other judgment-debtors. (*Newbould and B. B. Ghose, JJ.*) KHAJEH SALALUDIN *v.* AFZAL BEGUM. **28 C. W. N. 963 : 39 C. L. J. 590 : 84 I. C. 68 : A. I. R. 1925 Cal. 23.**

——**O 41, R. 4**—*Appeal by one deft.—Decree against several—When can be set aside.*

Though a decree against several defendants which proceeds upon a ground common to them all can be set aside on appeal at the instance of one of them, it cannot be so set aside when the appealing deft. values the appeal for a sum representing the amount decreed against him alone. Such an appeal is not one against the entire decree at all. (*N. R. Chatterjee and Panton, JJ.*) JOGENDRA NATH ROY CHAUDHURI *v.* RAJENDRA NATH RAI CHAUDHURI. **63 I. C. 95 (Cal.)**

——**O. 41, R. 4**—*Powers of Appellate Court—Variation in decree.*

If a decree is passed against several defendants on a common ground, the appellate Court can, on appeal by one defendant only, vary the decree in favour of all. (*Shamsul Huda and Panton, JJ.*) RAM SUNDER DAS *v.* SHAJIDUR RAHMAN. **60 I. C. 460.**

——**O. 41, R. 4**—*Appeal by only one of the plaintiffs.*

Where the contention was that the appeal should be regarded as having been dismissed so far as half the share of the other plaintiffs, who did not appeal, is concerned, *held*, the provisions of O. 41, R. 4 lay down that, if the decree appealed against proceeds on a ground common to all plaintiffs, any one of the plaintiffs may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs. (*Chevis, J.*) KUNDAN *v.* MAM RAJ. **4 Lah. L. J. 178: 31 P. W R. 1922 : A. I. R. 1922 Lah. 57.**

——**O. 41, R. 4**—*One appellant dying before decree—Decree obtained by other enuring to benefit of legal representatives of deceased—Legal representatives should be brought on record though applying after decree.*

Where one of two appellants who were undivided Hindu brothers had been dead when the decree was passed in the appeal and where subsequently the deceased's legal representatives applied to be brought on the record, *held*, that as the decree passed legally in favour of the surviving appellant must enure for the benefit of all the members of the appellants' family, and as they wished to be formally brought on record as legal representatives of the deceased appellant who was not a party when the appeal was heard, their application to be brought on the record should be allowed. 27 B. 284 Foll. (*Phillips and Krishnan, JJ.*) GUNTUKU APPANNA *v.* GAVARAPPADU.

22 L. W. 142 : 87 I. C. 748 : A. I. R. 1925 Mad. 910 : 48 M. L. J. 601.

——**O. 41, R. 4**—*Scope.*

Where out of four defendants constituting partnership only three appealed against the decree which was for a sum of money alleged to have been lent to the partnership and one of the appellants died during the pendency of the appeal and his legal representative was the non-appearing defendant who was not brought on record, *held*, that O. 41, R. 4 would enable the

C. P. CODE (V OF 1908), O. 41, R. 4.

Court to grant relief to appellants, in view of the fact that taking of accounts was not necessary in the case. (*Spencer, O. C. J.*) NAMINENI CHENGAMMA NAIDU v. N. GANGULU NAIDU. **20 L. W. 402 : (1924) M. W. N. 789 : 82 I. C. 420 : A. I. R. 1925 Mad 235.**

——O. 41, R. 4—*Deceased defendant—Judgment in favour of—Appellate court can reverse.*

Under O. 41, R. 4, C. P. Code, an appellate Court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as regards that part of it in which the surviving defendants were particularly interested. 40 M. 846, 848 ; 25 M. L. J. 248 Foll. (*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR v. KANDASWAMI MUDALI. **32 M. L. T. 124 : 70 I. C. 168 : 16 L. W. 330 : (1922) M. W. N. 674 : A. I. R. 1923 Mad. 58.**

——O. 41, R. 4—*Common interest.*

Where the second plaintiff was the transferee from the first plaintiff:

Held, that the question of the latter's title to the property in suit affected the second plaintiff's also and that a decision that first plaintiff's suit was not barred by limitation enured for the benefit of the second plaintiff also though he had not joined in the appeal. (*Wazir Hasan, J. C. and Kendall, A. J. C.*) BANS BAHADUR SINGH v. MT. SAKALRAJ KUAR. **11 O. L. J. 297 : 81 I. C. 484 : A. I. R. 1924 Oudh 385.**

——O. 41, R. 4—*Several plaintiffs—Revision applications by some—Interference.*

Where some out of several plaintiffs prefer a revision on grounds common to all of them, it is open to the Court to interfere and set aside the order sought to be revised in favour of all the plaintiffs. (*Fremantle, S. M. and Burn, J. M.*) DEOKINANDAN v. MAHADEO SINGH. **L. R. 5 O. 136 (Rev) : 10 O. & A. L. R. 942 : L. R. 5 A. 281 (Rev).**

——O. 41, R. 4—*Appeal—Parties—Some of the parties entitled to rent made respondents—Effect of.*

Where certain tenants appealed making only some of the co-sharer landlords respondents, *held*, that as the respondents alone could not have sued for rent, the appeal impleading them without joining the other landlords as respondents was unsustainable. Under O. 1, R. 9, C. P. Code, a person who is a necessary party to the suit is a necessary party to the appeal. 6 C. W. N. 196 : 11 C. W. N. 504 : 31 C. 489 (P. C.) Rel. 34 C. 1020, Not Foll. (*Ross, J.*) JITENDRANATH CHATTERJI v. JHAKU MANDAR. **3 P. L. T. 456 : 66 I. C. 780 : A. I. R. 1922 Pat. 4.**

——O. 41, R. 4.

Where in the course of a redemption suit by Burmese husband and wife the husband died, *held*, that the wife could prosecute the appeal. (*Young and Baguley, JJ.*) MAUNG BYAUNG v. MG. SHWE BAW. **2 Rang 486 : 3 Bur. L. J. 171 : 84 I. C. 170 : A. I. R. 1924 Rang 376.**

——O. 41, R. 4—*Power of Court to vary decree in favour of person not party to appeal.*

O. 41, R. 4 deals with the case where the decree passed by the Trial Court proceeds on any ground common to all the plffs. or to all the defts. (*Maung Kin, J.*) A. C. T. R. M. CHETTY v. PO U. **63 I. C. 973 : 13 Bur. L. T. 163.**

——O. 41, R. 5—*Effect.*

Stay order on condition of security by appellate Court comes into effect when security is given (*Sulaiman and Mukerji, JJ.*) SUPERIOR BANK LTD v. BUDH SINGH. **22 A. L. J. 413: L. R. 5 A. (C v.) 769: 83 I. C. 1028 : A. I. R. 1924 All. 698.**

C. P. CODE (V OF 1908), O. 41, R. 5.

——O. 41, R. 5—*No appeal before Appellate Court—No stay of execution.*

An appellate Court has no jurisdiction to order the stay of a sale unless it has seizin of the case and where there is no appeal before the appellate Court the order staying execution is *ultra vires* and is a nullity. (*Mears, C. J. and Banerji, J.*) PARSHOTTAM v. HARGU LAL. **43 All. 613 : 63 I. C. 837 : 19 A. L. J. 462.**

——O. 41, R. 5—*Appeal not filed—Appellate Court cannot order stay.*

An Appellate Court cannot grant a stay of execution of a decree of the Subordinate Court unless it is actually hearing an appeal from such decree. When no appeal has been preferred, the Court passing the decree can alone grant a stay for sufficient cause within the time allowed for appeal. (*Walsh and Gokul Prasad, JJ.*) PARSHOTTAM SARKAR v. HARGULAL. **43 All. 198 : 2 U. P. L. R. (A.) 424 : 60 I. C. 131 : 18 A. L. J. 1121.**

——O. 41, R. 5—*Application for stay—Delay in applying—Dismissal without going into the merits—Propriety of.*

An application for stay of execution was filed more than 9 months after the filing of the appeal. The Court dismissed it on the ground of delay, without going into the merits. *Held*, per *Suhrawardy, J.*, it is the duty of the Court to go into the merits and decide, failing which the order can be revised by the High Court.

Per *Graham, J.*, the power conferred by O. 41, R. 5 being discretionary, the order is not capable of revision if judicial discretion is used. The rule contemplates that application for stay should be made as soon as possible after filing the appeal. (*Suhrawardy and Graham, JJ.*) BIRESH CHANDRA DAS v. HARI DASI BOSE. **82 I. C. 435 : A. I. R. 1925 Cal. 254.**

——O. 41, R. 5—*Execution—Stay of—High Court, Original Side—Application to whom to be made—Practice.*

If a party, against whom judgment has been given on the Original Side, desires to obtain a stay of execution, pending an intended appeal, and desires to apply in the first instance on the Original Side, he must apply within reasonable time to the Judge who decided the case. (*Sanderson, C. J. and Richardson, J.*) CHATURBHUJ CHANDANMULL v. BASDEO DAS DAGA. **25 C. W. N. 928 : 66 I. C. 198 : 48 C. 796.**

——O. 41, Rr. 5 to 8—*Appeal—Order refusing stay of sale.*

An order refusing stay of sale under O. 41, R. 6 falls under S. 47 and is appealable. (*Martineau, J.*) SHANKAR DAS v. KASTURI LAL. **75 I. C. 789 : A. I. R. 1925 Lah. 69.**

——O. 41, R. 5—*Stay of execution—Powers of executing Court after appeal filed.*

After an appeal is filed from a decree or order, it is only the appellate Court which could order stay of execution under O. 41, R. 5 and recourse cannot be had by the trial Court to S. 151 to override the provisions of R. 5. (*Martineau, J.*) FIRM GOBIND RAM-RAM CHANDER v. FIRM RULIA RAM NAURTA RAM. **A. I. R. 1924 Lah 602.**

——O. 41, R. 5—*Order for—Security—No Appeal lies.*

An injunction was granted to stay execution on the condition of filing security. The judgment-debtor thereupon offered to hypothecate his immoveable property by way of security. The Judge, however, refused to accept this security as sufficient and allowed two weeks' time to the judgment-debtor to produce some other person as surety. *Held*, every interlocutory

order passed in the course of execution proceedings is not appealable, and an appeal lies only from a decres and a decree must conclusively determine the rights of the parties with regard to all or any of the matters in controversy. The order attacked is not appealable. (*Moti Sagar, J.*) BAJRANG DAS *v.* DONGARSE DAS.
75 I. C. 793 : A. I. R. 1923 Lah. 446.

——**O. 41, R 5**—*Stay of sale during appeal.*

If the decree-holders shall have sufficient security in the property itself which will remain under attachment, execution ought to be stayed. (*Moti Sagar, J.*) RAM GOPAL *v.* MANPUL SINGH.
75 I. C. 791 : A. I. R. 1923 Lah. 445 (2).

——**O. 41, R 5**—*Scope of.*

Where it had been found that the sale in favour of the petitioner, a rival pre-emptor, was not genuine and that he waived his right of pre-emption, *held*, unless it is shown that substantial loss would result to the petitioner, an order to stay execution in favour of the pre-emptor would not be made especially where the decree-holder has deposited a large sum of money which would be idle and where he would be placed in the same position as the petitioner with respect to the collection of rent. (*Brasher, J.*) ARJAMAND KHAN *v.* SHANKAR LAL.
A. I. R. 1922 Lah. 364.

——**O. 41, R. 5**—*Stay of execution—Principles—Power of Appellate Court.*

Where the learned Judge in Chambers has exercised a discretion vested in him by law, his order should not be disturbed unless there is anything to show that it was without jurisdiction or was passed with material irregularity or there is any adequate proof that some loss would be occasioned by it to the appellant which can be called substantial. Where one obvious loss is that the appeal which is pending becomes useless, another probable loss is that the business of the appellant firm will be seriously disturbed by their account books passing into the hands of the receiver, and where the process is likely to be a protracted and expensive one, the balance of convenience is in favour of staying the execution rather than proceeding with it. (*Shadi Lal and Abdul Qadir, JJ.*) THE FIRM OF BADRI DAS JANKIDAS OF DELHI *v.* MATHANMAL.
A. I. R. 1922 Lah. 185.

——**O. 41, R. 5**—*Grounds for stay—Substantial loss.*

Sufficient cause for the stay of execution under O. 41, R. 5 of the Code is not shown merely by putting in an affidavit, containing a bare statement that the appellant will suffer substantial loss. The rule laid down in O. 41, R. 5, C. P. Code, applies to immoveable equally with moveable property. (*Scott-Smith and Leslie Jones, JJ.*) DHERA MAL *v.* HAIDAR SHAH.
61 I. C. 77 : 2 Lah. 61.

——**O. 41, R 5**—*Stay of execution—Mortgage decree.*

The execution of a mortgage-decree to be realised from the mortgaged property and the balance, if any, from the judgment-debtor's other property, cannot be stayed simply because a claim by a prior mortgagee is pending. The hypothecated property should be sold, and after retaining out of the sale proceeds the amount sufficient to meet the claim, the balance should be paid to the decree holder. (*Scott-Smith, J.*) UDE RAM *v.* BENI PRASAD.
60 I. C. 378 : 57 P. W. R. 1920.

——**O. 41, R. 5**—*Stay of execution—Costs—Practice.*

Where the respondent is an insolvent and an application for stay of execution on the term of taxed costs is presented the proper order to make is to direct the appellant to pay the costs to the respondent's solicitor on the latter's undertaking to repay the same in the

event of the appellant succeeding on appeal. (*Schwabe, C. J. and Krishnan, J.*) RAMANUJAM CHETTY *v.* PADMANABHAM PILLAI.
16 L. W. 975 : (1923) M. W. N. 73 : 31 M. L. T. 440 : 70 I. C. 784 : A. I. R. 1923 Mad. 229 (2).

——**O. 41, R. 5**—*Notice to decree-holder—Possession delivered—Effect.*

Before a final order staying execution is passed under O. 41, R. 5, notice to show cause should issue to the decree-holder. If by that time decree is executed or possession delivered, there is nothing to stay. (*Kulwant Sahay, J.*) HIRA LAL *v* CHUNI SAH.
5 Pat. L. T. 556 : 79 I. C. 1 : 2 Pat. L. R. 263 : A. I. R. 1924 Pat. 715.

——**O. 41, R. 5**—*Conflicting allegations—Balance of convenience to be looked to.*

In an application by the judgment-debtor for stay of execution pending the disposal of the appeal, the judgment-debtor alleged that on the land in question stood his coolie shed and tram lines for the purpose of working colliery and the opposite party denied the existence of any coolie shed or the tram lines. *Held*, that the balance of convenience lay in staying the execution and delivery of possession of the property in dispute pending the disposal of the appeal on the judgment-debtor furnishing sufficient security for the restitution of the same to the decree-holder in the event of the appeal being dismissed. (*Jwala Prasad and Ross, JJ.*) KARSHAN BHABAN *v.* INDRA NARAYAN.
4 P. L. T. 508 : 76 I. C. 49 : 1 P. L. R 393 : A. I. R. 1923 Pat. 597.

——**O. 41, R. 5**—*Proceedings for taking accounts—Stay of.*

Unless irreparable injury will otherwise be caused, stay of proceedings for taking accounts will not be allowed. (*Mullick and Bucknill, JJ.*) HARIHAR PRASAD SINGH *v.* KESHAV PRASAD SINGH.
61 I. C. 9 (Pat.).

——**O. 41, R. 5**—*Staying proceedings in suit—Registrar—Power of—Inherent power of Court.*

The Registrar of the Patna High Court has power to receive and dispose of applications under O. 41, R. 5 only for stay of execution and has no power to stay proceedings in a suit pending appeal. An appellate Court has that jurisdiction, not under O. 41, R. 5 but under its inherent power. (*Das and Adami, JJ.*) NENA OJHA *v.* SARBHOO DUTT OJHA.
59 I. C 883 : 2 Pat. L T. 70.

——**O. 41, R. 5**—*Appeal—Does not operate as stay.*

An appeal does not by itself operate as a stay of execution. (*Saunders, J. C.*) MAUNG YANSIN *v.* KATHIRESAN CHETTY.
63 I. C. 799 : (1921) 4 U. B. R. 1.

——**O. 41, R. 5 (2) (c)**—*What is required is a mortgage bond which if property exceeds Rs. 100 in value must be registered.*

The forms given in Appendix G of the Civil Procedure Code for security bonds in such cases indicate clearly that what is required is a mortgage of property to secure the decree, and such a mortgage would naturally require registration in cases where the property exceeded the value of Rs. 100. (*Duckworth and Godfrey, JJ.*) P. R. P. R. SOMASUNDARAM CHETTIAR *v.* V. P. N. NACHIAPPA CHETTIAR.
2 Rang. 429 : 84 I. C. 302 : A. I. R. 1925 Rang. 55.

——**O. 41. R. 5 (3) (a), (b) and (c)**—*Decree for possession of immoveable property—Stay of execution.*

The execution of a decree for possession of property, moveable or immoveable, is not to be stayed unless all the three conditions in O. 41, R. 5 (3) (*a*), (*b*) and (*c*) are satisfied. The most important thing to be remembered is whether *substantial loss* will result to the

C. P. CODE (V OF 1908), O. 41, R. 6.

plaintiff if the order applied for is not made. (*Abdul Raoof, J.*) RAJINDRA SINGH *v.* UMRAO SINGH.
64 I. C. 827 (Lah.).

——— O. 41, R. 6—*Stay of execution—Security furnished—Insolvency of debtor—Rights of Official Assignee.*

Pending an appeal against a decree for money the defendant-appellant applied for stay of execution and obtained an order for stay on depositing the decretal amount into Court. Subsequently the defendant-appellant was adjudicated insolvent and the Official Assignee did not prosecute the appeal. The Official Assignee claimed to be entitled to be paid out the money deposited in Court and the decree-holder opposed the application. *Held*, that the amount was earmarked for the decree-holder and could not be paid out to the Official Assignee. (*Sanderson, C. J. and Walmsley, J.*) CHOWTHMULL MAGANMULL *v.* THE CALCUTTA WHEAT AND SEEDS ASSN.
51 Cal. 1010 : A. I. R. 1925 Cal. 416.

———O. 41, Rr. 6 and 8—*Order to furnish security passed—No enquiry made as to value of property attached—Revision lies.*

Where security was ordered to be paid to stay a sale of immoveable property pending appeal, without making any enquiry as to the value of the property attached, *held*, that the order was liable to be set aside in revision. (*Moti Sagar, J.*) POKHAR DAS *v.* GHANAYA LAL.
6 Lah. L. J. 510 : A. I. R. 1925 Lah. 256.

———O. 41, R. 6—*Claim suit dismissed—Appeal—Sale in execution in which claim was preferred cannot be stayed.*

After the rejection of a claim petition in execution proceedings the claimant filed his suit for declaration of title and on its being dismissed appealed. Pending the appeal, he applied for a stay of sale. *Held*, O. 41, R. 6 applies only to cases where the appeal is against the decree which is to be executed. The petitioner's remedy is to ask for a temporary injunction under O. 39. (*Le Rossignol, J.*) MOLAR *v.* KANHAIYA LAL. **4 Lah. L. J. 188 : A. I. R. 1922 Lah. 58.**

——— O. 41, R. 6—*Appeal to Privy Council pending—Trial Court cannot pass order under O. 41, R. 6.*

Where after a suit was decreed by the High Court on appeal, there was an appeal to the Privy Council. *Held*, that the Trial Court had no jurisdiction to pass an order under O. 41, R. 6 against the decree-holder for security for the property of which he obtained possession. The proper Court to deal with the matter was not the original Court but the High Court which had to be moved under O. 45, R. 13. (*Carr and Brown, JJ.*) MAUNG PO SHEIN *v.* MAUNG PO KIN. **3 Rang. 158 : 88 I. C. 992 : 4 Bur. L. J. 50 : A. I. R. 1925 Rang. 254.**

——— O. 41, R. 6 (2)—*Stay of sale—Terms—Nature of.*

Under O. 41, R. 6 (2), it is incumbent on a Court to stay sale on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. Where the Court stays a sale on condition that the decree amount is deposited and paid to the decree-holder who is not required to furnish security, the order is one in effect refusing to stay the sale. (*Martineau, J.*) SHANKAR DAS *v.* KASTURI LAL.
75 I. C. 789 : A. I. R. 1925 Lah. 69.

———O. 41, R. 6 (2)—*Appeal from decree—Duty of Court to stay sale.*

Where an appeal is pending against a decree, an order for stay of sale of immoveable property in execution of the same should be passed under O. 41, R. 6 (2) on such terms as to giving security or otherwise as the Court thinks fit. (*Moti Sagar, J.*) THE FIRM PHAGGU MAL MATA DIN *v.* BENARSI DAS.
75 I. C. 1001 : A. I. R. 1924 Lah. 671.

C. P. CODE (V OF 1908), O. 41, R. 10.

———O. 41, R. 10—*Applies to Letters Patent appeal—Language mandatory.*

The rule applies to Letters Patent Appeal. The words as to rejecting an appeal if the order for security for costs is made and is not complied with within the time fixed are mandatory. (*Lord Sumner.*) SABITRI THAKURAIN *v.* SAVI
48 Cal. 481 : 48 I. A. 76 : (1921) M. W. N. 159 : 19 A. L. J. 281 : 23 Bom. L. R. 681 : 25 C. W. N. 557 : 33 C. L. J. 307 : 14 L. W. 362 : 60 I. C. 274 : 3 U. P. L. R. (P. C.) 57 : 40 M. L. J. 308 (P. C.).

———O. 41, R. 10—*Rejection of appeal—Order setting aside is not appealable.*

No appeal lies from an order setting aside an order rejecting an appeal for failure of the appellant to give security for costs nor is the order open to revision when it is made in the interests of justice. (*Piggott and Kanhaiya Lal, JJ.*) SUNDAR *v.* HABIB CHICK.
42 A. 626 : 18 A. L. J. 838 : 60 I. C. 81 : 2 U. P. L. R. (All.) 283.

———O. 41, R. 10—*Failure to give security—Dismissal of appeal—Restoration.*

The High Court has power to reconsider upon cause shown an order rejecting an appeal under O. 41, R. 10 (2), C. P. Code, and such a power is inherent also in Subordinate Courts of appeal. Per *Kanhaiya Lal, J.*—Although there is an absence in O. 41, R. 10 of a specific provision similar to that contained in O. 25, R. 2 (2), yet a Court which has rejected an appeal for default of filing security for costs is competent to take action in review of its order of rejection and to discharge that order and grant further time for filing the security. 30 All. 143, Ref. (*Piggott and Kanhaiya Lal, JJ.*) SUNDAR *v.* HABIB CHICK.
42 All. 626 : 2 U. P. L. R. (All.) 283 : 60 I. C. 81 : 18 A. L. J. 838.

———O. 41, R. 10—*Appeal under the Letters Patent—Power to demand security for costs—Bombay High Court Rules, 1922, R. 736.*

The High Court has power on an appeal under cl. 15 of the Letters Patent to demand security for costs from the appellant in addition to the deposit of Rs. 500 under Rule 736 of the Bombay High Court Rules. But the power to demand security for the costs of an appeal must in any event be exercised according to well-known principles. The mere fact that the appellant may lose and may not pay the costs of the appeal is not a sufficient ground for demanding security. There must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant, such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant, or if in any way it can be shown that the application is vexatious. (*Macleod, C. J. and Crump, J.*) RATANCHAND *v.* DAMJI.
25 Bom. L. R 468 : 78 I. C. 474 : A. I. R. 1923 Bom. 399.

———O. 41, R. 10—*Security for costs—Discretion of Court—Interference on appeal.*

Under O. 41, R. 10 C. P Code, the appellate Court may in its discretion demand from the appellant security for the costs of the appeal or of the original suit or of both. The poverty of the defendant is no ground for depriving him of his right to appeal. As a general rule, a Court is loth to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each cases must stand on its own facts, and there may be cases in which a party

should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further. (*Macleod, C. J. and Crump, J.*) GULAB RAO *v.* VINAYAK. **25 Bom. L. R. 195 : 72 I. C. 285 : A. I. R. 1923 Bom. 264. (1).**

——— **O. 41, R. 10**—*Security for costs—Order for Letters Patent appeal from decision of a single Judge of the High Court.*

Both under the provisions of O. 41, R. 10, C. P. Code and apart from it, there is ample jurisdiction for the High Court to demand security for costs in an appeal under cl. 15 of the Letters Patent from the decision of the single Judge of the High Court on the Original Side. 27 M. 121, Not Foll. 20 C.W.N. 49 : 46 C. 481, Ref. (*Sanderson, C. J. and Richardson, J.*) AVIS MARY KATHLEEN GOULDING, *In the matter of.* **28 C. W. N. 676 : 51 Cal. 695 : 80 I. C. 295 : A. I. R. 1924 Cal. 781.**

——— **O. 41, R. 10**—*Security for costs—Appeal dismissed—Effect.*

Where during the pendency of an appeal, security for costs was ordered, and then the appeal was allowed, the sureties ceased to be liable thereafter. Sureties are not liable where the respondent was able to get the appellate order reversed. (*Mookerjee and Panton, JJ.*) KEDAR NATH CHAKRABARTY *v.* CHANDI CHARAN MITTER. **38 C. L. J. 190 : 76 I. C. 510 : A. I. R. 1924 Cal. 528.**

——— **O. 41, R. 10**—*Appeal—Rejection of, for failure to furnish security—Effect of—Subsequent extension of time.*

Once an appeal has been dismissed for failure of the appellant to give security for costs within the time fixed, it is not thereafter open to the Court to extend the time for giving security. (*Greaves and Ghose, JJ.*) SRIMATI HARI BHABINI DEBI *v.* NARENDRA NATH ROY. **67 I. C. 883 : A. I. R. 1923 Cal. 317.**

——— **O. 41, R. 10**—*Rejection of appeal—Failure to furnish security for costs—Appeal.*

An order of rejection of an appeal for failure to furnish security for the costs of appeal and of the original suit under O. 41, R. 10 is not appealable either as a decree or as an order. (*Mookerjee and Buckland, JJ.*) ROMESH CHANDRA DAS *v.* MANINDRA LAL DAS. **49 C. 355 : 26 C. W. N. 1020 : 35 C. L. J. 131 : A. I. R. 1922 Cal. 246.**

——— **O. 41, R. 10**—*Non-applicability to pauper appeals.*

O. 41, R. 10, C. P. Code, does not apply to pauper appeals. 42 Bom. 5, Foll. (*Chevis and Campbell, JJ.*) NAZIM *v.* ABDUL HAMID. **3 Lah. 30 : 4 U. P. L. R. (Lah.) 87 : 68 P. L. R. 1922 : 67 I. C. 256 : A. I. R. 1922 Lah. 87.**

——— **O. 41, R. 10 and O. 49, R. 3**—*Provision in the Code as to security for costs applies to appeals from the Original Side.*

Order 41, R. 10, and its proviso apply to Original Side appeals, and security for the costs of the respondent can be ordered in an Original Side appeal. 37 Bom, 572 and A. I. R. 1923 Bom. 399, Dist. (*Ramesam and Reilly, JJ.*) VIRUPAKSHA RAO NAIDU *v.* M. RANGANAYAKI AMMAL. **21 L. W. 662 : 87 I. C. 346 : A. I. R. 1925 Mad. 1132.**

——— **O. 41, R. 10**—*Security for costs—Poverty of appellant alone is not sufficient ground.*

Poverty of the appellant by itself is not a sufficient ground for an order directing a security to be given. But no case has gone to the length of saying that mere want of means on the part of the appellant is a sufficient ground for dispensing with security. The true rule is that poverty of an appellant, standing by itself and without reference to the general facts of the case

under appeal ought not to be considered sufficient to warrant his being required to furnish security for costs. 8 A. 203 and other cases cited. (*Venkatasubba Rao, J.*) KONAMMAL *v.* ANNADANA JADAYA GOUNDAR. **17 L. W. 26 : 70 I. C. 686 : (1922) M. W. N. 801 : A. I. R. 1923 Mad. 204.**

——— **O. 41, R. 10 (2)**—*Pauper appeal—Security for costs cannot be ordered—Validity—Appeal if lies.*

No appeal lies against an order rejecting an appeal for failure to furnish security for costs but the validity of the same can be tested in revision. Where a District Court allowed the appellants to appeal *in forma pauperis* and subsequently directed them to furnish security for costs, it acted illegally and with material irregularity. (*Chevis and Campbell, JJ.*) NAZIM *v.* ABDUL HAMID. **3 Lah. 30 : 4 U.P.L.R. (Lah.) 67 : 67 I. C. 256 : 68 P. L. R. 1922 : A. I. R. 1922 Lah. 87.**

——— **O. 41, R. 10 (2)**—*Provisions mandatory—Security not furnished in time—Dismissal of appeal.*

In the absence of security within the time fixed by the Court the appeal should be rejected. The provisions of O 41, R. 10 (2) are mandatory and the mere fact that the whereabouts of the client are not known is not sufficient. Per *Chevis, A. J. C.*—It is the duty of every litigant to keep in touch with his case, and not to go wandering around the country at large without giving any address where a communication from the Court or from his Counsel can readily find him. (*Chevis and Martineau, JJ.*) PARMA NAND *v.* RAMPARKASH. **68 I. C. 306: 2 Lah. L. J. 391.**

——— **O. 41, R. 10 (2) and S. 115**—*Security filed—Clerical error—Application for correcting rejected—Rejection of appeal is revisable.*

The jurisdiction as to the passing of the order of rejection only arises in the event of no security being filed within the time fixed by the Court. Where security has been filed but there is a clerical error as to the description of the property and the appellant has applied for its correction, the Court cannot by rejecting the application, reject the appeal. Such rejection of appeal is apt to be revised as being an excessive exercise of jurisdiction. (*Wazir Hasan, A. J. C.*) JAIDAT SINGH *v.* BALDEO SINGH. **12 O. L. J. 83 : 86 I. C. 752 : A. I. R. 1925 Oudh 402.**

——— **O. 41, R. 10 (2)**—*Security filed—Clerical error—Application for correcting the error should be allowed.*

Where the bond executed by the appellants as security misdescribed the hypothecated property on account of a clerical error which consisted in the fact that the property was situated in a different mahal from that where it was stated to be and where it was found that the property was ample security for the costs. *Held*, that the Court should decide on the merits the appellant's application to correct the bond and should allow the alleged clerical error to be corrected, and not reject the appeal under O. 41, R. 10 (2). (*Wazir Hasan, A J.C.*) JAIDAT SINGH *v.* BALDEO SINGH. **86 I. C. 752 : 12 O.L.J. 83 : A.I.R. 1925 Oudh 402.**

——— **O. 41, R. 11**—*Summary dismissal of appeal—Effect on mortgage decree—Time for payment.*

In the case of an appeal from a mortgage decree being summarily dismissed under O. 41, R. 11, the time for payment of the mortgage money is not extended as the decree appealed from cannot be taken to have been confirmed under O. 41, R. 32. (*Shah, A. C. J. and Kemp, J.*) DATTATRAYA VITHAL GARWARE *v.* VASUDEO ANANT GARGATE. **47 Bom. 956: 25 Bom. L. R. 990 : 76 I. C. 1023 : A. I. R. 1924 Bom. 98.**

——— **O. 41, Rr. 11 and 31**—*Dismissal of appeal—*

C. P. CODE (V OF 1908), O. 41, R. 11.

Contents of judgment.

The dismissal of an appeal under O. 41, R. 11 of the C. P. Code, by Court whose decision may be subject of an appeal, does not relieve the Appellate Court from the necessity of writing a judgment which, however, need not be a long one. But the judgment, whatever it is, should show the points raised, the decision upon those points and the reasons for the decision. (*Ghose and Panton, JJ.*) SURENDRA NATH SHOME *v.* RAGHUNATH DUTT. **27 C. W. N. 501: 76 I. C. 1002: A. I. R. 1923 Cal. 558.**

——0. 41, R. 11—*Second appeal—Dismissal under O. 41, R. 11—Review of judgment—Discovery of new evidence—Not a sufficient ground.*

There is no review when a second appeal has been dismissed under O. 41, R. 11. Discovery of new evidence is not a sufficient ground for review of such a judgment. (*Sanderson, C. J. and Richardson, J.*) SAILABALA DEI *v.* GAJADHAR. **36 C. L. J. 76: 70 I. C. 408: 27 C. W. N. 918: A. I. R. 1922 Cal. 165.**

——0. 41, R. 11—*Summary rejection of appeal without fixing date of hearing or hearing the appellant is good ground for review—C. P. Code, O. 47, R. 1.*

Summary rejection of an appeal as time-barred without fixing a date for hearing the appellant is in contravention of the law and forms a good ground for review within O. 47, R. 1. (*Simpson, A. J. C.*) SRIPAT *v.* HUBDAR. **2 O. W. N. 678: A. I. R. 1925 Oudh 643.**

——0. 41, R. 17—*Notice of hearing not fixed—Dismissal of appeal for default is invalid—Application to set aside the dismissal—Limitation.*

Where no date was fixed for the hearing of an appeal and the Court purported to dismiss the appeal for default, *held*, that the dismissal was without jurisdiction and that an application to set aside the dismissal was not governed by Art. 168 of the Limitation Act. (*Scott-Smith, J.*) ATA MAHOMED *v.* SHANKAR DAS. **69 I. C. 618: A. I. R. 1924 Lah. 279.**

——0. 41, Rr. 17 and 19—*Dismissal of appeal for default—Remedy of appellant—Court if has an inherent power to restore.*

The Court has inherent power to restore an appeal dismissed for default. (*Schwabe, C. J. and Waller, J.*) KRISHNASAMI NAIDU *v.* CHENGALROYA NAIDU. **18 L. W. 870: 33 M. L. T. 207: 47 Mad. 171: 76 I. C. 836: A. I. R. 1924 Mad. 114: 45 M. L. J. 813.**

——0. 41, R. 17—*Appellant absent—Dismissal on the merits not proper.*

On the day fixed for hearing an appeal, the appellant was not present in Court but a vakil holding a vakalat from him was present and applied for an adjournment. This was refused and thereupon the vakil informed the Court that, as he had no instructions or papers, he could not argue the appeal and took no further part in the proceedings. The appellate Court instead of dismissing the appeal for default under O. 41, R. 17, C. P. Code, considered the evidence in the light of the grounds raised in the appeal memo. and dismissed the appeal with costs. *Held* (1) that there was no appearance on the part of the appellant within the meaning of O. 41, R. 17, C. P. Code, (2) that the appellate Court has no power to go into the merits of the case and to dismiss the appeal on the merits; (3) and that the proper order to be made on second appeal was to set aside the order of the lower appellate Court dismissing the appeal on its merits as *ultra vires* and to direct him to restore the appeal to file and dispose of it according to law. (*Ayling and Odgers, JJ.*) MUSALIARAKATH MAHOMED *v.* MANAVIKRAMA. **16 L. W. 434 : (1922) M. W. N. 604 : 45 M. 882 : 69 I. C. 513 : A. I. R. 1923 Mad. 13 : 43 M.L.J. 317.**

C. P. CODE (V OF 1908), O. 41, R. 17.

——0. 41, R. 17—*Adjournment—Refusal of—Dismissal for default—Remedy.*

When the appellant's vakil asks for an adjournment but it is refused, and he is unprepared to argue the case, the Court should not ignore his presence and proceed to dismiss the appeal as if there was no presence. Against such an order no appeal lies, but it is revisable (*Kinkhede, A. J. C.*) GANESH PRASAD *v.* BHANGILAL. **83 I. C. 257 : A. I. R. 1925 Nag. 236 (2).**

——0. 41, R. 17—*Effect.*

The effect of the dismissal of the appeal for default is to put the parties in the same position as if there had been no appeal or as if it had been dismissed on the merits. 6 All. 269, foll. (*Batten, J.C.*) MT. PURA *v.* BEHARI LAL. **A. I. R. 1923 Nag. 1.**

——0. 41, R. 17—*Counsel instructed merely to apply for adjournment of appeal—Refusal of application—Appearance—Dismissal for default—Preparation of formal decree by mistake—Appeal, whether competent.*

An application by a counsel or a pleader who is instructed only to apply for adjournment which is refused is not an appearance within the meaning of the Civil Procedure Code. 15 W. R. 143 ; 15 A. 359; 34 C. 403; 30 M. 274; 3 P. L. J. 355: 4 Pat. L. J. 712; 5 Pat. L. J. 17, and 22 All. 66, Foll. 26 Mad. 277. Not Foll. Where a counsel applies for adjournment of the appeal and on the request being refused expresses his inability to argue the appeal and the Court after referring to the judgment of the lower Court as clear and well-reasoned and free from any defect of error in law or fact dismisses the appeal, *held* that the dismissal of the appeal is not based on any determination of the merits but only on the failure of the appellant's counsel to put in an appearance and must be regarded as an order under O. 41, R. 17, C. P. Code, against which no appeal is provided by the Code. *Held*, further, that though the appellant might have been misled, by reason of a formal decree having wrongly been prepared by the office in the case, into thinking that he was bound to file an appeal, yet he was not entitled to file an appeal to which he had no right under the statute. (*Neave, A. J. C.*) MURLIDHAR *v.* FAQUIR BAKSH. **1 O. W. N. 736: 28 O. C. 166: 85 I. C. 811 : A. I. R. 1925 Oudh 549.**

——0. 41, R. 17—*Default of appearance—Pleader refusing to argue the case.*

Where when an appeal was taken up for hearing the pleader for the appellant declined to argue the appeal as he was unready and the Court dismissed the appeal for default, *Held*, that it was a case of non-appearance of the appellant. To constitute appearance by a pleader it must be shown that the pleader was ready to place the materials before the Court to enable it to apply its judicial mind. 34 C. 403, Foll. (*Mullick and Kulwant Sahay, JJ.*) FIRM OF JAI NARAIN RAMJASH *v.* SITARAM MARWARI. **1923 P H. C. C. 175 : 74 I. C. 947 : A. I. R. 1923 Pat. 520.**

——0. 41, Rr. 17 and 30—*If discretionary power is not exercised appeal must be adjourned—Decision on merits is possible only under R. 30.*

The power under R. 17 is discretionary. Therefore where that is not exercised in a case where the appellant is absent, the only alternative is to adjourn the case to give an appellant an opportunity of being heard. If the appeal is to be decided on merits it must be decided under R. 30 only after hearing the parties or their pleaders. (*Brown, J. C.*) MAUNG THAN GE *v.* MAUNG PO THEIN. **4 U. B. R. 164: 76 I. C. 166: A. I R. 1925 Rang. 96.**

——0. 41, R. 17—*Appearance, meaning.*

An appearance by a pleader who is instructed only

to apply for adjournment is not such an appearance as is contemplated by R. 17. (*Maung Kin, J.*) MENSEE DEVJEE & CO *v.* MAUNG THAN GYAUNG.
62 I. C. 57 : 10 L. B. R. 329.

——**O. 41, R. 18**—*Dismissal of appeal—Omission to provide identifier—Effect of.*

An appeal cannot be dismissed under O. 41, R. 18, C.P. Code, on account of the omission of the appellant to provide a person to identify the respondent as required by O. 5, R. 18, C. P. Code. (*Jwala Prasad and Ross, JJ.*) NAGENDRA NATH GHOSH *v.* SHAMBHU NATH PANDE. **3 Pat. L. T. 498 : 65 I. C. 49 : A. I. R. 1923 Pat. 114.**

——**O. 41, R. 19**—*Power of Court not exhaustive.*

The rule does not exhaust the powers of the Appellate Court to readmit an appeal dismissed for default. (*Shah and Crump, JJ.*) SONUBAI BABURAO *v.* SHIVAJIRAO KRISHNARAO. **45 Bom. 648 : 60 I. C. 919 : 23 Bom. L. R. 110.**

——**O. 41, R. 19**—*Transfer of appeal from Dt. Judge to Addl. Dt. Judge—Appellant ignorant of transfer and hence absent—Appeal dismissed for default—Dismissal should be set aside.*

An appeal was transferred by the District Judge to the file of the Additional District Judge and on the same day the appeal was called and, as the appellants were not present was dismissed for default. The appellants subsequently filed a petition for restoration of the appeal on the ground that neither they nor their pleader were aware of the transfer of the appeal to the file of the Additional Dt. Judge and so could not be present when the appeal was called. The learned Additional District Judge without taking any evidence, or giving the appellants an opportunity of adducing evidence dismissed the application. *Held*, that the procedure followed by the learned Judge was not quite in accordance with law, and that an opportunity should have been given to the appellants to prove their contention. (*Suhrawardy and Graham, JJ.*) JAHA BAKSH *v.* ABDUL LATIF.
79 I. C. 319 : A. I. R 1925 Cal. 500.

——**O. 41, R. 19**—*Applicant for re-admission of appeal dismissed for default must be enabled to show prevention by sufficient cause, of his presence.*

When an application for re-admitting an appeal dimissed for default is made, it should be treated as a miscellaneous matter and the applicant should be given an opportunity to show that he was prevented by any sufficient cause from being present when the appeal was called on for hearing. (*Pearson and Graham, JJ.*) KRISHNA CHARAN MANDAL *v.* CHINIBASI MANDAL. **82 I. C 330 : A. I. R. 1925 Cal. 269.**

——**O. 41, R. 19**—*Dismissal of appeal for default—Compromise thereafter—Power to record.*

Where an appeal has been dismissed for default of appearance of both the parties and both the appellant and respondent within a month of the dismissal filed a petition of the compromise settling their disputes, with an additional application for restoration of the appeal, *held*, that in the circumstances of the case, the Court ought to have restored the appeal and passed a decree in terms of the compromise. (*Suhrawardy and Panton, JJ.*) ASWINI KUMAR DUTT *v.* SUKHODA SUNDARI DEBYA. **68 I. C. 448 : A. I. R. 1923 Cal. 319 (2).**

——**O. 41, R. 19**—*Sufficient cause—Five appeals disposed of in half an hour—Counsel not expecting appeal—Rights of parties.*

A counsel in an appeal found five appeals above his in the list and when he went into the Court half an hour later he was told his appeal had been dismissed for default, *Held*, he could assume that five appeals

would not be disposed in half an hour and it was sufficient ground to readmit his appeal under O. 41, R. 19.

Even if the dismissal is due to laches on the part of the counsel, a Court should in such circumstances restore the appeal on payment of costs. (*Scott-Smith and Martineau, JJ.*) MOHAR CHAND *v.* HABIB.
89 I. C. 795 : A. I. R. 1925 Lah. 617.

——**O. 41, R. 19**—*Sufficient cause—Case put down lower in the list without notice to petitioner's vakil.*

There is no rule laying down that where Judge for any reason orders a case, which is before him, for having, to be put down lower in the list he must give notice to the counsel of the parties in other cases. On the other hand, the counsel, are expected to be present within the compound of the Court if they have got any case in the list. Where at the time of the hearing of a case transferred lower down in the list without notice to the appellant the appellant's counsel was not present in court and the appeal was consequently dismissed for default. *Held*, that there was no cause for the restoration of the appeal. (*Abdul Raoof, J.*) NANAK CHAND *v.* SAJED HUSSAIN. **71 I. C. 813 : A I. R. 1924 Lah 189.**

——**O. 41, R. 19**—*Sufficient cause—Counsel engaged in another court.*

The fact that the counsel was engaged in another court when the appeal was called on and had sent word to the Reader of the court for a short pass over is not sufficient to set aside the dismissal for default and re admitting the appeal. (*Abdul Raoof and Martineau, JJ.*) SAIF ALI *v.* CHIRAGH ALI SHAH.
68 I.C. 785 : A. I. R. 1923 Lah. 97 (1).

——**O. 41. R. 19**—*Dismissal for default—Absence of counsel, unintentional—Restoration.*

When there is an unintentional omission to appear at the hearing of an appeal and it is dismissed for default, the restoration of appeal must be made wholly unintentional. (*Broadway, J.*) BALMOKAND *v.* WAZIR CHAND. **79 I. C. 504 (2) : 5 Lah. L. J. 89.**

——**O. 41, R. 19**—*When pleader is engaged in another Court, somebody must be left to inform the Court when case is called—Otherwise rehearing will not be allowed.*

When a pleader is engaged in another Court some one should be left behind to inform the Court of the fact, so that. if it likes it can take up some other business. The disappearance of every person connected with the party, in the hope that the Court will be compelled to wait for the pleader, is certainly a wrong method and if the appeal is dismissed, the appellant will not be granted a rehearing. (*Dalal, A. J. C.*) HARI DAS FAQUIR *v.* PRADUMAN NATH.
79 I. C 550 : A. I. R. 1925 Oudh 234.

——**O 41, R. 19**—*Effect of—Not the sole remedy.*

When an appeal is dismissed for default under O. 41, R. 18, C. P. Code, O. 41, R. 19, gives an option to the appellant to apply for re-admission but it does not take away any other remedy that may be available. The omission of a provision for fresh appeal cannot have the effect of taking away such right. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v.* PARTAP RAI. **2 Pat. 739 : 4 Pat. L. T. 405 : (1923) P. H. C. C. 213 : 75 I. C. 284 : A. I. R. 1923 Pat. 514.**

——**O. 41, R. 19**—*Restoration of dismissal for default—Right of opposite party.*

Where an appeal has been dismissed for not making good the stamp in the prescribed time, the appeal cannot be restored under O. 41, R. 19, nor under O. 47, R. 4 (2) Proviso (*a*), without notice to the opposite party. But if the case is dealt with, without notice to the opposite party, he is entitled to a hearing even in

C. P. CODE (V OF 1908), O. 41, R. 19.

Second Appeal, as soon as the matter has been brought to his knowledge. (*Miller, C. J. and Coutts, J.*) SURAJPAL PANDEY *v.* UTIM PANDEY. **63 I. C. 99 : 1921 P. H. C. C. 337.**

——O. 41, R. 19—" *Sufficient cause* "—*Laches of advocate or careless mistake of clerk.*

The laches of an advocate or the careless mistake of his clerk is not a sufficient cause " for restoration of an appeal dismissed for default." (*Pratt, J.*) MAUNG THAN *v* ZAINAT BIBI. **3 Rang. 488.**

——O. 41, R. 19—*Dismissal of appeal in absence of appellant permits only an application for restoration.*

Where an appeal is decided, on merits and the appeal is dismissed in the absence of the appellant or his pleader, the remedy of the appellant is an application for restoration and not by way of appeal. (*Brown J. C*) MAUNG THAN GE *v.* MAUNG PO THIN. **4 U. B. R. 164 : 76 I. C. 166 : A. I. R. 1925 Rang. 96.**

——O. 41, R. 19—*Appeal dismissed for failure to deposit printing Costs—Application for restoration is one for review and not one under O. 41, R. 19—C. P. Code, O. 47, r. 1.*

The words " for any other sufficient reason" in R. 1 of O.47 will cover the case where there is a good ground for not filing the deficit printing costs, and therefore an application to set aside a dismissal of appeal for failure to file printing costs is one for review and not an application under O 41, R. 19. (*Mullick and Kulwant Sahay, JJ.*) ANANT POTDAR *v.* MANGAL POTDAR. **4 Pat. 704 : A. I. R. 1926 Pat. 27.**

——O. 41, R. 20—*Appellate Court cannot itself implead a party—It should remand the case for the purpose.*

Under O. 41, R. 20, the appellate Court has no power to implead a person who was no party to the original suit at all. 37 All. 57 Rel. on. If the appellate Court is of opinion that a certain person was a necessary party, and ought to have been impleaded, the proper procedure is to remand the case to the Court of first instance with a direction that the Court should implead that person and then proceed to dispose of the case. (*Sulaiman and Daniels, JJ.*) FIRM SHIAMAM LAL JOLI PRASAD *v.* DHAN PAT RAI. **23 A. L. J. 757 : L. R. 6 A. (Cv). 386 : 88 I. C. 493 : 47 All. 853 : A. I. R. 1925 All. 768.**

——O. 41, R. 20—*Omission to implead necessary parties—Joint Hindu family—Members of—Appeal—Discretion of Court.*

In an appeal by the plaintiff against a decree dismissing a suit in ejectment brought against three tenants who formed members of a joint Hindu family the name of one of the tenants was omitted from the array of parties by mistake. *Held*, that under O. 41 R. 22, C. P. Code, the appellate Court had power to adjourn the case in order to make the omitted defendant a party to the appeal and that its omission to do so amounted to a denial of justice. (*Fremantle, S M and Barn, J. M.*) BUDH RAM *v.* KRISHNANAND. **L. R. 5 A. 177 (Rev.)**

——O. 41, Rr. 20 and 33—*Joint decree for possession appeal therefrom—Death of one of the plffs. respondents—Legal representative not impleaded in time—Whether they can be brought on record as parties.*

Pending an appeal against a decree for joint possession in favour of the plffs, one of the plffs. respondents died and his legal representatives were not brought on record in time. *Held*, that the legal representatives cannot be brought on record as parties under O.41, R.20, C.P. Code as that rule is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suit without presence of a party who was not made a party to the appeal and as it is not intended to override the provisions of O. 22 C. P. Code. Nor can the powers under O. 41, R. 33 be exercised in such a case. (*Suhrawardy and Duval, JJ*) MANINDRA CHANDRA NANDI *v.* BHAGABATI DEVI CHAUDURANI. **90 I. C 986 : 30 C. W. N. 45.**

C. P. CODE (V OF 1908), O. 41, R. 20.

——O. 41, R. 20—*A formal defendant need not be made a respondent.*

A defendant in a suit need not be made a respondent when he is only a formal defendant and his non-impleadment cannot possibly have any effect on the decision of the case. (*Moti Sagar, J.*) NAGINA SINGH *v.* JIWAN SINGH. **79 I. C. 107 : A. I. R. 1925 Lah. 87.**

——O. 41, R. 20—*Power to add party—Discretion.*

The power of an appellate court under O. 41, R. 20, to add a party to an appeal is one which is not circumscribed by any rule of limitation. It is a discretionary matter, on which a higher court will not interfere if the discretion has been soundly and reasonably exercised. Where without a plaint being amended a new defendant was added, and the decree also omitted his name as a result of which he was omitted in the memo. of appeal, the Court can direct him to be added as a respondent even after the appeal-time has expired. (*Broadway, J.*) AMAR SINGH *v.* KANSHI. **A. I. R. 1924 Lah. 629.**

——O 41, R. 20—*Applicability of Law of Limitation.*

The Law of Limitation does not apply to action taken by a court under O. 41, R 20. but the power to take action is discretionary and should not be exercised in a case of extreme neglect. A third party cannot appeal on behalf of co-sharers who are interested in the appeal against a co-sharer and if they are not made respondents in time the appeal abates. (*Broadway, J.*) MUNICIPAL COMMITTEE, BHERA, *v.* SHIVRAM. **75 I. C. 90 : A. I. R. 1923 Lah. 503.**

——O. 41, R. 20—*Strangers cannot be made parties—Scope of S. 151—Inherent powers when to be exercised.*

An appellate court has power to implead only such persons as parties to the appeal as were parties in the trial court and were not made parties to the appeal but not those who were complete strangers to the suit. 18 All. 133 Ref. Powers of a court to implead parties under S. 151, C. P. Code, are circumscribed by O. 41, R. 20. and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. 3 Pat. L. J. 409 Dist. (*Moti Sagar, J.*) MUSSAMMAT HALIMAN *v.* NUR-MAHOMED KHAN. **73 I. C. 136 : A. I R. 1923 Lah. 490.**

——O. 41, R. 20—*Appeal—Joinder of parties—Court's power of.*

Where names of certain defendants are omitted by mistake, in a memorandum of appeal, the Court has power to add them as parties under O. 41, R. 20 of the Code. (*Drake Brockman, J. C*) DEOKARAN *v.* NATHU. **63 I. C. 352 : 4 N. L J. 138.**

——O. 41, Rr. 20 and 33—*Addition of parties by appellate Court—Limitation—Powers of second appellate Court.*

In a suit by a co-sharer landlord against the tenant and his other co-sharer landlords, plaintiff claimed rent from the tenant and if it was found that he had paid it, from the other co-sharer landlords who had collected it. The trial Court passed a decree against the co-sharer landlords on the ground that they had received the whole rent. On appeal by the co-sharer landlords impleading the plaintiff alone, the lower

C. P. CODE (V OF 1908), O. 41, R. 20.

appellate Court held that the appellants had not received the whole rent and allowed the appeal and dismissed the suit holding that the tenant had not been made a party to the appeal and the question of limitation would arise if the tenant were now to be made a party on second appeal. *Held*, that it was competent to the appellate Court to make the tenant (defendant) a party to the appeal in order to secure the ends of justice under O. 41, R 20, C. P. Code. The court of second appeal had power under O. 41, R 20, C P. Code to bring the parties on record in order to carry out the powers given to it under O. 41, R. 33, C. P. Code. (*Miller, C. J. and Foster, J.*) PADARATH MAHTON *v.* HIRAN SINGH. **1924 P. H. C. C. 249 : 5 Pat. L. T. 509 : 82 I. C. 600 : A. I. R. 1924 Pat 773.**

——**0. 41, Rr. 20 and 33**—*Court will not add new respondents after limitation for appeal against them.*

The Court will not exercise its discretionary power under O.41, R.20 or R.33 to add new respondents to an appeal, where the period of limitation for filing an appeal against them has elapsed and the lower Court's decree has become *res judicata*. Because, if the Court should exercise its discretionary power of adding respondents in such cases the result will be to allow the appellant to make a fresh appeal against persons who had been exonerated by the lower Court. (*Young and Baguley, JJ.*) CHOCKALINGAM CHETTY *v.* SINGARAM CHETTY. **2 Rang. 541 : 3 Bur. L. J. 259: 84 I. C. 522 : A. I. R. 1925 Rang. 108.**

——**0. 41, R. 20**—*Addition of parties—Powers of appellate Court.*

It is competent to an appellate court to add respondents to an appeal under the provisions of O. 41 R. 20, C. P. Code, even though the time within which an appeal against those persons might have been prepared had expired. 14 A. 154 ; 33 C. 329 Rel. on. (*Brown, A. J. C.*) MAUNG AN GALE *v.* MA MIN DUN. **66 I. C. 365 : (1921) 4 U. B. R. 87.**

——**0. 41, Rr. 20 and 33**—*Second Appeal—Court can add respondents.*

An appellate Court can in Second Appeal add as respondents persons impleaded in the original Court but not in first appeal, even though an appeal against them is time-barred. (*Robinson, J.*) YOOSUF OOSMAN BROS. & CO. *v.* WINNEYA. **59 I. C. 798 : 10 L. B. R. 191.**

——**0. 41, R. 21**—*Appeal heard* ex parte—*Restoration—Sufficient cause, what is.*

There is no universal rule as to what is sufficient cause in restoring an appeal decided *ex parte*, each case being dealt with on its own facts where a respondent's attorney failed to instruct his pleader, who consequently reported no instructions, *held*, there was sufficient cause for restoration under O. 41, R. 21 of the Code. (*Walsh and Lindsay, JJ.*) GODHNI *v.* SHYAM LAL. **63 I. C. 737 : 19 A. L. J. 547.**

——**0. 41, R. 21**—*Appeal*—Ex parte *hearing and decision—Application to rehear the appeal.*

It is in the highest degree improbable that a litigant having the advantage of a decree in his favour in the lower court would not be present on appeal to support the decree if he had been aware of the appeal. The unrebutted oath of the person to be served that he never was served and knew nothing of the case is sufficient to require the reopening of the case. 46 B. 130; 19 C. W. N. 1231 Ref. (*Young, J.*) MAUNG SHWE HLA *v.* SOOLAY NAIDU. **3 Bur. L. J. 101 : 82 I. C. 812 : A. I. R. 1924 Rang. 336.**

——**0. 41, R. 22**—*Memorandum of objections—*

C. P. CODE (V OF 1908), O. 41, R. 22.

Right to file an appeal, after dismissal of memorandum.

O. 41, R. 22, C. P. Code allows a respondent to take any cross-objection which he could have taken by way of appeal. It does not allow him to take any objection which he had already taken by way of appeal and which had been decided against him. In an appeal relating to the specific performance of a contract of sale, cross-objections filed by the plaintiff were dismissed on the ground that it was not competent to him to file cross-objections after the appeal of the other side had been dismissed. *Held* that it was open to the plaintiff to appeal on his own account. "Cross objection," in O. 41, R. 22, C P. Code, implies that the objections are taken in a pending appeal. (*Daniels, J.*) PARBHU DAYAL *v.* MURLIDHAR. **22 A. L. J. 365 : L. R. 5 A. 298 : 10 O. & A. L. R. 528 : 78 I. C. 677 : A. I. R. 1924 All. 867.**

——**0. 41, R. 22**—*Cross-appeal—Objection if can be filed.*

Where after a party files an appeal against a part of a decree the opposite party files a separate cross appeal, the first party has a statutory right to file a memorandum of objections to the cross appeal. (*Kanhaiya Lal J.*) KANHAIYA LAL *v.* MT. AZMATUNNISSA. **A. I. R. 1924 All. 840.**

——**0. 41, R. 22**—*Petition to support decree is not cross-objections—No* ad valorem *Court-fee payable.*

Where for the purpose of supporting the decree dismissing plaintiff's claim on any ground, even on a ground other than that taken by the Court of first instance, respondents filed a petition stating the reasons on which they supported the decree, it does not amount to cross-objections for which an *ad valorem* court-fee was payable. (*Banerjee and Ryves, JJ.*) RAM PERSAD KALWAR *v.* MT. AJNASIA. **44 All. 577 : A. I. R. 1922 All. 280 (1).**

——**0. 41, R. 22**—*Cross objection—Decree in favour of party.*

Petition to support decree in appeal on other grounds does not amount to cross objections. (*Banerjee and Ryves, JJ.*) RAM PRASAD *v* AJNASIA. **68 I. C. 861 : 44 A. 577 : A. I. R. 1922 All. 280 (1).**

——**0. 41, R. 22**—*Court-fee—Cross objections—Supporting the decree of the lower court—No Court-fee.*

Where the respondent in an appeal from a decree which totally dismissed the plaintiff's suit put in a petition stating the reasons on which they supported the decree, the respondent need not pay court-fee on the petition. (*Banerji and Ryves, JJ.*) RAM PRASAD KALWAR *v.* MT. AJANASIA. **68 I. C. 861 : 44 All. 577 : A. I. R. 1922 All. 280 (1).**

——**0. 41, R. 22**—*Letters Patent Appeal—Provisions of Code if apply.*

The provisions of the Code of Civil Procedure relating to cross objections do not apply to Letters Patent Appeals. (*Mears, C. J. and Banerjee, J.*) PURNA KUAR *v.* MANGAT RAI **A. I. R. 1922 All. 55 (1).**

——**0 41, R. 22**—*Letters Patent Appeal—Memorandum of cross objections cannot be filed.*

No cross-objections can be filed on a Letters Patent Appeal as O. 41, R. 22 does not apply to it. 21 A. 297 foll. (*Mears. C.J. and Banerjee, J.*) MANGAT RAI *v.* MUSST. PURNA KUAR. **L. R 3 A. 198.**

——**0. 41, R. 22**—*Cross objections as against other respondent.*

The decision which say that in the case of a purely lateral objection, the court will not as a rule permit it to be urged, will not apply to a case when the interest of the objector was really adverse to that of

the appellant and other co-respondents and though the appellant unnecessarily took the same objections in his ground of appeal. (*Sanderson, C. J. and Rankin, J.*) BHUBAN MOHAN GHOSE *v.* CO-OPERATIVE HINDUSTAN BANK, LTD. **29 C.W.N. 784 : 88 I. C. 866 : A I. R. 1925 Cal. 973.**

——0. 41, R. 22—*Suit in respect of one* Jote—*Finding that it formed part of a bigger* Jote *is unnecessary.*

In a suit for a declaration that one of the *jotes* is not permanent, the finding that this *jote* formed part of a bigger *jote* would not affect the point at issue, the suit being limited to the declaration sought in respect of a particular *jote* and for the correction of the record of rights in that respect. Such a finding is therefore not a ground which is covered by O. 41, R. 22 and it should be expunged from the lower Court's decree (*Suhrawardy and Duval, JJ.*) SIR PRODAT KUMAR TAGORE *v.* BAL GOBIND DITCHIHAT. **41 C. L.J. 31 86 I. C. 6 : A. I. R 1925 Cal. 518 (2).**

——0. 41, R. 22—*Objection not put as cross-objection, cannot be taken if it is not in support of the decree.*

Where the question as to the frame of the suit under O 34, R. 1 of the C. P. Code was raised in and decided by the lower Court and no cross-objection was filed in appellate Court under O.41, R.22, of the Code and where the ground was not one in support of the decree made but which if sustained, would render the decree invalid, *Held* : that such objection cannot be taken in the appellate Court. (*Newbould and B. B. Ghosh, JJ.*) SHAILESH CHANDRA GUHA *v.* BECHAI GOPE. **40 C. L. J. 67 : 84 I. C. 124 : A. I. R. 1925 Cal. 94.**

——0. 41, Rr. 22 and 33—*Scope—Powers of Appellate Court.*

R. 33 is not controlled by R. 22. (*Huda, J.*) JOGENDRA KISHORE *v.* NASIMUDDIN SARKAR. **62 I. C. 623 (C).**

——0. 41, R. 22—*Letters Patent Appeal—Rule does not apply.*

O. 41, R. 22 of the Code does not apply to a Letters Patent Appeal and a memorandum of cross-objections filed therein cannot be entertained. (*Mookerjee, A.C. J. and Fletcher, J.*) BROJENDRA CHANDRA SARMA *v.* PROSANNA KUMAR DHAR. **32 C. L. J. 48 : 59 I C. 589 : 24 C. W. N. 1016**

——0. 41, R. 22—*Time-barred appeal may be treated as cross objections.*

Where appellant apprehends that his appeal would be time-barred and prays that it should be treated as cross-objections in respondent's appeal. *Held*: that he is entitled to do so. 1922 L. 423 Foll. (*Harrison and Zafar Ali, JJ.*) BHAGAT RAM *v.* RAGHBAR DIAL. **79 I. C. 132 : A. I. R. 1925 Lah. 57**

——0. 41, R. 22—*Respondent having appealed, can't file cross-objections.*

The law does not permit a respondent, who has preferred an appeal, to file cross-objections. 25 All. 628, Foll. (*Martineau and Campbell, JJ.*) MT. TEHL KUAR *v.* AMAR NATH. **17 P. W. R. 1923. 79 I. C. 670 : A. I. R. 1925 Lah. 2.**

——0. 41, R. 22—*Limitation—Appeal barred by limitation—Effect of.*

Where it is found that the appeal itself was preferred out of time and therefore barred, the memorandum of objections could not be heard. (*Shadi Lal, C. J. and Fforde, J.*) JAI GOPAL SINGH *v.* MUNA LAL. **4 Lah 140 : 5 Lah. L. J. 345 : 73 I. C. 655 : A. I. R. 1924 Lah. 43.**

——0. 41, R. 22—*Cross-objection as to jurisdiction to attach not taken in the execution court cannot be taken in cross objection.*

When an objection to jurisdiction of the execution Court was not taken in first Court, *Held*, it is doubtful whether the order of the Court attaching the property could be properly attacked by means of cross-objections in connection with an appeal from an entirely different order. It is not open to the judgment-debtor to raise his objection by way of cross-objections in the appeal of the decree-holder from the order of the executing Court refusing to set aside a prohibitory order. (*Scott-Smith, J.*) FITZ HOLMES *v.* WARYAM SINGH. **75 I. C. 419 : A. I. R. 1923 Lah. 514.**

——0. 41, R. 22—*Co-respondent—Cross-objection.*

Under O. 41, R. 22 a respondent can file a memorandum of cross-objections against a co-respondent. 38 Mad. 705 foll. (*Martineau, J.*) CHHAJU *v.* QUTAB DIN. **5 Lah. L. J. 92 : 69 I. C. 330 : A. I. R. 1923 Lah. 39.**

——0. 41, R 22—*Limitation—Time—expired appeal can be treated as memorandum of objections.* (*Martineau, J.*) PAWA SINGH *v.* THAKUR SINGH. **4 U. P. L. R. Lah. 80 : 67 I. C. 478 : A. I. R. 1922 Lah. 423.**

——0. 41, R. 22—*Cross-objection—Second Appeal.*

A memorandum of cross-objections as to costs in the Courts below cannot be considered on second appeal. (*Shadi Lal, C. J. and Le-Rossignol, J.*) MADHO PRASAD *v.* FIRM OF ASHAN ILAHI. **5 Lah. L. J. 108 : 79 I. C. 977.**

——0. 41, R. 22—*Day for appearance mentioned in notice of appeal under Madras O. 41-A is not day fixed for hearing.*

The day of appearance of respondent mentioned in the notice issued in the form No. 6-A appended to O. 41-A (Madras High Court) cannot be regarded as the day fixed for hearing as contemplated by O. 41, R. 22. (*Ramesam and Reilly, JJ.*) PUSHKARAMBA *v.* NAGARATNAMMA. **22 L. W. 792 : A. I. R. 1926 Mad. 283 : 50 M. L. J. 112.**

——0. 41, R. 22—*Appeal from Original Sid. of High Court dismissed for default—Memo. of objection can be treated as appeal.*

Though the main appeal from the Original Side of a High Court has been dismissed for default, a memorandum of objection filed by the respondent in the appeal can be treated as a substantive appeal. (*Coutts-Trotter, C. J. and Srinivasa Aiyangar, J.*) P. K. BHIMASENA RAO *v.* I. C. VENUGOPAL MUDALI. **21 L. W. 672: 88 I. C. 443 : (1925) M. W. N. 190 : A. I. R. 1925 Mad. 725 : 48 M. L. J. 384.**

——0 41, R. 22—*Omission to give notice after judgment-debtor attained majority does not vitiate sale where he knew but did not object to the sale.*

Where a person became major prior to a sale but was not given notice and where though he was aware of the execution proceeding and did not appear to object : *Held*: failure to give him notice did not entitle him to question the validity of the execution sale. (*Oldfield and Devadoss, JJ.*) NAGAPPA CHETTY *v.* MUTHURAMAN CHETTY. **78 I. C. 12 : A. I. R. 1925 Mad. 158.**

——0. 41, R. 22—*New Grounds*—Ex parte *decree—Appeal from decree—Right to prefer—Conditions.*

A defendant who has been placed *ex parte* can impugn the decree in appeal on the ground that he was wrongly made *ex parte* provided he has not moved the trial Court under O. 9, R. 13, C. P. Code. The fact that before the decree was passed he took futile proceedings purporting to be under O. 9, R. 13 on the erroneous impression that a decree had been passed, does not take away the right of appeal. He can only file a cross-objection in place of appeal. (*Oldfield and*

C. P. CODE (V OF 1908), O. 41, R. 22.

Devadoss, JJ.) BABA LEVVAI SAHIB *v.* AMMEEN AMMAL. **A. I. R. 1924 Mad. 107 : 45 M. L. J. 805.**

———0. 41, Rr. 22 and 1—*Separate appeals--Appeal against one—Memo. of appeal.*

Where in two appeals one judgment and two decrees were passed, and an appeal was preferred against one appeal only and the respondents, instead of filing another appeal from the appeal not appealed against by the appellant, filed only cross-objection on the ground that under Rule 105 of the Civil Rules of Practice only one decree ought to have been passed in both appeals, *Held*, when there are in fact two decrees and the respondents wisn to appeal against one only, it is for them to see that the course that they take to get that decree amended is the appropriate one provided by law. (*Spencer and Krishnan, JJ.*) GOVINDASWAMI NAIDU *v.* UCHAPPA GOUNDAN

(1922) M. W N. 477 : A. I. R. 1922 Mad. 413

———0. 41, R. 22—*Limitation—Presented out of time—Excusing delay.*

It is clear from the words of O. 41, R. 22, C. P. Code, that a cross-objection can be admitted after the expiry of 30 days from service of notice of the appeal on the respondent, so that even if one be put in during the argument of the appeal, it might be admitted in a proper case. (*Hallifax, A. J. C.*) KUKSA *v.* DAJIBA. **5 N. L. J. 192 : 66 I. C. 217 : A. I. R. 1922 Nag. 213.**

———0. 41, R. 22—*Supporting decree on ground decided in favour—Variation in attack or defence.*

Per *Kanhaiya Lal, J. C.* (*Daniels, A.J C., contra*). —A man might not be willing to accept a method of account if compound interest is allowed, which he might have been willing not to contest, if simple interest was allowed. In a matter of right accounting or true construction, there can be no estoppel, and if fresh accounts have to be prepared, they must be prepared by the right method.

Per *Ashworth, A. J. C.*—Whether the respondents could or could not claim a reversal of the method of accounting adopted by the Lower Court, it is open to the Court of appeal to reverse that method as soon as it upset the decision of the lower Court as to the nature of interest to be allowed. (*Kanhaiya Lal, J. C., Daniels and Ashworth, A. J. Cs.*) SARSUTI PRASAD *v.* EHTISHAM ALI. **25 O. C. 349 : 77 I. C. 310 : A. I. R. 1923 Oudh 123.**

———0. 41, R. 22—*Cross-objections—Hearing of—Dismissal of appeal—Co-respondents.*

A cross appeal should ordinarily be directed against the appellants and not against the co-respondents. Where an appeal is dismissed for failure to furnish security under O. 41, R. 10, C. P. Code, in the presence of the respondent and without any objection on his part he cannot subsequently proceed with his cross-objections. 5 Pat. L. J. 328 : 8 O. L. J. 358 Foll. (*Daniels and Lyle, A. J. Cs.*) QARA MAHOMED SHAHAN *v.* BAZAR ARA BEGUM. **25 O. C. 280 · 70 I. C. 79 : A. I. R. 1923 Oudh 108.**

———0. 41, R. 22—*Court-fee.*

For a cross-objection covering relief referred to in the articles, respondent's valuation if reasonable should be accepted. (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) SRI RAJEO LOCHAN *v.* MAHANT RAM MANOHAR. **25 O. C. 275 : 70 I. C. 286 : A. I. R 1923 Oudh 44 (1).**

———0. 41, Rr. 22 and 33—*Co-respondents—Cross-objections.*

Where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, he cannot prefer a memorandum of objections against the other respondents on the appeal. O. 41, R. 22, C. P. Code should ordinarily be confined to cases of cross-objections urged against the appellant but O. 41, R. 33, C. P. Code, gives the court a very wide discretion and cases may occasionally arise where cross-objections against a co-respondent should be heard. (*Daniels, J. C and Dalal, A. J. C.*) SHEIKH MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH. **66 I. C. 642 : 8 O. L. J. 358.**

———0. 41, R. 22—*Scope of.*

A partition suit having been decreed both parties appealed. Plaintiff's appeal was dismissed while the defendant succeeded in part. The defendant filed a second appeal and then plaintiff filed a memo. of objections, attacking all that was unfavourable to him in the decree of the first Court. *Held* he was entitled to do so. The fact that he had filed an appeal in the Court below does not affect the question. (*Jwala Prasad and Ross, JJ.*) HARDHAN MAHTO *v.* GOKUL MAHTO. **5 Pat. L. T. 411 : 76 I. C. 257 : A. I. R. 1924 Pat. 775.**

———0. 41, R. 22—*In appeal by defendant, plaintiff can't file objection against other defendants.*

In an appeal by some of the defendants, the plaintiff-respondent cannot be allowed to prefer cross-objection against the defendant-respondent, when the time for appeal by the plaintiff had become barred. (*Das and Kulwant Sahay, JJ.*) GOPAL MISSER *v.* PARTAP MANDAL. **4 P. L. T. 652 : 72 I. C. 643 : A. I. R. 1924 Pat. 200.**

———0. 41, R. 22—*Court-fees—Petition by respondent criticising judgment.*

Where a suit has been dismissed in its entirety and, on the plaintiff's appeal, the defendant files objections to certain terms in the judgment, the petition of objections is not a petition of cross-objections, within the meaning of Order 41, rule 22; mere criticisms of a judgment cannot be filed as cross-objections nor should they be accepted by the office, if filed. (*Roe, J.*) SAHDEO NARAIN *v* KUSUM KUMARI. **1 P. 258 : A. I. R. 1922 Pat. 483 (2).**

———0. 41, R. 22 (4)—*Dismissal of appeal—Appeal—Insufficiently stamped — Rejected — Cross-objections if can be heard.*

The rejection of a memorandum of appeal as insufficiently stamped is not a dismissal for default and no cross-objections can be entertained or heard where the appeal is rejected. (*Scott-Smith, J.*) LAJPATRAI *v.* LACHMAN DAS. **59 I. C. 795 : 46 P. W. R. 1921.**

———0. 41, R. 22 (4)—*Scope of—Abatement of appeal.*

Under R. 22 (4), a person filing a memorandum of objections has a right to have his case heard and determined, even where after filing the memorandum, the appeal is withdrawn or dismissed for default; but he has no such right when the appeal abates. (*Wallis, C. J. and Napier, J.*) MURUGAPPA CHETTIAR *v* PONNUSWAMI PILLAI. **44 Mad. 828 : 13 L. W. 705 : 62 I. C 757 : (1921) M. W. N. 438 : 41 M. L. J. 304.**

———0. 41, R. 23.

Appeal
Defective trial.
Effect of order.
Exclusion of evidence.
Finality of order.
Grounds for remand.
Inherent power.
New plea.
Powers of Appellate Court.
Preliminary point.
Question of law.
Transfer of case.
Miscellaneous.

C. P. CODE (V OF 1908), O. 41. R. 23—Appeal.

See also C. P. CODE, S. 107.

Appeal.

——0. 41, R. 23 and O. 43, R. 1 (4)—*Appeal—Remand—Powers of appellate Court—Inherent power.*

In a suit for dissolution of partnership and rendition of accoun s, the trial court appointed a Commissioner to examine the account books and then passed a preliminary decree based upon the Commissioner's report. On appeal the District Judge was of opinion that the trial of the suit in the first court had not been a satisfactory one and that the pleadings of both parties ought to have been required to be amended. He set aside the whole proceedings of the trial Court and remanded the case for a new trial. The order of remand did not show under what provision of the Code it professed to have been made. The defendants having appealed from the order of remand, the question arose whether an appeal lay. *Held* without expressly deciding the question whether the District Court had an inherent right of remand and whether an appeal lay from a remand made in the exercise of such a right that having regard to the fact that the policy of the Allahabad High Court had always been to allow as wide a meaning as was reasonably possible to O. 41, R. 23, C. P. Code. and that the District Judge presumably conceived himself to be acting simply under those provisions and did not express himself as acting in the exercise of any inherent jurisdiction, the appeal lay. (*Piggott and Walsh, JJ.*) GOKUL PRASAD *v.* RAM KUMAR. **44 A. 176 : 19 A. L. J. 971 :. 64 I. C. 878 : A. I. R. 1922 All. 254.**

——0. 41, R. 23 and 0 43, R. 1 (A)—*Appeal Order of remand—Provision of law not specified.*

Where an appellate court passes an order of remand without specifying the provision of law under which the order is made, it must be presumed to be made under O. 41, R. 23. C. P. Code, and the order is appealable. 19 A. L. J. 971 Foll (*Walsh and Ryves, JJ.*) KULSOOM-UN NISSA *v.* RAM PRASAD. **20 A. L. J. 321 : L. R. 3 A. 394 : 44 A. 492 : 67 I. C 713 : 4 U. P. L. R. (A) 168: A. I. R. 1922 All. 226.**

——0. 41, R. 23—*Appeal—Though order of remand is irregular appeal lies.*

An order of remand by an appellate Court which is such in form and in substance, though it be irregular, is an order under R. 23 and is appealable. 31 C. L. J. 354 and 24 C. W. N. 708 Foll. (*Pearson and Graham, JJ.*) KAYEM BISWAS *v.* BAHADUR KHAN. **42 C. L. J. 22 : 89 I. C. 744 : 30 C. W. N. 41 : A. I. R. 1925 Cal. 1258.**

——0. 41, R. 23—*Appeal—Court-fee on appeal ordered to be refunded.*

Moreover though an order of remand passed by the Court of appeal below might not be in strict accord with the provisions of O. 41, R. 23 read with O. 43, R. 1 (*w*), if the order of the appellate Court purported to be an order under O. 41, R. 23, an appeal would lie from such an order. In this case, strictly speaking, the order passed by the lower appellate Court was not in conformity with O. 41 R. 23 but it was manifest from the form of its order that it purported to pass it under O. 41, R. 23. Its order that the Court-fee paid on the memorandum of appeal should be returned to the Appellant could only be passed, under S. 13 of the Court-fees Act, in a case where the remand is made under O 41, R. 23. Further, an order passed by the Appellate Court in the exercise of its inherent jurisdiction which is possessed was, an appealable order even though it may not come within the scope of O. 41, R. 23. (*Suhrawardy and Duval, JJ.*) AGENT, BENGAL NAGPUR RAILWAY *v.* BEHARILAL DUTT. **52 Cal. 783 : 29 C. W. N. 614 : A. I. R. 1925 Cal. 716.**

C. P. CODE (V OF 1908), O. 41. R. 23—Appeal.

——0. 41, R. 23 and O. 43, R 1 (*u*)—*Appeal—Remand order made under inherent power.*

In a suit for partition, the defendants resisted the claim of the plaintiffs in the Primary Court on the allegation that the land had been previously partitioned by metes and bounds and that they and their predecessors had long been in separation. The trial Court held in favour of the defendants and dismissed the suit. Upon appeal, the plaintiffs asked for permission to adduce in evidence any entry in the record-of-rights which had been finally published after the date of the decree of the Trial Court. The lower Appellate Court acceded to the request of the plaintiff and set aside the decree or the Court of first instance and directed a re-trial of the suit with reference to the entry in the record-of-rights and such other evidence as might be adduted by both the litigants. Against this order for re-trial the defendants preferred an appeal to the High Court. *Held* (1) that the order of remand was made not under the provisions of O. 41, R. 23, C.P. Code, but under the inherent powers of the Court ; (2) that an appeal lay against the order of the lower Appellate Court inasmuch as it amounted to a decree irrespective of the provisions of O. 43, R, 1 (*u*), C, P. Code ; (3) that the admission of the record of rights was justified under the circumstances of the case. (*Mockerjee and Chotzner, JJ.*) BHAIROB CHANDRA DUTTA *v.* KALI KUMAR DUTTA. **37 C. L. J. 491 : 71 I. C. 453 : 74 I. C. 1038 : A. I. R. 1923 Cal. 606.**

——0. 41, R. 23—*Appeal—Order of remand under B. T. Act.*

An appeal against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act, is incompetent. (*C. C. Ghose and Chotzner, JJ.*) DEBI PROSAD *v.* OFFICIAL TRUSTEE. **37 C. L. J. 314 : A. I. R. 1923 Cal. 333.**

——0. 41, R. 23 and O. 43, R. 1 (*u*)—*Appeal—Order of remand under inherent power, is not appealable.*

An order under the inherent power of the Court under S. 151 of the C. P. Code and not under O. 41, R. 23 is not appealable. (*Moti Sagar, J.*) WISAKHI RAM *v.* ALAWAL. **6 Lah. L. J. 153 : 78 I. C. 408 : A. I. R. 1924 Lah. 487.**

——0. 41, R. 23, S. 151—*Appeal—Amendment of plaint.*

Where a suit is remanded for rehearing after amending the plaint, the order is one made under S. 151 and not under O. 41, R. 23 and hence there is no right of appeal. The remand is not on a preliminary point and as O. 41, R. 23 will not apply, the court has power under S. 151 to remand. (*Martineau, J.*) MAHOMED SHAH *v.* TALAB HUSSAIN SHAH. **73 I. C. 915 : A. I. R. 1924 Lah. 245.**

——0. 41, R. 23—*Appeal — Custom—Punjab Courts Act, S. 4.*

There can be no appeal from an order of remand under O. 41, R. 23 of the Code of Civil Procedure where the question involved is one of custom. As the Appellant would have a right of second appeal from the decree of the Appellate Court only if he were to obtain a certificate under sub-S. 3 of S. 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of the appellate Court. The question of custom can be agitated in second appeal from the final decree if the certificate is obtained. (*Scott-Smith and Forde, JJ.*) MT. CHANDO *v.* MIRAN BAKHSH. **5 Lah. L. J. 392 :**

C. P. CODE (V OF 1908), O. 41, R. 23—Appeal.

73 I. C. 650 : A. I. R. 1923 Lah. 535.

——**O. 41, R. 23**—*Appeal—Order under.*

The Legislature intended to put orders of remand on exactly the same footing as appellate decree and to make them appealable on precisely the same grounds. If a mistake in deciding the question of custom can be corrected in an appeal from an appellate decree it is reasonable to hold that it can be and ought to be corrected in an appeal from an order of remand also, 20 I. C 788 Approved.

Per *Martineau, J.*—The competency of a second appeal is not dependent on the question whether the decision of the lower Appellate Court is based on a finding of fact or on a finding of law for even when the decision is based on a finding of fact a second appeal will be on one of the grounds mentioned in S. 41 (1) (*b*) and (*c*) of the Punjab Courts Act. Whether or not a second appeal lies depends on the nature and value of the suit a second appeal not being barred by S. 42 (2) only in a suit of the nature cognizable by a Court of Small Causes when the amount or value of the subject matter of the suit does not exceed Rs. 500. S. 42 (1) merely restricts the grounds on which a second appeal can be entertained to those mentioned in S. 41. (*Shadi Lal, C. J., Abdul Raoof and Martineau, JJ.*) MT. UMRI *v.* SHAH MAHOMED. **4 Lah. L. J. 359 : 3 L. 218 : 68 I. C. 849 : A. I. R. 1922 Lah. 178 (F. B)**

——**O. 41, R. 23**—*Appeal—Order under inherent power of Court and not covered by R. 23 is not appealable.*

Where the Trial Court decided all the issues and Appellate Court allowed the plaint to be amended and remanded the case for trial on the amended plaint to the Trial Court. *Held* that the order of remand was not one passed under O. 41, R. 23 and was therefore not appealable. (*Wallace and Madhavan Nair, JJ.*) MUPPAVARAPU VENKATA RADHAKRISHNA RAO *v.* VENTHURUMILLI VENKATA RAO. **20 L. W. 711 : 35 M.L.T. 135 : (1924) M. W. N. 922 : 84 I.C. 965 : A. I. R. 1925 Mad. 229 · 47 M. L. J. 552.**

——**O. 41, R 23**—*Appeal—Remand of case for disposal after the decision of the main point.*

Where the Appellate Court decides the main point in a case and remands the case for disposal of the remaining issues, the decision is not one on a preliminary point and thus the order is not appealable. 44 Cal. 929, Foll. (*Abdur Rahim and Oldfield, JJ.*) PONANGI VENKATA SUBBARAIDU *v.* ZAMINDAR OF NUZVID. **60 I. C. 609: 12 L. W. 667.**

Defective trial.

——**O. 41, R. 23**—*Defective trial—Case must not be remanded when trial Court has really disposed of a point on the merits, merely because its discussion of the evidence is inadequate or wrong.*

First appellate Court ough not to remand cases for re-trial when the trial Court has really disposed of them on the merits. In such cases if the appellate Court considers that it ought to have a finding on some issue or issues which the trial Court has not decided it can always remit issues under O. 41, R. 25 but it is not legitimate for an appellate Court to send back the case from its file merely because it differs radically from the conclusions of the Court below on the facts or because it considers that the discussion of the evidence in the trial Court's judgment is inadequate (*Sulaiman and Daniels, JJ.*) LAKHAN SINGH *v.* BABU RAM. **23 A. L. J. 880 : A. I. R. 1926 All. 65**

——**O. 41, R. 23**—*Defective trial—Remand for retrial—Proper issues not raised by trial Court.*

Where the trial court had not raised the proper issues arising from the pleadings of the parties and had not given them an opportunity to produce evidence thereon. *Held*, that the appellate court would remand the case for re-trial after framing the proper issues which it was the duty of the trial court to raise. (*Fremantle, S. M. and Burn, J. M.*) MANJI RAM *v.* DULARI LAL. **L. R. 5 A. 153 (Rev.).**

——**O. 41, R. 23**—*Defective trial—Decision on all issues by trial court—Appellate Court differing in its conclusion—Legality of remand.*

When a suit is tried by the first court and is dismissed on the merits and the appellate court comes to a different conclusion on the main issue in the case but nevertheless remands the case on the ground that evidence was not properly directed, the order of the appellate court recording its finding on the issue and then directing a remand is materially irregular and should be set aside in revision by the High Court. (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU *v.* GANAPATHI RAJU. **30 M. L. T. 314 : 16 L. W. 593 : 70 I C. 655 : A. I. R. 1923 Mad. 113.**

Effect of Order.

——**O. 41, Rr. 23 and 25**—*Effect of order—Interference on appeal with that order—Effect in proceedings in the interim.*

Per *Walsh, J.*—Whether upon a remand order being wrongly made, the decree and all the proceedings taken under that order are null and void, depends on the circumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any case it may be that the proceedings in the court below fall with it. It would be turning the law into absurdity, and would amount to a denial of justice if a proper trial which has taken place under a remand order made by the appellate Court and in obedience to such remand order were held to be invalid where as the result of the High Court's own decision that remand order turned out to have been perfectly justified. (*Piggott and Walsh, JJ.*) RAJKALI *v* GOPI NATH NAIK. **44 A. 211 : 20 A. L. J. 44 : 66 I. C. 317 : A. I. R. 1922 All. 35.**

——**O. 41, R. 23**—*Effect of order—Second appeal—Remand by single Judge—Questioning corrections of the order.*

If a party in second appeal accepts the order of remand by a single Judge, he cannot impeach it at a later stage. But if subsequently the appeal comes up before another Judge or a Bench differently constituted, the Bench is not bound by the order remitting issues but may consider the propriety of the issues and if of different opinion it may ignore those findings. (*Piggott and Walsh, JJ.*) MASIHUNNISSA *v.* CANIZ SUGHRA. **43 All. 377 : 19 A. L. J. 139 : 60 I. C. 975 : 3 U. P. L. R. (All.) 30.**

——**O. 41, R. 23**—*Effect of order—Jurisdiction to try suit on remand.*

The jurisdiction of a court trying a remanded case depends entirely on the order of the Appellate Court when remanding the case. (*Krishnan, J.*) UTHUMAN AMMAL *v.* NAINA MAHAMAD. **17 L. W. 355 : (1923) M. W. N 194 : 72 I. C. 314 : 32 M.L.T. 276 : A. I. R. 1923 Mad. 351 : 44 M. L. J. 238.**

——**O. 41, R. 23**—*Effect of order—No notice of remand is given in Central Provinces.*

Obiter :—Where a case is remanded for retrial by the First Court no notice is given to the parties of the date fixed for the re-hearing according to the practice of the Courts in the Central Provinces. 4 N. L. R. 166 Foll. (*Backer, J. C.*) SHEIKH BALDAR *v.* SHEIKH IMAM. **76 I. C. 46 : A. I. R. 1925 Nag. 31.**

C. P. CODE (V OF 1908), O. 41, R 23—Effect of order.

——— O. 41, R. 23—*Effect of order—Remand to First Appellate Court—Power of.*

Where on Second Appeal, the case is remanded to the Lower Appellate Court, it is not open to that Court, to consider arguments abandoned in Second Appeal or not raised in Second Appeal or to come to fresh findings on points decided by the order of remand. (*Mac Nair, A. J. C.*) GOPAL RAO *v.* NEMICHAND. **61 I. C. 575 (Nag.).**

——— O. 41, Rr. 23 and 25— *Effect of order—Decision on a point of law—Appeal from final decree after remand—Legality of order of remand not to be questioned.*

Where the High Court in Second Appeal differs from the lower Court on an issue of law and remands the case to the Court below, the order of the High Court is binding upon that Court and cannot be questioned in an appeal from the final decree passed after remand. (*Miller, C. J. and Ross, J.*) RAI BRIJ RAJ KRISHNA *v.* CHATHU SINGH. **4 P. L. T. 35 : A. I. R. 1923 Pat. 226.**

Exclusion of Evidence.

——— O. 41, R. 23—*Exclusion of evidence—Consideration of inadmissible evidence.*

Where the lower court has based its findings on certain inadmissible evidence but there is ample evidence otherwise on the record to sustain the findings, the High Court need not remand the case to the court below for a decision on the admissible evidence in the case. (*Suhrawardy, J.*) FAIJADDIN *v.* AGNI KUMAR SARMA. **71 I. C. 300 : A. I. R. 1924 Cal. 370.**

Finality of Order.

——— O. 41, R. 23—*Finality of order—Revision lies against order of remand finally disposing of matter before Court.*

Revision lies from the order of remand where Judge has finally disposed of the matter pending before him. (*Sulaiman and Daniels, JJ.*) HAFIZ ZAHUR AHMAD *v.* TASLIM-UN-NISSA. **23 A. L. J. 891 : L. R. 6 A. Civ. 575 : A. I. R. 1926 All. 55.**

——— O. 41, R. 23—*Finality of order—Order of remand whether final.*

An order of remand is interlocutory and therefore not subject of appeal to His Majesty in Council ; it can be a final order if it decides some cardinal point in the suit but an order of remand which merely decides that a suit is maintainable in the form in which it is brought is not final. (*Scott-Smith and Broadway, JJ.*) MEHRCHAND *v.* LABHURAM. **60 I. C. 522 : 2 Lah. 106.**

——— O. 41, R. 23—*Finality of order—Reopening of issues.*

Under O. 41, R. 23, the issues decided by the order of remand cannot be re-opened between the parties at any subsequent stage of the litigation. (*Daniels and Dalal, JJ.*) JANKI SHAH *v.* MAHOMMED ABBAS. **25 O. C. 245 · 70 I. C. 983 · A. I. R. 1923 Oudh 50 (2).**

——— O. 41, R. 23—*Finality of order—Order of single Judge—Power of successor to question the propriety of.*

Where a single Judge of the High Court hearing a second appeal remands it for fresh decision to the lower Court, and the case then comes up on second appeal from the revised decision of the lower Court, it is not open to the High Court to question its own earlier judgment remanding the case to the lower Court. The remedy of the party was to have appealed against the judgment of the single Judge remanding the case. (*Miller, C.J. and Coutts, J.*) MUNSHI LAL *v.* RAMASIS PURI. **1 P. 246 : 3 P. L. T. 343 : A. I. R. 1922 Pat. 284.**

C. P. CODE (V OF 1908), O 41, R. 23—Grounds for remand.

Grounds for remand.

——— O. 41, Rr. 23 and 25 - *Grounds for remand—Propriety of.*

In a suit for possession and damages where the appellate Court differs from the trial Court on the question of title and possession but as there was no finding of the trial Court as to damages remanded the whole suit. *Held*, the procedure is improper. The proper course would be to remit an issue under O. 41, R. 25. (*Piggott and Walsh, JJ.*) ABDULLA KHAN *v.* MAHAMMAD MAQBUL HUSAIN. **45 A. 565 : L. R. 4 A. 260 : 74 I. C. 822 : 21 A. L. J. 538 : A. I. R. 1923 All. 603 (2).**

——— O. 41. R. 23—*Grounds for remand—Suit tried ex parte—Sufficiency of evidence.*

A suit was tried *ex parte* and decreed in plff.'s favour on meagre evidence held on facts that if the plff. had even by way of a subsidiary defence to the appeal submitted a formal application supported by an affidavit to the effect that he would have produced further evidence in the trial Court if the Court itself had not intimated that the evidence actually tendered was sufficient to warrant the passing of an *ex parte* decree the Court would have felt much disposed to send the case back to the trial Court to be fully tried out on the merits. (*Rafique and Piggott, JJ.*) (LALA) RAM RAGHUBIR LAL *v.* DIP NARAIN SINGH. **21 A. L. J. 168 : 45 All. 311 : 71 I C. 749 : L. R. 4 A. (Civ.) 380 : A. I. R. 1923 All. 287.**

——— O. 41, R. 23 and O. 43, R. 1 (u)—*Grounds for remand—Order of remand—Court not stating provision of law under which order was passed—High Court refused to hold order was not under O. 41, R. 23*

Where the lower appellate Court did not say anywhere in its judgment under what provisions of law it purported to pass an order of remand, the High Court refused to hold that the order was not passed under the provisions of O. 41, R. 23 of the Civil Procedure Code. To hold otherwise would be to curtail the right to appeal which should not be done except upon very clear proof of circumstances justifying such curtailment. The High Court, assuming that the lower Court made the order under the provisions of O. 41, R. 23. although it might not be that the provisions of that rule strictly justified the order in question, *held*, that an appeal lay to itself from the order. A.I.R. 1922 Cal. 456, Foll. (*Greaves and Mukerji, JJ.*) UMESH NARAIN *v.* SECY. OF STATE. **87 I. C. 575 : A. I. R. 1925 Cal. 1157.**

——— O. 41, R. 23—*Grounds for remand—Remand should not be made where necessities of case are specifically provided for by the Code.*

In the presence of specific provision in the Code capable of meeting the requirements of the case, the Court should not exercise its jurisdiction to remand the case. (*Sanderson, C. J. and Chakravarti, J.*) RAJANI KANT SAHA *v.* RAJENDRA KUMAR BOSE. **82 I. C. 663 : A. I. R. 1925 Cal. 274.**

——— O. 41, R. 23—*Grounds for remand—Issue settled and tried.*

The C. P. Code does not make any provision for an order of remand where all the issues have been framed and tried. (*Sanderson, C. J. and Richardson, J.*) INJAD ALI *v.* MOHINI CHANDRA. **27 C. W. N. 1025 : A. I. R. 1924 Cal. 148.**

——— O. 41, R. 23—*Grounds for remand.*

Where a book was used by the Lower Court to establish certain facts which a party had no opportunity

C. P. CODE (V OF 1908), O. 41, R. 23—Grounds for remand.

of meeting and which he desired to rebut, the admission of the book in the Appellate Court might involve a remand. (*Woodroffe and Cuming, JJ.*) SECY. OF STATE *v.* ANANDA MOHAN ROY.
66 I. C. 287 : 34 C. L. J. 205.

——**O. 41, Rr. 23 and 25**—*Grounds for remand—Remand can be ordered only if decisions are set aside on preliminary point.*

An order of remand under O. 41, R. 23, cannot be made unless the decision of the first Court has been set aside on a preliminary point. If the appellate Court desires certain additional issues to be tried the order ought to be under R. 25. (*Abdul Raoof, J.*) HARI RAM *v.* BUTA SHAH-LACHMI DAS.
7 Lah. L. J. 351 : 26 Punj. L. R. 629 : A. I. R. 1925 Lah 480.

——**O. 41, R. 23**—*Grounds for remand—Determination as to the date of cause of action.*

A remand in order to enable the plaintiff (appellant) to ascertain whether or not a remand was made within three years of the institution of the suit which would save limitation was refused. (*Harrison and Zafar Ali, JJ.*) RAM *v.* GAMAN RAM.
A. I. R. 1923 Lah 645.

——**O. 41, R. 23**—*Grounds for remand—Remand when issues are framed and evidence recorded, is wrong under R. 23 which has an operation only when decision is on preliminary point.*

Where the trial Court gave findings on all the issues except one but without reasons and the appellate Court remanded the case under R. 23, *held*, that the order was irregular and ought to be set aside and that the fact that the appellant would be prejudiced in not being able to raise an objection as to its jurisdiction in the appellate Court is no ground for refusing to set aside the remand. (*Krishnan and Waller, JJ.*) A. CHELMAYYA *v.* A. LAKSHMI DEVAMMA.
79 I. C. 857 : A. I. R 1925 Mad. 171.

——**O. 41, Rr. 23 and 25**—*Grounds for remand—Remand under R 23 is not justified where an issue though necessary was not framed by the lower Court.*

Where an issue though necessary was not framed the Court should not remand the case but should refer the issue for taking additional evidence and for returning the case to it with its findings. (*Schwabe, C. J. and Wallace, J.*) M. KORU KUTTY *v.* VALIKATHODIYIL AHAMMAD. **78 I.C. 1 : A. I. R. 1925 Mad. 169.**

——**O. 41, R. 23**—*Grounds for remand—Disposal by first Court on all issues—Order of remand—Legality.*

Where the first Court has framed a number of issues and has decided every one of them, it is not open to an appellate Court to remand the case on additional issues. The proper course is to frame the essential issues and to call upon the Court to return findings on them after allowing each side to adduce additional evidence. (*Spencer and Venkatasubba Rao, JJ.*) MALAYANDI GOUNDAN *v.* BOMMAN POOSARI.
17 L.W. 159 : 71 I. C. 204 : A. I. R. 1923 Mad. 331 (1).

——**O. 41, R. 23**—*Grounds for remand—Omission to consider facts and actual bringing them to notice must be proved to justify remand.*

Unless it is very clearly shown that material circumstances were brought to the notice of the lower Appellate Court and that it omitted to consider them, High Court will not impute any negligence to it and will not remand the case for reconsideration by it. (*Kotval, A. J. C.*) ANANDRAO *v.* DADA. **71 I. C. 43 : A. I. R. 1924 Nag. 65.**

C. P. CODE (V OF 1908), O. 41, R. 23—Inherent power.

——**O. 41, R. 23**—*Grounds for remand—Evidence recorded—Absence of specific issue.*

Where all the information necessary for the decision of a point was supplied by the papers on the record and the Court applied its mind to the point and actually decided it, the mere fact that no issue was framed by the Court on the point did not necessitate a remand by the appellate Court (*Fremantle S. M.*) RAM DEO KUNWAR *v.* ALI HUSSAIN.
L. R. 5 O. 51 : 11 O. L. J. 401.

——**O. 41, R. 23**—*Grounds for remand—Decision to be not on pleadings but evidence.*

If the Court below fails to take evidence and does not come to a conclusion on this point there ought to be a remand. Decision should be based on evidence and not on pleadings of the parties. (*Das, J.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE. **67 I. C. 710 : A. I. R. 1923 Pat. 174.**

——**O. 41, R. 23**—*Grounds for remand.*

Where parties agreed not to adduce evidence and asked the Judge to inspect the locality and then give a judgment, *held*, that no remand with liberty to parties to adduce evidence should be ordered. (*Kennedy, J. C. and Raymond, A. J. C.*) TILLOOMAL JESSOMAL *v.* HARBHAGWANDAS. **76 I. C. 309 : A. I. R. 1924 Sind 134.**

Inherent power.

——**O. 41, R. 23 and S. 151**—*Inherent power—Case not covered by O. 41, R. 23—Remand can be made under S. 151.*

The powers of the appellate Court as regards remand are not restricted to the case specified in O. 41-R. 23, but the Court by reason of its inherent jurisdiction vested in it by S. 151 of the C. P. Code, may remand in any case other than the case specified in O. 41, R. 23, if it be necessary for the ends of justice to do so. 44 Cal. 929 (F.B.) Foll. (*Greaves and Mukerji, JJ.*) UMESH NARAIN *v.* SECRETARY OF STATE.
87 I. C. 575 : A. I. R. 1925 Cal. 1157.

——**O. 41, Rr. 23 and 25**—*Inherent power—Course to be followed in second appeal.*

In a second appeal involving several points difficult to disentangle, the appropriate course to follow is to make not an order under O. 41, R. 25, but an order of remand in the exercise of inherent power of the Court. 44 Cal. 929, 44 I.A. 218, 45 Cal. 94, Ref. (*Mookerjee and Rankin, JJ.*) KAMINI KUMAR DEB *v.* DURGA CHARAN NAG. **37 C. L. J. 122 : A. I. R. 1923 Cal. 521.**

——**O. 41, R. 23**—*Inherent power.*

An appellate Court has inherent powers to order a remand which can however be made where the justice of the case demands it. (*Walmsley and Ghose, JJ.*) SASHI MUKHI DASI *v.* ABINASH CHANDRA HALDAR. **A. I. R. 1922 Cal. 279.**

——**O. 41, Rr. 23 and 25**—*Inherent power—Powers of Appellate Court—Retrial.*

An Appellate Court has inherent power to order a retrial but that course should not be adopted except in exceptional circumstances and where the Code does not provide an adequate procedure. (*Buckland, J.*) RADHA KANTA DAS NANAK *v.* PRAKASH CHANDRA DUTT. **64 I. C. 599 (Cal.).**

——**O. 41, Rr. 23 and 25 and S. 115**—*Inherent power—Revision.*

Where instead of passing an order under O. 41, R. 25, C. P. Code, an Appellate Court remanded for rehearing under O. 41, R. 23, the Court cannot be said to have acted without jurisdiction to justify interference in revision under S.115, C.P.Code. The appellate Court has inherent power to make a remand. (*Newbould,*

C. P. CODE (V OF 1908), O. 41, R. 23—Inherent power.

J.) ATUL CHANDRA SEAL *v.* SHEIKH KOBADALI. **64 I. C. 436. (Cal.)**

——O. 41, R. 23—*Inherent power.*

A Court of appeal can remand even in cases not covered by O. 41, R. 23, if the ends of justice require the same. (*Moti Sagar, J.*) BHUP SINGH *v.* PREM SINGH. **76 I. C. 496 : 5 Lah. L. J. 384 : A. I. R. 1924 Lah. 362.**

——O. 41, R. 23—*Inherent power—Powers of appellate Court.*

The power of remand under S. 107, C. P. Code, is limited to the case described in O. 41, R. 23 but nothing in that section restricts in any manner the application of the principle of inherent power of remand recognised by S. 151 of the Code. (*Abdul Raoof and Moti Sagar, JJ.*) MT. UMRI *v.* SHAH MAHOMAD. **5 Lah. L. J. 269 : 74 I. C. 497 : A. I. R. 1924 Lah. 36.**

——O. 41, R. 23—*Inherent power—Improper exercise of power—Revision.*

An order of remand made not under O. 41, R. 23 of the C. P. Code but in the exercise of the inherent power of the Court is not appealable. (*Ayling, O. C. J. and Odgers, J.*) SHEIKH MUHAMMAD *v.* RANGASAMI NAIDU. **31 M. L. T. 182 : 69 I. C. 826: 16 L. W. 515.**

——O. 41, R. 23—*Inherent power.*

An Appellate Court has powers of remand apart from the power conferred by O. 41, R. 23. Such powers are conferred by S. 107 and are also implied by the provisions of S. 100, Sub S. (2) and S. 105 (1) of the C. P. Code, 30 M. 54 Ref. Where an order of remand is made under its inherent powers by an Appellate Court, there is appeal from the order but the High Court can interfere in revision with the order. (*Ashworth, J. C.*) FARZAND ALI *v.* EKADASHI. **26 O. C. 10: 10 O. L. J. 36 : 9 O. & A. L. R. 332 : 73 I. C. 591 : A. I. R. 1923 Oudh 177.**

New plea.

——O. 41, R. 23—*New plea—Question of fact raised in lower appellate Court for the first time—Case should be remanded*

Where a question of fact relating to the foundation of the plaintiff's title was raised for the first time in the first appellate Court, the case was remitted to the Court of first instance for the purpose of enquiring into the evidence relating thereto. (*Suhrawardy and Duval, JJ.*) MOTALEB KHAN *v.* IDRIS KHAN. **86 I. C. 750 : A. I. R. 1926 Cal. 414.**

——O. 41, R. 23—*New plea—Opportunity to plaintiff to supplement his case.*

Where the plaintiff has not come into Court with a definite statement of facts necessary for him to succeed and with all his evidence he cannot in second appeal ask for a remand so as to give him an opportunity to supplement his case in the Court below. (*Sanderson, C. J. and Ghose, J.*) JATINDRA MOHAN CHAKRAVARTHI *v.* BIJOY CHAND MAHATAB. **71 I. C. 284 : A. I. R. 1924 Cal 396.**

Powers of Appellate Court.

——O. 41, R. 23—*Powers of Appellate Court—Question of fact fully investigated.*

Where a question of fact has been fully investigated in the court below and the Appellate Court comes to a different conclusion on some portion it ought not to remand the case for working out the result of its decision but should itself uphold or modify the decision of the lower court. (*Piggott and Walsh, JJ.*) SHIAM SARAN *v.* BANARSI DAS. **20 A. L. J. 258 : 4 U. P. L. R. (A) 102 : 66 I. C. 866 :**

C. P. CODE (V OF 1908), O. 41, R. 23—Powers of Appellate Court.

A. I. R. 1922 All. 192.

——O. 41, R. 23—*Power of appellate Court—Trial Court deciding three points and dismissing suit—Appellate Court deciding only one point and remitting case is not justified.*

Where the Trial Court held that the description of the defendant in the plaint in a suit against a Railway was defective and also that the suit was not maintainable in view of the objections taken under Ss. 75 and 77 of the Railways Act and where the lower appellate Court considered only the question as to the frame of the suit and remanded the suit and ordered amendment of the plaint but the Court did not consider the points under Railways Act, Ss. 75 and 77, *Held* (Per *Suhrawardy, J.*), that the Court was not justified in remitting the case to the trial Court after setting aside its decision on only one of the points decided by it. The Court should have gone into the questions decided by the first Court under Ss. 75 and 77 of the Railways Act. (*Suhrawardy and Duval, JJ.*) AGENT, BENGAL-NAGPUR RY. *v.* BEHARI LAL DUTT. **29 C. W. N. 614: 52 Cal. 783: 90 I. C. 426 : A. I. R. 1925 Cal 716.**

——O. 41, R. 23—*Powers of Appellate Court under—Suit decided not only on preliminary point.*

The power of the Appellate Court to direct a remand is wider than that indicated in O. 41, R. 23. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends of justice. An order of remand may be valid even though it is not covered by O. 41, R 23. Assuming for a moment that an order made in the exercise of the inherent powers of High Court has been improperly made, that is, made under circumstances which do not justify it, such an order is not without jurisdiction. It is an order made with jurisdiction though the jurisdiction may have been erroneously exercised. A remand order made on second appeal is, unless a review of it be obtained within the prescribed time, a conclusive determination of the points of law involved in it; and the correctness of law laid down upon a remand cannot be questioned on a subsequent second appeal; nor is the fact of the Courts adopting a different view of the law after an order has been made in general a good ground for allowing a review of such order after the time for a review has elapsed. The policy of the legislature as indicated in the C. P. Code of 1908 is in favour of finality of orders of remand. (*Mookerjee and Rankin, JJ.*) BISAI NATH *v.* TARA NATH DEB. **72 I. C. 588: A. I R. 1923 Cal 385.**

——O. 41, Rr. 23, 24 and 25—*Power of Appellate Court—Full trial in Court of first instance.*

Where the trial Court has decided the suit on the evidence on all the issues it is not open to the appellate Court to remand the case under O. 41, R. 23, C. P. Code, as though the suit had been decided on a preliminary point. The appellate Court should have taken the course indicated by O. 41, R. 24 or R. 25, C. P Code. (*Richardson and Ghose, JJ.*) NURUL GUNI *v.* KAZAMAINI. **66 I. C. 922: A. I. R. 1923 Cal. 323.**

——O. 41, R. 23 and S. 151—*Powers of Appellate Court—Reversal and remand for* de novo *trial—Propriety of.*

Where the lower Appellate Court reversed the decree of the Court below, modified one of the issues and remanded the case for a *de novo* trial on the modified issue, *held*, the procedure was wrong. (*Greaves and Ghose, JJ.*) RADHA KRISHNA SAHA *v.* KANAL KAMINI DEBYA. **35 C. L. J. 345 : 70 I. C. 547: A. I. R. 1922 Cal. 456.**

——O. 41, R. 23—*Powers of Appellate Court*

C. P. CODE (V OF 1908), O. 41, R. 23—Powers of Appellate Court.

—Appeal from an order of remand—Findings of fact —Second appeal.

In an appeal from an order of remand, findings of fact cannot be examined by the Court sitting as a Court of second appeal. But where the findings of the first Appellate Court appear to have been based on misappreciation of the true controversy between the parties, the High Court, in such circumstances, will interfere and direct a re-hearing of the appeal. (*Broadway, J.*) QADIR BAKHSH *v.* SHAMAS DIN.

73 I .C. 756 : A. I. R. 1923 Lah. 206.

———**O. 41. R. 23**—*Powers of appellate Court—Order not covered by the section if wrongly passed is revisable.*

A remand order passed by an appellate Court which it was not competent to pass is liable to be set aside in revision. (*Krishnan and Waller, JJ.*) A. CHELMAYYA *v.* A. LAKSHMI DEVAMMA.

79 I. C. 857 : A. I. R. 1925 Mad. 171.

———**O. 41, R. 23**—*Power of Appellate Court—Decision by trial Court on all issues—Appellate Court differing on one issue.*

Where the trial Court decided a suit on all the issues and dismissed the suit and the appellate Court, being on a contrary opinion on one of the issues, remanded the suit for fresh disposal but without disturbing the findings of the first Court on the other issues, *held*, that the order of remand was improper. The appellate court should have dealt with the other issues and disposed of the case or if in its opinion the evidence on record and the findings of trial Court were insufficient to dispose of the case the Appellate Court should have called for findings under O. 41, R. 25, C. P. Code. (*Spencer and Venkatasubba Rao, JJ.*) MUNISAMI NAICKEN *v.* MUNISWAMI NAICKEN.

(1923) M. W. N. 11 : 76 I. C. 1041 : 16 L. W. 979: A. I. R. 1923 Mad. 227.

———**O. 41, R. 23**—*Powers of Appellate Court—Preliminary decree.*

Where an appellate Court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject-matter of the preliminary decree is not warranted. (*Kumaraswami Sastri and Devadoss, JJ.*) SUBBE GOUNDAN *v.* KRISHNAMACHARI.

45 Mad. 449 : 30 M. L. T. 217 : 15 L. W. 537 : (1922) M. W. N. 269 : 68 I. C. 869 : A I. R. 1922 Mad 112 : 42 M. L. J. 372.

———**O 41, R. 23 and Ss. 100. 105, 107**—*Power of Appellate Court*—Ex parte *decree— Power of remand otherwise than under the rule.*

When a suit is decided *ex parte*, an Appellate Court to which an appeal from the decree is preferred has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case *ex parte* and has also power to remand the suit for re-hearing. 30 M. 54 (F. B) Foll. The Code of Civil Procedure must in view of Ss. 100 (2), 105 (1) and (2) and S. 107, be held to permit a remand by an Appellate Court not in the particular case set forth in O. 41, R. 23, but also in all cases where there has been any error, defect or irregularity which has vitiated the whole decision of the case, provided that procedure under O. 41, Rr. 24 and 25, does not meet the case. A. I. R. 1922 All. 254: A.I.R. 1922 All. 226, Dist. But an order of remand cannot be made under R. 23 of O. 41 unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case from being tried to the end. (*Ashworth, J. C.*) SHEIKH FARZAND ALI *v.* EKADASHI.

10 O.L.J. 36 : 26 O. C. 10 : 9 O. & A. L. R. 332 : 73 I. C. 591 :

C. P. CODE (V OF 1908), O. 41, R. 23—Preliminary Point.

A. I. R. 1923 Oudh 177.

———**O. 41, Rr. 23 and 25**—*Powers of Appellate Court—Order of remand—Reconsideration of by appellate Court.*

There is a distinction between an order under O. 41, R. 23, C. P. Code, and an order under O. 41, R. 25, C. P. Code, which merely remands specific issues for decision. An order of the former class is a final order which is subject to appeal and cannot be considered by the court which passed it except on review whereas an order under O. 41, R. 25, C.P. Code, is an interlocutory order which it is open to the Court to re-consider. 16 A. 306 : 43 A. 477, Rel. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD.

25 O. C. 189 : 9 O. L. J. 235 : 69 I. C. 730 : A. I. R. 1922 Oudh 236.

———**O. 41, R. 23**—*Power of Appellate Court—High Court—Decision on issue given by the Courts below.*

Where an issue has been raised and determined by the first Court and the appellate Court on the evidence adduced it is not within the competence of the High Court in second appeal to remand the case for rehearing upon that very issue. (*Miller, C.J. and Mullick, J.*) GUNPAT RAO BANKA PURI *v.* RAJ KUMAR SINGH.

1 P. 639 : 67 I. C. 494 : A.I.R. 1922 Pat. 575.

Preliminary point.

———**O. 41, R. 23**—*Preliminary point—Remand on assumption.*

A case decided only on a preliminary issue as to stamp was remanded and the decision on the preliminary issue reversed, on the assumption of proof of a certain question of fact which was necessary for that decision. The trial Court was directed to try the question of fact first and to consider its effect on the contract in question (*Shah, A. C. J. and Crump, J.*) TRICAMJI DAMBJI AND CO. *v.* VIRJI KANJI.

24 Bom. L. R. 820 : A. I. R. 1923 Bom. 142.

———**O.41, R. 23**—*Preliminary point—Trial Court dismissing suit without entering into merits on ground of defect in description of defendant—Appellate Court directing amendment of plaint and remanding case.*

The trial Court did not enter into the merits of the case but held that the plaintiff's suit against the defendant Railway could not proceed because of the defect in the description of the defendant ; and it also found that the suit was barred under Ss. 75 and 77 of the Railways Act and dismissed the suit, The Appellate Court passed the following order :—The case will go back to the lower Court for amendment of the title of the defendant company and for a fresh trial. The costs of the Court will abide the result of the suit. The Court-fee paid on the memorandum of appeal should be returned to the appellant. *Held* that the decision of the Trial Court must be taken to be a decision on a preliminary point and the remand order of the lower appellate Court was one under O.41, R. 23, C P. Code (*Suhrawardy and Duval, JJ.*) AGENT, BENGAL NAGPUR RAILWAY *v* BEHARILAL DUTT.

52 Cal. 783 : 29 C. W. N. 614 : 90 I. C. 426 : A. I. R. 1925 Cal 716

———**O. 41, R. 23**—*Preliminary point—Remand—Appeal lies.*

An appeal lies from an order remanding a case under O. 41, R. 23 of the Civil Procedure Code even if the suit has been decided on a preliminary point. To say that there is no appeal where the Court acts in contravention of the rule and reverses the judgment of the trial Court and remands the case, would be to refuse an appeal in every case where the order of

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C. P. CODE (V OF 1908). O. 41, R. 23—Preliminary Point.

remand is erroneous. (*Walmsley and Ghose, JJ.*) SASHI MUKHI DASI *v.* ABINASH CHANDRA HALDAR. **A. I. R. 1922 Cal. 279.**

——O. 41, R. 23—*Preliminary point—Decree passed against dead person.*

Where the death of one defendant was brought to the notice of the Court, but the Court continued the suit and passed a decree without legal representative, *held*, that the lower Court must be taken to have disposed of the case on a preliminary point. Remand under O. 41, R. 23 ordered. (*Abdul Raoof and Campbell, JJ.*) DEBI PRASAD *v.* MT. BHAGO.
5 L. L. J. 187 : 74 I.C. 682 : A,I.R. 1924 Lah. 33.

——O. 41, R. 23—*Preliminary point—Remand order—Execution proceedings.*

In an appeal against an order in execution proceedings where the case had not been disposed of upon a preliminary point, an order of remand was made by the lower appellate Court. An order for refund of the Court-fee stamp paid on appeal was also made under S. 13 of the Court-Fees Act. *Held*, the order of remand was admittedly illegal as an order for refund of Court-fees can only be passed when remand is made under O. 41, R. 23. (*Campbell, J.*) MIRAN BAKHSH *v.* CHANAN DIN. **70 I. C. 1008 : A. I. R. 1923 Lah. 171.**

——O. 41 R. 23—*Preliminary point—Whether suit is barred by events in earlier suit is preliminary point.*

The question whether the trial of suit is barred by the events in an earlier suit is a preliminary point. A.I. R. 1922 Mad. 505, Foll. (*Ramesam and Jackson, JJ.*) A.N. RAMASAMI PILLAI *v.* NARAYANASAMI PILLAI.
21 L. W. 318 : 86 I C. 548 : (1925) M.W. N. 82 : A. I. R. 1925 Mad. 483 (2) : 48 M. L. J. 100.

——O. 41, R. 23 and O 43, R. 1 (4)—*Preliminary point—Meaning of—Order of remand—Appealability.*

Where the District Munsif in a suit held that the construction of a service grant was clear and that evidence of the consideration for that grant and of whether services were in fact rendered or not was irrelevant, and on appeal the appellate Judge took a different view of the construction of the grant and held that such evidence was relevant and accordingly remanded the case with that direction to the lower court. *Held* that the reversal was on a preliminary point within the meaning of O. 41, R. 23, C. P. Code and the order of remand was appealable. The expression "preliminary point" is not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact. There are many instances of such point such as, that a suit is barred by limitation ; that the Court has no jurisdiction under the Estates Land Act ; that evidence tendered was not admissible that on the plaintiff's evidence there is no evidence for the defendant to answer ; in a libel suit that there is no proof of publication. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) MALAYATH VEETHIL RAMAN *v.* KRISHNAN NAMBUDRIPAD.
31 M. L. T. 208 (H. C.) : 45 M. 900 : 16 L.W. 425 : (1922) M. W. N. 589 : 69 I. C. 828 : A. I. R. 1922 Mad. 505 : 43 M.L.J. 354 (F. B.)

——O. 41, R. 23—*Preliminary point—Meaning of.*

The expression "preliminary point" in O. 41, R. 23 means some point either collateral to the merits which precludes their determination altogether or some particular question which though relating to the merits,

C. P. CODE (V OF 1908), O. 41, R. 23—Transfer of Case.

precludes their general determination, 37 M. L. J. 536, Foll (*Abdur Rahim and Odgers, JJ.*) FERNANDEZ *v.* SYLVESTER SOUZA. **13 L. W. 54 : 61 I. C. 829 : 29 M. L. T. 56.**

——O. 41, R. 23—*Preliminary point—Remand is proper only when preliminary point is decided or new trial is desired.*

A remand should be made when a preliminary point only is decided or where the trial Court has not understood the case and a new trial is desired. (*Dalal, J. C.*) RAGHURAJ SINGH *v.* MAJID UN-NISSA.
87 I. C. 950 : A. I. R. 1925 Oudh 692.

——O. 41, R. 23—*Preliminary point—What is.*

Where the Court of first hearing appears to have decided every issue, the fact that its decision on a preliminary point covered the decision on the remaining points does not justify its being held that the decision was only on a preliminary point. (*Ashworth, J. C.*) AJODHYA SINGH *v.* KHUSRO BEGUM. **74 I. C. 582 : A. I R. 1924 Oudh 97.**

——O. 41, R. 23—*Preliminary point—Inherent power of remand—Appeal—Revision.*

An Appellate Court has power to remand a case under O. 41, R. 23, C. P. Code, only when the lower Court has disposed of it on a preliminary point. No order of remand can be regarded as made under O.41, R. 23, C. P. Code, unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end. 19 A.L J. 971 ; 20 A L. J. 321, Ref. (*Ashworth, J. C.*) FARZAND ALI *v.* EKADASHI.
26 O. C. 10 : 10 O. L. J. 36 : 9 O. & A. L. R. 332 : 73 I. C. 591 : A. I. R. 1923 Oudh 177.

——O. 41, Rr. 23 and 1—*Preliminary point—What is.*

The first and second issues were as follows :—(1) Has the plaintiff any cause of action against the defendant? (2) Is the suit as framed tenable? The Judge made the following addition to the second issue: "was the complaint, if any, made by the defendant malicious and without any reasonable and probable cause"? *Held*, that issues 1 and 2, as they stood, before the Judge made the addition to the second issue could be regarded as preliminary issues but the second issue after the addition could not be regarded as a preliminary issue. (*Das and Kulwant Sahay, JJ.*) JAGNARAIN DUBEY *v.* BIDAPAT DUBEY. **4 P.L.T. 202 : 1 P. L. R. 332 : A. I. R. 1923 Pat. 344.**

Question of Law.

——O. 41, R. 23—*Question of law—Remand of the case to lower appellate Court.*

If the grounds which the appellants wish to urge in the Court below are all grounds of law which can be argued equally well in High Court, High Court will not send back the case to have the appeal re-argued in the Court below on the same legal grounds. (*Daniels, A. J. C.*) MT. BASHIRAM *v.* BISAMBAR NATH. **9 O. L. J. 439 : A. I. R. 1922 Oudh 268.**

Transfer of Case.

——O. 41, R. 23—*Transfer of case—Appellate Court, if can direct trial by other than original Court.*

O.41, R.23, C.P Code contemplates that the remand should be to that Court from whose decree the appeal is prepared, but if the Appellate Court has power to transfer a case from one Court to another, there is nothing illegal in remanding the case to another Court. 279 P. L. R. 1913 Rel. Where the person who heard the appeal was an Additional Judge who had no power under the C. P. Code or the Punjab Courts Act to transfer a case from one Subordinate

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Court to another, his order remanding the case to another Court from that which tried it, is to that extent illegal. (*Scott-Smith, J.*) CHAJJU *v.* SHAM LAL. **25 P. W. R. 1922 : 66 I. C. 113 : A.I. R. 1922 Lah. 239.**

Miscellaneous.

——**0. 41, R. 23**—*Remand does not mean return of case for findings.*

The word "remand" should be used only when a case is returned for decision. It is used in this sense in the Civil Procedure Code and is not used there in the provisions for return of a case for findings. (*Carr, J.*) NACHIAPPA *v.* MAHOMED SABIK.

4 Bur. L. J. 135 : A. I. R. 1925 Rang. 303.

——**0. 41, Rr. 25 and 26**—*Issues sent to Lower Court—Findings — No objections — Acceptance by Appellate Court.*

The lower Appellate Court referred certain issues for trial to the Court of first instance. After the findings, which were against the defendant had been received, the defendant failed to prefer objections to the findings within the ten days' time allowed. The lower Appellate Court thereupon without considering the finding on the merits decided the appeal, considering those findings to be final and dismissed the appeal. The defendant preferred a second appeal urging that the action of the District Judge was not warranted by law, and that he ought to have himself considered whether the findings were good or bad findings and should have decided the case. *Held*, that the Lower Appellate Court ought to have itself considered the correctness or otherwise of the findings returned by the trial Court before deciding the appeal. 6 A. 391, Ref. to. (*Gokul Prasad, J.*) MUKHTARA *v.* SARDARA. **71 I. C. 444 : A. I. R. 1923 All. 417(1).**

——**0. 41, R. 25**—*Finality of order determining issues.*

Where a Court at the first hearing does not decide the case but merely remits certain specific issues it is open to the Court before which the case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order An order remanding issues under O. 41, R. 25 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand. It is quite otherwise with an order of remand passed under O. 41, R. 23 for this is an order which does finally determine subject to any right of appeal the issues which it decides. (*Daniels, J.*) GOPAL NATH SHUKUL *v.* SAT NARAIN SHUKUL.

74 I. C. 1014 : A.I.R. 1923 All. 384.

——**0. 41, R. 25**—*Duty of Court—Opportunity to both parties to give evidence must be given.*

If the Court, to which an issue has been remitted for submitting a finding thereon, records evidence of one party and gives its finding without informing the other the date of recording the evidence, it can restore the case and take further evidence if the other party applies for restoration and an opportunity to produce further evidence. (*Ryves, J.*) AJODHIA PRASAD *v.* RAM NARAIN. **19 A. L. J. 79 : 62 I. C. 447 : L. R. 2 A. 1.**

——**0. 41, R. 25**—*No specific issue framed but evidence given—No remand is necessary.*

Where the point as to the existence of custom was substantially alleged in the plaint, but there was no formal issue, and both the lower Courts had considered that question, *held*, that the defendants could not possibly contend that he had no opportunity to adduce evidence on the point. (*Shah and Coyajee, JJ.*)

C. P. CODE (V OF 1908), O. 41, R. 25.

GUNDAPPA BHARMA GOWDA *v.* SANTAPPA BHAURAO. **A. I. R. 1924 Bom. 113.**

——**0. 41, R. 25**—*Remand should not be made on issue not raised in the pleadings.*

An appellate Court should not ordinarily frame a new issue not raised in the pleadings or even suggested in the Trial Court and then remand the case. It ought only to be done in exceptional cases on good cause shown and payment of costs. (*Mookerjee and Panton, JJ.*) GOPAL *v.* ABDUL. **66 I. C. 640 : 34 C. L. J. 319.**

——**0. 41, R. 25**—*Findings called for—If can be questioned in second appeal.*

When the finding and evidence upon issues remanded under O. 41, R. 25, Civil Procedure Code, are returned to the High Court the finding is conclusive and cannot be challenged on the evidence before the High Court as in first appeal the reason being that a second appeal is not allowed on questions of fact. (*Scott-Smith and Harrison, JJ.*) RAM MEHR *v.* PALI RAM. **6 Lah. L. J. 145 : 78 I. C. 404 : 5 Lah. 268 : A I. R. 1924 Lah. 455.**

——**0. 41, R. 25**—*Case remitted for trial to lower appellate Court—Lower appellate Court cannot send the case to the first Court.*

Where the High Court has remitted certain issues for trial to the lower appellate Court, that Court has no power to delegate its duties to the Munsif and the Munsif has no authority to record additional evidence in the case or express any opinion upon it, 105 P. R. 1903 : 14 A. 23 Ref. to. (*Abdul Raoof, J.*) UTTAMCHAND *v.* MUHAMMAD BAKSH.

71 I. C. 896 : A. I. R. 1924 Lah. 354.

——**0. 41, R. 25**—*Revision—Remand of case to the lower Court for findings—Power of the High Court.*

The High Court can on second appeal remand a case for findings even on the points not taken in the grounds of appeal. The finding of the lower appellate Court on a question of fact which has not been put in issue can be contested in second appeal. (*Shadi Lal and Martineau, JJ.*) CHANDU LAL *v.* FIRM OF LAKHMI CHAND JOWALA DAT. **85 I. C. 92 : 5 Lah. L. J. 49.**

——**0. 41, R. 25**—*No revision except in exceptional cases.*

It is only in exceptional cases that revisional powers are exercised in the case of orders of an interlocutory nature and even when the order is not of an interlocutory nature the High Court should not interfere except in cases where the order is not a final order such as one under O.41, R. 25 of the C.P. Code, (*Broadway, J.*) ALLAH BAKSH *v.* LAL KHAN.

67 I. C. 269 : 2 L. L. J. 662.

——**0. 41, R. 25**—*Second appeal—Issue not raised—Procedure.*

Where the right to redeem in a mortgage suit was based alternately on a will as well as on a lease and the first Court found the will genuine and decreed redemption, but the appellate Court held the will to be spurious and dismissed the suit *held*, in second appeal, that the proper thing to do was to frame an issue on the question of lease and call for findings under O. 41, R. 25. (*Schwabe, C. J. and Wallace, J.*) MANAMAL KORU KUTTY *v.* AHAMAD. **78 I. C 1 : A. I. R. 1925 Mad. 169.**

——**0. 41, R. 25**—*Decision by trial Court on all issues—Appellate Court differing on one issue and remanding the case—Propriety of remand.*

Where the trial Court decided a suit on all the issues and dismissed the suit and the appellate Court being of a contrary opinion on one of the issues, remanded the suit for fresh disposal but without disturbing the

C. P. CODE (V OF 1908), O. 41, R. 25.

findings of the first Court on the other issues. *Held*, that the order of remand was improper. The appellate Court should have dealt with the other issues and disposed of the case or if in its opinion the evidence on record and the findings of trial Court were insufficient to dispose of the case, the appellate Court should have called for findings under O. 41, R. 25, C.P. Code (*Spencer and Venkatasubba Rao, JJ.*) MUNISWAMI NAICKEN *v.* MUNISWAMI NAICKEN, **16 L. W. 979 : 76 I. C. 1041 : (1923) M. W. N. 11 : A. I. R. 1923 Mad. 227.**

——— —O. 41. R. 25—*Appeal from order under O. 7, R. 10—Issues cannot be remanded.*

By the terms of S. 2, C.P. Code, an order returning a plaint for presentation to the proper Court is not a decree. It is an order for an appeal against which special provision is made in O. 43 The appellate Court which hears the appeal from such an order has no jurisdiction to make remand at all and any remand made would be without jurisdiction. (*Daniels, J.C.*) KANDHAI LAL *v.* ANANTU. **12 O. L. J. 277 : 87 I. C. 172 : 2 O. W. N 239 : A. I. R. 1925 Oudh 393.**

——— —O. 41, R. 25—*Unless issue is material remand should not be ordered.*

Unless the omitted issue, if decided, is likely to affect the final result of the suit, the suit should not be remanded. (*Pullan, A. J. C.*) GANGA *v.* PANCHAM. **27 O. C. 383 : 80 I. C. 591 : A. I. R. 1925 Oudh 97.**

——— —O. 41, R. 25—*Remand of specific issues—Reconsideration.*

An order under O. 41, R. 25 which merely remands specific issues for decision is interlocutory which it is open to the Court to reconsider. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD. **25 O. C 189 : 69 I. C. 730. 9 O. L. J. 235 : A. I. R. 1922 Oudh 236.**

——— —O. 41, R. 25—*Order of remand—Reconsideration on further hearing.*

Where a case has been remanded under O. 41, R. 25, the appellate Court on receipt of the finding of the Court below can reconsider the view of the law on which the remand was based. 43 All. 377, Foll. (*Daniels, J. C.*) SHYAM NARAIN *v.* JADUNATH SINGH. **25 O. C. 41 : 68 I. C. 242 : A. I. R. 1922 Oudh 118**

——— —O. 41, R. 25—*Partial remand—Appeal.*

There is no appeal against an order of partial remand under O. 41, R. 25, (*Po Han, J.*) MAUNG SHWE ON *v.* N. K. R. P. MUDALIAR. **2 Bur L. J. 216 : 76 I. C. 816 : A. I. R. 1924 Rang. 131.**

——— —O. 41, R. 26—*Scope of—Remand—Calling for findings—Distinction.*

It cannot as a matter of principle be affirmed broadly that when an order has been made under O. 41, R. 25, the Court called upon to determine the appeal finally under O. 41, R. 26 is competent to treat the order as erroneously made, when an order has been made under O. 41, R. 25, the appeal remains pending and undisposed of on the file of the Court. The order, however, whether rightly or wrongly made, is an order made with jurisdiction, its validity may be attacked on review but till it has been set aside in an appropriate proceeding, it must be treated as an interlocutory one which is operative in law. If the order had been made under O. 41, R. 23, its propriety would not have been challenged in an appeal against the final decree made after remand. The same principle is applicable to order under O. 41, R. 25, subject to the reservation that as the appeal remains pending,

C. P. CODE (V OF 1908), O. 41, R. 27.

the ultimate decision must be based upon a consideration of all the findings before and after the order under O. 41, R 25. This, indeed, is plain from the language used by the legislature in O. 41, R. 26. The evidence and findings become part of the record in the suit and when the Court proceeds to determine the appeal such determination must be based upon all the materials on the record; these include whatever was part of the record as it stood before the order under O. 41, R. 25 was made, as also what has been added in the Court of appeal, namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon. No portion of the record can be disregarded and neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority. (*Mookerjee and Rankin, JJ.*) KAMINI KUMAR DEB *v.* DURGA CHARAN NAG. **37 C. L. J. 122 : 74 I. C. 392 : A. I. R. 1923 Cal. 521.**

——— —O. 41, R. 26—*Finding—Objections not filed—Court's discretion.*

Where no objections have been filed under O. 41, R. 26, C. P. Code, the Court may in its discretion decline to hear objections at the hearing. (*Scott-Smith and Leslie Jones, JJ.*) PARTAB SINGH *v.* ACHAR SINGH. **67 I. C. 846 : 3 L. L. J. 230.**

——— —O. 41, R. 27—*Substantial cause.*

Where an appeal has been preferred, a review is out of question and the party's proper course is to apply to the appellate Court, which is in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of Rule 27, which lays down that the appellate Court may for any other substantial cause, viz., other than those particularly specified, allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. 11 Moo. I. A. 28 : 34 I. A. 115. Dist. (*Mr. Ameer Ali.*) INDRAJIT PRATAP BAHADUR *v.* AMAR SINGH. **4 P. L. T. 447 : 1 Pat. L. R. 345 : 21 A L. J. 554 : 2 Pat 676 : 50 I. A. 186 : 33 M. L. T. 233 : L. R. 4 (P. C.) 123 : L. R. 5 P. C. 8 : 28 C. W. N. 277 : 18 L. W. 728 : 25 B L. R. 1259 : 39 C. L. J. 318 : A. I. R. 1923 P. C 128 : 45 M. L. J. 578. (P. C.)**

——— —O. 41, R. 27—*Additional evidence cannot be admitted merely because the evidence is such as to justify grant of review.*

An appellate Court as such has no jurisdiction to admit fresh evidence merely on the ground that it has been discovered by one of the parties to a litigation under such circumstances as would warrant an application for review of judgment under O. 47, R. 1. (*Piggott, J.*) BALDEO RAM *v.* KUNKIN RAM. **L. R. 6 A. (Civ.) 393 : 88 I. C. 586 : A. I. R. 1925 All. 808.**

——— —O. 41, R. 27—*Reason for admitting additional evidence recorded only in judgment—Law is complied with.*

Although appellate Court does not record at the time when it admits the additional evidence the reasons why it was admitting it but it does record those reasons in its judgment, there is a substantial compliance with the law. (*Ryves and Daniels, JJ.*) RAM CHARAN *v.* BIHARI VARMA. **85 I. C. 676 (2) : A. I. R. 1925 All. 752.**

——— —O. 41, R. 27—*Record of reasons—Admission of evidence.*

Where an appellate Court admits additional evidence on appeal without stating sufficient reasons there-

C. P. CODE (V OF 1908), O. 41, R. 27.

for its findings are vitiated thereby and the case will have to be remanded for retrial. 19 A. L. J. 407, Foll. (*Gokul Prasad, J.*) ALI AHMAD *v.* KISHAN PRASAD. **71 I. C. 289 : A. I. R. 1924 All. 303.**

——**O. 41, R. 27**—*Evidence discovered after first Court's decree is admissible.*

To admit or to refuse to admit fresh evidence in appeal is a matter primarily in the discretion of the Court. Where the appellant was not aware of the existence of some evidence at the time when the case was disposed of by the first Court and he has discovered some new evidence subsequently and has preferred an appeal, the proper course open to him is to apply to the appellate Court which is in possession of the case to admit the additional evidence either under the general principles of law or under the specific provisions of O. 41, R. 27, C.P. Code, which lays down that an appellate Court may for "any other substantial cause" allow such evidence or document to be produced or witness to be examined. A. I. R. 1923 P.C. 128, Foll. (*Sulaiman and Ryves, JJ.*) BADRI DAS *v.* HOSHIAR SINGH. **47 All. 412 : 23 A. L. J. 193 : L. R. 6 A. (Civ.) 85 : 86 I. C. 761 : A. I. R. 1925 All 288.**

——**O. 41, R. 27**—*Additional evidence not tendered in lower appellate Court though possible, cannot be admitted in High Court in second appeal.*

Where an order of Revenue Court was passed as early as the 13th of May, 1921, and the appeal was disposed of by the lower appellate Court on the 15th February, 1922, and the defendant made no attempt whatsoever to tender the order of Revenue Court which was within his knowledge and power before the lower appellate Court nor was the attention of that Court directed to this matter, *held*, that it was too late for the defendant to try to tender it in the High Court. (*Sulaiman, J.*) NOHAR AHIR *v.* PURTAP AHIR. **21 A. L. J. 899 : L R. 5 A. 1 (Rev.) : 79 I. C. 367 : A. I. R. 1924 All. 231.**

——**O. 41, R. 27**—*Record of reasons—Not made—Effect.*

Where the First Appellate Court issued a commission for the measurement of the plot in dispute and considered the report of the Commissioner along with other evidence on record without stating reasons for admitting the additional evidence and to give a finding, *held*, that the finding cannot be accepted as binding as it is partly based on inadmissible evidence. (*Gokul Prasad, J.*) KABUL *v.* KABOOL SINGH. **A. I. R. 1923 All. 413.**

——**O. 41, R. 27**—*Additional evidence—Application for, in appeal.*

The ordinary way of bringing new and important matter to the notice of the Court, which was not within knowledge at the time of decree is by way of review. (*Fremantle, J. M.*) SWAMI DIN *v.* QAMAR JABAN SINGH. **L. R. 3 A. 12 (Rev.).**

——**O. 41, R. 27**—*Late stage—Admission after arguments.*

An Appellate Court cannot admit additional evidence, without recording reasons therefor, after the arguments are closed and a date is fixed for judgment. (*Gokul Prasad and Stuart, JJ.*) HANSRAJ *v.* SHIAM SUNDAR. **63 I. C. 423 : 19 A. L. J. 407.**

——**O. 41, R. 27 and O. 47, R. 1**—*'Or for any substantial cause,' meaning of.*

The words "or for any substantial cause" in sub-r. 1 (*b*) of O. 41, R. 27 do not give the Court jurisdiction to entertain an application for recording further evidence on the grounds which would enable an application to be entertained under O. 47, R. 1. (*Macleod, C. J. and Crump, J.*) BOMBAY SIZING AND STORES SUPPLYING CO. *v.* V. B. KUSUMGAR & CO. **47 Bom. 674 : 25 Bom L. R. 310 : A. I. R. 1924 Bom. 227.**

——**O. 41, R. 27 and O. 47, R. 1**—*Additional evidence—Admission of—Discovery of evidence on appeal—Review.*

Even where a party having satisfied the Court that since the filing of the appeal he has discovered further evidence being unknown and not available to him and could not have been discovered with due diligence during the pendency, of the appeal even up to the date of the judgment. that is no sufficient cause for an appellate Court to admit that evidence under O. 41, R. 27, C. P. Code. It is a ground for review under O. 47, R. 1, C P. Code. (*Macleod, C. J. and Crump, J.*) THE BOMBAY SIZING & STORES SUPPLYING CO. *v.* KUSUMGAR & CO. **47 Bom. 674 : 25 Bom. L. R. 310 : A. I. R. 1924 Bom. 227.**

——**O. 41, R. 27**—*Scope—Further evidence.*

An application to the Appeal Court for further evidence to be taken on the ground that it has recently been discovered whether it is made before the appeal is heard, or before judgment is given, does not come within the provisions of O. 41, R. 27. (*Macleod, C. J. and Crump, J.*) BOMBAY SIZING AND STORES SUPPLYING CO. *v.* V. B. KUSUMGAR & CO. **47 Bom. 674 : 25 Bom. L. R. 310 : A. I. R. 1924 Bom. 227.**

——**O. 41, R. 27**—*Substantial cause — Adjournment, refusal to grant.*

An Appellate Court can allow additional evidence under O. 41, R. 27, where there has been a wrongful refusal by a Lower Court, to grant an adjournment. (*Macleod, C.J. and Shah, J.*) JETHALAL *v.* VARAJLAL. **23 Bom. L. R. 769 : 46 Bom. 184 : A. I. R. 1922 Bom. 267.**

——**O. 41, R. 27**—*No reasons given—Objection not raised—Effect.*

Where a document is admitted as additional evidence in appeal without any objection being raised by the parties the mere fact that reasons were not recorded as required by O. 41, R. 27 does not render it inadmissible, when the parties appear not to be prejudiced in any way. (*Greaves and Cuming, JJ.*) NABIN CHANDRA KAPALI *v.* GOUR MOHAN MISTIRI. **90 I. C. 756.**

——**O. 41, R. 27**—*Commission to examine witness refused—Statement of witness admitted as additional evidence in appeal.*

An application to issue a commission to examine a witness who was alleged to be ill was refused. In appeal; the Court admitted in evidence a statement purporting to be made by him. *Held*, it had power to do so under O. 41, R. 27. (*Cuming and Panton, JJ.*) DHIRAJUDDIN BEPARI *v.* BAHARULLA SHEIKH. **90 I. C. 630.**

——**O. 41, R. 27**—*New evidence admitted—Reasons must be recorded—Defendant allowed to give new evidence—Plaintiff also must be allowed.*

In admitting additional evidence the appellate Court is bound to record its reasons for the admission of additional evidence tendered before it. The appellate Court should give an opportunity to the plaintiff to adduce further evidence if it is inclined to admit fresh evidence on behalf of the defendants at the appellate stage. (*Greaves and Chakravarti, JJ.*) AHMED ALI *v.* MADHAB RAM NAMASUDRA. **86 I. C. 646 : 41 C. L. J. 194 : A. I. R. 1925 Cal. 671.**

——**O. 41, R. 27**—*Additional evidence.*

Court must give reasons for admitting additional evidence in appeal. (*Rankin and Mukerji, JJ.*) KEBAL NAMADAS *v.* RAJANI KANTA ROY.

C. P. CODE (V OF 1908), O. 41, R. 27.

39 C. L. J. 261 : 81 I. C. 999 : A. I. R. 1925 Cal. 98.

——O. 41, R. 27—*Additional evidence—Record of rights published after decision of trial Court—Admission of.*

In a suit by some tenants for recovery of possession of lands, it became necessary to ascertain the status of the tenants for determining whether or not the suit fell within Sch. III, Art. 3 of the B. T. Act. After the decision of the trial Court and before the judgment was pronounced by the lower appellate Court the Record of rights was published. The appellants could not with due diligence have produced the record of rights before the hearing of the appeal by the lower appellate Court. *Held*, that it was open to the higher Court in second appeal to admit the Record-of-rights in evidence and remand the case to the lower appellate Court in order that the Court may try the question of the status of the defendants after admitting the Record-of-rights as evidence in the case. (*Suhrawardy and Chotzner, JJ.*) INDRA BHUSAN SAHA *v.* JANARDAN SAHA. 28 C. W. N. 945 : 82 I. C. 104 : A. I. R. 1924 Cal. 1071.

——O. 41, R. 27—*Inherent lacuna.*

Where any point is required to be cleared in the interest of justice an appellate Court has got power to take additional oral evidence. (*Mookerjee and Rankin, JJ.*) BANK OF BENGAL *v.* W. A. LULAS. 51 Cal. 185 : 28 C. W. N. 497 : 81 I. C. 471 : 41 C. L. J. 1 : A. I. R. 1924 Cal. 578.

——O. 41, R. 27—*Late stage—Documents received after close of the arguments.*

Arguments in the Lower Appellate Court were finished and the judgment was reserved on the 24th March. On the next day 25th March, the defendants filed a copy of the deposition of a person in a claim case and that was accepted by the appellate Judge. There was nothing to show that the plaintiff had any notice of the document having been filed, or having been used in evidence. *Held*, that the Appellate Judge ought not to have admitted this document in evidence after arguments had been finished on both sides and judgment was reserved. An opportunity should have been given to the plaintiff to raise any objection which he might have to the admissibility of the document in evidence. (*Chatterjee and Cuming, JJ.*) MANJURI DASSI *v.* KHETRAMANI DASSI 75 I. C. 96 : A. I. R. 1924 Cal. 403.

——O. 41, R. 27—*Discovery of evidence—Dismissal of suit for partition—Fresh evidence—Available after dismissal—If admissible in appeal.*

When a suit for partition of land is dismissed and the plaintiff applies to the Appellate Court for leave to adduce the fresh evidence which has become available long after the dismissal, he is entitled to adduce such evidence. (*Mookerjee and Chotzner, JJ.*) BHAIRAL CHANDRA DUTT *v.* KALI KUMAR DUTT. 37 C. L. J. 491 : 71 I. C. 453 : A. I. R. 1923 Cal. 606.

——O. 41, R. 27—*Opportunity to rebut.*

An Appellate Court can admit additional evidence only under the provisions of O. 41, R. 27, C. P. Code and if it admits additional evidence, the other side must have an opportunity of rebutting it. 31 B. 381 : 24 C. L. J. 457 Ref. (*Ghose, J.*) HRIDAY KRISHNA PAL *v.* RAJANIKANTA PAL. A. I. R. 1923 Cal. 300.

——O. 41, R. 27—*Discretion—Admission on appeal.*

It is largely discretionary with an appellate Court to admit additional evidence on appeal and a party cannot claim it as a matter of right. (*Greaves, J.*) NAYAJAN ALI *v.* MIDNAPORE ZAMINDARY COMPANY. A. I. R. 1923 Cal. 285.

——O. 41, R. 27—*Sufficient cause — Additional*

C. P. CODE (V OF 1908), O. 41, R. 27.

Evidence—Admission by Appellate Court—Grounds for.

The mere fact that a litigant was not aware of the existence of documentary evidence in the case, is no ground for admission of such evidence for the first time on appeal. 31 B. 381 ; 42 C. 675 Rel. (*Newbould, J.*) SRIMATI MANMOHINI DEBI *v.* RAMKISHORE. 68 I. C. 334 : A. I. R. 1923 Cal. 273.

——O. 41, R. 27—*Discretion — Appellate Court should sparingly use its discretion.*

The appellate Court should exercise its power allowing additional evidence very cautiously and sparingly and only in the interests of justice. (*Mookerjee and Chotzner, JJ.*) RAJA SREENATH ROY *v.* SECRETARY OF STATE FOR INDIA. 50 C. 276 : 36 C. L. J. 345 : A. I. R. 1923 Cal. 233.

——O. 41, R. 27—*Record of reasons.*

Non-recording of reasons is an irregularity and fresh trial was ordered in the circumstances of the case. (*Sanderson, C. J. and Richardson, J.*) AFSAR KHAN *v.* SHABU MONDAL. A. I. R. 1922 Cal. 148.

——O. 41, R. 27—*Late stage—Admission after arguments.*

An Appellate Court acts improperly in admitting additional evidence after the close of the arguments in the case. Even if it does admit such evidence, it should record its reasons for so doing under O. 41, R. 27, C. P. Code. (*Suhrawardy and Cuming, JJ.*) ISAP ALI *v.* SATIS CHANDRA ROY. 65 I. C. 504 (Cal.)

——O. 41, R. 27—*Subsequent events—Decree passed pending appeal.*

Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the appellant in a title suit, the appellate Court should receive the decree in evidence and act upon it. 31 B. 381 : 31 M. 114 : 36 A. 93 Ref. (*Teunon and Newbould, JJ.*) SASHI BHUSHAN BOSE *v.* PRASULLA MULLICK. 64 I. C. 721 Cal.

——O. 41, R. 27—*Record of reasons—Omission to record reasons—Effect.*

Where an appellate Court admits in evidence a khatian from the Record-of-Rights without recording reasons for the admission of such evidence, the defect is not fatal to its decision. O. 41, R. 27, C. P. Code, is only directory and not mandatory. (*Walmsley and Greaves, JJ.*) RAHIMUDDIN KAZI *v.* RADHA GOVINDA BHOUMIK. 64 I. C. 238 (Cal.)

——O. 41, R. 27—*Additional evidence—Application of party—Power to grant.*

An appellate Court has power to admit additional evidence not only in cases when it discovers a *lacuna* but also in the application of parties. (*Moti Sagar, J.*) MUHAMMAD UMAR HAYAT KHAN *v.* SARDAR KHAN. 89 I. C. 997 (1).

——O. 41, R. 27—*Additional evidence—When can be taken—Party if can apply for.*

The jurisdiction of an appellate Court to admit additional evidence is not confined to cases where the Court itself discovers a *lacuna*. Under the words "for any other substantial cause" give a discretion for the Court, even on the application of a party. (*Scott-Smith and Martineau, JJ.*) ECLIPSE MOTOR CO *v.* WARBURTON. 89 I. C. 721.

——O. 41, R. 27—*Additional evidence—Reasons for admission by appellate Court—Opportunity to rebut.*

An appellate Court ought not to admit additional evidence without recording reasons and without giving the opposite side an opportunity to adduce evidence in rebuttal. Where the Court admits such additional evidence without following this procedure the appeal

must be remanded for fresh disposal. (*Abdul Raoof and Moti Sagar, JJ.*) RAMZAN *v.* NABI BUX.
6 Lah. L. J. 234 : 80 I. C. 530 : A. I. R. 1924 Lah. 638.

———O. 41, R. 27—*Additional evidence—Admission of—Second appeal.*

Even if a second appellate Court has power to admit fresh evidence under O. 41, R. 27, C. P. Code it will not admit such evidence in the absence of a valid reason for the delay in the production of this evidence. (*Broadway and Fforde, JJ.*) WALI MAHOMED *v.* MAHOMED BAKHSH. **5 Lah. 84 : 80 I. C. 998 : A. I. R. 1924 Lah. 444.**

———O. 41, R. 27—*Substantial cause.*

There is ample authority for holding that the cause in O. 41, R. 27, C. P. Code, need not be *ejusdem generis* with the causes stated in the earlier part of the rule, and the expression any other substantial cause confers a wide discretion on the appellate Court to admit additional evidence when the ends of justice require it. (*Moti Sagar, J.*) PRABHU LAL *v.* GULZARI MAL. **A. I. R. 1923 Lah. 584.**

———O. 41, R. 27—*Discretion—Power to direct to amend grounds of appeal.*

An appellate Court can issue a commission for the purpose of examining the accounts and remedying certain mistakes and omissions made by the previous commissioner and it would be perfectly justified in passing an order for the production of additional evidence if it found itself unable to decide the appeal on the record as it stood at the time. It has full discretion to direct an appellant at any stage to amend his grounds of appeal if they are not sufficiently clear. (*Scott-Smith and Abdul Raoof, JJ.*) MT. RAM PIARI *v.* SULTAN BAKSH. **3 Lah. 382 : A. I. R. 1923 Lah. 115.**

———O. 41, R. 27—*Second appeal—Powers of High Court.*

Where a lower Appellate Court refuses to admit a certain material document as additional evidence in the appeal under O. 41, R. 27, C. P. Code the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower Appellate Court. 42 Mad. 737 (F. B.); 9 I. C. 265 Foll. (*Broadway, J.*) SANTA SINGH *v.* BHAN SINGH. **A. I. R. 1923 Lah. 30**

———O. 41, R. 27—*Additional evidence—Admission of—Powers of appellate Court.*

Evidence tendered after the close of the case in the trial Court and during the arguments and for that reason rejected by the trial Court, should not be admitted by the appellate Court. (*Chevis and Le-Rossignol, JJ.*) VAISHNO DAS *v.* HEM RAJ. **4 Lah. L. J. 371.**

———O. 41, R. 27—*Additional evidence is not admissible if failure of justice is not caused.*

If the Court is satisfied that there has been failure of justice in the case, by reason of absence of proof on a technical aspect of the case, it would consider an application to let in additional evidence; otherwise not. (*Venkatasubba Rao and Srinivasa Iyengar, JJ.*) A. L. S. K. KANDAPPA CHETTY *v.* R. S. S. T. THIRUPATHI CHETTI. **21 L. W. 210 : 86 I. C. 576 : A. I. R. 1925 Mad. 444.**

———O. 41, R. 27 and O. 47, R. 4—*Appellate Court can allow additional evidence even at the instance af a party—But opponent must be given opportunity to rebut—Where party allowed to give additional evidence had been negligent, High Court ordered him to pay costs though allowed to give additional evidence—C. P Code. O. 47, R. 4.*

Additional evidence was allowed to be taken by the Lower Appellate Court at the plaintiff's instance, the plaintiff having been even according to the Lower Appellate Court itself very negligent. *Held*, in revision, that the order allowing additional evidence must not be interfered with but that the plaintiff must pay the defendant his costs of the revision petition as well as all the costs of taking the additional evidence whatever might be the final result of the case. *Held*, further, that if as a result of the additional evidence adduced by the plaintiff new matter was introduced into the evidence in the case the defendant must be given an opportunity to rebut the additional evidence. It is open to an appellate Court to allow additional evidence to be adduced even at the instance of a party and an application for giving additional evidence can be heard and disposed of by the Appellate Court even before the appeal is heard and disposed of. O. 41, R. 27 and O. 47, R.4 do not exclude the effect of each other and a party who is entitled to let in additional evidence when the case is in an appellate stage is not compelled to restrict himself to an application for review and an Appellate Court is not confined to merely the power of allowing the introduction of additional evidence in cases in which the Court finding a *lacuna*, of its own motion desires additional evidence. (*Venkatasubba Rao, J.*) B. SUBBAYYA *v.* K. RANGARAO.
20 L. W. 840 : 85 I. C. 385 : A. I. R. 1925 Mad. 181 : 48 M. L. J. 32.

———O. 41, R. 27—*Discovery of evidence at the appellate stage—Application for its admission cannot be entertained.*

An application to the appellate Court for further evidence to be taken on the ground that it has recently been discovered does not come within R. 27. A.I.R. 1924 Bom. 227 Rel. on. (*Kinkhede, A.J.C.*) GANGABAKAS *v.* NARAYAN. **86 I. C. 505 : A. I. R. 1925 Nag. 284.**

———O. 41, R. 27—*Waiver of objections—Party objecting relying on a portion of that evidence.*

Fresh evidence should not be admitted by an Appellate Court in order to enable it to decide the case in favour of one of the parties to the suit. 31 Bom. 381 ; 1 Pat. L.J. 435; 31 Mad. 114 Ref. Where, however, such evidence had been admitted in the Lower Appellate Court and the party objecting to the admission himself relies upon a portion of such evidence, he cannot object to the remainder being placed on the record. (*Batten, J.C.*) BHAIRON SINGH *v.* HINDU SINGH. **A. I. R. 1922 Nag. 119 (2).**

———O. 41, R. 27—*Additional evidence—Discovery after decision in trial Court.*

A redemption suit relating to an old mortgage, which did not require to be registered under the law in force at that time, was dismissed as not proved. Subsequent to the dismissal, the mortgagee found out that it had been registered and obtained a registration copy. *Held* it could be admitted as additional evidence in appeal. (*Daniels, J. C.*) ABDUL RAHMAN KHAN *v.* MT. NOOR JAHAN. **89 I. C. 359.**

———O. 41, R. 27—*Additional evidence—Admission of, by appellate Court—Improper rejection by trial Court.*

It is competent to an appellate court in its discretion to admit and consider material and relevant evidence refused by the trial Court. (*Wazir Hasan and Neave, A. J. Cs.*) MT. RACHHPALI *v.* MT. CHANDRESAR DEI. **10 O. L. J. 595 : 78 I. C. 256 : 27 O. C. 114 : A. I. R. 1924 Oudh 252.**

———O. 41, R. 27—*Discretion — Considerations governing.*

A party cannot claim admission of additional evidence, oral or documentary, as a matter of right. O. 41, R. 27, C. P. Code, gives a discretion of the Court

C. P. CODE (V OF 1908), O. 41, R. 27.

of appeal to allow the production of such evidence and lays down definite limits within which additional evidence may be produced in an appellate Court. The words "any other substantial cause" mean a *causa ejusdem generis* to the grounds already mentioned in O. 41, R. 27, C. P. Code or, in other words, as meaning a case at least analogous to those specified previously. Further the appellate court has a discretion in the matter and when it has exercised its discretion in one way it is not open to a Court of second appeal to interfere with that discretion. 42 M. 737 Rel. (*Wazir Husan, A. J. C.*) BADRI PRASAD *v.* MUKANDI. **9 O. L. J. 505 : 26 O. C. 66 : A. I. R. 1923 Oudh 109.**

——0. 41, R. 27—*Evidence not in existence at the time of suit—It may be admitted in appeal.*

Where an appeal was pending and another suit was filed between the same parties and the latter went to the appellate stage when the prior appeal was decided and the decision in the previous appeal had a material bearing on the decision in the subsequent appeal, *held*, that the decision in the previous appeal should be admitted in evidence in the subsequent appeal. 6 C. L. J. 74 ;6 C.L.J. 92 and 6 C. L. J. 102 Rel. on. (*Kulwant Sahay, J.*) HARIHAR PRASAD SINGH *v.* GHARBHARAN KOERI. **3 Pat. L. R. 174 : 88 I.C. 553 : A. I. R. 1925 Pat. 612.**

——0. 41, R. 27—*Admitting additional evidence—Question is of discretion.*

Both under the general law and under O. 41, R. 27 the Court may for a substantial cause admit additional evidence in appeal, but the question is one of discretion. (*Das and Foster, JJ.*) JITAN DUSADH *v.* JAWAHIR SINGH. **85 I. C. 459 : A. I. R. 1925 Pat. 504.**

——0. 41, R. 27—*Defect in evidence—Powers of Appellate Court.*

An appellate Court has no power to admit additional evidence unless upon examining the evidence as it stands some inherent *lacuna* or defect becomes apparent. 31 B. 381 (P. C.) Foll. (*Das and Bucknill, JJ.*) JAI KRISHNA *v.* BIBI SOGHRA.
4 P.L.T. 418 : 71 I.C. 881 : A.I.R. 1923 Pat. 446.

——0. 41, R. 27—*Subsequent events.*

If the Lower Appellate Court does not call record-of rights in evidence which was published after the Munsif gave decision but before an appeal was made, the High Court will decide on an entry and may not call for record. (*Adami and Bucknill, JJ.*) RAJNATH SINGH *v.* WAHID KHAN. **3 Pat. L. T. 107 : 1921 P. H. C C. 206 : A. I. R. 1922 Pat. 28.**

——0. 41, R. 27—*New plea—Additional evidence—Power of Appellate Court to admit—Point not pressed in Court below allowed to be raised on appeal.*

Where an Appellate Court allows the appellant to raise a point which was not pressed in the Court below, the other side must be given opportunity of meeting the point by adducing additional evidence on appeal. (*Das and Kulwant Sahay, JJ.*) MAN SINGH *v.* NAWLAKHBATI. **72 I. C. 239 : 2 Pat. 607.**

——0. 41, R. 27 —*Discretion to be sparingly exercised.*

The words "substantial cause" used in the rule confer a wide discretion which should be sparingly exercised, otherwise it may open a wide door to the admission of evidence in the Appellate Court. (*Raymond and Madgaokar, A.J.Cs.*) NARAINDAS *v.* TEK CHAND. **A. I. R. 1923 Sind 42.**

——0. 41, Rr. 27 1 (a), 28 and 29—*Exclusion of evidence by trial Court—Appellate Court, duty of.*

The improper exclusion of evidence by the Trial Court does not justify a reversal of decree of that

C. P. CODE (V OF 1908), O. 41, R. 31.

Court. It is only open to the Appellate Court, either to take that evidence itself or direct the Lower Court to take the evidence and send it to the Appellate Court for consideration. (*Mookerjee and Panton, JJ.*) RAJA JYOT KUMAR *v.* JADU. **34 C. L. J. 160 : 64 I. C. 693 : 26 C. W. N. 1022.**

——0. 41, R. 27 (2)—*Record of reasons—Admission of fresh evidence.*

Where a document is admitted in evidence for the first time in the appellate Court, the Court ought to record its reasons for the same. (*Chatterjee and Suhrawardy, JJ.*) AMBIKA CHARAN SEN *v.* GIRISH CHANDRA SEN. **68 I. C. 719 (Cal.)**

——0. 41, R. 28—*On remand lower appellate Court can appoint Commissioner to examine witnesses.*

When the issues are remanded by the Court of second appeal to the lower appellate Court for trial, the lower appellate Court resumes its functions as the Court of first appeal and though it is the only Court which can record a finding on the issues remanded yet it may appoint a Commissioner for the examination of witnesses under S. 75, Civil Procedure Code, 9 S.L.R. 148, Foll. (*Abdul Raoof and Martineau, JJ.*) LABH SINGH *v.* RAM LAL.
5 Lah. 252 : 81 I. C. 589 : A I. R. 1925 Lah. 39.

——0. 41, R. 29—*Pleading of gross negligence not distinct —Issue wide enough to cover gross negligence—Evidence produced—Finding as to gross negligence necessary—Remand proper.*

Where the plea of gross negligence was not taken in any distinct language in defendant's written statement which was very general, but on which two very general issues were framed, one of which was quite wide enough to cover the plea of gross negligence, and the parties had in mind the plea of gross negligence at the trial and the defendant was attempting to produce evidence in support of it, which was rejected not because the matter was not agitated in the suit, but because the District Munsif did not think that that evidence was of any value. *Held*, that the case of gross negligence was open and that the Munsif should have found definitely on it and therefore the lower Appellate court's order remanding the suit for retrial on that point must be supported. (*Oldfield and Venkatasubba Rao, JJ.*) KARI BAPANNA *v.* SUNKARI YERRAMMA. **18 L. W. 49 : 1923 M. W. N 452 :33 M. L. T. 46 : A. I. R. 1923 Mad. 718 : 45 M. L. J. 324.**

——0. 41, R. 31—*Appellate Court need not examine Trial Court's finding on fact not objected to.*

Where a party to an appeal does not ask to be heard on a question of fact decided by the Trial Court and the legal question only is argued in appeal the Court is justified in disregarding the question of fact. (*Boys and Ashworth, JJ.*) KALI CHARAN SINGH *v.* BAGESHRA KUNWARI. **23 A.L.J. 653 : 89 I. C. 374 : A.I.R. 1925 All. 585.**

——0. 41, R. 31—*Mandatory provision.*

The provisions of O. 41, R. 31, C. P. Code, are mandatory. A Judge is bound to give the points for decision and the reason for the decision thereon in order to enable the Court of second appeal to see that the Judge whose findings on facts are binding as the High Court has put properly before him the points at issue and has decided them. 9 A. 26 Rel. (*Gokul Prasad, J.*) GUPTA NAND *v.* BEHARI LAL.
21 A. L. J. 567 : L. R. 5 A. 21 : A. I. R. 1924 All. 100.

——0. 41, R. 31—*Defective judgment—Reasons for finding—Statement of.*

The judgment is not illegal when the appellate court decides cursorily on the basis of the issues dis-

C. P. CODE (V OF 1908), O. 41, R. 31.

cussed in the lower court. (*Pearson, J.*) SHEO BAKSH SHAH *v.* MANNU SINGH. **L. R. 3 A. 454.**

——**O. 41, R. 31**—*Appealable judgments should contain findings on all important points.*

In appealable cases, with a view to enable the appellate Courts to dispose of the case finally and thus obviate any cause for remand and its attendant delay and expense, Courts should give their finding on all important points. (*Chakravarti, J.*) HARISADHAN PATARI *v.* DINANATH BANERJEE. **82 I. C. 318 : A. I. R. 1925 Cal. 316.**

——**O. 41, R. 31**—*Form of judgment of appellate Court.*

Whether or not a judgment of an appellate Court is according to law must depend upon the facts and circumstances of each case. There is firstly that difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the first Court. Then there is to be considered nature of the judgment affirmed, its fullness and accuracy and so forth. When Court has fully discussed all facts which were placed before it and the lower appellate Court's judgment affirmed it, it is not contrary to law simply because the judgment is in a short form. (*Woodroffe and Ghose, JJ.*) MAHOMED HUSSAIN *v.* RABIA KHATUN. **A. I. R. 1923 Cal. 163.**

——**O. 41, R. 31**—*Affirming judgment—Contents of.*

Whether or not a judgment is according to law must depend on the facts and circumstances of each case. There is firstly the difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the first court. Where the judgment of the first court has fully discussed all the matters placed before it and the appellate court has appreciated the main facts in the case but has dismissed the appeal in a short judgment the appellate judgment is not vitiated by any irregularity. (*Woodroffe and Ghose, JJ.*) MAHOMED HUSAIN CHOUDHURY *v.* RABIA KHATUN. **36 C. L. J. 484 : A. I. R. 1923 C. 113.**

——**O. 41, Rr. 31 and 11**—*Contents of judgment—Summary dismissal of appeal.*

O. 41, R. 31 of the C. P. Code controls O. 41, R. 11 and an appellate court dismissing a second appeal under the latter provision must state the points for decision and the decision thereon with reasons. (*Chatterjee and Panton, JJ.*) BIPIN BEHARI CHATTOPADHYA *v.* JOGENDRA NATH BANDOPADHYA. **65 I. C. 479 (Cal.)**

——**O. 41, R. 31**—*Consideration of evidence—Appellate Court—Judgment of.*

A judgment of the First Appellate Court, omitting to set out the evidence on which the judgment is based, is not one in accordance with law. (*Teunon and Majid, JJ.*) UPENDRA NATH *v.* ADHAR CHANDRA. **63 I. C. 436 (Cal.)**

——**O. 41, R. 31**—*Defective judgment—Adoption of judgment of lower Court.*

There is abundant authority for holding that the Judge of an appellate Court should state his own reasons and should not confine himself to approving reasons of the Court of the first instance. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law. (*Moti Sagar, J.*) MT. AISHA BIBI *v.* MT. SUGHRA JAN. **75 I. C. 1013 : A. I. R. 1923 Lah. 658.**

——**O. 41, R. 31**—*Reversing judgment must give grounds for difference.*

A mere general and sweeping statement of opinion is not a sufficient disposal of the questions with which a Court is concerned. The duty of the lower appellate

C. P. CODE (V OF 1908), O. 41, R. 33.

Court is to deal with the matter by examining the grounds stated by the first Court and if it differs in its conclusion it must show that those grounds were not supported by evidence or that they were insufficient in themselves, or that they were overbalanced by other considerations arising out of the proved or admitted circumstances of the case. 9 C.P.L.R. 142 and 33 Cal. 23 (P. C.) Ref. (*Kinkhede, A. J. C.*) DATTATRAYA *v.* AMRIT. **89 I. C. 763 : A. I. R. 1926 Nag. 55.**

——**O. 41, R. 31, and S. 99**—*Defective judgment.*

The omission of an Appellate Court to comply with the provisions of O. 41, R. 31, is mere irregularity and is curable by S. 99 of the Code. (*Kincaid and Raymond, A. J. C.*) LAKHAMBAI *v.* DEVIBAI. **59 I. C. 673 : 14 S. L. R. 132.**

——**O. 41, R. 32**—*Judgment affirming lower Courts' decree—Reasons must be given.*

Where the appellate Court affirmed the lower Courts' decision on the point of necessity for alienation, without giving reasons therefor, the High Court remanded the case for fresh decision on the point. (*Martineau, J.*) MIHAN MAL *v.* INDAR SINGH. **6 L. L. J. 506 : 84 I. C. 946 : A. I. R. 1925 Lah. 246.**

——**O. 41, R. 33**—*Suit decreed against 1st defendant but dismissed against 2nd defendant—1st defendant appealing—Plaintiff not appealing from dismissal of claim against 2nd defendant—Appellate Court can pass decree in plaintiff's favour against 2nd defendant.*

There were three defendants to the suit. The suit was decreed as against the first two defendants but dismissed as against the third defendant. The first two defendants appealed; but the plaintiff did not appeal against the dismissal of his claim against the third defendant. *Held*, that the appellate Court could pass a decree against the 3rd defendant alone while exonerating the first two defendants, 43 Mad. 803 Foll. (*Mears, C. J. and Piggott, J.*) KANJI MALL *v.* DURGA PRASAD. **23 A. L. J. 501 : 88 I. C. 438 : L. R. 6 A. Civ. 346 : 47 All. 597 : A. I. R. 1925 All. 555.**

——**O. 41, R. 33**—*Powers of Appellate Court.*

Where an appellate court is seized of the whole case on appeal, it can make such orders as are necessary to terminate the controversies and to do justice between the parties by making the necessary alterations in the decree of the lower court. (*Piggott and Walsh, JJ.*) GOVIND DASS *v.* RAM CHARAN LONIA. **4 U. P. L. R. 25 (A) : 68 I. C. 307 : A. I. R. 1923 All. 235.**

——**O. 41, R. 33**—*Powers of Appellate Court Transposition of respondent as appellant—Procedure.*

An appellate court acts without jurisdiction in ordering by its judgment that a respondent who had not been formally transposed as appellant, should be shown as appellant. Such an order deprives the respondent of his costs and ought to have been made during the pendency of the appeal and not as part of the judgment. (*Piggott and Walsh, JJ.*) HARDEO PRASAD *v.* DAMODAR PRASAD. **L. R. 4 A. 536 : 71 I. C. 424 : 20 A. L. J. 980 : A.I.R. 1923 All. 119.**

——**O. 41, R. 33**—*Non-appealing plaintiffs—Powers of appellate Court may be used in favour of party not appealing—Appellate Court not to lose sight of other provisions of the Code.*

R. 33 of O. 41 gives the appellate court power to pass any decree which ought to have been passed, and this power may be exercised in favour of any party even though he may not have filed an appeal. But the Courts in exercising the power conferred by this rule should not lose sight of the requirements of the Code as for instance the general principle which requires that a suit should be decided with reference

C. P. CODE (V OF 1908), O. 41, R. 33.

to the pleadings by the parties and issues struck between them. The rule must be read also with R. 22 of the same Order which gives a respondent a specific remedy of which he should *prima facie* avail himself before he can claim the benefit of R. 33 NARAIN DAS *v.* HIRA. **L. R. 2 A. 186 (Rev.).**

——**O. 41, R. 33**—*Power under—When to be exercised.*

The power conferred by O. 41, R. 33 should be limited to those cases where as the result of the appellate court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. The provisions of the rule should be cautiously applied and only to cases where but for recourse to it the ends of justice would be defeated. (*Greaves and Mukerji, JJ.*) NANDALAL ROY CHOUDHURY *v.* MUKUNDALAL DE. **89 I. C. 24.**

——**O. 41, R. 33**—*Powers to vary decree—Order against parties not on record cannot be passed.*

O. 41, R. 33 is intended to cover cases where the Court may vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court was passed liable under the order passed by the appellate Court. (*Suhrawardy and Duval, JJ.*) MANINDRA CHANDRA *v.* BHAGBATI DEVI. **30 C. W. N. 45 : A. I R. 1926 Cal. 335.**

——**O. 41, R. 33**—*Powers of Appellate Court—Partition suit.*

The appellate court has power to exercise the powers conferred upon it by O. 41, R. 33 in partition suits. There is no restriction of the powers as to any class of suit under that rule. (*Chatterjee and Panton, JJ.*) PROBHAT CHANDRA BISWAS *v.* GOPAL CHANDRA. **49 C. 379 : A. I. R. 1922 Cal. 398.**

——**O. 41, R. 33**—*Powers of appellate court—Grant of relief against defendant not impleaded as a party to the Appeal.*

An appellate court can grant relief to an appellant as against a defendant against whom there is no appeal. The powers conferred by O. 41, R. 33, should be exercised in cases where, as the result of an Appellate Court's interference in favour of the appellant, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. 22 C. L. J. 390 foll. (*N. R. Chatterjee and Panton, JJ.*) BIKRAM KUMAR BOSE *v.* MOHIT KRISHNA. **64 I. C. 178 (Cal.)**

——**O. 41, R. 33**—*Powers of Appellate Court.*

The first Court passed a decree in a rent suit for a proportionate amount of rent, payable in respect of land included in the plaint, and held that the holding covered more land. In an appeal by the plff., the Appellate Court held that no relief should be granted to the plff. and thus dismissed the suit. *Held*, that having regard to R. 33, the Appellate Court's decision was not without jurisdiction and that no Second Appeal lay as the value of the suit was not above Rs. 100, and no question of law was involved. (*Huda, J.*) JOGENDRA KISHORE *v.* NASIMUDDIN SARKAR. **62 I. C. 623 (Cal.)**

——**O. 41, R. 33**—*On reversal of decree for one relief alternative relief should be granted if justice requires it.*

Where plaintiff made alternative claims on one of which the trial Court decreed the claim, the appellate Court in reversing the decree is bound to see whether the plaintiff is not entitled to the alternative relief. (*Scott-Smith, J.*) QAMAR-UD-DIN *v.* MATVA. **6 Lah. L. J. 464 : A. I. R. 1925 Lah. 155.**

——**O. 41, R. 33**—*Although no general rule can be laid down, Court will not apply, without strong reasons O. 41, R. 33 in favour of party who has appealed or lodged cross-objections and failed.*

Though no general rule can be laid down that Court should not apply O. 41, R. 33 in favour of party who has appealed or filed cross-objections and failed, yet without strong reasons, it will not take such a course. (*Martineau, and Campbell, JJ.*) MT. TEHE KUAR *v.* AMAR NATH. **17 P. W. R. 1923 : 79 I. C. 670 : A. I. R. 1925 Lah. 2.**

——**O. 41, R. 33 and O. 7, R. 7**—*Discretionary matter.*

The discretion allowed to the Judge by O. 7, R. 7 and O. 41, R. 33 is wide and covers the granting of a declaratory decree in a suit for possession where alternative relief is claimed therein. (*Campbell, J.*) ARJUN *v.* JUG LAL. **A. I. R. 1923 Lah. 422.**

——**O. 41, R. 33**—*Powers of Appellate Court—Decree not challenged by the respondents.*

The Appellate Court cannot, while acting under R. 33, interfere with the decree obtained by the appellant so far as it is not challenged by the respondent in the form of cross objections or appeal. (*Martineau, J.*) RAMLAL *v.* DIP CHAND. **60 I. C. 705 (2) : 3 Lah. L. J. 231.**

——**O. 41, R. 33**—*Suit for itle—Tenants—Defendants claiming occupancy rights—Trial Court disallowing the claim—Appeal by other defendants—Tenants not appealing—Finding cannot be reversed.*

Where in a suit for declaration of title to certain lands the tenants defendants pleaded occupancy rights and their claim was disallowed by the trial Court but on appeal by other defendants the claim was allowed though the tenants did not appeal. *Held* : the Appellate Court's judgment cannot be upheld. (*Devadoss, J.*) M. SURAYYA *v.* SURAYYA RAO. **88 I. C. 99 : 22 L. W. 376 : A. I. R. 1925 Mad. 771 : 48 M. L. J. 577.**

——**O. 41, R. 33**—*Variance betweee decree and judgment of lower Court—Decree confirmed on appeal—Decree must be amended but by appellate Court—C. P. Code, O. 20, R. 6.*

Where a decree is confirmed on appeal any order to amend the decree so as to make it agree with the judgment should be passed by the Appellate Court. The omission on the part of the party to file a memo of objections praying for the amendment of the decree when Appellate Court has cognizance of the case, will not have the effect of taking away the party's inherent right to have a decree in accordance with the judgment passed in his favour. (*Spencer, J.*) MUTHAPPA NAIR *v.* POOPHIL. **1925 M. W. N. 209 : 88 I.C. 828: A.I.R. 1925 Mad. 735 : 49 M. L. J. 388.**

——**O 41, R. 33**—*Appellate Court can in appeal against portion of decree set aside whole decree in absence of cross appeal or objections by respondent due to sufficient reasons.*

O. 41, r. 33 gives an appellate Court in an appeal against a portion of the decree alone, jurisdiction to quash whole of the decree passed, against the respondent, although the respondent had not himself appealed against the decree or filed cross-objections, in the presence of sufficient reasons for the respondent not doing so. The respondent's failure to present cross-objections or to appeal due to the state of authorities at the time subsequently changed, as to the period when the cross-appeal or memorandum ought to have been filed, was held to have been due to sufficient reasons. (*Srinivasa Aiyangar, J.*) S. M. S. SUBRAMANIAN CHETTIAR *v.* SINNAMMAL. **20 L. W. 761 : A. I. R. 1925 Mad. 266.**

——**O. 41, R. 33**—*Powers of Appellate Court.*

C. P. CODE (V OF 1908), O 41, R. 33.

Powers of Court under O. 41, R. 33 can be exercised in revision for consistency in the decree. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR *v.* MUMMACHI REDDIAR. **17 L. W. 254 : A. I. R. 1923 Mad. 392.**

———0. 41, R. 33—*Scope.*

Modification of decree in favour of a person not a party to appeal is not authorised by R. 33. (*Halifax, A. J. C.*) YADO RAO *v.* AMRIT RAO.
88 I. C. 803 : A. I. R, 1926 Nag. 135.

———0. 41, R. 33—*Circumstances subsequent to decree appealed from can be considered.*

An appeal to the Court of Appeal is by way of rehearing, and the Court may make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard. (*Kinkhede. A. J. C.*) PANDURANG *v.* BAYAJA. **8 N. L. J. 14 : A. I. R. 1925 Nag. 251.**

———0. 41, R. 33—*Applicability—Revision petitions.*

The principle underlying O. 41, R. 33 can be applied to revision petitions also, and in order to do justice to all parties the High Court can correct the decree of the Courts below even in favour of parties who have not set the law in motion. (*Kinkhede, A. J C.*) RANGRAO *v.* PANDURANG. **A. I. R. 1924 Nag. 154.**

———0. 41, R. 33—*Absence of appeal — Power of Court.*

Where a decree for foreclosure was asked for in plaint but the first court passed only decree for sale and that was confirmed by the Appellate Court the High Court cannot decree foreclosure where the plaintiff mortgagee had not appealed to the lower Appellate Court against the decree of the first court. (*Halifax, Kotva and Macnair A. J. Cs.*) SHEONARAIN *v.* NATHU. **5 N. L. J. 114 : A. I. R. 1922 Nag. 1 (F.B.).**

———0. 41, R. 33—*Does not apply where the plaintiff whose claim is decreed in part appeals with regard to part not decreed and defendant files neither appeal nor cross-objections.*

Rule 33, O. 41 does not apply where a plaintiff whose claim is decreed in part, institutes an appeal with regard to the part not decreed and the defendant prefers neither an appeal nor a cross-objection. In such a case the Court of appeal has no jurisdiction to enter into the question whether the plaintiff is entitled or not to any decree at all and to dismiss his suit wholesale. (*Dawson Miller, C. J. and Foster, J.*) KESHO PRASAD SINGH *v.* NARAYAN DAYAL.
4 Pat. 37 : 82 I. C. 984 ; A. I. R. 1925 P. 285.

———0. 41, R. 33—*Appellate Court must not interfere save when justice peremptorily requires interference.*

To enable the Appellate Court, in case its decision interferes with or modifies, or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary even with the rights and liabilities of those who were not in fact appealing from that decision of the trial Court, is the object of O. 41, R. 33. Save when it is necessary, in the interests of justice, to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before the Appellate Court there is no right whatever in the Appellate Court to interfere. (*Dawson Miller, C. J. and Foster, J.*) KESHEO PRASAD SINGH *v.* NARAYAN DAYAL. **4 Pat. 37 : 82 I. C. 984 : A. I. R. 1925 Pat. 285.**

———0. 41, R. 33—*Appeal from part and by some parties only enables the Court to exercise its power under R. 33.*

Rule 33 of Order 41 of the new Code enables the appellate Court to deal with the entire decree although the appeal may be as to a part of the decree, and also to give directions in favour of parties who have actually not filed any appeal or objection. In an appeal from a part of the decree by some of the parties the ent re decree becomes the subject-matter of the appeal. (*Jwala Prasad and Kulwant Sahay, JJ.*) SOMAR SINGH *v.* MT. PREMADI KUER. **3 Pat 327 : 5 P. L. T. 21 : 1924 P. H. C. C. 105 : 79 I. C. 794 : A. I. R. 1925 Pat. 40.**

———0. 41, R. 33—*Non-appealing defendants—Reversal in favour of.*

Reversal in favour of non-appealing mortgagor can be effected by an appellate Court by O. 41, R. 33, C. P. Code. (*Miller, C. J. and Mullick, J.*) AJTI CHAUDHURI *v.* JANAK LAL CHAUDHURI.
1923 P. H. C. C. 332 : A. I. R. 1924 Pat. 336.

———0. 41, R. 33—*Powers of Appellate Court—Portion of decree not appealed against.*

O.41, R. 33 of the C.P. Code empowers an appellate Court to interfere with a portion of the decree of the Trial Court which has not been appealed against in a case where the appellate Court adopts the ground of decision of the trial court and tries to give complete effect to it. 34 All. 32 dist. ; 43 A. 85 relied on. (*Foster, J.*) GOBIND SINGH *v.* JAI GOPAL SINGH.
A. I. R. 1924 Pat. 322.

———0. 41, R. 33—*Decree can be reversed even as against non-appealing defendants.*

Where the plaintiff claims relief as against all defendants jointly, and his suit is dismissed as against some defendants only, in an appeal against the dismissal, the appellate Court can dismiss the whole suit. 20 C. W. N. 178 and 19 C. W. N. 287, Ref. (*Dass and Kulwant Sahay, JJ.*) PANHU BANIA *v.* ANAM THAKUR. **2 P. 712 : 1 P. L. R. 356 : 77 I. C. 357 : 5 P. L. T. 489 : A. I. R. 1924 Pat. 160.**

———0. 41, R. 33—*Powers of appellate court.*

O. 41, R. 33, C. P. Code, gives the court power to pass a decree in favour of a person who is not a party before it but was a party in the lower court. (*Dalal and Wazir Hasan, A.J. Cs.*) BAIJ NATH SINGH *v.* RAJJU SINGH. **12 O. L. J. 571 : L.R. 6 O. 101 (Rev.).**

———0. 41, R. 33—*Powers of Appellate Court.*

The powers of appellate court under O. 41, R. 33 can only be exercised in favour of a person who is a party to the appeal. (*Maung Kin, J.*) A. C. T. R M. CHETTY *v.* PO U. **63 I. C. 973 : 13 Bur. L. T. 163.**

———0. 41, R. 35—*Scope.*

Where the case was remitted three times because the Judge in the first instance misunderstood the order of the High Court and in the second instance expressed himself as unable to come to a definite conclusion. *Held* : the High Court had jurisdiction to remit the case a third time though it could as well determine the issue left undetermined by the lower Court on evidence on record. (*Mr. Ameer Ali.*) CHIDAMBARA SIVAPRAKASHA *v.* VEERAMA REDDI.
(1922) M. W. N. 749: 45 Mad. 586 : 16 L. W. 102 : 31 M. L. T. 54 : 68 I. C. 538 : 49 I. A. 286 : 37 C. L. J. 199 : 27 C. W. N. 245 : A. I. R. 1922 P. C. 292: 43 M. L. J. 640 (P. C.)

———0. 43, R. 1—*Order—Returning plaint is appealable.*

An order of Appellate Court returning a plaint for want of jurisdiction in the Court in which the suit is brought is appealable. (*Walsh and Ryves, JJ.*) LACHHA RAM *v.* VIRJI. **19 A. L. J. 305: 62 I. C. 399: 3 U. P. L. R. (All.) 9.**

———0. 43, R. 1 and S. 104—*Order granting leave to sue a receiver is not appealable.*

An order granting leave to sue a receiver for damages caused by his negligence, laches, etc., is not ap-

C. P. CODE (V OF 1908), O. 43, R. 1.

pealable. (*Macleod, C. J. and Heaton, J.*) SRINIWAS *v.* M. C. WAZ. **22 Bom. L. R. 1126: 59 I. C. 421 : 45 Bom. 99.**

——O. 43, R. 1—*Appeal from order of remand—Findings of fact cannot be questioned.*

An appellant, in an appeal from an order of remand, cannot question findings of fact in the Second Appeal. (*Le Rossignol and Raoof, JJ.*) HONDA RAM *v.* HOTU-RAM. **2 Lah. 25: 59 I. C. 715: 31 P. W. R. 1921.**

——O. 43 R. 1—*Dismissal for default—Application for restoration.*

Au appeal lies against an order of dismissal of an application for restoration of the application dismissed in default. (*Halifax, A J. C.*) KALICHARAN *v.* RATANSINGH. **19 N. L. R. 119: 75 I. C. 589: A. I. R. 1923 Nag. 293.**

——O. 43, R. 1—*Proceedings under O. 21, R. 90. compromised—Payment not made in time—Order confirming sale is appealable.*

Where a proceeding under O. 21, R. 90 was compromised with a condition that the judgment-debtor should pay to the decree-holder a certain sum within a certain period but the judgment-debtor failed to pay the amount within the prescribed time and his application to set aside the sale was disallowed and the sale confirmed without his allegations being gone into. *Held* appeal lay under O. 43, R. 1. (*Jwala Prasad and Foster, JJ.*) LUCHHMAN LAL *v.* PADARATH SINGH. **4 P. L. T. 735 · 79 I. C. 594: A. I. R. 1924 Pat. 346.**

——O. 43, R. 1—*Dismissal of application under O. 9, R. 9 on ground of previous dismissal under O. 17, R. 3—Appeal.*

When the plaintiff's application under O. 9, R. 9, C. P. Code, is rejected on the ground that the previous order of dismissal was under O. 17, R. 3 and not under O. 17, R. 2, the plaintiff is entitled to appeal against it under O. 43, R. 1. (*Mullick and Kulwant Sahay, JJ.*) SYED BAKAR HUSSAIN *v.* MIRZA HUSSAIN MIRZA. **4 P. L. T. 46: 73 I. C. 373: A. I. R. 1923 Pat. 223.**

——O. 43, R. 1—*Receiver ordered to pay damages—No appeal lies from such order.*

An order directing a Receiver to pay a sum of money by way of damages is not appealable as it does not come within the operative part of R. 4. A. I. R. 1922 Mad. 234; 4 Pat. L.J. 636; 5 Pat. L.J. 97 Appr. 45 Bom. 99 and 42 Bom. 10 Dist. (*Heald and Chari, JJ.*) ARUNACHELLAM CHETTIAR *v.* U PO LU. **4 Bur. L. J. 91 : 3 Rang. 318 : A. I.R. 1925 Rang. 266.**

——O. 43, R. 1 (a)—*Order of remand.*

Remanding of a case without the exercise of inherent jurisdiction by District Judge is not competent and there can be an appeal against it. (*Piggott and Walsh, JJ.*) GOKUL PRASAD *v.* RAM KUMAR. **44 A. 176 : 19 A. L. J. 971: 64 I. C. 878: A. I. R. 1922 All. 254.**

——O. 43, R. 1 (a) and O. 7, R. 10—*Plaint—Return of plaint to be presented in the proper court—Appeal against order—Second appeal.*

Where a plaint is returned to be presented to the proper court, under Order 7, R. 10, the order is subject to an appeal under O. 43, R. 1 (a), but no second appeal lies. (*Macleod, C. J. and Coyajee, J.*) NILAKANT *v.* BALWANT. **27 Bom. L. R. 635: 88 I. C. 753: A. I. R. 1925 Bom. 431 : (1.)**

——O. 43, R. 1 (a)—*Remand—Appeal—When lies.*

When an order of remand does not say under what provision it was made, it is not proper to hold it was not made under O. 41, R. 23. To hold so would be to curtail the right of appeal which should not be done except upon very clear proof of circumstances

C. P. CODE (V OF 1908), O. 43, R. 1 (6).

justifying such curtailment. (*Greaves and Mukerji, JJ.*) UMESH NARAIN CHOUDHURY *v.* SECRETARY OF STATE FOR INDIA. **87 I. C. 575 : A. I. R. 1922 Cal. 1157.**

——O. 43, R. 1 (a)—*Remand—Inherent power—No appeal.*

There is no appeal provided in the Civil Procedure Code against an order made under the inherent power of the Court conferred by S. 151, C. P. Code, to remand a case for retrial. (*Moti Sagar, J.*) WISAKHI RAM *v.* ALAWAL. **6 Lah. L. J. 153: 78 I. C. 408 (2): A. I. R. 1924 Lah. 487.**

——O. 43, R. 1 (a) and O. 41, R. 23—*Order of remand—Appealability.*

Per *Shadi Lal, C. J. and Martineau, J.*—In order to determine whether an order of remand is appealable or not, the test is this : suppose, the Court instead of making an order of remand passed a decree on the strength of the adjudication constituting the order of remand, would there be a second appeal from that decree ? If a second appeal would lie from the decree, the order of remand is appealable, otherwise not.

Per *Raoof, J.*—An appeal from an order of an Appellate Court remanding a case under O. 41, R. 23, C.P. Code, does lie in all cases except those in which absolutely no right of second appeal against the appellate decree is given in the body of the Code or by any other law. 50 P. R. 1911; 85 P. R. 1914 Diss. ; 20 I. C. 788 foll. (*Shadi Lal, C. J., Abdul Raoof and Martineau, JJ.*) MUSST. UMRI *v.* SHAH MAHOMED. **3 Lah. 218 : 4 Lah. L. J. 359 : A I. R 1922 Lah. 178 (F. B.).**

——O. 43, R. 1 (a) and O. 41. R. 23—*Remand under inherent power—No appeal from order.*

There is no appeal for an order of remand under the inherent powers of an appellate court, and not falling under O. 41, R. 23, C. P. Code, and under O. 43, R. 1 (*a*), C.P. Code. (*Ayling, O. C. J. and Odgers, J.*) SHEIK MAHOMED MARAKAYAR *v.* RANGASWAMI NAIDU. **31 M. L. T. 182: 69 I. C. 826: 16 L. W. 515.**

——O. 43, R. 1 (a) and O. 7, R. 10—*Order returning plaint—Appeal—Revision.*

An order of an appellate Court returning a plaint for presentation to the proper court is appealable under O. 43, R. 1 (*a*). C.P. Code and consequently the order is not open to revision. (*Neave, A. J. C.*) BADRI SINGH *v.* LALTA SINGH. **10 O. & A. L. R 437: 79 I. C. 1024: 1 O. W. N. 156: A. I. R. 1925 Oudh 70.**

——O. 43, R. 1 (a)—*Order of remand by Special Judge under the Bengal Tenancy Act—No appeal lies.*

There is no appeal against an order of remand passed by a Special Judge under the provisions of the Bengal Tenancy Act. (*Ghose and Chotzner, JJ.*) DEBI PRASAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL. **72 I. C. 1013: 37 C. L J. 314: A. I. R. 1923 Cal. 333.**

——O. 43, R. 1 (b)—*Dispossession by Receiver of a third party—Appeal.*

When property of a third party is interfered with by an officer of the Court like the Receiver the party has ordinarily two remedies. He may apply to the Court for a summary order restraining the Receiver from interfering or he may ask the leave of the Court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. Where the party has adopted the summary remedy, the order of the Court is an order under O. 40, R. 1 (*b*) and is appealable. 39 C. 713, 3 Pat. L. J. 573 Rel. (*Oldfield and Venkatasubba Rao, JJ.*) RAMASWAMY PILLAI *v.* JANAKI AMMAL. **32 M. L. T. 96 : 16 L. W. 833 : 69 I. C. 393: (1922) M. W. N. 725.**

C. P. CODE (V OF 1908), O. 43, R. 1.

A. I. R. 1923 Mad. 129.

——**O. 43, R. 1 (c)**—*Execution application—Dismissal for non-prosecution—Appeal from order refusing to restore does not lie.*

Where the Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application there is no appeal from the order refusing to restore the application (*Piggott and Walsh, JJ.*) BHARAT INDU *v.* ASGHAR ALI KHAN. **45 A. 148: 73 I. C. 453: 21 A. L. J. 135: L. R. 3 A. 622: A. I. R. 1923 A. 460 (1).**

——**O. 43, R. 1 (c)**—*Application to set aside dismissal for default—Dismissal of that application for default—Appeal.*

Where a second application to set aside the dismissal of a prior application to set aside the dismissal of a suit for default, is itself dismissed, there is no appeal against the order of dismissal. 19 C.W.N. 25 Ref. (*Sanderson, C. J. and Richardson, J.*) HARA KUMAR *v.* MURARI MOHAN. **36 C. L. J. 184: A. I. R. 1922 Cal. 572.**

——**O. 43, R. 1 (d) and O. 9, R. 13**—*Appeal from order rejecting application for setting aside* ex parte *decree—Appellate Court cannot go beyond R.* 13.

Per *Sulaiman and Daniels, JJ.*—In an appeal from an order rejecting an application to set aside an *ex-parte* decree, the appellate Court cannot go beyond the provisions contained in O. 9, R. 13 for reasons for setting aside the decree. A. I. R. 1922 All. 44 and 43 M. 94 Foll. 44 Cal. 929 Dist. (*Lindsay, Sulaiman and Daniels, JJ.*) RAM SARUP *v.* GAYA PRASAD. **90 I. C. 180 : L. R. 6 All. 601 : A. I. R. 1925 All. 610 (F. B.).**

——**O. 43, R. 1 (d)**—*Order of appellate Court that no application lay under O. 9, R. 13—Order is not in appeal against order under O. 9, C. 13.*

An appeal would lie to the District Judge only when an application would properly lie to the Court of first instance under O. 9, R. 13. Where the District Judge says, in appeal, that no application lay under O. 9, R. 13, it can hardly be said that, he was entertaining an appeal against an order passed under O. 2, R. 13. (*Sulaiman and Mookerjee, JJ.*) FIRM OF GANESHI LAK HARNARAIN *v.* DEBI DAS. **47 All. 140 : 85 I. C. 470 : L. R. 5 All. 79 : A. I. R. 1925 All. 267.**

——**O. 43, R. 1 (d)**—*Case not open to appeal.*

A munsiff rejected the application to set aside the *ex parte* decree passed by a munsiff, having small cause powers, who was succeeded by the former who had no small cause powers. *Held*, no appeal lies to the District Judge. (*Banerji, J.*) HIRALAL *v.* JHUNNI LAL. **20 A. L. J. 208 : A. I. R. 1922 All. 50.**

——**O. 43, R. 1 (d)**—*Appeal from* ex parte *decree is no bar.*

An appeal from the *ex parte* decree does not affect the appeal from an order rejecting an application for setting aside the *ex parte* decree. (*Abdul Raoof, J.*) FIRM SETH KHUDA BAKSHI AND SONS *v.* FIRM GHULAM QADIR & SONS. **A. I. R. 1924 Lah. 224.**

——**O. 43, R. 1 (d)**—Ex parte *order—Application to set aside—Conditional order—Non-fulfilment of condition—Order dismissing—Appeal.*

An *ex parte* order was directed to be set aside if costs were paid in two weeks and the petition was to be posted to a later date. The costs were not paid and on the later date though security was offered, the application was dismissed. *Held*, the final order was appealable. The prior order was only a conditional order and as such not appealable. (*Madhavan Nair J.*) RAJAGOPALACHARI *v.* NARASIMHA TATHACHARIAR. **88 I. C. 196 (2) :**

C. P. CODE (V OF 1908), O. 43, R. 1.

A. I. R. 1925 Mad. 1182.

——**O. 43, R. 1 (i)**—*No revision lies against an order by the Appellate Court.*

Where an appellate Court dismisses an appeal from an order of the lower Court setting aside an execution sale, the dismissal is not open to revision. (*Sulaiman and Mukerji, JJ.*) FATEH LAL *v.* SHER SINGH. **L. R. 6 A. (Civ.) 63 : 85 I. C. 660 : A. I. R. 1925 All. 264.**

——**O. 43, R. 1 (j) and S. 96**—*Original decree dismissing a suit—Decree passed on review decreeing the suit—Appeal therefrom setting aside that decree and mentioning that suit be dismissed—Appeal from original decree does not lie.*

A suit was decreed by the trial Court but in appeal it was dismissed. An application for review of the appellate decree was successful and thus the suit was again decreed. In an appeal to Privy Council from that decision it was held that the decree of the High Court in appeal be restored and the suit dismissed with costs throughout. The plaintiffs then applied for leave to appeal to Privy Council which was granted by the High Court holding that the order of Privy Council merely held the review application to be incompetent. *Held* : that the appeal to Privy Council must be dismissed as it was an appeal from a non-existent suit. (*Lord Shaw.*) NEKI *v.* CHHAJJU RAM. **L. R. 6 P. C. 128 : A. I. R. 1925 P. C. 174 (2) (P. C.).**

——**O. 43, R. 1 (j)**—*Appealable order—Costs—Appeal as to—Competency of.*

If an order is itself appealable, an appeal will lie from that part of the order which relates to costs. 8 C 91 : 12 Cal. 271 : 16 B. 241 Ref.

Where on the application of the judgment-debtor, a sale was set aside but the order setting aside the sale saddled them with the costs of the other side, and they filed an appeal against that part of the order which directed them to pay the costs of the other side *held*, that an appeal lay. (*Piggott and Walsh, JJ.*) SHIB KUMAR *v.* SHEO GHULAM. **44 A. 209 : 20 A. L. J. 11 : L. R. 3 A 91 : L. R. 3 All. 577 : 64 I. C. 932 : A. I. R. 1922 All. 90.**

——**O. 43, R. 1 (j) and S. 104, Cl. (2)**—*Second appeal where no First Appeal lay.*

There can be no second appeal to the High Court from the decision in appeal which did not lie. (*Scott-Smith, J.*) GUL BANO *v.* MUHAMMAD ZAKAR KHAN. **3 Lah. L. J. 463.**

——**O. 43, R. 1 (j) and S. 104 (2)**—*Scope of.*

Where an order is passed setting aside a sale under O. 21, R. 92, C. P. Code, from which one appeal is specially provided for by O. 43, R. 1 (j). By S. 104 (2) no second appeal is permitted in such a case. (*Daniels, J. C.*) IFTIKHAR HAIDAR *v.* IKRAM FATIMA. **2 O. W. N. 376 : 12 O. L. J. 336 : 88 I. C. 559 (1) : A. I. R. 1925 Oudh 622.**

——**O. 43, R. 1 (k)**—*Abatement—Application to bring on record legal representative—Order on, if appealable.*

When an application to bring the representatives of a deceased plaintiff is made within time, the suit abates; and an application for substitution made afterwards ought necessarily to be considered on an application under O. 22, R. 9 (2), C. P. Code to set aside the abatement. (*Moti Sagar, J.*) BADLU *v.* NARAINI. **74 I. C. 17 : A. I. R. 1924 Lah. 424.**

——**O. 43, R. 1 (k)**—*Order refusing to set aside an abatement of an appeal is appealable.*

An appeal lies from an order refusing to set aside the abatement of an appeal, since O. 22, R. 11 makes the order apply to appeals. (*Jwala Prasad, A. J. C. and Kulwant Sahay, JJ.*) HARI SARAN SINGH SYED

C. P. CODE (V OF 1908), O. 43, R. 1.

MD. ERADAT HUSSAIN. 2 Pat. L. R. 279 : 85 I. C. 1010 : A. I. R. 1925 Patna 162.

——O. 43, R. 1 (m)—*Preliminary decree—Suit for accounts Reference to arbitrators—Setting aside of award—Appeal.*

After passing a preliminary decree by consent in a suit for accounts, a reference was made to arbitrators to take the accounts and settle the final figure. An award submitted by them was not accepted by the court and the matter remitted to them again. They defaulted to re-consider it, whereupon the court ordered the suit to be heard on the merits. *Held*, it did not amount to an order refusing to record a compromise, and was not appealable. (*Walmsley and Chakravarti, JJ.*) MUNSHI MASIHUL AZAM *v.* GOLZAR AHAMMAD MIA. 29 C. W. N. 795 : A. I. R. 1925 Cal. 924.

——O. 43, R. 1 (m) and O. 23, R. 3—*Compromise of suit—Power of Court to split up compromise and pass a decree—Decree or compromise—Appeal.*

Under O. 43, R. 1 (m) C. P. Code, an appeal is competent from an order under O. 33, R. 3, C.P. Code recording or refusing to record an agreement, compromise or satisfaction. The mere fact that an order recording a compromise or refusing to record a compromise has been followed by a decree does not deprive a party of his statutory right to prefer an appeal against such an order. A court should accept or reject a compromise as a whole and it has no power to accept a part of it only and pass a decree thereon. (*Moti Sagar, J.*) THE SHOP OF MEGH RAJ TEJ BHAN *v.* SHOP OF TULSI RAM DEVI DITTA MAL. 6 Lah. L. J. 187 : A. I. R. 1924 Lah. 466.

——O. 43, R. 1 (m)—*Order holding no compromise is not appealable.*

The words used in O 43, R. 1 (*m*), C. P. Code, "an order under R. 3 of O. 23 recording or refusing to record an agreement, compromise or satisfaction" presuppose the existence of an agreement, compromise or satisfaction. An order holding that no compromise has been proved is not appealable. (*Martineau, J.*) SHANTI SARUP *v.* THE FIRM OF JAHANGIR MAL BANSI MAL. 73 I. C. 177 : A. I R. 1924 Lah. 248.

——O. 43, R. 1 (m)—*Compromise decree—Relief not unlawful but unenforceable.*

Where a compromise embraces matters not relating to the suit and the decree following such compromise gives reliefs which are not unlawful but which could not have been given, if the suit had been decided after trial, the remedy is by way of appeal. If the objection could be taken in execution proceedings, the legislature would not have provided special provisions in O. 43, for an appeal. (*Maung Kin and Rigg, JJ.*) ANA PAKIRISHA *v.* SOMASUNDARAM. A. I. R. 1922 L B. 22.

——O. 43. R. 1 (n)—*Order for injunction subject to a condition is appealable.*

An order for the issue of an injunction subject to a condition is appealable, but there is only one appeal against it. (*Banerji, J.*) GANESH PRASAD SAHU *v.* DUKH HARAN SAHU. 66 I. C. 509 : A. I. R. 1922 All. 441 (1).

——O. 43, R. 1 (n) and O. 41, R 23—*Decision on preliminary point—Maintainability of suit—Appeal.*

A consignor of goods, which had been lost in transit, sued the Agent of the Railway Company for the loss and the trial Court dismissed the suit on the ground that the Agent was not liable but the Railway Company. In appeal, the decision was reversed and the suit remanded. *Held*, the order being one on a preliminary point, it was appealable. (*Suhrawardy and Duval, JJ.*) AGENT. BENGAL NAGPUR RY. *v.* BEHARI LALL DUTT. 29 C. W. N. 614 : 52 Cal. 783 : 90 I. C. 426 : A. I. R. 1925 Cal. 716.

C. P. CODE (V OF 1908), O. 43, R. 1.

——O. 43, R. 1 (q)—*Order under—No appeal lies—Letters Patent (Rang.), Cl. 13.*

An order made under the provisions of O. 38, R. 5 is not a "Judgment" within the meaning of clause 13 of the Letters Patent, because it is a mere interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit and therefore no appeal lies, from that order. A.I.R. 1925 Rang. 225 Foll. 26 Mad 502 and 32 Bom. 602 Expl. (*Heald and Lentaigne, JJ.*) MENGHA SINGH *v.* SUCHA SINGH. 4 Bur. L. J. 108. 3 Rang. 307 : 90 I. C. 995 : A. I. R. 1925 Rang. 267.

——O. 43, R. 1 (r)—*Order refusing to attach property—Appealable.*

An order of Court refusing to attach property for disobedience of an interim injunction falls within O. 39, R. 2 (3), C. P. Code, and is open to appeal. 27 I. C. 131 (foll.). (*Scott-Smith, J.*) DIWAN CHAND *v.* JHARIA COAL CO. 66 I. C. 9 : A. I. R. 1922 Lah. 347.

——O. 43, R. 1 (r)—*Appeal—Order directing notice on an application for the issue of a temporary injunction.*

There is no appeal against an order issuing notice on an application for temporary injunction under O. 39, R. 3, C. P. Code. (*Krishnan and Waller, JJ.*) SREEMATH DEIVASIGAMANI ANNAMALAI *v.* DESIKAN GOVINDA RAO. 20 L. W. 556 : A. I. R. 1924 Mad. 857.

——O. 43, R. 1 (s)—*Order under O. 40, R. 4 directing attachment of Receiver's property for failure to pay amount fixed as due from him—Correctness of amount—Right to question.*

In an appeal from an order under O. 40, R. 4, C. P. Code, directing attachment of the property of a receiver on the ground that he failed to pay the amount directed to be paid by him, it is open to the Receiver to question the amount fixed as due from him by the lower Court. *Held*, that the Court below erred in law in not fixing the exact amount of the receiver's indebtedness and in directing him to pay an approximate amount. Observations on the proper procedure to be followed in fixing the amount to be paid by a Receiver and in directing attachment of his property in default of payment. (*Krishnan and Venkatasubba Rao, JJ.*) R. M. P. PALANIAPPA CHETTI *v.* M. S. A. PT. PALANIAPPA CHETTY. 16 L. W. 754 : (1922) M. W. N. 741 ; 69 I. C. 203 : A. I. R. 1923 Mad. 85 (2) : 43 M. L. J. 707.

——O. 43, R. 1 (s) and O. 40, R. 4—*Order directing Receiver to pay money in Court—Is not appealable.*

An order directing a Reciver to pay a certain amount into Court is not an order within O. 40, R. 4, and hence is not appealable. (*Ayling. O. C. J. and Krishnasamy Sastri, J.*) PALANIAPPA CHETTY *v.* PALANIAPPA CHETTY. (1921) M. W. N. 806 : A. I. R. 1922 Mad. 234.

——O. 43, R. 1 (s)—*Order declaring that Receiver should be appointed—Appeal.*

An order under O. 40, R. 1, (s) C.P. Code declaring that a Receiver should be appointed in the case or appointing anybody by name as Receiver is an order which is appealable under O.43, R.1, S.14 C.L.J. 489 ; 40 M. 18 (F. B.) Foll. 13 C. L. J. 157 : 17 Bom. L. R. 510 ; 18 A. L. J. 212 Not Foll. (*Jwala Prasad and Bucknill, JJ.*) GOBIND RAM *v.* GANESH RAM. 4 U. P. L. R. (Pat.) 68 : 1922 P. H. C. C. 250 : 69 I. C. 929 : 1 P. L. R. 161 : 1 Pat. 625 :

C. P. CODE (V OF 1908), O. 43, R. 1 (t).

4 P. L T. 210 : A. I. R. 1922 Pat. 577.

——**O. 43, R. 1 (t)**—*Right of appeal—Not provided for.*

O. 47, R. 3 of the C. P. Code relates to the form of application and defines the method by which the form should be adopted and ascertained It does not relate to the right of appeal. (*Walsh, A. C. J. and Ryves, J.*) GIRDHAR LAL *v.* ZORAWAR SINGH.

47 All. 1 : 80 I. C. 649 : (1) : L. R. 5 A. 608 : A. I. R. 1925 All. 57.

——**O. 43, R. 1 (u)**—*Order of remand.*

When an appeal is remanded without any provision of law being stated the presumption is that the order is made under O. 41, R. 23, C. P. Code. (*Walsh and Ryves, JJ.*) KULSOOMUNNISSA *v.* RAMPRASAD.

20 A. L.J. 321 : L. R. 3 A. 394 : 44 A. 492 : 67 I.C. 713 : 4 U.P.L.R.(A). 168 : A.I.R. 1922 All. 226.

——**O. 43, R. 1 (u)**—*Order of remand—No second appeal.*

Where there is no second appeal from the decree of the Appellate Court, there is also no Second Appeal from the order of remand. (*Piggott and Walsh, JJ.*) SANT PRASAD *v.* BHAWANJ PRASAD.

2 U. P. L. R. (All.) 416 : 60 I. C. 831 (1) : 19 A. L. J. 72 : 43 All. 403.

——**O. 43, R. 1 (u)**—*Scope of.*

A remand order passed by a District Judge in appeal, otherwise than from a decree, is not an order passed under O. 41, R. 23 and is not appealable. (*Martineau, J.*) HAYAT ALI KHAN *v.* ISHAR DASS.

89 I.C. 384 (Lah.)

——**O. 43, R. 1 (u)**—*Appeal from order of remand- Findings of fact not to be questioned.*

The lower Appellate Court made an order of remand under O. 41, R. 22, C. P. Code, remanding the case to the Original Court, for the decision of the remaining questions arising in the case. An appeal was preferred to the High Court. *Held*, the policy of the Legislature being not to allow a second appeal on facts, it is difficult to see how the appellant coming in appeal under O. 43, R. 1 (u) can question findings of fact in this Court. (*Le Rossignal and Abdul Raoof, JJ.*) HANDARAM *v.* HOTU RAM.

A. I. R. 1922 Lah. 97 (2)

——**O. 43, R. 1 (u)**—*Nature of appeal under.*

An appeal under O.43, R. 1(u) is one from the order granting an application for review and not one from the final decree in the suit. The appeal is restricted to the grounds mentioned in O. 47, R. 7. (*Chevis, J.*) KANSHI RAM *v.* KARAM NARAIN.

3 Lah. L. J. 100 : 60 I. C. 259 : 3 U. P. L. R. (Lah.) 65.

——**O. 43, R. 1 (u)**—*Decree passed simultaneously—Order is appealable.*

Where the decree is passed immediately and as part of the order recording the compromise the order recording the compromise is appealable. A. I. R. 1922 Mad. 446 doubted. (*Srinivasa Aiyangar, J.*) SATYANARAYANAMURTHI *v.* JAYANTI BUTCHAYYA.

87 I. C. 124 : A. I. R. 1925 Mad. 606 : 48 M. L. J. 249.

——**O. 43, R. 1 (u)**—*Remand of case for disposal after decision of the main point—Not appealable.*

Where the appellate Court decides the main point in a case and remands the case for disposal of remaining issues, the decision is not one on a preliminary point and thus the order is not appealable. 44 Cal. 929 foll. (*Abdur Rahim and Oldfield, JJ.*) PONANGI VENKATA SUBBARAIDU *v.* ZEMINDAR OF NUZVID.

60 I. C. 609 · 12 L. W. 667.

——**O. 43, R. 1 (u)**—*Remand not under O. 41, R. 23—No appeal lies.*

C. P. CODE (V OF 1908), O. 44, R. 1.

Under O. 43, R. 1 (u) of the Code no appeal will lie against an order of remand unless that order of remand be passed under O. 41, R. 23. (*Ashworth, J. C.*) SHEIKH FARZAND ALI *v.* EKADASHI

26 O. C. 10: 73 I.C. 591 : 10 O.L.J. 36 : 9 O. & A. L. R. 332 : A. I. R. 1923 Oudh 177.

——**O. 43, R. 1 (u)**—*Order of remand—Appeal—Findings of fact.*

On an appeal from an order of remand, the High Court is bound by the findings of fact of the lower appellate court. 20 All. 42 ref. (*Daniels, A. J. C.*) QAMAR JEHAN BEGAM *v.* BANSI DHAR.

65 I. C. 376 : 8 O. L. J. 624.

——**O. 43, R. 1 (u) and O. 41 R. 23**—*O. 43, R. 1 (u) applies only when a case is remanded on a preliminary point—Remand for fresh trial with the addition of necessary party is not disposing a suit on a preliminary point and no appeal lies from the order of remand under O. 43, R. 1 (u).*

O. 43, R. 1 (u) gives right of appeal against an order under O. 41, R. 23, but that rule *applies* only when the trial Court has disposed of the suit on a preliminary point. Where the Appellate Court set aside the trial Court's decree on the ground of non-joinder of a necessary party and remanded the case for a fresh trial with the addition of such party, *Held*: that this is not disposing of the suit on a preliminary point, and so neither O. 41, R. 23 nor O 43, R. 1 (u) applied. (*Rutledge and Heald, JJ.*) MA ME MYA *v.* MA MIN ZAN.

4 Bur. L. J. 159 : 3 Rang. 490 : A. I. R 1925 Rang. 320.

——**O. 43, R. 1 (w)**—*Right of appeal is subject to O. 47, R 7.*

The right of appeal conferred by Order 43, rule 1 (w) is not an unlimited right, but is subject to the conditions of Order 47, rule 7. 40 All. 68 and 45 Cal. 60 Foll. (*Sulaiman and Daniels, JJ.*) MADHORI SURAN *v.* PARBATI.

23 A. L. J. 534 : 88 I. C. 653 : L. R. 6 A. Civ. 454 : 47 All. 881 : A. I. R. 1925 All. 552.

——**O. 43, R. 1 (w)**—*Order granting review—Appeal—Conditions.*

The right of appeal under R. 1 (*w*) is subject to conditions laid down by O. 47, R. 7 and therefore an appeal not coming under this rule cannot be maintained. (*Piggott and Kanhaiya Lal, JJ.*) SUNDER *v.* HABIB CHICK.

42 All. 626 : 18 A. L. J. 838 : 60 I. C. 81 : 2 U. P. L. R. (All.) 283.

——**O. 43, R. 1 (w) and O. 47 R. 7**—*Order granting review—Appeal.*

An appeal lies against an order granting review on any ground and is not confined to the grounds mentioned in O. 47, R. 7 C.P. Code. (*Macleod, C.J. and Madgavkar J.*) DASO *v.* KARBASAPPA.

27 Bom. L. R. 1446.

——**O. 43, R. 1 (w) and O. 47, R. 7**—*Order granting review—Appeal.*

An appeal against an order granting a review on the ground the order sought to be reviewed was really an earlier order does not lie. O. 43, R. 1 (*w*) must be read with O. 47, R. 7, by which the grounds on which an order granting review can be set aside on appeal are limited. (*Newbould and Suhrawardy, JJ.*) SURYA NARAIN *v.* KUNJ BEHARI.

66 I. C. 909 : 25 C. W. N. 884.

——**O. 44, R. 1**—*Decree appealed from not erroneous or unjust—Leave to appeal as pauper.*

Where the decree appealed from did not appear to be contrary to law or to some usage having the force of law or otherwise erroneous or unjust, the appellate Court did not admit an application to appeal as pauper even conceding that the applicant was a pauper

C P. CODE (V OF 1908), O. 44, R. 1.

(*Zafar Ali, J.*) MT. VIDYA VANTE *v.* JAI DIAL.
7 Lah. L. J. 214 : 89 I. C. 292 (1) : A. I. R. 1922 Lah. 391 (1).

——0. 44, R. 1—*Proviso—Applicability of—Leave to appeal in* forma pauperis.

The proviso to O. 44, R, 1, C. P. Code is not applicable unless it should be found that the applicant is a proper person. (*Zafar Ali, J.*) SHRIMATI VIDYA WANTI *v.* JAI DAYAL KAPUR.
6 Lah. L. J. 205 : 80 I. C. 649 (2) : A. I. R. 1924 Lah. 536.

——0. 44, R. 1—*Leave to appeal in* forma pauperis *—Dismissal of application does not involve dismissal of appeal.*

There is a distinction between applications to sue as a pauper, and applications to appeal as such. The distinction was deliberately drawn by the legislature. 40 M. 687 Ref. In the case of an application to sue, the plaint is an integral portion of the application, in the case of an appeal, the memorandum of appeal is a separate document, Consequently the dismissal of the application for leave to appeal as a pauper does not involve the dismissal of the appeal. An order of the Court directing payment of the Court-fees which could be made under S. 149, C. P. Code, is valid and proper. On payment of the Court-fees the appeal is effective as from the date of the original presentation. 2 Lah. 1 : 55 P. R. 1913 : 95 P. R. 1917. Dist. (*Le Rossignol and Campell, JJ.*) MAHANT DIYAL DAS *v.* SUNDAR DAS. **3 Lah. 35 : 65 I. C. 741 : 26 P. W. R. 1922 : A. I. R. 1922 Lah. 225.**

——0. 44, R. 1 (Proviso)—*Appeal lies only when correctness or reasonableness of decision is doubted.*

The terms in the proviso merely indicate that the Court, before admitting a pauper appeal, should be satisfied that it is not merely a frivolous appeal and that there are reasonable grounds for doubting the correctness or justness of the decision of the lower Court. (*Srinivasa Aiyangar, J.*) M. PARUSURAMUDU *v.* M. RAMANNA. **22 L.W. 23 : 87 I.C. 960 : A. I. R. 1925 Mad. 1178 : 49 M. L. J. 353.**

——0. 44, R. 1—*Pauper application and memorandum of appeal—Rejection of former—Proper order to pass on latter.*

When an application for leave to appeal *in forma pauperis* is presented along with the memorandum of appeal and the former is rejected, the proper order to pass on the latter is to give the party time to pay the Court-fee on it. The two documents are separate and must be separately disposed of. Difference in procedure under O. 33 and O, 44 pointed out. (*Dalal, J.C.*) SAJJAD ALI KHAN *v.* JAGMOHAN DAS.
90 I. C. 371 (Nag.).

——0. 44, R. 1, Proviso—*Direction is mandatory.*

The Court is entirely precluded from admitting an application under O. 41, R. 1 unless satisfied that the decree of lower Court, is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. The direction contained in the proviso to the Rule is mandatory. (*Adami and Sen, JJ.*) RAJENDRA PRASAD BOSE *v.* GOPAL PRASAD BOSE. **4 Pat. 67 : A I. R. 1925 Pat. 442.**

——0. 44, R. 1—*Leave to appeal* in forma pauperis *—Merits of the case—How far to be considered.*

It is no doubt open to the Court when an application for leave to appeal *in forma pauperis* comes before it for admission, to reject the application if it is not satisfied that the judgment is contrary to law or otherwise erroneous or unjust. But once the Court has admitted the application and ordered notice to the opposite party and the Government, the question whether the proviso under O. 44, R. 1 C. P. Code has been complied with or not cannot be considered. (*Miller, C. J. and Mullick, J.*) MT. BUCHAN DAI *v.* JUGAL KISHORE.
2 Pat. L. R. 153 : A. I. R. 1924 Pat. 791 (1).

——0. 44, R. 1—*Record of evidence cannot be referred to.*

Under O. 44, R. 1, the Court has no right to refer to the record of evidence. The Court must confine itself to the judgment and decree appealed from. (*Carr and Brown, JJ.*) MAUNG THA DIN *v.* DAW PAW. **4 Bur. L. J. 55 : A. I. R. 1925 Rang. 249.**

——0. 45—*Application for leave to appeal—Review petition successful—Reversal in appeal—Effect on original application.*

An application for leave to appeal to the Privy Council and a review petition were put in against the judgment of the High Court. The latter proving successful no order was necessary on the former. In an appeal against the order granting the review the same was reversed by the Privy Council. *Held*, the original application for leave to appeal was still alive and leave could be granted thereon. (*Harrison and Zafar Ali, JJ.*) NEKI *v.* CHHAJJU RAM.
4 Lah. 445 : 77 I. C. 869 : A. I. R. 1924 Lah. 225.

——0. 45—*Power of High Court to add parties pending appeal to Privy Council.*

There is no power for the High Court under order 45 of the C. P. Code to add parties pending appeal to the Privy Council. (*Rutledge and Heald, JJ.*) KALENTHER AMMAL *v.* MA MI. **3 Rang. 474.**

——0. 45—*Privy Council appeal—Death of second respondent—Abatement—Application for certificate declaring who are deceased respondent's legal representatives—Refusal of certificate—Delay in preparation of record—Enquiry ordered.*

Where an appeal abates as against a party to a Privy Council appeal, it abates as regards all orders regarding costs incidental thereto as a consequence. 34 M. 76 followed. A delay of three years having occurred in the preparation of the record of the appeal for His Majesty in Council, the office was directed to report the reasons for the delay and to show how far that delay was due to inaction and want of prosecution on the part of the appellants with a view to action being taken by the Court under R. 70 of the rules relating to appeals to the Privy Council. (*Robinson, C. J. and May Oung, J.*) D. L. SAKLAT *v.* BELLA. **2 R. 91 : 3 Bur. L. J. 30 : 80 I. C. 744 : A. I. R. 1924 Rang. 217.**

——0. 45, R. 3—*Certificate—Contents.*

A certificate issued under O. 45 must clearly show whether it fulfils the conditions of S. 110 or is otherwise a case fit for appeal to Privy Council under S. 109 (*c*). (*Lord Buckmaster.*) RADHA KRISHNA AYYAR *v.* SWAMINATHA AYYAR.
44 Mad. 293 : 19 A. L. J. 161 : 48 I. A. 31 : 23 Bom. L. R. 718 : 25 C. W. N. 630 : 33 C. L. J. 227 : 13 L. W, 321 : (1921) M. W. N. 119 : 60 I. C. 85 : 29 M. L. T. 418 (P. C.): 40 M. L. J. 229: On Appeal from 40 I. C. 587.

——0. 45, R. 4—*Essentials for.*

Under O. 45, R. 4 of the C. P. Code consolidation for purposes of valuation for leave to appeal to the Privy Council is admissible only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment. (*Oldfield and Krishnan, JJ.*) RAJA RAJESWARA *v.* ARUNACHELAM.
73 I.C. 217 : A. I. R. 1923 Mad. 602 : 44 M. L. J. 424.

C. P. CODE (V OF 1908), O. 45, R. 4.

——O. 45, R. 4—*Consolidation—When permissible.*

O. 45, R. 4, C. P. Code allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind. The rule speaks only of the consolidation of different suits decided by the same judgment but the principle applies where the interests of the two parties are so entirely separate that they are practically defendants in two different suits decided by one judgment. (*Batten, J. C. and Hallifax, A. J. C.*) SETH NARAYANA DAS *v.* MT. KAMLABAI. **69 I. C. 525 : A. I. R. 1923 Nag. 198.**

——O. 45, R. 4—*Consolidation when allowed.*

Under O. 45, R. 4 the case is only consolidated for the purpose of pecuniary value. It does not matter what the reason is why the appeals are consolidated. Once they are consolidated for whatever reason they form in fact one appeal and the parties in that appeal must be treated just as the parties in one suit. (*Dawson Miller, C. J. and Mullick, J.*) THE MIDNAPUR ZEMINDARI CO. *v.* MADAN MARWARI. **70 I. C. 782 : 1923 P. H. C. C. 17 : A. I. R. 1923 Pat. 215.**

——O. 45, R. 4—*'Judgment'—Meaning of—Requirements of R. 4.*

'Judgments' in R. 4 refers the judgment appealed against, *i.e.*, the judgment of the High Court. According to the rule the judgment which their Lordships of the Privy Council have to consider should be the same judgment in the consolidated appeals and the rule does not mean that they should have in the same case or in the same appeal to consider the effect of several judgments of the High Court. (*Miller, C. J. and Mullick, J.*) DEOKI NANDAN PRASAD *v.* NARASINGH RAUT. **6 P. L. J. 97 : 2 P. L. T. 157 : 60 I. C. 517 : 1921 P. H. C. C. 145.**

——O. 45, R. 5—*Form of enquiry is in discretion of Court.*

In a case remanded for enquiry and report as to the value of subject-matter of the suit the Court has discretion to determine whether there should be a local enquiry for determining value. (*Sanderson, C. J. and Walmsley, J.*) PRANADA NATH ROY BAHADUR *v.* BASIRUDDIN QUAZI. **82 I. C. 744 : A. I. R. 1925 Cal. 414.**

——O. 45, R. 7—*Time for furnishing security—Act XXVI of 1920.*

An appeal to His Majesty in Council from a decree passed before the coming into force of Act XXVI of 1920 is governed by O. 45, R. 7 as it existed before its amendment and the period for furnishing security is 6 months. Where cash is offered as security before the expiry of 6 months but is accepted after that period owing to the court's delay the deposit must be deemed duly made. (*Mears, C. J. and Banerji, J.*) DEBI RAI *v.* PRAHLAD DAS. **44 A. 242 : 20 A. L. J. 51 : L. R. 3 A. 94 : 65 I. C. 340 : A. I. R. 1922 All. 87.**

——O. 45, R. 7—*Time for furnishing security and deposit cannot be extended by more than six weeks.*

Under O. 45, R. 7 as amended by S. 3 of Act XXVI of 1920 the High Court's discretion to extend the time for furnishing security and making a deposit for translation and printing and other charges has been curtailed and limited to the period mentioned in the amendment. The High Court has no power to extend the period beyond six weeks. (*Mears, C. J. and Banerji, J.*) RAM DHAN *v.* PRAG NARAIN. **44 A. 216 : 20 A. L. J. 13 : 65 I. C. 249 : L. R. 3 A. 634 : A. I. R. 1922 All. 43.**

——O. 45, R. 7—*Decree amended on review—Leave to appeal to Privy Council—Limitation.*

C. P. CODE (V OF 1908), O. 45, R. 7.

On an application for leave to appeal from a decree of the High Court which reversed the decree of the Court of first instance, the decree of the High Court was first passed on the 29th November 1921 but on an application for review it was modified on the 9th May 1922. *Held* that the period of limitation for the application for leave to appeal to the Privy Council is to be recounted from the latter date, on which a new decree was passed in substitution for first one. (*Abdul Raoof and Martineau, JJ.*) NAWAZ ALI *v.* ALLU. **4 Lah. 185 : 75 I. C. 520 : 6 Lah. L. J. 44 : A. I. R. 1924 Lah. 82.**

——O. 45, R. 7—*Where Special leave was granted by P. C. under S. 112, C. P. Code, High Court cannot demand security.*

O. 45, R. 7 applies to the case where a certificate is granted by the High Court, but when the special power under S. 112 is exercised by the Privy Council, the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council. (*Dalal and Simpson, A. J. Cs.*) MATA PRASAD *v.* NAGESWAR SAHAI. **11 O. L. J. 195 : 76 I. C. 335 : A. I. R. 1925 Oudh 99.**

——O. 45, R. 7—*Power to extend time—High Court cannot extend period.*

Power is given to extend the first period of 90 days from the date of the decree up to a period of 60 days on cause shown but the Court has no power to extend the period of 6 weeks from the date of the grant of the certificate for the filing of the security and necessary costs. (*Lyle and Ashworth, A. J. Cs.*) ASHIQ ALI *v.* ARJUMAN-UN-NISSA. **25 O. C. 254 : 70 I. C. 937 : A. I. R. 1923 Oudh 50 (1).**

——O. 45, R. 7—*Security must be in cash or Govt. security—Order for, when to be made.*

As an ordinary rule security shall be furnished in case or in Government securities while the proviso to O. 45, R. 7 allows some other form of security. It provides against any delay by reason of such permission being given by requiring that the order for such other form of security might be passed at the time the certificate is granted. While, therefore, it is open to the applicant to move the Court to permit security in any other form to be granted it is essential the court should be so moved before or at the time of the hearing of the application for leave to appeal when a certificate would be granted. If no such order is obtained at the date of the grant of the certificate security must be furnished in cash or in Government securities within the period allowed by O. 45, R. 7, C. P. Code. (*Robinson, C. J. and Maung Kin, J.*) KIRKWOOD *v.* MAUNG SIN. **66 I. C. 548 : 11 L. B. R. 213.**

——O. 45, R. 7—*Time for furnishing security can be extended.*

It is competent to the High Court to extend the time for furnishing security for the costs of an appeal to His Majesty in Council if the appellant shows cogent reasons for such extension and also satisfies the Court that he has exercised due diligence during the period allowed. The mere fact that he has not been successful in his attempt to raise a loan is not a sufficient reason. 11 All. 7 ; 14 Mad. 391 ; 44 P. R 1910; 11 C. W. N. 1104 Ref. (*Maung Kin and Duckworth, JJ.*) PONNAMMAL *v.* THE BANK OF RANGOON. **65 I. C. 450 : 11 L. B. R. 108.**

——O. 45, R. 7 (1)—*Application to furnish security in other form than cash or Government bonds is incompetent if made after grant of certificate.*

An application that, on the ground of special hard ship some other form of security may be allowed to be furnished, if made subsequent to the making of an

C. P. CODE (V OF 1908), O. 45, R. 7 (1).

order granting the certificate under R. 7 (1), is incompetent. The contention that R. 7 (1) refers not to the granting of a certificate but to the actual issue of the document called the certificate is curious and untenable. (*Venkatasubba Rao and Srinivasa Aiyangar, JJ.*) R. ARUNACHALA NAIDU *v.* S. R. BALAKRISHNA & CO. **21 L. W. 147 · 86 I. C. 201 : A. I. R. 1925 Mad. 449 : 48 M. L. J. 134.**

——O. 45, R. 7 (1)—*Appeal to Privy Council—Delay in paying in security—Extension of time—Not granted without cogent reason.*

The Court will not grant an extension of time to furnish security for costs in an appeal to the Privy Council. The difficulty in furnishing security in cash is not a sufficiently cogent reason. 10 C. 557 ; 14 Mad. 391 followed. (*Carr and Maung Gyi, JJ.*) MA SEIN *v.* SIT PAUNG. **4 Bur. L. J. 3.**

——O. 45, R. 8—*Deposit out of time—Effect—Act XXVI of 1920.*

A deposit made out of time is not one made to the satisfaction of Court within O. 45, R. 8. The periods both for security and deposit are identical. 20 A. L. J. 13 foll. (*Mears, C. J. and Piggott, J.*) JAGMOHAN SARAN *v.* SAHU DEOKI NANDAN. **L. R. 5 A. 40 : 84 I. C. 535 : A. I. R. 1923 All. 572.**

——O. 45, R. 8 (b)—*Judicial Committee's Rules, R. 43—Appeal heard* ex parte—*Rehearing—Procedure.*

The omission to give notice to the respondents of the admission of an appeal to the Privy Council is no sufficient ground for rehearing provided the respondents in fact knew of the admission. (*Lord Shaw, Lord Phillimore, Sir John Edge, Ameer Ali and Sir L. Jenkins.*) HARDIT SINGH *v.* GURMUKH SINGH. **22 Bom. L. R. 550 : 59 I. C. 7 : 4 P. W. R. 1921 (P. C.).**

——O. 45, R. 13 and O. 41—*Appeal to Privy Council—Stay of execution by the District Court—Whether legal—Court, meaning of.*

The Dt. Court has no jurisdiction to pass order for stay of execution or giving security under O. 41 for pending an appeal from the High Court to the Privy Council. The powers with regard to stay of execution are laid down in O 45, R. 13, C. P. Code under that order the Court may allow the decree appealed from to be executed taking such security from the Respondent as the court thinks fit for the due performance of any order which the Privy Council may make on the appeal. The provisions of this rule are meant entirely to govern all questions regarding the execution of the decree under appeal before the Privy Council and the provisions of O. 41, R. 6 have no application and the proper court to deal with the matter is not the original Court but the High Court. 3 Pat. L. J. 40 followed. In such circumstances the Court means the High Court. (*Carr and Brown, JJ.*) MAUNG PO SHEIN *v.* MAUNG PO KIN. **4 Bur. L. J. 50 : 3 Rang. 158 : 88 I. C 992 : A. I. R. 1925 Rang. 254.**

——O. 45, R. 13 and S. 151—*Court can stay execution even before grant of certificate.*

The wording of O. 45, R. 13 clearly shows that the Court has power to stay execution after grant of a certificate and though no power has been specifically conferred on the Court under O. 45, R. 13 to stay execution prior to that stage, the Court has power to stay even before the grant of a certificate if not under this rule, under S. 151. 40 Cal. 955 Foll. 19 B. 10 Appr. 6 S. L. R. 86 Not Foll. (*Kincaid, J. C. and Aston, A. J. C.*) NARUMAL *v.* JAGATMAL. **82 I. C. 739 : A. I. R. 1925 Sind 216.**

——O. 45, R. 13—*Applicant must show good grounds for obtaining stay.*

C. P. CODE (V OF 1908), O. 46, R. 1.

The inherent powers of the Court to stay execution of its decree should be sparingly used and the onus is clearly on the applicant to establish good grounds for staying execution. (*Kincaid, J. C. and Aston, A. J. C.*) NARUMAL *v.* JAGATMAL. **82 I. C. 739 : A. I. R. 1925 Sind 216.**

——O. 45, R. 15—*Order of Privy Council—Transmission — Execution — Limitation — Right of person not a party to Privy Council—Appeal to apply for restitution.*

Though O. 45, R. 15, C. P. Code, makes it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission, it is inconvenient, if not impossible, to require that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted at the instance of another successful party. The fact that a person applying for restitution was not a party to an appeal to the Privy Council does not disentitle him to such relief. 17 M. 82 ; 25 M. 426 referred to. (*Oldfield and Devadoss, JJ.*) BALUSAMI IYAR *v.* VENKATASWAMI NAICKEN. **32 M. L. T. 249 (H. C.) : 76 I. C. 219 : A. I. R. 1924 Mad. 95.**

——O. 45, R. 15—*Order of His Majesty in Council—Transmission of—Power to impose conditions.*

Where a High Court acting under O. 45, R 15 of the C. P. Code transmits an order of His Majesty in Council to the first Court for execution it is competent to the High Court to give directions to pay out the money on taking sufficient security from the decree-holder. (*Daniels and Wazir Husan, A. J. Cs.*) RANI BIJAI RAJ KOER *v.* THAKUR JAI INDRA BAHADUR SINGH. **9 O. L. J. 5 : 66 I. C. 982 : A. I. R. 1922 Oudh 34.**

——O. 45, R. 15—*Mandatory—Non-compliance—Effect.*

The provisions of O. 45, R. 15 are mandatory and failure to comply with them renders an execution application liable to dismissal. (*Adami and Bucknill, JJ.*) MT. BHAGWANTA KOER *v.* ZAMIR AHMAD KHAN. **5 Pat. L. T. 451 : 78 I. C. 766 : 1924 P. H. C. C. 221 : 3 Pat. 596 : A. I. R. 1924 Pat. 576.**

——O. 46, R. 1—*Power to decide case referred does not include power to hear appeal.*

A power of reference is not a modified form of appellate jurisdiction. A right of appeal is a right conferred on the suitor. A power of reference is a power vested in the Court. It lies in the sole discretion of the Court to exercise or not to exercise it. An appeal presupposes a decree or order already passed against which the appeal is directed. The power of reference is exercised while the case is still pending in order to enable the Court to arrive at a correct decision. A Court to whom a reference can be made is not necessarily authorised to hear appeals from the Court making a reference. 3 P. L. J. 581 Dist. (*Linasay, Kanhaiya Lal and Daniels, JJ.*) ABDUL RAHMAN *v.* ABDUL RAHMAN. **23 A. L. J. 385 : L. R. 6 All. 191 (Civ). . 87 I. C. 51 : 47 All. 513 : A. I. R. 1925 : All. 380 (F.B.).**

——O. 46, R. 1—*Leave to sue—Receiver in Insolvency—Distinction.*

A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. A Receiver under the Insolvency Act holds a

C. P. CODE (V OF 1908), O. 46, R. 1.

different capacity altogether. He is more than a mere officer of the Court. Under S. 28 (2) the insolvent's estate vests in him. He alone, and no one else, represents the estate. He therefore is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him. (*Lindsay and Sulaiman, JJ.*) MAHRANA *v.* DAVID.

21 A. L. J. 737 : L. R. 4 A. (Civ.) 483 : 46 All. 16 : A. I. R. 1924 All. 40.

——— ——**O. 46, R. 1**—*Applicability.*

O. 46, does not apply to miscellaneous proceedings. (25 Bom. 327 ; 36 Mad. 16, Ref.) (*Suhrawardy and Duval, JJ.*) D. TANCRED *v.* D. N. MULLICK.

40 C. L. J. 578 : 84 I. C. 543 : 29 C. W. N. 521 : A. I. R. 1925 Cal. 391.

———**O. 46, R. 1**—*Rent Controller is Court but inquiry before him is not a suit within R. 1—Calcutta Rent Act, S. 24.*

The Court of the Rent Controller is in certain respects a Court of Civil jurisdiction but the enquiry before the Rent Controller is not a suit within the meaning of O. 46, R. 1 and therefore the Rent Controller cannot make a reference under this order (1922 Cal. 427 ; 1923 Cal. 169, Ref.) (*Suhrawardy and Duval, JJ.*) D. TANCRED *v.* D. N. MULLICK.

40 C. L. J. 578 : 84 I. C. 543 : 29 C. W. N. 521 : A. I. R. 1925 Cal. 391.

———**O. 46, R. 1**—*Reference—Subject of—Sanction to prosecute.*

O. 46, R. 1 refers only to such questions as may arise in the trial of a suit and not to questions arising on an application for sanction, which cannot, in any sense of the word, be considered as a trial of a suit. A reference arising out of such an application is incompetent. (*Moti Sagar, J.*) BALWANT RAI *v.* NIAMAT KHAN. **A. I. R. 1924 Lah. 566.**

———**O. 46, R. 5**—*Powers of High Court.*

When a High Court hears a reference, it acts like a Court of appeal quite as much as it undoubtedly does when it hears an application for revision. (*Mookerjee, A. C. J., Fletcher and Walmsley, JJ.*) MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR *v.* SECY. OF STATE. **25 C. W. N, 80 : 61 I. C. 112 : 32 C. L. J. 433.**

———**O. 47, R. 1.**

Conversion.
Grounds for Review.
Inherent Power.
Mistake or Error.
New Evidence.
Order for Review, effect of.
" Other Sufficient Reason ".
Power of Court.
Miscellaneous.

Conversion.

———**O. 47, R. 1 and O. 9, R. 13**—*Conversion—Registration.*

A successor-in-office has jurisdiction to change the registration of an application from one under O. 47, R. 1 to one under O. 9, R. 13 when the application is made under both the provisions, registration being purely a ministerial act. (*Coutts and Macpherson, JJ.*) MAHABIR *v.* BALKISUN. **3 P. L. T. 29 : 1922 P. H. C. C. 76 : 1 P. 48 : A. I. R. 1922 Pat. 376.**

———**O. 47, R. 1**—*Conversion — Application for setting aside* Ex parte *decree—Defendant's agent's negligence alleged as ground—Application cannot be treated as one for review.*

Where an application to set aside an *ex parte* decree or to restore a previous application (which had been dismissed for default, for setting aside the *ex parte* decree was asked to be treated as an application for review, *Held* : it could not be so treated because (1) it was not an application for review but one for setting aside *ex parte* decree (2) it was not stamped as an application for review and (3) the negligence of the former agent of the defendant which was the ground put forward was no justification for applying for this particular remedy. (*Young, J.*) MA NAW NAW *v.* V. E. S. S. SOMASUNDARAM CHETTY. **2 Rang. 655 : 85 I. C. 324 : A. I. R. 1925 Rang. 187.**

Grounds for Review.

———**O. 47, R. 1**—*Grounds for review—Power of appellate court.*

Under O. 47, R. 1 which reproduces S. 623 of the C. P. Code, 1882, a party has a right to apply for a review of judgment to the court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in R. 1. (*Mr. Ameer Ali.*) INDRAJIT PRATAP BAHADUR *v.* AMAR SINGH.

4 P. L. T. 447 : 1 P. L. R. 345 : 21 A. L. J. 554 ; 2 Pat. 676 : 50 I. A. 183 : 39 C. L. J. 318 : 33 M. L. T. 233 : L. R. 4 P. C. 123 : L R. 5 P. C. 8 : 28 C. W. N. 277 : 18 L.W. 728 : 25 Bom. L. R. 1259 : 74 I. C. 747 : 39 C. L. J. 318 : A. I. R. 1923 P. C. 128 : 45 M. L. J. 578.

———**O. 47, R. 1**—*Grounds for Review—Fraud or undue influence—No discovery of new matter—If ground for review—Compromise decree.*

Fraud or undue influence un-accompanied by the discovery of any new fact is not a ground for reviewing a compromise decree. It does not amount to " other sufficient reason " which has to be read *ejusdem generis* with what goes before. A ground for review must have existed on the date of the order sought to be reviewed and not have come into existence subsequently. (*Sulaiman and Boys, JJ.*) NATHU MAL *v.* RAGHUBIR SINGH. **89 I. C. 946 : L. R. 6 A. 569 : 23 A. L. J. 1029.**

———**O. 47, R. 1**—*Grounds for review—Dismissal of appeal for default.*

Where an appeal against a decree has been dismissed for default and that order of dismissal has become final, the appellant cannot thereafter apply for review of the judgment. (*Piggott and Walsh, JJ.*) MANPHUL SINGH *v.* HAKIM HAMID ALI KHAN.

21 A. L. J. 416 : L. R. 4 A. 276 : 74 I. C. 528 : A. I. R. 1923 All. 576.

———**O. 47, R. 1**—*Grounds for review—Commissioner for taking accounts.*

A Commissioner in order to take accounts may in his discretion and on proper grounds re-open the enquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive. Having given every opportunity to a party to prove his objection to a particular item, and when the Commissioner has after hearing the parties recorded his finding ; it is highly undesirable that he should reopen the enquiry merely because he is invited to do so by the party. The enquiry must be final and if he does re-open the enquiry, it must be on grounds similar to those mentioned in O. 47, R. 1 ; not because the provisions of O. 47, R. 1 apply to proceedings before him but because that rule affords the best guide in a matter of this kind. If the enquiry is re-opened on grounds which are not proper, the party aggrieved can object only by way of exception to this report. (*Mulla, J.*) FERNANDEZ *v.* RODRIGUES. **47 Bom. 593 : 25 Bom. L. R. 280 :**

C. P. CODE (V OF 1908), O. 47, R. 1—Grounds for review.

A. I. R. 1924 Bom. 231.

——O. 47, Rr. 1 and 7—*Grounds for review—Inherent power—Exercise of—Appeal from.*

Where a suit was dismissed for default though one of the plaintiffs was personally present at the time of the hearing and on an application for review the trial Court purported to set aside the order of dismissal for default, acting under the inherent powers of the Court, *Held*, that though there was no sufficient cause for entertaining a review, there was no appeal from the order of the Court below. (*Ghose, J.*) BASANTA KUMARI GUPTA *v.* ABHOY SHANKER SEN. **37 C. L. J. 99 : 73 I. C. 306 : A. I. R. 1923 Cal. 450.**

——O. 47, R. 1, and O. 43, R. 1 (u)—*Grounds for review.*

An appeal against an order granting a review on the ground the order sought to be reviewed was really an earlier order, does not lie. O. 43, R. 1 (*u*) must be read with O. 47, R. 7 by which the grounds on which an order granting a review can be set aside on appeal are limited. (*Newbould and Suhrawardy, JJ.*) SURYA NARAIN *v.* KUNJ BEHARI. **66 I. C. 909 : 25 C. W. N. 884.**

——O. 47, R. 1—*Grounds for review—Reversal of High Court's decision by Privy Council—Effect of.*

The ground for review under O. 47, R. 1, C.P. Code must be something which existed at the date of the decree and the rule does not authorise the review of a decision which was right when it was made on the ground of the happening of some subsequent event. Where the lower court had decided a case following the decision of the High Court in a connected case which was subsequently reversed on appeal by the Privy Council the reversal of the High Court's judgment is not a ground for review of the lower court's judgment. 24 M. 1 (P. C.); 4 M. L. T. 86 foll.; 13 B. 330 : 33 A. 566; 31 B. 128 : 13 M. L. T. 225 : 3 Pat. L. J. 372 Ref. (*Kumaraswami Sastri, J.*) GANNABATHULA VENKAMMA *v.* GANNABATHULA RANGA RAO. **(1922) M. W. N. 304 : 15 L. W. 593 : 31 M. L. T. 473 : 70 I. C. 741 : A. I. R. 1922 Mad. 227 : 43 M. L. J. 33.**

——O. 47, R. 1—*Grounds for review—Mistake of law—Review does not lie.*

A Court hearing an application for review of a decree made on appeal has no power to order a review upon the ground that the decision was wrong on the merits, or on the ground of a mistake of law. A judgment cannot be reviewed under O. 47, R. 1 (1), on account of some mistake or an error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law as, for instance, when the judgment is based on a precedent which has been notified by a subsequent decision. Even assuming that the discovery of an authoritative precedent, by which a precedent relied on in the judgment has been modified, amounts to the discovery of new and important matter or evidence within the meaning of O. 47, R. 1 (1), such a discovery is not a ground for review without strict proof that the subsequent authority was not within the knowledge of the applicant or could not be produced by him when the decree or order was passed or made. There would be no finality to the original decree if a review can be sought on account of real or supposed errors of law, a process which might be continued indefinitely. 3 Pat. 134; 44 I. C. 161; 63 I. C. 344 Foll. 46 Mad. 955 Dist. (*Baker, J.C. and Prideaux A.J.C.*) RAMACHANDRA MAHADEORAO *v.* GOVINDRAO. **8 N. L. J. 31 : 87 I. C. 125 : A. I, R. 1925 Nag. 266.**

C. P. CODE (V OF 1908), O. 47, R. 1—Inherent Power.

——O. 47, R. 1—*Ground for Review—Existence on the date of decree.*

A ground for review must be in existence on the date of the decree. (*Baker, J. C.*) BALWANTRAO *v.* FARID SAHEB. **89 I C. 216.**

——O. 47, R. 1—*Grounds for review—Different view of law taken since original judgment.*

The ground for a review must be something which exists at the time of the decree. There is no authority that review can be granted because of the happening of some subsequent event. It may be that the decree of a court would have been different had the new law been in force. But if it was not in force at the passing of the decree and the decree was perfectly correct there is no ground for review. (*Prideaux, A. J. C.*) SARFARAJ KHAN *v.* RAMCHANDRA. **73 I. C. 4 : A. I. R. 1924 Nag. 70.**

——O. 47, R. 1—*Grounds for review—Scope.*

Counsel was alleged to have erroneously abandoned evidence, but Court considered admissibility of evidence. *Held*: No review lies. (*Neave, A. J. C.*) MADHO PRASAD *v.* SUKH DIN. **A. I. R. 1925 Oudh 644.**

——O. 47, R. 1—*Grounds for review—Wrong decision, if a ground for.*

A wrong decision on a question of law, is not a sufficient ground for review. (*Daniels, A. J. C.*) RUGUAIYA KHANAM *v.* FAZL HAQ. **63 I. C. 344 : 24 O. C. 154.**

——O. 47, R. 1—*Grounds for review—Omission to raise a point of law—Error apparent on the face of the record.*

The mere omission to raise a point of law which, had it been raised, might and probably would have brought about a different result is not necessarily a "mistake or error apparent on the face of the record" for which a review can be claimed. 13 Cal. 62; 20 C. W. N. 1099. (*Dawson Miller, C. J. and Coutts, J.*) KAMLA PRASAD *v* KUNJ BEHARI. **1922 P. H. C. C. 1 : A. I. R. 1922 Pat. 119.**

——O. 47, R. 1—*Grounds for review—Order as to costs.*

A Court can review an order as to costs, if the order is not a proper one. (*Jwala Prasad and Adami, JJ.*) BRAJA SUNDAR *v.* JAGANNATH. **6 Pat. L. J. 284 : 63 I. C. 768 : 3 P. L. T. 67 : A. I. R. 1922 Pat. 1.**

——O. 47, R. 1—*Grounds for review—Bengal Tenancy Act, S.* 153.

S. 153 of the B. T. Act bars an application under O. 49, R. 13 or O. 47, R. 1, unless the application states injuries sustained by the applicant on account of the decree or judgment, and he deposits in court the amount of rent admitted by him to be due. If no rent is admitted to be due, no deposit is needed. (*Jwala Prasad, J.*) CHANDRA DHUR DEV *v.* BHOLA RAI. **2 P. L. T. 372 : 62 I. C. 80 : 1921 P. H. C. C. 301.**

——O. 47, R. 1—*Grounds for review—Diversity of opinion.*

The mere fact that another Judge is inclined to take a different view of the case from that taken by a Judge who originally decided the case, is no ground for review. 2 U. B. R. 608 : 2 U. B. R. 534; 2 U. B. R. 7; 10 I. C. 993 Ref. (*Brown, J. C.*) MA KYAW *v.* MA KYIN. **(1921) 4 U. B. R. 27 : 64 I. C. 895 : A. I. R. 1922 U. B. 16.**

Inherent Power.

——O. 47, R. 1—*Inherent power—Under S.* 151, *C. P. Code, also Court can review—C. P. Code, S.*151.

C. P. CODE (V OF 1908), O. 47, R. 1—Mistake or Error.

Apart from O 47, R. 1, the Court has inherent power under the new Section 151 of the C. P. Code of 1908 to make such orders as may be necessary for the ends of justice and thus to review its wrong orders or decisions passed previously. 20 All. 11 Foll. (*Jwala Prasad and Foster, JJ.*) MANI LAL *v.* DURGA PRASAD. **5 Pat. L. T. 425 : 1924 P. H. C. C. 254 : 3 Pat. 930 : 80 I. C. 667 (2) : A. I. R. 1924 Pat. 673.**

Mistake or Error.

———O. 47, R. 1—*Mistake or error—" Error apparent on the face of the record " includes a change in the construction of law on a subject.*

Where a judgment was delivered following 39 All. 437 (*Sahu Ram* v. *Bhup Singh*) but by the time an application for review of that judgment came on for hearing, the case in 1924 P.C. 50 (*Brij Narain* v. *Mongal Pd.*) had been decided and the judgment delivered by the Court was found to be wrong in view of the latter decision, *held*: that the words "error apparent on the face of the record" cover a case like this and that the application should be granted. (*Walmsley and Suhrawardy, JJ.*) BRINDABAN CHANDRA GHOSH *v.* DAMODAR PRASAD PANDEY. **29 C. W. N. 148 : 85 I. C 65 : A. I. R. 1925 Cal 304.**

——— ——O. 47, R. 1—*Mistake or error—Amendment of decree—If proper—Excusing delay in applying for review.*

Where a court passes a personal decree where it ought not to have done so, and the same is found out by the party aggrieved only when it is sought to be executed his remedy is not by way of amendment but by way of review. If he first applies for amendment and fails and then puts in a petition for review the second may be looked upon as a continuation of the first one for purposes of limitation. (*Hughes, J.*) LAKSHMANA AIYANGAR *v.* NARAYANA IYENGAR. **18 L. W. 876 : 33 M L. T. (H. C.) 221 : 76 I. C. 786 : A. I. R. 1924 Mad. 225.**

———O. 47, R. 1—*Mistake or error—Error includes error of law.*

The word ' error ' need not necessarily be limited to errors of facts, but there are cases in which an error of law can also come within the meaning of the rule *e. g.* where the error of law is such that it is clearly apparent on a perusal of the record. 44 I. C. 161 ; and 1 Cal, 184, Diss. (*Phillips and Venkatasubba Rao, JJ.*) M. MURARI RAO *v.* BALAVANTH DIKSHIT. **46 M. 955 : 18 L. W. 363 : 1923 M. W. N. 761 : 76 I. C 342 : A. I. R. 1924 Mad. 98 : 45 M. L. J. 309.**

———O. 47, R. 1—*Mistake or error—Compromise decree—Setting aside—Grounds for—Separate suit—New and important matter—Discovery of.*

A person who wishes to displace a decree passed in terms of a compromise to which she was a party on the ground that she affixed her signature to the compromise at the instance of an agent in ignorance of its contents, can either apply for a review of the decree or institute a separate suit for the purpose. The mere fact that an application to set aside the decree is headed as made under S. 151, C. P. Code (which is clearly inapplicable to the case) does not preclude the court from dealing with the application as one for review, if the provisions of the code relating to review are applicable to the case. The fact that a party to a compromise in terms of which a decree has been passed has affixed his signature to a compromise at the instance of an agent in ignorance of its contents is new and important matter within the meaning of O. 47, R. 1, C. P. Code,

Quaere :—Whether the circumstances that a party to a compromise affixed her signature to the same on misrepresentation or ignorance of its meaning and without enquiring as to its meaning in consequence of her confidence in her agent are sufficient to render the compromise void or voidable. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER. **31 M. L. T. 132 (H. C.) : (1922) M. W N. 495 : 16 L. W. 440 : 70 I. C. 425 : A. I. R. 1922 Mad. 446: 43 M. L. J. 290.**

———O. 47, R. 1 (1)—*Mistake or error—Judgment based on precedent which owing to a subsequent decision was no longer good law—No review is permissible.*

A judgment cannot be reviewed under O. 47, R. 1 (1), on account of some mistake or some error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, as, for instance, when the judgment is based on a precedent which has been modified by a subsequent decision. Even assuming that the dicovery of an authoritative precedent, by which a precedent relied on in a judgment has been modified amounts to the discovery of new and important evidence within the meaning of O. 47, R. 1 (1), such a discovery is not a ground for review without strict proof that the subsequent authority was not within the knowledge of the applicant, or would not be produced by him when the decree or order was passed or made. 3 *Patna* 134 and 1922 *P. C.* 112. (*Baker, J. C.*) ATMARAM *v.* PUNJAL RAO. **87 I. C. 1029 : A. I R. 1925 Nag. 384.**

———O. 47, R. 1 (1)—*Mistake or error—Alleged mistake a wrong exposition of law—Review is not competent.*

A judgment cannot be reviewed under O. 47, R. 1 (1), on account of some mistake or error apparent on the face of the record when the alleged mistake or error is a wrong exposition of law. 1924 *Patna* 250 *Foll.* (*Baker, J. C.*) JAGANNATH *v.* SHRINIVAS. **88 I. C. 112 : A. I. R. 1925 Nag. 362.**

———O. 47, Rr. 1 and 2—*Mistake or error—Direction as to payment of decretal money to a wrong person is not a mistake apparent on the face of decree.*

Where decree was in consonance with the judgment but there was the erroneous direction in the judgment that the pre-emption price should be paid to defendant No. 1 instead of defendant No. 3, *Held* that it may be a mistake or error apparent on the face of the record such as is referred to in Rule 1, Order 47 but it certainly is not a clerical mistake apparent on the face of the decree, in the case of which an application for review to the successor of the Judge who passed the order is not prohibited. (*Kotval, A. J. C.*) BALIRAM PIRAJI *v.* YESHWANTA M. A. MT. TULSI. **75 I. C. 829 : A I. R. 1924 Nag. 190.**

———O. 47, R. 1—*Mistake or error—Suit decided without examining plaintiff—Error is apparent on record.*

The decision of a case, merely on the ground that the defendants had not proved their title and without considering whether the plaintiff had proved his title was held an error apparent on the face of the record, rendering review permissible. (*Ashworth, A. J. C.*) SHEO MANGAL SINGH *v.* JAGMOHAN SINGH. **12 O. L. J. 30 : 86 I. C. 29 : A. I. R. 1925 Oudh 329.**

———O. 47, R 1—*Mistake or error—Mesne profits claimed—No evidence adduced by either party—Claim dismissed—Review of dismissal was refused is no ground for review.*

Where the question was as to the amount of mesne profits for a certain year to be awarded to the

C. P. CODE (V OF 1908), O. 47, R. 1—Mistake or Error.

plaintiff and the Court dismissed the claim as there was no evidence adduced by either party on the point, and where in a petition for review of the decision, it was contended that as the opposite party was admittedly in possession, the burden of proving the value of the crops was on them and that the Court made an error of law in deciding as it did. *Held*: that the question as to whether the decision was right or wrong might be a matter for argument, but there was not any mistake or error apparent on the face of the record within the meaning of O. 47, R. 1. (*Das and Ross, JJ.*) ABDUL GANI *v.* SITO SINGH. **6 P. L. T. 40 : 86 I. C. 143 : A. I. R. 1925 Pat. 368.**

——0. 47, R. 1—*Mistake or error—Judgment on a wrong view of the law—Full Bench decision not noticed.*

It is not a sufficient ground to order a review that the decision of the court was based on a view of the law which had been overruled by a Full Bench decision, but which had not been taken to the notice of the court by the pleader appealing in the case. (*Miller, C. J. and Mullick, J.*) SM. GARABINI KUMARI *v.* SURAJ NARAIN SINGH. **3 Pat. 134 : 5 Pat. L. T. 52: 1923 P. H. C. C. 361 : 75 I. C. 177 : A. I. R 1924 Pat. 250.**

——0. 47, R. 1—*Mistake or error.*

Where there is no mistake in computing the period of notice but only an error in law, in holding that 15 days from the 17th to the 31st inclusive of the month were sufficient, there is no sufficient ground for review. (*Adami, J.*) AKSHY KUMAR BHATTACHARJEE *v.* AGARWALA. **A. I. R. 1922 Pat. 308. (1).**

——0. 47, R. 1 (c)—*Mistake or error—Probate proceedings—Party's advocate conveying an impression to the Court that applicant was not intending to contest—Consent order passed by Court under mis-apprehension—Review was allowed.*

On the day on which orders for the grant of letters were passed, advocate for one of the parties conveyed to the Court the impression that his client did not contest the right of the other party to letters. It appeared, however, that, in fact, the client had given no consent, and, in his written objections, he quite clearly contended that the other party had no legal right to the Letters. It further appeared that the advocate did not intend to agree to a consent-order and in passing orders for the grant of Letters, the Court was acting under a mis-apprehension as to the attitude of the parties. *Held*: that that provided a sufficient reason for review analogous to the discovery of new and important matter or evidence, or a mistake apparent on the face of the record. (*Carr and Brown, JJ.*) KYONE HOE *v.* KYON SOON SUN. **3 Rang. 261 : A. I. R. 1925 Rang. 314.**

——0. 47, R. 1—*Mistake or error—Sufficient reason—Exposition of law by a superior court contrary to that applied, after the judgment, is no ground for review.*

Discovery by a Judge that he was in error on a point of law could not be a discovery of new and important matter or evidence because the law itself is always the same and the discovery by the Judge subsequent to the delivery of the Judgment that his Judgment is not in accordance with the true interpretation of the law or any statute which is in existence cannot be held to be a discovery of new and important matter of evidence. Nor is it possible to suppose that a mistake or error apparent on the face of the record. That a Judgment is found to be erroneous on a point of law as expounded by a superior court subsequent to the Judgment is not sufficient reason to grant a review of the Judgment. (*Kennedy, A. J. C.*) SALLEH MAHOMED UMOR DOSSAL *v.* NATHUMAL KISSAMAL. **78 I. C. 593 : A. I. R. 1925 Sind 53.**

C. P. CODE (V OF 1908), O. 47, R. 1—New Evidence.

——0. 47, R. 1—*Error of law—If ground for review.*

Where the view of law on which a judgment is based is subsequently overruled by a superior tribunal that is no ground for a review. (*Kennedy, A. J. C.*) SALLEH MAHOMED UMOR DOSSAL *v* NATHUMAL KISSAMAL. **78 I. C. 593 : A.I.R. 1925 Sind 53.**

New Evidence.

——0. 47, R. 1—*Additional evidence cannot be admitted merely because the evidence is such as to justify grant of review.*

An appellate Court as such has no jurisdiction to admit fresh evidence merely on the ground that it has been discovered by one of the parties to a litigation under such circumstances as would warrant an application for review of judgment under O. 47, R. 1. (*Piggott, J.*) BALDEO RAM *v.* KUNKUN RAM. **L. R. 6 All. 393 (Civ.) : 88 I. C. 586 : A. I. R. 1925 All. 808.**

——0. 47, R. 1—*New Evidence—Point not raised at trial cannot be raised in review.*

A party ought not to be allowed in review to raise a case which was never raised at the trial, and on which no evidence was adduced. (*Sulaiman and Daniels, JJ.*) MODHORI SARAN *v.* PARBATI. **23 A. L. J. 534 : 88 I. C. 653 : L. R. 6 A. (Civ.) 454 : A. I. R. 1925 All. 552.**

——0. 47, R. 1—*New evidence—Second appeal.*

The High Court cannot, in a second appeal, entertain an application for review of judgment based on the ground that since the disposal of the appeal, documentary evidence has been discovered, which, if sufficiently proved, would have led the court below to come to a different finding, although had such evidence been discovered before the disposal of the appeal the court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate court for a review of judgment on the discovery of fresh evidence. 32 A. 71 Foll. (*Lindsay and Rafique, JJ.*) MARIAM UN-NISSA BIBI *v.* BABU RAM. **45 A. 458 : 21 A. L. J. 377 : L. R. 4 All. 416 : 73 I. C. 1016 : A. I. R. 1923 A. 541.**

——0. 47, R. 1 and 0. 41, R. 11—*New evidence—Dismissal of second appeal—Review.*

The High Court will not accept a review of a judgment in a second appeal dismissed under O. 41, R. 11, C. P. Code, on the ground that new evidence to prove a fact has been discovered. 41 C. 809 foll. (*Sanderson, C. J. and Richardson, J.*) SRILABALA DEI *v.* GADADHAR. **36 C.L J. 76 : 27 C. W. N. 918 : 70 I. C. 408 : A. I. R. 1922 Cal. 165.**

——0. 47, R. 1—*New evidence—Subsequent decision is no ground.*

A judgment delivered after the passing of the decree sought to be reviewed is no material on which an application for review can be based; for the new and important matter alleged to have been discovered must have existed at the date of the decree. 24 M. 1; 50 C. 119 foll. 51 I. C. 625, dist. (*Newbould, J.*) KALI PRASANNA GUHA CHOUDHURI *v.* BHAGABATI DEBYA. **64 I. C. 324 (C).**

——0. 47, R. 1—*New evidence—"Or could not be produced by him at the time"—Meaning of.*

The words "or could not be produced by him at the time" in O. 47, R. 1, C. P. Code, must refer to the words which precede, namely "was not within his knowledge." The whole clause means that the new and important matters alleged by the applicant were

C. P. CODE (V OF 1908), O. 47, R. 1—Order for review, Effect of.

not within his knowledge and as such could not have been produced by him at the trial. (*Das and Macpherson. JJ.*) RAMESHWARDHARI SINGH *v.* SADHO SARAN SINGH. **A. I. R. 1924 Pat. 809.**

Order for review, effect of.

——**O. 47, R. 1**—*Order for review, effect of—Application for—Aamission of—Effect on judgment sought to be reviewed.*

When an application for a review of judgment is admitted and review is ordered, the judgment sought to be reviewed is not set aside but only held in suspense until the case has been reheard. (*Macleod, C. J. and Crump, J.*) ACHYUT VISHNU PATANKAR *v.* TAPIBAI KRISHNAJI. **48 Bom. 210 : 26 Bom. L. R. 103 : 79 I. C. 753 : A. I. R. 1924 Bom. 310.**

——**O. 47, R. 1**—*Order for Review, effect of—Application for—It re-opens questions already decided.*

The question whether an application for review gives fresh starting point of limitation for a declaratory suit depends upon whether the application re-opened the question already decided. A review of judgment is not an ordinary process and does not of necessity re-open questions already decided between the parties. The matter in issue is only re-opened when the application for review is accepted unlike a petition in appeal. (*Dalal, A. J. C.*) BHAGWAN BAKSH SINGH *v.* MANRAK KUNWAR. **24 O. C. 280 : 8 O. L. J. 3 : 66 I. C. 205 : A. I. R. 1922 Oudh 148.**

Other sufficient Reason.

——**O. 47, R. 1**—*"Other sufficient reason," meaning of.*

Rule 1 of the Order 47 must be read as in itself definite of the limits within which review is, under the new Code, permitted and reference to practice under former and different statutes is misleading. So constructing the words, " any other sufficient reason " are to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. Such an interpretation of other grounds of appeal which have not been decided by a former Bench or Judge being immaterial. (*Viscount Haldane,*) CHHAJU RAM *v.* NEKI. **3 Lah. 127 : 30 M. L. T. 295 : 26 C. W. N. 697 : 16 L. W. 37 : L. R. 3 P. C. 109 : 41 P. L. R. 1922 : 36 C. L. J. 459 : 4 U. P. L R. (P. C.) 99 : 49 I. A. 144 : 24 Bom. L. R. 1238 : 3 P. L. T. 435 : 17 P. W. R. 1922 : 72 I. C. 566 : A. I. R. 1922 P. C. 112 : 43 M. L. J. 332 (P. C.).**

——**O. 47, R. 1**—*'Other sufficient reason' is not limited to matters* ejusdem generis *with matters in earlier part of the rule—The words provide for exceptional cases.*

The words 'for any other sufficient reason' in O. 47, R. 1 need not be restricted to matters which are strictly *ejusdem generis* with those referred to in the earlier part of the rule. On the contrary, the words are not only very wide in themselves, but are intentionally so made by the legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed. (*Mears, C. J. and Piggott, J.*) NARAIN DAS *v.* CHIRANJI LAL. **47 All. 361 : 23 A. L. J. 56 : L. R. 6 A. (Civ.) 159 : 86 I. C. 168 : A. I. R. 1925 All. 364.**

——**O. 47, R. 1**—*Other sufficient reason—Compromise decree obtained by wrongful confinement and extortion.*

The expression "for for any other sufficient reason" in O. 47, R. 1 of the C. P. Code must be taken to refer to something *ejusdem generis* with the words

C. P. CODE (V OF 1908), O. 47, R. 1.—Other sufficient reason.

that precede. An application to set aside a compromise of a suit on the ground that it was obtained by wrongful confinement, extortion and coercion does not fall within O. 47, R. 1 of the C. P. Code. (*Piggott, J.*) BABU DWARKADHISH PRASAD SINGH *v.* MAHARAJA KESHO PRASAD SINGH. **46 A. 245 : 22 A. L. J. 118 : L. R. 5 A. 46 : 82 I. C. 1022 : A. I. R. 1924 All. 398.**

——**O. 47, Rr. 1 and 7**—*"Other sufficient cause."*

The "discovery of new and important evidence" in O. 47, R. 1, C. P. Code would refer only to a discovery made since the order sought to be reviewed was passed. If an application for review is vague and general on this point and yet the court grants a review, it may be taken to have formed the existence of "other sufficient cause" within O. 47, R. 1, but in the latter case there would be no appeal. (*Piggott and Walsh, JJ.*) MT. TIRBENI KUNWAR *v.* MOHAN LAL. **L. R. 3 A. 251 : 66 I. C. 558 : A. I. R. 1922 All. 366.**

——**O. 47, R. 1 and O. 9, R. 8**—*Other sufficient reason—Dismissal under O. 9, R. 8—Remedy by review is not competent.*

A plaintiff whose suit has been dismissed for want of appearance under O. 9, R. 8, has no remedy by way of review : [49 I. A. 144. Foll.] The words "any other sufficient reason " in sub-section (1) mean a reason sufficient on grounds at least analogous to those specified in the rule. The fact that the applicant was absent when the suit was called on is not a ground analogous to any of those specified in the rule. (*Macleod, C. J. and Coyajee, J.*) MAHADEO GOVIND *v.* LAKSHMINARAYAN RAMNATH. **27 B. L. R. 1150 : 90 I. C. 610 : 49 Bom 839 : A. I. R. 1925 Bom. 521.**

——**O. 47, R. 1**—*Other sufficient reason—Discretion of Court.*

The expression " any other sufficient reason " in O. 47, R. 1, C. P. Code, must be interpreted to mean a reason sufficient on grounds at least analogous to those specified immediately previously. Whether any analogy can be discovered between the two grounds specified, namely, the discovery of new and important matter or evidence and some mistake or error apparent on the face of the record need not be considered. But the question whether a particular reason is analogous to either the one or the other of these two grounds, may obviously lead to very refined if not settled arguments. The discretion of the Court in saying what is sufficient reason within the meaning of O. 47, R. 1 of C. P. Code is not so rigidly circumscribed that an analogy must in every case be discovered between the two grounds above specified. (*Mookerjee and Chotzner, JJ.*) KUMAR GOPIKA RAMAN RAY *v.* MAHAR ALI. **39 C. L. J. 247 : 81 I. C. 738 : A. I. R. 1924 Cal. 872.**

——**O. 47, R. 1**—*Other sufficient reason—Negligence of party or pleader—When sufficient—Government as a party not entitled to special consideration—Adjournment—Grounds for, to be made out—Not to be claimed as a matter of course.*

Petitioner applied for probate of a will. The respondent, the Collector, representing the Secretary of State, moved the Court for an enquiry under S. 19 (*h*) of the Court Fees Act as to the true valuation of the estate. The case was adjourned several times and on the date last fixed for hearing the Government Pleader examined two witnesses who did not advance his case. The Government Pleader was not ready with any further evidence and the Court dismissed the case. Thereupon the Collector applied for review on the ground that the Government Pleader expected a short adjournment of the case and that the matter involved a question relating to the public revenue.

C. P. CODE (V OF 1908), O. 47, R. 1—Other sufficient reason.

The Court below granted a review. *Held*, that no sufficient case had been made out for review and that the order of the Court below was bad. Under the words "other sufficient reason" in O. 47, R. 1, C. P. Code, the reason must be one having sufficiency of a kind analogous to the two specified cases, that is to say, analogous to excusable failure to bring to the notice of the court new and important matter or analogous to error on the face of the record. 6 A.W.N. 697, Foll. It is not the law that in almost every case where there was some little excuse for a manifest negligence the Court would be entitled to re-open the matter by granting a review. It is not the duty of the lower Courts to maintain, still less to interest any special practice as regards the grounds upon which adjournments of cases are given. The notion is erroneous that parties whose cases are fixed have a sort of right to get adjournments without any reason being given provided that somebody else undertakes to keep the Court busy.

Obiter: The Court should treat a vakil appearing for the Government with the same stringency as, but with no greater stringency than any of the other vakils appearing for other litigants. (*Rankin and Ghose, JJ.*) BINDUBASHINI ROY CHOWDHURY *v.* SECRETARY OF STATE FOR INDIA. **40 C. L. J. 163 : 51 C. 70 : A. I. R. 1924 Cal. 774.**

——— **O. 47, R. 1**—*Other sufficient reason—Consistency—Decree not signed.*

Where to be consistent in the decree finally passed, the court has to pass orders under O. 41, R. 33, the same relief can be given in a petition put in by way of review. Much more so will it be the case when the decree itself has not been signed. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR *v.* NUMMACHI REDDIAR. **74 I. C. 416 : 17 L. W. 254 : A. I. R. 1923 Mad. 392.**

——— **O. 47, R. 1**—*Other sufficient reason—Meaning of.*

The phrase 'or for any other sufficient reason' means that the reason must be one sufficient to the Court before whom the application for review is made. (*Drake Brockman. J. C.*) GANGABAI *v.* GHASARAM. **62 I. C. 253 (Nag). : 4 N. L. J. 16.**

——— **O. 47, R. 1 (1)**—"*Other sufficient reason*"—*Want of opportunity to plaintiff to rebut defendant's evidence is sufficient ground.*

Where a Court granted a review on the ground that the plaintiffs were deprived of their right to rebut certain evidence which the other side had produced. *Held*, that that would be a "sufficient reason" within the meaning of O.47, R.1. sub-rule (1) (*Wazir Hasan, A. J. C.*) KUNJAN *v.* CHANDRA HAS. **11 O. L. J. 682 : 84 I. C. 515 : 28 O. C. 4 : A. I. R. 1925 Oudh 266**

——— **O. 47, R. 1**—*Other sufficient reason—Appeal dismissed—Non-payment of printing fees—Application set aside—One by way of review.*

Where an appeal is dismissed for non-payment of printing fees, the appropriate remedy to set aside the dismissal is by way of review and not under O. 41. R. 19. If the person shows good cause for not paying printing fees, it will fall under "other sufficient cause". (*Mullick and Kulwant Sahay, JJ.*) ANANT POTDAR *v.* MANGAL POTDAR. **4 Pat. 704.**

——— **O. 47, R. 1, and Ss. 151, 148, 149 and 114**—*Other sufficient cause-Deficit Court-fee not paid due to treachery of pleader's clerk—Plaint rejected—Application to restore, lies.*

If the statute says that a thing should not be done, S. 151 cannot vest the Court with the power to direct that it should be done: but when and where there is doubt and difficulty in applying the other provisions of the code to the facts of a particular case, S. 151, would apply. The deficit Court-fee demanded by the Court was paid by the plaintiff to the pleader who handed it to his clerk to put it in Court. The Clerk mis-appropriated the money and filed bogus applications for time to pay the deficit court-fee with the result that the court, being tired of such applications, ultimately rejected the plaint. The plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file. *Held*, that the suit must be restored to file. After having paid the money to a duly constituted agent and an officer of the Court under the Legal Practitioners Act and the rules of the High Court, whose duty it was to deposit in Court, the responsibility of the plaintiff ceased until he was informed of the default made by the Pleader or his clerk. (*Jwala Prasad and Kulwant Sahay, JJ.*) ADIT PRASAD SINGH *v.* RAMHARAKH AHIR. **4 Pat. 180 : (1925) P. H. C. C. 147 ; A. I. R. 1925 Pat. 435 (2).**

——— **O. 47, R. 1**—"*Other sufficient reason*"—*Omission to refer to documentary evidence.*

For review there should be more than simple non-reference by the Judge to evidence in favour of either party. (*Miller, C. J. and Kulwant Sahay, J.*) RAGHU SINGH *v.* MAHANT KRISHNA DAYAL GIR. **2 P. 765 : A. I. R. 1924 Pat 258 (2).**

Power of Court.

——— **O. 47, R. 1 and O. 41, R. 11**—*Power of Court—Review after dismissal of appeal.*

Where an appeal against a judgment to the High Court is dismissed under O. 41, R. 11, the District Court cannot deal with an application for review of the same judgment. (*Macleod, C. J. and Shah, J.*) SHIVAPPA PASSA SAVADE *v.* RAMCHANDRA NARSIMH. **23 Bom. L. R. 597 : 63 I. C. 910 : 46 Bom. 1 : A.I.R. 1922 Bom. 130.**

——— **O. 47, R. 1**—*Power of Court*—Ex parte *order for delivery of property—Review is permissible.*

A Court can review its own order passed *ex parte* for the issue of a writ of delivery of possession of property. If possession is delivered in accordance with the earlier order, the later order will invalidate the delivery. 2 All.686 Rel. on. (*Greaves and Mukerji, JJ.*) RASH BEHABI MANDAL *v.* HEMANTA KUMAR. **41 C L. J. 349 : 88 I.C. 921 : A.I.R. 1925 Cal. 1023.**

——— **O. 47, R. 1, Ss. 115 and 151**—*Power of Court-Lower Court competent to extend time on a review application—Extension granted on application for extension is valid.*

If Court had jurisdiction to extend time upon an application for review, there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. (*Kulwant Sahay, J.*) MT. RAM KUMARI *v.* DEONANDAN SINGH. **(1925) P. H. C. C. 151 ; 90 I. C. 79 : A. I. R. 1925 Pat. 452.**

——— **O. 47, R. 1**—*Power of Court—Order of rejection of plaint.*

There is complete power in the Court under Order 47, Rule 1 to review the Order passed by it in rejecting the plaint under Order, 7, Rule 11 (c). (*Das and Kulwant Sahay, JJ.*) RAMESHWARDHARI SINGH *v.* SADHU SARAN. **2 P. 504 : 72 I. C. 629 : 4 P. L. T. 261 : A. I. R. 1923 Pat. 354.**

Miscellaneous.

——— **O. 47, R. 1**—*Appeal filed after application for*

C. P. CODE (V OF 1908), O. 47, R. 1—Miscellaneous.

review.

O. 47, R. 1, does not apply where after filing an application for review the opposite party prefers an appeal. (*Walsh and Ryves, JJ.*) GAURI SHANKAR *v.* JAGANNATH. **63 I. C. 841 (1) (All.).**

——— **O. 47, R. 1, and O. 41, R. 11**—*Review after dismissal of appeal.*

Where an appeal against a judgment to the High Court is dismissed under O. 41, R. 11 the District Court cannot deal with an application for review of the same judgment. (*Macleod. C. J. and Shah, J.*) SHIVAPPA PASSA SAVADE *v.* RAMACHANDRA NARSIMH. **46 Bom. 1 : 23 Bom. L. R. 597 : 63 I. C. 910 : A. I. R. 1922 Bom. 130.**

——— **O. 47, R. 1**—*Review—Notice to the opposite side.*

A court is not entitled to review its prior order without notice to the other side. (*Odgers, J.*) KOMMAREDDI RAMACHANDRAYYA *v.* VENKATARATNAM. **22 L. W. 582 : (1925) M. W. N. 804.**

——— **O. 47, R. 1 and O. 41, R. 11**—*Summary rejection of appeal—Good ground for review.*

Summary rejection of an appeal as time-barred without fixing a date for hearing the appellant and hearing him, if he appears, is in contravention of the law and forms a good ground for review within Order 47, Rule 1 of the Code of Civil Procedure. (*Simpson, A. J. C.*) SRIPAT *v.* HUBDAR. **2 O. W. N. 678 : 90 I. C 115 : A. I. R. 1925 Oudh 643.**

——— **O. 47, R. 1**—*Appeal pending—Effect of.*

Where an appeal from a decree is pending, there is no necessity for granting a review of the decree. If however the review is granted, the appeal becomes incompetent. (*Dalal, J. C.*) GHUTUR SINGH *v.* PHULANG SINGH. **90 I. C. 119.**

——— **O. 47, R. 1**—*Order passed by Registrar—Application must be made to him.*

Where an order under S. 41, Presidency Towns Insolvency Act, was made by the Registrar in Insolvency, an application for review of his order must be made to the Registrar and not to the Court. (*Greaves J.*) MEGHRAJ PUROHIT (INSOLVENT) *In re.* **27 C. W. N. 916 : A. I. R. 1924 Cal. 83.**

——— **O. 47, R. 2**—*Transfer of judge to another Court ousts his jurisdiction to grant review.*

Rule 2 declares that in cases other than those excepted therein an application for review can only be made to the Judge who is not only sitting as the same Court, but is further the individual Judge who passed the decree. If, in such cases, the individual Judge is transferred to another Court he has no jurisdiction to entertain the review application. (*Boys and Banerji. JJ.*) RAM CHARAN CHAUBE *v.* BHAGWATI PANDEY. **23 A. L. J. 674 : L. R. 6 A. (Civ.) 372 : 89 I. C. 295 : 47 All. 751 : A. I. R. 1925 All. 804.**

——— **O. 47, R. 2**—*Decree in accordance with judgment—Clerical mistake—Review by successor.*

In a pre-emption suit, the money was directed to be given to a wrong person and the decree was passed in pursuance of the judgment. An application for review was made to the successor of the Judge who passed the decree. *Held*, the erroneous direction in the decree as to the person to whom the pre-emption price was to be paid was not a clerical mistake apparent on the face of the decree under O. 47 R. 2 and the successor in office cannot entertain such an application. (*Kotval A. J. C.*) BALIRAM PIRAJI *v.* YESWANT. **A. I. R. 1924 Nag. 190.**

——— **O. 47, R. 2**—*Review by successor in office—Grounds for.*

Where a decree that is sought to be reviewed was

C. P. CODE (V OF 1908), O. 47, R. 4

passed by the predecessor in office of the Judge hearing the same there must be new and important matter which could not have been produced at the original trial. (*Das and Macpherson, JJ.*) RAMESHWARDHARI SINGH *v.* SADHO SARAN SINGH. **A. I. R. 1924 P. 809.**

——— **O. 47, R. 3**—*In revision against order granting review of judgment plea that review application was not accompanied by copy of decree and Court-fee was insufficient is not valid.*

Where in revision against an order granting a review of judgment it was objected that the review application was not accompanied by a copy of the decree and the Court-fee paid was insufficient, *Held*, that after the whole matter had been gone into and finally decided the High Court would not treat the proceedings as a nullity in revision on either of the grounds. (*Sulaiman and Daniels, JJ.*) MT. SALIMAN *v.* ABDUL AZIZ. **L. R. 6 A. (Civ.) 424 : A. I. R. 1925 All. 777.**

——— **O. 47, R. 3**—*A refusal to restore an application for review when the application to restore has been heard on the merits, is not appealable—C. P. Code, O. 43, R. 1. (t).*

The marginal note to O. 47, R. 3 describes the rule as one really relating to the form of application and the rule itself says that the provisions of the appellate rules shall apply to forms in applications for review. That does not extend the right of the party who goes for a review—and give him a right of appeal simply because, under R. 1 (t) O. 43, an order under R. 19 of O. 41, *i. e.*, an ordinary appellate order, is made appealable. (*Walsh, A.C.J. and Ryves, J.*) GIRDHARI LAL *v.* ZORAWAR SINGH **L. R. 5 A. (Civ.) 608 : 80 I. C. 950 : 47 All. 1 : A.I.R. 1925 All. 57.**

——— **O. 47, Rr. 4 and 7**—*Order granting an application for review—Appeal conditions.*

The right of appeal under R. 1 (*w*), is subject to conditions laid down by O. 47, R 7, and therefore an appeal, not coming under this rule, cannot be maintained. (*Piggott and Kanhaiya Lal. JJ.*) SUNDER *v.* HABIB CHICK. **42 All. 626 : 18 A. L. J. 838 : 60 I. C. 81 : 2 U. P. L. R. (All.) 283.**

——— **O. 47, Rr. 4 and 7**—*Review—Grant of application—Powers of appellate court.*

Where the Court of first instance grants an application for review on the ground of discovery of new not important evidence not within the knowledge or power of the applicant at the time of the trial, the appellate court will not generally consider the evidence afresh and disturb the conclusion of the lower court. (*Teunon and Newbould, JJ.*) AMBIKA CHARAN HAZRA *v.* BHANI RAM RATHI. **64 I. C. 219. (C).**

——— **O. 47, R. 4**—*Absence of notice—Effect.*

Where the defendant was given every opportunity to raise any objection that he could raise and he is in no way, therefore, prejudiced by reason of the fact that no notice was issued to him, *Held*, the order granting review should not be set aside by the appellate Court. 237 P L. R. 1913 Appr. (*Abdur Raoof, J.*) THE FIRM OF GOPAL MAL GANDA MAL *v.* HIRA CHAND. **75 I. C. 656 : A. I. R. 1923 Lah. 303.**

——— **O. 47, R 4 and O. 41, R. 27**—*If mutually exclusive—Application can be disposed of even at a preliminary stage—Opportunity to rebut.*

The provisions of O. 41, R. 27 and O. 47, R. 4 are not mutually exclusive and without resorting to an application for review in the Trial Court, an appellant can apply for additional evidence being let in, in appeal. When a party applies for such purpose, the appellate Court can make an order even before the hearing of the appeal, while in cases where the Court

C. P. CODE (V OF 1908), O. 47, R. 4

decides *suo motu* to call for additional evidence, it does so only at the final hearing of the appeal. Under proper circumstances, the other side can be allowed to let in evidence to rebut the same. (*Venkatasubba Rao, J.*) BRAHMA SUBBAYYA *v.* KANALA RANGA RAO. **20 L. W. 840 : A. I. R. 1925 Mad. 181 : 48 M. L. J. 32**

——**0. 47, R. 4 and S. 115**—*Discretion—Review—Refusal to grant—Revision.*

The grant of review is a matter peculiarly within the discretion of the Judge who passed the decree and a Court would not interfere in revision with the exercise of such discretion when a review has been refused. (*Daniels, A. J. C.*) JAG MOHAN SINGH *v.* MATAI BADAL. **9 O. L. J. 623 : 74 I. C. 351 (1) : A. I. R. 1923 Oudh 153.**

——**0. 47, Rr. 4 and 8**—*Dismissal of application after review is granted is not proper.*

The granting of an application for review merely amounts to a decision to rehear the case in which the decree or order (in respect of which a review is claimed) was passed. The Judge hearing the review is not entitled to anything in the first stage beyond passing an order granting the review and giving his reasons for so doing. If the review is granted, the Judge who has allowed the review becomes vested with jurisdiction to pass any order which the original Judge could have passed. It may be sufficient for him merely to alter the order of original Judge or it may be necessary for him to take some intermediate step such as an order in remand or referring an issue. When once an application for review is granted, an order dismissing the application for review is wrong and cannot be ignored. (*Ashworth and Simpson, A. J. Cs.*) BHAGWATI PRASAD *v.* ACHHAIBAR SINGH. **9 O. L. J. 531 : 74 I. C. 214 : 26 O. C. 24 : A. I. R. 1923 Oudh 93.**

——**0. 47, Rr. 4 and 7**—*Order granting review is appealable.*

An order granting a review on the ground that the view of the law taken was contrary to a Full Bench decision which had not been taken to its notice, is appealable. (*Miller, C J. and Mullick, J.*) SM. GARABINI KUMARI *v.* SURJA NARAIN SINGH. **3 Pat. 134 : 75 I. C. 177 : 5 Pat. L. T. 52 : 1923 P. H.C C. 361 : A. I. R. 1924 Pat. 250.**

——**0. 47, R. 4 (a)**—Ex parte *order on review setting aside summary dismissal of appeal was held valid.*

Where an appeal was at first summarily dismissed under O. 41, R 11, C. P. Code, and then on an application for review made by the appellant, the same Bench cancelled that order dismissing the appeal summarily and directed that the appeal should be heard. *Held*, that though this order was passed *ex parte*, it was valid. 42 Cal. 433, Diss from, 43 Cal. 178, Foll. (*Newbould and B. B. Ghose, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* BENODE BEHARI GHOSE MAL. **51 Cal. 943 : 84 I. C. 147 : A. I. R. 1925 Cal. 114.**

——**0. 47, R. 4 (2), Pro. (a)**—*Opposite party—Restoration of appeal under O. 41, R. 19.*

The expression "opposite party" in Pro. (*a*) is not restricted to cases in which such party has actually appeared before the Court, but it means the party interested to support the order or decree sought to be set aside on review. Where an appeal has been dismissed for not making good the stamp in the prescribed time, the appeal cannot be restored under O. 41, R. 19 nor under O. 47, R. 4 (2), Pro. (*a*) without notice to the opposite party. But if the case is dealt with, without notice to the opposite party, he is

C. P. CODE (V OF 1908), O. 47, R. 7.

entitled to a hearing even in second appeal, as soon as the matter has been brought to his knowledge. (*Miller, C. J. and Coutts, J.*) SURAJPAL PANDEY *v.* UTIM PANDE. **1921 P. H. C. C. 337 : 63 I. C. 99 : 3 P. L. T. 117 : A. I. R. 1922 Pat. 281.**

——**0. 47, R. 4 (2) (b)**—*Discovery of old sale deed—Appellate Court not deciding if it related to land in dispute but granting review and remanding case for decision of issue on merits after allowing opposite side to rebut the evidence—Order was held justified.*

An appellate Court granted an application for review on the ground of the discovery of a certain old sale deed relating to the land in dispute. But the Court did not decide whether the sale deed exactly referred to the land in dispute It considered *pima facie* that it did appear to refer to the land, but sent back the case for decision of the issue on the merits after allowing the opposite side to produce rebutting evidence. *Held*: that under the circumstances this was a proper order to pass. (*Sulaiman and Daniels, JJ.*) MADHORI SARAN *v.* PARBATI. **23 A. L. J. 534 : 88 I. C. 653 : L. R. 6 A. (Civ.) 454 : 47 A. 881 : A. I. R. 1925 All. 552.**

——**0. 47, Rr. 4 (2) (b) and 1**—*Strict proof of new matter not having been in applicant's knowledge at the time of decree is essential.*

The Court has no power to grant review without calling for strict proof of the allegation that the new matter said to have been discovered was not within the knowledge of the applicant for review when the decree was passed. (*Wallace and Madhavan Nair, JJ.*) V. POTHARAJU *v.* MATTA ADISESHU. **21 L. W. 276 : 87 I. C. 391 : A. I. R. 1925 Mad. 578 (1).**

——**0. 47, R. 7**—*Grounds of appeal are strictly limited to R. 7.*

An appeal against an order granting a review of judgment is strictly limited to the ground set out in O.47, R. 7. Allowing an appeal on grounds not covered by O. 47, R. 7 is open to revision. 40 All. 68, Foll. (*Daniels, J.*) GUDRI SINGH *v.* PARSOTAM DAS. **L. R. 6 A. (Civ.) 157 : 86 I. C. 917 : A. I. R. 1925 All. 395.**

——**0. 47, R. 7**—*Appeal from order granting review—Grounds are limited to R. 7.*

Under O. 43, R. 1 an appeal is allowed against an order granting an application for review of judgment, but that rule is obviously controlled by the provisions of O. 47, R. 7. Taken together, the effect of the two rules is that, though an appeal against such an order lies, it must be supported only on the one or other of the grounds set forth in O. 47, R. 7 and must fail unless it can be brought within the scope of the grounds set forth in that rule. 27 A. 695, Ref. (*Mears C. J. and Piggott, J.*) NARAIN DAS *v.* CHIRANJI LAL. **47 All. 361 : 23 A. L. J. 56 : L.R. 6 A. (Civ). 159 : 86 I.C. 168 : A. I. R. 1925 All. 364.**

——**0. 47, R. 7**—*Review—Discovery of new and important evidence—Other sufficient cause.*

Where the new evidence alleged as the basis of a review application did not comply with the requirements of O. 47 R.1, the review cannot be admitted on the ground of other sufficient reason. (*Daniels, J.*) RAM NARESH SINGH *v.* JAGARNATH SINGH. **L. R. 5 A. 392 : A. I. R. 1924 All. 759.**

——**0. 47, R. 7**—*Order granting review—Appeal.*

An order granting a review of judgment cannot be questioned under any of the provisions of O. 47, R, 7, C. P. Code. (*Piggott and Walsh, JJ.*) MUNNU LAL *v.* KUNJ BEHARI LAL. **20 A. L. J. 517 : L. R. 3 A. 295 : 44 All. 605 :**

C. P. CODE (V OF 1908), O. 47, R. 7.

4 U. P. L. R. (A) 66 : 67 I. C. 317 : A. I. R. 1922 All. 206.

——0. 47, R. 7—*Insufficiency of reason for review is no ground for appeal.*

Under R. 7, the sufficiency or otherwise of the reason for granting a review is not a ground for appeal. (*Stuart, J.*) BENARSI *v.* ALTAB HUSAIN.

63 I. C. 171 (All.)

——0. 47, R. 7—*Scope—Order refusing review is not revisable.*

An order refusing to grant a review is not revisable under S. 115, C. P. Code. (*Macleod, C. J and Shah, J.*) LAKSHMAN MAKUTI *v.* MARUTI LAKSHMAN.

26 Bom. L. R. 284 : A. I. R. 1924 Bom. 344

——0. 47, R. 7—*Review granted—Appeal—Grounds for.*

An order granting an application for review can only be objected to in appeal only on the grounds mentioned in O. 47, R. 7. (*Greaves and Cuming, JJ.*) HARENDRA NATH CHAUDHURY *v.* SONA GAZI.

90 I. C. 504.

——0. 47, R. 7—*Decree given on one out of two grounds alleged in plaint—On review decree maintained on other ground—Whole case can be opened in appeal.*

Where a plaintiff bases his claim on two grounds and the Court decrees it on one of them only without discussing the other, but on a review application by the defendant, rejects the ground on which it had based its decision formerly and maintains the decree on the second ground in an appeal by the defendant, although his application for review was limited only to the first ground, the plaintiff can reopen in the Court of appeal the question concerning the second ground as well. (*Walmsley and Suhrawardy, JJ.*) O. S. MEAH *v.* DURGA CHARAN. **29 C. W. N. 1027 : 90 I. C. 456 : A. I. R. 1926 Cal. 243**

——0. 47, R. 7—*Appellate Court can interfere if review is not granted for reasons in R. 1—Review cannot be turned into rehearing—C. P. Code, O. 47, R. 1.*

The appeal is not limited to the grounds set out in O. 47, R. 7. O. 47, R. 7 expressly provides that when an application for review is granted the party dissatisfied with the order may appeal against that order or may take the same objection in an appeal filed against the final decree. Rule 7 read with Rr. 1 and 4 shows that it is open to the appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of R. 1, then the appellate Court is competent to hold that the review was improperly admitted A. I. R. 1922 P. C. 112, Foll. There can be no rehearing for the purpose of seeing whether a different conclusion on the merits should be adopted. (*Greaves and Chakravarti, JJ.*) NRITYA GOPAL *v.* JORIT MANJURI.

87 I. C. 770 : A. I. R. 1926 Cal. 217.

——0. 47, R. 7—*Refusal to restore review application.*

Order refusing restoration of an application for review dismissed in default is not appealable. (*Pearson and Graham, JJ.*) HEM SANKAR ROY CHOWDHURI *v.* NISHI KANTA DAS GUPTA. **81 I. C. 1017 : A. I. R. 1925 Cal. 430.**

——0. 47, R. 7—*Execution application—Dismissal for default—Order granting review—Notice is not necessary.*

Before the judgment debtor has been served with a notice if an application for execution is dismissed in default, the Court has power to restore the application without giving notice to the judgment-debtor. Even if the application for restoration is treated as one for review, notice to the judgment-debtor is not necessary.

C. P. CODE (V OF 1908), O. 47, R. 8.

(*Scott Smith, J.*) ABDUL KARIM *v.* CHAUDHRI RAMSINGH. **69 I C. 506 : A. I. R. 1924 Lah. 350.**

——0. 47, R. 7 and S. 152—*Application challenging system of calculation only granted—Nature of order.*

Where a Court purported to act under S. 152 on an application which challenged the whole system of calculation adopted by a Court but there was no allegation that there was an arithmetical or clerical mistake really, the order is an order under O. 47, R. 7 of the Code and an appeal lies from it. (*Wilberforce, J.*) RAMJI LAL *v.* GIYANI. **3 Lah. L. J. 341 : 66 I. C. 992 : 4 U. P. L. R. (Lah.) 54.**

——0. 47, R. 7—*Review—Order granting—Appeal against—Grounds of—Grounds specified in—Final decree—Appeal from—Scope of—Appellant if can argue appeal on its merits.*

An appeal against order granting review may be challenged only on one of the grounds specified in O. 47, R. 7, C. P. Code.

In an appeal from the final decree itself, if the grounds of appeal relate to the granting of the review, the grounds must be those that are set out in R. 7. The appellant will not, however, be precluded from arguing the appeal on its merits. (*Venkatasubba Rao, J.*) KOLACHINA VENKAT SEETHARAMAYYA *v.* VEENA TOLASI BABU. **(1924) M. W. N. 355 (1) : 34 M. L. T. 224 : 19 L. W. 649 : 83 I. C. 548 : (1) : A. I. R. 1924 Mad. 602 (2) : 46 M. L. J. 463.**

——0. 47, R. 7—*Decree not open to objection under R. 7—Leave cannot be granted under C. P. Code, S. 109 (c).*

Where a decree passed by the High Court on review was not open to objection on some ground recognised by O. 47, R. 7 the case cannot be certified as a fit case under C.P. Code, S. 109 (*c*). (*Wazir Hasan and Simpson, A. Js.*) JAGMOHAN SINGH *v.* SHEO MANGAL SINGH. **90 I. C. 332: A. I. R. 1926 Oudh 17 (2).**

——0. 47, R. 7—*No revision lies from order of Appellate Court upholding the grant of review by trial Court.*

Where the trial Court found that a decree had been given to a party as if he had been alive, when as a matter of fact he was known to be dead, and granted, an application for review on that ground and set aside the decree and the order was upheld in appeal, *Held*, that there was a mistake apparent on the face of the record and that the Appellate Court did not act without jurisdiction, or illegally or with material irregularity in upholding the order of the trial Court so as to justify interference. (*Kendall, A. J. C.*) RAM LAL *v.* RAM DHANI. **11 O. L. J. 700 : 87 I. C. 204 : A. I. R. 1925 Oudh. 223.**

——0. 47, R. 7 (1)—*Appeal—C. P. Code, O. 43, R. 1 (w).*

O. 47, R. 1 restricts the scope of O. 43, R. 1 (w) as regards grounds of appeal from an order granting review of judgment. (*Wazir Hasan, A.J.C.*) KUNJAN *v.* CHANDRA HAS. **11 O. L. J. 682 : 84 I. C. 515 : 28 O. C. 4 : A. I. R. 1925 Oudh 266.**

——0. 47, Rr. 8 and 11—*Review—Grant of—Appeal—Effect on original decree.*

A review commences ordinarily with an *ex parte* application. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage, the rule may either be admitted or rejected and it is obvious that the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached ; the case is reheard on the merits and may result in a repetition

C. P. CODE (V OF 1908), O. 47, R. 27.

of the former decree or in some variation of it Though, in one respect, the result is the same whether the rule be discharged or on the rehearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been reopened, there is a fresh decree : in the former case, the parties are relegated to and still rest on the old decree. Consequently the order appropriate to a discharge of the rule is the rejection of the application ; an order so made terminates the second stage of the proceedings, and there is no third stage for the rehearing of the case. When the application for a review is granted, the decree previously made is vacated, with the consequence that an appeal preferred against that decree can no longer be prosecuted. But the parties can appeal from the final decree passed on review. Cases reviewed. (*Mookerjee and Rankin, JJ.*) GOURKRISHNA SARKA *v.* NILMADHAB SHA. **36 C. L. J. 484 :73 I. C. 34 : A.I.R. 1923 Cal. 113.**

——**O. 47, R. 27**—*Inherent lacuna.*

Where any point is required to be cleared in the interest of justice an appellate Court has got power to take additional oral evidence. (*Mockejee and Ranfin, JJ*) BANK OF BENGAL *v.* W. A. LUCAS. **51 Cal. 185 : 28 C. W. N. 497 : 81 I. C. 471 : 41 C. L. J. 1 : A. I. R 1924 Cal. 578.**

——**O. 48, R. 1**—*No time fixed for payment of process fees—Dismissal—Propriety of.*

Under the new Code, the Court should in all cases fix a time for the payment of process fee and it is only in default of payment within the time fixed that it can dismiss the suit. Where no time is fixed in the order dismissal for non-payment of process fees is not proper. (*Kinkhede, A. J. C.*) AJODHYA PRASAD *v.* SECRETARY OF STATE. **A. I. R. 1924 Nag. 298.**

——**O. 48, R. 1 (2)**—*Order directing process to be paid "at once"—Propriety of.*

An order directing a party to a suit to pay process fees for witnesses "at once" is contrary to the spirit of the C. P. Code and to dismiss the suit for default because no witnesses appeared on account of process fees being paid late is to defeat justice. (*Kinkhede, A. J. C.*) PANDU *v.* RAJESHWAR. **20 N. L. R. 131 : 78 I. C. 996 : A. I. R. 1924 Nag. 271.**

——**Sch. I—Appendix D**—*Form No. 4—Subsequent mortgage held by same mortgagee at time of decree over other property—Form No. 4 does not apply.*

Form No. 4 given in appendix (d) of the first schedule of the C P. Code, would not be applicable in a case where there was a second mortgage which the mortgagee held at the time of the decree covering property other than that included in his first mortgage. The form must be construed to mean all documents relating to the mortgaged property and having reference to the mortgage in respect of which the decree is given. (*Wazir Hasan and Ashworth, A. J. C's*) BANSIDHAR *v.* JAGMOHAN DAS. **86 I. C. 748 : 12 O. L. J. 127 : A. I. R. 1925 Oudh 379. (2).**

——**Sch. II**—*Applicability—Rules under by U.P. Government—Rule 20—Reference to arbitration under Code—Rule does not cover.*

A reference to arbitration under the provisions of the second schedule of the Code is entirely distinct from the procedure contemplated by R. 20 of the Rules. (*Ryves and Daniels, JJ.*) GOPINATH *v.* RAM NATH. **23 A. L. J. 129 : L. R. 6 A. 208 (Civ.) : 86 I. C. 585 : 47 A. 374 : A. I. R. 1925 All. 356.**

——**Sch. II**—*Arbitration—Agreement to refer to—Withdrawal from.*

A party to an agreement to submit a matter to arbitration cannot, after the arbitrator proceeds to evi-

C. P. CODE (V OF 1908), Sch. II, Para. 1.

dence, withdraw from the arbitration. The Court cannot compel a private arbitrator to arbitrate against his will. (*Sulaiman and Kanhaiya Lal, JJ.*) BASUDEO MAL *v.* KANHAIYA LAL. **43 All. 101 : 59 I. C. 667 : 18 A. L. J. 952.**

——**Sch. II**—*Appointment of fresh arbitrators—Effect.*

An application to Court to appoint fresh arbitrators amounts to an abandonment of the previous proceedings. (*Macleod, C. J. and Coyajee, J.*) KHIMCHAND NAROTHAMDAS *v.* BHOGILAL HIRACHAND SHAH. **46 B. 854 : 67 I. C. 913 : 24 Bom. L. R. 361 : A. I. R. 1922 Bom. 436.**

——**Sch. II**—*Applicability.*

Where the parties intend that no further steps should be taken in Court and that the arbitration should be one without the intervention of Court, the rules in Second Schedule apply to such cases also. (*Newbould and Pearson, JJ.*) HEMCHANDRA *v.* JNANENDRA CHANDRA. **90 I.C. 624: A.I.R. 1926 Cal. 116.**

——**Sch. II and S. 141**—*Schedule does not apply to execution proceedings.*

The execution Court has no jurisdiction to refer the dispute between the parties to arbitration under the Second Schedule of the C P. Code. (*Suhrawardy and Cuming, JJ.*) T. WANG *v.* SONA WANGDI. **52 Cal. 559 : 42 C. L. J. 26 : 87 I. C. 633 : 29 C. W. N. 886 · A. I. R. 1925 Cal. 812.**

——**Sch. II, Paras. 1 and 15**—*Order of reference made—Court retains its power of superintendence—Award otherwise than in accordance with the order of reference is 'otherwise invalid' within S. 15.*

It is incumbent upon arbitrators acting under an order made in pursuance of paras 1 and 2 strictly to comply with its terms. The Court does not thereby part with its duty to supervise the Proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is an award which is "otherwise invalid" and which may accordingly be set aside by the Court uuder para 15. (*Lord Blanesburgh*). RAM PRATAB *v.* DURGA PRASAD. **3 O. W. N. 127 : A. I. R. 1925 P. C. 293 (P. C.) : 49 M. L. J. 812.**

——**Sch. II, Para. 1**—*Same arbitration cannot relate to matters within and without jurisdiction between parties and non-parties and partly under agreement and partly upon order of reference—C.P.Code, Sch. 2, para. 15.*

An award not contemplated or authorised by the order of reference is invalid. It is impossible according to the Statute Law of India that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court, between the parties to the suit and between them and other persons and partly upon an order of reference and partly under an agreement. (*Lord Blanesburgh*). RAM PROTAP *v.* DURGA PRASAD. **3 O. W. N. 127 : A. I. R. 1925 P. C. 293 (P. C.) : 49 M. L. J. 812.**

——**Sch. II, Para. 1**—*Pending suit—Reference to arbitration—Oral consent of both parties recorded by Court—Effect of.*

On the day of hearing of a suit the pleaders for both the parties stated that they had agreed to arbitration and wanted to refer the matter in dispute to a certain pleader named by them for decision. Their statements were recorded by the Court and a reference was made in accordance with their agreement. The arbitrator made an award. Subsequently it was objected that the award was bad because the agreement to refer was not in writing. *Held*, that the objection was unsustainable A record taken down of an oral state-

ment made by the parties or their pleaders is as much an agreement in writing as a written application made by the parties or their pleaders themselves. 27 C. 61; 30 A. 32 ; 43 C. 290 Ref. (*Kanhaiya Lal, J.*) MAHABIR *v.* MANOHAR SINGH.

46 A. 208 : 22 A. L. J. 67 : 79 I. C. 816 : A. I. R. 1924 All. 540.

——**Sch. II, Para. 1**—*Arbitration—Submission to, if "Spent itself."*

Where the defendant contended that there could be no arbitration upon the agreement because the submission therein contained had somehow "spent itself" in an arbitrator's abortive award or because his supplementary award was lying unadjudicated upon in the Court of the District Judge when the arbitration proceedings began. *Held*, the parties are under a binding agreement to refer the dispute to arbitration in accordance with the terms of agreement itself and the obligation continues until it has been carried out. (*Piggott and Walsh, JJ.*) B. SHUSHIL CHANDRA DAS *v.* SUKHAMAL BANSIDHAR. **20 A. L. J. 377 : 44 All. 472 : A. I. R. 1922 All. 219.**

——**Sch. II, Paras. 1 and 3 (2)**—*Validity of reference—Pending reference to High Court—Jurisdiction—Separate suit, if lies.*

During the pendency of a reference to the High Court under S. 17 of the Ajmere Courts Regulation, the Ajmere Court on an application by the parties, referred the case to arbitration and the award was made the rule of Court. A party dissatisfied with the award filed a suit to declare that the order of reference to arbitration was *ultravires* and proceedings under it void, *held*, that notwithstanding the reference to the High Court, the Ajmere Court had jurisdiction to refer the case to arbitration inasmuch as pending the answer by the High Court, to the reference, the suit was still pending judgment within the meaning of Para. 1 to Sch.II to the Code, *held*, also that no suit as here would lie under Para. 3 (2) of Sch. II to the Code. (*Walsh and Wallach, JJ.*) RAM LAL *v.* DEORAJ.

19 A. L. J. 876 : 64 I. C. 601 : 44 A. 91 : A. I. R. 1922 All. 173.

——**Sch. II, Para. 1**—"*Dispute*", *meaning of.*

Whether or not the Court can legally enquire into any question on which the parties join issue is a dispute within the meaning of Para. 1. (*Suhrawardy and Cuming, JJ.*) T. WANG *v.* SONA WANGDI.

52 Cal. 559 : 42 C. L. J. 26 : 87 I. C. 633 : 29 C. W. N. 886 : A. I. R. 1925 Cal. 812.

——**Sch. II, Para. 1**—*Parties—All persons interested in suit to be parties.*

Where all the persons interested in the subject-matter of the suit do not join in this application for reference to arbitration the Court has no jurisdiction to make the reference. 21 C. W. N. 387 relied on. (*Walmsley and Suhrawardy, JJ.*) HARA PRASANNA BANDOPADHYA *v.* ARAB ALI. **71 I. C. 326 : A. I. R. 1924 Cal. 353 (1).**

——**Sch. II, Para. 1**—*Parties—Omission of some of the parties to join—Validity of award.*

All the parties interested in a suit must join in the reference to arbitration and where only some of the parties agree to refer the award on such reference is void. (*N. R. Chatterjee and Newbould, JJ.*) DEBENDRA NATH BISWAS *v.* JOGENDRA NATH BISWAS. **64 I. C. 221 (Cal.)**

——**Sch. II, Para. 1**—*Validity of reference—Pleader signing without authority—Reference invalid.*

The provisions of Para. 1 of Sch. II must be strictly complied with, in order that there might be a valid reference. Where a pleader signed a reference on behalf of a party but his *vakalatnama* did not contain a power to refer to arbitration, *held*, the reference was not valid so far as that party is concerned. (*Woodroffe and Chatterjee, JJ.*) FANINDRA *v.* DWARKA NATH. **25 C. W. N. 832.**

——**Sch. II, Para. 1**—*Validity of reference—Agreement to refer all disputes arising out of a contract—Successive awards.*

Where the parties agree to refer all disputes arising out of a contract to arbitration, the right to submit is not exhausted though one dispute is finally decided. Successive disputes as they arise may be referred and successive awards passed. (*Rankin, J.*) BAL MUKAND RUIA *v.* GOPISAN BHOTEA.

60 I. C. 195 : 24 C. W. N. 775.

——**Sch. II, Para. 1**—*Want of consent of parties interested ousts jurisdiction.*

If a Judge refers a case to arbitration, without the consent of the parties interested, he is exercising a jurisdiction not vested in him by law. 42 Mad. 632 ; Foll ; 29 I. C. 747, Expl. (*Jackson, J.*) PARASURAMA MUDALIAR *v.* MUTHUSWAMY PILLAI.

22 L. W. 395 : (1925) M. W. N. 744 : A. I. R. 1925 Mad. 1209.

——**Sch. II, Para. 1**—*Even party* ex parte *must be consulted if interested.*

Where agreement to refer to arbitration is not signed by a party who is *ex parte*, the award is without jurisdiction if the party is interested in the result of the suit. [39 All, 489 Not Foll. ; 42 Mad. 632 and 27 C. L. J. 339. Foll] Where vendor had covenanted to convey a title to the plaintiff vendee and was interested in the plaintiff's suit to establish that title, as otherwise he might be sued for damages, he is interested in the result of the suit. (*Jackson, J.*) PARASURAMA MUDALIAR *v.* MUTHUSWAMY PILLAI.

22 L. W. 395 : (1925) M. W. N. 744 : A. I. R. 1925 Mad. 1209.

——**Sch. II. Para. 1**—'*Parties interested*' *may include parties against whom no relief is claimed.*

The words 'parties interested in the suit' should not be restricted only to those persons against whom relief is claimed. A person against whom no relief is claimed may be interested in the result of the suit inasmuch as his liability to the plaintiff may ultimately arise by reason of any decision that may be given in that suit. (*Devadoss, J.*) T. S. SUBBA RAO *v.* APPADURAI AIYAR. **21 L. W. 498 : 86 I. C 839 : (1925) M. W. N. 97 : A. I. R. 1925 Mad. 621 : 48 M. L. J. 142.**

——**Sch. II, Para. 1**—Ex parte *defendant not joining—Reference is invalid.*

Reference without a party interested in the litigation joining in it is not a valid reference though he may be a defendant who is *ex parte*. (*Devadoss, J.*) T. S. SUBBA RAO *v.* APPADURAI AIYAR.

21 L.W. 498 : 86 I.C. 839 : (1925) M.W.N. 97 : A. I. R. 1925 Mad. 621 : 48 M. L. J. 142.

——**Sch. II, Para. 1**—*All parties not joining in reference—Subsequent consent cannot validate award—Award need not be set aside—Suit on same matter is not barred by such award.*

In order to make a valid reference it is necessary that all the parties should give their consent. But after a reference is made, subsequent consent by one of the parties who did not join in the reference at the time it was made cannot make the proceedings valid; for the foundation of the Court's jurisdiction is the consent of all the parties. The award passed in such proceedings is void and it need not be set aside. Its existence does not preclude a subsequent suit on the same subject-matter. (*Devadoss, J.*) T. S. SUBBA RAO *v.* APPADURAI AIYAR.

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21 L.W 498 : 86 I. C. 839 : (1925) M. W. N. 97 : A. I. R. 1925 Mad 621: 48 M. L. J. 142.

——Sch. II, Para. 1—*Validity of reference—Parties to reference—Exhonerated defendants—Validity of award.*

To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject matter agree to the reference. From the mere fact that certain defendants did not appear and the suit proceeded *ex parte* so far as they were concerned, it could not be assumed they were not interested parties. 42 M. 632 ; 47 Cal. 555 Ref. The High Court will not interfere in revision with an award on the ground that certain exhonerated defendants were not parties to the reference when no such objection had been taken to the award in the Court below. (*Spencer, J.*) BHAGAVANULU *v.* SEETHARAMASWAMI.
17 L. W. 424 : (1923) M. W. N. 296 : 32 M. L. T. (H. C.) 298: 73 I. C. 202 : A. I. R. 1923 Mad. 502 : 44 M. L. J. 359.

——Sch. II, Paras. 1 and 16—*Award—Decree in accordance with—Objection—Appeal—Revision.*

No appeal or revision lies from the decree which is in accordance with the award. Arbitration proceedings are not compulsory and when parties agree to refer their dispute to a tribunal other than that of recognised Courts, they must abide by the consequences of their procedure. It is immaterial whether the Court does or does not give proper opportunities for hearing all the objections to the award or whether it is right or wrong in deciding that the objection statement put in was not a proper application to set aside the award. (*Sadasiva Iyer and Napier, JJ.*) VE. N. K. R. M. A. VENKATACHELLAM CHETTIAR *v.* VE. N. K. RM. A. RAMANATHAM CHETTIAR. 15 L. W. 111 : 31 M. L. T. 52 : A. I. R. 1922 Mad. 429.

——Sch. II, Para. 1—*Claim relating to public office—Agreement to refer to arbitration—Validity.*

An agreement to refer to an arbitration, even if relating to an office, is not necessarily unlawful or opposed to public policy, but must be scrutinised by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects adversely the interests of the public. 32 M. L. J. 271, Foll. (*Sadasiva Iyer and Napier, JJ.*) VE. N. K. R. M. A. VENKATACHELLAM CHETTIAR *v.* VE. N. K. RM A. RAMANATHAN CHETTIAR. 15 L. W. 111 : 31 M. L. T. 52 : A. I. R. 1922 Mad. 429.

——Sch. II, Para 1—*Subject to reference—Jurisdiction to make reference—Extent of—Invalid award—If valid as compromise.*

The jurisdiction of Courts to refer to arbitration is confined to matters in difference in the suit itself. An award under an invalid reference, being itself invalid gives no rights either as an award or as a compromise. (*Krishnan and Odgers, JJ.*) PEDDAPALAYAM BODACHARI *v.* MUNIYACHARI. 14 L. W. 663 : 65 I. C. 92 : (1921) M. W. N. 756.

——Sch. II, Para. 1—*Validity of reference—Absence of one arbitrator at a meeting at which nothing particular was done.*

Absence of one of the arbitrators at one of the meetings, at which, it is shown, that nothing material was done, does not make the award invalid. (*Krishnan, J.*) VARANASI RAMANNA *v.* KILLAIN SETHI APPANA. 60 I. C. 181 : 12 L. W. 505.

——Sch. II, Para. 1—*Parties may agree to refer otherwise than under orders of Court.*

The provisions of Sch. II as to an agreement to refer to arbitration are practically all permissive and it is nowhere laid down or even suggested that such agreement made between the parties to a pending suit cannot be carried out except under the orders of the Court. (*Hallifax, A. J. C.*) PYARELAL *v.* GHANARAM. 83 I. C. 22 : A. I. R. 1925 Nag. 203.

C. P. CODE (V OF 1908), Sch. II, Para. 1

——Sch. II. Para. 1—*Failure of all parties to agree to reference—Effect.*

Where all parties interested do not agree to a reference to arbitration, the same is illegal and the award made therein invalid. (*Kinkhede, A. J. C.*) HUSSAINBHAI BHORA *v.* BANSILAL.
A. I. R. 1924 Nag. 338.

——Sch. II, Para. 1—*Reference to contents of.*

Only matters in dispute between the parties to a litigation which affect private rights can be referred to arbitration. (*Prideaux and Kotval, A.J.Cs.*) GANOBA *v.* NARAYAN. 6 N. L. J. 7 : 72 I. C. 1016 : A. I. R. 1923 Nag. 112.

——Sch. II, Para. 1—*Scope.*

An award cannot be set aside merely because the reference to arbitration is not made in writing. (*Pullan, A. J. C.*) WALIULLAH *v.* BHAGGAN.
11 O. L. J. 570 : 80 I. C. 7 : 28 O. C. 74 : A. I. R. 1925 Oudh 269.

——Sch. II, Para. 1—*Defendant unconditionally admitting a claim is not a necessary party to a reference to arbitration between the plaintiff and the other defendants.*

Where a person admits the plaintiff's claim unconditionally without reference to the liability of his co-defendants and absents himself from subsequent proceedings he is not interested in the suit within the scope of Sch. II, para. 1 and it is not necessary to implead him with respect to a reference to arbitration as between the plaintiff and the other defendants. (*Dalal, J. C.*) MT. BRIJ RAJ KUAR *v.* RAM NATH.
80 I. C. 821 : A. I. R. 1925 Oudh 201.

——Sch. II, Para. 1—*Reference to arbitration—Oral application—Parties attending arbitration proceedings—Award—Estoppel.*

During the pendency of an appeal the parties thereto agreed to refer the matter in dispute to arbitration but no application in writing under Sch. II, Para. 1, cl. (2) of the C. P. Code was made. The plaintiffs however signed their names on the order sheet of the Court in relation to the order of reference, attended the proceedings before the arbitrator who however did not admit the evidence produced by them. The award of the arbitrator was objected to by the plaintiffs on the ground that there was no application in writing asking for a reference. *Held*, that the plaintiffs were estopped from objecting to the award on the ground of want of a written application for reference. Where an award of arbitrators is good on the face of it the parties cannot object to the arbitrator's decision either upon law or on fact and the Courts will not ordinarily review his decision provided he acts within his authority and acts in accordance with the principles of natural justice. Nor is a mere mistake a ground for interference with an award. (*Wazir Hasan, A. J. C.*) MIRZA MAHOMED HASAN BEG *v.* MIRZA SHAKIR BEG. 10 O. & A. L. R. 55 : 78 I. C. 378 : 11 O. L. J. 142 : A. I. R. 1924 Oudh 400.

——Sch. 2, Para. 1—*Award—Validity of—Parties to reference—Subject matter—Parties interested in—Award—Partly valid—Enforcement of.*

Where there were a number of matters in difference between the plaintiffs and the various defendants to the suit, it can hardly be suggested that the submission to arbitration is bad on the ground that it does not refer to arbitration all the matters that may be in dispute between the parties. Sch. II, para. 1, C. P. Code, in terms provides that where all the parties in-

terested agree that any matter in difference between them shall be referred to arbitration, they may apply to the Court for a reference, and sub-cl. (2) provides that the application shall state the matter sought to be referred. It may well be that some of the parties are interested in certain of the matters in dispute only, whilst others are interested in other matters and there is no reason why all the parties interested in one or other of the matters in difference between them, should not agree to refer their disputes, if there are other matters still to be determined in the suit. Where the arbitrators, however, made an award not only in respect to the matters properly referred but in respect to the matters in dispute between the plaintiffs and the two minors which were not validly referred at all, it cannot be said then that the whole award is bad merely because the arbitrators have dealt with matters outside the terms of the reference ; the award is valid in so far as the reference was legal and binding. The rules in the schedule clearly contemplate a case where the arbitrators in making their award have gone outside the legitimate subject-matter of the reference. If that part of the award which deals with matters outside the reference can be separated from the other part, without affecting the decision on the matters referred, the Court may in such a case modify or correct the award. (*Miller, C. J. and Kulwant Sahay, J.*) RAGHUNATH SUKUL *v.* RAM RUP RAUT. **2 Pat. 777 : 76 I. C. 2 : 5 P. L. T. 239 : 2 P. L. R. 76 : 1923 P. H. C. C. 225 : A. I. R. 1924 Pat. 33.**

——— **Sch. II, Para. 1**—*Award by Judge who had ceased to be Judge is valid only if parties fully understood the effect thereof.*

Where a Judge who has ceased to be a Judge is alleged to have been appointed arbitrator, it must be shown not merely that the parties wished him to write and pronounce judgment but that they understood what they were agreeing to. It would not be a question of their making a mistake of law. For a consent to be valid, the consenting parties must agree upon the same thing in the same sense. Unless the parties understood that, if he wrote and pronounced a judgment, that judgment would amount only to an award and that they would have no right of appeal, their agreement would be void. (*MacColl, J.C.*) MAUNG BA *v.* MAUNG YE. **4 U. B. R 171 : 76 I. C. 170 : A. I. R. 1924 Rang. 358.**

——— **Sch. II, Para. 1**—*Oral award—Effect of—Bar to fresh suit.*

In law, an oral award is good and binding on the parties to the reference. Where the actual award is an oral award the drawing up of a formal award is purely a subsidiary act for giving effect to the previously completed judicial act. If the parties desiring to have the award, made a decree of the Court, it may be necessary for them to get the award reduced to writing to be filed in Court; but so far as the effect of the award on a subsequent suit dealing with the subject-matter of the award is concerned, the award will bar the suit whether it be oral or whether it be in writing. (*Robinson, C. J. and May Oung, J*) MA MYA *v.* KO PO SA.

2 Bur. L. J. 163 : A. I. R. 1924 Rang 60.

——— **Sch. II, Para. 1**—*Absence of dispute as to a point precludes reference of that point to arbitration.*

A point as to which there is no dispute cannot be referred to arbitration. A mere failure or refusal to pay on demand any amount admitted to be due may be a dispute. But where there is no allegation that the one party had made a demand on the other to pay the sum it cannot be said that there is a dispute with regard to the item. (*Rupchand Bilaram, A. J. C.*) FIRM OF BRIJLAL JAGANNATH *v.* FIRM OF ALLAH DITTA. **86 I. C. 393 : A. I. R. 1925 Sind 242.**

——— **Sch. II, Para. 1**—*Contract providing that any dispute arising should be referred to arbitration—Disputes arising at different times—Arbitration can be held at different times in respect of the same contract.*

Where the submission clause in the contract provides that any dispute arising from the contract would be referred to arbitration, it is open to the construction that there can be more than one award in respect of the same contract, if different disputes arise at different times, and the submission of any one dispute which may have arisen at any one time cannot be pleaded as a bar to a reference of any subsequent dispute to arbitration under the clause. (*Rupchand Bilaram, A. J. C.*) FIRM OF BRIJLAL-JAGANNATH *v.* FIRM OF ALLAH DITTA.

86 I. C. 393 : A. I. R. 1925 Sind 242.

——— **Sch. II, Para. 1**—*Submission to arbitration requires agreement in writing though unsigned by either party—Invalid submission vitiates arbitration—Arbitration.*

A valid submission must be supported on the basis of a previous agreement in writing between the parties to submit their disputes to arbitration. But the parties need not have signed the writing The invalidity of a submission infects also the reference to arbitration on the basis of such submission. (*Rupchand Bilaram, A. J. C.*) KISHANDAS PURSUMAL *v.* MEGHRAJ KHIALDAS.

81 I. C. 834 : A. I. R. 1925 Sind 144.

——— **Sch. II, Para. 1**—*Matter in difference.*

A failure to pay a claim constitutes a matter in difference between the parties to a submission. (1911) 5 S. L. R. 4, Foll. (*Raymond, A. J. C.*) MESSRS. BEITH STEVENSON & CO., LTD. *v.* FIRM OF NAROOMAL KHEM CHAND. **17 S L. R. 86 : 80 I. C. 1009 : A. I. R. 1924 Sind, 117.**

——— **Sch. II, Para. 1**—*Submission if to be in writing.*

Where parties have agreed in writing to submit any differences that may arise to arbitration, a subsequent submission to arbitration need not be in writing. (*Raymond, A. J. C.*) TAYABALLY ABDUL HUSSAIN *v.* JAMES FINLAY & CO. **80 I. C. 969 : 17 S. L. R. 15 : A. I. R 1924 Sind. 105 (2).**

——— **Sch. II, Para. 1**—*Differences—Failure to pay claim—If amounts to—Plurality of references,*

Where parties agree that all differences that may arise between them should be settled by arbitration, a failure to pay a claim arising out of the contract amounts to a difference which falls within the agreement. There can be as many awards as there are disputes and the mere fact that one award has issued does not exhaust the powers under the agreement. (*Raymond, A. J. C.*) TAYABALLY ABDUL HUSSAIN *v.* JAMES FINLAY & CO **17 S. L. R. 15 : 80 I. C. 969 : A. I. R. 1924 Sind 105 (2).**

——— **Sch. II, Para. 1**—*Minor Parties—Duty of Court.*

Where some of the parties to a reference to arbitration are minors, it is the duty of the Court to ascertain if the reference is for the benefit of the minors. (*Kennedy, J. C. and Raymond, A. J. C.*) EMNABAI *v.* FAKIR MAHOMED. **15 S. L. R. 165 : 65 I. C. 50 : A. I. R. 1922 Sind 1.**

——— **Sch. II, Para. 1**—*Duty of Judge before allowing awards to be filed.*

It is the duty of every Judge before he allows arbitration awards to be filed in Court, to satisfy himself that there has been some point of real difference

C. P. CODE (V OF 1908), Sch. II, Para. 1.

which was submitted to arbitration and that there was an arbitration on that point of real difference. (*Kincaid J. C. and Kemp, A. J. C.*) JUMNOMAL *v.* GARDINOMAL. **83 I. C. 913 : 17 S. L. R. 211**

——— **Sch. II, Para. 1**—*Validity of reference — Court when to restrain defendant from proceeding to arbitration.*

It is within Court's jurisdiction on equitable grounds to restrain the defendant from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference. (*Raymond, A. J. C.*) FIRM OF KRIPALDAS KAHANDAS *v* FIRM OF GAJANMAL BHAGWANDAS. **70 I. C. 864 : 15 S. L. R. 5.**

——— **Sch. II, Para. 1**—*Parties— Reference to arbitration—Parties—Interested—Assent of.*

A Court has no jurisdiction to make an order of reference to arbitration unless all the parties interested assent to such reference. An order of reference made without such assent is invalid and an award based thereupon is liable to be set aside. (*Raymond, A. J. C.*) CHOITH RAM *v.* LAL CHAND. **61 I. C. 451 : 14 S. L. R. 156.**

——— **Sch. II, Para 1 (1) and (2)**—*Form of reference— Agreement to abide by the statement of one.*

From the way in which an agreement was entered in the robkar of the Court and the application of the defendant, it appeared that the parties had agreed to abide by the statement of one H. and not that they had agreed to refer the matter in dispute for decision by H. Where no application in writing showing the agreement to refer the matter in dispute was ever filed in Court nor did the defendant ever apply to the Court to refer the matter to H, *Held*, the provisions of S. 1, sub-clauses (1) and (2) of Schedule II C. P. Code, were therefore not complied with, and accordingly the Court was not deprived of its jurisdiction to hear the appeal. (*Sulaiman, J.*) MT. MASITA BIBI *v.* KHUDA BAKSH. **A. I. R. 1923 All. 65.**

——— **Sch. II, Para. 2**—*Appointment of arbitrators appointed by parties, cancelled by the parties' pleaders and sole arbitrator appointed without express instructions—Appointment whether valid.*

Power of a pleader to make an appointment of an arbitrator in the first instance in the absence of instructions to the contrary is one thing, and power to undo the appointment made by his client is another thing. On this view, the cancellation of the Panchas by the Court, based as it is upon the pleader's request, is unwarranted and invalid, and the subsequent appointment of a sole arbitrator must be held to be such. (*Kotval, A. J. C.*) KASHI RAM *v.* MT. GUDDOO. **5 N. L. J. 229 : 18 N. L. R. 140 : A. I. R. 1922 Nag. 39.**

——— **Sch. II, Para 2. (12)**—*Decree—O. 9, R. 13*

The decree under para. 2 (12) of Sch. II is a decree under S. 2 (2) and the provisions of O. 9, R. 13 apply to it. The provisions of the C. P. Code apply so far as may be, to proceedings under Sch. II save where a special procedure is laid down in the Schedule. (*Coutts and Macpherson, JJ.*) MAHABIR *v.* BALKISUN. **3 P. L. J. 29 : 1922 P H. C. C.76 : 1 P. 48 : A. I. R. 1922 Pat. 376.**

——— **Sch. II, Para. 3**—*Leave to revoke order of reference is not to be granted save when substantial injustice will otherwise result—Principles underlying exercise of power to grant leave discussed.*

Obiter :—In giving leave to revoke a submission the Court shall be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who as a consideration for a

C. P. CODE (V OF 1908), Sch. II, Para. 3.

contract had agreed to submit any disputes whether of law or fact, which might arise, to arbitration when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction or refusing jurisdiction or failing to do all that their jurisdiction requires them to do. The principle underlying the exercise of the power to revoke is that the parties take the arbitrators for better or for worse, and that their decision is final both as to law and fact; unless a substantial miscarriage of justice may take place, leave ought not to be given. It is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by. (*Walsh and Ryves, JJ.*) GAYA PRASAD *v.* FIRM MATHU LAL BUDHA LAL. **5 L. R. A. (Civ.) 319. 78 I. C. 1050 : A. I. R. 1925 All. 202**

——— **Sch. II, Para. 3 (2)**—*Reference to arbitration —Jurisdiction to try suit.*

When a Court refers a pending suit to arbitration, its jurisdiction to try the case is suspended and it revives only in the event of the arbitration being ordered to be superseded under paras. 5, 8 or 15 of Sch. II. It cannot until that event takes place assume any jurisdiction to deal with the suit. The words "shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit" are imperative and convey prohibition, and limit the scope of the Court's jurisdiction. (*Kinkhede, A. J. C.*) SHANKER *v.* CHUNILAL MULCHAND. **89 I. C. 782.**

——— **Sch. II, Para. 3**—*Award—Validity—Objection to award—Appeal—Revision.*

There was a reference to arbitration and an award was made. Objections were taken to the validity of the award. One of the grounds taken was that there was no valid reference to arbitration as one of the defendants in the case did not at all join in the reference. The objections to the award taken by the plaintiffs were not properly heard. There was no necessity for any evidence to be adduced and the objections were not frivolous. *Held*, that though no appeal lay from the order of the Lower Court passing a decree on the award, still the High Court could interfere in revision. (*Mukerji, J.*) SIDH NATH RAUT *v.* JARBANDHAN PRASAD. **L. R. 5 A. 191 : A. I. R. 1924 All. 688.**

——— **Sch. II, Para. 3**—*Time for submission of award—Extension by arbitrators themselves —Propriety of—Misconduct of arbitrator.*

Matters in dispute between the parties in a pending suit were by their consent referred by Court to two arbitrators and the order of reference provided that the arbitrators should make their award within 6 months from the date on which an office copy of the said order should be served on them or within such further time as they might allow themselves by endorsement on the said office copy. The arbitrators enlarged the time for making their award under the order from time to time and after a large number of sittings extending over a period of 2 years they adjourned the hearing *sine die*. On an application by the plaintiff to the Court for superseding the reference and for proceeding with the trial of the suit, *held*, that the order of the Court giving unlimited authority to the arbitrators to extend the time was bad and of no effect and that under the mandatory provisions of Sch. II, cl. 3, C. P. Code, it was the Court that had to fix the time and enlarge it. Consequently it was open to the plaintiff to apply to the Court to supersede the reference and proceed with the trial of suit. 30 A. 169: 36 A. 354, Foll. 19 C. W. N. 165 dissented. The appropriate time for entertaining charges of mis-

conduct against an arbitrator is when the award has been filed. (*Rankin, J.*) ROBINDRA DEB MANNA *v.* JOGENDRA DEB MANNA.

27 C. W. N. 420 : A. I. R. 1923 Cal. 410.

——Sch. II, Para. 3—*Reference implies dispute.*

The existence of a "dispute" is essential to the validity of a reference to arbitration under the terms of a contract. A dispute involved the assertion of a right by one party and its denial by the other. Where the parties do not reach that stage and the vendors merely refuse to comply with the request of the buyer prior to the sale regarding incidental matters, there is no "dispute" within the meaning of the arbitration clause in the contract. (*Mookerjee and Fletcher, JJ.*) CHANDMULL GANESHMULL *v.* NIPPON MUNKWA KARBUSKHIKI. **64 I. C. 798 : 33 C. L. J. 545.**

——Sch. II, Para. 3—*Reference by the Court—Reference not in express terms—Action of Court and parties, inference from.*

The plaintiff and the only defendant interested in the subject-matter of the suit agreed in writing to refer their disputes, including those in suit, to arbitration and the plaintiff presented an application that, as the matter in suit as well as other matters had been referred to arbitration, the suit should be kept pending and adjourned till an award was made, and the Court accordingly granted the adjournment and kept the suit pending. Further adjournments consented to by the defendant, were applied for by the plaintiff and granted by the Court for the purpose of enabling the arbitrators to submit their award, and the Court wrote to the arbitrators to expedite and the arbitrators requested for further time, which was granted by the Court on the terms, that if they could not finish by the adjourned date, the suit would be posted for enquiry before the Court, that the parties should endeavour to get the arbitrators to pass the award and file the same within the time specified and that the arbitrators should be informed accordingly. After further adjournments the Court, on the application of the arbitrators, got certain accounts filed in another Court and after some more similar adjournments, to all of which the defendant was a consenting party, the award was filed and a decree was passed in accordance with it. *Held*, there has been substantially, though not in form, a reference by Court with the consent of the parties. (*Sadasiva Iyer and Napier, JJ.*) VENKATACHELLAM CHETTIAR *v.* RAMANATHAM CHETTIAR.

15 L. W. 111: 31 M. L. T. 52; A. I. R. 1922 Mad. 429.

——Sch. II, Para. 3 (2)—*Reference to arbitration—Cases appearing in the special list—Power of Court to make necessary orders.*

It does not necessarily follow that when a case referred to arbitration appears in the special list, the order for arbitration cannot be superseded by the Court for proper reasons and the necessary orders passed for the trial of the suit. Parties who wish to take advantage of the 2nd Schedule to the C. P. Code and agree to refer suits to arbitration rather than have them tried by Court, may not thereby make opportunity to delay the solution of their differences. (*Buckland, J.*) SARUPCHAND HUKUMCHAND *v.* MADHORAM.

28 C. W. N. 755 : 83 I. C. 128: A. I. R. 1925 Cal. 83.

——Sch. II, Para. 3 (2)—*Compromise effected after reference without applying for superseding the reference can't be recorded—C. P. Code, O. 23, R. 3.*

Where after the parties to a suit referred it to arbitration, a compromise was arrived at between them, but there was no order superseding the arbitration.

Held, the Court had no jurisdiction to record the compromise. (*Sanderson, C. J. and Richardson, J.*)

DOOLY CHAND *v.* MOHANLAL. **51 Cal. 432 : 83 I. C. 606 : A. I. R. 1924 Cal. 722.**

——Sch. II, Para. 3 (2)—*Court has inherent power to cancel order under para. 3—C. P. Code, S. 151.*

Although there is no specific provision in the second Schedule to the C. P. Code, authorising a Court to cancel an order made by it under para. 3 of the Schedule, yet in a proper case and for good cause the Court has inherent power to cancel that order. (Case-law discussed.) 10 Bom. 381. Not Foll. (*Kulwant Sahay, J.*) LACHMAN MUCHHNA *v.* MOGHAL MIAN.

6 P. L. T. 488 : 86 I. C. 540 : A. I. R. 1925 Pat. 720.

——Sch. II, Para. 3 (2)—*Arbitration—Power of Court to appoint Receiver.*

Where arbitration is actually proceeding, the Court is not to appoint a Receiver except in exceptional circumstances without the concurrence of the arbitrator. Where the arbitrator is *functus officio* and the award has been passed, the Court has power to appoint a Receiver in the *interim* between the submission of the award and the final acceptance or rejection of it. (*Kennedy, J. C.*) CHETANSINGH BAGASINGH *v.* GULIBAI. **78 I. C. 84 : A. I. R. 1925 Sind 102.**

——Sch. II, Para. 4—*Power to appoint umpire.*

Where the question was whether the Committee of the Delhi Piece goods Association had jurisdiction to appoint an umpire until the two arbitrators appointed by the parties had not only failed to agree as to the merits of the disputes but also had differed as to the choice of the umpire, *held*, enough had occurred to give the Committee, Delhi Piece goods Association under the rules accepted by the parties, jurisdiction to appoint an umpire, because the arbitrators had differed in such conclusive fashion as to put it beyond doubt, that they were not going to deliver a joint award. (*Piggott and Walsh, JJ.*) B. SHUSHIL CHANDRA DAS *v.* SUKHAMAL BANSIDHAR. **20 A. L. J. 377 : 44 All. 472 : A. I. R. 1922 All. 219.**

——Sch. II, Para. 4—*Reference to arbitration by Court—Award by majority of arbitrators is valid if so agreed upon.*

Where the matter in dispute in a pending suit was referred to the arbitration of two arbitrators and an umpire and the terms of the reference provided for a decision according to the opinion of the majority in the event of there being any dissent, and after the proceedings were over the dissenting arbitrator left the place after expressing his dissent from the opinion of the majority and the award was reduced to writing the next day, *held*, the award was in accord with the terms of the reference and was perfectly valid. (*Dalal and Wazir Hasan, A. J. Cs.*) DHURMAN SINGH *v.* SURAT SINGH. **88 I. C. 547 : A.I.R. 1925 Oudh 712.**

——Sch. II, Paras. 4 and 5—*Arbitrators not acting together—Award not legal.*

An agreement of reference to arbitration provided for the settlement of disputes by four arbitrators and an umpire acting together. There was no provision that in case of difference of opinion amongst the arbitrators, the opinion of the majority was to prevail. All the five arbitrators entered into the reference but the award made was signed by only four of them. The fifth man did not sign because he did not concur in the award. *Held*, that the award, as filed, was invalid. On a reference to several arbitrators together when there is no clause provided for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator : for as the office is joint, if one refuse or omit to act, the others can make no award. (*Kanhaiya Lal, J. C.*) NAND KISHORE

C. P. CODE (V OF 1908), Sch. II, Para. 4.

v. KISHORI LAL. 10 O. L. J. 29 : 9 O. & A.L.R. 545 : 74 I. C. 299 : 26 O. C. 350 : A. I. R. 1923 Oudh 181.

——— Sch. II, Para 4 (b)—*Decision of majority only is invalid.*

Where a reference to arbitration by four named persons without the intervention of Court, provides for a decision by all the arbitrators and not merely by a majority of them, the refusal of any of the arbitrators to take part in the arbitration invalidates the award. The submission to arbitration no longer remains in force and cannot be pleaded as a bar to a suit with reference to the subject-matter of the arbitration. (*Daniels, J. C.*) LACHMAN PRASAD *v.* PRAN NATH. 8 O. L. J. 585 : 65 I.C. 339 : A.I.R. 1922 Oudh 108

——— Sch. II, Para. 5—*Agreement filed under para. 17—Arbitrators nominated and appointed, but refusing to act—Court not observing proper procedure but parties not objecting—Dismissal of application by Court was confirmed where defendant filed regular suit to enforce his rights under ordinary law.*

Where the procedure in para. 5 was not strictly observed, but the parties acquiesced therein, and where on superseding the arbitration appointed under para. 17, the defendant filed a suit to enforce his rights which were referred to arbitration under the agreement and the suit was dismissed, the High Court in revision refused to set aside the order of dismissal. (*Sulaiman and Daniels, JJ.*) HAFIZ ZAHUR AHMAD *v.* TASLIM-UN-NISSA. 23 A.L.J. 891 : 6 L.R. A. (Civ.) 575 : A. I. R. 1926 All. 55.

——— Sch. II, Paras. 5 and 17—*Reference to arbitration—Refusal by one arbitrator—Remedy—Action.*

Where a reference to arbitration has been made without the intervention of the Court and during the proceedings one of the arbitrators refuses to act further, any of the parties may apply to the Court under Para. 17 of Sch. II of the Code to file the reference or agreement and the Court can take action under Para. 5 and appoint a new arbitrator. (*Walsh and Wallach, JJ.*) BAGWANDAS *v.* GURDAYAL. 64 I. C. 459 : 19 A. L. J. 823.

——— Sch. II, Paras. 5, 15 and 16—*Arbitration—Award—Setting aside—Personnel of arbitrators changed by parties without reference to Court—Award, if valid.*

Where during the pendency of an arbitration proceeding a change in the personnel of the arbitrators is made with the consent of both the parties but without the intervention of the Court, this cannot be said to be a defect which strikes at the root of the arbitration. The foundation of proceedings by arbitration is the consent of the parties to a decision by an extra-judicial tribunal and where there is such consent the omission to move the Court under para. 5 (2), Sch. II, C. P. Code, does not render the award a nullity. As an award it can only be set aside on any of the grounds specified in Sch. II, para. 15, C. P. Code. (*Walmsley and Suhrawardy, JJ.*) MAHOMED SHEIKH *v.* KANKINARAH & CO., LTD. 28 C W. N. 634 : 91 I. C. 574 : A. I. R. 1924 Cal. 665.

——— Sch. II, Paras. 5 and 8—*No notice to opposite party—Action under para. 5 cannot be taken—Inordinate delay in proceedings—Arbitration can be superseded.*

The Court cannot take action under para. 5 where neither party has served a notice upon the other for the removal of an arbitrator and the substitution of another. Even if the Court takes action under para. 5 it is within the discretion of the Court to refuse to appoint a fresh arbitrator and to supersede the reference. In a case where there has been a reference to arbitration but where nothing has been done for over a long

C. P. CODE (V OF 1908), Sch. II, Para. 8.

time, it is very desirable that the reference to arbitration should be superseded and the case be dealt with by the Court itself. (*Le Rossignol, J.*) THAKUR DASS *v.* RAM DASS. 7 L. L. J. 163 : 26 Punj. L. R. 476 : 88 I. C. 975 (1) : A. I. R. 1925 Lah. 374.

——— Sch. II, Para. 5—*Death of one of the two arbitrators—Application by a party to appoint a sole arbitrator is written notice.*

Where one of two arbitrators dies and one of the parties applies to the Court to appoint the surviving arbitrator as the sole arbitrator the application is "written notice" within the meaning of para. 5. (*Dalal Ag. J. C. and Wasir Hasan, A. J. C.*) MT. HASAN BANU BEGAM *v.* WASI ALI KHAN. 12 O. L. J. 174 : 86 I. C. 613 : 2 O. W. N. 64 : A. I. R. 1925 Oudh 361.

——— Sch. II, Para. 5—*Reference by surviving arbitrator—Mistake of judgment in construing reference—No revision lies.*

A mistake of judgment in construing the original reference cannot be rectified by the High Court on an application for revision. (*Dalal Ag. J. C. and Wazir Hasan, A.J.C.*) MT. HASAN BANU BEGAM *v.* WASI ALI KHAN. 12 O. L. J. 174 : 86 I. C. 613 : 2 O. W. N. 64 : A. I. R. 1925 Oudh 361.

——— Sch. II, Para. 5—*"Appoint" means "concur in appointing."*

"Appoint" means "concur in appointing" and therefore to concur in the appointment of an arbitrator is good though no arbitrator is named in the notice. The rule of English law is also the same. Where the condition of the rule as to the notice to concur in the appointment has been satisfied and no concurrence has been arrived at by the parties to the reference the Court has no discretion left but (1) to appoint an arbitrator, or (2) to supersede the arbitration. (1892) 1 Q. B. 136 Foll. (*Dalal Ag. J. C. and Wazir Hasan, A. J. C.*) MT. HASAN BANU BEGAM *v* WASI ALI KHAN. 12 O. L. J. 174 : 86 I. C. 613 : 2 O.W.N. 64 : 11 O. & A. L. R. 53 : A. I. R. 1925 Oudh 361.

——— Sch. II, Para. 7—*Taking evidence in absence of party is illegal*

Taking evidence in the absence of the party by an arbitrator is illegal. (*Devadoss, J.*) R. PALAVESAM CHETTIAR *v.* NARAYANA AIYAR. (1925) M. W. N. 503 : 88 I. C. 660 : A. I. R. 1925 Mad. 1086 : 49 M. L. J. 115.

——— Sch. II, Para. 7—*Absence at the time of evidence of arbitrator.*

Where all the arbitrators do not attend at all the meetings and where the evidence is taken in the absence of one or more of the arbitrators the award is invalid. (*Ashworth and Simpson, A.J.Cs.*) SANKATA PRASAD *v.* JAGANNATH. 9 O. L. J. 410 : A. I. R. 1922 Oudh 276.

——— Sch. II, Para. 7—*Award—Passed ex parte.*

An award passed *ex parte* will not be set aside in absence of sufficient cause for absent party's non-appearance. (*Rupchand Bilaram, A. J. C.*) FIRM MOTHARAM DOWLATRAM *v.* FIRM MAYADAS DOWLATRAM. 78 I. C. 521 : A. I. R. 1925 Sind. 150.

——— Sch II, Para. 8—*Award—Time for—Extension of—Oral application.*

An oral application for extension of the period for submission on the award by arbitrators is valid 3M. 59 Dist. (*Macleod, C. J. and Shah, J.*) SAKAL CHAND-MOTI *v.* AMBARAM. 26 Bom. L. R. 280 : 80 I. C. 260 : A. I. R. 1924 Bom. 380.

——— Sch. II, para. 8—*Extension of time for making award—Limitation Act, Art, 158.*

The time for filing an award may be extended by

the Court either before or after the expiration of the period fixed for the making of the award. But the extension must be made before the award is delivered. Where the parties signed a consent order before the award was made for extension of the period, but the order was signed only after the making of the award, *held*, that the Court's signature related back to the date of application and that the award could not be objected to on the ground that it was made after the expiry of the period fixed by the Court. (*Macleod, C. J. and Shah, J.*) GOPALAJI KALLIANJI *v.* CHHAGANLAL VITHALJI. **45 Bom. 1071 : 63 I. C. 929 : 23 Bom L. R. 614.**

——Sch. II, Para. 8—*Arbitrators have not submitted award—Issue* Takid *at once was held order extending time.*

Where a date was fixed for filing the award but the award was not filed on that date, and where the order passed thereupon was as follows :—"The arbitrators have not submitted their award. Issue *Takid* at once, fixing the 10th November, for hearing" and where the officer who had passed the decree filing the award said that his intention in passing that order was to extend time for filing of the award though he had not said so in so many words, *held*, that an order like this may be taken as an order extending the time for filing the award. (*Suhrawardy and Page, JJ.*) DEBRI-UL-DIN *v.* AMINA BIBI. **78 I. C. 335 : A. I. R. 1925 Cal. 475.**

——Sch. II, Para. 8—*Date fixed for filing of award—Non-appearance of parties—Dismissal of suit is bad.*

Where a Judge dismissed a suit for failure of the parties to attend on the date fixed for filing of the award even though the award was not filed on that date, the order of dismissal is improper and would be set aside. Since the filing of an award is an act of the arbitrator, the parties need not be present in Court. A Court has no power to supersede an arbitration in anticipation that the award will not be filed before the due date. (*Das, J.*) MAHARAJ BHAGAT *v.* HARIHAR BHAGAT. **3 Pat. L. T. 346 : 65 I. C. 144 : A.I.R. 1923 Pat. 115.**

——Sch. II, Para. 10 and S. 115—*Omission to give notice entitles a party to have the decree on the award set aside in revision, though party was aware of the date of filing of award.*

The provisions of cl. 10 are mandatory and the parties are entitled to notice even if they have knowledge of the date on which the award is filed. The omission to give such notice is a material irregularity which entitles the party to have the decree passed on the award set aside in revision. 11 Mad. 144 and 20 All. 474, Foll. (*Moti Sagar, J.*) GURDITTA MAL *v.* FIRM OF BASANTA MAL PANNALAL. **89 I. C. 240 : A. I. R. 1925 Lah. 619 (1).**

——Sch. II, Para. 10—*Decree not to be passed before* 10 *days.*

The Court cannot pass a decree in terms of an award before the expiry of 10 days allowed by Art. 158 of the Limitation Act. An agreement not to object to the award does not cover illegalities. The rejection of an application for further time to file objections does not amount to an application to set aside the award. (1912) M.W.N. 1232, Foll (*Odgers, J.*) RANGIAH CHETTY *v.* GOVINDASAMI. **(1921) M. W. N. 793 : 15 L. W. 160 : 45 Mad. 466 : 71 I.C. 266 : A. I. R. 1922 Mad. 179.**

——Sch. II, Para. 10—*Decree on award without notice is bad.*

A decree passed on award without notice to the opposite party and before the expiration of the time

allowed by Art. 158 of the Limitation Act is bad in law. (*Kanhaiya Lal, A. J. C.*) MANI RAM *v.* RAM ASRAY. **24 O. C. 234 : 64 I. C. 90 (2) : 8 O. L. J. 626.**

——Sch. II. Para. 10—*Notice of filing of award before passing a decree is necessary.*

Under Para. 10, a Court must give notice to the parties of the filing of the award, before passing a decree in its terms, and such notice to the deft. is necessary though he failed to appear before the arbitrators or the Court. (*Lindsay, J. C.*) SOHAN LAL *v.* MUNNA LAL. **24 O. C. 263 : 62 I. C. 849 : 8 O. L. J. 280.**

——Sch. II, Para. 11—*Scope is limited to questions of law.*

The scope of paragraph 11 is really limited to questions of law. It is true that it is not expressly stated in this paragraph that the statement of the special case must relate to questions of law ; but sufficient indication in this direction is given as to the scope of this rule by the wording of the form No. 4 of the Appendix to this schedule which expressly refers to questions of law to be stated for opinion of the Court. (*Shah, A. C. J. and Fawcett, J.*) LAKSHMAN BABURAO SONAR *v.* RAMCHANDRA RAJARAM SONAR. **26 Bom. L. R. 836 : 48 Bom 663 : 84 I. C. 378 : A. I. R. 1925 Bom. 22.**

——Sch. II, Para. 12—*Award—Application for filing—Correction of mistakes—Execution proceedings.*

The decision of the arbitrators is final. If there is on the face of the award a patent inconsistency such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the Court to which application is made for filing the award on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings. (*Walsh and Kanhaiya Lal, JJ.*) HAR PRASAD *v.* RAGHUBAR DAYAL. **21 A.L.J. 541 : 45 A. 628 : L. R. 4 A. 553 : 74 I. C. 817 : A.I.R. 1924 All. 62.**

——Sch. II, Para. 12—*Award—Reference to Commissioner for taking accounts—Report—Procedure bad.*

On a reference by the Court, the arbitrators prepared their award and submitted it to the Court. Both parties filed objections and Court remitted the award to the arbitrators for rectification under Para. 13. The arbitrators considered the objections and submitted their opinion regarding the alleged errors. The Court, however, appointed two Commissioners to examine the accounts prepared by the arbitrators to see if they involved arithmetical or clerical error. The Commissioners did so and made a report which supported the opinion of the arbitrators. When the report came up to the Court, it reversed the report on certain disputed items and asked the Commissioners to recalculate on the basis of its judgment. On the report finally made by the Commissioners the Court passed its decree. *Held* that a decree must be passed in terms of the arbitrators' award, that from the very commencement the Court had followed an absolutely wrong procedure under Para. 12 since it could neither be said that the Court had amended an obvious error which could be amended without affecting such decision, nor could it be said that the Court had rectified a clerical mistake or an error arising from an accidental slip or omission. (*Macleod, C. J. and Fawcett, J.*) GOPAL *v.* GANESH. **22 Bom. L. R. 1416 : 59 I. C. 785 : 45 Bom. 512.**

——Sch. II, Para. 12—*Award can't be modified unless imperfect in form or for obvious error it can be*

C. P. CODE (V OF 1908), Sch. II, Para. 12.

amended without affecting arbitrator's decision.

The Court has no power to rectify or correct an award unless the award is imperfect in form or the obvious error is of such a character that it can be amended without affecting the decision of the arbitrator. It is well settled that the Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator. (*Mookerji, J.*) MAHENDRA NATH KHUNDU *v.* SURESH CHANDRA PRAMANIK. **80 I. C. 10 : A. I. R. 1925 Cal. 332.**

——Sch. II, Paras. 12, 14 and 15—*Reference to arbitration pending suit—Award going beyond matters in dispute in the suit—Decision on rights of strangers.*

The C. P. Code deals with arbitrations under three heads :—1. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit, in that case all proceedings from first to last are under the supervision of the Court. 2. Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the Court, in that case all further proceedings are under the supervision of the Court. 3. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. Full directions are to be found in the Code as to the course of procedure in cases falling under head No. 1, and large powers are given to the Court with the view of making the award in such cases complete, operative and final. The Court makes an order of reference on the agreement (which must be the agreement of all parties to the suit), being brought before it and fixes a time for delivery of the award with power to enlarge the time, if necessary. When the award is submitted to the Court, the Court may in certain specified cases correct or modify it, subject to a right of appeal. In certain specified cases, it may remit the matter to the arbitrators or to the umpire, as the case may be. No award is to be set aside except in one of three cases specified and defined, In cases falling under heads 2 and 3, the provisions relating to cases under head 1 are to be observed, so far as applicable. But there is this difference. In cases falling under head 1, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned, and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 and 3, proceedings described as a suit and registered as such must be taken in order to bring the matter, the agreement to refer or the award, as the case may be, under the cognizance of the Court. That is or may be a litigious proceeding, cause may be shown against the application and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code. The Indian Arbitration Act, on the other hand, relates exclusively to arbitration by agreement without intervention of a Court of Justice, and subject to the provisions of S. 23, applies only in cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town. An examination of the provisions of the second schedule of the Code of Civil Procedure and of the Indian Arbitration Act leaves no room for controversy that the legislature has made clear and distinct provisions to regulate the procedure in respect of each of the four types of arbitration which have special characteristic features. The jurisdiction thus created in respect of each type of arbitration must be exercised through the machinery provided and in conformity with the procedure prescribed. The Legislature never contemplated a confusion of these jurisdictions. No provision can be traced for simultaneous arbitration, by private agreement and on reference by Court, in respect of subject-matters within and beyond the scope of a suit and amongst persons, some parties and some strangers to a litigation. What has happened in the present case is, in essence, an arbitration in a manner neither known to nor contemplated by the law, and the Court must consequently decline to affix the stamp of its authority on the product of the labour of the arbitrators, From this standpoint, the award must be treated as invalid. The arbitrators on such a reference are consequently limited to questions in dispute between the parties in the cause referred to, and they are not competent to mix up, in their investigation and determination, other controversies wherein strangers to the suit are interested. When an award has resulted from proceedings so carried on in a manner not contemplated by the law, the Court cannot be called upon to invoke the aid of the doctrine of separability. This is not a case where the arbitrators have failed to act with regularity from lack of care or knowledge ; the proceedings have been deliberately organised and carried on by the parties in a manner not contemplated by law and they have thus contrived to defeat the object they had at heart, namely, to settle their differences, in a tribunal of their choice. It is quite impossible that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court ; between the parties to the suit and between them and other persons : under the Code provided by the Indian Arbitration Act and under the Code provided by the Second Schedule ; under the superintendence and control of the Judge who has seizing of the suit and of the Judge disposiug of business under the Indian Arbitration Act ; partly upon an order of reference and partly under an agreement. (*Mookerjee and Rankin, JJ.*) RAM PRATAP CHAMARIA *v.* DURGA PRASAD CHAMARIA. **28 C. W. N. 424 : 83 I. C. 300 : A. I. R. 1924 Cal. 567**

——Sch. II, Para. 12—*Award partly valid—Effect.*

All the matters in dispute between the parties need not be referred to arbitration. Sch. II, Para. 1, C. P. Code, provides clearly that where all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may apply to the Court to that effect, while sub-clause (2) provides that the application shall mention the matter desired for reference. It is quite possible that each of the party has his own differences to be settled before an arbitration. The award is valid if the reference is legal and binding. If some portion of the award refers to extraneous matters it can be separated from other portion, provided it does not attack the decision relating to matters of reference. Under the circumstances, the Court may modify or correct the award. (*Miller, C. J. and Kulwant Sahay, J.*) RAGHUNATH SUKUL *v.* RAM RUP RAUT. **2 Pat. 777 : 76 I. C. 2 : 2 P. L. R. 76 : 1923 P. H. C. C. 225 : 5 Pat. L. T. 239 · A. I. R. 1924 Pat. 33.**

——Sch. II, Para. 12—*Award should not be disturbed save in case of misconduct by arbitrator or patent error though arbitrator may be an officer of the Court.*

C. P. CODE (V OF 1908), Sch. II, Para. 14.

The fact that the arbitrator was an officer of the Court does not affect the power or its exercise. Where no misconduct is proved, except for a patent error apparent on the very face of the award as made, the award is final and the Courts cannot set it aside. A. I. R. 1923 P. C. 66, Foll. (*Kennedy, J. C. and Madgavkar, A. J. C.*) JAN MAHOMED *v.* HAZI MUKHI GAZI. **78 I. C. 60 : A. I. R. 1925 Sind 89.**

——**Sch. II, Paras. 14 and 15**—*Award—Plea of payment—Effect.*

Where the defendant has put in a plea of payment which the arbitrators have not considered, it would not be a ground for setting aside the award but for remitting it for reconsideration under Para 14 of Schedule II. The ground on which an award can be set aside is given in Para 15 and this is not such a ground. (*Daniels, J.*) HAKIM ULLAH *v.* KARIM BUX. **86 I. C. 788 : L. R. 6 A (Civ.) 158 : A. I. R. 1925 All. 393.**

——**Sch. II, Paras. 14 and 15**—*Slip on the part of arbitrator is not material.*

An obvious slip on the part of the arbitrator is no ground for setting aside or remitting an award. (*Sanderson, C. J. and Walmsley, J.*) SREELAL MANGTULAL *v.* J. F. MADAN. **52 Cal. 100 : 88 I. C. 49 : A. I. R. 1925 Cal. 599.**

——**Sch. II, Para. 14**—*Award—Error on the face of the award, meaning of—Sale of goods—Objection to quality—Burden of proof—Award made without surveying goods as provided by the rules of the Bengal Chamber of Commerce—Legality of.*

In a suit by the plaintiffs against the defendants for a declaration that an award made by the Bengal Chamber of Commerce was invalid and inoperative, the grounds on which the claim was based were first that the award was bad on the face of it and secondly, that the arbitrators had no jurisdiction to make the award. In the contract for the sale and purchase of goods between the plaintiffs and the defendants it had been agreed that in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same should be referred to the Bengal Chamber of Commerce. The dispute having arisen as regards the quality of the goods tendered, the parties referred the same to arbitration. The award was as follows :—" Complaint—Inferior quality and other defects as per buyers' statement, dated 1st March, 1921. Award :—We have considered the papers and as the buyers are unwilling to produce the bales required for inspection their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of the contract." *Held*, (1) that the buyers having failed to produce the goods for inspection before the arbitrators could not rely on the abstract doctrine of burden of proof and seek to invalidate the award as being erroneous on the face of it ; and (2) that it was not a proper or legitimate inference from the terms of the award that the arbitrators had decided against the buyer relying upon the mere fact of their omission to produce the goods, inasmuch as the award itself stated that the arbitrators had considered the documentary evidence in the case. Though the rules of the Bengal Chamber of Commerce contemplated the making of the survey, the award of the arbitrators made without such a survey is not invalid because it was only one mode of settling the dispute and it was not contemplated that that should be the only means of settling the dispute. (*Sanderson, C. J. and Walmsley, J.*) S. & C. NORDLINGER *v.* CHANDMULL MULCHAND. **28 C. W. N. 888 : 82 I. C. 341 · A.I.R. 1924 Cal. 1051.**

——**Sch. II, Paras. 14 and 15**—*Award—When to be remitted—Arbitrator, powers of.*

An arbitrator has a wide discretion in the conduct of the proceedings. His award will not be set aside merely because his opinion differs from that of the Court. But where there are irregularities which affect the decision, it will be remitted to him for a fresh decision. In arbitration proceedings, both sides have to be heard in the presence of the other. An arbitrator should not examine a party or his witness in the absence of the other and, failure so to do, is an irregularity which necessitates the remitting back of the proceedings to him for fresh consideration. (*Mookerjee and Fletcher, JJ.*) HARI SINGH *v.* KANKINARAH & CO., LTD. **66 I. C. 389 : 34 C. L. J. 39.**

——**Sch. II, Paras. 14 and 16**—*Appeal from decree passed on an award—Order of remittal cannot be challenged therein.*

Where the Courts remit an award and the arbitrators submit a fresh award, and the Court passes a decree in accordance with such revised award, no appeal lies against such decree on the ground that the order of remittal was wrong and that the original award ought to have been accepted and acted upon. 31 M. 479, Foll. (*Abdul Raoof, J.*) BALAND BAKSH *v.* RAMCHANDRA **6 L. L. J. 500 : 84 I. C. 693 : 26 Punj. L. R. 77 : A. I R. 1925 Lah. 267.**

——**Sch. II, Paras. 14 and 15**—*A Court cannot amend arithmetical mistake in a private award or remit award with such mistake for re-consideration.*

A private award cannot be amended by the Court on the ground that the arbitrator has made an arithmetical mistake in arriving at the sums due by one party to another ; and it also cannot remit such an award for re-consideration 42 A. 277, Foll, 13 Q. B. D. 955 Dist. (*Le Rossignol, J*) RIAZ-UD-DIN *v.* SHIYA-UD-DIN. **78 I. C. 1042 : A. I. R. 1925 Lah. 86.**

——**Sch. II, Paras. 14 and 15**—*Misconduct—Acting on evidence adduced by one party behind the back of the other.*

If an arbitrator receives documents from one party and bases his award upon those documents without giving the other party an opportunity of seeing those documents and of meeting the inferences deducible therefrom, he is guilty of breach of duty and the other party can appeal to have the award set aside on that ground. (*Martineau, J.*) DELHI CLOTH & GENERAL MILLS CO. *v.* KIDARI PERSHAD. **4 U. P. L. R. (Lah.) 15 : 64 I. C. 363 : 22 P. L. R. 1922.**

——**Sch. II, Para. 14**—*Award on matters not referred is without jurisdiction—Court should remit it to arbitrators.*

Misconduct must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that, is action without jurisdiction whether or not it may amount also to misconduct. If the arbitrators' award is beyond their jurisdiction and therefore made without jurisdiction, then obviously the decree which embodies it is also made without jurisdiction. The duty of the Court when an award sent to it is beyond the jurisdiction of the arbitrators, is not to pass a decree in accordance therewith but to remit it back to the arbitrators under the terms of para. 14 of Sch. II. (*Wallace and Madhavan Nair, JJ.*) RAMASWAMI CHETTIAR *v.* VENKATARAMA AIYAR. **A. I. R. 1926 Mad. 201 : 49 M. L. J. 523.**

——**Sch. II, Paras 14 and 15**—*Authority not express.*

Where the reference recited " you will make a division of the moveable and immoveable property

C. P. CODE (V OF 1908), Sch. II, Para. 14.

having considered what is proper and having made a just settlement. That division we accept in every respect." *Held*: in making a division, not only was it open to the arbitrators to allot a definite share of the estate to each of the referring parties but it was also open to them to make the allotment subject to conditions which affect its tenure or devolution. The insertion of the condition was not the introduction into the award of a matter not referred by the parties but was merely an attachment of a condition of quality to a division which was authorised. Therefore the absence of any express mention of the condition in the reference did not exclude the power to make the division subject to the condition in dispute. 23 All. 283 (P. C.) Dist. Where according to Hindu Law, the co-parceners could have validly agreed amongst themselves to exclude the widows from succession. *Held*: the arbitrators could do the same. 29 M. L. J. 214: 42 All. 30, at p. 36 foll. (*Kotval A. J. C.*) MT. PHULA *v.* KUSAMSINGH. **A. I. R. 1923 Nag. 70.**

——**Sch. II, Paras. 14 and 15**—*Arbitrators deciding entirely from personal knowledge—Award cannot be attacked if parties intended that arbitrators should decide like that.*

Where parties intend that arbitrators should decide from their personal knowledge and purposely abstain from producing any evidence the award cannot be impeached on the ground that the arbitrators only decided from personal knowledge without taking evidence. (*Simpson, A. J. C.*) RAMLAL *v.* MAHADEO PRASAD. **89 I. C. 832 : A. I. R. 1925 Oudh 741.**

——**Sch. II, Paras. 14 and 15**—*Award by majority—Minority not signing—If valid.*

Under the terms of a reference to arbitrators the majority opinion has to prevail in cases of dissent. All the three arbitrators heard the evidence and discussed the award, two of them being of one opinion and the other of a contrary opinion. The latter thereupon left the place, and the award was written and signed by the former alone. A note was added that the third arbitrator dissented. *Held*, the award was valid. (*Dalal and Wazir Hasan, A. J. Cs.*) DHARMUN SINGH *v.* SURAT SINGH. **88 I. C. 547 : A. I. R. 1925 Oudh 712.**

——**Sch. II, Paras. 14 and 5**—*Arbitration and award—Death of an arbitrator—Meaning of 'written notice'—Court's discretion.*

Where two arbitrators were appointed who filed their award in Court and the Court acting under para. 14 of Sch. II, C. P. Code, remitted the award for reconsideration of certain points to the arbitrators, and one of them died before submission, and on the application of the surviving arbitrator in the presence of the defendants and plaintiffs, the Court under a mistaken belief that the deceased arbitrator belonged to the defendant's side directed the defendants to nominate another, and rejected the plaintiff's objection on the ground that it was the defendant's right to nominate the new arbitrator. In an application for revision under S. 115 challenging the legality of the order on the ground that there was no sufficient notice as required under para. 5 of the second Schedule. *Held*, that the meaning of the expression 'to appoint an arbitrator' in para. 5 of the second Schedule is to concur in appointment and therefore to concur in appointment is good though no arbitrator is mentioned in the notice, *held*, further, that the defendant's application was a 'written notice' within the requirements of the paragraph in the second Schedule, that the order of the Court was therefore within the jurisdiction with which it was vested that the unfortunate error committed by the Court was a mistake of judgment and could be rectified on revison. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) HASAN BANO BEGUM *v.* WASI ALI KHAN. **11 O. & A. L. R. 53 : 2 O. W. N. 64 : 86 I. C. 613 : 12 O. L. J. 174 : A. I. R. 1925 Oudh 361.**

——**Sch. II, Para. 14**—*Powers of arbitrator—Partition—Provision for maintenance can be made.*

If the arbitrators have authority to make a partition, they have authority to determine everything incidental or consequential with reference to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded. (*Kanhaiya Lal, J. C.*) MURLI DHARI *v.* MOOLCHAND. **10 O. L. J. 226 : 9 O. & A. L. R. 875 : 73 I. C. 39 (2) : A. I. R. 1924 Oudh 54.**

——**Sch. II, Para. 14**—*Parties representing whole property to be theirs—Third persons interested in the property but arbitrator unaware of the fact and deciding the dispute—Party to reference cannot challenge the award—Evidence Act, S. 115.*

When all the parties to the reference represent to the arbitrator that whole of the properties in dispute belonged to them and that third persons had no interest in such properties, the arbitrator is justified in treating the whole of such properties as belonging to the parties to the reference. If, as a matter of fact, third persons had any interest in those properties, and the parties to arbitration agreed to have such properties partitioned between them by the arbitrator, it is not open to any one of them to contest the validity of the award on the ground that it deals with matters in which third parties are interested. (*Mullick and Kulwant Sahay, JJ.*) MAHOMED KHATIL *v.* ABDUL RAHIM. **4 Pat. 670 : A. I. R. 1925 Pat. 810.**

——**Sch. II, Para. 14**—*Award partly bad—Not valid.*

Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part, the Court cannot remit to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. 19 C. W. N. 476 and 4 P. L. J. 394 Foll. (*Mullick and Bucknill, JJ.*) JALDHARI RAI *v.* MAHOMED ABDUL KABIR. **1 Pat. L. R. 244 : 4 P. L. T 669 : 74 I. C. 649 : A. I. R. 1923 Pat. 470.**

——**Sch. II, Paras. 14 and 15**—*Award—Validity of—Disputes between landlord and tenant referred to arbitration—Award thereon—Jurisdiction of Revenue Court to set aside the award.*

Where the relations between a certain landlord and his tenants were strained on account of a criminal case a commutation proceeding and a civil suit pending in the respective tribunals, and by consent of both the parties the matter was referred to an arbitration to settle their disputes, and after a valid award was made by him on the question at issue the landlord sued to set aside the award in a Revenue Court. *Held*, having once agreed to an award the petitioner had no business to attack the award, once it had been given; under Sch II, paras. 14 and 15, C. P. Code, no award could be set aside except on the ground of fraud or misconduct (neither of which was alleged in the case) and that it was beyond the powers of the Revenue Court to set aside or amend the award. (*Foley, Esq.*) DALIP NARAIN *v.* MAHABIR SINGH. **3 Pat. L R. 139 (Rev.).**

——**Sch. II, Para. 14**—*Award should not be remitted to arbitrator when circumstances in his situation is likely to prejudice him.*

When any circumstance in the situation of the arbitrator is such, as to tend to produce a bias in his

C. P. CODE (V OF 1908), Sch. II, Para. 14.

mind the Court should in its discretion decline to remit an award to an arbitrator. 114 R. R. 429, Foll. (*Rupchand Bilaram, A. J. C.*) FIRM OF MAHOMED ALI A. KARINJI & SONS *v.* CHARAT SING BUD SING.
80 I C. 596 : A. I. R. 1925 Sind 51.

——**Sch. II Para. 14 (a)**—*Mining of matters—Award can be remitted for correction.*

The arbitrators, who were three in number, were to report their decision *qua* the Tohana house in question to the Court, and the parties were to be bound by the award *qua* the other property. The award filed was remitted as it was considered that the arbitrators should omit that part which related to the Kabai property, *Held*, when an award deals which a matter extraneous to the reference which matter can be separated therefrom the Court may modify the award or may remit it to the arbitrators for correction. (*Broadway, J.*) MANSA RAM *v.* KARLA RAM.
76 I. C. 1007 : A. I. R. 1923 Lah. 411.

——**Sch. II, Paras. 14 (c) and 15**—*Illegality—Compulsion of Court.*

A Court has no power to compel an arbitrator to give a decision against his will, if the arbitrator after deciding some of the issues refuses to arbitrate further. Where a Court passed an order threatening the arbitrator with contempt proceedings and thereby forced out an award from him, the award is invalid and will be set aside on revision. (*Sulaiman and Kanhaiya Lal, JJ.*) BASDEO MAL *v.* KANHAIYA LAL.
18 A. L. J. 952 : 59 I. C. 667 : 43 All. 101.

——**Sch. II, Para. 14 (c)**—*Legal error—Must form part of award and be its basis.*

An error in law on the face of the award means that there can be found in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator, stating the reasons for his judgment, some legal proposition which is the basis of the award and which can then be said to be erroneous. (*Sanderson, C. J. and Walmsley, J.*) SREELAL MANGTULAL *v.* J. F MADAN. **52 Cal. 100 : 88 I. C. 49 : A. I. R. 1925 Cal. 599.**

——**Sch. II, Para, 14 (c)**—*Awarding excess as* jeshtabagam—*If illegal.*

Where arbitrators in partitioning joint family property gave an excess amount to the eldest brother for his trouble in managing the estate the award cannot be said to be illegal on the face of it. (*Krishnan and Waller, JJ.*) VAITHIANATHA AIYAR *v.* SUBRAMANIA AIYAR. **78 I. C. 238 : A. I. R. 1925 Mad. 301.**

——**Sch. II, Para. 15.**

Absence of one party.
Apparent error.
Interpretation.
Jurisdiction.
Minor.
Private inquiry.
Procedure.
Time of filing award.
Time of objecting.
Miscellaneous.

Absence of one party.

——**Sch. II, Paras. 15 and 16**—*Absence of one party—Decree on award—Appeal—Suit for partition—One of the defendants not a party to arbitration—Objections to award by plaintiff.*

In a suit for partition all the parties excepting one of the plaintiffs and one of the defendants agreed to refer the litigation to arbitration. An award was given and the plaintiff who was a party to the arbitration preferred objections to the award. The Court, however, passed a decree in terms of the award. *Held*,

C. P. CODE (V OF 1908), Sch. II, Para. 15—Apparent Error.

that there was no appeal from the decree on the award. 39 A. 69 followed. (*Rafique and Lindsay, JJ.*) HARI SHANKER *v.* RAM PYARI. **45 All. 441 : 21 A. L. J. 326 : L. R. 4 A. 543 : 74 I. C. 834 : A. I. R. 1923 All. 502.**

——**Sch. II, Para. 15**—*Absence of arbitrators—Joint deliberation essential—Absence of one or some of the arbitrators—Effect on award—Waiver.*

No doubt all the arbitrators must be present during the whole of the deliberations but it is open to the parties to waive the absence of one of them both at the time when the evidence is taken and the time when their conclusion is reached (*Greaves and Ghose, JJ.*) RAMA NATH MISRA *v.* RAMRANJAN MISRA.
67 I. C. 866 (2) : A. I. R. 1922 Cal. 181 (1).

——**Sch II, Para. 15 (1) (a)**—*Absence of one party—Conduct amounts to a judicial misconduct vitiating proceedings.*

The evidence must be recorded by the umpire in the presence of both parties allowing each to examine and cross-examine the witnesses. Recording evidence in the absence of one party amounts to judicial misconduct on the part of the umpire and vitiates his proceedings. (*Jai Lal, J.*) MOHAMMOD AFZAL *v.* ABDUL HAMID. **7 L. L. J. 463: 88 I. C 161 : A. I. R. 1925 Lah. 570.**

——**Sch. II, Para. 15 (1)**—*Absence of one party—does not make decree an* ex parte *decree.*

Where defendants were not present to prosecute their application to set aside their award the decree passed against them is not an *ex parte* decree but their application is only dismissed for default. (*Das and Adami, JJ.*) ROSHAN LAL *v.* FIRM OF BRIDHI CHAN. **1924 P. H. C. C. 170 : 3 P 839 : 83 I. C. 26 : A. I. R. 1924 Pat. 603.**

——**Sch. II, Para. 15**—*Absence of arbitrators—Agreement to abide by majority alone acting—Award if valid.*

When the arbitration was to consist of five members but those who actually took part were three, the decision was not binding. (*Po Han, J.*) SHEIKH ABDULLA *v.* M. V. R. S. FIRM. **2 Bur. L J. 229 : A. I. R. 1924 Rang. 153.**

——**Sch. II, Para. 15**—*Absence of one party—Arbitrator adopting special procedure without consent of all parties affected—Award should be set aside.*

An arbitrator is not entitled to adopt the procedure of a special nature unless all parties affected by it agree to the adoption of such procedure. To do so is to abrogate his function as an arbitrator, and that would be a technical misconduct. One of the parties was not present at the hearing before the arbitrator. With the consent of the other parties who were present the arbitrator disposed of the suit on the evidence of a particular witness. The absent party had not authorised anybody among the parties who were present to consent to the procedure adopted by the arbitrator. *Held*, that the absent party had suffered " at any rate, technical injustice " and that the award should be set aside. (*Kinnedy, J. C. and Raymond, A.J.C.*) DITAL *v.* DHANRAJMAL.
A. I. R. 1925 Sind 287.

Apparent Error.

——**Sch. II, Para. 15**—*Apparent error of law on the face of the award—Meaning.*

An error in law on the face of the award means, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment,

C. P. CODE (V OF 1908), Sch. II, Para. 15—Apparent Error.

some legal proposition which is the basis of the award and which you can then say is erroneous. (*Lord Dunedin.*) CHAMPSEY BHARA CO. *v.* JIVRAJ BALLOO SPINNING & WEAVING CO. **47 Bom. 578 : 50 I. A. 324 : 38 C. L. J. 130 : (1923) M. W. N. 596 : L. R. 4 P. C. 99 : 33 M. L. T. 419 : 28 C. W. N. 397 : A. I. R. 1923 P. C. 66 : 44 M. L. J. 706 (P. C.).**

——Sch. II, Para. 15—*Apparent error on the face of the award—Illegality—Arbitration by Bengal Chamber of Commerce—Sale of goods—Breach of contract—Damages—Award without inspection of goods.*

The parties to a contract for the sale of goods entered into an agreement containing terms under which they would conduct business with each other, and amongst other terms the second provided that "in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same shall be referred within 90 days of the arrival of the goods in Calcutta to the Bengal Chamber of Commerce and no claim would be entertained if made after 90 days from date of arrival of the goods." The latter part of the same clause provided that "the Chamber shall arrange for survey in accordance with its rules, that surveys shall be held on the actual goods and not on shipment samples and that all survey reports, accompanied by samples, signed and sealed by the surveyors, showing the basis on which their award has been made must be forwarded to the sellers whenever the award has been given against them. A dispute having arisen as regards the quality of goods supplied, the arbitrators passed an award to the following effect:—"We have considered the papers and as the buyers Messrs. C. & M. are unwilling to produce the bales required for inspection their claim cannot be upheld and we award that they pay and take delivery of the goods in terms of the contract." In a suit by the buyers to set aside the award on the ground of an error apparent on the face of the award. *Held*, that in a dispute as to the quality of the goods contracted for, it is the duty of the seller to prove that the goods are of the quality contracted for and that the award was erroneously in law on the face of it and liable to be set aside. (1923) A. C. 480 followed. (*Buckland, J.*) CHANDMUL MULCHAND *v.* NORDLINGER. **28 C. W. N. 261 : 80 I. C. 151 : A. I. R. 1924 Cal. 490. [See on appeal 28 C. W. N. 888 : 82 I. C. 341 : A. I. R. 1924 Cal: 1051]**

——Sch. II, Para. 15—*Apparent error—Award, setting aside—Error must appear on face of award or document forming part thereof.*

An error of law on the face of the award does not mean that, if in a narrative a reference is made to a contention of one party, that opens the door to seeing, first, what that contention is and then going into the contract on which the parties' rights depend to see if that contention is sound. An error of law which vitiates an award should be apparent on the face of the award itself or of any document so connected with the award as to form part of it, as for instance, a note appended by the arbitrators stating reasons of their judgment, some legal proposition which is the basis of the award and which the Court can say is erroneous. Where the buyers were bound to take delivery of the goods in the event of late shipment owing to *force majeure* and the buyers alone had the option to cancel the contract in the case of late shipment due to causes other than *force majeure* and where the sellers had rescinded the contract of their own motion, but where all the differences between the parties were referred to arbitration, *Held*, that the fact that arbitrators did not grant damages to the buyers did not amount to an error apparent on the face of the award. (*Rupchand Bilaram, A. J. C.*) FIRM OF MADHOWRAM HARDENDAS *v.* MITSUI BHUSAN KAISHA, LTD. **78 I C. 230 : A. I. R. 1925 Sind 186.**

——Sch. II, Para. 15—*Apparent error—Award can be set as de for error in law in reasons stated in award.*

An award in which an arbitrator gives his reasons for his decision which reasons are erroneous on a point of law is an award in which there is an error of law on the face of the award and should be set aside. 47 Bom 578, A. I. R. 1923 P.C. 66, Foll. (*Rupchand Bilaram, A.J.C.*) FIRM OF MAHOMEDALI A. KARIMJI AND SONS. *v.* CHARAT SING BUDSING. **80 I. C. 596 : A. I. R. 1925 Sind 51.**

——Sch. II, Para. 15—*Apparent error—What amounts to.*

Courts cannot investigate beyond the award of arbitrators and the documents actually incorporated therein and where no error is patent on these, the Court cannot go into the proceedings of the arbitrator. (*Kennedy and Rupchand Bilaram, A. J. Cs.*) RAMJIBHOY & Co. *v.* YUSUFALI MAHOMEDALI. **80 I. C. 403 : A. I. R. 1924 Sind 151.**

——Sch. II, Paras. 15 and 14—*Apparent error on the face of the award—Damage granted in Pounds—Exchange rate not specified—Award not uncertain.*

An error in law on the face of the award must be distinctly collected from the face of the award or from any paper so connected with the award as to form any part of it. Where, in an arbitration the arbitrator had awarded the amount claimed in pounds sterling and the rate of exchange for payment was not specified. *Held* that the award was not bad for uncertainty. (*Raymond, A.J.C.*) MESSRS. BEITH STEVENSON CO. LTD. *v.* FIRM OF NAROOMAL KHEMCHAND. **80 I. C. 1009 : 17 S. L. R. 86 : A.I.R. 1924 Sind 117.**

——Sch. II, Para. 15—*Apparent error of law vitiates award—Breach of duty though honestly caused is legal misconduct—Arbitration Act, S. 14.*

The Court will set aside an award if there is an error of law patent on the face of it. The term misconduct has in the legal sense a wider significance than personal misbehaviour. "Legal misconduct" means misconduct in the judicial sense of the word not from a moral point of view and means some honest though erroneous breach of duty causing a miscarriage of justice. Where the arbitrators had admitted improper evidence and were misled by it; *Held*, that they had committed an error of law patent on the face of the award and that this could amount to legal misconduct.

Per *Madgavkar, A. J. C.*—Patent errors of law are legal misconduct on which Courts can in their inherent power, set aside the award under S. 14 of the Arbitration Act. Whether the Courts should do so or should only remit the award is a matter on which no hard and fast rules can be laid down, depending as it does on the peculiar circumstances of each case. 13 S. L. R. 201 Foll; 44 Bom. 780 Ref. 1 S. L. R. 86 Ref. (*Kincaid, J. C., Aston and Madgavkar, A.J Cs.*) GUNNIS & CO., LTD *v.* AMANMAL TULSI DAS. **17 S. L. R. 133 : 83 I. C. 353 : A. I. R. 1924 Sind 75 (F.B.)**

——Sch. II, Para. 15—*Apparent error—Award—"Error of law on the face of award"—Meaning of.*

So long as an arbitrator acts within jurisdiction and without fraud or misconduct an award cannot be set aside unless there is an error of law which appears on the face of the award or in some document so closely connected that it must be regarded as part of the award. The expression means some legal proposition

C. P. CODE (V OF 1908), Sch. II, Para.15—Interpretation.

which is the basis of the award and which can be said to be erroneous. (*Raymond and Rupchand Bilaram, A. J. Cs.*) DUTTON MESSEY & CO. *v.* JAMNADAS HARPRASAD. **A. I. R. 1924 Sind 51.**

Interpretation.

——**Sch. II, Paras. 15 and 16**—*Interpretation—Sections do not operate where reference underPara. 1 is itself invalid.*

Paras. 15 and 16 depend for their operation on a valid reference under Para. 1 of the Schedule. (*Suhrawardy and Canning, JJ.*) T. WANG *v.* SONA WANGDI. **52 Cal. 559 : 42 C. L. J. 26 : 87 I. C 633 : 29 C. W. N. 886 : A. I. R. 1925 Cal. 812.**

——**Sch. II, Paras. 15 (1) (c) and 16**—*Interpretation—Judgment according to—Award—No appeal.*

The words "being otherwise invalid" in Sch. II, Para. 15 (1) (*c*) are intended to give effect to the principle of finality to awards. Where the judgment is according to the award there is no appeal nor a revision. 29 C. 167 Ref. (*Kennedy, J. C. and Raymond, A.J.C.*) EMNABAI *v.* FAKIR MAHOMED.
65 I.C. 50 : 15 S. L. R. 165 : A. I. R. 1922 Sind 1.

Jurisdiction.

——**Sch. II, Para. 15**—*Jurisdiction—Submission to—Revocation—Rights of parties.*

In giving leave to revoke a submission to arbitration the Court should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who, as a consideration for a contract, had agreed to submit any disputes, whether of law or fact, which might arise to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction, or refusing jurisdiction, or failing to do all that their jurisdiction requires them to do, and the principle underlying the exercise of the power to revoke is, that the parties take the arbitrators for better or for worse, that their decision is final both as to law and fact, that unless a substantial miscarriage of justice may take place, leave ought not to be given, and it is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by. (*Walsh and Ryves, JJ*) GAYA PRASAD *v.* FIRM OF MATHU LAL BUDHA LAL.
78 I. C. 1050 : L. R. 5 A. 319 : A. I. R. 1925 All. 202.

——**Sch. 2, Paras. 15 and 16**—*Jurisdiction—Arbitration—Award—When open to attack—Jurisdiction of Court.*

An arbitration, in substance, ousts the jurisdiction of the court, except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award, the Court has nothing to say, good, bad or indifferent. It has no right to review it or to consider it and in substance hear an appeal therefrom. (*Walsh, A.C. J. and Ryves, J.*) AFTAB BEGAM *v.* HAJI ABDUL MAJID KHAN.
22 A. L. J. 816 : 81 I.C. 525 (1) : L. R. 5 A. (Civ.) 783 : A.I.R. 1924 All. 800 (1).

——**Sch II, Paras. 15 and 16**—*Jurisdiction—Award—Acquiescence—Objection to jurisdiction.*

Where parties submitted themselves to the decision of arbitrators and a decree was passed in terms of the award, it was not open to them to seek to reverse the award on the ground of want of jurisdiction. (*Piggott and Kanhaiya Lal, JJ.*) SUKHNATH RAI *v.* NEHALCHAND. **42 All. 661 : 18 A. L. J. 644 : 59 I. C. 801 :**

C. P. CODE (V OF 1908), Sch. II, Para. 15—Minor.

2 U.P.L.R. (All.) 240

——**Sch. II, Para. 15**—*Jurisdiction.*

Arbitrators are judges of law as well as of fact and error of law does not vitiate the award of the arbitrators. (*Das and Ross, JJ.*) KOKIL SINGH *v.* RAMASRAY PROSAD. **3 P. 443 : 1924 P. H. C. C. 110 : 6 P. L. T. 122 : 81 I. C. 994 : A.I.R. 1924 Pat. 488.**

——**Sch. II, Para. 15**—*Jurisdiction—Award—Error in law—Question of law specifically referred—Error is not fatal—Otherwise error is fatal if apparent on face of award.*

Where the arbitrators are judges both of facts and of law, error in law, if any, does not vitiate the award. Where a specific question of law is specifically referred by the parties to the arbitrators who arrived at a wrong decision of law, their award cannot be challenged though the error of law is apparent on the face of the award itself. Where, however, a specific question of law is not so referred, an erroneous decision of law may be attacked provided such error appears on the face of the award itself, or any document so closely connected as to form part of the award. (*Rupchand Bilaram, A. J. C.*) FIRM OF MADHOWRAM HARDEODAS *v.* MITSIN BHUSANI KAISHA, LTD.
78 I. C. 230 : A. I. R. 1925 Sind 186.

——**Sch. II, Para. 15**—*Jurisdiction—Filing of suit to set aside award—Effect on pending proceedings.*

The filing of a suit for declaring an arbitration invalid does not render the arbitrators *functi officio* or the award void. (*Raymond, A. J. C.*) TAYABALLY ABDUL HUSSAIN *v.* JAMES FINLAY & CO.
17 S. L. R. 152 : : 80 I. C. 969 A. I. R. 1924 Sind 105 (2).

Minor.

——**Sch. II, Para. 15**—*Minor—Enforcibility—Dismissal of application to file award on ground of some parties being unrepresented minors does not render award void or otherwise unenforceable.*

Dismissal of application to file an award on the ground that certain parties were minors and were not properly represented may *per se* deprive the adult parties to the award, of the power of enforcing it by certain effective statutory methods, but it does not render the award void or otherwise unenforceable as against those parties. (*Lord Atkinson*) KIRKWOOD *alias* MA THEIN *v.* MAUNG SIN. **52 I. A. 265 : L. R. 6 P. C. 160 : A. I. R. 1925 P. C. 216 (P. C.)**

——**Sch. II, Para. 15**—*Minor—Setting aside of award—Minor—Duty of Court.*

A suit by some minors was referred to arbitration which ended in an award in their favour. Before the objections of the defendant were taken up for consideration, on an oral request of the parties, the court set aside the award and referred the matter to the counsel of the parties for fresh arbitration. *Held*, the award was valid and binding, unless set aside for one of the reasons mentioned in the C. P. Code. The Court ought to have addressed itself to the question whether the next friend of the minors could so compromise the disputes as to give the court no option but to accept the compromise and therefore to preclude the court from considering if it was to the benefit of the minors. Jurisdiction of equity courts over the interests of minors adverted to. (*Piggott and Walsh, JJ.*) JHINKU SINGH *v.* SITAL SINGH.
45 A. 263 : 21 A. L. J. 81 : L. R. 4 A. 329 : 74 I. C. 133 : A. I. R. 1923 All. 267 (2).

——**Sch. II, Para. 15**—*Minor—Legal misconduct*

It is improper on the part of an arbitrator to get the information from one side in the absence of the other or to utilise information not accessible to others

C. P. CODE (V OF 1908), Sch. II, Para. 15—Private Inquiry.

but consent of parties who are *sui juris* will cure the defect but a minor's guardian cannot waive the minor's right to object to irregular procedure. (*Spencer and Venkatasubba Rao, JJ.*) (CHINTALAPUDI) SANYASI-RAO MINOR BY NEXT FRIEND VANA PILLAI ATCHAYYA *v.* (CHINTALAPUDI) VENKATRAO MINOR BY GUARDIAN AD LITEM CHINTALAPUDI CHINNAYYA. **17 L. W. 71 : (1923) M. W. N. 7 : 32 M.L.T. 32 : 47 Mad. 30 · A. I. R. 1923 Mad. 301 : 44 M. L. J. 263**

Private Inquiry.

——Sch. II, Para. 15—*Private enquiries by arbitrators—Court superseding arbitration and taking up case—Propriety of.*

When an appeal was pending the parties agreed to refer their disputes to arbitrators who made an award. The award was attacked as vitiated by misconduct on the ground that the arbitrators made secret enquiries. The Court below held this to be misconduct and therefore entertained and decided the appeal on its merits without reference to the arbitration. *Held*, that it could not be said that the Court below acted without jurisdiction or illegally or with material irregularity in the exercise of its jurisdiction. (*Daniels, J.*) BABU RAM LAL *v.* BEHARI SINGH. **L. R 5 A. 367 : A. I. R. 1924 All. 761.**

——Sch. II. Para. 15—*Private enquiries by arbitrator—Effect of.*

Where the parties had given the arbitrator the widest possible powers and had expressly bound themselves to abide by his decision in whatsoever manner he might see fit to arrive at, the arbitrator cannot be said to be guilty of misconduct if he bases his award on private inquiries and the court acts without jurisdiction if it refuses to pass a decree in terms of the award on that ground. (*Piggott and Walsh, JJ.*) HUSAIN BAKSH *v.* LACHHMAN DAS MATHURA DAS. **20 A. L. J. 125 : 64 I. C. 934 : L. R. 3 A. 106 : A. I. R. 1922 All. 69.**

——Sch. II, Para. 15—*Private enquiry by arbitrator.*

Where the terms of a reference to arbitration do not authorise the making of private enquiries by the arbitrator behind the back of the parties, the arbitrator making such inquiries is guilty of misconduct. If a court in such a case supersedes the arbitration, it cannot be said to act illegally or with material irregularity. (*Piggott and Walsh, JJ.*) GANGASAHAI *v.* BALDEO SINGH **20 A. L. J. 117 : L. R. 3 A. 104 : 65 I. C. 779 : A. I. R. 1922 All 64.**

——Sch. II, Para. 15—*Private inquiry—Private communication with parties.*

An award can be justifiably set aside if in the course of the arbitration proceedings the arbitrator makes a private communication with one of the parties unknown to the other. The arbitrator renders himself guilty of legal misconduct except when such communication has been authorised by the reference itself. 4 A. L. J. 159 foll. (*Piggott and Walsh, JJ.*) SIA RAM *v.* CHET RAM. **L. R. 3 A. 84.**

——Sch. II, Para. 15—*Private enquiries—Making of—When objectionable.*

Where the parties produced no evidence and the arbitrators made enquiries from the neighbours of the parties and there was nothing to show that the inquiries were not made in the presence of the parties, the award, though no doubt based on hearsay and conjecture must be upheld. (*Le Rossignol, J.*) BUDH RAM *v.* CHANDU. **67 I.C. 866 : A.I.R. 1922 Lah. 480 (1).**

——Sch. II, Para. 15—*Private inquiry—Decision of arbitrator on broad principles cannot be impeached.*

Where a dispute relating to joint family property is referred to an arbitrator who has special knowledge of the circumstances of the family, without any stipulation that he should decide according to any custom of Hindu Law, his decision on broad principles, cannot be impeached as arising from any misconduct (*Chevis and Scott-Smith, JJ.*) DWARKA DAS *v.* KISHAN KISHORE. **2 Lah. 114 : 61 I. C. 628 : 3 Lah. L. J. 349.**

——Sch. II, Para. 15 (1) (a)—*Private inquiry—Importation of personal knowledge by arbitrators depends upon agreement to refer, by parties—If option given to arbitrators to import their own knowledge or to take evidence, they are entitled to import their personal knowledge but not otherwise.*

Whether the arbitrators can import their own personal knowledge into the consideration of the case before them will depend upon the terms of submission to arbitration. If the submission simply asks the arbitrators to decide a case that will not give them a right to import their own personal knowledge into the consideration of the case. But where the submission to arbitration gives them an option either to take evidence or to decide the case upon their own personal knowledge they would be entitled to import into the consideration of the case their own personal knowledge 42 All. 185 Applied. Where the reference to arbitration does not say that the arbitrators were to decide the matter in controversy upon their own personal knowledge ; but on the other hand the reference to arbitration simply asks them to decide the dispute between the plaintiff and the defendants. *Held*, that they cannot import into the consideration of the case anything derived from their own personal knowledge. (*Devadoss, J.*) R. PALAVESAM CHETTIAR *v.* NARAYANA AIYAR. **(1925) M. W. N. 503 : 88 I. C. 660 : A. I. R. 1925 Mad. 1086 : 49 M. L. J. 115.**

——Sch. II, Para. 15—*Private enquiries.*

An award passed on reference by a guardian, when the arbitrator acted upon information received in the absence of parties or on his own knowledge of facts, is vitiated by legal misconduct and would therefore be invalid. Ordinarily, an award based on information received in the absence of the parties or on the arbitrator's own knowledge of the facts in regard to the matters in issue between the parties would be invalid. But parties who are *sui juris* may agree to a reference that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence : and they will be bound by such a reference and no legal misconduct can be imputed to the arbitrator, if he based his award on such materials. 42 A. 185 followed. (*Spencer and Venkatasubba Rao, JJ.*) CHINTALAPUDI SANYASI *v.* CHINTALAPUDI VENKATARAO. **73 I. C. 470 : 32 M.L.T 32 : (1923) M W. N. 7 : 17 L. W. 71 : A. I. R. 1923 Mad. 301 : 44 M. L. J. 263.**

——Sch. II, Para. 15—*Private enquiries—Arbitrator getting private information—Communication to other arbitrators—Effect—Revision.*

Where a private information got by an arbitrator was, in the presence of the parties communicated to the other arbitrators, an award by them is not invalid. Courts proceed very warily in allowing revision in awards. (*Odgers, J.*) SHEIK MOHIDIN SAHEB *v.* RAMASAMI CHETTI. **65 I. C. 676 : (1921) M. W. N. 509 : 14 L. W. 349 : 41 M. L. J. 490.**

——Sch.II, Para.15—*Private enquiries—Legality of.*

C. P. CODE (V OF 1908), Sch. II, Para. 15—Private Enquiries.

It is in no case open to an arbitrator to make private enquiries. It may be that in some cases the parties contemplate that the arbitrator should do so. Even if the parties did not contemplate it, where the Court below has found as a fact that the decision of the arbitrator was based exclusively on the evidence which he recorded in the presence of both parties there is no ground for interference. (*Daniels, A. J. C.*) SHEO PALTON *v.* SUKHDEO SINGH.

26 O. C. 107 : 74 I. C. 401 : A. I. R. 1923 Oudh 235.

——Sch. II, Para 15 (a)—*Private inquiry—Consulting strangers on law point, style, etc., is not misconduct—Consulting on facts, is misconduct.*

In the award the arbitrator who had been made sole arbitrator stated that he began the arbitration, in the presence of four persons whom he named and whom, he said he associated with himself in one assembly for the purpose of strengthening his own opinion. He did not get any information from those persons or made use of it in arriving at the findings of fact, *held* : that if he asked them questions of law, or if he consulted them as to the style, syntax or grammar of his award, he was quite within his rights as an arbitrator, but if he arrived at any findings of fact by consulting the people and if he allowed the persons sitting with him to affect his decision as assessors then it must be held that there had been misconduct. (*Foster, J.*) ABDUL HAKIM *v.* ISMAIL MOMIN. **3 Pat. L. R. 59 : 86 I. C. 773 : 6 P. L. T. 544 : A. I. R. 1925 Pat. 465.**

——Sch. II, Para. 15 (a)—*Private enquiry is misconduct.*

No arbitrator performing his functions, which are in a sense the functions of a Judge, can listen to confidential information adverse to the one or the other party without committing grave misconduct. The words of the petition of the parties allowing the arbitrator full latitude in his method of coming to a decision cannot be interpreted as including unfair conduct. 13 C. L. J. 399 at p 402 and 14 Bom. L. R. 1007 Foll. (*Foster, J.*) ABDUL HAKIM *v.* ISMAIL MOMIN. **3 Pat. L. R. 59 : 86 I. C. 773 : 6 P. L. T. 544 : A. I R. 1925 Pat 465.**

——Sch. II, Para. 15 (1)—*Private inquiries—Award must not exceed submission in substance or form.*

An arbitrator has no right to traverse beyond the limits of the particular matters submitted to him for decision. His award must strictly conform both in substance and in form to the submission. (*Rupchand Bilaram, A. J. C.*) FIRM OF MAHOMED ALI A. KARIMJI AND SONS *v.* CHARAT SING BUD SING. **80 I. C. 596 : A. I. R. 1925 Sind 51.**

Procedure.

——Sch. II, Para. 15 (1) (a)—*Procedure—Misconduct of the arbitrator.*

Where after a reference to arbitration and before the making of award, the parties make an agreement about the matter in controversy and the arbitrator omits to decide that matter, or record the agreement as part of the award, such omission does not amount to a misconduct on the part of the arbitrator nor does the award become invalid. (*Mears, C. J. and Ryves, J.*) HARAK RAM JANI *v.* LAKMI RAM JANI. **43 All. 108 : 2 U. P. L. R. (All.) 310 : 60 I. C. 626 : 18 A. L. J. 960.**

——Sch. II, Para. 15—*Procedure—Not hearing parties.*

The ordinary rule is that the enquiry before the arbitrator is assimilated nearly to the proceedings on a trial in the courts. If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. Therefore if the parties are not informed of any meeting, in the ordinary case that would clearly amount to misconduct on the part of the arbitrators. (*Fawcett, J.*) TYEBBHAI ESSUBHAI *v.* ABDUL HUSEIN. **25 Bom. L. R. 392 : A. I. R. 1924 Bom. 149.**

——Sch, II, Para. 15—*Procedure—Award not published by arbitrators—Arbitrators not guilty of misconduct nor the award invalid.*

It is only where the submission provides for the making and publishing of the award that the award is not valid unless it is published. Where therefore there is not such provision in the submission, neither is the award invalid nor are the arbitrators guilty of misconduct if they do not publish the award. (*Kinkhede, A. J. C.*) ANANTRAM *v.* MURLIDHAR. **78 I. C. 194 : A. I. R. 1924 Nag. 204.**

——Sch. II, Para. 15—*Procedure—Decision by umpire by drawing lots does not amount to misconduct.*

A dispute was referred to four arbitrators, two being appointed by each side, and a *sirpanch* who was appointed by both parties. The two arbitrators appointed by the plaintiffs took one view and those appointed by the defendant another. The umpire being unable to decide between them drew lots and gave a decision accordingly. *Held* that though the reference to lot can hardly be tolerated in an ordinary Court the action of the umpire in such a case cannot be said to amount to misconduct. (*Pullan, A. J. C.*) PURAN CHAND *v.* RAM NATH. **11 O. L. J. 685 : 84 I. C. 490 : A. I. R. 1925 Oudh 227 (2).**

——Sch. II, Para. 15—*Procedure—Refusal to allow evidence under honest belief of want of jurisdiction to admit it, is not misconduct.*

Where a case was submitted to arbitration in the appellate stage and therefore the arbitrator refused to allow documentary evidence tendered by one party, being of opinion that his jurisdiction over the matter was the same as the Appellate Court, *Held*, that his award was not vitiated by misconduct. (*Wazir Hasan, A. J. C.*) MIRZA MUHOMED HASAN BEG *v.* MIR SHAKIR BEG. **11 O. L. J. 142 : 78 I. C. 378 : A. I. R. 1924 Oudh 400.**

——Sch. II, Para. 15—*Procedure — Arbitrator must decide according to legal rights of parties and not according to his notions as to the equities of the case.*

An arbitrator has no jurisdiction to pass an award according to what he considers to be an equitable arrangement under the circumstances of the case but he is bound to decide according to the legal rights of the parties. (*Rupchand Bilaram, A. J. C.*) FIRM OF MAHOMED ALI A. KARIMJI AND SONS *v.* CHARAT SINGH BUD SINGH. **80 I. C. 596 : A. I. R. 1925 Sind 51.**

——Sch. II, Para. 15—*Procedure—Misconduct.*

Where all that was done was that the documents and the correspondence had been perused, *Held*, this fact by itself did not constitute misconduct on the part of the arbitrators, but an arbitrator would entirely misconceive his duty if he takes upon himself to hear evidence behind the back of the party interested in controverting it. (*Raymond, A. J. C.*) JAMES FINLAY & CO., *v.* GUDAYAL PAHLAJRAJ. **17 S. L. R. 93: 76 I. C. 660 : A. I. R. 1924 Sind 91.**

——Sch. II Para, 15—*Procedure.*

On a question of construction being referred to arbitration, his award cannot be set aside merely

C P. CODE (V OF 1908), Sch. II, Para. 15—Procedure.

because the Court itself would have come to a different conclusion unless he has proceeded illegally, *e. g.*, on inadmissible evidence. (*Raymond and Rupchand Bilaram, A. J. Cs.*) DUTTON MASSEY & CO. *v.* JAMNADAS HARPRASAD. **76 I. C. 84 : A. I. R. 1924 Sind 51.**

——Sch. II, Para. 15—*Procedure—Award would be set aside if umpire does not inform the parties the date of hearing.*

The arbitrators to whom a dispute was referred having differed, appointed an umpire under the express terms of the contract. The umpire informed both the parties of his appointment, but fixed no date of hearing. No further steps were taken by any of the parties concerned and the umpire made his award whereupon the applicants objected on the ground that they had desired to lead evidence before him but had no opportunity to do so. *Held*, that the duties of an umpire are identical with those of an arbitrator. And therefore the parties are entitled to a hearing before an umpire no less than before the arbitrator and it is incumbent on the umpire on appointment, to fix a day of hearing and apprise the parties of it (5 S. L. R. 89 Foll.) And in the absence of an opportunity of hearing of the parties before the umpire, the decision filing the award must be set aside (*Kennedy, J. C. and Madgawkar, A. J. C.*) FIRM OF DHANASING *v.* FIRM OF RAM CHAND. **17 S. L. R. 172 : A. I. R. 1924 Sind 27.**

Time of filing Award.

——Sch. II. Para. 15 (1) (c,—*Time of filing award—Filing too late—Reference—Cancellation of—Power of Appellate Court to look and treat as Commissioner's report.*

Where the award was received too late and the first Court therefore cancelled the reference to arbitration, *Held*, the Judge had no power to look at the award at all and treating the award of an arbitrator as if it were the report of a Commissioner, when the reference to arbitration had been cancelled. (*Chevis, Ag. C.J.*) ARUR CHAND RAGHUNATH RAI *v.* AHMAD. **4 L. L. J. 48 : A. I. R. 1922 Lah. 194 (2).**

——Sch. II, Para. 15 and O. 23, R. 3—*Time of filing award—Partial Award—Submission after time.*

There is no rule of law that a partial award is invalid but the question has to be decided on the intention of the parties, the matter being a subject of contract between them, *i. e.*, it is valid unless there was an implied agreement that the award should be void unless an award were given in respect of all the matters referred for decision. Where after the time for submission of the award had expired. the Court passed its order, *Held*, it must be deemed to have exercised its power to supersede the arbitration and to deal with the suit. When a reference is made to arbitration, Court is not bound to act under Sch. II. (*Phillips and Devadoss, JJ.*) ALAGU PILLAI *v.* VELUCHAMI *alias* MAYILAPPA PILLAI. **18 L. W. 26 : 32 M. L. T. 369 : (1923) M. W. N. 331 : (1923) M. W. N. 509 : A. I. R. 1923 Mad. 576 : 45 M. L. J. 76.**

Time of Objecting.

——Sch. II, Para. 15—*Time of objecting—Objection to proceedings before reference cannot be made.*

After an order of reference to arbitration is made, neither party can object to the form of proceedings anterior to the reference or to the form of issues. (*Piggott and Walsh, JJ.*) KANHAIYA LAL *v.* JAGANNATH PRASAD HANUMAN PRASAD. **43 All. 305 : 60 I. C. 857 : 19 A. L. J. 33.**

C. P. CODE (V OF 1908), Sch. II, Para. 15—Miscellaneous.

——Sch. II, Para. 15—*Time of objecting to award—Invalidity—Objection to, when to be taken—Appeal against decree on award.*

An objection to an award on the ground that it is not an award or on the ground it is invalid must be made at the time when it is filed. If no objection is then taken or if it is made and disallowed, the party objecting cannot reagitate the matter by way of appeal from the decree. 26 M. 47 ; 31 A. 450 dist. 36 B. 105 Rel. (*Pratt and Fawcett, JJ.*) MAHOMED VALLI ASMAL *v* VALLI ASMAL. **26 Bom. L. R. 171 : 79 I. C. 723 : A. I. R. 1924 Bom. 324.**

——Sch. II, Para. 15—*Time of objecting -Charge of misconduct against arbitrator, when award is filed.*

Under the second Schedule, C. P. Code, the only time for entertaining the charge of misconduct against an arbitrator is when the award has been filed. (*Rankin, J.*) ROBINDRA DEB MANNA *v.* JOGENDRA DEB MANNA. **27 C.W.N. 420 : A. I. R. 1923 Cal. 410.**

Miscellaneous.

——Sch. II, Para. 15—*Award—Application to set aside—Form of.*

No form is prescribed for an application to set aside an award. It is sufficient if some notice of the objections to an award is given to the proper office or Court. (*Macleod, C. J. and Shah, J.*) GOPALJI *v.* CHHAGAN LAL. **45 Bom. 1071 : 63 I. C. 929 : 23 Bom. L. R. 614.**

——Sch. II, Para. 15—*An arbitrator is not bound to consider the decision of a Court, when such decision is referred to arbitration on appeal.*

Where parties prefer an amateur Court to a professional Court, they take the risk that the decision may not be technically perfect. The law is not supposed to assist such persons to get a second decision from a professional Court, because they are dissatisfied with the decision of the amateur tribunal which they themselves have chosen. An arbitrator cannot hear an appeal against a Court and can only decide the points referred to him. Where an arbitrator was entrusted with the decision of a case, he is not bound to consider in any way the decision of a Court whose decision is referred to arbitration on appeal. (*Pullan, A. J. C.*) WALIULLAH *v.* BHAGGAN. **11 O. L. J. 570 : 80 I. C. 7 : 28 O. C. 74 : A. I. R. 1925 Oudh 269.**

——Sch. II, Para. 15—*Misconduct—Arbitration—Reference—Dispute as regards management—Scheme—Arbitrators appointing themselves as managers—Propriety of—Delegation of functions.*

Where the parties referred a dispute as regards the management of a trust to arbitration the arbitrators in stead of deciding the dispute in favour of one or other of the parties, appointed themselves into a committee of management, *Held*, that the arbitrators were not themselves the best judges of whether they were fit persons to be members of a committee of management and it was impossible for them to avoid personal considerations when they came to consider the suitability of themselves as members. The award was therefore bad. An arbitrator may delegate to a third person the performance of acts of a ministerial character but this doctrine cannot be invoked to cover a case where evidence was taken in the absence of one or more of the arbitrators. (*Ashworth and Simpson, A. J. Cs.*) PANDIT SANKATA PRASAD *v.* JAGANNATH. **9 O.L.J. 410 : 26 O.C. 1 : A.I.R 1922 Oudh 276.**

——Sch. II, Para. 15—*Award should not be set aside on the ground of technical error.*

When the parties have agreed to abide by the decision of a tribunal of their own selection, unless there has been something radically wrong and vicious in the

C. P. CODE (V OF 1908), Sch. II, Para. 15—Miscellaneous.

proceeding it must not be set aside. An award should not be set aside on the ground of failure to observe the highly technical web of procedure and rules of evidence which surrounds judicial procedure. *Andrews* and *Mitchell* (1905) A. C. 78; *In re. Hopper* (1867) 2 Q. B. 367 Appl. (*Heald and Rutledge, JJ.*) MAUNG SHWE HPU *v.* U. MIN NYUN.

3 Rang. 387 : A. I. R. 1925 Rang. 383.

——**Sch. II, Para. 15**—*Award—Setting aside—Award can be set aside—Where the arbitrator has been paternal cousin to one of the parties and the other has not known this.*

A person who is related to one of the parties as his first paternal cousin is disqualified from sitting as an arbitrator if the other party was not aware of such relationship existing between him and the party mentioned. In such a case the fact of the relationship affords a real likelihood of an operative prejudice on his part. It is not necessary when the award is sought to be set aside to prove actual bias or partiality on the arbitrator's part or that the existence of the relationship produced any influence on his mind. (*Rupchand Bilaram, A. J. Cs.*) FIRM MOTHARAM DOWLATRAM *v.* FIRM MAYADAS DOWLATRAM. **78 I. C. 521 : A. I. R. 1925 Sind 150.**

——**Sch. II, Para. 16**—*Decree duly passed—No revision lies.*

No revision lies against a decree which has been passed in accordance with an award under para. 16 of the second schedule, after hearing and determining in accordance with law the objections raised against the validity of the award. (*Daniels, J.*) JAI MANGAL CHAND *v.* GANPAT CHAND. **L. R. 6 A. (Civ.) 156 : 86 I.C 942 : A. I. R. 1925 All. 541.**

——**Sch. II, Para. 16**—*Where application to set aside award is refused a decree must be passed in accordance with it.*

An award having been made and an application to set it aside on the ground of misconduct or any other illegality having been refused the Judge has no option but to pronounce a decree in accordance with it. (*Walsh, A. C. J. and Ryves, J.*) GOBIND SINGH *v.* BHIRGUNATH SINGH. **22 A. L. J. 676 : L. R. 5 A. 465 : 82 I. C. 16 : 10 O. & A. L. R. 820 : 46 All. 686 : A. I. R. 1924 All. 788.**

——**Sch. II, Paras. 16 and 21**—*Illegal part inseparable from legal part.*

Where the award does not state either the facts found by the arbitrators or the grounds for their decision and it is, consequently, impossible to hold that the award proceeded solely on these grounds which entitled the arbitrators to exercise their jurisdiction under the arbitration clause, and not on any of the grounds which did not afford a basis for the exercise of that jurisdiction. *Held*, that if the bad is not separable from the good, the whole is bad and the award is null and void. (*Mookerjee, Ag. C. J. and Fletcher, J.*) HURMUKHROY RAM CHUNDER *v.* THE JAPAN COTTON TRADING CO., LTD. **A. I. R. 1922 Cal. 399.**

——**Sch. II, Para. 16**—*Appeal where lies.*

An order adjudicating upon objections to an award under the Arbitration Act is nowhere described as an order filing or refusing to file an award and is not appealable under any law. 45 Cal. 502; 17 I. C. 90; 10 I. C. 211 followed. 43 All. 348 dissented from. (*Shadi Lal, C. J. and Campbell, J.*) FIRM JAI NARAIN *v.* FIRM NARAIN DAS. **3 Lah. 296 : 69 I. C. 583 : A. I. R. 1922 Lah. 369.**

——**Sch. II, Para. 16**—*Reference to arbitration—Decree on award—Appeal.*

C. P. CODE (V OF 1908), Sch. II, Para. 16.

Held, on the facts that there was substantially, though not in form, a reference to arbitration by Court with the consent of parties and consequently no appeal lies against the decree passed in terms of the award. Per *Napier, J.* Any of the parties interested in any matter of difference in the suit may get the matter referred to arbitration without all the parties joining in the reference. (*Sadasiva Aiyar and Napier, JJ.*) VENKATACHALAM *v.* RAMANATHAN CHETTY.

15 L. W. 111 : 31 M. L. T. 52 : 70 I. C. 410 : (1921) M. W. N. 423 : A. I. R. 1922 Mad. 429.

——**Sch. II, Para. 16**—*Power of court.*

The court hearing objections against an award is not a court of appeal sitting in judgment over the award. (*Wazir Hasan, A. J. C.*) MIRZA MAHOMED HASAN BEG. *v.* MIR SHAKIR BEG. **11 O. L. J. 142 : 78 I. C. 378 : A. I. R 1924 Oudh 400.**

——**Sch. II, Para. 16**—*Appeal from decree in terms of award—Grounds of appeal.*

Where a decree is passed in terms of an award under the provisions of para. 16 of Sch. II to the C. P. Code, no appeal lies against the decree on any ground except that it is in excess of the award. (*Das and Ross, JJ.*) SAGAR MULL *v.* HIRA MAHARAJ. **1925 P. H. C. C. 324.**

——**Sch II, Para. 16**—*A decree passed within ten days of filing the award is liable to be set aside in revision.*

Ten days are allowed for filing objections and therefore, a Court has no jurisdiction to pass a decree in accordance with the award before the expiry of the period. A decree passed in contravention of the rule is liable to be set aside in revision. (*Young, J.*) ACHABER PANDE *v.* KULDIP SINGH. **76 I. C. 307 : A. I. R. 1925 Rang 103.**

——**Sch. II, Para. 16 (1)**—*Award without giving time for objections—Revision.*

Where a Court receives an award, and without allowing time to parties to make objections, passes immediately decree in its terms, no appeal can lie from the decree so made; but the High Court can under S. 115, C. P. Code, set aside the decree and send the case back to the first Court to enable the parties to file their objections to the award. 29 All. 584 not foll. (*Macleod, C. J. and Fawcett, J.*) RAVJIBAI KASHIBAI *v.* DAHYABHAI ZAVERBHAI.

22 Bom. L. R. 1454 : 59 I. C. 811 : 45 Bom. 832.

——**Sch. II, Para. 16 (2)**—*Revision lies from decree in accordance with award where arbitrators or Court have exceeded jurisdiction or acted with material irregularity.*

It cannot be laid down as a general rule that in no case in which an award has been filed and decree passed in accordance therewith can the High Court interfere under S. 115, C. P. Code. Revision is permissible in cases in which the arbitrators or the Court may have exceeded their jurisdiction or acted with material irregularity in the conduct of the proceedings. (*Suhrawardy and Page, JJ.*) DEBIR-UL-DIN *v.* AMINA BIBI. **78 I. C. 335 : A. I. R. 1925 Cal. 475.**

——**Sch. II, Para. 16 (2)**—*Appeal—Revision—Decree on award without hearing objections.*

Decree on an award overruling the objections of a party without giving him an opportunity to substantiate them by evidence, is revisable but not appealable. 89 P. R. 1902 foll. 12 A. 422; 29 A. 584 dist. (*Abdul Raoof, J.*) BHAGAT DARBARI RAM *v.* BHIKHA RAM. **3 Lah. L. J. 487 : 20 P. L. R. 1922.**

——**Sch. II, Para. 16 (2)**—*Appeal—Maintainability—Test of—Validity of reference.*

A restrictive provision like the one in Sch. II, para. 16 (2), C. P. Code must be strictly construed. The

decree in respect of which that section prohibits an appeal must be one which has been passed after a substantial compliance with the preceding provisions of Sch. II. In a case where the validity of the reference is attacked, the Court in order to determine whether an appeal lay must decide whether the reference was valid or not. If the reference is valid and decree is passed in terms of the award no appeal lies therefrom but if the reference is not valid it is not a decree under Sch. II and an appeal will lie as from any other decree. (*Kinkhede, A. J. C.*) HUSSAINBHAI BHORA *v.* BANSILAL. **A. I. R. 1924 Nag. 338.**

——————**Sch. II, Para. 16 (2)**—*Decree on award passed without giving opportunity to objector to produce evidence—Appeal lies.*

When a court has passed a decree in terms of an award after having heard arguments only, but without having given sufficient opportunity to the objector to produce evidence to substantiate his objections, an appeal to set aside the decree is competent. 15 W. R. 37 (P. C.) and 18 All. 422 (F. B.) Foll. (*Carr and Brown, JJ.*) DAWOODJI AND SON *v.* SHERWAN. **4 Bur. L. J. 39 : A.I.R. 1925 Rang. 238.**

——————**Sch.II, Paras. 17 and 19**—*Order filing agreement of reference—Refusal of arbitrators to act—Order revoking reference—If appealable.*

An agreement referring disputes to arbitration was filed under para. 17 of Sch. II, but after a number of futile attempts at making the Arbitrators Act and appointing new Arbitrators to act, the court revoked the order of reference and dismissed the suit. *Held* the order of revocation was not appealable.

Where however an appeal is erroneously accepted and the case remanded, it is a final order and as such revisable. (*Sulaiman and Daniels, JJ.*) ZAHUR AHMAD *v.* TASLIMUN NISSA. **23 A L. J. 891 : 89 I. C. 404 : L. R. 6 A. 575.**

——————**Sch. II, Para. 17**—*Right to obtain reference through court.*

Where a party has gone to arbitration in which if he had refused to go to arbitration, an order of reference would have been made under para. 17. Sch. II, C. P. Code, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made to dispute the right of his opponent to obtain an order of reference under para. 17, Sch II, C. P. Code. (*Walsh and Ryves, JJ.*) FAZAL ILAHI *v.* PRAG NARAIN. **44 A. 523 : 20 A. L. J. 327 : L. R. 3 A. 434 : 4 U.P.L.R. (All) 156 : 67 I. C. 739 : A. I. R. 1922 All. 133.**

——————**Sch. II, Paras. 17 and 20**—*Reference to arbitration after suit—Procedure.*

Where parties to a suit agree to refer the matters in dispute to arbitration without the intervention of the Court they may make the agreement an order of Court and if they do not do so, they cannot file the agreement under para. 17, nor can they file the award (if made) under paras. 20 and 21. If the parties accept the award they can get a consent decree in terms thereof. If one party disputes the award the other party can plead the award as an adjustment binding on the plff Either party can also file a suit to enforce the award and apply for a stay of the Original Suit. (*Macleod, C. J and Fawcett, J.*) MANILAL MOTILAL *v.* GOKALDAS ROWJI. **45 Bom. 245 : 59 I. C. 53 : 22 Bom. L. R. 1048.**

——————**Sch. II, Para. 17**—*Resignation of one of the arbitrators is no ground for not filing agreement.*

The resignation of one of the arbitrators does not render the agreement void nor is the resignation sufficient to justify refusal to file the agreement in Court

where there is a distinct provision that the party who has selected the arbitrator would be competent to appoint another in case of the disability of the resignation or death of any arbitrator. 71 P. R. 1918 dist. (*Scott Smith and Dundas, JJ.*) SRI RAM *v.* SORABJI. **3 Lah. L. J. 276.**

——————**Sch. II, Para. 17**—*Award—Award on a reference in a pending suit emb dying compromise is valid.*

An award passed by arbitrators in a pending suit which merely embodies a compromise of the parties themselves before the arbitrator is a valid award and the arbitrators are not powerless to do anything more than recording the compromise and passing it on to the Court to deal with it. Accepting compromise is an adjudication of the case as is a decree of the Court founded on a compromise and to admit that an award may be challenged on the ground as the arbitrators did not themselves independently consider and decide the matter will be contrary to the principle of paragraph 15 of C. P. Code, Sch. II. (*Wallace, J*) L. RAMU NAIDU *v.* V. NAYANAPPA. **19 L. W. 562 : 1924 M.W.N. 356 : 80 I. C. 571 : A.I.R. 1925 Mad. 56.**

——————**Sch. II, Para. 17**—*Arbitration—Reference to—Application is not a suit—Award set aside—Court if can proceed.*

An application under Para. 17 (1) of Sch. II, though it has to be registered as a suit, is not in fact a suit within the meaning of the Code. Where in such a case the reference proves abortive, the Court has no power to make a fresh reference. The Court has no discretion to refuse to make the reference to the arbitrators nominated by the parties. It is only when the parties cannot agree that it can exercise any discretion in the matter. (*Das and Ross, JJ.*) SATISH CHANDRA BOSE *v.* PALIRAM. **2 P.L.T. 277 : 61 I.C. 390: 6 P. L. J. 287 : 1921 P.H.C.C. 170.**

——————**Sch. II, Para 17**—*Reference pending suit—Award if can be filed—Dispute decided by Court—Effect of.*

Pending a suit, parties referred to arbitrators the dispute in the suit as well as other matters. No award having been made within the time fixed or extended later, the court decided the suit. *Held*, the arbitrators had thereafter no authority to make an award, as it would amount to ousting the jurisdiction of the court. The remedy of the aggrieved party is only to sue the other side for damages for breach of the agreement to abide by the award. Parties cannot have an agreement to refer to arbitration disputes in a pending suit filed under Sch. II, para. 17. (*Kennedy J.C. and Aston, A. J. C.*) DEOMAL *v.* KHANOOMAL JOTHMAL. **89 I.C. 335.**

——————**Sch. II, Para. 17**—*Nomination "without prejudice—Effect—Signature to reference—Absence of.*

The nomination of an arbitrator "without prejudice" is not a proper compliance with the terms of an agreement to refer disputes to arbitration each party nominating one arbitrator. It is not clear and unequivocal and if as a result the other party nominates an arbitrator for the defaulter, the latter cannot exercise his right again. The fact that thereafter the reference is signed only by the first party does not vitiate the award. (*Aston, A. J. C.*) RAMJIBHAI & CO. *v.* YUSUF ALI MAHOMED ALI & BROTHERS. **76 I.C. 261 : A.I.R. 1925 Sind 12.**

——————**Sch. II, Paras. 17 and 20**—*Application under a suit within Deccan Agriculturists Relief Act, S. 3.*

An application to file a reference under clause 17 of Sch. II, C.P. Code, is not a suit and it is doubtful if an application under clause 20 to file an award even when an agriculturist is a party can be called a suit: but in any case it is not a suit of the description

mentioned in S. 3, Cl, (w), (y) or (z) of the Deccan Agriculturists' Relief Act and the Court can file the award to which an agriculturist is a party and on whose property a mortgage is created by the award without adjusting accounts under Ss. 12 and 13 of the Act, (*Kennedy, J.C. and Madgavkar, A.J.C.*) HOT CHAND BAL CHAND *v.* KISHIN CHAND.
17 S.L.R. 178 : A. I R. 1924 Sind 23.

——Sch. II, Paras. 17 (1) and 18—*Parties prosecuting case before arbitrators—Cannot challenge award on ground of jurisdiction.*

Where the parties accepted the decision of the Court who referred the matter in suit to arbitrators and appeared and fully prosecuted their case before the arbitrators. They could not afterwards, challenge the award on the ground of want of jurisdiction in the tribunal chosen by themselves. 41 Mad. 115 Ref, (*Piggott and Kanhaiya Lal, JJ.*) SUKHNATH RAI *v.* NEHAL CHAND. **42 All. 661 : 18 A. L. J. 644 : 59 I. C. 801 : 2 U.P.L.R. (A) 240.**

——Sch. II, Para. 18—*Suit after—Reference—No application for stay by deft.*

Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit, he must be deemed to have waived his right to arbitration. 47 Cal. 752, 41 Mad. 115 not foll. (*Piggott and Walsh, JJ.*) CHUNNI LAL POSTI MAL *v.* FIRM PHOOL CHAND FATEHCHAND.
44 A 292 : L.R. 3 A. 96 : 65 I. C. 795 : 20 A.L.J. 128 : A. I. R. 1922 All. 48.

——Sch. II, Paras 18 and 22—O. 17, R 3—*Reference to arbitration—Stay of suit*

Where in spite of an agreement to refer to arbitration, the plff. filed the suit and after it was stayed by the Court one of the arbitrators refused to act, *held*, that the plff. is entitled to a removal of the stay. The suit was not barred by the agreement to refer to arbitration. (*Macleod, C.J. and Shah, J.*) LAXMAN *v.* MANJUNATH. **45 Bom. 1181 : 64 I.C. 289 : 23 Bom. L.R. 511,**

——Sch. II, Paras. 18 and 20—*Award—Institution of suit pending arbitration—Effect of—Power of arbitrators.*

If the Court has refused to stay the action or if the defendant has abstained from asking it to do so the Court has seisin of the dispute and it is by its decision and by its decision alone that the rights of the parties are settled. As soon as the suit is instituted the arbitrators lose their authority. If the defendant still desires that the controversy should be decided by arbitration, he must endeavour to obtain a stay of the suit by an appropriate application under para. 18. If the application is refused by the Court in the exercise of its discretion, the remedy by arbitration ceases to be available. If the suit is stayed, two possible contingencies may require consideration. If the arbitrators have not yet made an award they are free to bring their proceedings to a termination and make an award in accordance with law. If, on the other hand, the arbitrators have made an award after the institution of the suit, the award cannot be pleaded as an effective bar to the suit. The award so made should be brought up before the Court under para. 20 : the Court will refuse to enforce it under para. 21 read with para 14 (c) ; and as the award will thus stand cancelled because made without jurisdiction the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. If this view were not adopted, the result would follow that a party to a submission who had appeared throughout and had taken his chance before the arbitrators might at

the very last moment, when the award, possibly an adverse award, was about to be made and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings. Where the defendant did not take recourse to the proper procedure namely. to apply for stay of the suit cancellation of the award as made without jurisdiction and thereafer remission of the matter to the arbitrators even if his failure was possibly attributable to ignorance of the law. *Held*, the agreement to refer to arbitration not having provided for reconstitution of the committee of arbitrators, if one of them should die, the award must be rejected as made without jurisdiction and the suit should be tried on the merits by the Court. (*Mookerjee and Chotzner, JJ.*) SARAT CHANDHA SEN *v.* RAJKUMAR MOOKERJEE. **26 C. W. N. 967 : 35 C. L. J. 432 : 69 I. C. 863 : A. I R. 1923 Cal. 135 (2).**

——Sch. II, Para. 18—*Stay of suit—Arbitration clause in indent—Bills of Exchange—Acceptance by buyer.*

A buyer placed an indent for the purchase of certain cotton goods with the seller, who, after shipment of the goods drew bills of exchange against the buyer. The buyer accepted the bills but subsequently refused to pay. In a suit by the seller upon the accepted but unpaid bills, the buyer relied on a clause in the indent that if any claim or dispute arose in connection with the contract it should be referred to arbitration and applied for stay of proceedings under Sch. II, para 18 of the C. P. Code. The seller relied on a clause in the indent to the effect that the bills drawn by the sellers on the buyers must be accepted and paid at maturity notwithstanding any objection the buyers may have regarding any variation in the terms of the indent. *Held*, that the buyer could not claim a stay of proceedings in the suit. 2 Lah. 19 dist. (*Scott Smith and Abdul Qadir, JJ.*) RADHA BIHARI DIWAN SINGH *v.* G. B. ALEXANDER **66 I. C. 43 : 2 Lah. 335 : A. I. R. 1922 Lah. 3.3.**

——Sch. II, Para. 18—*Agreement to refer disputes to arbitration—Suit by one party for damages for short supply of goods—Suit if should be stayed.*

When a Court is apprised that a suit has been instituted in contravention of an arbitration agreement, the Court has a discretion to stay the suit and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be so referred and not on the defendant to show that no such reason exists. (*Shadi Lal, C, J. and Leslie Jones, J.*) GANESH DAS ISHAR DAS *v.* DURGA DAT JAGANNATH. **A. I. R. 1922 Lah. 97 (1).**

——Sch. II, Para. 18—*Suit in contravention of agreement—Court can stay.*

A Court has discretion to stay a suit instituted in contravention of an arbitration agreement unless there is sufficient reason and the burden of proving that there is sufficient reason lies on the plaintiff. (*Leslie Jones and Broadway, JJ.*) VOLKART BROTHERS *v.* FATEH MUHAMMED. **61 I. C. 322 : 3 U. P. L. R. (Lah) 48.**

——Sch. II, Para. 18—*Suit in contravention of an agreement to refer—Stay.*

Where a suit is filed in contravention of the arbitration agreement and the Court comes to know of the agreement, it may stay the suit and in such case, the plff. has to prove sufficient reasons for filing the suit and the deft. is not bound to show absence of such reason. (*Shadilal, C. J. and Leslie Jones, J.*) GANESA DAS ISAR DAS *v.* DURGA DATTA JAGAN NATH. **2 Lah. 19 : 60 I. C 776 : 3 Lah. L. J. 61.**

——Sch. II, Para. 18—*Arbitration—Pendency of*

C. P. CODE (V OF 1908), Sch. II, Para. 18.

—*Institution of suit—Effect of.*

The institution of a suit does not by itself supersede a previous reference to arbitration, dealing with the same subject matter; but if, after the institution of the suit, neither party applies for a stay of the hearing of the suit under Sch. II, para. 18 either at the time of the settlement of issues or before, such a failure has the effect of superseding the arbitration for good; and any decision which might be arrived at in that suit would be binding on the parties as if no such reference to arbitration had been made prior to the suit. 41 Mad. 115, 12 A. L. J. 75 Ref. If an application is made under Sch. II, Para. 11 for the stay and the stay is granted, the arbitration can proceed; but if such stay is refused and the order refusing the stay becomes final, the arbitrator becomes *functus officio.* There is, however, a third contingency, *viz.* where no application for stay is made within the time allowed by law. The effect of the institution of the suit and its decision would in such a case equally be to supersede the arbitration and render any award made therein after the institution of the suit unenforceable at law. (*Kanhaiya Lal, J. C.*) ZAINAB *v.* BUDHUA.
25 O. C. 63 : 68 I C. 235 : A. I. R. 1922 Oudh 158.

———**Sch. II, Para. 18**—*Stay of suit—Grounds.*

In case of an agreement to allow disputes to be tried by another tribunal, the court will take into consideration all those grounds as in a case of submission to arbitration. Where the plffs'. residence, place of contract and the inspections of the ship happen to be in one place there are no grounds for staying the suit or refusing to entertain it at that place. (*Crouch, A. J. C.*) KIJRSESHI AND SONS *v.* SOOMAR HAJI.
15 S. L. R. 88.

———**Sch. II, Para. 19**—*Provisions of C. P. Code apply to proceedings under.*

C. P. Code Sch. II is not complete in itself. Per *Macpherson, J* The provisions of C. P. Code apply as far as possible, to the proceedings under Sch. II, of the Code. (*Coutts and Macpherson, JJ.*) MAHABIR PRASAD *v.* BAL KISHAN DAS. **62 I. C. 927. (P.)**

———**Sch. II, Para. 20**—*Jurisdiction over subject-matter—What is.*

Where the facts were that there was no substantial question decided by the award affecting property within the jurisdiction of the Berar Court and no one of the three temples to the management of which the award related, was within that jurisdiction, and two of them were within the dominions of the Nizam and outside British India and a large part of the award related to family questions and money payments to be made by members of the family, and all the members of the family were residing within the Nizam's Dominions but merely two of the villages which formed the principal endowments of the temples were situated in Berar, *Held*, that does not give the Berar Courts jurisdiction to file the award especially when there was no dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the three temples. (*Lord Phillimore*). RAMLAL HARGOPAL *v.* KISAN CHANDRA. **51 Cal. 361 : 7 N. L. J. 62 : 20 N. L. R. 33 : 34 M. L. T. 62 : 19 L. W. 549 : 22 A. L. J. 386 : 26 Bom. L. R. 586 : 51 I. A. 72 : (1924) M. W. N. 79 : 28 C. W. N. 977 : L R 5 P. C. 216 : A. I. R. 1924 P. C. 95 : 46 M. L. J. 628 (P. C.).**

———**Sch. II, Paras. 20 and 14**—*Order rejecting an application to file an award—Effect.*

An order rejecting an application to file an award is not a decision that the award is bad in law. (*Mears, C. J. and Ryves, J.*) HARAKH RAM JANI *v.* LAKSHMI RAM JANI. **43 All. 108 : 2 U. P. L. R. All. 310 : 60 I. C. 626 : 18 A. L. J. 960.**

C. P. CODE (V OF 1908), Sch. II, Para. 20.

———**Sch. II, Para. 20**—*Suit to enforce award is maintainable though no order for filing the award is obtained.*

A suit can be filed to enforce an award without the plaintiff first obtaining an order that the award itself shall be filed. The validity of the award can be assailed in that suit. (*Macleod C. J. and Coyajee, J.*) ABDUL AZIZ *v.* CHANDU SONU.
27 B. L. R. 652 : 89 I. C. 68 : A. I. R. 1925 Bom. 418.

———**Sch. II, Para. 20**—*Submission pending probate proceedings.*

There is nothing to prevent the parties going to private arbitration with regard to the division of the estate although probate proceedings are pending in a Civil Court in respect of a will concerning the same estate. (22 Bom. L. R. 1048 Ref.) The mere fact that it was entered upon before the probate proceedings had come to an end cannot possibly affect the question of its legality. (*Macleod, C. J. and Crump J.*) SHANKAR *v.* RAMCHANDRA. **25 Bom. L. R. 437 : A. I. R. 1923 Bom, 365.**

———**Sch. II, Para. 20**—*Suit to enforce award—Award not filed.*

An award was made on an arbitration out of Court. An application to file was numbered as a suit but was summarily rejected as being time-barred. Plff. filed a regular suit to enforce the award. *Held*, that the bar of *res judicata* did not apply. (*Macleod, C. J. and Fawcett, J.*) RAJMAL *v.* MARUTI.
22 Bom. L. R. 1377 : 59 I. C. 755 : 45 Bom. 329.
See also (*Mears, C. J. and Ryves, J.*) HARAKH RAM JANI *v.* LAKSHMI RAM JANI. **18 A. L. J. 960.**

———**Sch. II. Paras. 20 and 21**—*Matters referred already—Subject-matter of suit—Paras do not apply.*

Paras. 20 and 21 do not apply were the matters referred to arbitration are already the subject matter of a suit between the parties to the reference. (*Macleod, C. J. and Fawcett, J.*) MANILAL MOTILAL *v.* GOKALDAS ROWJI. **45 Bom. 245 : 59 I. C. 53 : 22 Bom. L. R. 1048.**

———**Sch. II, Para. 20**—*Compromise decree—Provision to work out details by arbitration—Law applicable.*

A compromise decree in a partition suit provided for the details being worked out by arbitration. *Held* it must be construed to mean arbitration without the intervention of court and hence the provisions of the second Schedule C. P. Code applied. (*Newbould and Pearson, JJ.*) HEM CHANDRA KUNDU *v.* JNANENDRA CHANDRA KUNDU. **90 I. C. 624.**

———**Sch. II, Para. 20**—*Absence of arbitrator—Objections—Waiver.*

If a party to an arbitration proceeding fails to take an objection to the absence of one out of several arbitrators, he will be deemed to have waived his right to take objection to the whole of the irregularity caused thereby and the award must be filed. (*Greaves and Ghose, JJ.*) RAMNATH MISRA *v.* RAMRANJAN MISRA. **67 I. C. 866 (2) : A. I. R. 1922 Cal. 181. (1).**

———**Sch, II. Para. 20**—*Court in accepting the award must accept or refuse it as a whole, but it cannot correct the same itself.*

Where the arbitration was without the intervention of the Court and where the award had been given on such reference. *Held* : that the only course open to the Court was to order the award to be filed and to pronounce judgment according to the award or to refuse to order that the award be filed, and that it was not open to the Court to correct the award itself. (*Jai Lal, J.*) MOHAMMOD AFZAL *v.* ABDUL HAMID.
7 L. L. J. 463 : 88 I. C. 161.

C. P. CODE (V OF 1908), Sch. II, Para. 20.

A. I. R. 1925 Lah. 570.

——— —**Sch. II, Paras. 20 and 21**—*Award on Private reference—Institution of suit prior to commencement of proceedings by arbitrators—Jurisdiction of arbitrators—Legality of the contract of submission—Enquiry into—Suit to set aside the award—Maintainability.*

Where an action has been commenced on a contract containing a provision for reference to an arbitrator of any dispute arising under the contract and is pending, no application to stay the action having been made or such application having been made and refused, an award made by the arbitrator under the provision for reference upon the subject matter of the action, subsequent to the commencement thereof and without the consent of the plaintiff is invalid and will not afford defence to the action. When the same matter comes before two tribunals a public tribunal appointed by the sovereign and, domestic forum chosen by the parties and no order is made staying the proceedings before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication by the private tribunal. Neither can that adjudication be pleaded as a bar to the action, nor can it be allowed to affect the merits of the decision given by the public tribunal. The law does not permit the same question to be decided by a court of law as well as by an arbitrator, and it is only when the dispute between the two tribunals is identical that a decision given by the arbitrator must be treated as *ultra vires*. There is no authority in support of the proposition that an award made after the commencement of an action must be treated as invalid even though the award deals with a question which is not in controversy in the action. 47 C. 752; 47 C. 849; 41 M. 115; 56 I. C. 150 dist. An award made after the commencement is not invalid if it deals with a question not in controversy in the action. (*Shadi Lal C. J. and Campbell, J.*) JAI NARAIN BALEN LAL *v.* NARAIN DAS JAINI MAL. **3 Lah. 296: 69 I C. 583: A. I. R 1922 Lah. 369.**

———**Sch. II, Para. 20 and O. 23, R. 3**—*Filing award—If overrides power to adjust disputes.*

The power given by Sch. II, Para. 20 to any person interested to apply to a court to have an award filed in court does not override the general power under O. 23, R. 3, to adjust disputes by a lawful compromise at any time after the institution of a suit. (*Spencer and Devadoss, JJ.*) CHINTALAPALLI CHINNA DORAYYA *v.* VENKANNA. **A. I. R. 1925 Mad. 50.**

———**Sch. II Para. 20**—*'Person interested'—Stranger to arbitration.*

A person who is a stranger to the submission to reference and under no obligation to abide by the award could not avail himself of it and could not be said to be a person interested in the award within Sch. II. para 20, C. P. Code. (*Ashworth and Simpson. A. J. Cs.*) PANDIT SANKARA PRASAD *v.* JAGANNATH. **9 O. L. J. 410: 69 I. C. 714: 26 O. C. 1: A I. R. 1922 Oudh 276.**

———**Sch. II, Paras. 20 and 21**—*Private reference—Compromise modifying award—Decree on award—No appeal lies.*

Held by Daniels and Lyle, A. J. Cs. (*Kanhaiya Lal J. C. dissenting*) that a court is competent on an application under Sch. II, para. 20, C. P. Code to pass a decree on an award as modified by a lawful compromise filed by the parties and that from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. 31 C. 516: 45 B. 245: 37 B. 639: 2 Lah. 114: 27 A. 526: 29 M. 303: 4 Pat. L. J. 394; 30 P. R. 1914; 21 C. L. J. 248 Ref. (*Kanhaiya Lal, J.C. Lyle and Daniels. A.J.Cs.*) HAKIM FAZAL AHMAD *v.* ENAYAT AHMAD **25 O. C. 213: 9 O. L. J. 219: 68 I. C. 209: A. I. R. 1922 Oudh 189.**

C. P. CODE (V OF 1908), Sch. II, Para. 20.

———**Sch., II, Paras. 20 and 14**—*Portion of award not within the arbitrator's jurisdiction—Portion separable from the rest—It is invalid but the rest of the award may be filed.*

Even in cases of a reference to arbitration without the intervention of a Court, when an application is made under paragraph 20 to file an award, the Court is competent to make an order to file an award even where the award deals with matters in excess of the authority conferred upon the arbitrator, where the portion of the award dealing with such matters can be separated from the rest of the award. 36 All. 336 (P. C.) Foll.; 1923 Patna 470, Not Foll. The ground upon which the Court can refuse to file an award under paragraph 21 is the ground upon which the Court should remit an award under paragraph 14, and as the Court cannot remit an award under paragraph 14 if the portion in excess of the arbitrator's authority be separable from the rest, it follows that it cannot refuse to file the award under paragraph 21 in those circumstances. (*Mullick and Kulwant Sahay, JJ.*) MAHOMED KHALIL *v.* ABDUL RAHIM. **4 Pat. 670 A. I. R. 1925 Patna 810.**

———**Sch. II, Paras. 20, 1, 16, 17, and 21**—*Reference to arbitration pending suit without sanction of court—Suit subsequently withdrawn—Decision by arbitrators—Error of law—Effect—Enlargement of time for award—Fresh submission.*

Para. 1 of Sch. II, C. P. Code is not mandatory; it is permissive. If the parties apply to the Court for an order of reference then the Court must keep control over the proceedings up to the end. But it is not necessary for the parties to take this course, and there is nothing to prevent their getting the suit dismissed by consent. Then the whole matter is at large and the parties can go on with the arbitration. Where there is no suit pending when an application is made to the Court under para. 20, Sch. II, C.P. Code there is nothing to bar the procedure under Para. 20 in the fact that the original agreement to arbitrate was made while a suit was pending. Paras. 20 and 21 provide for an adequate check of the proceedings before the award becomes a rule of the Court. This is all that is necessary. *Held*, that where pending a suit a reference to arbitration was made without the intervention of the court and subsequently the suit was withdrawn proceedings fell directly within the terms of para. 20 because the matter was referred to arbitration without the intervention of the Court. The Court made no order in the matter of arbitration in the original suit which was simply dismissed. 29 C. 167 : 30 C. 218 · 38 B. 687: 36 M. 358 Ref. An enlargement of time for the award is equivalent to a fresh submission to arbitration. Arbitrators are Judges of law as well as judges of fact and error of law certainly does not vitiate their award. (*Das and Ross, JJ.*) KOKIL SINGH *v.* RAMESRAY PRASAD CHOWDHARY.

3 Pat. 443 : 1924 P. H. C. C. 110 : 6 P. L. T. 122 : 81 I. C. 994: A. I. R. 1924 Pat. 488.

———**Sch. II, Paras. 20 21 and 14**—*Award—Partly in excess of reference—Filing of a portion of the award.*

Where a portion of the award is in excess of the reference, it is open to the Court to pass a decree and enforce the award so far as it relates to the dispute between the parties. (*Brown, 4. J. C.*) MAUNG TIN *v.* MAUNG POYA. **1 Bur. L. J. 265 : 72 I. C. 193 : 4 U. B. R. 157 : A. I. R. 1923 Rang. 130.**

———**Sch. II, Para. 20 (2)**—*Application to file an*

C. P. CODE (V OF 1908), Sch. II, Para. 20.

award—Limitation Act, S. 6 is not applicable.

An application to file an award does not become a suit by the provision of para. 20 (2), Sch. II, C.P. Code and hence the applicant cannot claim the benefit of S. 6 of the Limitation Act. (*Pratt and Carr, JJ.*) MA THEIRN TIN *v.* MAUNG BA THAN.

1 R. 256: 76 I. C. 493: A. I. R. 1923 R. 226.

———Sch. II, Para 20 (3)—*Arbitrator changed with consent of parties, but without Court's intervention—Award is valid.*

Where a change in the personnel of the arbitrators was made with the approval of the Defendant, but without the intervention of the Court. *Held*, that defendants cannot object to the validity of the award. (*Walmsley and Suhrawardy, JJ.*) MAHMAD SHEIKH *v.* KENKINARAH CO. LTD.

28 C. W. N. 634: 81 I. C. 574: A.I. R. 1924 Cal. 665.

———Sch. II. Para. 21—*Private reference—Power of Court to amend award.*

Where a reference to arbitration is made without reference to Court and an award is given, the courses open to the Court are to order it to be filed and pronounce judgment on its basis or to refuse to order that the award be filed. It is not open to the Judge to correct the award. (*Jai Lal, J.*) MAHOMED AFZAL *v.* ABDUL HAMID.

7 Lah. L. J. 463 : 88 I. C. 161 : 26 Punj. L. R. 706 : A. I. R. 1925 Lah. 670.

———Sch. II, Para 21—*Award must be enforceable at law.*

A Court must, before enforcing award, satisfy itself that it is enforceable in the same way as a decree is enforceable if it were a decree. Where an award is a mere declaration of the respective rights and liabilities of the parties or is an attempt to pass a sort of order for specific performance in a matter where no such decree can be passed in law, it would not be enforceable. (*Piggott and Walsh, JJ.*) SUKHAMAL BANSIDHAR *v.* BABULAL.

42 All. 525 : 18 A. L. J. 652 : 59 I. C. 75 : 2 U. P L. R. (All.) 243.

———Sch. II, Para. 21—*Award—Death of parties pending hearing—Minor representatives not impleaded—Effect of—No prejudice.*

The parties to a dispute referred it to arbitration agreeing that they and their heirs would be bound by the award. The adult parties adduced all the oral evidence and filed all the documents before the arbitrators. During the hearing of the arguments it was brought to the notice of the arbitrators that one of the parties had died, thereupon the arbitrators gave time to bring on record the minor representatives of the deceased and for appointment of a guardian. Nothing was done within the time and thereupon the arbitrators gave their award. On an application to the court to file the award, it was objected that the award was not binding because the minors had not been represented in the proceedings. *Held*, that having regard to the terms of the reference and to the fact that the interests of the minor were properly represented by the other parties on record, the award was binding on all the parties. It is true as a general principle that a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the C. P. Code. If there is a binding reference to arbitration all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. There is no rule of procedure by which the arbitrators could substitute the legal representatives of a deceased party or appoint guardians *ad-litem* for infants. If it be held that the arbitrators could not go on with the arbitration if the representatives or some other persons did not choose to come before the arbitrators, the result would be that although the reference would not abate on the death of a party under the law, the arbitrators would in fact be unable to make an award and the arbitration would come to an end. The question therefore whether the award given in the absence of the representatives of a deceased party would be binding or not depends on the circumstances of the case. If there has been a substantial representation of the interests of the legal representatives by the other parties on the record and if the enquiry is full and fair, the award will be binding and a decree could be passed thereon. 31 All. 572 : 15 C. L. J. 360 dist. (*Woodroffe and Ghose, JJ.*) BINAYAKDAS ACHARYA CHOWDHURY *v.* SASI BHUSAN CHOUDHARY.

26 C. W. N. 804: A. I. R. 1922 Cal. 226.

———Sch. II, Para. 21—*Award—Subsequent suit to set aside the award does not lie.*

Matters heard and determined in proceedings under para 21 cannot be reopened in a subsequent suit between the same parties brought for the purpose of setting aside the award and the decree following upon the judgment delivered in accordance therewith. 25 C. 757 Ref. (*Teunon and Richardson, JJ.*) GURU CHARAN SIRCAR *v.* UMA CHARAN SIRCAR.

70 I. C. 985 : 26 C. W. N. 940.

———Sch II, Para 21—*Validity of award—Disputes arising from contract—Power of arbitrator to determine existence of contract.*

Where a contract provides for submission of disputes to arbitration it is competent for the arbitrators under the terms of the submission to decide whether or not an alleged interpolation was in the contract as originally made. (*Greaves, J.*) *In the matter of an Arbitration between*, ALIBHOY MAHOMMAD AND BAIJA NATH.

59 I. C. 439 : 24 C W. N. 567.

———Sch. III, and S. 47—*Sale by Collector—Objection—Effect of Suit by purchaser for title—If barred by S. 47.*

If an objection has been raised as to a sale by a Collector, his powers to confirm the sale are suspended and he must refer the objector to the Civil Court. A purchaser's suit to establish his title to the property sold, is not barred by S. 47 of the Code. (*Macleod, C. J. and Shah, J.*) BALWANT DASS *v.* UMA BAI SHANKAR RAO.

45 Bom. 812 : 61 I. C. 287 : 23 Bom. L. R. 254.

———Sch. III—*Collector in management—Sale with the permission of Collector—Not an execution sale.*

A sale by a judgment-debtor with the permission of the Collector who is in management of the property under Sch. III, C. P. Code, has not the same effect as a sale by the Collector in execution but only amounts to a private sale. (*Baker, J. C.*) SHEOKISAN *v.* DOMA.

87 I. C. 995 : A. I. R. 1925 Nag. 341.

———Sch. III—*Amended C form is not now C form.*

Because a new number is given to the proceedings on the corrected "Form C", the original proceedings received by the Collector are not terminated when the "Form C" is returned for amendment but remains pending while it is with the Civil Court and continues on its return. (*Hallifax, A. J. C.*) HAR LAL *v.* NARAYAN.

18 N. L. R. 152 : A. I. R 1922 Nag 267.

———Sch. III, Para. 1—*Transfer of decree for execution—Powers of Collector.*

Where the decree of a Civil Court is sent to the Collector for execution, the Collector has absolute

jurisdiction to find out the best method for raising money in order to satisfy the Civil Court decree, but beyond that he had no jurisdiction to decide how much money was due to the decree-holder and how much of the decree had been satisfied. (*Stuart and Mookerjee, JJ.*) ABDUL SHAKUR *v.* MAHOMED MATIN. **22 A. L. J. 202 : L. R. 5 A. 93 : 78 I. C. 429 : 46 A. 414 : A.I.R. 1924 All. 307.**

———Sch. III, Para. 1—*Mortgage decree—Executing authority may mortgage the property to satisfy decree.*

It is open to the executing authority to effect a mortgage of a part of the property to satisfy a mortgage decree. (*Shah, A. C. J. and Kincaid, J.*) BECHARSANG BHUPATSANG *v.* NARAN MOTI MEGHJI. **27 B. L. R. 217 : 86 I. C. 846 : A. I. R. 1925 Bom. 277.**

———Sch. III, Para. 11—*Award in the form of a special case—Leave of Court.*

If there is any difficulty in point of law as to which the opinion of the Court should be taken, provision is made in cl. 11 of the 2nd schedule of C. P. Code for making the award in the form of a special case with the leave of Court. (*Sanderson, C.J. and Walmsley, J.*) SREE LAL MANGTULAL *v.* MADAN. **52 Cal. 100 : 88 I. C. 49 : A. I. R 1925 Cal. 599.**

———Sch. III, Para. 11—*Execution before Collector—Satisfaction by taking a lease—Surrender of tenancy right to landlord—If an alienation.*

Where a decree is sent to the Collector for execution and the decree-holder accepts a 15 years' lease in full satisfaction, the execution proceedings are *ipso facto* put an end to. The mere fact that the Collector keeps the proceedings pending does not make any alienation subsequent thereto invalid. A surrender of a tenancy right in favour of the landlord is not an alienation within the meaning of Rule 11. (*Findlay, O. J. C.*) MAROTI *v.* KRISHNA RAO. **89 I. C. 174 : A. I. R. 1925 Nag. 455.**

———Sch. III, Para. 11—*Incompetency to alienate—Extent of.*

Where a decree is transferred to a Collector for execution, the incompetency to alienate prescribed by para. 11 of Sch. III, C. P. Code, exists till the decree is satisfied and proceedings in appeal or revision therefrom are completed. (*Baker, J. C.*) SETH BALLABHDAS *v.* SOBHA SINGH. **A. I. R. 1924 Nag. 216 (2).**

———Sch. III, Para. 11—*Sale in contravention of—Obligation to refund.*

Where a sale takes place in contravention of para. 11, Sch. III, C. P. Code, without either party knowing he was violating the law, equity requires that money paid should be refunded. (*Prideaux, A. J. C.*) NARAYAN *v.* MOTISA. **20 N. L. R. 87 : 78 I. C. 343 : A. I. R. 1924 Nag. 132.**

———Sch. III, Para. 11—*Scope of--Attachment and sale of an unexpired portion of the lease granted by the Collector not void undar para. 11 if lease is under para. 1.*

The assumption, that, under paragraph 11, Sch. III of the C. P. Code in every case where the Collector exercises any powers or duties under preceding paras. 1 to 10, the whole of the judgment-debtor's immoveable property comes under the jurisdiction of the Collector and the judgment-debtor becomes incompetent to deal with it without the Collector's written permission, is not correct. When the Collector proceeds under para. 1 of the Schedule, his jurisdiction only extends to the property ordered to be sold and the lease of his whole property is outside his jurisdiction. There is therefore no infringement of the provisions of para. 11 if unexpired portion of the lease is attached and the attachment is not void. 16 N. L. R. 64 App. (*Kotval, A. J. C.*) GANGARAM *v.* RAMGOPAL. **18 N. L. R. 131 : A. I. R. 1922 Nag. 243.**

———Sch. III, Para. 11—*Object of—Attachment before judgment—Mortgage during pendency of.*

The object of Sch. III, para. 11, C. P. Code, is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object for by such attachment alone the property is not exposed to the risk of such loss. Attachment before judgment is not a process in execution of decree for at the time of attachment there is no decree and no process that could be issued in execution of the same is consequently an attachment before judgment is not prohibited by Sch. III, para. 11, C.P. Code. 26 C. 531 Ref. (*Kotval, A. J. C.*) BANSILAL *v.* SITARAM. **68 I. C. 188 : A. I. R. 1922 Nag. 238.**

———Sch. III, Para. 11—*Scope.*

The judgment-debtor does not charge the property by agreeing to sell it or accepting the purchase-money, but the charge arises by operation of the law out of that transaction and therefore the paragraph 11, Sch. III, does not apply to the case. (*Hallifax, A. J. C.*) AMOLAK RAO *v.* MAHIPAT RAO. **A I. R. 1922 Nag. 81**

———Sch. III, Para. 11—*Judgment-debtor—Incompetency to transfer.*

The Collector's powers under Para. 11 do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. They exist at least till the confirmation of the sale. (*Mitra, A. J. C.*) MAHDEO *v.* KRISHNAJI. **60 I. C. 310 : 16 N. L. R. 194.**

———Sch. III, Para. 11—*Civil Court cannot direct execution against property under Collector's control.*

No Civil Court can order, in execution of a money decree, the appointment of a Receiver to take the annual income of a property which is within the control of the Collector under S 68. But in the particular circumstances of the case, as the objection was raised by the judgment-debtor and that at very late stage, the Court refused to order the refund of the moneys actually collected but directed the removal of the receiver. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) JANG BAHADUR *v.* BANK OF UPPER INDIA LTD., LUCKNOW. **12 O. L. J. 146 : 87 I. C. 21 : 2 O. W. N. 73 : A. I. R. 1925 Oudh 448.**

———Sch. III, Para. 11 and S. 68—*Property under management of Collector—Mortgage without sanction—Validity of—Payment of debts by mortgagee—Right to subrogation.*

Where property is under the management of the Collector entrusted with the execution of a decree under S. 68, C. P. Code, a mortgage of the property without the permission of the Collector is void under Sch. III, para. 11, C. P. Code. Consequently if the mortgagee pays off prior encumbrances on the property, he does not become a transferee of the charge and the utmost that the mortgagee would be entitled is to recover the money spent in paying off the debts from the mortgagor. (*Dalal, J.C. and Neave, A.J.C.*) AKBAR HUSAIN *v.* SHAHANSHAH BEGAM. **27 O. C. 56 : 11 O. L. J. 82 : A. I. R. 1924 Oudh 302.**

———Sch. III, Para. 11—*Execution of decree by Collector—Power of debtor to alienate property—Scope of the restriction—Permission of Collector.*

While a decree is under execution by the Collector it is illegal for a civil court to issue process against the property and this illegality is not cured by the mere fact that subsequently the Collector ceased to

C. P. CODE (V OF 1908), App. A, Form I.

have charge of the execution proceedings. The permission of the Collector for a mortgage by the judgment-debtor need not take the form of a certificate under O. 21, R. 83, C. P. Code. It is enough if the Collector knows of the mortgage and gives sanction to it in writing. (*Daniels, J. C. and Dalal, A. J. C.*) SHEIKH MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH. **66 I. C. 642 : 8 O. L.J. 358.**

——— **Appendix A, Form (1)**—*Title of insolvent-defendant in plaint.*

Obiter :—Where the plaintiff desired to sue the defendant as well as his Official Assignee, *held*, the title of the suit as "Govindji Jivabhai insolvent and on behalf of him Official Assignee" is absolutely wrong. The Official Assignee ought to have been sued personally so that if the plaintiff wished to sue him, Govindji would have been the first defendant, and the Official Assignee as assignee of the estate and effects of the insolvent Govindji the second defendant. (*Macleod, C. J. and Crump, J.*) DAMODAR JAGJIWAN *v.* GOVINDJI. **25 Bom. L. R. 378 : A. I. R. 1923 Bom. 392.**

CIVIL RULES OF PRACTICE.
See UNDER THE RESPECTIVE PROVINCES.

CIVIL SUIT.
See (1) C. P. CODE, S. 9, PRACTICE.
(2) CRIMINAL TRIAL.

CLAIM.
See C. P. CODE, O. 21, RR. 58 TO 63.

CLAIM PETITION. *See* C. P. CODE, O. 21.

CLASS—Gift to a class. *See* T. P. ACT, S. 15.

CLERICAL MISTAKE. *See* C. P. CODE, S. 152.

CLIENT.
See (1) EVIDENCE ACT, SS. 126—129.
(2) PRACTICE.

CLOG.
——— **On the equity of redemption.**
See (1) DEED—CONSTRUCTION.
(2) MORTGAGE—REDEMPTION.
(3) T. P. ACT, S. 60.

CLUB.
See (1) ASSOCIATION.
(2) COMPANY.
(3) COMMUNITY.
(4) CORPORATION.

CO-ACCUSED. *See* EVIDENCE ACT, SS. 30, 114, 133.

CO-DEFENDANTS. *See* C. P. CODE, S. 11, O. 41, R. 22.

CODICIL.
See (1) SUCCESSION ACT.
(2) WILL—CONSTRUCTION.

CODIFICATION. *See* INTERPRETATION OF STATUTES.

COERCION.
See (1) CONTRACT ACT, S. 16.
(2) PARDANASHIN LADY.
(3) WILL.

CO-EXECUTORS.
See (1) EXECUTORS.
(2) PROBATE AND ADMINISTRATION ACT.

COGNIZABLE OFFENCE. *See* CR. P. CODE.

CO-HABITATION.
(1) MAHOMEDAN LAW—MARRIAGE.
(2) PENAL CODE.

CO-HEIR.
See (1) CONTRACT ACT, SS. 43—45.
(2) CO-SHARER.
(3) MAHOMEDAN LAW.

COMMISSION.

COIN.
——— **Counterfeiting of.** *See* PENAL CODE.

CO-LESSOR.
See (1) LEASE.
(2) CO-SHARER.

COLLATERAL.
——— **Agreement.**
See (1) CONTRACT ACT, SS. 30, 58.
(2) EVIDENCE ACT, SS. 92—96.
——— **Security.** *See* T. P. ACT, S. 59.

COLLECTION.
——— **Charges.**
See (1) CONTRACT.
(2) CONTRACT ACT.
(3) PRINCIPAL AND AGENT.
——— **Papers.**
See (1) EVIDENCE ACT.
(2) EVIDENCE — CIRCUMSTANTIAL EVIDENCE.

COLLECTOR. *See* C. P. CODE, SS. 68—72, 92, SCH. III.

COLLISION. *See* ADMIRALTY.

COLLUSION.
See (1) BENAMI.
(2) BENAMIDAR.
(3) PRACTICE.

COLOURABLE.
——— **Imitation.**
See (1) COPYRIGHT ACT.
(2) PENAL CODE.
——— **Transaction.**
See (1) BENAMI.
(2) FRAUDULENT TRANSFER.
(3) PENAL CODE.
(4) T. P. ACT, S. 53.

COMMENSALITY. *See* HINDU LAW — JOINT FAMILY—PARTITION.

COMMERCIAL DOMICILE.
———*Prize of war.*

Every act of claimant at the time of the breaking of the war was consistent with intention to retain his commercial domicile at Constantinople and inconsistent with any intention to divest himself of it. He did his best to continue the voyage of the "Kare Deniz" to a Turkish port although he was not able to show that there was any particularly pressing commercial object in sending her to Basra where there was no cargo engaged, where no agent had been appointed and where there was no trade to be expected, he being in the Piraeus and his ships being in the hands of the Turkish Government. *Held*, the claimant had not discharged the burden of proof which lay upon him of showing that he was no longer commercially domiciled in Turkey as he had been before. The condemnation must therefore stand. (*Lord Sumner.*) SOCRATES ATYCHIDES *v.* THE SECRETARY OF STATE. **46 Bom. 857 : 25 Bom. L. R. 116 : 18 L. W. 664 : (1923) M. W. N. 846 : 32 M. L. T. 81 : 27 C. W. N. 557 : A. I. R. 1922 P. C. 371.**

COMMISSION.
See (1) C. P. CODE.
(2) CONTRACT.
(3) CONTRACT ACT.
(4) PRINCIPAL AND AGENT.
——— **Agent.**
See (1) CONTRACT.
(2) CONTRACT ACT, S. 182.
(3) PRINCIPAL AND AGENT.
——— **For Examination of Witnesses.** *See* C. P. CODE, O. 26.

COMMISSION

——To executor.
See (1) MAHOMEDAN LAW—WILL.
(2) WILL.
——To Trustees.
See (1) TRUST.
(2) TRUSTS ACT.

COMMISSIONER. *See* C. P. CODE, O. 26.

COMMITMENT TO SESSIONS COURT. *See* CR. P. CODE, SS. 206—220.

COMMON.

——Ancestor. *See* HINDU LAW.
——Carriers.
See (1) CARRIERS.
(2) CARRIERS ACT.
(3) RAILWAYS ACT.
——Employment. *See* MASTER AND SERVANT.
——Land.
See (1) CO-SHARERS.
(2) DEEDS—CONSTRUCTION.
(3) PARTITION.
——Law.
See (1) CO-SHARER.
(2) PRACTICE—PRECEDENTS.
(3) SHAMILAT LAND.
——Manager.
See (1) ADVERSE POSSESSION, ETC.
(2) BENGAL TENANCY ACT, SS. 93—100.
(3) CO-SHARER.

COMMON INTENT OR OBJECT. *See* PENAL CODE (1) S. 34, (2) S. 141, ETC.

COMMUNICATION. *See* CONTRACT ACTS, S. 2.

COMMUNITY.
See also (1) ADVERSE POSSESSION.
(2) CUSTOM, PUNJAB.

COMMUTATION.
See (1) LANDLORD AND TENANT—RENT.
(2) MADRAS ESTATES LAND ACT, SS. 40 AND 41.

CO-MORTGAGEES.
See (1) CONTRACT ACT, SS. 38 AND 45.
(2) MORTGAGE.
(3) T. P. ACT, S. 60.

COMPANIES ACT (VI OF 1882).

——**S. 4**—*Unregistered Company of more than 20 persons is illegal.*

A Company of more than twenty members, if unregistered under S. 4 of the Act, is an association prohibited by law and is therefore illegal. (*Gokul Prasad and Lindsay, JJ.*) RAM KUMAR *v.* NEMCHAND. **64 I. C. 417 : 19 A. L. J 836.**

——**S. 146—(VII of 1913), S. 181**—*Want of sanction to appoint pleader does not invalidate suit if sanction was obtained to file the suit.*

The omission of the official liquidators to obtain sanction under S. 146 of the Act for the payment of a pleader might possibly render them personally liable for the payment of the pleader's fee, but it would not affect the validity of the acts done by the pleader in instituting or conducting the case if they had obtained sanction of the Court to institute the suit. London Metallurgical Company, *In re*, (1897) 2 Ch. 262, Dist. (*Martineau and Moti Sagar, JJ.*) KATHIAWAR AND AHMEDABAD BANKING CORPORATION, LTD. *v.* GURDAS RAM. **5 Lah. 414 : 84 I. C. 510 : A. I. R. 1925 Lah. 222 (1).**

——**Ss. 150 and 166**—*Order for payment—Right of transferee to enforce—Dissolution—Liquidation—Effect of.*

COMPANIES ACT (VI OF 1882), S. 169.

A person to whom the liquidator has transferred a payment order made by the Court under S. 150 of the Companies Act against a contributory is entitled to invoke the summary jurisdiction of the Court for the purpose of recovering money due from the latter. The circumstance that the company has been finally dissolved does not prevent the assignee from seeking relief from the liquidation Court and render it necessary for him to bring an action for the recovery of the money. (*Shadi Lal, C. J. and Wilberforce, J.*) PARDUMAN SINGH *v.* PIONEER JEWELLERY COMPANY, LTD. **67 I. C. 443 : 3 Lah. L. J. 382.**

——**S. 150**—*Payment order when can be made—Validity of a payment order.*

The Court in liquidation proceedings should realise the assets and discharge liabilities of a company as far as possible but it is not bound to help third persons who have purchased the debts to realize them. The Court cannot evidently make a payment order in respect of a debt which has been sold to a third person. A payment order, similar to a decree, can be disregarded by the Court which is applied for execution provided the order is nullity. (*Scott-Smith, J.*) SALIG RAM *v.* OFFICIAL LIQUIDATOR, INDIAN EXCHANGE BANK, LTD. **60 I. C. 506 : 3 Lah. L. J. 178.**

——**S. 150**—*Payment order who can obtain.*

A Liquidator of a Bank transferred with the Court's sanction certain book debts, to certain persons and subsequently agreed with the vendors to execute power-of-attorneys in their favour to enable them to obtain a payment order. The vendees applied under S. 150 for an order of payment, *held*, that as the application was made for the benefit of third parties and not 'in the name and on behalf of the company', it was not maintainable. (*Abdul Raoof and Martineau, JJ.*) DOABA BANK, LTD. *v.* KUNDUN LAL. **3 L. L. J. 80 : 59 I. C. 588 : 18 P. W. R. 1921.**

——**S. 169**—*Limitation—Application to set aside ex parte order.*

S. 169 of the Companies Act is no bar to an application to set aside an *ex parte* order. 16 A. 53, Foll. (*Piggott and Walsh, JJ.*) SHAH MUHAMMAD ESHANULLAH *v.* THE PEOPLES INDUSTRIAL BANK, LTD., ALLAHABAD. **9 O. & A. L. R. 477 : 72 I. C. 106 : L. R. 4 A. 154 : A.I.R. 1923 All. 429 (1).**

——**S. 169**—*Interpretation—"Notice"—Limitation for appeal—Extension of time.*

In connection with the liquidation of a Company an order was passed by the Court on 6—2—1914. The Official Liquidator applied for leave to appeal the same day and got it and on 18—2—1914 gave notice under S. 169 of the Act to the opposite party that the order would be appealed against. The appeal was actually filed on the 20th May, 1914. It was objected that the appeal was time-barred under S. 169 of the Act, *held*, that the literal construction of S. 169 makes the Act unworkable in practice and that in any event the Official Liquidator having done all he could in reason, to comply with the provisions of the law was entitled to an extension of time under that section. (*Walsh and Ryves, JJ.*) THE PEOPLES INDUSTRIAL BANK *v.* GOVINDAS DUBE. **63 I. C. 607 : 19 A. L. J. 371.**

——**S. 169**—*Appeal—Time for—Delay when excused—Sufficient cause.*

The carelessness or ignorance of a Pleader is not a sufficient reason to extend the time fixed by S. 169 of the Companies Act. Appeals under the Indian Companies Act, 1882 ought to be filed with such promptitude as to render service of notice upon the respondent possible within three weeks prescribed by S. 169 of the Act, and the Appellate Court will not

COMPANIES ACT (VII OF 1913).

extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the Appellate Court. (*Broadway, J.*) NARINDRA NATH SAHU *v.* KISHEN LAL. **73 I. C. 211 (2) : A. I. R. 1924 Lah. 379.**

——(VII OF 1913).

——*Fraud—Winding up—Waiver of fraud.*

Mere fact of there having been fraud in the promotion, or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order for the majority of the shareholders may waive the fraud. (*Sanderson, C. J. and Richardson, J.*) ORIENTAL NAVIGATION CO., LTD. *v* BHANARAM AGARWALLA. **49 C. 399 : 69 I. C. 241 : A. I. R. 1922 Cal. 365.**

——S. 2 (14), S. 92 (5)—*Advertisement offering for sale of certain shares of a limited company, whether falls within the definition of 'prospectus'—Omission to deposit the same with the Registrar—Whether an offence.*

The petitioner as representing a limited company registered under the Indian Companies Act was convicted for issuing an advertisement in a newspaper offering to the public some shares of the company for sale, without filing a copy thereof with the Registrar of Assurances. *Held*, that the advertisement came within the definition of 'prospectus' as contained in S. 2, cl. 14 of the Act, and the omission to file a copy with the Registrar of Joint Stock Companies for registration before issuing it was an offence under S. 92, cl (5). (*Suhrawardy and Mukerjee, JJ.*) PRAMATHANATH *v.* KALI KUMAR DUTT. **52 Cal. 440 : 29 C. W N. 523 : 88 I. C. 5 (2) : 26 Cr. L. J. 1061 (2) : A. I. R. 1925 Cal. 714.**

——S. 3 (1)—*Moffussil companies—Application lies to High Court in Original Side.*

Applications under the Companies Act relating to companies doing business in the moffussil should be made in the Original Side of the High Court. (*Suhrawardy and Cuming, JJ.*) MOHINI MILLS, LTD. *v.* SUSAMA DEBI. **52 Cal. 586 : 29 C. W. N. 403 : 86 I. C. 833 : 41 C. L. J. 191 : A. I. R. 1925 Cal 626.**

——S. 3 (1)—*Moffussil companies—Applications lie to High Court on Original Side.*

The expression "High Court" in the Act of 1913 is intended to include all the sides of the High Court and is as equally applicable to High Courts having original Civil Jurisdiction as to High Courts which have no Original Side. Applications under the Companies Act relating to Companies doing business in the moffussil should be made in the Original Side of High Court. (*Suhrawardy and Cuming, JJ.*) JAGADISHPORE TEA CO., LTD. *v.* MESSRS. MCLEOD & CO. **29 C. W. N. 404 : 86 I. C. 910 : A. I. R. 1925 Cal. 606 (2).**

——S. 4—"*Person*"—*Meaning of—Collection of persons—Person figuring in different capacities if can be treated as one person.*

A person who was shown as beneficially interested in one block of shares in a company and as holding shares on behalf of his two grandsons in another block. The entry against another person's name was "for self and as guardian of a minor." *Held*, that each of the two persons should be counted as one member for the purposes of S. 4 of Companies Act, although his name figured in different capacities and the Company must be held accountable to him alone although he in his turn was responsible to a number of other persons. 'Person' can be used to include a collection of people and an appropriate illustration is that the association of individuals known as a joint Hindu family. (*Mears, C. J. and Piggott, J.*) MOTI RAM *v.* KUNWAR MD. ABDUL JALIL KHAN. **L. R. 5 A. 235 : 22 A. L. J. 487 : 78 I. C. 441 : 46 A. 509 : A. I. R. 1924 All. 414.**

COMPANIES ACT (VII OF 1913), S. 28.

——S. 4—*Number of shareholders.*

An unregistered company of nine shareholders does not require registration for its valid existence. (*Krishnan, J.*) MOHIDEEN KARIYA PULAVAR *v.* PERIYANAYAKAM PILLAI. **20 L. W. 430 : (1924) M. W. N. 82 : 84 I. C. 118 : A. I. R. 1925 Mad. 233 (2).**

——S. 4 (1)—*Partnership—Test of—Debtor and creditor—Agreement between—Creditor's interest.*

The word "partner" or "partnership" in an agreement between several persons jointly advancing money does not necessarily show that there was a partnership between them. The parties may call themselves partners, but if one party is to do nothing more than advance money to the other and is to be repaid by a share of the profits they must be treated as debtor and creditor. 4 All. 74, Foll. (*Dhobley, A. J. C.*) MAHOMED JUSUF *v.* PIR MAHOMED. **65 I. C. 368 : A. I. R. 1922 Nag. 67.**

——Ss. 10, 12 and 14—*Alteration of memorandum of association—Revocation of appointment of managing agent—Confirmation by Court.*

The only power that the Court has to confirm resolutions of a company in regard to an alteration of the memorandum of association is in respect of matters covered by S. 12. The memorandum of association of a company formed for the purpose of carrying on a banking business had a clause appointing a particular person as agent, principal and secretary to the bank and he was given powers to enter into any agreement, contract or transaction with other banks or traders. Subsequently, by a special resolution, the company purported to alter the clause by removing the agent and applied for confirmation of the special resolution under S. 12 of the Companies Act. *Held*, that the Court should not confirm the resolution. Firstly, the clause was not one relating to the objects of the Company alterable under S. 12 (1) (*a*) of the Companies Act as one relating to a detail of management but was a condition under S. 10 of the Act. Secondly, even if the clause related to the object of the Company, the Court had a discretion in confirming it and the Court did not think it beneficial to the interests of the shareholders to confirm the resolution. (*Schwabe, C. J. and Ramesam, J.*) VENKATARAMA AIYAR *v.* THE COIMBATORE MERCANTILE BANK, LTD. **18 L. W. 304 : (1923) M. W. N. 568 : 74 I.C. 966 : A I. R. 1924 Mad. 126.**

——Ss. 28 and 29—*Delivery of share certificate in blank—Transferee's legal and equitable title.*

Delivery of share certificates with the transfers executed in blank, passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered owner. 15 A. C. 267, Foll. (*Kanga, J.*) FAZAL D. ALLANA *v.* MANGALDAS **46 Bom. 489 : A. I. R. 1922 Bom. 303.**

——S. 28—*Transfer of shares—Registration—Necessity for.*

Every shareholder in a company has an absolute right to transfer his share to another and the transfer is complete on the day the deed is signed by both parties. The provision in the Articles of Association that no transfer would be valid and recognised unless registered in the books and that the company could refuse to register a transferee without assigning

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reasons is one for the protection of the company and does not prevent the passing of title. (*Broadway and Abdul Quadir, JJ.*) FIRM OF SAWAN MAL GOPI CHAND *v.* SHIV CHARAN DAL. **71 I. C. 814 : A. I. R. 1924 Lah. 173.**

——— **S. 28**—*Transfer of shares.*

The transfer of shares of a company is incomplete until the name of the transferee is entered in the Company's Register. Such a transfer does not operate as a declaration of trust. (*Rankin, J.*) AMERENDRA KRISHNA DUTT *v.* MONIMUJARY DEBI. **66 I. C. 586 : 48 Cal. 986.**

——— **Ss. 28 and 34**—*Transfer of shares—Formalities, necessity for—Inchoate transfer—Rights of transferee—Discretion of directors in recognising transfer.*

A deed of transfer of shares in a company not complying with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company is invalid as against a person, who has purchased the shares in a sale in execution held under the provisions of the C. P. Code. When the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass so as to confer title on the transferee as against third persons. A transfer of shares in a company otherwise than as is provided by the Indian Companies Act and the Articles of Association may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance and the transaction evidenced by a transfer can be regarded as an agreement to convey capable of being perfected into an absolute conveyance by compliance with the prescribed formalities. Until then, the transfer is inchoate and transferee cannot claim priority over a Court auction purchaser of the shares. (1902) 2 K.B. 427 and 40 Mad. 1134 Foll. 31 Bom. 76 Not Foll.

Obiter :—It is open to the Directors of a Company in the *bona fide* discretion vested in them under the Indian Companies Act and the Articles of Association to refuse to recognise the purchaser of the shares of the company in a Court auction, as a shareholder in the Company. (*Kumaraswami Sastri and Devadoss, JJ.*) TADEPALLI NAGABHUSHANAM *v.* SRI RAM RAMACHANDRA RAO. **45 M. 537 : 15 L. W. 470 : 30 M. L. T. 231 : 70 I. C. 659 : (1922) M. W. N. 331 : A I. R. 1923 Mad. 241 : 42 M. L. J. 449.**

——— **S. 34**—*Passing of property.*

Plaintiff sold some shares of a Bank to defendant, but did not take the purchase money. A deed of transfer was duly executed and signed by the parties and was made over to the defendant to enable him to have his name registered in the books of the Bank in place of transferor. Later on the Bank failed and went into liquidation before the transferee had presented his deed of transfer to the Bank and thus the shares continued to stand in the name of transferor, as before. *Held*, that the contract was complete on the day that the deed of transfer was signed by both parties and that by virtue of that the defendant stepped into the shoes of the transferor and became an owner of the shares in the company in his place, with all the advantages and disadvantages attached to that status. (*Broadway and Abdul Qadir, JJ.*) FIRM SAWAN MAL GOPI CHAND *v.* SHIV CHARAN DAS. **A. I. R. 1924 Lah. 173.**

——— **S. 38**—*Court not bound to try serious question of title—Appeal—Duty of Company.*

A Judge is not bound to decide in a proceeding under S. 38 of the Act a serious question of title An appeal lies on a point of law from an order passed under the section. A Company has always a right to

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waive compliance with its rules. (*Walsh and Wallace, JJ.*) UNION SUGAR MILLS CO., LTD. *v.* JAI DEO. **19 A. L. J. 937 : 65 I. C. 291 : 44 A. 151 : L. R. 3 A. 56 : A. I. R. 1922 All. 258.**

——— **Ss. 38 and 91 (b)**—*Allotting unissued shares to some directors.*

By one resolution three shares were allotted by five directors to three directors. *Held*, that allotment of shares is but a contract and where three shares were allotted by one vote recorded in one resolution the one vote is not divisible into three votes. Because it is really one vote and not three votes and because each of the allotments was not considered separately on its own merits and because each director was interested in the allotments to the other two and probably voted for them in consideration of an allotment to himself. A quorum of three directors being necessary the directors in whose favour the allotment was made could not validly vote and thus the remaining two directors could form no quorum and the resolution and the allotment were therefore invalid. (*Pratt, J.*) SIR HORMUSJI A. WADIA, *In re.* **64 I. C. 933 : 23 Bom. L. R. 1104.**

——— **S. 38**—*Application for removal of name—Mortgagee of the uncalled share capital can oppose.*

If a shareholder applies to have his name removed from the register of members, the mortgagee of the uncalled share capital can oppose the application. Though persons are not entitled to an order *ex debito justicae*, the discretion of the Court under S. 38 is unlimited and should be used according to the circumstances of each case. (*Mookerjee and Fletcher, JJ.*) RAMESH CHANDRA MITTER *v.* JOGINI MOHAN CHATTERJI. **60 I. C. 946 : 47 Cal. 901.**

——— **S. 73**—*Promissory note—Signed by Secretary, Treasurer and Agent—Liability of company.*

A Company purchased certain machinery and in lieu thereof one of its secretaries and treasurers executed a pronote signing it in his own name. The pronote was on a sheet of paper printed with the name of the company and bearing a stamp impression of the company. *Held*, the pronote was signed on behalf of the company and it was therefore liable on the note. (*Macleod, C. J. and Coyajee, J.*) POONA CHITRASHALA STEAM PRESS *v.* GAJANAN INDUSTRIAL AND TRADING CO. **24 Bom. L. R. 355 : 67 I. C. 941 : A. I. R. 1923 Bom. 29.**

——— **Ss. 76 and 131**—*Omission of Directors to hold general meeting—Effect of—Holding of extraordinary meeting—Offence.*

On 27-2-1920 the Standard Aluminium and Brass Works Company, Ltd , was registered in Bombay. On 30-3-1921 the statutory meeting of the Company as required by S. 77 of the Companies Act was held. A general meeting was also held on that day. Subsequent to this there was no general meeting held nor was any balance sheet audited by the auditors of the Company, prepared and read before the Company in a general meeting. On the requisition of certain shareholders an extraordinary meeting was held on 29-6-1922. On a complaint being preferred against the directors of the Company for not complying with the requirements of S. 76 of the Companies Act. *Held*, that the directors were guilty of an offence under the section and that the holding of an extraordinary meeting on the requisition of the shareholder was not a sufficient compliance with S. 76. (*Macleod, C. J. and Crump, J.*) EMPEROR *v.* NASURBHAI ABDULLABHAI. **24 Cr. L.J. 349 : 72 I. C. 349 : 25 Bom. L. R. 224 : A. I. R. 1923 Bom. 194 (2).**

——— **Ss. 78 and 162**—*Compulsory winding up—Resolution for voluntary winding up.*

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The Judge had not decided whether there was a valid resolution for voluntary winding up: he had not decided whether there was any valid ground for making a winding up order, but he directed the meeting of shareholders to be held and then, because there was a considerable majority of the shareholders who voted at that meeting in favour of winding up, he made the compulsory winding up order. *Held*, that it is not a sufficient ground for the compulsory winding up order. The mere fact that a majority of the shareholders, who voted at the meeting were in favour of winding up the company either under supervision of the Court or by the Court compulsorily is not sufficient to justify the Court in making the compulsory winding up, especially where there was no valid resolution for voluntary winding up. (*Sanderson, C. J. and Richardson, J.*) ORIENTAL NAVIGATION CO., LTD. *v.* BHANARAM AGARWALLA.

49 C. 399 : 69 I C. 241 : A. I. R. 1922 Cal. 365.

———S. 79 (i) and of Sch. T, Table A, cl. 45 —*Notice calling general meeting to consider amalgamation of Bank with another bank is bad for not disclosing secret benefit received by the Directors under the arrangement. But where such secret arrangement is not proved, proceedings taken on notice cannot be upset for some defect in the notice which might have been avoided but which was not avoided due to some honest mistake.*

Where there is any secret agreement or any interest of the directors in the agreement not disclosed in the circular, or in the notice, the Court will view with strictness any omission to refer to it in the notice or in the circular accompanying the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no secret agreement is proved or suggested anywhere there is no indication that there was anything to conceal, the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect which might have been avoided but which was not avoided on account of some honest mistake. A meeting ought not to be treated very critically in order to see whether we cannot pick out some defect in it. Notice calling an extraordinary general meeting of the shareholders of a Bank to consider the proposal of amalgamating it with another Bank was held not so defective as to upset the proceedings at the meeting, though it failed to disclose the difference of opinion that existed among the directors in the matter and the basis of calculation on which the terms of union were settled, and although no copy of the agreement between the Banks was sent to the shareholders along with the notice. (*Shah, A. C. J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD.

26 Bom. L. R. 987 : A. I. R. 1925 Bom. 49.

———S. 81 — *Amendment may be allowed subject to the nature of the resolution and that of the amendment.*

Amendments can be allowed, but it must depend upon the nature of the resolution and the nature of the amendment whether it could be or should be allowed by the Chairman. (*Shah, A C. J. and Fawcett, J.*) PARSURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 Bom. L. R. 987 : A. I. R. 1925 Bom. 49.**

———S. 89—*Company's liability on a given endorsement is a matter of construction of that endorsement—Where responsibility of Company is not made quite plain, Company is not liable.*

The question as to the liability of a Company on a particular endorsement is in every case one of construction. If on the true construction of the instrument, the bill or note is the bill or note of the Company, the Company will be liable upon it, and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the Company, the persons whose names are upon it will be liable upon it whether they intended to be so or not. It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. Where the endorsement was "M. and Sons, Managing Agents of L. A. Company," *held*, that it would not necessarily be clear to any one that the responsibility of L. A. Company was involved and that L. A. Company therefore was not liable. (*Sanderson, C. J. and Rankin, J.*) SREELAL MANGTULAL *v.* LISTER ANTISEPTIC DRESSING CO. **52 Cal. 802 : 29 C. W. N. 828 : 89 I. C. 328 : A. I. R. 1925 Cal. 1062.**

———S. 89—*Manager can transfer a promissory note on behalf of the company.*

The ignorance of the Manager of the Bank of the terms of the Articles of Association does not affect his power to make a transfer of negotiable instruments. He is the agent of the Bank for performing all ordinary banking transactions, and a transfer of such an instrument is a very ordinary transaction. (*Scott-Smith and Fforde, JJ.*) HINDUSTAN ASSURANCE AND MUTUAL BENEFIT SOCIETY, LTD. *v.* GURDIT SINGH. **6 L. L. J. 183 : 80 I. C. 741 : A. I. R. 1924 Lah. 462.**

———S. 92 (5)—*Advertisement in newspaper inviting public to purchase shares is 'prospectus'.*

An advertisement in a newspaper offering to the public some shares of the Company for sale is a "prospectus" as defined in S. 2, cl. 14 of the Act and a copy of an advertisement of this nature must be filed with the Registrar before issuing it. (*Suhrawardy and Mukerji, JJ.*) PRAMATHA NATH SANYAL *v.* KALI KUMAR DUTT. **52 Cal. 440 : 88 I. C. 5 : 29 C. W. N. 523 : 26 Cr. L. J. 1061 (2) : A. I. R. 1925 Cal. 714.**

———S. 109—*All present and future moveables pledged by director but himself remaining in possession as agent of pledgee—No pledge of specific moveables but only floating charge is created.*

Where the director of a Company pledged the moveable assets of the company but remained himself in possession as agent of the pledgee, *held*, that only a floating charge was created and it not being registered as required by S. 109, was void against the liquidator. (*Macleod, C. J. and Coyajee, J.*) D. PUDUMJEE AND CO. *v.* H. N. MOOS.

27 Bom. L. R. 1218 : A. I. R. 1926 Bom. 28.

———S. 134— *Fine—Imposition of —Realisation from Directors.*

An order directing the Directors individually to pay fine imposed on the company is illegal. (*Broadway, J.*) DWARKA DAS *v.* EMPEROR.

6 L. L. J. 160 : 86 I. C. 431 : 26 Cr. L. J. 799 : A. I. R. 1924 Lah. 489.

———S. 136—*Company—Publication of statements—Limited Company—Omission to publish statements—Liability.*

Under S. 136, sub-sec. (1) of the Indian Companies Act, 1913, every limited banking company is bound to publish a statement provided in the third schedule on the dates specified in the section and failure to comply with its provisions is punishable under S. 136, sub-

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sec. (4). The fact that statements could not be published in time on account of the change in the closing date of the financial year of the company is not a valid answer to the charge. (*Shah, A. C. J. and Crump, J.*) PARASHURAM D. SHAMDASANI, *In re.*
26 Bom. L. R. 68 : 48 Bom. 305 : 82 I. C. 58 (2) : 25 Cr. L. J. 1194 (2) : A. I. R. 1924 Bom. 308.

——**S. 145**—*Auditor should satisfy himself whether the books submitted to him show a true state of affairs—Honesty does not exempt from liability.*

Unless Auditors are to be held strictly to their legal liability, however honest they may be, the object of the Legislature in requiring a certificate from them is absolutely defeated. It is nothing to an auditor whether the business of a company is being conducted prudently or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that. He is to ascertain that position by examining the books of the Company. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the Company. If he fails in his duty he will be jointly and severally liable with those who are responsible for the management of the Company, although he is not guilty of any dishonesty. (*Walsh and Mukerji, JJ.*) THE UNION BANK, ALLAHABAD (IN LIQUIDATION), *In the matter of.*
47 All. 669 : 88 I. C. 785 : 23 A. L. J. 473 : L. R. 6 A. (Civ.) 425 : A. I. R. 1925 All. 519.

——**S. 150**—*Payment order when can be made—Validity of payment order.*

The Court in liquidation proceedings should realize the assets and discharge liabilities of a company as far as possible but it is not bound to help third persons who have purchased the debts, to realize them. The Court cannot evidently make a payment order in respect of a debt which has been sold to a third person. A payment order, similar to a decree, can be disregarded by the Court which is applied for execution provided the order is nullity. (*Scott-Smith, J.*) SALIG RAM *v.* OFFICIAL LIQUIDATOR, INDIAN EXCHANGE BANK. **60 I. C. 506 : 3 Lah. L. J. 178.**

——**S. 150**—*Payment who can obtain.*

A Liquidator of a Bank transferred with the Court's sanction certain book debts to certain persons and subsequently agreed with the vendors to execute power-of-attorneys in their favour to enable them to obtain a payment order. The vendees applied under S. 150 for an order of payment, *held*, that as the application was made for the benefit of third parties and not in the name and on behalf of the company, it was not maintainable. (*Adbul Raoof and Martineau, JJ.*) DOABA BANK, LTD. *v.* KUNDUN LAL. **3 L. L. J. 80 : 59 I. C. 588 : 18 P. W. R. 1921.**

——**Ss. 153 and 202**—*Company—Scheme for reconstruction—Order in—No liquidation under—Appeal under S. 202 to High Court—Maintainability.*

There are two classes of orders which can be made under S. 153 of the Companies Act, (1) while the Company is in existence which can be made on application either by the Company or by a creditor, or by a member of the Company, (2) the second after a winding up order has been made which can be made on an application by the liquidator. When an order is made on an application by the Company which is not in the course of being wound up there is no provision which provides for such an order being appealable. It is

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only if the order is made in the course of liquidation by the Court that an appeal under S. 202 lies. (*Macleod, C. J. and Coyajee, J.*) VIRAMGAM SPG. & MANUFG. CO., LTD. *v.* INDUSTRIAL BANK OF WESTERN INDIA. **27 Bom. L. R. 655 : 89 I. C. 108 (1) : A. I. R. 1925 Bom. 442.**

——**S. 156 (4)**—*Voluntary liquidation—Shareholders—Surrender of shares in exchange for other sharers—Meeting of shareholder—Transaction of business—Transfer of assets—Unregistered deed—Effect of.*

A Bank went into voluntary liquidation and the respondents who held certain fully-paid up shares in the Bank surrendered them to another company in lieu of certain preference shares in that other company which had in the meantime by an unregistered deed of assignment taken over the assets of the Bank in liquidation. *Held*, that after the surrender of their shares the respondents had ceased to be shareholders and that any meeting convened by them or proceedings taken by a meeting in which they took part were invalid and inoperative. (*Walsh, A.C.J. and Ryves, J.*) HUNTER *v.* DAMODAR DAS. **46 A. 759 : 22 A. L. J. 719 : L. R. 5 A. 518 : 81 I.C. 508 : A.I.R. 1924 All. 772.**

——**S. 158**—*Debtor—If a contributory.*

A debtor of a company is liable to pay at all times whether the company goes into liquidation or not, and hence is not a contributory within the meaning of S. 158. (*Mukerjee, J.*) *In re* LAKSHMI FLOUR MILLS CO., LTD. **L. R. 6 A. 565 : 89 I. C. 994 : 23 A. L. J. 934.**

——**S. 162**—*Compulsory winding up—Majority of shareholders voting in favour of, is no ground for ordering it—Fraud in promotion is not a ground.*

Where the Judge had not decided whether there was a valid resolution for voluntary winding up; or that there was any valid ground for making a winding up order, but he directed the meeting of shareholders to be held and then, because there was a considerable majority of the shareholders who voted at that meeting in favour of winding up and then made the compulsory winding up order, *held*, it was not a sufficient ground for the compulsory winding up order. The mere fact that a majority of the shareholders, who voted at the meeting, were in favour of winding up the company either under supervision of the Court or by the Court compulsorily is not sufficient to justify the Court in making the compulsory winding up, especially where there was no valid resolution for voluntary winding up. The mere fact that there has been a fraud in the promotion or fraudulent misrepresentation in the prospectus will not be sufficient to found a winding up order as the majority of shareholders may waive the fraud. (*Sanderson, C. J. and Richardson, J.*) ORIENTAL NAVIGATION CO. *v.* BANARAM AGARWALLA. **49 Cal. 399 : 69 I. C. 241 : A. I. R. 1922 Cal. 365.**

——**S. 162**—*Interference by Court—Discretion when to be exercised.*

The Companies Act creates as between the shareholders, a domestic tribunal, and unless a clear case is made out, the Court will be slow to withdraw from it the decision whether the company's business shall or shall not be carried on. When an application to wind up a company is supported on the ground that the company has suspended business for a whole year, the power granted by the law to the Court to use its discretion while deciding whether such application should be refused or granted, should be exercised only when there is a fair indication that there is no intention to carry on business. If the suspension is satis-

factorily accounted for and appears to be due to temporary causes, the order may be refused. Where the firm of managing agents of a company is dissolved, the fact that steps were taken since the dissolution, at extraordinary general meetings to appoint new managing agents is sufficient to indicate that it is possible to carry on the business of the company and there is no complete deadlock, necessitating the compulsory winding up of the Company. The principle of 'substratum gone' cannot be applied to a case where it is not proved that the object of the company as set out in the memorandum cannot be fulfilled in other ways or by the employment of other agencies. (*Mookerjee and Fletcher, JJ.*) MURLIDHAR ROY *v.* THE BENGAL STEAMSHIP CO., LTD. **59 I. C. 542 : 47 C. 654.**

——S. 162—*Management for individual benefit of one family — Dominating position—Winding up is proper.*

It is good reason for making a winding up order that there is a justifiable lack of confidence in the conduct and management of the Company affairs owing to the management being held in one family which is in a position to dominate the other shareholders and monopolise the company affairs for its own individual benefit. (*Spencer and Devadoss, JJ.*) V. GOPAL CHETTI *v.* RIPON PRESS AND SUGAR MILL CO., LTD., BELLARY. **21 L. W. 367 : 86 I. C. 914 : A I.R. 1925 Mad. 633 : 48 M.L.J. 232.**

——S. 162 (5)—*Essentials.*

Where a company has a *bona fide* defence to a creditor's claim the creditor's application for its winding up must be dismissed. (*Young and Carr, JJ.*) COAL FIELDS OF BURMA, LTD. *v.* H. H. JOHNSON. **2 Rang. 575 : 3 Bur. L. J. 326 : 84 I. C. 1021 : A. I. R. 1925 Rang. 128.**

——S. 162 (6)—*Clause 6 not* ejusdem generis *with cls. 1 to 5—Directors dominating minority—Balance sheet not supplied—Dividends not paid—Winding up proper.*

Cl. 6 provides that a company may be wound up if the Court is of opinion that it is just and equitable that the company should be wound up. *Loch* v. *John Blackwood, Ltd.*, (1924) A. C. 783 Rel. on. The reasons for a Court considering it to be just and equitable that a company should be wound up are not necessarily *ejusdem generis* with the reasons given in cls. 1 to 5.

Where the directors of a company were able to exercise a dominating influence on the management of the company and the managing director was able to outvote the minority of the shareholders and retain the profits of the business between the members of the family, and there were several complaints that the shareholders did not receive a copy of the balance sheet, nor was the auditor's report read at the general meeting or attached to the balance sheet, as required by S. 131 of the Act and that dividends were not regularly paid and the rate of dividend had been steadily diminishing, *held*, that there were sufficient grounds to allow a winding up application and to call upon the directors to enter upon their defence. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) R. SABAPATHY RAO *v.* SABAPATHY PRESS CO., LTD. **48 Mad. 448 : 86 I. C. 135 : 21 L. W. 359 : A. I. R. 1925 Mad. 489 : 48 M. L. J. 118.**

——S. 162 (6)—*Scope of—Winding up—When to be ordered.*

Though S. 162 (6) need not be construed *ejusdem generis* with cls. (1) and (5) of the section it will yet require grounds of like magnitude before acting under the clause and it is only in extreme cases that a Court will at the suggestion of the minority disregard the

wishes of the domestic forum and condemn the Company to extinction. (*Rutledge, J.*) B. COWASJI *v.* NATH SINGH OIL COMPANY, LTD. **13 Bur.L.T. 51 : 59 I. C. 524.**

——S. 164—*Additional District Judge—Jurisdiction.*

The Additional District Judge has jurisdiction to make all orders which the District Judge can make in the winding up of a company. (*Lord Phillimore.*) BEHARI LAL BULAKI RAM *v.* KUNDAN LAL. **32 M. L. T. 15 : 27 C. W. N. 509 : 69 I. C. 356 : (1923) M. W. N. 388 : A. I. R. 1922 P.C. 361: 47 M. L. J. 322 (P.C.).**

——S. 166—*Petition to wind up—Opposition by other creditors.*

An application to wind up a company was adjourned to see if the agreement to sell the property would be effected to the advantage of the majority of the creditors who opposed the petition of creditors having interest. (*Beasley, J.*) IRRAWADDY FLOTILLA CO., LTD. *v.* MERGUI TIN DREDGING CO. **2 Bur. L. J. 296 : A. I. R. 1924 Rang. 108.**

——S. 167—*Winding up order—Secured creditor is not affected.*

In matters of liquidation the rules relating to bankruptcy are, as far as possible, applicable. When a company goes into liquidation a secured creditor may realise his security and prove for any outstanding balance. The remaining assets would be liable for such principal and interest as was due on the date of the winding up order. A secured creditor is in the case of liquidation on the same footing as in that of insolvency proceedings. The property hypothecated is liable for the whole claim, principal and interest, up to date of realisation, and it is only the liability of the remaining assets that could be affected by the winding up order. 7 B. 455 : 12 B. 272 : 15 I. C. 860 : 38 B. 359 Rel. (*Broadway and Martineau, JJ.*) RAM CHAND *v.* BANK OF UPPER INDIA. **3 Lah. 59 : 74 I. C. 187 : 24 P. W. R. 1922 : 5 L. L. J. 558 : A.I.R. 1922 Lah. 281.**

——Ss. 169, 207, 215—*Even in voluntary liquidation Court has same power as under S.* 169.

Under Ss. 207 and 215, read with S. 169, the Court has power, in order to protect the assets of the Bank for its other creditors even in cases of voluntary liquidation, to stay the execution of the decree for costs passed against the bank after liquidation, in a suit by the Bank prior to its going into liquidation. (*Neave and Kendall, A. J. Cs.*) NATIONAL BANK OF UPPER INDIA *v.* GOPAL DAS. **28 O.C. 197 : A. I. R. 1925 Oudh 630.**

——S. 171—*Properties sold by winding up Court without prejudice to rights of secured creditors to proceed in usual way—Secured creditors' suits, previously permitted to be prosecuted, should not be stayed.*

Where sale of the property by the winding up Court was a proceeding, which was carried out for the sake of convenience and with the object of getting the property sold at a time and in a place where a good price might be obtained for it and it was not intended that secured creditors should thereby be debarred from enforcing their rights in the usual way if they were so advised, *held*, that suits which such secured creditors had previously been granted leave to prosecute should not be stayed pending the adjudication on priority among the creditors by the winding up Court. *In re* Pacaya Rubber and Produce Company, Ltd., (1 Ch. 218) Dist. *Per Buckland, J.*—The argument that the Court has no power to recall leave once granted or that the machinery at the disposal of the Judge in the

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winding up would be inadequate to enable him to decide the questions which may arise in the mortgage suits should they come before him is not impressive. (*Sanderson, C. J. and Buckland, J.*) HUKUMCHAND *v.* RADHAKISSEN. **29 C. W. N. 715 : 88 I. C. 754 : A. I. R 1925 Cal. 916.**

——**Ss. 173, 174**—*Petition for compulsory winding up by creditors—Opposition by other creditors—Petition was stayed to enable Company to sell assets to new company.*

A petition was filed by a creditor of a company for compulsory winding up. The petition was opposed by the Company and certain other large creditors on the ground that the Company though involved, had, since the petition, entered into an agreement for sale of its property to a new company which was proposed to be formed and that the order if made would cause loss to the creditors and shareholders. The Court ordered the petition to stand over and allowed time upon the company undertaking not to part with any portion of the purchase money except for preliminary expenses and the company was allowed to complete the sale in the meantime with liberty to parties to apply in the meantime. (*Beasley, J.*) IRRAWADDY FLOTILLA CO., LTD. *v.* MERGUI TIN DREDGING CO., LTD. **2 Bur. L. J. 296 : A. I. R. 1924 Rang. 108.**

——**S. 179 (c)**—*Sale—Lessee as buyer—Validity.*

In the course of the winding up of a company the Official Liquidator found it convenient to let out a mill for a fixed period, and sell it when the market was favourable. Before the expiry of the lease, circumstances occurred which made a sale necessary and so the Court gave the lessees an option to purchase and sanctioned a sale. *Held*, under the circumstances, it was the only possible course for the Court to follow. (*Lord Phillimore.*) BEHARI LAL *v.* KUNDAN LAL. **27 C. W. N. 509 : (1923) M.W. N. 388 : 69 I. C. 356 : 32 M. L. T. 15 : A. I. R. 1922 P. C. 361 : 47 M. L. J. 322 (P. C.)**

——**S. 186**—*Summary process—Recovering money from firm of which contributory a partner—Contract Act, S. 43—Applicability.*

The summary procedure under S. 186, Companies Act, can be resorted to to recover money from firm, by selecting from among the partners one who is a contributory and calling upon him to liquidate the whole debt. The principle of S. 43, Contract Act, is applicable to such a case. (*Shadi Lal, C. J. and Le Rossignol, J.*) LIQUIDATOR, UNION BANK OF INDIA *v.* GOBIND SINGH. **4 Lah. 239 : 77 I. C. 338 : A. I. R. 1924 Lah. 148.**

——**S 186**—*Scope of—Contributory must be personally liable—List of contributories is final and cannot be questioned.*

In order to make a contributory liable, under S. 186, for payment of debts other than calls, the said debts must be due by the said contributory in his own personal capacity and not as a member of a firm, which is not a contributory. Where on liquidation of a company, a shareholder is settled on the list of contributories he cannot, in proceedings under S. 186, plead that he was improperly so settled. (*Broadway, J.*) GOBIND SINGH *v* UNION BANK OF INDIA. **71 I. C. 724.**

See **On appeal. 4 Lah. 239 : A. I. R. 1923 Lah. 85.**

——**S. 186**—*Transferee of payment order—Can invoke summary process.*

A transferee from the liquidator of a payment order made by a Court under S. 150 against the contributory can invoke the summary jurisdiction for recovering the money due from the latter. (*Shadi Lal, C. J. and Wilberforce, J.*) PARDUMAN SINGH *v.* PIONEER JEWELLERY COMPANY. **3 Lah. L. J. 382.**

COMPANIES ACT (VII OF 1913), S. 203.

——**S. 186 (a) (1882) and Ss. 150 and 144**—*Application by transferees does not lie.*

An application by the transferees of debts and calls due from contributories as the attorney of the liquidator is not one on behalf of the Company or for his benefit and is therefore incompetent. (*Abdul Raoof and Martineau, JJ.*) THE DOABA BANK, LTD. *v.* KUNDAN LAL. **18 P. W. R. 1921 : 59 I. C. 588 : 3 Lah. L. J. 80.**

——**S. 186 (1)**—*Time-barred debt—Cannot be enforced against contributory.*

S. 186 of the Companies Act does not override the provisions of the Limitation Act and does not enable the Court to enforce by a summary order the payment of a debt which it could not have enforced in an action at law. The section does not create new liabilities or confer new rights. It merely provides a summary procedure for enforcing existing legal liabilities. The words "at any time" can only mean at any time in the courts of liquidation proceedings commencing from the date of the winding up order. The section creates a new machinery for bringing in debts due by a contributory to the company and nothing more. (*Shadi Lal, C. J. and Fforde, J.*) SRI NARAIN *v.* LIQUIDATOR, UNION BANK OF INDIA. **4 Lah. 109: 74 I. C. 600 : 5 Lah. L. J. 569 : A. I. R. 1924 Lah. 53.**

——**Ss. 194 and 159 (1882)**—*Dissolution, effect of.*

The final dissolution of the Company does not preclude the assignee of a payment order from the liquidation Court, from seeking relief from that Court nor does it render it necessary for him to bring an action for the recovery of the money. (*Shadi Lal, C. J. and Wilberforce, J.*) PARDUMAN SINGH *v.* PIONEER JEWELLERY CO. **3 Lah. L. J. 382.**

——**S. 195**—*Examination— Petitioning creditor should not be allowed to attend.*

The examination under S. 195, Companies Act, is a private one and a petitioning creditor should not be allowed to attend the same, particularly when the creditor who seeks to attend is engaged in litigation with the company in liquidation. (*Beasley, J.*) MOOLLA DAWOOD COTTON MANUFACTURING COMPANY, LTD., *In re.* **1 Rang. 384 : 83 I. C. 3 : A. I. R. 1924 Rang. 24.**

——**S. 202**—*Application under S. 153 by Company which is not being wound up—Order on application not appealable.*

There is no appeal under S. 202 of the Act from an order made on an application by the company under S. 153 which is not in the course of being wound up. (*Macleod, C J. and Coyajee, J.*) VIRAMGAM SPG. AND MANFG. CO. *v.* INDUSTRIAL BANK. **27 Bom. L. R. 655 : 89 I. C. 108 : A. I. R. 1925 Bom. 442.**

——**Ss. 202 and 247 (6)**—*Order under S. 247 (6)—No appeal but revision lies.*

An order passed under cl. (6) of S. 247 refusing to restore the Company on to the register cannot be construed into an order made or given in the matter of the winding up of a Company by the Court and hence is not appealable. But where the order is based on an erroneous view of the law it is open to revision by the High Court. (*Broadway, J.*) SURJAN DAS *v.* THE CHABBA COTTON CO. **26 Punj. L. R. 68 : 86 I. C. 652 : A. I. R. 1925 Lah 443.**

——**S. 203 (2)**—*Mixing up of different matters in same resolution is legal—Companies Act, S. 213 (5).*

A resolution in which the voluntary winding up of the company is mixed up with other matters relating to the agreement of amalgamation with another

COMPANIES ACT (VII OF 1913), S. 207.

company is legal. (*Shah, A. C. J and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD.

26 Bom. L. R. 987 : A. I. R. 1925 Bom. 49.

——**S. 207 (9)**—*Voluntary liquidation—Removal of liquidators—Measure of 'due cause.'*

The power of the Court to remove a liquidator under S. 207, Cl. (9) of the Indian Companies Act is not confined to cases of unfitness on the part of the liquidator, but, also extends to cases where 'due cause' is shown, which, in its turn must be measured to the real interests of the liquidation. (1887) Ch. D. 299 cited and followed. (*Macleod, C. J. and Shah, J.*) KAI KUSHRU NUSSERWANJI *v.* TATA INDUSTRIAL BANK, LTD.

48 Bom. 471 : 80 I. C. 515 : 26 Bom L. R. 237 : A. I. R. 1924 Bom. 339.

——**S. 209 (2)**—*Court cannot make an appointment with retrospective effect—Person not appointed liquidator, but assuming duties of liquidator has no rights.*

The Court can extend the time for making an application for the appointment of a person as joint liquidator but the Court has no jurisdiction to make an appointment with retrospective effect. When an application is made under sub-clause (2) of S. 209 of the Companies Act, the Court is not required to register by a formal order the recommendation of the creditors of the Company as to the person to be appointed joint liquidator. The Court may or may not act under sub-clause (3) of S. 209, on the resolution of the creditors. The matter is entirely discretionary with the Court. Till an order is made appointing a person to act as joint liquidator such person cannot take upon himself the duties of a joint liquidator and therefore the assumption of the duties of the joint liquidator on the part of such a person does not give him any rights whatever. (*C. C. Ghose J.*) BHAGAT BROS. LTD., *In re.*

41 C. L J. 521 : A. I. R. 1925 Cal. 809.

——**S. 213**—*Limited company has statutory right to amalgamate itself with another company and no express power in the Memorandum of Association is necessary for the purpose.*

Every limited company has under S. 213 a statutory right of effecting an arrangement whereby it is amalgamated with another company. No express power need be contained in the Memorandum of Association of the company. (*Shah, A. C. J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD,,

26 B. L. R. 987: 90 I. C. 580 : A. I. R. 1925 Bom. 49.

——**S. 213**—*Mere permission to authorise in terms the liquidators to receive compensation and distribute it among share-holders does not make a resolution illegal under the section where the resolution authorises the liquidators to carry into effect the arrangement under which the company is amalgamated with another company.*

The mere fact that in terms there are no words authorising the liquidators to receive compensation and distribute it amongst the shareholders does not make a resolution illegal. Where the pertinent part of the resolution was " they (the liquidators) are hereby authorised pursuant to S. 213 of Companies Act, to adopt the said agreement (relating to the amalgamation of the company with another) and carry the same into effect." *Held* that the resolution was legal.

Per *Fawcett, J.*—The appointment of liquidators is not required to be by "special resolution," the latter being necessary only in regard to the proposed voluntary winding up of the company and amalgamation under S. 213. If any liquidators are proposed in the special resolution, the proposed liquidators may be

COMPANIES ACT (VII OF 1913), S. 232.

changed at the confirmatory meeting. Therefore,where the resolution omits saying that such and such persons are hereby appointed liquidators for the purpose of the winding up, and instead of this the notice calling the meeting says that the confirmatory meeting would among other matters consider the question of appointing liquidators, the resolution is quite legal. (*Shah, A. C. J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD.

26 B. L. R. 987 : 90 I. C. 580 : A. I. R. 1925 Bom. 49.

——**Ss. 215 and 207 (1)**—*Decree held by Company attached in execution of decree passed against Company after its voluntarily going into liquidation--Application by liquidators for removal of attachment should be granted.*

Where a Bank has gone into voluntary liquidation and a mortgage decree which it holds has been attached in execution of a decree passed against the Bank after its going into liquidation and the liquidators apply to the High Court under S. 215 of the Companies Act for the removal of the attachment, the High Court can and ought to order the removal of such attachment. (*Simpson, A. J. C.*) NATIONAL BANK OF UPPER INDIA *v.* LAKHPAT RAI.

2 O. W. N. 508 : A. I. R. 1925 Oudh 483.

——**S. 219**—*Application for compulsory winding up pending—Voluntary winding up decided at Company's meeting and carried into effect—No prejudice caused to creditor or contributories—Compulsory winding up would not be ordered.*

Where the rights of the creditors or the contributories are not shown to be prejudiced by a voluntary winding up, the Court is not justified in ordering a compulsory winding-up, though the application to that effect was filed before the company decided to go in a voluntary liquidation. *In re New York Exchange, Ltd.* (39 Ch. D. 415) Foll. (*Scott-Smith and Martineau, JJ.*) SANSAR CHAND *v.* KARAM CHAND.

26 Punj. L. R. 654 : 89 I. C. 613 : 6 Lah. 340 : A. I. R. 1925 Lah 527.

——**Ss. 229, 230 and 233**—*Applicability---Floating charges—Insolvency Act, S. 52.*

S. 52 of the Insolvency Act has no application to cases of floating charges. (*Kumarasamy Sastri, J.*) *In the matter of* INDIAN COMPANIES ACT, 1913 AND *In the matter of* MORRISONS LTD.

20 L. W. 861 A. I, R. 1925 Mad. 271.

——**S. 232**—*Application for winding-up—Subsequent to attachment—Sale of proprerty—Validity.*

Long before applying for windingatpup the immove able property of the Company was attached in execution and it was sold after a winding up order had been passed. The Official Liquidator applied to have the sale set aside on the ground that the sale was a putting in force of an execution within S. 232, *Held*, that the sale was valid as the execution was put in force on the date of attachment which was long before the date of application for winding up. If a liquidator appeals in a case without the permission of the winding-up Court, he runs the risk of having had to pay the costs in case of failure. (*Piggott and Walsh, JJ.*) OFFICIAL LIQUIDATOR, KAYASTHA TRADING AND BANKING CORPORATION *v.* SANT NARAIN SINGH.

19 A. L. J.262 : 60 I. C. 763 : 43 All. 433.

——**S. 232**—*Execution—Voluntary winding up—Effect of.*

A voluntary winding up of a company does not have the effect *ipso facto* of putting an end to an attachment already in force, (*Daniels, J. C.*) THE NATIONAL BANK OF UPPER INDIA *v.* SHEO MANGAL BAJPAI.

10 O. & A. L. R. 115 : 11 O. L. J. 349

COMPANIES ACT (VII OF 1913), S. 234.

1 O. W. N. 118 : 79 I. C. 968 : A. I. R. 1924 Oudh 406.

——S. 234 (ii)—*Compromise by liquidator—Validity.*

If a bank has gone into voluntary liquidation, S. 234 provides that a liquidator could compromise all calls, liabilities to calls, debts, liabilities, etc., with the sanction of an extraordinary resolution of the Company but if no such extraordinary resolution was passed sanctioning the compromise by the liquidator and if the compromise was actually entered into, the Bank should be held bound thereby so far as the debtor is concerned, any loss occurring thereupon being recoverable from the liquidator, who had ignored or exceeded his powers. (*Broadway, J.*) GOBIND SINGH *v.* OFFICIAL LIQUIDATOR OF UNION BANK OF INDIA, LTD. **71 I. C. 724 : A. I. R. 1923 Lah. 85.**

—— S. 235—*Distribution of dividends when no profits are earned is misapplication of funds.*

Distribution of the monies of a Company to the share-holders in the shape of dividends or profits when in fact no profits are being earned is misapplication of the company's funds. (*Walsh and Mukerji, JJ.*) THE UNION BANK, ALLAHABAD. (IN LIQUIDATION) *In the matter of.* **23 A. L. J. 473 : L. R. 6 A. (Civ.) 425 : A. I. R. 1925 All. 519.**

——S. 235—*Managing Director mixing up company's money with his own money and acquiring mortgage for himself with the whole sum is liable, though the fact was intimated to the auditors.*

A Managing Director occupies the position of a trustee for the company and he is bound to exercise his powers for the benefit of the company and for that alone. He cannot in law withdraw from the bill of the company any sum and mix the same with moneys belonging to him and take a mortgage in his name in lieu of the whole amount, representing to the mortgagor, that the entirety of the moneys advanced on the mortgage were moneys belonging to himself. If he does so, he is guilty of breach of trust. The fact that the act was not concealed from the auditors does not obviate the guilt. The touch-stone by which such cases are to be tried is whether the trustee has been guilty of a breach of trust or not. If he has been guilty of gross negligence, it is as bad in its consequences as fraud and is a breach of trust and such a transaction cannot be ratified by the Board of Directors. But an order under S. 235 of the Indian Companies Act should only be made on a clear case being made out. *In re Property Insurance Co., Ld.* (1914) 1 *Ch.* 775, *Foll. (C. C Ghose, J.)* A. E. ALEXANDER & Co., LTD. (IN LIQUIDATION), *In re.* **88 I.C. 672 : 41 C. L. J. 443 : A. I. R. 1925 Cal. 852.**

——S. 235—*Section does not apply to recover rent due from a director who rented company's premises in his private capacity.*

The terms of S. 235 show that that section is intended to provide a summary procedure for the recovery of money or property mis-applied or retained by a director or other officer of the company or money or property which such officer or director has become liable for by misfeasance or breach of trust in relation to the company, but it is not in terms meant to be applied for the purpose of enforcing sums due under contracts between the company and other persons, whether such persons happen to be directors or not and therefore, arrears of rent due by a director to the company upon foot of an ordinary contract of tenancy, entered into in his private capacity cannot be held to be money of the company and thus is not recoverable under this section. (*Scott-Smith and Fforde, JJ.*) SRI RAM *v.* NUR MUHAMMAD. **5 Lah. 461 : 85 I. C. 126 : A. I. R. 1925 Lah. 194.**

COMPANIES ACT (VII OF 1913), S. 247.

——S. 235—*Misfeasance—Claim for compensation—Limitation—Commencement—Limitation Act, Art. 36—Applicability.*

A claim for compensation for misfeasance under S. 235 of the Companies Act is governed by Art. 36 of the Limitation Act, the provisions of which are made applicable by S. 235 (3). S. 235 does not create any new right or liability and time begins to run from the date of the misfeasance for which compensation is sought. (*Martineau, J.*) HUKAM CHAND *v.* BANK OF MULTAN. **69 I. C. 255 : A. I. R. 1924 Lah. 285.**

——S. 235—*Directors of a Bank—Acts of misfeasance and breach of trust—Advance by directors on a promise to execute a mortgage instead of the mortgage itself—Personal liability—Director accepting fixed deposit receipt from the Bank in lieu of his claim against a person who is allowed over-draft by the Bank—Liability to refund the amount realised—Managing Director allowing overdraft with motives of personal gain—Liability to compensate the Bank.*

The mere fact that the directors allow advances to be made on the strength of a promise to execute a mortgage instead of the mortgage itself does not amount to an act of misfeasance so as to make them personally liable to the extent of the advances made. Facts which show imprudence in exercise of powers conferred upon the directors will not subject them to personal responsibility ; the imprudence must be so great and manifest as to amount to *Crassa negligenta.* The directors of a Company acting within their powers, and with reasonable care, and honestly in the interest of the Company are not personally liable for losses which the Company may suffer by reason of their mistakes or errors of judgment. Where, however, a director accepts a fixed deposit receipt from the Bank in lieu of his claim against a person who is allowed an overdraft by the Bank and subsequently cashes the fixed deposit receipt out of the funds of the Bank, he cannot be allowed to retain that money to the detriment of the share-holders and the creditors of the Bank and must refund it. The fact that he is not a director of the Bank on the date he cashes the deposit receipt does not relieve him of the obligations which arise out of his fiduciary relationship with the Bank.

The duties of a Managing Director of a Bank are of a higher standard than of an ordinary director. Where, in allowing an overdraft to be made the Managing Director is clearly impelled by motives of personal gain and dishonestly conceals the transaction from the Directors of the Bank, he is guilty of breach of trust and liable to compensate the Bank for the loss which the Bank suffers in consequence of the overdraft. (*Wazir Hasan, J. C.*) S. C. MITTRA *v.* NAWAB ALI KHAN. **2 O. W. N. 920.**

——S. 235 (3)—*Lim. Act, Art.* 120 *alone applies—Time runs from appointment of liquidators—Lim. Act, Art.* 120.

Article 120 is the only article applicable to an application under S. 235 of the Companies Act and time begins to run only after the appointment of the liquidator (*Walsh and Mukerji, JJ.*) THE UNION BANK, ALLAHABAD (IN LIQUIDATION), *In the matter of.* **23 A. L. J. 473 : L. R. 6 A. (Civ.) 425 : A. I. R. 1925 All. 519.**

——S. 247—*Registrar is not bound to remove Company from register when it is not carrying on business or has less than 7 members—Object of application for removal of Company being to avoid liability in suit pending against Company application should not be granted.*

The Registrar is not bound to remove the Company

COMPANIES ACT (VII OF 1913), S. 281.

from the register on discovering that it is not functioning or that its members have been reduced to less than seven. Even though an application is made for the removal of a Company from the registrar on the necessary grounds, the Registrar may refuse to remove the said Company from the register. The mere fact of the share-holders of a Company becoming less than seven persons does not render a Company defunct. Where an application is made to the Register under S. 247 for the removal of the Company from the register, and the object of the application is to avoid liability in a suit pending against the Company, the application must be rejected. If the application is granted, the order is liable to be set aside by the Court. (*Broadway, J.*) SURJAN DAS *v* THE CHABBA COTTON CO. **86 I. C. 652 : A. I. R. 1925 Lah. 443.**

——S. 281—*Directors being required by Articles of Association to control management of company but blindly trusting dishonest manager are not exempt though honest*

Under the Articles of Association of a company the directors were made responsible for the management of the company. The manager was to be entirely under their control and they had even the power to dismiss him. The directors blindly trusted a dishonest manager and allowed themselves to be in utter ignorance of the affairs of the company. The directors were not dishonest. *Held*: "that the directors had not acted reasonably" and so could not escape liability for any charge against them. (English case law discussed.) (*Walsh and Mukerji, JJ.*) THE UNION BANK, ALLAHABAD (IN LIQUIDATION), *In the matter of.* **23 A. L. J. 473 : L. R. 6 A. (Civ.) 425 : A. I. R. 1925 All. 519.**

——S. 282—*Limited Company—Prospectus sent to Registrar—Directors undertaking to subscribe certain shares—Failure to discharge obligation by two Directors—Application to start business with incorrect declaration—Offence.*

According to the prospectus for the floatation of a limited company sent by the accused to the Registrar of Joint Stock Companies it appeared that five persons who had agreed to be Directors of the Company had as such undertaken to subscribe for 500 shares. Two of these Directors never paid any sum due from them but in spite of this the accused applied to the Registrar for permission to commence business after making the necessary declaration that the Directors had taken 500 shares and paid for them. *Held*, that the accused led the Registrar to believe that even the two Directors who never paid any money had taken the shares and paid for them and he was therefore guilty under S. 282 of the Companies Act. (*Mears, C.J.*) BOSE *v.* EMPEROR. **46 A. 218 : L. R. 5 A. 71 (Cr.) : 77 I. C. 826 : 22 A. L. J. 83 : 25 Cr. L. J. 474 : A. I. R. 1924 All. 314.**

——S. 284—*Winding up commenced before new Act came into force—Procedure is that under the old Act.*

When proceedings in winding up were commenced, Act VII of 1913 came into force. S. 284 lays down that for all purposes connected with the winding up, the old Act should be regarded as in force. An appeal against the order of the District Judge must be filed and notice served in such a case within 3 weeks of the order as laid down in S. 169 of the old Act. (*Chevis, J.*) HEMRAJ *v.* PUNJAB TANNERY COMPANY. **68 I. C. 792 : A. I. R. 1923 Lah. 98.**

——Ss. 286 and 234—*Compromise between liquidator and contributory—When binding.*

Sanction by extraordinary resolution as under S. 234 is necessary in order that a compromise between a

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liquidator of a Company and a contributor though it might, if found, be binding on the former person, will be binding on the Company. (*Shadi Lal and Le Rossignol, JJ.*) LIQUIDATOR, UNION BANK OF INDIA *v.* GOBIND SINGH. **4 Lah. 239 : 77 I.C. 338 : A. I. R. 1924 Lah. 148.**

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——*Directors—Powers of Acts when binding—Articles of Association.*

The powers of the Directors of a Company are as defined by the Articles of Association and they cannot go behind the same. Act as done beyond their powers are *ultra vires* and not binding. Strangers acting *bona fide* with the directors within their apparent authority are protected. (*Kanhaiya Lal, J.*) RAM BARAM SINGH *v.* THE MUFASSIL BANK. **L. R. 6 A. 29 : 83 I. C. 142 : A. I. R. 1925 All. 206 (2).**

——*Director—Additional remuneration is not due for doing what is his duty as director.*

A director of a company is not entitled to any remuneration beyond what has been sanctioned by the Articles of Association for doing an act which would be his duty as a director to do. (*Mukerji and Dalal, JJ.*) DIKSHIT AND CO., LTD. *v.* MATHURA PRASAD. **22 A L. J. 883 : L. R. 5 A. (Civ.) 722 : 82 I.C. 21 : 47 All. 94 : A. I. R. 1925 All. 71.**

——*Director—Payment by, of uncalled capital due.*

Where the Directors of a company knowing that the Company is insolvent make payment of money representing the uncalled capital due as shares, the payment must be treated as payment towards capital and not as loan to the company. (*Walsh and Ryves, JJ.*) HARI RAM *v.* THE COMMERCIAL BANK, LTD. **62 I. C. 889 : 19 A. L J. 445.**

——*Director—Powers—Articles of Association.*

Where the Articles provide for notice in writing to a member whose share the Company desires to forfeit, it cannot work forfeiture without such notice. The Director of a Company has no power to cancel or forfeit shares or release share-holders in the absence of such special power. A resolution authorizing the return of the money of those who have not paid the allotment money and who do not desire to remain as members is *ultra vires*. (*Walsh and Ryves, JJ.*) PEOPLES INDUSTRIAL BANK, LTD. *v.* JALPA PRASAD. **3 U P. L. R. (All.) 57 : 62 I. C. 450 : 19 A. L. J. 351.**

——*Shares applied for on misreading of prospectus—Applicant cannot resile—"Friends of directors" include business friends.*

The plaintiff company issued a prospectus. It contained two representations (1) That applications for shares would be received only up to a certain date; (2) that a certain number of the shares were to be taken up by the directors, agents and their friends. The defendant applied for and was allotted certain shares. The plaintiff company accepted applications, long after the date fixed. The Directors, and their agents and friends took up a smaller number of shares than it was alleged that they would take up. The defendant admitted that the fact that the latest date for applications for shares was fixed in the prospectus had not induced him to apply for shares. But he contended that he had understood from the first that the Directors, etc., had taken up the shares that it had been announced they would take up. *Held*, that the defendant had applied for shares, on a misreading of the prospectus and not on the faith of the representations which had been made and that he was not entitled to resile from the contract, *Held*: further

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that the terms 'friends' in the prospectus included business as well as social friends, and that it would not be misrepresentation if the promoters guaranteed that so many shares were to be taken up by their friends, when they knew perfectly well that those friends intended to make what they could of the favour shown to them by the reservation, by distributing the shares among their own friends. (*Macleod, C. J. and Crump, J.*) BANSIDHAR DURGADATT *v* TATA POWER COMPANY, LTD. **87 I. C. 547 : 27 B. L. R. 330 : A. I. R. 1925 Bom. 272 (2).**

———*Share-holder misappropriating company's goods--Majority supporting the act—Minority can sue.*

Minority has a right to sue one of the share-holders forming majority for acts of misappropriation of company's goods on the part of that share-holder, even though the majority approved of his acts. (*Marten and Fawcett, JJ.*) VADILAL RAGHAVJI *v.* MANEKLAL MANSUKHBHAI. **49 Bom. 291 : 27 B. L. R. 48 : 89 I. C. 35 : A. I. R. 1925 Bom. 188.**

Meeting.

———*Meeting—Amendment—Rejection is proper if contrary to Court's order.*

Amendment may be rejected if it is contrary to the terms of the order of the Court, under which the meeting takes place, or if it is an integral amendment naming four persons as substitutes for the four persons mentioned in the principal resolution for certain offices and three out of the four persons mentioned in the amendment, intimate that they decline to accept the offices. (*Shah, A. C. J. and Fawcett, J.*) F. A. C. REBELLO *v.* CO OPERATIVE NAVIGATION AND TRADING CO., LTD. **26 B. L. R. 907 : 84 I.C. 363 : A. I. R. 1925 Bom. 105.**

———*Meeting—Minutes are* prima facie *though, not conclusive, evidence of proceedings—Chairman's declaration of the result of polls will be presumed to be correct until the contrary is proved. Also, when meeting is held and chairman acts under orders of Court, Court has some control as to evidence attacking the validity of the proceeding.*

The minutes in the books are to be received though not as conclusive, yet, as *prima facie* evidence of resolution and proceedings at general meetings; inasmuch as the chairman who presides at such meetings, and has to receive the poll and declare its result, has *prima facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minutes in the book ; and though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute-book, following the decision of the chairman, that the result of the poll was different from that there recorded. This principle all the more applies where a meeting is held and the chairman acts under the order of a Court.

Per *Fawcett, J.*—If the meeting had been held under the Court's orders and under the chairmanship of an officer appointed by the Court specially for that purpose, the result cannot be attacked as freely as otherwise. The case is like that of the report of a commissioner for a local investigation falling under Order 26, R. 10, C. P. Code, and although that particular rule does not in terms cover the present case, it does afford a useful guide as to the situation arising. The adducing of evidence in regard to objections to a commissioner's report is subject to the discretion of the Court. The Court has, therefore, a certain control as to the kind and amount of evidence that should be allowed to be adduced in regard to the objection taken to the result of the voting as reported by the Chairman. (*Shah, A. C. J. and Fawcett, J.*) F. A. C. REBELLO *v.* CO-OPERATIVE NAVIGATION AND TRADING CO., LTD. **26 B. L. R. 907 : 84 I. C 363 : A. I. R. 1925 Bom. 105.**

———*Meeting—Validity of Votes--Plaintiff disputing validity can claim inspection and discovery of documents—But refusal of inspection is not wrong so as to merit reversal by superior Court, where delay is bad and where inspection is not likely to benefit plaintiff—C. P. Code, O. 11, R. 12—C. P. Code, S. 99.*

When the plaintiff disputes the validity of the votes recorded in a meeting, he is entitled to inspection of the documents concerned. But when such inspection will cause delay which the nature of the case will not permit and when the plaintiffs do not show that the inspection would yield any result in their favour, refusal of inspection is not wrong so as to merit reversal by the superior Court. The restrictions in England in regard to the inspection of ballot papers in elections both to the House of Commons and in regard to Municipal elections, show there are some considerations against a free right of inspection of voting papers in a case like the present, though those restrictions being statutory, cannot apply in India. (*Shah, A. C. J. and Fawcett, J.*) F. A. C. REBELLO *v.* CO-OPERATIVE NAVIGATION AND TRADING CO., LTD. **26 B. L. R 907 : 84 I.C. 363 : A. I. R. 1925 Bom. 105.**

———*Meeting—Closing doors during taking of poll—Chairman is justified if special precautions are necessary.*

The chairman is justified in closing the doors during the taking of the poll if it is not an ordinary meeting of a company, but a meeting in which special precautions have to be taken in view of the rivalry between two groups. Although in an ordinary meeting the doors may be kept open, yet in such cases it is open to the chairman, if he thinks it advisable to close the doors during the taking of the poll. (*Shah, A. C. J. and Fawcett, J.*) F. A. C. REBELLO *v.* CO-OPERATIVE NAVIGATION AND TRADING CO., LTD. **26 B. L. R. 907 : 84 I.C. 363 : A. I. R. 1925 Bom. 105.**

———*Meeting—Presumption is in favour of validity of proceedings unless the invalidating fact is established beyond reasonable doubt.*

Court should incline more in favour of the validity of the proceedings than in favour of their invalidity, if the fact which would go to invalidate the proceedings is not established beyond reasonable doubt. The Court should not interfere on the ground of an irregularity in the case of acts which are valid if done with the approval of the majority of share-holders unless the acts complained of are of a fraudulent character or are *ultra vires*. A case of fraud or overbearing influence is necessary for interference by the Court. (*Shah, A. C. J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B. L. R 987 : A. I. R. 1925 Bom. 49.**

———*Amalgamation with another company is not confined to formation of new company to carry on business of the old—There must be sale of assets as a whole in return for shares in purchasing company.*

The amalgamation of a company with another company includes the formation of a new company but is not confined to that. The company in some way or other must sell its assets as a whole not for money but for shares in the purchasing company. (*Shah, A. C. J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B. L. R. 987 : A I. R. 1925 Bom. 49.**

———*Meeting—Point of order assailing competency of the meeting to consider the proposed resolution which is long enough to form a speech against the resolution is*

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properly ruled out as a point of order.

A point of order which is a request to the chairman to hold that the meeting is not competent to consider and confirm the arrangement, contained in the resolution as it is *ultra vires* of the company and which is long enough to form a decent speech against the resolution, is properly rejected as a point of order as it is for the shareholders to consider whether to accept or reject the resolution. (*Shah, A. C.J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B. L. R. 987 : A. I. R. 1925 Bom. 49.**

———*Meeting—Amendment — Disallowing proper amendment vitiates resolution—But amendment which amounts to rejection of the resolution is illegal.*

Any proper amendment, which is moved by any member at a meeting, should be put to the meeting for consideration and if the chairman rules out any such amendment, the resolution is liable to be set aside. But if an amendment though in form an amendment is really a counter-proposal of a different nature involving either adjournment of the consideration of the resolution or the rejection of the resolution proposed before the meeting, or goes beyond the scope of the subject matter of the resolution, it should be ruled out. Where the matter for consideration before a meeting of the shareholders of a company is whether a particular offer made by another company in connection with the amalgamation of the two companies, is to be accepted, an amendment which in effect asks the shareholders to consider that the proposed amalgamation may be modified and which requires something to be done by the other company after the amalgamation is effected, is illegal. But it is open to the shareholders to adjourn the consideration of the question before the meeting, with a view to further negotiate with the other company and to see whether any counter-offer made by their company would be accepted by the other company. (*Shah, A.C.J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B. L. R. 987 : A. I.R. 1925 Bom. 49.**

———*Meeting—Right of speech—A shareholder is entitled to be heard in reasonable terms for a reasonable time—The question whether the denial of this right vitiates the resolution itself intended to be opposed by him, depends on the circumstances of each case—If it is practically certain that his speech would not have made any difference in the situation, the resolution will stand—Though technically a speaker may seem to elect not to speak as when he resumes his seat when the audience shouts "no" to his appeal to them to hear him, yet, if it may be inferred from the circumstances that if he speaks, he would be prevented from doing so, he should be held to be prevented from speaking.*

A share-holder is not entitled to speak at a meeting as much as he pleases, but has a right to be heard in reasonable terms for a reasonable time. As to whether the denial of this right vitiates the resolution, the proper test is to consider the facts and circumstances of each case and to determine the question in the light of those circumstances. Though it is a difficult thing to say whether a particular speech will impress the audience in the direction desired by the speaker, yet, having regard to the definite hostile attitude which the majority of the share-holders maintain at the meeting with reference to the speaker, as also to the fact that all that he could have said, was really said in the point of order raised by him which was already read to the meeting, though the right of speech is denied to him when he desires to speak to the resolution, the circumstance cannot be accepted as affording a sufficient basis for setting aside a resolution, which represents the ascertained views and wishes of an overwhelming majority of the share-holders. As regards the question as to what constitutes denial of the right of speech, where the speaker appeals to the share-holders. "Brother share-holders, will you care to listen to me," and when they say 'no'; he elects not to speak, in substance he is prevented from speaking, if, from the attitude of the share-holders and other circumstances, it may be inferred that if the person thinks of speaking he would be prevented from doing so. (*Shah, A. C. J. and Fawcett, J*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B L.R. 987 : A. I. R. 1925 Bom. 49.**

———*Meeting—Evidence of proceedings—Evidence.*

The minutes of a meeting are *prima facie* evidence of what happened at the meeting. (*Shah, A. C. J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B. L. R. 987 : A. I. R. 1925 Bom. 49.**

———*Meeting—Objection to validity of votes must be handed in before the commencement of the poll—It must particularise the votes objected to.*

A point of order objecting to the validity of votes tendered for resolution must be handed to the chairman before he commences to take the poll. Also, it should be directed to particular votes. It is futile for any member to raise a general objection without indicating the nature of the objection and without any attempt to particularise the votes objected to. It can only be interpreted as a sort of invitation on the part of the member to adjourn the proceedings of the meeting to examine the votes over again. If the amendment simply says that the person objects to all the votes and if it does not enable the chairman to consider the validity of any particular vote, it is too general to be of any effect and is completely useless. (*Shah, A. C, J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B.L.R. 987 : A. I. R. 1925 Bom. 49.**

———*Meeting—Amendment to resolution lost on show of hands—Poll demanded and taken—But before declaration of result of poll, demand for poll and other amendments withdrawn and new amendment allowed—Original resolution is not invalidated.*

The proposal to appoint two liquidators was subject to two amendments, which were duly proposed and seconded. The second amendment was lost on a show of hands. A poll was demanded. The poll was taken, but before the result of the poll was declared, a new amendment was allowed to be proposed, the demand for poll and the other amendments being withdrawn. *Held*, it was perfectly open to meeting to adopt that course. Even if there was any irregularity it was a matter for the meeting or the chairman to control and the irregularity had not the slightest effect upon the validity of the appointment of the liquidators named at that meeting. (*Shah, A. C J. and Fawcett, J.*) PARSHURAM DATTARAM SHAMDASANI *v.* TATA INDUSTRIAL BANK, LTD. **26 B. L. R. 987 : A. I. R. 1925 Bom. 49.**

———*Shareholders—Rights of—Courts when can interfere—Adjournment—Chairman's right.*

Irregularity in the proceedings of a limited company are not a matter for the Court but it is dealt with by the majority of the shareholders. The Courts will interfere only if the rights of the share-holders are infringed or if a case of fraud or *ultra vires* is made out. Where the Articles of Association empower the Chairman to adjourn meetings with its consent, he is not bound to do it even if the meeting desires an adjournment. A shareholder is not entitled to operate as much as he pleases, but for a reasonable time.

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(*Pratt, J.*) PARSHURAM DATTARAM *v.* TATA INDUSTRIAL BANK, LTD. **47 Bom. 915 : 25 Bom. L. R. 1083 : A. I. R. 1924 B. 102.**

———*Meeting not held in accordance with Articles of Association or by direction of Court to liquidator in winding up proceedings is not meeting of Company.*

There are proper ways in which a meeting of a company can be called either by the directors in accordance with the provisions of the Articles of Association or by the shareholders on requisition, also in accordance with the provisions of the Articles of Association. There is only one other way apart from any special Article of Association, that a meeting of a company can be called and that is by a direction of a Court to the liquidator in winding up proceedings. The mere fact that certain persons who happened to be shareholders of the Company met together at a private —house and purported to pass resolutions appointing directors and so on, does not make that a meeting of the Company. For a meeting to be a meeting of the Company it must be a meeting convened in one of the ways referred to above and convened strictly in accordance with the Articles of Association. (*Greaves and Chakravarti, JJ.*) KAILASH CHANDRA DATTA *v.* SADAR MUNSIF SILCHAR. **52 Cal. 513 : 88 I. C. 826 : A. I. R. 1925 Cal. 817.**

———*Receiver of Company cannot be appointed—C. P. Code, O. 40, R. 1.*

There is no jurisdiction in a Court to appoint a Receiver of a Company except in a debenture holders' action when the business and assets of the Company are charged with payment of the claims of the debenture holders. If it is necessary to protect the assets of a company other means must be sought which are provided by the provisions of the Companies Act. (*Greaves and Chakravarti, JJ.*) KAILASH CHANDRA DATTA *v.* SADAR MUNSIF SILCHAR.

52 Cal. 513 : 88 I. C. 826 : A. I. R. 1925 Cal. 817.

———*Articles of Association*—Bona fide *alteration not opposed to memorandum is permissible—Inconsistency with special contract — Contractee, even if shareholder, is not bound.*

A share-holder in the company must be taken to know that one of the incidents of membership of a company is that the company may, by adopting the proper method, *bona fide* alter its articles in a way which may prejudicially affect his interest, and provided that the alteration in the article is not inconsistent with the objects set out in the Memorandum of Association, and is *bona fide* made in the interest of the company, the plaintiff, as a share-holder, in ordinary circumstances would be bound by such an alteration. But a special contract may be made with the Company, in the terms of or embodying one or more of the articles and if an alteration of the articles so embodied is inconsistent with the real bargain between the parties, the contractee, even though he might be a shareholder in the Company will not be bound. A company cannot break its contracts by altering its articles. The company was a Life Insurance Company. The insured was allotted shares. The insured was entitled under the contract to draw from the company a certain sum on a certain date. In the meanwhile the company altered its Articles of Association, by which such sums were made payable out of a special fund. At the time that the amount became payable to the insured, that fund was insolvent and was not in a position to clear the debt in a lump. *Held* : that the effect of the alteration of the articles was that it involved a fundamental breach of a contract which the company had previously entered into with the insured and in respect of that contract the article was inapplicable. In respect of that contract, although the insured was a shareholder in the company, in respect of this debt the directors would not be acting *ultra vires* in paying the sum out of the general assets of the company which the directors were at liberty to allocate for the purpose of liquidating this and other business claims. Alen *v.* Gold Reefs of West Africa (1900) 1 Ch. 656, Baily *v.* British Equitable Assurance Company (1904) 1 Ch. 374, *Ref. to.* British Murac Syndicate, *Held* v. Alperton Rubber Co., Ltd. (1915) 2 Ch. 186 *Ref. to.* (*Page, J.*) HARICHANDAN JOGA DEVA *v.* HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY, LTD.

52 Cal. 239 : 90 I. C. 86 : A. I. R. 1925 Cal. 690.

———*Liquidation—Members of a provident fund maintained by company—Subscriptions paid by members supplemented by contributions from company—Right of provident fund holders—Priority—Unsecured creditors—Share holders—Fiduciary relationship—Payment of interest—Effect of.*

The Alliance Bank of Simla had created and controlled a Provident Fund for its employees. The Bank suspended payment and went into liquidation. The question arose whether the members of the Provident Fund had priority over the unsecured creditors or whether they were only to rank *pari pasu* with them. Under the rules those of the Bank's employees who fulfilled the conditions required for membership of the fund were compelled to subscribe thereto and every half year the Bank contributed a sum equal to the aggregate amount of the subscriptions of the members during the preceding half year. Every half year the Bank also contributed interest at a rate not exceeding the rate at which interest was paid on fixed deposit and not exceeding 5 per cent. per annum. The half-yearly contributions of capital were divided (by book entry) among the members in proportion to amount of their subscriptions and the half-yearly interest was paid upon the capital amount from time to time standing to the credit of each member. The account of the fund was kept in the general books of the company at their head office where a subsidiary ledger was also maintained showing the amount from time to time standing to the credit of each member. Each member was supplied with a pass book which was made up and balanced half yearly. In the case of a member who was also a customer of the Bank in the ordinary sense, his Provident Fund Account was wholly distinct from his personal account. As regards the mode of collecting subscriptions those who had no personal accounts received their salaries in full and returned their subscriptions to an office of the Bank whose duty it was to collect them. Members with personal accounts were credited in those accounts with their salaries in full and debited with their subscriptions. *Held*, that there was a fiduciary relationship between the bank and its employees who were members of the Provident Fund, that the provision as to interest was not wholly inconsistent with the existence of a fiduciary relationship and that the money in this fund so constituted never became the property of the bank in the sense that the relationship between the Bank and the members was merely that of debtor and creditor. The amount standing to the credit of each member was his property in the possession and under the control of the Bank. The members of the fund were entitled to priority not only in respect of the contributions made by them but also in respect of the contributions made by the Bank which contributions included the sums equivalent to the aggregate sums subscribed by the members and the interest provided by the Bank. Consequently the members of the Provident Fund were entitled to receive payment in full of the

amounts standing to their credit in respect of the fund in priority to the unsecured creditors and share-holders of the Bank. Gee *v.* Liddell 35 Bead 629 ; *In re* Hallets' Estate 13 Ch. D. 696 : Exparte Blave (1894) 2 Q. B. 237 ; Sinclair *v.* Brougham (1914) A. C. 398 *Ref.* (*Sanderson, C. J. and Richardson, J.*) *In re* ALLIANCE BANK OF SIMLA, LTD.
28 C. W. N. 721: A. I. R. 1924 Cal. 818.

———*Management—Interference by Court with internal management when justified—Rights of share-holders and their minority.*

The Court will not interfere with the internal management of the companies acting within their powers, and in fact has no jurisdiction to do so. Burland *v.* Earl ; (1902) A. C. 83 ; Foster *v.* Foster (1916) 1 Ch. 532 Rel. on. In order to redress a wrong done to the company or to recover moneys or damages alleged to be due by the company, the action should *prima facie* be brought by the company itself. But an exception is made to the second rule, that is to say, that the company ought to bring the action "where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the courts allow the share-holders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious in such an action the Plaintiffs cannot have a larger right to relief than the company itself would have if it were Plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the share-holders, or capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other share-holders are entitled to participate. No mere informality which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the share-holders is clear. (*Mookerjee and Rankin, JJ.*) BHANDY *v.* L. P. E. PUGH. **28 C. W. N. 479 : A. I. R. 1924 Cal. 598.**

———*Winding up—Fraud—Waiver.*

The mere fact that there has been a fraud in the promotion or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order as the majority of share-holders may waive the fraud. (*Sanderson C. J. and Richardson, J.*) ORIENTAL NAVIGATION COY. *v.* BANARAM AGARWALLA. **49 Cal. 399 : (1922) Cal. 865.**

———*Winding up — Shareholders — Liability as contributory—Fraud.*

A share-holder cannot be relieved of his liability as contributory in the winding up proceedings on the ground he was induced to buy the shares by a fraudulent misrepresentation. (*Le Rossignol and Broadway, JJ.*) THE ORIENTAL BANK OF INDIA *v.* HABIBULLAH KHAN. **A. I. R 1924 Lah. 649.**

———*Contract by promoters before incorporation—Cannot be ratified.*

A Company cannot ratify or adopt a contract entered into by a person on its behalf before in corporation though it may enter into a new contract embodying the terms of the old one or adopting the old one.

(*Chevis, J.*) SURENDR AAND COY. *v.* PUNJAB TANNERY COY. **68 I. C. 787 : A. I. R. 1923 Lah. 100.**

———*Shares—Liability of share-holders—Transfer or forfeiture of shares—Liquidation—Contributaries—Transaction of business of company—Absence of quorum provided by rules—Business done by Circulation—Legality of.*

A company cannot purchase the shares from a share-holder. It can accept a surrender of the shares subject to the conditions and limitations applicable to a forfeiture of the shares. Where the facts are against it, no presumption arises that an entry of forfeiture of shares in the books of the company has been properly made. Even after a transfer, surrender or forfeiture of the shares, the liability of the shareholder continues and he is liable as a contributory on liquidation of the Company if it takes place within a year. It is not necessary that a list of contributories should have been placed before a meeting of the creditors to make the share-holder liable as a contributory. Where under the rules of business of a company a quorum for a meeting of directors is required before they can transact business, it is not open to a less number of directors by themselves to transact business by circulation even though the rules authorising the transaction of business by circulation do not fix any number of directors among whom the matter should be circulated. (*Devadoss, J.*) INDIAN COMPANIES ACT, *In the matter of.* **20 L. W. 74 : (1924) M. W. N. 582 : 83 I. C. 94 : A. I. R. 1924 Mad. 703.**

———*Shares—Transfer of—Formalities necessity for—Inchoate transfer—Rights of transferee—C. P. Code, O. 21, Rr. 46, 76, 79 and 80—Discretion of Directors in recognising transfer.*

A deed of transfer of shares in a company not complying with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company, is invalid as against a person who has purchased the shares in a sale in execution held under the provisions of the C.P. Code. When the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass so as to confer title on the transferee as against third persons. A transfer of shares in a company otherwise than as is provided by the Indian Companies Act and the Articles of Association may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance and the transaction evidenced by transfer can be regarded as an agreement to convey capable of being perfected into an absolute conveyance by compliance with the prescribed formalities. Until then, the transfer is inchoate and the transferee cannot claim priority over a Court auction-purchaser of the shares. (1902) 2 K. B. 427 and 40 Mad. 1134, Foll. 31 Bom. 76, Not Foll.

Obiter :—It is open to the Directors of a Company in the *bona fide* discretion vested in them under the Indian Companies Act and the Articles of Association to refuse to recognise the purchaser of the shares of the company in a Court auction as a shareholder in the company. (*Kumaraswami Sastri and Devadoss, JJ.*) TADEPALLI NAGABHUSHANAM *v.* SRI RAM RAMACHANDRA RAO. **45 Mad. 537 : 30 M. L. T. 231 (H. C.) : 15 L. W. 470 : (1922) M. W. N. 331 : 42 M. L. J. 449.**

———*Liquidation proceedings—Only two Directors—One of them disqualified to vote—The other Director alone can represent company.*

The appellant company consisted of only two share-holders. These were also the Directors of the Company. The articles contained a clause which provided that any Director who was interested in any contract

with the company was disqualified to vote on questions in which he was interested. One of the Directors was the Governing Director of the respondent company who was a creditor of the appellant company and who presented a petition for the winding up of the appellant company. The other Director opposed the winding up of the company. *Held*, that the other Director alone was competent to act for the company as a whole in the proceedings. (*Carr and Maung Gyi, JJ.*) BOWDENS, LTD *v* BRITISH PLUMBING AND SANITARY ENGINEERING CO., LTD. **4 Bur. L. J. 36 : 88 I. C. 331 : A. I. R. 1925 Rang. 241.**

COMPARTMENT. *See* RAILWAYS ACT.

COMPENSATION.

See (1) CR. P. CODE, S. 250.
(2) LAND ACQUISITION ACT.
(3) T. P. ACT, S. 51.

COMPETENT COURT.

See (1) CIVIL PROCEDURE CODE, S. 11.
(2) PRACTICE—JURISDICTION.

COMPETENT PERSONS TO DEPOSE AS WITNESSES. *See* EVIDENCE ACT, S. 118.

COMPLAINT. *See* CR. P. CODE, SS. 4 AND 199 TO 203.

COMPLETION OF TRANSFER. *See* T. P. ACT, S. 54.

COMPOSITION.

See (1) DEBTOR AND CREDITOR.
(2) T. P. ACT, S. 53.

COMPOUNDING OFFENCE. *See* CR. P. CODE, S. 345.

COMPOUND INTEREST. *See* INTEREST.

COMPROMISE.

See also (1) C. P. CODE, O. 23, R. 3.
(2) REGISTRATION ACT, S. 17 (2) (*vi*).

———*Construction—A provisional compromise confers no title unless the provision is satisfied.*

Where a compromise was arrived at between the alleged sharers in a certain property, by which the question as to giving share to appellant was to be referred to arbitration but the question was never so referred, *held*, that such a compromise is not effective as it was only a provisional one. (*Lord Sumner.*) KARIMUNNESSA KHATUN *v.* MAHOMED FAZLUL KARIM. **88 I. C. 149 : A. I. R. 1925 P. C. 70 (P.C.).**

———*Binding character of—Consensus* ad idem—*Necessity for—Interposition of third party to fix amount—Conclusive or leading element in contributing to compromise—Compromise by counsel—Compromise empowering counsel for opposite party to fix amount—Legality of.*

A suit, which had been heard for two days, was on the representation of counsel on both sides that it was likely to be settled, passed over. Later in the day counsel for the defendant stated that the case was settled and that the terms would be put in later. What happened was that counsel for both parties left the amount to which the plaintiff was entitled to be fixed by the counsel for the defendant. The counsel named a certain sum, but on the plaintiff being informed of it, he repudiated the suggestion that the counsel's opinion was final. On an application by the defendant asking that the terms of the settlement arrived at might be recorded and decree passed in accordance therewith, the question arose whether the parties to the compromise were truly *ad idem*. *Held*, that though the impression upon the minds of counsel for both parties was that the settlement had been achieved, yet in point of fact there was a misapprehension as to the exact ambit of the terms of that agreement, that as the defendant's counsel was under the impression that his interposition was merely to be accepted as a leading and predominant element in contributing to the compromise, while the plaintiff's counsel thought that it was to be conclusive, the parties were not *ad idem* in connection with the compromise and that the same had failed as a settlement of the suit between the parties. *Semble*: Express authority on the part of counsel from the client is necessary to entitle counsel to commit the fortunes of his client to the determination of the counsel for the other side. (*Lord Shaw.*) JAGATPUT SINGH DUGAR *v.* PURAN CHAND.

35 M.L.T. 136 : 26 Bom. L. R. 772 : 20 L. W. 571 : (1924) M. W. N. 646 : L. R. 5 P. C. 145 : 10 O. & A. L. R. 1011 : 1 O. W. N. 598 : 83 I. C. 380 : A.I.R. 1924 P. C. 200 : 47 M. L. J. 136 (P.C.).

———*Effect on other suits.*

When parties are competent to put an end to litigations and do put an end to one litigation by which other litigations are also put an end to, no Court with judicial notice of the compromise can proceed with the hearing in other suits. Where the filing of further and special vakalatnamas was intended in the minutes of compromise, but the parties knew what the terms were on which the suit was to be compromised and had assented to these terms and did not consider that it was necessary to file any further and special vakalatnamas and treated the compromise as binding upon them and acted upon it *held*, that the compromise bound the parties. (*Sir John Edge.*) SOURENDRA NATH *v* HERAMBA NATH. **(1923) M.W.N. 734 : 33 M.L.T. 294 : L. R. 4 A. (P.C.) 138 : 84 I. C. 721 : A. I. R. 1923 P. C. 98 : 45 M.L.J. 453 (P.C.).**

———*Construction.*

On the construction of the words "the bond is allowed to stand good as before, *i. e.*, the principal interest and compound interest will remain due from me." *Held*, that they constitute no more than a reservation of the rights whatever they may be, and that they do not constitute an admission of a legal necessity either of the principal amount or of the rate of interest or compound interest. The compromise terms would not constitute such proof of a justifying family necessity as would be sufficient to discharge the plaintiffs (mortgagees) from the *onus* of proving that there were special circumstances which entitled mortgagor to pledge the joint family property on excessive terms of interest or compound interest. (*Lord Parmoor.*) RAM BUJHAWAN *v.* NATHU RAM.

2 Pat. 285 : 50 I. A. 14 : 4 P. L. T. 29 : 32 M. L. T. 129 : (1923) M. W. N. 382 : 38 C.L.J. 25 : 25 Bom. L. R. 568 : L. R. 4 P. C. 75 : 18 L. W. 768 : 1 Pat. L. R. 445 : 28 C.W.N 446 : A. I. R. 1923 P. C. 37 : 44 M. L. J. 615 (P. C.).

———*Construction—Easement—Light and air—Obstruction to—Ancient light.*

In a prior suit between the parties for the closing of two windows alleged to have been unauthorisedly opened, the parties entered into a compromise under which the plaintiff secured the closing up of one of the windows and the defendant secured the maintenance of the other window with liberty to heighten it by one foot, if that were possible, otherwise to leave it as it was before suit. *Held*, that the effect of the compromise was to give to the window that was maintained the character of an ancient light together with all the advantages and disadvantages attaching to such light. (*Mears, C. J. and Piggott, J.*) GUR PRASAD MUKERJI *v.* BISHUN DAT. **L. R. 5 A. 262 : 79 I. C. 349 : A. I. R. 1924 All. 816.**

———*Parties agreeing to abide by decision of Court—No appeal.*

Where parties to a suit agree to abide by the decision of the Court it is not open to either to question the correctness of the decision in appeal. (*Banerjee and Gokul Prasad, JJ.*) SHAHZADI BEGUM *v.* MUHAM-

COMPROMISE.

MAD IBRAHIM. **19 A.L.J. 14 : 59 I. C. 787 : 43 A. 266.**

——One party agreeing to accept the other as tenant—Agreement to lease—Registration.

A solenamah which was for all intents and purposes a mere record of certain agreement which the parties had come to out of Court for the settlement of their differences existing at that time and whereby the plaintiffs agreed to accept the defendant as tenant with certain rights and a certain rate of rent and to give effect to which a formal document in the shape of a Kabuliyat would in future be executed by the defendants, is not a lease or agreement to lease and is not compulsorily registrable. 39 C. 663 Ref. The document was in effect merely a record of an oral agreement between the parties which was reduced to the form of writing only by way of a memorandum. (*Suhrawardy and Cuming, JJ.*) ALAM MULLA *v.* SURENDRA KUMAR KARFORMA. **71 I. C. 307 : 50 Cal. 79 : A. I. R. 1923 Cal. 432.**

——Matters outside suits.

Compromise embodying terms beyond the subject-matter of the suit may be recited in the decree which should be passed in accordance with that part of the compromise which relates to the suit. (*Mukerjee and Panton, JJ.*) JIVAN KRISHNA *v.* RAMESH CHANDRA DAS. **65 I. C. 47 (Cal.).**

——Construction of agreement not barred.

Though a party to a compromise cannot contest its binding character, he is not precluded from raising a question which turns on the construction of the agreement then arrived at. (*Richardson and Huda, JJ.*) MATHURA DEBYA *v.* BEJOY SINGH **62 I.C. 627 (Cal).**

——Interpretation of the word "aulad".

Where the words in the compromise were "uski aulad jo hogi wo sab malik hogi", the word "aulad" is used in its generic sense and includes male and female children. 114 P. R. 1900 offers a better guidance for the interpretation of the word "aulad" than 89 P. R. 1889. (*Le Rossignol, and Abdul Qadir, JJ.*) SAIDAN *v.* FAZAL. **A. I. R. 1922 Lah. 215.**

——Binding nature of—Alienation by widow—Suit to set aside—Compromise—Subsequent claimants when affected.

A Hindu widow in possession of husband's estate alienated it in favour of her son-in-law. The reversioner brought a suit for declaration that the alienation was null and void. To avoid a costly and protracted litigation, the parties entered into a compromise as a result of which they made certain arrangements for the enjoyment and disposal of the properties. *Held*, that the compromise was valid and binding on persons deriving titles from the alienee. It was also not competent to plaintiff who had not been born at the date of the compromise to impeach it by a suit. (*Broadway and Abdul Qadir, JJ.*) MT. MALTO *v.* FAKIRIA. **4 Lah. L.J. 27 : A. I. R. 1922 Lah. 115 (2).**

——Doubtful questions of law or fact—Waiver—Compromise.

When doubtful questions of law or fact have arisen between two parties and each of them has agreed to waiver what he honestly believes to be his lawful claim in whole or in part, the transaction amounts to a compromise, the waiver or abandonment on either side furnishing the consideration, provided of course that both parties had equal knowledge of the facts and equal opportunities of ascertaining their rights. A compromise entered into in good faith and with belief that it is best in the circumstances by a collateral having right to object to an alienation, is binding on the persons succeeding to his interest. (*Broadway and Raoof, JJ.*) JAIRAM *v.* TELU. **67 I. C. 362 : 1 Lah. L. J. 133.**

COMPROMISE.

——Compromise finally settling parties' rights—Retraction by one party does not release the other.

Where there is a compromise, which finally settles the rights of the parties and nothing more has to be done to give effect to it, the conduct of the executant, in acting in a manner inconsistent with the compromise, will not justify the other party in repudiating it. 31 Cal. 584, Dist. and 7 M. L. T. 33, Foll. Plaintiff granted a permanent lease to the defendant in a compromise between the two. Subsequently, plaintiff sued for possession of the land. *Held*, that plaintiff was not debarred on account of this from suing for rent. (*Spencer and Ramesam, JJ.*) KUPPUSWAMY AIYAR *v.* B. R. R. SETHUPATHI. **22 L. W. 258 : 90 I. C. 973 : A. I. R. 1925 Mad. 1282 : 49 M. L. J. 462.**

——Doubtful claims—Even limited owner representing estate can validly compromise so as to bind reversioners.

Where the defences raised by a limited owner while to a certain extent personal to him were in a large measure inseparable from the estate which he represented, and the claim that was put forward was a claim against the estate and if the claimant succeeded in making out that the family was undivided, the limited owner would get nothing, *Held*, that the limited owner can validly compromise claims of this nature. 38 I. A. 87 ; 33 All. 356 (P. C.) ; 49 I. A. 342 (P. C.), Foll. (*Spencer and Venkatasubba Rao, JJ.*) P. RAJAGOPALAN *v.* V. RAMAMURTHY. **18 L. W. 491 : 73 I. C. 284 : A. I. R. 1924 Mad. 301.**

——Effect of—Not a transfer.

Where there is a *bona fide* compromise of disputed claims under which each party gets a portion of the property in dispute, the proper view is to hold that whatever each got under it, was in recognition of his antecedent right and not by way of transfer by one to the other. 1 I. A. 157 ; 38 I. A. 87 Rel. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) MT. INDARKUAR *v.* MT. NAND RANI KUAR. **10 O. L. J. 657 : 1 O. W. N. 67 : 80 I. C. 333 : A. I. R. 1924 Oudh 273.**

——Mistaken view of law.

A compromise of a disputed title or a doubtful right is not rendered invalid because it proceeds on a wrong legal ground. The justification for the compromise is that the parties do not know what the Courts will ultimately decide and prefer to settle the matter amicably and avoid the expense of further litigation. If a compromise could be attacked on the ground that if the issue had gone to trial the Court would have decided it differently, the whole object of the agreement would be defeated and no compromise would be safe from attack. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD. **9 O. L. J. 235 : 69 I. C. 730 : 25 C. C. 189 : A. I. R. 1922 Oudh 236.**

——Admission—Evidential value is title.

Where the compromise is not binding on the parties, any recital in it is not of much value as evidence. Parties are often willing to make admissions for the purpose of effecting compromise, to which it would be unfair to hold them, if compromise falls through. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* SHIAM BAHADUR. **9 O. L. J. 262 : 74 I. C. 255 : 26 O. C. 33 : A. I. R. 1922 Oudh 231.**

——Inchoate—Actings of the parties—Estoppel.

Even where a compromise or settlement is considered to be defective or inchoate and insufficient to make a final and validly concluded agreement, the subsequent acts of the parties may be such as to supply all defects. In fact, when the actings and conduct of

the parties are founded upon it, as in the case of a part performance of an agreement the *locus penitentiae* which exists in a situation where the parties started upon nothing but an engagement which is not final or complete is excluded, for equity will support a transaction, clothed imperfectly, in those legal forms to which finality attaches after the bargain has been acted upon. The conduct of minors however cannot be pleaded in defeasance of their rights to repudiate the act of their guardians during their minority. But if their guardians had acted for their benefit and after attaining majority they continued to derive the benefit which the transaction conferred on them, it is not open to them to take advantage of the absence of registration, particularly when the parties can no longer be restored to their old positions without material prejudice to the interest of one of them. (*Kanhaiya Lal, J. C.*) RAGHUBAR *v.* RAM BHAROSE.
8 O. L. J. 392 : 66 I. C. 412 : A. I. R. 1922 Oudh 217.

———*Parties—Obligations—Conditional decree.*

Where several obligations are imposed upon parties to a compromise, who also get several rights, and a party comes to a Court to enforce his rights alone, the Court has power to pass a decree in his favour, conditional on his performing his obligations towards the other parties. (*Wazir Hasan, A. J. C.*) AMIR ALI *v.* IQBAL ALI. **24 O. C. 22 : 61 I. C. 312 : 8 O. L. J. 287.**

———*Effect of—Parties cannot resile from.*

Where a dispute is settled and the terms of the settlement are embodied in a compromise, none of the parties can resile from the conditions. (*Daniels and Wazir Hasan, A. J. Cs.*) RAMPAT *v.* DURGA BHARTI. **7 O. L. J. 547 : 60 I. C. 440 : 23 O. C. 303.**

———*Hindu Law—Compromise between limited owner and persons who have no* bona fide *claim at the time of compromise—Not binding on reversioners.*

An alienation by way of compromise entered into between a limited owner and persons who have no *bona fide* claim to the property at the time of compromise is not binding on the reversioners. 3 Pat. L. J. 83 Ref. to. (*Adami and Sen, JJ.*) BAIJ NATH RAI *v.* MANGLA PRASAD. **1925 P. H. C. C. 271 : 90 I. C. 732 : 6 Pat. L. T. 731.**

———*Doubtful claim and* bona fide *settlement thereof bind the parties though suppositions turn out later to be wrong.*

An agreement entered into upon supposition of right or of a doubtful right though it afterwards comes out that the right was on the other side shall be binding and the right shall not prevail against the agreement of the parties ; for the right must always be on one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement. "Undoubtedly parties entitled under different events may, while the uncertainty exists, each taking his chance effect a valid compromise." The Courts recognise the rule of equity as to agreements by way of compromise particularly in family arrangements and agreements entered into with good faith, honest intentions and full disclosures between the members of a family. The adjustment of the rights among themselves will not be disturbed because it is founded upon a supposition which ultimately turns out to be incorrect. (*Jwala Prasad and Foster, JJ.*) JAGRAM SAHAY *v.* RUPNARAIN MAHTON. **5 P. L. T. 375 : 84 I. C. 208 : A.I.R. 1924 Pat. 736.**

———*Counsel exceeding power.*

Where the applicant challenged the consent decree on the ground that his counsel misapprehended against instructions :—*Held*, on the facts proved that the

agent of the appellant acquiesced in the settlement though under protest proposed by the counsel in the interest of his chief and that he accepted it when every attempt to raise money necessary to satisfy plaintiff's claim failed, the decree was binding on him. Two propositions are well settled : first, that express authority is not needed for a counsel to enter into a compromise within the scope of the suit ; and secondly, where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. (*Das and Bucknill, JJ.*) NILMONI CHAUDHURI *v.* KEDAR NATH DAGA. **3 P. L. T. 371 : 1 P. 489 : 67 I. C. 96 : A. I. R. 1922 Pat. 232.**

COMPROMISE DECREE.

See also (1) C. P. CODE, O. 23, R. 3.
(2) COMPROMISE.
(3) DECREE.
(4) REGISTRATION ACT, S. 17 (2) (vi).

———*Settlement by limited owner—Reversioner when bound.*

Settlement of *bona fide* dispute made on compromise by a limited owner is binding on reversioner. (*Ryves and Gokul Prasad, JJ.*) NARAIN SINGH *v.* RAJ KUMAR. **20 A. L. J. 251 : L. R. 3 A. 229 : 66 I. C. 62 : 44 A. 428 : A. I. R. 1922 All. 217.**

———*Failure to comply with terms and consequent forfeiture of rights thereunder—Court can relieve in proper cases.*

One Court cannot bind all Courts in future by deciding that no consent decree can possibly be departed from even when justice and equity demand it. It is the privilege of the High Court to administer equity, and, in following the principles of equity, to relieve against forfeiture, if it considers the nature of the case requires it. 16 Bom. L. R. 668, Not Foll. (*Macleod, C. J. and Coyajee, J.*) NARAYAN BAPUJI *v.* RAJIMAL MOTIRAM. **27 Bom. L. R. 1453 : A. I. R. 1926 Bom. 81.**

———*Execution beyond time allowed by the decree is barred—Time of essence—Varying terms.*

It cannot be laid down in the hard and fast way as being a universal proposition capable of no explanation or deviation, that a consent decree differs from a contract inasmuch as its terms can never be varied except by consent. On January 29, 1920, the parties arrived at the compromise in question. There was a provision in that compromise for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of that compromise. Admittedly the money was not paid nor the wall built within the two months. Nothing was done by either party until the defendant took out the execution. There was no evidence at all of any intervening acts of the parties after the date of the decree. There was, therefore, a lapse of time of just over one year from the date fixed by the compromise for the performance of the acts. *Held*, that time was the essence of the contract; the defendant was out of Court because he was a year out of time and no waiver or a new agreement had been shown to have taken place. But supposing time was not of essence of the contract the defendant could not even then, after an unexplained delay of one year obtain specific performance of this agreement. (*Marten and Fawcett, JJ.*) SHANKER SAKHARAM *v.* RATANJ PREMJI.
47 B. 607 : 25 B.L.R. 328 : A.I.R. 1923 Bom. 441.

———*Alteration—Powers of Court—Dekhan Agriculturists' Relief Act, S. 15-B.*

A Court cannot alter the terms of a consent decree.

COMPROMISE DECREE.

A consent decree made without complying with the special provisions of S 15-B is not bad in law. (*Macleod, C. J and Shah, J.*) MADHAV *v.* APPAJI.
45 Bom. 1123 : 62 I. C. 634 : 23 Bom. L. R. 503.

———*Mortgage suit—No final decree necessary.*

Compromise decree makes it unnecessary to pass a final decree and property can be sold without a final decree. (*Ghose and Panton, JJ.*) HEMENDRA LAL SINGH DEO *v.* FAKIR CHANDRA DATTA.
27 C. W. N. 621 : 74 I. C. 929 : 50 C. 650 : A. I. R. 1923 Cal. 626.

———*How far binding.*

A compromise decree is just as binding on the parties as a decree on contest, but the decree has no greater validity than the compromise itself. (*Chatterjee and Panton, JJ.*) RAJENDRA KUMAR BOSE *v.* BISWARUP DEY. **64 I. C. 603 : 35 C. L. J. 173.**

———*Matters not directly in issue.*

A compromise decree, as regards matters not directly in issue in the suit cannot be enforced in execution but the decree evidences the agreement entered into as regards those matters. (*Newbould and Suhrawardy, JJ.*) JAGABHANDU SAHA *v.* HARI MOHAN ROY. **62 I. C. 63 : 25 C. W. N. 990.**

———*Right to forfeiture—Equitable jurisdiction,*

Although a consent decree embodies a right to forfeiture, the Court can grant relief against forfeiture, as it would, in the absence of such a consent decree and in case of suit to enforce the compromise. Where a consent decree directs payment on a certain date, time is not the essence of the contract and the Court can extend time for payment. (*Mookerjee, A. C. J. and Fletcher, J.*) KANDAPPA NAG *v.* BANWARI LAL NAG. **60 I. C. 864 : 33 C. L. J. 244.**

———*Consent by pleader without defendant's permission—No loss caused to the defendant—Order was allowed to stand*

A consent order was allowed to stand where the defendant did not suffer any loss of right by such order though the defendant contended that his pleader who consented to the order being passed by the Court was not given any permission by him to consent to the order. (*Madhavan Nair, J.*) V. DALEPPADU *v.* T. SURANNA. **20 L. W. 900 : 85 I. C. 408 : A. I. R. 1925 Mad. 278.**

———*Setting aside—Fraud of Agent—Contents—Remedy by suit—Application for.*

An application under S. 151 for setting aside the decree on compromise, the consent of the party to which, was obtained by fraud of agent and in ignorance of the contents is not maintainable. The remedy open to the party is an application for review or separate suit. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER.
16 L. W. 440 : (1922) M. W. N. 495 : 70 I. C. 425 : 31 M. L. T. 132 : A.I.R. 1922 Mad. 446 : 43 M. L. J. 290.

———*Nature of.*

A compromise decree only represents a contract between the parties with the order of the Court superadded to it. (*Baker, J. C.*) MIRA MOTI JU DEO *v.* MT. JANKI. **89 I. C. 926.**

———*Execution—Decree creating charge—Charge can be enforced in execution.*

Where a decree was passed in terms of a compromise which directed that in case of failure in payment up to a certain date by judgment-debtor of the decretal amount, the amount was to be a charge on certain property of his. *Held*, that that charge was enforceable in execution of that decree and no separate suit was necessary. (*Kinkhede, A. J. C.*) MT. SARJABAI *v.* DHANRAJ. **8 N. L. J. 9 : 86 I C. 11 : A. I. R. 1925 Nag. 239.**

COMPROMISE DECREE.

———*Cannot be set aside only as to a part onerous to plaintiff, and retained intact as regards the rest.*

Plaintiff sued M alleging that he was adopted by M to her deceased husband D. The suit ended in a compromise. The terms of the compromise were that the plaintiff be declared the adopted son of the deceased D, that the plaintiff and the defendant divide D's property between themselves and each manage his or her own share unhampered by the other ; and that on the death of either one of them, the other should succeed to his or her share. The plaintiff subsequently sued M alleging that the compromise was void and not binding on him for the reasons amongst others that it created a novel line of descent repugnant to Hindu Law and sentiment. *Held*, that the terms said to be contrary to Hindu Law were agreed to on his behalf as an inseparable part of the compromise which was to his benefit and he must be held bound by them. (*Kotval and Prideaux, A. J. Cs.*) YADORAO *v.* MIRABAI.
76 I. C. 368 : A. I. R. 1924 Nag. 180.

———*No fraud or collusion—Decree is effective.*

Where there is no allegation of fraud or collusion, a compromise decree is as effective as one after contest. (*Dalal, J. C. and Simpson, A. J. C.*) MAHA DEO BAKHSH SINGH *v.* SURAJ BAKHSH SINGH.
10 O. L. J. 252 : 80 I. C. 447 : A. I. R. 1924 Oudh 34.

———*Date of operation of.*

A compromise becomes operative when it is embodied in the decree. Therefore if the compromise fixes any time for the doing of an act, the time is to be calculated from the date of the decree and not from the date of the compromise. (*Daniels, J. C.*) ILAHI RAZA KHAN *v.* MT. TAIBA BEGAM.
9 O. L. J. 53 : 66 I C. 273 (1) : A. I. R. 1922 Oudh 145 (1).

———*Extension of time to pay money—Power of Court.*

Where a compromise decree providing for payment of money on a prescribed date and in case of failure the forfeiture is to result, Courts should consider in each case whether time was of the essence of the transaction and if relief against forfeiture should be given or not. If time is not of the essence, Courts have power on equitable grounds to extend the time. (*Mullick and Bucknill, JJ.*) MT. NAND RANI KUER *v.* DURGA DAS NARAIN. **2 Pat. 906 : 1924 P. H. C. C. 122 : 5 Pat. L. T. 401 : 82 I. C 505 : A. I. R. 1924 Pat. 387.**

———*Construction—Decree for delivery of lands with rents and profits—Collection of rent before such delivery—Liability to account.*

Where under a compromise decree the respondent undertook to deliver possession of certain lands as they then existed together with the rents and profits which had accrued till then, the respondent must be held to hold the property thereafter in a fiduciary capacity and for the purpose of handing over the property to the appellant. Where therefore the respondent cut down certain trees on the land and appropriated them to his own use then he was acting in breach of the obligation he was under by reason of the decree and was in fact committing a breach of trust. Further the respondent was liable to account to the appellant for all the rents that he had collected from the tenant since the date of the decree. (*Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD SAHU *v.* GAJADHAR PRASAD SAHU. **1 Pat. L. R. 145 : 73 I. C. 359 : A. I. R. 1924 Pat. 362.**

———*Compromise by pleader without instructions.*

COMPROMISE PETITION.

from party and without his consent—Valid if bona fide, *in the interests of the party.*

On principle, there does not seem to be any reason for interfering with a compromise consented to by a pleader duly authorised in this behalf, unless fraud or collusion is imputed to the pleader. (*Jwala Prasad, J.*) LAURENTIUS EKKA *v.* DUKHI KOERI.
4 Pat. 766 : A. I. R. 1926 Pat. 73.

COMPROMISE PETITION.
See (1) C. P. CODE, O. 23.
(2) COMPROMISE.

COMPULSION.
See (1) CONTRACT ACT, S. 16.
(2) PARDANASHIN LADY.

COMPULSORY DEPOSIT—*See* C. P. CODE, O. 21, R. 84.

COMPUTATION OF TIME.—*See* LIMITATION ACT, S. 12.

CONCEALMENT OF BIRTH.—*See* PENAL CODE, S. 318.

CONCILIATION.
See (1) ARBITRATION.
(2) AWARD.
(3) C. P. CODE, SCH. II.
(4) DEKHAN AGRICULTURISTS' RELIEF ACT.

CONCURRENT FINDINGS.
See (1) PRACTICE.
(2) PRIVY COUNCIL.

CONCUBINE.—*See* HINDU LAW—MAINTENANCE.

CONDITION.
See (1) DEED—CONSTRUCTION.
(2) EVIDENCE ACT, S. 92.
(3) SUCCESSION ACT, SS. 99—124.
(4) TRANSFER OF PROPERTY ACT, SS. 10—20.
(5) WILL—CONSTRUCTION.

CONDITIONAL GIFT.
See (1) SUCCESSION ACT, SS. 113—124.
(2) T. P. ACT, SS. 25—29.

CONDITIONAL SALE.
See (1) MORTGAGE.
(2) T. P. ACT, S. 58.

CONDUCT.—*See* EVIDENCE ACT, S. 115.

CONFESSION.
See (1) EVIDENCE ACT, SS. 24—30.
(2) CR. P. CODE, SS. 164, 364.
(3) CRIMINAL TRIAL.

CONFIDENCE—*See* EVIDENCE ACT, SS. 126—129.

CONFIDENTIAL COMMUNICATIONS.—*See* EVIDENCE ACT, SS. 122, 126—129.

CONFIDENTIAL RELATION.
See (1) CONTRACT ACT, S. 16
(2) EVIDENCE ACT, S. 111.
(3) TRUST.
(4) TRUSTS ACT.

CONFIRMATION OF AUCTION SALE.—*See* C. P. CODE, O. 21, RR. 90—92.

CONFISCATION.
See (1) ACT OF STATE.
(2) CROWN.
(3) GRANT.
(4) HINDU LAW—JOINT FAMILY.
(5) PENAL CODE, SS. 121, 122 AND 124-A.

CONFLICT.
——— of decision *See* C. P. CODE, S. 11.
——— of Equity. *See* PRACTICE.
——— of Evidence. *See* PRACTICE.

CONTEMPT.

CONFLICT OF LAWS.
See (1) INTERNATIONAL LAW.
(2) INTERPRETATION OF STATUTES.
(3) NEGOTIABLE INSTRUMENTS ACT, SS. 134—137.
(4) PRACTICE.
——— of Rulings. *See* PRACTICE—PRECEDENT.

CONJUGAL RIGHTS.
See (1) HUSBAND AND WIFE.
(2) RESTITUTION OF CONJUGAL RIGHTS.

CONNIVANCE.
See (1) ABETMENT.
(2) ACQUIESCENCE.

CONSENT.
See (1) ACQUIESCENCE.
(2) ESTOPPEL.
——— Decree.
See (1) C. P. CODE, S. 96 AND O. 23, R. 3.
(2) COMPROMISE.
——— Order. *See* C. P. CODE, S. 96 AND O. 23, R. 3.

CONSEQUENTIAL RELIEF.—*See* SPECIFIC RELIEF ACT, S. 42.

CONSIDERATION.
See (1) CONTRACT ACT, SS. 2 AND 25.
(2) EVIDENCE ACT, SS. 102 AND 103,
(3) FAMILY ARRANGEMENT.

CONSIGNMENT.—*See* RAILWAYS ACT, S. 72.

CONSIGNOR AND CONSIGNEE.—*See* RAILWAYS ACT, S. 72.

CONSOLIDATION.
See (1) MORTGAGES.
(2) T. P. ACT, SS. 60 AND 61.
——— of appeals. *See* C. P. CODE, S. 151.
——— Suits.
See (1) C. P. CODE, S. 151.
(2) PRACTICE.

CONSPIRACY.
See (1) TORT.
(2) PENAL CODE, SS. 109 to 114.

CONSTRUCTION.
See (1) CONTRACT—CONSTRUCTION
(2) DEED—CONSTRUCTION.
(3) HINDU LAW—WILL.
(4) LEASE—CONSTRUCTION.
(5) MORTGAGE—CONSTRUCTION.
(6) WILL—CONSTRUCTION.

CONSTRUCTION OF STATUTES.—*See* INTERPRETATION OF STATUTES.

CONSTRUCTIVE ESTOPPEL.
See (1) C. P. CODE, S. 11.
(2) EVIDENCE ACT, S. 115.

CONSTRUCTIVE NOTICE.—*See* T. P. ACT, S. 3.

CONSTRUCTIVE TRUST.
See (1) TRUST.
(2) TRUSTS ACT, SS. 80—94.

CONSUMMATION OF MARRIAGE.—*See* MAHOMEDAN LAW—MARRIAGE.

CONTEMPORANEOUS AGREEMENT.
See (1) DEED—CONSTRUCTION.
(2) EVIDENCE ACT, S. 92.

CONTEMPT.
———*Newspaper criticism—Immediate apology—Effect of.*

It is not always a defence to a rule for contempt of

Court that a newspaper guilty of contempt immediately afterwards published an apology to the Court. (*Macleod, C. J. and Crump, J.*) MARMADUKE PICKTHALL, *In re.* **25 Bom. L. R. 107 : 24 Cr. L. J. 313 : 72 I. C. 73 : A. I. R. 1923 Bom. 242.**

———*Repetition of negligence condoned in the past cannot be remedied by apology.*

An apology does not remedy the evil caused by publication of objectionable matter. If High Court acts in the interests of the administration of justice, it is clear that while an apology may be to some extent reparation on the part of the offender ; it cannot overtake and counteract the mischief already done by the original publication. Where the publication is due to a repetition of negligence which has been condoned in the past, an apology becomes little more than an idle form. (*Macleod, C. J. and Crump, J.*) MARMADUKE PICKTHALL, *In re.* **25 Bom. L. R. 107 : 24 Cr. L. J. 313 : 72 I. C. 73 : A. I. R. 1923 Bom. 242.**

———*Criticism in newspaper imputing judicial dishonesty to Judges is contempt.*

Where the article as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently innocent, in other words, it attributes judicial dishonesty to the Judges, *held*, such an article constitutes a contempt of Court. The Court has to consider the natural and probable effect of the article and not only the intention of the editor. Any unfair criticism of Courts or Judges constitutes such an interference with the administration of justice as should be punished. The tendency of such criticism is to undermine the dignity of the Court and in the end to embarrass the administration of justice. The High Court will not act so much to protect the dignity of its Judges, as in the interest of the administration of justice. *Macleod*, v. *St. Aubryn*, (1899) A. C. 549 ; *Reg.* v. *Gray*, (1900) 2 Q. B. 36 ; 33 Bom. 240 Foll. (*Shah, Ag. C. J. and Crump, J.*) EMPEROR *v.* MARMADUKE PICKTHALL. **25 Bom. L. R. 15 : 24 Cr. L. J. 289 : 72 I. C. 17 : A. I. R. 1923 Bom. 8.**

———*Scandalous attacks on Court's integrity—High Court can commit for contempt.*

In matters of contempt the Court acts not to defend the dignity of any Court or Judge but to safeguard the proper administration of justice and to ensure that the confidence of the public in that administration shall not be in any way impaired. The High Court has jurisdiction to punish for contempt a person who makes scandalous attacks on its integrity and impartiality. (*Marten and Crump, JJ.*) SATYABODHA RAM CHANDRA ADA BADDI, *In re.* **24 Bom. L. R. 928 : 23 Cr. L. J. 644 : 69 I. C. 84 : 47 Bom. 76: A. I. R. 1922 Bom. 426.**

———*Ill-treating attorney's clerk who has come to serve notice is contempt—Positive denial by party of charge does not in itself exempt him from punishment.*

The jurisdiction to punish for contempt of Court is inherent in the High Court as a Court of Record. But the Court always exercises its power of punishing for contempt with great forbearance and acts with scrupulous care. It is ordinarily very chary in punishing people for contempt, and when the occasion arises, it deals with such questions in the interest of the public, bearing in mind that the greater the power it possesses, the more caution it is necessary to use in exercising it. In other words, the Court does not interfere where the offence is of a slight or trifling nature and it only interferes where there is a real attempt to obstruct the course of justice. From the very

early times, it has been held to be contempt of Court to assault, ill-treat or threaten a process-server engaged in his duty. The object of punishing for contempt where a process-server in the execution of his duty has been abused and assaulted is not to vindicate the dignity of the Court but to prevent undue interference with the administration of justice. The law has armed the Court with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals, that insults to witnesses, jurymen and process-servers are not allowed. The principle is that those who have duties to discharge pursuant to orders of Court are protected by the law and shielded on their way to the discharge of such duties while discharging them, and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders. Notwithstanding the positive denial of the party, yet it is the duty of the Court to look into all the affidavits and see on which side the truth lies. *Peachey* v. *Peachey*, Foll. The Court does not and will not ordinarily take notice of mere rude behaviour on the part of the person against whom the allegation is made. The test is : Did the person in question abuse or maltreat the serving clerk, while he was engaged in the execution of his duty. Where an attorney's clerk went to serve a notice on a party and the latter maltreated and insulted him but the clerk was not prevented from affixing a copy of the notice on the door of the party's residence. *Held*, that he was maltreated and abused while he was engaged in the execution of his duty. (*C. C. Ghose, J.*) V. M. BASON *v.* A. H. SKONE. **41 C. L. J. 515 : 29 C. W. N. 766 : 88 I. C. 725 : A. I. R. 1925 Cal. 945.**

———*Injunction to company not to hold meeting—Some shareholders holding meeting—Meeting not held in accordance with Articles of Association—Persons holding meeting are not liable for contempt.*

A meeting of a Company was announced to take place on a certain day. Previous to that day a suit was instituted for declaring that the petitioner and certain other persons were not competent to act as shareholders. A temporary injunction was asked for, restraining the defendants from acting as shareholders of the Company. No notice was given to the petitioner (who was one of the defendants). The Court passed an injunction not restraining the shareholders in question from voting at the meeting but restraining the Company from holding a meeting until further orders. This injunction was not served on the petitioner. On the day of the meeting some of the shareholders including the petitioner proceeded to a private house and held a meeting whereby they purported to appoint directors, etc. *Held*, that the meeting was not a meeting of the Company and therefore was not a breach of the injunction and that, therefore, even assuming that it was not necessary to serve the injunction order on the petitioner or give notice to him before proceedings in contempt could be taken against him, he was not liable to such proceedings. (*Greaves and Chakravari, JJ.*) KAILASH CHANDRA DATTA *v.* SADAR MUNSIF SILCHAR. **88 I. C. 826 : 52 Cal. 513 : A. I. R. 1925 Cal. 817.**

———*Misconduct of litigant—Penalty—Right of audience—Refusal of—Appeal—Rejection of.*

The breach of an undertaking given to a Court by a litigant, pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction is misconduct amounting to contempt. It is well

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settled that when a person is guilty of such contempt, he places himself in a perilous situation so as not to be heard by the Court till he has purged his contempt. It is in fact an elementary rule that one in contempt may be denied certain favours of the Court and privileges, until he has purged himself of contempt. The rule denying privileges is limited to proceedings in which contempt occurs. A litigant in contempt has no standing in the Court. Where the attitude of the plaintiff in the case in refusing to pay the deficit Court-fee in spite of his undertaking to do so put him in contempt he cannot appeal from the decree nor would he be heard on the appeal. (*Mookerjee and Chotzner, JJ.*) RAJ RAJESWARI JIU *v.* GATI KRISHNA CHAKRABARTI. **39 C L. J. 217: 82 I. C. 292 (2): A. I. R. 1924 Cal. 953.**

———*High Court—Powers of—What constitutes contempt—Apology if sufficient.*

The Lahore High Court as a Court of Record has jurisdiction to deal summarily with contempts of Court. Where a newspaper comments on a case as decided not according to dictates of justice but in order to please and carry favour with others, it amounts to contempt. The principle underlying is not to protect the Court as a whole or the individual Judge but to protect the public. The impartiality of Judges should be recognised by the public at large. The mere fact that an apology is tendered does not secure the offender from punishment. (*Broadway, Addison and Colastream, JJ.*) *In the matter of* HABIB. **26 Cr. L. J. 1409 : 89 I. C. 833 : 26 Punj. L. R. 772.**

———*Disobedience of order of Court—Communication—Absence of formal order—Effect.*

The High Court stayed proceedings in a criminal trial. A telegram was sent by the vakil and this was supported by an affidavit, but still the Magistrate proceeded with the trial. *Held*, even in the absence of a formal communication of the stay order, the magistrate was bound to obey the order of the High Court. He would be guilty of contempt if he wilfully disobeyed the same. Where there is possible to construct two inferences upon the magistrate's conduct, the inference which discloses favourable view should be taken. (*Venkatasubba Rao, J.*) PONNUSWAMI AIYAR *v.* GANAPATHY AIYAR. **(1923) M. W. N. 919 : 18 L. W. 809 : 33 M.L.T. (H.C.) : 130 : A. I. R. 1924 Mad. 393 : 45 M. L. J. 742.**

CONTEMPT OF COURT—*See also* PENAL CODE, SS. 172-190.

CONTEMPT OF LAWFUL AUTHORITY—*See also* PENAL CODE, S. 185.

CONTENTIOUS SUIT. *See* T. P. ACT, S. 52.

CONTINGENT BEQUEST.

See (1) SUCCESSION ACT, S. 111.
(2) T P. ACT, SS. 21—26.
(3) WILL—CONSTRUCTION.

CONTINUING OFFENCE.—*See* PENAL CODE, S. 363.

CONTRACT.

C. I. F. Terms.
Breach.
Construction.
Hire purchase. *See also* CONTRACT ACT, S. 78.
Implied terms.
Interpretation of. *See* CONTRACT—CONSTRUCTION.
Liability.
Novation.
Right to enforce.

CONTRACT—C. I. F. Terms.

Shipping.
Stranger. *See also* (1) CONTRACT— RIGHT TO ENFORCE.
(2) CONTRACT ACT, S. 2 (d).
Teji Mundi Contracts.
Variation.

C. I F. Terms.

———*Avoidance of— Misrepresentation, etc.—Election—Laches—Effect.*

A contract entered into through misrepresentation, undue influence, non-disclosure of material facts, etc. is valid till the party defrauded elects to avoid it. The right to avoid subsists so long as innocent third parties have not acquired interests or the delay is such that it amounts to waiver. 7 Ex. 26 and 5 P. C. 221 followed. (*Schwabe, C.J. and Coutts-Trotter, J.*) BRUNTON *v.* BRUNTON. **78 I. C. 299 : A. I. R. 1925 Mad. 360.**

———*Breach of contract to marry— One party interned during the war and unable to communicate with other—Rescission of contract cannot be presumed.*

In certain circumstances silence, absence, conduct or expression in letters may be amply sufficient to lead a Court of Law to conclude that a contract of marriage was dissolved by agreement of both parties. But where circumstances were altogether extraordinary in that the parties were entangled and embarrassed by difficulties not of their making but by war breaking out and one of the parties being interned during the war being suspected as German subject. *Held*, that even then to prove that this contract was rescinded by mutual agreement is a burden of which the respondent must discharge himself. If he does not so prove he must make amends to the other party. (*Lord Darling,*) LUCIA JACOB *v.* DAVID ALEXANDER WILLAS. **2 O. W. N. 695 : 89 I. C. 824 : 22 L. W. 726 : A. I. R. 1925 P. C. 194 (P. C.).**

———*Breach of—Damages—Measure.*

The usual practice in produce markets is that where there is a claim of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain. (*Lord Phillimore.*) HOPE PRUDHOMME & CO. *v.* HAMEL & HORLEY, LTD. **L. R. 6 P. C. 129 : 88 I. C. 307 : A. I. R, 1925 P. C. 161 (P. C.).**

———*Breach of contract—Damages—Breach of two contracts by one act—One benefiting, the other damaging the other party— Defaulting party can't take advantage of benefit.*

Where there are two contracts and a party commits by one act breach of both, the fact, that as the result of the wrongful act a benefit may have accrued to the other in connection with the other, is a fact for which no credit can be claimed by the defaulting party. 8 Ch. Apps. 921 Foll. (*Lord Blanesburgh.*) DIWAN CHAND KIRPA RAM & CO. *v.* WELD & CO. **(1925) M. W. N. 459 : 88 I. C. 54 : A. I. R. 1925 P. C. 150 (P. C.).**

———*Breach, Vendor's failure to tender the documents—Vendor's right to compensation for short delivery.*

Under a C. I. F. contract, it is the duty of the vendor to tender the documents which would include the contract of affreightment, insurance policy and invoice to the vendee. Where the vendor does not follow this course, and eventually the vendee in taking delivery finds that there is shortage in the delivery, the vendee is entitled to compensation from the vendor in respect of the same. For, if the vendor had delivered the necessary documents to the vendee,

the vendee would have had his remedy either against the ship or against the Insurance Company. (*Sanderson, C. J and Buckland, J.*) J. D. KUMAR & BROS. *v.* BERUCK & COMENS. **41 C. L. J. 500 : 89 I. C. 636 : A. I. R. 1925 Cal. 941.**

——Breach of covenant—Right to sue—Cause of action.

When a contract had been entered into and repudiated by one of the parties before the time for fulfilment the repudiation gives rise to a cause of action to sue at once and he need not wait till the date fixed for the performance ; for a right to sue accrues whenever a person becomes clothed with a legal character entitling him to relief which a Court is competent to grant. (*Broadway and Campbell, JJ.*) ALI NAWAZ *v.* FAZIL ALI. **79 I. C. 165 : A.I. R. 1925 Lah. 79.**

——Breach of—Suit for damages—Implied condition in charter-party as to route—Whether deviation justified.

Where a master of a ship is guilty of deviation which is not justified in a case, it follows that he is bound to compensate the plaintiff by way of damages for deviation. (*Ramesam and Jackson, JJ.*) ARAB FARAJ BEN ALI BANAMEEN *v.* JETTA MEGHJI. **21 L. W. 249 : 86 I. C. 751 : A. I. R. 1925 Mad. 770.**

——Breach—Forfeiture—Advance paid — Forfeiture for breach—When allowed.

Whenever money is paid in advance on account of a contract, the vendor is entitled on breach of the contract to retain the whole sum, if the money has been paid as deposit. Every payment made by a purchaser is not in the nature of a deposit, but in each case the real intention of the parties must be ascertained from all the terms of the contract. (*Phillips, J.*) PASUMARTI SEETHANNA *v.* YASIKALAPPA. **22 L. W. 634.**

——Breach of—Repudiation by one party—Promisee's remedies in case of—Promisee if can sue upon breach and also keep contract open—Abandonment of contract — Implication of— Repudiation of contract coupled with delay in suing for its performance—Implication from.

If one party to a contract repudiate it, the promisee may treat the repudiation as inoperative, and at the end of the period of the contract, treat the other party as responsible for all the consequences of non-performance, thereby keeping the contract alive ; or, on the other hand, he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. The promisee cannot, however, both sue upon the breach and also keep the contract open. A party to a contract cannot repudiate it, wait a year, and then suddenly insist upon its performance. The question turns upon whether his conduct gives rise to an implication of abandonment. Delay coupled with repudiation does give rise to such an implication. (*Jackson, J.*) NARASIMHA MUDALI *v.* NARAYANASWAMI CHETTY. **22 L. W. 637 : 49 M. L. J. 702.**

——Breach of—Suit for damages—Readiness to perform—Repudiation—Effect of.

A plaintiff who brings a suit for damages for breach of contract is absolved from showing that he was ready and willing to perform his part of the contract when the defendant has repudiated the contract before suit. (*Walmsley and Chakravarty, JJ.*) SREE LAL CHAMARIA *v.* HARIRAM GOENKA. **88 I. C. 737 (Cal).**

——C. I. F. Terms—Property in goods—When passes—Bank draft what can be included in.

Where goods are shipped on C. I. F., C. I. (cost, insurance, freight, commission, interest) terms and documents of title sent to a Bank to be handed over to consignee on bank draft being accepted, property in the goods does not pass the moment the goods are shipped. The consignor cannot include in the bank draft amounts due in respect of a different transaction and if included. consignee can refuse to accept it. (*Macleod, C. J. and Shah, J.*) MEHTA & CO. *v.* JOSEPH HEUREUX. **26 Bom. L. R. 382 : 48 Bom. 531 : 80 I. C. 766 : A. I. R. 1924 Bom. 422.**

——C. I. F. Terms—Sale of goods—Contract—Breach—Shipment delayed—Reasonable delay—Document sent to Bank against payment—Non-payment—Rights of Seller—Damages.

On 17—12—1919 the defendant in Bombay ordered out from the plaintiffs at Manchester goods on C. I. F. terms June—July shipment. The plaintiffs in accepting the order added that in the then state of affairs they could not guarantee delivery in time and it was understood that in case the goods were late, there should be no claim for late delivery. The goods were shipped in different dates up to 26—8—1920 and reached Bombay in October. The first ten bales were taken delivery of by the defendant. But the drafts were sent through plffs'. which bank, for the remaining three shipments, when presented to the defendant were dishonoured. The plaintiffs thereupon sued the defendant for the price of the goods or in the alternative for damages. *Held*, that the defendant had no right to refuse to take delivery of the goods he having agreed to extend the time therefor. The plaintiffs were entitled to and did send the goods within a reasonable period beyond the contract time. The property in the goods not having passed to the defendant, the plaintiffs were not entitled to sue for the price but only to claim damages represented by the market rates at the date of breach. (*Macleod, C. J. and Crump, J.*) BANK OF MORVI, LTD. *v.* BAERBIN BROS. **48 Bom. 374 : 26 Bom. L. R. 155 : 79 I. C. 1012 ; A. I. R. 1924 Bom 325.**

——C. I. F. terms—Sale of goods—Passing of property.

In the case of a *C. I. F.* contract, the question whether the property in the goods has passed from the seller to the buyer depends entirely on the question whether the seller has parted with the control over the disposal of the goods. He may intend to do this if he endorses the bill of lading over to the purchaser. But if he endorses the bill of lading in blank and hands it over to his agent for delivery with instructions that he shall not hand it over until the goods are paid for then the seller has shown his intention to retain the disposal of the goods under his control. (*Macleod, C. J. and Crump, J.*) BANK OF MORVI, LTD. *v.* BAERLEIN BROS. **48 Bom. 374: 26 Bom. L. R. 155: 79 I. C. 1012: A. I. R. 1924 Bom. 325.**

——C. I. F. Terms—C. I. F. S. W.—Delivery of goods—Payment—Conditions precedent—Survey of goods—Right to.

It is the duty of the consignors of goods under a C. I. F. S. W. contract to tender to the consignee the bill of lading and insurance policy before the price is demanded and a delivery telegram sent by the shipping company is not equivalent to the bill of lading. In the absence of the usual documents of title, the consignee is entitled to inspect the goods and satisfy himself as to the same. (*Mulla, J.*) STEEL BROTHERS & CO., LTD. *v.* DAYAL KHATAV & CO. **47 Bom. 924 : 25 Bom. L. R. 1063 : 87 I. C. 67 : A. I. R. 1924 Bom. 247.**

——C. I. F. Terms—Terms and incidents of.

Under a C. I. F. contract for the sale of goods, the seller undertakes to sell the specified goods, to ship

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them to the place agreed upon, to obtain a contract of affreightment and policies of insurance and to hand over the bill of lading and the policies to the buyer. Such a contract provides for the delivery of the goods to be made by handing over the documents to the buyer and when this is done, the seller has performed the contract in full and is relieved of further liability. English cases reviewed. (*Robinson, C. J. and Duckworth, J.*) S. K. S. S. L. CHETTY FIRM *v.* AMARCHAND MADHOWJEE & CO. **66 I. C. 579: 11 L. B. R. 141.**

———*—C. I. F. Terms—Indent—Construction.*

If the importer buys on his own account as well as for his constituent, he ought to make clear what his liabilities are under his contract with them. If he does not do so, he cannot, afterwards as the market falls, decide whether he shall deliver goods bought on his own account or goods which he says he has brought against a particular indent. The importer may, however, confine himself to buying only against orders received. He may in this case undertake to supply at the indent price charging his own profit and commission as agreed. Or he may establish direct connection with the vendor in which case he only gets his commission. Whether he gets from both the vendor and the purchaser or from one of them is immaterial for determining whether privity of contract exists between vendor and purchaser. (*Macleod, C. J.*) N. ROY & CO. *v.* SURANA DALAL & CO. **64 I. C. 935: 23 Bom. L. R. 1119.**

———*—C. I. F. Terms—Vendor is liable for short delivery if he fails to tender documents.*

Under the C. I. F. contract the vendor must tender the documents, which would include the contract of affreightment, insurance policy and invoice, to the vendee. If on account of not fulfilling this duty, there has been a short delivery, the vendee is entitled to compensation from the vendor. (*Sanderson, C. J. and Buckland, J.*) T. D. KUMAR *v.* BERUCK AND COMENS. **41 C. L. J. 500: 89 I. C. 336: A. I. R. 1925 Cal. 941.**

———*—C. I. F. Terms—Bills of lading to be delivered on payment of price—Property when passes.*

When a seller deals with, or claims to retain, the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only and until then the property in the goods does not pass to the buyer. (*Martineau and Moti Sagar, JJ.*) GULAB RAISAGAR MAL *v.* MIRBHE RAM-NAGAR MAL.

4 Lah. 423: 79 I. C. 194: A. I. R. 1924 Lah. 239.

———*—C. I. F. Terms—Mercantile custom—Payment.*

When goods have been sold upon C. I. F. terms, the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. These documents must of course be tendered within a reasonable time from the date agreed upon for shipment of the goods which they represent. If the contract of sale provides that payment is to be drawn on the buyer, the latter is bound to accept the draft upon tender of the proper documents. This he must do even though the goods be lost or destroyed at the time the draft is presented. The delivery he is entitled to as against payment of the contract price is not the goods contracted for but their symbol represented usually by the bill of lading, charter-party, invoice

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and policy of insurance. Upon payment, he can upon arrival of the ship, demand the goods themselves and should these not be forthcoming, or, when forthcoming, not be of nature contracted for, all his remedies at law are then open to him. (*Shadi Lal, C. J. and Fforde, J.*) BUBLEY HURRY AND CO. *v.* HERTZ AND CO. **4 Lah. 215: 72 I. C. 421 : A. I. R. 1923 Lah. 541.**

———*—C. I. F. Terms—Property passes to purchaser on putting articles on board.*

The obligations of a seller under a C. I. F. contract are that he secures the freight for the carriage of the goods in question to their destination, has the goods covered by an Insurance policy for the voyage, places the goods on board the ship proceeding to the destination mentioned in the contract, and then tenders the necessary documents to the buyer. When he has done this, he has done all that he need do to entitle him to the payment of the price at which the goods have been agreed to be purchased. The insurance of the goods is clearly intended for the protection of the buyer and if the goods are lost in transit, it is the buyer that recovers the amount of the insurance policy. The buyer therefore protects himself against the loss of the goods by getting the seller to insure them as soon as they are placed on board and the property in the goods therefore which are appropriated to the buyer passes to him as soon as the seller puts the goods on board a ship bound for the place of destination. (*Raymond, A. J. C.*) MEHTA & CO. *v.* PARMESHARDAS PARSHOTAMDAS. **16 S. L. R. 293: A. I. R. 1924 Sind 4.**

Construction.

———*Construction—Contract to supply sleepers.*

The material portion of a contract to cut sleepers from a jungle was as follows :—

"We, the second party, shall during the term of each year from the month of Kartik up to the end of Asarh, get 15,000 sleepers of every measurement prepared every month, and shall, after they are counted according to the contract, pay to the first party the price thereof according to the rates mentioned above, without any objection to this. Neither we, the second party, nor our representatives shall raise any objection. If we do so, the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below without waiting for the expiry of the term of this agreement.....Let it be known that we, the second party, will have to prepare 135,000 sleepers of different measurements every year during the nine months from Kartik to Asarh, in accordance with the terms specified above." The contractors failed to cut 15,000 sleepers each in the first two months and therefore the first party cancelled the contract. *Held* : that the cancellation was not justified as the cutting of 15,000 sleepers in any particular month was not obligatory but cutting 135,000 sleepers in nine months was obligatory and therefore the first party was liable for breach of contract. (*Lord Phillimore.*) HOMESHWAR SINGH *v.* JUGAL KISHORE MARWARI. **90 I. C. 596 : A. I. R. 1925 P. C. 223 : 49 M. L. J. 800 (P. C.).**

———*Construction — Retaining undated invoice from seller after denying contract does not prove contract.*

Where the plaintiff alleged that a broker contracted on behalf of defendant to purchase certain goods while defendant denied authority of the broker and the broker who had signed the contract also supported the defendant on the point and at a certain conference owing to dispute between parties, the invoice (patti) which was undated was alleged to have remained in possession of defendant. *Held*, such retention was

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not either an admission of the contract or the creation of a new contract. (*Lord Carson.*) N. S. P. K. L. PALANIAPPA CHETTIAR *v.* K.V. KATHIRESAN CHETTIAR.

22 L. W. 309 : 88 I. C 351 : A. I. R. 1925 P. C. 172 (P. C.).

———*Construction—Sale of land—Time—When of the essence of contract—Negotiations—Notice—What is reasonable time.*

In a contract, dated the 27th February, 1919, for the sale of land, it was stipulated that completion was to be within two (subsequently extended to three) months, and that time was of the essence of the contract. Subsequently, owing to the purchaser's further delay, the vendor gave him notice determining the contract on the 13th May, but, on discovering his mistake, allowed the contract to continue beyond the three months. *Held*, that the condition as to time being of the essence of the contract was, by the conduct of the parties, abandoned. After certain correspondence between the solicitors for the parties, in August, 1919 (by which time the requisition on title had long since been answered, and the draft conveyance approved, and the balance of the purchase-price remained to be paid), the vendor gave the purchaser notice that he must complete the contract it within five days failing which the contract would be treated as cancelled. The purchaser failed to comply with the notice, and later when he had found a sub-purchaser, sued the vendor for specific performance, alleging that the notice was too short and therefore unreasonable. *Held*, that in the circumstances, the notice was reasonable, especially as the purchaser had himself, in the course of the correspondence, asserted that the engrossment of the conveyance and the purchase-money were ready. (*Lord Shaw*). MOTILAL ITCHHALAL GANDHI *v.* HAJI MOOSA HAJI MAHOMED.

(1925) M. W. N. 314 : 26 Punj. L. R. 209 : 41 C. L. J. 334 : 3 Pat. L. R. 152 : L. R. 6 P C. 106 : 27 Bom. L. R. 814 : 88 I C. 440 (2) : A. I. R. 1925 P. C. 124 : 48 M. L. J. 484 (P. C.).

———*Construction—Agreement to finance litigation—Propertyexistent but title to which is subject-matter of pending suit—Agreement as regards — Validity—Disbursements by borrower of amounts advanced—Vouchers of—Condition to furnish —Breach of—Rights of parties on—Compromise of litigation—Consent of lender and borrower's Vakil— If a condition precedent—Property obtained by compromise—Rights of creditor—Assignment of fruits of—Legality of—Agreement to assign—Property coming into existence subsequently.*

R and others who had instituted a suit in the District Court to establish R's title to the absolute estate in a zemindari, subject to the life interest of C, being in want of funds to carry on the said litigation approached T for financial aid and entered into an agreement with him, which provided, *inter alia*, as follows:—"(1) It is therefore agreed that you T should advance for the proceedings of the said suit and appeal, money up to a sum not exceeding two lakhs of rupees and within that limit as per the conditions mentioned below; that in respect of the money advanced by you from time to time detailed receipts for the vakil's fees, printing, stamps, etc., should be furnished to you; that as regards the whole of the balance, accounts of receipts and expenses should be rendered to you and for the sum so ascertained you should obtain receipt from R out of us and with respect to the money that may again be required, you should at the request of R out of us advance money, look into accounts, and get detailed vouchers for moneys spent as above stated and settle the accounts then and there without giving room for disputes in future. (10) We shall not compromise with the deft. or file razinama or withdrawal without your consent. (11) It is agreed that if K, High Court Vakil, who is our working on our behalf in this suit advises us from the then existing circumstances of this suit, that it would be better for us to compromise we should agree to it and compromise or, withdraw the suit. (12) Moreover out of the moveable and immoveable properties that may be obtained by such compromise, we shall first pay to you the principal money advanced by you together with interest at one rupee per mensem from the respective dates and out of the moveable and immoveable properties that remain after so giving away to you, we shall at once execute and give you a proper sale-deed and place you in possession of 3/32 share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail." T advanced a portion of the amount which he undertook by the agreement to advance, and before making any further advances, insisted upon the vouchers being furnished to him as regards fees alleged to have been paid to pleaders and as regards amounts spent on lodging expenses, etc. R. the settler sent a reply, dated 14—2—1908 to T's demand for vouchers which reply ran as follows:—"while not even one half of the amount agreed to be expended for the suit has yet been spent and while you are liable to pay the entire amount for the expenses of the suit and though the arrangement is that you should not fail to spend the amount required for expenses in this Court (Court of first instance), and though you are fully aware of the fact that in the event of your failing to do so, the agreement would be cancelled, you have, without sending money when required by us, written this letter containing false and unnecessary reasons. I do not know what reply you expected to be given thereto. For the money spent previously, the necessary explanations, accounts of credit and debit and receipts bearing my signature have been sent; when credit and debit accounts have been sent under my signature and on my responsibility, I do not see proper reasons for the transaction being stopped. *Held*, on a construction of the agreement set out above (1) that T was entitled to insist upon vouchers of the disbursements made by R out of the sums advanced by T, under the agreement, the settler R was bound to send vouchers of those disbursements whether demanded by T or not. R's letter, dated 14—2—1908 amounted to a refusal by him to send them, coupled with an intimation that if money was not sent, though the vouchers should not be furnished in the first instance, he, R would treat the contract evidenced by the agreement at an end: the settler R in sending the letter broke the contract and T might, if he wished have taken the refusal of R, to furnish vouchers as a repudiation by him of the contract and have elected to treat the contract at an end: but if T did not do so, it was not open to R to put an end to the contract merely by committing a breach of it; (2) that the agreement embodied in Cl. 12 of the agreement was an agreement by the plaintiff in O. S. No. 18 of 1903 to assign to others part of the fruits they might acquire in an action at law and therefore perfectly legal; and there could be no distinction on the point between the fruits of an action which the plaintiffs got by compromise and the fruits he would receive by a decree or verdict in his favour; (3) that even if the money given to the plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence subsequently at the date of the compromise decrees contemplated by the agreement, the agreement attached to the things so coming into

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existence subsequently and (4) that on the true construction of cls. 10 11 and 12 of the agreement the giving of the consent of T and his vakil K, was not a condition precedent which must be performed before any compromise should be made. "Moveable or immoveable property" in cl. 12 of the agreement included almost every conceivable kind of property and the words of that clause would be satisfied if half the estate sued for or another estate or the jewels of the tenant for life C, deposited in his safe, and the money in his chest had been awarded under the compromise. As regards the clause relating to the consent of T or the vakil to the compromise, it would be unbusinesslike and indeed irrational for the parties in 1907, the date of the agreement, to have entered into a contract making such consent a condition precedent to the compromise which might be entered into years after. A term must, therefore, be implied to exist in the contract to the effect that the consent mentioned should be given when possible. (*Lord Atkinson.*) VATSAVAYA VENKATASUBHADRAYAMMA *v.* VENKATAPATHI RAJU. **52 I. A. 1: 48 Mad. 230 : 20 L. W. 298 : 26 Bom. L. R. 786 : (1924) M. W. N. 607 : 35 M. L. T. 210 : L. R. 5 (P.C.) 147 : 29 C. W. N. 57 : 80 I. C. 807 : A. I R. 1924 P. C. 162 : 47 M. L. J. 93 (P. C.).**

——*Construction—Previous negotiations if constitute a condition precedent—Effect of.*

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain ; or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the mere formal document may be ignored. (*Lord Shaw.*) HUKAM CHAND *v.* RAM BAHADUR SINGH. **51 I. A. 208 : 34 M. L. T. 336 : 3 Pat. 625 : L. R. 5 (P.C.) 190 : 80 I. C. 841 : 21 L. W. 1 : 5 Pat. L. T. 639 : (1924) M. W. N. 710 : 3 Pat. L. R. 157 : 22 A. L. J. 935 : 29 C. W. N. 342 : A. I. R. 1924 P. C. 156 : 47 M. L. J. 562 (P.C.).**

——*Construction.*

Where a contractor agreed to construct ' kothi ' in the bagh at the rate specified less Rs. 10 per cent. for commission, and the work was to be done within one year and where within a few weeks of the acceptance of this contract radical changes began to be ordered by the owner. *Held*, the arrangement by way of rebate or a reduction of 10 per cent. commission in favour of the owner, was an arrangement which was only exigible and became crystallised when the work was completed and the final accounts at the end of the year were to be made up. As the contract was not possible of completion within the year and as it in point of fact was not completed and as the failure to complete was not due to any fault on the contractor's part the stipulation accordingly disappeared. *A fortiori* such a deduction was never agreed to with regard to the further work. (*Lord Shaw.*) SAHU RAM KUMAR *v.* MAHOMED YAKUB. **26 Bom. L. R. 631 : L. R. 5 P. C. 89 : 34 M. L. T. 102 : 20 L W. 82 : (1924) M. W. N. 431 : 80 I. C. 203 : A. I. R. 1924 P. C. 123 : 47 M. L. J. 180 (P.C.).**

——*Construction.*

Where the contract provided that goods are to be delivered as and when same may be delivered from the mills, *Held*, this should not be construed to mean " if and when the same may be received from the mills. " To construe in this way is to convert words, which fix the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all, and virtually make a new contract. The words certainly regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding the agreed bales as the Mills might deliver to the defendants during the agreed period. (*Lord Sumner*). HARNANDRAI FATCHAND *v.* PRAG DAS. **47 Bom 344 : L. R. 4 P. C. 61 : 32 M. L T. 171 : 72 I. C. 485 : 25 Bom. L. R. 537 : 27 C. W. N. 878 : (1923) M. W. N. 547 : 18 L. W. 441 : 38 C. L. J. 248 : 50 I. A. 9 : A. I. R. 1923 P.C. 54 (2) : 44 M. L. J. 498 (P.C.).**

——*Construction—Condition.*

The term 'conditions of sale' in connection with the preparation of bargain paper means 'terms of sale' and not conditions to which the bargain is subject. Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway* v. *Walton*, 6 H.L. Cas. 289, the fact of a subsequent agreement being prepared may evidence that the previous negotiation did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. (*Mr. Ameer Ali.*) HARICHAND MANCHARAM *v.* GOVIND LUXMAN. **47 Bom. 335: 28 C. W. N. 73: 17 L. W. 572 : 32 M. L. T. 175: L. R. 4 P. C. 84: 37 C. L. J. 440 : 25 Bom. L. R. 531: 50 I. A. 25 : 4 L. R. P. C. 84: 71 I. C. 763 : A. I. R. 1923 P. C. 47 : 44 M. L. J. 608 (P. C.).**

——*Construction of.*

The terms of contract of 1888 were as follows :— 'under the orders of Sri Maharajalangaru (plaintiff) the accounts were looked into in their presence in respect of items due to the said Saravana Pillay (defendant) relating to the said villages and also relating to all money transactions between Saravana Pillai and Sri Maharajalangaru. On looking into the accounts the amount found due to the said Saravana Pillai was Rs. 99,568-15-6. Saravana Pillai consented to receive the sum of rupees etc., and sell the aforesaid villages to Sri Maharajalangaru " *Held* : This contract was a settlement of questions of account in relation to the said villages and other matters and under the terms of it, deft. (Pillai) is treated as the legal and beneficial owner. No charge is created by the contract over the villages in question and the plff. the Raja, had no right to recover possession of the property absolutely or conditionally. (*Lord Carson*). E. SUBBARAYA PILLAI *v.* RAJAH KUMARA VENKAT PERUMAL RAJU BAHADUR. **45 Mad. 641: 16 L. W. 169: 31 M. L. T. 146. 68 I. C. 172 : 49 I. A. 335 : 27 C. W. N. 408 : A. I. R. 1922 P. C. 345 (P.C).**

——*Construction—Contract for conveyance—Duty to make out marketable title—Execution of conveyance —Delay.*

According to the terms of an agreement for sale the purchaser bound himself to complete the purchase within one month from the date of agreement and in case of default was to bear the burden of certain charges. He tendered the draft conveyance three days after the fixed period but the vendor refused to execute it on the ground of its belated tenders. *Held*

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that the provision relating to the purchaser's default being in the nature of a penalty and no loss from delay in the tender having been proved by the vendor the latter was bound to execute the conveyance. (*Mr. Ameer Ali*). BANKU BEHARI DHUR *v* GALSTAUN.
21 A. L. J. 9: 9 O. & A. L. R. 237: 69 I. C. 162 : 31 M. L. T. 159 : 27 C. W. N. 77 : A. I. R. 1922 P. C. 339 : 47 M. L. J. 145 (P. C.).

———*Construction — Performance, condition for avoiding—Breach of contract.*

A contract for the purchase of Alizarine provided that if there was any fluctuation in the Syndicate rates the conditions of the contract regarding price would become void. The syndicate was composed of a German firm and English members and after the Great War broke out, the syndicate ceased to the operative. In a suit by the purchasers against the sellers for damages for breach of contract to continue the deliveries, *Held*, that the obligation of sellers did not depend upon the continuance of the syndicate and that as the condition avoiding the contract, namely, fluctuation of rates, never came into operation the contract continued on the footing of the rates specified and that the buyers were entitled to recover damages. (*Viscount Haldane*). TOOLSIDAS TEJPAL *v.* VENKATACHALAPATHY IYER. **(1920) M. W. N. 557 : 25 C. W. N. 26: 28 M. L. T. 410 : 59 I C. 27 : 13 L. W. 1 (P. C.).**

———*Construction—Court is not entitled to see what the parties might have intended.*

The Court must construe the contract which the parties have made and is not at liberty to make a fresh contract on their behalf because it thinks that they might have intended to do certain things which they have not expressed in their written agreement. Sale and mortgage are two quite different things and prohibition against one does not necessarily import prohibition against the other. (*Daniels, J.*) GULZARI LAL *v.* HAR PRASAD. **L. R. 5 A. (Rev.) 260 : 85 I. C. 99 : A. I. R. 1925 All. 97.**

———*—Construction—"Deposit for profit or loss" Meaning of.*

Plaintiff entered into a contract with the 1st defendant to buy 2,000 bags of cotton seeds to be delivered at the defendant's factory within one month. The plaintiff agreed to pay the full amount in respect of the said bags, and remove the goods within the said time ; and if he failed to remove the same within the same period, he undertook to make good the loss which the defendant might suffer, and treat the contract as cancelled. The contract also contained "In respect of this contract a total sum of Rs. 1,025 has been deposited for profit or loss, and the said deposit amount should after the completion of the contract be returned to us." *Held*, that Rs. 1,025 was to be security for any loss that defendant might suffer on the plaintiff's failing to take delivery of the goods. (*Macleod, C. J. and Crump, J.*) SHRICHAND ANOPCHAND *v.* BOYCE & SONS.
A. I. R. 1924 Bom. 62.

———*Construction—Mutuality.*

Stipulation in a contract, "to cancel or not to cancel the sold goods for any reasons depends upon you" (*i.e.* seller,) does not destroy the mutuality necessary for the formation of a contract. The stipulation referred to above confers upon the sellers-plaintiffs the power to determine the contract if they could assign good reasons for so doing and therefore the contract is not void, but a valid and binding contract. (*Mulla, J.*) CHOTELAL *v.* CHAMPSEY UMERSEY & SONS.
24 Bom. L. R. 877 : A. I. R. 1923 Bom. 75.

———*Construction—Sale of land—Contract for sale of immoveable property—Time made essence of the contract by notice—Breach—Notice unreasonable—Specific performance.*

By an agreement, dated 27th February, 1919 the defendant agreed to sell to the plaintiff certain immoveable property and the plaintiff paid to the defendant Rs. 500 as earnest money. Clause (3) of the agreement provided that the sale should be completed within three months from the date thereof and time was made of the essence of the contract. Subsequently both the parties agreed that the time for completion of the contract should be extended beyond the three months mentioned in the clause. There was considerable delay on both sides in preparing requisitions for title, in answering requisitions, and in the preparation and approval of the draft conveyance. After some correspondence as to the engrossment of the conveyance, the defendant wrote to the plaintiff on 27th August 1919, that unless the sale was completed before 1st September 1919, time being of the essence of the contract, the contract would be treated as broken by the plaintiff and the earnest money would be forfeited. The plaintiff did nothing further until the 2nd September 1919 on which date he sent the engrossment of the conveyance to the defendant who in reply wrote on the same day that he had forfeited the earnest money. The plaintiff, thereafter, tendered the purchase-money but it was refused. The plaintiff, thereupon, filed a suit for specific performance of the agreement of 27th February 1919. *Held*. (1) that as there were no special circumstances which would demand that the contract should be completed on the 1st September 1919, the notice given on 27th August 1919 to complete the contract in four days was not a reasonable notice : (2) that considering the extremely leisurely way in which both the parties had proceeded from the date of contract, there was no reason why the defendant should be entitled to demand of the plaintiff that the matter should be completed within four days and that in default the contract should be considered as broken ; (3) that there was nothing in the surrounding circumstances to indicate that the defendant would be so prejudiced by further delay in the completion of the contract that equity would not assist the plff. in getting it performed; and (4) that the plff. was, therefore, entitled to the assistance of the Court in obtaining specific performance. 40 Bom. 289 Foll. (*Macleod, C. J. and Shah, J.*) MUSSA MAHOMED *v.* MOTILAL ITCHALAL.
24 Bom. L. R. 203 ; 69 I. C. 13 : A. I. R. 1922 Bom. 14.

———*—Construction— Sale of goods—Delivery to be taken within a specified period.*

Where no delivery was taken or given within the specified period, delivery of part of goods after the fixed period is a separate transaction and is no part of the original contract and therefore refusal to take delivery does not give rise to liability in damages. (*Macleod, J.*) THE PHOENIX MILLS, LTD. *v.* MADHAV DAS RUPCHAND. **69 I. C. 9 : 24 Bom. L.R. 142.**

———*Construction—Each contract to be construed on its own terms.*

It is not proper that a contract in one case should be interpreted in the view taken with regard to another contract which is differently worded and under consideration in another case. (*Suhrawardy and Cuming, JJ.*) HARA MOHAN BANIKYA CHOUDHURY *v.* HEMCHANDRA CHAKRAVARTHY. **42 C. L. J. 172 · A. I. R. 1925 Cal 1248.**

———*Construction—' F. O. B. New York "— Express instructions to ship at New York were held to be present.*

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The material portions in the indent placed by the defendants with the plaintiffs were as follows :—"Fill at manufacturers' best prevailing prices. F. O. B. New York". *Held* : that the indent contained express instructions to ship at New York. (*Sanderson, C.J. and Rankin, JJ.*) DAYTON PRICE & CO. *v.* S. ROHOMOTOLLAH & CO. **29 C. W. N. 422 : 86 I. C. 571 : A. I. R. 1925 Cal. 609.**

———*Construction—Sale — Agreement subject to approval of solicitors— If valid—Enquiry into title.*

An agreement to purchase property subject to title being approved by the vendee's solicitors is perfectly valid. It is open to a vendee to claim in the plaint an enquiry into the vendor's title ; only he must accept the title as it is, if he chooses to purchase the property. (*Chatterjee and Cuming, JJ.*) KAMAL KRISHNA KUNDU CHOWDHURY *v.* CHATURBHUJ DASSA. **78 I. C. 962 : A. I. R. 1925 Cal. 324.**

———*Construction—Contract enabling plaintiff to resell on defendant's default goods ordered by latter—Plaintiffs claiming difference between contracted price and price realised—Plaintiff must prove that goods resold were such as defendants would have been obliged to accept Undue delay in reselling vitiates plaintiff's claim.*

Where a contract entitled plaintiffs on defendant's refusal to accept bills for goods ordered by them, to dispose of the goods and recover from the defendants any loss to which the plaintiffs were put, *Held* : that the plaintiffs should not unreasonably delay before they resold the goods and that before they could substantiate their claim to recover the difference between the contracted price and the price actually realized by them, they must show that the goods which they purported to resell and had resold the goods which the defendants would have been obliged to take under the terms of the contract but failed to do so. *Braithwate's* case, (1905) 2 K. B. 543 Cons. (*Coutts-Trotter, C.J. and Krishnan, J.*) PARTHASARATHY CHETTY & CO *v.* T. M. GAJAPATHI NAIDU & CO. **48 M. 787 : 22 L. W. 417 : (1925) M. W. N. 756 : A. I R. 1925 Mad. 1258 : 49 M. L. J. 215.**

———*Construction—Contract for purchase - Time being of essence of contract— Custom extending time to take delivery pleaded—Custom must be specifically alleged and proved.*

Where in the case of a contract for sale and purchase the time is the essence of contract and a custom is alleged that the purchaser could take delivery of the goods contracted for after some days of the date fixed for taking delivery, definite custom has to be alleged and proved by the purchaser. (*Phillips, J.*) BALARAM PARAMSUKHDAS FIRM *v.* G. GOVINDA CHETTY. **A. I. R. 1925 Mad. 1232 : 49 M. L. J. 200.**

———*Construction—Time if essence of—Rule as to— Applicability to contract for resale—Contract of sale and agreement to re-sell—What amounts to—Vendor allowed to remain in possession as tenant at a rate of rent fixed—Acceptance of rent fixed from vendor —If part performance of contract to re-sell—Acts of part-performance which will attract operation of principle.*

The plff.'s husband, the original owner of the suit property, sold it to A. A, being anxious to sell the property in his turn, applied to plff.'s husband to find another purchaser. The defendant agreed to purchase and the plaintiff's husband caused A to sell the property to the defendant. At the time of the sale, the plaintiff, her husband, and the defendant entered into an arrangement that the defendant should execute an agreement in favour of the plaintiff containing the following terms, *viz.*, that the plaintiff should keep the suit house in her possession, that the plaintiff and her husband should pay regularly Rs. 4-8-0 every month or once in two months at the same rate, being the amount due at 0-12-0 per cent. per mensem for the sale amount of Rs. 600, that the plaintiff should pay the defendant the principal sum of Rs. 600 before 14th December. 1914, and that, *if payment be made in that manner*, the defendant should execute and register a sale deed for the suit house. Such an arrangement was executed by the defendant. No money was tendered by plaintiff within 14th December, 1914. She continued to occupy the house and to pay the rent up to June, 1918. On 11th June 1918 the defendant issued a notice to quit and the plaintiff replied relying upon the agreement and sent Rs. 600 and arrears of rent Rs. 22-8-0 which the defendant rejected.

In a suit brought by the plaintiff for specific performance of the agreement, *held*, (1) that the agreement though one-sided was a contract, (2) that the transaction between the parties was substantially a contract of sale with an agreement to re-sell ; (3) that the principle that, in contracts of sale of real property, time is not generally of the essence of the contract, was not applicable to contracts to re-sell ; and (4) that the acceptance of rent beyond 14th Dec. 1914 up to June, 1918, was not though the rent fixed represented a rate of interest at 9 per cent. on the purchase money stipulated, such part performance as to attract the operation of the principle of part performance. The main contract was one of re-sale and there was a subsidiary contract of tenancy up to the resale and all the acts of part-performance are explainable either as due to mere inaction or a willingness to continue the tenancy as one from month to month. *Held*, therefore that the plaintiff's suit must fail. (*Ramesam, J.*) DAKSHINAMURTHI MUDALIAR *v.* DHANAKOTI AMMAL. **87 I. C. 552 : A. I. R. 1925 Mad. 965 : 48 M. L. J. 661.**

———*Construction—Priority of change in management of school—All obligations if transferred—Dismissal of employee—Suit for damages.*

Unless there be some evidence to that effect it is not right to presume that the contract entered into by any one with a particular Society was transferred to another institution or body which took over the management of the concern conducted by the former in respect of which the contract was entered into. (*Devadoss, J.*) MUNICIPAL COUNCIL, CALICUT *v.* KESEVA MENON. **86 I. C. 509 (2) : A. I. R. 1925 Mad. 943.**

———*Construction — Covenant itself providing remedy for breach—Whether other remedies are barred is question of intention.*

The question whether a person is entitled to have a covenant enforced or to any remedies other than the remedy indicated in the contract, is a question of the intention of the parties to be deduced whether on a proper construction of the entire document the remedy provided is cumulative or exclusive. (*Srinivasa Aiyangar, J.*) LODD GOVINDOSS KRISHNA VARU *v.* MUTHIAH CHETTY. **A. I. R. 1925 Mad. 660 : 48 M. L. J. 721.**

———*Construction—Purchaser under contract to sell land imposing conditions not agreed to cannot back out for non fulfilment of conditions.*

Under an agreement to sell land the sale was to be effected on 31-8-1919. The purchaser knew that his vendor was only a joint owner of the property with another and that the entire property was in the occupation of a tenant. On 30-8-1919 the purchaser gave a notice to the vendor requiring him to obtain a division of the land in definite shares within 24 hours. This

condition was not contained in the agreement to sell. The purchaser did not tender the money or the sale-deed for the execution on 31-8-1919 and even when given notice on 1-9-1919 by the vendor, fixing a time within which he should do so, he did not do so. *Held*: that the purchaser made default. (*Devadoss, J.*) K. SURYANARAYANA MURTHI *v.* B. SATYANARAYANA MURTHI.

20 L. W. 832 : 85 I. C 521 : A. I. R. 1925 Mad. 211 : 48 M. L. J. 150.

———*Construction—Clause for arbitration—Breach of Contract.*

A contract of sale between the vendors and purchasers of certain goods contained the following arbitration clause: "should any dispute arise as to the interpretation of this contract or any matter in connection therewith or with the carrying out thereof the same shall be submitted to arbitration" *Held*, on a construction of the contract that a claim for damages for breach fell within the clause requiring a submission to arbitration. (*Schwabe, C. J. and Ramesam, J.*) SUBBIAH & CO. *v.* TETLEY AND WHITLEY.

75 I. C. 673 : 32 M. L. T. 380 (H. C.) : 18 L. W. 77 : (1923) M. W. N. 445 : A. I. R. 1923 Mad. 693 : 45 M. L. J. 39.

———*Construction—Commercial contracts—Mode of delivery—Stipulation as to.*

In construing mercantile contracts courts will assume that every clause inserted therein was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. A party to the contract is entitled to delivery of goods in the manner stipulated and he cannot be compelled to take something else in substitution for it however effective a substitute it might be. (*Schwabe. C. J. and Krishnan, J.*) ADAM HAJI PEERA MAHOMED ISHAIK *v.* HUSSAIN AKBARI.

(1922) M. W. N. 434 : 31 M. L. T. 40 : 70 I. C. 736 : A. I. R. 1923 Mad. 103 : 43 M. L. J. 199.

———*Construction—Sale of goods—Contract to purchase from plaintiffs goods which plaintiff had previously thereto purchased from another—Tender by plff. of similar goods relating to other contracts—Repudiation.*

Plaintiff had agreed to purchase from B and Co. certain bales of yarn of specified shipments. The contract between plaintiff and B and Co. provided as follows: "B and Co. are relieved from liability for non-shipment owing to causes specified herein and buyers are not entitled to cancel the contract owing to delay caused by any of the specified causes provided that such delay in shipment shall not exceed three months. The buyers are also debarred from objecting to goods being shipped prior to the contract." The defendants in their turn agreed to purchase these very goods from plaintiffs and the contract while incorporating by reference the terms of plaintiffs' contract with B and Co. went on to provide. "Please note that you have to take delivery of goods as received by us and we are not responsible for the late shipment or non-shipment of the goods or part of the goods." The plaintiffs tendered other goods of similar quality but forming part of some other contract of plaintiffs with B and the defendants wanted better particulars about shipment, etc., before they would accept the goods. *Held*, that the defendants were bound to take the goods as and when they were received by the plaintiffs without reference to the date of shipment, but the defendants were not bound to accept goods relating to other contracts of plaintiffs with B and Co., even though they are of the same quality, make and quantity. *Held*, further, that the defendants' letter asking for fuller particulars in the absence of which they declined to accept the goods was not a repudiation of the contract which disentitled them from raising in defence in the suit that the goods were not such as they were bound to accept under their contract. *Braithwaite* v. *Foreign Hardwood Co.*, 2 K. B. 543; *Consorozio* v. *Northumberland*, 88 L. J. K B. 1194, *Bowes* v. *Shand*. L. R. 2 A. C. 455; Ref. to. (*Wallis, C. J. and Ramesam, J.*) S. V. SIVARAM AIYAR *v.* K. M. SUBBIAR & SONS.

70 I. C. 346 : 15 L. W. 9 : A. I. R. 1922 Mad. 28.

———*Construction—Railway demanding excess and demurrage.*

Plaintiff consigned timber at Quilon to Negapatam and charges were levied at Quilon according to weight. On arrival of timber at Negapatam, the Railway authorities purpoting to act under R. 22, authorizing re-classification and re-calculation of rates, charged at waggon rate and refused delivery till the excess was paid. They also claimed demurrage and wharfage. The plaintiff paid under protest and sued to recover. *Held*, that the rules as to re-calculation related to errors in calculation and not to a change in the fundamental basis of calculation. *Quaere*: whether the Company could claim demurrage. (*Seshagiri Aiyar, J.*) VENUGOPALA AIYANGAR *v.* S. I. RAILWAY CO.

62 I C. 602 : 13 L. W. 309.

———*Construction—Auction sale is a contract.*

There can be no doubt whatever that the sale by auction is a contract when the conditions of sale provide that the highest bidder shall be the purchaser; the person who makes the highest bid has a right of action against the seller on his refusing to act in accordance with the conditions. (*Baker, J. C.*) ABDUL AZIZ KHAN *v.* MUNICIPAL COMMITTEE, KHANDWA.

78 I. C. 1052 : A. I. R. 1924 Nag. 227.

———*Construction—Transfer of actionable claim.*

One M agreed to deliver 2,000 tons of Manganese at Rs. 6-8-0 a ton "within two years from date in about equal monthly quantities." This contract was assigned to the plaintiff on the 9th of December 1916. No deliveries having been made till then, there had been eleven defaults in making deliveries. The words as to the time of delivery very clearly import that the essential condition was that delivery of the whole 2,000 tons was to be made within two years, and the words referring to the monthly deliveries were nothing more than a statement of the times of delivery within those two years which, if possible, would be most convenient to both parties. One twenty-fourth of 2,000 is 83·33 but if the seller had delivered only 43·33 tons in any particular month the buyer could not have sued him for the balance of forty tons until the expiry of the two years. (*Hallifax, A. J. C.*) MOHANLAL *v.* SIR BISHESWARDAS DAGA.

A. I. R 1923 Nag. 121 (2).

———*Construction—Carriage of goods—Rate fixed—Railway authorities using bigger waggon for their own convenience—Higher rate cannot be demanded.*

A Railway Company though it has a right to re-measure and recalculate the freight on goods after it reaches its destination, cannot after making a contract with a party to carry goods at a certain rate subsequently alter the entire basis of calculation merely because to suit their own convenience they have used a much bigger waggon than was actually necessary. (*Daniels, J.*) MT. GULAB DEI *v.* G. I. P. RY.

90 I. C. 99: L. R. 6 A. 615.

———*Construction—Agreement—Where terms are being negotiated and a document is contemplated to be signed, parties are not bound till the signing of the document. But in absence of intention to sign such*

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document the principle does not apply.

Where parties are negotiating as to the terms of an agreement and it is contemplated that a written document shall eventually be signed, everything which takes place until the document is finally signed amounts merely to negotiation. But where at the time of agreement it was not contemplated that any document should be signed, the principle does not apply. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJ KESHAV PRASAD SINGH. **5 P. L. T. Sup. 1 : A. I. R. 1925 Pat. 68.**

——*Construction—Exception and Proviso.*

The general rule is, that where a contract contains an exception and proviso, the party who desires to take the benefit of the former must not only plead it but prove it and that when that has been done the other party who desires to take the benefit of the proviso, which is in reality an extensive covenant by way of defeasance must prove that the subject-matter is not within the exception. (*Mullick and Bucknill, JJ.*) G. I. P. RY. CO. *v.* GITAN RAM NIRMAL RAM. **2 P. 442 : 1 P. L. R. 169 : 72 I. C. 440 : 1923 P. H. C C. 82 : 4 P. L. T. 173 : A. I. R. 1923 Pat. 285.**

——*Construction—Delivery of goods.*

A contract for the sale of goods "delivery to be taken *ex* scale in all October" means that the goods are to be taken whenever in all that month sellers call upon buyers to do so. Consequently 31st October is the last day for the performance of the contract and a breach of the contract takes place only on that date. (*Maung Kin and Pratt, JJ.*) HUNT HUAT & CO. *v.* SIN GEE MOH & CO. **66 I. C. 510 : 11 L. B. R. 182.**

——*Construction—Contract for purchase of goods—Vendee asking for time for payment of price—Vendor asking for interest but not treating vendee's action as repudiation of contract—Vendee is not guilty of breach of contract.*

Where the vendees merely asked for time for payment for goods till the arrival of other goods ordered from the same vendors, and the vendors did not treat this as vendees' repudiation of the contract but only asked for payment of interest, *Held*: that the vendees had not refused to take delivery of the goods at the proper time, and had not committed breach of contract. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) PREMJI MULJI *v.* GURLICK & CO. **90 I. C. 573 : A. I. R. 1925 Sind 254.**

——*Construction—Contract for sale of goods—Defendant failing to take delivery on due date—Resale after undue delay—Demand for damages on basis of resale is untenable but plaintiff must be permitted to amend plaint so as to claim damages on market price—C. P. Code, O. 6, R. 17.*

Where the plaintiff had made undue delay in reselling the goods, which the defendant had failed to take delivery of as per the contract of sale between the parties, and where the plaintiff claimed damages on the basis of the actual price realised by him. *Held*, that he was entitled to damages only on the basis of the market price on the date of the breach but that he should be allowed to so amend his plaint as to claim damages on that basis. A. I. R. 1924 Bom. 390 and 1 S. L. R. 81, Foll. (*Kennedy, J. C. and Lobo, A J. C.*) FIRM OF GANGARAM *v.* KODOOMAL. **88 I. C. 571 ; A. I. R. 1925 Sind 222.**

——*Construction — Karachi Bazar dealers—"Office dhara" and "usual terms" mean what importing firms do as seen from printed forms of contract used by them.*

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The expressions "office dhara" and "usual terms" as used in the contracts of the Bazar dealers mean "what the importing firms do" to be seen from the printed forms of contracts used by them. 13 S. L. R. 100, Foll. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) FIRM OF DASSO MAL RAMCHAND *v* FIRM OF YUZAFALI ADAMJI. **86 I. C. 364 : A.I.R. 1925 Sind 80.**

——*Construction—Contract should be read as a whole.*

The general rule of construction of a written contract is that the language of an instrument is to be understood in its ordinary and natural meaning but at the same time the whole of the contract must be considered in order to ascertain the meaning of any particular part thereof. (*Kaymond, A. J. C.*) TYEBALLY ABDUL HUSSAIN *v.* MESSRS. JAMES FINLAY & CO. **80 I. C. 969 : 17 S.L.R. 12 : A. I. R. 1924 Sind 105 (2).**

——*Cross contracts—Effect of.*

In the case of cross contracts to supply the same goods, the secured contract does not operate as a *novatio*. Each is separate and even if the parties intended only to pay differences, different legal consequences arise. (*Bilaram, A. J. C.*) KISHINDAS PURSUMAL *v.* MENGHRAJ KHIALDAS. **81 I. C. 834 : A. I. R. 1925 Sind 144.**

——*Enforceability—Right to enter into a contract.*

Law does not recognize a contract to enter into a contract and hence it cannot be specifically enforced. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUDRA DAS CHAKRAVARTHY *v.* KUMAR KAMAKHYA NARAYAN SINGH. **3 Pat. 968 : 84 I. C 178 : A. I. R. 1925 Pat. 259.**

Hire Purchase.

——*Hire purchase—An agreement is not a hire purchase agreement unless hirer has option not to complete purchase.*

A hire purchase agreement and an agreement to sell are different. In the latter the property in the thing sold passes immediately to the purchaser while in the former there is not only no such immediate transfer of title but also the hirer is not bound to complete the purchase and can at his option return the thing at any time before the instalments are paid. An agreement is only one of sale though it may profess to be a hire-purchase one if it contains an obligation to pay the purchase money. *Helby* v. *Matthews* (1895) A. C. 471 and *Lee* v. *Butter* (1893) 2 Q. B. 318 Cons. (*Marten, J.*) A. CECIL COLE *v.* NONDLAL MORAJI DAVE. **49 Bom. 172 : 26 B. L. R. 880 : A. I. R. 1925 Bom. 18.**

Implied Term.

——*Implied terms—Deposit by purchaser with seller—Repudiation of contract by purchaser—Whether entitled to return of deposit.*

There is nothing either in the Specific Relief Act or in the Contract Act which touches the question of deposit. But it is clear that, even when there is no clause in the contract as to the forfeiture of deposit if the purchaser repudiates the contract, he cannot get back the money as the contract has gone off through his default. This will equally be so even though the buyer is not put to any loss by the repudiation. L. R. 10 Ch. App. 512 and 24 Cal. 897 Ref. to. (*Chatterjee and Pearson, JJ.*) MANGOBINDA DUTTA *v.* BAISOGOMAFF. **67 I. C. 714 : A. I. R. 1922 Cal. 104.**

——*Implied term.*

Contract whether implied or express, gives an equal cause of action. (*Martineau, J.*) IMAN DIN *v.*

CONTRACT—Implied term.

DITTU. 78 I. C. 445 : A. I. R. 1925 Lah. 174 (1).

———*Implied term—Agreement between two temples regulating processions—Construction.*

Per *Chief Justice* :—The law on the subject of the implication of terms in a contract has frequently been misunderstood and misapplied. The Court ought not to imply terms in a contract unless there arises from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied. *Held*, on a construction of an agreement between two temples regulating the processions of idols on particular days that there was no implied term that one of them would limit its procession to those particular days. (*Schwabe, C. J. and Wallace, J.*) GOVINDA CHARIAR *v.* NATU KESAVA MUDALIAR. 17 L. W. 79 : (1923) M. W. N. 186 : 72 I. C. 243 : A. I. R. 1923 Mad. 344.

Liability.

———*Liability—Sale of goods—German steamers carrying goods seized during war—Arrival in a different ship long after—Doctrine of frustration.*

In pursuance of a contract for sale of goods headed "contract shipment and arrival" goods were sent in a German steamer, which on the outbreak of war was seized and condemned as prize. Two years later the goods arrived in a different steamer, but were not given to the buyer. In a suit for damages for non-delivery *held* plaintiff was not entitled to delivery of the goods.

Per *Sanderson, C. J.*—The arrival of the goods under the particular circumstances was not such an arrival as was thought by the parties to the contract. The purpose of the contract and the intention of the parties had been up set by the capture and the prolonged delay.

Per *Richardson, J.*—According to the doctrine of "frustration" a subsequent event or contingency beyond the ken of the parties at the time of the transaction, for the occurrence of which neither of them is responsible and for which they have not provided may sometimes operate to undermine and avoid the contract. English case-law referred to. (*Sanderson, C. J. and Richardson, J.*) GOURI SHANKAR AGARWALLA *v.* H. P. MOITRA. 70 I. C. 379 : 26 C. W. N. 573.

———*Liability—Date of operation of.*

An agreement when confirmed becomes operative with effect from the date when originally made. (*Mookerjee and Fletcher, JJ.*) DINA NATH *v.* METHARAM. 64 I. C. 785 : 33 C. L. J. 577.

———*Liability—Failure to complete contract—Earnest money when forfeited.*

Where a purchaser was, under the contract of sale, bound to pay up the balance of consideration within a certain time in default of which he was to forfeit the earnest money, and it is found that not only was he not in a position to pay that money but he never offered to pay it, he is not entitled to recover the earnest money paid by him. (*N. R. Chatterjee and Panton, JJ.*) ATUL CHANDRA KUNDU *v.* SARAT CHANDRA LAHA. 59 I. C. 215 : 24 C. W. N 967.

———*Liability—Negotiable instrument.*

There is a difference between the law relating to liability on ordinary contracts and that on negotiable instrument. (*Wazir Hasan, A. J. C.*) JAGRUP SINGH *v.* RAMA KISHAN DAS. 7 O. L. J. 705 : 59 I. C. 596 : 23 O. C. 353.

———*Liability—Marriage—Securing a girl for marriage—Money paid to be given to girl's guardian—Girl not secured—Money recoverable.*

CONTRACT—Right to enforce.

Defendant asked for Rs. 200 for the purpose of settling the plaintiff's marriage. The plaintiff however sent only Rs. 175 by money order. Defendant did not spend that sum in connection with the plaintiff's marriage in accordance with the agreement come to and therefore plaintiff sued to get the money back. Plaintiff's pleader stated that girls were scarce and plaintiff wanted the defendant to secure a girl for him and the money was given to him to be paid to the guardian of the girl selected, should money be demanded. *Held*, that plaintiff can recover. 41 M. 197 and 33 Bom. 411, Foll. (*Prideaux, A.J.C.*) GANGADHAR *v.* GOVIND. 8 N.L.J. 66: A.I.R. 1923 Nag. 296.

Novation.

———*Novation—Partnership—Debt due by—Mortgage by one of partners for—Effect—Where no extinguishment of firm's debt or release of partner's liability.*

Where during the continuance of a partnership one of the partners executed to a creditor of the firm a mortgage to secure *inter alia*, the debt due to him from the firm, *held*, on the evidence in the case that the mortgage did not work either as a novation of the firm's debts to the creditor or a release of any of the partners from full liability in respect of it. (*Lord Blanesburgh.*) VEERAPPA CHETTY *v.* ARUNACHALLAM CHETTY. 26 Bom L.R. 661 : (1924) M. W. N. 559 : 20 L.W. 368 : 35 M. L. T. 161 : 29 C. W. N. 438 : 86 I. C. 259 : A.I. R. 1924 P. C. 192 : 47 M. L. J. 168 (P. C.).

———*Novation—Fresh and independent cause of action—Amount due on previous account—Consideration, proof of.*

The balance due cannot be recovered until it is proved that the sum was due within limitation. But where there is a novation of contract and a promise to pay within a specified period, a fresh and independent cause of action accrues on the date on which payment is promised to be made. (*Dalal, J. C.*) MENDI LAL *v.* RAM CHANDER. 1 O. W. N. 797.

———*Novation—What it consists of—Parties—Tenancy—Change of terms.*

The novation of a contract implies a fresh contract, directly, or by implication in place of the original one and all the parties to the old contract must agree to it. The terms of a tenancy cannot be changed unless the landlord is a party thereto. (*Jwala Prasad and Macpherson, JJ.*) GOPAL OJHA *v* RAMADHAR SINGH. 82 I. C. 204.

Right to enforce.

———*Right to enforce—Suit to enforce payment—Minority, plea of—Onus.*

The burden of proof must be laid on the party who says that at the time of contract he was a minor. (*Mukerjee, J.*) KANDHAI LAL *v.* DEBI PRASAD. L. R. 6 All. 219 : 87 I. C. 778 : A. I. R. 1925 All. 399.

———*Right to enforce—Agreement to abide by oath.*

If the parties have made a binding agreement it does not matter to a Court how foolish it is, and after all the parties probably know their business better than the Court and it may not be so foolish in the eyes of the parties as in the eyes of the Court. Consequently where the parties contracted to abide by the statement of the defendant on oath, there is nothing illegal in such contract and the parties are bound to abide thereby. (*Walsh, J.*) KESHO RAM *v.* PEARE LAL. 21 A. L. J. 209 : L. R. 4 A. 368 : 71 I. C. 761 : A. I. R. 1923 All. 443 (2).

CONTRACT—Right to enforce.

——Right to enforce—Bearer a minor—Whether can sue on the Hundi.

The bearer of a Shah Jog Hundi, although a minor is entitled to sue on the Hundi. (*Macleod, C. J. and Coyajee, J.*) RAM PRASAD *v.* SHRINIVAS.
27 Bom. L. R. 1122 : 90 I. C. 685 : A. I. R. 1925 Bom. 527.

——Right to enforce—Minor's rights to enforce contract of marriage—Minor.

Contract made by the natural guardian of a minor so as to be binding on the minor, which is for the minor's benefit, is enforceable at law.

Minor can maintain suit for damages for breach of contract of marriage entered into on minor's behalf by the minor's natural guardian. (Case law discussed.) (*Taraporewala, J.*) ROSE FERNANDEZ *v.* JOSEPH GONSALVES. **48 Bom. 673 : 26 B. L. R. 1035 : 85 I. C. 587 : A. I. R. 1925 Bom. 97.**

——Right to enforce—Waiver must be with intention to waive and with knowledge of all circumstances—Payment by vendee of purchase money, due to mistake induced by advice of solicitors is not waiver of right under covenant for title.

In order that there may be an effectual waiver of any stipulation in an agreement, it must be intentional and based upon full knowledge of the circumstances. Where there has been no independent investigation of title on behalf of the plaintiff-vendee, but, due to a mistake induced by the advice of his solicitors, he pays portion of the purchase money, he does not thereby waive his right to the enforcement of the stipulation by the vendor to make out marketable title. (*Shah, A. C. J. and Kincaid, J.*) MEGHJI MOORJI *v.* TYEBALLI KAMRUDDIN.
26 B. L. R. 1019 : A. I. R. 1925 Bom. 64.

——Right to enforce—Mahabrahmans—Offerings to—Contract to divide.

A contract to divide offerings to Mahabrahmans is not enforceable except as between the immediate parties to it. (*Lindsay, J. C.*) MAHESH PRASAD *v.* BHARATH. **59 I. C. 677 : 23 O. C. 252.**

——Right to enforce—Forward contract in Karachi—Clause 9—Clause 6 is not affected by clause 9.

Clause (6) which gives option to the seller to retain the goods under lien till payment, is not affected by clause (9); clause (9) of the usual contract is not intended to require the seller not to part with the goods at all where delivery is to be made to an Indian Merchant, but to further restrict the right of the seller to exercise his option of retaining the goods where delivery is to be made to a European Office. Parting with goods without full payment therefore does not by itself divest the vendors of their right to enforce payment of the purchase money. (*Rupchand Bilaram and Kennedy, A. J. Cs.*) FIRM OF BUDHURAM *v* KIMATRAL BHOJRAJ. **A. I. R. 1924 Sind. 137.**

Shipping.

——Shipping—Construction—F.O. B. New York—Shipping soonest—Goods must be shipped only at New York as soon as possible.

The defendant's indent to the plaintiffs required the goods to be shipped soonest and contained instructions to ship at New York. *Held*, that the plaintiffs were to ship the goods as soon as possible at New York and were not at liberty to ship them at any other port on the ground of their inability to ship at New York without great delay. L. R. 5 H. L. 395 Ref. (*Sanderson, C J. and Rankin, J.*) DAYTON PRICE & CO. *v.* S. ROHOMOTOLLAH & CO. **29 C. W. N. 422 : 86 I. C. 571 : A. I. R. 1925 Cal. 609.**

——Shipping—Charter party—Unjustified deviation leading to loss of cargo—Suit for damages—Maintainability.

A contract of charter party was entered into between the parties by which goods ought to be loaded and unloaded between C. and S. with the usual clauses of exemption from liability on account of King's enemies and Act of God. The ship deviated from the usual route and in a storm, some goods belonging to the plaintiff were jettisoned, and a suit was filed for damages on account of loss. *Held*, (1) it is settled law that if the charter party says nothing more than that the cargo should be carried, from one port to another, it is an implied condition that the ship must go according to the nearest route between the ports; (2) in a case of unjustified deviation, a plaintiff is entitled to recover all damages caused by deviation. (*Ramesam and Jackson, JJ.*) BANA MEEN *v.* JETTA MEGHJI. **21 L. W. 249 : 86 I. C. 751 : A. I. R. 1925 Mad. 770.**

Stranger.

——Stranger—Right to enforce—Privity—Subsequent dealings.

Though at the outset a person was a stranger to a contract, still, if subsequent dealings have brought him into privity with the parties, it is open to the Courts to grant relief to him on the contract. 41 Cal. 137 Ref. (*Lindsay and Kanhaiya Lal, JJ.*) NEHAL SINGH *v.* FATEH CHAND. **20 A. L. J. 708 : 44 A. 702 : 68 I. C. 778 : A. I. R. 1922 All. 426.**

——Stranger—Sale of land—Agreement by vendee to discharge debt of vendor—Right of suit—Privity of contract—Rule as to Exception—All parties before Court—Effect.

The vendee of a property undertook to discharge a debt due by his vendor to a third party. The plaintiff alleging that the third party was a benamidar for him sued for the amount due impleading as defendants the benamidar, the vendee and the vendor. It was proved that the third party was a benamidar for the plaintiff, but the vendee pleaded that he was not liable as there was no privity between him and the plaintiff. *Held*, the ordinary rule of law that a stranger to a contract though beneficiary thereunder could not sue upon it does not prevent a Court, in the exercise of its equitable jurisdiction from passing a decree in his favour, when all the parties affected by the contract are before the Court. 3 Mer. 582; 31 I. C. 792 : 41 Cal. 137; 45 M. L. J 693, Foll. 41 M. 488; 38 M. 753, Ref. to. (*Devadoss, J.*) ARETI SINGARAYYA *v.* ARRETI SUBBAYYA. **20 L. W. 721 : 35 M. L. T. 103 : (1924) M. W. N. 838 : A. I. R. 1924 Mad. 861 : 47 M. L. J. 517.**

——Stranger can enforce.

Per Krishnan, J.—Stranger can enforce contract if parties to contract are parties to suit and stranger is supported by the interested party. 34 A. 3. (P.C.) Dist. 34 Mad. 119 partly Foll. (*Krishnan and Venkatasubba Rao, JJ.*) THIRUVADI AYYANGAR *v.* P. JANAKI. **18 L. W. 530 : 75 I. C. 1016 : A. I. R. 1924 Mad. 103 : 45 M. L. J. 693.**

——Stranger—Right to enforce—Assignment of all the property of the transferor—Credit of transferor—Suit for recovery of debt from transferee—Maintainability.

Where a person gets a transfer of all the assets of his transferor and subjects himself to the payment of his debts, a creditor of the transferor to whom such a transfer is communicated has a right to proceed against the transferee. A suit by the creditor against the transferee is in such a case not open to the objection that there is not privity of contract between

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the parties. 41 Cal. 157 ; 41 Mad. 488 ; 26 Mad. 686. Ref. 4 Cal. 897 ; 8 Cal. 79 Foll. (*Kumaraswamy Sastri, J.*) G RAMASWAMI AIYAR *v.* DEIVASIGAMANI PILLAI. (1922) M. W. N. 442 : 16 L.W. 282 : 69 I. C. 957 (2) : 31 M. L. T. 156 (H.C.) : A. I. R. 1922 Mad. 397 : 43 M. L. J. 129.

———*Stranger—Enforceability by stranger depends on his having actual beneficial interest under contract.*

To entitle a third party not named as a party to the contract to sue either of the contracting parties, the third party must possess an actual beneficial right which places him in the position of *cestui que trust* under that contract. (*Baker, J. C.*) MT. JANKI *v* MOHAN LAL. 80 I. C. 405 : A. I. R. 1925 Nag. 29.

Teji Mandi Contracts.

———Teji Mandi *Contracts—Sale of goods—Contract to pay differences—Wagering transactions—Teji-mandi contracts—Kaccha Adatia dealing with up-country constituents.*

It cannot be disputed that a Kaccha Adatia in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay and that when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay both the Kaccha Adatia and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay but the name of the third party with whom the Kaccha Adatia transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The Adatia enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed. Where the plaintiff is employed as a Kaccha Adatia by an up-country constituent and where transactions are entered into by the Adatia with third parties in Bombay and where there is the circumstance that the intention of the third parties, is not shown to be to deal in differences only, it is not enough for the defendant to prove an agreement between himself and his Adatia that the Adatia would so arrange business for him as not to require him to give or take delivery. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. The two parties to the contract in the case would be the defendant and his agent on the one hand and the third party with whom the Adatia enters into the contract on behalf of the defendant on the other. (*Shah, A. C. J. and Kincaid, J.*) MUKUND CHAND *v.* SOBHAGMAL. 26 Bom L. R. 1097 : 85 I. C. 613 : A. I. R. 1925 Bom. 79.

———Teji Mandi *transactions—Wagering contracts.*

There is no presumption as regards *Teji Mandi* transactions that they are wagering transactions. 1922 Bom. 408 Foll. (*Shah, A. C. J. and Kincaid, J.*) MUKUNCHAND BALIA *v.* SOBHAGMAL GIANMAL. 26 B.L.R. 1097 : 85 I.C. 613 : A.I.R 1925 Bom. 79.

CONTRACT—Variation.

Variation.

———*Contract—Variation—Breach of contract—Where date of sale is postponed by consent, old contract continues but date of breach is the postponed date if date is fixed, or the date when plaintiff refused to extend time or after reasonable time from last date of grant of indulgence.*

Where the time for performing a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place, and therefore alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the breach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence. (*Marten, J.*) COORLA SPINNING AND WEAVING MILLS CO. *v.* VALLABHADAS KALLIANJI. 27 B. L. R. 1168 : A. I. R. 1925 Bom. 547.

———*Variation—Power to vary terms.*

Where one party to a contract is authorized to vary terms, the powers should be strictly construed and the indulgent party should not be allowed to travel beyond the plain words of the power. (*Seshagiri Aiyar, J.*) VENUGOPALA AIYANGAR *v.* S. I. RAILWAY CO. 62 I. C. 602 : 13 L. W. 309.

———*Variation—Novation—Essentials.*

The main element in a novation of a contract is that the right against original contractor is relinquished and the liability of the new contracting party accepted, provided that the new contract is legally enforceable. (*Das and Adami, JJ.*) BARKUARIN ALAK *v.* SIRKAR BARNARD & CO. 2 Pat. L. T. 761 : 62 I. C. 668 : 6 P. L. J. 473.

———*Waiver must be with intention to waive and with knowledge of all circumstances.*

Payment by vendee of purchase money, due to mistake induced by advice of solicitors is not waiver of right under covenant for title. (*Shah, A, C. J. and Kincaid, J.*) MEGHRAJ MOORJI *v.* TYBALLI KAMRUDDIN. 26 Bom. L. R. 1019 : A. I. R. 1925 Bom. 64.

———*Waivers—Sale of goods—Acceptance of portion—Refusal of rest—Portion accepted not of the description contracted for—Presumption—Damages.*

A portion of the goods contracted for were accepted and the rest refused. It was found that the goods accepted did not correspond to the goods ordered and in a suit for damages for acceptance of the remainder, the vendee pleaded that the portion accepted was not of the sort ordered. *Held*, the plaintiffs were entitled to damages, and the vendees had waived performance of all conditions precedent. (*Ramesam, and Reilly, JJ.*) KAYALU AYYAR *v.* KUPPU AIYAR. 21 L. W. 503 ; 88 I. C. 241 : A. I. R. 1925 Mad. 974 : 49 M. L. J. 1

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CONTRACT ACT (IX OF 1872).

———*Scope.*

See CONTRACT—CONSTRUCTION.

———*If exhaustive.*

The Indian Contract Act deals only with a part of the law of contract applicable to British India. (*Mukerjee, J.*) JATINDRA CHANDRA CHOWDHURY *v.* RANGPUR TOBACCO CO. **A. I. R. 1924 Cal. 990.**

———**S. 2**—*Boy running away from home—Boy's father advertising reward to any one tracing boy and bringing him home—Taking boy to Ry. Police Station, making report and sending telegram to boy's father are substantial performance of condition—Advertisement of reward is offer capable of an acceptance by any person fulfilling the condition.*

A young boy ran away from his father's home. The father eventually issued a pamphlet, offering a reward in these terms: "Anybody who finds trace of the boy and brings him home, will get Rs. 500." The plaintiff was at the *dharmashala* of a railway station, there he saw a boy, overheard part of a conversation, realised that the boy was the missing boy and promptly took him to the Railway Police Station where he made a report and sent a telegram to the boy's father saying that he had found his son. *Held*, that the hand-bill was an offer open to the whole world and capable of acceptance by any person who fulfilled the condition and that the plaintiff substantially performed the condition and was entitled to the amount offered. (*Mears, C. J.*) HAR BHAJAN LAL *v.* HAR CHARAN LAL. **23 A. L. J. 655 : L. R. 6 A. (Civ.) 486 : 88 I. C. 908 (1) : A. I. R. 1925 All. 539.**

———**S. 2**—*Forbearance to enforce legal rights is good consideration.*

Walsh, J.—Forbearance to sue and forbearance to take definite steps to enforce legal rights have always been held to be adequate consideration to support an agreement, particularly an agreement where there are mutual considerations and both parties are intending, and agree, to make an end of their dispute. (*Walsh, Kanhaiya Lal and Mukerjee, JJ.*) GAJENDRA SINGH *v.* DURGA KUMARI. **47 All. 637 : 88 I. C. 768 : 23 A. L. J. 561 : A. I. R. 1925 All. 503 (F. B.).**

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——— **S. 2**—*Alteration of position.*

Alteration of position of one party on faith of offer by the other is good consideration. (*Newbould and B. B. Ghose, JJ.*) SHAILESH CHANDRA GUHA *v.* BECHAI GOPE. **40 C. L. J. 67 : 84 I.C. 124 : A. I. R. 1925 Cal. 94.**

———**S. 2**—*Stranger to—Right to take benefit.*

There is no universal rule that a stranger to a contract can in no circumstance claim a benefit thereunder. 32 A. 410 : 41 C. 737 : 46 Cal. 160 Rel. It is competent to a tenant to invoke the benefit of a contract between the Govt. and the settlement-holder even though he may not be a party thereto. 11 C. L. J. 68 ; 37 C. 449 : 3 Pat. L. J. 394 : 17 C. L. J. 70 Ref. (*Mukerjee and Cuming, JJ.*) RANI HEMANTA KUMARI DEBI *v.* THE MIDNAPORE ZEMINDARY CO. **35 C. L. J. 493 · 77 I. C. 261 : A. I. R. 1923 Cal. 25.**

———**S. 2**—*Consideration—Omission to sue—Effect of.*

Where a person in consideration of a promise desists from enforcing by suit a claim for an alleged infringement of his right the promise is one supported by consideration and can be enforced as a contract. (*Abdul Raoof and Campbell, JJ.*) PARSHOTTAM SINGH *v.* RALLIA SINGH. **4 U. P. L. R. (L.) 36 : 65 I. C. 52 : A. I. R. 1922 Lah. 269.**

———**S. 2**—*Offer—Invitation to offer—Quotation of prices.*

An offer must be distinguished from an invitation for an offer. A letter from a prospective buyer asking for quotations from a merchant is an invitation for an offer. If the merchant sent his quotations and the buyer accepts them and orders goods that constitutes the proposal, which the seller may or may not accept. (*Wilberforce, J.*) FIRM OF DURGA PARSHAD MUTSADDI LAL *v.* FIRM OF RULIA MAL DOGAR

CONTRACT ACT (IX OF 1872). S. 2.

MAL. 4 L. L J. 176 : 29 P. L. R. 1922 : 65 I. C. 282 : A. I. R 1922 Lah. 100.

———S. 2—*Contract—Consideration—Bonus to employee—Promise to pay—Suit to enforce—Maintainability—Transfer of ownership in bonus to employee by employer—Suit to recover bonus in case of—Maintainability.*

In a suit which was dismissed for want of a cause of action the allegations in the plaint were that the plaintiff, a godown keeper in the employment of a Mahomedan firm, was credited with a bonus of Rs. 3,500 out of the profits of the firm in consideration of the good services rendered by him and of the final profits made by the firm, that bonus was carried to plaintiff's credit in the firm's books in 1919, and that in 1920 he was allowed to draw out of it Rs. 420 but that the defendants refused, in spite of his demand to pay the balance. *Held, by the Officiating Chief Justice.* —The allegation in the plaint disclosed a case of a completed gift and a transfer of ownership in favour of the plaintiff ; if ownership in the bonus was completely transferred, and there was more than a mere promise without consideration to give the plaintiff a bonus, it was immaterial that the amount was originally of the nature of a bonus; and the suit was wrongly dismissed on the ground that the plaint disclosed no cause of action. *Held, by Srinivasa Aiyangar, J.* (Concurring). —The plaintiff's claim should be deemed to be based on a contract, apart from any question whatever of a contemplated gift and apart from any relationship between the parties of depositor and depositee or creditor and debtor, and the plaintiff had a case on the footing of a contract which was clearly sustainable. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) KANAKASABAPATHY MUDALIAR *v.* HAJEE OOSMAN SAHIB.
20 L. W. 910 : (1925) M. W. N. 279 : A. I. R. 1925 Mad. 192 : 47 M. L. J. 791.

———S. 2—*Auction bid—Withdrawal before fall of hammer.*

A bid at an auction is nothing more than an offer and can be withdrawn like all other offers before it is accepted by the other party which, in the case of an auction, is signified by the fall of the hammer. (*Coutts-Trotter and Ramesam, JJ.*) CHAMPALAL *v.* JEYGOPAL DAS.
16 L. W. 816 : (1922) M. W. N. 564 : 45 M. 799 : 31 M. L. T. 401 : 70 I. C. 977 : A. I. R. 1922 Mad. 486 : 43 M. L J. 132.

———S. 2—*Receipt—If requires consideration.*

A receipt is merely evidence of a fact. It is not an agreement requiring consideration to make it a valid contract. (*Hallifax, A. J. C.*) SALE MUHAMAD *v.* RAMRATAN TIWARI. **A. I. R. 1924 Nag. 156.**

———S. 2—*Existence of a* bona fide *dispute is a good consideration though the claim causing dispute is found later on to be devoid of foundation.*

The existence of a *bona fide* dispute is a good and sufficient consideration to support a contract even though the claim which causes the dispute turns out afterwards to have had no foundation. 22 O. C. 300, Foll. (*Dalal, J.C.*) RAMCHARAN *v.* MT. SARTAJI.
2 O.W.N. 849 : 90 I. C. 766 : A.I.R. 1926 Oudh 22 (2).

———S. 2—*Less consideration.*

Where the mortgagor had agreed to pay a larger sum than what he had actually received, *held*, the contract was perfectly a legitimate one and the mortgagor was bound to pay the entire sum he had agreed to pay. (*Wazir Hasan, A. J. C.*) BALBHADAR PRASAD *v.* DHANPAT DAYAL. **27 O. C. 4 : 10 O. L. J. 447 : 80 I. C. 213 . A. I. R. 1924 Oudh 193.**

———S. 2 (a)—*Auction bids are mere offers until accepted.*

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The Tahsildar of Madura acting on behalf of Government held an auction of certain lands in July 1915. The 1st defendant purchased the property at the auction and deposited 15 per cent. of the purchase-money on the day of sale. There was a stipulation in the conditions of sale that the sale was to be subject to confirmation by the Collector. In spite of several applications by the 1st defendant the sale was not confirmed and the Government cancelled the sale in 1917. *Held*, that the effect of the 1st defendant's bid at the auction was a mere offer by him which was to be accepted by confirmation of the Collector and that, in the absence of such confirmation, there was not a completed contract of sale in favour of the 1st defendant. (*Phillips and Devadoss, JJ.*) MUTHU PILLAI *v.* SECY. OF STATE FOR INDIA.
17 L. W. 531 : (1923) M. W. N. 317 : 32 M. L. T. (H.C.) 309 : 72 I. C. 436 : A. I. R. 1923 Mad. 582 : 45 M. L. J. 67.

———S. 2 (d) *See also* CONTRACT—STRANGER.

———S. 2 (d)—*Consideration—Agreement by purchaser at Court sale to reconvey the properties to the judgment-debor for the same price—"At the desire of the promisor".*

A Court auction-purchaser at an execution sale entered into an agreement with the judgment-debtor that he would reconvey the properties purchased to him on his repaying the purchase-money. *Held*, that the agreement was not supported by consideration, for the promise of the judgment-debtor to repay the sale price was not one made at the "desire of the promisor" within S. 2 of the Contract Act, which words imply a promise which has a real effect in conducing to the contract. (*Fawcett and Madgavkar, JJ.*) VISHVESHVAR *v.* SADASHIV. **27 Bom. L. R. 1456.**

———S. 2 (d)—*Broker's undertaking to pay the premium is good consideration in marine insurance contract*

In marine insurance the consideration for the contract is the broker's undertaking to pay the premium and that consideration, though it moves from a third person, is good consideration as the law stands in India. (*Crump, J.*) RAMCHANDRA RAMVALLABH *v.* GOMTIBAI.
27 Bom. L. R. 1310 : A. I. R. 1926 Bom. 82.

———S. 2 (d)—*Agreement to drop prosecution against promisor's brother—Agreement held valid by Court—Agreement is good consideration.*

Where the complainant in a case of criminal breach of trust agrees to the prosecution being dropped in consideration of a portion of the embezzled money being paid to him in cash, and of a mortgage being executed in his favour, by the accused and his brother, and where the agreement is held to be legal, there is consideration for the mortgage as against the accused's brother, and he is bound by the mortgage. (*Walmsley and Mukerjee, JJ.*) DWIJENDRA NATH *v.* GOPIRAM GOBINDRAM.
42 C. L. J. 90 : 29 C. W. N 855 : A. I. R. 1926 Cal. 59.

———S. 2 (d)—*Agreement by creditor to give up part of his claim—No consideration is necessary.*

Under the Indian Law the creditor is entitled to give up a portion of his claim, and there need be no consideration nor any agreement by him so to give up. (*Srinivasa Aiyangar, J.*) LODD GOVINDOSS KRISHNA VARU *v.* MUTHIAH CHETTY.
A. I. R. 1925 Mad. 660 : 48 M. L. J. 721.

———S. 2 (d)—*Consideration.*

Where the members of a community, who had rendered some help to the defendant, stipulated for payment by him of a certain sum of money to the community as a whole, and he promised to do so, *held*,

CONTRACT ACT (IX OF 1872), S. 2.

that the promise was for consideration and was enforceable. (*Krishnan, J.*) BUDAVARAM NARASIMHULU CHETTY *v.* NOOTA IBBUNDRUM NAGESAM VARU. **(1923) M. W. N. 237 : 72 I. C. 95 : A.I. R. 1923 Mad. 434 : 44 M. L. J. 240.**

——S. 2 (d)—*Consideration—Benefit to one co-promisor—If enough.*

To amount to consideration, it is not necessary that the promisor should himself benefit ; it is sufficient if the promisee did any act from which a third person is benefited and which he would not have done but for the promise. Consideration paid to any one of several joint promisors is legally sufficient to support the promise of all the joint promisors. (*Kinkhede, A. J. C.*) MUNNALAL *v.* MT. DUKLO. **89 I. C. 819.**

——S. 2 (d)—*Consideration—Decree-holder accepting leave in full satisfaction of decree.*

Where a decree-holder accepts a term lease in full satisfaction of his decree such a promise is consideration within S. 2 (*d*). (*Findlay, O. J. C.*) MAROTI *v.* KRISHNA RAO. **89 I. C. 174 : A. I. R. 1925 Nag. 455.**

——S. 2 (d)—*A time-barred debt can be valid consideration or transfer of property.*

A transfer of property is valid despite the fact that the debt in consideration of which it is made is barred by time. (*Wazir Hasan, A. J. C.*) MT. ZOHRA BIBI *v.* GANESH PRASAD. **78 I. C. 106 : A. I. R. 1925 Oudh 267.**

——S. 2 (d)—*Mortgage executed to make good to mortgagee the loss sustained by him for having lost a property by pre-emption is valid.*

Where the plaintiff had purchased certain property from A, but the property was lost by plaintiff because it was pre-empted by A's relation, and therefore A gave in mortgage certain property to A to make up the difference between the pre-emption money and original purchase money, *held*, the mortgage was valid. (*Wazir Hasan, J. C. and Pullan, A. J. C.*) MT. CHANDRA KUNWAR *v.* PT. SHEO DAYAL. **11 O. L. J. 707 : 84 I. C. 539 : A. I R. 1925 Oudh 215.**

——S. 2 (d)—*Consideration—Pro-note executed in lieu of a previous pro-note.*

A pro-note was executed by the defendant in favour of *S*, wife of the second plaintiff *R*, on 8th December 1917. It was in renewal of a pro-note previously executed by the deft. in favour of *R's* uncle *K*, on 16th December 1914. It was executed just before limitation on the earlier pro-note expired. *K* died childless and made a will in favour of *S*. It was found that it was at the request of the second plaintiff that the pro-note was renewed in favour of *S*. *Held*, that the second plaintiff's forbearance to sue on the original instrument is sufficient consideration for the renewal. (*Daniels, A. J. C.*) SYED MUHAMMAD *v.* RAMCHARAN. **10 O. L. J. 43 : 74 I. C. 316 : 26 O. C. 204 : 9 O. & A. L. R. 155 : A. I. R. 1923 Oudh 176.**

——S. 2 (d)—*Compromise of doubtful right is enough basis for agreement—Contract Act, S. 25.*

If an agreement is entered into upon a supposition of a right or of a doubtful right it shall be binding. The compromise of a doubtful right is a sufficient foundation for an agreement. 1 Atk. 2, Foll. 5 H.L. 85 Dist. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJ KESHAR PRASAD SINGH. **5 P. L. T. (Supp.) 1 : A. I. R 1925 Pat. 68.**

——S. 2 (d)—*Agreement with minor's father to confer benefit on minor—Minor can enforce agreement.*

Where some persons agree with another that in consideration of the latter's services to their firm they would allow a certain share of the profits to his minor son, the contract may be enforced by the minor as he becomes a *cestui que trust* under the agreement, (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) TULSIDAS *v.* GANGARAM. **18 S. L. R. 96 : 86 I. C. 944 : A. I.R. 1925 Sind 272.**

CONTRACT ACT (IX OF 1872). S. 7.

——S. 2 (e)—*Consideration — Essentials of—Stranger if can enforce performance.*

Under S. 2 (*e*) it is not necessary that consideration should move from the promisee himself, but it is still necessary that the proposal should be made to him and he should signify assent thereto. A stranger cannot therefore enforce a contract to which he was not a party unless there is a family arrangement or trust or charge created. (*Mears, C. J. and Sulaiman, J.*) MITTAR SAIN *v.* DATA RAM. **90 I. C. 1000.**

——S. 2 (e)—*Municipality taking over management of school belonging to another institution—Definite appointment by Municipality is essential, for making any member of the staff a municipal servant.*

A Municipality took over the management of a school belonging to another institution. The Municipality then gave notice to the teachers that their services would not be required after a certain date. One of the teachers was willing to continue in the service and the Municipal Chairman authorised him to appoint a peon as a night watchman. *Held*, that this would not constitute the appointment of the teacher in the Municipal service and that in the absence of definite appointment he could not be held to be a servant of the Municipality. (*Devadoss, J.*) MUNICIPAL COUNCIL, CALICUT *v.* KESAVA MENON. **86 I. C. 509 (2) : A. I. R. 1925 Mad. 943.**

——S. 3—*Revocation of contract requires concurrence of both parties.*

A contract is concluded when in the mind of each contracting party there is a *consensus ad idem* and a modification or revocation of the contract requires a like consensus. (*Lord Wrenbury.*) Y. A. J. NOORBHAI *v.* S. P. L. K. R. KARUPPAN CHETTY. **A. I R. 1925 P. C. 232 (P. C.).**

——Ss. 3 and 7—*Acceptance, place of.*

When the proposal and acceptance are made by means of letters the contract must be deemed to have been made at the place where the letter of acceptance is posted. Where the customers could have no control over the goods until they had paid the price at Amritsar and had thus obtained the railway receipt and endorsement in their favour and though the railway would be deemed to take delivery at Calcutta on behalf of the customers of goods despatched from there and consigned to the customers ; it is not easy to see how the railway could take delivery on behalf of the customers of goods which were not consigned to the latter and not in any way under their control. But where it must have been understood between the parties that the goods should be delivered and paid for at Amritsar, the cause of action arose at Amritsar. (*Moti Sagar, J.*) FIRM OF HIRA NAND MURLIDHAR *v.* FIRM OF GURMUKH RAI. **73 I. C. 205 : A. I. R. 1923 Lah. 427.**

——S. 3—Quotation cards are mere invitations for offers and not themselves offers. (*Rupchand Bilaram, A.J.C.*) FIRM OF PREMJI MULJI *v.* FIRM OF TARACHAND THAWERDAS. **76 I. C. 353 : A. I. R. 1924 Sind 64.**

——S. 7—*Acceptance.*

The letter of the plaintiff firm began with the words "We have the pleasure to accept your indents," then follow particulars, and finally comes the phrase upon

which the dispute has hinged : "The abovementioned acceptance is subject to revision and confirmation by mail if required," which meant only if there was mistake in a telegram according to the usal practice of the parties, *held*, there is a complete contract subject to the possible discovering of mistake and that under this contract the defendant firm is under an obligation to submit the dispute to arbitration in the manner provided by the printed conditions on the indent form. F.A. 438 of 1917 All. Dist. (*Piggott and Walsh, JJ*) B. SHUSHIL CHANDRA DAS *v.* SUKHAMAL BANSIDHAR. **44 All. 472 : 20 A. L. J. 377 : A. I. R. 1922 All. 219.**

——S. 7—*Instrument showing agreement of both parties—Construction of.*

Until acceptance, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer and until both parties are bound, neither party is bound. Where the agreement is executory on both sides, with an option to one of the parties to do as he likes, there is nothing more than a standing offer though it may be that, during the lifetime of the promisor, the distinction between a binding offer and a complete agreement is not of much importance as between the parties. (*Ayling and Ramesam, JJ.*) IGALA NAGAPPA *v.* P. MUNISWAMY. **15 L. W. 409 : (1922) M. W. N. 201 : 30 M. L. T 175 : A. I. R. 1922 Mad. 16 : 42 M. L. J. 432.**

——S. 7—*Offer refused—Subsequent acceptance no effect.*

To convert a proposal into a promise, the acceptance must be unqualified and without condition. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal into a promise so as to create a contract. (*Jwala Prasad and Adami, JJ.*) NIROD CHANDRA ROY *v.* RAJA KIRTYA NANDA SINGH. **A. I. R. 1922 Pat. 24.**

——S. 10—*Minor—Suit on pro-note.*

A minor can sue on a promissory note for its enforcement. (*Po Han, J.*) SHARFATH ALI *v.* NOOR MAHOMED. **2 Bur. L. J 227 : 76 I. C. 810 : 2 Rang. 1 : A. I. R. 1924 Rang. 136.**

——S. 11—Minor—Estoppel. *See also* EVIDENCE ACT, S. 115.

——S. 11—*Minority—Burden of proof is on party setting up minority.*

The burden of proof should be laid on the party who says that at the date of contract he was a minor. Although it is for the plaintiff to prove the validity of a contract on which he relies, yet, the age of a person entering into a contract is not such an essential part of the contract as must be proved by the plaintiff. 34 All. 189 and 6 A. L. J. 693, Not Foll. A. I. R. 1924 All. 730 and 45 Cal. 909, Foll. (*Mukerjee, J.*) KANDHAI LAL *v.* DEBI PRASAD. **L. R. 6 A. (Civ.) 219 : 87 I.C. 778 : A. I. R. 1925 All. 399.**

——S. 11—*Money paid to minor—Agreement to pay on attaining majority—Legality of.*

If a minor accepts money except for necessaries he cannot be compelled to repay this and any contract to do so made by him as a minor is void against him but if when of full age he takes it upon himself to repay, there is no reason either in law or in equity why this agreement should be deemed unlawful. (*Daniels and Dalal, JJ.*) NARAIN SINGH *v.* CHIRANJI LAL. **22 A. L. J. 461 : 46 A. 568 : 79 I. C. 945 : L. R. 5 A. 353 · A. I. R. 1924 All. 730 (2)**

——S. 11—*Minor promisor—Sale—Setting aside—Decree for repayment of money.*

Setting aside of a sale deed executed by a minor or

refund of the consideration money is within the power and competence of a Court, but this power should not be used if the vendee has been unscrupulous in his dealings with the minor. (*Mears, C. J. and Piggott, J.*) MAHOMED SAID *v.* BISHAMBAR NATH. **21 A. L. J. 596 : 45 All. 644 : 85 I. C. 79 : A. I. R. 1924 All. 156.**

——S. 11—Agreement to pay dower—Mahomedan husband—Minor under Majority Act but major under personal law—Validity. *See* MAJORITY ACT. (*Suhrawardy and Duval, JJ.*) MOZHARUL ISLAM *v.* ABDUL GANI ALA. **80 I. C. 914 : A. I. R. 1925 Cal. 322.**

——Ss. 11 and 17—*Fraud by minor—Misrepresentation as to age, effect of—Estoppel.*

A mortgage made by a minor is wholly void. 30 Cal. 539, Foll. A minor who makes a false representation made to a person who knows it to be false is not estopped from taking away the privilege of infancy. (*Abdul Raoof, J.*) HARNAM SINGH *v.* NARAINA. **66 P. W. R. 1921.**

——S. 11—*Minor promisee—Sale in favour of minor is enforceable.*

There is nothing in law to prevent a sale of immoveable property in favour of a minor and the minor can sue for possession of the property as such vendee. 33 M. 312 Not Foll; 40 M. 308 : 38 A. 61 : 38 A. 154 Ref. (*Prideaux A.J.C.*) BALKRISHNA *v.* LAKHU. **68 I. C. 191 : A. I. R. 1922 Nag. 239.**

——S. 11—*Minority at the time of contract pleaded—Minority must be proved beyond reasonable doubt by the party pleading.*

When a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority. It is not enough that they leave the matter in doubt. They must satisfy the Court beyond reasonable doubt that the minority is a fact. 45 Cal. 909 (P. C.) Foll. (*Simpson and Gokaran Nath Misra, A.J. C.*) JAI KISHORI *v.* ALI AHMAD KHAN. **12 O. L. J. 395 : 89 I. C. 108 (2) : A. I. R. 1925 Oudh 487.**

——S. 11—*Lunatic or minor can purchase or can be mortgagee of immoveabl. property.*

An executory contract cannot be validly entered into by a lunatic or a minor. But a minor or a lunatic is not disqualified, as such, from being the transferee of immoveable property, as purchaser or mortgagee, under an executed contract. 39 Cal. 232 Dist. ; 18 O. C. 115 ; 38 All. 62 ; 40 Mad. 308, Foll. (*Kendall, A. J. C.*) SHEORATAN SINGH *v.* KALI CHARAN. **11 O. L. J. 498 : 79 I. C. 955 : 27 O. C. 214 : A. I. R. 1925 Oudh 37.**

——S. 11—Agreements by disqualified persons or by minors are void and compensation cannot be claimed under Contract Act, S. 65. (*Neave and Kendall, A. J. Cs.*) HARI KISHUN DAS *v.* MAHOMED SHAFI JAN. **11 O. L. J. 502 : 80 I. C. 800 : A. I. R. 1924 Oudh 438.**

——Ss. 11 and 65—*Minor promisor—Execution of bond—Consideration paid—No misrepresentation—Suit for cancellation of bond—Duty to restore benefit.*

A person of the age of 19 for whom a certificated guardian had been appointed under the Guardians and Wards Act, executed a bond on obtaining in cash the consideration therefor. There was no fraud or misrepresentation on the part of the minor and the creditor *bona fide* believed that the executant of the bond was a major. In a suit by the minor for cancellation of the bond *held*, that the plff. was entitled to a decree only on his returning the money he got from the defendant but without interest and cost. (*Simpson. A. J. C.*) MUHAMMAD ANWAR KHAN *v.*

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JHANDA SINGH. **9 O. L. J. 404 : 69 I. C. 888 : 25 O. C. 237 : A. I. R. 1922 Oudh 271.**

——**S. 11**—Lease by minor is void and confers no right to possession in the lessee. 30 C. 539 (P. C.); 28 B. 181, Rel. on. (*Young, J.*) DOO DOO MEAH *v.* KASIM ALI. **3 Bur. L. J. 76 : 82 I. C. 250 : A. I. R. 1924 Rang. 288.**

——**S. 11**—*Scope.*

A minor has no right to enforce a fraudulent contract of his guardian. (*Robinson, C. J. and Heald, J.*) MAUNG TIN *v.* MAMAI MYINT. **65 I. C. 409 : 11 L B. R. 83.**

——**S. 12**—*Sound mind.*

Where the rent reserved by the lease was disproportionate to the net proceeds and no money was paid and the lessor was a man of deranged intellect, incapable of understanding the nature of the transaction and its effect upon his interests, the lease must be held to be void and unenforceable. (*Lindsay and Kanhaiya Lal, JJ.*) MT. AMINA BIBI *v.* SAIYID YUSUF.

44 A. 748 : 20 A. L. J. 731 : A. I. R. 1922 All 449.

——**S. 12**—*Soundness of mind—Contractual capacity—Presumption in favour of sanity—Mere weakness of mind—Effect on contract.*

The test of soundness of mind under S. 12 of the Contract Act is that the contractor or donor is capable of understanding the business and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test. Mere weakness of mind is not sufficient as laid down in 27 A. 1 (P. C.) Although it is not necessary to prove utter mental darkness or congenital idiocy, there must be proof that the donor or contractor was incapable of understanding business, and forming rational judgment as to its effect. Even if occasional aberrations are proved they would not vitiate transactions not entered into under their influence. (*Jwala Prasad and Adami, JJ.*) MAHOMED YAKUB *v.* ABDUL QUDDUS.

68 I.C. 372 : 4 P. L. T. 7 : A I. R. 1923 Pat 187.

——**S. 16**—*Provision in deed for emoluments and expenses of mutwalli is not unreasonable.*

Where a Mahomedan aged 67 made a waqf reserving a portion for himself and his wife and nominating one of his nephews as mutwalli after him and the other as supervisor and also made arrangements for their expenses and emoluments, *held*, that the waqf was reasonable and cannot be said as brought about by the domination or undue influence on the part of nephews. (*Lord Sumner.*) MIRZA FIDA RASUL *v.* YAKUB BEG. **27 O. C. 346 : L. R. 6 P. C. 55 : 12 O. L. J. 98 : 87 I. C. 702 : A. I. R. 1925 P. C. 101 (P. C.).**

——**S. 16**—*Amending Act of* 1899, *S.* 2—*Unconscionableness of bargain—If can be gone into—Position to dominate will.*

By Sub-S. 3 of S. 16 three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, *viz.*, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. The burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations

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of the parties. Even though a bargain had been unconscionable a remedy under the Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. The decision in 42 Cal. 690 which lays down that "where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate," is wrong. (*Lord Shaw.*) RAGHUNATH PRASAD SAHU *v.* SARJU PRASAD SAHU.

22 A. L. J. 105 : 19 L. W. 470 : 2 Pat. L. R. 87 : 34 M. L. T. 57 : 26 Bom. L. R 595 : 3 Pat. 279 : 28 C. W. N. 834 : 51 I. A. 101 : 5 Pat. L. T. 72 : 1 O. W. N. 210 : 82 I. C. 817 : (1924) M. W. N. 638 : 11 O. L. J. 122 : L. R. 5 P. C. 206 : A. I. R. 1924 P C. 60 : 46 M. L. J. 610 (P.C.).

——**S. 16**—2 *per cent per mensem compound interest as held unconscionable—Usurious Loans Act, S.* 3.

Where the mortgagors were illiterate persons and ignorant of the technicalities of law and legal expressions, *held*, that a stipulation to pay the interest at the rate of 2 per cent per mensem compound interest with monthly rests was unusual, hard and unconscionable. (*Kanhaiya Lal, J.*) PANDIT SHYAM LAL *v.* BADRI. **75 I. C. 784 : A. I.R. 1925 All. 31.**

——**S. 16**—*Position—Undue influence.*

A creditor can ask his debtor to execute documents in a particular form and where a creditor writes to his debtor's servant to get his master's signature to such a form, no inference that undue influence was used can arise. (*Mears, C. J. and Banerjee, J.*) BHAGWAN BAKSH SINGH *v.* DAMODHARJI JOSHI.

42 All. 230 : 59 I. C. 20 : 18 A. L. J. 100.

——**Ss. 16 and 19-A**—*Debtor agreeing with free will to pay high rate of interest—No question of undue influence or misrepresentation arises.*

Where the debtors wanted money for their business and expected to make a good profit out of the business when assisted by the loan from the creditor, and where the debtors consented freely and willingly to pay a high rate of interest in anticipation of realizing a bumper profit out of their own business, there cannot be any question of undue influence or misrepresentation. (*Macleod, C. J. and Coyajee, J.*) CHUNILAL MOKAMDAS MARWADI *v.* E. CHRISTOPHER.

27 Bom. L. R. 1462 : A. I. R. 1926 Bom. 65.

——**S. 16**—*Undue influence—Suit for money—Execution admitted—Relation between debtor and creditor, whether conclusive proof of domination.*

The relation between a debtor and creditor is not one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter. (*Greaves and Mukerjee, JJ.*) RAMESHWAR MARWARI *v.* UPENDRANATH DAS **90 I. C. 463 : 29 C. W. N. 1029.**

——**S. 16**—*High rate of interest charged—Undue influence would not be presumed but must be proved.*

Where a contract is challenged on the ground of a very high rate of interest, it is necessary to prove that one party had undue advantage over the other in the matter of the settlement of the rate of interest. 48 I. C. 933 (P.C.) and 48 (I.C.) 1 P.C. Foll. (*Suhrawardy and Cuming, JJ.*) RAJ KUMAR BASU *v.* GIRINDRA KUMAR BANDOPADHYA.

41 C. L. J. 453 : 87 I. C. 178 : A. I. R. 1925 Cal. 722.

——**S. 16**—*Reduction of rate of interest fixed—Undue influence—Proof.*

The rate of interest fixed in a contract cannot be reduced by a court merely because it finds that the

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rate fixed is excessive or that the parties are relations and that there is good security for the debt. Unless it can be shown that undue advantage had been taken or that one party dominated the other, the contract rate should not be interfered with. (*Cuming, J.*) PANCHI DASI *v.* KSHIRODA DASI. **90 I. C. 727.**

——S. 16—*Lending money to a profligate young man—No undue influence can be presumed.*

Where the defendant was a profligate young wastrel unaccustomed to the possession of any money and on his father's death he embarked upon a career of debauchery and the plaintiff, a professional money-lender, advanced him monies on various documents which debts were subsequently consolidated in the mortgage in suit, *held*, there was no question of undue influence or fraud and the plaintiff must succeed. Undue influence of a third person is no defence to a claim. (*Le Rossignol and Fforde, JJ.*) SARDARI MAL *v.* ABDUL SAMAD. **7 Lah. L. J. 208 : 90 I. C. 39 : 26 Punj. L. R. 506 : A. I. R. 1925 Lah. 430.**

——S. 16—*Question as to undue influence depends upon circumstances.*

Where a pardha lady aged 63 years and suffering from paralysis gifted her property to her brother's son out of natural love and subsequently sought to rescind the gift on the ground of undue influence, *held*, on facts, that the transaction was free and voluntary and no case of undue influence was made out. (*Scott-Smith and Fforde, JJ.*) SRI RAM *v.* NAND KISHORE. **85 I. C. 169 : 5 Lah. 465 : A. I. R. 1925 Lah. 196 (2).**

——S. 16—*Mental distress—Undue influence—Proof of.*

It is not enough to prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the time of sale. (*Broadway and Harrison, JJ.*) INDER SINGH *v.* DYAL SINGH. **6 Lah. L. J. 446 : 72 I. C. 1032 : A. I. R. 1924 Lah. 337.**

——Ss. 16 and 74—*High rate of interest—Power of Court to reduce.*

Though the rate of 25 per cent. compound interest on a mortgage is high, it is not within the power of the court to reduce the interest in the absence of proof of undue influence on the part of the mortgagee. 101 P. R. 1918 : 124 P. R. 1918 Foll. (*Martineau and Campbell, JJ.*) KHOTA RAM *v.* NAWAZ. **4 Lah. 76 : 5 Lah. L. J. 238 : 72 I. C. 765: A. I. R. 1924 Lah. 21.**

——S. 16—*High rate of interest.*

There is nothing inherently wrong or oppressive in an agreement to pay compound interest. The rate of 1½ per cent. is not exorbitant and the mere fact of its being high, would not be sufficient to raise a presumption of undue influence. 124 P. R. 1918 : 96 P. R. 1901, Ref. (*Martineau and Zafar Ali, JJ.*) CHIRANJI LAL *v.* DOST MAHOMED. **A. I. R. 1923 Lah. 634.**

——S. 16—*Who can plead—Position of obligor's donee.*

It would not be open to a plaintiff to plead that a mortgage contract is bad for undue influence where he is only a donee from the mortgagor's widow. He is not entitled to the equities which existed in favour of the mortgagor. 20 I. C. 812, Ref. (*Martineau and Zafar Ali, JJ.*) CHIRANJI LAL *v.* DOST MAHOMED. **A. I. R. 1923 Lah. 634.**

——S. 16—*Youth—Vendor youthful and inexperienced—Vendee taking advantage—Major portion of consideration valid.*

Where in a particular case the vendees take advantage of the youth and inexperience of the vendor and all the transactions are suspicious, the Court would not uphold the sale merely because it is held to be good in respect of a major portion of the consideration. There is however no hard and fast rule. 83 P. R. 1911 (F. B.) and 6 I. C. 984 Ref. to. (*Wilberforce and Abdul Qadir, JJ.*) BER SINGH *v.* HAZARA SINGH. **3 Lah. 99 : A. I. R. 1922 Lah. 275.**

——S. 16—*Burden of proof—Avoidability for undue influence, fraud, etc., does not affect validity until party entitled to avoid, exercises right—Such exercise cannot affect innocent third parties' rights in the property or even the wrong-doers' rights themselves when the delay has altered his position.*

A party who is entitled to avoid a contract by reason of misrepresentation, fraud, non-disclosure of material facts or undue influence, must exercise his election before an innocent third party has acquired an interest in the property or in consequence of his delay, even the wrongdoer's position is affected. Otherwise the party entitled to resign will forfeit his right. Subject to this, so long as no election either way is made by the party entitled to avoid a contract of the abovementioned description, the contract continues valid. (*Schwabe, C.J. and Coutts-Trotter, J.*) WILLIAM BRUNTON *v.* JOHN E. C. BRUNTON. **78 I. C. 299 : A. I. R. 1925 Mad. 360.**

——S. 16—*Burden of proof — Bequest under undue influence.*

Where a legacy under a will is sought to be set aside on the ground of undue influence, it must be proved not only that the legatee was in a position to exercise influence but that the influence was unduly exercised, the burden of proving both being on the party attaching the legacy. Courts do not look with favour on attempts to attack bequests on the ground of undue influence. (*Sadasiva Aiyar and Spencer, JJ.*) RAJARAJESWARA SETHUPATHI *v.* KUPPUSAMI AIYAR. **(1921) M. W. N. 722 : 68 I. C. 352 : 41 M. L. J. 474.**

——S. 16—*Burden of proof—Active confidence.*

The plaintiff setting up a plea of undue influence in a suit to avoid an instrument, must prove that there was active confidence between the person executing the document and the person under whose influence the document is said to have been executed. (*Abdul Rahim, O. C. J. and Odgers, J.*) RAMA KRISHNA PRABHU *v.* NARAINA. **62 I. C. 215 : 11 L. W. 112.**

——S. 16—*Use of influence to obtain unfair advantage must be proved—Mortgagor being servant of mortgagee, mortgage is not necessarily the result of undue influence.*

Where it has been shown that one party was in a position to dominate the other, it must also be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. 43 Mad. 546 (P. C.) Rel. on ; 1922 P. C. 14 Dist. The mere fact that the mortgagor was a servant of the mortgagee is not sufficient in the absence of other evidence to show that undue influence was used in getting the mortgage executed. (*Baker, J. C.*) DAULAT *v* GULAB RAO. **88 I. C. 295 : A. I. R. 1925 Nag. 369.**

——S. 16—*Excessive rate of interest is evidence of undue influence*

Excessive rate of interest can of itself be evidence of the fact that there was undue influence, 1906 A. C. 461, Foll. (*Kinkhede, A. J. C.*) GHASI *v.* GANGABISAN. **83 I. C. 239 : A. I. R. 1925 Nag. 211.**

——S. 16—*Deed—Execution by illiterate person—Creditor must prove good faith.*

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The law casts a veil of protection upon ignorant agriculturists just like Pardanashin ladies when they deal with professional moneylenders and every fact establishing the perfect good faith of the transaction and its consideration must be proved by the creditor who seeks to obtain the benefit of contract. 1 N. L. R. 76 Ref to. (*Kinkhede, A. J. C.*) GHASI *v.* GANGABISAN. **83 I. C. 239 : A. I. R. 1925 Nag. 211.**

——**S. 16**—*Position—Undue influence—Indebtedness—Effect of.*

The fact that one party to a contract stands in the relation of a debtor to the other is not by itself sufficient to prove undue influence. (*Prideaux, A. J. C.*) MAHADEO *v.* KISANLAL. **68 I. C. 597 : A. I. R. 1922 Nag. 219.**

——**S. 16**—*Position to dominate must be first proved—Excessive and usurious interest is no ground for relief.*

In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties, 1924 P. C. 60 ; 28 All. 570 and 31 All. 386 Foll. The mere fact that a mortgage deed provided for excessive and usurious interest and that the security given was ample would not justify a presumption being raised that the contract was induced by undue influence in the absence of proof by the mortgagor that the mortgagee was in a position to dominate his will. Excessive interest in itself is not a ground for relief but it might be evidence of the fact that the debtor must have been in a very helpless condition to accept the terms imposed by the creditors. 42 Cal. 690 Diss., 20 O. C. 319 Foll. (*Simpson and Gokaran Nath Misra, A. J. Cs.*) RUDRA PRATAP SINGH *v.* RAJESHWARI PRASAD. **12 O. L. J. 434 : A. I. R. 1925 Oudh 661.**

——**S. 16**—*Excessive rate—No fraud or undue influence—Contracted rate cannot be cut down.*

A Court has no power to reduce the contract rate of interest solely on the gronnd that it is excessive, apart from any question of undue influence of fraud. (*Dalal, J. C., Gokaran Nath Misra, A. J. C.*) BIBI BATUL *v.* DEBI PRASAD. **12 O. L. J. 379 : 89 I. C. 348 : A. I. R. 1925 Oudh 535.**

——**S. 16**—*Position to dominate the will of the promissor is essential for plea of undue influence.*

A party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will. The mere fact that a man is indebted to another's brother does not put the other in a position to dominate the will of the former. (*Dalal, J. C. and Gokaran Nath Misra, A. J. C.*) BIBI BATUL *v.* DEBI PRASAD **12 O. L. J, 379 : 89 I. C. 348 : A.I.R. 1925 Oudh 535.**

——**S. 16**—*Helplessness of borrower—Caused by lender—Mortgage—High rate of interest.*

Defendant, a pardanashin lady, had her properties attached in execution. She approached the plaintiffs for a loan and one of them promised a loan on the security of the property at 12 per cent. The defendant thereupon obtained an adjournment of the court sale, but the plaintiffs did not advance the loan. Subsequently on the last adjourned date for the sale, the defendant obtained money on mortgage from the plaintiffs at 24 per cent. with 3 monthly rests and containing a condition of foreclosure. *Held*, that the helplessness of the defendant was to a large extent caused by the plaintiffs having promised to lend her at a reasonable interest almost up to the date of sale and thus preventing her from going to other money-lenders that she was forced to consent to these onerous terms by reason of the last day for sale having approached, and that the terms of the mortgage were hard and unconscionable. (*Wazir Hasan and Pullan, A. J. Cs.*) GHANISHAM DAS *v.* MT. MASJIDA NARAIN BIBI. **10 O. & A. L. R. 612 : 11 O. L. J. 523 : 1 O.W.N. 275 : 83 I. C. 1019 : 27 O. C. 374 : A. I. R. 1924 Oudh 423.**

——**S. 16**—*Urgent need of money does not mean position to dominate—Plaintiff must prove dominating position then defendant must prove absence of undue influence.*

Urgent need of money does not place the lender in a position to dominate the will of the borrower. The burden of proving the absence of undue influence can lie on the defendant only in the event ot the plaintiffs discharging the initial onus of satisfying the Court that the defendant was in a position to dominate the will of the plaintiff. (*Wazir Hasan, A. J. C.*) BALBHADDAR PRASAD *v.* DHANPAT DAYAL. **27 O. C. 4 : 10 O. L. J. 447 : 80 I. C. 213 : A. I. R. 1924 Oudh 193.**

——**S. 16**—*High rate of interest—Undue influence—Mortgage.*

Neither prior indebtedness nor a high rate of interest would be sufficient to prove undue influence by the mortgagee on the mortgagor. There is undue influence if the debt constitutes a large amount and the money lender puts pressure on the debtor for its payment. (*Dalal, A. C. J.*) RAZA HUSAIN KHAN *v.* GANESH PRASAD. **10 O. L. J. 390 : 77 I. C. 383 : A. I. R. 1924 Oudh 118 (2).**

——**S. 16**—*Youth or sex—Undue influence—Old man—Gift of an agent.*

Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has fixed his name. The principles of law applicable to a *pardanashin* woman will not be extended to a man on the ground that he happened to be old and not in robust health. But even in a case where an agent was the object of the bounty of his principal there is nothing to prevent this and if an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. (*Daniels and Dalal, A. J. Cs.*) MIRZA YAQUB BEG *v.* MIRZA RASUL BEG. **10 O. L. J. 86 : 74 I. C. 517 : A. I. R. 1923 Oudh 254.**

——**Ss. 16 and 74**—*High rate of interest—Undue influence—Presumption—Mortgage.*

It is not a universal proposition of law that wherever there is a security for the debt a rate of interest over ten per cent. per annum is penal. Where a certain rate of interest is excessive or not is a question which must depend upon the particular circumstances of each case and a rate of interest at 15 per cent. per annum compoundable every year is not sufficient to raise the presumption that undue influence was exerted by the mortgagee on the mortgagor in obtaining the mortgage, 42 C. 690 ; 18 A. L. J. 344 referred to. (*Simpson and Wazir Hasan, A. J. Cs.*) BABU BASANT RAI *v.* LALA KESHO RAM. **9 O.L.J. 612 : 74 I. C. 346 : A.I.R. 1923 Oudh 139.**

——**S. 16**—*High rate of interest—Power of Court to reduce—Undue influence—Costs.*

In cases where there is no proof of undue influence

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a court has no power to reduce the contract rate of interest merely on the ground it is very high. 28 A. 570 P. C.; 20 O. C. 318 : 8 O. L. J. 418; 24 O.C. 313 foll. But the court disallowed costs on the ground that the interest decreed was high. (*Daniels, A. J. C.*) SHEIKH FAZAL AZIM *v.* LALA GIRDHARI LAL. **9 O. L. J. 442 : 69 I. C. 657 : A. I. R. 1923 Oudh 8 (1).**

——S. 16—*Burden of proof.*

Where the alienee was in a position to dominate the will of the alienor and the terms of the deed were hard and unconscionable and unfair advantage was taken of the alienor, held the burden lay on the alienee to show that undue influence was not exercised (*Daniels and Lyle, A. J. Cs.*) KUNJ BEHARI LAL *v.* PT. PRAG NARAIN. **9 O.L.J. 294 : A. I. R. 1922 Oudh 283.**

——S. 16—*Urgency—Undue influence—Evidence of.*

Urgent need of money on the part of the borrower is not by itself sufficient to prove undue influence or to show that the lender was in a position to dominate the will of the borrower 34 C. 150 : 3 O. L. J. 418 Rel. (*Daniels, A. J. C.*) MT. BASHIRAM *v.* BISHAMBHAR NATH. **9 O. L. J 439 : 69 I. C. 667 : A. I. R. 1922 Oudh 268.**

——Ss 16 and 19—*Burden of proof—Pardanashin lady—Deed of gift.*

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. Where a deed of gift by a pardanashin lady is impeached on the ground of undue influence the questions that arise are (1) was the transaction a righteous transaction, *i.e.*, was it a thing which a right-minded person might be required to do? (2) was it an improvident act? (3) was it a matter requiring advice? (4) did the intention of making the fact originate with the donor? Where the relation between the parties is such that one of them is in a position to influence the other and the bargain is with the influencer and in itself unconscionable then, the person in a position to use his dominating power has the burden thrown on him of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. 43 Mad. 546; 18 Cal. 545 ref. (*Dalal and Wazir Hasan, A. J. Cs.*) CHAURAS KUAR *v.* ABHAIRAJ KUAR. **65 I. C 380 : 8 O. L. J. 681 : A. I. R. 1922 Oudh 59.**

——S. 16—*Urgency—Necessity—Need of money.*

The mere fact of the existence of an urgent necessity on the part of the borrower is not sufficient to raise the presumption that undue influence was exercised, 34 C. 150 : 8 O.C. 193 Rel. Nor does the existence of urgent need accompanied by a high rate of interest establish such a presumption. In ordinary circumstances, the more pressing the necessity, the higher the rate of interest, is likely to be, for, the borrowers have no time to make such inquiries as will ensure that they are borrowing at the cheapest rate obtainable. In order to establish undue influence, as defined by S. 16 of the Contract Act it must be shown that the lender took advantage of the necessity and of the position of the borrower and imposed unconscionable terms (*Daniels and Lyle, A. J. Cs.*) MAHRAJ PRAG DIN *v.* BHAGWATI SAHAI. **66 I. C. 687 : 8 O. L. J. 418.**

——S. 16—*Essentials—Plea of—Proof—Need of money—High rate of interest.*

To establish a plea of undue influence it must be shown that plff. (mortgagee) was in a position to dominate the will of the defendants (mortgagors) and secondly that he used that position to obtain an unfair advantage. If the terms of the contract appear on the face of them to be unconscionable or are shown to be so, the second point may be presumed. Urgent need of money on the part of the borrower is not in itself sufficient to place the lender in a position to dominate his will. (*Daniels, J.C. and Dalal, A.J.C.*) SHEIK MAHOMED MUZAFFAR ALI KHAN *v.* BHAWATI PRASAD SINGH. **66 I. C. 642 : 8 O. L. J. 358.**

——S. 16—*Unconscionable bargain—Champertous bargain—Relief against—Power of Court.*

Champertous bargains not having been held in the country contrary to public policy stand on the same footing as any other contract. The fact of a bargain being unconscionable is treated not in itself a sufficient ground for setting it aside but as one of the two elements which when combined will throw the burden of rebutting undue influence on the person seeking to profit by the contract (*Daniels, A. J. C.*) ABDUL KASIM BEG *v.* ESHANUL GHANI. **65 I. C. 129 : 24 O. C. 313.**

——S. 16—*Mere exorbitant rate of interest is no ground of relief in absence of proof of lender having been in a position to dominate the will of the borrower.*

The fact that the borrower is under a pressing necessity for money does not of itself place the lender in a position to dominate the will of the borrower within the meaning of S. 16 of the Contract Act, (34 Cal. 150 Foll.) No relief can be claimed by a borrower unless it is proved by him first that the lender was in a position to dominate his will and secondly that the bargain was unconscionable within the meaning of Cl. 3 of S. 16 of the Contract Act. Unless there is the concurrence of these two elements the borrower cannot be properly granted relief. The mere fact that the rate of interest is exorbitant is not a ground for relief unless it be shown that the lender was in a position to dominate the will of the borrower (*Das and Ross, JJ.*) DEBI BAKCHAND *v.* BARAKATUNISSA. **78 I. C. 565 : A. I. R. 1925 Pat. 326.**

——Ss. 16 and 74—*High rate of interest—Penalty—Relief against.*

The rate of interest, however exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentation such as are mentioned in the Contract Act. A solemn agreement duly and freely entered cannot be allowed to avoid the terms thereof which they agree to with their eyes open and with no restraint upon their freedom of will. Upon this principle, contracts for payments of exorbitant rates of interest, such as 75 per cent. in some cases were upheld and were not allowed to be disturbed; but in those cases the contract were upheld against the party to the contract being allowed to trip up the terms of the contract when he agreed to them voluntarily and with his eyes open. (*Jwala Prasad and Ross, JJ.*) MAHADEO PRASAD *v.* BISSESSAR PRASAD. **2 Pat. 488 : 4 Pat. L. T. 707 : 74 I. C. 695 : A. I. R. 1924 Pat. 71.**

——S. 16—*Gift to children.*

Where a father is old but capable of exercising independent and intelligent judgment, there is no presumption of undue influence which would invalidate a gift by him to his son. (*Jwala Prasad and Adami, JJ.*) MAHOMED YAKUB *v.* ABDUL KUDDUS. **4 Pat. L. T. 17 : 68 I. C. 372 : A. I. R. 1923 Pat. 187.**

——S. 16—*Urgency.*

Because the debtor was in need of money it does not follow that the creditor was in a position to dominate his will. (*Das and Adami, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION, LTD *v.* BHAGWAT BUX

CONTRACT ACT (IX OF 1872), S. 16.

RAI. 1 P. 263 : 69 I. C. 697 : A. I. R. 1922 Pat. 491.

——S. 16 (3)—*Non-contest by the aggrieved co-defendant disentitles others to relief.*

When contesting defendants are not the same as the one whose account was alleged to have been caused by undue influence, and the latter did not at any time avoid the contract nor did he seek to do so, then the former are not competent to avoid the same. (*Newbould and B. B. Ghosh, JJ.*) SHAILESHCHANDRA GUHA *v.* BECHAI GOPE. 40 C. L. J. 67 : 84 I. C. 124 : A. I. R. 1925 Cal. 94.

——S. 17—*Fraud—Plea of—Allegation and proof—Particulars.*

To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true that they were made for the purpose of being acted upon and believes, that they were believed and acted upon and caused the actual damage for which relief is claimed. (*Mears, C. J. and Piggott, J.*) GAURI SHANKER *v.* MANKI KUNWAR. 45 A. 624 : 21 A. L. J. 571 : L. R. 4 A. 464 : 74 I. C. 466 : A. I. R. 1924 All. 17.

——S. 17—*Fraud not carried out—Third person.*

A fraud cannot be pleaded successfully against an innocent person. It is only where the attempted fraud has been wholly or partially carried into effect that the court will give effect to the fraudulent transaction as between transferor and transferee. (*Stuart, J.*) MUSAMMAT MUSTAFAI BIBI *v.* SHAIK MAHOMED SHABBIR. A. I. R. 1923 All. 164.

——S. 17—*Fraud, avoidance of—Contract—Performance—Effect.*

If a contract is obtained by fraud or cheating, it is voidable at the instance of the person defrauded or cheated. But where a performance has been obtained by fraud or cheating, the contract cannot be avoided. (*Kanga, J.*) FAZAL *v.* MANGALDAS. 23 Bom. L. R. 1144 : 66 I. C. 726 : 46 Bom. 489 : A. I. R. 1922 Bom. 303.

——Ss. 17 and 18—*Agreement to withdraw appeal in consideration of a sum less than one actually due in full satisfaction—Subsequently agreement not acted upon—No fraud under S. 17 or 18.*

Where in a suit to set aside an *ex parte* decree on the ground of fraud, it was alleged that there was fraud in connection with the agreement that the defendant would withdraw an appeal which was pending against the plaintiff in consideration of a sum less than what was actually due by the plaintiff to the defendant in full satisfaction of his claim, but the defendant did not withdraw the appeal but prosecuted it and got against plaintiff a decree *ex parte*. *Held*, that it was not a fraud of the description under S. 17 or 18, sufficient for setting aside the *ex parte* decree obtained by the defendant against the plaintiff. (*M. N. Mukerji, J.*) PRITHURAM KALITA *v.* MAYARAM SARMA. 79 I. C. 330 : A. I. R. 1925 Cal. 555.

——S. 17—*Wrong belief—Does not vitiate contract.*

That a party misreads, the acceptance memo and believed it to be something different from what it was, would not vitiate the contract. (*Kemp, A. J. C.*) SODAWATERWALA *v.* VOLKART BROTHERS. A. I. R. 1923 Sind 25.

——S. 18—*Signing of document is not consenting—Document signed by blind man—Contents of document misrepresented—Plea of* non-est factum *can be raised*—Bona fide *purchaser for consideration is not affected.*

Mere signing of a document does not necessarily imply consent. Thus if a blind man, or a man who cannot read, has a written contract falsely read over to him, the reader misreading to such an extent that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise misrepresented to the person signing it, then at any rate if there is no negligence the signature so obtained is of no force. The rule does not apply to a man who can read but who forbears to read the document. But the question is important only when it is raised between two innocent parties, for unless the document is wholly void, as it would be if the plea of *non-est factum* succeeds, an innocent party giving consideration cannot be deprived of an interest which he has taken under the deed ; but where the question arises between a party deceiving and a party deceived it is immaterial whether the deed is void or voidable ; and even if the party deceived falls in his plea of *non-est factum*, that is to say, that there was no consent on his part within the meaning of the term as defined in the Contract Act, it is still open to him to prove that there was a misrepresentation and to ask the Court to relieve him from the consequences of the transaction. (*Das and Ross, JJ.*) HEM SINGH *v.* BHAGAWANT SINGH. 80 I. C. 67 : A. I. R. 1925 Pat. 140.

——Ss. 18 and 17—*Failure to make enquiry—Presumption.*

Failure to make such inquiries as an ordinary prudent man would make, may under certain circumstances be evidence that the person to whom misrepresentation was made was not actually deceived. (*Kennedy, J. C., Raymond and Kemp, A. J. Cs.*) MT. HURI *v.* ROSSEN KHUDABUX. 16 S. L. R. 112 : 71 I. C. 161 : A. I. R. 1923 Sind 5 (F. B.).

——S. 19—*Partnership—Fraud of one partner—Rights of partner defrauded—Liability for loss.*

If a person is induced by fraud to become a partner, the Court will rescind the contract and order the person defrauded to be reimbursed with the amount he might have paid owing to the fraudulent misrepresentation. (*Scott-Smith and Leslie Jones, JJ.*) GOLA SINGH *v.* HAKAM RAI. 3 Lah. L. J. 306 : 3 U. P. L. R. 26 (Lah.) : 60 I. C. 709 . 23 P. W. R. 1921.

——S. 19—*Suit on acknowledgment—Intimidation—Effect of.*

A person is not liable on an acknowledgment, where the money has been paid and his signature to the acknowledgment had been obtained by intimidation. (*Wilberforce, J.*) BISRAM *v.* KEWALRAM. 59 I. C. 781 : 24 P. W. R. 1921.

——Ss 19 and 23—*Licensed vendor of rice—Contract against the terms of license.*

The defendant, under the terms of his license, was forbidden to sell his rice to other wholesale merchants in the port on entry than those who were approved by the Collector of the District. The plaintiff who was not one of those approved dealers and was a wholesale merchant, contracted to purchase rice from defendant and paid the price. The contract was " I have settled price with you at the controller's rate for the rice coming for me by the Viravu Steamers and marked ' N. R.' If perhaps the Madras Director of Supplies should ask the said bags from me and if I should have to give the bags to him, I shall return you the money you have given with one per cent interest." The rates agreed upon were much higher than the controlled rates. *Held*, plaintiff being a merchant in

CONTRACT ACT (IX OF 1872), S 19.

the place must have known that he could not purchase rice except by permission from Government and, therefore, he was probably very willing to pay defendant these higher rates in order to secure the rice. Where there was control of rice imports and rice sales set up in Negapatam as in other places, it is impossible to believe that the plaintiff, who was himself a big rice merchant did not know of these facts. The mention in the contract of the probability of the rice being taken by the Director of Civil Supplies is quite sufficient to put him upon notice of the control and of the various regulations which had been prescribed with reference to the sale of rice. And therefore under Ss. 23 and 24 of the Contract Act, the contract is void and the plaintiff can base no claim upon it. (*Phillips and Devadoss, JJ.*) JANU SAIT *v.* RAMASWAMI NAIDU. **(1923) M. W. N. 335 : 32 M. L. T. 330 : 18 L. W. 564 : A. I. R. 1923 Mad. 626.**

——S. 19—*Dishonest concealment of identity of contracting party—Agent secretly procuring a running contract with his principal—Contract voidable.*

When fraud has to be used in inducing a contract as to the contracting party and his identity, the contract is repudiable by the party defrauded. A contract is voidable where the agent dishonestly conceals the fact that he intends to cause wrongful gain to himself from the principal. (*Schwabe, C. J. and Wallace, J.*) ACHUTHA NAIDU *v.* MESSRS. OAKLEY BOWDEN. **16 L. W. 345 : 69 I. C. 927 : (1922) M. W. N. 576 : 45 M. 1005 : 31 M. L. T. 487 : A. I. R. 1922 Mad. 497 : 43 M. L. J. 444.**

——S. 19—*Finding as to—Misrepresentation—Inducing consent—Second Appeal.*

Illustration (*b*) of S. 19 is not exhaustive of the class of cases which could come under the explanation. A finding on the question whether a misrepresentation induced the consent of the party who relied on it, is one of fact and the High Court will not interfere with it in Second Appeal, though the finding may not be quite satisfactory. (*Sudasiva Aiyar and Spencer, JJ.*) PANNIKATTU RAGHAVA MANNIDIYAN *v.* PARAKKAL PATHAYAPURA VEETIL SIVASANKARA MENON. **13 L. W. 525 : 29 M. L. T. 230 : 62 I. C. 764 : (1921) M. W. N. 340.**

——Ss. 19 and 24—*Pardanashin lady—Deed of gift—Validity.*

It was argued for the appellants donees that the deed of gift of 1908, the execution of which the donor admitted but the knowledge, as to the contents of which she denied, was not void but voidable only and must be treated as valid until set aside in a suit properly framed for that purpose, and that the deed of gift of 1917 in favour of respondents transferred a mere right to sue. *Held*, if the facts alleged by the respondents, that the gift of 1908, was under undue influence and fraud and that, when the donor came to know that she was imposed upon she cancelled it, should be made out, there was never any consent at all to the gift within the meaning of S.19 and although the donor may have permitted her signature to be written on the documents in question she never in fact consented thereto. If the contract were voidable and not void *ab initio* it would have to be set aside before a suit for possession could be maintained and further the donor could not transfer the mere right to sue. (*Miller, C. J. and Mullick, J.*) BAIJNATH SINGH *v.* BRIJRAJ KUAR. **2 P. 52 : A. I. R. 1922 Pat. 514.**

——S. 19 A—*Nature of pleadings in the case of undue influence.*

Undue influence must be pleaded with precision and unless a case is made out in the pleadings, the Court will not investigate it. (*Das and Adami, JJ.*)

CONTRACT ACT (IX OF 1872), S. 23—Acts defeating Statute.

INDARCHAND *v.* BUDIADHAR PANDE. **2 Pat. L. T. 111 : 5 Pat. L. J. 744 : 60 I. C. 282 : 1921 P. H. C. C. 107.**

——S. 20—*Mistake.*

Where both the vendor and vendee of land did not know that the land had already become the subject of proceedings under the Calcutta Improvement Act, and as such might any day come under the Act there is a mistake as to a matter of fact essential to the agreement and the agreement is void. (*Sanderson, C.J. and Richardson, J.*) NURSING DASS KOTHARI *v.* CHUTTOO LALL MISSER. **50 Cal. 615 : 74 I. C. 996 : 27 C. W. N. 639 : A. I.R. 1923 Cal. 641.**

——S. 20—*Scope of—Doctrine of frustration.*

S. 20 deals with the question of common mistake; perhaps the general principle of frustration may govern such cases. (*Sanderson, C. J. and Richardson, J.*) GOURI SHANKAR AGARWALLA *v.* MOITRA. **70 I. C. 379 : 26 C. W. N. 573.**

——Ss. 20 and 22—*Mistake of fact—Mistake must be of both parties to the contract.*

To avoid a contract on the ground of mistake of fact, the mistake must be as between the plff. and the defendant. If one of the parties has nothing to do with the mistake of fact, it cannot be avoided. *Kelly* v *Solari*, 9 M. and W. 54; *Townsend* v. *Crowdy*, 8 C. B. and S. 477, Dist. *Chambers* v. *Mover*, 32 L. J. (C. P.) 30, Foll. (*Robinson, C. J. and Maung Ba, J.*) CHINA AND SOUTHERN BANK LIMITED *v.* TE THOE SENG. **3 Rang. 477.**

——S. 22—*Contract can't be avoided on ground of its becoming more onerous than supposed, owing to increase in duty.*

Under certain circumstances a party may avoid a contract on the ground of mutual mistake and the like. It is not open to a seller to avoid performance of his contract on the plea that the contract had become commercially impossible or was more onerous than what he considered it to be, on account of the duty having been increased. (*Kennedy. J. C. and Rupchand Bilaram, A. J. C.*) FIRM OF DASSO MAL RAMACHAND *v.* FIRM OF YUSAFALI ADAMJI. **A. I. R. 1925 Sind 80.**

——S. 23.

Acts defeating statute.
Acts prohibited by statute.
Bribe to public officers.
Burden of proof.
Champerty and maintenance.
Collateral contract.
Contrary to Public Policy.
Excise contract.
Indemnifying surety.
Marriage contract.
Partial illegality.
Parties to illegal acts.
Prostitution.
Religious purposes.
Stifling prosecution.
Unlawful object.
Miscellaneous.

Acts defeating statute.

——S. 23—*Acts defeating statute—Clause tending to defeat the provisions of the Agra Tenancy Act—Enforceability.*

A sale deed which tends to defeat the provisions of the Agra Tenancy Act on the subject of the creation of exproprietary tenancies is void and unenforceable. Where the defendants, the executant of the deed, expressly stipulated that they would surrender actual possession and enjoyment of the *Sir* and *Khudkasht*

CONTRACT ACT (IX OF 1872), S. 23—Acts defeating Statute.

lands in respect of which they became by statute exproprietary tenants from the date of the execution of the deed of sale, such a stipulation is void as being contrary to public policy. Any stipulation by way of penalty, inserted in a sale deed in order to enforce the fulfilment of such a covenant on the part of the vendor is also void and unenforceable. Where the entire clause stipulating for the surrender of the exproprietary tenure and for a penalty in the event of the failure of the vendor to make such a surrender can be wiped out of the document without interfering in any way with the other stipulations, the latter can be enforced. (*Piggott and Walsh, JJ.*) BITHAL DAS *v.* RAGHUNATH DAS.
L. R. 3 A. 464 (Rev.) : A. I. R 1922 All. 430 (2).

——S. 23—*Acts defeating statute—Contract.*

If the contracts for reconveyance or pre-emption in respect of a land offered the rule against perpetuities by having no time or a remote time fixed for their performance they are against public policy and void. (*Macleod, C. J. and Kanga, J.*) DINKAR RAO *v.* NARAYAN. **24 Bom.L.R. 449 : A. I. R 1922 Bom. 84**

——S. 23—*Acts defeating statute—Waiver.*

Where a statute is not intended only for the benefit of a particular class of persons the advantage cannot be waived. 35 Cal 64 Dist. (*Chatterji and Panton, JJ.*) JOGESHVAR MEHTA *v.* ZAPAL SANTAL.
51 Cal. 224 : 28 C. W. N. 556 : 82 I. C. 848 : A. I. R. 1924 Cal. 638.

——S. 23—*Acts defeating statute—Object to defeat Rent Act makes contract void.*

Where the object of the lease is of such a nature that, if permitted, it would defeat the provisions of the Rent Act, the object is unlawful and the object being unlawful, the lease is void. (*Sanderson, C. J. and Richardson, J.*) SALEH IBRAHIM *v.* MANEKJI COWASJI.
50 Cal. 491 : 75 I. C. 521 : A. I. R. 1924 Cal. 57.

——S. 23—*Acts defeating statute—One of several judgment-debtors getting assignment of decree.*

One of several judgment-debtors got an assignment of the decree in the name of his agent who was to be paid commission for executing the same against the remaining judgment-debtors. The agent realized the moneys but refused to pay them to his principal. In a suit by principal for the money *held* that the suit is not barred by S. 23. (*Abdur Rahim and Oldfield, JJ.*) PALANIAPPA CHETTIAR *v.* CHOCKALINGA CHETTIAR.
44 Mad. 334 : 12 L. W. 609 : (1920) M. W. N. 776 : 60 I. C. 127 : 29 M. L. T. 59 : 39 M. L. J. 692.

——S. 23—*Acts defeating statute—Oral agreement with prohibited object.*

Where the object of the agreement to postpone the registration of the deed of lease is obvious enough from the circumstances and scarcely needs specific admission, and is to conceal the actual *sivai amdani* of the village, and so to reduce the assessment of land revenue. *Held*, this would defeat the provisions of the Registration Act and probably the Transfer of Property Act and the Stamp Act as well; it was fraudulent in that it attempted to conceal the assets of the village and so to reduce the assessment; it involved injury to all other members of the community in that they would get as land revenue less than their proper share of the income of the village ; and it was obviously opposed to public policy. (*Hallifax, A. J. C.*) CHAGAN LAL *v.* KASHIRAM.
A. I. R. 1923 Nag. 76.

——S. 23—*Acts defeating statute—Transfer of occupancy tenure.*

CONTRACT ACT (IX OF 1872), S. 23—Acts prohibited by Statute.

Transfers of occupancy and ordinary tenant rights are voidable in the manner and to the extent provided for by the Tenancy Act. Such transfers are not unlawful within the meaning of S. 23. The transfers are not absolutely void even under the Tenancy Act. (*Mitra, A. J. C.*) SHALIGRAM *v.* NARAYAN.
4 N. L. J. 221.

——S. 23—*Acts defeating statute—Illegal transfers.*

Transfer of items declared untransferable by T. P. Act, S. 6, is void. Thus mortgage of a mere chance of inheritance is void. (*Wazir Hasan and Neave, A. J. Cs.*) DWARKA PRASAD *v.* NASIR AHAMAD.
11 O. L. J. 219 : 78 I. C. 850 : A. I. R. 1925 Oudh 16.

——Ss. 23 and 24—*Acts defeating statute—Contract infringing Abkari law is void.*

The Collector of a certain place gave one of the parties a license empowering him to sell intoxicating drugs. One of the clauses in the license required that a licensee if he took a partner should submit his name for approval to the Collector. Without regard to this provision, the licensee entered into an agreement with another to conduct that business for selling intoxicating drugs as his partner. A dispute arose between the parties and the plaintiff, that is to say, the licensee brought an action in the Court for settling partnership accounts. *Held*, that if the clause referred to in the license were alone relied on it might perhaps be argued that although an infringement of that clause might lead to penalty being inflicted by the Collector on an erring licensee, yet that infringement would not render an agreement of that kind illegal between the plaintiff and the defendant. But the matter went further than that because under the ordinary law of the country no person is allowed to sell drugs except with the permission of the Collector. And a person who entered into a partnership with the licensee in disregard of the terms of the above-mentioned clause in the license was as a matter of fact entering into an agreement which made him a person who undertook himself to sell intoxicating drugs without the permission of the Collector. *Held*, further, that it is not the case that an infringement of an Abkari Act is an infringement of a mere fiscal or administrative regulation but it verges on the commission of an act which is *malum in se*; hence the contract was illegal and unenforceable in a court of law. (*Kennedy, J. C. and Lobo, A. J. C.*) DEWANDAS KIMATMAL *v.* KESOMAL PAHLAJMAL.
18 S. L. R. 16 : 87 I. C. 353 : A. I. R. 1925 Sind 55.

Acts prohibited by Statute.

——S. 23—*Acts prohibited by statute—Contract of pre-emption is not against public policy.*

In view of the fact that in the United Provinces contracts for pre-emption have been enforced for several years the contract of pre-emption cannot be deemed to be against public policy. (Case-law discussed.) (*Lindsay and Sulaiman, JJ.*) BUSDEO RAI *v.* JHAGRU RAI.
46 All. 333 : 22 A. L. J. 265 : L. R. 5 A. (Civ.) 161 : 83 I. C. 390 : A. I. R. 1924 All. 400.

——S. 23—*Acts prohibited by statute—Court should enforce contract as between parties to it notwithstanding statute prohibiting real beneficiaries under the contract from entering into such a contract.*

A Civil Court has no power to decline to enforce a contract which is legal and binding in every respect on the face of it as between the parties, on a mere assumption that in reality it is intended for the benefit of a third person against whom a statutory prohibition

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to enter into such contract exists. (*Moti Sagar, J.*) SHAMS-UD-DIN *v.* ALLAH DAD KHAN.
6 Lah L. J. 351: 82 I. C. 603 : A. I. R 1925 Lah. 65.

——— **S. 23**—*Acts prohibited by statute.*

Purchase by a Judge of a house is not trafficking in an actionable claim. (*Campbell and Moti Sagar, JJ.*) AKHTAR BEG *v.* HAQ NAWAZ.
A. I. R. 1924 Lah. 709.

——— **S. 23**—*Acts prohibited by statute— Written contract challenged on the ground of its being forbidden by law as it operates as a transfer—Such transfer must appear in the terms of the contract.*

When the terms of a contract are reduced to writing and the question is whether the contract is illegal by reason of its seeking to do what is forbidden by law and the contention is that the agreement operates as a transfer, such a transfer should not merely be presumed, but must appear in the document if not in terms at least as necessarily involved. (*Srinivasa Aiyangar, J.*) GANGADARA SAH *v.* SWAMINADHA MUDALI.
22 L. W. 679 : A. I. R. 1926 Mad. 218.

——— **S. 23**—*Acts prohibited by statute—Public policy—Money-lending by Pleader.*

Where a pleader took a mortgage in his wife's name as consideration for pro-notes, *held*, there is a wide distinction between a contract which it may be improper for a pleader to enter into without the sanction of J. C.'s Court and a contract the operation of which is so injurious to the public welfare that even as between the parties who have voluntarily entered into it, the Courts will refuse to enforce it. The question in such cases is really one of professional etiquette rather than of public policy and the contract cannot be regarded as invalid. (*Kanhaiya Lal, J.C.*) RAM SINGH *v.* MT. RAGHUBANSA.
26 O. C. 201 : 9 O. & A. L. R. 29 : 72 I. C. 877 : A. I. R. 1923 Oudh 3.

Bribe to Public Officers.

——— **S. 23**—*Bribe to public officers—Money paid under coercion can be recovered.*

The plaintiff purchased his release by payment to the defendant, a police officer, of the sum of Rs. 75 under coercion, or putting it in other words, that the Rs. 75 were extorted from the plaintiff by placing him under a wrongful arrest, taking him to the Thana and detaining him there. *Held*, that the money can be recovered. (*Sanderson, C. J. and Richardson, J.*) DAKSHINA RANJAN *v.* OMAR CHAND.
50 Cal 992 : 38 C. L. J. 104 : 28 C. W. N. 10 : 75 I. C. 173 : A. I. R. 1924 Cal. 145.

Burden of Proof.

——— **S. 23**—*Burden of proof*—Onus *of proving illegality is on contestor.*

A presumption of lawfulness exists in first instance in favour of every consideration and the law presumes against illegality to begin with. Therefore, the *onus* of establishing that a particular consideration is illegal as a matter of fact is on the person who asserts so. (*Kinkhede, A. J. C.*) NARAYAN *v.* LAXMAN.
80 I C. 885 : A. I. R. 1925 Nag. 111.

——— **S. 23**—*Burden of proof—Suit for money advanced—Defendant pleading illegality of contract—Defendant must clearly plead and prove illegality.*

Where the defendant in an action for recovery of money intends to show that the contract was illegal under S. 23, the burden lies on him to show clearly that it was intended to effect the purpose for which the money was borrowed and it is not sufficient for him to use indefinite expressions when demanding the money from the plaintiff and then to ask the Court to

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presume that the defendant had intended to act fraudulently, illegally or otherwise in contravention of any law. 23 M. 227 (P. C.) Foll. (*Lentaigne, J.*) MAUNG SEIN HTIN *v.* CHEE PAN NGAW.
3 Rang. 275 : A. I. R. 1925 Rang. 275.

Champerty and Maintenance.

——— **S. 23**—*Champerty—Maintenance.*

In India, champerty or maintenance is not illegal. (*Lord Atkinson.*) VATSAVAYA VENKATA SUBHADRAYAMMA *v.* VENKATAPATHI RAJU.
20 L. W. 298 : 26 Bom. L. R. 786 : (1924) M. W. N. 607 : 80 I C. 807 : 35 M.L. T. 210 : L. R. 5 P. C. 147 : 29 C. W. N. 57 : 52 I. A 1 : 48 Mad. 230 : A. I. R. 1924 P. C. 162 : 47 M. L. J. 93 (P. C).

——— **S. 23**—*Champerty—Consideration— Legality of.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself would be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party financed ; or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them. 2 Cal. 233, Foll. Where the reward stipulated was out of all proportion to the actual expenses incurred, *held*, that the agreement was unconscionable and therefore illegal as against public policy. (*Moti Sagar, J.*) KESHO DAS *v.* TULSHI DASS.
89 I. C. 229 : A. I. R. 1926 Lah. 43.

——— **S. 23**—*Champerty—Pleader agreeing to take as fees part of suit property in case of success—Agreement is void.*

An agreement taken by a pleader that he shall be given part of the property in dispute in the suit in which he is engaged must necessarily be contrary to public policy and therefore unlawful under S. 23. 4 C. L. J. 259 and 32 Bom. 449, Appr. (*Macleod, C. J. and Coyajee, J.*) KATHU JAIRAM *v.* VISHVANATH GANESH.
49 Bom. 619 : 27 B. L. R. 682 : 89 I. C. 199 : A. I. R. 1925 Bom. 470.

——— **S. 23**—*Champerty—English Law.*

The English Law of Champerty is not in force in India and fair agreements to share property in litigation with others in consideration of their supplying the funds for carrying on suits are not opposed to public policy and such agreements should receive effect except when extortionate or inequitable, 20 Cal. 145 (P. C.); 15 All. 35 (P. C.) Foll. (*Scott-Smith and Martineau, JJ.*) INDAR SINGH *v.* MUNSHI.
1 Lah. 124 : 56 I. C. 272 : 4 Lah. L. J. 301 :

——— **S. 23**—*Champerty—English and Indian law.*

There is no law in India corresponding to the English Law of Champerty and Maintenance so as to render an agreement which in England would be champertous void in India. (*Prideaux. A. J. C.*) LATIF *v.* PANDHARI.
A. I. R. 1923 Nag. 214.

——— **S. 23**—*Champerty, validity of.*

An agreement to obtain, for a nominal sum, the

CONTRACT ACT (IX OF 1872), S. 23—Champerty and Maintenance.

right to carry on a litigation with a very poor chance of success, is champertous and cannot be given effect to on principles of equity and good conscience. (*Macnair, A. J. C.*) HARI *v.* BALIRAM.
63 I. C. 356 (Nag).

——— —S. 23—*Champerty—Public policy.*

Contract made for the purpose of gambling in litigation should not be given effect to as being champertous and against public policy. (*Macnair, A. J. C.*) ANANDA *v.* LAXMAN. **61 I. C. 884 (Nag.).**

———S. 23—*Champerty—Property transferred for mere costs of litigation to recover it—Transferee's claim to recover the property is not invalid—T. P. Act, S. 6.*

Making over of property by a person who lays a claim to it, to another person who is prepared to pay the costs of the litigation amounts to transfer of the property and does not convey a mere right to sue. No doubt, transferee's claim to recover the property is, in a sense, a case of speculation in litigation but it is not of such a nature as to be rendered invalid in law. (*Pullan, A. J. C.*) INDAR PAL SINGH *v.* RAMESHWAR BAKSH SINGH. **80 I. C. 285 : A. I. R. 1925 Oudh 71.**

———S. 23—*Champerty—Agreement by vendee to finance litigation is not invalid.*

Borrowing money for the purposes of litigation on a promise by the vendee to run a law suit is not unlawful. (*Dalal, A. J. C.*) DURGA *v.* JAMNA PRASAD. **26 O. C. 368 : 77 I. C. 109 : A. I R. 1924 Oudh 234.**

———S. 23—*Champerty and maintenance—Money advanced for purposes of litigation—Enforceability of contract.*

The specific law of maintenance and champerty has not been introduced into India and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered, should not be regarded as *per se* opposed to public policy yet such agreements should be carefully watched and if, extortionate, and unconscionable or made not with the *bona fide* object of assisting for a reasonable recompense a claim believed to be just, but for the purpose of gambling in litigation, or of injuring and oppressing others by encouraging unrighteous suits, should be held contrary to public policy and not enforced. The question is one essentially between the vendor and the vendee. Reasonable compensation for the expenses incurred and the services rendered if substantial may, however, be awarded in such cases. (*Duckworth and Po Han, JJ.*) U PE GYI *v.* MAUNG THEIN SHIN. **1 R. 565 : 2 Bur. L. J. 177 : 77 I. C. 372 : A. I. R. 1924 Rang. 48.**

———S. 23—*Champerty and maintenance—Agreement to supply funds.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered, ought not to be regarded as being *per se* opposed to public policy. No doubt agreements of this character are to be carefully scrutinized and they are not to be tolerated if their motive is improper or if the immediate object is merely to promote gambling in litigation. (*Kennedy, J. C. and Raymond, A. J. C.*) BEGRAJ *v.* ALISHER. **16 S. L. R. 278 : A. I. R. 1923 Sind 50.**

Collateral Contract.

——— —S. 23—*Collateral contract—Public policy.*

Mortgage of occupancy holding will not be recognized even collaterally under T. P. Act, S. 68, if it is illegal. A.I.R. 1922 All. 134, Foll. (*Daniels, J.*) DAYER RAM *v.* THAKURI. **46 All. 622 : 22 A. L. J. 506 : L. R. 5 A. (Cr.) 170 : 83 I. C. 21 : A. I. R. 1924 All. 668 (1).**

CONTRACT ACT (IX OF 1872), S. 23—Indemnifying Surety.

——— —Ss. 23 and 24—*Collateral contract—Punjab Government Tenants Act, S. 8—T. P. Act, S. 43—Agreement by Government tenant to share whatever right may be acquired by him.*

An agreement by a Government tenant with plaintiff to the effect that if the plaintiff helped the former in bringing the land under cultivation the former would give to the plaintiff one-half of whatever rights he might acquire in the land not opposed to public policy. (*Abdul Raoof and Harrison, JJ.*) NATHU *v.* ALLAH DITTA. **3 Lah. 92 : 64 I. C. 18 : 3 Lah. L. J. 505 : A. I. R. 1922 Lah. 287.**

Contrary to Public Policy.

———Ss. 23 and 24—*Contrary to public policy—Pleader and client—Agreement—Consideration unlawful in part—Void.*

Where a client agreed to pay his pleader Rs. 500 in cash, and further undertook to convey him certain immoveable properties, for charitable purposes, in the event of his carrying on the litigation to full success. *Held*, that such an agreement was contrary to public policy and was unlawful under S. 23. That as part of the single consideration for one object was unlawful the whole agreement was void under S. 24. (*Macleod, C. J. and Coyajee, JJ.*) KATHU JAIRAM *v.* VISHWANATH. **49 Bom. 619 : 27 Bom. L. R. 682 : 89 I. C. 199 (2) : A. I. R. 1925 Bom. 470.**

Excise Contract.

———S. 23—*Excise contract.*

An agreement to sub-lease salt pan in contravention of terms of license is not specifically enforceable. (*Macleod, C.J. and Shah, J.*) RABIABIBI *v.* GANGADHAR. **24 Bom. L. R. 111 : 46 Bom. 651 : 66 I. C. 393 : A. I. R. 1922 Bom 78.**

———S. 23—*Excise contract — Partnership by licensee is not illegal in all cases.*

A partnership agreement with a licensee is not necessarily in all cases and under all circumstances illegal. 20 M. L. J. 337, Foll. (*Srinivasa Aiyangar, J.*) GANGADARA SAH *v.* SWAMINADHA MUDALI. **22 L.W. 679 : A. I. R. 1926 Mad. 218.**

——— —S. 23—*Excise contract — Partnership by Abkari licensee according to Mysore Law is not illegal.*

According to the law of the Mysore State a partnership agreement with reference to an Abkari license is not an agreement the consideration or object of which is unlawful. (*Srinivasa Aiyangar, J.*) GANGADARA SAH *v.* SWAMINADHA MUDALI. **22 L. W. 679 : A. I. R. 1926 Mad. 218.**

——— —S. 23—*Excise contract—Lease to unlicensed person for tapping toddy.*

A lease to a person not licensed under the Madras Abkari Act for tapping toddy is not illegal and can be enforced. (*Odgers, J.*) SANTHANARAMA MUDALIAR *v.* SAMI KARUPPU NADAR. **61 I. C. 537 : 14 L. W. 226.**

Indemnifying Surety.

———S. 23—*Indemnifying surety—Accused's agreement with surety giving bail, to indemnify the latter if the bail is forfeited on account of accused's non-appearance, is void.*

Sureties on a bail bond are required in order that the failure of the principal to appear may be at the peril of others besides himself, and the whole object of that provision is defeated if the principal and surety are allowed to relieve the latter of the peril and confine it to the former by an arrangement among themselves. Agreement by an accused with the surety who gives bail to him, that he will indemnify the surety if

CONTRACT ACT (IX OF 1872), S. 23—Marriage Contract.

the bail is forfeited on account of the accused's non-appearance, is void. (*Hallifax, A. J. C.*) JODHRAJ v. BISANLAL. **20 N. L. R. 166 : 82 I. C. 1036 : A. I. R. 1925 Nag. 59.**

Marriage Contract.

——S. 23 — *Marriage contract — Ante-nuptial agreement securing maintenance to wife.*

An ante-nuptial agreement whereby a suitable maintenance is provided for the wife in case the husband ill treated or behaved improperly towards her or capriciously turned her out, is not opposed to S. 23 of the Act and is enforceable. (*Lindsay and Kanhaiya Lal, JJ.*) MUHAMMAD MUIN-UD-DIN v. JAMAL FATIMA **19 A. L. J. 675 : 43 A. 650 : 63 I. C. 883 : L. R. 3 A. 21.**

——Ss. 23 and 26—*Marriage contract—Agreement by Muhammadan husband not to contract second marriage—Validity of.*

An ante-nuptial agreement by a Muhammadan husband not to contract a second marriage is not illegal nor invalid as immoral or opposed to public policy or in restraint of marriage. (*Robinson, J.*) KHALILAL RAHAMAN v. MARIAN BIBI. **10 L. B. R. 194 : 59 I. C. 804 : 13 Bur. L. T. 89.**

Partial Illegality.

——Ss. 23 and 24—*Partial illegality—Document containing legal and illegal engagements—Enforceability.*

One cannot ask the Court to make a new contract in plea of that which is illegal, but where in the same instrument there are distinct engagements, some of which use legal and some illegal, the performance of those which are legal can be enforced. (*Miller, C. J. and Adami, J.*) GRANT v. EKLAL JHA. **1922 P. H. C. C. 177 3 Pat. L. T. 386 : 67 I. C. 49 : A. I. R. 1922 Pat. 171.**

Parties to illegal acts.

——S. 23—*Parties to illegal acts— Judgment-debtor—Transfer of decree—Object to defraud—If can be enforced.*

Where a judgment-debtor got a decree against him assigned to a relation for a small amount with a view to induce other creditors to come to terms, and the understanding was that the transferee was not to sue on the assignment, the agreement is against public policy and the agreement is not enforceable in the court. The doctrine of *in pari delicto* will apply. (*Spencer and Venkatasubba Rao, JJ.*) KALAGARA SRIRAMA RAO v. BAPAYYA. **18 L. W. 453 : 76 I. C. 845 : A. I. R. 1924 Mad. 189.**

——S. 23—*Parties to illegal acts—Contract opposed to public policy - Restrictions on dealing in rice—Contract in contravention of—Enforceability.*

Where in contravention of the rules framed by the Government and of the terms of a license issued to one of them the parties entered into a contract for wholesale supply of rice, the contract is illegal as opposed to public policy and where the plaintiff knew of restrictions on the defendant's capacity to contract, both are *in pari delicto* and the plaintiff cannot recover monies advanced to the defendant on the basis of such contract. (*Phillips and Devadoss, JJ.*) JANU SAIT v. RAMASWAMI NAIDU. **(1923) M. W. N. 335 : 32 M. L. T. (H. C.) 330 : 18 L. W. 564 : 72 I. C. 735 : A. I. R. 1923 Mad. 626.**

——S. 23—*Parties to illegal acts—Plea of illegality—Duty of Court to take notice.*

If the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of

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the Court is himself implicated in the illegality, the Court will not assist him.

Contracts which are expressly prohibited by statute, contracts that are illegal at Common Law as involving the commission of a crime or tort and contracts which are unlawful as being contrary to the public policy are distinguishable from contracts which are not actually unlawful but merely void, either by statute, such as gaming or wagering contracts or on grounds of public policy such as contracts in general restraint of trade. (*Ross, J.*) JHINGUR OJHA v. MEGHNATH PANDY. **72 I. C. 653 : A I. R. 1924 Pat. 321.**

Prostitution.

——S. 23—*Prostitution—Past illegal co-habitation is not illegal consideration.*

Where a Mahommedan transfers certain property in lieu of a dower to a woman who has been his wife but with whom his marriage has been illegal, the consideration is not illegal though it may be void. (*Sulaiman, J.*) MT. MAHTAB-UN-NISSA v. RIFAQAT ULLAH. **L. R. 6 A. (Civ.) 145 : 85 I. C. 459 : A. I. R. 1925 All. 474.**

——S. 23—*Prostitution—Gift in consideration of future illicit intercourse—Gift is void.*

Where the donor made a gift of the property to a husband and wife, on condition that he should have physical enjoyment of the latter, *held*, that the consideration for the transfer, being the future illicit connection, the agreement was obviously both immoral and opposed to public policy within the meaning of S. 23. 28 Mad. 413 Rel. on. (*Sulaiman and Boys, JJ.*) GHUMNA v. RAMCHANDRA RAO. **23 A. L. J. 376 : 47 All. 619 : 88 I. C. 411 : L. R. 6 A. (Civ.) 331 : A. I. R. 1925 All. 437.**

——Ss. 23, 24 and 25—*Prostitution — Past co-habitation.*

An agreement for paying a sum of money in consideration of services being rendered by a kept mistress of the promisor is not enforceable owing to the consideration being illegal. 3 A. 387. Foll. (*Macleod, C. J. and Crump, J.*) HUSSEINALI CASAM MAHOMED v. DINBAI. **25 Bom. L. R. 252 : 86 I. C. 240 (2) : A. I. R 1924 Bom. 135.**

——S. 23—*Prostitution—Transfer of property—Illegal or immoral object—Rights of vendor to recover property*—In pari delicto.

It is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out. A gift of property to a female in respect of past and future cohabitation cannot be set aside at the instance of the donor when the object of the gift has been accomplished. 28 M. 413, Foll. (*Krishnan, J.*) IVATURI BRAHMAYYA LINGAM v. KAMISETTI MALLAMMA. **20 L. W. 323 : (1924) M. W. N. 600 : 82 I. C. 14 : A. I. R. 1924 Mad. 849 : 47 M. L. J. 652.**

——S. 23—*Prostitution—Bond for future adulterous intercourse—Validity.*

Where the consideration for a bond was future adulterous cohabitation, the agreement is void under S. 23, Contract Act, and is not enforceable. The fact that the defendant in a suit to enforce the bond has already received the consideration does not disentitle him to raise the plea, and the Court cannot enforce it. (*Phillips, J.*) KANDASAMI GOUNDEN v. NARAYANASWAMI GOUNDEN. **(1923) M. W N. 566 : 76 I. C. 306 : 19 L. W. 617 : A. I. R. 1924 Mad. 159 : 45 M. L. J. 551.**

——S. 23—*Prostitution—Money advanced—Suit*

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for recovery—Maintainability.

Where it is no part of the contract between the lender and the borrower that the money lent should be utilised for immoral purposes and the lender has no control over the application of the money, he is not prevented from recovering the money on the principle of *Ex turpi cause non oritur actio.* (*Spencer and Devadoss, JJ.*) NATARAJULU NAICKER *v.* SUBRAHMANIAN CHETTIAR. **(1922) M. W. N. 450 : 16 L. W. 705 : 69 I. C 939 : 45 M. 778 : A. I. R. 1922 Mad. 181 : 43 M. L. J. 695.**

———S. 23—*Prostitution—Past illicit cohabitation is not immoral consideration.*

The plaintiff was a widowed sister of the defendant's wife. The defendant took her into his house when she was only 8 or 10 years of age and kept her as his mistress as soon as she attained the age of puberty. With the woman getting older and there being disputes between this woman and her sister, (the defendant's wife), the defendant thought it better to get rid of her and executed an agreement promising to pay her a monthly allowance.

Held, that the consideration for the agreement was not immoral and that the agreement was binding. (*Dalal, J. C.*) KRISHNA NAND *v.* MT SHIVRAJI. **12 O L. J. 510 : 2 O. W. N 503 : 89 I. C. 573 : A. I. R. 1925 Oudh 536.**

Religious Purposes.

———S. 23— *Religious purposes — Offerings — Agreement for division—Public policy.*

An agreement between the panda and pariwal of a temple to participate in the offerings made by pilgrims is not contrary to public policy. (*Kanhaiya Lal and Sulaiman, JJ.*) KALLU TEWARI *v.* RAJINDER PRASAD. **20 A. L. J. 807 : L. R. 3 A. 474 : 70 I. C. 124 : 45 A. 79 : A. I R. 1923 All. 56.**

Stifling Prosecution.

———S. 23--*Stifling prosecution—Consideration—Abandonment of prosecution in non-compoundable case—Document void.*

Where the consideration for a bond is found to be an agreement to abandon the prosecution in a matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate that fraud and that there is no difference in the degree of guilt of the plaintiff (who is asking the court to give him some help) and that of the defendant, the duty of the Court is not to assist either party ; in other words, the duty of the court is to dismiss the claim, because the Court having then in its knowledge that it has before it, two persons equally guilty of fraud, will not assist either of them. Once it is established that the parties are *pari delicto*, the Courts will not assist an illegal transaction in any respect, that is to say, the person who asks the Court to do something will fail. (*Mears, C. J. and Banerji, J.*) VILAYAT HUSAIN *v.* MISRAN. **45 A. 396 : 21 A. L. J. 303 : L. R. 4 A. 418 : 72 I. C. 92 : A.I.R. 1923 All. 504.**

———S. 23, Ill. (h)—*Stifling prosecution—Agreement to drop prosecution for breach of trust on receipt of part of embezzled money in cash and in the shape of a mortgage by accused and his brother—Prosecution dropped by police upon representation by the complainant—No intention on the complainant's part to spoil proceedings if police did not agree—Agreement is not to stifle prosecution.*

Defendant No. 1, whilst on trial for criminal breach of trust in respect of Rs. 30,000 belonging to plaintiff firm, pressed plaintiff firm to drop the prosecution upon receipt of Rs. 15,000 in cash and a mortgage for

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Rs. 5,000 to be executed by Defendant No. 1 and his brother, Defendant No. 2. Plaintiff firm agreed and laid all the facts before the Commissioner of Police, and representing to him that they could not afford to lose the whole sum and that it would be to their advantage to get a portion, asked his permission to withdraw the case against Defendant No. 1. Plaintiff did nothing further. Defendant engaged a solicitor to persuade the Commissioner to allow the case to be withdrawn. Defendants succeeded. In a suit to enforce the mortgage bond, *held*, that the consideration of the agreement was not opposed to public policy and was not illegal within the meaning of S. 23. Plaintiffs were not making "a trade of felony." They did not take the administration of justice out of the hands of the authorities and themselves determine what should be done. *Held*, also, that the consideration of the agreement was valid for the purpose of binding the Defendant No. 2.

Per *Walmsley, J.*—The decision to withdraw the prosecution was the Commissioner's. Plaintiffs did not abate any part of their charge against accused and did not suggest that they would withhold evidence if the case proceeded. They merely laid all facts before the Commissioner and left it to him to decide. As they did not attempt to take the administration of justice into their own hands, their conduct was not against public policy.

Per *Mukerji, J.*—The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must always be applied with caution. At the same time, the doctrine may legitimately be invoked if the real object of the agreement is to interfere with the course of justice. An agreement to stifle a prosecution is distinguishable from the lawful compounding of a compoundable offence. If the offence is not compoundable under the law, a compounding of it must be held to be illegal and opposed to public policy. If the effect of an agreement is to take the administration of the law out of the hands of the Judges, and to put it into the hands of a private individual to determine what is to be done in the particular case, it is opposed to public policy. [*Collins* v. *Blantoon* (1 Sm L. C. 11th Edn. 369) ; *Keir* v. *Leeman* (9 Q.B. 371) ; and *Williams* v. *Bayley* (L. R. 1, H. L. 200) Foll.] On the other hand, there is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute. *Flower* v. *Sadler* (10 Q. B. D. 572) Foll. In the present case the motive for the execution of the bond and the payment of the money was the withdrawal; but there is a good deal of difference between the motive for the act and the consideration or object of the agreement. It is necessary to keep this distinction in view all the more in a case where there is a civil liability already existing which is discharged or remitted by the agreement. A guarantee for the payment to creditors of debts due to them in consideration of the creditors abstaining from taking criminal proceedings is void as being against public policy ; but a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence, and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute, but he must not by stifling a prosecution obtain a guarantee from third parties. 11 Bom. 566 and 28 A. 718, Foll. (*Walmsley and Mukerjee, JJ.*)

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DIVIJENDRA NATH *v.* GOPIRAM.
42 C. L J. 90 : 29 C. W. N. 855 : 89 I. C 200 : A. I. R. 1926 Cal. 59.

——S. 23—*Stifling prosecution—Non-compoundable—Parties not* in pari delicto.

Money paid on illegal contract cannot be recovered in the absence of fraud, duress or undue influence or oppression, where the payment was obtained by the innocent misrepresentation of the other party. The generality of the rule is, however, subject to some qualification *e.g.*, where contracts or transactions are prohibited by law for the sake of protecting one set of men from another set of men, the one from their situation and condition being liable to be oppressed or imposed upon by the other ; there the parties are not *in pari delicto* : and it has therefore been held that the person injured after the transaction is finished and completed, may bring his action and defeat the contract. If one person has paid money to another or has executed deeds in favour of another in pursuance of an illegal agreement, *e.g.*, to stifle as non compoundable criminal prosecution though both parties are *in delicto*, yet they are not *in pari delicto* and the person who has paid the money or has executed the deeds may recover it back in an action for money paid and received or may apply for the setting aside of the deed respectively. (Case-law discussed.) (*C. C. Ghose and Panton, JJ.*) RAM KUMAR DAS *v.* NANDA KUMAR SAHA.
50 C. 639 : 75 I. C. 27 : A. I. R. 1924 Cal. 248.

——S. 23—*Stifling prosecution—Agreement void.*

Where the consideration of the bond is an agreement on the part of the plaintiff to abandon the prosecution of the defendant in a non-compoundable case, the bond is void even if part of the consideration is good in law. (*Newbould and Panton, JJ.*) KARUNA KRISHNA CHAUDHURY *v.* RAKHALDAS MUKERJEE.
68 I. C. 721 : A. I. R. 1923 Cal. 292 (1).

——S. 23—*Stifling criminal prosecution—Bond—Consideration—Debt due and agreement to withdraw prosecution—Legality.*

A bond, the consideration for which was partly a debt due and partly an agreement to withdraw non-compoundable criminal proceedings is not invalid for failure of consideration. (*Stott-Smith, J.*) RAM GOPAL *v.* GANESHI LAL.
85 I. C 610 : A. I. R. 1925 Lah. 364.

——S. 23—*Stifling prosecution—Pronote executed for stifling criminal prosecution is void—Original debt is not provable when suit has proceeded in two Courts entirely on basis of pro-note.*

A pro-note executed for stifling a prosecution is void under section 23. When a plaint is clearly based upon such a pro-note and the suit has run through two Courts on that footing, the case cannot be remanded to see whether plaintiff cannot succeed in proving the original debt. A. I. R. 1924 Oudh 243, Dist. (*Simpson, A. J. C.*) MT. THAKURAIN *v.* TOTARAM.
2 O. W. N. 791 : A. I. R. 1926 Oudh 40.

——S. 23—*Stifling prosecution—Non-compoundable case—Consideration, if can be recovered.*

Where in a case of theft the complainant dropped the proceedings on account of an agreement to pay a sum of money, he cannot sue to recover the same, as the agreement is opposed to public policy. (*Campbell, J.*) NAZAR *v.* MT. PARAS.
73 I. C. 668 : A. I. R. 1923 Lah. 689 (2).

——S. 23—*Stifling prosecution—Pronote executed on plaintiff promising to withdraw a criminal proceeding, is void.*

Defendant passed hundis for debts due to the plaintiff which were dishonoured on which plaintiff instituted a criminal prosecution against one of the defendants for forgery. The parties came to terms and the defendants executed a pronote on the plaintiff promising to withdraw the prosecution. *Held*, that the stifling of the criminal prosecution was the consideration for the pronote and therefore the pronote was void. (*Dalal, J. C.*) BHOLA NATH *v.* RASOOL BAKHSH.
26 O. C. 378 : 77 I. C. 78 : A. I. R. 1924 Oudh 243.

CONTRACT ACT (IX OF 1872), S. 23—Unlawful Object.

——S. 23—*Stifling prosecution—Withdrawal of non compoundable case—Consideration—Validity.*

Where the consideration for a bond is the withdrawal of a non-compoundable case, the bond is unenforceable under S. 23. (*Miller, C. J. and Kulwant Sahay, J.*) BION *v.* SHEOGULAM LAL.
74 I. C. 843 ; A. I. R. 1924 Pat. 305.

Unlawful Object.

——S. 23—*Unlawful object—Consideration if lawful.*

A promissory note executed by a minor under the Court of Wards though void, is not unlawful consideration for a bond executed by his son after his death and after the estate had ceased to be under the Court of Wards. (*Lindsay and Sulaiman, JJ.*) BINDESHRI PRASAD *v.* SARJU SINGH.
21 A. L. J. 446 : L. R. 4 A. 241 : 73 I. C. 458 : A. I. R. 1923 All. 590

——S. 23—*Unlawful object—Agreement by Parsi husband and wife to live separately—Legal—Reference to arbitration as to the quantum of maintenance—Award—Enforceable.*

An agreement by a Parsi husband with his wife that they should live separately is lawful and a reference to arbitration on the question as to the amount of maintenance to be paid to the wife is quite legal. 23 Bom. 279, Foll. (*Macleod C. J. and Fawcett, J.*) ERUCHSHAW DOSABHAI *v.* BAI DINBAI.
45 Bom. 318 : 59 I. C. 189 : 22 Bom. L. R. 1293.

——Ss. 23 and 30—*Unlawful object—Suit to recover money on a hundi drawn to cover betting losses.*

Defendant was an owner of race horses and betted on horse races in considerable amounts. On 20-10-20 he owed a sum of Rs. 8,500 which he had lost to the plaintiff's firm. As he did not pay, the plaintiffs reported him to the Turf Club whose Secretary intimated that he would publish the defendant's name as a defaulter. On 20—12—1920 defendant executed a hundi for Rs. 8,500 in consideration of his name being withdrawn from the defaulters' list and is being permitted to run his horses and make his bets. In a suit by the plaintiffs (who were a firm) to recover the money due under the Hundi, *held*, that the consideration for the Hundi was legal and that it could be enforced. Contracts by way of wagering and gaming are void but not illegal. There is nothing illegal in the agreements made by a partnership firm of bookmakers nor are such agreements prohibited by law. Consequently a suit by such a firm is maintainable. (1908) 2 K. B. 696 ; (1920) 3 K. B. 451. Ref. (*Buckland, J.*) LEICESTER & CO. *v.* MULLICK.
27 C. W. N. 442 : A. I. R. 1923 Cal. 445.

——S. 23—*Unlawful objects—Commissioner appointed by Court—Taking bond from party—Propriety of—Enforceability of bond.*

Where a pleader is appointed by Court in a suit as Commissioner, the work done by the Commissioner is no work done for the party but for the Court. Consequently where a Commissioner who had been appointed at the instance of a party to a suit took a bond from that party for a certain sum of money and

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subsequently sued upon it, *held*, that the consideration for the bond was illegal and that it represented an improper advantage obtained by an officer of Court by abuse of his position as such. Consequently the bond was unenforceable. 4 M. 399 Dist. (*Rankin and Panton, JJ.*) PRAMATHA NATH SEN GUPTA *v.* SHEIKH ABDUL AZIZ MEAH. **27 C. W. N. 430 : 75 I. C. 443 : 37 C. L. J. 406 : A. I. R. 1923 Cal. 436.**

——S. 23—*Unlawful object—Contract to pay brokerage.*

A contract to pay brokerage is neither immoral nor opposed to public policy. (*Chevis, J.*) KISHEN CHAND *v.* KHUDA BAKSH. **60 I. C. 727.**

——S. 23—*Unlawful object—Marriage and adoption agreement—Consideration—When opposed to public policy.*

Agreement to marry or adopt in consideration of something of value is void as opposed to public policy only when they tend to a conflict of interest and duty. (*Madhavan Nair, J.*) PENUMATSA SUBBA RAJU *v.* NARAYAN RAJU. **83 I. C. 56 : A. I. R. 1925 Mad. 321.**

——S. 23—*Unlawful object—Contract opposed to law of public policy—Contract legal according to French Law but not according to law of British India—Enforceability.*

Contract opposed to law on public policy is legal according to French Law but not according to law in British India and hence not enforceable. (*Coutts-Trotter, J.*) VENKATA SUBRAMANIA AIYAR *v.* SYED USUFF. **18 L. W. 314 : (1923) M. W. N. 721 : 74 I. C. 1006 : A. I R. 1923 Mad. 708 : 45 M. L. J. 59.**

——S. 23—*Unlawful object—Alienation of service inam lands.*

Under Sec. 60 of the T.P. Act, a service inam granted to Swasthivachakam Service is inalienable and is opposed to public policy because it is burdened with the performance of a service of a Public nature. (*Schwabe, C. J., Coutts-Trotter and Kumaraswami Sastri, JJ.*) NETI ANJANEYALU *v.* SRI VENUGOPAL RICE MILL. **15 L. W. 513 : 30 M. L. T. 255 : (1922) M. W. N. 307 : 45 M. 620 : 70 I. C. 466 : A. I. R. 1922 Mad. 197 : 42 M. L. J. 477 (F. B.).**

——S. 23—*Unlawful object—Transfer for purpose achieved—If transferor can get relief.*

When a transaction has been entered into for unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of a *Particeps criminus* to relieve him from the legal effect of the transaction. (*Abdur Rahim and Oldfield, JJ.*) DEIVANAYAGA PADAYACHI *v.* MUTHU REDDI **44 Mad. 329 : 12 L. W. 291 : (1920) M. W. N. 547 : 59 I. C. 1003 : 28 M. L. T. 255 : 39 M. L. J. 525.**

——S. 23—*Unlawful object—Advancing money for compensating husband willing to divorce when compensated, is legal.*

Where a creditor advances money with the knowledge that the object of the debtor in taking the loan is to use the money for paying compensation to a husband who is prepared to divorce his wife in the event of his marriage expenses being made good to him the creditor is not disentitled from recovering the amount by suit from the debtor. (*Kinkhede, A. J. C.*) NARAYAN *v.* LAXMAN. **80 I. C. 885 : A. I.R. 1925 Nag. 111.**

——S. 23—*Unlawful object—In absence of proof of absence of custom, contract to compensate husband for expenses of marriage upon his consenting to divorce wife is not void.*

In order to prove that a contract to compensate the husband with the expenses of his marriage upon his assenting to divorce his wife is immoral or opposed to public policy and therefore unlawful, it must be established beyond doubt that there is no custom of compensating the husband. The reason for this is that the custom of re-imbursing the late husband's relations for the expenses of a woman's first marriage is so well-known. (*Kinkhede, A. J. C.*) NARAYAN *v.* LAXMAN. **80 I C. 885 : A. I. R. 1925 Nag. 111.**

——S. 23—*Unlawful object—Documents forming part of one illegal transaction—Enforceability.*

Where a bond is executed as part and parcel of an illegal transaction the bond cannot be enforced. 32 B. 449 Ref. (*Baker, O.J.C.*). KASHI RAM *v.* BARKYA. **7 N. L. J. 13 : 77 I. C. 46 : A. I. R. 1924 Nag. 101.**

Miscellaneous.

——S. 23—*Compromise—Husband and wife—Complaint of non-compoundable offence pending—Effect.*

While a complaint under S. 363, I. P. C. was pending against a husband, a compromise was arrived at through the advice of panchayatdars by which the husbad agreed to pay maintenance at a certain rate to the wife in case he ill treated her and made it uncomfortable for her. The dismissal of the complaint was not made a condition of the compromise, but the complaint was a few days later ordered to be filed. *Held*, the compromise was not bad in law under S. 23, Contract Act. (*Abdul Raoof, J.*) FEROZE DIN *v.* MT. GHULAM FATIMA. **89 I. C. 434.**

——S. 23—*Insurance Policy.*

A Clause in an insurance policy cutting down limitation period for bringing suit for rejection of claim is enforceable. (*Greaves and Buckland, JJ.*) GIRIDHARILAL HANUMAN BUX *v.* EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO., LTD. **27 C. W. N. 955 : A. I. R. 1924 Cal. 186.**

——S. 23—*Public policy.*

It is a paramount public policy that courts are not lightly to interfere with freedom of contract. (*Wazir Hasan and Pullan, A. J. Cs.*) BANSI DHAR *v.* AJUDHIA PRASAD. **27 O. C. 175 : 82 I. C. 333 : 11 O. L. J. 619 : A. I. R. 1925 Oudh. 120.**

——Ss. 23, 26 and 27—*If exhaustive—Agreement to associate for life with one body of men and not another—If contrary to public policy.*

Ss. 23, 26 and 27 of the Contract Act cannot be regarded as exhausting all the instances of agreements which are contrary to public policy. An agreement by which a man binds himself to associate for the whole of his life only with a certain body of his fellow-men and to abstain completely from associating with another body is one which ought not to be enforced and for the breach of which no penalty can be claimed. (*Neave, A. J. C.*) LAL KHAN *v.* KIMMAN KHAN. **10 O. & A. L. R. 111 : 27 O. C. 100 : 11 O. L. J. 408 : A. I. R. 1924 Oudh 404 (2).**

——S. 23—(Per *Lentaigne, J.*) *If illegal contract is totally unperformed, party can recover money paid thereunder.*

If an illegal contract has not been carried out and remains totally unperformed, it is open to a party to repudiate it and on the avoidance of the contract to recover any money deposited thereunder. Even if the party institutes a suit in order to enforce the illegal transaction, he will not thereby lose his right to repudiate the transaction and to avoid it, at least in a subsequent suit, or, if he has elected to do so, by an application to the Court to be allowed to amend in the same suit. For example, if a party has a doubt as to the legality or otherwise of a contract, he may

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request the Court to decide on that question and to decide on the alternative questions as to what relief he should get, that is, to give him relief on the affirmation of the contract if the Court finds the contract to be valid, or in the alternative to give relief on the basis of the invalidity of the contract if the Court holds that the contract is invalid.

Per *Carr, J.*—If the plaintiff seeks to enforce the illegal contract, he cannot recover, at any rate in the same suit, the moneys paid by him thereunder. (*Lentaigne and Carr, JJ.*) HIRJEE DEORAJ AND CO. *v.* HAUNG NYUN SHEIN. **2 Rang. 414 : 84 I. C. 295 : A.I.R. 1925 Rang. 49 (1).**

——— S. 24—*Mortgage of occupancy holding and other lands for single consideration—Mortgagee in possession of occupancy holding suing for possession of other land—Suit should fail as otherwise result would be to enforce entire contract part of which is illegal.*

Where a mortgage was made of occupancy holdings, along with certain other properties which were legally transferable, for a single consideration and the mortgagee was given, and he admittedly retained possession, of the occupancy lands which were not transferable and he sued to recover possession of the remaining lands, *Held* : that if the suit were to be decreed, the result substantially would be to enforce the entire mortgage contract, part of which was illegal and that therefore he was not entitled to seek any relief in Court at all. 39 All. 539 Dist. (*Sulaiman and Daniels, JJ.*) SITAL RAI *v.* RAM KHELAWAN. **88 I. C. 431 : 23 A. L. J. 521 : A. I. R. 1925 All. 543.**

——— S. 24—*Out and out transfer—S. 24 does not apply.*

S. 24 of the Contract Act would not by implication apply to cases of an out and out transfer. (*Sulaiman, J.*) MT. MAHTAB-UN NISSA *v.* RIFAQAT ULLAH. **85 I. C. 459 : L. R. 6 A. (Civ.) 145 : A. I. R. 1925 All. 474.**

——— S. 24—*Mortgage void—Personal covenant is void.*

Where a usufructuary mortgage of an occupancy holding is void as personal covenant to that effect is also void and unenforceable. (*Lindsay and Stuart, JJ.*) HAR PRASAD *v.* SHEO GOVIND. **20 A. L. J. 318 : 44 A. 486 : 67 I. C. 793 : A. I. R. 1922 All. 134.**

——— S. 24—*Agreement by client to pay to pleader a sum of money and part of suit property as "inam for religious purposes."—Agreement is inseparable and whole is void.*

A client executed a bond in favour of his pleaders as follows : "I have this day given you a vakilpatra in the above suit and agree to give you both Rs. 500 as inam or reward in case you obtain full success for me in this or in the High Court, and would further give over to you possession of survey No. 58 for religious or charitable purposes." Survey No. 58 was part of the property in dispute in the suit. *Held* : that the agreement to give land to the pleaders though for religious or charitable purposes was void, and as it cannot be separated from the agreement to give them Rs. 500 for their services in the case as pleaders the whole agreement is void under S. 24. (*Macleod C. J. and Coyajee, J.*) KATHU JAIRAM *v.* VISHVANATH GANESH. **49 Bom. 619: 27 B. L. R. 682 : 89 I. C. 199 : A. I. R. 1925 Bom. 470.**

——— S. 24—*Agreement to give in adoption—Annuity as consideration.*

The promise to pay an annuity as consideration for the agreement to give a boy in adoption invalidates the agreement. (*Macleod, C. J. and Coyajee, J.*)

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NARAYAN LAXMAN *v.* GOPALRAO TRIMBAK. **24 Bom. L. R. 414 : 46 Bom. 908 : A. I. R. 1922 Bom. 382.**

——— S. 24—*Promissory note purporting to be by two persons—One executant forging signature of the other—Plaintiff consenting—No intention to cheat—Plaintiff can succeed against real executant.*

Where a promissory note purported to be executed by two persons but it was found that the signature of one of them had been forged by the other executant and the plaintiff had concurred in this, *Held* : that if the intention of the parties was not to cheat the person whose signature was forged, the contract was not wholly void and the plaintiff could succeed as against the party who had really executed the promissory note. (*Devadoss, J.*) MADAM PILLAI *v.* ATHINARAYANA PILLAI. **87 I. C. 48 : 21 L. W. 532 : A. I. R. 1925 Mad. 929.**

——— S. 24—*Void part separable from legal part—Legal part is not invalidated.*

Where the legal and illegal objects, or the legal and illegal transactions, cannot be separated, the whole transaction is void; but it is otherwise where the legal and illegal portions can be separated. Where the sale of lands and surrender of occupancy rights therein were both contended to be void as being one transaction and intended to defeat the Tenancy Law. *Held* : that the surrender was separable from the sale and the former alone was void. 39 All. 173 (P. C.) Foll. (*Baker, J. C. and Prideaux, A. J. C.*) BHAGWAT *v.* ANUNDRAO. **86 I. C. 515 : A.I.R. 1925 Nag. 302.**

——— S. 24—*Part of the consideration illegal—Effect.*

Under S. 24 if any part of a single consideration for one or more objects or any one or any part of several considerations for a single object is unlawful the agreement is void. This applies where the whole contract is one and the legal part cannot be separated from the illegal. Where the legal and illegal parts can be separated, the legal part can be enforced. (*Baker, J. C.*) CHOONI LAL *v.* NANI SINGH. **A. I. R. 1924 Nag. 284.**

——— S. 24—*Champertous agreement not void.*

Plaintiff who married her mother's servant made an agreement with a certain person that if she succeeded in her suit for her mother's property he would get half the property and if she failed he was to bear the costs. *Held* the suit was not a speculative one at all. The plaintiff respondent had a natural right to succeed to her mother's estate and the burden of proving that she had lost the right by her marriage with the servant was on the defendants appellants. (*Mc Coll, A. J. C.*) MAUNG NYI MAUNG *v.* MANU. **4 U. B. R. 104 : 70 I. C. 904 : 1 Bur. L. J. 78 : A. I. R. 1922 U. B. 12.**

——— S. 24— *Scope.*

If the various promises of the two parties are quite interdependent, the fact that one large part of the contract is void must vitiate the whole. (*Brown, A. J. C.*) MOHAMED *v.* ONA MAHOMED EBRAHIM. **70 I. C. 881 : 1 Bur. L. J. 72 : 4 U. B. R. 110 : A. I. R. 1922 U. B. 9 (2).**

——— S. 25—*Surrender—No consideration except freedom from liability to pay rent, effect of.*

Freedom from liability to pay rent is a sufficient consideration for a surrender. Absence of any other consideration does not render the surrender void under Section 25 of the Contract Act. (*Fremantle, S. M.*) MANPAL *v.* MAWASI RAM. **L. R. 6 All. 224 (Rev.).**

——— S. 25—*Valid contract—Writing—Signed by agent—Pleader if authorised to admit liability.*

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In order that a valid contract may be constituted under S. 25 (3) of the Contract Act it is necessary that the statement should be in writing and should be signed by the person charged therewith or by the agent generally or specially authorized. Where there was no proof at all that a pleader who made the statement relied upon as a contract had any general or special authority from the defendant which would entitle him to enter into a contract on their behalf to pay a time-barred debt, and the pleader's authority was confined to conduct of the case, his statement that if during the pendency of the suit the plaintiff obtained a succession certificate, the defendants were ready to submit to a decree for the amount claimed together with interest for six months did not constitute an unqualified admission of liability within the meaning of S. 25 of the Contract Act. Nor could the court treat the statement as showing in any way that the pleader who made it had authority to bind the defendant by a fresh contract under section 25 of the Contract Act. (*Lindsay and Sulaiman, JJ.*) BANSIDHAR *v.* BABU LAL.
21 A. L. J. 713 : 75 I. C. 309 : L. R. 4 A. (Civ.) 473 : A. I. R. 1924 All. 12.

——**S. 25**—*Adequacy of consideration.*

Adequacy of consideration is not under explanation 2 to S. 25, Contract Act a matter to be taken into consideration in deciding whether an agreement is valid. (*Lindsay and Sulaiman, JJ.*) BINDESHRI PRASAD *v.* SARJU SINGH. **45 A. 590 : 21 A. L. J. 446 : L. R. 4 A. 241 : 73 I. C. 458 : A. I. R. 1923 All. 590.**

——**S. 25**—*Consideration—Forbearance to sue.*

The forbearance to enforce in a Court of law a claim *bona fide* believed to exist and to be enforceable, would be a good consideration for a contract. (*Gokul Prasad and Stuart, JJ.*) GULAB CHAND *v.* KAMAL SINGH. **44 All. 424 : 20 A. L. J. 285 : 4 U. P. L. R. (A) 154 : 67 I. C. 4 : L R. 3 A. 242 : A. I. R. 1922 All. 260.**

——**S. 25**—Post-obit *bond requires unconditional and certain terms.*

The first requisite of a bond is that the obligor must be bound in a certain sum of money. But if the payment depends on a contingency as in the event of obligor surviving a relative from whom he has expectations, or if the payment is certain but the terms of payment uncertain as in the case of a bond conditioned for payment of a certain sum on the death of the obligor, the bond is called a Post obit-bond. (*Macleod, C. J. and Crump, J.*) HUSSEIN ALI *v.* DINBAI. **25 Bom. L. R. 252 : A. I. R. 1924 Bom. 135.**

——**S. 25**—Mablakhandi—*If a promise to pay.*

Mablakhandi is not a promise to pay under S. 25, Contract Act, so as to revive any debt which was barred at the date of it. (*Rankin and Mukherjee, JJ.*) KSHITISH CHANDRA DAS *v.* UMED MANDAL. **78 I. C. 139 : A. I. R. 1925 Cal. 338.**

——**S. 25**—*Oral settlement—Barred debt promised to be paid—Promise is not binding.*

An oral settlement of account under which a barred debt is promised to be paid is not binding on the promisor. (*Srinivasa Iyengar, J.*) ASIRVADA NADAN *v.* VEDAMUTHU NADAN. **86 I. C. 942 (2) : A. I. R. 1925 Mad. 1147.**

——**S. 25**—*Promissory note—Barred debts.*

When a promissory note is executed in respect of transactions which have gone on for some years and the items consist of advances which would be barred and of subsequent dealings, the settlement cannot be impeached as to the items which would but for the settlement, be barred so long as there is no fraud or mistake. (*Kumaraswami Sastri, Krishnan and Odgers, JJ.*) P. RAMA PATTER *v.* A VISVANATHA PATTER. **15 L. W. 130 : (1922) M. W. N. 27: 30 M. L. T. 209: 45 Mad. 345: 66 I. C. 155 : A. I. R. 1922 Mad 23 : 41 M. L. J. 567.**

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——**S. 25**—*Acknowledgment—Can form basis of suit.*

A suit is maintainable on the basis of a *Ruju* or acknowledgment as every acknowledgment implies a promise to pay. (*Kinkhede, A. J. C.*) SITARAM *v.* NANDARAM. **78 I. C. 234 : A. I R. 1925 Nag. 9.**

——**S. 25**—*Compromise of doubtful right is enough basis for agreement—Contract Act, S. 25.*

If an agreement is entered into upon a supposition of a right or of a doubtful right it shall be binding. The compromise of a doubtful right is a sufficient foundation for an agreement. 1 Atk. 2 Foll. 5 H. L. 85 Dist. (*Dawson Miller, C. J. Mullick and Foster, JJ.*) HARIHAR PRASAD *v.* KESHEO PRASAD. **5 Pat. L. T. Supp. 1: A. I. R. 1925 Pat. 68.**

——**S. 25**—*Debt due by joint Hindu family—Division into three parts—Acknowledgment by members, Lim. Act, S. 19—Distinction between.*

There is a difference between acknowledgment sufficient for Lim. Act, S. 19 and Contract Act, S. 25. In order to create a new contract as required by the latter, the promise to pay must be expressed. A debt due by a joint Hindu family was divided into three equal parts and each of three branches acknowledged severally to pay each portion. *Held*, a new contract might be implied from the terms of the acknowledgment, apart from the terms of S. 25. (*Das and Ross, JJ.*) RAM BAHADUR SINGH *v.* DAMODAR PRASAD SINGH. **6 Pat.L J. 121 : 60 I.C. 514 : 2 Pat. L. T. 308.**

——**S. 25**—*Good consideration.*

Relinquishment by a party of his counter-claims is a good consideration for the withdrawal by the plaintiff of his claim. (*Raymond, A. J. C.*) FIRM MAYADAS LUKHMICHAND *v.* FIRM BHAGWANDAS PARMANAND. **76 I. C. 359: A. I. R. 1924 Sind 41.**

——**Ss. 25 (2) and 11**—*Minor—Benefit done to—Promise to pay after majority.*

An agreement by a person to compensate a promisee who had already done something to him even while he was a minor, falls within S. 25 (2) and is binding on the promiser. (*Abdul Raoof and Moti Sagar, JJ.*) RAM RATTAN *v.* BASANT RAI. **2 Lah. 263: 64 I. C. 121 : 3 Lah. L. J. 563.**

——**S. 25 (2)**—*Voluntary promise.*

The plaints only alleged that according to a village custom subscriptions are realised from persons of the caste of the plaintiff and defendants for conducting a festival, and it was alleged that it was in consequence of any prior agreement by these defendants that plaintiff incurred obligations. And it was also neither alleged nor proved that there was any promise by defendants to compensate plaintiff for something which plaintiff had already voluntarily done for the petitioners. *Held*, the promise by the defendants to pay was purely voluntary, for no legal consideration, and payment is not therefore enforceable in law as payment of money due under a contract. (*Wallace, J.*) KOSALAI RAMU PILLAI *v.* PULASTHIAM PILLAI. **(1923) M. W. N. 86: 17 L. W. 321 : 72 I. C. 774 : A. I. R. 1923 Mad. 330.**

——**S. 25 (3)**—*Debt barred by time—Acknowledgment deed—Hindu Law.*

According to the Hindu Law as well as under S. 25 (3) Contract Act, the execution of bonds by the father in exchange of time-barred debts is binding on the son. (*Gokul Prasad and Stuart, JJ.*) RAM KISHEN RAI *v.* CHHEDI RAI. **44 A. 628: 68 I. C. 235 : 20 A. L. J. 577 : A. I. R. 1922 All. 402.**

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———S. 25 (3)—*Accounts—Barred items—Balance promised to be paid—Signature—Effect of.*

The words "The balance of the old account has to be paid" entered at the commencement of a fresh account, opened after the previous one has been checked and signed, constitute an agreement within the meaning of S. 25 (3) of the Contract Act and is enforceable. (*Ryves and Gokul Prasad, JJ.*) BENAYAK PRASAD PANDEY *v.* BISHEN DUTT PATHAK. **L. R. 3 A. 308.**

———S. 25 (3)—*Scope of—If includes judgment debt.*

A judgment debt comes under the meaning of S. 25 (3). (*Newbould and Rankin, JJ.*) IBRAHIM MULLICK *v.* LALIT MOHAN ROY. **50 Cal. 974 : 28 C. W. N. 322: 79 I. C. 489 : A. I. R. 1924 Ca . 388.**

———S. 25 (3)—*Written promise to pay a barred debt under—Suit on.*

A suit on a written promise to pay a barred debt under S. 25 (3) of the Contract Act lies as it is a contract. 23 Mad. 94 foll. (*Abdul Raoof and Campbell, JJ.*) DAVID SUTHERLAND CLARK *v.* ROSE GRIMSHAW. **73 I. C. 652 : A. I. R. 1923 Lah. 481.**

———S. 25 (3)—*Joint Hindu family—Debt by Manager—Promissory note by junior members—Validity.*

A debt contracted by the Manager of a joint Hindu family for a joint family purpose is a debt due by the other members of the family within the meaning of S. 25 (3) of the Act and a promissory note executed by the latter, undertaking to pay such debt after it had become barred, is valid and binding on them. (*Kumaraswami Sastri, Krishnan, and Odgers, JJ. dissenting.*) RAMA PATTAR *v.* VISWANATHA PATTAR. **66 I. C 155: 45 Mad. 345: 15 L. W. 130 : (1922) M. W. N. 27: 30 M. L. T. 209 : A. I. R. 1922 Mad. 23 : 41 M. L. J. 567.**

———S. 25 (3)—*Debt of Guardian—Minor agreeing to pay.*

S. 25 (3) applies to the case of a minor executing a promise in writing to pay a debt of his guardian. (*Batten, A. J. C.*) NANDRAM *v.* RANCHHODDAS. **5 N. L. J. 178: 65 I. C. 716 : A. I. R. 1922 Nag. 250.**

———S. 27—'*Good will*'—*Sale of—Construction of documents.*

Under an agreement called the *kisti bandi* bond, executed by an owner of a ferry boat on a river, in favour of another person having a ferry boat on the same river, the former purported to buy from the latter the goodwill of his trade in plying the ferry boats and every description of interest and ownership which the latter had acquired in several river landing places for plying the boats as well as the settlement obtained for the collection of tolls. The price was to be paid by instalments and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the buyer of the goodwill. In addition to the transfer of good will, there was an agreement or *kobala* executed about the same debt by the person selling the goodwill in favour of the buyer purporting to transfer the rights of the former, in the landing places and settlements and in the goodwills of the business and plying the ferry boats, in consideration of the price promised to be paid under the first document. The transferee was to be able to enjoy and possess these rights by exercising whatever rights the transferor had in them and the latter undertook to close the business of plying further ferry-boats and promised to return the whole amount, if he ever carried on the business again. The buyer made a default in paying instalments and a suit was brought by the seller. The other side contended that the agreement was in restraint of trade and therefore was void. *Held* that as the documents showed it amounted to a sale of good will and therefore was valid. (*Viscount Haldane.*) CHANDRA KANTA DAS *v.* SARASULLAH MULLICK. **26 C. W. N. 345 : 3 U. P. L. R. (P. C.) 92 : 48 C. 1030 : 24 Bom. L. R. 602 : 48 I. A. 508 : 30 M. L. T. 115 · 65 I. C. 271 : A. I. R. 1922 P. C. 167 : 47 M. L. J. 657 (P.C.).**

CONTRACT ACT (IX OF 1872), S. 28.

———S. 27—*Contract in restraint of trade is void.*

Contracts in restraint of trade whether partial or total is void under S. 27 of the Contract Act. Where the plaintiffs entered into an agreement with the defendant to the effect that the former would sell beef for 14 days in the month and the latter for 16 days and that each party should sell goat's flesh for 15 days only in the month. *Held*, the contract is void and unenforceable under S. 27 of the Contract Act. (*Brown, A. J. C.*) MOHAMMED *v.* ONA MOHAMED. **4 U. B. R. 110 : 70 I. C. 881 : 1 Bur. L. J. 72 : A. I. R 1922 U. B. 9 (2).**

———S. 27—*Contract of personal service—Provision against service elsewhere.*

Where a contract of personal service for a specified period contains a stipulation prohibiting the servant from serving a third party during that period, the stipulation is valid and does not offend S. 27 of the Contract Act. (*Robirson, C. J. and Heald, J.*) INDO-BURMA OIL FIELDS, LTD. *v.* BURMA OIL COMPANY, LTD. **64 I. C. 794 : 11 L. B. R. 26.**

———S. 28—*Insurance policy.*

Clause cutting down period of limitation for suit is enforceable. (*Greaves and Buckland, JJ.*) GIRIDHARILAL HANUMANBUX *v* EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO., LTD. **27 C.W N. 955 : A. I. R. 1924 Cal. 186.**

———S. 28—*Where two Courts have jurisdiction to try a suit, an agreement restraining a party to sue the other in one of them particularly, is not in absolute restraint of legal proceedings and must be given effect to.*

Where there are two Courts both of which would normally have jurisdiction to try the suit, the parties may be allowed to agree among themselves that a suit should be brought in one of those Courts and not in the other. Such an agreement does not contravene the provision of S. 28 because the plaintiff is not thereby restricted absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary tribunals, as the restriction is only partial ; 1 Agra. 129, Dist. (*Madhavan Nair, J.*) ACHRAPLAL KESAVLAL *v.* VIJAYAM & CO. **22 L. W. 70 : 90 I. C. 1019 : A. I. R. 1925 Mad. 1145 : 49 M. L. J. 189.**

———S. 28—*Contract by plaintiffs to purchase—Readiness to deliver goods intimated to plaintiffs by defendants though defendants were not in actual possession of the goods—Plaintiffs keeping silent—Plaintiffs cannot recover advance money, where defendant's claim for damages exceeds the advance.*

Plaintiffs agreed to purchase 50 bales from defendants. Defendants offered to deliver the goods to plaintiffs though they had not taken delivery from their own vendors. Plaintiffs did not reply though repeatedly asked to take delivery. In a suit by plaintiffs to recover the advance paid, *Held*, that by refusing to accept the goods plaintiff committed a breach of contract and that the defendants rightly treated the contract as at an end. The fact that the defendants had not taken actual delivery of the bales of yarn from their own sellers did not vitiate their tender to the plaintiffs, and the plaintiffs were not

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entitled to any refund of the advance, because, defendants' claim for damages exceeded the advance. Appeal No. 150 of 1922. Foll. 19 L.W. 654 Diss. from. (*Phillips and Krishnan, JJ.*) L. N. LAKSHMANA AIYAR *v.* RAMALINGA MUDALIAR.

A. I. R. 1925 Mad. 888 : 48 M. L. J. 522.

——S. 28—*Restraint on execution is void.*

An agreement between a transferor and a transferee that the transferee shall not in any way enforce his rights under the transfer. *e. g.*, execute or intervene in execution is void under S. 28 of the Contract Act. (*Wallis, C.J., Spencer and Kumaraswami Sastri, JJ.*) MUTHIAH CHETTIAR *v.* GOVINDDOSS KRISHNADOSS. **44 Mad. 919 : 14 L. W. 287 : 69 I. C. 337 : (1921) M. W. N. 6.9 41 M. L. J. 316 (F. B.).**

——S. 28—*Agreement—Promise not to prosecute—Consideration—Validity.*

Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not enforceable by law, but this limitation to freedom of contract should only be enforced, where it is quite clear that the considera tion for the agreement was such an illegal promise. When on a mere threat to prosecute or an apprehension that prosecution would take place, an agreement has been come to, this threat or apppprehension is not sufficient to vitiate the agreement. The distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing which is discharged or remitted by the agreement". (*Das and Adami, JJ.*) ADHIKANDA *v.* JOGI SAHU. **1 P. 164 : A. I. R. 1922 Pat. 502.**

——S. 28—*Insurance policy—Condition limiting period of time for enforcing claim—Validity of.*

A clause in a policy of insurance that if a claim is made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under the policy would be forfeited, is not void under S. 28, Contract Act. S. 28 applies only to the loss of remedy, while the condition in the policy refers to the extinction of a right. (*Robinson, C. J. and Maung Ba, J.*) RAINEY *v.* BURMA FIRE AND MARINE INSURANCE COY., LTD **3 Rang. 383 : 3 Bur. L.J. 104 · 82 I. C. 814 : A.I.R. 1924 Rang. 351.**

——S. 29—*If enforceable against representatives of parties—No time fixed for performance—Effect.*

A compromise decree was passed in a partition suit under which a pre-emption right was reserved in favour of one party in case of sale by the other. The latter died and his heir sold the estate, whereupon a right of pre-emption was claimed. *Held*, by *Lindsay, J.* the contract was enforceable against purchasers with notice. (*Lindsay and Sulaiman, JJ.*) MIRZA MAHOMED JAN *v.* SHAIKH FAZALUDDIN.

46 All. 514 : 22 A. L. J. 400 : L. R. 5 A. (Civ.) 761 : A. I. R. 1924 All. 657.

——S. 29—*Document capable of two meanings.*

Where a document is capable of two contrary interpretations and practically incapable of interpretation at all, and therefore it is not possible for the Court to allow the document to be enforced, it is void for uncertainty within S. 29. (*Findlay, A. J. C.*) GOPAL RAO *v.* GANA. **63 I. C. 48 : 4 N. L. J 67.**

——S. 30—*Plaintiff alleging agency—Clear proof that plaintiff acted as agent between the defendant and third parties is necessary.*

The plaintiff sued the defendant on a balance of account on a series of transactions of the sale and purchase alleged to have been effected by the defendant through the plaintiff. The transactions were admitted wagering transactions. *Held*, that before the applicability of the rule that though wagering transactions are void in themselves the collateral liabilities between the plaintiff as agent and defendant as principal are unaffected has to be considered, it must be clear that the plaintiff was not acting for himself as principal and with the defendant as the other principal but was acting merely as agent between the defendant as one principal and the plaintiff as agent and one or more other principals, as third parties and that where the plaintiff had failed to establish a ingle instance of dealings with any other party than the defendant in regard to the transactions of the subject-matter of the suit, it followed that the plaintiff must himself have been a principal and not an agent. (*Boys, J.*) FIRM HIRALAL UMRAO SINGH *v* FIRM SRI RAM BRIJ MOHAN LAL. **L. R. 5 A. Civ. 642 : 86 I. C. 656 : A. I. R. 1925 All. 102.**

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——S. 30—*Collateral contracts—If enforceable.*

Even in the case of wagering contracts, S. 30 of the Contract Act does not prevent a person who is employed as agent in connection with them, from recovering sums due to him by his principal. (*Lindsay and Daniels, JJ.*) BIDHI CHAND *v.* KACHHU MAL.

45 A. 503 : 73 I. C. 477 : A. I. R. 1923 All. 558.

——S. 30—*Wager—Speculative contract—Contract to supply goods at a future date.*

A contract for the supply of goods at a future date at fixed prices, though speculative, is not a wager and a suit for damages for its breach would be maintainable. 42 B. 373 Ref. (*Ryves and Daniels, JJ.*) FIRM OF HAZARI LAL *v.* FIRM OF KESHO DAS.

L. R. 4 A. 119 : 21 A. L. J. 153 : A. I. R. 1923 All. 273.

——S. 30—*Wagering contract—Intention.*

To determine whether a contract is one of wager it must be seen whether the parties intend to take delivery and whether the parties are dealing with actual commodities that they are handling or expecting to handle or agreeing to settle an account according to fluctuation in prices of commodities in which they do not have and cannot expect to have any real title. When persons, in a position to carry out a contract and expected to be in that position at the time of performance, contract to receive or deliver goods at a future date, such contracts are not necessarily wagering contracts because there is an element of speculation in them, even if the contracts provide for the alternative of receiving or paying on differences instead of for actual delivery. (*Gokul Prasad and Stuart, JJ.*) SRINIVAS *v.* RAMDEO. **43 All. 585 : 64 I.C. 65 : 19 A. L. J. 522 : A. I. R. 1922 All. 360.**

——S. 30—*Wager—Agreement to pay differences—Settlement by cross contract Bombay Act III of 1865, Sec. 1.*

A contract for forward delivery wherein neither party intends to give or take delivery and differences only are to be paid or received according to the market rate on the due date, and which is settled by a cross-contract is a wagering contract within S. 1 of Bombay Act III of 1865, though not under S. 30 of the Contract Act. (*Macleod, C. J. and Coyajee, J.*) JIVANCHAND *v.* LAXMINARAYAN. **49 Bom. 689 : 27 Bom. L.R. 941: 89 I.C. 885: A. I. R. 192. Bom.511.**

——S. 30—*Wagering contract—Contract containing stipulation to pay difference between contract price and market price in event of breach of contract by either party—Nature.*

The agreement between the plaintiff and the defendant was to the effect that the plaintiff was to sell cotton to the defendant at the rate of 160 rupees per kandi and the plaintiff received ornaments as earnest

money. On failure of defendant to take delivery on due date he was to pay the loss in accordance with the then prevailing rate. There was also a stipulation on the part of the plaintiff as follows :—" If the price be above Rs. 150 then I will give you the profits." On the due date the price fell down to Rs. 130 and the defendant did not take delivery. In a suit to recover damages for breach of a contract the defence set up was that the transaction was of a wagering character. *Held*, that the contract was not a wagering transaction. The fact that the parties had unnecessarily provided for the consequences of a breach namely that if the market price on the due date fell and the purchaser did not take delivery, then he was to pay the loss and that if the market went up and the vendor failed to give delivery then the vendor was to pay the loss did not make difference. (*Shah, A. C. J. and Fawcett, J.*) BALWANT VISHNU *v.* MISHRILAL SHIVNARAYAN. **26 B. L. R. 1194 : 85 I. C. 177 : A. I. R. 1925 Bom. 115.**

——— **S. 30**—*Wagering Contract—Intention to deal only in differences must be common to both parties.*

Where an agent makes contracts on behalf of his principal, with third parties who do not intend to deal only in differences, the contracts are not wagering contracts though between the agent and principal there is an understanding that the agent should manage to see that the principal is not called on to take or give delivery, but merely to pay differences. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. Where there is an understanding between a principal and an agent that the latter while making contracts on behalf of his principal, should manage to see that the principal is not required to take or give delivery but only to pay differences, but where the intention of the third parties with whom the agent makes the contracts is not to deal in differences only, there is no wagering contract, as the understanding between the agent and the principal alone is not enough, but the third parties on the one side and the agent and principal on the other must together agree to deal only in differences. (*Shah, A. C. J. and Kincaid, J.*) MUKUNDCHAND BALIA *v.* SOBHAGMAL GIANMAL. **26 B. L. R. 1097 : 85 I. C. 613 · A. I. R. 1925 Bom. 79.**

——— **S. 30**—*Wagering contract—Intention of parties—Question of fact.*

The question whether the contracts between the parties are of a wagering nature is really a question of fact, that is to say, the party disputing that he was liable under the contracts would have to show that at the time the contracts were entered into the parties did not intend to carry on the contracts but agreed to abide by the prices at the due dates, when differences would be received. (*Macleod, C. J. and Crump, J.*) GANGA DAS *v* JEKISONDAS. **73 I. C. 1032 : 25 Bom. L. R. 520 : A. I. R. 1923 Bom. 458.**

——— **S. 30**—*Tejimundi contracts when void as a wager.*

The mere fact that a contract is a *teji* contract or a *mundi* contract or a *teji mundi* contract with double option does not give rise to an inference that it is a wagering contract and therefore void. The question depends on the common intention of the parties and is one of fact. It may be that if a party desires to prove that a particular contract of the above description was a wagering contract, he may be able to do so with slight proof. The mere fact of a contract being a *teji mundi* contract is not by itself sufficient to take it out of the ordinary rule that the party who pleads that the contract is void as being in the nature of a wager as to prove that fact. 37 B. 264 ; 12 Bom. L. R. 590 : 24 Bom. L. R. 60 Ref. (*Shah, A. C. J. and Crump, J.*) MANI LAL DHARAMSI *v.* ALLIBHAI CHAGLA. **24 Bom. L.R. 812 : 68 I.C. 481 : A. I. R. 1922 Bom. 408.**

——— **S. 30**—*Wagering contract—Burden of proof—* Onus *on defendant.*

The plaintiff sold two bales of yarn to the defendant, who at a later date re-sold them to the plff. at lower rates. The plaintiff sued to recover the difference between the two bales as damages. The defendant contended that the plaintiff was not entitled to recover, the contract being a wagering one. At the hearing the Court examined both the plaintiff and the defendant, neither of them was cross-examined by the other side. As neither party produced any evidence, the Court decided the suit on the pleadings and statements of parties and dismissed the suit. *Held*, that the suit should be decreed inasmuch as the defendant has absolutely failed to prove, what he was bound to prove in order to succeed, in his defence, that the suit transactions were of the nature of wagering contracts. If the defendant does not choose to go into the witness box on his own behalf that is a matter for himself to decide. In any ordinary case, however, the Court is entitled to consider that as a point against the defendant. The plaintiff is not bound to issue a summons to the defendant and unless the defendant gives evidence on his own behalf so as to give the plaintiff an opportunity of cross-examining him, then the Court is entitled to infer everything against the defendant (*Macleod, C. J. and Shah, J.*) RAJMAL RAMNARAYAN *v.* BUDNASAHEB ABDULSAHEB. **24 Bom. L. R. 115 : 66 I. C. 943 : A. I. R. 1922 Bom. 81.**

——— **S. 30**—*Wagering contract—Defence of wager* —Onus *on defendant to prove that both parties agreed neither to ask for nor to give delivery*—Tejimandi *transactions.*

In the transaction known as *teji* the buyer of the *teji* pays the seller a premium or *teji* over and above the contract price of the commodity or goods. If the market raises the buyer of the *teji* who is also a buyer of the commodity or goods can ask the seller of the *teji* to give him the commodity or goods or the value of such commodity or goods at the market rate on the settling day. If the market falls the buyer of the *teji* merely loses his premium. *Teji* and *vaida* transactions are on exactly the same footing and unless it can be positively proved that the parties agreed neither to ask for nor to give delivery, the transactions are not wagering contracts. On 6th January 1919, the plaintiff bought from the defendant twenty-five cases of Japanese camphor at the rate of Rs. 2-12-0 a tin for delivery on the 15th April 1919. He paid the defendant Rs. 125 as *teji* at the rate of one anna on every Rs. 2-12-0. On 7th February 1919, he further bought for the same delivery one hundred cases of camphor at Rs. 2-13-0 a tin and paid the defendant Rs. 500 as *teji* at the rate of one anna on every Rs. 2-13-0. On 15th February, he again bought one hundred and fifty cases of camphor for the same delivery at Rs. 2-15-0 a tin and paid the defendant Rs. 750 as *teji* at the rate of one anna on every Rs. 2-15-0. The price of the camphor rose to Rs. 5-2-0 per tin and the plaintiff wrote to the defendant, on the 14th April 1919, that he would take delivery on the next day. On the 15th of April 1919, he went to the defendant and tendered the contract price and asked for delivery of the camphor. The defendant had no camphor to deliver and he replied to the plaintiff's letter that the plaintiff was not entitled to any delivery as the transactions were wagering and

therefore invalid. The plaintiff sued the defendant claiming the difference between the rate at which he bought the camphor and its price on the settling day. *Held*, that, as the defendant had failed to prove that there was an agreement or understanding between him and the plaintiff that in case the market rose the plaintiff should not require the defendant to deliver to him any camphor the transactions were not wagering contracts. The transactions known as *teji mandi*, *teji* and *mandi* explained and discussed. (*Kincaid, J.*) MANUBHAI PREMANAND *v.* KESHAVJI RAMDAS.

24 Bom. L. R. 60 : 65 I. C. 682 : A. I. R. 1922 Bom. 66

——S. 30—Pakka adatia—*Wagering contract—Relation between* Pakka adatia *and principal and third persons.*

A contract between *Pakka adatia* and an ordinary broker cannot be a wagering contract and the *adatia* must win unless the constituent can bring within Bombay Act III of 1865. In dealing with third persons the *Pakka adatia* deals as principal and the constituent has no right to be brought into contract with third parties. Also the transactions between *Pakka adatia* and third parties have no connection with transactions between constituents and third parties. (*Macleod, C.J. and Fawcett, J.*) MANALAL RAGHUNATH *v.* RADHAKISHAN RAMJIVAN.

45 Bom. 386 : 62 I. C. 361 : 22 Bom. L. R. 1018.

——S. 30—*Betting transaction—Legality of.*

Neither in India nor in England has the Legislature gone so far as to enact in express terms that betting transactions are illegal, but it is clear that both in India and in England the Legislature regards it as undesirable in the public interest that any assistance should be afforded by Courts of law to enforce obligations which have been created in connection with betting or wagering transactions. In India it has expressly been enacted that "agreements by way of wager" are void. Similar provisions obtain in England, but up till 1892 it was not deemed necessary on grounds of public policy in England to include within the ambit of the legislation relating to betting and wagering transactions in which a principal had instructed an agent to back a horse for him. (*Page, J.*) WALTER MITCHELL *v.* A. K. TENNENT. **52 Cal. 677 : 90 I. C. 59 : A. I. R. 1925 Cal. 1007.**

——S. 30—*Wagering contract—Speculation.*

A common intention to wager is essential in a contract by way of wager within the meaning of S. 30 of the Act. Speculation does not necessarily involve a contract by way of wager ; whether a contract is speculation or wager is to be determined by the Court. It must look behind the form of the contract to the real intention of the parties gathered from the oral evidence and the transactions between the parties. A Court should scrutinize the evidence of the defendant when he accepts payments when the dealings are successful but pleads wagering contract when the transaction ends in loss. (*Mookerjee and Fletcher, JJ.*) BISSESWAR *v.* BASIR ALI. **64 I. C. 809 : 33 C. L. J. 533.**

——S. 30—*Intention to give and take delivery absent—Contract is one by way of wager.*

Where a contract for the purchase of salt from Salt authorities was successively transferred from one to another, every transferee paying the amount of profits as ascertained from the prevailing market price, and it was found that the delivery was obviously likely to be much delayed and the actual date of delivery was doubtful, *Held* : the contract was one by way of wager. (24 Bom. 227 Foll.) The intention of the parties is to be gathered from the position of the parties and history of dealings. (*Abdul Raoof, J.*) FIRM GURDAS MAL-RAM LAL *v.* RAM LAL.

7 Lah. L. J. 402 : A. I. R. 1925 Lah. 564.

——Ss. 30 and 222—*Commission agent—Wagering contract—Indemnity.*

Where an agent enters into a wagering contract he cannot claim to be indemnified by the principal for losses incurred thereby. In the case of a commission agent the *onus* is on him to show that he entered into the contract as agent and not principal. (*Martineau, J.*) SHIB LAL RAM LAL *v.* HARI RAM CHHADAMILAL. **67 I. C. 959 : A. I. R. 1922 Lah. 408.**

——Ss. 30 and 65—*Chit transaction—When a lottery.*

Where in a chit transaction, 500 persons undertook to subscribe each Rs. 2 a month and there were to be 50 drawings one in each month and the winner at each drawing was to get Rs. 100 and cease to be liable for the rest of the subscriptions for subsequent months and the 450 persons were to get their subscriptions without interest after the end of the 50 months, *held*, that the transaction was a wagering contract under section 30 of the Contract Act and a lottery and consequently a subscriber was not entitled to get back his subscription from the stake-holder even though it was provided by the rules of the chit transaction. (*Spencer and Madhavan Nair, JJ.*) VEERANAN AMBALAM *v.* AYYACHI AMBALAM.

(1925) M.W.N. 857 : 22 L. W. 772 : 49 M. L. J. 791.

——S. 30—*Wagering contract—Breach—Suit for damages does not lie.*

A suit for damages for breach of a wagering contract cannot be brought. (*Venkatasubba Rao and Jackson, JJ.*) CHINGARAVELU & SONS. *v.* VENKANNA & SONS. **86 I. C. 299 : A. I. R. 1925 Mad. 971 : 49 M. L. J. 300.**

——S. 30—*Wager or lottery—Chit transaction—Promissory note executed by one stake-holder to another for sums due under the chit—Suit on—Maintainability.*

In a chit transaction, there were 500 subscribers each of whom subscribed 1 Rupee per month. The transaction was to close after 50 months. At the end of every month there was a drawing by lot and the subscriber who won at the drawing was paid Rs. 50 and his connection with the transaction forthwith ceased. At the close of the 50th month each of the remaining subscribers was paid Rs. 50 and the stake-holders divided the profits. The plaintiff and defendants were stake-holders and on settlement of accounts a certain amount was found due to the plaintiff by the defendants and a promissory note was executed for the same. *Held*, that the chit fund did not amount to a lottery and the suit on the pro-note was maintainable. (*Ramesam and Venkatasubba Rao, JJ.*) SHUNMUGA MUDALI *v.* KUMARASAMI MUDALI.

(1925) M. W. N. 655 : 48 M. 661 : 90 I. C. 420 : 21 L. W. 403 : A. I. R. 1925 Mad. 870.

——S. 30—*Where both parties are members of Stock Exchange,* onus *of proving transaction to be wagering one is on defendant.*

Where the plaintiff and the defendant are both members of the Stock Exchange, the *onus* of proving that there was a mutual understanding that shares should not be delivered lies upon the defendant, who asserts the same. When, as here, both parties themselves are stock-brokers, that *onus* is greatly increased. (*Spencer, O.C.J. and Beasley, J.*) G. SIRUR *v.* A. M. BHAMIA. **20 L. W. 971 : 85 I. C. 410 : A. I. R. 1925 Mad. 330.**

——S. 30—*Chit fund with arrangement for payment of prize every month by casting lots, illegal as*

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lottery.

Contract Act, S. 65. *Held* by *Krishnan, and Odgers, JJ.* dissenting that as the prize arrangement was severable from the rest of the contract, money paid could be sued for by way of refund.

A chit fund was carried on by the defendant. There were five hundred subscribers, each paying one rupee per mensem. The period of the chit fund was to be fifty months and every month two prizes were to be drawn by lot of Rs. 25 each would at once be paid to any subscriber who won the prize and afterwards he had only to pay eight annas a month. While if he won a second prize he would be given another Rs. 25 and thereafter his subscriptions would cease and his name would no longer be included in drawing the prize. When the fifty months were over all the subscribers who had won no prize would be paid back the whole of the money they had subscribed. *Held*, the arrangement was a lottery. In the above case the chit was discontinued by the stakeholder after 27 months. Thereupon a subscriber filed a suit against him for refund of the subscriptions he had paid. *Held* Per *Krishnan, J. (Odgers, J. dissenting)* that the main contract was to pay the total amount of subscriptions paid. The arrangement to give prizes was only a collateral one serving as an inducement to join the chit and it was severable from the main object of the fund and its illegality did not affect the main object of the fund. Hence the suit for refund was maintainable. (1919) M. W. N. 570, Not Foll. Per *Odgers, J.*—The subscriber was not entitled to recover the amounts paid inasmuch as a material part of the illegal purpose had been carried out and as both the plaintiff and the defendant were in *pari delicto* and there was no ground for holding they were not *Potir est Conditio Possidentis.* As the contract was illegal from the beginning it was not also a case where S. 65 of the Contract Act would apply. (*Krishnan and Odgers, JJ.*) NAGAPPA PILLAI *v.* ARUNACHALAM CHETTY.

47 M. L. J. 876 : A. I. R. 1925 Mad. 281.

——— **S. 30**—*Sale of goods—No delivery contemplated—Wagering.*

A transaction which is a sale of goods does not become a wagering agreement merely because both parties do not contemplate that delivery is likely to be demanded. A definite agreement that delivery cannot in any event be demanded without a breach of the understanding between the parties constitutes a gaming or wagering contract. (*Coutts Trotter, J.*) SUKDEVADOSS RAMPRASAD *v.* GOBINDOSS CHATURBHUJDOSS. **18 L. W. 911 : 76 I. C. 893 : 33 M. L. T. (H. C.) 223 : 1924 M. W. N. 133 : A. I. R. 1924 Mad. 378 : 45 M. L. J. 716.**

——— **S. 30**—*Wagering contract—Suit on—What defendant has to prove.*

In a suit on a contract which defendant alleges to be by way of wager, it is not sufficient for the defendant to show that neither party intended or contemplated that there should be any delivery of goods. He has to show further that there was an agreement that neither party should make or demand delivery. Where both parties took pains to create evidence to clothe the transaction with the appearance of a valid contract, much stronger evidence than was created is necessary to rebut its effect. (*Hallifax, A. J. C.*) KUNDAN LAL *v.* QADIR AHMED ALI.

A. I. R. 1924 Nag. 290.

——— **S. 30**—*Contract to pay differences is wagering contract.*

Where the parties never intended to deliver the goods but only meant to pay differences and that was the understanding between the parties, *Held*, that the contracts between the parties were wagering. (*Kotval, A. J. C.*) HARNARAYAN JODH RAJ *v.* RADHAKISAN CHANDRABHAN. **75 I. C. 906 : A. I. R. 1923 Nag. 324.**

——— **S. 30**—*Wagering contract—Essentials of—Sale of a crop.*

The essence of gaming and wagering is that one party to win and the other to lose on a future event, which at the time of the contract, is of an uncertain nature, that is to say, if the event turns out one way he will lose, but if it turns the other way he will win. *Richards* v. *Storck* (1911) 1 K. B. 296 foll. The sale of a growing crop for cash is not gaming or wagering though the consideration is to be paid in kind out of the proceeds of the harvest. (*Macnair, A. J. C.*) VITHOBA *v.* SITARAM. **19 N. L. R. 21 : 65 I. C. 324 : A. I. R. 1923 Nag 291.**

——— **S. 30**—*Scope of—Collateral transaction—Copartner—Right of re-imbursement.*

S. 30 of the Contract Act does not affect agreements or transactions collateral to wagers. Where two partners enter into a contract, even assuming it to be one of a wagering nature, and one of them satisfies the whole liability under the contract, he has a right of reimbursement against the other. (*Prideaux, A.J.C.*) MOHAMMAD GULAM MUSTAFA *v.* PADAMSI.

69 I. C. 186 : A. I. R. 1923 Nag. 48.

——— **S. 30**—*Wagering contract—Speculative contract—Distinction between.*

A contract may be unenforceable, if it only amounts to a wager on the rise or fall of the market, and it is not accompanied by an intention to sell or to purchase goods, at a given time and place at a certain rate. To some extent, speculation forms an element in many transactions relating to the sale and delivery of goods at a certain rate, and because the market-rate for those goods may be liable to fluctuation ; but the existence of such an element does not make the contract void, because it may yet be accompanied by a real desire on the part of the vendor to sell and the buyer to purchase the goods agreed to be sold, at the contracted rate. Where such an intention exists, the contract is not a wagering contract and can be enforced. (*Kanhaiya Lal, J. C.*) NARAYAN DAS *v.* MAHESHI LAL. **9 O. & A. L. R. 538 : 9 O. & A.L.R. 567: 73 I.C. 309 : A.I.R. 1924 Oudh 186.**

——— **S. 30**—*Wagering contract—What amounts to.*

Where the plaintiff expects that the goods would be delivered to him and he enters into the contract with that expectation, and also in the hope of making some profit upon the difference in price, *Held* : the defendants might or might not have intended to deliver the goods, but that would not make the contract as a contract of wager. In order to bring a contract under S. 30 of the Contract Act it is necessary to show that both parties intended that no delivery or acceptance shall take place and agreed that the mere difference between the price at the time of the bargain and the price at some later time shall be paid ; but if only one of the parties intends that no delivery shall take place the contract is not vitiated. Speculation does not necessarily involve a contract by way of wager and to constitute such a contract a common intention to wager is essential. 44 Bom. 373 followed and referred to. (*Juala Prasad, J.*) SANEHIRAM BAIJNATH *v.* SURAJMAL MARWARI. **69 I. C. 769 : A. I. R. 1922 Pat. 220.**

——— **S. 30**—*Wagering contracts—Plaintiff entering into wagering contract on defendant's behalf as agent—Plaintiff is entitled to his commission.*

Where a plaintiff, on behalf of a defendant, (a)

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limited liability company represented by a manager) enters into gambling transaction with third parties, the defendant is nevertheless bound to make good the losses incurred in those transactions to the plaintiff and pay the commission claimed. (*Robinson, C. J. and Brown, J.*) ALLY MOOLA INDUSTRIAL CORPORATION, LTD. *v.* M. A. ESMALI.

4 Bur. L J. 131 : A. I. R. 1925 Rang. 284.

——**S. 30**—*Wagering contract— All speculative contracts are not necessarily wagering—Intention to treat them as wagering must be present.*

The fact that forward contracts are made in the rice trade is not one which of itself indicates anything at all. No doubt, such contracts must, in the nature of things, be speculative to a large extent. But the fact that they are speculative does not render them wagering contracts, and there can be no wagering contract where there is not an intention common to both parties that the dealing should be by way of wager or gambling in differences 42 Bom. 373 (P. C.) Foll. (*Robinson, C. J. and Brown. J.*) ALLY MOOLA INDUSTRIAL CORPORATION LTD. *v.* M. P. ESMAIL

4 Bur. L. J. 131 : A. I. R. 1925 Rang. 284.

——**S. 30**—*Wagering contract—Intention of parties.*

To constitute wagering contracts, the intention of both contracting parties at the time of entering into the contracts must be not to call for or give delivery from and to each other under any circumstances. (*Roymond, A. J. C.*) FIRM OF KIRPALDAS *v.* FIRM OF GAJANMAL. **70 I. C. 864 : 15 S. L. R. 5.**

——**S. 30**—*Common intention*—Onus of proof.

Where a plea of wager is set up in defence, the *onus* of proof is on defendant ; and he has to prove that the common intention of the parties was to pay by way of difference and not by way of delivery. The question of common intention is one of fact in every case. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) RADHOMAL KESHOWDAS *v.* HOLOMAL KESUMAL.

66 I. C. 489 : 15 S. L. R. 193.

——**S. 30**—*Wagering contract—Broker incurring losses—Presumption—Burden of proof.*

In a wagering contract, a common intention between the principal and broker to wager is essential and the burden of proving it is on the principal. Where the broker is entitled to commission and any losses incurred, which he has paid, the transaction is not a wager. (*Fawcett, J. C. and Kennedy, A. J. C.*) DWARKOMAL *v.* HARCHUMAL. **60 I. C. 944 : 14 S. L. R. 227.**

——**Ss. 31, 32, 33 and 34**—*Contract to purchase shares on condition of being made sole agent of Company—Company going into liquidation before appointing purchaser sole agent—Latter is not liable as contributory.*

The agreement was that *R* would become a member of a sugar manufacturing Company by purchase of shares in case he was appointed the sole agent of the Company for sale of sugar at a certain centre. The Company was not manufacturing any sugar at the time of the agreement. The terms of the agency were not settled when *R* signed the application for shares. The Company either declined or failed to appoint *R* their sole agent at the said centre, and later went into liquidation. *Held* ; that there was nothing in law to prevent the Company from appointing *R* their sole agent by settling the terms although sugar was not being manufactured at the time and the agreement on the part of *R* to become a member of the Company was contingent, *i. e.*, dependent for its validity and enforcement on the condition of the Company appointing him their sole agent, and as the Company either declined or failed and later made it impossible to appoint *R* their sole agent, *R* was not liable to contribute towards the liquidation. (*Mukerjee, J.*) JAUNPUR SUGAR FACTORY LTD, *In re.* **23 A. L. J. 608 : L. R. 6 A. Civ. 472 : 89 I. C. 438 : A. I. R. 1925 All. 658.**

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——**S. 33**—*Agreement to sell goods and claim difference if not accepted—Condition subsequent.*

The provisions of clause 3 of the indent form are : Any claim or dispute arising in connection with this contract including claims of dispute in connection with "non-delivery" these words are decisive. It seems that the provisions of clause 3 do no more than authorise the importers to take certain action in certain event without thereby shutting them out to any other remedy lawfully opened to them. The condition is what is known as condition subsequent. The question was one for the determination of the arbitrators (or umpire) whose decision is final and binding on both parties. The umpire, therefore, was within his jurisdiction in interpreting the terms of the contract, and in deciding that the plaintiff firm could support a claim for damages apart from the special provisions of Cl. 3. (*Piggott and Walsh, JJ.*) SHUSHIL CHANDRA DAS *v.* SUKHAMAL BANSILDHAR. **20 A. L. J. 377 : 44 All. 472 : A. I. R. 1922 All. 219.**

——**Ss. 37 and 38.**

Where payee does not agree to accept payment to third party as equivalent to payment to himself there is no proper tender. (36 All. 139 ; 42 All. 420, Foll.) (*Harrison, J.*) KESHO RAM *v.* THAKUR DAS.

78 I. C. 80 : A. I. R. 1925 Lah. 180 (2).

——**S. 38**—*Tender.*

The practice of the Courts is not to require a party to make a formal tender wherefrom the facts stated or from the evidence, it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. (*Lord Buckmaster.*) VENKATARAYANIM *v.* SUBADRAYAMMA. **46 Mad. 108 : 50 I. A. 41 : 32 M. L. T. 70 : 17 L. W. 383 : 25 Bom. L. R. 541 : 38 C. L. J, 34 : 28 C. W. N. 25 : A. I. R. 1923 P. C. 26 (P. C.) : 44 M. L. J. 631.**

——**S. 38**—*Tender with condition is not valid.*

If the tender is accompanied by a condition which prevented its being a perfect and complete tender, the other parties are under no obligation to accept it ; it follows therefore that that cannot be regarded as the equivalent of payment. (*Lord Buckmaster.*) NARAIN DAS *v.* ABINASH CHANDAR. **: L. R. 3 P. C. 129 : 31 M. L. T. 217 : 16 L. W. 780 : (1922) M.W.N. 791 : 27 C. W. N. 299 : 21 A. L. J. 201 : 37 C. L.J. 457 : 69 I. C. 273 : 4 U. P. L. R. (P. C.) 111 : A. I. R. 1922 P. C. 347 (P. C.) : 44 M. L. J. 728.**

——**S. 38**—*Money order to both—Acceptance by one absolves debtor.*

Acceptance by one of joint promises absolves debtor from liability to the other where postal money order is addressed to both. (*Daniels, J.*) BHOLA NATH *v.* RAM SAHAI. **A. I. R. 1923 All. 465 (2).**

——**S. 38**—*Tender—Debtor and creditor—Tender of a portion of the debt—Conditions attached to tender.*

A debtor when tendering to a creditor really part of his debt, not the entire debt, and asking him to take that in full satisfaction of the debt, it is clear law that the creditor is entitled to refuse to accept the tender, because otherwise he would virtually preclude himself from saying that he had not been paid the full amount due. If you go and attach your offer to pay a debt the condition that the creditor must accept it as full satisfaction although really it is not the whole amount due, you attach a condition to your offer and the creditor is entitled to reject it. (*Fawcett*

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J.) NADERSHAW v. SHIRINBAI.
25 Bom. L. R 839 : A. I. R. 1924 Bom. 264.

——S. 38—*Tender—Validity of—Portion of debt—Acceptance by creditor—Effect of.*

A creditor is not bound to accept less than his whole debt, and there can be no valid tender of part of an entire and indivisible debt. But there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account, provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole. A tender must be unconditional or, at all events, free from any condition to which the creditor may rightfully object. (*Mukerjee and Rankin JJ.*) BEHARI LAL BISWAS v. NASMUNNISSA BIBI.
37 C. L. J. 222 : A. I. R. 1923 Cal. 527.

——S. 38—*Breach of contract—Plaintiffs willing to do their part—Defendant keeping silent—Defendants were held liable.*

Where plaintiff (vendors) were ready and willing to supply goods as per defendant's order but the defendants, after having received a part of the goods and complaining that they were not of the description, kept silent and thus refused to take the remainder though the plaintiffs intimated their willingness to set right the defect if any were found. *Held* : that the defendants were liable in damages for breach of contract. (*Ramesam and Reilly, JJ.*) RAYULU AIYAR v. KUPPU AYYAR & SONS. 21 L. W. 503 :
A. I. R. 1925 Mad. 974 : 49 M. L. J. 1.

——S. 38—*Physical possession of goods is unnecessary for seller to be held ready to deliver.*

In order to be considered to be ready and willing to deliver, a seller need not be in physical possession of the goods. (*Venkatasubba Rao and Jackson, JJ.*) SINGARAVELU & SONS v. VENKANNA & SONS.
86 I.C. 299 : A.I.R. 1925 Mad. 971 : 49 M.L.J. 300.

——S. 38—*Tender ; when not good.*

The tender of goods priced higher than at the contract price cannot be a performance of the contract. (L. R., 2 A. C. 455.) Followed. (*Wallis, C. J. and Ramesam, J.*) SIVARAMA AYYAR v. SUBBA AYYAR.
15 L. W. 92 : A. I. R. 1922 Mad. 28.

——S. 38—*Contract of sale with condition of repurchase—Actual production of cash only is strict compliance but conduct of vendee may dispense with strict compliance—T. P. Act, S. 59.*

The strict compliance which is necessary in the contracts of repurchase would be the production by the plaintiff of the sum of consideration and the conduct of a creditor may amount to a dispensation with the literal compliance of the condition contained in the contract. (*Dalal and Wazir Hasan, A. J. Cs.*) SUMESHAR DATT SINGH v. KAMTA SINGH.
2 O.W.N. 386: 12 O. L. J. 534 : A.I.R. 1925 Oudh 533.

——S. 38—*Applies to mortgages.*

A tender to be valid must be a tender of the whole amount due and not of a part only and there is nothing to prevent this general law as to tenders applying to payments decreed in respect of a mortgage. (*Ashworth, J. C. and Simpson, A. J. C.*) NAWAB MIRZA FAGHFUR MIRZA v. KHUSHAL CHAND.
26 O. C. 59 : 74 I. C. 246 : A. I. R. 1923 Oudh 241.

——S. 38—*Applicability—Joint principals—Liability of agent to amount.*

The liability of an agent to account to two principals who jointly appointed him is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent. S. 38 of the Contract Act does not apply to such a case. (*Das and Kulwant Sahay, JJ.*) JAGDIP

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PRASAD SAHI v. MT. RAJU KUER 2 P. 585 :
4 Pat. L. T. 531 : 75 I. C. 1022 : 1923 P. H. C. C. 177:
A. I. R. 1923 Pat. 464.

——S. 38 (2)—*Goods need not be in physical possession of plaintiff.*

It is not necessary that a vendor of goods should reduce to his actual physical possession the goods in order to give notice to the vendee to take delivery of them. Delivery is usually given on delivery orders in the trade. (*Phillips and Krishnan, JJ.*) ARUNACHELLAM CHETTIAR v. KRISHNA AYYAR.
22 L. W. 265 : (1925) M. W. N. 324 : 90 I C. 481 :
A. I. R. 1925 Mad. 1168 : 49 M. L. J. 530.

——S. 38 (3)—*Promisor has only to give promisee opportunity to satisfy himself as to the identity of the articles promised to be delivered.*

Section 38, Cl. (3) only requires that the promisee must have a *reasonable opportunity of seeing* that the thing offered is the thing which the promisor is bound by his promise to deliver. The promisor is under no obligation *to prove* the identity of the thing offered to the promisee's satisfaction. It is the promisee's duty to take the steps necessary to satisfy himself. Promisor has only to give him an opportunity for it. (*Phillips and Krishnan, JJ.*) ARUNACHELLAM CHETTIAR v. KRISHNA AYYAR. 22 L. W. 265 :
(1925) M. W. N. 324 : 90 I. C. 481 :
A. I. R. 1925 Mad. 1168 : 49 M. L. J. 530.

——S. 39—*Repudiation.*

Repudiation must be total, absolute and clear. (*Mulla, J.*) STEEL BROS. & CO. v. DAYAL KHATAV & CO. 47 Bom. 924 : 25 Bom. L. R. 1063 :
A. I. R. 1924 Bom. 247.

——S. 39—*Refusal to perform—Right to cancel.*

To enable a party to a contract to be relieved from its future performance by the conduct of the other, the conduct must amount to a renunciation or absolute refusal to perform the contract, such as would amount to a revision if he had the power to rescind. Where a party to a contract complains about the delay in carrying out the contract and protest against the other party's right to put an end to it, refusal to perform is not effected. (*Sanderson, C. J. and Richardson, J.*) BURN & CO. LTD. v. THAKUR SAHEB SREE LUKHDIRJEE. 28 C. W. N. 104 :
83 I. C. 260 : A. I R. 1924 Cal. 427.

——S. 39—*Repudiation of contract before time fixed for performance if accepted by the other party terminate the contract—English cases reviewed.*

If one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance or even before that time, the other may accept or may decline that offer. If he accepts, then by consensus the contract is determined and then the party offering to repudiate cannot turn round and insist on its performance by the other or sue for damages for non-performance—English Cases reveiwed. (*Scott Smith and Fforde, JJ.*) JHANDOO MAL JAGAN NATH v. PHUL CHAND FATESH CHAND. 5 Lah. 497 : 7 Lah. L. J. 19 :
85 I. C. 118 : A. I. R. 1925 Lah. 217.

——S. 39—*Implied repudiation of contract.*

The defendants who contracted to purchase 25 bales of yarn from the plaintiff and take delivery of the bales one day after, the plaintiff gave intimation of the arrival of the bales from the mills took delivery only of 3 bales but did not take delivery of 7 bales though notice was given by the plaintiff about their arrival. The plaintiffs treated this action on the part of the defendants as a repudiation of the entire contract and did not give notice of arrival as regards

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the remaining 15 bales. In a suit by the plaintiff for damages for breach of contract in respect of all the 22 bales, *Held*, that the plaintiffs were not entitled to treat this conduct on the part of the defendants as a repudiation of the entire contract and were bound to give notice to the defendant that they had the 15 bales ready for delivery or inform them that if they failed to their letter they would treat the whole contract as having been broken by them.

Per *Ramesam, J.*—Possession of the goods in the godown is not a condition precedent to the plaintiff intimating to the defendants asking them to take delivery of the goods. It is enough if the plaintiff had practically the goods at their disposal in the custody of the mills. (*Spencer and Ramesam, JJ.*) OBLA K. SUBBIER *v.* VENKATACHALAPATHI. **1925 M. 129 : (1925) M. W N. 592.**

——S. 39—*Repudiation what is.*

When the defendants talk of refusing to perform but ask for further information and speak of sending a definite answer when it arrives, it does not amount to a clear repudiation. 88 L. J. K. B. 1914. Followed. (*Wallis, C. J. and Ramesam, J.*) SIVARAM AYYAR *v.* SABBIER. **15 L. W. 9 : A. I. R. 1922 Mad 28.**

——S. 39—*Sale of immovable property—Postponement of performance—Rescission by vendor—Damages.*

Where under a contract the vendee is required to purchase within a certain date and he defers performance till a litigation between the vendor and a third party, no suit by the vendee in consequence of which the vendor rescinds the contract comes to an end, is maintainable after a long lapse of time for damages for breach of contract. (*Wallis, C. J. and Odgers, J.*) SURI CHETTY RANGANATHAN CHETTY *v.* GADALA PARTHASARATHY. **13 L. W. 77 : 29 M. L. T. 67 : 61 I. C. 457 : (1921) M. W. N. 94 : 40 M. L. J 13.**

——S. 39—*Scope.*

The lessor contracted with the lessee to allow him to cut trees from his jungle The lessee at the time of the agreement gave Rs. 25,000 and agreed to pay instalments each quarter but in no case was he to cut trees more than that he had paid for. The rate was Rs. 29 per Bigha. The lessee failed to make any further instalments after the Rs 25,000, when he cut down the 400 bighas 7 biswas and as he had already cut down 598 bighas 12 biswas before the agreement was signed this area plus 400 bighas 7 biswas multiplied by 29 which was the rate per bigha would exceed the Rs. 25,000. *Held*, as soon as the lessee cut anything in excess of 862 bighas (that is to say Rs. 25,000 divided by 29) he committed a breach of the agreement not to cut anything in excess of the area covered by the Rs. 25,000 and the lessor was entitled to rescind the agreement under section 39. (*Lyle and Ashworth, A. J. Cs.*) MD. MUMTAZ ALI *v.* ALTAF-UL-RAHAMAN. **25 O. C. 169 : A. I. R. 1922 Oudh 209.**

——S. 43—*Suit against several defendants—One defendant only present—Plaintiff and other defendant absent—Suit dismissed for default—Plaintiff can bring fresh suit against absent defendants for whole amount if cause of action be joint and several.*

Where on the day fixed for hearing only one of several defendants appears and the plaintiff also fails to appear, and the suit is consequently dismissed for default, the plaintiff can bring a fresh suit on the same cause of action against the absent defendants and can get a decree for the whole amount if the cause of action be joint and several against all defendants. 10 N. L. R. 39 Foll. (*Kanhaiya Lal, J.*) PARBHU DAYAL *v.* TRIBHUWAN SINGH. **L. R. 6 A. 71 (Rev.) : 85 I. C. 788 ; A. I. R. 1925 All. 425.**

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——S. 43—*Rent suit—Some heirs of deceased tenant not joined—Suit is not bad for non-joinder and is maintainable.*

Per *Curiam* (*C.C. Ghose and Mukerjee, JJ.* dissenting)—A suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. *B. B. Ghose, J.*—The heirs of a deceased tenant do not take the tenancy as an entire body forming as it were partnership or a corporation, the individual members of which have no definite interest but they take as tenants-in-common, each having a definite share in the whole which he might deal with in any he pleases.

Mukerjee. J.—When a person obtains a share of a tenure either by assignment or by inheritance he becomes a co-tenant with the other tenant or tenants in the whole tenure, and in so far as the relations between him and his landlord are concerned, he cannot be deemed to hold any estate in severalty. There is no valid reason why tenants-in-common should be in a position as regards liability for rent different from that of joint tenants. On the contrary each of the tenants-in-common has the privity of estate with the landlord in the whole of the land leased. A suit, however, against some of such tenants need not be dismissed on that ground. The Court must proceed under O 1, R. 10 (2). C. P. Code, to make an order for the addition of such of these persons as are not already on the record as defendants, and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. Persons who are under a joint liability to pay the rent are necessary parties in a suit for rent, from more points of view than one. They are necessary for determining whether the liability which *prima facie* joint is also joint and several for protecting the defendant from being made to pay what may have already been paid by others for safeguarding against the eventuality of his being defeated in a suit for contribution as the co-tenant against whom a suit for contribution is brought will not be bound by the result of the earlier suit, for preventing conflicting decisions as to the character and incidents of the same tenancy being arrived in different suits, and for various other reasons. (*Walmsley, Greaves, C.C. Ghose, B.B. Ghose and Mukerjee, JJ.*) KAILASH CHANDRA MITRA *v.* BROJENDRA K. CHAKRVARTI. **29 C. W. N. 1000 : 42 C. L. J. 232 : 90 I. C. 211 : A. I. R. 1925 Cal. 1056 (F. B.)**

——Ss. 43 and 44—*Co-mortgagors—Release of one—Effect.*

A release of one of two mortgagors does not release the other. (*Mukerjee and Rankin, JJ.*) CHAND MALL BABU *v.* BAN BEHARI BOSE. **50 Cal. 718 : 74 I. C. 1021 : A. I. R. 1924 Cal. 209.**

——S 43—*Joint tenants—Liability for rent.*

Where one of several joint tenants is liable for the whole rent on the death of one of such joint tenants leaving several heirs no question can arise as to whether the liability is joint or several. All the parceners constitute in law one heir. (*C. C. Ghose and Panton, JJ.*) ABINASH CHANDRA ROY *v.* FULCHAND CHAUDHURI, **50 Cal. 737 : 74 I. C. 1032 : A. I. R. 1924 Cal. 165.**

——S. 43—*Rent and cesses—Lessees—Liability of heirs of original lessee.*

A suit for rent and cesses was instituted against the heirs of the original lessees without serving some of them by proper notices. *Held*, that so far as the original lessees were concerned, their liability for rent was, in the absence of a contract to the contrary, joint and

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several and any one of them could be sued for the entire rent. 11 C. W. N. 1026: 12 C. L. J. 591: 22 C. W. N. 289: 5 Pat. L. J. 32 Rel. A suit for cesses is maintainable against all the heirs of one of the original lessees although the heirs of the other original lessees are not properly made parties. (*Chatterjee and Cuming, JJ.*) MAHENDRA NATH BOSE *v.* ABINASH CHANDRA BOSE. **27 C. W. N. 521 : 77 I. C. 364 : A. I. R. 1923 Cal. 615.**

——— S. 43—*Applicability—Debt due from firm—One of the parties or contributory—Liability to pay.*

S. 186 of the Companies Act can be resorted to to recover money from the firm by selecting one of the partners who is a contributory and calling upon him to liquidate the whole debt. The principle of S. 43, Contract Act applies to such a case. (*Broadway, J.*) GOBIND SINGH *v.* UNION BANK OF INDIA. **4 Lah. 239 · 77 I. C. 338 : A. I. R. 1924 Lah. 148 (On appeal from A. I. R. 1923 Lah. 85).**

——— S.43—*Joint vendees—Major and minor—Enforceability.*

A contract of sale entered into by a major and minor vendee, in which shares were fixed but not the portion of purchase money to be paid by each, is a joint transaction which can be enforced against the major vendee. (*Harrison and Zafar Ali, JJ.*) SAIN DAS *v.* RAM CHAND. **4 Lah. 334 : 5 Lah. L. J. 469 : A. I. R. 1924 Lah. 146.**

——— S. 43—*Joint judgment-debtors—Decree discharged by one—Contribution.*

If a decree is passed jointly against three persons, in the absence of any direction to the contrary, it is obvious that each of them should contribute equally towards the satisfaction of the decree. One of the judgment-debtors alone having paid the whole amount decreed, is entitled to one-third of that amount from each of the joint judgment-debtors, and if nothing can be realised from either of them, he is obviously entitled to get half the total amount from the other. Though S.43, according to which section if any one of two or more joint promissors makes default in such contribution, the remaining joint promissors must bear the loss arising from such default in equal shares, is not directly applicable to such a case, it is obviously founded upon equity and its principles should be applied to the case of joint judgment-debtors. (*Scott-Smith, J.*) SHAH MUHAMMAD *v.* MUHAMMAD ROSHAN KHAN. **4 P. W. R. 1922 : 65 I. C. 128 : 31 P. L. R. 1922 : A. I. R. 1922 Lah. 148.**

——— S. 43—*Payment to joint promisee discharges joint debt.*

A payment made to one of two joint mortgagees is a valid discharge of the mortgage liability. But a mere undertaking to pay the amount at some future date is not equivalent to payment. (20 M. 461 : 36 M. 544. Foll.) It is open to the parties to a contract to supersede that contract by another contract. But in order to do so, all the parties to the first contract must be parties to the second contract. (*Devadass and Jackson, JJ.*) P. RAMASWAMI *v.* CHANDRA KOTTAYYA. **A. I. R. 1925 Mad. 261 : 47 M. L. J. 840.**

——— S. 43—*Registered Pattadar with limited interest in land paying Government Revenue can recover from other persons having interest.*

A registered pattadar of land with a limited interest therein, who pays the whole of the Government assessment is in the position of a co-mortgagor and has a right of contribution as against other persons interested in the land on which the revenue was a charge. (*Wallis, C. J. and Krishnan, J.*) MUHAMMED KHALI *v.* ALATHADU MALWA KUNHI RAMA NAIR. **12 L. W. 180 : 59 I. C. 262 : (1920) M. W. N. 477.**

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——— S. 43—*Liability under joint contract—Enforceability—Consideration only to one—Effect.*

If an alleged joint contract by A and B is unenforceable against A on the ground that he was not privy to it, or did not sign it, it is not unenforceable against B who has signed it and received consideration under it. (*Kinkhede, A. J. C.*) SANKOLE *v.* BADRIDAS. **89 I. C. 977 (2).**

——— S. 43—*Joint and several liability under decree—Apportionment in execution—Remedy.*

Where a decree creates a joint and several liability, the judgment-debtors cannot in executiou claim an apportionment. If executed for the whole against any one his remedy is to sue for contribution. (*Mullick and Bucknill, JJ.*) SIA SHACHARI PEARI *v.* RAM KISHORI KUER. **2 Pat 796 : 74 I. C. 867 : A. I. R. 1924 Pat. 262.**

——— S. 43—*Handnote—Suit against one of two joint promisors is competent.*

A suit on a hand-note executed by several persons is not bad simply because one only of the joint promisors has been sued. In such a case each of those liable under the hand-note is liable to the full extent of the loan if not there are some special terms in the contract which in some way limit or restrict their liability, and under the provisions of S. 43 of the Contract Act, the lender is quite competent to sue all or any, as he may choose, of those who have incurred the liability. (*Miller, C. J. and Foster, J.*) BISHUNNATH SAHAY *v.* NANKU PRASAD. **76 I. C. 988 : 2 Pat. 466 : A. I. R. 1924 Pat. 164.**

——— S. 43 (2)—*One judgment-debtor paying full decree amount—Right to contribution—Basis of.*

Where one of several judgment-debtors satisfies the whole decree, he can ask for contribution founded not on contract but on a general principle of equity. The community of burden and benefit is the real ground of the right to contribution, (*Phillips and Venkatasubba Rao, JJ.*) ABBOY NAIDU *v.* RAMCHANDRA NAIDU. **19 L. W. 686 : 76 I. C. 905 : 1923 M. W. N. 925 : A. I. R. 1924 Mad. 279.**

——— S. 45—*Co-parcener—Tender to Manager of Hindu family is valid.*

Where a mortgage is really entered into by a joint Hindu family though it is in the name of a minor member, tender of the mortgage-money to the managing member is a good and valid tender in law. (*Lindsay and Stuart, JJ.*) SHEO SARAN *v.* RAM LAGAN. **19 A. L. J. 852 ; 64 I. C. 413 : 44 A. 64 : A.I.R. 1922 All. 355.**

——— S. 45—*Firm—Debt due to—Partnership—Death of partner—Rights of surviving partners.*

The rule of Law is firmly established that debt due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partners parties to the suit. 9 A. 486 ; 17 C. L. J. 648; 20 A. 365; 32 A 638 : referred to: 18 C. 86 dissented. (*Abdur Raoof and Moti Sagar, JJ.*) MULCHAND *v.* MULCHAND. **4 Lah. 142 : 71 I. C. 951 : A. I. R. 1923 Lah. 197.**

——— S. 45—*Co-mortgagees—Payment to one—Not effective as a discharge.*

Payment of the entire mortgage money to one of several co-mortgagees without the consent of the other does not operate as a good discharge of the liability of the mortgagor. 68 P. R. 1217 Foll. (*Shadi Lal, C.J. and Harrison, J.*) MT. MALAN *v.* TARA SINGH. **4 Lah. L. J. 23 : A. I R. 1922 Lah. 64.**

——— S. 45—*Co-mortgagees—Payment to one—Not*

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effective as a discharge.

The mortgage debt is not completely discharged by the payment of the mortgage money to one of several co-mortgagees without the consent of the others even though the name of the payees was entered in the revenue record as sole mortgagees. 68 P. R. 1917 foll. 7 P. R. 1913 : 35 P. L. R. 1916, Ref. (*Broadway, J.*) MAYA RAM *v.* HABIB. **3 Lah. L. J. 502.**

——**S. 45**—*Joint promisees—Suit by each for his share—Maintainability.*

Under S. 45, Contract Act, in regard to a promise made to two or more persons jointly, proceedings to enforce the claim must be taken by all promisees and a suit brought by one of several creditors or partners is liable to be dismissed. (*Prideaux, A.J.C.*) KISEN LAL *v.* CHANDRA. **A. I. R. 1924 Nag. 196.**

——**S. 45**—*Debt due to partnership—Suit for—Parties—Assignment of debt to one partner—Effect of.*

In the case of a partnership all the individuals constituting it are necessary parties to a suit in which a debt due to the partnership is claimed. But when under a decree of Court the proprietary rights in the firm;are after its dissolution vested in one of the partners solely, and the other partners disclaim all rights to the debt, a suit is maintainable by that partner alone for the debt. (*Raymond, A.J.C.*) MALIBAI *v.* SHEWARAM MENGHRAJ. **90 I. C. 111.**

——**S. 46**—*Whether, where time is not of essence of contract it can be made so by notice and whether time allowed by such notice is reasonable are all questions of fact answerable from the circumstances of each case.*

Where in a contract of sale of immoveable property which sale can be completed only on the completion of certain other transactions, a time limit of two months for completing the sale was fixed, but where the vendor did not complete the sale for four or five months and the vendee was not aware of the vendor's difficulties in his way of fulfilling the contract : and where also it was found that the vendor could not be completely held to be not indifferent. *Held* : that time was not of the essence of the contract, but that the vendee in the present case was justified in giving notice to the vendor to perform the contract within a definite time and that three weeks' time was reasonable. (*Shah, A. C. J. and Crump, J.*) KARSANDAS PURSHOTHAMDAS *v.* GOPALDAS TRIKAMJI.
25 Bom. L. R. 1144 : A. I. R. 1924 Bom. 282.

——**S. 46**—*Mortgagee undertaking to pay debts of mortgagor—Failure to discharge—Effect.*

Where the major part of the consideration for a mortgage was left with the mortgagee himself for the payment of debts due by the mortgagor and where the object of the mortgage was to consolidate the debts of the mortgagor and to prevent interest running at a high rate. *Held*, that the mortgagee was bound to pay off the debts as soon as possible and his failure to do so disentitled him from right to possession under the terms of the deed of mortgage but his security was good for the money actually paid by him. (*Kendall, A. J. C.*) COLLECTOR SINGH *v.* MADAN LAL.
78 I. C. 738 : A. I. R. 1925 Oudh 132 (2).

——**S. 47**—*Acceptance of part of mortgage money after the agreed period is not a new contract—Contract Act, S. 62.*

Where mortgagor agreed to accept part of the mortgage money by a certain period and actually accepted it after that period there is no new contract at the time of the acceptance of the part amount but there is merely an acquiescence in the late payment. (*Jwala Prasad and Ross, JJ.*) MT. BIBI HAFIZUNNISSA *v.* IMAMUDDIN KHAN. **A. I. R. 1924 Patna 825.**

——**S. 50**—*Payment of revenue—Revenue money order—Bengal Touji Manual, R. 61—Payment to post office—If different.*

Reading S. 50, Contract Act, along with R. 61 of the Bengal Touji Manual, where land revenue is sent to the Collector through the Post Office by means of a Revenue Money Order before the last day it is payable, it is a valid payment. (*Newbould and Ghose, JJ.*) BILAST CHANDRA ROY *v.* RAJENDRA CHANDRA DAS ROY. **78 I. C. 661 : 51 Cal. 776 : A. I. R. 1924 Cal. 839.**

——**S. 50**—*Payment not by cash but by transfer of figures in account is valid.*

The method of payment in discharge of a contract is not confined to paying in cash but includes also mere transfer of figures in accounts without the transfer of any money actually taking place. Case law discussed (*Rupchand Bilaram, A. J. C*) KISHANDAS PURSUMAL *v.* MEGHRAJ KHIALDAS. **81 I. C. 834 : A. I. R. 1925 Sind 144.**

——**S. 51**—*Non-delivery by seller without payment.*

Unless a special contract to the contrary is definitely proved it must be presumed that the goods were to be paid for at delivery and that the buyer in refusing to make such payment is guilty of a default. The *onus* is upon the buyer to prove his assertion contrary to usual practice. Very strong and cogent evidence on the part of the buyer would be required to prove that the parties intended to depart from the general practice. (*Abdul Raoof and Motisagar, JJ.*) VERMAN AND CO *v.* FIRM OF GOPAL DAS RAM LAL. **A. I. R. 1923 Lah. 363.**

——**S. 51**—*Contract for sale of goods—Conditions are concurrent unless otherwise agreed.*

In a contract for the sale of goods, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. (*Venkatasubba Rao and Jackson, JJ.*) SINGARAVELU & SONS *v.* VENKANNA & SONS. **86 I.C. 299 : A. I. R. 1925 Mad. 971 : 49 M. L. J. 300.**

——**S. 51**—*Concurrent conditions—Suit for damages for breach of contract—Plaintiff cannot succeed unless he proves he was ready and willing to perform his part.*

Where the parties have agreed that the performance of their respective promises is to be simultaneous, *i.e.*, that each shall be ready and willing to perform his promise at one and the same time one party cannot sue the other for damages for breach of contract unless he alleges and proves that he was ready and willing to perform his part of the contract at the appropriate time. Thus where such contract relates to sale of goods, the plaintiff if he happens to be a buyer must allege and prove that he was ready and willing to pay for the goods and likewise if the seller be the plaintiff, he must allege and prove that he was ready and willing to deliver the goods. (*Venkatasubba Rao and Jackson, JJ.*) SINGARAVELU & SONS *v.* VENKANNA & SONS. **86 I. C. 299 : A. I. R. 1925 Mad: 971 : 49 M. L. J. 300.**

——**Ss. 51 and 54**—*Vendee not completing sale due to vendor's defective title—Vendee need not pay brokerage.*

Where a sale was not completed owing to the vendor's title being doubtful and the broker was helping the vendor. *Held* : that in view of the fact that the purchaser could not go on with the purchase and obtain possession of the property the broker in effect committed breach of the contract, by joining with the vendor in proposing a sale, which could not in fact be carried out and was not entitled to any brokerage. (*Kennedy, J. C. and Percival, A. J. C.*) SHARAFDIN

CONTRACT ACT (IX OF 1872), S. 51.

v. ALLAHBUX. **88 I.C. 569 : A.I.R. 1925 Sind 220.**

——S. 51—*Vendor not bound to tender if vendee unwilling.*

Vendor is not bound to tender the purchase price unless the purchaser is ready and willing to perform his part of the promise. In a suit for specific peformance the strict law as to tender is not applicable. (*Kennedy, C. J. and Raymond, A. J. C.*) BEGRAJ *v.* ALISHER. **16 S. L. R. 278 : A. I. R. 1923 Sind 50.**

——S. 53—*Fraudulent transfer of a substantial portion—Effect.*

Where a substantial portion of the consideration for the transfer is fraudulent and fictitious, the whole transfer must be treated as fraudulent. (*Broadway and Harrison, JJ.*) MULA RAM *v.* JIWINDA RAM. **5 L. L. J. 200 : 72 I. C. 452 : 4 Lah. 211 : A. I. R. 1923 Lah. 423.**

——S. 54—*Failure of promisor to perform his part of the contract—Promisee if can rescind the whole contract.*

By the contract the defendant company agreed to manufacture and to deliver to the Morvi State Railway 50 railway wagons in all at the price of Rs. 1,825 for each covered wagon and at the price of Rs. 1,875 for each open wagon, the wagons to be in accordance with certain specifications and drawings, and the 50 wagons to be delivered in six months from the date of the receipt by the defendant company of an order for the wagons. The terms of payment were that His Highness of Morvi should pay to the defendant company one-third of the contract price on the order for the wagons being given, and one-third of the contract price when the underframes of the wagons should be wheeled, and the remaining one-third when the wagons should be delivered. The contract contained no provision that the contract time for the delivery of the wagons should be extended in case the defendant company should be delayed in completing the wagons owing to the war or any other cause beyond the company's control. *Held*: having regard to the times when the three instalments of the contract price were according to the contract to become payable, and to the fact that the manufacture of the 50 wagons would involve considerable expenditure by the defendant company in providing materials for their construction and in the payment of men who would necessarily be employed in constructing them, and to the fact that it might be difficult to enforce in a British Court or in a Court of the State of Morvi payment by His Highness of Morvi of the contract price, it must have been the intention of the parties when the contract was made that time should be of the essence of the contract as to the times when the three instalments of the contract price should be paid. When His Highness of Morvi had, after he had notice that the underframes of the wagon had been wheeled, made default in payment of the second instalment of the contract, which was, in effect a refusal by him to perform the contract in its entirety, the defendant company was entitled to treat the contract as void and to rescind it, but the defendant company by delivering 8 of the wagons treated the contract as a subsisting contract. Therefore the defendant company was not on that delivery of the 8 wagons entitled to insist on a then payment for them as the contract price was not payable until the 50 wagons had been delivered. (*Sir John Edge.*) BURN AND CO. LTD. *v.* HIS HIGHNESS THAKUR SAHIB SREE LUKHDHIRJI OF MORVI STATE.

30 C. W. N. 145 · 90 I. C. 52 : 23 A. L. J. 806 : 6 L. R. P. C. 147 : A. I. R. 1925 P. C. 188 (P.C.).

——S. 54—*Breach of contract—Defence by party committing a breach.*

CONTRACT ACT (IX OF 1872), S. 55.

A party cancelling a contract without any justification is precluded from making any defence which would have been open to him in an action for damages by the other party. (*Macleod, C. J.*) RUSTOMJI *v.* HAJI. **59 I. C. 515 : 22 Bom. L. R. 1165.**

——S. 54—*Party cannot insist on the other doing his part without party doing his own part.*

Where promises are reciprocal each party has always the option to perform his part of the contract but one party cannot insist on the other performing his promise without himself performing what he has agreed to do. (*Madhavan Nair, J.*) VAIRAVAN CHETTIAR *v.* KANNAPPA MUDALIAR. **86 I. C. 436 : A. I. R. 1925 Mad. 1029.**

——S 54—*Reciprocal promises—Sale of goods—Delivery of telegram—Condition of contract.*

Where on a contract for the sale of goods, the seller agrees to give the buyer a delivery telegram for the goods sold, the provision as to the delivery telegram is a condition of the contract and if for any reason, it is broken, the buyer is entitled to rescind the contract and sue the seller in damages. A covenant as to delivery is as much an essential part of a contract for the sale of goods as a covenant for payment of price or any other condition in the contract. (1919) 1 K. B. 198 ; 1920 2 K. B. 1 (9). (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PEERA MAHOMED ISHAK *v.* HUSSAN AKBARI. **31 M. L. T. 40 : 70 I. C 736 : (1922) M. W. N. 434 : A. I. R. 1923 Mad. 103 : 43 M. L. J. 199.**

——S. 54—*Agreement between two chelas of a deceased mohunth of muth—One to be mohunt and other adhikari—Latter entitled to maintenance in event of difference—Latter suing for mohunthship—Suit failing—Maintenance cannot be claimed.*

The appellant and respondent were both chelas of the late mohunth of a muth. According to custom and practice of the muth there was one mohunt only and two chelas cannot become mohunts at the same time. After the death of the late mohunt, both the chelas had become mohunts with the result that dispute had arisen between them. They therefore executed an ekrarnama. They agreed that the appellant should be declared to be the mohunt and the respondent adhikari of the said muth : and they declared that they should, to the end of their lives, be bound to act according to the terms set forth in the ekrar-nama. The material terms set forth in the ekrarnama were that the appellant should remain mohunt and malik of all the properties of the muth during his life-time ; and the respondent adhikari during his life-time : and that in the event of difference between the parties, the appellant would give to the respondent Rs. 40 a year for maintenance out of the income of the properties of the muth and this should remain a charge on the muth properties. Notwithstanding the terms of this agreement, the respondent brought a suit against the appellant in the Court of the District Judge claiming the mohunthship. That suit was dismissed. *Held*, that the respondent by his action in bringing a suit for mohuntship broke his promise and defeated the whole intention of the agreement ; and that he could no longer hold the appellant to his part of the contract, and that he could not therefore maintain a suit for maintenance as vouchsafed by the ekrarnama. (*Mullick and Ross, JJ.*) RAMCHARAN DAS *v.* RAMLAKHAN DAS. **6 Pat. L.T. 830 : 83 I.C. 697 : 1925 P H. C. C. 157 : A. I. R. 1925 Pat. 496.**

——Ss. 55 and 63—*Effect of failure—Contract—Time, essence of—Failure to perform—Extension of time.*

Where time is of the essence of a contract and there

is a breach thereof, the promisee may under S. 63 of the Act avoid the contract but if he extends the time for performance, he cannot claim damages for non-performance at the original agreed time. (*Lord Dunedin.*) MUHAMMAD HABIBULLAH *v.* BIRD & CO. **43 All. 257 : 14 L. W. 350 : 48 I. A. 175 : 63 I. C. 589 : 24 Bom. L. R. 687 : A. I. R. 1922 P. C. 178 (P. C.)**

——**Ss. 55 and 63**—*Contract—Time essence of—Failure to perform—Extension of time.*

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——**S. 55**—*Time can be subsequently made as essence of contract.*

Time may be made of essence of contract where it was not originally so by reasonable notice to the other party. Notice may be reasonable despite promisor's difficulties. (*Shah A. C. J. and Fawcett, J.*) DHAN RAJGIRJI NARSINGGIRJI *v.* TATA SONS, LTD. **49 Bom. 1 : 26 Bom. L. R. 858 : A. I. R. 1924 Bom. 473.**

——**S. 55**—*Test Time—When of the essence.*

Where time for performance is fixed but time is not made the essence of the contract either party can give notice to the other fixing reasonable period for performance. (*Fawcett, J.*) SHAMSUDEIN TAJBHAI *v.* DAHYABHAI MAGANLAL. **48 Bom. 368 : 26 Bom. L. R. 105 : A. I. R. 1924 Bom. 357.**

——**S. 55**—*Though time not made of essence of contract yet a party can limit time where the other party delays unnecessarily-*

Although the parties did not by the terms of their agreement make time of the essence of the contract, yet if unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract should be perfected by the other. What is a reasonable time must depend upon the facts of each particular case. The question of reasonableness of notice should be considered with reference to the past attitude of the parties. (*Fawcett and Coyajee, JJ.*) KARSANDAS *v.* CHHOTALAL **48 B. 259 : 25 Bom. L. R. 1037 : 77 I. C. 275 : A. I. R. 1924 Bom. 119,**

——**S. 55**—*Test of time being essence of contract—Intention.*

The question whether time is of the essence of the contract depends on the intention of the parties. Equity has never laid it down that a man must never be allowed to mean what he says. (*Marten and Fawcett, JJ.*) SHANKAR SAKHARAM *v.* RANTANJI PREMJI. **47 B. 607 ; 25 B. L. R. 328 : A. I. R. 1923 Bom. 441.**

——**S. 55**—*Effect of failure—Contract—Construction—Sale of goods—Delivery to be taken within a specified period—Default—Delivery of part of goods after expiry of time fixed—Refusal to take delivery of the rest—Damages*

On 18th September 1913, the plaintiffs entered into a contract with the defendants for the sale of two hundred bales of yarn No. 20,s and 20½s. The yarn was to be delivered in October-November 1913 as manufactured. Under the terms of the contract, if the defendants failed to take delivery of the bales from time to time as they became ready, the plaintiffs were entitled to resell them on the defendants' account and risk by public auction or private sale and the defendants were bound to make good to the plaintiffs any loss that they might suffer by the re-sale. No delivery was asked for by the defendants during October-November 1913 and the goods were manufactured by the plaintiffs against this contract. Up to July 1914 the defendants took delivery in small quantities of sixty-six bales of 20s and forty-two bales of 20½s. On 9th July 1914, the plaintiffs wrote to the defendants to arrange to take immediate delivery of the remaining ninety-two bales. On 13th January 1915, the plaintiffs gave the notice to the defendants that if they did not take delivery within twelve days they would resell the bales by public auction. On 10th of February 1915, the bales were sold by auction and they realised Rs. 9,951—1—6 against the contract price of Rs. 14,946-1-6 leaving a difference of Rs. 4,995. The plaintiffs claimed from the defendants this amount together with interest and godown rent and fire insurance as per terms of the contract, in all Rs. 5,858-6-3. The defendants replied that under the contract, the delivery was to be in October-November 1913 that the d fendants were ready and willing to take delivery of the bales but as the bales were not ready the plaintiffs were not in a position to give delivery and the defendants therefore repudiated their liability in the matter. The plaintiffs having sued the defendants to recover the amount. *Held*, (1) that, as there was no evidence to show that the terms of the contract were altered by mutual consent and therefore the contract remained in existence after the end of November as altered by the parties, the Court could not say what was the altered contract ; (2) that whenever after the end of November 1913 the defendants asked for delivery it was optional to the plaintiffs to give them delivery and if the plaintiffs chose to give them delivery at the rates mentioned in the previous contract, that was a separate transaction, and the Court could not imply from the plaintiffs having given delivery of some bales in December 1913 to the defendants, that the parties had entered into a new contract whereby the plaintiffs agreed to give delivery to the defendants of the remaining bales according as the defendants should choose to ask for them. (3) that the Court could only read the contract according to the plain intention of the words in the written contract, and that as the parties did nothing under the contract within the contract period, the written contract thereby came to an end. (*Macleod, J.*) THE PHOENIX MILLS, LTD. *v*, MADHAV DAS RUPCHAND. **69 I. C. 9 : 24 Bom. L. R. 142.**

——**S. 55**—*Waiver — Contract for sale— Time made essence of contract—Waiver—Parties continuing negotiations for completion of the contract—Time ceases to be of essence of contract—Extension of time does not change the character of its being of the essence.*

Purchaser may by his conduct waive although time is made the essence of the contract and where the time is once allowed to pass and parties continue to negotiate for completing the purchase then time no longer remains the essence of the contract. But simple extension of time without anything more amounts only to a waiver to the extent of substituting such extended time for the original time and does not destroy the essential character of the time. (*Chatterjee and Cuming, JJ.*) KAMAL KRISHNA KUNDU *v.* CHATURBHUJ DASSA. **78 I. C. 962 : A. I. R. 1925 Cal. 324.**

——**S. 55**—*Test of—Time being essence of contract—Waiver—Notice.*

In a contract to supply wagons, the price was to be made in 3 instalments, the last being on delivery,

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There was default in payment of the second instalment, still a number of wagons were completed and delivered. *Held*, such delivery showed time was not of the essence of the contract. It is open to the parties in such a case to give reasonable notice of the default and is made time the essence of the contract. (*Sanderson, C. J. and Richardson, J.*) BURN AND CO. LTD. *v.* THAKUR SAHEB OF MORVI.
28 C. W. N. 104: A. I. R. 1924 Cal. 427 : 83 . C. 260.

——S. 55—*Contract for sale of immoveable property—Time is not essential.*

In a contract for the sale of immoveable property time is not of the essence of the contract. (*Shadi Lal, C. J. and Harrison, J.*) SRI RAM *v.* KIDARI PRASAD CHEDDI LAL. **6 Lah. 308 : 88 I. C. 743 : 26 Punj. L. R. 488 : A. I. R. 1925 Lah. 481.**

——S. 55—*Effect of rescission.*

The vendors cannot rescind a contract by reselling the goods and thus putting an end to the Arbitration clause. (*Shadi Lal, C. J. and Campbell, J.*) FIRM JAI NARAIN *v.* FIRM NARAYAN DAS. **3 L. 296 : A. I. R. 1922 Lah. 369.**

——S. 55—*Contract to sell—Delay—Rescission—Liability.*

Under a contract for the sale of yarn, the goods were to be delivered on steamer at Madras in July, August and September, in three shipments. No yarn was shipped in July and August but ten bales were shipped together in September. The defendant had made no complaint of even the delays in the deliveries but just before the tender of the goods, gave notice to the plaintiffs of his intention to put an end to the entire contract. In a suit by plff. for damages for breach of the contract: *Held*, the partial breach did not go to the root of the contract, as by non-delivery of the thing contracted for, the whole object of the contract was not frustrated. Hence defendant was not entitled to rescind the entire contract but plaintiffs should be awarded damages in respect of the bales allocated for the September shipment. (*Ayling, Offg. C. J., and Odgers, J.*) MESSRS SWAMI & CO. *v.* NUKALA VENKATASUBBIAH. **69 I. C. 41: (1922) M W. N. 47.**

——S. 55—*Sale of land—Time essence of contract—Sale of immoveable property.*

In contracts for the sale of immoveable property, time is not ordinarily considered to be of the essence of the contract unless there is anything in the express stipulation between the parties, the nature of the property and the surrounding circumstances which would make it inequitable to apply the rule. (*Wallis, C. J. and Odgers, J.*) SURI CHETTY RANGANATHAN CHETTY *v.* GADALA PARTHASARTHY.
13 L. W. 77: (1921) M. W. N. 94: 61 I C. 457: 29 M L. T. 67: 40 M. L J. 13.

——S. 55—*Waiver—Mere delay is not—Delay is immaterial where time is not essence of contract—Undue delay coupled with notice by other party will bar equitable relief.*

Mere delay on the part of a party to the contract should not be taken to amount to waiver or abandonment by him. Unless the parties have expressly or impliedly by their conduct, made time the essence of the contract, delay is no valid plea in a suit on contract. Undue delay on the part of one party to a contract coupled with reasonable notice given to him by the other party will disentitle the party delaying from claiming any relief in equity. (*Kinkhede, A. J. C.*) ABDUL MAJID KHAN *v.* BALAPPA.
82 I. C. 105: A. I. R. 1925 Nag. 58.

——S. 55—*Test—Agreement for re-purchase—Time is essence.*

In an agreement for re-purchase time is of the essence of the contract. (*May Oung and Duckworth, JJ.*) MAUNG WALLA *v.* MG SHWE GUN.
1 R. 472 : 2 Bur. L. J. 188: A. I. R 1924 Rang. 57.

——S. 55—*Sale of land—Option to repurchase land under contract of sale—Time if of the essence of the contract.*

Though in the case of a contract for sale of land, time may or may not be of the essence of the contract in the case of an option for repurchase before a fixed date, time is of the essence and option must be exercised before that date. 42 Mad. 802: 30 M. L. J. 186 Ref. (*Maung Kin, J.*) MAUNG POYIN *v.* MAUNG SHWE KIN. **11 L. B. R. 441 : 70 I. C. 126 : 1 Bur. L. J. 167: A. I. R. 1923 Rang. 42.**

——S. 55, Cl. 2—*Effect of failure—Contract for completion of building work within stipulated period—Default—Damages.*

Where under a building contract it was agreed that the work was to be completed within 4 months and a fine of Rs. 5—was to be paid for every day after the date that the work remained incomplete. *Held*, that time was not of the essence of the contract in the case. The very fact that a penalty was stipulated for in case of failure to complete the work within the stipulated time indicated that in case of such failure it was not the avoidance of the contract that was contemplated but acceptance of performance after the stipulated time subject to payment of damages which were fixed. (*Kotwal, A. J. C.*) ROBERTS *v.* SHAIKH HYDER. **6 N L. J. 91 : 69 I. C. 894: A. I. R. 1923 Nag 140.**

——S. 56—'*Becomes Impossible.*'

Where a contract for supply of coal within a certain time was entered into by the defendants but failed to make the delivery in accordance with its terms owing to Government restriction on the transport of coal from collieries but it was admitted that coal was available and could be purchased in the local market. *Held*, as the contract had not become impossible of performance the defendants are liable to the plaintiffs for the damages claimed by them. (*Atkinson, J.*) KESHAV LAL BROTHERS AND CO. *v.* DIWAN CHAND AND CO. **50 I. A. 142 : 74 I. C. 396 : 25 Bom. L. R. 854: 27 C. W. N. 974: 47 B. 563: 33 M. L. T. 342: 1 P L. R. 434 : 1923 M. W. N. 583: A. I. R. 1923 P. C 105 (P. C.) : 45 M. L. J. 630.**

——Ss. 56 and 65—*Becomes Impossible—Contract of lease.*

Where in a contract to lease lands, the performance of contract becomes impossible by acquisition of land by Government, the promisee is entitled to compensation for loss. (*Banerjee, J.*) MUHAMMAD HASHIM *v.* MISRI. **20 A L. J. 41: 65 I. C 253: L R. 3 A. 575: 44 A. 229: A. I. R. 1922 All. 6.**

——S. 56—*Becomes impossible—Frustration.*

Per *Richardson, J.*—S. 56 of the Contract Act is applicable only to the physical impossibility and therefore does not cover every case of frustration. S. 9 however recognises that promises may be implied. (*Sanderson, C. J. and Richardson, J.*) GOWRI SHANKAR AGARWALLA *v.* MOITRA. **70 I. C. 379: 26 C. W. N. 573.**

——S. 56—'*Becomes Impossible*'—*When a discharge—Economic unprofitableness—Rise in freight—*Force majeure.

Impossibility as an excuse for non-performance of a contract, must be a physicial or legal impossibility and not merely an impossibility with reference to the ability and circumstances of the promiser, a mere economic unprofitableness is not equivalent to impossibility of performance; but a rise in freights may be equivalent to such a scarcity of ships as to amount to physical

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impossibility. The expression '*force majeure*' has more extensive meaning than '*act of God*' or '*vis major*' though it may not include all, "causes you cannot prevent and for which you are not responsible." (*Mookerjee, C. J. and Fletcher, J.*) GUBBAY *v.* RAMJUS RAY. **63 I. C. 267: 33 C. L. J. 151.**

——S. 56—*Portion of contract becoming impossible—Contract does not become void.*

When a portion of the contract becomes incapable of performance, the contract does not become void or unenforceable. (1903) 2 K. B. 683 Foll. Plaintiffs purchased from a District Board, the right to collect tolls at certain toll gates. Owing to a Government ordinance the traffic of food grains was stopped and plaintiffs suffered loss. The traffic of food grains was not the only traffic that passed the toll gates. *Held*, that the plaintiffs could not recover the purchase money from the District Board. (*Devadoss, J.*) PRESIDENT, D. B., S. KANARA *v.* SANTHAPPA. **86 I. C. 362 : A. I. R. 1925 Mad. 907.**

——S. 56—Force majeure—*C. I. F. Contract to ship goods of particular branch—Steamer commandeered for war—Impossibility to procure tonnage in other steamers—*" Force majeure" *arises.*

The defendant entered into a contract on C. I. F. terms to ship certain goods of a certain brand to a certain port in a certain period. The contract contained a *force majeure* clause which exempted the parties from liability in case of war, revolution, strikes, epidemics and other unforeseen circumstances which might prevent the goods from reaching the port of embarkation or from being shipped or despatched. The defendant booked the necessary tonnage on a certain steamship. But the steamer was commandeered by the Government for purposes connected with the War of 1914. In spite of his best endeavours, the defendant was unable to obtain accommodation for that cargo on any other steamer leaving the ports from which the goods to be sent were usually shipped and calling at the port mentioned in the contract in the period stipulated therein. *Held*, that the defendant was prevented by *force majeure* within the meaning of the contract, from performing his contract and that he was not liable for damages for the non-performance of the contract. The defendant could not have fulfilled the contract by trying to purchase the articles in some other market and supplying the plaintiffs, because the contract was on C. I. F. terms and in respect of goods of a particular brand to be selected by the defendant and the plaintiffs could not be compelled to accept goods when the requirements of the contract were not strictly satisfied. The meaning of the term "*Force majeure*" discussed. *Per Srinivasa Aiyangar, J.*—In cases of *force majeure* it is not sufficient for the contracting party to point to something in the nature of a *force majeure* and seek to escape liability. It is absolutely necessary to go further and establish by satisfactory evidence that the circumstance or occurrence which is called *force majeure* was the real cause, which prevented the performance of the contract. In the circumstances such as were present in the case on hand, when a commercial man finds himself face to face with an upsetting of his plans and calculations brought about by *force majeure* he is not bound to prove more than that he made his best endeavours as a man of ordinary prudence would and should, who was anxious to procure some tonnage for himself in such circumstances, (*Spencer and Srinivasa Aiyangar, JJ.*) EDMUND BENDIT *v.* EDGAR RAPHAEL PRUDHOMME. **48 Mad. 538 : 87 I. C. 681: A. I. R 1925 Mad. 626 : 48 M. L. J. 374**

CONTRACT ACT, S. 60.

——S. 56—*Applicability—Impossibility due to default of contracting party.*

S. 56, Contract Act, has no application to a case where the impossibility is due to the default of the contracting party himself. (*Ross and Das, JJ.*) BANARSI PRASAD *v.* MOHI-UD-DIN AHMED. **3 Pat. 581: A. I. R. 1924 Pat. 586.**

——Ss. 56, 35 (2)—'*Becomes impossible*'—*Surety for production of judgment-debtor—Imprisonment—Effect.*

Where a person stands surety to produce a person in Court on a particular day, but by that time the person had been convicted and lodged in jail, the promise becomes impossible to perform and the agreement becomes void. The agreement is not one falling under the second part of S. 35 of the Contract Act. (*MacCell, J. C.*) MAUNG KY WE *v.* MAUNG SAN TIN. **4 U. B. R. 99 : 1 Bur. L. J. 236 : 70 I. C. 870 : A. I. R. 1923 Rang. 26.**

——Ss 59 and 60—*Appropriation—Principles.*

A creditor is entitled to appropriate an indefinite payment to the payment of interest. A debtor may stipulate that a payment should be applied to the principal. If the creditor accepts the money he must appropriate it in the manner directed by the debtor. If he is not willing so to receive it he must return the money. (*Lord Dunedin.*) TEEKAM CHAND *v.* RADHA KISHEN. **14 L. W. 391 : 26 C. W. N. 153 : 63 I. C. 904 : 30 M. L. T. 39 : (1921) M. W. N. 411 (P. C.)**

——Ss. 59 to 61—*Decree debt—Payment of portion—How to be appropriated—Principal or interest.*

In the absence of any agreement to the contrary, payments made by a judgment-debtor have first to be appropriated towards the interest and the balance of the payment, if any, is then to be credited to the principal. Ss. 59 to 61 of the Contract Act do not expressly deal with interest, but the principle underlying these sections can well apply to interest as well. 8 B. L. R. 110 (P. C.) relied upon. (*Jwala Prasad and Bucknill, JJ.*) MALIK MOKHTAR AHMED *v.* MT. BIBI RAHIM UNNISSA BEGUM. **67 I. C. 606 : 4 P. L. T. 58 : 1922 P. H. C. C. 66 : A. I. R. 1922 Pat. 369.**

——S. 59—*Payment by joint debtor.*

Payment by joint-debtor with discretion to adjust it against joint debt extinguishes same *ipso facto* against all the debtors and any arrangement subsequently come to between the creditor and the person who paid cannot revive the joint liability. The creditor has the option of refusing to accept the payment at all with the direction as to appropriation. But once he accepts the payment he must obey the direction and even if he accepts the payments under protest, he will still be liable. (*Lentaigne and Carr, JJ.*) T. D. FOSTER *v.* R. M. A. L. CHETTY FIRM. **2 Rang. 204 : 82 I. C. 660 : A. I. R. 1925 Rang. 4.**

——S. 60—*Principal and interest both due—Indefinite payment by debtor—Creditor whether entitled to appropriate it to interest—Course to be followed by creditor if debtor's appropriation unacceptable—Entries in the creditor's book indicative of acceptance of debtor's appropriation.*

A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or the cheque

by which the money is proffered. If he accepts it he would then be bound by the appropriation proposed by the debtor. That entries in the books of the creditor may be taken as indicative of agreement to a proposed appropriation by the debtor need not be denied and is in accordance with the law as above stated. 26 C. W. N. 33 (P. C.) Foll. (*Lord Dunedin.*) NEMICHAND *v.* RADHA KISHEN.
30 M. L. T. 39 : 26 C. W. N. 153 : A. I. R. 1922 P. C. 26 (P. C.).

——S. 60—*Creditor may apply payment to any debt he chooses unless debtor has appropriated payment to any particular debt.*

Where there are two bills and the amount paid by the debtor does not even cover the first bill, nevertheless, the creditor is in law entitled to credit the payment to both the bills so as to save, if necessary, limitation in respect of each, unless an appropriation has been made by the person making the payment. (*Buckland, J.*) MAURICE MAYAHAS *v.* MORLEY.
29 C. W. N. 496 : 87 I. C. 508 : A. I. R. 1925 Cal. 937.

——Ss. 60, 61—*Instalment—Decree—Interest.*

The decree-holder in the case of an instalment decree has the right to appropriate the payments first towards satisfaction of the interest due to him under sections 60, 61, Contract Act. There is no distinction between an ordinary decree and an instalment decree. (*Jwala Prasad and Ross, JJ.*) BARCLAY *v.* MT. DHANDEI.
4 P. L. T. 112 : 1923 P. H. C. C. 194 : A. I. R. 1923 Pat. 322.

——S. 61—*Principal and interest due—No definite appropriations.*

Where moneys are received by the creditor without any definite appropriation on either side, the money so received must first be applied in payment of interest and then in payment of the capital. (*Lord Buckmaster.*) VENKATADRI APPA RAO *v.* PARTHASARATHY APPA RAO.
44 Mad. 570 : 48 I. A. 150 : 19 A. L. J. 465 : 23 Bom. L. R. 644 : 33 C. L. J. 447 : 14 L. W. 25 : (1921) M W. N. 347 : 3 U. P. L. R. 27 : 61 I. C. 31 : 26 C. W. N. 33 : 40 M. L. J. 549 (P. C.).

——S. 61—*Time-barred items.*

Where there is a running account there is no reason why the payments within three years should not be treated as appropriated to the satisfaction of the earlier advances even though these advances may be time-barred at the date of the suit or at the date of the payment. (*Shah, C. J. and Crump, J.*) SATAPPA *v.* ANNAPPA.
47 Bom. 128 : 24 Bom. L. R. 1284 : A. I. R. 1923 Bom. 82.

——S. 61—*Debts of equal standing.*

Per *Daniels, A. J. C.*:—It is only where the debts are of equal standing in point of time that the payment is to be applied in discharge of each proportionately. There is no authority for the suggestion that the money should be applied first in payment of the most onerous debt.

Per *Ashworth, A. J. C.*:—Notwithstanding anything in Section 61 of the Contract Act, in the absence of appropriation, payments of surpluses should be appropriated to interest before they are appropriated to principal of any particular debt. (*Kanhaiya Lal, J. C., Daniels and Ashworth, A. J. Cs.*) SARSUTI PRASAD *v.* EHTISHAM ALI.
25 O. C. 349 : 77 I. C. 310 : A. I. R. 1923 Oudh 123.

——S. 61—*Appropriation of payments—Rule as to.*

Under S. 61, Contract Act, where neither party makes any appropriation, payments are to be applied in the discharge of debts in order of time. (*Ross, J.*) FIRM AMRIT PAIYAR BILAT MANDAL *v.* FIRM SUNDAR RAM RAMPHAL RAM.
78 I.C. 910 (Pat.).

——S. 61—*Creditor can appropriate in absence of presumed or express intention of debtor.*

A creditor can appropriate a payment made by the debtor towards payment of his debts and accepted by the creditor as such in the absence of any express or presumed intentions of the debtor to the contrary: but *ex post facto* appropriation of payment by the creditor cannot prevail. (*Rupchand Bilaram and Kennedy, A. J. Cs.*) FIRM OF BUDHURAM *v.* KIMATRAL BHOJRAJ.
84 I.C. 672 : A.I.R. 1924 Sind 137.

——S. 62—*Essentials of novation—Partnership—Debt due by—Mortgage by one of partners for—Effect—When no extinguishment of firm's debt or release of partners' liability for it.*

Where during the continuance of a partnership one of the partners executed to a creditor of the firm a mortgage to secure, *inter alia*, the debt due to him from the firm, *held* that the mortgage did not work either as a novation of the firm's debt to the creditor or a release of any of the partners from full liability in respect of it. (*Lord Blanesburgh.*) VEERAPPA CHETTY *v.* ARUNACHALAM CHETTY.
26 Bom. L. R. 661 : (1924) M. W. N. 559 : 20 L. W. 368 : 35 M. L. T. 161 : 29 C. W. N. 438 : A. I. R. 1924 P. C. 192 : 47 M. L J. 168 (P. C.).

——S. 62—*Effect of novation—Contract—Rescission—Stipulation empowering a party to rescind—Legality of.*

Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning; subject to the principle of law that a party shall not take advantage of his own wrong, 1919 A. C. 1 Ref. The mere fact that the option to rescind the contract is not made dependent on the happening of any specified contingency, but an option to terminate the contract for any reasons whatsoever does not render the contract void for want of mutuality. (*Mulla, J.*) CHOTALAL LALLUBAI *v.* CHAMPSEY UMERSEY AND SONS.
24 Bom. L. R. 877 : 75 I. C. 233 : A. I. R. 1923 Bom. 75.

——S. 62—*Invalid novation — Insufficiently stamped hundi—Effect of—Suit on original cause of action.*

Where an insufficiently stamped hundi was given in renewal of a prior hundi, the plaintiff could fall back on the prior hundi. The giving of the second hundi would have operated as a discharge of the first one only if the new contract could have been legally enforced and as the plff. could not sue on the second hundi as being unstamped, he could fall back on the first one; and S. 62 of the Contract Act was no bar to his doing so. 27 M. 540 Rel. (*Martineau, J.*) SUNDAR DAS *v.* PURAN SINGH.
11 P. W. R. 1922 : 67 I. C. 856 : A. I. R. 1922 Lah. 56.

——S. 62—*Effect of novation—Substituted contract falling through—Rescission—Right to enforce old contract.*

Where a debtor has disabled himself from performing his promise under a later contract which had been intended to be a substitute for an earlier one it is open to the creditor to enforce the earlier contract rescind

ing the later and S. 62 of the Contract Act is no bar. 66 P. R. 1888 Foll. : 15 P. W. R. 1918 : 63 P. R. 1917 : 53 P. R. 1916 : 41 Cal. 137 Dist. (*Wilberforce and Martineau, JJ.*) NAJAF SHAH *v.* RANGU RAM.
66 I. C. 47 : 2 Lah. 323.

——— **S. 62**—*Decree on compromise—Compromise itself stating that such decree should be obtained—Decree supersedes compromise.*

Whether an earlier contract is superseded by a later contract, on account of a certain alteration, depends on whether the parties intended to rescind the original contract. It is possible to vary a term of an original contract by a subsequent parol contract in such a way as to keep alive the original contract. Where a decree was passed on a compromise : *Held*, that the decree and not the compromise in the decree bound the parties especially in view of the parties' intention indicated in the compromise preceding the decree itself, that a decree should be obtained on the basis of the compromise. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) ARUNACHALLAM CHETTI *v.* R. R. SETHUPATHI.
22 L. W. 195 · A. I. R. 1925 Mad. 1260.

——— **S. 62**—*Lease originally in manager's name—Adding one coparcener's name does not give rise to new lease.*

The mere circumstance that a coparcener's name is added to the name of the manager, while getting the lease confirmed by the widow of the lessor after his death does not make the lease a new one. (*Madhavan Nair, J.*) ELAGAN *v.* NANJAPPAN.
85 I. C. 964 : A. I. R. 1925 Mad. 919.

——— **S. 62**—*Effect of novation—There can be novation even after breach.*

Under S. 62 of the Act, there can be an agreement to cancel or vary the old contract or substitute a new contract, even after the breach of the original contract. 15 Cal. 319 Dis. from. (*Ayling, O. C. J. and Odgers, J.*) K. M. P. R. N. FIRM *v.* THEPERUMAL CHETTY.
14 L. W. 660 : (1921) M. W. N. 861 : 45 Mad. 180 : 67 I. C. 905 : 31 M. L. T. 478 : A. I. R. 1922 Mad. 314 : 42 M. L. J. 236.

——— **S. 62**—*Debtor's undertaking at creditor's request to pay a debt to a third person operates as substitution of new contract based on consideration of original creditor's forbearance to sue debtor.*

If the promiser being requested by the promisee, agrees to pay the debt to a third party, the original contract is replaced by a new one and the original promisee cannot enforce his claim against the promiser. The substituted contract is supported on this consideration, namely, the original promisee's forbearance to demand the payment from the promiser. (*Kinkhede, A. J. C.*) GANAPATI *v.* JAIRAM.
81 I. C. 1019 : A. I. R. 1925 Nag. 66 (2).

——— **S. 62**—*Merger—Debt on hatchitta—Mortgage for the same debt.*

Whether the parties agreed to substitute one contract for the other under Section 62 of the Contract Act is a question of fact and intention. Where a mortgage was executed for the purpose of securing the amount lent on a hatchitta, *held* that the original debt had not become merged in the mortgage deed. (*Buckland, J.*) RAMLAL MURLIDHAR *v.* JOGENDRA KRISHNA ROY.
30 C. W. N. 58.

——— **S. 62**—*If the new contract that is substituted for the original one turned out to be void, the latter cannot be enforced unless there is express abandonment of rights under old contract—Mere returning of mortgage deed when a registered deed of surrender is taken in lieu of the mortgage, is not abandonment so as to debar the enforcement of the mortgage when the surrender is set aside.*

What is needed or essential for a novation is the wiping out of the original contract as well as the creation of a new valid contract. If the new agreement is held or declared by law to be in contravention of the provisions of any statute it is not contract and therefore it cannot serve as *novatio*, and the original contract continues unless the rights thereunder are expressly abandoned. Where a mortgagee accepts a registered surrender of a portion of the land in lieu of the mortgage and hands over to the mortgagor the mortgage bond and where subsequently the surrender is set aside by the Court, the mortgagee's action in returning the mortgage deed to the mortgagor is not abandonment of his rights under the original mortgage and he can enforce the same. Case-law discussed. (*Kinkhede, A. J. C.*) GANAPAT *v.* MAHADEO.
85 I. C. 264 : A. I. R. 1925 Nag. 26.

——— **S. 62**—*Essentials of novation—Settlement of damages is not novation.*

Where the contract subsisted and had failed the cause of action would be the failure of the contract. The settlement that a certain amount of money was payable for the failure is not a new contract. (*Prideaux, A. J. C.*) KAMAL NARAYANA *v.* BANIRAM.
75 I. C. 440 : A. I. R. 1923 Nag. 332.

——— **S. 62**—*Essentials of novation—Mortgage—Sale with a view to discharge mortgage—Nature of the transaction.*

A suit was brought for foreclosure of a mortgage executed on 14th of August 1908. It was of the simplest possible character, being a claim for the amount still due on the mortgage after making allowance for a payment of Rs. 9,000 made on 17th October 1917. On that date the mortgagor sold a portion of the property and paid the Rs. 9,000 he received for the sale to the mortgagees towards satisfaction of the mortgage-debt. The purchasers happened to be the mortgagees. The mortgagor originally agreed to sell the property for Rs. 9,000 on the 9th January 1916, and he agreed also that the purchaser might retain enough of the purchase-money to pay off the mortgage. But the defendant mortgagor did not carry out his agreement till he was compelled to do so by a decree of a Civil Court in a suit instituted under the Specific Relief Act. The sale-deed was eventually executed by the Court for him on 17th October 1917, by which time the amount due on the mortgage was considerably in excess of Rs. 9,000. *Held* the effect of the sale was not to relieve the mortgagor of his liability to pay the mortgage debt. (*Hallifax, A. J. C*) NARAYAN *v.* VENKATA RAO.
72 I. C. 422 : A. I. R. 1923 Nag. 213.

——— **S. 62**—*Limitation starts from breach of new promise.*

Where there is novation of contract a fresh and independent cause of action accrues on the day on which the new promise is broken. (*Dalal, J. C.*) MENDI LAL *v.* RAM CHANDER.
A. I. R. 1925 Oudh 632 (2).

——— **S. 62**—*Test is intention of parties and not dissimilarity of terms.*

The essence of the innovation of a contract lies not in the dissimilarity of the terms between the old and the new contract but in the intention of the parties to supersede the old by the new. (*Wazir Hasan, A. J. C.*) BALDEO *v.* B. SHER BAHADUR KHAN.
74 I. C. 42 : A. I. R. 1924 Oudh 169.

——— **S. 62**—*No novation takes place without the substitution of a fresh contract for the original one.*

When a contract is novated there is a fresh contract

coming into existence directly or by implication in place of the original contract. Hence the fact of the holders of a perpetual and heritable grant, partitioning subsequent to the grant, the subject-matter of the grant without reference to the grantor, so as to entitle the respective heirs to the specific properties, does not invite the operation of the principle of novation. (*Jwala Prasad and Macpherson, JJ.*) GOPAUL OJHA *v.* RAMADHAR SINGH. **82 I. C. 804 : A. I. R. 1925 Pat. 228.**

——— S. 62—*New contract.*

A compromise decree passed in the suit based on a mortgage, does not create a new contract. 46 C. 76 and 19 C. W. N. 1228 Dist. (*Mullick and Kulwant Sahay, JJ.*) ISHAN CHANDRA *v.* NILRATAN. **2 P. 538 : 1923 P. H. C. C. 184 : 72 I. C. 1049 : 1 P. L. R. 217 : 4 P. L. T. 311 : A. I. R. 1923 Pat. 375.**

———S. 62—*"Cross contracts" no extinction by process of* novatio *takes place.*

In the case of "cross contracts" the second contract does not operate to extinguish the first contract completely nor is it effective of a *novatio.* The two contracts are distinct and separate and the fact that the parties intended only to pay differences does not extinguish them. Where cross contracts contain a submission clause and they are settled, failure to pay the amount found due by such settlement is referable to such arbitration. But if the parties to a contract in which there is a submission clause, settle the amount due under it and the party who has to pay such amount enters in the cash book details showing the payment of the amount due from him in cash in full settlement and discharge of the contract and showing that he has received a *dusti* or temporary loan of the amount from the other party such entry gives rise to a new and separate cause of action and can completely answer a suit on the original cause of action. In any case the settlement has the effect of a *novatio* and precludes the parties from resorting to arbitration under the submission clause contained in the original contract. (*Rupchand Bilaram, A. J. C.*) KISHINDAS PURSUMAL *v.* MENGHRAJ KHIALDAS. **81 I. C. 834 : A. I. R. 1925 Sind 144.**

——— S. 63—*Acceptance of performance—Cheque for smaller amount accepted and cashed—Effect of.*

Defendant sent a cheque to plff. for a portion of the sum claimed by the latter with a condition that this sum was being paid in full discharge of the total amount due to plff. The plff. retained the cheque and eventually cashed it. Two days after cashing the cheque, plff. wrote to the deft. that the cheque had been cashed but he did not agree to receive the amount in full discharge of the payment of the sum due to him. *Held*, that the mere fact that the plff. retained the cheque and cashed it and at the same time refused to receive the amount in full discharge of the payment of his debt, does not raise any conclusive presumption that they had accepted it as a conditional offer made by deft. 6 A. L. J. 67 : 22 Q. B. D. 610 Ref. (*Stuart and Sulaiman, JJ.*) BASDEO RAM SARUP *v.* DILSUKHRAI SEWAK RAM. **20 A. L. J. 717 : L. R. 3 A. 548 : 68 I. C. 783 : 44 A. 718 : A. I. R. 1922 All. 461.**

———S. 63—*Scope of.*

S. 63 of the Contract Act does not entitle a promisee for his own purposes and without the consent of the promiser to extend time to his own advantage. There must be an agreement or mutual understanding to waive. (*Abdul Raoof and Campbell, JJ.*) ASMAD ULLAH *v.* MESSRS. BEHARI LAL & SONS. **68 I. C. 912 : A. I. R. 1923 Lah. 117.**

———S. 63—*Promisee—Not bound to accept part performance.*

A promisee is not bound to accept part performance of a contract. (*Le Rossignol and Wilberforce, JJ.*) SHAMS DIN MEHR BAKSH *v.* MUHAMED KHALIL. **59 I. C. 971 : 3 Lah. L. J. 141.**

———S. 63—*Waiver—Evidence of—Mortgage—Discharge of.*

Waiver may be evidenced by conduct inconsistent with the continuance of the rights waived. There is nothing in law to prevent a discharge by acceptance of something in lieu of the performance of the contract. (*Prideaux, A.J. C.*) KAWA DAJI *v.* GANGARAM. **64 I. C. 461.**

———S. 63—*Promisor accepting cash from promisee—Breach of contract—Effect.*

Where a party to a contract of marriage having accepted cash and jewels repudiates the marriage he is bound to return what he has taken. 15 Cal. 319. (*Coutts and Bucknill, JJ.*) MATHURA PRASAD SINGH *v.* SATYA NARAIN PRASAD SAHAI. **65 I. C. 812 (Pat.).**

———Ss. 64 and 65—*Minor's property—Sale by step-mother—Purchase money applied in discharging mortgage executed by minor's father—Marriage expenses of minor defrayed out of the money—Sale can be set aside but purchase money must be refunded—Guardian and Ward—Sp. Rel. Act, S.* 41.

Where the step-mother of a minor sold property belonging to the minor in order to pay off a mortgage executed by his father and to meet the marriage expenses of the minor. *Held*: that the sale could be set aside at the instance of the minor, but the minor was bound to refund the consideration money. (*Macleod, C. J. and Crump, J.*) LIMBAJI RAVJI *v.* RAHI RAVJI. **49 Bom. 576 : 27 Bom. L. R. 621 : 88 I. C. 643 : A. I. R. 1925 Bom. 499.**

———S. 64—*Alienation by minor—Alienation set aside—Minor's liability to restore benefit received.*

If an alienation is set aside at the instance of the alienor on the ground that he was minor at the time of alienation, the alienor is not bound to restore the benefit received by him except in the case of fraud. 30 Cal. 539 (P.C.) and 38 Mad. 1071 Rel. (*Chevis, J.*) KESHOR SINGH *v.* ASA SINGH. **60 I. C. 519 : 3 U. P. L. R. (Lah.) 94.**

———S. 64—*Voidable contract—Rescinding—Effect of further performance dispensed with.*

Where an agreement is rescinded its further performance cannot be enforced. S. 64 of the Contract Act will apply where an agreement has been rescinded. S. 64 is not restricted to contracts voidable under S. 39 but extends also to cases of contracts voidable by reason of breach under S. 39. (*Lyle and Ashworth, A. J. Cs.*) MAHAMMAD MUMTAZ ALI KHAN *v.* ALTAFUL RAHMAN. **25 O. C. 169 : 69 I. C. 789 : 10 O. L. J. 166 : A. I. R. 1922 Oudh 259.**

———Ss. 64 and 65—*Mistake—Restoration of benefit.*

Where the parties are found to have been in ignorance of any discrepancy, then it follows that both of them were labouring under a mistake of fact and when restoration of one party to his original position takes place he cannot recover from the other party without surrendering the benefit which he derived under the mistaken act. This principle is not limited only to cases of agreements, which are provided for by Ss. 64 and 65 of the Contract Act but extends even to acts committed under a common mistake of fact. (*Wazir Hasan, A. J. C.*) MAQBUL AHMED *v.* FARHAT ALI. **4 U. P. L. R. (J. C.) 6 : 66 I. C. 461 : 8 O. L. J. 546 : A. I. R. 1922 Oudh 152.**

——S. 65—*Scope of.*

The section deals with (*a*) agreements and (*b*) contracts. S. 65 deals with (*a*) agreements enforceable by law and (*b*) with agreements not so enforceable. By clause (*g*) of S. 2 an agreement not enforceable by law is said to be void. An agreement discovered to be void is one discovered to be not enforceable by law and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. The agreement to sell the right of reversioner is manifestly void from its inception, because its subject-matter is incapable of being bound by sale. The vendee in this case was given the purchase money and interest at 6 per cent. from the date of suit. (*Sir Lawrence Jenkins.*) HARNATH KUAR *v.* INDAR BAHADUR SINGH. **45 A. 179 : 50 I. A. 69 : 26 O. C. 223 : 18 L. W. 383 : 2 Pat. L. R. 237 : 37 C. L. J. 346 : 9 O. L. J. 652 : 27 C. W. N. 949 : 9 O. & A. L. R. 270 : 71 I. C. 629 : 33 M. L. T. 216 : 5 P. L. T. 281 : A. I. R. 1922 P. C. 403 : 44 M. L. J. 489 (P. C.).**

——S. 65—'*Discovered to be void.*'

A Hindu reversioner to an estate in Oudh sued for a declaration that a will alleged to have been made by the last male owner directing his widows to adopt was invalid and void and obtained a decree to that effect. He was also declared entitled to succeed to the estate on the death of the last surviving widow. Subsequently the reversioner transferred his right to half the estate in favour of the plaintiff's predecessor-in-title, for a consideration of Rs. 25,100—agreeing to put the vendee in proprietary possession of the estate after the death of the last surviving widow. In a suit by the plaintiff after the death of the widow for recovery of the estate or for the purchase money, *Held*, that there was no valid transfer of the estate in favour of the plaintiff's predecessor-in-title inasmuch as the vendor had at the date of the conveyance a mere *spes successionis* which he could not validly transfer under S. 6 of the Transfer of Property Act, that the suit for possession must therefore fail ; that the plaintiff however was entitled to recover the consideration paid for the sale with interest thereon from the date of suit : and that the case was governed by S. 65 of the Contract Act, the cause of action having arisen after the death of the last surviving widow when alone the vendee discovered that the transfer was void and unenforceable. (*Sir Lawrence Jenkins.*) HARNATH KUER *v.* INDRA BAHADUR SINGH. **45 All. 179 : 9 O. L. J. 652 : 50 I. A. 69 : 37 C. L. J. 346 : 5 P. L. T. 281 : 27 C. W. N. 949 : 26 O. C. 223 : 71 I. C. 619 : 2 Pat. L. R. 237 : 33 M. L. T. 216 : 9 O. & A. L. R. 270 : 18 L. W. 383 : A. I. R. 1922 P. C. 403 : 44 M. L. J. 489 (P. C.).**

——S. 65—*Joint holding—Mortgage by one of the tenants—Rights of others.*

In the case of a joint occupancy holding belonging to four brothers and mortgaged by some of them with possession in favour of another person, one of the brothers, who was not a party to the mortgage cannot get back possession of the entire holding without paying the mortgage money on the ground that such a mortgage was invalid. 37 A. 779 Ref. (*Kanhaiya Lal, J.*) SHAIKH MUDI *v.* MOHIB ALI. **L. R. 5 A. 36 (Rev.) : 78 I. C. 1022 : A. I. R. 1924 A. 746.**

——Ss. 65 and 56—*Becomes void—Contract of lease—Impossibility of performance—Compensation for advantage received.*

Where by reason of the acquisition of a lower garden by Government under the Land Acquisition Act the plff. lessee was deprived of the garden and the contract having become impossible of performance under S. 65 of the Contract Act, the plff. was entitled to be compensated by the deft. for the loss sustained by him. (*Banerji, J.*) MUHAMMAD HASHIM *v.* MISRI. **44 A. 229 : 20 A. L. J. 41 : L. R. 3 A. 575 : 65 I. C. 253 : A. I. R. 1922 All. 6.**

——Ss 65 and 11—*Minor's contract—Section does not apply.*

S. 65 has no application to a case where there never was or could have been any contract between competent parties, as for instance where one of the parties to a contract is a minor. (*Macleod, C. J. and Fawcett, J.*) MOTI LAL MANSUK RAM *v.* MANEKLAL DAYABHAI. **45 Bom. 225: 59 I.C. 245 (1): 22 Bom. L.R. 1195.**

——S. 65—*Return of purchase money on sale being void.*

When the person affected by a voidable transaction seeks to avoid its consequence, he is in the position of a person who seeks equity and he must do equity. Thus not only can he not ignore the transaction but he must offer to reimburse the prior transferee whose money has benefited the transferor. 3 C. L. J. 260 ; 21 C. W. N. 63 ; 16 C. L. J. 537 Foll. (*Mukerji and Cuming, JJ.*) VIJENDRA MOHUN SARMA *v.* MANARAMA DASI. **36 C. L. J. 326 : 49 C. 911 : A. I. R. 1922 Cal. 150.**

——S. 65—*Applicability—Agreement void to the knowledge of both parties.*

S. 65 does not apply to an agreement which at its very inception is known to be void to both parties. (*Shadi Lal, C. J. and Zafar Ali, J.*) FIRM PRABHA MAL—GHULA MAL *v.* FIRM BABU RAM—BASHESHER DAS. **89 I. C. 684.**

——S. 65—*Vendor unable to complete sale because of his defective title—Defect known to buyer—Buyer is entitled to refund of earnest money paid to vendor but not to interest thereon—Sp. Rel. Act, S. 18 (d).*

Where under an agreement for the sale of immoveable property the vendee pays to the vendor a sum of money as earnest money, and the vendor is subsequently found to be unable to convey a valid title because of the property being ancestral and there being a minor co-parcener concerned in the property and the transaction falls through for this reason, the vendee though aware of the defect in the title of the vendor is entitled to refund of the earnest money but is not entitled to claim interest or damages in lieu of interest on the earnest money. (*Broadway and Abdul Quadir, JJ.*) LACHHMAN DAS *v.* JOWAHIR SINGH. **44 P. L. R. 1922 : 70 I. C. 250 : A. I. R. 1924 Lah. 476.**

——S. 65—*Becomes void—Payment under—Right to recover.*

S. 65 of the Contract Act applies even though the contract was not void *ab initio* but becomes void subsequently and a suit to recover money paid under such a contract is maintainable. (*Abdul Raoof and Martineau, JJ.*) BADLU *v.* SHEO CHAND. **67 I. C. 367 : 56 P. L. R. 1922.**

——S. 65—*Agreement to transfer a karnam service inam when it would be enfranchised—Agreement is void, but refund of advance is claimable—Trusts Act, S. 88.*

Where the person who was for the time being in possession of a *karnam* service inam expected that the same would be enfranchised in his name and agreed to transfer his interest in the property to the plaintiff when the event would take place. *Held*, that the agreement was void and forbidden by law. *Held*, further, that the plaintiff would be entitled to refund of the money advanced by him. (*Phillips, J.*) A. AURYAPRABHAKARA RAO *v.* GUMMUDU SANYASI.

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(1925) M. W. N. 400 : 88 I. C. 557 : A. I. R. 1925 Mad. 885 : 48 M. L. J. 598.

——S. 65—*Charter party—Money advanced—Voyage becoming impossible—Advance can be recovered.*

Where money has been advanced under a contract of charter party, but the voyages stipulated for have become impossible owing to the ship having stranded on her way to the port of lading, the money can be recovered. (*Phillips and Odgers, JJ.*) SIVANADIAN CHETTIAR *v.* BATCHU SURAYYA. **48 Mad. 459 : 21 L. W 445 : 87 I. C 127 : (1925) M. W. N. 303 : A. I. R. 1925 Mad. 727 : 48 M. L. J. 413.**

——S. 65—*Chit fund—Lottery — Discontinuance in the middle—Subscriber if entitled to sue for a refund of subscriptions paid—Severance of legal from illegal part of the contract.*

The defendant was carrying on a chit fund. There were 500 subscribers each paying one rupee per month. The chit was to go on for 50 months and every month 2 prizes of Rs. 25 each were to be drawn by lot ; any subscriber who happened to win a prize would get Rs. 25 at once and had to pay thereafter only As. 8 a month while if he wins a second prize he would be given another Rs. 25 and thereafter his subscriptions would cease and his name would no longer be included in drawing the prize. At the end of 50 months all subscribers who had won no prize would be paid back the whole of the money they had subscribed. *Held*, that the arrangement was clearly a lottery. Where the stakeholder discontinued the chit after 27 months and thereupon a subscriber sued him for refund on the subscriptions he had paid. *Held*, per *Krishnan, J.* (*Odgers, J.* dissenting) the main point was to pay back the total amount of subscriptions paid while the arrangement to give prizes was only a collateral one serving as an inducement to join the chit and hence the former was severable from the latter and the illegality of the latter did not necessarily attach to the former. The suit for refund was therefore maintainable. (1919) M. W. N. 570 not foll. Per *Odgers, J.*—As a material part of the illegal purpose had been carried out, the subscriber was not entitled to recover the amounts paid, as both the plaintiff and defendant were in *pari delicto* and there was no ground for holding that they were not *potior est conditio possidentis*. Nor is the case one to which S. 65 of the Contract Act would apply as the contract was illegal from the beginning. (*Krishnan and Odgers, JJ.*) NAGAPPA PILLAI *v*, ARUNACHALAM CHETTY. **A. I. R. 1925 Mad. 281 : 47 M. L. J. 876.**

——S. 65—*Master and servant—Whether service by month or at daily rate—Servant leaving without notice—Whether entitled to be paid for the days he worked—Whether Master entitled to compensation.*

A school master, absenting himself from service without notice forfeits his pay for the whole month, as his service is held to be by month and not daily rates, in the absence of special custom or particular contract. The District Council, engaging his services, is entitled to damage for extra labour. 13 Cal. 80 ; 13 Bom. L. R. 19 ; 13 Ch. Dn. 339 ; 28 T. L. R. 530 ; 101 English Rep. 573, Foll. ; 23 M. L. J. 680, not followed. (*Oldfield, J.*) CUDDALORE MUNICIPAL COUNCIL *v.* T. M. PANCHAPAKESA AIYAR. **15 L. W. 362 : (1922) M. W. N. 153 : 31 M. L. T. 83 : A. I. R. 1922 Mad. 102.**

——S. 65—*Agreement by minor—The other party not aware of minority.*

Where a minor enters into a contract, but at that time the parties are not aware of his being a minor S. 65 of the Contract Act applies. (*Hallifax, A. J. C.*) GOKALDAS *v.* GULABRAO. **89 I. C. 143**

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——Ss. 65 and 23—*Transfer of occupancy rights in C. P. is not unlawful within S. 23—Money can be recovered on failure of consideration.*

Transfers of occupancy and ordinary tenant rights are voidable in the manner and to the extent provided for by the C. P. Tenancy Act. Such transfers are not unlawful within the meaning of S. 23 of the Contract Act, and are not absolutely void. A party who has paid any money under the transaction is therefore entitled to recover the sum paid on failure of the consideration S. A. No. 530 of 1918 Dist ; 45 I. C. 669 Foll. (*Baker, J. C.*) VITHOBA *v.* VISHNU. **87 I. C. 1043 (1) : A. I. R. 1925 Nag. 375.**

——S. 65—*Material alteration in deed—Deed becoming void—Advantage received under the deed must be refunded.*

Where a contract becomes void owing to material alteration of the deed embodying the contract, the party receiving benefit under the deed is bound to return the same. 38 M. L. J. 256 Ref. (*Kinkhede, A. J. C.*) HEMCHAND *v.* GOVINDA. **8 N. L. J. 1 : 86 I. C. 185 : A. I. R. 1925 Nag. 248.**

——S. 65—*Transfer prohibited by law—Refund of consideration can't be sued for.*

No suit can be brought for the recovery of money paid under an agreement which has as its object the evasion of the statutory prohibition against the transfer of occupancy land. Such contract is void *in toto*. (*Baker, J. C.*) NARSINGH *v.* NARAYAN. **80 I. C. 949 : A. I. R. 1925 Nag. 119 (2).**

——S. 65—*Return of money paid under void contract is to be determined subject to Contract Act and not English law.*

Principles of English law have no place when deciding whether money paid under contract that goes off must be returned or not. Such question must be decided with reference to the provisions of the Contract Act and not on the principles of English law. Case-law discussed. (*Hallifax, A. J. C.*) LACHHMI NARAYAN *v.* DAMODARDAS. **20 N. L. R. 192 : 81 I. C. 282 : A. I. R. 1925 Nag. 109.**

——S. 65—*Applicability—Money paid under illegal contract—If can be recovered.*

S. 65, Contract Act, applies to a case where money is paid under a contract which is illegal, but neither of the parties knowing its illegality. Equity requires a refund of the money in such a case. (*Prideaux, A. J. C.*) NARAYAN *v.* MOTISA. **20 N. L. R. 87 : 78 I. C. 343 : A. I. R. 1924 Nag. 132.**

——S. 65—*Right to sue—Securing a girl for marriage—Money paid to be given to girl's guardian—Girl not secured—Money recoverable.*

Defendant asked for Rs. 200 for the purpose of settling the plaintiff's marriage. The plaintiff however sent only Rs. 175 by money order. Defendant did not spend that sum in connection with the plaintiff's marriage in accordance with the agreement come to and therefore plaintiff sued to get the money back. Plaintiff's pleader stated that girls were scarce and plaintiff wanted the defendant to secure a girl for him and the money was given him to be paid to the guardian of the girl selected, should money be demanded. *Held* : that plaintiff can recover. 41 M. 197 and 33 B. 411, Foll. (*Prideaux, A. J. C.*) GANGADHAR DAJI *v* GOVIND NARAIN. **74 I. C. 107 : A. I. R. 1923 Nag. 296.**

——S. 65—*Benami transaction—Consideration—C. P. Code, S. 66.*

While S. 66, C.P. Code bars a suit to prove benami character of certain transactions it does not make these benami transactions illegal, and the consideration, if any, could be recovered under S. 65 of the

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Contract Act. (*Batten, J. C.*) ABDULLA KHAN *v.* JALAM SINGH. **A. I. R. 1923 Nag. 11 (2).**

——**S. 65**—*Applicability — Mortgage — Reversionary interest—Personal decree—Limitation.*

The mortgage of reversionary interest being void, even a money decree cannot be obtained on it, and S. 65 will not apply. (*Dalal, J.C.*) SUKHDEO SINGH *v.* KASHI SINGH. **90 I. C. 340.**

——**S. 65**—*Mortgage acted upon by both parties though held to be void for want of legal necessity must be deemed to be discovered to be void only on the date of the decree.*

Where a mortgage by the adult members of a joint Hindu family was acted upon for several years, the mortgagee being put in possession of the mortgaged property and where subsequently it was held to be void for want of legal necessity. *Held*, that the mortgage must be deemed to have been discovered to be void only when the Court so decided. (*Wazir Hasan, A. J. C.*) RAM NATH *v.* DAMODAR PRASAD. **80 I. C. 855 : A. I. R. 1925 Oudh 212.**

——**S. 65**—*Discovery cannot be made later where the contract is void* ab initio, *but under special circumstances the Court may hold that the discovery was made later.*

If an agreement is void *ab initio* it cannot be discovered to be void when the Court finds it to be so because the parties are presumed to know the law. However, special circumstances of the case may enable the court to say that the discovery was made later than the date of the agreement itself. (*Wazir Hasan, A. J. C.*) RAM NATH *v.* DAMODAR PRASAD. **80 I. C. 855 : A. I. R. 1925 Oudh 212.**

——**S. 65**—*Contract by disqualified proprietor—Right to recover money paid.*

Where a person enters into a contract with a disqualified proprietor whose estate is in the management of the Court of Wards, the contract is void and no compensation can be allowed to the other party under S. 65 of the Contract Act. (*Neave and Kendall, A. J. Cs.*) HARI KISHUN DAS *v.* CHOUDHURI MAHOMED SAFI JAN. **10 O. & A. L. R. 491 : 80 I. C. 800 : 11 O. L. J. 502 : 1 O. W. N. 182 : A. I. R. 1924 Oudh 438.**

——**S. 65**—*Void contract—Right to recover compensation.*

Where a contract is void from the very inception, the promisee is not entitled to recover compensation under S. 65 of the Contract Act. (*Dalal, J.*) RAM DAYAL *v.* NIMAR SINGH. **11 O. L. J. 360 : 26 O. C. 355 : A. I. R 1924 Oudh 133.**

——**S. 65**—*Minor's contract—Avoidance—Duty to restore benefit.*

A minor who seeks to recover the property sold by him after cancellation of the sale, must restore the benefit he had received. 11 O. C. 1 Foll ; 40 All. 558 ; 8 O. L. J. 287 Ref. (*Daniels, J. C.*) RAGHUNATH SINGH *v.* DHONDHE SINGH. **24 O. C. 348 : 9 O. L. J. 30 : 64 I. C. 771 : A I. R. 1922 Oudh 30.**

——**S. 65**—*Becomes void—Agreement to transfer decree—Death of decree-holder—Recovery of earnest money.*

A decree-holder agreed to execute a transfer of his decree in favour of the plaintiff's predecessor-in-title to the proposed transferee, paid a sum of Rs. 2,000 out of the stipulated consideration to the decree-holder in advance. Subsequently the proposed transferee died and the original decree-holder realised the decretal amount by execution of the decree against the judgment-debtor. The plaintiffs thereupon instituted a suit for recovery of the amount advanced with interest. It was found that the contract was a

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personal one. So that on the death of the proposed transferee it was incapable of fulfilment. *Held* that, the plaintiffs were entitled to recover the earnest money with interest. (*Das and Macpherson, JJ.*) MT. RAMDULARI KUER *v.* JANG BAHADUR SINGH. **1923 P. H. C. C. 247 : 77 I. C. 378 : A. I. R. 1923 Pat. 589.**

——**S. 65**—*Breach of contract—Illegality of contract—Damages and return of earnest money—Claiming the latter alone in appeal, when a fresh suit would be time-barred.*

In a suit for damages, for breach of contract, and return of earnest money the trial court dismissed the plaintiff's claim on the ground of illegality, and the plaintiff, without amending the plaint for return of deposit money in the trial court, raised it for the first time in appeal, when a fresh suit for the same would have been time-barred. *Held*, relying on, *Janardhan Kishore Lal* v. *Shib Pershad Ram* (43 Cal. 95) that a claim in appeal inconsistent with the relief asked for in the plaint, when a fresh suit for the new claim would be time-barred on the day when it was made, should not be allowed to be amended. (2) where an executory contract is made for an illegal sale of goods, and if the contract remains unperformed, it is open to a party to repudiate the illegal contract and to recover any moneys deposited thereunder. *T. P. Petherperumal Chetty* v. *R Muniandy Servai*, 4 L. B. R. 266 ; 35 Cal. 551, Foll. (*Lentaigne and Carr, JJ.*) HIRJEE DEVRAJ & CO. *v.* MAUNG NUYN SHEIN. **2 Rang. 414 : A. I. R. 1925 Rang. 49.**

——**S. 65**—*The words 'is discovered to be void'—Contract by heirs of deceased for sale of rice mill—Contract void on ground that certain heirs are minors—Suit for refund of purchase money—Limitation Act, Art.* 97.

It is a reasonable construction of the words "is discovered to be void" in S. 65 to hold that they apply to a case where an agreement which was not *prima facie* void in its entirety, though it might be void in part, is declared by the Courts to be void and any money paid under such an agreement is money paid under an existing consideration which afterwards fails and in such a case time runs only from the date of the failure of the consideration. (*Heald and Rutledge, JJ.*) MAUNG KYI OH *v.* MAUNG KYAW ZAN. **4 Bur. L. J. 197 : A. I. R. 1926 Rang. 7.**

——**S. 67**—*Repudiation—Tender.*

Where the defendants had practically repudiated the terms of the contract, it is not necessary that any actual tender of money should have been made to them and it is sufficient for the plaintiffs to show their readiness to pay the money. (*Shadi Lal, C. J. and Abdul Qadir, J.*) FIRM RAM DYAL SHEO PERSHAD *v.* FIRM GHAMANDI LAL NARAIN DAS. **A. I. R. 1923 Lah. 56.**

——**S. 68**—*Discharge of decretal debt by stranger as owner of property of the deceased, where deceased's minor sons were living does not avail the stranger.*

Where the share of T was attached, while he was separate from his mother and where T had minor sons but T's brother and mother representing themselves to be owners and to be persons in possession of T's share, mortgaged that share and with the mortgage money satisfied the decree against T's estate. *Held* : that the mortgagors having never purported to act on behalf of minor sons of T and having totally ignored their existence, the mortgage could not be enforced against either T's descendants or T's property and that S. 68 of the Contract Act did not apply to the case. (*Mukerji and Dalal, JJ.*) LALMAN *v.*

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KALKA PRASAD. **L. R. 5 A. (Civ.) 729: 81 I. C. 1041: A.I.R. 1925 All. 213.**

——S. 68—*Litigation expenses—Payment of father's debts.*

The general rule is that a minor is incapable of entering into contract and that such a contract is absolutely void and unenforceable. S. 68 of the Contract Act is an exception to the general rule and the minor's estate is liable for the necessaries supplied to him. Moneys paid to a minor for the discharge of his father's decretal debts, for the recovery of which, nothing was done, cannot be called necessaries but moneys borrowed by him for the necessary costs of a Civil or Criminal proceeding are held as necessaries within S. 68 of the Contract Act. (*Dhobley, A. J. C.*) NILKANTH *v.* CHANDRA BHAN. **18 N. L. R. 119 : 64 I. C. 851 : A.I.R. 1922 Nag. 247.**

——S. 68—*C. P. Court of Wards Act of* 1915—*Ward not liable for necessaries.*

Neither the property nor the person of a ward, under the C. P. Court of Wards Act is liable for necessaries under S. 68 of the Contract Act. (*Mittra, A. J. C.*) HEMRAJ SHA *v.* PANNA LAL. **61 I. C. 563 : 17 N. L. R. 20**

——S. 68—*Money when recoverable under—'Necessary.'*

Under Hindu Law, a minor is under an obligation to provide for the marriage expenses of his sister and such a provision is a 'necessary' within the meaning of S. 68 of the Act, which the minor is 'legally bound' to make but the money cannot be recovered unless the money is spent and constitutes a 'debt'. (*Daniels and Wazir Hasan, A. J. Cs.*) JAI INDRA *v.* DILRAJKUAR. **61 I. C. 278 : 8 O. L. J. 94.**

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See also (1) SECTION 70.
(2) CONTRIBUTION.

——S. 69—*Agreement by seller with a third party to pay off charges—Effect.*

Where the vendor sold property to a third person, and arranged that the buyer should discharge the incumbrances on the property which the vendor had sold to the first purchaser free from incumbrances. *Held*, that a suit by the first purchaser against the second purchaser for recovery of the value of the incumbrances was misconceived, as the first purchaser was not a party to the second purchase deed and no trust had been created in his favour by the arrangement. (*Lord Buckmaster.*) NATHU KHAN *v.* THAKUR BURTONATH SINGH. **(1922) M. W. N. 323: 20 A. L. J. 301 : 24 B. L. R. 571 : 35 C. L. J. 417 : 26 C. W. N. 514 : 66 I. C. 107 : 15 L. W 635 : A. I. R. 1922 P. C. 176 : 42 M.L.J. 444 (P. C.)**

——S. 69—*Bound by law to pay—Payment of* Judi—Inamdar *losing his right of levying assessment.*

Where the *Inamdar* loses his right of levying assessment on occupancy tenants, he cannot recover the sum paid as *judi* from them as the tenants are not bound by law to pay *judi*. S. 69 only applies where a person is interested in the payment of money which any other is bound by law to pay and therefore if he pays it, he has a right to be reimbursed by the other. (*Macleod, C. J. and Fawcett J.*) BHIMABAI PADAPPA *v.* SWAMIRAO SHRINIVAS. **45 Bom. 638 : 60 I. C 892 : 23 Bom. L. R. 100.**

——S. 69—*'Bound by law' means bound to any person.*

"Bound by law" does not mean "bound by law to the plaintiff" but that the defendant at the suit of any person might be compelled to pay. *A* sold certain properties to *B*. Subsequently he sold certain other properties to *C*. The sale to *B* was said to be free

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from encumbrances, whereas the sale to *C* recited various encumbrances on the property, which *C* was to discharge as a part of the sale price. One of them was a decree debt of Rs. 2,000 obtained by *D*. *C*. did not pay off this amount and subsequently *B's* properties which together with those sold to *C* had been attached by *D* before judgment, were sold. In order to prevent the sale being confirmed, *B* paid the decree amount and sued to recover that sum from *A* and *C*. *Held*, that S. 69 was applicable and that *B* was entitled to recover the money he had paid. 42 Bom. 93 Foll. 39 Mad. 795 Ref. (*Phillips, J.*) RASAPPA PILLAI *v.* DORAISWAMI REDDIAR. **(1925) M.W.N. 486 : 90 I.C. 548 : A. I. R. 1925 Mad. 1041 : 49 M. L. J. 88.**

——S. 69—*Payment on behalf of trespassers—"Bound in law to pay."*

For the application of S. 69, Contract Act, it is necessary to show that the defendants are the persons bound in law to pay. Where the defendants are trespassers pure and simple, they cannot be said to be persons bound in law to pay. The remedy of the plff. is to sue the defts. for mesne profits. (*Madhavan Nair, J.*) PAYIDA RAMAKRISHNAYYA *v.* NAGARAZU. **22 L. W. 836.**

——S. 69—*Bound by law to pay—Surety.*

The section applies to the case of a surety who pays a decree debt, which other persons besides the judgment-debtor for whom he stood surety, were bound by law to pay. (*Spencer and Ramesam, JJ.*) TIRUMALAI SAVURI NAICKER *v.* ROYAR. **13 L. W. 559 : 62 I. C. 706 : (1921) M. W. N. 334 : 40 M.L.J. 529.**

——S. 69—*Bound by law to pay.*

On the 2nd August 1916 Bhagwandas, defendant 2, obtained a preliminary mortgage decree in Civil Suit No. 20 of 1914 in the Court of Additional District Judge, Amraoti, against the plaintiffs for a sum of Rs. 1,22,528-1-0 payable by instalments with interest. On the 31st August 1918 Radhakison obtained a money decree against the plaintiffs for Rs. 28,675-9-3 in the Court of the District Judge, Khandwa, and having got it transferred to Amraoti for execution attached a ginning and pressing factory belonging to the plaintiffs. The factory was sold subject to the incumbrance of the decree in suit No. 20 of 1914 ; and the sale was ultimately confirmed in favour of defendant 1, Mitsui. The plaintiffs stated and the defendants admitted that the plaintiffs had paid out of Court Rs. 18,000 in various sums towards the decree before the proclamation of sale was issued. It was also admitted that defendant 1 paid off the decretal debt and credit for the amount of Rs. 18,000 was given to him in the account of the mortgage debt by defendant 2. The plaintiffs sued for this amount. *Held* : that plaintiffs' suit is not maintainable either against defendant 1, who was under no obligation to repay or defendant 2 on whom there was no obligation to certify. 31 All. 583 : 1 A. 1, Foll. (*Kotwal and Prideaux, A. J. Cs.*) MITSUI BHSSAN KAISHA *v.* PADAMRAJ. **6 N. L. J. 217 : 72 I. C. 461 : A. I. R. 1923 Nag. 219.**

——S. 69—*Interested in payment—Usufructuary mortgagee in possession—Sale of property in execution—Deposit under O. 21, R. 89, C. P. Code—Right to recover.*

In execution of a money decree against the deft. by a third person, property usufructuarily mortgaged to plff. was sold. Plff. deposited the required amount to set aside the sale under O. 21, R. 89 and sued deft. for the same. *Held*, that in the circumstances plff. was not a mere volunteer but a person interested and therefore was entitled to be reimbursed. (*Banerji, J.*) BENI MADHO *v.* SANWAR DAT.

CONTRACT ACT, S. 69—Interested in payment.

20 A. L. J. 42 : 64 I. C. 918 : A. I. R. 1923 A. 127.

——S. 69—*Interested in payment—Puisne mortgagee of prior mortgage—Right to reimbursement.*

A puisne mortgagee discharging the prior mortgage acquires a charge on the property on the date of the payment of the prior mortgage and his right to reimbursement accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which, under the decree exists on them. (*Banerji and Gokul Prasad, JJ.*) BORA-SHIB LAL *v.* MUNNI LAL.

3 U.P.L.R. (A) 193 : 63 I. C. 604 : 19 A. L. J. 840.

——S. 69—*Interested in payment—Reason and prudence.*

A man, interested in the payment of money which he has proper grounds for thinking, another is bound to pay and but who cannot or does not intend to pay, is entitled to pay that money and should be allowed to recover it if in the opinion of the Court he has acted as a reasonable and prudent man would act under the circumstances. (*Mears, C.J. and Knox, J.*) JHANKU LAL *v.* REWATI LAL. 19 A. L. J. 73 : 61 I. C. 892 : L. R. 2 A. 45.

——S 69—*Interested in payment—Decree and sale on prior mortgage—Decree on subsequent mortgage—Satisfied by auction-purchaser—Reimbursement.*

The sale proceeds of an auction sale in execution of a decree on a prior mortgage was sufficient to satisfy the decree with a surplus over, and a subsequent mortgagee, who obtained a decree on his mortgage, applied to be paid out of the surplus. The application was dismissed and the surplus was withdrawn by the mortgagor. Thereupon the subsequent mortgagee applied for sale of the property in execution of his decree. In order to prevent the sale the auction-purchaser paid the amount and sued the mortgagor to recover the amount so paid. *Held*, that he was entitled to be reimbursed the money which he had paid in discharge of the subsequent mortgage and for which the mortgagor was primarily liable. (*Banerji and Gokul Prasad, JJ.*) KARAN SINGH *v.* ISHTIAQ HUSAIN. 19 A. L. J 16 : 61 I. C. 376 : 43 All. 268.

——S. 69—*Interested in payment —Property claimed* bona fide—*Payment made to save property—Alleged interest turning out to be absent—Reimbursement can be claimed.*

Where payment is made by a person who puts forward a *bona fide* claim to the property in dispute he is entitled to the protection afforded by S. 69 even though it ultimately transpires, as a result of litigation that he had not in fact or in law the interest, for the protection whereof the payment was made. 25 Cal. 305, 26 Cal. 826, Foll. The expression "interested in payment of money" is comprehensive enough to include cases of apprehension of any kind of loss or inconvenience and is not restricted to cases of individuals, who are sure to suffer actual detriment assessable in money value. (28 All. 563, 33 Mad. 232, 18 C. W. N. 778, Foll.) A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid, a debt or promise to pay is then implied in law, without any actual agreement to that effect. Where a person procured the setting aside of an auction sale by proving to the Court that he had a share in the property. *Held*, that the mere fact that plaintiff in fact had not the interest claimed by him in the property did not make S. 69 inapplicable. 45 Cal. 691 Foll. (*Greaves and Mukerji, JJ.*) NAGENDRA NATH ROY *v.* JUGAL KISHORE ROY. 29 C. W. N. 1052 : 90 I. C. 281 : A. I. R. 1925 Cal. 1097.

CONTRACT ACT, S. 69—Interested in payment.

——S. 69—*Interested in payment—Apprehension of loss or inconvenience makes a person interested.*

A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid ; a debt or promise to pay is then implied in law, without any actual agreement to that effect. The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or at any rate of any detriment capable of being assessed in money, while that was not enough in the Common Law to found a claim to reimbursement by the person interested if he made the payment himself. 28 All. 563 and 33 Mad. 232 Foll. and 6 All. 67 Dist. (*Walmsley and Mukerjee, JJ.*) EASTERN MORTGAGE AND AGENCY CO., LTD. *v.* FAZLUL KARIM.

52 Cal. 914 : 41 C. L. J. 571 : A. I. R. 1926 Cal. 385.

——Ss. 69 and 70—*Interested in payment—Suit for rent—Sale—Deposit of decretal money and statutory compensation by co-sharer not a party—Suit for contribution.*

Plaintiff who was part owner of a darpatni which was sold by the patnidar in execution of a decree for rent obtained by him in a suit in which the plaintiff had not been made a party had the sale set aside by depositing the decretal money and the statutory compensation of five per cent of the purchase money due to the auction-purchaser and then sued the other co-sharers for contribution *Held*, that if the plaintiff was not bound by the decree, as the entire darpatni had been put up to sale, the plaintiff had the right to sue under S. 70 of the Contract Act, though not under S. 69 and that not merely in respect of the decretal amount but also of the statutory compensation money intended for the auction-purchaser. 38 Cal. 1 : 16 C. L. J. 156: 16 C.W.N. 975 ref. (*Richardson and Huda, JJ.*) KANGAL CHANDRA PAL *v.* GOPI NATH PAL. 68 I. C. 104 : 24 C. W. N. 1068

——Ss. 69 and 70—*Scope of—Vendee aware of defect in title—Discharge of incumbrance—Right to amounts paid when title fails—Relief.*

Per *Spencer, J.*:—The vendee of properties who had received specific notice that the sale-deed standing in the name of his vendor was only nominal, unenforceable and had not been given effect to, is not a *bona fide* purchaser without notice. But where after taking the sale deed he pays off incumbrances and tries to preserve the property from the clutches of creditors, his payments are *bona fide* and he is a person "interested" within the meaning of S. 69 of the Contract Act Though it is well established that Ss. 69 and 70 of the Contract Act were not designed for the benefit of persons who are mere volunteers, a person who pays off incumbrances on the property purchased after his title is decreed in one court and before his title is declared bad by the court of appeal is entitled to claim the same in spite of the notice he had. In such a case, the ordinary relief he is entitled to is a personal decree and not a charge on the property.

Per *Devadoss, J.*:—In order to claim payments made to discharge incumbrances on property, plaintiff must show he was a volunteer and did not make the payments officiously. The onus is heavily on him to show he paid the amounts *bona fide*. The equitable doctrine of subrogation can not have any application to volunteers or persons whose conduct is officious. The distinction should always be kept in view of sales which are void, voidable and merely sham. The fact that the incumbrances were discharged after the vendee's title was declared to be good in the court of first instance but before the same was upset in appeal

will not make any difference as courts do not confer rights to property where the person had admittedly none. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR *v.* MUMMACHI REDDIAR. **17 L. W. 2.4 : 74 I. C. 416 : A. I. R. 1923 Mad. 392.**

—— — **Ss. 69 and 70**—*Interested in payment—Benamidar setting aside—Court sale in assertion of hostile title—Rights of—T. P. Act. S.* 100.

A was the real owner of the property and B, his wife, the benamidar thereof. C was their son. After B's death, the property was sold in execution of a decree for A's debt. C was also a party to the decree. Before confirmation of the sale, C asserted that B was the real owner of the property and that she had bequeathed by will to C the property, and mortg ging the property to D (who knew all the circumstances relating thereto) and by paying the money raised, had the sale set aside.

Held : Per *Kumaraswamy Sastry, J.*—Where a person makes a payment in the assertion of a hostile title and for the protection of his own interests, in order to save property which he claims to be his from passing out of his hands, the mere fact that the other party is benefited will not, if it is found that the person making the payment has no title, entitle him to be reimbursed. But in this case the property was sold at a sale binding on both the real owners, A and C, the benamidar and if the sale was not set aside, the title of the real owner would have been extinguished and the purchaser would have got an absolutely good title. As under the C.P. Code title vests in the auction-purchaser from the moment of the sale and as no confirmation is necessary, the setting aside by the benamidar of that sale must be treated as a re-purchase by him and the mortgage to D must be treated as money borrowed to repurchase the properties. As in this case the execution sale was not due to C. the benamidar's default or misconduct, although A was entitled to the benefit of the re-purchase by him (1). It being open to the real owner, where a person in the position of an agent or trustee repudiates his character and re purchases properties in his own name, to treat such repudiation as a nullity and to claim that the properties are held by the benamidar in trust for him and that the benamidar cannot treat the re-purchase as for his own benefit, yet A could not get the properties free from the obligation to pay the money that was the consideration for the re-purchase. Because where the benamidar re purchases the property or raises money for the purpose of setting aside the sale, it is contrary to all equitable principles to hold that the real owner who took no steps to discharge the decree and who allowed the property to be sold could step in and claim the property free from any obligations to repay the money borrowed by the benamidar for the purpose of setting aside the sale. Hence in this case D, the mortgagee had a charge on the property for the amount of the Court sale and this charge was enforceable even against *bona fide* purchasers for value.

Per *Spencer, J.*—C as the reversionary heir was sufficiently interested in the preservation of the property to be entitled under S. 91 of the T. P. Act to redeem the property or under C. P. Code. O. 21, R. 89 to apply to set aside an execution sale thereof and so, he was entitled to an equitable lien on the property for the amount so utilised, by him and D having obtained an assignment of C's rights through the mortgage deed was entitled to recover the amount by way of charge on the redeemed properties. (*Spencer and Kumaraswami Sastri, JJ.*) MULLAYA PADAYACHI *v.* KRISHNASWAMI IYER. **85 I. C. 855 : 21 L.W. 336 : A.I.R. 1925 Mad. 95 : 47 M.L. J. 622.**

——— **S. 69**—*Scope of—Co-mortgagor redeeming—Suit for contribution.*

S. 69, Contract Act, contemplates only those cases where payment is made by a person under no legal liability to make it and for another person who is bound in the law to pay it. It does not apply to a case where contribution is claimed by some of the mortgagors who have redeemed a mortgage against the purchaser of the title of one of the other mortgagors as the latter is not a person from whom money is legally recoverable. (*Baker, J. C.*) PARASHRAM *v.* BONDRUSA. **A. I. R. 1924 Nag. 238.**

——— **Ss. 69 and 70**—*Interested in payment—Payment made in good faith to preserve the property—Right of recovery.*

When a person *bona fide*, believing himself to have a claim to a property, pays off the charges on the property, he is entitled to recover the amount. 7 C. 573 : 26 C. 826 Foll. Though a person's title in the property is subsequently found to be non-existent, he is still entitled to recover the money, which he has paid for the preservation of the property, from the persons who are the actual owners, under sections 69 and 70 of the Contract Act. 31 B. 439 (Ref.) (*Baker, J. C.*) THAKURSA *v.* BEHARI. **78 I. C. 177 : A. I. R. 1923 Nag 301.**

——— **S. 69**—*Scope of—Liability to pay—By whom enforceable.*

There is no justification at all for the proposition that the legal liability to pay contemplated by the section in respect of the person who does not make the payment is only such a liability as can be enforced by the person to whom the payment is made. (*Hallifax, A. J. C*) UMED SINGH *v.* BIHARI LAL. **A. I. R. 1922 Nag. 50.**

——— **S. 69**—*Bound by law to pay—Who is—Interested in payment.*

The words 'interested in payment' do not exclude a person who is interested as well as bound by law to pay. The words 'bound by law to pay' include persons legally bound to pay whether under contract or otherwise, and whether the contract is enforceable by the person to whom the payment is to be made. (*Hallifax, A. J.C.*) UMED SINGH *v.* BIHARI LAL. **62 I. C. 881 : 4 N. L. J. 76 (N.)**

——— **S. 69**—*Interested in payment.*

The 'interest' of the person lending the money under this section must be one as would be recognised by law An interest resting merely on grounds of sentiment or on moral orsocial obligations is not 'an interest' which would give in law a right to repayment. (*Daniels and Wazir Hasan, A. J. Cs.*) JAI INDRA *v.* DILRAJ KUAR. **61 I. C. 278 : 8 O. L. J. 94.**

——— **S. 69**—*'Interested' does not mean only persons with a real interest.*

The word 'interested' ought not to be construed as meaning only a person with a real interest. If a person *bona fide* believes that he has interest in property and not merely for laying a claim makes some payment for those who are bound to make it he is entitled to reimbursement under S. 69. (*Jwala Prasad and Ross, JJ.*) MUSAMMAT DULJIN SINA KUER *v.* MUSAMMAT BIBI ALE FATIMA. **77 I. C. 157 : A. I. R. 1925 Pat. 201.**

——— **Ss. 69 and 70**—*Bound by law to pay—Right to reimbursement—Mortgagee purchaser—Rent decree prior to purchase.*

The burden of rent of the original tenant falls on the buyer of a holding. It becomes a first charge and therefore a mortgagee purchaser cannot have a right of suing his mortgagor for reimbursement if he pays such arrears of rent accrued due before his purchase

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in order to save it from sale. (*Jwala Prasad and Ross, JJ.*) RANG LAL SAHU *v.* KALI SHANKAR SAHI. **2 P. 890 : 77 I. C. 73 : 1923 P. H C. C. 353 : A. I R. 1924 Pat. 235**

——— —S. 69—*Interested in payment.*

It is not necessary for a person to show that his interest in the property would be adversely affected by the sale of the property as regards which he had paid the money which he seeks to recover from the party who is bound to pay. It is sufficient if the person who pays the money has an apprehension founded upon an impression that his interest will be adversely affected whether or not he may, as the result of more careful investigation, find that his apprehension was really in law justified, does not affect at all. (*Bucknill, J.*) SRIMATI SURADHANI DEBI *v.* HARI CHARAN MAHTO. **3 P. L. T. 122 : 1921 P. H. C. C. 298 : 64 I. C. 226 : A. I. R. 1922 P. 337.**

———S. 69—*Scope of—Sub-tenure holder making deposit to save tenure from being sold in execution—Right to contribution and incidental expenses arises, but not to interest on sums deposited.*

Where a decree was passed against one *M*, and on her death her heirs became bound to pay the decretal amount or lose the property, and when the property was about to be sold, the plaintiff a sub-tenure holder to save his sub-tenure paid the debt and saved the tenure. *Held* : that the plaintiff was entitled to contribution from the heirs of *M*, but was not entitled to interest on the sum deposited, but that he was entitled to the incidental expenses only. (*Adami and Sen, JJ.*) DEBLAL JHA *v.* KUMAR DAS. **1925 P. H. C. C. 236 : A. I. R. 1925 Pat. 737.**

———S. 70—

See also CONTRACT ACT, S. 69.

———S. 70—*Enjoying benefit—Assets of a deceased person—Purchaser from an unauthorised person satisfying decree—Not entitled to recover the decretal debt from the assets.*

B died leaving a widow R and a son M. R. survived M., one S. the heir of B, after M's death sold the property to plffs. One A, got a decree against S. and widow R. and attached the property in question. The defts. purchased the property from R. and paid off the decretal amount. The plffs. brought a suit to recover the property from the defts. without being required to pay the decretal amount. *Held* that as the defts. had purchased the property from a person who had no title to sell it, they cannot expect to be recouped for the amount which they paid to clear off the decree : because of their purchase they did not acquire any interest. (*Gokul Prasad, J.*) GYA PRASAD *v.* METHAI LAL. **75 I. C. 624 : A. I. R. 1923 All. 404 (2).**

———S. 70—"*Lawfully*" *meaning of—Existence of an interest is a test but not conclusive in all cases*

The existence of an interest is generally a test as to the lawful character of a payment, but even if an interest were not shown to exist payments on account of another, if lawfully made, would generally be provided for by S. 70 of the Act. Where a person makes a payment to save a property in which he claims *bona fide* a share, notwithstanding that the interest claimed by him is found to be non-existent, he is entitled to reimbursement. "Does" in S. 70 includes payment of money. It is consistent with general principles of equity that those whose funds are used to meet the legitimate demands of others, when the latter have the benefit of such payments, are entitled to ask the latter to pay to the extent of the benefit, that they cannot retain the benefits and plead non-liability, and that where the codified law does not cover the case the Court should apply the general law, legal and equitable. It is necessary to be very circumspect in the application of this general principle of justice, equity and good conscience, but the terms of S. 70 are wide enough to afford ample room for the application of this principle in a fit case. Meaning of "lawfully" discussed with case law. (*Greaves and Mukerji, JJ*) NAGENDRA NATH ROY *v.* JUGAL KISHORE ROY. **29 C. W. N. 1052 : 90 I.C. 281 : A.I.R. 1925 Cal. 1097.**

———S. 70—'*Lawfully*'—*Hindu Reversioner paying money to prevent sale for road cess.*

The word "lawfully" in S. 70 is not a mere surplusage and a person must have lawful interest in making the payment. A Hindu Reversioner's interest in the estate is a mere expectancy and he has no lawful interest in the payment of money to prevent a sale (of the estate held by a widow as heiress to her husband) for non-payment of road-cess, and is not entitled to be reimbursed. (*Sanderson, C. J. and Chotzner, J.*) GOPESWAR BANERJEE *v.* BROJO SUNDARI DEBI. **25 C. W. N. 1029 : 67 I. C. 40 : 49 Cal. 470 : A. I. R. 1922 Cal. 353.**

———S. 70—*Enjoying benefit—Suit for share—Expenses of filling tank.*

One of two joint owners of a tank undertook to fill it up at the request of the other, as they were asked by the Municipality to do so owing to sanitary reasons. He paid for the expenses of filling it up and sued the other for a share of the expenses. The other contended the claim time barred. *Held*, that the article of the Lim. Act. applicable was 120 and the suit was not barred and that the case fell under S. 70 of the Contract Act. (*Mookerjee, A. C. J, and Fletcher, J.*) UPENDRA KRISHNA *v.* NABA KRISHNA. **62 I. C. 615 : 25 C. W. N. 813.**

———Ss. 70 and 69—*Person expecting to get certain properties after death of certain persons and discharging encumbrances though not bound to do so, is entitled to reimbursement.*

A testator bequeathed certain properties to his foster son. The testator, his wives and the foster son were living together and the latter continued to live in the family even after the testator's lifetime. The foster son discharged certain encumbrances on some properties other than those bequeathed to him. The Will did not direct him to do so. The foster son died and afterwards there was a contest between the widows and his legal representatives. The Court thought that if he had survived the widows he would have got the properties. *Held* : that he was not a volunteer and was entitled to be reimbursed. (*Devadoss, J.*) PIRAMU AMMAL *v.* SERUNATHA AMMAL. **86 I. C. 737 : A. I. R. 1925 Mad. 1175.**

———S. 70—*Lease taken by Receiver of estate—Prior mortgagee acquiescing in Receiver's management and lease, cannot claim precedence over Receiver's expenses and rent due to landlord.*

When property is placed in *custodia legis*, by the appointment of a Receiver, all the orders passed by the Court for the management of such property will be binding on all persons who, if not actual parties to the suit, have so conducted themselves, either with regard to the litigation, or with regard to the management of the property under the directions of the Court, as to make themselves virtually or constructively parties to the suit, or have otherwise submitted themselves to such management by the Court.

Per *Spencer, Offg. C. J.*—If in pursuance of the order of the Court appointing him, a Receiver mortgages the property for raising a fund to defray the cost of his management, that mortgage would take precedence over an earlier mortgage. A landlord had a decree for arrears of rent against a tenant who carried

on a printing press in the premises. A Receiver was appointed in the course of the execution of the decree and was directed by the Court in presence of all the parties to sell the press for the best price obtainable and meanwhile to keep it running as a going concern and to pay the rent due to the landlord. Another person held a mortgage on the stock-in trade of the press. Though not a party to the landlord's suit, he became aware of the appointment of a Receiver and applied to the Court that the Receiver appointed in the suit for rent should be appointed Receiver in his own mortgage suit and opposed the removal of the press from the landlord's premises and asked that the defendant should be restrained by an injunction from removing it. *Held*: that he acquiesced in the housing of the property in the landlord's premises and in the employment of a Receiver to preserve the property and he took the benefit of its being preserved. He could not afterwards claim to have the properties, without paying any rent and his claim to the proceeds of the mortgaged property could not be given precedence over the landlord's claim for rent for the period during which the property was in the Court's management and over the claims of the Receiver for his remuneration and expenses of management. (*Spencer Offg .C. J. and Srinivasa Aiyangar, J.*) K. RAJAGOPALACHARI *v.* M. JAMAL AIYSHA BI BI.

21 L.W. 312 ; 90 I. C. 337: A. I. R. 1925 Mad. 571.

——S. 70—*Enjoying Benefit—Acceptance of benefit—Doing an act for another.*

Where it is proved that defendant co-sharer was asked to join in the suit and pay his quota of the expenses and was warned that he would be responsible for the loss that might accrue by his not joining the plaintiffs in filing a suit on the mortgage ; it cannot be said that he has not had the option. But it is not necessary that he should have had option of joining in the suit when he gladly availed himself of the benefit of the plff's action Where a person does an act which is greatly beneficial to himself and which is sure to benefit another, the former cannot claim contribution from the latter ; in other words where a person is bound to do an act, or would do an act, whether another consents to it or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. In short, where the benefit to himself is great, a person cannot be said to do the thing for another within the meaning of S. 70 but where defendant applied to be and become co-plaintiff he is liable to contribute. 45 I. C. 786, 21 Cal. 496 : 33 Mad 15, 16 M.L.T 375 Foll. (*Odgers and Davadoss, JJ.*) T. M. SUNDARA AIYAR *v.* T. M ANANTHAPADMANABHA.

16 L. W. 231 ; 31 M. L. T. 164 : 70 I. C. 405 : 1922 M. W. N. 608 : A. I. R. 1923 Mad. 64 : 43 M. L. J. 271.

——S 70—*Minor—Necessaries—Payment of Government revenue—Right of creditor to a decree against the estate of the minor.*

Where money has been advanced for payment of land revenue due from a malguzari estate owned by the minor, the creditor is entitled to a decree against the minor's estate, such payment being considered as one for the necessaries of the minor proprietor. (*Kinkhede, A. J. C.*) LACHMIRAM *v.* PAHLAD SINGH.

7 N. L. J. 199 : 84 I. C. 580 : A. I. R. 1925 Nag. 33 (1).

——S. 70—*Heir after widow's remarriage is bound to return benefit to estate got by payment of legally binding debt by a stranger at request of widow.*

A Hindu widow had to pay up the debts of her husband out of his assets inherited by her, she conferred benefit upon estate by getting her relation to pay it up.

Held: the heir on the remarriage of the widow was bound to repay out of the estate where the widow had elected to accept the benefit. (*Kinkhede, A. J. C.*) MT. SUNDAR *v.* BHOPAT.

7 N. L. J. 167 : 82 I. C. 586 : A. I R. 1925 Nag. 19.

——S. 70—*Applicability—"Enjoy such benefit"—Meaning of.*

In order to enable a party to recover money paid by him from another under S. 70 it is necessary that the party sought to be made liable must not only have been benefited by the payment but must also have had an opportunity of rejecting such benefit. Where no such option is left to him and the circumstances do not show he intended to take such benefit, he cannot be said to have "enjoyed such benefit". (*Baker, J. C.*) PARASHRAM *v.* BONDRUSA.

A. I. R. 1924 Nag 238.

——S. 70—*Enjoying benefit—Pleader's right to sue for services rendered to client—Legal Practitioner's Act, Ss. 27 and 28.*

Where an agreement between a pleader and his client is invalid under S. 28 of the Legal Practitioner's Act or there is no agreement, the pleader can sue under S 70 of the Contract Act and is entitled to a fair remuneration for the services actually rendered and in the former case the terms of the agreement may be considered in determining the proper remuneration and except as evidence as to the amount of remuneration, the 'party and party' fee under S. 27 of the Legal Practitioner's Act does not come into question. (*Hallitax, A. J. C.*) VITHAL RAO *v.* BALWANT HARI.

59 I. C. 172 : 17 N. L. R. 8.

——S. 70—*Payment by a person holding under void transfer creates rights of reimbursement but no charge as the principle of subrogation does not apply—Subrogation—T. P. Act*, S. 101.

Payment of prior charges by a mortgagee under a void deed creates no charge but only entitles the mortgagee to claim from the mortgagor a repayment of the amounts paid. Subrogation does not come into existence unless a person is under a legal obligation to make a payment or unless he is compelled to do so for the preservation of any rights or properties of his own. (*Dalal, J. C. and Neave, A. J. C.*) AKBAR HUSAIN *v.* SHAHAN SHAH BEGAM.

27 O. C. 56: 11 O. L. J. 82 : 83 I. C. 854 : A. I. R. 1924 Oudh 302.

——Ss. 70 and 69—*Scope.*

A person believing in good faith makes necessary payments for the preservation of the estate pending certain litigation about it and if his opponent gets the estate in the litigation he is entitled to be reimbursed by the opponent if the person has failed, through no fault of his, to reimburse himself out of the rent of the estate. (*Jwala Prasad and Ross, JJ.*) MUSSAMMAT DULJIN SONA KUER *v.* MUSAMMAT BIBI ALE FATIMA.

77 I. C. 157 : A. I. R. 1925 Pat. 201.

——Ss. 70 and 69—*Enjoying benefit—Bound by law to pay.*

S. 69 of the Contract Act does not authorize a person who made a payment to protect his own interest from recovering from the person on whose behalf he ostensibly paid it, unless the latter was bound in law to pay the money. He cannot also recover under S. 70 of the Act unless the person for whom he paid the money had not only benefited from the payment but had also had the opportunity of expressing his acceptance or rejection of such benefit. The plaintiff purchased a tenure in execution of a money decree against the tenants when the latter were in arrear with their rents.

The landlord having later on obtained a decree for such rents against the out-going tenants put up the tenure to sale which was set aside on plaintiff depositing the decretal amount: the plaintiff is not entitled to recover the amount from the original tenants either under S. 69 or under S. 70. (*Bucknill, J.*) SRIMATI SURADHANI DEBI *v.* HARI CHARAN MAHTO.

1921 P. H. C. C. 298 : 3 Pat. L. T. 122 : 64 I. C. 226 : A. I. R. 1922 Pat. 337.

——S. 72—*Mistake—Set of.*

To append a consideration of the relation of parties *inter se* apart from actual circumstances which enforced the payment for the refund of which the suit was brought under Contract Act, S. 72 is simply to allow counter-claim under another name, and a counter claim in the Punjab is not admissible (*Lord Dunedin*) KANHAIYA LAL *v.* NATIONAL BANK OF INDIA.

4 Lah. 284 : 33 M. L. T. 349 : 25 Bom. L. R. 1248 ; 75 I. C. 7 : 50 I. A. 162 · A. I. R. 1923 P. C. 114 (P. C.) : 45 M. L. J. 497.

——S. 72—*Mistake—Presumption under—Money paid by mistake or coercion.*

As the section lays down, that a person to whom money is paid by mistake or coercion, must repay or return it, it implies that the money was not really due to the person to whom it was paid. (*Piggott and Walsh, JJ.*) MAHADEO PRASAD *v.* DIRGBIJAI SINGH.

43 All. 272 : 60 I. C. 881 : 19 A. L. J. 41.

——S. 72—*Presentment of hundi to wrong person who accepted by mistake—Drawee discovering mistake long afterwards—Notice to holder delayed beyond reasonable time—Drawee is disentitled to sue—Negotiable instrument—Limitation Act, Arts. 96—97.*

Where the plaintiffs through negligence wrongly accepted the position as drawees of the hundi, presented by a bank: *Held*, that it established for the time being mutual relationship between themselves and the bank who presented the hundi which cast upon them the duty to inform the bank within a reasonable time that they had accepted that position under a mistake of fact where there had been gross carelessness on the part of the plaintiffs in not detecting the mistake immediately and also in not intimating the bank of it within a reasonable time after they discovered the mistake ;

Held further that the plaintiffs were not entitled to recover the money from the defendant bank (*Macleod, C. J. and Coyajee, J.*) RAGHUNATH RITHKARAN *v.* IMPERIAL BANK OF INDIA.

27 Bom. L. R. 1229 : A. I. R. 1926 Bom. 66.

——S. 72—*Coercion—Money paid under—Meaning of.*

The word "coercion" referred to in S. 72 of the Contract Act is used in its general and ordinary sense, its meaning not being controlled by the definition of "Coercion" in S. 15 of the Act. 40 C. 598 P. C. Rel. (*Chatterjea and Panton, JJ.*) ADHOR CHANDRA DASS *v.* RAMESWAR MANNA. **65 I. C. 517 (Cal.).**

——S. 72—*Mistake—Money paid under a mistake of fact is recoverable.*

Money paid under a mistake of fact on the part of both the parties is recoverable. (*Sir Lancelot Sanderson, C. J. and Chotzner, J.*) ERFANUDDI *v.* BHARAT CHANDRA SARKAR. **A. I. R. 1922 Cal. 1 (2).**

——S. 72—*Debtor of insolvent—Money paid by private settlement.*

Where the debtor of an insolvent under a private settlement paid money to an auction purchaser and on a subsequent suit by the insolvent to recover the money, brought a suit against the auction purchaser to whom he had paid the money by private settlement, *Held*, the suit could be brought under the provisions of S. 72 of the Contract Act. (*Broadway and Wilberforce, JJ.*) BALKISHEN DAS *v.* DEVI SARAN.

4 Lah. L. J. 164 : A. I. R. 1922 Lah. 103.

——S. 72—*Sale of piece goods—Long chain of changing hands—Bales found by the ultimate buyer to contain less number of pieces than paid for—Party from whom the ultimate seller purchased becoming bankrupt—Ultimate buyer is entitled to recover the price of shortage from his seller.*

A sold some bales of cloth to *B*. *B* sold the bales to *C* and *C* to *D*. *D* found that there was shortage in the contents of the bales. He filed a suit for recovery of price of the shortage against *C*. In the meantime *B* had become insolvent, and *C* pleaded that he should not be called upon to pay as he had lost his remedy against *B*, due to *B's* bankruptcy. *Held*, *D* was entitled to recover from *C* and *B's* insolvency did not affect *C's* liability 43 M. L. J. 142, Dist. (*Coutts-Trotter, C. J. and Krishnan, J.*) RAMIAH & CO. *v.* SADASIVA MUDALIAR. **22 L. W. 341 : (1925) M. W. N. 688 : 48 M. 925 : A. I. R. 1925 Mad. 1255 : 49 M. L. J. 228.**

——S. 72—*Money paid by mistake—Right to recover exists.*

Plaintiff paid to defendant certain sum to discharge debt due under a pro-note but by forgetfulness he mentioned a wrong date of the pro-note. Defendant appropriated, the money as if due under a pro note of a fictitious and wrongly mentioned date and then endorsed the pronote to third person who then sued plaintiff on the note. Plaintiff then brought action against defendant for the money. *Held* that plaintiff could recover even before a suit against him by the endorsee was decreed (*Madhavan Nair, J.*) RAMASWAMI NAICKER *v.* NARAYANASWAMI NAICKER.

(1925) M. W. N. 41 : 90 I. C. 906 : A. I. R. 1925 Mad. 762.

——S. 72—*Mistake—Sale of goods—Delivery of excess quantity by mistake—Subsequent sale to third persons—Right to equitable restitution.*

Where plff. sold 70 bales of grey mulls, each bale to contain 100 pieces, to deft., and deft. in his turn *bona fide* sold the bales as containing each 100 pieces to several persons, and it was eventually ascertained that plff. had delivered an excess number of pieces. *Held* that deft. was not liable to return or pay the price of the excess number of pieces. The doctrine of equitable restitution has no application where the deft. labouring under the same mistake as the plff. has *bona fide* parted with the goods to others. (*Coutts-Trotter and Ramesam, JJ.*) K. M. P. R. FIRM *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **16 L. W. 75 : 70 I. C. 751 ; (1922) M. W. N. 498 : A. I. R. 1923 Mad. 17 : 43 M. L. J. 142.**

——S. 72—*Money paid under mistake of fact with which the payee has nothing to do cannot be recovered.*

Money paid under a mistake of fact arising between the person paying and the payee can be recovered, but money paid under a mistake of some fact with which the payee had nothing to do, cannot be recovered. (*Kelly* v. *Solari*, 9 M. & W. 54, Dist.) (*Robinson, C. J. and Maung Ba, J.*) CHINA AND SOUTHERN BANK, LTD. *v.* TE THOC SENG.

3 Rang. 477 : A. I. R. 1926 Rang. 14.

——S. 72—*Money paid to wrong person by plaintiffs broker contrary to plaintiff's instructions can be recovered from the person under S. 72.*

A broker was authorised by plaintiff to purchase particular property and a certain amount was paid to the broker as earnest-money to be paid to the vendor, but the broker contracted with a different vendor in respect of different property and paid the earnest-

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money also to the vendor who received it in good faith. *Held*, on suit by plaintiff, that the defendant vendor was bound to repay to plaintiff under S. 72. (*Raymond and Kennedy, A. J. Cs.*) NARUMAL WATOOMAL *v.* YUSIFALLY NOORDIN. **78 I. C. 794 : 18 S. L. R. 65 : A. I. R. 1925 Sind 93.**

——S. 73.

Applicability of.
Breach of Marriage Contract.
Effect of Plaintiff's Failure.
Extent of Damages.
Interest as Damages.
Measure of Damages.
Plaintiff's Duty to Minimise Damages.
Special Damages.
What is a Breach.
See also DAMAGES.

Applicability of.

——S. 73—*Applicability of—Breach of contract—Party cancelling contract when cannot set up alternative defence.*

Where the buyer wrongfully cancels the contract without justification he cannot set up any defence which he might otherwise have done to any action for damages. (*Macleod, C. J.*) RUSTOMJI A DUBASH *v.* HAJI HUSSAIN LARI. **59 I. C. 515 : 22 Bom. L. R. 1165.**

——S. 73—*Applicability of—Claim for damages premature—Due date is date when goods ought to be delivered according to contract.*

In a contract which fixes the date for performance the due date is as a rule ascertainable.

Where the date was the actual date of arrival in Karachi with an allowance of such reasonable time as would enable the railway receipt and invoices to reach Delhi from Karachi, *Held*, so long as any goods deliverable under the contract had still to reach Karachi, the due date had not arrived. (*Broadway and Jai Lal, JJ.*) PHUL CHAND FATEH CHAND *v.* CHHOTE LAL AMBA PERSHAD. **7 L. L. J. 360 : 90 I. C. 654 (2) : 26 Punj. L. R. 528 : A. I. R. 1925 Lah. 513.**

——S. 73—*Applicability of—Specific performance not granted for special reasons.*

Where a party is entitled in law to specific performance, but the court for special reasons does not grant it he is entitled to damages in lieu of the same. (*Moti Sagar, J.*) GENDA RAM *v.* RAMCHANDER. **73 I. C. 1013 : A. I. R. 1924 Lah. 163.**

——S.73—*Applicability of—One party repudiating contract—Other party may accept or sue in damages.*

If one party to a contract repudiates it, the other party may either treat the repudiation as inoperative, or he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, but he cannot both sue upon the breach and also keep the contract open. (*Frost v. Knight. 7 Ex. 111, Rel.*) (*Jackson, J.*) NARASIMHA MUDALI *v.* P. NARAYANASWAMI CHETTY. **22 L.W. 637: A. I. R. 1926 Mad. 118 : 49 M.L.J. 720.**

—— S. 73—*Applicability of—Contracts affecting immoveable property—Principles in S. 73 apply.*

The principles as to damages enunciated in S. 73 are applicable even in respect of agreements relating to immoveable properties. (*Heald and Chari, JJ.*) MA HNIN YI *v.* CHEW WHEE SHEIN. **4 Bur. L. J. 93 : 90 I. C 261 . A. I. R. 1925 Rang 261.**

Breach of Marriage Contract.

——S. 73—*Breach of marriage contract—Breach of contract to marry—One party interned during the*

CONTRACT ACT, S. 73—Effect of Plaintiffs failure.

War and unable to communicate with other—Rescission of contract cannot be presumed.

In certain circumstances silence, absence, conduct or expressions in letters may be amply sufficient to lead a Court of Law to conclude that a contract of marriage was dissolved by agreement of both parties. But where circumstances were altogether extraordinary in that the parties were entangled and embarrassed by difficulties not of their making but by war breaking out and one of the parties being interned during the war, being suspected as German subject *Held*: that even then to prove that this contract was rescinded by mutual agreement is a burden of which the respondent must discharge himself. If he does not so prove he must make amends to the other party. (*Lord Darling.*) LUCIA JACOB *v.* DAVID ALEXANDER WILLS. **2 C. W. N. 695 : 89 I.C. 824 : 22 L. W. 726 : A. I. R. 1925 P. C. 194 (P.C.).**

Effect of Plaintiff's Failure.

——S. 73—*Effect of Plff's failure—Contract for sale of immoveable property—All except engrossment of title and payment of price finished—Vendee assuring of his readiness—Vendor's demand for immediate completion is not unreasonable.*

The contract was for the sale of immoveable property. Everything in connection with the transaction had been completed except two matters alone, *viz.*, the payment of the price and the engrossment of the draft conveyance for signature. In these circumstances the vendor's agents wrote saying that the matter must be completed without delay. To this the vendee replied that the money was ready and that the title was being engrossed. Thereupon the vendor gave a notice of five days within which the sale was to be completed. *Held*; that there was no abruptness in the conduct of the vendor and there being no abruptness in it, the unreasonableness fell to the ground, because the unreasonableness of the demand consisted not in its method but would have consisted in this that it would have put the purchaser, whose finances might have been allowed to drop owing to the dragging on the negotiations, into a position of much embarrassment on such a short notice being given. *Held*; further that it was not open to the purchaser to set up such a case because the purchaser had given, prior to that notice, the very assurance that no abruptness could be felt by the two statements that he had made, namely that his money was ready and his title was engrossed. *Held*; also that the vendee was estopped from maintaining that the facts were otherwise than his letter represented them to be. *Held*, further that, whether he was estopped or not, the circumstances of a long drawn-out transaction in which all remaining to be done was the engrossment of the deed of sale and the payment of the price, demonstrated that as between purchaser and vendor of immoveable property in a time of financial strain it was not a reasonable position for a purchaser to occupy to be unable to complete within four days. (*Lord Shaw.*) MOTILAL ITCHHALAL GANDHI *v.* HAJI MOOSA HAJI MAHOMED. **41 C.L.J. 334 : 1925 M. W. N. 314 : L. R. 6 P. C. 106: 88 I. C. 440: 3 Pat. L. R. 152 (P.C.): A. I. R. 1925 P. C. 124 (P.C.) : 48 M. L. J. 484.**

——S. 73—*Effect of plff's failure—Agreement not to claim damages for breach—Effect.*

Where in a contract for the sale of goods it was provided that in the event of the vendor failing to deliver the goods, the contract will be cancelled but that there would be no right to claim damages, *Held*, the vendor could not arbitrarily refuse to carry out the contract, but should adduce reasonable grounds for the refusal

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—(1919) A. C. 1 Foll. (*Macleod, C. J. and Shah, J.*) CHUNILAL DAYABHAI & CO. *v.* AHMEDABAD SPINNING AND WEAVING CO. **24 Bom. L. R. 295 · 67 I. C. 223: 46 Bom. 806 : A. I. R. 1922 Bom. 44.**

——S. 73—*Effect of plff's failure—Party rendering performance impossible can't get damages.*

A party who by his conduct makes a performance of the contract impossible is deprived of his rights to recover anything by way of damages from the other party. (*Baker J. C.*) NARSINGH *v.* NARAYAN. **80 I. C. 949 : A. I. R. 1925 Nag. 119 (2.)**

Extent of Damages.

——S. 73—*Extent of damages—Breach of two contracts by one act—One benefiting, the other damaging the other party—Defaulting party cannot take advantage of benefit.*

Where there are two contracts and a party commits by one act breach of both, the fact, that as the result of the wrongful act a benefit may have accrued to the other in connection with the other, is a fact for which no credit can be claimed by the defaulting party. 8 *Ch. Apps.* 921 Foll (*Lord Blanesburgh*) DIWAN CHAND KIRPA RAM & CO., *v.* WELD & CO. **88 I. C. 54 : 1925 M W.N. 459 : A. I. R. 1925 P.C. 150 (P.C.).**

——S. 73—*Extent of Damages—Clause empowering vendor, on vendee's default to pay on due date, to resell at any time and on such terms and conditions as vendor might decide is valid, provided vendor acts within its limits.*

Clause in contract entitling vendor on vendee's default, to pay for and take delivery on due date, to resell goods at any time and on such conditions and terms as vendors might decide, is valid and the vendors can recover the full damages ascertained on that basis provided they act within its limits. 1924 Bom. 390, Expl.; 25 Cal. 505 Rel. on. (*Shah, A. C. J. and Fawcett, J.*) HARICHANDA & CO. *v.* GOSHO KUBU SHIKI KAISHA, LTD. **26 B. L. R. 921 : 49 B. 25 : 86 I. C. 521 : A. I. R. 1925 Bom. 28.**

——Ss. 73 and 74—*Extent of damages—Deposit—Breach of contract—Forfeiture—Repudiation of contract.*

In a contract of sale a deposit serves two purposes. If the purchase is carried out, it goes against the purchase money but its primary purpose is this, it is a guarantee that the purchaser means business. Money paid as deposit is paid on the implied understanding that if the purchaser refuses to complete the deposit is to be the property of the payee. If the purchaser repudiates the contract he forfeits the deposit and cannot claim its refund on the ground that the purchaser has had no loss. 19 A. 489 : 43 A. 166: 17 C. W. N. 100 : 24 C. W. N. 40: 38 M. 178 Ref. (*Chatterjea and Pearson, JJ.*) MANGOBINDA DATTA *v.* BAISO. GOMAFF. **67 I. C. 714 : A. I. R. 1922 Cal. 104.**

——S. 73—*Extent of damages—Sale of goods—Rescission—Right to return of advance—Further damages.*

Where the plff. lawfully rescinds a contract he is entitled to the return of his advance and to such further damages as where within the contemplation of both the parties at the time when the contract was made. (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PERA MAHOMED ISHAK *v.* HUSSAIN AKBARI. **31 M. L. T. 40 : 70 I. C. 736: (1922) M. W. N. 434 : A. I. R. 1923 Mad. 103 : 43 M. L. J. 199.**

——S. 73—*Extent of Damages—Damages for bailee's negligence—Small Cause Court.*

When the Court is a Small Cause Court, it is open

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to the Judge to assess the damages for bailee's negligence and the amount of wear deposed to, *etc.*, even in the absence of more definite evidence as to the extent of the negligence which he has found to be proved. A Court of Small Causes is not bound to discuss such points at so great a length as ordinary Courts. (*Lentaigne, J.*) HOLLANDIA PINMEN *v.* H. OPPENHEIMER. **3 Bur. L. J. 203: 84 I. C. 274 : A. I. R. 1924 Rang. 306.**

Interest as Damages.

——S. 73—*Interest as Damages—Non payment of Surplus profits in the hands of the mortgagee—Propriety of.*

Interest by way of damages can be awarded under S. 73 of the Indian Contract Act. In most of the cases for redemption it is not till an account has been taken, that it is discovered on what date there was a surplus in the hand of the mortgagee. In the case of surplus profits in the hands of the mortgagee, it cannot be said, that any contract has been broken. Interest should not be allowed by way of damages. (*Mukerji and Dalal JJ.*) SAIYED ISMAIL HASAN *v.* SAIYED MEHDI HASAN. **L. R. 5 All. 625 : 22 A. L. J. 833 : 46 All. 897: A. I. R. 1924 All. 881.**

——S. 73, Ill. (*n*)—*Interest as damages—Right to—Contract.*

The only grounds upon which interest can be claimed upon a sum of money when the liability for that sum is established are to be found either in S. 73, illustration (*n*) of the Contract Act or in the Interest Act. Interest depends on contract, express or implied, or on some rule of law allowing it. 40 A. 497 ; 17 A. L. J. 177, Ref. (*Mookerjee and Dalal, JJ.*) JWALA PRASAD *v.* HOTI LAL. **22 A. L. J. 558 : 46 A. 625 : 79 I. C. 1049 : A. I. R. 1924 A. 711.**

——S. 73—*Interest as damages—Interest on.*

To say that interest cannot be allowed on damages because interest can itself only be allowed as damages is not to advance a reason but to make an incorrect and almost meaningless assertion (*Hallifax, A. J C.*) MOHANLAL *v.* SIR BISHESWARDAS DAGA. **A. I. R. 1923 Nag. 121 (2).**

Measure of Damages.

——S. 73—*Measure of damages—Chain of sellers and buyers.*

The usual practice in produce markets is that where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain. (*Lord Phillmore.*) HOPE PRUDHOMME AND CO. *v.* HAMEL AND HORSEY LTD. **49 Mad. 1 : 88 I. C.307: L. R. 6 P. C. 129 : A. I. R. 1925 P. C. 161 (P. C.).**

——S. 73—*Measure of Damages—Breach of Contract.*

On 11th October 1917 the Respondent Company entered into contract with the appellant Company to supply 200 tons of coal monthly from November to April 1917. The respondent Company failed to supply the coal as agreed upon, and the appellant Company sued for damages for breach of contract assessing the damages at the difference between the agreed price and the market price. There was no contract to supply to the former the identical coal obtained from the collieries. On the contrary, it was expressly provided that that coal purchased, from the respondents was to be supplied from the respondents' stock. Again no contract was entered into between the appellants and respondents or between the appellants and the Ice Factory in whose favour the special indent certified by

the Dy. Controller "Coal supplies", was obtained the supply of coal being regulated on account of war, that the appellants should deliver over to the Ice Factory the coal that should be delivered to them under the contract of the 11th October, 1917. The indent was no doubt manipulated in the way in order to get the use of wagons. The appellant's name did not appear on the indent. The respondents did appear. No evidence was given as to a particular relations between the respondents and the Ice Factory. *Held* whatever those relations may have been and whatever obligations rest upon the respondents, the appellants would not have been bound, had the agreement of the 11th October been performed, to sell or deliver to the Ice Factory the coals which should be delivered to the appellants out of the respondent stock. The Ice Factory was not the appellants' only customer. Had the coals purchased been delivered to the appellants in pursuance of their contract, the latter would have been entitled to sell them in the open market at the market price and that being so, the damages were rightly assessed at the difference between the contract price and that market-price. (*Lord Atkinson.*) KESHAVLAL BROS. & CO. *v.* DIWAN CHAND & CO.

(1923) M. W. N. 583 : 50 I. A. 142 : 27 C. W. N. 974 : 33 M. L. T. 342 : 74 I.C. 396 : 1 Pat. L. R. 434 : 25 B. L. R. 854 : 47 B. 563 : A. I. R. 1923 P. C. 105 (P.C.) : 45 M. L. J. 630.

——S. 73—*Measure of Damages—Considerations.*

In estimating damages for the breach of a contract of sale the law does not take into account anything that is incidental as between the p'ff. and the defendant, *e. g.* an intermediate contract with a third party for the purchase or sale of goods. (*Lord Dunedin.*) MUHAMMAD HABIBULLAH *v.* BIRD & CO.

43 All. 277 : 48 I. A. 175 : 14 L. W. 350 : 63 I. C. 589 : 24 Bom. L. R. 687 : A. I. R. 1922 P. C. 178 (P. C.).

——S. 73—*Measure of Damages—Contract to convey immoveable property—Breach.*

When a person who has entered into a contract to convey a house is unable to fulfil it by reason of his having no title to the property, he is liable in damages the measure of damages being the difference in the market price on the date agreed on for the completion of the sale and the contractual price. (*Banerji and Gokul Prasad, JJ.*) PANNA LAL *v.* HUSAIN BEG.

L. R. 4 A. 540 : 75 I. C. 460 : 21 A. L. J. 428 : A. I. R. 1924 All. 167.

——S. 73—*Measure of Damages—Breach of contract—Damages meaning of—Merchant committee. decision of.*

The suit was brougut by the plaintiffs to recover a certain sum of money alleged to be due in respect of a contract which was entered into on the 12th September, 1918, for the delivery by the 18th November of that year of a bale of dhotis at a certain rate. The date fixed for payment was the 27th of November 1918. It was not denied that the goods were delivered to the defendant on the date in question and that the price was not paid on the date fixed for payment. After this latter date in as much as there had been much speculation in this class of goods a committee of the cloth merchants of Jhansi assembled and brought out a plan by which claims for breach of contract of delivery of these goods or for failure to pay the price due in respect of these goods were to be settled. *Held* the plaintiffs could only recover on the basis of the scheme which was laid down by the cloth merchants' committee, and that plaintiffs were not entitled to revert to the original contract. (*Lindsay and Daniels JJ.*) RAM NATH *v.* MANNU LAL.

72 I. C. 615 : 21 A. L. J. 380 : 45 A. 472 : L. R. 4 A. (Civ.) 216 : A. I. R. 1923 All. 518.

——S. 73—*Measure of Damages—Contract for sale of land—Breach—Damages—Measure of—Time if the essence of the contract.*

Plaintiff contracted to buy a building in the city of Bombay for 18 Lakhs of rupees and paid one lakh of rupees as earnest money to the defendant. The contract was entered into in January 1920, and the sale was to be completed within six months. The building was erected on leasehold land which had been taken by the defendant for a term of 50 years from the year 1886. At the date of the sale a tenant was in possession of the building for a term expiring in March 1920. A few days after the contract for sale the plaintiff contracted to resell the building to a person who was desirous of opening a hotel. The tenant claimed that he was entitled to a renewal of a lease from the defendant for a period of six years under an oral contract. The tenant gave notice of his claim to the plaintiff and also sued the defendant in May 1920 for specific performance to grant a further lease. In April 1920 the solicitors of the defendant sent the title deeds of the properties to the plaintiff's solicitors for investigation. In August 1920 the person with whom the plaintiff had contracted to resell the house wrote to the plaintiff stating that if the sale to him was not completed by November 1920, he would cancel the contract. The plaintiff in his turn asked the defendant to complete the sale before November 1920 making time the essence of the contract. As the defendant failed to fulfil the contract within time the person with whom the plaintiff had contracted to resell the building cancelled his contract. In a suit by the plaintiff against the defendant for refund of the earnest money together with damages to the extent of 5 lakhs of rupees the defendant counter-claimed for specific performance. *Held*, that the plaintiff was justified in making time the essence of the contract and that the time he gave was reasonable. The default therefore lay on the part of the defendant who was bound to return the earnest money and also pay to the plaintiff all the costs incurred in the investigation of title. The plaintiff however was not entitled to damages on the footing of the difference between the contract price and the market value of the property on the date of breach. (*Shah, A.C. J. and Fawcett, J.*) DHANRAJGIRJI NARASINGGIRJI *v.* TATA SONS, LTD.

49 Bom. 1 : 26 Bom. L. R. 858 : A. I. R. 1924 Bom. 473.

——S. 73—*Measure of damages — Reasonable compensation is question of fact—If circumstances require so, no damages need be awarded for breach of contract to sell real property.*

No hard and fast rule can be laid down for assessment of damages for breach of contracts to sell. The circumstances of each case have to be considered in deciding what is reasonable and proper compensation for the damage caused by a breach of contract. Under S. 73 the Court is not bound in every case to award damages on the basis of a difference between the price at the date of the contract and the market price at the date of the breach. If circumstances require so no damages need be awarded for breach of contract to sell real property where the vendor is not guilty of fraud. (*Shah, A.C. J. and Fawcett, J.*) DHANRAJGIRJI NARASINGGIRJI *v.* TATA SONS LTD.

49 Bom. 1 : 26 Bom. L. R. 858 : A. I. R. 1924 Bom. 473.

——S. 73—*Measure of damages—Ill. (o)—Dama-*

CONTRACT ACT (IX OF 1872), S. 73—Measure of Damages.

ges for breach of contract to sell should be based not on profit that would have been made by plaintiff but on the market price on day of breach.

In calculating damages for breach of contract for sale of property it is not the profit which would have arisen to the plaintiffs, which is to be taken into account but the market price of the property on the date of the breach. At the same time the profit which the plaintiffs could have made on a resale if uncontradicted by other evidence is evidence of the latter value. *Engell* v. *Fitch* (1869) L. R. 4 Q. B. 659 Foll. (*Shah, A. C. J. and Fawcett, J.*) DHANRAJGIRJI NARSINGGIRJI *v.* TATA SONS, LTD. **49 Bom. 1 : 26 Bom. L. R. 858 : A. I. R. 1924 Bom. 473.**

——S. 73—*Measure of damages—Contract for sale of goods—Breach—Resale—Power of.*

Plaintiff sued defendant for damages for breach of contract for purchase of yarn and cloth, the defendant having failed to take delivery of the goods within the stipulated period. *Held*, that the measure of damages was the difference between the contract rate and the market rate at the date of breach. The property in the goods did not pass to the purchaser till delivery and the vendor could not resell the goods on the purchaser's account. Even though the plaintiff erroneously calculated the amount of damages by having regard to the difference between the contract price and the price realized on resale, it is open to the Court to award damages according to correct principles of law without insisting upon an amendment of the plaint. (*Macled, C. J. and Shah, J.*) THE NARASINGHIRJI MANUFACTURING CO. *v.* BUDAN SAHEB ABDULSAHEB. **26 Bom. L.R. 523 : 80 I. C. 430 : A. I. R. 1924 Bom. 390.**

——S. 73—*Measure of damages—Sale of goods—Breach—Late shipment—Late arrival.*

Under a contract in writing dated 21—8—1918 defts. agreed to buy from plaintiffs 25 bales of yarn. The contract was in these terms : "This day we have purchased from you the undermentioned goods in accordance with the bazaar rules cotton yarn of Japan shipment for February-March 1918 is to be given whenever the same arrive earlier or later, and on the safe arrival of the same by steamer." On 25—9—1918 defts. wrote to p'ffs. that unless the goods were delivered in 8 days the contract was to be treated as cancelled. On 12—10—1918 the goods arrived in Bombay and the plffs. required the defts. to take delivery. On 15—10—1918 defts. replied that the 8 days' period having already expired the contract was cancelled and that they were not bound to pay for the goods or take delivery of them. In an action for damages, *held* that having regard to the express provisions of the contract with reference to late shipment, the September shipment was contract shipment which the defendants were bound to accept. The date of breach was 15—10—1918 when defendants improperly repudiated the contract. As the property in the goods had not passed to the defendants, plffs. were entitled to recover the difference between the contract price and the market price on the day of the breach. (*Mulla, J.*) CHOTALAL *v.* CHAMPSEY UMERSEY & SONS. **24 Bom. L. R. 877 : 75 I. C. 233 : A. I. R. 1923 Bom 75.**

——S. 73—*Measure of damages—Sale of goods—Date of breach.*

On 13th September 1920, the plffs. sold to the defts. one hundred bales of yarn of which seventy-five were for ready and twenty-five for September delivery. The defts. took delivery of twenty-four bales on 17th September 1920, twelve bales on 4th October 1920, and a further lot of twelve bales on 21st October 1920, but they failed to take delivery of the remaining fifty-two bales. After writing several letters to the defts. the plffs. sold the bales by public auction on 2nd March, 1921, and claimed Rs. 11,035-1-4 as difference in the contract price and the amount realised on sale. The defts. contended that the date of the breach of contract as regards twenty-five bales of September delivery was at the end of September 1920, and that of twenty-seven bales of ready delivery was in September 1920 but that they were not liable to pay damages on the basis of rates prevalling in January or March, 1921. *Held*, (1) that the property in the goods did not pass to the defts. and the plffs. could not, therefore, rely on the auction sale in March, 1921; (2) that there was no understanding betwteen the parties after the due date that if the defts. failed to take delivery of the goods the plffs. were entitled to go into the market and sell at the then market price ; and (3) that the whole of the forty-eight bales of which delivery was taken must be taken to be appropriated to the ready contract, and that the date of the breach as regards ready delivery was eight days from 13th September 1920 and as regards September delivery it was 30th September. 1920. (*Marten, J.*) TOYO MENHA KAISHA, LTD. *v.* CHABILDAS NATHUBHAI. **24 Bom. L. R. 149 : 69 I. C. 29 : A. I. R. 1922 Bom. 203.**

——S. 73—*Measure of damages—Vendor and purchaser.*

In an ordinary contract for the purchase and sale of land where the vendor contracts to make out a marketable title the Court may find an implied agreement that without any fault on the part of the vendor if he was not able to make out a marketable title the bargain will be off and that the vendor would have only to pay the purchasers' cost of the agreement and the inspection of the title-deeds. However, if the vendor is found to be guilty of default of a deliberate nature in breaking the contract the damages will be calculated on a higher scale the measure of which will be the difference between the contract price and the market price on the breach. (*Macleod, C. J. and Shaw, J.*) VALLABHDAS *v.* NAGARDAS. **23 Bom. L. R. 1213.**

——S. 73—*Measure of damages—Contract—Indent.*

When the deft. through whom plff. ordered goods by an indent placed the order with their London agents the plff. who indented practically contracted with the deft.'s London agent and plff. became the purchaser from the agents of the deft. The plff. under the contract was bound to retire the draft on the due date. He having failed to do so the property in the goods did not pass to the plff. and the London agents remained the owner of the goods. The deft. who was the drawee in case of need retired the draft and obtained possession of the shipping documents but he had no right to cancel the contract and retain possession of the goods after he had retired the draft since the original contract of purchase and sale still existed. But on retiring the draft the property in the goods passed on to retiring the deft. But under the contract of purchase and sale it would only dispose of the goods on plff.'s account and until he did so the plff.'s right as purchaser to the goods on payment existed and deft. could not refuse the tender of the cheque made by the plff. after deft. retired the draft. Therefore the plff. was entitled to damages namely the difference between the market-value of the goods on the day of which he sent the cheque and the amount due by him on the draft. (*Macleod, J.*) NAZARALI *v.* MALWA AND CO.

CONTRACT ACT (IX OF 1872), S. 73—Measure of Damages.

64 I. C. 943 (2) : 23 Bom. L. R. 1108.

——S. 73—*Measure of damages—Variation of contract—Delivery not to be made—Effect of.*

Plffs. agreed to buy goods from M which they agreed to sell to defendants. Subsequently it was agreed that the defts. should pay M direct against delivery and should get M to give credit to the plffs. for the amount. Defts. failed to take delivery, *held*, that the original contract as to delivery was subsequently modified, and that the plffs. were entitled to the difference between the price which they had agreed to pay to M and the price which the defts. had agreed to pay to them. (*Heaton and Marten, JJ.*) HIRALAL AMBALAL *v.* GOPALJI KALLIANJI. **59 I. C. 263 : 22 Bom. L. R. 338.**

——S. 73—*Measure of damages—Late delivery of goods by carrier—Plaintiff's negligence in not helping defendant to deliver in time—Market value on date on which goods would have reached destination but for plaintiff's negligence determines damages.*

Generally speaking when a carrier fails to deliver article of merchandise in the ordinary course and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold if they had been carried, according to the contract, and their marketable value at the earliest period at which they could have been brought to the market after the delivery to the consignee, will be measure of damages recoverable. But where the plaintiff was guilty of unjustifiable conduct in not co-operating with the railway in tracing out the lost bale by helping them to identify the same, etc., when requested by the Railway, so to do. *Held*, that the last day of which the market value should be taken into calculation ought to be the day on which the plaintiff would in ordinary course have received the goods if he had complied with the request of the Railway and co operated with them in tracing out the lost bale. (*Suhrawardy and Duval, JJ.*) FIRM OF ARJUN DAS NARIRAM *v.* SECY. OF STATE. **85 I. C. 786 : A. I. R. 1925 Cal. 737.**

——S. 73—*Measure of damages—Breach of contract for sale of goods.*

Under a contract dated 23—11—1916 defendants sold to plaintiffs certain quantities of shirting cloth, the shipments to be made from April to June. The period for delivery of the May shipment was extended to 31—10—1917 but no cloth was delivered before that date. *Held*, that the market rate on the 1st of November 1917 could be taken into consideration in assessing damages for failure to deliver the May shipment. (*Sanderson, C. J. and Richardson, J.*) PANNALAL SAGORE *v.* MUKHRAM RADHA KISSEN. **39 C. L. J. 77 : 80 I. C. 87 : A. I. R. 1924 Cal. 637.**

——S 73—*Measure of damages—Infringement of right—Nominal damages.*

Though every breach of duty arising out of contract gives rise to an action for damages without proof of actual damage the amount of damages recoverable is, as a general rule, governed by the extent of the actual damages sustained in consequence of the defendant's act. In cases admitting proof of such damage the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required; nor in all cases is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable precise measurement. Only such of approximation to certainty is required as would satisfy the mind of a prudent and reasonable person. Cases on the subject reviewed. (*Mookerjee and Chotzner, JJ.*) KINGSLEY *v.* THE SECRETARY OF STATE FOR INDIA. **36 C. L. J. 271 : 72 I. C. 270 : A. I. R. 1923 Cal. 49.**

——S. 73—*Measure of damages—Carrier—Suit against, for damages—Loss of profit of re-sale.*

Where goods entrusted to a carrier are not delivered according to the contract the measure of damages is the value of the goods at the place of destination, in the condition in which the carrier undertook to deliver them at the time when they should have been delivered, less the proper charges of transportation and delivery, if these have not been paid by the consignee. The consignee is not entitled to the profit of re-sale, where he has procured them, for re-sale. (*Mookerjee and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. *v.* EASTERN ASSAM CO., LTD. **47 Cal. 1027 : 61 I. C 14 : 33 C. L. J. 72.**

——S. 73—*Measure of damages—Damages in usual way must be awarded to purchaser, if vendor fails to make good title to property sold by him.*

Since S. 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. 32 B. 165, Foll. (*Campbell and Zafar Ali, JJ.*) MD. ABDUL LATIF AHMAD KHAN *v.* LADHA RAM. **5 Lah. 527 : 85 I. C. 421 : A. I. R. 1925 Lah. 262.**

——S. 73—*Measure of damages—Contract to sell land—Breach—Date of breach cannot be postponed.*

Where a contract to sell land is broken the measure of damages is the difference between the contract price and the market value on the date of breach. Where conveyance is demanded and refused, the plaintiff cannot postpone the date of breach in order to claim higher damages (*Campbell and Moti Sagar, JJ.*) AKHTAR BEG *v.* HAQ NAWAZ. **A. I. R. 1924 Lah. 709.**

——S. 73—*Measure of damages.*

The measure of damages in a case of breach of contract to deliver, is the sum by which the contract price fell short of the price at which the purchaser might have obtained goods of like quality at the time when they should have been delivered. (*Abdul Raoof and Campbell, JJ.*) ASMAT ULLAH *v.* MESSRS. BEHARI LAL AND SONS. **68 I. C. 912 : A. I. R. 1923 Lah. 117.**

——S. 73—*Measure of damages—Breach of contract—Sale of goods.*

In a suit for breach of contract to deliver goods on a certain date the market price on that date is the standard for the computation of compensation and not on a later date on which the goods may have been demanded and refused. The position of a seller would be very precarious, indeed, if such were the case and he would be entirely at the mercy of the purchaser who could demand goods on any date he liked after breach and then claim damages on the basis of the rates prevailing on that date if the goods remained undelivered. (*Broadway and Moti Sagar, JJ.*) FIRM OF MANSA RAM GORDHAN DAS *v.* FIRM OF MANGAL SAIN DUNI CHAND. **65 I. C. 497 : A. I. R. 1922 Lah. 149.**

CONTRACT ACT (IX OF 1872), S. 73—Measure of Damages.

——S. 73 — *Measure of damages—Default of plaintiff - Effect.*

Where the defendant has committed a technical breach of contract and the plaintiff himself had no intention of performing his terms of the contract, nominal damages are awardable. (*Shadi Lal, C. J. and Wilberforce, J.*) WELD & COMPANY *v.* HAR CHARN DAS. **4 Lah L. J. 317.**

——Ss. 73, 54—*Measure of damages—Mercantile contracts—Terms—Damages for breach—When to be awarded.*

In construing mercantile contracts it must be assumed that every clause in it was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. In order that the latter part of S. 73 of the Contract Act may apply it has to be proved that not only the plaintiff but the defendant also knew when the contract was made that such loss was likely to result from the breach. Remfrey on Sale of Goods. (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PEERA MOHAMED ISHACK *v.* SAKVATHA HUSSAIN AKBARI. **31 M. L T. 40 : (1922) M. W. N. 434 : 70 I. C. 736 : A. I. R. 1923 Mad. 103 : 43 M. L. J. 199.**

——S. 73 —*Measure of damages — Damages should be determined according to intention of contract.*

Damages should be determined according to what may be deemed to be the intention of the contract between the parties. Where in a sale-deed the vendors undertook to be "responsible in case the vendors or their heirs or anybody else made claim of any kind to the property sold". *Held*, that the damages should be measured by the value of the land at the time of sale and not by that at the time of eviction. (*Kotval, A. J. C.*) MAHOMED RAZZAK *v.* AMRUTRAO. **20 N. L. R. 55 : 76 I. C. 451 : A. I. R. 1924 Nag. 257.**

——S. 73—*Measure of damages — Contingent contract.*

The defendant entered into a contract with plaintiffs that if any grain should remain in his hands, after he had satisfied the demands of his *asamis* for seed grain he would sell the balance of his stock, the amount of which was named to the plaintiffs at a named rate. It was common ground that the contract was to be completed within a week. The defendant parted with no grain at all to his *asamis* and failed to deliver any grain to the plaintiffs. *Held*, the contract was an ordinary contract which was not to be carried out or only to be partially carried out if certain events occurred, namely, the taking of some of the grain by *asamis*. Those events had not occurred and hence the contract should be enforced. The question of measure of damages is one quite apart from the fact that the contract is a contingent contract. The contingency on which the contract was to be enforced having occurred damages have to be ascertained in the usual manner. (*Batten, J. C.*) SATH KANCHEDILAL *v.* MOTIRAM. **68 I. C. 720 : A. I. R. 1922 Nag. 192.**

——S. 73—*Measure of damages—Failure by lessor to give possession to lessee is the probable profit to lessee.*

Where a person executed a lease for one year of a rice mill with option of renewal for another year and failed to give possession, *held*, in a suit for damages by the lessee, that the measure of damages was the profit the plaintiff would have made from the mill in the first year, had possession been given to him as stipulated. *Held*, further that no damages for the second year in respect of which he had an option for renewal should be awarded. In such cases there would be a duty cast upon the plaintiff to minimise the damage if he could, but the burden of proving that the plaintiff had the means available and did not take steps to avail himself of the means would lie heavily on the defendant. (*Heald and Chari, JJ.*) MA HNIN YI *v.* CHEW. **4 Bur. L. J. 93 : 90 I. C. 261 : A. I. R. 1925 Rang. 261.**

——S. 73—*Measure of damages—Rate of exchange at the date of breach to be considered—Interest as damages to be awarded.*

The defendant-appellant bought two lots of sateens through the plaintiff-respondent by verbal arrangements which were subsequently embodied in indents. The agreement was that the price was to be as per Home invoice plus 5 per cent. commission and usual charges; payment to be made 83 days after the buyers at the rate of 8 per cent. per annum from the date of invoice to due date. To this the plaintiffs added that thereafter the rate of interest was to be 12 per cent. per annum. This was denied by the defendants. *Held*, that the date at which damages for breach of contract are to be calculated is the date of the breach and the date on which the rate of exchange is to be taken for the purposes of converting the amount in English currency into rupees is the date on which under the agreement the money was to be paid and on which a breach occurred by its not being paid, and that the rate of interest that should be fixed so as to save plaintiffs from loss is indicated by the rate of interest fixed for the 83 days. (*Robinson, C. J. and Beasley, J.*) Y. A. SHAKOOR & CO. *v.* FINLAY FLEMING & CO. **1 Rang 339 : 2 Bur. L. J. 130 : A.I.R. 1923 Rang. 265.**

——S. 73—*Measure of damages—Sale of goods—Short delivery—Damages.*

Where the seller is ready to give delivery on the date fixed, but the buyer takes delivery on a later date and there is shortage of delivery, the seller is liable for the difference between the contract and the market rates on the date fixed for delivery and not on the date on which the buyer actually takes delivery. (*Maung Kin, J.*) A. L. S. V. CHETTY *v.* MAUNG KYIN KE. **13 Bur. L. T. 214 : 64 I. C. 60 : A. I. R. 1922 L. B. 1 (1).**

——S. 73—*Measure of damages—Sale of goods—C. I. F.—Breach.*

A C. I. F. contract is not a sale of documents relating to goods but a sale of the goods by delivery of documents. Consequently where the seller does not put the goods on board the ship the true measure of damages is the difference between the contract price and the market price at the time of breach. (*Robinson, C. J. and Duckworth, J.*) S. K. R. S.L. CHETTY FIRM *v.* AMARCHAND MADHOWJEE & CO. **66 I. C. 179 : 11 L. B. R. 141.**

——S. 73—*Measure of damages—Sale of goods—Breach—Repudiation.*

Where defendant has utterly repudiated a contract or put it out of his power to perform it, the plaintiff may at his option sue at once or wait till the time when the act was to be done. But the measure of damages is the same in both cases, *viz.*, the difference between the contract rate and the market rate on the due date. The election to take advantage of the repudiation of the contract goes only to the question of breach and not to the question of damages, and the damages are to be calculated with reference to the date of breach only where no time was fixed for acceptance, because there is then no other measure possible. (*Maung Kin and Pratt, JJ.*) HUNT HUAT & CO. *v.* SIN GEE MOH & CO. **68 I. C. 510 :**

CONTRACT ACT (IX OF 1872), S. 73—Measure of Damages.

11 L. B. R. 182.

——S. 73—*Measure of damages—Sale of goods—"Office dhara"—What is—Failure to give notice—Breach of contract—Damages—Customs duty—If to be allowed.*

There is a trade usage in Karachi according to which buyers of goods sold by importing offices are within certain limits allowed to keep the goods in the importer's godowns and can ordinarily take delivery of them at their convenience after the time prescribed. In such a case, if the seller fails to give notice to the buyer of the arrival of the goods, he commits a breach and the damages are assessable on the basis of the market rate as on the date of the breach or as on the date of expiry of the days af grace. Where customs duty is payable by the buyer, the same should be deducted along with the contract price in assessing damages. (*Kennedy, J. C. and Aston, A. J. C.*) FIRM OF RAMSARAN DAS RAMKOOVER *v.* BHURAMAL RECKCHAND. **17 S. L R. 236 : A. I. R. 1924 Sind 38.**

——S. 73—*Measure of damages.*

A written agreement was entered into between respondent and appellants in terms of which the former purchased the whole stock of old clothings lying in Karachi, the property of the appellants at stated prices, and also agreed to purchase 500 bales at ruling price in London, during the season. To this agreement was attached a schedule which contained a specification of the 500 bales of second hand clothing indented for and the rates at which they were to be supplied. Respondent claimed Rs 8,000 as damages in respect of the breach to deliver the 500 bales admittedly 525 and Rs. 4,000 as the loss of profit which he sustained by the failure of the appellants to supply second-hand clothing for the three seasons referred to in this agreement. *Held*, there was a complete contract between the parties and the contract rates were those specified in the schedule attached to the agreement. Agreeing with the lower Court the High Court allowed Rs. 4,000 at 5 per cent. on the value of 500 bales estimated as Rs. 80,000 for the season for which respondent was actually employed. (*Kennedy, J. C. and Raymond, A. J. C.*) LANDAU & SONS *v.* AHMED AYUB. **15 S. L. R. 140 : A. I. R. 1922 S nd 25.**

——S. 73—*Measure of damages—Market rate—How determined.*

In a suit to recover damages for a breach of contract to sell immoveable property, the Court's consideration for ascertaining the market value of the land for the quantum of damages will be to see what value would be fetched by it in the open market. In such a case earlier sales of the same property or comparison with other similar plots in the locality will also help for ascertaining the value. (*Kemp, A. J. C.*) NAROOSHANKAR RAMSHANKAR *v.* RAJUMAL BHAGWANDAS. **15 S L. R. 21.**

——S. 73—*Measure of damages— Settlement between buyer and stranger—If can be taken advantage of.*

If a vendor of goods commits a breach of his contract to deliver goods at a future date he cannot take advantage of a settlement effected between his buyer and a stranger as regards the same goods which has the effect of reducing the damages which the buyer has sustained. 17 Q B. D. 316 ; (1914) 2 A. C. 510 : (1920) 2 K. B. 11, Foll. The measure of damages must be governed by the market rate at the due date. (*Kemp, A. J. C.*) FIRM OF SANTDAS DEVKISHENDAS *v.* FIRM OF NIDHAN SINGH JAVAHARSINGH. **65 I. C. 267 : 15 S. L. R. 214.**

CONTRACT ACT (IX OF 1872), S. 73—What is a Breach.

Plaintiff's Duty to Minimise Damages.

——S. 73—*Plaintiff's duty to minimise damages—Vendor with right to resell at any time, on vendee's default to pay by due date need not resell immediately but must do so within reasonable time, otherwise he can get damages only on basis of difference between contract and market rates at date of breach.*

A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. Where the vendor had the right to resell the goods at any time if vendees failed to pay and take delivery by certain date and where vendee made default, *held*, that the vendor was not bound to resell the goods immediately after the defaults but could do so within a reasonable time afterwards, but that in view of the persistent refusal of the vendees to take the goods and the falling state of the market, the vendors were bound not to delay in reselling. Should the vendors make unreasonable delay, they can recover only damages on the ordinary basis of the difference between contract rate and market rate at date of breach. 19 All. 535, Diss. from. (*Shah, A. C. J. and Fawcett, J.*) HARICHAND AND CO. *v.* GOSHO KOBUSHIKI KAISHA, LTD. **26 B. L. R. 921 : 49 B. 25 : 86 I. C. 521 : A. I. R. 1925 Bom. 28.**

——S 73—*Plaintiff's duty to minimise damages.*

In a suit claiming damages for breach of contract the duty on the part of plaintiff to minimise damages arises only in a case where breach has occurred. (*Sanderson, C. J. and Richardson, J.*) BURN & CO., LTD. *v.* THAKUR SAHEB SHREE LUKHDIRJI. **28 C. W. N. 104 : 83 I. C. 260 : A. I. R. 1924 Cal. 427.**

Special Damages.

——S. 73—*Special damages—Notice.*

Where there is a breach of a contract by a Railway Company in carrying goods sent by train, special damages can only be claimed where the special object of the sending was either specially brought to the notice of the carrier or was within his knowledge or reasonable inference. (*Stuart and Kanhaiya Lal, JJ.*) FAZI ILAHI *v.* E. I. RY. CO. **43 All. 623 : 64 I. C. 868 : 19 A. L. J 6'4 : A. I. R 1922 All. 324.**

——S. 73—*Special damages—Breach of contract—Notice of special circumstances.*

Where the party who has broken the contract, entered into it, in contemplation of special circumstances which would affect the consequences of a breach, and accepted those circumstances as condition under which the contract was to be performed, he is liable for any special loss which may have resulted. But such circumstances must be brought home to the party sought to be charged under the circumstances. (*Mookerji and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. *v.* EASTERN ASSAM CO., LTD. **47 Cal. 1027 : 61 I C. 14 : 33 C. L. J. 72.**

What is a Breach.

——Ss. 73 and 112—*What is a breach—Mutual obligations—What plaintiff has to prove.*

In a contract for the sale of indigo, under which plaintiff agreed to pay a certain sum of money and the defendant a certain quantity of indigo as per sample given, if the plaintiff sues for damages for breach of contract he must first show that on the due date he was ready and willing to perform his part of the bargain. It may not be necessary to prove that he

CONTRACT ACT (IX OF 1872), S. 73—What is a Breach.

made an actual tender of the money, but it was incumbent on him to show he had made arrangements for the purchase money and was in a position to hand it over as soon as he was satisfied that the bulk of the goods agreed with the sample. (*Rafique and Lindsay, JJ.*) MAHOMED ISMAIL KHAN *v.* HASAN ALI KHAN. **4 U. P. L. R. 37 (A) : 67 I. C. 602 : A. I. R. 1923 All. 220.**

——**S. 73**—*What is a breach—Sale of goods—Instalment delivery—Default—Breach —Damages—Right to sue for.*

Where there is a contract by the plff.'s to supply goods to the defendants from time to time as they required for their business, if the sellers clearly show their intention not to be bound by and to repudiate the contract, the buyers if they please may treat the notice of intention as inoperative and await the time when contract is to be executed and then hold the sellers responsible for all consequences of non-performance; but in that case they keep the contract alive for the benefit of the sellers as well as their own the buyers remain subject to all their obligations and liabilities under the contract and enable the sellers not only to complete the contract if so advised notwithstanding their previous repudiation of it but also to take advantage of any supervening circumstances which would justify them in declining to complete it. On the other hand the buyers may, if they think proper, treat the repudiation of the sellers as a wrongful putting an end to the contract and may at once bring their action as on a breach of it and in such action they will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded them the means of mitigating their damage. *Frost* v. *Knight.* (1872) L. R. 7 Ex. 111 ; 113 ; *Cost* v. *Ambetgate, etc , Ry. Co.* (1851) 17 Q. B. 127 : *Braithwite* v. *Foreign Hardwood Co.* (1905) 2 K. B. 543 ; *Meal Chrin* v. *Nickoll and Knight* (192c) 1 K. B. 693 Ref. (*Mulla, J.*) NAJAN AHMAD HAJI ALI *v.* SALE MAHOMED PEER MAHOMED. **24 Bom. L. R. 998 : 77 I. C. 943 : A. I. R. 1923 Bom. 113.**

——**S. 73**—*What is a breach.*

Where defendant contracted to sell to plff. goods to arrive by the *City of Delhi* : the delivery to be made on the arrival of the vessel and on her arrival it was found that the goods were not on board, *Held*, that the deft. was liable in damages to the plff. as, in effect he gave a warranty that the goods that he sold were on the "*City of Delhi*". (*Macleod, C. J. and Shah, J.*) BHAI LAL CHATURBHAI PATEL *v.* KALYANRAI VARAJZAI DESAI. **45 Bom. 1222 : 63 I. C. 952 : 23 Bom. L. R. 547.**

——**S. 73**—*What is breach—Duty to give notice of arrival of goods—Failure—Effect.*

Where under a contract of sale there was a duty on the part of the vendor to give notice to the vendee of the arrival of the goods and it was not done it amounts to a breach of the contract. (*Phillips and Venkatasubba Rao, JJ.*) ALAGIRISAMY AIYAR *v.* RUNA CHEENA MANA NAVANNA ONA & BROS. **78 I. C. 326 (2) : 19 L. W. 654.**

——**S. 73**—*What is a breach—Contract of agency—Undertaking by agent not to work for other mills—Breach.*

Where an agent has undertaken not to work for other mills or merchants, *held*, the mere fact that he was buying and selling cloths from other mills and merchants, was not a violation of the contract. (*Oldfield and Ramesam, JJ.*) RAIPUR MANUFACTURING CO. *v.* VENKATA SUBBA RAO. **70 I. C. 284 : 14 L. W 341.**

CONTRACT ACT (IX OF 1872), S. 74—Applicability of.

——**S. 73**—*What is breach—Breach what entitles parties to repudiate.*

It is not every breach but breach of an essential term alone by one party which entitles the other to repudiate the contract, the breach in non-essential terms entitling the other party to damages. (*Raymond and Madgavkar, A. J. Cs.*) MANOKJI FRAMJI *v.* FIRM OF MANIKLAL PRITAMDAS. **A. I. R. 1924 Sind 105 (1).**

——**S. 74.**

Applicability of.
Applicability to decrees.
See also (1) C. P. CODE, O. 23, R. 3.
(2) DECREE.
Compound Interest.
Compound Interest at increased rate.
Enhanced Rate of Interest (Retrospective or from Default.)
Extent of damages.
Forfeiture of Deposit or Earnest Money.
High Rate of Interest.
Interest from Date of Bond.
Interest from default.
Interpretation.
Lease.
Meaning of Penalty.
Measure of Damages.
Reduction for Punctual Payment.
Unconscionable Bargain.

Applicability of.

——**S. 74**—*Applicability —Interest—Power to relieve against—Penalty.*

It is not open to the Court to make a new contract between the parties and therefore it cannot interfere with the rate of interest stipulated between the parties unless it is satisfied that the rate of interest charged is a penalty within S. 74 of the Contract Act. (*Greaves and Ghose, JJ.*) SATYABHAMA SUNDARI *v.* MAHOMMED ESAHAK MEAH. **68 I. C. 497 : A. I. R. 1923 Cal. 268.**

——**S. 74**—*Applicability of—Grain bond—Damages—Undue influence.*

Where a grain bond provided that on failure to repay at a certain date the deft. would be liable to pay interest at 37½ p. c., per annum and the plff. waited for 6 years before enforcing the bond in which time the original claim for Rs, 400 had risen to Rs. 1,700. *Held*, that in such cases the prayer is not for the performance of the contract but for the compensation for breach, and in such cases the Courts are entitled and in fact it is their duty to grant compensation, having regard to all the circumstances of the case. (*Le Rossignol and Harrison, JJ.*) TIKIYA RAM *v.* JIWAN. **A. I. R. 1923 Lah. 452.**

——**S. 74**—*Applicability—Relief against penalty can be granted even in compromise decrees.*

A Court can relieve against a penalty on breach of a condition in a compromise decree which embodies the contract between the parties. (*Venkatasubba Rao, J.*) S. R. JAYA RAO *v.* VENKATANARAYAN CHETTY. **80 I. C. 925 : A. I. R. 1925 Mad. 264 (1).**

——**S. 74**—*Applicability of—Chit fund—Stipulations in bond executed by successful bidder—When a penalty—Instalment bond—Waiver of default for one or two instalments—Effect of.*

The defendant was a subscriber to a chit conducted by plff. and was the successful bidder at the second auction held in connection with the chit which was to

CONTRACT ACT (IX OF 1872), S. 74—Applicability of.

run over 12 instalments. On taking the prize the deft. executed in favour of the plff. the stake-holder, a bond providing *inter alia* that in case deft. failed to pay his subscriptions he was not only to forfeit the dividend, interest and premium, but was also to pay the whole amount on demand with interest thereon at 1½ per cent per-mensem from the date of the auction and that the deft. should within 15 days executed another document to the plff. for the due payment of the chit amounts of the subsequent instalments and for abiding by the terms of the bond. Deft. executed the other document above referred to and paid the third, fourth and fifth instalments duly and defaulted in the payment of the sixth. In a suit by plff. to recover the amount due under the bond, *Held*, that the terms of the bond as regards (1) the defendant's liability for future instalments from the date of default, (2) his deprivation of the dividend and interest and (3) the imposition on him of liability for interest on the amount due from him at 18 per cent from the date of his default did not either, each taken by itself, or altogether, amount to a penal stipulation. In cases like this the Court has to decide whether the terms are unreasonable as a whole and whether they are so unreasonable that the parties never contemplated that they should receive effect. The waiver by the plff. of his right to enforce the terms of the bond in connection with fourth and fifth instalments did not affect his right to use the coercive measures provided by the bond in cases of future default. (*Oldfield and Ramesam, JJ.*) VAITHIANATHA IYER *v.* GOVINDASWAMI ODAYAR.
(1922) M. W. N. 203 : 67 I. C. 995 : A. I. R. 1922 Mad. 67 : 42 M. L. J. 551.

——S. 74 —*Applicability —Explanation —Retrospective effect.*

Though the explanation was introduced only by the Amending Act of 1899, yet inasmuch as it only explains and illustrates the section as it had already been, so as to remove the doubt entertained in quarters, it is applicable to contracts entered into before 1899. (*Jwala Prasad and Kulwant Sahay, JJ.*) DEVENDRA NATH GHOSE *v.* SAMBHU NATH PANDAY.
3 Pat. 657 : 84 I. C. 677 : 6 P. L. T. 440 : A. I. R. 1925 Pat. 64.

——S. 74—*Applicability—Retrospective effect.*

S. 74 was enacted in 1899, but under the law as it stood in 1897 a stipulation in a mortgage bond providing for increased interest in the case of a breach was not regarded as penalty if it referred to future interest only and was not retrospective. (*Dawson Miller, C. J. and Foster, J.*) TAJESWAR DUTT *v.* LAKHAN PRASHAD SINGH. **2 P. 296 : 4 P.L.T. 127 : 1 P. L. R. 59 : 1923 P. H. C. C. 88 : A. I. R. 1923 Pat. 231.**

Compound Interest.

——S. 74—*Compound interest—Relief against penalty.*

The Courts do not lean towards compound interest, they do not award where there is no stipulation but where there is a clear agreement to pay, it is in the absence of disentitling circumstances allowed. Under a mortgage deed, it was agreed that if any of the monthly instalments of interest was not paid on its due date, such unpaid instalment of interest should be capitalised and added to the amount of the principal loan and would henceforth carry interest at the rate of twelve annas per month leviable as simple interest. A provision was further made that all such additions by way of capitalised interest should be chargeable upon the mortgaged property. *Held*, such a provision was not penal so as to bring the case under S. 74 of the Contract Act. (*Fawcett, J.*) NADERSHAW *v.* SHRINIBAI. **25 Bom. L. R. 839 : A. I. R. 1924 Bom. 264.**

CONTRACT ACT (IX OF 1872), S. 74—Compound Interest at increased-rate.

——S. 74—*Compound interest.*

To determine whether an agreement to pay compound interest is penal, the real question is whether the stipulation is in itself penal, independently of the results to which continued default on the debtor's part to pay interest as it falls due, will lead. 101 P. R. 1918 (P. C.) and 124 P. R. 1918 (P.C.), Ref. (*Walmsley and Greaves, JJ.*) SURENDRA NATH CHATTERJI *v.* JOGENDRA NATH ADHIKARI.
62 I. C. 717 (C.).

——S. 74—*Compound interest—Penalty.*

Rate of Re. 1-8-3 per cent per mensem compound interest was held as not penal. 101 P. R. 1918 and 124 P. R. 1918 Rel. on. (*Jai Lal, J.*) RAM CHAND *v* NANAK CHAND. **7 Lah. L. J. 417 : 26 Punj. L.R. 299 : A. I. R. 1925 Lah. 580.**

——S. 74—*Compound interest— Stipulation to pay compound interest on default is not penal.*

A bare stipulation to pay compound interest is not penal within the meaning of S. 74 of Contract Act. Compound interest is paid in many business transactions and the borrower who undertakes to pay the interest on the loan on a due date is bound to pay it and if he does not pay it, any stipulation to pay interest on such interest, is not penalty. (*Devadoss and Madhavan Nair, JJ.*) ANANJAPERUMAL KONAR *v.* PICHAIMUTHU NADAR. **20 L. W. 968 : 85 I. C. 394 : A. I. R. 1925 Mad. 332 : 47 M. L. J. 910.**

——S. 74—*Compound interest at original rate from date of default—Penalty.*

A stipulation to pay compound interest from the date of default at the original rate is legal and not a penalty. (*Ayling and Odgers, JJ.*) MALLI CHETTY *v.* VEERANA. **(1921) M. W. N. 717 : 69 I. C. 812 : 41 M. L. J. 470.**

——S. 74—*Compound interest on default after certain date.*

The payment of compound interest at enhanced rate on default, after a certain term is a penalty and is not enforceable. (*Wallis, C. J. and Seshagiri Iyer, J.*) RAMAGANTI RAMARAYANIM GAR *v.* MAHARAJA OF VENKATAGIRI. **44 Mad. 301 : 12 L. W. 685 : 28 M. L T. 234 : 61 I. C. 612 ; 40 M. L. J. 236.**

——S 74—*Compound interest in default of payment of simple interest.*

A provision for payment of compound interest at the same rate as the simple interest on default of payment of the latter is not a penalty. (*Coutts and Ross, JJ.*) RAMCHANDRA PRASAD *v.* MAHABIR PRASAD SINGH. **64 I.C. 247. (P).**

Compound Interest at increased-rate.

——S. 74—*Compound interest at increased rate—Stipulation ta pay compound interest at 1½ per cent. per mensem on default to pay simple interest at 1 per cent. per mensem was held a penalty and the rate was reduced to 1 per cent. compound interest.*

The mortgage deed provided for the payment of simple interest at Re. 1 per cent per mensem with a clause that in case of default the already accumulated interest should be added to the principal and thereafter compound interest paid on the whole at Rs. 1-8 per cent per mensem. *Held*, that the stipulation is a penalty and further that it was too high and must be reduced to compound interest at 1 per cent per mensem. 34 Cal. 150 Ref. to. (*Neave, J.*) NIHORA KHAN *v.* MATHURA KHAN. **L. R. 5 A. Civ. 689 ;**

CONTRACT ACT (IX OF 1872), S. 74—Enhanced Rate of interest.

81 I. C. 758 : A. I. R. 1925 All. 78.

——S. 74—*Compound interest at increased rate.*

The terms of a mortgage deed were as follow: "The mortgagors having admitted a previous mortgage executed with regard to a debt due by them agreed to pay the amount by bi-annual instalments. They further agreed that in case of default of payment of any two instalments in succession the plaintiff would be entitled to interest at one per cent per mensem with annual rests from the date of the bond. *Held*, the case is not affected by the change in S. 74 as it stands at present, but even if it could be brought within the change the interest at one per cent per mensem compoundable annually is not penal or extortionate and the defendants are not entitled to resile from the contract into which they entered with open eyes. (1885) A. W. N. 65 Ref. to. (*Gokul Prasad, J.*) BUDH SINGH *v.* BALDEO SAHAI. **69 I. C. 681 (1) : A. I. R. 1922 All. 284.**

Enhanced Rate of Interest.

(Retrospective or from default.)

——S. 74—*Enhanced rate of interest—Compensation.*

Where a bond provides for the payment of interest annually and on default further provides that interest should be charged at double the original rate from the date of the deed, the stipulation for enhancement of interest is a penalty and would be relieved against by the Court. At the same time a reasonable portion of the interest should be allowed by way of compensation to the creditor. 155 P. L. R. 1901 : 10 I. C. 572 : 25 I. C. 702 Ref. (*Scott-Smith, J.*) RAMCHAND *v.* JAGIRI MAL. **4 Lah. L. J. 270 : 54 I. C. 897 : 73 P. W. R. 1921 : A. I. R. 1922 Lah. 268.**

——S. 74—*Enhanced rate of interest—Provision in mortgage-deed for payment of principal and interest in annual instalment—Stipulation for compound interest in default, at a higher rate, is not penal.*

It was provided in a mortgage-deed that every year one instalment of the principal must be paid together with the interest thereon and in default a certain rate of interest slightly higher than the rate provided for in the body of the document must be paid and that compound interest also must be paid in such case. *Held*. that taking into consideration the unusual nature of the document the provision cannot be said to be by way of penalty. (*Phillips, J.*) V. C. VENKATASUBBIAH *v.* T. LAKSHMIPATHI. **20 L. W. 801 : A. I. R. 1925 Mad. 302.**

——S. 74—*Enhanced rate of interest, Stipulation as to—Penalty.*

A stipulation charging enhanced interest from the date of the bond on failure of payment on the fixed date is penal and cannot be enforced. (*Prideaux, A.J.C.*) LALCHAND *v.* NARHAR. **89 I.C. 896 (Nag.).**

——S. 74—*Higher interest from date of bond if default committed—Penalty—Claim from date of default—Waiver.*

Where a bond provides for a higher rate of interest to be paid from the date of the bond in case default is made in paying interest, the provision is penal. But where the penal stipulation is waived and the higher rate is claimed only from the date of default the Courts can grant the same. (*Baker, J. C.*) MAHOMED ABDUL SATTAR *v.* KONDIBA. **89 I. C. 119 (Nag.).**

——S. 74—*Enhanced rate of interest from date of bond, on default is penal.*

Where a bond provides Re. 1-4 per cent. interest per mensem and on default, Rs. 2 per cent. per-mensem from date of bond, a Court is justified in holding that the clause is penal and in awarding 2 per cent. simple interest from date of default. (*Mittra, A. J. C.*) NARAYAN *v.* WAMAN. **59 I. C. 121 (Nag.).**

CONTRACT ACT (IX OF 1872), S. 74—Enhanced Rate of interest.

——S. 74—*Enhanced rate of interest—Stipulation to take no interest up to a certain date but at 37½ per cent afterwards is penal.*

Under a mortgage deed a sum of Rs. 3,000 had been borrowed without interest and it was agreed that if it was re-paid on a date equivalent to the 22nd June, 1910 in one lump sum, no interest would be charged. If, however, payment was not made on that date, then interest was to run at 6 pies per month per rupee, compoundable with six monthly rests, which amounted to 37½ per cent. per annum. In a suit on the mortgage bond, *held* that the stipulation for enhanced interest, at so exorbitant a rate as that specified in the bond in suit, was a stipulation by way of penalty, and that the plaintiff was entitled to no more than reasonable compensation for the breach of contract committed by the opposite party. (*Neave and Wazir Hasan, A. J. Cs.*) MAHABIR PRASAD *v.* MOHAMMAD MUSTAFA KHAN. **12 O. L. J. 70 : 28 O. C. 51 : 83 I. C. 92 : A. I. R. 1925 Oudh 231.**

——S. 74—*Enhanced rate of interest.*

It is not unconscionable to make a provision in the mortgage deed that if payment is not made as stipulated the interest remaining due shall carry interest thereon at one per cent per mensem. (*Kanhaiya Lal, J. C.*) DULAM SINGH *v.* AJODHIA PRASAD. **9 O. & A. L. R. 366 · 70 I. C. 919 : A. I. R. 1924 Oudh 103.**

——S. 74—*Enhanced rate of interest—Usufructuary mortgage—Stipulation to pay additional interest if mortgage not registered—If enforceable.*

An agreement to pay additional interest in case the mortgagor failed to get the registered bond constituting a usufractuary mortgage is a stipulation by way of penalty and is unenforceable when possession was actually given to the mortgagee. (*Lyle, A. J. C.*) JHAM SINGH *v.* GAURI SHANKAR. **A. I. R. 1922 Oudh 123.**

——S. 74—*Enhanced rate of interest—Stipulation to pay enhanced interest.*

A stipulation that if default was made in payment of *kishts*, interest at 1 per cent. per month was to be paid and if default was made for four *kishts* successively interest at Rs. 3-2-0 per cent per month was to be paid was held to be penal but was held to be reasonable compensation. (*Jwala Prasad and Kulwant Sahay, JJ.*) DEVENDRA NATH GHOSH *v.* SAMBHU NATH PANDAY. **6 P. L. T. 440 : 3 Pat. 607 : 84 I. C. 677 : A. I. R. 1925 Pat. 64.**

——S. 74—*Enhanced rate of interest on default—Penalty.*

Where a mortgage provided for payment of interest regularly at the rate of 21 per cent at the end of each month and on default the whole was to become due at once or to pay interest at 24 per cent. *Held*, that the increase of only 3 per cent was not a penalty. (*Robinson, C. J. and May Oung, J.*) P.C. PAL *v.* K. A. L. R. FIRM. **1 Rang. 460 : 76 I. C. 835 : 2 Bur. L. J. 158 : A. I. R. 1924 Rang. 46.**

——S. 74—*Enhanced rate of interest—Mortgage—Enhanced interest.*

Where there are valuable properties as security in mortgage an increase of the rate of interest from 24 per cent to 36 per cent from the date of default is penal. (*Robinson, C. J. and Macgregor, J.*) KO TAINE *v.* ISMAIL CASSIM MORAD. **11 L. B. R. 356 : 1 Bur. L. J. 117 : 68 I. C. 887 ;**

CONTRACT ACT (IX OF 1872), S. 74—Extent of Damages.

A. I. R. 1923 Rang. 61.

Extent of damages.

——S. 74—*Extent of damages—Penal clause—Compensation, extent of.*

In contracts obtaining penal clauses the Court should give the plaintiff reasonable compensation for the breach of contract not exceeding the amount of penal interest but should not reduce the interest from date of default below the rate originally allowed in the bond. (*Daniels, A. J. C.*) SHEO JIAWAN *v.* MT. MITHANA AND ANOTHER. **76 I. C. 500 : A. I. R. 1923 Oudh 162.**

Forfeiture of deposit or Earnest money.

——S. 74—*Forfeiture of earnest money—Contract broken by purchaser—Earnest money is forfeited.*

Earnest money is part of the purchase price when the transaction goes forward, it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee. (*Lord Shaw.*) CHIRANJIT SINGH *v.* HAR SWARUP. **3 O. W. N. 168 : 23 L. W. 172 : A. I. R. 1926 P. C. 1.**

——S. 74—*Forfeiture of earnest money—What is earnest money.*

When there is no written contract, the point, as to determination of what is and what is not earnest money, must be decided, according to the evidence on the record as a point of fact. (*Stuart and Sulaiman, JJ.*) MADHODAS *v.* GOKULDAS. **20 A. L. J. 742 : 68 I. C. 761 : A. I. R. 1922 All. 478.**

——S. 74—*Forfeiture of earnest money—Purchaser is entitled to deposit where there is no repudiation by him though specific performance is refused to him.*

Where there is no repudiation of the contract by the purchaser, nor any conduct on his part amounting to repudiation, he is entitled to a return of the deposit, though specific performance is refused. Where there had been no repudiation prior to suit, and the claim of the defendant was based merely on plaintiff's abandonment at the hearing of the claim to specific performance. *Held*, he was at liberty to abandon it, and the abandonment cannot properly be treated as a repudiation entitling the defendant to forfeit the deposit. Further the right of the purchaser to recover his deposit springs out of breach of contract by the vendor. (Halsbury. Vol. 25 Art. 688, p. 401) *Held* further where there has been a breach by the defendant the plaintiff is clearly entitled to recover his deposit. (*Fawcett and Coyajee, JJ.*) KARSANDAS *v.* CHHOTALAL. **48 B. 259 : 25 Bom. L. R. 1037 : 77 I. C. 275 : A. I. R. 1924 Bom. 119.**

——S. 74—*Forfeiture of earnest money—Effect of—Default.*

The primary purpose of a deposit by way of earnest money being a guarantee for the performance of the contract, the plaintiff is not entitled to recover the money if he has been in default. 14 A. C. 429 at p. 435 : 50 C. L. J. 113 Ref. (*Chatterjee and Panton, JJ.*) ATUL CHANDRA KUNDU *v.* SARAT CHANDRA LAHA. **59 I. C. 215 : 24 C. W. N. 967.**

——S. 74—*Forfeiture of earnest money—Earnest money and part payment—Difference.*

An earnest is something paid or given at the time of bargain to evidence the fact that the negotiation had ended in an actual and binding contract, and as a pledge for its due performance by the depositor, to be forfeited in case of non-performance by his default. Though the plaintiffs owing to their default may not have any claim for damages, there is no justice or equity in allowing defendants to retain the sum paid to them in part payment for the price of the goods which are admittedly never delivered, and which beyond doubt owing to rise in the prices and in consequence of the plaintiff's default they were able to sell at such better rates than they would otherwise have done. (*Abdul Raoof and Moti Sagar, JJ.*) VERMAN & CO. *v.* FIRM GOPAL DAS RAM LAL. **A. I. R. 1923 Lah. 363.**

CONTRACT ACT (IX OF 1872), S. 74—Forfeiture of deposit or Earnest money.

——S. 74—*Forfeiture of earnest money—Time for payment—Mercantile usage — Proof — Earnest money.*

Ordinarily in a contract of sale, the price for goods must be paid at the time of delivery unless there are words to the contrary in the contract or there is a well known and well established mercantile usage postponing the date of payment. Where the buyer deposits purchase money in instalments after the agreement of sale, it is not earnest money liable to forfeiture. (*Abdul Raoof and Moti Sagar, JJ.*) VERMAN & CO *v.* FIRM OF GOPAL DAS RAM LAL. **A. I. R. 1923 Lah. 363.**

——S. 74—*Forfeiture of earnest money—When given as security.*

An advance is liable to be forfeited only when it is given as security for performance of the contract but not otherwise. (*Phillips, J.*) PASUMARTI SEETHAMMA *v.* YARIKLAPPA. **22 L. W. 639.**

——S. 74—*Forfeiture cannot be relieved against where time is the essence of contract—Decree—Forfeiture.*

Where time is of the essence of the contract the question of relieving of forfeiture, which only arises when a penalty is provided for non performance, does not arise. 33 C. L. J 241 Appl.; 24 Mad. 265 ; (1914) M. W. N. 192 Foll. (*Spencer, O.C.J. and Devadoss, J.*) ELLAMMAL *v.* VENKATA RAMANA. **34 M. L. T. 283 : 79 I. C. 958 : A. I. R. 1924 Mad. 796.**

——S. 74—*Forfeiture of earnest money—Damages—Sale of goods—Rescission—Right to return of advance—Further damages.*

Where the plff. lawfully rescinds a contract, he is entitled to the return of his advance and to such further damages as were within the contemplation of both the parties at the time when the contract was made. (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PERA MAHOMED ISHAK *v.* HUSSAIN AKBARI. **(1922) M. W. N. 434 : 31 M.L.T. 40 : 70 I. C. 736 : A. I. R. 1923 Mad. 103 : 43 M. L. J. 199.**

——S. 74—*Forfeiture of earnest money—In absence of stipulation, vendor must prove special damage when claiming forfeiture of earnest money when contract is broken by vendee.*

Under S. 73 of the Contract Act, where there is breach of contract on the part of the purchaser and there is no stipulation as to the forfeiture of the money paid as earnest, the seller is bound to prove special damage if he wants to claim such forfeiture of earnest money. (*Hallifax, A. J. C.*) LACHHMI NARAYAN *v.* DAMODARDAS. **20 N. L. R. 192 : 81 I. C. 282 : A. I. R. 1925 Nag. 109.**

——S. 74—*Forfeiture of deposit—Vendor and Purchaser.*

Where a contract of sale goes off owing to the default of the purchaser, the vendor is entitled to retain the deposit made by the purchaser. 38 M. 178; 19 All. 489 ; 33 All. 166 Ref. (*Drake Brockman, J. C.*) MANGULAL *v.* MT. NANHI. **19 N. L. R. 131 : 67 I. C. 806 : 5 N.L.J. 1 : A. I. R. 1922 Nag. 104.**

——S. 74—*Forfeiture of deposit for breach of stipulation—Penalty.*

CONTRACT ACT, S. 74—Forfeiture of deposit or earnest money.

Neither S. 74 of the Contract Act, nor the principles of law laid down in decisions dealing with promises to pay specified sums in case of breach of contract, apply to cases of forfeiture of deposits for breach of stipulations. In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount. (*Duckworth, J.*) SINGER SEWING MACHINE CO. *v.* MAUNG TIN.
70 I. C. 96 : 11 L. B. R. 420 : 1 Bur. L. J. 158 : A. I. R. 1923 Rang. 47.

——— **S. 74**—*Forfeiture of earnest money—Breach of contract—Amount not deposited as earnest money and not appropriated by payee to loss due to breach—Amount is not liable to forfeiture on breach.*

Where a party to a contract commits breach thereof, a sum which he has paid under the contract as part purchase money and not as earnest money and which the other party has never claimed to appropriate for any loss which he has suffered in consequence of the breach, cannot be treated as deposit liable to forfeiture on the happening of the breach. (*Kennedy, J.C. and Rupchand Bilaram, A. J. C.*) PREMJI MULJI *v.* GURLICK AND CO. **A. I. R. 1925 Sind 254.**

High rate of interest.

——— **S. 74**—*High rate of interest—12 per cent. is a reasonable rate.*

Having regard to the local conditions in India 12 per cent. is very proper and reasonable rate to impose, though it may appear a very high rate of interest. (*Lord Buckmaster.*) NARAIN DAS *v.* ABINASH CHANDAR. **L. R. 3 P. C. 129 : 31 M. L. T. 217 : 16 L. W. 780 : (1922) M. W. N. 791 : 4 U. P. L. R. (P. C.) 111 : 27 C. W. N. 299 : 21 A. L. J. 201 : 37 C. L. J. 457 : 69 I.C. 273 : A. I. R. 1922 P. C. 347 : 44 M. L. J. 728 (P.C.).**

——— **S. 74**—*High rate of interest.*

Interest in a mortgage deed at 9½ per cent. per annum is not penal. (*Sir John Edge.*) MATI LAL DAS *v.* THE EASTERN MORTGAGE AND AGENCY CO. **47 I. A. 265 : 28 M. L. T. 351 : 2 U. P. L. R. (P. C.) 166 : 25 C. W. N. 265 : 61 I. C. 486 : (1920) M. W. N. 631 (P C.).**

——— **S. 74**—*High rate of interest—No undue influence or unconscionable bargain—High rate of interest is not penal.*

In the absence of anything to prove undue influence or that there was an unconscionable bargain, the mere high rate of interest is not to be treated either as penal or unconscionable (*Greaves and Mukerjee JJ.*) NABIN CHANDRA *v.* DUDUMIA. **30 C. W. N. 83 : 87 I. C. 767 : A. I. R. 1925 Cal. 1193.**

——— **S. 74**—*High rate of interest—Power to relieve against—Penalty.*

The court cannot interfere with the rate of interest stipulated between the parties unless it is satisfied that the rate of interest charged is a penalty within S. 74 of the Contract Act. In other cases, the court, if it interferes, would be making a new contract between the parties. (*Greaves and Ghose, JJ.*) SRIMATI SATYABHAMA SUNDARI *v.* MAHOMED ISHAK MEAH **68 I. C. 497 : A I.R. 1923 Cal. 268.**

——— **S. 74**—*High rate of interest—Power of Court to reduce—Circumstances justifying.*

Where there is only one rate of interest and that rate is exorbitant, the Court has no power to reduce the rate in the absence of proof of fraud, undue influence or oppression. (*Maclean, C. J and Geidt, J.*) NARENDRA NATH SARKAR *v.* MONIREDDI HOWLADHAR. **69 I C. 109 : 35 C. L. J. 209.**

CONTRACT ACT, S. 74—Interest from date of Bond.

——— **S. 74**—*Higher rate of interest by oral agreement not allowed..*

In order to avoid the consequences of S. 74 of the Contract Act, all that a mortgagee need to do is to reserve the higher rate as payable under the mortgage and to provide for its reduction in case of punctual payments. (*Broadway and Harrison, JJ.*) FITZHOLMS *v.* THE BANK OF UPPER INDIA, LTD.
4 Lah. 258 : 77 I C 523 : 5 Lah. L. J 438 : A. I. R. 1923 Lah. 548.

——— **S. 74**—*High rate of interest.*

A high rate of interest does not constitute a penalty. (*Broadway and Abdul Raoof, JJ.*) TOHLU MAL *v.* BUTA. **67 I. C. 132 : 3 Lah. L J. 184.**

——— **S. 74**—*High rate of interest—Power of court to reduce—Undue influence—Costs.*

In cases where there is no proof of undue influence, a court has no power to reduce the contract rate of interest merely on the ground that it is very high. 28 A. 570. P. C. ; 20 O. C. 318 ; 8 O.L.J. 418 ; 24 O. C. 313 Foll. But the court disallowed costs on the ground that the interest decreed was high. (*Daniels, A. J. C.*) SHAIKH FAZAL AZIM *v.* LALA GIRDHARI LAL. **69 I. C. 4010: 9 O.L.J. 442 : A.I.R. 1923 Oudh 8.**

——— **S. 74**—*High rate of interest—Market rate.*

Where the plaintiff failed to prove that 24 per cent. per annum with yearly rests was the market rate of interest on the transaction in suit. *Held* : that the market rate of 12 per cent. per annum with yearly rests should be awarded. (*Das and Ross, JJ.*) KHARAG NARAYAN *v.* DWARKA PRASAD.
3 Pat. 465 : 78 I.C. 588 : A I.R. 1924 Pat. 580.

——— **S. 74**—*High rate of interest—Court's power to decrease.*

It is an error to say that the tendency in modern decisions is always to disallow high rate of interest on security bonds where a property is sufficient for payment of a loan advanced by the creditors. (*Das and Adami, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION, LTD. *v.* BHAGWAT BUX RAI. **1 Pat. 263 : 69 I.C. 697 : A. I. R. 1922 Pat. 491.**

——— **S. 74**—*High rate of Interest—Penalty.*

Interest at one per cent. per mensem on mortgage security is not penal and may be allowed. (*Rupchand Bilaram, A. J. C.*) TULSIDAR KESHAWA DAS *v.* HASHI. **78 I. C. 868 : A. I. R. 1925 Sind 164.**

Interest from date of Bond.

——— **S. 74**—*Interest from date of Bond.*

The terms of S. 74 of the Contract Act are not applicable to a decree and a decree-holder is entitled to recover interest at the rate prescribed in the decree. There is no difference in this respect between compromise decree and decrees on contest. (*Daniels and Dalal, JJ.*) RAGHUNANDAN PRASAD *v.* GHULAM ALAUDDIN BEG. **46 A. 571 : 79 I. C. 916 : 22 A. L. J. 464 : L. R. 5 A. 356 : A. I. R. 1924 All. 689.**

——— **S. 74**—*Interest from date of bond—Usufructuary mortgage.*

Where a mortgage deed provides that the mortgagee should be in possession of the property in lieu of interest and the period fixed for redemption was four years, a provision that interest was to be paid in addition after the 4 years is no stipulation for increased interest and S. 74 of the Contract Act is not applicable to the case. (*Scott Smith, J.*) LACHMAN *v.* SANTA. **64 I. C. 350 : 14 P. L. R. 1922.**

——— **S. 74**—*Interest from date of bond—Increased rate of interest from the date of the bond is penal, but can be allowed if from the date of default only.*

CONTRACT ACT, S. 74—Interest from date of bond.

When the stipulation is restrospective and the increased interest runs from the date of the bond, and not merely from the date of default, it is always to be considered as a penalty and cannot be enforced, but where increased interest is claimed only from the date of default it is allowed. (*Baker, J. C.*) MAHOMED ABDUL SATTAR *v.* KONDIBA. **89 I. C. 119 : A. I. R. 1926 Nag. 173.**

——S. 74—*Interest from date of bond—Stipulation to pay interest from the date of bond on failure to repay the loan by a certain date is penal.*

The bond in favour of the plaintiffs stipulated that a certain sum was to be paid by the defendant within two months and in default of payment within the time limited, interest was to run at Rs. 3—2—0 percent. per mensem from the date of the execution of the bond. *Held* : that the stipulation regarding interest in the bond was by way of penalty. (*Dalal, J C.*) FAQUIR CHAND *v.* BAIJ NATH. **75 I. C 888 : A. I. R. 1925 Oudh 72.**

Interest from default.

——S. 74—*Interest from default.*

A mortgage deed provided for the payment of interest at 5 annas per cent. per mensem payable half yearly and that if a default was made in making such payment, the interest due was to be added to the principal and the whole sum was to bear interest thereon at 12 annas per cent. per mensem. *Held*, that the contract is not penal. An agreement to pay interest at an enhanced rate for the breach of contract may not be extravagant or unconscionable if the original rate of interest is paid regularly at the stipulated time. A covenant to pay compound interest is by itself not penal. S. 74 does not enact that the stipulation for the payment of enhanced interest from the date of default ought always to be considered penal. (*Kanhaiya Lal, J C.*) KANDHI *v.* HUSSAIN BIBI AND OTHERS. **26 O. C. 3.2 : 10 O. L. J. 611 : 77 I. C. 768 : A. I. R. 1923 Oudh 158.**

Interpretation.

——S. 74—*Interpretation—Discretion of Court—Whether penalty can be reduced.*

In spite of the exception to S. 74, the Court has discretion, according to the circumstances of the case, to reduce the amount of penalty entered in the bond executed between the parties. (*Macleod, C. J. and Shah, J.*) SECRETARY OF STATE FOR INDIA *v.* DILZISIAN. **23 Bom. L. R. 495 : 62 I. C. 675 : 45 Bom. 1213.**

——S. 74—*Interpretation—Liquidated damages.*

Where a certain sum is named as to be paid in case there is a breach of contract, the plff. in case of breach, can get reasonable compensation to be assessed by the Court. Previous law on the point discussed. (*Sanderson, C. J. and Richardson, J*) DHARENDRA KRISHNA DEB *v.* ALTAFUR RAHMAN. **62 I. C. 759 (c).**

Lease.

——S. 74—*Lease—Stipulation to pay heavy rent—Penalty.*

The contract was that at the end of 4 years when the lease terminated, the defendants should pay to their landlord half the amount of the produce of land. In the event of their objection to do so or preventing the landlords from having the produce assessed, then the stipulation in the *kabuliyat* was that they should pay at Rs. 10 per bigha, *Held*, that the stipulation is purely a penalty as understood in law and being a much higher rate of rent than is usual in such cases is purely a penalty and not meant to be a substantive

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part of the contract binding on the parties. (*Dawson Miller, C. J. and Adami, J.*) PITHU MANJI *v.* JHUKSAR SINGH. **A. I. R. 1922 Pat. 240.**

Meaning of Penalty.

——S. 74—*Meaning of penalty—Agreement of—Compromise—Failure to carry out*

An agreement of compromise provided "if such purchase be not completed within the aforesaid period then the interest on part of the principal money secured by the said mortgage and further charges, namely Rs. 2,90,000 should cease to run and the respondent (mortgagee) shall be deemed to be the owner of the above premises subject to the charge and mortgage mentioned in clause (a) as well as all existing encumbrances on the property and the whole of the said consideration money of Rs. 2,90,000 should *ipso facto* be set off against his claims under his mortgage and further charges." The appellant (mortgagor) refused the conveyance tendered by the respondent on the ground of delay. *Held* : that there was a duty imposed on appellant in relation to the conveyance he had to execute in favour of respondent ;that he was bound to make out a marketable title in respect of the property and appellant did not take any steps to do so, and that consequently he was not in a position to ask for the enforcement of the provision on which he took his stand. Further even if the provision might be regarded as one in the nature of a penalty, appellant has not made out any loss and is therefore not entitled to refuse the conveyance tendered. (*Mr. Ameer Ali.*) BANKU BIHARI DHUR *v.* J. C. GALSTAUN. **27 C. W. N. 77 : 31 M. L. T. 159 : 21 A. L. J. 9 : 69 I. C. 163 : A. I. R. 1922 P. C. 339 (P, C.)**

——S. 74—*Meaning of Penalty—Agreement to pay interest on non-payment of rent on a certain date—Agreement is not necessarily penal.*

It is not right to hold that in every case where there is a stipulation for payment of interest on non-payment of rent within a certain time, it must be taken to be penal. (*Suhrawardy and Cuming, JJ.*) RAJ KUMAR BASU *v.* GIRINDRA KUMAR BANDOPADHYA. **41 C. L. J. 453 : 87 I. C. 178 : A. I. R. 1925 Cal. 722.**

——S. 74—*Meaning of penalty—Compromise to pay per month.*

Under a compromise, the defendant agreed to pay Rs. 10 per month to the plaintiff and he would be liable to pay Rs. 15 per month, if he failed to pay Rs. 10 for four consecutive months. *Held*, that the clause to pay Rs. 15 was by way of penalty and was inserted to enforce regular payment of Rs. 10 per month. (*N. R. Chatterjee and Panton, JJ.*) HEMANTA KUMAR *v.* SUDHANGSU GOBIND. **62 I. C. 436 : 25 C. W. N. 262.**

——S. 74—*Meaning of penalty—Where reasonable compensation for breach is provided there is no penalty but where it is* in terrorum *it is a penalty.*

The whole principle of the law of penalty is this : If in making provision for breach of contract the promisee stipulates from the promisor on the breach only for such compensation as the Court would deem reasonable in the circumstances then there is no penalty and the stipulation is not penal. But if on the other hand the Court would on a proper consideration come to the conclusion that the stipulation was put in not by way of reasonable compensation to the promisee but in order that by reason of its burdensome or oppressive character it may operate *in terrorum* over the promiser so as to drive him to fulfil the contract then the stipulation is one by way of penalty. The principle underlying illustration (*f*) is that the whole of

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the debt being payable immediately the creditor agrees with the debtor to allow him to pay the amount by instalments so long as he pays them regularly. But the principle underlying illustration (*g*) is that debtor by paying consideration gets the right to retain and use the amount of each instalment until the date of its becoming due and payable. If therefore in such a case the debtor commits a breach and fails to pay one instalment no doubt he becomes liable to pay to the creditor damages for such breach but to be called upon to pay the whole of the balance, in spite of the fact that he has given consideration for witholding the amounts of the other instalments till their respective due dates, would undoubtedly be in the nature of a penalty. (*Srinivasa Aiyangar, J.*) RAMALINGA ADAVIAR *v.* MEENAKCHISUNDARAM PILLAI.
21 L. W. 54 : 85 I. C. 261 : A. I. R. 1925 Mad. 177 : 47 M. L. J. 833.

——S. 74—*Meaning of penalty—Question as to stipulation being by way of penalty is to be decided from circumstances of each case.*

The question as to a stipulation being penal or not should be decided according to the circumstances of each case. Where on a partition among three Hindu brothers it was agreed that one of them should instead of being given any land, be entitled to receive from each of the others an annuity and on default, should resume that portion of his share which had gone to the defaulter. *Held* : that the last clause was not by way of penalty. Nor can this be regarded as a forfeiture clause as a rerurn to the *status quo* at the time when the agreement was entered into does not vest the property in the defaulter. (*Jackson, J.*) RAJGOPAL PADAYACHI *v.* VARADARAJA PADAYACHI.
(1924) M. W. N. 861 : 82 I. C. 751 : A. I. R. 1925 Mad. 84 : 47 M. L. J. 605.

——S. 74—*Meaning of penalty.*

The idea is very common that what is called a "penalty clause" in a contract is a mere *brutum fulmen*, an agreement that neither party has any intention of enforcing at all to any extent. Such an agreement would certainly not be mentioned in the Contract Act and in fact would not be agreement at all. A penalty clause merely fixes a maximum for damages which would be difficult to state in terms of money, and anyhow does not deprive the aggrieved party of his right to damages that can be so estimated. 12 N. L. R. 177 Ref. (*Hallifax, A. J. C.*) BALAJI *v.* SUKAMIYA,
68 I. C. 605 : A. I. R. 1923 Nag. 98.

——S. 74—*Meaning of penalty—Interest and principal consolidated together and made payable in instalments—Default—Provision for payment of whole—Power of Court to relieve against.*

If in an instrument in which the principal and interest have been consolidated and the total amount is payable by instalments there is a default clause that on failure to pay an instalment, the whole sum will become at once due, such a provision is a penalty. Even where no interest is payable until default but an exorbitant rate is payable on default, it is open to the court to treat the stipulation as a penalty. 42 C. 652 ; 36 M. 229 foll. (*Batten, J. C.*) BHAGWANSA *v.* AMIN. **65 I. C. 963 : A. I. R. 1922 Nag. 49.**

——S. 74—*Meaning of penalty—Right of re-sale of goods—Power to sell on breach of conditions.*

Where in a contract for the sale of goods a right of re-sale is reserved to the vendor on breach of certain conditions the vendor can avail himself of the right of re-sale on the breach and the power to re-sell is not a stipulation by way of penalty. (*Kanhaiya Lal, J. C.*) NAZIRKHAN *v.* MIRZA MAHOMED ABID.

CONTRACT ACT. S. 75—Unconscionable Bargain.

10 O. L. J. 33 : 25 O. C. 186 : A. I. R. 1922 Oudh. 265.

——S. 74—*Penalty—Primary obligation—Breach of—Necessity of.*

A penalty under Section 74 of the Contract Act will only follow a breach of a contract or an obligation. Where there is no obligation at all there is no question of a penalty. (*Adami and Sen, JJ.*) JITENDRA NATH CHATTERJEE *v* MUSST. JASODA SAHUN.
1925 P. H. C. C. 353.

——S. 74—*Penalty—Stipulations contained in decrees—Applicability.*

The doctrine of penalties is not applicable to stipulations contained in decrees. (*Adami and Sen, JJ.*) JITENDRA NATH CHATTERJEE *v.* MUSST. JASODA SAHUN. **(1925) P. H. C. C. 353.**

Measure of Damages.

——S. 74—*Measure of damages—Stipulation of a definite amount in case of breach—No reasons appearing for not awarding—Stipulated amount should be awarded.*

Where the contract of sale itself provided that in the event of a breach Rs. 3,200 was to be paid as damages by the party failing to perform his part of the contract. *Held* : that in the absence of any equitable ground, the stipulated sum should be decreed as damages. (*Shadi Lal, C J. and Harrison, J.*) LACHHAMAN DAS *v.* BHOJA RAM. **6 Lah. L. J. 554 : 84 I. C 865 : A. I. R. 1925 Lah. 284.**

Reduction for Punctual payment.

——S. 74—*Reduction for punctual payment.*

Where a deed provides for a rate of interest but also contains a covenant to accept interest at a reduced rate if paid punctually, the covenant does not make the original rate a penalty within S. 74 of the Act. (*Mookerjee and Buckland, JJ.*) BAIKUNTA NATH *v.* RAMANAND. **33 C. L. J. 414 : 61 I. C. 923 : 25 C. W. N. 776.**

——S. 74—*Reduction for punctual payment.*

Where the deed recited "I will claim a remission of annas 4 per cent per month from the interest, if I pay the amount as stipulated. I will not claim remission if I do not pay the amount as stipulated". *Held*, the reduction in the rate of interest contemplated on punctual payment of instalments does not amount to a penalty. (*Prideaux, A. J. C.*) KESHAV RAO *v.* KRISHNA RAO. **70 I. C. 31 : A. I. R. 1922 Nag. 263.**

Unconscionable Bargain.

——S. 74—*Unconscionable bargain—Penalty—Fixation of price of paddy due under contract—No undue influence—Power of Court to reduce price.*

The plaintiffs advanced a sum of Rs. 500—and for this the defendant undertook to repay 172 maunds of paddy in the next year and the same amount in the following year. In default of delivering paddy the price was to be charged at Rs. 3—per maund. There was no suggestion that the defendant acted under any undue influence. It was found that the defendant had to pay under this agreement nearly double the amount advanced *Held*, that there was no ground for holding that the stipulation was a penalty and the Court had no power to reduce the price. It was in the interests of the party that a definite rate should be fixed for the paddy and it might have been to the advantage of the defendant if the paddy at the time of payment was selling at a higher rate to be able to pay cash instead of paddy itself. (*Newbould and Panton, JJ.*) ASHRAF ALI *v.* MAKBUL AHMED.
49 C. 1040 : 70 I. C. 931 : A. I. R. 1923 Cal. 166 (1).

CONTRACT ACT, S. 76.

——S. 75—*Goods—Shares in a company—General Clauses Act, Ss. 5 and 6.*

Shares in a Company are goods within S. 76. (*Macleod, C. J. and Crump, J.*) VADILAL *v.* MANEKJI. **25 Bom L R. 414 : A.I.R. 1923 Bom. 372.**

——Ss. 76 and 178—*Meaning of 'goods.'*

The term 'goods' used in S 178 is very wide (S. 76 of the Act) sufficiently wide to include share certificates. 46 Bom. 489. (*Macleod, C.J. and Coyajee, J.*) JAMSHEDJI *v.* MAGANLAL.

27 Bom. L. R. 514 at 524 : A. I. R. 1925 Bom. 314.

——Ss 76 and 121—*Shares in a company—Contract for sale and delivery—Rights of transferee—Pledge.*

Plaintiffs sold some shares to the 1st defendant who sold 25 of them to a third party and pledged 104 along with other similar shares to the second defendant. Defendant 2 put forward defendant 3 as a party who was willing to advance money. In fact defendant 3 was a mere nominee of 2nd defendant and defendant 2 got possession of 305 shares fraudulently. The fraud was that he deceived defendant 1 by false pretences that he would use these shares for the purpose of raising a loan for the benefit of defendant which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the moneys due to him from 1st defendant. The plaintiffs sued to recover the shares and damages from defendants 2 and 3. *Held*, that the plaintiffs suit was unsustainable and the remedy of the plaintiffs was to sue the 1st defendant for the purchase money. The shares were moveables or 'goods' within S. 76 of the Contract Act and the case therefore fell within S. 121 of the same Act. The plaintiffs had delivered all they had and they could not, therefore rescind the contract on the buyer's failing to pay the price unless it was stipulated by the contract that they should be so entitled. The plaintiffs as vendors agreed to sell and deliver transfers and certificates with the interests and rights which they conveyed. Such delivery passed not the property in the shares but a title legal and equitable which would enable the holder to vest himself with the shares. On delivery of the documents there was no interest left in the plaintiffs on which any equity can be founded. As between them and 1st defendant there was no fraud or misrepresentation which could vitiate the transaction. (*Macleod, C. J. and Crump, J.*) VADILAL *v.* MANEKJI.

25 Bom. L. R. 414 : A. I. R. 1923 Bom. 372.

——Ss. 76 and 108—*Share certificates are 'goods.'*

Share certificates are movable property within the meaning of S. 76 and are therefore 'goods.' (*Kanga, J.*) FAZAL *v.* MANGALDAS. **23 Bom. L. R. 1144 : 66 I. C. 726 : 46 Bom. 489 : A. I. R. 1922 Bom. 303**

——S. 76—*Sale of goods—Goods ordered, despatched to buyer—Refusal to take delivery—Suit to recover price.*

Where ascertained goods are sold and despatched to the buyer, but the buyer refuses to take delivery, the seller can sue him for their price. (*Broadway, J.*) SURJAIN MAL KISHEN CHAND *v.* GIAN CHAND CHIRANJI LAL. **59 I. C. 877 : 3 Lah. L. J. 239.**

——S. 77—*Ownership.*

Transfer of stolen property passes no ownership to buyer. (*Greaves and Panton, JJ.*) KHITISH CHANDRA DEB *v.* EMPEROR. **51 Cal. 796 : 25 Cr.L.J. 1235 : 82 I. C. 163 : A. I. R. 1924 Cal. 816.**

——S. 78—*Hire purchase agreement.*

See also (1) CONTRACT—HIRE PURCHASE.
(2) CONTRACT ACT, S. 178.

——S. 78—*Sale of goods—Property passes as soon as contract is made.*

CONTRACT ACT, S. 79.

On a sale of ascertained goods the property in the goods passes to the purchaser as soon as the contract of sale is made even though the delivery of the goods is postponed at his request and to suit his own convenience. (*Stuart, J.*) DWARKA DAS AJODHYA PRASAD *v.* RAM RATAN. **20 A. L. J. 579 : L. R. 3 A. 424 : 68 I.C. 239 : A. I. R. 1922 All. 458.**

——Ss. 78 and 7—*Payment of price by instalments—Property passes as per intention of parties.*

If S. 78 were construed as laying down an inflexible rule as to the passing of property not only would there be a serious limitation on the freedom of contract but there would also be an inconsistency with other sections of the Indian Contract Act *e.g.*, S. 7. No doubt it is curious that S. 78 should not be expressed as subject to a contrary intention but the Act is a notoriously badly drafted Act and it does not purport to be exhaustive, where the intention of the parties as expressed in the conditions of the contract was that the property in the car in dispute should not pass until full price had been paid *Held*, that intention would prevail in spite of S. 78. (*Pratt, J.*) HURBUT JOHN AMIES *v.* JAL P. VIRJI. **25 Bom. L. R. 778 : 77 I. C. 150 : A. I. R. 1924 Bom. 41.**

——S. 78—*Property in goods passes on payment of price.*

Where a Manchester firm sent goods to India for defendant firm at Delhi, and after shipment sent the drafts and shipping documents to the National Bank of Delhi with the directions for the delivery to the buyer on payment of the money to the Bank, *held*, that property in the goods did not pass to the buyer till the money was paid to the Bank. 3 Ex. D. 164 ; A. I. R. 1923 Bom. 125, Foll. (*Martineau and Moti Sagar JJ.*) GULAB RAI-SAGAR MAL *v.* NIRBLE RAM, NAGAR MAL. **4 Lah. 423 : 79 I. C. 194 : A. I. R. 1924 Lah. 239**

——Ss. 78 & 80—*Sale of specific goods—Position of buyer—Claim for price—Wholesale delivery.*

Where specific goods are sold and agreed to be delivered wholesale to a certain person at a certain rate, it is for the buyer to get goods weighed and delivered to him. The weighment is only for the consideration of the buyer and the latter cannot by delay in weighing the goods prevent the transfer of the ownership to him. Where the contract was for the sale of the entire heap of bark stored in the godown amounting approximately to 446 maunds it was practically a sale of specific or ascertained goods and it was the duty of the purchaser to get the goods weighed and delivered on the due date. (*Kanhaiya Lal J. C.*) ANNAN *v.* SHEIKH DUBAR. **26 O. C. 39 : 68 I. C. 969 : 9 O. L. J. 339 : A. I. R. 1923 Ordh 15.**

——Ss. 79 and 83—*Suit for damages suffered on re-sale—Whether there was valid appropriation of goods with the express or implied consent of the defendant—Implied assent, meaning of.*

A contract was entered into on 30th Sept. 1917 for sale of 40 bales of calico to be delivered to the purchasers on 16—11—17 on payment of purchase money. The purchasers not having tendered the price, the plaintiff (seller) asked the defendant by letter to take delivery at once and pay the price ; no reply was sent to this. On January, 1918, the plaintiff instructed a firm of auctioneers to sell the goods at the risk of the defendants. On Feb. '18, they in their turn repudiated their liability under the proposed sale, asserting that the goods did not belong to them, and that the goods were not ascertained for the contract with their consent. The plff. thereupon filed a suit claiming damages alleged to be suffered on re-sale ; but there was no mention of plaintiff's appropriation of goods

with the assent of the defendants. The plaintiff was therefore asked to amend his plaint so as to include an alternative claim of damages on the ordinary basis of difference between the contract and the market rate. The plaintiff, however, chose to take his stand on the re-sale and on the action as originally brought. *Held*, that the suit was rightly dismissed for in such cases appropriation and communication thereof to the buyer should both take place before there has been repudiation or breach of the contract by either party; that no assent by the buyer can be implied by his silence after he has actually broken the contract *Held*, further, that on the suit as framed by the plaintiff, he must not be given his remedy of damages on the ordinary basis of difference between the contract rate and the market rate at the date of breach. (*Harrison and Jai Lal, JJ.*) BIJ RAJ *v.* THE FIRM GOBIND PERSHAD. **26 Punj. L. R. 425 : 88 I. C. 230 : 7 Lah. L. J. 512 : A. I. R. 1925 Lah. 581.**

——— **Ss. 82 and 83**—*When property in goods passes to buyer.*

The combined effect of those sections is that where goods agreed to be sold are not ascertained at the time of making the agreement but goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement and that appropriation is assented to by the other, the sale is complete, and the property in the goods passes to the buyer. In order that the property may pass to the buyer it is necessary that the goods appropriated to the contract by the seller must answer the description in the agreement. Mere appropriation by the seller does not pass the property in the goods to the buyer. The effect of appropriation is that the seller loses the possibility of withdrawing the goods from the contract and he would break his contract with the buyer if he offered any other goods to him, though the goods still remained his property. The appropriation must be assented to by the buyer to pass the property. (*Mulla, J.*) N. BUCH & CO. *v.* GORDHANDAS. **24 Bom. L. R. 991 : A. I. R. 1923 Bom. 92.**

——— **Ss. 83 and 91**—*Appropriation—What constitutes—Delivery—Bill of lading—Discounting draft.*

The commonest form of appropriating goods, to a contract for the sale of unascertained goods is by delivering them to a carrier. A very common mode of doing business is for one merchant to give an order to another to send him certain goods. Here it becomes the seller's duty to appropriate the goods to the contract. The seller is by the express or implied terms of the contract authorised to select and appropriate the goods, the buyer having given a previous implied assent to the seller's appropriating. The difficulty in such cases is to determine what constitutes the appropriation. The question is one of intention but there are certain well-established rules :—(1) In the case of a contract for the sale of unascertained goods the delivery by the seller to a common carrier or, unless the effect of the shipment is restricted by the terms of the bill of lading shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. (2) If, however, the vendor when shipping the articles which he intends to deliver under the contract takes the bill of lading to his own order and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property and consequently there is no final appropriation and the property does not on shipment pass to the purchaser. (3) If the vendor deals with or claims to retain the bill of lading in order to secure the contract price as when he sends forward the bill of lading with a bill of exchange attached with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft or payment or tender of the price, is conditional only, and until such acceptance or payment or tender the property in the goods does not pass to the purchaser. (4) If the seller discounts a draft upon the buyer with a bank and authorises the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred according to general mercantile understanding is that the seller intends to transfer the ownership when the draft is accepted but intends also to remain the owner until this has been done. S. 83 of the Contract Act applies to cases where the seller is authorised to make the appropriation and the buyer has given a previous implied assent to the appropriation where in pursuance of the contract the seller delivers the goods to a carrier for the purpose of transmission to the buyers but retains a *jus disponendi* until certain conditions are fulfilled. (5) The property in the goods does not pass to the buyer until the conditions imposed by him are fulfilled. This rule applies not only to delivery of goods to carriers by sea but to delivery to carriers by land. (*Mulla, J.*) THE FORD AUTOMOBILES (INDIA), LTD. *v.* THE DELHI MOTOR AND ENGINEERING CO. **24 Bom. L. R. 1140 : 70 I. C. 138 : A. I. R. 1923 Bom. 125.**

——— **S. 83**—*Vendor appropriating and communicating to vendee after latter's breach of contract—Latter's silence does not pass title to him.*

Appropriation and communication thereof to the purchaser should both take place before there has been repudiation or breach of the contract by either party. No assent by the purchaser can be implied by his mere silence after he has actually broken the contract. Once a party has by his conduct given an indication of his intention not to abide by his contract his neglect or refusal to reply to the communications of the other party to the contract thereafter, cannot amount to an indication of his desire to keep the contract alive. An express or implied assent to an appropriation is an indication of such an intention. 1 K. B. 459, Foll. (*Harrison and Jai Lal, JJ.*) BIJ RAJ *v.* FIRM GOBIND PERSHAD. **7 L. L. J. 512 : 88 I. C. 230: 26 Punj. L.R. 425 : A.I.R 1925 Lah. 581.**

——— **Ss. 83, 91**—*Property when passes—Divisibility of contract.*

A contract for the sale of goods provided "for the sale of 1000 bales of jute, shipment to be during August and September 1919, delivery at the buyer's place." A portion of the jute was shipped, but the ship caught fire and the goods were destroyed. *Held*, on a construction of the contract, property did not pass to the buyer till the goods reached his place; also, the contract was an indivisible one and performance can be only by delivery of the bales at the buyer's place. (*Greaves and Chakravarti, JJ.*) SADASOOK KOTHARI *v.* CHAITRAM RAMBILASH. **88 I. C. 910 (2): 29 C. W. N. 808.**

——— **Ss. 83, 84**—*Sale of goods—Appropriation—Price to be paid before delivery—Default—Suit for price—Rate of exchange—Calculation of.*

X agreed to sell to Y 15 cases of piece goods which he had contracted to purchase from Z, price to be paid before delivery. When the goods were sent to Y he refused to take delivery and so X had to pay the price to Z. *Held*, prior to the payment of the price by X, there was only a conditional appropriation, but

on paymen the appropriation became final, property passed to Y and he was liable to pay the full price and not merely damages. The rate of exchange governing the transaction would be that on the date on which X paid Z. (*Harrison and Zafar Ali, JJ.*) RAGUNATH DAS RAM SARUP *v.* FIRM GHAMANDI LAL NARAIN DAS. **86 I. C. 794: A. I. R. 1925 Lah. 586.**

——S. 86—*Non-taking of delivery.*

Where the purchaser fails to take delivery the property does not pass to the purchaser and the vendor is not at liberty to re-sell the goods on purchaser's account. (*Macleod, C. J. and Shah, J.*) NARSING GIRJI MANUFACTURING CO. *v.* BUDAN SAHEB. **26 Bom. L. R. 523 : A. I. R. 1924 Bom. 390.**

——S. 91—*Scope—English law.*

S. 91 does not provide for cases where the seller delivers the goods to a carrier and reserves the right of disposal. Therefore the Courts of British India resort to the rules of English common law so far as they are not inconsistent with the text of the Contract Act. One of those rules is that where in pursuance of the contract, the seller delivers the goods to a carrier for the purpose of transmission to the buyer, but retains a *jus disponendi* until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by him are not fulfilled. This rule applies not only to delivery of goods to be carried by sea but to delivery to carriers by land and to canal boat companies. (*Mulla, J.*) THE FORD AUTOMOBILES *v.* THE DELHI MOTOR AND ENGINEERING CO. **24 Bom. L. R. 1140 : 70 I. C. 138: A. I. R. 1923 Bom. 125.**

——S. 91—*Goods delivered to railway at Delhi for defendant residing at Meerut—Delhi Court can try suit for recovery of price—C. P. Code, S. 20 (c).*

An action for the recovery of the price of goods despatched by plaintiff by railway from Delhi to the defendant at Meerut is triable at Delhi where the goods were delivered to railway, as delivery to the railway company as a carrier has the same effect as delivery to the buyer. (*Shadi Lal, C. J.*) FIRM AMARSINGH *v.* SHARAFUDDIN. **7 L. L. J. 395 : 26 Punj. L. R. 498 : 89 I. C. 751 : A. I. R. 1925 Lah. 555.**

——S. 91—*Position of commission agent buying goods for principal and sending them to latter is not of vendor to vendee and S. 91 has no application to him. He is liable for loss of goods only on proof of negligence or breach of duty as agent.*

The legal effect of the transaction of a purchase of specified goods by a commission agent has not the effect of turning his contract as between principal and agent wholly or into one as between vendor and purchaser. The agency contract is in some respects analogous to that of a contract of purchase and sale and not identical with it, analogous in the sense that it will attract to the commission agent certain reliefs ordinarily open to a vendor, for example, the right of a stoppage *in tran situ*. On the other hand, property in goods specified would pass to the principal immediately on purchase by the agent. The passing of the property in the goods would not depend on the manner of the delivery. Hence if the commission agent is liable for the loss of the goods it must be on proof of negligence or proof of breach of duty as agent. (*Wallace, J.*) VENKATACHALAM *v* PONNUSWAMI AIYANGAR. **20 L. W. 195 : (1924) M. W. N 499 : 82 I. C 536 : A. I. R. 1925 Mad. 46: 47 M. L. J. 312.**

——S. 91—*Consignment of goods to Ry. Co.—Property if passes—Who can sue for loss.*

Where goods are consigned to a Railway Company property passes to the consignee under S. 91, Contract Act, and he alone can thereafter sue the Railway Company for loss arising out of the contract of freight. (*Phillips, J.*) M. AND S.M. RY. CO. *v.* RANGASWAMY CHETTI. **73 I C. 537: A. I. R. 1924 Mad. 517.**

——S. 92—*Vendor's lien—When exists.*

Vendor's lien exists only when the goods remain in his possession, the price is wholly or partially unpaid and a contrary intention does not appear. (*Baker, J. C.*) HAJI KARIM *v.* DOMA. **A. I. R. 1924 Nag. 416.**

——S. 94—*Delivery and vendor's warehouse—Passing of property—Vendor despatching goods—Railway receipt sent to Bank for collection—Effect of—Liability for shortage.*

In a contract for sale goods were to be delivered at the vendor's warehouse or if the vendee so desired, the vendor was to despatch them by rail to the vendee. Under directions from the vendee, the goods so sent, but the Railway receipt sent to a Bank and directed to be handed over to the vendee only on payment of the price. The goods were paid for, but a shortage was discovered, and also much damage. In a suit for return of a proportion of the purchase money, *held*, title to goods passed to the vendee as delivery was to be at the vendor's warehouse and thereafter the vendor was only in law the agent of the vendee. But the effect of sending the railway receipt to the Bank and demanding payment of the price altered the original contract, and the effect of it was that property in the goods passed back to the vendor and hence the vendee was not liable to pay for more than what actually reached him in a good condition. (*Simpson, A. J. C.*) RAM PRASAD BABU *v.* PAUL BROTHERS. **90 I. C. 381.**

——S. 95—*Retention of seller's lien does not necessarily imply unconditional appropriation.*

The fact that under S. 95 of the Contract Act a seller retains a lien on undelivered goods even after the title has passed, by no means amounts to saying that wherever the seller retains a lien on undelivered goods it is to be assumed that the title has passed in the sense that there has been full unconditional appropriation. Where *A* contracts to purchase goods from *B* and there is a condition of payment of the price before delivery, and *A* contracts also to sell the same goods to *C*, any appropriation of the goods to the contract before payment of price by *A* will be only conditional appropriation, but on payment of price by *A*, the appropriation becomes final, and if *C* has assented to the payment the property in the goods passes to *C*. If *C* fails to take delivery of the goods *C* is liable for their price and not merely for damages, and the rate of exchange at which *C* is liable to pay the price is the rate prevailing on the date on which *A* owing to *C's* conduct in refusing to pay and take delivery was compelled to pay price himself. (*Harrison and Zafar Ali, JJ.*) RAGHUNATH DAS *v.* GHAMANDI LAL. **86 I. C. 794: A. I. R. 1925 Lah. 586.**

——Ss. 95 and 96—*Sale of goods on credit—Omission to take delivery—Buyer repudiating contract.*

Where on sale of goods on credit the buyer makes default in taking delivery and repudiates the contract, the general provisions of S. 95 of the Contract Act giving the seller a lien on goods remaining in his possession after sale has effect. (*Reilly, J.*) MULKI NARAYANAKAMMATHI *v.* K. KUNI MOYI. **20 L. W. 486 : (1924) M. W. N. 748 : 82 I. C. 850 : A. I. R. 1924 Mad. 866 : 35 M L. J. 72.**

——S. 95—*When contract is silent on question of payment, refusing to deliver before receipt of full purchase money, goods sold is legal though the price may have been settled and advance also paid.*

CONTRACT ACT, S. 95.

The defendants agreed to deliver to the plaintiff 125,000 bundles and received earnest money. Out of this the plaintiffs received 35,000 bundles, while 13,000 had been counted but remained with defendants. The defendants refused to allow the plaintiff to remove the remaining 13,000 bundles or to deliver the balance until the plaintiff paid the whole of the money. *Held*, that as the contract was silent on the question of payment the defendants were not liable for breach of contract. (*Baker, J. C.*) HAJI KARIM *v.* DOMA. **80 I. C. 639 : A. I. R. 1924 Nag. 416.**

——— **Ss. 96 and 97**—*Sale of goods to plaintiffs on credit—Defendants subsequently insisting on cash payment knowing about the insolvency of the plaintiffs—Plaintiffs are not entitled to cancel the contract—Defendant's omission to state plaintiff's insolvency in their correspondence is no bar to plead plaintiff's insolvency in defence.*

Where plaintiffs purchased from defendants on the condition that the plaintiffs would have credit of two months for paying the price of the goods purchased after delivery but subsequently the defendants came to know that plaintiffs were in insolvent circumstances and insisted that cash should be paid before delivery, and subsequently the plaintiffs applied to get the contract rescinded, and to restrain the defendants from selling the goods at the risk of the plaintiffs, *held*, that the insolvency of the plaintiffs justified the defendants in insisting on cash being paid before delivery and retaining goods and it was not open to the plaintiffs to cancel the contract merely because of the defendants' insisting on cash payment before delivery. The defendants were not prevented from putting forward the insolvency of the plaintiffs as a ground of their defence simply because they did not set forth in their correspondence plaintiff's insolvency as their main cause for change of position. (*Devadoss, J.*) R. K. ABDUL RAHIMAN SAHIB AND CO. *v.* SHAW WALLACE AND CO. **20 L. W. 725 : (1924) M. W. N. 924 : 84 I. C. 912 : A. I. R. 1925 Mad. 292.**

——— **Ss. 99 and 107**—*Stoppage in transit—Nature of right—Assignment of document of title—Effect—Burden of proof.*

Per *Sanderson, C. J.*—*Quaere* : Whether the right of a seller of goods to stop the goods in transit is a mere equitable right.

Per *Richardson, J.*—It is too late in the day to argue that the right of stoppage is a merely equitable right. Where the buyer of certain goods while they were in transit became an insolvent but had meanwhile assigned the document of title to a third party and the vendor exercises his right of stoppage in transit, it is for the assignee to show under S. 102 that he acted in good faith and paid valuable consideration. Origin and nature of the vendor's right of stoppage considered. (*Sanderson, C. J. and Richardson, J.*) RASH BEHARI KARURI *v.* NARAIN DAS DORILAL. **50 Cal. 399 : 27 C. W. N. 231 : A. I. R. 1923 Cal. 182.**

——— **Ss. 102, 108 and 178**—*Railway receipt—Assignment—Mode of—Rights of transferee and consignee—T. P. Act, S. 137.*

Railway receipts are not negotiable by law and are not rendered negotiable by S. 137 of the T. P. Act. Nor was there anything to show that such receipts were negotiable by the mercantile custom of Rangoon. S. 137 of the T. P. Act merely provides that the methods of assignment in Ch. 8 of the Act shall not apply to the case of certain specified documents which are for the time being by law or custom negotiable

CONTRACT ACT, S. 107.

It merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made. In order that such transfer should have in the case of railway receipts the effect of transferring the ownership of the goods, it must be established thet they are not negotiable. (*Rabinson, C. J. and Macgregor, J.*) FIRM OF S. R. N. S. ARUNACHALAM CHETTY *v.* KO PO YAN. **1 Bur. L. J 90 : 11 L. B. R. 341 : 68 I. C. 694 : A. I. R. 1923 Rang. 1.**

——— **Ss. 106 and 118**—*Contract for sale of goods—Numbers on packages not material or of the essence of the contract unless descriptive of the quality of the contents—Mistake.*

A contract note for the sale of bales of Long Cloth in course of manufacture described some of them as bearing numbers "139" and "141" whereas from previous contracts in respect of the sale of the identical bales beginning from that of the original vendor who, in ordering them from the Mills, had required his numbers "739." "741" respectively to be printed not "139" or "141". *Held*, (affirming the decision of the High Court of Bombay in its appellate jurisdiction) that, as the numbers in the contract had no specific meaning in the market, and were merely reference numbers the figures "139" and "141" bearing mere clerical errors for "739" and "741" respectively did not constitute a warranty of the goods or, indicate their quality or description. (*Lord Atkinson.*) RAMJIVAN NEVATIA *v.* BHIKAJI & CO. **26 Bom. L. R. 442 : 10 O. & A. L. R. 601 : (1924) M. W. N. 430 : L. R. 5 P. C. 135 : 20 L. W. 424 : 80 I. C. 381 : 35 M. L. T. 140 : 48 Bom. 519 : 29 C. W. N. 537 : 1 O. W. N. 304 : A. I. R. 1924 P. C. 143 : 46 M. L. J. 655 (P.C.).**

——— **S. 107**—*Scope.*

If a purchaser does not take delivery and pay the balance of the purchase money on the due date, the seller or his representative may sell the goods against him and charge him with the loss. If the property has undoubtedly passed and the real date for paying the balance of the purchase money and for delivery of the goods has not arrived, the re-sale by the vendor is a breach of contract entitling the vendee to repudiate the transaction. (*Piggott and Walsh, JJ.*) KISHORI LAL *v.* JIWAN LAL. **A. I. R. 1923 All. 242.**

——— **S. 107**—*Where vendor retains ownership he is entitled to difference between contract rate and market rate on date of breach, but must mitigate damages as far as possible—Where title has passed to vendee, vendor may recover price though vendee has not taken delivery or may sue for breach of contract even after re-sale of goods—In latter case damages are the difference between contract rate and market rate when contract ought to have been completed.*

If the property in the goods did not pass to vendee the measure of damages would normally be the difference between the contract rate and the market rate at the date of breach. It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. [*Halsbury, X* 332 (*g*) *Diss.*] If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. If the purchaser refuses to accept the goods, and the property has passed to him, the vendor may at his option consider the contract of sale as still unbroken, and recover their entire price in an action for goods bargained and sold, even though they have

not been delivered. He may, on the other hand, after the time for acceptance has expired, or any other essential condition has been broken, sue for breach of the contract, even after he has re-sold the goods. In the latter case the measure of damages is the difference between the contract price and the market price at the time when the contract ought to have been completed, for the seller may take his goods into the market and obtain the current price for them. (*Marten, J.*) COORLA SPINNING AND WEAVING MILLS CO. *v.* VALLABHDAS KALLIANJI. **27 B. L. R. 1168 : A. I. R. 1925 Bom. 547.**

——S. 107—*Sale must be within reasonable time.*

The sale by auction whether under the contract of the parties or S. 107 of the Indian Contract Act or otherwise must be within a reasonable time. The provision in a contract that "the company is at liberty to keep the said goods or re-sell them on our account and at our risk" cannot be construed as a power to keep the goods as long as the company liked before it re-sold. (*Marten, J.*) COORLA SPINNING AND WEAVING MILLS CO. *v.* VALLABHDAS KALLIANJI. **27 B. L. R. 1168 : A. I. R. 1925 Bom. 547.**

——S. 107—*Ordinarily appropriation notice passes property to vendee but not where property agreed to be sold and property appropriated are not identical.*

If the seller sends notice of appropriation to the buyer and the latter does not reply promptly it must be inferred that he assents to the appropriation and the property in the goods will be deemed to pass on the expiration of a reasonable time after receipt of the notice. This principle does not apply in all cases. Where vendees contracted to purchase a certain number of cases of dyed sateens bearing certain numbers but failed to take delivery of the goods on the ground that the numbers on the cases were fictitious and the contents were not complete and vendors gave notice to vendees and auctioned the goods and sued the vendees for short proceeds, *held*, that in the absence of express or implied assent to the appropriation of the goods the vendors had no right to re-sell them. (1919) 1 K. B. 459 Dist. (*Shadi Lal, C.J. and Lumsden, J.*) THE FIRM MAKHANLAL HAZARILAL *v.* THE FIRM OF SURAJ BHAN-BAKHTAWAR MAL. **76 I. C. 77 : A. I. R. 1925 Lah. 70.**

——S. 107—*Sale of goods—Rights of vendor—Reasonable time for re-sale of goods.*

Where a right of re-sale is given by the contract between the parties, it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale. If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between the price agreed to be given and the price realised on the re-sale with the costs and expenses of the re-sale, but if the re-sale has been unreasonably delayed until the market has fallen, the price realized on such re sale will not afford a true criterion of the damage. If the seller elects to re sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer, for it will then be open to the seller with the deliberate intention of causing loss to the buyer, to delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract. (*Abdul Raoof, J.*) FIRM OF ABDUL HAKIM MAHOMED SADIK *v.* JOHO JAUTZEN. **72 I. C. 772 : A.I.R. 1924 Lah. 319.**

——S. 107—*Mercantile contracts—Time is essence of contract.*

The general rule is that time is the essence of mercantile contracts and particularly when a party agreed to make payment and take delivery as soon as the goods arrived. Provisions in the contract regarding payment of interest and liability for godown rent do not take the case out of the general tule where no evidence had been offered that the plaintiffs in fact took money to the Hindustan Mercantile Association when it was their duty to make an unconditional offer of cash to the defendants and wrote asking to be told where to make payment, several days after receipt of the defendant's warning. *Held*, plaintiffs failed to make out any breach of contract by the defendants which would entitle them to damages. ((*Martineau and Campbell, JJ.*) THE FIRM DURGA DAT JAGAN NATH OF DELHI *v.* THE FIRM RAM PARTAB SUKH DAYAL OF DELHI. **A I. R. 1923 Lah. 138.**

——S. 107—*Rights of unpaid seller to resell goods at purchaser's risk—Rescission of contract—English and Indian law.*

So far as the English Law is concerned, when an unpaid seller of goods resells them under an expressed power reserved by him, he thereby rescinds the contract. Under the Contract Act, there is no reason why an unpaid vendor should not re-sell the goods " on account and risk of the purchaser " as specified in the contract, and enforce at the same time all other rights given to him by the contract in so far as those rights are not affected by the re-sale. (*Shadi Lal, C. J and Campbell, J.*) JAI NARAIN BALU LAL *v.* NARAIN DAS JAINIMAL. **3 Lah. 296 : 67 I. C. 228 : A. I. R. 1922 Lah. 369.**

——S. 107—*Re-sale—Notice—Burden of proof.*

The giving of a notice is a condition precedent to exercising the right of re-sale and the person who re-sells must plead and prove notice. He cannot get over the statutory obligation by saying the purchaser did not suffer any loss by the re-sale. (*Kotval, A J. C.*) NARAINDAS *v.* KUNJILAL. **A. I R. 1924 Nag. 162 (2).**

——S. 107—*Re-sale without notice to vendee—Vendee can recover only earnest money.*

When the vendor re-sells the goods illegally without notice to the defaulting vendee at a profit, the latter is en itled to recover the earnest money but not to damages or profits earned by the vendor. (*Pullan, A. J. C.*) JHANDOO SINGH HORBANS SINGH FIRM *v.* FIRM KUNJ BEHARI LAL BAIJ NATH. **84 I. C. 472 : A. I. R. 1925 Oudh 310.**

——S. 107—*Condition of re-sale.*

Where the right of re-sale is reserved by the terms of contract it can be exercised, if any of the conditions of the sale on which the right of re-sale depends is broken A power of re-sale implies a power of annulling or rescinding the contract, in other words, the sale is conditional and not absolute. The property in the goods sold in such a case passes to the buyer subject to the conditions attached to the contract of the sale ; and if those conditions justify a right to rescind the contract or to re-sell the goods, such a right can be enforced and cannot be regarded as penal. *Lamond* v. *Davell* 72 Revised Reports, 502 Foll. (*Kanhaiya Lal, J. C.*) NAZIR KHAN *v.* MIRZA MOHAMAD. **25 O. C. 186 : A. I. R. 1922 Oudh 265.**

——S. 107—*Without vendees' refusal to take delivery or without notice to them vendors cannot re-sell and claim difference.*

CONTRACT ACT (IX OF 1872), S. 107.

Where vendees did not refuse to take delivery of the goods and all that they were asking was that delivery should be held over a little longer, *held*, that vendors could not sell without giving notice. Even as agents they ought to hold the goods at the disposal of their principals and unless they had express authority to sell them they were not entitled to sell them without either requesting payment or asking the vendees to take delivery and giving notice that in the event of their failure to do so they would sell the goods for their account. (*Dawson Miller, C. J. and Mullick, J.*) DHANRAJ *v.* FIRM SANEHI RAM PANNA LAL.

A. I. R. 1924 Pat. 687.

——— **S. 107**—*Re-sale—Vendee is liable for loss.*

Where the vendee neither pays the price nor accepts delivery of the goods contracted for and the vendor is obliged to sell them at a lower price after due notice to the vendee, the vendor is entitled to damages in accordance with S. 107 of the Contract Act. (*Coutts and Adami, JJ.*) BHAGWANDAS *v.* KESHWARLAL.

70 I. C. 843 : A. I. R. 1923 Pat. 36.

——— **S. 107**—*Seller's right of re-sale when arises.*

Before the sellers can exercise the right of re-sale under S. 107, Contract Act, and claim damages on that footing, the property in the goods must have passed to the buyers. (*Maung Kin and Pratt, JJ.*) HUNT HUAT AND CO. *v.* SIN GEE MOH AND CO.

66 I. C. 510 : 11 L B. R. 182.

——— **S. 108**—*Share certificate allowed to be with broker—Transfer by latter—Estoppel.*

Where the owner of shares either signs the transfer forms and delivers the same with the share certificate to a broker, or where he allows them to be in the broker's possession, knowing that they are in such a condition that a broker can deal with them, and thereby enables him to part with them to another who takes them *bona fide* for value without notice, then the true owner is estopped from questioning the title of the purchaser, who has taken them upon the faith of the apparent authority of the broker to deal with them. Such a *bona fide* purchaser gets a legal and equitable title under his purchase and can register himself as owner. (*Kanga, J.*) FAZAL *v.* MANGALDAS.

66 I. C. 726 : 23 Bom. L. R. 1144 : 46 Bom 489 : A. I. R. 1922 Bom. 303.

——— **Ss. 108 and 178**—Bona fide *purchaser from gratuitous bailee for a specific purpose—Rights of.*

Where a gratuitous bailment of jewels for a specific purpose is made and the pledgee sells them to a *bona fide* purchaser for value without notice, *held* that the latter does not acquire a good title to the jewels as against the real owner either under the Trusts Act or under Ss. 108 and 178 of the Contract Act. The word 'possession' in S. 178 is used in the same sense as in S. 108 and neither of the sections applies where the possession is qualified or for a specific purpose.(*Ayling, O. C J. and Odgers, J.*) KATTA RAMASAMI *v.* KAMALAMMAL.

14 L. W. 599 : 70 I. C. 448 : (1921) M. W. N. 801 : 30 M. L. T. 156 : 45 M. 173 : A. I. R 1922 Mad. 44 : 42 M. L. J. 32.

——— **S. 108**—*Exception 1—Attachment of moveable property in the possession of the judgment-debtor—Property hired by him—Sale by bailiff without knowledge of the owner—Rights of purchaser.*

In execution of a decree for money certain moveable property in the hands of the judgment-debtor was attached and sold by the bailiff. It was found that the property had been hired by the judgment-debtor and not his own. *Held* that the purchaser at the court sale did not get a better title than the judgment-debtor and he was liable to return the property or its value to the owner. (*Carr, J.*) MAHOMED

CONTRACT ACT (IX OF 1872), S. 113.

KAKA *v.* RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD.

3. Bur. L. J. 164 : A. I. R. 1924 Rang. 379 (1).

——— **S. 108**—*T. P Act, S. 53.*

B made over his buffaloes to *S.* in settlement of a debt, and then hired them from him. Later he sold or rather made them over in settlement of a debt to *K. Held* that *S.* was entitled to recover his buffaloes. (*Duckworth, J.*) SHAUNG NYAN *v.* KO MAUNG.

1 Bur. L. J. 164 : A. I. R. 1923 Rang. 98 (1).

——— **S. 108, Excep. I**—*Hiring a sewing machine with option of purchase—Sale by hirer before exercising option—Rights of purchaser.*

A purchaser from the hirer of a sewing machine with an option to purchase it, who has not exercised the option of purchasing the machine cannot invoke the provisions of Exception 1 to S. 108 of the Contract Act, and is liable in trover to the owner although he acted in perfect good faith. 12 B. L. R. 42 ; 51 P. R. 1919 : *Helly* v. *Mathews* (1895) A. C. 475 referred to. 27 P. R. 1902, doubted (*Shadi Lal, C. J.*) AHMAD JAN *v.* THE SINGER SEWING MACHINE COMPANY OF RAWALPINDI.

67 I. C. 638 : 3 Lah. L. J. 249.

——— **S. 108, Excep. (1)**—*Applicability—Sale of goods—Title—Good faith.*

Expl. 1 to S. 108 of the Act applies to any sale of a moveable property by any person in any kind of possession, so long as the possession was by consent of the owner and the vendee acts in good faith. (*Heald, A. J. C.*) DULAB DAS *v.* MA WIN.

59 I. C 965 : (1920) 3 U. B. R. 217.

——— **S. 109**—*Vendee deprived of goods by criminal Court—Suit by vendee against vendor* onus *is on defendant to prove his title.*

There is an implied warranty of title in the case of the sale of goods and the *onus* is on the seller to prove his title to the goods sold by him. In a suit by the plaintiff who has been deprived of the property purchased by him from the defendant in pursuance of an order of a Criminal Court which held the property to be stolen property, the *onus* is on the defendant to prove that he had title to the property. (*Shadi Lal, C. J.*) RADHA KISHAN *v.* GANGA BISHAN.

26 Punj. L. R 180 : 86 I. C. 1020 : 7 Lah. L. J. 148 : A. I. R. 1925 Lah. 366 (2) :

——— **S. 112**—*Seller is bound to prove the quality contracted.*

Ordinarily where there is a dispute between a buyer and a seller with reference to quality it would be the duty of the seller to prove that the goods were of the quality contracted for. (*Buckland, J.*) CHANDMUL MULCHAND *v.* S. & C. NARDLINGER.

28 C. W. N. 261 : 80 I. C. 151 : A. I. R. 1924 Cal. 490.

——— **Ss. 112 and 113**—*Warranty of quality—Re-sale.*

To recover special damages for a breach of warranty in a re-sale it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he re-sells or deals with them. (*Broadway, J.*) THE FIRM OF KOTUMAL MALCHARAN DAS *v.* THE FIRM OF BEHARI LAL JAGGAMAL.

22 P. L. R 1921 : 59 I. C. 424 : 16 P. W. R. 1921.

——— **S. 113**—*Merchantability of goods—Test of—Damages to major portion of goods—Effect of.*

The effect of S. 113 of the Contract Act is that when there is no express warranty in the sale of goods, there is an implied warranty of merchantability. The question whether goods are "merchantable" in law is a question of mixed fact and law. A bale of a thousand pieces of piecegoods of which nine-tenths are damaged, however slightly, is radically unmerchantable and a

CONTRACT ACT (IX OF 1872), S. 114.

seller cannot force such goods on an unwilling buyer. In such cases there is no room for the application of the principle of *de minimis*. 8 L. W. 192 : (1910) 2 K. B. 937 : (1910) 2 K. B. 831 Ref. (*Coutts-Trotter and Ramesam, JJ.*) MESSRS. NALLI & CO. *v.* V. A. A. R. FIRM. **16 L. W. 145 : (1922) M.W.N. 468 : 32 M. L. T. 158 : 69 I. C. 396 : A.I.R. 1923 M. 252 : 43 M.L.J. 208.**

——S. 114—*Implied contract as to warranty exists*—Caveat-emptor.

In England the common law rule depended upon whether the buyer relied on his own judgment or the seller's. (3 Q. B 197 Ref.) But distinction is not made in the Indian Contract Act the construction that the words have been ordered in S. 114 imply that the buyer is relying on the sellers judgment is a strained construction of the section and there is no reason why the sellers should be excused from the performance of his contract because of what may or may not be passing in the buyer's mind. A seller of a motor car impliedly contracts to sell a car that is reasonably fit for use as a motor car. (*Pratt, J.*) HURBUT JOHN AMIES *v.* JAL P. VIRJI. **25 Bom. L. R. 778 : 77 I. C. 150 : A. I R. 1924 Bom. 41.**

——S. 118—*Scope of—Acceptance.*

The question of acceptance does not arise when the property in the goods has passed to the buyer. The provisions of S. 118 do not apply where the property in goods has passed to the buyer ; for where the property in goods passes by appropriation on the part of the seller and assent on the part of the buyer. since the appropriation can only be of goods of the contract description, the conditions of the contract are *ex hypothesi* complied with. The case contemplated by S. 118 is one where there has been a contract with a condition and the condition is broken. In such a case the buyer may waive that right of rejection and accept the goods. The property in the goods then passes by the buyer's acceptance and if the buyer thereafter refuses to pay for and take delivery of the goods, the seller is entitled to sue the buyer for the price. (*Mulla, J.*) N. BUCH & CO. *v.* GORDHANDAS MAVJI. **70 I. C. 877 : 24 Bom. L. R. 991 : A.I.R. 1923 Bom. 92.**

——S. 118—*Sale of goods—Retention by buyer—Return of goods—Warranty—Reasonable time.*

Where the goods are sold and delivered to a buyer, it is open to the buyer to have the goods in his custody for a reasonable time in order that he may examine them and see whether they comply with the warranty. At the same time, the buyer loses his rights to reject the goods by any act amounting to acceptance. Mere receipt of goods is no acceptance but such a receipt will become an acceptance if the goods are not rejected within a reasonable time. 23 C. L. J. 415. What is reasonable time is purely a question of fact and has to be decided on the circumstances of each case. A period of 18 days was held not to be a reasonable time in the case of cotton goods. (*Broadway and Martineau, JJ.*) FIRM OF PROBHU DIAL BANWARI LAL OF DELHI *v.* DIN NATH KAPUR. **4 U. P. L. R. (L.) 26 : 65 I. C. 464 : A. I. R. 1922 Lah. 127**

——S. 118—*Vendee must object within reasonable time on the ground of breach of warranty but where damage is nil he must pay contract price if he did not object within reasonable time.*

The vendee must reject the goods if they are not according to the contract within reasonable time and on such rejection the vendee is entitled to compensation for damages caused, by the breach of warranty.

CONTRACT ACT (IX OF 1872), S. 124.

But where the goods delivered are in texture and quantity the same as the goods contracted for, the damage caused is nil. Where the vendee is not deprived of the goods on the ground of want of title, the vendor is entitled to the contract price. (*Phillips and Venkatasubba Rao, JJ.*) S. S. RAMUDU AIYAR *v.* N. K. RAMAIYYAR AND BROS. **78 I. C. 1051 : A. I. R. 1925 Mad. 221.**

——S. 119—*Sending more goods than was ordered—Consignee has right of rejection*

A consignee of goods has got the right to reject the goods when more than what was ordered is sent. The fact that the consignor's agent subsequently offered to reduce the consignment cannot affect the legal position of the parties. (*Foster, J.*) JUGAL KESHWAR BHOLANATH *v.* KISHORI LAL BEHARI LAL. **74 I. C. 923 : A. I. R. 1924 Pat. 159.**

——S 121—*Delivery by Vendor—Purchase money not received—Effect*

Plaintiffs sold 129 shares to defendant 1 ; the documents were handed over to defendant No. 1 but were not transferred in his name. Plaintiffs were given a cheque for the price but it was dishonoured. Defendant No. 1 sold 25 of these to a third party and pledged 104 along with 201 similar shares to defendant No. 2. Defendant 2 put forward defendant 3 as party who was willing to advance money. In fact defendant 3 was a mere nominee of defendant No. 2. Defendant 2 got possession of these 305 shares fraudulently. The fraud was that he deceived defendant 1 by false pretences that he would use these shares for the purpose of raising a loan for the benefit of defendant 1 which he did not do and which he did not intend to do. his real object being to secure himself from loss as regards the money due to him by defendant No. 1. In a suit by plaintiffs to recover the shares or in the alternative the price from defendants 1, 2 and 3, *Held* that plaintiffs were entitled to a decree as against defendant 1 for their unpaid purchase money, but they could not recover the documents nor damages as against defendants 2 and 3. (*Macleod, C J. and Crump, J.*) VADILAL *v.* MANEKJI. **25 Bom. L. R. 414 : A. I. R. 1923 Bom. 372.**

——S. 124—*Order placed with commission merchant—Stipulation to ship at particular port—Term is essence of contract.*

Although the legal effect of the transaction between a commission merchant and the consignee who has given him the order is a contract of sale passing the property from one to the other, there is also a contract of agency between the parties. Under such circumstances, if for example the consignee has undertaken to indemnify the commission merchant and the commission merchant has been expressly instructed to ship at a particular port but ships the goods at a different port the question whether the consignee's liability to indemnify the commission merchant is avoided or not depends upon whether the parties intended that shipment at the particular port should be a condition precedent to the liability to indemnify. But where the contract is a mercantile contract and the parties are mercantile men it must be assumed that they did not insert the stipulation as to shipment at a particular port, unless some value or importance was attached thereto, and the stipulation must be regarded as one which went to the root of contract and which must be performed before the plaintiffs could claim indemnity from the defendants. It is immaterial to enquire into the question as to what damage was actually suffered by the defendants by the plaintiffs' breach of the stipulation.

Per *Rankin, J.*—These contracts have to be looked

at not merely as contracts involving the general principle of indemnity but as contracts with respect to which there is a particular arrangement between the parties as to the time when and the conditions upon which the agent shall get both his indemnity and his commission. Men of business would never employ the services of a commission merchant abroad if they were told that so long as the commission merchant did his best for them, they were obliged to take the goods even if they were contrary to conditions of the contract. (*Sanderson, C. J. and Rankin, J.*) DAYTON PRICE & CO. *v.* S. ROHOMOTTLLAH & CO.

29 C. W. N. 422 : 86 I. C. 571 : A I. R. 1925 Cal. 609.

——S. 124—*Guarantee—Principal and Surety—Rights of creditor—Collateral security given by debtor to surety—Liability of surety.*

There is no authority for the unqualified proposition that the principal creditor is entitled to the benefit of every collateral security given by the principal debtor to the surety, or that, all securities given by a principal to his surety are held in trust. This theory of trust is rested on the analogy derivable from the class of cases where the remedies of a creditor against the principal debtor are transferred to a surety who has paid the debt. In the case where the remedies of the creditor are transferred to the surety, who has paid the debt, the payment by the surety extinguishes the creditor's claim, and what he seeks is a substitution to the creditor's remedies against the principal debtor. Where this does not happen, there can be no question of substitution proper, for the receipt of the surety's securities by a creditor does not relieve the surety from liability in case the securities prove insufficient. The relief by substitution is extended on the assumption that the debt has been, or is to be paid in full, so that further detention of the security is against equity. Another objection to the substitution may be found in the fact that the security being for the surety, he has no right to it till he has been damnified by payment; the creditor's remedies against the principal debtor, on the other hand ripen as soon as there has been a refusal to pay. By subrogating the creditor's remedies against the debtor, the burden is finally placed where it belongs, and therein lies the equity of the transaction No such object is attained in doing the converse of this, where the result is to place the creditor in a position of advantage which he cannot claim. The burden in the latter case is not always placed where it belongs; if the securities are sufficient in value, the burden will take care of itself; if they are insufficient, the loss will fall, in part at least on the surety. Consequently a creditor can derive no benefit from the securities given by the principal to the surety unless he can show a direct interest in them by contract or under trust or unless both the principal and surety are insolvent or the debtor has refused to pay. (*Mookerjee and Rankin, JJ.*) BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS.

51 Cal. 185: 28 C. W. N. 497: 81 I. C. 471: A. I. R. 1924 Cal. 578.

——Ss. 124 and 125—*Indemnifying surety—Mortgage attachment.*

Where defts mortgaged certain property which was attached in execution of a decree against deft. and the mortgage deed contained an indemnity clause in case of loss and the property was sold in execution, whereupon the plff. sued to enforce the indemnity clause, *held*, that the plff.'s claim must succeed as the mortgage was lawful as between the plffs. and defts. (*Leslie Jones and Wilberforce, JJ.*) NATHU MAL *v.* GANGA RAM.

63 I. C. 108 (L.)

——S. 124—*Breach—Cause of action—Covenant*

to discharge mortgage by vendee—Default—Damages—Liability.

The plaintiff who owned a house and certain lands mortgaged it to the first defendant. Subsequently the plaintiff sold the lands to the second defendant, the arrangement being that the second defendant should pay the consideration money for the sale to the first defendant and thus discharge the mortgage. The plaintiff also executed a mortgage on the house to the second defendant for the purpose of securing the additional amount required to discharge the mortgage due to the first defendant. The second defendant failed to discharge the mortgage with the result that the first defendant obtained a decree on the mortgage and brought the properties to sale. At this stage the second defendant paid a portion of the mortgage decree and by an arrangement with the mortgagee got the lands alone released. The house was brought to sale and was purchased by the second defendant himself in the name of another person who ejected the plaintiff therefrom. Plaintiff brought a suit for possession of the house and damages. *Held*, that the cause of action for the suit for damages arose on the date when he suffered a loss by being ejected from the house. Second defendant was in a fiduciary position of relationship to the plaintiff and having purchased the house as a result of his own breach of duty, was bound to convey the house to the plaintiff with mesne profits, subject however to the mortgage in his favour for Rs. 1,000. 29 M. L. J. 551; 44 Cal. 573, referred to. (*Schwabe, C. J. and Wallace, J.*) VENKATANARAYANIAH *v.* SUBRAMANI AIYAR.

17 L. W. 453: A. I. R. 1923 Mad. 492.

——S. 124—*Vendor undertaking to indemnify the vendee against litigation—Vendee can claim pleader's fees.*

Where the vendor contracts to indemnify the vendee against the costs of litigation as to the title to the property, the vendee can claim pleader's fees unless they are unreasonable. (*Wallis, C. J. and Seshagiri Aiyar, J.*) VENKATA RANGAYYA APPA RAO *v.* BOMMADEVARA SATYANARAYANA VARAPRASAD RAO.

43 Mad. 898 : 28 M. L. T. 188 : 60 I. C. 164: 13 L. W. 297 : 39 M L. J. 316.

——S. 125—*Indemnity—Decree against promisee—If can be impeached by promiser—Costs—Recovery of.*

In the case of a contract of indemnity, a decree passed against a promise cannot be impeached by the promiser. Costs reasonably incurred in resisting or reducing or ascertaining the claim can be recovered. (*Wadegaonkar, A. J. C.*) RAMDHAN *v.* PURUSHOTTAM.

88 I. C. 699.

——S. 126—*Relation of principal debtor and surety.*

Per *Ramesam, J.*—There need not be privity between a principal debtor and a surety. All debtors whose debt the surety promises to pay are his principal debtors though they are not the objects of his benevolent intention. (*Spencer and Ramesam, JJ.*) THIRUMALAI SAVURI NAICKER *v.* ROYAR.

13 L. W. 559: 62 I. C. 706: (1921) M. W. N. 334: 40 M. L. J. 529.

——S. 128—*Creditor is not entitled to benefit of securities given by debtor to a surety unless he gets interest by a contract, trust, or bankruptcy, of both debtor and surety, or debtor's refusal.*

Principal creditor is not necessarily entitled to the benefit of every collateral security given by the principal debtor to the surety, nor are all securities held to be given by a principal to his surety held in trust. The theory of trust is rested on the analogy derivable from the class of cases where the remedies of a creditor against the principal debtor are transferred to a surety

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who has paid the debt. A creditor cannot derive benefit from securities given by the principal debtor to the surety unless he can show a direct interest in them by contract or under trust or in the event of both principal and surety being bankrupt, or in the case of a refusal by the debtor to pay (*case-law discussed.*) (*Mookerjee and Rankin, JJ.*) BANK OF BENGAL *v.* W. A. LUCAS. **51 Cal. 185: 28 C. W. N. 497: 81 I. C. 471: 41 C. L. J. 1: A. I. R. 1924 Cal. 578.**

——S. 128—*Principal and surety—Liability of surety.*

S. 128 of the Act does not refer to the nature of the principal's obligation but only to the extent of the surety's liability. Where a person stands surety for attendance of another person before a Court and the latter fails to attend before that Court, the surety is liable under the bond. (*Martineau, J.*) CHHAJJU SINGH *v.* EMPEROR. **3 U. P. L. R. (L.) 77: 2 Lah. 204: 63 I. C. 464: 22 Cr. L. J. 652.**

——Ss. 128 to 135—*Liability of surety—Debt extinguished by merger—Effect.*

The liability of a surety is co-extensive with that of the principal debtor and the liability ceases when the principal's debt has been extinguished by the merger of the estate of the creditor and the debtor. (*Spencer, J.*) JEKUNNU SAMI AIYAR *v.* MUTHU KUMARA RAMA SWAMI CHETTIAR **17 L. W. 473: 72 I.C. 194: (1923) M. W. N. 253: A.I.R. 1923 Mad. 340: 44 M. L. J. 171.**

——S. 128—*Surety for payment of interest—Liability—Extent of.*

A mortgage deed provided for redemption in one year and a certain person stood surety for the payment of interest. *Held*, though a surety's liability cannot be extended beyond the precise terms of his engagement it comprises all transactions which naturally and reasonably are entered into on the faith of the guarantee and hence he was liable for interest up to date of redemption and not merely for the period of one year. (*Bilaram, A. J. C.*) TULSIDAS KESHOWDAS *v.* HASHIM. **78 I. C. 868: A. I. R. 1925 Sind 164.**

——S. 129—*Continuing guarantee must refer to series of transactions some of which are unknown at the time.*

The guarantee to be a continuing guarantee must refer to a series of transactions of which when the guarantee is given, some are unknown and indefinite or not certain to come into existence. The fact that the amount was payable by instalments does not make it a continuing guarantee as defined in S. 129 (*Hallifax and Kotwal, A. J. Cs.*) KANTI CHAND *v.* THAKUR UDAYA BHAUSH. **80 I. C. 349: A. I. R. 1925 Nag. 7**

——S. 131—*Continuing guarantee—Does not terminate on death of guarantor.*

Where no notice is given as contemplated by the bond by the guarantor during his life or by his legal representatives after his death, the estate must be held liable under the contract of guarantee. (*Gokul Prasad and Ryves, JJ.*) MUHAMMAD UBED ULLAH *v.* MUHAMMAD IRSHA ALLAKHAN. **43 All. 132: 61 I. C. 138: 18 A. L. J. 976.**

——Ss. 133 and 135—*Surety for stay of execution is not discharged by agreement between judgment-debtor and decree-holder increasing rate of interest and extending time for payment.*

Surety for securing stay of execution is not discharged from liability by the agreements entered into between the decree-holder and the judgment-debtor without surety's consent, by which interest was increased and further time was granted to judgment-debtors. (*Martineau, J.*) GURANDITTA *v.* FIRM GURDASMAL. **7 Lah. L. J. 343: 26 Punj. L. R. 634: A. I. R. 1925 Lah. 552.**

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——S. 133—*Variation in terms.*

Deft. was, under a compromise decree, directed to pay decretal money in instalments and the attachment order against his property was to remain in force till the debt was paid. A certain person stood surety for the performance of the terms. The court subsequently without the knowledge or consent of the surety allowed the attached properties to be sold. *Held*, this did not discharge the surety as the court did only what the attachment order implied and hence there was no variation in the terms of the contract. (*Shadi Lal, C. J. and Fforde, J.*) FIRM OF DARSHAN RAM GANESH DAS *v.* FIRM KHAIR DIN ALLAH BAKHSH. **73 I. C. 353: A. I. R. 1924 Lah. 211.**

[ON APPEAL FROM **71 I. C. 783 (2).**]

——S. 134—*Change in relationship between debtor and creditor.*

Certain decree-holders attached the entire property of the judgment-debtor and a person stood surety undertaking the liability to pay. Subsequently the judgment-debtors with the consent of the decree-holders obtained permission from Court to effect private mortgages or sales. *Held*, that there was a change in the position of the debtor and the creditor by the release of the attachment and that the surety was discharged from his liability. (*Abdul Raoof, J.*) DARSHAN RAM GANESH DAS *v.* KHAIR DIN ALLAH BAKSH. **71 I.C. 783 (2): A. I. R. 1924 Lah. 194.**

——S. 134—*Two sureties for a pro-note—Discharge by one of the sureties—Execution of fresh pro-note by one of the sureties—Effect of.*

Where one of two co-sureties discharges the principal debt without the knowledge of the other by the execution of a fresh promissory note to the original creditor's transferee, he is not entitled to contribution as against the co-surety on his discharging the latter note. (*Phillips and Odgers, JJ.*) LAKSHMINARASAYYA *v.* VENKATAKRISHNAYYA. **15 L. W. 143: 70 I. C. 355: A. I. R. 1922 Mad. 119 (1).**

——S. 134—*Omission of creditor to sue principal debtor—Effect on surety.*

The omission of a creditor to sue the principal debtor within the statutory period will not discharge the surety under S. 134 of the Contract Act. 33 M. 308 Foll. (*Prideaux, A. J. C.*) SETH ABDE ALI *v.* ASKARAN. **20 N. L. R. 140: A. I. R. 1924 Nag. 411.**

——S. 134—*Co-executant but really surety.*

Discharge of a debtor without the consent of the surety destroys the liability of the surety though he had signed as a co-executant where the creditor knew that he was a surety. (*Young, J.*) MAUNG SEIN *v.* MA SAW. **3 Bur. L. J. 112: 82 I. C. 816: A. I. R. 1924 Rang. 360.**

——S. 134—*Surety's liability ceases after preliminary decree.*

Mere forbearance on the part of the creditor to sue does not discharge the surety of his liability but the liability of a surety to pay future interest merges in the preliminary decree. (*Rupchand Bilaram, A. J. C.*) TULSIDAR KESHAWA DAS *v.* HASHI. **78 I. C 868: A. I. R. 1925 Sind 164.**

——S. 139—*Sureties binding themselves to produce in Court Judgment-debtor on the date the appeal was dismissed and in case of failure to pay decretal amount—No notice to produce debtor sent to sureties after dismissal of appeal—Counsel for decree-holder declining to require the production of the debtor—Sureties are not liable.*

Where the sureties bound themselves to produce in

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Court, the judgment-debtor on the day the appeal, then pending, was dismissed and in case of failure, to pay the decretal amount, but after dismissal of appeal no notice was sent to the sureties to produce the judgment-debtor and the counsel for the decree-holder even declined to require the production of the judgment-debtor, *Held* : that it was practically impossible for the sureties to know beforehand on what date the appeal would be finally disposed of by the High Court, that a reasonable construction of the document was that the sureties undertook to produce the judgment-debtor in Court after the dismissal of the appeal when they were called upon to do so, that though the judgment-debtor had got himself released by furnishing security which was not in compliance with the order of the Court, yet it was to some extent the fault of the decree-holders that they did not examine the security bond at the time and that the sureties were not at fault and were not liable to pay the decretal amount. (*Sulaiman, J.*) THAKUR MAHIPAL SINGH *v.* ATHAL SINGH. **80 I. C. 416 : A. I. R. 1925 All. 5**

——————**S. 139**—*Bank deposits—Security for—Liquidation—Creditors applying for dividends is not inconsistent with rights of surety.*

Where a person stood surety for depositing money in a bank and the bank subsequently failed and the creditor after diligently registering himself as a creditor and obtaining his dividend in liquidation sued the surety for the balance : *Held*, he had not done anything inconsistent with the rights of the surety ; on the other hand, if he had omitted to do what he actually did, his inaction might have been relied upon as an omission to do an act which his duty to the surety required him to do. The liability of the surety being co extensive with that of the principal debtor, the fact that the latter may not have sufficient means to pay interest is not an adequate ground for relieving the surety from liability. (*Shadi Dal, C. J. and Wilberforce, J.*) MALAWA RAM *v.* SWAMI DAS. **4 Lah. L. J. 183 : A. I. R. 1922 Lah. 89.**

——————**S. 139**—*Surety for several defendants—Plff. proceeding against one deft. only—Surety is discharged.*

Where a person stands surety for several defts. but the plff. proceeds against one deft. only, the exonera tion of the remaining defts. discharges the surety. (*Ayling and Odgers, JJ.*) SISTLA SITARAMASWAMY SASTRI *v.* BOUTHU BASAVAYYA. **60 I. C. 114 : 12 L. W. 536.**

——————**S. 140**—*The word 'invested' dispenses with necessity of assignment.*

The word "invested" is a strong one and coming as it does in a statute, it would operate as a transfer to the surety of the creditors' rights without the necessity of any written assignment. (*Marten, J.*) COORLA SPINNING AND WEAVING MILLS CO. *v.* VALLABHDAS KALLIANJI. **27 B. L. R. 1168 : A. I. R. 1925 Bom. 547.**

——————**S. 140**—*Rights and liability of surety.*

A surety's right stands on a higher footing than a right for contribution, he is bound to discharge the liability of the person for whom he stands surety but he is not liable jointly and severally to pay the decree debt along with all the judgment-debtors. (*Spencer and Ramesam, JJ.*) THIRUMALAI SAVURI NAICKER *v* ROYAR **13 L. W. 559 : 62 I. C. 706 : (1921) M. W. N. 334 : 40 M. L. J. 529.**

——————**S. 145**—*Surety keeping alive his liability by payments within time—Decree against surety—Limitation over against Principal debtor—Payment under decree is not wrongful.*

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The act of the surety in keeping his liability alive by *bona fide* payments of interest within time is not such as could make the payment by him in pursuance of the decree obtained against him by the creditor wrongful within the meaning of the section, though such payment may be made at a time when the creditor's remedy against the principal debtor has been barred by limitation. (*Shah, A. C J. and Kincaid, J.*) RAGHAVENDRA GURURAO *v.* MAHIPAT KRISHNA. **49 Bom. 202 : 86 I. C. 883 : 27 B. L. R. 178 : A. I. R 1925 Bom. 244.**

——————**S. 145**—*Payment—Meaning of—Liability of principal—When arises.*

Payment in S. 145 means a payment in money or by transfer of property and not merely the incurring of a pecuniary obligation in shape of a bond, promissory note or acknowledgment of liability (*Moti Sagar, J.*) NUR SAMAND KHAN . FAJJA. **A. I. R. 1924 Lah. 657 (2).**

——————**S. 145**—*Mortgage--Decree against surety—Payment—Suit to recover from principal.*

A suit by a mortgagee against his mortgagor and the surety was decreed against the latter but dismissed against the former. The surety paid the decree debt and then sued the principal debtor for the amount. *Held* he must succeed under S. 145, Contract Act, in spite of the fact that the mortgage suit had been dismissed against the mortgagor. (*Baker J. C.*) MAROTI *v.* HUSSAIN MIYA. **89 I. C. 65 (1) : A. I. R. 1925 Nag. 392**

——————**Ss. 148 and 160**—*Pawn or pledge—Assignee from pawnor cannot give directions as to disposal.*

It is the pawnor, and not an assigeee from him that can give directions to the pawnee as regards the delivery or disposal of the pledged property. The directions must be definite and reasonable in order to be binding on the pledgee. (*Kotval A. J. C.*) TEK CHAND *v.* MAHADEO. **65 I. C. 65 : A. I. R 1922 Nag. 127.**

——————**S. 149**—*Delivery of goods--What constitutes—Filling up forwarding note is not sufficient.*

The mere fact that the loading clerk of a railway filled up what is called the serial number in the forwarding note without doing any further would not amount to the delivery of goods to the railway by the consignor. (*Rafique and Lindsay, JJ.*) LACHMI NARAIN *v.* B. B. & C. I. RAILWAY COMPANY. **45 A. 235 : L. R. 4 A. 97 : 21 A. L. J 474 : 74 I. C. 248 : A. I. R. 1923 All. 449 (2).**

——————**Ss. 149 and 151**—*Duty of Ry. Co. is that of common carrier.*

By law the duty of a railway Company is that of a common carrier and the Railway Co. cannot refuse carriage of goods. Liability of railway is that of bailee. Rules restricting liability imposed by Railway Act are invalid. (*Piggot, Walsh, and Gokul Prasad, JJ.*) SOHANPAL MUNNALAL *v.* THE E. I. RAILWAY. **20 A. L. J. 31 : 44 A. 218 ; L. R. 3 A. 33 : 65 I. C. 109 : A. I. R. 1922 All. 9 (F. B.).**

——————**S. 151**—*Scope.*

It will be quite impossible to apply the common law of England in force against inn-keepers in the mofussals in India owing to climatic difference and other circmstances, because hotels in India are unlike hotels in England , open and unconfined, and they are easily accessible to the public. 22 All. 164, referred to. (*Ryves and Gokul Prasad, JJ.*) JAN AND SONS *v.* A. CAMERON. **44 A. 735 : 20 A. L. J. 728 : A. I. R. 1922 All. 471.**

——————**S. 151**—*Pressure of work or avoidable accident cannot help to avoid liability.*

When a carrier receives goods under a contract of

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carriage he cannot shake off his statutory liability under S. 151 of the Contract Act by pleading pressure of work or avoidable accident. (*Suhrawardy and Duval, JJ.*) ARJUN DAS NARIRAM *v.* SECY. OF STATE.
85 I. C. 786 : A. I. R. 1925 Cal. 737.

——— **S. 151**—*Degree of care varies with the quality of goods.*

The degree of the care required of the carrier in dealing with the goods depends upon and varies with the nature and condition of the thing carried; a man of ordinary prudence would not send his own jute in boat with 20 or 30 leaks of 1 or 1½ inches in length and keep the jute in the hold of the boat for thirty hours. (*Chatterjee and Cuming, JJ.*) LAKSHMI NARAYAN *v.* THE SECRETARY OF STATE FOR INDIA.
27 C. W. N. 1017 : 80 I. C. 279 : A. I. R. 1924 Cal.92.

——— **Ss. 151, 152 and 161**—*Railway—Liability of, as carrier—Exemption—Risk-note Form B.*

Under Ss. 151 and 152 of the Contract Act read with S. 72 of the Railways Act, the liability of the Railway Administration for the loss, destruction, or deterioration of goods delivered to the Administration to be carried on by Railway is that of an ordinary bailee; that is to say if the Railway Administration take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, they will not in the absence of special contract be responsible for the loss, destruction or deterioration of the goods. The Railways Act of 1890 by repealing Ss. 7 and 10 of the Carriers Act and by also enacting in S. 72, Cl. (3) that nothing in the common law of England or in the Carriers Act of 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility of a Railway Administration, leaves no room for doubt that the liability of the Railway Company must be measured and determined solely by the tests formulated in Ss. 151 and 152 of the Contract Act. The *onus* is therefore upon the bailee to show that he is exonerated from liability for loss to the bailor by means of a special risk note relieving him from such liability. (*Mullick and Bucknill, JJ.*) G. I. P. RY. *v.* JITAN RAM NIRMAL RAM.
2 Pat. 442 : 72 I. C. 440 : 4 Pat L. T. 173 : 1 Pat. L. R. 169 : 1923 P. H. C. C. 82 : A. I. R. 1923 Pat. 285.

——— **S. 151**—*Bailee is liable for his employee's negligence or abuse unless expressly exempted—Clause that "Clothing cannot be claimed in case of accident by fire or if things get torn" cannot exempt laundry from liability for damages in case of damage to clothes due to careless handling—Contract Act, S. 152.*

Where the receipt given by a laundry contained the clause "Clothing cannot be claimed in case of any accident by fire or if things get torn," *Held*: that the clause in effect stated that the return of the article could not be claimed if it happened to get torn that, even assuming, however, that it was intended to mean that damages cannot be claimed for tearing, obviously when so construed, it should be taken as meaning that the safeguard only arose in the case of such accidental tearing as might easily happen even if all reasonable care were taken and that on such a construction the clause would not safeguard the laundry against any tearing due to negligent treatment or deliberately improper treatment. A clause intended to safeguard against the negligence of employees must be explicit to that effect. (*Lentaigne, J.*) HALLANDIA PINMEN *v.* H. OPPENHEIMER. **3 Bur. L. J. 203 : 84 I. C. 274 : A. I. R. 1924 Rang. 356.**

CONTRACT ACT (IX OF 1872), S. 162.

——— **S. 151**—*Negligence of bailee.*

Proof as to manner in which article was damaged when in bailee's custody is not necessary so long as Court holds that damage has been caused by negligence. Absence of strong evidence is different from absence of evidence of negligence. (*Lentaigne, J.*) HALLANDIA PINMEN *v.* H. OPPENHEIMER.
3 Bur. L. J. 203 : 84 I. C. 273 : A. I. R. 1924 Rang. 356.

——— **S. 151**—*Reasonable care—Burden of proof.*

A bailee is responsible for proper care of goods entrusted to him. The burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised, was duly exercised by him. (*Pratt, J.*) MAUNG PO THAIR *v.* MAUNG THA BYAW. **1 Bur. L. J. 132 : 74 I.C. 18 : A.I. R. 1923 Rang. 74 (2).**

——— **S. 152**—*Bailment for hire—Warranty—Bailee, duty of.*

A bailee for hire is bound to return the article hired at the end of the period for which it is hired. But there is an implied warranty that the thing is fit for the purpose for which it is hired and if there is a breach of this warranty, the bailee is not bound to pay the hire and return the article but can give notice of the same to the bailor. (*Macleod, C. J. and Fawcett, J.*) ISUFALLI HASSANALLY *v.* IBRAHIM DAJIBOY. **45 Bom. 1017 : 61 I. C. 570 : 23 Bom. L. R. 403.**

——— **Ss. 160 and 161**—*Bailment—Loss or injury to goods—Liability of bailee—Negligence—Presumption.*

Under S. 160 of the Contract Act it is the duty of the bailee to return or deliver according to the bailor's directions the goods bailed without demand as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished. If, by the default of the bailee the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for loss, destruction or deterioration of the goods from the time. An action in trespass lies where the bailee has destroyed the bailed property, or lost it, while where the bailee has been guilty of a conversion of the bailed property either by a user of it in a different manner or for a different purpose from that agreed upon or by failure. to redeliver it or deliver it over in accordance with the terms of the contract the bailor may sue him in trover. Proof of loss or injury to the goods establishes a sufficient *prima facie* case against the bailee to put him upon the defence. Where chattels are delivered to a bailee in good condition and are lost or not returned or are returned in a damaged state, the law presumes negligence to be the cause, and casts upon the bailee the burden to show that the loss is due to causes consistent with due care on his part. (*Mookerjee and Suhrawardy, JJ.*) KUSH KANTA BARKAKATI *v.* CHANDRA KANTA KAKATI. **28 C. W. N. 1041 : 83 I. C. 151 : A. I. R. 1924 Cal. 1056.**

——— **S. 161**—*Railway—Carriage of goods—Risk-note Form A. absence of—Delay in transit.*

In the absence of evidence as to the execution of risk-note Form A, the railway is liable for delay in delivery. (*Banerjee, J.*) E. I. RY. *v.* INDERMAN TULSHI RAM. **L. R. 3 A. 101 : 65 I. C. 771 : 20 A.L.J. 114 : A. I. R. 1922 All. 63.**

——— **S. 162**—*Not exhaustive—Death of depository—Liability of heir.*

The Contract Act is not a complete Code with reference to the law of bailments. Bailments are of two kinds, voluntary and involuntary. Where a depository dies and the subject of the deposit passes into the

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hands of his heir, the latter becomes an involuntary bailee. A depositary is a bailee within chapter IX of the Contract Act. 33 M. 56 Ref. (*Ghose, J.*) PROMOTHO NATH MULLICK *v.* PRODYMNO KUMAR MULLICK. **69 I. C. 900 : 26 C. W. N 772.**

——— **-S. 163** —*New shares capitalised out of old when the old ones were pledged—Pledgee must deliver the new shares to pledgor along with old.*

Where after shares, in a company, were pledged, the company issued fresh shares and allotted them to the old share-holders taking the call money from the yearly dividend payable on the old shares, on which they had resolved to pay a fixed interest of 6 p. c. p a. *Held* : that the new shares were 'increase or profits' within S. 163 and the pledgee must return them to the pledgor along with the old shares. (*Ameer Ali, J.*) MOTILAL HIRABAI *v.* BAI MANI.

52 I. A. 137 : 27 Bom. L. R. 455 : 49 Bom. 233 : 86 I. C. 368 : 30 C. W. N. 5 : A. I. R. 1925 P. C. 86 : 48 M. L. J. 648 (P.C.).

———**S. 171**—*'Banker'—Nattukottai Chetty.*

A Nattukottai Chetty is a 'banker' within S. 171 of the Act and is therefore entitled to banker's lien on goods bailed to him. (*Wallis, C. J. and Moore, J*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASAMI CHETTY. **43 Mad. 747 : 12 L. W. 89 : (1920) M. W. N. 424 : 59 I. C. 475 : 39 M. L. J. 135.**

——— ———**Ss.173 and 166**—*Pawn of another's property.*

The case of *Altenborough* v. *Solomon* is only an authority for this proposition, that if a pawn-broker takes in pledge from A an article which belongs in fact to B. he must return it on demand to B, free of the amount advanced. What his liability is if he has already sold the article at the request of A and repaid himself his advance is an entirely different question. (*Macleod, C. J. and Shah, J.*) BANK OF BOMBAY *v.* FAZULBHOY. **24 Bom. L. R. 513 : A. I. R. 1923 Bom. 155.**

———**S. 178**—*Proviso—' Fraud ' in the proviso implies total absence of consent.*

The use of the term ' fraud ' in juxtaposition to offence in proviso to S. 178 would seem to indicate that it is confined to the substantive wrong of deceit. If possession of goods obtained under a contract voidable on the ground of fraud, is possession obtained by fraud, a pledge by the possessor could be invalid even before the rescission of the contract although an out and out sale would be valid under S. 108. The obtaining of goods or documents by fraud as contemplated by S. 178 proviso, must mean obtaining possession by such a trick or fraud as excludes real consent and therefore cannot be the foundation of any contract. (*Macleod, C. J. and Coyajee, J.*) JAMSHEDJI NAVROJI *v.* MAGUNLAL BANKELAL & CO **27 Bom. L. R. 514 : A. I. R. 1925 Bom. 314.**

———**S. 178**—" *Goods* " *includes* " *share certificates.* "

The term " goods " used in S. 178 is sufficiently wide to include share certificates. (*Macleod, C. J. and Coyajee, J.*) JAMSHEDJI NAOROJI *v.* MAGANLAL BANKELAL & CO. **27 Bom. L R. 514 : A. I. R. 1925 Bom. 314.**

———**Ss. 178 and 108**—' *Possession* ' *means juridical possession.*

It has been often held that possession required in S. 178 is similar to the possession required by S. 108 of the Contract Act in regard to sales, that is to say, the possession must be juridical possession of the goods and not mere custody. Where P was given possession of the sewing machines by the owner in order that he might sell them for and on behalf of the owner and he pawned the machines with a pawn broker. *Held* : his possession is not a mere custody for safe keeping, but for the definite purpose of sale. He would have such a possession of them as is contemplated by S. 178. The fact that he disposed of the goods contrary to the instructions of the owner makes no difference to the character of the possession which vested in him. If, therefore, the pawnee acted in good faith and had no ground for doubting the authority of P to pledge the goods he would be entitled to the protection granted by S. 178. (*Robinson, C. J. and May Oung, J.*) EMPEROR *v.* NGO PO CHIT. **1 Rang. 199 : 2 Bur. L. J. 241 : 24 Cr. L. J. 858 : 74 I. C. 1050 : A. I. R. 1923 Rang. 227.**

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———**S. 178**—*Breach of contract—Assistance of Criminal Court.*

The company, having given the sewing machine to a person whose position is that of an agent or factor to be disposed of for money, the company is not entitled to the assistance of a Criminal Court in recovering it from a person to whom it was disposed of. (*Macgregor, J.*) SINGER SEWING MACHINE CO *v.* YEN KUM. **1 Bur. L. J. 45 : A. I. R. 1923 Rang. 68 (1).**

———**S. 178**—*Possession may be lawful and yet appropriation may be dishonest—Proviso still applies.*

It is not necessary before the proviso to S. 178 can be made applicable that the goods or documents should be obtained dishonestly in the first instance, and a subsequent misappropriation of them or any offence connected with them after they had been lawfully acquired prevents the possessor from making a valid pledge of them. To create a valid pledge the pledgor must be in juridical possession of the goods as distinguished from a bare custody. 12 Bom. L.R. 870 dist. (*Kennedy, J. C. and Raymond, A.J.Cs.*) THE KARACHI BANK *v.* KODUMAL KALUMAL. **A. I. R. 1923 Sindh 54.**

———**S. 178**—' *Possession* '—*Gratuitous bailee—Pledge by.*

The word ' possession ' as used in S. 178 does not include the possession by a gratuitous bailee and so a pledge by him of the thing is invalid. The pledgee must return the thing so pledged, to the original depositor. (*Kennedy and Raymond, A. J. Cs.*) RAMKISHEN DAS *v.* JASUMAL. **61 I. C. 305 : 14 S. L R. 175.**

———**S. 182**—*Principal and agent—Relationship of.*

B contracted to sell to *A* a certain quantity of sugar, but as he was not the producer himself, he entered into a contract with *J* for purchase and delivery of the sugar in instalments. In the contract with *A* stipulated for payment of a commission, *held* in a suit for breach of contract by *A* against *B* that *B* was not an agent of either *A* or *J* that the contract between *A* and *B* was as between principals and that the mere mention of the commission is not inconsistent with the relation being between principal and principal. (*Lord Dunedin.*) BALTHAZAR *v.* ABOWATH. **63 I. C. 521 : 13 L. W. 537 (P. C.)**

———**S. 182**—*Sub-broker receiving money from constituent and misappropriating—Payment to broker for other transactions—Suit for money.*

Where a sub-broker took part in a business transaction with the plaintiff on behalf of the defts., the brokers, and received a large sum of money as advance and misappropriated the same using a major portion of it in settlement of his own private accounts with defendants, who never knew of the source of the money or the business transaction entered into with the plaintiff, a suit by the plaintiff against the defendant to recover the amount advanced does not lie. 13 Ch. D. 696 ; (1893) A. C. 282 and 44 Bom. 139 foll.

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(*Fawcett and Coyajee, JJ.*) MORARJI PREMJI GOKULDAS *v.* MULJI RANCHHOD VED & CO.
25 Bom. L. R. 1014 : 77 I. C. 266 : 48 Bom. 20 : A. I. R. 1924 Bom. 232.

——S. 182—*Broker—Commission—Right to—Completion of transaction—Failure of one of the parties to complete the contract—Effect of.*

In order to entitle a broker to his commission, he must prove either that the transaction has been completed, or that, if it is not, the non-completion was due to default on the part of the principal. *Lott* v. *Outhwite* (1893) 10 P. L. R 76, 77, Ref. A mortgagee in Bombay is not bound to deliver possession of the title deeds or to produce them for the inspection of the mortgagor until actual tender or payment of the principal with interest and costs. Consequently where the vendor mortgagor is unable to complete a contract of sale on account of the non-production of the title-deeds by his mortgagee and the contract of sale falls through, it is the default of the vendor that is responsible for the result. The broker who arranged for the sale will nevertheless be entitled to his commission. (*Mulla, J.*) MEHTA *v.* CASSUMBHAI KESHAVJI.
24 Bom. L. R. 847 : 75 I. C. 193 : A. I. R. 1922 Bom 433.

——S. 182—Del credre *agents—Certified brokers of the Bombay Native Stock and Share Brokers' Association are such.*

The certified brokers of the Bombay Native Stock and Share Brokers Association are *del credre* agents of their constituents. Their duties are strictly to adhere to the position of agents, diligently act for the principals and to make *enforceable* bargains for them and keep them open. (*Kanga, J.*) FAZAL *v.* MANGALDAS.
23 Bom. L. R. 1144 : 46 Bom 489 : 66 I. C. 726 : A. I. R. 1922 Bom. 303.

——Ss. 182 and 222—*Contract of agency—Limitation Act, Art.* 83.

Where evidence of witnesses showed that the contract was not simply for the purchase of grain by the plffs. for the deft. but a contract to purchase the goods, hold them for the deft. and sell them upon his instructions at such times and in such lots as he might think fit. *Held*, the transactions may be properly regarded as a contract of agency carrying with it the rights to indemnity conferred upon the agent by S. 222 of the Indian Contract Act. That being so Art. 83 of the Limitation Act was applicable to the case. (*Scott-Smith and Ffordc, JJ.*) THE FIRM DEVI SAHAI RAMJI DAS *v.* TIRATH RAM.
73 I. C. 143 : A. I. R. 1923 Lah. 473.

——S. 183—*Express instructions to ship "soonest" at New York—Impossibility to avoid delay at New York—Goods cannot be shipped elsewhere without promisee's previous consent.*

The defendants' indent required the plaintiffs to ship the goods at New York and wanted that the shipping was to be "soonest". There were shipping difficulties at New York on account of which the plaintiffs could not ship the goods at New York without great delay. But the plaintiffs had ample time to obtain the consent of the Defendants to ship the goods at another port. *Held*, that under the circumstances of the case, the plaintiffs were not at liberty to ship the goods at a different port without the previous consent of the defendants. (*Sanderson, C. J. and Rankin, J.*) DAYTON PRICE & CO., LTD *v.* S. ROHOMOTOLLAH & CO.
86 I. C. 571 : 29 C. W. N. 422 : A. I. R. 1925 Cal. 609.

——S. 186—*Mere direction by C to A to pay money to B—B is not necessarily agent of C.*

Mere direction by C to A to pay the money to B will not make B the agent of C. It is necessary to prove that C intended that the money should be paid to B on behalf of C and also it is necessary to show that B accepted the money as a payment on behalf of C. (*Newbould and B. B. Ghose, JJ.*) HARI CHARAN DAS *v.* TARA PRASANNA SEN.
79 I. C. 354 : A. I R. 1925 Cal. 541.

——S. 188—*Authority—Estate or house agent—Power to enter into contract.*

An estate or house agent authorised to procure a purchaser, has no implied authority to enter into an open contract of sale. There is a substantial difference between an authority to sell and an authority to find a purchaser. Authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser means less than that; it means, to find a man willing to become a purchaser nor to find him and also make him a purchaser. (1900) 2 Ch. 267 Ref. (*Mookerjee and Cuming, JJ.*) DURGA CHANDRA MITRA *v.* RAJENDRA NARAIN SINHA.
36 C. L. J. 467 : A. I. R. 1923 Cal. 57.

——S 190—*Sub agent—Appointment.*

From the nature of the agency it was manifest that in order that agents might sell wolfram in time of War, they would have to appoint a sub agent in England. Apart from this purchasers at that time would have been chary of entering into contracts with a Foreign principal, because of the difficulty of suit and other matters. *Held*, there was authority to appoint a sub-agent to sell the ore, and the agent did not contract to sell the ore personally. (*Pratt and Duckworth, JJ.*) THE LEIOBAX SYNDICATE *v.* FINLAY FLEMING & CO.
1 Bur. L J. 219 : 11 L. B. R 326 : 77 I. C. 920 : A. I. R. 1923 Rang. 84.

——S. 196 *Ratification validates act.*

A mortgage executed by a general agent holding a power-of-attorney, which did not authorize him to execute mortgages is operative if acted upon, and ratified by the principal and cannot be treated as being void *ab initio*. (*Mears, C. J. and Banerji, J.*) MUHAMMAD HANIF *v.* ISRI PRASAD.
19 A. L. J. 827 : 64 I. C 768 · 44 A. 77 : A. I. R. 1922 All. 197.

——Ss. 196 and 197—*Ratifications.*

Agreement of promoters of company with third party before incorporation is not binding on company. Affixing of such agreement to Articles of Association does not amount to a new contract by the company. (*Chevis, J.*) SURENDRA AND CO. *v* PUNJAB TENANCY CO., LTD.
68 I. C. 787 : A. I. R. 1923 Lah 100.

——S. 196—*Void transaction.*

A transaction which is *ab initio* void cannot be ratified. (*Scott-Smith and Dundas, JJ.*) ALLAH DITTA *v.* GIAN SINGH.
4 Lah. L. J. 454.

——S. 196—*Ratification should be as regards whole.*

Obiter :—A person cannot be allowed to ratify a part only of an act of another and reject a part which is inconvenient to him. (*Foster, J.*) EAST INDIAN RAILWAY CO. *v.* FIRM SUKHDEO DAS.
4 P. L. T. 443 : 74 I. C. 431 : A. I. R. 1924 Pat. 25.

——S. 200—*Ratification*—Melcharth *by person without authority.*

Where the only objection to the grant of a *melcharth* is that it was granted without proper authority it can be subsequently ratified by the person who has power to grant it (*Oldfield and Ramesam, JJ.*) KOZHIKOT PATHINHARE KOVILAGATH *v* SANKARA MENON.
73 I. C. 376 : A. I. R. 1924 Mad. 245.

——Ss. 201 and 209—*Death of Principal—Agency terminates.*

There is termination of agency after the death of the principal and a suit against agent for accounts must

be brought within 3 years under Art. 89, Limitation Act. (*Chatterjee and Panton, JJ.*) SARASHIBALA *v.* CHOONI LAL. **26 C. W. N. 320 : 65 I. C. 219 : A. I. R. 1922 Cal. 53.**

——S. 205—*Revocation of agency by Principal—Damages.*

An agreement provided that the respondent was to be the agent of the appellants for a period of one season certain, with an option to continue for two seasons more, and that said agent shall not during the continuance of this agreement purchase second-hand clothing from any other dealer except from the principals ; nor shall he during the continuance of this agreement act as agent for any other rival trader or traders. *Held*, there was a clear contract between the parties that the respondent was to be employed as the agent for the appellant and if the latter were at liberty during the period, the contract was in force to or not to supply goods to the respondent, the whole contract becomes meaningless and it is futile to describe the respondent as the agent of the appellants, per *Kennedy, J. C.*—Where A agrees to employ B on commission, there is not necessarily an implied agreement that A will provide B with any employment. Whether there is such an agreement, is a question of fact in each case. The probability of existence of such an agreement will depend on the custom of the trade and the general circumstances of the business. (*Kennedy, J. C. and Raymond, A. J. C.*) LANDAU AND SONS. *v.* AHMED AYUB.
15 S. L. R. 140 : A. I. R. 1922 Sindh 25.

——S. 209—*Death of principal—Powers of agent in case of.*

Even after the death of the principal, the agent can enter into transactions, necessary to protect the interest of the heirs of the deceased and such authority continues till it is revoked by the heirs (*Broadway and Abdul Raoof, JJ.*) MUSAJI AHMED & CO *v.* ADMINISTRATOR-GENERAL OF BENGAL.
60 I. C 739 : 3 Lah. L. J. 265.

——S. 211—*Plaintiffs violating defendants' instructions cannot claim damages.*

Where the plaintiffs have infringed the definite instructions given by the defendants the plaintiffs are not entitled to any damages for the non fulfilment of the contract by the defendants. (*Campbell, J.*) FIRM MATHRA DAS MUTSUDDI LAL *v.* FIRM KISHEN CHAND. **7 Lah. L. J. 84 : 26 Punj. L. R. 108 : 86 I. C. 567 : A. I. R. 1925 Lah. 332.**

——S. 212—*Measure of reasonableness between commission agent and principal is not that laid down in S. 91 of the Contract Act.*

The measure of reasonableness as between agent and principal is not what is laid in S. 91 as the proper method of delivery as between vendor and purchaser. It has to be decided on what the parties themselves in their usual course of conduct and trade custom considered reasonable. Where a commission Agent was accustomed to send by rail goods to his principal uninsured without any direction to the contrary *Held* : that he was not liable for loss of goods for which the principal could not recover damages from the Railway Company due to non insurance. (*Wallace, J.*) VENKATACHALAM *v.* PONNUSWAMI AIYANGAR.
20 L. W. 195 : 1924 Mad. 499 : 82 I. C. 536 : A. I. R. 1925 Mad. 46 : 47 M. L. J 312.

——S. 213—*Rendering accounts by agent is not sufficient, he must explain them.*

An agent will not discharge himself from the duty of accounting, by merely delivering to his employer a set of written acounts without attending to explain them, and without producing vouchers by which the items of disbursements are supported. 6 Cal. 754, 32 Cal. 719, 43 Cal. 248 Foll. 13 C. W. N. 696 and 24 C. W. N. 110 Not. Foll. (*Greaves and Mukerjee, JJ.*) BHARAT CHANDRA *v.* KIRAN CHANDRA RAI.
52 Cal. 766 : 90 I. C. 944 : A. I. R. 1925 Cal. 1069.

——S. 213—*Agent must render account to principal—Principal not bound to render account to agent—No statutory duty cast upon agent to keep account—Plaintiff cannot demand account simply because defendant has kept it—Principal and Agent.*

If a duty is not cast upon the defendant under the law to keep an account the plaintiff is not entitled to demand an account from him, simply on the ground that the defendant has been keeping an account. Under S. 213 it would be obligatory on an agent to render account to his principal but the principal is not under any such counter-statutory obligation towards the agent. (*Moti Sagar, J.*) GULAM QUTAB-UD DIN KHAN *v.* MIAK FAIZ BAKHSH. **78 I. C. 959 : A. I. R. 1925 Lah. 100.**

——S. 213—*Money advanced to agent for work to be done—Must be accounted for by agent.*

Where money is advanced to an agent for work to be done on the understanding that a bill is to be sent subsequently, the agent must account for the money. (*Wallis, C. J. and Ramesam, J.*) TAR MAHOMED *v.* WALKER & CO. **62 I. C. 503 : 13 L. W. 366.**

——S. 213—*Suit by principal against agent for monies unaccounted for is maintainable.*

In a suit by a principal against his agent and after his death against his representatives the principal is entitled not only to the sums actually received but not accounted for, but also to the sums which the agent has failed to collect, when it was his duty to do so. (*Spencer and Odgers, JJ.*) VENKATA CHARYULU *v.* MOHAN PANDA. **44 Mad. 214 : 12 L. W. 390 : 61 I. C. 30 : (1920) M. W. N. 610 : 39 M. L. J. 586.**

——Ss. 215 and 19—*Principal and agent—Dealing by agent in the business of the agency without the knowledge of the principal—Contract is voidable at the option of principal—English and Indian law.*

Plaintiff entered into a running contract with defendants for the supply, at a fixed price of a large quantity of tiles of a certain manufacture for the sale of which defendants had been appointed sole agents. It was found as a fact that the plff. was acting for and a mere alias of the dubash and local agent of the defendants who had entered into the contract without any knowledge of the fact. The defendants on becoming aware of their own agent's interest in the contract repudiated it and refused to perform it further. In an action for damages by the plaintiff, *Held*, that the defendants were entitled to avoid the contract both under S. 19 and under S. 215 of the Contract Act and that the plaintiff's suit was unsustainable. The concealment by the dubash and local agents of the defendants of the fact that he was dealing with them through the plaintiff was dishonest and his procuring a running contract for the supply of tiles on a large scale with the object of competing with his principals in the market which it was his duty to exploit for their benefit was prejudicial to the defendants. The case therefore satisfied S. 215 of the Contract Act. Even apart from S. 215 the dishonest concealment by the plaintiff of the identity of the contracting party constituted fraud and entitled the defendants to avoid the contract. (*Schwabe, C. J. and Wallace, J.*) ACHUTHA NAIDU *v.* MESSRS. OAKLEY BOWDEN & CO.
16 L. W. 345 : (1922) M. W. N. 576 : 45 M. 1005 : 69 I. C. 927 : 31 M. L. T. 487.

CONTRACT ACT (IX OF 1872), S. 217.

A. I R 1922 Mad. 497 : 43 M. L. J. 444.

——— S. 217—*Principal and Agent—Agency for sale of sugar—Agent depositing moneys with principal—Insolvency of principal—Right of agent to set-off*

The respondents were the agents of Arbuthnot & Co., which carried on a large business *inter alia*, as sugar manufacturers. The appellant was the Official Trustee of Madras representing a company called Mysore Sugar Refining Company. The relation between the Arbuthnot and the Mysore Sugar Refining Company was this. The Mysore Sugar Refining Company was incorporated by Arbuthnot & Co. in 1905. It consisted entirely of representatives of the Arbuthnot & Co. or persons under their control. The whole of its capital came from Arbuthnot & Co. The responden's were appointed by Arbuthnot & Co in 1901 as agents for sale of sugar in Mysore and they had also made deposits of money with Arbuthnot & Co. The respondents knew nothing whatever of the Mysore Sugar Refining Company, The Arbuthnot & Co became insolvents in 1906. The appellant claimed to recover the proceeds of sugar manufactured by their company and sold by the respondents and claim ed to do this without reference to the deposits which the respondents had made with the Arbuthnot and Company and with respect to which the respondents alleged a case of counter claim or set-off. *Held*, that the Mysore Sugar Refining Company could not claim to recover the proceeds of sugar unless the cross claims or set-off of respondent are settled and that the appellants can claim the benefit of the sums representing the sale proceeds of their sugar only subject to every equity which affects those sums in the hands of Arbuthnot & Co. themselves. (*Viscount Haldane.*) OFFICIAL TRUSTEE OF MADRAS *v.* A. SUNDARAMURTHI MUDALIAR. 15 L. W. 201 : 76 I C. 944 : 24 C. W. N. 1004 (P.C.).

———Ss. 217 and 221 — *Implementing — Lien—Limitation.*

Implementing of contracts is a part of the general law, and the agent is entitled to a lien or retainer upon monies of his principal which are in his hands, for all expenses properly incurred. In cases of exercise of lien or retainer, no question of time limit arises at all. 30 Mad. 365 Foll. (*Pratt and Duckworth, JJ.*) THE LEIBOAK SYNDICATE *v.* FINLAY FLEMING & CO. 1 Bur. L.J. 219: 11 L.B.R. 326 : A I.R. 1923 Rang. 84.

———S. 219—*Principal and agent—Broker—When entitled to his commission.*

A broker in order to be entitled to his commission must prove either that the transaction has been completed or that if it is not, the non-completion was due to default on the part of the principal. Lott *v.* Duth Waite 10 T. L. R. 76 followed. (*Mulla, J.*) K. C. MEHTA *v.* CASSUMBHAI. 24 Bom. L. R. 847 : A. I. R. 1922 Bom. 433

———S. 221—*Commission Agent—Lien—Right of resale.*

The rights conferred by S. 221, Indian Contract Act. upon an agent who has a lien on the principal's property are of a limited nature and seem to be confined to a mere right of retainer which, may be used as a defence to an action to recover the property. A commission agent does not stand in the position of an unpaid seller and has no right to resell. (*Moti Sagar, J.*) FIRM BALLA MAL RAKHA MAL *v.* FIRM BUDHU MAL PRABH DIAL. 89 I. C. 409.

———S. 223—*Reimbursement—Right of agent to, when arises.*

An agent, on general grounds is entitled to reimbursement and indemnity by his principal but only on the condition that he has acted within the scope of his directions. (*Le Rossignol and Wilberforce, JJ.*) SHAMAS DIN MEHAR BAKSH *v.* MUHAMMAD KHALEEL. 59 I. C. 971 : 3 Lah. L. J. 141.

CONTRACT ACT (IX OF 1872), S. 230.

———S. 226—*Agent—Power to sell property—Recital of authority unnecessary.*

The omission on the part of a general agent to mention either in the body of the document or in the signature, his capacity as agent, could not affect the substance of the transaction entered into by him on behalf of his principal. The question whether an agent is to be taken to have contracted personally or on behalf of his principal, depends on the intention of the parties to be deduced from the terms of the particular contract and the surrounding circumstances. (*Wazir Hassan, A. J. C.*) JAGRUPSINGH *v.* RAMA KRISHNA DAS. 23 O. C 353 : 59 I. C. 596 : 7 O. L. J. 705.

———Ss. 227 and 237—*Agent acting beyond scope of authority—Third party—Damages.*

A parcels-office clerk of a Railway Company received for despatch a consignment of fire-works as a 'parcel' instead of as 'goods' according to rules. The Railway Company made delay and ultimately sent it by goods train and claimed extra freight charges which the consignor refused to pay. The company sold the goods. The consignor then brought a suit for damages, *held*, that in accepting the goods for despatch as 'parcel' the clerk was undoubtedly acting in the course of his employment, though outside the scope of his authority and led the plaintiff into an honest belief of his authority. The company could not therefore repudiate the contract or escape liability for any damages incurred by the plaintiff in their not carrying out the contract within reasonable time. (*Stuart and Kanhaiya Lal, JJ.*) FAZAL ILAHI *v.* E. I. RY. CO. 43 All. 623 : 19 A. L J. 654 : A. I. R. 1922 All. 324.

——— S. 229—*Knowledge of agent prior to agency—If binds principal.*

Any knowledge on the part of a person employed as agent prior to his employment as such would not amount to information of the fact obtained by the agent in the course of the business transacted by him as agent. (*Kinkhede, A. J. C.*) GUNABAI *v.* MOTILAL. 89 I. C. 625 : A. I. R. 1925 Nag. 398.

——— S. 230—*Agent can sue in his own name if he has an interest in the contract.*

An agent may sue in his own name on contracts made by him on behalf of his principal in the following case, namely, where, as in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof. The proper person to bring the action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case of agents auctioneers or factors, these exceptions are in truth more apparent than real. The real proposition of law, which these and other cases establish, is that where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name. Unless the contract, for the breach of which the action is brought is one made by the agent he has no cause of action because there is no privity between himself and the defendant. 24 Mad. 30 Appr. (*Marten, J.*) COORLA SPINNING AND WEAVING MILLS CO. *v.* VALLABHDAS KALLIANJI. 27 B. L. R. 1168 : A. I. R. 1925 Bom. 547.

———S. 230—*Broker—Liability of, in principal contracts—Calcutta jute market—Custom of.*

There is a difference between a broker and an agent for sale. Under the custom of the

Calcutta Jute Market, brokers are liable to both buyers and sellers in the case of what are called 'principal contracts,' as distinguished from "direct contracts." Under the custom of the market there is a liability for the performance of the contract resting upon the brokers and a right in them to enforce the contract. It makes no difference whether at the time of the making of the contract buyers are informed of the name of the sellers and sellers of the name of the buyers. In the case of such contracts the only person to whom the sellers can really be given credit—the only person mentioned in the contract—is the broker. Either the sellers do not know the name of the other party or if they do and still prefer a "principal contract" they prefer the broker's credit. Consequently in the case of a breach of contract by the seller, the broker is entitled to go to arbitration on an arbitration clause of the contract. (*Rankin, J.*) JITMULE GIRDHARI *v.* RAM GOPAL BOHITRAM. **50 Cal. 12 : A. I. R. 1923 Cal. 419.**

——S. 230—*Contract to the contrary, presumed where contract is made for merchant abroad.*

An agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. Such a contract, however, has to be presumed to exist where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad. (*Broadway and Zafar Ali, JJ.*) THE FIRM DEOKI NANDAN *v.* RAM LAL QULAK. **73 I. C. 885 : A. I. R. 1923 Lah. 296.**

——S. 230—*Contract by agent — No personal liability.*

A man who is an agent and describes himself as such, may still be contracting in his personal capacity but the mere fact that he fails to specify his capacity, as an agent in signing a contract, does not raise any such presumption when the terms of the contract itself are clearly to the contrary. (*Chevis, A. J. C. and Wilberforce, J.*) MESSRS. G. S. BHARGAVA & CO. *v.* B. KOBAYASHI. **65 I.C. 468 : 2 Lah. L. J. 374.**

——S. 230—*Contract by agent on behalf of undisclosed principal—Agent signing the contract as "agent and manager"—Agent is not personally liable as principal.*

Where an agent does not disclose the name of his principal, the presumption is that the contracts to be held personally liable as well. Such a presumption, however, is rebutted where the agent signs the contract expressly as "agent and manager." The appending of the word "agent" to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but, apart from that the appending of the word "agent" to the signature is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that two-fold sense by the other contracting party. Universal Navigation Co. Ltd. *v.* James Mackelvie & Co. (1923) A. C. 493 Foll. (*Wazir Hasan, A. J. C.*) HARI SADHAN MITRA *v* BECHA LAL. **2 O. W. N. 581 : 89 I. C. 380 : A. I. R. 1925 Oudh 641.**

——Ss. 230 and 231—*Agent acting for undisclosed principal—Both can be sued.*

A person contracting with an agent for an undisclosed principal can sue either the agent or the principal or both and the fact that the agent further claimed to be an agent of another undisclosed principal makes no difference. (*Heald, A. J. C.*) DULAB DAS *v.* MAWIN. **59 I. C. 965 : (1920) 3 U. B. R 217.**

——S. 230 (1)—*Contract by agent— Personal liability.*

Where a man is by profession an agent of some particular firm and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity as an agent in signing a contract raises no such presumption when the terms of the contract itself are clearly to the contrary. *Gadd* v. *Houghton*, (1876) 1 Ex. D. 35 Rel. (*Chevis, A. C. J. and Wilberforce, J.*) BHARGAVA & CO. *v.* KOBAYASHI. **65 I. C. 468 : 2 Lah. L. J. 374.**

——S. 231—*Partnership is not liable for loan by a partner in his personal capacity on his own pro-note though the loan is used in partnership business without contract to the creditor—Contract Act, S. 251.*

Every partner is, in contemplation of law the general and accredited agent of the partnership and may consequently bind all the other partners by the acts in all matters which are within the scope and objects hence if the partnership will be of a general commercial nature he may even pledge or sell the partnership property. The partnership is not liable for the loan incurred by a partner upon his credit by giving his own promissory note where the partner uses the money in the partnership concern of his own free will and without any contract with the lender to do so. The fact that the partnership obtained the benefit of the loan is only a piece of evidence to show that he entered into the transaction by a member of the firm, and not further because it is not the ultimate use by the firm of money borrowed as above that makes the firm liable. Dormant partner is liable only to the extent of sums borrowed by the active partner in his capacity as a member of the firm. (*Mookerjee and Rankin, JJ.*) RAM CHANDRA SAHU *v.* KASEM KHAN. **28 C. W. N. 824 : 81 I. C. 513 : A. I. R. 1925 Cal. 29.**

——S. 233—*Money paid to agent—Money not credited—Money recovered by principal by suit—Debtor's suit against agent.*

The debtors paid money to the creditor's agent who failed to credit it. The principal brought a suit against the debtor. The debtor was *ex parte* and a decree was passed and money recovered. Debtor then brought the suit to recover money paid to agent-*Held* he could not recover owing to his failure in former suit to take advantage of the plea of discharge which was open to him. (*Oldfield, J.*) KULANDAIVELU PILLAI *v.* RAMASWAMI NAICKER. **17 L. W. 448 (1923) M. W. N. 235 : A. I. R. 1923 Mad. 551 : 44 M. L. J. 495.**

——S. 233—*Suit against both agent and principal—Decree to be passed.*

A person who deals with another not knowing that he was the agent of another can afterwards sue him as well as his principal, pleading that if it should be found as a fact one was only agent of the other, a decree might be passed against both, under S. 233. (*Simpson, A. J. C.*) LACHHMAN DAS *v.* BHAGIRATH. **90 I. C. 487.**

——S. 235 — *Purchase by pretended agent — Liability.*

The Court below found that the purchases in question had been made by the deft. on behalf of a Rani by representing himself as her agent : but as the Rani had repudiated her liability in a letter by her to

CONTRACT ACT (IX OF 1872), S. 236.

the Court of Wards, which had assumed the superintendence of her estate in 1920, the plff. (vendor was entitled to recover the amount due from the deft. under S. 235 of the Indian Contract Act (IX of 1872). *Held*, that the decision was correct. (*Kanhaiya Lal. J. C.*) RATAN SINGH *v.* HAFIZULLAH.
9 O. & A. L. R. 820 : A. I. R. 1924 Oudh. 184.

——S. 236—*Broker—Undisclosed principal—Broker acting for—Liability of—Custom—Stock and share market.*

The defendant entered into a contract with the plaintiff who was a dealer and broker in stocks and shares for sale of certain shares. The relevant portion of the contract was as follows :—"Sold this day by order and for account of B. G. H. to selves for principals, etc." The contract was signed by the plaintiff over the word "brokers". The defendant having failed to deliver the shares, the plaintiff sued for damages. The plaintiff also alleged a custom of the Calcutta share market whereby the broker is treated as principal and entitled as principal to enforce contracts. *Held* that the plaintiff having entered into the contract on behalf of undisclosed principal as broker or agent, he could not enforce the same. Further the plaintiff's suit must fail under S. 236 of the Contract Act as he was not acting as agent but on his own account. 17 Cal. 449 ; 42 Cal. 1050 ; L. R. 18 Q.B.D. 708 referred to. Though evidence of a usage augmenting the responsibility of a broker is admissible as consistent with the contract, evidence of a usage inconsistent with the terms of the contract is inadmissible. There is no usage in the Calcutta Stock and Share Market that a broker should be treated as principal both by buyer and seller whom he could hold liable under the contract. (*Buckland, J.*) NANDA LAL ROY *v.* GURUPADA HALDAR
51 Cal. 588 : 81 I. C. 721 : A. I. R 1924 Cal. 733

——S. 238—*Liability of principal for fraud of agent—Misappropriation of goods.*

There is nothing in S. 238 of the Contract Act to show that in order to render the principal liable, the fraud must be committed for the benefit of the principal. It is enough if the fraud is committed by the agent in the course of his business for his principal, *i. e.*, in matters falling within the scope of his authority. (*Chatterjee and Pearson, JJ.*) DINA BANDHU SAHA *v.* ABDUL LATIF MOLLA. **39 C. L. J. 290 : 50 Cal. 258 : 27 C. W. N. 18 : A. I. R. 1923 Cal. 157.**

——S 238—*Fraud by Agent—Principal's liability.*

The principal is liable for the fraud of his agent who was acting within the scope of his authority whether the fraud was committed for his own benefit or for the benefit of his principal. (*Baker, J. C.*) VURDHMAN BROS. *v.* RADHAKISHAN JAI KISHUN.
7 N. L. J. 74 : 79 I. C. 139 : A. I. R. 1924 Nag. 79.

——S. 238—*Forgery and fraud by agent—Principal not bound.*

A sharebroker on being instructed by plaintiff purchased two war bonds each payable to order and immediately pledged them with other bonds with a forged endorsement in his favour with the Bank *Held*, that the forged endorsement was null and hence could not convey a title to the Bank who could not hold them against the plaintiffs. (*Kemp A. J. C.*) MESSRS. KODUMAL KALUMAL *v* THE KARACHI BANK, LTD. **15 S. L. R. 93**

——Ss. 239 and 266. *See also* PARTNERSHIP.

——Ss. 239 and 253 (8)—*Divided members of Hindu family running business are partners.*

CONTRACT ACT (IX OF 1872), S. 239.

Where the divided members of a Hindu family run a business, they are partners within S 239 of the Act and where one member puts an end to such partnership S. 253 (8) of the Act will apply. (*Tudball and Sulaiman, JJ.*) BHAGAWATI PERSHAD *v.* BABU LAL. **63 I C. 548 (2) : 19 A. L. J. 525.**

——S. 239—*One partner having option to send another or take fresh partners—Nature of relation is that of partnership.*

A husband having made an agreement took his wife in partnership in his business, fixed her share at X but he reserved liberty to take in fresh partners as he liked and to determine her share. On his death, she was to be at liberty to admit new partners. *Held*, the agreement evidenced a partnership within the meaning of S. 239 of the Act. (*Shah and Crump, JJ.*) AMBALAL SARABHAI, *In re.*
25 Bom. L. R. 1225 : A. I. R. 1924 Bom. 182.

——S. 239—*Partnership Company promoters—Relationship between—Agreement of parties.*

Persons who are working together to form a company, although they may intend to become members of the company, after its formation are not partners if this be the only relation between them : they are, it is true, engaged in a common object, and that object is ultimately to acquire profit, but their immediate object is the formation of a company, and even if the company is not to be incorporated they are only in the position of persons who intend to become partners after the company is formed.

Per *Mookerjee, J.* Promoters may become partners in fact, by actually carrying on as incidental to the work of forming a corporation, a business enterprise ; in such an event it is the carrying on of such business not the combination to effect an incorporation that makes them partners. (*Mookerjee and Rankin, JJ.*) WILLIAM ROWE RAE *v.* LEWIS PUGH.
39 C. L. J. 537 : A. I. R. 1924 Cal. 940.

——S. 239—*Partnership Intention of parties—Commission and not profits.*

The question whether there is a real partnership must depend on the real intention and contract of the parties. Where there was an agreement to the effect that a certain person was to get a fixed pay and 10 per cent as commission on the net proceeds of the firm and not any share of the profits that person is a partner as he, sole sharer in the profits. (*Sanderson, C. J. Mukerjee and Chatterjee, JJ.*) RAGHUMALL KHAN DELWAL *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **28 C. W. N. 34 · A. I. R. 1924 Cal 424.**

——S. 239—*One firm cannot be partner in another.*

A firm as such cannot be a member of a partnership. A partnership under S. 239 is a relationship which subsists between persons ; but a firm is not a person ; it is not an entity ; it is merely a collective name for the individuals who are members of the partnership. It is neither a legal entity, nor is it a person. (*Page, J.*) SLODOYAL KHEMKA *v.* JOHARMULL MANMULL.
50 Cal. 549 : A. I. R. 1924 Cal. 74.

——S. 239—*Partnership—Test—Participation of profits is evidence of partnership but not conclusive.*

A right to participate in profits is a strong test of partnership, though that circumstance is not by itself conclusive. The true test of partnership is whether there is really a common business and whether the business is being carried on by the alleged partner or by some other person on his account so that the alleged partner can be regarded as a principal. (1875) 20 Eq. 331, Applied. (*Wadegaonkar, A J. C.*) AMBADAS *v.* KASABAI. **89 I. C. 283 : A. I. R. 1925 Nag. 436.**

CONTRACT ACT (IX OF 1872), S. 239.

——S. 239—*Remuneration varying with profits—Relationship.*

A servant whose remuneration varies with the profits may be partner in popular sense, but is not legally so. (*Halifax, A. J. C.*) MOULA BUX *v.* MUHAMMAD AFZAL. **69 I. C. 781 : A. I. R. 1922 Nag. 96.**

——S. 239—*Partnership—Joint advance of loan does not constitute.*

Creditors jointly advancing money to another do not necessarily become partners in a firm even though they possess a right to a share of the profits. There is no relation of partnership *inter se* between such creditors and as such there is no partnership. (*Dhobley, A. J. C.*) MOHAMAD JUSUF *v.* PIRMOHAMAD. **65 I. C. 368 : A. I. R. 1922 Nag. 67.**

——Ss. 240 and 242—*Partnership—Use of words 'partners' or 'partnership' in an agreement—One party advancing money to another—Relation of creditor and debtor—Agreement to work as servants—Remuneration by share.*

The use of the word 'partner' or 'partnership' in the agreements does not necessarily show that there was a partnership. The parties may call themselves partners, but if it appears that one party is to do nothing more than advance money to the other, and is to be repaid by a share of the profits, they must be treated as creditor and debtor. The person entering into an agreement could not be a partner, but a mere servant, though paid by a share in the profits, if his liability to pay the losses is clearly in respect of the losses occasioned by his neglect or default. (*Dhobley, A. J. C.*) MOHAMMAD YUSUF *v.* PIRMOHAMAD. **A I. R. 1922 Nag. 67.**

——S. 242—*Sharing in profits does not make a man a partner—But sharing in profits should be considered in determining if partnership exists.*

An arrangement to share in the profits does not necessarily show that the person who shares in such profits is a partner of the firm ; but this fact will have to be considered along with the evidence relating to other characteristics of a partnership, such as sharing of losses, etc., in arriving at a conclusion whether the parties intended to carry on the business in partnership. (*Wallace and Madhavan, Nair, JJ.*) CHOKALINGA CHETTIAR *v.* MUTHUSWAMI CHETTIAR. **87 I. C. 663 : 21 L. W. 541 : A. I. R. 1925 Mad. 768 : 48 M. L. J. 518.**

——S. 245—*Name of A included in a firm's name—A is not necessarily a partner.*

Names are indiscriminately used by Indian firms and therefore the mere use of a name would not lead any member of the public or any dealer to presume that the person whose name is so used is a partner in the firm. (*Dalal, A. J. C.*) NEM CHAND *v.* GUR DAYAL. **12 O. L. J. 285 : 88 I. C. 584 : 2 O. W. N. 296 : A. I. R. 1925 Oudh 451.**

——S. 245—*Section can be relied on only by those who have acted on the faith of the representation.*

The rule of liability by "holding out" can be relied on only by the persons to whom the representation has been made and who have acted on the faith of its being true. *Fraser. In re* (1892) 2 Q. B. 633 Foll. (*Rupchand Bilaram, A. J. C.*) HARNAMDAS *v.* FIRM OF MAYADAS LAKHMICHAND. **87 I. C. 905 : A. I. R. 1925 Sind 310.**

——Ss. 247 and 239—*Minor—Partner—Rights and liabilities of.*

A person under the age of majority cannot become a partner by contract, 30 C. 539. If he is admitted to the benefits of the partnership under S. 247 of the Contract Act his right is no more than a right to participate in the property of the firm after its obligations

CONTRACT ACT (IX OF 1872), S. 247.

have been satisfied. The question whether a minor has been admitted to the benefit of a partnership is one of fact to be pleaded and proved at the trial and cannot be allowed to be raised for the first time on appeal. (*Sir Lawrence Jenkins.*) SANYASI CHARAN MANDAL *v.* KRISHNADHAN BANERJEE. **49 Cal. 560 : 16 L. W. 536 : 26 C. W. N. 954 : 35 C. L. J. 498 : L. R. 3 P C. 133 . 20 A. L. J. 409 : 24 Bom. L. R. 700 : 49 I. A. 108 : 30 M L T. 228 : 67 I. C. 124 : (1922) M. W N. 364 : A. I. R. 1922 P. C. 237 (P. C.) ; 43 M. L J. 41.**

——Ss. 247 and 11—*Partnership—Minor—Admission to the benefits of partnership.*

Though S. 247 of the Contract Act provides that a minor may be admitted to the benefits of a partnership, it does not cancel or revoke S. 11 of the Contract Act and make it possible for a minor simultaneously to create a partnership and to admit himself to the benefits of the same. 3 C. W. N. 134 ; 10 B.L.R. 312 ; 20 M. L. T. 565 Ref. (*Abdul Raoof and Harrison, JJ.*) MAHOMED RAFIQ *v.* KHAWAJA QAMAR DIN. **4 U. P. L. R. (L.) 63 : 67 I. C. 95 : A. I. R. 1922 Lah. 441.**

——S. 247—*Infant as partner — No personal liability.*

Where a business is carried on by guardians, the infants do not become partners therein and therefore are not subject to the rights and liabilities of the partnership. Though a minor is admitted to the benefits of a partnership. he never becomes personally liable for the partnership debts. (*Abdur Rahim and Sadasiva Iyer, JJ.*) KAKUMANU VENKATA SURYANARAYANA *v.* AKUTHOTA RAMAYYA. **29 M. L. T. 114 : 13 L. W. 551 : 62 I. C. 802 (1) : (1921) M. W. N 100 : 40 M. L. J. 103.**

——S. 247—"*Benefits of Partnership*" *include benefits which minor would enjoy if he were major.*

The benefits of the partnership referred to by S. 247 may fairly be interpreted to mean benefits which the minor would have enjoyed by being made a partner if he were *sui juris.* (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) TULSIDAS *v.* GANGARAM GHAVSHAM DAS. **18 S. L. R. 96 : 86 I. C. 944 : A. I. R. 1925 Sind. 272.**

——S. 247—*Minor cannot become partner by contract but may sue for partnership benefits to which he has been admitted.*

Where a person is a minor and his father is an insolvent and a firm in consideration of the services rendered to it by the father agree to have the minor as a partner in respect of a certain share, the minor does not become a partner. But the minor can maintain a suit for accounts and for his share of the profits. 1922 P. C. 237 Foll. (*Kennedy, J. C. and Rupchand Bilaram, A.J.C.*) TULSIDAS *v.* GANGARAM GHANSHAMDAS. **18 S. L. R. 96 : 86 I. C. 944 : A. I. R. 1925 Sind 272.**

——S. 249—*Retirement—No liability for subsequent transactions.*

When a firm ceases to exist, but some of the partners carry on the business under the same name, the retiring partners cannot be made liable for any transaction entered into after the dissolution. (*Scott-Smith and Abdul Raoof, JJ.*) BICHHIA LAL *v.* MUNSHI RAM. **68 I.C. 932 : A. I. R. 1922 Lah. 466.**

——S. 249—*Liability of partners for each other's acts.*

Partner is not liable for the action of other partners uuless the same is on behalf of the partnership. (*Prideaux, A. J. C.*) SETH ABDE ALI *v.* ASKARAN. **20 N. L. R. 140 : 84 I. C. 199 : A.I.R. 1924 Nag. 411.**

CONTRACT ACT (IX OF 1872), S. 250.

——— S. 250—*Partnership rescinded on the ground of fraud—Liability for loss*

Where a partnership is rescinded on the ground of fraud, the partners at fault, cannot ask the other partners to contribute to the loss which may have resulted in the partnership. (*Scott-Smith and Leslie Jones, JJ.*) GOLA SINGH *v.* HAKAN RAI.
3 Lah. L. J. 106: 3 U. P. L. R. (Lah.) 26 : 60 I. C. 709 : 23 P. W. R. 1921

———S. 251—*Trading firm—What is—Liability of partners for money borrowed by another partner.*

Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. A firm would be a trading firm if its business consists in buying and selling. In such a case there is no duty cast on the person who advances the money to make any further inquiries and the other partners are responsible though the borrowing partner may misappropriate the money. (*Mulla, J.*) SAREMAL PUNAMCHAND *v.* KAPURCHAND PUNAMCHAND. **25 Bom. L. R. 1093 : 48 Bom. 176 : 77 I. C. 48 : A. I. R. 1924 Bom. 260.**

——— S. 251—*Partnership — Money borrowed by partner and spent by him for partnership purposes—Liability of the other partners—Dormant partner—Extent of liability.*

Where one member of a partnership borrows money on his own credit by giving his own promissory note for the sum so borrowed and he afterwards uses the proceeds of the note in the partnership business, of his own free will, without being under any obligation to or contract with the lender so to do, the partnership is not liable for the loan. The ultimate use by a firm of money borrowed by a partner individually on his own credit does not make the firm liable for the loan. The circumstance that the firm obtains the benefit of a transaction entered into by one of its members may show that he entered into the contract as agent of the firm. But the fact is no more than evidence that this was the case and the question upon which the liability or nonliability of the firm depends is, not whether the firm obtained the benefit of the contract, but did the firm by one of its partners or otherwise enter into the contract. (*Mookerjee and Rankin, JJ.*) RAM CHANDRA SAHU *v.* KASEM KHAN. **28 C. W. N. 824 : 81 I. C. 513 : A. I. R. 1925 Cal. 29.**

———S. 251—*Surviving partner cannot bind heirs of deceased partner or other partners by acknowledgment, in the absence of special authority.*

Where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowlegment of a debt of the firm, unless they are specially authorised to do so. An acknowledgment made by one partner does not bind and the other partners in the absence of proof that they authorised such an acknowledgment or payment, and such authority cannot be presumed, 37 Mad 146, Ref. (*Baker, J.C.*) SHEONARAIN *v.* BABULAL.
85 I. C. 775 : A. I. R. 1925 Nag. 268.

———S. 251—*The authority of a partner to incur debts, or pay them fully or partly may be presumed from surrounding circumstances.*

So far as the question for the authority of a partner to sign and endorse promissory notes on behalf of others is concerned, it is quite unnecessary for the creditor to establish any specific authority in order to succeed. It is sufficient if such authority can be inferred from the surrounding circumstances, and any person having general authority to pay the amount of claim must necessarily have also authority to make part-payments to prevent me from becoming a bar to it.

CONTRACT ACT (IX OF 1872), S. 253.

Where the partners were severally in the habit of obtaining goods on the joint account and of selling in the same shop.

Held : that any one of them might bind the others by the promissory notes executed by him and by his endorsements of payments. (*Duckworth and Godfrey, JJ.*) RALA SINGH *v.* BABU BHAGAWAN SINGH AND SONS. **2 Rang. 367 : 84 I. C. 391 : A. I. R. 1925 Rang. 30.**

——— S. 251—*In absence of fraud one partner can release joint cause of action.*

Per *Kincaid, J. C.* and *Aston, A J.C.* (*Kennedy, A. J.C.* dissenting.) One partner may release a cause of action in which all the partners are jointly interested in the absence of fraud.

Per *Aston, A. J. C.*—As a rule it is necessary for carrying on the business of a partnership in India, that a managing partner should have power to release causes of action even after the suit whether he has signed the plaint or not and a Court will not set aside a release given by one partner unless fraud can be clearly established.

Per *Kennedy, A. J. C.*—It is not possible to lay down a rule which will generally empower all partners to bind the other members of the partnership by a compromise or a rule to prohibit all partners from so binding their fellow partners. The question in each case whether the act done by the partners is one which is usual or necessary for the business of the partnership. (*Kincaid, J. C.*) (*on difference between Kennedy and Aston, A.J.Cs.*) MANGALSEN *v.* FIRM OF BHAGWANDAS PARMANAND. **80 I.C. 583 : A.I.R. 1925 Sind 63.**

——S. 251—*Partner—Power to compromise suit—Consideration—Withdrawal of counter-claim.*

Where a suit has been instituted on behalf of a firm, one partner alone has power to compromise the suit, provided he does not act in fraud of the other partners. The withdrawal by the defendants of their counter-claim is sufficient consideration for the compromise. (*Raymond, A. J. C.*) MAYADAS LAKHMIDAS *v.* BHAGWANDAS PARMANAND.
A. I. R. 1924 Sind. 41.

———S. 251—*One partner can join in submission to arbitration.*

One partner has no power in the absence of special authority to bind the firm by submission to arbitration, but each partner who does any act necessary for, or usually done in, carrying on business of such a partnership as that of which he is a member, binds his copartners to the same extent as if he were their agent duly appointed for that purpose and S. 188 Contract Act, gives an agent, having authority to carry on a business, power to do anything necessary for the purpose or usually done in the course of conducting such business. (*Kennedy, J. C and Raymond A. J. C.*) FIRM OF KHALSA BROS. *v.* HARIRAM SRI RAM & CO. **17 S. L. R. 164 : A. I. R. 1924 Sind 29.**

———S. 253—*Partnership — Suit for accounts—Dissolution—How far continues.*

Where a partnership is dissolved by the death of a partner, and a suit is filed for accounts the business is to be regarded as a continuing business up to the date of final decree. (*Lord Parmoor.*) HAJI HEDAYATULLA *v.* MAHOMED KAMIL. **19 L. W. 425 : 34 M. L. T. 69 : 22 A. L. J. 382 : 81 I. C. 525 : (1924) M. W. N 660 : 29 C. W. N. 161 : L. R. 5 P. C. 109 : A. I. R. 1924 P. C. 93 (P. C.).**

———S. 253—*Partner failing to carry out duties imposed on him—Suit for dissolution—Partner is not liable for probable loss.*

CONTRACT ACT (IX OF 1872), S. 253.

One partner is not liable, in a suit for accounts upon a dissolution of partnership, for the probable loss sustained by the firm owing to the neglect or failure of one partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business. (*Macleod, C. J. and Coyajee, J.*) MAHADEV VITHO PATIL *v* GANOO CHANGOO PATIL. **87 I. C. 735 : 27 B. L. R. 500 : A. I. R. 1925 Bom 324.**

——S. 253—*Mortgage to firm--Release of property is useless unless executant is authorised by all partners.*

A partnership firm is not a legal entity like a limited liability company. Consequently a conveyance to the firm operates as a conveyance to the individual partners. Release of property mortgaged to a firm as a whole is useless unless it is known who the individual partners are and whether the executant of the release is authorized by them to act on their behalf. Case law discussed. (*Marten and Kincaid, JJ.*) HIRACHAND AMERSEY *v.* JAYGOPAL GANGABISHAN. **49 Bom. 245 : 26 B. L. R. 1049 : 89 I. C. 553 : A. I. R. 1925 Bom. 69**

——Ss. 253 and 257—*Partnership—Duration—Dissolution—What constitutes—Business carried on after dissolution—Liability to account.*

In the absence of any term agreed upon by the parties any partner may determine the partnership at any time on giving notice of intention to do so. The dissolution takes place as from the date of the communication of the notice. If persons intending to retire from the partnership business continue to take things from the business and to associate otherwise with its work a presumption may be drawn in favour of the continuance of the partnership. The accounts on a dissolution of partnership have to be taken for the benefit of all the partners concerned and there must be a full enquiry into them irrespective of the relief sought for in the plaint. If a partner without the permission of the other partner carries on a competing business with the firm, he must account for and pay over to the firm all profits made by him in such business and also make compensation to the firm for any loss occasioned thereby. The rule is not however applicable to a different business though the same knowledge and information may be useful in both. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 10 : 34 C. L. J. 405.**

——S. 253—*Partnership of joint family manager and a stranger, dissolves on the manager's death.*

Where the manager of a joint Hindu family enters into a partnership for the family benefit with a person, a stranger to the family, the partnership is dissolved on the death of the manager in the absence of any agreement with the survivors, who have no right in such a case against the other partners even to sue for any assets received by them subsequently to the dissolution of the partnership. (1922 P. C. 115, Foll.) (*Baker, J. C.*) SETH RAMBHAN *v.* PRAYAGDAS. **7 N. L. J. 195 : 20 N. L. R. 49 : 78 I. C. 198 : A. I. R. 1924 Nag. 263.**

——S. 253—*Dissolution—Rights* inter se—*Capitalist partner—Position of.*

A capitalist partner has no right of pre-eminence or superiority to compel working partners to submit to a sale of their rights on such terms as he should prescribe. On dissolution, in the absence of a contract to the contrary every partner has a right to have all partnership property sold, and after discharging all debts, have the balance divided according to their shares. No partner has a right to insist that any particular item should remain unsold and that it should either remain unsold or allotted to one at an arbitrary value. (*Rupchand Bilaram, A. J. C.*) AMRITLAL GULABDAS *v.* DERSI JAMAL VORA. **89 I. C. 577 (5).**

——S. 253—*That partnership formed for particular purpose continues till the purpose is served, is an English principle—S. 253 does not contain such provision.*

There is no provision in S. 253, similar to the English Law that if a partnership be entered into for a single adventure or undertaking an agreement that the partnership shall last until the termination of the undertaking or adventure will be inferred. (*Raymond, A. J. C.*) HEMRAJ KANJI *v.* TOPAN VISHINJI. **A. I. R. 1925 Sind 300**

——S. 253 (6)—*One partner assigning his interest to a third party—Assignee cannot claim accounts from other partners nor can he sue for dissolution.*

If one partner assigns his share to an outsider without the consent of his partners during the existence of the partnership, no immediate rights accrue to the assignee as against the other partners, the assignee only having a right against his assignor. One partner cannot by his action introduce a third party without the consent of the other partners, so as to give the third party a right to interfere in the management of the business or to ask for an account. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done, to claim an account as from the date of the dissolution. But it is the assignor and not the assignee who can sue for dissolution. 10 Cal. 669 Dissented from. (*Macleod, C.J. and Crump, J.*) DHANAJI JHELAJI *v.* GULABCHAND PANA **87 I. C. 812 : 27 B. L. R. 409 : A. I. R. 1925 Bom. 347.**

——S. 253 (7)—*One partner neglecting partnership business is not enough to dissolve partnership.*

There is no provision in law for a dissolution of the partnership being brought about merely by one partner neglecting to do anything further towards the carrying on of the objects of the partnership. A partner can retire, but that retirement can only be by and upon notice to the other side. (*Sulaiman and Boys, JJ.*) CHUNNI LAL *v.* SHEO CHARAN LAL. **47 All. 756 : 23 A. L. J. 725 : L. R. 6 A. (C.v.) 362 : 89 I. C. 122 : A. I. R. 1925 All. 787.**

——S. 253 (7) and (10)—*Construction—Dissolution—Infant—Liability.*

S. 253 (7) and (10) are subject to the qualification, *viz.*, "in the absence of a contract to the contrary" which may be made expressly or by conduct. The stoppage of business or refusal to supply capital by a partner cannot be treated as a dissolution of the firm. The question whether there has been an abandonment depends upon the facts of each case. An infant inheriting his father's share in the partnership is liable for his father's personal liabilities only to the extent of the assets inherited by him and as regards the liabilities of the firm since the death of the father the minor is not personally liable but his share only is liable. (*Mookerjee and Walmsley, JJ.*) HARAMOHAN PODDAR *v.* SUDARSON. **66 I. C. 811 : 25 C. W. N. 847.**

——S. 253 (10)—*Joint family business continued after partition—Death of one partner dissolves partnership.*

Where subsequent to the partition of a Hindu joint family, the family business is carried on jointly by two of the members on the one side and another member on the other, the death of the latter dissolves the part-

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nership. (*Mears, C. J. and Mukerji, J.*) SAWARATH RAM *v.* RAM BALLABH. 23 A. L. J. 625 : 6 L. R. A. (Civ.) 465 : 89 I. C. 27 : 47 All. 784 : A. I. R. 1925 All. 595.

——— Ss. 253 (10) and 239—*Sole partner—Death of—Business continued by heirs—Legal effect.*

When the sole proprietor of a firm dies, his heirs inherit the stock-in-trade, outstanding dues, good will, etc., but they do not *ipso facto* become partners of the firm. Before a partnership can come into existence there must be an express or implied agreement between the heirs that the old firm should be continued. Such an agreement might be inferred from the fact that the firm was allowed to carry on business even after the death of the sole proprietor. But in the absence of any such evidence it would not be just to presume the heirs became partners. (*Sulaiman, J.*) HABIB BUX *v.* SAMUEL FITZ & CO. L. R. 6 A. 253 : 89 I. C. 22 : 23 A. L. J. 961.

——— S. 253 (10)—*Family partnership— Death does not dissolve.*

Where a partnership consists of members of a joint Hindu family, it is not dissolved by the death of any of the partners, as a stipulation to that effect is ordinarily to be inferred. (*Piggott and Walsh, JJ.*) FAKIR CHAND *v.* NANUG RAM. 74 I. C. 721 : A. I. R. 1924 All. 277.

——— S. 253 (10)—*Partnership—Death of a partner—Representatives, rights of*

In the absence of special circumstances to the contrary, the representatives of a deceased partner are entitled to a share in the profits made out of the business since the death of the partner and continued by the surviving partner. (*Mookerjee and Buckland, JJ.*) MAHAMMAD KAMIL *v.* HAJI HEDAYATULLA. 33 C. L. J. 411 : 64 I. C. 861 : 48 Cal. 906 : 26 C. W N. 463 : A. I. R. 1922 Cal. 122.

——— S. 253 (10)—*Scope of.*

The principle underlying the section is that where the partners agree to continue the partnership even after the death of the original partner, the suit for accounts with the widow is not barred under Limitation Act, Art. 106. (*Abdul Raoof and Abdul Qadir, JJ.*) HARI CHAND *v.* JUGAL KISHORE. 5 L. L. J. 55 : 68 I. C. 722 : A.I.R. 1922 Lah. 349.

——— S. 253 (10)—*Interpretation of.*

S. 253, clause (10) of the Contract Act which provides for the dissolution of a partnership on the death of a partner must be read as qualified by the interlocutory words "in the absence of any contract to the contrary." (*Abdul Raoof and Abdul Qadir, JJ.*) HARI CHAND *v.* JUGAL KISHORE. 5 L. L. J. 55 : 68 I. C. 722 : A. I. R. 1922 Lah. 349.

——— S. 253 (10)—*Agreement to continue partnership.*

An implied agreement to continue a partnership even after the death of one of the partners operates to prevent the termination of the partnership on the death of a partner. (*Kennedy J. C. and Lobo, A. J. C.*) TANUMAL *v.* GANGARAM. A. I. R. 1925 Sind. 103.

——— S. 254—*Suit before the termination of partnership term—If premature.*

By a partnership deed the partnership was to last from 1st January 1915 till 31st December, 1919. The plaintiff's suit for dissolution and accounts was filed on the 20th November, 1919. Various allegations and counter-allegations had been made in the pleadings and in the evidence and from these it was perfectly obvious that there was a state of feeling existing between the partners which rendered it impossible for the partnership to be continued with any advantage.

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Held, that the Court could infer from that that the business of the partnership could not be carried on at a profit and that it would only be carried on at a loss and therefore the suit was not premature. (*Macleod, C. J. and Crump, J.*) HASHAM ISMAYAL *v.* NARIMAN RUSTOMJI MEHTA. A. I. R. 1924 Bom. 57.

——— S. 254—*Partnership dissolution—Lunacy of partner, whether* ipso facto *dissolves partnership.*

An order of Court is necessary to dissolve a partnership on the ground of the unsoundness of mind of one of the partners. The unsoundness of mind of a partner by itself does not dissolve the partnership. (*Sanderson, C. J. and Buckland, J.*) JAGAT CHANDRA BHATTACHARYYA *v.* GUNNY HAJEE AHMED. 30 C. W. N. 11.

——— S. 254—*Partnership for term—If can be dissolved before expiry of term—Period expiring* pendente lite—*Insolvency—Effect of.*

Even when a partnership is entered into for a fixed term a decree for dissolution may be passed when the mutual confidence which the partners had in each other originally has ceased. A partnership instituted prior to the expiry of the term can still be decreed, if the term expired during the pendency of the suit. If pending the suit the plaintiff becomes insolvent, it is only the Official Receiver that can continue the suit. (*Abdul Raoof and Martineau, JJ.*) TULSI RAM *v.* DINA NATH. 89 I. C. 333.

——— S. 254 (2)—*Mere institution of insolvency proceedings against partners does not dissolve partnership.*

The mere institution of insolvency proceedings against the partners of a firm or even the adjudication of a partner does not by itself dissolve the partnership. (*Rupchand Bilaram, A. J. C.*) HARNAMDAS *v.* FIRM OF MAYADAS LAKHMICHAND. 87 I. C. 905 : A. I. R. 1925 Sind 310.

——— S. 262—*Declaration that partnership has ceased makes S. 262 inapplicable.*

The petition of the co partner preferring a claim to a half share and consenting to a release of his half share only and agreeing to the sale of the half share of his partner's son in execution of the decree for the personal debts of the latter's father amounts to a declaration that the partnership had ceased and has the effect of divesting the said half share of the moveables of its character as partnership property and to such property the provisions of S. 262. Contract Act, relating to partnership property would no longer apply. (*Walmsley and M. N. Mukerji, JJ.*) DWARKA DAS MARWARI *v.* JADAB CHANDRA. 51 Cal. 761 : 39 C. L. J. 439 : 28 C. W. N. 704 : 78 I. C. 731 : A. I. R. 1924 Cal. 801.

——— S. 262—*Property of partnership—Right to dispose of—Rights of creditors.*

Although partnership property has annexed to it a paramount liability for partnership debts, yet there is nothing in law which prevents partners from disposing of it as they like or allowing it to be treated as the sole property of one partner and obliges them to preserve it as partnership property for the benefit of the creditors of the partnership. Any disposition of the property by the agreement of the partners is effective unless made with a view to defraud the creditor, and the creditor is not entitled to be consulted in the matter. (*Kotwal, A. J. C.*) JAMNADAS *v.* RAMADHAR. 18 N. L. R. 186 : 64 I. C. 719 : A. I. R. 1922 Nag. 70.

——— S. 263—*Partnership dissolved—Presumption of agency does not exist.*

The presumption of agency does not exist in the

CONTRACT ACT (IX OF 1872), S. 263.

case of a partnership which has ceased to be a going concern. 10 Bom. 358, Foll. 32 All. 51, Dist. (*Baker, J. C.*) SHEONARAIN *v.* BABULAL. **85 I. C. 775 : A. I. R. 1925 Nag. 268.**

——S. 263—*Profits after dissolution of partnership property.*

Where the account books produced unmistakeably proved that the order for the purchase of goods was made on behalf of the firm and further that the payment of the price in two instalments was also made on behalf of the firm ; but by mere accident, the goods were received after the dissolution of the partnership, *held* on principle of equity the plaintiff is entitled to his share of the profits made by the defendants in selling the goods in question. It may be that the terms of S. 263 of the Contract Act do not cover the case in its entirety. (*Wazir Hasan, A. J. C.*) JANKIRAM *v.* PT. SAMESHAR PRASAD. **9 O. L. J. 599 : 74 I. C. 324 : A. I. R. 1923 Ovdh 23.**

——S. 264—*Applicability to persons who dealt with the firm after dissolution of partnership.*

S. 264 of the Contract Act applies not only to persons who dealt with the firm before the dissolution but also to persons dealing with the firm after the dissolution or change of partners. (*Sanderson, C. J. and Buckland, J.*) JAGAT CHANDRA BHATTACHARYA *v.* GUNNY HAJEE AHMED. **30 C. W. N. 11.**

——S. 264—"*Persons dealing with a firm*"—*Meaning of—Scope of—Estoppel.*

The expression " persons dealing with a firm " indicates only such persons who have been in the habit of dealing with the firm previously. The section does not contemplate such persons who deal with a firm for the first time after the retirement of some of the partners. S. 264 is an illustration of a particular form of estoppel by conduct and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of notice excited in him a belief which caused him to do something that he would not otherwise have done. The section must not be construed as an absolute proposition of law, but must be read with S. 115 of the Evidence Act. (*Scott-Smith and Abdul Raoof, JJ.*) BICHHIA LAL *v.* MUNSHI RAM. **68 I. C. 932 : A. I. R. 1922 Lah. 466.**

——S. 264—*Third parties dealing with firm without notice of dissolution.*

In the absence of notice, express or constructive, given of dissolution of a partnership, it is clear that, third parties who deal with it are entitled to assume that the partnership still continues. (*Spencer and Odgers, JJ.*) MAHADEVA IYAR *v.* RAMAKRISHNA REDDIAR. **(1925) M. W. N. 707 : 50 M. L.J. 67**

——S. 264—*Dissolution of partnership—Notice—Publication.*

In the case of old customers of a firm the mere publication of notice of dissolution in the public press is not sufficient to relieve a retiring partner from liability. 8 C. 617, Foll. (*Heald, J.*) EZEKIEL *v.* THE RUSSA ENGINEERING WORKS, LTD.

1 Rang. 47 : 2 Bur. L. J. 46 : 74 I. C. 16 : A. I. R. 1924 Rang. 133.

CONTRADICTORY STATEMENTS—*See* PENAL CODE, S. 193.

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See also (1) CONTRACT ACT, SS. 69 AND 70.
(2) T. P. ACT, S. 82 AND 95.

——*Mesne profits—Joint decree — Liability of each judgment-debtor to contribute.*

The doctrine that no suit for contribution lies between tort-feasors does not apply in its full extent to

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India. If it does apply, it applies only where it must be presumed that the party in default knew that he was committing an unlawful act or the act is one of an obviously illegal character. It is obviously equitable in the case of a decree for mesne profits against parties who were in joint possession that a person who had to satisfy the entire decree should be able to recover his share from his co-defendants, unless there has been something in his conduct to deprive him of this right. (*Daniels and Neave, JJ.*) SHEO RATAN SINGH *v.* KARAN SINGH. **22 A. L. J. 788 : L. R. 5 A. 571 : 46 All. 860 : A. I. R. 1924 All. 807.**

——*Costs—Co-defendants — Joint decree—Effect of.*

Where two or more persons join in an attack or in a common defence in an action, there is at least an implied contract that they will share the gain or the loss. At any rate equity will infer such a contract and there is a *prima facie* right of contribution among the litigants so joining in an attack or defence. But it may happen that the defendants to a suit may have different, antagonistic and exclusive defences and in such a case in the absence of a contract or some equity between them there will be no contribution. Cases on the subject reviewed. (*Ryves and Stuart, JJ.*) PARSOTTAM DAS KOLAPURI *v.* LACHMI NARAIN. **45 A. 99 : 69 I. C. 688 : 20 A. L. J. 890 : A. I. R. 1923 All. 67.**

——*Co-judgment-debtors—Extent of liability* inter se *– Proof of.*

In a suit for a contribution as between co-judgment-debtors the latter may show the extent of their liability, and the decree in the prior suit does not operate as *res judicata* in this respect. (*Ryves and Gokul Prasad, JJ.*) ITWARI LAL *v.* MATA PRASAD. **L. R. 3 A. 425.**

——*Costs—Partition suit - Co-defendants.*

A suit for partition was equally contested by all the defendants. The defence failed and the suit was decreed with costs against all the contesting defendants jointly and severally. The decree was executed and costs were recovered against one of the defendants who sued the others for contribution. *Held*, the plaintiff was entitled to contribution from his other co-defendants unless facts could be proved which would be considered sufficient to defeat the equity. 26 M. 373; 32 A. 485 ; 18 Ch. D. 236 Ref. (*Macleod, C. J. and Crump, J.*) KESHAV VITAL *v.* HARI RAM KRISHNA. **48 Bom. 351 : 80 I. C. 526 : A. I. R 1924 Bom. 318.**

——*Money wrongfully retained by defendants—All defendants equally liable to plaintiff.*

The plaintiffs-donees under a sanad claimed Rs. 456-1-0 with interest, being the amount rightly recovered by the village authorities as assessment in respect of the lands in suit, but wrongfully retained by the defendants representatives of the donor in respect of the years 1910 11-12. The defendants to the suit included (defendant 14) one of the executants of the sanad. The other defendants were either representatives of the other executants of the document, or purchasers of their shares in the inam. The trial Court decreed plaintiffs' claim for Rs. 456-1-0 and costs to be recovered from defendant 14, personally, and from the estates of the other deceased executants. The essential part of the document was as follows :—"The terms of the lands so given are—(1) Exemption of the assessment of the sale lands has been made in favour of you and your heirs. (2) In case there is any obstruction made by *Bhaubands* in respect of the inam of 70 bighas and in case you have occasion to pay the assessment, we will pay it. If you have to pay it, the said sum of assessment will be paid by us

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without reference to each other." *Held*, that the plaintiffs were entitled to a decree for the amount claimed by them in this suit against all the defendants and not only against defendant 14. (*Shah, A. C. J. and Coyajee, J.*) RAMCHANDRA MADHOVRAO *v.* TRIMBAK SRIDHAR. **25 Bom. L. R. 1074 : A. I. R. 1924 Bom. 1.2**

———*Co-tenants—Suit for contribution of amount paid under rent decree—Defendant can claim set-off of amount paid by him previously though the claim be barred by time.*

In a suit for contribution by a co-tenant who has paid off a rent decree in order to save the joint holding from sale in execution, the defendant co-tenant is entitled to put forward a claim by way of set off in respect of payments of rent made by him on behalf of the plaintiff, though the claim to set off be barred by time. (*Pearson and Chakravarti, JJ.*) ABDUL MAJID *v.* KULSUM BIBI. **88 I. C. 696 : A. I.R. 1925 Cal. 1146.**

———*Suit for—Joint decree—Propriety.*

In a suit for contribution against two persons who are judgment-debtors along with some others, a joint decree against the two defendants should not be passed. (*Madhavan Nair, J.*) NAIWALE SULAIMAN ALI KHAN *v.* M. VENKATANARAYANA GARU. **22 L. W. 319.**

———*Co-sharer—One sharer paying Government revenue has a right to contribution and he has a charge on the revenue of others even in cases governed by Madras Estates Land Act—Limitation Act, Art.* 132 *—Madras Estates Land Act, S.* 5.

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save the estate, he is by the operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue and therefore a suit by him brought more than three years after the payment is not barred by limitation as it is a suit to enforce a charge and comes within the scope of Art. 132 of the Limitation Act, even where the case is governed by the Madras Estates Land Act. 26 Mad. 686 (F. B) Foll. (*Phillips, J.*) N. KOTAYYA *v.* K. KOTAPPA. **(1925) M. W. N. 722 : 23 L. W. 178 : A. I. R. 1926 Mad. 141 : 49 M. L. J. 117.**

———*Co-sureties—Counter-security taken by one of several sureties—Benefit of.*

Where the defendant, a surety, has received from the principal debtor a counter-security for the liability, which he undertook jointly with the plaintiff he is liable to bring in for the benefit of the plaintiff and his co-sureties whatever he has received from that source. (*Phillips, J.*) MUTHUSAMI NAIDU *v.* RAYALU NAIDU. **20 L. W 385 : 82 I. C. 395 : A. I. R. 1924 Mad. 848.**

———*Joint-tort-feasors—Who are — Failure to prove common defence set up—Effect of.*

Where a number of defendants in a suit fail to convince the Court that the defence set up is true, they cannot be treated as joint tort-feasors and a suit for contribution as between them is maintainable *Quære*: If there can be no decree for contribution among the joint tort-feasors? (*Jackson, J.*) RAJAGOPALA IYER *v.* THATAYYA ARUNACHALA AIYAR. **20 L. W. 200 : (1924) M. W. N. 676 : 83 I.C. 17 : A. I. R. 1924 Mad. 829 : 47 M. L. J 305.**

———*Joint-tort-feasors—No contribution—Scope of the rule.*

To defeat a claim for contribution among co-defts. it must be shown that the defts. in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal and wrongful act. In that case no suit for contribution would lie. But, on the other hand, if the defts. in the former suit were not guilty of a wrong in that sense, but acted under a *bona fide* claim of right, and had reason to suppose that they had a right to do what they did then, no doubt, they might have a right of contribution *inter se*. (*Hallifax, A. J. C.*) JHIBU *v.* BALAJI. **19 N. L. R. 75 : 7 N. L. J. 30 : A. I. R. 1923 Nag. 2 5.**

———*Suit by certain heirs of an estate against trespasser—Person recovering estate by compromise for entire body of heirs on payment of money can recover proportionate amount and costs from other heirs.*

Where an estate is recovered by certain heirs for the benefit of themselves and the entire body of heirs from the hands of a trespasser on payment of certain money as part of a *bona fide* compromise and the costs of the suit, they are entitled to a contribution by the other heirs in proportion to their share. (*Wazir Hasan, A. J. C.*) DUNYA SINGH *v.* GANGA DHAR. **2 O. W. N. 684 : 90 I. C. 408 : A.I.R. 1925 Oudh 650.**

———*Co-defendants—Joint decree for damages for allowing cattle to graze crops—All defendants are liable for contribution.*

A joint decree is sufficient to support a suit for contribution by a defendant who has paid more than his share, unless the persons sued can show some equity rendering it unjust that contribution should be allowed against them. *Semble*: The rule in *Merryweather* v. *Nixon*, (1799) 8 T. R. 186, is not applicable in India. 43 A. 77 ; 24 O. C. 148 ; A.I.R. 1923 All. 67 ; A.I.R. 1924 All. 857 and 5 Cal. 720, Ref. to. (*Daniels, J. C.*) KARYA SINGH *v.* SHIVA RATAN SINGH. **12 O. L. J. 243 : 86 I. C. 913 : 2 O. W. N. 196 : A. I. R. 1925 Oudh 408.**

———*Co-defendants—One not contesting and the other contesting—Former is liable for costs only to the extent of* ex parte *pleading.*

Where there are two defendants one of whom contests the suit and the other allows the suit to be decreed *ex parte* against him the latter is liable to contribute costs of the suit to the extent of *ex parte* pleading and not contentious pleading. (*Dalal, J.C.*) MAHRAJ DIN *v.* BALBHADAR PERSHAD **12 O. L. J. 265 : 85 I. C. 481 : 2 O. W. N. 8 : A. I. R. 1925 Oudh 403.**

———*Cost—Joint decree for.*

A suit for contribution lies between judgment-debtors against whom a joint decree for costs has been passed. (*Lindsay and Daniels, A. J. Cs.*) BHAGWANDAS *v.* RAJPAL SINGH. **63 I. C. 276 : 24 O. C. 148.**

CONTRIBUTORY LIABILITY. *See* TORT.

CONTRIBUTORY NEGLIGENCE.

See (1) RAILWAYS ACT.
(2) TORT—NEGLIGENCE.

CONVERSION.

See also (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW—SUCCESSION.
(3) MAHOMEDAN LAW.

———*Judgment—Effect of title.*

Where a decree is satisfied, then alone a judgment in conversion passes the property. Distinction between detinue and conversion in English law considered. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) SINNAN CHETTY *v.* ALAGIRI AIYAR. **18 L. W. 545 : 46 Mad. 8 2 : 77 I. C. 580 : (1924) M. W. N. 6 : A. I. R. 1924 Mad. 438 : 45 M. L. J. 516 (F. B.).**

CONVEYANCE.

See (1) DEED.

CONVEYANCE.

(2) T. P. ACT, SS. 8 AND 54.
(3) PART-PERFORMANCE.

CO-OCCUPANT.

See (1) CO-SHARER.
(2) OCCUPANCY HOLDING.

CO-OPERATIVE SOCIETIES ACT (II OF 1912).

——S. 24—*S. 24 cannot be called to aid except in liquidation proceedings under S. 42.*

A judgment-debtor cannot call in aid provisions of S. 24 as an answer to the claim of the decree holder to execute the decree since it applies only in liquidation proceedings under S. 42. (*Greaves and Graham, JJ.*) KUDRATULLA SARKAR *v.* UPENDRA KUMAR CHOWDHURY. **40 C. L. J. 254 : 84 I. C. 999 : A. I. R. 1925 Cal. 203.**

——S. 40 and R. 10—*Object of—Disputes between society and members—Cognizance by Civil Court.*

The object of the Co-operative Societies Act is to encourage thrift, self-help, co-operation among the agriculturists, artisans and persons of limited means, and it would be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worry of an extensive and protracted litigation. In the case of a dispute between a society and a member the substitutional remedy provided under the rules in the shape of a reference to the Registrar must be availed of and the common law remedy by an action in a Civil Court must by necessary application be deemed to have been taken away. (*Abdul Raoof and Moti Sagar, JJ.*) THE ZAMINDARA BANK, SHERPUR KALAN *v.* SUBA. **71 I. C. 722 : A. I. R. 1924 Lah. 418.**

——S. 42 (6)—*Scope.*

S. 42 (6) is intended to prevent litigation in the Civil Courts in regard to the validity of the actions and decisions of a liquidator under the Act except in respect of certain specified orders which are appealable to a District Court or which may be enforced as decrees of Court. It was never intended to preclude a suit by a person against a fellow-member of the society when the plaintiff's property has been utilised by the liquidator in the payment of the dues owed by the defendant. (*Duckworth, J.*) MAUNG PO MAUNG *v.* MAUNG AUNG PAN. **2 Rang. 325 : 84 I. C. 964 : 3 Bur. L. J. 191 : A. I. R. 1925 Rang. 38.**

——S. 43—*Rules under, by the U.P. Government—R. 20—Reference to arbitration under C. P. Code, Sch. II—Rule does not cover.*

A reference to arbitration under the provisions of the second schedule of the Civil Procedure Code is entirely distinct from the procedure contemplated by R. 20 of the Rules. (*Ryves and Daniels, JJ.*) GOPA NATH *v.* RAM NATH. **47 All. 374 : 23 A. L. J. 129 : L. R. 6 A. (Civ). 208 : 86 I C. 585 : A. I. R. 1925 All 356.**

——S. 43—*Rules framed under Rules 31 and 34—Award under the rules—Application to Civil Court to enforce award as decree—Transfer of decree.*

Rules 31 and 34 framed under S. 43 of the Co-operative Credit Societies Act provide that awards shall be enforceable as decree of a Court having local jurisdiction if application is made to it to enforce it. A Court having a power to execute an award can transfer it for execution (*Macleod, C. J.*) JAIRAM *v.* NAWROJI. **24 Bom. L. R. 909 : 46 B. 887 : 65 I. C. 212 : A. I. R. 1922 Bom. 449 (2).**

——S. 43 (2)—"*Business*" *includes election of officers.*

Having regard to the very wide form in which S. 43 and the rules made under it are couched, it should be held that the word "business" was not intended to be confined to money business. The election of its officers is certainly a part of the business of the society and the intention of the Act was that this and any dispute of a similar character should be referred for the decision of the Registrar or the arbitrator appointed by him in accordance with the rules made under S. 43 and not to the Civil Court. (*Ryves and Daniels, JJ.*) GOPA NATH *v.* RAM NATH. **47 All 374 : 23 A. L. J. 129 : L. R. 6 A. (Civ.) 208 : 86 I. C. 585 : A. I. R. 1925 All. 356.**

——S. 43 (2) (1)—*Scope and applicability—Director and Society—Dispute between, arising out of particular transaction—If within section—"Touching the business of a society"—Meaning.*

The words "touching the business of a society" in S. 43 (2) (1) of Act II of 1912 are not confined to disputes in connection with the internal management of the affairs of a society or disputes in regard to principles which would regulate the conduct of the business thereof (*Mookerjee and Chotzner, JJ.*) BHUBAN MOHINI DASI *v.* KUMUDBULA DASI. **28 C. W. N. 131 : 39 C. L. J. 140 : A. I. R. 1924 Cal. 467.**

——S. 43 (2) (1)—*Dispute between society and its officer.*

A dispute between a member who happens to be an officer of a co operative society and the society in regard to sums of money entrusted to the former for purchase of certain articles is within S. 43 (2) (*l*) of the Act. A dispute between a member who happens to be an officer of a co-operative society on the one hand and the committee or an officer thereof on the other falls within the words of the section. (*Krishnan and Venkatasubba Rao, JJ.*) DASARATHA RAO *v.* CHEVVURU SUBBA RAO. **17 L. W. 346 : (1923) M. W. N. 222 : 72 I. C. 838 : 32 M. L. T. (H.C.) 321 : A. I. R. 1923 Mad 481 : 44 M. L. J. 382.**

——S. 43 (2) (1)—*Registrar can pass award against sons of deceased member as representing his estate, but not personally.*

The Co-operative Society has complete power to refer any matter in dispute between them and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member. So, if the Registrar passes an award against the sons of a deceased member personally, the Civil Court has complete jurisdiction to set aside the award. (*Das and Ross, JJ.*) MAHABIR PRASAD *v.* BASUDEO NARAYAN. **6 P. L. T. 452 : 88 I. C. 671 : 1925 P. H. C. C. 231 : A.I.R. 1925 Pat. 575.**

CO-OWNER. *See also* CO-SHARER.

——*Ejectment suit—If all necessary parties.*

In a suit in ejectment by one co-owner against a third party, the other co-owners are not necessary parties. (*Rupchand Bilaram, A.J.C.*) MAHOMED FARUG *v.* SIDIK. **79 I. C. 59 : A. I. R. 1925 Sind 36.**

——*Joint wall—Rights of.*

When two persons are joint owners of a wall, one of them cannot by building over the whole wall deprive the other of his right to the use of it. (*Addison, J.*) ATA MUHAMMAD *v.* NUR AHMAD. **89 I. C. 746 : A. I. R. 1925 Lah. 642.**

CO-PARCENER. *See* HINDU LAW.

COPIES.

See (1) EVIDENCE ACT, S. 65.
(2) LIMITATION ACT, S. 12.

CO-PLAINTIFF

CO-PLAINTIFF.
See (1) PRACTICE.
(2) CIV. PRO. CODE.

CO-PRISONER, EVIDENCE OF. *See* EVIDENCE ACT, S. 30

CO-PROPRIETORS. *See* CO-SHARERS.

COPYRIGHT. *See also* COPYRIGHT ACT (III OF 1914).

——— —Compilation from other works—Compiler has copyright.

Though a book is a compilation from other works, and is not original, the fact that its contents have been arranged on a new plan will give the compiler a copyright in the book. (*Banerji and Gokul Prasad, JJ.*) FIRM OF SHEIKH GHAGOOR BAKSH *v.* JWALA PRASAD. **43 All. 412 : 61 I. C. 394 : 19 A. L. J. 180.**

———Sale of songs—Unpublished work—Purchaser, rights of.

Where *P* purchased the right to publish and sell 90 songs composed by *D* and shortly afterwards *D* sold 40 of these to *M* who published the same and sold them, *held*, that *P* was entitled to sue *M* for an injunction restraining him from publishing and selling the 40 songs in violation of the right exclusively acquired by him. (*Abdul Rahim and Moore, JJ.*) RAMIAH ASARI *v.* CHIDAMBARA MUDALIAR.
12 L. W. 151 : 59 I. C. 229 : (1920) M. W. N. 426 : 39 M. L. J. 341.

COPYRIGHT ACT (III OF 1914).

———Selection of passages from work is not an original work and is not protected.

A selection of passages from a non-copyright work is not entitled to protection. Per *Macleod, C. J.*—Where about half of the original non-copyright work was adopted as an abridgment is not an original literary work entitled to copyright. Skill and labour by themselves will not make up for the want of originality when there is nothing original in picking out for publication portions of a work which are not copyright. Selection from classical authors for the use of schools if it connoted originality would certainly be protected. The word 'original' should be so construed as to allow a man the benefit of the use of his brain but adopting word for word a part of non copyright work does not constitute an original work. (*Macleod, C. J. and Shah, J.*) COOPER *v.* MACMILLAN & CO. **65 I. C. 187 : 23 Bom. L. R. 1299.**
See **on appeal 48 B. 308 : 51 I. A. 109 (P.C.).**

———Abridgment —Merely selecting passages and knitting them together does not constitute -- Raw material or the original works are open for consultation for all—Use of another's labour and skill only is prohibited.

An abridgment of an author's work means a statement designed to be complete and accurate exposition of the thoughts, opinions and ideas by him expressed therein, but set forth much more concisely in the compressed language of the abridger. A publication, the text of which consists of a number of detached passages selected from author's work, often not contiguous, but separated from those which precede and follow them by considerable bodies of print, knit together by a few words so as to give these passages, when reprinted, the appearance, as far as possible, of a continuous narrative, is not an abridgment at all. It only expresses, in the original author's own words, some of the ideas, thoughts and opinions set forth in his work. And it is obvious that the learning, judgment, literary taste and skill requisite to compile properly and effectively an abridgment deserving that

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name would not be at all needed merely to select scraps taken from an author and to print them in a narrative form. To constitute a true and equitable abridgment, the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the individuality employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive and more convenient both to the time and use of the reader. Independent labour must be apparent, and the reduction of the size and work by copying some of its parts and omitting others confers no title to authorship, and the result will not be an abridgment entitled to protection. To abridge in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose, language substantially different from that of the original. To make such an abridgment requires the exercise of mind and labour, skill and judgment brought into play, and the result is not merely copying. To constitute a proper abridgment the arrangement of the book abridged must be preserved, the ideas must also be taken and expressed in language not copied but condensed. To copy certain passages and omit others so as to reduce the volume in bulk is not such an abridgment as the Court would recognise as sufficiently original to protect the author. The mere process of selecting passages from works readily accessible to the public is not, but difficulty in obtaining access to the originals or skill manifested in making or arranging the selection is sufficient to give the character of an "original literary work" to the selection. (1893) 1 Ch. 218 Appr. A publication, the text of which consists merely of a reprint of passages selected from the work of an author can be entitled to copyright. For instance, it may very well be that in selecting and combining for the use of schools or universities passages of scientific works in which the lines of reasoning are so closely knit and proceed with such unbroken continuity that each later proposition depends in a great degree for its proof or possible appreciation upon what has been laid down or established much earlier in the book, labour, accurate scientific knowledge, sound judgment touching the purpose for which the selection is made, and literary skill would all be needed to effect the object in view. In such a case copyright might well be acquired for the print of the selected passages. It is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material. Any new and original plan, arrangement or combination of material will entitle the author to copyright therein, whether the materials themselves be old or new. Whosoever by his own skill, labour and judgment writes a new work may have a copyright therein unless it be directly copied or evasively imitated from another's work. To constitute piracy of a copyright it must be shown that the original has been either substantially copied or so imitated as to be a mere evasion of the copyright. In the case of works not original in the proper sense of the term, but composed of or compiled or prepared from materials open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind and in doing so to use all the materials open to him. The true

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principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at, for the purpose of producing his work ; that is, in fact, merely to take away the result of man's labour, or, in other words, his property. This principle applies to maps, guide books, street directories, dictionaries, to compilation of scientific work and ther subjects, and applies to a selection of poems. What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree It will not create copyright in a new edition of a work of which the copyright has expired merely to make a few emendations of the text or to add a few important notes. To create a copyright by alterations of the text these must be extensive and substantial practically making a new book. With regard to notes, in like manner, they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation and often in a very eminent degree, an exercise of intellect and an application of learning which place the annotator in the position and character of author in the most proper sense of the word. (*Lord Atkinson.*) MACMILLAN & CO., LTD. *v.* K. & J. COOPER.

48 Bom. 308 : 19 L. W. 299 : 26 Bom. L. R. 292 : (1924) M. W. N. 308 : 83 I. C. 101 : L. R. 5 P. C. 57 : 28 C. W. N. 613 : 2 Pat. L. R. 137 : 22 A. L J. 473 : 51 I. A. 109 : A. I. R. 1924 P. C. 75 : 46 M. L. J. 637 (P.C.).

——S. 1 (1)—'*Original*' *does not relate to ideas but to their expression.*

The word " original " does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought ; and in the case of "literary work" with the expression of thought in print or writing. The orginality which is required relates to the expression of the thought ; but the Act does not require that the expression must be in an original or novel form but that the work must not be copied from another work—that it should not originate from another. (*Lord Atkinson.*) MACMILLAN & CO. *v.* K. & J. COOPER. **48 Bom. 308 : 19 L. W. 299: 26 Bom. L. R. 292: (1924) M W. N. 308: L. R. 5 P. C. 57: 28 C. W. N. 613: 2 Pat. L. R. 137: 22 A. L. J. 473 51 I. A. 109: 83 I. C. 101 : A. I. R. 1924 P. C. 75 : 46 M. L. J. 637 (P.C.).**

—— — S. 2—*Expert evidence.*

The Court should be reluctant to sit as an expert to decide the question of infringement of copyright without the aid of the expert evidence. But in a case capable of construction the Court should exercise a *prima facie* judgment upon it. The proper course in ordinary circumstances in such cases is to get the opinion of such experts who may be appointed as Commissioners to investigate and report on the matters in issue. (*Mookerjee and Chotzner, JJ.*) SITA NATH BASAK *v.* MOHINI MOHAN SINGH. **39 C. L. J. 134 : 81 I. C. 754 : A. I. R. 1924 Cal. 595.**

——S. 3—*Copyright —Infringement— Presumption of Copyright—Expert evidence—Duty to take.*

Where the defendants in an action for damages for infringement of copyright in respect of a work do not put in issue the existence of the copyright in the work, there is an irrebuttable presumption that the alleged work was a work in which copyright existed and that the plaintiff was the owner of the copyright. In this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. The proper course, in such cases, is to get the opinion of experts who might be appointed Commissioners to investigate and report on the matters in issue. The opinion and findings of the experts are not conclusive on the Court, but may be reviewed on exceptions. (*Mookerjee and Chotzner, JJ.*) SITA NATH BASAK *v.* MOHINI MOHAN SINGH. **39 C. L. J. 134 : 81 I. C. 754 : A. I. R. 1924 Cal. 595.**

—— S. 6—*Owner.*

An irrebuttable presumption arises that an alleged work is a work in which copyright subsists and that the plaintiff is the owner where the defendant does not dispute the existence of copyright (*Mookerjee and Chotzner, JJ.*) SITA NATH BASAK *v.* MOHINI MOHAN SINGH. **39 C. L. J. 134 : 81 I. C. 754 : A. I. R. 1924 Cal. 595.**

CORPORATE BODY.

See (1) CORPORATION.
(2) COMPANY.

CORPORATION. *See also* COMPANY.

——*Constituted by statute—Powers presumed to be known.*

Where a corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers. (*Mookerjee and Chotzner, JJ.*) AKSHAY KUMAR CHAND *v.* FOGRA MUNICIPALITY. **37 C L.J 589 A.I.R. 1923 Cal. 675.**

——*Contract by—Formalities.*

Contracts made by a public body should be strictly in conformity with mode of making such contracts as prescribed by statute. (*Baker, J. C.*) ABDUL AZIZ KHAN *v.* MUNICIPAL COMMITTEE, KHANDWA. **A I. R. 1924 Nag. 227.**

—— *Social Club not registered as a corporate body —Debts incurred by such club—Only members who actually contracted or authorised the contracts are liable—Liability is personal.*

A club is merely a term of convenience. It is a short method of designating a certain body of persons who meet together for social or recreative purpose. But the club is not a corporative body and has no existence in the eye of the law and it is so far incapable of contracting or entering into any legal relations with other persons and bodies. Merchants who deal with such a club which is not registered as a body politic do so at their own risk and the only persons they can hold liable for their debts are such officials of the club as had actually contracted with them and possibly such directing bodies or such members of the club as may be shown to have authorised or approved of the contracts. Creditors cannot by any device make those secretaries or managers who have not entered into contracts with them or ratified such contracts liable under the contracts and they cannot by any device, *e. g.*, by application under Order 1, R. 8 turn what is not a corporate body into a corporate body and so render members of clubs who are not personally liable for such contracts so liable. (*Kennedy, J. C. and Rupchand. Bilaram, A. J. C.*) SCOTT OLDFIELD *v.*

CORROBORATION.

FIRM OF CO-OPERATIVE STORES.
18 S. L. R. 93 : 88 I. C. 784 : A. I. R. 1925 Sind 244.

CORROBORATION.
See (1) EVIDENCE ACT, S. 133.
(2) CRIMINAL TRIAL.

CO-SHARER.
Abadi.
See (1) ABADI.
(2) LANDLORD AND TENANT.
Adverse Possession.
Building on Common land.
Exclusive Possession.
Jaghir.
See (1) GRANT.
(2) INAM.
(3) JAGHIR.
(4) LAND TENURE.
Joint Possession.
Lambardar.
Mutual Relation.
Partition.
Right against Trespasser.
Right to Alienate.
Sham lat land.
Suit for Possession.
Suit for Rent.
Who is.
See also (1) CONTRACT ACT, SS. 43 AND 45.
(2) PARTITION.

Adverse Possession.

——Adverse possession.

Denial of title of a co-sharer is the starting point for limitation. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMUD ALI KHAN. **20 A. L. J. 545 : 24 Bom. L. R. 951 : 35 C. L. J. 554 : 67 I. C. 444 : 31 M. L. T. 94 : A. I. R. 1922 P. C. 84 : 43 M. L. J. 104 (P. C.)**

——Adverse possession—Ouster, non-payment of profits may amount to.

If a tenant-in-common has not been in participation of the rents and profits for a considerable length of time and other circumstances concur, there may be ouster of the tenant-in-common. *Corea* v. *Appuhamy*, (1912) A. C. 230, Dist.; 43 Mad. 244, Expl. (*Daniels, J.*) BASU *v.* MT. NANHI.
L. R. 5 A. (Civ.) 376 : A. I. R. 1924 All. 920.

——Adverse possession—Mere non-payment of profits by Lambardar is not ouster.

Mere non-payment by a *lambardar* to any co-sharer of the said co-sharer's property *quota* of the annual divisible profits of the *mahal* does not in the absence of evidence to the contrary constitute an ouster of the said co-sharer from possession. (*Walsh, A. C. J and Piggott, J.*) LACHMAN PANDE *v.* TRIBINE SAHU.
22 A. L. J. 518 : L. R. 5 A. (Rev.) 174 : 79 I. C. 538 : A. I. R. 1924 All. 719.

——Adverse possession.

Where *A*, a co-sharer takes more than his share and *B*, not interfering, consents to *A* remaining in possession of more than his share, the possession of *A* is adverse against *B*. (*Walsh, J.*) MUSTAFA KHAN *v.* MUSAMMAT DULARI. **3 U. P. L. R. (All.) 5 : A. I. R. 1922 All. 433 (2).**

——Adverse possession does not begin until ouster or notice of denial of right—Mahomedans.

Co-heirs under the Mahomedan Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all the co-heirs. The entry and possession of one tenant-in-common is ordinarily deemed to be the entry and possession of all the tenants-in-common and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. (*Greaves and Chakravarty, JJ.*) ASIRUDDIN *v.* LATIFUNNISA. **85 I. C. 763 : A. I. R. 1925 Cal. 1176.**

——Adverse possession of strangers on behalf of one co-sharer begins only when he asserts his own exclusive right.

Where the plaintiff has been out of actual possession of the land in suit since a few years after the plaintiff's father's death which took place about 40 years ago and the second defendant has been in possession of the land for over 12 years, *held*, that though defendant No. 1, the husband of defendant No. 2, is not a co-sharer with the plaintiff before he could be treated as a stranger it must be shown that he was possessing the land asserting his own right. If this defendant possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not possessing it on behalf of the plaintiff's sister, then the plaintiff's suit would not be barred. (*Newbould, J.*) JOYTUN BIBI *v.* SOLIMUDDIN CHOUKIDAR. **72 I. C. 33 : A. I. R. 1924 Cal. 356.**

——Adverse possession—Ouster.

The possession of a co-owner is generally possession on behalf of all, but if there is ouster or acts equivalent to it, it will begin to be adverse. (*Walmsley and B. B. Ghose, JJ.*) BHAIRABANDRA NARAIN ROY *v.* RAJINDRA NARAIN ROY. **50 Cal. 487 : A. I. R. 1924 Cal. 45.**

——Adverse possession—Co-mortgagor redeeming.

The rule that ordinarily one co sharer cannot hold adversely against another co-sharer proceeds upon a rebuttable presumption that the co-sharer in exclusive possession is holding on behalf of the other co sharers. This presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed. (*Campbell, J.*) WAZIR *v.* GIRDHARI. **A. I. R. 1923 Lah. 311.**

——Adverse possession.

Where a sale is made by one co-owner, the purchaser's possession is to be treated as adverse to his co-sharers. (*Broadway, J.*) ANWAR *v.* KISHEN SINGH. **A. I. R. 1922 Lah. 205.**

——Adverse possession.

Where the defts. acted on their own behalf only in suing a trespasser for possession their adverse possession begins from the date of their possession as against their co-sharers. (*Le Rossignol, J.*) ZULPHI *v.* ASGHAR. **3 Lah. L. J. 441.**

——Adverse possession—Joint possession should be presumed where no separation or overt act of ouster is proved.

The ordinary presumption of law is that the joint possession of co-sharers is continued until there is some overt act of ouster or separation. Where the overt act was the assertion made in the written statement in a previous litigation and was evidenced only by a summary in the judgment which recited that the defendants asserted that the plaintiffs were out of possession of the lands and had not received the rent, *held*, that in the absence of the written statement itself it was impossible to say exactly what the assertion made by the defendants in the case was or precisely to what extent they denied the title of the plaintiffs and set up title in themselves and that there was no ouster proved. (*Neave, A. J. C.*) RAM NIDU *v.* JANKI. **85 I. C. 387 : A. I. R. 1925 Oudh 510.**

CO-SHARER—Adverse Possession.

———*Adverse possession by one against others—Ouster is essential.*

Mere possession will not give prescriptive title to one co-sharer as against another. To establish such a title there must be clear evidence of ouster. (*Wazir Hasan, A. J. C.*) JAGDAMBA SINGH *v.* AZMAT ULLAH. **86 I. C. 324 : A. I. R. 1925 Oudh 494.**

———*Adverse possession is wiped off by acceptance of release deed stating existing title.*

The acceptance by some co-sharers of a deed of release executed by another co-sharer setting forth an existing title in the subject-matter of the release takes away the adverseness of possession of the former, if any. (*Wazir Hasan, J.C.*) CHHOTEY LAL *v.* HANUMAN SINGH. **11 O. L. J. 735 : 80 I. C. 619 : A. I. R. 1925 Oudh 208.**

———*Adverse possession—Presumption is that one holds for the other who is not in possession.*

Co tenant out of possession starts with the presumption in his favour that the possession of the other co-tenant is not adverse to him. (*Wazir Hasan, A. J.C.*) INDARPAL *v.* THAKUR DIN. **10 O. L. J. 646 : 27 O. C. 77 : A. I. R. 1924 Oudh 266.**

———*Adverse possession—Rights of each—Principles guiding.*

Every co-sharer has the right to enter upon and occupy the common property and this in itself does not raise any presumption of a denial of rights to the other co-sharers. Nor is possession in such cases adverse. All the more so is this the case where they all agree for the purposes of convenient management that a certain area shall be occupied by certain co-sharers. Mere occupation even for a long period creates no presumption of ouster. There must be open and notorious acts indicating a claim to exclusive ownership in denial of the rights of the other co-sharers before adverse possession can begin to run. (*Miller, C. J. and Foster, J.*) TILAKDHARI LAL *v.* ABDUL WAHAB KHAN. **89 I. C. 913 (Pat.).**

———*—Adverse possession.*

Co-sharer's possession is *prima facie* on behalf of others. (*Heald, J.*) MA SAN HLA ME *v.* MA TUN ME. **3 Bur. L. J. 105 : 82 I. C. 821 : A. I. R. 1925 Rang. 40.**

Building on Common Land.

———*—Building on common land—Injunction—Rebuilding by one co-sharer—Effect.*

Whatever the powers of the Court may be in adjudicating on the rights of parties and in passing injunction (or conditional injunctions) in consequence of such adjudications it is a different matter to say that where a party admittedly owns a piece of property the Court has any authority to create and impose conditions as to the enjoyment of the same, neither breach of contract nor the infringement of any right being alleged to have taken place. Consequently a co-sharer who had rebuilt at his expense a common wall belonging to him and the defendant, another co sharer, cannot obtain an injunction restraining the latter from treating the half belonging to him as his property until he had paid his portion of the cost of re-building the wall. (*Harrison, J.*) TALIB HUSSAIN *v.* MAHOMED HUSSAIN. **A. I. R. 1924 Lah. 297 (2).**

———*Building on common land—Injunction.*

A proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use by erecting a building thereon. It is not necessary for the other co-sharers to prove special damage. 1 Lah. 249 : 2 Lah. 73, Ref. to. (*Martineau, J.*) RUSTAM KHAN *v.* RAHMAN. **15 P. W. R. 1923 : A. I. R. 1923 Lah. 289.**

CO-SHARER—Exclusive Possession.

———*Building on common land—Ouster is determined by facts of each case—Ouster is not necessarily implied by sole occupation of portion of joint property by one co-sharer, nor by erection of building without consent of other co-sharer.*

The facts that amount to ouster in each particular case may vary so that the question of ouster is one to be determined with reference to the facts and circumstances of each particular case. Where a *tappar* is put up by one co-owner on joint land without the consent of the other co-owner, the demolition of the *tappar* will not be ordered by the Court unless special damage is proved by the plaintiff. 14 C. P. L. R. 76 and 21 W. R. 373, Foll. An ouster of co-owner is not necessarily implied by the sole occupation of a part of the joint estate by one co-owner. Even the erection of a substantial building by one co-owner upon a portion of joint property without the assent of the other co-owner may not necessarily amount to evidence of ouster. 11 C.L.J. 189, Ref. to. (*Kinkhede, A J. C.*) KUVERJEE *v.* RAMA. **82 I. C. 432 : A. I. R. 1925 Nag. 145.**

Exclusive Possession.

———*Exclusive possession—Ejectment—Co-sharers remaining in separate possession of items of common property— Private arrangement — Transferee from co-sharer—Rights of.*

Where a co-sharer has been in separate possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition. Where for facility of cultivation the co sharers of a khata had under private arrangement been in long possession of separate lands and one of the sharers transferred his plots under an invalid transfer who took formal possession of the plot and subsequently the other co-sharers dispossessed him under a decree for ejectment for arrears of rent, *held*, that their possession was not that of trespassers but of proprietors. (*Neave, J.*) BABU RAM *v.* YASIN. **L. R. 5 A. 526 : A I. R. 1924 All. 880.**

———*Exclusive possession—Ejectment—Khudkasht—Partition.*

Where a co-sharer suing for the exclusive possession of a plot of land proves that it was his khudkasht and the defendant trespassed upon the property and dispossessed him, the plaintiff is entitled to a decree and he could not be driven to a suit for partition in the Revenue Court. (*Gokul Prasad, J.*) KULDIP CHAUBE *v.* JAGNANDAN CHAUBE. **A. I. R. 1923 All. 363.**

———*Exclusive possession.*

As between co-sharers the rule is that where there is land to be cultivated, each sharer may take into his own cultivation out of the culturable land an amount proportionate to his share. If he takes more he must recompense his other co-sharers, but until he has taken more he need not recompense anybody. (*Stuart, J.*) BHIRUG RAI *v.* HAZARI RAI. **64 I. C. 922 (All.).**

———*Exclusive possession—Position and rights of.*

The position of a co-tenant or a co-partner holding the property in his own name is not that of a trustee for the other co-owners or co-partners ; and if he has certain obligation in respect of the property so held by him towards the co-owners or co-partners, the co-owners or co-partners would have the right to enforce in a proper manner their right of ownership to that property. (*Shah, A. C. J., Crump and Mulla, JJ.*) SUPDT. OF STAMPS *v* CHIMANLAL. **47 Bom. 321 : 25 Bom. L. R. 112 : A. I. R. 1923 Bom. 287.**

CO-SHARER—Exclusive Possession.

———*Exclusive possession—Possession of one is not ouster of others save in rare cases.*

The possession of one co-sharer is the possession of other co-sharers also and save in exceptional circumstances it does not amount to ouster of other co-sharers. (*Greaves and Graham, JJ.*) JINNATENNESSA *v.* ABDUL HALIM MUNSHI. **82 I. C. 822 : A. I. R. 1925 Cal. 469.**

———*Exclusive possession— Arrangement as to—Disturbance—Remedy.*

Where joint owners have agreed to a mode of enjoyment of joint property, it is not open to one of them to disturb that arrangement without the consent of the others. 27 C. L. J. 441 Rel. This is not inconsistent with the fundamental principle that in law each joint owner of an estate is regarded as having a proprietary right in the whole estate. That however is merely a right and must not be confounded with the manner of enjoying that right ; it operates in strict law to prevent a co-owner from setting up a claim to any parcel as his exclusive property during the continuance of the joint ownership. But where co-owners, by arrangement, either tacit or express, take up exclusive possession and enjoyment of different parcels of the joint property, without such definition on severance of interest as would amount to partition, the Court will not interfere with the arrangement at the instance of one co-owner during the tenure in common and will do so only on partition so far as may be necessary to make an equitable division of the property. 28 C. 223 11 C. W. N. 143 ; 19 C. W. N. 872 : 27 A. 88 ; 34 A. 113 Rel. (*Mookerjee and Rankin, JJ.*) KAMESWARI DASYA *v.* SISHURAM DEKA. **39 C.L. J. 414 : A. I R. 1921 Cal. 792.**

———*Exclusive possession for enjoyment—Right to eject—Lessee if can sue for ejectment.*

Where co sharers were in exclusive possession of parts of joint property, a lessee of one of the co sharers can sue for possession if he is dispossessed by other co-sharers. (*Newbould and Panton, JJ.*) SHIAM LAL SAH *v.* FULIA MOOSAMAT. **A. I. R. 1922 Cal. 147.**

———*Exclusive possession—Shamilat land--Transfer by one co sharer—Until partition other co-sharers cannot prevent transferee from building on land.*

Although a co-sharer in shamilat land not being the sole owner of the land cannot sell the full proprietary rights in the land, a sale by him, nevertheless, holds good to the extent of conveying the rights which he can sell including the right to retain possession till partition. When a co-sharer has been long in possession of a portion of the shamilat land no other co-sharer can oust him therefrom or even get joint possession with him as long as a partition of the shamilat does not take place. A transferee from a co-sharer has the same rights in the land that his transferor had. He is entitled to undisturbed possession of the land as long as the shamilat is not partitioned and the other co-sharers have no right to prevent him from building on the land. (*Martineau, J.*) SAAD ULLAH *v.* IBRAHIM. **85 I. C. 553 (1) : A. I. R. 1925 Lah. 518.**

———*Exclusive possession— Shamilat land—Exclusive possession cannot be decreed but joint possession can be decreed.*

A co-sharer cannot obtain exclusive possession of village commom land but he may be granted a decree for joint possession. (*Martineau, J.*) PIR MAHOMED *v.* GULAM. **7 L. L. J. 147 : 89 I. C. 199 (1) : 26 Punj. L. R. 177 : A. I. R. 1925 Lah. 369 (2).**

———*Exclusive possession—Common land—Use by one to the prejudice of others is not justified.*

CO-SHARER—Joint Possession.

It is a well-established custom that no individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of the partition, and that plaintiffs who come into the Court to restrain such individual without any delay are not obliged to show material and substantial injury. (*Campbell, J.*) BISHNA *v.* SAPURAN SINGH. **6 L. L. J. 548 : 84 I. C. 917 : A. I. R 1925 Lah. 287.**

———*Exclusive possession—Shamilat land—Land possession—Ejectment.*

Where a co-sharer has been in exclusive possession of a por ion of the common shamilat land, it is not open to the other co-sharers to sue to eject him or to obtain joint possession with him, so long as a partition of the shamilat does not take place. (*Scott-Smith, J.*) MAHOMED AMIN *v* KARIM DAD. **A. I. R. 1924 Lah. 293.**

———*Exclusive possession—Shamilat—User of excess area for private purposes of the proprietor.*

Where the area over which grazing rights extend is larger than that required by the persons with those rights a proprietor may use the excess for his own purposes. The defts. cannot prevent him from developing any excess area and using it to its best purposes. 31 Cal. 503 ; 86 P. R. 1911 ; 119 P. R. 1899 ; 100 P. R 1830, Foll. (*Wilberforce, J.*) KARTAR SINGH *v.* RALLA. **67 I. C 306 : 2 L. L. J. 44.**

———*Exclusive possession—One cannot recover mesne profits from others in absence of ouster—Ouster cannot be presumed from the fact of one co-sharer exclusively occupying a portion of joint land if he leaves enough to the others.*

A co-sharer is not entitled to get mesne profits from his co-sharers on account of their cultivating lands in excess of their shares when there is no proof of ouster and the mere taking up the exclusive occupancy of a portion of joint property by one co-owner after leaving sufficient margin for the other co-owner to take up similar exclusive occupancy of other plots would not amount to an ouster so as to render the first occupant liable in mesne profits to the claimant or make him accountable for cultivating profits. (*Kinkhede, A. J. C.*) MT. BHAGAI *v.* BHEOSEN. **83 I. C. 86 : A. I. R. 1925 Nag. 240.**

———*Exclusive possession by one can't be ended save on strong grounds.*

Very strong grounds are necessary for depriving a co owner of the exclusive occupation which he has taken up of joint land. (*Kinkhede, A. J. C.*) KUVERJI *v.* RAM. **82 I. C. 432 : A. I. R. 1925 Nag. 145.**

———*Exclusive possession—Easement—Two plots held exclusively by two co-sharers severally—Holder of one plot cannot claim easement over the other plot.*

Although exclusive possession by co-sharers of portions of undivided estates is a common thing, such exclusive possession does not amount to an ouster of the other co sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it. Therefore one co-sharer in exclusive possession of a plot cannot acquire a right of easement over another plot held exclusively by another co-sharer. (*Ross and Kulwant Sahay, JJ.*) KAMESHWAR NARAIN SINGH *v.* JANARDHAN PRASAD NARAIN SINGH. **3 Pat. L. R. 81 : 87 I. C. 736 : A. I. R. 1925 Pat. 492.**

Joint Possession.

———*Joint possession—One co-sharer forcibly dispossessed from khudkasht—Physical possession can be decreed.*

CO-SHARER—Joint Possession.

When a co sharer in a village has rightfully acquired land as his *khudkasht* and another co-sharer forcibly dispossesses him, the Court can restore the man forcibly dispossessed to physical possession. (*Stuart, J.*) BHAGWAT PRASAD *v.* BALDEO PRASAD. **L. R. 6 A. (Civ.) 313 : 87 I. C. 679 : A. I. R. 1925 All. 593.**

———*Joint possession—Common land.*

No co-sharer who has been in physical or actual possession of any part of joint land is liable to be ejected by any of the other co-sharers except by means of a partition lawfully obtained. Where he has been ousted from the land occupied by him he is entitled to be restored to the actual possession which he had before and not merely to joint possession with the defendant co-sharer. 44 A. 5. Foll. (*Daniels, J.*) RAM HARAKH PANDEY *v.* CHUNI SINGH. **A. I. R. 1923 All. 446.**

———*Joint possession—Decree for.*

A co-sharer is entitled to a decree for joint possession and it should not be refused merely on account of troubles and difficulties arising by reason of parties not being on good terms, but it may be refused when there are circumstances which render it improper to pass such a decree. (*Banerjee and Gokul Prasad, JJ.*) BIRGUNATH RAI *v.* AP NARAIN RAI. **45 A. 157 : L. R. 3 A. 515 (Rev.) : A. I. R. 1923 All. 445.**

———*Joint possession—Common land—Cultivation by one of the co-sharers—Suit for possession by others.*

Where one of the co sharers brings land under cultivation it is open to the other co-sharers to get a decree for joint possession in their favour. (*Gokul Prasad, J.*) BADRI UPADHIA *v.* DWARKA UPADHIA. **L. R. 5 A. 23 (Rev.) : A. I. R. 1923 All. 416.**

———*Joint possession—Ouster by one—Suit for possession—Decree.*

One co-sharer is entitled to a decree for joint possession and not merely a declaratory decree, against the other co sharers who have ousted him. (*Lindsay and Kanhaiya Lal, JJ.*) BISHESHWAR SINGH *v.* HANUMAN SINGH. **44 A 1 : 19 A. L. J. 780 : 3 U. P. L. R. (All.) 143 : A. I. R. 1922 All 314.**

———*Joint possession—Ouster is a question of fact in each case—Ouster can be presumed from non-participation in profits and other circumstances—Ejectment suit, when lies.*

Generally speaking, one tenant in-common cannot maintain an ejectment suit against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and to enable the party complaining to maintain an ejectment there must be an ouster of the party complaining. But where the claimant, a tenant in-common, has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Court can presume that there has been an ouster. However, no definite rule of law can be laid down as to what constitutes an ouster, every case must depend upon its own facts and the Court of fact is entitled to find whether certain set of facts presented before it, does or does not amount to ouster. 43 Mad. 244, Foll.; 28 C. L. J. 437 (P. C.) Ref. (*Suhrawardy and Cuming, JJ.*) HANGESWAR KUNDU *v.* SURYA NARAIN. **87 I. C. 336 : A. I. R. 1925 Cal. 1221.**

———*Joint possession—Mere setting up a rival claim in the written statement does not give a right to a decree for joint possession—Exclusive circumstances must be proved to justify exclusive occupation of joint property by one co sharer.*

CO-SHARER—Joint Possession.

Setting up of hostile title or ouster prior to the filing of the written statement must be proved. The plaintiff will not be entitled to allege that there was ouster and on that ground to seek joint possession by merely setting up a rival claim or hostile title in the written statement. If there are more tenants-in-common than one and one of them be in actual occupation of a portion of the estate and cultivating that part in a proper course of cultivation as if it belonged to him separately and another tenant-in common attempts to come upon the said portion for carrying on operations inconsistent with the course of cultivation in which the first tenant-in-common is engaged and the profitable use of the said portion by him and the first tenant resists and prevents such entry by the other tenant not in denial of his title but simply to protect himself in the profitable enjoyment of the land, his conduct would not give the other tenant right to a decree for joint possession. *Prima facie* co-owners have a right to hold joint possession of joint property and therefore if one co-sharer tries to defeat the claims of another co-sharer to such joint possession of the property then special circumstances have to be alleged and established to justify exclusive occupation by one of the co-sharers of the joint property. Where only some of the co-sharers set up an exclusive or adverse right in land jointly held, the above principles apply. (*Walmsley and Mukerji, JJ.*) RAJENDRA NARAYAN ROY *v.* BHAIRABENDRA NARAYAN ROY. **82 I C. 235 : A. I. R. 1925 Cal. 235.**

———*Joint possession—Common way—Obstruction by one—Suit by the other—Limitation.*

A suit by one co-owner against another for the removal of the actual existing obstructions constructed by the other, on land, which by long usage and by agreement between the parties is reserved for use as a common passage is governed by Art. 144. 6 Cal. 394 (P. C.) Ref. (*Richardson and Suhrawardy, JJ.*) DWARKA NATH *v.* TARA PRASANNA SEN. **A. I. R. 1923 Cal. 356.**

———*Joint possession—Right to—Partition suit.*

Where a suit for partition is pending between the co-sharers and the rights of the parties to *khas* possession of different lands would be finally decided, the Court would not disturb the existing possession of the lands by the co-sharers, unless it is compelled by cogent reasons. (*Newbould and Panton, JJ.*) MAHOMED HYDER ALI KHAN *v.* MAHOMED WAJED ALI KHAN PANI. **36 C. L. J. 155 : A. I. R. 1923 Cal. 208.**

———*Joint possession of party wall recognised by agreement—One cannot build so as to make exclusive use of the party wall.*

Where by agreement two co-owners were jointly in possession of a party wall one cannot build a second storey on the party wall so as to use the party wall exclusively for himself and make it impossible for the other to build a storey with the support of the party wall. (*Addison, J.*) ATA MAHOMED *v.* NUR AHMAD. **89 I. C. 746 : A. I. R. 1925 Lah. 642.**

———*Joint possession—Gift to two persons without defining shares is not necessarily joint—Where parties are other than Hindus, presumption of tenancy-in-common arises.*

A joint gift cannot be assumed merely by the circumstance that it is made in favour of two or more persons without defining their shares and in cases of donees who are incapable of forming a joint Hindu family, the presumption is that they were tenants-in-common without benefit of survivorship. 30 P. R. 1909. Foll. (*Abdul Qadir, J.*) MUSA *v.* GUL MUHAMMAD. **A. I. R. 1924 Lah. 289.**

CO-SHARER—Joint Possession.

———*Joint possession—Right to.*

Where one co-sharer in possession of a portion of the common land denies the title of the others, the latter can sue the former for joint possession. *Quaere*: Whether the doctrine that a co-sharer in possession of a portion of the joint land, who has not denied the joint character of the property should be allowed to retain it until partition, is applicable to *abadi* land? (*Shadi Lal, C. J. and Leslie Jones, J.*) MANJI *v.* GHULAM MUHAMMAD. **2 Lah. 73 : 61 I. C. 415 : 3 Lah L. J. 75.**

———*Joint possession can be decreed in the discretion of the Court.*

It is a matter entirely within the discretion of the Court whether or not to grant a decree for joint possession. (*Kinkhede, A. J. C.*) KUVERJI *v.* RAMA. **82 I. C. 432 : A. I. R. 1925 Nag. 145.**

———*Joint possession.*

The circumstance that a co-sharer is himself in exclusive possession of certain home-farm land which is recorded as his *sir* at the Settlement is a good ground for not awarding joint possession of the land in dispute. (*Kotval, A. J. C.*) JUGAN *v.* AMANSINGH MANSUKSINGH. **78 I. C. 390 : A. I. R. 1924 Nag. 345.**

———*Joint possession.*

Where a party acquires certain property with the help of a fund which belongs to him jointly with others, the co-owners in equity are entitled to their proportionate interest in the newly acquired property. 25 C. W. N. 406 (P. C)., L. R 42 I. A. 177, Foll. (*Wazir Hasan and Neave, A. J. Cs.*) JAI INDRA BAHADUR SINGH *v.* SHEO INDRA BAHADUR SINGH. **10 O. L. J. 481 : 78 I. C. 393 : A. I. R. 1924 Oudh 218.**

———*Joint possession—Decree for.*

A person entitled to joint possession can be given a decree for joint possession, even if he had never been in possession at all. (*Daniels, J.C.*) RAM BAHADUR SINGH *v.* LAL NARASINGH. **63 I. C. 433 : 24 O. C. 227.**

———*Joint possession—Letting of land by one co-sharer—Right of others to joint possession.*

Where a tenant has taken a settlement only from the 12 annas sharer landlords, the 4 annas landlord who has not made any settlement is entitled to a decree for joint possession with the tenant. 18 C. 10; 28 C. 223; 19 C. W. N. 407; 51 I. C. 31 Dist. (*Ross and Coutts, JJ.*) BALGOBIND MANDAR *v.* DWARKA PRASAD. **1 P. 394 : 1922 P. H. C. C. 142 : 3 P. L. T. 409 : A. I. R. 1922 Pat. 279.**

Lambardar.

———*Lambardar—Liability of Lambardar arises on date of ascertaining the amount due except in case of any legal provision—He is also liable for negligence or wilful mischief.*

For the purpose of collection and distribution, a *lambardar* is undoubtedly the agent of the co-sharer and that legal relationship, when a question arises with regard to the accounting by the lambardar for the rents and profits for which he is responsible on behalf of his principal, sets in motion two recognised principles of contract law. The first is this.—An agent who collects money for his principal subject to a proper deduction for commission, expenses, outgoing and so forth, is a debtor to his principal for the balance in his hands. The liability to pay arises when the amount is ascertained, subject to this, that if there is a customary period or a period fixed by some notification having the force of law, it becomes payable in the eyes of the law on that date. The delay in such a case is neither the fault of the lambardar nor the fault of the co-sharer. It is the fault of the tenant and cannot affect the contractual rights of the parties. The second principle is this:—An agent who neglects his duty, that is to say, who is guilty of a breach of contract, is ordinarily liable to pay compensation or what is called damages, which directly follow from his breach. If a lambardar does not collect from solvent and willing tenants, if he squanders the cash, and generally fritters away profits which might be realised if he were ordinarily diligent, he is, in the eyes of the law, apart from anything in the Tenancy Act, liable for breach of contract. To these two just claims recognised by the Contract Act, there can be only two defences. The first is satisfaction either by cash payment or contra account. The second is limitation, by which the law prohibits the co-sharer from enforcing his claim. (*Walsh, Ag. C. J., Sulaiman, Ryves, Mukerji and Daniels, JJ.*) SHEO GHULAM *v.* SALIK RAM. **22 A L. J. 610 : 46 All. 791 : L. R. 5 (Rev). 189 : A. I. R. 1924 All. 481 (F. B.).**

———*Lambardar—Power to grant leases.*

The lambardar has authority to grant a lease of Zemindari property with due regard to the season. (*Gokul Prasad, J.*) HARDILAL *v.* ALAM. **L. R. 4 A. 298 (Rev.) : A .I. R. 1924 A. 459.**

———*Lambardar—Land compensation paid to Lambardar is not recoverable as profits.*

The lambardar had received a certain sum from Government as compensation for a small area acquired under the Land Acquisition Act. The amount instead of being paid to all the proprietors was for some reason paid to the Lambardar who apparently had not given the plaintiff, a co-sharer, his share. *Held*, that this could not properly be treated as *sewai* income recoverable in profits in a suit under the Tenancy Act. (*Ryves and Daniels, JJ.*) CHHAMMI LAL *v.* SUKHRANI KUNWAR. **L. R. 5 A. 24 (Rev.) : 74 I. C. 19 : A. I. R. 1923 All. 537.**

———*Lambardar—Dues payable to—Agreement between co-sharers—Effect.*

In a suit by a lambardar against the co sharers for the recovery of lambardari dues, the defence was that the co-sharers made collections themselves and paid revenue of their respective shares and that under the terms of the *wajib ul arz* of 1285 fasli the lambardar of the village was not entitled to any remuneration. At the settlement of 1285 fasli before the Board of Revenue had issued the rules under U. P. Land Rev. Act there was an agreement between the co-sharers that the lambardar should receive no remuneration. At a subsequent settlement in 1312 Fasli the plaintiff lambardar contended that this agreement was abrogated. There was no evidence that it had been abrogated or reaffirmed. *Held*, that if the co-sharers as a body desired to contract themselves out of the rule framed by the Board of Revenue, they ought to have agreed upon some nominal remuneration for the lambardar. The lambardar is placed in a strong position; he can bargain with the co-sharers for some reasonable remuneration, under threat of standing upon his extreme rights and claiming his full 5 per cent. on the land revenue. The agreement relied upon by the defendants co-sharers even if it survived the enactment of the Board of Revenue's Rules came to an end automatically at the close of the settlement for which it was made and could have no effect on the rights of the lambardar thereafter, at any rate, unless it were proved that it was expressly renewed. (*Mears, C. J. and Piggott, J.*) SHEO CHARAN *v.* PANNA LAL. **20 A. L. J. 795 : L. R. 3 A. 468 (Rev.) : 45 A. 84 : A. I. R. 1923 A. 41.**

———*Lambardar—Lease of land during pendency of litigation—Effect of.*

CO SHARER—Lambardar.

The mere fact that a lambardar gave a lease of land during the pendency of a litigation between him and a co-sharer, does not in the absence of collusion between the lessee and the lambardar, vitiate the lease. Though the transaction may be suspicious, fraud cannot be assumed on a mere consideration of general probabilities (*Hopkins, S.M. and Fremantle, J. M.*) KALKA SINGH *v.* MIRJA ASGHAR HUSSAIN.
L. R. 3 A. 425 (Rev.) : 4 U. P. L. R. (B. R.) 76.

———*Lambardars—Powers of—Agreement between co-sharers and lambardar.*

The lambardar has no statutory power to settlement. But he is the ostensible agent of the co-sharers and if they appoint him their agent generally with certain reservations, they must be deemed to give him such authority as is not expressly reserved ; the tenants or lessees cannot be expected to know the reservations made unless they are communicated to them and certainly cannot be expected to know that there are other limitations on his authority outside the specified reservations. (*Hopkins, S. M.*) BHAIRON *v.* MOHAN.
L. R 3 A. 244 (Rev.).

———*Lambardar—Lease for a long term—Validity of*—Onus.

A lambardar's authority to grant leases is not a statutory authority ; on the other hand there are no statutory restrictions upon his power in this respect. His authority to arrange for the cultivation rests on the fact that he is the agent of the co-sharers. He is bound to manage the property in their interests and for their benefit exercising the same ordinary prudence as if the property was his own. Whether it was necessary or prudent to grant a lease for a period of 20 years depends on the circumstances of the case. It cannot be presumed that the period was excessive. Where the co-sharers have acquiesced in the lease for 16 years, and then turn round and say that the lease was fraudulent or collusive or unreasonable, the *onus* lies upon them to prove their assertions. (*Hopkins, S. M.*) BIBI KANIZ FATIMA *v.* SHEORAJ SINGH
L. R. 3 A. 167 (Rev.).

———*Lambardar—Suit in ejectment by co-sharer—Compromise of litigation by the widow on his death is not binding on other co-sharers.*

Where the widow of a Lambardar compromises an ejectment suit brought by her husband by conferring occupancy right in consideration of an increased rent, the compromise is not binding on the other co sharers. (*Hopkins. S. M.*) KHAMAN SINGH *v.* KUAR INDER SINGH. **L. R. 3 A. 166 (Rev.).**

———*Lambardar—Power of—To confer occupancy rights.*

Neither a lambardar nor a co-sharer who collects rent by some agreement could confer occupancy rights on persons not entitled to it under the law. (*Fremantle, S. M. and Burn, J. M.*) KUNWAR BAHADUR *v.* SHAMBHU DAYAL. **L. R. 5 A 165 (Rev.).**

———*Lambardar — Lease—Interest of co-sharers not looked to—Validity of lease.*

Where a lease was granted by the lambardar for his own benefit without due regard to the interest of the co-sharers who were soon to come into possession of their lots, and on a very small enhancement, *Held*, unless it was clearly proved that the lambardar acted against the interest of the co sharers, the lease cannot be held to be invalid. SHEIKH DOOBRU *v.* HANUMAN. **L. R. 2 A. (Rev.) 141.**

———*Lambardar—Powers of leasing—Perpetual lease—Lease for 12 years.*

A perpetual lease is on the face of it an alienation which a lambardar may not make but a lease for a considerable term of years stands on a different footing

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and each case has to be considered on its merits. A lease for 12 years is not necessarily unreasonably long, and if the transaction is a profitable one the lambardar may well enter into it. (*Hopkins, S. M. and Burn, J. M.*) BALDEO *v.* WARIS ALI.
4 U. P. L. R. (B. R.) 37.

———*Lambardar—Village divided into pattis subsequent to appointment of plaintiff as lambardar for whole mahal—Plaintiff cannot claim lambardar's remuneration.*

Where the village has been divided into pattis after the plaintiff was appointed lambardar for the whole mahal, and no further appointments have been made, the plaintiff cannot be deemed to be the lambardar of any of the pattis and cannot claim the remuneration of a lambardar in respect of them. On partition, the plaintiff should be held to have ceased to be the nominal lambardar even of his own patti, though for that patti only he remained so for all practical purposes A.I.R. 1923 Nag 153, Foll. (*Hallifax, A.J.C.*) HARIDAYAL *v.* SUNDERLAL. **21 N. L. R. 16 : A. I. R. 1925 Nag. 451.**

———*Lambardar—Co-sharers should claim proportionate share of land surrendered in favour of one of them within reasonable time—Their right is within Court's discretion to grant or not—Unreasonable delay in asserting their claim will deprive them of the right.*

Where a tenant surrenders his holding to a co-sharer lambardar, the claim of other co-sharers to partake of the holding on payment of their quota of the expenses of acquisition is one in equity which the Court in its discretion may grant or not ; which discretion will not be interfered with in appeal unless there has been something wrong in the manner of its exercise. Undue delay in the assertion of the claim negatives the right. Where more than three years had elapsed since the plaintiff knew of the surrender and the defendant had spent money and leased the land to another, *Held*, that there was unreasonable delay and that the plaintiff had no right to disturb the lessee. (*Prideaux, A. J. C.*) MAHADEO *v* SONBA.
78 I. C. 532 : A. I. R. 1925 Nag. 51.

———*Lambardar—Rights of, are not transferable.*

The rights of Lambardar cannot be transferred. 3 C. P. L. R. 126, Rel. on. (*Baker, J. C.*) CHOONILAL *v.* NANISINGH. **78 I. C. 278 : A. I. R. 1924 Nag. 284.**

———*Lambardar—Who can be appointed as.*

It is only persons having a proprietary interest that can be appointed *lambardar* and when that capacity is lost, they cease to be *lambardars*. (*Prideaux, A.J. C.*) MOTILAL GULABSAO *v.* GANPATRAO.
A. I. R. 1924 Nag. 211.

———*Lambardar—Suit for arrears of profits—Burden of proof.*

In a suit by co-sharers against lambardar for profits, the burden of proving amount of arrears lies on the lambardar. (*Prideaux, A J. C.*) SARJE RAO *v.* HARAK CHAND. **6 N.L.J. 234:A.I.R. 1923 Nag. 287.**

———*Lambardar—Lease—Lambardar's authority to give.*

A lease granted by the Lambardar of a village and impliedly consented to by his co-sharer is binding on the co-sharer. The position of a Lambardar with reference to his co-sharer in the matter of letting out vacant land cannot well be put higher than that of a manager of the joint property of a Hindu family. (*Drake-Brockman, J. C*) KUNJILAL *v.* C. CHANDAR SINGH. **64 I. C. 775 : 17 N. L. R. 169.**

———*Lambardar—Profits — Lambardar planting usar in groves— All co-sharers would share in profits thereof.*

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Where the lambardar planted some *usar* in the groves and he contended that he should retain the profits accruing thereupon. *Held*, that in the absence of clear evidence of an agreement amongst the other co-sharers, the lambardar should re-imburse himself for any expense in planting the *usar* by taking the whole profits, the plea of the lambardar was not maintainable. (*Ashworth, A. J. C.*) GHANI AHMAD KHAN *v.* MT. AZIZ BEGAM. **28 O. C. 217 : 12 O. L. J. 272 : 88 I. C. 134 : L. R. 6 O. C. 93 · A. I. R. 1925 Oudh 432.**

———*Lambardar—Suit for profits — Collection charges—No specific percentage can be claimed.*

Lambardar cannot claim a specific percentage as expenses incurred in collection of profits in a suit for profits among co-sharers. 27 Cal. 951 (P. C.) Dist. and Diss. (*Ashworth, A J. C.*) GHANI AHMAD KHAN *v.* MT. AZIZ BEGAM. **28 O. C. 217 : 12 O. L. J. 272 : 88 I. C. 134 : L. R. 6 O. 93 : A. I. R. 1925 Oudh 432.**

———*Lambardar—Co-sharer must prove excess realizations or default in realizations.*

When a co-sharer wishes to charge the lambardar beyond what is admitted on the ground that he has collected more than what is admitted, it lies on the co sharer to prove how much more the lambardar has collected or might have collected but for the gross negligence or misconduct, than is admitted. (*Wazir Hasan, A. J. C.*) GANGA PRASAD *v.* BECHCHU LAL. **80 I. C. 469 : A. I. R. 1925 Oudh 317.**

———*Lambardar and co-sharers—Interest.*

Fiduciary position of the lambardar towards the co-sharers justifies award of interest on the refusal of the lambardar to give accounts. (*Wazir Hasan, A. J. C.*) ADITYA PRASAD *v.* CHHOLE LAL **11 O. L. J. 206 : L. R. 5 O. 99 : 78 I. C. 85 : A. I. R 1924 Oudh 319.**

———*Lambardar—Suit for profits—Liability of heirs of Lambardar.*

A lambardar is under a duty to take reasonable care in collecting the rents and the liability incurred by the failure to perform that duty survives after his death. The heirs of the deceased lambardar are liable to the extent of the assets of their deceased father which have come into their hands for the co-sharer's share of the profits which might with reasonable care have been collected. Where the difference between the gross rental and the collections is very great, there is a presumption either of dishonesty or of gross negligence on the part of the deceased lambardar and the burden is on his heirs to rebut that presumption. (*Lyle, A. J. C.*) SURAJ PRASAD *v.* DEBI DAYAL. **25 O. C. 49 : 8 O. L. J. 485 : A. I R. 1922 Oudh 149.**

———*Lambardar—Suit for profits—Liability for interest.*

In the absence of proof that the lambardar has deliberately or contumaciously declined to render accounts or pay his dues to a co-sharer, he cannot be made liable for interest on sums found due on taking the accounts. 12 O. C. 140 ; 14 O. C. 150 dist. (*Kanhaiya Lal, J. C.*) KAMPTA SINGH *v.* MATA BHIKA SINGH. **3 U. P. L R. (J. C.) 24 : 8 O. L. J. 630 : A. I. R. 1922 Oudh 107**

———*Lambardar—Power of—Grant of long leases.*

Under exceptional circumstances it is competent to a lambardar in the exercise of his powers as a manager to grant leases for a longer term than what the requirements of the particular year or season may necessitate if he thereby secures the largest amount of benefit to the co-sharers by saving the property from sale. (*Kanhaiya Lal, J. C. and Dalal, A. J C*) MAHOMED MASUDALAM *v.* MAHOMED MAHUMUD ALAM. **24 O. C. 369 : 9 O. L. J. 66 :**

CO-SHARER—Mutual Relation.

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Mutual Relation.

———*Suit for profits—No enquiry into collections—Procedure—Illegality.*

A suit for profits by a co-sharer against another on the ground that the latter was collecting the whole rent was dismissed without examining the deft. or enquiring into the collections ; *Held*, the order was wrong and the procedure adopted wrong. (*Fremantle, S M. and Burn, J. M.*) SUNDER LAL *v.* SRI NARAIN. **L. R. 6 A. 16 (Rev.)**

———*Mutual relation—Improvements* bona fide *in the interests of the property—Compensation, though improvements were made without consent of other co-sharers—Compensation how assessed, indicated.*

Where a co-tenant spends money and restores a property which is in ruins to a state in which it is of use and can bring in some profit, he is entitled to compensation at the hands of the other co-tenants, though he may not have made the improvements with the consent of the other co-sharers, provided he has not made the improvements with a view to embarrass his co-sharers at the time of partition. The co-tenant against whom the improvements are charged, will be charged not with the price of the improvements but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum of which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements. (Freeman on "Co-tenancy and Partition" Ref.) (*Lindsay and Kanhaiya Lal, JJ*) SHIAM LAL *v.* RADHA BALLABH. **23 A. L J. 950 : L. R. 6 A. (C v.) 547 : 88 I C. 822 : A. I. R. 1925 All. 770.**

———*Mutual relation—One co-sharer building on joint land without other's consent—Others can sue for demolition of building and joint possession of site.*

One co-sharer out of many has no right to build on what is joint land without the consent of the others, and if he does so, the others can sue for demolition of the building and for joint possession of the land 9 All. 661, Diss. (*Mukerji, J.*) RAM LAL *v.* AMIR MUSTAFA KHAN. **L. R. 6 A. (C v.) 274 : A. I. R. 1925 All. 700.**

———*Lease to one—Holding over—No payment of rent or profits—Effect of.*

Where a co-sharer who takes a lease of property from the body of co-sharers remains in possession for a long time after the period of the lease, without giving rent or profit to the others, his possession is adverse and not as co-sharer. (*Mukerji, J.*) DALMIR SINGH *v.* JOTI PRASAD. **L. R. 6 A. 254: 85 I. C. 550 : A. I. R. 1925 All. 698.**

———*Mutual relation—Determination of rights—Entries in Revenue records.*

When there has been an alteration in the revenue record prior to the institution of the suit, but made during the period for which profits are claimed, the duty of the Court trying a suit for profits must be to consider the order by which the alteration was made and to give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of an eight annas share in a mahal during the first year or the period in respect of which profits were claimed and it was shown that after the close of that year he had been recorded as proprietor of a four annas share from a finding only that he had transferred his interest in the remaining four annas share after the close of the first year in suit, then the duty of the Court would be to give effect to the entries year by

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year, calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. When however it is clear upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previously erroneous entry and was not passed upon any alleged transfer having occurred during the years covered by the suit, then the court is bound to give effect to the entry as it stood on the date of the institution of the suit. (*Piggott and Stuart, JJ.*) MT MUBARAK FATIMA *v.* MD. WULI KHAN. **44 All. 413 : 66 I. C. 125 : 20 A. L. J. 243 : L. R. 3 A. 140 (Rev.) : 4 U. P. L. R. (A.) 188 : A. I. R. 1922 All. 102.**

———*Mutual relation—Right on obstruction.*

If one of the two tenants-in-common of a wall excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction. *Watson* v. *Gray*, 49 L. J. Ch 243 Foll. (*Marten and Fawcett, JJ.*) EMPEROR *v.* BALKRISHNA NARHAR. **26 Bom. L. R. 978 : A. I. R. 1924 Rom. 486.**

———*Mutual relation—Possessory right can be claimed by one even before partition.*

Even before a general partition among co-sharers, one of them can have a possessory right over a particular plot, which right is transferable by him. (*Macleod, C. J. and Crump, J.*) MOHIDDIN *v.* IBRAHIM. **A. I. R. 1924 Bom. 297.**

———*Mutual relation—Partition wall — Rights* inter se.

Conditions attaching to party wall are not easy to define. Each party is entitled to act as owner of his half, but cannot compel the owner of the other half to bear any greater burden than he chooses to place on it. An encroachment cannot take place in defiance of the other's rights. (*Macleod, C. J. and Crump, J.*) DAUDKHAN MUSEKHAN *v.* CHANDULAL KANHAYALAL. **A. I. R. 1923 Bom. 370.**

———*Mutual relation*—Hat *started on joint land by two co-sharers—Subsequent improvement by one—Other co-sharer is not excluded from profits.*

Where two co-sharers start a *hat* on joint land and where subsequently one of them makes improvements in the *hat* at his own expense, he cannot on that account, exclude the other co-sharer fram that *hat* which the two had started for their joint benefit. (*Newbould, J.*) MD. SAFAR JANIA KHAN *v.* RAJA SATYA NIRANJAN CHAKRAVARTI. **82 I. C. 290 : A. I. R. 1925 Cal. 266 (2).**

———*Mutual relation—Government revenue—Default in payment of revenue—Purchase by defaulter or in connivance with him.*

A co-sharer who has defaulted to pay the Government dues and has thereby brought about the sale of the estate, cannot be permitted, if he purchases the estate at the sale, to hold it to his own benefit to the exclusion of his co-owner The position is similar when a tenant, in violation of his agreement defaults to pay, on behalf of his immediate landlord, the dues of the superior holder and thereby brings about a sale of the interest of his land. 44 C. 373, 16 C. 194 ; 15 C. W. N. 776 ; 12 C. L. J. 336 ; 10 M. I, A. 540 ; 18 W. R. 240 ; 20 C. L J. 11 Rel. The essence of the matter is that the co-owner or lessee who thus acts in breach of his obligation contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the person whose interest it was his duty to protect. 12 C. L.J. 336 : 10 M. I. A. 540 ; 18 W. R. 240 ; 20 C. L. J. 11 : 24 C. W. N. 201 ; 30 C. L. J. 475, Rel. (*Mookerjee and Chotzner, JJ.*) LALIT-

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MOHAN SEN *v.* MANORANJAN GHOSH CHAUDHURI. **36 C. L. J. 208 : A. I. R. 1923 Cal. 13.**

———*Mutual relation—Joint property—Incidents.*

One of the incidents of joint property is that it may be enjoyed jointly ; another incident is that its joint character is likely to be terminated. If a co-owner is content to enjoy joint property as such he should not be driven to seek for partition merely because his co-owner chooses to dispute the extent of his share. (*Mookerjee and Buckland, JJ.*) JOYNARAIN *v.* SRIKANTHA. **33 C. L. J. 592 : 26 C. W. N. 206 : A I. R. 1922 Cal. 8**

———*Mutual relation—Improvements—Right of one co-tenant to claim compensation.*

A tenant-in-common is not entitled to compensation for improvements effected by him on the common property as against the other co-tenants in the absence of any necessity for repairs or improvements or of the other co-tenants' concurrence, express or implied, in their execution. 2 C. L. J. 25 dissented from. *Swan* v. *Swan*, 8 Price 518 ; *Harrington* v. *Forrestre*, (1893) 2 Ch. 461 ; *Leigh* v. *Dickeson*, 15 Q.B. D. 60 referred to. (*Oldfield and Devadoss, JJ.*) JANTAPURAM SUBBIAH *v.* VENKATARAMAYYA. **17 L. W. 77 : 46 Mad. 104 : (1923) M. W. N. 13 : A. I. R. 1923 M. 358 : 44 M. L. J. 43.**

———*Mutual relation—In suit by one co-sharer for ejectment from entire premises he must prove that on date of suit he had authority to sue for ejectment from the entire premises.*

When a lease is granted by one co-owner, the other cannot maintain a suit for the ejectment of the lessee from the whole of the premises. In a suit by one co-owner for ejectment of a trespasser from the whole of the premises the burden of proof lies on him to show that he had unrestricted authority to eject him on the date of the suit. The mere fact that at some point of time in the past he had such authority is not sufficient to show that he continued to be clothed with that authority at the date of the suit so as to be entitled by himself to require the defendant to clear out of the entire premises notwithstanding the fact that the other co-owner has manifested his intention to the contrary by granting him a fresh lease of the entire properties. (*Kinkhede A. J. C.*) VITHAL *v.* SADASHEO. **82 I. C 1041 : A. I. R. 1925 Nag. 175.**

———*Mutual relation—Negligence.*

One co-owner cannot exclusively be saddled with the loss due to negligence in the repairing joint property in proper time, where the other co-owner could arrange himself for the repairs. (*Kinkhede, A.J.C.*) CHANDRA SHEKHAR *v.* ABIDALLI. **80 I. C. 920 : A. I. R. 1925 Nag. 58.**

———*Mutual relation—Suit for share of profits-Right to interest.*

A co-sharer is not entitled to interest on his share of the profit unless there has been a refusal by the other co-sharers to pay the former his share of the profit. An offer to pay only a fraction of the sum due to the co-sharer is tantamount to a refusal. 15 N. L. R. 85, referred to. (*Hallifax, A. J. C.*) YADO PRASAD *v*, GANGA RAM. **A. I. R. 1923 Nag. 211.**

———*Mutual relation—Ejectment—Suit by one alone—If lies.*

One co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers. (*Dalal, J.C.*) HARIHAR BAKSH SINGH *v* MUHAMMAD USHAN KHAN. **90 I. C. 807.**

———*Mutual relation—Whether one co-sharer can eject a tenant singly.*

One co-sharer can only eject if he has the right by private partition or otherwise to collect the whole

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rent of the whole holding. (*Fremantle, S.M.*) MD. SHERKHAN v. RAMCHARAN. **L. R. 6 O. 66 (Rev.)**

——— *Mutual relation—Re-construction—Co-sharer not objecting is bound to pay proportionate expenses of reconstruction.*

When one of several co-sharers reconstructs joint property without protest from the other co-sharers it is equitable that when the other sharers demand their share of the property they should be called upon to defray the proportionate expense of the new constructions. (*Dalal, J.C.*) JOKHU v. MT. SARASWATI. **9 O. & A. L. R 643 · 76 I. C. 1017 : A. I. R. 1925 Oudh 45**

——— *Mutual relation—Lessee from co-sharer—Right to sue for profits.*

It is not competent to a co-sharer or his lessee or transferee to deal with joint land against the wishes of the other co-sharers. Though a lessee or grantee may be a co-sharer for the purpose of a suit for profits that does not mean that he has acquired the full rights of a proprietor for all purposes. Where a lessee of a certain plot of Shamilat land from one of the co-sharers also obtains a lease or mortgage from some of the other co-sharers, he is not entitled to deal with the lands as he likes, but he is bound by the terms of the leases in his favour. (*Daniels, A. J. C.*) PANDIT SRI NATH v. NAJMUNNISA. **9 O. L. J. 92 : A. I. R. 1922 Oudh 16.**

——— *Mutual relation—Liability for—Co-owners—Appropriation of profits by one co-owner.*

Where one of several co-owners has appropriated the profits of the common property for a number of years, it is open to the Court on equitable grounds to make him liable for interest on the amount due to the other co-owners. 23 C. W. N. 488 ; 35 B. 255, 41 M. 316, 42 M. 661, 3 C. 654. 38 A. 581 Ref. (*Mitter, C. J. and Mullick, J.*) INGLIS v. SARJU PRASAD MISSER. **3 Pat. 311 : A. I. R. 1924 P. 633.**

——— *Mutual relation—Default in payment of rent—Purchase by one does not enure to the benefit of all.*

Where all co-sharers made default in payment of rent due and in consequence, the tenure is sold and is purchased by one of them the purchase does not enure for the benefit of all. (*Jwala Prasad and Kulwant Sahay, JJ.*) MADUSUDANLAL v. RAM GULAM SAHU. **3 Pat. 458 : 78 I. C. 807 : 5 Pat. L. T. 447 : 1924 P. H. C. C. 240 : A. I. R. 1924 Pat. 547.**

Partition.

——— *Partition—Disagreement as to management—Co-sharer cannot deal with common land to the detriment of another co sharer.*

Partition is the remedy which a co owner has if he and the other co-owners cannot agree as to how the lands which they hold in common should be managed. 17 I.A. 110 Ref. Where lands in India are held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary rights as co-sharers in the lands. No co-sharer can, as against his co-sharer, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy in them. 17 I. A. 120, 121 Ref. Where a co sharer alleged that he purchased jote rights in lands held in common by the co-sharer, *held*, such a purchase would in law be

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held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished. (*Sir John Edge.*) MIDNAPORE ZAMINDARY CO., LTD. v. NARESH NARAYAN ROY. **L. R. 5 P. C. 137 : 51 Cal. 631 : 80 I. C. 827 : 35 M. L. T. 169 : (1924) M. W. N. 723 : 20 L. W. 770 : 29 C. W. N. 34 : 51 I. A. 293 : 26 Bom. L. R. 651 : 23 A. L J. 76 : 3 Pat. L. R 193 : A. I R. 1924 P. C. 144 : 47 M. L. J. 23 (P. C.).**

——— *Partition.*

If a co-sharer files a suit within 12 years from the date of the partition for the removal of the trees allotted to one co-sharer and standing on the land allotted to another co-sharer, he is entitled to have the same removed and the land vacated. (*Kanhaiya Lal, J.*) NIAMAT ULLAH v. SA-UT-UN NISSA BIBI. **L. R. 4 A. 314 (Rev.) : A. I. R. 1924 All. 160.**

——— *Partition—Co-tenant is entitled to use every part of joint property provided he does not exclude co-tenant or deny his right—Co-tenant can prevent use by the other co-tenant which is repugnant to his feelings—Where differences occur remedy is by partition only.*

Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants. A co-tenant has a right to insist that his own property should not be put to a use which is repugnant to his feelings except where the plaintiff has lost his undoubted rights to insist upon the continuation of the existing state of the possession of the common lands. In case a co-sharer is unreasonable and obstructs his co tenant in making beneficial use of the joint property, the remedy of the tenant-in-common is to seek partition and not to take forcible possession of the joint property to the exclusion of his co-sharers. 18 Cal. 10 (P. C.) Dist. (*Greaves and Chakravarti, JJ.*) ASHUTOSH ROY v. CHAIRMAN OF COMMISSIONERS, ROMPORE BOALIA MUNICIPALITY. **29 C. W. N. 643 : 85 I. C. 796 : A. I. R. 1925 Cal. 1027.**

——— *Partition—Properties omitted in preliminary decree—Power of Court to add.*

Ordinarily a suit for enforcing partition of some only of the common property will not lie ; if, however, by mistake, fraud or some other reason, some properties are left out, any of the co-owners can apply to have them divided. So also, even after preliminary decree, a Court may direct discovery of properties still remaining joint and pass preliminary decrees in respect thereof. (*Mookerjee and Chotzner, JJ.*) BHUBAN MOHINI DASI v. KUMUDBALA DASI. **28 C. W. N. 131 : 39 C. L. J. 140 : A. I. R. 1924 Cal. 467.**

——— *Partition—Improvements—Equity.*

If a joint owner has in good faith made valuable improvements upon the common property at his own expense, equity takes the fact into consideration upon a partition and in some suitable way makes an allowance to him therefor in addition to his rateable share of the property. (*Mookerjee and Buckland, JJ.*) JAGANNATHA MARWARI v. CHANDNI BIBI. **26 C. W. N 65 : 67 I. C. 31 : 34 C. L. J. 432.**

——— *Partition—Nature of tenure and survivorship does not apply thereafter.*

Partition puts an end to the incidents of a joint tenancy. When the interest of a joint tenant is severed by partition, on his death succession to his interests will not be by survivorship but the separated tenant's heirs would inherit his interest in the tenancy. (*Jwala Prasad and Macpherson, JJ.*) GOPAL OJHA v.

CO-SHARER—Right against trespasser.

RAMDHAN SINGH. **82 I. C. 204 : A. I. R. 1925 Pat. 228.**

Right against Trespasser.

———*Right against trespasser.*

One of the co-sharers can sue to eject a trespasser from the joint land and the suit is maintainable. (*Lindsay and Kanhaiya Lal, JJ.*) SRI THAKURJI *v.* HIRA LAL. **20 A. L. J. 609 : L. R. 3 A. 581 : 44 A. 634 : A. I. R. 1922 All. 408.**

———*Right against trespasser.*

The principle that in a suit for the ejectment of a tenant from a joint holding all the co-sharers must act jointly or obtain partition is not applicable, where the defendant is not a tenant but a trespasser. (*Moti Sagar, J.*) LEKHA *v.* BHANI.

A. I. R. 1923 Lah. 647.

——*Right against trespasser—Shamilat land—Encroachments.*

Where the land encroached upon had been reserved for the common purposes of the village body and in consequence of the encroachments there is hardly sufficient space left on the spot for the common purposes of the village body, *held*, a decree can be passed for restoration of the land to its original use as there will be no exclusion of the defendants from joint possession of a legitimate character. 2 Lah. 73, Foll. (*Campbell, J.*) PASAWA SINGH *v.* AMAR CHAND.

A. I. R. 1923 Lah. 308 (2).

———*Right against trespasser—Suit by one for ejectment—Form of decree.*

In a suit by one of the co-sharer landlords for ejectment of the defendant who was found to be a trespasser, the Court can pass a decree only for the plff.'s share. (*Brasher, J.*) DIPA *v.* LAL CHAND.

49 P. L. R. 1922 : 68 I. C. 428 : A. I. R. 1922 Lah 393.

——*Right against trespasser—Ejectment—Suit by one alone—If lies.*

One co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers. (*Dalal, J. C.*) HARI HAR BAKSH SINGH *v.* MOHAMMAD USMAN KHAN. **90 I. C. 804.**

Right to Alienate.

———*Right to alienate—Power to confer occupancy rights—Bengal.*

In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middle-man would have, and in Bengal a middle-man cannot obtain as a middle-man a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middle-man. (*Sir John Edge.*) MIDNAPORE ZAMINDARY CO., LTD. *v.* NARESH NARAYAN ROY. **26 Bom. L. R. 601 : L. R. 5 P. C. 137 : 51 Cal. 631 : 35 M. L. T. 169 : (1924) M. W. N. 723 : 80 I. C. 827 : 20 L. W. 770 : 29 C. W. N. 34 : 51 I. A. 293 : 3 Pat. L. R. 193 : 23 A. L. J. 76 : A. I. R. 1924 P. C. 144 : 47 M. L. J 23 (P. C.).**

———*Right to alienate — Sir land — Permanent lease of, is invalid.*

A co-sharer cannot alienate permanently the *Sir* which is recorded separately in his name for purposes of cultivation. Revenue Courts have the right to declare such leases invalid. (*Fremantle, J. M.*) DUKHI KOERI *v.* LOKNATH SINGH. **L. R. 3 A. 225 (Rev.)**

———*Right to alienate—Tenancy created by one—Tenant not a trespasser.*

Where a co-sharer owning part of a proprietary interest puts a tenant in possession of a holding, the tenant is not a trespasser. (*Fremantle, J. M.*) RAM BAHADUR SINGH *v.* RAM NIRANJAN PATHAK.

L. R. 3 A. 165 (Rev.).

CO-SHARER—Right to alienate.

———*Right to alienate—Lease by one cannot affect rights of others.*

It is not competent to one co-sharer to lease out a portion of the joint property so as to affect prejudicially the rights of other co-sharers in the property. 18 I. C. 281 Foll. (*Fremantle, J. M.*) RAJARAM SINGH *v.* RAMAI KEWA. **L. R. 3 A. 81 (Rev.).**

———*Right to alienate—Lease by one—Lease for 7 years given to one of them only—Consent of the other.*

(*Hopkins, S. M.*)—Where there are two joint tenants of a land a registered lease for seven years of some more plots given by the landlord to one of them binds the other if the latter gives his express or implied consent.

(*Fremantle, J. M.*)—When one of the members of a cultivating partnership does an ordinary act connected with the holding such as the execution of a lease and there is no reason to suspect that he is acting against the interest of other members of the partnership he should be taken to be acting with their consent and they should be bound by his action. (*Hopkins, S. M. and Fremantle, J. M.*) SHFO RAJ *v.* NAND KISHORE SAHU. **L. R. 2 A. 42 (Rev.).**

———*Right to alienate—Agreement restricting alienations* inter se—*Effect of.*

A covenant among co-owners restricting alienation of shares by sale or mortgage to themselves does not extend to an involuntary transfer. (*Suhrawardy, J.*) SATISH CHANDRA DE *v.* GAGAN CHANDRA RUDRA.

78 I. C. 802 (2) : A. I. R. 1925 Cal. 471.

———*Right to alienate—Registered mortgages by one co-owner—Effect on other co-owners.*

Registration cannot be held to give to other co-owners notice of dealings with the property. It is not necessary for one joint owner of property to constantly examine the registers with a view to satisfying himself that his co-owner is not holding himself out as the sole proprietor of the property. (*Broadway and Moti Sagar, JJ.*) ISHAR DAS *v.* FAZAL ILAHI.

77 I. C. 516 : A. I. R. 1923 Lah. 522.

———*Right to alienate—Rights in joint undivided property.*

Every co-sharer in joint undivided property has a right to every part of that property until partition. What he can sell is his share or a fraction of his share in the whole of that undivided property. (*Le Rossignol, J.*) SARDAR ALI *v.* FAZIL. **A. I. R. 1923 Lah. 75.**

———*Right to alienate—Shamilat land—Abandonment—Sale of Khewat.*

Rights in Shamilat lands are independent rights. A sale of a khewat holding without any reference to the Shamilat would not result in the conveyance of the Shamilat. The question whether rights in the Shamilat had been abandoned after the sale of Khewat, is one of fact and the High Court is bound by the finding of the lower appellate Court. (*Broadway and Martineau, JJ.*) WALI *v.* MAHOMED.

4 Lah. L. J 221 : A. I. R. 1922 Lah. 34.

———*Right to alienate—Lease by one of two co-sharers operates only on his interest.*

A lease executed by one of two co-owners can take effect only with respect to the lessor's half-interest and is voidable as against the other co-owner. (*Kinkhede, A. J. C.*) VITHAL *v.* SADASHEO.

82 I. C. 1041 : A. I. R. 1925 Nag. 175.

———*Right to alienate—Transferee of a co-sharer cannot be saddled with liabilities for misdeeds of negligence of transferor subsequent to the transfer.*

The transferee of a co-owner cannot be saddled with new conditions or liabilities not existent at the date of the transfer. Nor can the transferee be made to suffer for the negligence or misdeeds of the trans-

CO SHARER—Right to alienate.

feror or his legal representative subsequent to the date of the transfer. (*Kinkhede, A. J. C.*) CHANDRA SEKHAR *v.* ABIDALLI. **80 I. C. 920 : A. I. R. 1925 Nag. 68.**

———*Right to alienate—Power of—Lease of joint property by one—Effect.*

A perpetual lease of joint property granted by one co-sharer is not binding as against the others. (*Ashworth and Wazir Hasan, A. J. Cs.*) LAL MAHOMED KHAN *v.* MT. AMATUL FATIMA. **26 O. C. 239 : A. I. R. 1924 Oudh 60.**

———*Right to alienate—Patti—Sale and mortgage by one sharer—Effect.*

One of the co-shares of a patti cannot sell anything more than his joint interest in the plots subject to the result of any partition which may be made among the co-sharers of the patti or village. The purchaser is entitled to have his possession maintained subject to the result of any partition that may take place though his title would be confined to the interest which his vendor held in the plots or was capable of transferring. (*Kanhaiya Lal, J.C.*) JARBANDHAN *v.* DATTA DIN. **A. I. R 1922 Oudh 46.**

———*Right to sue—Suit by—Abatement—Claim by tenants.*

When a co-sharer who under an arrangement between the whole body of the landlords and tenants sues for his share of the rent, the tenants can claim abatement. (*Greaves and Mukerji, JJ.*) SIVADAS DUTT *v.* BIRENDRA KRISHNA DUTT. **41 C. L. J. 330 : 88 I. C. 654 : A. I. R. 1925 Cal. 783.**

Shamilat Land.

———*Shamilat land—Sale of proprietary land does not necessarily include a share in Shamilat land—Onus lies on purchaser to show that Shamilat was included.*

The rights of proprietors in the shamilat of the village are not a mere accessory to the land separately held by them and the *onus* lies on the purchaser of the proprietary land to show that the sale to him included also a share of the shamilat. (*Scott-Smith and Fforde, JJ.*) GOBIND RAM *v.* ALI MUHAMMAD. **79 I. C. 84 : A. I. R. 1925 Lah 99.**

———*Shamilat land — Not accessory to Khewat holdings.*

The *Shamilat* lands are not accessories to the Khewat holdings. (*Broadway and Zafar Ali, JJ.*) ZAIDA *v.* RAJA. **A. I. R. 1923 Lah. 350.**

———*Shamilat land—What is—Share of joint holding.*

Land which belongs to the whole village or a *taraf* is shamilat, but not the land jointly held by one against a small number of proprietors. Therefore, the words *mai hissa shamilat* in a sale-deed do not include the share in the joint holding. (*Chevis, J.*) BASKAT RAM *v.* IMAM DIN. **3 Lah. L. J. 451.**

———*Shamilat land — Gift of land—Right in shamilat created afterwards—Effect.*

Where the deed of gift did not convey rights in the shamilat to the donee there being no shamilat in existence on the date of the gift but rights in sham lat being created afterwards, all the proprietors including the donee become entitled to it proportionately to their proprietary holding (*Martineau, J.*) AHMAD YAR *v.* MAHOMED ALI. **3 Lah L. J. 445.**

———*Shamilat land—Not accessory to khata.*

Rights in the *shamilat* of a village are not accessory to the land held by a proprietor and a sale of the latter does not convey the *shamilat* rights unless there is an intention to the contrary. (*Raoof and Moti Sagar, JJ.*) SHANKAR DAS *v.* MALI. **63 I. C. 746 (2) (L).**

———*Suit against co-sharer for injunction for removal of encroachment on common land—Plaintiff should prove encroachment was within 6 years from suit.*

CO-SHARER—Suit for possession.

In a suit for perpetual injunction directing the defendants to remove an encroachment made on common land, it is for the plaintiff to prove that the encroachment was made within six years before suit and mere surmise by the Court that the encroachment was recent is insufficient for holding that it took place within six years. (*Jai Lal, J.*) CHANDU *v.* GAJJU. **26 Punj L. R. 283 : 7 Lah. L. J. 228 : 88 I. C. 176 : A. I. R. 1925 Lah. 455.**

Suit for possession.

———*Suit for possession—Defendants in peaceful possession of lands as khudkasht—Joint possession need not be decreed.*

Where a party is entitled to joint possession, he should be granted the relief, and, to entitle him to it, it is not necessary that he should have been in possession before and should have been dispossessed later on, (34 All. 150 Foll.) But in certain cases a Court would be entitled to refuse a decree for joint possession. 18 Cal. 10 and (1894) A. W. N. 127 Foll. Where the defendants had been in peaceful possession of the lands as their khudkasht for well-nigh twelve years before the suit for joint possession was instituted. *Held*, that a decree for joint possession need not be granted. *Held*, further that having regard to the peculiar nature of the people of the District concerned, a decree for joint possession would be inexpedient. 8 A. L. J. 312 Dist. It is no doubt the case that the Code of Civil Procedure as it was enacted in 1882 did not provide for the execution of a decree for joint possession and the Code of 1908 does provide a mode as to how a decree for joint possession is to be executed. But from this, it does not follow that in every case where there are joint claimants and joint owners it is the duty of the Court to grant a decree for joint possession. (*Mukerji, J.*) GAJRAJ-SINGH *v.* RAM ANJORE SINGH. **87 I. C. 59 : A. I. R. 1925 All. 668.**

———*Suit for possession—Ejectment—Excessive—Occupation by one sharer—Remedy is—Partition.*

Where a plaintiff co-sharer, sued for joint possession with the defendant another co-sharer, on the ground that the latter was in occupation of an excess area and it was found that the defendant had been in possession for a very long time, *Held*, that the plaintiff could have sued for partition or profits and that he need not be put in joint possession. (*Neave, J.*) AMBIKA PRASAD SINGH *v.* RAM KISHAN **L. R. 5 A. 185 (Rev) : A. I. R 1924 All. 923.**

———*Suit for possession—Mutual arrangement to possess separately alone will support suit for separate possession ; otherwise the remedy is by partition suit.*

A co-sharer cannot maintain a suit for recovering possession of a specific portion of the property where he is not able to prove the existence of a mutual arrangement among the co-sharers by which they are to be in possession of separate portions of the property. In such a case the dispossessed co-sharer's remedy lies by way of suit for partition (*Mukerji, J.*) EKABBAR ALI SHAH *v.* SHAIKH KON ALI. **82 I. C 31 : A. I. R. 1925 Cal. 272.**

———*Suit for possession—One can sue to eject trespasser.*

One co-owner can sue to eject a trespasser and the suit is not bad for non-joinder provided the plaintiff does not deny the other co-owner's right. (*Krishnan and Ramesam, JJ.*) P. THIMMAYYA *v.* P. SIDDAPPA. **75 I. C. 112 : A. I. R. 1925 Mad. 63.**

CO SHARER—Suit for possession.

———*Suit for possession—Suit for profits without a relief for possession—Maintainability.*

Where one co-sharer stated in his plaint "accordingly 25 acres of home farm and of the izara was to be partitioned, but defendant No. I did not partition the same and wrongly cultivated it and enjoyed the produce thereof, and accordingly, the defendants should have paid the amount to the plaintiffs' share to them, but they did not pay it and wrongfully appropriated it to themselves." *Held*, the suit is in substance one by a person claiming to be a joint owner against the managing proprietor for his share of the village profits; that in the passage quoted above the plaintiffs mean to assert that the defendant I refused to effect a partition and put the plaintiffs in possession of their share and withheld their share of the profits which he had no right to do and that the suit is maintainable without a relief of possession. (*Kotwal, A. J. C.*) BHAGIRATHIBAI *v.* KESHEO GANPATRAO. **A. I. R 1923 Nag. 229.**

———*Suit for possession.*

One of the co-owners can maintain a suit for possession and other co-owners are not necessary parties. (*Rupchand Bilaram, A. J. C.*) MAHOMED FARUG *v.* SIDIK. **79 I. C. 59 : A. I. R. 1925 Sind 36.**

Suit for rent.

———*Suit by one for rent of entire holding—If maintainable.*

One co-sharer has a right to bring a suit for the entire rent of the holding by making the other co-sharers parties and then ask for his share of the rent allotted to him. So far as the tenants are concerned they are liable to pay rent for the entire holding to the persons who have got the superior interest. (*Suhrawardy and Duval, JJ.*) MOHINI MOHAN SAHA CHOUDHURY *v.* MEAJAN. **90 I. C. 673.**

———*Suit for rent by a co-sharer can't be changed into one for apportionment of rent—All co-sharers and tenants are necessary parties in suit for apportionment.*

A simple suit for rent cannot be converted into a suit for apportionment of rent. A suit for apportionment of rent should be properly framed so as to implead all the co-sharers and the tenants who are necessary parties. A co-sharer cannot as a matter of right, claim from the tenants what he estimates to be his proportionate share of the rent. (5 Cal. 902 ; 27 C. L. J. 438, *Ref.* (*Suhrawardy and Chotzner, JJ.*) KAMALESH RAY *v.* DWARIKANATH KOTAL.
28 C. W. N. 967 : 83 I. C. 931 : A. I. R 1925 Cal. 197 (1).

———*Suit for rent—Suit against tenant for assessment—All co-sharers must join.*

A suit by a co-sharer landlord for an assessment of the rent of a tenant's holding is not maintainable where the other co-sharers have not been made parties either as plaintiffs or defendants. (*Das and Adami, JJ.*) PARTAP MAHTON *v.* MT. WAZIR-UN-NISSA.
4 Pat. 604: 6 P. L. T. 367: 88 I. C. 687: 1925 P. H. C. C. 125: A. I. R. 1925 Pat. 559.

Who is.

———*Who is—Death of a joint tenant does not benefit the zamindar, bub surviving joint tenant takes the whole.*

In case of joint tenancies, if a joint tenant dies without any heir-at-law, his interests survives to the surviving joint tenant. The surviving joint tenant does not lose his right in half the tenancy. Holdings cannot be divided in that way. The death of a joint tenant without heirs does not in any way benefit the zamindar, but the surviving tenant still remains a tenant of the whole holdings. (*Sulaiman, J.*) RAJARAM DHUR DUBE *v.* JADUNANDAN DHUR DUBE.
L. R. 6 All. 196 (Rev) : 88 I. C. 539: A. I. R. 1925 All. 758.

———*Who is—Proprietor—Distinction between*

A person may be proprietor in a *mahal* without being a co-sharer. To be ranked as a co-sharer, he must have a specific fractional share in the *mahal*. (*Sulaiman and Kanhaiya Lal, JJ.*) IMDAD HUSAIN *v.* HAIDER BEG. **82 I. C. 196: A. I. R. 1925 All. 135.**

———*Who is—Right to use of water—Does not make a man a co-sharer.*

The plaintiff's right to use the water on the defendant's land does not make him a co-sharer in the land itself nor is the defendant's title to the land affected thereby.(*Shadi Lal and Wilberforce, JJ.*) (SADAMAN *v.* LAKKU. **4 Lah. L. J. 514.**

COSTS.

See (1) C. P. CODE, S. 35.
(2) PRACTICE.

———*Fatal Accidents Act—Damages awarded—Scale of costs.*

In an action under the Fatal Accidents Act, where damages are awarded the costs of the action should be taxed as between attorney and client as otherwise a considerable sum will be deducted out of the damages awarded. 7 B. H. C. R 113 : 2 C. W. N. 609, Foll. (*Page, J.*) NANI BALA SEN *v.* BUCKLAND JUTE CO., LTD. **52 C. 602 : 89 I. C. 679 : A. I. R. 1925 Cal. 893.**

———*Mortgage suit—Rate of interest alone challenged—If an undefended suit—Pleader's fees.*

In a mortgage suit, the mortgagor admitted the execution of the deed and the consideration therefor, but objected to the rate of interest. *Held*, though the amount in dispute was very small when compared with the mortgage sum due, it was not an undefended suit for the purpose of calculating pleader's fees. (*Baker, J. C.*) MAHOMED ABDUL SATTAR *v.* KONDIBA. **89 I. C 119.**

———*Stay of execution.*

Execution of costs awarded by the Court below is not generally stayed except in cases where it is abundantly clear that there will be no chance of recovering it in case of a success in the appeal. (*Miller, C. J. and Macpherson, J.*) KESHUB PRASAD SINGH *v.* HARIHAR PRASAD SINGH. **90 I. C. 703.**

CO-TENANCY. *See* CO-SHARER.

CO-TENANT. *See* CO-SHARER.

CO-TRUSTEE. *See* TRUSTS ACT.

COTTON DUTIES ACT (II OF 1896).

———**S. 25, cl. 9**—*Wilful obstruction does not require any overt act.*

The Inspector of Cotton Excise wanted access to the godown of the accused's mill for inspection of the goods or account books. The godown was locked. The requisition of the complainant to have it opened was not complied with. It was not suggested in the case that the accused had not the necessary control over the key and that he was not in a position to open the godown if he was minded to do so. *Held*, under these circumstances if the accused refused to open the godown he undoubtedly caused an obstruction to the free access to this godown to which the complainant was entitled. It does not matter as to what the object of the complainant was in asking the accused to open the godown. Obstruction is caused no less because the purpose for which it was wanted is not established as alleged by the complainant. (*Shah, A. C J. and Fawcett, J.*) MUKUNDLAL BANSILAL *v.* EMPEROR.

COUNSEL.

26 Bom. L. R. 721 : A. I. R. 1924 Bom. 492

COUNSEL.

See (1) LEGAL PRACTITIONER.
(2) PRACTICE.

COUNSEL'S FEES. *See* LEGAL PRACTITIONER.

COUNTER-CLAIM. *See* CIV. PRO. CODE, O. 8.

COUNTERFEITING COIN. *See* PENAL CODE, S. 232.

——— **Trade Mark.** *See* PENAL CODE, S. 482.

COUNTER PART.

See (1) LEASE.
(2) EVIDENCE ACT, S. 65.

CO-URALANS. *See* MALABAR LAW.

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See also (1) CIV. PRO. CODE, SS. 9 AND 20.
(2) PRACTICE.
(3) JURISDICTION.

———*Calcutta Improvement Tribunal—If a Court.*

The President of the Calcutta Improvement Tribunal is a Civil Court having power to make an order for costs and an inherent power to execute such order for costs made by him (*Chatterjea and Chotzner, JJ.*) BATA KRISTO *v.* A. K. ROY. **65 I. C. 177 : 26 C. W. N. 30.**

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——— **Conditional Decree.**

See (1) COURT FEES ACT, S. 7 (iv) (*c*).
(2) Do. SCH. I, ART. 1.
(3) Do. SCH. II, ART. 17 (vi).
(4) Do. S. 7 (ix).

——— **Execution Orders.**

See also (1) COURT FEES ACT, SCH. I, ART. 1.
(2) Do. SCH. II, ART. 11.

——— **Insufficient Court-Fee.** *See* COURT-FEES ACT, S. 12.

——— **Pauper.** *See* C. P. CODE, O. 33, R. 7.

——— **Reduction.** *See* COURT-FEES ACT, S. 10.

———*Deficiency can't be ordered to be made up after dismissal of appeal.*

Where the Court after dismissing an appeal proceeded to order the appellant to make up a deficiency discovered in the Court-fees on the appeal. *Held*, that the Court had no power to do this and having dismissed the appeal the Court was *functus officio* (*Martineau, J.*) ABDULLAH *v.* SECRETARY OF STATE. **82 I. C. 588 : A. I. R. 1925 Lah. 131 (1).**

———*Pre-emption suit—Market value of the property.*

Where in a pre-emption suit Court-fee is to be paid on the market value of the property sold the value of the suit should be determined with reference to what the value was on the date of the sale and not on the date of the institution of the suit. (*Scott-Smith, J.*) SHER MAHAMAD *v.* AHMAD SAID. **A. I. R. 1924 Lah. 380.**

———*Partition suit—Appeal relating to certain items.*

Where the memorandum of appeal from the final decree in a partition suit attacks various items allowed or disallowed in the final decree, *ad valorem* court-fee should be paid on the items. (*Broadway and Martineau, JJ.*) MUHAMMAD MAJID ULLAH KHAN *v.* MUHAMMAD HAMID ULLAH KHAN. **A. I. R. 1924 Lah. 325.**

———*Decree passed against one of several defendants—Appeal so as to make other defendants liable.*

In a suit for recovery of money brought against several persons the trial Court passed a decree against one of them. The plaintiff preferred an appeal so as to make the other defendants jointly liable for the decree amount. On a question arising as to the

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amount of Court-fee payable on the memorandum of appeal, *held*, that *ad valorem* Court-fee ought to be paid. 86 P. R. 1912 followed. (*Shadi Lal, C. J. and Abdul Qadir, J.*) RAM KISHEN *v.* HARDE RAM. **A. I. R. 1923 Lah. 135.**

———*Greater conditional relief decreed—Lesser amount claimed on payment of.*

A claim for being given a smaller share on payment of proportionately lesser amount cannot be valued. (*Scott-Smith and Brasher, JJ.*) ALI AKBAR *v.* SULTAN-UL-MULK **A. I. R. 1923 Lah. 129.**

———*Suit for possession—Decree on condition of paying a certain sum—Appeal.*

Where in a suit for possession a decree is passed on condition of the plaintiff paying a certain sum of money to the defendants as in a redemption suit and the plaintiff appeals against that liability, he must pay *ad valorem* court-fee thereon. 59 I. C. 667 Rel. (*Abdul Raoof and Harrison, JJ.*) TIKKAN RAM *v.* BOSA RAM. **4 U. P. L. R. (Lah.) 77 : A. I. R. 1922 Lah. 440.**

———*Appeal—Rejection of plaint for non payment of court-fee—Extension of time.*

An order rejecting a plaint for non-payment of extra Court-fee amounts to a decree, and the memorandum of appeal from that decree must bear an *ad valorem* Court-fee. Where a memorandum of appeal was presented bearing a Court-fee label of Rs. 2 and it was pointed out to the appellant that the document was insufficiently stamped and the memorandum of appeal was consequently returned to him, but he refiled it without making up the deficiency in the Court-fee. *Held*, that no valid memorandum of appeal was presented within the period of limitation prescribed for the appeal, and that no adequate ground for the extension of the period has been established. (*Shadi Lal, C. J. and Wilberforce, J.*) SHAHU *v.* BAKRI. **67 I. C. 901 : 3 L. L. J. 237.**

———*Pauper—Appeal—In forma pauperis—Court-fee payable to Government—Order directing same to be made equally, when made.*

The plaintiff filed a suit *in forma pauperis* He then filed an appeal *in forma pauperis*. *Held*, in the circumstances of the case the Court-fee payable to the Government was directed to be paid by the plaintiff and defendant in equal moieties. (*Venkatasubba Rao and Srinivasa Aiyangar, JJ.*) BALAMANI AMMAL *v.* RAMA AIYAR. **(1925) M. W. N. 163 : 21 L. W. 528 : A. I. R. 1925 Mad. 786 : 48 M. L. J. 273.**

———*Crown debt—Priority.*

Court-fees form a Crown debt and the Crown is entitled to precedence in payment of this debt over all creditors. (*Jackson, J.*) THE COLLECTOR OF KRISHNA *v.* GAJJALA SREERAMAMOORTY. **80 I. C. 935 (1) · A. I. R. 1925 Mad. 433.**

———*Memorandum of appeal—Valuation.*

If the appeal in a suit for accounts is from the whole decree the appellant is bound by the plaintiff's valuation in the plaint. (*Spencer, J.*) DAMODAR PADHAND *v.* HARIBHANDHU PATNAICK. **(1921) M. W. N. 558 : 70 I. C. 392 : 14 L. W. 389.**

———*Cross-objections—Subject-matter incapable of money valuation—Reasonable valuation.*

Where the subject-matter of certain cross-objections cannot be valued in money the Court should accept any reasonable valuation put by the appellant. (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) REJEO LOCHAN MAHARAJ *v.* RAM MANOHAR PRASAD. **25 O. C. 275 : A. I. R. 1923 Oudh 44 (1).**

———*Can be claimed on relief apparently claimed.*

The question of Court-fee has to be decided with

reference to the claim. The Court cannot insist on Court-fee on consequential relief not actually asked on the ground that the plaintiff has cast the reliefs in such a form as to conceal the real nature of the relief, though if consequential relief is not asked when it could have been asked, the suit may be dismissed. (*Das, J.*) NARAYAN SINGH *v.* NAWAB SAIYID DILDAR ALI KHAN. **3 Pat. 915 : 80 I. C. 644 : 6 P. L. T. 191 : A. I. R. 1925 Pat 210.**

———*Alternative reliefs.*

Where out of two reliefs which are identical in actual money value, one requires a higher Court-fee, the Court-fee is payable on the relief requiring the higher Court-fee. (*Das and Ross, JJ.*) DASARATE MESHY *v.* JAYCHAND SUTRADHAR. **78 I. C. 630 : A. I. R. 1925 Pat. 193 (2).**

———*Devolution of interest pending suit.*

The devolution of interest pending the suit can make no difference in the Court fee to be paid. (*Dass and Ross, JJ.*) HARIHAR PRASAD NARAIN DEO *v.* MAHESWARI PRASAD NARAIN DEO.

3 Pat. 604 : 82 I. C. 813 : A. I. R. 1925 Pat. 47.

———*Mesne profits—Appeal against decree bearing full court-fee—Dismissal—Subsequent ascertainment of mesne profits—Appeal—Fresh Court-fee if payable.*

Plaintiff brought a suit for possession and mesne profits, the claim for mesne profits being valued at Rs. 4,696-8-3. The suit was decreed for possession and it was directed that the amount of mesne profits should be ascertained. An appeal to the High Court bearing full Court-fee was filed but the appeal was dismissed. Then the mesne profits were ascertained to be Rs. 1,604-10-3. The defendant appealed to the District Court and preferred a second appeal in the High Court. *Held*, that the Court-fee on the mesne profits had in fact been paid already by the Court-fee on the original memorandum of appeal and that it need not be paid again a second time. 16 C. L. J. 564 Ref. (*Das and Ross, JJ.*) BABU RAM MANDER *v.* MAHARANI NAWLAKBHATI. **1924 P. H. C. C. 206 : 3 P. 815 : A. I. R. 1924 Pat. 694.**

———*Declaratory suit—Property in the custody of Court—Court-fee payable.*

The property was in the custody of the Court ; all that the plff. had to do was to establish his title to the property. Therefore, it is only necessary for him to file a suit for a declaration of his title to the property, but not for recovery of possession, it is enough if the court-fee is paid as in a declaratory suit. (*Das and Kulwant Sahay, JJ.*) SABURI PANDE *v.* RAM KHELAWAN PANDE. **A I. R. 1924 Pat. 380.**

———*Cross-objections—Mere criticism of judgment.*

Mere criticism of judgment cannot be filed as cross-objections. Where there is nothing in the decree to which objection or exception could be taken by a party in whose favour a suit is dismissed with costs, and he files some criticisms of the judgment as cross-objections, it should not be accepted by the office. Such a petition does not require any stamp at all. (*Roe, J.*) SAHDEO NARAIN DEO *v.* KUSUM KUMARI **1 P. 258: A. I. R. 1922 Pat. 483 (2).**

———*Contribution—Suit for declaration of right to.*

Where in a suit for a declaration that the plaintiff will be entitled to contribution from the defendant if and when occasion arose, the plaintiff had paid a Court fee of Rs. 10 only, *held*, the fee was correct. (*Das and Adami, JJ.*) S. RAFIQUDDIN *v.* ASGAR ALI. **1 P. 1 : 3 P. L. T. 793 : A. I. R 1922 Pat. 392.**

———*Mortgage suit—Interest between date of suit and decree—Appeal Court-fee, if payable on interest.*

Where the decree in a mortgage suit awarded the amount claimed in the plaint and also the interest from the date of the institution of the suit to the date of decree, *held*, in calculating Court-fees for purposes of appeal, the amount of interest awarded in addition to that claimed in the plaint should also be taken into consideration. 10 M L.J. 144 ; 13 Mad. 508 and 30 Cal. 516 Ref. to. (*Jwala Prasad, A. C. J. and Ross, J.*) JAMUNA RAI *v.* RAMTAHAL RAUT. **1 P. 19 : 3 P. L. T. 790: 77 I. C. 1039: A.I.R. 1922 Pat. 387 (2).**

———*Interest—Future interest—*Ex parte *decree—Appeal—Interest after period of grace.*

A decree-holder is as a matter of right entitled to interest at the rate of 6 per cent. per annum from the date of grace up to the date of realization. If no such interest is allowed and the decree-holder appeals, he is not liable to pay Court-fee on interest due in the interval between the expiry of the period of grace and the date of hearing of the appeal. 17 B. 41, Ref. (*Adami and Bucknill JJ.*)BHAGWATI PRASAD SINGH *v.* BISHNU PRAGASH NARAIN. **6 P. L. J. 676: 1922 P. H C. C. 73: 3 P. L. T. 310: A. I. R. 1922 Pat. 386.**

———*Deficiency of, on cross-objections in lower Court—No appeal relating thereto—High Court can levy.*

Where in the lower appellate Court there was a deficiency of Court-fee on a memorandum of cross-objections which was not noticed, the High Court has an inherent power to insist on the payment of the same, even though the appeal does not relate to the subject-matter of the memorandum of cross-objections in the lower Court. (*Miller, C. J. and Adami, J.*) RASIK BEHARI PRASAD *v.* HRIDOY NARAIN. **1922 P. H. C. C. 162: 3 P. L. T. 327: 1 P. 471: A. I. R. 1922 Pat. 284.**

———*Arbitration in pending suit—Moneys found due to defendant—Decree of Court—Defendant to pay Court-fee.*

Pending a suit, the disputes were referred to arbitration out of Court and it was found that money was payable to defendant. He applied for the award being recorded as an adjustment under O 23, R. 3, *Held*, the Court could direct the defendant to plead the award as an adjustment and claim the amount awarded, paying Court-fee thereon. (*Kennedy, J. C. and Aston, A. J. C.*) FIRM OF BOLMAL CHELLARAM *v.* JHAMANDAS KISHARAM. **18 S. L. R. 111 : 88 I. C. 61 (2): A.I.R. 1925 Sind 266.**

———*Determination of—Evidence.*

To decide if a suit has been valued properly for purposes of Court-fees evidence should be recorded on the point. An application for the appointment of a curator under Act XIX of 1841, which contains a description of the value of the property does not impose a corresponding obligation as to the stamp duties leviable on it, and hence is not a safe criterion as to the value of the property. A decision as to valuation based on it cannot be sustained. (*Fawcett, J C. and Raymond, A. J. C.*) RAMDAS *v.* AJUDHIADAS. **63 I. C. 685: 14 S. L. R. 137.**

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COURT FEES ACT, (VII of 1870)

———*New Act coming into force—Effect—Plaint returned for presentation to proper court—New Court Fees Act before actual presentation—Court fee payable.*

Where a plaint filed while the old Court Fees Act was in force was returned for presentation to proper court and before the actual presentation in the proper court the New Court Fees Act came into force, the Court Fee payable is under the new Act and the amount payable is the amount due under the new Act minus the amount that had been already paid. (*Newbould and Graham, JJ.*) BIMALA PROSAD MUKERJI *v.* LAL MONI DEVI. **30 C. W. N. 90.**

———*Alternative relief—Stamp on large relief.*

Where a plaintiff sues in the alternative for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp. (*Abdul Raoof, J.*) KUNDAN LAL *v.* ANUND SARUP. **A. I. R. 1923 Lah. 456.**

———Decree for possession on payment of money—Appeal—Relief prayed for possession without payment—Court-fee must be paid on amount directed to be paid. (*Scott-Smith, J.*) WADHAWA SINGH *v.* SUNDAR SINGH. **59 I. C. 667 : 21 P. W. R. 1921.**

———*Drafting is unscientific.*

The drafting of the Act is unscientific and its interpretation gives rise to considerable difficulty. (*Dawson Miller, C. J., Mullick, Jwala Prasad, Das and Foster, JJ.*) KRISHNA MOHAN SINHA *v.* RAGHUNANDAN PANDEY. **4 Pat. 336 : 1925 P. H. C. C. 65 : 87 I. C. 137 : 6 P. L. T. 262 : A. I. R. 1925 Pat. 392 (F. B.).**

———*Basis of taxation.*

Under the Act, it is the value of the property, in respect of which the grant of Probate or Letters of Administration is made that is taxed. The Court cannot consider what the value of the property would be, if it passes into the hands of an efficient manager well equipped with capital and energy. (*Das and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683 : 62 I. C. 513 : 6 P. L. J. 411.**

———*Fiscal enactment—Strict construction.*

The Court Fees Act is an Act dealing with purely fiscal matters, and the rule of construction adopted by the courts that statutes imposing pecuniary burden on the subject, must, in cases of doubt, be interpreted in favour of the subject, applies to the Act. (*Saunders, J. C.*) JAGANATH KAHAR *v.* EMPEROR. **23 Cr. L. J. 121 (1921) : 4 U. B. R. 72 : A. I. R. 1922 U. B. 14.**

———S. 4—*Letters Patent Appeal—No Court-fees.*

No Court-fees are leviable upon a petition of appeal under the Letters Patent of the Allahabad High Court from the judgment of a Single Judge. (*Tudball, J.*) BHADOOL PANDEY *v.* MANNI. **19 A. L. J. 677 : 44 A. 13 : 63 I. C. 318 : A. I. R. 1922 All. 164.**

———Ss. 4 and 28—*Memorandum of appeal—Omission to affix stamp.*

Where a memorandum of appeal is filed without a duly stamped decree appealed against, the appeal is

COURT FEES ACT (VII OF 1870), S. 5.

liable to be rejected, if the deficiency is not made up within the limitation period for filing an appeal. (*Scott Smith, J.*) SHAHADAT *v.* HUKAM SINGH. **A. I. R. 1924 Lah. 401.**

———S. 4—*Letters Patent Appeal—Court fee if payable on.*

S. 4 of the Court Fees Act is not applicable to a Letters Patent Appeal from the judgment of a single Judge of the High Court and no Court fee is leviable thereon except Rs. 2 prescribed for an application to the High Court. 44 A. 13 ; 65 I. C. 675, followed. (*Shadi Lal, C. J. and Abdul Qadir, J.*) HAR DIAL SHAH *v.* SECY. OF STATE FOR INDIA. **3 Lah. 420 : A. I. R. 1923 Lah. 275.**

———S. 4—*Suit transferred to High Court under Cl. 13 of the Letters Patent (Mad.)—Deficiency must be paid by plaintiff according to Court-fees Act.*

Suits below Rs. 1,000 in value do not come within Ss. 39 and 40 of the Presidency Small Cause Courts Act. The transfer of such suits to the High Court will be under powers vested in it under S. 13 of the Letters Patent, and the jurisdiction of the High Court to try such suits would be Extraordinary Original Jurisdiction conferred by the Letters Patent. (22 M. L. J. 187, Foll.) The High Court (Mad.) has framed no rules in respect of suits transferred under the Extraordinary Original Jurisdiction of the Court conferred either by S. 13 of the Letters Patent or S. 24 of the C. P. Code. In such cases the Court-fees Act would apply. The fees payable are the fees prescribed in the First and Second Schedules to the Act. Any deficiency, if payable, must be paid by the plaintiff. (*Kumaraswami Sastri, J.*) VARADARAJA MUDALIAR *v.* ARUMUGAM PILLAI. **22 L. W. 15 : A. I. R. 1925 Mad. 1216.**

———S. 4—*Applicability—Letters Patent appeal—Decision of single Judge.*

Where an appeal is filed under S. 10 of the Letters Patent (Patna) against a decision of a single Judge, S. 4 of the Court-fees Act cannot apply as it refers only to appeals against the judgment of two or more Judges or of a Division Court and as there is no provision under which court-fee is leviable, the appeal must be accepted without any court-fee. (*Coutts, J.*) RAGHUBAR SINGH *v.* JETHU MAHTON. **1 Pat. 384 : 3 Pat. L. T. 194 : 1922 P. H. C. C. 88 : A. I. R. 1922 Pat. 13 (1).**

———S. 5—*No reference made under S. 5—Court hearing appeal must decide question of insufficiency of Court-fee paid on memo. of appeal.*

Where there has been a reference to the Taxing Officer or the Taxing Judge, the question of insufficiency of the Court-fees as paid on the memorandum of appeal cannot be raised again at the time of the hearing of the appeal; for S. 5 of the Court-fees Act would clearly be a bar to any such re-consideration. But where no reference under S. 5 has been made at all the Court hearing the appeal must decide it. 37 Cal. 914, and 39 Mad. 725, Foll. (*Sulaiman and Boys, JJ.*) CHUNNI LAL *v.* SHEO CHARAN LAL.

COURT FEES ACT (VII OF 1870), S. 5.

47 All. 756 : 23 A. L. J. 725 : L. R. 6 A. Civ. 362 : 89 I. C. 122 : A. I. R. 1925 All. 787.

——S. 5—*Taxing Officer can decide as to deficiency of Court-fee on plaint or memo. of appeal in lower Courts.*

By S. 5 the power of the Court to decide disputed questions of Court-fee is vested in the Taxing Officer subject to his power to refer the matter to the Taxing Judge when a question of general importance arises. This authority extends to all such questions arising in the High Court, whether the deficiency alleged is on the memorandum of appeal in the High Court or on a plaint or memorandum of appeal filed in the Court below. (*Daniels, J.*) MT. BAHAL KUAR *v.* NARAIN SINGH. **22 A. L. J. 1038 : L. R. 6 A. Civ. 33 : 84 I. C. 822 : A. I. R. 1925 All. 184.**

——S. 5—*Jurisdiction of Taxing Officer—When arises—Difference of opinion between suitor and Court clerk not necessary—Object of section.*

The jurisdiction of the Taxing Officer does not arise like the jurisdiction of an arbitrator, upon a difference of opinion between a Court clerk and a suitor and upon some sort of formal reference to decide that dispute. The intention of S. 5 is merely to ensure that the question should be raised before the Taxing Officer, that he should bring his mind to bear on the question and that he should decide it. (*Sanderson, C. J. and Rankin, J.* IN THE GOODS OF BHUBANESWAR TRIGUNAIT. **52 C. 871 : 29 C. W. N. 879 : A. I. R. 1925 Cal. 1201.**

——Ss. 5 and 19-I—*Letters of Administration to the estate of deceased Hindu governed by Mitakshara—Duty payable—Taxing Officer's decision is final—Rules and orders of Calcutta High Court, Ch.* 35, *R.* 4.

A Hindu governed by the Mitakshara School of Hindu Law died intestate. His younger brother and his two sons applied for Letters of Administration. The deceased, at the time of his death, was a member and the karta of a joint Hindu family consisting of himself and the applicants. The deceased left certain amount in a bank. The applicants based their claim on the view that the deceased was a sole trustee, and they maintained that no sum was payable under Art. 11 of the First Schedule of the Court-fees Act. The applicants obtained a certificate from Taxing Officer within the meaning of S. 5 of the Court Fees Act, 1870, to the effect that "the fee prescribed by Art. 11 of Sch. I is not payable in this case, it appearing from the affidavit that the property mentioned therein was held by the deceased in his life-time not beneficially or with general power to confer a beneficial interest." The learned Judge before whom the application was laid for grant of Letters dismissed the application being of opinion that a fee under Art. 11 of Sch. I was chargeable. *Held* : the Taxing Officer's decision is a final decision under S. 5 and the Court had no authority to review it under S. 19-1. (*Sanderson, C. J. and Rankin, J.*) IN THE GOODS OF BHUBANESWAR TRIGUNATH. **29 C. W. N. 879 : A. I. R. 1925 Cal. 1201.**

——S. 5—*Appeal from Original Side of High Court—Dispute as to court-fee payable—Power of Judge to decide dispute—Madras High Court Rules, Original Side, Art.* 36.

It is competent to the Chief Justice of the High Court to refer a dispute between a suitor or his attorney and the Officer of the court as regards the court-fee payable on an appeal from an order of a single Judge on the Original Side, to the decision of a particular Judge of the High Court under S. 5 of the Court-fees Act. The Court fee payable on an appeal against a final order on a guardianship petition presented on the Original Side of the High Court is Rs. 100 under Art. 36 of App. II to the Madras High Court Original Side Rules. (*Coutts-Trotter, J.*) MAHOMED ISHACK SAHIB *v.* MAHOMED MOIDEEN. **(1922) M. W. N. 511 : 16 L. W. 210 : 45 M. 849 : A. I. R. 1922 Mad. 421: 43 M. L. J. 436.**

COURT FEES ACT (VII OF 1870), S. 7.

——S. 5—*Wrong assessment by Taxing officer—Remedy.*

The Court has no power or jurisdiction to interfere with the order passed by the Taxing officer which is final and against which there is no power of appeal, review or revision, even in a case where a Division Bench of the High Court decided that the order of the Taxing officer as to the court fee payable was wrong. The remedy of the party is to move the Board of Revenue to grant a refund. (*Adami and Sen, JJ.*) HITENDRA SINGH *v.* MAHARAJADHIRAJ OF DARBHANGA. **(1925) P. H.C. C. 359.**

——S. 5—*Valuation of subject-matter— Taxing officer has jurisdiction—He should take evidence.*

Per *Curiem*, (*Das, J. dissenting*) :—The Taxing Officer or Taxing Judge, as the case may be, is under S. 5, the proper person to determine the fee payable on a memorandum of appeal presented to the High Court and for this purpose, he may investigate the question of the proper valuation of the subject-matter of the appeal. It is essentially desirable that the Taxing Officer in determining questions of valuation should not as a rule base his decision merely upon allegations in the plaint as to the annual profits of the property to be valued. In order to arrive at a proper decision on such a question, the parties should be called upon to produce in such manner as may be convenient such documentary or other evidence as they may be prepared to tender to enable the Taxing Officer to decide the question. Per *Jwala Prasad, J.*, (*Semble.*)—The non-observance by the Taxing Officer of such precautions will detract from the finality of his decision. (*Dawson Miller, C. J. Mullick, Jwala Prasad, Das, and Foster, JJ.*) KRISHNA MOHAN SINGH *v.* RAGHUNANDAN PANDEY. **4 Pat. 336 : 87 I. C. 137 : 1925 P. H. C. C. 65 : 6 P. L. T. 262 : A. I. R. 1925 Pat. 392 (F. B.).**

——S. 5—*Decision of Taxing Officer—Finality of.*

The Bench hearing an appeal will not interfere with fees taxed on memorandum of appeal even by the Taxing Officer, even though it is done wrongly. (*Mullick and Bucknill, JJ.*) SHEOPUJAN RAI *v.* KESHO PRASAD SINGH. **2 Pat. 919 : 5 Pat. L. T. 315 : A. I. R. 1924 Pat. 310.**

——S. 5—*Taxing Judge if can refer to Bench.*

It is not proper for a Judge to whom a Court-fee matter is referred, under S. 5 of the Court Fees Act to refer the matter to a Bench. (*Jwala Prasad, J.*) KULDIP SAHAY *v.* HARIHAR PRASAD. **3 Pat. 146 : 4 Pat. L T. 638 : A. I. R. 1924 Pat. 161.**

——S. 5—*Decision of Taxing Officer-Finality of.*

Under S. 5 of the Court Fees Act, the Taxing Officer has jurisdiction to fix the amount of fee payable, and if he decides that the valuation put by the appellants upon the relief was incorrect, he can correct it. Even if he has done anything not expressly allowed by law, the Court Fees Act gives the High Court no power to interfere with his decision as to the amount of fee. (*Miller, C. J. and Mullick, J.*) RAM SEKHAR PRASAD SINGH *v* SHEONANDAN DABEY. **1922 P. H. C. C. 337 : 2 Pat. 198 : 4 Pat. L. T. 71 : 1 Pat. L. R. 25 : A. I. R. 1923 Pat. 137.**

——S. 7—*Value in plaint determines forum of*

COURT FEES ACT (VII OF 1870). S. 7.

appeal—Suits Valuation Act, S. 8.

In order to determine the proper appellate Court what has to be looked at is the value of the original suit, *i.e.*, the amount or value of the subject matter of the suit. The word "value" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court unless it appears that, either purposely or through gross negligence, the true value has been altogether misrepresented by the plaintiff. 32 All. 22. ; 34 al. 954 Dissented from. (*Lindsay and Kanhaiya Lal, JJ.*) MUHAMMAD ABDUL MAJID *v.* ALA BUX. **23 A. L. J. 216 : 86 I. C. 1055 : 47 All. 534 : A. I R. 1925 All. 376.**

——S. 7—*Suit for setting aside sale—Valuation.*

A suit for setting aside a sale under the Bengal Public Demand Recovery Act should be valued for purposes of jurisdiction and Court fee at the value of the whole property sold. (*Walmsley and Suhrawardy JJ.*) PRAN KRISHNA GHARAI *v.* NITYA GOPAL MAITI. **50 Cal. 892 : A. I. R. 1924 Cal. 239.**

——S. 7 and Sch. I, Art. 1—*Suit for redemption of kanom—Decree for redemption subject to payment of the value of improvements to the kanomdar—Appeal against the decree for value of improvements—Court-fee payable.*

In a suit for redemption of kanom, the plaintiff obtained a decree subject to payment of the value of improvements. The plaintiff appealed against the value allowed for improvements. *Held*, that the Court fee payable on the appeal must be determined in accordance with the value of the improvements which the appellant seeks to avoid. (*Phillips and Ramesam, JJ.*) TIRUVANGADATH NELYOTON PAIDAL NAYAR *v.* EMPEROR. **92 I. C. 624 : (1926) M. W. N. 169 (2) : A. I. R. 1926 Mad. 225.**

——S. 7—*Substance of claim must be looked to.*

The application of any particular clause of S. 7 must depend on the substance of the claim and not on the mere words used in the plaint. (*Odgers, J.*) ALAGUR AIYANGAR *v.* SRINIVASA AIYANGAR. **22 L. W. 515 : (1925) M. W. N. 777 : A. I. R. 1925 Mad. 1248.**

——S. 7—*Redemption—Larger amount claimed in appeal than allowed by decree—Court fee is payable on the difference.*

Mortgagee in appeal claiming a larger amount than that awarded by the decree of the lower Court allowing redemption, must pay *ad valorem* fee on his memo. of appeal calculated on the difference between the amount found due by the lower Court and that claimed by him in appeal. 1922 Oudh 82, Foll. (*Wazir Hasan, A. J. C.*) SANT BAKSH *v.* DILDAR HUSSAIN. **74 I. C. 88 : A. I. R. 1924 Oudh 170.**

——Ss. 7 and 17—"*Subject*" *meaning of—Suit embracing two or three distinct subjects—Court-fees payable on the aggregate and not on each separately.*

In a suit for possession of land with mesne profits and a *maikhana* claim, plaintiff had valued each of the items separately. *Held*, he was liable to pay Court-fee only on the aggregate amount and not on each item separately, as that was the established practice in Bengal from 1882. The word "subject" in S. 17 means cause of action and is not to be interpreted with reference to S. 7. (*Chapman and Atkinson, JJ.*) NAURATAN LAL *v.* WILFORD JOSEPH STEPHENSON. **1922 P. H. C C. 79 : A. I. R. 1922 Pat. 359.**

——Ss. 7 (1), 4 (e) and 11 (b)—*Suit for declaration of plaintiffs' liability to make a smaller periodical payment than that claimed by deft.—Valuation for purposes of court-fees and jurisdiction.*

COURT FEES ACT (VII OF 1870), S. 7.

A suit for a declaration that the plaintiff is liable to pay *achu palasha* (a kind of royalty payable to a hill owner) only at the rate of 150 seers of paddy per annum and not at the rate of 459 and odd seers as claimed by the defendant, does not fall under S. 7, cl. (1) or S. 4, cl. (*e*). or S. 11, cl. (*b*) of the Court Fees Act. The suit is one for a declaratory decree without any consequential relief, and its jurisdictional value cannot be higher than the value of the subject-matter in dispute between the parties. The subject-matter in dispute is the difference between what the plaintiff admits to be the proper rate and the rate alleged to be claimed by the defendant. The declaration which the plaintiff seeks, if allowed, would relieve him from the liability to pay the difference between these two sums for all time, and therefore in estimating the value of the subject-matter in dispute the Court must take the capitalised value of that right. (*Krishnan and Waller, JJ.*) KARAKKATTIDATHIL KYRAPPAN NAMBIYAR *v.* CHATHU KUTTI NAMBIYAR. **34 M. L. T. 271 : 19 L. W. 668 : 79 I. C. 343 : A. I. R. 1925 Mad. 621 : 46 M. L. J. 377.**

——S. 7 (1)—*Valuation of plaint for money decree.*

The valuation of a plaint in which a money decree is claimed is based on the actual sum claimed after allowing for deductions, such as sums expressly set-off in the plaint. (*Lentaigne, J.*) D. S. ABRAHAM & CO. *v.* IBRAHIM GORABHOY. **2 Rang. 462 : 84 I. C. 971 : A. I. R. 1925 Rang. 65.**

——S. 7 (1), Sch. I, Art. 1—*Suit for balance due on commission agency account is a suit for money.*

A suit for the balance due on a commission agency account is a money suit under S. 7 (1) of the Court Fees Act ; the amount of Court fee payable for an appeal against the preliminary decree in such a suit will be according to Sch. I, Art. 1 of the Act. (*Fawcett, J. C. and Kemp, A. J. C.*) RAI BAHADUR HARIJIMAL *v.* DHANPATAL DEWAN CHAND. **64 I. C. 626 : 15 S. L. R. 82.**

——S. 7 (iv)—*C. P. Code, O. 7, R. 11—Court can fix proper value if plaintiff's valuation is arbitrary—But no revision lies from Court's decision—C. P. Code, S. 115.*

The Court is empowered under the law to revise the valuation put by the plaintiff and if on such revision, it is of opinion that the valuation is insufficient or arbitrarily low, it has jurisdiction to fix the proper value. But where a Court determines the valuation according to its judgment or holds that plaintiff's valuation is correct, it does not commit such an error of law as to entitle the High Court to interfere under S. 115, C. P. Code. (*Suhrawardy and Duval, JJ.*) G. M. FALKNER *v.* MIRZA MAHOMED SYED ALI. **86 I. C. 853 : 29 C. W. N. 627: A. I. R. 1925 Cal. 814.**

——S. 7 (iv)—*Suit for separate possession—Mahomedan co-sharer.*

Where a Mahomedan co-sharer sues the other co-sharers for partition and possession of her share of her father's properties, alleging she is in possession of some items indicating a joint possession in law, the suit falls under Sch. II, Art. 17 (vi) of the Court-Fees Act. (*Krishnan, J.*) KURSHIT KATHUM *v.* HYDER KHAN SAHIB. **(1923) M. W. N. 564 (2) : A. I. R. 1924 Mad. 207.**

——S. 7 (iv)—*Joint family property—Possession in the name of various members—Court-fee payable.*

Court-fee is payable on the footing of the plaint and not on what is afterwards decided by the court. In a suit for partition of joint family property standing in the possession and names of various members,

no *ad valorem* court-fee is payable. (*Das and Ross, JJ*) BASUKI BEHARY PANDEY *v.* CHATTER PANDEY. **5 Pat L. T. 655 : 79 I. C. 913 : 1924 P H. C. C. 210 : A. I. R 1924 Pat. 640.**

——S. 7 (iv)—*Partition suits—Jurisdiction and Court Fees.*

There is a distinction between suits for partition pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title of share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case it is the value of the plaintiff's share which will determine jurisdiction of the Court and not the value of the entire property. Where there is no question as regards the title of the plaintiffs and the only question before the Court is as regards partition, the value of the whole of the properties sought to be partitioned must be the value for the purpose of jurisdiction. 1 P. L. T. 595 Dist. (*Das and Kulwant Sahay, JJ.*) RANJIT SAHI *v.* MAULAVI QASIM. **2 P. 432 : 4 P. L. T. 257 : A. I. R. 1923 Pat. 342.**

——S. 7 (iv)—*Valuation—Nature of -Binding on appeal.*

The valuation which a plaintiff is allowed to put under S. 7 (iv) of the Court Fees Act should not be arbitrary or fanciful, and is binding on all parties including the plaintiff when an appeal is preferred. (*Kennedy, J. C. and Aston, A. J. C.*) DIPCHAND DOWLATRAM *v.* FIRM OF PERMANAND CHIMANDAS. **79 I. C. 582 : 16 S. L. R. 273.**

——S. 7 (iv) (a) and (x) (a)—*Specific performance of contract—Suit by plaintiff for return of a sale deed or for execution of a fresh sale-deed and its registration—Court-fee payable.*

In pursuance of a contract for sale of a shop defendant executed a sale-deed and gave it to the Sub-Registrar for registration. The document was returned to the defendant and in the absence of the plaintiff (the vendee) the defendant sold the shop to a third person. Subsequently plaintiff brought a suit for return of the original sale-deed or in the alternative for the execution of a fresh sale-deed and for its registration. Plff. valued the suit under S. 7 (iv) (*a*) of the Court Fees Act and on the relief for registration paid a court-fee of Rs. 10 under Sch. II, Art. 17 (vi) of the Act. *Held*, that the suit was one for specific performance of a contract of sale and court-fee was payable under S. 7 (*a*) (*b*) of the Court Fees Act according to the amount of consideration. The absence of a prayer for possession was immaterial. (*Scott-Smith and Fforde, JJ.*) FAKIR CHAND *v.* RAM DATT. **5 Lah. 75 : 80 I. C. 953 : A. I. R. 1924 Lah. 439.**

——S. 7 (iv) (a)—*Sale deed—Suit by vendee to set aside and to recover portion of purchase money—Damages—Court-fee on plaint.*

The appellant purchased some property for Rs. 2,000 under a sale deed executed by the defendant and paid him Rs. 1,000 in cash and executed in favour of the defendant and his minor sons a mortgage deed for the balance of consideration for the sale. In a suit brought by her (appellant) alleging that the defendant had played a fraud on her by suppressing important facts and praying for declaration that the sale deed and the mortgage deed were invalid and for the return of the Rs. 1,000 paid by her and for Rs. 300 as damages, *held*, that the substantial relief asked for by the plaintiff was the cancellation of the sale deed, the claim for money being only ancillary to it, and that Court-fee on Rs 2300 should be paid by her. The property having actually passed by the sale deed from the defendant to the plaintiff, she could not claim the amount paid by her without setting aside the sale. (*Devadoss and Wallace, JJ.*) LAKSHMI AMMAL *In re* : **(1925) M. W. N. 826 : A. I. R. 1926 Mad. 96 : 49 M. L. J. 608.**

——S. 7 (iv) (a)—*Hindu Law—Joint Family—Suit by sons to have it declared that father's alienation as their guardian is invalid and for partition and possession of their share.*

The father of a joint Hindu family made certain alienations as guardian of his minor sons. The sons brought a suit for a declaration that the alienations were not binding on them and for partition and possession of their share in all the properties. *Held* that as the alienations were made by the father not only as the manager of a joint Hindu family but also as their guardian, the minors appear as parties to the alienations which are *prima facie* binding on them, and consequently the plaint must be construed as one for cancellation or avoidance of the alienations to which the minors are parties and court fee is payable under S. 7 (4) (a) on the amount or value of the property for which the documents of alienation were executed. (*Odgers, J.*) ALAGAR AIYANGAR *v.* SRINIVASA AIYANGAR. **22 L. W. 515 : (1925) M. W. N. 777: A. I. R. 1925 : Mad. 1248.**

——S. 7 (iv) (b)

See also COURT FEES ACT (1) SCH. I, ART. 1.
(2) SCH. II, ART. 17 (iii) and (vi).

——S. 7 (iv) (b)—*Suit to enforce right to share in joint family—Court fee.*

S. 7 (4) (*b*) is applicable to a suit to enforce a right to a share in any joint family property. (*Chevis and Scott-Smith, JJ*) DWARKA DAS *v.* KRISHAN KISHORE. **2 Lah. 114 : 61 I. C. 628 : 3 L. L. J 349.**

——S. 7, iv (b)—*Suit not on basis of plaintiff's ouster—Clause applies.*

Where there is no ouster by the defendants of the plaintiff from the joint possession of the joint family property, S. 7, cl. 4 (b) applies to the case. The proper test to be applied to the case to see whether S. 7 cl. 4 (b) applies will be whether, if the plaint state of affairs continued for 12 years, the plaintiff would be barred from suing. Where the suit is on the footing that the right to share exists admittedly and has never been denied, and the plaintiff is merely suing to enforce that right to share, he could not be barred from suing if the plaint state of affairs continued for 12 years. A mere statement by the plaintiff in an affidavit filed more than a year after the plaint to the effect that he was out of the enjoyment of the profits of the property does not affect the question. (*Wallace, J.*) P. M. RAMAKRISHNA AIYAR *v.* MUTHUSWAMY IYER. **86 I. C. 627 : 21 L. W. 207 : A. I. R. 1925 Mad. 468.**

——S. 7 (iv) (b)—*Suit for partition—Right to share disputed right—Court-fee payable on.*

The valuation for the computation of court-fees in a suit for partition depends upon whether the relief sought is merely a change in the mode of enjoyment of the property or the enforcement of a disputed right. In the present case the plaintiffs alleged a partial partition and they claimed partition of that part of the family property, including certain moveables, which was kept joint at the partition. The defendants' case is that the plaintiffs have already separated and have been given their full shares and have no rights whatever in the property in suit, which is not available for partition. *Held*, this is a clear denial of the plaintiffs' right to share, and the present suit is a suit to enforce the right to share in the property on the ground that it is joint family property falling under

section 7, cl. (iv) (b) of the Court Fees Act. (*Baker, J. C.*) BHADDOO *v.* SADDOO.

20 N. L. R. 43 : 81 I. C. 766 : A. I. R. 1924 Nag. 86.

——S. 7 (iv) (b)—*Suit for partition—Allegation that family is joint—Court fee payable.*

Where the plaintiffs sued for partition alleging that the properties stood in the names of different members of the family and were in their possession on behalf of the family, *Held*, that the possession of one member of the family was the possession of all the members of the family, that the Court should decide the question of court-fee by reference to the allegations in the plaint and not by what is afterwards found by the Court and that the suit was properly stamped as a simple suit for partition. (*Das and Ross, JJ.*) BANKU BEHARY PANDE *v.* CHATUR PANDEY.

1924 P. H. C. C. 210: A. I. R. 1924 Pat. 640.

——S. 7 (iv) (b) and (v)—*Suit for partition—Prayer for declaration of title—Removal of cloud on title—Court fee.*

Where in a partition suit, the plaintiff distinctly prays for a declaration of his title to and confirmation of possession of certain land in order to disperse a cloud cast on his title by reason of an adverse entry in the Record-of-Rights, an *ad valorem* Court fee is payable on the value of the plaintiff's share in the land in respect of which the cloud is cast in addition to the fixed fee for partition. (*Dawson Miller, C. J. and Coutts, J.*) RACHHYA RAUT *v.* MUSAMMAT CHANDO. **6 Pat. L. J. 662 : 1922 P. H. C. C. 65 : 3 P. L. T. 293 : A. I. R. 1923 Pat. 113.**

——S. 7 (iv) (c).

See also (1) COURT-FEES ACT, SCH. I.
(2) SCH. II, ART. 17 (iii AND vi).

——S. 7 (iv) (c) and (d)—*Suit for declaring plaintiff to be rightful manager of trust properties and for injunction against defendants—S. 7 (iv) (c) applies though plaintiff is in possession of properties.*

The suit was brought by the plaintiff No. 3 with and on behalf of plaintiffs Nos. 1 and 2 who were idols *inter alia* for the following reliefs :—(*a*) It may be held that defendant has no power to supervise and manage the properties of plaintiffs Nos. 1 and 2 and it may be declared that the plaintiff No. 3 is the lawful manager of plaintiff Nos. 1 and 2. (*b*) The defendant may be restrained by means of a perpetual injunction from supervising and managing the property of the plaintiffs Nos 1 and 2 and from entering the property of the plaintiffs. The possession of the property by the plaintiff was not in dispute. *Held* : that the relief claimed was consequential and not merely an injunction and that S. 7 (iv) (c) and not S. 7 (iv) (d) applied to the case. (*Piggott, J.*) MANNI LAL *v.* RADHEY GOPALJI. **47 All. 501 : 23 A.L.J. 344 : L.R. 6 A (civ). 258 : 87 I C. 190 : A. I. R. 1925 All. 602.**

——S. 7 (iv) (c)—*Court fee must be levied on value of declaration of right plus that of the consequential relief.*

The "relief sought" on which the court fee must be levied, is the sum total of the two reliefs, *viz.*, declaration of right and consequential relief and not the consequential relief alone. 36 All. 500 Foll. (*Piggott, J.*) MANNI LAL *v* RADHEY GOPALJI.

47 All. 501 : 23 A.L.J. 344: L.R. 6 A (civ.) 258 : 87 I. C. 190 . A. I. R. 1925 All. 602.

——S. 7 (iv) (c)—*Declaration—Suit for—Consequential relief—Court-fee.*

The plaintiff alleging herself to be a certified guardian for the management of the estate of her husband, who she alleged, was a lunatic and who had executed a deed of gift in favour of the defendant asked for the following reliefs.

(*a*) To declare that the gift deed executed by her husband in favour of the defendant was void and that the defendant had acquired no interest in the property. (*b*) That actual possession of the lands specified in the gift be awarded to the plaintiff as manager on behalf of her lunatic husband ; and (*c*) that a sum of money realised by defendant under the gift be handed over to the plaintiff. *Held*, that the suit fell under S. 7 (iv) (*c*) of the Court Fees Act and court-fee was payable as in a suit for declaration with consequential relief. (*Daniels, J.*) MT. GANGA DEI *v.* SUKHDEO PRASAD. **L. R. 5 A. 618 : 22 A. L. J. 945 : A. I. R. 1924 All. 612.**

——S. 7 (iv) (c) and (v) (a) and (b)—*Suit to set aside alienation by father—Suit for declaration and possession—Valuation—Court-fee.*

Where a junior member of a joint Hindu family brings a suit for cancellation of a sale of joint family property by his father and elder brother and for possession of his share, he is liable to pay *ad valorem* court-fee on the value of the whole of the property as he had asked, though quite unnecessarily, for cancellation of the sale deed. Where, however, the court below decreed the plffs.' suit subject to the payment of certain sums to the purchasers, the defendant in his appeal against the decree need pay court-fee only on ten times the Government revenue of the property in dispute. 3 Pat. L. J. 448 Dist. (*Piggott, J.*) RUP NARAIN *v.* BISHWA NATH SINGH.

44 All: 629 : 20 A. L J. 587 : 4 U. P. L. R. (A.) 192 : A. I. R. 1922 All. 358

——S. 7 (iv) (c)—*Declaration that plaintiff was owner of certain Toda Giras Hak annuity and entitled to recover same—S. 7 (iv) (c) applies—Same value applies for jurisdiction purposes as for Court-fees—Suits Valuation Act, S. 8.*

A suit for a declaration that the plaintiff was the owner of the Toda Giras Hak annuity of a certain amount received by a certain lady, as her heir and as such entitled to recover the same, comes within S. 7 (iv) (c) and the Court-fee stamp would be according to the amount at which the relief sought was valued in the plaint and the same is the value of the suit for purposes of jurisdiction. (*Macleod, C. J. and Crump, J.*) BHIMSANGJI CHHATRASANGJI *v.* DOLATSANGJI HAMERSANGJI. **27 B. L. R. 247 : 87 I. C. 801 : A. I. R. 1925 Bom. 282 (1).**

——S. 7 (iv) (c)—*Suits for declaration that decree was fraudulent and injunction—Court-fee payable thereon.*

In order to determine whether a suit is properly valued or not, it is necessary to confine attention to the plaint itself and not to look to other circumstances which may subsequently influence the judgment of the Court as to the true value of the relief sought. A suit for a declaration that the decree obtained by the defendant is fraudulent, for an injunction against the defendant restraining him from interfering with the plaintiff's possession of the property in suit and for consequential relief confirming plaintiff's possession, comes within S. 7 (iv) (*c*) of the Court Fees Act and the valuation of the suit is the valuation of the decree which the plaintiffs seeks to set aside. 6 C. L. J. 427 Ref. In such cases the value put by the plaintiff should be taken as the proper value unless it appears that the value so put is arbitrary and inconsistent with the value of the reliefs sought. (*Suhrawardy and Chotzner, JJ.*) RAJABALA DASI *v.* RADHIKA CHARAN ROY. **40 C. L. J. 150 : 79 I. C. 982 : A. I. R. 1924 Cal. 969.**

——S. 7 (iv) (c)—*Consequential relief—Admi-*

nistration of estate and appointment of Receiver are such reliefs.

Plaintiff sued for a declaration of his right, to administration of the estate and appointment of an interim receiver. *Held*, that the suit fell within S. 7 (iv) (c) of the Court Fees Act. In the absence of a prayer for possession of the property the plaintiff was not bound to pay court fee on the market value. (*Chatterjee and Walmsley, JJ.*) RUPCHAND GHOSH *v.* KSHIRODAMAYI DASI. **27 C. W. N. 457 : A. I. R. 1923 Cal. 329.**

——**S. 7 (iv) (c) and (v) (a)**—*Mortgage—Personal decree for sale—Suit to set aside.*

Plaintiff sued to set aside an execution sale of certain properties on the ground that the decree having been previously adjusted could not be executed and that the sale was therefore null and void and for a declaration that a personal decree passed against the plff. was inoperative against him. On a question arising as to the Court-fee payable on the plaint, *Held*, that the suit was one substantially for possession though framed as one for declaration and consequential reliefs and that Court fee was payable under S. 7 (v) of the Court Fees Act and not under S. 7 (iv) (c). (*Mookerjee and Cuming, JJ.*) RADHA KANTA SAHA *v.* DEBENDRA NARAYAN SAHA. **49 Cal. 880 : 27 C. W. N. 566 : 38 C. L. J. 74 : A. I. R. 1922 Cal. 506.**

——**S. 7 (iv) (c)**—*Declaration—Suit—Valuation.*

In a suit where the claim was only for a declaration that the decree and sale were fraudulent and for an injunction, the suit being valued at the amount recoverable under the decree, *Held* : The party could put his own value on the plaint. (*Chatterjee and Panton, JJ.*) J. N. SEN *v.* TORIAUTNESSA BIBI. **35 C. L. J 144 : A. I. R. 1922 Cal. 242.**

——**S. 7 (iv) (c)**—*Declaration that a decree is fraudulent—Plaintiff can put his own value.*

In a suit for declaration that a decree and a sale held thereunder is fraudulent, without a prayer for possession, the plff. can put his own value on the plaint and pay Court fee thereon. (*N. R. Chatterji and Panton, JJ.*) JOGENDRA NATH SEN *v.* TORIAUTNESSA. **62 I. C. 685 (C.)**

——**S. 7 (4) (c)**—*Declaration of decree as fraudulent and restarting of case. asked for—Fees is* ad-valorem.

A suit for a declaration that the mortgage decree passed against the plaintiff does not bind him as having been obtained by fraud, and praying that the former case be restarted, should be stamped *ad valorem.* (*Scott-Smith, J.*) HARNAM SINGH *v* HAYAT. **86 I.C. 680 : 7 Lah L. J. 15 : 26 Punj. L.R. 73 : A. I. R. 1925 Lah. 346.**

——**S. 7 (iv) (c)**—*Suit to declare decree void by non-party thereto, is not within the clause.*

A person who was no party to the decree may sue to have it declared void without asking for any consequential relief and the suit is not governed by S. 7 (v) (c). (*Broadway and Zafar Ali, JJ.*) MT. NIHAL DEVI *v.* RAI CHUNI LAL. **5 Lah. L. J. 357 : A. I. R. 1923 Lah. 373.**

——**S. 7 (iv) (c)**—*Suit for declaration and Injunction—Valuation.*

Where plaintiff sues (1) for a declaration that he is the owner of certain property (2) that an ejectment decree obtained against him by defts. should be cancelled on the ground of fraud and declared not binding and (3) for a perpetual injunction that defts should not interfere with his possession, the suit is one for a declaration with consequential relief within S. 7 (*iv*) (*c*) of the Court Fees Act. The courts are bound to accept valuation placed by the plaintiff upon the relief sought by him, even though such valuation is arbitrary and inadequately represents the value of the property. (*Scott Smith, J.*) NANDAN MAL *v.* SALIG RAM. **A. I. R. 1922 Lah. 236.**

——**S. 7 (iv) (c)**—*Declaration that father's alienation is not binding*—Ad valorem *fee must be paid.*

A suit in which the plaintiffs asked for a declaration that a sale deed of the joint properties by their father is not valid and binding on them must be treated as a suit for the cancellation of the deed and an *ad valorem* fee is requisite. (*Odgers, J.*) ALAGUR AIYANGAR *v.* SRINIVASA AIYANGAR **22 L. W. 515 : (1925) M. W. N. 777 : A. I. R 1925 Mad. 1248.**

——**S. 7 (iv) (c) and proviso to cl. (c)**—*Suit for declaration and injunction regarding immovable property—Suit must be valued and Court fee paid according to (IV) (c)—Proviso applies—In such cases the portion of the property in dispute only is to be valued and not the whole.*

A suit for declaration and injunction ought to be valued and Court-fee paid, as is required by S. 7, Cl. (*iv*) of the Court-fees Act. The proviso to the Cl. (*c*) is applicable to immoveable property and it is not necessary in such cases, to have the whole of the property valued. It is sufficient if only such portion of the property, as is the subject-matter of dispute is valued. But that if the whole of the property is likely to be in dispute, then the Court-fee will have to be paid on half the value of the whole property. (*Devadoss, J.*) AMBALAM *v.* P. K. RAMACHANDRA. **21 L. W. 699 : 89 I. C. 930 : A. I. R. 1925 Mad. 1143.**

——**S. 7, (iv) (c) and 2nd Sch., Art. 17 A. (1)**—*Hindu joint family—Mortgage executed by some members—Suit by others for declaring mortgage not binding on them—2nd Schedule Art. 17 A (1) and not S. 7, Cl. 4 (c) applies.*

Where the question is whether a suit is governed by S. 7, Cl. 4 (c) or by Sch. II, Art. 17 A (1), the answer must depend upon the relief which the plaintiff prays for because Court fee must be determined with reference to the prayer contained in the plaint. Where the plaintiffs who are some of the members of a Hindu joint family ask for a declaration that the mortgage executed by some other members of the family is not supported by consideration and is not binding upon them, the suit falls under 2nd schedule, Art. 17 (1) as a declaratory suit, and not S. 7, Cl. 4 (c). 30 Cal 788 Foll. 30 Mad. 18; 38 Mad. 022 (F. B.) and 1924 Mad. 611 *Ref.* (*Venkatasubba Rao, J.*) VENKAT RAMANI AIYAR *v.* M. NARAYANASWAMI AYYAR. **21 L. W. 649 : 87 I. C. 660 : (1925) M. W. N. 276 : A. I. R. 1925 Mad. 713 : 48 M. L. J. 688.**

——**S. 7 (iv) (c) and Sch. II, Art. 17 (i)**—*Suit for declaration that a deed to which plff. is not a party is not binding—Suit for cancellation—Valuation for purposes of Court-fees and jurisdiction—Suit for removal of eight trustees and declaration of plaintiff's right.*

Where a plaintiff, who is not a party to a deed wants a declaration that the deed is not binding on him or on the devaswom of which he is a trustee, the suit is one for declaration and not one for cancellation. 14 M. 26 : 32 M. L. J. 447 ; 37 M. 420 Ref. Where a plaintiff sues for such a declaration and for an injunction and accounts as reliefs consequential on this declaration, the plff. is entitled to place his own valuation on these reliefs, but the relief for purposes of jurisdiction and court-fees must be the same. A claim for further relief, *viz.*, that the 8 defendants

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should be removed from the office of trustee comes under Art. 17 (ii) of Sch. II of the Court Fees Act and a separate fee of Rs. 10 need not be paid for each of the 8 trustees especially where the ground for removal is the same. (*Phillips and Venkatasubba Rao JJ.*) VELLORA KARUPPAN V. C. CHATHU KUTTY NAIR *v.* K. V. CHATHU KUTTY NAIR.

19 L. W. 249 : 34 M. L. T. 22 : (1924) M. W. N. 210 : 78 I. C. 118 (2) : A. I. R. 1924 Mad. 611 (2.).

——— S. 7 (iv) (c) and (d)—*Valuation fixed by plaintiff—Finality of—Suit for declaration, injunction and appointment of Receiver.*

A suit for declaration and injunction and for the appointment of a Receiver falls within S. 7 (iv), clauses (*c*) and (*d*) of the Court Fees Act and the plaintiff can put his own valuation for the reliefs claimed. (*Baker, J. C. and Prideaux, A.J.C.*) KRISHNA RAO *v.* MT. CHANDRABHAGABAI.

A. I. R. 1924 Nag. 316.

———S. 7 (iv) (c)—*Valuation--If arbitrary Power of Court.*

The valuation put by a plaintiff in a suit falling under S. 7 (iv) (*c*), Court Fees Act, is not to be an arbitrary valuation, but is to accord with the value of the subject-matter of the suit and, in case of dispute, is to be determined by the Court. (*Prideaux, A. J. C.*) KALICHARAN LAL *v.* SHIVSHANKAR SAHAI.

A. I. R. 1924 Nag. 295.

———S. 7 (iv) (c)—Sch. II, Art. 17 (vi)—*Suit under S. 31, Sp. Rel. Act for declaration and Consequential Relief—Falls under cl. (iv) (c).*

A suit under S. 31 of the Sp. Rel. Act brought for a declaration with consequential relief for purposes of court-fees and jurisdiction is governed by S. 7 (iv) (c) of the Court Fees Act, and Art. 17 (vi) of Sch. II of the Court-fees Act cannot apply where it is possible to estimate the money value of the claim. 7 N. L. R. 190 Foll. (*Batten, J. C.*) MT. BARI BAHU *v.* KUNDAN SINGH. **A. I. R. 1922 Nag. 264.**

——— S. 7, (iv) (c)—*Suit by minor for declaration that mortgage decree against him was void involves a consequential relief.*

Where a minor sued, on attaining majority, to set aside a final decree for foreclosure passed against him on the ground that the decree, though based on a compromise sanctioned by the Court, was void and therefore unenforceable against him. *Held* that the relief for declaration involved a consequential relief and that the suit should be valued under S.7, cl.(iv) (c) of the Court Fees Act with an *ad valorem* court fee (*Daniels, J. C.*) SRIPAL SINGH *v.* JAGDISH NARAYAN.

65 I. C. 980 : 24 O. C. 361.

———S. 7 (iv) (c)—*Where a mere declaration will give full relief further declaration is redundant and asking therefor will not make suit one for declaration with consequential relief—Court Fees Act, Sch. II, Art. 17 (3).—Act.*

A consequential relief can be insisted upon only when the plaintiff will not get any redress by having merely a declaratory decree. For instance, when the property is in possession of the defendant, the Plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as consequential relief. But where a mere declaration is sufficient to give the plaintiff full relief, a further declaration will be deemed to be redundant and the act that the plaintiff asked for a redundant relief will not alter the nature and scope of the suit and make the suit one for a declaration with consequential relief. Where the suit is for declaration that certain transactions diminishing defendant's share in joint family property so as to save it from attachment and sale in execution of plaintiff's decree were void, and for declaration of plaintiffs' right to realize their decree from the property, the latter relief is unnecessary and the suit is only a suit for declaration and not for declaration with consequential relief. It falls within Sch. II, Art. 17 (3) and not S. 7 (IV) (c) of the Act. (*Jwala Prasad, J.*) MAHABIR PRASAD *v.* SHYAN BEHARI SINGH.

3 Pat. 795 : 80 I. C. 655 : 6 P. L. T. 82 : A. I. R. 1925 Pat. 44.

———S. 7 (iv) (c) and Sch. II, Art. 17—*Suit for declaration and consequential relief--Memorandum of appeal—Court-fee.*

Where the plaint prays for a declaration and consequential relief, the value of the consequential relief determines the court-fee payable on the plaint. 4 Pat. L. J. 297 : 46 I. A. 24 : 5 P. L. J. 394 Foll. Where however an appeal is preferred only against the declaration it may be valued under Sch. II, Art. 17 of the Court Fees Act. The nature of the relief sought may vary at the stage when the appeal is preferred and the Court-fee leviable will be upon the altered relief on appeal. (*Jwala Prasad, J.*) NEKO TEWARI *v.* KISHUN PRASAD PANDEY. **2 Pat. L. R. 193 : 6 P. L. T. 65 : 3 Pat. 640 : 80 I. C. 563 : A. I. R. 1924 Pat. 582.**

———S. 7 (iv) (c)—*Consequential relief—Confirmation of possession—Arbitrary valuation.*

Under S. 7 (iv) (c) of the Court Fees Act, it is not open to the plaintiff to fix an arbitrary or incorrect valuation. 36 A. 500 ; 6 C. L. J. 427 ; 14 C. L. J. 47 ; 16 C. L. J. 194 : 4 Pat. L. J. 703 Rel. A prayer for confirmation of possession is nothing more than a prayer that the fact of, and his right to possession may be declared but the words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the court thinks the plaintiff is out of possession. Consequently a prayer for confirmation of possession has come to be regarded as consequential relief. 19 W. R. 18 : 22 C. L. J. 415 : 23 C. L. J. 561 Ref. (*Miller, C. J. and Mullick, J.*) RAM SEKHAR PRASAD SINGH *v.* SHEONANDAN DUBEY. **4 Pat. L. T. 71 : 1 Pat. L. R. 25 : 2 Pat. 198 : 1922 P.H. C. C. 337 : A. I. R. 1923 Pat. 137.**

——— ———S. 7 (iv) (c) and (v)—*Suit for declaration of title and possession.*

Where a challenge is directly thrown on the title of the plaintiff who comes to Court in order to meet that challenge, it is a suit clearly under S. 42 of the Specific Relief Act and if the plaintiff asks for possession also in that suit, his suit comes under S. 7, cl. (4), Sub-cl. (c) of the Court Fees Act and not within S. 7 cl. (5) of the Act. A challenge having been directly thrown upon the title, a suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, cl. (4), Sub cl. (c) of the Court Fees Act, (*Das and Foster, J J.*) UGRAMOHAN CHOWDHRI *v.* LACHMI PRASAD CHOWDHRI. **1922 P. H. C. C. 6 : A. I. R. 1923 Pat. 100.**

———S. 7 (iv) (c)—*Suit for declaration of invalidity of decree against Hindu family.*

In execution of a decree obtained against some members of a Hindu family, certain properties were sold. Some of the other members of the family brought a suit for a declaration that the sale was null and void. *Held*, the suit was one for declaratory decree and consequential relief and under S. 7 (iv) (c) *ad valorem* fee was payable. (*Das and Bucknill, JJ.*) SURENDRA NARAIN SINGH *v.* SHAMBIHARI SINGH.

1 P. 197 : A. I. R. 1922 Pat. 404.

———S. 7 (iv) (c)—*Reversioner—Declaration—*

COURT FEES ACT (VI OF 1870), S. 7.

Suit against a Hindu widow as to waste—Appointment of a Receiver, whether a consequential relief.

Where a suit was brought by a reversioner against a Hindu widow for declaration that she was committing waste and for appointment of a receiver. *Held* that under S. 42 of the Specific Relief Act the prayer for appointment of a Receiver is in consequence of declaration sought and is therefore consequential relief. The suit will be governed by S. 7 (iv) (*c*), Court Fees Act. (1913) 19 I. C. 859 Foll. (*Jwala Prasad, J.*) HARBANS SAHU *v.* MUSAMMAT LAL MONI KOER.
3 P. L. J. 21 ; A. I. R. 1922 Pat. 61.

——**S. 7 (iv) (c)**—*Assertion of adverse title—* Ad valorem *fee.*

As a claim before a survey officer or an entry made in the survey records amounts to an assertion of adverse title, the plff. in a partition suit, must clear up his title and possession over the plots recorded adversely to him in the survey records and pay *ad valorem* fee with respect to the property. (*Jwala Prasad, J.*) HARNARAYAN PANDEY *v.* SURESH PANDEY.
63 I. C. 203 (Pat.)

——**S. 7 (iv) (c), Sch. II, Art. 17**—*Interpleader suit—Appeal.*

In an appeal from a decision in an interpleader suit in respect of money the Court-fee payable is Rs. 10 under Art. 17 of Sch. II of the Act and not under S. 7 (iv) (*c*) of the Act. (*Jwala Prasad, J.*) BRIJNARAIN *v.* BALMIKI PRASAD. **61 I. C. 820 : 2 Pat. L. T: 280.**

——**S. 7 (iv) (c) and (v)**—*Suit for declaration and possession falls under (iv) (c).*

A suit by a reversioner, after the death of the widow, for a declaration and possession : against an alienee of the widow, falls, under Cl. iv (*c*) and not under under Cl. (v) of S. 7 of the Court-Fees Act. (*Jwala Prasad and Ross, JJ.*) KHETRA MOHAN *v.* GANESH LAL.
2 Pat. L. T. 607 : 61 I. C. 565 : 6 P. L. J. 10.

——**S. 7 (iv) (c)**—*Valuation of suit—Valuation of subject-matter—Option to plaintiff to put his valuation.*

In suits coming under S. 7 (iv) (*c*) of the Court Fees Act the plaintiff is at liberty to put his own valuation whatever be the real value of the subject-matter. (*Young, J.*) SIT SOE *v.* MA THIN.
3 Bur. L. J. 128 : 84 I. C. 201 : A. I. R. 1924 Rang. 378 (2).

——**S. 7 (iv) (c)**—*Declaration to avoid an award —Valuation.*

In a suit for a declaration that a certain award is invalid there being no contract at all between the parties, and for an injunction by way of consequential relief the plaintiff has the right to value his claim for the purposes of court-fees and the value for the purposes of the jurisdiction is the same. 44 Bom. 331, Foll. (*Raymond, A. J. C.*) TYEBALLY ABDUL HUSSAIN *v.* MESSRS. JAMES FINLAY & CO. **17 S. L. R. 15 : 80 I. C. 969 : A. I. R. 1924 Sind 105 (2).**

——**S. 7, Cl. (iv) (d)**—*Injunction, suit for—Valuation.*

The Court-fee for a suit for an injunction must be computed according to the amount at which the relief sought is valued in the plaint and which the plaintiff is entitled to fix himself. (*Macleod, C. J. and Fawcett, J.*) GOVINDA KRISHNA SATHE *v* HANMAYA LINGAYA FULMALI. **45 Bom. 567 : 59 I. C. 777 : 22 Bom. L. R. 1450.**

——**S. 7, (iv) (d)**—*Suit for injunction—Valuation for purposes of Court-fees and Jurisdiction, is same.*

A suit for injunction was valued at Rs. 4,000 for purposes of jurisdiction and at Rs. 110 for Court-fees. The suit was dismissed with costs. On a question arising as to the Pleader's fee payable, *held* that the valuation for the purposes of Court-fees should, under S. 8 of the Court Fees Act determine the valuation for purposes of jurisdiction ; that the Court below ought to have asked the plaintiff to re-state his value and as it did not do so it must be taken to have accepted the valuation of Rs. 110 as correct. Consequently Pleader's fee was allowed on Rs. 110 only. 11 P. R. 1913 Ref. to. (*Scott Smith, J.*) AMIR CHAND *v.* HAKIM ALI.
A. I. R. 1924 Lah. 364.

——**S. 7 (iv) (f)**—*Appeal from preliminary decree for accounts—Appellant is not bound by plaintiff's valuation of suit and can have his own valuation.*

In an appeal from a preliminary decree in a suit for accounts, the appellant is entitled to fix his own value for the relief he claims and is not bound by the valuation put by the plaintiff's on the suit. 39 Mad. 725 and 23 Mad. 490, Diss. (*Sulaiman and Boys, JJ.*) CHUNNI LAL *v.* SHEO CHARAN LAL. **47 All. 756 : 23 A. L. J. 725 : L. R. 6 A. (Civ.) 362 : 89 I. C. 122 : A. I. R. 1925 All. 787.**

——**S. 7 (iv) (f)**—*Suit for account—Appeal from preliminary decree—Plff.'s valuation to be accepted.*

Where a person appeals from a preliminary decree in a suit for account, he is allowed to option of placing his own valuation upon the memorandum of appeal and he is not bound by the valuation put upon the claim in the plaint. 7 A. L. J. 546 Ref. 30 M. L. J. 402. Not Foll. (*Piggott, J.*) KANHAIYA LAL *v.* SETH RAM SARUP. **44 A 542 : 20 A. L. J. 416 : L. R. 3 A. 193 : 4 U. P. L. R. (A) 99 : A. I. R. 1922 All. 228.**

——**S. 7 (iv) (f)**—*Partition suit—Valuation.*

In a suit for partition part of the joint property to be divided is comprised of a mundi trade the plff can value it under S. 7, Cl. (iv) (f) and need not value it in accordance with a tentative valuation to be amended subsequently after inquiry. (*Oldfield, J.*) BALA PATTABHI *v.* SUBBARAYA CHETTY.
14 L. W. 446 : 70 I. C. 17 : (1921) M. W. N. 611 : 41 M. L. J. 433.

——**S. 7 (iv) (f)**—*Suit for accounts—Valuation by defendant in appeal—Right to give own value.*

In an appeal by the defendant against a preliminary decree directing accounts where what is disputed is not the liability to render accounts but the plaintiff's mode of doing so, the relief does not admit of correct valuation and the appellant is at liberty to fix his own valuation without being tied down to the valuation in the plaint. (*Jwala Prasad, J.*) KULDIP SAHAY *v.* HARIHAR PRASAD. **4 Pat.L. T. 638 : 3 Pat. 146 : A. I. R. 1924 Pat. 161.**

——**S. 7 (iv) (f)**—*Suit for accounts.*

In a suit for an account it is open to the plaintiff to value his suit for purposes of Court-fee at any figure he chooses. (*Robinson, C. J. and Brown, J*) HARDAYAL *v.* RAM DOO. **2 Rang. 408 : 3 Bur. L. J. 207 : A. I R. 1924 Rang. 354.**

——**S. 7 (v) and Sch. II, Art 17**—*Cross-objection claiming possession of immoveable property*—Ad valorem *fee is payable.*

In the case of a cross-objection claiming possession of an immoveable property the Court-fee is payable *ad valorem* on the value of the property and should not be calculated on five times the land revenue in accordance with S. 7 (v). (40 All. 93, Foll.) An *ad valorem* fee is payable on a cross-objection even when the relief claimed by it is of a declaratory nature which would come under Art. 17 of Schedule II, for Art. 17, does not provide for cross-objections but only for plaints and appeals. A.I.R. 1924 All. 175 Foll. (*Daniels, J.*)

COURT FEES ACT (VI OF 1870), S. 7.

BISHEN SAHAI *v.* CHHOTEY LAL.
22 A. L. J. 911 : L. R. 5 A. (Civ). 712 : 47 All. 89 : A. I. R. 1925 All. 119 (1.)

———S. 7 (v) and Sch. II, Art. 17 (b)—*Suit by trustee for declaration and possession*—Ad interim *fee must be paid.*

The plaintiff sued for a declaration that he was *Sajjadanashin* of two *durgas* and for the possession of the *durgas* and their properties. He alleged that he was appointed by the last *Sajjada* as his successor and that he took possession of the *durgas* and the properties on the last *Sajjada's* death, but that he was subsequently dispossessed by the 1st defendant. *Held*, that in a case like this, the plaintiff is bound to ask for possession and the suit falls under S. 7, Cl. (v) and that Art. 17, Cl. (*b*) is inapplicable. 19 All. 60; 21 All. 200; 12 C. L. J. 211, Dist. (*Madhavan Nair, J.*) SYED MAHAMMAD GOUSE, *In re.* 22 L. W. 163 : 88 I. C. 209 : (1925) M. W. N. 252 : A. I. R. 1925 Mad. 804 : 48 M. L. J. 571.

———S. 7, (v) and Sch. II, Art. 17 (3), (6)—*Suit for recovery of possession of immoveable properties—Decree, conditional on payment of a sum—Appeal against the condition—Court-fee.*

The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted which a party wants to get rid of. Where in a suit for recovery of possession of immoveable properties, the plaintiff is given a decree, conditional on his paying a sum to the defendant, an appeal by him, against the condition must be valued *ad valorem* on the amount he was asked to pay. (*Kumaraswami Sastri, J.*) PORKODI ACHI, *In re.* 45 Mad. 246 : 14 L. W. 624 : 68 I. C. 444 : 30 M. L. T 88 : (1921) M.W. N. 854 : A. I. R. 1922 Mad. 211 : 41 M. L. J. 587.

———S. 7 (v)—*Suit against—Tenant holding over in defiance of notice is governed by clause* (v).

Where the defendant remained in possession after the end of the period of tenancy, with express disagreement of plaintiff, as it was evidenced by the act that the latter gave him written notice to quit. *Held*, the defendant could not be called a tenant holding over, but that the suit was clearly for the possession of land held by a trespasser and fell under clause (v) and not under xi (*cc*) of S. 7. (*Hallifax, A. J. C.*) NARAYAN *v.* TUKARAM. 8 N. L. J. 63 : A. I. R. 1923 Nag. 310.

———S. 7 (v)—*Suit for declaration of title and possession—Court-fee.*

Where a challenge is directly thrown on the title of the plaintiff, and the plaintiff comes to Court in order to meet that challenge, it is a suit clearly under S. 42 of the Specific Relief Act and if the plaintiff asks for possession also in that suit, his suit comes under S. 7 cl. (iv), Sub-cl. (c) of the Court Fees Act and not within S. 7, cl. (v) of the Act. A suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, cl. (iv). Sub-cl. (c) of the Court Fees Act. (*Das and Foster, JJ.*) UGRAMOHAN CHOWDHRI *v.* LACHMI PRASAD CHOWDHRI. 1922 P. H. C. C 6 : A. I. R. 1923 Pat. 100.

———S. 7 (v) and (iv) (c)—*Suit by Hindu reversioner to recover possession of property gifted by Hindu widow after her death falls under cl.* (*v*).

In a suit by the reversioners of a deceased Hindu for recovery of possession of properties, gifted away by the widow after her death, the plaintiffs prayed *inter alia* (1) that on consideration of the above facts the Court may be pleased to hold that the properties in dispute constitute the estate of B (the last male owner), that the plaintiffs as reversionary heirs of the said B are entitled to get possession of the properties in dispute since the death of K (the widow), that it is illegal on the part of the defendant not to give up possession of the properties and that the defendant's possession is quite wrongful and illegal. (2) That on adjudication of the above points a decree may be passed in favour of the plaintiffs in respect of properties in dispute by dispossessing the defendant or such person as may be found in possession at the time of delivery of possession. *Held*, that the suit was not one to obtain a declaratory decree where consequential relief was prayed for but one for possession under S. 7 (v) of the Court Fees Act. 6 P.L.J. 101 ; 5 P. L. J. 339 ; 34 C. 329. (*Miller, C. J. Mullick, Jwala Prasad, Coutts and Das, JJ.*) RAM SUMRAN PRASAD *v.* GOBIND DAS. 4 U. P. L. R. (Pat.) 75 : 1 Pat. L. R. 1 : 2 P. 125 : 1922 P. H. C. C. 291 : 3 Pat. L. T. 704 : A.I.R. 1922 Pat. 615. (S.B.).

———S. 7 (v) (a) and (d)—*Suit for possession of specific plot of land in permanently settled estate—Court fee—Deficiency—Procedure.*

A suit for the recovery of a specific plot of land situated within a permanently settled estate but not constituting a definite share thereof or separately assessed to revenue, falls within cl. (v) (*d*) and not under cl. (v) (*a*) or (*b*) of S. 7 of the Court Fees Act. Court-fee should therefore be paid on the market-value of the property in suit.

The plaintiff in the above suit having valued his plaint at ten times the share of the Government revenue due on the land, the Court directed him to pay court-fees on its market value. The plaintiff did not pay and the Court holding that the subject-matter of the suit exceeded its jurisdiction directed the return of the plaint for presentation to a superior Court. *Held*, that the procedure of the Court below was illegal. The Court should have first called upon the plaintiff to state the market value and then directed him to pay the proper court-fee on his plaint and on his failure to do so rejected the plaint. If the plaintiff paid the requisite court-fee and it was then found that the valuation of the suit went beyond the jurisdiction of the Court, the plaint should have been returned for presentation to the proper Court. (*Krishnan, J.*) KANDASAMI GOUNDAN *v.* SUBBAI GOUNDAN. 34 M. L. T. 92 : (1924) M. W. N. 338 : 77 I. C. 781 : A. I. R. 1924 Mad. 646 : 46 M. L. J. 345.

———S. 7 (v) (b) and (d)—*Suit for fraction of holding—Court-fee payable is on market value.*

In a suit for recovery of land which is not an entire holding or a definite share or fractional part of a holding separately assessed to revenue but consisting of individual field plots which form part of a holding but which are not separately assessed. Court-fees are payable under S. 7, Cl. (v) (*d*) and not under S. 7, Cl. (v) (*b*) of the Act. (*Heald, J.*) MA SHA MA *v.* SOMASUNDARAM CHETTY. 2 Bur. L. J. 39 : 1 R. 492 : 75 I.C. 217 : A. I. R. 1923 Rang. 246.

———S. 7 (1) (v) (c) and Sch. II, Art. 17 (iii) and (vi)—*Suit for commutation of grain rent into money rent—Appeal—Valuation—Court-fee payable—Revision—Interference by High Court—C. P Code, S.* 115.

An appeal by a landlord from the decree in a suit for commutation of grain rents into money rents on the ground that the rate fixed by the Lower Court is too low, falls either under Sch. II, Art. 17, cl. (vi) of the Court Fees Act or under cl. (iii) and must bear Court-fees accordingly. Neither S. 7, cl. (i) nor cl. (iv) (c) of the Act has any application to the case.

Quaere—Whether the High Court should interfere in revision with an order of the Lower Court deciding

the proper amount of Court-fee payable in a case pending in that Court. (*Phillips and Odgers, JJ.*) SENDATTIKALAI PANDIA CHINNA THAMBIAR *v.* VEERAPPA NAIDU. **34 M. L. T. 216 · 19 L. W. 629 : 78 I. C. 928 : A. I. R. 1924 Mad. 623 : 46 M. L. J. 450.**

——S. 7 (v) (c)—*Land paying no revenue—'Religious land.'*

If the subject-matter of suit is land paying no revenue and has produced no profits during the year next preceding the suit, the valuation should be made with reference to similar land in the neighbourhood, irrespective of the fact that the land is 'Religious land.' (*Heald, A.J.C.*) MAUNG MEIK *v.* U KUMARI. **60 I. C. 5 : (1920) 3 U. B. R. 236.**

——S. 7, (v) (d)—*Suit for pre-emption—Market value of the property is its value at the date of sale.*

The market value of the property in a suit for pre-emption is to be determined with reference to its value at the date of the sale and not with reference to its value at the date of the institution of the suit for pre-emption. 7 A. 778 Foll.. (*Scott-Smith, J.*) SHER MAHOMED *v.* AHMAD SAID. **A. I. R. 1924 Lah. 380.**

——S. 7 (v) (d)—*'Market value'—Suit for possession as usufructuary mortgagee.*

The plff. sued for possession as usufructuary mortgagee and valued the property on the amount of the mortgage-money. *Held*, that the word "market value" in S. 7 of the Court-Fees Act must mean the market value of the subject-matter of the suit, which in this case is not a proprietary interest but a mere mortgagee interest in the property. (*Daniels, A. J. C.*) MADHI *v.* GAJADHAR. **9 O. & A. L. R. 85: A. I. R 1924 Oudh 163.**

——S. 7 (v) (d)—*Claim for* Khudkhast *lands—Addition of* milkyat *shares—Effect.*

A suit for *khudkhast* lands falls under S. 7 (v) (*d*) and not S. 7 (v) (*a*) of the Court Fees Act and court-fee on the market value is to be paid. But when the plaint claims for *milkyat* shares within which the *khudkhast* lands lie and for *khudkhast* lands, separate court-fees should be paid. (*Das and Foster, JJ.*) RAGHUBANS NARAYAN SINGH *v.* KHUB LAL SINGH. **80 I. C. 439 : 6 Pat. L. T. 255.**

——S. 7 (v) (d)—*Land separately assessed—Court-fees is payable on five times the annual revenue.*

Where the lands in dispute form an entire holding which is separately assessed to revenue provisions of S. 7 (v) (b) apply and the Court-fees, so far as the lands are concerned, should be assessed on five times the annual revenue. (*Heald, J.*) MA SHIN *v.* MAUNG HUMN. **1 Rang. 651 : 79 I. C. 579 : A. I. R. 1924 Rang. 102**

——S. 7 (v) (e)—*Pre-emption—Garden, with house, out-houses and trees market value to be given,*

What was sold was described as a garden together with a house and out-houses as well as trees of all kinds. In a suit for pre-emption, *held*, that the property sold was a garden and that under S. 7 (v) (e) the fee payable should be *ad valorem* on the market value. 146 P. R. 1918 ; 71 P. R. 1914, Foll. 40 Mad. 824 Dist. The High Court finding that the appellant had no intention of making good the Court-fees by the fixed date, as per order declined to give him any further opportunity. (*Shadi Lal and Broadway, JJ.*) BEHARI LAL *v.* NANDLAL. **768 I. C. 345 : 2 Lah. L. J. 362.**

——S. 7 (v) (e) and Sch. II, Art. 17 (b)—*Suit for recovery of a Hindu temple—Valuation—Market value.*

There is no market value for a temple as such and for purposes of Court-fees, a suit for the recovery of possession of a temple falls under Sch. II, Art. 17 (*b*) of the Court-Fees Act and not under S. 7 (v) (*e*) of the Act. (*Schwabe, C. J. Oldfield and Ramesam, JJ.*) RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR. **(1923) M W. N. 550 : 18 L. W. 326 : 33 M. L T. 21 (H. C) : 46 Mad. 782 : A. I. R. 1924 Mad. 19 : 45 M. L. J. 274 (F. B.).**

——S. 7 (ix)—*See also* COURT FEES ACT, SCH. I, ART. 1 (V) AND SCH. II, ART. 17.

——S. 7 (ix) and Sch. 1, Art. 1—*Foreclosure suit dismissed—Appeal—*Ad valorem *fee according to subject-matter of appeal is payable.*

On a memorandum of appeal by a plaintiff whose suit for foreclosure of a mortgage has been dismissed the Court-fee payable is an *ad valorem* Court-fee on the value of the subject-matter of the appeal. A. I. R. 1922 Oudh 82, Diss. ; 36 All. 40, (F. B.), Foll. (*Daniels, J.*) PRAG *v.* BHAGWAN DIN. **88 I. C. 888 : 23 A. L. J. 853 : L. R. 6 A. Civ. 457 : A. I. R. 1925 All. 734.**

——S. 7 (ix)—*Mortgage—Suit for redemption—Court-fee to be paid only on principal amount.*

In a suit for redemption court-fee is payable only upon the principal amount secured by the mortgage. The plaintiff is not bound to pay court-fee upon the surplus amount claimed as mesne profits. 29 A. 471 ; 68 I. C. 226 Foll. (*Banerji and Gokul Prasad, JJ.*) CHHIDDU SINGH *v.* JHANJHAN RAI.

L. R. 3 A. 628 : 45 All. 154 : A. I. R. 1923 All. 261.

——S. 7 (ix) and Sch. I, Art. 1—*Suit for redemption—Appeal for reduction of amount.*

In a redemption suit, the Court below passed a preliminary decree in which the amount payable by the plaintiffs was fixed at Rs. 39,240-11-7 on the 24th June 1919. The plaintiffs having paid the amount fixed, into the Court together with an additional sum of Rs. 409.6-0 interest accruing up to the date of payment, a final decree was passed on 29th April, 1920. The plaintiffs filed appeals from both these decrees asking for reduction of the amount fixed in the preliminary decree by Rs. 32,225-11-7. On the appeal from the preliminary decree the plaintiffs paid Court-fees *ad valorem* on the sum by which they wished the amount fixed therein to be reduced. On the appeal from the final decree they paid a Court-fee of Rs. 2 only, *Held*, the preliminary decree decided what the amount payable was and in the appeal from it the appellants contested the amount and paid full Court-fee on the relief claimed by them. The final decree is a mere corollary to the preliminary decree and followed it as a matter of course : the plaintiffs having paid into Court, the amount fixed, there was nothing fresh for the Court to decide before it passed that decree, and the appeal from that decree is really of a formal nature, and does not contest anything beyond what is contested in the appeal from the preliminary decree. (*Scott-Smith and Fforde JJ.*) BUDHU RAM *v.* NIAMAT RAI. **6 Lah. L. J. 72 : 4 Lah. 406 : A. I. R. 1923 Lah. 632.**

——S. 7 (ix)—*Redemption Suit—Appeal for reduction of redemption amount.*

Ad valorem Court-fee must be paid on the amount sought to be reduced from the mortgage decree in a redemption sult 3 L. L. J. 370 Foll. (*Campbell, J.*) RAMJI LAL *v.* SHIBBA. **A. I. R. 1923 Lah. 309.**

——S. 7 (ix)—*Appeal against a decree for redemption—Fee must be prid on principal amount.*

In an appeal for a decree against redemption on payment of a certain sum, the Court-fee should be according to the principal sum. (*Scott-Smith and Leslie Jones, JJ.*) FATEH SINGH *v.* BABU RAM.

COURT FEES ACT (VII OF 1870), S. 7.

67 I. C. 130 (1) : 3 Lah. L. J. 156.

——S. 7 (ix) and Art. 1, Sch. 1—*Redemption suit appeal—Valuation.*

An appeal f om a judgment in a suit for redemption seeking reduction of the decretal amount must be valued *ad valorem* and not on the principal amount of the mortgage. 13 All. 94 and (1891) P. J. 218 Diss. (*Scott-Smith and Wilberforce, JJ.*) LEKH RAM *v.* RAMJI DAS. **1 Lah 234 : 57 I. C. 215 : 3 Lah. L. J. 370.**

——S. 7 (ix)—*Suit for redemption of Malabar Kanom and Puranyadam- Mortgage amount including value of paddy—Court-fee payable*

In a Malaber Kanom and Purankadam it was agreed that a certain sum and a certain quantity of paddy valued at a certain price was fixed as the amount of the Purankadam *Held* that the court-fee payable in a suit for redemption of this Kanom and Purankadam was on the amount as mentioned in the document and not on the market value of the paddy on the date of the plaint. (*Odgers, J.*) SREEDHARAN NAMBUDRI *v.* PERUMBARA NAIR. **22 L. W. 408 : (1925) M. W. N. 747.**

——S. 7 (ix)—*Redemption suit—Claim of surplus—Court-fee*

Where in a suit for redemption surplus profits also are claimed, court-fee need be paid only on the principal amount due and not on the profits claimed (*Baker, O. J. C.*) DAULATRAM *v.* GULAB CHAND. **A. I. R. 1924 Nag. 346.**

——S. 7 (ix) and Sch. I, Art. 1—*Provisions if applicable to appeals—' Suit ', meaning of—Mortgage suits—Court-fee payable in appeal.*

The provisions of S. 7 are applicable equally to appeals as to original suits and the word ' suit ' is not there used in contradistinction to ' appeal '. Court-fees are payable not on suits or on appeals but on documents which are filed, exhibited or recorded in Courts in accordance with S. 6 of the Act. The court-fee payable in appeal need not be the same as in the suit, as the nature of litigation may be changed in appeal. (1) If a suit for redemption or foreclosure has been dismissed the court-fee payable by the plaintiff-appellant on his memorandum of appeal will be computed in accordance with the provisions of cl. (ix.) of section 7 of the Court-fees Act, that is according to the principal money expressed to be secured by the instrument of mortgage. In such a case clearly the suit has not changed its nature in appeal. (2) If a suit to redeem has been decreed and the defendant-appellant merely challenges the right to redeem, the court-fee payable on the memorandum of appeal will be computed in accordance with the provisious of cl. ix of section 7 of the Court Fees Act. Here again there is no change in the nature of the suit. (3) If a suit to redeem or foreclose has been decreed and the plaintiff or the defendant in appeal merely challenges the amount to be paid or received without questioning the right to redeem on foreclose the court-fee payable on the memorandum of appeal will be on the subject-matter in dispute that is on the additional amount claimed or the amount in respect of which the appellant seeks to avoid liability. In this case the suit has clearly changed its nature in appeal and is no longer a suit falling within the provisions of cl. (ix) of section 7 of the Act (4) Where in a foreclosure suit a decree has been passed for a cer ain sum in default of payment of which within a fixed time the property shall be foreclosed and the defendant in appeal denies the plaintiff's right to foreclose on the ground that he is not liable to pay any portion of the sum decreed, the court-fee payable on the memorandum of appeal will be calculated *ad valorem* on the subject-matter in dispute according to Article 1 of Schedule 1, that is, on the amount of the decree the payment of which the defendant by his appeal seeks to avoid. In this case the suit has clearly changed its nature in appeal and has become a suit to avoid the payment of a specific sum. (5) Where a decree has been passed for redemption on payment of a certain sum and in appeal the defendant not only denies the plaintiff's right to redeem but in the alternative claims that if he be entitled to redeem he can do so only on payment of a larger sum than that fixed by the Court of first instance, the court-fee will be paid on the relief which is liable to pay the higher fee; on the former the fee would be computed in accordance with the provisions of cl. (ix) of section 7 read with Article 1 of Schedule I and on the latter the court-fees would be *ad valorem* on the difference between the amount found due by the lower Court and that claimed by the appellant. (*Daniels and Lyle, A J. Cs.*) SANGAT BAKHSH SINGH *v.* RAWAT DIJDEO BAKHSH SINGH. **25 O. C. 30 : A. I. R. 1922 Oudh 82.**

——S. 7 (ix)—*Mortgage suit—Appeal—Valuation—Interest* pendente lite.

Where a mortgage suit is dismissed, the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realisation or to pay court fee thereon. But if any future interest is determined by the trial court and is entered in the decree, additional court-fee on such interest has to be paid. If the appellate court grants him a decree for an amount larger than that claimed in the court below, court-fee must be paid on the difference and unless this is done the decree cannot be executed. (*Jwala Prasad, J.*) KALI PRASAD SINGH *v.* MATHURA PRASAD SINGH. **3 Pat. L. T. 813 : 1 Pat. L. R. 16 : A. I. R. 1923 Pat. 28.**

——S. 7 (ix) (a)—*Contract of sale—Stamp must be paid on consideration.*

Court-fees payable in suits for the specific performance of a contract of sale will be levied according to the amount of the consideration. The suit is not a suit for possession of immoveable property so as to be liable to a stamp of value 10 times the *jama.* (*Abdul Raoof, J.*) KUNDAN LAL *v.* ANAND SARUP. **A. I. R. 1923 Lah. 456.**

——S. 7 (x) (a)—*Exchange on same foot as sale.*

The framers of clause (x) of S. 7 of the Court Fees Act contemplated that for the purposes of court-fee under this clause an exchange should also be dealt with as a sale for otherwise that is no reason why separate provision should not have been made relating to exchange. (*Abdul Raoof, J.*) KUNDAN LAL *v.* ANAND SARUP. **A. I. R. 1923 Lah. 456.**

——S. 7 (x) (a)—*Suit for specific performance—Prayer for possession does not alter nature of suit.*

The nature of the suit is not altered by an additional prayer for possession in a suit for specific performance of a contract or sale and for the purpose of court-fees as well as jurisdiction, the suit falls under S. 7 (x) (*a*) (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAI. **18 L. W. 333 : 47 Mad. 150 : (1923) M. W. N. 726 : A. I. R. 1924 Mad. 360 : 45 M. L. J. 431.**

——S. 7 (x) (a)—*Suits Valuation Act, S. 8—Suit for specific performance.*

Valuation of a suit for specific performance of a contract of sale for the purposes of Court-fee at the amount of the consideration is valid under S. 7 (x)

(*a*) of the Court Fees Act. In such a suit the valuation for the purposes of jurisdiction will be the same under S. 8 of the Suits Valuation Act. (*Dalal, A. J. C.*) SAIYED ASHFAQ HUSAIN *v* SAIYED BUNYAD HUSAIN. **9 O. & A. L. R. 415 : A. I. R. 1923 Oudh 252.**

——S. 7 (x) (c)—*Suits Valuation Act, S. 8 - Suit for specific performance of lease— Court-fees — Jurisdiction.*

A suit for specific performance of a contract of lease should first be valued for court-fees under S. 7 (x) (c) of the Court Fees Act and the value should be adopted under S 8 of the Suits Valuation Act for jurisdiction. (*Mookerjee, J.*) SAILENDRANATH *v.* RAM CHARAN **34 C. L. J. 94 : 66 I. C. 268 : 25 C. W. N. 768.**

——S. 7, xi (cc)—*Suit for possession on ground of forfeiture is governed by the clause.*

Value of a suit for possession of lease property on the ground of termination of tenancy by forfeiture is not the value of the property itself but amount of rent payable for the year next before the date of the plaint. (*Walsh, A. C. J. and Sulaiman, J.*) MOHAN LAL *v.* BHUTESWAR, **L. R. 5 A Civ. 709 : 83 I. C. 1 : A. I. R. 1925 All. 142.**

——S. 7, xi (cc)—*Notice to quit served on defendant—Defendant refusing to deliver possession—Suit for possession against the tenant is not a suit between landlord and tenant—Defendant can be ejected as trespasser.*

Where the defendant who is an annual tenant of land refuses to deliver possession although he is served with a notice to quit under S. 79, Berar Land Revenue Code, a suit for possession of the land is not a suit between landlord and tenant as the defendant is not a tenant who is holding over as referred to in S. 7, cl. xi (*cc*) of the Court Fees Act. Where a tenant after a notice to quit has been served and a demand for possession has been made continues in possession he can be ejected as trespasser. (*Kotwal, J.C.*) CHAMPAT *v.* BALAKDAS. **20 N. L. R. 124 : 84 I. C. 202 : A. I. R. 1925 Nag. 131.**

——S. 7 (xi) (cc)—*Tenant holding over—Suit for possession,*

Where after the expiry of a tenancy, the tenant in spite of notice to quit refuses to hand over possession, a suit for possession against him is not one against a tenant holding over but against a trespasser and falls under S. 7 (v) of the Court Fees Act. (*Hallifax, A. J. C.*) NARAYAN *v.* TUKARAM. **A. I. R. 1923 Nag. 310,**

——S. 7 (xi) (cc)—*Suit to eject—Thicadar is within the clause.*

A suit to eject a thicadar on the expiry of his lease falls within S. 7 (xi) (cc) of the Court Fees Act. Wherever a landlord seeks to recover property from a person whose tenancy has come to an end either by the efflux of time or by reason of some breach of covenant, the case would be governed by S. 7 (xi) (*cc*) of the Court Fees Act. (*Miller, C. J. and Ross, J.*) RAM CHARAN SINGH *v.* SHEO DUTTA SINGH. **2 Pat, 260 : 4 Pat. L T. 666 : A. I. R. 1923 Pat. 380.**

——S. 7 (xi) (e).

See also SCH. II, ART. 5.

——S. 7 (x) (e)—*Suit between landlord and tenant—Person inducted by landlord joined as proper party—Suit is still governed by clause.*

The Court Fees Act being a fiscal enactment must in cases of ambiguity be construed in favour of the public, clause xi refers to suits between the landlord and the tenant. It does not restrict such suits between the landlord and the tenant only. There is, therefore, no reason why Cl. xi should be limited to suit where the landlord and the tenant alone are parties and should not apply to a suit, where in order to avoid any unnecessary delay in execution proceedings a person inducted by the landlord is joined as second defendant to the suit. 32 Cal. 268 Not Appr. (*Rupchand Bilaram, A.J.C.*) SECY. OF STATE *v.* DINSHAW NAVROJI. **87 I. C. 1002 ; A. I. R. 1925 Sind 275.**

——S. 8—*Appeal by claimant in Land Acquisition case—Valuation of claim.*

The memorandum of appeal by a claimant to land acquired in a Land Acquisition proceeding should bear a Court-fee stamp *ad valorem* on the value of the land claimed since what was styled as apportionment was really the determination of the amount payable by Government to the claimant for the land. (*Shah and Hayward, JJ.*) MANGAL DAS *v.* THE ASST. COLLECTOR OF PRANTIJ PRANT AHMEDABAD **45 Bom 277 : 64 I. C. 582 and 584 : 23 Bom. L. R. 148.**

——S. 8, Sch. I, Art. 1 and Sch. II, Art 17, cl. (ii)—*Applicability of—Appeal by Government against award of compensation in a land acquisition case - Award by Chief Judge of Small Cause Court—Court-fees payable on appeal.*

Where the Crown appeals against award of compensation in a land acquisition case, on the ground that the award is excessive, S. 8 of the Court Fees Act does not govern the appeal. On appeal by the Crown against an award of compensation by the Chief Judge of the Presidency Small Cause Court in a land acquisition case the court-fees payable is that prescribed by Art. I, Sch, I of the Court Fees Act. (*Schwabe, C. J.*) ASSISTANT COMMISSIONER OF LABOUR, *In re.* **19 L. W. 207 : (1924) M. W. N. 108 : 34 M. L. T. (H. C.) 357 : 78 I. C. 435: A. I. R. 1924 Mad, 489 (2) : 46 M. L. J. 150.**

——S. 9, para. 9—*Jurisdiction for redemption suits depends on amount found due on mortgage and not the principal amount of mortgage—Suits Valuation Act, S. 8.*

Value for the purposes of jurisdiction of a suit for redemption of a mortgage is not the principal amount of the mortgage nor the value of the mortgaged property but the amount ultimately found to be due to the mortgagee-defendant. S. 8 of the Suits Valuation Act expressly excludes redemption suits from its operation. (*Suhrawardy and Chotzner, JJ.*) SARODA SUNDARI BASU *v.* AKRAMANISSA KHATUN. **51 Cal. 737 : 28 C. W. N. 710 : 78 I. C. 747 : A. I. R. 1924 Cal. 783.**

——Ss. 10 and 17—*Distinct causes of action.*

Where three declarations were sought arising from distinct causes of action held Rs. 30 should be paid as court-fee. (*Stuart, J.*) SHAMBHU DIYAL SINGH *v.* ISWAR SARAN. **A. I. R. 1923 All. 306.**

——Ss. 10 and 12—*Point of deficit Court-fees—When to be raised,*

The question of deficit Court-fees should be dealt with by the Appellate Court as soon as it is discovered, though it may be postponed at the Court's discretion in exceptional cases. If the question arises on appeal, the appeal should first be admitted so as to remove doubts, as to jurisdiction and this point should be decided before other issues and the appeal should be stayed till the deficit is paid : and it is also desirable that the expenses of printing paper book should not be incurred till the question is decided. (*Miller, C. J., Mullick and Bucknill, JJ.*) HITENDRA SINGH *v.* RAMESHWAR SINGH. **2 Pat. L. T. 383 : 62 I. C. 43 : 6 P. L. J. 293 : 1921 P. H. C. C. 161 (F. B.).**

COURT FEES ACT (VII OF 1870), S. 10.

——Ss. 10 (2) 12 and 17—*Suit for specific performance and possession.*

Where in a suit for specific performance of a contract of sale, and for possession of the property agreed to be sold, the relief for specific performance is the main relief and not ancillary to the claim for possession, a separate Court-fee must be paid in the Original Court as well as in the Appellate Court. Where on appeal, the Court-fee is found to be deficient, an order should be made to make good the deficiency and in case of non-compliance, the suit or appeal should stand dismissed. (*Daniels, A. J. C.*) RAM NIDHI *v.* BALKRISHNA SINGH. **60 I. C. 654 : 23 O. C. 388.**

——S. 11—*Suit for accounts and mesne profits—Valuation on estimate.*

In a suit for accounts or mesne profits, the plaintiff has a right to value his claim on estimate and the court has power to decree larger amount. (*Kanhaiya Lal, A. J C.*) DURGA BHARATI *v.* BHAGWATI PRASAD. **24 O. C. 209 : 64 I. C. 101 : 8 O. L J. 477.**

——S. 11—*Mortgage suits— Amount decreed higher than amount claimed—Additional court-fee not leviable.*

Where in a suit on a mortgage, the mortgagee ultimately got a decree of a much larger amount than he claimed on account of the interest *pendente lite* and on his trying to execute the same, it was objected that he could not do so before paying the court-fee on the excess amount awarded, *held*, S. 11 of the Court Fees Act refers only to suits for immoveable property, mesne profits and accounts and as such does not apply to mortgage suits. Hence no additional court-fee is leviable. (*Coutts and Ross, JJ.*) RAM BUJHAWAN PRASAD SINGH *v.* NATHO RAM. **3 Pat. L. T. 146 : A. I. R. 1922 Pat. 59.**

——S. 11—*Future mesne profits.*

Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. (*Rigg, J.*) DAWOOD *v.* RAHMAN. **10 L. B. R. 276 : 62 I. C. 175 : 13 Bur, L. T. 165.**

——S 12—*Construction of—Strict construction.*

The provisions of S. 12 of the Court Fees Act should be strictly construed and the additional fee should be levied from a party litigant only in exact conformity with the precise words of the statute. But the provisions in fiscal statutes should not be so construed as to furnish a chance of escape and a means of evasion. (*Mookerjee and Chotzner, JJ.*) RAJ RAJESWARI JIU *v.* GATI KRISHNA CHAKRAVARTI. **39 C. L. J. 217 : 82 I.C. 292 (2) : A.I.R 1924 Cal. 953.**

——S. 12—*Court-fee—Order for payment of—Appeal—When competent.*

If the case is not one of appraisement of or fixation of the value with a view to determine the amount of fee chargeable, but the dispute involves root questions of principles as to the nature of the suit and retrospective operation of statutes an appeal against an order for payment of Court-fee is maintainable. (*Mookerjee and Chotzner, JJ.*) TARAPRASANNA *v.* NARISINHA MURARI PAL. **51 Cal. 216 : 28 C. W. N. 683 : 39 C. L. J. 212 : 81 I. C. 763 : A. I. R. 1924 Cal. 731.**

——S. 12—*Wrong assessment of Court-fee by the original Court—Appeal against order.*

An order by a trial Court wrongly assessing Court-fee is not subject to appeal. S. 12 of the Court Fees Act lays down that no appeal lies. (*Harrison and Campbell, JJ.*) UJAGGAR SINGH *v.* SOHAN SINGH. **26 Punj. L. R. 163.**

COURT FEES ACT (VII OF 1870), S. 12.

——S. 12—*Finality of order—Decision as to category of suit is not final.*

A decision as to the category to which a suit on appeal belong is not final. (*Venkatasubba Rao, J.*) VENKAT RAMANI AIYAR *v.* M. NARAYANASWAMI AYYAR. **21 L. W. 649 : 87 I. C. 660 : (1925) M. W. N. 276 : A. I. R. 1925 Mad. 713 : 48 M. L J. 688.**

——S. 12—*Appeal is not barred when the category of the suit is disputed.*

Section 12 applies only to a decision as to the valuation of a suit, which falls within a particular class and not to a decision as to the particular class in which a suit falls, that is to say, if there is no doubt as to the class, in which the suit falls, and the section of the Court-Fees Act, which applies to it, the decision of the first Court as to the valuation, which depends on the value of the property in suit, is final, but if there is a dispute as to the class in which the suit falls, that is to say the section of the Court-Fees Act which applies to it an appeal will lie. 23 Bom. 486, Foll. (*Baker, J. C.*) GOVIND *v.* VITHABAI. **87 I. C. 911 : A. I. R. 1925 Nag. 435.**

——S. 12—*Finality—Valuation.*

The valuation made by a trial court for the purpose of computing court-fee is final as between parties, but the class within which a suit falls can be agitated in appeal. The court itself can act under the 2nd part of S. 12 for protecting the Revenue.

The 1st clause of S. 12 is subject to the provisions of the Suits Valuation Act. (*Mullick and Ross, JJ.*) MT. LUDHI BEGAM *v.* RAM DAS. **1925 P. H. C. C. 167 : 6 P.L.T. 448 : 90 I. C. 321 (2) : A I. R. 1925 Pat. 488.**

——S. 12—*Decision about amount is final but as to category of suit or applicability of a section is not final.*

The question whether an order directing additional Court-fee to be paid is an interlocutory order which will be revised depends on the circumstances of each case. If it is an order merely assessing valuation of the property and the only question involved is as to the amount upon which the Court-fee has to be paid, the decision of the Court of first instance would appear to be final under S. 12 of the Courts Fees Act. That section has been enacted in the interests of revenue and is final so far as that Court is concerned. There will be no appeal or revision from that order. But the question may under certain circumstances be raised on appeal from the final decree made in the suit. Where, however, the question is under what provision of the Court Fees Act the relief sought for in the plaint comes or under which category the suit falls, the decision of the first Court is not final. Where it involves the jurisdiction of the Court to try the suit the decision is liable to be revised. 23 Bom. 486 ; 28 Cal. 334 ; 14 Mad. 169 ; 1 All. 360 Foll. (*Jwala Prasad and Foster, JJ.*) MANI LAL *v.* DURGA PRASAD. **5 Pat. L. T. 425 : 3 Pat. 930 : 1924 P. H. C. C. 254 : 80 I. C. 667 (2) : A. I. R. 1924 Pat. 673.**

——S. 12—*Review is permissible notwithstanding finality.*

Before or after an order of demand fructifies by non-compliance into a recorded order of rejection, the Court contemplated in Section 12 of the Court Fees Act may for good and sufficient reasons review its own order of demand on application by the plaintiffs or revise that order of its own motion. 4 Pat. L. J. 57, Foll. (*Jwala Prasad and Foster, JJ.*) MANI LAL *v.* DURGA PRASAD. **5 P. L. T. 425 :**

COURT FEES ACT (VII OF 1870), S. 12.

1924 P. H. C. C. 254 : 80 I. C. 667 : 3 P. 930 : A. I. R. 1924 Pat. 673.

——S. 12 (1) and (2)—*Plaint—Deficiency in Court-fee paid on—Power of Appellate Court to demand—Plaint accepted by Chief Ministerial Officer entrusted with duty of receiving plaints and of seeing that proper fee is paid thereon—Not actual decision by Lower Court on question of Court-fee—Effect.*

A plaint, which was insufficiently stamped was filed in the City Civil Court, and was accepted without objection by the Sheristadar of that Court, the Chief Ministerial Officer of that Court entrusted with the duty of checking the pleading filed in that Court and of seeing whether the proper Court-fee had been paid thereon. The suit was dismissed by the City Civil Judge, and, on appeal, by the plaintiff, the Taxing Officer of the High Court demanded from the plaintiff the difference between the court-fee paid by her in the City Civil Court and the Court-fee payable by her according to law. The plaintiff contended that as there was no decision by the City Civil Judge under S. 12 of the Court Fees Act as to the proper Court-fee payable on the plaint, the Appellate Court had no power under S. 12 (2) of that Act to require her to pay the additional Court-fee. *Held*, overruling the contention, that the act of the Sheristadar in accepting the plaint amounted to a decision by the City Civil Judge as to the Court-fee payable on the plaint under S. 12 (1) of the Court Fees Act, and that the Taxing Officer was therefore entitled, under S. 12 (2) of the Act, to insist upon the payment of the difference. The words "shall be decided by the Court" in S. 12 (1) do not mean that an issue shall be raised and decided by the Court. All that they mean is that the Court, either the presiding officer, or the ministerial officer who is charged with that duty, has to determine what the Court Fee is. (*Devadoss and Wallace, JJ.*) LAKSHMI AMMAL, *In re*: **(1925) M. W. N. 826 : A, I. R. 1926 Mad. 96 : 49 M. L. J. 608.**

——S. 13—*Court fees paid on appeal from final decree filed during pendency of appeal from preliminary decree should be refunded—Court-fee—Refund of.*

When an appeal is pending from the preliminary decree it is not necessary to file another appeal from the final decree. The result of the appeal in the preliminary decree would govern the final decree as well and if an appeal has actually been filed from the final decree, the Court fee may be refunded. (*Dalal, J.C. and Neave, A.J.C.*) RAJA SETH SWAMI DAYAL *v.* MUHAMMAD SHER KHAN. **11 O. L. J. 148 : 83 I. C. 129 : A. I. R. 1925 Oudh 39.**

——S. 14, Sch. I, Arts. 4 and 5—*Application for review—Presentation to Stamp Reporter—Sufficiency of—Delay.*

The judgment in an appeal was delivered by the High Court on the 7th June 1922. The application for review was signed on the 21st July 1922. The application for review was presented to the Stamp Reporter on the 6th Sep. 1922. The court-fee paid on the application was one half of the Court-fee paid on the Memorandum of Appeal. The application was returned by the Stamp Reporter on the day it was presented, when the High Court had been closed for the vacation. Thereupon the application was presented to the Senior Judge on the 13th of Nov. 1922, when the Court re-opened after the long vacation. *Held*, that the presentation to the Stamp Reporter was proper presentation within the meaning of Arts. 4 and 5 of Sch. I to the Court Fees Act. As the decree in the appeal was not in existence till the 21st of July 1922 the delay in presentation could not be a ground for penalising the applicant. The Court accordingly directed that the application should be heard as if the full court-fee had been paid and one half had been returned under S. 14 of the Court Fees Act. (*Mookerjee and Chotzner, JJ.*) NOWRANG SINGH *v.* JANARDAN. **39 C. L. J. 344: 80 I. C. 794 : A. I. R. 1924 Cal. 994.**

COURT FEES ACT (VII OF 1870), S. 17.

——S. 15—*Review—Refund of Court-fee—Inherent power.*

Where an application for review was filed under S. 151 and Order 47, Rule 1, C.P. Code, and the Court allowed the application with reference to S. 151, C. P. Code, *held* that the applicant for review was entitled to a refund of the court-fee under S. 15 of the Court Fees Act. (*Mukerjee, J.*) PROBHAS KUMAR GANGULI *v.* NITHARLAL GANGULI. **28 C. W. N. 928 : 84 I. C. 278 : A. I. R. 1924 Cal. 1054.**

——S. 17—*Balance due on* Khata, *suit for.*

In a suit for a balance on a *Khata*, which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject-matter of the suit is the balance due on the account, and the Court-fee is payable on the aggregate amount. (*Macleod, C. J. Shah and Fawcett, JJ.*) HIRALAL *v.* GANPAT. **23 Bom. L. R. 995 : 64 I. C 486 (2) : 46 B. 142 : A. I. R. 1922 Bom. 376.**

——Ss. 17 and 19-I (1)—*Bengal Amendment Act (IV of 1922)—Application for probate—Court fee payable on—Introduction of new Act—Effect of.*

An application for probate was made on the 19th March 1922, the estate was valued and court-fees to the extent of Rs. 18,000 were paid. Thereafter, the will was proved on the 8th April 1922, and an order for probate was made. On the 8th April, 1922, it was brought to the notice of the Court that in the interval between the payment of court-fees on the application for probate and the order for Probate, the Bengal Court Fees (Amendment) Act, 1922, came into force on the 1st April 1922, and that the court-fees if calculated on the basis of the amended statute, would exceed the amount already paid by Rs. 10,370. *Held*, that the petitioner was not bound to pay the excess amount and that the Court-fee already paid under the old Act was sufficient. S. 19-I (1) of the Court Fees Act provides that no order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant, until the petitioner has filed in Court a valuation of the property in the form set forth in the first Schedule and the Court is satisfied that the fees mentioned in paragraph II of the Schedule have been paid on such valuation. The third Schedule shows that the petitioner for probate or letters of administration is required to set out in detail the valuation of the moveable and immoveable properties left by the deceased. The law consequently, requires that such valuation should be made and the Court-fees paid on the basis thereof before an order entitling the petitioner to the grant of probate or letters of administration is made upon the application. As soon as he complied with requirements of the statute, his application was presented, and he became entitled to an order for the grant of probate or letters of administration if he could establish the genuineness of the testamentary instrument propounded by him. The subsequent amendment of the Act did not affect the petitioner. (*Mookerjee and Chotzner, JJ.*) THADDEUS NAHAPIET *v.* SECRETARY OF STATE FOR INDIA. **39 C. L. J. 209 : 81 I. C. 751 : A. I. R, 1924 Cal. 987.**

——S. 17—*Decree for pre-emption — Appeal by vendee—Alternative reliefs—Valuation—Court-fee.*

Plaintiff claimed a right of pre-emption alleging that the property had been sold ostensibly for Rs. 10,000 while its real price was Rs. 5,100. The vendor

and vendee denied his right to pre-emption on the grounds of dominance and contiguity. The trial Court granted a decree for possession to plaintiff on payment of the market value which was fixed at Rs. 6,800. The vendee valued his ap eal at Rs. 6,800 and asked for a decree restoring that property to him or else requiring the successful pre-emptor to pay him an additional sum of Rs. 3,200. *Held* that they were two alternative relief based on exactly the same cause of action and only one of them could be granted. They were not two distinct subjects within the meaning of S. 17 of the Court Fees Act, and the correct Court fee is one calculated not on the aggregate of the two values but on the higher of the two. The fact that the appellant himself asserts the value of the property to be Rs. 10,000 does not affect the question. (*Abdul Raoof and Campbell, JJ.*) TEK CHAND *v.* TARA CHAND. **5 Lah. 114 : 85 I. C. 556 : A. I. R. 1924 Lah. 494**

——S. 17—*Subject—What is—Suit for specific performance and possession:*

Per *Krishnan, J.*:—The word "subject" is of a somewhat uncertain connotation and is not capable of any precise definition. In a suit for specific performance and possession, court-fee need be paid only for one prayer. (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAY. **18 L. W. 333 : 47 Mad. 150 : (1923) M. W. N. 726 : A. I. R. 1924 Mad: 360 : 45 M. L. J. 431.**

——S. 17—*Suit for land or for refund of consideration—If separate Court-fee payable.*

When the plaintiffs in whose favour the first defendant had surrendered the suit lands for consideration, finding the land to belong to another person file a suit against both, asking for possession against the latter or in the alternative claim refund from the former of the consideration paid the suit embraces two distinct reliefs in respect of each of which separate Court-fees must be paid. (*Baker, J. C.*) HIRDERAM *v.* RAMCHARAN. **A. I. R. 1924 Nag. 169.**

——S. 17—*Redemption of usufructuary mortgage—Section does not apply.*

Where the plff. seeks to redeem the usufructuary mortgage the Court-fee is payable on the principal amount exclusive of any surplus profits realised by the mortgagee and claimed in the suit. S. 17 of the Court Fees Act relates only to a suit which embraces two or more distinct subjects and does not apply to such a case. 29 All. 471 : 8 N. L. R. 179 Foll., 16 Mad. 328 ; Dist. (*Drake Brockman, J. C.*) GOPIKISAN *v.* SARABJI. **A. I. R. 1922 Nag. 259.**

——S. 17—*Subject—Meaning of—Railway Company—Loss in respect of several consignments—Suit for -Court-fee.*

The word "subject" in S. 17, Court Fees Act, means "cause of action" and where in respect of loss of several consignments of various dates the consignor has issued one consolidated notice to the Railway Company under S. 77, Railways Act, he has only one cause of action in respect of the total loss and the Court-fee payable on the plaint is to be calculated on the aggregate claim. Whether a suit embraces only one cause of action or more depends on the terms of the plaint. (*Das and Ross JJ.*) EAST INDIAN RAILWAY CO. *v.* AHMADI KHAN. **1924 P. H. C. C. 175 : 78 I. C. 415 : A. I. R. 1924 Pat. 596.**

——S. 17—*Suit for partition—Joint possession—Court-fee-payable.*

The plaintiffs on their own allegations, were not in possession of any portion of the properties sought to be partitioned and they prayed for joint possession and partition. *Held*, that the plaintiffs were bound to pay court-fee on two subject-matters within the meaning of S. 17 of the Court Fees Act. The plaintiffs must pay the fixed fee for partition in addition to the *ad valorem* fee as in a suit for possession. (*Das and Ross, JJ.*) SITBARAN JHA PANDEY *v.* LOKANATH MISSIR. **3 Pat. 618 : 5 Pat. L. T. 618 : 81 I. C. 1052 : A. I. R 1924 Pat. 558.**

——S. 17—*Suit on mortgage—Same person holding two mortgages—Valuation—Subject—Meaning of*

A person holding two mortgages from the same mortgagor hypothecating the same properties and even when the due date in both is the same can bring suits separately on both bonds. In other words, there is nothing to prevent a mortgagee from suing on the first mortgage without joining the second and *vice versa*. If that is so, there can be no question that the mortgages were separate subjects and one under S. 17 of the Court Fees Act. The ordinary meaning of the word "subject" when used in law is a thing or matter, over which a right is exercised and the two mortgages were certainly two distinct matters. They could be deemed to be one either by a covenant in the mortgage consolidating the two together, or by some provision in law. Hence the suit to enforce the two mortgages is covered by S. 17 of the Court Fees Act. (*Jwala Prasad and Ross, JJ.*) NAWABA WAZIRI BEGAM *v.* BABU SHASHI BHUSHAN ROY. **2 Pat. 874 : 4 Pat. L. T. 546 : 1923 P. H. C. C. 293 : A. I. R. 1924 Pat. 77.**

——S. 17—*Subject, meaning of.*

The word 'subject' in Sec. 17 means 'Cause of action' and is not to be interpreted with reference to Sec. 7. (*Chapman and Atkinson, JJ.*) B. NAURATAN *v.* W. J. STEPHENSON. **1922 P. H. C. C. 79 : A. I. R. 1922 Pat. 359.**

——S. 19—*Court-fee on property outside province also is payable.*

The sum charged upon a grant of Probate or Administration is not a tax or duty levied upon the property upon which the Probate or Administration operates. But it is merely a fee levied by the Court issuing the Probate or Letters of Administration for the work done in this connection and therefore it is right to levy Court-fee at the enhanced rate on the value of all the assets, whether in the Province where Probate is granted or outside. (*Greaves, J.*) G. T. WILLIAMS, *In re.* **50 Cal. 597 : 27 C. W. N. 812 : 75 I. C. 466 : A. I. R. 1924 Cal. 115.**

——S. 19 (1)—*Petitioner claiming by survivorship to Hindu co-parcener—Compliance with S. 19 (1) is essential.*

Ad valorem duty as provided by Sch. I, Art. 11 must be paid under S. 19 before letters of administration can be granted to the estate of a Hindu governed by the Mitakshara law. (*C. C. Ghose, J.*) BHUBANESHWAR TRIGUNIT, *In re.* **29 C. W. N. 372 : A. I. R. 1925 Cal. 627 (1).**

——S. 19 (1)—*Petition for letters for part—Court-fee on whole cannot be levied.*

On a petition for Letters of Administration for part of property Court-fee on the value of the whole property cannot be levied. (*Abdul Raoof, J.*) GURBACHAN KUAR *v.* SATWANT KUAR. **7 Lah. L. J. 288 : 90 I. C. 620 : 26 Punj. L. R. 608 : A. I. R. 1925 Lah. 493.**

——S. 19 (1)—*Does not apply to Provident Fund money.*

Even in the absence of an administrator, Provident Fund money does not form an asset of the estate of the deceased and passes to the nominee direct ; hence

COURT FEES ACT, S. 19.

it is exempt from probate or administration duty. (*Hallifax, A. J. C.*) AGNUS MARY DE'SANTOS *v.* JAMES WILLIAM DE'SANTOS.

82 I. C. 128 : A. I. R. 1925 Nag. 108 (1).

——S. 19 (xvii)—*Petition on behalf of prisoner by counsel—If requires stamp.*

No stamp is required for an appeal or revision petition put in on behalf of a prisoner by his counsel as it is none-the-less a petition by the prisoner. (*Robinson, C. J.*) *In re*, COURT FEES ACT, S. 19 (xvii). **1 Rang. 510 : 25 Cr. L. J. 277 : A. I. R. 1924 Rang. 160.**

——S. 19 (xvii)—*Prisoner in remand—Application by advocate—No court fee necessary.*

An application made by the Advocate of a prisoner in duress or under restraint is an application made by the prisoner himself. It has been the practice to accept applications by Advocates on behalf of persons in custody within the meaning of section 19, clause (xvii), without a Court-fee. (*Saunder, J. C.*) JAGANATH KAHAR *v.* EMPEROR. **23 Cr. L. J. 121 : 65 I. C. 53 : A. I. R. 1922 U. B. 14.**

——S. 19 (xx)—*Due by Government—Application for refund of costs deposited for paper book.*

An application for refund of money deposited for the costs of preparing a paper book, etc., is not an application for payment of money due by Government to the applicant within the meaning of S. 19, cl. (xx). On the other hand it is an application or petition presented to the High Court within the provisions of Sch. II, Art. 1 of the Court Fees Act (*Sanderson, C. J. and Richardson, J.*) HARIDASI DEBI *v.* GOPESWAR. **27 C. W. N. 646 : A. I. R. 1923 Cal. 599.**

——S. 19 C—*Court fee paid at the time of first grant—Subsequent application for administration* de bonis non—*No fresh fee need be paid.*

When the appointment is made *de bonis non*, there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court fee must be paid, 4 L. B. R. 255 affirmed. (*Robinson, C.J. and Maung Gyi, J.*) MAUNG WIN PAN *In re.* **3 Rang. 90 : 4 Bur L J. 97 : 88 I. C. 759 : A. I. R. 1925 Rang. 217.**

——S. 19-D—*Joint family—Letters of Administration—Application by son.*

A son applying for letters of Administration limited to joint family property left by his father, need not pay any Court-fee (*Shah, A. C. J., Crump and Coyajee, JJ.*) KESHAVLAL PUNJALAL SHETH *v.* COLLECTOR OF AHMEDABAD. **48 Bom. 75 : 25 Bom. L. R. 1240 : A. I. R. 1924 Bom. 228 (F B.)**

S. 19-H—*Refusal to exercise jurisdiction—Valuation in probate matter—Refusal to adjudicate if property is debutter—Interference.*

Where in the course of valuing properties under S. 19, Court Fees Act, it is objected that certain properties are *debutter* and as such not liable to be valued but the judge gives no adjudication thereon, he refuses to exercise a jurisdiction vested in him by law and the order is revisable. (*Rankin and Mukerjee, JJ.*) CHINMATHA NATH PAL CHOUDHURI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **78 I. C. 901 : A. I. R. 1925 Cal. 357.**

——S. 19-H—*Proceeding under—Court cannot award costs.*

A proceeding under S. 19-H merely decides a revenue dispute between the Collector and the holder of the probate. The Court has no power to award costs in a proceeding under S. 19-H of the Act. (*Chatterjee and Cuming, JJ.*) HRIDAY MOHINI DASI *v.* SECRETARY OF STATE. **50 Cal. 239 : A. I. R. 1923 Cal. 406.**

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——S. 31—*Court-fee—Direction to pay complainant—Revision.*

The commission of a non-cognizable offence gives the right to the complainant to receive the charges of Court-fees. If under S. 31 of the Court Fees Act the order is not proper it can be corrected in appeal or revision. (*Stuart, J.*) MINGAN *v.* EMPEROR. **L. R. 3 A. 187 (Cr): A. I. R. 1923 All. 86.**

——S. 31—*Order under S. 31 does not ordinarily amount to enhancement of sentence but may be made incidentally to bring the judgments into conformity with the law—Fees though made recoverable as if they were fines are not part of the sentence.*

The making of an order under S. 31 does not ordinarily amount to an enhancement of sentence but may be made as an incidental order to bring the judgments into conformity with the law. S. 31 of the Court Fees Act provides that all fees ordered to be repaid under the section shall be recoverable "as if they were fines", but does not thereby make them part of the sentence. 22 M. 153 Dist. (*Spencer, J.*) E. THIMMIAH *v.* EMPEROR. **47 Mad. 914 : 20 L. W. 293 : 35 M. L. T. 39 : (1924) M.W.N. 489 : 82 I. C. 141 : 25 Cr. L. J. 1213 : A. I. R. 1925 Mad. 136 : 47 M. L. J. 355.**

——S. 31—*Cognizable case—Costs.*

In a cognizable case it is inequitable to order the accused to pay the costs of the complainant. (*May Oung, J.*) MAUNG SAN MYIN *v.* EMPEROR. **2 Bur L. J. 37 : A I. R. 1923 Rang. 245.**

——Sch. I, Art. 1.

See also SCH. II, ART. 17 (iii) AND (vi).

——Sch I, Art. 1 and S. 7 (9)—*Suit for foreclosure—Dismissal on a question of principle—Appeal—Subject-matter same—Court-fee—*Ad valorem.

A suit was brought for recovery of Rs. 7,525-6-0 principal and interest and in case the money was not paid for the foreclosure of the property which was mortgaged by conditional sale. The Court below dismissed the suit with costs. An appeal was preferred to the High Court valuing it at Rs. 7,525-6-0 but paying a Court-fee of Rs. 38-4-0, i.e., upon the principal amount secured by the mortgage. *Held*, that the plaintiff was liable to pay an *ad valorem* Court fee on the value of the subject matter of the appeal. 36 All. 45 Foll. (*Daniels, J.*) PRAG *v.* BHAGWAN DIN. **23 A. L. J. 853 : L. R. 6 All. 457 : 88 I. C. 888 : A. I. R. 1925 All. 734.**

——Sch. I, Art. 1—*Cross-objections—Sale deed—Suit to set aside—No legal necessity as to part.*

In a suit for setting aside a sale deed it was found by the Court that a part of the sale amount (Rs. 1,001) was not covered by legal necessity, and the Court dismissed the suit. An appeal was preferred against this dismissal and the respondents filed their cross-objections questioning the finding that part of the sale amount (Rs. 1,001) was not covered by legal necessity. On this cross-objection *ad valorem* Court-fee on that amount must be paid. (*Piggott, J.*) ISHDAT TIWARI *v.* TAMESHWARI TIWARI. **45 All. 537 : 83 I. C. 780 : A. I. R. 1924 All. 175.**

——Sch. I, Art. 1—*Set-off—Court-fee must be paid* ad valorem.

Where the defendant claims right of set-off, he has to pay *ad valorem* court-fee on the same. (*Piggott and Walsh, JJ.*) CHAKKAN LAL *v.* KANHAIYA LAL. **20 A. L. J. 1005 : 9 O. & A. L. R. 146 : 45 A. 218 : L. R. 4 A. 40 : A. I. R. 1923 A. 118.**

——Sch. I, Art. 1, Sch. II, Art. 1 (d) and 11—*Cross-objection on question of costs.*

A memo of cross-objections filed in the High Court on the question of costs only does not fall under Art.

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1, Sch. I, or Art. 11, Sch. II of the Act but may be treated as a petition under Art. 1 (*d*) of Sch. II of the Act and a Court-fee of Rs. 2 is leviable thereon. (*Chatterjee, J.*) KAMAL KUMARI DEBI *v.* EMADUDDIN. **64 I. C. 606 : 26 C. W. N. 934.**

——Sch. I, Art. 1—*Mortgage—Redemption suit—Valuation.*

Art. 1 of Sch. I applies to appeal from decrees in redemption suits and not S. 7 (ix) of the Court Fees Act where the redemption is sought for a particular amount and the decree directs payment of a different sum. (*Scott-Smith and Wilberforce, JJ.*) LOKH RAM *v.* RAMJI DASI. **3 Lah. L. J. 370 : 1 Lah. 234.**

——Sch. I, Cl. 1—*Value of decree appealed from decides Court fees.*

The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of, that value being determined according to S. 7 (v). (*Krishnan, J.*) G. B. SETTHAYAMA, *In re.* **48 M. 652 : 85 I. C. 405 : 21 L. W. 15 : A. I. R. 1925 Mad. 323 : 47 M. L. J. 919.**

——Sch. I, Art. 1—*Appeal from final dercee—Subsequent mesne profits—Court fee.*

An appeal from a final decree under O. 20, R. 12 (2) of the Civil Procedure Code, in respect of subsequent mesne profits is chargeable with *ad valorem* Court-fee under Art. 1, of Sch. I to the Act. (*Ayling, O.C.J. and Odgers, J.*) BALRAMA NAIDU *v.* SANGAN NAIDU. **14 L. W. 730 : 30 M. L. T. 83 : 45 M. 280 : A. I. R 1923 Mad. 19 : 42 M. L. J. 184.**

——Sch. I, Art. 1—*Redemption decree—Appeal—Claim of larger amount*—Ad valorem *fee is payable on excess.*

In an appeal against a redemption decree on the ground that more is due, *ad valorem* Court-fee is payable on the excess amount claimed. (*Wazir Hasan, A. J. C.*) SANT BAKHSH *v.* DILDAR HUSAIN. **74 I. C. 88 (1) : A. I. R 1924 Oudh 170.**

——Sch. I, Art. 1—*Appeal in foreclosure suit—Court-fee.*

If a suit for foreclosure or redemption is dismissed then for the purpose of the memorandum of appeal Court-fee should be calculated in accordance with the provisions. (*Daniels and Lyle, A. J. Cs.*) SANGAT BAKHSH SINGH *v.* RAWAT DIJDEO BAKHSH SINGH. **25 O. C. 30 : A. I. R. 1922 Oudh. 82.**

——Sch. I, Art. 1—*Cross-objections as to costs only, must be stamped* ad valorem *for the value of the sum claimed as costs.*

In a cross-objection as to costs only, the amount and the value of the subject-matter in dispute is the amount or value of the sum claimed as costs. Subject to this, a cross-objection which relates to costs and costs only must not be treated as a petition under cl. (d) Art. 1, Sch. II of the Court Fees Act but must be stamped *ad valorem* under Sch. I, Art. 1 of the Act. 25 C. W. N 934, dissented from, 8 M. I. A. 262 Expl (*Robinson, C. J. and Baguley, J.*) MA SHIN *v.* MAUNG SHWNE HUIT. **2 Rang. 637 : 3 Bur. L. J. 279 : 85 I. C. 2 7 : A. I. R. 1925 Rang. 145.**

——Sch. I, Art. 5—*Court-fee payable on review application—Appeal filed before the new Court Fees Act—Receiver application filed afterwards—Proper Court-fee—Bengal Court Fees Act, Amendment Act.*

The subject matter of an appeal was valued at Rs. 7,750 and on the 20th December 1919, a Court fee of Rs. 385 was paid on the memorandum in accordance with the table rates of *ad valorem* fees embodied in Sch. I of the Court Fees Act, 1870. The appeal was thereupon registered and was heard in due course.

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Judgment was pronounced on the 29th August 1922, when the appeal was dismissed with costs. On the 21st November 1922, the appellant presented the application for review of judgment. The application bore a court-fee of Rs. 192-8 0 that is, one-half of Rs. 385, the amount payable and paid on the memorandum of appeal when it was lodged in this Court. After the 20th December 1919 when the memorandum of appeal was filed and before the 21st November 1922. When the application for review was lodged, the Bengal Court Fees Amendment Act, 1922 (Act IV of 1922, B C.) had come into force on the 1st April 1922. Sec. 5 of this amending statute modified Art. 1 of Sch. I of the Court Fees Act, 1870, by enhancement of rate of fee payable on plaints, written statements and memorandum of appeal. Sec. 9 as a corollary altered the table of rates of *ad valorem* fees appended to the same Schedule. The consequence was that from the 1st April 1922, the amount of Court-fee payable on a memorandum of appeal valued at Rs. 7,750 was raised from Rs. 385 to Rs. 615. *Held*, that neither under the Court Fees Act as originally framed in 1870 nor under the Court Fees Act amended in 1922, can a petitioner for review of judgment be called upon to pay Court-fees on the basis of the fee which would be payable on the plaint or memorandum of appeal if it were to be filed on the date of the application for review. The amount must be calculated on the basis of the fee leviable (which in the normal course of events, is the fee actually levied,) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum is filed in Court. Tested in the light of this principle the application in the present case must be deemed to bear the correct Court-fee and must accordingly be heard on the merits. (*Mukerjee and Cuming, JJ*) NANDI LAL AGRANI *v.* JOGENDRA CHANDRA DUTTA. **28 C. W. N. 403 : 39 C L. J. 222 : 82 I. C. 297 : A. I. R. 1924 Cal. 881.**

——Sch. I, Art. 5—*Application for review—Court-fee payable on—Whether the same as on appeal.*

An application for review of the decision of a Court on an appeal must pay full court-fee on the valuation of the appeal and not merely on the subject of the review application. Had the legislature intended that an *ad valorem* fee should be levied only on the value of the subject-matter in respect of which relief was sought by the application for review, it could have said so in clear and definite terms. The words "Plaint" or "Memorandum of appeal" mean the plaint or memorandum of appeal in which the judgment review of which is asked for was passed, 31 All. 294; 3 C. W. N. 292, Foll. (*Daniels and Lyle, JJ.*) KUAR NAGESHAR SAHAI *v.* SHIAM BAHADUR. **11 O. L. J. 339 : 26 O. C. 33 : A. I. R. 1924 Oudh 108.**

——Sch. I, Art. 5—*Review—Court-fee payable in whole appeal.*

Where an appeal is filed against a decree, but only a part of the appeal is argued, still for purposes of review, court-fee is payable on the whole appeal and not on that portion alone which was argued in appeal. (*Das and Ross, JJ.*) SHEIKH ABDUL GANI *v.* SITO SINGH. **6 Pat. L. T. 40 : 86 I. C 143 : A. I. R. 1925 Pat. 368.**

——Sch, I, Art. 11. *See also* COURT FEES ACT, S. 19 (viii).

——Sch. I, Art. 11—*Probate—Property situate in two districts.*

On the death of a testator in March, 1916, his executor applied for probate to the District Judge of one of the districts in which the testator's property was

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situate. He did not file an affidavit as in Sch. III, Court Fees Act. The Dist. Judge granted probate in respect of property situate in both districts. On 16-8-19 he applied to the High Court of another district in which lay some property of the testator for Letters of Administration. The High Court granted letters and proceeded to determine the value of the property for purposes of Court-fees. *Held*, that the value of the property must be assessed to the date, on which the first affidavit on 11-4-16 was filed and that on deducting the duty already paid under Art. 11, Court Fees should be paid on the value of the entire estate situate in both districts. (*Das and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683 : 62 I. C. 513 : 6 P. L. J. 411.**

——**Sch. I, Arts. 17, (1) and 11**—*Cross-objection.*

Cross-objections must bear a Court-fee calculated on the amount or value of the subject-matter in dispute. (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) SRI RAJEO LOCHAN MAHARAJ *v.* MAHANT RAM MANOHAR PRASAD. **25 O. C. 275 : A. I. R. 1923 Oudh 44 (1).**

——**Sch. I, Art. 17**—*Charge held enforceable against portion of property—Appeal that charge enforceable against whole property—Court-fee must be paid on value of property in dispute.*

Where in a suit for the enforcement of a mortgage or charge against certain property, the trial Court held the charge to be enforceable only against a portion of the property and where in appeal the relief sought was that the charge should be declared against the whole property, it was held, that an *ad valorem* Court-fee on the value of the property in dispute was payable. (*Daniels, J. C.*) SAHEB ALI *v.* MAHOMED ZAHIB. **65 I. C. 114 : 24 O. C. 295.**

——**Sch. I, Art. 17 (6)**—*Appeal attacking mode of execution—Ten-rupee stamp is enough.*

An appeal not attacking the decree as a whole but only the manner in which the trial Court's decree was enforced falls under clause 6 of Art. 17 and a stamp of Rs. 10 is sufficient. (*Jai Lal, J.*) RADHA KRISHNAN *v.* MEHTAB MIAN. **7 L. L. J. 364 : A. I. R. 1925 Lah. 496.**

——**Sch. II, Art. 1**—*Appeal against order under S. 144, C. P. Code—Court-fee.*

An appeal against an order passed under S. 144, C. P. Code, is an appeal against a decree and an *ad valorem* stamp duty is payable thereon. (*Daniels, J.*) BAIJNATH DAS *v.* BALMUKUND. **47 All. 98 : 22 A. L. J. 881 : 5 L. R. A. (Civ.) 773 : 82 I. C. 321 : A. I. R. 1925 All. 137.**

——**Sch. II, Art. 1**—*Cross objections—Possession of land—Court-fee.*

In the case of cross objections relating to possession of land, *ad valorem* fee is payable on its value and not on the basis calculated under S. 7 (v) of the Court Fees Act. (*Daniels, J.*) BIHSHEN SAHAI *v.* CHHOTEY LAL. **L. R. 5 A. 712 : 22 A. L. J. 911 : 47 A. 89 : A. I. R. 1925 All. 119 (1).**

——**Sch. II, Art. 2**—*Application for mesne profits—Appeal against order of Court-fee payable.*

An application under S. 144, C. P Code, for mesne profits by way of compensation relates to the execution, discharge or satisfaction of the decree and in an appeal from an order dismissing the application, *ad valorem* Court fees need not be paid but only a sum of 8 annas. (*Drake-Brockman, J. C.*) GABBA *v.* KANCHHEDILAL **18 N. L. R. 15 : A. I. R. 1922 Nag. 62.**

——**Sch. II, Art. 6**—*Security bond executed in pursuance of an order of Court.*

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Security bonds executed in pursuance of an order of the Court under O. 32, R. 6 (2) or any other rule or section of the Civil Procedure Code must bear a Court-fee stamp as required by Art. 6 of Sch. II of the Court-fees Act, 1870, and they will also be chargeable under the Stamp Act if they are of the kind described in Art. 40 or Art. 57 but they will not be chargeable under the Stamp Act if they fall under the residuary Art. 15. (*Walmsley Greaves, C. C. Ghose, B. B. Ghose and Mukerji, JJ.*) RE : REFERENCE UNDER S. 113 READ WITH O. 46, R. 1, C. P. CODE. **29 C. W. N. 851 : 42 C. L. J. 5 : 89 I. C. 289 : A I. R. 1925 Cal. 906 (F. B.)**

——**Sch. II, Art. 6**—*Surety bond—Duty payable.*

A security bond filed by a claimant in a claim case, being an instrument of obligation given in pursuance of an order of Court is governed by Sch. II, Art. 6. of the Court Fees Act. (*Newbould and Panton, JJ.*) SARBO MUSALMANI *v.* SAFAR MANDAL. **49 Cal. 997 : A. I. R. 1923 Cal. 269 (2).**

——**Sch. II, Art. 6**—*Surety bond on order for stay of execution must be stamped under Stamp Act.*

A security bond taken on an order for stay of execution must be stamped in accordance with the Stamp Act and cannot be written on plain paper bearing a Court-fee of eight annas. (*Martineau, J.*) GURDITTA MAL *v.* FIRM GURDASMAL RAM CHAND. **7 Lah. L. J. 343 : 26 Punj. L. R. 634 : A. I. R. 1925 Lah. 552.**

——**Sch. II, Art. 11**—*Restitution proceedings Appeal—Court-fee.*

Proceedings in restitution are proceedings in execution and the Court fee payable on an appeal therefrom is under Sch. II, Art. 11 of the Court Fees Act. (*Oldfield. J.*) SUDALAI MUTHU PILLAI *v.* SUDALAI MUTHU PILLAI. **17 L. W. 623 : (1922) M. W. N. 831 : A. I. R. 1923 M. 270.**

——**Sch II, Art. 11**—*Appeal from order granting application for final decree—Court fee is* ad valorem—*Civil P. C., S.* 97.

Appeal from an order passed on an application for final decree in a mortgage suit against the judgment-debtor who objected on the ground that he had satisfied the decree, is chargeable with *ad valorem* Court fee and not only 8 annas. (*Kendall and Pullan, A. J. Cs.*) ASGHAR ALI *v.* MAHABIR. **27 O. C. 225 : 84 I. C. 742 : A. I. R. 1925 Oudh 102.**

——**Sch. II, Art. 11**—*Order awarding interest—Appeal—Court fee—Government Notification.*

A mortgagee who obtained a decree for sale was ordered to pay out of the sale proceeds a certain amount as interest due to a prior mortgagee decree-holder. He filed an appeal against the order, *Held*, the order was one under S. 47, C. P. Code, and under the Government Notification. Court-fee would be payable as under Sch. II, Art. 11 of the Court Fees Act. (*Jwala Prasad, J.*) SITAL PRASAD SINGH *v.* JAGDEO SINGH. **4 Pat. 294 : A. I. R. 1925 Pat. 577.**

——**Sch. II, Art. 17**—*Appeal—Court-fee—Money decree against one defendant—Appeal with regard to the liability of other defendants.*

Where a plaintiff who obtained a decree for the full amount sued for against one of the defts, appealed with a view to make the other defendants also liable *held* he was bound to pay *ad valorem* Court-fee on the amount for which the other defendants were sought to be made liable. 13 M. 508 Foll (*Macleod, C. J. and Coyajee, J.*) ANNA NARAYAN PAVGI *v.* MADHYAMA STHITITILA. **24 Bom. L. R. 313 : 46 Bom. 840 : A. I. R. 1922 Bom. 172.**

——**Sch. II, Art. 17**—*Suit for reversal of patni sale—Court-fee payable on—Amending Act (IV of*

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1922)—*Effect of.*

A suit for the reversal of a patni sale is not solely for a declaration that the sale is a nullity. It is on the other hand a suit for the reversal or cancellation of sale, on the assumption that if the validity of the sale is not challenged the sale would remain operative between the parties. Prayers for injunction and for confirmation of possession are prayers for consequential relief. Where the suit had been instituted on the 16th June 1920, the amount of Court-fee leviable on the plaint must be determined by a reference to the law as it stood on that date, irrespective of the amendment under Bengal Act (IV of 1922.) (*Mookerjee and Chotzner, JJ.*) TARAPRASANNA CHAUGDAR *v.* NRISINGHA MURARI. **51 Cal. 216 : 81 I. C. 731 : 28 C. W. N. 683 : 39 C. L. J. 212 : A. I. R. 1924 Cal. 731.**

——Sch. II, Art. 17—*Suit to set aside an order on claim—Court-fee.*

Under Art 17, Sch. II of the Act a Court-fee of Rs. 10 is payable upon the plaint in a suit to set aside an order of dismissal of a claim in execution proceedings. (*Chatterjee and Pearson, JJ.*) SATINDRA NATH *v.* SHIVA PRASAD. **26 C. W. N. 126 : A. I. R. 1922 Cal. 166.**

——Sch. II, Art. 17—*Appeal against decree against one defendant—Other defendants to be made jointly liable.*

Ad valorem court fee stamp should be paid on the amount decreed by the lower Court, where the lower Court granted the plaintiff a decree against one of several defendants and the plaintiff appealed with the object of getting the other defendants made jointly liable for the amount decreed. But where the question involved was a debatable one and the deficiency in Court fee as originally paid was due to a *bona fide* mistake. *Held* the case is a fit one for extension of time and for allowing the appeal to be heard on the merits, 86 P R. 1912 Foll. (*Shadi Lal, C. J. and Abdul Qadir, J.*) RAM KISHAN *v* HIRDE RAM. **A. I. R. 1923 Lah. 135.**

——Sch. II, Art. 17, S. 7 (4) (c)—*Applicability—Execution of mortgage decree against joint family—Resistance by some members—Declaratory suit that the mortgagee be entitled to attach and sell the joint family estate—Whether consequential relief.*

In a suit for enforcement of the mortgage against a joint family of defendants 1—6, and a personal decree was passed against defendant 1 only, as no necessity was proved, and the decree-holder applied for execution against 1st defendant, defendants 3, 7 and 8 resisted the application on the strength of a prior partition, and deft. 10, on a prior sale to him by the judgment-debtor for consideration and the 1st deft.'s share was diminished. The decree-holder filed a declaratory suit for holding that the sale to the 10th defendant was nominal, and that the prior partition suit filed on behalf of defendant 3, did not take place, with a specific relief, that it may be declared that the plaintiffs are entitled to realise their decree from the joint properties by attachment and sale. It was contended that the Court-fee paid was insufficient, for, besides the declaration claimed, consequential relief is claimed for, in the last prayer, and *ad valorem* fee under S. 7, cl. 4 (*c*) should be paid. *Held*, that the last mentioned relief is a mere surplusage and the relief sought is merely declaratory and the Court-fee charged should be under Sch. II, Art. 17 of the Court Fees Act. (*Jwala Prasad, J.*) MAHABIR PRASAD *v.* SHYAM BEHARI SINGH. **3 Pat. 795 : 80 I. C. 655 : 6 P. L. T. 82 : A. I. R. 1925 P. 44.**

——Sch. II, Art. 17—*Claim suit—Court-fees.*

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A suit under O. 21, R. 63, C. P. Code, is one to declare the plaintiff's right to the property attached and the mere fact that the property has been sold in the meanwhile in execution does not affect the plaintiff's right of suit. The Court-fee payable upon the suit is Rs. 10 under Art. 17, Sch. II of the Court-Fees Act. (*Jwala Prasad, J.*) MT. MANIK *v.* RAMJAS AGARWALLA **1 Pat. L. R. 51 : 3 P. L. T. 832 : A. I. R. 1923 P. 152.**

——Sch. II, Art. 17 (a) (ii)—*Decision by Court on reference.*

Memo. of appeal against decision by Court on reference by Collector under Land Acquisition Act requires *ad valorem* Court-fee under Sch. I, Art. 1, Court Fees Act. (17 I. C. 764, Dist.) (*Schwabe, C. J.*) *In re* ASSISTANT COMMISSIONER OF LABOUR. **19 L.W. 207 : (1924) M.W.N. 108 : 78 I. C. 435 : 34 M. L. T 357 : A. I. R. 1924 Mad. 489 (2) : 46 M. L J. 150.**

——Sch II, Art. 17 (iii).

Prayers for injunction and for confirmation of possession are prayers for consequential relief. (*Mookerjee and Chotzner, JJ.*) TARA PRASANNA *v.* NRISINGHA MOORARI PAL. **51 Cal. 216 : 28 C W. N. 683 : 39 C. L. J. 212 : 81 I. C. 763 : A. I. R. 1924 Cal. 731.**

——Sch. II, Art. 17 (iii)—*As amended by Bengal Act (IV of 1922)—Suit for mere declaration—Appeal—Court-fee—Basis of calculation—What appellant ought to have claimed cannot be considered.*

Where a plaint or a memorandum of appeal asks only for a pure declaration, the Court in calculating Court-fees cannot go into the question whether he should also have asked for consequential relief. The effect of failing to claim consequential relief is for the final decision of the Court. A fixed fee under Sch. II. Art. 17 (iii) is sufficient. (*B. B. Ghose, J.*) IDOL SRI SRI GOKUL NATH JIN *v.* NEW BIRBHUM COAL CO., LTD. **27 C. W. N. 972 : A. I. R. 1924 Cal. 183.**

——Sch. II, Art. 17 (iii)—*Hindu co-parcener's suit for declaration that alienation of joint family property by another co-parcener is not binding, need not be stamped* ad valorem.

A suit, brought by a Hindu co-parcener in a joint family for declaration that the mortgage executed by another coparcener of joint family property does not bind the property mortgaged, is not a suit for cancellation of the mortgage but merely a suit for a declaration coming under Court Fees Act, Sch. II, Art. 17 (3) and does not require *ad valorem* fee. 35 P.R. 1914 Dist. (*Broadway and Campbell, JJ.*) SRAMDAS *v.* CHARN DAS. **78 I. C. 782 : A. I. R. 1925 Lah. 90.**

——Sch. II, Art. 17 (iii)—*Appeal— Declaratory decree that mortgages did not affect plaintiff's reversionary rights—Condition of payment of a certain sum.*

The suit was one for a declaration that a certain alienation made by the plaintiff's father should not be binding upon their reversionary interest. The plaint was rightly stamped with a court-fee of Rs. 10. The suit was decreed subject to a reservation that a sum of Rs. 2,365 had been borrowed for necessary purposes. On appeal by the plaintiffs for the same relief *held* that the memorandum of appeal need not be stamped with more than 10 rupees. From the mere fact that the suit had been decreed on payment of a certain sum to the defendant—mortgagee, its nature was not in any way altered. It was not contemplated by the legislature that the court-fee payable on a part of a whole claim in appeal is, in the absence of express direction to the contrary, to exceed the court-fee payable on the whole claim. 92 P. R. 1900 Ref. (*Abdul Raoof and Motisagar, JJ.*) HARBHAGWAN *v.* AMAR SINGH. **5 Lah. 137 : A. I. R. 1924 Lah. 530.**

COURT FEES ACT, Sch. II, Art. 17.

——Sch. II, Art. 17 (iii)—*Scheme suit—Prayer for temporary mandatory injunction to compel defendant to deposit amount in Court—*Ad valorem *Court-fee if payable thereon.*

Where in a suit under S. 92, Civil Procedure Code, the plaintiff claims among other reliefs a temporary mandatory injunction to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 due from him to the trust, it is in effect only a prayer for an account falling clearly within the express words of S. 92. The character of the suit is not altered and a Court-fee of Rs. 50 as fixed in Sch. II, Art. 17 (iii) of the Court Fees Act is sufficient. (*Venkatasubba Rao, J.*) RAMANUJA NAIDU *v.* ALAGAPPA CHETTY. **20 L. W. 716 : 35 M. L. T. 124 : A. I. R. 1924 Mad. 882 : 47 M. L. J. 656.**

——Sch. II, Art. 17 (iii)—*Suit for declaration that property belongs to plaintiff and is not liable to be sold in execution of mortgage decree to which plaintiff was not party is not liable to* ad valorem *fee.*

A suit for declaration that certain property belongs to the plaintiff and is not liable to be sold in execution of a mortgage decree which has been passed in a suit to which the plaintiff has not been a party does not involve any consequential relief and does not require *ad valorem* Court fee. 24 O. C. 361 Dist. (*Wazir Hasan and Neave, A. J. Cs.*) SRI RAM *v.* MATHURA PRASAD. **85 I. C. 349 : A. I. R. 1925 Oudh 500.**

——Sch. II, Art. 17 (iv).

See also COURT-FEES ACT, S. 8.

——Sch. II, Art. 17 (iv)—*Suit for declaration that money is jointly due.*

No *ad valorem* fee need be paid, when a suit is brought for a declaration that money is jointly due and that the plaintiff does not object to its being received by defendants. (*Scott-Smith and Moti Sagar, JJ.*) MT. UTTAM DEVI *v.* DINA NATH. **75 I. C. 774 : A. I. R. 1923 Lah 359.**

——Sch. II, Art. 17 (iv), S. 7, Cl. 4 (c)—*Suit to set aside award—Actual and not arbitrary value will be accepted.*

In a suit to set aside an award the plaintiff cannot place arbitrarily his own valuation on the relief and it need not be accepted as conclusive for purposes of jurisdiction, (*case law discussed*). (*Venkatasubba Rao J.*) VENKATACHALAM PILLAI *v.* P. V. SRINIVASA IYER. **18 L. W. 399 : 1923 M. W. N. 747 : 75 I. C. 115 · A. I. R. 1924 Mad. 84.**

——Sch, II, Art. 17 (V)—*Suit for declaration that certain adoption deed executed by a widow shall be of no effect on the plaintiff's reversionary rights after death or re-marriage of the widow is not a suit to annul an adoption—Suits Valuation Act, S.* 8.

A suit was filed by the plaintiffs for a declaration that a deed of adoption executed by A should not after she died or re-marriage affect their reversionary right. They valued their suit for purposes of jurisdiction at Rs. 6,895-15-0 being 30 times the land revenue on certain land together with the value of certain house and attached a court-fee of Rs. 10 to their plaint. The trial Court dismissed the suit. The Dt. Judge was appealed to and he granted the appellants the declaration sought in respect of a portion of the estate of the adoptive mother. In the second appeal preferred to the High Court by the defendant one of the pleas was that the appeal from the first Court's decree lay not to the Dt. Judge but to the High Court. *Held*, that as the suit was not one for annulling an adoption but for declaring that the adoption must not affect the plaintiff's reversionary rights was correctly valued for purposes of jurisdiction at Rs. 6,895-15-0 and therefore, the appeal from the trial Court decree must be made to the High Court and not to the Dt. Court. (*Campbell and Moti Sagar, JJ.*) GANGA SINGH *v.* SHER SINGH. **5 Lah. 440 : 6 L. L. J. 585 : 84 I. C. 486 : A. I. R. 1925 Lah. 229.**

COURT FEES ACT, Sch. II, Art. 17.

——Sch. II, Art. 17 (vi).

See also (1) COURT FEES ACT, S. 7 (iv) (*b*). (*c*).
(2) SCH. I, ART. 1.

——Sch. II, Art. 17 (vi)—*Suit for declaration of title and for partition—Court-fee.*

A person alleging he was in possession of certain property asked for a declaration of title as a cloud had been cast on it. He also asked for partition on the basis of title. *Held*, Art. 17 (vi) applied. (*Greaves and Chakravarti, JJ.*) RAJANI KANTA BAG *v.* RAJABALA DASI. **29 C. W. N. 76 : 52 Cal. 128 : A. I. R. 1925 Cal. 320.**

——Sch. II, Art. 17 (vi)—*Suit for dissolution of partnership—Objection on appeal as to the manner in which the decree ought to be enforced—Court-fee, amount of.*

The plaintiff filed a suit for dissolution of partnership and the Trial Court decreed the suit but directed the appointment of a Receiver to sell the partnership assets and that plaintiff should incur certain initial expenses. The plaintiff appealed without attacking the whole decree only as to the manner in which the decree passed by the Trial Court was to be enforced. *Held*, that a Court-fee stamp of Rs. 10 was sufficient on a memorandum of appeal, as the case was covered by Cl. 6 of Art. 17 of the second schedule of the Court Fees Act. 52 I. C. 979 ; 33 All. 705 Ref. to. (*Jailal, J.*) RADHA KISHEN *v.* MEHTAB MIAN. **7 Lah. L. J. 364 : 26 Punj. L. R. 645 : 90 I. C. 629 : A. I. R. 1925 Lah. 496.**

——Sch. II, Art. 17 (vi)—*Suit under C. P. Code S. 92—No beneficial interest asked for by plaintiff—Prayer to compel trustees to restore misappropriated sums to trust—Art.* 17 (6) *applies.*

Where in a suit under C. P. Code, S. 92 the plaintiff did not claim any beneficial interest in the properties but only said that on going through his accounts a sum which he estimated at a certain amount would be found due by the trustees to the trust and that the trustees should be asked to make good to the trust itself that amount of money and hand over possession of the immoveable property ; *Held*, that these reliefs could not be treated as being part of the subject matter in dispute between the parties ; that they were merely ancillary reliefs, and that the relief claimed clearly fell under Art. 17 (6) of the 2nd Schedule of the old Court Fees Act. 11 M 148 Diss. (*Krishnan, J.*) SUDALAIMUTHU PILLAI *v.* P. SOMASUNDARAM PILLAI. **87 I. C. 25 : (1925) M. W. N. 104 : A. I. R. 1925 Mad. 722 : 48 M. L. J. 514.**

——Sch. II, Art. 17 (vi)—*Applies to suit for cancellation of a mortgage decree mortgagee being left the right to bring suit on same mortgage.*

A suit wherein the relief claimed is the cancellation of a mortgage decree which leaves the defendant with the right and the opportunity to obtain another similar decree on the same mortgage in a properly framed suit is a suit, the value of the subject-matter of which is not capable of ascertainment and it falls within Art. 17 (6) of the Sch. II to the Court Fees Act. (*Hallifax, A. J. C.*) MAHADEO GANESH SOHAN *v.* SADASHIV. **78 I. C. 437 : A. I. R. 1925 Nag. 66 (1).**

——Sch. II, Art. 17 (v)—*Suit for partition—Declaration of right to partition and possession—Ejectment suit—Court-fee payable on.*

Ordinarily, where the plaintiff in the case, as laid

by him in the plaint, affirms that he is in possession of a portion of the joint estate and claims a change in the mode of enjoyment of the property and prays for separate possession of his share as the result of redistribution of the property under the separate management of the parties, his suit is one for partition and separate possession of his share in the entire property, and as such the claim falls under Article 17 clause (c) of Schedule II of the Court Fees Act, and a fixed fee of Rs. 10 only is payable thereon. Where, however, the plaintiff admits that his title is disputed and that he is out of possession and enjoyment of the property sought to be partitioned, and he does not hold or possess or occupy any portion or item of the divisible property, and asks for partition, his suit must be treated practically as an ejectment suit, and an *ad valorem* Court-fee is leviable on a plaint in such suit. The Court will have to see whether the plaintiff claims anything more than a change in the mode of enjoyment of the property by partition or, in other words, whether it is a part of his cause of action as disclosed in the plaint that the defendants have denied his right for partition, or his right to joint possession in the property, or the nature of the property in the suit involved either in whole or in part. If he seeks a declaration of his right to partition on the ground that it is disputed it may safely be said that he claims something more than a change in the mode of enjoyment. This must be determined with reference to the tenor of plaintiff's claim as laid in the plaint, *i. e.*, on the cause of action as disclosed in the plaint. If the plaintiff alleges that each party is in possession of what he says is joint family property, then, on the principle that possession of one co-owner is possession of another the plaint cannot be treated as one instituted by person who is admittedly out of possession or whose right to partition is admittedly disputed, or the quantum of whose interest in the joint property is admittedly a matter on which he himself seeks an adjudication of the Court. Such a suit is one for partition of joint family property and must be distinguishable from a suit for declaration of his right to partition and possession, or for possession of his share on partition or for ejectment by a person who admits that he is wrongfully excluded from enjoyment of joint family property. In the latter class of suits what the plaintiff himself seeks is an establishment of his own title or right to partition of the property which is already in dispute (*Kinkhede A, J. C.*) MINAJI *v.* SITARAM.
7 N. L. J. 91 : 81 I. C. 643 : A. I. R. 1924 Nag. 105.

——— **Sch. II, Art. 17 (vi)**—*Relief capable of money value—Section does not apply.*

Art 17 (vi) of Schedule II of the Court-Fees Act cannot apply where it is possible to estimate the money value of the claim. (*Batten, J. C.*) BARI BAHU *v.* KUNDAN. **A. I. R 1922 Nag. 264.**

——— **Sch. II, Art. 17 (vi)**—*Partition suit—Declaration of title and possession sought*—Ad valorem *fee is payable.*

Where the plaint clearly asked for a declaration of title and possession as well as partition. *Held*: that *ad valorem* Court-fee was payable: 1923 Pat. 113 Foll. (*Adami and Macpherson, JJ.*) KANHAIYA LAL *v.* BALDEO LAL.
A. I. R. 1925 P. 703.

——— **Sch. II, Art. 17 (vi)**—*Suit for partition—Valuation—Dispute as to share of the plaintiff—Court Fees Act, S. 7, Cl. 4 (c)—Suits Valuation Act, S. 8.*

A suit for partition, pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share falls within Sch. II, Art. 17, Cl. (vi) of the Court-Fees Act. A suit in

which plaintiff prays for declaration of his title and partition as a consequential relief falls within S. 7, Cl. (iv) (*c*) of the Court-Fees Act. In the former case the suit must be valued for purposes of jurisdiction at the value of the entire subject-matter and not at the value of the plaintiff's share only. In the latter case the plaintiff's share becomes also the valuation of the suit for purposes of jurisdiction. (*Das and Kulwant Sahay, JJ.*) RANJIT SAHI *v.* MAULAVI QASIM.
2 Pat. 432 : 4 Pat. L. T. 257 : A. I. R. 1923 Pat. 342.

——— **(As Amended by Madras Act V of 1922) Sch. II. Art. 17-B**—*Division in status—Suit for partition by metes and bounds—Fee payable.*

Where after a joint Hindu family has become divided by status, one member sues for partition by metes and bounds, the relief is merely one of change in the form of enjoyment and as its money value cannot be fixed, Sch. II, Art. 17 B. will apply and a court fee of Rs. 15 is sufficient if the suit is filed in the Munsiff's court. (*Odgers, J.*) PRATTIPATI SURYANARAYANA *v.* SESHAYYA. **90 I. C. 843.**

——— **Sch. III (Annexure B)**—*'Property held in trust'—Meaning of.*

Property held in trust within Annexure B in the form set out in Sch. III, is property held in trust by the testator and not one as to which the testator has created a trust. (*Das and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683 : 62 I. C. 513 : 6 P. L. J. 411.**

COURT, JURISDICTION OF. *See* JURISDICTION.

COURT OF APPEAL.
See (1) APPEAL.
(2) C. P. CODE, O. 41.

COURT OF WARDS. *See also* LOCAL COURT OF WARDS ACTS.

COURT OF WARDS ACT. *See* LOCAL ACTS.

COURT SALE.
See (1) EXECUTION.
(2) CIVIL PROCEDURE CODE, O. 21.

COURT'S PROCESS.
See (1) PRACTICE.
(2) CIVIL PROCEDURE CODE, S. 151.

COVENANT. *See* T. P. ACT, SS. 10, 40, 55, 72, 76 AND 108.

COVENANT, BREACH OF. *See* T. P. ACT, S. 55.

COVENANT FOR TITLE.
See (1) C. P. CODE, O. 21, R. 93.
(2) EXECUTION SALE.
(3) T. P. ACT, S. 55.

COVENANT IN RESTRAINT OF TRADE. *See* CONTRACT ACT, S. 27.

COVENANT NOT TO ALIENATE. *See* T. P. ACT, SS. 10 AND 11.

COVENANT RUNNING WITH LAND.
See (1) LANDLORD AND TENANT.
(2) T. P. ACT, S. 40.

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CRIMINAL BREACH OF CONTRACT—*See* (1) **ACT XIII OF 1859** (WORKMEN'S BREACH OF CONTRACT ACT)
(2) PENAL CODE, SS. 490-492.

CRIMINAL BREACH OF TRUST—*See* PENAL CODE, SS. 405-409.

CRIMINAL CASE—*See* CRIMINAL TRIAL.

CRIMINAL FORCE—*See* PENAL CODE.

CRIMINAL INTIMIDATION—*See* PENAL CODE, S. 506.

CRIMINAL LAW AMENDMENT ACT (XIV OF 1908.)

——**Ss. 15 and 17**—*Instigating formation of unlawful assembly—Contribution of funds—Abetment of offence—I. P. C., Ss.* 107, 108 *and* 117.

A man who instigates the formation of an association, the purposes of which are such as to render that association unlawful and contributes to and solicits contributions for that association may, broadly speaking, be considered to have contributed to and solicited contributions for the purpose of such association. But a penal statute has to be construed strictly and before an assocition can have a purpose it must be in existence and any contribution to or solicitation for such an association prior to its formation cannot render a person amenable to S. 17 (1) of the Cr. Law Amendment Act. The intention of the legislature was to render punishable only such contributors, etc. who contributed or solicited contributions for the purpose of an *existing* association. But such acts amount to "instigation" of the formation of an association which is unlawful under S. 15 (2) (b) of the Criminal Law Amendment Act. The conduct of the accused amounting to abetment of the commission of an offence by a class of persons exceeding 10 is liable to the penalty provided by S. 117, I. P. C. A person is said to "instigate" another to an act when he actively suggests or stimulates him to the act, by any means or language direct or indirect whether it takes the form of express solicitation or of hints, insinuation or encouragement. 22 M. L. T. 373 Ref. (*Broadway and Motisagar, JJ.*) EMPEROR *v.* MIHAN SINGH. **5 Lah 1 : A. I. R. 1924 Lah. 440.**

——**S. 17 (2)**—*Police report—No* prima facie *case made out.*

The case against petitioners originated on a Police report which was in these words: "I beg to report that Srijut Parmanand Agarwala has been assisting the volunteers by giving them shelter in a house belonging to him in the Tejpur town. I, therefore, request that action under the Criminal Law Amendment Act may be taken against him." Upon this, the Deputy Commissioner ordered "Issue warrant with bail under S. 17 (2) of the Act." *Held*: This report failed to make out a *prima facie* case in respect of the offence described in this section with the result that the proceedings based on the report must be quashed. (*Walmsley, and Suhrawardy, JJ.*) PARMANANDA AGARVALA *v.* EMPEROR. **36 Cal L. J. 179 : 24 Cr. L. J. 1 : 71 I. C. 49 : A. I. R. 1922 Cal. 538.**

——**S. 17 (2)**—*Association must be in existence for its meeting to be promoted—Authority to convene meeting, must be proved.*

The offence of promoting or assisting in promoting a meeting of an unlawful association implies that the association is already in existence. No doubt a thing not already existing may be promoted, but the offence under the Act consists in promoting, or assisting in promoting, not an unlawful association but a meeting of such an association and therefore the association must exist before a meeting of it can be promoted. It cannot therefore be said that a person by urging his hearers to form 'themselves into "Jathas" promotes or assists in promoting meetings of the "Jathas" when the "Jathas" themselves had not come into existence. The person alleged to have promoted such meetings on behalf of an unlawful association must be proved to have authority from that association to convene the meetings. (*Martineau, J.*) ATTAR SINGH *v.* EMPEROR. **6 Lah. 349: 88 I.C. 367. A.I.R. 1925 Lah. 522.**

——**S. 17 (2)**—*Scope.*

Where a High Court Vakil defied the order of constituted authority and took the law in his own hands as a result of which he was convicted under S. 17 (2) of the Criminal Law Amendment Act, he renders himself liable to the disciplinary jurisdiction of the High Court. Where the vakil without expressing regret for his conduct maintained the correctness of his position he was suspended for 6 months. Advocates and pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the courts in the administration of justice but also for giving professional advice for which they are entitled to be paid by those members of the public who require their services. Their position, training and practice give them an immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary for the High Court in order to be able to exercise its disciplinary jurisdiction that any offence should have been committed by a pleader nor is it necessary that what the pleader has done should have subjected him to anything like general infamy or imputation of bad character. (*Miller, C. J. Mullick and Kulwant Sahay, JJ.*) BABU MADHEVA SINGH, *In the matter of.* **(1923) P. H. C. C 42 : 1 Pat. L. R. (Cr.) 36 : A. I. R. 1923 P. 185 (2). (S. B.).**

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CRIMINAL PROCEDURE CODE, (V OF 1898).

———*Three accused charged of criminal conspiracy —Two acquitted—Effect on the third.*

Where three persons were charged of criminal conspiracy and two are acquitted, the third also must be acquitted. (*Cuming and Mukerjee, JJ.*) PRAFULLA KUMAR ROY CHOWDHURY *v.* EMPEROR.

30 C. W. N. 94.

———*Exhaustive only so far as it deals.*

So far as it deals with any point specifically the Code must be deemed to be exhaustive and the law must be ascertained by reference to its provisions, but where a case arises which obviously demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require. (*Buckland and Cuming, JJ.*) RAHIM SHEIKH *v.* EMPEROR.

50 Cal. 872 : 37 Cal. L. J. 595 : 73 I C. 773 (2) : 24 Cr. L. J. 677 (2) : A. I. R. 1923 Cal. 724.

CRIMINAL PROCEDURE CODE.

———*Surety bond.*

A surety bond for the production of any person before the police taken by the Police Officer is void *ab initio.* (*Martineau, J.*) HAMID ALI *v.* EMPEROR. **25 Cr. L. J. 712 : 81 I. C. 200 : A. I. R. 1925 Lah. 152 (1).**

——— *Abrogation of—Martial Law.*

The introduction of Martial Law does not abrogate or suspend the operation of the Cr. Pro. Code in any particular area. (*Spencer and Kumaraswami Sastri, JJ.*) KOCHUNNI ELAYA NAIR, *In re.* **45 Mad. 14 : 68 I. C. 26 : 23 Cr. L. J. 490 : 14 L. W. 465 : (1921) M. W. N. 708 : A. I. R. 1922 Mad. 215 : 41 M. L. J. 441.**

———*Compoundable offence—Offence under S.* 494, *Indian Penal Code.*

Under the new Criminal Procedure Code the offence under S. 494, I. P. C., is one which is compoundable with the permission of the Court. (*Findlay, O. J. C.*) MT. RITHA *v.* EMPEROR. **8 N. L. J. 178.**

——— *Local inspection—Keeping note.*

Though there is no provision in the Code for making local inspection or for keeping a note of the inspection if made, it has been settled by authorities that a Magistrate must invariably put on record a note of his inspection. 37 Cal. 340 ; 14 C. W. N. 422 (1910) Foll. (*Jwala Prasad, J.*) ATHAR HUSSAIN *v.* EMPEROR. **1922 P. H. C. C. 27 : 24 Cr. L. J. 234 : 71 I. C. 698 : A.I.R. 1922 Pat. 51.**

———*Magistrate need not arrest person whom he may think he can convict, in the middle of trial and start it* de novo.

A Magistrate is not bound under the Code at any stage of the trial to stop the proceedings and to arrest any person against whom he thinks there exists a chance of getting a conviction and to start *de novo* the original trial. 16 N.L.R. 9 and 25 Mad. 61 (P. C.) Explained. (*Bagnley, J.*) A. V. JOSEPH *v.* EMPEROR. **3 Bur. L. J. 265 : 3 Rang. 11 : 26 Cr. L. J. 492 : A. I. R. 1925 Rang. 122.**

———S. 1—*Village Magistrates—Applicability of the Code.*

S. 1 of the Code should not be read as meaning that Village Magistrate could not complain or be tried under the Code but only that in his official capacity as Village Magistrate that is in the proceedings he takes as Village Magistrate, he is not governed by the Code. (*Krishnan, J.*) PUBLIC PROSECUTOR *v.* MARI MUDALI. **19 L. W 30 : 76 I C 653 : (1924) M. W N. 145 : 25 Cr. L. J. 221 : A. I. R. 1924 Mad. 730.**

———S. 1 (2)—*Applicability—U. B. R. Reg.* 1887 *S.* 6—*Cr. P. Code, Ss.* 417 *and* 418—*Cr. P Code, S.* 435.

Orders passed under the Upper Burma Ruby Regulations of 1887, S. 6, are within the scope of the Code as regards appeal and revision though no provision is made in the Regulation for an appeal or revision. (*Duckworth, J.*) MAUNG PO LON *v.* EMPEROR **2 Rang. 321 : 3 Bur. L. J. 168 : 26 Cr. L. J. 289 : 84 I. C. 433 : A.I.R. 1925 Rang. 12.**

———S. 4 (1) (h)—*Complaint—Report of Trial Magistrate.*

Where a Magistrate having tried a case sent up a report to the Dt. Magistrate that the accused had made a certain change in a document filed in Court and had thus committed an offence, *held*, the report is a complaint. (*Sulaiman, J.*) SURAJ PRASAD *v.* EMPEROR. **21 A. L. J. 825 : L. R. 4 A. 248 (Cr.) : 9 O. & A. L. R. 1049 : A. I. R. 1924 All. 190.**

———S. 4 (1) (h) and S. 476—*Proceeding drawn up and forwarded to magistrate for disposal under S.* 476.

Sanction granted under S. 476 for prosecution is not complaint within S. 4 (*b*) (*Newbould and B. B. Ghose, JJ.*) DURJODHAN BHAT *v.* EMPEROR. **52 Cal. 666 : 89 I. C. 1027 : A. I. R. 1925 Cal. 1226.**

———Ss. 4 (1) (h) and 190 (1)—*Complaint—What is.*

The definition of complaint does not contain any limitation that before a Magistrate can take cognizance of an offence on a complaint there must be before him some one with a personal knowledge of the facts. But he must have before him an allegation of facts constituting the offence and not a mere repetition of the words of a section. S. 190 (1) (*a*) must be read with S. 4 (*h*) of the Code. (*Beachcroft and Ghose, JJ.*) SUKUMAR CHATTERJEE *v.* MUFEZUDDIN AHMED. **25 C. W. N. 357 : 61 I. C. 839 : 22 Cr. L. J. 455.**

———S. 4 (1) (h)—*Section under which complaint is made need not be quoted—Magistrate has to determine what offence is committed on the facts disclosed but complaint should be made by competent person.*

A complaint need not quote any section of I. P. C., but must contain a statement of the facts relied on as constituting the offence, and it is for the Magistrate to determine on these facts what offence has *prima facie* been committed ; the nature of the charge will be determined by him. All that is necessary for him to see is that the enquiry into the charge is within his competency, and that, in the case of certain offences, the complaint has been made by the proper person. (*Le Rossignol and Fforde, JJ.*) MT. NAURATI *v.* EMPEROR. **6 Lah. 375 : 26 Punj. L. R. 552 : A. I. R. 1925 Lah. 631.**

——— — Ss. 4 (1) (h) and 190—*Police Officer's report with a view to taking action whether a complaint Cr. P. Code, S.* 190.

The written allegation of a non-cognizable offence made by a police officer who is also a Public Prosecutor with the idea of making the Court take action on it is not the report of a police officer but is a complaint as defined in S. 4 of the Code and it is competent for the Court to take action thereon. The words "Report of a Police Officer" refer to the report of a police officer in cases in which he is authorised to investigate by the Code. (*Shadi Lal, C. J. and Le Rossignol, J.*) EMPEROR *v.* GHULAM HUSSAIN. **6 L. L. J. 606 : 25 Cr. L. J. 1361 : 82 I. C. 753 : A. I. R. 1925 Lah. 237.**

———S. 4 (1) (h)—*Application under S.* 107. *If a complaint.*

An application under S. 107 of the Code does not fall within the definition of complaint and as such S. 203 does not apply to it. (*Jafar Ali, J.*) SHAMASUDDIN *v.* RAM DYAL SINGH. **76 I. C. 25 (1) : 25 Cr L. J. 89 (1) : A. I. R. 1924 Lah. 630.**

———S. 4 (1) (h)—*Application to Court Inspector—If a complaint.*

Where a Superintendent after inquiring into various allegations against a Sub-Inspector found they were undue and sanctioned prosecution under S. 195, Cr. P. Code and directed the Sub-Inspector to submit an application by way of complaint, whereupon he sent the necessary papers to the Court Inspector who took proceedings, there is in effect a complaint. (*Lumsden, J.*) MEHR CHIRAGH DIN *v.* EMPEROR. **4 Lah. 359 : 76 I. C. 189 : 25 Cr. L. J. 125 : A. I. R. 1924 Lah. 258.**

———S. 4 (1) (h)—*Nature of Complaint is ascertained by—Sworn statement and written complaint.*

The sworn statement and written complaint may be read together for the purpose of ascertaining the real nature of the complaint in any particular case.

CRIMINAL PROCEDURE CODE (V OF 1898), S. 4.

(*Spencer, J.*) ARUNACHELAM CHETTY, *In re.*
(1923) M. W. N. 876 : 33 M. L. T. 268 (H. C.) : 74 I. C. 949 : 24 Cr. L. J. 837 : A. I. R. 1924 Mad. 323 : 45 M.L J. 543 (2).

——— **Ss. 4 (1) (h) and 200**—*Written complaint—Deposition on oath under S. 200.*

Per *Wallis, C. J. and Coutts Trotter* (*Ayling J. contra.*)—Ascertainment of what specific charges were preferred by the complainant cannot be made from the deposition of the complainant on oath under S. 200, Cr. P. Code. (*Wallis, C. J.*) PEDDA ANJINIGADU *In re.* **13 L. W. 695 : (1921) M. W. N. 514 : 64 I. C. 282 : 22 Cr. L. J. 762 : A.I.R. 1922 Mad. 353.**

——— **S. 4 (1) (h)**—*Complaint—Petition to Deputy Commissioner—Enquiry not undertaken by.*

An application to the Police not being enquired into, the applicant petitioned the Deputy Commissioner for an enquiry. *Held*, there was no complaint. (*Kotval, A. J. C.*) MAHADU *v.* EMPEROR.
75 I. C. 543 : 24 Cr. L. J. 959 : A. I. R. 1924 Nag. 115 (1).

——— **S. 4 (1) (h)**—*Complaint—Application under S. 107, Cr. P. Code.*

A "complaint" is an allegation that some person has committed an offence and "an offence" is an act or omission made punishable by any law for the time being in force. An application under S. 107, Cr. P. Code, is not a complaint where there is merely an allegation that a breach of the peace is likely. (*Kendall, A J. C.*) RAM LAL *v.* BANKATESHAR RAWAN BAHADUR PAL SINGH. **10 O. & A. L. R. 630 : 1 O. W. N. 359 : 81 I. C. 973 : 11 O. L. J. 732 : 25 Cr. L. J. 1149 : 28 O. C. 44 : A. I. R. 1925 Oudh 138.**

——— **S. 4 (1) (h)**—*Application to continue proceedings is not a complaint.*

An application by the complainant stating that the proceedings against the accused already questioned, be received as he has sufficient material to support the case against the accused is not a complaint but an application for continuing the case. (*Kulwant Sahay, J.*) GAJO CHAUDHRY *v.* DEBI CHAUDHRY.
1 Pat. L. R 97 (Cr.) : 24 Cr. L. J. 481 : 72 I. C. 945 : A. I. R. 1923 Pat. 532.

——— **S. 4 (1) (h)**—*Complaint—False charge—Charge to whom to be made.*

To fall under S. 211, I. P. C., the false charge must be made to some person in authority, *i. e.*, to a person who is in a position to get the offender punished. The charge must be embodied either in a complaint to a Magistrate or in a report of a cognizable offence to a police officer. 6 C. 620 ; 30 C. 415 ; 26 B. 150 ; 35 M 8 Ref. (*Simpson, A J. C.*) GAYA BARHAI *v.* EMPEROR. **26 O. C. 44 : 9 O. L. J. 342 : 4 U. P. L. R. (O) 81 : 69 I. C. 81 : 23 Cr. L. J 641 : A. I. R. 1923 Oudh 4.**

——— **S. 4 (1) (j)**—*High Court—Ordinary Original Jurisdiction—If a court of Session.*

The High Court exercising original criminal jurisdiction is not a court of session within the meaning of the Code. (*Mukherji, J.*) EMPEROR *v.* HORENDRA CHANDRA CHAKRAVARTHI. **51 Cal. 980 : 29 C. W. N. 384 : 84 I. C. 929 : 26 Cr. L. J. 385 : A. I. R. 1925 Cal. 384.**

——— **S. 4 (1) (j)**—*High Court—What is—European British subject—Plea of.*

The mere fact a person is an European British subject is not sufficient to make the first part of S. 4 (*j*) apply to him. His pleading that he is an European British subject will only entitle him to be treated as such. In such cases the second part of S 4 (*i*) will apply. (*Krishnan, J.*) JEREMIAH *v.* JOHNSON.

CRIMINAL PROCEDURE CODE (V OF 1898), S. 6.

18 L. W. 895 : 33 M. L. T. 194 : (1924) M. W. N. 60 : 76 I. C. 695 : 25 Cr. L. J. 231 : A. I. R. 1924 Mad. 373 : 45 M. L. J. 800.

——— **S. 4 (1) (k)**—*Inquiry is a judicial proceeding*

The scheme of the Code and also the general provisions in Chap. XXIV relating to inquiries and trial go to show that the word 'inquiry', is used to indicate a judicial proceeding as distinguished from 'investigation and trial'. (*Macleod, C. J. and Shah, J.*) MOTI LAL HIRA LAL *v.* EMPEROR. **46 Bom. 61 : 23 Bom. L. R. 884 : 64 I. C. 40 : 22 Cr. L J. 728 : A. I. R. 1922 Bom. 138.**

——— **S. 4 (1) (m)**—*Judicial proceeding—Retrial of suit after decree* ex parte *is set aside is continuation of the original suit.*

The trial of a suit after an *ex parte* decree against the defendant is set aside may be regarded as a continuation of the trial of the same suit which first ended in a decree. The definition of "judicial proceeding" in S. 4 (*m*) of the Code is not opposed to this view. 32 M. 49 and 42 M. 422 (F. B.) Dist. (*Spencer, J.*) ARUMUGAM PILLAI, *In re.* **18 L. W. 133 : A. I. R. 1924 Mad. 86.**

——— **S. 4 (1) (n)**—*Non-cognizable offence—Police officer is not prohibited from presenting complaint—Cr. P. Code, S. 190.*

A police officer is not prohibited under the Cr. P. Code, from presenting a complaint to the Magistrate in a non-cognizable case. (*Shadi Lal, C. J. and Le Rossignol, J.*) EMPEROR *v.* GHULAM HUSSAIN.
6 L. L. J. 606 : 25 Cr. L. J. 1361 : 82 I. C. 753 : A. I. R. 1925 Lah. 237.

——— **S. 4 (1) (p)**—*Officer-in-charge—Writer Head Constable may investigate when officer-in-charge.*

Where in a particular case the Sub-Inspector in charge was ill and the Writer Head Constable was not generally empowered to investigate cognizable cases. *Held*, that he being the officer-in-charge of the police station on that day, it was his duty to make the investigation. (*Mullick and Bucknill, JJ.*) EMPEROR *v.* BHOLA BHAGAT. **2 Pat. 379 : 4 P. L. T 521 : 1 Pat. L. R. 248 (Cr.) : 24 Cr. L. J. 375 : 72 I. C. 375 : A. I. R. 1923 Pat. 547.**

——— **S. 5 (2)**—*'Enactment' does not include Rule 4 framed by Local Government under S. 23 of the Calcutta Rent Act.*

Rule 4 framed by the Local Government under S. 23 of the Rent Act is not an "enactment" within S. 5 (2) of the Code. (*Sanderson, C. J. and Richardson, J.*) GOBARDHAN DAS *v.* DOOLIE CHAND.
33 C. L. J. 551 : 25 C. W. N. 661 : 61 I. C. 210 : 22 Cr. L. J. 354.

——— **S. 5 (2)**—*Offence under Abkari Act, Code is subject to the provisions of the Act.*

The police have no right to file a charge sheet or otherwise to proceed under chapter 14 of the Code in respect of an offence under the Abkari Act. Chapter 14 is controlled by S. 5 (2) of the Cr. P. Code and this is an offence under a special law, which can be investigated and tried only according to the provisions of the law. (*Oldfield and Ramesam, JJ.*) COOPUSAMI NAIDU, *In re.* **17 L. W. 308 : 72 I. C. 175 : 24 Cr. L. J. 335 : A. I. R. 1923 Mad. 339 · 44 M. L. J. 231.**

——— **S. 6**—*High Court with Original Criminal Jurisdiction is not 'Court of Sessions'.*

The High Court exercising Original Criminal Jurisdiction is not a Court of Sessions within the meaning of the Code. (*Mukerji, J.*) EMPEROR *v.* HARENDRA CHANDRA CHAKRAVARTHI. **51 Cal. 980 : 29 C. W. N. 384 : 84 I. C. 929: A. I, R. 1925 Cal 384.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 9.

——S. 9. 531—*Appeal to Addl Sessions Judge—Appeal heard by Sessions Judge himself—Jurisdiction.*

The jurisdiction of the Sessions Judge in respect of an appeal is not ousted in consequence of any arrangement, which he might previously have made for the convenient disposal of the work of Sessions Court. The absence of any corresponding provision in respect of cases tried within the same Sessions Division by a lawfully appointed Judge of that Sessions Division, whether he be the Sessions Judge or an Additional Sessions Judge, shows that the Legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of S. 9 of the Cr. P. Code. (*Piggott and Walsh, JJ.*) BIRJU MARWARI *v.* EMPEROR. **44 All. 157 : 23 Cr. L. J. 107 : 65 I. C. 491 : 19 A. L. J. 952 : L. R. 2 A. (Cr.) 166 : A. I. R. 1922 All. 387.**

——Ss. 10 (2) and 197—*Additional District Magistrate can give sanction under S. 197.*

The Local Government having empowered all District Magistrates to pass orders of sanction under S. 197, the appointment of an Additional District Magistrate and the conferring on him of "all the powers of a District Magistrate under this Code" under S. 10 (2) imply that he can pass orders of sanction under S. 197. (*Wallace, J.*) KAKARLA CHINA CHENDRAYYA *v.* MADDUKURI SUBBARAYADU. **17 L. W. 226 : 71 I. C. 244 : 24 Cr. L. J. 116 : (1923) M. W. N. 77 : A. I. R. 1923 Mad. 338.**

——S. 11—*District Magistrate ill but not left district—No temporary succession.*

Where the District Magistrate is ill but has not left the district there is no vacancy in the office of the District Magistrate and no temporary succession to such office within S. 11 of the Code. (*Kanhaiya Lal, J. C.*) EMPEROR *v.* ACHHAIBAR SINGH. **24 O. C. 255 : 63 I. C. 873 : 22 Cr. L. J. 713.**

——S. 12—*Sub-divisional Magistrate—No power to take cognizance outside his local area.*

A Sub-divisional Magistrate cannot take cognizance of matters outside the local area within which the Dt. Magistrate has appointed him to act. 26 C. W. N. 201 Dis. (*Mears, C. J.*) CHAUBEY KUNJ BEHARI *v.* LANNA. **19 A. L. J. 77 : L. R. 2 A. (Cr.) 1 : 59 I. C. 554 : 22 Cr. L. J. 122.**

——S. 12 (2)—*Jurisdiction not defined—Magistrate cannot take cognizance of case pending in another Court.*

If the jurisdiction of a Magistrate is not defined in the manner laid down in S. 12 (2) his jurisdiction extends throughout the district. But he cannot take cognizance of a case pending in another Court unless there is a valid order transfering the case from the file of that Court to his file. (*Kanhaiya Lal, J. C.*) EMPEROR *v.* ACHHAIBAR SINGH. **24 O. C. 255 : 63 I. C 873 : 22 Cr. L. J. 713.**

——S. 15—*Bench Magistrates—Trial.*

The object of constituting a Bench is that the Magistrates concerned should individually and collectively give their attention, and apply their minds to the hearing of the evidence and the determination of the points at issue and, arrive at an independent judgment in regard to the merits of the charge. This is not possible, if, while one Magistrate is recording the evidence, the other Magistrate constituting the Bench is attending to some other work. Such a procedure defeats the very object with which a Bench is constituted and might lead in some cases to a miscarriage of justice. (*Kanhaiya Lal, J. C.*) SULTAN *v.* SHAMSHER. **25 O. C. 182 : 23 Cr. L. J. 696 : 69 I. C. 376 : A. I. R. 1922 Oudh 21.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 17.

——S. 16—*One Bench Magistrate being competent to try, absence of others during trial does not vitiate trial—Bench Magistrates.*

Where transfer of accused was made under S. 192 to the Bench Magistrates one of whom alone being invested with powers of a Magistrate of third class was empowered to hear and try the case under orders issued by the District Magistrate consonant to the provisions of S. 16 of the Code, and where he had jurisdiction to try the case sitting alone and he heard all the evidence and he was the Magistrate who pronounced judgment, *held*, there was no irregularity nor one vitiating the trial. (*Dalal, J.*) DEBI PRASAD *v.* EMPEROR. **L. R. 5 A. (Cr.) 93 : A. I. R. 1924 All. 674.**

——S. 16—*Honorary Magistrates as such are not restricted to trying particular class of cases.*

There is nothing in the Code prescribing that any particular class of cases should be tried by Honorary Magistrates. (*Baker, J. C.*) YAKUB *v.* APPASWAMI. **25 Cr. L. J. 556 : 81 I. C. 44 : A. I. R. 1925 Nag. 40.**

——Ss. 16 and 350—*Bench Trials—Different magistrates at different hearings—Retrial necessary.*

The trial was commenced before a Bench of two Honorary Magistrates. They heard the evidence for the prosecution and examined one of the witnesses for the defence. On a sub equent date one of the Magistrates was not present; and his place was taken by another who recorded the remaining evidence for the defence and heard the arguments and the case was eventually decided by all the three acting together, and ended in the conviction of the accused. On appeal the accused was acquitted. In revision the acquittal by the Appellate Court was set aside and retrial was ordered. 38 M. 797; 15 A. L. J. 463; 41 A. 116; 38 M. 304; 41 B. 400; 17 O. C. 142 Ref. (*Kanhaiya Lal, J. C.*) BRIJ BHUKAN *v.* RAM KIRAT. **10 O. L. J. 614 : 25 Cr. L. J. 198 : A. I. R. 1923 Oudh 163.**

——Ss. 17, and 561 (a)—*Application for revision—Crim. Pro. Code, S. 561 (a).*

On application for revision against order of Asst. Collector instead of against that of Collector who was responsible for that of the Asst. Collector, High Court's inherent power could be exercised under S. 561 (*a*). (*Boys, J.*) MT. RAM SRI *v.* SRI KISHUN: **22 A. L. J. 803 : L. R. 5 A. (Cr.) 129. 82 I. C. 170 : 25 Cr. L. J. 1242 : 46 All. 879 : A. I. R. 1924 All. 777.**

——S. 17—*Power of Dt. Magistrate to direct a stay.*

There is no provision in the Cr. P. Code which would give the District Magistrate the power to stay proceedings in a Criminal Court subordinate to him and it would appear that the High Court's power to pass such an order can only be exercised under its general powers of superintendence. 23 Cal. 610; 30 M. 216 Ref. (*Ayling, J.*) KRISHNA RAO *v.* SESHASUBRAMANIA. **(1923) M. W. N. 251 : A. I. R. 1923 Mad. 688.**

[But see contra. A. I. R. 1923 Mad. 595 : 44 M. L. J. 642.]

——S 17—*Criminal Rules of Practice (Mad.), R. 122—Power to stay trial.*

A District Magistrate has wide powers of superintendence over his subordinate Magistrates which might be considered to justify special directions being issued by him to stop or go with particular proceedings pending before them. (*Spencer, J.*) NAMBIA PILLAI *v.* SUDALAIMUTHU NADAN. **17 L. W. 570 : 32 M. L. T. 191 : (1923) M. W. N. 276 :**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 29.

76 I. C. 872 : 25 Cr. L. J. 280 : A. I. R. 1923 Mad. 595 : 44 M. L. J. 642.

——Ss. 29 and 5—*Applicability to Court not specifically mentioned.*

Having regard to the provisions of S. 29 read with S. 5 (2), Cr.P. Code, the possibility of the application of the provisions of the Code of Criminal Procedure to Courts which are not mentioned specifically in the Code is not excluded. (*C. C. Ghose and Cuming, JJ.*) ISHAN CHANDRA SARKAR *v.* MANMATHA.

37 C. L. J. 298 : A. I. R. 1923 Cal. 339.

——Ss. 30 and 337—*After tendering pardon to approver Magistrate with powers under S. 30 can't try the case in which approver is to be examined as witness but must commit accused to Sessions or High Court, if satisfied of reasonable grounds for believing accused's guilt.*

It is not open to a Magistrate having powers under S. 30 of the Code, who has tendered a pardon to an approver to try the case in which the approver is to be examined as a witness. But the Magistrate must commit the accused to Sessions Court or to the High Court if he is satisfied that reasonable grounds exist for believing that the accused is guilty. (*Prideaux, A. J. C.*) KISHORE *v.* KING EMPEROR.

25 Cr. L. J. 1341 · 82 I. C. 573 : A. I. R. 1925 Nag. 119 (1)

——S. 32—*Sentence—Enhancement in appeal is illegal.*

An accused was convicted under S. 406, I. P. C., by a second class Magistrate and sentenced to three months' simple imprisonment. An appeal was preferred and the appellate Court changed the sentence to a fine of Rs. 400 or in default rigorous imprisonment for a certain period. On revision it was *held* that an appellate Court's power of varying a sentence must be measured by those of the Court of first instance and that the present variation went against S. 32 Cr. P. Code. (*Walsh and Kanhaiya Lal, JJ.*) EMPEROR *v.* MUHAMMAD YAKUB ALI.

45 All. 594 : A. I. R. 1924 All. 130.

——S. 32—*Applicability—Opium Act, S. 12.*

Any fine could be imposed in lieu of confiscation under S. 12 of the Opium Act as S. 12 is not affected by S. 32. (*Das, J.*) MANGAN DAS *v.* RAHIM BUX.

2 Pat. L. T. 63 : 1 Pat. L. R. (Cr.) 32 : 69 I. C. 635 : 23 Cr. L. J. 747.

——Ss. 33 and 262 Cl. (2)—Imprisonment for four months in default of fine cannot be awarded. (*Wilberforce, J.*) GHASITA MAL *v.* EMPEROR.

3 Lah. L. J. 346 : 59 I. C. 849 : 22 Cr. L. J. 145.

——Ss. 35 and 397—*Sentences in three different trials must run consecutively.*

Where there were three separate trials of the accused under S. 441, I. P. C., *held*, the sentences in the three trials must run consecutively. The case would be different if the three cases had been tried together. (*Tudball, J.*) HARAKH NARAIN *v.* EMPEROR. **L. R. 2 A. (Cr.) 38 · 62 I. C. 408 : 19 A. L. J. 310 : 22 Cr. L. J. 520.**

——S. 35—As amended by Act XVIII of 1923—*Separate sentences for offences under Ss. 148 and 326, I. P. C.*

It is competent to the Court to pass separate sentences for offences under Ss. 148 and 326, I. P. Code, after the amendment of the Cr.P. Code by Act XVIII of 1923. But the two sentences must not be in excess of the powers of the Court passing the same. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* PIRU RAMA.

49 Bom 916 : 27 Bom. L. R. 1371.

——S. 35—*Concurrent sentences—Sentences in default of payment of fine.*

CRIMINAL PROCEDURE CODE (V OF 1898), S. 35.

An accused was sentenced to suffer rigorous imprisonment for one day and to pay a fine of Rs. 150, and in default to suffer rigorous imprisonment for 3 months for each of two offences, *i. e.*, to pay a fine of Rs. 300 and in default to suffer rigorous imprisonment for 3 months in all (in addition to substantive imprisonment for one day); the sentences running concurrently. *Held*, that the passing of concurrent sentences of imprisonment in default of fines imposed for two offences was not warranted by S. 35 of the Criminal Procedure Code and the same must be quashed. But the substantive term of imprisonment for one day may run concurrently. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* SUBRAO. **27 Bom L. R. 1351.**

——S 35—*Offences under Ss. 380 and 457 can be separately punished at one trial so as to justify consecutive sentences—Penal Code, S. 71.*

There is nothing in S. 71 of the Indian Penal Code that in any way restricts the power of Court under S. 35 of the Code of 1923. Therefore separate sentences can be passed under S. 35 as amended for an offence of housebreaking at night with intent to commit theft under S. 457 of I. P. C., and of theft of ornaments from that house under S. 380 of I. P. C. and the sentences of imprisonment can be made to run one after another. (*Newbould and B. B. Ghose, JJ.*) KANCHAN MOLLA *v.* EMPEROR. **41 C. L. J. 563 : 88 I. C. 997 : 26 Cr. L. J. 1283 : A. I. R. 1925 Cal. 1015.**

——S. 35—*Conviction by First Class Magistrate—Several offences—Concurrent running of sentences, appeal against.*

When an accused is convicted for more offences than one, and is sentenced for each offence to a term of imprisonment which cannot be appealed against and the sentences are to run concurrently no appeal lies to the sessions Court on the ground that the sentences taken in aggregate amount to a term which can be appealed against. (*Richardson and Shamsul Huda, JJ.*) ABDUL JABBAR *v.* EMPEROR. **25 C.W. N. 613 : 66 I. C. 65 (1) : 23 Cr. L. J. 225.**

——S. 35—*Manufacture and possession of excisable article.*

The offence of manufacture of an excisable article necessarily includes that of possession and the two offences cannot be called "distinct" for the purposes of S. 35 of the Criminal Procedure Code. 1 Bom. L. R. 344, Foll. (*Hallifax, A. J. C.*) SHEIKH MUNIR *v.* EMPEROR. **25 Cr. L. J. 83 : 76 I. C. 19 : A. I. R. 1924 Nag. 32.**

——S. 35 (1)—*Sentences in different trials cannot be ordered to run concurrently.*

Court can order two or more sentences to run concurrently only when they are passed in the same trial. (*Sulaiman, J.*) DULLI *v.* EMPEROR. **47 All. 59 : L. R. 6 A. (Cr.) 10 : 85 I. C. 714 : 26 Cr. L. J. 570 : A. I. R. 1925 All. 305.**

——S. 35 (3)—*Concurrent non-appealable sentences for each—No appeal.*

Where a First Class Magistrate convicts for several offences and gives concurrent sentences for each offence which by itself is not appealable, *held*, that an appeal does not lie to the Sessions Judge. (*Richardson and Huda, JJ.*) ABDUL JABBAR *v.* EMPEROR.

25 C. W. N. 613 : 66 I. C. 65 (1) : 23 Cr. L. J. 225.

——Ss. 35 and 146—*Penal Code—Separate sentences.*

The fact that under S. 146 of the I. P. C. the use of force or violence is a necessary ingredient of the offence of rioting does not render the separate sentences passed on those who actually used force or violence illegal. (*Newbould and B. B. Ghose, JJ.*) KAPIL

CRIMINAL PROCEDURE CODE (V OF 1898), S. 39.

MANDAL *v.* RABBANI SHEIKH. **41 C. L. J. 471 : 89 I. C. 241 (1) : 26 Cr. L. J. 1297 (1) : A. I. R. 1925 Cal. 1038.**

——— **S. 39**—*Specially empowered—What is.*

Where a Government notification empowers second class Magistrates of a particular locality mentioned in a list appended to it, to try cases under the Opium Act, that meets the requirements of S. 3, Opium Act. (*Ayling and Odgers, JJ.*) ALAGA PILLAI *v.* EMPEROR. **24 Cr. L. J. 845 : 74 I. C. 958 : A. I. R. 1924 Mad 266.**

——— **S. 44**—*First information report if only hearsay is inadmissible.*

As the first information report can only be used by the prosecution for the purpose of corroborating in the witness box the person who supplied the information contained in the document, if the informant himself can only speak from hearsay, the report cannot be used to corroborate such inadmissible evidence of the witness. (*Abdul Raoof and Fforde, JJ.*) SAJJAN SINGH *v.* CROWN. **7 L L. J. 259 : 6 Lah. 437 : 90 I. C. 145 (2) : 26 Cr. L. J. 1489 (2) : 26 Punj. L. R. 601 : A. I. R. 1925 Lah. 418.**

——— **S. 45**—*Report.*

Report made by any Police Officer is not "Police report" in technical sense. But "Report" in S. 45 must state facts which constitute offence. Mere assertion that offence had been committed is not enough. (*Mukerjee and Chatterjee, JJ.*) NAGENDRA NATH *v.* EMPEROR. **51 Cal. 402 : 38 C. L. J. 388 : 81 I. C. 220 : 25 Cr. L. J. 732 : A. I. R. 1924 Cal. 476.**

——— **S. 45**—*Scope of—No duty to supply information already known to the police.*

The provisions of S. 45, Cr. P. Code, are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offence and thereby to facilitate steps being taken in the investigation of the same. Where the police are already informed of a fact, there is no obligation to repeat the information. 4 C. 623, 20 C. 316, 7 M. 436. Ref. (*Wazir Hasan, A. J. C.*) RAM *v.* EMPEROR. **4 U. P. L. R. (O. C.) 17 : 65 I. C. 626 : 8 O. L. J. 590 : 23 Cr. L. J. 162.**

——— **S. 45**—*Chaukidar—Duty to give information—Mere rumours need not be communicated to police.*

S. 45 of the Cr. P. Code does not make it incumbent on the village chaukidar to communicate to the officer in charge of the Police Station any rumour of any occurrence prevailing in the village. It is only an information which he may himself possess that is to be communicated to the officer-in-charge of the police-station. It is noteworthy that the Amending Act 18 of 1923 has substituted the word "possess" in place of the word "obtain" in S. 45 making thereby only such information which the informant may possess to his own knowledge fit to be communicated to the officer-in-charge of the police station (*Kulwant Sahay, J.*) LACHMI SINGH *v.* EMPEROR. **1924 P. H. C. C. 181 : 5 Pat. L. T. 505 : 81 I. C. 620 : 25 Cr. L J. 972 : A.I.R. 1924 Pat. 691.**

——— **S 45 (1) (d)**—*Unnatural death, meaning of*

Where the accused did not communicate forthwith to the nearest Police Station the accidental death of a person, who fell from a tree and died of the fall within two days and were charged under S. 45, Cr. P. Code, *held*, however unnatural, in the ordinary sense of the word, the case of the death might be, it would not come within meaning of the word unnatural as used in S. 45 so as to require to be reported immediately, unless it occurred fairly soon after the cause. (*Hallifax, A. J. C.*) DOMAR SINGH *v.* EMPEROR. **66 I. C. 1001 : 23 Cr. L. J. 345 : A.I.R. 1922 Nag. 87.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 54.

——— **S. 46**—*Custody—Evidence Act, S. 27.*

The submission to the custody of a Police Officer within the meaning of S. 46 is 'custody' within the meaning of S. 27, Evidence Act. (*Teunon and Ghose, JJ.*) LEGAL REMEMBRANCER *v.* LALIT MOHAN SINGH. **49 Cal. 167 : 25 C. W. N. 788 : 62 I. C. 578 : 22 Cr. L. J. 362 : A. I. R. 1922 Cal. 342.**

——— **S. 54**—*Absence of warrant—Does not matter.*

After a complaint is lodged a constable was sent after the accused, but he had no warrant with him. *Held*, he had sufficient authority under S. 54, Cr. P. Code to arrest, on the suspicion of an offence being committed. (*Kanhaiya Lal, J.*) MAHADEO RAI *v.* EMPEROR. **21 A. L. J. 791 : 9 O. & A. L. R. 900 : L. R. 4 A. 251 (Cr.) : A. I. R. 1924 All. 201.**

——— **Ss. 54 and 497**—*Arrest without warrant—Bombay City Police Act, S. 33 (g)—Detention by Magistrate—Extradition Act, Ss 23 and 10 (4)—Bail*

Where the police arrest a person without warrant either under S. 54 (*g*) of the Cr. P. Code or S. 33 (*g*) of the Bombay City Police Act, 1902, and the person so arrested is detained by a magistrate under S. 23 of the Extradition Act, 1903, it is open to the Magistrate to release the arrested person on bail under S 10 (4) of the Extradition Act. (*Marten and Fawcett, JJ.*) *In re.* SHIVRAM SHAMBUDAYAL **26 Bom. L. R. 984 : 87 I. C. 100 : 26 Cr. L. J. 908 : A.I.R. 1925 Bom. 104.**

——— **Ss. 54, 60 and 61**—*Object of—Arrest by police without warrant—Production before magistrate—Necessity for.*

Though under S. 54 of the Cr. P. Code a Police Officer may arrest without warrant in the case of a cognizable offence under S. 60 he is bound without unnecessary delay to take or send the person arrested before the Magistrate and under S. 61 this must be done within 24 hours. The precautions laid down in these sections seem designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be. (*Greaves and Duval, JJ.*) DWARKADAS HARIDAS *v.* AMBALAL GANPATRAM. **28 C. W. N. 850 : 82 I.C. 131 : 25 Cr. L. J. 1203 : A. I. R. 1924 Cal. 893.**

——— **Ss. 54 and 55**—*Penal Code, S. 225-B—Arrest by Police Constable without warrant—Resistance—Offence.*

Where a police constable arrests a person and tells him expressly that he is doing so under a particular authority which he claims to have to arrest him, and such arrest is resisted, it will be for the prosecution on a charge under S. 225-B. Indian Penal Code, to establish that the constable who arrested the person had power to act under the authority he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority to arrest under some other provision of law. (*Krishnan, J.*) APPASAMI MUDALI, *In re.* **47 Mad. 442 : 19 L.W. 504 : 34 M. L T. 95 : 81 I. C. 51 : 25 Cr. L. J. 563 : A I. R. 1924 Mad. 555 : 46 M. L. J. 447.**

——— **S. 54**—*Scope—Code does not deal with arrest for prevention of crimes.*

The Code is dealing rather with the arrest for crimes that had been committed than with the arrest for the prevention of crimes although there are specific instances given permitting the arrest of persons suspected of crimes. (*Schwabe, C. J., Phillips, Devadoss, Venkatasubba Rao and Wallace, JJ.*) GOPAL NAIDU *v.* EMPEROR. **46 Mad. 605 : 17 L.W. 592 : 73 I. C. 343 : 32 M. L. T. 352 : 24 Cr. L. J. 599 : (1923) M. W. N. 425 :**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 54.

A.I.R. 1923 Mad. 523 (2) : 44 M.L.J. 655 (F. B.).

——S. 54—*Complaint recorded by Magistrate sufficient information.*

A complaint of cognizable offence recorded by a Magistrate and sent by him to Police for investigation and report is sufficient information to justify resort to the provisions of S. 54. (*Mullick and Bucknill, JJ.*) EMPEROR *v.* BHOLA BHAGAT. **2 Pat. 379 : 4 P. L. T. 521 : 1 Pat. L. R. 248 (Cr.) : 72 I.C. 375 : 24 Cr. L. J. 375 : A. I. R. 1923 Pat. 547.**

——S. 54 (1)—*Arrest without warrant by constable—Cognizable offence—Reasonable complaint.*

Where a Magistrate after taking down the statement of the complaint acts upon it on a complaint of a non-cognizable offence and issues a warrant, there is a reasonable complaint of the accused being concerned in a cognizable offence, and a constable is justified in arresting the accused person without warrant. It is not necessary that the complaint must have been made by the constable who makes the arrest; it is sufficient if there is a reasonable complaint made by any person. (*Lindsay, J.*) ALEY MAHOMED *v.* EMPEROR. **22 Cr.L.J. 758 : 64 I.C. 278 : L.R. 2 A. (Cr.) 109: A. I. R. 1922 All. 457.**

——S. 54 (7)—*Bare assertions can't form material for person ordering arrests, to form judgment—A present liability for apprehension is necessary—Lawfully arrested person must be immediately produced before Magistrate.*

Per *Walmsley, J.*—The expressions "credible and reasonable" in cl. 7 of S. 54 must refer to the mind of the person by whom the information is received and mere assertions cannot form the material for the exercise of an independent judgment by such person.

Per *Mukerji, J.*—There are two conditions necessary to satisfy the requirements of S. 54, cl. 7. The first is one which contemplates either the proof of a fact, viz., the fact of the person having been involved in the act or a reasonable complaint or credible information or a reasonable suspicion of his being concerned therein. The second is that the person is liable for such act to be apprehended or detained in custody in British India under any law relating to extradition or under the Fugitive Offenders' Act, 1881 or otherwise. Under the first requisite, the arresting police officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. The circumstances of each particular case must determine the question as to what is reasonable complaint or suspicion ; but at least this much is clear that not mere vague surmise or information must be the basis thereof but some definite fact at least tending to throw suspicion on the arrested person. Under the second requisite, what is necessary is the existence of the present liability for apprehension or detention and not a future contingent liability. Such liability would be created by the issue of some sort of process under the law, though the process may not arrive and may not be available for execution. It is the duty of the police when all the conditions necessary to fulfil the requirments of S. 54, cl. 7 are present and an arrest is validly and lawfully made, to forthwith produce the arrested person before a Magistrate.

Quaere :—Has a Deputy Commissioner of Police as a Justice of the Peace in Calcutta, power under the Calcutta Police Act to order detention for an unlimited period ? (*Walmsley and Mukerji, JJ.*) SUBODH CHANDRA ROY CHAUDHRY *v.* EMPEROR. **40 C. L. J. 489 : 29 C. W. N. 98 : 85 I. C 913 : 26 Cr.L.J. 625 : 52 Cal. 319 : A.I.R. 1925 Cal. 278.**

——S. 55—*Discharge from custody—Order for further detention.*

Where by order, a Magistrate discharges from custody an accused on the ground of insufficient evidence, he has no power to direct his further detention in connection with a different matter unless and until he has been re-arrested under S. 55 of the Code. (*Piggott, J.*) RAHU *v.* EMPEROR. **43 All. 186 : 18 A. L. J. 1114 : 22 Cr. L. J. 115 : 59 I.C. 547 : L. R. 2 A. (Cr.) 76.**

——S. 55—*Forfeiture—Cr. P. Code, S. 91.*

Surety's liability to produce accused to answer one charge does not extend to producing the accused to answer charges for other offences. (*Martineau, J.*) MANA *v.* EMPEROR. **A. I. R. 1924 Lah. 622.**

——S. 56 (1)—Chaukidar *need not show order to accused without being asked.*

S. 56 (1) does not require a *chaukidar* on his own initiative to show to the accused an order given to him by the officer-in-charge of the Police Station. (*Ashworth, A. J. C.*) UMRAO *v.* EMPEROR. **86 I. C. 427 : 26 Cr. L. J. 795 : A. I. R. 1925 Oudh 544.**

——S. 59—*Powers of a private person to arrest—When can be exercised.*

S. 59 of the Criminal Procedure Code gives the powers to a private person to arrest any person, who, in his view, commits a non-bailable and cognizable offence. Arrest of the offender by a person in whose presence the offence is not committed, is not justified. Unless it is proved by the evidence on record that the intention of the accused was to prevent the arrest, or that the pursuers where lawfully empowered to arrest him ; persons stopping them from doing so are not liable under S. 225, Penal Code. (*Abdul Raoof and Abdul Qadir, JJ.*) ALAWAL *v.* EMPEROR. **19 P. L. R. 1922 : 64 I. C. 371 : 23 Cr. L. J. 3 : 4 U. P. L. R. (Lah.) 21 : A. I. R. 1922 Lah. 73.**

——S. 59—"*In his view*"—*Meaning of—Private arrest—Not handing over accused to policeman on the way—Effect.*

The words "in his view" in S. 59, Cr. P. Code, should not be construed too strictly. Where three persons were engaged in stealing toddy, two of them upon the tree and another down by below collecting the same and he was arrested by private persons, he can be said to have committed theft "in their view."

The mere fact that on the way to the Police Station they met a police constable on duty but the accused was not placed in his charge does not constitute unnecessary delay within S. 59 (1). (*Krishnan, J.*) ARUMUGA GOUNDAN, *In re.* **18 L.W. 818 : A. I. R. 1924 Mad. 384.**

——S. 59—"*In his view*"—*Meaning of—Person hiding in house—Arrest of.*

The words "in his view" in S.59 mean "in the presence of" or "within the sight of".A person who is found hiding in the house of another cannot be arrested by a private person under S. 59, as the hiding alone does not amount to a non-bailable and cognizable offence. (*Kulwant Sahay, J.*) GOKUL TATWA *v.* EMPEROR. **89 I. C. 1030 (2) : 26 Cr. L. J. 1462 (2).**

——Ss. 61, 167 and 190—Investigation not completed in 24 hours—Procedure—Cognizance upon report of police—Powers of Magistrate. BHOLANATH DAS *v.* EMPEROR. **28 C. W.N. 490 : 1924 Cal. 614.**

——Ss. 61, 167—*Production before Court.*

The intention of the legislature is that an accused person should be brought before a Magistrate competent to try or to commit with the least delay as possible. (*Mukerjee and Chatterjee, JJ.*) NAGENDRANATH CHAKRABARTI *v.* EMPEROR. **51 Cal. 402 : 38 C.L.J. 388 : 81 I.C. 220 : 25 Cr. L. J. 732 : A.I.R. 1924 Cal. 476.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 70.

——S 70—*Summons effected on mother of accused is not valid.*

Issue of summons effected by serving upon the mother of the accused is not warranted by the Code. (*Fforde, J.*) SAWAN SINGH *v.* EMPEROR.
26 P. L. R. 291 : 26 Cr. L. J. 1393 : 89 I. C. 705 : A. I. R. 1926 Lah. 50.

—— S. 72—*Sub-Inspector of Railway Police.*

Summons to a Sub-Inspector of Railway Police should be served through the Superintendent of Rail way Police for the District, (*Kulwant Sahay, J.*) GAURI SHANKAR *v.* COLLECTOR OF MUZAFFARPUR.
6 P. L. T. 215 : 3 Pat. L. R. (Cr.) 127 : 87 I.C. 421 : 26 Cr. L. J. 965 : A. I. R. 1925 Pat. 553.

—— Ss. 77 and 78—*Person not mentioned in warrant—Search is illegal.*

Warrant for search and arrest not addressed to any particular person with authority to make the search and arrest is irregular. A search of the room in charge of a person not mentioned in the warrant is an irregularity and the accused must be acquitted. (*Kanhaiya Lal, J. C.*) EMPEROR *v.* SHANKER DAYAL.
25 O. C. 111 : 24 Cr. L. J. 14 : 71 I. C. 62 : 9 O. L. J. 667 : A. I. R. 1922 Oudh 224.

——S. 77—*Warrant—Search warrant issued to Thana—Legality of search.*

A search warrant was directed to a certain police thana without specifying the name of any officer in the station. The station officer endorsed the warrant to a police constable who was obstructed in executing it. The accused was tried and convicted by the Magistrate and the conviction was confirmed on appeal. *Held*, in revision that the objection to the legality of the warrant not having been taken either at the time of the search or in the Court below and as the accused had not shown that they had suffered any prejudice from what at the most was a clerical error, there was no ground for setting aside the conviction. (*Baguley, J.*) MA KIN *v.* EMPEROR. **3 Bur. L. J. 182 : 26 Cr. L. J. 845 : 86 I.C. 669 : A I.R. 1924 Rang. 383.**

——Ss. 87 and 88—*Interest of the absconder only in the property can be attached and the property under attachment must be freed after his death.*

The property of an absconder against whom proceedings under Ss 87 and 88 of the Cr. P. Code have been taken should be freed from attachment on the death of the absconder. With regard to the ancestral lands in the Punjab it has been settled that all that can be attached in proceeding under Ss. 87 and 88 of Code is the interest of the absconder and that on his death the land must be released in favour of his heirs. 18 P. R. 1908 (F. B.) : 52 P. R. 1915 Cr. Applied. (*Le Rossignol, J.*) SHAH MAHOMED *v.* EMPEROR. **7 Lah. L.J 540 : 26 Cr. L. J. 1148 : 88 I. C. 460 : 26 P.L.R. 395 : 26 P.L.R. 831 : A.I R. 1925 Lah. 629.**

——S. 87—*Absconder—Person arranging to get bail in superior Court is not an absconder.*

Action under S. 87 can be taken only when a Court has reason to believe that any person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed. But a man who files a petition against the order issuing the warrant and takes steps to procure an order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself. (*Aldul Qadir, J.*) QAMARDIN *v.* EMPEROR.
66 P. L. R. 1922 : 67 I. C. 726 :23 Cr. L. J. 454 : A. I. R. 1922 Lah. 475 (2).

——Ss. 87, 69, 70—*Substituted service.*

If there was absence of reasonable diligence in attempting to serve, the substituted service is bad.

CRIMINAL PROCEDURE CODE (V OF 1898), S. 94.

(*Prideaux, A. J. C.*) JADHO *v.* MANIK LAL.
6 N. L. J 63 : 23 Cr. L. J. 739 : 69 I. C. 627 : A. I. R. 1923 Nag. 55 (1).

——S. 88—*Confiscation and Re-grant effect of.*

On the absconding of the plaintiff his property was confiscated and re-granted to defendant No. 1 ; *held* a suit for possession of the property cannot be maintained on the mere chance that something which might be decided in the Civil Courts might influence the revenue authorities in matters in which the decision is entirely within their province. (*Macleod, C. J. and Crump, J.*) DATTAJI NANA *v.* NARAYANRAO.
25 Bom. L R. 228 : A. I. R. 1923 Bom. 198.

——S. 88 - *Order refusing to release property from attachment—If revisable.*

The High Court can interfere in revision with an order passed by a Magistrate refusing to release property from attachment. (*Shadi Lal, C. J.*) SANTA SINGH *v.* EMPEROR. **25 Cr. L. J. 82 : 76 I. C. 18 : A. I. R. 1924 Lah 617.**

—— S. 89—*Sale of property—Applicant can get only sale proceeds.*

Where property has been sold and subsequently an application under S. 89, Cr.P.Code is made and allowed, the applicant can only get the net proceeds of the sale of the property. (*Campbell, J.*) EMPEROR *v.* FAZAL DAD. **73 I. C. 269 (L.) : 24 Cr. L, J. 573 : A. I. R. 1924 Lah. 420.**

——S. 90—*Failure to record reasons is only irregularity.*

In a prosecution under S. 498, I. P. C. the Magistrate issued a warrant in the first instance for arrest of the abducted woman on the application of the complainant that she would escape, without recording reasons for doing so. *Held*, the omission of the Magistrate to record the reasons for the issue of a warrant in the first instance amounted to a mere irregularity and not to an illegality and persons who forcibly rescued the woman from the custody of the constable who had arrested her under the warrant were guilty. (*Gokul Prasad, J.*) MAHAR SINGH *v.* EMPEROR.
18 A. L. J. 1149 : 22 Cr. L. J. 111 : 59 I. C. 415 : L. R. 2 A. (Cr.) 14.

——Ss. 90 and 537—*Recording reasons—Provisions only directory.*

Per *Curiam* (*N. R. Chatterjea, J., dissentiente*) If a Magistrate under section 90 of the Code of Criminal Procedure issued a warrant drawn up in the terms of Form VII of Schedule V of the Code, for the arrest, of any person as therein specified but does not first record his reasons in writing (that is, apart from the statement in the warrant) the warrant so issued is valid 38 C. 789 overruled.

Per *Sanderson, C. J.* : The words of section 555 of the Code of Criminal Procedure are not intended to supersede the provisions of section 90. The principle to be applied in considering whether the provisions of a statute or an Act, are imperative or directory is this. The Court must look to the subject-matter, consider the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory 38 C. 789. Diss from. (*Sanderson, C. J., Chatterjee, Richardson, Buckland and Panton, JJ.*) THE GOVERNMENT OF ASSAM *v.* SAHEBULLA.
27 C. W. N. 857 : 38 C. L. J. 77 : 75 I. C. 129 : 24 Cr.L.J. 881 : 51 Cal. 1 : A.I.R. 1924 Cal. 1 (F.B.).

——S. 94—*Accused is entitled to copy of inquest report, in murder case, which report Magistrate can call for, if it is not in Court already.*

CRIMINAL PROCEDURE CODE (V OF 1898), S. 96.

In a murder case the accused has a right to a copy of the statement made by the witnesses at the inquest inquiry. Even if the inquest report is not in Court, S. 94 of the Criminal P. C. empowers the Magistrate to call for its production by the police. (*Spencer, O. C. J.*) CHAULET, *In re.* **20 L. W. 745 : 26 Cr. L J. 426 : 85 I. C. 42 : A. I. R. 1925 M. 424.**

——— **Ss. 96 and 97**—*Search by police—Mode of—Obstruction to—Offence.*

In a search by the police there are two stages.—(i) The persons whose houses have got to be searched have to give reasonable facilities at the bidding of the police. (ii) Where no facilities are given, such obstruction is an offence. In this particular case the police were driven off and an affray took place. This amounted to a grave and wanton disregard of law. (*Piggott and Walsh, JJ.*) HARDEO *v.* EMPEROR. **L. R. 3 A. 117 (Cr.).**

——— **S. 99 D**—*Series of books published—Whole series must be looked to.*

Where the applicant is alleged to have published a series of books, the whole series must be looked to, to determine whether the passages contained therein are seditions.

An extract in a book, stating that the Rowlatt Act was intended "to suppress once and for all political agitation in the country" is a statement known by the writer to be false, and made by him with the deliberate intention of promoting disloyalty and hatred as also a statement that that Act, a Government measure gave to the police full power to harass all innocent people. (*Mears, C. J., Piggott and Mukerji, JJ.*) BAJNATH KEDIA *v.* KING EMPEROR. **86 I. C 55 : 26 Cr. L. J. 679 . 23 A. L. J. 1 : L. R. 6 A. (Cr.) 65 : 47 All. 298 : A. I. R. 1925 All 195 (F. B).**

——— **S. 99 D**—*High Court can only consider whether the document is seditious.*

When an application is made to the High Court under S 99 B in respect of a document, the High Court is precluded by S. 99 D from considering any other point than the question whether in fact the matters contained in the document were seditious or not, and come within the mischief claimed at by S. 124 A. (*Mears, CJ. Piggott and Mukerji JJ.*) BAIJNATH KEDIA *v.* EMPEROR. **23 A. L. J. 1 : 86 I. C. 55 : 26 Cr L. J. 679 : L. R. 6 A. Cr. 65 : 47 All. 298 : A. I. R. 1925 All. 195 (F. B.)**

——— **S. 103**—*Discrepancies.*

Two of the witnesses present at the search stated that the articles produced, *viz.*, silver *bank* and *bana* were produced from a *tind*, but a third witness stated that the *tind* contained a silver *bank* and made no mention of the other articles. No explanation was even suggested as to how the other article came to be there : *Held* that the circumstances under which these things were produced were not altogether beyond suspicion. (*Fforde, J.*) SAUDAGAR SINGH *v.* EMPEROR. **5 Lah. L. J. 572 : A. I. R. 1923 Lah. 683.**

——— **S. 103**—*Search—Independent witness.*

Independent witnesses are necessary for valid search. (*Abdul Qudir, J.*) SHER ALI *v.* EMPEROR. **68 I. C. 833 : 23 Cr. L. J. 609 : A. I. R. 1923 Lah. 79.**

——— **S. 103**—*Applicability—Section does not apply to search under Gambling Act.*

A search conducted after the issue of a warrant under Section 5 of Act 3 of 1867 is not a search under Chapter VII of the Cr.P.C., and S. 103, Cr. P.C. can have no application. In the case of searches under the Opium Act the provisions of the Cr P. C. have been expressly made applicable by S. 16, but Act. 3 of 1867 contains no corresponding section. (*Brasher, J.*) KHILINDA RAM *v.* EMPEROR. **3 Lah. 359 : 23 Cr. L. J. 621 : 68 I. C. 845 : A. I. R. 1922 Lah. 458.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 106.

——— **S. 103**—*Densely populated town—Witnesses to search must be from immediate vicinity.*

The provision that the witnesses of the search should be inhabitants of the locality is intended to operate in favour of the accused and in a densely populated town means persons in the immediate vicinity (*Young, J.*) MA HTWAY *v.* EMPEROR. **4 Bur. L. J. 2 : 86 I. C 475 : 26 Cr. L. J. 827 : A. I. R. 1925 Rang. 205 (1).**

——— **S. 103 (1)**—*Non-compliance with provisions do not vitiate trial.*

The omission to comply with the requirements of the law laid down in S. 103 (1) of the Cr. P. C. that the search must be witnessed by two respectable inhabitants of the locality would not *ipso facto* vitiate a trial and the conviction of the accused is not illegal, if the Court is upon the evidence produced before it, convinced of the possession of the accused over the incriminating articles in question. (*Jwala Prasad, J.*) DEBI DAS *v.* EMPEROR. **2 Pat. L. T. 359.**

——— **S. 106**—*Offence involving breach of peace—Conviction for assault—Election Campaign-Order legal.*

If the Court binds a person convicted of an assault in view of his being a dangerous person, the order is legal under Section 106, Cr. P. C. It does not matter if the assault is made during election time. (*Sulaiman, J.*) JAFAR HUSAIN *v.* EMPEROR. **L. R. 4 All. 259 (Cr.) : 46 All. 105 : A. I. R. 1924 All. 306.**

——— **S. 106**—*Procedure—Execution of bond to be ordered at the time of conviction.*

An order under S. 106 must be passed at the time of conviction and passing of sentence. If it is passed at a subsequent stage it would be without jurisdiction. In case the Magistrate having arrived at a decision starts proceedings only subsequently the only procedure open to him is under S.107, Cr. P. Code. (*Sulaiman, J.*) RAM ADAIN *v* EMPEROR. **21 A.L.J. 839 : L. R. 4 A. 240 (Cr.) : 9 O. & A. L. R. 1085 : A.I R. 1924 All. 230.**

——— **S. 106**—*Conviction under S. 323, I. P. C., Order binding over to keep the peace.*

Where a person is convicted under S. 323, I. P. C., the accused cannot be bound down to keep the peace merely on the ground the parties were on bad terms. There must be a further finding that a breach of the peace was involved in the occurrence. (*Banerji, J.*) MUHAMMAD RAHIM *v.* EMPEROR. **89 I. C. 1025 (2) : 26 Cr. L. J. 1457 (2) : 23 A. L. J. 1053.**

——— **S. 106**—*Forum—Procedure.*

Order under this section should be passed by the same Magistrate who tried the accused for the principal offence and not by another Magistrate. (*Daniels, J.*) DUKHI *v.* EMPEROR. **74 I. C. 448 : 24 Cr. L. J. 784 : A.I.R. 1924 All. 141.**

——— **S. 106**—*Procedure—Case referred by second class Magistrate—Order passed but trial directed to be conducted by second class Magistrate.*

A joint magistrate, to whom a case was referred by a second class Magistrate as the latter thought an order under S. 106, Cr. P. C. was necessary, passed the necessary order, but sent the accused for trial back to the latter. *Held*, the order mas wrong, (*Daniels, J.*) DUKHI *v.* EMPEROR. **74 I. C 448 : 24 Cr. L. J. 784 : A.I.R. 1924 All. 141.**

——— **S. 106**—*Offence involving breach of peace—S. 323, I. P.C. is such offence—Person convicted under S. 323, Penal Code—If can be bound over.*

A person convicted under S. 323 of the Penal Code, may be bound over to keep the peace under S. 106 of the Cr. P. Code. (*Lindsay, J.*) CHHAJU *v.* EMPEROR.

CRIMINAL PROCEDURE CODE (V OF 1898), S.106.

19 A. L. J. 856 : 22 Cr. L. J. 668 : 63 I. C. 460 : 3 U. P. L. R. (A) 173.

———S. 106—*Construction—Proceedings under—Nature of.*

Proceedings under Ch. VIII, Cr. P. Code are not in the form of a trial nor is the person who is proceeded against an accused person who has committed any offence. (*C. C. Ghose and Cuming, JJ.*) BINODE BEHARI NATH *v.* EMPEROR. **50 Cal. 985 : A. I. R. 1924 Cal. 392.**

———S. 106—*House trespass—Intent to cause injury—Breach of the peace if involved.*

Trespassing in a man's house for the purpose of causing him injury involves a breach of the peace and an order under S. 106 is legal. (*Martineau, J.*) DULLAH *v.* EMPEROR. **89 I. C. 1030 (1) : 26 Cr. L. J. 1462 (1) : A I. R. 1925 Lah. 621 (1).**

———S. 106—*Offence involving breach of peace—Wrongful confinement is not such offence.*

S. 106 of the Cr. P. Code can only be applied when the person concerned has been convicted of an offence involving a breach of the peace. The offence must be one of which a breach of the peace is in law a necessary ingredient. It cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement. (*Broadway, J.*) MAHOMMAD AFZAL *v.* EMPEROR. **71 I. C. 879 : 24 Cr. L. J. 271 : A. I. R. 1924 Lah. 311.**

———S. 106—*Construction—Offense involving a breach of the peace—Meaning of.*

The words "offence....peace" in S. 106 mean an offence in which breach of the peace is an ingredient and not merely an offence provoking or likely to lead to a breach of the peace. To justify an order under S. 106 the person must have been *convicted* of the offence of criminal intimidation. An order under . 106 cannot be passed on a conviction for an offence under S. 143 or 297 of the Penal Code as those offences do not necessarily involve the use of force. (*Martineau, J.*) ABDULLA *v.* EMPEROR. **2 Lah. 279 : 63 I. C. 869 : 22 Cr. L. J. 709.**

———S. 106—*Security to keep the peace—Offence involving a breach of the peace—Meaning of—Conviction under Section 342, I. P. C.—Order under S. 107, Cr. P. Code if legal.*

The expression "other offence" in S. 106, Cr. P. Code, refers to offence *ejusdem generis* with the offences against public tranquillity and of assault mentioned in the section. To attract the operation of S. 106, Cr. P. Code, it is enough if the offence brought home to the accused necessarily includes or implies a breach of the peace. It is not necessary that apart from the offence, there must have ensued a breach of the peace. The facts constituting an offence must be looked at, for determining whether the case comes within S. 106 or not Wrongful confinement *per se* is not an offence involving a breach of the peace but if the accused is found to have violently seized another person, tied his hands and wrongfully confined in an open garden, security can be ordered under S. 106, Cr. P. Code. (*Venkatasubba Rao, J.*) KUPPA REDDIAR, *In re.* **20 L. W. 481 : 47 Mad. 846 : 81 I. C. 920 : 25 Cr. L. J. 1096 : A. I. R. 1924 Mad. 808 : 47 M. L. J. 232.**

———S. 106—*Finding as to breach not necessary.*

The expression "Other offences involving a breach of the peace' would embrace offences *ejusdem generis* with the offences of assault and rioting which are specified in the section. It is not necessary that the lower Court should record a finding that a breach of the peace was involved in order to invest itself with power to make an order under S. 106 (1). Where the Judge has recorded his opinion that it is necessary in a case to require the convicted persons to execute a bond for keeping the peace that is all that the section in terms demands. (*Spencer, J.*) RAMASWAMI *v.* EMPEROR. **17 L. W. 499 : (1923) M. W. N. 314 : 32 M. L. T. (H. C.) 297 : 72 I. C. 615 : 24 Cr L. J. 455 : A. I. R. 1923 Mad. 618 : 44 M. L. J. 485.**

———S. 106—*Essentials.*

In the absence of a finding that there is a likelihood of a breach of the peace, an order under S. 106 cannot be passed. (*Kinkhede, A. J. C.*) RAJARAM *v.* GOVINDA. **25 Cr. L. J. 1064 : 81 I. C. 888 : A. I. R. 1925 Nag. 36.**

———S. 106—*Involve—Meaning of—Order under—When proper.*

The word "involve" in S. 106, Cr. P. C. connotes the inclusion not only of a necessary but also ofa probable feature, circumstance, antecedent condition or consequence. To justify an order for security there must be an express finding that the act committed involved a breach of the peace or an evident intention of committing the same or the evidence must be so clear as to satisfy the court (without an express finding) that such was the case. (*Baker, O. J. C.*) NANHA *v.* KANHAYALAL. **75 I. C. 983 : 25 Cr. L. J. 71 : A. I. R. 1924 Nag. 118.**

———S. 106—*Appellate Court — Though trial Court not competent to demand security appellate Court can demand.*

The power conferred on an appellate Court by clause 3 of S. 106. Crl P. C. is not limited by the fact that the court whose decision is under appeal has no power to direct security to be taken. (*Prideaux, A. J, C*) HASAN BEG *v.* EMPEROR. **19 N. L. R. 154 : 73 I. C. 335 : A. I. R. 1924 Nag. 49.**

———S. 106—*Offence involving breach of peace—Conviction under S. 323, I.P.C.—Attacking in public place is such offence.*

Where a person has been convicted of an offence under S. 323, I. P. C. for striking a person with a lathi and kicking and cuffing another ata public place, it is open to the Court to require the accused to furnish security under S. 106, Cr.P.C., 9 O.C. 318 ; 43 B. 554; 33 A. 771 referred to. (*Dalal and Simpsons, A.J. C.*) EMPEROR *v.* SHEO RAM. **9 O & A. L. R. 191 : 72 I. C 79 (2) : 24 Cr. L. J. 319 (2) : A. I. R. 1924 Oudh 233.**

———S. 106—*Security for good behaviour—Rejection of sureties—Grounds for—Right of appeal.*

The rejected sureties in a case of security for keeping the peace or for good behaviour have no *locus standi* to challenge the order.

Close neighbourhood is not necessary for suretyship. But inability to control is a good ground. The nature of security required is personal and not of property. (*Ashworth, A. J. C.*) EMPEROR *v.* MAHAMMAD BAKSH. **26 O. C. 284 : 25 Cr. L. J. 796 : 81 I. C. 316 : A. I R. 1924 Oudh 80.**

———S. 106—*Construction.*

Breach of the peace implies some offence against the public, 8 O. L. J. 318 Foll. (*Wazir Hasan, A. J. C.*) MAHANT DURGA BHARATHI *v.* EMPEROR. **72 I. C. 955 : 24 Cr. L. J. 491 : A. I. R. 1923 Oudh 37.**

———S. 106—*Offence involving breach of the peace—Assault.*

An offence under S. 325, I.P.C. involves the use of criminal force and is, in that sense an assault, but the word "assault" as used in S. 106 of the Cr. P. Code refers to offence of assault as defined in S. 351, I.P.C. and is made punishable by S. 352. An offence under

CR. P. CODE (V OF 1898), S. 106.

S. 325 does not always involve the breach of the peace. (*Lindsay, J. C.*) DUBRI *v.* EMPEROR.

71 I. C. 601 : 24 Cr. L. J. 227 : 8 O. L. J. 318.

——S. 106—*Penal Code—S.* 149, *Order under, S.* 106, *Cr. P. C. does not lie where accused is convicted under section* 149, *I. P. C.*

The amendment to S. 106 by the Act XVIII of 1923 has made an order under S 106 impossible where the only section under which the accused are convicted is a section of the Penal Code which is read with S. 149. The amendment is not very happily worded for it speaks of an offence punishable under S, 149. No offence is punishable under S. 149 alone ; there must be some substantive offence charged to be read with S.149. Where the accused were convicted under S. 325 read with S. 149, *Held*, that under S. 106, as it now stands, an order cannot be passed against them. (*Adami and Bucknill, JJ.*) CHHEDI SINGH *v.* EMPEROR.

26 Cr. L. J. 426 : 6 P.L.T. 330 : 3 Pat 870 : 85 I. C. 42 : A. I. R. 1925 Pat. 117.

——Ss. 106, 126—*Demanding security having a certain pecuniary status is not unreasonable.*

The provisions of Chapter VIII are not intended to punish but to prevent crime and it is not premissible, to limit the security or the amount of security to such descriptions that it is perfectly impossible for the accused to furnish them, thus rendering it certain that they will be committed to jail. The conditions that the security should be given to the extent of Rs. 500 in the case of the first accused, Rs. 250 in the case of the other accused and that securities asked for should be zemindars owning a certain amount of land or paying certain amount of income tax and living in the neighbourhood were held in this case not to be so severe that the accused would have such difficulty in obtaining them. Such conditions are common in Sind and they are not unreasonable. (*Kennedy, J. C. and Aston, A. J. C.*) ALLAHDAD *v.* EMPEROR.

17 S L. R. 160 : A. I. R. 1924 Sind 120.

——S, 106 (1) and (3)—*Appellate Court cannot order security—Where lower Court cannot do so.*

Held following 35 C. 434 that the appellate Court, cannot exercise the power given by S. 106 (3), Cr. P. Code, where the conviction has not been by a Court specified in sub-S. (1). (*Newbould and Suhrawardy, JJ.*) EUSAFALI AHMED KHAIRAJ *v.* EMPEROR.

24 Cr. L. J. 308 : 72 I. C. 68 : A. I. R. 1924 Cal 540 (1.)

——S. 106 (3)—*Appellate Court can make an order for security.*

Appellate Court can under S. 106 (3) make an order for security, though the trial Court had no such power under S. 106 (1). (*Banerji, J.*) TILAK RAI *v.* EMPEROR. **43 All. 372 : 19 A. L. J. 123 : 22 Cr. L. J. 310 : 60 I. C 998 · L. R. 2 A. (Cr.) 12.**

——S. 106 (3)—*Appellate Court cannot order security if lower Court cannot.*

An order under the section by an appellate Court in appeal from an order of a second class Magistrate is illegal and *ultra vires*. (*Harrison, J.*) KARAM SINGH *v.* EMPEROR. **23 Cr. L, J. 457 : 67 I. C. 729 : A. I. R. 1923 Lah. 91.**

——S. 106 (3)—*Finding as to breach of peace is necessary.*

The appellate Court is wrong in directing accused to enter into a bond under S. 106, Cr. P. C., when there is no finding that any breach of peace occurred. 29 M. 190, 37 M. 153, Ref. (*Kumaraswamy Sastry, J.*) THIRUMALA REDDI, *In re.*

30 M. L. T. 348 : A. I. R. 1923 Mad. 133.

——S. 106 (4)—*Appellate Court can demand security though lower Court cannot.*

CR. P. CODE (V OF 1898), S. 107—Applicability.

Though a case is tried by a second class or third class Magistrate, the Court of appeal or revision can demand security under S. 106. (*Daniels, A J. C.*) LACHHMI NARAYAN *v.* EMPEROR.

22 Cr. L. J. 276 : 60 I. C. 676 : 23 O. C. 380.

[*See contra* **A. I. R. 1923 Lah. 91.**]

——S. 107—

Appeal.
Applicability.
Bail.
Consent of accused.
Delegation of enquiry.
Discretion of Magistrate.
Dispute about land.
Essentials.
Evidence.
Fresh proceedings.
Joint trial.
Jurisdiction.
Nature of proceedings.
Procedure.
Revision.
Vague information.
Wrongful Act.

Appeal.

——Ss. 107, 118 and 406—*Appeal—Order directing security to be given for good behaviour is appealable, that directing security to be given for keeping the peace is not-*

Order under S. 107 directing security for good behaviour to be given can be appealed from under S. 406. But no appeal will lie in proceedings instituted under S. 107 read with S. 118 for keeping the peace. (*Prideaux, A.J.C.*) SHAMRAO *v.* EMPEROR.

19 N. L. R. 160 : 25 Cr L. J. 67 : 75 I. C. 979 : A. I. R. 1924 Nag. 60.

——S. 107—*Appeal—Bond under S.* 107 *is given to a Court and not to any private party.*

A bond under S. 107 is not given to any particular person but to the Court and no private party is entitled to appeal against an order refusing to forfeit it, though it is open to the Magistrate to take action in revision. (*Daniels, A- J. C.*) SARJU *v.* THAKURAIN JAI RAJ KUMAR. **25 Cr. L. J. 445 : 77 I. C. 733 : A I. R. 1925 Oudh 51.**

Applicability.

——S. 107—*Applicability—Object is not to bring pressure on the party.*

S. 107 only applies to cases in which the right to property has not been adjudicated upon. It should never be used to bring pressure upon a party to give up his rights over a property. (*Gokul Prasad, J.*) GAURI SHANKAR *v.* EMPEROR.**L. R. 2 A. (Cr.) 19.**

——S 107 and 145—*Applicability—Breach of the peace—Apprehension as to—Procedure.*

A dispute about land which would justify proceedings under S. 145, Cr. P. Code, does not bar proceedings under S. 107 of that Code. But if the complainant is out of possession and there is no danger of a breach of the peace unless he attempts to resume possession, he should be referred to his remedies under S. 145, Cr.P. Code, or in the Civil Court and the facts that his attempting to resume possession may cause a breach of the peace and that his dispossession was *prima facie* illegal are not sufficient grounds for binding over the opposite party. 5 N. L. R. 94, Ref. (*Prideaux, A.J.C.*) DHUMA *v.* EMPEROR.

23 Cr. L. J. 567 : 68 I. C. 407 : A I. R. 1923 Nag. 54.

CR. P. CODE (V OF 1898), S. 107—Applicability.

——— S. 107—*Applicability—Order demanding security to keep the peace of—Charge of murder—Acquittal—Effect of.*

Where an apprehension of a breach of the peace arose out of facts which were undisputed and in connection with those facts a charge of murder was laid unsuccessfully against certain persons and the proceedings against the petitioners were also started under S. 107, Cr. P. Code, *held*, that the proceedings were regular and the order demanding security was valid. 41 M. 246, Dist. (*Kanhaiya Lal, J. C.*) EMPEROR *v.* GOBARDHAN SINGH. **9 O. L. J. 285 : 4 U. P. L. R. (O. C.) 73 : A. I. R. 1922 Oudh 273.**

———S. 107—*Applicability—Initiation of proceedings—Guiding principles.*

S. 107 is essentially one to be directed against individuals who personally are likely to act in a wrongful manner which may probably occasion or who are themselves likely to commit a breach of the peace or a disturbance of public tranquillity. A vague statement not containing a direct allegation against the individuals proceeded against cannot form the basis of a proceeding under S. 107. A Magistrate cannot keep a proceeding under S. 107 pending on the ground that such pendency tends to preserve peace. (*Bucknill, J.*) GRANT *v.* EMPEROR. **2 Pat. L. T. 669 : 64 I. C. 137 : 22 Cr. L. J. 745.**

———Ss. 107 and 145—*Applicability—Propriety of order under S.* 107.

Where the property was recorded in the Collector's register in the name of the widow after the death of her husband in the absence of an objection by the agnates by the Bengal Land Registration Act and where there was a dispute as to the possession of the property, proceedings under S. 107 against the agnates who claimed the properties on the ground of survivorship were proper especially where there was overwhelming evidence of the widow's possession. An order under S. 107 can be passed only when the wrongful acts can be proved by overt actions against each of the several individuals sought to be bound down. Where, however, wrongful acts are committed or threatened, to be committed jointly by number of individuals and not only by some of them, the act is the act of all and therefore all of them are liable under S. 107. (*Jwala Prasad, J.*) LACHMI SINGH *v* EMPEROR. **1 Pat. L. T. 681 : 59 I. C. 374 : 22 Cr. L. J. 86.**

Bail.

———S. 107 (3) and (4)—*Bail when to be refused.*

Where the proceedings have been instituted against a person under S. 107, it is only in the special circumstances referred to in sub-sections (3) and (4) of that section that the law empowers a magistrate to detain a person in custody until the completion of the enquiry. The sub-section can only be put into operation when a Magistrate, who has no powers to proceed under sub-section (1) of Section 107 is led to believe that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act which might possibly occasion a breach of the peace or disturbance and cannot, by any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest a person and send him then to another Magistrate who has got adequate powers for dealing with the case. 32 C. 80 and 31 M. 315 Ref. (*Bucknill, J.*) WAHARI MANDER *v.* EMPEROR. **24 Cr. L. J. 825 : 74 I. C. 857 : 5 Pat. L. T. 109 : 2 Pat. L. R. 77 (Cr.) : A. I. R. 1923 Pat. 527.**

Consent of accused.

———S. 107—*Consent of accused—Consent to be bound over.*

A Court has got power to act upon a solemn consent given before it by the accused person. (*Walsh, J.*) GHARIBA *v.* EMPEROR. **21 A. L. J. 881 : L. R. 5 A. (Cr.) 21 : 10 O. & A. L. R. 11 : 46 All. 109 : A. I R. 1924 All. 269.**

———S. 107—*Consent of accused—Order on the admission of the accused is illegal.*

Consent to furnish security is no ground to order security. In the absence of evidence indicating apprehension of breach of the peace or of some act likely to cause breach of the peace on the part of the person concerned, order passed is illegal. (*Broadway, J.*) JOTI MALIK *v.* EMPEROR. **25 Cr. L. J. 710 : 81 I. C. 198 : A. I. R. 1925 Lah. 135.**

———S. 107—*Consent of accused is not a good ground.*

The mere statement of a person that he is willing to give security is not sufficient ground for taking security from him for keeping the peace. 24 P. R. 1915 ; 27 P. R. 1917 (Cr), Foll. (*Chevis, J.*) KARAM *v.* EMPEROR. **65 I. C. 639 (2) : 23 Cr. L.J. 175 (2) (Lah.).**

Delegation of enquiry.

———S. 107—*Delegation of enquiry—Direction by District Magistrate.*

If a District Magistrate thinks it necessary, in order to prevent a breach of the peace, to take proceedings under S. 107, Criminal Procedure Code, against the petitioners, he should himself draw up such proceedings and he might then transfer the case to a Subordinate Magistrate for hearing. But he should not direct proceedings to be drawn up by a Subordinate Magistrate nor should the Subordinate Magistrate draw up proceedings merely because the District Magistrate has ordered him to do so. He has full power under S. 107, Criminal Procedure Code, to take action under that section when he thinks it is necessary to do so to prevent a breach of the peace. But in deciding as to the necessity for action he must come to a conclusion of his own accord on the materials before him and act accordingly. (*Newbould and Suhrawardy, JJ.*) HANIF SHELKH *v.* JABANI MANDAI. **24 Cr. L. J. 367 : 72 I. C. 367 : A. I. R. 1924 Cal 540 (2).**

Discretion of Magistrate.

———Ss. 107 and 145—*Discretion of Magistrate—Breach of peace apprehended—Civil suit pending.*

Where a civil suit is pending for the determination of the rights of the parties in certain property it is not proper to start proceedings under S. 145 of the Code. Proceedings under S. 107 are more appropriate. (*N. R. Chatterjee and Cuming, JJ.*) ALI MOHAMMAD *v.* FAKIRUDDI MUNSHI. **24 C. W. N. 1039 : 59 I. C. 643 : 22 Cr. L. J. 131 : 32 C. L. J. 255.**

Dispute about land.

———Ss. 107 and 145—*Dispute about land—Scope.*

A dispute about land which would justify proceedings under section 145 does not bar proceedings under section 107, but if the complainant is out of possession of the land in dispute and there is no danger of a breach of the peace unless he attempts to resume possession, he should be referred to his remedies under S. 145 or in the Civil Courts, and the fact that his attempting to resume possession may cause a breach of the peace and that his dispossession was *prima facie* illegal are not sufficient grounds for binding over the opposite party to keep the peace. (*Prideaux, A. J. C.*) DHUMA *v.* EMPEROR. **23 Cr. L. J. 567 :**

CR. P. CODE (V OF 1898), S. 107—Dispute about land.

68 I. C. 407 : A. I. R. 1923 Nag. 54.

——**S. 107**—*Dispute about land.*

In a dispute regarding property the aid of S. 144 is invoked when there is danger to breach of the peace and of Sec. 145 when the danger to the peace is to be averted at once. (*Jwala Prasad, J.*) RATAN CHAND SAHU *v.* MOHAN LAL SAHU.

A. I. R. 1922 Pat. 228.

——**Ss. 107 and 145**—*Dispute about land.*

S. 107 applies to a case of undisputed possession ; where the possession is in dispute, proceedings under S. 145 should be instituted. (*Jwala Prasad, J.*) KALI PRASAD *v.* DHODBAI. **62 I. C. 590 : 22 Cr. L. J. 574 (Pat.)**

Essentials.

——**S. 107**—*Essentials—Uttering Amen aloud is not sufficient.*

Before demanding security the Court must be satisfied that there is apprehension of a breach of peace. It is not a sufficient cause to demand security that the members of Ahl-i-hadis sect worship with other Mahomedans in the same mosque and utter the word Amen aloud. (*Daniels, A. J. C.*) ABDUR RAHMAN *v.* EMPEROR. **8 O. L. J. 282 : 62 I. C. 830 : 22 Cr. L J. 590.**

——**S. 107**—*Essentials—Application can be rejected if Court is satisfied that there is no apprehension.*

If a Magistrate is satisfied after making an enquiry himself or through some other agency that the apprehension of a breach of the peace complained of does not exist, he need not make an order under S. 112 of the Code and must refuse the application. (*Zafar Ali, J.*) SHAMAS-UD-DIN *v* RAM DAYAL SINGH.

25 Cr. L. J. 89 : 76 I. C. 25 : A. I. R. 1924 Lah. 630.

Evidence.

——**S. 107**—*Evidence—Insufficient—Masters and servants jointly tried—Masters discharged but servants ordered to provide heavy securities—Order is wrong.*

Where there were old standing feuds between two parties which in the course of events developed into a very serious and heavy litigation and the Magistrate finding no evidence against the masters discharged them but assuming a possibility of breach of peace ordered their servants to provide heavy securities. *Held*, that the Magistrate's order was not justified. (*Walsh. J.*) DIN DAYAL *v.* EMPEROR.

23 A. L. J. 300 : 87 I. C. 517 : 26 A. L. J. 981 : A. L. R. 1925 All. 443.

Fresh proceedings.

——**S. 107**—*Fresh proceedings — Discharge—Another case.*

After the notices were cancelled and the accused were discharged, the complainant filed a fresh complaint upon which the Deputy Magistrate recorded the statement of the complainant and then passed orders for process to issue to the accused. *Held*, a Court which has passed an order of discharge cannot re-open the same case but there is no bar to a second case being instituted ; the order of discharge does not stand in the way of such proceedings being taken. There is no acquittal but merely a discharge in such a case which does not prevent another case being instituted. (*Lindsay, J.*) JASUA *v.* EMPEROR. **21 A. L. J. 215 : 71 I. C. 696 : L. R. 4 A (Cr.) 67 (2) : 24 Cr. L. J. 223 : A. I. R. 1923 All. 332 (2).**

Joint trial.

——**Ss. 107 and 110**—*Joint trial—Members of gang—Propriety of evidence against each must be considered separately.*

Though there is no legal prohibition to try a number

CR. P. CODE (V OF 1898), S. 107—Jurisdiction.

of persons under S. 107, Cr. P. Code, it is highly unfair and unjust to proceed against them jointly unless it is quite clear they form a gang. The case of each has to be considered separately and this is not likely to be effected if the trial is joint. (*Sulaiman, J.*) MUHAMMAD ISMAIL *v.* EMPEROR.

21 A. L. J. 841 : L. R. 4 A. 241 (Cr.) : A. I. R. 1924 All. 195.

——**S. 107**—*Joint trial.*

A joint trial of two persons, not being contending parties, is legal. S. 117 (4) and not S.235, Cr.P. Code, applies to the case. (*Stuart, J.*) GANGA PRASAD *v.* EMPEROR. **25 Cr. L. J. 200 : 76 I. C. 568 : A. I. R. 1923 All. 476.**

——**Ss. 107 and 239**—*Joint trial—Conspiracy to boycott—Legality—Preliminary order not served on absent accused, but explained in Court—Effect.*

Where a number of persons have joined together to boycott a class of people, joint action can be taken against all of them under S. 107, Criminal Procedure Code, and the proceedings are not vitiated by such joint trial. Where the preliminary order could not be served on a person as he was absent, but it was read to him in Court when he appeared, the requirements of law are satisfied. (*Prideaux, A. J. C.*) BAJI RAO, *In re.* **25 Cr. L. J. 132 : 76 I. C. 228 : A. I. R. 1924 Nag. 166.**

Jurisdiction.

——**Ss. 107 and 545**—*Jurisdiction — Security proceedings—Order for payment of costs.*

S. 545 of the Code of Criminal Procedure cannot possibly apply to a case under S. 107 and an order directing the accused persons to pay the costs of the complainant is therefore *ultra vires.* (*Sulaiman, J.*) SHEO PRASAD SINGH *v.* MAHANGU NONIA.

L. R. 5 A. 12 (Cr.) : 77 I. C. 828 : 25 Cr. L. J. 76 : A. I. R. 1924 All 694 (2).

——**S. 107 (2)**—*Jurisdiction—Security for keeping peace—Person resident of a Native State.*

When proceedings are taken under S. 107 before the District Magistrate within whose jurisdiction the place where the breach of peace is apprehended is situate, it is immaterial whether the person informed against was or was not within the district at the time the notice was issued and there is no error or irregularity in procedure. (*Stuart, J.*) SHEOBRAN DUBE *v.* EMPEROR. **20 A. L. J. 523 : 67 I. C. 348 : L. R. 3 A. 96 (Cr.) : 23 Cr. L. J. 396 : A. I. R. 1922 All. 337 (1).**

——**S. 107**—*Jurisdiction—Compensation.*

In proceedings under S. 107 an order for compensation cannot be passed. (*Ryves, J.*) MANNU KHAN *v.* CHANDI PRASAD. **23 Cr. L. J. 474 : 67 I. C. 826 : 4 U. P. L. R. (A.) 161 : 20 A. L. J. 624 : A. I. R. 1922 All. 321 (2).**

——**S. 107**—*Jurisdiction—Ordering a man to leave a village under threat of prosecution is illegal.*

A Magistrate has no authority to order a man to leave any place under threats of being prosecuted as a bad character, (*Lindsay, J.*) RAM PRASAD *v.* EMPEROR. **L R. 2 A. (Cr.) 165.**

——**S. 107**—*Jurisdiction—Temporary residence.*

Temporary residence is sufficient to give a Magistrate jurisdiction to act under this section. (*Gokul Prasad, J.*) ZIAULLAH KHAN *v.* EMPEROR.

22 Cr. L. J. 109 : 59 I. C. 413 : L. R. 1 A (Cr.) 168.

——**Ss. 107 and 145**—*Jurisdiction—Dispute as to possession of fishery—Proceeding under S. 107—Refusal to change into S. 145.*

Where a dispute likely to lead to a breach of the peace was over the possession of a fishery, and the

CR. P. CODE (V OF 1898), S. 107—Jurisdiction.

Magistrate drew up a proceeding under S. 107 of the Cr. P. Code, *held*, the Magistrate had jurisdiction to proceed under S. 107 of the Cr. P. Code and he having exercised his discretion it was not open to the High Court to interfere in revision. 39 Cal. 150, Ref. (*Walmsley and Greaves, JJ.*) AMULYA CHARAN SIRCAR *v.* AMRITA LAL MUKERJI.

24 C. W. N. 1075 : 60 I.C. 336 : 22 Cr. L. J. 224.

——S. 107—*Jurisdiction—Sessions Judge cannot direct institution of proceedings under S. 107 in revision—Cr. P. Code, S. 438*

An order refusing to take action under S. 107 cannot be reversed by the Sessions Judge nor can he direct the Magistrate to draw up proceedings under the section. (*Greaves and Panton, JJ.*) PHANI BHUSHAN ROY *v.* KUNGA BEHARI BISWAS. **25 Cr. L. J. 679 : 81 I.C. 167 : A. I. R. 1925 Cal. 262.**

——S. 107—*Jurisdiction.*

It is only a Chief Presidency or a District Magistrate who can take these proceedings when either the person informed against (he having left the place) or the place where a breach of the peace or disturbance is apprehended is not within the local limits of the Magistrate's local jurisdiction. 5 N. L. R. 94, Foll. (*Prideaux, A. J. C.*) DHUMA *v.* EMPEROR.

68 I. C. 407 : 23 Cr. L. J. 567 : A. I. R. 1923 Nag. 54.

——S. 107—*Jurisdiction—Order of attachment—If legal.*

In proceedings under S. 107, Cr.P. Cdoe. attachment of property cannot be ordered. (*Neave, A. J. C.*) RAM SARUP *v.* EMPEROR. **25 Cr. L. J. 350 · 77 I. C. 238 : A. I. R. 1924 Oudh 345.**

——S. 107—*Jurisdiction—Sessions Judge can make reference in a proceeding under S. 107.*

The Sessions Judge has jurisdiction to make reference in a proceeding under S. 107, even before the applicants have submitted the proceedings to the District Magistrate under S. 125 of the Code. 40 A. 140, Not Foll; 39 A. 466, Appr. & Foll. The jurisdiction of the District Magistrate under S. 125 of the Code is neither appellate nor revisional. The Code has allowed an appeal expressly against an order of a Subordinate Magistrate directing a party to give security for good behaviour. As no such appeal is allowed in a case where security is ordered for keeping the peace, the District Magistrate's power is merely confined to examining the record to satisfy himself whether it was any longer necessary to keep the parties under the bond. The act is not a judicial act which the District Magistrate is called upon to exercise. (*Dalal, A.J.C.*) EMPEROR *v.* BALWANT SINGH. **73 I. C 504 : 24 Cr. L. J. 616: A. I. R. 1924 Oudh 241.**

——Ss. 107, 144, 145—*Jurisdiction—Possession given by Civil Court—Criminal Court cannot re-open question.*

The Criminal Court is bound to maintain the auction-purchaser in possession of the property purchased by him after the passing of a decree by a Civil Court and the service of the writ of the delivery of possession. The Criminal Court cannot re-open the question of possession and investigate it under Ss. 107, 144 and 145 of the Cr. P. Code or in an inquiry of an offence under the Penal Code. The Magistrate has power under S.145, Cr.P. Code, to investigate into the actual service of the writ of delivery of possession. But as soon as it is proved that the *dakhaldhahani* has been effected, it is his duty to maintain the possession of the auction-purchaser. (*Jwala Prasad and Coutts, JJ.*) RAM KRISHNA SINGH *v.* EMPEROR. **3 Pat. L. T. 335 : 23 Cr. L. J. 321 : 66 I. C. 817 : A. I. R. 1922 Pat. 197 (2).**

——S. 107—*Jurisdiction — Ferry—New ghat opened—Dispute about possession.*

A new *ghat* was opened for the ferry to ply by that change of course of the river. By the award of the arbitrators it was agreed to share equally the tolls. The Magistrate in proceeding under S. 107 held that the proceedings belonged to the second party only, who were originally entitled to them on the ground that only some of the landlords of the second party were party to arbitration proceedings. *Held*, the main objection to this order is that, so far as there is any dispute between the parties, it relates to the right of the second party to take passengers to and from Raotara, and so far as the Magistrate's order has the effect of declaring that the second party have this right, it is without jurisdiction. Raotara is admittedly in Madhipura sub-division, and the proper tribunal for the decision of any question as to the taking of passengers by ferry from and to Raotara is the Court of the Sub-divisional Magistrate of Madhipura. (*Ross, J.*) KALANAND SINGH *v.* HIRDE MISSER.

A. I. R. 1922 Pat. 219.

——S. 107—*Jurisdiction—Sufficient time to produce security should be given.*

Persons against whom orders are passed under S. 107 must be given sufficient time to furnish security. (*Das, J.*) MAUNG TUN U. *v.* EMPEROR.

4 Bur. L. J. 172 : A. I. R. 1925 Rang. 353.

——S. 107 *Jurisdiction—Rejection of sureties should be made within a reasonable time.*

The Magistrate if he is not satisfied with the sureties tendered should reject them within a reasonable time so as to give the accused an opportunity of offering fresh sureties. (*Das, J.*) MAUNG TUN U. *v.* EMPEROR. **4 Bur. L J. 172 : A I. R. 1925 Rang. 353.**

——S. 107—*Jurisdiction—Rejection of security—Politics of surety is no ground.*

As long as the security is ample, the Court is bound to accept the same without enquiring into the politics of the person standing surety. (*Das, J.*) MAUNG TUN U. *v.* EMPEROR. **4 Bur. L. J. 172 : A. I. R. 1925 Rang. 353.**

Nature of proceedings.

——S. 107—*Nature of proceedings—Order refusing to take action cannot be set aside by superior Court—The power is administrative rather than judicial.*

Section 107 is not intended to give any redress to the applicant because without injury there can be no redress while the section contemplates possible injury, therefore the order of a Magistrate refusing to take action cannot be interfered with, by a superior court, as the power is administrative rather than judicial. The person complained against is not an accused person. (*Kendall, A. J. C.*) RAM LAL *v.* BANKATE SHAR RAWAN BAHADUR PAL SINGH.

11 O. L. J. 732 : 25 Cr. L. J. 1149 : 28 O. C. 44 : 81 I. C. 973 · A. I. R. 1925 Oudh 138.

——S. 107 – Nature of proceedings—Order requiring security—Is not a conviction. RAWLINS *v.* ANANTA LAL SAHU. **2 Pat. L. T. 176 : 59 I. C. 905 : 1921 P. H. C. C. 41.**

Procedure.

——Ss. 107, 112 and 117—*Procedure—Proceedings under—Mode of trial—Penalty for failure to furnish security.*

The provisions of S. 112, Criminal Procedure Code, ought to be complied with strictly. In proceedings started under Sec. 107 of the Criminal Procedure Code, the enquiry should, as nearly as practicable, be in the manner prescribed for conducting a charge and recording evidence in summons cases. The case

should not be treated as a warrant case. A final order directing that in default of furnishing the required security the accused should undergo rigorous imprisonment for one year is also altogether illegal. (*Sulaiman, J.*) UTTAM CHAND SINGH *v* EMPEROR.
L. R. 5 A. (Cr.) 24 : A. I. R. 1924 All. 695.

——Ss. 107 and 514—*Procedure—Proceedings under S. 514 instituted within but completion delayed beyond one year—Legality not affected.*

If proceedings under S. 514 for breach of conditions of a bond to keep peace under S. 107 of the Code are instituted within one year from date of the bond, the fact that they were not completed within that period, will not affect the legality of the proceedings. (*Lindsay, J.*) UMA DUTT *v.* EMPEROR.
68 I. C. 847 : 44 All. 657 : 23 Cr. L. J. 623 : 20 A. L. J. 693 : A. I. R. 1922 All. 503.

——S. 107—*Procedure—Security to keep peace—Both sides dangerous—Personal security.*

Where a dispute between two parties may end in a riot and both parties are dangerous, both the parties must be bound over and if they are landed proprietors, their personal security is sufficient. (*Stuart, J.*) BINDRABAN *v.* EMPEROR.
22 Cr. L. J. 701 : 63 I. C. 829 : 3 U. P. L. R. (A). 185.

——S. 107—*Procedure—Depositions need not be read over to witnesses in accused's presence.*

It is not necessary for the deposition to be read over to the witness in the presence of the accused in the case of an inquiry under S. 107. (*Newbould and Ghose, JJ.*) LEGAL REMEMBRANCER *v.* ZAFAR RAKI.
52 Cal 668 : 89 I. C. 976 : 26 Cr. L. J. 1456 : A. I. R. 1925 Cal. 940.

——S. 107—*Procedure—Application under—Dismissal without taking evidence—Propriety.*

S. 203 does not apply to applications under S. 107 but every Magistrate possesses inherent power of refusing an application which he finds groundless and if he is satisfied that the apprehension of breach of the peace does not exist, he can dismiss the application without taking evidence. (*Zafar Ali, J.*) SHAMASUDDIN *v.* RAM DAYAL SINGH. **76 I. C. 25 (1) : 25 Cr. L. J. 89 (1) : A. I. R. 1924 Lah. 630.**

Revision.

——S. 107—*Revision—Revision lies when security is ordered on insufficient grounds.*

The High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Code of Criminal Procedure, but it would interfere when the materials on which the orders are based are clearly insufficient to support the orders passed therein. (*Newbould and C. C. Ghose, JJ.*) NAFAR CHANDRA PAL CHAUDHURY *v.* EMPEROR.
28 C. W. N. 23 : 38 C. L. J. 198 : 76 I. C. 429 : 25 Cr. L. J. 189 : A. I. R. 1924 Cal. 114.

Vague Information.

——S. 107—*Vague information.*

The mere fact, that a dispute exists between two rival Zemindars would not justify proceedings being taken against all their officers and servants unless there are materials to show that they are likely to commit any breach of the peace. Information of the kind mentioned in section 107 must be of a clear and definite kind directly affecting the person against whom process is issued, and it should disclose tangible facts and details ; so that it may afford notice to such person, of what he is to come prepared to meet.' It may be that some of the persons mentioned in the Police report are likely to commit a breach of the peace, while others are not likely to do so, but all of

them must not be lumped up together because they are all interested in the dispute. In one sense all the members of a Zemindar's family are interested in a dispute relating to a property comprised in the Zemindary but that, by itself, would be no ground for taking proceedings against them all. 6 All. 26 Foll. (*Chatterjee and Cuming, JJ.*) AINUDDIN *v.* EMPEROR.
24 Cr. L. J. 230 : 71 I. C. 694 : A. I. R. 1922 Cal. 97.

——S 107—*Vague information.*

An order based upon vague evidence dealing in generalities and not specifying any of the petitioners as having any particular cause for hostilities is not justifiable. (*Broadway, J.*) NITIANAND *v.* CROWN.
3 Lah L. J. 480.

——Ss. 107 and 112—*Vague information—Allegations not specific—Effect.*

Where the allegations against the petitioners are too vague and do not give the necessary details which are required to inform the petitioners of the accusation that they have to meet, the Magistrate should not call upon the petitioners to show cause why they should not be bound down to keep peace. *Jaiprakash Lal* v. *The King-Emperor* 6 All. 25 and *Nagi Reddi Kondu Reddy* v. *The King Emperor*, 41 Mad. 246, Ref. (*Ross, J.*) NAND KISHORE NATH *v.* EMPEROR. **A. I. R. 1922 Pat. 209.**

Wrongful Act.

——S. 107—*Wrongful Act—Dispute in a market place.*

Action may be taken against the disputants under S. 107 if the dispute against certain claim to weigh grain in a market place is likely to cause a breach of the peace. (*Rafique, J.*) MAKBUL AHMAD *v.* EMPEROR. **20 A. L. J. 694 : 68 I. C. 836 : 23 Cr. L. J. 612 : A. I. R. 1922 All 430 (1).**

——S. 107—*Wrongful act—Public thrashing.*

Abetment by instigation or conspiracy of the offence of voluntarily causing hurt is a wrongful act and nothing more likely to occasion a breach of the peace can be imagined than instigating the infliction of a public thrashing. 4 P R. Cr. 1912 Diss from ; 64 P. R. Cr. 1897 and (1812) 17 W. R. Cr. 54 Dist. (*Hallifax, A.J.C.*) BAINES *v.* EMPEROR.
6 N. L. J. 274 : 67 I. C. 346 : 23 Cr. L J. 394 : A. I. R 1922 Nag. 180.

——Ss. 107 and 145—*Wrongful Act—Propriety of order under S. 107.*

Where the property was recorded in the Collector's register in the name of the widow after the death of her husband in the absence of an objection by the agnates under the Bengal Land Registration Act and where there was a dispute as to the possession of the property, proceedings under S. 107 against the agnates who claimed the properties on the ground of the survivorship were proper especially where there was overwhelming evidence of the widow's possession. An order under S. 107 can be passed only when the wrongful acts can be proved by overt actions against each of the several individuals sought to be bound down. Where, however, wrongful acts are committed or threatened to be committed jointly by number of individuals and not only by some of them, the act is the act of all and therefore all of them are liable under S. 107. (*Jwala Prasad J.*) LACHMI SINGH *v.* EMPEROR. **59 I. C. 374 : 1 Pat. L. T. 681 : 22 Cr. L. J. 86.**

——S. 108—*Prosecution to prove their case.*

The procedure applicable to proceedings under S. 108 is that prescribed for warrant cases except that

a charge need not be framed. The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought is entitled to keep quiet and expect prosecution to prove their case. (*Shah, C.J. and Crump, J.*) EMPEROR *v.* T. K. PITRI. **47 Bom. 438 : 25 Bom. L. R. 97 : 76 I. C. 294 : 25 Cr. L. J. 150 : A. I. R. 1923 Bom. 255.**

——— **Ss. 108 and 397**—*Applicability of—Sentence of imprisonment—Withdrawal of security.*

On 23-5-1921 the applicant was ordered to furnish security for a period of one year under S. 108, Cr. P. Code. In default of finding security it was directed that he should undergo rigorous imprisonment for the same period. The accused furnished the security required so that the alternative sentence of rigorous imprisonment did not come into operation. On 31-7-1921 the applicant was convicted of a substantive offence under S. 500, I. P. C. and sentenced to three months' simple imprisonment. He however remained on bail until 23-11-1921 when the bail-bond was cancelled. In the meanwhile on 16-10-'21 the applicant had withdrawn his security under S. 108, Cr. P. Code, and had been committed to prison under that section. *Held* that the substantive sentence of three months' imprisonment should commence on the date when the bail bond was cancelled, namely, 23-11-1921. 30 A. 334, Dist. (*Daniels, A. J. C.*) GANESH SHANKER *v.* EMPEROR. **25 O. C. 249 : 73 I. C. 321 : 24 Cr. L. J. 577 : 10 O. L. J. 593 : A. I. R. 1923 Oudh 56 (2).**

——— **S. 109**—*Dependence upon father—Unsatisfactory account is sufficient ground.*

A person dependant upon his father who earns an honest living is not a person who has no ostensible means of subsistence. Where a person, arrested under suspicious circumstances gives a wrong name and address he fails to give a satisfactory account of himself and proceedings against him under S. 109 are perfectly justified. 17 A. L. J. 432, Dist. (*Sulaiman, J.*) ABDUL RASHID *v.* EMPEROR. **64 I. C. 141 : 22 Cr. L. J. 749.**

——— **S. 109**—*Section is often abused.*

It is regrettable that the salutary provisions of S. 109, Cr. P. Code, are often turned into a sort of an engine of oppression upon old convicts who are thrown helpless upon the world with none to take them in their employ or help them to turn out an honest penny for their living. The fact that a man does not work or that he was convicted previously for bad livelihood does not justify a Magistrate, without being satisfied from the evidence that since his release he has no ostensible means of livelihood, to order him to furnish securities for good behaviour. (*Cuming and Mukerji, JJ.*) PIRU *v.* EMPEROR. **41 C. L. J. 142 : 86 I. C. 666 : 26 Cr. L. J. 842 : A. I. R. 1925 Cal. 616.**

——— **S. 109 (a)**—*Giving false name and then correcting it—If concealing presence.*

Action cannot to be taken under S. 109 (*a*), Cr. P. Code, in a case where a person who is asked his name by the police first gives a wrong name and then corrects it and there is nothing else to show he was taking precautions to conceal his presence. (*Sulaiman, J.*) SHEO PRASAD *v.* EMPEROR. **21 A. L. J. 847 : L. R. 4 A. 237 (Cr.) : A. I. R. 1924 All. 202.**

——— **S. 109 (a)**—*Continuous act with view for offence is essential.*

Cl. (a) of S. 109 refers to a continuous act and does not apply to a case where there is a momentary effort at concealment, to avoid detection or arrest. Passing under a false name or taking precautions to conceal one's presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause. Moreover, such precautions for the purpose of concealment must be taken with a view to commit offence. Accused was loitering on a certain road at 3 A. M. and caught by a constable as he attempted to conceal himself. Accused was an old offender. *Held*, that a mere attempt at concealment on the approach of a constable was nothing and an old offender could not be expected to face a constable if found at that hour of the night. The attempt to conceal himself to avoid observation did not bring the accused within the mischief of the section 39 Cal. 456 Foll. (*Cuming and Mukerji, JJ.*) PIRU *v.* EMPEROR. **41 C. L. J. 142 : 86 I. C. 666 : 26 Cr. L. J. 842 : A. I. R. 1925 Cal. 616.**

——— **S. 109 (b)**—*Accused saying that he works as cooly in a big city and has no abode does not amount to failure to give "satisfactory account".*

The whole object of the latter part of Cl. (*b*) is to enable Magistrate to take action against suspicious strangers lurking within their jurisdiction. The expression "give a satisfactory account of himself" does not mean that the person should satisfy the Magistrate how he spends his time, but it means that he has to satisfactorily account for his presence within the limits of the Magistrate's jurisdiction. It means that if a person is present within such limits or is present at a place within such limits, to which place he does not belong, and there are circumstances justifying a suspicion that he is there not for an innocent purpose, he has got to explain his presence. Where the accused's explanation was that he came to the city in question about a month and a half before and that he worked as a cooly but had no fixed abode, *Held*, that if true, it was a satisfactory explanation as to his presence and the accused must be taken to have given a satisfactory account of himself. A finding that the accused has no work and no place to live in did not mean that the accused had not come to the city as he stated to work as a cooly or that he did not work as such at any time within the period, but was in city for some ulterior object. The accused could not be said to have failed to give a satisfactory account of himself. (*Cuming and Mukerji, JJ.*) PIRU *v.* EMPEROR. **41 C. L. J. 142 : 86 I. C. 666 : 26 Cr. L. J. 842 : A.I R. 1925 Cal. 616.**

——— **S. 109 (b)**—*Accused not engaged in any work at time of arrest—Absence of means of living is not proved.*

The fact, that about the time when the accused was arrested he could show no work in which he was engaged, does not necessarily mean that he had no ostensible means of subsistence. (*Cuming and Mukerji, JJ.*) PIRU *v.* EMPEROR. **41 C. L. J. 142 : 86 I. C. 666 : 26 Cr. L. J. 842 : A. I. R. 1925 Cal. 616.**

S. 110—Change--Cl. (a) now includes a habitual forger and cl. (d) has been made to include the offences of kidnapping, abduction and those under chap. XII, I. P. Code, and the abetment thereof and the attempt thereto. Ed.

——— **S. 110.**

Appeal.
Appellate Court.
Applicability and Scope of.
Defence.
Detention in jail.
Evidence.
Fitness of Surety.
Fresh Proceedings.

Habitual offender.
Joint trial.
Jurisdiction.
Notice.
Offence.
Period of Security.
Police records.
Procedure.
Rejection of Sureties.
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Appeal.

——S. 110—*Appeal—Power of Appellate Court to enhance the amount of security.*

Held, that a Court seized of a case under S. 110 of the Cr. P. Code in appeal was not competent to enhance the amount of security demanded by the Trial Court. (*Daniels, J. C.*) RAMESHWAR BAKSH SINGH *v.* EMPEROR. **24 O. C. 286 : 9 O. L. J. 28 : 64 I. C. 286 : 22 Cr. L. J. 766 : A. I. R. 1923 Oudh 44 (2).**

Appellate Court.

——Ss. 110 and 423—*Appellate Court—Powers of, to enhance security.*

Any accused in a *badmashi* case who is able to produce a large number of defence witnesses is not necessarily entitled to a discharge. Although the word "alter" in section 423 (*c*) literally includes an alteration which increases the severity of the order, still the whole tenor of the section is that the appellate Court can make any necessary alteration in the terms of the order of the Court below but it has no power to increase the severity of the penalty imposed by the trial Court. Under section 423 imprisonment follows automatically on failure to furnish the security. Such a result cannot be within the intention of the Legislature. (*Daniels, J. C.*) RAMESHWAR BAKSH SINGH *v.* EMPEROR. **9 O. L. J. 28 : 64 I. C. 286 : 22 Cr. L. J. 766 : 24 O. C. 286 : A. I. R. 1923 Oudh 44 (2).**

Applicability and Scope of.

——S. 110—*Applicability—"Dacoit" does not come under S. 110—Person guilty of definite offence—Preventive sections do not apply.*

S. 110 does not provide for any person being called upon to furnish security on the ground that he was by habit a dacoit and belonged to a gang of dacoits. Being a member of a gang of dacoits is a definite offence defined and punishable under the Penal Code and it cannot be permitted that instead of of the specific charge being tried in a proper Court on a proper evidence, the person should be indirectly punished by proceedings under the preventive sections. (*Mukerji, J.*) RAM PRASAD *v.* EMPEROR. **23 A. L. J. 18 : L. R. 6 A. (Cr.) 45 : 86 I. C. 282 : 26 Cr. L. J. 746 : A. I. R. 1925 All. 250.**

——S. 110—*Applicability—Duty of Court—Rival factions.*

Where there are two parties equally dangerous in a village, it is not proper to bind one party without binding the other. (*Stuart, J.*) BINDRABAN *v.* EMPEROR. **L. R 2 A. (Cr.) 112.**

——S. 110—*Applicability and scope of—Powers when to be exercised.*

The powers under S. 110, Cr.P. Code, should be exercised only where the evidence is very clear and precise. It was never intended by the Legislature to provide a means of punishment by enactment of S. 110. (*Abdul Raoof, J.*) JAGAT SINGH *v.* THE CROWN. **2 Lah. L. J. 237 : 68 I. C. 43 : 23 Cr. L. J. 507.**

——S. 110—*Applicability and scope—Sufficient evidence not forthcoming.*

Proceedings under S. 110 do not enable the Police to send a person to jail where sufficient evidence is not produced to prosecute him for any specific offence. (*Abdul Raoof, J.*) HARNAM DAS *v.* EMPEROR. **60 I. C. 669 (Lah.) : 22 Cr. L. J. 269.**

——S. 110—*Applicability and scope*—Badmashi *sections are not intended to help Police to detain persons against whom a definite charge has failed.*

Every High Court always looks with grave suspicion on cases in which proceedings are started against an accused, because the Police have failed to procure evidence against him on a charge of substantive offence. The *Badmashi* sections were not intended for furnishing the police with the means of detaining persons against whom a definite charge had been made but has broken down. (*Daniels, J. C.*) BHAGVAT PRASAD *v.* EMPEROR. **9 O. L. J. 57 : 65 I. C. 551 : 23 Cr. L. J. 119 : 24 O. C. 317 : A. I. R. 1922 Oudh 26.**

——S. 110—*Applicability—Burma Opium Law Amendment Act (VII of 1909).*

The effect of S. 3, Burma Opium Law Amendment Act is to introduce an additional ground on which S. 110 of the Code can be applied. (*May Oung, J.*) EMPEROR *v* NGA KYANG. **2 Rang. 61 : 3 Bur. L. J. 17 : 81 I. C. 546 : 25 Cr. L. J. 930 : A. I. R. 1924 Rang. 244.**

Defence.

——S. 110—*Defence—Discrediting witnesses—Grounds for.*

The fact that witnesses called for the defence in proceedings under S. 110 were caste fellows of the accused and had come forward from distant villages to give evidence voluntarily without being summoned, is no adequate ground for discrediting their evidence. (*Piggott, J.*) RAHU *v.* EMPEROR. **18 A. L. J. 1114 : 59 I. C. 547 : 43 A. 186 : 22 Cr. L. J. 115 : L. R. 2 A. (Cr.) 76.**

Detention in jail.

——S. 110—*Detention in jail.*

A Magistrate should not detain a person under S. 110 unless he has the information upon which he can make the order required by S. 112. 10 A.L.J. 351, Appr. (*Walsh, J.*) RAJBANSI *v.* EMPEROR. **42 All. 646 : 18 A. L. J. 673 : 60 I. C. 420 : 22 Cr. L. J. 228 : L. R. 1 A. (Cr.) 182.**

Evidence.

——S. 110—*Evidence of substantive offence is not necessarily inadmissible.*

Evidence going to show that a substantive offence had been committed, or evidence which might possibly form the basis of a charge of a substantive offence need not necessarily be excluded in proceedings under S. 110 and can form the basis of an order under S. 112 and a finding under S. 118. A. I. R. 1925 All. 250 Expl. (*Boys and Banerji JJ.*) BUDHAN *v.* EMPEROR. **47 A. 733 : 23 A. L. J. 507 : L. R. 6 A. (Cr.) 129 : 26 Cr. L. J. 1130 : 88 I. C. 362 : A. I. R. 1925 All. 694.**

——S. 110—*Evidence of allegations against accused made in case in which he was acquitted is admissible.*

The fact that the accused person has been acquitted of a particular charge may diminish in many cases, and may even destroy wholly the value of the evidence as to the allegations made against the accused in the case in which he was acquitted, but does not render it inadmissible. (*Boys and Banerji, JJ.*) BUDHAN *v.* EMPEROR. **47 A. 733.**

CR. P. CODE (V OF 1898), S. 110—Evidence.

23 A. L. J. 507 : 26 Cr. L. J. 1130 : L. R. 6 A. (Cr.) 129 : 88 I. C. 362 : A. I. R. 1925 All. 694.

——S. 110—*Evidence—Charge of being habitual robber—Accused gathering bad characters in his house is not in itself relevant.*

When the charge against the accused is that of being a habitual robber, the facts that the accused gathered bad characters at his house does not go far enough to be in itself relevant. It would be necessary to show that these bad characters were robbers, or were gathered there for the purpose of robbery or theft. (*Boys and Banerji, JJ.*) BUDHAN *v.* EMPEROR. 47 A. 733 : 23 A. L. J. 507 : L. R. 6 A. (Cr.) 129 : 26 Cr. L. J. 1130 : 88 I. C. 362 : A. I. R. 1925 All. 694.

——S. 110—*Evidence.*

Although the trying Magistrate cannot use the information which he possesses as regards the accused as evidence in the case yet he can use it as a check to test the nature of the evidence with which he has to deal. (*Walsh, J.*) EMPEROR *v.* DARBARI SINGH. 45 A. 749 : A. I. R. 1924 All. 461

——S. 110—*Evidence—Evidence insufficient.*

Evidence showing that the applicant took part in a dacoity, that he was actually arrested in connection with the dacoity but the police considered the evidence against him of so little value, that he was released under S. 169 of Cr. P. Code, without even being placed before the Court, is totally insufficient for binding the accused over on a charge of being a bad character. (*Daniels, J.*) JHANDOV SINGH *v.* EMPEROR. L. R. 4 A. (Cr.) 216 : 75 I. C. 733 : 25 Cr. L. J. 45 : A. I. R. 1924 All. 142.

——S. 110—*Evidence—Private enquiry by the Magistrate—Effect.*

Where the evidence for the prosecution is partly inadmissible, partly inconclusive and hearsay, vague and unsubstantial and there is nothing definite proved against them and no evidence called against them from their own village, but there are a number of persons of good character and position from their village itself and from the neighbouring villages who speak well of these men, while nobody has been able to suggest that they have got resources for living as they do live, without support from theft or bad means of livelihood. *Held*, that it would be unfair to brand these men as bad characters upon this evidence. No doubt a Magistrate is compelled in the performance of his duties to make private enquiries as to the character of his neighbourhood and as to the persons reputed to be of bad character and be likely to cause trouble. These enquiries are necessary to an executive officer having to inform himself of the nature of the population committed to his charge but where it is shown, that the Magistrate has allowed actual information *ad hominem* to influence his judgment in a judicial decision against particular individuals brought before him by process of law, his order would be quashed as being vitiated by the admission of such information. (*Walsh, J.*) ASHIZ ALI *v.* EMPEROR. 21 A. L. J. 513 : 73 I. C. 337 : 24 Cr. L. J. 593 : L. R. 4 A. (Cr.) 126 : A. I. R. 1923 All. 596.

——S. 110—*Evidence—Evidence of suspicion is not sufficient for passing order.*

Evidence as to the accused having been suspected in particular cases is clearly not evidence on the basis of which any person could be bound over, yet when evidence of general repute has been given, the fact that the accused have been suspected in a large number of cases may be admissible as corroboration.

CR. P. CODE (V OF 1898), S. 110—Evidence.

Conversely the fact that the accused had never been suspected in any case might tend to weaken the evidence of general repute. (*Daniels, J.*) GUDRI KHATIK *v.* EMPEROR. A. I. R. 1923 All. 595.

——Ss. 110 and 439—*Evidence—Proceedings under—Several accused—Legality of—Evidence of friends and relations—Value of—Evidence—Duty of High Court to consider.*

The proceedings under S. 110, Cr. P. Code, against a particular individual, evidence should be confined to his case alone unless the case is that he has a confederate or partner to whom all the evidence is equally applicable. Where witnesses voluntarily come forward as friends or associates of the accused and give evidence it ought not to be brushed aside unless the witnesses are discredited as regards their good faith and honesty. Evidence of general repute by persons having no personal knowledge of the accused is insufficient. It is open to a District Magistrate to lay down rules for the guidance of his subordinates so as not to allow an unnecessarily large number of witnesses to be examined. In revision the High Court would weigh the evidence and see whether the case has been considered from the point of view of the accused and if the evidence for the defence is equally good as that of the prosecution, the High Court would quash the conviction. Mere repetitions unaccompanied by direct evidence personally affecting each accused or accompanied by direct evidence which is worthless and incredible, is insufficient in a case under S. 110, Cr. P. Code. (*Walsh, J.*) ANGNOO SINGH *v.* EMPEROR. L. R. 3 A. (Cr.) 149 : 20 A. L. J. 881 : 71 I. C. 865 : 45 A. 109 : 24 Cr. L. J. 287 : A. I. R. 1923 All. 35.

——S. 110—*Evidence—Defence evidence, when should not be discredited.*

The fact that a large number of defence witnesses are caste fellows of the accused, that they come voluntarily without summons from villages several miles from the village of the accused and that they admit that they have come forward because they regard the accused as head of their brotherhood, is not sufficient to discredit their evidence. (*Piggott, J.*) BAHU *v.* EMPEROR. 43 A. 186 : 22 Cr. L. J. 115 : 69 I. C. 547 : L. R. 2 A. (Cr.) 76 : 18 A. L. J. 1114.

——Ss. 110 and 118—*Evidence—Corroboration of an approver's evidence.*

Relationship of a person with another bound down under S. 118 is not a sufficient corroboration of an approver's evidence against the former in a proceeding under S. 110. (*Teunon and Ghosh, JJ.*) FOCHAI RAI *v.* EMPEROR. 22 Cr. L. J. 486 : 62 I.C. 182 (Cal.).

——S. 110—*Evidence—Strong and universal evidence of repute is necessary for the order.*

In absence of strong evidence of repute which is of universal kind, order under S. 110 should not be passed. Evidence of an avowed enemy cannot be worth very much. (*Scott-Smith, J.*) WALI MUHAMMAD KHAN *v.* EMPEROR. 81 I. C. 344 : 25 Cr. L. J. 808 : A. I. R. 1925 Lah. 166.

——S. 110—*Evidence—Association with persons of bad character—I. P. C., S. 457.*

The evidence against the petitioner consisted of the statements of a Sub-Inspector of Police, a *Safed-Posh*, a *Zaildar*, some *Lambardars* and of one Fazal who stated that the petitioner was a habitual thief, that he associated with persons of bad character. In 1922 the petitioner was suspected on three occasions under S. 457, Penal Code, and on two of these occasions his house was searched. It was, however, admitted that though the petitioner's house was searched on two occasions no stolen property was ever found in his house

CRIMINAL PROCEDURE CODE, S. 110—Evidence.

and as to his having been suspected of having committed an offence under S. 437, the petitioner was never criminally prosecuted and no written complaints were ever made to the police against him. Fazal was admittedly not on good terms with the petitioner. The petitioner had produced 17 witneses of respectable position who testified to the petitioner's good character and deposed to the fact that he was not a habitual thief by reputation. *Held*, that the evidence on the record is not sufficient to justify action being taken against him under S. 110. (*Moti Sagar, J.*) ABDULLAH *v.* EMPEROR. **76 I. C. 1034 : A. I. R. 1923 Lah. 419.**

——S. 110—*Evidence—Security should not be ordered where evidence on both sides equal.*

Where there is a large volume of evidence in favour of the accused which was as good as, if not better than that of the prosecution, there is no ground for ordering security under S. 110, Cr. P. Code. (*Scott-Smith, J.*) KRISHNA *v.* THE CROWN. **4 Lah. L. J. 531.**

——S. 110—*Evidence—Number of reliable witnesses deposing in accused's favour—Accused should be acquitted.*

Where a number of witnesses who are considered, to be respectable and reliable by the Court have deposed that the accused are men of good character, this is quite sufficient to entitle them to an acquittal. (*Dalal, J. C.*) BAHADUR *v.* EMPEROR. **27 O. C. 327 : 85 I. C. 370 : 26 Cr. L. J. 530 : A. I. R. 1925 Oudh 501.**

——S. 110—*Evidence—What people say generally of the man is evidence of general repute.*

"Evidence of general repute" means, with reference to a man's character, evidence as to his general character founded on the general opinion of the neighbourhood in which he lives. Such evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally nor that such general opinion has been publicly expressed by the neighbours. If a witness is asked what the man's character is, and he were to say that in the general opinion of the man's neighbours the man is an habitual thief, that statement is 'evidence of general repute,' and if he were to say that he did not know what the neighbours in general thought of the man, but his opinion was that the man was an habitual thief, that also would be admissible as evidence of the man's character. Evidence of what is generally said of a man by his neighbours is a direct evidence of the fact in issue. 5 O. C. 203 and 10 O. C. 132, Foll. Admissibility of a witness's answer depends upon the substance of it, not upon its form. The real test is whether the answer shows what is the general reputation of the man in question, and the opinion given by the witness need not be the opinion of the entire community but it must at least give the opinion of a considerable number of persons and not be merely a repetition of what one or two persons have said to the witness. (*Gokaran Nath, A. J. C.*) KEWAL KISHORE *v.* EMPEROR. **12 O. L. J. 413 : 89 I. C. 147 : 26 Cr. L. J. 1283 : A. I. R. 1925 Oudh 473.**

——S. 110—*Evidence—Prosecution witnesses on hostile terms with accused—Conviction on the strength of such witnesses is improper.*

Where the prosecution witnesses were mostly enemies of the accused and they were men of influence so as to procure a large number of people to speak as to the general bad character of the accused, *held*, the accused should not be convicted on such evidence especially when there was a large number of persons who deposed to his good character. (*Dalal, A. J. C.*)

CRIMINAL PROCEDURE CODE, S. 110—Evidence.

GUR DAYAL *v.* EMPEROR. **26 Cr. L. J. 99 : 83 I. C. 659 : A. I. R. 1925 Oudh 277.**

——S. 110—*Evidence—Order based on vague statements—Legality.*

The prosecution evidence in a case under S. 110, Cr. P. Code, consisted of witnesses who said that according to the opinion of the neighbourhood, the accused was a thief and dacoit. In the absence of details, *held*, the evidence was too vague to base an order under S. 110, Cr. P. Code. (*Dalal, A.J.C.*) RAGHU DATT *v.* EMPEROR. **9 O. & A. L. R. 517 : 74 I. C. 535 : 24 Cr. L. J. 791 (Oudh): A. I. R. 1924 Oudh 187.**

——S. 110—*Evidence of specific instances wherein accused was suspected is good for corroboration.*

Evidence of instances in which the accused has been suspected is certainly not evidence of general repute. But when independent evidence of the accused's reputation has been given, evidence that he has been suspected in a number of instances may be admissible as corroboration. 23 O. C. 371, Foll. (*Daniels, A. J. C.*) SANKU *v.* EMPEROR **9 O. & A. L. R. 269 : 73 I. C. 352 : 24 Cr. L. J. 608 : A. I. R. 1924 Oudh 112.**

——Ss. 110 and 125—*Evidence—Sureties—Hearsay evidence of repute—Admissibility.*

In the case of persons standing sureties for a person charged under S. 110, Cr. P. Code hearsay evidence as to general repute is not admissible. (*Wazir Hasan, A. J. C.*) SHEOPAL *v.* EMPEROR. **9 O. L. J. 353 : 68 I. C. 959 : 23 Cr. L. J. 639 : 4 U. P. L. R. (O.) 2 : A. I. R. 1922 Oudh 227.**

——S. 110—*Evidence must not be vague and general.*

Evidence to prove the charge against the accused under S. 110, cls. (*a*) (1) and (*f*) should not be vague, general and of hearsay character. (*Jwala Prasad, J.*) DEODHARI PANDAY *v.* KING EMPEROR. **1925 P. H. C. C. 6 : 86 I. C. 274 : 26 Cr. L. J. 738 : 6 Pat. L. T. 810 : A. I. R. 1925 Pat. 131.**

——Ss. 110 (a) and (f), 117 and 118—*Evidence Nature of—Evidence of repute—Evidence of good character adduced by accused—Duty of Court.*

To prove a charge under S. 110, clause (*a*) of the Code of Criminal Procedure, with which the petitioners were charged in the present case, it is necessary to keep in mind that such evidence must be specific and must relate to particular instances within the knowledge of the witnesses. Mere belief and information without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute within the meaning of S. 117 (3) of the Code. The evidence must be of persons who are acquainted with the accused and live in the neighbourhood and are themselves aware of the accused's reputation. It must be an opinion formed by the witnesses from specific cases coming to their knowledge and not merely from reports or rumours received from others. For instance, where a witness says that to his knowledge a certain person is a thief or a housebreaker by habit and on being pressed to give the source of his knowledge, he merely says that there is a rumour to such effect or that he heard it from the villagers generally without being able to name any one of them, such evidence is not admissible in law. Where in a proceeding under S. 110, Cr.P. Code, the accused person is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence and to give substantial reason for not believing such evidence before it makes an order under S. 118. (*Kulwant Sahay, J.*) RAMLAGAN AHIR

CRIMINAL PROCEDURE CODE, S 110—Evidence.

v. EMPEROR. **5 Pat. L. T. 166 : 2 Pat. L. R. 98 (Cr) : 25 Cr. L. J. 985 : 81 I. C. 633 : A. I. R. 1924 Pat. 500.**

——S. 110—*Evidence—Suspicion—If sufficient—Evidence as to good character—Powers under to be exercised cautiously.*

Mere suspicion is not sufficient to bind a man down to be of good behaviour under S. 110, Cr. P. Code. The evidence ought to be of such a nature as to lead to a reasonable and definite ground for concluding that the petitioner is a habitual offender. Where the person is able to produce witnesses on his behalf to speak of his good character, the Court should not disbelieve the same unless there are substantial reasons for doing so. The powers under the section should be exercised with extreme caution and with very great discretion. (*Kulwant Sahay, J.*) AMJAD ALI *v.* EMPEROR.
5 Pat. L. T. 129 : 2 Pat. L. R. 79 (Cr.) : 25 Cr. L. J. 35 : 75 I. C. 723 : A. I. R. 1924 Pat. 498.

——S. 110—*Evidence—General reputation among inhabitants of accused's place of residence is not conclusive.*

A man's general reputation is the reputation which he bears in the place in which he lives among the inhabitants of that place. Though this definition may be accepted as correct in the great majority of cases it can hardly be recognised as conclusive. It is quite possible for a cunning rogue to conceal his real character from his immediate neighbours. (*Carr and Godfrey, JJ.*) EMPEROR *v.* PO YIN.
2 Rang. 686 : 4 Bur. L. J. 6 : 85 I. C. 368 : 26 Cr. L. J. 528 : A. I. R. 1925 Rang. 174.

——S. 110—*Evidence—No consideration as to accused's being restrained by more rigorous police vigilance should enter.*

Though the Magistrate should take all precautions possible before ordering security to be furnished, if the evidence actually taken is sufficient to prove that the accused is a fit person to be placed on security, that is all that the law requires. The Magistrate should not consider whether the police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties. (*Carr and Godfrey, JJ.*) EMPEROR *v.* PO YIN.
2 Rang. 686 : 4 Bur. L. J. 6 : 85 I. C. 368 : 26 Cr. L. J. 528 : A. I. R. 1925 Rang. 174.

——S. 110—*Evidence—"Place" meaning of—Witnesses not immediate neighbours—Evidence is not necessarily unreliable.*

It is not possible to set any definite bounds to the meaning of the term 'place'. The meaning must necessarily vary with the circumstances of the case. It cannot rightly be restricted to the group of houses in which the accused happens to reside however small that may be. Nor is it right to discard the evidence of witnesses who speak to the reputation of the accused merely because they are not his immediate neighbours. What the Court has to do is to satisfy itself that the evidence of the witnesses is true, and if it is satisfied on this point, then it is entitled to accept the evidence. Where a witness lives at a considerable distance from the person of whose reputation he speaks, the Court should, of course, require how he came by that knowledge and should take his answer into consideration in framing its estimate of the value of the evidence. (*Carr and Godfrey, JJ.*) EMPEROR *v.* PO YIN.
2 Rang. 686 : 4 Bur. L. J. 6 : 85 I. C. 368 : 26 Cr. L. J. 528 : A. I. R. 1925 Rang. 174.

——S. 110—*Evidence—General repute—Evidence of police and headman—Not sufficient in general but acting on such evidence is not illegal.*

CRIMINAL PROCEDURE CODE, S. 110—Habitual Offender.

It is better to satisfy on mere evidence than supplied by the police and the village authorities before taking certain action against a man as a habitual offender. But it is not rule of law and the Judge is at liberty to decide the sufficiency of evidence. (*May Oung, J.*) NGA PAN YIN *v.* EMPEROR.
2 Bur. L. J. 153 : 76 I. C. 709 : 25 Cr. L. J. 245 : 1 Rang. 447 : A. I. R. 1924 Rang. 22.

Fitness of Surety.

——S. 110—*Fitness of surety.*

Where the accused are landed proprietors, their personal security should be deemed as sufficient. (*Stuart, J.*) BINDRABAN *v.* EMPEROR.
L. R. 2 A. (Cr.) 112.

——Ss. 110 and 122—*Fitness of sureties.*

Under S. 110 hearsay evidence of general repute is clearly not admissible as against sureties. (*Wazir Hasan, A. J. C.*) SHEOPAL *v.* EMPEROR.
9 O. L. J. 353 : 23 Cr. L. J. 639 : 68 I. C. 959 : A. I. R. 1922 Oudh 227.

Fresh Proceedings.

——Ss. 110, 119 and 437—*Fresh proceedings—Security for good behaviour—Discharge of person against whom proceedings taken—Further inquiry.*

Where after proceedings against the accused under S. 110, Cr. P. Code, terminated in his discharge under S. 119, the District Magistrate acting on a note put up by the Superintendent of Police but without taking fresh evidence or issuing notice to the accused to show cause, directed further proceedings to be taken in the case: *Held*, the order was illegal and could be set aside. It was further held that it was open to the Magistrate to issue notice to the accused to show cause why the order under S. 119 should not be set aside. (*Stuart, J.*) JASWANT *v.* EMPEROR.
19 A. L. J. 985 : L. R. 3 A. 5 (Cr.) : 64 I. C. 846 : 23 Cr. L. J. 62.

——S. 110—*Fresh proceedings—Accused once proceeded against but discharged for want of evidence—Fresh proceedings under S. 110 require fresh evidence.*

Where the accused was run in under S. 110 and was discharged on a finding that the prosecution had entirely broken down and proceedings were again started against him only seven months afterwards under the same section, *held*, that under these circumstances it was obviously the duty of the Courts to be very careful to see that there was sufficient evidence of accused's conduct after the conclusion of the previous proceedings to justify fresh proceedings being started against him after so short an interval. (*Daniels, A. J. C.*) SHAKUR *v.* EMPEROR.
26 O. C. 242 : 73 I. C. 261 : 24 Cr. L. J. 565 : 9 O. & A. L. R. 90 : A. I. R. 1924 Oudh 84.

Habitual Offender.

——S. 110—*Habitual offender—'Habit' and 'habitually' imply only repetition not inclination by nature.*

The word "habit" means persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts. "Habitually" must be taken to mean repeatedly or persistently. (*Kotval, A.J.C.*) THE LOCAL GOVERNMENT *v.* HANMANTRAO.
75 I. C. 764 : 25 Cr. L. J. 60 : A. I. R. 1924 Nag. 19.

——S. 110 (f)—*Habitual offender—Evidence of general repute.*

Evidence of general repute is only admissible under S. 117, Cr. P. Code, to prove that a person is a habitual offender under S. 110, but not to prove a charge

CRIMINAL PROCEDURE CODE, S. 110—Joint Trial.

under S. 110 (*f*) of being of desperate and dangerous character. (*Maung Kin, J.*) EMPEROR *v.* PYU ZIN. **13 Bur. L. T. 157 : 62 I. C. 188 : 22 Cr. L. J. 492.**

Joint trial.

——S. 110—*Joint trial invalid unless joint evidence.*

It seems very hard, almost oppressive, to any set of defendants to charge them together, unless the whole of the evidence against all of them is precisely the same and they are to be dealt with on the same facts, and compel them to fight each his own individual battle during a prolonged enquiry, a great deal of which concerns for the moment only one out of the general body. (*Walsh, J.*) ANGNOO SINGH *v.* EMPEROR. **45 All. 109 : 20 A. L. J. 881 : 24 Cr. L. J. 257 : L. R. 3 A. (Cr.) 149 : 71 I. C. 865 : A. I. R. 1923 All. 35:**

——Ss. 110 and 118—*Joint trial—Accused belonging to different villages.*

Where there is an association of several persons belonging to different villages at several places for committing offences their joint trial in a proceeding under S. 110, Cr. P. Code, is not bad. (*Teunon and Suhrawardy, JJ.*) RAHIM BUX PRAMANIK *v.* EMPEROR. **64 I. C. 842 (1) : 23 Cr L. J. 58 (Cal).**

——S. 110—*Joint trial—Legality of—Evidence—Weight due to.*

In proceedings under S. 110, Cr. P. Code, the joint trial of several persons is illegal. (*Scott-Smith, J.*) KRISHNA *v.* EMPEROR. **4 Lah. L. J. 531.**

——S. 110—*Joint trial of accused is bad where proceedings are taken against them not only for conduct coming within cls. (d) and (e) but also cl. (f)—Cr. P. Code, S. 239.*

Joint trial must be condemned as prejudicial to the accused, where proceedings are taken against the accused not only for conduct coming within S. 110, cls. (*d*) and (*e*) but also under cl. (*f*) for the reason that they are so desperate and dangerous as to make their being at large without security hazardous to the community and where the accused are tried jointly and evidence pertaining exclusively to the nefarious acts of each of the accused is let in addition to the evidence as to the events in which it is alleged that they are associated together and the Magistrate passes an order against them on a consideration of the entire evidence thus introduced into the record against all the accused. (*Mathavan Nair, J.*) KUTTI GOUNDAN, *In re.* **(1925) M. W. N. 57 : 86 I. C. 49 : 26 Cr. L. J. 673 : A. I. R. 1925 Mad. 189 : 47 M. L. J. 689.**

——S. 110—*Joint trial—Two accused committing acts of violence jointly—Joint trial in proceedings under S. 110 is not illegal.*

Where there is evidence of joint acts committed by the two accused and some of the evidence applies to one and some to the other, the joint trial of the two accused under S. 110 is not illegal. A. I. R. 1923 All. 35 Expl. (*Baker, J. C.*) SHAMSUDDIN *v.* EMPEROR. **26 Cr. L. J. 1114 : 88 I. C. 282 : A. I. R. 1925 Nag. 381.**

——Ss. 110 and 117—*Joint trial—Legality.*

The legality of a joint trial does not depend upon what is alleged for the prosecution but on the facts subsequently found to be true. The Magistrate, of course, will bear in mind that a joint trial is not permissible unless there is evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief to which the witnesses depose. Ordinarily, under S. 110, Cr. P. Code, every person has to be tried separately for the offences enumerated therein. In other words, a joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in S. 110, clauses (*a*) to (*f*). But for clause (4) of S. 117, Cr. P. Code, a joint trial would not have been in any case permitted. The circumstances mentioned therein, namely, the association of several persons in the commission of the offence mentioned in S. 110 of the Cr. P. Code must be established in order to entitle the Magistrate to try several persons jointly. In a case under S. 110, Cr. P. Code, in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them form the integral parts of the offence, it is impossible to conceive that the evidence led against one will not at all prejudice the case of the other accused persons assembled together in the same dock. (*Jwala Prasad and Ross, JJ.*) JAI SAO *v.* EMPEROR. **3 Pat. L. T. 538 : 23 Cr. L. J. 100 : 65 I. C. 484 : 1923 P. H. C. C. 8 : A.I.R. 1923 Pat. 104.**

Jurisdiction.

——S. 110—*Jurisdiction—Within the local limits meaning of.*

Where proceedings under S. 110, Cr. P. Code, were instituted against a person in the Cantonment Magistrate's Court in the local limits of whose jurisdiction he lived and carried on a career of crime, *held*, that S. 110 has left the question of permanent residence open and it is not the question of permanent residence but of where the man practises his career of crime that will decide jurisdiction. (*Stuart, J.*) BHOLA *v.* EMPEROR. **20 A.L. J. 49 : 65 I. C. 438 : 23 Cr. L. J. 86 : A. I. R. 1922 All. 86 (2).**

——S. 110—*Jurisdiction—Threat of prosecution as a bad character—Order to leave the town is* ultra vires.

An order by a District Magistrate that a person should leave the town under a threat of prosecution as a bad character is illegal and *ultra vires.* (*Lindsay, J.*) RAM PRASAD *v.* EMPEROR. **19 A.L. J. 951 : 65 I. C. 554 : 23 Cr. L. J. 122.**

——S. 110—*Jurisdiction - Information.*

The law in no way limits the method in which the Magistrate, who is empowered by the Local Government, is to receive the information and even if the information is addressed to the Judicial Commissioner or to another Magistrate and is then received by the Magistrate ; there is nothing in the section which would preclude him from acting on the information so received. "If in his opinion there is sufficient ground for proceeding" seems to make it incumbent on Magistrates to be satisfied about the veracity of the information, before they can take action. (*Mullick and Coutts, JJ.*) HIRANAND OJHA *v.* EMPEROR. **1 Pat 621 : 4 Pat. L. T. 44 : 71 I. C. 79 : 24 Cr. L. J. 31 : A. I. R. 1922 Pat. 586.**

——S. 110—*Jurisdiction—Powers should not be exercised unless information is precise and supported by satisfactory evidence at subsequent inquiry.*

The powers conferred by S. 110 ought not to be exercised unless the information is precise and the subsequent inquiry supports the information by evidence which is satisfactory. (*Rupchand Bilaram, A. J. C.*) KHAIRO *v.* EMPEROR. **25 Cr. L. J. 1377 : 83 I. C. 337 : A. I. R. 1925 Sind 204.**

Notice.

——Ss. 110 and 112—*Notice — Contents of—Condition precedent to proceedings.*

Merely informing an accused person that he was suspected to be a habitual thief is not sufficient notice

CRIMINAL PROCEDURE CODE, S. 110—Notice.

under S. 112 of the Code. There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate. Accused were arrested as suspected habitual thieves. The Magistrate fixed a date for the production of evidence with the object of issuing a notice under S. 112. On the date fixed, after hearing prosecution evidence, he at once called upon the accused to enter upon their defence to a charge under S. 110, *held*, the procedure was bad and the proceedings must be set aside. It is only after the Magistrate has made the order required by S. 112 which is really a notice in writing, that the actual hearing under S. 110 can by law take place at all. (*Walsh, J.*) RAJ BANSI *v.* EMPEROR. **42 All. 646 : 18 A. L. J. 673 : 22 Cr. L J. 228 : 60 I. C. 420 : L. R. 1. A. 182 (Cr.)**

——S. 110—*Notice — Finding on enquiry not coinciding with first order to accused—Accused prejudiced—Security order will be set aside.*

Magistrates ought to do their best to see that the first order does actually contain the substance of the information received by them, no less and no more. The next thing is that the finding on enquiry should conform to the first order which in its turn should conform to the information received by the Magistrate. Deviation from this procedure is likely to gravely prejudice the position of the accused and the order passed against him calling on him to furnish security will be set aside if such prejudice has occurred. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) SULTAN KHAN *v.* EMPEROR. **26 Cr. L. J. 767 : 86 I. C. 351 : A. I. R. 1925 Sind 236.**

Offence.

——S. 110—*Offence—Evidence as to reputation only.*

Where the prosecution merely gives evidence about the reputation of the accused but none beyond reputation, and the witness knows nothing about the business carried by or the circumstances of the accused, an order under S. 110 is not justified. (*Ryves, J.*) KALLU *v.* EMPEROR. **19 A. L. J. 39 : 60 I. C. 1002 : 22 Cr. L. J. 314.**

——S. 110—*Offence – Men acquitted of dacoity—Proceedings subsequently taken against them for bad livelihood—Desire of Police for revenge should be presumed.*

There is no legal bar to a prosecution for bad livelihood of men acquitted of the substantive offence of dacoity, but in weighing evidence such a matter is to be taken into consideration as indicating the desire of the Police to get rid of the presence of such men from villages whether satisfactory evidence of their bad character be available or not. (*Dalal, J. C.*) BAHADUR *v.* EMPEROR. **27 O. C. 327 : 85 I. C. 370 : 26 Cr. L. J. 530 : A. I. R. 1925 Oudh 501.**

——S. 110—*Offence—Proceedings under S 110, after discharge for substantive offence, are not illegal if evidence for such proceedings is independent and antecedent.*

Where a man has been arrested on a substantive charge but released for the reason that that charge could not be sustained, a prosecution under S. 110 on the same evidence on which the charge for the substantive offence was founded or on evidence which arose as a natural sequel to the charge of the substantive offence is not desirable. But if the evidence in support of the charge under S. 110 is antecedent to charge for the substantive offence and is wholly independent of it; the proceedings under S. 110 are not illegal. (*Wazir Hasan, A. J. C.*) SITAL DIN *v.* EMPEROR. **77 I. C. 302 : 25 Cr. L. J. 366 : A. I. R. 1925 Oudh 49.**

CRIMINAL PROCEDURE CODE, S. 110—Procedure.

——S. 110— *Offence — Substantive charge not proved—Suspicion—How far evidence of bad reputation.*

Where a substantive charge is made but not proved, the Court is not right in binding the accused under S. 110. Mere suspicion does not justify such an order; but evidence that a person had been suspected and named in a large number of years extending over a long interval, may serve as evidence of general bad reputation and conversely the fact that a person has never been suspected of any offence may weaken the evidence of bad reputation given against him. (*Daniels, A. J. C.*) RAJA RAM *v.* EMPEROR. **22 Cr. L. J. 273 : 60 I. C 673 : 23 O. C. 371.**

Period of security.

——S. 110 (f)—*Period of security—Order not stating amount or term of bond is improper.*

In so far as an order does not state the amount of the bond to be executed, or the term for which the bond is to be in force, as required under the provisions of S. 112 of the Cr. P. Code, the order is not a proper one for the purpose of S. 110, cl. (*f*) of the Cr. P. Code. (*Lentaigne, J.*) PARSODAN *v.* EMPEROR. **2 Rang 524 : 26 Cr. L. J. 417 : 85 I. C. 33 : A. I. R. 1925 Rang. 69.**

Police records.

——S. 110—*Police records—Action taken on police diary—Binding over accused—Evidence.*

Where the accused was not even brought before the Court, the charge of dacoity not being proved, he can never be bound down as a bad character. This would be quite illegal.

A Judge cannot take any action simply on the evidence of Police diaries. All the evidence has to be produced in open Court. (*Daniels, J.*) JHANDU SINGH *v.* EMPEROR. **L. R. 4 A. 216 (Cr.) : 75 I. C. 733 (1) : 25 Cr. L. J. 45 (1) : A. I. R. 1924 All. 142.**

Procedure.

——Ss. 110 and 112—*Procedure—Irregular procedure—Accused not given an opportunity to obtain legal assistance.*

Two persons were arrested under S. 156 on the ground that they were habitual thieves and housebreakers. On the date fixed the Magistrate recorded the evidence given by the police and without giving the accused any opportunity to obtain legal assistance called upon them to conduct their case. *Held*, the procedure was irregular. Merely informing the accused that he is a suspected thief is not sufficient as it does not give him the slightest intimation as to the grounds of the allegation. (*Walsh, J.*) RAJ BANSI *v.* EMPEROR. **42 A. 646 : 22 Cr. L. J. 228 : 60 I. C. 420 : L. R. 1 A. (Cr.) 182 : 18 A. L. J. 673.**

——S. 110— *Procedure — Witnesses — Time to produce.*

Where witnesses are cited for the defence in proceedings for security for good behaviour there should be no order unless and until, time and opportunity are given to have the witnesses produced. (*Buckland and Cuming, JJ.*) PONTHIRAM JOAB *v.* EMPEROR. **38 C. L. J. 285 : 76 I. C. 965 : A. I. R. 1924 Cal. 196.**

——S. 110—*Procedure—Trial of accused—Local inquiry is improper—Decision reached on evidence—Local inquiry used to confirm decision—Procedure is irregular but proceedings may not be set aside.*

CRIMINAL PROCEDURE CODE, S. 110—Rejection of Sureties.

Though local inquiry is most appropriate where proceedings under S. 110 shall be instituted, it is entirely out of place when the accused are brought before the Court. Once the accused are before the Court the case must be decided on the evidence alone. But where the Magistrate merely used his enquiries to confirm the result at which he had arrived on a consideration of the evidence, *held*, that though the course taken by the Magistrate was irregular yet it was not sufficient ground for setting aside the whole proceedings and directing a re-trial. (*Daniels, J. C.*) RAM PARGAT *v.* EMPEROR.

12 O. L. J. 341 : 26 Cr. L. J. 1149 : 88 I. C. 461 : 2 O. W. N. 350 : A. I. R. 1925 Oudh 441.

Rejection of sureties.

——**Ss. 110 and 125** — *Rejection of sureties — Police report—Illegality.*

When sureties are offered the Court ought to accept them unless it itself is satisfied that they are not proper persons. A magistrate is wrong in rejecting the sureties on the police report. (*Ryves, J.*) GOPIKHATIK *v.* EMPEROR. **L. R. 3 A. 140 (Cr) : 20 A. L. J. 760 : 68 I. C 35 : 23 Cr L. J. 499 : A. I. R. 1922 All. 541.**

—— —**S. 110**—*Rejection of sureties—Accused cannot be ordered to produce sureties residing within certain limits.*

An order directing an accused person to produce sureties residing within certain limits is illegal. A Magistrate has no authority to lay down any limits within which sureties must reside. (*Lindsay, J.*) RAGHUNANDAN PRASAD *v.* EMPEROR.

20 A. L. J. 520 : 23 Cr. L. J. 400 : L. R. 3 A. 116 (Cr.) : 67 I. C. 352 : A. I. R. 1922 All. 489 (1).

——**S. 110**—*Rejection of sureties—Residing at a distance—If should be rejected.*

Unnecessary difficulties should not be placed in the way of people required to furnish security for good behaviour and sureties ought not to be rejected merely because they reside at a distance from that of the accused. (*Mears, C. J.*) RAHMATULLAH *v.* EMPEROR.

61 I. C. 523 : 22 Cr. L. J. 395 (All.).

——**S. 110**—*Rejection of sureties—Relationship is not a valid ground—Legality.*

The mere fact that the surety offered under S. 110 of the Code is a relation of the person from whom the security is demanded, is his intimate friend and is named by him as a witness is no valid reason in law for refusing to accept the surety. (*Piggott, J.*) MUHAMMAD WASI *v.* EMPEROR.

59 I. C. 134 : 22 Cr. L. J. 22 (All.).

——**S. 110**—*Rejection of surety—Surety not accepted because he was already a surety for another man —Order not tenable.*

When a surety for good behaviour was not accepted on the ground that he had already stood surety for some other man, *held*, that ground is clearly insufficient. (*Kanhaiya Lal, J. C.*) GHISA *v.* EMPEROR.

9 O. & A. L. R. 40 : 73 I. C. 53 (1) : 24 Cr. L. J 517 (1) : A. I. R. 1924 Oudh 132 (2).

——**S. 110**—*Rejection of surety—Distant residence by itself is no ground for rejection unless that indicates absence of control—Personal security must be given.*

Sureties should not be rejected merely because they are not close neighbours of the persons called upon to execute the bond, but this does not mean that sureties cannot be rejected when in the particular case the Magistrate finds that they live too far away to be able to exercise any control over the conduct of the person called upon to execute the bond. Inability to control, whether owing to distance or any other reason, is a good reason for rejection, though mere distance is not.

In the case of a bond for good behaviour and a bond to keep the peace, personal security is necessary. (*Ashworth, J. C.*) EMPEROR *v.* MAHAMMAD BAKSH.

26 O. C. 284 : A. I. R. 1924 Oudh 80.

——**S. 110** — *Rejection of sureties, sufficiency of grounds for.*

Refusal to accept a surety on the ground that the surety lived four miles away from the accused and that he looked a boy and inexperienced and would consequently be too weak to take proper care of the accused is bad. (*Lindsay, J. C.*) EMPEROR *v.* PANCHU.

24 O. C. 292 : 67 I. C. 585 : 23 Cr. L. J. 425.

——**S. 110** —*Rejection of sureties—Power of Magistrate to reject sureties.*

It is quite open to a Magistrate to ask the Police to report on the character of the sureties offered, but before finally rejecting them it is his duty to have some materials on which he can act judicially. (*Daniels, J. C.*) EMPEROR *v.* LACHHMAN. **24 O. C. 303 : 65 I. C. 574.**

Revision.

——**Ss. 110 and 439**—*Revision—Powers of High Court.*

Though the High Court finds it difficult to interfere with orders under S. 110, Cr. P. Code, still it has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interest of public security to send the man to prison or to bind him down. (*Ryves, J.*) ALIM-UD-DIN *v.* EMPEROR. **22 A. L. J. 678 : L. R. 5 A. 97 (Cr.) : 25 Cr. L. J. 1172 : A. I. R. 1924 All. 569.**

——**S. 110**—Revision—Order under S. 110 does not enable a Sessions Judge to call for the record. (*Walsh, J.*) ASHIQ ALI *v.* EMPEROR.

21 A. L. J. 573 : 73 I. C. 337 : L R. 4 A. (Cr.) 126 : 24 Cr. L. J. 593 : A. I. R. 1923 All. 596.

——**S. 110**—*Revision—High Court's powers.*

The High Court is not in criminal cases a court of appeal, but it is its duty to endeavour to weigh the evidence and to see whether the case has been fairly considered from the point of view of the defendant. Secondly, if the evidence for the defence is equally good as that for the prosecution, the High Court may quash the order in revision. Thirdly, witnesses, who voluntarily come forward whether as friends or associates of the accused to give them a good character, must not be brushed aside, unless they are discredited as regards their good faith and honesty, just as witnesses in any other proceeding must be discredited before they are rejected by the tribunal. Fourthly, evidence of general repute by persons who have no personal knowledge of the accused and know nothing of his business and circumstances is not sufficient to justify an order, and lastly vague repetition unaccompanied by direct evidence personally affecting each accused person or accompanied by direct evidence which breaks down, is not sufficient in itself to justify an order. (*Walsh, J.*) ANGNOO SINGH *v.* EMPEROR.

45 All. 109 : 20 A. L. J. 881 : 24 Cr. L. J. 257 : L.R. 3 A. (Cr.) 149: 71 I. C. 865 : A.I R. 1923 All. 35.

——**S. 110**—*Revision.*

Where the Dt. Magistrate disposed of an appeal from an order under S. 110 in a few lines, making some general observation upon the volume of evidence put before him, *held*, that that was not the proper way of disposing an appeal. Retrial ordered. (*Lindsay, J.*) SUNCHRI *v.* EMPEROR. **L. R. 2 A. (Cr.) 150.**

——**S. 110**—*Revision—Question of fact.*

The High Court will not ordinarily interfere in revi-

CRIMINAL PROCEDURE CODE, S. 110—Revision.

sion on questions of fact under S. 110 of the Code. (*Walsh, J.*) BISHESHWAR DAYAL *v.* EMPEROR.
19 A. L. J. 668 : 22 Cr. L. J. 660 : 63 I. C. 452 : L R. 2 A. (Cr.) 114.

——S. 110—*Revision.*

It is sufficient if the evidence establishes that there is a gang of persons joined together to commit such acts as the security section exists to prevent. Where the lower Courts are satisfied by evidence that the occasion has arisen to bind down certain people to be of good behaviour, the High Court will always be loath to interfere with such orders unless it is obvious that a miscarriage of justice has taken place. (*Prideaux, A. J. C.*) BAKARAM *v.* EMPEROR. **69 I. C. 629 : 23 Cr. L. J. 741 : A. I. R. 1923 Nag. 53.**

——S. 110—*Revision—High Court is only to see whether the lower Court has fairly considered the case —Weight of evidence and not the number of witnesses is to be looked to.*

The High Court is not a Court of appeal in cases under S. 110 and the duty of the High Court is not to weigh the evidence given on behalf of one side or the other, but only to see whether the Court below had approached the consideration of the case in a fair way, having regard to the interest not only of the prosecution but also of the accused. The accused is not entitled to an acquittal in such cases because the defence witnesses were as numerous as or more numerous than the prosecution witnesses but it is the weight of the evidence and not the number of the witnesses which the Court has to consider. 13 A. L. J. 1046 and 24 O. C. 225 Rel. on. (*Gokaran Nath, A. J. C.*) KEWAL KISHORE *v.* EMPEROR. **12 O. L. J. 413 : 89 I.C. 147 : 26 Cr. L. J. 1283 : A.I.R. 1925 Oudh 473.**

——Ss. 112 and 110—*Order under S. 112 should conform to terms of S. 110.*

An order under S.112 is illegal, in so far as it travels beyond the terms of S. 110. (*Boys and Banerji, JJ.*) BUDHAN *v.* EMPEROR. **23 A. L. J. 507 : L. R. 6 A. (Cr.) 129 : A. I. R. 1925 All. 694.**

——Ss. 112 and 108—*On forfeiture of bond it is discharged by payment by principal or surety.*

The bond that Ss. 112 and 118 have in contemplation is one bond for one amount and on forfeiture is discharged by the payment of the amount either by the principal or the surety. 26 P. R. (Cr.) 1894 and 12 Cr. L. J. 404 Foll. 36 Cal. 562 Not Foll. (*Scott-Smith, O. C. J.*) HARNAM *v.* EMPEROR.
5 Lah. 448 : 26 Cr. L. J. 322 : 84 I. C. 546 : A. I. R. 1925 Lah. 228.

——S. 112—*Notice under must contain full details so as to enable accused to prepare for defence.*

A notice served under S. 112, which is very meagre and does not contain sufficient details regarding the charges brought against the persons must be held not to comply with the provisions of the Code. Any explanation given by the Prosecuting Inspector at the commencement of the trial cannot have the effect of remedying the defect in the notice because the object of S. 112 is to enable the accused person to prepare for his defence and to summon witnesses on his side before actual commencement of trial. The issue of a preliminary notice under S.112 of the Cr. P C. is not a formal matter ; but it is a judicial act which must be exercised by the Magistrate after due consideration of the materials before him. (*Madhavan Nair, J.*) KUTTI GOUNDAN, *In re* **(1925) M. W. N. 57 : 86 I. C. 49 : 26 Cr. L. J. 673 : A. I. R. 1925 Mad. 189 : 47 M. L. J. 689.**

——S. 112—*Preliminary order not served but read to accused in Court—No illegality.*

If in a case a preliminary order is not served on an absent accused and then that accused appears and the order is read out to him the requirements of the law are substantially complied with. (*Prideaux, A.J.C.*) BAJIRAO, *In re.* **25 Cr. L. J. 132 : 76 I. C. 228 : A. I. R. 1924 Nag. 166.**

——S. 112—*Substance of information and amount of bond as laid down in S. 112 should be recorded.*

Where the records of the Magistrate showed: 'Case under S. 107, Cr. P. Code with D. M's. sanction sent up from Hmawza, P. S. Accused present. Order drawn up and explained to accused. Six witnesses examined, etc. Order passed.' *Held*, that this was not a compliance with the provisions of S. 112. (*Das, J.*) MAUNG TUN U *v.* EMPEROR. **4 Bur. L. J. 172 : A. I. R. 1925 Rang. 353.**

——Ss.112, 117—*Order under S. 112—Admission of allegations—Enquiry still necessary.*

Where an order is framed under S. 112, Cr. P. Code and the accused admits the allegations against him, it is still necessary to make an enquiry into the truth of the information upon which action has been taken. (*Kennedy, A. J. C.*) ALLAH DITTO *v.* EMPEROR.
26 Cr. L. J. 1041 : 87 I. C. 961 : A. I. R. 1925 Sind 321.

——S. 112—*Notice—Failure to incorporate substance of information—Effect.*

The mere failure to incorporate the substance of the information in the notice under S. 112 does not render the subsequent proceedings null and void. The object is to give the suspect a reasonable opportunity to come prepared with what he has to meet, but the omission does not deprive the magistrate of jurisdiction. It however,amounts to a grave and substantial irregularity which renders it necessary for Courts of Appeal and Revision to scrutinise the proceedings carefully and if it is shown the accused has been prejudiced in the slightest degree the order must be set aside,but, in the absence of such prejudice, the subsequent proceedings cannot be treated as *ab initio* void. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) TANWOR *v.* EMPEROR. **89 I. C. 710 (2) : 26 Cr. L. J. 1398 (2).**

——Ss. 112 and 118—*Sureties—Rejection—Subsequent imposition of conditions—Control—Test of.*

It is not the object of Chapter 8 of the Criminal Procedure Code to punish a suspect for past unproved crimes but to prevent him from committing offences and to give him an opportunity to reform himself. When a Magistrate has under S. 112 passed an order as to the nature and amount of liability of sureties, S. 118 bars the right of the Magistrate to impose fresh conditions at the time of making the order absolute. It is therefore not open to the Magistrate to reject sureties as unfit because they do not comply with certain arbitrary conditions which were not included in the order under S. 112. The fact that the sureties cannot control the suspect does not make them unfit as sureties. Similarly it cannot be made a condition precedent for acceptance of sureties, that they should show their good faith and influence over suspect by doing a particular act. (*Kennedy and Rupchand Bilaram, A. J. Cs.*) EMPEROR *v.* MANU WALAD ISMAIL.
25 Cr. L. J. 1226 : 82 I. C. 154 : A. I. R. 1925 Sind 57 (2).

——S. 114—*Orders under—Temporary injunction of Civil Court—Effect of.*

Successive extensions of an order under S. 144, Cr. P. Code, are invalid but they can be supported as fresh orders. Such successive orders may amount to an abuse of the process of Court especially when the Civil Court has passed an order of temporary injunction

against one party. It is the duty of the Criminal Courts to respect the opinions of Civil Courts and in taking steps to preserve peace, to take action only against those who are infringing the rights of others and protect those who wish to exercise their right and not prohibit the latter's lawful enjoyment of rights. 27 M. L. J. 628 : 22 M. L. J. 251 : 20 C. W. N. 758 Ref. (*Ramesam, J.*) MURARI NAICKEN *v.* AIYASAMI NAICKEN. **16 L. W. 452 : 69 I. C. 369 : (1922) M. W. N. 612 ; 23 Cr. L. J. 689 : A. I. R. 1923 Mad. 15.**

——S. 114—*Arrest when justified—Order—What to contain.*

S. 114, Cr. P. Code, contains two stringent elements obviously directed against any ill-considered precipitancy on the part of the magistrate. He must be of opinion that the only way of preventing a breach of the peace is to commit the person to custody, and he must put on record the substance of the Police or other report by which he is influenced. (*Foster, J.*) MANIRUDDIN *v.* EMPEROR. **2 Pat. L. R. 45 (Cr.) : 5 Pat. L. T. 93 : 74 I. C. 861 : 24 Cr. L. J. 829 : A. I. R. 1924 Pat. 320.**

[Note.—A new sub-section (3) has now been added to the section, which enables a magistrate to pass an interim order for security pending inquiry.]

——S. 115—*Order of restoration without notice to custodian and without enquiry as to his title is bad.*

Four men were charged a long time ago with stealing 59 bags of mustard seed from the grain market. The thieves dealt with the seed by selling 113 maunds of it to the petitioner. This transaction by the present petitioner took place at a considerable distance, *i.e.* 30 or 40 miles from the scene of the crime. No charge was made against them for receiving stolen property. After one trial of three of the thieves had taken place in the year 1921 and after a second trial of the fourth thief had taken place in the midsummer 1922 on the 17th of February 1923 a first class magistrate issued an order attaching other property of the applicants as security or by way of satisfaction, for an assumed liability of the value of the grain which they had purchased two years before in the ordinary course of their business. *Held*, that proceeding was absolutely unintelligible and had no reasonable basis. (*Walsh, J.*) NAINIMAL *v.* THE CROWN. **74 I. C. 708 : 24 Cr. L. J. 804 : A. I. R. 1924 All. 189.**

——S. 117, Cls. 1 and 2—*Accused admitting allegations—Enquiry cannot be dispensed with.*

Even where the accused persons do admit that they fall under the categories given in S. 112, enquiry should be made. (*Kennedy, A.J.C.*) ALLAHDITTO *v.* EMPEROR. **26 Cr. L. J. 1041 : 87 I. C. 961 : A. I. R. 1925 Sind 321.**

——S. 117 (3)—*General repute—Evidence of—Suspicion—If amounts to.*

The evidence of a mere suspicion of a person having taken part in certain criminal offences is not evidence of general repute within the meaning of S. 117 (3). (*Kulwant Sahay, J.*) AMJAD ALI *v.* EMPEROR. **5 Pat. L. T. 129 : 2 Pat. L. R. 79 (Cr.) : 25 Cr. L. J. 35 : 75 I. C. 723 : A. I. R. 1924 Pat. 498.**

——Ss. 117 (4) and 107—*Proceedings under S. 107—Joint complaint—Joint trial.*

S. 107, Cr. P. Code forbids joint-trial of parties ranged on opposite sides. But if they are of the same side the trial is legal. (*Stuart, J.*) RANGA PRASAD *v.* EMPEROR. **L. R. 3 A. 181 (Cr.).**

——Ss. 117 (4) and 110 (f)—*Security proceedings—Joint trial—Legality of.*

The joint trial of persons under S. 110 (f) of the Code, is not bad, where there is evidence of a conspiracy or of acting in concert. But its legality must depend upon what is alleged by the prosecution and not what is subsequently found to be true. (*Beachcroft and Ghose, JJ.*) JOGENDRA KUMAR NAG *v.* EMPEROR. **22 Cr L. J. 377 : 61 I. C 233 : 25 C. W. N. 334.**

——S. 117, Cl. 4—*Association must be proved.*

Under cl. 4 of S. 117, two or more persons may be jointly tried where they have been associated together in the matter under inquiry, but there must be clear evidence to prove the association. (*Jwala Prasad, J.*) DEODHARI PANDAY *v.* KING EMPEROR. **1925 P. H. C. C. 6 : A. I. R. 1925 Pat. 131.**

——S. 117 (4)—*Magistrates must consider case against each suspect separately and come to separate finding against each.*

The Magistrate is bound to consider the case of each suspect separately and individually on its own merits and to come to a separate finding in respect of each of the suspects, notwithstanding that under S. 117 (4) it is permitted to a Magistrate to hold a joint enquiry against several suspects associated together in the matter under enquiry. (*Rupchand Bilaram, A. J. C.*) KHAIRO *v.* EMPEROR. **25 Cr. L. J. 1377 : 83 I. C. 337 : A. I. R. 1925 Sind 204.**

——S. 117 (5)—*Joint enquiry—When can be made.*

Where in proceedings under S. 110, Cr. P. Code, a number of suspects have been jointly associated, S. 117 (5) does not make it a condition of such joint trial that they should be shown to be associated together in the order itself. Clause 5 is permissive and permits an enquiry being held where such persons are as a matter fact associated together. (*Kennedy, J. C. and Bilaram, A. J. C.*) TANWAR *v* EMPEROR. **89 I. C. 710 (2) : 26 Cr. L. J. 1398 (2).**

——Ss. 118, 110 and 406—*Order under S. 118—Appeal.*

An order by an Additional District Magistrate under S. 118 in a proceeding under S. 110, is appealable to the District Magistrate. (*Beachcroft and Ghose, JJ.*) MAHENDRA BHUMIJ *v.* EMPEROR. **48 Cal. 874 : 66 I. C. 69 : 25 C. W. N. 383 : 23 Cr. L. J. 229.**

——Ss. 118 and 110—Evidence—Entries in the Thana Village Crime Note Book are not sufficient evidence to support an order under S. 118. (*Teunon and Ghosh, JJ.*) POCHAI RAI *v.* EMPEROR. **62 I. C. 182 : 22 Cr. L. J. 486.**

——S. 118—*Fitness of surety—Surety a previous convict is not necessarily unfit.*

Though the proposed surety is one, who is previously punished for an offence under the Penal Code, he does not for ever become unfit to be a surety for a party required to give security for good behaviour. (*Richardson and Ryves, JJ.*) BUDHU AHIR *v.* EMPEROR. **25 C. W. N. 140 : 62 I. C. 179 (1) : 22 Cr. L. J. 483.**

——S. 118—*Sureties—Fitness of—Enquiry into—If can be delegated.*

It is not competent to a magistrate who has passed an order under S. 118, Cr. P. Code, to delegate to another the duty of inquiring into the suffiiciency of the security tendered, but should make such enquiry himself. (*Moti Sagar, J.*) KANWAL NABH *v.* EMPEROR. **25 Cr. L. J. 91 : 76 I. C. 27 : A. I. R. 1924 Lah. 672.**

——Ss. 118 and 112—*Sureties—Rejection—Subsequent imposition of conditions—Control—Test of.*

It is not open to a Magistrate to reject sureties as unfit because they do not comply with certain arbitrary conditions which were not included in the order under S. 112. In the case of a notorious thief, the sureties cannot be asked to show their good faith

and influence over him by first producing in court his father who was also absconding. (*Kennedy and Bilaram, A. J. Cs.*) EMPEROR *v.* MANU WALAD ISMAIL. **82 I. C. 154 (2) : 25 Cr. L. J. 1226 (2) : A. I. R. 1925 Sind 57 (2).**

——Ss. 118 and 112—*Magistrate should not introduce new qualifications while deciding on suitability of sureties offered.*

In the proceedings taken after the order for securities is made and after the accused persons bring certain sureties the Magistrate cannot introduce any new qualifications while deciding on the suitability of the sureties. (*Kennedy, A. J. C.*) ALLAHDITTO *v.* EMPEROR. **26 Cr. L. J. 1041 : 87 I. C. 961 : A. I. R. 1925 Sind 321.**

——S. 119—*Further enquiry will not be ordered by High Court unless the order of discharge is perverse.*

A further enquiry after discharge under S. 119 is improper unless the order of discharge is manifestly perverse or foolish or is based on a record of evidence which was obviously incomplete. (*Wazir Hasan, A. J. C.*) EMPEROR *v.* JUGDAMBA SINGH. **11 O. L. J. 334 : 25 Cr. L. J. 1026 : 81 I. C. 802 : A. I. R. 1924 Oudh 368.**

——S. 120 (1)—*Person sentenced to imprisonment at the time of order for security—Period cannot run before the expiry of the sentence.*

The accused was released on bail, pending appeal from his conviction under S. 147, I. P. Code. During this term he was awarded rigorous imprisonment for failure to give security under S. 110, Cr. P. Code, and was directed to undergo his remaining sentence under S. 147, I P. Code, after the latter. *Held* the order was illegal. (*Gokul Prasad, J.*) JHABDEY *v.* EMPEROR. **22 Cr. L. J. 95 : 59 I. C. 383 : L. R. 2 A. (Cr.) 36.**

——S. 122—*Rejection of surety—Previous conviction.*

A Magistrate acts unreasonably in rejecting a surety merely on the ground that he had once been convicted of an offence under S. 223, I.P. Code. 26 All. 189 Ref. (*Richardson and Greaves, JJ.*) BUDHU AHIR *v.* EMPEROR. **25 C. W. N. 140 : 62 I. C. 179 (I). 22 Cr. L. J. 483.**

——S. 122—*Order under Punjab Restriction of Habitual Offenders Act, whether requires confirmation of Sessions Judge.*

An order of restriction for a period exceeding one year passed by the Magistrate under the Act does not require confirmation by the Sessions Judge. (*Shadi Lal, C. J.*) EMPEROR *v.* SUHELA. **1 Lah. 614 : 59 I. C. 412 : 22 Cr. L. J. 108 : 17 P. L. R. 1921 : 5 P. W. R. 1921 (Cr.).**

——S. 122—*Fitness of surety residing at a distance of 18 miles.*

The mere solvency of a surety may not invariably be sufficient to ensure the good conduct of the accused any more than the mere fact of his residing at a distant place may be a sufficient ground for rejecting him as such. The sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they are willing to stand sureties. If the sureties undertake to keep the accused within the area of their observation or adopt other suitable measures for securing the supervision and control needed to keep him in good behaviour, there can be no inherent objection to their being accepted as sufficient. Sureties residing at such a distance as 18 miles from the residence of the accused, may be accepted if the person concerned undertakes to live with them in their village and the sureties concerned are

otherwise suitable. 6 O. C. 199 Foll. (*Kanhaiya Lal, J. C. and Simpson, A. J. C.*) EMPEROR *v.* RAMESHAR TEWARI. **9 O. & A. L. R. 526 : 10 O. L. J. 299 : 74 I. C. 539 : 24 Cr. L. J. 795 : A. I. R. 1923 Oudh 165.**

——S. 122—*Surety for good behaviour—Rejection of—Grounds for.*

The applicant was bound over to be of good behaviour for a period of one year. He furnished two sureties, one of whom was accepted by the trying Magistrate and the other was not accepted on the ground that he had already stood surety for some other man. *Held* that that ground was clearly insufficient. (*Kanhaiya Lal, J. C.*) GHISA *v.* EMPEROR. **73 I. C. 53 (1) : 24 Cr. L. J. 517 (1) : 9 O. & A. L. R. 40 : A. I. R. 1924 Oudh 132 (2).**

——Ss. 123, 110 and 192—*Security for more than a year—Procedure.*

The provisions of S. 192 are clear on the point that if security is not furnished and security for a period of more than a year has been ordered, the case must be referred to the Sessions Judge, who alone is empowered to pass orders under that section for the imprisonment of the person who has failed to furnish security and when such a case has been referred to the Sessions Judge under S. 123 it is hardly necessary that the case should go in appeal to the District Magistrate. (*Abdul Qadir, J.*) QAMARDIN *v.* EMPEROR. **66 P. L. R. 1922 : 67 I. C. 726 : 23 Cr. L. J. 454 : A. I. R. 1922 Lah. 475 (2).**

——S. 123—*Nature and scope—Sessions Judge required to pass definite order binding over and not to confirm Magistrate's order.*

Proceedings under S. 123 are not proceedings in confirmation but for orders and a Sessions Judge has to pass a definite order binding over and not to confirm an order passed by a Magistrate. (*Dalal, J. C.*) BAHADUR *v.* EMPEROR. **1 O. W. N. 773 : 85 I. C. 944 : 26 Cr. L. J. 656 : A. I. R. 1925 Oudh 517.**

——Ss. 123 and 379—*Failure to furnish Security—Imprisonment—Nature of sentence — Subsequent sentence for an offence—How to take effect.*

An order detaining a person who has failed to furnish security under Chapter VIII, Cr. P. C. is not a sentence of imprisonment and therefore S. 379 does not authorise a magistrate to direct that a subsequent sentence for an offence should take effect on the expiry of the previous detention. (*Kennedy, J. C. and Madgavkar, A. J. C.*) SUKHAL SINGH *v.* EMPEROR. **15 S. L. R. 205 : 66 I. C. 191 : 23 Cr. L. J. 255.**

——S. 123—*Legality of order for imprisonment for term to be fixed afterwards doubted.*

It is by no means clear that an order directing, on accused's failure to produce the required sureties, that the accused be detained in prison for a period to be specified hereafter is a legal order. (*Kennedy, A. J. C.*) ALLAHDITTO *v.* EMPEROR. **26 Cr. L. J. 1041 : 87 I. C. 961 : A. I. R. 1925 Sind 321.**

——S. 123 (2)—*Period should ordinarily begin from date of Magistrate's Order.*

Where a Sessions Judge to whom a case was submitted under S. 123 (2), Cr. P. C. directed that the period for which the accused were to be bound, should begin from the date of his order and not from the Magistrate's order. *Held*, that the order in fact amounted to an enhancement of sentence, and that it was undesirable that the court should do that even if it has the power, without special reasons. (*Kennedy, J. C. and Aston, A. J. C.*) ALLAHDAD *v.* EMPEROR. **17 S. L. R. 160 : A. I. R. 1924 Sindh 120.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 123.

——S. 123 (2)—*Sessions Judge need not write full judgment in a case under S. 123 (2).*

Section 123 (2) seems to contemplate more of administrative than Judicial functions to be exercised by the Sessions Judge when a case is submitted to him under the section. He should however hear both the accused persons and the Crown and see at any rate whether there are substantial grounds for demanding security. It is not however necessary to deal with such matter as if it were an appeal nor is it necessary to write a judgment as if it were an appeal. (*Kennedy, J. C. and Aston, A. J. C.*) ALLAHBAD *v.* EMPEROR **17 S. L. R. 160 : A. I. R. 1924. Sind 120.**

——S. 123 (3)—*Sessions Judge cannot order re-hearing of case but can pass order on evidence on record.*

S. 123, Cl. 3 does not empower Sessions Judge to order the re-hearing of a case, though the judge can ask for further information or evidence. The Sessions Judge can consider the evidence on record and pass such orders as he thinks fit on the evidence without requiring further evidence. (*Newbould and B. B. Ghose, JJ.*) NARAYAN SINGH *v.* THE KING EMPEROR. **25 Cr. L. J. 1112 : 81 I. C. 936 : A. I. R. 1925 Cal. 191.**

——S. 125—*District Magistrate cannot act as an appellate Court.*

An application under S. 125 is not an appeal and does not give power to the District Magistrate to review an order passed by a Deputy Magistrate on the ground that it was improperly passed. (35 A. 103 : 39 A. 466, 41 A. 651, Ref.) If he on such evidence as may be laid before him finds that the danger of a breach of the peace no longer exists he may set aside the bonds on this ground. (*Daniels, J.*) RAM DIN *v.* NAUJADAK SINGH. **71 I. C. 668 : 24 Cr.L.J. 204 : A. I. R. 1923 All. 484 (1).**

——S. 125—*District Magistrate cannot act as an appellate Court.*

The District Magistrate can cancel a bond for keeping the peace and to be of good behaviour under S. 125 on the only ground that something has supervened since the date of the first court's order which satisfies him that there is no longer any necessity for keeping the accused person under bond. The District Magistrate has no authority to use S. 125 as if he were sitting as a Court of appeal. If the order of the first Court is not maintainable in his opinion on the evidence presented, he cannot pass an order under S.125: he should refer the case to the High Court on its revisional side. (*Lindsay, J.*) NIZAMUDDIN KHAN *v.* MD. ZIAUL NABI. **44 All. 614 : 20 A. L. J 521 : 67 I.C. 350 : 23 Cr.L.J. 398 : A.I.R. 1922 All. 191: (*But See*) 37 Mad. 125 (F.B.).**

——S. 125—*District Magistrate's power to modify or alter a bond for keeping the peace—His power to cancel.*

A District Magistrate can cancel at any time a bond under S. 107, Cr. P. C. for keeping the peace or leave the bond alone ; he cannot alter or modify it. He can however under Ss. 406 and 423 alter a bond for good behaviour. (*Hallifax, A. J. C.*) BAINES *v.* EMPEROR. **6 N. L. J. 274 : 23 Cr. L. J. 394 : 67 I. C. 346 : A. I. R. 1922 Nag. 180.**

——S. 125—*Powers of District Magistrate—Not an appellate jurisdiction—Reference to High Court, in the absence of appeal to District Magistrate.*

CRIMINAL PROCEDURE CODE (V OF 1898), S. 133

The jurisdiction of a Dt. Magistrate under S. 125, Cr. P. Code, is neither appellate nor revisional and its power is merely confined to examining the record to satisfy himself whether it was any longer necessary to keep the parties under the bond. The act is not a judicial act which he is called upon to exercise ; even before proceedings are submitted to him, a reference can be made to the High Court as to the propriety of the proceedings. (*Dalal, A. J. C.*) EMPEROR *v.* BALWANT SINGH. **73 I. C. 504 : 24 Cr. L. J. 616 : 9 O. & A. L. R. 344 : A. I. R. 1924 Oudh 241.**

——Ss. 125 and 107—*District Magistrate can discharge security and cancel bond.*

Though no appeal lies from an order under S. 107 the District Magistrate can order the discharge of the appellants from the necessity of giving security for their future behaviour, setting aside the order of the lower Court, in his executive capacity as well as cancel the bond for keeping peace or for good behaviour. (*Adami, J.*) MONMOHAN DASS *v.* BABU LALL. **73 I. C. 515 : 24 Cr. L. J. 627 : A.I.R. 1922 Pat. 420.**

——S. 125—*District Magistrate—No jurisdiction to quash proceedings.*

Under S. 125, Cr. P. Code, the District Magistrate or the Deputy Commissioner has jurisdiction to cancel the bond ordered to be executed by a Sub-Divisional Magistrate under S. 107 of the Code. But as his jurisdiction is executive and neither appellate nor revisional he cannot vacate the order passed by the latter as *ultra vires* and quash the proceedings. In such a case he ought to refer it to the High Court. The High Court has power to set aside his order as being without jurisdiction, when the District Magistrate set aside the order under S. 107 as *ultra vires* and does not merely order the cancellation of the bond. (*Adami, J.*) DURGA SINGH *v.* AMAR DAYAL SINGH. **3 Pat. L. T. 103 : 66 I. C. 425 : 23 Cr. L. J. 281 : A. I. R. 1922 Pat. 334.**

——Ss. 127 and 128—*Penal Code, Ss. 149, 304 and 326—Charge against police—Defence.*

Where in a charge under Ss. 149, 304 and 326, Penal Code, for which no sanction is necessary, the accused, some constables, stated they acted under orders of the officer-in-charge of the police station under Ss. 127 and 128, Cr. P. Code. The jury should be told to consider the facts and if they find in favour of the accused, the prosecution cannot be continued except with the sanction of the Governor-General, and the accused are entitled to acquittal. If the Jury find in favour of neither, then they should consider whether the accused exercised the right of private defence and whether they exceeded the right. (*Teunon and Ghose, JJ.*) ABDUL RAHIM MIR *v.* EMPEROR. **25 C. W. N. 623 : 33 C. L. J. 340 : 62 I. C. 878 : 22 Cr. L. J. 606.**

——S. 133—*Closing of public drain—Accused denying drain to be public—S. 139-A disregarded—Trial is vitiated.*

Where the dispute was as to the closing of an old drain, and the accused definitely asserted that the drain was not a public one but the Magistrate instead of proceeding under S. 139-A at once took evidence under S. 137 and where the Magistrate also did not find in clear words that the drain was a public one, *held*, that the trial was vitiated by wrong procedure. (*Piggott, J.*) RAGHUNATH UPADHIA *v.* EMPEROR. **23 A. L. J. 187 : 26 Cr. L. J. 873 : 86 I. C. 809 : A. I. R. 1925 All. 311 (1).**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 133.

——— S. 133—*Initial order if vague may be modified.*

S. 133 clearly contemplates that in suitable cases the order initially made may be modified and the modified order may be allowed to stand. (*Mukerjee, J.*) JHAN LAL *v.* EMPEROR. **23 A. L. J. 43 : L. R. 6 A. (Cr.) 86 : 86 I. C. 219 (2) : 26 Cr. L. J. 731 : A. I. R. 1925 All. 310.**

——— S. 133—*Constructions existing for long time—Action under the section, legality of.*

S. 133 of the Code of Criminal Procedure is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which has been in existence for a long time—in this case 15 years. (*Daniels, J.*) GHURAHU DAS *v.* SHAKALRAJ DAS. **L. R. 6 A. 190 (Cr).**

——— S. 133—*Unlawful obstruction—Over-hanging branch of a tree—Branch likely to fall at some future time—Danger to public.*

S. 133 of Cr. P. Code deals with the condition of things at the time when the enquiry is held. If at such a time a house or branch of a tree is likely to fall and thereby endanger the life of passersby, no doubt action might be taken under the section. But it is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. Where a solid and vigorous branch of a tamarind tree is 15 ft. above the level of a country-road, it cannot be said that an obstruction at the height, having regard to the normal traffic, is an unlawful obstruction within the meaning of S. 133, Cr. P. Code. Even if it could be held that the branch was likely, at some time or other and under abnormal circumstances, to prove an obstruction it is not necessary for the magistrate to go to the extreme length of ordering it to be cut down. A tamarind tree is an object of veneration to many Hindus and the safety of the public, which after all is what is contemplated by the section, would have been adequately secured if the magistrate had ordered proper support to be given so as to prevent the branch from falling. (*Ryves, J.*) GOKUL *v.* EMPEROR. **22 A. L. J. 436 : L. R. 5 A. 84 (Cr.) : A. I. R. 1924 All. 667.**

——— S. 133—*Claim of right—Civil dispute involved—Magistrate has jurisdiction to refuse to interfere—Public way—Dedication to public must be proved.*

S 133 is quite plain. The Magistrate must deal with an alleged "public" way even though it is disputed. These summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, a Magistrate clearly has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a Civil Court. 28 All 98, Diss. A. I. R. 1922 Cal. 59 : 49 Cal. 682 (F. B.) Ref. Private property cannot be converted into public merely because it looks as though it ought to be and because to do so would be convenient to a section of the public who have enjoyed permissible user over it. (*Walsh, J.*) ABDUL WAHID *v.* ABDULLAH KHAN. **45 All. 656 : 21 A. L. J. 529 : L. R. 4 A. (Cr.) 105 : 74 I. C. 849 : 24 Cr. L. J. 817 : A I. R. 1924 All. 1.**

——— **Ss. 133 and 137**—*Procedure—Complaint Notice—Enquiry—Order absolute.*

Where a person against whom a notice is issued under S, 133, Cr. P. Code, appears and objects to the order, the inquiry must proceed as in a summons case. (*Stuart, J.*) JASSI *v.* EMPEROR. **20 A. L. J. 692 : 76 I. C. 826 (2) : L. R. 3 A. 129 (Cr) : 25 Cr. L. J. 266 : A. I. R. 1922 All. 335 (2).**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 133.

——— **Ss. 133 and 137**—*Procedure—Conditional order—Evidence taken by one and final decision by another Magistrate is irregular.*

A conditional order was made under S. 133, Cr. P. Code, by a Magistrate whereby the petitioner was required to appear before the said Magistrate to show cause against the order. After that the parties appeared before him and the papers were forwarded to another Magistrate for inquiry and report. After evidence having been recorded and a report made by that Magistrate, the first Magistrate made his final order. *Held*, that the procedure followed in this case is irregular and the order should be set aside on that ground. After the conditional order was made in the terms already stated, it was incumbent upon the Magistrate under S. 137 to take evidence as in summons case, if the final order was to be made by him. (*Shah, Ag. C. J. and Crump, J.*) *In re* KARIAPPA LINGAPPA. **47 Bom. 89 : 23 Cr. L. J. 587 : 24 Bom. L R. 807 : 68 I. C. 619 : A. I. R. 1922 Bom. 384.**

——— **Ss. 133 and 137 (3)**—*Applicability—Chap. X—Object of—Civil Court.*

The Chap. X aims at enabling the Magistrate to make speedy orders in cases of public nuisance and for this reason the jurisdiction of Civil Courts is barred by S. 133 (2). (*Pratt and Fawcett, JJ.*) RANGUBAI GURURAO, *In re.* **23 Bom. L. R. 844 : 62 I. C. 877 : 22 Cr. L. J. 605.**

——— **Ss. 133 and 137**—*Jurisdiction—Conditional order under S. 133 (1)—Made absolute under S. 137 (3).*

A conditional order passed under S. 133 (1) on 12—2—16 was made absolute under S. 137 (3) on 11—9—20 The High Court refused to treat the latter as resting on the former and consequently reversed it. (*Pratt and Fawcett, JJ.*) RANGUBAI GURURAO, *In re.* **23 Bom. L. R. 844 : 62 I. C. 877 : 22 Cr. L. J. 605.**

——— S. 133—*Claim of right—Does not oust his jurisdiction—Such claim not well founded, in Magistrate's opinion though made in good faith—Magistrate if can allow objector time to establish his claim in a Civil Court—Failure of objector to go to Civil Court within time allowed—Magistrate can continue proceedings.*

Per *Teunon J*, :—When in proceedings under S. 133 of the Cr. P. Code, arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right, which is found by the Magistrate to be made in good faith, the Magistrate's jurisdiction is not ousted thereby.

Per *Sanderson, C. J* :—If the Magistrate does not think the claim well founded, though he considers it to have been made in good faith, he may in his discretion allow the defendant a reasonable time to assert the claim made by him by a Civil Suit, and if he does not go to the Civil Court within such time or fails there, the Magistrate, has power to continue the proceedings under S. 133 of the Cr. P. Code.

Per *Sanderson, C. J. Teunon and Ghose, JJ.* With regard to case of *Betat Ali* v. *Abdur Rahim* (8 C. W. N. 143) (1903), it could not be said, having regard to the facts of that case, that it was wrongly decided.

Per *Richardson and Newbould, JJ.*—An order giving a defendant, whose claim the Magistrate considers ill-founded, a limited opportunity to go to the Civil Court, is within the Magistrate's jurisdiction, but he also has jurisdiction, and in some cases, it may be his duty, to act himself on his own finding that the claim is ill-founded. It is a matter for his discretion. It would in some sense be within the Magistrate's

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discretion in such cases to terminate his proceedings leaving it to either party desiring to do so, to seek a remedy in the Civil Court in the usual way.

- Per *Ghose, J.*—If the Magistrate finds that there is a real or substantial question to be tried out between the parties he ought, in exercise of his discretion, to stay his hands and not to proceed any further after making the conditional order under S. 133. It is not a case of ouster of jurisdiction and there is no ouster of jurisdiction.

The Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put forward. The Magistrate is not entitled to direct the objector to go to the Civil Court because in his opinion the claim of right cannot be ultimately maintained. So far as the case of *Belat Ali* v. *Abdur Rahim* 8 C. W. N. 143 (1903) is not inconsistent with the above view, it was rightly decided. (*Sanderson, C. J. Teunon, Richardson, Newbould, and C. C. Ghose, JJ.*) RAM SAGAR MONDAL *v.* ALEK NASKER. **49 Cal. 682 : 35 Cal. L. J. 247 : 67 I. C. 177 : 26 Cal. W. N. 442 : 23 Cr. L. J. 353 : A. I. R. 1922 Cal. 59 (F. B.).**

——— **S. 133**—*Section does not provide for reconstruction of obstruction removed.*

Under S. 133, cl. (2) it is only the power to order the removal of an obstruction which is given to a Magistrate. There is no provision for reconstruction of an obstruction which has once been removed under this section. (*Sanderson, C. J. and Chotzner, J.*) RAHIMADDI JAMADAR *v.* SHER ALI.

40 C. L. J. 597 : 85 I. C. 357 : 26 Cr. L. J. 517 : A. I. R. 1925 Cal. 399 (2).

——— **S. 133**—*Section does not provide for costs.*

There is no provision in Chapter X for the payment of costs by any party to the proceeding. (*Sanderson, C. J. and Chotzner, J.*) RAHIMADDI JAMADAR *v.* SHER ALI. **40 C. L. J. 597 : 85 I. C. 357 : 26 Cr. L. J. 517 : A. I. R. 1925 Cal. 399 (2).**

——— **S. 133**—*Part acceptance of Jury's verdict is not justified.*

A Magistrate should not accept only a part of the verdict of jury and base his order thereon. (*Sanderson, C. J. and Chotzner, J.*) RAHIMADDI JAMADAR *v.* SHER ALI. **40 C. L. J. 597 : 85 I. C. 357 : 26 Cr. L. J. 517 : A. I. R. 1925 Cal. 399 (2).**

——— **S. 133**—*On production of Settlement records showing accused to be owner of land—Magistrate must stay his hand.*

When proceedings are taken under section 133 relating to the obstruction of and encroachment over a public drain, the Magistrate ought to stay the proceedings under S. 139-A (2) and relegate the parties to the remedies open to them in the Civil Court, in a case where the person against whom the proceedings under S. 133 are taken produces the settlement record evidencing his title to the land in dispute. (*Greaves and Panton, JJ.*) DEBENDRA NATH CHAUDHARI *v.* CHAIRMAN, LOCAL BOARD, ASANSOL.

25 Cr. L. J. 1080: 81 I.C. 904: A.I.R. 1925 Cal. 268 (1).

——— **s. 133 137 and 140 (2)**—*Jurisdiction—Successor cannot interfere.*

A Magistrate is not justified in going behind the order of his predecessor under Ss. 133 and 137, Cr. P. Code and coming to a decision as to its legality. Even though a Magistrate has discretion under S. 140 (2), Cr. P. Code, this direction must be a judicial discretion and no Magistrate has judicial discretion to sit as a Court of appeal and decide whether an order passed by a Magistrate of concurrent jurisdiction was a proper order or not. 10 W. R. Cr. 27 and 25 Cal 425 Ref. (*Newbould and Suhrawardy, JJ.*) KIRAN

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CHANDRA *v.* RAMESH CHANDRA. **27 C. W. N. 459 : 72 I. C. 77 : 24 Cr. L. J. 317 : A. I. R. 1923 Cal. 589.**

——— **Ss. 133 and 135**—*Procedure—Appointment of jury.*

In a proceeding under S. 133 in respect of a way the Magistrate must first decide whether the way in question is or is not a public way and whether the claim to the contrary is put forward in good faith. If he concludes that the way is a public way and that the claim to the contrary is merely a pretext to oust the Magistrate's jurisdiction, he can then appoint a Jury if the claimant still desires the appointment of a Jury. (*Teunon and Ghose, JJ.*) DURLAV CHANDRA SANTRA *v.* BHUBAN CHANDRA DAS.

61 I.C. 843 : 22 Cr. L. J. 459 (Cal.).

——— **Ss. 133 and 137**—*Procedure—Applicability of S. 137—Proceedings under.*

S. 137 is imperative and before a Magistrate can make an order under S. 137 (2), dropping a proceeding under S. 133, he must take evidence as directed by S. 137 (1). (*Chatterjee and Cuming, JJ.*) SHEO KHELAN RAM KALWAR *v.* NAYAN BEHARI.

60 I.C. 431 : 22 Cr. L. J. 239 (Cal.).

——— **S. 133**—*Decision as to a public pathway to be arrived at by Magistrate before referring to Jury.*

It is the duty of the Magistrate in a proceeding in respect of an obstruction to a footpath under Chapter X of the Cr. P. Code, before referring the matter to the jury, to decide himself whether or not the claim is made in good faith, and whether the pathway is a public one or not, and it is only on deciding that there was no such claim that any matter can be referred to the jury. (*Scott-Smith and Fforde, JJ.*) KHUSHI RAM *v.* THE CROWN.

4 Lah. 224 : 5 L. L. J. 420 : 24 Cr. L. J, 457 : 72 I. C. 617 : A. I. R. 1923 Lah. 525.

——— **S. 133**—*Procedure—Order based on oral enquiry—Illegal.*

The procedure to be followed in cases regarding public nuisance is as in a summons case and evidence must be recorded. An order based on an oral enquiry is illegal. (*Moti Sagar, J.*) MAM CHAND *v.* EMPEROR. **73 I. C. 503 : 24 Cr. L. J. 615 (Lah.) : A. I. R. 1924 Lah. 392.**

——— **S. 133**—*Evidence—Previous conviction of petitioner under S. 341, Penal Code, is not sufficient.*

Where to pass an order under S. 133, Cr. P. Code, for the removal of a building on the ground that it obstructed a village street, the fact that the petitioner had been previously convicted under S. 341, Penal Code in respect of the same building by a Magistrate of the third class and the conviction had been upheld by the Dt. Magistrate had been relied on. *Held*: The Magistrate should have proceeded *de novo* as in summons cases. 32 P. R. 1917 Cr. Ref. (*Zafar Ali, J.*) BHEDU *v.* THE CROWN. **5 Lah. L. J. 81 : A. I. R. 1924 Lah. 128.**

——— **S. 133**—"*Channel*"—*Water course taking water to an urani.*

The word "channel" is not defined in the Cr. P. Code but it is quite wide enough to include a water course carrying water to a public urani. Where there was a catchment area in the centre of which there was a water course which was obstructed and the water which flowed into the water course was attempted to be carried away by the petitioners to their own village tank by building a bund and cutting a new channel and by cutting down a new portion of the old bund of the catchment area thus making the water run away in a direction different to that of the water course and preventing its falling into the urani. *Held*, that this was an obstruction to the water course and

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can be dealt with under S. 133 of the Code. (*Krishnan, J.*) RAMASAMI CHETTIAR *v.* RAMANATHAN CHETTIAR. **(1925) M. W. N. 663 : 22 L. W. 470.**

——S. 133—*Applies only to public nuisances and not private nuisances.*

S. 133 deals with only public nuisances and not with private uuisances. So an application for removal of obstruction of a private pathway does not lie under the section. (*Kendall, A. J. C.*) BHAIYA GAURI SHANKAR *v.* BHAGELY PANDE. **11 O. L. J. 659 : 25 Cr. L. J. 1118 : 81 I. C. 942 : A. I. R. 1925 Oudh 130 (1.).**

——S. 133—*Claim of right—Public nuisance.*

The existence of a genuine dispute as to title suitable for decision by the Civil Court is a sufficient ground for holding that the conditional order is not reasonable and proper. (*Dalal, A. J. C.*) BHAGWAN DAS *v.* EMPEROR **9 O. & A. L. R. 35 : 24 Cr. L. J. 635 : 73 I. C. 523 (2) : A. I. R. 1923 Oudh 152.**

——S. 133—*Procedure—Enquiry is necessary.*

In a case under S. 133, Cr. P. Code an enquiry is obligatory. The magistrate cannot make his conditional order absolute, without taking such evidence as the parties may adduce as in a summons case. (*Kanhaiya Lal, J. C.*) SANT SAHAI *v.* LACHMAN SINGH. **9 O. L. J. 64 : 23 Cr. L. J. 250 : 66 I. C 186 : A. I. R. 1922 Oudh 29.**

——S. 133—*Applicability—Throwing of rubbish on common land, is not a ground.*

The mere throwing of rubbish on vacant land lying between two houses is not sufficient to justify proceedings under S. 133, Cr. P. Code. (*Lindsay, J. C.*) EMPEROR *v.* SUKHDEI. **24 O. C. 327 : 64 I. C. 841 : 23 Cr. L. J. 57.**

——S. 133—*Procedure—Can act on report of another Magistrate.*

A Magistrate is competent to make a conditional order absolute upon the report of a subordinate magistrate to whom the matter had been referred. (*Bucknill, J.*) CHANDRIKA KOERI *v.* BUDHU DUSADH **2 P. L. R. 21 : 73 I. C. 802 : 24 Cr. L. J. 690 (Pat.) : A. I. R. 1924 Pat. 418.**

——S. 133—*Claim of right.*

Where there is a *bona fide* question as to the public nature of the subject of dispute, the question should be left to a civil court for adjudication. But whether there is a *bona fide* question is for the magistrate to decide. (*Bucknill, J.*) CHANDRIKA KOERI *v.* BUDHU DUSADH. **2 P. L. R. 21 : 73 I. C. 802 : 24 Cr. L. J. 690 (Pat.) : A. I. R. 1924 Pat. 418.**

——S. 133—*Public place--Railway land not a public place—Finding as to public way must be specific.*

There is no warrant for the view that Railway land is necessarily a public place especially railway land which is outside the railway fencing at a railway station. Where there is a finding of fact that the accused has encroached on the railway land left outside the railway fencing, but there is no finding that the land encroached upon is in a way or that if it is in a way, it is on one which is or may be lawfully used by the public. *Held*, that the observation which the Magistrate made when discussing the question why the land is outside the fencing, *viz.*, "It is said that it appears to have been done for the sake of the public to use the well" cannot be considered to be a finding that there is a way over the land encroached upon. (*Macpherson, J.*) RANGI SAH *v.* B. N. W. RY. CO. **4 P. L. T. 402 : 74 I. C. 1047 : 24 Cr. L. J. 855 : 1 Pat. L. R. 154 (Cr.) : A. I. R. 1923 Pat. 540.**

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——Ss. 133 and 135—*Jury—Appointment of jury—No verdict—Order under S. 141—Rights of petitioner.*

On an application under S. 133, Cr. P. Code, for removal of an encroachment the opposite party moved for the appointment of a jury under S. 135, Cr. P. Code, and a jury was appointed. The foreman of the jury simply returned the papers without the verdict whereupon the Magistrate made the order absolute under S. 141, Cr. P. Code. *Held*, that the magistrate had jurisdiction to pass the order, but he should have done after giving the party an opportunity of showing cause and producing such evidence as he wanted. 13 C. W. N. 367 Foll. (*Adami, J.*) JIBLAL TELI *v.* GENA SAHU. **4 Pat. L. T. 15 : 72 I. C. 956 : 1 Pat. L. R. 164 (Cr.) : 24 Cr. L. J. 492 : A. I. R. 1923 Pat. 229.**

——S. 134—*'Person' includes body of persons.*

The word 'person' includes any company or association or body of persons whether incorporated or not—*see* the definition in S. 11 of the Indian Penal Code and also in the General Clauses Act. It can, therefore, include all the male adults residents in a certain mohalla. When the order is communicated to those concerned, it is immaterial that the method in which it was served on them is not strictly in accordance with the provisions of S. 134 of the Cr. P. Code. (*Scott-Smith and Fforde, JJ.*) KHUSHI RAM *v.* THE CROWN. **4 Lah. 224 : 5 L. L. J. 420 : 24 Cr. L. J. 457 : 72 I. C. 617 : A. I. R. 1923 Lah. 525.**

——Ss. 134, 135 and 244—*Magistrate passing orders without recording evidence of parties—Effect of.*

A Magistrate issued a notice under S. 133 of the Cr. P. Code directing *K* to demolish a *chubtra*. *K* appeared to show cause against the order. The Magistrate inspected the spot and passed orders on the result of his inspection without giving the parties an opportunity to produce their evidence. *Held*, that the Magistrate was bound under Ss. 134 and 135 read with S. 244 to record such evidence as might be produced by the parties. (*Daniels, A. J. C.*) EMPEROR *v.* KANHAIYA LAL. **24 O. C. 267 : 64 I. C. 285 : 22 Cr. L. J. 765.**

——S. 136—*Effect of amendment.*

In view of the amendment of S. 497 of the Cr. P. Code, Courts will be less fettered than before. (*Mukerjee and Chatterjee, JJ.*) NAGENDRA NATH *v.* EMPEROR. **51 Cal. 402 : 38 C. L. J. 388 : 81 I. C. 220 : 25 Cr. L. J. 732 : A. I. R. 1924 Cal. 476.**

——S. 137—*Accused appearing to show cause—Evidence in support of order should be heard before calling on accused for defence.*

When the accused person appears and shows cause why no order should be made against him, the Magistrate should hear evidence in support of the order against him before calling on him for his defence. Where, on the day fixed for the production of evidence, neither party produced any evidence and the Magistrate made the order absolute, *held*, that the order must be quashed. (*Daniels, J.*) BECHAN TELI *v.* EMPEROR. **47 All. 341 : L. R. 6 A. (Cr.) 80 : 26 Cr. L. J. 905 : 86 I. C. 969 : A. I. R. 1925 All. 614.**

——Ss. 137, 135 and 133—*Procedure.*

Magistrate can only make a notice under S. 133, Cr. P. Code, absolute if the person against whom the order is made does not appear under S. 135 and protest against it. If the person appears and puts in a written statement it is then the duty of the Magistrate to proceed under S. 137 as if the case were summons case. (*Stuart, J.*) JASSI *v.* EMPEROR.

CRIMINAL PROCEDURE CODE, S. 137.

20 A. L. J. 692 : L. R. 3 A. 129 (Cr.) : 76 I. C. 826 : 25 Cr. L. J. 266 : A. I. R. 1922 All. 335 (2).

——**S. 137**—*Conditional order by Magistrate—When can be made absolute.*

A conditional order should be made final after taking evidence by the Magistrate who should himself give the decision regarding the final order. (*Shah, A. C J. and Crump, J.*) *In re* KARIYAPPA.

47 B. 89 : 68 I. C. 619 : 23 Cr. L. J. 587 : 24 Bom. L. R. 807 : A. I. R. 1922 Bom. 384.

—— **S. 137**—*Finding as to* bona fides *is condition precedent.*

Before making an order for the removal of obstruction under S. 137, the Magistrate should record a clear finding as to the *bona fides* of the claim set up by the party against whom the order is directed and in absence of such a finding the order cannot be sustained. (*Teunon and Suhrawardy, JJ.*) EMPEROR *v.* ASIRUNUDDIN SARKAR. **34 C. L. J. 172 : 62 I. C. 412 : 22 Cr. L. J. 524 (Cal.)**

——**Ss. 137 and 133**—*Sufficient ground*—Bona fide *dispute is such.*

Where there is a *bona fide* dispute as to whether an encroachment exists or not, section 133 should not be applied in order to relieve the Government of the necessity of filing a civil suit. The existence of a genuine dispute as to title suitable for decision by the Civil Courts is a sufficient ground within the meaning of S. 137 for holding that the order under S. 137, where the alleged encroachment has been in existence for over 20 years, is not reasonable and proper. 15 Cal. 564, Foll. (*Daniels, J. C.*) RAM LAKHAM *v.* EMPEROR. **72 I. C. 958 : 24 Cr. L. J. 494 : A. I. R. 1923 Oudh 22.**

——**S. 137**—*Finding as to the* bona fides *of claimant necessary.*

In taking evidence under S. 137 in a case where the public nature of the way is disputed, it is incumbent on the Magistrate, even where he has found, that the claim of title to the land in question on the part of the person showing cause is not justified, to determine further whether the claim is nevertheless a *bona fide* claim, and if he finds in the affirmative, to stop proceedings and give such person time to establish his claim in the Civil Court. Where the Sub-Divisional Magistrate failed to find that the petitioner's claim. even though notjustified was not *bona fide. Held*, that his proceedings cannot be sustained. 15 C. 564, 2 P. L. J. 67 Foll. (*Macpherson, J.*) RANGI SAH *v.* B. N. W. RY. CO. **4 Pat. L. J. 402 : 1 Pat. L R. 154 Cr. · 74 I. C. 1047 : 24 Cr. L. J. 855 : A. I. R. 1923 Pat. 540.**

——**S. 137**—*Dispute cannot be referred to arbitration.*

A Magistrate has no power to refer a dispute under S. 133 of the Cr. P. Code, to arbitration. (*Jwala Prasad, J.*) RAJ BALAM RAI *v.* NAWLAKH SINGH. **2 P. L. T. 6 : 61 I. C. 55 : 22 Cr. L. J. 327.**

——**S. 137 (1)**—*Scope.*

Where it was complained that the applicant had built a wall and had thereby obstructed a public road and the Court passed the following order:—The Tahsildar has inspected the spot and reports that the wall built is the cause of the trouble. Notice to issue under S. 140, Cr. P. Code (More than one notice had been issued by the Court under S. 133). *Held*: Court's order was a legal and valid order, inasmuch as the provisions of S. 137 (1) of Cr. P. Code were not complied with. S. 137 (1) of the Cr. P. Code lays down that "If the opposite party appears and shows cause against the order the magistrate shall take evidence in the matter as in a summons case." It was thus clearly intended by the legislature that the Court should itself go into evidence before making the preliminary order final and should give a judicial decision in the matter. (*Stuart, J.*) ISMAIL *v.* BUNDA. **20 A. L. J. 657 ; A I. R. 1922 All. 265 (2).**

CRIMINAL PROCEDURE CODE, S. 139.

——**Ss. 138 and 139**—*Jury—Refusal to give verdict—Power to summon another jury.*

Where the majority of the jurors appointed by a Magistrate under S. 138 (1) of the Cr. P. Code perversely refuse to return a verdict for fear of displeasing either party, the Magistrate can discharge them and appoint a fresh Jury and decide the matter before him under S. 139, Cr. P. Code. (*Lindsay, J.*) GIRWAR LAL *v.* BANSIDHAR. **44 A. 575 : 20 A. L. J. 472 : L. R. 3 A. 84 (Cr.) : 66 I. C. 420 : 23 Cr. L. J. 276 : A. I. R. 1922 All. 297 (1).**

——**S. 138**—*Duty to nominate Jury.*

If the Magistrate is of opinion that a Jury should be appointed under S. 138, he as well as the party showing cause must nominate the jury. (*Newbould and Suhrawardy, JJ.*) SUDHAG SHUDER ROY *v.* RAHIM PRAMANIK. **62 I. C. 817 : 22 Cr. L. J. 577 (Cal.).**

——**S. 138**—'*Forthwith*' *Meaning of.*

The word 'forthwith' must be interpreted in a reasonable way. It merely means that the Magistrate shall appoint a jury as soon as he reasonably can. (*Scott-Smith and Fforde, JJ.*) KHUSI RAM *v.* THE CROWN. **4 Lah. 224 : 5 L. L. J. 420 : 24 Cr. L. J. 457 : 72 I. C. 617 : A. I. R. 1923 Lah. 525.**

—— **S. 139 (2)**—*Jurymen refusing to give verdict—Fresh jury to be appointed.*

If some three men of the Jury deliberately shirk their duty by not giving any verdict at all, probably because they do not want to offend either party, which amounts to a perverse refusal on the party of the men to decide, then, in accordance with the note in para. 9 on page 220 of Sohoni's Cr. P. Code, 9th Edition, it is competent on the part of the Court to appoint a fresh jury. (*Lindsay, J.*) GIRAWAR LAL *v.* BANSIDHAR. **44 All. 575 : 20 A. L J. 472 : 66 I. C. 420 : 23 Cr. L. J. 276 : A. I. R. 1922 All. 297 (1).**

——**S. 139-A**—*Existence of public right—Magistrate must raise question himself and cannot refuse enquiry thereinto on ground of its being raised too late in the proceedings.*

Under the Cr. P. Code, as now amended, it is the duty of a Magistrate to proceed in accordance with the provisions of S. 139-A without waiting for the objection to be raised by one of the parties to the proceeding. Under that Section on the appearance before him of the person against whom the order is made, the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way, river, channel or place and if he does so the Magistrate shall before proceeding under S. 137 or S. 138 inquire into the matter. The Magistrate cannot refuse to inquire into the matter because the objection was not taken until a late stage of the case. (*Newbould and Ghose, JJ.*) SHEIKH SADIR *v.* SABARALI. **29 C. W. N. 649 : 88 I. C. 528 (1) : 26 Cr. L. J. 1168 (1) : A. I. R. 1925 Cal. 736.**

——**S. 139-A**—*Scope of—Essentials to give the magistrate jurisdiction.*

The law requires first of all that the party shall appear before the magistrate and deny the existence of the public right in question. Secondly that he shall produce some reliable evidence and thirdly that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then

the Magistrate's jurisdiction ceases to exist. The section requires evidence and not proof that no public right exists. The only condition is that upon the materials before him the magistrate shall have no reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans. (*Mullick and Ross, JJ.*) THAKUR SAO *v.* ABDUL AZIZ. **4 Pat. 783.**

[Note.—This new section provides for enquiry when the existence of public right is denied—Ed.]

———S. 141—*Failure of Jury—Order can be made absolute.*

If the jury failed to return their verdict within the time fixed, the Magistrate has jurisdiction to make the order absolute. Where the jury fails to perform its duty through no fault of the person against whom a conditional order has been passed the person should be allowed to revert to the other alternative given him by S. 135. (*Adami, J.*) JIBLAL TELI *v.* GENA SAHU. **4 Pat. L. T. 15 : 72 I. C. 956 : 1 Pat. L. R. Cr. 164 : 24 Cr. L. J. 492 : A. I. R. 1923 Pat. 229.**

———S. 141—*Jury not returning verdict in time.*

The words " if the jury appointed does not return its verdict within the time fixed " mean if the jury for any reason does not return its verdict the Magistrate must inquire into the matter before he passes an order. (*Bucknill, J.*) AJODHA TEWARI *v.* EMPEROR. **4 P. L. T. 13 : 1 P. L. R. Cr. 22 :73 I. C. 327 : 24 Cr. L. J. 583 : A. I. R. 1923 Pat. 131.**

———S. 144—*Other means to avert danger being available, proceedings should not be taken under S. 144.*

An action should be taken under S. 144 only in urgent cases of nuisance or apprehended danger. It is not proper that Criminal Courts should take upon themselves a jurisdiction to decide what are really civil disputes.

Where the complaint was that a person by closing a drain and obstructing the flow of the rain water of another house endangered the safety of the house but where its owner could drain off the water in some other way. *Held*, that the proper remedy was in the Civil Court. (*Mukerjee, J.*) HAJI ALI *v.* EMPEROR. **26 Cr. L. J. 560 : 85 I. C. 656 : A. I. R. 1925 All. 678.**

———S. 144—*Duration—Extension for indefinite time.*

Before the expiry of the period of the order the local Government passed an order directing that the order should remain in force until cancelled by a notification in the Gazette. *Held*, that the Legislature has not limited the time for which the force of the order may be extended and under the terms of the section, the Local Government can extend the order so long as the danger which it apprehended continued to exist. (*Daniels, J.*) BHURE MAL *v.* EMPEROR. **45 All. 526 : 73 I. C. 801 : 24 Cr. L. J. 689 : A. I. R. 1923 All. 606.**

———S. 144—*Scope of—Nuisance — Temporary emergency—Orders under section.*

The opponent applied to the Chief Presidency Magistrate to have the noises from an adjoining house stopped under the provisions of S. 144. *Held*, Per *Shah, J.* that though the order was in form within S. 144, Cr. P. Code, yet it was in substance outside it, in as much as the opponent's application to the Magistrate was for the prevention of nuisance not temporarily but permanently. Per *Hayward, J.* It was difficult to say that the order was not within S. 144 ; nor was it possible to hold that a temporary injunction should not be passed merely because the dispute demanded a permanent injunction for final settlement.

(*Shah and Hayward, JJ.*) CAWASJEE JEHANGIR READYMONEY, *In re.* **22 Bom. L. R. 157 : 62 I. C. 409 : 22 Cr. L. J. 521.**

———S. 144—*Temporary order—Grounds for issuing.*

The fact that a dispute demands a permanent injunction for its final settlement should not be a ground for withholding a temporary order. (*Shah and Hayward, JJ.*) CAWASJEE JEHANGIR READYMONEY, *In re.* **22 Bom. L. R. 157 : 62 I. C. 409 : 22 Cr. L J. 521.**

———S. 144—*Revision—Functions of High Court.*

S. 435 (3), Cr. P. Code, expressly excludes the exercise of revisional powers in cases under S. 144. The High Court has merely to satisfy that the facts found fall within the section so as to give jurisdiction to the Magistrate. (*Shah and Hayward, JJ.*) CAWASJEE JEHANGIR READYMONEY. *In re.* **22 Bom. L. R. 157 : 62 I. C. 409 : 22 Cr. L. J 521**

———S. 144—*General order—Essential elements.*

There is a clear distinction between interfering with the rights of private proprietors with whatever ulterior motive they may do acts which they have a right to do and the perpetration of wrongful acts by such proprietors. The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace. The Criminal Court assumes jurisdiction to interfere with this lawful exercise of a person's right of ownership when such exercise in its ulterior consequences being directed primarily against the lawful exercise of another person's right of ownership is likely to cause a breach of the peace. An order prohibiting a party from ever holding a *hat* at any place on his own property is not competent under S. 144. 18 W. R. (Cr.) 47 ; 23 C.W.N. 141 Foll. (*Walmsley and Suhrawardy, JJ.*) BENOWARI LAL *v.* PRONAB KRISHNA. **35 Cal. L. J. 397 : 71 I. C. 516 : 26 C. W. N. 663 : 24 Cr. L. J. 164 : A. I. R 1922 Cal. 569.**

———S. 144—*Nuisance—Action against—When to be taken.*

Action under S. 144 should only be taken in urgent cases of nuisance or apprehended danger. If the party applying had a proper remedy in the Civil Court, Criminal Courts should not assume jurisdiction. (*Mukerjee, J.*) HAJI ALI *v.* EMPEROR. **26 Cr. L. J. 560 : 85 I. C. 656 : A. I. R. 1925 All. 678.**

———S. 144—Ex-parte *order not legal.*

It is not proper for a Magistrate to pass an *ex parte* order under S. 144, and when its propriety or legality is challenged, to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matter ought to be disposed of quickly in order to avoid unnecessary encroaching on the civil rights and liberties of the subject. (*Walmsley and Suhrawardy, JJ.*) BENOWARI LAL *v.* PRONAB KRISHNA. **35 Cal. L. J. 397 : 71 I. C. 516 : 26 C. W. N. 663 : 24 Cr. L. J. 164 : A. I. R. 1922 Cal. 569.**

———S. 144—*Procedure—Legality of order.*

If the effect of the order under S. 144 is that no Mahomedan would be allowed to say his prayers in the mosque, such an order is not justified under S. 144, Cr. P. Code The proper course that the Magistrate ought to follow is to find out which party is wrong and restrain that party from committing any act which may lead to a breach of the peace. (*Walmsley and Suhrawardy, JJ.*) HAJI MD. ISMAIL *v.* BARKAT ALI. **26 C. W. N. 904 : 71 I. C. 506 :**

CRIMINAL PROCEDURE CODE, S. 144.

24 Cr. L. J. 154 : A.I. R. 1922 Cal. 483.

——**S. 144**—*Disobedience of—Order—Legality of the order—If can be questioned in proceedings under S. 188 of the Penal Code.*

The legality of the order under S. 144 of the Code can be questioned in proceedings under S. 188 of the Penal Code taken against the accused for disobedience of the order. (*Newbould and Ghose, JJ.*) JIARATDIN MOHAMMED *v.* EMPEROR. **34 C. L. J. 578 : 67 I. C. 200 (1) : 23 Cr. L. J. 376.**

——**S. 144**—*Scope of—Magistrate passing order under—Whether a Court.*

A Magistrate passing an order under S.144, Criminal Procedure Code, is not acting as a "Court" and sub-section (7) of S. 195 is inapplicable to such a case. 6 M. 203 (F.B.); 14 W R. (Cr.) 46 Foll. and 35 M. L. J. 454, Diss.

Obiter : It is impossible that while securing orders under S. 144 from interference except by the successor of the Magistrate passing them or by some superior Magistrate, the Sessions Judge should have been given the power to render the order practically nugatory by declining to allow a prosecution for disobedience to it. (*Ayling and Ramesam, JJ.*) NATARAJA PILLAI *v.* RANGASWAMI PILLAI. **17 L. W. 409 : 72 I. C. 536 : 24 Cr. L. J. 424 : (1923) M. W. N. 240 : 32 M. L. T. (H. C.) 214 : A. I. R. 1923 Mad. 473 : 44 M. L. J. 328.**

——**S. 144**—*Revision—Suit for declaration and perpetual injunction—Questioning of the legality of the order—An order remains unaffected by the declaratory decree.*

If orders under S.144, Cr.P. Code, are illegal or *ultra vires*, the proper way to question them is by a Criminal Revision Petition to the High Court. It is possible to question their validity in a properly framed suit to which the Government and its officers are parties. The existence of the criminal orders justifies a refusal on the part of the Court to enquire into the civil rights of the parties. The orders under S. 144 would still remain in force unaffected by any declaratory decree. But such orders are always open to reconsideration by Government. (*Ayling, Offg. C. J. and Odgers, J.*) BABA SAH *v.* K. G. MD. HUSSAIN SAHIB.

15 L. W. 68 : 68 I.C. 180 : (1921) M. W. N. 867 : A. I. R. 1922 Mad. 123 : 42 M. L. J. 179.

——**S. 144**—*Effect of order—Declaration—Suit for—Order under S. 144 against the plaintiff—Plaintiff can sue for a declaration that he is entitled to use his property in any manner he pleases—Order under S. 144 furnishes cause of action for suit against defendants—Specific Relief Act, S. 42.*

Where the plaintiffs and the defendants are owners of adjacent properties and the defendants complained to the Police and obtained an order from a Magistrate under S. 144 of the Criminal Procedure Code preventing the plaintiffs from making use of their property by erecting certain buildings on the same, without notice to them or without an adjudication of the private rights of parties, it is open to the plaintiff to sue the defendants for a declaration that they are entitled to use their property as desired by them and for an injunction restraining the defendants from interfering with them in so doing; and the order under S. 144 of the Criminal Procedure Code is no bar to such suit.

The order under S. 144 would itself furnish the cause of action for the suit for declaration and injunction. (*Ayling, Offg. C. J. and Odgers, J.*) P. BABA SAH *v.* K. G. MAHOMED HUSSAIN SAHIB.

(1921) M. W. N. 867 : 15 L. W. 68 : 68 I. C. 180 : A. I. R. 1922 Mad. 123 : 42 M. L. J. 179.

CRIMINAL PROCEDURE CODE, S. 144.

——**Ss. 144 and 439**—*Time-expired order—Revision—No interference.*

Where an order passed by a Magistrate under S.144, Cr. P. Code, has expired by effluxion of time, the High Court would not adjudicate on the merits of the order or annul it in revision. 28 I. C. 160 Foll. 42 M. L. J. 352 Not Foll. (*Spencer, J.*) KUPPU ODAYAR *v.* POOMALAI GOUNDAN. **(1924) M.W.N. 675 : 82 I.C. 472 : 25 Cr. L. J. 1304 : A.I.R. 1924 Mad. 896: 47 M L. J. 439.**

——**S. 144**—*Scope.*

Where the Civil Court has passed an order of temporary injunction against one party, implying that, in its opinion, the petitioner has a *prima facie* right, it is the duty of Criminal Courts to repeat the opinions of Civil Courts and in taking steps to preserve peace, to take action only against those who are infringing the rights of others and protect those who wish to exercise their rights and not prohibit the latter's lawful enjoyment of rights. The High Court views with disapproval the use of S. 144 for anything of the nature of a permanent expedient. The word 'alter' in S. 144 (4), Cr P. Code, does not justify the substitution for or addition to the party against whom the original order is directed. Orders under S. 144 are void as mere extensions and can be valid only as fresh orders. 27 M. L. J. 628 : 3 Pat. L. J. 130, Foll. (*Ramesam, J.*) MURARI NAICKEN *v.* AIYASAMI.

16 L. W. 452 : 69 I. C. 369 : (1922) M. W. N. 612 : 23 Cr. L. J. 689 : A. I. R. 1923 Mad. 15.

——**Ss. 144, 145 and 146**—*Procedure—Preliminary order—Attachment—Restoration of property to one of the parties—Effect of.*

A Magistrate passed a preliminary order under S. 145 (1) and subsequently attached the properties under S. 145, sub-sec. (4). Eventually he refused to take evidence and dismissed the petition as unnecessary in view of a prior order under S.144, Cr. P. Code. At the same time he directed delivery of possession of the properties to one of the parties. *Held*, that the order must be set aside as illegal and without jurisdiction. (*Venkatasubba Rao, J.*) PALANI GOUNDAN *v.* KULANDAIVELU GOUNDAN.

(1922) M. W. N. 484 : 72 I. C. 541 : 24 Cr. L. J. 429 : A. I. R 1922 Mad. 437 : 43 M. L. J. 716.

——**Ss. 144 and 145**—*Procedure—Magistrate can rely on documentary evidence as to title.*

A Magistrate can rely on the documentary evidence as to title to corroborate the oral evidence as to possession, even if the oral evidence were not quite satisfactory. (*Kumaraswami Sastri, J.*) ADAIKHAN *v.* NALLAKARUPPAN. **15 L. W. 62 : 65 I. C. 853 : (1922) M. W. N. 12 : 23 Cr L. J. 197 : A. I. R. 1922 Mad 188 (2).**

——**Ss. 144 and 145**—*Scope—Dt. Magistrate can revise order on any ground—Government of India Act, S. 107.*

There is no reason why the power given in the 4th clause of the section should be confined to cases where there has been a change of circumstances since the original order was made. There is nothing in the wording of the 4th clause which limits the powers of the Magistrate in the sense indicated, and I can see no valid reason why words of limitation should be read into the section which would have the effect suggested. The words "alter or rescind" clearly empower the District Magistrate to modify or cancel the order upon any ground whatsoever.

Per *Mullick, J.*—Where S. 107 or S. 145 will meet the requirements of the case, S. 144 is not an appropriate remedy, and if it is found that the danger was

not so imminent that it could not be otherwise averted, an order under S. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another, whose claim to possession is a mere pretence, is threatening to interfere with that possession, the Magistrate is clearly entitled to resort to the special summary procedure of S. 144, if immediate prevention or speedy remedy is desirable. Sometimes it may even be necessary to take action against the party who is actually in possession, but in every case it must be shown that the conditions required by the section exist. What is deprecated is the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145.

Per *Jwala Prasad, J.*—S. 144 is a larger and more general section than S. 145. An order under that section can be made under various circumstances including a danger of a breach of the peace. S. 145 is of limited scope and applies only when there is a danger of a breach of the peace. The former is discretionary, the latter is mandatory. The latter provides for a thorough enquiry into the dispute as to possession of the parties which tends to a breach of the peace. Therefore when the special condition of S. 145 is fulfilled, S. 144 then yields to S. 145 in the sense that when he finds that there is a real dispute tending to a breach of the peace the Magistrate is bound to institute a proceeding under S. 145 and enquire into the possession of the parties irrespective of any order that he might have originally passed under S. 144. When one party is clearly in the wrong and threatens to usurp the rights of another, who is in actual possession of the land in dispute, the proper remedy is an order under S. 144 or S. 107, Criminal Procedure Code. (*Miller, C. J. Mullick and Jwala Prasad, JJ.*) SHEEBALAK SINGH *v.* KAMARUDDIN.

2 Pat. 94 : 3 Pat. L. T. 573 : 68 I. C. 149 : 4 U. P. L. R. (Pat.) 57 : 1 Pat. L. R. (Cr.) 2 : 1922 P. H. C. C. 241 : 23 Cr. L. J. 549 : A. I. R. 1922 Patna 435 (F.B.)

——**S. 144**—*Order under—Setting aside—Order need not be set aside after two months.*

An order under S. 144 being operative only for two months need not be set aside after the period of two months is over. (*Bucknill and Kulwant Sahay, JJ.*) MUNNI LAL *v.* GATTI AHIR. **3 Pat. L. R. (Cr.) 70 : 88 I. C. 845 : 26 Cr. L. J. 1229 : 6 Pat. L. T. 746 : A. I. R. 1925 Pat. 514.**

——**S. 144**—*Order under—Incidental observation as to possession has not force of order under S.* 145.

Where a Magistrate while making an order under S 144 makes an incidental observation as to possession of the property, the observation cannot have the force of an order under S. 145. (*Bucknill and Kulwant Sahay, JJ.*) MUNNI LAL *v.* GATTI AHIR.

3 Pat. L R. (Cr.) 70 : 88 I. C. 845 : 6 Pat. L.T. 746 : 26 Cr. L. J. 1229 : A. I. R. 1925 Pat. 514.

——**S. 144**—*Order under—Value of as evidence—Rioting—Penal Code, S.* 147.

Undue importance should not be attached to a temporary injunction under S. 144, Cr. P. Code, and in a case of rioting an order under S. 144, Cr. P. Code, should not be treated as substantive evidence of possession. (*Mullick and Bucknill, JJ.*) GITA PRASAD SJNGH *v.* EMPEROR. **1924 P. H. C. C. 29 : 5 Pat. L. T. 656 : 81 I. C. 535 : 25 Cr. L. J. 919 : A. I. R. 1925 Pat. 17.**

——**Ss. 144, 145 and 439**—*Dispute as to possession of land—Action of magistrate—Expiry of time fixed for order under S.* 144, *Cr. P. Code—Revision.*

Proceedings had been drawn up under S. 144, Cr. P. Code, between petitioners and one *H* and others regarding a plot of about 24 bighas of ryoti land which had newly formed on a *diara*. These proceeding under S. 144 were converted into proceedings under S. 145 and the parties gave the Court to understand that all they wanted was a demarcation of the plots respectively claimed. The opposite party in those proceedings stated that they did not claim the 24 bighas which was the subject of the proceedings. An amin was directed to go and demarcate the *diara* lands and eventually submitted a report which was not agreed to by one of the parties. A petition was put in by the opposite party that the present petitioners were interfering with their possession. The Sub-divisional Officer thereupon passed an order under S. 144 directing the petitioners not to interfere with the possession of the opposite party with regard to the plots. The petitioners applied to the High Court for revision of the order under S. 144, Cr. P. Code, but the order had expired by lapse of time. *Held*, that notwithstanding that the order had lapsed, the case was one for interference by the High Court in revision. The opposite party were not parties to the proceedings under S. 145 nor had any report been received from the police as to their possession of the plots or of a likelihood of a breach of the peace. The procedure of the Sub-Divisional officer in passing the final order under S. 144, Cr. P. Code, without issuing any preliminary notice to the present petitioners and without hearing them was totally wrong. (*Adami, J.*) DHANRAJ BHAGAT *v.* BHARAT NARAIN SINGH. **6 Pat.L. T. 253 : 84 I. C. 324 : 2 Pat. L. R. 198 (Cr.) : 26 Cr. L. J. 560 : A. I. R. 1924 Pat. 703.**

——**Ss. 144 and 145**—*Scope of—Dispossession to be forcible and wrongful.*

Where *L* was appointed managing agent for a colliery under certain conditions by *N* and was dismissed for misconduct and the landlord took direct possession, the dispossessed party instituted proceedings under Ss. 145 (4) and 144, Cr. P. Code, before the Magistrate which was dismissed. *held*, on revision, that dispossession under sub-section (4) of S. 145 should be forcible and wrongful and that Magistrates acting under Ss. 145 and 144 should not usurup the power of a Civil Court in the direction of ejecting the party in actual possession. (*Adami and Bucknill, JJ.*) H. V. LOW AND CO., LTD. *v.* MAHARAJA SRI MANINDRA CHANDRA NANDY. **3 Pat. 809 : 84 I. C. 332 : 26 Cr. L, J. 268 : A. I. R. 1925 Pat. 33.**

——**S. 144**—*Scope of—Jurisdiction.*

Under S. 144, Cr. P. Code, a magistrate has no jurisdiction to make any order unless he is satisfied there is an apprehension of a breach of the peace and that immediate prevention or speedy remedy is desirable. If he had made up his mind to that effect he must state the material facts in the order. The section should be applied only to temporary orders in urgent cases of nuisance or apprehended danger and not to cases where there is a dispute as to land for the settlement of which S. 145 provides the proper remedy. (*Kulwant Sahay, J.*) AKAL MAHTON *v.* MAHABIR MAHTON. **1 Pat. L. R. 223 (Cr) : 24 Cr. L. J. 947 : 5 P. L. T. 90 : 75 I. C. 531 : A. I. R. 1924 Pat. 145.**

——**S. 144**—*Revision—Order wholly without jurisdiction—High Court will interfere.*

Although under clause (4) of S. 144, Cr. P. Code, it is incumbent on the petitioners to go in the first instance before the District Magistrate before coming up in revision to the High Court and ordinarily that is the practice in the High Court, still the High Court will

interfere where the order of the Sub-divisional Magistrate is wholly without jurisdiction. A. I. R. 1922 Pat 435 (F. B.) Foll. (*Kulwant Sahay, J.*) AKAL MAHTON *v.* MAHABIR MAHTON. **5 P. L. T. 90 : 1 Pat. L. R. 223 (Cr.) : 75 I. C. 531 : 24 Cr. L. J. 947 : A. I. R. 1924 Pat. 145.**

——— **Ss. 144 and 145**—*Procedure—Order based on rent note—Evidence Act, S.* 13.

The rent decree is to some extent evidence under section 13 of the Evidence Act as to the landlord having recognised the holding as being in possession of the first party (deft.)but that evidence is not conclusive as against the second party in proceedings under S. 144 (who was not a party to rent proceeding). The order of the Magistrate under S. 144 based on the rent decree is good inasmuch as it was passed with a view to prevent a breach of the peace which is then imminent. The more appropriate action however would be for the Magistrate after hearing the parties to convert his order under S. 144 into a proceeding under S. 145 of the Code so as to, once for all, determine the right of the contending parties to the possession of the land in question, unless it has been already determined by a Civil Court. 1 P. L. T. 81 ; 1 P. L. T. 44, Ref. (*Jwala Prasad, J.*) NANDKISHORE SAO *v.* BIKAN SINGH. **3 Pat. L. T. 570 : 65 I. C. 856 : 23 Cr. L. J. 200 : A. I. R. 1922 Pat. 557.**

——— **S. 144**—*Scope of—No sufficient material—Order not valid.*

Petition of the petitioners whose goods were detained on the petition of the lessee of a certain ghat for action against certain persons for refusal to pay tolls did not disclose any ground for an order against them. The report of the police who were ordered to report as there was likelihood of breach of peace, according to which report the order complained against was drawn up gave the Magistrate no material for proceeding against three petitioners. There was in the body of the report a general remark about Marwaris in Murliganj : but certain persons were specially named at the end of the report and the Police Sub-Inspector prayed for proceedings against them. *Held*, the effect of the report must be understood as limiting its purpose to these named persons. The only other document is the petition of the lessee and this admittedly makes no reference to the petitioners at all. The Magistrate had no materials before him upon which he could make an order against petitioners. (*Ross, J.*) PANCHI RAM *v.* SHEIKH MD. ABDULLA. **A. I. R. 1922 Pat. 239.**

——— **Ss. 144, 107 and 145**—*Scope.*

It is well to indicate the relative value of the preventive Ss. 107, 144 and 145 of the Code in a dispute relating to property, where the first party claims to be in exclusive possession and the second party claims to be in joint possession. If the property is found to be in joint possession of both the parties, then no order under S. 145 can be passed and the danger to a breach of the peace by the contending parties with a view to exclude the other from the possession of the property in dispute can only be averted or avoided by binding both the parties or by binding both of them under S.107, for none of them has a right to exclude the other from joint possession. If, on the other hand, one of them is found to be in exclusive possession of the property then the other side can be restrained under S. 144 from interfering with the exclusive possession of the other party, and if possible by binding him down Unless the exclusive possession of one of the parties is undisputed or is admitted or is concluded by some decision of a competent Court, an enquiry into the claims of the parties as to exclusive or joint possession must be held. It is only when after an enquiry a decision is arrived at as to the possession of the contending parties, separate or joint, an order under S. 144 or 107 against one of the parties will not be justifiable. Such an order will prejudice the other party and will exclude him from the possession of the property whether exclusive or joint. No Court by its proceeding or order can allow such an advantage to one of the parties. Therefore in a dispute of this kind the danger to a breach of the peace can be averted by issuing a temporary order upon both the parties under S. 144 if the case is of urgency and holding an enquiry into the possession of the parties before confirming the order. The danger to a breach of the peace can also be averted by at once instituting a proceeding under S. 145 by attaching the property in dispute pending the enquiry. (*Jwala Prasad, J.*) RATAN CHAND *v.* MOHAN LAL SAHU. **A. I. R. 1922 Pat. 228.**

——— **Ss. 144 and 145**—*Scope—Distinction between.*

Under S. 144 no order can be passed where a question as to the *factum* of the delivery of possession is raised between the parties. The judgment-debtor and the members of his family, his Tahsildar and other servants and in fact those claiming under him have no right to dispute the delivery of possession if they were parties to the certificate and the sale proceedings ; but under-raiyats or intermediate holders of the land, not parties to the proceedings, in the property and the survey department which resulted in the sale of the property on the *dakhaldehani* had a right to dispute the actual service of the *dakhaldehani* on the spot. Where possession is publicly delivered with full notice, to all the persons in possession of the property, none of them are entitled to dispute the delivery of possession though they may be living some miles off. Though ordinarily a dispute of land should be enquired into in a proceeding under S. 145 of the Code of Criminal Procedure yet when the possession in the law is vested in the 1st party, as against any person claiming to be in possession of the property by reason of the writ of delivery of possession, section 145 is not at all necessary. There is no *bona fide* claim of possession of the 2nd party. In other words there is no dispute in law as to the possession of the property, S. 145 summarily determines the right to possession. Order 21, Rule 95 as well as the similar provision in the Bihar and Orissa Public Demands Recovery Act, actually puts the purchaser into possession of the property and a person claiming a right to the present possession of the property has either to move the Court delivering the possession or to go to the Civil Court. (*Jwala Prasad, J.*) KAMLA PRASAD *v.* GOBINDH SAHAY. **3 Pat. L. T. 826 : 71 I. C. 785 : 24 Cr. L. J. 241 : A. I. R. 1922 Pat. 13 (2).**

——— **Ss. 144 and 145**—*Scope of—Possession doubtful—Order by Magistrate* ultra vires—*If Magistrate can set aside.*

S. 145 and not S. 144 applies where the possession is disputed. A Magistrate has no jurisdiction to pass under S. 144 an order which amounts to an ejectment decree of a Civil Court. Where the order passed is *ultra vires* it cannot be set aside under sub-section (4) of that section but can be set aside in revision only by the High Court. (*Jwala Prasad, J.*) MADAN LAL *v.* EMPEROR. **2 Pat. L. T. 484 : 63 I. C. 621 : 22 Cr. L. J. 685.**

——— **S. 144**—*Procedure—Authority to act.*

In passing orders under S. 144, Cr. P. Code, the record should show in clear and unmistakable terms the authority under which a Magistrate taking action professes to act. (*May Oung, J.*) U THUDAMAWAYA

CR. P. CODE (V OF 1898), S. 144.

v. EMPEROR. **1 Rang. 49 : 74 I. C. 65 : 2 Bur. L. J. 22 : 24 Cr. L. J. 737 : A. I. R. 1923 Rang 146.**

——**S. 144 (1) and (2)**—*Object of—Statement of material facts—Restriction on liberty of individual—Vague order improper.*

Under S. 144, Cr. P. Code, something more is necessary to be done than a mere recital of the fact that in the opinion of the District Magistrate there was sufficient ground for proceeding under S. 144. When a Magistrate is of opinion that there is a sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by S. 134 direct any person to abstain from a certain act. An order as it stands which does not state any facts relating to the case in order to show that there was any justification for making the order under S. 144 is bad in law. S. 144, Cr. P. Code, is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. Nor does it relieve the Magistrate of the duty of making a proper enquiry into the circumstances which show a likelihood of breach of the peace. If it is found that a man is doing that which he is legally entitled to do and his neighbour chooses to take offence thereat and to create disturbance in consequence the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right but to restrain the second from illegally interfering with that exercise of legal right. 5 Cal. 132, Ref. (*Kulwant Sahay, J.*) BLONG *v.* EMPEROR. **1914 P. H. C. C. 262 : 82 I. C. 42 : 25 Cr. L. J. 1178 : A. I. R. 1924 Pat. 767.**

——**S. 144 (2)**—Ex parte *order—When to be passed.*

The object of S. 144, Cr. P. Code, is to provide a speedy and emergent remedy in case of disputes which are likely to lead to a breach of the peace. An *ex parte* order passed under S. 144 (2) can be revoked or altered as provided in sub S. 4. (*Wazir Hasan, A. J. C.*) JANG BAHADUR *v.* EMPEROR. **11 O. L. J. 54 : 77 I. C. 721 : 25 Cr. L. J. 433 : A. I. R. 1924 Oudh 338.**

——**S. 144 (3)**—*Public directed to abstain from attending* Hat—*Order is bad.*

An order can only be issued to the public generally when frequenting or visiting a particular place. An order which directs the public in general to abstain from attending *Hat* is bad since it is not until the public attends the *Hat* that the order can be binding on them. (*Newbould and Mukerji, JJ.*) ASHUTOSH ROY *v.* HARISCHANDRA. **29 C. W. N. 411 : 86 I. C. 810 : 26 Cr. L. J. 874 : A. I. R. 1925 Cal. 625.**

——**S. 144 (3)**—*General order—Stopping new Bazar to be held on the same day—When legal.*

Although a general order under S. 144 of the Cr. P. Code (V of 1898) restraining the holding of a *hat* or market is not a permissible order, the prohibition in which related only to the holding of the market on the same days as the old market is held with the object of preventing a breach of the peace is legal. 18 W. R. (Cr.) 47 and 22 C. W. N. 141, Foll. Disobedience of such an order is punishable under S. 188, I. P C., prosecution for which might start either by sanction under S. 195 or S. 476, Cr P. Code. 14 C. W. N. 234, Foll. (*Jwala Prasad, J.*) PARAMESWAR RAI *v.* EMPEROR. **3 Pat. L. T. 268 : 67 I. C. 205 : 1922 P. H. C. C. 204 : 23 Cr. L. J. 381 : 4 U. P. L. R. (Pat.) 34 : A. I. R. 1922 Pat. 84.**

CR. P. CODE (V OF 1898), S. 144.

——**S. 144 (4) and (5)**—*Revision.*

If the Magistrate tries to use S. 144 as a means of grant of perpetual injunction, the High Court has the power to interfere. The order is made without jurisdiction. (*Odgers, J.*) MUTHU KUMARASAMI NADAR *v.* MAHOMED ROWTHER. **15 L. W. 423 : 67 I. C. 500 : 30 M. L. T 148 : (1922) M. W.N. 177 : 23 Cr. L. J. 404 : A. I. R. 1922 Mad. 76 : 42 M. L. J. 352.**

——**S. 144 (4)**—*Scope of—'Alter' does not mean substitution of names.*

The word 'alter' in S. 144 (4), Cr. P. Code, cannot mean the substitution of the names of one party for those of the other. The District Magistrate, in going beyond altering or rescinding an order, acts without jurisdiction. (*Odgers, J.*) MUTHU KUMARASWAMI NADAR *v.* MAHOMED ROWTHER. **15 L. W. 423 : 67 I. C. 500 : 30 M. L. T. 148 : 23 Cr. L. J. 404 : (1922) M. W. N. 177 : A.I.R. 1922 Mad. 76 : 42 M. L. J. 352.**

——**Ss. 144 (4) and 145**—*Rescission—Special jurisdiction.*

There is neither revisional nor appellate jurisdiction in the Magistrate under S. 144, cl. 4, Cr. P. Code, but there is still a special jurisdiction vested in him by the statute to rescind or alter any order made under S. 144 either by himself or by a Magistrate subordinate to him or by his-predecessor-in-office. (*Das, J.*) SATRUHAN DAS *v.* MAKHAN DAS. **1 Pat. L. R. 53 (Cr.) : 72 I. C. 171 : 24 Cr. L. J. 331.**

——**Ss. 144 (4) and 145 (1)**—*Procedure—District Magistrate directing Sub-Divisional Magistrate to substitute proceedings under S. 145 in place of S. 141 case.*

A District Magistrate acts illegally in directing a Sub-Divisional Magistrate to substitute a proceeding under S. 145 (1) in lieu of that under S. 144 as under S. 145 (1) it is only the Magistrate who substitutes the proceedings that has to satisfy himself by exercise of his own independent judgment and upon proper materials, for example, police report, pleading of the parties, as to the existence of a reasonable apprehension of the peace. (*Jwala Prasad, J.*) TILOKI RAI *v.* EMPEROR. **2 Pat. L. T. 392 : 68 I. C. 34 : 23 Cr. L. J. 498.**

——**S. 144 (4)**—*Scope of—District Magistrate cannot reverse an order of the Magistrate—Proceedings started as ordered by the DistrictMagistrate* ultra vires.

Although under the provisions of S. 144 (4) it is open to the District Magistrate to rescind or alter any order made under the section by himself or any Subordinate Magistrate, the purview of that section has been held not to cover a reversal of an order on grounds which interfere with the discretionary power of the Magistrate who originally made the order but to comprise only the rescission or alteration of the order when the reason for its having been made no longer exists or has varied in such a manner as to make an alteration necessary as a corollary. "Even though on proper grounds the Dist. Magistrate may rescind or alter an order made by another Magistrate" under S. 144 it is not open to such Magistrate at all to direct that other Magistrate to initiate proceedings under S. 145, Cr. P. Code, and a proceeding started in obedience to such a direction is *ultra vires.* (*Bucknill, J.*) CHEDDI LALL MARWARI *v.* MAHABIR PRASAD SUKUL. **2 Pat. L. T. 650 : 64 I. C. 507 : 23 Cr. L. J. 27.**

——**S. 144 (6)**—*Second order same as first—Additional parties in second one—Total period exceeding two months—Order is illegal.*

CR. P. CODE (V OF 1898), S. 145.

The preiod during which an order under S. 144, Cr. P. Code, remains in force is two months only and it cannot be extended beyond that period by the Magistrate. To draw up the same order once more merely adding to the parties affected is an attempt to evade the provisions of clause (6) of S. 144, Cr. P. Code, and is illegal if the total period exceeds two months. (*Newbould and Mukerji, JJ.*) ASHUTOSH ROY *v.* HARIS CHANDRA. **29 C. W. N. 411 : 86 I. C. 810 : 26 Cr. L. J. 874 : A. I. R. 1925 Cal. 625.**

———S 145—Main Changes.

(1) The Court must now receive all such evidence as may be produced by the parties : *see* cl. 4 as amended. It must also issue summons to witnesses on the application of parties : *see* cl. 9—Ed.

(2) When a party is dead his legal representatives may be brought on record and if there is any dispute in respect of it, it must be inquired into.

———S. 145.

Applicability.
Arbitration.
Attachment.
Breach of Peace.
Consent.
Costs.
Decision of Revenue Court.
Decree of Civil Court.
Defects in procedure.
Dispute as to land.
"Due course of law," meaning of.
Duty of Magistrate.
Easement.
Effect of order.
Foundation of jurisdiction.
Fresh Proceedings.
Government of India Act.
Immoveable property.
Information.
Joint possession.
Large area.
Local inquiry.
Nature of proceedings.
Object of.
Order without notice.
Parties.
Pendency of civil suit.
Period of possession.
Power of Magistrate.
Relevancy of symbolical possession.
Relevancy of title.
Revision.
Security for keeping peace.
Transfer of case.
Transfer of Magistrate.
Value of Police Report.

Applicability.

———S. 145—*Applicability—Alluvial accretion — Breach of the peace—Jurisdiction of the Magistrate to take action—Bengal Act (V of 1920), S.3—Effect of—Examination of Court witness after close of arguments —Irregularity.*

It is open to the Magistrate in the case of alluvial lands recently formed, where questions of breach of the peace arise, to deal with the matter either under Act V of 1920 or under the provisions of S. 145, Cr. P. Code. There is no implied repeal of S. 145, Cr. P. Code, so far as alluvial lands recently formed are concerned by Bengal Act V of 1920. The mere fact that the Court examined a Court witness after the arguments on both sides does not furnish a ground for revision especially where neither party asked the Magistrate to allow further arguments to be addressed after such

CR. P. CODE (V OF 1898), S. 145—Applicability.

examination. (*Greaves and Duval, JJ.*) ABDUL JABBAR MUNSHI *v.* MAFIZUDDI SARKAR. **28 C. W. N. 783 : 25 Cr. L. J. 1107 : 81 I. C. 931 : A. I. R. 1924 Cal 980.**

———S. 145—*Applicability—One co-sharer can be held to be in exclusive possession.*

Where according to the settlement papers, the land in dispute is a joint property in which the petitioners were co-sharers ; but the Magistrate finds that one co-sharer was in sole possession of this land, *held*, the Court had jurisdiction to make an order under S. 145. (*Newbould and Suhrawardy, JJ.*) JOYMONGAL SINGH *v.* KANTAGOPE. **24 Cr. L. J. 304 : 72 I. C. 32 : A. I. R. 1924 Cal. 444.**

———S. 145—*Applicability of — Discontinuous possession—Market stalls—Possession once a week—Proceedings under S. 145, Cr.P. Code.*

The element of continuity of possession is an ingredient which is necessary at any rate in cases where interruption is not due to seasonal variations, in proceedings under S. 145, Cr. P. Code. S. 145 does not apply to a case where the petitioners claim possession of a market stall only one day in the week and the respondents are alleged to be in possession throughout the week. (*Walmsley and Suhrawardy, JJ.*) NAYAN MANJURI DASI *v.* FAZLEY HUQ SARDAR. **49 Cal. 871 : 71 I. C. 527 : 24 Cr. L. J. 175 : A. I. R. 1922 Cal. 502.**

———S. 145—*Applicability—Joint land, inquiry into possession of, not forbidden.*

The mere fact that the Revenue Records show that the holding was joint is not sufficient to stop the enquiry contemplated by S. 145, Cr. P. Code, 17 Bom. L.R. 382 and 20 C. W. N. 518, Foll. (*Broadway, J.*) MT MALUN *v.* MAKHAN SINGH. **2 Lah. 372 : 66 I. C. 65 : 23 Cr. L J. 225 : A. I. R. 1922 Lah. 348.**

———S. 145—*Applicability.*

S. 145 of the Code contemplates the existence of disputes regarding property likely to lead to a breach of the peace, and where all likelihood of a breach of the peace has disappeared all necessity ceases for maintaining any orders passed on account of the dispute. (*Wilberforce, J.*) KHUSHI RAM *v.* EMPEROR. **1 Lah. 451 : 59 I. C. 36 : 22 Cr. L. J. 4.**

———Ss. 145 and 144—*Applicability—Scope.*

Where the Magistrate merely stated that as proceedings were previously taken under Section 144 and incidentally in the course of those proceedings it was found that the counter-petitioners were in possession of the property, it was not desirable to proceed with the enquiry under S. 145. *Held*, the order the Magistrate clearly contravened the provisions of the Cr. P. Code. The order under S 145 is without jurisdiction when no evidence is taken and no enquiry held before the final order is made, by the Magistrate. 2 L. W. 1208 ; 17 Bom. L. R. 382 : 17 C. W. N. 700 Ref. to. (*Venkatasubba Rao, J.*) PALANI GOUNDAN *v.* KULANDAIVELU GOUNDAN. **(1922) M. W. N. 484 : 24 Cr. L. J. 429 : 72 I. C. 541 : A. I. R. 1922 Mad. 437 : 43 M. L. J. 716.**

———Ss. 145 and 147—*Applicability—Easement, Dispute as to.*

S. 147, Cr. P. Code, and not S. 145, applies to a dispute about an easement in respect of which action has to be taken. (*Kotval, A. J. C*) ASARAM *v.* CHOTULAL. **64 I. C. 288 : 22 Cr. L. J. 768 (Nag.).**

———S 145 (2)—*Applicability—No dispute as to possession—Co-sharers—Collection sexclusively by lambardar.*

Where the rents in kind are exclusively collected by the lambardar and the other co-sharers are only entitled to a certain share, the dispute about the shares

CR. P. CODE (V OF 1898), S. 145—Applicability.

of the co-sharers is not a dispute about possession which is admittedly with the lambardar, so as to make the provisions of section 145 applicable. The case does not come under cl. 2 as the words "crops or other produce of land" refer only to the crops or other produce while still attached to the land. (*Daniels, J. C. and Wazir Hasan, A. J C.*) EMPEROR *v.* RAM BHAJAN. **25 O. C. 137 : 23 Cr. L. J. 650 : 69 I. C. 90 : A. I. R. 1922 Oudh 199.**

——S. 145—*Applicability—Present danger of breach of peace is essential.*

An order under S. 145 can only be passed when there is a present danger of a breach of peace. In the absence of any finding that there is a likelihood of a breach of peace, an order under S. 145 cannot be sustained. It is not enough for the Magistrate to merely say that the parties are "in a contesting mood." (*Daniels, J. C.*) MUNNU LAL *v.* HARDE RAM. **12 O. L. J. 256 : 2 O. W. N. 220 : 86 I.C. 1008 : 26 Cr. L. J. 944 : A. I. R. 1925 Oudh 416.**

——S. 145—*Applicability — Dispute regarding the water channel.*

Where a water channel is actually being used for irrigation purposes, a dispute about the flow of water falls within S. 145, Cr. P. Code, but not so if it is not being used at the time of dispute. Where there is ample time to have dispute settled in a civil court, action under S. 145 is not justified. (*Dalal, J. C.*) CHOTEY LAL *v.* EMPEROR. **25 Cr. L. J. 227 : 76 I. C. 691 : A. I. R. 1924 Oudh 341.**

——S. 145—*Applicability — Moveables—Interference in revision.*

Proceedings under S. 145, Cr. P. Code, cannot be instituted with respect to moveables. (*Wazir Hasan, A. J. C.*) HIRA LAL *v.* EMPEROR. **11 O. L. J. 59 : 77 I. C. 728 : 25 Cr. L. J. 440 : A. I. R 1924 Oudh 331.**

——S. 145—*Applicability—Moveables.*

The Magistrate has no jurisdiction to order attachment of moveables under the section. (*Wazir Hasan, A. J. C.*) ARJUN SINGH *v.* CHANDAN KUAR. **24 O. C. 167 : 63 I. C. 321 : 22 Cr. L. J. 625.**

——S. 145—*Applicability— Dispute regarding land—Possession of one party confirmed--Procedure not followed—Validity of order.*

On a report from the Police recommending action under Ss. 144 and 145 a Magistrate directed the parties to appear before him and pending his orders ordered them not to go to the disputed land. When the parties appeared, he argued arguments passed in order that party *A* was in possession and directed party *B* not to interfere with the possession of the other party on pain of action under S. 107 being taken. *Held*, the order was in substance one under S. 145, but the due formalities not having been complied with, the order was illegal. (*Macpherson, J.*) HARBANS NARAIN SINGH *v.* MOHAMMAD SAYEED. **26 Cr. L.J. 1511: 90 I. C. 295.**

——S. 145—*Applicability—Co-sharers in separate possession of shares—Exclusive possession of disputed item claimed by either party—S. 145 applies.*

Where the joint owners of a lease of the right to collect rent of certain lands are actually in separate possession of certain shares of the right but there is a dispute as to the possession of a certain other share of which each party claims exclusive possession, S. 145 is applicable. The criterion in such cases is whether the parties claim exclusive possession. 5 All. 607, 23 Cal. 80, 10 C. W. N. 1088 and 36 Cal. 986, Dist. 27 Cal. 259, 17 M. L. T. 225, 1 P.L.T. 594 and A.I.R. 1923 Pat. 369, Foll. (*Macpherson, J.*) BASUDEO SINGH

CR. P. CODE (V OF 1898), S. 145—Arbitration.

v. MAHADEO LAL. **6 P. L. T. 454 : 88 I. C. 707 : 26 Cr. L. J. 1187 : A. I. R. 1925 Pat. 618.**

——S. 145 (iv)—*Applicability.*

Dispossession should be wrongful as well as forcible (*Adami and Bucknill, JJ.*) H. V. LOW AND CO., LTD. *v.* MAHARAJ SIR MUNINDRA CHANDRA NANDI. **3 Pat. 809 : 26 Cr. L. J. 268 : 84 I. C. 332 : A. I. R. 1925 Pat. 33.**

——S. 145—*Applicability—Scope of.*

S. 144, being of general application, should not be resorted to when S. 145 is sufficient to meet the requirements of a particular case. (*Miller, Mullick and Jwala Prasad, JJ.*) SHEOBALAK SINGH *v.* KAMARUDDIN MANDAL. **1922 P. H. C. C. 241 : 1 Pat. L. R. 22 (Cr.) : 23 Cr. L. J. 549 : 3 P. L. T. 573 : 68 I. C. 149 : 2 P. 94 : A. I. R. 1922 Pat. 435.**

——S. 145—*Applicability — Working of mines and minerals.*

If a party under a mining lease is in actual possession of the mines and minerals as profit *a prendre* they can enforce their possession not only by a civil suit but can claim to be maintained in their possession by an order under Sec. 145 of the Code of Criminal Procedure. Whatever difficulty might have been felt in the construction of the corresponding section in the Code of 1878 as to whether Sec. 145 can comprise a dispute relating to mines and minerals it is clear that the present section provides an explanation so as to remove any doubt whatsoever upon the point. No doubt is entertained upon the point that mines and minerals and the right to take mines and minerals can well be dealt with by an order under Sec. 145. But behind all this rests the fundamental idea in connection with Sec. 145 of positive physical possession. The question as to whether Sec. 145 is appropriate must be determined in the circumstances of each case. The proceeding drawn up under cl. (1) of Sec. 145 must be considered to be conclusive of the existence of a breach of the peace unless it were shown that the information upon which the proceeding is based does not in fact disclose any danger to a breach of the peace. (*Jwala Prasad, J.*) MAHADEO DUTT *v.* J. N. SARKAR. **1922 P. H. C. C 122 : 24 Cr. L. J. 263 : 71 I. C. 871 : A. I. R. 1922 Pat. 340.**

——S. 145—*Applicability--Order declaring possession.*

Where a Magistrate in passing an order under S. 145 makes a general remark that the evidence is not reliable without referring it or giving reasons it is not a disposal of the evidence upon record but amounts to refusal to exercise jurisdiction, liable to revision by High Court. An order declaring certain person to be in possession of property in dispute on the happening of a contingency is not one under S. 146, but under S. 145. (*Jwala Prasad, J.*) LACHMI OJHA *v.* BIRJA MISSER. **2 Pat. L. T. 168 : 63 I. C. 152 : 1921 P. H. C. C. 110 : 22 Cr. L. J. 616.**

——Ss. 145 and 107—*Applicability—No dispute as to possession--Effect.*

S. 145 does not apply where one party is clearly in possession and the other party wants to take forcible possession of it, as there is no dispute as to possession of the property within S. 145. The proper remedy is to take proceedings under S. 107 of the Code. (*Jwala Prasad, J.*) LACHMI SINGH *v.* EMPEROR. **1 Pat. L. T. 681 : 59 I. C. 374 : 22 Cr. L. J. 86.**

Arbitration.

——S. 145—*Arbitration—When can be had.*

If the parties to a proceeding under S. 145 privately refer the dispute to arbitration, and accept the

award by the arbitrator, the Magistrate would have ground for proceeding under S. 145 (5). Otherwise the Magistrate must himself take the evidence and decide the case himself. (*Teunon and Ghosh, JJ.*) JAMUNA DAS KUNWALA *v.* HANUMAN BAKSH MARWARI. **25 C. W. N. 719 : 63 I. C. 159 : 22 Cr. L. J. 623 : 33 C. L J. 338.**

——S. 145—*Arbitration—Reference to—Award—Scope of enquiry—Order of Magistrate embodying award—Legality of—Inclusion of larger area in final order—Legality of.*

The scheme of S. 145, Cr P. Code, is against the view that a reference to arbitration and the award thereon can be made the basis of an order of the Magistrate under S. 145, Cr. P. Code. It is for the Court to consider who was in possession at the date of the proceedings. The scheme of the enquiry is retrospective and not prospective. There might conceivably be certain instances in which the parties have agreed that the Court should refer the matter in dispute to arbitration for the purpose of deciding the question as to who is in actual possession at the time of the proceedings. A compromise can only be taken by the Magistrate as evidence for an order to be passed under S. 145 (5), Cr.P. Code, and cannot possibly be made the basis of an order passed under cl. (6). A magistrate has no jurisdiction to pass an order under S. 145 (6) in respect of land which was not referred to in the initiatory proceedings. 3 Pat. L. J. 248 : 32 C. 552 : 2 Pat. L. J. 86 : 15 C. W. N. 568, Ref. (*Adami and Foster, JJ.*) UTTIM SINGH *v.* JODHAN RAI. **3 Pat. 288 : A. I. R. 1924 Pat. 589.**

Attachment.

——S. 145 (4)—*Attachment of—Subject of dispute—House and moveables.*

Under S. 145, Cr.P. Code, a Magistrate has no jurisdiction to attach anything but land and its rents and profits. Consequently an order for the attachment of a house and moveables is *ultra vires.* (*Stuart, J.*) GAJRAJ SINGH *v.* EMPEROR. **20 A. L. J. 906 : 24 Cr. L. J. 85 : 71 I. C. 213 : L. R. 3 A. 189 (Cr.) : A. I. R. 1922 All 528 (1).**

——S. 145—*Proceedings under—Attachment and sale of crops during pendency of appeal—Proceedings dropped by agreement of parties—Jurisdiction to order amount to be paid out.*

Where proceedings initiated under S. 145, Cr. P. Code, are dropped by consent of parties on the ground that there was no further likelihood of a breach of the peace, the Magistrate has no jurisdiction to direct the payment out of the sale proceeds of attached crops to one of the parties. The amount has to be kept in Court pending decision by a competent civil court on the rights of parties. (*Beasley, J*) NATESA NAICKEN *v.* RAGHAVACHARIAR. **20 L. W. 924 : 26 Cr. L. J. 512 : 85 I. C. 256: A. I. R. 1925 Mad. 327.**

——Ss. 145 (5) and 146—*Attachment—Order of, when justified.*

It should be held as a very important principle in cases under S. 145 Cr. P. Code, that a Magistrate should be extremely reluctant to attach the property in dispute. Where the land is admittedly subject year by year and season by season to cultivation, it is his duty to collect and sift the evidence and come to a conclusion as regards possession. (*Foster, J.*) RAM BAHAL SINGH *v.* RANG BAHADUR SINGH. **5 Pat. L. T. 589 : 82 I. C. 367 : 25 Cr. L. J. 1295 : A. I. R. 1924 Pat. 804.**

——S. 145—*Attachment—Proceedings not actually drawn up—Order is* ultra vires.

A Magistrate has no jurisdiction to direct the attachment of the disputed lands and to settle them with any person for the purpose of cultivation when no proceedings under S. 145 had actually been drawn up (*Das, J.*) JAMNA PRASAD *v.* MOHAN KOERI. **2 Pat. L. T. 724 : 64 I. C. 848 : 23 Cr. L. J. 64.**

Breach of peace.

——Ss. 145 and 435—*Breach of peace—Likelihood of—No finding as to—Revision.*

Even though there is no express finding as to the likelihood of a breach of the peace in the order made by a Magistrate under S. 145 of the Cr. P. Code, yet where the notice shows that the Magistrate was satisfied that there was a serious dispute between the parties and in consequence he issued the notice and in the judgment it appeared that there was a quarrel between the parties with reference to the possession of several plots of lands, it could not be said that the proceedings were not proceedings contemplated by S. 145 of the Cr. P. Code. Consequently, the High Court should not interfere in revision. (*Ryves, J.*) BABUA SINGH *v.* ANGNU KEWAT. **66 I. C. 527 (1) : L. R. 3 A. 65 (Cr.) : 23 Cr. L. J. 303 : A. I. R. 1922 All. 31 (1).**

——S. 145 (1)—*Breach of peace—Evidence of—Police report—Statement of parties.*

Where there is no police report the statement of interested parties as regards the existence of a breach of the peace must be received with great caution, but if a Magistrate has reason to believe such a statement it cannot be said that he acts without jurisdiction in taking proceedings under the section. (*Newbould and Suhrawardy, JJ.*) JOYMANGAL SINGH *v* KANTA GOPE. **72 I. C. 32 : 24 Cr. L. J. 304 : A. I. R. 1924 Cal. 444.**

——S. 145—*Breach of peace—Finding need not be recorded in final order.*

The finding of breach of peace is necessary for the purpose of the preliminary order, when a Magistrate assumes jurisdiction, but once he is satisfied that there is an apprehension that peace will be broken, it is unnecessary that he should record a finding to that effect again when passing his final order. (*Abdul Quadir, J.*) GANGA RAM *v.* MURAD SHAH. **73 I. C. 519 : 24 Cr. L. J. 631 : A.I. R. 1923 Lah. 253.**

——S. 145—*Breach of peace—Scope of section.*

S. 145 contemplates the existence of disputes regarding property likely to lead to a breach of the peace, and where all likelihood of a breach of the peace has disappeared all necessity ceases for maintaining any orders passed on account of the dispute. (*Wilberforce, J.*) KHUSHI RAM *v.* EMPEROR. **1 Lah. 451 : 59 I. C. 36 : 22 Cr. L. J. 4.**

——S. 145—*Breach of peace—Magistrate can drop proceedings once started if he finds no likelihood of breach of peace—S.* 145 (5) *does not take away this jurisdiction—After proceedings are dropped no further order can be passed by the Magistrate.*

Proceedings under S. 145 are not taken in the interests of private parties but for the preservation of the public peace and if the Magistrate is satisfied that the likelihood of the breach of the peace either did not exist or that it has ceased to exist, it is the proper duty of the Magistrate to drop proceedings under S. 145 and withdraw from interfering with the rights of parties in the property. 30 Cal. 112, Rel. on ; 20 L. W. 58, Foll. Clause (5) of S. 145 provides for a special case where as the Magistrate is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The

CR. P. CODE (V OF 1898), S. 145—Breach of Peace.

existence of this clause does not take away the power of the Magistrate himself to drop proceedings if he is satisfied that there is no further likelihood of the breach of the peace. But after he drops the proceedings under S. 145 he is *functus officio* and has no jurisdiction to pass any further orders in the case, *e. g.*, with regard to the delivery of possession of the attached property to either party. He must leave the parties to settle their rights in the manner they think best to do, in the meanwhile holding his hands. 1 L. W. 1032 and A. I. R. 1925 Mad. 327, Foll ; A. I. R. 1923 Mad. 472, Not Foll. (*Krishnan, J.*) NARASAYYA *v.* C. VENKIAH. **22 L. W. 524 : (1925) M. W. N. 192 : A. I. R. 1925 Mad. 1252 : 49 M. L. J. 784.**

——S. 145—*Breach of peace likely—Magistrate not making the fact clear in his order—Interference by High Court in revision is not necessary.*

Where there was evidence that both parties were attempting to cultivate the land, the sowings of one party having been ploughed up by the other, *held* : that this was likely to cause a breach of peace, and the mere fact that the Magistrate had not made this clear in his order did not justify the High Court in interfering in revision. 12 C. P. L. R. (Cr.) 2 Ref. (*Baker, J. C.*) RAMCHANDRA *v.* GANPAT. **26 Cr. L. J. 1035 : 89 I. C. 923 : A. I R. 1925 Nag. 448 (2).**

——S, 145—*Breach of peace— Enquiry—Evidence—Police report.*

Under S. 145, Cr. P. Code. a Magistrate has no jurisdiction to make an enquiry as to possession, still less any final order, unless and until he is satisfied of the likelihood of a breach of the peace and it is absolutely essential that the fact and grounds of his being so satisfied should appear in his first order directing the issue of a notice, and the grounds stated must be such as to satisfy a Court of revision before which the case may be brought by any of the parties concerned. 12 C. P. L. R. 2 (Cr.) Foll. The Police report and the personal talk to parties and personal inspection of the land in dispute are not grounds justifying an order under S 145, Cr. P. Code. (*Kotval, A. J. C.*) ASARAM *v.* CHOTULAL. **64 I. C. 288 : 22 Cr. L. J. 768 (Nag.).**

——S. 145—*Breach of peace—Finding as to, is not necessary in final order.*

The law does not require the Magistrate to record an express finding in his judgment that a breach of the peace was imminent. Such a finding in respect of the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order. (*Wazir Hasan, A. J. C.*) MT. MUQIM-UN-NISA *v.* MT. AHMAD-UN-NISA. **2 O. W. N. 704 : A. I. R. 1925 Oudh 605.**

——S. 145—*Breach of peace—Likelihood of a—Jurisdiction of Magistrate to draw up proceedings.*

The Magistrate in order to assume jurisdiction under S. 145, Cr. P. Code, has to satisfy himself about the likelihood of a breach of the peace. He is to exercise his own judgment upon the materials placed before him, and to arrive at a conclusion as to whether upon the material placed before him there was a likelihood of a breach of the peace. He would not be justified in acting merely upon the expression on an opinion by the police, and if by exercising his own independent judgment he came to the conclusion that there was a likelihood of a breach of the peace he in entitled to act under the section. If in the proceedings so drawn up in the office a reference is made to the police report and to the petition of the second party which documents stated that there was no likelihood of a breach of the peace that will not by itself take away the jurisdiction of the Magistrate to initiate proceedings under S. 145, if he was satisfied that there was a likelihood of a breach of the peace. (*Kulwant Sahay, J.*). GANGA BISHUN SINGH *v.* RAJO CHAUDHURI. **1924 P. H. C. C. 83 : 5 Pat. L. T. 252 : 26 Cr. L. J.133 : 83 I. C. 693 : A. I. R. 1924 Pat. 787.**

CR. P. CODE (V OF 1898), S 145—Decision of Revenue Court.

——S. 145—*Breach of peace.*

When there is real danger to a breach of the peace in dispute relating to property proceedings under S. 145 should be instituted by attaching the property in dispute. (*Jwala Prasad, J.*) RATANCHARIND *v.* MOHAN LAL. **A. I. R. 1922 Pat. 228.**

——S. 145—*Breach of peace—No likelihood of a—Duty of Magistrate.*

If a magistrate does not think there is any likelihood of a breach of the peace, he is in duty bound to refuse to proceed. A magistrate is justified in applying S. 145 only when he anticipates that unless he interferes there will be a breach of the peace. The person on whose information he is asked to act is not in the position of a complainant. Procedure to be followed laid down. (*Kennedy, J. C. and De Souza, A. J. C.*) MOOLYAMAL TOPANDAS *v.* ALI MAHOMED JADOW. **89 I. C. 309 : 26 Cr. L. J. 1333.**

Consent.

——S. 145—*Consent—Enquiry under—Evidence—Agreement to dispense with oral evidence—Recent decree of Civil Court—Effect on Criminal Court.*

As the Magistrate is required in disputes under S. 144, Cr.P. Code, to come to a conclusion on the fact of actual possession at the date of order or two months prior to it, an agreement between the parties to get the case decided on documents or without adducing evidence of possession is outside the scope of the section. Where however there is a decree of a Civil Court in execution of which possession has been recently delivered, the Criminal Court is bound thereby. The Criminal Court must uphold a recent delivery of possession by the Civil Court. (*Adami, J.*) MAHARAJA PRATAP UDAI NATH SAHAI DEO *v.* BHAIAIN SUNDERBANS KOER. **3 Pat. L. T. 628 : 71 I. C. 999 : 24 Cr. L. J. 279 : A. I. R. 1923 Pat. 76.**

Costs.

——Ss. 145 and 439—*Costs—Power of High Court to award costs in revision against proceedings under S. 145.*

The High Court can award costs of a revision petition against an order under S. 145 of the Cr. P. Code (*Fawcett and Madgavkar, JJ.*) BAI JIBA *v.* CHANDULAL AMBALAL. **27 Bom L. R. 1353.**

——Ss. 145 and 439—*Costs—Power of High Court to award costs of revision proceedings.*

The High Court has no power to award costs incurred before it on the hearing of a criminal revision case against an order passed under Ch. XII of the Cr. P. Code, 45 Mad. 913, Foll. (*Spencer, O. C. J., Kumaraswami Sastri and Krishnan, JJ.*) VEERAPPA NAIDU *v.* AVUDAYAMMAL. **48 Mad. 262 : 86 I. C. 147 : 26 Cr. L. J. 707 : 21 L. W. 688 : A. I. R. 1925 Mad. 438 : 48 M. L. J. 106 (F. B.).**

Decision of Revenue Court.

——Ss. 145, 146 and 435 (3)—*Decision of Revenue Courts—Land Revenue Act. S. 40.—Revision.*

Revision will lie against an order under S. 146 releasing a property from attachment on the finding under S. 40, U. P. Land Revenue Act, in mutation proceedings if Revenue Courts have no power to declare who is entitled to possession. (*Ashworth, J. C.*) SURENDRA BIKRAM SINGH *v.* EMPEROR. **25 O. C. 242 :**

CR. P. CODE (V OF 1898), S. 145—Decree of Civil Court.

73 I. C. 153 : 24 Cr. L. J. 537 : A. I. R. 1922 Oudh 300.

Decree of Civil Court.

——S. 145—*Decree of Civil Court—Possession—Decree—Revision.*

In a proceeding under section 145, Cr. P. Code, the Magistrate cannot go behind the decision of the Civil Court in the matter. It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court. When the decree is *inter partes* it is immaterial whether the delivery of possession is symbolical or not. In disregarding this delivery of possession the Magistrate acts with gross irregularity and in a manner that is likely to cause a failure of justice. (*Newbould and Suhrawardy, JJ.*) ABHOY MONDAL *v.* BABU RAI. **37 C. L. J. 256 : 27 C. W. N. 267 : 73 I. C. 53 (2) : 24 Cr. L. J. 517 (2) : A. I. R. 1923 Cal. 176 (1).**

——S 145—*Decree of Civil Court—Possession, delivery of, to decree-holder—Dispossession outside two months.*

In execution proceedings terminating in actual possession of the property being delivered on 16th May 1920 to the decree-holder auction-purchaser, the heirs and representatives of the judgment-debtor were impleaded as parties. On the finding of the Magistrate, that on the date when the proceedings under S. 145 were instituted and for more than two months preceding that date, the members of the first party had been, and were in possession. *Held*, possession could not be given to the auction-purchaser the second party under S. 145. (*Teunon and Suhrawardy, JJ.*) SHAHABAJ MANDAL *v* BHAJAHARI NATH. **49 C. 177 : 25 C. W. N. 743: A. I. R. 1922 Cal. 364.**

——S. 145 (4)—*Decree of Civil Court—Possession on date of preliminary order not found—Possession found on a date prior thereto—Presumption of continuance of possession—Order confirming possession.*

Where in a proceeding under S. 145 of the Code, 1898, the Magistrate found one party to have been in possession a few days before the date of the preliminary order and confirmed his possession without finding who was in possession on the date of preliminary order itself but the interval between the two dates was very short only 5 days and there was nothing on the record to suggest that there was any change of possession in that short interval and the party confirmed in possession had a decree of a competent Civil Court declaring him entitled to possession, *Held*, that the High Court was not bound to vacate the order. It would be the duty of a Magistrate to maintain the possession of the party, who had a decree of a competent Court and who was put in possession in execution. 5 C. W. N. 563 : 6 C. W N. 841, Foll. (*Kumaraswamy Sastri, J.*) MAHOMED HUSSAIN SAHIB *v.* PACHAYYAPPA CHETTY. **14 L. W. 678 : 23 Cr. L. J. 92 : (1921) M. W. N. 866 : 65 I. C. 444 : A. I. R. 1922 Mad. 356 : 42 M. L. J. 147.**

——S. 145 (5)—*Decree of Civil Court—Incidental decision by any Court does not cause cessation of dispute.*

The existence of a decision incidentally arrived at by a Criminal Court, or for the matter of that, even by a Civil Court, does not *per se* cause a cessation of the dispute between the parties as to possession. (*Jwala Prasad, J.*) ABDUL SHAKUR *v.* ABU SAYEED. **26 Cr. L. J. 870 : 86 I. C. 806 :A. I. R. 1925 Pat. 593.**

——S. 145—*Decree of Civil Court—Effect of Civil Court's order regarding possession.*

In possession proceedings under S. 145, Cr. P. Code, the Magistrate must be guided by the order of a Civil Court given about that time dealing with the possession of the parties. (*Bucknill, J.*) DURGANAND OJHA *v.* HIRANAND OJHA. **25 Cr. L. J. 88 : 76 I. C. 24 : A. I. R. 1924 Pat. 711 (2).**

——S. 145—*Decree of Civil Court—Inquiry as to possession—How made—Title questions and validity of decrees.*

Objections as regards the validity or otherwise of the decree or the proceedings to annul the encumbrance which gives rise to the dispute are matters beyond the scope of an enquiry in a proceeding under section 145. Although a Magistrate in deciding the question of possession under section 145 of the Code is not in every case bound by the previous order of a Civil Court or Criminal Court relating to the possession of the subject-matter of dispute and the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case, yet when there is a recent order of a Civil Court delivering possession to a particular party that order ought ordinarily to be respected and given effect to by a Magistrate under section 145, unless and until there is something shown which might induce the Magistrate to hold that subsequent to the delivery of possession something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court. A.I.R. 1922 Cal. 364 ; 33 Cal. 33 and 1 P.L.J. 336 Cons. (*Kulwant Sahay, J.*) RAMBARAI RAI *v.* SAGINA RAI. **4 Pat. L. T. 333 : 75 I. C. 363 : 24 Cr. L. J. 939 : A. I. R. 1923 Pat. 437.**

——S. 145—*Decree of Civil Courts—Value of.*

It is true that a Magistrate in proceedings under S. 145 is bound to maintain the decisions as to title passed, and possession delivered by a Civil Court in execution of its decree, if such possession has been given within a reasonable time from the initiation of the proceedings under section 145. But this is not an invariable rule and the evidentiary value to be attached to the fact that the Civil Court has given possession to one party must depend upon the particular circumstances of the particular case. 33 Cal. 33 Foll. (*Adami, J.*) KEDAR NATH *v.* JALESWAR RAM. **4 Pat. L. T. 248 : 1 Pat. L. R. (Cr.) 166 ; 72 I. C. 883 (2) : 24 Cr. L. J. 467 (2) : A. I. R. 1923 Pat. 364.**

——S. 145—*Decree of Civil Court—Possession disputed—Decree of Civil Court and proceedings under S. 145 giving possession—Magistrate's duty.*

Where in spite of the decree of a Civil Court declaring title and giving possession to the first party and also in spite of an order in appeal of High Court to that effect under S. 145, Cr. P. Code, the Magistrate on the ground that second party was not a party to the previous proceedings and that the dispute was not the same declared them to be entitled to claim possession and gave it : *Held*, when under cl. 3 proceedings under cl. 1 of S. 145 are published by affixing at a conspicuous place or near the subject-matter in dispute and this sufficient notice is given to persons interested in the subject-matter in dispute to come forward to be made parties to the proceedings, the proceedings are binding upon the whole world. As far as the Magistrate is concerned, the question of possession is thus set at rest once for all and thereafter he should maintain the order by taking action under Ss. 107 and 144 as the case may be against persons interfering with the possession of the party declared by the Magistrate to be in possession. The possession wa effectively delivered by the Civil Court to the first part and the only course open to persons, other than th judgment-debtors, was to apply under section 100

CR. P. CODE (V OF 1898), S. 1.5—Decree of Civil Court.

the Code and thereafter to institute regular suit. The subject-matter in dispute being the same in the new as well as in the previous proceedings that in itself is sufficient ground to set aside the order of the Magistrate. (*Jwala Prasad, J.*) RAGHUNANDAN PANDEY *v.* KISHIN MOHAN SINGH. **A. I. R. 1922 Pat. 210.**

——S. 145—*Decree of Civil Court—Survey entry—No oral evidence—Legality.*

Where in the absence of oral evidence the Court decided the case upon the documentary evidence, namely, the Record-of-Rights, the High Court will not interfere. By delivery of possession by a Civil Court in a partition suit, the part-proprietor is not estopped from setting up a claim of tenancy in the land allotted exclusively to another proprietor by the mere fact that the Civil Court in the partition suit delivered possession to another. (*Jwala Prasad, J.*) PATHAKJAIRAM SINGH *v.* THAKUR DOMAN SINGH. **2 Pat. L. T. 266.**

Defects in procedure.

——**Ss. 145 and 435 (3)**—*Defects in procedure—Omission to state likelihood of a breach of the peace—Revision—Power of the High Court.*

Where proceedings are in intention, in form and in fact, proceedings under Chap. XII of the Cr P. Code by a Magistrate duly empowered to act under that chapter, the High Court has no power to send for those proceedings or to revise them. The mere omission by a Magistrate to state that he was satisfied from the police report there was a likelihood of a breach of the peace is not a fatal defect. (*Gokul Prasad, J.*) MT. HAR PIARI *v.* NATHE LAL. **18 A. L. J. 1140 : 22 Cr. L. J. 97 : 2 U. P. L. R. (A.) 428 : 59 I. C. 401 : L. R. 2 All. 22 (Cr.).**

——S. 145—*Defect in procedure—Judgment of Magistrate—Reasons for decision not given—Fresh enquiry.*

When a Magistrate makes an order under S. 145, Cr. P. Code, declaring possession to be with one party and there is nothing to show how the Magistrate had approached the question or how he had considered the evidence which was before him the High Court will direct the case to be reopened and a fresh enquiry to be made. The High Court is entitled in proceedings under S. 146 to require from the Trying Magistrate a statement of the reasons for his decision sufficient to enable it to determine whether he has or has not complied with S. 145, sub-S. 4, Cr P. Code, and whether he has directed his mind to the consideration of the effect of the evidence adduced. (*Greaves and Panton, JJ.*) MOTHAHER ALI JAMADAR *v.* ESHAQUE SIKDAR. **39 C. L. J. 366 : 25 Cr. L. J. 1115 : 81 I. C. 939 : A. I. R. 1924 Cal. 848.**

——**Ss. 145 and 435**—*Defects in procedure—Proceedings without jurisdiction—Can be interfered with in revision.*

The omission to pass an order under S. 145 (1) of the Cr. P. Code stating that the Magistrate is satisfied of the existence of a dispute likely to cause a breach of the peace is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section, the proceedings are without jurisdiction and cannot be regarded as proceedings under S. 145 of the Cr. P. Code. Accordingly S. 435 (3) of the Cr. P. Code, does not preclude the High Court from entertaining an application for revision in such a case. (*Martineau, J.*) HAKAM *v.* RALIA RAM. **4 Lah. 66 : 74 I. C. 79 : 24 Cr L. J. 751 : A. I. R. 1924 Lah. 91.**

CR. P. CODE (V OF 1898), S. 145—Defects in Procedure.

——S. 145—*Defects in procedure—Dispute as to several items of property—Lumping items together—Legality.*

A decision under S. 145 should not be arbitrary but should be arrived at after giving each of the disputants an opportunity of being heard. A decision arrived at in the absence of parties or either of them is illegal. Where a dispute embraces several items of property, they may be lumped together in a single enquiry provided the disputants are the same for each item. In other cases the Magistrate would have no jurisdiction to decide the question of possession of a number of items after only hearing the parties claiming possession of one or two of them. The Magistrate's failure to record his reasons for thinking that there is a danger of the breach of the peace though a serious irregularity, does not affect his jurisdiction. (*Ayling and Coutts-Trotter, JJ.*) VELU MALAVARAYAN *v.* KUPPUSAWMY PILLAY. **12 L.W. 315 : 59 I. C. 378 : 22 Cr. L. J. 90.**

——S. 145—*Defects in procedure—Proceedings are not* ultra vires *because some parties in possession are unlikely to cause breach of peace—Some parties filing compromise can be put into possession—Not every error vitiates proceedings—Mutation order does not affect order under S.* 145.

In S. 145 the words "parties concerned in such disputes" include all persons claiming to be in possession and merely because some of those parties are unlikely to cause a breach of the peace, the proceedings under the section are not without jurisdiction. For questioning the validity of proceedings under the section there must be proof of want of jurisdiction in the strictest sense of the term. The result of the proceedings will not be invalidated by any and every error and a radical defect must be established corrupting the whole proceedings before their jurisdiction can be questioned. The mere fact that some of the parties file a compromise does not prevent the Magistrate from putting such parties into possession although, had the compromise been filed by all the parties and had there been no longer any dispute. It might be held that the Magistrate's jurisdiction had ceased and that he was only empowered to cancel the proceedings under cl. 5 of S. 145. In so far as a Magistrate's order in proceedings under S. 145 limits the period within which a Civil Suit may be brought by any of the parties, an order in mutation proceedings does not affect the Magistrate's order under S. 145 because an order in mutation proceedings is not a final decision as to ownership. (*Kendall and Pullan, A. J. Cs.*) ABADI BEGAM *v.* MIRZA AHMAD MIRZA BEG. **11 O. L. J. 757 : 82 I. C. 691 : A. I. R. 1925 Oudh 190.**

——**S. 145 (1)**—*Defects in procedure—Order not in terms of the section—Order in the handwriting of the Reader of the Court—Breach of the peace not clearly stated—Proper order.*

Where a Magistrate did not prepare an order as required by S. 145 (1) but an order was really passed and was in the handwriting of the Reader of the Court and did not specifically state that there was a danger of the breach of the peace. *Held*, that it will not be equitable to set aside the order because of the deficient knowledge of the law of the Magistrate and the best order would be to direct him to take proceedings under Chap. XII if he is satisfied of a breach of the peace. (*Dalal, J. C.*) RAM BHUSAN DAS *v.* RAM LAKHAN SAHU. **1 O. W. N. 701 : 85 I. C. 918 : 26 Cr. L. J. 630 : A. I. R. 1925 Oudh 484.**

CR. P. CODE (V OF 1898), S. 145—Defects in procedure.

——S. 145, sub-S. 3—*Defect in procedure—Absence of notice does not oust jurisdiction nor does notice, though irregular, vitiate the proceedings.*

Omission to publish the notice under sub-section 3 is not fatal to the Magistrate's jurisdiction, under the section. Nor does a notice without the grounds or without specifying the land in dispute, though irregular, vitiate the proceedings particularly where the parties perfectly knew the property in dispute. (*Kendall, A. J. C.*) PARBHU DAYAL *v.* EMPEROR.
25 Cr. L. J. 1139 : 81 I. C. 963 : A. I. R. 1925 Oudh 152.

——Ss. 145 and 439—*Defect in procedure—Enquiry—Finding as to possession—Finding based on evidence in another case.*

Finding as to possession based on evidence in another case is not a finding based on legal evidence. (*Kanhaiya Lal, J. C.*) MIRZA RAZA HUSSAIN *v.* MEHDI HASAN. **10 O. L. J 157 : 69 I. C. 268 : 23 Cr. L. J. 684 : 25 O. C. 148 : A. I. R. 1922 Oudh 256.**

——S. 145—*Defects in procedure.*

The present case was prolonged from day to day. The Magistrate examined the witnesses in chief and postponed their cross-examination till after the first party had closed its case. When the cross-examination of one of the witnesses of first party had to be resumed the second party did not appear in time. The Magistrate then disposed of the case *ex parte* holding that the evidence adduced by the first party was sufficient to prove its possession over the lands in question. *Held*, the order was wrong. (*Jwala Prasad and Coutts, JJ.*) MOTI SINGH *v.* DHANUKDHARI.
24 Cr. L.J. 595 : 73 I. C. 339 : A. I. R. 1923 Pat. 53.

——S. 145—*Defects in procedure—Revision—Review by Deputy Magistrate* ex parte, *legality of.*

A complaint was lodged as to the possession of certain property and the Sub-Divisional Magistrate made an enquiry, heard evidence and made an order purporting to be under S. 145. He found that the proceedings under S. 145 were no longer necessary as there had been no breach of the peace during the four months previous to the proceedings. He found actual possession in favour of the first party and ordered the crops to be delivered to them. On the second party applying for review to District Magistrate, he set aside the order of the Sub-Divisional Magistrate and ordered the crops to be delivered to the second party. *Held*, although the procedure followed by the Sub-Divisional Magistrate was irregular and was not according to the procedure as laid down by S. 145, Cr. P. Code, he must be considered to have contemplated the proceedings to be under S. 145, Under the circumstances, it was not open to the Deputy Commissioner to review the Sub-Divisional Magistrate's decision, in any case to do so *ex parte*, and the order of the Deputy Commissioner should be set aside. Further *held* that the order of Sub-Divisional Ma5istrate was not passed on proper procedure and it must be set aside. (*Bucknill, J.*) JAGU PAL *v.* MAKUNDA KOER. **A. I. R. 1922 Pat. 449.**

——S. 145—*Defects in procedure—Irregularity—Mis-stating of evidence—Effect.*

Where the Magistrate's order was attacked on the ground that the amended proceedings were incorrect with respect to the names of the parties and the subject-matter, and the kucha receipts relied upon by the Magistrate related only to a few of the claimants and could not therefore be evidence as regards possession of the large body of the members who claimed specific and separate lands in dispute and who had no community of interest and lastly on the ground that there was a mis-statement of evidence. *Held* : on the facts proved, the Magistrate's order must be vacated. (*Jwala Prasad, J.*) MT. RAM RATAN KUAR *v.* TARAKH NATH. **A. I. R. 1922 Pat. 249.**

CR. P. CODE (V OF 1898), S 145—" Dispute as to land.

——S. 145 (4)—*Defects in procedure—Refusal to issue summons—If vitiates proceedings.*

It is not obligatory on a magistrate to assist the parties to a proceeding under S. 145, Cr. P. Code to produce their witness and they cannot claim as a matter of right that process should be issued by the Court. 32 Cal. 1096 ; 38 Cal. 24 foll. The refusal to issue such summons does not mean a denial of a fair trial. (*Ross, J.*) ARJUN MAHTON *v.* JUGGARNATH SINGH.
3 Pat. L. T. 433 : 66 I. C. 419 : 23 Cr. L. J. 275 : A. I. R. 1922 Pat. 226.

——S. 145—*Defects in procedure—Failure to serve a copy of the preliminary order and failure to post the order on the land are curable by S.* 537.

Where the Magistrate failed to serve a copy of the preliminary order under S. 145, clause 1 and to post the order on the land, *Held* : that these were irregularities curable by S. 537. (*Carr, J.*) MAUNG MAUK *v.* MAUNG PO YIN. **3 Rang. 169: A. I. R. 1925 Rang. 270.**

——S. 145 (1)—*Defect due to not making order in writing as required by S.* 145 (1) *is curable under S.* 537.

Where the Magistrate did not make an order in writing as required by S. 145 (1), *held*, that S. 537, Cr. P. Code, is sufficient to cure this defect. (*Carr, J.*) MG. PO LON *v.* MG. BA ON.
3 Bur. L. J. 256 : 26 Cr. L. J. 324 : 84 I. C. 548 (1) : A. I. R. 1925 Rang. 111 (2).

——Ss. 145 (2) and 107—*Dispute regarding right to perform puja and take offerings to idols—Whether amounts to " right of user of any land " within the meaning of the sub-section.*

The dispute between the parties was with regard to the right to go upon the temple, to perform the puja and take a portion of the offerings to the idol. There was no dispute as regards the temple or any land belonging to the idol. *Held*, that such a right cannot be said to be a right of user of any land as provided in S. 145, sub-sec. (2), Cr. P. Code, and that the dispute cannot be considered to be one coming under the provisions of that section. *Held*, further, if there is such a dispute between the parties leading to a breach of the peace, proceedings may be drawn up under S. 107, Cr. P. Code. (*Walmsley and Ghose, JJ.*) SURENDRA NATH *v.* SHOSHI BHUSAN. **42 C. L. J. 127 : 52 Cal. 959.**

Dispute as to land.

——S. 145—*Dispute as to land—Proceedings should be under S.* 145 *and not under Cr. P. Code, S.* 107.

While it is discretionary with the Magistrate to draw up proceedings under S. 107, the proper course when there is a *bona fide* dispute as to lands is to proceed under S. 145. Otherwise the effect would be to bind down one of the parties only to the dispute without any adjudication upon the question as to which of the two parties is in possession. 1922 Patna 435 (F. B.) Ref. and Foll. 32 Cal. 966 and 7 C. W. N. 746. Dist. (*Sen, J.*) SHAMA CHARAN *v.* EMPEROR.
1925 P. H. C. C. 263 : 6 Pat. L. T. 766 : 90 I. C. 442 : 26 Cr. L. J. 1562 : A. I. R. 1925 Pat. 610.

——S. 145—*Disputes relating to possession of immoveable property—Opportunity to parties to produce evidence.*

Under S. 145, Cr. P. Code, proper opportunity

CR. P. CODE (V OF 1898), S. 145—" Due course of law " meaning of.

should be given to the parties to produce their evidence. A Magistrate is entitled to initiate proceedings under S. 145 if he receives information from any source that there was a likelihood of a breach of the peac) relating to possession of immoveable property. (*Kulwant Sahay, J.*) GOURI SHANKER *v.* COLLECTOR OF MUZAFFERPUR. **6 Pat. L. T. 215 : 3 Pat. L. R. 127 (Cr.) : 26 Cr. L. J. 965 : 87 I. C. 421 : A. I. R. 1925 Pat. 553.**

" Due course of law " meaning of.

——S. 145 (4) Pro. 1—*Due. Course of law—Wrongful dispossession—What is—Forcible when.*

A dispossession otherwise than in due course of law, is wrongful. To make it a forcible dispossession intimidation enough to frighten those in possession from resisting the dispossession is sufficient. There need not be actual force or violence used. (*Teunon and Ghose, JJ.*) SITA NATH *v.* HARVEY. **63 I. C. 333 : 25 C. W. N. 601 : 33 C. L. J. 353 : 22 Cr. L. J. 637.**

Duty of Magistrate.

——S. 145 (4)—*Duty of magistrate—Magistrate must give reasons for his decision.* (*Cuming, J. dissenting*).

Per *Buckland, J.*—Whether Ss. 366 and 367 do or do not apply to proceedings under S. 145, magistrate must give a statement of the reasons for the decision sufficient to determine whether he has or has not complied with sub-S. (4) of S. 145 and directed his mind to the consideration of the effect of the evidence adduced before him. To what extent a Magistrate should state the reasons cannot be laid down by a general rule, but, provided he states the reasons so as to enable the High Court to appreciate and deal with the case in revision, a degree of brevity which would be out of place in a judgment to which S. 367 applies would not necessarily be open to objection. Per *Cuming, J.* The law does not require that the Court should give reasons for the decision in a proceeding under Chap. 12. (*Suhrawardy, Cuming and Buckland, JJ.*) ISHAN CHANDRA SAMANTA *v* HRIDOY KRISHNA. **41 C. L. J. 357 : 29 C. W. N. 475 : 26 Cr. L. J. 915 : 86 I. C. 979 : A.I.R. 1925 Cal. 1040.**

——S. 145—*Duty of magistrate—Evidence—Absence of—No order can be made.*

A Magistrate has no jurisdiction to make an order under S. 145, Cr. P. Code without any evidence being adduced before him. (*C. C. Ghose and Cuming, JJ.*) HATEMALI CHAPRASI *v* OSIMADDI. **73 I. C. 814 : 24 Cr. L. J. 702 : A. I. R. 1924 Cal. 544 (2).**

——S. 145—*Duty of Magistrate—Judgment—Omission to record reasons for decision—Proceedings under Ss. 366 and 367.*

Whether Ss. 366 and 367 do or do not apply to proceedings under S. 145 the Magistrate has to give reasons for his decision sufficient to enable the High Court to determine whether he has complied with the terms of sub-section (4) and directed his mind to the consideration of the evidence adduced and whether in making his final order he has acted within or without jurisdiction. The statement of reasons, that a certain number of witnesses had been heard and that the oral and documentary evidence of both parties had been considered in the light of the arguments addressed, is not sufficient. (*Teunon and Suhrawardy, JJ.*) BHUBAN CHANDRA HAZRA *v.* NIBARAN CHANDRA SANTRA. **49 Cal. 187 : 25 C. W. N. 887 : 34 C. L. J. 125 : 62 I. C. 323 : 22 Cr. L. J. 499 : A. I. R. 1922 Cal. 382 (1).**

——S. 145—*Duty of Magistrate—Final order, Cr. P. Code, Ss. 366 and 367—Contents of the order.*

CR. P. CODE (V OF 1898), S. 145—Duty of magistrate.

The final order under S. 145 should contain the reasons which led the Magistrate to that decision, irrespective of the question whether Ss. 366 and 367 apply, so that the Superior Court may be able to determine whether he has complied with S. 145 (4), whether he has properly considered the evidence adduced and whether he has acted with or without jurisdiction. (*Teunon and Suhrawardy, JJ.*) BHUBAN CHANDRA HAZRA *v.* NIBARAN CHANDRA SANTRA. **25 C. W. N. 887 : 34 C. L. J. 125 : 62 I. C. 323 : 22 Cr. L. J. 499.**

——S. 145—*Duty of Magistrate—Time to produce evidence must be given.*

An order refusing adjournment for production of documentary evidence regarding possession under S. 145 of the Code, is arbitrary and liable to be set aside. (*Teunon and Ghose, JJ.*) BISWAMBHAR ROY *v.* AMINUDDI. **25 C. W. N. 602 : 61 I. C. 63 : 33 C. L. J. 507 : 22 Cr. L. J. 335.**

——S. 145—*Duty of Magistrate—Finding as to dispute, whether necessary in the final order.*

Section 145 does not require the Magistrate to give in his final order, a finding that there is a likelihood of a breach of the peace. After he has made an order in writing under sub-section (1) the only matter which he has to determine is the question of the possession of the disputed property. (*Martineau, J.*) JHANDO RAM *v.* TOPAN RAM. **67 I. C. 584 : 4 U. P. L. R. (Lah) 82 : 23 Cr. L. J. 424 : A. I. R. 1922 Lah. 454.**

——S. 145—*Duty of Magistrate—Scope.*

It is the duty of the Magistrate to complete the inquiry and to pass final orders under S. 145, Cr. P. Code where proceedings have once been started under it and a preliminary order passed. (*Ramesam, J.*) VIRAPPA *v.* KATHAYEE AMMAL. **16 L. W. 592 : 71 I. C. 112 : 24 Cr. L. J. 64 : A. I. R. 1923 Mad. 180 (2).**

——Ss. 145 and 537—*Duty of Magistrate—Possession case—Judgment—Contents of.*

A magistrate after holding an enquiry under S. 145, Cr. P. Code instead of pronouncing a judgment with reasons for his conclusion merely passed an order in these terms " counter-petitioner is declared to be put in possession of the lands described hereunder ; fill up schedule form accordingly." A printed form was filled up declaring counter-petitioner to be in possession. *Held*, that the order of the magistrate was without jurisdiction and that he ought to have written a Judgment giving a finding as to the possession of the property on the date of the preliminary order. 18 M. 41 : 49 C. 187 Ref. (*Venkatasubba Rao, J.*) PERIA SUBBA GOUNDAN *v.* SINNA SUBBAYYA GOUNDAN. **16 L. W. 701 : 31 M. L. T. 382 (H. C.) : 69 I. C. 158 : 23 Cr. L. J. 670 : A. I. R. 1923 Mad. 142 : 45 M. L. J. 56.**

——S. 145 (4)—*Duty of Magistrate—Possession under a decree of Court, shortly prior to a preliminary order—Vacation of the order.*

It is the duty of a Magistrate to maintain the possession of the party who has a decree of a competent Court and who was put in possession in execution. Where such a party is found to be in possession a few days before the preliminary order under S. 145 of the Code and where there is nothing on the record to suggest any change of possession, the High Court will not vacate the order in revision. (*Kumaraswami Sastri, J.*) MAHOMED HUSSAIN *v.* PACHAYAPPA. **(1921) M. W. N. 866 : 14 L. W. 678 : 65 I. C. 444 : 23 Cr. L. J. 92 A. I. R. 1922 Mad. 356 : 42 M. L. J. 147.**

CR. P. CODE (V OF 1898), S. 145—Duty of magistrate.

——S. 145—*Duty of Magistrate under S. 145, Cr. P. Code, is to determine what parties are concerned in the dispute—He is not deprived of the jurisdiction under S.145 though some parties only are concerned.*

It is the initial duty of a Magistrate in a proceeding under S. 145 to find out what parties are concerned in the dispute that has arisen and he should also determine which parties are in actual possession. The proceedings under S. 145 are not without jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute ; 5 C. W. N. 900 and 30 Cal. 155, Foll. (*Findlay, O. J. C.*) NARAYAN *v.* CHANDRA BHAGA.

26 Cr. L. J 1289 : 89 I. C. 153 . A. I. R. 1925 Nag. 457 :

——S. 145—*Duty of Magistrate—Dispute Bona-fide—Magistrate should proceed under S. 145.*

Where the Magistrate finds that there is a *bona fide* dispute between the parties he ought to initiate proceedings under S. 145, 1922 Patna 435 (F.B.) and 4 Pat. L. W. 354 Foll.

Where the presumption of the record of rights and of the partition papers was in favour of the petitioners, and the police report was in favour of the opposite party :

Held : that there was clearly a case in which there was a *bona fide* dispute between the parties as regards possession. (*Bucknill and Kulwant Sahay, JJ.*) MUNNI LAL *v.* GATTI AHIR.

3 Pat. L. R. (Cr.) 70 : A. I. R. 1925 Pat. 514.

——S. 145—*Duty of Magistrate.*

It is incumbent upon Magistrates to dispose of proceedings under S. 145 as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained section. The procedure for the trial of a case under S. 145 is that laid down for the trial of summons cases where witnesses are examined, cross-examined, and re-examined, and then discharged. The Magistrate is wrong in treating the case as if it was a warrant case. (*Jwala Prasad and Coutts, JJ.*) MOTI SINGH *v.* DHANURDHARI.

24 Cr L. J. 595 : 73 I. C. 339 : A. I. R. 1923 Pat. 53.

——S. 145—*Duty of Magistrate—Proof of possession—Title of first party—No other proof, wanted.*

If the first party shows that the land in dispute is within the boundaries of the land leased to him and if on the oral evidence he establishes possession, it is immaterial that the land was subsequently lease to the second party. Moreover the Magistate is bound to decide on a consideration of the lease of the first party itself, whether the disputed land was within the land leased to the first party, he is not entitled to go outside that document in order to interpret its terms. (*Coutts and Das, JJ.*) LACHMI NARAIN *v.* MUKHORAM MARWARI. **A. I. R. 1923 Pat. 31.**

——S 145—*Duty of Magistrate—Proceedings passed—Long after hearing—Case struck off—Propriety of.*

Proceedings under S. 145, Cr. P. Code were initiated in May 1922. The proceedings were amended upon a report from the police and fresh proceedings were drawn up in 7th August 1922. The case was allowed to hang on from August 1922 up to June 1923. Witnesses were examined on certain dates and then the case was postponed from time to time to examine further witnesses. The witnesses were examined at long intervals and although arguments were heard no order was passed for about 10 months. The Magistrate apparently forgot all about the case until he

CR.P.CODE (V OF 1898), S. 145—Duty of Magistrate.

was reminded of it when he was going away on transfer. He then hurriedly disposed of the case by an order of the 27th March 1924, striking off the proceedings on the ground that there would be no likelihood of a breach of the peace after such a long interval. *Held*, that the order of the Magistrate was not justified, by any provision of law. It is highly desirable that once the hearing is commenced and witnesses are examined, the hearing should go on from day to day until all the evidence is taken and argument is heard and then the order should be passed as soon as possible. (*Kulwant Sahay, J.*) SASTU SAHU *v.* NATHUNI THAKUR.

1924 P. H. C. C. 231 : A. I. R. 1924 Pat. 689.

——S. 145—*Duty of Magistrate.*

It was incumbent on the Magistrate to make the enquiry and to take such evidence as the parties offered irrespective of the fact that one or other of the parties failed to put in a written statement. The Magistrate would not be justified in refusing to proceed with the case because the parties neglected to file a written statement on the date fixed ; he has to take evidence if offered by any of the parties and to decide the case upon such evidence. The basis of a proceedings under S. 145, Cr. P. Code is not the written statement but the police report or other information from which the Magistrate is satisfied about the fact of the likelihood of a breach of the peace.

If no written statement is put in, the Magistrate is bound nevertheless to hear the parties and take the evidence produced by them. The non-filing of the written statement does not take away the jurisdiction of the Magistrate to make an order in his favour. (*Kulwant Sahay, J.*) MT. RAMJAHRIA *v.* PIAR KOERI. **4 Pat. L. T. 308 : 73 I. C. 173 : 2 Pat. L. R. 6 (Cr.) : 24 Cr. L. J. 557 : A. I. R. 1923 Pat. 369.**

—— S. 145—*Duty of Magistrate—Discussion of oral and documentary evidence necessary.*

The judgment in a case under S. 145 should form the basis for a discussion of the entire evidence in the case both oral and documentary. Documents relating to possession cannot be ignored altogether. It depends upon the circumstances of each case whether the rejection of, or omission to consider documents or evidence would amount to refusal to exercise proper jurisdiction. (*Jwala Prasad, J.*) HANUMAN SINGH *v.* SHEO CHANDRA SINGH. **2 Pat. L. T. 333.**

——S. 145—*Duty of Magistrate—Cancellation of order—Procedure.*

When an order under S. 145 is to be cancelled on the ground that no dispute likely to cause breach of peace exists, the Magistrate cannot revive the proceedings. He can start fresh proceeding only on fresh material. An enquiry into question of possession should be as full as that in a summons case, entitling each party to adduce evidence. The final order in such a proceeding ought to declare the party in whose favour possession is declared. A mere warning to the opposite party not to interfere with the possession of the other is not enough. (*Jwala Prasad, J.*) KHUBI SINGH *v.* DARBARI MAHTON. **2 Pat. L. T. 267 : 1921 P. H. C. C. 167 : 62 I. C. 177 : 22 Cr. L. J. 481.**

——S. 145—*Duty of Magistrate—Finding as to dispute.*

A Court has no jurisdiction to take any action under the section without recording a preliminary finding as to dispute or to ignore the procedure under the section. (*Pratt, J.*) NGA PO TIN *v.* NGA PO SOUNG.

1 R. 53 : 2 Bur. L. J. 32 : 74 I. C. 68 24 Cr. L. J. 740 : A. I. R. 1923 Rang. 211.

CR. P. CODE (V OF 1898), S. 145—Effect of order.

Effect of order.

——— S. 145—*Effect of order—Agra Tenancy Act, Chapter 5—Ejectment proceedings—S. 145 Cr. P. Code applies.*

An order under S 145, Cr. P. Code does not bar at suit for ejectment under tbe Agra Tenancy Act. The expression "eviction in due course of law" in S. 145, Cr. P. Code is equally applicable to ejectment proceedings under chapter 5, Agra Tenancy Act and to ejectment under a Civil Court decree. (*Daniels, J.*) IQBAL AHMAD *v.* SURAJ BALI.

82 I. C 651 : A. I. R. 1925 All. 210.

——— S. 145, Cl. 6—*Effect of order—Unsuccessful lessee can sue for mesne profits without suing in ejectment.*

An order under S. 145 (6) declares the party found to have beenin possession of the property at the date of the notice to be entitled to possession thereof until evicted therefrom in due course of law. This does not mean that the successful party is thereby entitled as of right, to the property in defeasance of whatever legal title there may be existing in favour of the rightful owner. The party who was unsuccessful can therefore sue for mesne profits without suing in ejectment. (*Spencer and Devadass, JJ.*) MD. SHAMSGOYA ROWTHER *v.* OMANDU PILLAI.

18 L. W. 649 : (1923) M. W. N. 779 : 76 I. C. 76 : A. I. R. 1924 Mad. 224.

——— S. 145—*Effect of order—Strangers to proceedings are not bound by order under S. 145.*

Persons not parties to the proceedings are not bound by order under S. 145, which is not against them, and their remedy is not by application in revision against the order. (*Baker, J. C.*) RAMCHANDRA *v.* GANPAT.

26 Cr. L. J. 1035 : 87 I. C. 923 : A. I. R. 1925 Nag. 448.

——— S. 145—*Effect of order—Order under S. 145 does not always result in dispossessing any one party.*

The proposition cannot be comprehensively laid down that in every case where an order under S. 145, Cr. P. Code has been made, the necessary consequence is the actual dispossession of the unsuccessful party. (*Wazir Hasan, J. C.*) MAHESH SINGH *v.* KING EMPEROR. **11 O. L. J. 743 : 84 I. C. 942 : A. I R. 1925 Oudh 251.**

——— S. 145—*Effect of order—Finality of.*

Until superseded by an order of a competent Civil Court an order under S. 145 of the Code is final. (*Daniels, A. J. C.*) EMPEROR *v.* BANDI DIN.

24 O. C. 21 : 22 Cr. L. J. 384 : 61 I. C. 240.

——— Ss. 145 (6) and 146—*Effect of order—Proceedings under—Difference between—Civil suit.*

The provisions of S. 146 are different from those of S. 145 (6). An order under S. 145 (6) entitles the successful party to possession till he is evicted therefrom in due course of law. When there is an attachment under S. 146, the plaintiff who comes to court after attachment has to show the court he has rights in the lands and is entitled to possession. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) HARGOBIND RAI *v.* KESHWA PRASAD SINGH. **1924 P.H.C.C. 297 : A. I. R. 1925 Pat. 168.**

——— S. 145—*Effect of order—No presumption against loser.*

A decision in proceedings under section 145, Cr. P. Code, does not throw the onus on the loser in those proceedings. The decision in proceedings under section 145, Cr. P. Code. is not of such a nature as to give rise to a presumption in the Civil Court in favour of the winning party in those proceedings. (*Adami, J.*) MT. GANTRA KOER *v.* ALIGJAN.

71 I. C. 478 : A. I. R. 1923 Pat. 401.

CR. P. CODE (V OF 1898), S. 145—Foundation of Jurisdiction.

——— S. 145—*Effect of order—Possession.*

Where a party fails to take the step under Section 37 of the Bihar and Orissa Public Demands Recovery Act or rule 103 of order 21, Cr.P. Code, the next remedy is to file a suit in a civil court. But subject to the result of the suit, the order is final and conclusive and is binding upon the criminal court and in fact any court which has to adjudicate upon the possession of the parties. (*Jwala Prasad, J.*) KAMLA PRASAD *v.* GOBIND SAHAY. **3 Pat. L. T. 826 : 24 Cr. L. J. 241 : 71 I. C. 785 : A. I. R. 1922 Pat. 13 (2).**

——— Ss. 145 and 360—*Evidence of witness must be read over to him—Presence of parties to proceeding is unnecessary.*

Per *majority of the F.B.*—The provisions of S. 360, Cr. P. Code, apply to proceedings under S. 145, Cr. P. Code, to this extent at least, that as the evidence of each witness is completed it must be read over to him. But the parties to the proceedings are not "Accused" and their attendance at the reading over is not necessary.

Per *Cuming, J.*—The expression "accused" in S. 360 cannot and does not include the parties referred to in Chapter XII, neither does the section contemplate that in cases coming under Ch. XII, so much of the section must be complied with as relates to the reading over of the evidence to the witnesses.

Per *Mukerji and Chakravarthi, JJ.*—The word "accused" has been used in S. 360, Cr. P. Code, in its wider significance as including not merely persons accused of offences before a Criminal Court but also persons against whom proceedings are instituted under the Cr. P. Code, in any such Court. The provisions of the section are therefore applicable to a proceeding held under S. 145, Cr. P. Code, and the said provisions should, if practicable, be applied in their entirety to such proceedings. If, however, a party or the parties to the proceedings do not care to attend or appear by pleader at the reading over of the deposition, so much of the provisions as it is possible to apply should be complied with. (*Walmsley, Greaves, Cuming, Mukerji and Chakravarthi, JJ.*) NARENDRA CHANDRA *v.* SUBBARAYALLI. **52 Cal. 721: 41 C. L. J. 479 : 29 C. W. N. 701 : 26 Cr. L. J. 1194 : 88 I. C. 714 : A. I. R. 1925 Cal. 822 (F. B.).**

——— S. 145—*Evidence recorded behind the back of a party—Review of order—Power of Court.*

Where an order under S. 145 is based on evidence recorded at a time when one of the parties was not on the record at all, it is wholly illegal. An order passed by a magistrate dropping certain persons as unnecessarily made parties cannot be reviewed by him. It is the initial duty of a magistrate in a proceeding under S. 145, Cr. P. Code, to find out what parties are concerned in the dispute and he should also determine who is in actual possession. The proceedings are not without jurisdiction merely because some of the parties are concerned only with possession of a portion of the lands in dispute. (*Findlay, O. J. C.*) NARAYAN *v.* CHANDRABHAGA. **89 I. C. 153 (2) : 26 Cr. L. J. 1289 (2) : A. I. R. 1925 Nag. 457.**

Foundation of Jurisdiction.

——— S. 145—*Foundation of jurisdiction—Different plots of land—Different parties interested—Single proceedings—Legality of.*

Proceedings under S. 145, Cr. P. Code, are not without jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute. To require a magistrate to hold separate proceedings in respect of each plot of land claimed by

CR. P. CODE (V OF 1898), S. 145—Foundation of Jurisdiction.

each of the ryots would be to require him to undertake what would be almost impossible from the intricate character of such proceedings. The jurisdiction of the Magistrate would depend on the nature of the information, on which he has acted. If the dispute so brought to his notice is one likely to cause the breach of the peace, it would be impossible to characterise his proceedings as without jurisdiction, because in the course of the judicial enquiry subsequently held the claim of some of the parties related only to particular plots of land out of the entire area in question. (*Newbould and Suhrawasdy, JJ.*) RAJANI KANTA ROY *v.* SHAMSHER ALI SHEIKH. **71 I. C. 699 : 24 Cr. L. J. 235 (Cal.) : A. I. R. 1924 Cal. 539.**

——S. 145—*Foundation of jurisdiction—Apprehension of breach of the peace.*

The apprehension of a breach of the peace is the first condition necessary to give a Magistrate jurisdiction under S. 145, Cr. P. Code, and if it is found there is no longer any such apprehension, the jurisdiction ceases, and he is bound to cancel the initial order and stay all further proceedings under clause (5). (*Newbould and Suhrawardy, JJ.*) MAHOMED KHANDU SARKAR *v.* SADAKALI SHEIKH. **38 C. L. J. 284 : 76 I. C. 963 (1) : 25 Cr. L. J. 291 (1) : A. I. R. 1923 Cal. 577.**

——S. 145—*Foundation of jurisdiction—Provisions not complied with—Order passed is one without jurisdiction.*

S. 145 (1) requires that a Magistrate has to satisfy himself "that a dispute likely to cause a breach of peace exists concerning any land" and has then to "make an order in writing, stating the grounds of his being so satisfied." Failure to comply with the provision makes the Magistrate's order without jurisdiction. (*Broadway, J.*) SHERKHAN *v.* DR. FAZAL ILLAHI. **7 Lah. L. J. 173 : 88 I. C. 601 : 26 Cr. L. J. 1177 : 26 Punj. L. R. 187 : A. I R. 1925 Lah. 368.**

——S. 145 (1)—*Foundation of Jurisdiction—Failure to make initial order vitiates proceedings.*

Under S. 145 (1) it is first of all essential that the Magistrate should be satisfied that a dispute likely to cause a breach of the peace exists and that he should make an order in writing stating the grounds of his being satisfied. Omission to pass an order under sub-S. (1) is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section the proceedings are without jurisdiction and cannot be regarded as proceedings under S. 145. (*Martineau, J.*) HAKAM *v.* RALIA RAM AND SUNDAR DAS. **4 Lah. 66 : 74 I. C. 79 : 24 Cr. L. J. 751 : A. I. R. 1924 Lah. 91.**

——S. 145—*Foundation of jurisdiction—Essentials necessary.*

The essential requisite to give a Magistrate jurisdiction under S. 145 Cr. P. Code is that he must be satisfied of the existence of a dispute. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure and not jurisdiction. The Magistrate need not give a finding in his final order as to the likelihood of a breach of the peace after making an order under S. 145 (1). The only matter he has to determine is the question of the possession of the disputed property. Revisional powers of the High Court in proceedings under Ch. XII considered. (*Martineau, J.*) JHANDA RAM *v.* TOPAN RAM. **4 U. P. L. R. (Lah.) 82 : 67 I. C. 584 : 23 Cr. L. J. 424 : A. I. R. 1922 Lah. 454.**

CR P. CODE (V OF 1898), S. 145—Foundation of Jurisdiction.

——S. 145—*Foundation of jurisdiction — No breach of peace—Property attached—Magistrate cannot order delivery of property to one party—He should retain it in his custody pending Civil Court's decision.*

Where a Magistrate attaches in cases of emergency the property which is the subject of dispute under S. 145 and after recording evidence adduced by the parties to the proceeding comes to the conclusion that there is no danger of a breach of the peace and on that ground files the proceedings he has no jurisdiction to direct that the attached property should be delivered to one of the parties to the proceeding. In such a case the proper order is to direct that the property should remain in his custody and management pending decision of a Civil Court on the question of title. 48 Cal. 522 (S.B.) and 1 L.W. 1032 Foll. (*Wadegaonkar, A. J. C.*) DASHRATH *v.* TARACHAND. **8 N. L. J. 69 : 89 I. C. 514 : 26 Cr. L. J. 1378 : 21 N. L. R. 191 : A. I. R. 1925 Nag. 297.**

——S. 145—*Foundation of jurisdiction taken away—Magistrate cannot act.*

If, during a proceeding under the section, circumstances arise which take away the initial jurisdiction of the Magistrate, the jurisdiction must cease and anything done after that is without jurisdiction. (*Wazir Hasan, A.J.C.*) ARJUN SINGH *v.* CHANDAN KUAR. **24 O. C. 167 : 63 I. C. 321 : 22 Cr. L. J. 625.**

——S. 145—*Foundation of—Jurisdiction—Non-joinder or misjoinder of parties does not affect jurisdiction.*

The question of misjoinder of parties does not ordinarily affect jurisdiction. It is a question of procedure by which jurisdiction is not affected, whether a party has been wrongly included or excluded. (*Macpherson, J.*) NANDAN SINGH *v.* SIARAM SINGH. **89 I. C. 151 : 26 Cr L. J. 1287 : A. I. R. 1926 Pat. 67.**

——S. 145—*Foundation of jurisdiction—Likelihood of a breach of the peace—Jurisdiction of Magistrate to draw up proceedings.*

The Magistrate in order to assume jurisdiction under S. 145, Cr. P. Code, has to satisfy himself about the likelihood of a breach of the peace. He is to exercise his own judgment upon the materials placed before him, and to arrive at a conclusion as to whether upon the material placed before him there was a likelihood of a breach of the peace. He would not be justified in acting merely upon the expression of an opinion by the police, and if by exercising his own independent judgment he came to the conclusion that there was a likelihood of a breach of the peace he is entitled to act under the section. If in the proceedings so drawn up in the office a reference is made to the police report and to the petition of the second party which documents stated that there was no likelihood of a breach of the peace that will not by itself take a way the jurisdiction of the Magistrate to initiate proceedings under S. 145, if he was satisfied that there was a likelihood of a breach of the peace. (*Kulwant Sahay, J.*) GANGA BISHUN SINGH *v.* RAJO CHAUDHURI. **1924 P. H. C. C. 83 : 5 Pat. L. T. 252 : A. I. R. 1924 Pat. 787.**

——S. 145—*Foundation of jurisdiction—Written statement not filed—Effect of claim to joint possession.*

In order to give jurisdiction to a Magistrate to proceed under S. 145 all that is necessary is that he should be satisfied of there being likelihood of a breach of the peace and he should make a note stating his grounds of his so being satisfied and require the parties to attend and to put in written statements of their claims. If a party fails to put in written statement

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that would not take away the jurisdiction of the Magistrate to proceed with the case; 11 W. R. Cr. Rulings, p. 9, Ref. Where each party claims exclusive possession of half of the plot in dispute and not joint possession of the whole together, proceedings under S. 145 are maintainable. 1 P. L. T. 594. Dist. (*Kulwant Sahay, J.*) RAMJHARIA *v.* PIAR KOERI.

4 Pat. L. T. 308 · 73 I. C. 173 : 2 Pat. L. R. Cr. 6 : 24 Cr. L. J. 557 : A. I. R. 1923 Pat. 369.

——**S. 145 (1)**—*Foundation of jurisdiction.*

Under S. 145 (1) a Magistrate cannot start proceedings in January upon the strength of a police report of previous September when he had no information whatever as to any likelihood of a breach of peace on the date when he drew up the proceedings even though on proper grounds. The District Magistrate may rescind or alter an order made by another Magistrate under S. 144. It is not open to such Magistrate at all to direct that other Magistrate to initiate proceedings under S. 145, Cr.P. Code and a proceedings started in obedience to such a direction is *ultra vires*. (*Bucknill, J.*) CHHEDDI LAL MARWARI *v.* MAHABIR PRASAD SUKUL. **2 Pat. L.T. 650 : 64 I. C. 507 : 23 Cr. L. J. 27.**

——**S. 145**—*Foundation of jurisdiction—Breach of the peace—Evidence—Police report.*

A Magistrate does not act without jurisdiction when the initiates proceedings under S. 145 of the Cr. P. Code upon a Police report that there is a dispute likely to cause a breach of the peace. (*Jwala Prasad, J.*) ISRI PRASAD CHOWDHURI *v.* WARASAT HUSSAIN. **1 Pat. L. T. 738 : 60 I. C. 61 : 22 Cr. L. J. 205.**

——**S. 145**—*Foundation of jurisdiction—Land in the possession of tenants—Parties.*

To proceed under the section relating to breach of peace a magistrate should give grounds of his being satisfied to such proceeding. (*May Oung, J.*) MA MA GYI *v.* EMPEROR. **2 Bur. L. J. 295 : 25 Cr. L. J. 1161 (2) : 81 I. C. 985 (2) : A. I. R. 1924 Rang. 178.**

Fresh proceedings.

——**S. 145 (4)**—*Fresh proceedings—Proceedings dropped—Subsequent reopening of proceedings—Delivery of possession—Legality.*

Certain land was attached under clause (4) of S.145. After several adjournments, the Magistrate refused to give further time to the first party and recorded the order. 'Proceedings stopped, File. On the same day, a petition was put in by the second party and the Magistrate wrote on it this order—" Heard the parties, examined the documents. The first party have failed to prove their possession and case, though repeated opportunity was granted. Second party will remain in possession." *Held*, in doing so, the Magistrate was clearly wrong. In the first place having dropped proceedings he ought not to have re-opened them, and secondly, assuming that he had jurisdiction to go on with the case without a fresh proceeding, he ought to have put the parties on the same footing instead of awarding possession to the second party because the first party had failed to prove its case. (*Walmsley and Suhrawardy, JJ.*) SAMAD ALI *v.* ABDUL MAJID. **65 I. C. 851 : 23 Cr. L. J. 195 : A. I. R. 1923 Cal. 314.**

——**S. 145**—*Fresh proceedings — Proceedings struck off—Renewal on same facts.*

Proceedings under Section 145 cannot be renewed after the dispute has been settled and an order has been made that the case be struck off. Under such circumstances a new proceeding would not be justified only on the materials upon which the proceeding, which was struck off was based. (1893) 20 Cal. 867, Foll. (*Shadi Lal, C. J.*) GHULAM MAHOMED *v.* EMPEROR. **3 Lah. 401 : 24 Cr. L. J. 160 (1) : 71 I. C. 512 : A. I. R. 1923 Lah. 81 (1).**

CR. P CODE (V OF 1898), S. 145—Government of India Act.

Government of India Act.

——**S. 145**—*Government of India Act, S. 107.*

The High Court under S. 107 of the Govt. of India Act, 1915, can set aside proceedings instituted without jurisdiction by a subordinate Court under S. 145 notwithstanding S. 435 (3) of the Cr P. Code and can make consequential or incidental orders under the same section. Thus it can give direction for disposal of property attached and dealt with by the subordinate Courts. (*Mookerjee, A.C.J., Fletcher, N. R. Chatterjee, Richardson and Ghose, JJ.*) ALI MAHOMED MANDOL *v.* PIGGOT. **48 Cal. 522 : 60 I. C. 325: 22 Cr. L. J. 213 : 32 C. L. J. 270 (S. B.).**

——**Ss. 145 and 439**—*Government of India Act, S. 107—Power to quash proceedings under S. 145, Cr. P. Code.*

A Sub-Divisional Magistrate passed an order under S. 145, Cr.P.Code, declaring first pary to be entitled to retain possession as against the opposite party. Thereafter the interest of the principal person of the opposite party passed to another and he began to disturb possession of the first party. The Magistrate thereupon made an order drawing up new proceedings under S. 145, Cr. P. Code, even though the parties and lands were identical. On revision against this order, *held*, when proceedings are taken under Cr. P. Code, which amount to an abuse of process of Court and the object of which is only to harass the party who has got a previous order of the Magistrate in his favour, the High Court has ample jurisdiction to interfere (and ought to interfere) under S. 107 of the Government of India Act. The Magistrate did not exercise proper judicial discretion in starting the proceedings. (*B. B. Ghose and Chotzner, JJ.*) ARAN SORDAR *v.* HARA SUNDAR. **37 C. L. J. 39 : 27 C. W. N. 171 : 71 I. C. 225 : 24 Cr. L. J. 97 : A. I. R. 1923 Cal. 95.**

——**Ss. 145 and 439**—*Govt. of India Act—Proceedings under revisional power of High Court—Jurisdiction—Material irregularity — Evidence of possession not considered—Effect of—Government of India Act, S. 107.*

Where there is initial want of jurisdiction proceedings, though they may purport to be under S. 145, Cr. P. Code, are not really proceedings under it and the High Court can interfere under S. 439, Cr. P. Code, but if the proceedings were properly started, all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of Government of India Act. 36 M. 275, 286; 41 A. 302; 37 M. L. J. 589 : 27 M. L. J. 169 ; 17 C. W N. 205 ; 40 C. 982 ; 32 C. 249 ; 2 L. W. 107 ; 3 L. W. 164 ; 12 L. W. 939; 38 M. L. J. 73 Ref.

Pattas and kist receipts are evidence not merely of legal right but of possession also. Where the Magistrate comes to a perverse conclusion on the question of possession after getting rid of the oral and documentary evidence in the case, the High Court can interfere in revision. (*Ramesam, J.*) THYLAYEE AMMAL *v.* SRIRANGAROYA GOUNDAN. **31 M. L. T. 202 : 16 L. W. 497: 71 I. C. 228 : 24 Cr. L. J. 100 : (1922) M. W. N. 629 : A. I. R. 1923 Mad. 60 : 43 M. L. J. 624.**

CR. P. CODE (V OF 1898), S. 145—Immoveable Property.

Immoveable property.

——S. 145—Immoveable property—Dispute about right to weigh grain in market is not covered by the section. (*Rafique, J.*) MAQBUL AHMAD *v.* EMPEROR. **20 A. L. J. 694 : 23 Cr. L. J. 612 : L. R. 3 A. 128 (Cr.) : 68 I. C. 836 : A. I. R. 1922 All. 430 (1).**

——S. 145—*Immoveable property—Lac—Right to collect.*

Where the Dt. Magistrate on a dispute as to the right to grow and collect *lac* on plum trees standing on the lands in the holdings of the tenants attached and sold a part of the *lac* under S. 145, *held*, that he had no jurisdiction over the property in dispute and the *lac* stored and the sale proceeds should be kept in the custody of the Criminal Court pending a decision by a Civil Court on the question of the title to the *lac*. (*Mookerji, A C. J., Fletcher, N. R. Chatterjee, Richardson and Ghose, JJ.*) ALI MAHOMED MANDOL *v.* PIGGOTT. **48 Cal. 522 : 32 C. L. J. 270 : 60 I. C. 325 : 22 Cr. L. J. 213 (S. B.).**

——Ss. 145 and 146—*Immoveable property—Mining license.*

The definition of land as given in the Code of 1908 is wide enough to cover mining rights and even prospecting or boring licenses which can only be utilised by going upon the land and exercising some rights relating to it. Nor is S. 145 Cr. P. Code, limited in its scope to dispute relating to "actual possession" only, if by that expression is meant possession by squatting the land. It is not correct to say that a license to dig minerals confers no interest or estate in the soil, and that a dispute concerning mining rights is not one with which the magistrate can deal under S. 145. Other proceedings might serve equally well to preserve tranquillity, but that is a matter on which the Magistrate is entitled to use his own discretion. 32 C. L. J. 54 Dist. (*Walmsley and Suhrawardy, JJ.*) BIMALA PRASAD MOOKERJEE *v.* TATA IRON AND STEEL CO., LTD. **35 C. L. J. 456 : 71 I. C. 236: A. I. R. 1922 Cal. 83.**

——S. 145—*Immoveable property—Right to bore for minerals—Does not concern land.*

Where a dispute concerns the rights of the respective parties to bore for minerals over a specific area and does not concern land or involve any question of actual possession, the Court has no jurisdiction to go into intricate questions of title and possession, and if in such a case there is a likelihood of a breach of the peace proceedings under S. 107 of the Code are more appropriate than under S. 145. (*Chaudhuri and Newbould, JJ.*) THE INDIAN IRON AND STEEL COMPANY, LTD. *v.* BANSE GOPAL. **32 C. L. J. 54 : 59 I. C 403 : 22 Cr. L. J. 99.**

——S. 145—*Immoveable property—Applicability of—Mines and minerals—Right to work.*

A dispute as regards mines and minerals and the right to work mines falls within the scope of S. 145, Cr. P. Code. 4 P. L. J. 154, 2 Pat L. J. 637, Foll. (*Jwala Prasad, J.*) MAHADEO DUTT *v.* J. N. SARKAR. **1922 P. H. C. C. 122 : 71 I. C. 871 : 24 Cr. L. J. 263 : A. I. R. 1922 Pat. 340.**

Information.

——S. 145—*Information—Omission to mention source of information in preliminary order though known does not oust jurisdiction.*

The mere omission in the preliminary order, of the mention of the source of the information, when in fact the Court is assured of the existence of such a source, cannot oust the Magistrate's jurisdiction, to proceed under S. 145. (*Dalal, J. C.*) SHER BAHADUR SINGH *v.* FAZAL ALI. **25 Cr. L. J. 48 : 75 I. C. 736 : A. I. R. 1925 Oudh 46.**

CR. P. CODE (V OF 1898), S. 145—Jurisdiction.

——S. 145 (4)—*Inquiry under—No breach of the peace likely—Procedure.*

Where after taking evidence under S. 145 (4), Cr. P. Code and as the result of his enquiry, a magistrate comes to the conclusion that there is no danger of a brach of the peace, his proper course is to cancel the order under S. 145 (5) and not to pass an order under S. 145 (6). But there is nothing which prevents him form recording the results of his enquiry and the opinion at which he has arrived as to possession. (*Pullan, A.J.C.*) NAWAB SINGH *v.* RUKMANGAD SINGH. **89 I.C. 710 : 26 Cr. L. J. 398 (1).**

——S. 145—*Joinder of claims relating to various plots—Propriety of.*

Where a Magistrate in one prrceeding dealt with various plots as regards which there were disputes between various sets of parties, the proper procedure would be to make each the subject-matter of a separate proceeding, but in the absence of actual prejudice to any party there is nothing in law to prevent a joinder of all these in one proceeding. Even the failure to allocate the particular plots to particular individuals does not vitiate the proceedings, although it would have been more proper to do it. (*Bucknill, J.*) GAJADHAR MULL MARWARI *v.* THAKUR SINGH. **26 Cr. L. J. 424 : 85 I. C. 40 : A. I. R. 1923 Pat. 545.**

Joint possession.

——S. 145—*Joint possession—Dispute concerning land—Magistrate—Duty of—Co-sharers.*

In case of an application under S. 145, Cr. P. Code, if the person alleges that he is in possession of the land in question the object of the proceeding ought to be to ascertain how far his allegation is correct, *i.e*, to decide whether or not he is or has been recently in actual possession. The mere fact that the Revenue Records show that the holding is joint is not sufficient to stop the enquiry contemplated by S.145, Cr.P.Code. It is incumbent on the Magistrate to examine the parties and to take evidence. S. 145, Cr.P. Code, applies to a case where the dispute is between co-sharers each claiming to be in possession of the disputed land to the exclusion of the others and sub-section (*b*) to S. 145 does not render that section inapplicable to a case in which the parties are jointly entitled to the land in question. (*Broadway, J.*) MALAN *v.* MAKHAN SINGH. **2 L. 372 : 23 Cr. L. J. 225 : 66 I. C. 65 (2) : A. I. R. 1922 Lah. 348.**

——S. 145—*Joint possession.*

S. 145 of the Code contemplates a case where one party is in actual possession and the other not and therefore it does not apply to a case of two co-owners. (*Wazir Hasan, A.J.C.*) ARJUN SINGH *v.* CHANDAN KUAR, **22 Cr. L. J. 625 : 63 I. C. 321 : 24 O. C. 167.**

——Ss. 145 and 146—*Joint possession—Order under the sections incompetent.*

Where the Magistrate finds that the property is joint and presumably in the joint possession of both the parties, he cannot make an order under section 145 or under section 146. (*Bucknill, J.*) NAND KISHORE *v.* KALIKA MISSAR. **5 Pat. L. T 45 : 75 I. C. 69 : 24 Cr. L J. 869 : A. I. R. 1923 Pat. 546.**

——Ss. 145 and 144—*Joint possession—Jurisdiction.*

Where there is a good and valid claim to joint possession, the Magistrate has no jurisdiction to take proceedings under section 145. (*Adami, J.*) RAM PABITAR SINGH *v.* KASIM ALI KHAN. **23 Cr. L. J 379 : 67 I. C. 203 : A.I. R. 1922 Pat. 423.**

CR. P. CODE (V OF 1898), S. 145—Large area.

——S. 145—*Jurisdiction—Errors and omissions in procedure—Effect on.*

Two essential conditions are necessary to confer jurisdiction on a magistrate to proceed under S. 145, *i. e.*, there should be a dispute over land or water and also it must be likely to cause a breach of the peace. Where once the magistrate is seized of jurisdiction he cannot be divested of it by errors and omissions relating to procedure such as the preliminary order not specifying the lands or the grounds for being satisfied of the likelihood of a breach of the peace, or an interested party not being impleaded or failure to affix notice at or near the subject-matter of dispute. (*Kennedy, J. C. and Bilaram, A. J. C.*) MAHOMED MAHDISHAH *v.* WAHDALSHAH. **89 I. C. 156 : 26 Cr. L. J. 1292.**

Large area.

——S. 145—*Large areas—Right to carry on boring operations—Complicated question of title—Constructive possession—Duty of Magistrate.*

Per *Newbould, J.*—S. 145 is applicable where the report shows that there is a likelihood of a breach of peace and the dispute concerns land. If the Magistrate is unable to find possession, he will act under S. 146, if necessary. Per *Chaudhury, J.*—When a party claims under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit is not of itself a sufficient possession on which the Magistrate's order under S. 145 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession though at variance with the right. The Magistrate is not the proper forum for determining such question. In such a case the Magistrate is to proceed under S. 107, Cr.P Code. Proceedings under S. 146 of the Code with regard to a large mouza will cause great injustice to the persons in actual occupation. It is not the function of a Criminal Court to go into complicated questions of title and possession including that of adverse possession and of constructive possession of wide areas inferred from actual possession of limited areas. (*Chaudhury and Newbould, JJ.*) THE INDIAN IRON AND STEEL COMPANY *v.* BANSO GOPAL TEWARI. **32 C. L. J. 54 : 59 I. C. 403 : 22 Cr. L. J. 99.**

——S. 145—*Large area—Numerous claims tried together—Not illegal.*

Proceedings were initiated between two sets of persons both of whom claimed a large area of somewhat over 300 bighas situated in the domain of the Maharaja of Darbhanga. The first party claimed to he in possession as tenants of the Raj from long past, he second party claimed to have recently been settled on the land by the Raj and to be in possession thereof. The lands were not co-terminus, but they were divided into some 23 different plots. They were not claimed jointly or as a whole by all of the eight parties of the first party, but each party claimed to be in possession of certain of these plots. *Held*, there is nothing to prevent a Magistrate from joining numerous claims of this description together and in dealing with the matter at one hearing. The only objection which can really be taken to such a course is, if it can be shown, that the objector is adversely prejudiced by such proceeding, and the fact that the Magistrate does not in his judgment state which of the first party is actually, according to his finding, in possession of which part of the property in dispute, does not concern the second party at all. (*Buckland, J.*) GAJADHAR MULL *v.* THAKUR SINGH. **1 Pat. L. R. 135 (Cr.) : A.I.R. 1923 Pat. 545.**

CR. P. CODE (V OF 1898), S. 145—Nature of proceedings.

——S. 145—*Large area—Jurisdiction of Magistrate—Dispute concerning a limited area—Order affecting larger area—Legality of.*

Where a Magistrate had dealt with a larger area of land than is included in the order drawn up in the case, he exceeds his jurisdiction and the whole order may be set aside. 7 C. W. N. 558, Foll. (*Ross, J.*) SUKHARI NONIA *v.* RAM KHELAWAN THAKUR. **4 Pat. L. T. 372 : 1 Pat. L. R. 255 (Cr.) : 72 I.C. 69 (2) : 24 Cr. L. J. 309 (2) : A.I. R. 1923 Pat. 528.**

Local inquiry.

——S. 145—*Local inquiry—No other evidence—Order not valid—Validity.*

Where a final order under S. 145 of the Code is based on a local enquiry of which no note or memorandum is made, *held*, the order was based on no evidence and must be set aside. (*Teunon and Suhrawardy, JJ.*) GOGAN *v.* KARIMADDI. **25 C.W.N. 1007 : 65 I. C. 855 (1) : 23 Cr. L. J. 199 : 34 C. L. J. 127.**

——S. 145—*Local inquiry—Evidence—Supplemented by observations—Results of local inspection not recorded—Order is bad.*

Where it is urged that the Magistrate twice made local inspections and that without making any record of the rssult of his observations, he used his conversations at the time of his local inspections in the course of his judgment in substitution of and in order to supplement the evidence which has been recorded by him, *held*, if the Magistrate has used his observations made at the time of local inspection both in substitution of and to supplement the evidence recorded by him, he had, in fact, turned himself into a witness in the case and, further, if he has failed to record the result of his local inspections which would have given both parties a chance of challenging the correctness of his observations, the decision is vitiated. (*Coutts, J.*) RAMSUNDAR *v.* KESHO PRASAD. **A. I. R. 1922 Pat. 294 (1).**

——S. 145—*Local inquiry—Order on the basis of local inspection, whether legal.*

Where a Magistrate converted a proceeding under S. 145 into one under S. 144 and before the date fixed for the filing of statements paid a surprise visit and based his order on the impressions gathered during the local inspection, *held*, that local inspection would not be a legal substitute for evidence especially where the inquiry on the spot is *ex parte* and where the evidence in the case is practically ignored. (*Jwala Prasad, J.*) RAM SAHAI SINGH *v.* DWARKA SINGH. **1 Pat. L. T. 569 : 61 I. C. 712 : 22 Cr. L. J. 424.**

Nature of proceedings.

——S. 145—*Nature of proceedings—Parties should be given sufficient time to adduce evidence, proceedings under S. 145 being of* quasi-*civil nature.*

At the moment the case was called on the Muktear engaged by the first party was absent ; the first party went to fetch him. The Court waited for full 20 minutes and then proceeded to take evidence on behalf of the second party ; *Held*, that the first party should be given an opportunity of adducing evidence in support of his claim, the proceeding under S. 145, Cr. P. Code being *quas*-civil proceeding. (*Ghose and Cuming, JJ.*) BANDE ALI *v.* B. RAJAULLAH. **25 Cr. L. J. 303 : 76 I. C. 975 : A. I. R. 1925 Cal. 263 (1).**

CR. P. CODE (V OF 1898), S. 145—Nature of proceedings.

——S. 145—*Nature of proceedings—All processes shouldissue at Government expense—Proceedings are between Crown on one side and all other parties on the other side.*

Proceedings under S. 145 of the Criminal Procedure Code take place on behalf of the Crown on a report made to theesMagistrate. The proceedings are againt all other parction cerned and processes should issuse at Government expense. The parties originally mentioned and any others who may come in later should be ranged on one side as the first party, the second party and so forth. (*Hallifax, A. J. C.*) EMPEROR *v.* MT. FHUTANJA. **25 Cr L. J. 1109 : 81 I. C. 933 : A. I. R. 1925 Nag. 142.**

——**Ss. 145 and 360**—*Nature of proceedings—Possession, proceedings under Ch. XII—Depositions as basis for valid order—Evidence Act, S. 80.*

During the absence of the opposite party, a stealthy act of possession in the most haphazard manner more than two months before the date of the order under S. 145 (1) cannot be regarded to be an act of possession. *De facto* possession means effective occupation or control. If the word "accused" in S. 360 does not include persons against whom an order under section 145 (1) has been drawn up, then there is a plain inconsistency in the section itself; the section must at least mean that in the case of proceedings under Chapter XII the evidence must be read over to the witnesses. The omission only exempts the witnesses from prosecution for perjury, but Magistrate's order based upon the depositions is not *ultra vires.*

The omission to implead a tenant in possession of a portion of the disputed land does not make the proceedings defective. (*Ross, J.*) RAMNARAIN SINGH *v.* DHONRAI GOPE. **3 Pat. L. T. 291 : 65 I. C. 557 : 23 Cr. L. J. 125 : A. I. R. 1922 Pat. 371.**

Object of.

——**S. 145**—*Object of—Religious disputes—Question of title—If relevant.*

The object of S. 145, Cr. P. Code, is to bring to an end by a summary process disputes relating to land, etc., which are in their nature likely if not suppressed to end in breaches of the peace. The mere circumstance that the dispute is of a religious nature is not sufficient to justify action being taken under the section, unless there is positive evidence on the record that breach of the peace is likely to occur, if proceedings are not instituted.

Questions as to rights of parties cannot legitimately be the subject of inquiry in such proceedings. (*Moti Sagar, J.*) BHAGWAN DAS *v.* MAULA DAD KHAN. **25 Cr. L. J. 78 : 75 I. C. 990 : A. I. R. 1924 Lah. 678.**

——**S. 145**—*Object of—Possession by servant.*

S. 145 is not meant to be used to protect the possession of a servant against the master. (*Ramesam, J.*) THYLAYEE AMMAL *v.* SRIRANGAROYA GOUNDAN. **16 L. W. 497 : 71 I. C. 228 : 31 M L. T. 202 : (1922) M. W. N. 629 : 24 Cr. L. J. 100 : A. I. R. 1923 Mad. 60 : 43 M. L. J 624.**

——**S. 145**—*Object of—Decision must be arrived at at once whether right or wrong.*

It is not one of the objects of S. 145 of the Cr. P. Code to protect or maintain anybody's possession. The sole object of the proceeding is to prevent an imminent breach of the peace and the decision in regard to it must be made at once (*Hallifax, A. J. C.*) EMPEROR *v.* MT. FHUTANJA. **25 Cr. L. J. 1109 : 81 I. C. 933 : A. I. R. 1925 Nag. 142.**

——**S. 145**—*Object of—Failure to give notice or to affix notice on land—Effect.*

CR. P. CODE (V OF 1898), S. 145—Order without notice.

The object of S. 145 is to take speedy measures to prevent a breach of the peace and even the question of possession is subsidiary; failure to affix notice on the property in dispute or to serve notices on the persons interested are at best only irregularities cured by S. 537, cl. (5) of the section provides for interested parties coming in even if they have not been served with notice. (*Hallifax, A. J. C.*) BHURE KHAN *v.* FAKIRA. **25 Cr. L. J. 159 : 76 I. C. 303 : A. I. R. 1924 Nag. 171.**

——**S. 145**—*Object of.*

The object of S. 145 is to prevent a breach of the peace by a summary decision as to the possession of the contending parties leaving them to decide their title and right to possession in a competent Civil Court where naturally the proceeding has to be a protracted one. (*Jwala Prasad and Coutts, JJ.*) MOTI SINGH *v.* DHANUKDHARI. **73 I. C. 339 : 24 Cr. L. J. 595 : A. I. R. 1923 Pat. 53.**

——**S. 145**—*Object of—Is to stop breach of the peace.*

The object of S. 145 is to finally terminate the dispute between the parties so far as the Criminal Court is concerned so as to effectively put a stop to any breach of the peace. It is with this object that the decision of the Magistrate under S. 145 is declared to be final and conclusive until it is set aside by a competent Civil Court and the rights of the parties are determined by a competent Court. (*Jwala Prasad, J.*) ABDUL SHAKUR *v.* ABU SAYEED. **26 Cr. L. J. 870 : 86 I. C. 806 : A. I. R. 1925 Pat. 593.**

——**S. 145**—*Object of—Refusing to admit written statement filed by claimants—If revisable.*

The very object of the proceeding under S. 145 of the Code is to put an end to disputes as to possession of immoveable properiies so as to prevent a breach of the peace. This object cannot be gained until all the contending parties are on the record and an opportunity is given to them to put forward their respective claims. The effect of an order rejecting the written statement of certain parties is that his decision under S. 145 will not be binding upon them. (*Jwala Prasad, J.*) RAGHUNATH KUER *v.* BAJKISHORE KUER. **5 Pat. L. T. 458 : 25 Cr. L. J. 906 (1) : 81 I. C. 442 (1) : A. I. R. 1924 Pat. 783.**

——**S. 145 (1)**—*Omission to record preliminary order.*

The requirements of S. 145 Criminal Procedure Code, should be strictly followed. The omission by the magistrate to record the preliminary order required by S. 145 (1) amounts to an illegality and all further proceedings are not according to law and must be set aside. (*Abdul Raoof, J.*) DHANIRAM *v.* KALIRAM. **26 Punj.L. R. 712.**

——**Ss. 145, 146**—*Order under—Effect of—Mutation order under S. 40, U. P. Land Revenue Act.*

The order of a Magistrate either under S. 145 or S. 146, Cr. P. Code, does not interfere with an order passed by a competent Court under S. 40, U. P. Land Revenue Act. (*Dalal, J. C.*) EMPEROR *v.* NISAN ALI KHAN. **90 I. C. 399 : 26 Cr. L. J. 1551.**

Order without notice.

——**S. 145**—*Order without notice—Defects in procedure.*

The Magistrate has no jurisdiction to decide the question of an actual possession without giving the claimants an opportunity of being heard. An omission to record reasons for holding that there is a likelihood of a breach of the peace though a culpable irregularity does not oust the jurisdiction of the Magistrate,

CR. P. CODE (V OF 1898), S. 145—Order without notice.

(*Ayling and Coutts-Trotter, JJ.*) VELU MALAVARAYAN *v.* KUPPUSWAMI PILLAI. **12 L. W. 315 : 59 I. C. 378 : 22 Cr. L. J. 90.**

——S. 145—*Order without notice—Minor—No service of notice—Order passed—If without jurisdiction.*

Where in proceedings under S. 145, one of the parties interested is a minor but he is not served with notice, the proceedings though they be bad in law as against him, are not without jurisdiction as regards the other parties. (*Macpherson, J.*) NANDAN SINGH *v.* SIARAM SINGH. **89 I. C. 151 : 26 Cr. L. J. 1287.**

——S. 145—*Order without notice is a grave irregularity.*

In a proceeding purporting to be under S. 145, Cr. P. Code (V of 1898), notice was not served upon the parties or their pleaders, nor was it served upon the locality, as is required by S. 145; no written statement was filed by parties nor any evidence, oral or documentary, was adduced. *Held*, that the non-compliance of the aforesaid requirements constituted such a grave irregularity as, when it has caused a failure of justice or a prejudice to any party the order under S. 145 is vitiated and jurisdiction of the Magistrate is affected and that the High Court has jurisdiction to set aside the order. (4 P. L. W. 183, Foll. (*Jwala Prasad, J.*) BASAWAN PANDEY *v.* TILAK GOPE. **4 Pat. L. T. 723 : 24 Cr. L. J. 345 : 72 I. C. 345 : 1 Pat. L. R. (Cr.) 130 : A. I. R. 1922 Pat 77.**

——S. 145 (1)—*Order without notice—Party not served with preliminary order is not bound by the final order—Parties' admission of a dispute is evidence of the existence of a dispute.*

Where no preliminary order, as required by S. 145, sub-sec. (1) is served on a party, nor is he given an opportunity to prove his possession over the subject of the dispute, he cannot be subjected to the final order passed by the Magistrate. Admission of a dispute by both the parties concerned is certainly evidence of the existence of that dispute. (*Wazir Hasan, A. J. C.*) MT. MUQIM-UN-NISA *v.* MT. AHMAD-UN-NISA. **2 O. W. N. 704 : 90 I. C. 541 : 26 Cr. L. J. 1581 : A. I. R 1925 Oudh 605.**

Parties.

——Ss. 145, 244 and 439—*Parties—Right to produce witnesses.*

The procedure in a case under S. 145 is that prescribed for the trial of summons cases and the Court can curtail the number of witnesses on the ground that their examination is unnecessary and will defeat or delay the ends of justice. Subject to this the parties can examine their witnesses and their right cannot be curtailed by the Magistrate. (*Jwala Prasad, J.*) BISWANATH MAHAPATRA *v.* SHIVANAND SARASWATHI. **2 P. L. T. 330: 61 I. C. 718 : 22 Cr. L. J. 430.**

[But under cl. (4) as amended the Magistrate is bound to receive all such evidence as may be produced.—Ed.]

Pendency of civil suit.

——S. 145—*Pendency of civil suit.*

Where a civil suit is pending for the determination of the rights of the parties in certain property, proceedings under S. 144 should not be started; if immediate steps are necessary to avert a serious breach of the peace the parties may be bound down under S.107. (*N. R. Chatterjee and Cuming, JJ.*) ALI MAHOMED *v.* FAKKIRUDDI. **24 C. W. N. 1039 : 32 C. L. J. 255 : 59 I. C. 643 : 22 Cr. L. J. 131.**

CR. P. CODE (V OF 1898), S. 145—Power of Magistrate.

Period of possession.

——S. 145—*Period of possession—Applicability of—Discontinuous possession—Market stalls—Possession once a week—Proceedings under S. 145, Cr. P. Code.*

The element of continuity of possession is an ingredient which is necessary at any rate in cases where interruption is not due to seasonal variations, in proceedings under S. 145, Cr. P. Code. S. 145 does not apply to a case where the petitioners claim possession of a market stall only one day in the week and the respondents are alleged to be in possession throughout the week. (*Walmsley and Suhrawardy, JJ.*) NAYAN MANJURI DASI *v.* FAZLEY HUQ SARDAR. **49 Cal. 871 : 71 I. C. 527 : 24 Cr. L. J. 175 : A. I. R. 1922 Cal. 502.**

——S. 145—*Period of possession—Word 'actual' must be construed according to the nature of property.*

The word "actual" in S. 145 of the Cr. P. Code, used in relation to possession, must be interpreted in the sense of only such actual possession as the nature of the property is susceptible of. (*Wazir Hasan, J. C.*) MAHESH SINGH *v.* EMPEROR. **11 O. L. J. 743 : 84 I. C. 942 ; 26 Cr. L. J. 398 : A. I. R. 1925 Oudh 251.**

Power of Magistrate.

——S. 145—*Power of Magistrate—Communal dispute—Representatives of each community—Magistrate may choose.*

In Cr. P. Code, there is no rule of procedure like the one contained in O. 1, R 8 of the C. P. Code by which a representative suit may be brought or a representative defence may be set up in a case under S. 145, and, therefore, in a dispute between two communities the Magistrate would be justified in choosing out who should be the right people to represent each community and after hearing whom he should either permit a community to do a certain thing or to prevent it from doing it till a Civil Court has decided upon the rights of parties. (*Mukerji, J.*) NANHE MAL *v.* JAMIL-UR-RAHMAN. **23 A. L. J. 41 : 86 I. C. 59 : L. R. 6 A. (Cr.) 94: 26 Cr. L. J. 683: A. I. R. 1925 All. 316.**

——S. 145—*Power of Magistrate.*

A Magistrate has no jurisdiction under S. 145 to attach moveable properties in a house. (*Stuart, J.*) GAJRAJ SINGH *v.* EMPEROR. **20 A. L. J. 906: L. R. 3 A. 189 (Cr.): 71 I. C. 213: 24 Cr. L. J. 85 : A. I. R. 1922 All. 528 (1).**

——S. 145—*Order under—Power of District Magistrate to set aside.*

A District Magistrate has no power to set aside orders passed by a Subordinate Magistrate under S. 145 ; he can only refer the case to the High Court. (*Walmsley and B. B. Ghose, JJ.*) ESERUDDI HOWALDAR *v.* OTARUDDI AKON. **26 Cr. L. J. 116 (1) : 88 I. C. 526 (1) : A. I. R. 1925 Cal. 1234.**

——S. 145—*Power of Magistrate—Dispute regarding immoveable property—Declaration of a right of way.*

In proceedings under S. 145, Cr. P. Code, it is competent to the Magistrate not only to award possession of the land in dispute but also grant a right of way to one of the parties. 17 C.W. N. 793 Not Foll. (*Macleod, C. J. and Shah, J.*) AMARSINGH, SHIVASANGJI, *In re.* **48 Bom. 512 : 26 Bom. L.R. 436 : A. I. R. 1924 Bom. 452.**

——Ss. 145 and 147—*Power of Magistrate—Proceedings under S. 145—Conversion into proceedings under S. 147 is not* ultra vires.

CR. P. CODE (V OF 1898), S. 145—Power of Magistrate.

Where proceedings are instituted under S. 145 on the basis of a police report which states that there is an imminent risk of a breach of the peace, but the Magistrate afterwards discovers that the question at issue is not one of possession under S. 145, but is one as to rights falling under S. 147, he can convert the proceedings into proceedings under S. 147. (*Greaves and Panton, JJ.*) ANATH BANDHU NUNDY *v.* WAHID ALI. **26 Cr. L. J 558 : 85 I. C. 654: A. I. R. 1925 Cal. 1022.**

——Ss. 145 and 350—*Power of Magistrate—Decision of officer under the Survey and Settlement Act—Value of decision on evidence given before another Magistrate—Propriety of.*

It is open to a Magistrate in deciding a case under S. 145 of the Cr. P. Code to go behind the orders passed in favour of a party under the Survey and Settlement Act and the Bengal Tenancy Act. It is also open to the Magistrate to hold that on the evidence the presumption arising from an entry in the Record-of-rights has been rebutted. S. 350, proviso (*a*) of the Cr. P. Code, is limited to criminal trials and does not extend to enquiries under S. 145. Consequently a magistrate has jurisdiction to proceed with the further trial of a case under S. 145, Cr. P. Code, even though a portion of the evidence has been recorded by his predecessor and an application is made to him on behalf of one of the parties to start proceedings *de novo*. (*Newbould and Suhrawardy, JJ.*) SYED SADEK REZA *v.* SACHINDRA NATH ROY. **37 C. L. J. 128 : 24 Cr. L J. 569 : 73 I. C. 265: A.I.R. 1923 Cal. 483 (2).**

——S. 145—*Power of Magistrate—Order not justified.*

The Magistrate is not justified in making an order in favour of one of the parties, where there is no evidence to show that there is a likelihood of a breach of peace between the parties or either of them. (*Beachcroft and Ghose, JJ.*) RASIK CHANDRA HORE *v.* JAGABANDHU ROY. **25 C. W. N. 214 : 62 I. C. 326 : 22 Cr. L. J. 502.**

——S 145—*Power of Magistrate to decide question of jurisdiction—Revision.*

A Magistrate has power to decide whether he has jurisdiction over the land in dispute and where he decides he has no jurisdiction it is not a failure to exercise his jurisdiction so as to enable the High Court to interfere in revision. (*Beachcroft and Ghose, JJ.*) RAJANI KANTA DE *v.* DEBENDRANATH. **61 I. C. 520: 22 Cr. L. J. 392 (Cal.)**

——S. 145—*Powers of Magistrate—Order for restoration of case.*

In proceedings under S. 145, Cr. P. Code, a Magistrate has no jurisdiction to order restoration of possession. The section itself contains no provisions to the effect that party in whose favour the order is made is to be put into possession nor does this section provide any machinery by which the successful party can have his possession restored by the Court. All that the Magistrate is empowered to do is to declare that he is entitled to possession.

At the same time, if a party is declared to be entitled to possession, and the world at large is forbidden to disturb his possession, he would be entitled to take possession and no one would have any right to interfere with his doing so. (*Broadway, J.*) BHAWALA *v.* DUNICHAND. **72 I. C. 621: 24 Cr. L. J. 461 (Lah) : A. I. R. 1924 Lah. 411.**

——S. 145—*Power of Magistrate—Temporary order, pending decision on question of possession—Legality.*

A Magistrate cannot, under S. 145 of the Code, pass a temporary order pending his decision on the question of possession. (*Scott-Smith, J.*) RAM DITTA *v.* DYAL MAL. **14 P. L. R. 1921 : 22 Cr. L. J. 48 : 59 I.C. 160 : 2 P. W. R. 1921 (Cr.).**

——S. 145—*Magistrate whether can drop proceedings once initiated, without giving opportunity to parties as to show the existence of likelihood of breach of peace.*

After proceedings under S. 145 were initiated and a preliminary order was passed, the magistrate becoming satisfied that there was no likelihood of a breach of the peace dropped the proceedings. *Held* that the magistrate was entitled to drop the proceedings without giving an opportunity to the parties to show by evidence that there was a likelihood of the breach of the peace. The existence of clause (5) to S. 145 does not take away the power of the magistrate himself to drop proceedings if he is satisfied that there is no further likelihood of the breach of the peace, for it only provides for a special case where, as the magistrate is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. *Held also*, that the magistrate having dropped the proceedings becomes *functus officio* and has no jurisdiction to pass any orders as regards the deposit in Court of the sale proceeds of the crops from the lands in favour of any of the parties and the proper order for him to pass is to direct the money to be kept in Court deposit till one or other of the parties gets a decree of the civil court to prove his right to the money. (*Krishnan, J.*) DONEPUDI NARASIAH *v.* VENKIAH. **22 L. W. 524 : (1925) M. W. N. 192 : 49 M. L. J. 784.**

——S. 145—*Power of Magistrate—After proceedings under S. 145 are dropped with consent of both parties, Court cannot decide as to title to the crops attached during proceedings.*

Where proceedings instituted under S. 145 are dropped with the consent of both parties, on the ground that there is no likelihood of breach of the peace, the Magistrate has no jurisdiction to decide as to the title to the sale proceeds of the crop attached during the pendency of the proceedings. (*Beasley, J.*) NATESA NAICKEN *v.* RAGHAVACHARI. **20 L. W. 924 : A. I. R. 1925 Mad. 327.**

——S. 145—*Powers of Magistrate—Proceedings under whether can be dropped—Magistrate being satisfied that no dispute likely to cause breach of the peace existed—Source of Magistrate's information—Magistrate not bound to record evidence—Sale proceeds of crops on attached lands—Whether may be ordered to be kept in deposit in Court pending an order.*

In a proceeding under S. 145 of the Cr. P. Code, the Magistrate will not be acting illegally if he drops the proceedings after passing the preliminary order if he is satisfied that no dispute likely to cause a breach of the peace existed, although in coming to the conclusion he acted on the petition of a third party to the proceedings; and the Magistrate is not bound under such circumstances to record the evidence of the witnesses of the petitioner, who might have shown by their evidence that a dispute still existed. 30 Cal. 112 at p. 116; 30 Cal. 161 Ref. to.

The sale proceeds of crops standing on the lands, when the lands were attached in possession proceedings, may be ordered to be kept in deposit in the Court until the one party or the other obtained an order in his favour. 12 Cr. L. J. 104 Ref. to. (*Spencer, J.*)

CR. P. CODE (V OF 1898), S. 145—Power of Magistrate.

GOTHIPATHI SURYANARAYANA *v.* SREE RAJA ANKINEED PRASAD BAHADUR. **20 L. W. 58: 35 M. L T. 68: 47 Mad. 713: 81 I. C. 626: 25 Cr. L. J. 978: 46 M.L. J. 565: A.I.R. 1924 Mad. 795.**

——S. 145—*Power of Magistrate—Jurisdiction.*

Directions under S. 145 by Magistrate after finding that there was no likelihood of breach of peace are without jurisdiction (*Ramesam, J.*) MAHALAKSHMI *v.* SUBBARAYADU. **17 L. W 429: 74 I. C. 447: 24 Cr. L. J. 783: A. I. R. 1923 Mad. 472 (1).**

——S. 145—*Powers of Magistrate—Receiver cannot be appointed under S. 145—Person appointed by Magistrate to take charge of property, has no powers of a Receiver.*

Although under S. 145 a Magistrate has in cases of emergency the power to attach the subject in dispute, he has no power at the stage to appoint a Receiver. (8 M. L. T. 314 and 3 P. L. J. 147, Foll.) If in order to prevent a breach of the peace it is necessary for the Magistrate to take possession of the attached property and manage it during the pendency of the proceedings, it is quite competent to him in his administrative capacity or in exercise of his inherent jurisdiction to appoint some person to manage the property on his behalf and subject to his control and supervision, but the person so appointed is in no sense a receiver but merely a servant of the Magistrate, *e. g.*, he has no powers which a receiver appointed under S. 146 (2) can exercise. (*Wadegaonkar, A. J. C.*) DASHRATH *v* TARACHAND **8 N. L. J. 69: 89 I. C. 514: 26 Cr. L.J. 1378: 21 N L R. 191: A.I.R. 1925 Nag. 297.**

——S. 145—*Power of Magistrate—Source of information as to breach of peace is immaterial.*

A Magistrate is entitled to initiate proceedings if he receives information from any source whatever that there is likelihood of a breach of the peace relating to possession of immoveable property. (*Kulwant Sahay, J.*) GOWRI SANKAR *v.* COLLECTOR OF MUZAFFERPUR. **6 P. L. T. 215: 3 Pat. L. R. (Cr.) 127: 87 I. C. 421: 26 Cr. L. J. 965: A I. R. 1925 Pat. 513.**

——S. 145—*Power of Magistrate—Witnesses—Discretion in examining—Admitting document without proof—Effect.*

In proceedings under S. 145, Cr. P. Code, a Magistrate is not bound to examine all the witnesses adduced by the parties but may limit the number for good and sufficient reason. He must exercise his discretion with care and caution.

Where a document is admitted without proof it is an illegality but it does not affect the jurisdiction of the Court to pass the final order. (*Kulwant Sahay, J.*) MT WAHIDUNNISSA *v.* PICHIT LAL MISSIR. **24 Cr. L. J. 954: 75 I. C. 538: A. I. R. 1924 Pat. 534.**

[But see the Provision in the New Code—*Ed.*]

——S. 145—*Power of Magistrate—Possession proceedings—Decision of civil or criminal court in another case—Value of—Enquiry—Taking of evidence—Discretion of Magistrate.*

It is not always incumbent upon the Magistrate to give effect to the decision of a civil or criminal court and no hard and fast rule can be laid down in this respect. 1 Pat. L. J. 336 Rel. on. Where in proceedings under S. 145, Cr. P. Code, one of the parties files a written statement and adduces evidence in support thereof, Magistrate does not act without jurisdiction in relying upon the said written statement or in accepting the decision in a previous case of rioting as to possession. A Magistrate if satisfied on the evidence produced that one of the parties was in possession need not take further evidence. (*Kulwant Sahay, J.*) BHULAN RAUT *v.* KUMAR RAI. **5 Pat. L. T. 69: 2 Pat. L. R 104 (Cr.): 75 I. C. 535: 25 Cr. L J. 951: A. I. R. 1924 Pat. 509.**

CR. P. CODE (V OF 1898), S.145—Proceedings under

——S. 145—*Power of Magistrate—Order of Magistrate regarding more land than included in the proceeding—Illegal.*

If in a proceeding under S. 145, the Magistrate deals in his order with more land than that included in the proceedings, his order is bad and must be set aside. 7 C. W. N. 558, Foll. (*Ross, J.*) SUKHARI NONIA *v.* RAMKHELAWAN THAKUR. **4 Pat. L. T. 372: 1 Pat. L. R. (Cr.) 255: 72 I. C. 69 (2): 24 Cr. L. J. 309 (2): A. I. R. 1923 Pat. 528.**

——S. 145—*Power of Magistrate—Adjournment application—Refusal—Processes not issued—Effect—Delivery of possession by Civil Court—Chota Nagpur Tenancy Act, S. 14.*

Where the Magistrate refused an application of the petitioner for adjournment based on the ground that witnesses were not present and that copies of papers were required, but he decided the case on the arguments of the pleaders and on such evidence as was adduced: *held*, the legislature could hardly have contemplated an elaborate and protracted investigation, the result of which might in many instances be to defeat the very object in view, namely, an effective prevention of a breach of the peace. It appears clear from the provisions of the Code that it is not obligatory upon the Magistrate to assist the parties to a proceeding under S. 145 to produce their witnesses and they cannot claim as a matter of right that processes should be issued by the Court to enable them to bring forward their evidence. Similarly whether the delivery of possession by the Civil Court is symbolical or actual or whether there was a recognition by the second party of the sub-tenancy claimed by first party petitioner or whether there was a resumption of tenure under S. 14 of Chota Nagpur Tenancy Act, these are plain questions which are not for the Magistrate to decide. When the Magistrate has the evidence before him that the judgment-debtor was ejected and possession delivered by the Civil Court he must act on it. (*Ross, J.*) ARJUN MAHTON *v.* JUGGANNATH SINGH. **3 Pat. L. T. 433: 23 Cr. L. J. 275: 66 I. C. 419: A. I. R. 1922 Pat. 226.**

——S. 145—*Power of Magistrate — Order that neither party should work the land is incorrect.*

A Magistrate's order that neither party should work the land is incorrect. Under S. 145 (4), if he thinks the case is emergent he can attach the land. (*Carr, J.*) MG. PO LON *v.* MG. BA ON. **3 Bur. L. J. 256: 26 Cr. L. J. 324: 84 I. C. 548: A. I. R. 1925 Rang. 111 (2).**

——S. 145—*Proceedings under—Long delay after hearing—Case struck off—Propriety of.*

Proceedings under S. 145, Cr P. Code, were initiated in May, 1922. The proceedings were amended upon a report from the police and fresh proceedings were drawn up in 7th August 1922. The case was allowed to hang on from August 1922 up to June 1923. Witnesses were examined on certain dates and then the case was postponed from time to time to examine further witnesses. The witnesses were examined at long intervals and although arguments were heard, no order was passed for about 10 months. The Magistrate apparently forgot all about the case until he was reminded of it when he was going away on transfer. He then hurriedly disposed of the case by an order of the 27th March 1924, striking off the proceedings on the ground that there would be no likelihood of a breach of the peace after such a long interval. *Held*, that the order of the Magistrate was not justified by any provision of law. It is highly desirable that once the hearing is

CR. P. CODE (V OF 1898), S. 145—Relevency of Title.

commenced and witnesses are examined, the hearing should go on from day to day until all the evidence is taken and argument is heard and then the order should be passed as soon as possible. (*Kulwant Sahay, J.*) SASTU SAHU *v.* NATHUNI THAKUR.
1924 P. H. C. C. 231 : 6 Pat. L. T. 258 : 83 I. C. 665 : 26 Cr. L. J. 105 : 3 Pat L. R 145 (Cr.) : A. I. R. 1924 Pat. 689.

——S. 145—*All processes should be issued at Government expense—Proceedings are between Crown on one side and all the other parties on the other side.*

Proceedings under S 145 of the Criminal Procedure Code take place on behalf of the Crown on a report made to the Magistrate. The proceedings are against all other parties concerned and processes should issue at Government expense. The parties originally mentioned and any others who may come in later should be ranged on one side as the first party, the second party and so forth. (*Hallifax, A. J. C.*) EMPEROR *v.* MT. EHUTANJA. **A.I.R. 1925 Nag. 142.**

—— S. 145—*Receiver—Remuneration.*

The fixing of the remuneration to be paid to a Receiver appointed under S. 145 of the Criminal Procedure Code is not to be guided by that to be paid to a Receiver under the Civil Procedure Code. But there is no legal basis for remuneration being allowed far in excess of the actual income from the property. (*Findlay, O. J. C.*) MT. YAMUNA BAI *v.* EMPEROR.
8 N. L. J. 167 : A. I. R. 1925 Nag. 462.

Relevancy of symbolical possession.

——S. 145—*Relevancy of symbolical possession obtained in* ex parte *decree in Civil Court can be ignored as against stranger to a suit.*

A Criminal Court is not bound by *ex parte* Civil Court decree in execution of which plaintiff landlord obtained merely symbolical possession, in a case between the decree-holder and the third party. 20 C. W. N. 796 ; 26 Cal. 625, Dist. (*Greaves and Panton, JJ.*) PROMADA SUNDARI DASSI *v.* KHETRA BAG.
25 Cr. L. J. 1104 : 81 I. C 928 : A. I. R. 1925 Cal. 186.

——S. 145—*Relevancy of symbolical possession of decree-holder — Actual possession with judgment-debtor's representatives.*

Where the heirs and representatives of the original judgment-debtor were in possession of a property symbolical possession of which was given to the decree-holder auction-purchaser on 17th November 1918 few days before the death of the judgment-debtor, *held*, that the Magistrate could not validly put the auction-purchaser in possession, in S. 145 proceedings instituted on 22nd January 1921. (*Teunon and Suhrawardy, JJ.*) SHAHABAJ MANDAL *v.* BHAJAHARI NATH. **49 C. 177 : 75 I. C. 75 : 25 C. W. N. 743 : 24 Cr. L. J. 875 : A. I. R. 1922 Cal. 364.**

Relevancy of title.

——S. 145—*Relevancy of title—Possession—Conflicting evidence.*

Where a Judge finds on each side evidence which in itself is reliable and he finds that the evidence on the one side is equally balanced and he is unable to conclude from such evidence which party is in possession, then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he has found to be in that side. However, the principle does not apply to a case where the Court has come to the conclusion that the evidence as regards possession is equally unreliable on both sides. (*Sanderson, C. J. and Chotzner, J.*) AKSHOY KUMAR *v.* BROJESWAR GHATTAK. **26 C. W. N. 1000 : 71 I. C. 365 : 24 Cr. L. J. 141 : A. I. R. 1923 Cal. 303.**

CR. P. CODE (V OF 1898), S. 145—Revision.

——S. 145—*Relevancy of title—How far can be used.*

The Magistrate cannot, in a proceeding under S. 145 of the Cr. P. Code, rely simply on the question of title but he can use the evidence of title to supplement the evidence of possession. (*Beachcroft and Ghose, JJ.*) ROMESH CHANDRA SARKAR *v.* MOHIM CHANDRA GUHA. **61 I. C. 174 : 22 Cr. L. J. 350 (Cal.).**

——S. 145—*Relevancy of title—Question need not be elaborately gone into.*

Elaborate enquiries into questions of title need not be made as the proceedings are intended to be summary. (*Kendall, A. J. C.*) EMPEROR *v.* MT. MAN KUNWAR. **25 Cr. L. J. 1081 : 81 I. C. 905 : A. I. R. 1925 Oudh 149.**

——S. 145—*Relevancy of title—Cr. P. Code, S. 144.*

Questions of title, fraud, etc., cannot be tried in proceedings under S. 145 or 144. (*Adami and Bucknill, JJ.*) H. V. LOW AND CO., LTD. *v.* MAHARAJ SIR MANINDRA CHANDRA NANDI. **3 Pat. 809 : 26 Cr. L. J. 268 : 84 I. C. 332 : A. I. R. 1925 Pat. 33.**

——S. 145—*Relevancy of title.*

An agreement to get the case decreed on title and not to produce any evidence as to possession does not fall within the scope of S. 145. (*Adami, J.*) PRATAB UDAI NATH *v.* SUNDERBANS KOER.
3 Pat. L. T. 628 : 71 I. C. 999 : 24 Cr. L. J. 279 : A. I. R. 1923 Pat. 76.

Revision.

——S. 145—*Revision.*

The High Court can interfere in revision if there has been not a proceeding either in fact or in law as contemplated by S. 145. 17 A. L. J. 434 Ref. Where the lower Court has exceeded its jurisdiction in making the order, it is null and void and the High Court will interfere. (*Gokul Prasad, J.*) MT. HAR PIARI *v.* NATHE LAL. **L. R. 2 A. (Cr.) 22.**

—— S. 145—*Revision—Question of possession — Decree of Civil Courts—Value of.*

In proceedings under S. 145, Cr. P. Code, the Magistrate in considering the question of possession should not go behind the decision of the Civil Court between the same parties. Where a Magistrate acts in disregard of an order of a Civil Court directing delivery of possession he acts with material irregularity justifying interference by the High Court in revision. Where the decree of the Civil Courts is between the same parties it does not matter whether the delivery of posseseion is actual or symbolical. (*Newbould and Suhrawardy, JJ*) AKHOY MONDAL *v.* BASU RAI. **37 C. L. J. 256 : 73 I. C. 53 (2) : 24 Cr. L. J. 517 (2) : A. I R. 1923 Cal. 176 (1).**

——S. 145 (1) (5)—*Revision — Order without jurisdiction—Setting aside order.*

The mere absence of a finding that there is likelihood of a breach of the peace does not justify interference by the High Court. Unless a party to such a proceeding can show that there was no likelihood, an order under S. 145 (1) cannot be set aside. (*Beachcroft and Ghosh, JJ.*) RANADA RAMJAN *v.* BHARTA CHANDRA. **33 C. L. J. 69 : 25 C. W. N. 215 : 62 I. C. 180 : 22 Cr. L. J. 484.**

——Ss. 145 and 439—*Revision — Difference of opinion—Senior Judge.*

On a difference of opinion in matters under S. 145, Cr. P. Code, the Senior Judge's opinion prevails as the jurisdiction exercised by the High Court is under S. 107 of the Govt. of India Act and not under Ss. 435

CR. P. CODE (V OF 1898), S. 145—Revision.

and 439, Cr. P. Code. (*Chaudhury and Newbould, JJ.*) THE INDIAN IRON AND STEEL COMPANY *v.* BANSO GOPAL TEWARI. **32 C. L. J. 54 : 59 I. C. 403 : 22 Cr. L. J. 99.**

——**Ss. 145 and 435** — *Revision — Proceedings without jurisdiction—Breach of the peace — Preliminary order—Interference by High Court.*

The omission to pass an order under S. 145 (1) of the Criminal Procedure Code stating that the Magistrate is satisfied of the existence of a dispute likely to cause breach of the peace is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section, the proceedings are without jurisdiction and cannot be regarded as proceedings under S. 145 of the Criminal Procedure Code. Accordingly S. 435 (3) of the Criminal Procedure Code does not preclude the High Court from entertaining an application for revision in such a case. (*Martineau, J.*) HAKAM *v.* RALIA RAM **4 Lah. 66 : 74 I. C. 79 : 24 Cr. L. J. 751 · A. I. R. 1924 L. 91.**

——**S. 145**—*Revision.*

Complainant appeared before the Magistrate with a petition to the effect that the respondent had in violation of the *razinama* previously filed taken possession of a *kotha* leasing it out and threatened to use violence. The Magistrate summoned the respondent who appeared and put in a written statement to the effect that the *kotha* was already in his possession and that there was no apprehension of breach of the peace. The Magistrate then ordered that " till the decision of the civil case the respondent shall not keep his possession over the property in dispute." *Held*, that the proceedings after the date of the *razinama* were in continuation of the order made on that day, and that the second complaint was not treated by the Magistrate as a fresh complaint under S. 145. That being so, there was no grave irregularity in the proceedings or final order of the Magistrate. (*Zafar Ali, J.*) BAWA BANSIGIR *v.* BAWA JAMNAGIR. **69 I. C. 452 : 23 Cr. L. J. 724 : A. I. R. 1923 Lah. 46.**

——**S. 145** —*Revision—Irregularity of procedure is no ground.*

The essential requisite to give a Magistrate jurisdiction under section 145 is that he must be satisfied from information of some sort that a dispute likely to cause a breach of the peace exists concerning land or water or the boundaries thereof in his jurisdiction and that once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. It being so, High Court will not interfere in revision with an order under section 145 even when the order is passed without giving an opportunity to the aggrieved party to produce evidence, that being only an irregularity in procedure. (*Martineau, J.*) JHANDA RAM *v.* TOPAN RAM. **4 U. P. L. R. (Lah.) 82 : 67 I. C. 584 : 23 Cr. L. J. 424 : A. I. R. 1922 Lah. 454.**

——**S. 145**—*Revision.*

Where the magistrate dismissed an application without finding as to who was in possession, his order is revisable. (*Broadway, J.*) MT. MALAN *v.* MAKHAN SINGH. **2 Lah. 372 : 66 I C. 65 23 Cr. L. J. 225 : A. I. R. 1922 Lah. 348.**

——**S. 145 (1) and (4)**—*Revision — Preliminary order—Cancellation of—Dropping of proceedings — Revision.*

A magistrate has jurisdiction to cancel an order passed under S. 145 (1), Cr. P Code, and to stay proceedings if he becomes satisfied, whatever the source of information may be that the state of things does not exist which alone would give jurisdiction to proceed with the enquiry. The High Court could not interfere in such cases as the magistrate has not acted without jurisdiction. 30 C. 112, Foll. (*Scott-Smith, J.*) SANTOKH SINGH *v.* RAM SINGH. **2 Lah. 364 : 66 I. C. 516 : 23 Cr. L. J. 292.**

——**S. 145**—*Revision—Order under—Revision to High Court against—Receiver—Appointment of, pending disposal of petition—High Court—Jurisdiction.*

The High Court has no jurisdiction to entertain a petition for the appointment of a Receiver pending the disposal of a criminal revision petition preferred against an order of the Lower Court passed under S. 145, Criminal Procedure Code. (*Devadoss and Wallace, JJ.*) MARUDAYYA THEVAR *v.* SHANMUGA SUNDARA THEVAR. **22 L. W. 723 : (1925) M. W. N. 772 : 49 M. L. J. 593.**

——**S. 145**—*Revision.*

Where the Magistrate failed to decide as to which party was in possession on the date of the preliminary order, the High Court can in such circumstances interfere on the ground that the Magistrate has acted without jurisdiction. 16 Cr. L. J. 239, 7 Cr. L. R. 450 and 18 Mad. 41, Foll. (*Venkatasubba Rao, J.*) PERIA SUBBA GOUNDAN *v.* SUBBAYYA GOUNDAN. **16 L. W. 701 : 69 I. C. 158 : 31 M. L. T. 382 (H. C.) : 23 Cr. L. J. 670 : A. I. R. 1923 Mad. 142 : 45 M. L. J. 50.**

——**Ss. 145 and 439**—*Revision—Want of jurisdiction—Serious irregularity—Government of India Act* (1915), S. 107.

When there is initial want of jurisdiction it is clear that the proceedings though they may purport to be under S. 145 are not really proceedings under it and the High Court can interfere under S.439, Cr. P. Code, but if the proceedings were properly started all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Charter Act. 31 Mad. 318, Foll ; 26 M. L. J. 280, Ref. (*Ramesam, J.*) THYLAYEE AMMAL *v.* SRIRANGAROYA GOUNDAN. **16 L. W. 497 : 71 I. C. 228 : (1922) M. W. N. 629 : 31 M. L. T. 202 : 24 Cr. L. J. 100 : A. I. R. 1923 Mad. 60 : 43 M. L. J. 624 :**

——**Ss. 145 and 146**—*Revision—Possession proceedings—Finding as to possession—Absence of—High Court—Interference in revision.*

Where the magistrate in proceedings under S 145, Cr. P. Code, did not even attempt to deal with the question of possession and gave no finding thereon, but declared the possession to be with the party whom he considered to be lawfully entitled, his order is an obvious infringement of S. 145, Cr. P. Code, and the High Court could set it aside in revision. 29 M. 561 ; 17 Bom. L. R. 382, 18 C W. N. 700 ; 36 M. 275 Ref. (*Venkatasubba Rao, J.*) SINNANAN SHUKURATHI ROWTHEN *v.* GULAM MOIDEEN ROWTHER. **16 L. W. 338 : (1922) M. W. N. 689 : 71 I. C. 508 : 24 Cr. L. J. 156 : A. I. R. 1923 Mad 24.**

——**S. 145**—*Persons not parties to proceedings—Revision.*

An order under S. 145 is not binding on persons who are not parties to the proceedings. Such persons have no *locus standi* to apply in revision. (*Baker, J. C.*) RAMCHANDRA *v.* GANPAT. **26 Cr. L. J. 1035 : 87 I. C. 923 (2) : A. I. R. 1925 Nag. 448.**

——**Ss. 145 (1) and 439**—*Order under S. 145 (1)—Revision—Necessary party not asked to file written*

CR. P. CODE (V OF 1898), S. 145—Revision.

statement—No specific statement as to danger of breach of peace—Proceedings will be set aside in revision.

Although a person is not one of the parties to the dispute but is in possession of part of the land, he is a necessary party to the proceedings and should be asked to file a written statement. Where this is not done and where the Magistrate's order does not specifically state that there is a danger of breach of the peace, the High Court on revision will interfere. (*Dalal, J. C.*) RAM BHUSHAN DAS *v.* RAM LAKHAN SAHU. **85 I. C. 918 : 26 Cr. L. J. 630 : A. I. R 1925 Oudh 484.**

——— **S. 145**—*Revision.*

Orders under the section are not revisable unless they are wholly *ultra vires* and without jurisdiction. (*Wazir Hasan, A. J. C.*) HIRA LAL *v.* EMPEROR. **11 O. L. J. 59 : 77 I. C. 728 : 25 Cr. L. J 440 : A. I. R. 1924 Oudh 331.**

——— **S. 145**—*Revision—Finding not based on legal evidence is open to revision—Scope.*

A property was sold in execution of a decree. While an appeal was pending from an order refusing to set aside the sale, the auction-purchaser applied for mutation which proceeding was also stayed. In S. 145 proceedings the magistrate relying on the evidence in the mutation proceedings came to the conclusion that the possession of the auction-purchaser had been satisfactorily established and that existence of the conflicting claims rendered a breach of the peace at any time probable. *Held*, the magistrate was not justified in importing his knowledge of the evidence recorded in the mutation proceeding still undecided into this case and assuming that a breach of the peace was likely, the finding is thus virtually a finding based on no legal evidence and is open to revision. 34 Cal. 840, Foll. (*Kanhaiya Lal, J. C.*) MIRZA RAZA HUSAIN *v.* M. HASAN MIRZA. **25 O. C. 148 : 69 I. C 268 : 10 O. L. J. 157 : 23 Cr. L. J. 684 : A. I. R. 1922 Oudh 256.**

——— **S. 145**—*Revision.*

Where the Dist. Magistrate wrongly ordered the substitution of proceedings under S. 145 for those under S. 144 but where the petitioner himself wanted proceedings under S.145 and where the Sub-Divisional Magistrate himself drew up the proceeding on proper material, the High Court will refuse to set aside the order. (*Jwala Prasad, J.*) TILOKI RAI *v.* EMPEROR. **2 Pat. L. T. 392 : 68 I. C. 34 : 23 Cr. L. J. 498.**

——— **S. 145**—*Revision—Refusal to examine witnesses is ground.*

The refusal of a Magistrate to examine witnesses in a proceeding under S. 145 amounts to failure to exercise jurisdiction and entitles the High Court to interfere in revision. (*Jwala Prasad, J.*) BISWANATH MAHAPATRA *v.* SHIVANAND SARASWATHI. **2 P. L. T. 330 : 61 I. C. 718 : 22 Cr. L. J. 430.**

——— **S. 145**—*Revision—Survey entry—No oral evidence—Legality.*

Where in the absence of oral evidence the Court decided the case upon the documentary evidence, namely, the record of rights, the High Court will not interfere. (*Jwala Prasad, J.*) PATHAK JAIRAM SINGH *v.* THAKUR DOMAN SINGH **2 Pat. L. T. 266.**

Security for keeping peace.

——— **Ss. 145 and 107**—*Security for keeping peace—Propriety of order under S. 107.*

Where the property was recorded in the Collector's register in the name of the widow after the death of her husband in the absence of an objection by the agnates under Bengal Land Registration Act, and where there was a dispute as to the possession of the property, proceedings under S. 107 against the agnates who claimed the properties on the ground of survivorship were proper especially where there was overwhelming evidence of the widow's possession. An order under S. 107 can be passed only when the wrongful acts can be proved by overt actions against each of the several individuals sought to be bound down. Where, however, the wrongful acts are committed or threatened to be committed jointly by a number of individuals and not only by some of them, the act is the act of all and therefore all of them are liable under S. 107. (*Jwala Prasad, J.*) LACHMI SINGH *v.* EMPEROR. **1 Pat. L. T. 681 : 59 I. C. 374 : 22 Cr. L. J. 86.**

CR. P. CODE (V OF 1898), S. 145.—Value of Police Report.

Transfer of case.

——— **Ss. 145 and 526**—*Transfer of case—Proceedings under S. 145 can't be transferred.*

S. 526 does not empower a High Court to transfer proceedings under S. 145 of the Code as such proceedings cannot be described as a criminal case which means a case in which a person is accused of an offence. (*Martineau, J.*) NARAIN SINGH *v.* GANDHARI RAI. **25 Cr. L. J. 276 : 76 I. C. 868 : A. I. R. 1925 Lah. 48.**

——— **S. 145**—*Transfer of case—Not illegal.*

It is not illegal for a magistrate to transfer the case when the parties are ready for trial and some have even filed written statements. 2 P. L. T. 186, Dist. (*Kulwant Sahay, J.*) RAMJHARIA *v.* PIAR KOERI. **4 Pat. L. T. 308 : 73 I. C. 173 : 2 Pat. L. R. (Cr.) 6 : 24 Cr. L. J. 557 : A. I. R. 1923 Pat. 369.**

Transfer of Magistrate.

——— **S. 145**—*Transfer of Magistrate—Order cannot be passed by a Magistrate after handing over charge.*

Where a Magistrate who has tried a case under S. 145, Cr. P. Code, is transferred and hands over charge, he is incompetent to deliver the final order, having become *functus officio* at that time. (*Newbould and Suhrawardy, JJ.*) JAGAT BHANDHU SAHA *v.* JAGABANDHU SAHA SARDAR. **38 C. L. J. 201 : 76 I. C. 432 : 25 Cr. L. J. 192 : A. I. R. 1924 Cal. 192.**

——— **Ss. 145 and 350**—*Transfer of Magistrate—Evidence partly recorded by predecessor—If can be relied on.*

A Magistrate is within his jurisdiction in deciding a case under S. 145, Cr. P. Code, on evidence partly recorded by his predecessor and partly by himself even though the party demanded a *de novo* hearing, (*Foster, J.*) SONDI SINGH *v.* GOVIND SINGH. **5 Pat, L. T. 237 : 2 Pat. L. R. 108 (Cr.) : 76 I. C. 25 (2) : 25 Cr. L. J. 89 (2) : A. I. R. 1924 Pat. 786.**

Value of Police Report.

——— **S. 145**—*Value of police report—Magistrate can refuse to take action except on a report from the police containing the definite opinion of a responsible police officer that he apprehends a breach of the peace requiring Magistrate's intervention.*

A Magistrate as a general rule may refuse to take action at all under S. 145 except when a report from the police is sent to him on the matter. Even when such report is sent to the Magistrate it should not be a mere forwarding of a report made to the police by one of the parties even though accompanied by a record of the inquiry made by a police officer in the same matter. But it must be a definite statement of opinion by a responsible police officer to the effect that he apprehends that there will be a disturbance

CR. P. CODE (V OF 1898), S. 145—Value of Police Report.

of the peace which is beyond his powers to prevent and that he therefore desires the exercise of the higher powers of the Magistrate to prevent it. When such report is not sent to the Magistrate the fact will almost be conclusive as an indication of the absence of any likelihood of the breach of the peace. (*Hallifax, A. J. C.*) EMPEROR *v.* MT. EHUTANJA.

25 Cr. L. J. 1109 : 81 I. C. 933 : A. I. R. 1925 Nag. 142.

——S. 145—*Value of police report—Proceedings not defective.*

Where the Magistrate initiates proceedings under S. 145 upon a Police report that there is a dispute likely to cause breach of peace, he cannot be said to act without jurisdiction. (*Jwala Prasad, J.*) ISARI PRASAD CHAUDHRI *v.* WARASAT HUSSAIN.

1 Pat. L. T. 738 : 60 I. C. 61 : 22 Cr. L. J. 205.

——S. 145 (4)—"*Wrongful*"—*Rightful owner taking possession otherwise than peaceably.*

The word "wrongful" in S. 145, cl. (4) of the Cr. Pr. Code does not involve that the dispossessor has no legal right to the possession of the property. The distinction is between forcible entries which are rightful and forcible entries which are wrongful and this depends on whether the person entering is entitled to use force and not merely on whether he has a legal right to possession. The words "forcibly and wrongfully" have the same meaning as forcible entry without due warrant of law under the English statute. A forcible entry must be wrongful unless it is in execution of a legal process. (*Marten and Pratt, JJ.*) BAI JIBA *v.* CHANDULAL AMBALAL

27 Bom. L. R. 1353.

——S. 146—*Order of attachment cannot be withdrawn unless likelihood of breach of peace has ceased or competent Court has determined the rights of the parties to the proceedings.*

Once an order under S. 146, Cr. P. Code, has been passed by a Court it can come to an end only if there is no longer any likelihood of a breach of the peace in regard to the subject-matter of the dispute, in which case the Magistrate can withdraw the order of attachment or if a competent Civil Court has determined the rights of the parties to the proceedings or the person entitled to possession of the subject-matter of the dispute. An entry in the finally published Record-of-rights cannot be regarded as constituting the final adjudication of a competent Court within the meaning of S. 146, (1). Cr. P. Code. (*Newbould and Mukerji, JJ.*) KUTISWAR MONDAL *v.* JITENDRA NATH SEN.

26 Cr. L. J. 1055 : 87 I. C. 975.

——S. 146—*Attachment of property—Subsequent decision of Civil Court—Not* inter partes—*Effect of—Withdrawal of attachment.*

On the 29th of March 1922 a Magistrate before whom proceedings under S. 145 of the Cr. P. Code had been instituted ordered attachment of the property in dispute consisting of an underground colliery and certain huts on the surface. In a suit relating to a money claim laid by a third person against some members of the second party the Subordinate Judge on 24-3-1923 decided adversely to rights of the members of the second party with regard to the ownership of the colliery. Thereupon the first party applied to the Magistrate for withdrawal of the attachment that had been effected on 29-3-1922 and for a declaration of possession. The Magistrate withdrew the attachment and gave possession to the first party. *Held*, that Magistrate had jurisdiction to pass the order in question, even though the first party had not been impleaded as party to the civil litigation and all the members

CR. P. CODE (V OF 1898), S 146.

of the second party had not been made parties to that litigation. (*Greaves and Panton, JJ.*) ASES KUMAR MISRA *v.* KISSORI MOHAN SARKAR.

39 C. L. J. 353 : 25 Cr. L. J. 937 : 81 I. C. 553 : A. I. R. 1924 Cal. 812.

——S. 146—*Brevity of order under—Revision.*

It is impossible to lay down a hard and fast rule when the High Court should interfere on the ground of brevity of the order passed in a proceeding under S. 146. (*Newbould and Suhrawardy, JJ.*) KANAI LAL *v.* HYDER ALI. **37 Cal. L. J. 127: 73 I. C. 271: 24 Cr. L, J. 575 : A. I. R. 1923 Cal. 483 (1).**

——S. 146—*Evidence of possession on both sides equally unreliable—Order under S.* 145 *based on presumption of possession arising from the title, if valid—Such presumption when applicable—Interference by High Court—Magistrate directed to act under S.* 146.

Where in a proceeding under S. 145, Cr. P. Code, a Magistrate found that the evidence of possession on both sides was equally unreliable, but declared the second party to be in possession relying on the presumption as to possession arising from title. *Held* that the order of the Magistrate under S. 145 was bad and he was directed to act under S. 146, Cr. P. Code.

Where a Magistrate finds the evidence on both sides, which in itself is reliable, equally balanced, and he is unable to conclude from such evidence which party is in possession, then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side. But this principle does not apply in a case where the Magistrate finds that the evidence of possession on both sides is equally unreliable. (*Sanderson, C. J. and Chotzner, J.*) ASHOY KUMAR BHATTACHARJIA *v.* BROJESWAR GHATTAK.

26 C. W. N. 1000 : 24 Cr. L. J. 141 : 71 I. C. 365 : A. I. R. 1923 Cal. 303.

——Ss. 146 and 145—*Witnesses present not examined—No order can be passed.*

An order passed under S. 146 was held not to be valid and was set aside, where none of the witnesses present in Court to give evidence in a proceeding under S. 145 was examined. (*Walmsley, and Suhrawardy, JJ.*) SITA NATH BHAGAT *v.* RAMKISHORE MONDAL

35 Cal. L. J. 291 : 69 I. C. 272 : 23 Cr. L. J. 688 : A. I. R. 1922 Cal. 280.

——S. 146—*Attachment under—Custody of Court enures for benefit of true owner.*

A property attached under S. 146 of the Code passes into legal custody, such custody being for the benefit of the true owner. If the true owner was in possession at the time of attachment his possession is not interrupted. But if a wrongdoer was in possession the effect of the attachment is to interrupt his possession and revive the possession of the rightful owner. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BIBHABATI DEBI. **66 I. C. 433 (2) : 34 C. L. J. 302.**

——S. 146—*Attachment of property—Release—Inherent power.*

S. 146 of the Cr. P. Code is not exclusive and an attaching Magistrate has an inherent power to release from attachment when the likelihood of the breach of the peace has disappeared. (*Wilberforce, J.*) KHUSHI RAM *v.* EMPEROR.

1 Lah. 451 : 59 I. C. 36 : 22 Cr. L. J. 4.

——S. 146—*Order without enquiry is wrong.*

Where no evidence was taken, no statements were made before Mthe agistrate and he made an order merely on account of an allegation in the written statement of a party as to possession *held*, the order of attachment is clearly wrong. (*Venkatasubba Rao, J.*) PALANI GOUNDAN *v.* KULANDAIVELU GOUNDAN.

CR. P. CODE (V OF 1898), S. 146.

72 I. C. 541 : (1922) M. W. N. 484 : 24 Cr. L. J. 429 : A. I. R. 1922 Mad. 437 : 43 M. L. J. 617.

——S. 146—*Order under—Proceedings under S. 145 necessary.*

There must be a proceeding under S. 145 before an order under S. 146 can be passed. (*Kotval, A. J. C.*) NILKANTH *v.* SURYABHAN.

75 I. C. 80 : 24 Cr. L. J. 880 : A. I. R. 1923 Nag. 297.

—— S. 146—*Attachment—Withdrawal of — Magistrate's discretion to deliver possession of the subject of dispute to the contesting parties in fractional shares—Exercise of judicial discretion.*

It is open to a Magistrate under the proviso to S. 146 of the Code to make over possession of the subject of dispute, which is in most cases a landed estate, to any person that he thinks fit, and when he makes over the possession in certain fractional shares to two parties, he must exercise a judicial discretion. The Magistrate is, however, not bound to make over the possession to anybody. There may be cases in which it is sufficient for him to make an order withdrawing the attachment and leave some party to take possession. *Held*, that in this case a judicial discretion was exercised by the Magistrate. (*Simpson, A. J. C.*) ALI BAHADUR *v.* EMPEROR. **26 Cr. L.J. 1629 : 90 I. C. 925 : 2 O. W. N. 868.**

——S. 146—*Attachment of property--Criminal Court—Jurisdiction of.*

Under S. 146 of the Code of Criminal Procedure the Criminal Court after attaching the property is *functus officio* unless the subsequent event occurs of a competent court determining the rights of the parties to the property or the person entitled thereof- (*Ashworth, J. C.*) SURENDRA BIKRAM SINGH *v.* EMPEROR. **25 O. C. 242 : 73 I. C. 153 : 24 Cr. L. J. 537 : A. I. R 1922 Oudh 300.**

——S. 146—*Scope of—Attachment by itself does not justify appointment of receiver.*

The passing of an *ad interim* order of attachment does not by itself justify the appointment of a receiver unless on a subsequent inquiry the appointment of a receiver is found necessary, where the Magistrate is unable to decide which party is in possession or decides that none of them is in possession. *Kanhaiya Lal, J. C.*) RAZA HUSAIN *v.* M. HUSAIN MIRZA. **25 O. C. 148 : 69 I. C. 268 : 10 O. L. J. 157 : 23 Cr. L. J. 634 : A. I. R. 1922 Oudh 256.**

——Ss. 146 and 145 (4) (6)—*Burden of proof—Provisions of S. 146 differ from provisions of S. 145 (6)—Plaintiff going to a Civil Court after attachment under S. 146 has to show that he has rights in the land and he was entitled to possession.*

Provisions of S. 146 differ from those of S. 145 (6). What the plaintiff has to show to the Court when he comes to it after attachment under S. 146 is that he has rights in the lands attached and that he is entitled to possession. Provisions of S. 146 differ from those of S. 145 (6). S. 146 (6) provide that the Magistrate shall issue an order declaring a party to be entitled to possession of the subject-matter in dispute until evicted therefrom in due course of law in case he decides that the party was in possession or should, under the first proviso to sub-section 4, be treated as being in possession, of the subject-matter in dispute. (*Jawala Prasad, A. C. J. and Kulwant Sahay, J.*) HARAGOBIND RAY *v.* KESHAV PRASAD SINGH. **1924 P H. C. C. 297 : 84 I. C. 386 : A. I. R. 1925 Pat. 168.**

——S. 146—*Revision— Failure to understand Civil Court's decree.*

Where the Deputy Magistrate attached the property in dispute, owing to his not understanding the meaning of a Civil Court's decree relating to the same property, his order is irregular and without jurisdiction. (*Bucknill, J.*) DURGANAND OJHA *v.* HIRANAND OJHA. **25 Cr. L.J. 88 : 76 I. C. 24 : A. I R. 1924 Pat. 711 (2).**

——S. 146—*Order of attachment without trying to give a final decision is not sound.*

It is not a Magistrate's business to speculate whether his order under S. 145 will prejudice a future decision, perhaps several years hence, in a revenue proceeding. It is also not sound to check his hand because his decision is not final. Although it is true that an attachment under S. 146 will as effectually prevent a breach of the peace as a decision in favour of a party under S. 145 a reasonable effort, varying of course with the circumstance of each particular case, must be made to decide as to possession before there is jurisdiction to attach the subject-matter under S. 146. 10 C. 105, Ref. (*Macpherson, J.*) WAYESAL HUQ *v.* SHOBRATE JOLAHA. **4 Pat. L. T. 441 : 74 I. C. 258 : 1 Pat. L. R. Cr. 161 : 24 Cr. L. J. 754 : A. I. R. 1924 Pat. 47.**

——S. 146—*General remarks about evidence insufficient.*

The general remark in an order under S. 146, Criminal Procedure Code, that the oral evidence is not reliable without referring to it and without giving any reason, is not a disposal of the evidence upon the record; it amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision. 63 I. C. 152 and 57 I. C. 169, Foll. (*Kulwant Sahay, J.*) LAKHPAT GOPE *v.* EMPEROR. **4 P. L. T. 579 : 1 Pat. L. R. 152 Cr. : 72 I. C. 544 : 24 Cr. L. J. 432 : A. I. R. 1923 Pat. 588.**

——S. 146—*One party found to be in possession—No attachment can be made.*

Where the first party, a widow and her mortgagee are found to be in possession of the disputed garden and the second party is not found to be in possession, a Magistrate is not entitled to attach the subject of dispute merely on the ground that the widow had, in her written statement, stated that she was not in possession but the mortgagee was, because the possession which she had may be exercised through her mortgagee. (*Ross, J.*) MT. MAHODRA KOER *v.* KHUBAN PANDAY. **A. I. R. 1923 Pat. 363.**

——Ss. 146 and 145—*Dt. Magistrate cannot upset order of Magistrate.*

An order passed in a proceeding under S. 145 cannot be upset by the Magistrate of a District ; the remedy is to move High Court in revision or to go to the Civil Court for a decision of the claims of the parties. The notice issued by the Deputy Commissioner stating that, unless a civil suit is brought within a certain period, the lands would be released from attachment and handed over to one of the parties cannot stand. He would not be able to review his order in the above manner. (*Adami, J.*) RAM KUMAR LAL *v.* THAKUR OJHA. **3 Pat. L. T. 648: 68 I. C. 402 : 1922 P. H. C. C. 224 : 4 U. P. L. R. (Pat.) 52 : 1 Pat. L. R. Cr. 1 : 23 Cr. L. J. 562 : A. I. R. 1922 Pat. 554.**

——S. 146—*Inquiry is necessary.*

Before attaching the property, a Magistrate must make some enquiry in order to ascertain, if possible, who was in possession. (*Ross, J.*) PARSURAM RAI *v.* SHIVAJATAN UPADHAYA. **3 Pat. L. T. 434 : 23 Cr. L. J. 277 : 66 I. C. 421 : A. I. R. 1922 Pat. 544.**

——Ss. 146 and 145—*Remark that evidence is not reliable—Refusal to exercise jurisdiction—Revision.*

CR. P. CODE (V OF 1898), S. 146.

Where a Magistrate in passing an order under S. 146, makes a general remark that the evidence is not reliable without referring it or giving reasons, it is not a disposal of the evidence upon record but amounts to refusal to exercise jurisdiction, liable to revision by High Court. An order declaring certain persons to be in possession of property in dispute on the happening of a contingency is not one under S. 146 but under S. 145. (*Jwala Prasad, J.*) LACHMI OJHA *v.* BIRJA MISSER. **(1921) P. H. C. C. 110 : 22 Cr. L. J. 616 : 63 I. C. 152 : 2 Pat. L. T. 168.**

——**S. 146**—*Order under—When to be passed—Contents of—Revision.*

A Magistrate can pass an order under S. 146 of the Code only when he is unable, on a consideration of the evidence, to come to a definite finding as to the possession of either party and he must give reasons for such inability. If not the order is without jurisdiction and liable to be set aside in revision. (*Jwala Prasad, J.*) KHEDAN MAHTO *v.* HUSSAINI KALAL. **61 I. C. 51 : 2 P. L. T. 16 : 22 Cr. L. J. 323 : 1921 P. H. C. C. 112.**

——**S. 146 (1)**—*Campetent Court—Meaning of—Decision of Revenue Court.*

The expression "competent Court" in S. 146 (1) of the Cr. P. Code is wide enough to cover a Revenue Court and the order of Revenue Court under S. 40 of the U. P. Land Revenue Act declaring the person entitled to the property and putting him in possession and ordering mutation in the Revenue Records in his favour is within the section. (*Boys, J.*) RAM SRI *v.* SRI KISHAN. **22 A. L. J. 803 : L. R. 5 A. 129 (Cr.) : 82 I. C. 170 : 25 C. L. J. 1242 : A. I. R. 1924 All. 777.**

——**S. 147**—*Inclusion of a further portion of the pathway without notice to the party affected vitiates the final order.*

Where the court amended the proceedings which related originally only to a portion of a pathway, by making them applicable to the whole pathway without notice to the party affected. *Held*, that the final order was not binding on the party affected (*Greaves and Panton, JJ.*) JANAKI NATH KUNDU PAL *v.* MONMOHAN DE. **25 Cr. L. J. 674 : 81 I. C. 162 : A. I. R. 1925 Cal. 263 (2).**

——**S. 147**—*Dispute as to right of worship only—S. 147 and not S. 145 is proper.*

Where the real dispute between the parties was as to the right to worship in the temple and not as regards the possession of the temple.

Held; that the proper section under which action should be taken by the Magistrate to prevent a breach of peace is S. 147 and not S. 145. 16 M. L. T. 427, 29 Mad. 237 and 11 Mad. 323 Rel. on, 17 Cr. L. J. 235, Dist. (*Krishnan, J.*) SINNASWAMI CHETTI *v.* PALANI GOUNDAN. **88 I. C. 2 : A. I. R. 1925 Mad. 779 : 26 Cr. L. J. 1057 (1) : 48 M. L. J. 528.**

——**S. 147**—*Order under—Breach of the peace—New parties if can be added after preliminary order.*

Unless there are special circumstances giving rise to an apprehension of the breach of the peace there is no jurisdiction to make an order under S 147, Cr. P. Code. Bringing on record new applicants after a preliminary order has been passed is undesirable. But it is only an irregularity and does not vitiate the proceedings. (*Prideaux, A. J. C.*) PARASHRAM *v.* GOPAL RAM CHANDRA. **25 Cr. L. J. 353 : 77 I. C. 289 : A. I. R. 1924 Nag. 294.**

——**S. 147**—*Easement.*

In respect of dispute as to an easement procedure under S. 147 to be followed. (*Kotwal, A. J. C.*)

CR P. CODE (V OF 1898), S. 147.

ASARAM *v.* CHOTULAL. **64 I. C. 288 : 22 Cr. L. J. 768 (N.)**

——**S. 147**—*Order against Gumashta of a proprietor without impleading the proprietor—Legality—Revision by High Court.*

The fact that the manager or the gumashta of a proprietor and not the proprietor has been made a party to the proceedings under S. 145 of the Cr. P. Code is a mere irregularity and not an illegality so as to justify interference by way of revision by the High Court. (*Kulwant Sahay, J.*) CHHAKAURI LALL *v.* ISHAR SINGH. **6 P. L. T. 799.**

——**S. 147**—*Final order—What it must contain.*

In the absence of a finding that the right has been exercised within the periods specified S. 147 the final order under S. 147 cannot be maintained. 2 Pat. L. T. 364 Foll. (*Kulwant Sahay, J.*) SIRKAWAL SINGH *v.* BHUJA SINGH. **5 Pat. L. T. 457 : 81 I. C. 708 : 25 Cr. L. J. 996 : A. I. R. 1924 Pat. 784.**

——**Ss. 147 and 144**—Ex parte *order declaring road to belong to respondent—Legality.*

Where a petition was put in under S. 144, Cr. P. C., claiming a right of easement over a road and asking for an order under the section on the opposite party on the ground a breach of the peace was imminent, but the Magistrate went over to the opposite party and after some *ex parte* enquiry passed an order declaring the road to belong to the opposite party the order is illegal and contrary to S. 147, Cr. P. Code. (*Kulwant Sahay, J.*) NARENDRA NATH SARKAR *v.* EAST INDIAN RAILWAY CO. **5 Pat. L. T. 419 : 77 I. C. 807 : 2 Pat. L. R. 209 (Cr.) : 25 Cr. L. J. 455 : A. I. R. 1924 Pat. 717.**

——**S. 147**—*Magistrate's power.*

Where the contention on behalf of the petitioners is that the order in favour of the opposite party in respect of a right to fish in water lying over the occupancy holdings of the petitioners is without jurisdiction inasmuch as an order can only be made under S. 147 if it appears to the Magistrate that the right to the use of land or water exists, but the Magistrate himself gave a finding of fact to that effect himself, relying on the written statement. Where there is an allegation that the right is the sole right of the Pipra concern, who have been exercising and enjoying it ever since the grant of the mokarari right to them by the Bettiah Raj:—*Held*, although this is not an explicit pleading of an acquisition of the right by adverse possession it is sufficient to let in the evidence on which that finding has been arrived at. (*Ross, J.*) BANDH RAI *v.* T. B. NORMAN. **A. I. R. 1922 P. 214.**

——**S. 147**—*Finding on evidence—Not vitiated by Local Inspection.*

Where in a proceeding under S. 147 a magistrate stated that he was satisfied from the evidence standing by itself that the conclusions he had come to were right one and that the conclusions were supported by what he had noticed in his local inspection; *held* that an order under S. 147 was rightly passed giving a party a right of way limited by the exclusions of vehicular traffic. A finding as to which party is in possession, though unnecessary under S. 147, does not affect materially proceedings ostensibly taken under S. 147. (*Bucknill, J.*) MUHAMMAD MUSA *v.* SHYAM SUNDER KOERI. **1921 P. H. C. C. 174 : 2 Pat. L. T. 681 : 64 I. C. 131 : 22 Cr. L. J. 739.**

——**S. 147**—*Direction to appear before another Magistrate is illegal.*

According to S. 147, an order directing the parties to appear before another Magistrate is illegal. (*Jwala Prasad, J.*) MISRI CHOUDHURY *v.* NARASING PRASAD. **2 Pat. L. T. 186 :**

CR. P. CODE (V OF 1898), S. 147.

62 I. C. 179 (2) : 22 Cr. L. J. 483.

——**S. 147**—*Order under, when to be made.*

A Magistrate cannot pass an order under S. 147 without coming to a clear finding that the party in whose favour the order is made exercised the rights in dispute within three months next before the institution of the inquiry or during the last season or occasion before its institution, if the right is exercisable at particular seasons or occasions. (*Jwala Prasad, J.*) MR. GRANT *v.* PADARATH JHA.

2 P. L. T. 364 : 61 I. C. 847 : 22 Cr. L. J. 463.

——**S. 147** (1)—*Right to take religious car in procession along public road is covered by sub-S.* (1).

A right to take a car in procession along a public road to a temple is a right of user of land which falls within the scope of sub-S. (1) of S. 147. (*Fawcett and Madgavkar, JJ.*) BASAPPA RACHAPPA BELKERI—*In re.* **27 B. L. R. 1058 : 26 Cr. L. J. 1422 : 89 I. C. 846 : A. I. R. 1925 Bom. 536.**

——**S. 147** (2) *Proviso—Non-exercise of the right for reasons beyond the control of the persons claiming the right.*

Where the non-exercise of the right within the proper period was due to the circumstances beyond the control of the person claiming the right, the proviso to S. 147 (2) cannot apply. (*Fawcett and Madgavkar, JJ.*) *In re* BASAPPA RACHAPPA BELKERI. **27 Bom. L. R. 1058 : 89 I. C. 846 : 26 Cr. L. J. 1422 : A. I. R. 1925 Bom. 536.**

——**S. 147 (2) & (3)**—*Merely not passing order under sub-S.* (2) *does not justify order under sub-S.* (3).

The mere fact that the Magistrate cannot pass an order in favour of the petitioners under sub-S. (2) is no reason for passing an order in favour of the opponents, prohibiting the petitioners from any exercise of their alleged right. That is an order under sub-S. (3), which he could only pass, if it appears to him that the petitioners' right does not exist. The mere fact that they did not exercise the right during the preceding year is not sufficient to show that the right does not exist, and it only prevents the Magistrate from issuing an order under sub-S. (2) supporting the alleged right. (*Fawcett and Madgavkar, JJ.*) BASAPPA RACHAPPA BELKERI : *In re.* **27 B. L. R. 1058 : 26 Cr. L. J. 1422 : 89 I.C. 846 : A.I.R. 1925 Bom. 536.**

——**S. 147 (2)**—*Sub-S.* (2) *does not empower Magistrate to issue mandatory injunction.*

The words of Sub-sec. (2) do not give the Magistrate any power of directing one of the parties to do a positive act by way of mandatory injunction such as demolishing a wall built by him. The power given to a Magistrate under that sub section is analogous to the power of a Civil Court to grant a temporary injunction restraining a person from doing a certain act. (*Newbould and Ghose, JJ.*) HAZI MATI DASI *v.* HARI DASI DASI. **41 C. L. J. 568 : 88 I. C. 1041 : A. I. R. 1925 Cal 991.**

——**S, 148**—*Application for costs—Order without notice to other party is illegal.*

An order awarding costs on the application of one of the parties without notice to the other party is without jurisdiction. (*Ayling, J.*) PALANIANDI SERVAI *v.* SAMMANDI AMMAL. **16 L. W. 613 : 71 I.C. 128: 24 Cr. L. J. 80 : A.I.R. 1923 Mad. 87 (2).**

——**S. 148**—*Scope.*

Before a Magistrate began to take evidence he went to the place in order to see the exact land in dispute and the features of the disputed property. He restricted his inquiry very closely to those points and it did not appear that he directed his inquiry to any matter which could be proved by oral evidence. No

C. P. CODE (V OF 1898), S. 148.

evidence was taken at the local enquiry and all that was done was to inspect the locality, make a note of what the disputed area was and prepare a plan. Every thing was placed on the record. *Held*, in holding a local inspection of this sort the Deputy Magistrate did not in any way act outside the jurisdiction vested in him by law. (*Coutts and Das, JJ.*) LACHMI NARAIN *v.* MHKHORAM MARWARI.

A. I. R. 1923 Pat. 31.

——**Ss. 148 and 145**—*Direction to survey and report respecting land in dispute under S.* 145—*Is not a local inquiry but a ministerial act.*

The direction was merely " to survey the disputed lands and report within 15 days." All that the person had to do was to ascertain from the parties what lands were in dispute and then to survey the lands pointed out and to draw up a map and report what he had done. This was a ministerial act, whether the duty of survey was entrusted to a pleader commissioner or to an amin makes no difference ; stress cannot be laid on the fact that the person selected to do the work bore the title of pleader commissioner. It cannot be held that the survey of the lands, after enquiry from all the parties as to what land was in dispute amounted to a " local inquiry " within the meaning of S. 148. It was a mere ministerial act. (*Adami and Ross, JJ.*) CHULAI MAHTO *v.* SURENDRA NATH. **1 Pat. 75 : 3 Pat. L. T. 17 : 65 I. C. 616 : 23 Cr. L. J. 152 : A. I. R. 1922 Pat. 224 (2).**

——**Ss. 148 and 147**—*Local inspections—Court must make a note for what he saw and place it on record.*

Section 148 clearly provides for local inspection whenever such enquiry is deemed necessary for the purposes of Chapter XII of the Code. Such enquiry can be made either by any Magistrate subordinate to the Magistrate before whom the case is pending or by that Magistrate himself. Although as a rule it is better to have such an investigation made by some other person, there is nothing in law to prevent the presiding Magistrate from making the investigation himself provided he records what he saw and does not set upon hearsay evidence. It is a salutary principle of law that the finding of a Court must be based upon evidence duly recorded by it and not upon the impression formed by the Judge on a local inspection of the locality. He can in order to elucidate the evidence make a local inspection and the object of a local enquiry would be only with a view to understand the evidence actually adduced in the case. Moreover it is absolutely necessary that if a Magistrate makes a local enquiry he must make a note of what he saw and must place it on the record so that the parties may be in a position to know what impression the Magistrate had got by the local enquiry. 15 C. L. J. 267 Foll. (*Kulwant Sahay, J.*) ABDUL HAMID *v.* HASAN RAZA. **4 Pat. L. T. 297 : 1 Pat. L. R. (Cr.) 195 : 24 Cr. L. J. 487 : 72 I. C. 951 : A. I. R. 1923 Pat. 366.**

——**Ss. 148 and 145**—*Order for costs must give details.*

In awarding costs in proceedings under S. 145, the Magistrate did not mention how the sum of Rs. 100 awarded as costs was computed or that he had made any enquiry as to what the actual pleader's fees and the costs of the witnesses were, *Held* such an order is without jurisdiction and must be set aside. 1 P.L.T. 369, Foll. (*Adami, J.*) HIRA MAHTON *v.* RAJKUMAR MAHTON. **3 Pat. L. T. 484 : 68. I. C. 44 : 1 Pat. L. R. Cr. 15 : 23 Cr. L. J. 508 : A. I. R. 1922 Pat. 564.**

CR. P. CODE (V OF 1898), S. 148.

——S. 148—*Local Inspection—Cannot take the place of legal evidence.*

The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered in court; but the local inspection cannot take the place of legal evidence, much less the result thereof can be used as a basis for the decision (61 I. C. 712 Foll.) (*Jwala Prasad, J.*) MT. RAM RATAN KUAR v. TARAKH NATH. **A. I. R. 1922 Pat. 249.**

——S. 148—Inquiry prior to taking evidence is not necessary. (*Jwala Prasad, J.*) RAM SAHAI SINGH v. DWARKA SINGH. **1 Pat. L. T. 569 : 61 I. C. 712 : 22 Cr. L. J. 424.**

——Ss. 148 (3) and 145—*Costs ordered—Court has no discretion afterwards to refuse to recover it.*

Where a Magistrate or his predecessor has ordered the costs to be recovered, he has afterwards no discretion to refuse to recover costs on the ground of long delay, limitation being six years or any other ground. The Magistrate having excused one of the persons from payment of costs it will be open to the opponent in applying for distress warrants to exempt him from the list of persons from whom the costs are to be recovered. The use of the word "may in his discretion" in section 386 cannot be used for the purpose of interpreting the words "may be recovered" in section 148. The discretion in section 386 only refers to cases where there has been a conviction and sentence and the sentence directs that in default of payment of fine, the offender shall be imprisoned. (*Adami, J.*) HARENDRA KRISHNA v. BALKUMAR. **3 Pat. L. T. 762 : 71 I. C. 294 : 24 Cr. L. J. 126 : A. I. R. 1923 Pat. 57.**

——S. 149—*Section does not empower police officer to pass any order he likes.*

Per *Sulaiman, J.*—To hold that under S. 149 a police officer can pass any oral order he thinks desirable, would be to hold that his word is law. If his powers were to be so wide, it would be unnecessary for the Magistrate or the police to take any precautionary measures in advance, it would be quite sufficient to send down a Sub-Inspector to the scene and let him pass all sorts of sweeping orders, disobedience of which will entail covinction. Such a method, if sanctioned, would deprive the persons concerned of all opportunity to appeal to higher authorities, and they would have to submit to such orders at the peril of a prosecution. Such wide powers vested in a police-officer would interfere unreasonably with the ordinary liberty of private citizens and could not have been contemplated to be within the scope of S. 149. (*Walsh, A. C. J. and Sulaiman, J.*) KING-EMPEROR v. RAGHUNATH VENAIK DHULEKAR. **22 A. L. J. 1049 : L. R. 6 A. (Cr.) 1 : 47 A. 205 : 85 I. C. 823 : 26 Cr. L. J. 599 : A. I. R. 1925 All. 165.**

——S. 149—*Interpose.*

Per *Sulaiman, J.*—'Interpose' connotes the idea of actively intervening and not merely a prohibition by word of mouth. (*Walsh, A. C. J. and Sulaiman, J.*) KING-EMPEROR v. RAGHUNATH VENAIK DHULEKAR. **22 A. L. J. 1049 : L. R. 6 A. (Cr.) 1 : 47 All. 205 : 85 I. C. 823 : 26 Cr. L. J. 99 : A. I. R. 1925 All. 165.**

——Ss. 150, 164 and 364—*Preliminary enquiry—Confession to Magistrate—Not reduced to writing—Oral evidence of Magistrate—Admissibility.*

Confessions by certain persons were made to a Magistrate during the preliminary enquiry by the Police under S. 159 of the Code, but were not reduced to writing by him. *Held*, that oral statements of the Magistrate as to those confessions are inadmissible in

CR. P. CODE (V OF 1898), S. 154.

evidence. View of *Shah, J.* in 52 I. C. 465, Diss. from. (*Spencer and Kumarasamy Sastri, JJ.*) TANGUDYPOLLE PEDDA OLIGADU, *In re.* **45 M. 230 : 14 L. W. 542 : (1921) M. W. N. 779 : 30 M. L. T. 107 : 69 I. C. 264 : 23 Cr. L. J 680 : A. I. R. 1922 Mad. 40 : 42 M. L. J. 37.**

——S. 154—*First information—Statement of witness during investigation is not one—First information report is useful for contradiction or corroboration only.*

A statement made by a witness during investigation after the police-officer has actually arrived on the scene and himself seen what has happened, is not first information. The first information report is not a substantive piece of evidence; it can be used merely by way of corroboration or as a contradiction and not any further. (*Sulaiman, J.*) CHITTAR SINGH v. EMPEROR. **47 All. 280 : 23 A. L. J. 14: 85 I. C. 650 : 26 Cr. L. J. 554 : A. I. R. 1925 All. 303.**

——S. 154—*Admission of guilt is not first information.*

A statement made by the accused implicating himself and others cannot be called 'first information report' so far as he is concerned. (*Walsh, J.*) SUBEDAR v. EMPEROR. **L. R. 4 A. Cr. 210 : A. I. R. 1924 All. 207.**

——Ss. 154 and 172—*Evidence—List of stolen property handed over to police during investigation is not admissible but first information is admissible to corroborate the informant when challenged—Map prepared by police officer on information is not admissible—Cr. P. Code, Ss. 172 and 154.*

A list of stolen property handed to a Police-officer in the course of investigation is not admissible in evidence and should not be placed before the Jury. The admission of such a list however would not of itself vitiate the trial unless it is shown that the accused have been prejudiced by such admission. Where the names of certain persons are sent to the Police as being the names of those who are suspected of being concerned in the commission of an offence and the evidence of the person who supplied these names to the Police is challenged in Court, the list of names supplied by him is admissible in evidence to corroborate his statement. A map which contains upon it certain things which must have been supplied to the Police Officer by some person should not be admitted unless there had been the evidence of the person as to what he said to the officer and the evidence of the Police Officer as to what the person told him. (*Greaves and Panton, JJ.*) KAILA v. EMPEROR. **85 I. C. 723 : 26 Cr. L. J. 579 : A. I. R. 1925 Cal. 959.**

——Ss. 154 to 176—*Investigation under Ch. XIV—Information to Officer in charge of Police Station is essential before starting investigation.*

Before there should be an investigation under Chap. XIV there must be an information given to an officer in charge of a Police station and reduced to writing by him. (*Newbould and Mukherjee, JJ.*) DARGHAI v. EMPEROR. **52 Cal. 499 : A. I. R. 1925 Cal. 831.**

——S. 154—*First information report—Prosecution if bound by.*

The prosecution is bound to produce in court the First Information report made to the police, but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is bound by it is to recognize the recording officer as possessing an authority which he does not have. (*Campbell, J.*) RAJA v. EMPEROR. **25 Cr. L. J. 465 : 77 I. C. 817: A. I. R. 1924 Lah. 591.**

——Ss. 154 and 162—*Statement in the course of*

CR. P. CODE (V OF 1898), S. 154.

police investigation—Signature—Effect.

Statement made in course of a police investigation merely because they happen to be signed contrary to the provisions of S. 162, Cr. P. Code, do not thereby become admissible under S. 154. (*Odgers and Wallace JJ.*) M. P. NARAYANA MENON, *In re.*

25 Cr. L. J. 401 : 77 I. C. 481 : A. I. R. 1925 Mad. 106.

——**Ss. 154 and 162**—*First information vague—Police making inquiry—Statements made to police during this enquiry not first information.*

Circumstances may arise in which information given to the police is of such a vague and indefinite character that it cannot be treated as coming under S. 154 so as to make it incumbent upon the officer in charge of the Police station to start an investigation, and he may reasonably require more direct information before doing so and such further information given to him in such circumstances might not come under the provisions of S. 162. The information referred to in S. 154 appears to be something in the nature of a complaint or accusation, or at least information of a crime given with the object of putting the police in motion in order to investigate, as distinguished from information obtained by the police when actively investigating a crime. The information referred to in S. 154 may come from more than one source and more than one such information may be recorded at or about the same time, but once the police have taken active steps to investigate, any written statements taken by them cannot be admissible as evidence as they would come within S. 162. (*Miller, C. J. and Mullick, J.*) GANSA ORAON *v.* EMPEROR. **2 Pat. 517 : 4 P. L. T. 462 : 1 Pat. L. R. 178 (Cr.) : 73 I. C. 561 : 24 Cr. L. J. 641 : A. I. R. 1923 Pat. 550.**

——**S. 154**—*First information—Statement made to police.*

A statement casually made to a Sub-Inspector of Police is not first information and cannot be relied on as such. (*Coutts and Dass, JJ.*) DASRATH SINGH *v.* EMPEROR. **1 Pat. L. R. 192 (Cr.) : 67 I. C. 502 : 23 Cr. L. J. 406: A. I. R. 1923 Pat. 158.**

——**S. 154**—*First informant—Failure to produce as witness is bad—Penal Code, S. 302.*

The failure to record the statement of the first informant and his non production before the Sessions Judge has the serious consequence of depriving the accused of the right of cross-examination which will make the case of the prosecution suspicious. The recording of the statement of the second informant does not make him the first informant. (*Coutts and Ross, JJ.*) CHANDRIKHA RAM *v.* EMPEROR.

1 Pat. 401 : 3 Pat. L. T. 771 : 1923 P. H. C. C. 26 · 71 I. C. 353 : 1 Pat. L. R. Cr. 77 : 24 Cr. L. J. 129 : A. I. R. 1922 Pat. 535.

——**Ss. 154 and 161**—*Statement of witnesses recorded in course of investigation is not "information" given to police.*

A statement by a witness to the police-officer, in the course of an investigation under Ch. 14 of the Cr. P. Code and recorded under S. 161, Cr. P. Code is not information given to the Police under S. 154 and therefore, even if it is false, the witness is not liable to be prosecuted under Penal Code, S. 182 : Rat. Un. Cr. C. 124 Ref. (*Maung Ba, J.*) SULTAN *v.* WELLBOURN. **90 I. C. 316 : 26 Cr. L. J. 32 : A. I. R. 1925 Rang. 364.**

——**S. 157—Changes.**

(1) When the officer-in-charge wishes to depute the investigation to another, that other must not be below the rank prescribed by the Local Government.

(2) The investigating officer need not necessarily take measures to arrest the offender as before but may use his discretion—Ed.

CR. P. CODE (V OF 1898), S. 162.

——**S. 157 and 159**—*First class Magistrate can depute Sub-Deputy Magistrate to hold a preliminary enquiry—Latter can also record statement by witness in police investigation.*

Where the case comes before a First Class Magistrate, under the provisions of Ss. 157 and 159 of the Cr. P. Code he can depute a Sub-Deputy Magistrate to hold an investigation or a preliminary inquiry. The latter can also under the provisions of S. 164, Sub-sec. (1) record a statement of a witness made before him in the course of the police investigation and therefore this is admissible as a statement made in the course of an investigation. (*Sanderson, C. J. and Chotzner, J.*) HARENDRA NATH SAHA *v.* EMPEROR.

40 C. L. J. 313 : 26 Cr. L J. 307 : 84 I. C. 451 : A. I. R. 1925 Cal. 161.

——**S. 159**—*Right of private citizen to arrest—Extent of.*

Where certain villagers *bona fide* believed that certain armed police constables who had come at midnight without their uniforms, were dacoits and consequently arrested and confined them till the arrival of the police from a neighbouring locality, *Held* that the villagers were entitled to arrest and had committed no offence. (*Mookerjee, J.*) KISHEN LAL *v.* EMPEROR.

22 A. L. J. 501 : L. R. 5 A. 177 (Cr.): 26 Cr. L. J. 501 : 85 I. C. 245 : A. I. R. 1924 All. 645.

——**S. 161**—"*Any person*" *refers to witness and not to accused.*

The expression "any person" in S. 161 refers to a witness and not to the person who is accused of the offence. (*Rupchand Bilaram, A. J. C.*) UMER DUREZ MUNSHI *v.* EMPEROR.

86 I. C. 410 : 26 Cr. L. J. 778 : A. I. R. 1925 Sind 237.

——**S. 161**—*Inquiry under—Incriminating statement by accused is inadmissible—Evidence Act, S. 25.*

Any incriminating statement made by an accused person at an inquiry held under S. 161, Cr. P. Code would be excluded at the trial under S. 25 of the Evidence Act, as having been made to a Police-officer, and as such of no material use at the trial. (*Rupchand Bilaram, A.J.C.*) UMER DUREZ MUNSHI *v.* EMPEROR.

26 Cr. L. J. 778 : 86 I. C. 410 : A. I. R. 1925 Sind 237.

——**S. 162—Changes.**

(1) Cl. (1) has been redrafted and provides that neither the statement not a record thereof can be used in evidence except to contradict the witness.

(2) The accused is now, as a matter of right, entitled to get copies of the statement recorded.

——**S. 162**—*Statement to police—Evidentiary value.*

A statement to the police by a witness is inadmissible in evidence for any purpose against the accused. But it is admissible in evidence to contradict the sworn testimony of the witness. When the person who made the previous statement is examined in Court, that statement can be used as provided for in the Indian Evidence Act to contradict and sometimes to corroborate the witness ; but is not substantive evidence by itself, and a conviction cannot be based upon it. (*Ryves, J.*) SHIAM SUNDER *v.* EMPEROR.

A. I. R. 1923 All. 469.

(But see the section as amended.)

——**S. 162**—*Evidence as to what the complainant stated to the investigating officer.*

Under section 162 of the Cr. P. Code the evidence as to what the complainant stated to the investigating officer and her pointing out the places where she was

CR. P. CODE (V OF 1898), S. 162.

taken is inadmissible in evidence. (*Newbould and Ghose, JJ.*) KARAMAT MANDAL *v.* KING-EMPEROR. **42 C. L. J. 524.**

——S. 162—*Statement of Investigating Officer—Maps prepared by Police officer containing statements of witnesses to the Police officer—Admissibility.*

Section 162 of the Cr. Pr. Code is clear enough to exclude any statement made by any person and therefore a statement by the Investigating Officer that he examined witnesses for the defence in the course of the investigation is not admissible. A map prepared by the Police-officer and which contained statements of witnesses is also inadmissible in evidence, as these statements were not of the Police-officer from his personal knowledge but from what he heard from other people. (*Suhrawardy and Panton, JJ.*) BHAGIRATH CHOUDHURY *v.* EMPEROR. **30 C. W. N. 142.**

——S. 162—*List of stolen property—Admissibility.*

A list of stolen property given to the police during the course of the investigation is not admissible in evidence. So also a map prepared by the police containing information given to them during the investigation. (*Greaves and Panton, JJ.*) KALIA *v.* EMPEROR. **26 Cr. L. J. 79 : 85 I. C. 723 : A. I. R. 1925 Cal. 959.**

——S. 162—*Statements made to an investigating Sub-Inspector are inadmissible.*

Statements made to the Investigating Sub-Inspector in the course of an investigation are inadmissible in evidence under section 162 of the Code of Criminal Procedure. (*Sanderson, C. J. and Chotzner, J.*) HARENDRA NATH SAHA *v.* EMPEROR.
40 C. L. J. 313 : 26 Cr. L. J. 307 : 84 I. C. 451 : A. I. R. 1925 Cal. 161.

——S. 162—*Statements made to Police—When to be used.*

A statement made to a police officer could only be made evidence when used for the purpose of cross-examining the person who made it ; scope of section considered. (*Shadi Lal, C. J. and Fforde, J.*) MAHOMED *v.* EMPEROR.
89 I. C. 252 : 26 Cr. L. J. 1308 (Lah.).

——S. 162—*Statements made in Police investigation are not admissible for corroborating evidence before committing Magistrate—Evidence Act, S. 157.*

Statements made by the witnesses to the police during the investigation are not admissible for purpose of corroborating their depositions before the committing Magistrate. (*Shadi Lal, C. J. and Zafar Ali, J.*) RAKHA *v.* CROWN. **6 Lah. 171 : 26 Punj. L. R. 304 : A. I. R. 1925 Lah. 399.**

——S. 162—*Using police diaries against accused is improper.*

It is improper of the Court to use Police diaries against the accused. (*Scott-Smith, J.*) AZIZ *v.* EMPEROR. **84 I. C. 436 : 26 Cr. L. J. 292: A. I. R. 1925 Lah. 295 (2).**

——S. 162—*Stage at which an accused is entitled to copies of statements made by prosecution witnesses to the Police in the course of investigation.*

Under Sec. 162 of the Cr. P. Code the stage at which an accused person is entitled to ask for copies of statements made by the prosecution witness to the Police in the course of the investigation, is the stage when the witness had made a statement which lays him open to contradiction by his former statement to the Police. Consequently, the accused is not entitled to copies before cross-examination is opened at all. (*Krishnan and Wallace, JJ.*) *In re* PERAMASAMI RAYUDU.
22 L. W. 784.

CR. P. CODE (V OF 1898), S. 162.

——S. 162—*Oral statements in Police investigation are admissible subject to Evidence Act.*

The application of the new S. 162 is confined as that of the old one was, to the written record ; the new section was designed to confer on an accused person legal right, which the old section did not give, of having a copy of such written statement for the purpose of using it to contradict the witness and as regards proof and use of oral statements, the law is unaltered and is as it was before. All oral statements which were previously admissible, under the Evidence Act, the use of which was not prohibited by the Criminal Procedure Code, are still admissible and may be used. (*Wallace and Madhavan Nair, JJ.*) G. VENKATASUBBIAH *v.* EMPEROR.
21 L. W. 190 : (1925) M. W. N. 68 : 85 I C. 209 : 26 Cr. L. J. 721 : A I. R. 1925 Mad. 579 : 48 M. L. J. 195.

——S. 162—*Section does not repeal Evidence Act, S. 27.*

The amended S. 162 does not exclude from evidence the fact that the accused made a statement to the Police that the weapon with which the crime had been committed was concealed in a prickly pear bush. The section both before and after amendment, is directed against the admission, at the instance of the prosecution, of Police diaries and other records prepared or copied from the diaries of investigating officers. The provisions of the Evidence Act are quite independent of the sections in the Cr. P. Code and cannot be treated as impliedly repealed in consequence of the amendment of the Code of Criminal Procedure. (*Spencer, Offg. C. J. and Reilly, J.*) SEMALAI GOUNDAN, *In re.* **21 L. W. 199 : 86 I C. 664 : 26 Cr. L. J. 840 : A. I. R. 1925 Mad. 574 (2).**

——S. 162—*As amended by the Act of 1923—Statement to the investigating officer by the accused before arrest—Admissibility.*

The statement made by an accused to the investigating officer before his arrest is not admissible. (*Kotval, A. J. C.*) SHEOSATYANARAYAN LAL *v.* EMPEROR. **8 N. L. J. 217.**

——S. 162—*As amended by Act XVIII of 1923—Statements of witnesses recorded by the investigating police-officer in his diary.*

A statement made by any person to a police-officer in the course of an investigation cannot be used as evidence except for the purpose of contradicting him, in certain limited circumstances under S. 162 of Cr. P. Code as recently amended. It is not permissible to use the recorded statement as a whole to show that the witness did not say something to the police-officer only a part of such statement can be used. (*Bucknill and Macpherson, JJ.*) BADRI CHAUDHRY *v.* EMPEROR. **6 Pat. L. T. 620.**

——S. 162—*Police diaries cannot be used for or against the accused even with accused's consent.*

Consent or desire of accused cannot legalise the procedure of using police diaries as evidence in the case either for or against the accused. (*Wazir Hasan, A. J. C.*) MANNA LAL *v.* EMPEROR.
27 O. C. 40 : 25 Cr. L. J. 49 : 75 I. C. 753 : A. I. R. 1925 Oudh 1: 4 Pat. 204 : A. I. R. 1925 Pat. 450.

——S. 162—*Witness making statement in Court can be asked whether he had made that statement to the Police.*

The provisions of S. 162 do not prevent the prosecution, after a witness has made a statement, from taking him simply whether he made that statement to she police, or when a witness has made a statement

CR. P. CODE (V OF 1898), S. 162.

in his evidence, from asking the Police-officer whether in fact the witness had made that statement to him. (*Adami and Bucknill, JJ.*) GUHI MIAN *v.* EMPEROR. **4 Pat. 204 : A. I. R. 1925 Pat. 450.**

——S. 162—*Statement made to the Police—Proof of—Duly proved—Meaning of.*

Under S. 162, Cr. P. Code as substituted by the Amendment Act of 1923 it is not now permissible for statements made to the police whether oral or written, to be put in evidence, in order to corroborate a prosecution witness or to contradict a defence witness. Under the terms of the Section a police statement can be used only for one purpose and that is by the accused to contradict a prosecution witness in the manner provided by S. 145 of the Evidence Act. The expression " it duly proved " in S. 162 of the Cr. P. Code clearly shows that the record of the statements cannot be admitted in evidence straightway but that the officer before whom the statements were made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness ; and the provisions of S. 67 of the Evidence Act apply to this case as well as to any other similar case. (*Shah, A. C. J. and Fawcett, J.*) EMPEROR *v.* VITHU.
26 Bom. L. R. 965 : 26 Cr. L. J. 223 : A. I. R. 1924 Bom. 510.

——S. 162—*Statements of witnesses—Late record by Police.*

Whatever reasons might be given by the police to record late the statement of the principal witnesses for the prosecution, the defence is entitled to ask that the evidence of those witnesses should be discarded inasmuch as there was sufficient time and opportunity for their being tutored. (*Jwala Prasad and Coutts, JJ.*) EMPEROR *v* PUNIT CHAIN.
3 Pat. L. T. 413 : 67 I. C. 581 : 1922 P. H. C. C. 218 : 4 U. P. L. R. (Pat) 53 : 23 Cr. L. J. 421 : A. I. R. 1922 Pat. 348.

——S. 162—*Statement by a witness admissible.*

The police-officer can under certain circumstances depose to what a witness deposed but the statement written by the Police-officer is not admissible in evidence. (*Coutts and Ross, JJ.*) LACHIMI LAL *v.* EMPEROR. **3 Pat L. T. 398 : 65 I. C. 1002 : 23 Cr. L. J. 218 : 1922 P. H. C. C. 159 : A. I. R. 1922 Pat. 40.**

[No longer good law.]

——S. 162—*Statements to Police—Oral evidence of such statements, if excluded.*

Oral evidence of statements made to the Police, whether taken down in writing or not is not excluded by S. 162 of the Code as that section does not override the provisions of the Evidence Act as to oral evidence of such statements to corroborate the evidence of a witness. (*Miller, C. J. and Adami, J.*) BALDEO KOERI *v.* EMPEROR. **2 Pat. L. T. 565 : 61 I. C. 785 : 6 P. L. J. 241 : 22 Cr. L. J. 433.**

——S. 162—*Diaries received after written statement by Police as to absence of statement recorded under S. 162—Accused is not entitled to call or see the diaries.*

The Magistrate called for the diary after receiving a written statement from the Police that there was no statement recorded under S. 162, Cr. P. Code, *Held*, that if the diary was one of the kind described in S.172 neither the accused nor his agent were entitled to call for them or to see them unless and until they were used by the Police or by the Court for the purposes described in the section. (*Foster, J.*) RABINDRA NATH SINGH *v.* EMPEROR. **84 I. C. 441 : 26 Cr. L. J. 297 : A. I. R. 1925 Pat. 339.**

CR. P. CODE (V OF 1898), S. 162.

——S. 162—*Identification of accused—Necessity for—First information—Police-officer refreshing memory.*

The charge against the petitioners was that they formed an unlawful assembly and had entered the field of occurrence where the complainant's party were getting their paddy seedlings uprooted. There was no allegation of any assault at all against the petitioners. The story was that the defence party had assembled some Pathans from Kothi to help them in their attempt to take possession of the land and two of the petitioners were alleged to have been two of these Pathans. As a matter of fact one of them was not a Pathan. In the first information given in the case the names of the two petitioners were not mentioned. The witnesses examined gave ambiguous or evasive answers when questioned whether they had named these two petitioners to the police as having been present. The police Sub-Inspector was asked whether the witnesses had named the two petitioners to him and said that he could not remember. When asked to refresh his memory from the diaries he refused to do so, and the Magistrate did not compel him to look into those diaries for the purpose of answering the question as he ought to have done. *Held*, that the evidence of identification of the two petitioners was absolutely unsatisfactory and the case should be sent back for rehearing. (*Adami, J.*) SYED SULTAN HUSAIN *v.* EMPEROR.
2 Pat. L. R. 202 (Cr.) : A. I. R. 1924 Pat. 829.

——S. 162—*Overrides S. 27 of the Evidence Act—Evidence Act, S. 27.*

S. 162 of the Cr. P. Code, in its present form, overrides S. 27 of the Evidence Act. In determining whether the guilt of the accused has been proved it is necessary to ignore entirely all evidence which is held to be inadmissible under S. 162, Cr. P. Code. Conviction on the ground that the stolen property was discovered in consequence of a statement made by the accused to a Police-officer is bad. (*Baguley, J.*) BAWA RAWTHAR *v.* EMPEROR. **3 Bur. L. J. 245 : 26 Cr. L. J. 321 : 84 I. C. 545 : A. I. R. 1925 Rang. 101.**

——S. 162—*Statement—Oral evidence if allowed.*

Statement made to Police-officer during an investigation need not be reduced to writing and oral evidence regarding the same is admissible. (*Kennedy, J. C. and Aston, A. J. C.*) PITHUMAL *v.* EMPEROR.
88 I. C. 449 : 26 Cr. L. J. 1137.

——S. 162—*Statements recorded by Police-officer during investigation are not admissible at the trial.*

Statements recorded by a Police-officer under S. 162, cl. (1) are inadmissible in evidence at the trial of the offence under investigation at the time when those statements were made. (*Kincaid, J. C. and Aston, A, J. C.*) BAHADUR *v.* EMPEROR.
A. I. R. 1925 Sind 289.

——S. 162—*Section does not relate to statements of accused made at police investigation.*

The statement of any person in S. 162 refers to the statement of any person examined as a witness and not to the statement of any accused person in respect of whom the investigation is being held. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) ADHO *v.* EMPEROR. **26 Cr. L. J. 897 : 86 I. C. 961 : A. I. R. 1925 Sind 257.**

——S. 162—*Section does not apply to statement of accused person.*

The words " statement of any person " in S. 162, Cr. P. Code refer to the statement of any witness in the course of a Police investigation, and not to the statement of an accused person in respect of whom such investigation is held. Such parts of a confes-

CR. P. CODE (V OF 1898), S. 162.

sional statement as lead to discovery of incriminating facts as also statements made to the Police by an accused person which are not of an incriminating nature are admissible. (*Rupchand Bilaram, A. J. C.*) UMER DUREZ MUNSHI *v.* EMPEROR. **86 I. C. 410 : 26 Cr. L J. 778 : A. I. R. 1925 Sind 237.**

——S. 162 (1)—*Using statements in police diaries—Due proof is essential.*

There is no presumption as to the genuineness of the statements of witnesses entered in the police diaries, and unless they are duly proved the evidence given in Court cannot be contradicted by them. (*Martineau and Campbell, JJ.*) LABH SINGH *v.* CROWN. **6 Lah. 24 : 88 I. C. 513 : A. I. R. 1925 Lah. 337.**

——S. 164—Changes.

(1) 3rd Class Magistrates and 2nd Class Magistrates not specially empowered by the Local Govt. cannot now record confessions

(2) Magistrate must before recording the confession warn the accused that he is not bound to make the confession.

——S. 164—*Duty of Magistrate—Question when to be put and recorded.*

It would be going too far to say that a magistrate recording a statement or a confession under S. 164 cannot and should not ask a single question of the deponent. But it is equally certain that his position when recording such statement or confession is merely that of a Recording Magistrate and that he is in no sense an Investigating Officer. He would be justified in, and ought in the ordinary performance of his duties, to clear up any matter which is ambiguous in the face of the statement, but he would be wholly unjustified in extracting by questions from the deponent facts which he had not spoken to of his own accord. Under the section the magistrate is bound to record every question that he asks. (*Boys and Banerjee, JJ.*) HASAN ALI *v.* EMPEROR. **L. R. 6 All. 137 (Cr.) : 88 I. C. 729 : 23 A. L. J. 719 : 26 Cr. L. J. 1209 : A. I. R 1926 All. 22.**

——Ss. 164 and 533—*Confession—Record by magistrate—Narrative form—Irregularity—Cure of defect.*

Where a magistrate who recorded a confession was called and he swore that he had all the police removed from the court room and also had the handcuffs removed from the accused before recording the confession and the Magistrate also asked the accused whether he was tutored by anybody and after being satisfied that the accused was not tutored by anybody recorded his confession. *Held* that any irregularity in the record of the confession was cured under S. 533 of the Code and that the record of the confession in English and in a narrative form did not render it inadmissible. (*Stuart and Ryves, JJ.*) DEO DATT *v.* EMPEROR. **20 A. L. J. 915 : 45 All. 166 : 71 I. C. 54 : L. R. 3 A. 191 (Cr.) : 24 Cr. L. J. 6 : A. I. R. 1923 All. 90.**

——S. 164—*Sessions Trial—Plea of not guilty—Procedure.*

The accused, in a murder case, made a confession which was duly recorded under S. 164 The accused had admitted their guilt in the Court of the committing magistrate and they pleaded 'not guilty' before the Court of Session. The Sessions Judge proceeded to take in evidence, before a single witness had been examined, the previous statements made by the accused not only before the committing magistrate, but prior to the commencement of the proceedings in the Magistrate's Court when they were examined under S. 164 of the Code. *Held*, that the trial Court was certainly contravening the provisions of S. 286 of the Cr. P. Code. Although under S. 342 of the same Code the power given to the Court to examine an accused person is one which may be exercised at any stage of the trial in the discretion of the Court, the provision must not be regarded as in any way superseding the clear directions contained in S. 286 as to the manner in which a trial at Sessions should be commenced. (*Piggott and Walsh, JJ.*) MT. SUKHIA *v.* EMPEROR. **20 A. L. J. 669 : 73 I. C. 497 : L. R. 3 A. 101 Cr. : 24 Cr. L. J. 609 : A. I. R. 1922 A. 266.**

——S. 164—*Powers of Magistrate—Territorial jurisdiction.*

In recording a confession under S. 164, a Magistrate does not perform an act but exercises his power and this power of a Magistrate is limited to the district in which he is appointed. *Quaere* :—Whether he can exercise it outside British India. (*Walsh and Ryves, JJ.*) NAHAR SINGH *v.* EMPEROR. **19 A. L. J. 355 : 3 U. P. L. R. (All.) 66 : 62 I. C. 583 : L.R. 2 A. (Cr.) 33 : 22 Cr. L. J. 567.**

——Ss. 164 and 337—*Tender of pardon is to be made in inquiry.*

Under the provisions of S. 337 of the Cr. P. Code a tender of pardon can be made only during an inquiry into an offence under the Code. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* MOTILAL HIRA LAL. **46 Bom. 61 : 23 Bom. L. R. 884 : 64 I. C. 40 : A. I. R. 1922 Bom. 138 : 22 Cr. L. J. 728.**

——S. 164—*Magistrate of Native State recording accused's explanation for purpose of Extradition Rules is not recording statement of accused in investigation under Ch.* 14.

Magistrate of Native State recording the explanation of an accused for the purpose of the Extradition Rules of that State is not recording the statement of an accused person in the course of an investigation under Chapter XIV of the Cr. P. Code. (*Crump, J.*) EMPEROR *v.* ANANDRAO GUNGARAM. **49 B. 642 : 27 B. L. R. 1034 : 89 I. C. 1046 : A. I. R. 1925 Bom. 529.**

——S. 164—*Statement by accused, though somewhat incriminating, is admissible in evidence if self-exculpatory.*

The word "statement" in S. 164, Cr. P. Code, is ot limited to a statement by a witness but includes that made by an accused and not amounting to a confession. Where the statements though of a somewhat incriminating nature, are self-exculpatory and were duly recorded in accordance with the provisions of S. 164, they can be rightly admitted in evidence. 2 C. W. N. 702 Dist., 1922 Cal. 342 Foll. (*Newbould and Ghose, JJ.*) ABDUL RAHIM *v.* EMPEROR. **41 C. L. J. 474 : 88 I. C. 1055 : 26 Cr. L. J. 1279 : A. I. R. 1925 Cal. 926.**

——S. 164—*Statement of accused not recorded—Magistrate cannot give oral evidence thereof.*

The accused made no confession, and the statement which he did make was for that reason not recorded in the manner provided in S. 164. There being no record, the Magistrate was then required and permitted to give oral evidence regarding the statement made

to him by the accused. *Held*, no distinction can be drawn between a statement made by an accused person and a confession made by him. The statement made should be recorded as provided in S. 164, and the Magistrate's evidence regarding the unrecorded statement is inadmissible. (*Teunon and Ghose, JJ.*) LEGAL REMEMBRANCER *v.* LALIT MOHAN SINGH.
49 Cal. 167 : 25 C. W. N. 788 : 62 I. C. 578 : 22 Cr. L. J. 562 : A. I. R. 1922 Cal. 342.

——— **S. 164** – *Confession recorded by a Presidency Magistrate of Calcutta Police—Section does not apply.*

S. 164, in spite of the alteration that it has undergone by the amendment introduced by Act XVIII of 1923, does not apply to the confessions recorded by a Presidency Magistrate in investigations conducted by the police in the town of Calcutta. (*Mukerji, J.*) EMPEROR *v.* PANCHKARI DUTT. **52 Cal. 67 : 29 C. W. N. 300 : 86 I. C. 414 : 26 Cr. L. J. 782 : A. I. R. 1925 Cal. 587.**

——— **S. 164**—*Accused not warned that he is not bound to confess—Confession is inadmissible.*

Where there is nothing to show that the accused was told that he need not make a confession and that if he did so it might be used as evidence against him, his confession is inadmissible in evidence. (*Scott-Smith and Fforde, JJ.*) BAHAWALA *v.* CROWN.
6 Lah. 183 : 88 I. C. 854 : 26 Punj. L. R. 331 : 26 Cr. L. J. 1238 : A. I. R. 1925 Lah. 432.

——— **Ss. 164 and 533**—*Confession not complying with the statute—Whether curable by the recording magistrate's deposition.*

Where a confession did not contain the foot-note required by S. 164, Cr. P. Code as amended by the Act of 1923 and did not therefore comply with the statute and it was sought to be admitted in evidence under the provisions of S. 533, Cr. P. Code, by calling the magistrate responsible and proving that the statement was in fact 'duly made.' *Held*, it is enough if it appears sufficient from his evidence that he did make it clear to the accused that he was not bound to make a confession. The exact words of the warning which must be given to a person making a statement in the nature of a confession are not material provided the magistrate explains and the person making the statement understands that he need not make a confession. (*Scott-Smith and Fforde, JJ.*) BAWASINGH *v.* EMPEROR. **7 Lah. L. J. 250 : 26 Punj. L. R. 579 : 89 I. C. 1026 : 26 Cr. L. J. 1455 : A. I. R. 1925 Lah. 448.**

——— **S.164 (Amended 1923)**—*Accused not informed that he is not bound to make a confession—Confession becomes inadmissible.*

The principal requirement introduced by the Amending Act in S. 164 is that a Magistrate before recording any confession should explain to the person making it that he is not bound to make a confession, and that if he does so it may be used in evidence against him. The confession becomes inadmissible if this essential requirement is not complied with. (*Le Rossignol and Fforde, JJ.*) MT. RAO *v.* CROWN.
7 Lah. L. J. 170 : 88 I. C. 599 : 26 Cr. L. J. 175 : 26 Punj. L. R. 173 : A. I. R. 1925 Lah. 367.

——— **S. 164**—*Confession to Magistrate—Condition that should be fulfilled—Doubt as to warning—Procedure.*

In order to render a confession alleged to be made to a Magistrate admissible in evidence, the person making it must have been warned that he was not bound to make any confession at all but that if he did so it might be used in evidence against him. If the memorandum on the foot of the recorded confession

contains the proper note, it can be presumed under S. 80, Evidence Act, that all the formalities were duly performed. But if it is not clear whether the accused was warned, under S. 533, Cr. P. Code, the Court can take evidence if the formalities were duly complied with. (*Scott-Smith and Fforde, JJ.*) KHEMAN *v.* EMPEROR. **6 Lah. 58 : 26 Punj. L. R. 346 : 88 I. C. 18 : 26 Cr. L. J. 1074 : A. I. R. 1925 Lah. 315.**

——— **S. 164**—*Statements—If unable to contradict other witnesses.*

Statements recorded by a Magistrate under S.164, Cr. P. Code, and used by the Crown under S. 157, Evidence Act, forthe purpose of corroborating the evidence given in Court cannot be used as substantive evidence for the purpose of contradicting the evidence of other witnesses. (*Harrison and Jai Lal, JJ.*) HARI RAM *v.* EMPEROR. **89 I.C. 897 (2): 26 Cr.L.J. 1425 (2) (Lah.)**

——— **S. 164** – *Recording of confessions—Duty of Magistrates.*

When a confession is made to a Magistrate during the course of a police investigation, there is a duty cast on him to question the person to satisfy by himself that he was making it voluntarily. When such a confession is subsequently retracted, the Court before admitting it in evidence must come to the conclusion it was voluntarily made. (*Scott-Smith and Zafar Ali, JJ.*) NEKI *v.* EMPEROR. **25 Cr. L. J. 116 : 76 I. C. 180 : A. I. R. 1924 Lah. 624.**

——— **S. 164**—*Confession recorded by Magistrate—Formalities not observed—Admissibility of confession.*

Before recording confessions, the Magistrate although he stated that he was satisfied that the confessions were made voluntarily failed to question the confessants whether they were making a voluntary statement and this defect was not made good at the examination of the Magistrate before the Sessions Court. *Held*, that the confessions must be rejected as irrelevant. (*Shadi Lal, C. J. and Le Rossignol, J.*) KHUSI MAHOMED *v.* EMPEROR. **6 Lah. L. J. 166 : 25 Cr. L. J. 979 : 81 I. C. 627 : A. I. R. 1924 Lah. 481.**

——— **S. 164**—*Confession not voluntary is of no value as evidence.*

One witness had stated that the appellant was beaten before he told the Police what had happened, and the Magistrate stated that the appellant was returned to the Police after making his confession. Further there were details in the confession which conflicted with the evidence for the prosecution. The confession had been retracted on the first possible occasion. *Held*, it was not genuine and it is of no value as evidence against the appellant. (*Shadi Lal, C. J. and Campbell, J.*) HARPHUL *v.* EMPEROR.
25 Cr. L. J. 58 : 75 I. C. 762 : A. I. R. 1923 Lah. 429.

——— **S. 164**—*Absence of cretificate vitiates confession.*

The absence of the certificate might be cured by the evidence of the Magistrate but the failure to make any enquiry as to the state of mind of the confessant at the time the confession is recorded is fatal (*Le Rossignol and Zafar Ali, JJ.*) JEHANA *v.* EMPEROR.
24 Cr. L. J. 618 : 73 I. C. 506 : A. I. R. 1923 Lah. 345.

——— **Ss. 164, 533**—*Failure of Magistrate to ask whether confession voluntary is a fatal defect.*

S. 164 of the Cr. P. Code makes it imperative for the Magistrates before recording a confession made to him in the course of a Police investigation, to question the person making it as to whether it is made voluntarily. Telling an accused person that he should make his

statement voluntarily and questioning him as to whether he is making it voluntarily are two very different things. The omission to question the appellant before recording his confession under S. 164 as to whether he is making it voluntarily is a material omission which prejudices him, and the defect is a fatal one, not curable by S. 533 and the confession must, therefore, be excluded from evidence. (*Shadi Lal, C. J. and Martineau, J.*) FARID *v.* EMPEROR. **2 Lah. 325 : 23 Cr. L. J. 149 : 5 P. W. R. 1922 (Cr.): 4 U. P. L. R. (L.) 33 : 65 I. C. 613 : A I. R. 1922 Lah. 237.**

——S. 164—*Exculpatory statement by one accused —S. 164 disregarded— Statement is inadmissible against others.*

Where the statement made by one of the accused persons previous to the trial before another Magistrate was not a confession but was in the nature of an exculpatory statement, and the procedure prescribed in S. 164 of the Code was not followed. *Held*, that the statement was not admissible in evidence against the other accused. (*Scott-Smith, J.*) BATAN SINGH *v.* EMPEROR. **7 Lah. L. J. 39 : 86 I. C. 219 : 26 Cr L. J. 731 : A. I. R. 1925 Lah. 334.**

——S. 164—*Failure to question is fatal—Confession to the husband of kidnapped girl in the presence of police is not admissible.*

Before recording the confession the Magistrate failed to question the accused as to whether he was making the confession voluntarily. *Held*, this defect is a fatal one and renders the confession inadmissible in evidence. Nor the oral confession said to have been made on that very day by accused to the husband of the kidnapped girl in the presence of the police can be taken into consideration against him. 2 L. 325 Foll. (*Shadi Lal, C. J.*) LACHHI RAM *v.* EMPEROR. **24 Cr. L. J. 564 : 73 I. C. 260 : A. I. R. 1923 Lah. 330.**

——S. 164—*Admissions before trial need not be recorded—Oral evidence of such statements is admissible—Distinction between Ss.* 164 *and* 364.

S. 364, Cr. P. C., makes it obligatory upon the Magistrate who examines a person as an accused, to record the whole of the questions put to him and answers given by him. But statements whether in the nature of information given by witnesses about a crime or admissions by persons who have taken part in a crime, if made during the course of an investigation but before the commencement of trial or inquiry are governed by S. 164, which permits but does not compel the Magistrate to record the same. Oral evidence of a Magistrate who watches investigation conducted by the police under instructions given to him under S. 159, Cr. P. Code and who did not himself make any independent inquiry or record any statements from the available witnesses are admissible to prove that the accused confessed the crime to him though the statement was not recorded under S. 164. (*Spencer and Kumaraswami Sastri, JJ.*) TANGEDUPALLE PEDDA, *In re.* **45 Mad. 230 : 69 I. C. 264 : 30 M. L. T. 107 : 14 L. W. 542 : (1921) M. W. N. 779: 23 Cr. L. J 680 : A. I. R. 1922 Mad. 40 : 42 M. L. J. 37.**

——S. 164—*Confession duly recorded but against orders of District Magistrate is nevertheless admissible in evidence.*

A confession duly recorded by a Magistrate in accordance with S. 164 of the Cr. P. Code is admissible in evidence in spite of the instruction by the District Magistrate, or even by the High Court or Local Government that he is not to record confession. (*Hallifax and Macnair, A. J. Cs.*) GOVINDA *v.* EMPEROR. **17 N. L. R. 113 : 69 I. C. 257 : 23 Cr. L. J. 673.**

——S. 164—*Real caution must be given.*

Confessing accused are almost invariably unarmed beforehand of the necessary cautions, and are given to understand that if they do not reply satisfactorily to the questions that will be put to them, their statements will not be accepted : but this is not proper. (*Wazir Hasan and Cuming, A. J. Cs.*) MAHADEO *v.* EMPEROR. **10 O.L.J. 280 : A. I. R. 1924 Oudh 65.**

——S. 164—*Certificate of Magistrate is not conclusive.*

The certificate recorded by a Magistrate at the foot of confession is not conclusive and facts leading the Court to think that the confession was not voluntary, can be proved. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) NAR SINGH *v.* EMPEROR. **25 O.C. 229 : 24 Cr. L. J. 561 : 73 I. C. 257 : A. I. R. 1922 Oudh 302.**

——S. 164—*Confession which is uncontradicted and corroborated must be held to be true.*

Per Kanhaiya Lal, J. C. and Lyle, A. J. C. :— Where there is a reasonable doubt whether the accused gave the information which led to a discovery, it would be unsafe to rely on his confession. If the dead body in a murder case was discovered in consequence of the confession, the corroboration would be material, but if the evidence produced about the time when the dead body was discovered is discrepant it is difficult to say whether the discovery was made before the confession or afterwards.

Per Lyle, A. J. C.—Although criminals do at times confess for no apparent reason, they generally do so in some vague hope of escaping from the penalty of their crime when they know or believe that there is evidence against them.

Per Kanhaiya Lal, J.C.—The failure of the prosecution in many cases is due to the inveterate desire of the investigating officer not to work up to the confession but to get hold of a confession first and then work from it downwards.

Per Ashworth, A. J. C.— Where an accused person has pointed out the whereabouts of the body of a man who has undoubtedly been murdered and has made a confession which not only is uncontradicted by any of the facts proved in the case but indeed has received corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make out a strong case to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there was such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking part in it. (*Kanhaiya Lal, J. C., Lyle and Ashworth, A. J. Cs.*) NINGA *v.* EMPEROR. **9 O.L J. 190 : 68I. C. 17 : 4 U. P. L. R. (J.C.) 150 : 23 Cr. L. J. 481 : A. I. R. 1922 Oudh 202.**

——S. 164—*Recording of confession—Irregularity—Retraction.*

Where the provisions of S. 164 of the Code had not been complied with in recording the confession and the confession was retracted before the committing Magistrate, *held*, no evidential value attached to the confession. (*Wazir Hasan, A.J.C.*) GAJADHAR *v.* EMPEROR. **9 O. L. J. 500 : A. I. R. 1923 Oudh 39.**

——S. 164—*Accused's statement of exculpatory character is admissible in evidence against him.*

Where an accused person makes a statement before a Magistrate under S. 164 of the Cr. P. C. and the

statement is not a confession but is of an exculpatory character, it is not admissible in evidence in favour of the accused but is admissible against him as evidential of a fact relative to the prosecution story. (*Bucknill and Ross, JJ.*) GOLAM MAHOMED KHAN *v.* EMPEROR. **4 Pat. 327 : 6 P. L. T. 598 : 86 I. C. 814 : 26 Cr. L. J. 878 : A. I. R. 1925 Pat. 536.**

——S 164—*Retracted confession must be corroborated.*

A retracted confession cannot be given any weight, unless it is well corroborated by reliable evidence. (*Adami and Bucknill, JJ.*) RAMAI HO *v.* EMPEROR. **3 Pat. 872 : 26 Cr. L. J. 314 : 84 I.C. 458 : A. I. R. 1925 Pat. 191.**

——S. 164—*Evidence of Recording Magistrate that he had followed all the provisions of the section is sufficient.*

Where the Magistrate who recorded the confession did not sign the certificate which is prescribed by the Code as now amended; and signed the certificate which was in use under the old Code, and where the accused was not asked if he made the statement voluntarily, but was asked the following question only:—"Are you prepared to make a statement of your own free will ?" and where the record of the confession too did not show that the appellant was warned that he was not bound to make a confession and that if he did, it might be used in evidence against him; but where the Magistrate himself was called as a witness and in his evidence he said in clear terms, that he cautioned the accused, explaining to him that he was not bound to make any statement and that if he did so it might be used in evidence against him. *Held*, that the confession, as recorded, was admissible in the case especially since the Magistrate had been examined and had shown that he had observed the provisions of the law. 9 Mad. 224; A.I.R. 1922 Lah. 237, Dist.; 2 Pat. L. T. 773, Foll. (*Adami and Bucknill, JJ.*) RARMAI HO *v.* EMPEROR. **3 Pat. 872 : 26 Cr. L J. 314 : 84 I. C. 458 : A. I. R. 1925 Pat. 191.**

——S. 164—*Examination like cross-examination.*

Statement made during examination of the accused which amounts to cross-examination cannot be used against him. (*Coutts and Adami, JJ.*) NUR BHAGAT *v.* EMPEROR. **1 Pat. 630 : 4 Pat. L. T. 76 : 71 I. C. 219 : 24 Cr. L. J. 91 : A. I. R. 1922 Pat. 582.**

——S. 164—*Retracted confession is always open to suspicion.*

A confession made and retracted must always be open to some suspicion. But it is sufficient for a conviction, if the Court is satisfied that it was voluntarily made and true. The credibility of such a confession in each case is a matter for the Court to decide, according to circumstances of each particular case. 8 W. R. 40 (Cr.); 22 Cal. 164 Foll. (*Das and Adami, JJ.*) BEHARI ADRAKI *v.* EMPEROR. **3 Pat L. T. 98 : A. I. R. 1922 Pat. 492.**

——S. 164—*Confession can be recorded before trial.*

There is nothing in S. 164 or any other provision of the Cr. P. Code which forbids a Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement if proved to be voluntary is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt. (*Mullick and Thornhill, JJ.*) MADAN GURU *v.* EMPEROR. **24 Cr. L. J. 723: 73 I. C. 963 : 4 Pat. L. T. 381.**

——Ss. 164 and 533—*Warning not given by Magistrate—Confession defective.*

Where the record does not show whether the Magistrate gave due warning to the accused that the confession is defective, the defect is curable by S. 533 on taking Magistrate's evidence that the warning was given in fact. (*Jwala Prasad and Sultan Ahmad, JJ.*) MAKSUD ALI *v.* EMPEROR. **2 Pat. L. T. 773 : 60 I. C. 56 : 3 U. P. L. R. (Pat.) 18 : 22 Cr. L. J. 200.**

——S. 164—*Confession—Not in accordance with law.*

A confession in answer to a question "After due warning do you want to say anything?" without any indication of what the due warning was, is not a confession recorded in accordance with law. (*Coutts and Ahmad, JJ.*) MADHU MAJHI *v.* EMPEROR. **2 Pat. L. T. 129 : 59 I. C. 551 (1) : 22 Cr. L. J. 119.**

——S. 164—*Statements recorded by Magistrate need not be on solemn affirmation.*

The statement recorded by a Magistrate is admissible in evidence under S. 164 whether taken on solemn affirmation or not. (*Kincaid, J. C. and Aston, A.J.C.*) BAHADUR *v.* EMPEROR. **26 Cr. L. J. 1063 : 88 I. C. 7 : A. I. R. 1925 Sind 289.**

——Ss. 164 (3) and 533—*Evidence Act, S. 80—Confession containing memorandum under S. 164 (3)—Presumption under S. 80, Evidence Act, arises that all formalities have been performed—Court must be satisfied that confession was voluntarily made.*

If, when a document is tendered in evidence at a trial purporting to be a confession of the accused, it is found to contain the memorandum required by S. 164 (3), a presumption arises under S. 80 of the Evidence Act that all the necessary formalities purporting to have been performed have in fact been performed and the document is admissible in evidence without further proof. If however, the said memorandum does not appear or is defective the document is inadmissible unless the defects can be cured by the examination of the Magistrate who recorded it, under S. 533. The provisions of S. 164 (3) render it incumbent on a Magistrate who is called on to record a confession to explain to the person who is to make it that he is not bound to make a confession at all, and that if he does so it may be used as evidence against him. Further the Magistrate should only record the confession if upon examination of the person making it he has reason to believe that it will be made voluntarily. Where the memorandum at the foot of confession recorded does not conform with the form as laid down, the defect is curable if it is of form and not of substance. If as a matter of fact the statement was duly recorded, that is to say, after the required explanation had been given but the Magistrate had failed to embody that fact in the certificate, such a defect would be curable. If the explanation had not in fact been made the statement could not be held to have been "duly made" and S. 533 cannot be appealed to. (*Broadway and Addison, JJ.*) PARTAP SINGH *v.* EMPEROR. **6 Lah. 415 : 7 L. L. J. 482 : A. I. R. 1925 Lah. 605 (2).**

——S 164 (3)—*Absence of memorandum of inquiry does not vitiate confession.*

A Magistrate would be well advised to make a memorandum of enquiry before recording the confession of an accused though the law does not expressly require it. But a confession duly recorded does not become inadmissible owing to the absence of a memorandum. (*Chevis and Scott Smith, JJ.*) UMAR DIN *v.* EMPEROR. **2 Lah. 129 : 3 L. L. J. 287 : 67 I. C. 340 : 23 Cr. L. J 388.**

——S. 164 (3)—*Duty of Magistrate.*

It would be a very dangerous rule to lay down that any particular form of questioning is necessary. Whilst it is clearly desirable that a Magistrate should always put such questions as may be necessary to enable him

CR. P. CODE (V OF 1898). S. 164 (3).

to determine whether the confession is voluntary, there is no reason why a comprehensive question such as asking him that he might make a statement if he so wished, should not be sufficient. 4 P. L. T. 187, Foll. 40 I. C. 721, Not Foll. 2 I. C. 681 : 45 I. C. 613 : 25 Bom. 543, Ref. If in a murder case the accused have confessed, the Court has to see whether it can rely on the confessions and this involves a consideration of whether the evidence in the case affords corroboration of the matters alleged by themselves before the Magistrate in their confessions. (*Dawson Miller, C. J. and Mullick, J.*) THIBU BHOGTA *v.* EMPEROR. **2 Pat. L. R. (Cr.) 52 : 4 Pat. L. T. 279 : 73 I. C. 569 : 24 Cr. L. J. 649 : A. I. R. 1923 Pat. 356.**

——S. 164 (3)—*Magistrate must satisfy himself that confession is voluntary.*

Where an accused person was actually produced before the Magistrate as soon as he was arrested and was produced before him the next day for recording the confession, *Held*, that the confession should not be ignored on the ground that the Magistrate did not ask him how long he was in Police custody. It is highly irregular for the Magistrate to peruse the alleged statements of the accused made to and recorded by the Police Officer before proceeding to question the prisoner. A Magistrate should generally question the accused closely as to his motives in making a confession. It is desirable that a Magistrate in recording the confession should put various questions to an accused to enable him to decide whether the confession is a voluntary one or not, but there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of the confession by putting a single question to the accused person. (*Das and Adami, JJ.*) EMPEROR *v.* DEWAN KAHAR. **4 Pat. L T 186 : 72 I. C. 961 : 24 Cr. L. J. 497 : A. I. R. 1923 Pat. 13.**

——S. 165—*Search for articles alleged to have been stolen.*

A Police officer is entitled to make a search for not only what is stolen property but also for everything necessary for the purpose of investigating the offence, (*Boys and Ashworth JJ.*) EMPEROR *v.* PARAM SUKH. **L. R. 6 A 173 (Cr.)**

——S 167—*Change.*

(1) The words 'under this chapter' have been omitted. The section will now apply to proceedings under Chap. VIII. (2) The investigating officer must not be below the rank of a Sub-Inspector. (3) The power to remand is now confined to 1st class magistrates and 2nd class magistrates specially empowered.

——Ss. 167, 190 and 61—*Investigation not completed in 24 hours—Procedure—Cognizance upon report of police—Powers of Magistrate.*

The law as laid down in Ss. 61, 167 and 169, Criminal Procedure Code, is that at the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before a Magistrate allowed under Secs. 61 and 167, an accused must either be released by the Police under Sec. 169 security for his appearance if and when required being taken or the Magistrate, empowered in that behalf must either take cognizance if he has before him a police report which ordinarily would be a report in the form laid down in S. 173 which he thinks, makes out a *prima facie* case or he must release him. The provisions of Sec. 190 extend to any offence and notwithstanding the use of the words "Police Report" in Sec. 175, that Sec. 190 (1) (*b*) cannot be restricted merely to non-cognizable offences and a Magistrate is empowered by Sec. 190 (1) (*b*) to take cognizance both of cognizable and non-cognizable offences upon a report such as is mentioned in Sec. 190 (1) (*b*). (*Greaves and Panton, JJ.*) BHOLANATH DAS *v.* EMPEROR. **28 C. W. N. 490 : A. I. R. 1924 Cal. 614.**

CR. P. CODE (V OF 1898), S. 172 (2).

——Ss. 169, 514—*Surety bond must be strictly construed.*

The surety bond in criminal cases must be strictly construed, and a surety cannot be required to pay the amount of the bond as the result of an opinion held by the Court as to what was in his mind when he signed it. He can only be required to forfeit the amount, if the terms expressed in the bond are broken. Sureties do not bind themselves to produce the accused except on the date agreed ; having done so their liability is discharged. (*Saunders, J. C.*) NGA PO TIN *v.* EMPEROR. **4 U. B. R. (1921) 71 : 65 I.C. 420: 23 Cr. L. J 68 : A. I. R. 1922 U. B. 8.**

——S. 172—*Entries in personal diary of Police officer are admissible.*

Entries made in a personal diary kept by a Police officer, who did not start or carry on the investigation of a case do not fall within the purview of S. 172 and are not therefore inadmissible in evidence by virtue of the provisions of that section. (*Greaves and Panton, JJ.*) KALIA *v.* EMPEROR. **26 Cr. L J. 579 : 85 I. C. 723 : A. I. R. 1925 Cal. 959.**

——S 172—*Diaries kept under Calcutta Suburban Police Act and produced without summons can be used by accused to contradict prosecution witnesses under S. 145, Evidence Act.*

Where a diary is prepared under S. 47 (*a*) of the Calcutta Suburban Police Act no privilege attaches to it and S. 172 has no application and therefore the accused person would be entitled to use those statements recorded by the Police officer of witnesses who have been examined in the case, to contradict those witnesses who had given evidence before the Magistrate under S. 145 of the Evidence Act. It is immaterial in a criminal case on whose behalf it is put in. (*Ghose and Cuming, JJ.*) SURESH CHANDRA GHOSE *v.* EMPEROR. **24 Cr. L. J. 757 : 74 I. C. 261 : A. I. R. 1924 Cal. 542.**

——S. 172—*Police diary—Cannot be used as—Purpose of—Evidence of corroboration.*

Police diary maintained under S. 172 of the Code cannot be used as substantial evidence in a case or to corroborate the evidence of the Police Officer who kept it, although it may be used to contradict him. An improper use of the diary by the Court by itself is not a ground on which the High Court will interfere. (*Jwala Prasad, J.*) ACHAIBAT SINGH *v.* EMPEROR. **2 P. L. T. 233 : 61 I. C. 230 : 22 Cr. L. J. 374.**

——S. 172 (2)—*Object of.*

The object of sub-section (2) is to enable the Court to direct the police officer who is giving his evidence, to refersh his memory from the notes made by him in the course of his investigation of the case or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court. If used for the latter purpose, the provisions of Ss. 145 and 161 of the Evidence Act shall apply. The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial. If the statements in question, however, have not been made evidence in accordance with these statutory provisions no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or enquiry. (*Shadi Lal, C. J. and Fforde,*

CR. P. CODE (V OF 1898), S. 172 (2).

J.) MAHOMED *v.* EMPEROR. **26 Cr. L. J. 1308 : 89 I. C. 252 : A. I. R. 1926 Lah. 54.**

——**S. 172 (2)**—*Police diaries cannot be used by Court as evidence.*

S. 172 (2), Cr. P. Code, authorises a criminal court to send for the police diaries of a case under inquiry or trial in such court, and to use such diaries, not as evidence in the case, but to aid such an enquiry or trial. Where the Sessions Court uses the Zimnis as evidence, it is an improper use of them and the conviction cannot stand. (*Scott Smith and Abdul Qadir, JJ.*) SUNDAR SINGH *v.* EMPEROR. **66 I. C. 187 : 23 Cr. L. J. 251 : 4 Lah. L. J. 284.**

——**S. 173**—*Changes.*

[(1) The action taken by the Officer should be communicated to the informant, if any. (2) The accused is entitled to get a copy of the Police report]

——**S. 173**—*Report requesting Court to issue process, if necessary, is a report within S.* 173.

In a case investigated by the police against three persons for theft the police sent up their report wherein one person had been described as concerned in theft and for the other two they reported that witnesses spoke against them on account of enmity but if the Court thought there was evidence against them the Court may issue warrant. *Held*, that the report was a police report within S. 173 even as regards the other two persons. (*Kincaid, J. C., Raymond and Aston, A. J. Cs.*) MEHRAB *v.* EMPEROR. **17 S. L. R. 150 : 83 I. C. 885 : 26 Cr. L. J. 181 : A. I. R. 1924 Sind 71 (F. B.)**

——**S. 174** *Change.*

[A magistrate of the 1st class has now been empowered to hold inquests.]

——**Ss. 174, 175 and 161**—*Police inquiry under S.* 174—*Voluntary of information is not bound to speak the truth.*

A man who comes forward without being summoned and volunteers information at a Police enquiry under S. 174, is not bound to give true answers to questions. (*Campbell, J.*) MAHOMED HAYAT *v.* EMPEROR. **6 P. W. R. 1922 (Cr.) : 65 I. C. 434 : 23 Cr. L. J. 82 : A. I. R. 1922 Lah. 133.**

——**S. 176**—*Penal Code, S.* 121.

In a case under S. 121, I. P. C., even if the charge does not set out the speeches alleged to be seditious it would not vitiate the proceedings. (*Odgers and Wallace, JJ.*) M. P. NARAYANA MENON, *In re.* **25 Cr. L. J. 401 : 77 I. C. 481 : A. I. R. 1925 Mad. 106.**

——**S. 177**—*Offence of bigamy where triable.*

The offence of bigamy and the abetment of bigamy is triable only in the district in which the second marriage or the abetment took place and not in the district in which the woman is reported to have been enticed away. (*Martineau, J.*) AMIRCHAND *v.* CROWN. **6 L. L. J. 422 : A. I. R. 1924 Lah. 732.**

——**Ss. 177 and 182**—*Jurisdiction.*

In a case where Railway receipts were sent from Harda and Rs. 40,000 were obtained on their credit at Bombay, it was held that both Bombay and Harda Courts have jurisdiction to try the case. (*Batten, J. C.*) SHAMJI *v.* EMPEROR. **5 N. L. J. 16 : 65 I. C. 994 : 23 Cr. L. J. 210 : A. I. R. 1922 Nag. 40.**

——**Ss. 177 and 526**—*Offence tried contrary to S.* 177—*High Court is not bound to quash proceedings but can transfer case to Court having jurisdiction.*

Where an offence is being inquired into and tried by a Court contrary to the provisions of S. 177, the error can be rectified by the High Court by transfer to the Court having jurisdiction. The High Court is not bound to quash the proceedings. 23 O. C. 87 Diss. (*Dalal, J. C.*) MUBARAK ALI *v.* ABDUL HAQ. **26 Cr. L. J. 577 : 85 I.C. 721 : A. I. R. 1925 Oudh 490.**

CR. P. CODE (V OF 1898), S. 179.

——**Ss. 179 and 181 (2)**—*Place of trial—Money due at M—Misappropriation at A—Former Court can try.*

Where the bill-collector of a firm carrying on business at *M*, misappropriated money collected on behalf of the firm, at a place in the Dt. *A*, he can be tried at the Court in the Dt. *M*. (*Mears, C. J., Rafique and Ryves, JJ.*) SHEO SHANKAR *v.* MOHAN SARUP. **19 A. L. J. 69 : 60 I. C. 996 : 22 Cr. L. J. 308 : L. R. 2 A. (Cr.) 15 (F.B.).**

——**S. 179**—*Offence partly in C. P. and partly in U. P.—Latter Courts have jurisdiction.*

An agent of a firm at Mirzapur was entrusted with the collection of lac in C.P. He was to send monthly accounts to the firm from there. He failed to account in respect of a sum of Rs. 85,000 and odd when demanded by the Company. *Held*, that a considerable part of the offence was committed at Mirzapur in U.P. and the Mirzapur Court had jurisdiction to try the case. (*Tudball, Piggott and Walsh, JJ.*) KANHAIYA LAL *v.* EMPEROR. **L. R. 2 A. (Cr.) 28 (F. B.)**

——**Ss. 179 and 185**—*Accused charged with two offences—Court having jurisdiction to try one only shall try that alone.*

S. 179 is controlled in respect of certain offences by S. 181 and no question of convenience or expediency can be considered under S. 185. That section deals only with questions of competency when they are involved in doubt. 44 C. 598, Foll. Where the accussd was charged under S. 420 and S. 406, I.P.C., the former triable at Basti as well as at Bombay and the latter triable only at Bombay, the Basti Court was directed to proceed with the trial under S. 420 and to drop so far as that Court was concerned the charge under S. 406 of the Code. (*Kanhaiya Lal, J.*) GIRDHAI DAS *v.* EMPEROR. **21 A.L.J. 621 : L. R. 4 A. (Cr.) 142 : 75 I.C. 353 (1) : 24 Cr. L. J. 929 (1) : A. I. R. 1924 All. 77.**

——**S. 179**—*'Consequence' bears only a grammatical meaning and is not confined to a necessary ingredient of the offence.*

S. 181 (2) does not restrict the provisions of S. 179 of the same Code. One of the consequences of criminal breach of trust, if committed by an agent, would be loss to the person to whom the property entrusted to the agent, belonged, and therefore as the complainant would be entitled to get the proceeds of the articles. sent to the agent, paid to him; if the proceeds were not paid to him, loss would be incurred at the place where he lives and therefore the Court would have jurisdiction. S. 181 (2) in no way restricts the provisions of S. 179. There is nothing in that section which prevents a Court within whose local limits any consequences of an offence have ensued, having jurisdiction to try the offence. The word "consequence" in S. 179 bears its ordinary grammatical meaning and is not restricted to meaning a consequence which is a necessary ingredient of the offence. (*Macleod C. J. and Kanga, J.*) EMPEROR *v.* RAMRATAN CHUNILAL. **46 Bom. 641 : 65 I. C. 637 : 24 Bom. L. R. 46 : 23 Cr. L. J. 173 : A. I. R. 1922 Bom. 39.**

——**Ss. 179 and 181 (2)**—*Scope.*

S. 181 (2) and not S. 179 applies to a case of criminal breach of trust. (*Suhrawardy and Mukerji, JJ.*) GUNANANDA DHONE *v.* LALA SANTI PRAKASH NANDY. **41 C. L. J. 80 : 29 C. W. N. 432 : 86 I. C. 213 · 26 Cr. L. J. 725 : A. I. R 1925 Cal. 613.**

——— S. 179—*Does not apply to offence under Penal Code, S. 408—Loss is not a 'consequence' within S. 179—Penal Code, S. 408.*

S. 179 does not govern the jurisdiction of a Court to try the offence of criminal misappropriation or of criminal breach of trust for which a special provision is to be found in S. 181 (2). 22 P.R. 1915 (Cr.), Foll. (*Shadi Lal, C.J.*) MAHTAB DIN *v.* EMPEROR.
A. I. R. 1924 Lah. 663.

——— **Ss. 179 and 181**—*Place of trial is place of offence.*

Where the accused, a merchant carrying on business at Calcutta, ordered goods from the complainant at Delhi on condition that the goods were to be delivered in Calcutta and payment was to be made in Delhi and the accused disposed of the goods in Calcutta without paying for them, *held*, that the offence of cheating or criminal breach of trust, whoever, was committed in Calcutta and the Delhi Court had no jurisdiction to entertain a complaint in respect of those offences against the accused. (*Shadi Lal, C.J.*) ABDUL HAQ *v.* EMPEROR. **23 Cr. L. J 743 (2) : 69 I. C. 631 (2) : A.I.R 1924 Lah. 353.**

——— S. 179—*Scope—"Consequence," meaning.*

"Consequence" means a consequence which forms part and parcel of the offence and does not mean a consequence which is not such a direct result of the act of the offender as to form any part of that offence. 38 Mad. 639, 29 M.L.J. 178 and 7 P. R. 1910, Foll. (*Moti Sagar, J.*) NADAR *v.* EMPEROR.
24 Cr. L. J. 579 : 73 I. C. 323 : A. I. R. 1923 Lah. 487.

——— S. 179—*Cheating—Offence is triable, where cheating is committed.*

In cases of cheating, there must be an intention to cause wrongful loss or wrongful gain but it is not essential that loss should be caused. It is the Court within whose jurisdiction the cheating was committed and not where loss ensued that should determine the forum of trial. Case of criminal misappropriation distinguished. (*Campbell J.*) RAGHBIR SARAN *v.* KURAKSHETAR MOTOR SERVICE CO.
67 I. C. 623 : 23 Cr. L. J. 447 : A. I. R. 1923 Lah. 90.

——— **Ss. 179, 182**—*Place of publication will give jurisdiction.*

If the defamatory letter is posted in Madras with a view to be read in Tinnevelly the offence of defamation is triable either in Madras or in Tinnevelly. (*Spencer, J.*) KRISNAMURTI IYER *v.* PARASURAMA IYER. **32 M. L. T. (H. C.) 164 : 72 I. C. 69 (1) : 24 Cr. L. J. 309 (1) : A. I. R. 1923 Mad. 666 : 44 M.L.J. 648.**

——— S. 179 — *False verification — Verification signed at one place but presented in another place of signing gives jurisdiction.*

A petition under S. 21 of the Income-Tax Act, 1918, was verified at a place in the Tanjore District but presented in Ramnad District. On a complaint of an offence under S. 177, I.P.C., read with S. 40, Income-Tax Act, being filed in Ramnad, *held*, that the alleged offence was completed in the Tanjore District and that the Ramnad Magistrate had no jurisdiction to entertain the complaint. (*Oldfield and Ramesam, JJ.*) MOHIDEEN PAKIRI MARAKKAYAR, *In re.*
45 M. 839 : 31 M. L. T. 282 : 16 L. W. 335 : (1922) M. W. N 690 : 68 I. C. 843 · 23 Cr. L. J. 619 : A I. R. 1923 M. 50 (2) : 43 M. L. J. 475.

——— S. 179—*Offence under S. 409, I. P. C.—Place of trial—Consequence of wrongful act.*

A person is not accused of the offence of criminal breach of trust by reason of his having actually caused wrongful loss to anybody ; it is enough that he intended to do so, even if no wrongful loss was ever caused in fact. Such loss is certainly the usual consequence of the offence but it is not one of the consequences by reason of which the person is accused of the commission of the offence. It is therefore not one of the consequences contemplated by S. 179, Cr. P. Code. The offence of criminal breach of trust is complete with the act of conversion and the intention to cause wrongful gain or wrongful loss. That intention can only be formed or at least can only be proved to have been formed at the place where the conversion takes place and that place is the forum for trial of the accused. 38 M. 630, Foll. ; 46 B. 641, Diss. (*Hallifax, A.J.C.*) BANERJI *v.* POTNIS. **20 N. L. R. 72 : 81 I C. 253 : 25 Cr. L. J. 922 : A. I. R. 1924 Nag 253.**

——— S 179—*Cheating—Place of trial.*

Where the crucial letter by which for the first time the complainant was clearly led to realise that there had been an intention to cheat on the part of the accused was received by him at Buxar, *held*, that there was jurisdiction to try the accused at Buxar. (*Bucknill, J.*) P. H. METFEAL *v.* J. WATSON.
25 Cr. L. J. 81 : 76 I. C. 17· A. I. R. 1924 Pat. 708.

——— S. 180—*Non-British subject in Native State cannot be tried in British Courts.*

British Courts have no jurisdiction over a non-British subject retaining stolen property in a Native State. 9 A. 523: 16 P. R. 1880 (Cr.): 22 P. R. 1888 (Cr.), Foll. (*Wilberforce, J.*) MUHAMMAD HUSSAIN *v.* EMPEROR. **2 L. L J. 348 : 68 I. C. 160: 23 Cr. L. J. 560.**

——— S. 181—*Change.*

Cl. (3) of this section will now apply not only to theft alone, but to any offence which includes theft or the possession of stolen property.

——— **Ss. 181 and 239**—*Conspiracy—Trial for—Jurisdiction of Court.*

Where a conspiracy is entered into in one district and the acts in pursuance thereof are committed in another district, the Magistrate of the former district can try the offence of conspiracy but cannot try the accused in the same trial for offences committed outside his district. The mere fact that the offences could have been tried jointly under S. 239, Cr. P. Code if committed within the jurisdiction would not give a Magistrate jurisdiction to try the offence committed outside the jurisdiction. (*Newbould and Chakravarti, JJ.*) BISSESWAR *v.* EMPEROR. **28 C. W. N. 975: A. I. R. 1924 Cal. 1034.**

——— **S. 181 (2)**—*Accused—Failure to account due to breach of trust—Offence is committed at place where the accounts were due to be rendered.*

Where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate, may enquire into and try the offence under the provisions of S. 181, sub-S. (2). (*Suhrawardy and Mukerji, JJ.*) GUNANANDA DHONE *v.* LALA SANTI PRAKASH NANDY. **41 C. L. J. 80: 29 C. W. N. 432: 86 I. C. 213: 26 Cr. L. J. 725: A. I. R. 1925 Cal. 613.**

——— **S. 181 (2)**—*Offence of criminal misappropriation should be tried where it is committed.*

Where money was received by *P* from the complainant in Calcutta, that is, the misappropriation took place there. *Held*, that the case should be tried in Calcutta. (*Ghose and Cuming, JJ.*) A. K. MAITRA *v.* KAMINI MOHAN BOSE. **25 Cr. L. J. 377 : 77 I. C. 425 : A. I. R. 1925 Cal. 107.**

——— **S. 181 (2)**—*Penal Code, S. 406—Criminal breach of trust in respect of monies received at Singapore for which accused to account at Calcutta—Cal-*

cutta Court has jurisdiction.

Where in a complaint it was alleged that the accused while in service of the complainant's firm at Singapore committed criminal breach of trust in respect of monies received there but for which he was to account at Calcutta, *Held*, that on the allegations made, Courts in Calcutta have jurisdiction. (*Teunon and Ghose, JJ.*) ABDUL LATIFF *v.* ABU MD. **26 C. W. N. 175: 71 I. C. 241: 24 Cr. L. J. 113: A.I. R. 1922 Cal. 46 (1).**

——**S. 181 (2)**—*Where money is payable in District A but it is misappropriated in District B offence is triable in District B.*

Where the complaint was that accused No. 1 delivered a certain amount to accused No. 2 in Kangra District for payment at Hoshiarpur and that the money was dishonestly misappropriated by both the accused in Kangra District, the offence is triable only in Kangra District. (*Campbell, J.*) DINA NATH *v.* TULSI RAM. **6 L. L. J. 471 : 83 I. C. 690: 26 Cr. L. J. 136: A. I. R. 1925 Lah. 171.**

——**S. 181 (2)**—*Criminal breach of trust—Offence where triable—Loss where arises.*

The jurisdiction of a Court to try an offence of criminal misappropriation or criminal breach of trust is governed by S. 181 (2) and not by S. 179, Cr. P. Code. The resulting loss though a normal result in such cases, is not an ingredient of those offences and cannot therefore be described as a consequence within the meaning of S. 179. Where a firm with headquarters at *X* employs an agent at *Y* to sell goods there and he fails to account for some items a complaint with regard to it can only be laid at *Y*. (*Shadi Lal, C J.*) MAHTAB DIN *v.* EMPEROR. **25 Cr. L. J. 410 : 77 I. C. 490: A. I. R. 1924 Lah. 663.**

——**Ss. 181 (2) and 179**—*Criminal breach of trust—Offence triable where conversion takes place.*

For the application of S. 179 it is essential that the offence should depend on an act done and on a consequence which has ensued. Loss to one person though a normal result of an act of misappropriation by another, is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued but on the act which has been done, and therefore the offence is triable where the conversion takes place and the accused intends wrongful gain to himself and falls under S. 181 (1). 44 C 912, Foll. (*May Oung, J.*) AHAMED EBRAHIM *v.* HAJEE A A. GANNY. **1 Rang. 56: 2 Bur. L. J. 40: 74 I. C. 74: 24 Cr. L. J. 746: A. I. R. 1923 Rang. 209.**

——**S. 181 (3)**—*Being in possession of stolen property—Offence if can be enquired into by Court within whose jurisdiction theft was committed.*

Section 181 (3), Cr. P. Code, as amended means that the offence of being in possession of stolen property may be inquired into either in the District where it was stolen or where it was found to be dishonestly possessed. The context requires that the words "such offence" in that section should mean the offence of theft whereas grammatically they should mean any offence of possession. (*Ashworth, J.*) EMPEROR *v.* BHIMA. **L. R. 6 A. 208 (Cr.)**

——**Ss. 181 (4) and 531**—*Scope of—No failure of justice by trial at wrong place—Effect.*

It is doubtful if the words "offence of kidnapping or abduction" in S. 181 (4) include an offence of wrongfully distraining or keeping in confinement a kidnapped person. When a person is tried in wrong court contrary to the provisions of S. 181 (4), but there is no failure of justice, S. 531 cures the defect and the conviction can be sustained. (*Stuart, J.*) BADLU SHAH *v.* EMPEROR. **21 A. L. J. 912 : 46 A. 138: L. R. 5 A. (Cr.) 49 : A. I. R. 1924 All. 454.**

——**S. 183**—*Theft from running train—Place of trial.*

In the case of a theft from a running train during the course of the journey the offence can be enquired into and tried by any Court having jurisdiction over any part of the country through which the train passed during the course of its journey. (*Abdul Kadar, J.*) LAZARAS MEGH NATH *v.* EMPEROR. **24 Cr. L. J. 253: 71 I. C. 797 : A. I. R. 1924 Lah. 351.**

——**S. 183**—*Scope—Whether offence committed in British India or outside doubtful—Benefit of doubt should be given.*

The section applies only when offence is committed in British India. Where it was doubtful as to whether the offence was committed in British India or outside, the benefit of doubt was given to the accused. (*Moti Sagar, J.*) NADAR *v.* EMPEROR. **24 Cr. L. J. 579 : 73 I. C. 323: A. I. R. 1923 Lah. 487.**

——**S. 183**—*Offence committed during journey.*

Offence committed in course of journey from one place to another can be tried by Court having jurisdiction at latter place. (*Kennedy, J. C. and Raymond, A, J. C.*) EMPEROR *v.* MOULABUX. **25 Cr. L. J. 439: 77 I. C. 727 : A. I. R. 1925 Sind 177 (1).**

——**S. 186**—*Duty of Magistrate—Case when to be sent.*

The wording of the section itself shows that it relates to offences which the Magistrate knows at the outset to have been committed, if at all outside the limits of his jurisdiction. The marginal note makes the meaning clearer and still more the references to the section in Schedule III and S 529 of the Code. (*Walmsley and Suhrawardy, JJ.*) AMULYA CHANDRA, *In re.* **25 Cr. L. J. 184 : 76 I. C. 424 : A. I. R. 1923 Cal. 401.**

——**S. 188**—*Certificate under, may be obtained subsequently.*

Where the certificate under S. 188 was not obtained at the date of the complaint, *Held*, the defect would be cured if the certificate has been obtained subsequently. (*Shah and Kajiji, JJ.*) RAMBHARTHI HIRABHARTHI, *In re.* **47 Bom. 907 : 25 Bom. L. R. 772 : 77 I. C. 189 : A. I. R. 1924 Bom. 51.**

——**S. 188**—*Absence of Political Agent's certificate renders proceedings void.*

The defect as to absence of a certificate of Political Agent as required by S. 188 is not curable by the subsequent production of the same. 11 P. R. 1899 (Cr.) Foll. 13 Mad. 423 and 19 All. 109, Appl. (*Campbell, J.*) RAMCHARAN *v.* EMPEROR. **5 Lah. 416 : A. I. R. 1925 Lah. 185.**

——**S. 188**—*Political Agent's or Local Government's certificate is necessary for inquiry but proceedings can be continued on obtaining of sanction subsequently.*

The sanction of a Political Agent or the Local Government as the case may be is necessary for the prosecution of a native Indian subject committing an offence without and beyond the limits of British India. But the proceedings in such a case may be continued on the subsequent obtaining of the sanction even though the absence of such sanction will come in the way of the inquiry being proceeded with. (*Kincaid, J. C. and Aston, A J. C.*) ALLIBHOY JIVRAJ *v.*

EMPEROR. 25 Cr. L. J. 620 : 81 I. C. 108 : A. I. R. 1925 Sind 88.

——S. 190—Change.

[Only Police Reports in writing should be acted upon under cl. (b) as amended.]

——S. 190—*Relation to S.* 173.

Magistrate can take cognizance both in cognizable and non-cognizable offences upon a report mentioned in S. 190 (1) (*b*) since the provisions of S. 190 extend to all offences. The use of the words "police report" in S. 173 does not restrict this power as conferred by S. 190 (1) (*b*). (*Greaves and Panton, JJ.*) BHOLANATH DAS *v.* EMPEROR.
28 C. W. N. 490 : 83 I. C. 628 : 26 Cr. L. J. 68 : A. I. R. 1924 Cal. 614.

——S. 190—*Police report—What is—Notice of act.*

"Police report" in S. 190, Cr. P Code, means a report within the meaning of S. 170. When a Magistrate takes cognizance of an offence under S. 190, a judicial act is performed by them. (*Mukerjee and Chatterjee, JJ.*) NAGENDRA NATH CHAKRABARTY *v.* EMPEROR. 51 Cal. 402 : 38 C. L. J. 388 : A. I. R. 1924 Cal. 476.

——Ss. 190 and 537—*Proceedings* suo motu *by Magistrate—Failure to comply with S.* 191 *is illegal.*

Where proceedings were initiated by a Magistrate *suo motu* and he did not comply with the provisions of S. 191 and inform the accused of his right to have his case tried by another Magistrate, *held*, that the omission was not an irregularity curable by S. 537 but was an absolute illegality vitiating the whole trial. (*Wilberforce, J.*) BODHA *v.* EMPEROR.
4 P. W. R. 1921 (Cr.) : 59 I. C. 384 : 22 Cr. L. J. 96 : 16 P. L. R. 1921.

——S. 190—*False complaint—Proceedings against complainant for offence under I. P Code, S.* 211—*Complaint under Cr. P. Code, S.* 190, *is essential.*

The petitioner made a statement to the Village Munsif that a dacoity was committed in his house and mentioned certain persons as having taken part in the dacoity. The Village Munsif forwarded the complaint to the Police, who held an investigation and referred the case as false. The Sub-Magistrate to whom the papers were sent accepted the referred charge-sheet and struck the case off his file. The police put in a charge-sheet before the Sub-Divisional Magistrate against the petitioner for an offence under S. 211, I. P. C. The Sub-Divisional Magistrate transferred the case to the Second Class Magistrate who had acted on the referred charge-sheet in the alleged dacoity case. *Held*, that this was not a case in which the police could start proceedings of their own accord. The offence under S. 211 is a non-cognizable one and the Police were not empowered to investigate into a non-cognizable offence and charge the petitioner. It was open either to the accused in the alleged dacoity case or to the Village Munsif, or any Police Officer to prefer complaint under S. 190, Cr. P. Code, in which case the Magistrate before whom the complaint is made might take the case on his file after taking a sworn statement from the complainant. As such course was not adopted in this case, the proceedings were illegal. (*Devadoss and Wallace, JJ.*) PERUMAL NAICK *v.* EMPEROR. 22 L. W. 209 : 26 Cr. L. J. 1550 : (1925) M. W. N. 317 : 90 I. C. 398 : A. I. R. 1925 Mad. 672.

——Ss. 190, 200 and 537—*Omission to examine complainant—Irregularity.*

A Magistrate has cognizance of a criminal case before he examines the complainant under S. 200, Cr. P. Code. The omission to examine a complainant under S. 200, Cr. P. Code, is a mere irregularity and not an illegality. The person prejudiced by such an irregularity is the complainant and when the case ends in a conviction, he has no grievance. The accused cannot in general complain of the irregularity as the omission to take a sworn statement from the complainant cannot prejudice the accused. (*Odgers and Wallace, JJ.*) AMBAYARA GOUNDAN *v.* PACHAMUTHU GOUNDAN. 19 L. W. 461 ; 25 Cr. L. J. 730 : 81 I. C. 218 : A. I. R. 1924 Mad. 587 (1).

——S. 190—*Prosecution for bringing a false charge—Accused should be given opportunity to substantiate his allegations.*

A Magistrate who is considering whether he shall order an individual to be prosecuted upon a charge of bringing a false charge should definitely offer to the accused person an opportunity of saying whether he abandons his charge or whether he wishes to support it, and, if he says the latter, shall give him an opportunity of putting forward what he wishes to say in support of his charge prior to ordering him to be prosecuted for having brought a false charge. 14 Cal. 707 (F. B.,) Foll. (*Bucknill and Ross, JJ.*) JADU DHANUK *v.* EMPEROR. 86 I. C. 829 : 26 Cr. L. J. 893 : A. I. R. 1925 Pat. 708.

——S. 190—*Cognizance of an offence—Court need not know beforehand—What each witness is to prove.*

No provision of law requires that the Magistrate before taking cognizance should know exactly what each of the witnesses named in the charge-sheet will prove ; where the charge-sheet alleges that a certain offence will be established by the evidence of certain witnesses, this is sufficient to enable the Magistrate to take cognizance. (*Coutts and Ross, JJ.*) H. GRANT *v.* EMPEROR. 23 Cr. L. J. 69 : 65 I.C. 421 : A. I. R. 1922 Pat. 294 (2).

——Ss. 190, 202 and 476—*Inquiry. can be made only on complaint—Jurisdiction of Magistrate.*

A Magistrate has no power to make a judicial or preliminary enquiry unless a complaint is lodged before him under S. 190 (1) (*a*). S. 202, under which alone an inquiry can be made, relates exclusively to complaints. No such inquiry can be made when cognizance is taken under cls. (*b*) and (*c*) of S. 190. Where a report was made to the Police of an offence but it was found that the act complained of was a mere accident, and the Magistrate thereupon called on the person to show cause why he should not be prosecuted under S. 211 of the Penal Code and eventually passed an order under S. 476 directing his prosecution, *held*, that there was never a judicial proceeding before the Magistrate within S. 476 of the Code and that the order was bad. (*Jwala Prasad, J.*) TILOKI MAHTON *v.* EMPEROR. 2 Pat. L. T. 220 : 64 I. C. 47 : 22 Cr. L. J. 735.

——Ss. 190 and 351—*Subsequent addition of new accused does not require fresh proceedings in initiation.*

The addition of a new accused does not necessitate fresh proceedings in initiation. The evidence, it is true, must be recorded *de novo*, but that is merely in order that the witnesses, whose evidence has already been recorded, may be used against the new accused. The Magistrate having taken cognizance of the offence, it is right and proper, that he should bring to justice all those persons whether originally mentioned or not who, the evidence shows, were guilty of that offence. In such cases the Magistrate should be regarded as taking cognizance under the same clause of section 190 as he did against the original accused. Section 351 applies to such cases, and is intended to apply to them. There is also authority for the view that S. 351

CR. P. CODE (V OF 1898), S. 190.

is independent of the provisions of S. 190.

Per Maung Kin, J.—As regards section 190 (1) the information, or the knowledge, or suspicion referred to therein, has reference to the initiation of proceedings in regard to the offence alleged to have been committed, and not to a later stage of the case. (*Robinson. C. J., Maung Kin and Mac Gregor, JJ.*) NGA CHAN THA *v.* EMPEROR.

1 Bur. L. J. 183 : 11 L. B. R. 398 : 73 I. C. 55 : 24 Cr. L. J. 519 : A. I. R. 1923 Rang. 31 (F. B.)

——S. 190—*Construction.*

Under S. 190, a Magistrate takes cognizance of an offence and not of the offender. (*Kincaid, J. C., Raymond and Aston, A. J. Cs.*) MEHRAB *v.* EMPEROR. **17 S. L. R. 150 : 83 I. C. 885 : 26 Cr. L. J. 181 : A. I R. 1924 Sind 71 (F.B.)**

——Ss. 190 (1) (a) and 192 (1)—*Powers of District Magistrate—Cognizance of case—Transfer.*

Where a trial Magistrate reports to the District Magistrate that an accused before him was a perjurer and altered a document filed in Court, he can take cognizance of the offence under S. 190 (*a*) and transfer it for trial under S. 192 (1) to another Magistrate. (*Sulaiman, J.*) SURAJ PRASAD *v.* EMPEROR.

21 A L. J. 825 : 9 O. & A. L. R. 1049 : L. R. 4 A. 248 (Cr.) : A. I. R. 1924 All. 190.

——S. 190 (1) (a)—*Complaint—Cognizance by a Magistrate—Police report—Showing complaint to be false—Procedure.*

If a person is charged by another person with an offence and on enquiry by the police the police consider that the whole case is false, it is open to the complainant on petitioning against the police enquiry to place the matter within the scope of the operation of S. 190, sub-S. 1 (*a*), Cr. P. Code. But where a Magistrate has already taken cognizance of an offence in which certain persons are accused, there is no authority for the suggestion that if when the charge sheet is placed before the Magistrate the police-officer as the prosecution medium omits the name of certain persons whose participation in the offence has up to that time been before the Magistrate he is compelled in any way to follow what is after all no more than advice tendered by the prosecuting authority. But the Magistrate need not, without giving any reason differ from that advice. Once the Magistrate has taken cognizance of an offence he is strictly entirety independent of any opinion which the police-officer offers to him and it is within his power to order that any person who have been, since he has taken cognizance of the matter, accused as being participants in the offence should be produced before him to undergo the preliminary enquiry before committal or for trial in cases which do not go to a higher tribunal for trial. To hold otherwise would be to place in the hands of the police (after a judicial tribunal had taken cognizance of the offence) powers which might be subject to tne gravest abuse. (*Adami and Bucknill, JJ.*) RAGHUPAT NARAYAN SINGH *v.* EMPEROR. **1924 P. H. C. C. 162 : 84 I. C. 241 : 26 Cr. L. J. 241 : 16 Pat. L. T. 323 : A. I. R. 1924 Pat. 597.**

——S. 190 (a) and (c)—*Distinction.*

When a Magistrate takes cognizance of a complaint under S. 190, cl. (b) and directs process to issue against other persons whose names transpired in the prosecution evidence during the trial, he is perfectly justified in doing so and he is deemed to have taken action against them under clause (a) and not under clause (c.) (*Kincaid, J. C., Raymond and Aston, A. J. Cs.*) MEHRAB *v.* EMPEROR. **17 S. L. R. 150 : A. I. R. 1924 Sind 71 (F. B.)**

——S. 190—(1) (a)—*Order to take certain person to custody on charge of robbery is not a complaint.*

Where the District Judge on receiving a petition issued an "order" that certain persons should be taken into custody to the Court of the Resident Magistrate on charges of robbery and abetment of robbery: *Held*, such a document cannot be deemed to be a "complaint". The order of the District Judge, being *ultra vires*, goes for nothing and the proceedings must be quashed. (*Kincaid, J. C. and Raymond, A. J. C.*) POHUMAL *v.* EMPEROR. **15 S. L. R. 119 : 65 I. C. 481 : 23 Cr. L. J. 97 : A.I.R. 1922 Sind 9.**

——S. 190 (1) (b) and (c) and S. 351—*Magistrate directing prosecution—Cognizance under.*

Where the trying Magistrate after the close of the case directs the Police to institute criminal proceedings against a witness, and tries the case himself after receiving the police report, he takes cognizance under S. 190 (*b*) and not under S. 190 (*c*) or S. 351. The trial is however illegal as the same person cannot be the prosecutor and a Judge. (*Pratt and Fawcett, JJ.*) GUNDO CHIKKO KULKARNI *v.* EMPEROR.

23 Bom. L. R. 842 : 62 I. C. 875 : 22 Cr. L. J. 603.

——S. 190 (1) (b)—"*Police report*"—*What amounts to.*

'Police Report' is not restricted merely to reports under Chap. XIV of the Code upon information lodged to the Police but embraces all reports submitted under S. 24 of the Police Act. An application by the Police to a Magistrate to take action against a person amounts to a 'Police Report' within S. 190 (b) of the code. (*Jwala Prasad, J.*) ABDUL ALI *v.* EMPEROR.

1 Pat. L. T. 446 : 59 I. C. 41 : 22 Cr. L. J. 9.

——S. 190 (1) (b)—"*Police report*" *does not only mean report under S.* 173.

There is no justification for restricting the term "police report" in S. 190 (b) to reports under S. 173 only. (1911) 5 S. L. R. 1 Dist. (*Kincaid, J. C., Raymond and Aston, A. J. Cs.*) MEHRAB *v.* EMPEROR. **17 S. L. R. 150 : A. I. R. 1924 Sind 71 (F.B.).**

——S.190 (1) (c)—*Magistrate not informing the accused that he can get his case transferred.*

If the Magistrate takes cognizance of a case under S. 190 (*c*) but does not inform the accused that he can have his case tried by another Magistrate, the proceedings before him are illegal. (*Banerji, J.*) RAM RATAN *v.* EMPEROR.

19 A. L. J. 138 : 60 I. C. 1007 : L. R. 2 A. (Cr.) 104 : 22 Cr. L. J. 319.

——S. 190 (1) (c) and 191—*Magistrate transferring a person from the witness-box to the dock—Right of such person to be tried by another Court.*

Where a Magistrate transfers a person from the witness-box to the dock, he does not act under S. 190 (1) (c) of the Code of Criminal Procedure and take cognizance of an offence at all, and, therefore the person so transferred is not entitled to be tried by some other Court, S. 191 of the Code being inapplicable. (1924) Sind 71 ; (1899) 26 C. 738 ; (1914) 41 C. 1013 relied on. (1895) 1 C. W. N. 105 referred to. (*Simpson, A. J. C.*) SRI KISHAN *v.* DEBI DAYAL.

2 O. W. N. 823 : 90 I. C. 915 : 26 Cr. L. J. 1619 : A. I. R. 1925 Oudh 739.

——S. 190 (1) (c)—*Letter asking for action to be taken about the alleged offence can be treated as information.*

A letter written to the District Magistrate conveying information of an offence and asking for action to be taken can be treated as information under S. 190, (*c*) for taking action. (*Neave, A. J. C.*) CHHOTE MAHARAJ *v.* KING EMPEROR. **25 Cr. L. J. 1147 : 81 I. C. 971 : 28 O.C. 33 : A. I. R. 1925 Oudh 144 (1)**

CR. P. CODE (V OF 1898), S. 190.

——S. 190 (1) (c)—*District Registrar who is also Dt. Magistrate can take cognizance of a case coming before him as Dt. Registrar.*

After a Sub-Registrar refused to register a document, an appeal was made to the Dt. Registrar but that appeal was dismissed, and the Dt. Registrar who was also the Dt. Magistrate directed the prosecution of one C the purchaser, for an offence under S. 471, Penal Code.

Held that the Dt. Registrar who was also the Dt. Magistrate was competent to take cognisance under S. 190, clause (1) sub-section (c) Cr. P. Code and to transfer the case to a Subordinate Magistrate in order that a commitment inquiry might be held and there was, therefore, no defect in the jurisdiction of the Sessions judge to try the accused. (*Mullick and Bucknill, JJ.*) CHETA MAHTO *v.* EMPEROR.

2 P. 459 : 4 P. L. T. 727 : 74 I. C. 536 : 24 Cr. L. J. 792 : A. I. R. 1924 Pat. 128.

——S. 190 (1) (c)—'*Information received*'—*Meaning.*

Information received from the petition of objection filed by the petitioners' opposite party in the proceeding under S. 144 in showing cause against the order under the said section is not information received as against the petitioners. (*Kulwant Sahay, J.*) GAJU CHAUDHURI *v.* DEBI CHAUDHURI.

1 Pat. L. R. 97 (Cr) : 72 I. C. 945 : 24 Cr. L. J. 481 : A. I. R. 1923 Pat. 532.

——S. 190 (1) (c)—*Cognizance of offence under—When can be taken.*

A proceeding can be taken cognizance of under S. 190 (*c*) of the Code only when it is instituted upon information received from a person other than a Police-officer or upon the Magistrate's own knowledge or suspicion. (*Jwala Prasad, J.*) ABDUL ALI *v.* EMPEROR. **1 Pat. L. T. 446 : 59 I. C. 41 : 22 Cr. L. J. 9.**

——Ss. 190 (c), 191 and 556—*Cognizance of case by Magistrate on his own knowledge—Subsequent trial by same Magistrate*

The mere fact that a Magistrate takes cognizance of a case on his own knowledge under S. 190 (*c*), Cr. P. Code, does not bring the case within the operation of S. 556 and so long as the Magistrate complies with the provisions of S. 191, Cr. P. Code, he is entitled to try the case. (*Heald, J.*) NGA CHIT KYAW *v.* EMPEROR. **26 Cr. L. J. 24 (1) : 3 Bur. L. J. 121 : 84 I. C. 249 (1) : A. I. R. 1924 Rang. 325 (1).**

——S. 191—*Omission to inform accused is fatal*

Omission of the Magistrate to inform the accused before any evidence is taken, that he is entitled to have the case tried by another Court, is fatal to the legality of the trial, where the Magistrate is taking cognisance of an offence upon his own knowledge or suspicion. (*Walsh, J.*) CHANDER SEN *v.* EMPEROR.

21 A. L. J. 89 : L. R. 4 A. Cr. 11 : 73 I. C. 576 : 24 Cr L. J. 656 : A. I. R. 1923 All. 383.

——S. 191—*De novo trial—General allegation carries little weight.*

A general allegation as to *de novo* trial without any date or without any specific allegation as to date when and the person to whom the application was made or what the order was in respect of it, carries little weight. (*Sanderson, C. J. and Panton, J.*) AZIZ MANDAL *v.* GIRISH CHANDRA. **68 I. C. 38 : 23 Cr. L. J. 502 : A. I. R. 1923 Cal. 320.**

——S. 191—*Transfer-Apprehension of irregularity is sufficient ground.*

Where the accused has every reason to apprehend that there will be irregularities in the further proceedings of the Magistrate's Court, it is necessary to transfer it to the Court of any other Magistrate. (*Harrison, J.*) KADDA SINGH *v.* MOTI SINGH.

5 Lah. L. J. 370 : A. I. R. 1924 Lah. 410.

CR. P. CODE (V OF 1898), S. 193.

——S. 192—*Complaint—Police investigation—Case found false—Complainant challenging police report—Case made over to another Magistrate—If can be with drawn.*

A complaint was sent to the Police for investigation. They reported it to be false, whereupon the complainant impugned the report and applied for an inquiry. The Magistrate then sent the case to another Magistrate for enquiry, who on reading the records directed the Police to charge-sheet the accused. On this, the original Magistrate recalled the case, ordering it to be sent to another Magistrate. *Held*, the case having been sent to a Magistrate under S. 192, Cr. P. Code could not be transferred again; but the proper order for the latter Magistrate to pass would be to summon the accused and not direct the police to charge-sheet them. (*Sen, J.*) MAHARI DHANGAR *v* BALDEO NARAIN. **90 I. C. 657 (2).**

——S. 192—*Transfer.*

District Magistrate taking cognizance of case on a report of his subordinate, has power to transfer the case to another magistrate. (*Sulaiman, J.*) SURAJ PRASAD *v.* EMPEROR. **21 A. L. J. 825 : 9. O. & A. L. R. 1049 : L. R. 4 A. 248 (Cr.) : A. I. R. 1924 All. 190.**

——S. 192 and S. 145—*Transfer.*

Proceedings under S. 145 can be transferred. (*Ryves, J.*) MAHENDRA SINGH *v.* MT. RAJPATTI. **20 A. L. J. 215 : 65 I. C. 861 : 23 Cr. L. J. 205 : A. I. R. 1922 All. 99.**

——S. 192—*Transfer of case—Cannot retransfer it again.*

A Magistrate who transfers a case for trial under S. 192 of the Cr. P. Code has no power to transfer it again. (*Stuart, J.*) GANGA SAHAI *v.* JASWANT. **65 I. C. 441 : L. R. 2 A. (Cr.) 161 : 23 Cr. L. J. 89 (All).**

——S. 192 with 110—*Scope.*

S. 192 applies to a proceeding under S. 110, the proceedings being a case. (*Mullick and Coutts, JJ.*) HIRRNAND OJHA *v.* EMPEROR. **1 Pat. 621 : 4 Pat. L. T. 44 : 71 I. C. 79 : 24 Cr. L. J. 31 : A. I. R. 1922 Pat. 586.**

——Ss. 192, 528—*Transfer of cases under Ss. 145 and 147.*

Proceedings under Ss. 145 and 147 are criminal cases and a Magistrate has power to transfer such cases under sections 192 and 528 of the Code of Criminal Procedure. (*Kulwant Sahay, J.*) ABDUL HAMID *v.* HASAN RAZA. **4 Pat. L. T. 297 : 1 Pat. L. R. Cr. 195 : 72 I. C. 951 : 24 Cr. L. J. 487 : A. I. R. 1923 Pat. 366.**

——Ss. 192 (1) and 202—*Transfer simply for considering report of investigation under S. 201 is illegal.*

S. 192 (1) empowers a Magistrate to transfer a case for enquiry or trial but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under S. 202, Cr. P. Code, which he has himself ordered. (*Suhrawardy and Mukerji, JJ*) MAHABIR SINGH *v.* GIRIBALA DASSI **87 I. C. 526 : 29 C.W.N 508 : A. I. R. 1925 Cal. 42.**

——S. 193 (2)—*Reference to Sessions Judge under S. 123—Latter can transfer it to Addl. Sessions Judge.*

When under S. 123, Cr. P. Code a magistrate referred to the Sessions Judge a case where the accused failed to give security for good behaviour the case can

CR. P. CODE (V OF 1898), S. 195—Application.

be transferred by the latter to the Additional Sessions judge for disposal. (*Walmsley and Chotzner, JJ.*) BENODE BEHARI NATH *v.* EMPEROR.

27 C.W. N. 996 : 50 Cal. 229 : 39 C. L. J. 75 : A. I. R. 1923 Cal. 649.

[S. 95—Changes : The right of private individuals to prosecute has been taken away by abolishing sanction altogether. All the cases bearing on sanction are therefore of little use hereafter, Ed.].

———S. 195—

Application.
Costs.
Death of applicant.
Delay.
Evidence.
Grant of Sanction.
Necessity of Sanction.
Prima Facie Case.
Procedure.
Propriety of Action.
Sanction after new Code.
Scope of.
Want of Complaint.
Want of sanction.

Application.

———Ss. 195, 476—*Amendment — Sanction given under old Code—Trial commenced but not completed before amending Act came into force—Fresh complaint —Necessity for.*

A Criminal Court took cognizance of an offence for perjury on a sanction granted to a person before the Cr. P. Code Amendment Act came into force, but the trial was not completed till after that date. A charge was then framed against the accused and he sought to revise the order framing the charge and to quash all proceedings in connection therewith on the ground that no written complaint by the Court was filed as required under the amended provisions of the Code. *Held*, the proceedings were perfectly valid and no complaint by the Court was necessary. 19 L. W. 392 and Cr. M. P. No. 606 of 1924 followed.

Per *Wallace, J*:—In such cases it is essential not to confuse " cognizance " with " jurisdiction " Once a Court is properly seized of a oase, no amendment of the law except an amendment which took away the jurisdiction of the Court to try the offence can affect the Court's authority to proceed with the trial.

Per *Madhavan Nair, J* :—An alteration in the law of procedure relating to the grant of sanction cannot invalidate proceedings validly begun under the old procedure. If the intention of the legislature was to annul such proceedings also, it would have expressed such intention in appropriate language. (*Wallace and Madhavan Nair, JJ.*) APPASAMY IYER, *In re.*

(1925) M. W. N. 668 : 22 L. W. 554 : A. I. R. 1925 Mad. 1122 : 49 M. L. J. 276.

———S. 195—*Application—Defamation by party to judicial proceeding—Refusal of sanction is no bar to prosecution.*

The dismissal of an application for sanction under S. 195 of the Code to prosecute for defamation, a party to a judicial proceeding, in respect of a statement made by him therein is no bar to the institution of a prosecution for defamation. (*Mookerjee, Ag. C. J. Fletcher, Richardson, Walmsley and Buckland, JJ.*) SATIS CHANDRA *v.* RAM DAYAL. **48 Cal. 388 : 32 C. L. J. 74 : 94 C. W. N. 982 : 59 I. C. 143 : 22 Cr. L. J. 31 (S. B).**

———S. 195—*Bar—Complaint to police and then to Court—Police report as false—Conviction under S. 211—Legality.*

CR. P. CODE (V OF 1898), S.195—Death of applicant.

A person made a complaint to the Police, which they reported to be false. Meanwhile he had filed a regular complaint to the Magistrate, which was investigated. He was convicted under S. 211, I. P. C. for having preferred a false charge *Held*, in the absence of sanctioned or complaint under S. 195, the proceedings were illegal. (*Bucknill and Ross, JJ.*) SHAIK MUHAMMAD YASSIN *v.* EMPEROR.

4 Pat. 323 : 6 Pat. L. T. 457 : 26 Cr. L. J. 889 : 86 I. C. 825 : A. I. R. 1925 Pat. 483.

———S. 195—*Charge under S. 211, I. P. C. altered to charge under S. 182—Complaint of public servant concerned is essential.*

The essence of an offence under S. 182 is not the falseness of the information, as it is the essence of an offence under S. 211, but the contempt of the lawful authority of the public servant concerned chooses to move the matter, Court has no authority to do *suo moth*, by whatever process it reaches the result. (*Wallace and Madhavan Nair, JJ.*) MUTHU GOUNDAN *v.* EMPEROR. **(1925) M. W. N. 108 : 21 L. W. 661 : 26 Cr. L. J. 962 : 87 I. C. 418 : A. I. R. 1925 Mad. 400.**

Costs.

———S. 195—*Costs—Costs if may be ordered by Civil Court in proceedings under.*

Proceedings uuder S. 195 of the Code though taken in a Civil Court relate to a criminal matter and the court cannot direct payments of costs in such cases. (*Chatterjee and Cuming, JJ.*) BHOLANATH KHARNA *v.* PURNA CHANDRA. **25 C. W. N. 661 : 67 I. C. 730 : 23 Cr. L. J. 458.**

———S. 195—*Costs.*

Quaere :—Whether the court can order costs to be paid in a proceeding under S. 195, Cr. P. Code. (*Schwabe, C. J. Oldfield and Coutts-Trotter, JJ.*) MUNISWAMI *v.* RAJARATNAM. **45 M. 928 : 72 I.C. 340 : 16 L. W. 505 : 24 Cr. L.J. 340 : A. I. R. 1923 Mad. 136 44 M. L. J. 774 (F. B.).**

———S. 195—*Costs can be allowed in revision.*

Costs can be allowed in application for revision of the order granting sanction to prosecute under S. 195. (*Daniels, A. J. C*) MT. FIROZA JAN *v.* MIRZA AMIR ALI. **9 O. L. J. 593 : 9 O. & A. L. R. 103 : 74 I. C. 445: 24 Cr. L. J. 781 : A. I. R.1923 Oudh 119.**

———S. 195—*Costs.*

No costs can be awarded in proceedings under S. 195. (*Duckworth, J.*) KARUPIAH NAIDU *v.* R. M. S. MUTHUSWAMI. **1 Bur L. J. 155 : 11 L. B. R. 418 : 72 I. C. 975 : 24 Cr. L. J. 511 : A. I. R. 1923 Rang. 12.**

Death of applicant.

———S. 195—*Death of applicant — Sanction to prosecute—If lapses on death.*

A sanction for prosecution given by a court under S. 195, Cr. P. Code, (1898) is not a personal privilege granted to a petitioner but a decision that the case is one suitable for magisterial investigation, and therefore a sanction for prosecution does not lapse on the death of the persons who obtained it. Any man can avail of such sanction on the death of the person who obtained it and can prosecute the person against whom it was obtained. (*Abdul Qadir, J.*) GOPAL SINGH *v.* CROWN. **71 I. C. 601 : 24 Cr. L. J. 185 :A. I. R. 1922 Lah. 221.**

———S. 195—*Death of applicant—Legal representative—Right to continue application.*

Where an applicant for sanction dies during the pendency of the application, his legal representatives cannot continue the application. They may file a fresh petition if necessary. (*Oldfield and Devadoss, JJ.*)GHULAM MOHIDEEN QURAISHI SAHIB *v.* AHA-

CR P. CODE (V OF 1898), S. 195—Delay.

MADULLA BEGAM SAHIBA. **46 M. 88 : 24 Cr. L. J.2 : (1922) M. W. N. 810 : 71 I. C. 49 (2) : 32 M L. T. 102 : 16 L. W. 881 : A. I. R. 1923 Mad. 206: 44 M. L. J. 66.**

Delay.

——S. 195—*Delay.*

Delay may under certain circumstances be almost a sufficient ground in itself but in other cases it may not be a ground at all for setting aside order for prosecution. (*Boys, J.*) EMPEROR *v.* BALDEO PRASAD.

22 A. L. J. 772 : L. R. 5 A. (Cr.) 121 : 82 I. C. 285 : 25 Cr. L. J. 1277 : 46 All. 851 : A. I. R. 1924 All. 770.

——S. 195—*Delay—Ends of justice.*

In a suit the deft. denied execution of the suit note and did nothing further but allowed the suit to proceed *ex parte* and paid the decree amount soon after. In a subsequent criminal proceeding he admitted having executed the note. More than a year after the filing of the said written statement sanction was applied for against him. *Held*, after such lapse of time, the ends of justice did not require the giving of a sanction to prosecute in respect of what may be spoken of as a temporary lapse from probity, apparently repented of. (*Teunon and Suhrawardi, JJ.*) TRAILOKYA NATH *v.* RADHARANJAN. **25 C. W. N. 886 : 67 I. C. 204 : 23 Cr. L. J. 380.**

——S. 195—*Delay if not explained is fatal.*

There is no limitation fixed for applications for sanction to prosecute but, in such cases no time should be lost in instituting proceedings. Delay obviously tends to prejudice the person against whom proceedings are to be taken. (*Lumsden, J.*) ABDUL QADIR *v.* MUHAMMAD IBRAHIM KHAN.

A I.R. 1924 Lah. 569.

Evidence.

——S. 195—*Evidence—Witnesses on commission —Examination of.*

For the purposes of an enquiry made by a CivilCourt under the provisions of S. 195, Cr. P. Code examination of witnesses on commission is permissible and sufficient if sanction is granted. *Emperor* v. *Molla Karim* (1905) 33 Cal. 193 Foll. (*Teunon and Suhrawardy, JJ.*) DULLO SINGH *v.* DEPUTY INSPECTOR-GENERAL OF POLICE, C.I.D., BENGAL.

49 Cal. 551 : 65 I. C. 570 : 23 Cr. L. J. 138: A. I. R. 1922 Cal. 412 (1).

——S. 195—*Evidence—Legal evidence necessary to grant sanction.*

It has been authoritatively held that sanction must be based on legal evidence.

Where the Court had on the pleadings full jurisdiction to try the suit and had power to record evidence on oath.

Held : the evidence so recorded did not become any the less legal evidence because it subsequently appeared that the plaintiff in the suit had omitted to take certain steps which the appellate Court considered necessary before the suit could be instituted and therefore the evidence was evidence on which a sanction under S. 195, Cr. P. Code, could legally be based. (*Heald, J.*) ABDUL AZIZ *v.* MAUNG TIN.

2 Bur. L. J. 48 : 75 I. C. 74 : 24 Cr. L. J. 874 : A. I. R. 1923 Rang. 225.

Grant of Sanction.

——S. 195—*Grant of sanction—High Court—Interference.*

Where the question of grant of sanction has been considered by two courts below, the High Court will interfere in revision only in order to prevent a gross and palpable failure of justice. (*Daniels, J.*) JOTI-

CR. P. CODE (V OF 1898), S. 195—Grant of sanction.

PRASAD *v.* DURGA PRASAD. **L. R. 4 All. 213 (Cr.): 77 I. C. 805 : 25 Cr. L. J. 454 : A. I. R. 1924 All. 461.**

——S. 195—*Grant of sanction—Court's duty.*

Sanction ought not to be given unless the Court giving sanction has satisfied itself that there are very favourable chances of obtaining a conviction. When sanction is given to prosecute for giving false evidence, the actual statements, which are alleged to be false, should be mentioned in the sanction. (*Macleod, C. J. and Shah, J.*) DANAPPA NARSAPPA, *In re.*

24 Bom. L. R. 45 : 65 I. C. 640 : 23 Cr. L. J. 176 : A. I. R. 1922 Bom. 38.

——S. 195—*Grant of sanction.*

If the order granting the sanction embodies by reference the application made and if all the essential particulars required by S. 195 are to be found there, it is a substantial compliance with the requirements of the law. (*Teunon and Suhrawardy, JJ.*) DALLO SINGH *v.* DEPUTY INSPECTOR GENERAL OF POLICE, C. I. D., BENGAL.

49 Cal. 551 : 65 I. C. 570 : 23 Cr. L. J. 138 : A. I. R. 1922 Cal. 412 (1).

——S. 195—*Grant of sanction—Perjury committed before Munsif—Munsif transferred—Appellate Court can grant sanction.*

Where a Munsif, before whom, a false statement is alleged to have been made, is transferred, an application for sanction to prosecute is cognizable by the Court to which appeals lie from that Munsiff's Court. (*Shadi Lal, C. J. and Abdul Raoof, J.*) DINA NATH GANTAM *v.* MUHAMMED ABDULLA.

2 Lah. 57 : 61 I. C. 53 : 22 Cr. L. J. 325.

——S. 195—*Grant of sanction—Fraudulently obtaining decree for sums which had been disallowed in the former suit—Court in which second suit was filed but not the first Court can take action under S. 210, I. P. Code.*

Where a plaintiff first instituted a suit in one Court and obtained a decree for a part of his claim and then proceeded to present a fresh plaint in respect of the item disallowed and obtained an *ex parte* decree, the action under S. 210, Indian Penal Code, can only be taken by the Court in which later suit was filed or by the Court to which they are both subordinate, as the filing of the second suit cannot be held to be an offence committed in relation to proceedings in the first Court. (*Harrison, J.*) VISHNU RAM *v.* CROWN. **7 L. L. J. 341 : 6 Lah. 445 : 26 Cr. L. J. 1588: 90 I.C. 660 : 26 Punj. L.R. 717: A.I.R. 1925 Lah. 524.**

——S. 195—*Grant of sanction—Omission to specify the required particulars wholly vitiates the sanction—Cr. P. Code. S. 537.*

A sanction under S. 195 omitting to specify the particulars such as the court or other place in which, and the occasion on which the offence was committed, is liable to be set aside in revision. The defect cannot be cured by S 537. (*Moti Sagar, J.*) JASWANT SINGH *v.* KING EMPEROR. **25 Cr. L. J. 731 : 82 I.C. 209 : A. I. R. 1925 Lah. 139.**

——S. 195—*Grant of sanction—Grounds.*

There should be a reasonable expectation of conviction before sanction is granted. (*Lumsden, J.*) ABDUL QADIR *v.* MAHOMMED IBRAHIM KHAN.

25 Cr. L. J. 119 : 76 I. C. 183 : A.I.R. 1924 Lah. 569.

——S. 195—*Grant of sanction—False suit—Plaintiff prevented from producing evidence.*

Sanction to prosecute for bringing a false and fraudulent suit should not be granted when the plff. has been thwarted while attempting to establish the correctness of his claim by the unwarranted activities of the Police acting as the agent of the defendants.

CR. P. CODE (V OF 1898), S. 195—Grant of sanction

(*Shadi Lal, C. J.*) KHAIRAT RAM *v.* EMPEROR.
3 Lah. L. J. 537.

——**S. 195**—*Grant of sanction—Judicial discretion of—* Prima facie *case—Powers of Appellate Court.*

Under S. 195 (1) (*b*) the exercise of the Court's discretion will be judicial only if it considers whether with reference to the evidence available and the other circumstances, a prosecution is desirable in the public interest, and not, if it merely satisfies itself that "a *prima facie* case" has been made out.

Per *Oldfield, J.*—Firstly, the duty of the Court granting sanction is discharged if it exercises a judicial discretion; and similarly the duty of the Appellate Court, if it satisfies itself whether such a discretion has been exercised. The former Court must therefore be required, whatever the extent to which the investigation undertaken for its own satisfaction has been carried to put on record sufficient to demonstrate to the latter that its exercise of discretion has been judicial. In the next place it may be said at least that the Court cannot be regarded as having exercised a judicial discretion in granting sanction, when it has satisfied itself only that a *prima facie* case has been made out, if by that is meant only that formal evidence of the ingredients of the offence is available, without reference to defects which may deprive that evidence wholly or to a material extent of value.

Per *Coutts-Trotter, J.*—It is to my mind, vital that it should be recognised that a Court, in sanctioning a prosecution arising out of facts which have come before it during the trial of a civil case should not be supposed to be discharging that which is the task of the Committing Magistrate at a later stage and usurping his functions by explicitly or tacitly pronouncing that there is a *prima facie* case. Where it is shown that the learned Judge exercised his discretion on a mistaken view of the facts, he may be treated as not having exercised a judicial discretion at all, and the appellate tribunal may be considered as thereby invested with an unfettered discretion to act on the true facts. (*Schwabe, C. J. Oldfield, and Coutts Trotter, JJ.*) MUNISWAMY MUDALIAR *v.* RAJARATNAM PILLAI. **72 I.C. 505 : 16 L. W. 505 : 24 Cr. L. J. 340 : 45 M. 928 : A. I. R. 1923 Mad. 136 : 44 M.L.J. 774 (F.B.).**

——**S. 195**—*Grant of sanction—Principle guiding.*

In granting or refusing sanction to prosecute under S. 195, Cr. P. Code, what has mainly to be seen is whether there is reasonable probability of a conviction. When conviction for perjury can be had, considered. (*Kinkhede, A. J. C.*) BHAGIRATHI BAI *v.* EMPEROR. **89 I.C. 713 : 26 Cr. L. J. 1401.**

——**S. 195**—*Grant of Sanction—Grounds.*

The power to grant sanction under S. 195 is included among the powers which can be exercised in revision under S. 439 of the Code; and if this power can be exercised in a proceeding arising out of trial in any of the Courts below it can also be exercised for discharging an order made by a Subordinate Court revoking the sanction granted by the trying magistrate. (*Kanhaiya Lal, J. C.*) BRIJ KUMAR *v.* MANNA MISRA. **25 O. C. 153: 9 O. L. J. 662: A. I. R. 1922 Oudh 18.**

——**S. 195**—*Grant of sanction—Proper investigation necessary before granting sanction.*

Sanction must not be given to prosecute a person merely because an officer without proper judicial investigation or enquiry is of opinion that such person ought to be prosecuted for some offence. (*Bucknill, J.*) CHHOTE LAL *v.* EMPEROR. **1 Pat. L. R. 137 Cr. 74 I. C. 710 : 24 Cr. L. J. 806 : A. I. R. 1923 Pat. 542.**

CR. P. CODE (V OF 1898), S. 195—Necessity of sanction.

——**S. 195**—*Grant of sanction—Principles governing grant.*

In ordering a sanction for perjury under Ss. 191 and 193, I.P. Code the Court must clearly show by its order that the person against whom a sanction is granted intentionally made false statements which should be set forth in the order. Although in certain circumstances the omission to set forth the statements may be cured by a reference to the application for sanction but the grounds upon which the sanction is based must be recorded in the order granting the sanction. Under S. 195 the Court must find that the statements were intentionally false and the opposite party need not show that he did not testify falsely. Though there is no bar of limitation, delay of a month is very material and whether it is prejudicial or not depends upon circumstances. The Court must find whether the object of the application is to wreak vengeance. The Appellate Court must discuss points raised by the appellant and assign reasons for sustaining the order. The opposite party should be given sufficient opportunity to substantiate the pleas taken in the petition showing cause. (*Jwala Prasad, J.*) DAROGA JHA *v.* BABUJAN MANDAL.
2 Pat. L. T. 311.

——**S. 195 and Penal Code, S. 209**—*Grant of sanction—Sanction to prosecute under—Facts necessary.*

To justify a sanction to prosecute for an offence under S. 209 of the Penal Code, a mere dismissal of the plaintiff's suit is not enough. It must be proved that the claim was to his knowledge false. (*Jwala Prasad, J.*) RAMNANDAN *v.* PUBLIC PROSECUTOR. **22 Cr. L. J. 467 : 61 I. C. 995 (Pat.)**

——**S. 195**—*Grant of Sanction—Necessity for False complaint—Instigation by third parties.*

Where it was found that a false complaint was filed, at the instigation of certain persons who were not parties to the complaint and proceedings were started against them under S. 211, I. P. C. *Held*, that as the offence had been committed in relation to the proceedings in Court no prosecution could be launched except on the written complaint of the Magistrate's court or of some court to which it was subordinate. The High Court being a superior court could file the necessary complaint and the High Court directed that its order in the revision case should issue as a complaint to the Magistrate. (*Heald, J.*) P.N.S. M. SYED KHAN *v.* P. K. C. NAGOOR. **3 Bur. L. J. 141 : 26 Cr. L.J. 262: 84 I. C. 326 : A. I. R. 1924 Rang. 369.**

——**S. 195**—*Grant of sanction—Sanction to prosecute—Judicial proceedings—Proceedings without jurisdiction—Effect of—Perjury.*

Plaintiff filed a suit to enforce compulsory registration of a deed: the defendant challenged it as a forgery. The suit was dismissed for non-compliance with the provisions of Ss. 71 and 76 of the Registration Act. The defendant applied for sanction to prosecute the plaintiff for forgery and sanction was granted by the first Court and revoked by the appellate Court on the ground that the proceedings were without jurisdiction, and a nullity. *Held*, that the Court had jurisdiction to grant sanction even though the proceedings in the course of which the evidence was taken proved abortive (*Heald, J.*) ABDUL AZIZ *v.* MAUNG TIN. **2 Bur. L. J. 48: 75 I. C. 74: 24 Cr. L. J. 874: A. I. R. 1923 Rang. 225.**

Necessity of Sanction.

——**S. 195**—*Necessity of sanction—Condition as to sanction cannot be evaded.*

Where the law clearly says that it is a condition precedent to the prosecution that a sanction shall be

CR. P. CODE (V OF 1898), S. 195—Necessity of sanction.

obtained from the local Government, it is not open to any subordinate authority to override the provision of the law by saying that the offence falls under another section of the Indian Penal Code and if no sanction is necessary for the prosecution under that section, the offender may be prosecuted without any sanction. (*Mukerjee, J.*) RAM NATH *v.* KING EMPEROR.
22 A. L. J. 1106: L. R. 6 A. (Cr.) 25: 84 I. C. 714: 26 Cr. L. J. 362: 47 All. 268 : A. I. R. 1925 All. 230.

——S. 195—*Necessity of sanction—False charge to Police—Sanction—Subsequent complaint—Effect.*

The court is competent to act under S. 182, I. P. Code when a false charge is made to the Police instead of the court. Sanction is not required for the prosecution of such a man. His lodging a complaint in the court afterwards is immaterial. (*Daniels, J.*) BAKSHI *v.* EMPEROR. **L. R. 4 All. 207 (Cr.) 21 A. L. J. 805 : 46 All. 43: A. I. R. 1924 All. 187.**

——S. 195—*Necessity of sanction—Revenue Court Deputy-Tahsildar holding enquiry into patta transfer—Production of document—Sanction—Penal Code, S. 471.*

Where the applicants for a transfer of patta produce as genuine a forged will before the Deputy Tahsildar in the course of the enquiry held by him, they can be prosecuted under S. 471, I.P. Code only with the sanction of the Deputy Tahsildar. 12 Bom. L. R. 383 Rel. (*Schwabe, C J. and Krishnan, J.*) MATTAM CHINNA VIRAYA, *In re.* **16 L. W 534: 71 I. C. 63: 24 Cr. L. J. 15: A. I. R. 1923 Mad. 87 (1).**

——S. 195—*Necessity of sanction—Complainant a public servant.*

Sanction under S. 195, Cr. P. Code is not required when the complainant is himself the officer in question. (*Miller, C. J. and Ross, J.*) GOVERNMENT ADVOCATE OF BIHAR AND ORISSA *v* GANGA PRASAD.
1 P. 423: 3 P. L. T. 559 : 75 I. C. 719 : 25 Cr. L. J. 31 : A. I. R. 1922 Pat. 532.

Prima Facie Case.

——S. 195—*Prima facie case.*

The object of granting sanction to prosecute is to remove the statutory bar to the prosecution of offences mentioned in S. 195 of the Code. A *prima facie* case must be made out for setting the Criminal Law in force and the evidence must be such, that if unrebutted, the accused can be convicted. (*Jwala Prasad, J.*) RAMNANDAN *v.* PUBLIC PROSECUTOR.
61 I. C. 995: 22 Cr. L. J. 467 (Pat.).

Procedure.

——S. 195—*Procedure—Passages under complaint not given in the order but given in application for sanction are sufficient.*

Where the particular passages in respect of which sanction was sought under S. 195 were set out in the application for sanction but, not in the order of the Court, *Held*: that the order of sanction must be deemed to have been passed with respect to the statements contained in the application for sanction and was valid. (*Daniels, J.*) KASHMIRI LAL *v.* MT. KISHEN DEI. **L.R. 5 A. Cr. 99: 83 I. C. 650 : A. I. R. 1924 All. 563.**

——S. 195—*Procedure—No necessity of notice.*

Before sanction is granted notice need not be issued to the person proposed to be charged. There is no statutory obligation upon any Judge to do anything of the kind. (*Walsh, J.*) ANGNOO SINGH *v.* EMPEROR.
45 All. 109: 20 A. L. J. 881 : L. R. 3 A. Cr. 149: 71 I. C. 865: 24 Cr. L. J. 257: A. I. R. 1923 All. 35.

——S. 195—*Procedure—Dt. Judge cannot remand order.*

A Dt. Judge cannot when acting under S.195 remand a case to the Subordinate Court for further enquiry. He must himself decide whether the sanction which was refused by the Munsiff should be granted and he has power for this purpose to take evidence himself, but he has no power to remand the case for further enquiry by the Munsiff. 44 C. 816 Foll. (*Newbould and Suhrawardy, JJ.*) MATHURA NATH *v.* RAJENDRA KUMAR. **72 I. C. 79 (1): 24 Cr. L. J. 319 (1) (Cal.) : A. I. R. 1924 Cal. 641 (2).**

CR. P. CODE (V OF 1898), S. 195—Procedure.

——Ss. 195 and 196—*Procedure—A conspiracy—Non-cognizable offence—Particulars specified in application for sanction—Omission to specify particulars in the order granting sanction—Effect of.*

An application for sanction under S. 195, Cr. P. Code should be read with the order granting sanction and where the particulars required by S. 195, Cl. 4 are contained in the petition for sanction the order granting sanction need not set them out. 40 C. 423. Foll. Under S. 196-A of the Cr. P. Code consent in writing of the authorities therein specified is not necessary to a prosecution for a conspiracy to commit a non-cognizable offence when S. 194, Cl. 3 of C. P. Code is applicable to the case. (*Newbould and Suhrawardy, JJ.*) KALI SINGH *v.* EMPEROR. **50 Cal. 461: 75 I. C. 533: 24 Cr. L. J. 949: A. I. R. 1924 Cal. 53.**

——Ss. 195 and 476—*Procedure—High Court having to make complaint to be enquired into by a Magistrate is inconsistent with the Judge's dignity and unfair to the accused—But no escape exists under the present Code.*

Under the new law the Court has no alternative but to prefer a complaint in writing and to forward it to a Magistrate of the first class having jurisdiction to entertain it. This procedure in its application to the High Court is open to serious objection. It is hardly consistent with the dignity of a Judge of the High Court that he should have to make and sign a complaint which is to be inquired into by one of his subordinates and that he should be treated and recorded as complainant throughout the proceedings, the only exception being that his examination in support of the allegations in the complaint has been dispensed with by proviso (aa) to S. 200, Cr. P. Code. Nor is it fair to the accused that he should be arraigned in a case which has been instituted on a complaint made by a Judge of the highest tribunal and is to be tried by a judicial officer who is subordinate to the complainant. Though no Magistrate taking cognizance of a case of this description ought to be influenced by the circumsance that the complaint has been preferrd by a Judge of the High Court yet there can be little doubt that the accused person is likely to entertain an apprehension, not altogether without justification, that his conviction is a foregone conclusion. (*Shadi Lal, C. J.*) EMPEROR *v.* PIR QADIR BAKSH.
6 Lah. 34 : A. I. R. 1925 Lah. 312.

——S. 195—*Procedure—Sanction does not lapse on death of applicant.*

A sanction for prosecution given by a Court under S. 195, Cr.P.Code, 1898, is not a personal privilege granted to a petitioner but a decision that the case is one suitable for magisterial investigation and therefore a sanction for prosecution does not lapse on the death of the persons who obtained it. Any man can avail of such sanction on the death of the person who obtained it and can prosecute the person against whom it was obtained. (*Abdul Qadir, J.*) GOPAL SINGH *v.* EMPEROR. **24 Cr. L. J. 185 : 71 I. C. 601 : A. I. R. 1922 Lah. 221.**

——Ss. 195, 476 and 476-A—*Procedure—Sanction to prosecute granted before amendment of Code—Lapsing of sanction owing to amendment of Code—*

CR. P. CODE (V OF 1898), S. 195—Procedure.

Superior Court cannot make complaint—Procedure indicated.

Where, before the amendment of the Cr. P. Code, a Subordinate Court granted sanction under S. 195 of the Code but the sanction lapsed owing to the subsequent amendment of the Code; *Held*: that the remedy of the complainant was to move the Subordinate Court to make a complaint under the amended S. 476 and not to move a superior Court under S. 476-A of the Code to make a complaint. (*Wallace and Madhavan Nair, JJ.*) L. PATTABI CHETTY *v.* GOPALA CHETTY. **26 Cr. L. J. 1125 : 88 I. C. 357 : A. I. R. 1925 Mad. 1181.**

——S. 195—*Procedure— Death of applicant—Legal representative—Right to continue application.*

Where an applicant for sanction dies during the pendency of the application, his legal representatives cannot continue the application. They may file a fresh petition if necessary. (*Oldfield and Devadoss, JJ.*) GHULAM MOHIDEEN QURAISHI SAHIB *v.* AHAMADULLA BEGAM SAHIBA. **16 L. W. 881 : 46 Mad. 88 : 32 M. L. T. (H. C.) 102 : 71 I. C. 49 (2): 24 Cr. L. J. 2 : A. I. R. 1923 Mad. 206 : 44 M. L. J. 66.**

——Ss. 195 and 476—*Procedure—Sanction to prosecute—Court's duty.*

The Magistrate shall himself make a proper enquiry into the offences against public justice of the commission of which there are at least strong indications and shall thereafter either refuse sanction or grant it, if it should seem proper to take action, himself under S. 476 of the Cr. P. Code. The proper attitude of the Court and the principle that should guide it in the case of offences against public justice are exactly the same as those of the police-officer who actually sees the commission of what appears to be cognizable offences. He must make full inquiry. He fails in his duty if he takes no action at all, but merely waits for the aggrieved party to complain and also if, when such a complaint has been made, he does no more than scrutinize the evidence put before him by that party or that of the facts he happens to have seen himself. (*Hallifax, A. J. C.*) TULSIRAM *v.* TILOKCHAND. **23 Cr. L. J. 605 : 68 I. C. 829 : A. I. R. 1923 Nag. 258.**

——S. 195 (6)—*Procedure—Sanction granted but no action taken—Application for revocation of sanction rejected—Time begins to run from date of sanction and not from refusal of revocation.*

The opposite party obtained a sanction under S. 195, Cr. P. Code for the prosecution of the applicant under S. 471, I. P. Code but no action was taken for some months and the applicant applied to have the order of sanction revoked and this application was rejected. *Held* that the sanction cannot possibly be said to have been given by the Court which did not originally grant the sanction but which merely refused to revoke that sanction when it had been granted and hence six months period began to run from the date of grant of sanction originally. (40 All. 338 Foll. 26 M. L. J. 51. Diss. (*Neave, A. J. C.*) MAKHDUM THALER *v.* EMPEROR. **87 I. C. 515 : 26 Cr. L. J. 965 : A. I. R. 1926 Oudh 22 (1).**

——S. 195—*Procedure—Penal Code, S. 193—Sanction to prosecute for perjury—Different view by a trial court and an appellate court—Effect of.*

If a piece of evidence is regarded by the appellate court in a different light from the view taken by the trial court sanction cannot be granted to prosecute for perjury the witness giving such evidence. (*Das, J.*) HIRALAL *v.* LILA. **3 P. L. T. 60 : 64 I. C. 276 : 22 Cr. L. J. 756 : A. I. R. 1923 Pat. 102 (2).**

CR. P. CODE (V OF 1898), S. 195—Propriety of action.

Propriety of Action.

——S. 195—*Propriety of action—Penal Code, S. 193.*

A person commits no perjury when the assertions which he makes are, according to his affidavit, not from his personal knowledge but from what he had been told, and where there is nothing whatever to show that the assertions are not correct. The Dist. Judge cannot possibly sanction a prosecution for perjury in respect of an affidavit sworn before him as Dist. Registrar. (*Stuart, J.*) DINA NATH *v.* NEK RAM. **21 A. L. J. 88 : 74 I. C. 75 : L. R. 4 A. Cr. 6 : 24 Cr. L. J 747 : A. I. R. 1923 All. 175 (1).**

——Ss. 195 and 203—*Propriety of action—Criminal breach of trust—Complaint—Dismissal of complaint without examining complainant—Sanction for false charge—Revision.*

A Magistrate dismissed a complaint for criminal breach of trust without examining the complainant in contravention of S. 203, Cr. P. Code. The Magistrate thereupon granted sanction to prosecute the complainant for bringing a false charge, *i. e.*, under S. 211 or S. 182, I. P. Code. The complainant applied in revision to the High Court. *Held*, that the Magistrate not having dismissed the complaint according to law under S. 203, Cr. P. Code, the complainant could not be convicted of bringing a false charge. On an application in revision for setting aside the order granting sanction, the High Court held, that the order dismissing the complaint had been made illegally. (*Macleod, C. J. and Crump, J.*) NINGAPPA RAYAPPA, *In re.* **48 Bom. 360 : 26 Bom L. R. 183 : 25 Cr. L. J. 960 : 81 I. C. 608 : A. I. R. 1924 Bom. 321.**

——Ss. 195 and 476—*Propriety of action—Sanction on evidence of witnesses—Petitioner having no opportunity to cross-examine—Notice—Revision.*

In a mortgage suit the plaintiff (petitioner) did not appear on the date of the hearing but the Court after examining some witnesses for the defence granted sanction under S. 476, Cr. P. Code, to prosecute the plaintiff for bringing a false claim under S. 209, I P. Code, on the ground that the suit was on a discharged mortgage. *Held*: the lower Court in granting sanction without notice to the petitioner (plaintiff) and on the evidence of witnesses whom the petitioner had no opportunity to cross-examine, acted with material irregularity in the exercise of its jurisdiction. The order granting sanction must be set aside. There is no rule of law which precludes a Court taking action against a person under S. 476, Cr. P. Code even before the civil proceedings had come to an end. (*Wallace, J.*) PERUMALLA VENKATASUBBIAH, *In re.* **16 L. W. 925 : 69 I. C. 440 : (1922) M. W. N. 811 : 23 Cr. L. J. 712 : A. I. R. 1923 Mad. 228. 44 M. L. J. 74.**

——S. 195—*Propriety of action—Judge sanctioning prosecution—If can hear appeal from conviction.*

It is a fallacy to hold that a Court which sanctions or directs a prosecution under S. 195, Cr. P. Code, is thereby rendered incompetent to try the offence or hear an appeal against a conviction for it. (*Hallifax, A. J. C.*) PANDIA MAHAR *In re.* **76 I. C. 395 : 25 Cr. L. J. 171 : A. I. R. 1924 Nag. 23.**

——S. 195—*Propriety of action—Grounds.*

Where an inveterate enmity exists between the parties, the Court will, in the interests of justice, refuse to give sanction for prosecution. (*Lyle, A. J. C.*) NAZIR HASAN *v.* MD. YAMIN. **26 O. C. 104 : 68 I. C. 414 : 9 O. L. J. 282 : 23 Cr. L. J. 574 : A. I. R. 1922 Oudh 225.**

CR. P. CODE (V OF 1898), S.195—Propriety of action

———S. 195—*Propriety of action—Grounds.*

Where the grounds on which the learned Sessions Judge proceeded, do not exclude the possibility of the complaint and the evidence adduced in support of it being true, *held* that on the mere existence of such a possibility the order passed by the trying Magistrate granting the sanction ought not to be lightly set aside. It is essential that no one should be permitted to use the penal law to satisfy his own private ends or personal spite and if there is a *prima facie* ground for thinking that the charge was prompted by improper motives and was false and vexatious the necessary elements to justify the grant of the sanction would be made out. (*Kanhaiya Lal, J. C.*) BRIJ KUMAR *v.* MANNA. **25 O. C. 153 : 71 I. C. 681 : 9 O.L.J. 662 : 21 Cr. L. J. 217 : A. I. R. 1922 Oudh 18.**

———S. 195—*Propriety of action—Different views of Courts—I. P. Code, S.* 193.

When two Courts take different views of facts, sanction for prosecution should not be granted. (*Das, J.*) HIRALAL *v.* LILA MAHTON.
3 Pat. L. T. 60 : 64 I. C. 276 : 22 Cr. L. J. 756 : A. I. R. 1923 Pat. 102 (2).

Sanction after New Code.

———S. 195—*Sanction after New Code—Sanction granted before the new Code came in force—Prosecution after its coming in force is invalid.*

A prosecution for perjury started after the amended Code came into force, on the strength of sanction granted before its so coming in force is illegal. (*Mukerji, J.*) AMERAJ SINGH *v.* EMPEROR.
23 A. L. J. 35 : L. R. 6 A Cr. 70 : 86 I. C. 287 : 26 Cr. L. J. 751 : A. I. R. 1925 All. 306.

———S. 195—*Sanction after new Code—Refusal of—Appeal—Passing of new Code—Effect of—Perjury—Passages not set out in the order—Effect of.*

Against an order of the Subordinate Judge refusing sanction to prosecute the petitioners for perjury there was an appeal to the District Judge. When the appeal was pending, the new Cr. P. Code came into force. It was contended that the District Judge had no power to grant sanction afterwards as he did. *Held*, that the petitioners had incurred a liability to have their prosecution for false evidence sanctioned and the complainant on his application being dismissed by the Sub-Judge acquired a right to apply to appellate Court under S. 195, Cr. P. Code, (as it was unamended) for the grant of sanction which the lower Court had refused. Under these circumstances the repeal of S. 195 as it then stood could not affect any pending investigation in respect of the right which had accrued to the complainant or the liability which had been incurred by the applicants. The Dt. Judge had therefore power to grant the sanction. Where the particular passages complained of as being perjured evidence were not set out in the order of the District Judge but were set out in the application for sanction the order of sanction must be deemed to have been passed with respect to the statements alleged in the application. (*Daniels, J.*) KASHMIRI LAL *v.* MT. KISHAN DEI. **L. R. 5 A. 99 (Cr.). : A. I.R. 1924 All. 563.**

———S. 195—*Sanction after new Code—Sanction granted after new Code came into operation is illegal.*

A sanction to prosecute for perjury granted after 1st September, 1923, *i.e.*, when the new Code (Act XVIII of 1923) came into force is illegal. 1924 Cal. 826, Foll. (*Marten and Fawcett, J.*) GAFUR DAUD SAHEB *In re.* **26 Cr. L. J. 448 : 85 I. C. 64 : 26 B. L. R. 1235 ; A. I R. 1925 Bom. 151 (1).**

———S. 195—*Sanction after new Code—Amendment of—Sanction granted after—Legality of.*

CR. P. CODE (V OF 1898), S. 195—Scope of.

Where after the amendment of S. 195, Cr. P. Code by Act (XVIII) of 1923, a Court grants a sanction on application made prior to the amendment, the sanction is illegal and no Court can take cognizance of the offence on such sanction. The High Court refused to treat the sanction though valueless as a good complaint within S. 195 (b), Cr. P. Code or S 476, Cr P. C. In a criminal case involving the liberty of the subject it was not a proper course to adopt. (*Greaves and Panton, JJ.*) BALDEO MISSIR *v.* DEPUTY INSPECTOR OF POLICE, C I.D., BENGAL.
51 Cal. 652 : A. I. R. 1924 Cal. 826.

———S. 195—*Sanction after new Code—Sanction obtained by private person before amendment—Complaint after amendment is illegal.*

The alteration made by the new enactment affects only procedure to be adopted for setting the law in motion. A person, who had obtained sanction prior to the date of the enforcement of the Act, could not lawfully institute, after that date, a complaint in respect of an offence covered by the sanction. (*Shadi Lal, C. J.*) JAWAHAR LAL *v* JAGGUMAL.
26 Punj. L. R. 152 : 6 Lah. 41 : 88 I. C. 523 : 26 Cr. L. J. 1163 : A. I. R. 1925 Lah. 330.

———S. 195—*Sanction after new Code—Sanction given but no prosecution launched before September, 1923.*

Sanction to prosecute was given before the amendment of the Cr. P. Code but no prosecution was made till after the amended Act was passed (1923) : the old order is useless and new order should be requested. (*Carr, J.*) ANI *v* AH YONE. **2 Bur. L. J. 289 : A. I R. 1924 Rang. 211.**

Scope of.

———Ss. 195 and 476—*Scope—Meaning of the word "Court."*

The expression 'Court' in S. 195 is of a wider scope than the expression 'civil, revenue or criminal Court' in S. 476. (*Sulaiman, J.*) KANHAIYA LAL *v.* BHAGWAN DAS. **23 A. L. J. 956 : L. R. 6 A. Cr. 153 : A. I. R. 1926 All. 30.**

———S. 195 (1) (c)—"*Court*" — *Court in a Native state.*

The word "Court" in S. 195 (1) (c) of the Cr. P. Code cannot be construed as including a court in a Native State such as Baroda State (*Fawcett and Madgaonkar, JJ.*) MULJIBHAI HIRABHAI PATEL *In re.* **89 I. C. 976 (1) : 27 Bom L. R. 1063.**

———S. 195—*Scope of—Proceedings under, are not appellate proceedings.*

Proceedings under S. 195 are not appellate proceedings though they may in some respects resemble them. For at each stage they are described as constituted by the grant or revocation of the sanction, which some inferior authority has refused or has granted, not with direct reference to the setting aside of that inferior authority's order. (*Oldfield and Ramesam, JJ.*) A. R. M. N. NARAYANAN *v*, KADIRAYA GOUNDAN.
17 L. W. 311 : 72 I. C. 337 : 1923 M. W. N. 223 : 24 Cr. L.J. 337: A.I.R. 1923 Mad. 504 : 44 M.L.J. 320.

———S. 195—*Scope—Under Cl. (c) complaint must be made by the Court before which the offence was alleged to have been committed—Private complaint is illegal.*

If an offence has been committed in or in relation to any proceeding in any civil, revenue or criminal Court, that Court alone can start proceedings, but if offences mentioned in sub-clauses (b) or (c) are committed in respect of a document produced or given in evidence in such proceeding then also no Court shall take cognizance of them except on the complaint in

CR. P. CODE (V OF 1898), S. 195—Scope of the sections.

writing by such Court, and the proceedings started on a private complaint in relation to an offence under sub-Cl. (c) are illegal and ought to be quashed; 14 A.L.J. 74, *Foll.* (*Sulaiman, J.*) KANHAIYA LAL *v.* BHAGWAN DAS. **23 A.L.J. 956 : L.R. 6 A. (Cr.) 153 : A. I. R. 1926 All. 30.**

——Ss. **195 and 476**—*Scope of the sections—Amendment of the Code—Effect of.*

Prior to the amendment of the Cr. P. Code by the amending act of 1923, Ss. 195 and 476 of the Code referred to two different things. S. 195 required a sanction or complaint by the Court for the prosecution of certain offences. S. 476 gave the Court a quite independent power to direct a prosecution of its own authority and send the case for trial on the merits to a first class Magistrate. As the Code now stands both the sanction by a Court and the direct order by a Court directing a prosecution are done away with and the procedure in all cases is one of complaint by the Court: S. 195 describes the offences in respect of which a complaint is necessary and S. 476 describes the procedure under which a complaint is to be made. The intention of the legislature seems to be to make S 476 co extensive in its scope with clauses (b) and (c) of S. 195 (1). Cl. (a) of S. 195 is not concerned with Courts and S. 476 does not refer to it. (*Daniels, J.*) DWARKA PRASAD *v.* MAKUND SARUP. **L. R. 6 A. 630 : 90 I.C. 290 : 26 Cr. L J. 1506 : L. R. 6 A. 213 (Cr.)**

——**S. 195**—*Scope of—'Produced or given in evidence' refers to original and not to copy.*

The words "produced or given in evidence" in S. 195, Cr. P. Code, refer to the production of the original and not the production of a copy. 8 O. C. 313 *Foll.* (*Daniels, J.C.*) GIRDHARI LAL *v.* EMPEROR. **12 O. L. J. 194 : 2 O. W. N. 174 : 86 I. C. 993 : 26 Cr. L. J. 929 : A. I. R. 1925 Oudh 413.**

——**S 195**—*Scope of—Special conferment of appellate powers on city Magistrate does not oust the appellate powers of District Magistrate.*

By Notification No. 4848 VI-353 of the 3rd December 1921, the City Magistrate of Lucknow had been invested with the power to hear appeals from orders and convictions by Magistrate of the 2nd and 3rd classes under S. 407 (2) read with S. 37 of the Cr. P. Code. *Held* that for the purpose of S. 195, clause (7) of the Code an appeal from the decision of a Bench of Honorary Magistrates, exercising second or third class powers, was to be deemed "ordinarily" to lie to the District Magistrate and not to the City Magistrate. 30 Cal. 394 and 26 Mad. 656 Ref. (*Kanhaiya Lal, J.C.*) AHMAD HUSAIN *v.* MT. RAHIMAN. **26 O. C. 358 : A. I. R. 1924 Oudh 239.**

——**S. 195**—*Scope of—Section should be given wide interpretation—One offence may be committed 'in relation to another though the other may never be committed.*

The words of S. 195 (b) should be given as wide an application as possible. Some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. False evidence for instance may be fabricated for a contemplated suit or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if the judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. If two offences are even remotely connected by the relationship of cause and effect, then the first may be said to have been committed in relation to the second. It may be that the commission of the latter offence may never

CR. P. CODE (V OF 1898), S. 195—Want of Complaint.

have been intended, but if it is in fact the consequence of the former offence then S. 195 applies. (*Mullick and Jwala Prasad, JJ.*) DAROGA GOPE *v.* EMPEROR. **6 P. L. T. 515 : 88 I. C. 1045 : A. I. R. 1925 Pat. 717.**

——**Ss. 195 and 200 (aa)**—*Scope of—Offence under S. 182, I. P. Code—Complaint not in writing—Conviction—Liability of.*

Where an objection as to the absence of a complaint in writing was not taken at the trial or in the appellate court but only in revision, it is not sufficient to upset a conviction under S. 182, I. P. Code. Assuming there was no complaint in writing, it would not make the conviction illegal. The object of introducing the words "in writing" after the word complaint in S. 195 and adding cl. (aa) to S. 200, Cr. P. Code, was to remove the inconvenience which might be felt if it was made incumbent on the Magistrate to examine the complainant when taking cognizance of an offence. As the provision as regards sanction was removed from S. 195, Cr. P. Code and as it was made obligatory for the public servant concerned to make a complaint instead of giving a sanction in order to prosecute a person for offences referred to in S. 195, Cr. P. Code, it was thought that it would cause a good deal of inconvenience if such public servant had to attend the court and to appear before the Magistrate in order to lodge the complaint. (*Kulwant Sahay, J.*) LACHMI SINGH *v.* EMPEROR. **1924 P. H. C. C. 181 : 5 Pat. L. T. 505 : 81 I. C. 629 : 25 Cr. L. J. 972 : A. I. R. 1924 Pat. 691.**

——**S. 195**—*Scope of—Party to proceedings—Cr. P. Code, S. 476.*

It is not open to a Court to make a complaint in respect of any person other than persons who were parties to the proceedings before it. (*Robinson, C. J. and Brown, J.*) C. T. GURUSWAMI *v.* D. K. S. IBRAHIM. **2 Rang. 374 : 26 Cr. L. J. 295 : 84 I. C. 439 : A. I. R.1925 Rang. 28.**

Want of Complaint.

——**S. 195**—*Want of complaint—Conviction under S. 173 of the Penal Code, without complaint by public servant concerned is illegal though convicting Magistrate purported to take cognizance of the offence under S. 225 (b) of the Penal Code to convict the accused for a minor offence under S. 173.*

When the Code provides that the Court shall not take cognizance of certain offences without complaint from a public servant it is not open to a Magistrate to ignore this provision by the device of instituting the case under another section of the Penal Code. Hence the Magistrate cannot say that he took cognizance of an offence under S. 225 (*b*) of the Penal Code and that having done so he was entitled under S. 238 of the Cr. P. Code to convict the accused under S. 173 of the Penal Code which he regarded as a minor offence of the same character as that for which a penalty is provided under S. 235 (*b*). (*Neave, J.*) SRI NARAIN SINGH *v.* EMPEROR. **22 A. L. J. 1005 : L. R. 5 A. (Cr.) 153 : 47 All. 114 : A. I. R. 1925 All. 129.**

——**S. 195**—*Want of complaint—Absence of formal complaint does not vitiate conviction when police-officer asks for prosecution and deposes in this case.*

When a police-officer asks that a person should be prosecuted under S. 211 for information given to him and gives evidence himself in support of that charge, no serious irregularity can arise in the conviction of the accused in proceedings initiated upon that report. A report by police-officer in a non-cognizable case is a complaint within the definition. (30 Cal. 910, 32 P. R.

CR. P. CODE (V OF 1898), S. 195—Want of complaint.

1910 and 30 Cal. 285, Dist.; 40 Cal. 300, 22 Bom. 550, Foll.) (*Lumsden, J.*) MEHR CHIRAGH DIN *v.* EMPEROR. **4 Lah. 359 : 25 Cr. L. J. 125 : 76 I. C. 189 : A. I. R. 1924 Lah. 258.**

——**Ss. 195 and 537**—*Want of complaint—Want of complaint under S.* 195 *is incurable.*

The want of a complaint by the Court concerned, under S. 195 will vitiate the whole trial and the defect cannot be condoned. (*Daniels, J. C.*) GIRDHARI LAL *v.* EMPEROR. **12 O. L. J. 194 : 2 O. W. N. 174 : 86 I. C. 993 : 26 Cr L. J. 929 : A. I. R. 1925 Oudh 413.**

——**Ss. 195, 476 and 4 (1) (h)**—*Want of complaint—Order passed by Court on complaint made by Police is not complaint by Court.*

Where a prosecution was initiated by the Police who made the complaint and on that complaint the Magistrate passed an order to summon the accused. *Held*; that the order could not be construed as a "complaint" within the meaning of the Code. (*Bucknill and Ross, JJ.*) MAHOMED YASSIN *v.* EMPEROR. **4 Pat. 323 : 6 P. L. T. 457 : 86 I. C. 825 : 26 Cr. L. J. 889 : A. I. R. 1925 Pat. 483.**

——**S. 195**—*Want of complaint—Penal Code, S.* 211—*False information to police followed by complaint to Court—Sanction to prosecute is necessary.*

Where an information to the police is followed by a complaint to the Court based on the same allegations and the same charge, the sanction of complaint of the Court itself under S. 195 (1) (b) of the Code is necessary before the Court could take cognizance of an offence punishable under S. 211 of the Indian Penal Code, in respect of the false charge made to the police, on the ground that it was an offence committed in relation to a proceeding in Court. The fact that the complaint was not investigated by the Court, does not make any difference, 43 Cal. 650 Foll. (*Bucknill and Ross, JJ.*) MAHOMED YASSIN *v.* EMPEROR. **4 Pat. 323 : 6 Pat. L. T. 457 : 86 I. C. 825 : 26 Cr. L. J. 889 : A. I. R. 1925 Pat. 483.**

——**S. 195**—*Want of complaint—False complaint—Instigation by third parties.*

Where it was found that a false complaint was filed at the instigation of certain persons who were not parties to the complaint and proceedings were started against them under S. 211, I. P. Code, *Held*, that as the offence had been committed in relation to the proceedings in Court no prosecution could be launched except on the written complaint of the Magistrate's court or of some court to which it was subordinate. The High Court being a superior Court could file the necessary complaint and the High Court directed that its order in the revision case should issue as a complaint to the Magistrate. (*Heald, J.*) P. N. S. M. SYED KHAN *v.* P. K. C. NAGOOR. **3 Bur. L. J. 141 : A. I. R. 1924 Rang. 369.**

Want of sanction.

——**S. 195**—*Want of sanction to prosecute—Refusal of—Appeal—Passing of new Code—Effect of—Perjury—Passages not set out in the order—Effect of.*

Against an order of the Subordinate Judge refusing sanction to prosecute the petitioners for perjury there was an appeal to the District Judge. When the appeal was pending the new Cr. P. Code came into force. It was contended that the District Judge had no power to grant sanction afterwards as he did. *Held*, that the petitioners had incurred a liability to have their prosecution for false evidence sanctioned and the complainant on his application being dismissed by the Sub-Judge acquired a right to apply to appellate Court under S. 195, Cr. P. Code (as it was unamended) for

CR. P. CODE (V OF 1898), S. 195.

the grant of sanction which the lower Court had refused. Under these circumstances the repeal of S. 195 as it then stood could not affect any pending investigation in respect of the right which had accrued to the complainant or the liability which had been incurred by the applicants. The Dt. Judge had therefore power to grant the sanction. Where the particular passages complained of as being perjured evidence were not set out in the order of the District Judge but were set out in the application for sanction the order of sanction must be deemed to have been passed with respect to the statements alleged in the application. (*Daniels, J.*) KASHMIRI LAL *v.* MT. KISHAN DEI. **L. R. 5 A. 99 (Cr.) : 26 Cr. L. J. 90: 83 I. C. 650 : A. I. R. 1924 All. 563.**

——**S. 195**—*Want of sanction—Effect on complaint which does not require sanction.*

Where a complaint consists of an offence for which sanction is required and another offence the trial of which is exempted from such sanction, the failure to produce the sanction does not absolve the court from investigating that part of the complaint for which no sanction is required. (*Stuart, J.*) TARSU BEG *v.* MUHAMMAD YAR KHAN. **21 A. L. J. 915 : L. R. 5 A. (Cr.) 53 : A. I. R. 1924 All. 296.**

——**S. 195**—*Want of sanction.*

An affidavit sworn before District Judge as District Registrar cannot be used as sanction for perjury. (*Stuart, J.*) DINA NATH *v.* NEK RAM. **21 A. L. J 88 : 24 Cr. L. J. 747 : 74 I. C. 75 : L. R. 4 A. (Cr.) 6 : A. I. R. 1923 All. 175.**

——**S. 195**—*Want of sanction—Penal Code, S.* 193—*Offence in relation to proceedings—False evidence—Alleged abetment by pleader.*

Where the petitioner, the pleader of certain accused persons charged with dacoity, was prosecuted for an offence under S. 193, I. P. Code, in that he suborned three of the prosecution witnesses in the dacoity case and the prosecution was launched without the sanction of the criminal court and before the trial of the dacoity case was over. *Held*, that the want of sanction was fatal to the prosecution of the petitioner and that the starting of the prosecution against the petitioner even before the dacoity case was heard was inadvisable.

Per *Crump, J.* The words "in relation to" in S. 195 (b), Cr. P. Code, are very general and are wide enough to cover a proceeding in contemplation before a Criminal Court, though it may not have begun when the offence was committed. (*Shah A. J. C. and Crump, J.*) VASUDEO RAM CHANDRA JOSHI, *In re.* **24 Cr. L. J. 171 : 71 I. C. 523 : 24 Bom. L. R. 1153 : A. I. R. 1923 Bom. 105.**

——**S. 195**—*Want of sanction—Irregularity cured by S.* 537, *Cr. P. Code.*

Sanction of the trying Magistrate or of the District Magistrate must be obtained before launching a prosecution under S. 182, I.P. Code in cases where a police enquiry is followed by a trial in Court, but the want of sanction is an irregularity under S. 537 and does not vitiate the trial unless it has occasioned a failure of justice. (*Heald, J.*) NAGAPPAN MUDALIAR *v.* EMPEROR. **1 Bur. L. J. 258 : 74 I. C. 259 : 24 Cr. L. J. 755 (2) : A. I. R. 1923 Rang. 135 (2).**

——**S. 195 (1) and (6)**—*Offence under S.* 186, *I. P. Code—Sanction by District Munsif for prosecution—Enquiry—Complaint preferred on sanction—Appeal—New Code—Amending Acts, XII and XVII of* 1923.

The petitioner was alleged to have obstructed the Amin of the Munsif's Court in delivering possession of property decreed to the complainant. The Court gave sanction to prosecute after perusing the report of the Amin and the village munsif. *Held*, that there had

been sufficient enquiry and the exercise of a judicial discretion by the Court granting the sanction.

Where a complaint has been launched after obtaining sanction under S. 195 (1). Cr. P. Code, the subsequent repeal of the sanction procedure by the Cr. P. Code Amending Act does not affect the sanction of the complaint filed under it; 26 M. L. J. 511 Ref. (*Ramesam and Wallace, JJ.*) MUTHIA GOUNDAN *v.* CHINNA NAILLAPPA GOUNDAN.

19 L. W. 392 : (1924) M. W. N. 358 : A. I. R. 1924 Mad. 615 (2).

——S. 195 (1)—*Sanction—Complaint by public servant—Necessity for sanction.*

Under S. 195, Cr. P. Code, sanction is not necessary when the public servant against whom the offence has been committed is himself the complainant. (*Krishnan, J.*) PUBLIC PROSECUTOR *v.* MARI MUDALI. **19 L.W. 30 : (1924) M. W. N. 145 : 76 I.C. 653 : 25 Cr. L. J. 221 : A. I. R. 1924 Mad. 730.**

——S. 195 (1) (a)– *Superintendent of Police—If subordinate to District Magistrate.*

S. 195 (1) (*a*) of Cr. P. Code says that the District Magistrate is above that of a D. S. P. The District Magistrate ordered the prosecution of the accused for contempt of lawful authority of a police-officer. The sanction is not given by a court of justice. It cannot therefore be annulled in revision. (*Mears, C. J. and Piggott, J.*) CHHOTEY LAL *v.* CHHEDDI LAL.

L. R. 3 A. 176 (Cr.) : 45 All. 135 : A. I. R. 1923 All. 149.

——S. 195 (1) (a) and (7)—*Appeal—Order passed by First Class Magistrate—Subsequently transferred—Disobedience — District Magistrate cannot grant sanction.*

Under S. 195 (1) (*a*), Cr. P. Code, if the public servant making the order is a court, in respect of that order, the court to which that court would be subordinate is the Court to which appeals would ordinarily lie. 42 M 64 Foll.

A Magistrate of the first class passed an order under S. 145, Cr. P. Code and was subsequently transferred and the order was disobeyed thereafter. The judicial charge of the Magistrate went to the City Magistrate, *Held* that sanction to prosecute for the disobedience could be given by the Sessions Court and not by the District Magistrate. (*Shah, A. C. J. and Crump, J.*) BADRUDDIN SARFUDDIN *In re.*

47 B. 102 : 24 Bom. L R. 810 : 68 I.C. 416 : 23 Cr. L. J. 576 : A. I. R. 1922 Bom. 453.

——S. 195 (1) (a)—*Charge under S. 211, I. P. Code altered to charge under S. 182—Complaint of public servant concerned is essential.*

The essence of an offence under S. 182 is not the falseness of the information, as it is the essence of an offence under S. 211, but the contempt of the lawful authority of the public servant and unless and until the public servant concerned chooses to move the matter, the Court has no authority to do so *suo motu*, by whatever process it reaches the result. (*Wallace and Madhavan Nair, JJ.*) MUTHU GOUNDAN *v.* EMPEROR. **(1925) M.W.N. 108 : 21 L. W. 661 : A. I. R. 1925 Mad. 400.**

——S. 195 (1) (a)—*Perjury—Sanction for—Different views of evidence by final court and appellate court.*

Where the two courts have taken different views on a fact it is impossible to see how a sanction for prosecution for perjury in respect of a piece of evidence can be granted. (*Das, J.*) HIRALAL MAHTON *v.* LILA MAHTON. **3 P. L. T. 60 : 64 I. C. 276 : 22 Cr. L. J. 756 : A. I. R. 1923 Pat. 102 (2).**

——S. 195 (1) (b)—*Perjury—Sanction for prosecution when to be given—Conflicting statements.*

A witness is entitled to *locus penitentiae* and an opportunity to correct himself and it, when he gets that opportunity, he recalls to his mind any fact about which he had made a statement which was not quite accurate, a prosecution for perjury will hardly be desirable. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected, if necessary till then it is open to the witness to qualify any statements or correct it himself. Where the statements relied on were, moreover, statements hardly material to the issue before the Court, sanction to prosecute for perjury should not be given. (*Kanhaiya Lal, J.*) MAHARAJ PRASAD *v.* EMPEROR. **21 A. L. J. 673 : 9 O. & A. L. R. 694 : 74 I. C. 443 : 24 Cr. L. J. 779 : A.I.R. 1924 All. 83.**

——S. 195 (1) (b)—*Procedure—Trial without sanction against abettor (not a party) invalid.*

In the case of offences to which reference is made in section 195, clause (B), a Court taking cognizance of such an offence when that offence has been committed in, or in relation to any proceeding in any Court or a Court taking cognizance of a criminal conspiracy to commit such an offence or of abetment or attempt to commit such an offence, cannot do so unless sanction has been given not only to the *factum* but to cover the case of each person who is charged with having committed it. (*Stuart, J.*) RAM BILAS *v.* LACHMI NARAIN. **45 All. 140 : 20 A. L. J. 904 : 71 I. C. 684 : 24 Cr. L. J. 220 : A. I. R. 1923 All. 84.**

——S. 195 (1) (b)—*False evidence—Oath against oath.*

Where there is no documentary evidence and the question is of oath against oath sanction to prosecute for giving false evidence is not justified. (*Gokul Prasad, J.*) ABDUL AZIZ *v.* BOHRA TARA CHAND. **19 A. L. J. 291 : 60 I. C. 800 : 22 Cr. L. J. 304.**

——S. 195 (1) (b)—*False evidence—In relation to proceeding not before Court.*

Where it was alleged that the petitioner on April 10, instigated certain persons to give false evidence in a criminal proceeding which was about to come before a Magistrate on April 15.

Held, that the words "in relation to" in S. 195 (b) are very general and are wide enough to cover a proceeding in contemplation before a criminal court though it may not have begun at the date when the offence was committed, and therefore the proceedings which had been undertaken against the petitioner were null and void without sanction under S. 195, (b). (*Shah, Ag. C. J. and Crump, J.*) VASUDEO RAMCHANDRA JOSHI, *In re.* **24 Bom. L. R. 1153 : 71 I. C. 523 : 24 Cr. L. J. 171 : A. I. R. 1923 Bom. 105.**

——S. 195 (1) (b)—*False evidence—Fabrication for future judicial proceeding—Sanction is not necessary.*

S. 195 (1) (*b*) does not apply to any future judicial proceeding for which the false evidence may have been fabricated. (*Shah and Crump, JJ.*) GOVIND PANDURANG, *In re.* **45 Bom. 668 : 22 Bom. L. R. 1239 : 59 I. C. 193 (2) : 22 Cr. L. J. 49.**

——S. 195 (1) (b)—*Sanction—Penal Code, Ss. 193, 209 and 471.*

A compromise in a suit for money due on a hand note is no bar to a sanction for prosecution under S. 195, Cr. P. Code. (*Teunon and Suhrawardy, JJ.*) DULLO SINGH *v.* DEPUTY INSPECTOR-GENERAL OF POLICE, BENGAL, C. I. D. **49 Cal. 551 : 65 I.C. 570 : 23 Cr. L. J. 138 : A. I. R. 1922 Cal. 412 (1).**

——S. 195 (1) (b)—*False charge—Penal Code, S.*

CR. P. CODE (V OF 1898), S. 195.

211—*Parties on bad terms.*

If the Magistrate after a consideration of evidence has found that the charge is false, there is no reason why the accused against whom the charge was brought should not be allowed, on the ground that the parties are on bad terms to prosecute his accuser, for having brought a false charge. (*Martineau, J.*) HARICHAND *v.* AYA RAM. **4 Lah. L. J. 321 : A. I. R. 1922 Lah. 403 (1).**

———S. 195 (1) (b)—*Perjury.*

It is highly inexpedient to grant an application for sanction for prosecution for perjury made out of motives of revenge. (*Moti Sagar, J.*) FAZAL DIN *v.* EMPEROR. **3 Lah. L. J. 442.**

——— S. 195 (1) (b)—*Powers of Court—Parties.*

The power of a Court to complain in respect of the offences under S. 195 (1) (b) is not restricted to the parties before it. (*Robinson, C. J., Rutledge and Maung Gyi, JJ.*) EMPEROR *v.* SYED KHAN. **3 Rang. 303 : A. I. R. 1925 Rang. 321 (F. B.).**

———S. 195 (1) (*c*)—"*Court" does not include Court in Native State.*

The word "Court" in Cl. (c) of S. 195 (1) does not include a Court in a Native State such as Baroda State, 35 Bom. 139, Ref. (*Fawcett and Madgavkar, JJ.*) MULJIBHAI HIRABHAI, *In re.* **27 B. L. R. 1063 : 89 I. C. 976 : 26 Cr. L. J. 1456 (1) : 49 B. 860 : A. I. R. 1925 Bom. 535.**

———S. 195 (1)(*c*)—*Document tendered but returned by presiding Judge is 'produced in evidence'.*

Where a party to a proceeding hands up a document to the Judge who does not take the document on the file but returns it to the party, the document is "produced" in the proceeding, within the meaning of S. 195 (*c*). No complaint with reference to the document can be entertained by a Criminal Court, in the absence of a complaint in writing by the Court concerned. (*Mirza and Percival, JJ.*) GULABCHAND *v.* EMPEROR. **27 B. L. R. 1039 : A. I. R. 1925 Bom. 467.**

———S. 195 (1) (*c*)—*Document produced in a case—Production may be by another than the alleged offender.*

Sec. 195 (*c*) is wide enough to include any document produced or given in evidence in the course of a proceeding whether produced or given in evidence by the party who is alleged to have committed the offence or by any one else. (*Macleod, C. J. and Coyajee, J.*) BHAW VANKATESH, *In re.* **49 Bom. 608 : 27 B. L R. 607 : A. I. R. 1925 Bom. 433.**

———S. 195 (1) (*c*)—*Superior and subordinate Court—Concurrent Jurisdiction.*

Ordinarily application for sanction under S. 195 (*c*), Cr. P. Code should be made to the Court in which the proceeding in respect of which the sanction is asked for, was taken. But it does not mean that the Superior Court has no jurisdiction. The two courts have concurrent jurisdiction. (*Sanderson, C. J. Mookerjee, J.*) NARENDRA LAL KHAN *v.* AKHOY KANDAR. **61 I. C. 162 : 22 Cr. L. J. 338 (Cal.)**

———S. 195 (1) (*c*)—*S. 463, I. P. Code as used in S. 195 (1) (c) includes all types of forgery*

S. 195 (1) (c) of the Cr. P. Code refers to an offence described in S. 463, I. P. Code and the latter is used there in a comprehensive sense so as to embrace all species of forgery and includes a case falling under S. 467, I. P. Code. (*Martineau, J.*) KHAIRATI RAM *v.* MALAWA RAM. **5 Lah. 550 : 26 Cr. L. J. 537 : 85 I. C. 377 : A. I. R. 1925 Lah. 266.**

———S. 195 (1) (c)—*Read with (7)—Sanction to prosecute—Meaning of the words "or of some other court to which such court is subordinate".*

CR. P. CODE (V OF 1898), S 195.

Where the case has been tried in any Court other than that of a District and Sessions Judge or an Additional District and Sessions Judge to which the Trial Court is subordinate, the words, "or of some other Court to which such Court is subordinate" in Section 195 (1) (*c*) read with sub-S. (7) of the Cr. P. Code do not include the High Court and, in virtue of having heard the appeal, the High Court is not empowered to grant sanction to prosecute. 34 I. C. 654; 35 All. 90, 31 I. C. 340 Ref. to. 41 Mad. 787; 2 Lahore 57 Foll. (*Martineau and Harrison, JJ.*) M. FAZAL ILAHI *v.* MOHAN LAL. **72 I. C. 383 : 24 Cr. L. J 383 : A.I.R. 1922 Lah. 346.**

———S. 195 (1) (c)—*Sanction of Court wherein the forged document was used is necessary, though forgery was committed beforehand.*

Where a document has been produced in a Court by a party to a proceeding before it, the sanction of such Court is necessary for his prosecution in respect of an antecedent forgery. 44 Cal. 1002 Foll. (*Martineau, J.*) KHAIRATI RAM *v.* MALWA RAM. **5 Lah. 550 : 85 I. C. 377 : 26 Cr. L. J. 537 : A. I. R. 1925 Lah. 266.**

———S. 195 (1) (c)—*S. 463, I. P. Code as used in S. 195 (1) (c) includes all types of forgery.*

S. 463, I.P. Code is used in S. 195 (1) (c) in a comprehensive sense so as to embrace all species of forgery and thus includes a case falling under S. 467. (*Martineau, J.*) KHAIRATI RAM *v.* MALAWA RAM. **5 Lah. 550 : 85 I. C 377 : A. I. R. 1925 Lah. 266.**

———S. 195 (1) (c)—*Section does not apply to a witness.*

Sub-Clause (1) (c) of S. 195 applies to a party to proceedings or suit and not to a witness. (*Broadway, J.*) BHAG SINGH *v.* EMPEROR. **67 I. C. 832 : 23 Cr.L. J. 480 : 4 U. P. L. R. (Lah.) 89 : A. I R. 1922 Lah. 401 (1).**

———S. 195 (1) (c)—"*Any offence under S. 463 I. P. Code" includes all forms of forgery.*

The words "any offence described in S. 463" in S. 195 (1) (*c*) must be taken to mean all forms of forgery under whatever Section of the Penal Code they fall. (*Baker, J. C.*) ISMAIL PANJU *v.* EMPEROR. **A.I.R. 1925 Nag. 337 : 88 I.C. 283 : 26 Cr. L.J. 1115.**

———S. 195 (1) (c)—*Sanction to prosecute—"Produced or given in evidence."*

The words "produced or given in evidence" do not include production of the document for inspection in the sanction proceedings or for translation. (*Schwabe, C. J. Oldfield and Coutts-Trotter, JJ.*) MUNISWAMY MUDALIAR *v.* RAJARATNAM PILLAI. **72 I. C. 340 : 44 M. L. J. 774 : 45 Mad. 928 : 16 L. W. 505 : 24 Cr. L. J. 340 : A. I. R. 1923 Mad. 136 (F. B.).**

———S. 195 (1) (c)—*Revenue Court-Production of forged document—Sanction is necessary.*

Where the applicants for a transfer of patta produce as genuine a forged will before the Deputy Tahsildar in the course of the enquiry held by him, they can be prosecuted under S. 471, I. P. Code only with the sanction of the Deputy Tahsildar. 12 Bom. L. R. 383 Ref. (*Schwabe, C. J. and Krishnan, J.*) MATTAM CHINNA VIRAYYA *In re.* **71 I. C. 63: 16 L. W. 534 : 24 Cr. L. J. 15 : A. I. R. 1923 Mad. 87 (1).**

———S. 195 (1) (c)—*Court can file complaint only against parties.*

For offence mentioned in S. 195 (*c*), the Court has jurisdiction to file a complaint only against parties to the suit. 1925 Rang. 28. Foll. (*Carr and Maung Gyi, JJ.*) SHWE PHWE MAUNG *v.* MA MA HMOKE. **3 Rang. 48 : 3 Bur. L. J. 344 : 85 I. C. 244 :**

CR. P. CODE (V OF 1898), S. 195.

26 Cr. L. J. 500 : A.I.R. 1925 Rang 195.

——S. 195 (1) (c)—*Witness—Prosecution for producing document alleged to be a forgery—No sanction is necessary.*

It is open to a person to prosecute a witness under Ss. 469 and 471 I.P. Code, without obtaining sanction under S. 195 (1) (*c*), Cr. P. Code, or even though a sanction so obtained has been revoked under S. 195 (6). (*Kennedy J. C. and Madgaonkar, A. J. C.*) BASSARMAL AWATMAL *v.* EMPEROR.

15 S. L. R. 149 : 64 I. C. 511 : 23 Cr. L. J 31.

——S. 195 (2)—*The word "includes," as substituted for "means," has widened the scope of "Court",* —(*Sulaiman, and Daniels, JJ. contra*).

Per *Sulaiman, J.*—The word " means" in S. 195, sub-clause (2), of the old Code has been substituted by the word "includes," which suggests that the term "Court" is intended to be a wider expression than a " civil, revenue or criminal Court." If it had not a wider meaning, it was wholly unnecessary to say "but does not include a registrar or sub-registrar etc."

Per *Daniels, J.*—It seems doubtful whether the Legislature, in substituting the word " includes " for " means " in S. 195 (2), really intended to widen the definition. They may have thought that to say that the term "Court" means "a Civil, Revenue or Criminal Court but does not ' include ' a Registrar or Sub-Registrar, implies that Registrar or Sub-Registrar, " would be a Court unless specially excepted from the definition. The word " includes " in an enactment is not always of a wider significance than the word means 1899 App. Cases 99, Rel. on. (*Sulaiman and Daniels, JJ.*) BILAS SINGH *v.* EMPEROR.

23 A. L. J. 845 : 89 I. C. 630 : A. I. R. 1925 All. 737.

——S. 195 (2) *Court—Public Demands Recovery Act—Proceedings under.*

An officer in the collectorate directing refund of the surplus sale proceeds, is not a Court and no sanction is necessary to prosecute certificate debtors, who forge the signature of co-debtors on a Muktarnama empowering the muktear to withdraw the surplus. (*Mullick and Bucknill, JJ.* JHARU LAL *v.* MADAN DAS.

2 Pat. 257 : 74 I. C 713 : 24 Cr. L. J. 809 : A. I. R. 1923 Pat 410.

[Sub-clause (4) has been omitted now].

——S. 195 (3)—*Election commissioners are not Court subordinate to principal Court of ordinary original civil Jurisdiction.*

Election commissioners would not be considered to be subordinate to the principal Court of ordinary original civil jurisdiction under sub-clause (3) because neither appeals ordinarily lie thereto nor are the Commissioners a civil Court. (*Sulaiman and Daniels, JJ.*) BILAS SINGH *v.* EMPEROR.

23 A. L. J. 845 : 89 I. C. 630 : A. I. R. 1925 All. 737.

——Ss. 195 (3) and 478-B—*Order by Judge of Small Cause Court, Madras—Complaint forwarded to Magistrate for inquiry—Scope of I.P.C. S. 193.*

Before an order is passed under S. 476, Cr. P. Code, the Court must hold such an enquiry that its order when sent to the Magistrate will amount to a complaint under S. 200. For that purpose the complaining Court must decide upon and name the witnesses to be examined by the Magistrate. In the case of an offence under S. 193, I. P. C., the complaint itself must state what was the false evidence given without leaving it to the Magistrate to fish about and find it. (*Wallace and Madhavan Nair, JJ.*) KALYANJI *v.* RAMDEEN.

48 Mad. 395 : 86 I. C. 449 : 21 L. W. 664 : 26 Cr.L.J. 801 : A.I.R. 1925 Mad. 609: 48 M.L.J. 290.

——Ss. 195 (3), 476-A, 476-B and 526—*Order under S. 195—Appeal—Transfer by High Court is legal—Court to which transfer is made has for that case exactly the same powers as the Court from which case is transferred.*

Section 526 of the Cr P. C., which clothes the High Court with power to transfer any case from any file to any other file, controls S. 195 (3) and Ss. 476-A and 476-B of the Code.

The Court to which an appeal against an order refusing or granting a sanction for prosecution is transferred is invested with all the powers of the ordinary Court of Appeal or revision for hearing the particular appeal or revision against the order under S. 195, of the Code and can grant or refuse sanction or proceed under S. 476. (*Kinkhede, A. J. C.*) BUDHABAI *v.* ALIBHAI.

26 Cr. L, J. 796 : 86 I. C. 428 : A. I. R. 1925 Nag. 358.

——S. 195 (3)—*Complaint by a Munsif invested with Small Cause powers—Appeal lies to the District Judge and not to the Sessions Judge.*

An appeal from a complaint made by a Judge of the Court of Small Causes, who describes himself as a Munsiff because he was a Munsiff invested with Small Cause powers, for prosecution of a person under Ss.471 and 467, I. P. C., lies to the District Judge and not to the Court of the Sessions Judge. (*Dalal, J. C.*) FATEH BAHADUR *v.* ABDUL RAHIM.

2 O. W. N. 845 : A. I. R. 1925 Oudh 713.

——S. 195 (4)—*Absence of sanction—If a mere irregularity—What sanction should contain.*

The absence of a sanction under S. 195, Cr. P. Code is not a defect that is curable under S. 537, Cr. P. Code.

A sanction to prosecute for an offence under S. 186, I.P.C. should contain the time and place at which the offence was committed and a conviction based on a sanction which omitted the particulars acquired by S. 195 (4) will not be sustained. (*Moti Sagar, J.*) JASWANT SINGH *v.* EMPEROR.

81 I. C. 209 : 25 Cr. L. J. 721.

——S. 195 (5)—*Complaint for an offence under S. 179, I.P.C., was withdrawn by the High Court.*

Where the Sessions Judge forwarded an alleged offender under S. 179, I. P. C., to Dt. Magistrate under S. 482 without giving reasons for not acting under S. 480, Cr. P. C. the complaint was withdrawn by the High Court under S. 195 (5) Cr. P. C. (*Wazir Hasan, A.J.C.*) CHEDI LAL *v.* EMPEROR.

11 O. L. J. 358 : 25 Cr. L. J. 1127 : 81 I. C. 951 : A.I.R. 1924 Oudh 402.

——S. 195 (6)—*Revision—High Court—Interference.*

Under S. 195 the question of grant of sanction can be revised by the High Court only if there is failure or miscarriage of justice when it has already been taken notice of by the two lower Courts. (*Daniels, J.*) JOTI PRASAD *v.* DURGA PRASAD.

L. R. 4 All. 213 (Cr.): 77 I. C. 806 : 25 Cr. L. J. 454 : A.I.R. 1924 All. 461.

——Ss. 195 (6)and 476—*Power of superior Court —Appellate Court can alter sanction.*

If a Magistrate granted sanction under S. 195, Cr. P. Code, the District Magistrate, as the Court to which appeals would ordinarily lie can uphold or modify that sanction, but where an order has been passed under section 476 the District Magistrate has no power to alter it. (*Daniels, J.*) SITA RAM *v.* EMPEROR.

73 I.C. 690 : 24 Cr. L.J. 658: A.I.R. 1923 All. 597.

——S. 195 (6)—*Revision—District Judge granting sanction on refusal by the trial Court—Revision does not lie.*

No revision lies from an order of the District

CR. P. CODE (V OF 1898), S. 195.

Judge granting sanction to prosecute under the Penal Code, S. 193, on the refusal of the trial Code to grant the same. (36 All. 469, Foll.) (*Lindsay, J.*) RAM NARAIN *v.* HARBANS SINGH. **71 I. C. 617 : A I. R. 1923 All. 490 (1).**

——S. 195, (6)—*Second appeal—Refusal of sanction by Asst. Collector—Dismissal of appeal by Commissioner—Second appeal to the Board of Revenue does not lie.*

Where on appeal against an order of the Asst. Collector declining to sanction the prosecution of a person under S. 467, I. P. C. the Commissioner without hearing the parties dismissed the appeal on the ground that he had no power to interfere, though the Commissioner's decision was wrong, it is not competent to the Board of Revenue to interfere with the order of the Commissioner as no appeal or revision lies to the Board against the order. (*Burn, J.M.*) RAJ RANI KUNWAR *v.* SHEO NARAIN LAL. **L.R. 3 A. 78 (Rev.)**

——S. 195 (6) (7)—*Sanction to prosecute—Addl. Dist. Judge—Whether can revoke.*

A sanction to prosecute granted or refused by a Munsif can be revoked or granted by an Additional District Judge to whom the case is transferred by the District Judge. (*Gokul Prasad, J.*) RAM CHARAN *v.* MEWA RAM. **43 All. 409 : 19 A. L. J. 192 : 3 U.P.L.R. (All.) 39 : 61 I. C. 513 : 22 Cr. L.J. 385.**

——Ss. 195 (6) and 439—*Revision—Sanction to prosecute—Application to revoke—Order of Sessions Judge—Revision.*

The order of a Sessions Judge on an application to revoke a sanction is not open to revision by the High Court. (*Stuart, J.*) DEBI SAHAI *v.* RAGHUNATH SAHAI. **19 A. L. J. 399 : 61 I. C. 173 : L.R. 2 A. (Cr.) 56 : 22 Cr. L. J. 349.**

——S. 195 (6) and (7)—*Appeal—Sanction to prosecute—Grant of sanction by single Judge—Appeal to High Court.*

An order of a single Judge of the High Court granting or refusing sanction under S. 195, Cr. P. Code is open to appeal to the High Court. Though generally speaking the Subordinate Court contemplated by S. 195, Cr. P. Code is a court different from the court to which the appeals ordinarily lie, yet for purposes of S. 195 a single Judge of the High Court is subordinate to the appellate Bench. (*Shah, A. C. J. and Crump, J.*) ABDUL LATIF USMAN *v.* HAJI TAR MAHOMED. **24 Bom. L. R. 817 : 68 I. C. 33 : 47 B. 270: 23 Cr. L. J. 497 : A. I. R. 1922 Bom. 455.**

——S. 195 (6)—*High Court—Sanction granted by District Munsif but revoked by the District Court —Powers of High Court.*

Where sanction to prosecute was granted by a District Munsif but was revoked by the District Judge on appeal the High Court can only interfere with the order of the District Judge under S. 115, C.P.C. or S. 177 of the Government of India Act, 36 C. L. J. 265 Foll. (*Newbould and Suhrawardy, JJ.*) JAINUDDIN *v.* KERAMATULLA. **71 I. C. 595 : 24 Cr. L. J. 179 (C.): A. I. R. 1924 Cal. 641 (1).**

——S. 195 (6)—*Limitation—Extension of time.*

The High Court has jurisdiction to extend the time of six months allowed by S. 195 (6) of the Cr. P. Code even though the application for extension of time is made after the expiry of six months and after sanction has ceased to be in force. The High Court however will not extend the time unless good cause is shown. An application for revocation of sanction does not bar the institution by the complainant of proceedings in pursuance of the sanction. (*Sanderson, C. J. and Panten, J.*) RAM SARAN SINGH *v.* CHANDRA MOHAN SAHA. **71 I. C. 222 : 24 Cr. L. J. 94 (C): A.I.R. 1924 Cal. 386.**

CR. P. CODE (V OF 1898), S. 195.

——S. 195 (6)—*Refusal of sanction—By first court and appellate court—Revision—Power of High Court—C. P. Code, S. 115—Government of India Act.*

Where the first court and the appellate Court have both refused sanction, there is no provision for any further appeal or application to the High Court. Even if the High Court has power under S. 115, C. P. Code or S. 107 of the Government of India Act to interfere, it will not do so, where the courts below have refused sanction on a consideration of the entire evidence. 11 C. W. N. 195 ; 5 C. L. J. 222 Ref. 10 C. W. N. 1026 Appr. (*Ghose and Cuming, JJ.*) SARAT CHANDRA MANDAL *v.* RAMSASHI ROY. **36 C. L. J. 265 : 26 C. W. N. 1016 : 69 I. C. 153 : 23 Cr. L. J. 665 : A. I. R. 1923 Cal. 45.**

——S. 195 (6) and (7)—*Revision—Interpretation of section.*

It is doubtful if the words in sub-S. 6 of S. 195 Cr. P. C., "any sanction given or refused under the section," could have been intended to mean anything else but the sanction given or refused in the first instance. If that is so, then only one appeal or rather one application in revision would appear to have been contemplated by this sub-section. Sub-S. 7 provides that for the purposes of the section every Court shall be deemed subordinate only to the Court to which appeals from such Court ordinarily lie. It is very much doubtful if the Legislature intended in cases not covered by S. 439, Cr. P. C. to allow a succession of appeals or applications in revision. A sanction given under S. 195 is not a mere formal matter and before sanction can be granted it is necessary for the Court to see if there is a *prima facie* case against the opposite party. Further the Court will be astute to see that no abuse of the administration of criminal justice takes place 10 C. W. N. 1026 Foll. (*Ghose and Cuming, JJ.*) SARAT CHANDRA *v.* RAMSASHI ROY. **36 Cal. L. J. 265 : 26 C. W N. 1016 : 69 I. C. 153 : 23 Cr. L. J. 665 : A. I. R. 1923 Cal. 45.**

——S. 195 (6)—*Revision—Penal Code, S. 193.*

Where no notice was given to the petitioner before the sanction was given which was given on vague grounds by a Magistrate who had no jurisdiction but to whom the case was transferred by A. D. M., the order giving sanction to prosecute was set aside. Such notice may not be legally necessary but it has been held repeatedly to be highly desirable that it should be given and the omission to give notice taken into consideration with other circumstances may be ground for setting aside on revision such orders as the present. (*Campbell, J.*) CHARN DAS *v.* RODU. **72 I.C. 970 : 24 Cr.L.J. 506 : A.I.R. 1923 Lah. 36 (2).**

——S. 195 (6)—*Appeal—Persons not a party to previous proceedings—Right of, to appeal.*

A person who is not a party to the suit cannot make an application for sanction. A person who was not a party to the previous proceedings in his private capacity has no right to appeal. (*Harrison, J.*) PRABH DAIYAL *v.* GURDIT SINGH. **4 Lah. L. J. 89 : 68 I.C. 46: 23 Cr. L.J. 510: A.I.R. 1922 Lah. 194 (1).**

——S. 195 (6)—*Refusal of sanction—Magistrate specially authorised to hear appeals is not Appellate Court.*

A Magistrate specially authorised to hear appeals under S. 407 (7) Cr. P. Code, is not a court to which an appeal ordinarily lies for purposes of S. 195 (7). 30 C. 394 ; 3 N. L. R. 50 foll. A sanction under S. 195, Cr. P. Code, refused by a Magistrate of a second class cannot be granted under sub-S. (6) by a Magistrate specially empowered to hear appeals under S. 407 (2) of the Code. 30 C. 394; 3 N. L. R. 50 Foll.

CR. P. CODE (V OF 1898), S. 195.

Where a Magistrate failed to specify the false statements on account of which he had granted sanction, or the court before which and the occasion on which the offence was committed, the order of sanction was bad. (*Wilberforce, J.*) MT. JIWANI *v.* EMPEROR.

2 Lah. L. J. 660 : 68 I. C. 412 : 23 Cr. L. J. 572.

——**S. 195 (6)**—*Limitation—Refusal by lower court to grant sanction—Application to higher court—Limitation.*

An apptication to a higher court under S. 195 (6) of the Cr. P. Code though akin to an appeal and though treated as an appeal is not an appeal for the purposes of the Limitation Act, and an application to the appellate court cannot be time-barred, under the Limitation Act. (*Wilberforce, J.*) PUNNA LAL *v.* JAMITA MAL.

1 Lah. 602 : 60 I. C. 33 : 22 Cr. L.J. 177.

——**S. 195 (6)**—*Sanction obtained before Amended Code 1923 came into force—Amended Code abolishing provision as to sanction and revocation—Sanction can be revoked by superior authority even after coming into force of the new Code—General Clauses Act, S. 6.*

Sanction for prosecution granted before the coming into force of the new Code under which the provision as to the grant and revocation of sanction is abolished, can be revoked even after the coming into force of the new Code, the right to apply for revocation of sanction not being a mere matter of procedure but of substantive right. *Gardner* v. *Lucas* (1878) 3 A. C. 582 ; *Attorney-General* v. *Sillem* (10 H.L.C. 704) *and Colonial Sugar Refining Co.* v. *Irving* (1905) A. C. 369 Foll. (*Coutts-Trotter, C. J., Spencer, Kumaraswami Sastry, Beasley and Srinivasa Aiyangar, JJ.*) RAMKRISHNA *v.* SEETHAI AMMAL.

A. I. R. 1925 Mad. 911 (F. B.) : 49 M. L. J. 223.

——**S. 195 (6) and (7)**—*Appeal—High Court—Original Side—Order of single judge for prosecution—Appeal—Costs.*

An order of a single Judge of the High Court on the Original Side granting sanction to prosecute is open to appeal to a Bench of the High Court. (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) MUNISWAMI MUDALIAR *v.* RAJARATNAM PILLAI.

16 L.W. 505: 72 I.C. 340: 45 Mad. 928: 24 Cr.L.J. 340: A. I. R. 1923 Mad. 136 (F. B.) : 44 M. L. J. 774.

——**S. 195 (6) and (7)**—*Appeal—Judge sitting alone on Original Side.*

Appeals ordinarily lie to a Division Bench of the Appellate Side of the High Court from a judge sitting alone on the Original Side, and therefore the power of the High Court to revoke sanction given under S. 195 is given by Sub-S. (7). The additional words of the Sub-S. 7, "that is to say etc.", are merely illustrating and to some extent limiting the words that go before, and the true way of reading that section is that the power to revoke is granted to the Court which ordinarily hears appeals from the Court sanctioning, but, as there may be difficulty in applying that rule, where two Courts have ordinarily the function of hearing appeals or where no Court has that function, provision is made by the rest of the section for those cases.

Per *Schwabe, C. J.*—If it were a question whether the Judge sitting on the Original Side is subordinate to the Bench within the meaning of Sub-S. 6, I incline to the view that he is properly described as subordinate. (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) MUNISWAMY MUDALIAR *v.* RAJARATNAM PILLAI.

45 Mad. 928 : 16 L. W. 365 : 17 I. C. 126 : 1922 M. W. N. 594 : 31 M. L. T. (H. C.) 287 : 24 Cr. L. J, 78 : A. I. R. 1922 Mad. 495 (F. B.) : 43 M. L. J. 375.

——**S. 195 (6)**—*Jurisdiction under—Nature of appellate revisional or special—Sanction to prosecute—Order revoking—Application to High Court under S. 195 (6) to set aside—Maintainability after new Code.*

The petition was under S. 195 (6) of the old Code of Criminal Procedure to set aside an order of a District Magistrate revoking the sanction granted by a Sub-divisional Magistrate, for the prosecution of the respondent for an offence under S. 188, I.P. Code. Objection was taken to the maintainability of the petition on the ground that the new Code of Criminal Procedure (Act XVIII of 1923) had abolished such sanction and that was the law applicable to the case. Petitioner contended that the right to move the High Court under S. 195 (6) for sanction was of the nature of a substantive right, such as a right of appeal, which could not be taken away by any alteration of the processual law. *Held*, that the right conferred by S. 195 (6) of the old Code was not a right in the nature of a right of appeal, that the amendments made by the new Code did not take away any substantive right and merely affected procedure, and that the petition was therefore unsustainable. (*Odgers and Wallace, JJ.*) NATARAJA PILLAI *v.* RANGASWAMI PILLAI.

47 Mad. 384 : 19 L. W. 358 : 34 M. L. T. 56 : 77 I. C. 297 : 25 Cr. L. J. 361 : A. I. R. 1924 Mad. 657 : 46 M. L. J. 274.

——**S. 195 (6)**—*Sanction to prosecute—Application to revoke—Maintainability after the passing of the New Amending Act.*

Where sanction to prosecute had been granted by the lower Court and pending an application for revocation to the superior Court, the New Criminal Procedure Amending Act (XVIII of 1923) had come into force, the application for the revocation could not be sustained. The sanction for cognizance of a complaint for offences specified in S. 195, Cr. P. Code is a matter relating to procedure. (*Krishnan and Waller, JJ.*) SESHA AYYAR *v.* THE PUBLIC PROSECUTOR.

19 L. W. 463 : 34 M. L. T. 353 : 25 Cr. L. J. 702 : 81 I. C. 190 : A. I. R. 1924 Mad. 585.

——**S. 195 (6)**—*Appeal—Sub-magistrate granting sanction.*

Where a Sub-magistrate grants sanction to prosecute under S. 193, I. P. C. he does so as a court ; an appeal lies to the Dt. Magistrate, and an application in revision lies first to the Sessions Judge. (*Krishnan and Wallace, JJ.*) PALLIKUDATHAN *v.* BUDDU GOUNDAN.

(1923) M. W. N. 745 : 76 I. C 647 : 25 Cr. L. J. 215 : 47 M. 229 : A. I. R. 1924 Mad 387 (2) : 45 M. L. J. 553.

——**S. 195 (6)**—*Power of superior Court—Fresh evidence can be taken by the appellate Court.*

The appellate Court which under S. 195 (6) of the Cr. P. Code, has power to revoke or grant sanction has power to take fresh evidence if it thinks necessary. 33 Mad. 90 : 30 Mad. 311, Expl. (*Sadasiva Aiyar and Napier, JJ.*) *In re.* SUBBASARI.

12 L. W. 605 : 61 I.C. 228: 44 M. 47: 22 Cr. L. J. 372.

——**S. 195 (6)**—*Sanction—Court if can go beyond evidence at the trial Court.*

Before granting sanction to prosecute, a court is not restricted to the evidence given at the original trial. It can itself take such steps as it thinks necessary in the case before passing the order. (*Baker, O. J. C.*) PARMANAND PARWAR *v.* KARTAR NATH.

75 I. C. 703 : A. I. R. 1924 Nag. 35.

——**S. 195 (6)**—*Appeal—Order granting sanction—Sanction when to be granted.*

In cases of inveterate enmity between the parties, it is certainly not desirable nor in the interests of justice, that a power like a sanction should be placed in the hands of one of them. S. 195 (6) does not provide for

interference by a third Court but allows only one appeal. 22 I. C. 322, 20 I. C. 213 : 30 I. C. 448 Rel. (*Lyle, A.J.C.*) NAZIR HASAN *v.* MAHOMED YAMIN.
9 O. L. J. 282 : 68 I. C. 414 : 23 Cr. L. J. 574 : A. I. R. 1922 Oudh 225.

——**Ss. 195 (6) and 476**—*Revision.*

No revision can lie against the order directing a prosecution for an offence under section 195, I. P. C. 40 A. 24 : 15 A. L. J. 817 : 48 Bom. 300 at p. 310 : 20 Bom. L. R 928, Foll. (*Daniels, J. C.*) EJAZ ALI KHAN *v.* EMPEROR. **24 O. C. 367 : 66 I. C. 68 : 23 Cr. L. J. 228 : A. I. R. 1922 Oudh 220.**

——**S. 195 (6)**—*Revision.*

The power to grant sanction under section 195 is included among the powers which can be exercised in revision under section 439 of the Code and if this power can be exercised in a proceeding arising out of trial in any of the Courts below it can also be exercised for discharging an order made by a Subordinate Court revoking the sanction granted by the trying magistrate. (*Kanhaiya Lal, J. C.*) BRIJ KUMAR *v.* MANNA.
71 I. C. 681 : 25 O. C. 153 : 9 O. L. J. 662 : 24 Cr. L. J. 217 : A. I. R. 1922 Oudh 18.

——**S.195, cl. (6)**—*Sanction given by Magistrate—Refusal to revoke sanction by the superior Court—Sanction when can be regarded as "given"—Commencement of six months.*

When a sanction is given by a Magistrate on a certain date and the application for its revocation is rejected by the Sessions Judge, the sanction must be taken to have been "given" by the Court which originally granted it and not by the Court which merely refused to revoke that sanction after it had been granted. Hence the date from which the six months limitation prescribed in S. 195, Cl. (6) begins to run is the date on which the sanction was originally granted by the Magistrate. (*Neave, A. J. C.*) MAKHDUM THATER *v.* EMPEROR.
87 I. C. 595 : 1 O. W. N. 752.

——**S. 195 (6)**—*Appeal—Application to Superior Court is not an appeal.*

S. 195 (6) of the Code confers on a Superior Court the power to revoke or grant a sanction given or refused by a Subordinate Court but an application to the Superior Court is not an appeal. (*Daniels, A. J. C.*) NAWAB ALIKHAN *v.* EMPEROR. **24 O. C. 165 : 63 I. C. 409 : 22 Cr. L. J. 649.**

——**Ss. 195, cl. (6) and 476**—*Power of superior Court—Additional evidence can be taken by Sessions Judge.*

Whatever may be the law under O.XLI, R. 27 C.P. Code the Court exercising its powers as an Appellate Court under S. 195 (6) has got ample powers to examine any number of witnesses, or to take any evidence if he thinks it fit in order to satisfy itself whether it should or should not grant sanction or direct the re prosecution of any person. 58 I. C. 826 (1919) Dist. (*Sultan Ahmed, J.*) RAMDHARI AHIR *v.* EMPEROR. **4 Pat. L. T. 370 : 71 I. C. 997 : 1922 P. H. C. C. 29 : 24 Cr. L. J. 277 : A. I. R. 1922 Pat. 52.**

——**S. 195 (6)**—*Revision—High Court—Interference.*

The High Court has power to interfere with the order of an appellate Court granting or revoking sanction, whether,in upsetting or affirming the order of the Primary Court under S. 195 (6) of the Code (*Jwala Prasad, J.*) RAMNANDAN *v.* PUBLIC PROSECUTOR. **22 Cr. L. J. 467 : 61 I. C. 995 (Pat).**

——**S. 195 (6)**—*Second appeal—Divisional Court.*

The order under S. 195 of the Township Court can be considered by the District Court, but once the latter

Court has passed an order under section 195, Cl. 6 the only remedy of the party aggrieved is to move the High Court probably on revision and the Divisional Court has no right to deal with the case. This latter Court has in Civil matters no right to revise or hear appeals from decisions of Township Courts, even when they have been on appeal before the District Court. If the original proceedings are held in the Sub-Divisional or District Court, then it would seem that the Divisional Court has jurisdiction, but only when it is the Court intended by section 195 (7) Cr.P. Code. 30 Mad. 382 (F.B.) Foll. (*Duckworth, J.*) KARUPIAH NAIDU *v.* R. M. S. MUTUSWAMI.
1 Bur. L. J. 155 : 11 L. B. R. 418 : 72 I. C. 975: 24 Cr. L. J. 511 : A. I. R. 1923 Rang. 12.

——**S. 195 (7)**—*Superintendent of Police—Subordination.*

The words of the relevant section of the Police Act, do make the Superintendent of Police of a District subordinate to the Magistrate of that District. (1905) 7 All. 292, Foll.(*Mears, C. J. and Piggott, J.*) CHHOTELAL *v.* CHEDILAL. **45 All. 135 : 73 I. C. 341: L.R. 3 A. 176 Cr.: 24 Cr.L J. 597:A.I.R. 1923 All. 149**

——**S. 195 (7)**—*Sanction to prosecute—Addl. Dist. Judge—Whether can revoke.*

A sanction to prosecute granted or refused by a Munsif can be revoked or granted by an additional District Judge to whom the case is transferred by the District Judge. (*Gokul Prasad, J.*) RAM CHARAN *v.* MEWA RAM. **43 All. 409: 19 A. L. J. 192: 3 U. P. L. R. All. 39 : 61 I. C. 513 : L. R. 2 A. Cr. 141 : 22 Cr. L. J. 385.**

——**S. 195 (7)**—*Appeal—Order by a single Judge of High Court exercising original jurisdiction.*

An appeal lies to a Bench of two Judges of the High Court from an order granting or refusing to grant sanction for prosecution for giving false evidence though the order is passed by a single Judge of the same High Court exercising original jurisdiction, as under clause 15 of the Letters Patent, appeals would ordinarily lie from the judgments of a single Judge exercising Original Civil Jurisdiction to a Bench of two Judges which is the Court of Appeal on the Original Side. It may be that sub-section (7) really provides for the three classes of cases mentioned in clauses (*a*), (*b*) and (*c*) of that sub-section. But those specific provisions are not restrictive of the general rule contained in that sub-section defining subordination for the purpose of S. 195 (*Shah, Ag. C. J. and Crump, J.*) ABDUL LATIF *v.* HAJI TAR. **47 Bom. 270 : 24 Bom. L. R. 817 : 68 I. C. 33 : 23 Cr. L. J. 497 : A. I. R. 1922 Bom. 455.**

——**S. 195 (7)**—*Munsif to whom subordinate.*

For the purposes of S. 195, Cr. P. Code, a Munsif is subordinate to the Senior Subordinate Judge and not to the District Judge. The latter is not competent to grant sanction for an offence committed before the Munsif. (*Martineau, J.*) KANHAYA LAL *v.* ROSHAN MAL. **23 Cr. L. J. 720 (Lah.) : 69 I. C. 448 : A. I. R. 1924 Lah. 356.**

——**S. 195 (7)**—*Police is not subordinate to District Magistrate.*

Where the District Magistrate granted sanction under section 182 for false report to police and the Sessions Judge refused to deal with it on the ground that District Magistrate passed the order as head of the Police. The High Court revoked the sanction holding that the Sessions Judge had the power to revoke it. It was further held by the High Court that the police are not subordinate to District Magistrate within the section. Although police officers in district are generally subordinate to the District Magistrate the

subordination contemplated by section 195 of the Cr. P. C. is not such subordination. That subordination contemplates some superior officer of police. (*Abdul Raoof, J.*) KHAZAN SINGH *v.* KIRPA SINGH.
4 Lah. 130 : 5 L. L. J. 372 : 73 I. C. 779 : 24 Cr. L. J. 683 : A. I. R. 1923 Lah. 341.

——**S. 195 (7)**—*Small Cause Court.*

A Subordinate Judge or Munsiff exercising the powers of a Small Cause Court is subordinate for the purposes of section 195, Cr. P. Code to the District Judge. (*Broadway, J.*) BHAG SINGH *v.* EMPEROR.
4 U. P. L. R. (Lah) 89 : 67 I. C. 832 : 23 Cr. L. J. 480 : A. I. R. 1922 Lah 401 (1).

——**S. 195 (7) and (1) (a)**—*Appeal—First Class Magistrate—Subordination.*

The petitioner made an application to the District Magistrate for sanction under S. 195, as an authority to which Mr. Date *i e.* the Court whose order was disobeyed, would be subordinate. The District Magistrate was of opinion that Mr. Date made his order as a First Class Magistrate, and that the Court to which he would be subordinate in that capacity would be the Sessions Court to which appeals from his decisions as a First Class Magistrate would ordinarily lie, and therefore refused to entertain the application. *Held*, that under clause (a) sub-section 1 of S. 195 if a public servant making the order is a Court, in respect of that order, the Court to which that Court would be subordinate would be the Court to which appeals would ordinarily lie, that is, in the present case, the Sessions Court and not the District Magistrate. The order of the District Magistrate was therefore right. (1918) 42 M. 64 Foll. (*Shah, A. C. J. and Crump, J.*) *In re* BADRUDDIN SARFUDDIN. **47 Bom. 102 24 Bom. L. R. 810 : 68 I. C. 416 : 23 Cr. L. J. 576 : A. I. R. 1922 Bom. 453.**

——**S. 195 (7) (a)**—*Contradictary Statements in two different Courts—Sanction for prosecution under 193, I. P. C. should be given by that Court to which both Courts are subordinate.*

Where a witness makes contradictory statements in two different Courts, the sanction for prosecution under S. 193, I. P. C. must be given by the Court to which both the Courts are subordinate. For the purposes of giving sanction, 2nd class Sub-Magistrate is subordinate to District Magistrate. (*Abdul Qadir, J.*) WARYAM SINGH *v.* EMPEROR.
67 I. C. 817 : 3 L. L. J. 589 : 23 Cr. L. J. 465.

——**Ss. 196, 202 and 203**—*Magistrate initiating proceedings, is competent to try the case.*

There is no bar under the Cr. P. Code for a Magistrate who has taken part in the initiation of the proceedings to take mere cognizance of the criminal case. (*Walmsley and Suhrawardy, JJ.*) MD OZIULLAH *v.* BENI MADHAB. **50 Cal. 135 : 26 Cal. W. N. 878 : 73 I. C. 239 : 36 Cal. L. J. 180 : 24 Cr L. J. 111 : A. I. R. 1922 Cal. 298.**

——**S. 196**—(*Amended by Act. 39 of 1920*)—*Punjab Electoral Rules, R. 5 (4)—Lodging false return of election expenses—Magistrate cannot hold judicial enquiry in absence of complaint from Government.*

A Magistrate has no jurisdiction to hold a judicial inquiry undet rule 5 (4) of the Punjab Electoral Rules as to whether a candidate at an election had lodged a false return of his election expenses where there is no complaint by the Government in the matter. (*Harrison, J.*) LABH SINGH *v.* NARINJIAN DAS.
6 Lah. 188 : A. I. R. 1925 Lah. 449.

——**S. 196**—*Nature of sanction—Penal Code S. 124A.*

The section does not lay down any particular form

in which the sanction should be accorded, and sanction must be deemed sufficient if it names the persons to be prosecuted and specifies the sections under which they are alleged to have committed the offence, as also the period of their activity. (See 15 Cal. L. J. 517.) The mere fact that the sanction does not specify the utterances made by the accused or the songs which they are alleged to have recited does not in any way affect its validity. (*Moti Sagar, J.*) KISHEN SINGH *v.* EMPEROR. **25 Cr. L. J. 279 : 76 I. C. 871 : A. I. R. 1923 Lah. 333.**

——**S. 196**—*Objection.*

Any objection on ground of defect in granting sanction ought to be taken as early as possible. (*Odgers and Wallace, JJ.*) M. P. NARAYAN MENON, *In re.* **25 Cr. L.J. 401 : 77 I.C. 481 : A. I. R. 1925 Mad. 106.**

——**S. 196**—*Sanction without naming person to whom it is addressed is sufficient.*

Where the order ran as follows :—His Excellency the Governor in Council in exercise of the powers conferred on him by S. 196, Cr. P. Code, hereby sanctions the prosecution of the said persons before a Special Judge for offence punishable S. 121, Indian Penal Code. *Held*, the order was sufficient in law. Even if there was a defect, it was an irregularity not vitiating the conviction. (*Oldfield, and Ramesam, JJ.*) KUTTY MOOPAN, *In re.*
17 L. W. 100 : 73 I. C. 155 : 24 Cr. L. J. 539 : A. I. R. 1923 Mad. 328 : 44 M. L. J. 166.

——**S. 196**—*Sanction must specify sections.*

"The sanction should be specifically directed to the particular section of Chapter VI, Penal Code, in respect of which proceedings are to be taken, and the order or authority should be proceeded by and be the result of a deliberate determination that proceedings shall be taken in respect of a particular section or particular sections of the chapter and no other." It would be opposed to the true intendment of S. 196, Cr. P. Code, for the Local Government, by its order to give its legal or other advisers a roving power to determine under what sections proceedings should be taken. (*Oldfield and Krishnan, JJ) In re* KUNHI KADIR.
15 L. W. 311 : 65 I. C. 859: (1922) M. W. N. 71 : 30 M. L. T. (H. C.) 125 : 23 Cr. L, J. 203 : A. I. R. 1922 Mad. 126: 42 M. L. J. 108.

——**S. 196**—*Conviction for a different offence from that for which the prosecutionwas ordered is bad.*

An order for prosecution having been ordered for an offence, the Courts have no jurisdiction at all to take cognizance of another offence. An authority to prosecute for a definite offence could not be any authority for a prosecution for an offence which quite clearly could not be within the terms of the order. 2 Bur. L. J. 196 ; 44 M. L. J. 166, Dist ; 37 C. 46 , 489, et esq, Ref. (*Brown, J.*) U. PATHADA *v.* EMPEROR.
3 Bur. L.J. 178 : 84 I.C. 245 : A.I.R. 1924 Rang. 371.

——**Ss. 196-A and 195**—*No sanction is necessary if S. 195 (3) applies.*

Under the proviso of S. 196 A of the Code of Criminal Procedure a sanction under that section for prosecution for criminal conspiracy to commit a non-cognizable offence is not necessary where the provisions of sub-section (3) of S. 195 are applicable. (*Newbould and Suhrawardy, JJ.*) KALI SINGH *v.* EMPEROR.
50 Cal. 461 : 75 I. C. 533 : 24 Cr. L. J. 949 : A. I. R. 1924 Cal. 53.

——**S. 196-A**—*Criminal conspiracy—Cheating in pursuance of conspiracy—Sanction—Putting in the form of charge specific acts is not improper.*

There is no reason why, because the accused might have been charged with an offence for the prosecution

CR. P. CODE (V OF 1898), S. 196-A

of which the sanction of the Govt. is required, he should not be charged with and tried for offences in respect of which no sanction is required. Where the accused is charged with an offence of conspiracy and acts of cheating in pursuance of conspiracy it is open to the prosecution to prove such acts in order that from them the existence of the conspiracy may be proved and the charge is not bad. Once a charge of conspiracy is framed, anything done in pursuance of the conspiracy, can be tried at the trial for conspiracy. It is not an irregularity or an improper exercise of discretion in putting in the form of charges specific acts specially relied on as against each individual accused to show that they joined in the conspiracy. S. 196-A of the Cr. P. Code only renders sanction necessary when the prosecution is for criminal conspiracy punishable under S. 120-B of the Indian-Penal Code. Prosecution for the abetment by way of conspiracy punishable under S. 109 of the said Act requires no sanction. The legality of joint trial in a criminal case depends on the accusation and not on the result of the trial. 42 Cal. 957 : 21 C. L. J. 331, Foll. 25 Mad. 61 : L. R. 28 I. A. 257 Dist. (*Newbould, and Suhrawardy, JJ.*) ABDUL SALIM *v.* EMPEROR.
49 Cal. 573 : 34 Cal. L. J. 279 : 69 I. C. 145 · 26 C. W. N. 680 : 23 Cr. L J. 657 : A. I. R. 1922 Cal. 107.

——S. 196-A.—*Section does not apply to abetment by conspiracy under S.* 109.

S. 196-A, Cr. P. Code, applies only to a prosecution for conspiracy punishable under S. 120-B of the Penal Code, and not for abetment by conspiracy punishable under S. 109 of the Penal Code. (*Robinson C.J. and Godfrey, J.*) ABDUL RAHMAN *v.* EMPEROR.
3 Rang. 95 : 89 I C. 305 : 26 Cr. L.J. 1329 : A. I. R. 1925 Rang. 296.

——S. 196-A.—*Accused not a party to any proceeding—Consent of or complaint by Local Government is necessary.*

No Court should take cognizance of an offence punishable under S. 120-B, I. P. C., and committed by a person who is not a party to any proceedings. without the consent of the Local Government if the case is one under the second sub section of S. 196-A, and, in respect of charge falling within the purview of sub-section (1) of S. 196-A without a complaint by the Governor-General in Council or the Local Government, (*Robinson, C.J. and Godfrey, J.*) ABDUL RAHMAN *v.* EMPEROR. **3 Rang 95 · 89 I. C. 305 : 26 Cr. L. J. 1329 : A. I. R. 1925 Rang. 296.**

——S. 196-A. (1)—*Proviso* 1 *to S.* 196-*A does not apply to Sub-S.* (1) *of S.* 196-*A.*

A charge falling under the first sub-section of S. 196 A cannot be taken cognisance of without a complaint by the Governor-General in Council or of the Local Government even in respect of a person who was a party to a proceeding. (*Robinson, C. J. and Godfrey, J.*) ADDUL RAHMAN *v.* EMPEROR. **3 Rang 95 : 89 I. C. 305 : 26 Cr.L.J : 1329: A.I.R. 1925 Rang. 296.**

——S. 196-B—*Summons and charge under S.* 120-*B, I. P C.—Government sanction not taken—Fact. disclosing offence under S.* 109—*Charge can be altered to one under S.* 109.

If the facts disclosed on the evidence show a *prima facie* case only under S. 120 B, I. P. C., then the whole proceedings will be void *ab initio* having regard to the provisions of S. 196-B, Cr. P. Code, if the consent of the Local Government is not previously obtained. But if the facts disclosed show a *prima facie* case under S. 109, I. P. C., the proceedings are competent without such consent. It makes no difference that the summons to the accused was under the wrong section.

CR. P. CODE (V OF 1898), S. 197.

The whole test is not under what sections the accused are summoned but whether the proceedings are competent or not. The accused was summoned under S. 120-B, and charge was framed under that section. No previous consent of theLocal Government was obtained. The facts disclosed an offence under S. 109. *Held*, that the charge could be altered to one under S. 109. (*Greaves and Duval, JJ.*) BIROO SARDAR *v.* Y. C. ARIFF. **26 Cr. L. J. 302 : 84 I. C. 446 : A. I. R. 1925 Cal. 579.**

——S. 197—*Changes.*

[(1) Sub-section (1) has been re drafted so as to include Magistrates and officers removable by the Secretary of State within its scope.

(2) Sanction can be given now only by the Local Government and cannot be delegated.—Ed.]

——S. 197—*Prosecution of chairman of Union Committee—Local Government's sanction is unnecessary.*

The sanction of the Local Government under S. 197 is not necessary for the prosecution of the chairman of a Union Committee of whom it cannot be said that he is not removeable from his office save by the Local Government. (*Walmsley and Mukerjee, JJ.*) MAHAMMAD YASIN *v.* EMPEROR. **52 Cal 431 : 88 I. C. 602 : 29 C. W. N. 650 : 26 Cr. L. 1178 : A. I. R. 1925 Cal 782.**

——S. 197—*Sanction—Abuse of powers by a Magistrate.*

Where a Magistrate is alleged to have abused powers vested in him by law, no Court will take cognizance of a complaint against him, except with a sanction under S. 197. (*Newbould and Suhrawardy, JJ.*) BAISNABCHARAN TARAN *v.* SUKHAMAGY CHAUDHRI BAHADUR. **25 C. W. N. 956 : 62 I. C. 825 : 22 Cr. L. J. 585.**

——S. 197—*Municipal Secretary—Sanction is not necessary.*

A complaint against the Secretary of a Municipality for an offence does not require sanction under this section. (*Abdul Kadir, J.*) KISHEN SINGH *v.* GIRDHARI LAL. **23 Cr. L. J. 750 : 69 I. C. 638 : A. I. R. 1924 Lah 310.**

——S. 197—*Sanction of Local Government—Delegation of authority.*

Where prosecutions under Ss. 384 and 161, I. P. C. were instituted against a Zilladar without the sanction of the Local Govt. but with the sanction of the Chief Engineer, although the Local Govt. had delegated the power of appointment, suspension and removal of Zilladars to the Chief Engineer. *Held*, as the accused was appointed at a time when the powers of appointment, suspension, and removal of Zilladar were vested in the Local Govt. alone the cases could not proceed without the necessary sanction under S. 197, Cr. P. Code. (*Abdul Raoof, J.*) CROWN *v.* KHAN CHAND. **24 Cr. L. J. 411 : 72 I. C. 523 : A. I. R. 1922 Lah. 337.**

——Ss. 197 and 439—*Order under S.* 197 *is an executive order—Revision does not lie.*

The granting of sanction under S. 197, Cr. P. Code, is clearly not a judicial but an executive act, and it is difficult to see how it can assume a different character because sanction is granted by a Court or merely because the Court regards it as such. Under the revisional powers conferred by the Cr. P. Code, the High Court has no authority to interfere with an order made by a Subordinate Court granting or refusing sanction under S. 197. (*Martineau, J.*) ALI HUSSAIN KHAN *v.* HARCHARAN DAS. **2 L. 305 : 65 I. C. 545 : 4 P. W. R. 1922 (Cr.) : 35 P. L R. 1922 : 4 U. P. L. R. (Lah.) 147 : 23 Cr. L. J. 113 : A. I. R. 1922 Lah. 146.**

CR. P. CODE (V OF 1898), S. 197.

——— **S. 197**—*Nature of order of sanction is an executive one—Reasons if to be stated.*

Action taken under S. 197 is more of the nature of an executive than judicial action. The fact that reasons are not stated does not constitute an irregularity. An additional Dt. Magistrate on whom powers of District Magistrate are conferred can order sanction under S. 197. (*Wallace, J.*) KAKARLA CHINA CHENDRAYYA *v.* MADDUKURI SUBBARAYUDU.

17 L. W. 226 : (1923) M. W. N. 77 : 71 I.C. 244 : 24 Cr. L. J. 116 : A. I. R. 1923 Mad. 338.

——— **S. 197**—*Forest Ranger—Sanction of the Government is not necessary.*

The Forest Ranger not being a public servant not removable from his office without the sanction of the Government of India or the Local Government, no sanction under section 197 is necessary before a Court can take cognisance of the offence. (*Kotwal, A. J. C.*) KRIPA SINGH *v.* EMPEROR. **23 Cr. L. J. 397 : 67 I. C. 349 : A. I. R. 1922 Nag. 121.**

——— **S. 197**—*U. P. Dist. Boards Act* (1922), *Ss.* 33, 55, 89 *and* 31—*Member of Dt. Board appointed to sell impounded cattle is "public servant."*

A member of District Board in U. P. legally appointed by that Board to be an officer for the purpose of holding a sale by auction of an impounded cattle under the provisions of S. 14 of the Cattle Trespass Act, 1871, is a public servant who is not removable from his office save by or with the sanction of the Local Government, within S. 197. (*Dalal, J. C and Wazir Hasan, A. J. C.*) EMPEROR *v.* KRISHNA KANT.

28 O. C. 155 : 12 O. L. J. 498 : 2 O. W. N. 395 : 88 I. C. 517 : 26 Cr. L. J. 1157 : A. I. R. 1925 Oudh 565.

——— **S. 198**—*Change.*

[A proviso has been added that in the case of pardanashin women, minors, and persons disabled from making complaint some other person may make the complaint with the leave of the Court-Ed].

——— **S. 198**—*Abetment of bigamy—Complaint of person aggrieved, necessity of.*

Under section 198 of Cr. P. Code the complaint of the person aggrieved is necessary only in the case of the substantive offences mentioned in the section. It is not necessary in the case of an abetment of any of these offences. (*Kanhaiya Lal, J.*) MUNIR *v.* EMPEROR. **L. R. 6 A. 209 (Cr.)**

——— **S. 198**—*Petition and order to be read together.*

The order of sanction and the petition asking for sanction should be read together. (*Newbould and Suhrawardy, JJ.*) KALI SINGH *v.* EMPEROR.

50 Cal. 461 : 75 I. C. 533 : 24 Cr. L. J. 949 : A. I. R. 1924 Cal. 53.

——— **S. 198**—*Person aggrieved--Meaning of—Complaint by husband—Imputation of unchastity to wife.*

Where a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the magistrate may take cognizance of the offence under section 198, Cr. P. Code. 14 M. 379 : 25 B. 451, Foll. (*Scott-Smith and Harrison, JJ.*) GURDIT SINGH *v.* EMPEROR.

5 Lah. 301 : 26 Cr. L. J. 342 : 84 I. C. 646 : A. I. R. 1924 Lah. 559.

——— **S. 198.**

No specific reference to every exhibit need be made in a complaint of defamation. (*Odgers and Hughes, JJ.*) K. BURKE *v.* T. C. W. SKIPP.

18 L. W. 718 : 33 M. L. T. 168 : (1923) M. W. N. 913 : 25 Cr. L. J. 641 : 81 I. C. 129 : A. I. R. 1924 Mad. 340 : 45 M. L. J. 754.

——— **S. 198**—*'Person aggrieved'—Husband of a defamed wife.*

CR. P. CODE (V OF 1898), S. 199.

Where a married woman is defamed by imputation of unchastity and the civil rights of the parties are not in question, her husband is a 'person aggrieved' under S. 198 of the Code of Criminal Procedure and has the right to prefer a complaint of defamation. (*Venkatasubba Rao, J.*) B. APPANNA *v.* P. AKKANNA.

20 L. W. 921 : 26 Cr. L. J. 521 : 85 I. C. 361 : A. I. R. 1925 Mad. 320 : 47 M. L. J. 746.

——— **S. 198**—*Complaint by superior is insufficient.*

Conviction under Section 500, I. P. C. is illegal when a complaint by some person aggrieved is not made ; a letter of the Prosecuting Inspector cannot be treated as an adequate complaint where the aggrieved Sub-Inspector made no complaint since there is no authority for holding that his official superior could take action. 18 P. R. 1889 Appr. (*Simpson, A. J. C.*) GAYA BARHAI *v.* EMPEROR. **26 O. C. 44 : 9 O. L. J. 342 : 69 I. C. 81 : 4 U. P. L. R. (O.C.) 81 : 23 Cr. L. J. 641 : A. I. R. 1923 Oudh 4.**

——— **S. 199**—*Change.*

(1) A proviso has been added that in cases of minority or other disability of minor, some other person may complain.

(2) A person other than the husband giving complaint must get the leave of Court.—Ed.

——— **Ss. 199 and 345**—*Person having care of woman cannot compound it.*

A person having the care of a woman on behalf of her husband is competent to prefer a complaint under S. 498, I. P. C. But he cannot compound the offence and an acquittal based on such composition is illegal. (*Broadway, J.*) MAHBUB ALI KHAN *v.* EMPEROR.

4 Lah L. J. 488 : 74 I. C. 444 : 24 Cr. L. J. 780 : A. I. R. 1924 Lah. 330.

——— **S. 199**—*"Husband of the woman"—Marriage dissolved—Effect—Penal Code, Ss.* 497 *and* 498.

The dissolution of the marriage does not take away from the complainant the right to lodge a complaint. The words in section 199 "the husband of the woman" are simply intended to point to the particular person who has the right to start proceedings and that a man does not cease to be "the husband of the woman" within the meaning of section 199, merely because the marriage tie has been dissolved. The right to start proceedings is given to him simply because he is the person aggrieved. (*Chevis, J.*) DHANNA SINGH *v.* EMPEROR. **16 P. W. R. 1922 (Cr.) : 67 I. C. 734 : 23 Cr. L. J. 462 : A. I. R. 1922 Lah. 477.**

——— **S. 199**—*Minor husband.*

Whereas in some cases the Code does not provide for representation of a minor (see for instance S. 345 (iv), there is no such provision in S. 199.) There is nothing to prevent a husband under the age of 18 from lodging a complaint. Except where the husband is absent the father-in-law cannot lodge a complaint even though the husband be a minor. (*Chevis, J.*) WALIA *v.* EMPEROR. **68 I. C. 837 : 23 Cr. L. J. 613 : A. I. R. 1922 Lah. 168.**

——— **S. 199.**

Absence of complaint, oral or written, that the accused's purpose was to have illicit intercourse with her daughter or the statement as to puberty, is fatal to conviction under S. 498, Penal Code. (*Spencer, J.*) ARUNACHALAM CHETTY *In re.* **33 M. L. T. 268 : (1923) M. W. N. 876 : 74 I. C. 949 : 24 Cr.L. J. 837 : A. I. R. 1924 Mad. 323 : 45 M. L. J. 543.**

——— **S. 199**—"Complaint," must be to Magistrate and not Police. (*Krishnan, J.*) ARUMUGA MUDALIAR, *In re.*

16 L. W. 494 : 31 M. L. T. 254 : (1922) M. W. N. 801: 68 I. C. 624 : 23 Cr. L. J. 592 : A. I. R. 1923 Mad. 59 : 43 M. L. J. 564.

CR. P. CODE (V OF 1898), S. 199.

——Ss. 199, 200—*Complaint — Examination of complainant not part of complaint.*

A complaint is something anterior to and distinct from the examination on oath of the complainant by a Magistrate taking cognizance of a complaint under S. 200. Such an examination cannot be regarded as part of the complaint for the purposes of S. 199. (*Wallis, C. J.*) PEDDA ANJINIGADU *In re.*
13 L. W. 695 : 64 I. C. 282 : (1921) M. W. N. 514 : 22 Cr. L. J. 762 : A. I. R. 1922 Mad. 353.

——S. 199—*Adultery—Absence of complaint by husband.*

Where the husband has elected not to empower the Magistrate to punish the accused for adultery and the accused was found to have committed house-trespass with intent to commit adultery, a charge of an attempt to commit adultery comes under Sec. 199. An intent to commit an offence punishable with imprisonment is not the same thing as an attempt to commit such offence. Intent exists before the attempt is begun. A mere intent is not by itself an offence ; therefore where it is used as essential to bring a particular act within the category of criminal offences, and proof has been given that such an act, accompanied by such an intent, has been committed, the offence is complete, even though the further act intended may not have been committed or even attempted. (*Stanyan, A.J.C.*) EMPEROR *v.* DHANTUA LODHI. **4 N. L. J. 245.**

——S. 199—*Penal Code, Ss.* 494 *and* 498—*Complaint in respect of offence under S.* 494, *covers complaint under S.* 498.

S. 199 of the Cr. P. Code only requires that in the case of an offence under S. 498, Penal Code, there should be a complaint by the husband in respect of the facts constituting the offence. It cannot be said that there was no such complaint merely because the husband alleged additional facts which if proved, would have amounted to the graver offence under S. 494 of the Penal Code. (*Daniels, A. J. C.*) BRAHMA DAT *v.* EMPEROR.
22 Cr. L. J. 742 : 64 I. C. 134 : 24 O. C. 232.

——S. 200—*Change.*

[A new proeiso a a has been added to the effect that when the complaint is made by a Court or sublic servant there shall be examinatfon of the complaint.]

——S. 200—*District Magistrate to whom case is sent for being transferred can legally dismiss it.*

The complaint was originally before a Deputy Magistrate. The Deputy Magistrate sent the case to the District Magistrate with a view to the District Magistrate transferring it to another court. Instead of transferring it to another court the District Magistrate after examining the record came to the conclusion that the complaint was wholly without foundation and dismissed it. *Held*, the order passed by him was not passed without jurisdiction. (*Daniels, J.*) GOVIND PRASAD SINGH *v.* RAM DAS DUSADH.
L. R. 5 A. 70 (Cr.) : 81 I. C. 43 : 25 Cr L.J. 555 : A. I. R. 1924 All. 666 (1).

——S. 200—*Contravention order directing inquiry before examining complainant and directing his prosecution on report of police is illegal.*

Direction for an enquiry before the complainant has been examined on oath is illegal. The law very properly enjoins that the court having jurisdiction must examine the complainant so as to think out for itself whether the complaint is true or false. Such a decision cannot be left by the court to some other court or police authority. (*Dalal, J.*) REKHA CHAMAR *v.* EMPEROR. **L. R. 5 A. 86 (Cr.) : 83 I. C. 736 : A. I. R. 1924 All. 664 (1).**

CR. P. CODE (V OF 1898), S. 200.

——S. 200—*Failure to examine complainant—If vitiates trial—Prejudice.*

The failure to examine the complainant does not vitiate the trial. Where the accused has not been prejudiced, the omission is only an irregularity and S. 537, applies. (*Lumsden, J.*) MEHR CHIRAGH DIN *v.* EMPEROR. **4 Lah. 359 : 76 I. C. 189 : 25 Cr. L. J. 125 : A. I. R. 1924 Lah. 258.**

——S. 200—*Omission to take sworn statement is a serious irregularity.*

The omission to take a sworn complaint is a serious irregularity which in general prejudices the complainant. To say that the complainant would not have been prejudiced on the ground that there was a prior enquiry is to prejudice the complainant's case without having all the materials, the law entitled him to place before the Court. 13 Bom. 590, Ref. to. (*Ramesam, J.*) RAMASWAMI IYENGAR, *In re.* **16 L. W. 220 : (1922) M. W. N. 681 : 69 I. C. 371 23 Cr. L. J. 691 : A. I. R. 1922 Mad. 443 : 43 M. L. J. 710.**

——S. 200—*Examination of complainant—If deposition to be read over.*

The principle underlying S. 360 (i) of the Cr. P. Code should be made applicable on grounds of public policy to the substance of the examination of a complainant on oath if the accuracy of the record of such examination is to be vouchsafed, particularly when it is to be utilized as a basis for a possible perjury in future, for it would be unsafe to use against a complainant what on the face of it purports to be only a substance and not the full version of his examination. But under the present state of the law, it cannot be contended that the substance of the oral examination is inadmissible in evidence under S. 91 of the Evidence Act in proof of the statement therein contained. (*Kinkhede, A.J.C.*) BHAGIRATHI BAI *v.* EMPEROR.
89 I. C. 713 : 26 Cr. L. J. 1401 (Nag.).

——Ss. 200 and 202—*Dismissal, when proper.*

A Magistrate cannot dismiss a complaint without an examination of the complainant challenging a police investigation. (*Jwala Prasad, J.*) KARTICK PATHAK *v.* EMPEROR. **2 Pat. L. T. 142.**

——S. 200—*Failure to examine—Irregularity.*

The failure to examine a complainant under S. 200 of the Code is a mere irregularity which can be subsequently cured and does not vitiate the proceedings. (*Jwala Prasad, J.*) ABDUL ALI *v.* EMPEROR.
1 Pat. L T. 446 : 59 I. C. 41 : 22 Cr. L. J. 9.

——S. 200—*Examination of complainant—Object of.*

When a complaint is in writing and is sufficiently clear, it would be a sufficient compliance of S. 200 if the Magistrate read it over to the complainant and the complainant on oath is asked to subscribe it. It is only when the written complaint is obscure or vague that the Magistrate is bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegation on which the complaint is made. (*Kincaid, J. C. and Aston, A J. C.*) MAHOMED *v.* MAHOMED IDRIS. **26 Cr. L. J. 1101. 88 I. C. 189 : A. I. R. 1925 Sind 328.**

——S. 200—*Examination of complainant—Obligatory—Transfer of case for enquiry only—Illegal.*

The provisions of S. 200, Cr. P. Code, make it illegal for a Magistrate to whom a complaint is presented to deal with it in any way without examining the complainant. A transfer of a case to a subordinate Magistrate merely for the purpose of an enquiry is not permissible. (*Kennedy, J. C. and Kemp, A. J. C.*) MULCHAND PAMANMAL *v.* KESSOOMAL RAMCHAND.
23 Cr. L. J. 243 : 66 I. C. 179 (1) : 15 S. L. R. 200.

CR. P. CODE (V OF 1898), S. 202.

——S. 202—*Main changes.*

(1) Third class Magistrates can now inquire into the case personally.

(2) "Inquiry or investigation" have been substituted for "previous local investigation" and evidence can be taken in such inquiry.

(3) Presidency Magistrates can now act under this section without special authorisation.

(4) The enquiry can now be made if the Magistrate thinks fit.

——S. 202—*Inquiry and local investigation—Magistrate cannot have both.*

Under S. 202 the Magistrate had the option of only one out of two alternatives, namely, either to enquire into the case himself, or direct a previous local investigation. There is nothing in S. 202, which empowered the learned Magistrate to have recourse to both the alternatives. His order, therefore, directing local investigation is irregular. And if it be found that any material obtained through this irregular course acted on the mind of the Magistrate in arriving at a conclusion, prejudicial to the accused persons, it must be *held*, that the accused persons must be prejudiced in consequence of that irregularity. It would, therefore, vitiate the proceedings. (*Lindsay, J.*) EMPEROR *v.* DURGA PRASAD. **44 All. 550 : 20 A. L. J. 355 : 66 I. C. 423 : L. R. 3 A. 76 (Cr.): 23 Cr. L. J. 279 : A. I. R. 1922 All. 211.**

——S. 202—*Magistrate instead of waiting for report, ordering issue of summons—Order is liable to be set aside.*

Where a Magistrate distrusting the truth of a complaint, directed an investigation under S. 202 but instead of waiting for the report issued summons against the petitioner under S. 323, I. P. C., as he thought that the case could no longer be kept pending:

Held, that the order was not regular and should be set aside, as the action of the Magistrate was not the result of a proper exercise of judicial discretion on his part. (*Suhrawardy and Mukerji, JJ.*) KRISHNA BALA DASI *v.* NERODA BALA DASI. **41 C L. J. 170 : A.I.R. 1925 Cal. 989.**

——Ss. 202, 192, 203 and 304—*Investigation under S. 202 ordered—Subsequent transfer of case for being dealt with under S. 203 or S. 204—Fresh investigation is essential.*

The provisions of S. 192 or S. 202 do not entitle a Magistrate after he has proceeded under the latter section to make an order under the provisions of the former section transferring the case for the purpose of being dealt with under S. 203 or S. 204 without a fresh investigation as contemplated by S. 203, Cr. P. Code. (*Suhrawardy and Mukerji, JJ.*) MAHABIR SINGH *v.* GIRIBALA DASSI. **29 C. W. N. 508 : 87 I. C. 526 : 26 Cr. L. J. 990 : A. I. R. 1925 Cal. 742.**

——S. 202—*Preliminary enquiry—Hearing of arguments—Of accused—If proper—In ordering further inquiry Sessions Judge cannot direct that accused be summoned.*

Holding an enquiry under S. 202, Cr. P. Code while the accused were before the Magistrate by pleader, though they had not been summoned, and their arguments were heard is a procedure highly condemnable. The Sessions Judge cannot when ordering a further enquiry in respect of a complaint which has been dealt with by the Magistrate, under S.202, Cr.P. Code direct that the accused be summoned. The revising officer may direct that by way of further inquiry he shall cause an investigation to be made, or if one has been made which he considers insufficient or unsatisfactory or if he considers that the complainant has not been sufficiently examined, may order that the complainant be recalled and his examination continued. But a further inquiry cannot be ordered in any but one of these three cases The inquiry is preliminary to the issue of process and the next step to take, if the inquiry as far as collection of materials is complete, is the issue of process, 15 Cal. 608 Foll. (*Greaves and Duval, JJ.*) BACHOO MIA *v.* ANWAR NABI. **26 Cr. L. J. 305: 84 I. C. 449 : A. I. R. 1925 Cal. 576.**

——S. 202—*Order directing enquiry—Reasons to be given—Cross-examination—Notice to accused—Irregularity.*

Ordering an enquiry under S. 202, Cr. P. Code, and deferring the issue of process should only be done after recording reasons. It is also as a rule undesirable that the enquiry should be prolonged by cross-examination and arguments *inter partes*. But there is no reason why the accused should not be called to the enquiry. Departure from the strict letter of the law in the matter of allowing cross-examination and hearing arguments is only a mere irregularity. (*Foster, J.*) RAM SARAN SINGH *v.* MOHAMMAD JAN KHAN. **26 Cr. L. J. 1394 : 89 I. C. 706.**

——Ss. 202 and 203—*Notice to accused before issuing process is not proper.*

On hearing the complainant the Magistrate directed notice to be served upon the accused and to show cause why process should not issue against him. A petition was put in by the accused and a learned pleader appeared for him and showed cause why process should not issue, with the result that the Magistrate dismissed the complaint.

Held, that the procedure adopted by the Magistrate, in calling upon the accused to show cause why he should not be proceeded against, was improper and irregular. This procedure is quite inconsistent with the scheme of this legislation. It is inconceivable how the accused person ever goes before the Magistrate until the Magistrate has made up his mind to issue process. (*Sanderson, C. J. and Chotzner, J.*) CHANDI CHARAN *v.* MANINDRA CHANDRA. **36 Cal. L. J. 414 : 27 C. W. N. 196 : 72 I. C. 173 : 24 Cr. L. J 333 : A. I. R. 1923 Cal. 198.**

——Ss. 202 and 54—*Trial by Magistrate and investigation by Police-The former does not bar latter.*

The Cr. P. Code draws a clear difference between jurisdiction to try and jurisdiction to investigate and it is possible to conceive of cases when, although the Magistrate may distrust a complaint or delay in passing orders the police would be failing in their duty, if they did not arrest an offender against whom a cognizable offence has been made out. Much more so would this be the case where the Magistrate, after recording the complaint, finds that a regular police investigation would be more suitable and intentionally keeps the complaint pending in order that the police may exercise their powers of investigation and arrest independently of the Magistrate. In practice of course, the police would not ordinarily take independent action in respect of a complaint which had already been distrusted by the Magistrate: but to lay down the general proposition that a Magistrate's order under S. 202 debars the police from exercising their powers of arrest and investigation, would be neither expedient nor correct. (*Mullick and Bucknill, JJ.*) EMPEROR *v.* BHOLE BHAGAT. **2 Pat. 379 : 4 P. L. T. 521 : 1 Pat. L. R. 248 (Cr.) : 72 I. C. 375 : 24 Cr. L. J. 375 : A. I. R. 1923 Pat. 547.**

——S. 202—*Issue of process without recording reasons is not correct—Cross examination and arguments should not, as a rule, be allowed in a case of inquiry under S. 202.*

It is certainly not a correct procedure to defer the

issue of process and order an enquiry without recording reasons. It is also as a rule undesirable that the enquiry should be prolonged by cross-examination and arguments *inter partes*, the reason being that if this is necessary it is obviously advisable to follow the procedure of a trial and for that purpose to issue process at once. At the same time if a Magistrate having the duty of making an enquiry under S. 202 can make his enquiry more complete and can inform himself of the facts more fully by having the accused in Court, there is no reason either in common sense or in law why the accused should not be called to the enquiry. (*Foster, J.*) RAM SARAN SINGH *v.* MAHOMED JAN KHAN. **26 Cr. L. J. 1394 : 89 I. C. 706 : A. I. R. 1926 Pat. 34.**

——S. 202—*Dismissal of complaint—No record of the evidence of witnesses—Irregularity.*

Where the Magistrate, in an enquiry under S. 202 did not record the statements of witnesses but he had before him the final report of the police a detailed account of the statements of the witwesses before the police and the witnesses repeated the same statements before him.

Held : that it cannot be asserted that there has been an error of law since the Code makes no provision with regard to the manner in which the evidence in an inquiry under S. 202 should be recorded. The case would be different had the deposition of any witness deviated from the record of the previous statements. (*Macpherson, J.*) TILAKDHARI SINGH *v.* MISRI SINGH. **3 Pat. L. R. 77 (Cr.) : A. I. R. 1925 Pat. 584.**

——Ss. 202 and 203—*Dismissal of complaint—Enquiry—Scope of.*

The enquiry contemplated by S. 202, Cr. P. Code, does not necessarily mean an inquiry by the Magistrate himself examining witnesses or by holding investigation into the case. It is open to the Magistrate to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper. Where an investigation had been made by the police and witnesses had been examined by the investigating police-officer, there is nothing in law to prevent the Magistrate from looking into the police papers for the purpose of ascertaining the truth or falsehood of the complaint. The enquiry contemplated by S. 202, Cr. P. Code is not limited to any particular form of enquiry and if upon looking into the police papers the Magistrate was satisfied that it was not a fit case in which process ought to be issued against the accused person, there is nothing in law to prevent the Magistrate from doing so. (*Kulwant Sahay, J.*) RAMANAND LAL *v.* ALI HASSAN. **1924 P. H. C. C. 226 : A.I.R. 1924 Pat. 797.**

——Ss. 202, 203 and 204—*Counter complaints—Order staying one is not improper.*

Where two counter-petitions were filed before a Sub-Divisional Magistrate which he referred to a Sub-Magistrate for report and enquiry under S. 202, and on receipt of the report issued process in one case and directed in the other case that it be put up after the disposal of the first. *Held*, that at that stage in revision High Court could not interfere with the discretion exercised by the Magistrate as the Magistrate had not contravened any rule of procedure. (*Jwala Prasad, J.*) LALJI SINGH *v.* NAURANGI LAL. **3 Pat. L. T. 764 : 1922 P. H. C. C. 304 : 4 U. P. L. R. (Pat.) 112 : 74 I. C. 248 : 24 Cr. L. J. 120 : A. I. R. 1922 Pat. 618.**

——S. 202 (2)—*Evidence under—If basis of prosecution.*

A prosecution can be ordered on the basis of evidence recorded under S. 202 (2), Cr. P. Code. (*Macpherson, J.*) BANSHIDAR MARWARI *v.* EMPEROR. **24 Cr. L. J. 862 (2) : 74 I. C. 1054 (2) : A. I. R. 1924 Pat. 138.**

——S. 203—**[The changes made herein are merely verbal.]**

——S. 203—*Dismissal set aside by Sessions Judge—Interference in revision.*

After dismissal of a complaint by the Magistrate, if the Sessions Judge wishes to take action he should set aside the dismissal himself instead of asking the Magistrate to do so. Where a complaint has been dismissed under S. 203 without notice to the accused, dismissal may be set aside without notice to the accused, 35 All. 78 Ref. (*Daniels, J.*) MATA PALAT *v.* EMPEROR. **24 Cr. L. J. 811 (2): 74 I. C. 715 (2) : A. I. R. 1923 All. 479 (2).**

——S. 203—*Dismissal of complaint does not bar fresh complaint, but complainant must inform Magistrate about previous dismissal.*

Where an accused person has been once discharged by a magistrate under S. 203 the same case can be enquired into by other Magistrate again. But the complainant is bound to inform the magistrate before whom he makes a fresh complaint that his previous complaint was dismissed. (*Macleod, C. J and Crump, J.*) MAHADEV LAXMAN SATARDEKAR, *In re.* **27 B. L. R. 352 : 87 I. C. 527 : 26 Cr. L. J. 991 : A. I. R. 1925 Bom. 258.**

——S. 203—*Complaint, dismissal of—Examination of complainant's witnesses is essential.*

A complaint cannot be dismissed without examining the witnesses of the complainant who are present in Court. A complainant should be given an opportunity of establishing the truth of his allegations by having the witnesses, evidence tested by the Magistrate. (*Sanderson, C. J. and Chotzner, J.*) PUROSATTAM *v.* RAM DAS. **26 Cr. L. J. 561 : 85 I. C. 705 : A. I. R. 1925 Cal. 1031.**

——Ss. 203 and 437—*Dismissal of complaint on notice to accused—Further enquiry—Opportunity to show cause must be given.*

After giving the accused an opportunity of being heard a Magistrate dismissed a complaint under S. 203, Cr. P. Code. The Sessions Judge without giving an opportunity to the accused to be heard set aside the order of dismissal and directed a further enquiry. *Held*, that under the circumstances the accused should have been given an opportunity of being heard at the hearing of the application under S. 437, Cr. P. Code. (*Ghose and Chotzner, JJ.*) JOGESH CHANDRA SEN *v.* NIKUNJA BEHARI CHOWDHURY. **27 C. W. N. 552 : 76 I. C. 236 : 25 Cr. L. J. 140 : A. I. R. 1923 Cal. 651.**

——S. 203—*Dismissal—Sessions Judge ordering further enquiry—Magistrate may dismiss again.*

Where a Sessions Judge orders further enquiry in a complaint dismissed by the Magistrate under S. 203, the Magistrate can again dismiss it under the section. (*Chatterjee and Cuming, JJ.*) NIBARAN CHANDRA *v.* SITAL CHANDRA. **25 C. W. N. 312 : 62 I. C. 416 : 22 Cr. L. J. 528.**

——S. 203—*Applicability—Petition under S. 107.*

S. 203 does not apply to applications under S. 107, Cr. P. Code. (*Zafar Ali, J.*) SHAMA SUDDIN *v.* RAM DYAL SINGH. **25 Cr. L. J. 89 (1) : 76 I. C. 25 (1) : A. I. R. 1924 Lah. 630.**

——Ss. 203 and 209—*Magistrate—Commitment—Discretion—Weight due to evidence—Discharge of accused.*

It is quite within the discretion of a Magistrate holding a preliminary inquiry to weigh the evidence and

discredit the same if necessary. He is not bound to commit the accused to the Sessions merely because there is some evidence, if he thinks that those portions of the evidence essential to make out the charge were not reliable. 28 I. C. 741 ; (1922) M. W. N. 13, Ref. (*Schwabe, C. J. and Krishnan, J.*) NARAMBAN *v.* EMPEROR. **15 L. W. 552 : (1922) M. W. N. 326 : 71 I.C. 877: 24 Cr. L.J. 269: A. I. R. (1922) Mad. 195.**

———S. 203—*Hearing evidence on both sides—Discharge—Effect of.*

Where a Magistrate who has jurisdiction to try a case hears the evidence on both sides and then discharges the accused, it is tantamount to an acquittal. (*Dalal, J. C.*) DAL CHAND *v.* RAM LAL,
75 I. C. 727 ; 25 Cr. L, J. 39 : A. I. R. 1925 Oudh 60.

———S. 203—*Complaint against Police Officer should be carefully enquired into and should not be dismissed without enquiry.*

When a complaint is made against a Police Officer it should be enquired into with care and every opportunity given to the complainant to prove his complaint. If the complaint is false the Magistrate has considerable power of granting compensation by inflicting a fine on the complainant and of prosecuting him for perjury. (*Dalal, A. J. C.*) BALDA PASI *v.* M. NASIR ALI KHAN. **74 I. C. 718 : 24 Cr. L. J. 814 : A. I. R. 1924 Oudh 174.**

———Ss. 203 and 202—*Dismissal of complaint——Investigation under S. 202 is not necessary.*

S. 203 is not dependent on the provisions for the postponement of the issue of process, contained in S. 292. The use of the word "any" clearly implies that an investigation or enquiry under S. 202 may or may not be made. (*Bucknill and Ross, JJ.*) DUKHIRAM *v.* JAMUNA KUER. **6 Pat. L T. 727 : 86 I. C. 985 (2) : 26 Cr. L J. 921 (2) : A. I. R, 1925 Pat. 704.**

———S. 203—*Complaint—Dismissal by Magistrate—Further enquiry by Sessions Judge—Miscarriage of justice.*

Where a complaint under S. 395, I. P. C, was dismissed by the Magistrate, after considering the police report and the evidence of the complainant and his witness, finding that no offence had been made out, and on appeal the Sessions Judge ordered further enquiry and upset the order of the Magistrate. *Held* that an appellate court should not lightly set aside an order of dismissal do so only when it is clear that there has been miscarriage of justice. (*Adami, J.*) JANGAL SINGH *v.* RADHA KISHAN
3 Pat. L. R. 33 (Cr) : 26 Cr. L. J. 866 : 86 I. C. 802 : A. I. R. 1925 Pat. 447.

———S. 203 *Reasons for dismissal—Recording of.*

Under S. 203, Cr. P. Code. it is incumbent in a Magistrate to record briefly his reasons for dismissing the complaint. (*Kulwant Sahay, J.*) HARNANDAN DAS *v.* ATUL KUNAR PRASAD **90 I. C. 158 : 26 Cr. L. J. 1502**

———Ss. 203 *and* **204 (3)**—*Dismissal under and discharge—Distinction—Party not being tried is not an accused person.*

In the case of a dismissal under S. 203 or S. 204 (3) notice to the other side is not desirable. The other side has never had notice, the proceedings not having reached the stage of summoning them as accused persons ; and in this regard such cases are distinguished from cases in which accused persons have been tried and discharged. Until the accused has been brought before the Court either by summons or by warrant he should not be allowed to come before the Court at all. A party who is not being tried for an offence is not an accused person. 32 Cal. 1088

10 C. W. N. 51, Foll. (*Roe and Coutts, JJ.*) SHEO NARAIN SINGH *v.* RAMPERTAB RAI.
1922 P. H. C. C. 31 : A. I. R. 1922 Pat. 54.

———S. 203—*Reasons for dismissal.*

A Magistrate dismissing a complaint is bound to give reasons for dismissal. (*Foster, J.*) CHAUDHURY MANDAR *v.* EMPEROR. **74 I. C. 855 : 24 Cr. L. J. 823 (Pat) : A. I. R. 1924 Pat. 436.**

———S. 203 —*Procedure*

The Magistrate ought only to see whether the complainant has *prima faice* made out a true case. (*Adami-J.*) CHHEDI UPADHAYA *v.* EMPEROR.
4 P. L. T. 703 : 1 P. L. R. 50 (Cr.) : 24 Cr. L.J. 316 : 72 I.C. 76 : A.I.R.1924 Pat. 739.

———S. 203—*Police referring case false—Complainant entitled to have his complaint tried.*

Where a person having made a charge against another finds that the police report designates his charge as false, he is entitled to file a petition before a Magistrate impugning the correctness of the police report. The Magistrate must regard this petition as a complaint and the complainant is entitled to have the persons complained against tried on the charge, or else his statement (that is the complainant's statement) must be recorded on oath and his complaiot dismissed (*Bucknill, J.*) NAND KISHORE *v.* KALIKA MISSIR.
74 I.C. 957 : 24 Cr.L.J. 845: A.I.R. 1923 Pat. 539.

———Ss. 203 and 437—*Order of discharge—Further enquiry—When to be ordered.*

Where the applicant had been prosecuted before a competent Magistrate and has been, after a trial before that officer, found not guilty and discharged, the Magistrate expressly finding there was no case for the Crown it is not open to the District Magistrate to order further enquiry in the absence of any allegation of improper conduct on the part of the trying officer. (*Bucknill, J.*) RAKTU SINGH *v.* EMPEROR,
24 Cr. L. J. 486 : 1 Pat. L. R. (Cr.) 28 : 72 I.C. 950.

———S. 203 —*Fresh complaint cannot be entertained unless new facts not available previously are adduced or manifest error or miscarriage has occurred in previous proceedings.*

On dismissal of complaint under S. 203 a new complaint on the same facts should not be entertained unless new facts, which could not, with reasonable diligence, have been brought forward in the previous proceedings, would be adduced or unless there was some manifest error or manifest miscarriage in the previous proceedings. (*Brown, J.*) U. SHWE KYAW *v.* MA SEIN BWIN. **3 Bur. L. J. 228 : 26 Cr. L. J. 284 : 84 I. C. 348 : A.I.R. 1925 Rang. 114.**

———S. 204—*Order under—Subsequent passing of another order under S. 202 is not improper.*

A complaint was made before a Magistrate on the 22nd December and he passed an order directing that the two accused persons be summoned. Subsequently on that date one of the persons against whom summons had been ordered to be issued appeared and laid a cross complaint. The Magistrate then rescinded the order passed by him and sent both the cases to a Subordinate Magistrate for local enquiry and report. *Held*, that there is nothing in the Code which forbids the Magistrate to reconsider an order of this kind on sufficient grounds, and that the order passed by him was a right and proper order. (*Newbould, and Suhrawardy, JJ.*) LALIT MOHAN *v.* NONI LAL.
27 C. W. N. 651 : 39 C. L. J. 329 : 77 I. C. 816 : 25 Cr. L. J. 464 : A. I. R. 1923 Cal. 662.

———Ss. 204 and 344—*Powers of Court to postpone issue of process even in warrant cases.*

S. 344 is applicable to cases even before the issue of process under S. 204 and the Magistrate is entitled

CR. P. CODE (V OF 1898), S. 204.

under S. 344 if there be a reasonable cause for doing so, to postpone any enquiry or trial and to postpone the issue of process under S. 204 even if the case be a warrant one. (*Kulwant Sahay, J.*) RAM SARAN SINGH *v.* NIKHAD NARAIN SINGH.
6 Pat. L. T. 477 : 3 Pat. L. R. 134 (Cr.) : 26 Cr. L. J. 1179 : 88 I. C. 603 : A.I.R. 1925 Pat. 619.

——S. 204—*Process fees for summoning of accused—Non-cognizable warrant cases—Neither the complainant nor the accused can be compelled to pay process-fees for witnesses.*

In the case of non-cognizable warrant cases, neither the complainant nor the accused can be compelled to pay process-fees for the production of witnesses although the complainant must, under S. 204 in the ordinary course of events, pay process-fees for the summoning of the accused. (*Doyle, J.*) EMPEROR *v.* MG SAN NYEIN. **4 Bur. L. J. 187 : A. I. R. 1926 Rang. 13.**

——S. 204 (3)—*Order to complainant to pay process fee for enforcing accused's attendance on the date of judgment—Process fee not paid—Complaint cannot be dismissed.*

It is nowhere laid down in the Code that the complainant must file a process fee to enforce the attendance of the accused not on the date of trial nor on the date of arguments but on the date fixed for delivery of judgment. Where on the date fixed for delivery of judgment in a summons case the complainant was present but the accused was absent and the Magistrate had ordered the complainant to file a process fee to secure the attendance of the accused, but the complainant did not file the process fee required, and the case was dismissed for default of prosecution and accused was acquitted, *Held*, that the order on the complainant to pay process fees was without jurisdiction and must set aside. (*Walsh, J.*) BHIMMI *v.* PERSHADI. **23 A. L. J. 304 : L. R. 6 A. (Cr.) 105 : 26 Cr. L. J. 963 : 87 I. C. 419 : A.I. R. 1925 All. 392.**

——Ss. 205 and 353—*Applicability—Sessions Court—Pardanashin accused in Sessions Court should be exempt from personal attendance.*

There is nothing in the Code of Criminal Procedure to prevent the Sessions Judge from dispensing with the attendance on the accused in Sessions trial. 17 C. W. N. 1268. 14 Bom. L. R. 236 ; Ref. to. (*Kumaraswami Sastri, J.*) KANDAMANI DEVI *v.* EMPEROR.
45 Mad. 359 : 66 I. C. 330 : 15 L. W. 550 : 30 M. L. T. 346 : (1922) M. W. N. 165 : 23 Cr. L. J. 266 : A. I. R. 1922 Mad. 79 (1) : 42 M. L. J. 337.

——Ss. 205 and 537—*S. 205 does not apply where warrant is issued or accused arrested—Trial in absence of accused—Defect is not curable under S. 537, Cr. P. Code.*

S. 205, Cr. P. Code. applies only to cases in which, the Magistrate has issued a summons in the first instance. It does not apply to a case where accused has been arrested without or after the issue of a warrant. Where the Magistrate allowed the accused to be present through pleader at his request. *Held*, the defect in jurisdiction would not have been cured even if there had been an express request on his part ; for jurisdiction could not be conferred by any consent, and the defect is not curable under S. 537. (*Mullick and Bucknill, JJ.*) ABDUL HAMID *v.* EMPEROR.
2 Pat. 793 : 4 Pat. L. T. 648 : 1923 P H. C. C. 239 : 2 Pat. L. R. 1 Cr. : 75 I. C. 72 : 24 Cr. L. J. 872 : A. I. R. 1924 Pat. 46.

——S. 205—*Conviction of accused represented by co-accused and not by a pleader is wrong.*

Where a co-accused is absent throughout the proceeding and a co-accused was allowed to represent him, the conviction of the absent accused should be set aside. Magistrate can dispense with absence of accused only where he is represented by a pleader. (*Baguley, J.*) MA KIN *v.* EMPEROR.
3 Bur. L. J. 182 : A. I. R. 1924 Rang. 383.

——S. 205 (2)—*Personal appearance dispensed with—Concession when can be revoked.*

The petitioner was served with a notice on the 12th December 1922, by a Sub-Divisional Officer in his capacity as an Income-Tax Officer, requiring the petitioner to submit a return of his income within seven days. The petitioner thereupon raised a question as to whether separate income should or should not be included in the income of the family of which he was a member. On the 11th February 1923, the Sub-Divisional Officer applied to the District Magistrate in the latter's capacity as an Assistant Commissioner of Income-Tax for sanction to prosecute the petitioner under S. 51 (c) of the Income-Tax Act, for having failed without reasonable cause or excuse to furnish in due time a return which had been called for from him under S. 22 of the Act. The District Magistrate granted sanction for prosecution on the 15th February 1923. On the 16th February 1923 the Sub-Divisional Officer in his capacity as an Income-Tax Officer purported to make a report to himself as the Sub-Divisional Magistrate, with a request for issue of a process against the petitioner and on the same date the Sub-Divisional Officer took cognizance of the case and summoned the petitioner to appear before him on the 26th February 1923. On the 27th February 1923, the petitioner appeared before the Sub-Divisional Officer through a Pleader and prayed for exemption from personal attendance and for permission to appear through a Pleader. This prayer was granted by the Sub-Divisional Officer, and on the case being put up before him on the 28th February, 1923, the Sub-Divisional Officer took the statement of the Pleader, wherein it was stated that the petitioner was not legally bound to submit a return and that the learned Sub-Divisional Officer had no jurisdiction to try the petitioner. Thereupon the Sub-Divisional Officer recorded the following order in the Order Sheet :—" He (the petitioner) further objects to trial by me. I have no objection to give the accused option to have the case tried elsewhere but, I am afraid his attitude shows that he is bent on delaying the ends of justice anyhow. I cannot quash the proceedings at this stage on the objection taken by the accused without entering into the merits of the case. Before, however writing up to the District Magistrate for transfer of the case from my file, I must enforce the attendance of the accused, so I revoke the concession granted under S. 205 (2) of the Code of Criminal Procedure and order the issue of warrant against him with bail of Rs. 200 ; fixed 6th March, 1923." *Held*, that having regard to the circumstances of the case the Sub-Divisional Officer should not have revoked the concession which he had previously extended to the petitioner of allowing him to appear by pleader. (*Ghose and Cuming, JJ.*) DWIGENDRA NARAIN BAGHI *v.* EMPEROR. **38 C. L. J. 9 : 75 I. C. 150 : 24 Cr. L. J. 902.**

——S. 206—*Changes.*

[(1) "Subject to the provisions of S. 443" have now been omitted.

(2) 3rd class Magistrate has now no power to commit.]

——Ss. 206 and 210—*Convesion of warrant case into a case triable by Sessions—Accused has right to recall witnesses for cross-examination.*

CR. P. CODE (V OF 1898), S. 206.

After the hearing in a warrant case, the Magistrate was of opinion that the offence proved was triable by a Court of Sessions, and he converted the proceedings accordingly. *Held* the accused has a right to re-call the witnesses for cross-examination especially when he had reserved the right till the framing of charge in the warrant case. (*Stuart, J.*) DAMARCHA *v.* EMPEROR. **19 A.L.J. 463 : 62 I.C. 192 : 22 Cr. L. J. 496.**

——S. 206—*Discretion—Option of Magistrate.*

A Magistrate should try a case himself even though triable exclusively by Sessions Court if in his discretion evidence indicates that the course is proper. (*Walmsley and Suhrawardy, JJ.*) EMPEROR *v.* HARI DAS. **37 Cal. L. J. 34 : 73 I. C. 770 : 24 Cr. L. J. 674 : A. I. R. 1923 Cal. 108.**

——Ss. 207, 254 and 347—*Procedure—Where Magistrate is justified in committing a case to the Sessions which could have been adequately dealt with by him—Stage at which he may commit.*

If before the commencement of an enquiry or trial, the Magistrate is of opinion that the case is one which for any reason ought to be tried by a Court of Session then he has ample power to inquire into the case with a view to commitment and subsequently to commit if the evidence justifies the course. Nor does there seem to be any reason for holding that if nevertheless the Magistrate has once started proceedings under Ch. XXI, he no longer has the power to commit unless he is of opinion that the sentence which he could pass would be inadequate. It would be an undue extension of the scope of S. 254 to hold that it was meant to fetter the scope of a Magistrate in all circumstances. S.347 is a general section and applies to all inquiries and trials. There is no suggestion that the only possible reason for a competent Magistrate to commit a case to Sessions is that he will not be able to pass a sufficiently severe sentence. The discretion vested in him cannot clearly be limited by the provisions of S. 254 of the Code. (*Brown, J.*) EMPEROR *v.* ISHAHAT. **3 Rang. 42 : 89 I. C. 525 : 26 Cr. L. J. 1389 : A. I. R. 1925 Rang. 207 (2)**

——S. 208—*Non-compliance with the section though undesirable does not necessarily vitiate conviction.*

Where after the charge was framed, the investigating police officer and the Sub-Deputy Magistrate who recorded the dying declaration were examined, probably under S. 219, Cr. P. Code, *Held*, the procedure though contrary to the provisions of S. 208 would not be a sufficient ground for setting aside conviction. *Quaere* : whether the word 'complainant' in this section applies to the person who laid the first information ; such procedure however isnot desirable. (*Newbould and Ghose, JJ.*) KASEMMOLLA *v.* EMPEROR. **42 C.L.J. 114 : 26 Cr. L.J. 1560 · A.I.R. 1926 Cal. 410.**

——S. 208—*Failure to take defence evidence—Effect.*

Before committing an accused to the Sessions, it is the duty to record such evidence as the accused wants to produce. Where after the prosecution evidence was recorded and the statements of the accused taken down, a charge was framed without asking the accused if they had any evidence to produce, the whole procedure is illegal. (*Kanhaiya Lal, J.*) KUAR JASWANT SINGH *v.* EMPEROR. **21 A. L. J. 911 : L.R. 5 A. 50 (Cr.) : 46 All. 187 ·A.I.R. 1924 All. 317.**

——S. 208—*Accused not allowed to cross-examine—Trial vitiated.*

A trial began under Ss. 325, 326, Penal Code. The accused did not cross-examine the two witnesses. On hearing the evidence the Court came to the conclusion that an offence under S. 307, I. P. C., was made out and he committed the case to the sessions without giving the accused an opportunity to cross-examine the prosecution witnesses holding that the accused had no such right : *held*, that the accused was prejudiced and retrial was ordered. (*Stuart, J.*) DAMARCHA *v.* EMPEROR. **L. R. 2 A. 54. (Cr.)**

CR. P. CODE (V OF 1898), S. 209.

——S. 208—*Amendments—Scope of—Statement of witness—Retraction of—If can be acted on.*

Evidence given before the committing court and transferred to the Sessions Court can be used not only for purposes of corroboration or contradiction but for all purposes. The words " for all purposes subject to the provisions of the Evidence Act" merely mean that the law of evidence as embodied in the Act must be complied with, *e.g.*, evidence wrongly admitted by the committing court cannot be transferred. The amendment is obviously introduced forthe purpose of removing any doubt as to the right of the court to treat evidence given before the committing court as substantive evidence at the Sessions trial. (*Scott-Smith and Fforde, JJ.*) AMIR ZAMAN *v.* EMPEROR. **6 Lah. 199 : 26 Punj. L. R. 361 : 26 Cr. L. J. 1245 : 88 I. C. 861 : A. I. R. 1925 Lah. 452.**

——S. 208 (2)—*Accused must be allowed to cross-examine prosecution witnesses, especially if accused applies before framing of charge.*

Where the application by the accused to cross-examine the prosecution witnesses was made before the charge was framed and before the committing Magistrate had decided to commit the case to the Court of Sessions. *Held*, the Magistrate was bound to allow the accused to cross-examine the prosecution witnesses and that he had no discretion in the matter. (*Greaves and Panton, JJ.*) JYOTSNA NATH *v.* EMPEROR. **51 Cal. 442 : 26 Cr. L. J. 63 : 83 I. C. 591 : A. I. R. 1924 Cal. 780.**

——S. 209—*No foundation for charge—Discharge.*

Where in a charge triable by the Sessions Judge, the Magistrate who heard the case is of opinion that there is no foundation for a prosecution, he is bound to discharge him after recording his reasons. (*Daniels, J.*) GANPAT LAL *v.* EMPEROR. **22 A. L. J. 411 : 10 O. & A.L.R. 551 : 46 A. 537 : L. R. 5 A. 174 (Cr.) : 81 I.C. 315 : 25 Cr.L.J. 795: A.I.R. 1924 All. 664 (2).**

——S. 209—*Committing Magistrate has ample discretion to weigh the evidence before him.*

The committing Magistrate has ample discretion to decide whether the evidence given before him is true or false and to commit the case to sessions if there is sufficient evidence in favour of prosecution. 37 A. 355 Foll. (*Ryves, J.*) EMPEROR *v.* CH. IFTIKHAR HUSAIN. **L. R. 2. A. (Cr.) 43.**

——S. 209—*Commitment to Sessions by District Magistrate—Discharge by Deputy Magistrate—Conclusions of Civil Court—Reliance on.*

The petitioners were prosecuted for forgery and the Deputy Magistrate who inquired into the case disbelieved the evidence and discharged the accused. The District Magistrate relied on two Judgments of a civil court and committed the accused for trial to the Sessions. *Held*, that the District Magistrate was influenced by the decisions of the civil court and that he had no right to rely on them. It is open to a Deputy Magistrate to form his opinion with regard to the credibility of the witnesses callled before him. If a *prima facie* case is made out he should clearly leave it to the jury at the Sessions to form their own view as to their credibility of the evidence. But if after hearing the evidence he is satisfied that it is not trustworthy and that a conviction will not result, he is entitled to record a finding that the witnesses who spoke in support of the charge cannot be believed and

CR. P. CODE (V OF 1898), S. 209.

that a conviction will not result. (*Greaves and Panton JJ.*) TARAPADA BISWAS *v.* KALIPADA GHOSH.
28 C. W. N. 587 : 51 Cal. 849 : 83 I. C. 677 : 26 Cr. L. J. 117 : A. I. R. 1924 Cal. 639.

——S. 209—*Duty of Magistrate — Sufficient ground for committing.*

A committing Magistrate is entitled, at any rate to some extent, to weigh the evidence of direct witnesses and to pronounce as to their credibility and where there is no credible evidence on which a Court could convict, it is the duty of the Magistrate to discharge the accused and he should not commit to the court of Session. But a Magistrate holding a preliminary enquiry ought to commit the accused to the Court of Session when the evidence is enough to put the party on his trail and such a case obviously rises when credible witnesses made statements which if believed would sustain a conviction. It is the duty of the Magistrate to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused. (*Scott-Smith, J.*) MAULU *v.* EMPEROR.
4 Lah. 69 : 5 Lah. L. J. 276 : 76 I. C. 702 : 25 Cr. L. J. 238: A. I. R. 1923 Lah. 337.

——S. 209—*Evidence worthless—Accused must be discharged.*

Where a committing Magistrate finds that the evidence tendered for the prosecution is totally unworthy of credit it is his duty under S. 209 of the Cr. P. Code to discharge the accused. (*Martineau, J.*) AHMED *v.* EMPEROR. **68 I. C. 825 : 4 U. P. L. R. Lah. 108 : 23 Cr. L. J. 601 : A. I. R. 1923 Lah. 279.**

——S. 209—*Jurisdiction—Magistrate can weigh evidence—To see if there is* prima facie *case.*

The committing Magistrate must see whether there is a *prima facie* case fit for the jury to decide between conflicting probabilities or whether evidence clearly point to there being no *prima facie* case for the accused to meet. In arriving at this decision the committing Magistrate has discretion and power to weigh the evidence. To hold that where there is some evidence, however untrustworthy in the Magistrate's opinion, he is bound to commit a person for trial, will be to make the preliminary enquiry directed by the code, a mere matter of form while it is intended to be a safeguard against false or frivolous cases being sent up for trial and innocent men from being put to the trouble and expense of undergoing a trial in the Court of Sessions. (*Kumaraswamy Sastri, J.*) PONNIAH TIRUMALI VANDAYA THEVAR, *In re.* **16 L.W. 460 : 65 I. C. 993 : 30 M. L. T. (H.C.) 72 : 23 Cr. L. J. 209 : (1922) M. W. N. 13 : A. I. R. 1922 Mad. 43 : 42 M. L. J. 49.**

——S.209—*Case triable by First Class Magistrate as well as by Sessions—Commitment is discretionary.*

Where a case is triable by Sessions as well as by First Class Magistrate, Magistrate has a discretion to commit the case or to try it himself. In view of the maximum sentence, however, which the Magistrate cannot inflict, a commitment would only be justifiable on very special grounds. Where a Magistrate in his discretion considered that a commitment would result in an unwarrantable waste of public time without any advantage to anybody, *held*, that he exercised a sound discretion in rejecting the idea of commitment to the Sessions. (*Macpherson, J.*) B. N. RY., CO. *v.* MAKBUL.
A. I. R. 1925 Pat. 755.

——S. 209—*Preliminary enquiry in a case triable by a Court of Sessions is not without jurisdiction—Commitment is not proper on unreliable evidence and improbable case.*

A Magistrate holding a preliminary enquiry should not commit a person for trial if he is of opinion that notwithstanding direct evidence, the evidence is unreliable and the case is improbable and a preliminary enquiry made by him in a case triable by Sessions Court is not beyond his jurisdiction if he examined the credibility of the testimony. (*Ross, J.*) MUNSHI MANDER *v.* KARU MANDER. **25 Cr. L. J. 1079 : 81 I.C. 913 : 6 Pat. L. T. 146 : A. I. R. 1925 Pat. 279.**

CR. P. CODE (V OF 1898), S. 213.

——Ss. 209, 437 and 439—*The Dt. Magistrate has jurisdiction to commit to Sessions accused whom Magistrate of First Class has refused to charge with offence triable by Sessions Court—Cr. P. Code. S.* 437.

A Magistrate of the first class acquitted certain persons who were charged before him under sections 424 and 506 (1) of the Penal Code. The complainant afterwards made several applications to the Magistrate to frame a charge against the accused under S. 395 of the Penal Code and commit the accused to Sessions. The Magistrate recorded the applications but declined to entertain them. Upon this the District Magistrate was moved by the complainant and acting under S. 437 of the Cr. P. Code framed a charge against the accused and committed them to take their trial before the Sessions Court. It was contended in revision that the District Magistrate's order was illegal because the accused had been acquitted and not discharged: *Held*, that the First Class Magistrate's order was substantially one discharging the accused in respect of an alleged offence under S. 395 of the Penal Code and that the District Magistrate had jurisdiction to pass the order in question. (*Kincaid and Aston, A. J. Cs.*) KHANU *v.* EMPEROR. **25 Cr. L. J. 1368 : 82 I. C. 760 : A. I. R. 1925 Sind 190.**

——S. 209—*Evidence doubtful—Duty of Magistrate is to commit.*

If there is no evidence against the accused or if it is totally unworthy of credit, the Magistrate can discharge the accused. But if the evidence is doubtful, the case should be left for the Court of Session. (*Pratt, J. C.*) AIDAS TEKCHAND *v.* SABAN.
15 S. L. R. 1 : 62 I. C. 586 : 22 Cr. L. J. 570.

——S. 209 (2)—*Distinction between grounds for conviction and for committing for trial.*

The intention of the Legislature clearly is to make a distinction between grounds for conviction and grounds for committing for trial. Satisfactory proof of the guilt of the accused is the ground for conviction. Satisfactory evidence to go to trial must be regarded as the ground for committing for trial. (*Srinivasa Aiyangar, J.*) MANIA MANICKA PADAYACHI *In re.* **48 M. 874: 90 I.C. 530: 22 L.W. 755 : 26 Cr. L.J. 570 : A. I. R. 1925 Mad. 1061 : 49 M. L. J. 155.**

——S. 210—*Sessions case—Duty of committing Magistrate.*

In a Sessions case, it is the duty of a committing Magistrate to make some investigation into the truth of the prosecution before committing the case. It is not sufficient for him to say that a *prima facie* case had been made out and thus relieve himself of further responsibility. (*Mullick and Jwala Prasad, JJ.*) RAM PERSHAD TEWARI *v.* EMPEROR.
26 Cr. L. J. 1589 : 90 I. C. 661 (2).

——Ss. 213 (2) and 209—"*Not sufficient grounds for committing the accused*"—*Meaning of—Discretion to be carefully exercised—Sufficient grounds—Case of doubt—Procedure as to commitment.*

S. 213 uses the expression "not sufficient grounds for committing the accused." This expression is quite different from such expressions as "the case not proved" or "the accused are innocent." If a Magistrate hearing a charge triable by the Court of Sessions comes to the conclusion that the evidence before him

CR. P. CODE (V OF 1898), S. 213.

is totally untrustworthy and that there is no reasonable possibility of the case resulting in a conviction, he is entitled and it is his duty to discharge the accused under S. 209, Criminal Procedure Code. The same result follows if he comes to a similar conclusion after framing a charge and hearing witnesses for the defence under S. 213 (2). This discretion is to be carefully exercised, and wherever there is a possibility that different Courts might take different views of the evidence, the Magistrate even though he may himself not think the evidence sufficient for a conviction, should leave it to the Sessions Court to decide. 40 All 625 Not Foll. A. I. R. 1922 All. 168, foll. (*Sulaiman and Daniels, JJ.*) AKBAR ALI *v.* RAJA BAHADUR.

L. R. 6 A. 185 (Cr) : A.I.R. 1925 All. 670.

——S. 213—*Case triable by Court of Session—Magistrate has power to discharge.*

Even in a case triable by a Court of Session a Magistrate may discharge the accused under S. 213 of the Code if he is of opinion that a conviction will not follow. (*Lindsay, J.*) MUHAMMAD ABDUL HADI *v.* BALDEO SAHAI.

44 A. 57 : 19 A L. J. 831 : 22 Cr. L. J. 703 : 63 I. C. 831 : 3 U. P. L. R. (A) 184 : L. R. 2 A (Cr.) 123 : A. I. R. 1922 All. 168.

——Ss. 213 (2) and 347—*Case tried as warrant-case—Framing of charge—Order of discharge, whether legal—Acquittal—Inquiry preliminary to commitment—Court's power to discharge—Cancellation of charge—Discharge of accused against whom charge has been framed, whether authorised by S. 347, Cr. P. Code.*

After a charge under S. 409, I. P. C. is framed against an accused under Chapter XXI of the Code of Criminal Procedure, the Magistrate cannot discharge the accused but can only acquit him unless he convicts or decides to commit him to the Sessions under S. 347, Cr. P. Code.

When, however, a case is taken up from the first under Ch. XVIII as an enquiry preliminary to commitment, a Magistrate can, under S. 213 (2) cancel the charge and discharge the accused even after hearing witnesses for the defence if he is satisfied that there are no sufficient grounds for committing the case. A charge framed by the Magistrate when trying a warrant case cannot be cancelled under the above section. It is open to a Magistrate to pass an order of acquittal in respect to one part of the offence, *e. g.*, criminal breach of trust in respect to one item and to commit the accused under S. 347, Cr. P Code, to the Sessions in respect to another part of the offence if he finds that a *prima facie* case is made out.

S. 347, Cr. P. Code, does not empower a Magistrate to discharge an accused against whom a charge has been framed It is only in respect of the offence for which the accused is to be committed to the Court of Session that the proceedings are taken out of Chapter XXI and the other proceedings of the Magistrate must remain governed by the provisions of that Chapter. (*Wazir Hasan and Neave, A. J. Cs.*) PANDIT BISHAMBHAR NATH *v.* EMPEROR.

10. W. N. 705 : A. I. R. 1925 Oudh 547.

——S. 215—*Trial, if legal, is non-vitiated by irregularity in commitment.*

The Sessions Judge has jurisdiction to try a case which has been committed for trial to him, and if the trial is legally held it is doubtful if an irregularity in the commitment would vitiate the proceedings in the Sessions Court. 12 C. L. R. 120, Foll. When a person has been put on his trial and pleads to the charge, the commitment cannot be quashed, as it is too late to object to the commitment after the accused has pleaded to the charge before the Sessions Court.

CR P. CODE (V OF 1898), S. 215.

(*Newbould and Ghose, JJ.*) KASEM MOLLA *v.* EMPEROR.

42 C. L. J. 114 : 26 Cr. L. J. 1560 : A. I. R. 1926 Cal. 410.

——S. 215—*Manifest and fatal flaw in prosecution—Prosecution must be quashed.*

Commitments should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution.

The accused were railway clerks who, under the orders of the station-master, altered certain entries in the registers which were maintained by them. The action of the station-master was held by a Civil Court to be wrong. But the error was due to the honest mistake of the station-master in his view as to some railway rules. The accused had no animus in the matter, and were only acting on the orders of their superior officer.

Held, that the proceedings which had been taken against the accused for forgery must be quashed. (*Stuart, J.*) GULAB SINGH *v.* EMPEROR.

L. R. 6 A. (Cr.) 148 : 26 Cr. L.J. 1233 : 88 I. C. 849 : A.I.R. 1925 All. 751.

——Ss. 215 and 360—*Non-observance of S. 360 during commitment proceedings, and at the trial, in case of majority of witnesses—Public Prosecutor asking for* de novo *trial and Sessions Judge recommending commitments to be quashed—Accused opposing—Accused in* hajat *for long time—Commitments were refused to be quashed.*

During the commitment proceedings the provisions of S. 360 Cr. P. Code, were not at all observed. During the trial the said provisions were not complied with in the case of the majority of the witnesses. Public Prosecutor applied to the Sessions Judge for a *de novo* trial. This was about a month after the ruling of the Calcutta High Court in 1924 Cal. 889 regarding Cr. P. Code, S. 360 was published. On the basis of the application by the Public Prosecutor the Sessions Judge recommended to the High Court that the commitments themselves should be quashed. The accused opposed this. Most, if not all, of the accused persons were in *hajat*, and some of them had been in *hajat*, for about a year and a half or so.

Held, that in the circumstances of the case the commitments should not be quashed, but that the trying Court should recall the witnesses in respect of whom S. 360 was not complied with and take steps to comply with those provisions so far as these witnesses were concerned. (*Suhrawardy and Mukerji, JJ.*) ABDUL RAHIM *v.* EMPEROR.

29 C. W. N. 698 : 88 I. C. 1052 : 26 Cr. L. J. 1276 : A.I.R. 1925 Cal. 928.

——S. 215—*Order of commitment not challenged when made, cannot be challenged in appeal from conviction.*

A commitment once made stands, unless quashed by the High Court, and if it is not quashed the trial of the persons must take place in pursuance thereof.

Where, in an appeal against conviction, it was contended that the order of the District Magistrate directing further enquiry which resulted in commitment was illegal, but the High Court was not moved at all to quash the commitment,

Held, that the trial was perfectly in order.

A commitment is quashed with only one object, namely, that the trial of the persons committed may not take place. If a trial has already taken place it serves no purpose to impugn the commitment. (*Martimeau and Zafar Ali, JJ.*) NAZIRSINGH *v.* EMPEROR.

7 L. L. J. 428 : 26 Punj. L R. 767 : A. I. R. 1925 Lah. 557

——S. 215—*Commitment can be quashed only on a point of law and not on ground of want of evidence.*

CR. P. CODE (V OF 1898), S. 215.

A commitment can be quashed on a point of law only. It cannot be quashed on the ground that there is no evidence on the committing Magistrate's record to sustain the charges. 13 Bom L. R. 201 and 27 M. L. J. 593, Foll.. (*Baker J. C.*) ISMAIL *v.* EMPEROR. **26 Cr. L.J. 1045 : 87 I. C. 965 : A. I. R. 1925 Nag. 409.**

——S. 215—*Accused committed on a charge of abetment of the fraudulent use of a forged document and also being separately tried for giving false evidence in respect of the same act—There is no ground to quash commitment.*

While it is not desirable that there should be two trials in respect of the same act namely the giving of false evidence, one for giving false evidence under S. 193 and another for abetment of the fraudulent use of a forged document under S. 471-109 it is no ground to quash a commitment. (*Simpson, A. J. C.*) EMPEROR *v.* GAJADHAR. **2 0 W. N. 707 : 90 I. C. 447 : 26 Cr. L.J. 1567 : A. I. R. 1925 Oudh 610.**

——S. 215—*High Court cannot quash commitment merely because of doubts as to credibility of evidence.*

The High Court has no power to quash the commitment merely because of doubts as to the credibility of the evidence of the prosecution, if there is, in fact some evidence which would justify the Sessions Judge in leaving the decision of guilt or innocence to the jury. (7 Bur. L. T. 26 : 27 M. L. J. 593 ; 15 A. L. J. 756 ; 13 Bom. L. R. 203 and 9 C. W. N. 829 Foll. 9 L. B. R. 208, Dist.) (*Lentaigne, J.*) MAHOMED MOIDIN *v.* THE CROWN **1 R. 526 : 76 I. C. 821 : 25 Cr. L. J. 261 : A. I. R. 1924 Rang. 165 (2).**

——Ss. 215 and 423—*Question of commitment—Revision.*

Where a commitment is made by a magistrate under orders of Sessions Judge under S. 423, S. 215 does not apply but the High Court will interfere in revision. (*Macgregor, J.*) EMPEROR *v.* NGA THAT SHE- **1 Bur. L. J. 250 : 11 L. B. R. 375 : A. I R. 1922 L. B. 40 (2).**

——S. 215—*Error of Law—First Class Mogistrate not punishing an offence punishable by him is error of law.*

Where the case was not only exclusively triable by the Sessions Court and the Committing Magistrate who was the First Class Magistrate was empowered to pass an adequate sentence,

Held, the commitment by the Magistrate to the Sessions, was an error of law and the quashing of commitment was justified. 14 C L J. 304 Dist. 1 S. L. R. 31; 8 S L. R. 23 and 14 S. L. R. 85 and 15 B L. R. 98 Foll. (*Raymond and Madgavkar, A. J. Cs.*) UTLI BAI *v.* EMPEROR. **17 S.L.R. 188: A.I.R. 1924 Sind. 61.**

——S. 215—*Judicial commissioner when sitting in Sessions division can pass an order under S. 215.*

The Judicial Commissioner when sitting in the Session Divisions is not divested of his dual capacity as a High Court Judge and he has full power to make an order under S. 215, Cr P. Code even when sitting as a Sessions Judge. 32 Cal. 379 Dist. (*Raymond and Madgavkar, A. J. Cs.*) UTLIBAI *v.* EMPEROR. **17 S. L. R. 188 : A. I R. 1924 Sind. 61.**

——S. 221—*Changes,*

Sub cl (7) has been amended to make it clear that evidence of previous conviction may be given even in cases where the enhanced punishment *is not* beyond the competence of the Court.

——S. 221—*Form of charge—Reading and explaining to jury.*

The heads of charge must show that the law was properly explained to the jury. A mere statement in the charge that the sections were read and explained

CR. P. CODE (V OF 1898), S. 222.

to the jury is not sufficient, unless it is shown in what manner they were explained (*Newbould and B. B. Ghose, JJ.*) RAHAMALI HOWLADAR *v.* EMPEROR. **26 Cr. L. J. 1151 (2) : 88 I. C. 463 (2) : A.I.R. 1925 Cal. 1055.**

——Ss. 221 to 223 and 225—*Cheating—Manner of cheating must be given.*

An accused person is entitled to know with certainty and accuracy the exact value of the accusation brought against him. In a case of cheating the charge must set out the manner in which the offence was committed Whether the orders of the charge are reasonably sufficient to give the accused notice of the accusation which he has got to meet depends upon the circumstances of each particular case. The somission to state the manner of the cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice. In the charges framed in the case the manner of the cheating was set out as follows :—" By deceiving with false representations and promises a well as by conduct."

Held, that the expression used was too vague and indefinite to give the accused proper notice, of the manner of the deceit and was so dangerously wide as might include almost anything. (*Newbould and Mukerji, JJ*). KEDARNATH CHAKRAVARTI *v.* EMPEROR. **41 C. L. J. 172 : 29 C. W. N. 408 : 86 I.C. 705 : 26 Cr. L. J. 849 : A. I. R. 1925 Cal. 603.**

——S. 221—*Charge—Certainty and accuracy of—Language of Statute to be used.*

An accused is entitled to know with certainty and accuracy the exact nature of the charge brought against him for unless he has this knowledge, he may be seriously prejudiced in his defence. In framing charges, it is always a sound rule to adhere to the language of the statute as far as possible (*Newbould and Mukerji, JJ.*) CHHAKARI SHAIK *v.* EMPEROR. **85 I. C. 711 : 26 Cr. L. J. 567.**

——S. 221—*Where conspirator is sought to be made liable as principal under S 114, I. P. C., that section must be mentioned with the main offence in the charge—Penal Code, S. 114.*

Where a conspirator is present at the commission of the offence he may under the provisions of S. 114, I. P. C., be deemed to have committed the offence, but if that is the way in which the accused is to be made responsible for the offences he should be specifically charged with such offence as read with the provisions of S. 114, I. P. C.

Where the only evidence of the accused being a conspirator was his presence at the commission of the offence, there may arise a further question, *viz.*, whether it would be premissible to infer conspiracy from mere presence, and again to make him liable as principal by taking into account the fact that he was present at the commission of the offence. (*Walmsley and Mukerji, JJ.*) ALI MUDDI NASKAR *v.* EMPEROR. **40 C. L. J. 541 : 29 C. W. N. 173 : 52 Cal. 253: 85 I. C. 231 : 26 Cr L. J. 487 : A. I. R. 1925 Cal. 341.**

——Ss. 221, 225 and 537—*False evidence—Failure to enter actual words used is not fatal.*

The failure to enter in the charge the actual words used in the deposition is at most an irregularity cured by S. 537, Cr. P. Code. (*Prideaux, A.J.C.*) MIRABUX *v.* EMPEROR. **18 N. L. R. 192 : 68 I. C. 36 : 23 Cr. L. J. 500 : A. I. R. 1923 Nag. 39.**

——Ss 222 and 223—*Dacoity—Looting Police Stations and villages—A single general charge without dates is bad.*

The accused were under trial for waging war. One

of the counts in the charge was that "you and others did loot the Police Stations above mentioned" (of which there were eight) on dates not specified and that "you did extract supplies of food and other articles by force or threats from the villagers of various villages" on dates not specified.

Held. (Per *Spener, Offg. C. J.*) that the count was too vague. Each looting of a village or Police station should have been treated as a separate offence if it was intended to try any or all of the accused for dacoity apart from waging war. Otherwise the convictions for dacoity must be quashed on the ground of the charges not giving the accused sufficient notice and particulars of what they had to meet. (*Krishnan, J.*) (*On a difference of opinion between Spencer, Offg. C. J. and Reilly, J.*) GAM MALLU DORA *In re*.

1925 M. W. N. 192 : A. I. R. 1925 Mad. 690 : 48 M. L. J. 308 :

———S 222 (1)—*Penal Code, S. 193—Charge must set out the specific answers alleged to be false.*

A charge under S. 193, was as follows : "That you intentionally gave false evidence in answer to certain of the following questions put to you in the course of your evidence before the said Court." Then followed the 50 questions and the answers thereto. Which answers were alleged to be false did not appear in the charge sheet.

Held, that no accused person reading such a charge could say what he was called on to answer. (*C. C. Ghose and Cuming, JJ.*) R. H. E. OATES *v.* EMPEROR.

38 C. L J. 163 : 76 I. C. 417 : 25 Cr. L. J. 177 : A. I. R. 1924 Cal. 104.

———S. 222 (2)—*Charge, contents of—Penal Code, S. 408—Prosecution, duty of.*

Though under S. 222 (2) the accused may be charged in respect of the gross sum received by him, still the prosecution must decide what amount they are prepared to prove the accused lawfully received and lawfully expended, and what sum was not. To convict there must be a definite findingof a definite sum traced to the accused. (*Walsh, J.*) MOHAN SINGH *v.* EMPEROR.

42 All. 522 : 18 A. L. J. 633 : 2 U. P. L. R (All.) 360 : 59 I. C. 372 : 22 Cr. L.J. 84.

———S. 222 (2)—*Effect of amendment.*

The introduction of Cl. 2 in S. 222, Cr. P. Code was not to amend the Penal Code but to amend the processual law. As the law stood before, there was great difficulty in convicting where there was a running account and where the prosecution were unable to put their hands on a specific item out of which the particular sum was embezzled ; also there was the difficulty of joinder of charges under S. 234. (*Walmsley and Mukerji, JJ.*) KHIRODE KUMAR MUKERJI v. EMPEROR.

29 C. W. N. 54 : 40 C. L. J. 555 : A. I. R. 1925 Cal. 260.

———S. 222 (2)—*Construction—Section only dispenses with particulars but gross sum does not include every act of misappropriation.*

The petitioner was charged in August 1922 under S. 409 of the Indian Penal Code with criminal breach of trust in respect of a sum of Rs. 18, 924—4—0 alleged to have been misappropriated by him between the 1st October 1921 and the 1st March 1922. The charge was withdrawn with the leave of the Court on the 28th August 1922 so that the accused was acquitted. The petitioner was subsequently prosecuted at the instance of the complainant, who was also the complainant in the previous matter, for criminal breach of trust as a servant under S. 408 of the Indian Penal Code in respect of a sum of Rs. 100 alleged to have been misappropriated by the petitioner on the 30th November, 1921, that is within the period covered

by the charge under section 409 in respect of the sum of Rs. 8, 924—4—0

Held, that S. 222 (2) only dispensed with the particulars which otherwise would be required but it does not say that the gross sum is to include every act of misapprorpriation committed within the dates specified in the charge. The essence of the offence is the misappropriation and not the time within which it took place. 12 Bom. L. R. 226 foll. 17 Cr. L. J. 30 Not foll. (*Greaves, J.*) NAGENDRA NATH *v.* EMPEROR.

50 Cal. 632 : 38 Cal. L. J. 286 : 27 Cal. W. N. 578 : A. I R 1923 Cal. 654.

———S. 223—*Cheating—Manner of cheating misdescribed—Defect is material but can be condoned if accused is not prejudiced.*

The alleged facts of the case were that the complainant paid a certain amount to the accused for redeeming at certain jewel pledged with the accused, that the accused received the money and, saying that he would get the jewels, absconded. The charge under S. 420 I. P. C. was to the effect that the accused dishonestly induced the complainant to part with several gold and silver ornaments on false representation and thereby committed the said offence. *Held*, the charge did not correctly set out the facts of the case for the prosecution upon which it was founded, and that the real charge under S. 420 I. P. C., which could be framed upon the case as presented on behalf of the prosecution was that the accused dishonestly induced the complainant to part with the sum, dishonestly concealing from the complainant the fact that he never intended to return the ornaments for the return of which the amount was being paid. *Held*, further that this defect in the framing of the charge, though a material one, did not prejudice the accused in any way as it was clear from the answer which the accused gave to the Court when examined under the provisions of S. 342 Cr. P. Code, that he understood exactly what the case against him was. (*Mukerji, J*) GOKUL KHALIK *v.* EMPEROR.

29 C.W.N. 483 : 86 I. C. 970 : 26 Cr. L. J. 906. A. I. R. 1925 Cal. 674.

———S. 223—*Charge under Railways Act—Conviction under Railways Act read with S. 149 I. P. C.—Legality.*

Where the charge mentions only an offence under S. 126 Railways Act a conviction under that section read along with S. 149, I. P. C. is not legal as the accused cannot be expected to meet that case in the absence of notice of it. (*Ramesam and Wallace JJ.*) THAIKKOTTATHIL KUNHAN *In re*.

18 L. W. 946 : 33 M. L. T, 210 : (1924) M. W. N. 47: 76 I. C. 644 : 25 Cr. L.J. 212 : A. I. R. 1924 Mad. 338.

———S. 223—*Omission of particulars mentioned in the charge can be cured by virtue of Ss. 225 and 537.*

A trial *de novo* must not be ordered when no charge has been framed or when a defective charge has been framed. In such a case what must be done is to order a fresh trial from the stage at which the illegality occurred. Ss. 225 and 537 of the Cr. P. Code, remedy any defect due to the omission in the charge of the particulars required by S. 223 of the Code. (*Hallifax, A. J. C.*) GANGADHAR *v.* BHANGI SAO.

25 Cr. L.J. 1152 : 81 I.C. 976 : A. I. R. 1925 Nag. 147.

———Ss. 225 and 537—*Omission in charge—Cure—Re-trial—When to commence.*

Ss. 225 and 537 would cure any omission there may be of the particulars required by S. 223. Even in cases of defective charges, the whole trial is not vitiated but only the portion after the framing of the charge. (*Hallifax, A. J. C.*) GANGADHAR *v.* BHANGI SAO.

25 Cr. L. J. 1152 : 81 I. C. 976 :

CR. P. CODE (V OF 1898), S. 226.

A. I. R. 1925 Nag. 147.

——Ss. 226 and 227—*Sessions trial— Power to add a charge distinct from the charges framed by Committing Magistrate.*

The accused were committed to the Sessions for the murder of one person and for causing hurt to another person. The Sessions Judge added a charge relating to the murder of the latter person also. *Held*, that in the circumstances of the case the Sessions Judge had power to add a charge distinct from the charge framed by the committing Magistrate. (*Newbould and Ghose, JJ.*) HASSENULLA SHEIKH *v.* EMPEROR. **28 C. W. N. 561 : 26 Cr. L. J. 5 : 83 I. C. 485 : A. I. R. 1924 Cal. 625.**

——Ss. 226 and 227—*Sessions Court can add charges—Penal Code, Ss.* 497 *and* 498.

There is nothing to prevent the Sessions Court from adding charges under Ss. 497 and 498 of the Penal Code where the complaint is not merely of offences involving the use of force but was also a specific complaint under the said sections. (*Teunon and Ghose, JJ.*) RAJANI KANTA *v.* IDRIS THAKUR. **48 Cal. 1105 : 25 C. W. N. 615 : 34 C. L. J. 51 : 64 I. C. 280 : 22 Cr. L. J. 760.**

——S. 226—*Sessions trial— Court can frame fresh charges.*

A Sessions Judge can proceed under S. 226 only on the facts appearing from the magisterial enquiry. Where the facts disclosed by the magisterial enquiry warrant the framing of a charge not framed by the committing Magistrate, it is open to the Sessions Judge to frame an additional charge. 32 C. 22, Not Foll. (*Broadway, J.*) MULA SINGH *v.* EMPEROR. **71 I. C. 593 : 24 Cr. L. J. 177 : A. I. R. 1924 Lah. 413.**

——Ss. 227, and 237—*Ss.* 227 *and* 237 *should be read together.*

An accused is entitled to know what offence he has to answer ; Ss. 237 and 227, Cr. P. Code, necessarily go together. It is not the intention of the Legislature to empower a Court to convict an accused person of an offence of which he has not been told anything. (*Banerji, J.*) DHUM SINGH *v.* EMPEROR. **23 A. L. J. 436 : 88 I. C. 1 : L. R. 6 A. (Cr.) 143 : 26 Cr. L. J. 1057 : A. I. R. 1925 All. 448.**

——S. 227—*Summons to accused under one section —Evidence disclosing another offence—Amendment of charge.*

Where a Magistrate summoned the accused under a certain section of the Penal Code, but the evidence disclosed an offence under another section, he can amend the charge. The fact that he originally summoned under a wrong section does not affect the question. (*Greaves and Duval, JJ.*) BIROO SARDAR *v.* ARIFF. **26 Cr. L. J. 302 (2) : 84 I. C. 446 (2) : A. I. R. 1925 Cal. 579.**

——S. 227—*Charge under Ss.* 352 *and* 504, *I. P. C.—Discovery at the time of writing judgment that the offences could not be tried together—Illegality of charges—Charges struck out and new charge framed under S.* 504, *I. P. C.—Conviction on such charge—Conviction is illegal and should be set aside.*

Where the Magistrate inquired into the complaint and framed a charge under Ss. 352 and 504, but at the time of writing the judgment he discovered that the occurrences were different and that the charges under Ss. 504 and 352 could not be tried together, and finding the illegality of the charges, he struck out the charge framed, and framed a charge under S. 504 alone against the accused and asked the accused whether the prosecution witnesses were to be recalled and examined and whether he had any defence witnesses to examine, but the accused stated that he did not want to examine witnesses and the Magistrate convicted him under S. 504 :

Held, that such procedure was not sanctioned by S. 227, Cr. P. Code. What could be done under S. 227 was only to alter or modify the charge at any time before judgment. But the section does not permit the Court to try in the same trial two distinct offences which are in no way connected with one another and that the procedure was illegal and the conviction must be set aside 29 Mad. 569, Foll. (*Devadoss, J.*) KRISHNAMURTHI AIYAR *v.* NARAYANASWAMI AIYAR. **22 L. W. 402 : 90 I. C. 914 : 26 Cr. L.J. 1618 : (1925) M. W. N. 746 : A. I. R. 1925 Mad. 1065 : 49 M. L J. 93.**

CR. P. CODE (V OF 1908), S. 232.

——S. 231—*Amendment of charge—Right of accused to recall and cross examine witnesses.*

When a charge is amended the accused has a right to recall and cross-examine all the prosecution witnesses. The right is not restricted to the recalling of those witnesses only who have deposed to the subject-matter of the alteration or amendment in the charge. (*Martineau, J.*) HAZARA SINGH *v* EMPEROR. **90 I. C. 153 : 26 Cr. L. J. 1497.**

——S. 231—*Criminal trial—Charge—Alteration of, after commencement of trial—Right of accused to re-examine prosecution witnesses, and adduce further evidence in defence—Legality of procedure.*

The accused was originally tried under S. 324 of the Penal Code. After the evidence for the prosecution closed, the accused was charged under S. 324 of the Penal Code and the trying Magistrate recorded his plea and proceeded to hear the evidence for the defence. The charge aforesaid was framed on the 16th November, 1923. The evidence for the defence was concluded on the 12th of December 1923. On the 15th of December, 1923, the trying Magistrate altered the charge into one under S. 307 of the Penal Code and without giving the accused an opportunity to re-examine the witnesses for the prosecution in regard to the altered charge or to produce such further defence evidence as he may have in his defence on that charge, committed him to the Court of Sessions, for trial on the charge so altered. S. 231, Cr. P. Code, requires that when a charge is altered by the Court after commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon and examine with reference to such alteration or addition any witness who may have been examined and also to call any such further witness whom the Court may think material. The alteration was made at a very late stage of the case and no commitment ought to have been made on the altered charge without giving the accused an opportunity of re-examining the witnesses for the prosecution and producing his defence in regard thereto. *Held*, that the procedure of the Magistrate was entirely illegal and likely to prejudice the accused in his trial before the Court of Session. (*Kanhaiya Lal, J.*) MOHAN LAL *v* EMPEROR. **22 A. L. J. 239 : L. R. 5 A. 79 (Cr.) : 81 I. C. 318 : 25 Cr. L. J. 798 : A.I.R. 1924 All. 665.**

——Ss. 232 and 221—*Error in the charge—Common object not mentioned.*

Where no sufficient evidence had been given to prove a common object to resist the execution of the order and the charge framed against accused by the trial Court did not even set out the common object of the unlawful assembly, *held*, it is impossible to say that the accused had notice of the precise case which the prosecution were making against him. (*Mullick, Coutts and Das, JJ.*) EMPEROR *v.* ABDUL HAMID. **2 Pat. 134 : 3 Pat. L. T. 585 : 1 Pat. L. R. (Cr.) 199 : 68 I.C. 945: 1922 P.H.C.C, 274 : 4 U.P.L.R. (Pat) 73**

CR. P. CODE (V OF 1898), S. 233.

23 Cr. L. J. 625 : A. I. R. 1923 Pat. 1 (S. B.)

——S. 233—*Theft and beating after an interval, to prevent complainant from lodging complaint, are distinct offences.*

Sharfuddin and Nanhe accused were detected while stealing the crop of the complainant Chiddu Chamar, who objected to the theft and was compelled to run away to his house. After this, Sharfuddin and Nanhe hearing that the complainant intended to go to the police station to make a report, went along with the other persons to the complainant's *chaupal* and there caused hurt to Chiddu, and grievous hurt to his father Nanhe.

Held, that the two offences were obviously quite distinct and separate, and there was also an interval of time between their commission. *Held* further, that they were not so connected together as to form the same transaction. (*Sulaiman, J.*) SHAFI *v.* EMPEROR.

21 A. L. J. 859 : L. R. 4 A. (Cr.) 4 : A. I. R. 1924 All. 211.

——S. 233—*Where several persons are killed in the same transaction, there must be a charge in respect of each victim when the charge is one of murder.*

Where several persons are murdered by setting fire to the hut in which they are sleeping to frame one charge of murder comprising the names of all the victims instead of a separate charge being framed with regard to each is a defect but is only a technical defect

Per *Mukerji, J.*—The first part of S. 233, Cri. P Code, lays down that for each distinct offence there shall be a separate charge. The provision is mandatory and a number of different charges should have been framed for these several offences of murder which appear, to have been huddled into the first count as it stands. Whether this provision of the law is obligatory or merely directory, or whether the failure to comply with it is an illegality which vitiates the trial or is a mere irregularity, is a question with regard to which there is a clear conflict of judicial opinion in the Calcutta High Court. (*Walmsley and Mukerji, JJ.*) ALI MUDDI NASKAR *v.* EMPEROR.

40 C. L. J. 541 : 29 C. W. N. 173 : 52 Cal. 253 : 85 I. C. 231 : 26 Cr. L. J. 487 : A. I. R. 1925 Cal. 341.

——Ss. 233 and 235—*Distinct offences—Separate charges are necessary except where they form one series of acts.*

A charge is a bad charge if it contains more than one distinct offence. But where the distinct offences which were included in that particular charge, were one series of acts so connected together as to form the same transaction, the accused can be charged with and tried at one trial for each such offence, and the evidence relating thereto can be presented to the Court by the prosecution if those distinct offences are contained in separate charges. (1901) 25 Mad. 61 Dist. (*Sanderson, C. J. and Panton, J.*) RADHA NATH *v.* EMPEROR. **50 Cal. 94 : 36 Cal. L. J. 149: 71 I. C. 120 : 24 Cr. L. J. 72 : A. I. R. 1922 Cal. 573.**

——S. 233—*Joint trial of cross-cases, prosecution evidence in one case being treated as defence evidence in the other is illegal.*

There were two cross-cases arising out of a riot and although two separate records were prepared only one joint trial was held and the prosecution evidence in each case was treated as defence evidence in the other case.

Held, that the procedure was illegal and the trials must be quashed. (*Abdul Raoof, J.*) MUHAMMAD *v.* EMPEROR.

25 Cr. L. J.551 : 81 I. C. 39 : A. I. R. 1925 Lah. 149.

——Ss.233 and 239—*Penal Code, Ss.*379 *and* 411.

Joint trial for the offence under sections 379 and 411 Indian Penal Code is illegal with reference to the provisions of sections 233 and 239 of the Cr. P. Code. (*Abdul Raoof, J.*) SOHAN SINGH *v.* EMPEROR.

A. I. R. 1923 Lah. 394 (1).

——S. 233—*Misjoinder of charges.*

Joint trial of several persons for offence under S. 193, Penal Code is illegal. (*Abdul Raoof, J.*) LACHMAN SINGH *v.* EMPEROR.

15 P. W. R. 1922 (Cr.) : 67 I. C. 615 : 23 Cr. L. J. 439 : A. I. R. 1923 Lah. 89 (2).

——Ss. 233 and 434—*Misjoinder of charges—Several acts of defalcation—False entries.*

Each false entry which amounts to an act of falsification constitutes a separate offence although a number of false entries might be proved to cover one defalcation. Where there are two acts of defalcation covered by two false entries and the only thing to connect them together was the fact that the goods were received on the same day from the same depositor, a joint trial in respect of them is illegal. 26 C. 560 : 41 C. 772 Ref. (*Spencer and Ramesam, JJ.*) CHAKRAKODI SHAMA SASTRI *v.* EMPEROR.

(1922) M. W. N. 476 : 72 I. C. 622: 24 Cr. L. J. 462 : A. I. R. 1922 Mad. 435: 44 M. L. J. 67.

——Ss. 233 and 537—*Charges—Lumping together—Contrary to section is only an irregularity.*

The lumping together of several charges in one trial although contrary to S. 233 is only an irregularity that is cured by S. 537. (*Lindsay and Daniels, A. J. Cs.*) KALLU *v.* EMPEROR.

8 O. L. J. 10 : 3 U. P. L. R. (J. C.) 4 : 61 I. C. 168 : 22 Cr. L. J. 344.

——S. 233—*Penal Code, Ss.* 417 *and* 109—*Lumping together ten distinct offences—Joint trial is illegal.*

The accused were charged with one offence though they were liable to be charged with as many offences as the number of persons who were cheated, as the cheating was not done at one and the same time or as a part of the same transaction. The complainants stated that they were called separately at different intervals. The Charge Sheet did not make it clear which of the accused persons was being charged with abetment and which of them was being charged with the substantive offence. *Held*, the offences were all separate and a joint trial of the accused persons for ten separate offences was not only irregular but illegal, (*Kanhaiya Lal, J. C.*) GIRJA DAYAL *v.* EMPEROR.

25 O. C. 151 : 69 I. C. 271 : 23 Cr. L. J. 687 : A. I. R. 1922 Oudh 250.

——Ss. 233. 272, 285 and 537—*Five accused—Separate charges—Separate trials—Necessity.*

The simultaneous hearing of two cases by one set of assessors is more than a mere irregularity. The mere fact that there are separate and complete records with separate judgments in each case is not sufficient compliance with law in a case where the trials are to be distinct. Where there are five persons accused of several offences regarding the same property, their trial should not be conducted piecemeal but the Judge might adjourn one case under S. 344, Cr. P. Code while taking up the other. 6 C. 96 ; 20 C. 537 : 25 M. 61, Rel. (*Duckworth, J.*) EUSOOF *v.* EMPEROR.

11 L. B. R. 73 : 64 I. C. 833 : 23 Cr. L. J. 49.

——S. 233—*Cross-complaints— Prosecution evidence in one, cannot be treated as defence in another.*

Where cross-complaints arising out of the same occurrence are filed, the prosecution evidence in one case should not be treated as defence evidence in the other; otherwise the trial will be vitiated. (*MacGregor, J.*) MAMSA *v.* EMPEROR.

13 Bur. L. T. 243 : 63 I. C. 867 : 22 Cr. L. J. 707.

——. 234—*Changes.*

(1) The offences of same kink might now be

CR. P. CODE (V OF 1898), S. 234.

against several persons.

(2) Offenoes under Ss. 379 and 380 are of the same kind.

(3) An offence is of the same kind as an attempt thereof where such attempt is an offence.

——Ss. 234 and 239—*Words in singular do not, under this section include the plural.*

Ss. 234 to 238 by their terms, refer to the case of a single accused, and S. 239 is the section which deals with the case where more persons than one are accused. The existence of S. 239 specifically dealing with the case of several accused, and the arrangement of the sections relating to joinder of charges, constitute such a repugnancy in the context as prevents the reading of the words "a person" in S. 234 as including several persons, by applying the provision of the General Clauses Act that words in the singular shall include the plural. Exceptions to the general rule that there should be a separate trial and separate charge, except as otherwise laid down, must be strictly construed in favour of the accused. (*Kanhaiya Lal and Wallach, JJ.*) RAM PRASAD *v.* EMPEROR. **19 A. L. J. 798 : 22 Cr. L. J. 657 : 3 U.P.L.R. (All) 151: 63 I.C 449: L.R. 2 A. (Cr.) 138.**

——Ss. 234, 239—*Joint trial—Offences on different dates—Trial is illegal.*

If the same person commits different offences on two different days, it is illegal to try him for all such offences, *e. g.*, a joint trial for offences under Ss. 147 and 325, I. P. C. committed on one day and under Ss. 147, 323 and 342, I.P.C., committed on the next day is illegal. (*Daniels, J.*) PUTTOO LAL *v.* EMPEROR. **L. R. 4 A 203 (Cr.) 21 A. L. J. 820 : 46 A. 54 : 9 O. & A. L. R. 1047 : A. I. R. 1924 All. 316.**

——S. 234 — *Misappropriation—One trial for twenty-six items is not legal.*

A conviction for criminally misappropriating 26 different sums amounting to Rs. 91-2 between the 4th of August, 1921, and 12th of January, 1922 cannot be upheld. 25 M. 61, Foll. (*Stuart J.*) GANGA PRASAD *v.* EMPEROR. **25 Cr. L. J. 220 · 76 I. C. 652 : A. I. R. 1923 All. 483 (2).**

——Ss. 234 and 235—*Joinder of three charges under S.* 408 *and one under S.* 477 (*A*) *I. P. C.—Is not legal.*

Joinder of three charges under S. 408, I. P. C. (criminal breach of trust by a public servant) with one under S. 477 A (falsification of accounts to conceal the defalcations) vitiates the trial. 32 All. 219, Foll. (*Gokul Prasad, J.*) SHUJA UDDIN AHMAD *v.* EMPEROR. **44 All. 540 : 20 A. L. J. 320 : 66 I. C. 322 : 23 Cr. L. J. 258 : L. R. 3 A. 81 (Cr.) : A. I. R. 1922 All. 214 (1.)**

——S. 234—*Three acts of criminal breach of trust and three acts of falsification of accounts—Accused cannot be charged in respect of them all at one trial—Cr. P. C, S.* 235.

It is illegal to try a person on a charge which alleges three distinct acts of criminal breach of trust and three ditinct acts of falsification of accounts though in respect of the same items : 30 Mad. 328 and 41 Cal. 722, Appr ; 33 Bom. 221, Dist. The case is not covered by S. 234 of the Code, inasmuch as the offences of criminal breach of trust and of falsification of accounts are not offences of the same kind ; and it cannot fall under S. 235 because there are three defalcations committed on different occasions, and the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcation and falsifications. (*Fawcett and Coyajee, JJ.*) EMPEROR *v.* MANANT K. MEHTA. **49 Bom. 892 : 27 Bom. L. R. 1343 : A. I. R. 1926 Bom. 110.**

CR. P. CODE (V OF 1898), S. 234.

——S. 234—*Joinder of charges—Under Ss.* 411 *and* 414, *I. P. C. is bad.*

The joinder of the charges of offences under section 411, I. P. C., with those under section 414, I. P. C. is bad. If the charges are framed in the alternative, this might come within the terms of section 236 Cr. P, Code. But if the charges as framed are not in the alternative, the mistake cannot be corrected by the argument that, if they had been in the alternative, there would have been no defect in the trial. Having framed defective charges the Magistrate cannot remedy the error, at the conclusion of the trial, by saying in his judgment that he would only proceed on the charges that had been legally joined. If he wished to strike out any of the charges he should do so before concluding the trial, and should give the accused an opportunity of making such defence as he thinks fit on the charges as amended. (*Newbould and Ghose, JJ.*) CHETTO KULWAR *v.* EMPEROR. **49 Cal. 555 : 24 Cr. L. J. 86 : 71 I. C. 214: A. I. R. 1922 Cal. 401.**

——S. 234—*Meaning of—Separate offences.*

Each false entry which amounts to an act of falsification constitutes a separate offence; although a number of false entries might be proved to cover one defalcation. (*Spencer and Ramsam, JJ*) CHAKRAKODAI SHAMA SHASTRI *v.* EMPEROR. **(1922) M. W. N. 476 : 72 I. C. 622 : 24 Cr. L. J. 462 : A. I. R. 1922 Mad. 435 : 44 M. L. J. 67.**

——S. 234—*Penal Code, S.* 121—*Offence under S.* 121 *is continuing offence.*

The offence of waging war, punishable under S. 121, Penal Code, is a continuing offence. A charge under the section is not illegal by reason of contravening S. 234, Cr. P. Code, by mentioning more than three offences spread over a period longer than a year. (*Krishnan, J.*) (*On a difference of opinion between Spencer, Offg. C. J. and Reilly, J.*) GAM MALLU DORA, *In re.* **(1925) M. W. N. 192 : 90 I. C. 297: 26 Cr. L. J. 1513 : A. I. R. 1925 Mad. 690: 48 M. L. J. 308.**

——Ss. 234, 235, 236 and 239 —*Joint trial—Accusation and not result of trial determines legality.*

Per *Krishnan, J.*—The question of the legality of a joint trial really depends upon the accusation made and not upon the result of the trial ; provided, of course, that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. (*Krishnan, J.*) (*On a difference of opinion between Spencer, Offg. C. J. and Reilly, J.*) GAM MALU DORA, *In re.* **(1925) M. W. N. 192 : 90 I.C. 297 : 26 Cr. L. J. 1513 : A. I. R. 1925 Mad. 690 : 48 M. L. J. 308.**

——Ss. 234 and 239—*Passing counterfeit coins on different occasions to different persons on the same day—Joint trial is legal.*

Where two persons were jointly charged with and convicted under S. 241 of the I. P. C., of passing counterfeit coins on three different occasions on the same day to three different persons, *held*, the trial was not illegal within the meaning of S. 234 or S. 239. 39 Cal. 292 Diss : 25 M. L. T. 379, Foll. (*Wallace, J.*) KOVAGANTI *v.* EMPEROR. **16 L. W. 831 : 69 I. C. 447 : (1922) M. W. N 820 : 23 Cr. L. J. 719 : A. I. R. 1923 Mad. 181: 44 M. L. J. 130.**

——S. 234—*Joint trial—Members of the same crowd—Common object—Series of attacks at different places and at short intervals, whether constituting a single or a number of separate riots.*

Where all those persons who attack are actuated by a single motive a continuous series of attacks with the same common object, even though the composition of the crowd may vary, constitutes a single riot and not a

CR. P. CODE (V OF 1898), S. 234.

number of separate riots. The mere fact that one of them attacks at one place and another at another place a few minutes after does not prevent them from being tried jointly as long as they are members of the same crowd actuated by the same motive. (*Pullan, A. J. C.*) PRAG *v.* EMPEROR. **1 O. W. N. 473 : 10 O. & A. L. R. 871: 82 I. C. 33: 25 Cr. L. J. 1169 : 11 O. L. J. 693: A. I. R. 1925 Oudh 65.**

———S. 234—*Stolen properties—Several diverse articles found—Procedure at trial—Joint or separate.*

When the date or dates at which various parcels of stolen property were received are not known, the date is not material in dealing with charges of retention upon which the prosecution is thrown back. If the prosecution forms a charge on the presumption that the retentions constituted a set of independent offences, it must include only three parcels in respect of which the charge is made and it may here be met by the plea that the retentions in fact constitute one transaction, in which case the charge may be amended and the whole tried at one trial. If the prosecution launches several separate proceedings, the accused can take the benefit of S. 403, Cr. P. Code, on the ground the retention constituted a single transaction. The only safe course for the prosecution in such cases is to adopt the first course. Even if the articles recovered were of diverse character, it constitutes the same offence, as being punishable under the same section of the Penal Code. (*Adami and Bucknill, JJ.*) EMPEROR *v.* BISHUN SINGH. **3 Pat. 503 : 5 Pat. L. T. 319 : 2 Pat. L. R. 131 (Cr.) : 1924 P. H. C. C. 126 : 25 Cr. L. J. 738 : 81 I.C. 226 : A. I. R. 1925 Pat. 20.**

———S. 234—*Three separate offences charged against one accused and second accused charged with abetting two of the offences—Trial is bad for misjoinder.*

S. 234 permits the joinder of three charges against one accused, and S. 239 read with S. 234, permits the joinder of two charges against one accused with the charges of abetment of those two offences against another accused. But there is no provision which permits the joinder of a third charge against the one accused with either or both of the first two charges against the other accused. Therefore where one accused was charged with three separate offences and the other accused was charged with abetment of two of these offences, but not of abetment of the third, *held*, that S. 233 governed the case, and that the trial was illegal. (*Carr, J.*) AH KIT *v.* EMPEROR. **3 Bur. L. J. 254 : 84 I. C. 463 : 26 Cr. L. J. 319 : A. I. R. 1925 Rang. 198.**

———S. 234—*Offences against several persons—Trial is legal.*

S. 234 of Cr. P Code is not limited to cases where the offence has been committed against the same person but it applies also to cases where the complainants are different persons. 43 C. 13, Foll. (*Duckworth, J.*) NGA PO KYIN *v.* EMPEROR. **11 L. B. R. 45 : 69 I. C. 628 : 23 Cr. L. J. 740.**

———S. 235—*Same transaction—Joint trial—Numerous accused.*

Where a large number of persons amounting to more than 300 persons were charged with and tried for the offence of wilful murder committed by the members of an unlawful assembly at a time when each of the persons was alleged to be a member of that assembly, the joint trial of the accused must be held to be legal under S. 239 of the Criminal Procedure Code. (*Mears, C. J. and Piggott, J.*) ABDULLAH *v.* EMPEROR. **L. R. 4 A. 145 (Cr.) : A. I. R. 1924 All. 233.**

———Ss. 235 and 239—*Receiving stolen property*

CR. P. CODE (V OF 1898), S. 235.

—Different owners—Properties not received at different times—Offence—Conviction.

Even though a person is in possession of stolen property identified to belong to different individuals he cannot be convicted of several offences of theft in respect of property identified by each owner unless it is proved that they were received by him at different times. 15 A. 317, Foll. (*Ryves and Daniels, JJ.*) SHEO CHARAN *v.* EMPEROR. **21 A. L. J. 389 : L. R. 4 A. 104 (Cr.) : 45 All. 485 : 24 Cr. L. J. 632 : 73 I. C. 520 : A. I. R. 1923 All. 547.**

———Ss. 235 and 239—*Same transaction—Several offences by gang of dacoits.*

Where some of the dacoits robbed each ekka and the cart passing by the road and each act of crime was committed by the same gang in pursuance of the same object, *held*, clearly, all these offences were committed in the same transaction and Ss. 235 and 239 have application. (*Stuart and Ryves, JJ.*) RAM PRASAD *v.* EMPEROR. **20 A. L. J. 926 : 71 I. C 505 : L. R. 4 A. (Cr.) 4 : 24 Cr. L. J. 153 : A. I. R. 1923 All. 137 (1).**

———S. 235—*Distinct offences — Joint trial — Different offences and acts—Legality.*

Where two acts were committed on different dates and there was no connection between the two so as to make them the same transaction, a joint trial is not legal. (*Sulaiman, J.*) SHAFI *v.* EMPEROR. **21 A. L. J. 859 : L. R. 5 A. (Cr.) 4 : A. I. R. 1924 All. 211.**

———S. 235—*Distinct offences—Joinder of charges—Theft and cheating—Procedure—Evidence of theft, inadmissible to prove cheating.*

The accused was charged at one trial with offences under Ss. 420 and 380, I. P. C., alleged to have been committed under the following circumstances. The complainant was taken to a shop by the accused and was induced by him to try a bar of silver which on subsequent examination proved to be base metal covered with a thin coating of silver. On the same night the accused in whose house the complainant was staying stole the silver bar. *Held*, that though the two offences under Ss. 380 and 420, I. P. C., were not committed in the course of the same transaction within S. 235, Cr. P. Code, still the evidence which went to establish the charge under S. 380, I. P. C., was admissible as showing dishonest intention in respect of the offence under S. 420, I. P. C., and that as there had been no prejudice to the accused the joint trial was not bad. (*Ryves, J.*) BECHAI *v.* EMPEROR. **20 A. L J. 324 : L. R 3 A. 74 (Cr.) : 69 I. C. 159 : 23 Cr. L. J. 671 : A. I. R. 1922 All. 244.**

———Ss. 235 and 239—*Scope of—No rule that more than three offences cannot be combined.*

There is nothing in Ss. 235 or 239 of the Code to warrant the rule that in no circumstance can more than three offences be combined even if more have been committed in the same transaction. (*Stuart, J.*) HANUMAN *v.* EMPEROR. **19 A. L. J. 392 : 63 I. C. 401 : L. R. 2 A. (Cr.) 57 : 22 Cr. L. J. 641.**

———S. 235—*Illustration (i) and I. P. Code, S. 414—Person dishonestly receiving stolen property, whether can be charged and convicted of voluntarily concealing or disposing of that property.*

A person who has dishonestly received stolen property can be charged and convicted of voluntarily concealing or disposing of that property. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* ABDUL GANI. **27 Bom. L. R. 1373 : 49 Bom. 878.**

———S. 235—*Rioting and hiring for rioting are ordinarily distinct offences.*

The offence of hiring a person to take part in a riot

is a separate and distinct offence from the riot itself and ordinarily the hiring and the riot would be separate transactions. There may, however, be circumstances which might justify the Court in holding that the alleged hiring or employing and the riot were part of the same transaction. (*Newbould and Mukerjee, JJ.*) NAYAN ULLAH *v.* EMPEROR.

26 Cr. L. J. 594 : 85 I. C. 818 : A. I. R. 1925 Cal. 903.

——— Ss. 235 and 239—"*Same transaction*"—*Acts need not be committed all on same occasion—Close connection by continuity of purpose is enough.*

Whether a transaction is the same or not is a question of fact depending on the facts and circumstances of the particular case. It is not necessary for the purposes of Ss. 235 and 239 that the acts should have been committed all on the same occasion, but it is sufficient that, though separated by a distinct interval of time, they are closely connected by continuity of purpose or as progressive acts towards a single object. Under the decree of a Civil Court certain lands had been given to the complainant. The accused went on these lands and cut and took away paddy from some of the plots. On the next day they went on the other plots and cut and took away other paddy. *Held*: that the events of the two days really formed one transaction, for in each case the object of the accused was to assert their rights or alleged rights over the lands which had been awarded by the decree of the Civil Court to the complainant and the accused were rightly tried together in respect of the offences on both the days. (*Greaves and Panton, JJ.*) PALIT PABAN ROY *v.* EMPEROR. **26 Cr. L. J. 369 : 84 I. C. 849 : A. I. R. 1925 Cal. 580.**

——— S. 235—*Trial for charges under Ss.* 304-149 *and Ss.* 304-34 *is not illegal but should be carefully conducted.*

Although under the law, there cannot be any objection to one charge under S. 304 read with S. 149 and another under S. 304 read with S. 34 being put forward against the accused persons at one and the same trial, in some instances they may cause embarrassment inasmuch as they proceed upon an assumption of facts which may not be identical so far as the two charges are concerned and it is desirable that in framing charges with regard to matters of this description, attention should be paid to the case as put forward on behalf of the prosecution and the matter should then be dealt with strictly in accordance with the allegations which the prosecution desires to prove. (*Walmsley and Mukerjee, JJ.*) SURENDRA LAL DAS *v.* EMPEROR. **40 C. L. J. 559 : 85 I. C. 147 : 26 Cr. L. J. 467 : A. I. R. 1925 Cal. 413.**

——— Ss. 235 and 239—*Provisions are merely enabling ones—Joinder of charges though legally permissible should not be resorted to if there is risk of embarrassing the defence.*

In a case of a charge of conspiracy, and nine separate charges of murder and one of arson, upon the allegation that all these offences were committed in pursuance of the conspiracy or at any rate in the course of the same transaction and applying the exceptions laid down in Ss. 235 and 239, Cr. P. Code, all these charges could no doubt be legally joined, but the provisions of these sections are merely enabling ones and if there is risk of embarrassing the defence such joinder of charges should not be resorted to. There was evidence against all the accused together, only of conspiracy to commit murder. A number of murders and an offence of arson were committed. Though all the accused were present, there was only evidence against some of them as regards these the latter offences. All the accused were charged with conspiracy, murder and arson and the jury returned a verdict of guilty against all the accused on all the charges. *Held*, that the jury were embarrassed and the accused were prejudiced in their defence and that a re-trial must be ordered. (25 Mad. 61 P.C. Foll.) (*Walmsley and Mukerjee, JJ.*) ALI MUDDI NASKAR *v.* EMPEROR.

40 C. L. J. 541 : 29 C. W. N. 173 : 52 Cal. 253 : 85 I. C. 231 : 26 Cr. L. J. 487 : A. I. R. 1925 Cal. 341.

——— Ss. 235, 239—*Same transaction—Abduction and concealment on different dates—Joint trial.*

If a series of acts are so connected together by proximity of time, community of criminal intention and continuity of action and purpose or relation of cause and effect as to constitute one transaction, a joint trial is valid, and is required in the interests of public time and convenience. Where a girl is abducted on a certain night and thereafter various people conceal her, the first offence being a continuing offence, joint trial is not illegal. (*Ghose and Cuming, JJ.*) KUSHAI MALLIK *v.* EMPEROR. **50 Cal. 1004 : 25 Cr. L. J. 1082 : 81 I. C. 906 : A.I.R. 1924 Cal. 389.**

——— S. 235—*Same transaction—Charges under S.* 218 *and S.* 477-*A.*

The accused was the Sub-Inspector in charge of the Netrokana Police Station. On the 7th February last a prostitute named Kamini died in Netrokana town at 2 P.M. in the afternoon. She had executed a registered deed of gift covering most of the properties to one Purna. On her death the Sub-Inspector took charge of the properties left by Kamini and removed them to the Thana shortly after her death. A telegram was sent to Purna who was 17 miles away and he came to the Thana on the morning of 8th between 10 and 11. In the evening he took away the properties claimed by him except three specific ornaments gold Gophar, a pair of gold ananta, and silver rates, which were retained by the Sub-Inspector. Entries had been made in the Police General Diary recording that this property of Kamini had been taken charge of, but the pages containing those entries were torn out and fresh pages were written from which it will appear that the property was never taken to the Thana and that it was made over to Purna at 10 P.M. on the 7th February. On these allegations, the accused was charged firstly, with having committed criminal misappropriation of three ornaments belonging to Kamini which had not been delivered to Purna. He was, secondly, charged with having framed the record in a manner which he knew to be incorrect, namely, the entry No. 173 which related to the delivery of Kamini's property to Purna. He was, thirdly, charged under S. 477-A with having destroyed the original entries in the General Diary and with having altered the entry No. 173 already referred to. Further there were three charges of criminal breach of trust by a public servant punishable under S. 409, the first relating to the properties left by Kamini and not covered by the deed of gift in favour of Purna, the second relating to the three specific ornaments already mentioned and the third relating to the properties mentioned in the deed of gift. *Held*: that as regards these charges, *i.e.*, under Ss. 218 and 477-A they fall under two separate definitions of the law and the accused can be jointly charged and tried at one trial for these offences under S. 235, and that the joinder of the other charges is covered by the provisions of that section, as all the charges relate to acts which are so connected together as to form one transaction. (*Newbould and Suhrawardy, JJ.*) BILAS CHANDRA *v.* EMPEROR.

27 Cal W. N. 626 : A. I. R. 1923 Cal. 647.

——— S. 235—*Offences under Ss.* 500 *and* 501

CR. P. CODE (V OF 1898), S. 235.

I. P. C.—Joint trial of two persons.

On a complaint, two accused were put on their trial on charges under Ss. 500 and 501, I. P. C., and convicted under S. 505. *Held*, the joint trial was illegal. (*Ghose and Cuming, JJ.*) ASHUTOSH DAS GUPTA *v.* PURNA CHANDRA GHOSH. **36 C. L. J. 287 : 71 I.C. 670 : 5 O.C. 159 : 24 Cr. L. J. 206 : 50 Cal. 159 : A. I. R. 1923 Cal. 11.**

——— **Ss. 235 and 239**—"*Same transaction*" *absent —Joint trial is bad.*

Joint trial of the accused for different offences is illegal if the offences were not committed in the same transaction. (*Zafar Ali, J.*) NUR KHAN *v.* EMPEROR. **88 I. C. 527 : 7 L. L. J. 64 : 26 Cr. L. J. 1167 : A. I. R. 1925 Lah. 326 (1).**

——— **S. 235**—*Same transaction—What is—Separate acts of cheating—Joint trial—Legality.*

A number of accused were tried jointly under S. 420, I. P. C., in respect of acts of defrauding on various persons on different occasions and not all by the same accused. *Held*, a joint trial of all the accused was illegal. Each act was complete in itself and the defrauding could not be said to be in the course of "the same transaction". (*Moti Sagar, J.*) NANAK CHAND *v.* EMPEROR. **25 Cr. L. J. 1020 : 81 I. C. 796 : A.I.R. 1924 Lah. 734.**

——— **S. 235**—*Joinder and misjoinder—Test to determine—Same transaction—Misjoinder—Theft and assault committed on different occasions—Irregularity.*

The real test to see whether there is proper joinder is to see whether the charges are so related in point of purpose or as cause and effect or as principal and subsidiary as to constitute one continuous action. The accused by force carried two buffaloes on 13—8—20 and on 12—9—20 he assaulted the owner while taking away one of them from the possession of the accused. The accused was charged under Ss. 392 and 323 Penal Code. *Held*, there was misjoinder of charges which vitiated the trial. (*Moti Sagar, J.*) GANDA SINGH *v.* EMPEROR. **62 I. C. 329 : 3 Pat. L.R. 1922 : 22 Cr. L.J. 505 ; A. I. R. 1922 Lah. 144.**

——— **S. 235**—*Series of acts forming same transaction—All acts may be jointly tried.*

(*Per Spencer, Offg. C.J.*) When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction, S. 235 authorises persons accused of doing these acts to be charged and tried at one trial for them all. (*Krishnan, J.*) (On a difference of opinion between *Spencer, Offg. C. J. and Reilly, J.*) GAM MALLU DORA, *In re.* **(1925) M. W. N. 192 : A. I. R. 1925 Mad. 690 : 48 M. L. J. 308.**

——— **S. 235**—*Two articles belonging to two persons slolen in one enterprise—Only one offence is committed —Penal Code, S.* 379.

Theft of two articles belonging to two different persons, committed in one enterprise constitutes only one offence of theft and not two. (*Hallifax, A. J. C.*) BHURA *v.* EMPEROR. **26 Cr. L. J. 1495 : A. I. R. 1926 Nag. 89.**

——— **Ss. 235 and 236**—*Distinct offences—Joint trial—Different offences in respect of different persons —Penal Code, Ss.* 109 *and* 477.

It was alleged that the accused induced ten different persons to affix their thumb impressions on blank paper representing that they had to do it under a Government order in connection with the census. Subsequently the accused used the thumb impressions for the purposes of extorting money from the persons who affixed them. *Held*, that the joint trial of the accused on a consolidated complaint of these 10 persons was illegal and bad. (*Kanhaiya Lal, J. C.*) GIRJA DAYAL *v.* EMPEROR. **25 O. C. 151 : 69 I. C. 271 : 23 Cr. L. J. 687 : A. I. R. 1922 Oudh 250.**

——— **S. 235**—*Same transaction—Acts done in pursuance af a common object are parts of the same transaction.*

The word "transaction" in S. 235, Cr. P. Code, has a very wide connotation and covers a series of acts connected together, *e.g.*, when a proposal for a boycott is made by the President of an Association and shortly afterwards the Secretary and a member take joint action to boycott the person against whom the resolution is directed, the inference is that they are acting in furtherance of a common purpose or, in other words, that they are taking part in a conspiracy. Acts done in pursuance of such a conspiracy must be deemed to be part of the same transaction. 37 Cal. 467, Foll. Though to establish a charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence ; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. The term "transaction" is not synonymous with "offence" 19 C. W. N. 707, Foll. (*Pratt, J.*) EMPEROR *v.* NGA AUNG GYAW. **1 R. 604 : 2 Bur. L. J. 224 : 76 I. C. 830 : 25 Cr. L. J. 270 : A. I. R. 1924 Rang. 98.**

——— **Ss. 235 (1) and 537**—*Same transaction—Acts must be related as to constitute one continuous action — Misjoinder of charges—Theft and assault committed on different occasions—Irregularity vitiating trial.*

The accused was charged in one trial with offences under Ss. 392 and 323 of the Penal Code, for carrying away by force two buffaloes grazing in a field and for assaulting the owner a month later who was returning to his village after having recovered one of the buffaloes from the possession of the accused. *Held* : there was a misjoinder of charges which vitiated the trial. The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts as to constitute one continuous action. (*Moti Sagar, J.*) GANDA SINGH *v.* EMPEROR. **3 P. L. R. 1922 : 62 I. C. 329 : 22 Cr. L. J. 505 : A.I. R. 1922 Lah. 144.**

——— **S. 235 (1)**—"*Same transaction*"—*Connection by same purpose, as cause and effect or as principal and subsidiary act is the test.*

The expression "same transaction" is incapable of exact definition. The arena of facts covered by the expression 'same transaction' varies with the circumstances of each case. The real and substantial test for determining whether several offences are so connected together as to form one transaction depends upon whether they are so related together in point of purpose or as cause and effect or as principal or subsidiary acts as to constitute one continuous action. Where the accused was charged under Ss. 304-A, 337 and 338 and under Ss. 465 and 471 or S. 193, I. P. C., in the alternative for forging entries in order to conceal his offence of criminal neglect. *Held*, that there was misjoinder of charges. (*Kennedy, J. C. and Rupchand Bilaram, A J. C.*) F. C. WOODWARD *v.* CROWN. **18 S. L. R. 199 : A. I. R. 1925 Sind 233.**

——— **S. 235 (3)**—*Penal Code, S.* 121—*Convictions for other offences forming parts of offence under S.* 121 *struck off—Conviction under S.* 121 *is not affected.*

One of the counts in the charge against the accused

CR. P. CODE (V OF 1898), S. 236.

under trial for waging war was that they had committed dacoity. This count failed as being too vague. *Held* : (*Per Spencer, Offg. C. J.*) that the validity of the conviction under S. 121 was not affected by the striking off of the convictions for other offences forming component parts of the offence of waging war, and the accused cannot be said to have been prejudiced in their defence on the charge for waging war, as the acts of dacoity were all merely some of a series of incidents which went to make up the continuing offence of waging war, within the meaning of S. 235 (3). (*Krishnan, J.*) (On a difference of opinion between *Spencer, Offg. C. J. and Reilly, J.*) GAM MALLU DORAN, *In re.* **(1925) M. W. N. 192 : A. I. R 1925 Mad. 690 : 48 M. L. J. 308.**

——S. 236—*Alternative charges.*

Alternative charges may be properly run against an accused person on the same set of facts, but alternative charges which include offences which do not arise out of the same set of facts as those with which they are linked, even though tried in the same proceedings, ought to be made clear to the accused before the trial and clearly dealt with in the Judge's final decision. (*Walsh, J.*) JODHA SINGH *v.* EMPEROR. **L. R. 4 A. (Cr.) 83 : A. I. R. 1923 All. 285.**

——S. 236—*Series of acts—Statement under S. 164 and statement in evidence can be treated as a series of acts.*

A statement recorded by a Magistrate in the course of Police investigation under S. 164, Cr. P. Code, is not an evidence in a stage of judicial proceedings. Per *Curiam.* (*Shah, J.* contra.) The statement can be linked with a statement which is evidence in a judicial proceeding following the investigation and then the two can be treated as a series of acts on which an alternative charge can be framed. (*Macleod, C. J., Shah, Pratt, Fawcett and Setalwad, JJ.*) PURSHOTTAM ISWAR AMIN *v.* EMPEROR. **45 Bom. 834 : 23 Bom. L. R. 1 : 60 I. C. 593 : 22 Cr. L. J. 241 (F. B.).**

——Ss 236 and 237—" *Doubt* " *in S. 236 refers to doubt as to law applicable to proved facts and not as to facts of case itself.*

It is a settled law that the doubt referred to in S. 236 must be a doubt as to application of the law to the proved facts and the section has no application where there may be a doubt as to the facts which constitute one of the elements of the offence. (*Newbould and Mukerjee, JJ.*) NAYAN ULLAH *v.* EMPEROR. **85 I. C. 818 : 26 Cr. L. J. 594 : A. I. R. 1925 Cal. 903.**

——Ss. 236 and 237—*Applicability.*

Where an accused person, about the time of the theft, made large payments to the creditors and gave a goldsmith old ornaments to be melted down under suspicious circumstancs, *Held*, a charge under section 54-A of the Calcutta Police Act (IV of 1866) could be joined properly with that of theft, under S. 236, Cr. P. Code, and therefore, under S. 237, Cr. P. Code, the accused could be convicted of an offence under the former though she was not charged with it. (*Newbould and Suhrawardy, JJ.*) TULSI TELINI *v.* EMPEROR. **50 Cal. 564 : 72 I. C. 372 : 24 Cr. L. J 372 ; A. I. R. 1923 Cal. 596.**

——Ss. 236 to 238—*Conviction for murder—Appellate Court if can convict for offence against property.*

In an appeal against a conviction for murder the court can convert the sentence into one of an offence against property under the Penal Code. (*Shadi Lal, C. J. and Campbell, J.*) WALLU *v.* THE CROWN. **4 Lah. 373 : 6 L. L. J. 59 : 77 I. C. 433 : 25 Cr. L. J. 385 : A. I. R. 1924 Lah. 109.**

CR. P CODE (V OF 1898), S. 237.

——S. 236—*Statements under S. 164, Cr. P. Code, and opposite statements before a competent Magistrate constitute series of acts and an alternative charge can be framed.*

Statements made under S. 164, Cr. P. Code, in a case under police investigation and diametrically opposite statements made in an inquiry before a competent Magistrate constitute a series of acts on which an alternative charge under S. 236 of the Code of Criminal Procedure, can be framed. 45 Bom. 834 (F. B.), Foll. (*Wazir Hasan, A. J. C.*) MT. PATRAJI *v.* EMPEROR. **2 O.W.N. 637 : 89 I. C. 1025 : 26 Cr. L. J. 1457 (1) : 12 O. L. J. 644 : A. I. R. 1925 Oudh 660.**

——S. 236—*Application.*

S. 236 which must control S. 237 only applies when, from the evidence led by the prosecution, it is doubtful which of the offences has been committed by the petitioner, and not when it is doubtful whether an offence has been committed at all. (*Das, J.*) GOVIND MAHTON *v.* EMPEROR. **1921 P. H. C. C. 96 : 3 Pat. L. T. 127 : 64 I. C. 510 : 66 I. C. 334 : 23 Cr. L. J. 30 : 23 Cr. L. J. 270 : A. I. R. 1923 Pat. 121.**

——S. 236—*Discovery of two lost articles with accused 2 years after loss—Source of possession not discovered—Only one offence under S. 411 of retaining stolen property is committed and not two under S. 403—Penal Code, Ss. 403 and 411.*

A packet containing a loose diamond and a diamond ring was lost and was found with accused two years later. *Held* : only one offence of retaining stolen property was committed under S. 411 and not two offences under S. 403, one in respect of diamond and the other in respect of the ring. (*Lentaigne, J.*) RAM PERSHAD *v.* EMPEROR. **2 Rang. 80 : 81 I. C. 443 : 25 Cr. L. J. 907 : A. I. R. 1924 Rang. 256.**

——S. 236—*Charges for murder and concealing evidence of murder—Joinder of legality.*

The joinder of charges of murder, or in the alternative of causing disappearance of the evidence of murder, is legal under S. 236, Cr. P. Code. Where, notwithstanding the circumstances of grave suspicion, it is impossible on the record to hold that a person is the murderer or one of the murderers, his conviction under Ss. 201 and 203, I. P. C. is not vitiated by the existence of such circumstances. (*Kennedy, J. C. and Raymond, A.J.C.*) ANDAL SHAH *v.* EMPEROR. **18 S. L. R. 185 : 26 Cr. L. J. 909 : 86 I. C. 973 : A. I. R. 1925 Sind 306.**

——S. 236—*Scope—Deposition in Sessions Court and civil suit are not series of acts.*

To attract the applicability of S. 236, Cr. P. Code, and justify a charge in the alternative it is essential to remember that it is only when the statements constitute a " series of acts " that an alternative charge can be framed. As there is a common relation between a police investigation, an inquiry by the Magistrate preliminary to commitment and a final trial in the Sessions Court, to the statements made at these different stages the words " series of acts " would be applicable. A series of acts means two or more acts connected together by some common relation. 45 Bom. 834, Expl. and Dist. (*Kennedy, C.J. and Raymond, A. J. C.*) SALEH SHAH *v.* EMPEROR. **82 I. C. 59 : 16 S. L. R. 286 : 25 Cr. L. J. 1195 : A. I. R. 1924 Sind 1.**

——S. 237—*Change.*

[Sub. cl. (2) has been omitted here and has been

re-enacted as sub-S. (2-A) in S. 238 for appropriateness.

——S. 237—*Charge under S. 302—Conviction under S. 201 is proper.*

Where the accused were charged under S. 302, and on evidence they were found to be guilty of an offence under S. 201 (causing the evidence of crime to disappear) and so were convicted under the latter section. *Held*, that the conviction was proper. (*Viscount Haldane.*) BEGU *v.* EMPEROR. **6 Lah. 226 : 52 I. A. 191 : 27 B. L. R. 707 : 41 C. L. J. 437 : 20 W. N. 447 : 26 Cr. L. J. 1059 : 23 A. L. J. 636 : 7 L. L. J. 324 : 88 I. C. 3 : 3 Pat. L. R. (Cr.) 95 : (1925) M. W. N. 418 (P. C.) : A. I. R. 1925 P. C. 130 (P. C.) : 48 M. L. J. 643.**

——S. 237—*Alteration of charge.*

A person was convicted under S. 325, I. P. C., for a charge that he caused such bodily injury which resulted in the man's death. The appellate court disbelieved the evidence, but was asked to amend the charge by changing it into one under Ss. 34 and 325, I. P. C., as there was a common intention to beat. *Held*, the charge could not be amended in appeal as it would in effect deprive the accused of an opportunity to meet the new case. Nor could a re-trial be ordered in the case on the amended charge. (*Boys, J.*) CHHIDDA SINGH *v.* EMPEROR. **82 I. C. 364 : 25 Cr. L. J. 1292 : L. R. 5 A. (Cr.) 133 : A. I. R. 1924 All. 766.**

——S. 237—*With charge under S. 304 conviction can be under S. 304-A.*

As it is open to the prosecution to bring the accused to trial on charges under S. 304 and S. 304-A, it follows under S. 237, Cr.P.C., that although the charge under S. 304-A is not formally made it is open to the Court to convict under that section. (*Macleod, C. J. and Fawcett, J.*) EMPEROR *v.* C J. WALKER. **26 Bom. L. R. 610 : A. I. R. 1924 Bom. 450.**

——Ss. 237 and 238—*Sections give exceptions to rule that none can be convicted of an offence of which he was not charged.*

Ordinarily a person cannot be convicted at a Sessions trial, of an offence with which he has not been charged. There are some exceptions to this rule which are to be found in Ss. 237 and 238 of the Cr. P. Code. (*Newbould and Mukerjee, JJ.*) NAYAN ULLAH *v.* EMPEROR. **85 I. C. 818 : 26 Cr. L. J. 594 : A. I. R. 1925 Cal. 903.**

——S. 237—*Conviction for different offence from that charged, must be quashed if accused has been prejudiced.*

Where the accused were not charged under the sections under which they are convicted and sentenced and if from the perusal of the charge as a whole the Court is of the opinion that the accused have been prejudiced by the fact that they have been convicted on charges which had not been framed against them, the conviction must be set aside and a re-trial must be directed. (*Greaves and Panton, JJ.*) SHEIKH ABDUL *v.* EMPEROR. **84 I.C. 708 ; 26 Cr. L. J. 356 : A. I. R 1925 Cal. 581.**

——S. 237—*Attempt to commit not charged, conviction for it is legal.*

Where the accused presented the bills to the Government of India knowing that they contained false representations as regards the number of gallons of linseed oil supplied :

Held, the presentation of each of the bills was an application for the payment of money under false pretences. It was done dishonestly and with the object of deceiving the officials of the Government of India and inducing the Government of India to issue cheque

or cheques for the amounts of the bills. As soon as each of the bills was presented the offence of the attempt was committed. The accused may be convicted of the attempt although it is not charged. (See S. 237 of the Cr. P. Code.) (*Sanderson, C. J. and Richardson, J.*) BILLINGURST *v.* EMPEROR. **27 C. W. N. 821 : A. I. R. 1924 Cal. 18.**

——S. 237—*Charge for one offence—Conviction for another—Legality—Test of.*

The petitioner was convicted of an offence punishable under S. 54-A of Act VI of 1866 Calcutta Police Act. At the trial the only charge framed against her was that she committed theft in respect of gold and silver ornaments, cloths and cash Rs. 13,410 in G. C. notes, sovereigns and coins valued in all about Rs. 18,000 from the room of one Khelwan Ahir and thereby committed an offence punishable under S. 380, I. P. Code. *Held*, that the conviction was valid under the provisions of S. 237, Cr. P. Code. The legality of a conviction for an offence not charged depends on whether reliance is placed on S. 237 or whether the different offence of which the accused has been convicted is one for which he might have been charged under the provisions of S. 236, Cr.P. Code. (*Newbould and Suhrawardy, JJ.*) TULSI TLINI *v.* EMPEROR. **50 Cal. 564 : 72 I. C. 372 : 24 Cr. L. J. 372 : A. I. R. 1923 Cal. 596.**

——Ss. 237 and 238—*Charge of murder—Facts found indicating robbery—Conviction cannot be altered.*

A charge of murder cannot be converted into one of robbery. The essentials of the two offences are so widely different that neither S. 237 (1) nor S 238 (2) can be applied. 20 All. 107, Ref. (*Shadi Lal, C. J. and Campbell, J.*) WALLU *v.* EMPEROR **4 L. 373 : 6 L. L. J. 59 : 77 I. C. 433 : 25 Cr. L. J. 385 : A. I. R. 1924 Lah. 109.**

——S. 237—*Charge of murder—Abetment—Conviction for, is legal.*

A committed a murder at the bidding of B. B's actual presence at the scene of the murder was not established. The Sessions Judge convicted A under S. 302, Penal Code and B of abetment. *Held*, on facts that B could have been charged not only with the commission of the principal offence but also with the abetment, and therefore by virtue of S. 237, Cr.P.Code, he could be convicted of the offence of abetment though not separately charged with it. (*Shadi Lal, C. J. and Leslie Jones, J.*) KEHR SINGH *v.* EMPEROR. **11 P. W. R. 1921 (Cr.) : 59 I. C. 913 : 22 Cr. L. J. 161.**

——S. 237—*Applicability.*

S. 237 authorises the Court to convict a person for an offence with which he has not been charged but for which he might have been charged under the provisions of S. 236. (*Das, J.*) GOVIND MAHTON *v.* EMPEROR. **1921 P. H. C. C. 96 : 3 Pat. L. T. 127 : 64 I C. 510 : 66 I. C. 334 : 23 Cr. L. J. 30 : 23 Cr. L. J. 270 : A. I. R. 1923 Pat. 121.**

——S. 238—*Accused charged under S. 412, I. P. C., may be convicted under S 411, I. P. C. though not charged—Cr. P. C., S. 269 (3)*

An accused charged under S. 412 (triable by Jury) can be convicted under S. 411 (triable with aid of assessors) though not separately charged : 22 Bom. L. R. 1241 and 26 Mad. 243, Rel. on. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* GULABCHAND DOSOJI. **27 Bom. L. R. 1416: A. I. R. 1926 Bom. 134.**

——S. 238—*Conviction for abetment—Charge only of substantive offence.*

Where a person is charged only with a substantive offence under the Penal Code, he cannot be convicted of abetting the commission of the offence. (*Macleod,*

CR. P. CODE (V OF 1898), S. 238.

C. J. and Shah, J.) EMPEROR *v.* RAGHYA NAGYA.
26 Bom. L. R. 323 : 25 Cr. L. J. 1135 : 81 I. C. 959 : A. I. R. 1924 Bom. 432.

——S. 238—*Trial for offence with assessors—Conviction for minor offence triable by Jury is legal.*

Under S. 238 of the Code a Court trying an accused for an offence with assessors can convict him for a minor offence triable by Jury. (*Shah and Crump, JJ.*) CHANGOUDA PIRGOUDA *v.* EMPEROR
45 Bom. 619 : 22 Bom. L. R. 1241 : 59 I. C. 195 : 22 Cr. L. J. 51.

——S. 238—*No conviction under I. P. C., S.* 304, *read with S.* 149 *is justifiable where accused is not charged with the offence.*

Constructive culpable homicide cannot be said to be a minor offence compared with actual culpable homicide. Hence conviction under S. 304 read with S. 149, I. P. C., when the accused was not charged with such an offence is bad in law. (*Newbould and Mukerji, JJ.*) NAYAN ULLAH *v.* EMPEROR.
26 Cr. L. J. 594 : 85 I. C. 818 : A. I. R. 1925 Cal. 903.

——S. 238—*Minor offence—Dishonestly receiving stolen property—If included in charge of dacoity.*

None of the particulars which go to make up the offence of dacoity constitute by themselves the offence of dishonestly receiving stolen property. Hence the latter cannot be considered as a minor offence included in dacoity and an accused charged with dacoity cannot be convicted under S. 412, I. P. C. (*Scott Smith and Afforde, JJ.*) ACHPAL *v.* EMPEROR.
26 Cr. L. J, 1361 : 89 I. C. 449.

——S. 238—*Charge under S.* 304/149. *I. P. C. for killing certain person—Conviction under S.* 325/34 *for assaulting another is bad.*

The offence charged was one under Ss. 304/149 for having caused the death of a certain person.

Held, that a conviction for an offence under S. 325/34 for assault on some other person was illegal. (*Martineau, J.*) ROHELA *v.* EMPEROR.
6 L. L. J. 630 : A. I. R. 1925 Lah. 286.

——Ss. 238 and 535—*Charge under S.* 147 *I. P. C.—Conviction of abetment of assault—Conviction under S.* 353, *I. P. C.—Legality.*

A person charged with an offence under S. 147 I. P. C., cannot be convicted of the abetment of an assault, which was the alleged common object of the assembly. 33 M. 264. But a conviction under S. 352, I. P. C. (*i. e.*) of assault is maintainable on a charge under S. 147, I. P. C. 9 I. C. 455 : 19 M. L. J. 487 : 41 I. C. 828 Ref. (*Odgers, J.*) MUTHUKANAKU PILLAI *v.* EMPEROR. **15 L. W. 583 : 65 I. C. 862 : 23 Cr. L. J. 206 : (1922) M. W. N. 182 : A.I.R. 1922 Mad. 110.**

——Ss. 238—*Sub-S.* 2—*Conviction under S.* 426 *or charge under S.* 452 *is not illegal.*

S. 238 sub-S. 2 justifies conviction under S. 426 where the original charge was under S. 452 of the Penal Code. (*Wazir Hasan, J. C.*) M. MUNNARY MIRZA *v.* EMPEROR. **81 I. C. 911 : 25 Cr. L. J. 1087 : A. I. R. 1925 Oudh 89.**

——S. 238—*I. P. C., Ss.* 426 & 430—*Cr. P. C., S.* 238 *applies.*

When the charge is under I. P. C., S. 430, the conviction can be under S. 426. (*Foster, J.*) BANAMALI KUMAR *v.* EMPEROR. **6 P. L. T. 39 : 3 Pat. L. R. (Cr.) 25 : 86 I. C. 58 : 26 Cr. L. J. 682 : A. I. R. 1925 Pat. 389 (1).**

——S. 238—*Charge for theft—Conviction under S.* 457, *I. P. C., is illegal.*

The accused was convicted under S. 457, I. P. C., though the charge of theft framed against him could not be sustained. S. 238, Cr. P. Code, empowers the Magistrate to convict the accused of a different charge from what he was originally accused of, provided the accused was not in any way prejudiced by the conviction on the new charge.

CR. P. CODE (V OF 1898), S. 239.

An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has knowledge of this, he must be seriously prejudiced in his defence. It is the bounden duty of the Magistrate in such cases to draw up a charge. *Mohammad* v. *King Emperor* (41 Cal. 703, Foll.) *Behari Mahton* v. *Queen Empress* (11 Cal. 106 Dist. (*Jwala Prasad, J.*) BALKESAR SINGH *v.* EMPEROR. **3 Pat. L. T. 322 : 65 I. C. 546 : 23. Cr. L. J 114 : A. I. R. 1922 Pat. 5.**

——S. 238—*Charge under S.* 457, *Penal Code—Conviction under S.* 456 *is not illegal if accused not prejudiced.*

Conviction under S. 456, I. P. C., when the charge was under S. 457, is not illegal, and the trial is not vitiated by the Magistrate's finding that the intention was not to commit theft, as mentioned in the charge but to commit adultery, if upon the evidence on the record the accused had the chance of meeting a case under S. 456 if the superior Court finds that the omission to frame the charge under S. 456 and to specify the intention to commit adultery has prejudiced the accused the conviction must be set aside and retrial ordered. (*Jwala Prasad, J.*) JADAB MAHTON *v.* EMPEROR. **2 Pat. L. T. 140.**

——S. 238 (2)—*Witnesses—Order of examining.*

The witnesses for the prosecution ought, as far as possible, to be called in the order of event which they are called to prove, and in chronological order. The Trying Judge may suggest to those who are responsible for the conduct of the prosecution that the proper method and order of calling witnesses should be observed. (*Sanderson, C. J. and B. B. Ghose, J.*) EMPEROR *v.* AHIRANNESSA BIBI.
A. I. R. 1923 Cal. 579.

——S. 238, cl. (2-A).—*Charge of substantive offence—Conviction under attempt—No separate charge or trial is necessary.*

The new amendment of S. 238, Cr. P. Code, cl. 2-A, allows an accused person charged with a substantial offence, to be convicted of an attempt to commit that offence, without a separate charge and trial. (*Krishnan, J.*) DORAISWAMY AIYAR, *In re.* **21 L. W. 174 : 86 I. C. 339 : 1925 M. W. N. 113 : 26 Cr. L. J. 755 : 48 M. 774 : A. I. R. 1925 Mad. 480 : 48 M. L. J. 190.**

——S. 239—*Changes.*

Section has been redrafted and added to. The following also may now be tried jointly:—

(1) Persons accused of offences of same kind committed jointly during one year.

(2) Persons accused of an offence which includes theft or extortion, criminal misappropriation and another of receiving, retaining or disposing of the stolen property.

(3) Persons accused of counterfeiting coin and another of possessing or altering it.

(4) Persons accused under Ss. 411 and 414, I.P.C.

——S. 239—*Same transaction—Numerous accused—Murder—Unlawful assembly.*

In determining whether S. 239 of the Cr. P. Code does or does not authorize a Sessions Judge not only to try a large number of the accused at one and the same trial but to try them in each and all of the charges set forth against them under the orders of the committing Magistrate, the Sessions Judge has to look to the case or the prosecution as set forth on the charges themselves. **If according to that**

case the offences were such as could be regarded as parts of the same transaction he would be justified in entering upon the trial of all the accused on the charges framed. It would not be necessary for him to consider what the position would be if he finally comes to the conclusion that no offence had been committed or that the offence committed was one which was excluded from his cognizance by S. 196-A of the Cr. P. Code. (*Mears, C. J. and Piggott, J.*) ABDULLAH *v.* EMPEROR.
L. R. 4 A. 145 (Cr.) : A. I. R. 1924 All. 233.

——S. 239—*Same transaction—Question of fact.*

The question, whether certain offences specified in different charges were or were not so connected together, that it might fairly be said that they had been committed in the same transaction, is after all substantially one of fact, and admissions on a question of fact which go to determine whether there should be a joint trial, made by accused persons may undoubtedly be received and acted upon by a trial Court. (*Piggott and Walsh, JJ.*) EMPEROR *v.* GAYAN SINGH.
26 Cr. L. J. 29 : 83 I. C. 509 : A. I. R. 1923 All. 277.

——Ss. 239 and 235—*Dacoity—Several offences by same gang—Joint trial.*

Where a gang of dacoits assembled on a highway for robbing passers-by and in the course of the dacoity several offences were committed by them. *Held*, that all these offences were committed in the course of the same transaction and it was not material whether all the members of the gang took an active part in each dacoity. (*Stuart and Ryves, JJ.*) RAM PRASAD *v.* EMPEROR.
L. R. 4 A. 4 (Cr.) : 20 A. L. J. 926 : 71 I. C. 505 : 24 Cr. L. J. 158 : A. I. R. 1923 All. 137 (1).

——Ss. 239 and 537—*Different offences—Charges under Ss. 302 and 202, I. P. C.—Cannot be tried together.*

A joint trial of two persons one under S. 302 and the other under S. 202 of the I. P C., is illegal and not a mere irregularity which can be cured under S. 537 of the Code. (*Lindsay and Stuart, JJ.*) RATAN SINGH *v.* EMPEROR.
19 A. L. J. 915 : L.R. 2 A. (Cr.) 148 : 64 I.C. 376 : 23 Cr. L.J. 8.

——S. 239—*Dacoities—Joinder of charges against several accused—Not "same transaction"—Legality.*

Four persons were jointly tried at one trial for three dacoities, committed on different dates at different places. *Held*, that the three offences were not committed in the same transaction, and that the joint trial was not warranted by S. 239 and was illegal. (*Kanhaiya Lal and Wallach, JJ.*) RAM PRASAD *v.* EMPEROR.
19 A. L. J. 798 : 3 U P. L. R. (A.) 151: L. R. 2 A. (Cr.) 138 : 63 I. C. 449 : 22 Cr. L. J. 657.

——S. 239—*Dacoities, several by some persons—Separate trial is necessary.*

Where several persons join in several dacoities, each dacoity is a separate transaction requiring a separate trial. It is illegal to group the accused and the dacoities together (*Mears, C.J. and Banerjee, J.*) RAM SAHAI *v.* EMPEROR.
19 A. L. J. 610 : L.R. 2 A. (Cr). 130 : 61 I. C. 525 : 22 Cr. L.J. 397.

——S. 239 (a) and (d)—*Joint trial—Injury caused by firing fireworks in public road—Persons causing injury cannot be tried together.*

A festival was being celebrated along a public road. An agreement had been previously arrived at amongst certain members of the community to the effect that the firing of fire works should be stopped till the procession of *Dulendi* passed off but the accused along with some others fired off fireworks at random thereby causing injury to passers-by. They were all tried together and convicted. *Held*, that the joint trial was illegal. (*Mukerjee, J.*) TUFAIL AHMAD *v.* EMPEROR.
23 A. L. J. 5 : L. R. 6 A. (Cr.) 53 : 86 I. C. 222 : 26 Cr. L. J. 734 : A. I. R. 1925 All. 301 (2).

——S. 239—*Joint trial—Dacoity and Receiving stolen property can be joined together.*

It is always for the prosecution to justify a joint trial. A separate trial is the rule and a joint trial is the exception. Where upon the evidence the offence of a dacoity and the two offences of dishonest possession of stolen property knowing it to have been stolen in the commission of dacoity or dishonest reception of such property knowing it to be stolen from a known dacoit, were committed in the same transaction, a joint trial was held to be permissible under the provisions of S. 239, Cr. P. Code, inasmuch as this is not a case of separate charges of receiving stolen property each in itself forming a separate transaction and unlinked by something which brings them into the same transaction. (*Stuart, J.*) DURGA PRASAD *v.* EMPEROR.
45 All. 223 : 20 A. L. J. 981 : L. R. 3 A. 198 (Cr.) : 71 I. C. 501 : 24 Cr. L. J. 149 : A. I. R. 1923 All. 126.

——S. 239—*Gambling—Same transaction—Keeping a gaming house—Using it—Joint trial.*

The trial of the owner or keeper of a common gaming house under S. 3 of Act III of 1867 together with the trial of persons found gaming or present for the purpose of gaming in such house under S. 4 in one trial is not illegal. It is always necessary to justify a joint trial and to point out the provisions under which it can be held. The separate trial is the rule, the joint trial is the exception, and this trial can only be justified if the provisions of S. 239, Cr. P. Code, have application. (*Stuart, J.*) GANESHI LAL *v.* EMPEROR.
24 Cr. L. J. 155 : 20 A.L.J. 967 : A. I. R. 1923 All 88 (1).

——S. 239—*Joint trial.*

It is always necessary to justify a *joint trial* and to point out the provisions under which it can be held. The separate trial is the rule, the joint trial is the exception. (*Stuart, J.*) GANESHI LAL *v.* EMPEROR.
20 A. L. J. 967 : L. R. 3 A. 197 (Cr.) : 71 I. C. 507 : 24 Cr. L. J. 155 : A. I. R. 1923 All. 88 (1).

——S. 239—*Receiving stolen property—No connection between accused—Joint trial is not legal.*

A Magistrate tried two men jointly under S. 411 of the I. P. C. The only connecting link between them is that. on the Magistrate's finding, each retained some property stolen from a single complainant several days ago. It is not suggested that either or both are the original thieves. *Held*, the joint trial is illegal. (*Rafique J.*) MOOSAN *v.* EMPEROR.
20 A. L. J. 563 : L. R. 3 A. 98 (Cr.) : A. I. R 1922 All. 459 (1).

——S. 239—*Same transaction—Persons committing theft and persons receiving stolen property may be tried jointly.*

The joint trial of persons tried at the same trial, some on the charge of theft and the others for having dishonestly received stolen property, is legal as the theft and the dishonest receiving of the stolen property form one transaction. (*Stuart, J.*) ANWAR *v.* EMPEROR.
44 All. 276 · 20 A. L. J. 96 : 67 I. C. 510 : 23 Cr. L. J. 414 : L. R. 3 A. 10 (Cr.) : A. I. R. 1922 All. 208 (2).

——Ss. 239 and 537—*Receiving stolen property—Three accused under S. 411, I. P. C.—No joint possession—Joint trial is not legal.*

CR. P. CODE (V OF 1898), S 239

Three persons in separate independent possession of separate articles of stolen property cannot be tried together under S. 411 of the I. P. C. Such an illegality cannot be cured under S. 537 of the Code. (*Lindsay, J.*) JIWAN *v.* EMPEROR. **19 A. L. J. 815 : 67 I. C. 505 : 23 Cr. L. J. 409.**

——S. 239—*Receiving stolen property—Stolen property recovered from two different persons on two different dates.*

Where properties stolen at a burglary are recovered from two different persons on two different dates they cannot be tried together for an offence under S. 411 of the Penal Code. (*Stuart, J.*) RAM SARUP *v.* EMPEROR. **22 Cr. L. J. 684 : 63 I. C. 620 : L. R. 2 A. (Cr.) 125.**

——S. 239—*Misjoinder of charges.*

Two persons were charged with offences under Ss. 366 and 376 of the Penal Code. The prosecution case was that rape was committed on the woman by both the accused persons at a certain place and this woman was subsequently taken either by force or by fraud by one of them alone to different places where he alone committed rape on her. *Held*, that the first charge against both the accused of having committed rape in all the places is improper. (*Newbould, and Ghose, JJ.*) KERAMAT MANDAL *v.* EMPEROR. **42 C. L. J. 524.**

——S. 239—*Joint trial—Discretion.*

Where a number of persons are tried for offences committed in the same transaction it is a question for the Court in the exercise of its judicial discretion to say whether there should be a joint trial or not. (*Maclean, C. J. Pinsep, Hill, Harrington and Brett, JJ.*) EMPEROR *v.* CHARU CHANDER MUKERJEE. **38 C. L. J. 309 : 76 I. C. 966 (2) : 25 Cr. L. J. 294 (2) (F. B.).**

——S. 239—*Joint trial of one charge under S. 201 and another under S. 304 was held illegal.*

A riot took place over a dispute relating to *Gopat* and in the course of the riot one J was wounded with a bamboo staff at his knee and one B. was also assaulted—the result of which was that he died on the spot and thereafter the appellant along with one other person took away the dead body and the corpse was not recovered since then. *Held*, that the offence under S. 201, I. P. C, alleged to have been committed by the appellant was not committed in the course of the same transaction in which the offence of rioting was committed and therefore the trial of appellant on the charge under S. 201, I. P. C., along with the other accused who were charged for rioting and murder, was vitiated by misjoinder of charges. (*Walmsley and Mukerjee, JJ.*) SURENDRA LAL DAS *v.* EMPEROR. **40 C. L. J. 559 : 85 I. C. 147 : 26 Cr. L. J. 467 : A. I. R. 1925 Cal. 413.**

——S. 239—*The receiver of the stolen property cannot be tried jointly with a person who purchased the property afterwards.*

Joint trial of the receiver of the stolen property and of the person to whom it was sold afterwards is illegal as the acts do not form part of the same transaction. (*Greaves and Chotzner, JJ.*) DALSUK ROY AGARWALA *v.* EMPEROR. **25 Cr. L. J. 807 : 81 I. C. 343 : A. I. R. 1925 Cal. 248.**

——S. 239—*Conspiracy—Penal Code, Ss. 500 and 501.*

Where there was really no evidence of conspiracy between the two opposite parties, *held* so far as the charge of publication of the defamatory matter is concerned, the two petitioners could not have been charged together. (*Ghose and Cuming, JJ.*) ASUTOSH

CR. P. CODE (V OF 1898), S. 239.

DAS *v.* PURANA CHANDRA. **50 Cal. 159 : 36 C. L. J. 287 : 71 I. C. 670 : 24 Cr. L. J. 206 : A. I. R. 1923 Cal. 11.**

——S. 239—*Same transaction, meaning of.*

It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated. They are proximity of time, unity or proximity of place, continuity of action and community of purpose or decision; under these circumstances, joint trial is not bad in law. *Amrit Lal Hazra* v. *Emperor*. 42 Cal. 957, p. 982, Ref. to. (*Walmsley and Suhrawardy, JJ.*). BANGA CHANDRA DE *v.* ANANDA CHARAN. **35 C. L. J. 527 : 69 I. C. 269 : 23 Cr. L. J. 685 : A.I.R. 1922 Cal. 76.**

——S. 239—*Misjoinder of parties.*

Two persons giving separate information on different dates, ought not to be tried together for offences under S. 211, Penal Code. There ought to be a separate charge against each of them. (*Beachcroft and Ghose, JJ.*) GOPAL KAHAR *v.* EMPEROR. **61 I. C. 61 : 22 Cr. L. J. 333 (Cal.).**

——S. 239—*Same transaction—Dacoity—Dishonestly receiving stolen property.*

It is illegal to convict a person under S. 412, I. P. C., which is a totally different offence from dacoity committed at a different time and not in the course of the same transaction, as a charge under S. 412 should not be tried with a trial of other accused under S. 396, I.P.C. (*Scott-Smith and Fforde, JJ.*). ACHPAL *v.* EMPEROR. **89 I. C. 449 : 26 Cr. L. J. 1361.**

——Ss. 239 and 235—"*Same transaction*"—*Offences not committed in—Joint trial is bad.*

Joint trial of the accused for different offences is illegal if the offences were not committed in the same transaction. (*Zafar Ali, J.*) NUR KHAN *v.* EMPEROR. **7 L. L. J. 64 : 88 I. C. 527 : 26 Cr. L. J. 1167 : A. I. R. 1925 Lah. 326 (1).**

——S. 239—*Separate offences—Two occurrences at intervals—Persons involved being different.*

Resistance to and rescue from arrest after warrants at different times by different persons cannot be investigated at one trial. (*Wilberforce, J.*) GHASITA MAL *v.* EMPEROR. **22 Cr. L. J. 145 : 59 I. C. 849 : 3 Lah. L. J. 346.**

——S. 239—*Waging war—Periods during which accused were members of the offending gang not same—Joint trial is legal.*

Six persons were accused of waging war under S. 121 of the I. P. C. The sixth accused joined the gang after the first and the second accused had been arrested. But the gang to which the accused belonged continued under the leadership of the same man and was actuated by the same purpose.

Held: (by *Spencer, Offg. C. J.* and *Krishnan, J.*, *Reilly, J.*, dissenting) that the joint trial of the sixth accused with the 1st and 2nd accused was legal.

Per *Spencer, Offg. C. J.*, S. 239, Cr. P. Code (as amended), cl. (d) authorises the trial of more persons than one on one charge and under one trial if they are accused of different offences committed in the course of the same transaction. If an offence is a continuing one, it can be regarded as a continuous transaction.

Per *Reilly, J.* An offence cannot be treated as necessarily one transaction merely because it is a continuing offence.

Per *Krishnan, J.* The question whether the various incidents in a war form parts of the same transaction or must necessarily be held to be different

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transactions has to be judged on the facts of each case. (*Krishnan, J.* On a difference of opinion between *Spencer, Offg. C. J. and Reilly, J.*) GAM MALLU DORA, *In re.* (1925) M.W.N. 192: A. I. R. 1925 Mad. 690 : 48 M.L.J. 308.

——S. 239—*Separate offences—Misjoinder of charges—Passing counterfeit coins—Joint trial.*

Where two persons were jointly tried and convicted of passing counterfeit coins on three different occasions on three different persons on the same day, the trial was not bad for misjoinder of charges. (*Wallace, J.*) KOVAGANTI, *In re.* 69 I.C. 447 : 16 L. W. 831 : (1922) M.W.N. 820 : 23 Cr. L. J. 719 : A. I. R. 1923 Mad. 181 : 44 M. L. J. 130.

——S. 239—*Theft of two articles at the same time—Ownership different—If distinct offences.*

Two bulls were stolen at the same time but they belonged to different owners. *Held*, there is only one theft and two convictions and sentences are not legal. (*Hallifax, A. J. C.*) BHURA *v.* EMPEROR. 90 I. C. 151 : 26 Cr. L. J. 1495.

——S. 239—*Proceedings under S. 107, Cr. P. Code—All conspirators can be tried together.*

Where there was a conspiracy to molest a particular caste of money-lenders and traders, *held*, all persons who had joined in the conspiracy to molest those people and to cause them injuries, could, if their common aims and objects were once established, be tried at the same trial. (*Prideaux, A. J. C.*) BAJIRAO, *In re.* 25 Cr. L. J. 132 : 76 I. C. 228 : A. I. R. 1924 Nag. 166.

——Ss. 239 and 110—*Scope of.*

If a gang like to join together in jointly committing acts of violence or criminal intimidation, proceedings under security section against the whole gang in the same case are proper and it suffices in such cases to establish that some members of the gang committed various acts. (*Prideaux, A. J. C.*) BAKARAM *v.* EMPEROR. 69 I. C. 629 : 23 Cr. L. J. 741 : A. I. R. 1923 Nag. 53.

——S. 239—*Joint trial—Criminal conspiracy.*

The legality of a joint trial depends on the accusation and not on the result of the trial. The discretion of a court to try accused persons separately is not improperly exercised by holding a joint trial in conspiracy cases. (*Robinson, C. J. and Godfrey, J.*) ABDUL RAHIMAN *v.* EMPEROR. 3 Rang. 95 : 89 I. C. 305 : 26 Cr.L.J. 1329 : A.I.R. 1925 Rang. 296.

——S. 239—*Joinder of charges—Boycott, promotion of—Trial under Ss. 4 (a) and 4 (c) of Burma Anti-Boycott Act.*

Where an association decides to boycott a person and shortly after, some members take joint action to boycott that person, they act in furtherance of a common purpose and acts done in pursuance thereof can be the subject of a joint trial. There is a continuity of purpose and action and the acts must be deemed parts of the same transaction. (*Pratt, J.*) EMPEROR *v.* NGA AUNG GYAW. 2 Bur. L. J. 224 : 76 I. C. 830 : 1 Rang. 604 : A. I. R. 1924 Rang. 98.

——S. 239—*Offences under S. 489 B. & C.*

Where the evidence was against the supposition that accused knew or had reason to believe that the note was counterfeit at the time when he accepted it, *held*, any subsequent retaining of it by him in such circumstance, as to amount to an offence under S. 489 (C) would therefore not be a part of the same transaction to which the acts of those guilty under S. 489 (B) in connection with it belonged. The trial is therefore bad for misjoinder. (*Macgregor, J.*)

CR. P. CODE (V OF 1898), S. 242.

KYAW DWE AND PO CHIT *v.* EMPEROR. 1 Bur. L. J. 69 : 74 I. C. 78 : 24 Cr. L. J. 750 : A. I. R. 1923 Rang. 67.

——S. 239—*Joint trial—Allegations against—Accused mutually exclusive.*

Where the allegations against two accused are mutually exclusive, *i.e.*, where the allegation is that either one or other of them committed the offence they cannot be tried together. 7 L. B. R. 68, Foll. (*Macgregor, J.*) KYAW DWE *v.* EMPEROR. 1 Bur. L. J. 69 : 74 I. C. 78 : 24 Cr. L. J. 750 : A. I. R. 1923 Rang. 67.

——S. 239 (d) and (e)—*Accused charged under S. 413, I. P. C., with others charged under S. 401, I. P. C.—Clauses (d) and (e) are not applicable.*

Where the accused was charged under S. 413, I. P. Code, with other persons who were charged under S. 401, I. P. Code, *Held*: that the accused cannot be tried with others as Cl. (*d*) does not apply, as the offence of receiving stolen property and the offence of belonging to a gang of thieves relate to separate transactions. Cl. (*e*) also does not apply, as an offence under S. 401, I P. Code, cannot be said to include theft, for it is committed as soon as a gang of persons associated for the purpose of habitually committing theft is formed, and before any theft is actually committed by them. (*Martineau, J.*) CHHAJJU *v* EMPEROR. A. I. R. 1925 Lah. 537.

——S. 239 (f)—*Accused charged jointly under S. 412, Penal Code—Joint trial is illegal.*

Joint trial of two accused both charged under S. 412, I. P. Code, is illegal. 18 O. C. 92, Ref. (*Dalal, A. J. C.*) BEHARI *v.* EMPEROR. 12 O. L. J. 339 : 2 O. W. N. 330 : A. I. R. 1925 Ovdh 452.

——S. 239 (f)—*Joint trial—Provisions as to—If can be extended by analogy.*

The provisions of S. 239 (f), Cr. P. Code, cannot be extended by analogy to a trial of persons accused of offences other than those specifically mentioned therein. 18 O. C. 92, Ref. to. (*Dalal, J. C.*) BEHARI *v.* EMPEROR. 12 O. L. J. 339 : 2 O. W. N. 330 : 89 I. C. 155 : 26 Cr. L. J. 1291 : A. I. R. 1925 Ovdh 452.

——Ss. 241 and 251—*Distinction—Sufficient material to frame charge must exist in warrant cases.*

One of the distinguishing points between a summons and a warrant case is that in a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. (*Newbould and C. C. Ghose, JJ.*) NATABAR KHAN *v.* EMPEROR. 27 C. W. N. 923 : A. I. R. 1924 Cal. 63.

——S. 242—*Examination of accused—Provisions of the Code mandatory—Illegality—Irregularity.*

The object of the examination referred to in S. 342, Cr. P. Code, is to enable the accused to explain any circumstances appearing in the evidence against him. The provisions of the section are mandatory and the Court is bound to question the accused generally on the case, after the prosecution case is completed and before the accused person is called on for his defence. Non-compliance with S. 342 renders the trial illegal. (*Sanderson, C. J. and Chotzner, J.*) MOZAHUR ALI *v.* EMPEROR. 50 C. 223 : 36 C. L. J. 417 : 71 I. C. 662 : 27 C. W. N. 99 : 24 Cr. L. J. 198 : A. I. R. 1923 Cal. 196.

——S. 242—*Conviction based on counsel's admission is bad.*

In a summons case, the Magistrate is not entitled to convict the accused on the basis of an admission by

CR. P. CODE (V OF 1898), S. 244.

the accused's counsel and without examining the accused or recording any evidence. Such conviction is illegal and will be set aside. (*Neave, A. J. C.*) MUNICIPAL BOARD, LUCKNOW *v.* MESSRS. TULSI RAM. **83 I. C. 883 : 26 Cr. L. J. 179 : A. I. R. 1925 Oudh 305 (2).**

——S. 244—*Change.*

[Court is not bound to hear any person as complainant when the complaint has been made by a Court.]

——Ch. XX and XXI, Ss. 244 and 256—*Change of procedure during trial—Accused's application to summon defence witnesses should not be refused.*

A trial of a warrant case commenced under Chapter XXI must be continued and concluded by the procedure laid down in that chapter and the Magistrate cannot in the midst of the trial, change the procedure and conclude it by the procedure prescribed for summons case in Chapter XX. Whether a case is tried as a summons case or as a warrant case the accused should be given an opportunity to produce his defence under S. 244 or S. 256 as the case may be, and his application to summon defence witnesses should not be refused on the ground that the accused was directed by the Court to come with his witnesses. (*Jwala Prasad, J.*) MUNSHI TELI *v.* EMPEROR. **2 Pat. L. T. 482 : 63 I. C. 619 : 22 Cr. L. J. 683.**

——S. 246—*Conviction for an offence not referred to in the complaint is not proper.*

The section does not warrant the conviction in a summons case, of an accused for an offence, alleged to have been committed on a date to which no reference is made in the complaint or summons. (*Newbould and Suhrawardy, JJ.*) N. K. SARKAR *v.* HOWRAH MUNICIPALITY. **62 I. C. 575 : 22 Cr. L. J. 559 (Cal.).**

——S. 247—*Applicability of—Case not instituted on complaint—Non-appearance of complainant—Effect of—U. P. Act (II of 1916), S. 47.*

Under S. 47 of the U. P. Act, II of 1916, it is the Magistrate who takes cognizance of the offence upon information received. So the case is not one instituted upon a complaint within the meaning of the word "complaint" in Section 4 (*h*) of the Code of Criminal Procedure, and S. 247 of the Code of Criminal Procedure has no application. In spite of the non-appearance of the complainant, the proceedings must continue. (*Stuart, J.*) MT. BASANTI *v.* MAQSUD ALI KHAN. **L. R. 5 A. 63 (Cr.) : 26 Cr. L. J. 170 (1) : 83 I. C. 730 (1) : A.I.R. 1924 All. 528.**

——Ss. 247 and 403—Autrefois acquit—*Acquittal under, is a bar to further proceedings*

An acquittal under S. 247, Cr. P. Code, acts as a bar to further proceedings equally with an acquittal after trial on the merits by virtue of S. 403, Cr. P. Code. 4 C.W.N. 346: 34 M. 253, Ref. (*Ryves, J.*) EMPEROR *v.* DULLA. **45 A. 58 : 74 I. C. 1054 (1) : 24 Cr. L. J. 862 (1) : A.I.R. 1923 All. 360.**

——S. 247—*Order under, cannot be set aside by the same Court.*

Once an order under S. 247 acquitting the accused was passed no application for the revival of the proceedings can be entertained unless the order under S. 247 is set aside by a superior Court. An order under S. 247 can only be set aside by the High Court. (*C. C. Ghose and Cuming, JJ.*) NITYANANDA KOER *v.* RAUKKAHARI. **38 Cal. L. J. 196 : 73 I. C. 940 : 24 Cr. L. J. 716 : A. I. R. 1924 Cal. 96.**

——S. 247—*Court not taking up case at all—Accused cannot be acquitted.*

CR. P. CODE (V OF 1898), S. 247.

The right to an order of acquittal accrues to the accused upon two conditions, and is dependent, firstly, on the absence of the complainant and secondly on the Court not adjourning the case. If a case is not taken up at all, it cannot be said that the second condition is fulfilled, for there is no knowing in what way the Court's discretion would have been exercised if it had been taken up. 1923 Cal. 725, Foll. (*Newbould and Mukerjee, JJ.*) RASH BEHARY *v.* CORPORATION OF CALCUTTA. **26 Cr. L. J. 1050 : 87 I. C. 970 : A. I. R. 1926 Cal. 102.**

——S. 247—*Complainant absent—Accused not acquitted automatically.*

S. 247 gives the Magistrate a discretion and the absence of a complainant in a summons case cannot result in the acquittal of the accused without the Magistrate passing any order in exercise of that discretion. (*Newbould and Suhrawardy, JJ.*) SHERMULL *v.* CORPORATION OF CALCUTTA. **A. I. R. 1923 Cal. 725.**

——Ss. 247 and 403—*Acquittal—Different charges on same facts—Trial bad.*

The accused was originally summoned on a charge under S. 426, I. P. Code, but was acquitted under S. 247, Cr. P. Code, on account of the absence of the complainant. The complainant applied to the District Magistrate who directed that the complaint should be revived and that the prosecution should proceed under S. 379, I. P. Code, instead of under S. 426, I. P. Code. The accused was tried and convicted of an offence under S. 379, I. P. Code. *Held*, that the acquittal by the Magistrate on the charge under S. 426, I. P. Code, was a bar to the petitioner being put on his trial again on the same facts which were relied on to support the charge under S. 379, I. P. Code, and that the conviction and trial under this latter section were without jurisdiction. (*Newbould and Suhrawardy, JJ.*) FAZAR PRAMANIK *v.* EMPEROR. **37 C.L.J. 253 : 76 I. C. 293: 25 Cr. L. J. 149 : A. I. R. 1923 Cal. 407.**

——S. 247—*Enquiry under Workman's Breach of Contract Act—Proceedings are not criminal—Section does not apply.*

The Magistrate's proceedings under the Workman's Breach of Contract Act up to the stage of the passage of an order by the Magistrate for repayment or performance are not criminal at all. 43 M. 443 ; 33 B. 22, Ref. If the proceedings are not criminal proceedings, the procedure cannot be regulated by Chapter XX of the Cr. P. Code and an order for acquittal cannot be held to be one under Ch. XX of the Cr. P. Code but merely a dismissal of the complaint. Viewed in this light, there is nothing to prevent the Magistrate from rescinding that order if he sees cause to do so. (*Ayling and Odgers, JJ.*) RAMANNA *v.* GURUNATHAM. **32 M. L. T. 347 (H. C.) : 72 I. C. 881 : 46 Mad. 723 : (1923) M. W. N. 402 : 18 L. W. 111 ; 24 Cr. L. J. 465 : A. I. R. 1923 Mad. 719 : 45 M. L. J. 36.**

——S. 247—*Trial as a warrant case but charge with summons case offence—Right to acquittal under section does not depend upon procedure.*

S. 247 seems to be intended to lay down a general principle that a person charged with a summons case offence is entitled in law to an acquittal if the complainant is absent; and this right should not be denied to him simply because the Magistrate has adopted a warrant case procedure in the trial of the case. The general principle must be that the right of the accused to benefit under S. 247 of the Code of Criminal Procedure does not depend on the procedure

which the magistrate chose to adopt and was constrained to adopt the complaint as laid, but on the nature and class of the offence for which he is being tried at the time of the complainant's failure to appear in Court. The plea that the date of hearing was a holiday is not a sound excuse for complainant not appearing to prosecute his case and a legal treason for the Magistrate refusing to act under the peremptory provisions of S. 247. (*Wallace, J.*) VENKATARAMA IYER *v.* SUNDARAM PILLAI.

17 L. W. 229 : 72 I.C. 885 : 24 Cr. L. J. 469 : A. I. R. 1923 Mad. 439 : 44 M. L. J. 119.

——S. 247—*Complainant absent on the day of delivery of judgment—Acquittal not proper.*

Where the complainant was present throughout the whole case but was absent only on the day of delivery of judgment, *held* the acquittal of accused under this section is improper. 46 Cal. 867, Foll. (*Batten, J. C.*) EMPEROR *v.* JANGUSINGH.

19 N.L.R. 48 : 24 Cr. L. J. 205 : 6 N. L. J. 68 : 71 I C. 669 : A. I. R. 1923 Nag. 158 (1).

——S 247—*Summons Case—Dismissal for default—Fresh complaint on same facts—If lies.*

Where the complaint in a summons case is dismissed for default the order is one under S. 247, Cr. P. Code, and is tantamount to an acquittal. Such an order does not fall within the purview of S. 436, Cr. P. Code. (*Wazir Hasan, A. J. C.*) BINDRA *v.* MT. BHAGWANTA.

25 Cr. L. J. 359 : 77 I. C. 295 : A. I R. 1925 Oudh 44.

——S. 247—*Acquittal under—Revision—Improper clutching at jurisdiction.*

An order of acquittal will not ordinarily be interfered with in revision by the High Court but this rule does not apply to an acquittal under S. 247. Cr.P Code, especially where the acquittal is the result of an improper clutching at jurisdiction. (*Ashworth, A.J.C.*) RAM NIDH *v.* RAM SARAN.

26 O. C. 282 : A. I. R. 1924 Oudh 64.

——S. 247—*Absence of complainant—Acquittal of accused—Effect—Bar of fresh trial.*

An order of acquittal under S. 247, Cr. P. Code, on account of the absence of the complainant is a final order which operates as a bar under S. 403, Cr. P. Code. The presence or absence of the accused has no bearing on the question. (*Foster, J.*) KIRAN SARKAR *v.* EMPEROR.

4 Pat. L.T. 15 : 24 Cr. L. J. 815 : 74 I. C. 719 : 2 Pat. L. R. 10 (Cr.) : A. I. R. 1924 Pat. 140.

——Ss. 248 and 345—*Withdrawal of complaint—Composition of offence—Several accused—Trial as regards some.*

Under S. 345 (6), Cr. P. Code, as recently amended by Act XVIII of 1923, a composition of an offence with some of several accused has the effect of an acquittal as regards them, but does not affect the case as against the remaining accused. The complainant charged five persons with an offence under S. 326, I. P. Code, and subsequently put in a petition whereby he withdrew his complaint against one of the accused who had apologised and wished the case to proceed against the others. *Held*, that there was in effect a composition of the offence with one of the accused and that expression "withdrew the complaint" was loosely used. Per *Le Rossignol, J.* (*Harrison, J. Contra*) There is nothing in S. 248, Cr. P. Code, which involves a withdrawal of the whole complaint merely because the complaint is withdrawn against one of the accused. (*Le Rossignol, Abdul Raoof and Harrison, JJ.*) ANANTIA *v.* EMPEROR.

5 Lah. 239 : 25 Cr. L. J. 629 : 81 I. C. 117 : A. I. R. 1924 Lah. 595

——S. 248—*Withdrawal of complaint against some does not operate as an acquittal of the rest.*

The withdrawal of a complaint against one person does not amount to a withdrawal of the complaint against others. 19 A. L. J. 374. Foll. 7 C. W. N. 176, Dist. (*Kanhaiya Lal, J. C.*) ROHTI SINGH *v.* MAKHDUM KALWAR.

9 O. L. J. 54 : 23 Cr. L. J. 271 : 66 I. C. 335 : A. I. R. 1922 Oudh 145 (2).

——S. 248—*Compromise — Magistrate accepting become functus officio.*

A Magistrate who accepts a compromise in a compoundable case thereby becomes *functus officio* and ceases to have any jurisdiction over the matter. If the entire case is compounded, the compromise absolves not only the accused present in Court but all the accused in the case. (*Jwala Prasad, J.*) AMAR ALI *v.* EMPEROR.

2 Pat. L. T. 584 : 63 I. C. 611 : 22 Cr. L. J. 675 : 1921 P H. C. C. 304.

——S. 250—*Main-changes.*

[(1) The complaint must be *false* and either frivolous or vexatious.

(2) Complainant must now be called upon to show cause why compensation should not be awarded.

(3) The limit of compensation has been increased to Rs. 100 except in the case of 3rd class magistrate.

(4) Imprisonment for default of payment can be awarded in the order of compensation itself.

(5) An appeal lies from an order of 1st class magistrate awarding compensation exceeding Rs. 50.

(6) Time for payment in non appealable cases is 30 days.]

——S. 250—*Case instituted on false report to Police—Accused acquitted—Compensation, if can be ordered.*

Where in a case instituted on a report to the Police the Magistrate acquitted the accused and, being of opinion that the accusation was a false and frivolous one, immediately called upon the complainant to show cause why he should not pay compensation to the accused, and, the complainant not being able to show cause, directed him to pay the compensation : *Held*, (1) that the proceeding taken by the Magistrate to award compensation being in continuation of the original proceeding against the accused the procedure adopted was not illegal, and (2) that compensation for false, frivolous or vexatious accusations could be awarded even in a case instituted on a report made to the Police. (*Banerji, J.*) JAIRAJ SINGH *v.* BANSI.

L. R 6 All. 193 (Cr.) : 23 A. L. J. 1054.

——S. 250—*Complaint of several offences, some triable exclusively by Magistrate and some by Sessions Court—Trial—Discharge in respect of all offences—Compensation, if can be awarded.*

An order for compensation cannot be passed under S. 250, Cr. P. Code, in a case in which a complaint has been filed against an accused person for offences some of which are triable exclusively by the Magistrate and some by the Sessions Court and the accused after trial is discharged in respect of all the offences. (*Sulaiman, J.*) HARIHAR DAT *v.* MAKSUD ALI.

L. R. 6 All. 188 (Cr.) : 23 A. L. J. 1056.

CR. P. CODE (V OF 1898), S. 250.

——S. 250—*Appeal—Appellate Court cannot act under this section.*

It is only the trying Magistrate who, if he discharges accused persons, can order compensation to be paid. The appellate Court has no jurisdiction to proceed under S. 250. 28 All. 625 and 39 Cal. 157, F. B., Foll. (*Sulaiman, J.*) CHEDI *v.* RAM LAL.
46 A. 80 : 21 A. L. J. 834 : L. R. 4 A. 233 Cr. : 9 O. & A. L. R. 1056 : A. I. R. 1924 All. 224.

——S. 250—*Notice—Order for compensation—Vexatious accusation.*

S. 250, Cr. P. Code, does not require that the Magistrate should call upon the complainant to show cause before directing him to pay compensation for having preferred a vexatious accusation. 9 A. L. J. 170, Diss. (*Walsh, J.*) PANCHAM *v.* EMPEROR.
45 A. 474 : 21 A. L. J. 369 (All.) : L. R. 4 A. 197 (Cr.) : 73 I. C. 943 : 24 Cr. L. J. 719 : A. I. R. 1923 All. 548.

——S. 250—*Applicability—Section does not apply to security proceeding.*

S. 250 by its term applies only to a case where a person is accused before a Magistrate of an offence and not to proceedings the object of which is to require him to give security to keep the peace. (*Daniels, J.*) RAM BADAN *v.* JANKI.
45 All 363 : 21 A. L. J. 207 : 71 I. C. 692 : L. R. 4 A. (Cr.) 91 : 24 Cr. L. J. 228 : A. I. R. 1923 All. 332 (1).

——S. 250—*Applicability — Proceedings under S. 107—Section does not apply.*

S. 250 does not apply to an enquiry under S. 107 instituted at the instance of private persons though the accused are discharged. (*Ryves, J.*) MANNU KHAN *v.* CHANDI PRASAD.
20 A. L. J. 624 : 67 I. C. 826 : 4 U. P. L. R. (A.) 161 : 23 Cr. L. J. 474 : L. R. 3 A. 147 (Cr.) : A. I. R. 1922 All. 321 (2).

——S. 250—*Applicability—"The Magistrate by whom the case is heard"—Meaning of.*

The expression, "The Magistrate by whom the case is heard" in S. 250 of the Code means, the Magistrate by whom the case is decided, whether he has heard the evidence or not. (*Stuart, J.*) RAM DEBI *v.* GOVIND SAHAI.
19 A. L J. 651 : 3 U. P. L. R. (All.) 114 : 61 I. C. 646 : L. R. 2 A. (Cr.) 85 : 22 Cr. L. J. 406.

——Ss. 250 and 537—*Where one of two accused is discharged and the other is subsequently acquitted and on the latter occasion the complainant is ordered to show cause and pay compensation to both accused, procedure is illegal under S. 250 of the Code as amended—The defect is incurable under S. 537, Cr. P. Code.*

Where there were two accused and one of them was discharged and the case against the other was adjourned to a later date when he was acquitted and where the Magistrate required the complainant to show cause against an order for compensation being passed and ordered the complainant to pay compensation to each of the accused;

Held, that the procedure followed was illegal under S. 250 of the Cr. P. Code as now amended. When the order of discharge was made against one of the accused the case against him was at an end and in so far as payment of compensation to him was concerned, the order to show cause under S. 250 should have been made along with the order of discharge. The defect was not one which was curable under

CR. P. CODE (V OF 1898), S. 250.

S. 537. (*Sanderson, C. J. and Chotzner, J.*) SURESH CHANDRA GUPTA *v.* ABDUL JABBAR.
29 C. W. N. 127 : 85 I. C. 129 : 26 Cr. L. J. 449. A. I. R. 1925 Cal. 264.

——S. 250—*Notice—Order to pay compensation without opportunity to show reasons is illegal.*

The Magistrate ordered the complainant to pay compensation to the persons who had been discharged without giving the complainant an opportunity to show cause why such an order may not be made against him. *Held*, the order is illegal as being contrary to the proviso (a) to S. 250 of the Cr. P. Code. (*Abdul Raoof, J.*) MUGHLA *v.* MAHOMED.
A. I. R. 1923 Lah. 458 (1).

——S. 250—*Time for order—Compensation cannot, in general, be awarded before examining all the witnesses of the complainant.*

Though compensation can be awarded in exceptional cases before all the evidence for the complainant has been recorded, yet where there were witnesses present whom the complainant wished to produce *held* the Magistrate should have examined them before passing his order awarding compensation. (*Harrison, J.*) DEWA SINGH *v.* EMPEROR.
71 I. C. 795 : A. I. R. 1923 Lah. 194 (2).

——S. 250—*Applicability—Corporation—Person includes a corporation.*

The expression, "person" includes not only natural person but also a juristic person.S. 3 (39) of the General Clauses Act makes it perfectly clear that the word "person" includes "any company or association or body of individuals whether incorporated or not." (*Shadi Lal, C. J.*) MUNICIPAL COMMITTEE OF LAHORE *v.* RATTAN CHAND.
72 I. C. 623 : 24 Cr. L. J. 463 : A. I. R. 1923 Lah. 31 (1).

——S. 250—*Frivolous or vexatious charge—No evidence adduced—Case thrown out.*

Where a person lodged a complaint against others accusing them of cutting and carrying away his crops and obtained a warrant for their arrest, and put them to the inconvenience of attending the Court and compelled them to execute bonds of their attendance and then, having attained his object of harassing them, informed the Court that the case might be filed as he did not wish to produce evidence, he can be properly ordered to pay compensation under S. 250 of the Criminal Procedure Code. (*Martineau, J.*) CHANAN SINGH *v.* EMPEROR.
18 P.L.R 1922 (2) : 64 I. C. 369 : 23 Cr. L. J. 1.

——S. 250—*Time for order—Order of compensation not an integral part of the order of acquittal is not proper.*

Where the Magistrate after signing the order of acquittal passes a subsequent order to pay compensation to the accused, the latter order is without jurisdiction as after signing the order of acquittal the Magistrate becomes *functus officio*. The order of compensation must be an integral part of the order of acquittal. (*Harrison, J.*) KARRAM BAKSH *v.* MUHAMMAD SAID.
62 I. C. 415: 22 Cr. L. J. 527 (Lah.).

——S. 250—*Compensation for frivolous accusation—Reasons must be recorded—Reasons are meant for higher tribunal to test justification of order.*

The recording of the reasons, for ordering compensation to be paid, is almost a condition precedent to the proper exercise of the power under the section. The recording of the reasons is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious and why in his opinion it was a

CR. P. CODE (V OF 1898), S. 250.

fit case in which an order for compensation should be made. The policy of the legislature in requiring that in such a case the reasons should be recorded in writing is obviously to afford an opportunity to an appellate or revising tribunal to consider the sufficiency of the reasons so recorded. (*Srinivasa Aiyangar, J.*) THADIAPPAN *v.* VEERAPERUMAL.

21 L. W. 646 : 90 I. C. 157 : 26 Cr. L. J. 1501 : A. I. R. 1925 Mad. 1139.

——— S. 250—*Complainant—Order for compensation—Information given to village magistrate—Liability of informant for false information.*

A man who complains to a village munsif of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the Police gives information to the police just as effectively as if he went in person to the Police station. Consequently the informant is liable to pay compensation under S. 250 of the Cr. P. Code. 39 M. 1006 ; 5 L. W. 290 : 4 L. W. 73 ; 25 M. 667 : 32 M. L. J. 138, Ref. (*Venkatasubba Rao, J.*) KALIYAPERUMAL NAIDU *v.* BAVAJI SAHIB.

18 L.W. 32 : (1923) M. W. N. 421 : 73 I. C. 941 : 24 Cr. L. J. 717 : A. I. R. 1924 Mad. 91 : 45 M. L. J. 255.

——— S. 250—*Frivolous or vexatious charges—Case triable by Sessions Court—Magistrate trying accused for lesser offence can award compensation.*

Conviction for less serious offence would not be illegal merely because the offence committed really fell under a more serious section and was not one which the Magistrate was competent to try. As the Magistrate was not proceeding illegally in trying the accused for the lesser offence, he was not acting illegally in awarding compensation when he found the accusation to be frivolous or vexatious. (*Ayling, O. C. J. and Krishnaswami Rao, J.*) MAHAGANAM VENKATRAYAR *v.* KODI VENKATRAYAR.

45 Mad. 29 ; 30 M. L. T. (H. C.) 75 : 66 I. C. 72 : 23 Cr. L.J. 232 : 14 L. W. 247 : (1921) M.W.N. 613 : A. I. R. 1922 Mad. 223 : 41 M. L. J. 398.

——— S. 250—*Appeal—Notice of hearing.*

In an appeal from an order under S. 250, notice of the hearing need not be given to the accused but such notice should be given to the Magistrate of the district unless the very officer is to hear the appeal. (*Napier, J.*) KRISHNA KONE *v.* NARAYANA DASS.

13 L. W. 689 : (1921) M. W. N. 387 : 62 I. C. 823 : 22 Cr. L. J. 583 : 41 M. L. J. 172.

——— S. 250—*Notice—Order without is illegal.*

It is illegal to make an order under S. 250 of the Code, without notice to the complainant and before concluding the examination of all his witnesses. (*Sadasiva Aiyer and Napier, JJ.*) APPALA NARASAYYA, *In re.*

44 Mad. 51 : 12 L. W. 388 : (1920) M. W. N. 785 : 59 I. C. 913 : 22 Cr. L. J. 161 : 39 M. L. J. 484.

——— S. 250—*For ordering compensation to the accused the charge must be false and either frivolous or vexatious.*

Two elements, one of falsity and the other of either frivolousness or vexatiousness are essentially necessary to base an order for compensation to the accused. A "vexatious" charge may be partly true and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the persons accused. (*Kinkhede, A. J. C.*) BHAU *v.* SYED CHAND.

26 Cr. L. J. 1033 : 87 I. C. 921 : A. I. R. 1926 Nag. 31 (2).

CR. P. CODE (V OF 1898), S. 250.

——— S. 250—*Case instituted on information to Police—Compensation can be awarded.*

Compensation can also be awarded in a case instituted upon information given to a Police Officer. (*Dalal, J.C.*) HAFIZ KHAN *v.* EMPEROR.

26 Cr. L. J. 527 : 85 I.C. 387 : A.I.R. 1925 Oudh 558.

——— S. 250—*Order directing compensation passed—Complainant does not escape civil or criminal liability.*

A complainant does in no way escape a liability for prosecution under S. 211, I. P. C., by reason of the order passed by the Magistrate under S. 250, directing payment of compensation to the accused. (*Dalal, J. C.*) HAFIZ KHAN *v.* EMPEROR.

26 Cr. L. J. 527 : 85 I. C. 387 : A. I. R. 1925 Oudh 558.

——— S. 250—*Applicability—Failure to consider complainant's objection, effect of.*

Order of Magistrate dismissing and ordering the complainant to pay a fine under S. 250 of the Cr. P. Code without recording and considering the objections which he may have, is illegal. (*Lindsay, J. C.*) EMPEROR *v.* CHUNNI.

24 O. C. 261.

——— Ss. 250 and 367—*Notice—Proviso—Mandatory—Juagment of Appellate Court.*

The direction in the proviso of S. 250 is mandatory, the non-compliance whereof vitiates the order of the Magistrate directing compensation to be paid by the complainant. Appellate Court is bound to record a proper judgment setting forth the points of determination, the objections of the appellant, its decision thereon, and the reasons for its decision. (*Jwala Prasad, J.*) DEO NARAIN MAHTO *v.* CHHATTO RAUT.

3 Pat L. T. 203 : 23 Cr. L. J. 261 : 66 I. C. 325 : A. I. R. 1922 Pat. 157.

——— S. 250—*Compensation—Failure of Court to examine witnesses of complainant—Order for compensation invalid against conviction under S. 250, Criminal Procedure Code.*

Compensation under S. 250, Cr. P. Code, can only be awarded after the complainant has had an opportunity of producing all his evidence including those witnesses whose names are not contained in the list but are brought to Court without summons. (*May Oung, J.*) SYA KAW *v.* EMPEROR.

3 Bur. L. J. 26 : 82 I. C. 288 : 25 Cr. L. J. 1280 : A. I. R. 1924 Rang. 293.

——— S. 250—*Applicability—Case triable by Sessions Judge.*

Where a case ordinarily triable only by a Court of Session, is tried by Magistrate empowered under S. 30, the Magistrate is not competent to award compensation. (*Pratt, J.*) MA E. DOK *v.* MAUNG PO THAN.

1 Bur. L J. 38 : 66 I. C. 513 : 11 L. B. R. 151 : 23 Cr. L. J. 289 : A. I. R. 1923 Rang. 15 (1).

——— S. 250—*Compensation—When to be given—Appeal.*

The mere fact that a complaint is frivolous or vexatious does not necessarily mean that it must be false. Compensation can be awarded only if the complaint is false and also frivolous or vexatious.

S. 250 (3) does not limit the right of appeal to cases when the compensation awarded to each accused exceeds Rs. 50. Where the total amount directed to be paid to several accused persons exceeds Rs. 50 a right of appeal exists. (*Bilaram, A. J. C.*) ASSANMAL CHATUMAL *v.* DILBAR.

89 I. C. 159 : 26 Cr. L. J. 1295.

——— S. 250—*Offence triable by Sessions Court—Magistrate can pass an order under the section.*

In filing a complaint under the section, the complain-

CR. P CODE (V OF 1898), S. 250.

ant must be deemed to make an accusation which includes not only the offence specifically referred to but also any offence which the facts disclosed in the complaint considered in the light of such enquiry as the Magistrate considers necessary, disclose. If the Magistrate tries an accused with an offence triable by Sessions Court, this only does not oust the jurisdiction of the Magistrate to pass an order under the section. (*Kennedy J. C. and Aston, A. J. C.*) HEMDAS *v.* AHMED KHAN THROUGH EMPEROR. **26 Cr. L. J. 265 : 84 I. C. 329 (2) : 16 S. L. R. 205.**

——S. 250—*Complainant—False information to Police.*

Where S pointed out two persons to the Police, as those who had assaulted him, and the Police in the first information report described S as the complainant, and arrested the two persons and sent them up for trial and the Magistrate discharged them finding the complaint to be false and malicious and ordered S to pay compensation, *held*, that S was the complainant as it was he who pointed out the men, and that the finding that the complaint was false and vexatious was tantamount to finding it to be vexatious and that the order for compensation was justified. (*Kincaid, J. C. and De Souza, A. J. C.*) FAIZ MUHAMMED *v.* EMPEROR. **14 S. L. R. 168 : 59 I. C. 552 : 22 Cr. L. J. 120**

——S. 250 (1)—*Applicability.*

In cases of offences triable by a Court of Sessions only, an order by a Magistrate to pay compensation under S. 250, is illegal. (*Lindsay, J.*) SARUP SONAR *v.* RAM SUNDER. **20 A. L. J. 433 : 66 I. C. 671 : 23 Cr. L. J. 319 : A. I. R. 1922 All. 188 (1).**

——S. 250 (1)—*Notice—Order for compensation—Frivolous complaint—Opportunity to show cause.*

Before an order for payment of compensation under S. 250, Cr. P.Code, is made on the ground of the complaint being frivolous or vexatious, the complainant must be given an opportunity of showing cause why such order should not be passed. (*Shah, A. C. J. and Crump, J.*) MAHADEV RAM KRISHNA KARKARE, *In re.* **24 Bom. L. R. 805: 68 I. C. 414 : 23 Cr. L. J. 574 : A. I. R. 1922 Bom. 409.**

——S. 250 (3)—*Appeal lies when compensation exceeds Rs. 50 whether payable to one or more accused.*

Whenever a complainant or informant has been ordered under sub-S. (2) to pay compensation exceeding fifty rupees the right of appeal is given, whether compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding fifty rupees. In other words in a case where the total compensation awarded is over fifty rupees, the complainant is entitled to appeal. (*Macleod, C. J. and Crump, J.*) PERIRA *v.* DUMING PASCOL DEMELLO. **26 B. L. R. 1243 : 49 Bom. 440 : 26 Cr. L. J. 480 : 85 I. C. 160 : A. I. R. 1925 Bom. 129 (1).**

——S. 250 (3)—*Appeal—When lies.*

It is the total amount of compensation directed to be paid by a complainant which must form the basis of the decision whether an appeal lies or not. (*Adami and Macpherson, JJ.*) SOBHIT MALLAH *v.* EMPEROR. **90 I. C. 160 : 26 Cr. L. J. 1504.**

——S. 250 (3)—*Notice of appeal under, should be given to accused though no express provision exists—Cr. P. Code, S. 422.*

Where an appeal is preferred against an order directing payment of compensation to accused, *Held*, that although there is no express provision nevertheless on the principle *audi alteram partem* the accused should have notice of the appeal in order that they should have an opportunity of supporting the order passed in their favour. 29 Mad. 187, Foll.; 38 Mad. 1091, Foll. (*Campbell, J.*) RAM CHAND *v.* JESA RAM. **25 Cr. L. J. 209 (2) : 76 I. C. 641 (2) : A. I. R. 1924 Lah. 675 (2).**

——S. 250 (3)—*Compensation payable to several accused—30 days' imprisonment can be imposed in respect of each.*

The term of thirty days specified in S. 250 (3) of the Criminal Procedure Code can be imposed in respect of each of several accused in whose favour payment of compensation has been ordered. (*Carr, J.*) EMPEROR *v.* MUKHA GYI. **3 Rang. 93 : 4 Bur. L. J. 9 : 86 I. C. 469 : 26 Cr. L. J. 821 : A. I. R. 1925 Rang. 202.**

——S. 250 (3)—*Imprisonment in default cannot be postponed till end of term of Civil detention.*

The Magistrate has no power to order that the sentence of imprisonment in default shall take effect after a term of civil detention. (*Carr, J.*) EMPEROR *v.* MA KHA GYI **3 Rang. 93 : 4 Bur. L. J. 9 : 86 I. C. 469 : 26 Cr. L. J. 821 : A. I. R. 1925 Rang. 202.**

——Ss. 251 to 259 Chap. XXI—*Contravention of provisions vitiates proceeding.*

Where the trial in a warrant case has actually begun and the statement of the complainant and some of the witnesses recorded, it is illegal to split the offence into two component parts and to try it as a summons case Where in a warrant case the Magistrate records the accused's statement immediately after the examination of the complainant and before he is cross-examined ; *held*, that such a procedure was in contravention of Chap XXI of the Code and entirely vitiates the proceedings. (*Gokul Prasad, J.*) GANGA SARAN *v.* EMPEROR. **59 I. C. 850 : 19 A. L. J. 6 : 22 Cr. L. J. 146.**

——S. 252—*Change.*

[When complaint is by a Court the complainant need not be heard.]

——S. 252—*Non-examination of complainant is not irregular.*

Trial without the examination of the complainant on oath is not irregular. (*Oldfield and Krishnan, JJ.*) UMAYYATHANTAGATH PUTHEN VEETIL, *In re.* **15 L. W. 311 : (1922) M. W. N. 71 : 30 M. L. T. (H. C.) 125 : 65 I. C. 859 : 23 Cr. L. J. 203 : A. I. R. 1922 Mad. 126 : 42 M. L. J. 108.**

——S. 252 (2)—*Non-production of essential prosecution evidence—Magistrate ought to call—Failure of the prosecution to produce a necessary witness is not a good ground for acquittal.*

The duty of seeing that all the evidence essential to the prosecution case is before the Court, is thrown by Cr. P. Code upon the Magistrate himself. It is not open to a Magistrate to acquit the accused on the ground that the prosecution has failed to produce a necessary witness. (*Wazir Hasan and Simpson, A. J. Cs.*) EMPEROR *v.* MAIKUR LAL. **12 O. L. J. 632 : 2 O. W. N. 584 : 88 I. C. 1042 : 26 Cr. L. J. 1266 : A. I. R. 1925 Oudh 667.**

——S. 253—*Complainant absent but represented by a pleader—Discharge order not proper.*

The petitioner instituted on the 15th September, 1920 a complaint against the opposite party under S. 409, I.P.C.; process was issued and the trial began on the 22nd January 1921. On the 21th February 1921 a charge was framed under S. 409 I. P. C. The op-

CR P. CODE (V OF 1898), S. 253.

posite party applied to the High Court on the 25th February 1921 for an order that the criminal trial should be stayed for a period of two months pending the determination of a Civil suit in which the question of the shares referred to in the complaint in the Criminal Court was involved. The Court made an order to that effect on the 20th April 1921. On the expiration of the said two months the criminal case was proceeded with on the 8th March, 1922 on which date an adjournment was granted by the Magistrate who had succeeded the previous Magistrate till the 20th March 1922, for moving the High Court for a further stay of the criminal case pending the determination of the said Civil suit. On the 20th March 1922, a rule for a further stay of the criminal case was issued by this Court. Meanwhile it appears that the petitioner had been summoned to appear as witness in a cause on the Original Side of this Court on 20th March 1922 and he could not be personally present in the Court of the Magistrate on the 20th March 1922 though he was represented by his pleader. An application for adjournment was made on behalf of the petitioner before the Magistrate but this was refused and the accused was thereupon discharged by the Magistrate under S. 253, Cr. P. C., on the same date. *Held*, that the order passed on the 20th March 1922, cannot be regarded as an order of acquittal and it should be set aside. (*C. C. Ghose and Cuming, JJ.*) HRISHIKESH SEN *v.* PARESH NATH. **A. I. R. 1923 Cal. 403 (2).**

——**S. 253**—*In refusing to commit to Sessions, the Magistrate must be satisfied of the untenability of the charge.*

Where the Magistrate who held the enquiry for committing a person to Sessions, under the orders of the Superior Court, after recording the prosecution evidence, discharged the person and where such person had originally formed one of those against whom the report in connection with the offence had been made and where he was subsequently dropped out of the proceedings by the senior investigating officer, *Held* that the Magistrate had not acted properly in refusing in spite of the Superior Court's order to commit the accused to Sessions and that it was a case in which the Court empowered to try the offence charged against the accused should give a definite pronouncement. There is no necessity compelling a Magistrate to convict an accused to Sessions notwithstanding that he may consider conviction to be impossible. But the Magistrate must be satisfied fully that the prosecution will fail in the Sessions Court. The law will not be satisfied if the Magistrate merely doubts portions of the prosecution evidence. The discretion vested in the Magistrate to discharge an accused charged with an offence triable only by Court of Sessions must be exercised properly and very carefully. (*Pullan, A. J. C.*) CHHEDA KHAN *v.* EMPEROR. **11 O. L. J. 664 : 25 Cr. L. J. 1189 : 82 I. C. 53.**

——**Ss. 253 and 437**—*Discharge—Order directing committal—When to be made.*

A magistrate discharged the accused under S. 253, Cr. P. Code, bnt the Sessions Judge directed committal. *Held*, before coming to such a conclusion the Sessions Judge must consider whether it was open to the magistrate to come to the conclusion to which he did on the material before him. That a different view could be taken on the evidence would not justify the Sessions Judge to direct a committal, unless he comes to the conclusion that the finding of the magistrate is not only wrong but perverse. (*Das, J*) RITBHANJAN RAI *v.* EMPEROR. **26 Cr. L. J. 886 : 86 I. C. 822 : 6 Pat. L, T. 570 : A. I R. 1925 Pat. 599.**

CR. P. CODE (V OF 1898), S. 255.

A. I. R. 1925 Oudh 167.

——**Ss. 253, 494 and 145**—*Discharge—Fresh complaint—New materials necessary—Disputes regarding succession to large estates—Succession (Property Protection) Act (XIX of 1841.)*

An accused person cannot summarily be tried in several courts on the same facts, although the complainants in the several cases may be different. An order of discharge under section 494 (a) or under section 253 in a warrant case does not necessarily prevent the Magistrate from taking cognizance of a complaint on the same facts, but an order of discharge cannot be set aside and prosecution started afresh unless there are new materials before the Magistrate which were not before him formerly. The Succession (Property Protection) Act has a larger scope than S. 145, Cr. P. Code. and affords a more appropriate remedy in cases involving disputes regarding succession to large estates involving breaches of the peace. (*Jwala Prasad, J.*) BISO RAM *v.* EMPEROR. **23 Cr. L. J. 236 : 66 I. C. 76 : A. I. R. 1922 Pat. 372.**

——**S. 253**—*Limitation—Six months' period does not apply to original possessor.*

Period of limitation of six months applies only to the person other than the original possessor. (*Kennedy, J. C.*) YARU *v.* EMPEROR. **A. I. R. 1925 Sind 316.**

——**S. 253 (2)**—*Discharge prior to date fixed for hearing—Propriety of.*

Under S. 253 (2) a Magistrate has ample jurisdiction to make an order of discharge even before the date fixed for hearing if upon the materials then before him he is satisfied the offence could not have been committed. (*Kulwant Sahay, J.*) WATSON *v.* METCALFE. **81 I. C. 184 : 25 Cr. L. J. 696 : A. I. R. 1925 Pat. 154.**

——**S. 254**—*Petty case—Commitment to Sessions not right.*

A petty case of robbery ought not to be committed to the Sessions simply because the Magistrate was a witness to the identification proceedings. The proper course is for the District Magistrate to send the case to another Magistrate for trial. (*Ryves, J.*) EMPEROR *v.* RAM JATAN. **21 A. L. J. 420 : L. R. 4 A. 215 (Cr.) : A. I. R. 1924 All. 185.**

——**S. 254** — *Warrant case—Charge framed—Defence evidence unsatisfactory—Judgment need not necessarily be one of conviction.*

Although in a warrant case a Magistrate has in the first instance thought fit to frame a charge against an accused person, it is not incumbent on him to convict the accused merely because the latter has failed to adduce satisfactory rebutting evidence. It is his duty when he proceeds to judgment to carefully consider all the evidence adduced in the case and the probabilities and surrounding circumstances and if at the time of giving judgment, he comes to the conclusion that the guilt of the accused has not been satisfactorily established, he is bound to acquit him although he may have framed a charge against him in the first instance. (*Wadegaonkar, A. J. C.*) DAMODAR *v.* JUJHARSINGH. **26 Cr. L. J. 1348 : A. I. R. 1926 Nag. 115.**

——**Ss. 255 and 256**—*Procedure after framing of charge.*

If after the charge is framed the accused pleads guilty, the Magistrate can take further evidence either of his own motion or at the suggestion of the Crown. (*Woodroffe and Buckland, JJ.*) EMPEROR *v.* RASH BEHARI GHOSE. **25 C W. N. 212 : 62 I. C. 590 : 22 Cr. L. J. 574.**

——**Ss. 255, 256 and 257**—Alteration or addition of charges do not necessarily require new trial, unless

CR. P. CODE (V OF 1898), S. 256.

accused is prejudiced thereby. (*Jwala Prasad and Adami, JJ.*) SHAMLAL KALWAR *v.* EMPEROR.
3 P. L. T. 91 : 1 P. 54 : 65 I. C. 610 : 23 Cr. L. J. 146 · A. I. R. 1922 Pat. 393.

——S. 256—Changes.

Where after charge the accused does not plead, the case is to be adjourned to another date for the accused to state if he wishes to cross-examine the prosecution-witnesses unless for reasons to be recorded the Magistrate thinks [otherwise].

——S. 256—*Declaration of accused that he had no witnesses for defence—Cross-examination of prosecution witnesses—Right of accused to produce defence thereafter.*

The accused declared that he had no witnesses for the defence and the cross-examination of the prosecution witnesses took place under the direction of the Court. *Held* that the accused could not claim any right to produce his defence after cross-examination under S. 256, Cr. P. Code. (*Dalal, J.*) MUSHTAQ HUSAIN *v.* EMPEROR. **L. R. 5 A. 92 (Cr.) : A. I. R. 1924 All. 673.**

——S. 256—*Obligation under S. 256 is different from that under S. 342.*

There can be no difference in the meaning between the words "called upon to enter upon his defence" in S. 256 and "called on for his defence" in S. 342, (1923 Cal. 727, Appr.) The obligation imposed by S. 256 on the Magistrate to ask the accused whether he wishes to cross-examine the prosecution witness is quite distinct from the obligation imposed by S. 342 to question the accused generally for the purpose mentioned therein. (*Macleod, C. J. and Crump, J.*) EMPEROR *v.* NATHU KASTURCHAND MARWADI.
27 B. L. R. 105 : 86 I.C. 66 : 26 Cr. L. J. 690 : A. I. R. 1925 Bom. 170.

——S. 256—*Magistrate infringing section without giving reason—Accused prejudiced—Re-trial must be ordered.*

Though S. 537 of the Code could in no circumstances be applied to a case where a Magistrate has infringed the provisions of S. 256 yet the accused must be held to have been prejudiced if the Magistrate, without assigning any reason for departing from the normal procedure has not allowed him the privilege to which he was entitled under S. 256. (*Campbell, J.*) PHUMAN SINGH *v.* CROWN. **7 L. L. J. 114 : 88 I. C. 518 : 26 Cr. L. J. 1158 : 26 Punj. L. R. 460 : A. I. R. 1925 Lah. 339.**

——S. 256—*Provisions are imperative.*

The provisions of S. 256 are imperative and the accused has a right to be given an opportunity of further cross-examining the prosecution witnesses, if he so desires. 11 P.R. 1914 (Cr.) Foll. 26 I.C. 309, Not Foll. (*Abdul Qadir, J.*) MAHAN SINGH *v.* EMPEROR. **9 P. W. R. Cr. 1923 : 72 I. C. 371 : 24 Cr. L. J. 371 : A. I. R. 1924 Lah. 215.**

——Ss. 256, 342 and 537—*Warrant case—Recalling prosecution witnesses for cross examination—Omission to examine accused—Effect of.*

Where the prosecution witnesses have been recalled for further cross-examination in a warrant case under S. 256, Cr. P. Code, the omission of the Court to examine the accused thereafter is a serious irregularity or illegality vitiating the trial. If the accused is entitled to an opportunity of stating his case to the court, the failure to allow him to do so vitiates the trial. 41 C. 743; 63 I. C. 825, Ref. (*Oldfield and Ramesam, JJ.*) MARUDAMUTHU VANIAN, *In re.*
71 I. C. 252 : 16 L. W. 420 : (1922) M. W. N. 601 : 45 Mad. 820 : 24 Cr. L. J. 124 : A. I. R 1922 Mad. 512 : 43 M. L. J. 402.

CR. P. CODE (V OF 1898), S. 257.

——Ss. 256 and 257—*S. 256 refers to cases where charge is framed before all Prosecution Witnessse are examined in chief and S. 257 refers to cases where prosecution closes cases after examining all its witnesses.*

The scope of S. 256 is with reference to cases in which the charge is framed before all the witnesses for the prosecution have been examined in chief and the scope of S. 257 refers to a stage when the prosecution closes its case after examining all its witnesses (*Hallifax, A. J. C.*) GANGADHAR *v.* BANGI SAO.
25 Cr. L. J. 1152 : 81 I. C. 976 : A. I. R. 1925 Nag. 147.

——Ss. 256 and 544—*Accused—Right to cross-examine witnesses—Batta for witnesses—Liability to pay.*

Where an accused seeks to exercise the right of cross-examination conferred by S. 256, Criminal Procedure Code, he cannot be legally required to deposit the expenses. The question who should pay whether the Government or the complainant is one to be decided by the Magistrate. S. 544 of the Code of Criminal Procedure is subject to rules made by the Local Government. The rules in force in the Central Provinces will be found in the Judicial Commissioner's Circular, No. 1—37. If the complaint is a private one brought for using false trade-mark and the prosecution is not one carried on by, or under the orders or with the sanction of the Government and is bailable, the only provision under which the Government could be made to pay the expenses is if it appears to the presiding officer that the prosecution is directly in the interests of public justice, a point which is one obviously for the Magistrate to decide. But in no case can the accused be compelled to pay the expenses of the witnesses for the prosecution whom he wishes to cross-examine under S. 256, Criminal Procedure Code. Under that section the right of the accused to cross-examine is absolute. (*Baker, O. J. C.*) RADHAKISAN *v.* RAMKRISHNA. **7 N. L. J. 57 : 25 Cr. L. J. 912 : 81 I. C. 448 : A. I. R. 1924 Nag. 114.**

——S. 256 (2)—"*Remaining witnesses*" *who may not be present when application is made for their examination—But applicant cannot insist on an adjournment for their examination.*

A Magistrate held an enquiry and committed the accused to the Sessions on a charge of bigamy. Owing to the amendment of the Cr. P. Code, the offence of bigamy ceased to be exclusively triable by the Court of Sessions and the case was sent back to the Trying Magistrate for disposal. The prosecution witnesses, who had been examined and cross-examined were then re-called and cross examined again. The complainant then asked that the evidence of seven prosecution witnesses might be taken. The witnesses were not present, but some of the witnesses had, as a matter of fact, been summoned but had not attended. With regard to others an application for witness summonses had ben granted. *Held*, that the witnesses were remaining witnesses. But the complainant had no right to insist on the examination of witnesses for whose evidence a postponement would have been necessary. (*Kennedy, J. C. and Aston, A. J. C.*) ALI SHER *v.* MIR MAHOMED.
A. I. R. 1925 Sind 315.

——S. 257—*Witnesses for defence—Duty of Court to enforce attendance.*

It is the business of the Court to enforce the attendance of witnesses cited by an accused and a conviction without doing so is not proper. (*Lindsay, J.*) BISSAY *v.* EMPEROR. **19 A. L. J. 945 : 65 I. C. 556 : 23 Cr. L. J. 124.**

CR. P. CODE (V OF 1898), S. 257.

——S. 257—*Evidence—Failure to record reasons for not re-summoning a prosecution witness when so requested is illegal.*

The accused, even after he has entered upon his defence, is entitled to have the prosecution witnesses summoned for cross-examination, unless the Magistrate considers that such application should be refused on the ground that it was made for the purpose of vexation or delay or for defeating the ends of justice. If the Magistrate does so consider, the section is imperative that such ground shall be recorded by him in writing. A failure to comply with this provision of law is an illegality which vitiates the trial. (*Newbould and B. B. Ghose, JJ.*) MANOMOHAN DASTIDAR *v.* BANKIM BEHARI CHOWDHURY.
51 Cal. 1044 : 84 I. C. 864 : 26 Cr. L. J. 384 : A. I. R. 1925 Cal. 411 (1).

——S. 257—*Conviction after refusal to summon two material witnesses in contravention of S. 257 was set aside.*

Where the accused was prejudiced by the Magistrate's refusal to summon two material witnesses without recording grounds for such refusal, in contravention of S. 257 of Cr. P. Code, the High Court set aside the conviction and directed rehearing of the case. (*C. C. Ghosh and Panton, JJ.*) ABDUL JABBAR *v.* EMPEROR. **25 Cr. L. J. 310 : 76 I. C. 1030 : A. I. R. 1925 Cal. 80.**

——S. 257—*If witnesses is reported ill, Court must issue fresh summons and grant adjournment.*

Where the accused informed the Court that the witness summoned by him was ill and asked for a postponement in order to enable him to produce the witness.

Held : the application should not have been refused on the ground that the petitioner had not produced a medical certificate to show that the witness was actually ill. (*Newbould and Suhrawardy, JJ.*) MIHIR LAL *v.* EMPEROR. **24 Cr. L. J. 370 : 72 I. C. 370 : A. I. R. 1924 Cal. 534.**

——S. 257—*Further processes not asked for, nor witnesses given up—Opportunity to examine witnesses given in revision by High Court.*

Where accused or his mukhtear did not apply for further process but did not expressly give up witnesses nor argued the case, the High Court in revision ordered further opportunity to be given. (*Buckland and Cuming, JJ.*) PONTHIRAM JOAB *v.* EMPEROR.
38 C. L. J. 285 : 76 I. C. 965 : 25 Cr. L. J. 293 : A. I. R. 1924 Cal. 196.

——S. 257—*Witness for defence—Summons, issue of—Absence—Court's duty.*

Having once issued the summons under S. 257, Criminal Procedure Code the Magistrate is not entitled to dispense with the evidence of the witness who does not attend on the ground that at the most she would support accused in his statement. (*Leslie Jones, J.*) SOHARA *v.* EMPEROR.
5 P. L. R. 1922 : 62 I. C. 325 : 22 Cr. L. J. 501 : A. I. R. 1922 Lah. 143.

—— Ss. 257 and 537—*Witnesses of defence—Magistrate's refusal to summon—Witnesses not served or not in attendance—Magistrate's refusal to re-summon—Illegality.*

S. 257 leaves the Magistrate no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Where several witnesses from among those summoned are not present on the day of hearing, if the Magistrate refuses to re-summon on the ground that the request is for delaying the case and that their evidence is superfluous, that is a mistaken view of law and the Magistrate has no right to refuse to resummon. A refusal to summon witnesses for the accused in such circumstances amounts to an illegality not curable by S. 537. (*Abdul Qadir, J.*) MD. DIN *v.* EMPEROR. **6 P. L. R. 1922 : 62 I. C. 321 : 22 Cr. L. J. 497 : A. I. R. 1922 Lah. 71.**

——S. 257—*Scope of.*

Section 257 is neither imperative nor exhaustive. (*Odgers and Wallace, JJ.*) M. P. NARAYAN MENON, *In re.* **25 Cr. L. J. 401 : 77 I. C. 481 : A. I. R. 1925 Mad. 106.**

——S. 257—*Failure to summon defence witnesses—Effect.*

Where in a case of murder, some defence witnesses were not summoned for the mere reason they were living at a great distance, there is such a grave irregularity that failure of justice must be deemed to have resulted. (*Ayling and Odgers, JJ.*) AYAVALI POKKER, *In re.* **(1923) M. W. N. 758 : 18 L. W. 899 : 74 I. C. 952: 24 Cr. L. J. 840 : A. I. R. 1924 Mad. 243 : 45 M. L. J. 305.**

——S. 257—*Cross-examination—Prosecution witness recalled as defence witness.*

The Magistrate, having allowed the prosecution witnesses to be recalled as defence witnesses under section 257, Criminal Procedure Code, must clearly have allowed them to be cross-examined by the accused, for they do not change their character and may be cross-examined. (*Odgers, J.*) VENKU REDDY *v.* EMPEROR. **65 I. C. 768 : 16 L. W. 196 : 23 Cr. L. J. 192 : (1922) M. W. N. 120 : A. I. R. 1922 Mad. 32.**

——S. 257—*Prosecution witnesses called under S. 257 can be cross-examined—Court is not bound to summon them merely because of absence of previous cross-examination.*

The accused are entitled to cross-examine prosecution witnesses called to the Court under S. 257. The section itself however gives the Magistrate certain powers to refuse an application for the summoning of witnesses under S. 257 whether it is the case of a witness who desired to be called for the defence or whether it is one whom it is desired only to cross-examine. The mere fact that an accused's lawyers declined to cross-examine such witnesses or the mere fact that such witnesses were not cross-examined does not compel Court to summon them. (*Bucknill and Macpherson, JJ.*) AJO MIAN *v.* EMPEROR.
6 P. L. T. 626 : A. I. R. 1925 Pat. 696.

——S. 257—*Unreasonable and improper refusal can be revised.*

If a good case was made out that the Magistrate's refusal was outside the limits of reasonable discretion, the High Court should and would interfere. The fact that it might perhaps have been possible from a cross-examination of those witnesses to have extracted from them something which might have been of advantage to the accused is not sufficient, but it must appear in fact that there was matter to be obtained from the witnesses sought to be called for cross-examination which would have materially affected the result of the trial. (*Bucknill and Macpherson, JJ.*) AJO MIAN *v.* EMPEROR. **6 P. L.T. 626 : A. I. R. 1925 Pat. 696.**

——S. 257—*Defence witnesses—All must be summoned—Accused's failure to pay costs is no excuse.*

The provision that the Magistrate shall, save in exceptional circumstances, issue process on the defence witnesses is mandatory. The exception arises

CR. P. CODE (V OF 1898), S. 257.

when the Magistrate considers that the application of the accused should be refused on a special ground which must be recorded in writing. The inability or even refusal to pay the costs of the witnesses would not be adequate ground in a warrant case. 3 A. 392, 26 B. 412, 31 M. 131, Ref. (*Macpherson, J.*) DEBI SINGH *v.* EMPEROR. **5 P. L. T. 112 : 74 I. C. 863 : 2 Pat. L. R. (Cr.) 73 : 24 Cr. L. J. 831 : A. I. R. 1924 Pat. 142.**

——S. 257—*Refusal to summon witnesses for cross-examination is illegal.*

If an application to summon the prosecution witnesses for cross-examination is refused without the requirements of the section having been sufficiently complied with, the accused is prejudiced as he has had no opportunity of cross-examination. (*Jwala Prasad, J.*) BISESWAR SINGH *v.* EMPEROR. **22 Cr. L. J. 572 : 62 I. C. 588 (Pat.)**

——S. 257—*Prosecution witness summoned again for defence—Summons ordered—Subsequent change of order—Prejudice.*

As a general proposition it can be laid down that once a Magistrate has given orders that a certain witness should be called he should take steps to enforce his attendance. But if he later comes to the conclusion that his presence is not really necessary, as in the case of a prosecution who had already been cross-examined at great length, it cannot be said he has no jurisdiction to dispense with his attendance. In the absence of prejudice, it will be no good ground for interference with the conviction. (*Bucknill, J.*) RAMSAKAL RAI *v.* EMPEROR. **90 I. C. 923: 26 Cr. L.J. 1627.**

——S. 257—*Right of accused to apply for the attendance of a prosecution witness as a witness for the defence and cross-examine him.*

Under the provisions of S. 257 of the Criminal Procedure Code, the accused has a right to make an application to the Magistrate that certain prosecution witnesses should be ordered to attend for the purpose of cross examination and if the magistrate orders the application the accused are entitled to a cross-examine such witnesses. The section however gives the Magistrate certain powers to refuse such an application. Thus where an accused cross-examined or had the opportunity of cross-examining a witness after a charge has been framed, the Magistrate may refuse unless he is satisfied that it is necessary for the purposes of justice. If it is shown that the refusal of the Magistrate to order the attendance of the witness was outside, the limits of reasonable discretion of the High Court would interfere in revision. (*Bucknill and Macpherson, JJ.*) AJO MIAN *v.* EMPEROR. **6 P. L. T. 626 : A. I. R. 1925 Pat. 696.**

——S. 257—*Burma Process Fees Act, 1910—Process-fees not to be paid by complainant or accused in non-cognizable warrant cases.*

In non-cognizable warrant cases neither the complainant nor the accused can be compelled to pay process-fees for the production of witnesses. Such charges must be provided for in the Magistrate's budget. But the complainant must, under S. 204, Criminal Procedure Code, in the ordinary course of events, pay process-fees for the summoning of the accused. Judicial Department Notification No. 57, dated 8th May, 1923. 2 Weir 323 Ref. to. (*Doyle, J.*) EMPEROR *v.* MG. SAN NYEIN. **4 Bur. L. J. 187.**

——S. 257 (2)—*Scope.*

Section 257 (2) of the Cr. P. C. fully empowers a Magistrate trying a case to order that reasonable expenses of a witness shall be deposited by the applicant in Court before he is summoned. The language of section 257, Cr. P. C., is imperative and the Magistrate has no discretion to refuse to issue process to compel the attendance of any witness merely because he thinks that no useful purpose will be served by summoning him as a witness to attend the Court. The only grounds upon which an application can be refused are those enumerated in clause (1) of section 257 of the Cr. P. C and the Magistrate is not entitled to refuse the application on any other grounds. It is not for the Magistrate to say which witnesses shall and which shall not be of any use to the accused. Where the accused wanted to prove his presence in various Courts on the dates when he was alleged to have made certain objectionable speeches and that the fact of his presence in those Courts was recorded in the records. *He'd* the records should have been allowed to be produced without the petitioners having been made to undergo the unnecessary expense of obtaining certified copies. (*Moti Sagar, J.*) GANPAT RAI *v.* EMPEROR. **24 Cr. L. J. 686 · 73 I. C. 782 : A. I. R. 1923 Lah. 420.**

CR. P. CODE (V OF 1898), S. 259.

——S. 258—*Finding accused not guilty is essential.*

To apply the provisions of S. 258 the Magistrate must find the accused not guilty. (*Dalal, J. C. and Neave, A. J. C.*) EMPEROR *v.* GODHAN. **26 Cr. L. J. 400 :84 I. C. 944 : A. I. R. 1925 Oudh 314.**

——S. 258—*Complainant's absence is no ground for acquittal.*

An order of acquittal in a warrant case can be passed only under S. 258 of the Code, that is, on a finding that the accused is not guilty. The accused cannot be acquitted merely because the complainant is absent. (*Wazir Hasan, A. J, C.*) RAM BAKSH *v.* JAIRAM DAS. **27 O. C. 316 : 84 I. C. 328: 26 Cr. L. J. 264 : A. I. R. 1925 Oudh 306 (1).**

——S. 259—Changes.

[Absence of complainant in a non-cognizable case entitles the Magistrate to discharge the accused.]

——S. 259—*Warrant case—Adjournment to absence of complainant—Liability to pay costs.*

In a warrant case after a charge is framed the Magistrate has to go on with the trial irrespective of the presence or absence of the complainant. The position of the latter thereafter is reduced to that of a witness and he cannot be asked to pay the costs of an adjournment necessitated by his absence. (*Zafar Ali, J.*) NABI BAKSH *v.* EMPEROR. **25 Cr. L. J. 87 : 76 I. C. 23 A. I. R 1924 Lah. 627.**

——S. 259—*Acquittal after charge framed—Procedure.*

No order of acquittal can be made after the framing of charge, except on a finding on merits of not guilty. After the charge is framed, the Trial Court must proceed with the trial even in the absence of the complainant and convict or acquit the accused. (*Le Rossignol, J.*) NARAIN DAS *v.* MEWA SINGH. **3 U. P. L. R. (Lah) 39 : 60 I. C. 1000 : 22 Cr. L. J. 312.**

——Ss. 259 and 403—*Dismissal of complaint under S. 259 does not bar fresh complaint.*

A complaint dismissed under S. 259 can be revived on a fresh complaint as it is not an acquittal. 28 Mad. 310 ; 29 Mad. 126 (F. B.) and 28 Cal. 652 (F. B.) Foll. Where the original complaint was entertained by Magistrate *A* only because another Magistrate *D* who had the jurisdiction in the place was on leave, *Held*, that a subsequent complaint could be taken up by Magistrate *D*. (*Baker, J. C.*) ASHGAR ALI *v.* AKBAR ALI. **26 Cr. L. J. 1040 : 87 I. C. 928 : A. I. R. 1925 Nag. 432.**

CR. P. CODE (V OF 1898), S. 259.

——S. 259—*Scope.*

After a charge is framed the provisions of S 259 will not apply. (*Dalal, J. C. and Neave, A. J. C.*) EMPEROR *v.* GODHAN.
84 I. C. 944 : 26 Cr. L J. 400 : A. I. R. 1925 Oudh 314.

——S. 259—*Charge framed—No discharge is possible.*

There can be no discharge under S. 259 after a charge has been framed. (*Wazir Hasan, A. J. C.*) RAM BAKSH *v.* JAIRAM DAS.
27 O. C. 316 : 84 I. C. 328 : 26 Cr. L. J. 264 : A. I. R. 1925 Oudh 306 (1).

——Ss. 259, 494 and 495—*Absence of complainant—Withdrawing from prosecution.*

It is only in compoundable cases that a Magistrate can under S. 259 order the discharge of an accused person for want of prosecution. In non-compoundable cases it is only the Public Prosecutor who can withdraw the prosecution. 2 L. B. R. 165, overruled. (*Maung Kin, Offg. C. J. and Regg, J.*) EMPEROR *v.* A. YANAKYA.
13 Bur. L. T. 244 : 64 I. C. 273 : 22 Cr. L. J. 753 : 10 L. B. R. 375.

——S. 260—*Offence under Workmen's Breach of Contract Act—Summary trial can take place.*

A first class Magistrate has jurisdiction under S. 260 of the Code to deal with a case under the Workmen's Breach of Contract Act summarily. (*Piggott and Walsh, JJ.*) ABDUS SAMAD *v.* YUSUF.
43 All. 281 : 19 A. L. J. 22 : 2 U. P. L. R. (All.) 389 : 22 Cr. L. J. 165 : 59 I. C. 917 : L. R. 2 A. (Cr.) 17.

——Ss. 260 and 355—*Separate offences of theft—Stolen property not exceeding Rs. 10—Procedure.*

Where the accused was charged with two separate offences of theft, the subject-matter of theft in each case being a goat of Rs. 10 or less in value, the procedure at the trial of the accused was regulated by S. 355, Cr. P. Code. (*Lindsay, J.*) EMPEROR *v.* BULAKI.
21 A. L. J. 276: L. R. 4 A. 87 (Cr.) : A. I. R. 1923 All. 432.

——S. 260—*Trial under S. 290, I. P. C., should not be a summary one.*

A trial under S. 290 of the Penal Code should not be summary where the accused has objected to such a trial. In the particular case the trial took a long time, a number of witnesses were examined and the accused was unable to work the flour mill for a long time as a result of the summary trial. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* RUSTOMJI.
23 Bom. L. R. 984 : 64 I. C. 501 : 23 Cr. L. J. 21.

——S. 260—*Change of procedure causing prejudice*—De novo *trial must be ordered.*

Where the Magistrate after partly trying as a warrant case, finished it as a summary trial and the accused were actually prejudiced. *Held*, the *de-novo* trial is necessary. (*Walmsley and Suhrawardy, JJ.*) GOSTA BEHARI BASU *v.* BAISTAM DAS.
26 C. W. N. 831 : 37 C. L. J. 105 : 71 I. C. 509 : 24 Cr. L. J. 157 : A. I. R. 1923 Cal. 105.

——S. 260—*High Court can try summarily contempt of Court cases.*

The High Court as a Court of Record has jurisdiction to deal summarily with contempts of Courts. 10 Cal. 109 (P.C.), 29 All. 95 (P. C.), Foll. (*Broadway, Addison and Coldstream, JJ.*) HABIB *In the matter of.*
6 Lah. 528 : 26 Cr. L. J. 1409 : 26 P. L. R. 772 : A. I. R. 1926 Lah. 1 (F. B.).

——S. 260—*Large number of witnesses.*

A summary trial would be improper when there is a large number of accused and the number of witnesses is also very large. (*Wilberforce, J.*) SITA MAL *v.* EMPEROR.
59 I. C. 849 : 22 Cr. L. J. 145 : 3 Lah. L. J. 346.

CR. P. CODE (V OF 1898), S. 260.

——Ss. 260 and 530—*U. P. Excise Act (IV of 1910), S. 60—Offence not triable summarily but tried summarily—Proceedings are void.*

An offence under S. 60 of the Excise Act being punishable with imprisonment for one year cannot be tried summarily, and if it is so tried the proceedings are void. (*Dalal, J. C.*) BHIKHA *v.* EMPEROR.
28 O. C. 123 : 26 Cr. L. J. 800 : 86 I. C. 432 : A. I. R. 1925 Oudh 627.

——S. 260—*Irregularities by Magistrate—Charge under S. 447, I. P. C.*

Where in a trial in which the accused was charged, under S. 447 examination under S. 342, Cr. P. Code of the accused was not taken or recorded, no opportunity was given to cross-examine the complainant on the main question the Magistrate did no place a note of his local inspection on record and did not confine himself to evidence taken, *held* on these grounds these charges could not be maintained and the conviction must be set aside. (*Jwala Prasad, J.*) PARMESHWAR LAL *v.* EMPEROR.
3 Pat. L. T. 347 : 67 I. C. 616 : 23 Cr. L. J. 440 : A. I. R. 1922 Pat. 296.

——S. 260—*Though offence may be light or technical summary procedure should not be adopted where taking exhaustive notes of evidence is necessary.*

A summary trial is meant to be a summary trial and where owing to the bulk of evidence or the complication of the matters or owing to the difficult nature of points of issue, it is not possible for the Magistrate to keep in his mind without taking exhaustive notes the evidence of important facts then even though the offence may be technical and be punishable only with a slight sentence, the Magistrate will not be acting properly if he applies the summary procedure to such a trial and should he in so important a case apply the summary procedure, then the Appellate Court or Revisional Court will direct the retrial of the case in more appropriate form. (*Kennedy, J. C. and Lobo, A. J. C.*) RAHIMTULLAH *v.* EMPEROR.
26 Cr. L J. 1026 : 87 I. C. 914 : A. I. R. 1925 Sind 284.

——S. 260—*Notes of evidence—Duty to maintain.*

Notes of evidence taken in a summary trial form part of the record and the Magistrate is bound to keep them and not destroy them. (*Kinkhede, A. J. C.*) LAL CHAND *v.* EMPEROR.
89 I. C. 974 : 26 Cr. L. J. 1454 (Sind).

——S. 260—*Summary trial—Public servant—Question of title.*

The fact that a trial involves a question of title is not in itself sufficient ground for holding that the case is too complicated for a summary trial. Nor is there any law for bidding the summary trial of public servants. (*Pullan, A. J. C.*) SAKHPAT LAL *v.* EMPEROR.
89 I. C. 972 : 26 Cr. L. J. 1452 (Sind).

——S. 260 (1) (*f*)—*Magistrate's duty is to satisfy himself that the value of property is less than Rs. 50*

Before the Magistrate can assume jurisdiction to try the accused in a summary form, he has to satisfy himself that the property in respect of which he is trying the accused is less than Rs. 50 in value. (*Ross, J.*) BRIJ NANDAN PANDAY *v.* EMPEROR.
6 Pat. L. T. 114 : A. I. R. 1922 Pat. 227.

——S. 260 (2)—*Scope.*

Though there was a dispute concerning land, *marpit* took place when a Panchayat was called in order to settle the dispute and at the time nothing was pending in connection with the land. *Held*, there was nothing

in the character of the dispute between the parties which rendered it desirable that the case should not have been tried summarily and, therefore sub-section (2) of section 260 did not apply. (*Jwala Prasad, J.*) MAHOMED ISHAQ *v.* EMPEROR.

1 Pat. L. R. (Cr.) 159 : 65 I. C. 552 : 23 Cr. L. J. 120 : A. I. R. 1923 Pat. 157.

——Ss. 262 and 263—*Complaint disclosing offence punishable under S. 144, I. P. C.—No summary trial.*

The accused were tried by the summary procedure and convicted under S. 447, I. P. C., though the complaint disclosed the commission of an offence under S. 144, I. P. C. and there was nothing in the examination of the complainant reducing the offence to a less serious one. *Held*, that the conviction was bad and there should be retrial. (*Teunon and Ghose, JJ.*) CHANDRA MOHANDAS MANDAL *v.* EMPEROR.

25 Cr. L. J. 528 : 77 I. C. 992 : 27 C. W. N. 148.

——S. 262—*Trial of summons cases—No difference between, summary and ordinary trials.*

There is no difference between summary trial of summons cases and the ordinary trials of summons cases. (*Schwabe, C. J., Oldfield, Ramesam, Devadoss and Coleridge, JJ.*) DHARAM SINGH *v.* EMPEROR.

46 Mad. 766 : 18 L. W. 612 : 74 I. C. 959 : (1923) M. W. N. 893 : 24 Cr. L. J. 847 : A. I. R. 1924 Mad. 30 : 45 M. L. J. 230. (F. B.)

——Ss. 262 (2), 33—*Imprisonment for four months in default of fine is illegal.*

Four months imprisonment in default of payment of fine cannot be awarded. (*Wilberforce, J.*) GHASITA MAL *v.* EMPEROR.

3 L. L. J. 346 : 59 I. C. 849 : 22 Cr. L. J. 145.

——S. 262 (2)—*Summary trial—Maximum sentence is three months.*

Under S. 262, Cr. P. Code, in summary trials the maximum punishment is three months, in the case of any conviction. (*May Aung, J.*) NGA SAN BA *v.* EMPEROR.

76 I. C. 704 : 25 Cr. L. J. 240 : 2 Bur. L.J. 150.

——S. 263—*Appealable cases—No exemption from framing charge exists.*

S. 263 applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases. But there is no such exemption in a case tried summarily in which the sentence passed is appealable. (*Newbould and C. C. Ghose, JJ.*) NATABER KHAN *v.* EMPEROR.

27 C. W. N. 923 : 25 Cr. L. J. 1270 : 82 I. C. 278 : A. I. R. 1924 Cal. 63.

——Ss. 263 and 355—*Memorandum of substance of evidence—Magistrate cannot destroy.*

A memorandum of the substance of the examination of each witness, recorded by a Magistrate in a summons case becomes part of the record and that the Magistrate cannot destroy it. (*Mukerjee, Ag. C. J. and Fletcher, J.*) SATISH CHANDRA MITRA *v.* MANMOTH NOATH-MITRA.

48 Cal. 280 : 61 I. C. 846 : 22 Cr. L J. 492 : 32 C. L. J. 451.

——Ss.263, 370, 439 and 537—*Presidency Towns—Honorary Magistrates—Summary trial—Omission to record reasons—Revision—Interference.*

Honorary Magistrates as Presidency Magistrates are governed also by S. 370, Cr. P. Code, in cases where imprisonment is inflicted. The omission of the reasons for the conviction is no doubt an irregularity but unless the irregularity has prejudiced the accused, there would be no interference in revision. 46 M. 253, Ref. (*Odgers and Wallace, JJ.*) THURMAN, *In re.*

20 L W. 330: 25 Cr. L. J. 1084: 81 I. C. 908 : A.I.R. 1924 Mad 799.

——Ss 263, 370 and 441—*Absence of reasons may vitiate judgment.*

It is one thing to hold that, in a case where all the record before the original trying Court is also available before the High Court in revision, no substantial failure of justice has occurred by the omission of the trying Court to record reasons. It is a very different case when the conviction was passed without reasons therefor on evidence of which no record is taken and which therefore is not available to the High Court. In such a case the omission to record reasons is a grave irregularity which in most cases would be sufficient ground for interference. In the case of convictions by Presidency Magistrates there is the saving S. 441 and when the record submitted under that section discloses sufficient grounds for the decision, it may be taken into consideration. (*Wallace, J.*) DERWISH HUSSAIN, *In re.*

46 Mad. 253 : 17 L. W. 18 : 71 I. C. 212 : 32 M. L. T. (H.C.) 100 : 24 Cr. L. J. 84 : A.I.R. 1923 Mad. 185 : 44 M.L.J. 84.

——S. 263—"*If any*"—*Meaning of.*

The words "if any" in S. 263 do not limit the obligation imposed on courts by S. 342 or render it inapplicable to summary trials. They merely have reference to those cases in which owing to the admission and plea of the accused or owing to the weakness of the evidence called in support of the prosecution, the accused can either be convicted on his own plea without the taking of evidence or acquitted on the evidence without the examination under S. 342. (*Kennedy, J.C. Aston and DeSouza, A.J.Cs.*) EMPEROR *v.* NABU.

90 I. C. 434 : 26 Cr. L. J. 1554.

——Ss. 263, 264—*Summary trial—Charge if necessary.*

In a summary trial, when an appeal is provided by S. 264, a charge need not be framed. 27 C. W. N. 923 Diss from. (*Dalal, J. C.*) KALLU BARI *v.* EMPEROR.

89 I. C. 310 : 26 Cr. L. J. 1334 : A. I. R. 1925 Oudh 722.

——S 263—*Judgment—Contents of—No reasons for conviction—Revision.*

Where a judgment contained practically nothing for the information of a Court in revision, *held*, that, where no reasons whatsoever are given in support of the conviction. S. 263, Cr. P. Code, is not complied with and the conviction must be set aside. (*Lindsay, J. C.*) EMPEROR *v.* MIAN JAN.

23 Cr. L. J. 427: 67 I.C. 587 : 24 O. C. 293.

——S. 263—*Absence of reasons and materials may vitiate judgment.*

Under S. 263 the Magistrate must give the reasons, though briefly, for justifying the conviction. Convictions are revisable by a superior Court and the superior Court will always insist on having materials before it, so that it may be in a position to say whether the conviction is proper or not. (*Sultan Ahmed, J.*) DAMODAR DAS *v.* EMPEROR.

3 Pat. L. T. 499 : 65 I. C. 446 : 23 Cr. L. J. 94 : A. I. R. 1923 Pat. 56.

——Ss. 263 (g) and 264—*Examination under S. 342 not dispensed with.*

Plea of accused under S. 263 (*g*) is not a valid substitute for examination of accused under S. 342. (*Jwala Prasad, J.*) PARMESHWAR LALL MITTAR *v.* EMPEROR.

3 P. L. T. 347 : 67 I. C. 616 : 23 Cr. L. J. 440 : A.I.R. 1922 Pat. 296.

——S. 263 (h)—*Non-compliance is curable under S. 537, if conviction is right.*

Omission is comply with cl. (*h*) of S. 263, *i.e.*, omission to briefly record reasons for finding is a mere irregularity curable under S.537 where in a non-appealable case it appears that there is clear evidence justifying the conviction. (*Marten and Fawcett, JJ.*) EMPEROR

CR. P. CODE (V OF 1898), S. 264.

v. NAMDEO LAKMAN. 26 Bom. L. R. 1236 : A. I. R. 1925 Bom. 138.

——S. 264—*Summary trial—Clear finding necessary,*

In summary trials it is very important there should be clear findings on questions of facts because it is only through such findings that the court of revision can form its own judgment with regard to the legality or otherwise of the proceedings of the Trial Court. (*Wazir Hasan, A. J. C.*) EMPEROR *v.* JEGMOHAN DAS. 24 Cr. L. J. 916 : 75 I. C. 292 : A. I. R. 1924 Oudh 297.

——S. 264—*In appealable cases, Magistrate must give reasons in judgment.*

Where the accused is tried summarily and sentenced to an appealable sentence, the Magistrate must write a judgment embodying the substance of the evidence on both sides ; for example, merely saying that the witnesses for prosecution support the statement of the complainant, and that the statement of the witnesses examined by the accused very conflicting, is not enough. 16 O.C. 357, Ref. (*Daniels, A.J.C.*) SALIM *v.* EMPEROR. 24 Cr. L. J. 484 : 72 I. C. 948 : A. I. R. 1924 Ovdh 167.

——S. 264—*Rough notes taken by Magistrate should not be attached to record.*

Where a Magistrate tries a case summarily and does, as a matter of fact, take rough notes, those rough notes should not be transcribed and attached to the record. (*Kennedy, J.C. and Lobo, A.J.C.*) RAHIMULLAH *v.* EMPEROR. 26 Cr. L. J. 1026 : 87 I.C. 914 : A. I. R. 1925 Sind 284.

——S 266—Change.

[The defin tion of High Court has now been made to include the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind.]

——Ss. 266 and 418—*Sessions trial by Judicial Commissioner of Sind—Appeal lies.*

An appeal lies from the decision of a Judge of the Court of the J. C. of Sind holding a Sessions trial, where the Judge has accepted the finding of the Jury. For purposes of appeal such trial is a Sessions trial notwithstanding the amendment of Cr. P. Code, S.266. (*Kincaid, J.C. Kennedy, Aston, Rupchand Bilaram and Lobo, A. J. Cs.*) HAJI KHUDABUX *v* EMPEROR. 26 Cr. L. J. 562 : 85 I. C. 706 : A. I. R. 1925 Sind 249 (F.B.).

——S. 269 (3) and S. 238—*Trial by Jury—Charge under S. 412, I. P. C.—Conviction for offence under S. 411, I. P. C.—No charge for offence under S. 411—Validity.*

The accused was charged with an offence under S. 412, I. P. C., and tried by a jury. He was however convicted of an offence under S. 411, I. P. C., though there was no charge for this offence. *Held*, that the provisions of S. 269 (3) of the Cr. P. Code did not apply, as no charge was framed for an offence under S. 411. But under S. 238 of the Code the accused can be convicted for the minor offence and the conviction is not invalid. Consequently an appeal does not lie on facts under S. 418 of the Code. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* GULABCHAND DOSAJI. 27 Bom. L.R. 1416.

——S. 271 (2)—*Murder case—Sentence on a plea of guilty is not improper.*

Although as a matter of practice in Sessions trials many Judges very properly prefer not to act on a plea of guilty but proceeded to take the evidence as if the plea had been one of not guilty, in order to ascertain the accused's state of mind and whether or not he acted under provocation, sufficient to reduce the offence to one of culpable homicide or only sufficient to affect the sentence, yet in sub-section (2) of S. 271 it is enacted "If the accused pleads guilty the plea shall be recorded, and he may be convicted thereon." It has certainly never been laid down that it is illegal to convict in a murder case on a plea of guilty, and in each case the circumstances must be examined to see whether the plea of guilty is one which would have been acted on. 11 Cal. 410 Ref. (*Batten, J. C. and Hallifax, A. J. C.*) MANJOO *v.* EMPEROR. 24 Cr. L. J. 570 : 73 I. C. 266 : A. I. R. 1923 Nag 251.

CR. P. CODE (V OF 1898), S. 276

——Ss. 275 and 528-A—*Procedure in mofussal and in Presidency Towns discussed.*

An Indian British subject to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of enquiry or trial. This applies to Presidency Magistrates as well as Magistrates in the mofussal.

If the Magistrate rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such appeal. This applies to Presidency Magistrates as well as to Magistrates in the mofussal.

If the Magistrate rejects the claim and commits him to the Court of Session, he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not the High Court exercising Original Criminal Jurisdiction,

If the Court of Session rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such trial.

It necessarily follows that if a claim is made before a Presidency Magistrate and rejected by him and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in, under S. 275 of the Cr. P. Code, before the High Court, a further claim for being tried by a jury the majority of whom should be Indians.

Where no such claim is put forward before a Magistrate, there being no provision for repetition of the claim before the High Court, S. 528-B. is a bar to the assertion of the same in any subsequent stage of the case. (*Mukerji, J.*) EMPEROR *v.* HARENDRA CHANDRA CHAKRAVARTHY. 51 Cal. 980: 29 C. W. N. 384: 84 I. C. 929: A. I. R. 1925 Cal. 384.

——Ss.275, 528-A and 528-B—*Claim to be tried as Indian British subject is different from claim to be tried by majority of Indian jury.*

The claim to be tried as an Indian British subject mentioned in Ss. 528-A and 528-B is a different and distinct one from the claim to be tried by a majority of Indian jury as mentioned in S. 275, though it can only be put forward by a person who has, in the language of that section, been found under the provisions of the Code to be an Indian British subject. (*Mukerji, J.*) EMPEROR *v.* HARENDRA CHANDRA CHAKRAVARTHY. 51 Cal. 980: 29 C. W. N. 384 : 84 I. C. 929 : A. I. R. 1925 Cal 384.

——S. 276—Changes.

[For the words "in the Presidency towns" is now substituted "in a trial before any High Court in the town which is the usual place of sitting of such High Court" so that other High Courts may also be included.]

——S. 276—*Selection of jurors from outsiders need not be by lot and persons need not be on jury list.*

S. 276, Cr P. Code, provides that in case of a deficiency of persons summoned, the number of the jurors required may with the leave of the Court be chosen from such other persons as may be present. They need not be chosen by lot or be on the jury list

CR. P. CODE (V OF 1898), S. 279.

(*Newbould and Mukerji, JJ.*) THE GOVERNMENT OF BENGAL *v.* MUCHU KHAN. **29 C. W. N. 652: 86 I. C. 467: 26 Cr. L. J. 819: A. I. R. 1925 Cal. 798.**

——S. 279—*Objection to jurors—Decision as to, by Trial Judge is final.*

The Trial Judge has a wide discretion in the matter of accepting or overruling objections to jurors and his decision is final. (*Newbould and Mukerji, JJ.*) THE GOVERNMENT OF BENGAL *v.* MUCHU KHAN.
29 C. W. N. 652: 86 I. C. 467 : 26 Cr. L. J. 819 : A. I. R. 1925 Cal. 798.

——Ss. 279 and 278—*Scope.*

Whether the evidence has been adequately criticised by the Court must depend upon the special circumstances of each case such as the constitution of the jury, their intelligence and education, the elaboration with which the case has been conducted on both sides, the skill of the defence and a variety of other circumstances. It is open to the Judge to express his own opinion of the evidence, provided he cautions the Jury that they are not bound by that opinion. Although a motion for revision does lie against the Sessions Judge's order, it is not the intention of the law that the motion shall be heard by High Court as an appeal; for if that were the case, then there would be no object in giving a right of appeal to the Sessions Judge at all. All that the petitioners can claim in a revision petition is a right to show that the Sessions Judge has decided wrongly. (*Mullick and Kulwant Sahay, JJ.*) GAJO SINGH *v.* EMPEROR. **4 Pat. L. T. 265: 72 I. C. 959: 1 Pat. L: R. (Cr.) 25 : 1923 P. H. C. C. 109 : 24 Cr. L. J. 495: A. I. R. 1923 Pat. 238.**

——Ss. 282 and 283—*Jury—Power of Judge to discharge for misconduct.*

Where the question of misconduct on the part of the jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge the jury and empanel another. It is true that the Code does not provide for such circumstances, but, on the other hand, the presumption that jurors will discharge their duties without impropriety may explain the omission. The power to discharge a jury on such grounds is one not to be exercised lightly nor until the Judge has satisfied himself by such form of enquiry as in the circumstances he can adopt that reasonable grounds for exercising such a right exist. (*Buckland and Cuming, JJ.*) RAHIM SHEIKH *v.* EMPEROR.
50 Cal. 872: 37 C. L J. 595 : 73 I. C. 773 (2): 24 Cr. L. J. 677 (2): A. I. R. 1923 Cal. 724.

——S. 284—Change.

[The number of assessors should not be less than 3 and, if practicable, should be 4.]

——S. 284—*Trial with two assessors—Effect.*

Where a criminal trial takes place after the 1st September 1923 with only two assessors when the law requires at least three, the proceedings are null and void. In cases triable with the aid of assessors the Judge together with the assessors constitute the Court. (*Prideaux and Kinkhede, A. J. Cs.*) JAIRAM KUNBI *v.* EMPEROR. **20 N. L. R. 129 : 77 I. C. 811 : 25 Cr. L. J. 459 : A. I. R. 1924 Nag. 287.**

——Ss. 284 and 537—*Trial with less than minimum assessors is illegal.*

S. 284 of the amended Code requires that there shall be at least three assessors ; and therefore a trial held with the assistance of only two assessors is improper and S. 537, Cr. P. Code. does not cure the defect. (*Daniels, J.*) RAM NARAIN *v.* EMPEROR.
27 O. C. 213 : 84 I. C. 711 (1) : 26 Cr. L. J. 359 (1) : A. I. R. 1925 Oudh 110 (2).

——S. 284—*Trial with assessors—Requisite number not obtained—Effect on trial.*

CR. P. CODE (V OF 1898), S. 287.

Where the criminal trial was commenced after the amended Criminal Procedure Code came into force with two assessors only contrary to the provisions of S. 284 as amended, this renders the trial illegal. (*Daniels, J. C.*) PRAGI *v.* EMPEROR. **11 O.L.J. 245 : A. I. R. 1924 Oudh 417 (1).**

——S. 284—*Trial with three assessors—No reasons given for not having four—Trial is illegal.*

Where four assessors are not chosen, it is right that the Court should give reasons in the order-sheet to explain the impracticability of choosing four, but the trial with three assessors, without the record of these reasons, is not irregular but is still according to law and does not offend against the provisions of S. 284. (*Adami and Bucknill, JJ.*) JAMAL MOMIM *v.* EMPEROR. **1925 P. H. C. C. 29 : 86 I. C. 153: 26 Cr. L. J. 713: A. I. R. 1925 Pat. 381.**

——S. 284—*Objection to assessors should be considered by Court.*

Assessors should be selected judicially and with great caution. If the assessors are the admitted tenants of the other party this in itself is a sufficient ground for the accused to mistrust the impartiality of the assessors and the relationship of landlord and tenant, or of master and servant creates an incapacity in a person to sit as a Judge or as an assessor in a case, under S. 284. There is no express provision for objecting to the selection of an assessor as is in the case of jurors under section 278. Yet the opinion of the assessors is of great value both to the Judge who tries the case and to the superior Court. It is, therefore, necessary as an elementary principle that they should be above suspicion. (*Jwala Prasad, J.*) SHIVADHIN SINGH *v.* EMPEROR. **3 Pat. L. T. 32: 60 I. C. 662: 22 Cr. L. J.262 : A. I. R. 1923 Pat. 116.**

——S. 285—*Trial by assessors.*

The simultaneous hearing of two cases by one set of assessors render the trial invalid. (*Duckworth, J.*) EUSOOF *v.* EMPEROR. **23 Cr. L. J. 49 : 64 I.C. 833 : 11 L. B. R. 73.**

——S. 286—*Evidence—Uncorroborated confession—Retraction—Evidentiary value.*

The two accused had admitted their guilt in the Court of Committing Magistrate, and they pleaded "not guilty" in the Sessions Court. The Sessions Judge proceeded at once to take in evidence before a single witness had been examined the previous statements made by the accused not only before the Committing Magistrate, but prior to the commencement of the proceedings in the Magistrate's Court when they were examined under Section 164 of the Code of the Criminal Procedure. He then examined and almost cross-examined the two accused upon these confessions and having done this began to record the prosecution evidence. *Held*, the trial Court certainly contravened the provisions of Section 286 of the Code of Criminal Procedure as to the manner in which a trial at Sessions should be commenced. It seems quite beyond question that the retracted confessions, practically uncorroborated by anything in the prosecution evidence do not afford anything like a satisfactory basis for the conviction of the accused. (*Piggott and Walsh, JJ.*) MT. SUKHIA *v.* EMPEROR. **20 A. L. J. 669: 24 Cr. L. J. 609 : L. R. 3 A. 101 (Cr.) : 73 I. C. 497 : 24 Cr. L. J. 609 : A. I. R. 1922 All. 266.**

——Ss. 287 and 310—*Previous statement of accused, in so far as it relates to prevent offence is admissible.*

S. 287 of the Cr. P. Code allows a previous statement of the accused to be read as part of the prosecution case only so far as such statement refers to the offence for which the accused is being tried and not

so far as it relates to a previous conviction. The latter portion cannot be read out to the jury or assessors under S. 310 until they have given their verdict. (*Jwala Prasad and Sultan Ahmad, JJ.*) THEKA AHIR *v.* EMPEROR.

22 Cr. L. J. 219 : 60 I. C 331 : 5 Pat. L. J. 706.

——S. 288—Main changes.

For the words 'before the committing Magistrate' is now substituted 'under Chap. XVIII' so as to cover the case of evidence recorded by a Magistrate other chan a committing Magistrate under S. 219.

——S. 288—*Court can rely on witnesses' statements before committing Magistrate though varied before the Sessions Judge when satisfied of their truth.*

Where the Court is satisfied that statements made by the witnesses before the committing Magistrate were true and the statements made by them subsequently before the Sessions Judge were false, the Court is at liberty to rely upon the previous statements. (*Sulaiman and Mukerji, JJ.*) TULLI *v.* EMPEROR.

47 All. 276 : 21 A. L. J. 1075 : L. R. 6 A. (Cr.) 33 : 85 I. C. 130 : A. I. R. 1925 All. 185.

——S. 288—"*Provisions*" *are not limited to Ss.* 155 *and* 157 *of Evidence Act.*

Under S. 288 the evidence of a witness taken before the committing Magistrate can, in the discretion of the Judge, be treated as substantive evidence in the case "for all purposes subject to the provisions of the Indian Evidence Act." "Provisions" in the section cannot be limited to particular provisions in the Evidence Act, so that statements made by witnesses before the committing Magistrate are admissible not only to contradict or corroborate a witness but also for the purpose of determining the guilt or innocence of the accused. But if the witness changes the verson before the Sessions Judge such evidence must be accepted with more caution than the evidence of a witness who adheres in the Sessions Court to what he deposed before the committing Magistrate. (*Macleod, C. J. and Crump, J.*) BASAPPA RUDRAPPA *v.* EMPEROR.

27 Bom. L. R. 113: 86 I. C. 145 : 26 Cr. L. J. 705: A. I. R. 1925 Bom. 266.

——S. 288—*Statements to Police and Committing Magistrate—Retraction—If evidence under S.* 288.

Statements of witnesses, made to the Police and the Committing Magistrate, if retracted, are evidence in the case, substantive evidence of the facts deposed to, but there should be some reason why it should be preferred under S. 288 of the Code. (*Pratt and Fawcett, JJ.*) MARUMTI JOTI *v.* EMPEROR.

46 Bom. 97 : 23 Bom. L. R. 820 : 22 Cr. L. J. 636 : 63 I. C. 332 : A. I. R. 1922 Bom. 108.

——S. 288—*Evidence admitted under, can be basis of conviction.*

Under the amended S 288 the evidence recorded by the committing Magistrate, if admitted under S. 288, must be treated as evidence for all purposes even as the basis of finding or verdict and on a par with any other evidence before the Sessions Court or as substantive evidence on which the verdict of the jury or judgment of the Judge can be based. 51 P. R. (Cr.) 1887, Appr. A. I. R. 1925 Pat. 51, Not Foll. (*Suhrawardy and Panton, JJ.*) ABUL GANI *v.* EMPEROR.

42 C. L. J. 205 : 26 Cr. L. J. 1577 : 90 I.C. 37 : A. I. R. 1926 Cal. 235.

——S. 288—*Evidence recorded before committing Magistrate whether with a view to commitment or not is admissible in Sessions Court.*

The amendment of S. 288 by substituting the words 'duly recorded in the presence of the accused under Chapter XVIII' for the words 'duly taken in the presence of the accused before the committing Magistrate' is intended to cover cases where evidence may be recorded by the committing Magistrate but not for the purposes of commitment, as under S. 219, Cr.P. Code. There is no special procedure laid down in Ch. XVIII for recording evidence and any evidence recorded by a Magistrate before commitment whether recorded with a view to commitment or in the ordinary course of trial, is evidence recorded in the presence of the accused under Chapter XVIII. (*Suhrawardy and Panton, JJ.*) ABDUL GANI *v.* EMPEROR.

42 C. L. J. 205 : 26 Cr. L. J. 1577 : 90 I. C. 37 : A. I. R. 1926 Cal. 235.

——S. 288—*Deposition of witnesses before committing Magistrate is substantive evidence.*

The deposition of witness before the committing Magistrate when put in under S. 288 becomes substantive evidence and is used as such. It cannot be put in evidence if for any reason it is irrelevant under the Evidence Act. (*Newbould and B. B. Ghose, JJ.*) FAZURUDDIN *v.* EMPEROR.

42 C. L. J. 111 : 26 Cr. L. J. 1553 : A. I R. 1926 Cal. 105.

——S. 288—*Evidence recorded under S.*288 *can be acted upon precisely as if it had been deposed to before Sessions Judge.*

The evidence of a witness which has been recorded under the provisions of S. 288, Cr. P. Code, may be acted upon by the Court precisely as if that evidence had been deposed to before the Sessions Judge. The amending words " for all purposes subject to the provisions of the Indian Evidence Act, 1872" merely mean that the law of evidence enacted in that Act must be complied with. For instance, evidence, which had been wrongly admitted by the Committing Magistrate, in violation of the provisions of the Evidence Act, could not be transferred to the Sessions' file. (*Scott-Smith and Fforde, JJ*) AMIR ZAMAN *v.* CROWN.

6 Lah. 199 : 88 I. C. 861 : 26 Cr. L. J. 1245 : 26 Punj. L. R. 361 : A. I. R. 1925 Lah. 452.

——S. 288 — *Statements made before committing Magistrate and repudiated before Sessions Judge can be treated as evidence.*

S. 288 empowers the Court of Sessions to treat as substantive evidence at the trial depositions made before the committing Magistrate but subsequently, repudiated before Sessions Judge as having been made under police pressure. (*Shadi Lal, C. J. and Zafar Ali, J.*) RAKHA *v.* CROWN.

6 Lah. 171 : 26 Punj. L. R. 304 : A. I. R. 1925 Lah. 399.

——S. 288—*Value of evidence in the magisterial proceedings transferred to Sessions record—Whether testimoney under the Evidence Act and admissible to corroborate statement of witnesses made before the Police.*

The evidence of a witness recorded by the committing Magistrate is by the operation of S. 288, Cr. P. Code, held to be just as much evidence in the case, as that recorded at the trial in the Sessions, and is therefore 'testimony' within the meaning of S. 157 of Evidence Act.

Held, further, that the statement of the witnesses before the Police is admissible in evidence in corroboration of the one made before the committing Magistrate. 72 I.C. 529, Foll. and 27 Cal. 295 Ref. to. (*Scott-Smith and Fforde, JJ.*) MAMCHAND *v.* EMPEROR.

5 Lah. 324 : 25 Cr. L. J. 1201 : 82 I. C. 129 : A. I. R. 1924 Lah. 609.

——S. 288—*Time for transfer of depositions.*

Court has absolute discretion to allow the state-

CR. P. CODE (V OF 1898). S. 288.

ments of approvers before the committing Magistrate to be transferred under S. 288 of the Code, but it should not allow the statements to be read out to the witnesses before the defence had had an opportunity of cross-examining them. (*Scott-Smith and Broadway, JJ.*) MAHANT NARAIN DAS *v.* EMPEROR. **3 Lah. 144 : 23 Cr. L. J. 513 : 9 P. W. R. 1922 (Cr.) : 68 I. C. 113 : 4 Lah. L. J. 91 : A. I. R. 1922 Lah. 1.**

——S. 288—*The whole previous statement of the witness should first be filed.*

If a Judge wants to rely upon S. 288 the whole of the previous statement should be filed and it would then be open to the Court to come to a conclusion after weighing the evidence. (*Devadoss and Wallace, JJ.*) AVYAMPERUMAL PILLAI *v.* EMPEROR. **(1925) M.W.N. 319 : 22 L. W. 405 : A. I. R. 1925 Mad. 879.**

——S. 288—*Statements made before Committing Magistrate—Retraction of part at the Sessions—Conviction based on—Not necessarily illegal.*

Where in a case of a faction fight involving a case and a counter case, before the committing Magistrate, names of assailants were given on both sides but at the Sessions this portion was withdrawn, obviously to protect each other, but the main details of the fight were given, the Judge may rely upon the statement before the committing Magistrate as evidence under S. 288, Cr. P. Code. (*Odgers and Wallace, JJ.*) BACHALA PEDA SOMADU *v.* NETHIPUDI APPIGADU. **47 Mad. 232 : 18 L. W. 705 : 33 M. L. T. (H C.) 159 : A. I. R. 1924 Mad. 379 : 45 M. L. J. 602**

——S. 288—*Effect of—Deposition of witness before committing Magistrate—If testimony.*

The object and effect of S. 288 of Cr. P. Code. is to place the deposition in the committal inquiry on exactly the same footing as the deposition in the Sessions Court. Such a deposition is "testimony" within the meaning of S. 157 of Evidence Act. (*Ayling, J.*) VELLIAH KONE *v.* EMPEROR. **45 M. 766 : 16 L. W. 239 : (1922) M. W. N. 506 : 31 M. L. T. 175 : 24 Cr. L. J. 417 ; 72 I. C. 529 : A. I. R. 1923 Mad. 20 : 43 M. L. J. 222.**

——S. 288 — *Amendment of* 1923 — *Magisterial depositions can be used in a trial if they are evidence within Evidence Act.*

Evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Indian Evidence Act. The view that S. 288 can only be utilised in such cases as the Evidence Act specifically provides is wrong as that Act has no such special provisions. On the other hand, to hold that S. 288 can be utilised in all cases except those in which the Evidence Act directly prohibits such use, would render the amendment of 1923 quite useless. (*Adami and Bucknill, JJ.*) JEHAL TELI *v.* EMPEROR. **3 Pat. 781 : 6 P. L. T. 53 : 26 Cr. L. J. 270 : 84 I. C. 334 : A. I. R. 1925 Pat. 51.**

——S. 288—*In the absence of evidence showing the preferability of evidence given before a Magistrate—Convictions should not be based on it when it differs from evidence given at the trial—Criminal Trial.*

Unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge the evidence given before the Magistrate cannot be effectively utilized in support of a conviction. (Case-Law reviewed.) (*Adami and Buckwill, JJ.*) JEHAL TELI *v.* EMPEROR. **3 Pat. 781 : 6 P. L. T, 53 : 26 Cr. L. J. 270 : 84 I. C. 334 : A. I. R. 1925 Pat. 51.**

CR. P. CODE (V OF 1898). S. 289.

——S. 288—*Statements before committing Magistrate are good evidence.*

The section clearly intends that the evidence taken before the committing Magistrate where the witnesses produced are examined at the subsequent trial may be treated as substantive evidence in the case. 28 A. 683 ; 24 M. 414 and 63 I. C. 332, Ref. (*Miller, C. J. and Mullick, J.*) GANSA ORAN *v.* EMPEROR. **2 Pat. 517 : 4 P. L. T. 462 : 1 Pat. L. R. 178 (Cr) : 24 Cr. L.J. 641 : 73 I. C. 561 : A. I. R. 1923 Pat. 550.**

——S. 288—*Deposition of witness—Can be put on record of Sessions Court only when his attention has been drawn to it.*

Where the deposition of a witness before the committing Magistrate was put in before the Sessions Court without calling attention of the witness to the portion to be used. *Held*, to put in such evidence is permissible, but it has been repeatedly laid down and it is now settled law that statements should not be put in without the attention of the witness being drawn to the portion of the statement which it is desired to use. (*Coutts and Ross, JJ.*) LACHMI LAL *v.* EMPEROR. **3 Pat. L. T. 398 : 65 I. C. 1002 : 1922 P. H. C. C. 159 : 23 Cr. L.J. 218 : A. I. R. 1922 Pat. 40.**

——S. 288—*Evidence before committing Magistrate—Amended section does not preclude its use as substantive evidence in Sessions Court—Subject to the provision, etc., is meant to prevent irrelevant evidence.*

S. 228 is intended to enable the Court to read the evidence in the committing Magistrate's Court as substantive evidence in the case at the trial where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. 27 Cal. 295, Ref. In using the words "subject to the provisions of the Indian Evidence Act, 1872", the intention of the Legislature was to prevent the admission of irrelevant evidence in the Sessions Court merely on the ground that it had been recorded by the committing Magistrate. The committing Magistrate might well record through inadvertence hearsay evidence or statements made by the accused persons to the Police in the absence of a Magistrate. (*Kincaid, J. C. and Aston, A. J. C.*) BAHADUR *v.* EMPEROR. **26 Cr. L. J 1063 : 88 I. C. 7 : A. I. R. 1924 Sind 289.**

——S. 289—*Scope of—Thinks fit, meaning of.*

The words "as the Court thinks fit" in section 239 of the Cr. P. C. are of the widest possible import. It is to be presumed that the Court will 'think fit, to adopt, in each particular case whichever course it regards as most conducive to the ends of justice. (*Mears, C. J. and Piggott, J.*) EMPEROR *v.* HARPRASAD BHARGAVA. **45 All. 226 : 21 A. L. J. 42 : L. R. 4 A. (Cr.) 19 : 77 I. C. 961 : 25 Cr. L. J. 497 : A. I. R. 1923 All. 91.**

——S. 289—*Direction to return verdict of "not guilty"—Evidence on record—Duty of Judge.*

A Judge should not direct a jury to return a verdict of "not guilty" on the ground there is no evidence worth the name against the accused. If there is evidence on record it is for the jury to say that it is unreliable. (*Newbould and B. B. Ghose, JJ.*) RAHAMALL HOWLADAR *v.* EMPEROR. **26 Cr. L. J. 1151 (2) : 88 I. C. 463 (2) : A. I. R. 1925 Cal. 1055.**

——Ss. 289 and 342—*Accused—Opportunity to give statement should be given.*

Where an accused in a preliminary enquiry pleaded not guilty and said he would make a statement later on, *held*, he ought to be given an opportunity to make

CR. P. CODE (V OF 1898), S 289.

it in the Trial Court. (*Teunon and Ghose, JJ.*) GOALA *v.* REED. 25 C. W. N. 609 : 33 C. L. J. 503 : 64 I. C. 665 : 23 Cr. L. J. 41.

——S. 289—*Trial by Jury—Evidence insufficient—Duty of Judge—Misdirection.*

Where the evidence against the accused is in sufficient, the omission of the judge to tell the Jury that there was no evidence against the accused amounts to a misdirection which entitles the accused to an acquittal. (*Walmsley and Huda, JJ.*) ASIMUDDIN SARDAR *v.* EMPEROR. 32 C. L. J. 89 : 59 I. C. 204 : 22 Cr. L. J. 60.

——S. 291—*Witness—Court witness on a previous trial—Duty of prosecution to call.*

It cannot be the duty of a Public Prosecutor to call or put into witness-box for cross-examination a witness who in the former trial was called by the court and whom he believes to be false. (*Buckland, J.*) EMPEROR *v.* REED. 49 Cal. 277 : 69 I. C. 630 : 23 Cr. L. J. 742 : A. I. R. 1922 Cal. 461 (1).

—— S. 291—*Witness not named in the list—Refusal to adjourn case to summon is legal.*

Refusal to grant an adjournment to summon a witness not named in the list delivered to the trying Magistrate is legal. (*Martineau and Zafar Ali, JJ.*) NAZIR SINGH *v.* EMPEROR. 7 Lah. L. J. 428 : 26 Punj. L. R. 767 : A. I. R. 1925 Lah. 557.

——S. 291—*Sessions trial—Accused can be allowed to examine defence witness once discharged if present in Court.*

S. 291 of the Cr. P. Code does not in express terms refer to a witness who has been discharged but if the accused insists on the examination of a witness in attendance who had been discharged before, the Court may, in the interests of justice, allow the accused an opportunity for his production. (*Kanhaiya Lal, J. C.*) NAGESHWAR *v.* EMPEROR. 73 I C 54 : 9 O. & A. L. R. 46 : 24 Cr. L. J. 518 : A. I. R. 1923 Cudh 142.

——S. 292—*Change.*

[Prosecutor has also the right of reply with the Court's permission (1) On a point of law and (2) when a document is produced by an accused, which need not be proved.]

——S. 297—*Object of summing up.*

The object of summing up under section 297, Cr. P. Code is to enable the Judge to place before the jury the facts and circumstances of the case both for and against the prosecution, so as to help them in arriving at a right decision upon the points which arise for their consideration (*Cuming and Mukerji, JJ.*) KHIJIRUDDIN *v.* EMPEROR. 42 C. L. J. 504.

——S. 297—*Summing up to the Jury—Materials to be placed before the Jury—Omission to place an important piece of evidence in favour of the defendant.*

A verdict obtained from the jury without placing before them an important piece of evidence in favour of the defence, whatever may have been its real worth, cannot be sustained. The charge to the jury must be recorded in such a way as would enable a Court of appeal to judge whether the facts and the circumstances of the Case have been properly placed before the jury and also whether the law has been correctly explained. (*Cuming and Mukerji, JJ.*) KHIJIRUDDIN *v.* EMPEROR. 42 C. L. J. 504.

——S. 297—*Misdirection—Directing jury that a retracted confession is not evidence against any accused other than confessor and again asking them to take into consideration such confession in individual cases amounts to misdirection and causes failure of justice.*

Where the Sessions Judge directed the jury that the retracted confession of a co-accused is practically of no value against anybody but the confessor, but asked the jury to take into consideration the confession while considering the cases of the other two co-accused individually:

Held that such direction was likely to prejudice the jury and lead them to give some weight to such statements when they should have disregarded them altogether. And that it caused a miscarriage of justice and necessitated a re-trial of all those accused in respect of whom there had been such misdirection. (*Newbould and B. B. Ghose, JJ.*) IBRAHIM, *In re.* 42 C. L. J. 496 : 26 Cr. L. J. 1146 : A. I. R. 1926 Cal. 374.

——S. 297—*Penal Code, S. 368—Charge to jury should not tend to make the jury forget distinction between knowledge and mere suspicion on accused's part.*

The proper way to charge the jury in a case under S. 368, I. P. C. would be to place before the jury the evidence, the direct evidence of knowledge as given of the abduction of the girl, to point out the strength and weakness of that evidence, to tell them that it was the only evidence relating to the knowledge, and then to place before them the circumstances, if any, which might raise an inference of knowledge on the part of the accused that the girl was an abducted girl; and lastly to ask the jury to draw their own conclusion on that question. To place before the jury the suspicion in the mind of the accused and the reasonable cause for such suspicion and also direct evidence as to knowledge on his part will have the effect of obliterating from the mind of the jury any distinction they may entertain between knowledge and suspicion. A defect of this nature on a crucial point is likely to vitiate the verdict. (*Suhrawardy and M. N. Mukerji, JJ.*) GADADHAR SARKAR *v.* EMPEROR. 26 Cr. L. J. 1021 : A. I. R. 1926 Cal. 226.

——S. 297—*Judge should express, but not too strongly, his opinion on facts.*

There is no harm in the trial Judge expressing his opinion on the fact, and in fact it is his duty so to assist the jury provided that he is careful to express his opinion in such a way as not in any way to interfere with the duties of the jury to finally decide according to their own view of the facts. (*Newbould and B. B. Ghose, JJ.*) FAZURUDDIN *v.* EMPEROR. 42 C. L. J. 111 : 26 Cr. L. J. 1553 : A. I. R. 1926 Cal. 105.

——S. 297—*Presumption as to possession of stolen property—Accused's claim to such property need not be strictly proved—Penal Code, S. 412.*

Where in a case of dacoity the Judge charged to the jury saying that if the articles are stolen properties and were found in possession of the accused it is sufficiently proved that they were thieves or dacoits and the rebuttable presumption that arises in law is that the accused are either thieves or dacoits until they succeed by adducing sufficient proof in establishing their innocence,

Held: that the direction was a serious misdirection. 31. C. L. J. 310 Ref.

In a case where the evidence of the guilt of the accused rests upon discovery of stolen property from his possession, and which is tried by the jury the proper course is to direct that the jury are entitled to take the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be proved. 52 Cal. 223, Ref. (*Suhrawardy and Panton, JJ.*) KABATULLA *v.* EMPEROR. 42 C. L. J. 212 : 90 I. C. 542 : A. I. R. 1925 Cal. 1241.

——S. 297—*Penal Code, S. 147—Trial by jury—Question of title important in the case—Direction to ignore that question is misdirection.*

CR. P. CODE (V OF 1898), S. 297.

Where in a case of rioting the question of title to the disputed property is of importance and the Sessions Judge in his charge to the Jury asks them to arrive at their verdict irrespective of that question, his action amounts to a misdirection which vitiates the trial. (*Newbould and Mukerji, JJ.*) AHEDFAKIR *v.* EMPEROR. **26 Cr. L. J. 946 : 87 I. C. 98 : A. I. R. 1925 Cal. 1235.**

——— S. 297—*Charge showing that particular sections were explained to jury—In what manner they were explained not shown—Charge is bad.*

Merely stating in the charge, that particular sections have been read and explained to the jury without showing in what manner they were explained, is bad. (*Newbould and B.B. Ghose, JJ.*) RAHAMALI HOWLADAR *v.* EMPEROR. **A. I. R. 1925 Cal. 1055.**

——— S. 297—*Stating impressions about witnesses without recording them is no misdirection.*

The mere fact that a Sessions Judge without recording at the end of depositions states to the Jury his impression of the demeanour of some of the witnesses is not a misdirection when the witnesses appeared before the Jury. (*Greaves and Panton, JJ.*) SHAMLAL SINGH *v.* EMPEROR. **26 Cr. L. J. 572 : 85 I. C. 716 : A. I. R. 1925 Cal. 980.**

——— S. 297—*Corroboration need not be on all points—A direction to jury to that effect is not misdirection.*

It is not necessary that the approver should be corroborated as regards every single statement that he makes and therefore a direction to jury that if the approver was corroborated on some points, they might believe him on other points in respect of which he was not corroborated, is not misdirection. (*Newbould and B. B. Ghose, JJ.*) LEDU MOLLA *v.* EMPEROR. **52 Cal. 595 : 87 I. C. 925 : 26 Cr. L. J. 1037 : 42 C. L. J. 501 : A. I. R. 1925 Cal. 872.**

——— S. 297—*Not explaining first information report, properly amounts to misdirection—Mere summarising evidence is not summing up.*

The Judge in a proper summing up must formulate and specify simple issues for consideration, and collate the evidence *pro* and *con* bearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence, examination-in-chief, cross-examination and re-examination of the different witnesses who have deposed at the trial, and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the jury will only confuse them. The omission on the part of the Judge to present in his summing up to the jury the first information report and its variance with the depositions of several witnesses, named therein, has a material bearing on the case and constitutes serious misdirection sufficient to vitiate the verdict of the jury. (*Newbould and Mukerji, J.*) JESSARAT *v.* EMPEROR. **87 I. C. 833 : 29 C. W. N. 526 : A. I. R. 1925 Cal. 729.**

——— S. 297—*Prosecution witness suspected of complicity—Jury not directed to be careful—Misdirection is caused.*

Where one of the witnesses for the prosecution is himself suspected of being implicated in the offence, the jury should have been directed not to accept his evidence without the most careful scrutiny. The omission to give such a direction amounts to a serious misdirection. (*Newbould and Mukeriee, JJ.*) SATYA CHARAN *v.* EMPEROR **26 Cr. L.J. 1155 : 52 Cal. 223 : 88 I. C. 515 : A. I. R. 1925 Cal. 666.**

——— S. 297—*Misdirection—Evidence Act, S.* 114 *Ill.* (*a*)—*Jury asked to presume accused's guilt on proof of identity of articles—Jury not properly directed to weigh all circumstances-Misdirection was held to exist.*

The charge to the jury regarding the Evidence Act, S. 114, Ill. (a) was such as to have left an impression in the minds of the jury that if they found that the two articles were properly identified, as having been the properties which were stolen at the time of the dacoity in question, and were found in the accused's possession they were bound to presume the accused's guilt. The jury were not properly directed that it was their duty to weigh all the circumstances of the case, consider the accused's explanation and then decide whether or not they should make such a presumption. *Held* ; that this was a serious misdirection. (*Newbould and Mukerji, JJ.*) SATYA CHARAN *v.* EMPEROR. **52 Cal. 223 : 88 I. C. 515 : 26 Cr. L. J. 1155 : A. I. R. 1925 Cal. 666.**

——— S. 297—*Misdirection—Evidence Act, S.* 114, *Ill.* (*a*)—*Direction that on proof of property being stolen,* onus *of proving innocence shifts to accused, is misdirection—Evidence Act, S.* 114, *Ill* (*a*).

In a criminal case the *onus* is on the prosecution to prove beyond reasonable doubt the guilt of the accused. The *onus* never changes. Where the judge stated in his direction to the jury regarding Evidence Act, S. 114, Ill. (a) that if the property was proved or reasonably presumed to be stolen property, the *onus* would shift to the accused to show that he acquired the property in an innocent manner. *Held* ; that it was a misdirection. 31 C. L. J. 310 and 1914 Cr. Appr. R. 45, Foll. (*Newbould and Mukeriee, JJ.*) SATYA CHARAN *v.* EMPEROR. **52 Cal. 223: 26 Cr.L.J. 1155 : 88 I. C. 515 : A. I. R. 1925 Cal. 666.**

——— S. 297—*Judge must look to admissibility—Objection by parties is immaterial.*

The duty of a Judge in a trial held with the aid of a jury is to prevent the production of inadmissible evidence whether it is or is not objected to by the parties. (*Mukerji, J.*) EMPEROR *v.* PANCHKARI DUTT. **52 Cal. 67 : 29 C. W. N. 300 : 86 I. C. 414 : 26 Cr. L. J. 782 : A. I. R. 1925 Cal. 587.**

——— S. 297—*Unlawful assembly—Judge must mention any changes that may be in the objects of the unlawful assembly—Penal Code, S.* 141.

In making the charge to the Jury with respect to accused in an unlawful assembly case the judge must be careful to see whether there has been any change in the common object of the assembly in the course of the occurrence. For the common object of an unlawful assembly can change as the occurrence progresses. So it may be that there are various common objects in the course of an occurrence and it is the business of the Judge in his charge to the Jury to place all these common objects that there may have been, before the jury to enable the Jury to decide if any of them has been proved against the accused and if so which of them. (*Greaves and Panton, JJ.*) ABDUL GANI *v.* EMPEROR. **25 Cr. L. J. 1386 : 83 I. C. 346 : A. I. R. 1925 Cal. 494.**

——— S. 297—*Describing common object of unlawful assembly as "Disturbing public peace, resisting, obstructing and overawing the police by criminal force and of assaulting police" was held not likely to prejudice the accused.*

Where a judge's charge to a Jury in respect of the accused forming an unlawful assembly described the object of the unlawful assembly as follows :—"With the premeditated object of disturbing the public peace and resisting, obstructing and overawing the police by

criminal force and assaulting the police," *Held* : that there can really be no objection to the way in which the common object was placed before the jury: *Held* : further that such a charge does not on the whole exceed the limits of the common objects set out in S. 141, Penal Code, so as to be likely to prejudice the accused. (*Greaves and Panton, JJ.*) ABDUL GANI *v.* EMPEROR. **25 Cr. L. J. 1386 : 83 I. C. 346 : A. I. R. 1925 Cal. 494.**

——S. 297—*Persons arrested as implicated, then discharged, and made prosecution witnesses— References in 3 places to their arrest and ample directions as to value of evidence if they were found to be accomplices were held sufficient for the point.*

Where the case was a dacoity case and two of the prosecution witnesses were persons who had admitted having assisted in disposing of stolen property and who had been arrested and subsequently discharged before being placed before a Magistrate,

Held that the Judge might no doubt have elaborated the point but that having regard to the ample directions he gave the Jury as to the value of the evidence of these men if they were found to be accomplices and to the fact that he called the attention of the jury in three passages in his Judgment to their detention by the police, no further amplification was necessary. (*Sanderson, C. J. and Chotzner, J.*) HARENDRA NATH SAHA *v.* EMPEROR. **40 C. L. J. 313 : 26 Cr. L. J. 307 : 84 I. C. 451 : A. I. R. 1925 Cal. 161.**

——S. 297—*Jury.*

Judge should not suggest that a particular evidence is of no importance. (*Newbould and B.B. Ghose, JJ.*) EMPEROR *v.* SAGARMAL AGARWALLA. **28 C. W. N. 947 : 40 C. L. J. 135 : 25 Cr. L. J. 1217 : 82 I. C. 145 : A. I. R. 1924 Cal. 960.**

——S. 297—*Charge to jury—Misdirection— Private defence—Person and property—Not distinctly put to the jury—More injury than reasonably necessary—Causing of.*

On a charge under S. 304, I. P. C., the defence of the accused was that the deceased came into his house at midnight for robbery, that the accused woke up, saw the deceased coming from house and inflicted wounds on him which proved fatal. The Asst. Sessions Judge who charged the jury expounded the law only with reference to the right of private defence of the body and omitted all reference to the right of private defence of property. *Held*, that the Judge should have charged the jury that if they believed that the accused had reasonable ground for supposing that the thief had with him articles taken from the house, the accused was entitled to exercise his right of private defence of property under S. 103, I. P C. The Judge should have further directed the jury to consider whether the accused had not used more force than was reasonably necessary for preventing the thief from running away with the stolen property. (*Greaves and Panton, JJ.*) BASERUDDI SHEIKH *v.* EMPEROR. **39 C. L. J. 525 : 28 C. W. N. 585 : A. I. R. 1924 Cal. 776.**

——S. 297—*Charge to jury—Different trials—Reference to former trial—Sentence.*

Where there are two trials, one original and the other supplementary it is proper for the Judge to warn the Jury in the supplementary trial that they should not be influenced by the fact that the first batch have been convicted. The second trial must be decided on the evidence on its own merits. As a general rule there ought to be uniformity in the convictions and punishments but it is impossible to apply this principle in all cases where there are two trials, one original and the other supplementary, one batch of prisoners being tried by one Judge and one Jury and the other batch by a different Judge and different jury. (*Walmsley and Suhrawardy, JJ.*) MOFE JUDDI *v.* EMPEROR. **72 I. C. 65 : 24 Cr. L. J. 305 : A. I. R. 1924 Cal. 435.**

——S. 297—*Charge to Jury—Common intention and act by any of the confederates in furtherance thereof makes all equally liable—Hence such a charge is not a misdirection.*

The material portions of the Judge's charge to the jury were as follows :—

"Therefore in this case if these persons went to that place with a common intention to rob the Post Master and if necessary to kill him, and if death resulted, each of them is liable, whichever of the three fired the fatal shot.

"If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob, and if necessary, to kill, and if death resulted from their act, if that be so, you are bound to find a verdict of guilty.

"I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter, if you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of this common intention, if that be so, then it is your duty to find a verdict of guilty."

Held, that there was no misdirection and that the balance of authority and reason is against the limited interpretation placed on S. 34 of the Indian Penal Code in 41 Cal 1072. (*Mukerji, Richardson, C. C. Ghose, Cuming and Page, JJ.*) EMPEROR *v.* BARENDRA KUMAR GHOSE. **28 C. W. N. 170 : 38 C. L. J, 411 : A. I. R. 1924 Cal. 257 (F. B.).**

——S. 297—*Charge to the jury—Misdirection—Private defence—Offence under S. 326—Statement o accused—Admissibility of.*

Where the only issue in the case of a trial for causing grievous hurt is whether the right of private defence exists or not, it is a misdirection for the Judge to refer to S. 300, Exception 2 of the I. P. C. and to ask the jury to consider whether such right was exercised. Where a judge in explaining S. 100 of the Penal Code to the jury omits mention of the apprehension of grievous hurt there is misdirection even though the whole section is read out to the jury. On a charge under S. 326, I. P. C. the omission to refer to the provisions of S. 101, I. P. C. is a misdirection. Similarly where the statement of the accused before the Magistrate is put in at the trial, his deposition in a cross case should also be put in if he considers it as part of his defence. It is the duty of the Judge to warn the jury that the statement of an accused, not amounting to a confession cannot be considered against the co-accused. (*Newbould and Suhrawardy, JJ.*) MAHOMED YUNUS *v.* EMPEROR. **50 Cal. 318 : 77 I C. 819 (2) : 25 Cr. L. J. 467 (2) · A. I. R. 1923 Cal. 517.**

——Ss. 297, 298—*Misdirection to jury—Defective direction—Charge must set out all questions required for decision.*

Where the jury was asked to decide which hypothesis suited the facts better, they were in effect told that the prosecution would discharge its *onus* by producing the better hypothesis. The charge is defective if it does not set out all the questions that are required for decision. It is wrong to refer to the amendments of law proposed for legislation. (*Walmsley and Suhrawardy, JJ.*) ABDUL GOHUR *v.* EMPEROR. **26 C. W. N. 972 : 36 C. L. J. 152 : 71 I. C. 124 : 24 Cr. L. J. 76 : A. I. R. 1922 Cal 505.**

CR. P. CODE (V OF 1898), S. 297.

——— -S. 297—*Charge to jury—Heads of charges, recording of.*

The law requires, in trials by jury, a judge only to record the heads of his charge These must include such statements on the part of the judge as will enable the appellate Court to understand exactly what he really said. (*Walmsley and Suhrawardy, JJ.*) ABDUL GAFUR KHAN *v.* EMPEROR.
26 C. W. N. 996 : 35 C. L. J. 437 : 71 I. C. 56 : 24 Cr L. J. 8 : A. I. R. 1922 Cal. 192

———S. 297—*Non-direction—Comment on every possible point is not necessary.*

A Sessions Judge is not required to comment on every point that could be possibly argued in favour of the accused. It is sufficient if the Judge deals with the more important points and does not unduly press on the jury his own views on questions of fact. In deciding whether there has been misdirection on the facts, the charge of the jury should be considered as a whole. (*Newbould and Suhrawardy, JJ.*) ABDUL SALIM *v.* EMPEROR. **49 Cal. 573 : 26 C.W.N. 680 : 69 I. C. 145 : 23 Cr. L. J. 657 : 34 C. L. J. 279 : A I. R. 1922 Cal. 107.**

———S. 297—*Charge to jury—Essentials of—Reference to defence case.*

In judging the charge to the jury one cannot say that there has been mis-direction because every point in favour of the accused has not been put to the jury. The charge must be judged as a whole and one must see whether judging it as a whole, the case for the two sides had been fairly put, so that the jury can understand what they have to decide and come to a right conclusion. It is not necessary for the Sessions Judge to repeat everything that has been said by the pleader for the defence in his speech. But he should draw the attention of the jury to the more essential items and the strongest argument that had been advanced for the defence. A mere reference to the argument of the pleader is insufficient. (*Newbould and Ghose, JJ.*) HARI CHARAN DAS *v.* EMPEROR. **34 C. L. J. 515 : 66 I. C. 998 : 23 Cr. L. J. 342.**

———S. 297—*Charge to jury—Misdirection.*

In a charge to the jury the Sessions Judge said that it was for the accused to prove their plea of *alibi* and if they failed to prove it a presumption as to their complicity in the crime should be drawn. He also said that if the case against the accused had been a got-up one, the evidence would have been of a different character and free from many defects, and that there was nothing in the evidence to support the defence. He also stated that one of the Prosecution Witnesses, was under an obligation to the accused but this, the High Court found was not supported by the evidence. *Held*, that there was a misdirection to the jury and that the accused should be acquitted. The Judge must be careful that he does not usurp the functions of the advocate, and that the evidence is presented to the Jury in a dispassionate manner. (*Beachcroft and Ghose, JJ.*) EMPEROR *v.* TARIBULLAH SHEIKH.
25 C. W. N. 682 : 66 I. C. 180 : 23 Cr. L. J. 244.

———S. 297—*Charge to jury.*

Where a charge to a Jury concluded thus "you will have to consider whether the absurdities, contradictions, and discrepancies in the prosecution evidence are such, as would arise naturally or are due to the fact that that story is a fabrication, *held* the charge was not a proper one. (*Teunon and Ghose, JJ.*) GOALA *v.* REED. **25 C. W. N. 609 : 33 C. L. J.503 : 64 I. C. 665 : 23 Cr. L. J. 41.**

———S. 297—*Omission to tell Jury of non-examination of material witnesses by the prosecution.*

CR. P. CODE (V OF 1898), S. 297.

Where a Judge did not tell the Jury that they could draw an inference unfavourable to the prosecution, from its omission to examine material witnesses, it amounts to a material misdirection and vitiates the trial. (*Chatterjee and Cuming, JJ.*) TENARAM MONDAL *v.* EMPEROR. **33 C. L. J. 180 : 25 C. W. N. 142 : 61 I. C. 1003 : 22 Cr. L. J. 475.**

———S. 297—*Charge to Jury—Theft.*

Mere failure to explain essentials of offence is no reason for supposing that the jury were in any doubt as to the offence charged, if no misdirection has been pointed out. (*Oldfield and Ramesam, JJ.*) RANGARE RAMUDU, *In re.* **17 L. W. 236 : A. I. R. 1923 Mad. 329.**

——— S. 297—*Defective direction.*

Where the Sessions Judge did not explain in what the offence of theft with which the accused was charged consisted, *Held* there was no want of direction where no question as to whether there was a legal possession or dishonest intention, was established. (*Oldfield and Ramesam, JJ.*) RANGARE RAMUDU, *In re.* **17 L. W. 236: A. I. R. 1923 Mad. 329.**

———S. 297—*Omission to state that accused is entitled to benefit of doubt is not misdirection.*

The omission to tell the Jury that the accused is entitled to the benefit of any reasonable doubt is not a misdirection vitiating the trial, though as a matter of practice it is as well to always end the charge with these words. (*Baker, J. C.*) RAHIMBEG *v.* EMPEROR. **7 N. L. J. 208 : A. I. R. 1925 Nag. 154.**

———S. 297—*Charge to jury—What to contain.*

A charge to the jury which neither sums up the evidence for the prosecution nor lays down the law by which the jury are to be guided but merely states that the law on the subject had already been presented by the Public Prosecutor and that in the judge's opinion no difficult point of law arose is defective. (*Kotval, A. J. C.*) RAMPRASAD *v.* EMPEROR.
88 I. C. 178 : 26 Cr. L. J.1090.

———S. 297—*Excluding question as to accused's infancy and immature understanding is misdirection.*

When the Judge attempts to exclude the consideration by the jury, of the question as to whether the accused was a boy under 12 years of age and incapable of understanding the nature of his act, his summing up upon the point amounts to a misdirection, the question being one for the jury to decide notwithstanding no proof may have been adduced on the point. (*Pullan, A. J. C.*) EMPEROR *v.* ALI RAZA.
26 Cr. L. J. 310 : 84 I. C. 454 : 28 O. C. 69 : A. I. R. 1925 Oudh 311.

———S. 297—*Omission to define in detail offence charged does not justify reversal of verdict where jury has understood fully the constituent factors.*

An omission by the magistrate to give the jury a detailed definition of the offence charged is not a misdirection justifying reversal of verdict where the nature of the offence was fully described to the jury and the constituent factors fully understood by them. (*Pullan, A. J. C.*) JINDAR SINGH *v.* EMPEROR.
81 I. C. 808 : 25 Cr. L. J. 1032 : A. I. R. 1925 Oudh 69.

——— Ss. 297 and 537—*Sessions trial—Charge to the Jury—Dacoity—Misdirection—Irregularity.*

A Sessions Judge in a case of dacoity charged the Jury as follows on the nature of the offence. "The nature of the charge is, no doubt, familiar to you all. It must be proved that there was robbery committed by five people or more and also that each of accused took part in the robbery." *Held*, that the direction was insufficient and illegal in that it did not explain to the Jury the ingredients necessary to constitute the

offence of robbery and that the defect could not be cured by S. 537, Cr. P. Code. 30 M. 44; 39 A 348, Ref. (*Wazir Hasan, J. C.*) NAWAB ALI *v.* EMPEROR.

10 O. & A L.R. 538: 11 O.L.J. 315 : 25 Cr. L.J. 1129 · 81 I. C. 853 : A. I. R. 1924 Oudh 411.

——**S. 297**—*Charge to Jury—Failure to refer to inadmissible evidence on record—Verdict of Jury, setting aside of.*

Where statement of the accused amounting to confession was brought to light in the presence of the jury, and was held to be inadmissible but was not referred to in the charge to the jury.

Held, if the statement was inadmissible then omission to refer to it in the charge was a misdirection in law and vitiated the trial. If, on the other hand, it was admissible, this statement must have been prominently brought out by the Judge in his charge to the Jury. The verdict of the Jury cannot be set aside unless there is a clear misdirection in the charge by the Judge to the Jury. (*Jwala Prasad and Adami, JJ.*) SUMESHWAR JHA *v.* EMPEROR.

3 Pat. L. T. 101 : 65 I. C. 443 : 23 Cr. L. J. 91 : 4 U. P. L. R. (Pat). 31 : A. I. R. 1923 Pat. 103.

——**S. 297**—*Non-direction—Mis-direction—Penal Code*, S. 302.

A mere failure on the part of the Sessions Judge to point out to the Jury all the matters which may be considered by them in evidence, does not necessarily amount to a misdirection. Where the facts disclose a case to be either of murder or nothing else, the non-direction by a Sessions Judge of the attention of the Jury to the fact that even if an offence under S. 302 of the Penal Code has not been made out the facts established might constitute a minor offence, does not amount to a misdirection. (*Dawson Miller, C J. and Adami, J.*) EMPEROR *v.* BHIM LAL.

23 Cr. L. J. 47 : 64 I. C. 671 : A. I. R. 1922 Pat. 321.

——**Ss. 297 and 298**—*Charge to Jury—Jury asked to take broad view of the evidence is not a misdirection.*

A direction to the Jury to take a broad view of the evidence and cautioning them against minor discrepancies in immaterial and collateral matters in the case, is not a misdirection. (*Jwala Prasad, J.*) BAIJNATH MAHTON *v.* EMPEROR

1 Pat. L. T. 708 : 59 I. C. 557 : 22 Cr. L. J. 125.

——**S. 297**—*Misdirection alone is not sufficient to vitiate the trial—High Court, in case of misdirection vitiating the verdict, may direct re-trial or dispose of the case by entering into the merits of the case—Judge may in the charge state his opinion on the facts but not too dogmatically—He must fairly leave the facts to be decided by the jury—If summing up is calculated to leave misleading impressions on the mind of the jury, there is misdirection.*

High Court, in the case of misdirection vitiating the verdict can direct re-trial or enter into the merits and dispose of the case.

In a charge to the jury in a conspiracy case not only is it necessary that there should be a consideration of the conspiracy and the determination as to what was its nature and by what evidence it is proved ; but unless it is quite clear that if there was a conspiracy all the accused were the members of it, there should be somewhere a separate statement and criticism of the proved actions of each of the members of the conspiracy. If this is not done the jury may take it for granted that all the accused were knowingly members of the conspiracy and that the only question before them was whether the conspiracy was criminal.

It is permissible for a Judge and especially in India, it is often necessary for a Judge, to express an opinion

clearly to the jury, and it is also permissible, though not always or indeed often advisable, to admonish the Jury as to their duty, but it is unfair to the Jury if the Judge says to them "I am thoroughly convinced of the guilt of the accused. Return a just verdict. If you do not, both you and I will be disgraced for ever."

A Judge in his charge to the jury must not make an appeal or exhortation to the jury. Where the summing up is calculated to leave a misleading impression on the mind of the Jury ; that amounts to a misdirection.

A Judge may express his opinion in the charge to the Jury but he should be careful to add that it is for the Jury to form their opinion on the evidence. A Judge should not in his charge to the Jury express his opinion in terms too dogmatic and unqualified and state his own view on important matters of fact so positively as to leave the jury no loophole for taking any other view ; his doing so vitiates the verdict of the Jury.

The Judge is not expected to comment on every point that could possibly be urged in favour of the accused. It is sufficient if he deals with the more important points and does not unduly press on the jury his own view on the questions of fact. 49 Cal. 573 at 599, Foll.

The Judge should not ridicule the defence at the very outset of the charge before the discussion of the evidence ; for that may have a pernicious influence on the mind of the Jury and the Jury may thereby reject the whole defence theory without giving sufficient consideration to it.

The Judge should warn the Jury that the statement of the accused not amounting to confession cannot be considered against the co-accused.

A charge to the Jury must be read as a whole and if upon the general view taken, the case has been fairly left within the Jury's province there is no misdirection. 41 Cal. 1023 Foll. Morever, misidrection by itself is not a sufficient ground for setting aside a trial. (*Kennedy, J. C. and Raymond, A. J. C.*) TOPANDAS *v.* EMPEROR.

25 Cr. L. J. 761: 81 I. C. 249 : A. I. R. 1925 Sind 116.

——**S. 298**—*None of the accused recognised on the spot in spite of sufficient opportunity to recognise existing—Fact not pointed out to Jury—Prejudice is caused.*

Where in the charge to the Jury there was no direction given as to the circumstances pointing to the fact that there was opportunity of recognition, and the fact that none of the accused were recognised was not even mentioned by the learned Judge.

Held, that this was an omission on a vital point likely to prejudice the accused. (*Walmsley and Mukerji, JJ.*) SHEIKH ABDUL *v.* EMPEROR.

26 Cr. L. J. 606 : 85 I. C. 830 : A. I. R. 1925 Cal. 887.

——**S. 298**—*Charge to Jury—Judge stating that certain confessions admitted in evidence were voluntary —Jury asked to consider only if they were true—Trial is vitiated.*

Where the Judge made observations in his charge to the Jury to the following effect : "Taking the evidence and the circumstances and the probabilities into my consideration I am satisfied that the confessions in question were voluntary and I accordingly hold them to be so. It is for you to decide whether or not they are true."

Held, that the jury have to decide independently whether the confessions were voluntary and it was not right, therefore, to take away entirely from the jury the consideration of the question as to whether the confessions were voluntary or not. It was the duty of the learned Judge to place before them the facts and

CR. P. CODE (V OF 1898), S. 298.

circumstances *pro* and *con*, and ask them to form their own conclusions as to the character of the confessions. The omission to do the same is sufficient to vitiate the verdict of the jury. (*Walmsley and Mukerji, JJ.*) SHEIKH ABDUL *v.* EMPEROR. **26 Cr. L. J. 606 : 85 I. C. 830 : A. I. R. 1925 Cal. 887.**

——S. 298—*Charge to the jury—Non-direction—Right of private defence.*

Where a charge to the jury omits to make any reference to the right of private defence under S. 103, I. P. C., set up by the accused, the charge is bad in law and vitiates the trial. (*Greaves and Panton, JJ.*) BASERUDDI SHEIKH *v.* EMPEROR. **28 C. W. N. 585 : 39 C. L. J. 525 : A. I. R. 1924 Cal. 776.**

——Ss. 298 and 299—*Charge to jury—Record of—Identification.*

In trials by jury though the law requires a judge to record only the heads of his charge, still the record should include such statements and comments on the part of the judge as will enable the appellate Court to understand exactly what he said. 23 W. R. 32 Cr. Foll. (*Walmsley and Suhrawardy, JJ.*) ABDUL GAFUR KHAN *v.* EMPEROR. **26 C. W. N. 996 : 35 C. L. J. 437 : 71 I. C. 56 : 24 Cr. L. J. 8 : A. I. R. 1922 Cal. 192.**

——S. 298—*Formulating questions for consideration of jury is not required by law—The practice is however, advisable.*

The law does not expressly require a Judge to formulate, at the conclusion of the delivery of his charge, specific questions for the juror's reply. Such a practice is, however, helpful in deciding the legal effect of jury's finding, but the formulation of such questions requires great care and queries should be confined within the narrowest possible compass.

Kulwant Sahay, J.—In complicated cases the judge should, in his charge to the jury, not only explain the law, but should draw their attention to the evidence in the case and explain how they should apply the law to the particular facts of the case. Observations of Manuk, J. in 3 Pat. L. J. 655 Appr. (*Bucknill and Kulwant Sahai, JJ.*) RUPAN SINGH *v.* EMPEROR. **4 Pat. 626 : A. I. R. 1925 Pat. 797.**

——S. 298—*Misdirection—Reference to statement not on record is a misdirection.*

The Judge told the jury what the purport of the statement made on the 5th of July was although the statement had not been proved and was not on the record ; and furthermore, he told the Jury that the statement of the 13th of July proved as the first information merely amplified the statement of the 5th of July and that its importance was not more than that of a statement made in the ordinary course to a Police officer. *Held*, he placed before the Jury a statement which was not on the record and he did not tell them that they should exclude from consideration a statement which was not evidence in the case. There was consequently misdirection. (*Coutts and Das, JJ.*) DASRATH SINGH *v.* EMPEROR. **1 Pat. L. R. (Cr.) 192 : 67 I. C. 502 : 23 C. L. J. 406 : A. I. R. 1923 Pat. 158.**

——S. 298—*Confession inadmissible referred to in charge—Retrial must be ordered.*

Where an inadmissible confession was referred to in the charge to Jury though the Judge tried to remove the effect thereof from the mind of the Jury. *Held*, retrial should be ordered. (*Das and Bucknill, JJ.*) DAMODAR RAM *v.* EMPEROR. **3 Pat. L. T. 52 : 1P at. L.R. (Cr.) 171 : 65 I. C. 573 : 23 Cr. L. J. 141 : A. I. R. 1923 Pat. 142.**

——S. 298—*Direction—Asking jury to take broad view of evidence is not a misdirection.*

Where a Sessions Judge directs the Jury to take a broad view of the evidence ignoring small discrepancies in immaterial and collateral events inthe case there is no misdirection. (*Jwala Prasad, J.*) BAIJNATH MAHTON *v.* EMPEROR. **1 Pat. L. T. 708 : 59 I. C. 557 : 22 Cr. L. J. 125.**

——S. 299—*Jury, duty of—Nuisance on public road.*

Where it was contended that the jury acted without jurisdiction in recommending that *Bhusaul* should be allowed to remain on land which they found to be a public road, *held*, in allowing the *Bhusaul* to remain they must be understood as having found that it did not constitute any obstruction. It seems they made a distinction between *Bhusaul* and other articles such as tiles, palm trees, leaves, etc., which they evidently regarded as nuisance and ordered them to be removed. (*Ross, J.*) JANKI SINGH *v.* BIDAPAT SINGH. **A. I R. 1922 Pat. 224 (1).**

——S. 300—*Jury allowed to disperse after charge—Trial is illegal.*

There can be no doubt that S. 300 does not contemplate that the jury, after the Judge has summed up a case to the Jury, will leave the precincts of the Court or be at large. The section clearly contemplates that after the Judge had delivered his charge the Jury must then retire to the Jury room and then and there consider its verdict. Where after the Judge's charge to the jury the latter were, owing to exceptional circumstances, allowed to disperse for several hours and then returned to the Court and considered and delivered their verdict, *held*, that the trial was vitiated. (*Bucknill and Ross, JJ.*) SARIMAN AHIR *v.* EMPEROR. **6 Pat. L. T. 552 : 86 I. C. 717 : 26 Cr. L. J. 861 : A. I. R. 1925 Pat. 595.**

——S. 301—*Procedure.*

Where there are more than one accused and where there are several charges, it would be at convenient course if the officer of the Court were to take the verdict of the Jury upon each charge separately. (*Sanderson, C. J. and Panton, J.*) ERAN KHAN *v.* EMPEROR. **50 Cal. 658 : 24 Cr. L. J. 838 ; 74 I. C. 950 : A. I. R. 1924 Cal. 47.**

——S. 301—*Important defence evidence not placed before jury—Their verdict cannot be sustained.*

A verdict obtained from the jury without placing before them an important piece of evidence in favour of the defence, whatever may have been its real worth, cannot be sustained. (*Cuming and Mukerji, JJ.*) KHIJIRUDDIN *v.* EMPEROR. **42 C. L. J. 504 : A. I. R. 1926 Cal. 139.**

——S. 303—*Inability to give reasons—Inference that jury has no good reasons is not justified.*

In a trial for murder by jury all the jurors found the accused not guilty. Thereupon the learned Judge asked them the question : "What are your reasons for your verdict." The answer they gave was :—"We give him the benefit of doubt. We can give no other reason" *Held*, that from the mere fact that the jury were unable to give reasons beyond saying that they gave the accused the benefit of doubt, it cannot be held that the Jury had no adequate reasons for bringing a verdict of not guilty. (*Suhrawardy and Mukerji, JJ.*) EMPEROR *v.* NISHI KANTA BANIKYA. **41 C. L. J. 35 : A. I. R. 1925 Cal. 525.**

——S. 303—*Verdict incomplete— Questions to jury can be put by Judge.*

In a case of incomplete verdict, the Judge is competent to put questions to ascertain precisely what they meant. A verdict obtained by means of such questions is legal. (*Sanderson, C. J. and Panton, J.*)

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ERAN KHAN *v.* EMPEROR. **50 Cal. 658 : 24 Cr. L. J. 838: 74 I. C. 950 : A. I. R. 1924 Cal. 47.**

——— **S. 303**—*Verdict of Jury—Duty of Judge to ascertain verdict on each charge.*

The accused was tried for criminal misappropriation, for criminal breach of trust under S. 409, I. P. C., for framing incorrect records under S. 218, I. P. C. and for falsification of accounts under S. 477 (*a*), I. P. C. The Jury who tried the cases returned a verdict of "not guilty" under Ss. 409 and 403, I. P. C., but "guilty" under Ss. 218 and 477 (*a*). *Held*, that the verdict was sufficiently clear and meant that the jury acquitted the accused on all charges under S. 409 and the charge under S. 403, I. P. C. Consequently there was no reason or necessity to ascertain from the jury what their verdict was. (*Newbould and Suhrawardy, JJ.*) BILAS CHANDRA BANERJEA *v.* EMPEROR. **27 C. W. N. 626 : A. I. R. 1923 Cal 647.**

——— **S. 303**—*Trial by jury—Recording individual opinion of jurors is irregular.*

In cases of disagreement among the jury the individual opinion of members should never be disclosed. 36 Mad. 585, Foll. The procedure of disclosing is opposed to a fundamental principle of the scheme of trial by jury. (*Simpson, A. J. C.*) JAGANNATH *v.* EMPEROR. **2 O. W. N. 534 : 89 I. C. 386 : 26 Cr. L. J. 1346 : 12 O. L. J. 643 : A. I. R. 1925 Oudh 746.**

——— **S. 303**—*Reasons should not be asked.*

It is not competent to the Sessions Judge after a clear verdict was returned by the Jury to ask them for their reasons. 58 I. C. 829, Foll. (*Mullick and Bucknill, JJ.*) EMPEROR *v.* ALI HYDER. **4 Pat. L. T. 425 : A. I. R. 1923 Pat. 474.**

——— **S. 303 (1)**—*Verdict must be elicited by questions on all charges—Several charges—Conviction on a verdict of guilty without mentioning of which charge, will be set aside.*

A verdict on all charges should be elicited by the Judge by questions under S. 303 (1), Cr. P. Code and the questions and answers recorded under S. 303 (2). Where there were several charges of which the accused were charged, a statement in the judgment that the verdict was of 'guilty' was held not sufficient and the conviction was set aside. (*Kotval, A. J. C.*) RAMPRASAD *v.* EMPEROR. **26 Cr. L. J. 1090 : A. I. R. 1926 Nag. 53.**

——— **S. 303 (1)**—*Where in case under S. 408, I. P. C., jury's verdict as to amount embezzled is not definite and Judge is inclined to differ from them, he is bound to question jury.*

Where in a case under S. 403, I. P. Code, the jury returned a verdict of guilty but were not definite as to the amount embezzled but gave some approximate amount which was a fraction of the amount charged and where the Judge was inclined to think that a much larger amount than that mentioned by the jury had been misappropriated, *held*, that under S. 303 (1), Cr. P. Code, the Judge is always entitled to ask the jury such questions as are necessary to ascertain what their verdict is ; and in a case like this, it is his duty to question them. (*Walmsley and Mukerji, JJ.*) KHIRODE KUMAR MUKERJI *v.* EMPEROR. **40 C. L. J. 555 : 29 C. W. N. 54 : 26 Cr. L. J. 532 : 85 I. C. 372 : A. I. R. 1925 Cal. 260.**

——— **S. 304**—*Verdict given—Fresh evidence after verdict—Fresh verdict void.*

All the evidence on both sides must be concluded

CR. P. CODE (V OF 1898), S. 307.

before the case can be submitted to the jury. There is no power in a Judge to present a case to a jury subject to conditions, and once a verdict is delivered there is no power in the trial Court or in the jury to reconsider that verdict except under the provisions of S. 304. Where after a trial had been concluded and verdict given, a new trial had been held on further evidence and a fresh verdict given. *Held*, that it is immaterial that the second verdict happened to be the same as the first. The second verdict upon which judgment has been given and sentence pronounced is a nullity and the judgment based upon it is, therefore, made without jurisdiction and is void. (*Ffoulkes, J.*) LYME *v.* EMPEROR. **4 Lah. 382 : 77 I. C. 425 : 25 Cr. L. J. 425 (1) : A. I. R. 1924 Lah. 17.**

——— **S. 307**—*Reference to High Court—Difference between Judge and jury—Weight due to their opinions—Charge of rape.*

On a reference under S. 307, High Court may exercise any powers which it may exercise on appeal but it is perfectly within its rights in considering that in cases such as these, interference should only be permitted in cases of perversity or clear and manifes terror and that where a jury has arrived at a verdict which is not perverse and not clearly and manifestly wrong, such verdict should not be interfered with although it is perfectly possible to form a not unreasonable opinion contrary to the opinion taken by the Jury. The advantage of adopting this course is that it secures the object of the legislature in creating juries. If the other view be taken and the case is re-opened *ab initio*, it is somewhat difficult to see what useful function is performed by a jury. For in every case in which the Judge does not agree with their verdict, the case can be referred to the High Court which then proceeds to try it *de novo*. The High Court should not interfere unless the verdict is perverse or clearly and manifestly wrong. In no case is it more difficult to arrive at a confident verdict as to whether evidence is false or true than in cases in which women alleged that they have been outraged or that outrage has been attempted upon them. Not only has one to consider the possibility of deliberate falsehood but those who have to arrive at a verdict have to consider the possibility of unintentional mis-statements produced by hysterical conditions which are apt to be found for in cases of this nature. The difficulties are increased when from the nature of the charge there can be no physical trace of outrage such as in a case of attempted rape. Where there is no reason to suppose that the jury did not give an honest and a not unreasonable verdict, the High Court will not interfere with that verdict. (*Stuart, and Mukerji, JJ.*) EMPEROR *v.* PANNA LAL. **22 A. L. J. 162 : L. R. 5 A. 65 (Cr.) : 81 I. C. 629 : 25 Cr. L. J. 981 : 46 All. 265 : A. I. R. 1924 All. 411.**

——— **S. 307**—*Reference to High Court—Difference between Judge and Jury—Verdict of Jury—Weight due to.*

Only in cases where the verdict of the jury is perverse, will the High Court place its own estimate of the evidence as against the verdict of the jury. (*Macleod, C. J, and Fawcett, J.*) EMPEROR *v.* CHARLES JOHN WALKER. **26 Bom. L. R. 610 : 26 Cr. L. J. 211 : 83 I. C. 995 : A. I. R. 1924 Bom. 450.**

——— **S. 307**—*Want of sanction under S. 195 is no ground for non-interference.*

The fact that there was a want of necessary sanc-

CR. P. CODE (V OF 1898), S. 307.

tion before the prosecution was instituted is no ground for the High Court to decline to interfere in reference, if no failure of justice has been occasioned. The words of S. 307 (3) are wide enough to cover the limitations which exist upon High Court's powers in dealing with appeals under S. 537. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* SHANKER BALKRISHNA.

47 Bom. 31 : 24 Bom. L. R. 484 : A. I. R. 1922 Bom. 368.

——S. 307—*High Court should consider entire evidence giving due weight to opinion of Judge and Jury.*

When a Judge makes a reference to the High Court under S. 307 it is the duty of the High Court not only to consider the entire evidence, but also to give due weight to the opinion of the Judge and the Jury. (*Sanderson, C. J. and Panton, J.*) EMPEROR *v.* MOFIZAL PEADA. **29 C. W. N. 842 : 89 I. C. 242 : 26 Cr. L. J. 1298 : A. I. R. 1925 Cal. 909.**

——S. 307—*Verdict of jury should be accepted where it is not unreasonable.*

What the Court has got to find before it can refuse to accept the verdict of the jury in a case under S. 307, C. P. Code., is if the verdict is unreasonable. (*Greaves and Mukerji, JJ.*) EMPEROR *v.* PREMANAND DUTT. **29 C. W. N. 738 : 42 C. L. J. 247 : 88 I. C. 1000 : 26 Cr. L. J. 1256 : 52 Cal. 987 : A. I. R. 1925 Cal. 876.**

——S. 307—*Judge considering verdict of jury to be wrong but not perverse—Reference is necessary.*

Before making a reference the Judge need not be satisfied that the verdict is perverse; it is sufficient that he should clearly be of opinion that a reference is necessary for the ends of justice. 23 C. W. N. 747 Ref.

Where in a trial of accused on a charge of murder the judge felt that the verdict of the Jury was wrong and that if he accepted the verdict in its entirety he was unable to do justice to the accused.

Held, that the ends of justice demanded a reference to the High Court. (*Mukerji and Duval, JJ.*) SARODA CHARAN MISTRI *v.* EMPEROR.

87 I. C. 606 : 41 C. L. J. 320 : A. I. R. 1925 Cal. 798: 26 Cr. L. J. 1006.

——S. 307—*Opinion of Judge and Jury—Due weight should be given to both.*

In dealing with a case under S. 307, the High Court has got to give due weight to the verdict of the jury and also to the opinion of the learned Judge: (*Suhrawardy and Mukerji, JJ.*) EMPEROR *v.* NISHI KANTA BANIKYA. **41 C. L. J. 35 : 86 I. C. 453 : 26 Cr. L. J. 805 : A. I. R. 1925 Cal. 525.**

——S. 307—*High Court—Verdict of jury—Reference—Powers of High Court.*

S. 307 of the Cr. P. Code requires the High Court to give due weight to the opinion of the Sessions Judge and the jury after considering the entire evidence and then to acquit or convict the accused. It does not require the High Court to attempt to reconstruct the verdict of the jury. In giving due weight to the opinion of the jury,the High Court would always hesitate to reverse a unanimous verdict unless it is perverse or unreasonable. Where the verdict is unreasonable, having regard to the cumulative effect of the evidence and there cannot be any doubt as to the guilt of the accused, the High Court would accept the reference and set aside the jury's verdict. (*Newbould and B. B. Ghose, JJ.*) EMPEROR *v.* SAGARMAL AGARWALLA. **40 C. L. J. 135 : 28 C. W. N. 947 : 25 Cr. L. J. 1217 : 82 I. C. 145 : A. I. R. 1924 Cal. 960.**

CR. P. CODE (V OF 1898), S. 307.

——S. 307—*Reference to High Court—Verdict of jury—Interference with—When justified.*

Where there is a reference to the High Court by the Sessions Judge disagreeing with a unanimous verdict of "not guilty" by the jury, the High Court will have to consider whether the Jury were entirely unreasonable in giving the benefit of the doubt, as they did, to the accused, and whether it was impossible for the jury to arrive at any other reasonable conclusion than that the guilt of the accused had been brought home to him. (*Greaves and Duval, JJ.*) EMPEROR *v.* GOLAM KADER. **28 C. W. N. 876 : 25 Cr. L. J. 1284 : 82 I. C. 356 : A. I. R. 1924 Cal. 956.**

——S. 307—*Reference to the High Court—Powers of the High Court on such reference—Opinion of jury—Weight due to.*

S. 307, Cr. P. Code, lays down that, in dealing with a case submitted thereunder, the High Court "may exercise any of the powers which it may exercise on an appeal" and that "subject thereto, it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it." The High Court's duty accordingly is to consider the evidence on record as it stands, to weigh the respective opinions of the Sessions Judge and the Jury, and then to form its own conclusion. It still remains that the verdict of the Jury is first in the field and the S. 299 of the Code makes it primarily the function of the Jury "to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned," and 'to decide all questions which according to law are to be deemed to be questions of fact." On general principles therefore it appears that when the process which S. 307 directs has not been carried out, and the opinions of the Judge and the Jury have been measured, in the result the verdict of the Jury should stand unless the evidence and the opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed. (*Richardson and Suhrawardy, JJ.*) EMPEROR *v*, JAMALDI FAKIR.

51 Cal. 160 : 28 C. W. N. 536 : 81 I. C. 712 : 25 Cr. L. J. 1000 : A, I. R. 1924 Cal. 701.

——S. 307—*Reference—Duty of Court.*

In acting under S. 307, Cr. P. Code, the High Court must act with great caution, as it has not the advantage which the judge and jury had, *i. e.*, to see the witnesses giving evidence. Where acting on the evidence of the same witnesses the judge agrees with the jury in acquitting some of the accused, while as regards the others the Judge disagrees with the Jury and wants to convict the accused, the verdict of the jury should be sustained. (*Mookerji and Chatterjee, JJ.*) EMPEROR *v.* AKBAR MOOLA. **38 C. L. J. 379 : 51 Cal. 271 : A. I. R. 1924 Cal. 449.**

——S. 307—*Reflection upon juror's motives in letter of reference are highly condemnable.*

To charge rashly in a letter of reference under S. 307, a juror that he has broken his oath to judge impartially, is unfair to the juror, to the Judge himself, the accused and to the High Court. No action can be taken against jurors unless they have been proved by strictly legal evidence to have misconducted themselves.

Quaere : What is the action to be taken when jurors have misconducted themselves. (*Mookerjee and Chat-*

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terjee, JJ.) MAMFRU CHOWDHRY *v.* EMPEROR.
38 C. L. J. 397 : 51 Cal. 418 : A. I. R. 1924 Cal. 323.

——**S. 307**—*Relative weight to be attached to the opinion of Judge and Jury is dependent on the circumstances of each case—Unanimous verdict of jury carries great weight—Extra-judicial reflections on jury are blameable.*

The opinion of the Sessions Judge to be given due weight to under S. 307 is his opinion on the merits of the case and not his speculations as to what external considerations might have affected the judgment of the jury. The opinion of the jury signifies the verdict of the jury. 18 C. L. J. 522, Foll. The measure of the relative weight to be attached to the opinion of the Judge and that of the jury cannot be crystallised into an inflexible formula. It all depends upon the circumstances of each case. But the trend of judicial opinion has been in favour of preference of the unanimous verdict of juries on whom the duty is imposed by S. 299 to decide which view of the facts is true. Want of unanimity would detract from the weight of the jury's opinion. When the Judge accepts the verdict of the jury as to some of the accused and not as to others, his opinion is weakened in a corresponding measure. But the High Court should not interfere with a unanimous verdict of the jury unless it can say decidedly that it thinks that it is clearly wrong. But notwithstanding this, due weight must be given to the opinion of the Judge as required by the statute. 20 W. R. (Cr.) 73, Foll. (*Mookerjee and Chatterjee, JJ.*) EMPEROR *v.* DHAUANJAY RAY. **51 Cal. 347 : 38 C. L. J. 384 : A. I. R. 1924 Cal. 321.**

——**S. 307**—*High Court taking another view—Not enough—Whether jury would have taken the view it has taken.*

It is not enough to show that the High Court, if it had tried the case as a Court of original jurisdiction, would upon the evidence on the record come to a conclusion other than the conclusion at which the jury have come, but it must be shown by the Court before it sets aside the verdict of the jury on a reference under S. 307 that the verdict of the jury is so manifestly wrong that it must be set aside by the High Court. It is not enough to find that the defence theory is one which cannot be accepted, but it must be found whether on the evidence such as appears on the record it was not possible for the jury to take the view which they have taken. 41 Cal. 621, Foll. (*C. C. Ghose and Chotzner, JJ.*) EMPEROR *v.* NRITYA GOPAL ROY. **38 C. L. J. 1 : 75 I. C. 145 : 24 Cr. L. J. 897 : A. I. R. 1924 Cal. 317.**

——**S. 307**—*Submission necessary if justice requires so.*

S. 307 quite clearly gives to the Judge a discretion in the matter of reference and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall submit it. If he is not clearly of that opinion, his failure to submit the case is not a subject for interference by the High Court on appeal. (*Sanderson, C. J. and Panton, J.*) ERAN KHAN *v.* EMPEROR. **50 Cal. 658 : 74 I. C. 950 : 24 Cr. L. J. 838 : A. I. R. 1924 Cal. 47.**

——**S. 307**—*Reference to High Court—Verdict of Jury not perverse.*

In a murder case the confession by the accused regarding administering *Dhatura* to deceased was retracted at the trial in the Sessions Court. The chemical examiner's report was not satisfactory or sufficient. The Doctor's evidence showed that even though there was some undigested food found in the stomach no trace of poison was detected either in the stomach

CR. P. CODE (V OF 1898), S. 307.

or in the food. The High Court held that the verdict of the Jury acquitting the accused was not so perverse or unreasonable as to justify interference. (*Sanderson, C. J. and B. B. Ghose, J.*) EMPEROR *v* AHIRANNESSA BIBI. **A. I. R. 1923 Cal. 579.**

——**S. 307**—*Reference to High Court—Re-opening of verdict—Extent of.*

The accused was tried on charges under S. 302 and 302 read with S. 34, I. P. C. The jury found that it was doubtful whether the accused committed the offence by his own hand and the Judge agreed with the jury on that finding but referred the case under S. 307 of the Criminal Procedure Code on the ground that he disagreed with the verdict as to whether the accused acted together in furtherance of common intention. *Held*, that the High Court should not, even if it had the power to do so, deal with the question whether the accused committed the offence personally. (*Sanderson, C.J. and Panton, J.*) EMPEROR *v.* PROFULLA KUMAR MAJUMDAR. **50 Cal. 41 : 74 I. C. 267 : 24 Cr. L. J. 763 : A. I. R. 1923 Cal. 453.**

——**S. 307**—*Power of Sessions Judge to refer for conviction for minor offences.*

A Sessions Judge having rejected much of the evidence and having accepted the jury's finding on the grave charges, cannot make reference with the object of having some of the accused convicted on minor charges, but this principle does not apply where prosecution has failed, not because the evidence as to what happened is false, but because the facts alleged do not amount to the alleged offences, the substance of the prosecution case remaining unaffected (*Walmsley and Suhrawardy, JJ.*) EMPEROR *v.* HARI DAS. **37 Cal. L. J. 34 : 73 I. C. 770 : 24 Cr. L. J. 674 : A. I. R. 1923 Cal. 108.**

——**S. 307**—*Verdict of jury—Reference to High Court—Interference when justified.*

To justify a conviction for murder by poison it must be proved that the accused knowingly administered poison to the deceased with at least the intention of causing him death or hurt. The most natural way in which it could be done is to trace possession of the poison to the accused. Where there is a substantial gap in the chain of evidence which one generally expects to see completed in a case of murder by poisoning and though the jury had not mentioned this point in the reasons which they had given for their verdict whatever may bethe proper practice as regards asking the jury for their reasons, in such a case as the present the High Court could not leave out of sight the fact that they had reasons for their verdict which they had not mentioned in answer to the Judge's question. *Held*, though there was a gap in the evidence which might be expected in the case the rest of the case was not so strong that the High Court ought to set aside the unanimous verdict of the Jury. (*Stephen and Chatterjee, JJ.*) EMPEROR *v.* SUKHU BEWA. **38 C. L. J. 155 : 76 I. C. 389 : 25 Cr. L. J. 165.**

——**S. 307**—*Matters to be stated in making reference.*

The Judge making a reference is bound to state the grounds of his opinion and in the case of acquittal the offences which he considers to have been committed. It is only if the Judge has made a proper reference that the High Court can deal with the matter. (*Beachcroft and Ghose, JJ.*) EMPEROR *v.* TARIBULLAH SHEIKH. **25 C. W. N. 682 : 66 I. C. 180 : 23 Cr. L. J. 244.**

——**S. 307**—*Trial under Ch. XXXIII—Power of High Court to go into question of fact.*

In the case of a jury under Chapter 33, Cr. P. Code, if the Judge disagrees with the verdict of the Jury and

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refers the case to the High Court the latter can go into the facts of the case. (*Scottsmith and Martineau, JJ.*) EMPEROR *v.* BIMAL PARSHAD.

6 Lah. 98 : 26 Cr. L. J. 263 : 88 I. C. 857 : 26 Cr. L. J. 1241 : A. I. R. 1925 Lah. 401.

——S. 307—*Judge's opinion in the reference or at the hearing and the verdict of the Jury usually are to be considered by High Court as a trying Court.*

Where a Judge hears a case with a Jury and disagrees with the Jury and disagrees to such an extent that he feels that he cannot accept their verdict, he is entitled to refuse to accept that verdict and then submit the case with his reasons to the High Court and the High Court then has thrown upon it the burden of examining for itself the entire evidence in the case deriving such assistance as it can by giving what is described as due weight to the opinion of the Sessions Judge and the Jury. The opinion of the Sessions Judge is the opinion as expressed in the reference or at the hearing. The opinion of the Jury might possibly be expressed in some other way, but it will usually be found expressed in the verdict. The so-called verdict does not bind him. It becomes for all legal purposes a mere opinion and this is what S. 307 refers to when it speaks of the 'opinion' of the Jury. If the Court comes to the conclusion on that evidence that it should not convict if the case came before it in the capacity of trying Judge, and in arriving at that conclusion it must give due weight to the fact that other persons have taken other views and have seen the witnesses, in such a case it is the duty of the High Court to acquit the prisoner. (*Schwabe, C. J. and Wallace, J.*) NANNI KUDUMBAN *v.* CROWN.

18 L. W. 482 : 25 Cr. L. J. 145 : 76 I. C. 289 : (1923) M. W. N. 695 : A. I R. 1924 Mad. 232 : 45 M. L. J. 406.

——S. 307—*Jury shown material for conviction under S. 366, I P.C.—Verdict under S. 363, I.P.C., is not perverse.*

The case was one of kidnapping a girl. The Judge indicated to the jury that there was material for conviction under S. 366, I. P. C., but he left it to the jury themselves to determine whether the conviction should be recorded under S. 363 or S. 366, I. P. C. *Held*, that though in cases of this kind there is always a probability that the girl who has been kidnapped will be submitted to illicit intercourse such a conclusion is not inevitable and a contrary conclusion on the part of the Jury need not be necessarily perverse. *Held*, further, that there is only a technical difference between the two sections and S. 363 provides the possibility of sentence of seven years' rigorous imprisonment, and that the Judge should, in view of his own summing up, have accepted the verdict of the Jury and passed a sentence according to law. (*Pullan A. J. C.*) EMPEROR *v.* ALI RAZA. **28 O. C. 69 : 84 I. C. 454 : 26 Cr. L. J. 310 : A.I. R. 1925 Oudh 311.**

——S. 307—*Judge disagreeing with jury—Reference—Duty of High Court.*

Where a Judge disagreeing with the jury makes a reference to the High Court, the High Court has only to consider if the unanimous verdict of the jury is manifestly wrong or perverse and cannot be supported on any consideration of the case whatever. (*Dalal, J. C.*) EMPEROR *v.* MOHAMMAD SHAFI.

90 I. C. 536 : 26 Cr. L. J. 1576.

——S. 307—*Trial by Jury—Verdict of jury—Interference by High Court—Reasons for verdict.*

If the verdict of the jury had merely turned upon the appreciation of oral evidence capable of being viewed either way, but as to which the Court is inclined to take different view from that of the jury the

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High Court will not interfere. But where the evidence is so coercive that it is impossible to draw any conclusion except one adverse to the accused, the duty of the High Court is to interfere with the verdict. It is not competent to the Sessions Judge after a clear verdict is returned by the Jury to ask them for their reasons. 58 I. C. 829 Foll.; 3 Pat. L. T. 655 Diss. (*Mullick and Bucknil, JJ.*) EMPEROR *v.* ALI HYDER.

4 Pat. L. T. 425 : 26 Cr. L. J. 856 : 86 I. C. 712 : A. I. R. 1923 Pat. 474.

——S. 307—*Trial by jury—Inadmissible confession—Evidence given—Omission of Judge to direct jury.*

In a case tried by Jury the Sessions Judge allowed a police witness to give in evidence a confession made by the accused to him. The Judge made a note in the record that the confession was inadmissible but omitted to mention it in his charge to the jury. *Held*, that the conviction was bad inasmuch as the mind of the Jury might have been influenced by the inadmissible confession having been deposed to and recorded in their presence and the omission of the Judge to mention it in the summing up constituted a misdirection. (*Jwala Prasad and Adami, JJ.*) SUMESWAR JHA *v.* EMPEROR. **3 Pat. L. T. 101 : 65 I. C. 443 : 4 U. P. L. R. (P.) 31 : 23 Cr. L. J. 91 : A. I. R. 1923 Pat. 103.**

——S. 307—*Duty of Sessions Judge to record reasons for the opinion of the Jury when making a reference to the HighCourt—Omission to put questions is no reason for High Court to decline to go into entire evidence.*

Before a reference is made to High Court under S. 307 it is necessary for the Sessions Judge to put questions to the jury and record the opinions. The High Court upon such a reference is bound to consider the entire evidence and give weight to the opinions of the Sessions Judge and the Jury. The circumstance that the Sessions Judge failed to ascertain reasons from the Jury does not warrant the High Court to decline to go into evidence. (*Jwala Prasad and Adami, JJ.*) EMPEROR *v.* BHUILOTHAN SINGH.

2 Pat. L. T. 605 : 6 Pat. L. J. 264 : 64 I. C. 379 : 23 Cr. L. J. 11.

—— S.307—*Judge of Jud. Commissioner's Court, Sind.*

A Judge of the Jud. Commissioner's Court of Sind sitting in Sessions has no power to differ from the verdict of the jury and refer the case to the Court in its High Court jurisdiction. (*Kennedy, A. J. C.*) KING-EMPEROR *v.* MITHOO. **25 Cr. L. J. 428 : 77 I. C. 604 : A. I. R. 1925 Sind 34.**

—— S. 307, Cls. 1 and 3—*Disagreement with the verdict—Sessions Judge, duty of—High Court's power to set aside on substantial grounds.*

In making a reference under S. 307 of Cr. P. Code, disagreeing with the verdict of the jury, the Sessions Judge should ask for their reasons for the verdict. It is still more necessary, whenever there is a difference in the opinion of the Jury, to consider not only the opinion of the majority, but also of the minority of the Jury. S. 307. Cl. (3) requires due weight to be given by the High Court to the opinion of the Sessions Judge and of the Jury.

Per *Jwala Prasad, J.*—Although on a reference the High Court is required to consider the entire evidence in the case that does not necessarily mean that the opinion of the Jury on the question of fact will be ignored. There must be something more than a mere estimate of the evidence on facts that should entitle the High Court to upset the verdict of the Jury. Whenever the verdict of a jury is set aside, it must be

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upon a very substantial ground, and not merely upon the ground that another view of the evidence might be taken.

Per *Coutts, J.*—After the change in the new Cr. P. Code, the High Court is entitled to look into the entire evidence of the case and to give due weight to the opinion of the Sessions Judge and of the jury and not to rely solely on the verdict of the Jury. The High Court is not bound to act in accordance with the unanimous verdict of the Jury, although it is shown not to be perverse or clearly and manifestly wrong. (*Jwala Prasad and Coutts, JJ.*) EMPEROR *v.* PUNIT CHAIN. **3 Pat. L.T. 413 : 1922 P.H.C.C. 218 : 4 U. P. L.R. (Pat.) 53 : 67 I. C. 581 : 23 Cr. L. J. 421 : A. I. R. 1922 P. 348.**

——S. 307 (3)—*Changes.*

(1) When a Judge does not accept the verdict as regards some only of the accused he need only refer the case of that accused to the High Court.

(2) Provision is made for trial as to charge of previous conviction, in the Sessions Court itself.

——S. 307 (3)—*Letter of reference inconsistent with the summing up—High Court should not interfere.*

Where the Sessions Judge expressed a doubt as to prosecution evidence regarding discovery of the knife *i. e.* the alleged instrument for killing the deceased and the Jury disbelieved that part of the story and returned a verdict of not guilty, and the Sessions Judge expressed belief in the prosecution evidence in his letter of reference. *Held* : The Sessions Judge may be right. But the jury were the judges of the facts, and having regard to the directions the Sessions Judge gave as regards the ownership of the knife and the finding of if it is impossible for High Court to hold that the jury were not entitled to take the view that it would not be safe to convict the accused, and to overrule the verdict of the majority of the jury. (*Sanderson, C. J. and Chotzner, J.*) EMPEROR *v.* SRISTIDHAR MAZUMDAR. **37 Cal. L. J. 30 : A. I. R. 1923 Cal. 97.**

——S. 307 (3)—*No preference is to be given to Judge's or Jury's opinion over the other.*

When once a reference is made to the High Court the language of the Code does not justify any undue preference being given to the opinion of Jury over that of the Judge. The High Court has to weigh both the opinions and consider the entire evidence on the record just as it would consider in any other criminal matter coming before it for decision. (*Dalal, J. C.*) EMPEROR *v.* RADCHARAN.
27 O. C. 29 : 11 O. L. J. 210 : 81 I. C. 305 : 25 Cr. L. J. 785 : A. I. R. 1924 Oudh 314.

——Ss. 308, 282 and 283—*Inherent power to discharge jury.*

Where the question of misconduct on the part of the jury or other similar sufficient cause arises the Sessions Judge has inherent power to discharge the Jury and empanel another. But the power to discharge a jury on such grounds is one not to be exercised lightly nor until the Judge has satisfied himself by such form of enquiry, as in the circumstances he can adopt, that reasonable grounds for exercising such a right exist. (*Buckland and Cuming, JJ.*) RAHIM SHEIKH *v.* EMPEROR. **50 Cal. 872 : 73 I. C. 773 (2) : 37 Cal. L. J. 595 : 24 Cr. L. J. 677 (2) : A. I. R. 1923 Cal. 724.**

——S. 309—*Change.*

[The Judge may question the assessors for the purpose of ascertaining their opinion on the several charges. But the questions and answers should be recorded.]

CR. P. CODE (V OF 1898), S. 310.

——S. 309—*Sessions trial—Evidence taken after assessors are discharged is illegal.*

In a Sessions trial with the aid of assessors a Sessions Judge cannot take evidence after the assessors are discharged. If he does so the trial is vitiated. (*Mears, C. J. and Ryves, J.*) JAISUKH *v.* EMPEROR. **43 All. 25 : 19 A. L. J. 1 : 59 I. C. 559 (1) : 22 Cr. L. J. 127 (1).**

——S. 309—*Opinion of assessors not taken on offence for which accused are convicted—Effect.*

In a criminal trial, the assessors found the accused free from the charge of abetment of murder. The Judge accepted the opinion, but convicted them of causing disappearance of the evidence of murder, without putting the same to the assessors. *Held*, under S. 309, Cr. P. Code it is imperative to take the opinion of the assessors on the charge it is proposed to convict the accused. (*Marten and Coyajee, JJ.*) EMPEROR *v.* APPAYA BASLINGAPPA HONNAPUR. **25 Bom. L. R. 1318 : A. I.R. 1924 Bom. 246.**

——S. 309—*Actual words of assessor must be recorded.*

The Judge ought to record at the time, in writing, the opinion actually given in his own words by each of the assessors. (*Miller, C. J. and Adami, J.*) FATU SANTAL *v.* EMPEROR. **2 Pat. L. T. 288 : 6 Pat. L. J. 147 : 61 I. C. 705 : 22 Cr. L. J. 417.**

——S. 309 (1)—*Committing Magistrate is not to see whether a case for trial has been made out but whether there is a case for trial.*

What the enquiring Magistrate has got to try and determine is not whether the case has been made out but only whether there is a case for trial. There is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and the weighing of the evidence. But if the evidence be of such a nature that no reasonable person and no tribunal, Judge or Jury would ever on that evidence hold the accused guilty, it follows that there is no case for trial and it is then a case for the enquiring Magistrate to discharge. 15 Cr. L. J. 373 : 1915 M. W. N. 233 Foll. 10 I. W. 630 Dist. (*Srinivasa Aiyangar, J.*) MANIA MANICKA PADAYACHI, *In re.* **90 I. C. 530 : 22 L. W. 755 : 48 M. 874 : 26 Cr. L. J. 1570 : A. I. R. 1925 Mad. 1061 : 49 M. L. J. 155.**

——S. 310—*Change.*

A new section has been substituted in place of the old.

——S. 310—*Not applicable to trial before Magistrate.*

On the 21st June the accused was charged under Ss. 457 and 380. On the 18th July witnesses were examined to prove a previous conviction and a charge was framed that he was liable to enhanced punishment, under S. 75 of the Penal Code, in consequence of previous conviction. *Held*, that S. 310 of the Cr. P. Code lays down a special form of trial before the Court of Sessions only, and does not apply to trials before a Magistrate and that in the present case there was no prejudice to the accused. (*Newbould and Suhrawardy, JJ.*) DEHRI SONAR *v.* EMPEROR. **50 Cal. 367 : A. I. R. 1923 Cal. 707.**

——S. 310—*Trial by assessors—Evidence of previous conviction to be given—When opinion has been delivered.*

If the statement of the accused to a committing Magistrate contains admission about his previous conviction, that part of the evidence should not be read before the assessors have given their opinion as such a procedure is against S. 310 and vitiates the trial.

CR. P. CODE (V OF 1898), S. 330.

(*Jwala Prasad and Sultan Ahmed, JJ.*) TEKA AHIR *v.* EMPEROR. **5 Pat. L. J. 706 : 60 I. C. 331 : 22 Cr. L. J. 219.**

——— S. 330—*Magistrate's act in trying offence disclosed by the facts and within his jurisdiction is improper but not void, when the facts disclose a more serious offence beyond his jurisdiction.*

Where the facts disclose an offence within the jurisdiction of the Magistrate, it is a fallacy to say that he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction, as, for instance, if a second class Magistrate should ignore the violence used in committing theft (S. 379) instead of sending the accused before a first class Magistrate to be tried for robbery (S. 392). Here the action of the second class Magistrate would be improper, but his proceedings would not be void." 25 Mad. 61 (P. C.) Dist. (*Brown, J.*) DAWSON *v.* KING EMPEROR. **2 Rang. 455 : 88 I. C. 276 : 26 Cr. L. J. 1108 : A. I. R. 1925 Rang. 45.**

———S. 333—Nolle Presequi—*Effect of.*

Though an order under S. 333 does not amount to an acquittal, a *nolle presequi* puts an end to the indictment on which the prisoner is brought before the Court, and he cannot subsequently be proceeded against on the same charge. Queen *v.* Allen (31 L. J. M. C. 129) and Queen *v.* Mitchell (3 Cox. 93) Foll. (*C. C. Ghose, J.*) EMPEROR *v.* JITENDRA NATH BOSE. **52 Cal. 590 : 89 I. C. 709 : 26 Cr. L. J. 1397 : A. I. R. 1925 Cal. 902.**

———S. 337—*Changes.*

[(1) Several offences other than those triable by the Court of Session or High Court are now included, in which pardon can be tendered.

(2) Only a Magistrate of the 1st class can now tender pardon and he can tender it during an investigation as well as after inquiry.

———S. 337—*Statements previous to tender of pardon are admissible against the approver.*

A previous admission made by accused, who was subsequently tendered pardon, is admissible in evidence against him. (11 All. 79, Dist.) (*Piggott, Lindsay and Sulaiman, JJ.*) SARDARA *v.* EMPEROR. **22 A. L. J. 85 : L. R. 5 A. Cr. 25 : A. I. R. 1924 All. 220 (F. B.).**

———S. 337—*Interpretation of section—Section is an empowering section.*

S. 337 of the Cr. P. Code empowers certain Courts of Justice, namely, Magistrates exercising certain powers or specially empowered *ad hoc*, by an order of sanction, to pass a judicial order, the effect of which is that a "person supposed to have been directly or indirectly concerned in, or privy to, the offence under enquiry," who chooses to accept the pardon tendered by the said order, can give his evidence "as a witness in the case," with the knowledge and assurance that the order will operate as a bar to his own subsequent prosecution or trial for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter. Under certain circumstances set forth in S. 339, the order tendering the pardon may cease to have this effect; but this will only be when it has been superseded by a judicial finding that the

CR. P. CODE (V OF 1898), S. 337.

pardon has been forfeited. The points to be noticed are that S. 337 is an empowering section ; that it is addressed to certain Courts of Justice, and has nothing to do with the powers or discretion of an executive authority, such as a Local Government, in the matter of instituting, or refraining from instituting, any prosecution, and that the Legislature has seen fit to limit its operation to "the case of any offence triable exclusively by the Court of Session, or High Court." If the Magistrate after issuing process against all accused thinks fit to try one first, the other accused would not thereby become incompetent witnesses at the trial of their co-accused whether for the prosecution or for the defence. (10 C. L. R. 553 : 20 All. 426 : 7 W. R. Cr. 44 Foll.) There is no law or principle which prevents a person who has been suspected or charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for a prosecution. 16 Bom. 661 Foll; 2 A. 260 Dist ; 1 Lah. 102, Not Foll. Legislature in India has provided no method outside the scope of S. 337 or S. 494 of the Cr. P. Code, by which a Local Government can provide an accomplice witness with a judicial order which he can subsequently plead in bar of his own prosecution, should such prosecution be instituted. At the same time, a discretion to refrain from instituting a prosecution in any particular case is inherent in any authority to which the law has entrusted the power to institute a prosecution. Nor can any law prevent a person, or body of persons exercising such authority, from determining beforehand how that discretion should be exercised upon the happening of a certain contingent event. If such determination is communicated beforehand to any person or body of persons whom it may concern, there is no provision in the Indian Statute Law which lays down that the competence of such person or persons to testify as witnesses in a Criminal Court about any matter referred to in such communication is thereby affected. (*Mears, C. J. and Piggott, J.*) EMPEROR *v.* HAR PRASAD BHARGAVA. **45 All 226 : 21 A. L. J. 42 : L. R. 4 A. 19 Cr. : A. I. R. 1923 All. 91.**

———S. 337—*Approver—Statement disclosing illegal possession of fire arms—Subsequent trial under S. 20 of the Arms Act—Legality of.*

Where an approver makes a statement disclosing his illegal possession of firearms, and is released after pardon, it is illegal to try him under S. 20 of the Arms Act. (*Stuart, J.*) SHIAM SUNDER *v.* EMPEROR. **19 A. L. J. 717 : 22 Cr. L. J. 699 : 63 I. C. 827 : L. R. 2 A. (Cr.) 107.**

———S. 337—*Tender of pardon—"Any Magistrate .....offence."*

The expression "any Magistrate . . . . offence" in S. 337 (1) ordinarily indicates a Magistrate holding an enquiry under Chap. XVIII of the Code. That is the only enquiry which is necessary under the Code in the case of offences exclusively triable by a Court of Session. The Code does not provide for an enquiry in connection with a tender of pardon. It is entirely a matter of choice of the Magistrate. Any such inquiry as he makes would not be one under S. 4 (k) of the Code. A pardon tendered at a time when no inquiry is being conducted into the case is not a valid pardon and a statement by the approver is not admissible in evidence and cannot be the basis of an alternative charge in respect of an offence under S. 193 of the Penal Code. (*Macleod, C. J. and Shah, J.*) MOTI LAL HIRA LAL *v.* EMPEROR. **23 Bom. L. R. 884 : 22 Cr. L. J. 728 : 46 Bom. 61 : 64 I. C. 40 : A. I. R. 1922 Bom. 138.**

———S. 337—*Evidence of—Corroboration—Differ-*

ence between one to whom pardon tendered and one against whom prosecution withdrawn.

An accomplice witness against whom the case has been withdrawn under S. 494 of the Cr. P. Code is less reliable than one to whom a pardon has been tendered under S. 337 of the Code. (*Campbell, J.*) CHAPROLIA *v.* EMPEROR. **24 Cr. L. J. 696 : 73 I. C. 808 : A. I. R. 1924 Lah. 235.**

———**Ss. 337 and 339**—*Tender of pardon—Reasons for—Failure to give—Effect.*

The omission to record reasons for tendering a pardon does not vitiate the proceedings. (*Zafar Ali, J.*) EMPEROR *v.* WARYAM SINGH. **5 Lah. L. J. 407 : 25 Cr. L J. 174 : 76 I. C. 398 : A. I. R. 1924 Lah. 90.**

———**S. 337**—*Inapplicability—Position of approvers.*

No formal order of discharge was passed in respect of the approvers but their names did not appear among those of the accused actually challaned. On the contrary it was expressly stated in the chalan that no proceedings were being taken against them : *Held* in these circumstances they clearly do not come within the definition of accused persons. (16 Bom. 661, 23 Cal. 493 and 21 P. R. 1904, Foll.) (*Lumsden, J.*) EMPEROR *v.* DARYA SINGH. **A. I. R. 1923 Lah. 666.**

———**S. 337**—*Inquiry—Includes everything done in a case by a Magistrate.*

When a case has been reported to a Magistrate by the Police, and he is asked to tender a pardon, and does so, there is an inquiry within the meaning of S.337, Criminal Procedure Code. The word inquiry is meant to include everything done in a case by a Magistrate, whether the case has been challaned or not. (*Broadway and Martineau, JJ.*) SHER MAHOMED *v.* EMPEROR. **3 Lah. 431 : 75 I. C. 365 : 24 Cr. L. J. 941 : A. I. R. 1923 Lah. 270.**

———**S. 337**—*Tender of pardon after a charge has been framed.*

The section does not prevent a pardon being tendered after a charge has been framed. (*Scott-Smith, J.*) MANGU *v.* EMPEROR. **22 Cr. L. J. 255 : 60 I. C. 607 : 3 U. P. L. R. (Lah.) 20.**

———**S. 337**—*Offences exclusively triable by Sessions Court mixed with other offences in the same enquiry—Pardon can be granted—Approver's evidence is relevant for all the charges.*

All that Ss. 337 and 338 require is that there should be an offence that is triable exclusively by the Sessions Court under enquiry or trial and the fact that there may be other offences alleged or charged which are not so triable is immaterial and will not invalidate a pardon granted in respect of the offence exclusively triable by the Sessions Court : [9 S. L. R. 43 and 246 P. L. R. 1915, Foll.] The approver is an approver as regards the whole case and not as regards some of the accused only. (*Baker, J. C.*) ISMAIL *v.* EMPEROR. **26 Cr. L. J. 1045 : 87 I. C. 965 : A. I. R. 1925 Nag. 409.**

———**S. 337**—*No analogy exists between approver's statement and confession of accused—Evidence Act, S.24.*

Necessarily in every case where an accused is made an approver it must be ascertained whether he is willing to tell the truth or not No analogy exists between the case of a confession obtained from an accused person by any inducement and the case of an approver. If it were so, practically all approvers' evidence would be inadmissible. (*Baker, J. C.*) ISMAIL PANJU *v.* EMPEROR. **26 Cr. L. J. 1115 : 88 I. C. 283 : A. I. R. 1925 Nag. 337.**

———**Ss. 337, 163 and 343**—*Assurance of amnesty given to witness—Competency of witness is not affected but his credibility may be affected.*

The local Government prosecutes offenders. There is no law that it must prosecute every offender, and it is well known that offenders do manage to conceal their misdeeds or that evidence is found insufficient. There is nothing to prevent the prosecuting authority from refraining from prosecution. The discretion to refrain from instituting a prosecution in any particular case is inherent in the authority to which the Law has entrusted the power to institute a prosecution. It makes no difference to the competency of the witness if that assurance of non-prosecuting is communicated before the witness makes any statement. The local Government is quite entitled to give such an assurance or amnesty and it is also entitled to ratify what has already been done by the enquiring officer. Such an assurance therefore in no way affects the competency of the witness to whom it is given, though it may affect the credibility of his evidence. Such an assurance is not contrary to Ss. 163 and 343 of the Cr. P. Code. 1923 All. 91, Foll. (*Prideaux, A. J. C.*) ANANT WASUDEO CHANDEKAR *v.* EMPEROR. **8 N. L. J. 138 : 89 I. C. 1035 : 26 Cr. L. J 1467 : A. I. R. 1925 Nag. 313.**

———**Ss. 337 and 30**—*Scope of—If governs S. 30—Trial by Magistrate.*

A Magistrate with powers under S. 30 when he tenders a pardon to one of the accused, must not try the case himself but commit the accused to the Sessions. S. 337 (2-A) governs S. 30, Cr. P. Code. (*Prideaux, A. J. C.*) KISHAR *v.* EMPEROR. **25 Cr. L. J. 1341 : 82 I. C. 573 : A. I. R. 1925 Nag. 119.**

———**Ss. 337 and 338**—*Applicability—Only a person concerned in an offence can be tendered pardon.*

Under Ss. 337 and 338 it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of the Session ; all that is requisite is that the person to whom pardon is tendered, who may not even be an accused in the case, should be supposed to have been directly or indirectly concerned in, or privy to, an offence, triable exclusively by the Court of Session, with which another person is charged. (*Batten, J. C. and Hallifax, A. J. C.*) KASHIRAM *v.* EMPEROR. **6 N. L. J. 144 : 24 Cr. L. J. 566 : 73 I. C. 262 : A. I. R. 1923 Nag 248.**

———**S. 337**—*Pardon in case of an offence not exclusively drawn by a Court of Sessions.*

Pardon cannot be tendered in the case of an offence under S. 457 of the Penal Code, as it is not triable exclusively by the Court of Sessions. (*Jwala Prasad, J.*) SHEOBHAJAN AHIR *v.* EMPEROR. **2 Pat. L. T. 125.**

But See the section as amended.

———**S. 337**—*Penal Code, S. 394 — Conditional pardon to approver—Case must be committed to Sessions.*

If a Magistrate who takes cognizance of an offence under S. 394, I. P. Code, and grants conditional pardon to an approver, is satisfied that there is a *prima facie* case against the accused, he is bound under the provisions of S. 337 (2) (*a*) of the Code to commit the case to the Court of Sessions for trial. He has no jurisdiction to try the case himself. (*Brown, J.*) NGA KIN *v.* EMPEROR. **4 Bur. L. J. 11 : 86 I. C. 477 : 26 Cr. L. J. 829 : A. I. R. 1925 Rang. 207 (1).**

———**S. 337 (2) (a)**—*Approver cannot be committed to Sessions.*

The word " him " in S. 337 (2) (a), does not refer to the person who has accepted a tender of pardon but refers to the accused. What the provision of law means is that wherever an approver is examined the

CR. P. CODE (V OF 1898), S. 337.

Magistrate has no jurisdiction to proceed with the trial but must commit the accused persons for trial to the Court of Session. It does not mean that the approver should be committed for trial along with the accused persons. (*Dalal, J. C.*) EMPEROR *v.* PERU.
12 O. L. J. 542 : 88 I. C. 736 : 26 Cr. L. J. 1216 : 2 O. W. N. 464 : A.I.R. 1925 Oudh 472.

——S. 337 (3)—*Object of.*

The section implies that a trial is in progress and its object is to secure the evidence of the approver for such trial. (*Pratt and Fawcett, JJ.*) DAGADU BAPU, *In re.* **46 Bom. 120 : 23 Bom. L. R. 839 : 63 I. C. 156 : 22 Cr. L. J. 620 : A. I. R. 1922 Bom. 177 (1).**

——S. 337 (3)—*Preliminary examination on oath after pardon is not permitted.*

There is no authority for preliminary examination on oath after the extension of the pardon to the approver. Prosecution for perjury is an exceptional measure and sanction ought not to be granted where the only material is the one provided by an unnecessary examination on oath. (*Pratt, J.*) EMPEROR *v.* NGA BOGYI. **3 Rang. 224 : A. I. R. 1925 Rang. 286.**

——S. 337 (3)—*Approver—Forfeiture of pardon—Prosecution.*

No action can be taken against an approver before the principal trial is over. Under the new Code no necessity of a formal withdrawal of pardon. (*Raymond, J. C.*) EMPEROR *v.* HAJIJI. **16 S. L. R. 131 : 68 I. C. 835 : 23 Cr. L. J. 611 : A.I.R. 1922 Sind 31.**

——Ss. 337, (4) and 537—*Omission to record reasons does not vitiate.*

Omission to record reasons is neither an illegality nor an irregularity which vitiates the proceedings. 5 Cr. L. J. 12 Ref. (*Zafar Ali, J.*) EMPEROR *v.* WARYAM SINGH. **5 L. L. J. 407 : 25 Cr. L. J. 174 : 76 I. C. 398 : A. I. R. 1924 Lah. 90.**

——S. 338—*Reference by Sessions Judge—Acquittal—Interference.*

It is not in accordance with the practice of the Allahabad High Court to interfere on a reference by the Sessions Judge where the Government could have appealed under S. 417, Cr. P. Code, and has not done so. (*Boys, J.*) QALANDAR SINGH *v.* MAHOMED RAZAKHAN. **L. R. 5 A. 120 (Cr.) : A. I. R. 1924 All. 624.**

——S. 339—*Changes.*

[(1) Instead of the trying Court determining whether the pardon has been forfeited a certificate of the Public Prosecutor is now sufficient.

(2) A new S. 339-A has been added providing the procedure to be adopted in the trial of person under S. 339.]

——S. 339—*Tender of pardon--Acceptance—What constitutes—Plea of ignorance.*

A pardon is accepted when the person to whom it is tendered does volunteer to make some statement with reference to the crime. Where a person expresses complete ignorance of the crime and states that he is indifferent whether a pardon is granted to him or not, he cannot be said to have accepted the tender of pardon. (*Dalal, J.*) PALTI RAI *v.* EMPEROR. **L. R. 5 A. 89 (Cr.) : A. I. R. 1924 A. 564.**

——S. 339—*Applicability of—Dacoity—Pardon for—Confession—Admissibility of confession.*

Where a pardon is given to the accused in respect of a particular dacoity and he makes a confession implicating himself and others in several previous dacoities there is nothing in S. 339, Cr. P. Code, to forbid the confession of the accused from being admissible in evidence on a trial for such previous

CR. P. CODE (V OF 1898), S. 339.

dacoities. 11 A. 79 Dist. (*Piggott Lindsay and Sulaiman, J.*) SARDARA *v* EMPEROR.
46 A. 236 : 22 A. L. J. 85 : L. R. 5 A. 25 (Cr.) : 81 I. C. 604 : 25 Cr. L. J. 956 : A. I. R. 1924 A. 220 (F. B.).

——S. 339—*Forfeiture of—Pardon—Sessions Judge—If can order commitment.*

Where a person who has been tendered a pardon has not fulfilled the conditions upon which he was pardoned, the Sessions Judge is competent to order his commitment. (*Scott-Smith and Fforde, JJ.*) DIL BAHADUR *v.* EMPEROR. **25 Cr. L. J. 121 : 76 I.C. 185 : A. I. R. 1924 Lah. 568.**

——S.339—*Approver not complying with conditions of pardon—Sessions Judge can pass order of commitment.*

If the Sessions Judge finds that the approver had not told the truth he can himself commit the accused to stand his trial. (*Chevis, J.*) DAULAT *v.* EMPEROR.
22 Cr. L. J. 128 : 59 I. C. 560 : 2 Lah. L. J. 653.

——S. 339—*Tender of pardon—Accused rejecting—If can be tried along with others.*

It is open to an accused who has accepted pardon to resile from it and claim to be tried. If he does it before he is treated as an approver and put into the box, there is no illegality in his being tried along with the other accused. The acceptance of pardon must continue in force till he actually gives evidence and then only S. 339 will apply. (*Krishnan and Wallace, JJ.*) BASIREDDY NARAPPA *v.* EMPEROR.
(1923) M. W. N. 697 : 18 L. W. 606: 33 M. L. T. 77 (H. C.) : 33 M. L. T. 156 : 25 Cr. L. J. 210 : 76 I. C. 642 : A. I. R. 1924 Mad. 391 : 45 M. L. J. 613.

——S. 339—*Amended section has no retrospective effect.*

S. 330 does not apply to a case in which the pardon had been declared forfeited by the Magistrate and the proceedings against the approver after the forfeiture, commenced before the amended section came into force. (*Kotwal and Prideaux, A.J.Cs.*) GANGARAM *v* EMPEROR **25 Cr. L. J. 1355 : 82 I. C. 715 : A. I R. 1925 Nag. 172.**

——Ss. 339 and 532—*Approver prosecuted—Commitment to Sessions without Public Prosecutor's certificate — Certificate obtained before trial by Sessions Judge—Setting aside of trial was refused.*

On the conclusion of a trial the Magistrate ordered the Police to prosecute a person who had given evidence as an approver, of the original offence for which he had been originally arrested. The Magistrate overlooked the provisions of S. 339 of the Code. The accused went before a Magistrate, who also overlooked those provisions. The Magistrate committed the accused to the Court of Session on charges of murder, etc. On the case coming up for trial, the Sessions Judge notified the absence of the certificate from the Public Prosecutor. The trial was adjourned. On the adjourned date, a certificate was filed and accepted by the Sessions Judge, and the trial proceeded. *Held*, that the Magistrate was duly empowered to commit the case. The proceedings before him were merely an enquiry and what was forbidden by the provisions of S. 339 was the trial of the accused which, in this particular case, had to be a trial by a Court of Session as a Court of original jurisdiction. *Held*, further that it was open to the Sessions Judge to accept the commitment even if it was irregular. 9 Bom. 288 and 22 Bom. 112, Foll : 37 Cal. 467, Dist. 42 Bom. 172 and 17 Mad. 402, Ref. to. (*Robinson, C.J. and Cunliffe, J.*) NGA WA GYI *v.* EMPEROR.
3 Rang. 55 : 4 Bur. L. J. 23.

CR. P. CODE (V OF 1898), S. 339.

A. I. R. 1925 Rang. 219 (2),

——S. 339—*A pardon validly given is not affected by subsequent proceedings.*

A valid pardon once given is not in any way affected by subsequent proceedings in the case. Even where the offence for which the accused are tried and convicted is not an offence triable exclusively by Court of Sessions, the evidence of an approver is still admissible where the pardon given was in respect of an offence triable exclusively by a Court of Sessions. (*Kincaid, J. C. and Aston, A. J. C.*) FAIZULLAH *v.* EMPEROR.

25 Cr. L. J. 1057 : 81 I.C. 881 : A.I.R. 1925 Sind 105.

——Ss. 339 and 337—*Trial of approver not to commence before termination of trial.*

No action can be taken against the approver till after the conclusion of the case in the Court of Sessions and if it be desired to proceed against him, his trial should commence *de novo.* At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised the Crown may rearrest and proceed against him for the offence in respect of which he was given conditional pardon. In the proceedings against the approver for the offence in respect of which a pardon was tendered to him, he is entitled to plead his pardon in bar and the issue whether this pardon has been forfeited should be tried before the Court proceeds with the trial of the offence charged. (*Raymond, A.J.C.*) EMPEROR *v.* HAJI JIND. **16 S. L. R. 131 : 23 Cr. L J. 611 : 68 I. C 835 : A. I. R. 1922 Sind 31.**

——S. 339 (1)—*Certification by Public Prosecutor is absolutely necessary.*

Sub-Section (1) of S. 339 as amended by Act of 1923 makes the certificate by a Public Prosecutor the sole basis of a prosecution of an approver and therefore an approver cannot be prosecuted at the instance of a suggestion by the presiding Judge that he should be so dealt with. (*Marten and Fawcett, JJ.*) EMPEROR *v.* MARIA BASAPPA.

26 B. L. R. 1240 : A. I. R. 1925 Bom. 135.

——S. 339 (1)—*Certificate by Public Prosecutor.*

The absence of certificate by the Public Prosecutor vitiates the trial. (*Scot-Smith and Fforde, JJ.*) ALI *v.* EMPEROR. **5 Lah. 379 : 26 Cr. L. J. 237 : 84 I. C. 61 : A. I. R. 1925 Lah. 15.**

——S. 339 (2)—*'Statement' in sub-s. (2) covers statement before pardoning Magistrate.*

The words "the statement made by a person who has accepted the tender of pardon" in sub-section (2) are wide enough to cover a statement before the pardoning Magistrate. (*Kotwal and Prideaux, A J Cs*) GANGARAM *v.* EMPEROR. **25 Cr. L. J. 1355 : 82 I. C. 715 : A. I. R. 1925 Nag. 172.**

——S. 339 (3)—*Contradictory statements made—Sanction will be granted unless undue influence proved.*

A witness, who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *locus penitentioe* but where contradictory statements have been made on different occasions sanction cannot be refused unless there be something to show that the approver made the statement alleged to be false under undue influence. 11 A. L. J. 944. Ref. (*Zafar Ali, J.*) EMPEROR *v* WARYAM SINGH. **5 Lah. L J. 407 : 76 I.C, 398 : 25 Cr. L. J. 174 : A.I.R. 1924 Lah. 90.**

——S. 339-A—*Proper compliance with the section.*

Where the accused was not asked in the manner provided by the section, but was asked whether he had fulfilled the conditions on which the pardon had been granted and had given true evidence. *Held* there was no proper compliance with the section. (*Scot-Smith and Fforde, JJ.*) ALI *v.* EMPEROR.

5 Lah. 379 : 26 Cr. L. J. 237 : 84 I. C. 61 : A. I. R. 1925 Lah. 15.

CR. P. CODE (V OF 1898), S. 341.

——S. 340—Changes.

[(1) A person against whom proceedings are instituted under the Code can of right be now defended by a pleader.

(2) Person against whom proceedings are instituted under S. 107, Chapters, X, XI, XII, or XXXVI or S.552, can offer himself as a witness in the case.]

——S. 340—*Reasonable opportunity to engage pleader must be allowed--Opportunity to accused's pleader to cross-examine must be allowed.*

When after the commencement of the trial an application is made for an opportunity to engage a pleader the reasonable course to adopt would be for the Magistrate to proceed with the evidence for the prosecution in chief and then, to allow, if it had not already been allowed, a reasonable time for the accused to appoint a pleader. The accused's pleader ought to be given a reasonable opportunity to cross-examine the prosecution witnesses. The fact that the accused who have been refused an opportunity to engage a pleader were asked if they wished to cross-examine and that they answered that they did not wish to do so is only a literal compliance with the law and a breach of its spirit. (*Boys, J.*) PITA *v.* EMPEROR.

47 All. 147 : L. R. 6 All. (Cr) 17 : 85 I.C. 719 : 26 Cr. L. J. 575 : A. I. R. 1925 All. 285.

——S. 340—*Opportunity for arguments in defence must be allowed.*

Though literally speaking, the Code does not provide for the legal right of the pleader for the accused to submit arguments, the Court is bound to allow to the accused a proper opportunity to be heard in argument. (*Boys, J.*) MALIK *v.* EMPEROR.

L. R. 6 A. (Cr.) 21 : 86 I. C. 458 : 26 Cr. L. J. 810 : A. I. R. 1925 All. 282 (2).

——S 340—*Complaint dismissed under S. 203—Further enquiry ordered by Sessions Judge without hearing accused—Not proper.*

The complaint of the complainant was dismissed under S. 203, Cr. P. Code, after giving accused an opportunity of being heard. The Sessions Judge on being moved by the complainant set aside the order of dismissal and directed a further enquiry, without giving the accused an opportunity of being heard. The Magistrate had dismissed the complaint holding that the matter was more or less of a civil nature. *Held*, on facts that this is one of those cases in which the accused should have been given an opportunity of being heard, before the Sessions Judge at the hearing of the application under S. 437. 15 Cal. 608 (F. B.) Foll. *Obiter* : The words used by Mr. Justice Wilson and Mr. Justice Prinsep in delivering the judgments of the Full Bench case do not imply that the discretion of the Magistrate or Sessions Judge is in all cases fettered. (*C. C. Ghose and Chotzner, JJ.*) JOGESH CHANDRA *v.* NIKUNJA BEHARI.

27 Cal. W. N. 552 : A. I. R. 1923 Cal. 651.

——S. 341—*Deaf and dumb accused—Attempt to commit suicide.*

A deaf and dumb accused was convicted on his confession indicated by signs indicating to attempt to commit suicide and the High Court sentenced him to one day's simple imprisonment. (*Marten and Fawcett, JJ.*) EMPEROR *v.* KHASHABA TATYA.

25 Bom. L. R. 43 : 72 I. C. 349 : 24 Cr. L. J. 349 : A. I. R. 1923 Bom. 194 (1).

CR. P. CODE (V OF 1898), S. 342.

———S. 342.

Alteration of charge.
Applicability.
Construction.
Non-Compliance.
Oath or affirmation.
Object of.
Power of Court.
Procedure.
Summons case.
Time of Examination
Written Statement.
Miscellaneous.

Alteration of charge.

———Ss. 342 and 231—*Alteration of charge—Recall of prosecution witnesses — Examination of accused.*

If after the examination of the accused under S. 342 but before he is called upon to enter on his defence there is an alteration made in the charge, or a new charge is added, it is not necessary that the court should re-examine the accused under S. 342, although some of the witnesses have, after the alteration of or addition to the charge is made, been recalled under section 231 and examined with reference to such alteration or addition. (*Jwala Prasad and Ross, JJ.*) SHAMLAL KOLWAR *v.* EMPEROR.
1 Pat. 54 : 3 Pat. L. T. 91 : 65 I. C. 610 : 23 Cr. L. J. 146 : A. I. R. 1922 Pat. 393.

Applicability.

———S. 342—*Applicability—Trial by Presidency Magistrate—Examination of accused S. 3.*

Where a Presidency Magistrate trying an accused person for an offence under S. 352 of the Penal Code fails to examine the accused in the manner required by S. 342 of the Cr. P. Code before convicting, it is an illegality which vitiates the proceedings. (*Shah and Crump, JJ.*) FERNANDEZ *v.* EMPEROR.
22 Bom. L. R. 1040 : 59 I. C. 129 : 22 Cr. L. J. 17 : 45 Bom. 672.

———S. 342—*Applicability—Security proceedings—Failure to put questions—Effect.*

S. 342, Cr. P. Code, does not apply to proceedings under Chapter VIII. The person called upon to give security is not an accused person, nor is there any trial or offence committed. Failure to question him is not an illegality but only an irregularity. (*C. C. Ghose and Cuming, JJ.*) BINODE BEHARI NATH *v.* EMPEROR. **50 Cal. 985 : A. I. R. 1924 Cal. 392.**

———S. 342—*If controls S. 540—Second cross-examination of prosecution witnesses—Examination of accused not necessary.*

S. 342 does not control S. 540 and where the accused has once been examined under S. 342, if the Court *suo motu* examines a witness, it is not bound to examine the accused again under S. 342. Nor is a second examination of the accused necessary after the prosecution witnesses are cross-examined a second time. (*Shadi Lal, C. J.*) FAZAL KARIM *v.* EMPEROR. **89 I. C 842 : 26 Cr. L. J. 1418.**

———S. 342—*Immunity under—If applies to affidavit to support transfer.*

An application for transfer is not part of the defence of an accused and statements made by an accused in an affidavit to support a transfer petition do not enjoy the immunity conferred by S. 342. (*Le Rossignol, J.*) MT. ALLAH WASAI *v.* EMPEROR.
89 I. C. 457 : 26 Cr. L. J. 1369.

———Ss. 342 and 349—*Applicability—Examination of complainant after close of defence—Court witness—Further examination of accused—Trying Magistrate forwarding case to higher Magistrate for sentence.*

S. 342, Cr. P. Code, does not apply where a court witness is examined, be he the complainant or any other person. If a Magistrate considers a person to be guilty and to deserve a larger penalty than the Magistrate himself can impose, he should send the case to a superior court for a fitting sentence. He should not convict the accused and send the record of conviction with a request for a higher sentence. (*Adami and Sen, JJ.*) PRAYAG GOPE *v.* EMPEROR.
(1924) P.H. C. C. 247 : 5 Pat. L. J. 571 : 3 Pat. 1015 : 25 Cr. L. J. 1276 : 82 I. C. 284 : A. I. R 1924 Pat. 764.

———S. 342—*Applicability—Summons cases and summary trials.*

S. 342 which is mandatory in character applies to summary trials and summons cases also. (*Kennedy, J. C., Aston and DeSouza, A. J. Cs.*) EMPEROR *v.* NABU. **90 I. C. 434 : 26 Cr. L. J. 1554.**

Construction.

———S. 342—*Construction—Insufficient examination does not necessarily vitiate trial*—(Mukherji, J.) *—Court must ask specific question pointing out the points against accused*—(Newbould, J.) *General questioning is enough.*

A refusal to give the accused an opportunity to make a statement at a stage when the mandatory part of S. 342, Cr. P. Code, is operative, vitiates the trial, but an insufficient examination at that stage does not necessarily invalidate it.

Mukherji, J.—The section is undoubtedly for the benefit of the accused but it cannot be said that it is intended merely for his benefit. It is a part of a system for enabling the Court to discover the truth and it constantly happens that the accused's explanation or his failure to explain, is the most incriminating circumstance against him. The result of the examination may certainly benefit the accused if a satisfactory explanation is offered by him; it may, however, be injurious to him, if no explanation or a false or unsatisfactory explanation is given. It follows from the wording of the section that the Court should not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation, but that it must, out of fairness to the accused, exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation, failure or refusal to give which will entitle the Court to draw an inference against him. The word "generally" in S. 342 does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of it.

Mukherji, J. (*Newbould, J., Contra*). The law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them if he wishes to do so. A mere question, *e.g.*, 'what is your defence' is not enough. (*Newbould and Mukherji, JJ.*) EMPEROR *v.* ALI MUDDIN NASKAR.
52 Cal. 522 : 85 I. C. 919 : 26 Cr. L. J. 631 : 29 C. W. N. 231 : 41 C. L. J. 101 : 52 Cal. 522 : A. I. R. 1925 Cal. 361.

———S. 342—*Nature of examination.*

The examination of the accused in a case consisted of a single question "What is your defence" to which he answered, "I am innocent". *Held*, as he was given an opportunity to make a defence if he

CR. P. CODE (V OF 1898), S. 342—Construction.

wished to do so, it was sufficient compliance with the section. The section must not be interpreted so as to give the Court the power to cross-examine the accused. (*Newbould and Chakravarti, JJ.*) REZ MAHAMMAD *v.* EMPEROR. **90 I. C. 294 : 26 Cr. L. J. 1510.**

——S. 342—*Construction—Accused should explain suspicious circumstances in his own interest.*

Per Mookerjee, J.—Though the proof of the case against the prisoner must depend for its support, not upon the absence of explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt given by the Crown, yet if he is involved by such evidence in a state of considerable suspicion, he is called upon, for his own sake and for his own safety, to state and elucidate the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence. (*Mukerji, Richardson, C. C. Ghose, Cuming and Page, JJ.*) EMPEROR *v.* BURENDRA KUMAR GHOSE. **28 C. W. N. 170 : 38 C. L. J. 411 : A. I. R. 1924 Cal. 257 (F.B.).**

——S. 342—*Construction—Examination of witnesses includes cross-examination as well as re-examination.*

The accused was standing his trial in a warrant case on a charge under S. 500 of the Indian Penal Code. After the prosecution witnesses had been examined in chief the accused was questioned generally on the case by the Magistrate. Thereafter cross-examination of the prosecution witnesses took place, but the accused was not again examined generally.

Held, that the word "examine" in S. 342 is to be taken in the ordinary English sense in which it covers all kinds of examination including cross-examination and re-examination, and that the accused should have been examined again. (*Rankin, J.*) DIBAKANTA CHATTERJEE *v.* GOUR GOPAL, MUCKERJEE. **50 Cal. 939 : 27 Cal. W. N. 743 : A. I. R. 1923 Cal. 727.**

——S. 342 (2)—*Construction—False accusation by person who is not an accused under trial is not exempt from punishment.*

S. 342 of the Cr. P Code, cannot be invoked in aid of a person who not being an accused person goes to a Court and makes a false charge against other persons. That section only protects an accused person from punishment for giving false answers to the Court. (*Pullan, A.J.C.*) MAKHDUM *v.* EMPEROR. **25 Cr. L. J. 1194 : 82 I. C. 58 A. I. R. 1925 Oudh. 227 (1).**

——S. 342 — *Construction — Examination of accused—Answers, if can be used at trial.*

The answers of the accused in an examination under S. 342 of the Code may be used at the trial. They may be used even in a subsequent trial for any other offence. (*Miller, C. J. and Adami, J.*) BALDEO KOERI *v.* EMPEROR. **2 Pat. L. T. 565 : 22 Cr. L. J. 433 : 61 I. C. 785 : 6 P. L. J. 241.**

——S. 342 (4)—*Construction—'Accused'—Meaning of.*

Under S. 342 (4), Cr. P. Code, an accused stands for a person accused and then under trial and under examination by the Court. (*Baguley, J.*) A. V. JOSEPH *v.* EMPEROR. **3 Bur. L. J. 265 : 3 Rang. 18 : A. I. R. 1925 Rang. 122**

Non-Compliance.

——S.342—*Non-compliance—Omission to examine an accused—Irregularity—Effect on trial.*

The omission of the Magistrate to examine the accused at the end of the trial in accordance with the provisions of S. 342, Cr. P. Code, is an irregularity but the irregularity is not an illegality vitiating the whole trial. Unless the irregularity is shown to have prejudiced the accused in any way the conviction will not be set aside. (*Boys, J.*) GANGASHAI *v.* EMPEROR. **L.R. 5 A. 124 (Cr.) : A. I. R. 1924 All. 763.**

——S. 342—*Non-compliance.*

The failure to apply correctly the provisions of S. 342 is an error and not irregularity, and an error which has not in any way prejudiced a person convicted, may be condoned under the provisions of S. 537, if it is not fatal to the validity of the decision, and is concerned with the proceedings rather than the mode of trial. (*Stuart, J.*) BECHU CHAUBE *v.* EMPEROR. **45 All. 124 : 20 A. L. J. 874 : 71 I. C. 115 : L. R. 3 A. 168 (Cr.) : 24 Cr. L. J. 67 : A. I. R. 1923 All. 81 (2).**

——S .342—*Omission to examine accused—Illegality and not irregularity.*

The omission to examine an accused under S. 342 of the Cr. P. Code is an illegality and not merely an irregularity and consequently is not waived by the consent of the accused or his legal representatives. (*Fawcett and Madgavkar, J.*) EMPEROR *v.* GAMADIA. **27 Bom. L. R. 1405.**

——S. 342—*Non-compliance—Examination of accused is essential.*

The omission to examine an accused person in a summons case is an irregularity vitiating the conviction. Per *Macleod, C. J.*—In petty cases the provisions of S. 364 ought not to hamper a Magistrate to the same extent as the provisions of S. 342 which are more mandatory. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* GULABJAN. **23 Bom. L. R. 1203 : 64 I. C. 669 : 23 Cr. L. J. 45 : 46 Bom. 441 : A. I R. 1922 Bom. 290.**

——S. 342—*Non-compliance—Questioning the accused whether he has to add to statements is not compliance with the section.*

The proper method of applying S. 342 is to bring to the attention of the accused specific matters which appear in the evidence against them and merely questioning them generally as to whether they have anything to add to what was said before the Committing Magistrate is not a satisfactory method of applying S. 342. (*Greaves and Panton, JJ*) SHAMLAL SINGH *v.* EMPEROR. **26 Cr. L. J. 572 : 85 I. C. 716 : A. I. R. 1925 Cal 980.**

——S. 342 — *Non-compliance — Accused making statements at earlier stage—No statements after examination of P. Ws. —Trial is vitiated.*

Where accused's statements were taken before many of the P. Ws. were examined but no statements were recorded afterwards. *Held*, that the trial should be held afresh. *Held*, further that the necessity for a strict observation of the provisions of the Cr. P. Code should be impressed on the Magistrates and that where the terms of the Code are perfectly clear there is no excuse for a deliberate disregard of them. (*Cuming and B. B. Ghose, JJ.*) HAMID ALI *v.* SRI KISSEN GOSAIN. **37 C. L. J. 413 : 28 C. W. N. 118 : 75 I. C. 367 : 24 Cr. L. J. 943 : A. I. R. 1925 Cal. 574 (2).**

——S. 342—*Non-compliance—Proceedings under S. 488—Accused examined under—If should be questioned under S. 342.*

Where in proceedings under S. 488, Cr. P. Code, the accused gave evidence on his own behalf, he cannot afterwards object that the trial is vitiated by absence of examination under S. 342. (*Greaves and Panton, JJ*) BACHAI KALWAR *v.* JAMUNA KALWARIM.

CR. P. CODE (V OF 1898), S. 342—Non-Compliance.

25 Cr. L. J. 1091 : 81 I. C. 915 : A. I. R. 1925 Cal. 339.

——S. 342—*Non compliance—Provisions of, mandatory—Acquittal.*

The provisions of S. 342, Cr. P. Code, are mandatory and non-compliance with its terms vitiates a criminal trial. The High Court when it sets aside an order of acquittal on the above ground will not determine whether the accused should be retried. (*Suhrawardy and Graham JJ.*) REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* SATISH CHANDRA ROY.

39 C. L. J. 411 : 51 Cal. 924 : A. I. R 1924 Cal. 975.

——S. 342 — *Non-compliance—Omission to examine accused after examination of prosecution witnesses is fatal to trial.*

The trial Court after recording the examination-in chief of the prosecution witnesses framed charge and on the same date recorded the statements of the accused persons These witnesses were then cross-examined but since then no further statement of the accused persons had been recorded. *Held*, the omission is not an irregularity which can be cured by S. 537 of the Code. (*Cuming and B. B. Ghose, JJ.*) HARO NATH MALO *v.* ALA BUX. 38 C. L. J. 281 : 28 C. W. N. 119 : 76 I. C. 961 : 25 Cr. L. J. 289 : A. I. R. 1924 Cal. 182.

——S. 342 — *Non-compliance — No substantial compliance with—Conviction should be set aside.*

Where there was no substantial compliance with the provisions of S. 342 and out of the sentence of rigorous imprisonment for a period of one month the petitioners had already undergone the sentence for a period of 22 days the conviction was set aside instead of ordering retrial. (*C. C. Ghose and Cuming, JJ.*) SAILENDRA CHANDRA SINGH *v.* The CROWN.

38 C. L. J. 175 : A I. R. 1924 Cal. 153.

——S. 342 — *Non-compliance — Omission to examine accused at the close of prosecution evidence vitiates trial*

In a trial for an attempt to commit murder the Magistrate examined the accused after taking some evidence and then framed a charge against them. After doing so he recalled the witnesses that had already been examined, to enable the accused to cross examine them and then examined the remaining two prosecution witnesses. After taking the evidence of these two witnesses he did not question the accused as he was required to do by S. 342. *Held*, that the omission vitiated the trial, (*Zafar Ali, J.*) MAHOMED SADIQ *v.* EMPEROR, 26 P. L. R. 533 : 26 Cr. L. J. 1370 : A.I.R. 1926 Lah. 51.

——S. 342 (1)—*Non-compliance—Duty of questioning accused is mandatory.*

The word 'shall' in the section makes the duty imposed on the Court, of 'questioning the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence, mandatory. Where the accused was examined after only a part of the prosecution evidence had been recorded and was not examined again after all the witnesses for the prosecution had been examined. *Held*, that the trial was vitiated. (*Scott-Smith, J.*) GHAZA ALI *v.* KING EMPEROR.

6 L. L. J. 618 : A. I. R. 1925 Lah. 288.

——S. 342—*Non-compliance—Omission to examine —Effect.*

The psovisions of S. 342 are mandatory and where an accused is examined at one stage, but thereafter other prosecution witnesses are examined and the accused was not examined again, the procedure is illegal and the trial is vitiated. (*Moti Sagar, J.*) NANAK CHAND *v.* EMPEROR. 25 Cr. L. J. 1020 : 81 I. C. 796 : A.I.R. 1924 Lah. 734.

——S. 342—*Non-compliance.*

The procedure prescribed by the section being binding on the Courts the omission to comply with the provisions of this section is not a mere irregularity such as can be cured under S. 537, Cr. P. Code, but is an illegality vitiating the trial. (*Chevis, J.*) HAJI MAHOMED BAKSH *v.* CROWN. 4 Lah. L. J. 230 : 65 I. C. 618 : 23 Cr. L. J. 154 : A.I.R. 1922 Lah. 455.

——S. 342—*Non-compliance — Trial is not vitiated by absence of further examination of accused after further cross examination after framing charge, of the witnesses.*

The fact that an accused is not further examined under S. 342 of the Crl. Pro. Code, after the witnesses are further cross-examined under S. 257 of the Crl. Pro. Code after the charge is framed at the close of the entire prosecuting evidence does not vitiate a trial. (*Hallifax, A.J.C.*) GANGADHAR *v.* BHANGI SAO.

25 Cr. L. J. 1152 : 81 I. C. 976 : A. I. R. 1925 Nag. 147.

——S. 342—*Non-compliance—Trial is not rendered invalid* ab initio *but must be held again from the point at which the error was made—Crl. Pro. Code, S. 537.*

The entire omission to question an accused generally on the case after the prosecution witnesses have been examined and before the accused enters on his defence renders the trial from that point onwards and not *ab initio* improper or illegal. S. 537 cannot condone the error but the defect must be rectified in a fresh trial commencing from the point at which the error was committed. (*Hallifax, A. J. C.*) GANGADHAR *v.* BHANGI SAO. 25 Cr. L. J. 1152 : 81 I. C. 976 : A. I. R. 1925 Nag. 147.

——S. 342—*Examination after close of prosecution evidence.*

A Magistrate is bound to examine the accused after the examination of all the prosecution witnesses and before he is called on for his defence. Any defect therein can be cured by again questioning the accused and then calling on him to enter on his defence. (*Hallifax, A.J.C.*) WASUDEO *v.* EMPEROR.

26 Cr. L. J. 1425 (1) : 89 I. C. 897 (1) : A. I. R. 1925 Nag 433.

——S. 342 (1)—*Non-compliance—Failure to examine accused—Effect of—Mode of examination.*

S. 342 (1) is mandatory and the omission to question the accused generally on the case as required by the section is not a mere irregularity but it is an illegality which vitiates the whole trial. The examination contemplated is after the prosecution case is closed and if the Magistrate discharges the accused without calling on the defence, the proceedings are not vitiated in any way. A general question as to what the accused has to say is not sufficient. The court must communicate to the accused by appropriate questions everything that is alleged against him and ascertain what explanation or defence in law or in fact he wishes to put forward. (*Kinkhede, A. J. C.*) UDHAO *v.* EMPEROR. 25 Cr. L. J. 417 : 77 I. C. 593 : A. I. R. 1924 Nag. 301.

——S. 342—*Non-compliance—Non-examination of accused after cross-examination after charge vitiates trial though accused is not prejudiced.*

It is obligatory on the Magistrate to question the accused generally on the whole case after the prosecution have closed their case, *i.e.*, when all the prosecution witnesses have been examined in chief, cross examined and re-examined. The

examination of the accused after the charge, and the examination-in-chief of only some of the prosecution witnesses and again after the cross-examination of only some of such witnesses is not a compliance with the mandatory provisions of law and the trial is vitiated by the omission to question the accused generally, after the cross-examination of a recalled witness is finished although the accused may not have been thereby prejudiced on the merits. 50 Cal. 223 and 227. Foll. (*Kinkhede, A. J. C.*) KRISHNAPPA *v.* EMPEROR. **A. I. R. 1924 Nag. 51.**

———S. 342—*Non-compliance—Examination of the accused—Stage for—Examination of prosecution witnesses—Cross-examination after charge.*

The word " examined " in S. 342, Cr. P. Code, includes cross-examination and re-examination. The omission to examine the accused after the cross-examination and re-examination of all the prosecution witnesses vitiates the trial and conviction. The examination of the accused only after the examination in chief of the prosecution witness is not a compliance with S. 342, Cr. P. Code. The examination of a witness means his examination-in-chief, cross-examination and re-examination. The expression " after the witnesses for the prosecution have been examined" used in S. 342, Cr.P. Code, includes any cross-examination of them after the charge has been framed. The obligatory examination of the accused must be made after the witnesses for the prosecution have been cross-examined after the charge. 50 C. 939, Foll: 46 M. 449. Diss. (*Baker, J. C., Prideaux and Kinkhede, A. J. Cs.*) LOCAL GOVERNMENT *v.* MARIA.
20 N. L. R. 174 : A. I. R. 1925 Nag. 44.

———S. 342—*Non-compliance—Whether non-compliance is or is not an illegality vitiating trial without prejudice to accused, no interference by way of revision is necessary where substantial justice is done.*

Whether omission to make further examination of the accused after the charge and after prosecution witnesses have been recalled for cross-examination is or is not an illegality which vitiates the trial, without regard to whether the accused has been prejudiced or not whether substantial justice has been done High Court will refuse to interfere. A. I. R. 1925 Oudh 422 Ref. (*Dalal, J.C.*) KHUMAN SINGH *v.* EMPEROR.
12 O. W. N. 378 : 89 I. C. 462 (1) : 26 Cr. L. J. 1374 : A. I. R. 1925 Oudh 603.

———S. 342—*Non compliance — Merely reading out accused's statement in a cross-case and getting it admitted by him is not compliance with the section.*

Where two cross-cases of riot were tried together and the accused in one had been examined and cross-examined as prosecution witnesses in the other and the Magistrate recorded their examination under S. 342 in this form : —

"My sworn evidence in cross case is correct. I have no more to say."

Held : that the provisions of S. 342 have not been properly complied with and the procedure followed is nothing short of a grave irregularity. (*Simpson, A. J. C.*) NAGESHAR PRASAD *v.* EMPEROR.
73 I. C. 693 : 24 Cr. L. J. 661 : A.I.R. 1924 Oudh 111.

———S. 342—*Failure to comply with—Effect.*

The provisions of S. 342 are mandatory and where they are not observed, the trial is vitiated. (*Adami, J.*) RAMCHARAN SINGH *v.* EMPEROR.
89 I. C. 153 (1) : 26 Cr. L. J 1289 (1).

———S. 342—*Non-compliance—Omission to examine accused at close of prosecution evidence vitiates trial—Object of examination is for the accused's benefit.*

The examination of the accused at the close of the evidence for the prosecution in the manner required by S. 342 is imperative, and the omission to examine vitiates the trial. 5 P.L.J. 430 and 1923 Cal. 470. Ref. The first portion of S. 342 is an enabling provision. It entitles the Court "at any stage of any enquiry or trial" to put such questions to him (the accused) as the Court considers necessary. "The second portion of the section which provides for questioning the accused" generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence, is imperative: it casts a duty upon the Court to question the accused generally on the case after the witnesses for the prosecution have been examined, that is, the whole case against the accused has been disclosed. The object of the examination is to enable the accused to explain any circumstances appearing in the evidence againt him. (*Jwala Prasad, J.*) RAMESHAR SINGH *v.* EMPEROR.
6 P. L. T. 493 : 26 Cr. L. J. 927 : 86 I. C. 991 : A. I. R. 1925 P. 723.

———S. 342—*Non-compliance—No prejudice to accused—Trial is not vitiated—Principles elaborately discussed.*

Principle requires that the accused shall not be convicted without being given an opportunity of explaining the allegations against him. Experience shows that judicial questioning must not become inquisitorial. If these essentials are secured, the trial cannot be impeached. The trial is not vitiated from any deviation from the section unless the accused has been prejudiced in his defence. (Principles discussed historically and elaborately.) (*Mullick and Bucknill, JJ.*) SAIYID MOHIUDDIN *v.* EMPEROR. **4 Pat. 488 : 6 P.L.T. 154 : (1925) P.H.C.C. 112 : 86 I. C. 459 : 3 Pat. L. R. 110 (Cr.) : 26 Cr. L. J. 811 : A. I. R. 1925 P. 414.**

———S. 342—*Non-compliance—Trial illegal — Revision lies—Accused need not be prejudiced.*

Where the examination of the accused persons has not been made in compliance with the provisions of S. 342, it amounts to an illegality. It is immaterial whether the accused persons were or were not prejudiced by the non-compliance with the provisions of S. 342. The High Court will in such cases interfere in revision. (*Kulwant Sahay, J.*) DURGA RAM *v.* EMPEROR. **6 P. L. T. 33 : 86 I. C. 156 : 26 Cr. L. J. 716 : A. I. R. 1925 P. 342.**

———S. 342—*Non-compliance — Examination of accused after framing of charge—Mode of examination.*

An examination of the accused before the charge is framed is under the first part of S. 342, Cr. P. Code and is optional to the Court. But after the witnesses for the prosecution have all been examined and cross-examined and before the accused is called on for his defence it is compulsory for the court to question the accused in such a way as to enable him to explain any circumstances which appear in the evidence against him. The mere asking the accused as to whether they had anything further to say is not a sufficient compliance with the second part of S. 342. Cr. P. Code. The question must be framed in such a way as to enable the accused to know what he is to explain, as to what are the circumstances which are against him and for which an explanation is needed. A general question as to whether they had anything further to say is not a sufficient compliance with the requirements of the law. 5 Pat. L. J. 430: 6 Pat. L.J. 147 Ref. (*Kulwant Sahay, J.*) BOHKARI SINGH *v.* EMPEROR. **(1924) P. H. C. C. 198 : 5 Pat. L. T. 445 : 25 Cr. L. J. 711 : 81 I. C. 199 :**

CR. P. CODE (V OF 1898), S. 342—Non-compliance.

A. I. R. 1924 P. 791 (2).

——— S. 342—*Non-compliance.*

If the accused are not examined under S. 342 at the trial, the proceedings are vitiated. (*Ross, J.*) BAIJNATH SAHAY *v.* EMPEROR. **4 Pat. L. T. 231 : 1 Pat. L. R. (Cr.) 34 : 1923 P. H. C. C. 96 : 72 I. C. 71 (1) : 24 Cr. L. J. 311 : A. I. R. 1923 P. 292.**

——— S. 342—*Non-compliance—Failure to examine accused after prosecution evidence—Effect of.*

Non-compliance with the provisions of S. 342 Cr. P. Code *i.e.* not examining the accused after the close of the prosecution evidence, but simply filing their written statement does not entitle them to an interference in revision, if they have not been prejudiced in the trial and there has been no miscarriage of justice. (*Coutts and Macpherson, JJ.*) MIR TILAWAN *v.* EMPEROR. **1 P. 31 : 4 P. L. T. 60 : 69 I. C. 383 : 23 Cr. L. J. 703 : 1 Pat. L. R. (Cr.) 35 : A. I. R. 1922 P. 388.**

——— S. 342—*Non-compliance.*

A trial is vitiated if the accused were not examined as required by S. 342, Cr. P. Code. (*Ross, J.*) RAM NANDAN SINGH *v.* EMPEROR. **A. I. R. 1922 P. 212.**

——— S. 342—*Non-compliance — Effect—Written statement filed—Effect.*

The filing of a written statement by the accused does not relieve the Court of its imperative duty to examine the accused under S. 342 of the Code. (*Jwala Prasad, J.*) MOINUDDIN *v.* EMPEROR. **61 I. C. 794 : 22 Cr. L. J. 442 : 2 Pat L. T. 455.**

——— Ss. 342 and 364—*Non-compliance.*

A failure to comply with the provisions of Ss. 342 and 364 of the Code would vitiate the trial. (*Miller, C. J. and Adami, J.*) FATU SANTAL *v.* EMPEROR. **2 Pat. L. T. 288 : 61 I. C 705 : 22 Cr. L. J. 417 : 6 P. L. J. 147.**

——— S. 342—*Non-compliance is not necessarily fatal.*

Where the accused was once examined after the prosecution evidence was over. *Held* : that the omission to examine the accused after further cross-examination of the prosecution witnesses is nothing more than an error, omission or irregularity within the meaning of S. 537, 1923 Mad. 609 (F. B.) Foll. 25 Mad 61 (P. C.) Expl. and 1923 All. 81 Ref. (*Brown, J.*) NGA HTA U. *v.* EMPEROR. **3 Rang. 139 : 89 I. C. 312 : 26 Cr. L. J. 1336 : A. I. R. 1925 Rang. 258.**

——— S. 342—*Non-compliance— Magistrate must note every material point and ask accused about it.*

Where the only question asked by the Magistrate to the accused was "what have you to say regarding the statement of the complainant's witnesses". *Held*, this was not a sufficient compliance with the requirement of the law. The object of the section is to enable the accused to explain each and every circumstance appearing in evidence against him. A Judge or a Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point ; otherwise it is impossible for the accused to know what is in the Court's mind. (*May Oung, J.*) MG. HAMAN *v.* EMPEROR. **1 R. 689 : 2 Bur. L. J. 238 : A. I. R. 1924 Rang. 172 (2.)**

Oath or affirmation.

——— S. 342 (2)—*Oath or affirmation — False affidavit to support transfer application by accused—No protection exists.*

The only provision of the law, which confers immunity upon an accused person from criminal liability for making a false statement, is that contained in sub-S. (2) of S. 342, Cr. P. Code. But the protection afforded by that sub-section is expressly confined to the statement made by an accused in answer to questions put to him to explain any circumstances appearing in the evindence against him. These questions can be put only at some stage of an inquiry or trial in the original Court and it is only the answers to such questions for which the privilege can be claimed. Neither in the language of the section nor on principle is there any valid reason for extending the immunity to a statement made otherwise than in an answer to questions put by the trial Court. There is no law which confers upon an accused person immunity from prosecution in respect of a false statement in an affidavit tendered by him in support of his application for transfer; such statement can be the subject-matter of a charge for perjury. (1906) 28 All. 331 and (1897) 19 All. 200 Diss. from (1922) 3 Lah, 46 Foll. (*Shadi Lal, C. J.*) EMPEROR *v.* PIR QADIR BAKHSH SHAH. **6 Lah. 34 : 26 Punj. L. R. 158 : A. I. R. 1925 Lah. 312.**

——— S. 342—*Oath—Accused person— Need not speak truth.*

An accused person is not bound to speak the truth and he cannot be pinned down to any statement that he may have made. (*Broadway and Campbell, JJ.*) KAKAR SINGH *v.* EMPEROR. **6 L. L. J. 575 ; 25 Cr. L, J. 1005 : 81 I. C. 717 : A. I.R. 1924 Lah. 733.**

——— Ss. 342 (4) and 526—*Oath or affirmation—Application for transfer—Affidavit in support, can be filed by accused.*

The provision in section 342 (4) that no oath shall be administered to the accused has reference only to the statement made by him in answer to questions put by the Court in accordance with sub-section (1) of that section. It does not preclude him from making an affidavit in support of an application for transfer under section 526 and there is no bar to his being prosecuted under S. 193, I.P.C. for making false statements (*Martineau, J.*) GULAM MD. *v.* EMPEROR. **3 Lah. 46 : 23 Cr. L. J. 399 : 67 I. C. 351 : 4 U. P. L. R. (Lah.) 71 : A. I. R. 1922 Lah. 113.**

——— S. 342 (4)—*Oath—Oath can be administered to either party to proceedings unner S. 145, Cr. P. Code.*

None of the parties litigating under S. 145 can be called an accused person and so the provisions of S. 343 (4), that no oath shall be administered to an accused person, do not prevent the examination of the parties to a litigation under S. 145 Cr. P. C. on oath. (*Dalal, J. C.*) CHOUDHURI MAHOMMAD AYUB *v.* CHAUDHARY SURFRAJ AHMAD. **26 Cr. L. J. 70 : 83 I. C. 630 : A. I. R. 1925 Oudh 286.**

Object of

——— S. 342—*Object of—Object is to give accused opportunity of explaining his defence if any.*

What is necessary under S. 342 is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips. Where five accused were tried and to all the accused the same question was put "What is your defence," two of them replied, "I am innocent. I will file a written statement," and the other two replied "I am innocent." *Held*: that that was sufficient compliance with S. 342, A I. R. 1923 Cal. 470 Rel. on. (*Newbould and Chakrawarti, JJ.*) REJ MAHOMED *v.* EMPEROR.

CR. P. CODE (V OF 1898), S. 342—Object of.

26 Cr. L. J. 1510 : A. I. R. 1926 Cal. 424.

——S. 342—*Object of—Accused should explain suspicious circumstances in his own interest.*

Per *Mookerjee, J.*—Though the proof of the case against the prisoner must depend for its support, not upon the absence of explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt given by the Crown, yet if he is involved by such evidence in a state of considerable suspicion, he is called upon, for his own sake and for his own safety, to state and elucidate the circumstance, whatever they may be, which might reconcile such suspicious appearances with perfect innocence. (*Mookerjee, Richardson, C. C., Ghose, Cuming and Page, JJ.*) EMPEROR *v.* BARENDRA KUMAR GHOSE.

28 C. W. N. 170 ; 38 C. L. J. 411 : 81 I. C. 353 : 25 Cr. L. J.817: A. I. R. 1924 Cal. 257 (F. B.).

——S. 342—*Object of—Examination of accused—Provisions of the Code mandatory—Illegality—Irregularity*

The object of the examination referred to in S. 342, Cr.P. Code is to enable the accused to explain any circumstances appearing in the evidence against him. The provisions of the section are mandatory and the Court is bound to question the accused generally on the case, after the prosecution case is completed and before the accused person is called on for his defence. Non-compliance with S. 342 renders the trial illegal. (*Sanderson, C. J. and Chotzner, J.*) MAZAHAR ALI *v.* EMPEROR. **50 C. 223 : 71 I, C. 662 : 24 Cr. L. J. 198 : 36 C. L. J. 417 : 27 C. W. N. 99 : A. I. R. 1923 Cal. 196.**

——Ss. 342 and 164—*Object of.*

S. 342 of the Cr. P. Code no doubt allows the Court at any stage of any enquiry or trial, to put such questions to the accused as the Court considers necessary but the object of putting such questions is, as laid down in the section, "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." (*Scott-Smith and Fforde, JJ.*) BARHALI *v.* EMPEROR. **A. I. R. (1923) Lah. 539.**

——S. 342—*Object of.*

A Court cannot use S. 342 for cross-examining the accused, nor can it put questions with the object of trapping the accused after he has resiled from his confession. (*Chevis, C. J. and Scott-Smith, J.*) UMAR DIN *v.* EMPEROR, **3 Lah. L. J. 287 : 67 I. C. 340 : 23 Cr. L. J. 388 : 2 Lah. 129.**

——S. 342—*Object of—Failure to examine accused after prosecution case—Effect.*

Whether or not an examination of the accused at the stage they now contend for will be of any particular service to them or the administration of justice the examination must be allowed. (*Oldfield and Ramesam, JJ.*) *In re* MARUDA MUTHU VANNIAN.

45 M. 820 : 16 L. W. 420 : (1922) M. W. N. 601 : 71 I. C. 252 ; 24 Cr. L. J. 124 : A.I.R. 1922 Mad. 512 : 43 M. L. J. 402.

——S. 342—*Object of—Examination must not be like cross-examination of adverse witness by counsel—Object of section is to enable accused in his own interest to explain circumstances in evidence against him.*

The object of S. 342 is to enable the accused in his own interest to give an explanation of the circumstances appearing in the evidence against him. It is not competent for the Court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution. Any examination of an inquisitorial nature is both improper and illegal. The examination of an accused cannot and must not, be conducted in the manner of cross-examination of adverse witness by a

CR. P. CODE(V OF 1898), S. 342—Power of Court.

counsel. It is also not permissible for the Magistrate to examine the accused as to what certain absent defence witnesses would be likely to state and the like 7 C. W. N. 345 Ref. (*Findlay, O. J. C.*) MAHADEO SINGH *v* EMPEROR. **8 N. L. J. 190 ; A. I. R. 1925 Nag. 403.**

——S. 342—*Object of—General questions not sufficient.*

The object of S. 342 is to enable the accused to explain each and every circumstance appearing against him. A Judge or Magistrate should note every point which he thinks is against the accused and then question him on each. To put a general question as to what he has to say is not a sufficient compliance with the section. (*May Oung, J.*) MG. HMAN *v.* EMPEROR. **1 R. 689 : 2 Bur. L. J. 238 : 77 I. C. 887 : 25 Cr. L. J. 487 : A. I. R. 1924 Rang. 172 (2).**

——S. 342—*Principle underlying the section.*

The vital principle underlying S. 342 of the Cr. P, Code is that the accused is only examined in order to enable him to explain any circumstances appearing against him. The underlying purpose of the examination of an accused is to enable him in his own interest to give an explanation of the circumstances appearing in the evidence against him. It is not competent for the court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution. It has again and again been pointed out that an examination of an accused under this section cannot and must not be conducted in the manner of cross examination of adverse witness by a counsel. (*Findlay, O. J. C.*) MAHADEOSINGH *v.* EMPEROR. **8 N. L. J. 190 · A. I. R. 1925 Nag. 403.**

——S. 342—*Object of—Magistrate should not cross-examine accused—The object of the examination is to enable the accused to explain the adverse facts against him and not to show that he is guilty.*

Examination under section 342 is intended to enable the accused to explain the circumstances appearing in the evidence against him and is not intended to supplement prosecution case and to show that the accused is guilty nor to drive him to make self-incriminating statements. The Judge is therefore not entitled to put embarassing questions to draw admissions from accused.(*Kennedy, J. C. and Raymond, A. J. C.*) TOPANDAS *v.* KING EMPEROR. **25 Cr. L. J. 761 : 81 I. C. 249 : A. I. R. 1925 Sind 116.**

Power of Court.

——Ss. 342 and 164—*Powers of Court—Scope.*

S. 342 of the Cr. P. Code no doubt allows the court at any stage of any enquiry or trial, to put such questions to the accused as the court considers necessary but the object of putting such questions is,as laid down in the section, " for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. " (*Scott-Smith and Fforde, JJ.*) BARHATI *v.* EMPEROR. **A. I. R. 1923 Lah. 539.**

——S.342—*Power of Court—Statement of accused under—Admission of certain facts—Effect.*

No evidence was given by prosecution to prove that the petitioner made or published the imputation complained of, but the Courts below held the publication proved because the petitioner when examined admitted the publication. *Held*, the prosecution must make out its case by evidence and a gap in the evidence cannot be filled up by any statement made by the accused in his examination under S. 342 of the Cr. P. Code. 17 Mad. 238, Foll.

The Magistrate is not entitled under S. 342 to put questions to the accused ; if the prosecution had not let

in evidence implicating him in the offence with which he is charged, answers to questions put by a committing Magistrate in contravention of that section are not admissible in evidence against the accused at the trial (*Martineau, J.*) DEVI DIAL *v.* EMPEROR.
4 Lah. 55 : 73 I. C. 805 (2) : 2 P. W. R. 1923 (Cr.) : 24 Cr. L. J. 693 (2) : A. I. R. 1923 Lah. 225.

——S. 342—*Power of Court—Court cannot examine accused.*

A Court cannot use S. 342 for cross-examining the accused, nor can it put questions with the object of trapping the accused after he has resiled from his confession. (*Chevis and Scott-Smith, JJ.*) UMAR DIN *v.* EMPEROR. **2 Lah. 129 : 67 I. C. 340 : 23 Cr. L J. 388 : 3 Lah. L. J. 287.**

——S. 342—*Power of Court—Co-accused can make a concerted statement—Accused exchanging remarks during examination of one of them by Magistrate do not commit offence under Penal Code, S. 228.*

Two co-accused on trial for the same crime are not debarred from giving a concerted statement in their examination. Where there were two accused and where, when the Magistrate was examining the first accused, he found that the two accused were exchanging remarks. *Held*, that the course that the accused attempted to follow was not an illegal or improper one and that the Magistrate was not entitled to remove the second accused from the Court and examine the first accused in his absence. *Held*, also that for a conviction under Penal Code, S. 228, there should be an intentional interruption to the Court and the action of the accused in the Magistrate's Court in the present case did not reasonably suggest such intention and would appear undoubtedly to have been adopted in good faith in their own interests: 10 C. W N. 1062, Ref. (*Findlay, O. J. C.*) MAHADEO SINGH *v.* EMPEROR. **8 N. L. J. 190 : A.I.R. 1925 Nag. 403.**

——S. 342—*Power of Court—Finger impressions of accused—If prohibited*

A Magistrate can under S. 342 ask an accused to make finger impression in court. (*Young, O. C. J. Heald and May Oung, JJ.*) EMPEROR *v.* NGA TUN HLAING. **2 Bur. L. J. 270 : 1 Rang 759 : A. I. R. 1924 Rang. 115 (F.B.).**

Procedure.

——S. 342—*Procedure—Examination of accused—Form of—Compliance with the section.*

Under S. 342, Cr. P. Code, it is incumbent on the court to ask the accused generally whether he wishes to offer an explanation of any of the evidence which has been given against him and if the Court does so, that would be a sufficient compliance with the section. But the section also gives the court power to put specific questions to the accused with regard to any of the evidence adduced for the prosecution. Without S. 342 the Courts would have no such power. But it is left entirely to the discretion of the Magistrates as judges whether they should, after having put the general question, ask specific question on particular point in the evidence. (*Macleod, C.J. and Crump, J.*) EMPEROR *v.* NARAYAN SAYANNA KAMATHI.
26 Bom. L. R. 109 : 25 Cr. L. J. 1127 (2) : 81 I. C. 951 (2) : A. I. R. 1924 Bom. 334.

——S. 342—*Procedure.*

Per *Rankin, J.*—What is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips. A discussion with Counsel about the number and nature of the witnesses is not what the section requires. It is also important to have regard to the time at which this examination took place. In the decided cases it has been pointed out that to ask an accused for his defence before he has the whole of the prosecution evidence in front of him, is not a compliance with the section. To ask the accused not at the beginning of his defence but later on when his statements may be subject to heavy discount owing to the evidence given in his hearing by his own witnesses in the meantime, is not to be assumed to be a substantial compliance with the requirements of the section. (*Newbould, Suhrawardy and Rankin, JJ.*) PROMOTHA NATH *v.* EMPEROR.
50 Cal. 518 : 27 C. W. N. 389 : 71 I. C. 792 (2) : 24 Cr. L. J. 248 (2) : A. I. R. 1923 Cal. 470.

——S. 342—*Procedure—Re-examining the accused after recall of prosecution witnesses not obligatory.*

S. 342 does not make it legally incumbent on the Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses, after the framing of the charge when they are re-called by the Magistrate under S. 256, Cr. P. Code. It may be highly desirable that he should so question the accused, if the evidence contains a new matter of importance. (*Ayling and Odgers, JJ.*) THACAROTH HYDROSS, *In re.* **18 L. W. 113 : 1923 M. W. N. 860 : 75 I. C. 695 : 25 Cr. L. J. 7 : A. I. R. 1923 Mad. 694 : 45 M. L. J. 279.**

——S. 342 (1)—*Procedure—Magistrate not complying with S. 342 (1)—He should again question the accused and again ask him to enter on his defence.*

If a Magistrate fails to examine an accused after the witnesses for the prosecution have been examined, and before he is called on for his defence, he can set the matter right by again questioning the accused and then again calling on him to enter on his defence. (*Hallifox, A. J. C.*) WASUDEO *v.* EMPEROR. **26 Cr. L. J. 1425 : 89 I. C. 897 : A. I. R. 1925 Nag. 433.**

——S. 342—*Procedure—Cross-examination of recalled prosecution witnesses must be allowed where summons case has been treated as warrant case.*

The accused must be held to be prejudiced in their defence on account of the Court's wrong procedure and must be enabled by means of a further opportunity to cross-examine the prosecution witness in a case where the Court commits a mistake and treats a summons case as a warrant case and frames a charge against the accused who intimate their wish to further cross-examine prosecution witnesses and produce defence and where, when the witnesses are recalled, the Court cancels the charge and declines to allow cross-examination and delivers judgment against the accused. (*Pullan, A. J. C.*) RAM RATAN *v.* RAM SAGAR. **25 Cr. L. J. 1271 : 82 I. C. 279 : A. I. R. 1925 Oudh 200 (1).**

——S. 342—*Procedure—Detailed examination of accused is not essential in every case.*

What must be the nature of the questions put by the Court depends upon the circumstances of each case; but it would be a sufficient compliance with the provision of the Code if the Court gives to the accused an opportunity by questioning him generally on the case to explain the circumstances appearing in the case against him. It is neither necessary nor desirable to examine the accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined. But it is impossible to lay down any hard and fast rule as to the nature of the exam

CR. P. CODE (V OF 1898), S. 342—Procedure.

nation of an accused under S. 342 of the Code, 1925 Patna 342 ; 1925 Patna 389, 29 Cal. W. N. 231 Ref. (*Jwala Prasad, J.*) MAHOMED NASIRUDDIN *v.* EMPEROR. **4 Pat. 459 : 6 P. L. T. 588 : 26 Cr. L. J 954: 87 I. C. 106 : A. I. R. 1925 Pat. 713.**

——S. 342—*Procedure- Putting general question is enough.*

Where after the prosecution evidence was over the Court asked the accused " Have you any statement to make" ? and the accused replied in the nagative, *Held* : in the circumstances of the case, the provisions of the section were complied with. (*Foster, J.*) BANAMALI KUMAR *v.* EMPEROR. **6 P. L. T. 39 : 3 Pat. L. R. Cr. 25 : 86 I. C. 58 : 26 Cr. L. J. 682 : A. I. R. 1925 Pat. 389 (1).**

——S. 342—*Procedure — Circumstances against accused—Court must ask specific questions—General questioning is not enough.*

Under S. 342 in order to enable the accused to know what are the circumstances appearing in the evidence against him and what the Court considers to be such circumstances, it is necessary for the Court to put those circumstances directly to the accused and to ask him to explain those circumstances if he can. It is not always possible for the accused to know as to what are the circumstances which to the Court may appear to be against him ; and it is possible that the Court may consider one circumstance appearing from the evidence as being against the accused while the accused may not consider that circumstance to be against him. The object of S. 342, Cr. P. Code is to enable the accused to know what in the opinion of the Court are the circumstances which from the evidence appear to be against him. To merely question the accused after the cross-examination of the prosecution witnesses whether they had anything to say then, is not a sufficient compliance with the provisions of the law. A. I. R. 1924 Patna 791 Foll. (*Kulwant Sahay, J.*) DURGA RAM *v.* EMPEROR. **6 P. L. T. 33 : 86 I. C. 156 : 26 Cr. L. J. 716 : A. I. R. 1925 Pat. 342.**

——S. 342—*Procedure—Examination of accused —Sufficiency of—Revision.*

It is not open in revision to the High Court to enquire into the sufficiency of the examination made under S. 342, Cr. P. Code. Where the accused is defended by a legal practitioner an elaborate examination is unnecessary. Where an accused is undefended, the tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation ; but where an accused is defended by a legal practitioner, it would not be desirable to contemplate a tribunal entering upon a lengthy examination of an accused person which might easily develop into a recounting of the history of the whole case or into, what would be far worse, some sort of cross-examination. (*Bucknill, J.*) PANCHU CHOUDHURY *v.* EMPEROR. **66 I. C. 73 : 3 P. L. T. 649 : 23 Cr. L. J. 233 ; A. I. R. 1923 Pat. 91.**

——S. 342—*Procedure.*

Where an accused is undefended the Tribunal may point out to him the elements of the evidence adduced against him which seem in his own interest to demand his explanation but where an accused is defended by a legal practitioner a Tribunal ought not to enter upon a lengthy examination of an accused person. (*Bucknill, J.*) PANCHU CHOWDHRY *v.* EMPEROR. **3 Pat. L. T. 649 : 23 Cr. L. J. 233 : 66 I. C. 73 : A. I. R. 1923 Pat. 91.**

——Ss. 342 and 537—*Procedure accused has right to be examined after further cross-examination of the prosecution witnesses—Omission to so examine cannot be cured by S. 537 but vitiates the conviction.*

CR. P. CODE (V OF 1898), S. 342—Summons Case.

An accused person has a right to be examined and to state his case after the further cross-examination of prosecution witnesses, even though he has already been examined before the charge was framed and he was called on for his defence. That right is fundamental and the omission to so examine him cannot be regarded as a mere error or irregularity, which can be cured by S. 537, Cr. P. Code, but vitiates the conviction. A. I. R. 1923 Cal. 164 ; 1924 Cal. 975 and 1922 Mad. 512, Foll. (*Godfrey, J.*) AH. KAUNG *v.* EMPEROR. **4 Bur. L. J. 143 : A. I. R. 1925 Rang. 363.**

——S. 342—*Procedure—Taking prosecution evidence after framing charge and examining accused is illegal.*

After the charges had been framed and the accused examined, the Magistrate recalled the Police witnesses to prove the statement alleged to have been made by one of the accused.

Held : that the course was illegal. (*Baguley, J.*) BAWA RAWTHAR *v.* KING EMPEROR. **3 Bur. L. J. 245 : 26 Cr. L. J. 321 : 84 I. C. 545 : A. I. R. 1925 Rang. 101.**

—— S. 342—*Procedure examination by the Sessions Court or by the committing Magistrates.*

In a case exclusively triable by a Sessions Court it is this Court that tries the accused and calls upon the accused for his defence and it should strictly conform to the provisions of the section. At the same time it is highly desirable that committing Magistrates should adhere to the provisions of the section and examine the accused after the prosecution case has been concluded. A. I. R. 1922 Patna 299 Diss. from. (*Raymond and Aston, A. J. Cs.*) DINU *v.* EMPEROR. **26 Cr. L. J. 191 : 83 I. C. 895 : 16 S. L. R. 201.**

Summons Case.

——S. 342—*Summons Case—Examination of accused.*

The omission to examine an accused person in a summons case is an irregularity vitiating the conviction.

Per *Macleod, C. J.*—In petty cases the provisions of S. 364 ought not to hamper a Magistrate to the same extent as the provisions of S. 342 which are more mandatory. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* GULABJAN. **23 Bom. L. R. 1203 : 64 I. C. 669 : 23 Cr. L. J. 45 : 46 Bom. 441 : A. I. R. 1922 Bom. 290.**

——S. 342—*Summons case.*

The question whether the Court is bound to examine the accused in a summons case was raised but not decided. (*Macleod, C. J and Shah, J.*) EMPEROR *v.* RUSTOMJI. **64 I. C. 501 : 23 Cr. L. J. 21 : 23 Bom. L. R. 984.**

——S. 342—*Summons case.*

Even in a summons case a Magistrate is bound to examine the accused before convicting him. (*Shah and Crump, JJ.*) EMPEROR *v.* FERNANDEZ. **45 Bom. 672 : 59 I. C. 129 : 22 Cr. L. J. 17 : 22 Bom. L. R. 1040.**

——S. 342—*Summons case—Examination of accused—Stage at which examination could be held.*

A Magistrate is bound to examine the accused under S. 342, Cr. P. Code, after all the prosecution witnesses have been examined and cross-examined. Where therefore in a summons case the Magistrate examined the accused after the examina-

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tion-in-chief of some of the prosecution witnesses but did not examine him again after another witness for the prosecution had been examined after the cross-examination of the previous witnesses, *held*, that there was no compliance with the provisions of S. 342 of Cr. P. Code and that the conviction was therefore illegal. (*Sanderson, C. J. and Panton, J.*) GULZARI LAL *v.* EMPEROR. **49 Cal. 1075 : 39 C. L. J. 31 : A. I. R. 1923 Cal. 164 : 71 I. C. 51 : 24 Cr. L. J. 3.**

——— —Ss. 342 and 537—*Summons case—Examination of accused—Omission to comply with formalities prescribed—Illegality.*

The procedure prescribed by S. 342, Cr. P. Code is binding on the courts and the omission to comply with its provisions is not a mere irregularity such as can be cured by S. 537, Cr. P. Code. 1 P. R. 1918 Cr. 45 B. 672 Foll. (*Chevis, J.*) MAHOMED BAKSH *v.* EMPEROR. **65 I. C. 618 : 23 Cr. L. J. 154 : 4 Lah. L. J. 230 : A. I. R. 1922 Lah. 45.**

———S. 342—*Summons case—Section does not apply to summons cases.*

S. 342 has no application to summons cases although in summons cases there is no objection to a Magistrate questioning the accused generally for the purpose of enabling him to explain the circumstances appearing in the evidence against him and in complicated cases especially where the accused is not represented by Counsel it is a desirable course notwithstanding that it is not obligatory. Recent cases of the other High Courts reviewed and dissented from. (*Schwabe, C.J., Oldfield, Ramesam, Devadoss, and Coleridge, JJ.*) PONNUSWAMI *v.* RAMASAMI. **46 Mad. 758 : 18 L.W. 478 : 24 Cr. L. J. 833 : 1923 M. W. N. 519 : 74 I. C. 945 : A. I. R. 1924 Mad. 15 (F.B.) : 45 M. L. J. 224.**

———S. 342—*Summons case—Accused not examined at the close of case of prosecution—Prejudice caused—Retrial was ordered.*

Where the accused in a summons case was prejudiced by the failure of the Magistrate to examine him at the close of the prosecution case the trial was set aside and a fresh trial ordered. (*Dalal, J. C.*) EMPEROR *v.* SHEOPAL. **26 Cr. L. J. 655 : 85 I. C. 943 : A. I. R. 1925 Oudh 491.**

———S. 342—*Summons cases.*

S. 342 of the Code applies to summons cases ; the provisions thereof are mandatory and omission to examine the accused after the witnesses for the prosecution have been examined and before the accused is called on for his defence, vitiates the trial. (*Adami and Bucknill, JJ.*) GULAM RASUL *v.* EMPEROR. **6 P. L. J. 174 : 61 I. C. 715 : 22 Cr. L. J. 427 : 2 Pat. L. T. 390.**

Time of Examination.

——— —S. 342—*Time of Examination—Accused is to be examined after all evidence against him is over.*

The Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him. That must mean the whole of the evidence against him, and any examination under S. 342, before that evidence is closed cannot possibly fulfil the conditions of the section. The stage in the trial prescribed by S. 342, when accused had to be questioned generally on the case for the prosecution, is after the prosecution evidence is complete and before he is called upon to enter on his defence. (*Macleod, C.J. and Crump, J.*) EMPEROR *v* NATHU KASTURCHAND MARWADI. **27 B. L. R. 105 : A. I. R. 1925 Bom. 170.**

———S. 342—*Time of Examination—Accused must be examined after close of prosecution case and before defence begins.*

CR. P. CODE (V OF 1898), S. 342—Time of Examination.

The examination of the accused must take place at the close of the prosecution case and before the accused have entered on their defence, and it is no compliance with the section if the examination takes place at a later stage. (*Greaves and Duval, JJ.*) SURENDRA LAL SHAHA *v.* ISAMMADDI. **51 Cal. 933 : 84 I. C. 325 : 26 Cr. L. J. 261 : A. I. R. 1925 Cal. 480 (1).**

———S. 342—*Time of examination—Examination of witnesses includes cross-examination as well as re-examination.*

The accused was standing his trial in a warrant case on a charge under S. 500 of the Indian Penal Code. After the prosecution witnesses had been examined-in-chief the accused was questioned generally on the case by the Magistrate. Thereafter cross-examination of the prosecution witnesses took place but the accused was not again examined generally.

Held, that the word "examine" in S. 342 is to be taken in the ordinary English sense in which it covers all kinds of examination including cross-examination and re-examination and that the accused should have been examined again. (*Rankin, J. on a difference of opinion between Buckland and Cuming, JJ.*) DIBAKANTACHATTERJEE *v.* GOUR GOPAL MUKHERJEE. **27 C. W. N. 743 : 50 Cal. 939 : 75 I. C. 715 : 25 Cr. L. J. 27 : A.I.R. 1923 Cal. 727.**

———S. 342—*Time of exmination of accused after examination-in-chief of the prosecution witnesses is not sufficient.*

Examination of accused only after examination-in-chief of the prosecution witnesses is not sufficient: he must be examined after their cross and re-examination. 27 C. W. N. 28, Foll. (*Newbould and Suhrawardy, JJ.*) JUMMON *v.* EMPEROR. **50 Cal. 308: A. I. R. 1923 Cal. 668.**

———S. 342 (1)—*Time of examination.*

The object of the examination referred to in the section is to enable the accused to explain any circumstances appearing in the evidence against him and it is clearly indicated in the last part of the section that the time, at which the Court shall question the accused generally on the case is after the prosecution case is completed and before the accused person is called on for his defence. Therefore the examination of the accused before all the prosecution witnesses have been examined is bad in law. (*Sanderson, C. J. and Chotzner, J.*) MOZAHUR ALI *v.* EMPEROR. **50 Cal. 223: 36 C. L. J. 417: 27 C.W.N. 99: 71 I. C. 662: 24 Cr. L. J 198: A. I. R. 1923 Cal. 196.**

———S. 342—*Time of examination—Omission to examine after whole evidence vitiates trial.*

A Magistrate is bound to examine the accused under S. 342 after all the prosecution witnesses have been examined and cross-examined. The omission to do so vitiates the conviction. (*Sanderson, C. J. and Panton, J.*) GULZARI LAL *v.* EMPEROR. **49 Cal. 1075: 71 I. C. 51: 24 Cr. L. J. 3: 39 C. L. J. 31: A. I. R. 1923 Cal. 164.**

———S. 342—*Time of examination—Provisions if mandatory.*

The "examination" in S. 342, Cr. P. Code means examination, cross-examination and re-examination of the witnesses of the prosecution and where the accused was not questioned thereafter by the Magistrate, the conviction is illegal and must be set aside. 45 B. 672 ; 25 C. W. N. 609 Foll. (*Walmsley and Pearson, JJ.*) KASHI PRAMANIK *v.* DAMU PRAMANIK. **27 C. W. N. 28: 77 I. C. 988: 25 Cr. L. J. 524.**

———S. 342—*Time of Examination—Accused can-*

CR. P. CODE (V OF 1898), S. 342—Time of examination.

not be examined under S. 342 before taking prosecution evidence.

Where the accused is examined by the Court before any evidence for the prosecution has been taken, his examination cannot be said to be under S. 342. (*Scott-Smith and Fforde, JJ.*) BAHAWALA *v.* CROWN.

6 Lah. 183: 88 I. C. 854: 26 Punj. L. R. 331: 26 Cr. L. J. 1258: A. I. R. 1925 Lah. 432.

——**S. 342**—*Time of examination--Fresh examination of accused after examination of—Prosecution witnesses recalled by accused is not necessary.*

The accused was questioned very fully and very fairly by the learned Magistrate after all the witnesses for the prosecution had been examined and cross-examined at considerable length before the charge was framed. After the charge was framed most of the witnesses were recalled for a further lengthy cross-examination at the termination of which the Magistrate proceeded to record the defence evidence without questioning the accused again. *Held*, that S. 256 is the section under which the accused is enabled to recall the prosecution witnesses for further cross-examination after the charge has been framed, and while making it clear that the accused does not enter upon his defence until the termination of such cross-examination, that section says nothing about any second examination of the accused after the further cross-examination. It is often desirable that the accused should be asked at this stage whether he wishes the Court to record any additional explanation, but S. 312 cannot be interpreted as conveying a peremptory direction to that effect, if the Court has already questioned him before the charge when the case for the prosecution has been closed and the prosecution witnesses have been cross-examined. 6 P. L. J. 644 Dist. The reason for questioning the accused as set forth in S. 342 is to enable him to explain any circumstance in the evidence appearing against him, but an accused person does not recall the prosecution witnesses for the purpose of discovering fresh circumstances against himself. (*Campbell, J.*) R. A. BYRNE *v.* CROWN.

4 Lah. 61 : 1 P. W. R. (Cr.)1923 : A. I. R. 1924 Lah. 84.

——**Ss. 342 and 537**—*Time of examination—Questioning the accused after examining the re-called prosecution witnesses—Omission not illegal.*

Cross-examination of re-called prosecution witnesses under S. 256 is not an examination of prosecution witnesses within the meaning of S. 342 and therefore omission to question the accused after this examination of re-called prosecution witnesses is not an illegality. This cross-examination is rather an evidence for the defence than evidence for the prosecution A. I. R. 1922 M. 512; 45 Mad. 820 Overruled. 6 P. L. J. 644 Diss.

Devadoss, J.—The contention that, if an accused person cross-examines any of the prosecution witnesses under S. 256, the Magistrate is bound once more to examine the accused generally on the case, seems untenable. S. 342 means only that the examination of the accused should take place after the prosecution has placed its whole case before the Court. The accused in a warrant-case has three opportunities of cross-examining the prosecution witnesses; once before the charge is framed, secondly under S. 256 and thirdly after he has entered on his defence. The words in S. 342 " after the witnesses for the prosecution have been examined" cannot reasonably be interpreted to mean "after the accused has chosen to exercise his right of cross-examination at the very end of his defence."

CR. P. CODE (V OF 1898), S. 342 -Time of examination.

Venkatasubba Rao, J. (Dissenting).—The decision in A. I. R. 1922 Mad. 512; 45 Mad. 820 is correct. (*Schwabe, C. J., Phillips, Devadoss, Venkatasubba Rao and Wallace, JJ.*) VARISAI ROWTHER *v.* EMPEROR.

46 Mad. 449 : 17 L. W. 722: 32 M. L. T. 385: (1923) M. W. N. 477: 73 I. C. 163: 24 Cr. L. J. 547: A. I. R. 1923 Mad. 609 : 44 M. L. J. 567 (F. B.)

——**Ss. 342, 253 and 537**—*Time of examination—Examination of accused after cross-examination of prosecution witnesses is obligatory.*

The procedure of examining the accused in a warrant-case only before charge is framed and not also after the prosecution witnesses have been recalled for further cross-examination under S. 256 (1), Cr. P. Code, is not correct. It is an illegality vitiating the trial. The words "if any" and "as he thinks necessary' under S. 253 show that the examination depends on the opinion of the Magistrate, and does not make the obligatory examination referred to in S. 342 after further cross-examination of prosecution witnesses unnecessary.

The accused's right to state his case, at whatever stage the law permits him to do so, is fundamental and cannot be regarded as a mere error, omission or irregularity such as is contemplated in S. 537. 41 Cal. 743, Foll. (*Oldfield and Ramesam, JJ.*) MARUDA MUTHU, *In re.*

45 Mad. 820: 16 L. W. 420 : (1922) M. W. N. 601: 71 I C. 252: 24 Cr. L. J. 124: A. I. R. 1922 Mad. 512 : 43 M. L. J. 402.

——**S. 342**—*Time of examination—Examination of accused after recalling and re-cross-examination of prosecution witnesses is not necessary.*

Examination of accused for the second time after second cross-examination of the prosecution witnesses is not necessary. A. I. R. 1923 M. 609 (F. B.) Foll. But even assuming that a further examination of the accused is necessary after the charge and after the prosecution witnesses have been re-called for cross-examination, the omission to make this further examination is not an illegality so as to vitiate the trial without regard to whether the accused has been prejudiced or not. A. I. R. 1923 All. 81 (2) Relied upon. (*Daniels, J. C.*) EMPEROR *v.* BRIJ BEHARI.

28 O. C. 130 : 12 O. L. J. 182 : 2 O W. N. 327 : 89 I. C. 245 : 26 Cr. L. J. 1301 : A. I. R. 1925 Oudh 422.

——**S. 342**—*Time of examination—Must be after cross-examination of prosecution witnesses.*

Where the accused were examined under S. 342 of the Criminal Procedure Code after the examination-in-chief of the prosecution witnesses but before their cross-examination, *held*, that examination under S. 342 ought to be after the close of the prosecution case, although it seems to be carrying the operation of this section to a very extreme limit. (*Bucknill, J.*) BALDEO DUBEY *v.* EMPEROR.

72 I. C. 891: 24 Cr. L. J. 475 : 1 Pat. L. R. (Cr.) 29: A. I. R. 1924 Pat. 376.

——**S. 342**—*Time of examination—Examination of accused before the examination-in-chief of the prosecution.*

It cannot be said as a general rule that medical evidence is always formal and where the legislature says definitely that the Court shall put questions to the accused person generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence it is not an admissible argument that the Court may do so before all the prosecution witnesses have been examined. 5 P. L. J. 450 Ref. (*Das and Adami, JJ.*) RAMESWAR SINGH *v.*

CR. P. CODE (V OF 1898), S. 342—Time of examination.

EMPEROR. **2 Pat. L. T. 741 : 60 I. C. 659: 22 Cr. L. J. 259: A. I. R. 1922 Pat. 299 (1).**

——— S. 342—*Time of examination—Failure to comply with provisions of S. 342—Whether mere irregularity or illegality.*

The word "examined" in S. 342 includes cross-examination and re-examination. The purpose of the examination of an accused under S. 342 is to enable him to explain any circumstances appearing in the evidence against him ; it is a provision for the benefit of the accused ; and, to enable him to obtain the full benefit of the section, it is clear that he must be examined after the cross-examination of the prosecution witnesses is over. Until the witnesses have been cross-examined and re-examined, it cannot be said what the exact case that the accused will have to meet is, and, if he is forced to disclose his defence before cross-examination, it might very well be that the prosecution witnesses would be on their guard and the value of the cross-examination to a great extent destroyed.

The provisions of S. 342 are mandatory and the Magistrate has no option but to examine the accused after cross-examination of all prosecution witnesses. If he does not do so, he omits to do something in regard to which he has no discretion and consequently he commits an illegality. (*Coutts and Adami, JJ.*) MITRAJIT SINGH *v.* EMPEROR. **1922 P. H. C. C. 7: 2 Pat. L. T. 250: 6 Pat. L. J. 644: 63 I. C. 825: 22 Cr. L. J. 697: A. I. R. 1922 Pat. 158.**

——— S. 342—*Time of examination—Failure to examine at proper stage—Legality of.*

The examination of an accused under S. 342 of the Code is for his benefit and it must be done after the cross-examination and re-examination of the prosecution witnesses is over. Failure to examine the accused at this stage is not merely an irregularity but an illegality which vitiates the trial. (*Coutts and Adami, JJ.*) MITRAJIT *v.* EMPEROR. **22 Cr. L. J. 697 : 63 I. C. 825 : 2 Pat. L. T. 520.**

——— S. 342—*Time of examination is after the prosecution case.*

Though a Magistrate can examine an accused before the case for the prosecution is concluded, it would not absolve him from examining him after the case is concluded, and the omission to do this would vitiate the trial. (*Jwala Prasad, J.*) RAMNATH RAI *v.* EMPEROR. **22 Cr. L. J. 460 : 61 I. C. 844 : 2 Pat. L. T. 549.**

——— S. 342—*Time of examination—Accused must be examined even after cross-examination or re-examination of prosecution witnesses after framing of charge or after fresh evidence of the prosecution evidence after charge.*

The provisions of section 342 are mandatory and not merely directory. Opportunity must be given to the accused to explain the circumstances appearing in the evidence against him thus even when new and material matter in support of the prosecution is elicited in the cross-examination or re-examination of a prosecution witness who has been cross-examined after the examination of the accused or where the prosecution call fresh or further evidence after the framing of the charge, section requires that the accused should be examined again generally. 46 Mad. 609, Foll. 27 C. W. N. 28 ; A.I.R. 1923 Cal. 470 ; and A.I.R. 1923 Cal. 727 Doubted. (*Rupchand Bilaram, A. J. C.*) JHANGLI *v.* EMPEROR. **25 Cr. L. J. 662 : 81 I.C. 150 : A. I. R. 1925 Sind 127.**

Written Statement.

——— S. 342—*Written statement—Statement of accused explaining possession of bills of exchange, about the theft of which he was charged.*

Accused's statement under S. 342, Cr. P. Code, can, and in case of circumstantial evidence, must be taken into consideration. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* ABDUL GANI **49 Bom. 878 : 27 Bom. L. R. 1373.**

——— S. 342—*Written statement—Not sufficient.*

A written statement of defence cannot take the place of the examination of the accused at the close of the case of the prosecution as under S. 342. A Magistrate asked the accused whether he had to say anything besides the written statement. *Held*, that the procedure though not right was not illegal. (*Broadway, J.*) HARNAMA *v.* EMPEROR. **22 Cr. L. J. 276: 60 I. C. 676: 3 U. P.L. R. (Lah.) 34.**

——— S. 342—*Written statement is not sufficient—Provisions of—Mandatory.*

The provisions of S. 342 of the Code are mandatory and the omission of a Sessions Judge to question the accused on the case, after the prosecution was over and give him a chance to explain the case against him will vitiate the trial. A written statement by the accused would not take the place of such an examination. (*Spencer, J.*) NAINAMALAI KONAN, *In re.* **23 Cr. L. J. 697 : 69 I. C. 377 : 14 L. W. 418.**

——— S. 342—*Written statement.*

Written statements filed in Court cannot take the place of the examination contemplated by the section. (*Kinkhede, A. J. C.*) UDHAO *v.* EMPEROR. **25 Cr. L. J. 417 : 77 I. C. 593 : A. I. R. 1924 Nag. 301.**

——— S. 342—*Written statement by accused may be accepted in lieu of oral statement.*

S. 256 of the Code directs the Court to accept a written statement and it is intended that the Court should read it ; and if an accused states that he will file a written statement, the writing is to be accepted in lieu of his oral statement.

Where after the examination-in-chief of the prosecution witnesses, the accused was examined and afterwards the prosecution witnesses were cross-examined and re-examined and the accused was asked as to whether he had anything to say, and the accused also filed a written statement,

Held, that the fact that the accused was asked whether he had anything more to say, after the cross-examination and re-examination of the prosecution witnesses made it unnecessary to apply the principle of *Mitrajit Singh* v. *Emperor*, (1921) 2 P. L. T. 520,

Held, further that even if the Magistrate had not taken the precaution to examine the accused orally as said above, the written statement filed by the accused after the cross-examination of the prosecution witnesses would have relieved the Magistrate from the necessity of examining him orally in reference to the matters elicited in the cross-examination and re-examination of the prosecution witnesses. (*Mullick and Bucknill, JJ*). SAIYID MOHIUDDIN *v.* EMPEROR. **4 Pat. 488 : 6 P. L. T. 154 : 1925 P. H. C. C. 112 : 86 I. C. 459 : 3 Pat. L.R. (Cr.) 110 : 26 Cr. L. J. 811 : A.I. R. 1925 Pat. 414.**

——— S. 342—*Written statement—Accused filing written statement and refusing to answer questions—Magistrate is not bound to go on questioning.*

Though it is the duty of the Magistrate to question the accused generally on the case after the close of the prosecution yet when the accused refuses to answer a question, the Magistrate is not bound to go on asking questions especially where a written state-

CR. P. CODE (V OF 1898), S. 342—Written statement.

ment is put in at the time meeting the points of the prosecution. (*Adami and Bucknill, JJ.*) BHAGWAT SINGH *v.* EMPEROR. **4 Pat. 231 : 6 P. L. T. 73 : 86 I.C. 996 : 26 Cr. L. J. 932 : A. I. R. 1925 Pat. 378.**

——S. 342—*Written statement filed—No prejudice—No revision lies.*

When the accused persons were not examined under section 342 after the examination of the prosecution witnesses, but they filed written statement at that stage and also after the examination of the defence witnesses, the accused were held to have been not prejudiced, and there being no miscarriage of justice, the High Court would not interfere in revision. (*Coutts and Macpherson, JJ.*) MIR TILAWAN *v.* EMPEROR. **1 Pat. 31 : 4 Pat. L. T. 60 : 1 Pat. L.R. 35 (Cr.) : 69 I. C. 383 : 23 Cr. L. J. 703 : A. I. R 1922 Pat. 388.**

——S. 342—*Written statement—Written statement not to take the place of examination.*

The written statement filed by the accused cannot take the place of his examination after the evidence of the prosecution as required by the section. (*Jwala Prasad, J.*) BALKESAR SINGH *v.* EMPEROR. **3 Pat. L. T. 322 : 65 I. C. 546 : 23 Cr. L. J. 114 : A.I. R. 1922 Pat. 5.**

Miscellaneous.

——Ss. 342 and 364—*Accused, examination of—No record—Effect on trial.*

Where the examination of the accused purported to have been one under S. 342 was not recorded but the indication of it was found only in the order sheet, it was held that S. 342 was mandatory, and the trial was therefore vitiated by not conforming to the provisions of law. (*Suhrawardy and Mukerjee, JJ.*) EMPEROR *v.* NANI MANDAL. **52 Cal. 403 : 41 C. L. J. 50 : 86 I. C. 345 : 26 Cr L. J. 761 : A. I. R. 1925 Cal. 575.**

——S. 342 (1)—*Questions to the accused—Nature of—Insufficient examination of accused.*

Per *Newbould, J.* :—S. 342, Cr. P. Code, is a part of a system for enabling the Court to discover the truth and is not especially intended for the benefit of the accused. A formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provisions of S. 342, Cr. P. Code, since it enables the accused to explain any circumstances appearing in the evidence against him. To what extent the Court when complying with the mandatory provisions of the section should also exercise its discretionary powers under the other provisions of the section is a different question. The exercise of this discretion must vary with and depend on the circumstances of each particular case. It is neither desirable nor necessary in the majority of cases that there should be any detailed questioning of the accused. The point at which the Court is bound to question the accused is after the witnesses for the prosecution have been cross-examined. The examination of the accused should not be of an inquisitional nature.

Per *Mukerji, J.* :—It constantly happens that the accused's explanation or his failure to explain is the most incriminating circumstance against him. The result of the examination may certainly benefit the accused if a satisfactory explanation is offered by him. It may however be injurious to him if no explanation or a false explanation is given. The Court has got only the power to point out to the accused the circumstances appearing in the evidence which require explanation, failure or refusal to give which will entitle the Court to draw any inference against him.

CR. P. CODE (V OF 1898), S. 344.

(*Newbould and Mukerji, JJ.*) EMPEROR *v.* ALIMUDDI NASKAR. **29 C. W. N. 231 : 85 I. C. 919 : 45 C. L. J. 101 : 52 Cal. 522 : 26 Cr. L. J. 631 : A. I. R. 1925 Cal. 361.**

——S. 342—*Examination of accused — Answers, if can be used at trial.*

The answers of the accused in an examination under S. 342 of the Code may be used at the trial. They may be used even in a subsequent trial for any other offence. (*Miller, C. J. and Adami, J.*) BALDEO KOERI *v.* EMPEROR. **2 Pat. L. T. 565 : 61 I. C. 785 : 22 Cr. L. J. 433 : 6 P.L. J. 241.**

——Ss. 342, 364 and 537—*Omissions to examine accused—Fatal to validity of trial.*

The provisions of S. 364, Cr. P. Code, are mandatory. The omission to comply with the requirements of S. 364, Cr. P. Code, vitiates the trial. One of the essential points for which S. 342 provides is that the accused themselves should have an opportunity of making their statements directly to the Court and not through the intervention of a pleader. (*Newbould and B. B. Ghose, JJ.*) MESER BEHARI *v.* EMPEROR. **29 C. W. N. 939 : 87 I. C. 920 : 26 Cr. L. J. 1032.**

——S. 342—*Finger impressions of accused—If prohibited.*

There is nothing in S. 342, Cr. P. Code, to prevent a Magistrate trying an accused directing him to make a finger impression under S. 73, Evidence Act. (*Young O. C. J., Heald and May Oung, JJ.*) EMPEROR *v.* NGA TUN HLAING. **26 Cr. L. J. 108 : 83 I. C. 668 : A. I. R. 1924 Rang. 115.**

——S. 344—*Accused absent—Order for costs cannot be made.*

On the failure of the accused to appear on the day fixed for hearing of the complaint against him, the Criminal Courts have no authority to order him to pay costs of adjournment to the complainant. (*Gokul Prasad, J.*) BEEDHA *v.* EMPEROR. **20 A. L. J. 230 : 66 I. C. 179 : 23 Cr. L. J. 243: A. I. R. 1922 All. 184 (1).**

——S. 344—*Adjournment—Police—Prosecution—Costs.*

If an adjournment of a case takes place for which the complainant is solely to blame, an order can be made that he must pay any costs which may have been incurred by the accused. But in a case of prosecution by the Police the complainant cannot be saddled with the costs incurred by the accused at the time of granting an adjournment. (*Macleod, C.J. and Coyajee, J.*) EMPEROR *v.* LAXMAN NATH. **24 Bom. L.R. 380 : 66 I. C. 994 : 23 Cr. L. J. 338 : A. I R. 1922 Bom. 239 (1).**

——S. 344—*Cross cases instituted upon a police complaint and private complaint—Police case if entitled to precedence—Procedure—Interference by District Magistrate—Legality of.*

Two cross cases were started, one on a police report and the other on complaint, the accused in each case being the complainants in the other. The Subdivisional Magistrate directed the trial of the police case first and then of the private complaint case. The District Magistrate set aside the order and directed the simultaneous trial of the two cases. *Held*, that the District Magistrate had no jurisdiction to pass the order he did and his proper course was to make a reference to the High Court under S. 438, Cr.P.Code. But the High Court passed an order that both the cases should be tried simultaneously but should be dealt with wholly separately from each other each on its own merits and judgments should be pronounced after both the trials were over. 14 C. 358 : 27 C. W. N. 700 Dist. (*Page and Mukerjee, JJ.*) SHEIKH.

CR. P. CODE (V OF 1898), S. 344.

BAHATAR *v.* NOBADALI.
28 C. W. N. 487 : A. I. R. 1924 Cal. 634.

——S. 344—*Criminal trial—Power of postponement and adjournment.*

Once a Magistrate has taken cognizance of a case, his powers of postponement and adjournment are regulated by S. 344, Cr. P. Code. (*Greaves and Panton, JJ.*) BHOLANATH DAS *v.* EMPEROR.
28 C. W. N. 490 : A I. R. 1924 Cal. 614.

——S 344—*Absence of principal accused—Protracted proceedings—Extradition proceedings—Advisability of joint trial.*

Where the case was again and again postponed, notwithstanding the protest of the petitioner, on the ground that it was not advisable to proceed with the trial in the absence of the principal accused, and the petitioner thereafter applied to the Magistrate either for an early trial or his discharge but the application was refused, *Held*, the absence of the principal accused and the desirability of a joint trial were not sufficient ground for a further postponement. The Magistrate should not have granted a postponement, when the case was already delayed for a long time without the production of some evidence, though the petitioner was not entitled to be discharged on this ground alone. (*Teunon and Suhrawardy, JJ.*) BILLINGHURST *v.* MEEK. **49 Cal. 182 : 61 I. C. 993 : 22 Cr. L. J. 465 : A. I. R. 1922 Cal. 334.**

——S. 344—*Costs can't be ordered from complainant in non-compoundable warrant case after charge—Cr. P. Code, S. 259.*

After the framing of a charge in a non-compoundable warrant case the position of the complainant is reduced to that of a witness, and he cannot be ordered to pay the costs of an adjournmeut occasioned by his failure to attend on any particular date of hearing. (*Zafar Ali, J.*) NABIBAKHSH *v.* EMPEROR.
A. I. R. 1924 Lah. 627.

——S. 344—*Provisions must be strictly observed.*

The provisions of S. 344 of the Code must be strictly observed and convenience is no ground for an infringement of those provisions. (*Martineau, J.*) WADHWA SINGH *v.* EMPEROR. **22 Cr. L. J. 669 : 63 I. C. 461 : 3 U. P. L. R (Lah.) 78.**

——S. 344—*Court of Bench Magistrates—Criminal trespass—Power to stay proceedings pending decision of civil suit.*

A Court of Bench Magistrates has got power to stay criminal proceedings pending before it till the disposal of a civil suit between the same parties in respect of the same property. Where on a charge of criminal trespass the defence of the accused is that he was in possession of the property on the date of the alleged criminal trespass, the result of the trial in the civil suit will have no bearing on the case before the criminal court and the criminal trial is not to be stayed. Where, however, the defence of the accused is that he was not in possession but that he went to take possession in pursuance of his title, then the decision of the civil court will have some bearing on the Criminal case and the criminal case might be stayed. (*Wallace, J.*) PERIASAMI MUTHIRIYAN, *In re.*
20 L. W. 544 : (1924) M. W N. 762 · 35 M. L. T. 99 : A. I. R. 1924 Mad. 888.

——Ss. 344 and 439—*Application for stay does not lie to High Court.*

An application for stay of criminal proceedings pending civil suit cannot be made to the High Court unless the Magistrate has refused it. (*Spencer, J.*) Y. ANKAMMA *v.* P. ADRIBHOTLU. **18 L. W. 236 : 73 I. C. 528 : 24 Cr. L. J. 640 : A.I.R. 1924 Mad. 235.**

——S. 344—*Witness not called*

CR. P. CODE (V OF 1898), S. 345.

Where accused did not ask for fresh process after the witness failed to attend though served, adjournment was held to have been rightly refused. (*Wallace, J.*) DERWISH HUSSAIN, *In re.* **46 Mad. 253 : 17 L. W. 18 : 71 I. C. 212 : 32 M. L. T. 100 : 24 Cr. L. J. 84 : A. I. R. 1923 Mad 185 : 44 M. L. J. 84.**

——Ss. 344 and 204—*Issue of process can be postponed even in warrant cases.*

S. 344 is applicable to cases even before the issue of process under S. 204 and the Magistrate is entitled under S 344, if there be a reasonable cause for doing so, to postpone any enquiry or trial and to postpone the issue of process under S. 204 even if the case be a warrant case. (*Kulwant Sahay, J.*) RAM SARAN SINGH *v.* NITCHAND NARAIN SINGH.
6 Pat. L. T. 477 : 88 I.C. 603 : 26 Cr. L. J. 1179 : 3 Pat. L. R. 134 (Cr.) : A I. R. 1925 Pat. 619.

——S. 344—*Though policy of law is against postponing trial, postponement for reasonable cause is not illegal.*

It is the policy of the law that a Court should proceed to enquire into and try the case as soon as it takes cognizance of a complaint, but it is not prevented by any provision of the law from postponing the enquiry or trial if in its opinion there are sufficient and reasonable grounds for so doing. A.I.R. 1924 Cal. 634, Ref. (*Kulwant Sahay, J.*) RAM SARAN SINGH *v.* NITCHAND NARAIN SINGH. **6 Pat. L. T. 477 : 88 I. C. 603 : 3 Pat. L. R. 134 (Cr.) : 26 Cr. L. J. 1179 : A. I. R. 1925 Pat. 619.**

——S. 344—*Real question under Section is as to reasonable cause for postponement—High Court will not interfere where discretion has been judicially exercised*

The real question under S. 344 is as to whether there is any reasonable cause for postponing the counter-case. If there be such cause it is a matter of discretion and if the Magistrate does not exercise his discretion judicially in postponing the case, the High Court will interfere and set aside the order, but if the discretion is exercised in a sound and judicial manner the High Court will not interfere with the discretion. (*Kulwant Sahay, J.*) RAM SARAN SINGH *v.* NITCHAND NARAIN SINGH. **6 Pat. L. T. 477 : 88 I. C. 603 : 26 Cr. L.J. 1179: 3 Pat. L. R (Cr.) 134 : A. I. R. 1925 Pat. 619.**

——S. 344, Expl.—*Trial Court refusing in exercise of its discretion, adjournment for examination of remaining witnesses—Remand is unnecessary.*

The fact that the remaining witnesses could give further evidence implicating the accused is a reasonable cause for a remand, but a reasonable cause for a remand is not in itself sufficient to satisfy the requirements of S. 344. It is within the Court's discretion to postpone or not to postpone a case, and if it has within its discretion refused to postpone the case for the examination of the remaining witnesses remand is unnecessary. (*Kennedy, J. C. and Aston, A. J. C.*) ALI SHER *v.* MIR MAHOMED.
26 Cr. L. J. 958 : 87 I.C. 110 : A. I. R. 1925 Sind 315.

——S. 344 (1)—*Adjournment— Grounds—Time for production of material documents.*

A party to a proceeding under S. 145 of the Cr. P. Code, is entitled to an adjournment for procuring material documents in his favour, which had been filed in the Civil Courts which were then closed and an order refusing time is arbitrary and must be set aside. (*Teunon and Ghose, JJ.*) BISWAMBHAR ROY *v.* AMINUDDI. **33 C. L. J. 507 : 61 I. C. 63 : 22 Cr. L. J. 335 : 25 C. W. N. 602.**

——S. 345—*Changes.*

CR. P. CODE (V OF 1898), S. 345.

[(1) S. 508, Penal Code, has been added to the list of offences under cl. (1) and Ss 343, 346, 357, 403, 417. 418, 419. 420, 430, 451, 482, 483, 486, 494 and 509 have been added to sub-section (2).

(2) Sub-clause (5A) has been newly added.]

——S. 345—*Compound—Meaning of.*

The complainant wrote out and gave to John the accused a document as follows :—"This is to say that Mr. John came to me and offered an unconditional apology before Dr N. Rai. I beg to withdraw the case against him". This was signed, dated and given to the accused who produced it in Court. *Held*, that the document meant that the offence was compounded. There is no provision of law which forbids the compounding of offences for an apology, in particular in cases of defamation or abuse. 38 M. 946 and 21 Cal 103, Ref. (*Stuart, J.*) JOHN, J. *v* EMPEROR. **45 All. 145 : 74 I. C. 262 : 24 Cr. L. J. 758 : A. I. R. 1923 All. 474.**

——S. 345—*Several persons charged iointly—Offence compounded against one—Effect of, on the rest.*

A compounding by the complainant against one of several persons accused of an offence under S. 323, Penal Code, does not affect the case against any of the other accused. (*Walsh and Ryves, JJ.*) CHANDAN *v.* EMPEROR. **43 All. 483 : 61 I. C. 209 : L. R. 2 A. (Cr.) 49 : 22 Cr. L. J. 353 :19 A. L. J. 374.**

——S. 345—*Composition with one of several accused—Effect.*

A composition of an offence with one of several accused persons does not necessarily have the effect of an acquittal in the case of all the accused. (*Shah and Crump, JJ.*) EMPEROR *v.* ALLIBHAI ABDUL VORA. **45 Bom. 346 : 22 Cr. L. J. 55 : 59 I. C. 199 : 22 Bom. L. R. 1221.**

——S. 345—*Agreement to refer to arbitration does not amount to intention to treat award as final.*

Both parties to a proceeding under S. 427, I. P. C., filed a petition of compromise agreeing to be bound by the decision of arbitrators named therein and asked for adjournment for settlement of their dispute. The arbitrators made an award, which was objected to by the complainant. *Held*, that the agreement to refer the case to arbitration was not a final settlement of the dispute which the Court was bound to accept as it was not the intention of the parties to treat the reference to arbitration as taking the case out of the jurisdiction of the criminal Court. (*Newbould and B. B. Ghose, JJ.*) SRISH CHANDRA *v.* ABANI NATH. **42 C. L. J. 139 : 26 Cr. L. J. 1584 : 90 I. C. 544 : A. I. R. 1926 Cal. 266.**

——S. 345—*Person aggrieved only can compound.*

A complainant cannot compound an offence against his comrade who is also an aggrieved party. (*Newbould and Suhrawardy, JJ.*) SHIB CHANDRA *v.* RABBANI MANDAL. **37 C. L. J. 254 : 73 I. C. 322 : 27 C. W. N. 168 : 24 Cr. L. J. 578 : A. I. R. 1923 Cal. 168.**

——S. 345—*Written compromise—Effect.*

If the parties to a criminal proceeding file a written compromise in Court, it amounts to an acquittal and bars further proceedings against the accused in respect of the subject-matter of the compromise. (*N. R. Chatterjee and Cuming, JJ.*) HEM CHANDRA DUTTA *v.* GIRENDRA CHANDRA. **22 Cr. L. J. 301 : 60 I. C. 797 : 33 C. L. J. 226.**

——S. 345—*Penal Code, Ss.* 325 *and* 147—*Charge under S.* 325 *compounded—Prosecution for ffence under S.* 147 *does not necessarily fail.*

Where in a trial of the accused for offences under the Penal Code, Ss. 147 and 325, the Court sanctions the compromise of the charge under S. 325, the prosecution for the offence under S. 147 does not *ipso facto* fail. If in such a case, the circumstances require it, the Court can discharge the accused in respect of the charge under S. 147. (*Campbell, J.*) EMPEROR *v.* JARNABI. **26 Punj. L. R. 35 : 86 I.C. 62 : 26 Cr. L. J. 686 : A.I. R. 1925 Lah. 464.**

——S. 345—*Composition results in acquittal—Complainant cannot withdraw from composition.*

Composition of compoundable offence results in an immediate acquittal of the accused. Therefore once a composition has been effected, complainant cannot be permitted to withdraw from it. (*Moti Sagar, J.*) RAM RICHPAL *v.* MATA DIN. **25 Cr. L. J. 810 : 81 I. C. 346 : A. I. R. 1925 Lah. 159.**

——S. 345—*Husband, meaning of.*

However anomalous the position may be it is quite clear that the only person who can compound a case under S. 498-A is the husband of the woman. (*Harrison, J.*) MIR ALAM *v.* EMPEROR. **5 Lah. L. J. 183 : 69 I. C. 370 : 23 Cr. L. J. 690 : A. I. R. 1922 Lah. 177.**

——S. 345—*Compromise by permission of Court—Duty of Magistrate.*

It is the duty of a Magistrate in each case, which is compoundable with his leave, to decide whether he will or will not allow a compromise and the responsibility rests entirely with him. It is the duty of the Magistrate to allow compromise where the parties amicably arrive at it at an early stage of the suit and the offence is not so serious that the punishment is necessary. (*Harrison, J.*) SEWA SINGH *v.* EMPEROR. **23 Cr. L. J. 85 : 7 P. W. R. 1922 (Cr.) : 65 I. C. 437 : A. I. R. 1922 Lah. 138 (1).**

——S. 345—*Agreement to refer case to the decision of arbitrators—Award not made—Agreement by itself does not amount to a composition of the offence.*

Pending a criminal case of defamation the parties entered into an agreement referring to certain arbitrators the decision of all their disputes including criminal case within 15 days. *Held*, that until the arbitrators decided the dispute the offence cannot be treated as compounded. 21 Cal. 103, Foll. (*Krishnan, J.*) RAMALINGA AIYAR *v.* B. VARADARAJULU AIYAR. **22 L. W. 390 : (1925) M. W. N. 753 : 90I.C. 666 : A. I.R. 1925 Mad. 1211 : 49 M. L. J. 544.**

——S. 345—*Compounding of offence—In revision.*

It is open to the High Court to allow a case to be compounded in revision. (*Kanhaiya Lal, J. C.*) CHHOTAI SINGH *v.* EMPEROR. **9 O. & A. L. R. 776 : 73 I. C. 334 (2) : 24 Cr. L. J. 590 (2) : A. I. R. 1924 Oudh 260.**

See Sub cl. (5-A) newly added.

——S. 345—*Several accused—Compounding with one—Effect.*

Where a complaint has been compounded as against one of several accused, charged with the same offence, the whole case is deemed as compounded. 1 P. L. T. 32, Foll. (*Ross, J.*) SARAJ KUMAR *v.* EMPEROR. **4 Pat. L. T. 107 : 67 I. C. 592 : 23 Cr.L.J. 432 : A. I. R. 1923 Pat. 348 (1).**

[No Longer Law.]

——Ss. 345 and 439—*Revision—Composition of offence—Legality of.*

A Court of revision has no power to sanction the composition of an offence after the conviction of the accused by the Court below. 43 Cal. 1143, Foll. 29 M. L.J. 621 ; 37 All. 127 Ref. (*Bucknill, J.*) AUDHI RAI *v.* EMPEROR. **3 P. L. T. 458 : 65 I.C. 432 : 23 Cr.L.J. 80 : A.I. R. 1923 Pat. 89.**

——S. 345—*Complaint under S.* 342, *Penal Code—Accused summoned under S.* 343, *Penal Code—Withdrawal of complaint.*

CR. P. CODE (V OF 1898), S. 345.

Where a complaint disclosed the commission of an offence under S.342, Penal Code, and the accused was summoned under S. 343, Penal Code and the complainant applied to withdraw from the prosecution but was refused on the ground that the summons was under S. 343, *held*, that the mistake did not deprive the complainant of his right to withdraw and therefore all proceedings after the application for withdrawal were illegal. (*Jwala Prasad, J.*) KADIR *v.* EMPEROR.
2 Pat L. T. 602 : 62 I. C. 189 : 22 Cr. L. J. 493 : 1921 P. H. C. C. 16.

——S. 345—*Compromise with some accused—Case can be proceeded against others.*

Where more persons than one are charged with an offence and a compromise is effected with some of them only, the Court will accept the compromise in respect of the persons with whom it is effected and proceed to hear the case against the rest of the accused. (*Kennedy, J. C. and Madgavkar, A. J. C.*) EMPEROR *v.* ABDUL HAKIM. **26 Cr. L. J. 238 : 84 I. C. 62 (1) : 16 S. L. R. 149.**

——S. 345—*Compounding—Test of.*

The question of a case being compoundable or not must be decided with reference to the state of the facts existing at the date of the application to compound, as it is not possible for a Court to see what the ultimate result will be.

An application was put in to compound a case under S. 325, I. P. C. Permission of Court was not granted and the application was withdrawn. Later a charge was framed only under S. 323. *Held*, the accused was not entitled to an acquittal on the basis of the compounding. (*Baker, J. C.*) MT. RANI *v.* MT. JAIWANTI. **26 Cr. L. J. 1428 : 89 I. C 900 : A. I. R. 1925 Nag. 395.**

——S. 345 (2)—*Offence relating to public trust property—Matters more suitable for civil suit—Compromise refused by trial Court—High Court allowed the same.*

Where the trial Court declined to grant permission of a compromise in a case under S. 417, I. P. C. on the ground that the offence related to public trust property but it was found that matter would not be suitably dealt with in a criminal case and the compromise was sought at an early stage, the High Court allowed the case to be compounded. (*Macpherson, J.*) NEHAL AHMAD KHAN *v.* EMPEROR. **3 Pat. L. R. 7 (Cr.) : 89 I. C. 385 : 26 Cr.L. J. 134 : A.I.R. 1925 Pat. 583.**

——S. 345 (5-A)—*Compounding offence--Revision.*

Under S. 345 (5-A) Cr. P. Code, as amended, a High Court in revision may allow any person to compound any offence which he is competent to compound under the section. An offence under S. 420, I. P. C., is compoundable. (*Sulaiman, J.*) BRIJ BEHARI LAL *v.* EMPEROR.
46 All. 91 : 9 O. & A. L. R. 1083 : 21 A. L. J. 838 : L. R. 5 A. (Cr.) 8 : A. I. R. 1924 All. 209 (1).

——S. 346—*Decision by Magistrate on evidence recorded is not proper.*

Passing orders on evidence taken by another Magistrate who was not competent to try the case after merely hearing arguments cannot be considered to be "trying the case himself". (*Krishnan, J.*) CHINA VENKU, *In re.* **17 L. W. 247 : 24 Cr. L. J. 413 : 72 I. C. 525 : A. I. R. 1923 Mad. 327.**

——S. 346—*Reference by a Sub-Magistrate—Duty of Sub-divisional Magistrate.*

The duty of a Sub-Divisional Magistrate under S.346 is "either if so empowered to try the case referred to him himself or to refer it to any Magistrate subordinate to him having jurisdiction or to commit the accused for trial." And where he refers the case to a Sub-Magistrate the reference should be made explicitly and with some distinct indication of what action the Sub-Magistrate is to take, not with an obscure injunction which could afford no real guidance. Further a superior Magistrate cannot simply return a case to the Subordinate Magistrate from whom it comes but must refer to some other Magistrate or dispose of it himself. (*Oldfield and Ramesam, JJ.*) SESSIONS JUDGE OF BELLARY *v.* KOTTUR HAMPANNA.
45 Mad. 846 : (1922) M.W N. 641 : 16 L. W. 581 : 31 M. L. T. 365 : 23 Cr. L. J. 710 : 69 I. C. 438 : A. I. R. 1923 Mad. 51.

——S. 347—*Cross-examination of prosecution witnesses before framing of charges—Commitment to Sessions—Right of accused.*

Where an application for cross-examination of the prosecution witnesses was made to the Magistrate before the charge was framed and before the Magistrate had decided to commit the case to the Court of Sessions, the Magistrate is bound to allow such cross-examination of the witnesses called on behalf of the prosecution. 21 C. 642 : 36 C. 48 · 16 C. L. J. 45, Ref. (*Greaves and Panton, JJ.*) JYOTSNA NATH SIKDAR *v.* EMPEROR. **51 Cal. 442 : 83 I. C. 591 : 26 Cr. L. J. 63 : A. I. R. 1924 Cal. 780.**

——S. 347—*Magistrate taking cognizance under Ch. XXI—Accused found not guilty with respect to part but Magistrate finding* prima facie *grounds for commitment with respect to another part—He should acquit in respect of former and commit in respect of latter.*

S. 347 authorises a Magistrate at any stage of the trial of a warrant case to commit the accused for trial instead of completing the trial himself. The new charge which will then have to be drawn up by the Magistrate will have the effect of cancelling any previous charge framed by him, but this can only be with respect to the subject-matter of the new charge. So far as this subject-matter is concerned, the previous proceedings before the Magistrate must be regarded as proceedings in an enquiry preliminary to commitment, but this alteration of character cannot be extended to any matter which is not the subject of the new charge.

Where a Magistrate having taken cognizance of the case has found that the accused is not proved to have committed a part of the offence with which he has been charged, he is bound to pass an order of acquittal in respect of that part; with respect to another part if he has found that there are *prima facie* grounds for believing it to have been committed and that the circumstances are such that it ought to be tried by a Court of Sessions, he should commit it to that Court. But the power conferred by that section to commit the case in respect of that portion of the offence should not affect the obligation imposed on the Magistrate to acquit in respect of the other portion of the offence. S. 347 does not empower a Magistrate to discharge an accused against whom a charge has been framed. It is only in respect of the offence for which the accused is to be committed to the Court of Sessions that the proceedings are taken out of Ch. XXI and the other proceedings of the Magistrate must remain governed by the provisions of that chapter. (*Wazir Hasan and Neave, A.J.Cs.*) BISHAMBHAR NATH *v.* EMPEROR. **26 Cr. L. J. 520 : 83 I. C. 360 : 10 O. & A. L. R. 1210 : A. I. R. 1925 Oudh 547.**

——Ss. 347 and 254—*S.* 254 *cannot limit discretion of Magistrate under S.* 347.

CR. P. CODE (V OF 1898), S. 347.

Before the commencement of the enquiry or trial if the Magistrate is of opinion that the case is one which for any reason ought to be tried by the Court of Sessions then he has ample power to inquire into the case with a view to commitment and subsequently to commit, if the evidence justifies the Court. S. 347 is couched in general terms and gives the Magistrate very wide powers. There is no suggestion that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence. The discretion vested in the Magistrate cannot be limited by the provisions of S. 254. (*Brown, J.*) EMPEROR *v.* ISHAHAT. **3 Rang. 42 : 89 I. C. 525 : 26 Cr. L. J. 1389 : A I. R. 1925 Rang. 207 (2).**

——**S. 347**—*Scope of—Controlled by Chapter XVIII.*

S. 347 is subject to the provisions of Chap. XVIII and even when a committal order is made under S. 347 the Magistrate has to conform to the provisions of Chapter XVIII and cannot deprive the accused of any right he has under this chapter. S. 347 appears in Chapter XXIV of the Code which contains general provisions for inquiries or trial and is one of those sections providing what a Magistrate should do when in the course of an enquiry he finds that he should not finally deal with the case himself. But when he does make up his mind to commit he cannot disregard the provisions of Chapter XVIII 36 Mad. 321, Foll. (*Raymond and Madgavkar, A. J. Cs.*) UTLIBAI *v.* EMPEROR. **17 S. L. R. 188 : 83 I C. 708 : A. I. R. 1924 Sind 61.**

——**S. 349**—*Changes.*

Sub S. (1-A) newly added provides that when there are a number of accused tried together and the Magistrate wishes to act under sub-cl. (1), in regard to some, he should send up all the accused.]

——**S. 349**—*Case referred to joint Magistrate for passing order under S.* 106, *Cr. P. Code—Conviction by Trial Magistrate.*

Where a Second-class Magistrate sent a case to the joint Magistrate as he thought an order under S. 106, Cr. P. Code, was necessary and the latter passed the order, while he sent the case back to the Magistrate for trial, the order is without jurisdiction. (*Daniels, J.*) DUKHI *v.* EMPEROR. **24 Cr. L. J. 784 : 74 I. C. 448 : A. I. R. 1924 All. 141.**

——**S. 349**—*Case of accused tried jointly with others, whose case only can be referred, is not referrable.*

It is doubtful whether in a case where adults and adolescents are tried jointly, even if the case of the adolescents could have been validly referred under S. 349, that of the adult accused jointly tried with them can be also referred. (*Kotval, A. J. C.*) BABA *v.* EMPEROR. **24 Cr. L. J. 738 : 74 I. C. 66 : A. I. R. 1924 Nag. 37.**

——**S. 349**—*Joint trial—Sending up one alone to superior Magistrate—Procedure*—De novo *trial.*

Two accused were tried together by a Magistrate ; he convicted one of them, but holding he could not adequately punish the other, an old offender, sent up the case to a superior Magistrate. The latter on the evidence recorded by the inferior Magistrate convicted the accused. *Held*, (1) the inferior Magistrate should have forwarded both the accused to the superior Court, but this defect does not vitiate the jurisdiction to try the accused actually sent up ; (2) the superior Magistrate is not bound to hold a *de novo* trial. (*Kennedy, J. C. and De Souza, A. J. C.*) EMPEROR *v.* DODO. **26 Cr. L. J. 1363 (1) : 89 I. C. 451 (1) : 18 S.L.R. 216.**

——**S. 349 (1) (a)**—*Co-accused—Joint trial—One alone held guilty—But whole case referred—Legality of reference.*

CR. P. CODE (V OF 1898), S. 350.

A Magistrate who tried a number of accused found one of them alone guilty, but under S. 349 referred the whole case to a superior Magistrate. *Held*, the reference was illegal as he ought to have acquitted those whom he did not find guilty under S. 258 and the superior Magistrate cannot, in the exercise of his powers, order a retrial. (*Sulaiman, J.*) SULTAN MUHAMMAD KHAN *v.* EMPEROR. **26 Cr. L. J. 1630 : 90 I. C. 926 : L. R. 6 A. 194 (Cr.)**

——**S. 350**—*Changes.*

[(1) Section does not apply to proceedings under S. 349 also.

(2) A Magistrate from whom a case has been transferred shall be deemed to have used to exercise jurisdiction.

(3) S. 350-A newly added provides that a change in the constitution of a Bench does not affect the validity of order passed by it.]

——**S. 350**—*Applicability—U. P. Municipalities Act, S.* 247 ; *enquiry under.*

The provisions of S. 350, Cr. P. Code, apply to an enquiry under S. 247 of the U. P. Municipalities Act. (*Daniels, J.*) BASANTI *v.* EMPEROR. **25 Cr. L. J. 651 : 81 I. C. 139 : A I.R. 1925 All. 245.**

——**S. 350**—*Order of acquittal without complying with accused's application to have the evidence re-heard is illegal.*

On the coming up of the case before another Magistrate, the first Magistrate being transferred, the accused applied to have the prosecution evidence re-heard. The Magistrate without complying with this request entered an order of acquittal. *Held*, that such an order of acquittal is illegal and the Dt. Magistrate can set it aside. (*Lindsay, J.*) CHAJJU *v.* EMPEROR. **L. R. 2 A. (Cr.) 133.**

——**S. 350**—*Writing and delivery of judgment after ceasing to have jurisdiction is invalid.*

The Code of Criminal Procedure makes no provision for delivery of judgment written by the Magistrate who heard the case after he had ceased to have jurisdiction in the district. Even if the Magistrate, after his transfer, himself delivers judgment, he would act without jurisdiction. S. 350 does, under certain circumstances, give the Magistrate jurisdiction to decide the case on evidence recorded by his predecessor, but it does not give him jurisdiction to deliver a judgment written by his predecessor. 3 All. 563, Foll. (*Newbould and Suhrawardy, JJ.*) BAISNAB CHARAN *v.* AMIN ALI. **50 Cal. 664 : 38 C. L. J. 202 : 72 I. C. 953 : 24 Cr. L. J. 489 : A. I. R. 1924 Cal. 55.**

——**S. 350**—*Construction—Proceedings under S.* 145.

The wording of the principal clause of section 350 is very different from that in proviso (*a*). In the main body reference is made to an enquiry or trial ; proviso (*a*) is limited to trial and also makes reference to an accused, a word which does not appear in the preceding part of the section. The intention of the legislature was to limit the application of proviso (*a*) to criminal trial and not to extend that proviso to enquiries such as a proceeding under S. 145, Cr. P. Code, which are also covered by the first portion of the section. (*Newbould and Suhrawardy, JJ.*) SADEK REZA *v.* SACHINDRA NATH. **37 Cal. L. J. 128 : 73 I.C. 265 : 24 Cr.L.J. 569 : A.I.R. 1923 Cal. 483 (2).**

——**S. 350**—De novo *trial—Change of Magistrate—Application for new trial.*

Where after the charge had been framed, the Magistrate was transferred and the case was taken up

CR. P. CODE (V OF 1898), S. 350.

by a new Magistrate, the accused is entitled to a *de novo* trial if he applies for it. A general allegation that an application was made but rejected, without specifying the date or the person who made it, is not entitled to much weight. (*Sanderson, C. J. and Panton, J.*) SHAIKH AZIZ MANDAL *v.* GIRISH CHANDRA CHOUDHURY. **23 Cr. L. J. 502: 68 I. C. 38 : A. I. R. 1923 Cal. 320.**

——— **Ss. 350 and 15**—*Bench of Magistrates—Absence of one member of Bench during trial—Conviction not legal.*

The trial of an accused person by a Bench of Magistrates in which one of the Magistrates composing the Bench is not present and does not hear the entire evidence, is bad in law and a conviction by such Bench must be set aside. S. 350 of the Code has no application to cases tried by Benches of Magistrates. (*Moti Sagar, J.*) ABDUL GHANI *v.* EMPEROR. **1 P. L. R 1922 : 62 I. C. 335 : 22 Cr. L. J. 511 : A. I. R. 1922 Lah. 137.**

———**S. 350**—De novo *trial must be asked for at the time when the Second Magistrate commences his proceedings—Former statement of witness not admissible.*

For the purposes of S. 350, a trial cannot be said to commence only when a charge is framed and that, though in an enquiry by a Magistrate into a case triable only by a Court of Sessions or High Court, the accused has not the right to demand that the witnesses shall be resummoned and reheard in the event of changing of Magistrate, he has such a right not only in warrant cases but also in the cases of summary trials and trials of summons cases, and the time when he must exercise the right is when the Second Magistrate commences his proceedings and not when a charge is framed. The object of the provisions is no doubt, that a man shall not without his consent be convicted on evidence which has not been recorded in the presence of the Magistrate with whom the final decision of the case rests. In a case where the witness is re-summoned and retracts his former statement, it is in-admissible to treat the former statement as evidence in the case, (*Chevis and Abdul Qadir, JJ.*) SAHIB DIN *v.* CROWN. **3 Lah. 115 : 66 I. C. 826 : 10 P. W. R. 1922 (Cr.) : 4 U. P. L. R. (Lah.) 50 : 23 Cr. L. J. 330 : A. I. R. 1922 Lah. 49.**

———**S. 350**—*Bench of Magistrates—Hearings by one—Conviction—Legality.*

S 350 does not apply to cases tried by Benches of Magistrates. A conviction by a Bench of Magistrates in a case in which the entire evidence is heard by only one member, is illegal. (*Moti Sagar, J.*) GIRDHARI *v.* EMPEROR. **64 I. C. 132 : 22 Cr. L. J. 740 : 2 Lah. 237.**

[See Sowm 350-A.]

——— **Ss. 350 and 537**—*Transfer of Magistrate—Change of date—No notice to pleader of accused—Irregularity—Right of accused to resummon and examine witnesses.*

It is irregular and unfair to take up the case against an accused person on a date other than that fixed for his hearing in his counsel's presence and thus deprive him of the benefit of legal advice, unless his counsel has been duly informed of change of the date beforehand. An accused has a perfect right under S. 350 that all the prosecution witnesses be re-summoned and reheard, *i. e.*, their evidence should be recorded anew. To read out to them their previous statements and getting admission from them that they are correct and putting them such questions as the new Magistrate thinks necessary are not sufficient compliance with the requirements of the said section. (*Chevis, J.*) MANGAL SINGH *v.* EMPEROR. **59 I. C. 551 (2) : 22 Cr. L. J. 119 : 16 P. W. R. (Cr.) 1919.**

CR. P. CODE (V OF 1898), S. 350.

———**S. 350**—*Permitting fresh cross-examination is not* de novo *trial.*

De novo trial means a new trial from the very beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour, and thereby to be in a position to judge of their credibility. That object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of S. 350. (*Krishnan, J.*) NARAYANA REDDI *v.* E. BOJANNA. **(1925) M. W. N. 652 : 90 I. C. 668 : 26 Cr. L. J. 1596 (2) : A. I. R. 1925 Mad 1280 : 49 M. L. J. 423.**

———**Ss. 350 and 528**—*When a Magistrate who has been trying a case has been transferred and his successor grants a* de novo *trial, even when the case is transferred by the Dt. Magistrate to the transferred Magistrate with a view to avoid the* de novo *trial, the* de novo *trial cannot be avoided—When the transfer does not take account of the inconvenience and hardship caused to the parties, it can be set aside in revision—Cr. P. Code, S. 528.*

The Magistrate who tried the case was transferred when most of the witnesses had been examined. The succeeding Magistrate granted a *de novo* trial. After this, Dt. Magistrate transferred the case to the previous Magistrate who had been transferred, on the ground that the small amount of work that remained to be done could best be done by the same Magistrate who had tried the case so far and that to transfer the case to him was therefore preferable to the whole case being heard again by a new Magistrate.

Held : that even the Magistrate to whom the case was thus transferred could not take up the case from the point at which he had left it and that he must start the case only *de novo* all the previous proceedings being considered to have been wiped out.

Held : further that the Dt. Magistrate's order of transfer took no notice of the hardship and inconvenience of parties and witnesses by such transfer and that it must be set aside. (*Madhavan Nair, J.*) SARDAR KHAN SAHIB *v.* ATHAULLAH. **20 L. W. 847 : 26 Cr. L. J. 510 : 85 I. C. 254 : A. I. R. 1925 Mad 174 : 47 M. L. J. 926.**

———**S. 350**—*Applies to a case of more than two successive Magistrates.*

S. 350 (*a*) applies at the time when the succeeding Magistrate begins to exercise jurisdiction that is every time another Magistrate takes cognizance of a matter which has been begun or continued by this predecessor. On principle if a Second Magistrate can act on evidence recorded wholly or partly by his predecessor and partly by himself there seems to be no reason why a Third Magistrate should not act on evidence recorded by his predecessors. (*Odgers and Hughes, JJ.*) V. GOVINDAN NAIR *v* K. K. KRISHNAN NAIR. **47 M. 245 : 18 L. W. 949 : 33 M. L. T. 189 : (1923) M. W. N. 815 : A. I. R. 1924 Mad. 227 : 45 M. L. J. 808.**

———**S. 350**—*Applies to summons cases also.*

A person against whom proceedings are taken under S. 107 of the Cr. P. Code can claim that upon the First Magistrate ceasing to have jurisdiction and a Second Magistrate re-commencing the proceedings the witnesses or any of them should be heard afresh or summoned. S. 350 is applicable to summons cases as well as warrant cases. (*Dalal, A. J. C.*) BAIJ NATH SAH *v.* EMPEROR. **27 O. C. 323 : 25 Cr. L. J. 1380 : 83 I. C. 340 : A. I. R. 1925 Oudh 228.**

———**S. 350**—De novo *trial cannot be demanded*

CR. P. CODE (V OF 1898), S. 350.

merely on the ground that counsel was to be heard.

Under S. 350, accused cannot demand a *de novo* trial on transfer of a trying magistrate, on the ground that the trying magistrate had not heard his counsel. (*Kendall, A. J. C.*) CHANDIKA *v.* EMPEROR.
11 O. L. J. 725 : 81 I. C. 899 : 25 Cr. L. J. 1075 : 28 O. C. 109 : A. I R. 1925 Oudh 62.

——— **S. 350**—*Applicability— Proceedings under S. 145.*

S. 350 applies in part to proceedings under S. 145 and a Magistrate can let in evidence partly recorded by himself and partly by his predecessor. (*Foster, J.*) SONDI SINGH *v.* GOVIND SINGH. **5 Pat. L. T. 237 : 76 I. C. 25 (2) : 25 Cr. L. J 89 (2) : 2 Pat. L. R. 108 (Cr) : A. I. R. 1924 Pat. 786.**

——— **S. 350**—*Waiver of demand for* de novo *trial —Evidence partly recorded by one Magistrate and partly by another—Conviction is not illegal.*

Where on an application for transfer under S. 528 of the Cr. P. Code, the case was transferred to another Magistrate who completed the remaining evidence in the case and convicted the accused without a *de novo* trial which was not pressed for by the accused, *held*, that though the Magistrate from whose file the case was transferred was still in the same district, as he had lost the jurisdiction over the district after it was withdrawn from his file, the provisions of S. 350 apply and in the absence of a demand for a *de novo* trial, the conviction is not illegal. (*Jwala Prasad, J.*) RUPA SINGH *v.* EMPEROR. **59 I. C. 370 : 22 Cr. L. J. 82 : 1 Pat. L. T. 679.**

——— **S. 350** (a)—*Where all witnesses are re-summoned for examination but the accused examines only some and does not want to examine the rest, complainant cannot insist on their examination.*

Under proviso (a), the right given to an accused person is the right of demanding that the prosecution witnesses, or any of them, be resummoned and re-heard. It does not say that the trial must be begun again, from the beginning. The provision is one entirely in the interests of an accused person and when the accused is exercising his right under the proviso, the complainant cannot claim that he must demand a *de novo* trial from the beginning. Where the accused exercises his right under proviso (a), he has every option of withdrawing from the exercise of that right. (*Wallace, J.*) VUDIGALAPUDI, *In re.* **20 L. W. 916 : 85 I. C. 366 : 26 Cr. L. J. 526 : A. I. R. 1925 Mad. 317.**

——— **S. 350** (1) (*a*)—*Procedure in warrant case before charge.*

S. 350 (1) (a), Cr. P. Code, cannot be applied to proceedings in a warrant case before the charge has been framed. At that stage the proceeding is not a trial, but is merely an enquiry. (*Oldfield and Ramesam, JJ.*) RAMANATHAN *v.* EMPEROR. **46 Mad. 719 : 32 M. L. T. 81 : 17 L. W. 412 : 32 M. L. T. 217 (1) : 71 I. C. 608 : 24 Cr. L. J. 192 : A. I. R. 1923 Mad. 660.**

——— **S. 350** (2)—*Accused sent up for higher sentence—New trial need not be held.*

Under S. 350 cl. 2 a Magistrate to whom an accused is sent up under S. 349 need not hold a trial *de novo.* (*Kennedy, J.C. and De Souza, A.J.C.*) EMPEROR *v.* DODO. **18 S. L. R. 216 : 26 Cr. L. J. 1363 : A I. R 1926 Sind 48.**

——— **S. 352**—*Police officer can be ordered to be absent from Court room—Accused objecting to his presence—Reasonableness of his fear is guiding factor and not the convenience of prosecution.*

S. 352, Cr. P. Code, gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exceptions in the case of a police officer When the accused person objects to the presence of a Police officer or other person, the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs and not merely whether the presence is convenient or helpful to the Court or the prosecution. It is not advisable that a police officer interested in the case proceeding before the Magistrate should receive exceptional treatment, as a seat on the dais, as it is calculated to breed suspicion in the minds of the accused as to the independence of the Magistrate. (*Kotval, A.J.C*) NATHUSINGH *v.* CROWN. **26 Cr. L. J. 1130 (1) : 88 I.C. 362 : 8 N. L. J. 95 : A. I. R. 1925 Nag. 296.**

——— **S. 353**—*Cross complaint—Prosecution evidence in each to be defence evidence in the other—Validity.*

In the trial of two cross complaints, each evidence being the prosecution evidence in one and defence evidence inthe other, the procedure violatesS. 353, Cr. P. Code. (*Broadway and Fforde, JJ.*) ALLU *v.* THE CROWN. **4 Lah. 376 : 6 Lah. L. J. 103 : 75 I. C. 980 : 25 Cr. L. J. 68 : A. I. R. 1924 Lah. 104.**

——— **S. 353.**

A Sessions Judge has power to dispense with personal attendance of a *purda* lady at trial. (*Kumaraswami Sastri, J.*) KANDAMANI DEVI *v.* EMPEROR. **45 M. 359 : 15 L. W. 550 : (1922) M. W. N. 165 : 30 M. L. T. 346 : 66 I. C. 330 : 23 Cr. L. J. 266 : A. I. R. 1922 Mad. 79 (1) : 42 M. L. J. 337.**

——— **S. 353**—*Recording evidence behind the back of a party is illegal.*

An order is wholly illegal if it is based on evidence which is recorded behind the back of a party at a time when he was not a party to the proceedings at all. (*Findlay, O. J C.*) NARAYAN *v.* CHANDRABHAGA. **26 Cr. L. J. 1289 (2) : 89 I. C. 153 (2) : A. I. R. 1925 Nag. 457.**

——— **Ss. 355 and 356**—*Theft below Rs. 50—Section applies.*

In a case of theft under S. 379 in which the value of property stolen does not exceed Rs 50, the procedure at the trial is regulated by Ss. 355 and 356. (*Lindsay, J.*) EMPEROR *v.* BULAKHI. **21 A. L. J. 276 : L. R. 4 A. (Cr.) 87 : A. I. R. 1923 All. 432.**

——— **S. 355**—*Summary trial—Evidence need not be read to witnesses.*

S. 355 does not require that the evidence of witnesses should be read over to them in a case triable summarily. (*Jwala Prasad, J.*) MAHOMED ISHAQ *v.* EMPEROR. **1 Pat. L. R. (Cr.) 159 : 65 I. C. 552 : 23 Cr. L. J. 120 : A. I. R. 1923 Pat. 157.**

——— **S. 355, Cl. 2**—*Record not signed by the Magistrate vitiates trial.*

Where the record prepared by the Magistrate was very careful and complete, but was not signed, *held*, that the error vitiated the trial. (*Jwala Prasad, J.*) BALKESAR SINGH *v.* EMPEROR. **3 Pat. L. T. 322 : 65 I. C. 546 : 23 Cr. L. J. 114 : A. I. R. 1922 Pat. 5.**

——— **S. 356**—*Changes.*

[Sub-cl. (2-A) provides for procedure where the evidence is given in any language not being English, other than the language of the Court.]

——— **S. 356**—*Section prescribes mode of taking evidence in proceedings under S. 145, Cr. P. Code.*

The proceedings under S. 145 are of a *quasi* civil nature and the procedure prescribed in S. 356 applies for taking evidence in such cases. (*Dalal, J. C.*) CHOUDHARI MOHAMMAD AYUB *v.* CHAUDHARY

CR. P. CODE (V OF 1898), S. 360.

SURFRAJ AHMAD. **26 Cr. L. J. 70 : 83 I. C. 630 : A. I. R. 1925 Oudh 286.**

——— —S. 360—*Witness reading his deposition and admitting it to be correct is not by itself sufficient compliance.*

Reading the deposition by a witness himself and an admission by him that it was correct is not by itself a sufficient compliance. (*Newbould and Mukerji, JJ.*) SAHORALI MOLLA *v.* EMPEROR. **26 Cr. L. J. 951: 87 I. C. 103 : A. I. R. 1925 Cal. 1120.**

———S. 360—*Applicability—Proceeding under S. 107, Criminal Procedure Code.*

Depositions need not be read over to the witness in the presence of the accused in the case of an enquiry under S. 107. (*Newbould and B. B. Ghose, JJ.*) LEGAL REMEMBRANCER *v.* JAFAR RAKI. **52 Cal. 668 : 89 I. C. 976 (2) : A. I. R. 1925 Cal. 940.**

———S. 360—*Non-compliance in committal court—Objection by accused to quashing of commitment—Proper procedure.*

A large number of witnesses were examined in the committal court but the provisions of S. 360 were not complied with. A reference was made to the High Courtat the instance of the Crown to quash the proceedingsand start a *de novo* inquiry to which the accused objected. *Held*, the proper order to make was to send the case back to the committal court, and have the defect in procedure cured by recalling the witnesses whose evidence was not read over to them in the presence of the accused. (*Suhrawardy and Cuming, JJ.*) ABDUR RAHIM *v.* EMPEROR. **29 C. W. N. 698 : 88 I. C 102 : 26 Cr. L. J. 1276 : A. I. R. 1925 Cal. 928.**

———S. 360—*Deposition—Reading over—Presence of witness whether necessary.*

It is not a sufficient compliance with S. 363 of the Code of Criminal Procedure where the deposition is read by a witness himself and it is explained by the Sessions Judge to the accused though not in the presence of the witness. (*Newbould and Mukerji, JJ.*) JESSARAT *v.* EMPEROR. **29 C. W. N. 526 : 87 I.C. 833 : 26 Cr. L.J. 1009 : A. I. R. 1925 Cal. 729.**

———S. 360—*Depositions of witnesses read over to them by Court clerk while Magistrate recording other evidence, is non-compliance.*

After depositions of some of the witnesses are completed, their being read over to the witnesses by the Bench Clerk and witnesses' signature taken while the Court is recording the examination of other witnesses, is a procedure not warranted by the law and it is not a compliance with the provisions of S. 360. (*Newbould and Ghose, JJ.*) ADELADDI *v.* EMPEROR. **87 I. C. 840 (1) : 26 Cr. L. J. 1016 (1) : A. I. R. 1926 Cal. 423.**

———S. 360—*Non-complinace vitiates trial.*

Non-compliance with the provisions of S. 360 vitiates trial. (*Newbould and Ghose, JJ.*) ADILADDI *v.* EMPEROR. **26 Cr. L. J. 1016 : 87 I. C. 840 (1) : A. I. R. 1926 Cal. 423.**

———S. 360—*Provisions are mandatory.*

In a criminal trial the deposition of each of the prosecution witnesses was not read over or explained to him after it had been recorded but the depositions of the witnesses examined on the day were read to them after the close of the day's proceedings. *Held* : that that is not sufficient compliance with the provisions of S. 360. S. 360 is mandatory and its provision must be strictly complied with. This view is based on the wording of the section itself and on the policy underlying it, namely, to protect the witness and also to sateguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of the deposition. A.I.R. 1924 Cal. 889 and A. I. R. 1925 Cal. 831, Appr. (*Suhrawardy and Panton, JJ.*) ABUL (BARI) MULLICK *v.* EMPEROR. **42 C. L. J. 585 : A. I. R. 1926 Cal. 157.**

———S. 360—*Enquiry before committing Magistrate—Depositions read over while other witnesses were being examined—Enquiry is vitiated.*

At the hearing of a case before the committing Magistrate, though the depositions of the witnesses were read over to them as required by S. 360, Cr. P. Code, this was done while the other witnesses were being examined. *Held* : that commitment should bequashed as this is not sufficient compliance with the provisions of S. 360, Cr. P. Code, since the object of that section is that the accused may have the opportunity of ascertaining that the evidence has been correctly recorded. *Held* : further that this is of great importance in an enquiry with a view to commitment, since under certain circumstances the evidence then taken may be used as evidence against him at the trial. (*Newbould and B. B. Ghose, JJ.*) MANIK *v.* EMPEROR. **41 C. L. J. 393 : 88 I. C. 1043 : A. I. R. 1925 Cal. 933.**

———S. 360—*Evidence of one witness read over to him while another witness is being examined—There is no sufficient compliance with S. 360 and retrial should be ordered.*

Where while the evidence of one witness is being read over to him the evidence of another witness is taken in the Court, there can be said to be no sufficient compliance with S. 360 and retrial should be ordered. (*Newbould and Mukerjee, JJ.*) DARGAHI *v.* EMPEROR. **52 Cal. 499 : A. I. R. 1925 Cal. 831.**

———Ss. 360 and 145—*Evidence of witness must be read over to him—Presence of parties to proceeding is unnecessary.*

Per *majority of the F. B.*—The provisions of S. 360, Cr. P. Code, apply to proceedings under S. 145, Cr. P. Code, to this extent at least, that as the evidence of each witness is completed it must be read over to him. But the parties to the proceedings are not "Accused" and their attendance at the reading over is not necessary.

Per *Cuming, J.*—The expression "accused" in S. 360 cannot and does not include the parties referred to in Chapter XII neither does the section contemplate that in cases coming under Ch. XII so much of the section must be complied with as relates to the reading over of the evidence to the witnesses.

Per *Mukerji and Chakravarti, JJ.*—The word "accused" has been used in S. 360, Cr. P. Code in its wider significance as including not merely persons accused of offences before a Criminal Court but also persons against whom proceedings are instituted under the Cr. P. Code in any such Court. The provisions of the section are therefore applicable to a proceeding held under S. 145, Cr. P. Code and the said provisions should, if practicable, be applied in their entirety to such proceedings. If, however, a party or the parties to the proceedings do not care to attend or appear by pleader at the reading over of the deposition, so much of the provisions as it is possible to apply should be complied with. (*Walmsley, Greaves, Cuming, Mukerji and Chakravarti, JJ.*) NARENDRA CHANDRA RUDRA PAL *v* SABARALI BHUIYA. **41 C. L. J. 479 : 29 C. W. N. 701 : 52 Cal. 721 : 88 I. C. 714 : 26 Cr. L. J. 1194 : A. I. R. 1925 Cal. 822. (F. B.)**

———Ss. 360 and 110—*S. 360 applies to S. 110.*

The non-compliance with the provisions of S. 360 vitiates the proceedings under S. 110. (*Suhrawardy*

CR. P. CODE (V OF 1898), S. 360.

and Mukerji, JJ.) NAWAB ALI *v.* EMPEROR.
52 Cal. 470 : 88 I. C. 849 (1) : 26 Cr. L. J. 1233 (1) : A. I. R. 1925 Cal. 816.

——S. 360—*Reading over of the evidence by witness himself is not enough.*

Under S. 360 the witnesses whose statements have been recorded and the accused who is on trial are to be given an opportunity of knowing what has been recorded and a mere reading over of the evidence by the witnesses themselves cannot convey to the accused what has been recorded as the evidence given by the witnesses. Evidence not duly recorded as required by S. 360 cannot be used as the foundation of a conviction. (*Walmsley and Mukerjee, JJ.*) MAHAMMAD YASIN *v.* EMPEROR. 52 Cal. 431 : 88 I. C. 602 : 29 C. W. N. 650 : 26 Cr. L. J. 1178 : A. I. R. 1925 Cal. 782 :

——SS. 360 and 117—*S. 360 applies to proceedings under S. 117.*

The provisions of S. 360, Cr. P. Code, are applicable to proceedings under S. 117 when a person is called upon to show cause why he should not furnish security for good behaviour and failure to comply with the provisions of that section would vitiate the enquiry or trial which has resulted in an order under S. 118 of the Code.

Per *B. B. Ghose, J.*—There is considerable doubt whether S. 360, Cr. P. Code, applies to proceedings under Chap. VIII of that Code. (*Newbould and B. B. Ghose, JJ.*) SANATAN BHATTACHARYA *v.* EMPEROR. 52 Cal. 632 : 41 C. L. J. 352 : 88 I. C. 856 : 26 Cr. L. J. 1240 : A. I. R. 1925 Cal. 720.

——S. 360 and Ch. XII—*S. 360 applies to enquiries under Ch. XII.*

The word "accused" in S. 360, sub-S. (1) means a person over whom a Criminal Court is exercising jurisdiction. S. 360, Cr. P. Code is applicable to enquiries held under Ch. XII. 28 C. M. N. 968 Foll. (*Suhrawardy and Mukerji, JJ.*) ASWINI KUMAR DUTT *v.* PUTI. 52 Cal. 437 : 29 C. W. N. 474 : 86 I. C. 978 : 26 Cr. L. J. 914 : A. I. R. 1925 Cal. 678.

——S. 360—*Provisions of, mandatory—Non-compliance—Effect of.*

The provisions of S. 360, Cr. P. Code are mandatory and an omission to comply with them vitiates the trial. The general object of S. 360 is to ensure the accuracy of the record and also that the accused should know and understand what evidence is given at the trial. The reading over of the evidence to the witnesses is so essential to the framing of an accurate record that the direction in S. 360 that the evidence should de read over to the witness is imperative and not merely directory. The omission to read over their evidence to the witnesses is an illegality which vitiates the trial, and is not cured by S. 537, Cr. P. Code. (*Newbould and Mukerji, JJ.*) HIRA LAL GHOSH *v.* EMPEROR. 28 C. W. N. 968 : 52 Cal. 159 : A. I. R. 1924 Cal. 889.

——S. 360—*Non-compliance with the provisions of the section is fatal.*

The omission to comply with the provisions of the section, is an irregularity which is not curable by the provisions of S. 537. (*Cuming and B. B. Ghose, JJ.*) HARO NATH MALO *v.* ALA BUX.
38 C. L. J. 281 : 28 C. W. N. 119 : 76 I. C. 961 : 25 Cr. L. J. 289 : A. I. R. 1924 Cal. 182.

——S. 360—*Provisions of—Compliance with.*

The evidence of each witness ought to be read over to him as it is completed under S. 360 of the Code. This procedure must be strictly observed. It is not sufficient that each sentence is read out as it is being recorded. (*Martineau, J.*) WADHAWA SINGH *v.* EMPEROR. 63 I. C. 461 : 22 Cr. L. J. 669 : 3 U. P. L. R. 78 (Lah.).

——S. 360—*Reading depositions of witnesses after the examination of all is over—Procedure is illegal and not only irregular.*

S. 360 is mandatory and not directory. It is not proper for the Magistrate to examine a number of witnesses and ask them to be in a room and then have the depositions read over to them. Such a procedure is illegal and not only irregular. It is fair both to the witnesses as well as to the Magistrate who takes down the deposition, as well as to the accused, to have the deposition read over as soon as the examination of the witness is over. (*Devadoss, J.*) KUPPU MUDALIAR, *In re.* 22 L. W. 339 : (1925) M. W. N. 795 : 90 I. C. 659 : 26 Cr. L. J. 1574 : A. I. R. 1925 Mad. 1206. 49 M. L. J. 421.

——S. 360—*Depositions being read by witnesses themselves is not sufficient—They should be read over in accused's presence—Recording of the fact of the deposition having been read over is not imperative but desirable.*

There is nothing in S. 360 to indicate that the Magistrate shall record that the deposition was read over in the presence of the accused though it is much better that he ought to do so in order that there might be no complaint as to his not having done so. The law requires that the deposition of witnesses should be read over in the presence of the accused so that an opportunity may be given to him to challenge the correctness of the record. Therefore, merely reading of the evidence by the witnesses is not sufficient compliance with Cl. 1 of S. 360. (*Jwala Prasad, J.*) RAMESHAR SINGH *v.* EMPEROR. 6 P. L. T. 493 : 26 Cr.L.J. 927 : 86 I.C. 991 : A. I. R. 1925 Pat. 723

——S. 360—*Violation—Accused not prejudiced—Trial is not vitiated.*

When the question arises, whether the violation of S. 360 will vitiate the trial, the test will be whether the accused has been prejudiced. If the accused is not prejudiced, nothing short of an illegal or irregular exercise of jurisdiction would vitiate the trial. (*Mullick and Bucknill, JJ.*) SAIYID MOHIDDIN *v.* EMPEROR.
4 Pat. 488 : 6 P.L.T. 154 : 1925 P. H. C. C. 112 : 86 I. C. 459 : 3 Pat. L. R. (Cr.) 110 : 26 Cr. L. J. 811 : A. I. R. 1925 Pat. 414.

——S. 360—*Section is mandatory.*

The provisions of S. 360 are mandatory and their intention is to protect the witnesses as also to help the accused. But the absence of a memorandum sub-joined to a deposition and stating the fact of compliance does not itself prove that the provisions of the section have not been observed. (*Adami and Bucknill, JJ.*) BHAGWAT SINGH *v.* EMPEROR.
4 Pat. 231 : 6 P L. T. 73 : 86 I. C. 996 : 26 Cr. L. J. 932 : A. I. R. 1925 Pat. 378.

——S. 360—*Evidence not read over—Effect.*

Not reading over the deposition to the witness before his signing it is not such an irregularity as to make the evidence inadmissible entirely. (*Foster, J.*) SONDI SINGH *v.* GOVIND SINGH. 5 Pat. L. T. 237 : 2 Pat. L. R. 108 (Cr.) : 76 I. C. 25 (2) : 25 Cr. L. J. 89 (2) : A. I. R. 1924 Pat. 786.

——S. 360—*Provisions mandatory.*

The section is mandatory. Therefore the evidence given by a witness must be read over to him, in the presence of the accused or his pleader ; if not the witness cannot be prosecuted for perjury in respect of any false statement made by him. (*Sultan*

CR. P. CODE (V OF 1898), S.360.

Ahmad, J.) BRAHMADEO SINGH *v.* EMPEROR.
2 Pat. L. T. 380 : 62 I. C. 584 : 22 Cr. L. J. 568 : (1921) P. H. C.C. 139.

——S. 360—*Omission to comply with — Effect—Deposition if inadmissible.*

S. 360 is direct and positive and the provisions thereof should be faithfully followed. But the omission to read over the deposition to the witness does not necessarily render it inadmissible in evidence, but only impairs its evidentiary value. The true way of looking at the matter is this. If the statement is properly recorded under S. 360, then under S. 80, Evidence Act, a strong presumption arises in favour of its being what the deponent stated in his evidence. If not, such a presumption does not arise and the person who relies on its accuracy, in spite of the irregular recording, will have to prove it. (*Kennedy, J. C. and Aston, A. J. C.*) PITUMAR *v.* EMPEROR.
88 I. C. 449 : 26 Cr. L. J. 1137.

——S.360 (1) *and Chap. XII—S.*360 (1) *does not apply to proceedings under Chap. XII* (*Suhrawardy, J. dissenting*)—*Meaning of "accused" discussed.*

The parties to proceedings under Chap. XII of Cr. P. Code, are not persons referred to by the words "the accused" in S. 360 (1) of that Act. S.360 has no application to proceedings under Chap. XII and in such proceedings it is not obligatory on the Court to read over the depositions to the witnesses. (Suhrawardy, J. dissenting).

Per *Suhrawardy, J.*—The term "accused," means any person over whom the Criminal Court exercises jurisdiction. *Case-law discussed.*

Per *Cuming, J.*—"An accused" is a person charged with an infringement of the law for which he is liable, if convicted, to be punished.

Per *Buckland, J.*—The definition of an accused person as a person over whom the criminal Court is exercising jurisdiction cannot be accepted as one of universal application. It may be that in a case or class of cases a party is subject to sanctions or is entitled to rights similar to those to which an accused person is subject or entitled. In such circumstances the phrase that a party "is in the position of an accused person" is to be preferred. But that is a very different thing to holding that such a party is an accused. (*Suhrawardy, Cuming and Buckland, JJ.*) ISHAN CHANDRA SAMANTA *v.* HRIDOY KRISHNA BOSE.
41 C. L. J. 357 : 29 C. W. N. 475 : 26 Cr. L. J. 915 : 86 I. C. 979 : A. I. R. 1925 Cal. 1040.

——S. 360 (1)—*Principle underlying, should be applied to examination of complainant under Cr. P. Code, S.* 200.

The principle underlying S. 360, cl. (i) should be made applicable on grounds of public policy to the substance of the examination of the complainant on oath, if the accuracy of the record of such examination is to be vouchsafed, particularly when it is to be utilized as a basis for a possible perjury in future ; for it would be unsafe to use against a complainant what on the face of it purports to be only a substance and not the full version of his examination without some such sufficient and adequate safeguards as to its completeness and accuracy. (*Kinkhede, A. J. C.*) BHAGIRATHI BAI *v.* EMPEROR. **26 Cr. L. J. 1401 : 89 I. C. 713 : A. I. R. 1926 Nag. 141.**

——S. 362—*Changes.*

[(1) Evidence should be recorded only in appealable cases.

(2) A memo. of examination of accused should be made in such cases.

(3) Sentences under S. 35 shall be considered as one sentence unless the sentences are ordered to run concurrently.].

CR. P. CODE (V OF 1898), S.364.

——S. 362 (1) and (2)—*Strict compliance is necessary even where the accused is to be sent to Dharwar Juvenile Jail.*

A Magistrate must comply with the provisions of S. 362 (1) and (2) where, he deals with a case under S. 457 read with S. 511, I.P. C., and passes a sentence of one year's rigorous imprisonment though the sentence is to be served in the Dharwar Juvenile Jail. (*Marten and Fawcett, JJ.*) MAHOMED ROSHAN *v.* EMPEROR. **26 B. L. R. 1232 : 26 Cr. L. J. 454 : 85 I. C. 134 : A. I. R. 1925 Bom. 147.**

——Ss. 363 and 526—*Application for transfer—Cause for apprehension.*

S. 363 of the Cr. P. Code empowers a Magistrate to record such remarks, if any, as he thinks material respecting the demeanour of such witness whilst under examination. Where a Magistrate noted in his record of deposition of a prosecution witness, as to the demeanour ofa witness, and noted that the latter had not spoken the truth, in an application for transfer by the complainant to the High Court, *Held*, that it was desirable that the case should be transferred to some other Magistrate. (*Suhrawardy and Mukerji, JJ.*) GOLAM BARI GAZI *v.* YAR ALI KHAN.
29 C. W. N. 316 : 86 I C. 708 (1) : 26 Cr. L. J. 852 (1) : A. I. R. 1925 Cal. 480 (2).

——S. 364—*Changes.*

In sub-cl. (3) "unless he is a Presidency Magistrate," is omitted, and the sub-section now applies to all magistrates.

In sub-cl. (4) "or in the course of a trial held by a Presidency Magistrate," have been added.

——S. 364—*Omission to examine accused vitiates conviction.*

The omission to examine an accused person in a summons case is an irregularity vitiating the conviction. *Macleod, C.J.*—In petty cases, the provisions of S. 364 ought not to hamper a Magistrate to the same extent as the provisions of S. 342 which are more mandatory. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* GULABJAN. **46 Bom. 441 : 23 Bom. L. R. 1203 : 64 I. C. 669 : 23 Cr. L. J. 45 : A. I. R. 1922 Bom. 290.**

——S. 364—*Non-compliance with section vitiates trial.*

A record of the examination of the accused made under the provisions of S. 364 is obligatory and the absence of it will vitiate the trial. (*Suhrawardy and Mukerji, JJ.*) SURAT CHANDRA KAR *v.* EMPEROR.
52 Cal. 446 : 26 Cr. L. J. 1244 : 88 I. C. 860 : A. I. R. 1925 Cal. 821.

——S. 364—*Examination under S.* 342—*Only indication contained in order sheet—Questions put not disclosed—Retrial was ordered.*

Of an examination of the accused under S. 342 there was no record made and the only indication of it was to be found in the order sheet which contained the following remarks :—" The accused declined to make any statement in this Court and on being asked whether they would adduce any evidence they replied in the negative."

Held : that the provisions of S. 364 were violated and that the trial being therefore vitiated, should be held afresh. (*Suhrawardy and M. N. Mukerjee, JJ.*) EMPEROR *v.* NANI MANDAL. **52 Cal. 403 : 41 C. L. J. 50: 86 I. C. 345 : 26 Cr. L. J. 761: A. I. R. 1925 Cal. 575.**

——Ss. 364 and 164—*Scope.*

If an incomplete chalan is sent up and the evidence available is recorded by Magistrate the statement made by the accused is not a statement made under S. 164 of the Code but a statement recorded under

CR. P. CODE (V OF 1898), S. 366.

section 364 of the Code. (*Chevis, A. C. J. and Le Rossignol, J.*) BHAI KHAN *v.* EMPEROR.
4 Lah. L. J. 225 : 68 I. C. 841 : 23 Cr. L. J. 617 : A. I. R. 1922 Lah. 189.

——**Ss. 366 and 367**—*Irregularity does not vitiate judgment—Sessions Judge acquitting the accused recording his own finding and findings of assessors—Amplification at a later date giving reasons—Mere irregularity.*

Where in a sessions case the Sessions Judge at the end of the trial wrote a document headed judgment setting forth the findings of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty and they were acquitted and at a later date he wrote and prefixed to that judgment a full reasoned judgment dealing with the various points raised, the classes of the witnesses and the reasons he had for believing or disbelieving those witnesses, such a course even though it may possibly be an error in procedure is a mere irregularity and the High Court will not set aside the acquittal in revision. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) SANKARALINGA MUDALIAR *v.* NARAYANA MUDALIAR. **45 Mad. 913 : 16 L. W. 413 : (1922) M. W. N. 579 : 23 Cr. L. J. 583: 31 M. L. T. 342 : 68 I. C. 615 : A. I. R. 1922 Mad. 502 : 43 M. L. J. 369 (F.B.).**

——**S. 366**—*Judgment must discuss evidence against each accused.*

The Court of first instance ought to help an appellate Court by making some definite statements, as for instance pointing out the exact evidence showing the complicity of each accused in the crime. (*Dalal, J. C.*) INDU *v.* EMPEROR. **27 O. C. 32: 81 I. C. 529 : 25 Cr. L. J. 913 : A. I. R. 1924 Oudh 335.**

——**S. 367**—*Changes.*

(1) Judgment can be written from dictation of presiding officer and every page signed.

(2) Order under S. 118 or 123 (3) shall be deemed to be a judgment.

——**S. 367**—*Judgment written by Magistrate himself but delivered unsigned—Irregularity is curable by S. 537.*

Where the judgment was entirely in the handwriting of the Magistrate. *Held* : in the circumstances of the case the irregularity of the judgment not being signed, was covered by S. 537. (*Mukerji, J.*) RAM SUKH *v.* EMPEROR.
23 A. L. J. 8 · 47 All. 284 : L. R. 6 A. Cr. 41 : 86 I. C. 64: 26 Cr. L. J. 688 : A. I. R. 1925 All. 299.

——**Ss. 367 and 537**—*Judgment pronounced by another Magistrate is not an irregularity.*

It was not suggested that the failure of the Magistrate to pronounce judgment in any way prejudiced the accused in the conduct of the case. The only omission namely that the Magistrate did not himself pronounce the judgment in the case was due to the fact that he was physically incapacitated. *Held*, at the most, his procedure in getting another Magistrate to pronounce the judgment was a mere irregularity completely covered by section 537. (*Ryves, J.*) NUR MUHAMMAD *v.* EMPEROR. **21 A. L. J. 137 : 71 I. C. 525 : L. R. 4 A. Cr. 76 : 24 Cr. L. J. 173 : A. I. R. 1923 All. 276.**

——**Ss. 367 and 424**—*Applicability—Appellate judgment.*

The rules of the original Criminal Court cannot be strictly applied to the decisions of an appellate Court but may be applied as far as it is feasible. For guidance and direction the Criminal appellate Court should refer to. 20 Cal. 353. (*Stuart, J.*) LAL SINGH *v.* EMPEROR. **L. R. 3 A. 9 (Cr.).**

CR. P. CODE (V OF 1898), S. 367.

——**S. 367**—*Appellate judgment not containing discussion of evidence nor facts indicating occurrence does not comply with provisions of the section.*

If the judgment of an appellate Court does not discuss evidence and does not give facts indicating the occurrence dealt with in it, the judgment is not a judgment under S. 367, Cr. P. Code. Such a judgment must be set aside. (*Sanderson, C. J. and Chotzner, J.*) GAHARALI *v.* EMPEROR.
25 Cr. L. J. 901: 81 I. C. 437 : A. I. R. 1925 Cal. 266 (1.)

——**Ss. 367 and 424**—*Judgment of appellate Court—Contents of—Joint trial.*

S. 424 of the Cr. P. Code read with S. 367 lays down what the contents of a judgment of any appellate Court other than a High Court should be. The appellant is entitled to have, from Court of appeal that has to deal with them an explicit opinion on the questions of fact involved in the case and the Court of Appeal should take its own view of the evidence after perusing the record. The judgment of the Court of Appeal should be such that the High Court, as a court of revision might on looking into the judgment be in a position to judge for itself what the case was and how far the Court of Appeal had considered the evidence as bearing on the guilt or innocence of the individual accused before the latter affirmed the judgment of the trial Court. (*Newbould and Ghose, JJ.*) INATULLA SARKAR *v.* EMPEROR.
39 C. L. J. 117 : 25 Cr. L. J. 1041 : 81 I. C. 820 : A. I. R. 1924 Cal. 618.

——**S. 367**—*Judgment of criminal court—Contents of—Appellate Court—Duty of.*

Where a Magistrate does not dismiss an appeal summarily but gives a hearing to the pleaders of the parties and writes a judgment in which all that he says is that he is satisfied that the judgment of the trial court is substantially right, such a judgment is not in accordance with the provisions of S. 367, Cr. P. Code and can be set aside by the High Court. (*Walmsley and Chotzner, JJ.*) BAISHNAV CHARAN DAS *v.* EMPEROR. **72 I. C. 71 (2) : 24 Cr. L. J. 311 :A. I. R. 1924 Cal. 537.**

——**Ss. 367 and 423**—*Dismissal of appeal under S. 423—Court must write points for determination and reasons.*

Where an appeal is dismissed under S. 423, the appellate Court is bound to write a judgment stating the points for determination and the reasons for its decision. (*Martineau, J.*) THAKUR SINGH *v.* EMPEROR. **26 Cr. L. J. 1380 : 89 I. C. 516 : A. I. R. 1925 Lah. 644 (1).**

——**S. 367**—*Pronouncing judgment before writing is irregularity curable under S. 537, Cr. P. Code.*

Pronouncing sentence before writing judgments is an irregularity covered by S. 537 and is curable except in case of failure of justice. (14 All. 242, Diss.) (*Moti Sagar, J.*) ATA MUHAMMAD *v.* EMPEROR.
25 Cr. L. J. 705 : 81 I. C. 193 : A. I. R. 1925 Lah. 137 (1).

——**S. 367**—*Appellate judgment—Contents of.*

An appellate judgment should be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial Court. If it is impossible to follow the appellate judgment without reading the judgment of the trial Court, it is not a proper judgment. The court must apply its mind in a case where there are several accused to the evidence against each separately. (*Shadi Lal, C. J.*) SOLHU *v.* KRISHNA RAM. **25 Cr. L. J. 113 : 76 I. C. 177 : A. I. R. 1924 Lah. 660.**

——**S. 367**—*Non-compliance vitiates judgment.*

CR. P. CODE (V OF 1898), S. 367.

Under section 424 of the Cr. P. Code the rules contained in S. 367 as to the judgment of a Criminal Court of original jurisdiction apply to the judgment of any appellate Court other than a High Court. The High Court will not in revision make up for the deficiency of the appellate judgment by having recourse to that of the Court of first instance. I. L. R. 2 Lah. 308, Foll. (*Moti Sagar, J.*) RAHIM ALI *v.* EMPEROR. **A. I. R. 1923 Lah. 344.**

——S. 367—*Judgment can be pronounced by successor if written and signed by the Trying Magistrate.*

The succeeding magistrate cannot be said to act without jurisdiction in pronouncing judgment signed and written by his predecessor. 1923 All. 276 and 1924 Cal. 55. Dist. (*Kendall, A. J. C.*) CHANDIKA *v.* KING EMPEROR. **25 Cr. L. J. 1075 : 11 O. L. J. 725 : 28 O. C. 109 : 81 I. C. 899 : A. I. R. 1925 Oudh 62.**

——S. 367—*Judgment—Joint appeal by two accused—Failure to deal with points raised by one accused vitiates judgment.*

Where an Appellate Court in dealing with the appeal of two persons D and M, dealt only with the points arising in connection with the case against D and ignored the defence of *alibi* raised by M, *held*, that the judgment was no judgment in accordance with law and must be set aside. (*Lindsay, J. C.*) MADAD ALI *v.* EMPEROR. **24 O. C. 230.**

——S. 367—*Reference to oral evidence not necessary if conclusions from evidence are given.*

All that S. 367 requires is that the point for determination should be stated, the decision thereon, and the reasons for the decision. It cannot be assumed that because the Magistrate has not referred to the oral evidence but has drawn inferences from documents and from probabilities, therefore he has not considered the evidence. Where he has given strong and legal reasons for his conclusion there is no reason to say that his judgment is defective. (*Ross, J.*) DURGA SINGH *v.* EMPEROR. **71 I. C. 597 : 2 Pat. L. R. Cr. 154 : 24 Cr. L. J. 181 : A. I. R. 1924 Pat. 181.**

——Ss. 367 and 424—*Appeal—Contents of judgment.*

The judgment of an Appellate Court must contain the points for decision, the decision, and the reasons therefor and any defect in these matters will make it illegal. (*Jwala Prasad, J.*) MANGLA MAGHI *v.* EMPEROR. **63 I. C. 416 : 22 Cr. L. J. 656 : 2 Pat. L. T. 616.**

——S. 367—*Appellate Court—Judgment—When illegal.*

An appellate judgment, not containing the facts of the case and neither showing the points for determination nor the discussion of those points, is not one in accordance with law. (*Jwala Prasad and Ross, JJ.*) KALI CHARAN DAS *v.* GELI BEWA. **63 I. C. 336 : 22 Cr. L. J. 640 : 2 Pat. L. T. 228.**

——S. 367—*Appeal—Summary dismissal—Judgment must give reasons.*

An Appellate Court, though empowered to dismiss an appeal summarily, yet in doing so, must record its reason for the dismissal and show that the points raised were duly considered by it. (*Jwala Prasad, J.*) GOBIND BEHARI *v.* EMPEROR. **61 I. C. 49 : 22 Cr. L. J. 321 : 2 Pat. L. T. 10.**

——S. 367—*Signing and delivery of judgment by presiding officer himself is essential.*

The judgment was signed and dated before delivery and sent to the chief clerk to deliver. *Held*, it was not legally pronounced ; there was no Court for no presiding judge was present. The delivery of judgment and the passing of sentence is an integral part of a criminal trial. It is not mere formality and the deliberate breach of express provisions of the law cannot be treated as a mere irregularity to be cured by Section 537. (*Robinson, C. J. and Mac Gregor, J.*) RAMBIT *v.* EMPEROR. **1 Bur. L. J. 122 : 73 I. C. 328 : 24 Cr. L. J. 584 : A. I. R. 1923 Rang. 44 (2).**

CR. P. CODE (V OF 1898), S. 369.

——S. 367 (5)—*Proviso—Heads of charge to jury should be put on record as soon as possible.*

According to the proviso to S. 367 (5) the recording of "heads of charge to the jury" need not be a verbatim reproduction of the Judge's summing up ; nor is it necessary that the charge should be written out before it is delivered. But whether the heads of charge are written out before delivery or not, they should be placed on record by the Judge as soon as it is possible for him to do so and whilst what he said is fresh in his recollection. The heads of charge need not be meticulous or lengthy but must give accurately the substance of what the Judge said to the Jury so that the High Court may, if occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the jurors. Where the records of the heads of charge merely stated that certain sections of the Penal Code had been "read over and explained." *Held* that this was not a sufficient compliance with the law. 57 I. C. 934 and 1 Pat. L. J. 317. Rel. on. (*Bucknill and Kulwant Sahay, JJ.*) RUPAN SINGH *v.* EMPEROR. **4 Pat. 626 : A.I.R. 1925 Pat. 797.**

——S. 367 (5)—*Lesser sentence than capital—Circumstances under which to be passed.*

S. 367 (5), Cr. P. Code, directs to pass extreme sentence in case of punishment of death. Carefulness should be observed in using discretion and the accused should be given benefit of reasonable doubt. (*Young, O. C. J. and May Oung J.*) MI SHWE YI *v.* EMPEROR. **2 Bur. L. J. 277 : 1 Rang. 751 : A. I. R. 1924 Rang. 179.**

——S. 367 (5)—*Death sentence—Reasons for mitigating—Lapse of time—Effect.*

In cases of murder the extreme sentence is the normal sentence. The Judge should not ask himself if there are reasons for imposing the penalty of death. If he does not pass death sentence, he must give reasons for not passing it. (*Robinson, C. J. and MacGregor, J.*) EMPEROR *v.* SHWE HLA U. **11 L. B. R. 323 · 67 I. C. 613 : 23 Cr. L. J. 437 : 1 Bur. L. J. 66 : A. I. R. 1922 L. B. 32.**

——S. 369—*Change.*

The section applies save as otherwise provided by this Code, or by any other law in force or in the case of a High Court, by its Letters Patent.

——S. 369—*High Court—No power to review—Remedy of accused.*

The High Court has no power to review its Judgment dismissing a criminal appeal even though fresh materials throwing doubt on the conviction are placed before it. The proper procedure is to make a reference to the Local Govt. under Ch. XXIX, Cr. P. Code. (*Stuart, J.*) KALE *v.* EMPEROR. **L. R. 3 A. 185 (Cr.): 45 A. 143 : 74 I. C. 270: 24 Cr. L. J. 766 : A. I. R. 1923 All. 473 (2).**

——S. 369—*Powers of Sessions Judge—Revision by High Court.*

Where in passing a sentence of fine, the Sessions Judge omits to pass sentence in case of default in payment thereof, he has no power to correct the order. The only way is to submit the proceedings to the High Court, which should be requested to inflict punishment in default of fine, in its revisional jurisdiction. (*Pratt and Fawcett, JJ.*) DHONDI NATHAJI RAUT, *In re.*

CR. P. CODE (V OF 1898), S. 369.

62 I. C. 880 : 22 Cr. L. J. 608 : 23 Bom. L.R. 846.

——— **Ss. 369 and 439 (2)**—*Criminal case—Power of High Court to review its own decision—Criminal revision—Order enhancing sentence without notice to accused—Legality of—Rehearing of the case.*

Where the High Court acting under S. 439, Cr. P. Code, enhances the sentences passed by the Lower Court on the accused without giving him a reasonable opportunity to be heard, the High Court acts without jurisdiction and its order is void *ab initio*. It is therefore open to the High Court notwithstanding the prior order to decide the case on its merits after giving proper notice to the accused. Where there is jurisdiction the judgment of the High Court in a criminal case is final as soon as it is signed and thereafter there is no power in the Court to review or alter that decision. (*Odgers and Wallace, JJ.*) TADI SOMU NAIDU, *In re*. **20 L. W. 18 : 47 Mad. 428 : 34 M. L. T. 218 : A.I. R. 1924 Mad. 640 : 46 M. L. J. 456.**

——— **S. 369**—*Review of order of one Judge of High Court*

S. 369 expressly negatives subject to certain exceptions, the power of Courts other than High Courts to review and, there being no other provision authorising High Courts to exercise that power, their exclusion from the purview of the section. cannot be read as conferring it by implication. When a criminal appeal or a criminal revision petition is dismissed for default of appearance, there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may rehear it. (1922) M. W N. 982 (Diss.) (Case Law Discussed.) (*Oldfield and Devadoss, JJ.*) KUNHAHAMADI HAJI *v.* EMPEROR. **46 Mad. 382 : (1923) M. W. N. 94 : 72 I. C. 599 : 24 Cr. L. J. 439 : A. I. R. 1923 Mad. 420 : 44 M. L. J. 450**

——— **Ss. 369, 517 and 520**—*Scope.*

Where an appellate Magistrate disposing of a criminal appeal fails to pass an order under S. 520 it will be open to his successor to do so, in spite of section 369 if there is only an accidental slip or omission. Though an order under section 517, Cr. P. Code should be made at the time of passing judgment in the criminal case itself, an order made subsequently is not illegal or made without jurisdiction. (*Odgers. J.*) *In re* SUBBA NAIDU. **15 L. W. 664 ; (1922) M. W. N. 494 : 71 I. C. 511 : 24 Cr. L. J. 159 : 31 M. L. T. (H.C.) 367 : A. I. R 1922 Mad. 329 : 43 M. L. J. 87.**

——— **S. 369.**

It is not open to a Magistrate to review an order which is a final order, so far as one party is concerned, under S. 145. (*Findlay, O. J. C.*) NARAYAN *v.* CHANDRABHAGA. **26 Cr. L. J. 1289 (2) : 89 I. C. 153 (2) : A. I. R 1925 Nag. 457.**

——— **Ss. 369 and 439 (2)**—*Jurisdiction of court to review or revise its own orders—Order passed without hearing the accused either personally or by pleader, legal effect of.*

Under S. 369 of the Code of Criminal Procedure a Court has no jurisdiction to review or revise its own orders. An order passed in contravention of sub-section (2) of S. 439 of the Code of Criminal Procedure without the accused having had an opportunity of being heard either personally or by pleader in his own defence is null and void *ab initio* as being one passed without jurisdiction. 7 A. 672 : 14 C. 42 : 10 B. 176 : 46 Mad. 382 : 47 M. 428 referred to and relied on. (*Wazir Hasan, A. J. C.*) PARAS RAM *v.* EMPEROR. **26 Cr. L. J. 543 : 85 I.C. 383 : 1 O. W. N. 891 : 10 O. & A. L. R. 1328 : A. I. R. 1925 Oudh 476.**

——— **S. 369**—*Final Order—Cannot be altered.*

CR. P. CODE (V OF 1898), S. 386.

An entry in the order sheet " Entry false, mistake of law " is an order finally disposing of the case and has the effect of "destroying the proceedings"; and therefore under S.369, the Magistrate has no jurisdiction to alter or review that order. 20 Cal. 867 Foll. A. I. R. 1922 Pat. 97, Dist. (*Kulwant Sahay, J.*) GAJO CHAUDHURI *v.* DEBI CHAUDHURI. **1 Pat. L. R. 97 (Cr.) : 72 I. C. 945 : 24 Cr L. J. 481 : A I. R. 1923 Pat. 532.**

——— **S. 370**—*Reasons, necessary.*

Absence of reasons for the finding vitiates conviction. (*Ramesam, J.*) VARADA RAJULU PILLAI. *In re*. **16 L. W. 836 : 31 M. L. T. (H. C.) 400 : 68 I. C. 826 : 23 Cr. L. J. 602 : A. I. R. 1923 Mad. 144 (1).**

——— **S. 374**—*Reference to High Court—Unanimous verdict of jury—Duty of High Court to be satisfied on the evidence.*

Though the Jury have unanimously convicted an accused for murder, it is the duty of the High Court in a reference under, S. 374, Cr. P. Code, to be satisfied that the finding of fact is justified by the evidence on the record. (*Newbould and Mukerji, JJ.*) ARSHED ALI *v.* EMPEROR. **30 C. W. N. 166.**

——— **Ss. 375 and 428**—*Wording of S. 428 is not restricted to nature of evidence—Distinction between the two sections explained.*

In section 428 the word "necessary" does not import that it is impossible to pronounce judgment without the additional evidence. S. 375 says that "additional evidence may be taken upon any point bearing upon the guilt or innocence of the convicted person," whereas all that S. 428 (4) says is "in dealing with any appeal the appellate Court if it thinks additional evidence to be necessary *etc.*" There is no restriction in the wording of the section either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. (*Odgers and Wallace, JJ.*) M. P. NARAYANA MENON, *In re*. **25 Cr. L. J. 401 : 77 I. C. 481 : A. I. R. 1925 Mad. 106.**

——— **S. 376**—*Verdict of Jury—High Court has power to go into questions of fact.*

In a confirmation case under Chap. XXVII of the Cr. P. Code, the High Court is empowered under S. 376 of the Code to go into questions of fact and disturb the unanimous verdict of the Jury approved of by the Trial Judge. However in practice, arbitrary attack on the unanimous verdict will not generally be allowed. The convict is bound to show that a *prima facie* case has been made out and that the verdict is based upon very insignificant evidence. (*Kennedy, J. C. Kemp and Madgaonkar, A. J. Cs.*) EMPEROR *v.* GUL WD. LOUNG. **64 I.C. 657 . 23 Cr. L. J. 33 : 15 S. L. R. 103 (F. B.).**

——— **S. 379**—*Scope.*

S. 379, Cr. P. Code., is not applicable, to civil detention. (*Carr, J.*) EMPEROR *v.* MA KHA GYI. **3 Rang. 93 : 4 Bur. L.J. 9 : 86 I. C. 469 : 26 Cr. L. J. 821 : A. I.R. 1925 Rang. 202.**

——— **S. 386**—*Main Changes.*

A new section has been substituted which provides for recovery of fine by sale of both moveable and *immoveable property* in execution through Civil Court.

——— **S.386**—*Levy of fine—Fine cannot be recovered from deposit as security.*

The applicant had deposited a sum of money in court as security for his brother's appearance in a criminal case. The brother was fined and the fine was recovered from the deposit : *held* the recovery was illegal. *Quaere*. Whether the recovery would be right,

had the brothers been members of a Hindu joint family. (*Wallach, J.*) GIRDHARI LAL *v.* EMPEROR. **L. R. 2 A (Cr.) 153.**

——S. 386—*Fine—Sale of immoveable property of, for—Suit for possession.*

A sale of immoveable property for realizing a fine is illegal and passes no title to the purchaser. A suit for possession is maintainable and the Secretary of State is not a necessary party to it. (*Wilberforce, J.*) MADARI *v.* MEHR DIN. **61 I. C. 527 : 22 Cr. L. J. 399 (Lah.)(No longer law.)**

——S. 386—*Discretion of Magistrate.*

The use of words "may in his discretion" in S. 386 cannot be used for interpreting the words "may be recovered," in S. 148. The discretion in S. 386 only refers to case where there has been a conviction and sentence. (*Adami, J.*) HARENDRA KRISHNA BAGHI *v.* BALKUMAR. **3 Pat. L. T.762 : 24 Cr. L. J. 126 : 71 I. C. 254 : A. I. R. 1923 Pat 57.**

——S. 386 (1) (a)—"*Belonging to*"—*Joint property of the person and his brothers.*

The words "Belonging to" include the share of the offender in a Hindu Joint family estate. Therefore an order for maintenance under S. 488, Cr. P. Code, can be executed by levying the amount by attachment and sale of any property belonging to the offender even if such property consists of a share in a joint family. (*Per Fawcett, J.*) SHIVLINGAPPA *v.* GURLINGVA. **27 Bom. L. R. 1363 : 49 Bom. 906.**

——S. 397—*Changes.*

(1) The Court may now direct that the subsequent sentence shall run concurrently with the previous sentence.

(2) A proviso has been added to the second clause to the effect that where the accused whilst undergoing imprisonment under an order under S. 123, is sentenced to imprisonment for an offence committed before the date of the order, the sentence shall commence immediately.

——S. 397 and Penal Code, Ss. 71, 396 and 400—*Accused already convicted for dacoity and sentenced—Sentence under S. 400 is not barred—Cr. P. Code., S. 397 applies.*

A conviction can be had under S. 400 even where no actual commission of a dacoity is proved. The element of the offence is association with the knowledge that it is formed for the purpose of committing dacoities habitually. Hence where sentence is already passed for the offence of committing dacoity there is no bar to the passing of a sentence under S. 400. (*Dalal and Neave, A. J. Cs.*) MURLI BRAHMAN *v.* EMPEROR. **27 O. C. 385 : 89 I. C. 836 : 26 Cr. L. J. 1412 : A. I. R. 1925 Oudh 374 (2).**

——Ss. 397 and 108—*Applicability.*

On 31st July the applicant was convicted of a substantive offence under S. 500, I. P. C. He however remained on bail until 23rd November when the bail bond was cancelled. In the meanwhile on October 16th the applicant had withdrawn his security under S. 108, Cr. P. Code, and had been committed to prison under that section. *Held*, the substantive sentence of imprisonment under S. 500 should commence on the date (23rd Nov.) on which the bail bond was cancelled. For the application of S. 397, the accused should have been undergoing a sentence of imprisonment on the date on which sentence was passed on him for a substantive offence, 30 All. 314 and 37 Bom. 178, Ref. (*Daniels, A. J. C.*) GANESH SHANKAR VIDYARTHI *v.* EMPEROR. **25 O. C. 249 : 73 I. C. 321 : 24 Cr. L. J. 577 : 10 O. L. J. 593 : A. I. R. 1923 Oudh 56 (2).**

——S. 397—*Sentence passed on same day in separate trials—Concurrent sentences—Whether legal.*

Where the accused was convicted in two separate trials on the same day the cases being numbered 145 and 146 and the sentences were ordered to run concurrently, *Held*, that on the presumption that the sentence in case 145 was passed first, the accused had already begun to undergo that sentence from the moment it was pronounced and the provisions of S. 397, Cr. P. Code, applied and that the order for concurrent sentences was proper. (*Carr, J.*) EMPEROR *v.* NGA PO THAUNG. **3 Bur. L. J. 32 : 82 I.C. 478 : 25 Cr. L. J. 1310 : A. I. R. 1924 Rang 307.**

——S. 400—*Trial of offence in Native State—Accused cannot be tried again in British India for same offence.*

Where in respect of the offence under S. 411, I. P C., an accused is convicted by the Courts of a Native State, he cannot on the same facts be again convicted of the same in British India. (*Harrison, J.*) TEJA SINGH *v.* EMPEROR. **73 I. C. 939 : 24 Cr. L. J. 715 : 5 L. L. J. 574 : A. I. R. 1924 Lah 238.**

——S. 401—*Changes.*

(1) The power to suspend or remit sentences is now extended to orders restricting liberty or imposing liability.

(2) The Governor-General, if delegated by His Majesty, can grant pardons, etc.

(3) If a pardon is granted by His Majesty or Governor General with a condition such condition must be deemed to have been imposed by sentence of a competent Court.

——Ss. 401 and 439—*Applicability—Evidence subsequent to conviction, is no ground for revision.*

An application from the Sessions Judge of Meerut requesting the High Court to set aside a conviction passed by his predecessor and affirmed by a Judge of the High Court in appeal, on the ground that on certain materials that had since come to the knowledge of the District Magistrate, the conviction was wrong cannot be entertained in revision. In such cases the District Magistrate may refer the matter to the Local Government who have power under Chapter XXIX of the Code of Criminal Procedure to do the needful. (*Stuart, J.*) KALI *v.* EMPEROR. **45 All. 143 : 24 Cr. L. J. 767 : 74 I. C. 270 : L. R. 3 A. 185 (Cr.) : A. I. R. 1923 All. 473 (2).**

——S. 403—*Fight in a public place—Hurt to a third person—Conviction for affray is no bar to subsequent conviction for causing hurt in the affray.*

Where two people fight in a public street to the disturbance of the public peace, they commit affray. The police are the guardians of the peace and they maymake upa case of affray and prosecute the parties concerned. If in the course of the affray one party causes hurt to the other, it will be for the party who received the hurt, to decide whether he will proceed against the party who caused the hurt so that the offences of affray and causing hurt are distinct and separate. The offence of affray is committed not alone by the party causing the hurt but by both parties, namely the party causing the hurt and the party receiving the hurt. The offences being distinct from each other, the case falls within paragraph 1 and not para 2 of S. 235 of the Cr. P. Code and therefore, the conviction of the accused under S. 160 of the I. P. C., is no bar to their trial and conviction again under S. 323. (*Mukerji, J.*) RAM SUKH *v.* EMPEROR. **47 All. 284 : 23 A. L. J. 8 : 86 I. C. 64 : L. R. 6 A. Cr. 41 : 26 Cr. L. J. 688 : A. I. R. 1925 All. 299.**

——S. 403—*Acquittal—Compounding of case by*

complainant—Sanction of master of complainant not obtained—Effect.

The complainant compounded a case which he had instituted against the accused and the accused were acquitted. Subsequently the complainant's master alleged that the complaint had been filed under his authority and that he had not given sanction for withdrawal of the case or for compounding it. *Held*, that the acquittal of the accused was quite legal and proper and so long as the order stood, it was a bar to a further trial of the accused on the same charge. (*Boys, J.*) HARBANS *v.* EMPEROR. **22 A. L. J. 820 : L. R. 5 A. 143 (Cr.) : 83 I. C. 658 : 10 O. & A. L. R. 944 : A. I. R. 1924 All. 778.**

——**S. 403**—*Fresh trial barred—Acquittal—Second trial for same offence on same facts.*

Under S. 403, an accused once acquitted of an offence under S. 247, I.P.C., cannot again be tried for the same offence on the same facts. (*Ryves, J.*) DULLA *v.* EMPEROR. **45 All. 58 : 74 I. C. 1054 : 24 Cr. L. J. 862 (1) : A. I. R. 1923 All. 360.**

——**S. 403**—*Fresh trial not barred.*

Where the accused was first charged for false personation before Sub-Registrar and acquitted on a charge under S. 419, I. P. C. his subsequent trial under S. 82 of the Registration Act is not barred because of the previous acquittal where the former Court was not competent for want of sanction to try the latter offence. (*Lindsay, J.*) MOHAN LAL *v.* EMPEROR. **64 I. C. 142 (2) : 22 Cr. L. J. 750 : 19 A. L. J. 813.**

——**S. 403**—*Trial for offence under S. 193, I. P. C.—Acquittal—Subsequent charge under Ss. 467 and 471, I. P. C., on same facts—If barred.*

After a person is acquitted of an offence under S. 193, I. P. C., because he cannot be proceeded against on facts wholly inseparable from the facts of the prior prosecution case for an offence under Ss. 467 and 471 read with S. 120-B, I. P. C. (*Suhrawardy and Mukerji, JJ.*) CHERGALI BEHARI *v.* SATISH CHANDRA GHOSE. **87 I. C. 847 : 26 Cr. L. J. 1023.**

——**S. 403**—*Fresh trial not barred*—Autrefois acquit—*Criminal misappropriation—Prosecution in respect of gross sum misappropriated—Withdrawal—Subsequent prosecution for minor items—Bar.*

The accused was tried for criminal breach of trust under S. 409, I.P. C., in respect of a gross sum alleged to have been misappropriated within a specified period. No evidence was offered and the prosecution was withdrawn. The accused was subsequently prosecuted in respect of a particular sum misappropriated on a date within the period covered by the previous charge under S. 409, I. P.C. *Held*, that the previous acquittal was no bar to the subsequent trial. (*Greaves, J.*) NAGENDRA NATH BOSE *v.* EMPEROR. **50 Cal. 632 : 27 C. W. N. 578 : 38 C. L. J. 286 : 77 I. C. 300 : 25 Cr. L. J. 156 : A. I. R. 1923 Cal. 654.**

——**S. 403**—*Competent Courts—Duplicate trial—Cognizance by two Magistrates.*

On three separate police reports, the Deputy Magistrate took action against the petitioners and others in respect ot the conspiracy and required them to give bail to answer the charge. The cases before him remained pending and no evidence was taken up to the 24th June. On the 28th June a formal complaint was laid before the District Magistrate by the Police charging the petitioners and other persons with being members of the conspiracy and on that complaint the District Magistrate took proceedings which ended in the commitment of these petitioners to the Court of Sessions. On the day when the District Magistrate took congnizance of this complaint the Dy. Magistrate passed an order which amounted to a discharge of the persons who were appearing before him in the cases of which he had taken cognizance in connection with this conspiracy.

Held, that there was no illegality on the part of the District Magistrate in taking cognizance of the case and there was no ground for quashing the commitment.

Suhrawardy, J.—The complaint subsequently filed before the District Magistrate was not for all practical purposes the same as that filed and taken cognizance of by the Deputy Magistrate. (*Newbould and Suhrawardy, JJ.*) HAJI SATYA BISHNU *v.* EMPEROR. **50 Cal. 482 : 73 I. C. 934 : 37 C. L. J. 327 : 24 Cr. L. J. 710 : A. I. R. 1923 Cal. 652.**

——**S. 403**—*Dismissal of complaint—Previous acquittal—Subsequent conviction on the same facts.*

The petitioner was originally summoned to answer a charge under S. 426, I. P. C. During the pendency of that case the Magistrate acquitted him under S. 247, Cr. P. Code, on the ground of the absence of the complainant. The complainant submitted a petition to the District Magistrate who revived the complaint but directed that prosecution should proceed under S. 379, I. P. C. instead of under S 426. *Held*, the proceedings from the date of the revival of the case are vitiated by want of jurisdiction. (*Newbould and Suhrawardy, JJ.*) FAZZAR PRAMANIK *v.* EMPEROR. **37 C. L. J. 253 : A. I. R. 1923 Cal. 407.**

——**S. 403**—*Fresh trial barred—Acquittal on trial for criminal breach of trust—Subsequent trial on the same facts for falsification of accounts not legal.*

An accused was tried under S. 408 of the Penal Code for criminal breach of trust of three sums of money alleged to have been dishonestly misappropriated on three dates and the prosecution case at the trial alleged that he had made three false entries to conceal the acts of misappropriation and he was acquitted by the jury. *Held*, he should not on the facts of the case, be tried again on the same facts for an offence under S. 477-A. (*Sanderson, C. J.*) EMPEROR *v* JHABBAR MULL. **49 Cal. 924 : 72 I. C. 973 : 24 Cr. L. J. 509 : A. I R. 1923 Cal. 179.**

——**S. 403**—*Scope of*—Autrefois acquit.

A decision that a prosecution is barred under S. 403 of the Code should be arrived at only after an inquiry into the facts put forward by the complainant. (*Fletcher and Walmsley, JJ.*) RADHA KISSEN *v.* FATEH CHAND. **59 I. C. 323 : 22 Cr. L. J. 67 : 23 C. W. N. 543.**

——**Ss 403 and 195**—*Dismissal of application for sanction*—Autrefois acquit—*Dismissal of application for sanction to prosecute for false statement on oath.*

The dismissal of an application by a party to a judicial proceeding for sanction to prosecute the opposite party under Ss. 181 and 193 for statements made by the latter on oath is no bar to a prosecution started prior to the application for sanction. Its dismissal further does not attract the operation of S. 403, Cr. P. Code. (*Mukerjee, C. J. Fletcher, Richardson, Walmsley and Buckland, JJ.*) SATIS CHANDRA CHAKRAVARTHI *v.* RAM DAYAL DE. **48 Cal. 388 : 59 I. C. 143 : 32 C.L.J. 94 : 22 Cr. L. J. 31 : 24 C. W. N. 982 (S. B.)**

——**S. 403**—*Trial for conspiracy to kill Europeans is untenable on basis of facts proved in previous trial ending in conviction for conspiracy to overawe Government by killing British officers—Penal Code, S. 121-A—Penal Code, S. 120-B.*

There do not exist two conspiracies, one for overawing the Government and the other for killing

CR. P. CODE (V OF 1898), S. 403.

Europeans, where a conspiracy to overawe the Government by means of criminal force, namely, by causing bombs to be thrown at British officers is proved. The conspiracy is one and the same, the killing of Europeans being only the means to an end, *viz.*, the object of overawing the Government by criminal force. In such a case when once there has been a conviction under S. 121-A a fresh conviction, under S. 120-B, cannot be founded on the same facts. (*Martineau J.*) HUSSAIN *v.* EMPEROR. **25 Cr. L. J. 1241: 82 I. C. 169 : A.I.R. 1925 Lah. 157 (2).**

——S. 403—*Fresh trial barred—Penal Code, S. 411—Trial in Native State bars further trial for the same offence on the same facts in British India.*

Where accused committed dacoity in British India but were caught with the stolen property in a Native State and were tried and convicted under S. 411 by the State Court and had undergone the period of imprisonment, *held*, another trial for the same offence on the same facts in British India was barred. (*Harrison, J.*) TEJA SINGH *v.* EMPEROR. **5 L. L. J. 574 : 73 I. C. 939 : 24 Cr. L. J. 715 : A. I. R. 1924 Lah. 238 (2).**

——S. 403 and 236—Autrefois acquit—*Trial for mischief—Acquittal—Fresh charge for rioting on the same facts—Bar of trial.*

The accused who had been tried for and acquitted of a charge of mischief was again charged on the same facts for rioting. The case was that the second accused went with a number of others to a palmyra tope and cut down the spathes of trees and also threw down the pots attached to them in which toddy was being collected. The charge of rioting was based on the allegation that accused went along with the same body of people as alleged before and the palmyra spathes and pots were destroyed in pursuance of the common object, *viz.*, commission of mischief. *Held*, when the accused was tried for mischief it was open to the prosecution to have framed an alternative charge of rioting and that the case fell within the prohibition contained in S. 403 (1), Cr. P. Code. The second trial was therefore illegal. (*Krishnan, J.*) CHINNAPPA NAIDU, *In re.* **19 L. W. 31 : (1924) M.W.N. 153 : 33 M. L. T. (H. C.) 269 : 76 I. C. 708 : 25 Cr. L. J. 244 : A. I. R. 1924 Mad. 478.**

——S. 403—*Stolen property found in possession of accused—Conviction for second time improper unless the subject of second charge is found in different manner.*

Where stolen properties are found in possession of the accused at one and the same time and he has already been convicted under S. 411, I. P. C., for the receipt of one of the properties, he cannot be convicted again for the other property unless there is distinct evidence that the property of the second case was received by the appellant under different circumstances and at a different time from those of the first property. (*Dalal, J. C.*) MUMVA *v.* EMPEROR. **26 Cr. L. J 1 : 83 I. C. 481 : A. I. R. 1925 Oudh 298.**

——S. 403—*Fresh trial barred—Acquittal even under wrong sections is a bar to further trial on same facts.*

An acquittal of an offence arising out of certain facts under a wrong section will prevent a further enquiry into any offence based on the same facts until that acquittal is set aside. (*Ashworth, A. J, C.*) RAM NIDH *v.* RAMSARAN. **26 O. C. 282 . A. I. R. 1924 Oudh 64.**

——S. 403 — *Person proceeded against under S. 476, Cr. P. Code, but proceeding dropped—Change in law making proceedings against him competent—Previous discharge is not bar to re-trial.*

CR. P. CODE (V OF 1898), S. 403.

Petitioner deposited a sum of money along with a mortgage deed under S. 83, T. P. Act, praying for redemption of the mortgage. The deed was suspected to be forged and the opposite party applied to start proceedings under S. 476. The Court held that proceedings under S. 83, T. P. Act, were not of a judicial character and therefore dropped the proceedings. After the amended Code came into force under which the proceedings in respect of which the offence is alleged to have been committed need not be of a judicial character, the Public Prosecutor again moved the Court for taking the same action against the same person ; *Held*, that the petitioner could be proceeded against. (*Adami and Sen, JJ.*) CHAMAI SINGH *v.* PUBLIC PROSECUTOR OF GAYA. **4 Pat. 24 : 26 Cr. L. J 170 : 83 I. C. 730 (2) : 3 P. L. R. 51 : 6 P. L. T. 225 : 3 Pat. L. R. (Cr.) 51 : A. I. R. 1925 Pat. 330.**

——Ss. 403 and 234—*No presumption as to date of receipt of stolen property where several articles of stolen property are found in possession of accused - Procedure to be adopted for trial is to charge the accused for three offences regarding three parcels on the assumption that each offence is independent.*

Where no evidence, one way or other, exists as to whether receipt of various parcels of stolen property took place at the same or different dates no presumption can be drawn or assumption made as against the accused either that the offence of retention by the receiver constitutes one or more than one connected transaction. The prosecution cannot base its case or justify its procedure upon any presumption or assumption operating against an accused unless such presumption or assumption is grounded upon evidence. If the prosecution frames a charge on the presumption that the retentions constituted a set of independent offences it must include only three parcels in respect of which the charge is made and the prosecution may then be met with the plea that these retentions in fact constituted one transaction and one offence, in which case the charge could be amended accordingly and the whole of the stolen property included in one single charge and the accused tried at one single trial. Similarly, if the prosecution chooses to prosecute on several separate charges in several separate proceedings, directly one case is concluded and the accused is convicted or acquitted, the plea will, of course, at once be put forward, namely, that the accused can take the benefit of the provisions of S. 403 of the Code on the ground that the retentions constituted a single transaction and a single offence and no presumption or assumption to the contrary can be raised as against the accused. It is obvious, therefore, that the only safe course to adopt, in cases of this character where no date of reception is known, or can be proved by the prosecution, is to take advantage of the first course indicated above. This course whilst giving the accused the advantage of not being injured by the inclusion in the count of a very large number of parcels of stolen property (a course which might affect him prejudicially if his case was being tried before assessors or a jury and the avoidance of which is really the object of S. 234 of the Code) prevents the accused from objecting effectively in any way to the trial ; for if he contends that the whole matter is but one transaction and one offence then the charge can at once be amended to include the whole of the property.

Where two accused had already been tried for the offence of the retention of stolen property (carpets) found in their possession at the same time as were the stamps, the subject-matter of the second trial ; and their plea at the second trial was that they had

already been tried at the first trial with the same offence as that with which they were charged in the second trial :

Held, they, in effect, claim the presumption in their favour that their retention of all these goods was one offence and one transaction ; and to the benefit of this presumption they are entitled. The fact that one has been acquitted and the other convicted makes no difference. The contention that as the articles recovered from their possession were of very diverse character, the offences of the dishonest retention of each set of articles were distinct offences is negatived by the definition of what is the same offence as defined in sub-Sec. (2) of S. 234 of the Code. It is there prescribed that offences are of the same kind when they are punishable with the same section of the I. P. C. 1888 15 Cal. 511 : 1893 15 All. 317 ; A. I. R. 1923 Cal. 557 ; 1905 9 C. W. N 1023, Diss. 3. (*Adami and Bucknill, JJ.*) EMPEROR *v.* BISHUN SINGH.

3 Pat 503 : 5 P. L. T. 319 : 1924 P. H. C. C. 126 : 2 Pat. L. R (Cr.) 131 : 25 Cr. L. J. 738 : 81 I. C. 226 : A. I. R. 1925 Pat. 20.

———S. 403—*Discharge under S.* 494 (*a*) *of the Code whether bars the entertainment of fresh complaint on same facts.*

An order made under S. 494 (*a*) is an order of discharge of the accused person and under the circumstances of the cases held that S. 403 did not debar the entertainment of a fresh complaint. (*Kulwant Sahay, J.*) RAMANAND LAL *v.* ALI HASSAN.

1924 P. H. C. C. 226 : 83 I. C 689 : 26 Cr. L. J. 129 : A. I. R. 1924 Pat. 797.

———S. 403—*Fresh trial barred—Order under S.* 247, *Cr. P. Code, before accused was served with summons is a bar to fresh complaint on the same facts.*

The complainant *L* filed a criminal complaint on the 22nd January 1923 against *K* and the order of the Magistrate was that the accused should be summoned under S. 426, Penal Code, for the 23rd January. On that date neither party appeared. The complainant was ill and the accused *K* had received no summons. The Magistrate thereupon recorded an order of acquittal under S. 247, Criminal Procedure Code. On the 17th February 1923, *L* filed a second criminal complaint on exactly the same subject-matter and against the same accused *K* as the previous complaint. *Held*, that the order under S. 247, dated 23rd January, was a final order of acquittal which operated as a bar under S. 403. 36 M. 365, Dist. (*Foster, J.*) KIRAM SARKAR *v.* EMPEROR. **5 P. L. T. 15 : 2 Pat. L. R. (Cr.) 10 : 74 I. C. 719 : 24 Cr. L. J. 815 : A. I. R. 1924 Pat. 140.**

———S. 403—*Competent Court—Charge for minor offence.*

It is open to the complainant after the disposal of the case under S. 352, I. P. C., which is the only offence which a Magistrate was investigating to move the officer empowered to take cognizance thereof to proceed with trial of the charge under S. 384, I. P. C. (*Mullick and Kulwant Sahay, JJ.*) GOBID SWAIN *v.* EMPEROR. **2 Pat. 333: 1 Pat. L. R. (Cr.) 109 : 1923 P. H. C. C. 47: A. I. R. 1923 Pat. 229.**

———Ss. 403 and 247—*Scope of—Acquittal under S.* 247—*Second trial if barred.*

S. 403 of the Criminal Procedure Code bars a second trial of a person acquitted under S. 247 of the same charge. The section does not make any distinction between acquittals after trial and acquittals under Ss. 247, 345 and 494. (*Jwala Prasad, J.*) RAM MAHTO *v.* EMPEROR. **61 I. C. 59 : 22 Cr. L. J. 331 : 2 Pat. L. T. 170.**

———S. 403—Autrefois acquit—*Applicability.*

The acquittal of a person charged under S. 338 of the Penal Code for rash driving of a motor car, is a bar to a trial under S. 16 of the Motor Vehicles Act for driving the car without a license so long as his acquittal on the same facts for a different offence remains in force. S. 403 of the Code does not depend for its application upon additional evidence being available or not. (*Jwala Prasad, J.*) MAKSUDDAN HISTRY *v.* EMPEROR. **2 Pat. L. T. 31 : 22 Cr. L. J. 63 : 59 I. C. 207 : 1920 P. H. C. C 108.**

———S. 403—*Accused tried and acquitted under I. P. C.—Trial for offence under Registration Act on the same facts is barred.*

Where an accused has been tried and acquitted under sections of the Indian Penal Code of offences of forgery and abetment thereof, his subsequent trial for offences under the Registration Act on the same facts is barred under S. 403, Cr. P. Code. (*Pratt, J.*) MAUNG SAING *v.* EMPEROR. **1 Rang. 299 : 25 Cr. L. J. 191: 76 I. C. 431: A. I R. 1924 Rang. 213.**

———S. 403—*Competent Court—Burma Village Act (III of* 1889)—*Trial by Headman bars trial by any other Magistrate.*

The Burma Village Act has conferred on the Village Headman the power to try, as a Court, offences under S. 294, I.P. C., and other offences and therefore where the accused has been once tried by him for an offence and has been convicted of such offence, he is not liable to be tried again for the same offence by the Township Magistrate (*May Oung, J.*) NGAE *v.* EMPEROR. **1 Rang. 449: 2 Bur. L. J. 149: 25 Cr. L. J. 233: 76 I. C. 697: A. I. R. 1924 Rang. 23.**

———S. 403 (1)—*Abetment of theft—Acquittal—Subsequent charge of receiving stolen property—Bar of trial.*

The accused was charged before the Sessions Judge with offences under Ss. 109 and 382, I. P. C. The Judge acquitted the accused but observed that he was satisfied that the accused had committed an offence under S.411, I.P.C. The Judge, however, did not charge him with an offence under S. 411, I. P. C., at the trial as he could have done in view of S. 236, Illn. (*a*), Cr. P. Code. The accused was subsequently charged with an offence under S. 411, I P. C., and put on his trial. *Held*, that the provisions of S. 403 (1), Cr. P. C. applied to the proceedings and it was not competent to the prosecution to put up the accused again on a charge of receiving stolen property. (*Macleod, C. J. and Shah, J.*) PUNDALIK SHANKAR GUJAR, *In re.* **26 Bom. L. R. 440: A. I. R. 1924 Bom. 448.**

———S. 403 (1)—Autrefois acquit, *doctrine of—Applicability—Failure of the previous trial under S.* 401, *I. P. C., based on approver's statement—Approver's statement not material on subsequent charge under S.* 413, *I. P. C.—Subsequent trial based entirely on discovery of stolen property which did not prove the accused's membership of the gang—Joint trial.*

Where the charge for an offence under S. 401, I, P. C., rested primarily on the approver's statement about the accused having been present at a meeting held for the purpose of forming the gang, and where it was because that statement was disbelieved that the prosecution failed, and where the approver's statement was in fact part of the material on which the prosecution for the offence under S. 413, I.P.C., had been instituted, but that prosecution would be based entirely on the evidence as to the discovery of the stolen property in the accused's house, which, it was held in the former trial, did not prove his membership of the gang, *held*, that the two trials were not based on the same facts and S. 403 (1) did not apply. (*Martineau, J.*) CHHAJJU *v.* EMPEROR. **A. I. R. 1925 Lah. 537**

———S. 403 (4)—*Court trying first case not competent to try subsequent case—S.* 403 *does not bar second trial.*

S. 403, cl. (4) allows a second prosecution for an offence constituted by the same acts if the Court by which the first case was tried was not competent to try the offence subsequently charged. S. 403 does not apply to such cases. (*Krishnan, J.*) PALANI GOUNDAN *v.* EMPEROR. **88 I. C. 31 : 22 L. W. 205: (1925) M. W. N. 553: A. I. R. 1925 Mad. 711 : 48 M. L. J. 490.**

———S. 404 – *Forum of appeal depends upon sentence.*

For the purpose of deciding the tribunal before which the appeal lies, each accused must be deemed to have been convicted in a separate case of his own and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence. (*Oldfield and Ramesam, JJ.*) NITTOOR MOIDEEN HAJEE, *In re.* **16 L. W. 764: 43 M. L. J. 561: 71 I. C. 217: 24 Cr. L. J. 89: A. I. R. 1923 Mad. 95.**

———Ss. 404 to 431—*Limitation for appeals—Time spent in obtaining diary orders in the case cannot be deducted.*

The time spent in obtaining a copy of the diary orders in the case, which were filed with the appeal, should not be deducted while computing the period of limitation for filing an appeal. (*Robinson, C. J. and Maung Gyi. J.*) M. LAGRIYA *v.* EMPEROR. **3 Rang. 220 : 4 Bur. L. J. 44 : 89 I. C. 459: 26 Cr. L. J. 1371: A. I. R. 1925 Rang. 239.**

———Ss. 404, 437—*Fresh complaint on same facts*

An order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided by section 437. One Magistrate of co-ordinate jurisdiction should not in effect and substance, deal with as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority. But this rule admits of exception. (1899) 22 All. 106 Foll. and (1912) 40 Cal. 71 Ref. (*Fawcett, J. C. and Kemp, A.J.C.*) CHANDIRAM VERPOMAL *v.* EMPEROR. **15 S. L. R. 131: 69 I C. 625: 23 Cr. L. J. 737: A. I. R. 1922 Sindh 23.**

———S. 406—*Changes.*

(1) An order directing security to keep the peace is now appealable.

(2) An appeal lies from an order of any Magistrate.

(3) Appeals will ordinarily now lie to the Court of Session and not to the Dt. Magistrate.

(4) An order rejecting a surety is now appealable under S. 406-A newly added.

———S. 406—Orders for security for good behaviour are appealable and those for keeping the peace are not. (*Pridgeaux, A. J. C.*) SHAMRAO *v.* EMPEROR. **75 I. C. 979 : 25 Cr. L. J. 67 : 19 N. L. R. 160 : A. I. R. 1924 Nag. 60.**

———Ss. 407, 429 and 439—*Appeal—Notice of, to be given to District Magistrate—Acquittal without notice—Illegality.*

Where a Sub-Divisional Magistrate disposes of an appeal against a conviction without giving notice to the District Magistrate and acquits the accused, the omission to give the notice is an illegality and not a mere irregularity. The High Court interfered in revision and set aside the acquittal. (*Shah, A. C. J. and Crump, J.*) EMPEROR *v.* SHIVALINGAPPA BASAPPA. **24 Bom. L. R. 1150 : 73 I. C. 812 : 24 Cr. L. J. 700 : A. I. R. 1923 B. 74.**

(Note :—An order or sentence under S. 380 also by a Sub-Divisional Magistrate of the 2nd class is now appealable under this section and a similar order by a 1st class Magistrate is appealable under S. 308).

———S.407—*Part of case tried as second class Magistrate and part as first class—Appeal lies to Sessions Judge.*

It is not the conviction by a second class Magistrate but the holding of a trial by such Magistrate that determines the forum of the appeal.

Where the Magistrate was vested with first class powers sometime before the hearing of the arguments in the case, *i.e.*, part of the trial was held by him as a second class Magistrate and part as a first class Magistrate.

Held : thal the proper tribunal for hearing the appeal was the Sessions judge and not the District Magistrate. 8 Cr. L. J. 48 Ref. (*Mullick and Bucknill, JJ.*) SHEOBHANJAN SINGH *v.* EMPEROR. **1925 P. H. C. C. 120 : 3 Pat L. R. (Cr.) 100 : 86 I. C. 978 : 6 P. L. T. 554 : 26 Cr. L. J. 914 : A. I. R. 1925 Pat. 472.**

———S. 408—*Criminal breach of trust—Vague—Misappropriation of definite sums—Cr. P. Code, S.* 222 (1) *and* (2).

Where a charge of criminal breach of trust is made against a general agent of a trader with general authority to expend the monies, the cases must be rare in which it is sufficient to charge a net balance as having been mis-appropriated. It is not permissible to allege a net balance and convict on proof of an offence in regard to some more or less indefinite portion of the amount. The use of criminal courts to litigate a civil claim must be condemned. (*Walsh J.*) MOHAN SINGH *v.* EMPEROR. **42 All. 522: 2 U.P.L.R. (A) 360: 59 I.C. 372 : 22 Cr.L.J. 84 : 18 A. L. J. 633.**

———Ss. 408 and 413—*Cattle Trespass Act, Section 22—Order of compensation under, is appealable.*

An order awarding compensation and repayment of fines under S. 22 of the Cattle Trespass Act (I of 1871), is appealable under S. 408 of the Cr. P. C. (*Macleod, C. J. and Shah, J.*) BURTHOL DUMING *v.* PAPA DADA. **46 Bom. 58 : 23 Bom. L R. 836 : 63 I. C. 160 : 23 Cr. L. J. 624 : A. I. R. 1922 Bom. 191.**

———S. 413—*Right of appeal to some accused—Position of others.*

If a person who is given a sentence which is ordinarily non-appealable is tried jointly with a person who is given a larger sentence, the former does not thereby obtain a right of appeal which he would otherwise not have. (39 All. 293, 39 All. 549 Foll.) (*Daniels, J.*) JHAGRU *v.* EMPEROR. **73 I. C. 775 : 24 Cr. L. J. 679 : A. I. R. 1923 All. 609 (1.)**

———S. 413—*Compensation awarded under S, 22, Cattle Trespass Act is not fine.*

The compensation so awarded not being a fine, the restrictive provisions of S. 413, Cr. P. C. are not applicable. (*Macleod, C.J. and Shah, J.*) BURTHOL DUMING *v.* DADA. **46 Bom. 58 : 23 Bom L. R. 836 : 63 I. C. 160 : 22 Cr. L. J. 624 : A. I. R. 1922 B. 191.**

———Ss. 414 and 562—*Summary trial—Order of Magistrate under S.* 562—*Right of appeal.*

Under S. 408, Cr. P. Code there is a right of appeal to the Sessions Judge from an order of a Magistrate, passed in a summary trial under S. 562, Cr. P. Code. An order under S. 562 Cr. P. Code does not amount to sentence. (*Boys, J.*) HIRA LAL *v.* EMPEROR. **46 A. 828 : 22 A. L. J. 751 : L R. 5 A. 131 : 82 I. C. 172 : 25 Cr. L. J. 1244 : A. I. R. 1924 All. 765.**

———S. 417—*Appeal by Government—Acquittal on the ground of giving benefit of doubt—*Onus *is heavy*

CR. P. CODE (V OF 1898), S. 417.

to succeed in appeal.

An appeal by Government must be considered on its merits just as any other appeal always must be. The *onus* is on the appellant and this *onus* is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge. (*Walsh and Sulaiman, JJ.*) EMPEROR *v.* AUTAR. **47 All. 306 : 23 A. L. J. 25 : L. R. 6 A. Cr. 68 : 86 I. C. 52 : 26 Cr. L. J. 676 : A. I. R. 1925 All. 315.**

——S. 417—*Appeal against acquittal—Appreciation of evidence—Conviction.*

The right of appeal against an acquittal under S. 417, Cr. P. Code, is one that vests with the Government and should be sparingly used. But the discretion is not subject to the control of the Court. The Cr. P. Code makes no distinction between an appeal from an acquittal and an appeal from a conviction. If in an appeal from an acquittal the appellate court thinks that the lower court has taken an erroneous view of the evidence it has no power to convict. 20 A. 459 ; 19 B. 51 ; 17 C. 485 ; 38 M. 1028. (*Pratt and Fawcett, JJ.*) EMPEROR *v.* MUTI KHODA.

26 Bom. L. R. 113 : 25 Cr. L. J. 786 : 81 I. C. 306 : A. I. R. 1924 Bom. 335.

——S. 417—*Appeal against acquittal—Trial by Jury—Interference by High Court when justified.*

On an appeal by the Government against an acquittal by an unanimous verdict of the jury accepted by the Sessions Judge, the existence of a misdirection in the charge would not justify the reversal of the verdict of the jury unless this misdirection has in fact occasioned a failure of justice. (*Newbould and Suhrawardy, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS *v.* SHYAM SUNDAR BHUMJI

26 C. W. N. 558 : 71 I. C. 367 : 24 Cr. L. J. 143 : A. I. R. 1922 Cal. 106.

——S. 417—*Order of acquittal should not be set aside unless wrong or perverse.*

An order of acquittal arrived at upon evidence should not, as a rule, be set aside unless the appellate Courts holds it to be manifestly wrong or perverse or unless it can be said that the Court who tried the case has manifestly erred. (*Scott Smith and Zafar Ali, JJ.*) EMPEROR *v.* RAM KARAN. **7 L. L. J. 528 : 26 Cr. L. J. 1141 : 26 Punj. L. R. 295.: 88 I. C. 453 : A. I. R. 1925 Lah. 600.**

——Ss. 417, 439—*Appeal against acquittal—Penal Code, S.* 415, *Ill.* (*i*).

A sold a land to B without disclosing a prior incumbrance. The sale-deed contained a clause that the property was unencumbered. Subsequently the incumbrancer sued on his mortgage and got a decree under which B had to pay the mortgage money with interest to save the property from sale. B filed a complaint against A under Penal Code, S. 417 but A was acquitted. *Held* that the question is not of any public interest and the parties had a remedy in Civil Courts and therefore no interference with the order of acquittal is necessary. (*Lamsden, J.*) GANGA SINGH *v.* RAMZAN. **6 L. L. J. 50 : 84 I. C. 641 : 26 Cr. L. J. 337 : A. I. R. 1923 Lah. 601 (2).**

——S. 417—*Government can be moved to file an appeal by private applicants.*

So far as the wording of S. 417, Cr. P. Code is concerned there is nothing in it which shows that it is the District Magistrate alone who can move the local Government to file an appeal. It is, in ordinary cases a matter of practice that the local Government is moved by private applicants or the Police through the District Magistrate, or the latter as the head of criminal administration in his district himself moves the local Government, but the Government can move otherwise, (*Abdul Quadir, J.*) MUL SINGH *v.* EMPEROR.

72 I. C. 593 : 24 Cr. L. J. 433 : A. I. R. 1923 Lah. 163.

——S. 417—*Appeal against acquittal—Appellate Court when will interfere.*

An appellate Court will not interfere with the Trial Court's finding, when the evidence is all oral and not too strong to be rejected. (*Shadi Lal, C.J. and Leslie Jones, J.*) EMPEROR *v.* SAMAND.

59 I. C. 924 : 22 Cr. L. J. 172 (Lah.)

——S. 417—*Appeal against acquittal—Offence under S.* 121, *I. P. C.—Delay in prosecution—Effect of.*

The accused was summarily convicted by a magistrate having no jurisdiction on 6th September 1921 under S. 149, I. P. C. but this conviction was set aside by the High Court on *habeas corpus* proceedings which ended on 30th August 1922. The Government did not either in 1921 or till 8th December 1922 decide to prosecute the accused under S. 121, I. P. C. Subsequently the accused was again charged on a charge of waging war but the Sessions Judge acquitted him. *Held*, that under the circumstances the High Court would not interfere on appeal, especially as it was doubtful whether the accused were conscious that what they were doing was an act of waging war (*Odgers and Wallace, JJ.*) THE PUBLIC PROSECUTOR *v.* PALATHINGAL VALIA P. MUHAMAD.

20 L. W. 98 : (1924) M. W. N. 548 : 84 I. C. 547 : 26 Cr. L. J. 323 : A. I. R. 1924 Mad. 768.

——S. 417—*Verdict of jury—When can be set aside.*

In the absence of misdirection to the jury, a conviction based on the verdict of the Jury will be upheld in appeal. Where mis-direction to the jury is not proved the verdict of the jury will be upheld in appeal. (*Krishnan and Wallace, JJ.*) MULIMAYANDI THEVAN, *In re.* **18 L. W. 886 : 76 I. C. 829 : 25 Cr. L. J. 269 : A. I. R. 1924 Mad. 230 : 45 M. L. J. 845.**

——S. 417—*Accused acquitted of more serious offence and convicted of less serious one—Government can appeal.*

The legislature cannot have intended to deprive the Local Government of its right to appeal in cases where an accused person has been acquitted of a very serious charge, merely because at the same trial he was convicted of some other charge, possibly receiving a merely nominal sentence. (*Simpson and Gokaran Nath Misra, A. J. Cs.*) SITA RAM *v.* EMPEROR.

12 O. L. J. 421 : 2 O. W. N. 550 : 89 I. C. 452 : 26 Cr. L. J. 1364 : A. I. R. 1925 Oudh 723.

——S. 417—*Government alone has the right to appeal against acquittal* (*Obiter.*)

The practice in the Patna High Court is not to grant applications made by private persons for setting aside orders of acquittal. There is always a remedy in the hands of such a person who feels himself really aggrieved by an order of acquittal and that is to go to the Government legal advisers and if he could show them that he had good ground for being aggrieved by an order of acquittal they would on his behalf take it up ; and in such circumstances, the position of the Crown, which, alone has the conduct of prosecutions is entirely different when applying to the High Court against an order of acquittal from the position which a private person has. (*Adami and Bucknill, JJ.*) ANANT SINGH *v.* HARI CHARAN CHAUKIDAR.

2 Pat. L. R. Cr. 250 : 85 I. C. 356 : A. I. R 1925 P. 321.

CR. P. CODE (V OF 1898), S. 417.

——S. 417—*Appeal from acquittal.*

The High Court will not interfere unless lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public. But the reason that another tribunal or another Judge might have arrived at a view other than that formed by the assessors and the Judge in the case is not the reason for disturbing the verdict of acquittal which is arrived upon the full consideration of the circumstances and evidence in the case.

Per *Ross, J.* :—The mere fact that an inadmissible piece of corroborative evidence was on record through a technical error should not stand in the way of conviction. (*Ross, J.*) EMPEROR *v.* KUNJA DUSADH.
3 Pat. L. J. 396 : 67 I. C. 506 : 23 Cr. L. J. 410 : A. I. R. 1923 Pat. 119.

——S. 418—*Grounds for reversal of the verdict of the Jury.*

The Court admitted the statement made by a witness to police officer regarding an unimportant matter which had only a remote bearing on the question in issue and the contradiction was not at all vital. *Held*, the admission of this evidence could not have affected the verdict of the jury and it cannot be set aside. (*Chatterjea and Ghose, J.*) KERAMAT MANDAL *v.* EMPEROR. **42 C L. J. 528.**

——S. 418—*Appeal against acquittal — Trial Court failing to come to an independent finding—Interference.*

Where in a case of murder under S. 302, the Sessions Judge disbelieved all witnesses, and attached undue importance to several minor points urged before him, and acquitted the accused.

Held, that the High Court saw no reason to disbelieve the statement of eye-witnesses and that the Sessions Judge failed in his duty to come to any independent finding, after considering the evidence which he had not done. (*Harrison and Broadway, JJ.*) EMPEROR *v.* RUR SINGH. **26 Punj. L. R. 477.**

——S. 418—*Judicial Commissioner of Sindh—Sessions trial—Right of appeal.*

An appeal lies from the decision of a Judicial Commissioner of Sindh holding a Sessions trial, when the Judge has accepted the finding of the jury. (*Kincaid, J. C., Kennedy, Aston, Rupchand Bilaram and Lobo, A. J. Cs.*) HAJI KHUDABUX *v.* EMPEROR.
85 I. C. 706 : 26 Cr. L. J. 562 : A. I. R. 1925 Sind. 249 (F. B.)

——Ss. 419, 421 (1)—*Proviso to* 561 (*A*)—*Dismissal of appeal without the appellant being given an opportunity to be heard—Court's inherent powers.*

The specific terms of the proviso to S. 421 (1) lay down that no appeal presented under S. 419, Cr. P. Code should be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard. Where an accused person was in jail and could not attend court, and his pleader was informed of the date fixed in such a manner as to render it impossible for him to attend court, on a reference to the Bench to decide the question whether the High Court has inherent powers to rehear an appeal presented by a convict under S. 419 which was dismissed by a judge of the High Court, without the appellant or his pleader having had an opportunity of being heard in accordance with S 421, Cr. P. Code.

Held, the order of the judge dismissing the appeal was without jurisdiction. Without holding that the court under S. 561-A, Cr. P. Code has inherent powers this is a case where the Court has inherent powers to order a rehearing. (*Scott-Smith and Zafar Ali, JJ.*) MAHOMED SADIQ *v* .EMPEROR.

CR. P. CODE (V OF 1898), S. 421.

7 Lah. L. J. 108 : 88 I. C. 593 : 26 Cr. L. J. 1169 : A. I. R. 1925 Lah. 355.

——Ss. 419 and 420—*Jail appeal—Dismissal of—Effect of.*

Where a jail appeal is preferred under S. 420 of the Cr. P. Code and is dismissed, no further appeal can be preferred through Counsel under S. 419 of the Cr. P. Code, 3 O. L. J 326 Diss. (*Daniels, J. C.*) GANGA DIN *v.* EMPEROR. **9 O. L. J. 1 : 23 Cr. L. J. 148 : 65 I. C. 612 : 24 O. C. 304 : A. I. R. 1923 O. 56 (1).**

——S. 420—*Jail appeal—Dismissal on ground of limitation—Subsequent appeal presented by counsel against same conviction and sentence—Maintainability.*

Jail appeal was dismissed on the ground of limitation. Subsequent appeal presented by counsel against same conviction and sentence is not maintainable. (*Oldfield, J.*) K. KUNHAMMAD *v.* EMPEROR.
46 M. 382 : 1923 M. W. N. 94 : 24 Cr. L J. 439 : 72 I. C. 599 : A.I. R. 1923 M. 426 : 44 M. L. J. 450.

——S. 421—*Jail appeal—Dismissal of—Appeal by* mukhtar *filed before—Dismissal not proper.*

Prior to the filing of a jail appeal, an appeal against the conviction had been filed regularly through a *mukhtar*. Without knowing this, the jail appeal was dismissed. *Held*, the order was wrong and both appeals must be heard after giving the accused an opportunity of appearing by counsel. (*Daniels, J.*) EMPEROR *v.* MENA RAM. **L. R. 6 A. 202 (Cr.) : 26 Cr. L. J. 1621 : 90 I. C. 917 : 23 A. L. J. 1051.**

——S. 421—*Summary dismissal—Effect—Appeal from jail rejected—Second petition presented through counsel—Not entertainable.*

A second petition of appeal, on behalf of a convict is not entertainable if an order summarily dismissing the petitions of appeal received through the Superintendent of the Jail has been passed before. (1906) 26 A. W. N. 303, Dis. (1894) 19 Bom. 732, Foll. (*Mears, C. J. and Piggott, JJ.*) KHIALI *v.* EMPEROR. **44 All. 759 : 20 A. L. J. 739 : 68 I. C. 41 : 4 U. P. L. R. (A) 163 : L. R. 3 A 137 (Cr) : 23 Cr. L. J. 505 : A. I. R. 1922 All. 480.**

——S. 421—*Scope.*

After the record is sent for and received, the appellate Court is bound to hear the pleader and cannot dismiss the appeal summarily without hearing him. (*Chatterjee and B. B. Ghose, JJ.*) LALIT KUMAR SEN *v.* EMPEROR. **42 C. L. J. 551.**

——S. 421—*Appellant is entitled to be heard where record is sent for.*

Where the judge sends for the record under S. 421, the appellant is entitled to be heard in support of his appeal. (*Chatterjee and B.B. Ghose, JJ.*) SURENDRA NATH GHOSE *v.* EMPEROR. **42 C.L. J. 554.**

——S. 421—*Summary dismissal after admission is not legal.*

After the admission of criminal appeal, the Court has no jurisdiction to dismiss it summarily. Where the High Court calls for an explanation from the lower Court to give reasons why a criminal appeal was summarily dismissed, the lower Court ought to give clear reasons and should not merely remark that it was only a trumpery case. (*Sanderson, C. J. and Panton, J.*) RAM HARI CHAKRAVARTY *v.* SANTOSH KUMAR MANNA. **23 Cr. L.J. 733 (Cal.) : 69 I. C. 461 : A. I. R. 1924 Cal. 642.**

——Ss. 421 and 423.

Appeal once formally admitted, cannot be summarily dismissed. (*Sanderson, C. J. and Panton, J.*) RAM HARI CHAKRAVARTY *v.* SANTOSH KUMAR MANNA. **23 Cr. L. J. 733 : (Cr.) : 69 I. C. 461 : A. I. R. 1924 Cal. 642.**

——S. 421—*Summary dismissal.*

CR. P. CODE (V OF 1898), S. 421.

An appeal ought not to be summarily dismissed when there are disputed questions of fact and a large number of documents. (*Chatterjee and Cuming, JJ.*) RAHIMADI *v.* EMPEROR. **61 I. C 173 : 22 Cr. L. J. 349 (Cal.).**

——**Ss. 421, 369 and 561-A**– *Dismissal of appeal on account of absence of appellant or counsel—Application for rehearing—Maintainability—Power of Criminal Courts to review its orders.*

The accused appealed against an order under S. 195, Cr. P. Code passed by the Sessions Judge which was summarily dismissed in the High Court, as neither the appellant, nor his counsel was present. The appellant applied that the appeal be reheard and decided on merits as his counsel had failed to appear on the day of hearing on account of his having been misinformed as to date of hearing. No affidavit was filed that no reasonable opportunity was given of being heard in support of the appeal. *Held*, (1) that an appeal could be rejected under S. 421 without formality, *i. e.*, without recording judgment or reasons of any description, (2) that S. 561-A did not apply to the case, (3) that under S. 369, the Court could not alter, or review its judgment after it had been signed. (*Addison, J.*) ZAZAR MUHAMAD KHAN *v.* HARA SINGH BEDI. **26 Punj. L. R. 616.**

——**S. 421**—*Appeal—Hearing of, at time of presentation of appeal—Legality—Posting for hearing under S. 421—Lapse of reasonable time—Original records of Court below containing depositions—Necessity—Legal practitioners who drafted memo. of appeal—Failure to argue appeal at time of presentation of appeal.*

A criminal appeal ought not to be heard at the time of the presentation of the papers even for the purpose of dismissal under S. 421. The posting for the purpose of hearing under S. 421 must be a special posting after a reasonable time not less than a week. If questions of fact are argued in the appeal, the appeal ought not to be disposed of even under S. 421 without sending for the original records of the Court below containing the depositions. A pleader who has looked into the papers of a case for the purpose of drafting grounds of appeal is not guilty of professional misconduct merely because he is not prepared to argue the appeal at the time of presentation of the appeal papers. (*Ramesam, J.*) TURKA HUSSAIN SAHIB, *In re* **20 L. W. 623 : (1924) M. W. N. 893 : 84 I. C. 1051 : 48 M. 385 : 26 Cr. L. J. 411 : A I. R. 1924 Mad. 895 (1) : 47 M. L. J. 661.**

——**S. 421**—*Rejection of appeal—Brief record of reasons should be made.*

A Court when rejecting an appeal in a criminal case under the provisions of S. 421 should record shortly its reasons for such rejection in view of the possibility of such order being challenged by an application for revision. 17 A. 241, Foll. (*Dalal, J. C.*) BRIJ MOHAN LAL *v.* EMPEROR. **26 Cr. L. J. 4 : 83 I. C. 484 : A. I. R. 1925 Oudh 290.**

——**Ss. 421 and 430**—*Dismissal of jail appeal—Subsequent appeal through pleader—Maintainability.*

Where an appeal prepared by a prisoner in jail has been dismissed under S. 421, Cr. P. Code, the matter cannot be reopened again by the High Court by way of an appeal presented through counsel. (*Wazir Hasan, J. C.*) RAM AUTAR *v.* EMPEROR. **10 O. & A. L. R 739 : 11 O. L. J. 536 : 1 O. W. N. 354 : 82 I. C. 541 (1) : 25 Cr. L. J. 1313 (1) : A. I. R. 1924 Oudh 425 (1).**

——**S. 421**—*Writing is not necessary for summary dismissal of appeal, but reasons for dissmissal are necessary.*

CR. P. CODE (V OF 1898), S. 422.

An appellate Court is not required by law to write a judgment when dismissing an appeal summarily. It is no doubt necessary that in dismissing the appeal summarily the appellate Court should give the reasons for dismissing the same. A mere order to the effect that the appeal is summarily dismissed, without giving any reason whatsoever, would be bad in law. (*Kulwant Sahey, J.*) JAGANNATH SINGH *v.* EMPEROR. **25 Cr. L. J. 1237 : 82 I.C. 165 : A. I. R. 1925 Pat. 183.**

——**S. 421**—*Appeal—Dismissal for default is not legal.*

Even though no one may appear in a criminal appeal it is the duty of the Court to examine the matter and to come to some sort of decision on the merits. (*Bucknill, J.*) BALDEO DUBEY *v.* EMPEROR. **72 I. C. 891 : 24 Cr. L. J. 475 : 1 Pat. L. R. (Cr.) 29 : A. I. R. 1924 Pat. 376.**

——**S. 421**—*Summary dismissal—Appeal—Appellant absent.*

Where the judgment of the Appellate Court was to the effect that the appellant was absent and unrepresented, that he had been through the judgment and the whole record and the petition of appeal and could see no substance in any of the grounds of appeal : *Held*, there was nothing improper in the same. (*Ross, J.*) KABIR SHAN *v.* EMPEROR. **1 Pat. L. R. 174 (Cr.) : 1923 P. H. C. C. 237 : A. I. R. 1923 Pat. 297.**

——**S. 421**—*Summary dismissal—Power should be exercised with caution—Judgment—Duty of Court.*

The powers which are capable of being exercised under S. 421 should be exercised with considerable caution and where there has been a dispute as to facts and where credibility of witnesses for the prosecution has been even though it may be not very successfully impugned, it is proper for the appellate Court to call for the records and look at the evidence. It is also desirable, as has been often pointed out by the High Courts in this country, that in dismissing an appeal summarily although it is not necessary for the appellate tribunal which is thus acting, to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction. (*Bucknill, J.*) PADARATH KURMI *v.* EMPEROR. **72 I. C. 893 : 24 Cr. L. J. 477 : A. I. R. 1922 Pat. 552.**

——**Ss. 421, 422 and 423**—*Appeal admitted—Dismissal without notice to pleader—Legality.*

When a criminal appeal filed through a counsel was admitted, and subsequently dismissed without giving notice to the counsel, the order of dismissal is invalid; for after an appeal is admitted the Court cannot act under S. 421 Cr. P. Code. (*Lentaigne, J.*) TA PU *v.* EMPEROR. **3 Bur. L. J. 18 : 81 I. C. 549 : 25 Cr. L. J. 933 : A. I. R. 1924 Rang. 294.**

——**S 422 and 537**—*Want of notice—Revision—Judgment of acquittal.*

In the absence of notice to the District Magistrate on appeal from a conviction, the order of acquittal is revisable but not at the instance of the complainant. (*Macleod, C. J and Crump, J.*) DEVENDRA MARRAPPA *v.* SHETTAPPA. **25 Bom. L. R. 251 : 86 I. C. 281 : 26 Cr. L. J. 751 (1) : A. I. R. 1923 Bom. 264 (2).**

——**S. 422**—*Provisions imperative—Omission to give notice is illegal.*

A Sub-Divisional Magistrate who was authorised to hear appeals from the Second Class Magistrate heard and disposed of a criminal appeal, without giving any notice to the District Magistrate, as required by S. 422, Cr.P. Code. *Held*, the section provides that "if the appellate court does not dismiss the appeal summa-

CR. P. CODE (V OF 1898), S. 422.

rily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf of the time and place at which such appeal will be heard." The officer appointed by the Local Government in this behalf is the District Magistrate and, though this provision would not apply so far as the District Magistrate is concerned when the appeal is filed in his Court notice of appeal should have been given to the District Magistrate in the present case. The section is imperative and the omission to give such a notice cannot be treated merely as an irregularity. (*Shah, Ag. C. J. and Crump, J.*) EMPEROR *v.* SHIVLINGAPPA.

24 Bom. L. R. 1150 : 24 Cr. L. J. 700 : 73 I. C. 812 : A. I. R. 1923 Bom. 74.

——S. 422—*District Magistrate to be given notice under Rules—Appeal heard by joint Magistrate, originally filed before District Magistrate—Notice is still essential.*

Where the rules require notice to the District Magistrate the fact that the appeal which is ultimately heard by a Joint Magistrate was originally filed before the District Magistrate does not relieve the Joint Magistrate of his duty of giving notice to the District Magistrate. (*Venkatasubba Rao, J.*) MAHOMED MUSTAFA ROWTHER *v.* SHANMUGA THEVAN.

83 I. C. 349 : 25 Cr. L. J. 1389 : A. I. R. 1925 Mad. 375.

——S. 422—*Omission.*

Quaere :—Whether omission to give notice to the officer mentioned in the section is an illegality or mere irregularity. (*Venkatasubba Rao, J.*) MAHOMED MUSTAFA ROWTHER *v.* SHANMUGA THEVAN.

25 Cr. L. J. 1389 : 83 I. C. 349 : A. I. R. 1925 Mad. 375.

——S. 422—*Appeal cannot be admitted on ground of sentence only.*

The practice of admitting appeals only on the question of sentence is incorrect. 41 Cal. 406 Foll. (*Bucknill and Ross, JJ.*) GAYA SINGH *v.* EMPEROR.

4 Pat. 254 : 6 P. L. T. 381 : 3 Pat. L. R. Cr. 80 : 86 I. C. 718 : 26 Cr. L. J. 862 : A. I. R. 1925 Pat. 453.

——S. 423—*Appellate Court cannot alter a charge so as to make out a different case altogether.*

The charge cannot be so altered by an appellate Court as to make it necessary for the accused to meet an absolutely different case from that with which he is charged in the Court of the committing Magistrate. (*Banerji, J.*) MULA *v.* EMPEROR.

23 A. L. J. 924 : L. R. 6 A. Cr. 159.

——Ss. 423 and 32—*Power to vary sentence is measured by trial Court's powers.*

The powers of an appellate Court to vary a sentence must be measured by those of the Court of first instance. 7 N. L. R. 109 Ref. (*Walsh and Kanhaiya Lal, JJ.*) MAHOMED YAKUB ALI *v.* EMPEROR.

45 A. 594 : 76 I. C. 1032 : 25 Cr. L. J. 312 : A.I.R. 1924 All. 130.

——S. 423—*Dismissal for default.*

An appeal is not liable for dismissal for default, the proper procedure is that it should be decided judicially after perusing the record. (*Stuart, J.*) RAMCHANDAR *v.* EMPEROR.

L. R. 4 A. 7 (Cr.) : 73 I. C. 694 : 24 Cr. L. J. 662 : 21 A. L. J. 100 : A. I. R. 1923 All. 175 (2).

——S.423—*Alteration of charge—Appellate Court can alter charge.*

An appellate Court under S. 423 has power to alter conviction under one section of the Indian Penal Code into another of the same Code. (*Ryves, J.*) HANUMAN *v.* EMPEROR.

20 A. L. J. 213 : 23 Cr. L. J, 198 : 65 I. C. 854 : L. R. 3 A. 56 (Cr.) : A. I. R. 1922 All. 143 (1).

CR. P. CODE (V OF 1898), S. 423.

——S. 423—*Duty of appellate Court—Consequential or incidental orders, meaning of.*

The only consequential or incidental orders within the purview of the section are orders which follow as a matter of course, being the necessary complements to the main order passed, without which the latter would be incomplete or ineffective, such as directions to the refund of fines realised from acquitted appellants, or on the reversal of acquittals as to the restoration of compensation paid under S. 250 for which no separate authority is needed, and orders which though ancillary in character required more than the support of a criminal court's inherent jurisdiction, and could not be passed without express authority. The word 'amendment' only means in this connection amendment of an effective order of the court below. Consequently even improper remarks cannot be expunged on mere application of the aggrieved person, 2 C. W. N. 256 ; 11 I. C. 1000 ; 14 I. C. 643 Dist : 39 Cal. 157 ; 32 All. 153, Foll. (*Gokul Prasad and Stuart, JJ.*) MR. C. DUM *v.* EMPEROR.

44 All. 401 : 20 A. L. J. 261 : L. R. 3 A. 66 (Cr.) : 4 U. P. L. R (A) 165 : 66 I. C. 1005 : 23 Cr. L. J. 349 : A. I. R 1922 All. 107.

——S.423—*Additional Evidence—Appellate Court cannot direct enquiry.*

In an appeal from a conviction, the Appellate Court may if it likes, take further evidence, but has no power to direct an enquiry. (*Stuart, J.*) MUHAMMAD ATA *v.* EMPEROR.

19 A. L. J. 961 : 67 I. C. 498 : 23 Cr. L. J. 402 : L. R. 3 A. 1 (Cr.)

——S. 423—*Conviction under I. P. C., S.* 147, *cannot be converted into one under S.* 323 *in absence of charge under S.* 323 *during trial.*

In the absence of a charge under S.323, Penal Code framed during the trial, the conviction under S. 147, Penal Code, cannot be altered to one under S. 323, Penal Code. 18 C. W. N. 1276 and 30 Cal 288 Foll. (*Newbould and Mukerji, JJ.*) RAKHAL CHANDRA BISWAS *v.* JAMINI KANT BANERJI.

26 Cr. L. J. 108 (2) : 87 I. C. 842 (1) : A. I. R. 1926 Cal. 431.

——S. 423—*Powers of Court, in England—Courts in India may invoka in principle if not repugnant to the Code.*

If a rule is recognised under the English Law which is not a mere rule of practice and procedure but as embodying a principle of natural or substantial justice, and there is nothing in the C.P. Code militating against its application in India, the powers conferred by S.423, Cr. P. Code would be large enough to invoke its application. (*Suhrawardy and Mukerjee, JJ.*) I. G. SINGLETON *v.* EMPEROR.

41 C. L. J. 87 : 29 C. W. N. 260 : A. I. R. 1925 Cal. 501.

——S. 423—*Penal Code, Ss.* 323, *and* 325—*Alteration of conviction by appellate Court—Prejudice to accused is caused.*

The Petitioners along with one K were convicted by the Trial Court under S. 325 for having broken the knee cap of the complainant. The Appellate Court found that the injury to the knee cap was caused by the accused K alone and it came to the conclusion that the petitioners had been guilty of the offence under S. 323 for some other injuries they had inflicted on the complainant.

Held, that the alteration of the conviction of the petitioners from S. 325 to 5323 by the appellate court was unauthorised as they had not been given any opportunity of answering the charge of inflicting

injuries other than the injury to knee-cap. (*C. C. Ghose and Cuming, JJ.*) PATAL GHOSE *v.* EMPEROR.
24 Cr. L. J. 312 : 72 I. C. 72 : A. I. R. 1924 Cal. 532.

——S. 423—*Re-trial—Perfunctory cross-examination of prosecution witness is a good ground.*

Where cross-examination of prosecution witnesses was perfunctory owing to Counsel's inaptitude and facts were not ascertained before the sentence for an offence under S. 302 read with S. 34 was determined, *Held*, that re-trial should be ordered. (*Mookerjee, Richardson, C. C. Ghose, Cuming and Page, JJ.*) EMPEROR *v.* BURENDRA KUMAR GHOSE.
28 C. W. N. 170 : 38 C. L. J. 411 : A. I. R. 1924 Cal. 257 (F. B.).

——S. 423—*Dismissal for default—Criminal appeal cannot be dismissed for default.*

After an appeal had been presented, the records were called for and after the records had arrived the appeal was taken up for hearing. On that date no one appeared in support of the appeal on behalf of the appellant and no application for adjournment was filed. The Magistrate thereupon dismissed the appeal. *Held*, that it was incumbent upon the Magistrate to go through the record and to dispose of the appeal on the merits. (*C. C. Ghose and Cuming, JJ.*) BANSI MIRDHA *v.* BROJESWAR.
50 Cal. 972 : 27 C. W. N. 947 : 39 C. L. J. 278 : A. I. R. 1924 Cal. 95.

——S. 423—*Altering conviction.*

On appeal, the Sessions Judge upheld the conviction and sentence and further passed an order setting aside the order of acquittal of the offence under S. 379, Penal Code which had been passed by the trying Magistrate. *Held*, the Sessions Judge had no jurisdiction to set aside the acquittal of the petitioner. It was not a case of altering the conviction within S. 423, Penal Code. (*Newbould and Suhrawardy, JJ.*) PRASANNA CHANDRA *v.* UPENDRA NATH.
37 C. L. J. 409 : 27 C. W. N. 555 : 75 I. C. 362 ; 24 Cr. L. J. 938 : A. I. R. 1923 Cal. 658.

——S. 423—*Dismissal of appeal—Judgment.*

When an appeal is dismissed under S. 423, Cr. P. Code, the Appellate Court is bound to write a judgment stating the points for determination in the appeal and the reasons for the court's decision. (*Martineau, J.*) THAKAR SINGH *v.* EMPEROR.
26 Cr. L. J. 1380 (1) : 89 I C. 516 (1) : A. I. R. 1925 Lah. 644 (1).

——S. 423—*Alteration of charge.*

The offence of entering into a conspiracy with the *Lambardars* not to report a boy's death is one of a different nature from the offence under S. 189 and is constituted by an entirely different set of facts and if the accused are not called upon in the Trial Court to answer a charge of an offence under sections 176 and 109, Appellate Court is not justified in appeal in altering the convictions to convictions under those sections. Further an offence under Ss. 176 and 109, Indian Penal Code, requires sanction which is not necessary for a prosecution for an offence under S. 189. (*Martineau, J.*) ARJANMAL *v.* EMPEROR.
3 Lah. 440 : 23 Cr. L. J. 709 : 69 I. C. 437 : A. I. R. 1923 Lah. 260.

——S. 423—*Alteration of charge under Ss. 147, 323 into one under S. 160 is illegal.*

Alteration of charge under Ss. 147 and 323, Penal Code, into one under S. 160 is not justifiable. (*Krishnan, J.*) M. SREERAMALU, *In re*
47 M. 61 : 18 L. W. 741 : (1923) M. W. N. 814 : 25 Cr. L. J. 554 : 81 I. C. 42 : A. I. R. 1924 Mad. 375 (2) : 46 M. L. J. 120.

——Ss. 423, 421, and 422—*Scope—Power to excuse delay is not within the section.*

It is only when an appeal has been properly admitted under S. 421 that S. 423 becomes applicable and hence the power to excuse delay in filing an appeal cannot be regarded as incidental to the exercise of powers conferred on an Appellate Court by S. 423. (*Oldfield and Ramesam, JJ.*) NITTOOR MOIDEEN HAJEE, *In re.*
16 L. W. 764 : 71 I. C. 217 : 24 Cr. L. J. 89 : A. I. R. 1923 Mad. 95 : 43 M. L. J. 561.

——S. 423—*Power of Appellate Court— Retrial when ordered.*

Where in a criminal appeal the charge to the jury is defective and the verdict not properly elicited or recorded, retrial need not necessarily be ordered. There is no restriction on the powers of the Appellate Court to deal with a case of which it has complete seisin in any of the manners provided by S. 423, Cr. P. Code. 25 Cal. 711, Foll. 21 Cal. 955, Diss. from. Where there was no evidence on the record to warrant a conviction for the offence charged an order for retrial is not justified. (*Kotval, A. J. C.*) RAMPRASAD *v.* EMPEROR.
26 Cr. L. J. 1090 : 88 I. C. 178 : A. I. R. 1926 Nag. 53.

——Ss. 423 and 237—*Charge and conviction under S. 468, I. P. C., by trial court—Change of conviction under S. 471 in appeal is not proper.*

Where the accused was charged and convicted by the trial court under S. 468, I. P. C. and the appellate court convicted the accused under S. 471, I. P. C., *Held* that the conviction was wrong as it was impossible to postulate that the accused was not prejudiced by having no notice that he was to be convicted of the offence under S. 471. (*Findlay, O. J. C.*) AKBAR HUSSAIN *v.* EMPEROR.
8 N. L. J. 87 : 26 Cr. L. J. 1358 : 89 I. C. 398 : A. I. R. 1925 Nag. 294.

——S. 423—*Appellant's counsel has no right to reply to opposite party's arguments—But generally he should be permitted to do so, as a privilege.*

In a criminal appeal counsel for the appellant cannot claim as a matter of right, to reply to the arguments put forward by the opposite party, but the court should not ordinarily refuse him the privilege of permission to do so. (*Pullan, A. J. C.*) PRAG *v.* EMPEROR.
11 O. L. J. 693 : 82 I. C. 33 : 25 Cr. L. J. 1169 : A. I. R. 1925 Oudh 65

——S. 423—*Right of accused to reply is a privilege to be never refused.*

There is no right of reply vouchsafed to an accused under S. 423 but permission to reply is a privilege which should never be refused by an appellate court. (*Pullan, A. J. C.*) BAHRA *v.* EMPEROR.
25 Cr.L.J. 1173 : 82 I.C. 37 : A. I. R. 1925 Oudh 50.

——S. 423—*Enhancement of sentence.*

The petitioner was convicted under S. 429, I. P. C., by the Deputy Magistrate and sentenced to rigorous imprisonment for 2 months and to a fine of Rs. 50 or in default one month's rigorous imprisonment. On appeal the District Magistrate changed the sentence to one of one month's rigorous imprisonment and a fine of Rs. 200 or in default to two months' rigorous imprisonment; *Held* that the latter sentence amounted to an enhancement of the sentence passed by the trial court for supposing the fine was not paid, the petitioner would have to undergo 3 months' rigorous imprisonment and be still liable to the fine. (*Adami and Bucknill, JJ.*) BHOLA SINGH *v.* EMPEROR.
3 Pat. 638 : 5 P. L. T. 622 : 82 I. C. 50 (1) : 25 Cr. L. J. 1186 (1) : A. I. R. 1924 Pat. 563.

——S. 423—*Summary dismissal after admission is illegal.*

CR. P. CODE (V OF 1898), S. 423.

After an appeal from conviction was admitted, the Appellate Court dismissed the appeal making a note in the order sheet that it had gone through the record. *Held* that, an appeal having once been admitted, it could not be disposed of summarily without considering the whole evidence in the case and writing out a judgment. (*Kulwant Sahay, J.*) NEWA LAL *v.* EMPEROR. **4 Pat. L. T. 552 : 72 I. C. 613 (1) : 24 Cr. L. J. 453 (1) : A. I. R. 1923 Pat. 368.**

——S. 423—*Revision—Appeal disposed of on the merits—Pleader not heard—Power to revise judgment.*

The High Court has no power to set aside the judgment of the Court below merely upon the ground that the pleader or the Counsel on behalf of the petitioner was not heard in the Court below. (*Jwala Prasad and Coutts, JJ.*) OLAYET KHAN *v.* EMPEROR. **1 P. 589 : 4 P. L. T. 98 : 71 I. C. 246 : 24 Cr. L. J. 118 : A. I. R. 1922 Pat. 587.**

——S. 423—*Appeal from conviction under S. 376 (rape)—Appellate Court framing a charge under S. 366 holding that S. 376 had no application and trying the case itself—Proceedings are beyond the scope of S. 423.*

The trial Court had convicted the accused under S. 376 for rape. On appeal by the accused the Sessions Court held that the charge of rape had no application by reason of the fact that the girl was over twelve and that the act could not be said to have been without her consent or against her will and therefore proceeded to frame a fresh charge under S. 366 against the appellant, of kidnapping a woman that she might be forced or seduced to illicit intercourse. To this charge he called on the appellant to plead, and examined him upon it and allowed him to call one witness in defence. *Held* : that in so trying the case himself, the Sessions Judge exceeded the powers conferred on an Appellate Court by S. 423. A charge under S. 366 is triable by a Court of Sessions only and under S. 193 only on commitment ; therefore the Sessions Judge should, after setting aside the conviction, have ordered the accused to be committed for trial, when he would have been tried before a Court of Sessions with the aid of assessors. (*Young, J.*) G. C. SIRCAR *v.* EMPEROR. **3 Rang. 68 : 88 I. C. 287 : 4 Bur. L. J. 29 : 26 Cr. L. J. 1119 : A. I. R. 1925 Rang. 230.**

——S. 423—*Appellate Court can't decide legality of previous convictions.*

Where the appellant was convicted under S. 18 of Burma H. O. R. Act for having disobeyed an order under S. 7 of the Act, *Held*, that in an appeal from conviction under S. 18, the Court can't go into the legality of the order under S. 7. (*Carr, J.*) ON PE *v.* EMPEROR. **3 Bur. L. J. 27 : 82 I. C. 471 : 25 Cr. L. J. 1303 : A. I. R. 1924 Rang. 295.**

——S. 423—*Retrial cannot be ordered when the record is full.*

The appellate Court cannot remand a case for retrial on the ground that inadmissible and irrelevant evidence has been admitted. Where the trial is regular and the record of the Lower Court is as full as the law requires it to be, and there is evidence on the record to enable the Court to decide the appeal on its merits, there are no grounds for ordering a retrial. If inadmissible and irrelevant evidence has been admitted the same should be separated. (*Pratt, J.*) MRS. MAY BONDVILLE *v.* EMPEROR. **1 Bur. L. J. 32 : 74 I. C. 72 : 24 Cr. L. J. 744 : A. I. R. 1923 Rang. 65 (1).**

——S. 423—*In absence of prejudice to accused—Appellate Court can alter conviction into one of graver offence than that charged and found.*

A retrial on the altered charge is not necessary where the Appellate Court alters the conviction into one of an offence which is graver than that charged and found in the Lower Court, provided that the accused is not prejudiced by such a course. (*Kincaid, J. C. and Aston, A. J. C.*) FAIZULLAH *v.* EMPEROR. **25 Cr. L. J. 1057 : 81 I. C. 881 : A. I. R. 1925 Sind 105.**

CR. P. CODE (V OF 1898), S. 424.

——S. 423 (1) (a)—*Retrial—Acquittal—High Court should exercise caution.*

The jurisdiction of the High Court to order a retrial on revision against an acquittal must be exercised with caution and only in exceptional cases. (*Mears, C. J.*) NAND RAM *v.* KHAZAN. **22 Cr. L. J. 337 : 61 I. C. 161 : 19 A. L. J. 589.**

——S. 423 (1) (b) and 439—*Court of Session on an appeal quashing conviction and ordering commitment for trial—Power of High Court in revision to reverse or alter the order of commitment—Penal Code (XLV of 1866), S. 395—Dacoity, charge of—Not made out—Magistrate's jurisdiction to discharge.*

The High Court has jurisdiction in revision to reverse or alter an order of commitment passed by a Sessions Judge under S. 423, (*i*) (*b*) of the Code of Criminal Procedure. *Held* also that where the trial Magistrate does not think that a charge of dacoity is made out, he has jurisdiction to discharge the accused persons of that offence. (*Dalal, J. C.*) RAL SAMUJH LAL *v.* EMPEROR. **1 O. W. N. 525 : 10 O. & A. L. R. 957 : 25 Cr. L. J. 1375 (2) : 82 I. C. 767 (2) : 11 O. L. J. 748 : A. I. R. 1925 Oudh 233.**

——S. 423 (1) (d)—*Award of costs is not incidental to disposal of revision petition.*

The award of costs cannot be treated as incidental or consequential to the disposal of a revision petition within the meaning of S. 423 (1) (*d*) for it does not necessarily follow from an order passed in revision. (*Spencer, Offg. C. J., Kumaraswami Sastri and Krishnan, JJ.*) P. VEERAPPA NAIDU *v.* AVUDAYAMMAL. **48 Mad 262 : 86 I. C. 147 : 26 Cr. L. J. 707 : 21 L. W. 688 : A. I. R. 1925 Mad. 438 : 48 M. L. J. 106 (F. B.).**

——S. 424—*Appellate Court—Evidence not properly considered—Disposal is not in accordance with law.*

Where an Appellate Court disposed of an appeal, in a case involving a large mass of evidence without proper consideration thereof, the judgment is not in accordance with law and ought to be sent back for retrial. (*Lindsay, J.*) SUNSHRI *v.* EMPEROR. **23 Cr. L. J. 378 : 67 I. C. 202 : 19 A. L. J. 921.**

——Ss. 424. and 367—*Appellate Court's judgment must conform to the provisions of S. 367.*

In view of the provisions of S. 424 an Appellate Court's judgment must comply with the provisions of S. 367, Cr. P. Code. (*Sanderson, C. J. and Chotzner, J.*) GAHARALI *v.* EMPEROR **25 Cr. L. J. 901 : 81 I. C. 437 : A. I. R. 1925 Cal. 266 (1).**

——Ss. 424 and 367—*Appellate Court—Duty of, to deal with evidence—Law and evidence not discussed—Judgments not in accordance with law.*

An Appellate Court is not required to write a long and elaborate judgment, but it is clearly its duty, not only to examine the evidence, but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided.

An Appellate Court, which writes a judgment which a High Court is unable to follow without reference to the judgment of the Trial Court, obviously fails in the discharge of the duty imposed upon it by the law.

CR. P. CODE (V OF 1898), S. 424.

(*Shadi Lal C. J.*) DALIP SINGH *v.* EMPEROR.
2 Lah. 308 : 4 U. P. L. R. (Lah.) 9 : 64 I. C. 377 : 23 Cr. L. J. 9 : 24 P. L. R. 1922.

———S. 424—*Several accused—Appellate Court must separately consider case of each.*

Where in a Criminal appeal there are a number of appellants, it is the duty of the Court to bring to bear, with regard to the case of each of the accused, a judicial mind for the purpose of considering whether he was guilty or not having regard to the charges against him and the special evidence directed to him and his particular defence, if any. 2 L. W 958 and 7 L. W. 83 Foll. 20 C. W. N. 1296, Ref. (*Srinivasa Aiyangar, J.*) CHINNA MANIKAM, *In re.*
48 M. L. J. 504 : 88 I. C. 177 : 26 Cr. L. J. 1089 : A. I. R. 1925 Mad. 712.

———S. 424—*Lower Court convicting under one section—Appellate Court cannot set aside conviction under that section and convict under anotner section.*

The accused was convicted by the trial Court of an offence under S. 159 of the Mad. Local Boards Act (14 of 1920). The appellate Magistrate after having found that S. 159 (1) had no application went on to convict the accused, under S. 163 (1) of that Act. *Held*, that the action of the Appellate Magistrate was illegal as no charge had been framed under S. 163 (1) and the accused had not been tried for that offence or convicted by the first Court of any such offence. (*Srinivasa Aiyangar, J.*) T. KADALNATHA PILLAI, *In re.* **21 L. W. 520 : 87 I. C. 924 : 26 Cr. L. J. 1036 : A. I. R. 1925 Mad. 706.**

———S. 424—*In the case of free fight accused must be proved to be aggressor.*

Where there were injuries on both sides and the evidence showed that there was a free fight between the parties. *Held*, the Sessions Judge was bound to examine the evidence carefully so as to show that he was fully convinced upon the consideration of the *pros* and *cons* of the case and the criticisms advanced on behalf of the defence that the account given by the prosecution was true and that the accused were the aggressors. (*Jwala Prasad and Coutts, JJ.*) JIWAN RAUT *v.* EMPEROR. **4 P. L. T. 502 : 1 P. L. R. (Cr.) 55 : 72 I. C. 519 : 24 Cr. L. J. 407: A. I. R. 1924 Pat. 380.**

———Ss. 424, 367 and 250.

When a District Magistrate hears an appeal under S. 253 (3), Cr. P. Code, it is his duty to record a judgment in accordance with S. 367, Cr. P. Code. (*Jwala Prasad, J.*) DEONARAIN MAHTO *v.* CHHANTOO RAUT. **3 P. L. T. 203 : 66 I. C. 325 : 23 Cr. L. J 261 : A. I. R. 1922 Pat. 157.**

———Ss. 424, and 367—*Appellate Court's judgment is not a mere supplement to the trial Court's judgment.*

The provisions of S. 424, read with S. 367 are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically and that the appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the trial Court, but should, without being a long and elaborate one, be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record. (*May Oung, J.*) BHAG *v.* EMPEROR.
1 Rang. 301 : 2 Bur. L. J. 101 : 75 I. C.296 : 24 Cr. L. J. 920 : A. I. R. 1923 Rang. 188.

———S. 428—*Report of Chemical Examiner—Not tendered in trial Court—No order admitting additional evidence in appeal—Basis of conviction.*

In a trial for possession of cocaine, the articles

CR. P. CODE (V OF 1898), S. 428.

were sent for examination to the Chemical Examiner, but his report was not given in evidence in the trial Court. In appeal the Court sent for the report but without recording an order under S. 428, Cr. P. Code, perused the report and convicted the accused. *Held* the procedure was wrong and the conviction based on it illegal. (*Sulaiman, J.*) WALI MUHAMMAD *v.* EMPEROR. **21 A. L. J. 869 : 9 O. & A. L. R. 994 : L. R. 5 A. 9 (Cr.) : A. I. R. 1924 All. 193.**

———Ss. 428 and 288—*Additional evidence—Appellate Court—Procedure—Power of.*

An appellate Court has got no authority to make use of S. 288 of the Code and under S. 428, it can send down the records to the Sessions Court to take action under S. 288 whenever the Appellate Court finds additional evidence necessary. (*Lindsay, J.*) NAGINA *v.* EMPEROR. **19 A. L. J. 947 : L.R. 3 A. 36 (Cr.).**

———S. 428—*Order of remand for taking additional evidence must include the setting aside of conviction by the lower Court.*

Where the appellant had been convicted and in appeal his contention that there had not been due compliance with S. 342, Cr. P. Code, was upheld, and where the order which was passed then was in these terms. "The learned lower Court will therefore now examine all the accused persons afresh under S. 342, Code of Criminal Procedure and call upon them to adduce any defence evidence if they choose to give any, and after the examination and cross-examination of the defence witnesses, if any, he will resubmit the record to this Court with any observations that he may choose to make on the additional evidence, if any, adduced before him, within a month from the receipt of the record by him. The appeal will then be heard by me on its merits. *Held*: that the judge should have set aside the convictions and sentences and remanded the case to the first Court for that Court after compliance with the provisions of S. 342 of the Code of Criminal Procedure and after giving the petitioners an opportunity of calling evidence, to deal with the case on its merits" as if it were before that Court for the first time. The Judge's procedure was clearly erroneous. (*Walmsley and Mukerjee, JJ.*) MD. ABDUS SAMAD *v.* EMPEROR. **40 C. L. J. 319 : 26 Cr. L. J. 313 : 84 I. C. 457 : A. I. R. 1925 Cal. 172.**

———S. 428—*Necessary—Meaning of—Scope of section—Additional evidence or fresh trial.*

The word "necessary" in S. 428 does not import that it should be impossible to pronounce judgment without the additional evidence. There is no restriction in the wording of the section either as to the nature of the evidence or that it is to be taken for the prosecution only to be invoked when formal proof for the prosecution is necessary. The power of the appellate court is not restricted in such cases to ordering a retrial. (*Odgers and Wallace, JJ.*) M. P. NARAYANA MENON, *In re.* **25 Cr. L. J. 401 : 77 I. C. 481 : A. I. R. 1925 Mad. 106.**

———S. 428—*Appeal—Admission of additional evidence—Proof of signature.*

The appellate Court can admit a document as additional evidence to cure a formal defect. (*Ayling and Ramesam, JJ.*) *In re* CHOLANCHERRI AYAMMAD. **17 L. W. 615 : 32 M. L. T. 300 : (1923) M. W. N. 290 : 72 I. C. 515 : 24 Cr. L. J. 403 : A. I. R. 1923 Mad. 600 : 44 M. L. J 557.**

———S. 428—*Order allowing additional evidence will not be interfered with in revision except in case*

of error of law affecting merits of the case.

The Court of Revision will not always interfere with an order of the appellate Court allowing evidence. Where it might itself in the exercise of its discretion as the Appellate Court, have declined to admit additional evidence, to justify interference in revision the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits. (*Macpherson, J.*) AKHTAR HUSSAIN *v.* EMPEROR. **3 Pat. L. R. (Cr.) 101 : 88 I. C. 595 : 6 P. L. T. 431 : A. I. R. 1925 Pat. 526.**

——S. 428—*Additional evidence—Admission of by Appellate Court—Circumstances justifying.*

The scope of S. 428 is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure of the Court, Sub-Inspector or the magistrate as the vindication of the innocence of a person wrongfully accused, where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth. It is impossible on the plain words of the enactment to differentiate between these two cases. It would not be a sound exercise of discretion to do so in the circumstances of India, where justice when it fails does so by erroneous acquittal at least as much as by erroneous conviction. In India the *onus* is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the Appellate Court by S. 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice: on the contrary the enactment is, like the other provisions referred to, directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case. (*Macpherson, J.*) AKHTAR HUSSAIN *v.* EMPEROR. **3 Pat. L. R. Cr. 101 : 88 I. C. 595 : 6 P. L. T. 431 : A. I. R. 1925 Pat. 526.**

——Ss. 428 and 342—*S.* 342 *does not apply to S.* 428 (1)—Per Bucknill, J.—*Fresh opportunity to accused to make statement may be essential in some cases.*

In S. 428 of the Code there is no provision that the accused should be examined after the prosecution evidence is taken and as the examination of witnesses after remand may be made even in the absence of the accused the provisions of S. 342 do not apply to it.

Per *Bucknill, J.*—The Code itself does not contemplate or provide for the examination of the accused after fresh evidence is taken for the prosecution on remand. However, no hard and fast rule can be laid down with regard to when the provisions of S. 342 are and are not properly complied with; in conceivable cases where fresh evidence on a remand has been taken the applicant ought to be given an opportunity of making a statement, *i.e.*, in effect of being examined by the Magistrate: but provided the accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of S. 342, that is of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure or omission in the procedure ought not to be regarded as rendering a trial, wholly nugatory. Should such omission or failure be shown to have prejudiced the accused the matter assumes a different aspect and should be remedied but not otherwise (*Mullick and Bucknill, JJ.*) SAIYID MOHIUDDIN *v.* EMPEROR. **4 Pat. 488 : 6 Pat. L. T. 154 : 1925 P. H. C. C. 112. 86 I. C. 459 : 3 Pat. L R. (Cr.) 110 : 26 Cr. L. J. 811 : A. I. R. 1925 Pat. 414.**

——S. 429—*Scope*—(Per *Buckland, J.*) *A third Judge to whom reference is made cannot make a reference to a Full Bench.*

Per *Suhrawardy, J.*—It cannot be said that it is not absolutely necessary for the Magistrate to give some reasons for his decision in a case under Ch. XII. (*Suhrawardy, Cuming and Buckland, JJ.*) ISHAN CHANDRA SAMANTA *v.* HRIDOY KRISHNA BOSE. **41 C. L. J. 357 : 29 C. W. N. 475 : 26 Cr. L. J. 915 : 86 I. C. 979 : A. I. R. 1925 Cal. 1040.**

——S. 434—*Reference to Full Bench—Point on which opinion is sought should be formulated.*

The question referred to the Full Bench was whether 44 M. 913 was correctly decided, *Held*, this is not a desirable form of reference to a Full Bench because the facts of one case are seldom precisely the same as those of another and it is much better that the point on which the opinion of the Full bench is desired should be formulated. (*Schwabe, C. J. Phillips, Devadoss, Venkatasubba Rao and Wallace, JJ.*) GOPAL NAIDU *v.* EMPEROR. **46 Mad. 605 : 17 L. W. 592 : 32 M. L. T. (H. C.) 352 : (1923) M. W. N. 425 : 73 I. C. 343 : 24 Cr. L. J. 599 : A. I. R. 1923 Mad. 523 (2) : 44 M. L. J. 655 (F. B.).**

——S. 435—*Changes.*

(1) The Court may when calling for record direct the suspension of sentence or release of the accused.

(2) All Magistrates are deemed to be inferior to Sessions Judge.

(3) Sub-section (3) has been omitted.

——S. 435—*Sessions Judge can make reference to High Court against order of District Magistrate.*

Under the explanation to S. 435, the District Magistrate is inferior to the Sessions Judge. The latter has jurisdiction to call for the record of a case decided by the former and make a reference to the High Court. (*Sulaiman, J.*) DARBARI LAL *v.* EMPEROR. **89 I. C. 146 : 23 A. L. J. 894 : L. R. 6 A. 135 (Cr.) : 26 Cr. L. J. 1282 : A. I. R. 1925 All. 591.**

——Ss. 435 and 439—*Prosecution for cheating—Lower Court finding fraud but acquitting accused on ground that fraud was inchoate—Revision was allowed.*

Where in a prosecution for cheating the lower Court found that the accused had acted fraudulently but held that the fraud was inchoate and inconsequential, and acquitted the accused.

Held; that on the finding of fraud, a conviction ought to have followed and that the case should be remitted. (*Mukerjee, J.*) RAMESHWAR *v.* GOBIND PRASAD. **23 A. L. J. 433 : 87 I. C. 426 : 26 Cr. L. J. 970 : L.R. 6 A. Cr. 198 : A. I. R. 1925 All. 473.**

——S. 435—*Charge framed where none necessary—Interference is proper—Cr. P. Code* (1923) *S.* 561-*A.*

If a charge is framed where none should have been framed the proceeding of the Magistrate becomes irregular and the High Court has power to interfere, under S. 435 as well as under S. 561-A to prevent abuse of the process of any Court or as necessary to secure the ends of justice. (*Mukerjee, J.*) GOKUL PRASAD

CR. P. CODE (V OF 1898), S. 435.

v. DEBI PRASAD. 23 A. L. J. 21 : L. R. 6 A. 60 (Cr.) : 86 I. C. 284 : 26 Cr. L. J. 748 : A.I.R. 1925 All. 311 (2).

——S. 435—*Jurisdiction—Order under S. 110, Cr. P. Code—Sessions Judge can call for record.*

Section 435 does enable a Sessions Judge to call for the record of proceedings under S. 110, Cr. P. Code, taken before an inferior Criminal Court within his jurisdiction and the other provisions of the Code enable him to refer the matter to the High Court. (*Walsh, J.*) ASHIQ ALI *v.* EMPEROR. 21 A. L. J. 513 : 24 Cr. L. J. 593 : L. R. 4 A. 126 (Cr.) : 73 I. C. 337 : A. I. R. 1923 All. 596.

——S. 435—*Order under S.421, Cr.P. Code High Court—No power to review—Remedy of accused.*

If the High Court once dismisses a criminal appeal it can review it though new materials are afforded which question the validity of the conviction. The correct procedure is to refer to the Local Govt. (*Stuart, J.*) KALE *v.* EMPEROR. L.R. 3 A. 185 (Cr.) ; 45 A. 143 : 74 I. C. 270 : 24 Cr. L. J. 766 : A I. R. 1923 All. 473 (2).

——S. 435—*Inferior Court—District Magistrate acting under Police Act is not a Court.*

Where the District Magistrate had authority to grant the sanction to prosecute in virtue of Police Act No. V of 1861, S. (4), and he was not acting as the presiding officer of the Court of a District Magistrate constituted under the Code of Criminal Procedure (Act No. V of 1898), the Sessions Judge has no jurisdiction to interfere, with his order, and the order of the District Magistrate, not being that of a Court of justice is not in itself subject to the revisional jurisdiction of the High Court. (*Mears, C. J. and Piggott, J.*) CHHOTAY LAL *v.* CHHEDI LAL. 45 All. 135 : L. R. 3 A. 176 Cr. : 73 I. C. 341 : 24 Cr.L.J. 597 : A. I. R. 1923 All. 149.

——S. 435—*Jurisdiction— Knowledge may be through any source.*

It would be open to High Court on information contained in a newspaper. a placard on a wall, or an anonymous post-card, to take action, if it considered that sufficient grounds were established to justify sending for record under S. 435. (*Stuart, J.*) NARAIN PRASAD *v.* EMPEROR. 45 All. 128 : 20 A. L. J. 909: 24 Cr. L. J. 115 : L. R. 3 A. 178 (Cr.) : 71 I.C. 243 : A. I. R. 1923 All. 85.

——S. 435—*Withdrawal of cases suspends jurisdiction.*

When an order is made by the District Magistrate under S. 435 calling for the record and proceedings pending before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate the jurisdiction of the former Magistrate is suspended, and he is not therefore entitled to record a composition of the offence and acquit the accused under S. 345 though the case may not have been actually transferred to the other Magistrate. (*Marten and Pratt, JJ.*) MARUTI VITHU, *In re.* 49 Bom. 533 : 87 I. C. 596 : 27 B. L. R. 350 : 26 Cr. L. J. 996: A. I. R. 1925 Bom. 247 (1).

——S. 435—*Revision — Interference—Order of acquittal.*

Where there has been a regular trial by a Sessions Judge and an acquittal, it is only in the most exceptional circumstances that the High Court will interfere at the instance of the complainant when the Government have not chosen to appeal against the order. 9 Bom. L. R. 156 Ref. (*Macleod, C. J. and Crump, J.*) JOITA BECHAR *v.* PARSHOTTAM SANKALCHAND. 25 Bom. L. R. 488 : 73 I. C. 974 : 24 Cr. L. J. 734 : A. I. R. 1923 Bom. 455.

——S. 435—*Jurisdiction—Time for interference.*

S. 435 (3), Cr. P. Code expressly excludes the exercise of revisional powers in cases under S. 144, Cr. P. Code. The High Court has merely to satisfy that the facts found fall within the section so as to give jurisdiction to the Magistrate. (*Shah and Hayward, JJ.*) COWASJEE JEHANGIR READYMONEY, *In re.* 62 I. C. 409 : 22 Cr. L. J. 521 : 22 Bom. L. R. 157.

(Sub-section (3) has now been omitted——Ed.)

——Ss. 435 and 439—*Revision—Order of demolition passed by a Municipal Magistrate, whether revisable by High Court.*

A Municipal Magistrate appointed to deal with offences against the Calcutta Municipal Act is a Court of inferior criminal jurisdiction within the meaning of S. 6 of the Code of Criminal Procedure, and his orders are subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. (*Sanderson, C. J. and Panton, J.*) RAM GOPAL *v.* CORPORATION OF CALCUTTA. 29 C. W.N. 898 : 90 I. C. 317 : 26 Cr. L. J. 1533 : 52 Cal. 962 : A. I. R. 1925 Cal. 1251.

——Ss. 435 and 439—*Revision—High Court Interference—Charge of cheating.*

Where there was absolutely no dishonesty in a commercial transaction and where the facts disclosed did not constitute an offence under S. 420, I.P.C. the High Court would interfere in revision and quash the proceedings so as to prevent an abuse of the process of Court. (*Walmsley and Mukerjee, JJ.*) HARENDRANATH DAS *v.* JOTISH CHANDRA DUTT. 40 C. L. J. 283 : 85 I. C. 641 : 26 Cr. L. J. 545 : A. I. R. 1925 Cal. 100.

——S. 435—*Secretary to Local Government exercising powers conferred by Goondas Act (Bengal Act I of 1923) is not a Criminal Court*

The Act has not created any Court but has only provided a certain procedure for dealing with Goondas. The Secretary to the Local Government exercising the powers conferred on him by the Goondas Act is not therefore a Criminal Court within the meaning of S. 435. (*Greaves and Panton, JJ.*) BHIMRAJ BANIA *v.* EMPEROR. 51 Cal. 460 : 26 Cr. L. J. 20 : 83 I. C. 500 : A. I. R. 1924 Cal. 698.

——S. 435—*Revision—Security for good behaviour and keeping peace—Order based on insufficient material—Interference.*

The High Court seldom interferes in the preliminary stage with the discretion of a Magistrate taking action under the preventive sections of the Cr. P. Code, but when the materials on which the orders are passed are clearly not sufficient to support the orders the High Court will interfere. (*Newbould and C. C. Ghose, JJ.*) NAFAR CHANDRA PAL CHOWDHURY *v.* EMPEROR. 38 C. L. J. 198 : 28 C. W. N. 23 : 76 I. C. 429 : 25 Cr. L. J. 189 : A. I. R. 1924 Cal. 114.

——Ss. 435, 438 and 439—*Revision—Practice.*

The High Court will not entertain an application for revision under S. 439 of the Code against an order of the Sub-Divisional Magistrate unless the applicant first moves the Sessions Judge under S. 435 to make a reference to the High Court under S.438. (*Chatterjee, and Huda, JJ.*) RASH BEHARI *v.* PHANI BHUSAN. 63 I. C. 410 (1) : 22 Cr. L. J. 650 : 48 Cal. 534.

——S. 435—*Order under S. 88—If revisable.*

An order under S. 88, Cr. P. Code, is a proceeding within the meaning of S. 435, Cr.P. Code, and is revisable. (*Shadi Lal, C. J.*) SANTA SINGH *v.* EMPEROR. 76 I. C. 18 : 25 Cr. L. J. 82 : A. I. R. 1924 Lah. 617.

——S. 435—*Section not applicable, merely to find-*

CR. P. CODE (V OF 1898), S. 435.

ing, sentence or order but to proceedings generally.

The section does not deal merely with "finding, sentence or order," but with proceedings generally and the power of the High Court extends to calling for and examining the record of any proceeding for the purpose of satisfying itself as to the regularity of such proceeding (*Venkatasubba Rao, J.*) RAMANATHAN CHETTIAR *v.* SUBRAMANIA AIYAR.

47 Mad. 722 : 20 L. W. 234 : 35 M. L. T. 77 : (1924) M.W.N. 556 : 81 I. C. 785 : 25 Cr. L. J. 1009 : A. I. R. 1925 Mad. 39 : 47 M. L. J. 373.

——— **Ss. 435 and 439**—*Inferior Court—Conviction by Sessions Court at Bangalore—Power of revision—European British Subject.*

Where no question of European British subject is involved, the Madras High Court cannot interfere in revision over a sentence by the Sessions Judge of Bangalore, the proper tribunal being the Resident's Court. The law is the same where an European British subject waives his right to be tried as such in the Sessions Court of Bangalore. (*Krishnan, J.*) JEREMIAH *v.* JOHNSON. **18 L. W. 895 : 33 M. L. T. 194 : (1924) M. W. N. 60 : 76 I. C. 695 : 25 Cr. L. J. 231 : A. I. R. 1924 Mad. 373 : 45 M. L. J. 800.**

——— **S. 435**—*Order of discharge—Compensation awarded—Revision—Forum.*

Where compensation is ordered in discharging the accused under S. 250, Cr.P. Code, revision for further inquiry will lie first to the District Magistrate or Sessions Judge before approaching the High Court. (*Krishnan, J.*) GOPOBONDHU BEHARA *v.* VENKATESAM PANTULU. **18 L. W. 651 : (1923) M. W. N. 837 : 76 I.C. 1030 (1): 25 Cr. L. J. 310 (1) : A. I. R. 1924 Mad. 228.**

——— **Ss. 435 and 439**—*Revision of appellate order under S. 144 (5) is entertainable after two months.*

If the High Court is of opinion that the appellate order under S. 144 (5) is wrong, although it may have expired, it would not be deterred from expressing its views about it, in case it is sought to use it in the litigation which may be pending, in view of the fact that, for the time being, it purports to settle the claims of the parties. (*Odgers, J.*) MUTHU KUMARASWAMI NADAR *v.* MAHOMED ROWTHER.

15 L. W. 423 : (1922) M. W. N. 177 : 30 M. L. T. 148 : 67 I. C. 500 : 23 Cr.L.J. 404 : A.I.R. 1922 Mad. 76 :42 M.L.J. 352.

——— **Ss. 435 and 439**—*Discharge of accused by Magistrate—Order for further enquiry by Sessions Judge—Revision by High Court.*

The trying Magistrate after recording the evidence of a number of prosecution witnesses was of opinion that no case had been made out against the accused under S. 408, I. P. C. and discharged the accused. The Sessions Judge on going through the Evidence was of opinion that the Magistrate had not given proper reasons for discharging the accused and ordered a further enquiry. *Held*, that the order of the Sessions Judge was not illegal or improper and the High Court would not interfere in revision. (*Kendall, A. J. C.*) KARHLEY *v.* PANDIT JAGANNATH PRASAD.

10 O. & A. L. R. 576 : 11 O. L. J. 611 : 1 O.W.N. 302 : 87 I. C. 111 : 26 Cr. L. J. 959 : A. I.. R. 1925 Oudh 180.

——— **S. 435**—*Order dismissing complaint for default amounts to acquittal and is not liable to be set aside under S. 435—Cr. P. Code, S. 247.*

An order dismissing the complaint for default in prosecution must be taken to have been passed under S. 247 of the Cr. P. Code. Though the section is not mentioned in the order, such an order is tantamount to an order of acquittal and cannot be set aside by the

CR. P. CODE (V OF 1898), S. 435.

Dist. Magistrate under S. 435. (*Wazir Hasan A. J. C.*) BINDRA *v.* MT. BHAGAWANT.

25 Cr. L. J. 359 : 77 I. C. 295 : A. I. R. 1925 Oudh 44.

——— **S. 435**—*Powers of District Magistrate.*

Under S. 435, Cr. P. Code a District Magistrate after looking into the records of a case can reject the application altogether or take action under S. 438. In the latter case his power is limited to report for orders to the High Court the result of the examination of proceedings under S. 435. (*Wazir Hasan, A. J. C.*) HIR LAL *v.* EMPEROR. **11 O. L. J. 59: 77 I. C. 728 : A. I. R. 1924 Oudh 331.**

——— **S. 435**—*Inferior Court—District Magistrate—If inferior to Sessions Judge.*

As a Court of revision, the District Magistrate is not inferior to the Sessions Judge. Where he passes an order as a Court of original jurisdiction, he is subordinate to the Sessions Judge who can exercise revisional power. (*Dalal, A. J. C.*) EMPEROR *v.* BALWANT SINGH. **73 I. C. 504 : 24 Cr. L. J. 616 : 9 O. & A. L. R. 344 (0) : A. I. R. 1924 Oudh 241.**

[But *see* **explanation to section newly added]**

——— **Ss. 435 and 439**—*Order under S. 476, Cr. P. Code.*

No appeal lies from an order of Civil Court under S. 476, Cr. P. Code, nor is it open to revision. (*Daniels, J. C.*) EJAZ ALI KHAN *v.* EMPEROR.

24 O. C. 367 : 66 I. C. 68 : 23 Cr. L. J. 228 : A. I. R. 1922 Oudh 220.

——— **Ss. 435 and 439**—*Revision against acquittal—Interference by High Court when justified.*

The High Court has power to revise orders of acquittal but it is only in rare and most exceptional cases that acquittals are set aside in revision on the application of private persons. It is not open to a person to use the Criminal Courts to recover property which he cannot obtain by a civil suit. (*Baguley, J.*) KHEMI CHAND *v.* LALU.

3 Bur. L. J. 323 : 85 I. C. 255 : 26 Cr. L. J. 511 : A. I. R. 1925 Rang. 193.

——— **S. 435**—*High Court—Revisional jurisdiction—Upper Burma Ruby Regulation XII of 1887—Conviction—Imprisonment—Confiscation of property.*

Orders passed under the Upper Burma Ruby Regulation convicting a person and sentencing him to imprisonment and also confiscating precious stones are open to revision by the High Court. (*Duckworth, J.*) MAUNG PO LON *v.* EMPEROR. **3 Bur. L. J. 168: 2 Rang. 321 : A. I. R. 1925 Rang. 12.**

——— **S. 435**—*Exceptions.*

The only Acts which are excepted from the revisional jurisdiction of the High Court are the Press Act, the Extradition Act and the Reformatory Schools Act and this only in regard to certain orders passed by Lower Courts. (*Duckworth, J.*) MAUNG PO LON *v.* EMPEROR. **2 Rang. 321 : 3 Bur. L. J. 168 : 26 Cr. L. J. 289 : 84 I. C. 433 : A. I. R. 1925 Rang. 12.**

——— **Ss. 435 (3) and 145**—*Jurisdiction—Section does not apply to proceedings under S. 145.*

Proceedings under S. 145 were instituted but there was no finding that there was any likelihood of a breach of the peace. However, the notice showed that the Magistrate was satisfied that there was a serious dispute between the parties and from the judgment it appeared that there was a quarrel between the parties with reference to the possession of several plots of land. *Held*, it was a proceeding under S. 145 and therefore the High Court could not interfere in revision (*Ryves, J.*) BABU SINGH *v.* ANGNU KEWAT.

L. R. 3 A. 65 (Cr.) : 66 I. C. 527 (1) :

Advocate High Court Jammu & Kashmir Srinagar.

CR. P. CODE (V OF 1898), S. 435.

23 Cr. L. J. 303 : A. I. R. 1922 All. 31 (1).
[No longer Law.]

——**Ss. 435 (3) and 145**—*Revision—Government of India Act, S.* 107.

The High Court under S. 107 of the Government of India Act can set aside proceedings instituted without jurisdiction by a subordinate Court under S. 145 notwithstanding S. 435 (3) and can make consequential or incidental order under the same section. Thus it can give direction for disposal of property attached and dealt with by the subordinate Courts. (*Mookerjee, A. C. J., Fletcher, N. R. Chatterjee, Richardson and Ghose, JJ.*) ALI MAHOMED MANDOL *v.* PIGGOTT.
48 Cal. 522 : 60 I. C. 325 : 22 Cr. L. J. 213 : 32 C. L. J. 270 (S. B.).

——**S. 435 (3)**—*Order under S.* 145, *Cr. P. Code—Failure to give notice in proceedings under S.* 145, *Cr. P. Code—Effect.*

The irregularity or illegality committed by a Magistrate in failing to give notice of the date of hearing will not justify the High Court in interfering in revision. Proceedings under Ch. XII of the Cr. P. Code are excluded from the scope of S. 435 (3). (*Martineau, J.*) JHANDA RAM *v.* TOPAN RAM.
4 U. P. L. R. (Lah.) 82 : 23 Cr. L. J. 424 : 67 I. C. 584 : A. I. R. 1922 Lah. 454.

——**S. 435 (3)**—*Revision—Revenue Court—Decision as to question of possession.*

Pending an attachment by a Magistrate in proceedings under S. 146, Cr. P. Code, mutation proceedings were taken in the Revenue Court. The Revenue Court found on summary enquiry that the applicant was entitled to the non-talukdari property and the respondent to the talukdari property and the District Magistrate thereupon removed the Receiver and gave the talukdari property to the respondent. *Held*, in revision to the High Court, that Ss. 40 and 146 of the U. P. Land Revenue Act gave jurisdiction to the Revenue Court to decide who was in possession and that the High Court could interfere with the order in revision. (*Ashworth, J. C.*) SURENDRA BIKRAM SINGH *v.* EMPEROR. **25 O. C. 242 : 24 Cr. L. J. 537 : 73 I. C. 153 : A. I. R. 1922 Oudh 300.**

Present S. 436 is the old S. 436 with some changes, namely, that the power can be exercised only after giving the person concerned an opportunity of showing cause.

[Ss. 436 and 437 have been renumbered 437 and 436 by Act XVIII of 1923.]

——**S. 436 (Proviso) and S. 203**—*Complaint dismissed under S.* 203—*Proviso to S.* 436 *does not apply.*

The proviso to S. 436 cannot apply to a dismissal of a complaint under S. 203 ; it only applies to the case where an accused person has been discharged. Hence, when a complaint is dismissed under S. 203, it is necessary to issue notice to the accused person before ordering further inquiry. (*Sulaiman, J.*) GAJRAJ SINGH *v.* EMPEROR. **47 All. 722 : 23 A. L. J. 451 : 88 I. C. 600 : L. R. 6 A. 119 (Cr.) : 26 Cr. L. J. 1176 : A. I. R. 1925 All. 537.**

——**S. 436**—*Revising authority differing from trial Court in conclusion on evidence—Further inquiry cannot be ordered.*

Where on the evidence a revising authority comes to a different conclusion from the Court that hears the evidence, a further enquiry under S. 436 (new) should not be ordered. (*Mukerji, J.*) ZABAR SINGH *v.* RAM SARUP. **L. R. 6 A. (Cr.) 47 : 85 I. C. 726 : 26 Cr. L. J. 582 : A. I. R. 1925 All. 477.**

——**S. 436 [Old S. 437]**—*Further enquiry—Competent on the same facts.*

CR. P. CODE (V OF 1898), S. 436.

Further enquiry can be ordered by the Sessions Judge on the same facts as have been considered by the Trial Court. 9 All. 52, Ref. Where a Magistrate was very much influenced by the fact that a civil suit was pending and he regarded the complaint as a sort of forestalling the civil suit, *Held*, that the Sessions Judge's order directing further enquiry was a good order. (*Mukerjee, J.*) DAYA NAND *v.* EMPEROR.
23 A. L. J. 20 : L. R. 6 A. Cr. 55 : 86 I. C. 224 : 26 Cr. L. J. 736 : A. I. R. 1925 All. 298 (2).

——**Ss. 436 [Old S. 437] and 438**—*Proceedings under S.* 107—*Enquiry and order by Sub-divisional Magistrate—Order for further enquiry by District Magistrate.*

The District Magistrate set aside the order of a Sub-divisional Magistrate on an enquiry under S. 107, Cr. P. Code, and directed a further enquiry to be made. *Held* that though the District Magistrate had power to set aside an order, he had no power to send the matter back for further enquiry. (*Mears, C. J.*) ROSHAN SINGH *v.* EMPEROR. **46 A. 235 : 22 A. L. J. 129 : L. R. 5 A. 64 (Cr.) : 77 I. C. 819 (1) : 25 Cr. L. J. 467 (1) : A. I. R. 1924 All. 592.**

——**Ss. 436 [Old S. 437] and 133**—*Proceedings under S.* 133—*Sessions Judge cannot order further enquiry.*

Proceedings under S. 133 and Chap. X are not covered by S. 436 and the Sessions Judge has no power to order further enquiry in such proceedings. The only action which he can take, if one is found necessary, would be under S. 438 to make a report to the High Court. (*Dalal, J. C.*) PRITHIPAL *v.* EMPEROR.
2 O. W. N. 549 : 88 I. C. 995 : 26 Cr. L. J. 1251 : A. I. R. 1925 Oudh 736.

——**Ss. 436 and 423**—*Revision from appellate order—Re-trial of appeal only can be ordered.*

Where the defect discovered by the High Court is in the order in appeal, it has jurisdiction to interfere with the order in appeal and order a re-trial of the appeal only and not of the entire case. (*Dalal, A. J. C.*) BECHCHA SINGH *v.* BECHCHA KURMI.
2 O. W. N. 50 : 12 O. L. J. 63 : A. I. R. 1925 Oudh 321.

——**S. 436**—*Acquittal—Offence not serious—No injustice—No revision lies.*

The jurisdiction of the High Court to revise an order of acquittal and direct a re-trial should be exercised only in exceptional cases and with caution. It should only be done in cases where the alleged offence is of a serious character and the Judge comes to the opinion that there has been a miscarriage of justice, where for instance the lower Court has misquoted the evidence, or where having the evidence before it, which *prima facie* is reasonable and credible, the Judge of the Court gives no ground for rejecting it and does not satisfactorily review it. The finding of the first appellate Court was not accepted as a finding of fact when the finding was arrived at in a very summary fashion without reference to all the relevant law on the subject. (*Dalal, J. C.*) BECHCHA SINGH *v.* BECHCHA KURMI. **12 O. L. J. 63 : 2 O. W. N. 50 : A. I. R. 1925 Oudh. 321.**

——**S. 436**—*Notwithstanding full enquiry if Sessions Judge, holding that the discharge was perverse or wrong, orders further enquiry, the order should not be revised—Cr. P. Code, S.* 439.

A Revising Court has power to order further enquiry even when the Subordinate Magistrate has recorded all the evidence of the prosecution. Where the Ses-

CR. P. CODE (V OF 1898), S. 436.

ons Judge after going carefully through into the evidence came to the conclusion that the finding of the Magistrate was either perverse or in all probability wrong or manifestly at variance with the evidence which he has recorded and where this was his considered opinion, the High Court refused to hold that his order directing a further enquiry was illegal, improper or incorrect. (*Kendall, A. J. C.*) KARHLEY *v.* JAGANNATH PRASAD. **11 O. L. J. 611 : 87 I. C. 111 : 26 Cr. L. J. 959 : A. I. R. 1925 Oudh 180.**

——— **S. 436 (New Code)**—*If applies to proceedings under Ch. VIII.*

The present S. 436, Cr. P. Code, does not include persons against whom action was taken under Chapter VIII. (*May Oung, J.*) MAUNG THAN *v.* EMPEROR. **2 R. 30: 81 I. C. 970 : 21 Cr. L. J. 1146 : 2 Bur. L. J. 285 : A. I. R. 1924 Rang. 207.**

——— **S. 436 (Old S. 437)**—*Grounds for interference—Taking different view of evidence is no ground.*

The mere fact that the District Magistrate does not agree with the decision of the trying Court is not sufficient ground for ordering a further enquiry which is what is directed by S. 437. A.I.R. 1922 All. 429 Ref. (*Ryves, J.*) UMRAO KHAN *v.* EMPEROR. **21 A. L. J. 194: 71 I. C. 600: 24 Cr. L. J. 184 : L. R. 4 A. 95 (Cr.) : A. I. R. 1923 All. 484 (2).**

——— **S. 436 (Old S. 437)**—*Notice—Order for further enquiry without notice on the accused is illegal.*

An order directing further enquiry passed by the Sessions Judge under S. 437 against the accused without notice having been served on him cannot stand. (*Stuart, J.*) SAGAR MAL *v* EMPEROR. **20 A. L. J. 91: 65 I. C. 422 : 23 Cr. L. J. 70 : A. I. R. 1923 All. 122 (1).**

——— **S. 436 (Old S. 437)**—*District Magistrate disagreeing with the Magistrate making enquiry—No case against accused—Further enquiry—Whether can be directed.*

A District Magistrate cannot order a further enquiry under S. 437, Cr. P. Code, merely because he does not agree with the Subordinate Magistrate who after inquiry found out that no case is made against the accused, especially when it is not suggested that further evidence is either available or is to be taken (*Ryves, J.*) UDAIHRAJ SINGH *v.* EMPEROR. **44 A. 691: L. R. 3 A. 114 (Cr.): 71 I. C. 528 : 24 Cr. L. J. 176: A. I. R. 1922 All. 429.**

——— **Ss. 436 (Old S. 437) and 110** — *Grounds for interference—District Magistrate taking different view of evidence is not a ground.*

Merely because the District Magistrate takes a view of the evidence on record in any proceedings different from that taken by the trying Magistrate that is no reason for ordering further enquiry under Section 437, especially when there is no suggestion that further evidence is available or should be taken. (*Ryves, J.*) UDAI RAJ SINGH *v.* EMPEROR. **44 All. 691 : 71 I. C. 528. 24 Cr. L. J. 176 : L. R. 3 A. 114 (Cr.) : A. I. R. 1922 All. 429 (2).**

——— **S. 436 (Old S. 437)**—*Notice—Further inquiry or retrial should not be ordered without notice.*

Before making an order under S. 437 of the Code in order to make further enquiry or retrial, notice should be given to the accused who has been discharged. (*Mears, C. J.*) GANPATJI *v* EMPEROR. **L. R. 2 A. 32 (Cr) : 19 A. L. J. 71.**

——— **S. 436 (Old S. 437)**—*District Magistrate—Power to direct re-trial by himself.*

A District Magistrate cannot, when acting under S. 437, direct a re-trial by himself. (*Gokul Prasad, J.*) BINDESHRI DUBE *v.* EMPEROR. **2 U. P. L. R. (All.) 374: 59 I. C. 193 (1) · 22 Cr. L. J. 49 : 18 A. L. J. 1135.**

——— **S. 436 (Old S. 437)**—*Grounds for interference—Fresh evidence not possible—Further enquiry need not be directed.*

Where no fresh evidence is likely to be produced on further enquiry the superior Court should hesitate before exercising its powers under S. 437, Cr.P.Code, unless there are palpable errors in the decision of the lower Court and not merely a difference of opinion as to the weight to be given to the discrepancies in evidence. (*Newbould and Suhrawardy, JJ.*) ABDUL RASHID SHEIKH *v.* MOMTAZ SHEIKH. **38 C. L. J. 206 : 76 I. C. 431 : 25 Cr. L. J. 191 : A. I. R. 1924 Cal. 229.**

——— **S. 436 (Old S. 437)**—*Discharge does not preclude fresh proceedings on same facts—But fresh enquiry is not permissible except in special cases.*

When a Magistrate has passed an order discharging an accused person it is competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts although the order of discharge has not been set aside by higher authority. But generally speaking further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete. 10 P. R. 1911 (Cr) (F. B.) Foll. (*Scott-Smith, J.*) GOPAL DOSS *v.* MAGHI RAM. **7 L. L. J. 252 : A. I. R. 1925 Lah. 439.**

——— **Ss. 436 (Old S. 437)**—*Order of discharge passed by trial Court after full enquiry should not be lightly interfered with.*

An order of discharge passed by trial Court after a full enquiry and after recording all the evidence produced by the complainant should not be lightly interfered with. (*Scott-Smith, J.*) FAIZ MAHOMED *v.* CROWN. **7 L.L.J. 216 : 89 I.C. 272 : 26 Punj.L.R. 198 : 26 Cr. L. J. 1328 : A. I. R. 1925 Lah. 395 (1).**

——— **S. 436 (Old S. 437)**—*Notice—Want of notice vitiates order.*

Where accused has a plea to urge, want of notice vitiates the order passed without notice. (*Zafar Ali, J.*) MAHENDAR NATH *v.* MILKHI RAM. **25 Cr. L. J. 523 : 77 I. C. 987 : A. I. R. 1923 Lah. 689 (1).**

——— **S. 436 (Old. S. 437)**—*Order of discharge—Scope.*

When a Magistrate has passed an order discharging an accused person, generally speaking further enquiry should not be directed unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. (*Scott-Smith, J.*) KARAMCHAND *v.* MATHRA DAS. **72 I. C. 369 : 24 Cr. L. J. 369 : 7. P. W. R. 1923 · A. I. R. 1923 Lah. 329 (2).**

——— **S. 436 (Old. S. 437)**—*Scope.*

An order for a further enquiry should not be passed without notice to the person accused and then only if the order of disharge was manifestly perverse or occasioned a grave miscarriage of justice. (*Broadway, J.*) BAHADUR ALI *v.* CROWN. **A. I. R. 1923 Lah. 158.**

——— **S. 436 (Old S. 437)**—*Grounds for interference.*

Where the Sessions Judge without reasons ordered further inquiry in the interests of justice, *held*, the order was entirely inadequate. (*Broadway, J.*) DOST MAHOMED *v.* ASA RAM. **72 I. C. 890 : 24 Cr. L. J. 474 : A.I. R. 1922 Lah. 409.**

——— **S. 436 (Old S. 437)**—*Order of discharge—Further inquiry.*

Where the Sessions Judge ordered further inquiry,

while the order of discharge was not perverse or foolish and where further inquiry merely amounted to a rehearing of the same evidence by another Magistrate, *held*, that the order was illegal. 8 P. R. 1900 (Cr.): 2 P. R. 1901 (Cr.): 8 P. R. 1901 (Cr.): and 1 Lah, 216 Foll. (*Broadway, J.*) DOST MAHOMED *v.* ASA RAM. **24 Cr. L. J. 474 : 72 I. C. 890 : A. I. R. 1922 Lah. 409.**

——S. 436 (Old S. 437)—*Notice, issue of.*

So far as the question of notice is concerned there can be no doubt whatever that S. 437, Criminal Procedure Code, does not make the issue of notice necessary. All the Courts throughout India have, however, repeatedly pointed out that, though an order passed under S. 437, Criminal Procedure Code, without notice was not illegal, notice should, as a general rule, be issued. Failure to issue notice, however, would not justify interference. A District Magistrate has power to order a further enquiry when he is of opinion that the evidence on the record has not been properly appreciated. At the same time it has been repeatedly held by the High Court that a further enquiry should not, as a general rule, be ordered unless the order of discharge under Ss. 203 or 204 was manifestly perverse or foolish or was based on a record of evidence which was obviously incomplete. 10 P. R. 1911 (F.B.), Foll. (*Broadway, J.*) KALLU *v.* CROWN. **4 Lah. L. J. 411 : 69 I.C. 373 : 23 Cr. L. J. 693 : A. I. R. 1922 Lah. 59 (2).**

——S. 436 (Old S. 437)—*Order of discharge—Order when to be made—Notice, necessity for.*

It is competent to a District Magistrate to order further enquiry if in his opinion the evidence on record has not been properly appreciated. 17 P. R 1895 : 10 B. 131 : 15 C. 608 : 14 M. 334, Ref. At the same time unless it could be said that the order of discharge was manifestly foolish or perverse or based on an incomplete record of the evidence, a further inquiry should not as a general rule be ordered. It is not a sufficient ground for re-trial that the District Magistrate himself would have taken a different view of the evidence. 1 Lah. 216 ; 130 P. L. R. 1915 ; 10 P. R. 1911 (Cr.) (F.B.) ; 33 I. C. 641, Rel.

Though an order for further enquiry without issue of notice to the accused is not illegal, still according to the practice of all the Courts in India, it is considered proper to issue such notice. (*Broadway, J.*) KALLU *v.* CROWN. **4 Lah. L. J. 411 : 69 I. C. 373 : 23 Cr. L. J. 693 : A. I. R. 1922 Lah. 59 (2).**

——S. 436 (Old S. 437)—*Order of discharge after full trial – Order for fresh trial not proper.*

Where after a full trial the accused persons were discharged, the discharge was for all practical purposes as good as an acquittal. A further enquiry cannot be ordered by the District Magistrate. (*Wilberforce, J.*) SUNDER SINGH *v.* MT. BHAGAN. **4 L. L. J. 331.**

——S. 436 (Old S. 437)—*Grounds for interference.*

That the District Magistrate places a different value on the evidence from that placed by the Trial Court is not a good ground for directing further inquiry. When the whole of the prosecution evidence has been recorded, an order for further enquiry means simply a second trial on the same evidence. (*Chevis, J.*) DANI *v.* EMPEROR **3 U. P. L. R. (Lah.) 11 : 60 I.C. 55 : 22 Cr. L. J. 199 : 3 L. L. J. 97.**

——S. 436 (Old S. 437)—*Notice.*

Notice is not absolutely necessary in such cases especially where the accused cannot be said to have been prejudiced by want of it, the question being one of law on which the order was set aside and the accused being heard in full before the High Court. As a general rule notice should go to the party before an order is made to his prejudice. (*Krishnan, J.*) PARAVADA CHINNA VENKU NAIDU. *In re.* **17 L. W. 247 : 72 I. C. 525 : 24 Cr. L. J. 413 : A. I. R. 1923 Mad. 327.**

——S. 436 (Old S. 437)—*Order of discharge—Setting aside—Notice to accused, if necessary.*

Though as a general rule notice should go to an accused person before an order is made to his prejudice where the question arising is one of law and the accused has not been prejudiced by want of notice, an order without notice which is otherwise correct will not be set aside. (*Krishnan, J.*) PARAVADA CHINNA VENKU NAIDU, *In re.* **17 L. W. 247 : 72 I. C. 525 : 24 Cr. L. J. 413 : A.I.R. 1923 Mad. 327.**

——S. 436 (Old S. 437)—*Grounds for interference—Order for further enquiry—Lapse of considerable time since the occurrence.*

In the case of a petty riot in which no injuries of any gravity were inflicted and there was no question of any loss of any valuable property, the District Magistrate ordered a further enquiry. His order was based on the criticisms of the reasoning in the order of discharge. *Held*, the District Magistrate failed to consider the essential matter, *viz.*, the prospect of any public advantage from the case being reopened, in view of the period of two years which elapsed since the occurrence, its comparatively insignificant character and the nature of the evidence available. *Held*, the order of the District Magistrate passed without regard to what is really the material consideration in cases of this kind was passed without jurisdiction. (*Oldfield and Ramesam, JJ.*) KRISHNA PILLAI, *In re.* **16 L. W. 585 : (1923) M.W.N. 56 : 31 M.L.T. 419 : 68 I. C. 824 : 23 Cr. L. J. 600 : A. I. R. 1923 Mad. 134 (1): 43 M. L. J. 555.**

——S. 436 (Old S. 437)—*Procedure on 'Further enquiry'—New charge.*

Further enquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available which has not been taken and which would support a charge for that offence. (*Krishnan, J.*) ARUMUGA MUDALIAR. *In re.* **16 L. W. 494 : 23 Cr. L. J. 592 : 31 M. L. T. 254 : (1922) M. W. N. 801 : 68 I. C. 624 : A.I.R. 1923 Mad. 59 : 43 M. L. J. 564.**

——S. 436 (Old S. 437)—*Grounds for interference—Lapse of time is not sufficient for refusal.*

Mere lapse of time is not a sufficient ground for refusal to order further enquiry if the Court feels that an offence has been committed which should be enquired into. Any other view would offer an inducement to accused persons to delay the proceedings. (*Kotval, A. J. C.*) BIRJUBHUKVAN *v.* JANRAO. **23 Cr. L. J. 745 : 69 I. C. 633 : A.I.R. 1923 Nag. 100.**

——S. 436 (Old S. 437)—*Forfeiture of bond without notice is itself failure of justice not covered by S.537.*

Passing an order of forfeiture without notice to the party whose bond is forfeited amounts itself to a failure of justice even if the same order would eventually have been passed if the case had been heard. (*Daniels, A. J. C.*) SARJU *v.* THAKURAIN JAI RAJ KUMAR. **25 Cr. L. J. 445 : 77 I.C. 733 : A. I. R. 1925 Oudh 51**

CR. P. CODE (V OF 1898), S. 436.

——S. 436 (Old S. 437)—*Further enquiry can be ordered on the same materials which were before the Trial Court.*

A Magistrate has jurisdiction to order a further inquiry upon the same materials which were before the trying Magistrate. 15 Cal. 608 (F.B.), Foll. (*Dalal, J.C.*) HAIDER KHAN *v.* EMPEROR.
25 Cr. L. J. 66 : 75 I. C. 978 : A. I. R. 1925 Oudh 36.

——S. 437—*Reference to High Court—Disagreement between Judge and jury—Duty of Court—Opinion of jury—Weight due to.*

Where there is a verdict of a jury from which the Judge differs and refers the case to the High Court, it is not for the High Court to see whether it is necessary for the ends of justice that the opinion of the jury should be reversed. That condition is set down for the Sessions Judge to observe. When once a reference is made to the High Court, the language of the Code does not justify any undue preference being given to the opinion of the jury over that of the Judge. The High Court has to weigh both the opinions and consider the entire evidence on the record just as it would consider in any criminal matter coming before it for decision. (*Dalal, J. C.*) EMPEROR *v.* RAM CHARAN. **27 O.C. 29: 10 O. & A. L. R. 25 : 11 O. L. J. 210 : 81 I. C. 305 : 25 Cr. L. J. 785 : A. I. R. 1924 Oudh 314.**

——S. 437—*Order of discharge—Setting aside—Notice to accused.*

Under S. 437 of the Code it is advisable, as a matter of judicial discretion, that notice of the setting aside of an order of discharge should be given to the accused but it is not compulsory. (*Daniels, A. J. C.*) RIKH NATH *v.* EMPEROR. **63 I. C. 415 : 22 Cr. L. J. 655 : 24 O. C. 142.**

——S. 437 (Old S. 436)—*Discharge cannot be set aside unless it is perverse and not merely wrong.*

The Sessions Judge has to consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him. That a different view could be taken on the evidence would not justify the Sessions Judge in ordering commitment; he must come to the conclusion that the finding of the Magistrate is not only wrong but perverse. (*Das, J.*) RITBHANJAN RAI *v.* EMPEROR.
6 P. L. T. 570 : 86 I. C. 822 : 26 Cr. L. J. 886: A. I. R. 1925 Pat. 599.

——S. 437 (Old. S. 436)—*Some accused not made respondents—No notice served under S. 437—No opportunity of showing cause against their commitment given—Order is wrong and should be set aside.*

Where some of the accused were not made respondents to the revision petition to District Magistrate against order of discharge and no notice had been ordered to be served upon them and where they had no opportunity of showing cause why an order of commitment should not be made against them, *Held*, that the order of the District Magistrate was clearly wrong, and must be set aside so far as those accused were concerned. (*Srinivasa Aiyangar, J.*) MANIA MANICKA PADAYACHI, *In re.*
A. I. R. 1925 Mad. 1061 : 49 M. L. J. 155.

——S. 437 (Old. S. 436)—*Order of commitment by the District Magistrate—High Court can revise both on point of law and facts.*

An order of commitment passed by the District Magistrate can be revised by the High Court on points of law as well as of facts. (*Ross, J.*) MUNSHI MANDER *v.* KARU MANDER. **25 Cr. L. J. 1079 : 81 I.C. 913 : 6 P.L.T. 146 : A. I. R. 1925 Pat. 279.**

——S. 438—*Change.*

Sessions Judge can now transfer to Additional Sessions Judge Cases by any general or special order.

CR. P. CODE (V OF 1898), S. 438.

——S. 438—*Penal Code, S.-225 B—Prosecution irregularly instituted--No revision lies against acquittal.*

The High Court will interfere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction, on a prosecution for an alleged offence under S. 225-B of the Penal Code, irregularly instituted on a report sent in by a Munsif which was treated as a complaint. (*Piggott, J.*) EMPEROR *v.* MADHO SINGH. **47 All. 409 : 23 A. L. J. 189 : 86 I. C. 801 : 26 Cr. L. J. 865 : A. I. R. 1925 All. 318 (2).**

——S. 438—*Sessions Court not dissenting from decision of Lower Court—Reference with object of obtaining ruling on law point is improper.*

When the Sessions Court does not really dissent from the actual decision arrived at, a reference merely with the object of obtaining a ruling on a question of law ought not to be made. (*Piggott, J.*) EMPEROR *v.* MADHO SINGH. **47 All. 409 : 23 A. L. J. 189 : 86 I. C. 801 : 26 Cr. L. J. 865 : A. I. R. 1925 All. 318 (2).**

——S. 438—*Fresh evidence relevant as to sentence discovered by Crown—Retrial will not be granted.*

The High Court will not set aside a conviction and order re-trial at theinstance of the Crown on the ground that the Crown has since discovered fresh evidence which would require the infliction of a severer sentence on the accused. (*Boys, J.*) EMPEROR *v.* RAM DIN. **L. R. 6 A. (Cr). 16 : 85 I. C. 942 : 26 Cr. L. J. 654 : A. I. R. 1925 All. 292.**

——Ss. 438 and 145—*Dt Magistrate applied to, to refer to High Court, case decided by the lower Court—Dt Magistrate cannot himself set aside lower Court's order.*

The Dist. Magistrate cannot himself set aside the decision of the Lower Court under S. 145, Cr. P. Code. He must refer the case to the High Court. (*Walmsley and B. B. Ghose, JJ.*) ESERUDDIN HOWALADAR *v.* OTARUDDI AKON.
26 Cr. L. J. 1166 : 88 I. C. 526 : A. I. R. 1925 Cal. 1234.

——S. 438—*Reference to High Court is allowed only on point of law.*

A reference can only be made under S. 438 in criminal matters to the High Court in respect of an error on a point of law. (*Sanderson, C. J and Chotzner, J.*) EMPEROR *v.* ASIMULLA MONDAL.
26 Cr. L. J. 651 : 85 I. C. 939 : A. I. R. 1925 Cal. 1068.

——S. 438—*Admissions of fact made before Judge making reference—Admissions ought to be accepted by High Court.*

If, upon the proceedings before the Judge upon which the reference is made admissions of fact should be made by either party, then those admissions of fact ought to be accepted by High Court for the purpose of the reference. (*Sanderson, C. J. and Pearson, J.*) GARIB HAJI *v.* MUCHIRAM SAHU.
A.I. R 1925 Cal. 1020.

——S. 438—*Application direct to High Court is not in order.*

Ordinarily an application for revision by a person, whose appeal has been disposed of by a first class Magistrate empowered to dispose of appeals from the decisions of second and third class Magistrates under S. 407 (2) to the High Court, without going to the Sessions Judge and asking him to make a reference to High Court is not in order. 36 C. 643 and 48 C. 534 Ref. But where the rule had already been granted and application heard, the High Court disposed of the

CR. P. CODE (V OF 1898), S. 438.

rule on merits. (*C. C. Ghose and Chotzner, JJ.*) ABDUL MATTAB *v.* NANDA LAL. **50 Cal. 423 : A. I. R. 1923 Cal. 674.**

——**Ss. 438 and 439**—*Revision—Finding of fact.*

Where a Magistrate acquits an accused of an offence under I. P. C., S. 447 on the ground that the immoveable property in question was not in anybody's possession, the High Court will not interfere with the acquittal in revision. (*Shadi Lal, C.J.*) CROWN *v.* HARPHUL. **7 L. L. J. 42 : 86 I. C. 65 : 26 Cr.L. J. 689 : 26 Punj. L. R. 38 : A. I. R. 1925 Lah. 336 (2).**

——**Ss. 438 and 439**—*Order of acquittal--Revision by High Court.*

Ordinarily the High Court would not entertain a reference under S. 438, Cr. P. Code, the object of which is to have an order of acquittal passed by an inferior Court set aside. 24 A. 346 ; 25 A. 128 ; 68 I. C. 615 ; 62 I.C. 869 Rel (*Abdul Raoof and Harrison. JJ.*) EMPEROR *v.* ACCHAR SINGH. **5 Lah. 16 : 25 Cr. L. J. 931 : 81 I. C. 547 : A. I. R. 1924 Lah. 451.**

——**S. 438**—*District Magistrate—Reference to High Court—Enhancement of Sentence passed by Sessions Judge.*

A District Magistrate is incompetent to make a reference under S. 438, Cr. P. Code, recommending that a sentence passed by a Sessions Judge should be enhanced. The power conferred by S. 438, Cr. P. Code is confined. to proceedings of any inferior criminal Court,23 C. 249 ; 11 Bom L.R. 796, Foll. (*Abdul Raoof and Harrison. JJ.*) EMPEROR *v.* WASAWI. **5 Lah. 11 : 25 Cr. L. J. 928 : 81 I. C. 544 : A. I. R. 1924 Lah 437.**

——**Ss. 438 and 435** — *Jurisdiction —District Magistrate exercising appellate jurisdiction—Sessions Judge has power to refer his judgment to High Court.*

A Sessions Judge has power under S. 438 to refer to the High Court the judgment of the District Magistrate in the exercise of his appellate jurisdiction as a District Magistrate when exercising appellate jurisdiction is an inferior Criminal Court to the Sessions Judge within the meaning of S. 435 of the Code. 335 P. L. R. 1913, Foll. (*Harrison, J.*) KALLU *v.* EMPEROR. **3 Lah. 23 : 68 I. C. 609 : 23 Cr. L. J. 577 : A. I. R. 1922 Lah. 85.**

——**Ss. 438 and 439**—*Commitment can only be quashed on a question of law.*

A commitment can only be quashed on a question of law. The question whether the evidence already on the record is sufficient to establish the charge is a question connected more with the propriety of a conviction rather than with the propriety of a commitment. (*Kanhaiya Lal, J. C.*) MAHABIR *v.* EMPEROR. **23 Cr. L. J. 79 : 8 O. L. J. 627 : 65 I. C. 431 : A. I. R. 1922 Oudh 109 (1).**

——**Ss. 438 and 439**—*Reference—Grounds—Acquittal by trying Magistrate where evidence sufficient for conviction is not a sufficient ground.*

Where an order of acquittal was in spite of evidence which, would have justified a conviction, *held*, that this would not be a good ground for directing a re-trial for the District Magistrate. *Held*. further, that High Courts do not as a rule interfere with orders of acquittal which can be appealed against by the Local Government. (*Lindsay, J. C.*) EMPEROR *v.* CHANDIKA SINGH. **24 O. C. 4.**

——**Ss. 438 and 439**—*Dismissal must not be lightly disturbed.*

A Court should not lightly set aside in revision an order of dismissal of complaint but should only do so when it is clear that there has been a miscarriage of justice. (*Adami, J.*) JANGAL SINGH *v.* RADHA KISHUN. **3 Pat. L. R. (Cr.)33 : 86 I. C. 802 : 26 Cr. L. J. 866 : A. I. R. 1925 Pat. 447.**

CR. P. CODE (V OF 1898), S. 439—Acquittal.

——**S. 438**—*Reference under, should be in the form of a judicial order.*

Reference under S. 438, Cr. P. Code, made in the form of a letter to the Registrar of the High Court, is not appropriate. Such reference should be made by a judicial order. (*Carr, J.*) ON PE *v.* EMPEROR. **3 Bur. L. J. 27 : 25 Cr. L. J. 1303 : 82 I. C. 471 : A. I. R. 1924 Rang. 295.**

——**S. 439—Change.**

Sub-section (6) newly added provides that when a convicted person is given notice to show cause why his sentence should not be enhanced, he can also show cause against the conviction.

——**S. 439.**

See also CR. P. CODE, S. 537.

Acquittal.
Appealable Cases.
Compounding of Offences.
Construction of.
Conviction.
Conviction under wrong section.
Defective Judgment.
Enhancement of sentence.
Evidence.
Exercise of discretion.
Expunging Remarks.
Findings of Facts.
Jurisdiction.
Order Under.
Pending Proceedings.
Powers of High Court.
"Proceedings," Meaning of.
Proceedings under S. 110, Cr. P. Code.
Proceedings under S. 145, Cr. P. Code.
Proceedings under S. 195, Cr. P. Code.
Question of law.
Wrong Procedure.
Miscellaneous.

Acquittal.

——**S. 439**—*Acquittal—Power to Convict.*

The High Court cannot alter a sentence of acquittal into one of conviction. (*Mukerji, J.*) RAMESWAR *v.* GOBIND PRASAD. **23 A. L. J. 433 : L. R. 6 A. 198 Cr : 87 I. C. 426 : 26 Cr. L. J. 920 : A. I. R. 1925 All. 473.**

——**S. 439**—*Acquittal—Revision—High Court's Jurisdiction-Practice.*

The High Court will not interfere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction on a prosecution for an alleged offence under S. 225-B, I. P. C., irregularly instituted on a report sent in by a Munsif, which was treated as a complaint. (*Piggott, J.*) EMPEROR *v.* MADHO SINGH. **47 All. 409 · 23 A. L. J. 189 : 26 Cr. L. J. 865 : 86 I. C. 801 : A. I. R. 1925 All. 318 (2).**

——**S. 439**—*Acquittal.*

Ordinarily the High Court will not interfere in revision against an order of acquittal. (*Boys, J.*) HARBANS *v.* EMPEROR. **22 A. L. J. 820 : L. R. 5 A. (Cr.) 143 : 83 I. C. 658 : A. I. R. 1924 All. 778.**

——**S. 439**—*Acquittal of accused—Award of compensation—Interference.*

Where no prejudice is caused the High Court will be very reluctant to interfere with the acquittal of

persons who have undergone a trial in a Court of competent jurisdiction or with the order of such a competent Court under S. 25c, Cr. P. Code. (*Dalal, J.*) DEBI PRASAD *v.* EMPEROR.
L. R. 5 A. 93 (Cr) : A. I. R. 1924 All. 674.

———S. 439 (4)—*Acquittal—Converting of an acquittal into a conviction—No appeal by Government—Penal Code, Ss. 302 and 304.*

Accused was charged with both murder and culpable homicide not amounting to murder, but he was acquitted on the former charge and convicted on the latter. On a perusal of the sessions statement notice was sent to the accused to show cause wh, he should not be convicted of murder and punished accordingly. *Held*, the High Court has no power, except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conviction. (*Gokul Prasad and Stuart, JJ.*) EMPEROR *v.* SHEODARSHAN. **44 All. 332 : 20 A. L. J. 190 : 65 I. C. 858 : 23 Cr. L. J. 202 : A. I. R. 1922 All. 487.**

———S. 439—*Acquittal—Revision from an order of.*

The power of the High Court to revise an' order of acquittal is to be exercised sparingly and only in most serious cases and in case of a grave miscarriage of justice. (*Stuart, J.*) PAHELWAN SINGH *v.* SAHIB SINGH. **19 A. L. J. 382 : 62 I. C. 869 : 22 Cr. L. J. 597 : L. R. 2 A. (Cr.) 41.**

———S. 439—*Acquittal—Meaning of—Conviction under S. 326, I. P. C.—Appeal—Conviction altered into one under S. 323, I.P.C.—Revision—Interference.*

The trial court convicted the accused under S. 326, I. P. C., but the appellate court altered the conviction into one under S. 323, I. P. C. *Held* in revision that the effect of the appellate court's order was to acquit the accused of an offence under S. 326, I. P. C. and that the High Court should not convert a finding of acquittal into one of conviction. It cannot be said that "acquittal,' in S. 439, Cr. P. Code, means a complete acquittal on all the charges framed. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* SHIVAPUTKAYA. **26 Bom. L. R. 438 : 48 Bom. 510 : A. I. R. 1924 Bom 456.**

———S. 439—*Acquittal—No appeal by Local Government against order of acquittal—Revision at the instance of complainant not competent.*

Per *Macleod, C. J.*—If in a case tried by a Sessions Judge sitting with assessors where the Government do not exercise their right of asking the High Court to admit an appeal from the order of acquittal, the High Court would not be justified in interfering in revision at the instance of the complainant. 9 Bom. L. R. 156, Dist. Per *Crump, J.*—It would be only in the most exceptional cases that the High Court would be justified in interfering under S. 439 when there is no appeal by the Local Government under S. 417. (*Macleod, C. J. and Crump, J.*) JOITA BECHAR *v.* PARSHOTTAM. **25 Bom. L. R. 488 : 24 Cr. L. J. 734 : 73 I. C. 974 : A. I. R. 1923 Bom. 455.**

———S. 439—*Acquittal.*

Though the High Court does not ordinarily interfere with orders of acquittal, it will so interfere where the appeal ordering acquittal has been heard by a Subdivisional Magistrate without giving notice to District Magistrate. (*Shah, Ag. C.J. and Crump, J.*) EMPEROR *v.* SHIVLINGAPPA. **24 Bom. L. R. 1150 : 24 Cr. L. J. 700 : 73 I. C. 812 · A. I. R. 1923 Bom. 74.**

———S. 439—*Acquittal—Private complainant may be heard.*

A private complainant under certain circumstances may well be heard by the High Court when it is called upon to exercise its powers of revision. (*Ghose and Cuming, JJ.*) ASUTOSH DAS *v.* PURNA CHANDRA. **50 Cal. 159 : 36 C. L. J. 287 : 71 I. C. 670 : 24 Cr. L. J. 206 : A. I. R. 1923 Cal. 11.**

———S. 439—*Acquittal, order of—High Court—Interference.*

Unless the setting aside of an order of acquittal is urgently demanded in the interests of justice the High Court will not set it aside in revision. (*Sanderson, C. J and Walmsley, J.*) PRAMATHA NATH *v.* LAHIRI. **59 I. C. 37 : 22 Cr. L. J. 5 : 47 Cal. 818.**

———S. 439—*Acquittal—Revision does not ordinarily lie.*

The High Court will not interfere in revision with orders of acquittal unless there are very special circumstances calling for interference. 10 P. R. 1900 and A. I R. 1924 Lah. 451, Foll. (*Broadway, J.*) MEHR NUR MAHOMED *v.* NUR MAHOMED.
7 Lah. L. J. 367 : 26 Punj. L. R. 644 : 90 I. C. 668 : 26 Cr.L . J. 1596 : A. I. R. 1925 Lah. 490.

———S. 439—*Acquittal—High Court will interfere where referring Court does not want to change acquittal into conviction but to point out erroneous view of law taken by lower Court—Accused acquitted under I. P. C., S. 147 by order under Cr. P. Code, S. 345, —High Court should interfere.*

The High Court as a general rule will refuse to interfere in revision with an order of acquittal when no appeal has been preferred by the Local Government, but where the referring officer is not anxious to have the accused convicted but only to have it pointed out effectively that the Magistrate has taken an erroneous view of the law, the High Court will entertain the reference. Where a Magistrate acquitted the accused of an offence under Penal Code, S. 147, by an order which purported to be passed under the Cr. P. Code, S. 345, and the matter was referred to the High Court by the District Magistrate, the High Court entertained the reference. (*Campbell, J.*) EMPEROR *v.* JARNAB. **26 Punj. L. R. 35 : 86 I. C. 62 : 26 Cr. L. J. 686 : A. I. R. 1925 Lah. 464.**

———S. 439—*Acquittal—Finding of fact—Revision.*

Where the acquittal of an accused person is based on a finding of fact, High Court will not interfere in revision. (*Shadi Lal, C. J.*) EMPEROR *v.* HARPHUL. **7 Lah. L. J 42 : 86 I. C. 65 : 26 Cr. L. J. 689 : 26 Punj. L. R. 38 : A. I. R. 1925 Lah. 336 (2).**

———S. 439—*Acquittal—Powers of revision.*

In revision, the High Court has power on revision side, to set aside even an order of acquittal and may well do so when the order is based on a misapprehension of law. (*Chevis, J.*) FAKIR CHAND *v.* FAKIR. **69 I. C. 379 : 23 Cr. L. J. 699 : A. I. R. 1924 Lah. 286 (1).**

———S. 439—*Acquittal.*

Where the accused has been acquitted by the trying Magistrate and the complainant applies to the District Magistrate to move the High Court in revision, to set aside the order of acquittal, the District Magistrate, if he considers the case to be of sufficient importance, should, in the first instance, move the Local Government to file an appeal. 18 P. W. R. 1915, Dist. (*Lamsden, J.*) GANGA SINGH *v.* RAMZAN. **6 Lah. L. J. 50 : A. I. R. 1923 Lah. 601 (2).**

———S. 439—*Acquittal—Conversion into conviction.*

The High Court cannot convert an acquittal into conviction but it can direct the Trial Court to conclude the trial according to law (*Le Rossignol, J.*)

CR. P. CODE (V OF 1898), S. 439—Acquittal.

NARAIN DAS *v.* MEWA SINGH. **60 I. C. 1000 : 22 Cr. L. J. 312 ; 3 U. P. L. R. (Lah.) 39.**

——S. 439 (4)—*Acquittal—Nature of offence indeterminate—Alteration of Section—No acquittal.*

Where from the facts proved it was difficult to say, what was the offence committed by the accused.

Held, that the alteration of one section into another by the Sessions Judge could not be said to be a case of acquittal under the original section, within the meaning of cl. (4.) (*Krishnan, J.*) DORAISWAMY AIYAR, *In re.* **21 L. W. 174 : 86 I. C. 339 : (1925) M. W. N. 113 : 26 Cr. L. J. 755 : A. I. R. 1925 Mad. 480 : 48 M. L. J. 190.**

——S. 439—*Acquittal—High Court would interfere with order of acquittal only in the interests of public justice.*

The High Court has power to interfere with orders of acquittal but it will interfere only where exercise of the jurisdiction is urgently demanded in the interests of public justice. An order of acquittal was allowed to stand, where the dispute was essentially one of civil nature, both accused and complainant claiming ownership of the property in respect of which the crime was alleged to have been committed. (*Venkatasubba Rao, J.*) MAHOMED MUSTAFA ROWTHER *v.* SHANMUGA THEVAN. **25 Cr. L. J. 1389 : 83 I. C. 349 : A. I. R. 1925 Mad. 375.**

——S. 439—*Acquittal—Revision against—Interference by High Court.*

It is settled law that the High Court ought not to interfere in revision with an order of acquittal unless interference is urgently demanded in the interests of public justice. The omission to serve notice of appeal on the complainant or on the officer appointed under S. 422, Cr. P. Code, is not a ground for setting aside the acquittal. 39 M. 505 ; 16 L. W. 413, Foll. (*Venkatasubba Rao, J.*) PARA KANAKKAN *v.* AMIR BIBI. **20 L. W. 327 : A. I. R. 1924 Mad. 837.**

——S. 439—*Acquittal, revision against.*

The High Court has jurisdiction to interfere in revision with an acquittal but it should ordinarily exercise the jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. This view does not leave an aggrieved complainant without remedy ; it would always be open to him to move the Government to appeal under section 417. Where there is an appeal by the Public Prosecutor or the Crown from an acquittal, the Court sets its face against revision ; but, where a private prosecutor having no power of appeal comes to the Court in revision, it is certainly open to the Court to hear him. 42 Cal. 612 at 616, Foll. ; *Guardian of West Ham Union* v. *Church Wardens, etc. of St. Mathew Bethnal Green*, (1896) App. Cas. 477, Ref. (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) SANKARALINGA MUDALIAR *v* NARAYANA MUDALIAR. **45 Mad. 913 : 16 L. W. 413 : (1922) M. W. N. 579 : 31 M.L.T. 342 : 68 I.C. 615 : 23 Cr. L.J. 583 : A. I. R. 1922 Mad. 502 : 43 M. L. J. 369 (F. B.).**

——S. 439—*Acquittal—Passing order under S. 471 is not altering acquittal into conviction.*

The passing of an order under S. 471 after an acquittal has been recorded cannot be said to alter a finding of acquittal into one of conviction within cl. (4) of S. 439. (*Kumaraswami Sastri, J.*) A. B. MOHAMED, *In re.* **(1922) M. W. N. 10 : 30 M. L. T. 74 : 65 I. C. 423 : 23 Cr. L. J. 71 : A. I. R. 1922 Mad. 54 (2) : 42 M. L. J. 72.**

——S. 439—*Acquittal—Revision against—Private prosecutor.*

The High Court has jurisdiction under S. 439, Cr. P. Code to set aside an order of acquittal but the settled practice is not to interfere at the instance of a private prosecutor unless it is urgently demanded in the interests of public justice to prevent gross miscarriage of justice. Where the ground of the petition is that there has been no proper appreciation of evidence, it ought to be thrown out. (*Wadegaonkar, A. J. C.*) DAMODAR *v.* JUJHAR SINGH. **89 I. C. 388 : 26 Cr. L. J. 1348.**

——S. 439 — *Acquittal — Compromise between parties—Non-compoundable offence.*

As a rule, an interference is not made in revision with an order of acquittal on the application of a private party except where such interference is imperatively demanded in the interests of public justice or where the procedure adopted is so irregular or illegal as to vitiate the whole trial. Where a Magistrate trying a non-compoundable case heard the evidence of the prosecution and framed a charge but thereafter acquitted the accused on the complainant filing a written compromise without considering the merits of the case, *held*, that the procedure of the Magistrate was manifestly illegal and that the High Court should interfere in revision with the order of acquittal. (*Kanhaiya Lal, J. C.*) DR. ZAHIR-UD-DIN *v.* NASIR-UD-DIN. **24 Cr. L. J. 186 : 71 I. C. 602 : A. I. R. 1924 Oudh 171.**

——S. 439 (5)—*Acquittal—No appeal by Local Government from acquittal—Even third party can apply in revision.*

Where Local Government is not anxious to appeal from an order of acquittal, the complaint being of a personal nature, an application for revision is tenable at the instance of any person even a person other than the complainant. (*Kanhaiya Lal, J. C.*) DR. ZAHIR-UD-DIN *v.* NASIR-UD-DIN. **71 I. C. 602 : 24 Cr. L. J.186 : A. I. R. 1924 Oudh 171.**

——Ss. 439 and 423—*Acquittal—Order under S. 247, Cr. P. Code—High Court will set aside acquittal under S. 247, Cr. P. Code.*

High Court will not ordinarily interfere in revision in the case of an acquittal, since the Local Government can appeal, but this rule does not properly apply to an acquittal under S. 247, Cr. P. Code, and in any case the rule will not prevent interference by this Court when the acquittal is the result of an improper clutching at jurisdiction. (*Ashworth, A. J. C.*) RAM NIDH *v.* RAM SARAN. **26 O. C. 282 : A. I. R. 1924 Oudh 64.**

——S. 439 (4)—*Acquittal under S. 182, I. P. C.—Conviction under S. 211—High Court can alter acquittal into conviction.*

The High Court can convict an accused under S. 182, I. P. C. even though acquitted by the lower appellate Court. S. 439 (4) does not come in the way, for the meaning of that clause is that, where an accused person has been acquitted on all charges he is not to be convicted. If he has been convicted at all, S. 439 (4) does not apply to him. 37 Mad. 119, Ref. (*Simpson, A. J. C.*) GAYA BARHAI *v.* EMPEROR. **26 O. C. 44 : 9 O. L. J. 342 : 4 U. P. L. R. (O. C.) 81 : 69 I. C. 81 : 23 Cr. L. J. 641 : A. I. R. 1923 Oudh 4.**

——S. 439—*Acquittal—Revision.*

The law gives power to the Courts of revision to interfere even with orders of acquittal, but only in exceptional circumstances. (*Lindsay, J. C.*) MUNICIPAL BOARD, FYZABAD *v.* VIDYADHARI. **22 Cr. L. J. 638 : 63 I. C. 334 : 24 O. C. 157.**

——S. 439—*Acquittal—Circumstances of assault not truly disclosed by complainant—Acquittal proper.*

Where the trying Magistrate thought that the

CR. P. CODE (V OF 1898), S. 439—Acquittal.

accused has assaulted the complainant, but was quite satisfied that the circumstances under which the assault had taken place had not been truly laid before the Court and, acquitted the accused giving him the benefit of doubt.

Held, that in the circumstances it would not have been safe to have convicted the accused of any offence. (*Adami and Bucknill, JJ.*) ANANT SINGH *v.* HARI CHARAN CHAUKIDAR.
2 Pat. L. R. 250 (Cr.) : 85 I. C. 356 : 26 Cr. L. J. 516 : A. I. R. 1925 Pat. 321.

——S. 439—*Acquittal, can be revised, but only in exceptional cases—Grave error of procedure justifies revision but improper admission of evidence not essential to the result, does not.*

The power of interference in revision with the judgment of acquittal is sparingly exercised and ordinarily, only in cases where it is urgently demanded in the interests of justice. But it is impossible nor would it be expedient to enunciate any general principle The High Court will interfere where circumstances require it.

The final report in the diary of an investigating officer not called as a witness for the prosecution might be used to suggest means of further elucidating a point which needs clearing up, but only for elucidating by legal evidence. But using the final report for the purpose of evidence is a legal error. Such error cannot however, justify interference by the High Court, for setting aside an acquittal. An error of procedure of a grave character would justify interference by the High Court but not a mere error of improper admission of evidence which was not essential to a result which might have been come to independently of it. (44 Cal. 876, Foll.) (*Macpherson, J.*) GANGA SINGH *v.* RAMBHAJAN SINGH. **25 Cr. L. J. 1266 : 82 I. C. 274 : A. I. R. 1925 Pat. 165.**

——S. 439—*Acquittal — Private application against—High Court would entertain only in rare cases.*

Although the High Court has power to revise orders of acquittal, it is only in rare and most exceptional cases that acquittals are set aside in revision on the application of private persons. Where the Magistrate took one view of the oral evidence and the Sessions Judge took the opposite view, and there was no legal point or question of jurisdiction involved. *Held*, that there was no ground for interference. (*Baguley, J.*) KHEM CHAND *v.* I.ALU. **3 Bur. L. J. 323 : 85 I. C. 255 : 26 Cr. L. J. 511 : A. I. R. 1925 Rang. 193.**

——S. 439—*Acquittal—Where no appeal is made, Court ordinarily does not set aside acquittal.*

Where no appeal has been preferred against acquittal, High Court does not ordinarily interfere in revision *suo motu* to set aside the order of acquittal. (*Pratt, J.*) EMPEROR *v.* NGA AUNG GYAW,
1 R. 604 : 2 Bur. L. J. 224 : 76 I. C. 830 : 25 Cr. L. J, 270 : A. I. R. 1924 Rang. 98.

——S. 439—*Action by civil Court under S. 476—Revision—interference.*

Where a civil Court has taken action under S. 476, Cr. P. Code, the revisional court cannot act under S. 439 Cr. P. Code. (*Duckworth, J.*) VALAB DAS *v.* MAUNG BA THAN. **85 I. C. 362 : 26 Cr. L. J. 523 : A. I. R. 1924 Rang. 54.**

——Ss. 439 (5) and 417—*Acquittal—Appeal not preferred by Government—Revision.*

Where the Government does not prefer appeal under S. 417 against acquittal the High Court will not interfere under S. 439, unless there is error of law or procedure on the face of the judgment. (*Fawcett, J. C. and Kemp, A. J. C.*) EMPEROR *v.* JANU FAKIR.
15 S. L. R. 171 : 23 Cr. L. J. 343 : 66 I. C. 999 : A. I. R. 1922 Sind 22.

CR. P. CODE (V OF 1898), S. 439—Appealable cases

Appealable cases.

——S. 439—*Appealable cases—Appeal pending—Notice for enhancing sentence should not be issued till dismissal of appeal.*

When a case comes to the knowledge of the Court by an appeal having been filed against a conviction it is not desirable, if the appeal is admitted, to issue a notice at the same time under S. 439 to enhance the sentence. The notice should issue after the appeal has been dismissed after being dealt with on its merits. (*Macleod, C. J. and Crump, J.*) MANGAL MARAN *v.* EMPEROR. **49 Bom. 450 : 27 B. L. R. 355 : 87 I. C. 424 : 26 Cr. L. J. 968 : A.I.R. 1925 Bom. 268.**

——S. 439—*Appealable cases—Right of appeal not availed of—Conviction illegal—Government of India Act, S. 107.*

As a general rule when the petitioner has had an opportunity of appealing and has not utilised that opportunity the High Court will not permit a criminal revision petition. But where as a result of disallowing a revision in the case of an accused who having had an opportunity of appeal has not appealed, long sentence of imprisonment would be sustained, while according to the view of the High Court the conviction can only be for a smaller offence punishable with a very short term of imprisonment, it is open to the High Court to hear the case under its general powers of revision and if necessary to interfere. (*Wallace and Madhavan Nair, JJ.*) PUVANUR ATHAMU, *In re.*
20 L. W. 914 : 86 I. C. 283 : 26 Cr. L. J. 747 : A. I. R. 1925 Mad. 239.

——S. 439—*Appealable cases—Remedy of accused is by way of appeal.*

In an application by an accused person for revision of an order of a Sub-Magistrate refusing to allow a private vakil to appear on his behalf, it appeared that the trial in which the private Vakil's assistance was required had ended in the conviction of the accused. *Held*, that the case was not one for interference in revision, because the accused could, in an appeal from the conviction, make it a ground of appeal that he was improperly deprived of legal assistance at the trial. (*Oldfield, J.*) SARAVAYYA, *In re.*
17 L. W. 357 : A. I. R. 1923 Mad. 484 (2) : 44 M. L. J. 366.

——S. 439—*Appealable cases—Application to lower Court—Omission to make—Effect of.*

Where an application can be made in revision to a lower Court, the High Court should not under ordinary circumstances entertain an application in revision unless an application has already been made to the lower Court. 30 All. 116 ; 36 Cal. 643 Foll. (*Lyle, A. J, C..*) SAT NARAYAN SINGH *v.* EMPEROR.
9 O. L. J. 280 : 25 O, C. 37 : 71 I. C. 995 : 24 Cr. L. J. 275 : A I. R. 1922 Oudh 147.

——Ss. 439 and 413—*Appealable cases—Appealable sentences against some—Appeal by them—Effect on others.*

Where the Sessions Judge is dealing with appeals by the accused who have received appealable sentences, he can deal with the applications made by other accused who have received non-appealable sentences. 1919 P. H. C. C. 265, App. (*Jwala Prasad, J.*) BISWANATH SINGH *v.* EMPEROR. **60 I. C, 793 : 22 Cr. L. J. 297 : 3 U. P. L. R. (Pat.) 44.**

——S. 439 (1) and (5)—*Appealable cases—Revision*

CR. P. CODE (V OF 1898), S. 439—Appealable cases.

is excluded by competency of appeal--High Court cannot interfere suo motu.

The competence of an appeal excludes the right to move for revision. Where in such a case proceedings for revision are instituted, the High Court cannot interfere even *suo motu* under cl. (1) of S. 439. (*Kincaid, J. C. and Kennedy, A. J. C.*) NURAN *v.* EMPEROR. **25 Cr. L. J. 1362 : 82 I. C. 754 : 18 S. L. R. 262 : A. I. R. 1925 Sind 206.**

——S. 439—*Appealable cases—Appeal entertainable—Revision not allowed.*

Where the accused has a right to appeal but he does not, an application for revision cannot be entertained. (*Kincaid, J. C. and Kemp, A. J. C.*) HARBHARWANDAS *v.* EMPEROR.
60 I. C. 1001 (2) : 14 S. L. R. 17 : 22 Cr. L. J. 313.

Compounding of offences.

——S. 439—*Compounding of offences —Scope of—Power of Court.*

A boy was convicted under S. 323 along with his father and was sentenced to receive stripes. His father appealed but the case was compounded. The boy had no right of appeal and the Judge refused to deal with the case in revision. *Held*, S. 439 authorises the High Court to exercise any of the powers conferred on a Court of Appeal and if a Court of Appeal can allow the composition of an offence it follows that the High Court can allow the same in revision too. 7 A. L. J. 1031 Ref. (*Lindsay, J.*) SHIBBO *v.* EMPEROR. **45 A. 17 : 24 Cr. L. J. 854 : 74 I. C. 1046 : A. I. R. 1922 All. 488.**

——S. 439—*Compounding of offences—Compromise after conviction cannot be sanctioned.*

The High Court has no power as a Court of Revision under S. 439 read with S. 423 (1) (*d*), to sanction the composition of an offence when entered into after the conviction of the accused. (*Bucknill, J.*) AUDHI RAI *v.* EMPEROR. **3 Pat. L. T. 458 : 65 I. C. 432 : 23 Cr. L. J. 80 : A. I. R. 1923 Pat. 89.**

Construction of.

——Ss. 439, 556—*Construction—Provincial Insolvency Act (V of 1920), S. 69—Conviction under—Jurisdiction to hear appeal ; when complaint lodged by the Sessions Judge himself—Consent of parties, whether confers jurisdiction.*

The words " try any case " in S. 556, Cr. P. Code, are comprehensive enough to include the hearing of an appeal. 23 Cal. 45, Foll. The consent of a party concerned cannot affect the absolute disqualification imposed by S. 556, Cr. P. Code. 32 All. 635, Foll. 7 C. W. N. 708 Dist. (*Campbell, J.*) MAMOON *v.* CROWN. **4 L. L. J. 452 : 67 I. C. 622 : 14 P. W. R. 1922 (Cr.) : 61 P. L. R. 1922 : 23 Cr. L. J 446 : A. I. R. 1922 Lah. 30 (2).**

——S. 439—*Construction—Power to revise order of its own Judge by High Court is not within section.*

Notwithstanding the reference to procedure ordinarily peculiar to trials in a High Court, S. 439 does not empower a High Court to revise the judgment of one or more of its own Judges. (*Oldfield and Devadoss, JJ.*) KUNHAHAMAD HAJI *v.* EMPEROR. **46 Mad. 382 : 72 I. C. 599 : 24 Cr. L. J. 439 : (1923) M. W. N. 94 : A. I. R. 1923 Mad. 426 : 44 M. L. J. 450.**

Conviction.

——S. 439—*Conviction—Application by a stranger.*

A Court should be loath to interfere on behalf of a person convicted in a criminal case, if that person is

CR. P. CODE (V OF 1898), S. 439—Defective Judgment.

an adult and of ordinary intelligence, when that person himself in no way contests the propriety of his conviction. (*Stuart, J.*) NARAIN PRASAD *v.* EMPEROR. **45 All. 128 : 20 A. L. J. 909 : 71 I. C. 243 : 24 Cr. L. J. 115 : L. R. 3 A. 178 Cr. : A. I. R. 1923 All. 85.**

——S. 439—*Conviction—Conviction of Magistrate affirmed by Sessions Judge—Amendment of revision application into one from original conviction.*

The High Court on an application for revision of an order of the Sessions Judge confirming a conviction by a Magistrate, directed the application to be converted into one for revision of the order of the Magistrate and quashed the conviction. (*Walsh, J.*) MUNSHI LAL *v.* EMPEROR. **20 A.L.J. 198 : L. R. 3 A. 34 (Cr.). 66 I. C. 184 : 23 Cr L. J. 248 : A. I. R. 1922 All. 21.**

Conviction under wrong section.

——S. 439—*Conviction under wrong section—Conviction recorded under repealed Act not a vital error if accused guilty under an act in force.*

Where the Deputy Magistrate overlooked the fact that Act I of 1904 had been replaced by the Poisons Act of 1919 and recorded a conviction under the Act of 1904, *held*, that this error is not vital and does not vitiate the conviction recorded by the Deputy Magistrate. (*Dalal, A. J. C.*) EMPEROR *v.* SARJU PRASAD. **10 O. L. J. 208 : 77 I.C. 192 : 25 Cr. L. J. 336: A. I. R. 1924 Oudh 32.**

——S. 439—*Conviction under wrong section—Accused convicted of one offence though facts found would constitute more serious offence—High Court would not interfere unless sentence is inadequate or accused is deprived of right of appeal.*

Where a Magistrate convicts an accused person of an offence falling within his jurisdiction though the facts found would also constitute a more serious offence not within his jurisdiction, his proceedings are not void *ab initio* and the High Court will not ordinarily interfere unless the sentence appears inadequate or unless the accused has been deprived of the right of appeal. 13 Bom. 502 and 24 Mad. 675, Ref. (*Macpherson, J.*) BARHAMDEO RAI *v.* EMPEROR. **26 Cr. L. J. 1559 : 90 I. C. 439 : A. I. R. 1926 Pat. 36.**

Defective judgment.

——S. 439—*Defective judgment—Defects revealed in prolonged proceedings—Prosecution should not be helped with re-trial.*

It will not be right to allow the prosecution to shape its case afresh after the whole matter has been thrashed out and the defects brought to light in the course of prolonged proceedings. No re-trial should be ordered in such a case. (*Newbould and Mukerji, JJ.*) KEDAR NATH *v.* EMPEROR. **41 C.L.J. 172 : 29 C.W.N. 408 : 26 Cr. L. J. 849 : 86 I. C. 705 : A. I. R. 1925 Cal. 603.**

——S. 439—*Defective judgment—Void proceedings can be stayed.*

A proceeding which is void for want of jurisdiction cannot be literally quashed but the High Court can direct further proceedings to be stayed. (*Oldfield and Devadoss, JJ.*) SIKKA GOUDAN, *In re.* **17 L. W. 69 : 72 I. C. 351 : 24 Cr. L. J. 351 : A. I. R. 1923 Mad. 326.**

——S 439—*Defective judgment—Finding can be revised when inference from proved facts is groundless.*

The High Court will set aside the findings of a lower Court when the inference drawn by the lower Court from proved facts seems to be unwarranted. (*Kinkhede, A. J. C.*) SUBIMIYA *v.* EMPEROR.

CR. P. CODE (V OF 1898), S. 439—Enhancement of Sentence.

25 Cr. L. J. 1073 : 81 I. C. 897 : A. I. R. 1925 Nag. 123.

Enhancement of sentence.

——S. 439 (6)—*Enhancement of sentence--Accused called upon to show cause against enhancement can contend that his trial was illegal.*

An accused to whom an opportunity has been given of showing cause why his sentence should not be enhanced is entitled, on appearing, to show that the trial was contrary to law and thus illegal, though the question was not raised at the trial. (*Fawcett and Coyajee, JJ.*) EMPEROR *v.* MANANT K. MEHTA.

49 Bom. 892 : 27 Bom. L. R. 1343.

——S. 439—*Enhancement of sentence—Application of complainant.*

As a matter of practice the High Court will not entertain a revision application for enhancement of a sentence at the instance of a private complainant. The remedy of a private complainant who considers a sentence unduly lenient is to draw the attention of the Government to that fact and the District Magistrate, Sessions Judge or Government Pleader may draw the attention of the High Court to a sentence with a view to its being enhanced. (*Macleod, C. J. and Shah, J.*) NAGJI DULA, *In re.* 48 Bom. 358 : 26 Bom. L. R. 182 : 25 Cr. L. J. 966 : 81 I. C. 614 : A. I. R. 1924 Bom. 320.

——S. 439—*Enhancement of sentence—Interference with.*

The sentence in each case after conviction must be left to the Judge or Magistrate who tries the case, and the High Court ought not to interfere in revision unless the sentence is too severe or too lenient to be said to be in the exercise of a proper discretion. (*Macleod, C. J. and Shah, J.*) SANTU JADHAV *v.* EMPEROR.

22 Cr. L. J. 324 : 61 I. C. 52 : 23 Bom. L. R. 358.

——S. 439 (3)—*Enhancement of sentence—Sentence passed by Magistrate not specially empowered.*

Except in very exceptional cases the sentence passed by the High Court under its powers of enhancement should not, where the sentence has been imposed by a Magistrate not specially empowered, exceed one of seven years' rigorous imprisonment which a Magistrate acting under section 34 has power to pass. The usual course where the Court thinks that a sentence of seven years' rigorous imprisonment would not meet the ends of justice would be to set aside the trial and order the case to be committed to the Court of Sessions. (*Scott-Smith and Fforde, JJ.*) SEWA SINGH *v.* RANGHA.

24 Cr. L. J. 932 : 75 I.C. 356: A. I. R. 1923 Lah. 600.

——S. 439 (6)—*Enhancement of sentence—Court ordinarily confines itself to points raised in the revision petition.*

Ordinarily a Judge disposing of a revision petition filed by a convicted person or his pleader against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence. A Court exercising its revisional powers upon a revision petition ordinarily deals with the points raised in the petition and has no occasion to travel outside them and consider the whole case upon its merits, as the Court that tries the accused and the Court that hears the appeal, if any, does. It might be otherwise in a revision case taken up by the Court *suo motu.* (*Spencer and Wallace, JJ.*) SD. ANIF SAHIB, *In re.*

26 Cr. L. J. 583 : 85 I. C. 727 : A. I. R. 1925 Mad. 993.

——S. 439 (6)—*Enhancement of sentence—Application by prosecution for—Accused can show cause even against original conviction—High Court has power to set aside conviction.*

Under the provisions of the new sub-section (6) added to S. 439 by the Criminal Procedure Code, Amendment Act No. XVIII of 1923, the accused is entitled, in showing cause against enhancement also, to show cause against his conviction. The amendment thus enables the High Court not only to refuse an enhancement of sentence but also to set aside the conviction if it thinks that both the sentence and the conviction are equally unjustifiable. (*Kinkhede, A. J. C.*) EMPEROR *v.* MAHADEO GANESH.

26 Cr. L. J. 821: 86 I. C. 469 : A. I. R. 1925 Nag. 321.

——S. 439—*Enhancement of sentence—High Court can enhance sentence but where sentence is not manifestly inadequate it will not be enhanced.*

Although a High Court has power under S. 439 to enhance the sentence awarded by the lower Court, yet it will not ordinarily exercise its exceptional revisional powers in the direction of enhancing sentences, unless the sentences are manifestly inadequate. The mere ground that the High Court would itself have passed a heavier sentence, or that it would have maintained a heavier sentence is not enough to enhance the sentence. 7 P. R. 1889 (Cr.), Foll. (*Simpson and Gokaran Nath Misra, A. J. Cs.*) SITA RAM *v.* EMPEROR.

12 O. L. J. 421 : 2 O. W. N. 550 : 89 I. C. 452 : 26 Cr. L. J. 1364 : A. I. R. 1925 Oudh 723.

——S. 439—*Enhancement of sentence—High Court issuing notice* suo motu *for enhancement of sentence—Prisoner absent and unrepresented—Sentence cannot be enhanced.*

Where the High Court, of its own motion, has issued notice to a prisoner to show cause why his sentence should not be enhanced and where at the hearing of the notice neither the prisoner nor his Counsel is present, the High Court cannot pass an order enhancing the sentence. A. I. R. 1924 Mad. 640 Foll. If such an order is passed, it is null and void and can be declared to be so. (*Wazir Hasan, A. J. C.*) PARAS RAM *v.* EMPEROR

26 Cr. L. J. 543 : 85 I. C. 383 : A. I. R. 1925 Oudh 476.

——S. 439—*Enhancement of sentence.*

Although the High Court has power to interfere in revision with an inadequate sentence it does not ordinarily interfere merely because it would itself have passed a heavier sentence so long as the sentence passed involves substantial punishment. (*Heald, J.*) EMPEROR *v.* BEJAI.

3 Bur. L. J. 155 : A. I. R. 1924 Rang. 373 (1).

——Ss. 439 and 423—*Enhancement of sentence—Appeal by convict and revision by High Court—Conviction for murder in place of conviction for lesser offence is justified.*

Where there is an appeal by a prisoner, and in addition the High Court takes seizin of the case under its revisional jurisdiction, the conviction for a lesser offence where the prisoner has been suitably charged, can be converted into one under S. 302, Penal Code, and the sentence enhanced accordingly, under the combined provisions of Ss. 423 and 439. (*May Oung and Duckworth, JJ.*) ON SHWE *alias* KALAW *v.* CROWN.

1 R. 436 : 76 I. C. 711 : 25 Cr. L. J. 247 : A. I. R. 1924 Rang. 93.

——S. 439—*Enhancement of sentence--Sentence cannot be enhanced except on very serious grounds—Cr. P. Code, S.* 147.

It is perfectly impossible for the High Court to do the duty of all the Sessions Courts subordinate to it

CR. P. CODE (V OF 1898), S. 439—Evidence.

and it is primarily the business of the Police and the prosecuting agency to see that the Sessions Court trying the case in the original does its duty. It is very difficult for the Crown successfully to press for enhancement when their representative in the Sessions Court appears to have allowed the Sessions Court to pass the sentence, it did, without any serious attempt to modify it. (*Kennedy, J. C. and Raymond, A. J. C.*) EMPEROR *v.* KASIM WALAD MAHAMMAD SAFFAR.
17 S. L. R. 268 : 26 Cr. L. J. 177 : 83 I. C. 887 : A.I.R. 1925 Sind 188.

Evidence.

———**S. 439**—*Evidence—Sufficiency of evidence.*

The opinion of the Court of first instance in respect of sufficiency or insufficiency of evidence will not be questioned in revision. (*Wazir Hasan, A. J. C.*) SITAL DIN *v.* EMPEROR. **77 I. C. 302 : 25 Cr. L. J. 366 : A. I. R. 1925 Oudh 49.**

———**S. 439**—*Evidence—Conflicting views of evidence by the lower Courts.*

The respondents were called upon to show cause why they should not be ordered to furnish security for their good behaviour for one year. A Magistrate of the first class held an inquiry as to the truth of the information under S. 117, Cr. P. Code, and finally under S. 119 of the same Code discharged the respondents. The District Magistrate referred the case to the High Court asking it to set aside the order of discharge and either convict the accused under S. 118, Cr.P. Code or pass an order for further enquiry. *Held*, that the trial Court having fully considered the evidence and discharged the accused the High Court would not interfere unless it could be shown that the order of the trial Court was either perverse or unreasonable. (*Wazir Hasan, J. C.*) EMPEROR *v.* JAGADAMBA SINGH. **10 O. & A. L. R. 511 : 11 O. L. J. 334 : 1 O. W. N. 245 : 81 I. C. 802 : 25 Cr. L J. 1026 : A. I. R. 1924 Oudh 368.**

———**S. 439**—*Evidence—Revision—Failure to examine important witness.*

Revision was allowed on the ground of omission to examine important defence witness without sufficient cause. (*Adami and Bucknill, JJ.*) JAMUNA SINGH *v.* EMPEROR. **3 Pat. 591 : 25 Cr. L. J. 1255 : 82 I. C. 263 : A. I. R. 1925 Pat. 55.**

———**S. 439**—*Evidence—Power of interference—Consideration of evidence.*

The High Court is not debarred from entering into a discussion of and looking into the evidence and the facts in order to find out if there has been a miscarriage of justice when exercising its powers under Ss. 435 and 439, Cr. P. Code. (*Kulwant Sahay, J.*) DAROGA SINGH *v.* EMPEROR. **1924 P. H. C. C. 177 : 5 P. L. T. 538 : A. I. R. 1924 Pat. 758 (2).**

Exercise of discretion.

———**S. 439**—*Exercise of discretion—Reference by Sessions Judge—Revision, right of.*

It would amount to a denial of justice to accept the argument that a reference by a Sessions Judge which High Court may or may not see fit in its discretion to entertain,resulted in depriving a convicted person of the right to apply to the High Court in revision. It by no means follows from this view that any accused person has the right to come in revision more than once. The mere fact that he had failed on his first application to raise the point which he relied upon in his second, would give a discretionary power not to entertain the second application at all. (*Walsh and Ryves, JJ.*) KOHNA RAM *v.* EMPEROR. **45 All. 11 : 20 A.L.J. 775 : L. R. 3 A. 141 (Cr.) : 4 U. P. L. R. (A.) 162 :**

CR. P. CODE (V OF 1898), S. 439—Exercise of Discretion.

68 I. C. 32 : 23 Cr. L. J. 496 : A. I. R. 1922 All. 502.

———**S. 439**—*Exercise of discretion—Order of retrial to be made in case of serious offences.*

Re-trial should be ordered only in exceptional cases as, for instance, when the offence alleged is of a serious character. Where the Lower Court has misquoted the evidence or the evidence being *prima facie* reasonable and credible the Court gives no grounds for rejecting it, an order of retrial is proper. (*Mears, C. J.*) NAND RAM *v.* KHAZAN. **L. R. 2 A. (Cr.) 68.**

———**S. 439**—*Exercise of discretion — Defects revealed in prolonged proceedings—Prosecution should not be helped with retrial.*

It will not be right to allow the prosecution to shape its case afresh after the whole matter has been threshed out and the defects brought to light, in the course of prolonged proceedings. No retrial should be ordered in such a case. (*Newbould and Mukerji, JJ.*) KEDAR NATH CHAKRAVARTI *v.* EMPEROR.
41 C. L. J. 172 : 29 C. W. N. 408 : 86 I. C. 705 : 26 Cr. L. J. 849 : A. I. R. 1925 Cal. 603.

———**Ss. 439 and 562**—*Exercise of discretion—Release of first offender on furnishing bond.*

The High Court in revision directed that the accused who had been sentenced to two months' rigorous imprisonment for having picked the pocket of the complainant, be released on furnishing a bond with sureties under S. 562 of the Code. (*Chatterjee and Cuming, JJ.*) ABDUL KADER *v.* MONO MOHAN GOPE. **23 Cr. L. J. 235 : 66 I. C. 75 : 25 C. W. N. 720.**

———**S 439**—*Exercise of discretion—Charge setting aside of.*

The High Court certainly has the power to set aside a charge, but it should exercise it only in very exceptional cases. (*Scott-Smith, J.*) BUTA SINGH *v.* EMPEROR, **5 L. L. J. 36 : 71 I. C. 246 (1) : 24 Cr. L. J. 118 (1) : A. I. R. 1923 Lah. 278 (1).**

———**S. 439**—*Exercise of discretion.*

Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court in revision will neither inquire into the reasons nor interfere. (*Mullick and Macpherson, JJ.*) GULLI BHAGAT *v.* NARAIN SINGH. **2 Pat. 708 : 5 Pat. L. T. 404 : 2 Pat. L. R. 165 (Cr.) : 2 Pat. L. R. 187 (Cr.) : 25 Cr. L. J. 446 : 77 I. C. 734 : A. I. R. 1924 Pat. 283.**

———**S. 439**—*Exercise of discretion—Revisional powers when to be exercised.*

The High Court should not hesitate to exercise discretion in its revisional jurisdiction whenever circumstances seem clearly to justify its so doing. (*Bucknill, J.*) RAGHUPAT SAHAY *v.* EMPEROR.
3 Pat. L.T. 93 : 1922 P. H. C. C. 26 : 66 I.C. 336 : 23 Cr. L. J. 272 : A. I. R. 1922 Pat. 160.

———**S. 439**—*Exercise of discretion—Parties should not be encouraged to come to High Court from time to time before completion of trial.*

It is undesirable that the discretionary powers of Court should become crystallized, but it would seriously impede the administration of justice if parties were encouraged to come to the High Court from time to time before the completion of a trial and only in exceptional cases should the Court interfere in revision in pending cases. 28 Bom. 533 and 8 S. L. R. 143, Foll. (*Kincaid, J.C. and Aston, A.J.C.*) MAHOMED *v.* MAHOMED IDRIS. **26 Cr. L. J. 1101 : 88 I.C. 189 : A. I. R. 1925 Sind 328.**

———**S. 439**—*Exercise of discretion—High Court will not interfere with exercise of discretion which is*

CR. P. CODE (V OF 1898), S. 439—Expunging remarks.

not arbitrary.

It is not usual for the High Court to interfere when the lower Court being duly invested with discretion has exercised it in a manner which is not on the face of it arbitrary. (*Kincaid and Aston, A.J. Cs.*) KHANU *v.* EMPEROR. **25 Cr. L. J. 1368 : 82 I. C. 760 : A. I. R. 1925 Sind 190.**

Expunging Remarks.

——S. 439—*Expunging remarks—Adverse remarks about character of stranger to proceedings without opportunity to be heard—Objectionable passages must be expunged.*

It is an elementary duty of a Judge in a criminal case to exclude evidence which is not legally admissible. A Magistrate should not in his judgment in a criminal case to make observations prejudicial to the character of a person who is neither a party nor a witness in the proceedings on materials which are not legally admissible as evidence. Even if the evidence is legally admissible, the Magistrate has no right to make such observations against a person without giving him an opportunity to be heard. It would be an abuse of judicial privilege for a Magistrate to pass strictures on third persons like this. It would be a denial of justice to allow such reflections upon the character of a person to stand and the High Court should order the expungement of the objectionable passages from the judgment. (*Fforde, J.*) BENARSI DAS *v.* CROWN. **6 Lah. 166 : 89 I.C. 270: 26 Cr. L. J. 1326 : 26 Pnj. L. R. 315 : A. I. R. 1925 Lah. 392 (2).**

——S. 439—*Expunging remarks—High Court will expunge remarks by Appellate Court doubting correctness of trial Court's acquittal of an accused when no appeal was made from such acquittal.*

The High Court in revision will not permit the continuance on record of the expressions of a lower appellate Court tending to show its opinion that an accused though acquitted by trial Court and in spite of the absence of appeal from the trial Court's acquittal was really guilty. The reason is that a person must be deemed to be innocent of the charge made against him once he is acquitted of the offence in regular course of law and there has not been any appeal made to a superior tribunal. Therefore it is not proper for an appellate Court when disposing of an appeal of one of two co-accused who were tried together and one of whom was discharged, to employ expressions which amount to a finding that the acquittal of the accused in question was wrong (*Fforde, J.*) ABDUL AZIZ *v.* EMPEROR. **25 Cr. L. J. 1245 : 82 I. C. 173 : A. I. R. 1925 Lah. 129.**

Finding of Facts.

——S. 439—*Finding of facts—Powers of High Court.*

A revisional Court does not pass judgment founded on the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact but it may be compelled to differ from a finding of fact which is either perverse or has been arrived at contrary to well-established principles of law. (*Walsh, J.*) UMED SINGH *v.* EMPEROR. **21 A. L. J. 765 : L.R. 4 A. 221 (Cr.) : 46 All. 64 : A.I.R. 1924 All. 299.**

——S. 439—*Finding of facts—High Court may interfere on facts.*

The practice of the High Court has long been not to interfere in the criminal revision on facts found by the lower appellate Court, but the rule is not an absolute one. Therefore, in a particular case the High Court may go into facts and if there is a reasonable doubt as to the guilt of accused, it will give him the benefit of doubt and set aside the conviction. (*Ryves, J.*) SHIAM SUNDAR *v.* EMPEROR. **20 A. L. J. 276 : 4 U. P. L. R. (A.) 185 : 66 I. C. 177 : 23 Cr. L. J. 241 : A. I. R. 1922 All. 122.**

CR. P. CODE (V OF 1898), S. 439—Finding of facts.

——S. 439—*Finding of facts—Interference is only in exceptional cases.*

Where both the lower Courts have concurred in a finding of fact and there is nothing illegal or erroneous in the procedure of the Magistrate the High Court is usually averse to interfere in revision, except in exceptional cases (*Scott-Smith, J.*) TABRI *v.* THE CROWN. **6 L. L J. 326 : 84 I. C. 937 : 26 Cr. L J. 393 : A. I. R. 1925 Lah. 442.**

——S. 439—*Finding of facts—When open to question in revision.*

Ordinarily the High Court would not in revision go behind the concurrent findings of the Courts below on a question of fact. (*Devadoss, J.*) MARUTHAYEE *v.* APPAVU PILLAI. **72 I. C. 892 : 24 Cr. L. J. 476 : 31 M. L. T. 388 (H. C.) : A. I. R. 1923 Mad. 237 (2).**

——S. 439—*Finding of facts.*

Pattas and kist receipts are evidence not merely of legal right but of possession also. Where the Magistrate comes to a perverse conclusion on the question of possession after getting rid of the oral and documentary evidence in the case the High Court can interfere in revision. (*Ramesam, J.*) THYLAYEE AMMAL *v.* SRIRANGAROYA GOUNDAN. **71 I. C. 228 : 24 Cr. L. J. 100 : 31 M. L. T. 202 : 16 L W. 497 : (1922) M. W. N. 629 : A.I.R. 1923 Mad. 60 : 43 M. L. J. 624.**

——S. 439—*Finding of facts—No revision will be allowed as regards question af a place being a public place.*

The High Court will not interfere in revision except in very rare cases of an extreme nature. When the question involved is as to whether a place is or is not a public place such question is a question of fact for decision on evidence in each particular case. (*Kinkhede, A. J. C.*) SABIMIYA *v.* EMPEROR. **25 Cr. L. J. 1073 : 81 I. C. 897 : A. I. R. 1925 Nag. 123.**

——S. 439—*Finding of facts.*

Criminal revision is not a second appeal on questions of fact. It is the custom in these cases to accept facts as found unless there is anything on the face of the record against the course being adopted, or the accused has been prejudiced by the action and procedure of the Courts below. (*Prideaux, A. J. C.*) SURYABHAN *v.* EMPEROR. **71 I. C. 667 : 24 Cr. L. J. 203 : A. I. R. 1923 Nag. 155.**

——S. 439—*Finding of facts—Decision on facts is not liable to be set aside in revision.*

The Trying Magistrate is entitled to his opinion on facts and his decision is not liable to be set aside in revision even where he has not acted, according to a superior Court, with "fair mindedness and breadth of vision." (*Dalal, J. C.*) HAFIZ KHAN *v.* EMPEROR. **26 Cr. L. J. 527 : 85 I. C. 387 : A. I. R. 1925 Oudh 558.**

——Ss. 439 and 440—*Finding of facts—Interference by High Court in revision, whether desirable—Party's right to be heard before a Court of Revision.*

The High Court is always adverse to interfering on facts by way of revision as it would tend to remove the difference specifically laid down by statute between appeal and revision. Under S. 440, Cr. P. Code

no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision. (*Dalal, J. C.*) HAFIZ KHAN *v.* EMPEROR. **1 O. W. N. 878 : 10 O. & A. L. R. 1189 : A. I. R. 1925 Oudh 558.**

——Ss. 439 and 145—*Finding of facts—Perverse finding—Interference in revision by High Court.*

Ordinarily the High Court will not interfere with findings of facts in the exercise of its jurisdiction under S. 439, Cr. P. Code, but there can be no doubt that it has jurisdiction to review even questions of facts as the words of S. 435, Cr. P. Code, clearly indicate, and will do so where there is a clear miscarriage of justice. A perverse finding of fact contrary to a mass of unrebutted evidence regarding the possession of one of the parties is liable to be set aside in revision. (*Wazir Hasan, J.*) EMPEROR *v.* SARJI PRASAD. **11 O L. J. 330 : 1 O. W. N. 229 : 81 I.C. 890 : 10 O. & A. L. R. 1042 : 25 Cr. L J. 1066 : A. I. R. 1924 Oudh 366.**

——S. 439—*Finding of facts—When discretion may be exercised on facts.*

The power of the High Court to interfere in revision on facts should be very sparingly exercised, but in cases where there is a considerable doubt as to whether the accused is rightly convicted the High Court will interfere. (*Daniels, J. C.*) MAHOMED ZAHUR *v.* EMPEROR. **9 O. L. J. 488 : 76 I. C. 870 : 25 Cr. L. J. 278 : A. I R. 1923 Oudh 8 (2).**

——S. 439—*Finding of facts.*

Where evidence has been considered by two Courts the High Court will not interfere in revision on the facts, though it may do so in exceptional cases. (*Daniels, J. C*) GURDIN *v.* EMPEROR. **63 I. C. 407 : 22 Cr. L. J. 647 : 24 O. C. 225.**

——Ss 439 and 360—*Finding of facts—Non-compliance with S. 360 cannot be raised for first time in revision.*

The question as to whether the provisions of S. 360, Cr.P. Code, have been duly complied with or not is a question of fact and unless it has been raised in the Court of fact it cannot be raised for the first time in the High Court in revision. (*Mullick and Bucknill, JJ.*) SAIYID MOHIUDDIN *v.* EMPEROR. **4 Pat. 488 : 6 P. L. T. 154 : 1925 P. H. C. C. 112 : 86 I. C. 459 : 3 Pat. L. R. (Cr.) 110 : 26 Cr. L.J. 811 : A. I. R. 1925 Pat. 414.**

——S. 439—*Finding of facts—Finding within the competence of the Lower Court.*

In revision the High Court will not interfere with a finding of fact, if it is within the competence of the lower Court. (*Mullick and Bucknill, JJ.*) GAJA DAR LAL *v.* EMPEROR. **60 I.C. 422 : 22 Cr. L. J. 230 (Pat.)**

——S. 439—*Finding of facts—Exercise of jurisdiction—Accused not applying—Effect.*

The revisional jurisdiction of the High Court can be exercised even in cases where the accused does not desire it. Unless a miscarriage of justice has resulted, findings of fact are not generally interfered with. (*Kennedy, J.C. and Madgavker, A.J.C.*) HIRANAND *v.* EMPEROR. **76 I. C. 230 : 25 Cr. L. J. 134 : 17 S. L. R. 245 : A. I. R. 1924 Sind 129.**

Jurisdiction.

——S. 439—*Jurisdiction—Order overruling objection that jurisdiction is barred by S. 403—High Court can set aside order.*

The revisional powers conferred on the High Court by S.439 of the Cr.P.Code include the power of setting aside an order overruling an objection taken on behalf of the accused to the jurisdiction of the Magistrate to entertain the charge, on the ground that a similar complaint had been previously made against the accused and dismissed 45 P R. 1885 (Cr.) Diss: 1925 Lah. 266 Foll. (*Scott-Smith, J.*) GOPAL DOSS *v.* MAGHI RAM. **7 L. L. J. 252: 90 I. C. 292 : 26 Cr. L. J. 1508 : 26 Punj. L. R. 353 : A. I. R. 1925 Lah. 439.**

——S. 439—*Jurisdiction—Revision lies where lower Court has assumed jurisdiction by ignoring aggravating facts.*

The High Court will set aside the conviction of an accused where the accused himself has objected to the jurisdiction of the lower Court which, by intentionally ignoring facts of aggravation making the offence cognizable only by a superior Court, has tried the accused. (*Venkatasu ba Rao, J.*) RANGAYYA *v.* SANAPPA. **20 L. W. 919: 25 Cr. L. J. 1193: 82 I. C. 57 : A. I. R. 1925 Mad. 367.**

——S. 439—*Jurisdiction—High Court staying proceedings—Lower Court informed by party but disposing of case—Lower Court's order is* ultra vires.

Once proceedings are stayed by the High Court and the matter is brought to the notice of the Court concerned it is its duty to stay its hands and stop further proceedings.

Where an application was made to the lower Court to stay the proceedings on the ground that the High Court had ordered their stay and this application was supported by the certificate of the Vakil who had moved the application in the High Court. *Held*, that it was the Magistrate's manifest duty to stay his hands and not to pass any order in the case and that if he did dispose of the case and pass final order, such order would be *ultra vires* and irregular. (*Kulwant Sahay, J.*) GOWRI SHANKAR *v.* COLLECTOR OF MUZAFFARPUR. **6 P.L.T. 215: 3 Pat. L.R. (Cr.) 127 : 87 I. C. 421: 26 Cr. L. J. 965 : A. I. R. 1925 Pat. 553**

Order Under.

——Ss. 439 and 476—*Order under S. 476, Cr. P. Code—Direction to prosecute—Revision by High Court.*

The High Court will interfere in revision with direction to prosecute made under S. 476, Cr. P. Code, only when that direction is based on grounds merely fanciful, grounds so empty and so obviously wrong that the Court granting cannot be said to have formed serious judicial opinion. 23 A. 249, Foll. (*Macleod, C. J. and Crump, J.*) EMPEROR *v.* PARSHOTAMDAS M. SHAH. **25 Bom. L. R 282: 72 I. C. 359: 24 Cr. L. J. 359: A. I. R. 1923 Bom. 201 (1).**

——Ss. 439 and 369—*Order of—Dismissal of Criminal case for default—Power to re-hear.*

Where the High Court has dismissed a criminal case for default and not on the merits, the Court can hear the case. (*Abdul Qadir, J.*) KISHEN SINGH *v.* GIRDHARI LAL. **69 I.C. 638: 23 Cr. L. J. 750 (L.) : 1924 Lah. 310.**

——S. 439 (2)—*Order under—Failure in previous revision against conviction will debar accused from showing cause against conviction.*

Per Spencer, J.—Though the words "unless he has already done so" do not occur in the end of sub-S. 2 it must be assumed that they are implied from the ordinary presumption as to the finality of orders in criminal revision proceedings. (*Spencer and Wallace, JJ.*) *In re* SD. ANIF SAHIB. **86 Cr. L. J. 583 : 85 I. C 727: A. I. R. 1925 Mad. 993.**

——S. 439—*Order under—Disposal of one revision case is no bar to another one out of same trial unless point raised in second revision case has been actually*

CR. P. CODE (V OF 1898), S. 439—Order under.

adjudicated upon in previous case.

The only limitation to the exercise of the right to apply for revision is that, under sub-S. (4) to S. 435 applications for revision cannot be made both to the Sessions Judge and to the District Magistrate. Also a petitioner would in practice be required to state all his grounds for revision in a single petition. With these exceptions there is nothing in the Code to make the disposal of one criminal revision case a bar to the disposal of another arising out of the same original trial. It is only when there has been an actual adjudication upon a particular point, such as the jurisdiction of the lower Court to try the accused or the adequacy of the sentence, that the High Court will not review its own decision. Hence where an accused's revision petition from his conviction has been dismissed, the complainant can apply for enhancing sentence.

Per *Wallace, J.*—No Court can reasonably accept the principle that once it has passed any sort of order in criminal revision, it is precluded from entertaining any further revision petition or reference in the same case, or even from proceeding *suo motu*. When a Court has refused to allow as adequate certain reasons put forward by a party for interference in revision, it cannot be said to have thereby endorsed the correctness, legality and propriety of the finding, sentence or order under revision beyond all further possibility of question. The Court would no doubt refuse to listen to a fresh revision petition put in by a party who had already put in a revision petition and obtained orders thereon, on the salutary principle that a party must put forward all his grounds of attack at once. (*Spencer and Wallace, JJ.*) *In re* SD. ANIF SAHIB.

86 Cr.L. J. 583: 85 I. C. 727: A. I. R. 1925 Mad. 993.

———**S. 439**—*Order under S. 423—Court can exercise powers conferred by S. 423 (1) (c).*

It is competent for a Court under S. 439 of the Cr. P. Code to exercise the powers of an Appellate Court conferred by S. 423 (1) (c) and *a fortiori* to reverse or alter an order of commitment passed by a Sessions Judge under S. 423 (1) (*b*). (*Dalal, J. C.*) RAM SAMUJH LAL *v.* EMPEROR. **11 O. L. J. 748: 25 Cr. L. J. 1375 : 82 I. C. 767: A. I. R. 1925 Oudh 233.**

———**Ss. 439 and 423**—*Order under S. 423, Cr. P. C.—Appeal disposed of on merits—Pleader's absence.*

Where the appeal is disposed of on the merits under S. 423, there is no power in the High Court under S. 439 to set aside the judgment of the Court below, merely upon the ground that the pleader or the Counsel on behalf of the petitioner was not heard in the Court below. (*Jwala Prasad and Coutts, JJ.*) OLAYAT KHAN *v.* EMPEROR. **1 P. 589: 4 P. L. T. 98: 71 I. C. 246: 24 Cr. L. J. 118: A. I. R. 1922 Pat. 587.**

———**S. 439**—*Order under S. 476 by Revenue Court—Revision.*

The High Court has no jurisdiction under S. 439 of the Code to entertain an application to revise an order passed by a Revenue Court under S. 476 of the Code. (*Adami and Bucknill, JJ.*) RAKTO SINGH *v.* EMPEROR. **2 Pat. L. T. 609: 6 Pat. L. J. 178: 61 I. C. 643: 22 Cr. L. J. 403: 1921 P. H. C. C. 240.**

———**S. 439**—*Order under S. 476, Cr. P. Code—No revision lies from an order under S. 476, Cr. P. Code.*

Where a Civil Court has taken action under S. 476, Cr. P. Code, the Revisional Court cannot act under S. 439, Cr. P. Code. 4 L.B.R. 339 and 40 C. 477 (F.B.) Foll. (*Duckworth, J.*) VALAB DAS *v.* MAUNG BATHAN. **1 Rang. 372 : 2 Bur. L. J. 154: A. I. R. 1924 Rang. 54.**

CR. P. CODE (V OF 1898), S. 439—Pending Proceedings.

Pending Proceedings.

———**S. 439**—*Pending proceedings—Complaint not inquired into—Order to show cause why complainant should not be prosecuted can be revised.*

Where, without enquiring into a complaint presented by the complainant, the accused was ordered to show cause why he should not be prosecuted under S. 182 of the Penal Code, *held*, that the High Court had power to revise the order although no final order directing the prosecution of the accused had been passed. (*Gokul Prasad, J.*) SHEO BALAK *v.* EMPEROR. **59 I. C. 369: 22 Cr.L.J. 81 (All.): L R. 2 A. (Cr.) 126.**

———**S. 439**—*Pending proceedings—Order directing enquiry under S. 202—Stay of such order cannot be made.*

A Magistrate cannot dismiss a complaint offhand unless he is satisfied that no *prima facie* case of any kind is made out and if he considers that before issuing process against the person complained against he should make further inquiry, interference by the High Court on the petition by either party for stay of the proceeding would obviously be uncalled for. (*Lumsden, J.*) NARAYAN SINGH *v.* EMPEROR. **A. I. R. 1923 Lah. 663.**

———**S. 439**—*Pending proceedings—Final order not passed—Revision.*

The High Court has power to quash proceedings in a subordinate Court, even at the stage when the accused is merely summoned and no final order is passed against him, when, if the proceedings were allowed to continue, grave injustice would be done to the accused. (*Abdul Quadir, J.*) THAKARIA *v.* PURAN SINGH. **67 I. C. 589: 23 Cr. L. J. 429: A. I. R 1922 Lah. 452 (2.)**

———**S. 439**—*Pending proceedings—High Court declined to interfere with pending proceedings, though the procedure followed was very irregular and extraordinary.*

Where the trial Magistrate consulted his appellate Magistrate as to the course to be followed in a particular case and the latter gave advice on the matter to the former, *held*, that the procedure followed was extremely irregular and extraordinary but did not justify interference by the Court so long as the proceedings had not come to a termination. (*Venkatasubba Rao, J.*) SAMI GOVINDAN, *In re.* **20 L. W. 937 : 85 I.C 37 : 26 Cr. L. J. 421 : A. I. R. 1925 Mad. 315.**

———**S. 439**—*Pending proceedings—High Court would interfere where bare statement of the facts of the case justifies interference.*

The circumstances which will justify the interference of the High Court in a pending case cannot be laid down with precision. But one safe practical test would be that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that it is a fit one for its interference at an intermediate stage. 25 Cal. 233 and 47 Mad. 722, Ref. to. (*Baker, J.C.*) MADHAV BHAGWANT *v.* EMPEROR. **26 Cr. L. J. 1093 : 88 I. C. 181 : A.I.R. 1925 Nag. 345.**

———**S. 439**—*Pending proceedings—Pending cases—Interference is exceptional.*

Although it is unusual to interfere in revision with a pending case the High Court will interfere in exceptional cases, *e.g.*, where a pleader was charged under S. 409 for retaining fees the legal recovery of which was time-barred. (*Batten, J. C.*) KRISHNA RAO *v.* EMPEROR. **6 N. L. J. 119 : 73 I. C. 335 : 24 Cr. L. J. 960 : A. I. R. 1924 Nag. 47.**

CR. P. CODE (V OF 1898), S. 439—Pending Proceedings.

——S. 439—*Pending proceedings—Direction to Subordinate Court not to try a case cannot be made.*

S. 439 of the Cr. P. Code does not authorise the High Court to direct a subordinate Court to refrain from trying an accused against whom process has been issued by such Court. (*Mullick and Bucknill, JJ.*) JHARU LAL *v.* MAHANTH MADAN DAS.
2 Pat. 257 : 74 I. C. 713 : 24 Cr. L. J. 809 : A. I. R. 1923 Pat. 410.

——S. 439—*Pending proceedings—High Court will not generally interfere—Complaint by one partner against another partner—Partnership subsisting—Dispute is of a civil nature—High Court will interfere.*

Although theHigh Court would not interfere much with the discretion of the Magistrates who are vested with ample powers to dispose of a case before it has proceeded to its due termination, it would so interfere on occasions where the circumstances clearly call for its interference. Courts should look with much suspicion on criminal actions which are brought forward by partners of a still subsisting partnership against one another, so as to make a prosecution an extremely oppressive mechanism for compelling a partner to admit or pay up a claim or enter into some compromise in a matter which is really one, more suitable for settlement in a civil suit than a case for a criminal prosecution. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) UDHARAM *v.* EMPEROR.
26 Cr. L J. 1303 : 89 I.C. 247 : A. I. R. 1925 Sind 231.

Powers of High Court.

——S. 439—*Powers of High Court—Order of Magistrate under S. 562—Interference.*

Unless the order passed by a Magistrate under S. 562 is clearly mistaken or injudicious or amounts to a failure of justice, the High Court will not interfere in revision. (*Mears, C.J. and Piggott, J.*) MURLIDHAR *v.* MAHBOOBKHAN. **47 All. 353 : 85 I. C. 848 : 26 Cr. L. J. 624 : A. I. R. 1925 All. 644.**

——S. 439—*Powers of High Court—Interference* suo motu—*Callings for records—Revision.*

A Court should be loath to interfere on behalf of a person convicted in a criminal case if that person is an adult of ordinary intelligence when that person himself in no way contests the propriety of his conviction. Under the very extensive powers conferred by S. 435, Cr. P. C, the High Court can call for and examine the proceedings of inferior Courts if the necessity for doing so is brought to its notice in any manner. But before it does so it would have to be satisfied that there are *apriori* grounds for apprehending a miscarriage of justice. (*Stuart, J.*) NARAIN PRASAD NIGAM *v.* EMPEROR. **71 I. C. 243 : L. R. 3 A. 178 (Cr.) : 20 A. L. J. 909 : 45 A. 128 : 24 Cr. L.J. 115 : A.I.R. 1923 All. 85.**

——S. 439—*Powers of High Court—Application to lower Court essential before moving High Court.*

An application to the lower Court is essential before moving the High Court in revision irrespective of whether the District Magistrate or Sessions Judge has power to grant the relief or not. (*Mears, C. J. and Banerji, J.*) SHARIF AHMAD *v.* QUABUL SINGH.
43 All. 497 : 19 A. L. J. 425 : 63 I. C. 875 : 22 Cr. L. J. 715 : 3 U. P. L. R. (All.) 77.

——S. 439—Power of High Court to award costs in revision against proceedings under S. 145. *See* Cr. P. Code, Ss. 145 and 439. BAI JIBA *v.* CHANDULAL AMBALAL. **27 Bom. L. R. 1353.**

——S. 439—*Powers of High Court—Rule for one relief can be utilized for any other relief.*

CR. P. CODE (V OF 1898), S. 439—Powers of High Court.

Where the rule issued by High Court was to show cause why the appeal should not be reheard by the Sessions Judge. *Held*, it was within the competence of High Court to make any order as it may think fit, *e.g.*, it may order that the order of the Sessions Judge be set aside. (*Sanderson, C.J. and Panton, J.*) BEJOY SINGH *v.* MATHURIYA DEBYA. **42 C. L. J. 124 : A.I.R. 1925 Cal. 1182.**

——S. 439—*Powers of High Court—Complainant—Right to be heard—Defamation.*

On hearing a revision the High Court could hear a private complainant in the case of an offence under Ss. 500 and 501, I. P. C. 42 C. 612, Ref. (*Ghose and Cuming, JJ.*) ASHUTOSH DAS GUPTA *v.* PURNA CHANDRA GHOSH. **50 Cal. 159 : 24 Cr. L. J. 206 : 71 I. C. 670 : 36 C. L. J. 287 : A. I. R. 1923 Cal. 11.**

——S. 439 *Powers of High Court—Evidence if can be gone into—Case of non-appealing accused—If can be considered.*

There is no provision of law which debars a Court of revision from going into the evidence, if it thinks it fit to do so in the interests of justice. Where a number of accused are convicted and some only apply in revision to the High Court the court has jurisdiction to consider the case of the non-appealing accused also. (*Moti Sagar, J.*) ALLAH DITTA *v.* EMPEROR. **25 Cr. L.J. 435 : 77 I. C. 723 : A. I. R. 1924 Lah. 585.**

——S. 439—*Powers of High Court—Order under S. 523, Cr. P. Code, can be examined.*

On a proper case being made out, a High Court has jurisdiction to examine orders passed under S. 523, Cr. P. Code. (*Broadway, J.*) CHUNI LAL *v.* ISHAR DAS. **4 L. 38 : 24 Cr. L. J. 670 : 73 I. C. 702: A. I. R. 1924 Lah. 76.**

——S. 439—*Powers of High Court—Order under S. 147—Finding of fact.*

The High Court will not interfere in revision with an order by a Magistrate under S. 147 of the Cr. P. Code which is a mere finding of fact. (*Jackson J.*) KHAZI MUHAMAD KHAN, *In re.* **22 L. W. 831.**

——S. 439—*Powers of High Court—Revision from order under Chap. 12 (Ss. 145-148)—Costs cannot be awarded—Cr. P. Code, S. 145.*

The High Court has no power to award costs incurred before it on the hearing of a Criminal Revision against an order passed under Chapter XII (Ss. 145-148) of the Cr. P. Code, A.I.R. 1922 Mad. 502 (F.B.) Foll. (*Spencer, Offg. C. J. Kumaraswami Sastri and Krishnan, JJ.*) P. VEERAPPA NAIDU *v.* AVUDAYAMMAL. **48 Mad. 262 : 86 I C. 147 : 26 Cr. L. J. 707 : 21 L. W. 688 (F. B.) : A. I. R. 1925 Mad. 438 : 48 M. L. J. 106.**

——S. 439—*Power of High Court—High Court can exercise powers not conferred on Appellate Courts besides those conferred on such Courts—High Court can at any stage quash proceedings.*

S. 439 does not say that the High Court shall exercise only those powers that are conferred on a Court of Appeal ; but on the other hand it enacts that among the powers possessed by the High Court are the powers conferred on an Appellate Court. The High Court has power at any stage to quash or set aside proceedings. 22 C. 131 ; 26 C. 786; 39 M. 561 ; 38 C. 168 ; 20 B. 543 and 67 I.C. 589, Foll. (*Venkatasubba Rao, J.*) RAMANATHAN CHETTIAR *v.* SIVARAMA SUBRAMANIA AIYAR. **47 Mad. 722 : 20 L. W. 234 : 35 M. L. T. 77 : 1924 M. W. N. 556 : 81 I. C. 785 : 25 Cr. L. J. 1009 : A. I. R. 1925 Mad. 39 : 47 M. L. J. 373.**

——S. 439—*Powers of High Court—In case of*

CR. P CODE (V OF 1898), S. 439—Powers of High Court.

concurrent jurisdiction a High Court can be approached as a last resort.

Even though High Court has concurrent jurisdiction with District Magistrate or Sessions Judge in the matter of ordering further enquiry it is a right course to adopt, to insist on the party exhausting all his remedies in an inferior Court before he comes up to High Court. The fact that an order for compensation passed along with an order of discharge is revisable by the High Court only does not alter the procedure. (*Krishnan, J.*) GOPOBONDHU BEHARA *v.* D. VENKATESAM PANTULU. **18 L. W. 651 : (1923) M. W. N 837 : 76 I. C. 1030 : 25 Cr. L. J. 310 : A. I. R. 1924 Mad. 228.**

——Ss. 439 and 435—*Powers of High Court—Dismissal for default cannot be set aside.*

The High Court cannot and will not entertain a petition on a matter already disposed of, when the order disposing of it, is still in force and has not been set aside. A revision petition dismissed for default cannot be restored. (*Wallace, J.*) NARRA APPAYYA *v.* DARSI VENKATAPPAYYA. **17 L. W. 23 : (1922) M. W. N. 821 : 23 Cr. L J. 746 : 69 I.C. 634 : A.I.R. 1923 Mad. 276 (1): 44 M.L.J. 27.**

—— S. 439—*Powers of High Court—Revision—Magistrate deciding that he has jurisdiction in a case—Interlocutory appeal—Power of a Supreme Court to interfere.*

Ordinarily there is no jurisdiction for a Supreme Court or any other Court to take up in revision what are interlocutory matters in a Criminal Court. There is no provision in the Cr. P. Code for an interlocutory appeal against a Magistrate's decision that he has jurisdiction in a case and the High Court would not interfere with such a decision in the exercise of its revisional powers. (*Stuart, C. J.*) KASHI RAM KHOSLA *v.* R. L. DIKSHIT. **3 O.W. N. 104.**

——S. 439—*Power of High Court—Discharge of accused by Magistrate—Order for further enquiry by Sessions Judge—Revision by High Court.*

The Trying Magistrate after recording the evidence of a number of prosecution witnesses was of opinion that no case had been made out against the accused under S. 408, I. P. C., and discharged the accused. The Sessions Judge on going through the evidence was of opinion that the Magistrate had not given proper reasons for discharging the accused and ordered a further enquiry. *Held*, that the order of the Sessions Judge was not illegal or improper and the High Court would not interfere in revision. (*Kendall, A. J. C.*) KARHLEY *v.* PANDIT JAGGANNATH PRASAD. **10 O. & A. L. R. 576 : 11 O. L. J. 611 : 1 O. W. N. 302 : A. I. R. 1925 Oudh 180.**

——S. 439—*Powers of High Court—Revision against order of acquittal—Principles of interference.*

The power of interference in revision against an order of acquittal should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice. But this rule does not apply to cases where there has been no trial. The High Court will not interfere in any case on the ground that the inferences drawn from evidence are erroneous. (*Mullick and Macpherson, JJ*) SIBAN RAI *v.* BHAGWAT DASS. **6 P. L T. 833.**

——S. 439—*Powers of High Court—Revision against orders under Ss. 145 and 147—Grounds.*

Under the amended provisions of the Cr. P. Code orders under Ss. 145 and 147 can be revised by the High Court not only on the question of jurisdiction but also on the question of legality. (*Kulwant Sahay, J.*) CHHAKAURI LALL *v.* ISHAR SINGH. **6 Pat. L. T. 799.**

CR. P. CODE (V OF 1898), S. 439—Proceedings under S. 110.

——S. 439—*Powers of High Court—Facts constituting higher offence—Conviction for lighter offence—Jurisdiction—Interference.*

A Magistrate who convicts an accused person of an offence falling within his jurisdiction though the facts found would also constitute a more serious offence not within his jurisdiction, his proceedings are not void *ab initio* and the High Court will not ordinarily interfere unless the sentence appears inadequate or the accused has been deprived of his right of appeal. (*Macpherson, J.*) BERHAMDEO RAI *v.* EMPEROR. **26 Cr. L. J 1559 : 90 I. C. 439.**

——S. 439—*Power of High Court—Direction to subordinate Court not to try a case.*

S. 439 of the Cr. P. Code does not seem to authorise the High Court to direct a subordinate Court to refrain from trying an accused against whom it has issued a process. (*Mullick and Bucknill, JJ.*) JHARU LAL *v.* MAHANTH MADAN DAS. **2 Pat. 257 : 24 Cr. L. J. 809 : 74 I. C. 713 : A. I. R. 1923 Pat. 410.**

——S. 439—*Power of—High Court—Interference—Exercise of discretion not arbitrary.*

It is not usual for the High Court to interfere when the lower Court being dulyinvested with discretion has exercised it in a manner which is not on the face of it arbitrary. (*Kincaid and Aston, A.J. Cs.*) KHANU *v* EMPEROR. **25 Cr.L. J. 1368 : 82 I. C. 760 : A. I R. 1925 Sind 190.**

"Proceedings", Meaning of

——S. 439—"*Proceedings*", *meaning of—High Court can interfere in proceedings for granting bail.*

Proceedings in which it is or it has been determined whether bail from the accused person should be taken or not come within the definition of "any proceeding" under S. 439 and the High Court can under that section interfere and control the propriety as well as the regularity of such proceedings. (*Kinkhede, A. J. C.*) LOCAL GOVERNMENT *v.* GULAM JILANI. **25 Cr. L. J. 1363 : 82 I. C. 755 : A. I. R. 1925 Nag. 228.**

——S. 439—*Proceedings under S. 107, Cr.P.Code—Refusal to take action—If revisable.*

An order of a Magistrate refusing to take proceedings under S. 107, Cr. P. Code, cannot be set aside by a Sessions Judge in revision. (*Greaves and Panton, JJ.*) PHANI BHUSAN ROY *v.* KUNJA BEHARI BISWAS. **25 Cr L J 679 : 81 I C. 167 : A. I. R. 1925 Cal. 262.**

Proceedings under S. 110, Cr. P. Code.

——S. 439—*Proceedings under S. 110, Cr. P. Code—Several accused—Legality of—Evidence of friends and relations—Value of evidence—Duty of High Court to consider.*

In proceedings under S. 110, Cr. P. Code, against a particular individualevidence should be confined to his case alone unless the case is that he has a confederate or partner to whom all the evidence is equally applicable. Where witnesses voluntarily come forward as friends or associates of the accused and give evidence it ought not to be brushed aside unless the witnesses are discredited as regards their good faith and honesty. Evidence of general repute by persons having no personal knowledge of the accused is insufficient. It is open to a District Magistrate to lay down rules for the guidance of his subordinates so as not to allow an unnecessary large number of witnesses to be examined. In revision the High Court would weigh the evidence and see whether the case has been

CR. P. CODE, (V OF 1898), S. 439 — Proceedings under S. 110.

considered from the point of the accused and if the evidence for the defence is equally good as that of the prosecution, the High Court would quash the conviction. Mere repetitions unaccompanied by direct evidence personally affecting each accused or accompanied by direct evidence which is worthless and incredible is insufficient in a case under S. 140, Cr. P. Code. (*Walsh, J.*) ANGNOO SINGH *v.* EMPEROR.
45 A. 109 : 71 I. C. 865 : 24 Cr. L J. 257 : 20 A.LJ. 881 : A. I. R. 1923 All. 35.

——S. 439—*Proceedings under S.* 110.

Where a party applies for revision and obtains an order issuing notice to show cause, he should confine himself to the ground on which the order was based. (*Walsh, J.*) RAJ BUNSI *v.* EMPEROR.
42 All. 646 : 18 A. L. J. 673 : 60 I. C. 420 : 22 Cr. L. J. 228 : L.R. 1 A. 182 (Cr.).

Proceedings under S. 145 Cr. P. Code.

——S. 439—*Proceedings under S.* 145, *Cr. P. Code—Revisional power of High Court—Jurisdiction Material irregularity—Evidence of possession not considered—Effect of— Government of India Act, S.* 107.

Where there is initial want of jurisdiction proceedings, though they may purport to be under S. 145, Cr. P. Code, are not really proceedings under it and the High Court can interfere under S. 439, Cr. P. Code, but if the proceedings were properly started all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Government of India Act. 36 M. 275, 286 ; 41 A. 302; 37 M. L. J. 589 ; 27 M. L. J. 169 ; 17 C. W. N. 205 ; 40 C. 982 ; 32 C. 249 ; 2 L W. 107 ; 3 L. W. 164 ; 12 L. W. 939 : 38 M. L. J. 73. Ref. to. Pattas and kist receipts are evidence not merely of legal right but of possession also. Where the Magistrate comes to a perverse conclusion on the question of possession after getting rid of the oral and documentary evidence in the case, the High Court can interfere in revision. (*Ramesam, J.*) THYLAYEE AMMAL *v* SRIRANGAROYA GOUNDAN. **71 I. C. 228 : 24 Cr. L. J. 100 : 31 M. L. T. 202 ; 16 L.W. 497 : (1922) M.W.N. 629 : A. I. R. 1923 Mad. 60 : 43 M. L. J. 624.**

——Ss. 439 and 145—*Proceedings under S.*145—*Possession proved—Preliminary order after a few days.*

When a party is found to be in possession a few days before the preliminary order and when there is nothing on the record to suggest that there was any change of possession, the Court is not bound in revision to vacate the order. (*Kumaraswami Sastri, J.*) MAHOMED HUSSAIN SAHIB *v.* PACHAYAPPA CHETTY.
(1921) M. W. N. 866 : 14 L. W. 678 : 65 I. C. 444 : 23 Cr. L. J. 92 : A. I. R. 1922 Mad. 356 : 42 M. L. J. 147.

Proceedings under S. 195. Cr. P. Code.

——Ss. 439 and 195 (6)—*Proceedings under S.* 195, *Cr. P. Code.—Sanction—Order for, by Sessions Judge—Revision.*

The High Court has power to interfere in revision with an order of the Sessions Judge granting sanction. 6 A. L. J. 1, Ref. (*Lyle, A. J. C.*) NAZIR HASAN *v.* MAHOMED YAMIN. **9 O. L. J. 282 : 68 I. C. 414 : 23 Cr. L. J. 574 : A. I. R. 1922 Oudh 225.**

Question of law.

——S. 439—*Question of law—Failure to comply with S.* 342.

The objection as to the Magistrate's failure to comply with the provisions of S. 342 of the Code raises a

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point of law and may be taken at the hearing of an application for revision although it was not urged in the Courts below and is not set forth in the application. (*Jwala Prasad, J.*) MOINUDDIN *v.* EMPEROR.
22 Cr. L. J. 442 : 61 I. C. 749 : 2 Pat. L. T. 455.

——S. 439—*Retrial—Doubtful case.*

Where after considering the case, a Magistrate comes to the conclusion that the case against the accused is doubtful, his judgment cannot be said to be foolish or perverse and retrial should not be ordered. (*Abdul Raoof, J.*) KHAN ZAMAN KHAN *v.* EMPEROR.
89 I. C. 397 : 26 Cr. L. J. 1357.

Wrong Procedure.

——S. 439—*Wrong procedure—Application to Lower Court essential before moving High Court.*

An application to the Lower Court is essential before moving the High Court in revision, irrespective of whether the District Magistrate or Sessions Judge has power to grant the relief or not. (*Mears, C. J. and Banerji, J.*) SHARIF AHMAD *v.* QUABUL SINGH. **43 All. 497 : 19 A. L. J. 425 : 63 I. C. 875 : 3 U.P.L.R. (All.) 77 : 22 Cr. L. J. 715 : L. R. 2 A. (Cr.) 45.**

——S. 439—*Wrong procedure—New grounds—Revision.*

Applicants in revision should, as a rule, be confined to the grounds upon which the rule *nisi* is granted (*Walsh, J.*) RAJBANSI *v.* EMPEROR.
18 A. L. J. 673 : 60 I. C. 420 : L. R. 1 A. (Cr.) 182 : 22 Cr. L. J. 228 : 42 All. 646.

——S. 439—*Wrong procedure—Revision petition.*

Omission by party to ask for further argument when Magistrate has examined witness after close of both parties' case and after submission of the arguments is a bar to raising objection to the Magistrate's act as a ground of revision. (*Greaves and Duval, JJ.*) ABDUL JABBAR *v.* MAFIZUDDI SARKAR.
28 C. W. N. 783 : 81 I. C. 931 : 25 Cr. L. J. 1107 : A. I. R. 1924 Cal. 980.

——Ss. 439, 107 and 145—*Wrong procedure—Proceedings under S.* 107, *Cr. P. Code.*

If the Magistrate in the exercise of his discretion elects to proceed under S. 107 instead of S. 145, the High Court cannot interfere in revision. (*Walmsley and Greaves, JJ.*) AMULYA CHARAN SARKAR *v.* AMRIT LAL MUKERJI. **22 Cr. L. J. 224 : 60 I. C. 336 : 24 C. W. N. 1075.**

——S. 439—*Wrong procedure—Order of Sessions Judge—Report by District Magistrate is not the proper procedure.*

It is not the practice of the High Courts in India to take action under S. 439 of the Code of Criminal Procedure on a report by a District Magistrate which has for its object interference with a decision by a Court of Session. A District Magistrate if he considers a Sessions Judge's order illegal should move the Public Prosecutor to bring it before this Court. (*Campbell, J.*) EMPEROR *v.* FAZAL DAD. **73 I. C. 269 : 24 Cr. L. J. 573 (Lah.) : A. I. R. 1924 Lah. 420.**

——S. 439—*Wrong procedure.*

It would be improper to proceed with the revision petition when the accused's contention can properly be put forward elsewhere. (*Oldfield, J.*) ATAKURI SARAVAYYA, *In re.* **17 L. W. 357 : A. I. R. 1923 Mad. 484 (2) : 44 M. L J. 366.**

——S. 439—*Wrong procedure—Disposal of case on extra-judicial grounds—Revision lies.*

Where a Court disposed of an application for prosecution of a witness for perjury on grounds of incon.

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venience to Court and not on the ground of the probability of his conviction on evidence *held*, that the Court acted on extra-judicial grounds and a revision lies. (*Wadegaonkar, A.J.C.*) KALU *v.* TIKARAM. **26 Cr. L. J. 1350 (2) : 89 I. C. 390 (2) : A. I. R. 1925 Nag. 412.**

——S. 439—*Wrong procedure —Lower Court's order erroneous in law, but otherwise proper ought not to be set aside.*

An order that proceeds upon an error of law, but which, apart from that error, is a proper order ought not to be set aside in revision. (*Simpson, A. J. C.*) SRI KISHAN *v.* DEBI DAYAL. **26 Cr. L. J 1619 : 2 O. W. N. 823 : 90 I. C. 915 ; A. I. R. 1925 Oudh 739.**

——S. 439—*Wrong procedure—Formal and important irregularities.*

In many cases where in orders there has been irregularity of form but where it would seem, on such investigation as is possible, that no harm would be done to the parties and that although by a wrong method a right result may perhaps have been reached, it is undesirable that the High Court should exercise its discretionary jurisdiction in revision, but the case is otherwise when there are material errors and not mere irregularity in form. Where Sub-divisional Officer without concluding his investigation under the provisions of S. 144 and at any rate making some order which would indicate what had happened to those proceedings, initiated proceedings under S. 107, Cr. P. Code, and the District Magistrate quashed the proceedings which had been initiated by the Sub-divisional Officer under the provisions of S. 107 and ordered the Sub-divisional Officer to initiate proceedings under Section 145 and the Sub-divisional Officer started proceedings under the provisions of S. 145 simply on the ground that he was told so to do by the District Magistrate, *held*, that if such a series of errors were passed over without comment and the orders which have been wrongly made were allowed to stand simply because it may possibly be that no harm will eventuate to either of the parties as a result of such orders, those who have to administer the criminal law in subordinate capacities might perhaps feel that any close adherence to the formalities prescribed by the Cr. P. Code, is unnecessary. (*Bucknill, J.*) BANSIDHAR *v.* INDAR NARAIN. **75 I. C. 65 : 24 Cr. L. J. 865 : 73 I. C. 161 : 1 Pat. L R. (Cr.) 93 : 24 Cr. L. J. 545 : A. I. R. 1923 Pat. 438.**

——Ss. 439 and 423—*Wrong procedure—Appeal disposed of on merits—Pleader's absence.*

Where the appeal is disposed of on the merits under S. 423, there is no power in High Court under S. 439 to set aside the judgment of the Court below, merely upon the ground that the pleader or the counsel on behalf of the petitioner was not heard in the Court below. (*Jwala Prasad aad Coutts, JJ.*) OLAYAT KHAN *v*, EMPEROR. **1 Pat. 589 : 71 I. C. 246 : 4 Pat. L.T. 98 : 24 Cr.L.J. 118 : A.I.R. 1922 Pat. 587.**

——S. 439 — *Wrong procedure — Order under S. 526, Cr. P. Code—Power to revise order of District Magistrate refusing transfer—Remedy of party.*

An order of the District Magistrate refusing to transfer a case from one Court to another is not open to revision by the High Court either under S. 439 or the Letters Patent. The remedy of the party is to file an application for transfer under S. 526. (*May Oung, J.*) ASHU *v* MG. PO KHAN. **1 Rang. 632 : 2 Bur. L. J. 236 : A. I. R. 1924 Rang. 100.**

——S. 439—*Wrong procedure—District Magistrate applying for revision against Sessions Judge is undesirable but useful.*

CR. P. CODE (V OF 1898), S. 443.

Though to allow the District Magistrate who is a subordinate of the Sessions Judge to get his superior's order modified in revision, is not advisable yet if the District Magistrate is wholly precluded from bringing cases to the notice of the High Court, many evils may ensue due to judicial idiosyncracies going unchecked. (*Kennedy, J. C. and Raymond, A. J. C.*) EMPEROR *v.* KASIM WALAD MOHAMED SAFFER. **17 S. L. R. 268 : 26 Cr. L. J. 177 : 83 I. C. 881 : A. I. R. 1925 Sind 188.**

Miscellaneous.

——S. 439—*Sentence—Enhancement.*

It is not the practice of the High Court to call on an accused person *proprio motu* to show cause why his sentence should not be enhanced ; but to leave it to the Local Government to apply in revision for an enhancement if so advised. (*Hallifax, A. J. C.*) KACHRIA MAHAR *v.* EMPEROR. **18 N. L. R. 101 : 64 I. C. 277 : A. I. R. 1922 Nag. 65.**

——S. 439—*Summary rejection of criminal revision—Interference.*

The rejection of a revision application summarily is no ground for interfering with the order. (*Pullan, A. J. C.*) SUKHPAT LAL *v.* EMPEROR. **89 I. C. 972 : 26 Cr. L. J. 1452.**

——S. 439 (1)—*Applicability where revision filed by a party.*

Where the Court has not acted of its own motion in calling for the proceedings under S. 435 but at the instance of the applicant, the Court cannot interfere under S. 439, cl. (1). (*Kincaid, J. C. and Kennedy, A. J. C.*) NURAN *v.* CROWN. **18 S. L. R. 262.**

——S. 439 (5)—*Revision where appeal lies*

The High Court is precluded from interfering in revision in a case where an appeal lies. (*Kincaid, J. C. and Kennedy, A. J. C.*) NURAN *v.* CROWN. **18 S. L. R. 262.**

——S 440—*Release of prisoner on bail—Disappearance—High Court will not hear application.*

Where an accused person applied in revision to the High Court and, pending the revision, he was let off on bail and thereupon he disappeared, *held*, that the High Court would not hear his application for revision. (*Lindsay, J.*) HAR NARAIN PRASAD *v.* EMPEROR. **L. R. 4 A 72 (Cr.) : 71 I. C. 704 : 24 Cr. L. J. 240 : A. I. R. 1923 All. 327 (1).**

——S. 440—*Revision—No party has a right to be heard.*

Under S. 440 no party has any right to be heard either personally or by Pleader before any Court when exercising its powers of revision. (*Dalal, J. C.*) HAFIZ KHAN *v.* EMPEROR. **26 Cr. L. J. 527 : 85 I. C. 387 : A. I. R. 1925 Oudh 558.**

——S. 441—*Scope of—If abrogates Ss. 263 and 370—Reasons for conviction can be stated later by Presidency Magistrate.*

S. 441 allows the Presidency Magistrate to supplement the reasons which have been already stated under Ss. 263 and 370. S. 441 does not abrogate the terms of S. 263 or S. 370. (*Wallace, J.*) DERVISH HUSSAIN, *In re.* **46 M 253 : 17 L. W. 18 : 32 M. L. T. 100 : 71 I. C. 212 : 24 Cr. L. J. 84 : A. I. R. 1923 Mad. 185 : 44 M. L. J. 84.**

——Chapter XXXIII (Ss. 443—463).

(Note.—An entirely new chapter has been substituted for the old one.)

——Ss. 443—463, Chap 33—*Right to be tried under the provisions of Chap. 33 can be raised at the time of application for leave to appeal.*

There is no provision in the Code of enabling a person to put forward a claim to be tried under Ch. 33

CR. P. CODE (V OF 1898), S. 443.

either before a Magistrate holding an enquiry or trial in a Presidency town or before the High Court during the trial of the case. It is unreasonable to suppose that the legislature ever intended that when there was no knowing whether there would be a conviction or an acquittal (and both are open to appeal under S. 449, Cr. P. Code), an enquiry might be asked for and the Court required to decide on the question as to whether if tried outside a presidency town the case would have been triable under the provisions of Chapter 33, the only object of such an enquiry being that the result of it may be availed of for the purposes of an appeal by the accused in the case of a conviction and by the Crown in the case of an acquittal. The proper time to raise the question is when leave to appeal is applied for. (*Walmsley and Mukerji, JJ.*) T. C. S. MARTINDALE *v.* EMPEROR. **52 Cal. 347 : 40 C. L. J. 256 : 29 C. W. N. 447 : 84 I. C. 1041 : A. I. R. 1925 Cal. 14.**

——**Ss. 443 and 528-B** — *Failure to avail of S. 528-A does not debar accused from relying on S. 443, cls. (a) or (b).*

Per *Walmsley, J.*—The omission of the accused person to avail himself of the right to claim the benefit of S. 528-A does not conclude the matter and he is not debarred from urging that the conditions mentioned in cls. (*a*) or (*b*) of S. 443 exist.

Per *Mukerji, J.*—A claim to be tried under the provisions of Chapter 33 of the Code is wholly different from a claim to be tried as a European British subject or an Indian British subject or a European not being a European British subject or an American. It is the latter claim only which is dealt with in Chapter 44 of the Code in which Ss. 528-A and 528-B occur and so far as the former claim is concerned the question of status of the claimant does not always arise as is evident from the provisions of section 443 (1) (*b*) of the Code. Consequently sections 528-A and 528-B can have no application to section 449 under which the right of appeal is claimed in Ch. 33, 51 C. 980, Foll. (*Walmsley and Mukerji, JJ.*) T.C.S. MARTINDALE *v.* EMPEROR.
40 C. L. J. 256 : 29 C. W. N. 447 : 84 I. C. 1041 : 52 Cal. 347 : A. I. R 1925 Cal. 14.

——**S. 443**—*Accused not claiming before committing Magistrate benefit of Ch. 33—Question cannot be raised after committal to Sessions.*

A claim by the accused and a finding by the Magistrate are necessary ingredients for the application of the provisions of Ch 33. If any such claim is made prior to commitment and there is no finding by the Magistrate, the question cannot be raised in the Court of Session. If such a claim is made and a finding favourable to the accused is recorded by the Magistrate the Sessions Judge would be bound to act under the provisions of Ch. 33 and could not refuse to do so on the ground that those provisions did not apply In the case of acceptance of the claim of the accused person the finding of the Magistrate would be final. When the finding of the Magistrate is adverse to the claim it is final unless the claimant appeals and in the case of an appeal the decision of the Sessions Judge shall be final. Where the accused merely stated that they were European British subjects and claimed to be tried as such according to the provisions of the Code, *held*, that there was no claim to be tried under Ch. 33. (*Dalal, J. C.*) F. S. HAY *v.* EMPEROR. **2 O. W. N. 469 : 28 O. C. 230 · 88 I. C. 830 : 26 Cr. L.J. 1217 : A. I. R. 1925 Oudh 469.**

——**S. 443** — *Indian subicet — Prosecution by*

CR. P. CODE (V OF 1898), S. 449.

British employee on behalf of Railway administration.

Where a European employee of a Railway administration launches a complaint against a British Indian subject, the latter cannot claim to be tried under Ch. 33 of the Cr. P. Code. (*Carr, J.*) A. V. JOSEPH *v.* J. L. LAMMOND. **3 Bur. L. J. 147 · A. I. R. 1924 Rang. 373 (2).**

——**S. 446**—*Trial must be by jury unless the accused desires otherwise.*

In the case of a person committed to a Sessions Court under S. 446 (1) of the Cr. P. Code, the trial must be with the aid of jury, the proviso to sub-clause (2) of S. 446 merely giving the accused person the right to claim to be tried by assessors. (*Broadway, Fforde and Campbell, JJ.*) BRAY *v.* EMPEROR.
5 Lah. 515 : 85 I. C. 380 : A. I. R. 1925 Lah. 236 (F. B.).

——**Ss. 447 and 534**—*Omission to inform accused as directed by S. 447 is cured by S. 534.*

The omission of the Magistrate to inform the accused of their rights under Ch. 33, as required by S. 447, is absolutely cured by the provisions of S. 534. (*Robinson, C, J. and Maung Gyi, J.*) U ZAGRIYA *v.* EMPEROR **3 Rang. 220 : 4 Bur. L. J. 44 : 89 I. C. 459 : 26 Cr. L. J. 1371 : A. I. R. 1925 Rang. 239.**

——**S. 449**—*Accused claiming to be tried as European British subject—Claim allowed but wrongly under S. 413—Error of the order cannot be challenged in appeal from conviction.*

There is a clear distinction between a claim to be tried as a European subject and a claim to be dealt with under the provisions of Ch. 33. But if that distinction is not properly appreciated by the enquiring Magistrate and an order is passed purporting to be under S. 443, it cannot be disputed by the Crown in opposing an appeal, from the conviction which follows. In such case, therefore, the appeal must be dealt with, on matters of fact and matters of law, as contemplated by S. 449 (1), Cr. P. Code. (*Suhrawardy and Mukerji, JJ.*) I. G. SINGLETON *v.* EMPEROR.
41 C. L. J. 87 : 29 C. W. N. 260 : A. I. R. 1925. Cal. 501.

——**S. 449**—*Notice to the Crown.*

Application for leave to appeal should be made with notice to the Crown but once the leave is granted, without such notice it cannot be revoked on the ground of want of such notice. Per *Mukerji, J.*—If it subsequently appears that the ground on which leave was asked for and granted is non-existent the appeal may be dismissed. (*Walmsley and Mukerji, JJ.*) T. C. S. MARTINDALE *v. v.* EMPEROR.
52 C. 347 : 40 C. L. J. 256 : 29 C. W. N. 447 : 84 I. C. 1041 : A.. I. R. 1925 Cal. 14.

——**Ss. 449 and 307**—*Trial by jury--High Court can interfere under S. 307 though the finding of jury is not perverse or manifestly wrong,*

Under S. 449, in cases tried by jury, an appeal lies to the High Court on a matter of fact as well as on a matter of law,; therefore in a case tried under Chapter 33, the finding of a jury on a question of fact is no longer final, according to the present Cr. P. Code and therefore to justify an interference by High Court under S. 307, the finding of jury need not be manifestly wrong or perverse. (*Scott-Smith and Martineau, JJ.*) CROWN *v.* BINAL PARSHAD. **6 Lah. 98 : 26 Punj. L. R. 263 : 88 I. C. 857 : 26 Cr. L. J. 1241 : A. I. R 1925 Lah. 401.**

——**S. 449 (c)**—*Question of status is the only question to be decided while granting leave.*

If the applicant for leave is able to show, that if the case had been tried outside a Presidency Town, it

would have been triable under the provisions of Chapter 33 of the Code, he has an absolute right of appeal. (*Newbould and B. B. Ghose, JJ.*) A. H. TURNER *v.* EMPEROR.
52 Cal. 636 : 41 C. L. J. 325 : 29 C. W. N. 458 : 86 I. C. 659 : 26 Cr. L. J. 835 : A. I. R. 1925 Cal. 673.

——S. 449 (c)—*Leave to appeal—Division Bench should hear.*

It is desirable that the application for leave to appeal should be heard by a Divisional Bench rather than by a single Judge. (*Newbould and B. B. Ghose, JJ.*) A. H. TURNER *v.* EMPEROR.
52 Cal. 636 : 41 C. L. J. 325 : 29 C. W. N. 458 : 86 I. C. 659 : 26 Cr. L. J. 835 : A. I. R. 1925 Cal. 673.

——S. 451—*Waiver of right is revocable before entering on defence.*

S. 454, Cr. P. Code, does not in express terms deal with a case where the claim has been made but subsequently withdrawn. The section clearly applies to the case where no claim has been made which would be valid under S. 451, Cr. P. Code. Waiver before accused enters on his defence is revocable. (*Newbould and Suhrawardy, JJ.*) MAKBUL AHMAD *v.* ALLEN.
50 Cal. 689 : 27 C. W. N. 649 : 74 I. C. 1040 : 24 Cr. L. J. 849 : A. I. R. 1923 Cal. 657.

(See S. 443 (1) newly inserted.)

——S. 454.

[Note.—This section has now been re-enacted as S. 528-B.]

——S. 454—*Any subsequent stage—If includes revision.*

Revision comes under the expression "any subsequent stage of the same case." (*Krishnan, J.*) JEREMIAH *v.* JOHNSON.
18 L. W. 895 : 76 I. C. 695 · 33 M. L T. (H. C.) 194 : (1924) M. W. N 60 : 25 Cr. L.J. 231 : A. I. R. 1924 Mad. 373 : 45 M. L. J. 800.

——S. 464—*Changes.*

Sub-cl. (A) newly added provides that pending the examination, the Magistrate may deal with the accused under S. 406. Further, if he is satisfied of the unsoundness of mind, he must record finding to that effect.

——Ss. 464 to 465—*Proceedings under S. 488—No guardian can be appointed—Case must be postponed if party insane—Cr. P. Code alone governs the case.*

A Magistrate has no power under the Code to appoint a guardian *ad litem* for a lunatic in a proceeding under S. 488. Such proceedings may be *quasi* civil but they are also criminal and are wholly governed by the provisions of the Cr. P. Code alone. Where in such a case, the counter-petitioner pleads insanity, it is the Magistrate's duty to hold a judicial enquiry and put him if necessary under medical observation. If, as a result of the enquiry, Court is satisfied that he is sane and capable of understanding the proceedings, then the matter is simple. But if he concludes that he is insane and not capable of understanding the proceedings and incapable of understanding questions put to him and giving rational answers, he must postpone further proceedings until he reverts to sanity. (*Wallace, J.*) APPICHI GOUNDAN *v.* KUTHUJAMMAL.
48 Mad. 388 : 21 L. W. 180 : 86 I. C. 77 : (1925) M. W. N. 65 : 26 Cr. L. J. 701 : A. I. R. 1925 Mad. 440 : 48 M. L. J. 187.

——S. 465—*Changes.*

If the Judge or Jury is satisfied as to the unsoundness of mind, a finding to that effect is to be recorded.

——S. 465—*In enquiry under the section prosecution and not defence has to begin.*

If enquiry is to be commenced under section 465 of the Cr. P. Code it should be regarded not so much as the issue joined between the parties, but as a preliminary enquiry which is conducted for the satisfaction of the Court, and in that view the prosecution ought to commence and give their evidence. (*Pearson, J.*) EMPEROR *v.* GOHI MOHAN SAHU.
51 Cal. 827 : 84 I. C 340 : 26 Cr. L. J. 276 : A. I. R. 1925 Cal. 479.

——S. 465 (1) and (2)—*Unsoundness of mind of the accused—Enquiry into—Burden of proof.*

In an enquiry under S. 465 (1), Cr. P. Code, where the accused pleads insanity it is for the prosecution to satisfy the Court with regard to the accused's capacity to stand the trial. Where there was a unanimous verdict of the jury that the accused was fit to stand his trial, the High Court refused to interfere. (*Greaves and Panton, JJ.*) SHIB DAS KUNDU *v.* EMPEROR.
51 Cal. 584 : 81 I. C. 827 : 25 Cr. L. J. 1051 : A. I. R. 1924 Cal. 713.

——Ss. 470 and 474 (1)—*Acquittal on the ground of lunacy—Duty of the Court—Proper order—Subsequent sanity.*

Where an accused is acquitted on the ground of lunacy, the Court ought to investigate and decide whether or not at the time when the act was committed, the accused was capable of understanding the nature of his act. If the Court is satisfied that he was not capable of understanding the nature of his act, it has an absolute duty imposed on it to declare the accused to be a criminal lunatic within the meaning of the Act IV of 1912 and direct him to be detained in a Lunatic Asylum, and the fact that the accused is not insane at the time of acquittal or is comparatively well again, is no matter which concerns the Court. (*Walsh and Ryves, JJ.*) ANANDI *v.* EMPEROR.
45 A. 329 : 24 Cr. L. J. 225 : 71 I. C. 689 : A. I. R. 1923 All. 327 (2).

——S. 471—*Changes.*

No case need now be reported for the orders of the Local Government. The Magistrates and Judges are themselves competent to direct the detention of the accused in the lunatic asylum or other place prescribed.

——S. 471—*Report not necessary.*

In view of the amendment of S. 471, Cr.P.Code, there is now no longer any necessity for a Court which acquits a person on the ground of insanity to report the case for the orders of the Local Government. Clauses (2) and (3) of that section were repealed by Act IV of 1912 mainly with the object of relieving the Local Government from the necessity of dealing with the cases of such persons. 20 Bom. L. R. 629, Not Foll. (*Macleod, C. J. and Crump, J.*) EMPEROR *v.* IMAM HASAN.
25 Bom. L. R. 286 : A. I. R. 1923 Bom. 261.

——S. 471—*Criminal lunatic—Acquittal without order under S. 471—High Court can pass order under the section—Revision by High Court against acquittal.*

Section 471, Cr. P. Code, does not compel the Court to send the accused to lunatic asylum. The Court is only to see that such safeguards have been taken as would prevent the accused from committing mischief. Where the Lower Court acquitted the accused on the ground that he was insane when he committed the offence, but omitted to pass orders under section 471. High Court in revision could pass the order. (*Kumaraswami Sastri, J.*) A. B. MAHOMED, *In re.*
(1922) M. W. N. 10 : 65 I. C. 423 : 23 Cr. L. J. 71 : 30 M. L. T. 74 : A. I. R. 1922 Mad. 54 (2) : 42 M. L. J. 72.

CR. P. CODE (V OF 1898). S. 476.

———S. 476—*Changes.*

The section has been re-drafted but the changes are slight.

(1) The Court acting under sub-cl. (1) should record a finding.

(2) The Court can act *suo motu.*

(3) It is not sufficient now that there is sufficient ground for enquiry. It must be necessary in the interests of justice.

(4) The Court should make a *complaint in writing.*

(5) The complaint must be made to a first-class Magistrate having jurisdiction and not to the nearest first-class Magistrate.

(6) Sub-cl. (3) provides for grant of adjournment by Magistrates when an appeal is pending against decision of the complaining Court.

———S. 476.

'Any offence,' meaning.
Appeal or Revision.
Applicability.
'Court', meaning of.
Delay.
Duty of Court.
Judicial Proceedings.
Legality of Order.
Notice or opportunity.
Order against strangers.
Pending proceedings.
Preliminary Enquiry.
Stay of Proceedings.
Miscellaneous.

'Any offence,' meaning.

———S. 476—*Any offence.*

Sanction against witness for offence under S. 465. I. P. C. can be granted. (*Daniels, J. C.*) EJAZ ALI KHAN *v.* EMPEROR. **23 Cr. L J. 228 : 66 I. C. 68 : 24 O. C. 367 : A. I. R. 1922 Oudh 220.**

———Ss. 476 and 195—*Any offence—Scope—Robbery is not included.*

S. 476, Cr. P. Code, empowers any Civil, Criminal or Revenue Court to send persons in custody to the nearest first Class Magistrate when it is of opinion "that there is ground for enquiry into any offence referred to in S. 195 and committed before it or brought under its notice in the course of a judicial proceeding." But robbery and abetment of robbery are not offences referred to in S. 195. (*Kincaid, J. C. and Raymond, A. J. C.*) POHUMAL *v.* EMPEROR. **15 S. L. R. 119 : 65 I. C. 481 : 23 Cr. L. J. 97 : A. I. R. 1925 Sind 9.**

Appeal or Revision.

———S. 476—*Appeal or Revision—Powers of District Magistrate—Cannot interfere with orders of Subordinate Magistrate.*

A District Magistrate has no power to interfere with orders passed under S. 476, Cr. P. Code, by Subordinate Magistrates, but it is otherwise if the order is passed under S. 195. (*Daniels, J.*) SITA RAM *v.* EMPEROR. **24 Cr. L. J. 658 : 73 I. C. 690 : A. I. R. 1923 All. 597.**

———S. 476—*Appeal or Revision—Revision, power of.*

An order of the District Judge taking proceedings under S. 476, Cr. P. Code, is revisable only under S. 115, C. P. Code. (*Ryves, J.*) R. SIMEON *v.* EMPEROR. **23 Cr. L. J. 291 : 66 I. C. 515 : A. I. R. 1922 All. 438 (1).**

———S. 476—*Appeal or Revision—Duty of High Court.*

CR. P. CODE (V OF 1898), S. 476—Applicablity.

It is the duty of the High Court when matters such as these are brought to its notice to satisfy itself that there has been no unreasonable delay, that the orders are not vexatious and that the charges are not of a flimsy nature. (*Ryves and Gokul Prasad, JJ.*) DALLI *v.* EMPEROR. **20 A. L. J. 326 : 23 Cr. L. J. 283 : 66 I. C. 427 : L. R. 3 A. 80 (Cr.) : A. I. R. 1922 All. 233 (1).**

———S. 476—*Appeal or Revision—Discretion of appellate Court.*

Where the trial Court or the Court to which that Court is subordinate thinks that complaint is not desirable, High Court should not interfere since a complaint under S. 476 is almost invariably a matter of discretion. (*Macleod, C. J. and Shah, J.*) SOMABHAI VALABHBHAI *v.* ADITBHAI PARSHOTTAM. **48 Bom. 401 : 26 Bom. L. R. 289 : A. I. R. 1924 Bom. 347.**

———S. 476—*Appeal or Revision.*

No appeal lies against an order under S. 476 to the Court to which the Court passing the order is subordinate. (*Macleod, C.J. and Shah, J.*) SOMABHAI VALABHBHAI *v.* ADITBHAI PARSHOTTAM. **48 Bom. 401 : 26 Bom. L. R. 289 : A. I R. 1924 Bom. 347.**

———S. 476—*Appeal or Revision—Proceedings started on empty grounds is ground for revision.*

There must be any error of law, any abuse or failure to exercise judicial discretion, such as would justify interference in revision. Revision is proper, if it is started on grounds merely fanciful, grounds so empty and so obviously wrong, that the Court cannot be said to have formed a serious judicial opinion. (*Macleod, C. J. and Crump, J.*) EMPEROR *v.* PARSHOTAMDAS. **25 Bom. L. R. 282 : 24 Cr. L. J. 359 : 72 I. C. 359 : A. I. R. 1923 Bom. 201 (1).**

———Ss. 476 and 195 (3)—*Appeal—Order by Small Cause Court—Appeal lies to High Court.*

An appeal against an order of the Court of Small Causes, under S. 476 of the Cr. P. Code, directing that a complaint under Ss. 193 and 196 of the Indian Penal Code be filed against the appellants lies to the High Court on its Appellate side. For this purpose Original Side of the High Court is not different from Appellate Side. (*Wallace and Madhavan Nair, JJ.*) KALYANJI *v.* RAM DEEN LALA. **48 Mad. 395 : 86 I. C. 449 : 21 L. W. 664 : 26 Cr. L. J. 801 : A. I. R. 1925 Mad. 609 : 48 M. L. J. 290.**

———S. 476—*Appeal or Revision.*

An application for revision of an order under S. 476 is not entertainable under the provisions of S. 435 and 438, Cr. P. Code. 17 O. C. 25, Foll. (*Daniels, J. C.*) EJAZ ALI KHAN *v.* EMPEROR. **23 Cr. L. J. 228 : 66 I. C. 68 : A. I. R. 1922 Oudh 220.**

Applicability.

———S. 476—*Applicability—Accused escaping from custody of peon of Civil Court—Procedure is that servant should file complaint in ordinary way.*

When a person has escaped from the lawful custody of a servant of a Civil Court, the proper procedure is that the "servant of the Court" should file a complaint in the ordinary way. (*Piggott, J.*) EMPEROR *v.* MADHO SINGH. **47 All. 409 : 23 A. L. J 189 : 86 I. C. 801 : 26 Cr. L. J. 865 : A. I. R. 1925 All. 318 (2).**

———S. 476—*Applicability—Prosecution can't be directed for offences under Ss.* 353, 341 *and* 147.

As regards offences under Ss. 353, 341 and 147 of the Indian Penal Code, S. 476 does not apply. Order under S 476 was therefore reversed. (*Walmsley and*

CR. P. CODE (V OF 1898), S. 476—Appliability.

Suhrawardy, JJ.) SARBESHWAR NATH *v.* EMPEROR. **39 C. L. J. 33 : A. I. R. 1924 Cal. 501.**

——S. 476—*Applicability—Disobedience of order under Bengal Tenancy Act, S. 69—Collector can take action.*

In cases of disobedience of orders under Ss. 69 and 70 of the Tenancy Act, the Collector has power to act under S. 195 or S. 476 of the Cr. P. Code and to direct a prosecution under S. 188 in respect of such disobedience. (*Teunon and Ghose, JJ.*) LAKSHAN BOR *v.* NARANARAIN HAZRA. **48 Cal. 1086 : 66 I. C. 71 : 23 Cr. L. J. 231 : 25 C. W. N. 617.**

'Court', meaning of

——Ss. 476 and 195 (1) (b)—*'Court', meaning of—Election Commissioners are not 'Civil Court' within S. 476—Complaint by them purporting to be under S. 476 should be deemed to be one under S. 195 (1) (b).*

The Election Commissioners are not a "Civil Court" within the meaning of S. 476, Cr. P. Code, and they have no jurisdiction to proceed under that section. The complaint which they purport to make under S. 476 must be deemed to be one under S. 195 (1) (*b*) by a Court in its wider meaning excluding a "civil, revenue or criminal court." (*Sulaiman and Daniels, JJ.*) BILAS SINGH *v.* EMPEROR. **23 A. L. J. 845 : 89 I. C. 630 : A. I. R. 1925 All. 737.**

——S. 476—*'Court', meaning of—Transfer of Magistrate—Proceedings taken by Magistrate after the transfer—Legality of—Reference by District Magistrate.*

A Judicial Officer acting as the City Magistrate decided a criminal case and was subsequently transferred from the station. After the transfer he purported to pass an order under S. 476, Cr. P. Code, on the application of one of the parties. *Held*, that the Magistrate had no jurisdiction to pass the order in question. A successor in a Court is the same Court as his predecessor in that Court and the predecessor who has departed to another Court can no longer be held to be a presiding officer of the first Court. Where a District Magistrate referred a case to the High Court through the Sessions Judge instead of acting either through the Government Advocate or Legal Remembrancer, the High Court will not ordinarily accept the reference direct. (*Boys, J.*) EMPEROR *v.* BALDEO PRASAD. **22 A. L. J. 772 : L. R. 5 A. 121 (Cr.) : 82 I. C 285 : 25 Cr. L. J. 1277 : A. I. R 1924 All 770.**

——S. 476—*"Court," meaning of.*

If a Court is of opinion that there is ground for enquiry into any offence referred to in S. 195 of the Code of Criminal Procedure committed before it in the course of a judicial proceeding even if the case has passed out of the hands of that Court and been decided by another Court, it cannot be held that the first Court's powers under S. 476 of the Cr. P. Code came to an end. The circumstance that a case has passed out of the hands of a Court in so far as an effective order regarding its disposal is concerned does not deprive the Court of its jurisdiction under S. 476. (*Stuart, J.*) SUNDAR LAL *v.* EMPEROR. **44 All. 642 : 23 Cr. L. J. 603 : 20 A. L. J. 666 : 68 I. C. 827 : L. R. 3 A. 93 (Cr.) : A. I. R. 1922 All. 233 (3).**

——S. 476—*"Court," meaning of.*

"Court" in S. 476 includes the successor of the Judge before whom an alleged offence was committed and therefore the successor can take action under S. 476 in continuation of the order passed by his predecessor. (*Kanhaiya Lal, J.*) BADRI SINGH *v.* EMPEROR. **19 A. L. J. 819 : 63 I. C. 616 : L. R. 2 A. 145 (Cr.) : 22 Cr. L. J. 680.**

CR. P. CODE (V OF 1898), S. 476—Court, meaning of.

——S. 476—*'Court,' meaning of—Proceedings heard by one Judge—Direction can be granted by another.*

A Judge of the High Court can grant a direction to prosecute under S. 476 although the matter out of which the action arose was heard by another Judge of the Court. (*Crump, J.*) BAI KASTURBAI *v.* VANMALI DAS. **27 B. L. R. 616 : 88 I. C. 709 : A. I. R. 1925 Bom. 436.**

——S. 476—*'Court,' meaning of—Court includes successor of the Judge before whom offence was committed.*

The word 'Court' in S. 476, Cr. P. Code includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. 37 Cal. 642 F. B. Foll. 34 A. 393; 32 B. 184, Appr.; 6 P. R. 1909 (Cr.) Disst. (*Scott-Smith, J.*) KHAN MUHAMMAD *v.* CROWN. **4 L. 58 : 71 I. C. 596 : 24 Cr L. J. 180 : A. I. R. 1924 Lah. 101.**

——S. 476—*'Court,' meaning of—Court of Subordinate Judge—Transfer of judges—Court whether permanent.*

It is clear from the use of the words "such court" in S. 476 that the court empowered to take action under that section is the same Court before which the offence has been committed or to whose notice the offence has been brought in the course of a judicial proceeding, and for the purpose of the section the Court of a Sub-Judge is permanent though one judge is transferred and is succeeded by another judge. (*Martineau, J.*) TARA CHAND *v.* EMPEROR. **65 P. L. R. 1922 : 67 I. C. 723 : 23 Cr. L. J. 451 : A. I. R. 1922 Lah. 479.**

——S. 476—*'Court,' meaning of—Enquiry by one Magistrate—Order directing prosecution by another.*

The Appellate Court cannot direct the trial Magistrate to make an inquiry and then on his report, itself pass an order under S. 476 directing the prosecution for perjury of a witness. The enquiry and the order under S. 476 must both be by the same Court (*Kanhaiya Lal, J. C.*) EMPEROR *v.* WAZIR BEG. **64 I. C. 143 : 8 O. L. J. 634 : 22 Cr. L. J. 751 : 24 O. C. 258.**

——S. 476—*'Court' meaning of—Judge dealing with application under T. P. Act, S. 83 is Court.*

A Judge receiving and dealing with a petition under S. 83 of the T. P. Act, is a Court within the meaning of S. 476 of Cr. P. Code. 13 Mad. 316, Dist. (*Adami and Sen, JJ.*) CHAMARI SINGH *v.* PUBLIC PROSECUTOR OF GAYA. **4 Pat. 24 : 26 Cr. L. J. 170 : 83 I. C. 730 : 6 P. L. T. 225 : 3 P. L. R. 51 : A. I. R. 1925 Pat. 330.**

——S. 476—*'Court', meaning of—District Registrar—Power to act under section.*

A District Registrar is not a Civil, Revenue or Revenue Court within the meaning of S. 476 and has no jurisdiction to proceed under that section. But where he also happens to be the District Magistrate, in his latter capacity he is competent to act under S. 190 (1) (*c*). (*Mullick and Bucknill, JJ.*) CHETA MAHTO *v.* EMPEROR. **26 Cr. L. J. 1482 (2) : 89 I. C. 1050 (2).**

——S. 476—*'Court,' meaning of—Warrant of attachment signed by order by* Sheristadar—*Warrant addressed to* Nazir—*Delegation of power.*

A warrant for the attachment of property was signed by the *Sheristadar* of the Court 'by order' and was addressed to the Bailiff *Nasir* of the Court. The warrant was delegated to a poor and the accused re-

CR. P. CODE (V OF 1898), S. 476—Court, meaning of.

sisted the execution of warrant. *Held*, on revision, that there was no illegality in the warrant, that the words 'by order' showed that the *Sheristadar* was authorized to sign it and that the *Nazir* was right in delegating it to a peon. (*Adami, J.*) WALI MOHAMAD *v.* EMPEROR. **22 Cr. L. J. 300 : 60 I. C. 796 : 3 U. P. L. R. (Pat.) 41.**

——S. 476—*'Court' meaning of—Successor of Judge can take action.*

An action can be taken by the successor of the Judge who tried the case, on an application to initiate proceedings for offences falling under S. 195, Cr. P. Code. (*Carr and Maung Gyi, JJ.*) SHWE PWE MAUNG *v.* MA MA HMOKE. **3 Rang. 48 : 3 Bur. L. J. 344 : 85 I. C. 244 : 26 Cr. L. J. 500 : A. I. R. 1925 Rang. 195.**

Delay.

——S. 476—*Delay—Revision—Duty of High Court.*

It is the duty of the High Court when matters such as these are brought to its notice to satisfy itself that there has been no unreasonable delay that the orders are not vexatious and that the charges are of a flimsy nature. (*Stuart, J.*) SUNDAR LAL *v.* EMPEROR. **20 A. L. J. 666 : A. I. R. 1922 All. 233 (3).**

——S. 476—*Delay—Sanction.*

When any of the offences noted in S.195, Cr.P.Code is committed, there is no reason why the Civil Court should delay proceedings under S. 476 till the suit is disposed of. (*Wallace, J.*) VENKATASUBBIAH, *In re.* **44 M. L. J. 74 : 16 L. W. 925 : (1922) M. W. N. 811 : 69 I. C. 440 : 23 Cr. L. J. 712 : A. I. R. 1923 Mad. 228.**

Duty of Court.

——S. 476—*Duty of Court—Order under—Essentials of.*

In an appeal from a conviction, the High Court directed the Sessions Judge to take action under S.466, Cr.P.Code. *Held*, it was the duty of the Sessions Judge to apply his mind to the matter on the merits and then only decide whether a prosecution was essential or not. (*Stuart and Kanhaiya Lal, JJ.*) GHANSHIAM RAI *v.* EMPEROR. **21 A. L. J. 930 : L. R. 5 A. 52 (Cr.) : A. I. R. 1924 All. 453.**

——S. 476—*Duty of Court—Perjury—Sanction to prosecute cannot be given to a private person.*

A Court before whom a perjury is committed should itself under S. 476 of the Code order the prosecution of the guilty person, and should not give sanction to a private individual to prosecute him. (*Ryves, J.*) ASHUTOSH GANGULI *a.* BRIJ NARAIN LAL. **61 I. C. 521 : 22 Cr. L. J. 393 : L. R. 2 A. 94 (Cr.).**

——S. 476—*Duty of Court—Court is bound to make a complaint in writing under the amended Code.*

Under S. 476 as amended by the Act of 1923 where a Court thinks that proceedings should be taken it is bound to make a complaint in writing signed by the presiding officer of the Court and to forward it to a Magistrate of the First Class having jurisdiction. (*Macleod, C. J. and Shah, J.*) SOMABHAI VALABHBHAI *v.* ADITBHAI PARSHOTAM. **48 Bom. 401 : 26 Bom. L. R. 289 : A. I. R. 1924 Bom. 347.**

——S. 476—*Duty of Court—Complaint must state particulars of offence.*

In a complaint under S. 476 the setting out of the particulars of the offence charged against the accused is absolutely necessary. (*Newbould and Mukerji, JJ.*) KALISADHAN ADDYA *v.* NANI LAL HAZRA. **52 Cal. 478 : A. I. R. 1925 Cal. 721.**

——S. 476—*Duty of Court—Sanction to debtor against creditor—Expediency of.*

It is not expedient that sanction to prosecute should be given to a debtor to use against his creditor. (*Moti Sagar, J.*) BIKRAM SINGH *v.* NIHAL CHAND. **25 Cr. L. J. 544 : 77 I. C. 1008 : A. I. R. 1924 Lah. 680 (1).**

——S. 476—*Duty of Court—Complaining Court must name witnesses to be examined.*

It is for the Court directing complaint to be filed to hold such enquiry that its order, when sent to the Magistrate, will amount to a complaint under S. 200 of Cr. P. Code. For that purpose, the complaining Court must decide upon and name the witnesses to be examined by the Magistrate, or the complaint is liable to be dismissed on the ground that there are no witnesses. (*Wallace and Madhavan Nair, JJ.*) KALYANJI *v.* RAM DEEN LALA. **48 Mad. 395 : 86 I. C. 449 : 21 L. W. 664 : 26 Cr. L. J. 801 : A. I. R. 1925 Mad. 609 : 48 M. L. J. 290.**

——S. 476—*Duty of Court—Penal Code, S. 193—Complaint must state the evidence alleged as false.*

A complaint of offence under S. 193, I. P. C., must state what was the false evidence given by the accused.

It is not for the Magistrate to fish about in order to find out what statements the complaining Court may have considered to be false. The complaint itself must make it clear; otherwise a complaint under S.193 cannot stand. (*Wallace and Madhavan Nair, JJ.*) KALYANJI *v.* RAM DEEN LALA. **48 Mad. 395 : 86 I. C. 449 : 21 L. W. 664 : 26 Cr. L. J. 801 : A. I. R. 1925 Mad. 609 : 48 M. L. J. 290.**

——S. 476—*Duty of Court—Proceedings for perjury against a witness should be started after conclusion of the case in which the witness gives evidence.*

Proceedings under S. 476, should not be taken until the case, in which the alleged false evidence was given, has been finally disposed of. Such a hasty proceeding, as placing a witness on a trial as an accused immediately after he has given his evidence, is bad because the obvious result of such a step would be to intimidate subsequent witnesses and defeat the object of the trial. The proper time to apply under S. 476 for the prosecution of witnesses for perjury is after the final disposal of the suit in which he was examined as a witness. (*Wadegaonkar, A. J. C.*) KALU *v.* TIKARAM. **26 Cr. L. J. 1350 (2) : 89 I. C. 390 (2) : A. I. R. 1925 Nag. 412.**

——S. 476—*Duty of Court—Merely an expert's evidence is not safe basis for complaint.*

It is not always very safe to order prosecutions to be started where there is no other testimony than that of an expert to support it. (*Kinkhede, A. J. C.*) BUDHABAI *v.* ALIBHAI. **26 Cr. L. J. 796 : 86 I. C. 428 : A. I. R. 1925 Nag. 358.**

——S. 476 (2)—*Duty of Court—Complaint under, need not state the Section of the Penal Code.*

It is not really necessary that the Court making a complaint contemplated in S. 476 (2) should state under what section the offence falls. (*Baker, J. C.*) ISMAIL PANJU *v.* EMPEROR. **26 Cr. L. J. 1175 : 88 I. C. 283 : A. I. R. 1925 Nag. 337.**

——Ss. 476 and 195—*Duty of Court.*

It is the obvious duty of every court to deal with every instance in which there is even a suspicion that an offence against public justice has been committed. If there is a fair possibility that enquiry will lead to the discovery of evidence sufficient to make a conviction probable, then the enquiry contemplated in S. 476

CR. P. CODE (V OF 1898), S. 476—Duty of Court.

should be instituted and the court fails in its duty if it does not do it of its own motion. The application under S. 195 is in most cases a reminder to the court of the failure to do this important duty. (*Hallifax, A.J.C.*) TULSIRAM *v.* TILAKCHAND. **23 Cr. L. J. 605 : 68 I.C. 829 : A. I. R. 1923 Nag. 258.**

——S. 476—*Duty of Court.*

It is no use passing an order under S. 476, Cr. P. Code, unless there is reasonable probability of conviction. (*Foster, J.*) CHAUDHURY MANDUR *v.* EMPEROR. **74 I. C. 855 : 24 Cr. L. J. 823 : A. I. R. 1924 Pat. 436.**

——S. 476—*Duty of Court—Difference of opinion between two different tribunals—Action under S. 476 is undesirable.*

Where one sees split opinions of two different tribunals, it may be taken as generally a normally safe guide to suggest that definite expressions as to the malice of either party are probably somewhat undesirable. (*Bucknill, J.*) RAGHUPAT SAHAY *v.* EMPEROR. **3 Pat. L. T. 93 : 1922 P. H. C. C. 26 : 66 I. C 336 : 23 Cr. L. J. 272 : A.I.R. 1922 Pat. 160.**

——S. 476—*Duty of Court—Summons—Refusal of Affidavit by person identifying—Perjury—Prosecution.*

Summons sent to the defendant in a suit residing at Devakotah was returned with the endorsement that defendant had refused the summons. The petitioner filed an affidavit to that effect and an *ex parte* decree was passed. Subsequently defendant applied to set aside the *ex parte* and the petitioner then denied the identity of the person served. On an application for sanction to prosecute the petitioner for perjury. *Held*, that one of the two statements must be false and that a complaint should be made against the petitioner of perjury so as to start an enquiry. (*Young and Heald JJ.*) V. P. R. N. SWAMINATHAN CHETTY *v.* V. PERIYANAN. **3 Bur. L. J. 149 : A. I. R. 1924 Rang. 374.**

Judicial Proceedings.

——S. 476—*Judicial proceedings—Proceedings under S. 195, Indian Penal Code—Jurisdiction.*

Where it was urged that the Sessions Judge, who though agreeing with the reasons given by the learned Munsiff for refusing sanction under S. 195 of the Indian Penal Code, has made an enquiry into the matter, examined witnesses and directed the institution of proceedings under S. 476 of the Cr. P. Code, had no jurisdiction to pass such an order because he was not seized as an originalCourt or as a Court of appeal of the original civil case in which the offence is alleged to have been committed. *Held*, the ruling in the case of (10 A.L.J. R. 174) that proceedings under S. 195 of the Indian Penal Code are judicial proceedings and therefore proceedings under S. 476 of the Cr. P. Code could have been taken, is binding. (*Gokul Prasad, J.*) BIKARAMA PRASAD *v.* EMPEROR. **L. R. 3 A. 145 (Cr,) : A. I. R. 1922 All. 292.**

——S. 476—*Judicial proceedings—Petition for return of documents after disposal of case is not in the course of a judicial proceeding.*

After some rent suits had been disposed of, a petition was put in for return of documents before the court clerk. On a prosecution being ordered under S. 476 for forging the signature in the petition, *Held*, under S. 476 a Civil Court can only send for enquiry or trial, cases of offences "committed before it" or brought to its notice "in the course of a judicial proceeding." The words "committed before it" are qualified by the words "in the course of a judicial proceeding" and as the rent suits had been disposed of, the petitions could not be said to be filed in the course of any judicial proceeding. Hence, the Court cannot take action under S. 476. (*Newbould and Ghose. JJ.*) GIRIJANANDA KALI MITRA *v.* EMPEROR. **71 I. C. 666 : 24 Cr. L. J. 202 : 26 C. W. N. 660.**

——S. 476—*Judicial proceedings—Offence not committed before Court or brought under its notice in the course of proceedings—No action can be taken.*

Where an application for the transfer of a case was made before the District Magistrate on behalf of the accused by another person and the applicant went to the Magistrate's house and told him that he has given a sum of money to the Magistrate's father and had received it back subsequently; *held*, the statement made by the applicant was unconnected with the application for transfer and the offence for which the applicant's prosecution had been ordered was not one committed before the District Magistrate or brought under his notice in the course of a judicial proceeding and could not be passed by him under S. 476 of the Cr. P.Code in respect of that statement. (*Martineau, J.*) JIWAN SINGH *v.* EMPEROR. **63 I. C. 413 : 22 Cr. L J. 653 : 3 Lah. L. J. 535.**

——Ss. 476 and 4 (m)—*Judicial proceedings—Ex parte decree set aside—Trial of suit thereafter is a Judicial proceeding.*

The trial of a suit after the *ex parte* decree against the defendant is set side may be regarded as a continuation of the trial of the same suit which first ended in a decree for the plaintiff. The definition of "judicial proceeding" in S. 4 (*m*), Cr. P. Code, is not opposed to this view. Where at the time of dismissing the suit, the District Munsif commenced to take action under S. 476, Cr. P. Code, by issuing notice to the petitioner to show cause against an order being passed under that section, *Held* his proceedings were legal. 32 M. 49. 42 M. 422, Ref. (*Spencer, J.*) ARUMUGAM PILLAI, *In re.* **18 L. W. 133 : A. I. R. 1924 Mad. 86.**

——S. 476—*Judicial Proceedings—Proceedings need not be judicial.*

Under the amended section it is not essential that the proceeding in respect of which action is taken should be of a judicial character. (*Adami and Sen, JJ.*) CHAMARI SINGH *v.* PUBLIC PROSECUTOR OF GAYA. **4 Pat. 24 : 26 Cr. L. J. 170 : 83 I.C. 730 : 6 P. L. T. 225 : 3 P. L. R. 51 : A. I. R. 1925 Pat. 330.**

——S. 476—*Judicial proceeding—Enquiry before Magistrate—Information by police—Sanction.*

An order for sanction under S. 476, Cr. P. Code, is bad in law where there was no judicial proceeding before the Court, as the offence must be one committed in or in relation to any proceeding in any Court. Where on a complaint of theft, the police inquired into the case and reported it to be false, a Magistrate cannot direct prosecution under S. 211, I. P. C. (*Kulvant Sahay, J.*) NAND KISHORE LAL *v.* EMPEROR. **1924 P. H. C. C. 124: 5 Pat. L. T. 300: 2 Pat. L. R. 184 (Cr.) : 81 I. C. 158 : 25 Cr. L. J. 670 : A. I. R. 1924 Pat. 789.**

——S. 476—*Judicial proceedings—Penal Code, S. 211—Evidence recorded under S. 202, Cr. P. Code, can be the basis of sanction.*

The wording of S. 476 is wide enough to cover the consideration of other than strictly legal evidence and there is nothing illegal in granting a sanction under S.195 based solely on an investigationconducted under S. 202 whether by a police-officer or by the Magistrate himself. (*Macpherson, J.*) BANSIDAR MARWARI *v.*

CR. P. CODE (V OF 1898), S. 476—Judicial Proceedings.

EMPEROR. **74 I. C. 1054 : 24 Cr. L. J. 862 : A. I. R. 1924 Pat. 138.**

Legality of order.

——S. 476—*Legality of order—Case heard by Honorary Magistrate—Dt. Magistrate can take action.*

Where the prosecution instituted by the applicant was heard by a Bench of Honorary Magistrates and ended in failure, *Held*, that under S. 476-A, the Dt. Magistrate could order the prosecution of the applicant under S. 193 of the Penal Code (*Mukerji, J.*) MOTI RAM *v.* EMPEROR. **L. R. 6 A. 44 (Cr.) : 85 I. C. 710 : 26 Cr. L. J. 566 : A. I. R. 1925 All. 410.**

——S. 476—*Legality of order—Complaint of cheating before Tahsildar having powers of a second class Magistrate—Act of Tahsildar enquiring and ordering prosecution under S. 476 is legal.*

Where there was a complaint of cheating before a Tahsildar having powers of a Second Class Magistrate who therefore was competent to entertain it and where after careful enquiry he ordered under S. 476 of the Cr. P. Code, the prosecution of the person complained against, *Held*, the Tahsildar must be conceived to have been acting as a Criminal Court and to have been put in motion by the proper procedure. Although as a result of his enquiry it might have been discovered that he could not take cognizance of the case he was certainly authorised, in fact required, to make an enquiry which was of the nature of a judicial proceeding if in the course of that judicial proceeding he considered that the facts showed that a forgery had been committed. Therefore he had authority to act under S. 476. (*Stuart, J.*) ABDUL QAIYUM KHAN *v.* EMPEROR. **25 Cr. L. J. 628 : 81 I. C. 116 : A. I. R. 1925 All. 99.**

——S. 476—*Legality of order—Handwriting expert—Value of report.*

The report of the Government expert, who never came into the witness box and whose report is not supported even by an affidavit is inadmissible in evidence and should not form the basis of the order directing the prosecution on a charge of forgery. A sanction, based on a piece of evidence that can in no circumstances be called legal evidence and especially when there is positive legal evidence against it, is illegal. (*Rafique, J.*) PEARY LAL *v.* EMPEROR.
21 A. L. J. 399 : L. R. 4 A. 92 Cr. : 75 I. C. 148 : 24 Cr. L. J. 900 : A. I. R. 1923 All. 601.

——S. 476—*Legality of order—Complaint not inquired into—Order to show cause why complainant should not be prosecuted is not legal.*

Where without any inquiry into a complaint presented by the complainant, he was ordered to show cause why he should not be prosecuted under S. 182 of the Penal Code, *held*, that the order was illegal as the complainant could not be made to suffer without full enquiry into the truth of the complaint. (*Gokul Prasad, J.*) SHEO BALAK *v.* EMPEROR.
59 I. C. 369 : 22 Cr. L. J. 81 : L. R. 2 A. 126. Cr.

——S. 476—*Legality of order—Statement not connected with judicial proceeding cannot be the basis of an action under section.*

A Magistrate has no jurisdiction under S. 476 of the Code to direct prosecution in r espect of a statement entirely unconnected with the judicial proceeding before him. (*Martineau, J.*) JIWAN SINGH *v.* EMPEROR. **63 I. C. 413 : 22 Cr. L. J. 653 : 3 Lah. L. J. 535.**

——S. 476—*Legality of order—Order directing either party to be prosecuted is illegal.*

CR. P. CODE (V OF 1898), S.476—Legality of order.

An order by a Civil Court, directing the prosecution of both parties to a suit for forgery, without determining which of them is *prima facie* responsible for the forgery is illegal. (*Abdul Raoof, J.*) AMARNATH *v.* MAM RAJ. **61 I. C. 57 : 22 Cr. L. J. 329 : 2 Lah. 63.**

——Ss. 476, 191 and 447—*Legality of order—Trial Magistrate initiating prosecution—Omission to inform accused of his right to have his trial before another magistrate.*

Where a Magistrate who had himself instituted criminal proceedings under S. 476, Cr. P. Code, tried the accused without informing them before taking any evidence that they were entitled to have the case tried by some other Court, *Held*, that the trial was illegal. (*Wazir Hasan, J. C.*) EMPEROR *v.* NAIPAL.
10 O. & A. L R. 735 : 11 O. L. J. 532 : 1 O. W. N. 329 : 82 I. C. 152 (1) : 25 Cr. L. J. 1224 (1) : A. I. R. 1924 Oudh 448.

——S. 476—*Legality of order—Enquiry by one Magistrate—Order directing prosecution by another is illegal.*

The Appellate Court cannot direct the trial Magistrate to make an inquiry and then on his report, itself pass an order under S. 476 directing the prosecution for perjury of a witness. The enquiry and the order under S. 476 must both be by the same Court. (*Kanhaiya Lal, J. C.*) EMPEROR *v.* WAZIR BEG.
64 I. C. 143 : 22 Cr. L. J. 751 : 24 O. C. 258 : 8 O. L. J. 634.

——S. 476—*Legality of order—Evidence under S. 202 (2)—If a basis for order.*

An order under S. 476, Cr. P. Code, can be passed on the basis of evidence recorded under S. 202 (2). (*Macpherson, J.*) BANSHIDAR MARWARI *v.* EMPEROR. **74 I. C. 1054 (2) : 24 Cr. L. J 862 (2) : A. I. R. 1924 Pat. 138.**

——S. 476—*Legality of order—Penal Code, S. 182—A non-judicial and irregular enquiry is an improper basis to decide an information to be false.*

A private or a personal enquiry conducted on non-judicial lines without the recording of any evidence, without cross-examination and based upon unrecorded and irregular methods of taking testimony does not justify the conclusion that a petition to a Magistrate to proceed under S. 144, Cr. P. Code, was false and does not justify the petitioner's prosecution under S. 182 of the Penal Code. (*Bucknill, J.*) CHOTE LAL *v.* EMPEROR. **1 Pat. L. R. 137 Cr. : 74 I. C. 710 : 24 Cr. L.J. 806 : A. I. R. 1923 Pat. 542.**

——S. 476—*Legality of order*—Prima facie, *no obstruction and annoyance.*

The order under S. 476 which does not take into account the fact that there is *prima facie* no obstruction, annoyance or injury, being one which does not set forth all the elements of an offence covered by it, is without jurisdiction and must be set aside. 4 C. W. N. 226, ref. to. (*Jwala Prasad, J.*) PARAMESHWAR RAI *v.* EMPEROR. **3 Pat. L. T. 268 : 67 I. C. 205 : 1922 P. H. C. C. 204 : 4 U. P. L. R. (Pat.) 34 : 23 Cr. L. J. 381 : A. I. R. 1922 Pat. 84.**

——S. 476—*Legality of order—Resisting execution of warrant—Warrant of attachment signed "by order" by Sheristadar is legal.*

A warrant for the attachment of property was signed by the *Sheristadar* of the Court "by order" and was addressed to the Bailiff *Nazir* of the Court. The warrant was delegated to a peon and the accused resisted the execution of warrant. *Held*, on revision that there was no illegality in the warrant, that the words "by order" showed that the *Sheristadar* we

CR. P. CODE (V OF 1898), S. 476—Legality of order.

authorised to sign it and that the *Nazir* was right in delegating it to a peon. (*Adami, J.*) WALI MOHAMED *v.* EMPEROR. **60 I. C. 796 : 22 Cr. L. J. 300 : 3 U. P. L. R. (Pat.) 41.**

——S. 476 — *Legality of order — Complaint under the section can be made in any case when justice requires— Complaint by Revision Court is not defective.*

S. 476 gives the High Court, as a superior Court, full powers to lay a complaint in any and every case in which it appears expedient in the ends of justice to do so, and there is nothing in the Code by which that power and jurisdiction is taken away, because, in cases of a complaint or for refusal to lay a complaint by some subordinate Court, an appeal from that order is allowed. A complaint made when taking up proceedings from a subordinate Court in revision, is not defective. A. I. R. 1925 Rang. 28 Dist. (*Robinson, C. J., Rutledge and Maung Gyi, JJ.*) EMPEROR *v.* SYED KHAN. **3 Rang. 303 : A. I. R. 1925 Rang. 321 (F. B.).**

——S. 476—*Legality of order—Opinion need not be formed during the progress of proceedings.*

The terms of S. 476, Cr. P. Code, indicate that the desirability of prosecuting the offender must be present to the mind of the Court during the proceedings in the course of which the offence was committed or brought to its notice. But this does not mean that unless it is during the progress of the actual case that this opinion is formed, no prosecution can be ordered under S. 476, Cr. P. Code. 34 C. 551, Dist. (*Duckworth, J.*) VALAB DAS *v.* MAUNG BA THAN. **1 R. 372 : 2 Bur. L. J. 154 : A. I. R. 1924 Rang. 54.**

Notice or opportunity.

——S. 476—*Notice or opportunity—Notice to accused if necessary—Admission of other evidence in preliminary enquiry.*

Though a notice to the accused is not essential under S. 476, Cr. P. Code, still it is highly desirable that it should be given. 38 A. 142 Foll. This is especially the case where the court holds a preliminary enquiry and records additional evidence and takes into consideration the result of another independent private inquiry made by the Circle Inspector. (*Sulaiman, J.*) IMAM ALI *v.* EMPEROR. **L R. 5 A. 5 (Cr.) : 77 I. C. 888 : 25 Cr. L. J 488 : A. I. R. 1924 All. 435.**

——S. 476—*Notice or opportunity—Perjury—Accused entitled to know exact words alleged to have been used.*

Order meant to be one under S. 476, is bad in law if there are no arrangements of perjury. The accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of the charge under S. 199. The High Court has power to revise the order if it cannot stand. 15 A. L. J. R. 517 ; 18 A. L. J. R. 381, Foll. (*Ryves, J.*) ABDUL WAHID *v.* ABDULLAH. **21 A. L. J. 211 : 71 I. C. 661 : L. R. 4 A. 69 Cr. : 24 Cr. L. J. 197 : A. I. R. 1923 All. 325.**

——S. 476—*Notice or opportunity—Order directing prosecution on evidence recorded in the absence of accused is not justified.*

An order under S. 476 directing prosecution of a person upon evidence recorded in his absence and without affording him an opportunity to cross-examine the witnesses cannot be justified. (*Ryves, J.*) LAL LOKPAL SINGH *v.* EMPEROR. **59 I. C. 655 : 19 A. L. J. 56 : 22 Cr. L. J. 143 : L. R. 2 A. 26 (Cr.).**

——S. 476—*Notice or opportunity — Notice though not legally necessary is expedient.*

As a matter of strict law, no notice would be necessary to a person before taking the proceedings against him under the law which now exists, but it is right that he should have notice. (*Crump, J.*) BAI KASTURIBAI *v.* VANMALIDAS. **27 B. L. R. 616 : 88 I. C. 709 : A. I. R. 1925 Bom. 436.**

——S. 476—*Notice or opportunity—Court acts with material irregularity on the evidence of witnesses whom applicant had no opportunity to cross-examine—Direction for prosecution before termination of civil proceedings is not wrong.*

Though notice that action will be taken against a petitioner under S. 476, Cr. P. Code, is not necessary as a matter of law, where the prosecution has been ordered on evidence given by witnesses whom petitioner had no opportunity to cross-examine and whose evidence has thus not been tested, the Lower Court acts with material irregularity in directing a criminal prosecution in the matter without giving the petitioner any chance to know and meet the case against him. 9 M. L. T. 192 Rel. (*Wallace, J.*) PERUMALA VENKATASUBBIAH, *In re.* **69 I. C. 440 : 16 L. W. 925 : 23 Cr. L. J. 712 : (1922) M. W. N. 811 : A. I. R. 1923 Mad. 228 : 44 M. L. J. 74.**

——S. 476—*Notice or opportunity—Accused has a right to cross-examine witnesses.*

In a proceeding under S. 476 of the Code the accused has a right to place his case before the Court by cross-examining the witnesses on behalf of the opposite party. A refusal to allow such cross-examination is liable to be set aside in revision. (*Jwala Prasad and Ross, JJ.*) GANESWAR PAHARAJ *v.* EMPEROR. **61 I. C. 842: 2 Pat. L. T. 552· 6 Pat. L. J. 146: 22 Cr. L. J. 458 : 1921 P. H. C. C. 176.**

——S. 476—*Notice or opportunity —Notice to show cause not essential.*

Section 476 does not require the issue of a notice to the party to be proceeded against and such notice is not invariably necessary. Whether notice is to issue or not depends upon the particular circumstances of each case. (*Maung Kin, J.*) GURA *v.* DT. JUDGE AKYAB. **1 Bur. L. J. 153: 73 I. C. 976: 24 Cr. L. J. 736: A. I. R. 1923 Rang. 79 (1).**

Order against Strangers.

——Ss. 476 and 467-A—*Order against strangers —Forged document—Production in Court by person not party to the proceedings nor by alleged forgerer—Complaint by Court—Procedure.*

Where it is possible that a document was forged by one B. but there was no evidence to suggest that he did so for the purpose of using them in court nor was it proved that he used the document in court, a complaint under S. 476, Cr.P. Code, against B by the Court is not justified. (*Greaves and Panton, JJ.*) BAHERUDDY SIKDAR *v.* EMPEROR. **28 C. W. N. 880: 81 I. C. 919: 25 Cr. L. J. 1095: A. I. R. 1924 Cal. 986.**

——Ss. 476 and 195 (b) and (c)—*Order against strangers—Their relation—Whether a Court can make complaint against persons who are not parties to—Effect of recent amendments.*

A court cannot make a complaint in respect of any person other than persons who were parties to the proceedings before it. (*Robinson, C. J. and Brown, J.*) G. T. GURUSWAMY & SONS *v.* D. K. S. EBRAHIM. **2 Rang. 374: A. I. R. 1925 Rang. 28.**

Pending Proceedings.

——S. 476—*Pending Proceedings — Forgery—Question pending in 'appeal'—Proceedings under S. 476 are improper.*

CR. P. CODE (V OF 1898), S. 476—Pending proceedings.

When the question as to whether the document in question is a forgery, has finally to be decided by the Court in which an appeal from the proceeding wherein the document was held to be a forgery is pending, it is not proper to take proceedings under S. 476. (*Zafar Ali, J.*) HARNAM SINGH *v.* MT. ATRI.

88 I.C. 526: 7 Lah.L.J. 73 : A. I. R. 1925 Lah. 323 (1).

——— ——S. 476—*Pending Proceedings—Trial begun on basis of sanction under old Code but not completed before the coming into force of amended Code can go on without fresh complaint under amended S.* 476.

When a criminal Court has taken cognizance of an offence for perjury, before the amendment of the Cr. P. Code, on a sanction order to a private individual granted before the Code was amended, but has not completed the trial before the amended Code came into force, the trial can go on without fresh complaint under the amended provisions of S. 476, Cr. P. Code, Cr. Misc. Proceedings No. 606 of 1924 and 1924 Mad. 615 Foll.

Per *Wallace, J.*—In order to decide as to whether a trial founded on a sanction and properly begun on a procedure which has been altered by the amended Cr. P. Code can now go on, it is essential not to confuse 'cognizance' with 'jurisdiction'. Once a Court is properly seized of a case, any amendment of law, except an amendment, which takes away its jurisdiction to try the offence, cannot affect the Court's authority to proceed with the trial. To hold that an amendment of the procedure of trial under the Code automatically brings to an end all trials founded on the original procedure is not a conclusion which is justified either in law or in commonsense. The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they shall be continued under the new procedure from the time when the new procedure came into force.

Per *Madhavan Nair, J.*—Sanction is required only to enable the Court to take cognizance of certain offences and, when once the case is launched and cognizance has been taken by the Magistrate of any offence, nothing short of an amendment which specifically takes away the jurisdiction of the Court to try the offence can affect the right of the Court to go on with the trial according to law. (*Wallace and Madhavan Nair, JJ.*) APPASAMI AIYAR, *In re.*

1925 M. W. N. 668: A. I. R. 1925 Mad. 1122: 49 M. L. J. 276.

Preliminary Enquiry.

———S. 476—*Preliminary enquiry is not essential.*

S. 476 does not make it incumbent upon the Court to make a preliminary inquiry in every case before starting prosecution. To justify the Court in initiating prosecution, it is necessary only to hold that it is expedient in the interest of justice that an inquiry should be made into an offence referred to in S. 195. (*Shadi Lal, C. J.*) EMPEROR *v.* PIR QADIR BAKHSH.

6 Lah. 34 : A.I. R. 1925 Lah. 312.

———S. 476—*Preliminary Enquiry—Extent of, is Court's discretion grant of right of appeal does not extend the scope of the enquiry.*

The nature of the preliminary inquiry mentioned in S. 476 (1) is a matter in the discretion of the Court; the law does not compel a detailed inquiry. The grant of a right of appeal has not conferred any new right upon the accused and the extent of the preliminary inquiry is still left to the discretion of the Court. (*Mullick and Bucknill, JJ.*) CHAMARI *v.* PUBLIC PROSECUTOR OF GAYA.

4 Pat. 484 : A. I. R. 1925 Pat. 677.

CR. P. CODE (V OF 1898), S. 476—Stay of Proceedings.

——— S. 476—*Preliminary Enquiry—Court making complaint must hold preliminary enquiry and must make a written complaint.*

S. 476 contemplates that after making such inquiry as may be necessary, the Court should make a complaint in writing. It is for the Court acting under S. 476 to make any inquiry that is necessary and then to make a complaint against the person or persons who, he is satisfied, have committed an offence. The section does not contemplate that the Court should send the case to a Magistrate for inquiry whether the offence it suspects has been really committed and for prosecution, if the Magistrate is so satisfied. The Court must be satisfied that there is a *prima facie* case against each person sent to the Magistrate, and then it can lay a complaint under S. 476. (*Adami and Sen, JJ.*) CHAMARI SINGH *v.* PUBLIC PROSECUTOR OF GAYA.

4 Pat. 24: 26 Cr. L. J. 170: 83 I. C. 730: 6 P. L. T. 225: 3 P. L. R. 51: A. I. R. 1925 Pat. 330.

Stay of Proceedings.

———S. 476—*Stay of proceedings—Pendency of appeal is no bar to trial.*

Where in a civil suit a Judge of experience directs a party or witness to stand his trial under S. 476, Cr. P. Code, the matter should be dealt with promptly. The fact that an appeal is pending does not matter and the decision of the Magistrate will not be relevant evidence in the civil appeal. (*Mears, C. J.*) ANRUDH KUMAR *v.* EMPEROR.

L. R. 3 A. 11 (Cr.) : 65 I. C. 436 : 23 Cr. L. J. 84.

[Under the new Code, the Magistrate may stay the trial until disposal of the appeal.—Ed.]

———S. 476—*Stay of proceedings—Pending—decision in Civil Court—Jurisdiction of the High Court.*

An application for stay of proceedings under S. 476 of the Cr. P. Code arising out of a suit from which an appeal is pending in the High Court in exercise of its general powers of superintendence over the proceedings of all the Courts subordinate to it can direct the subordinate Court to adjourn the proceedings when they are initiated by such presiding officer. Where criminal proceedings on the face of them raise a question of fact which is still under adjudication in a Civil Court, the Criminal Courts wherever possible, generally stay the proceedings until a final adjudication by the Civil Court but the High Court will not interfere with a proceeding under S. 476 merely on the ground that an appeal on the facts is pending before the High Court. (*Piggott, J.*) RAJ KUNWAR SINGH *v.* EMPEROR.

18 A. L. J. 1011: 60 I. C. 428: 22 Cr. L. J. 236: 43 A. 180.

[This decision is now given effect to in sub-Cl. (3) newly added.]

———S. 476—*Action under the section—Preliminary enquiry—Necessity of.*

A preliminary enquiry is not always essential before taking action under S. 476, Criminal Procedure Code. The finding of a competent Court that a document is forged, or that a witness committed perjury before it, has always been considered sufficient *prima facie* ground for an order under S. 195 or S. 476. (*Daniels, J.*) DWARKA PRASAD *v.* MAKUND SARUP.

L. R. 6 A. 630 : 90 I. C. 290 : 26 Cr. L. J. 1506 : L. R. 6 A. 213 (Cr.)

———S. 476—*Penal Code (Act XLV of 1860), S. 471—Offence under the section committed by a witness before a Court—Court, if can make a complaint.*

There is nothing in S. 476, Criminal Procedure Code, to prevent a Court from making a complaint in

CR. P. CODE (V OF 1898, S. 476.

respect of an offence under Section 471, Indian Penal Code, committed before it even by a witness in a case. (*Daniels, J.*) DWARKA PRASAD *v.* MAKUND SARUP. **L. R. 6 A. 630 : 90 I. C. 290 : 26 Cr. L. J. 1506 : L. R. 6 A. 213 (Cr.).**

——S. 476—*Proceedings under—Perjury—When to be instituted—Duty of Court.*

Proceedings under S. 476 should not be taken until the case in which the alleged false evidence is given has been finally disposed of. In deciding whether proceedings should be instituted, the main question to consider is whether there was a reasonable probability of a conviction for perjury. (*Wadegaonkar, A. J. C.*) KALU *v* TIKARAM. **26 Cr. L. J. 1350 (2) : 89 I. C. 390 (2) : A. I. R. 1925 Nag. 412.**

——S. 476— *Facts on which offence founded—Inquiry.*

When a criminal offence is alleged to have been committed in the course of revenue or civil proceeding, the rule is that the facts upon which the criminal offence is founded should as far as possible be finally determined in the Civil or Revenue Court. The refusal to do it amounts to a denial of the right of fair trial. (*Mullick, J.*) FOUJDAR RAI *v.* EMPEROR. **90 I. C. 445 : 26 Cr. L. J. 1565.**

——S. 476-A—*Appeal or Revision—Invalid complaint by Magistrate—Appeal to Sessions Judge—Sessions Judge can make complaint.*

Where a complaint which is made by a Deputy Magistrate is invalid and *ultra vires* and the matter goes up in appeal before the Sessions Judge, the latter can himself make a complaint under S. 476-A. (*Daniels, J.*) GULAB *v.* EMPEROR. **L. R. 6 A. Cr. 79 : 26 Cr. L. J. 923 : 86 I. C. 987 : A. I. R. 1925 All. 667.**

——S. 476-B—*Appeal or Revision—Appellant dying—Appeal abates.*

The language of S. 476-B does not indicate that any legal representative of the deceased appellant may file an appeal, or support it on the death of the appellant. Hence on the death of the appellant the appeal abates. But S. 404 has no application to the case. (*Mukerji, J.*) HAFIZ NEHAL AHMAD *v.* RAMJI DAS. **46 All. 359 : L. R. 6 A. Cr. 85 : 87 I.C. 608 : 26 Cr. L. J. 1008 : A. I. R. 1925 All. 620.**

——S. 476 B—*Appeal or Revision — Appellate Court should reconsider entire matter on merits—* prima facie *case not being made out, withdrawal of complaint should be directed.*

The appellate Court, in case of appeals under S. 476 B should reconsider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside. (*Banerji, J.*) RAM CHARAN DAS *v.* EMPEROR. **88 I. C. 358 : 23 A. L. J. 515: 26 Cr. L. J. 1126 : A. I. R. 1925 All. 544.**

——S. 476-A—*Appeal or Revision—Sanction to prosecute—Power of Appellate Court while application is pending in the Lower Court.*

Where an application under S. 476 is pending before an inferior Court there is no objection to the superior Court taking such action as could be taken by the Court under S. 476, Cr. P. Code. The pendency of the application cannot mean rejection of the application within the meaning of S. 476-A. (*Shah, A.C. J. and Fawcett, J.*) RAMDAS VISHNUDAS, *In re.* **26 Bom. L. R. 713 : 82 I. C. 359 : 25 Cr. L. J. 187 : A. I. R. 1924 Bom. 511.**

R . P. CODE (V OF 1898), S. 476.

——S. 476-B—*Appeal or Revision.*

Where a Court quashes the direction to prosecute it should order withdrawal of the complaint. A mere order that the sanction granted by the Court of first instance should be withdrawn is not sufficient. (*Macleod, C.J. and Shah, J.*) SOMABHAI VALABHBHAI *v.* ADITBHAI PARSHOTTAM. **48 Bom. 401: 26 Bom. L.R. 289: A.I.R. 1924 Bom. 347**

——S. 476-B—*Appeal or Revision—Revision.*

Orders under S. 476-B, though under extraordinary cases could be revised are not ordinarily speaking revisable where the lower appellate Court withdraws the complaint laid under S. 476, Cr. P. Code, (*Macleod, C. J. and Shah, J.*) SOMABHAI VALABHBHAI *v.* ADITBHAI PARSHOTTAM. **48 Bom. 401 : 26 Bom. L. R, 289 : A. I. R 1924 Bom. 347.**

——Ss. 476-A and 476-B—*Appeal—Limitation Act (IX of* 1908), *Sch. I, Art.* 154 *applies, and under S.* 476 *A superior Court can not* suo motu *take action where subordinate Court has refused to complain.*

The scheme of the sections 476-A and 476-B is that, if the Subordinate Court has neither made a complaint under S. 476 nor rejected an application for the making of a complaint then the superior Court may take action and make a complaint. But where the Subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code is by way of an appeal to the superior Court. Appeal Judge should consider whether the appeal is filed within the time specified. (*Sanderson, C. J. and Panton, J.*) CHUNDER KUMAR SEN *v.* MUTHURIYA DEBYA. **42 C. L. J. 120 : 29 C. W. N. 1035 : 90 I. C. 529 : 52 C. 1009 : 26 Cr. L. J. 1569 : A. I. R. 1925 Cal. 1228.**

——S. 476-B—*Appeal or Revision—Trial Court refusing to proceed under S.* 476—*Sufficient reasons must be given before reversing order.*

Where a superior Court reverses the order of the trial Court which has refused to proceed under S. 476 of the Cr. P. Code, sufficient reasons must be given by that Court as to why in its opinion the discretion was not properly exercised. (*Newbould and Mukerjee, JJ.*) KALISADHAN ADDYA *v.* NANI LAL HAZRU. **52 Cal. 478 : 89 I. C. 259 : 26 Cr. L. J. 1307 : A. I. R. 1925 Cal. 721.**

——S. 476-B—*Appeal or Revision — Appellate order making complaint—No appeal lies to High Court.*

No appeal lies to the High Court from an appellate order of the Dt. Judge making a complaint which the Subordinate Judge might himself have made under S. 476 of the Cr. P. Code. (*Martineau and Zafar Ali, JJ.*) MAHOMED IDRIS *v.* EMPEROR. **6 Lah. 56 : 88 I. C. 528 : A. I. R. 1925 Lah. 322 (2).**

——S. 476-B—*Order passed by Commissioners without jurisdiction—Appeal lies.*

Where Election Commissioners passed an order purporting to act as a civil Court under S. 476, Cr. P. Code.

Held : that appeal lay from their order, although passed without jurisdiction. (*Sulaiman and Daniels, JJ.*) BILAS SINGH *v.* EMPEROR. **23 A. L. J. 845 : 89 I. C. 630 : A. I. R. 1925 All. 737.**

——S. 476-B and 195-B—*Duty of Court—Private person—Validity.*

Where in cases of forgery or perjury, the Court neglects to take action and sanction has been granted at the instance of an application by a private person, the prosecution based thereon is not invalid. (*Hallifax, A. J. C.*) GANGAPRASAD *v.* SHYAMLAL. **68 I. C. 45 : 23 Cr. L. J. 509 : A. I. R. 1923 Nag. 180.**

CR. P. CODE (V OF 1898), S. 476.

(The grant of sanction has now been abolished.)

——— **S. 476-B**—*Scope of.*

S. 476-B appears to contemplate that if an appellate Court set aside the order of an Original Court, the party prejudicially affected has a right of appeal to the Court to which appeals from that Appellate Court ordinarily lie. (*Mullick, J.*) FOUJDAR RAI *v.* EMPEROR. **90 I. C. 445 : 26 Cr. L. J. 1565.**

——— **Ss. 476-B and 195 (3)**—*Complaint by Judge of the Court of Small Causes—Appeal, whether lies to the Subordinate or District Judge.*

Where a complaint is made by a Judge of the Court of Small Causes, who describes himself as a Munsif, for prosecution of a person under Ss. 471 and 467 of the Indian Penal Code, an appeal allowed under S. 476-B of the Code of Criminal Procedure lies to the District Judge, to whom only the Court of Small Causes is subordinate, and not to the Court of the Sessions and Subordinate Judge. (*Dalal, J. C.*) FATEH BAHADUR *v* ABDUL RAHIM. **2 O. W. N. 845 : A.I. R. 1925 Oudh 713.**

——— **S. 478**—*Change.*

This section is now applicable to European British subjects.

——— **S. 478**—*Faulty procedure—Accused should be discharged.*

An Assistant Collector, after deciding to act under S. 478, neglected to follow the directions contained in the second sub-section of that section, which requires that if he concludes the enquiry himself his proceedings shall be conducted as nearly as may be in accordance with Chap. XVIII, Cr Pro. Code. He framed no charge and although he made some sort of enquiry it was of a perfunctory character and when he came to write his committal order, he incorporated as the main grounds for committing for trial the reasons which he had given in his judgment in the civil suit, with the result that there was nothing in any way resembling a proper record in the Committing Magistrate's Court. *Held* : that the trial was irregular, there having been no proper proceedings before the Committing Magistrate. The accused must be discharged. 40 All. 32, Foll. (*Walsh, J.*) EMPEROR *v.* BASHA NAND. **A. I. R. 1923 All. 610.**

——— **S. 481**—*'If any'—Meaning—Court must give opportunity but cannot compel accused to make a statement.*

No person can be punished for contempt of Court which is a criminal offence unless the specific offence charged against him be distinctly stated and an opportunity given him of answering. The words "If any" in section 481 do not mean that in the special procedure provided by this section an exception to this general rule is provided. All that the expression "if any" indicates is that the Court cannot compel the accused to make a statement, but it cannot mean that it should not give him an opportunity to make a statement. L. R. 2 P. C. 106 and 13 C. W. N. 685 Foll. (*Newbould and Suhrawardy, JJ.*) KRISHNA CHANDRA *v.* EMPEROR. **37 Cal. L. J. 535 : 74 I. C. 549 : 24 Cr. L. J. 798 : A. I.R. 1923 Cal. 562.**

——— **S. 481**—*Statement of prisoner—Absence.*

The order of the Magistrate falls short of the requirements of S. 481 if it does not contain the statement made by the petitioner. (*Abdul Raoof, J.*) POHU RAM *v.* EMPEROR. **A. I. R. 1923 Lah. 88.**

——— **S. 482**—*Reasons must be given for proceeding under S. 482 instead of acting under S. 480.*

Where a court chooses to act under S. 482 instead of S. 480 in respect of an offence under S. 179, I. P. C. it must give reasons for not taking cognizance under S. 480 itself. (*Wazir Hasan, A. J. C.*) CHEDI LAL *v.* EMPEROR. **11 O. L. J. 358 : 25 Cr. L. J. 1127 : 81 I. C. 951 : A. I. R. 1924 Oudh 402.**

CR. P. CODE (V OF 1898), S. 488.

——— **S. 487**—*Court that heard appeal in sanction proceedings cannot hear appeal from conviction.*

The mandatory provisions of S. 487, Cr. P. Code, as amended, clearly prohibit the Sessions Judge from trying any person for any offence referred to in S. 195 of that Code The word "try" as used in S. 487 includes the "hearing of an appeal". 16 Cal. 121, Foll. (*Kinkhede, A. J. C.*) KRISHNAPPA *v.* EMPEROR. **25 Cr. L J. 713 : 81 I. C. 201 : A. I. R. 1924 Nag. 51.**

——— **S. 488**—*Main Changes.*

(1) The amount awardable has been increased to Rs. 100.

(2) A limitation period of 1 year has been fixed for recovery of arrears.

(3) Sub-section (7) has been omitted in view of S. 340 (2).

——— **S. 488**—*Section includes application by wife or child—Mere receipt of money by the mistress is not binding—composition of child's claim—Application by woman for the school fees of the child can be amended by Court on its own motion as one by her as guardian of child—Maintenance includes only food, clothing and lodging and does not include school fees—Application deliberately made for school fees cannot be amended by Court on its own motion as one for maintenance.*

S. 488 contemplates application by a wife or a child. Where the widow alleged herself to be a discarded mistress, and the application was made by her for the school fees of her son

Held, that this would require only a formal amendment of the application as one by the woman as guardian of the child and that the amendment might be made by the Court on its own motion. The payment of money to the child's mother by the alleged father could be weighed as evidence of an intimacy between the alleged father and the woman, but in no sense could it be regarded as a binding composition of the claims of the child. The object of proceedings for maintenance is to prevent vagrancy and that object is attained by the provision of lodging, food and clothing. A husband is bound to maintain his wife but he is not bound to do more than supply her with lodging, food and clothing ; he is not bound to maintain her as his wife. 16 Bom. 269 Ref to. 4 I. C. 758, Foll. A Court ought to allow an application framed, as one for educational expenses into one for maintenance only if it was satisfied that the application as framed was framed in error, that what the woman really wanted on behalf of the child was maintenance, and not where the application had been deliberately and purposely framed. (*Boys, J.*) MT. KUMLI *v.* EMPEROR. **L. R. 5 A. (Cr). 187 : 25 Cr. L. J. 1249 : 82 I. C. 257 : A. I. R. 1925 All. 73.**

——— **S. 488**—*Order for maintenance, charging amount on the joint estate of the person ordered to pay it and his brother not upset in appeal or revision—Objection by brother in execution.*

There was an order by a Magistrate directing the amount of maintenance to be a charge on the joint estate of the person ordered to pay it and his brother. This order was not disturbed in appeal or revision. *Held*, that the brother was not entitled to object to the attachment and sale of the joint properties and the order of the Magistrate levying execution will not be interfered with in revision by the High Court. (*Fawcett and Madgavkar, J.*) SHIVLINGAPPA *v.* GURLINGAPPA. **27 Bom. L. R. 1363 : 49 Bom. 906.**

——— **S. 488**—*Wife—Maintenance—Payment in*

kind and cash.

S. 488, Cr.P. Code, only permits of the Court directing a monthly payment of money, and an order directing a mixed payment in kind and cash every year is contrary to the terms of S. 488. (*Macleod, C. J. and Shah, J.*) MUKTA *v.* DATTU MAHADEV.

26 Bom. L. R. 186 : 81 I. C. 613 (1) : 25 Cr. L. J. 965 (1) : A. I. R. 1924 Bom. 332.

——S. 488—*"Living in adultery", meaning of—Continuous course of conduct is necessary.*

Unless continuity of conduct is established, it cannot be inferred from a single act of adultery that the woman is "living in adultery." In the present case it was held that although the woman had given birth to an illegitimate child it was open to the Magistrate to find that apart from that circumstance, she was not "living in adultery". 26 All. 326 ; 20 Mad. 470 (F. B.) ; 30 Mad. 332, Foll. (*Sanderson, C. J. and Chotzner, J.*) JOTINDRA NATH MOHAN BANERJEE *v.* GOWRI BALA DEBI. **88 I. C. 608 : 29 C.W.N. 647 : A. I. R. 1925 Cal. 794.**

——Ss. 488 and 342—*Person giving evidence on his own behalf under S. 488—Omission to examine him under S. 342 does not vitiate proceedings.*

Proceedings are not vitiated by the omission of the Magistrate to examine the person under S. 342 when he gives evidence on his own behalf in proceedings under S. 488. (*Greaves and Panton, JJ.*) BACHAI KALWAR *v.* JAMUNA KALWARI. **25 Cr. L. J. 1091 : 81 I. C. 915 : A. I. R. 1925 Cal. 339.**

——S. 488—*Neglects to maintain—Adjudication of insolvency of husband completely disproves wilful neglect.*

The fact that the husband has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that he is unable to pay his debts. He, being unable to pay his debts, is not guilty of wilful neglect within the meaning of S. 488. (*Ghose and Cuming, JJ.*) HALFHIDE (MR.) *v.* HALFHIDE (MRS.) **50 C. 867 : A. I. R. 1924 Cal. 230.**

——S. 488—*Arrears— Waiver by—Compromise after order for maintenance.*

After an order for maintenance was passed in wife's favour, both parties put in a petition in which they agreed that the present petitioner should pay his wife Rs. 10 a month as long as she remained at the house of the petitioner's father, *held*, that the lady forfeited her right to claim past maintenance up to the date of this petition. (*Sanderson, C. J. and Panton, J.*) PARUL BALA *v.* SATISH CHANDRA.

37 C. L. J. 180 : 75 I C. 529 : 24 Cr. L. J. 945 : A. I. R. 1923 Cal. 456.

——S. 488—*Only monthly cash allowance can be ordered.*

It is not legal under S. 488 to order the husband to give his wife twelve maunds of grain each harvest and to provide her with a separate house because under that section any other order than one for a monthly cash allowance is not allowed. (*Scott-Smith, O. C. J.*) ATRU *v.* MT. MOHAN. **25 Cr. L J. 1271 : 82 I. C. 279 : A. I. R. 1925 Lah. 142 (1).**

——S. 488—*Neglects to maintain—Husband willing to keep wife in his house—Liability.*

A husband who has turned his wife out cannot, by saying in Court that he will keep her in his house, avoid liability for giving her maintenance. (*Martineau, J.*) AISHAN *v.* SHER MUHAMMAD.

59 I. C. 853 : 22 Cr. L. J. 149 (Lah.).

——S 488—*" In the whole " mean one sum only and not separate sums for different purposes—Section, however, allows Rs. 100 to each of the wife and children.*

The words "in the whole" mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medicial expenses, etc., should be ordered to be paid. The words do not mean that when a woman makes an application for herself and for children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number. The words mean that the Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself. (*Devadoss, J.*) E. C. KENT *v.* E. E. L KENT.

A. I. R. 1926 Mad. 59 : 49 M. L. J. 335.

——S 488—*Order for alimony in existence—Jurisdiction under S. 488 is not ousted.*

The existence of a previous order for alimony is not sufficeint to oust the jurisdiction of the Magistrate ; for a mere order for maintenance is not equivalent to maintaining the wife ; and the order, whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife: *Craxton* v. *Craxton*, 71 *J. P.* 399, *Dist.* (*Devadoss, J.*) E. C. KENT *v.* E. E. L. KENT. **A. I, R. 1926 Mad. 59 : 49 M. L. J. 335.**

——S. 488—*Mere offer to maintain is not sufficient.*

A mere offer to maintain does not amount to absence of neglect to maintain. (*Devadoss, J.*) E. C. KENT *v.* E. E. L. KENT.

A. I. R. 1926 Mad. 59 : 49 M. L. J. 335.

——S. 488—*Daughter married after maintenance order—Order should continue if she is unable to maintain herself even then.*

Father must continue to maintain his daughter even after her marriage if in spite of her marriage she still remains unable to maintain herself either because her husband is too poor to maintain her or for any other good reason. (*Krishnan, J.*) MEENAKSHI AMMAL *v.* KARUPPANNA PILLAI. **48 Mad. 503 : 21 L.W. 142 : 86 I. C. 220 : (1925) M. W. N. 67 : 26 Cr. L. J. 732 : A. I. R. 1925 Mad. 491 : 48 M. L. J. 183.**

——S. 488 — *Proceedings under — Respondent alledged to be insane—Appointment of guardian-ad-litem—Procedure.*

Where the respondent in a proceeding under S. 488, Cr. P. Code is alleged to be insane, the Magistrate has no power under the Cr P. Code, to appoint a *guardian-ad-litem.* If the Magistrate has reason to apprehend that the respondent is of unsound mind it is his duty to hold a judicial inquiry into his sanity and put him, if necessary under medical observation. If as a result of such enquiry he comes to the conclusion that the respondent is insane, he must follow the procedure laid down in Ch. 34, of the Cr. P. Code and postpone the proceedings, until the Magistrate is satisfied that the respondent is capable of understanding the proceedings. (*Wallace, J.*) APPACHI GOUNDAN *v.* KUTHU JAMMAL. **48 Mad. 388 : (1925) M. W. N. 65 : 21 L. W. 180 : 86 I. C. 77 : 26 Cr. L. J. 701 : A. I. R. 1925 Mad. 440 : 48 M. L. J. 187.**

——S. 488—*Section cannot take away the right under Hindu Law.*

The provision of a summary remedy under S. 488 cannot, unless an Act expressly says so, take away a right conferred by Hindu Law. (*Kumaraswami Sastri, J.*) NATARAJAN *v.* MUTHIAH CHETTY.

22 L. W. 650.

——S. 488—*Application for maintenance—Neglect to maintain—Offer to maintain not enough to reject application.*

What entitles the children to get maintenance is-

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not merely a formal refusal of the children's father to maintain, but also his neglect to do so. That gives the Magistrate jurisdiction under S. 488, Cr. P. Code, to give maintenance to the children. A mere offer to maintain the children, at the time of the trial, is not a justification for rejecting the petition of the children. (*Krishnan, J.*) KAMBU AMMAL *v.* RANGANATHAN. **(1924) M. W. N. 465 : 76 I. C. 30 : 19 L. W. 530 : 25 Cr. L. J. 94 : A. I. R. 1924 Mad. 624.**

——— **S. 488**—*Maintenance—Malabar tarwad—Offspring of sambhandam—Maintenance from tarwad—Liability of putative father.*

The offspring of a sambhandam in Malabar are entitled to maintenance from their tavazhi and if the tavazhi or tarwad has sufficient means to maintain them, they are not entitled to an order for maintenance. (*Odgers, J.*) BHARATA AIYAR, *In re.* **(1924) M. W. N. 305 : 34 M. L. T. 167 : 77 I. C. 418 : 25 Cr. L. J. 370 : 19 L. W. 275 : A. I. R. 1924 Mad. 549 : 46 M. L. J. 324.**

——— **S. 488**—*Decision of Civil Court—Relationship declared not to exist—Order under S. 488 should not be given effect to.*

Where the relationship on which the maintenance order is based has been declared by the final decree of a competent Civil Court not to exist, it is open to the person adversely affected thereby to ask the Magistrate to abstain from giving any further effect to his order of maintenance 1918 M. W. N. 65, Foll. (*Ayling and Odgers, JJ.*) VENKAYYA *v.* MADDU PAIDANNA. **46 Mad. 721 : 18 L. W. 132 : 32 M.L.T. 345 : (1923) M.W.N. 401 : 24 Cr. L. J. 720 : 73 I. C. 944: A.I.R. 1923 Mad. 707 : 45 M. L. J. 104.**

——— **S. 488**—*Maintenance order—Refusal to cohabit is not a sufficient ground.*

There is nothing in the Code which compels the Criminal Court to award separate maintenance to a wife whom the husband agrees to protect and maintain in a manner suitable to her position in life simply because he refuses to cohabit with her. (*Kumaraswami Sastri, J.*) JAGGAVARAPU BASAWAMMA *v.* SEETA REDDI. **15 L.W. 535 : (1922) M. W N. 265 : 30 M. L. T. (H. C.) 315 : 66 I.C. 832 : 23 Cr. L. J 336 : A.I.R. 1922 Mad. 209: 42 M.L.J, 566.**

——— **S. 488**—*Marrying second wife—Effect—Offer to give a separate residence.*

The mere fact the husband has taken another wife is no ground for the first wife to refuse to go and live with him. Where she is offered separate residence which she rejects, she cannot be said to "refuse to live with her husband" within the meaning of sub-Ss. 3 and 4 of S. 488 if she disapproves of the offer. (*Kinkhede, A. J. C.*) SUKRULLA FAKIR *v.* FATMA. **25 Cr. L. J. 453 : 77 I. C. 805 : A. I. R. 1924 Nag. 297.**

——— **S. 488**—*Child, meaning of—Adult major—Right to maintenance.*

A person who has attained majority is not a "child" within S. 488, Cr. P. Code, and he is capable of earning his livelihood. Consequently he cannot claim maintenance from his father. 37 M. 565, Rel. (*Prideaux, A.J.C.*) GANGARAMSA *v.* VISHNUSA. **5 N. L. J. 247 : 65 I. C. 631: 23 Cr. L. J. 167 : A. I. R 1922 Nag. 249 (1).**

——— **Ss. 488, 489 and 490**—*Divorce—Wife divorced—Order cannot be enforced.*

An order under S. 488 of the Code for the maintenance of a wife is not enforceable under S. 490, if the wife is subsequently divorced and the order can be set aside under S. 489. The Magistrate is not only competent but is bound to do so. (*Hallifax, A. J. C.*)

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EMPEROR *v.* SHAIKH DAUD. **63 I. C. 329 : 22 Cr. L. J, 633 : 17 N. L. R. 92.**

——— **S. 488**—*Neglect or refusal to maintain is the first essential.*

The first essential for proceedings under S. 488 is that the person proceeded against should have neglected or refused to maintain his wife or child unable to maintain itself. (*Kendall, A. J C.*) INTAZAR AHMED *v.* MT. SAMIDAN. **27 O. C. 271 : 26 Cr. L. J. 128 : 83 I. C. 688 : A. I. R. 1925 Oudh 294.**

——— **S. 488**—*Application cannot be treated as evidence.*

An application under S. 488 though verified can be neither a substitute for or supplement to the applicant's examination on oath in the presence of her husband nor is it legal evidence against the husband. (*Lindsay, J. C.*) KAMPTA *v.* MANGAL DEI. **76 I. C. 974 : 25 Cr. L, J. 302 : 23 O. C. 237.**

——— **S. 488**—*Maintenance order—Effect of decree of Civil Court.*

The subsequent decree of Civil Court supersedes any order for maintenance that may have been previously passed by a Criminal Court under S. 488, Cr. P. Code. Such a decree is no answer to an application for enforcement of an order previously obtained by the wife under S. 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that without any sufficient cause she has left his custody. (*Das, J.*) RAMDHEYAN RAM *v.* MT. RAM DULARIA. **1 Pat. L. R. (Cr.) 158 : 3 P. L. T. 51 : 65 I. C. 576 : 23 Cr. L. J. 144 : A.I.R. 1923 Pat. 153 (1).**

——— **S. 488**—*Decision of Cigil Court.*

A Civil Court decree is no answer to an application for enforcement of an order previously obtained by the wife under S. 488 of the Code for her maintenance without proof by the husband that the conditions of the decree for custody had been duly complied with and that without any sufficient reason, she has left his custody. The question that her consent to the decree was obtained by fraud could not be investigated by the Criminal Court. (*Das, J.*) RAMDHEYAN RAM *v.* MT. RAM DULARIA. **3 Pat. L. T. 51 : 1 Pat. L. R. (Cr.) 158 : 65 I. C. 576 : 23 Cr. L. J. 144 : A. I. R. 1923 Pat. 153 (1).**

——— **S. 488**—*Unable to maintain itself—Child—Limit of age.*

It is a question of fact in each case as to whether a child can maintain itself or not : and there is no limit of age placed by S. 488 of the Cr. P. Code for such maintenance. (*Jwala Prasad, J.*) KHEDANI RAJWAMI *v.* LAGAN SINGH. **61 I. C. 64 : 22 Cr. L. J. 346 : 2 Pat. L. T. 109.**

——— **S. 488**—*No refusal to maintain—Order is illegal.*

Where there is no neglect and no refusal to maintain, an order for maintenance under S. 488 is wrong in law. (*Cunliffe, J.*) E. A. GRAHAM *v.* E. H. GRAHAM. **4 Bur. L. J. 11 : 86 I. C. 479 : 26 Cr. L. J. 831 : A.I.R. 1925 Rang. 205 (2).**

——— **S. 488**—*Before recommending reduction referring Court ought to hear both parties.*

It is desirable, before a referring Court recommends the reduction of maintenance, to hear both the parties. (*May Oung, J.*) BARAN SHANTA *v.* MA CHAN THA MAY. **2 Rang. 682 : 85 I. C. 375 : 26 Cr. L. J 535 : A. I. R. 1925 Rang. 197.**

——— **S. 488**—*Child's capacity to contribute to its support should be disregarded in fixing the sum pay-*

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able.

A father who has sufficient means is bound to maintain his child who is under the age of majority; and in fixing the sum payable, no regard should be paid to the fact that the child is able to contribute towards its own support by means of labour or work of any kind. (*May Oung, J.*) BARAN SHANTA *v.* MA CHAN THA MAY. **2 Rang. 682 : 85 I. C. 375 : 26 Cr. L. J. 535 : A. I. R. 1925 Rang. 197.**

——S. 488—*Application under—Nature of—Chin Hills Regulation.*

An application under S. 488, Cr. P. Code, is not a proceeding of a civil nature within the meaning of S. 12 (1) of the Chin Hills Regulation (*Mac Coll, A. J. C.*) MAUNG *v.* MAUNG TOM. **4 U. B. R. 169: 25 Cr. L. J. 111 : 76 I. C. 111 : A. I. R. 1925 Rang. 140 (1).**

——S. 488—*Buddhist Law—Personal law abrogated—Buddhist monk sued for maintenance of child.*

Even a Buddhist monk is bound to maintain his child. The Cr. P. Code must override his personal law, if it conflicts with it. The presumption is that an able-bodied man has sufficient means to support his child as well as himself and that it is for him to prove the contrary. (*MacColl, A. J. C.*) U THIRI *v.* MA PWA YI. **4 U. B. R. 138 : 72 I. C. 368 : 24 Cr. L. J. 368 : A. I. R. 1923 Rang. 131.**

——S. 488—*Buddhist Law.*

Under Burmese Buddhist Law the wife has one-third share if not one-half in what the husband earns; one fifth of the salary of the husband (*i.e.*, Rs. 30) was therefore granted as maintenance (*Maung Kin, J.*) MA PWA KYIN *v.* MAUNG BA THIN. **1 Bur. L. J. 124 : A. I. R. 1923 Rang. 100.**

——S. 488—*Child, meaning of—Boy of the age of 17 or 18.*

A father is bound to maintain a child if he is not able to maintain himself. Where a boy is 17 or 18 and is able to work and earn a living he cannot compel his father to educate him in a college and thus better his prospects. (*Maung Kin, J.*) ABDUL RAHIM *v.* MA SHWE MAY. **1 Bur. L. J. 123 : 73 I. C. 334 (1) : 24 Cr. L. J. 590 (1) : A. I. R. 1923 Rang. 45 (1).**

——S. 488—*Maintenance order—Jurisdiction of Civil Court to entertain a suit for declaration—Effect of decision of Civil Court.*

A Magistrate's order for maintenance under S. 488, Cr. P. Code, has not the effect of taking away the jurisdiction of the Civil Court and it can entertain a suit for a declaration that the person who has been required to maintain another as his son is not his father. The Civil Court could not grant an injunction restraining the Magistrate from enforcing the order for maintenance but the plaintiff could ask the Magistrate to abstain from giving further effect to his order in view of the finding of the Civil Court. (*Saunders, A. J. C.*) NGA PO THEIN *v.* MA ME SAN. **4 U. B. R. 120 : 1 Bur. L. J. 82 : 70 I. C. 897 : A. I. R. 1922 U. B. 20.**

——S. 488—*Buddhist Law—Maintenance—Pongyi is not liable to pay.*

A pongyi is not liable to pay maintenance, the presumption in the case of a Buddhist priest being undoubtedly that he does not possess any property, except such as is necessary for his religious life and which is held under conditions which do not make it available for other purposes. (*Saunders, J. C.*) MA E. SHI *v.* W. ADILSA. **1 Bur. L. J. 97 : 72 I. C. 974 : 24 Cr. L. J. 510 : A. I. R. 1922 U. B. 15.**

——S. 488—*Neglects to maintain—Maintenance*

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—Father having means failing to support child.

The provisions of S. 488, Cr. P. Code, apply to the case of a father who has sufficient means to maintain the child, but neglects to do so. (*Saunders, J. C.*) MA E SHI *v.* U ADITSA. **1 Bur. L. J. 97 : 72 I. C. 974 : 24 Cr. L. J. 510 : A. I. R. 1922 U. B. 15.**

——S. 488—*Decision of Civil Court—Court must take it into consideration.*

The jurisdiction under S. 488 of the Court being only auxiliary to that of the Civil Courts, a Magistrate should not enforce an order for maintenance of a child if a Civil Court subsequently holds that the respondent is not the father of the child. (*Robinson, J.*) BO GYI *v.* MA NYEIN. **22 Cr. L. J. 127 : 59 I. C. 559 (2) : 13 Bur. L. T. 104.**

——S. 488—*Maintenance order — Execution—Order of Civil Court—Effect of.*

A Magistrate ought to refuse to enforce an order for maintenance under S. 488 if after the passing of the order a Civil Court has decided that the respondent was not the father of the child. (*Robinson, J.*) BO GYI *v.* MA NYEIN. **59 I. C. 559 (2) : 22 Cr. L. J. 127 : 13 Bur. L. T. 104.**

——S. 488 (1)—*Children—Offer to maintain in future is no bar to passing order.*

With regard to the maintenance of children, it is sufficient under sub-S. (1) of S. 488 if the neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer was made ,and whether it was right and proper that the children, if not in the custody of the father, should be handed over to him. (*Macleod, C. J. and Coyajee, J.*) DAVID SASOON *v.* EMPEROR. **49 Bom. 562 : 27 B. L. R. 359 : 87 I. C. 431 : 26 Cr. L. J. 975 : A. I. R. 1925 Bom. 259.**

——S. 488 (2)—*Maintenance order against husband—Husband obtaining a decree for restitution of conjugal rights only to avoid maintenance—Maintenance order should not be cancelled.*

The husband, after an order for maintenance was passed against him, filed a suit for restitution of conjugal rights and obtained a decree. He applied for execution, but it was clear from the course of the proceedings in execution that he was not at all anxious to get back his wife to live with him ; for during the proceedings he proposed that the wife should live in a separate room. In fact he did not wish to have his wife back and his object in getting the decree passed was merely to get the maintenance order cancelled. *Held* : that in the exercise of the discretion under S. 489 (2) it would be wrong to cancel the order for maintenance. (*Phillips, J.*) PANAKKAL *v.* ATHAPPA GOUNDAN. **22 L. W. 479 : (1925) M. W. N. 645 : A. I. R. 1925 Mad. 1218 : 49 M. L. J. 269.**

——S. 488 (3)—*Magistrate is bound to consider judicially any objection to execution of maintenance order*

When execution of a maintenance order is applied for and the counter-petitioner contends that the order should not be executed and sets out certain grounds in support of his contention, the Court is bound to consider the sufficiency of the cause alleged by the counter-petitioner and refuse execution if the Court should be satisfied that the cause is sufficient and to grant execution if the Court is not so satisfied. The expression "sufficient cause" in sub-Cl. (3) means that

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the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all circumstances and that such judicial discretion should not be fettered or limited by any definite rules. (*Srinivasa Aiyangar, J.*) TEETHARAPPA PILLAI *v.* MEENAKSHI AMMAL.

21 L. W. 702 : 87 I. C. 105 : 26 Cr. L. J. 953 : A. I. R. 1925 Mad. 715 : 48 M. L. J. 494.

——— **S. 488 (3)**—*Offer to maintain—Refusal to co-habit—Effect of.*

There is nothing in the Cr. P. Code which compels the Criminal Court to award separate maintenance to a wife whom the husband agrees to protect and maintain in a manner suitable to her position in life merely because he refuses to co-habit with her. 6 M. 371, Dist. (*Kumaraswami Sastri, J.*) JAGGAVARAPU BASAVAMMA *v.* JAGGAVARAPU SEETHA REDDI.

(1922) M. W. N. 265 : 30 M. L. T. 315 (H. C.) : 15 L. W. 535 : 66 I. C. 832 : 23 Cr. L. J. 336 : A. I. R. 1922 Mad. 209 : 42 M. L. J. 566.

——— **S. 488 (4)**—*Principles.*

The separate living must be the result of a deliberate and express agreement between the parties. A hasty rejoinder to a husband, who, in the course of a quarrel, was manœuvering for a consent from a wife, cannot be considered to be such consent as would come within the meaning of the law, specially when she was willing to return to him. (*Maung Kin, J.*) MA PWA KYIN *v.* MAUNG BA THIN.

1 Bur. L. J. 124 : A. I. R. 1923 Rang. 100.

——— **S. 488 (5)**—*Maintenance order—Ground for cancelling.*

A mere temporary stay of the wife with the husband though it may have suspended the operation of the order has not the effect of cancelling it in the way in which it could be cancelled under S. 488 (5) of the Code. (*Sanderson, C. J. and Panton, J.*) PARUL BALA *v.* SATISH CHANDRA. **37 C. L. J. 180 : 75 I. C. 529 : 24 Cr. L. J. 945 : A. I. R. 1923 Cal. 456.**

——— **S. 488 (5)**—Ex parte *order—Succeeding magistrate has power to modify.*

Under S. 488, Cr. P. Code, an order for maintenance was passed *ex parte*. Within 3 months of the order applicant presented a petition to the successor of the Magistrate who passed the order to modify the order alleging that he had no notice. The petition was rejected on the ground that the Magistrate had no power to modify his predecessor's order. *Held* : the Magistrate was clearly wrong in supposing that he had no power to re-open the case. S. 488 (*b*) gives him the power. (*May Oung, J.*) MAUNG TUN YIN *v.* MA THEIN SHIN. **2 Bur. L. J. 61 : 75 I. C. 304 : 24 Cr. L. J. 928 : A. I. R. 1923 Rang. 159.**

——— **S. 488 (8)**—*Restitution of conjugal rights—Subsequent ill-treatment by husband—Order for maintenance.*

The weight to be attached to the decree of a civil court must depend upon the particular circumstances of the case and no hard and fast rule can be laid down that a decree of a civil court is for ever and aye binding on the Magistrate or that his discretion is never fettered. Where after the passing of a decree for restitution of conjugal rights it was found that the wife was being ill-treated by her husband and driven out with blows, a magistrate is justified in making an order for maintenance in favour of the woman and in the exercise of his discretion in absolving her from the condition that she must live with her husband. (*Boys, J.*) RAJPATTI *v.* EMPEROR. **22 A.L. J. 806 : L.R. 5 A. 126 (Cr.) : 82 I.C. 174 : 25 Cr.L. J. 1246 : 46 All. 877 : A. I. R. 1924 All. 784.**

——— **S. 488 (9)**—*Residence—Casual visitor.*

CR. P. CODE (V OF 1898), S 491.

Where a person makes casual visits to his mother-in-law's house where his wife happens to be at the time, such house is not the "residence" of the husband within S. 488 (9) giving the Magistrate of that place jurisdiction to entertain an application for maintenance. (*Kanhaiya Lal, J.C.*) RAM KUMAR *v.* RUKMIN. **63 I. C. 870 : 22 Cr. L J. 710 : 24 O. C. 249.**

——— **S. 489**—'*Altering' includes cancelling.*"

The reduction of the maintenance to nothing, *i.e.*, cancellation of the order granting maintenance, would also come within the meaning of the word 'alteration.' (*Krishnan, J.*) MEENAKSHI AMMAL *v.* KARUPPANNA PILLAI. **48 Mad. 503 : 21 L. W. 142 : 86 I. C. 220 : 1925 M. W N. 67 : 26 Cr. L. J. 732 : A. I. R. (1925) Mad. 491 : 48 M. L. J. 183.**

——— **(amended in 1923), S. 489**—*Maintenance order passed—Subsequent decree of Civil Court granting restitution—Decree does not* ipso facto *cancel maintenance order.*

Order of a competent Civil Court ordering restitution of conjugal rights does not of itself cancel a maintenance order previously passed under Cr. P. Code. In considering any such application for cancellation of a maintenance order the Magistrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstances which may be brought before him. *Case law discussed.* (*Carr, J.*) MAUNG DUN *v* MA SEIN.

3 Rang. 150 : A. I. R. 1925 Rang. 268.

——— **S 491**—*Change.*

(1) Power under this section is now given to *all* High Courts.

(2) The order can be made in respect of a person resident within its appellate criminal jurisdiction which extends to the moffusal also.

——— **S. 491**—Habeas Corpus—*Arrest and detention of foreigners—Delay in issuing order—Costs of application.*

The accused was born in a village which was once British India but which had since been ceded to the Rajah of Benares under a treaty. The accused was doing business in Bombay and living there for a number of years. On 17-9-1924 he was arrested by the warrant of the Commissioner of Police, Bombay, under S. 3-A of the Foreigners Act. On 23-9-1924 the Commissioner reported the case to the Government of Bombay. The accused applied on the same date to the High Court under S. 491, Cr. P. Code, and the Government did not pass any order till 14-10-1924 when the application was heard. *Held*, that in the absence of any order of Government, the continued detention of the accused was illegal and improper. Having regard to the delay on the part of the Government, the Crown was directed to pay the costs of the applicant. (*Marten and Fawcett, JJ.*) JAGRAI RAMSUMER TEWARI, *In re.* **49 Bom. 222 : 26 Bom. L. R. 1252 : A. I. R. 1925 Bom. 139.**

——— **S. 491**—*Application under can be dealt with by High Court on Appeallate Side.*

As a result of the amendment introduced by Act XII of 1923 the High Court on its Criminal Appellate Side is vested with jurisdiction to deal with an application under S. 491 of the Code. (*Walmsley and Mukerji, JJ.*) SUBOSHCHANDRA ROY CHOUDHURI *v.* EMPEROR. **40 C. L J. 489 : 29 C. W. N. 98 : 52 Cal. 399 : A. I. R. 1925 Cal. 278.**

——— **Ss. 491 and 456**—*High Court—Writ of* Habeas Corpus—*Power to issue writ—Mofussil places—Persons other than European British subjects.*

The power of the High Court to issue writs of *Habeas Corpus* in the mofussil in the case of persons

other than European British subjects is not taken away by Ss. 491 and 456. (*Schwabe, Oldfield and Trotter, JJ.*) GOVINDAN NAIR *v.* EMPEROR. **45 M. 922 : 16 L. W. 349 : 31 M. L. T. 304 (H.C.) : 68 I. C. 838 : 23 Cr. L. J. 614 : A. I.R. 1922 Mad. 499 (F.B) : 43 M. L. J. 396.**

——— —Ss. 492 and 495—*Prosecuting Inspector not appearing for prosecution, cannot withdraw the case.*

In a criminal case a legal practitioner engaged by the complainant was permitted to conduct the prosecution, and the Prosecuting Inspector did not actually take part in the case. After the evidence of the complainant had been recorded a charge was framed and after that stage the accused made an application to the District Magistrate requesting that the case be withdrawn on certain terms. The file was sent for. When sending up the file the trying Magistrate addressed a note to the District Magistrate setting forth the facts of the case and winding up with the remark "I therefore would strongly recommend the application for your kind consideration because I do not believe that the accused committed the offence with intent to defraud." On reading the report of the trying Magistrate, and perusing the file the District Magistrate accepted the apology of the accused persons as well as the offer of the sum of Rs. 4,500 for a charitable purpose. He ordered the Prosecuting Inspector to withdraw the case. This order reached the trying Magistrate's Court before whom a further application was presented by the Court Inspector. On that application the trying Magistrate passed this order "The case has been withdrawn by the District Magistrate. The accused should be acquitted accordingly." *Held*, the Prosecuting Inspector had no such authority. When a private complaint is filed and then the complainant is given permission to conduct the prosecution and be responsible for its conclusion, it is highly improper that after he has closed his evidence and the charge has been framed the prosecution should suddenly drop without even consulting him. (*Sulaiman, J.*) RAM GOBIND SINGH *v.* LALU SINGH. **46 A. 88 : 21 A.L.J. 855 : L. R. 5 A. 1 (Cr.) : A. I. R. 1924 All. 203.**

———S. 492—*Public Prosecutor should not be too eager to grasp at conviction.*

There should be on the part of Public Prosecutor no "unseemly eagerness for, or grasping at, conviction". He is not to aggravate the case against the prisoner but has "to perform his duties with that calmness and impartiability which should ever characterise a Public Prosecutor." He has to "aid the Court in discovering the truth" and also in the discharge of its duty to do justice as between the Crown and the accused. (8 Bom H.C.R. 126 (F.B.) at 153; 1923 Lah. 264, Appr. (*Kinkhede, A. J. C.*) ANANT WASUDEO CHANDEKAR *v.* EMPEROR. **7 N. L. J. 155 : A. I. R. 1924 Nag. 243.**

———S. 493—*Representative of Railway appointed under S. 145 (2) of Railways Act, cannot insist to lead prosecution in presence of Public Prosecutor—Railways Act, S. 145 (2).*

S. 145 (2) only entitles a person authorised by the Agent of a railway to conduct prosecutions on behalf of the railway administration without the permission of the Magistrate, which would, except for the provision, be required under S. 495, Cr. P. Code, *Prima facie*, neither S. 145 (2) of the Railways Act, nor S. 495 Cr, P. Code, affects S. 493 of the latter enactment which deals with the right of appearance and precedence of the Public Prosecutor before any Court in which any case of which he has charge, is under trial. Where the Public Prosecutor has charge of the

prosecution the pleader instructed by a private person, including the agent of a railway administration, shall, it is enjoined, act under the directions of the Public Prosecutor. (*Macpherson, J.*) B. N. RY. CO. *v.* MAKBUL. **A. I. R. 1925 Pat. 755.**

———S. 494—*Change.*

[All Public Prosecutors can now withdraw either generally or in respect of any one or more of the offences for which the accused is tried.]

———S. 494—*Withdrawal—Consent of Court—Interference by High Court in revision.*

Where reasons have been given by the Court below for allowing the withdrawal of a criminal case the High Court will be slow to interfere in revision against the order allowing the withdrawal. S. 494 controls the other sections of the Code relating to Sessions trial (*Ghose and Cuming, JJ.*) BEPIN BEHARI GHOSE *v.* HARI PADA GHOSE. **71 I. C. 53 : 24 Cr. L. J. 5 (Cal.) : A. I. R. 1924 Cal. 538.**

———S. 494—*Withdrawal of prosecution.*

When a Court accords its consent to the withdrawal from a prosecution it is the duty of the Court to give reasons for allowing the withdrawal. (*Teunon and Ghose, JJ.*) RAJANI KANTA *v.* IDRIS THAKUR. **25 C. W. N. 615 : 34 C. L. J. 51 : 64 I. C. 280 : 22 Cr. L. J. 760 : 48 Cal. 1105.**

———S. 494—*Scope—Magistrate must also consent to the withdrawal—I. P. C., S. 174.*

Where the Magistrate should have given his reasons for allowing withdrawal and did not act properly in passing the very brief order, *viz.*, the case is withdrawn, the accused is hereby discharged, without reference to S. 494 which could have shown him that his consent was necessary and that (under certain authorities) he had to state his reasons for giving that consent, *Held*, the absence of any statement of reasons in the particular case did not vitiate that order to such an extent as to make this case a fit case for exceptional treatment and justify the setting aside of an acquittal on revision in the absence of appeal by local Government under S. 417. Order of discharge in summons cases under this section is an order of acquittal. (*Abdul Qadir, J.*) MUL SINGH *v.* EMPEROR. **24 Cr. L. J. 433 : 72 I. C. 593 : A I. R. 1923 Lah. 163.**

———Ss. 494 and 439—*No revision lies at the instance of private person—Cr. P. Code, S. 439.*

An order of acquittal passed under S. 494, Cr. P. Code, should not be revised by the High Court at the instance of a private party. The private prosecutor has no position at all in criminal litigation. The Crown is the prosecutor and the custodian of the public peace, and if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance. (*Mullick and Macpherson, JJ.*) GULLI BHAGAT *v.* NARAIN SINGH. **2 P. 708 : 5 P. L. T. 404 : 25 Cr. L. J. 446 : 77 I. C. 734 : 2 P. L. R. (Cr). 165 : A. I. R. 1924 Pat. 283.**

———S. 494—*Court must record reasons when allowing withdrawal—Advocate-General alone can withdraw without giving reasons—Remedy is by appeal and not by revision from an improper order under this section.*

The only prosecutor who may under the Code withdraw from a prosecution without the consent of the Court and without giving reasons is the Advocate-General. No other Public Prosecutor is placed in that privileged position. When a Court acting under section 494 gives its consent to a withdrawal from the prosecution, it is acting in a judicial capacity and therefore it should record its reasons in order that the High Court may be in a position to say whether the discretion vested in the Court has been properly exer-

CR. P. CODE (V OF 1898), S. 494.

cised. Where the prosecution is so withdrawn and the Court records an order of acquittal, the proper course is to appeal through Local Government and not by way of revision. (*May Oung, J.*) ABDUL GANI *v.* ABDUL KADAR. **1 R. 756 : 2 Bur. L. J. 287 : A. I. R. 1924 Rang. 168.**

——**Ss. 494 and 495**—*Non-compoundable—Withdrawal—If permissible—Case by private Prosecutor.*

Non-compoundable cases can only be withdrawn under Ss. 494, 495, Cr.P. Code, and not by any private Prosecutors. (*Maung Kin, A. C. J. and Rigg, J.*) EMPEROR *v.* A. YANKAYA. **10 L. B. R. 375 : 64 I. C. 273 : 22 Cr. L. J. 753 : 13 Bur. L. T. 244.**

——**S. 494**—*Withdrawal of prosecution—Effect of—Fresh complaint on the same facts.*

Where a Criminal case was withdrawn on the ground that there was no case to be made out against the accused and some evidence had been recorded when the case was withdrawn under S. 494, Cr. P. Code, it is not competent for another magistrate to proceed against the accused on the ground that there is a *prima facie* case against them except in accordance with S. 437, Cr. P. Code. (*Fawcett, J. C. and Kemp, A. J. C.*) CHANDIRAM VERHOMAL *v.* EMPEROR. **23 Cr. L. J. 737 : 69 I. C. 625 : 15 S. L. R. 131 : A. I. R. 1922 Sind 23.**

——**S. 494 (a)**—*Withdrawal of prosecution—Order for—Reason must be stated.*

Where a Court on the application of the Public Prosecutor for withdrawal of the prosecution under S. 494 (a) makes an order allowing such withdrawal and discharging the accused, the order is a judicial one. The order must state the reasons so that the High Court may see whether the lower court's discretion has been properly exercised. 22 C. W. N. 69, Ref. (*Teunon and Ghose, JJ.*) JAGAT CHANDRA ROY *v.* KALLI MUDDI SARDAR. **71 I. C 693 : 24 Cr. L. J. 229 : 26 C. W. N. 880 : A. I. R. 1924 Cal. 382.**

——**S. 494 (a)**—*Reasons must be recorded.*

In according or withdrawing consent to an application by the Public Prosecutor for withdrawal under S. 494 (a), the Court acts in a judicial capacity and for its order, as for every order judicially made the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. 48 Cal. 1105 and 22 C. W. N. 69, Foll. *Contra* 5 M. L. T. 215. (*Prideaux, A. J. C.*) SUGANCHAND *v.* CHUNNI LAL. **6 N. L. J. 177 : 72 I. C. 361 : 24 Cr. L. J. 361 : A. I. R. 1923 Nag. 260.**

——**S. 495**—*Discretion—Proper exercise.*

It is improper to withdraw a case against a co-accused after he has made a confession prior to which he had complained of torture as his evidence obtained by giving him pardon amounts to procuring his evidence against the co-accused. (*Jwala Prasad, J.*) SHEO BHAJAN AHIR *v.* EMPEROR. **2 Pat. L. T. 125.**

——**S. 495**—*Prosecutor can choose his own pleader save where the Public Prosecutor takes up the case.*

It is not open to a Magistrate to decline to allow a complainant to have a particular pleader. S. 495 of the Cr. P. Code does not warrant the taking out of the prosecution from the hands of the complainant's pleader and assigning it to some other person other than the Public Prosecutor. (*Kennedy and Raymond, A.J. Cs.*) R. GHADIALLY *v.* EMPEROR. **18 S. L. R. 30 : 25 Cr. L. J. 571 : 81 I. C. 59 : A. I. R. 1925 Sind 99.**

——**S. 496**—*Change.*

[A proviso has been added to the effect that this section does not affect the provisions of S. 107 (4) and S. 117 (3).]

CR. P. CODE (V OF 1898), S. 497.

——**S. 496**—*Person breaking bail not to be heard.*

A person who applies to the Court and is allowed out on bail and afterwards breaks his bail, is not entitled to be heard. (*Lindsay, J.*) HAR NARAIN *v.* EMPEROR. **L. R. 4 A. 72 (Cr.) : 71 I. C. 704 : 24 Cr. L. J. 240 : A. I. R. 1923 All 327 (1).**

——**Ss. 496 and 497**—*Bail application—Considerations.*

The Court should, in bail applications, consider the penal consequences of the act if proved, the nature of the offence charged and whether the offence is bailable or not. (*Walsh, J.*) KHADIM ALI *v.* EMPEROR. **19 A. L. J. 693 : 63 I. C. 414 : 22 Cr. L.J. 654 : L. R. 2 A. 97 (Cr.).**

——**S. 496**—*Sessions Judge has power to grant bail—Cr. P. Code, Ss. 118 and 123.*

Bail can be allowed by the Sessions Judge in the case of a person against whom an order has been made under section 118 as the order is liable to be revised by a Sessions Judge under the provisions of S. 123, sub-S. (2). (*C. C. Ghose and Cuming JJ.*) AHMED ALI *v.* EMPEROR. **50 Cal. 969 : 37 C. L. J. 592 : 75 I. C. 537 : 24 Cr. L. J. 953 : A. I. R. 1923 Cal. 723.**

——**S. 496**—*Directing bail before the Police investigation is not illegal—Cr. P. Code, S. 202.*

A Magistrate being of opinion that further inquiry was necessary, sent the complaint to the Police and directed further that if the crime be proved, the accused should be challaned in due course, and that if he gave bail of Rs. 2,000 he be released. *Held*, that the powers under S. 496 are very wide and cover a case of this kind. (*Lumsden, J.*) NARAYAN SINGH *v.* EMPEROR **A. I. R. 1923 Lah. 663.**

——**S. 496**—*Limit of liability.*

Magistrate has no power after the appearance of the accused to attach bail money deposited by the surety to realise the fine imposed by the conviction. (*Neave, A. J. C.*) RAGHUNANDAN *v.* EMPEROR. **11 O. L. J. 296 : 26 Cr. L. J. 113 : 83 I. C. 673 : A. I. R. 1924 Oudh 396.**

——**S. 497**—*Change.*

[The general rule under the old section was that bail was not to be taken in non-bailable offences. Under the section as re-drafted bail should ordinarily be granted except in cases of offences punishable with death or transportation for life.]

——**S. 497**—*Bail—Grant of—Considerations.*

Bail is not to be withheld merely as a punishment. To secure the attendance of the accused at the trial is the object of bail,and the test to be applied is whether it is probable the party will appear to take his trial considering the nature of the accusation, the evidence in support of it and the punishment awardable. The power to admit to bail is not arbitrary but judicial. (*Mukerjee and Chatterjee, JJ.*) NAGENDRANATH CHAKRABARTI *v.* EMPEROR. **51 Cal. 402 : 38 C. L. J. 388 : A. I. R. 1924 Cal. 476.**

——**Ss. 497 and 498**—*Policy of law is to grant bail to under-trial prisoners.*

The present policy of the law is to allow the bail in the case of under-trial prisoners rather than to refuse it. That granting bail would be prejudicing the case is no reason for refusing bail. (*Scott-Smith, J.*) EMPEROR *v.* GULAM MOHAMMAD. **7 L. L. J. 331 : A. I. R. 1925 Lah. 510.**

——**S. 497**—*When bail ought to be granted—Police Inspector and village munsif.*

At the time of granting bail, the Court is not called upon to conduct a preliminary trial of the case and consider the probability of the accused's guilt or inno-

CR. P. CODE (V OF 1898), S.497.

cence. It would be entirely exceeding its function if it did that in any detail ; but it may incidentally have to look at the weight of the evidence against the accused as a necessary part of its proper function, that is, to enquire whether the giving of the bail, as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial, or whether there is any real reason to suppose that he is likely to tamper with the witnesses who would be called against him. A police inspector and village munsif are men of importance in their own walk of life and when charged with a serious offence it is more than possible they may take advantage of a release on bail to abscond and fail to take their trial. (*Coutts Trotter, C. J. and Srinivasa Aiyangar, J.*) THE PUBLIC PROSECUTOR *v.* SANYASAYYA NAIDU. **22 L. W. 156 : 90 I. C. 665 : A. I. R. 1925 Mad. 1224.**

——S. 497—*Considerations for granting release on bail discussed.*

Two persons were committed to Sessions on charges under Ss. 167 and 406, I. P. C. The Sessions Judge released one of them on bail but refused to release the other. This other person was about 70 years old and a Patwari. During the trial in the Magistrate's Court he was released on his personal recognizance of Rs. 50 only, and it was found that if he were not released there would be nobody to instruct his counsel in going through the documentary evidence, and that he would not be able to make at proper defence. *Held* : that there was no reason to refuse his release on bail. (*Simpson, A. J. C.*) ABHRAM BALI *v.* EMPEROR. **12 O. L. J. 394 : 28 O. C. 220 : A. I. R. 1925 Oudh 489.**

—Ss. 497 and 498—*Bail—Offence punishable with transportation for life—Discretion—Power of High Court.*

When the provisions of S. 497 are compared with the provisions of S. 498 of the Cr. P. Code and when the principle of interpretation that the two provisions should not be so read as to come into conflict with each other is borne in mind, the High Court or the Court of Sessions will be found to be invested by S. 498 with jurisdiction in the matter of granting or refusing bail as a Court of superior appellate or revisional jurisdiction. The powers of the High Court or the Court of Session given by S. 498, Cr. P. Code, are not controlled by the statutory limitation laid down in S. 497 of refusing to release an accused person on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with transportation for life. The powers in S. 498 are not fettered by any rules defining the limits within which they would be exercised as the powers under S. 497 are. Though the exercise of the powers under S. 498 are entirely left to the discretion of the High Court without any fetters being imposed on the exercise of that discretion the High Court would not act arbitrarily and its exercise of the discretion must be based on judicial grounds. Where it was found (1) that the offence was not of kind where there may be danger of repetition thereof while the applicants are on bail as would be the case on a charge involving personal violence ; (2) that the defence counsel would constantly need the help of the accused persons to explain Hindi accounts and intricate Hindi transactions; (3) that the trial would last for several months ; and (4) that the accused are willing to furnish substantial security, the accused are entitled to be let on bail. (*Wazir Hasan, J. C.*) BISHAMBHAR NATH TANDON *v.* EMPEROR. **10 O. & A.L.R. 503 : 11 O. L. J. 527 : 1 O. W. N. 281 : 25 Cr. L. J. 1132 : 81 I. C. 956 : A.I.R. 1924 Oudh 435.**

CR. P. CODE (V OF 1898), S. 497.

——S. 497—*Though High Court has full discretion regarding bail, it must follow general law save in extreme cases.*

Though a High Court is not limited within the bounds of S. 497 and has absolute discretion in the matter, yet, the legislature has placed the initial stage of dealing with crimes with Magistrates and having, in effect, enacted that persons accused of non-bailable offences shall be detained in custody, except when there are in the opinion of the Magistrate dealing with the case, no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court is bound to follow the general law as a rule, and not to depart from it, except under very special circumstances, especially so in the initial stages of a case. (*Duckworth, J.*) H. M. BOUDVILLE *v.* EMPEROR. **2 Rang. 546 : A. I. R. 1925 Rang. 129.**

——S. 497 (1) and (5)—*High Court can order re-arrest of any person out on bail—Men of importance charged with a serious offence—Probability of their taking advantage of their release on bail to abscond and fail to attend trial—It was held a proper case for re-arrest.*

High Court has ample jurisdiction to exercise discretion and order the re-arrest of any person out on bail under its own order if it feels that the circumstances warrant or demand such a course. The principles which govern the granting of bail, are not really doubtful. The Court is not called upon to conduct a preliminary trial of the case and consider the probability of the accused's guilt or innocence. It would be entirely exceeding its function, if it did that in any detail ; but it may incidentally have to look at the weight of the evidence against the accused, as a necessary part of what is its proper function, that is, to enquire whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial, or whether there is any real reason to suppose that he is likely to tamper with the witnesses, who would be called against him. Where two men of importance in their own walk of life were charged with a very serious offence and where it was more possible that they may take advantage of a release than that they may take their trial. *Held* : the accused should not be allowed to be on bail especially since a very short time was to elapse before their trial. (*Coutts Trotter, C.J. and Srinivasa Aiyangar, J.*) PUBLIC PROSECUTOR *v.* SANYASAYYA NAIDU. **22 L.W. 156 : 90 I.C. 665 : A. I. R. 1925 Mad. 1224.**

——Ss. 497 (3) and 439—*Bail—Non-bailable offence—Grant of bail by lower Court—Power of High Court to set it aside.*

Persons charged with non-bailable offences should not generally be let on bail, but if there are sufficient grounds to believe that the case against them shall fail or that for any special circumstances bail becomes necessary. If a person charged with murder is wrongly released on bail the High Court can annul the order after due notice to the accused. (*Stuart, J.*) EMPEROR *v.* MT. BASHIRAM. **L.R. 3 A. 190 (Cr.): A. I. R. 1923 All. 479 (1).**

[But see section as re-drafted.]

——S. 497 (5)—*Revision of order granting bail.*

A Court has ample jurisdiction to revise the order granting bail whenever change of circumstances may be proved before it. (*Coutts Trotter, C. J. and Srinivasa Aiyangar, J.*) THE PUBLIC PROSECUTOR *v.* SANYASAYYA NAIDU. **22 L. W. 156 : 90 I. C. 665 : 26 Cr. L. J. 1593 : A. I. R. 1925 Mad. 1224.**

——Ss. 497 (5) and 498—*High Court cannot interfere with order of Sessions Judge granting bail in*

CR. P. CODE (V OF 1898), S. 498.

case pending before Sub-Magistrate.

Under S. 497 (5) the powers of the High Court are confined to cases of persons released by the Trial Magistrate and under S. 498 the High Court can only release accused on bail and cannot order the arrest and commitment to custody of persons already released on bail by the Sessions Judge. Therefore, there is no jurisdiction in the High Court to entertain an application under S. 497 (5) or S. 498 against an order granting bail passed by a Sessions Judge in a case pending before a Sub-Magistrate. (*Kinkhede, A. J. C.*) LOCAL GOVERNMENT *v.* GULAM JILANI.
82 I. C. 755 : 25 Cr. L. J. 1363 : A. I. R. 1925 Nag 228.

——S. 498—*No jurisdiction exists after rejection of revision.*

S. 498 does not confer jurisdiction upon Court to grant bail to the applicant pending the result of an application to be made to the Privy Council for leave to appeal. (*Sanderson, C. J. and Richardson, J.*) TULSI TELINI *v.* EMPEROR. **50 Cal. 585 : 72 I. C. 362 : 24 Cr. L. J. 362 : A.I.R. 1924 Cal. 64.**

——S. 498—*Bail in view of intended appeal to Privy Council.*

Where no leave to appeal to Privy Council was yet granted, the case cannot be said to be under appeal so as to make possible the application of S. 498 of the Cr. P. Code. (*Kotwal, A. J. C.*) HANMANTRAO *v.* EMPEROR. **21 N. L. R. 161.**

——S. 498—*Bail—Amount deposited in Court—Sentence of fine— Appropriation of deposit.*

Where money had been deposited in Court as bail, the Magistrate is bound to return the amount on the appearance of the accused to the person who made the deposit. It has no jurisdiction to attach this money in order to realise out of it the fine imposed on the accused. 19 A. L. J. 887. Foll. (*Neave, A. J. C.*) RAGHUNANDAN *v.* EMPEROR. **11 O. L. J. 296 : A. I. R. 1924 Oudh 396.**

——S. 499—*Bail-bond is contract.*

A bail-bond is recognised by the Legislature as falling within the category of contracts. (*Raymond and Aston, A. J. Cs.*) ALLAHBACHAYO *v.* EMPEROR. **26 Cr. L. J. 193 : 83 I. C. 897 : 16 S. L. R. 195.**

——S. 499 (1) (*c*)—*Application for leave should be made to Judge who tried the case, but this is a mere matter of convenience.*

The question as to application for leave being made to the Judge who tried the case is a mere matter of convenience though it is desirable that such applications should be made to him. The right of appeal, if there is one, depends upon extraneous circumstances which have nothing to do with the guilt of the accused and the trying Judge is better qualified than any one else to decide whether those circumstances exist or not. (*Walmsley and Mukerji, JJ.*) T. C. S. MARTINDALE *v.* EMPEROR. **52 Cal. 347 : 40 C. L. J. 256 : 29 C. W. N. 447 : 84 I. C. 1041 : A. I. R. 1925 Cal. 14.**

——S. 503—*Application for commission being issued to Africa cannot be made.*

An application for commission being issued to Africa is clearly outside the authority of the Court under S. 503. (*Fawcett and Madgaonkar, JJ.*) EMPEROR *v.* ABDUL GANI. **49 Bom. 878 : 27 Bom. L. R. 1373 : A. I. R. 1926 Bom. 71.**

——S. 503—*Commission—Additional District Magistrate can issue a commission.*

Additional District Magistrate authorised to exercise all the powers of a District Magistrate as contained in Schedule III, Part V (18) is empowered to issue a commission under S. 503. This power entitles him to issue a commission for the examination of a witness within his own jurisdiction. (*Broadway, J.*) BAHADUR ALI *v.* EMPEROR. **73 I. C. 510 : 24 Cr. L. J. 622 : A. I. R. 1923 Lah. 158.**

CR. P. CODE (V OF 1898), S. 512.

——S. 503—*Dt. Magistrate can issue commission to save unreasonable expense.*

S. 503 empowers a District Magistrate to issue a commission for the examination of a witness whose evidence is necessary if his attendance cannot be obtained without unreasonable expense. It may be that the issuing of the commission would not result in a saving of time. (*Martineau, J.*) PARMA NAND *v* EMPEROR. **4 L. L. J. 538 : A. I. R. 1923 Lah. 73**

——S. 503—*Power to examine witnesses on commission.*

Reading S. 10 of the Malabar Ordinance of 1922 with S. 503 of the Criminal Procedure Code, a special Judge under the ordinance has no power to issue a commission to examine witnesses. (*Ayling and Odgers, JJ.*) AYARVALLI POKKER, *In re.* **(1923) M. W. N. 758 : 24 Cr. L. J. 840 : 74 I. C. 952 : 18 L. W. 899 : A. I. R. 1924 Mad. 243 : 45 M. L. J. 305.**

——S. 509—*Deposition of medical witness can be given in evidence only when accused had opportunity to cross-examine him.*

S. 509 of the Code permits the deposition of a medical witness taken in the Commitment Court to be given in evidence at the Sessions trial, but that is subject to the condition that the accused should have been given full opportunity to cross-examine the witness and the Court may, if it thinks fit, summon and examine such a witness, as to the subject-matter of his deposition. (*Jwala Prasad, J.*) SHIVADHIN SINGH *v.* EMPEROR. **3 Pat. L. T. 32 : A. I. R. 1923 Pat. 116.**

——S. 510—*Report of chemical examiner cannot be admitted in appeal for the first time especially when it is not formally tendered in evidence.*

Under S. 510 any document purporting to be a report under the hand of a chemical examiner upon any matter duly submitted to him for examination and report, may be used as evidence in any enquiry, trial or other proceedings. This however does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof but at the same time it must be tendered as evidence and used as such so that the accused may have a chance of questioning it. (*Sulaiman, J.*) WALI MUHAMMAD *v.* EMPEROR. **21 A. L. J. 869 : L. R. 5 A. 9 (Cr.) : A. I. R. 1924 All. 193.**

——S. 510—*Certificate of Professor of Anatomy is not admissible.*

The certificate of the Professor of Anatomy is not *per se* admissible in evidence apart from special authority like S. 510 of the Code of Criminal Procedure. (*Marten and Crump, JJ.*) EMPEROR *v.* AHILA MANAJI. **47 Bom. 74 : 24 Bom. L. R. 803 : A. I. R. 1923 Bom. 183.**

——Ss. 512 and 337—*Tender of pardon does not prevent prosecution of approver as accused for giving false evidence in proceedings under S. 512.*

In an enquiry into an offence of murder a pardon was tendered to the accused and evidence was recorded under S. 512 ; the validity of the tender of pardon being questioned, *held*, the offence of murder being under enquiry, in order to secure evidence the accused was made approver and a pardon was tendered to him which was valid. But the proceeding under S. 512 is only ancillary to that enquiry, and a tender of pardon does not prevent the prosecution being started against the approver as accused. In such a case the approver may plead pardon as defence. On

CR. P. CODE (V OF 1898), S. 512.

the ground that the approver has failed to perform the conditions of the pardon by giving false evidence under S. 512, the prosecution may proceed against him. A Magistrate has power to discharge an approver from custody, if the prosecution do not proceed further in the case against the principal offender. (*Pratt and Fawcett, JJ.*) DAGADU BAPU, *In re.*
46 Bom. 120 : 23 Bom. L. R. 839 : 63 I. C. 156 : 22 Cr. L. J. 620 : A. I. R. 1922 Bom. 177 (1).

——— **Ss. 512 and 337 (3)**—*Prosecution of approver—Discharge of approver.*

The principal accused in a murder case absconded and his accomplice was granted pardon and examined as witness under S. 512 There was no chance of the arrest of the principal offender, and therefore the prosecution desired to discharge the approver. The trial Magistrate considered that the pardon was invalid as it was not tendered for an inquiry but to secure evidence under S. 512 : *held*, that the pardon was granted to secure evidence for an inquiry in the murder case, that the prosecution can proceed against the approver on the ground that he gave false evidence under S. 512, and that if the prosecution did not desire to proceed further with the case against the principal offender, the Magistrate can discharge the approver from custody. (*Pratt and Fawcett, JJ.*) DAGADU BAPU, *In re.*
23 Bom. L. R. 839 : 22 Cr. L. J. 620 : 63 I. C. 156 : 46 Bom. 120 : A. I. R. 1922 Bom. 177 (1).

——— **S. 512**—*A qualified doctor's medical certificate indicating accused's inability to attend the Court should be accepted unless there is reason to believe it to be forged or not genuine.*

Generally speaking a certificate signed by a qualified doctor is to be considered sufficient evidence of accused's *bona fide* inability to attend the Court. Of course if there is reason for the Magistrate before whom the certificate is produced to believe that it is forged or not genuine for any other reason, the certificate loses its credit. (*Moti Sagar, J.*) AHMED DIN *v.* EMPEROR. **25 Cr. L. J. 638 : 81 I. C. 126 : A. I. R. 1925 Lah. 101.**

——— **S. 512**—*Essentials—Proof that accused absconded only necessary—Finding to that effect not necessary.*

To satisfy the requirements of S. 512, Cr. P. Code, all that is necessary is proof that the accused absconded and not a finding by the Court to that effect. (*Martineau and Jai Lal, JJ.*) DAYA RAM *v.* CROWN.
6 Lah. 489 : 26 Punj. L R. 845.

——— **S. 512**—*Incapable of giving evidence—Meaning of—Inability to remember details—Procedure.*

A witness who had been examined under S. 512 appeared in Court at the trial but could not remember the details of the occurrence. *Held*, he could not be considered as incapable of giving evidence within the meaning of the section. What the Court should do in such a case is to refresh the memory of the witness by reading out his deposition and then ask him if he remembered the details of the occurrence. (*Scott-Smith, J.*) BHIKA *v.* EMPEROR. **25 Cr. L. J. 95: 76 I. C. 31 : A. I. R. 1924 Lah. 605.**

——— **S. 514**—*Changes.*

(1) Where the person who has given security is convicted of an offence, and proceedings are taken under this section, a certified copy of the convicting judgment may be used as evidence:

(2) A new surety may be called for under S. 514-A even in cases where the surety already given becomes insolvent or dies.

——— **S. 514**—*Security for good behaviour—Subsequent conviction—No order forfeiting security—Subsequent action.*

CR. P. CODE (V OF 1898), S. 514.

If a Criminal Court knowing that a person charged before it is under security to be of good behaviour, in sentencing him takes no steps to confiscate the security, it is not competent to that court or any other court in a subsequent and separate proceeding to take such steps. (*Moti Sagar, J.*) MUNSHI *v.* EMPEROR.
25 Cr. L. J. 4 : 75 I.C. 692 : A. I. R. 1924 Lah 680 (2)

——— **S. 514**—*Forfeiture of bond—Liability—Extent of.*

On a person being arrested under S. 55, Cr.P. Code the usual security bonds were executed for his appearance. Some time after the person was suspected of having committed some other offence and the surety was directed to produce him. On failure to do so, his bond was forfeited. *Held*, the bond was only with respect to the offence for which the person was arrested under S. 55 and not any subsequent offence committed and as such the order of forfeiture was wrong. (*Martineau, J.*) MANA *v.* EMPEROR.
25 Cr. L. J. 131 : 76 I. C. 227 : A. I. R. 1924 Lah. 622.

——— **S. 514**—*Bond for good behaviour—Conviction under S. 323, I. P. C.—Forfeiture—Recovery of amount.*

After a conviction under S. 323, I. P. C., a bond for good behaviour can be forfeited on which the amount can be recovered from the principal or surety but not twice over, *i. e.*, from both. (*Moti Sagar, J.*) EMPEROR *v.* ABDUL AZIZ. **4 Lah. 462 : A. I. R. 1924 Lah. 262.**

——— **S 514**—*Accused discharged—S. 514 does not apply.*

No action shall be taken under S 514 when the Court itself, by discharging the accused persons held that their presence on the date of hearing was unnecessary. (*Dalal, J. C. and Neave, A. J. C.*) EMPEROR *v.* GODHAN. **84 I. C. 944 : 26 Cr. L.J. 400 : A. I. R. 1925 Oudh. 314.**

——— **S. 514**—*Failure to produce accused due to his being arrested in another case—Forfeiture is improper.*

Bail-bond should not be forfeited for failure of the surety to produce the accused person, where the failure to produce is due to an act of law, *e. g.* his being arrested. 16 C. W. N. 550 : 37 Mad. 156 Ref. (*Bucknill and Ross, JJ.*) ALAUDDIN *v.* EMPEROR.
4 Pat. 259 : 1925 P. H. C. C. 46 : 6 P. L. T. 397 : 86 I.C. 657 : 26 Cr. L. J. 833 : 3 Pat. L. R. 123 (Cr.) : A. I. R. 1925 Pat. 389 (2).

——— **S. 514**—*Forfeiture of security under S. 107—Clear proof necessary.*

S. 514 lays down that it must be proved to the satisfaction of the Court that the bond has been forfeited and the Court shall record the grounds of such proof, and it is after such grounds have been recorded that the person bound by the bond may be called on to show cause why the amount should not be paid. Where there has been a failure to carry out the express provisions of the law and the Deputy Magistrate acted without jurisdiction in failing to record proof before he issued notice to show cause on this ground the petitioners are entitled to have proceedings set aside. (*Ross, J.*) KISHAN NARAIN SINGH *v.* EMPEROR. **3 Pat. L. T. 381 · 67 I. C 830 : 23 Cr. L. J. 478 : A. I. R. 1922 Pat. 242.**

——— **S. 514**—*Bond to appear before a specified Court does not cover failure to attend Court to which the case is transferred, unless specially provided therein.*

Where accused entered into a bond to appear before Dt. Magistrate and before Sessions Court if the case would go to Sessions.

Held : that his failure to attend the Court of Se-

CR. P. CODE (V OF 1898), S. 515.

cond Additional Magistrate to whom that case was transferred, did not justify forfeiture of the bond nor was the Dt. Magistrate competent to order forfeiture. 30 C. 107, Foll. (*Lentaigne, J.*) MAUNG NGE *v.* EMPEROR. **2 Rang. 581 : 84 I. C. 933 : 26 Cr. L. J. 389 : A. I. R 1925 Rang. 153.**

——S. 515—*All orders under S. 514 are covered by S. 515.*

The language of S. 515 is wide enough to cover an order refusing to forfeit a bond as well as an order forfeiting it. (*Daniels, A. J. C.*) SARJU *v.* THAKURAIN JAI RAJKUMAR **77 I. C. 733 : 25 Cr. L. J. 445 : A. I. R. 1925 Oudh 51.**

——S. 517—*Changes.*

An order for disposal shall not, except in the case under sub-cl. (4), be carried for one month in any case, and not as formerly till the period allowed for appeal has passed.

——S. 517—*Prosecution for embezzlement—Accused paying creditors with the money—Money paid to one such creditor obtained by police—Money can be returned to complainant.*

When a person was being prosecuted for embezzlement it transpired that he had been utilising the money to pay of his creditors. The police traced one of these payments and the creditor concerned handed over the amount to the police. *Held*, that the Court could order the payment of the money to the complainant under S. 517. (*Sulaiman and Daniels, JJ.*) BANKEY LAL KAPOOR *v.* ALLAHABAD BANK, LTD. **23 A. L. J. 889 : 26 Cr L. J. 1232 : 88 I. C 848 (1) : A. I. R. 1926 All. 47.**

——S. 517—*Theft—Acquittal of accused—Property given to accused—Order reversed by Dt. Magistrate—Legality of.*

The Trying Magistrate acquitted the accused who was charged with theft of a drum and directed the drum to be restored to the accused. The District Magistrate set aside the order and directed the drum to be delivered to complainant. *Held*, that the District Magistrate had no jurisdiction to pass the order in question. 42 B. 664, Foll. (*Daniels, J.*) DEBI RAM *v.* EMPEROR. **22 A.L.J. 505: L.R. 5 A. 91 (Cr.) : 46 All. 623 : 81 I. C. 992 : 25 Cr. L. J. 1168 : A. I. R. 1924 All. 675 (2).**

——S. 517—*Conviction for importing opium—currency notes on the accused's person—Confiscation.*

The essential of S. 517 is that property or document must be proved to have been used in the commission of the offence. Where currency notes were found on the person of a man convicted for importing opium into British India in contravention of the Opium Act, but where it was held that no irresistible inference was possible that they represented payment of the imported opium. *Held*, that they should not be confiscated. (*Mears, C.J.*) GOVIND RAM, *In re.* **A. I. R. 1924 All. 618.**

——S. 517—*Restoration order*—Bona fide *purchaser—Remedy.*

Where property was stolen a long time back and a part of it comes into the hands of a merchant at a great distance, who has honestly aided in the detection of the offence, a criminal Court ought to hesitate a long time before making an order of restitution, even if the goods were still *in esse*. When a question of *bona fides* and of title by purchase or otherwise clearly arises, the duty of the Criminal Court is to leave the complainant to his remedy in the Civil Court. The jurisdiction to pass an order under S. 517, Cr. P. Code, is confined to an order at the conclusion of the trial for the disposal of the property which is before it. Such an order can only be made in the presence of the purchaser, who has a right to be heard. (*Walsh, J.*) NAINA MAL *v.* EMPEROR. **74 I. C. 708 : 24 Cr. L. J. 804 (All.) : A. I. R. 1924 All. 189.**

CR. P. CODE (V OF 1898), S. 517.

——S. 517—*Property forming the subject of dispute—Confiscation of—Power of Court—Conflicting claims.*

Before the amendment of S. 517 of the Criminal Procedure Code in 1923 a Criminal Court had no power to order confiscation of properties forming the subject of the offence or in respect of which an offence appeared to have been committed. Where rival claims are put forward to the property by different parties, the proper procedure would be to keep the property in court pending the decision of a Civil Court as regards the title to it. (*Sanderson, C. J. and Chotzner, J.*) RAM KHALAWAN AHIR *v.* TULSI TELINI. **28 C. W. N. 1094 : 84 I. C. 444 : 26 Cr. L. J. 300 : A I. R. 1924 Cal. 1040.**

——S. 517—*Disposal of property in the discretion of the Magistrate.*

After having hypothecated certain moveable property to the complainant as security for a loan, K removed it from his possession and sold it to the petitioner. K was convicted of theft. The petitioner claimed it as purchaser in good faith. The Magistrate however directed the property to be returned to the complainant. *Held*, that the Magistrate was right in turning the property to the complainant. As a general rule the Magistrate acting under S. 517, Cr. P. Code, should pass orders according to his discretion without making further enquiry, and the above case is not one of those exceptional cases in which further enquiry is necessary. (*Newbould and Suhrawardy, JJ.*) GOUR MOHAN *v.* BANSIDHAR. **71 I. C. 702 : 24 Cr. L. J. 238 : A. I. R. 1923 Cal. 598.**

——Ss. 517 and 520—*Order for delivery of property not proved to have been taken at the dacoity or to belong to the Complainant—Procedure.*

Where property produced before a criminal court is not proved to have been taken at an alleged dacoity or to belong to the complainant, the court ought to deliver it to the person who produced it leaving the complainant to his remedy in the civil court. (*Broadway, J.*) SULAIMAN *v.* EMPEROR. **6 Lah. L.J. 213 : A. I. R. 1924 Lah. 588.**

——S. 517—*Disposal of property—Order regarding—When can be made.*

An order for the disposal of property which is the subject-matter of the offence can only be made upon the conclusion of an inquiry or trial, and not on the application of a person subsequently made after the trial is over. (*Moti Sagar, J.*) ABDUL *v.* GULAM MAHAMMAD. **4 Lah. 460 : 76 I. C. 20 : 25 Cr. L. J. 84 : A. I. R. 1924 Lah. 261.**

——Ss. 517 and 520—*Powers under—No limitation for application under S. 517 exists.*

No period of limitation is prescribed for an application for restoration of property under S. 517 ; it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he is charged. The words "and make any further orders that may be just," in S. 520 obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under S. 517. (*Moti Sagar, J.*) KANSHI RAM *v.* CROWN. **3 P.W.R. (Cr.) 1923 : 73 I. C. 937 : 4 Lah. 49 : A. I. R. 1924 Lah. 75.**

——Ss. 517 and 520—*Sub-Divisional Magistrate in appeal can pass orders in disposal of the property.*

The District Magistrate alone can pass orders on an

CR. P. CODE (V OF 1898), S. 517.

application under S. 520, when such an application is made to itself. But where on hearing an appeal against a conviction, the Sub-Divisional Magistrate is asked to set aside an order under S. 517, he can, treating it as part of the proceedings in the appeal itself, make an order under S. 520, for the disposal of the property concerned in the case. When a District Magistrate has directed a case or a certain class of cases to be heard by a Sub-Divisional Magistrate, and under S. 407 he hears the appeal, his Court comes within the words "Court of Appeal" as used in S. 520 for that particular case or class of cases. Moreover S. 423 (*d*) authorises appellate Magistrates to pass consequential orders, and orders under S. 520 are usually consequential orders based on the findings in the appeal. When an appeal is confined entirely to a question of disposal of property, the District Magistrate should hear the petition. Ordinarily in such cases it is desirable that notice should be given, especially if the order is not passed on the day the appeal is disposed of; but there is no rule of law that requires that such notice is absolutely necessary. The words 'and make any further orders that may be just' are quite wide enough to empower the Court to direct the return of property. (*Krishnan, J.*) ARUNACHALA THEVAN *v.* VELLACHAMI THEVAN.
46 Mad. 162 : 17 L. W. 462 : 32 M. L. T. 104 (H. C.) : 71 I. C. 514 : 24 Cr. L. J. 162 : A. I. R. 1923 Mad. 324 : 44 M. L. J. 56.

——S. 517—*Order under--Appeal—Interpretation of S. 520—Whether a Sub-Divisional Magistrate to whom powers are delegated under S. 407 (2) is a Court of Appeal.*

The words, "Court of Appeal" in Cr. P. Code, S.520 mean according to Bombay High Court, the Court to which an appeal lies in the particular case, whereas the Madras High Court holds that the words, "Courts to which appeals ordinarily lie," cannot cover the case of a Sub-Divisional Magistrate whose power to hear appeals depend upon a delegation by the District Magistrate under S. 407 (2). Criminal Revision Cases No. 525 of 1905 and 84 of 1908, Foll.; 20 Mad. 448, not followed. (*Ayling and Ramesam, JJ.*) JOGI VENKIAH *v.* STATION HOUSE OFFICER, NARASAPUR
15 L.W. 534 : 1922 M. W. N. 191 : 30 M. L. T. 251 : 67 I. C. 339 : 23 Cr. L. J. 387 : A.I.R. 1922 Mad. 78 : 42 M. L. J. 401.

——S. 517—*Force need not be an ingredient of offence.*

S. 517, Cr. P. Code, applies to movable property only and does not extend to immoveable property to which the section applicable is S. 522. 18 C. W. N. 1116; 36 Cal. 44, Foll. (*Oldfield, J.*) ADEPU REDDI *v.* RAMAYYA. **22 Cr. L. J. 110 : 59 I. C. 414 : 12 L. W. 227.**

——S. 517—*When order can be passed–Order* ultra vires—*Appellate court—Power of interference.*

An order under S. 517 can only be made after the judgment in the case and within a reasonable time thereafter. It is not confined to orders in favour of the person from whose possession the property was recovered. (*Harrison, J.*) KISHEN CHAND *v.* NANAK CHAND. **89 I. C. 973 : 26 Cr. L. J. 1453.**

——S. 517—*Applicability—Property out of the Court's custody is not within section.*

S. 517 of the Cr. P. Code is not applicable to a case where the property has already passed out of the custody of the Court. S. 517 does not contemplate double restoration. (*Sultan Ahmad, J.*) JHUMAK SINGH *v.* TOTA MAHTO. **3 Pat. L. T. 228 : 65 I. C. 494 : 23 Cr. L. J. 110 : 1921 P. H. C. C. 128 : A. I. R. 1923 Pat. 84.**

CR. P. CODE (V OF 1898), S. 520.

—— S. 517—*Order under, may be passed by the trial, appellate or revisional Court after the principal judgment.*

S. 517 does not limit the power of the trying Magistrate or Judge, who has ommitted to pass an order for disposal of exhibits as part of his judgment convicting the accused, so as to deprive him of all power to subsequently pass orders for disposal of the property; similarly it does not limit the powers of a Court of Appeal or revision. (*Lentaigne, J.*) MA WET *v.* MG PO TAIK. **3 Bur. L. J. 302 : 85 I. C. 358 : A. I. R. 1925 Rang. 183.**

——S. 517—*Applicability—Proceedings under S. 512, is not an inquiry or trial.*

A proceeding under S. 512 (1) Cr. P. Code, is neither an enquiry nor a trial within the meaning of S. 517, Cr. P. Code. It is not the function of a criminal court to decide nice questions involving principles of civil law, if there is a dispute between rival parties claiming return of property. In such cases, the normal procedure is to return it to the person from whom it was seized and leave the dissatisfied party to his remedy in a civil court. (*May Oung, J.*) P. R. V. N. VELLIAPPA CHETTY *v.* JOSEPH. **2 Bur. L. J. 85 : A. I. R. 1923 Rang 248.**

—— S. 517—*Gold entrusted to goldsmith for making jewel-Pawn of jewel when made—Restoration of property can be ordered.*

A goldsmith was entrusted with a certain quantity of gold and diamonds for making a comb for the complainant. When the article was nearly completed, the goldsmith pledged it for Rs. 800 with a diamond merchant who had no knowledge that the property was the property of the complainant. The court ordered the jewel to be returned to the complainant. *Held*, that the order was justifiable. (*Macgregor J.*) CHAGANLAL *v.* MAUNG PO KAUK. **2 Bur. L. J. 152.**

——S. 517—*Coins found with thief—Disposal of.*

Cash is not, strictly speaking, property within the meaning of S. 517 except in so far as it is capable of being possessed and identified *in specie*. If it is certain that the actual coins found on the thieves or receiver of stolen property are the actual coins which have been the subject of theft, then it is permissible to treat such cash as stolen property. But even in such a case, it is safer to inflict a fine and to applythe coins found on the person of the accused towards the fine. (*Kennedy, J. C. and De Souza, A. J. C.*) PURSU *v.* EMPEROR. **26 Cr. L. J. 1315 : 89 I. C. 259 : 18 S. L. R. 218.**

—— S. 518—*Order under has only a temporary operation—Penal Code, S.* 188.

An order under S. 518 of the Cr. P. Code was passed in 1873 and the accused was convicted under S. 188, Penal Code for disobeying the same in 1920; *held*, that the order under S. 518, Cr. P. Code could not enure for all time but had a temporary operation only and that the conviction could not be sustained. (*Walsh, J.*) RAM DAS *v.* EMPEROR.
22 Cr. L. J. 2 : 59 I. C. 34 : 18 A. L. J. 857.

——S. 520—*Change.*

[(1) For "attended by criminal force" is added the words "or show of force or by criminal intimidation".

(2) The order for restoration should be made at the time of conviction or within 1 month thereafter.

(3) A court of appeal, confirmation, reference, or revision can now pass an order under this section.]

——S. 520—*Appellate court—Power to order restoration.*

An appellate court under S. 520, Cr. P. Code has power to modify, alter or annul an order made under

S. 517 or make any further orders that may be reasonable or proper. If there are complicated questions of title involved, the best course is to leave such questions to the Civil Court. (*Sulaiman, J.*) ONKAR *v.* EMPEROR. **21 A. L.J. 877 : L. R. 5 A. (Cr). 14 : A. I. R. 1924 All. 213.**

——S. 520—*District and Sessions Judge—If a Court of Appeal, confirmation, reference or revision—Order of Second Class Magistrate—Appeal to Sub-Divisional Magistrate—Order if can be varied by Sessions Judge.*

In a case of theft, a Second Class Magistrate convicted the accused and directed the subjectmatter to be handed over to the complainant. On appeal the Subdivisional Magistrate acquitted the accused but declined to interfere with the order directing return of the property. The Sessions Judge on appeal directed the subject-matter of the offence to be handed over to the accused. *Held*, the order of the Sessions Judge was unauthorised by S. 520 or any other section of the Cr. P. Code as he was not a court of appeal, confirmation, reference or revision with respect to the orders of the Second Class Magistrate or Sub-divisional Magistrate. (*Devadoss, J.*) SOMU PILLAI *v.* KRISHNA PILLAI. **20 L. W. 521 : (1924) M. W. N. 806 : 25 Cr. L. J. 1247 : A. I. R. 1924 Mad. 899 : 47 M. L. J. 481.**

——Ss. 520 and 369—*Order for disposal of property regarding which offence has been committed—Order by Appellate Court sometime after—Judgment—Mere irregularity.*

A conviction for theft of two bulls was set aside on appeal but in the judgment of the appellate magistrate nothing was said about the possession of the bulls, which had been ordered to be handed over to the complainant by the court below. Sometime after the disposal of the appeal, on application by the accused the appellate magistrate the successor of the magistrate who had disposed of the appeal ordered that the bulls should be restored to the accused. *Held*, in revision by the High Court that there was no question of jurisdiction justifying interference with the order of the appellate magistrate. 19 W. R. 3 : 35 B. 253 : 34 M. 94: 38 I.C. 309, Ref. (*Odgers, J.*) SUBBA NAIDU, *In re.* **15 L W. 664 : (1922) M. W. N. 494 : 31 M. L. T. 367 (H. C.) : 71 I. C. 511 : 24 Cr.L.J. 159: A. I. R. 1922 Mad. 329 : 43 M. L. J. 87.**

——Ss. 520, 517 to 519—*No appeal from conviction—District Magistrate has power to interfere with an order passed by a Subordinate Court under S.* 517.

Where no appeal has been filed from a conviction by a subordinate Court, District Magistrate has got jurisdiction to interfere as a Court of revision, under S. 520, with an order passed by the trial Court under S. 517. (*Robinson, C. J. and May Oung, J.*) EMPEROR *v.* NGO PO CHIT. **1 Rang. 199 : 2 Bur. L. J. 241 : 74 I. C. 1050 : 24 Cr. L. J. 858 : A. I. R. 1923 Rang. 227.**

——S. 522—*Trespass—Conviction— Finding as to cultivation of land by accused—Order for delivery of possession—Legality of.*

Where the accused had been legally ejected but subsequently remained in possession of the land asserting the bare defence that he would not give up actual possession, his plea is a plea of guilty to a charge of trespass. The accused was a tenant under a Zamindar. On a complaint by the agent of the Zamindar that the accused had resisted him in ploughing a field from which the accused has been ejected some time before, the Court found that the accused had, previous to that occasion, cultivated the land and sentenced the accused under S. 447, I. P. C. *Held*, that there

was no finding of criminal trespass on the occasion in respect of which the complaint was made and no order for possession in favour of the complainant could be made under S. 522, Cr. P. Code. (*Boys, J.*) GOVIND RAM *v.* NAMBAT. **L. R. 5 A. 147 (Cr.) : 83 I.C. 719 : 26 Cr. L. J. 159 : A. I. R. 1924 All. 762.**

——S. 522—*Power of appellate court to order restoration—No order by Trial Court—Powers of High Court.*

Where the Trial Court did not make an order to restore the property under S. 522, Cr. P. Code, the Court of appeal cannot direct restoration. But under the Code as amended, the High Court acting in reference or revision has power to pass the necessary orders. (*Sulaiman, J.*) LACHMAN *v.* EMPEROR. **21 A. L. J. 871 : L. R. 5 A. 11 (Cr.) : 46 All. 92 : 83 I. C. 910 : 26 Cr. L. J. 206 : A. I. R. 1924 All. 212.**

——S. 522—*Court of appeal or revision cannot make an order under.*

A Court of appeal or revision cannot compel the trial Court to pass an order under S. 522 where the latter in the exercise of its discretion, has declined to do so. (39 Cal. 1050 and 14 P. R. (Cr.) 1919, Ref.) (*Daniels, J.*) AZIZ AHMAD *v*, BUDDU KHAN. **45 A. 553 : 21 A. L. J. 459 : L. R. 4 A. Cr. 86 : 73 I. C. 773 : A. I. R. 1924 All. 183 (1).**

——S. 522—*Conviction under S.* 447, *I. P. C.—No Criminal force used—Applicability.*

A complaint was filed against the applicants under Ss. 447 and 323 and they were convicted under S. 447 and fined R. 5 each. But the Magistrate disbelieved the story of any beating, and held that only an altercation had taken place. There was, therefore, no conviction under S. 323. Later on the complainant filed an application before the Court under S. 522. The Magistrate allowed this application and passed orders directing delivery of possession of the fields to the complainant. *Held*, that an essential ingredient of S. 522 is that the offence of which the person concerned is convicted must have been attended by criminal force, or, at the very least, by the show of criminal force and therefore S. 522 did not apply to the case, 25 A. 341, Ref. (*Kanhaiya Lal, J.*) CHUNNI LAL *v.* BALDEO. **21 A. L. J. 593 : L. R. 4 A. Cr. 129 : 75 I. C. 730 : 25 Cr. L. J. 42 : A. I. R. 1924 All. 84.**

——S. 522—*Criminal force—Penal Code, Ss.* 349, 350.

Where it was proved that the complainant who had halted in front of the ploughs was obliged to run away by reason of the accused's rushing at him with sticks and lathis and using threats towards him, *held*, that was a resort to criminal force as defined in Ss.349 and 350 of the Indian Penal Code. Where the complainant came up while the acts of criminal trespass were still in progress and he had not already been effectively dispossessed, and that only took place when the complainant was actually driven off his lands by the accused rushing towards him with sticks and lathis and using threats. *Held*, the possession was not obtained peacefully. (*Lindsay, J.*) ASHIQ HUSAIN *v.* EMPEROR. **45 All. 25 : 74 I. C. 1049 : 24 Cr. L. J. 857 : A. I. R. 1923 All. 333.**

——S. 522—*Criminal trespass in the absence of complainant—Order for restoration of possession to complainant—Validity.*

An order to restore possession of immoveable property under S. 522, Cr. P. Code, can be made only where dispossession was by the use of criminal force, and cannot be made in a case where the trespass was committed in the absence of the complainant. 16 P.R. 1919 (C.), Foll. (*Abdul Raoof, J.*) MANGI RAM *v.* EMPEROR. **26 Punj. L. R. 500.**

CR. P. CODE (V OF 1898), S. 522.

——S. 522—*Penal Code, S. 447—Conviction set aside—Order under S. 522 must also be set aside.*

Where a conviction is set aside the order under S. 522 resulting therefrom must also be set aside. Once it has been held that no offence has been committed the consequences arising from the commission of the offence must automatically cease to be. The irregularity in first dealing with order under S. 522, Cr. P. Code, before taking up the appeal from conviction under S. 447, Penal Code, which ultimately results in acquittal is only a technical irregularity. 5 P. R. 1895, Foll. (*Harrison, J.*) LAL CHAND *v.* DASONDHI. **72 I. C. 957 : 24 Cr. L. J. 493 : A. I. R. 1923 Lah. 15.**

——S. 522—*Order under, binds only parties and their representatives.*

S. 522 of the Cr. P. Code. can only be binding between the parties to the order and can have no finality in favour of one who is not a party and does not claim under a party. (*Ramesam and Venkatasubba Rao, JJ.*) P. ADINARAYANA *v* N. SURAMMA. **A.I.R. 1925 Mad. 799 : 86 I. C. 744 : 48 M. L. J. 372.**

——S. 522—*Unlawful possession—Order restoring possession is proper—Criminal force.*

Taking advantage of temporary absence of the owner from the house, the wife, who had deserted him along with some others broke open the outer lock of the house and entered into unlawful possession of the house and when the husband returned he was driven out by force. *Held*, an order restoring possession under S. 522, Cr. P. Code, is a very proper order to pass. It is a question whether an order under S. 522 could be passed when dispossession was not caused by the use of criminal force to any person in possession of the property. (*Devadoss, J.*) MARUTHAYEE *v.* APPAVU PILLAI. **31 M. L. T. (H. C.) 888 : 72 I. C. 892 : 24 Cr. L. J. 476 : A. I. R. 1923 Mad. 237 (2).**

——S. 522—*No use of Criminal force—No jurisdiction to act.*

When use of Criminal force is wanting, Criminal Courts have no jurisdiction to act under S. 522. If possession has been given, it is the duty of the Court to restore the parties to the position in which they were before possession was wrongly given. (*Kumaraswami Sastri, J.*) RAJATHAMMAL *v.* RAJAMANICKAM PILLAI. **15 L. W. 533 : 68 I. C. 38 : (1922) M. W. N. 356 : 31 M. L. T. (H. C.) 20 : 23 Cr. L. J. 502 : A. I. R. 1922 Mad. 188 (1).**

——S. 522—*Applicability—Use of force need not be an ingredient of offence.*

To make S. 522 applicable to moveable property, force need not be an ingredient of the offence of which the accused is convicted provided the use of force appears from the evidence. (*Oldfield, J.*) ADEPU *v.* RAMAYYA. **12 L. W. 227 : 59 I. C. 414 : 22 Cr. L. J. 110.**

——S. 522—*Accused acquitted of trespass—Order under section cannot be passed.*

A Magistrate, after acquitting an accused person of trespass under S. 447, I P. C. cannot proceed to pass an order under S. 522, Cr. P. Code, and put the complainant in possession of the land in dispute, S. 522, Cr.P. Code, gives jurisdiction to the court only when a person is convicted of an offence attended by criminal force. (*Dalal, A. J. C.*) EMPEROR *v.* ALI BAHADUR. **66 I. C. 324 : 24 O. C. 352 : 23 Cr. L. J. 260 : A. I. R. 1922 Oudh 144.**

——S. 522—*House taken possession of by criminal trespass by accused threatening to use force—S. 522 applies.*

Where the accused succeeded in taking possession of the house by means of criminal trespass threatening to use force to the complainant and his men. *Held*, that their act clearly came under S. 522. (*Jwala Prasad, J.*) RAMESHWAR SINGH *v.* EMPEROR. **4 Pat. 438 : A. I. R. 1925 Pat. 689.**

CR. P. CODE (V OF 1898), S. 526.

——S. 522—*Nature of order under.*

An order under S. 522 is passed not against any person but in favour of the person dispossessed if there are circumstances justifying the passing of such an order. (*Das, J.*) NUR MOHAMMAD KHAN *v.* MUHAMMADALI MIAN. **62 I.C. 591 : 22 Cr. L. J. 575 (P.)**

——S. 522—*Provisions are not applicable to house trespass.*

In order that the provisions of S. 522 of the Code of Criminal Procedure should be applicable to a case, dispossession must be effected by force against a person and not against the property. (*Jwala Prasad, J.*) BALRAM SAHU *v.* CHAMRU SAHU. **61 I. C. 57 : 22 Cr. L. J 329 · 2 Pat. L. T. 120.**

——S. 522 (3)—*No time limit exists for order under S. 522 to be passed by Court of appeal, revision etc.*

An order under the section may be passed by the Courts of appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. Thus, where a Magistrate passes an order under S. 522 beyond the prescribed one month, though the order by the Magistrate is illegal, yet it is competent to the High Court as Court of Revision to order the restoration of possession to the person dispossessed. (*Jwala Prasad, J.*) RAMESHWAR SINGH *v.* EMPEROR. **4 Pat. 438 : A. I. R. 1925 Pat 689.**

——S. 523—*Private discussion about the case is ground for transfer.*

Where a Sessions Judge to whose Court criminal case had been committed admitted having discussed the case at the club with one or two other officers, this is a sufficient ground for transfer of the case. Such a discussion is highly improper (*Lindsay, J.*) MAHOMED DARAZ KHAN *v.* EMPEROR. **65 I. C. 558 : 23 Cr. L. J. 126 : 19 A. L. J 946.**

——S. 523—*Order passed on police papers alone is not wrong.*

An order passed by a Magistrate on the police papers alone and not on any enquiry made by him is not necessarily wrong. 9 B. 131 Ref. (*Broadway, J.*) CHUNI LAL *v.* ISHAR DAS. **4 L. 38 : 73 I. C. 702 : 24 Cr. L. J. 670 : A. I. R. 1924 Lah. 76.**

——Ss. 523 and 524—*Magistrate to whom report is made can dispose of matter—Orders of First Class Magistrate are necessary only when S. 524 applies.*

Under S. 523 it is the business of the Magistrate himself to whom the report is made to dispose of the matter in the first instance, and it is only when S. 524 applies that the orders of the Sub-Divisional Magistrate or specially empowered First Class Magistrate intervene. (*Kenneay, J. C.*) YARU *v.* EMPEROR. **26 Cr. L. J. 1048 : 87 I. C. 968 : A. I. R. 1925 Sind 316.**

——S. 523—*Possessor of property is presumed to be owner unless contrary is shown.*

There is always a presumption that a person actually in possession of the property is, unless the contrary is shown, the owner thereof. (*Kennedy, J. C.*) YARU *v.* EMPEROR. **26 Cr. L. J. 1048 · 87 I. C. 968 : A. I. R. 1925 Sind 316.**

——S. 526—*Main changes.*

[(1) The High Court can award costs on dismissal of application.

(2) The Court except the Sessions Court is bound to adjourn when an application is put in, whether at the commencement of the trial or in the course of any inquiry or trial.]

CR. P. CODE (V OF 1898), S. 526.

——S. 526.
Affidavit by Accused.
Applicability.
Duty of Magistrate.
Grounds.

Affidavit by Accused.

—— S. 526—*Affidavit of accused.*

An accused can make an affidavit to be used to support an application for transfer. (*Martineau, J.*) GULAM MUHAMMAD *v.* THE CROWN.
3 Lah. 46 : 4 U. P. L. R. (Lah) 71 : 67 I. C. 351 : 23 Cr. L. J. 399 : A. I.R. 1922 Lah. 113.

Applicability.

—— S. 526—*Applicability—Village Panchayat Court—Power to transfer proceedings.*

S. 526 applies only to proceedings pending in Subordinate Courts. Panchayat courts established under U. P. Act VI of 1920 are not subordinate to the High Court and the powers under the section cannot be used to transfer proceedings pending in one Court to another. (*Stuart and Kanhaiya Lal, JJ.*) SAT NARAIN *v.* SARJU. **83 I. C. 350 : 21 A. L. J. 925 : 46 All. 167 : A. I. R. 1924 All. 265.**

—— S. 526—*Applicability—Applies to enquiries under Workman's Breach of Contract Act (XIII of 1859.)*

An enquiry under the Act XIII of 1859 is an enquiry by a Magistrate or a Criminal Court within S. 6, Cr. P. Code, and although the object of the enquiry is merely to issue coercive orders and if necessary to enforce the same by a sentence of imprisonment, there is nothing to show that such an enquiry is excluded from the operation of S. 526, Cr.P. Code. The definition of "enquiry" given in S. 4, clause (*k*), which includes every enquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or a Court, is not exhaustive so as to exclude an enquiry under the Workman's Breach of Contract Act of the nature above referred to. (*Kanhaiya Lal, J.*) BANSI *v.* LAKSHMI DAS.
45 All. 700 : 21 A. L. J. 619 : L. R. 4 A. 140 (Cr.) : 75 I. C. 984 : 25 Cr. L. J. 72 : A. I. R. 1924 All. 76.

——S. 526—*Applicability—Transfer of case pending in another province is not governed by section.*

The High Court has no jurisdiction to transfer criminal cases which are in the course of hearing in another province, 44 C. 595 Dist. nor has it jurisdiction to declare, *e.g.*, that a particular case is triable exclusively in Benares and not in Calcutta. (*Walsh, J.*) RADHIKA NATHA *v.* JOTISH CHANDRA.
73 I. C. 523 : 24 Cr. L. J. 635 : A. I. R. 1924 All. 71.

——Ss. 526 and 145—*Applicability—Proceedings under S. 145 can't be transfered.*

S. 526 does not empower a High Court to transfer proceedings under S 145 of the Code as such proceedings cannot be described as a criminal case which means a case in which a person is accused of an offence. (*Martineau, J.*) NARAIN SINGH *v.* GANDHARY RAJ. **A. I. R. 1925 Lah. 48.**

——S. 526—*Applicability—High Court's jurisdiction to order transfer.*

Ordinarily a High Court does not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court. (6 Bom L. R. 450 Foll.) (*Moti Sagar, J.*) GHULM NABI *v.* JAMALA.
72 I. C. 882 : 24 Cr. L. J. 466 : A. I. R. 1923 Lah. 685 (1).

——S. 526—*Applicability.*

A case in a Court without jurisdiction cannot be retransferred. (*Oldfield and Devadoss, JJ.*) SIKKA GOUNDAN, *In re.* **72 I. C. 351 : 17 L. W. 69 : 24 Cr. L. J. 351 : A. I. R. 1923 Mad. 326.**

CR. P. CODE (V OF 1898). S. 526—Duty of Magistrate.

——Ss. 526 (1) (i), 177—*Applicability—Trial Court not having jurisdiction to try a complaint—Power of High Court to transfer—Quashing of complaint unnecessary—Proper procedure.*

Where a complaint is wrongly filed in a Court not having jurisdiction and the Court proceeds to inquire into it in contravention of provisions of S. 177 of the Code of Criminal Procedure, the High Court has, under the section 526 (1) (i) of the Code, the power to transfer the case to a Court having jurisdiction and it is futile to quash the complaint and direct the complainant to take his complaint to another Court. 23 O. C. 87 Diss. from. (*Dalal, J. C.*) MUBARAK ALI *v.* ABDUL HAQ. **10 O. & A. L. R. 960 : 10 O. W. N. 615 : A. I. R. 1925 Oudh 490.**

——S. 526—*Applicability — Proceedings under S. 145, Cr. P.C.*

Power of transfer exists even in the case of proceedings under section 145, Cr.P. Code. (11 O. C. 61, Foll. 34 A. 533 : 26 M. 188, Ref. 25 B. 279. Not Foll. (*Simpson, A. J. C.*) MAHOMED NAGI KHAN *v.* RAHAMAT UNNISA. **76 I. C. 562 : 25 Cr. L. J. 194 : A. I. R. 1923 Oudh 161.**

——S. 526—*Applicability—Inherent power—High Court has no power apart from S. 526.*

The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in S. 439, S. 526, is not one of these. The Letters Patent does not confer any power of transfer over and above that conferred by S. 526 since cl. 28 is qualified by Cl. 36. (*May Oung, J.*) ASHU *v.* MG PO KHAN. **1 R. 632 : 2 Bur. L. J. 236 : A. I. R. 1924 Rang. 100.**

Duty of Magistrate.

——S. 526—*Duty of Magistrate—Transfer—Reasonable apprehension—Prejudice against police sub-inspector.*

Under the new Code, when an application for adjournment is made with a view to apply for a tansfer it is the duty of the Criminal Court to postpone the case at once. S. 526, sub clause 8, is imperative and it omits the former expression " before the accused is called on for his defence." When the District Magistrate has already formed a very strong opinion on the conduct of the Sub-Inspector as disclosed by a prior judgment, it would be unfair and unjust to the accused that the case against him should be tried by the same District Magistrate. (*Sulaiman, J.*) SARTAJ SINGH *v.* EMPEROR. **22 A. L. J. 430 : L. R. 5 A. 57 (Cr) : 83 I. C. 699 : 26 Cr. L. J. 139 : A. I. R. 1924 A. 533.**

——S. 526 (8)—*Duty of Magistrate—Application for transfer—Necessary adjournment to be given.*

The court is only bound to give such adjournment as will afford a reasonable opportunity for an application for transfer being made and an order obtained thereon. (*Gokul Prasad, J.*) ABDUL RAB *v.* AZMAT ALI. **18 A. L. J. 1145 : 22 Cr. L. J. 88 : 59 I. C. 376 : L. R. 1 A. (Cr.) 179.**

——S. 526—*Duty of Magistrate—Magistrate frequently cross-examining prosecution witnesses or disallowing questions by complainant, to defence witnesses is improper but cannot reasonably cause complainant to apprehend that a fair trial will not be had.*

It is not proper for a Magistrate to frequently cross examine prosecution witnesses or disallow questions which the complainant may desire to put to the de-

CR. P. CODE (V OF 1898), S.526—Grounds—Attempt to compromise.

fence witnesses for the purpose of showing their partiality but if the Magistrate acts in such a manner, the complainant cannot thereby be held to have reason to apprehend that the Magistrate will not give a fair trial to his case. (*Wazir Hasan, A. J. C.*) ABDUL AZIZ *v.* GANESH PRASAD, **82 I. C. 49 : 25 Cr. L. J. 1185 : A. I. R. 1925 Oudh 52.**

GROUNDS.

Attempt to Compromise.
Expression of opinion.
Faith in Tribunal.
Magistrate initiating Proceedings.
Outside influence.
Previous trial of the similar cases.
Miscellaneous.

Grounds—Attempt to Compromise.

——S. 526—*Grounds—Attempt to compromise—Tansfer is proper.*

Where a Magistrate has interested himself in a case pending before him in the way of obtaining settlement by the parties, it is to the interest of both the parties and it is but fair to the Magistrate himself that he should not hear the case (*Mukerji, J.*) MUZAFFAR HUSAIN *v.* MAHOMED YAQUB. **47 All. 411 : 23 A. L. J. 191 : 26 Cr. L. J. 869 : 86 I. C. 805 : A. I. R. 1925 All. 289.**

——S. 526—*Grounds—Attempt to compromise case can reasonably cause suspicion of partiality.*

A natural suspicion can arise in the minds of parties and the case should be transferred on the application of one of the parties, where the magistrate has made an attempt to have the case compromised because what the Court has to consider in a question of transfer is not alone the question whether the Presiding Magistrate has really any bias in his mind against the applicant for transfer but also whether the applicant for transfer may reasonably have entertained an apprehension of partiality on the part of the Magistrate in view of any incidents which may have happened, though such incidents are capable of explanation and may be altogether independent in their origin of any actual bias in the Magistrate's mind. 35 All. 5 Foll. (*Dalal, A. J. C.*) GAYA CHARAN MISRA *v.* KUNWAR BAHADUR. **25 Cr. L. J. 570 : 31 I. C. 58 : A. I. R. 1925 Oudh 179 (1).**

——S. 526—*Grounds—Attempt to compromise.*

Where before the filing of the complaint the District Magistrate made a local enquiry in an unsuccessful attempt to bring about settlement between the parties and subsequently directed the complainant to file a complaint before him which was then transferred for disposal to the Sub-divisional Magistrate by an order discussing the merits of the complaint and expressing an opinion adverse to the accused, the case was transferred under Sec. 526 of the Code for trial to the Court of the District Magistrate of another district. (*Kanhaiya Lal, J. C.*) RAM SAGAR *v.* MAHADEO BUX SINGH. **A. I R. 1922 Oudh 124 (1).**

Grounds—Expression of opinion.

——S. 526—*Grounds—Expression of opinion—Pungent remarks on the conduct of witness—Transfer was directed.*

The Magistrate in recording the evidence of a witness made a note that the witness faltered and from his demeanour it appeared that he had not told the truth. *Held* : that there were sufficient grounds for transfer of the case. (*Suhrawardy and Mukerji, JJ.*) GOLAM BARI GAZI *v.* YAR ALI KHAN. **29 C. W. N. 316 : A. I. R. 1925 Cal. 480 (2).**

——S. 526—*Grounds—Expression of opinion—If a good ground for transfer.*

A case having once been dismissed on the report of the police by a Magistrate was resurrected in the form of a complaint at the suggestion of the Revenue Assistant. The Magistrate subsequently noted that as he had expressed an opinion on the case he thought it better he should not try it *Held*, that this was a good ground for transfer. Applications for transfer giving good reasons, if the allegations be correct, why a case should be transferred require to be seriously dealt with and should not be casually brushed aside as *fazul.* (*Harrison, J.*) BADAN SINGH *v.* EMPEROR. **5 Lah. L. J. 520 : A. I. R. 1924 Lah. 257 (1).**

——S. 526—*Grounds—Expression of opinion by magistrate.*

Where a magistrate in framing the charges against the accused observed that the offence had been proved the case should be transferred to another magistrate for trial. (*Abdul Quadir, J.*) SRI KISHEN *v.* GOKAL CHAND. **65 I. C. 632 : 23 Cr. L. J. 168 (L).**

——S. 526—*Grounds—Expression of opinion—District Magistrate remarking the case was quite clear and defence ridiculous—Transfer to another district is justified.*

Where a case was sent to a Magistrate for disposal with a remark by the District Magistrate that it was quite a clear case and the defence was ridiculous. *Held*, transfer of the case to another District is justified. (*Simpson, A. J. C.*) MAHOMED YAKUB *v.* EMPEROR. **2 O. W. N. 688 : 90 I. C. 309 : A. I. R. 1925 Oudh 690.**

——S. 526—*Grounds—Expression of opinion—Passing remark about another case if justifies transfer.*

Where a Magistrate passed certain remarks regarding accused's guilt in another case before him while convicting him in one case, the other case should be transferred from his file. (*Wazir Hasan, J. C.*) CHOUDHRI ZAHIRUDDIN *v.* EMPEROR. **11 O. L. J. 556 : A. I. R. 1924 Oudh 433.**

——S. 526—*Grounds—Expression of opinion in connected miscellaneous proceeding—If ground for transfer.*

While proceedings under Ss. 147 and 325, I. P. C., were pending in a court, proceedings under S 144, Cr. P. Code, were instituted and based on the police report the same magistrate passed an order against the accused. *Held*, it was no valid ground for granting a transfer. (*Wazir Hasan, A. J. C.*) JANG BAHADUR. *v.* EMPEROR. **11 O. L. J. 54 : 77 I. C. 721 : 25 Cr. L. J. 433 : A. I. R. 1924 Oudh 338.**

Grounds—Faith in Tribunal.

——Ss. 526 to 528—*Grounds—Faith in Tribunal—Strong language used by Magistrate—Apprehension of unfairness may be justified—Criminal trial.*

Use of strong language by Court is never calculated to satisfy the litigant public before it. An officer is some times bound to feel strongly on particular occasions, but as soon as he expresses himself strongly, he gives himself away and if he raises, by his language, an apprehension in the mind of a party that the Officer is prejudiced the officer has only himself to thank. Besides a calm state of mind is absolutely essential for the disposal of all cases whether civil or criminal. (*Mukerji, J.*) MUHAMMAD AKBAR *v.* EMPEROR. **47 All. 288 : 23 A. L. J. 133 : L. R. 6 A (Cr.) 57 : 47 All. 288 : 85 I. C. 378 : 26 Cr. L. J. 538 : A. I. R. 1925 All. 283.**

——S. 526—*Grounds—Faith in Tribunal—Transfer of a criminal case—Application by Crown—Procedure—Grounds for.*

Where a criminal appeal is pending against a con-

viction in a Sessions Court, the Crown is as much a party before the Sessions Judge as the accused person. Auy motion that has to be made before the Sessions Judge should be through the Government Pleader and not by an official or demi-official letter from the District Magistrate as representing the Crown. It is not a sufficient ground for a transfer of a criminal case that the presiding Judge belongs to the Hindu or Moslem faith and cannot be expected to deal impartially with a communal dispute. (*Mockerjee, J.*) BHAGWAN DAS *v.* EMPEROR. **22 A. L. J. 1103 : A. I. R. 1925 All. 218 (2).**

——S. 526 (8)—*Grounds—Faith in Tribunal—Haste in recording statement is a good ground--Transfer—Adjournment—Court's duty.*

The fact that the Magistrate refused to give copies and proceeds hurriedly in recording the accused's statement before the prosecution evidence is over is a sufficient ground for transfer. (*Gokul Prasad, J.*) ABDUL RAB *v.* AZMAT ALI. **18 A. L. J. 1145 : 59 I. C. 376: 22 Cr. L. J. 88 : L.R. 1 A. (Cr.) 179.**

——S. 526—*Grounds—Faith in Tribunal—Reasonable apprehension.*

Where an application is made for the transfer of a criminal case from the file of a Magistrate on the ground that he is biassed in favour of the complainant, the Court has to consider whether the apprehension of the accused is reasonable and in so doing the Court will try and place itself in the position of the accused person and look at the matter from his point of view. The matter does not depend on the way in which the Judge would regard it himself. (*Sanderson, C. J and Cuming, J.*) PULIN BEHARY DEY *v.* ASHUTOSH GHOSE. **39 C. L. J. 330 : 25 Cr. L. J. 944 · 81 I. C. 560 : A. I. R. 1924 Cal. 981,**

——S. 526—*Grounds—Faith in Tribunal—Petition to transfer case from one Magistrate to another—The question to be considered is, if it is possible from the accused's point of view, to say that apprehension is not reasonable.*

In regard to a petition to transfer a case from one Magistrate to another the question to be considered is, whether itis possible from the accused's point of view, to say that his apprehension is not reasonable. Where it was alleged that the complainant was closely associated with the Magistrate's brother in electioneering work and the Magistrate himself was assisting his brother in electioneering. *Held*, that under the circumstances the accused's apprehension of unconscious injustice was not unreasonable, *held*, further that no slur was thereby cast on the Magistrate. (*Sanderson, C. J. and Cuming, J.*) PULIN BEHARI DEY *v.* ASHUTOSH GHOSE **39 C. L. J. 330 : 81 I. C. 560 : 25 Cr. L. J. 944 : A. I. R. 1924 Cal. 981.**

——S 526—*Grounds—Faith in Tribunal—Mere allegation of apprehension of partiality is not enough—Facts in support of allegation are essential—Real bias in judge is unnecessary—Circumstances justifying applicant in entertaining apprehension are enough.*

It is not sufficient for the applicant for transfer merely to allege that he would not get an impartial trial, but he must place before the Court the facts which gave rise to this belief in his mind. The Court should not make an order for transfer unless it is satisfied that on the facts disclosed in the application and affidavit there arises a reasonable apprehension that the applicant may not have a fair and impartial trial. But at the same time, what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial The law has regard not so much to the motive which might be supposed to bias the Judge,as to the susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is essential to social order and security. *Surgent* v. *Dale* (1877) 2 Q. B. D. 558, Ref. (*Shadi Lal, C. J.*) AMUR SINGH *v.* SADHU SINGH. **6 Lah. 396· 7 L.L.J. 241: 86 I.C. 709: 26 Cr. L. J. 853: A. I. R. 1925 Lah. 361.**

——S. 526—*Grounds—Faith in Tribunal—Accused's confidence in Court's impartiality is important—Act of judge likely to cause accused to doubt impartiality—Case should be transferred though the acts can be traced to judge's superior sense of duty, for accused's degree of intelligence must be regarded in deciding what is reasonable cause for accused to suspect partiality.*

It is of the utmost importance that persons arranged before the Court should have confidence in the impartiality of theCourt and if a person has a reasonable cause to apprehend that the Court before whom he is being tried is not completely free from bias, a transfer should be directed. In deciding what is reasonable cause, regard must be had not so much to the motives which might be supposed to bias the Judge as to susceptibility of the parties. Hence the degree of intelligence possessed by an accused who applies for transfer must be taken into consideration while deciding his application. If the actions of the Judge though capable of being explained and though traceable to a superior sense of duty are calculated to create in the mind of the accused an apprehension that he may not have an impartial trial the case should be transferred to some other Judge for trial. (*Moti Sagar, J.*) AHMAD DIN *v.* EMPEROR. **25 Cr. L. J. 638 : 81 I. C. 126 : A. I. R. 1925 Lah. 101.**

——S. 526—*Grounds—Faith in Tribunal—Magistrate examining only one witness a day—Transfer.*

During a criminal trial, the Magistrate made an order that he would examine only one witness a day and not devote more time to the case. *Held*, it was sufficient ground to transfer the case. (*Harrison, J.*) NARAIN DAS *v.* EMPEROR. **89 I. C. 451 (2) : 26 Cr L. J. 1363 (2).**

——S. 526—*Grounds for transfer—Magistrate issuing warrant for arrest of absent complainant.*

The issue of a warrant for the arrest of a complainant who had not appeared is not justifiable and this action on the part of the Magistrate is a sufficient ground for the transfer of the case from his file. (*Zafar Ali, J.*) FAZAL AHMAD *v.* ABDULLAH KHAN, **26 Punj. L. R. 701 : 7 Lah. L. J. 571.**

——S. 526—*Grounds—Faith in Tribunal.*

Where the Magistrate sent the record after inexplicable delay and where the Magistrate had charged accused's father with an offence owing to enmity. *Held*, transfer is desirable. (*Scott-Smith, J.*) KIRPA RAM *v.* BUTA SINGH. **A. I. R. 1923 Lah. 282 (1).**

——S. 526—*Grounds—Faith in Tribunal.*

It is of paramount importance that persons arraigned before the Courts should have confidence in the impartiality of those Courts. Where there is anything in the case likely to create in the mind of the accused a reasonable apprehension that he may not have an

CR. P. CODE (V OF 1898), S. 526—Grounds—Faith in Tribunal.

impartial trial the case would be transferred. What is "reasonable" must of course depend on the degree of intelligence of the accused. Regard must be had to the susceptibilities of the accused and his apprehensions must be given due weight to. (*Broadway, J.*) SARDARI LAL *v.* EMPEROR. **71 I. C. 1006 : 3 Lah. 443 : 24 Cr. L. J. 286 : A. I. R. 1923 Lah. 264.**

——— S. 526—*Grounds—Faith in Tribunal—Apprehension of prejudice on the part of the trial Magistrate is sufficient grounds.*

Where the pleader for the accused had communicated to him that the Magistrate had asked him) the pleader) not to defend the accused, the latter could not have confidence in the impartiality of the Magistrate and the transfer of the case should be made. (*Shadi Lal, C. J.*) DHERA SINGH *v.* RAM SINGH **3 Lah. L. J. 528.**

——— S. 526—*Grounds—Faith in Tribunal—Transfer, grounds for—Apprehension of accused.*

In cases where an application for transfer is made the law has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. If there is a real fear of injustice in the mind of the accused, having regard to the ordinary standard of honesty and fair dealing the case should be transferred. 35 A. 5 : 19 A. 64 : 33 C. 1183, 1188, Ref. (*Kinkhede, A. J. C.*) ANANT WASUDEO *v.* EMPEROR. **7 N. L. J. 155 : A. I. R. 1924 Nag. 243.**

——— S. 526—*Grounds— Faith in Tribunal — Transfer was allowed where court itself examined witnesses and did not allow the party or their pleader to examine them—Evidence Act, S. 138.*

Generally it is not the province of the Court to examine witnesses and as a rule of the Court the Court should leave the witnesses to the pleaders to be dealt with as is provided for in S. 138 of the Indian Evidence Act ; where therefore the Court took the witnesses into its own hands and proceeded with their examination and they were not permitted to be examined by the complainant of his pleader. *Held*, that a ground for transfer of the case was made out. (*Wazir Hasan, J. C.*) JANKI *v.* SHEO NARAIN SINGH. **11 O. L. J. 333 : 27 O. C. 246 : 82 I. C. 154 : 25 Cr. L. J. 1226 : A. I. R. 1924 Oudh 371.**

——— S. 526—*Grounds—Faith in Tribunal—Accused suspecting partiality, is sufficient.*

A Magistrate in the discharge of the multifarious duties of his office has to perform a very large number of extra-judicial functions and it may so happen that in the discharge of his executive duties he may be compelled to act in a way which would raise a suspicion in the mind of an accused person that he was not likely to get justice when the Magistrate came to inquire into a particular matter judicially. Therefore when an occasion has arisen to give an accused person grounds for suspicion it is advisable that the judicial trial should be held by another Magistrate, specially where such a Magistrate is easily available. (*Dalal, J. C.*) MAHOMED YANUS KHAN *v* GULAB SINGH. **9 O. & A.L.R. 448 : 74 I. C. 715 (1): 24 Cr. L. J. 811 (1) : A. I. R. 1923 Oudh 172.**

——— S. 526—*Grounds—Faith in Tribunal—Belief that Magistrate had made up his mind is no ground.*

The fact that the trying Magistrate is believed to have made up his mind that there is no likelihood of a breach of peace is not a sufficient ground for transfer. If he forms any opinion on the question of possession which might hamper him in dealing with the evidence on that point, it might no doubt be proper

CR P. CODE (V OF 1898), S. 526—Grounds—Magistrate Initiating Proceedings.

ground for transferring the case. (*Simpson, A. J. C.*) MAHOMED NAGI KHAN *v.* RAHAMAT UNNISA. **76 I. C. 562 : 25 Cr. L. J. 194 : A. I. R. 1923 Oudh 161.**

——— S. 526—*Grounds—Faith in Tribunal.*

The law in enacting S. 526 has regard, not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant public. One object of the section is to clear away everything which might engender distrust of the Tribunal and so to promote the feeling of confidence in the administration of justice. The fact that the Magistrate appears to have been influenced by a private individual with regard to a case is a sufficient ground for transfer. (*Jwala Prasad, J.*) AWADH SINGH *v.* PARAN KANDU. **64 I.C. 38 : 22 Cr. L. J. 726 : 2 Pat. L. T. 198.**

——— S. 526—*Grounds—Faith in Tribunal—Refusal to grant adjournment is a good ground.*

The refusal to grant an adjournment thereby depriving the accused of quite a full opportunity of putting forward a defence is a ground for transfer of the case to some other Court. It is desirable that the accused should feel satisfied with their trial and that the trial should be removed to a sphere where they will be satisfied that they will have a trial and hearing entirely satisfactory to their own conscience. (*Bucknill, J.*) RANG BAHADUR *v.* KARIMAN CHOWKIDAR. **63 I. C. 868 : 22 Cr. L. J 708 : 2 Pat. L. T. 297.**

Grounds :—Magistrate initiating Proceedings.

——— S. 526 — *Grounds — Magistrate initiating Proceedings— Prosecution by Magistrate after inspection in another capacity.*

Where the prosecution of the applicant was ordered by the Cantonment Magistrate after inspection of the building alleged to be constructed in contravention of the Cantonment Rules in his capacity as Secretary to the Cantonment Committee, it would be more advisable if the case were tried by another Court. (*Rafique, J.*) HIRA LAL *v.* EMPEROR. **20 A. L. J. 911 : 71 I. C. 256 : 24 Cr. L. J. 128 : L. R. 3 A. 173 (Cr.) : A. I. R. 1922 All. 528 (2).**

——— S. 526—*Grounds — Magistrate initiating Proceedings—Magistrate as Vice-president of Municipal Committee starting proceedings sufficient ground.*

The reason on which the transfer was asked for, was nothing personal against the Honorary Magistrate, but involved a question of principle. The Magistrate was a member as well as the Vice president of the Municipal Committee, Rawalpindi, and was present at the meeting in which the resolution was passed, for the disobedience of which proceedings against the petitioners had been started. *Held*, under such circumstances, as a member and an office bearer of a municipality, the Magistrate is debarred from trying a case arising out of the proceedings of the municipality. The fact that he is one of the members of a Bench before which the cases against the petitioners are pending will not make any difference. (*Abdul Qadir, J.*) MT. NUR NISAN *v.* MUNICIPAL COMMITTEE, RAWALPINDI. **69 I. C. 384 : 23 Cr. L. J. 704 : A. I. R. 1922 Lah. 72 (2).**

——— S. 526—*Grounds — Magistrate initiating Proceedings — Trying Magistrate subordinate to Magistrate making the complaint—No ground for transfer is made out.*

The fact that the Magistrate trying a case is subordinate to the officer making the complaint is not sufficient ground for transfer. (*Hallifax, A. J. C.*) WASUDEO *v.* EMPEROR. **26 Cr. L. J. 1425 : 89 I. C. 897 : A. I. R. 1925 Nag. 433.**

CR. P. CODE (V OF 1898), S. 526—Grounds—Magistrate intiating Proceedings.

——S. 526—*Grounds—Magistrate intiating Proceedings—Transfer must be granted.*

Taking more than a formal part in the police investigation would serve as a ground for transfer. 2 L. B. R. 229, Foll. (*Young, J.*) NGA POTHA *v.* EMPEROR **4 Bur. L. J. 65 : A. I. R. 1925 Rang. 219 (1).**

Grounde : —Outside influence.

——S. 526—*Grounds—Outside influence—Discussion of the case at the club is good ground.*

Where, in a case committed to the Sessions, it appeared the Civil Surgeon discussed the case in the club with persons including the Sessions Judge, *held*, it was a good ground for the transfer of the case. (*Lindsay, J.*) DARAZ KHAN *v.* EMPEROR. **19 A. L. J. 946 : 65 I. C. 558 : 23 Cr. L. J. 126 : L. R. 2 A. (Cr.) 168.**

——S. 526—*Grounds—Outside Influence—Complainant's pleader being near relation of Magistrate, transfer was ordered.*

It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation. Where the complainant's muktear was a near relation of the Magistrate and where the muktearnama was not filed until the day on which the case was transferred to that Magistrate. *Held*, that transfer to some other Magistrate must be ordered. (*Newbould and B. B. Ghose, JJ.*) NITYARANJAN MANDAL *v.* EMPEROR. **29 C. W. N. 648 : 88 I. C. 607 : A. I. R. 1925 Cal. 806.**

——S.526—*Grounds—Outside influence—Sending case to a particular magistrate on complainant's request justifies transfer.*

An accused is entitled to transfer of the case which is sent to a particular magistrate at the request of the complainant. (*Moti Sagar, J.*) GHARSI MAL *v.* DEBI SAHAI. **25 Cr. L. J. 989 : 81 I. C. 637 : A. I. R. 1925 Lah. 121.**

——S.526—*Grounds—Outside influence—District Magistrate forming opinion in the discharge of his extra judicial duty—Fear of a Deputy Magistrate being influenced by such opinion of the District Magistrate is not sufficient ground for transfer of an inquiry prior to commitment.*

The fear in the accused's mind that a Deputy Magistrate making an enquiry prior to commitment would be influenced by the opinion, as to the guilt of the accused, of the District Magistrate formed in the extra-judicial inquiry as to the collection of evidence and to the proper conduct of the prosecution and that he would not get justice in the Court of the Deputy Magistrate is not a sufficient ground to transfer the inquiry to another Magistrate. (*Dalal, J. C.*) UMA NATH *v.* EMPEROR. **2 O. W. N. 847 : A. I. R. 1925 Oudh 731.**

——S. 526—*Grounds—Outside influence—Magistrate's son engaged as pleader for opposite side—Transfer cannot be ordered.*

The mere fact that the Magistrate's son is a pleader and that he has been engaged by the other side is no ground for granting a transfer to another Court. (*Pullan, A. J. C.*) PEARY LAL *v.* PUTTAN. **26 Cr. L. J. 440 : 85 I. C. 56 : A. I. R. 1925 Oudh 348.**

——S. 526—*Grounds — Outside influence — Superior officer expressing to the Trial Magistrate his belief in innocence of the accused justifies the transfer of a case.*

Where the Deputy Commissioner in the course of a speech delivered at a meeting where the sub-divisional Magistrate and other officials were present, expressed that he did not believe in the charges brought against the accused. *Held*, that a transfer to another District was proper. (*Kendall, A. J. C.*) RUP NARAIN BAKKAL *v.* ABDUL HAMID KHAN. **11 O.L.J. 657 : 82 I. C. 766 : 25 Cr. L. J. 1374 : A. I. R. 1925 Oudh 90.**

CR. P CODE (V OF 1898), S. 526— Grounds — Miscellaneous.

——S. 526—*Grounds—Outside influence—Reasonable fear of outside influence interfering—Trial Court slurring over P. W's uncertainty—Transfer should be granted.*

Where the accused had reason for apprehending that influences outside the Court might bear upon the course of their trial, and where the Trying Magistrate recording the evidence of the identification witness slurred over the uncertainty and hesitation of the witness. *Held*, that the case should be transferred. (*Foster. J.*) RABINDRA NATH SINGH *v.* EMPEROR. **84 I.C. 441 : 26 Cr. L. J. 297 : A. I. R. 1925 Pat. 339.**

——S. 526—*Grounds—Outside influence—Superior Magistrate holding strong view of the case is not sufficient.*

The fact that the Magistrate conducting the trial is subordinate to the District Magistrate and the latter has taken a strong view of the merits of the case, is not a sufficient ground for transferring the case outside the district. (*B. K. Mullick and Bucknill, JJ.*) CHANDI MISSIR *v.* SHYAMA CHARAN. **60 I. C. 657 : 3 U. P.L. R. (Pat.) 25 : 22 Cr. L. J. 257.**

Grounds—Previous trial of the similar cases.

——S. 526—*Grounds—Previous trial of other similar cases.*

The fact that a Sessions Judge has heard the appeals of some of several persons convicted of dacoity, is no bar to his hearing the appeals of others arrested and convicted subsequently, nor is it a ground for transfer of the appeal to another Sessions Judge. (*Ryves, J.*) JAGRUP *v.* EMPEROR. **22 Cr. L. J. 416 : 61 I. C. 656 : 2 U.P. L. R. (All.) 421.**

——S. 526—*Grounds—Previous trial of other similar cases—Trial of other accused of same offence—If ground for transfer.*

The fact that the Judge has already tried some other accused of the same offence is no ground for transferring the case to another Court. (*Dalal, A. J. C.*) DALSHER *v.* EMPEROR. **74 I. C. 544 : 24 Cr. L. J. 800 : 9 O. & A. L. R. 547 (Oudh) : A. I. R. 1924 Oudh 247.**

——S. 526—*Grounds—Previous trial of other similar cases—Application for transfer of a criminal case—Transfer, when desirable.*

Even though there is ample authority for saying that because a Magistrate has tried some other case involving somewhat similar facts, possibly between the same parties, the case should not be remanded to him for retrial, that in itself does not constitute necessarily any ground why a case should not be remanded to the same Magistrate for re-trial. Similarly it is highly desirable that such a re-trial should not be taken by the officer who has already expressed his final opinion upon the matter. (*Bucknill, J.*) MAHADEO *v.* KISHUN LAL. **3 Pat. L. T. 147 : 72 I. C. 339 : 24 Cr. L. J. 339 : A. I. R. 1922 Pat. 60.**

Grounds—Miscellaneous.

——S. 526 — *Grounds — Hindu-Muhammadan question involved—Case should preferably be tried by European Magistrate.*

Where a Hindu-Muhammadan question is involved in the case it is desirable that European Magistrate

CR. P. CODE (V OF 1898), S. 526— Grounds — Miscellaneous.

should enquire into and determine it. 127 P. L R. 1915, Foll. (*Zafar Ali, J.*) MANGAT *v.* EMPEROR.
26 Cr. L. J. 1056 : 87 I. C. 976 : A. I. R. 1925 Lah. 626.

——S. 526—*Grounds—Accused, an election agent of rival candidate with Magistrate—Chief witness, a friend of Magistrate—Transfer of the case is justified.*

Where the accused was an election agent of a rival candidate with the Magistrate before whom he was to be tried at the Council Election and where the chief witness in the case was a friend of the Magistrate, *held*, that there were sufficient grounds to justify a transfer of the case to another Magistrate. (*Moti Sagar, J.*) NIHAL SINGH *v.* EMPEROR.
89 I. C. 912 : 26 Cr. L. J. 1440 : A. I. R. 1925 Lah. 615 (2).

——S 526—*Magistrate belonging to the brotherhood of a person interested in the accused—Whether ground for transfer.*

Where in an application for transfer it was found that the magistrate belonged to the brotherhood of a person interested in the accused and the interested person did not attempt to influence the magistrate. *Held*, that the petitioner was not justified in presuming that he would not get a fair trial. (*Jai Lal, J.*) CHARAN SINGH *v.* BISHEN SINGH.
26 Punj. L. R. 312 (1).

——S. 526—*Power of transfer—Sanction matter —Appeal.*

S. 195 (3) as amended must be read in conjunction with old S. 476 and new Ss. 476-A and 476-B incorporated in that section by the new Amendment Act and again all these sections must be read as governed or controlled by S. 526, which clothes the High Court with power to transfer any case from any file to any other file. (*Kinkhede, A. J. C.*) MT. BUDHABAI *v.* SETH ALIBHAI.
86 I. C. 428 (2) : 26 Cr. L. J. 796 (2) : A. I. R. 1925 Nag. 358.

——S. 526—*Grounds—Prayer that a judicial officer should try the case amounts to condemnation of whole executive line and transfer of this nature cannot be granted.*

Where one of the grounds for transfer was that an officer purely of Judicial Department may be authorised, to deal with the case. *Held*, that the High Court will not under ordinary circumstances be justified in accepting a ground which insinuates condemnation of the whole body of Magistrates serving in the executive line. (*Kinkhede, A. J. C.*) ANANT WASUDEO CHANDEKAR *v.* EMPEROR.
7 N. L. J. 155 : A. I. R. 1924 Nag. 243.

——S. 526—*Grounds—Practitioners ordinarily employed in criminal cases not willing to act is good ground for transfer.*

Where no practitioner in a district ordinarily employed in criminal cases is willing to act for the accused, it is a good ground for transfer of the case to another District. (*Simpson, A J. C.*) LALTA *v.* ZAHOOR AHMAD.
2 O. W. N. 682 : 88 I C. 1048: A. I. R. 1925 Oudh 672.

——S 526 (3)—*Person at whose instance prosecution is started is "party interested"—Such person is entitled to apply for transfer ; but his rights are subordinate to those of Public Prosecutor.*

A private person, who lodges an information before the police of a certain offence and a criminal prosecution is started upon that information, is a person who is interested in the prosecution within the meaning of Cl. (3) of S. 526, and therefore he is entitled to apply for transfer under S. 526, but his rights are subordinate to those of the Crown : in other words, if the Public

CR. P. CODE (V OF 1898), S. 528— Grounds — Miscellaneous.

Prosecutor, or the person who is conducting the prosecution on behalf of the Crown, is unwilling to have the case transferred, the person at whose instance the case was started has no right to get the case transferred. (*Kulwant Sahay, J.*) SHEODHARI RAI *v.* JHINGUR RAI.
26 Cr. L. J. 1249 : 88 I. C. 993 : A. I. R. 1925 Pat. 818.

——S. 526—*Grounds—Magistrate making remarks that he is unfavourably disposed to prosecution —Transfer should be ordered.*

If the Magistrate makes observations which go to show that he is not favourable to the prosecution, complainant has cause for reasonable apprehension in his mind that the case is not being tried in a fair way, and there is sufficient ground to order transfer of the case. (*Kulwant Sahay, J.*) SHEODARI RAI *v.* JHINGAR RAI.
26 Cr. L. J. 1249 : 88 I. C. 993 : A. I. R. 1925 Pat. 818.

——S. 526—*Grounds—Refusal to grant gun license after usual season for granting is no evidence of bias.*

Refusal to grant an application for a gun license put in after the expiration of the usual season for the granting of gun licenses is no evidence of bias. (*Foster, J.*) RABINDRA NATH SINGH *v.* EMPEROR.
84 I. C. 441 : 26 Cr. L. J. 297 : A. I. R. 1925 Pat. 339.

——S. 526—*Grounds—Convenience of parties—Convenience of accused to be given preference.*

Where the accused carried on business at Gaya and the complainant at Buxar, and the offence was triable at both places, *held*, that for the convenience of the accused the trial should be held at Gaya. (*Bucknill, J.*) P. H. METCALFE *v.* J. WATSON.
25 Cr. L. J. 81 : 76 I. C. 17 : A. I. R. 1924 Pat. 708.

——S. 526—*Grounds—Refusal to admit document in evidence—Ordering party to deposit expenses for summons—If grounds for transfer—Complainant—* Locus standi.

The fact that a Magistrate erroneously refused to admit a document in evidence or asked a party to deposit the probable expenses for summoning a person as witness is no ground for transferring the case.

Quaere : if the complainant in a case as a *locus standi* to apply for transfer of the case. (*Kulwant Sahay, J.*) NAND KISHORE MISRA *v.* KALKA MISRA.
1924 P. H. C. C. 196 : 77 I.C. 810 : 5 Pat. L. J. 487 : 25 Cr. L. J. 458 : A. I. R. 1924 Pat. 695.

——S. 526—*Grounds—District Magistrate asking to withdraw certain illegal* parwanas—*Refusal to withdraw—Not sufficient ground for transfer.*

Certain illegal *parwanas* were issued by the accused prior to his arrest for the offence for which he was being tried. The District Magistrate had written him to withdraw those *parwanas* but he refused to do so. Subsequently the case was started against him and he applied for a transfer of the case on the ground that the District Magistrate was prejudiced owing to his refusal to withdraw the *parwanas*. *Held*, that there was nothing improper on the part of the District Magistrate in requesting the accused to withdraw the illegal *parwanas* and that it was not a ground for a transfer of the case. (*Coutts, J.*) MAHADEO SINGH *v.* EMPEROR.
A. I. R. 1922 Pat. 494.

——S. 528—*Change.*

(1) A Sessions Judge may recall a case made over to an Assistant Sessions Judge.

(2) Any Magistrate may recall any case made over by him to any other Magistrate under S. 192 (2).

CR. P. CODE (V OF 1898), S. 528.

(3) **The head of village under the Madras Village Police Regulation, 1821, is a Magistrate.**

——S. 528—*High Court—Exercise of powers when District Magistrate not approached.*

The High Court will not ordinarily entertain an application for transfer, when the applicant can under the law move the District Magistrate for the same relief, but has not done so. (*Daniels, J.*) RAVI CHANDRA SAHAI *v.* SUNDER SINGH.

87 I. C. 112 : 26 Cr. L. J. 960 : L R. 6 All. 87 (Cr.) : A. I. R. 1925 All 640.

——S. 528—*Case transferred by Dt. Magistrate—Fresh transfer cannot be ordered by Sub-Divisional Magistrate.*

S. 528 cannot be so read as to imply that after a District Magistrate has transferred some cases from one file to the file of another Magistrate, a Sub-Divisional Magistrate, who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file. (*Mukerjee, J.*) MAHOMED AKBAR *v.* EMPEROR.

23 A. L. J. 133 : 85 I. C. 378 : L. R. 6 A. (Cr.) 57 : 47 All. 288 : A. I. R. 1925 All. 283.

——S. 528—*Transfer of case by Additional Presidency Magistrate—Power of Chief Presidency Magistrate to retransfer the case.*

Under S. 528, Cr. P. Code, the Chief Presidency Magistrate has power to transfer to his own file a case which had been transferred to the Fourth Presidency Magistrate for disposal by the Additional Chief Presidency Magistrate who took cognizance of the offence. 14 M. 399, Foll. (*Greaves and Duval, JJ.*) MOHINI MOHAN ROY *v.* PUNAM CHAND SETHIA.

28 C. W. N. 903 : 39 C. L. J. 595 : 51 Cal. 820 : A. I. R. 1924 Cal. 911.

——S. 528—*Case partly tried by one Magistrate—Transfer—*De novo *trial granted by successor—Transfer of case to old Magistrate to avoid* de novo *trial—Legality of.*

A Magistrate who had almost completed the trial of a case was transferred to another station and his successor taking up the case granted a *de novo* trial. Thereupon the District Magistrate ordered the case to be transferred to the Magistrate who had heard it before as he thought he could thereby obviate the necessity for a *de novo* trial. *Held*, the grant of a *de novo* trial to the accused wiped out the prior proceedings and even the old Magistrate could not proceed with the trial from the point where he left it; there was no question of balance of convenience, and a transfer was not necessary. (*Madhavan Nair, J.*) SARDAR KHAN SAHIB *v.* ATHANLIA.

20 L. W. 847 : 47 M. L. J. 926 : A. I. R. 1925 Mad. 174.

——S. 528—*Order of transfer by competent Magistrate—Superior Magistrate cannot cancel without notice.*

Where a competent Magistrate has issued an order of transfer of a case after hearing both parties, a superior Magistrate should not cancel the order and retransfer the case to the original Court without hearing the complainant in support of the transfer. (*Abdur Rahim, J.*) MANICKAM PILLAI, *In re.*

12 L. W. 633 : 60 I. C. 55 : 22 Cr. L. J. 199 : (1920) M. W. N. 767.

——S. 528—*Reasonable apprehension of absence of fair trial is a ground for transfer though general rule can't be laid down.*

It is difficult to lay down any hard and fast rule under which transfer is made, for the circumstances of one case might differ from those of the other but

CR. P. CODE (V OF 1898), S. 528-A.

the principles under the decisions of the various cases go to establish that if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he would not receive fair dealings at his trial the case should be transferred to a calmer atmosphere. (*Jwala Prasad, J.*) BINODEY BEHARY BANERJEE *v.* EMPEROR.

5 P. L. T. 63 : 2 Pat. L. R. (Cr.) 69 : 25 Cr. L. J. 590 : 81 I. C. 78 : A. I. R. 1925 Pat. 115.

——S. 528—*Notice is necessary before transfer—Case going against a party is no ground.*

The omission to issue a notice to the accused before ordering the transfer on application of complainant is certainly irregular. Although, as a rule of practice, it is desirable that notices should be issued, the law is not mandatory upon the point and the omission to issue notice is not in itself a reason for setting aside an order of transfer. It is not the object of S. 528 that a case should be transferred merely because it is going against a particular party. (*Mullick and Kulwant Sahay, JJ.*) GOBIND SWAIN *v.* EMPEROR.

2 Pat. 333 : 1 Pat. L. R. (Cr.) 109 : 1923 P. H. C. C. 47 : A. I. R. 1923 Pat. 228.

——S. 528 (3)—*Transfer—Notice necessary.*

The District Magistrate, without sending for the record and without giving notice to the accused persons, passed an order as follows :—"The order for bail is cancelled and the case transferred to Mr. Phailbus. The accused who are on bail should be put back into the lock-up." It was contended that it was in order to become seized of the case so as to be able to cancel the order of bail that the transfer was ordered. *Held*, although strictly speaking it is not necessary to issue notice before transferring a case, nevertheless the practice has been to do so. Section 528 (3), Cr. P. Code, lays down that reasons should be given for transferring a case. The order of transfer was set aside. (*Broadway, J.*) SARDARA *v.* EMPEROR.

5 L. L. J. 230 : 71 I. C. 603 : 24 Cr. L. J. 187 : A. I. R. 1923 Lah. 380.

——S. 528 (5)—*Order of transfer of a criminal case—Reasons not given—Effect of.*

Where an order of transfer of a criminal case is made under S. 528, cl. (5), of the Cr. Procedure Code without giving any reasons therefor as required by the section, the order is bad and is liable to be set aside. (*Spencer, J.*) VENKATA REDDI, *In re.*

20 L. W. 384 : (1924) M W. N. 873 (1) : A. I. R. 1924 Mad. 873 (1).

——Ss. 528-A and 275—*Indian British subject—Claim to be dealt with as such—Rejection of—Trial by Sessions Judge—High Court—Claim to be tried by majority of Indian Jurors.*

An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of enquiry or trial. This applies to Presidency Magistrates as well as Magistrates in the mofussil. If the Magistrate rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such appeal. This applies to Presidency Magistrates as well as Magistrates in the mofussil. If the Magistrate rejects the claim and commits him to the Court of Session, he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not in the High Court exercising original criminal jurisdiction. If the Court of Session rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such a trial. It necessarily follows that if a claim is made before a Presidency Magistrate

CR. P. CODE (V OF 1898), S. 528-B.

and rejected by him and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in, under S. 275, Cr. P. Code, before the High Court, a further claim for being tried by a jury the majority of whom should be Indians. Where no such claim was put forward before a Magistrate there being no provision for repetition of the claim before the High Court, S. 528-B is a bar to the assertion of the same in any subsequent stage of the case. The claim may be made at any time up till the time when the commitment is made. The committing Court becomes *functus officio* and loses all jurisdiction over the case after the commitment and special provisions have been made in Ss. 216 to 219 to enable the Court to retain jurisdiction only in respect of some matters. (*Mukerjee, J.*) EMPEROR *v.* HARENDRA CHANDRA CHAKRAVARTHY. **51 Cal. 980 : 29 C. W. N. 384 : A. I. R. 1925 Cal. 384.**

——S. 528-B—*Claim may be put forth any time before commitment.*

The claim on the ground of status may be made at any time before the commitment is made: (*Mukerji, J.*) EMPEROR *v.* HARENDRA CHANDRA CHAKRAVARTHY. **51 Cal. 980 : 29 C. W. N. 384 : 84 I. C. 929 : A. I. R. 1925 Cal. 384.**

——S. 528-B—*Waiver.*

Failure to plead status of European British subject before the Court of first instance debar accused from claiming that status subsequently. (*Walmsley and Mukerjee, JJ.*) T. C. S. MARTINDALE *v.* EMPEROR. **40 C. L. J. 256 : 29 C. W. N. 447 : 84 I. C. 1041 : 52 Cal. 347 : A. I. R. 1925 Cal. 14.**

——S. 530—*Summary trial by a Magistrate not authorised—Effect.*

Where a Magistrate not empowered by law to do so tries a case summarily, the proceedings are void under S. 530, Cr. P. Code. (*Dalal, J. C.*) BHIKHAR *v.* EMPEROR. **10 O. & A. L. R. 1196 : 86 I. C. 432 : A. I. R. 1925 Oudh 627.**

——S. 530 (r)—"*Magistrate*" *meaning of.*

"Magistrate" includes a Sessions Judge, so that the dismissal of an appeal by a Sessions Judge where appeal lay only to the High Court was held to be void *ab-initio.* (*Duckworty, J.*) ABDULLA, *In re.* **2 Rang. 386 : 26 Cr. L. J. 293 : 84 I. C. 437 : A. I. R. 1925 Rang 39.**

——S. 531—Though the accused is tried at a place in contravention of S. 181 (4), but there is no prejudice, the trial is not vitiated. (*Stuart, J.*) BADLU SHAH *v.* EMPEROR. **21 A. L. J. 912 : L. R. 5 A. 49 (Cr.) : 46 A. 138 : A. I. R. 1924 All. 454.**

——S. 531—*Offence under S. 408, outside jurisdiction—Irregularity is curable.*

The conviction of an accused for an offence under S. 408 of the Penal Code, committed outside the jurisdiction of the Magistrate is a mere irregularity curable by S. 531 of the Code in the absence of prejudice. A mere objection to the jurisdiction is no proof of such prejudice. (*Newbould and Suharwardy, JJ.*) KALI CHARAN *v.* EMPEROR. **63 I. C. 458 : 22 Cr. L. J. 666 : 34 C. L. J. 200.**

——S. 531—*Commitment order without jurisdiction can be set aside even in the absence of prejudice.*

The High Court has got power to quash a commitment order passed by a Magistrate ordering an accused person to stand his trial in a Sessions Court which has no territorial jurisdiction over the place where the offence alleged was committed. (*Adami and Bucknill, JJ.*) MT. BHAGAWATI *v.* KING EMPEROR.

CR. P. CODE (V OF 1898), S. 533.

3 Pat. 417 : 83 I. C. 577 : 26 Cr. L. J. 49 : A.I.R. 1925 Pat. 187.

——Ss. 532 and 339—*Approver prosecuted—Commitment to Session without Public Prosecutor's certificate— Certificate obtained before trial by Sessions Judge—Setting aside of trial was refused.*

On the conclusion of a trial the Magistrate ordered the Police to prosecute a person who had given evidence as an approver, of the original offence for which he had been originally arrested. The Magistrate overlooked the provisions of S. 339 of the Code. The accused went before a Magistrate, who also overlooked those provisions. The Magistrate, committed the accused to the Court of Session on charges of murder, etc. On the case coming up for trial, the Sessions Judge notified the absence of the certificate from the Public Prosecutor. The trial was adjourned. On the adjourned date, a certificate was filed and accepted by the Sessions Judge, and the trial proceeded. *Held*, that the Magistrate was duly empowered to commit the case. The proceedings before him were merely an enquiry and what was forbidden by the provisions of S. 339 was the trial of the accused which, in this particular case, had to be a trial by a Court of Session as a Court of Original jurisdiction. *Held*, further that it was open to the Sessions Judge, to accept the commitment even if it was irregular. 9 Bom. 288 and 22 Bom. 112 Foll. 37 Cal 467 Dist. 42 Bom. 172 and 17 Mad. 402 Ref. to. (*Robinson, C. J. and Cunliffe, J.*) NGA WA GYI v. EMPEROR. **3 Rang. 55 : 4 Bur. L. J. 23 : A. I. R. 1925 Rang. 219 (2).**

——S. 533—*Scope.*

S. 533 completely cures any formal defects in the recording of the confession. 17 C. 862 Dis., 23 B. 221, Foll (*Stuart and Ryves, JJ.*) DEO DUTT *v.* EMPEROR. **20 A. L. J. 915 : 45 All. 166 : 71 I. C. 54 : 24 Cr. L. J. 6 : L. R. 3 A. 191 (Cr) : A. I. R. 1923 All. 90.**

——S. 533—*Accused warned of his not being bound to confess—Exact words of warning are immaterial.*

The exact words of the warning, which must be given to a person making a statement in the nature of a confession, are not very material provided the Magistrate explains, and the person making the statement clearly understands that he need not make a confession. (*Scott-Smith and Fforde, JJ.*) BAWA SINGH *v.* THE CROWN. **7 L. L. J. 250 : A. I R. 1925 Lah. 448.**

——Ss. 533 and 164—*Magistrate may not record how he was satisfied as to voluntary nature of confession—Footnote to confession record not in order—Examination of Magistrate disclosing compliance with provisions of law—Confession is admissible.*

Though S. 64 lays down that no Magistrate shall record any confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, still it is nowhere laid down that the Magistrate shall record any note showing what questions he has put to the person and how he has satisfied himself that the confession is made voluntarily. But it is advisable that the Magistrate should always record a memorandum showing that he has, by questioning the person making it, satisfied himself that the confession is made voluntarily.

The footnote to the recorded confession was as follows :—

'The statement was written in my presence and hearing. It was read over to the accused, and he admitted it to be correct. It contains a true and full account of the statement made by him."

Held that the footnote complied with the provi-

CR. P. CODE (V OF 1898), S. 535.

sions of S. 164 before it was amended by the Act of 1923 though not with the new provisions which had been added in 1923. As the Magistrate, however, had under the provisions of S. 533 been duly called as a witness and examined, and his evidence showed that he had in fact complied with the provisions of law, the document in which the confession was recorded was fit to be admitted in evidence. (*Scott-Smith and Fforde, JJ.*) KHEMAN *v.* EMPEROR.

6 Lah. 58 : 88 I. C. 18 : A.I R. 1925 Lah. 315.

——S. 535—*Omission to frame charge—Prejudice to accused.*

Where the accused was tried and convicted under S. 506, Penal Code, without framing a charge but a charge was framed against the co-accused under S.506, who was also convicted, *held*, that the omission to frame the charge did not prejudice the accused. (*Stuart, J.*) GANGA PRASAD *v.* EMPEROR.

76 I. C. 568 : 25 Cr. L. J. 200 : A. I. R. 1923 All. 476.

——S. 535—*Section applies where no charge was framed of the offence of which accused was convicted.*

The contention that S. 535 only applies to a trial where no charge at all has been framed is not correct. The section is applicable to a case in which no charge had been framed of the offence of which the appellant has been convicted. (*Newbould and B.B. Ghose, JJ.*) ABDUL RAHIM *v.* EMPEROR.

41 C. L. J. 474 : 88 I. C. 1055 : A.I.R. 1925 Cal. 926.

——S. 537—*Changes.*

Cl. (b) and the illustration to Explanation have been omitted.

——S. 537—*See also* CR. P. CODE, S. 439.

——S. 537—*Search—Irregularities in—Offence committed—Effect.*

Where the evidence is clear of the commission of an offence, any irregularity or illegality in the search can neither lessen the trial, nor can it have any influence on the sentence. (*Sulaiman, J.*) ALI AHMED KHAN *v.* EMPEROR. **21 A. L. J. 858 : L. R. 4 A. 252 (Cr.): 46 All. 86 : A. I. R. 1924 All. 214 (2).**

——Ss. 537 and 342—*Irregular procedure—Non-compliance with provisions of the Code—Effect of the irregularity.*

The test to be applied in considering whether a particular infringement of the provisions of the Cr. P. Code is one which does or does not come within the purview of S. 537, Cr. P. Code, appears to be this. "Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure?" If the error is of such a nature that the proceedings are vitiated in their very inception S. 537, Cr. P. C., has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceedings. (*Stuart, J.*) BECHU CHAUBE *v.* EMPEROR.

20 A. L. J. 874 : L. R. 3 A. 168 (Cr.) : 71 I. C. 115 : 24 Cr.L.J. 67 : 45 A. 124 : A. I. R. 1923 All. 81 (2).

——S. 537—*Defective charge—Charge—Alternative charge—Refusal of sanction—Effect of.*

Where a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, it is contrary to public policy and to the recognised principles of the administration of the criminal law to hold that a complainant can alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction. (*Walsh and Ryves, JJ.*) KOHNA RAM *v.* EMPEROR. **20 A. L. J. 775 : L.R. 3 A. 141 (Cr.) : 45 A. 11 : 4 U. P. L. R. (A.) 162 : 23 Cr. L. J. 496:**

CR. P. CODE (V OF 1898), S. 537.

68 I. C. 32 : A. I. R. (1922) All. 502.

——S. 537—*Irregular Procedure—Joint trial.*

Three persons in separate independent possession of separate articles of stolen property cannot be tried together under S. 411 of the Penal Code. Such a wrong procedure cannot be cured under S. 537 of the Code. (*Lindsay, J.*) JIVAN *v.* EMPEROR.

67 I. C. 505 : 23 Cr. L. J. 409 : 19 A. L. J. 815.

——S. 537—*Defective sanction—Applicability to sanction under S. 314, U. P. Municipalities Act.*

S. 333 of the Act does not authorise a Tahsildar to sanction a prosecution under the Act. The prosecution under S. 333 therefore without the proper sanction under S. 314 is illegal. An irregularity in the sanction cannot be cured by S. 537 of the Cr. P. Code, which is not applicable to the sanction under S. 314. (*Sulaiman, J.*) JUGGAN *v.* EMPEROR.

19 A. L. J. 942 : 65 I. C. 447 (2) : 23 Cr. L. J. 95: L. R. 2 A. (Cr.) 157.

——Ss. 537 and 263 (h)—*Trial by Bench Magistrates—Omission to record reasons for conviction.*

The omission to comply with cl. (*h*) of S. 263 of the Cr. P. Code. on the part of the Bench Magistrates trying a criminal case is only an irregularity which can be cured under S. 537 of the Cr. P. Code where the case was a non-appealable one and there was clear evidence justifying the conviction. It is an omission which does not occasion a failure of justice. (*Marten and Fawcett, JJ.*) EMPEROR *v.* NAMDEO LAKMAN.

26 Bom. L. R. 1236 : A. I. R. 1925 Bom. 138.

——Ss. 537 and 307—*Defective sanction.*

Want of sanction under S, 195, Cr. P. Code, is no ground for quashing a conviction on a reference under S. 307, Cr. P. Code, if no failure of justice has been caused. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* SHANKAR BALKRISHNA.

24 Bom. L. R. 484 : 76 I. C. 1035 : 25 Cr. L. J. 315 : 47 B. 31 : A.I. R. 1922 Bom. 368.

——Ss. 537 and 250—*Where one of two accused is discharged and the other is subsequently acquitted and on the latter occasion the complainant is ordered to show cause and pay compensation to both accused, procedure is illegal under S. 250 of the Code as amended —The defect is incurable under S. 537.*

Where there were two accused and one of them was discharged and the case against the other was adjourned to a later date when he was acquitted and where the Magistrate required the complainant to show cause against an order for compensation being passed and ordered the complainant to pay compensation to each of the accused: *Held*, that the procedure followed was illegal under S. 250 of the Cr. P. Code, as now amended. When the order of discharge was made against one of the accused the case against him was at an end and in so far as payment of compensation to him was concerned, the order to show cause under S. 250 should have been made along with the order of discharge. The defect was not one which was curable under S, 537. (*Sanderson, C. J. and Chotzner, J.*) SURESH CHANDRA *v.* ABDUL JABBAR.

29 C. W. N. 127 : 85 I. C. 129 : 26 Cr. L. J. 449 : A. I. R. 1925 Cal. 264.

——S. 537—*Joint trial—Plea of illegality—Not raised in court below—If open in revision.*

A plea that a joint trial was illegal under S. 239, Cr. P. C. can be raised for the first time in revision. If the point is made out, the trial is vitiated even if there is no prejudice. (*Greaves and Chotzner, JJ.*) DALSUK ROY AGARWALLA *v.* EMPEROR

25 Cr. L. J. 807 : 81 I.C. 343 : A. I. R. 1925 Cal. 248.

——S. 537.

The violation of S. 360, Cr. P. C. is incurable under

CR. P. CODE (V OF 1898), S. 537.

S. 537. (*Newbould and Mukerji, JJ.*) HIRALAL GHOSE *v.* EMPEROR. **52 Cal. 159 : 28 C. W. N. 968 : 83 I. C. 905 : 26 Cr. L. J. 201 : A. I. R. 1924 Cal. 889.**

——S. 537—*Defective charge.*

Where the charge does not indicate the matter with which the accused is charged sufficiently, the conviction cannot stand. (*Ghose and Cuming, JJ.*) OATES *v.* EMPEROR. **38 C. L. J. 163 : 76 I. C. 417 : 25 Cr.L.J. 177 : A.I. R. 1924 Cal. 104.**

—— Ss. 537 and 234—*Defective charge—Real charge understood—No prejudice.*

Where it was intended to allege one geueral conspiracy to commit an offence or offences under S. 420 of the Indian Penal Code by cheating the Government of India of large sums of money and the transactions in linseed oil, turpentine and water soluble oil were overt acts from which the conspiracy might be inferred and this was explained to the Counsel who appeared for the accused at different periods of the trial and the accused fully understood the charge. *Held*, that although the allegations amounted to charges of three different conspiracies, it was not a bad charge as the accused knew what the charge was. The mere fact of there being three letters in respect of the three articles is not inconsistent with the existence of one general conspiracy. The fact that there were many transactions intervening between the dates of the three matters alleged as overt acts by the prosecution, and that it was proved that such transactions were fraudulent or dishonest is not inconsistent with the existence of one general conspiracy. Although the charge should have contained an allegation of the person or persons who were alleged to have been deceived and induced to issue the cheque the omission should not be regarded as a fatal defect in the charge, where the accused were not misled and there was no failure of justice by reason of the omission of the above-named particulars from the charge. Where objection was taken to the charge of cheating the Government of India by inducing them to deliver a cheque for Rs. 59,265 in payment of five bills that the five bills therein referred to, were presented at different dates, and that if any offence was committed by the appellants in respect of the bills, there were five separate offences of cheating and five separate offences could not be included in one charge. *Held* : the offence charged under S. 420, Indian Penal Code, would not be complete until the Government of India, being induced thereto by the alleged fraudulent bills, delivered the cheque for Rs. 59,265. Until the last of the five bills was delivered the inducement was not complete, and until the cheque was issued the offence under S. 420, Indian Penal Code, was not complete. Therefore, the charge did not include five separate offences as alleged but one offence only. (*Sanderson, C. J. and Richardson, J.*) BILLING HURST *v.* EMPEROR. **27 C. W. N. 821 : A. I. R. 1924 Cal. 18.**

——S. 537—*Irregular Procedure.*

The mere fact that one question was put to the Judge by the Jury not in open Court but in chambers was no more than an irregularity and did not vitiate the trial. (*Newbould and Suhrawardy, JJ.*) BILAS CHANDRA *v.* EMPEROR. **27 C. W. N. 626 : A. I. R. 1923 Cal. 647.**

——S. 537—*Charge to Jury—Interference if failure of Justice.*

Where the Local Government appealed against the acquittal of the accused, who were found not guilty by the unanimous verdict of the jury and therefore acquitted by the Sessions Judge on the ground of misdirection in Judge's charge to the jury, *held*, though there is misdirection this does not justify a reversal of the verdict of the jury unless the misdirection in fact occasioned a failure of justice. If the High Court does not think that the verdict of the jury was due to the misdirection of the jury and apart from it they would not come to the same conclusion, the acquittal will be maintained. (*Newbould and Suhrawardy, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS *v.* SHYAM SUNDER BHUMIJ. **71 I. C. 367 : 26 C. W. N. 558 : 24 Cr. L. J. 143 : A. I. R. 1922 Cal. 106.**

——Ss. 537 and 540—*Omission to give accused opportunity to rebut evidence of Court witness examined after close of defence evidence is illegality incurable by S. 537.*

Where, after the close of the defence evidence, the Court examined the Police Sub-Inspector as a witness, *Held* : that the omission to give accused an opportunity to rebut the evidence was an illegality not curable by S. 537. (*Broadway, J.*) SHUGAN CHAND *v.* EMPEROR. **A. I. R. 1925 Lah. 531.**

——Ss. 537 and 540—*Omission to give accused opportunity to rebut evidence of Court witness examined after close of defence evidence is illegality incurable by S. 537.*

Where, after the close of the defence evidence, the Court examined the Police Sub-Inspector as a witness, *Held* : that the omission to give accused an opportunity to rebut the evidence was an illegality not curable by S. 537. (*Le Rossignol and Fforde, JJ.*) FATEH *v.* ALAYAR. **6 Lah. 352 : A. I. R. 1925 Lah. 530.**

——S. 537—*Case made triable by Sessions by new Code—New Code coming into operation during pendency of the case—Trial of the case by Magistrate is illegal.*

Where a case, which under the new code was made triable by Court of Sessions, was pending before a Magistrate when the new Code came into force and the Magistrate instead of committing the accused to Sessions Court concluded it himself and passed sentence against the accused *Held*, the trial was illegal and the illegality was not curable under S. 537. (*Moti Sagar, J.*) JIMUM SHAH *v.* EMPEROR. **26 Cr. L. J. 549 : 85 I.C. 645 : A. I. R. 1925 Lah. 378.**

——S. 537—*Absence of sanction—If a mere irregularity—What sanction should contain.*

The absence of a sanction under S. 195, Cr. P. Code, is not a defect that is curable under S. 537, Cr. P. Code. A sanction to prosecute for an offence under S. 186, I. P. C. should contain the time and place at which the offence was committed and a conviction based on a sanction which omitted the particulars acquired by S. 195 (4) will not be sustained. (*Moti Sagar, J.*) JASWANT SINGH *v.* EMPEROR. **81 I. C. 209 : 25 Cr. L. J. 721 : A.I R. 1925 Lah. 139.**

——Ss. 537 and 367—*Omission to write judgment before sentencing—Effect.*

The omission to write a judgment before an accused is sentenced is only an irregularity curable by S. 537 unless there has been a failure of justice. (*Moti Sagar, J.*) ATA MUHAMMAD *v.* EMPEROR. **81 I. C. 193 (1) : 25 Cr. L. J. 705 (1) : A. I. R. 1925 Lah. 137 (1).**

——S. 537—*Mode of trial—Scope of—Cross trials—Mixing up evidence.*

S. 537, Cr. P. Code, is applicable only to errors, omissions or irregularities of a technical nature. Where two cross trials are tried together, the prosecution evidence in each being treated as the defence in the other, *held* the whole proceeding was illegal. (*Broadway and Fforde, JJ.*) ALLU *v.* CROWN.

CR. P. CODE (V OF 1898), S. 537.

4 Lah. 376 : 75 I. C. 980 : 25 Cr. L. J. 68 : 6 L. L. J. 103 : A. I. R. 1924 Lah. 104

——S. 537—*Irregular Procedure—Infringement of statute is not covered by S. 537.*

S. 537 of the Code does not apply to an infringement of statutory requirement. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute. 25 Mad. 98 Foll. Where two cross-cases were tried together and the accused in each case replied that the prosecution evidence in one be considered as defence evidence in the other and it was so considered, *Held* that the procedure was illegal and this is not curable by S. 537. (*Broadway and Fforde, JJ.*) ALLU *v.* EMPEROR.

4 L. 376 : 6 L. L. J. 103 : 25 Cr. L. J. 68 : 75 I. C. 980 : A. I. R. 1924 Lah. 104.

——S. 537—*Irregular procedure—Witnesses not examined but only their previous statements merely read over to them—Illegality not curable.*

On the 12th March, 1923, the prisoner was brought before the District Magistrate upon a charge under S. 376, Penal Code. After seven witnesses for the prosecution had been examined the Public Prosecutor closed the case for the Crown, the cross-examination of these witnesses having been reserved. The case was then adjourned to the 14th when the prisoner claimed as a European British subject to be tried by a jury under the provisions of S. 451 of the Cr. P. Code and the proceedings were accordingly stayed to enable proper steps to be taken in compliance with the section. On the 22nd the witnesses were duly examined by the prosecution and cross-examined by counsel for the defence. As regards the remaining *i. e.* previous seven witnesses for the Crown, the course adopted was as follows. When each witness came into the box the recorded statement of the evidence given by him at the first hearing was read out to him. A few further questions were then put to the witness and he was tendered for cross-examination; some witnesses were not even sworn. *Held*, that this method of presenting the evidence for the prosecution is irregular, and not only irregular but entirely illegal, and the defect is not curable by S. 537. (*Fforde, J.*) JOHN THOMAS *v.* EMPEROR.

4 Lah. 382 : 77 I. C. 425 : A. I. R. 1924 Lah. 17.

——S. 537—*Irregular procedure.*

Omission to comply with the formalities prescribed by S. 342 is not a mere irregularity such as can be cured under S. 537. (*Chevis, J.*) MUHAMMAD BAKHSH *v.* EMPEROR. **23 Cr. L. J. 154 : 65 I. C. 618 : 4 L. L. J. 230 : A. I. R. 1922 Lah. 45.**

——S. 537—*Warrants and summons.*

The execution by a *Naib Nazir* and process-servers of a warrant addressed to the bailiff, without any endorsement by the bailiff, is illegal. (*Wilberforce, J.*) GHASITA MAL *v.* EMPEROR.

59 I. C. 849 : 22 Cr. L. J. 145 : 3 Lah. L. J. 346.

——S. 537—*Defective sanction.*

Where the order of Govt. sanctioning prosecution was addressed to three officers but not specifically to any one of them, *held*, that communication of order to the officer who is entrusted with the duty of initiating prosecution, *viz.*, Dt. Magistrate, is important and as he was one among the three, the order of sanction was a mere irregularity and not an illegality (*Oldfield and Ramesam, JJ.*) MANDAYAPURATH ERASA, *In re.* **24 Cr. L. J. 539 : 17 L. W. 100 : 73 I.C. 155 : A. I. R. 1923 Mad. 338 : 44 M. L. J. 166.**

——S. 537—*Irregular Procedure — Conviction when liable to be set aside.*

CR. P. CODE (V OF 1898), S. 537.

Under S. 537, the High Court will not upset a conviction on the ground of irregularity in the judgment unless a failure of justice has resulted. (*Wallace, J.*) DERVISH HUSSAIN, *In re.* **46 Mad. 253 : 32 M. L. T. (H. C.) 100 : 17 L. W. 18 : 24 Cr. L. J. 84 : 71 I. C. 212 : A. I. R. 1923 Mad. 185 : 44 M. L. J. 84.**

——S. 537—*Irregularity in judgment—Possession case—Judgment—Contents of.*

A Magistrate after holding an enquiry under S. 145, Cr. P. Code, instead of pronouncing a judgment with reasons for his conclusion merely passed an order ordering counter-petitioner to be put in possession of the lands. A printed form was filled up declaring counter-petitioner to be in possession *Held* that the Magistrate ought to have written a judgment giving a finding as to the possession of the property on the date of the preliminary order, 18 M. 41 ; 49 C. 187 Ref. (*Venkatasubba Rao, J.*) PERIA SUBBA GOUNDAN *v.* SINNA SUBBAYYA GOUNDAN. **69 I. C. 158 : 16 L. W. 701 : 31 M. L. T. (H. C.) 382 : 23 Cr. L. J. 670 : A. I. R. 1923 Mad. 142 : 45 M. L. J. 56.**

——S. 537—*Irregular Procedure— Failure to comply with S. 342, Cr. P. Code—Effect.*

The accused's right to state his case at whatever stage the law permits him to do so is fundamental and cannot be regarded as a mere error, omission or irregularity such as is contemplated in S. 537 (a), Cr. P. Code. (*Oldfield and Ramesam, JJ.*) MARUDA MUTHU VANNIAN. *In re.* **45 M. 820 : 16 L.W. 420 : 24 Cr. L. J. 124 : 1922 M. W. N. 601 : 71 I. C. 252 : A.I.R. 1922 Mad. 512 : 43 M. L. J. 402.**

——Ss. 537 and 200—*Irregular procedure—Complaint—Omission to examine complainant on oath—Serious irregularity.*

It is a serious irregularity if a Court does not examine a complainant on oath. (*Ramesam, J.*) RAMASWAMI AIYANGAR, *In re.* **16 L W. 220 : (1922) M. W. N. 681 : 69 I. C. 371 : 23 Cr. L. J. 691 : A. I. R. 1922 Mad. 443 : 43 M. L. J. 710.**

——S. 537—*Failure to question—Effect—Cross-examination of prosecution witnesses after charge—If accused to be questioned thereafter.*

Where a court entirely fails to question an accused after the close of the prosecution evidence the trial from that point onwards is illegal and a fresh trial should be ordered therefrom. Where after charge, the prosecution witnesses are cross-examined under S. 257, S. 342 does not apply and the accused need not be examined thereafter. (*Hallifax, A. J. C.*) GANGADHAR *v.* BHANGI SAO. **81 I. C. 976 : 25 Cr. L. J. 1152 : A. I. R. 1925 Nag. 147.**

——S. 537—*Absence of service of order.*

The defect of not serving on the accused a copy of the preliminary order is cured by S. 537. (*Hallifax, A. J. C.*) NARAINRAO *v.* EMPEROR.

25 Cr. L. J. 682 : 81 I. C. 170 : A. I. R. 1925 Nag. 33 (2).

——S. 537—*Trial with less than requisite number of assessors—Defect if cured.*

S. 537, Cr.P. Code, does not cure the defect in a trial where a case triable with assessors is tried with less than the required number of them. The errors in such a case is a substantive error of law and not of procedure only. (*Prideaux and Kinkhede, A. J. Cs.*) JAIRAM KUNBI *v.* EMPEROR. **25 Cr. L. J. 459 : 20 N. L. R. 129 : 77 I. C. 811: A I. R. 1924 Nag. 287.**

——S. 537—*Want of complaint under S. 195 is incurable.*

The want of a complaint by the Court concerned,

under S. 195 will vitiate the whole trial and the defect cannot be condoned. (*Daniels, J. C.*) GIRDHARI LAL *v.* EMPEROR. **2 O. W. N. 174 : 12 O. L. J. 194 : 26 Cr. L. J. 29 : 86 I. C. 993 : A. I R. 1925 Oudh 413.**

——S. 537—*Want of sanction is not curable under S. 537—Conviction under S. 477 and charge under S. 471 are illegal for want of sanction.*

Conviction under S. 474 at a trial in which the charge was framed under S. 471 is irregular for want of sanction and the trial is vitiated as want of sanction is not a mere technical irregularity curable under S. 537, Cr. P. C. (*Wazir Hasan and Pullan, A. J. Cs.*) SURAB BAHADUR *v.* EMPEROR. **25 Cr. L. J. 1162 : 81 I. C. 986 : 11 O. L. J 640 : A. I. R. 1925 Oudh 158.**

——S. 537—*Absence of written complaint required under S. 195, Cr P. C., does not vitiate conviction where complainant is examined.*

Where the complainant was examined on oath by the Magistrate when cognizance was taken of the offence, absence of a complaint in writing would only amount to an error, omission or irregularity as contemplated by S. 537 of the Cr P. Code. (*Kulwant Sahay, J.*) LACHMI SINGH *v.* EMPEROR. **5 P. L. T. 505 : 1924 P H. C. C. 181 : 81 I. C. 620 : 25 Cr. L. J. 972 : A. I. R. 1924 Pat. 691.**

——S. 537—*Irregular procedure—Accused examined before prosecution witness not curable.*

It is a fatal defect to examine the accused, before all the prosecution witnesses are examined and it is not curable by S. 537. (*Bucknill, J.*) TILAK GOPE *v.* BHAYA RAM. **62 I. C. 870 : 22 Cr. L. J. 598 (Pat.).**

——S. 537—*Irregular procedure— Prosecution witness not called for cross-examination.*

If the Judge refuses to recall the prosecution witnesses for cross-examination, the refusal amounts to an improper exercise of jurisdiction and vitiates the trial. (*Jwala Prasad and Sultan Ahmed, JJ.*) TEKA AHIR *v.* EMPEROR. **22 Cr. L. J. 219 : 60 I. C. 331 : 5 Pat. L. J. 706.**

——S. 537—*Accused has right to be examined after further cross-examination of the prosecution witnesses —Omission to so examine cannot be cured by S. 537 but vitiates the conviction.*

An accused person has a right to be examined and to state his case after the further cross-examination of prosecution witnesses, even though he has already been examined before the charge was framed and he was called on for his defence. That right is fundamental and the omission to so examine him cannot be regarded as a mere error or irregularity, which can be cured by S 537, Cr.P. Code, but vitiates the conviction. A. I. R. 1923 Cal. 164 ; A. I. R. 1924 Cal. 975 and A.I.R. 1922 Mad. 512 Foll. (*Godfrey, J.*) AH KAUNG *v.* EMPEROR. **4 Bur. L J. 143 : A. I. R. 1925 Rang. 363.**

——S. 537—*Defects in procedure even in contravention of positive enactments are curable.*

A positive enactment by the Code that a certain trial shall not take place is obviously a very different thing from a positive enactment that in the course of such a trial certain detailed procedure shall be followed. In the one case an infringement of the enactment amounts to an assumption of jurisdiction and vitiates the trial from the very beginning. In the other case an infringement merely amounts to an error, omission or irregularity in the procedure adopted in the course of the trial. S. 537 of the Code aims at curing infringements of the latter type. 25 Mad. 61 (P. C.) Expl. If the error is of the former nature, the proceedings are vitiated in their very inception, and S. 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings. (*Brown, J.*) NGA HTA U *v.* EMPEROR. **3 Rang 139 : A. I. R. 1925 Rang 258.**

——S. 5237—*Burma Habitual Offenders' Restriction (Act II of 1919), S. 7—Omission to state the period of restriction in the preliminary order as required by S. 4, proviso (2)—Omission is an irregularity curable by S. 537, Cr. P. Code*

Omission to state the period of restriction in the preliminary order does not render the whole proceeding void. (2 R. 524 dis). It is only an irregularity able by Upper Burma Criminal Justice Reg., Chap.XV (*Carr, J.*) MAUNG THWE *v.* KING-EMPEROR. **3 Rang. 74 : 89 I. C. 527 : 26 Cr. L. J. 1391 (2) : A. I. R. 1925 Rang. 214.**

——S. 537—*Defect due to not making order in writing as required by S. 145 (1) is curable under S. 537—Cr. P. Code, S. 145 (1).*

Where the Magistrate did not make an order in writing as required by S. 145 (1). *Held*, that S. 537, Cr. P Code, is sufficient to cure this defect. (*Carr, J.*) MG PO LON *v.* MG BA ON. **3 Bur. L. J. 256 : 26 Cr. L. J. 324 : 84 I. C. 548 : A. I. R. 1925 Rang. 111 (2).**

——S. 537—*Irregular procedure — Failure to examine complainant is a curable irregularity.*

Failure to examine the complainant is an error of procedure and where it has caused no injury to applicant and no failure of justice under S. 537 it is curable. (*Pratt, J.*) GOPI CHAND *v.* CROWN. **1 R. 517 : 76 I. C. 865 : 25 Cr. L. J. 273 : A. I. R. 1924 Rang 87.**

——S. 537 (a)—*Irregular procedure—Warrant for arrest of woman in abduction case—Omission to record reason is mere irregularity.*

The omission by a Magistrate to record in the first instance his reasons for issuing warrant of arrest against the alleged abducted woman in a case under S. 498 of the Penal Code is only a mere irregularity within S. 537 (*a*) of the Cr P. Code. (*Gokul Prasad, J.*) MAHAR SINGH *v.* EMPEROR. **18 A. L. J. 1149 : 59 I. C. 415 : 22 Cr. L. J. 111 : L R. 2 A. (Cr.) 14.**

——S 537 (a)—*Scope—In case of a mandatory provision, the section applies only to cases of failure to comply with some part of such provision in the course of general compliance with the whole.*

S. 537 (a) of the Cr. P. Code, has no application to cases in which there has been a disregard or disobedience of the whole of some mandatory provision of the Code ; but the section applies only to cases where there has been a failure to comply with some part of such a provision in the course of a general compliance with the whole. (*Hallifax, A. J. C.*) GANGADHAR *v.* BHANGI SAO. **25 Cr. L. J. 1152 : 81 I. C. 976 : A. I. R. 1925 Nag. 147.**

——Ss. 537 (b) and 195—*Defective sanction is no ground for interference.*

Where a person has been sentenced upon conviction for an offence mentioned in S. 195 of the Code, the sentence is not liable to be reversed or altered on appeal or revision on the ground that the sanction required by the section, had expired when the prosecution was initiated, unless it is established that the absence of sanction has in fact occasioned a failure of justice. Where the accused pleaded guilty there is no failure of justice in the case. 22 Cal. 176, overruled ; 28 Cal 217, approved : 31 Mad. 80. referred to. (*Sanderson, C.J., Woodroffe, Mookerjee, Teunon and Richardson, JJ.*) KHETRA MOHAN DAS *v.* EMPEROR. **66 I. C. 662 : 23 Cr. L. J. 310 :**

CR. P. CODE (V OF 1898), S. 539.

48 Cal. 867 (F. B.)

——S. 539—*Affidavits.*

Affidavits sworn before Presidency Magistrates of Calcutta are not admissible in the Patna High Court. Criminal Rev. 255 of 1925, Ref. (*Macpherson, J.*) B. N. RY. CO. *v.* MUKBUL. **A. I. R. 1925 Pat. 755.**

——S. 539-B—*The section only embodies an already recognized rule in Calcutta High Court—Contravention of the rule will vitiate final order if party is prejudiced.*

Section 539-B does not introduce any new principle; for the Calcutta High Court had often laid down that a memorandum should be prepared, so that both sides to an enquiry or trial might know what the Magistrate during his enquiry had noticed or failed to notice. Where the local enquiry was made in the presence of the petitioner's pleader who did not, however, ask the Magistrate to record a memorandum or to attach a memorandum to the record or to give him a copy: *Held*, he could not be allowed to say that for this formal defect the proceedings should be set aside, unless he could show that the Magistrate's omission had caused prejudice. (*Walmsley and B. B. Ghose, JJ.*) W. R. T. FORBES *v.* MD. ALI HAIDAR KHAN. **42 C. L. J. 131 : 90 I. C. 308 : A. I. R. 1925 Cal. 1246.**

——S. 539-B—*Inspection by Magistrate—Non-compliance with terms of the section—Illegality.*

The provision in the second clause of S. 539-B, Cr. P. Code, is mandatory and failure to comply with this express direction of the law is an illegality and not an irregularity which could be cured if there was no prejudice to the accused. (*Newbould and Mukerjee, JJ.*) HRIDOY GOVINDA SUR *v.* EMPEROR. **52 Cal. 148 : 40 C. L. J. 149 : 82 I. C. 767 (1) : 25 Cr. L. J. 1375 : A. I. R. 1924 Cal. 1035.**

——S. 540—*Both sides can freely cross-examine—Questions suggested by defence and put by Court are not cross-examination.*

If a witness is called under S. 540 both sides have a right to cross-examine that witness freely. It is wholly misleading to describe as a cross-examination that which consists of certain questions being suggested by the defence to the Court and those questions being put by the Court. (*Boys, J.*) PITA *v.* EMPEROR. **47 All. 147 : L. R. 6 A. (Cr.) 17 : 85 I. C. 719 : 26 Cr. L. J. 575 : A. I. R. 1925 All. 285.**

——S. 540—*Irregular procedure — Prosecution evidence recorded after defence evidence closed—Irregularity.*

The recording of evidence on behalf of the prosecution after the defence evidence is closed is an irregularity which ought to be avoided. (*Shah and Crump, JJ.*) ALEX PIMENTO *v.* EMPEROR. **22 Cr. L. J. 58 : 59 I. C. 202 : 22 Bom. L. R. 1224.**

——S. 540—*Examination of witnesses after close of case is unjustifiable.*

After both sides had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined before the Magistrate, the Magistrate having exercised his powers under S. 540, Criminal Procedure Code. *Held* that the procedure adopted by the Magistrate was entirely unjustifiable. Sentence was set aside and re-trial ordered. (*C. C. Ghose and Chotzner, JJ.*) NATABAR GHOSE *v.* ADYA NATH. **37 C. L. J. 415 : 27 C. W. N. 675 : 75 I. C. 541 : 24 Cr. L. J. 957 : A. I. R. 1923 Cal. 690.**

——S. 540—*Witness examined on application by party is not a Court witness.*

CR. P. CODE (V OF 1898), S. 545.

A Court witness means one whom the Judge acting on his own initiative caused to be produced. But where the Public Prosecutor put in a petition requesting the Court to examine a witness as a Court witness, so that both parties may cross-examine him, the witness so called is not a Court witness and his testimony thus obtained should be rejected *in toto*. (*Walmsley and Pearson, JJ.*) EMPEROR *v.* SATYENDRA KUMAR. **37 C. L. J. 173 : 71 I. C. 657 : 24 Cr. L. J. 193 : A. I. R. 1923 Cal. 463.**

——Ss. 540-342—*Witness summoned suo motu—Accused if to be examined again.*

S. 540 Cr. P. Code is not controlled by S. 342 and when a witness is examined by the Court *suo motu* after the witnesses for the prosecution had been examined and the accused had once been examined under S. 342, there is no duty on the court to examine the accused again under S. 342. (*Shadi Lal, C. J.*) FAZAL KARIM *v.* EMPEROR. **26 Cr. L J. 1418 : 89 I. C. 842.**

——S. 540—*Power of Magistrate to examine Court witnesses after the close of the case.*

Although it is true that proper discretion has to be exercised under S. 540, Cr. P. Code, still the terms of the section are extremely wide and any court may at any stage of any enquiry, trial or other proceedings summon any person as a witness, if his evidence appears to it essential to the just decision of the case. This power can be exercised even after the close of the case for the prosecution and the defence. (*Odgers, J.*) PERUMAL, *In re.* **(1924) M. W. N. 303 : 34 M. L. T. 165 : 77 I.C. 290 : 25 Cr. L. J. 354 : 19 L. W. 272 : A. I. R. 1924 Mad. 587 (2) : 46 M. L. J. 325.**

——Ss. 540 and 556—*Local Inspection of scene of occurrence—Magistrate—Legality of.*

Local inspection by a magistrate of scene of occurrence with a view to understand the evidence is not illegal. (*Ayling and Odgers, JJ.*) THACHROTH HYDROSS, *In re.* **1923 M. W. N. 860 : 18 L. W. 113 : 75 I. C. 695 : 25 Cr. L. J. 7 : A. I. R. 1923 Mad. 694 : 45 M. L. J. 279.**

——S. 540—*Defence closed—Rebutting evidence by prosecution—Admissibility.*

Where, after the case for the defence is closed, the prosecution offers to give rebutting evidence to falsify the case for the defence, and it is found that the prosecution could not possibly offer that evidence at an earlier stage, fresh rebutting evidence should be admitted. The second part of the section is imperative. If the new evidence appears to the Court essential to the just decision of the case, the Court has no choice but is bound to take the evidence. (*May Oung, J.*) MAUNG PO HMYIN *v.* J. B. BHATTACHARJEE. **1 Rang. 308 : 2 Bur. L. J. 127 : 76 I. C. 649 : 25 Cr. L. J. 217 : A. I. R. 1923 Rang. 216.**

——S. 545—*Change.*

[Sub-clause (c) has been newly added providing for compensating innocent third parties suffering loss, in cases of theft, criminal misappropriation, criminal breach of trust, cheating or of receiving stolen property.]

——S. 545—*Payment of money—Indemnity—Order—Legality of.*

There is no provision in Ch. XLIII, Cr. P. Code or in S. 545 which empowers a court to order payment of money as indemnity in a case of theft. (*Hallifax, A. J. C.*) BHURA *v.* EMPEROR. **90 I. C. 151 : 26 Cr. L. J. 1495 (Oudh).**

——S. 545—*Pledge of jewels—Cheating—Compensation out of fine to pledgee.*

CR. P. CODE (V OF 1898), S. 545.

Where the accused was convicted of cheating the complainant and obtaining jewels and pledging them, it is not competent to the magistrate to pay a portion of the fine as compensation to the pledgee. Such an order is not contemplated by S. 545, Cr. P. Code. (*Macleod, C. J. and Coyajee, J.*) EMPEROR *v.* RAMCHANDRA BAPUJI. **46 B. 893 : 66 I.C. 997 : 23 Cr. L. J. 321 : 24 Bom. L. R. 382 : A. I. R. 1923 Bom. 22.**

——S. 545—*Compensation—If can be directed to be paid.*

Where a person is dealt with under S. 562, and no fine is imposed on him, the court has no power to direct him to pay compensation to the other party. (*Wazir Hasan, J. C.*) MUNREY MIRZA *v.* EMPEROR. **25 Cr. L. J. 1116 (1) : 81 I. C. 940 (1) : A. I. R. 1925 Oudh 110 (1).**

——S. 545 (1) (*b*)—*Fine—Compensation out of fine to a third person.*

The accused obtained ornaments by cheating the complainant and pledged a portion of the ornaments with one Dalichand. He was convicted for the offence and ordered to pay a fine. Out of the fine, a certain amount was ordered to be paid to Dalichand. *Held* that the order to pay a certain amount out of the fine as compensation to the pledgee was outside the scope of S. 545 as the section directs compensation to be paid to the person who has suffered by the offence. (*Macleod, C. J. and Coyajee, J.*) EMPEROR *v.* RAMACHANDRA BAPUJI. **46 Bom. 893 : 24 Bom. L. R. 382 : 66 I. C. 997 : 23 Cr. L. J. 341 : A. I. R. 1923 Bom. 22.**

——S. 546-A—*Non-cognizable offence—Costs do not lie.*

An order for payment of costs is not competent under S. 546-A when the case is one of non-cognizable offence. (*Kendall, A. J. C.*) NUR-UD-DIN *v.* KING EMPEROR. **25 Cr. L. J. 1161 : 81 I. C. 985 : A. I. R. 1925 Oudh 109 (1).**

——S. 547—*Suit to recover balance of expenses ordered by a criminal Court to be paid to witness lies in Civil Court—Jurisdiction—Civil Court—C. P. Code, S. 9.*

There is no provision in the Code under which the Court can order payment of diet money to a witness. That power is vested in the Court under the general rules of the High Court and therefore a suit for recovery of such money is maintainable in a civil Court. S. 547, Cr. P. Code, does not apply to such a case. (*Suhrawardy and Page, JJ.*) KAMAL MUNDALINI *v.* PARAMSUKH CHAKRABAKTY. **29 C. W. N. 1033.**

——S. 556—*Magistrate being a witness to the identification proceedings is no ground for commitment.*

Where the Magistrate who committed the accused, was himself a Magistrate of the first class, but passed an order of commitment on the ground that he was a witness of the identification proceedings in the case: *Held*, that the proper course for him was to have moved the District Magistrate. (17 A. L. J. 456, Foll.) (*Ryves, J.*) EMPEROR *v.* RAM JATAN. **21 A. L. J. 420 : L. R. 4 A. 215 (Cr.) : A. I. R. 1924 All. 185.**

——S. 556—*Municipal Commissioner, a party to initiate the proceedings.*

The accused were convicted for keeping the pigs within the limits of the Municipality without a license and contrary to the bye-laws lawfully promulgated for that purpose. The Magistrate who tried the case had in his capacity as a Municipal Commissioner, invited the attention of the Executive Officer to the manner in which the bye-law on the subject of the keeping of swine within Municipal limits was apparently being disregarded. The Executive Officer and the Health Officer instituted the prosecutions, after satisfying themselves that there were good *prima facie* grounds for believing that the bye-law was being broken. *Held* that the convictions were not improper. (*Piggott, J.*) NANOO *v.* EMPEROR. **L. R. 4 A. 9 (Cr.) : 71 I. C. 359 : 24 Cr. L. J. 135 : A. I. R. 1923 All. 483 (1).**

CR. P. CODE (V OF 1898), S. 556.

——S. 556—*Provincial Insolvency Act, Ss. 43 and 48—Magistrate acting as Insolvency Judge—Appeal to Dt. Judge.*

A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where as an Insolvency Judge, on the application of a creditor, he allowed the prosecution to proceed. (*Walsh, J.*) SRI KRISHNA *v.* EMPEROR. **L. R. 4 A. 12 (Cr.) : 24 Cr. L. J. 144 : 71 I. C. 368 : 21 A. L. J. 90 : A. I. R. 1923 All. 193 (1).**

——S 556 Expl.—*Magistrate cannot both be prosecutor as well as Judge.*

S. 556 expl. does not apply where the Magistrate himself directs the prosecution as the Magistrate cannot both be a prosecutor as well as a Judge. (*Pratt and Fawcett, JJ.*) GUNDO CHIKKO *v.* EMPEROR. **62 I. C. 875 : 22 Cr. L. J. 603 : 23 Bom. L. R. 842.**

——S. 556—*Record of Local Inspection should be allowed to be objected to, if desired, before judgment.*

Recording result of local inspection after delivery of judgment is irregular. The Magistrate should record the result of his local inspection and allow the parties to adduce evidence and arguments if they so desire regarding what he has recorded. However where local inspection is used only to confirm the documentary and oral evidence on the record, conviction will not be set aside. (*Greaves and Chotzner, JJ.*) BHOLA NATH NANDI *v.* KEDAR NANDI. **25 Cr.L.J. 705 : 81 I. C. 193 : A. I. R. 1925 Cal 353.**

——S. 556—*Duty of counsel—Admission of guilt—Duty of Court.*

Per *Mookerjee, J.*—An advocate for a prisoner should not approach the trial judge and apprise him that in his opinion the man whose fate has been entrusted to his care, has no defence to make. The case should not in such case be tried by the Magistrate to whom such confession is made. (*Mookerjee, Richardson, Ghose, Cuming and Page, JJ.*) EMPEROR *v.* BARENDRA KUMAR GHOSE. **28 C. W. N. 170 : 38 C. L. J. 411 : 25 Cr. L. J. 817 : 81 I. C. 353 : A. I. R. 1924 Cal. 257 (F. B.).**

——S. 556—*Magistrate—Criminal trial—Report to Govt. for sanction,*

A Magistrate making a report to the Local Govt. for obtaining sanction under S.195, Cr.P. Code, for the prosecution of a person under S.29, I. P. C. is not on that account incompetent to take cognizance of the case. (*Walmsley and Suhrawardy, JJ.*) MD. OZIULLAH *v.* BENI MADHAB. **26 C. W. N. 878 : 36 C. L. J. 180 : 71 I. C. 239 : 50 Cal. 135 : 24 Cr. L. J. 111 : A. I. R. 1922 Cal. 298.**

——S. 556 *Provincial—Insolvency Act (V of 1920), S. 69—Conviction under—Jurisdiction to hear appeal when complaint lodged by the Sessions Judge himself—Consent of parties does not confer jurisdiction.*

The words "try any case" in S. 556, Criminal Procedure Code, are comprehensive enough to include the hearing of an appeal. 23 Cal 45, followed. The consent of a party concerned cannot affect the

CR. P. CODE (V OF 1898), S. 556.

absolute disqualification imposed by S. 556, Criminal Procedure Code. 32 All. 635 followed ; 7 Cal. W. N. 708, dist. (*Campbell, J.*) MAMOON *v.* CROWN.
4 Lah.L.J. 452 : 67 I.C. 622 : 14 P. W. R. 1922 (Cr). : 61 P. L. R. 1922 : 23 Cr. L. J. 446 : A. I. R. 1922 Lah. 30 (2).

——S. 556—*Result of local inspection may be stated in judgment.*

The judgment of a Magistrate is not vitiated by the fact that he inspected the *locus in quo* and stated in his judgment what he saw there. (*Ayling and Odgers, JJ.*) THACHROTH HYDROSS, *In re.*
18 L.W. 113 : 25 Cr. L. J. 7 : 75 I. C. 695 : 1923 M. W. N. 860 : A. I. R. 1923 Mad. 694 : 45 M. L. J. 279

——S. 556—*Court directing prosecution—If can hear appeal from conviction.*

A Court which sanctions or directs a prosecution is not thereby rendered incompetent to try the offence or to hear an appeal against a conviction for it, for, in directing a prosecution, the Court merely directs further inquiry into the matter. (*Hallifax, A. J. C.*) PANDIA MAHAR *v.* EMPEROR. **89 I. C. 1049 : 26 Cr. L. J. 1481.**

——S. 556—*Sanctioning or directing prosecution does not incapacitate.*

A Court which sanctions or directs a prosecution is not thereby rendered incompetent to try the offence or to hear an appeal against a conviction for it. There might of course be special circumstances in a case which render it improper that the Judge or Magistrate who sanctioned ordirected the prosecution should hear the appeal against the conviction obtained in that prosecution. (*Hallifax, A. J. C.*) PANDIA MAHAR, *In re.* **25 Cr. L. J. 171 : 76 I. C. 395 : A. I. R. 1924 Nag. 23.**

——S. 556—*The magistrate giving formal sanction as President of Committee but not directing prosecution is not disqualified.*

The mere fact that the trying Magistrate was the President of the Town Committee would clearly give him no personal interest in the proceedings under S. 162 of Burma Municipal Act, the more so, that the offence though punishable under the Municipal Act is not of a peculiarly municipal nature but one against the common safety. Where it was not alleged that the Magistrate as the president of the committee made any enquiries before sanctioning the prosecution or that he attended any meeting of the committee in which the subject of the prosecution of the accused was debated, but as the proceedings could not be initiated without formal sanction being obtained.

Held, this sanction which was merely an authorisation for prosecution and not an order to prosecute gave the Magistrate no personal interest in the proceedings. It was not necessary for him to form any opinion on the merits of the case before according formal sanction to the prosecution as President of the Town Committee. It is however extremely undesirable that when other Magistrates are available a Magistrate should try a case in which he has, in a different official capacity, given formal sanction to the prosecution. 32 All 635 Dist.; 24 M. 238 Foll. (*Pratt, J.*) GOPI CHAND *v.* CROWN. **1 R. 517 : 76 I. C. 865 : 25 Cr. L. J. 273 : A. I. R. 1924 Rang. 87.**

——S. 556—*Revision—Order of Court—Disobedience—Proceedings by court.*

Although it is undesirable that Magistrates whose lawful orders are disobeyed should, save in very exceptional circumstances try and dispose of the charge of disobedience themselves, the High Court will not ordinarily interfere, unless there has been a clear failure of justice. (*May Oung, J.*) J. R. DAS *v.* EMPEROR. **1 Rang. 549 : 2 Bur. L. J. 146 : A. I. R. 1924 Rang. 35.**

CR. P. CODE (V OF 1898), S. 561-A.

——S. 556—*Trial by the Magistrate holding enquiry is not illegal.*

The fact that the Magistrate held a preliminary enquiry does not incapacitate him from trying the case. (*Pratt, J.*) MRS. MAY BONDVILLE *v.* EMPEROR. **1 Bur. L. J. 32 : 24 Cr. L. J. 744 : 74 I. C. 72 : A. I. R. 1923 Rang. 65 (1).**

——S. 556—*Magistrate issuing warrant under Burma Gambling Act, S. 6 is incompetent.*

A Magistrate issuing a warrant under S. 6 of the Gambling Act is disqualified from himself trying the case. (*Maung Kin, J.*) CHIN PIN *v.* EMPEROR. **61 I. C. 835 : 22 Cr. L. J. 451 : 13 Bur. L. T. 154.**

——S. 557—*Practising Pleader cannot sit as Magistrate in court in which he practises.*

Section 557 does not forbid a pleader to practise in any Court but forbids him to sit as a Magistrate in certain Courts. If a pleader practises in the Honorary Magistrate's Court, or in the Township Magistrate's Court, within whose jurisdiction that Court is, he is debarred from sitting as a Magistrate in the Honorary Magistrate's Court. (*Mac Coll, A. J. C.*) EMPEROR *v.* NGA THA SHWIN. **4 U. B. R. 127 : 76 I. C. 1031 (1) : 25 Cr. L. J. 311 (1) : A. I. R. 1923 Rang. 119 (1).**

——S, 561-A—*Proceedings in both Civil and Criminal Courts regarding same dispute—Under inherent powers one can be stopped.*

It would be highly undesirable that the same dispute should be allowed to be fought out in two Courts. namely, Criminal and Civil Courts, simultaneously. The inherent power of the High Court to stay proceedings is very wide and can be properly exercised in such cases. 2 A.L.J. 747, Dist. (*Sulaiman, J.*) KANHAIYA LAL *v.* BHAGWAN DAS. **23 A. L. J. 956 : L. R. 6 A. (Cr.) 153 : A. I. R. 1926 All. 30.**

——Ss. 561-A and 89—*Application for restoration of property attached—Application made beyond prescribed period—Power of Court to order restitution.*

The Court could not pass an order under S. 561-A, Cr. P. Code, which would conflict with the provision of S. 86 of the Cr. P. Code, in the exercise of its inherent power. A Court has no jurisdiction to make an order for the restoration of the property where the application is made beyond the period prescribed in S. 89, Cr. P. Code. (*Shah, A. C. J. and Fawcett, J.*) GURUNATH NARAYAN BETGER, *In re.* **26 Bom. L. R. 719 : 82 I. C. 365 : 25 Cr. L. J. 1293 : A. I. R. 1924 Bom. 485.**

——S.561-A—*Appeal dismissed—Appellant's counsel not given an opportunity to support—Court can order rehearing.*

Where an appeal has been dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in support of the same, the order dismissing the appeal must be held to have been passed without jurisdiction and the Court has inherent power to make an order that the appeal should be reheard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the same. (*Scott-Smith and Zafar Ali, JJ.*) MAHOMED SADIQ *v.* CROWN. **88 I.C. 593 : 7 Lah. L. J. 108 : A. I. R. 1925 Lah. 355.**

——S. 561-A—*Inherent powers do not extend statutory powers.*

The Court cannot by invoking its inherent powers, extend the powers given to it by Statute [A. I. R. 1925 Mad. 438 (F. B.), Ref.]

Criminal Courts are not primarily for the purpose of

CR. P. CODE (V OF 1898), S. 561-A.

preventing private parties from sustaining pecuniary loss. (*Davadoss and Wallace, JJ.*) MARUDAYYA THEVAR *v.* SHANMUGASUNDARA THEVAR.
22 L. W. 723 : 1925 M. W. N. 772 : 49 M. L. J. 593.

——S. 561 A—*Scope.*

Under S. 561-A the High Court is at liberty to interfere with an order granting bail passed by a Sessions Judge. (*Kinkhede, A.J.C.*) LOCAL GOVERNMENT *v.* GULAM JILANI. **82 I. C. 755 : 25 Cr L. J. 1363 : A. I. R. 1925 Nag. 228.**

——S. 561-A—*High Court can order expunging of passages in Sessions Judge's order granting bail if such passages are likely to prejudice Magistrate in the trial of case.*

Under S. 561-A the High Court has inherent power to order the expungement of passages in the order of a Sessions Judge granting bail if such passages are likely to prejudice the Magistrate in the impartial trial of the case. (*Kinkhede, A. J. C.*) LOCAL GOVERNMENT *v.* GULAM JILANI. **82 I. C. 755 : 25 Cr. L. J. 1363 : A. I. R. 1925 Nag. 228.**

——S. 562—*Changes.*

(1) List of offences for which on conviction a person may be released is extended.

(2) Section applies not only to youthful offenders but to a wider class of persons.

(3) The period for which offender may be released has been extended to 3 years.

(4) High Court can, in appeal or revision inflict imprisonment in lieu of order under this section.

(5) The offence need not be a trivial one.

(6) Appellate or High Court can make an order under this section.

——S. 562—*Section applies even where imprisonment is obligatory.* (*But see S. 562 as amended.*)

On a proper construction of S. 562, a first offender, provided the other provisions of the section apply, is entitled to the benefit of the section, even when without such provisions the Magistrate would be obliged to pass a sentence of imprisonment. (In this case the accused was found guilty under S. 381, I. P. C., and his release was held proper. See amended S. 562.—Ed.) (*Macleod, C. J. and Crump, J.*) EMPEROR *v.* JINGA GAMAJI. **27 B. L. R. 111 : A. I. R. 1925 Bom. 192.**

——S. 562—*Juvenile offender—Sentence.*

While passing a sentence the offence committed should be taken into account. Thus a juvenile offender should not be subjected to a severe sentence than what would ordinarily be passed merely because the magistrate considers it to be for his benefit to be detained in a juvenile prison for longer term. (*Macleod, C. J. and Shah, J.*) ABDUL RAHMAN ISMAIL *v.* EMPEROR. **23 Bom. L.R. 1199 : 23 Cr. L. J. 93 : 46 Bom. 429 : 65 I. C. 445 : A. I. R. 1922 Bom. 169.**

——S. 562—*Appeal.*

An appeal does lie from an order passed under S. 562, Cr. P. Code. 1 Cr. L. J. 543 : 24 P. R. 1904, Cr. : 18 Cr. L. J. 401 : 37 All. 31, *Ref. to.* (*Suhrawardy and Mukerji, JJ.*) BAHADUR MOLLA *v.* ISMAIL. **41 C. L. J. 45 : 29 C. W. N. 151 : 52 Cal. 463 : A. I. R. 1925 Cal. 329.**

——S. 562—*Orders under—Second Class Magistrate if can pass.*

It is incompetent to a Second Class Magistrate to pass orders under S. 562, Cr. P. Code himself. He should submit the case to a First Class Magistrate or Sub-divisional Magistrate for orders with his report if he is of opinion that the case is a fit one for the exercise of powers under that section. (*Motisagar, J.*) EMPEROR *v.* JAWALI. **5 Lah. 36 : 25 Cr. L. J. 1124 : 81 I. C. 948 : A. I. R. 1924 Lah. 454.**

CR. P. CODE (V OF 1898), S. 562.

——S. 562—*Applicability—'Cheating' does not include aggravated forms.*

S. 562 of the Code applies only to a case of simple cheating falling under S. 417 of the Penal Code and not to aggravated forms of cheating under Ss. 418 to 420, Penal Code. (*Martineau, J.*) EMPEROR *v.* RAB NAWAZ. **59 I. C 854 : 22 Cr. L. J. 150 : 1 Lah. 612.**

——S. 562—*Failure to furnish security—Accused is liable to punishment.*

The effect of the order under S. 562 of the High Court in appeal is to set aside the sentence passed on the accused by the lower Court. But if he fails to furnish the security, his position is that of an accused, who was convicted, but not sentenced to punishment and is again produced before the Court for the purpose of suitable punishment being awarded. (*Venkatasubba Rao, JJ.*) BADSHA, *In re.* **21 L. W. 40 : 86 I. C. 59 : 26 Cr. L. J. 683 : A. I. R. 1925 Mad. 496.**

——S. 562—*Character and antecedents of accused can be considered.*

The law is no respecter of persons but the terms of S. 562 (1) (a) are wide, and character and antecedents of an accused may be taken into account. (*Simpson, A. J. C.*) EMPEROR *v.* PARTAB NARAIN. **2 O.W.N. 593 : 88 I.C. 1054 : 26 Cr L. J. 1278 : A. I. R. 1925 Nag. 673.**

——S. 562—*Order under S. 562 is not a punishment.*

An order under S. 562, Cr. P. Code directing release upon probation of good conduct cannot be said to be punishment. It is not one of the various kinds of puuishments described in S. 53, Penal Code. Under S. 562 the sentence of punishment is postponed and something which is not a punishment is substituted therefor. (*Kotwal, A.J.C.*) BABA *v.* EMPEROR. **74 I.C. 66 : 24 Cr. L. J. 738 : A. I. R. 1924 Nag. 37.**

——S. 562—*'Cheating'—Meaning and scope.*

As section 562 mentioned only two of the four forms of theft with which the Indian Penal Code deals, it must be interpreted as excluding the other two from its scope. But the same reasoning does not apply, nor was it meant to apply to the words "misappropriation" and "cheating" which appear in the same section. In S 562 of the Code of Criminal Procedure the word "misappropriation" covers sections 404 and 405 of the Penal Code as well as section 403 and the word "cheating" covers sections 418, 419 and 420 as well as section 417. (*Hallifax, A. J. C.*) EMPEROR *v.* JAILALBHOI. **71 I. C. 795 : 24 Cr. L. J. 251: A. I. R. 1923 Nag. 158 (2).**
(But see section as amended.)

——S. 562—*No previous conviction proved at the trial—Accused released after due admonition—Subsequent discovery of an old previous conviction against the accused does not justify interference on revision.*

Section 562 is intended primarily for first offenders, but the words used "and previous conviction is proved against him" seem to preclude the idea of an inquisition into the past of the accused. If a previous conviction against the accused is proved at the trial it no doubt is a technical bar to an order under S. 562. But if no such conviction is proved, and an order under S. 562 is passed, a subsequent discovery of a conviction of this type isno ground for interference in revision. (*Simpson, A. J. C.*) EMPEROR *v.* PARTAB NARAIN. **2 O.W.N. 593 : 88 I. C. 1054 : 26 Cr. L. J. 1278 : A. I. R. 1925 Oudh 673.**

——S. 562—*Applicability—Section does not apply to a conviction under—Gambling Act, 1867.*

S. 13 of Gambling Act having been repealed, an order under S. 562, Cr. P. Code cannot be upheld, as

CR. P. CODE (V OF 1898), S. 562.

that section has no application to a conviction under Gambling Act. (*Kanhaiya Lal, J. C.*) EMPEROR *v.* SHANKER DAYAL. **25 O. C. 111 : 9 O.L.J. 667 : 71 I.C. 62 : 24 Cr. L. J. 14 : A. I. R. 1922 Oudh 224.**

——— **S. 562**—*Applicability—I. P. C., S. 411.*

S. 562, Cr.P.Code cannot be applied in a case under S. 411, I.P.C. (*Ross, J.*) KABIR SHAH *v.* EMPEROR. **1923 P. H. C. C. 237 : 1 Pat. L. R. (Cr.) 174 : A. I. R. 1923 Pat. 297 (2).**

——— **S. 562**—*Magistrate's duty.*

The Magistrate should satisfy himself that security can be given before passing the order. But if the person does fail to furnish security the proper course is for Magistrate to pass sentence according to law. (*Carr, J.*) NASU MEAH *v.* EMPEROR **2 Rang. 360 : 26 Cr.L.J. 285 : 84 I.C. 349 : A. I. R. 1925 Rang. 42.**

——— **S. 562**—*Offence under S. 381, Penal Code is not covered.*

Section 562 does not apply to an offence under S.381, *i.e.*, theft by clerk or servant. (*May Oung, J.*) EMPEROR *v.* NGA THAUNG PE. **2 Bur. L. J. 75 : A. I. R. 1924 Rang. 12.**

——— **S. 562**—*Is not applicable where a juvenile offender has shown criminality rather than thoughtlessness.*

Before applying S. 562 the Court must consider whether there is a good case for its application or not. Courts in such a case must guard against two things at least, namely one, danger to the public and the other, danger to the accused himself. Where the crime committed was not a simple crime such as is committed by children out of mere thoughtlessness rather than criminality but it showed a general character of craft and deceit. *Held*, that the section should not be applied. (*Kennedy, A. J. C.*) DARYALAL *v* EMPEROR. **25 Cr. L. J. 1224 : 18 S.L.R. 61 : 82 I. C. 152 : A. I. R. 1925 Sind 75.**

——— **S. 562 (1-A)**—*Penal Code, S.579—Conviction under, by Second Class Magistrate—Magistrate can order release of accused after due admonition—Order is revised only if it is mistaken or is injudicious or failure of justice has occurred.*

The proviso to sub-S. (1) of S.562 of the Code must be read as a part of the said sub-section. It is superseded, as regards the effect of sub-S. (1-A) by the words "the Court before whom he is so convicted" in the aforesaid sub-section and cannot be used so as to control those words. A Second Class Magistrate who has convicted an accused under Penal Code, S. 279 can order his release after due admonition under Criminal P. Code, S. 562 (1-A). High Court will not interfere in revision unless the order is mistaken, injudicious or has caused failure of justice. (*Mears C, J. and Piggott, J.*) MURLIDHAR *v.* MAHOOB KHAN. **47 All. 353 : 26 Cr. L. J. 624 : 85 I. C. 848 : A. I. R. 1925 All. 644.**

——— **S. 562 (1-A)**—*Proviso to the section applies to whole section including sub-S. (1-A) newly added—No third class Magistrate can exercise powers under sub-S. (1-A.).*

Ordinarily when a proviso governs the whole of the provisions of a section, it ought to appear at the end; but the proviso to S. 562 is applicable to the whole of S. 562 including the newly added sub-S. (1-A), so that a Third Class Magistrate is not competent to exercise powers to release the offender after due admonition under S. 562 (1-A), though the proviso appears in the middle of S. 562. (*Macleod, C.J. and Coyajee, J.*) EMPEROR *v.* RANCHHOD HARJIVAN. **27 Bom. L. R. 1019 : 89 I. C. 1029: A. I. R. 1925 Bom. 479.**

CRIMINAL TRIAL.

S. 565 Changes.

(1) Ss 215, 489-A, 489-B, 489-C, 489-D. I. P. C., have been added to the list of offences mentioned in cl. (a).

(2) Provision is made for previous conviction in Courts of Native States.

(3) All First Class Magistrates are empowered to act.

(4) Appellate or Revisional Court can now act under the section.

——— **S. 565**—*Previous order of conviction set aside—Order cannot be used in subsequent trials.*

A Magistrate is not entitled to use an order which had been set aside, as proof that the accused was an old offender, on the ground that the previous order was set aside either in appeal or revision on technical grounds. (*Carr, J.*) NGA PO THAN *v.* EMPEROR. **3 Rang. 156: A. I. R. 1925 Rang. 277.**

——— **Sch. II**—*Penal Code, S. 427—Complainant's statement determines jurisdiction.*

The jurisdiction of the Court to hear a case depends on the allegations with which its help is sought. It may be that after a trial, it is found that the case has been materially exaggerated; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress, the statement of the complainant has to be accepted for the purposes of jurisdiction. Where the complainant in a case of mischief, alleged the damage to be Rs. 250 and a third class Magistrate tried the offence and found damage to be Rs. 140 and awarded Rs. 40 as compensation to the complainant. *Held*, that the third class Magistrate had no jurisdiction to try the offence. (*Mukerji, J.*) RAGHUNANDAN PRASAD *v.* EMPEROR. **47 All. 64: L. R. 6 A. 39 (Cr.) : 85 I. C. 730: 26 Cr. L. J. 586: A. I. R. 1925 All. 290.**

——— **Sch. II**—*Second Class Magistrate cannot try offence under S. 420, I. P. C.*

A Second Class Magistrate is not competent to try an offence under S. 420 of the Penal Code though he has jurisdiction to try an offence under S. 417. (*Venkatasubba Rao, J.*) RANGAYYA *v.* SANAPPA. **20 L. W. 919 : 25 Cr. L. J. 1193: 82 I. C. 57 : A. I. R. 1925 Mad. 367.**

——— **Sch. II**—*Offence under—If triable by First Class Magistrate.*

Under the Cr. P. Code as amended in 1923 a First Class Magistrate can try an offence of bigamy without committing it to the Sessions. (*Dalal, J. C.*) DAL CHAND *v.* RAM LAL. **25 Cr. L. J. 39: 75 I. C. 727 : A. I. R. 1925 Oudh 60.**

CRIMINAL PROCEEDINGS.

See also (1) CRIMINAL TRIAL.
(2) JUDICIAL PROCEEDINGS.

——— *Possession—Formal possession in execution of decree is sufficient possession.*

A person in formal possession of a property in execution of a decree shall be deemed to be in possession of the property. (*Neave, A. J. C.*) BALKU *v.* EMPEROR. **25 Cr. L. J. 917: 81 I. C. 533 : A. I. R. 1925 Oudh 183.**

CRIMINAL TRIAL.

See also PRACTICE (CRIMINAL).

Acquittal.
Appeal.
Approver.
Benefit of doubt
Circumstantial Evidence.
Civil Dispute.
Costs.

CRIMINAL TRIAL.

Counter cases.
Court's duty.
Death of Complainant.
Defence.
Duty of Prosecution.
Evidence.
First information.
Further Inquiry.
Grounds for conviction.
High Court.
Irregular Procedure.
Joint Trial.
Judgment.
Jury.
Local inquiry or inspection.
Private prosecution.
Procedure.
Sentence.
Sessions Cases.
Stay of.
Miscellaneous.

———*Accused absent on date fixed for judgment—Magistrates ordering to pay process fee to secure attendance of accused—Complainant's failure--Dismissal for default—Illegality.*

Where the Bench Magistrates after hearing all the evidence in a complaint, and at the conclusion of the trial passed an order that judgment would be delivered on a certain day, and the accused who was directed to be present on that day was not present then and the Magistrates, ordered the complainant to file a process fee to secure attendance of the accused on a later date and on his failure to do so, they dismissed the suit for default. *Held*, that the Magistrates' procedure was entirely illegal, and they should have enforced the attendance of accused in a manner laid down in the C. P. Code. (*Walsh, J.*) BHIMMI *v.* PERSHADI **23 A. L. J. 304: L. R. 6 A. 105 (Cr.) : 87 I. C. 419: 26 Cr. L. J. 963 : A. I. R. 1925 All. 392.**

———*Accused—Right of argument.*

Though the Cr. P. Code nowhere provides specifically for the accused's right to be heard in argument, no Criminal Court should refuse such a right. (*Boys, J.*) MALIK *v.* EMPEROR.
L. R. 6 A. 21 (Cr.): 86 I. C. 458 : 26 Cr. L. J. 810 : A. I. R. 1925 All. 282 (2).

Acquittal.

———*Acquittal— Agency—Cr. P. Code, S.* 345.

Court can acquit accused on the representation of an agent, who had filed complaint on another's behalf, that he desired to compound the offence, without enquiring into the agent's authority to compound. (*Boys, J.*) HARBANS *v.* EMPEROR.
22 A. L. J. 820: L. R. 5 A. 143 (Cr.) : 83 I. C. 658 : A. I. R. 1924 All. 778.

———*Acquittal—Question of jurisdiction.*

It is clearly illogical that a verdict of acquittal should be recorded as the ultimate result of a trial in respect of which it has not been finally determined that it was held before a Court of competent jurisdiction. (*Mears, C. J. and Piggott, J.*) EMPEROR *v.* HAR PRASAD BHARGAVA.
45 All. 226 : 21 A. L. J. 42 . L. R. 4 A. 19 (Cr.) : 77 I. C. 961: 25 Cr. L. J. 497 : A. I. R. 1923 All. 91.

———*Acquittal—Prosecution case not proved—Accused should be acquitted.*

Where the prosecution fails to prove its case as laid, the accused are entitled to acquittal. (*Mullick and Jwala Prasad, JJ.*) PERSHAD TEWARI *v.* EMPEROR. **26 Cr. L. J. 1589 : 90 I. C. 661 : A. I. R. 1926 Pat. 5.**

CRIMINAL TRIAL—Approver.

———*Acquittal—High Court will not interfere with order of acquittal unless necessity is made out.*

The High Court is very reluctant to interfere with an order of acquittal and it does not do so unless the necessity is clearly made out. (*Kennedy, J. C. and Aston, A. J. C.*) EMPEROR *v.* SUNDERDAS.
A. I. R. 1925 Sind 295.

Appeal.

———*Appeal—Charge found to be false by District Magistrate on inquiry—Procedure—Instructions to Government Pleader not to support conviction valid.*

Pending an appeal against a conviction the District Magistrate found on enquiry that the charge was false. *Held*, the proper procedure was to proceed with the appeals in the ordinary course as they had not been withdrawn but it was open to the District Magistrate to instruct the Government Pleader not to support the convictions. (*Stuart, J.*) BHAGWANA *v.* BHULLAN.
L. R. 3 A. 2 (Cr.).

———*Appeal—In appeal by Crown against acquittal where prosecution has not produced any evidence but has relied on accused's admission, no remand can be made.*

In a case where the prosecution produces no evidence and relies entirely on admissions by the accused and where the trial Court acquits the accused, the appellate court should not remand the case for proper trial, such admissions not being sufficient to enable the crown to procure a legal decision and there being no material for the High Court to supplement the deficiencies of the prosecution by remanding the case for proper trial. (*Scott-Smith and Fforde, JJ.*) EMPEROR *v.* JASWANT RAI & CO.
5 Lah. 404: 26 Cr. L. J. 320: 84 I. C. 464: A. I. R. 1925 Lah. 85.

———*Appeal — Inordinate delay in hearing is tant-amount to denial of justice.*

A delay of over four and a half months in hearing appeals would amount to a denial of justice in a majority of cases. (*Dalal, J. C.*) BAHADUR *v.* EMPEROR. **27 O. C. 327 : 85 I. C. 370 : 26 Cr. L. J. 530 : A. I. R. 1925 Oudh 501.**

Approver.

———*Approver can be a witness.*

An evidence of an accomplice is not outside the purview of S. 337, Cr. P. Code and he can give his evidence as a "witness in the case." (*Mears, C. J. and Piggott, J.*) EMPEROR *v.* HAR PRASAD BHARGAVA. **21 A. L. J. 42 : 45 A. 226 : 77 I. C. 497 : L. R. 4 A. 19 (Cr.) : A. I. R. 1923 All. 91.**

———*Approver—Corroboration.*

It cannot be said that as a point of law the evidence of witnesses who support the statement of an approver is not corroborative evidence because this evidence was known to the Police, before the approver was examined by them. But it might be urged that it is not of much evidentiary value as he might have been tutored by the Police to give evidence fitting in with the evidence of the other witnesses. (*Newbould and B. B. Ghose, JJ.*) IBRAHIM, *In re.* **88 I.C. 458 : 26 Cr. L. J. 1146 : 42 Cal. L. J. 496.**

———*Approver—Conviction based on.*

A conviction cannot be sustained on the uncorroborated testimony of an approver. The evidence of an old Jail bird and one who is actually under police surveillance is no corroboration at all. (*Shadi Lal, C. J. and Zafar Ali, J.*) NAWAB *v.* EMPEROR.
7 Lah. L. J. 219 : 26 Punj L. R. 519 : 89 I. C. 311 : 26 Cr. L. J. 1335 : A. I. R. 1925 Lah. 397.

———*Approver—Corroboration—Nature of.*

CRIMINAL TRIAL—Approver.

As an approver's evidence is tainted, other evidence which is itself tainted cannot be sufficient for purposes of corroboration. Thus a wife who knew about the conspiracy to murder her husband and even consented to it cannot be considered a corroborating witness for the purposes of securing conviction. (*Shadi Lal, C. J. and Abdul Qadir, J.*) AHMAD NUR *v.* EMPEROR. **4 U. P. L. R. (Lah.) 110 : 68 I. C. 821 : 23 Cr. L. J. 597 : A. I. R. 1923 Lah. 76.**

———*Approver—Duty of court—Approver's evidence.*

A Judge must direct himself to treat the evidence of approver with the greatest caution and suspicion, but nevertheless to act on his evidence if he believes it. A conscientious jury must treat the advice of the Judge with the greatest respect, but must nevertheless give a decision in accordance with their conscience. (*Hallifax and Macnair, A. J Cs.*) GOVINDA *v.* EMPEROR. **69 I. C. 257 : 23 Cr. L. J. 673 : 17 N. L. R. 113.**

———*Approver—Evidence of—Weight.*

In order to base the conviction upon the evidence given by approvers or persons practically in the position of approvers, it must be first scrutinised carefully. (*Wazir Hasan and Cuming, A. J. Cs.*) MAHADEO *v.* EMPEROR. **10 O. L. J. 280 : A I. R. 1924 Oudh 65.**

Benefit of doubt.

———*Benefit of doubt.*

The doctrine that the accused in a criminal case should be given the benefit of the doubt applies only to a real and reasonable doubt in the mind of the Judge. (*Walsh and Ryves, JJ.*) LAKHAN *v.* EMPEROR. **L. R. 5 A. 101 (Cr.) : A. I. R. 1924 All. 511.**

———*Benefit of doubt.*

The silence of the deceased himself in his first information report as well as of his relatives as long as he was alive, on the point of the guilt of the accused is a circumstance of which the accused is bound to get the benefit, especially if the majority of the eye witnesses originally named in the first information report are not produced as witnesses. (*Abdul Qadir, J.*) ATTAR KHAN *v.* CROWN. **A. I. R. 1922 Lah. 28.**

———*Benefit of doubt—Identification—Doubt as to.*

Where there was the gravest doubt as to whether the two prisoners were in fact identified as having participated in the crime in question, the Court must give both the prisoners the benefit of the doubt. (*Fforde, J.*) CHUHAR SINGH *v.* EMPEROR. **5 Lah. L. J. 317.**

———*Benefit of doubt—Accused's action should be construed favourably to him if possible.*

When the action of the accused is open to two constructions, one criminal and the other honest, the Appellate Court should not assume that it was criminal. (*Spencer, J.*) NARAYANA, *In re.* **20 L. W. 239 : 25 Cr. L. J. 1221 : 82 I. C. 149 : A. I. R. 1924 Mad. 816.**

———*Benefit of doubt accrues in accused's favour.*

Where the conduct of the accused was as much consistent with his guilt as with his knowledge of the guilt of another and the anxiety to protect him, *held*: the benefit of the doubt must accrue in favour of the accused. (*Wazir Hasan, A. J. C.*) BISHAMBHAR NATH *v.* EMPEROR. **26 Cr. L. J. 1042 : 87 I C. 962 : A. I. R. 1925 Oudh 676.**

———*Benefit of doubt—Accused must get the benefit of refusal of police to refer to diary—Cr. P. Code, S. 172.*

It may be within the right of the police officers not to refer to a diary, but the accused is entitled to the benefit of their refusal to refer to the diary and to disclose the source of their information. (*Jwala Prasad, J.*) DEODHARI PANDAY *v.* EMPEROR. **1925 P. H. C. C. 6 : 6 Pat. L. T. 810 : 86 I. C. 274 : 26 Cr. L. J. 738 : A. I. R. 1925 Pat. 131.**

CRIMINAL TRIAL—Circumstantial Evidence.

———*Benefit of doubt*—Prima facie *case not made out against accused—Accused can rely on presumption of innocence.*

If no *prima facie* case has been made against the accused it is open to the accused to rely safely on the presumption of innocence or on the infirmity of the evidence for the prosecution. But when a *prima facie* case is made out and the presumption of innocence is displaced, then the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain. (*Kincaid, J. C. and Aston, A. J. C.*) BAHADUR *v.* EMPEROR. **88 I. C. 7 : 26 Cr. L. J. 1063 : A. I. R. 1925 Sind 289.**

———*Benefit of doubt—Charge—Framing of—Guiding principles.*

The charge sheet corresponds to the English indictment and it is very much more than a mere form. An accused person is entitled to be informed with the greatest precision what acts he is said to have committed, and under what sections of the Penal Code the acts fall. (*Simpson, A. J. C.*) SHEO SHANKER *v.* EMPEROR. **2 O. W. N. 862.**

Circumstantial Evidence.

———*Circumstantial Evidence—Search, failure to make—Finding of articles after.*

Accused when pointed out in bazar by his co accused was not searched. This was a piece of gross negligence. He was driven on the Ekka to the Deputy Superintendent's where he was searched, and nothing incriminating was found. When the party came away from the Deputy Superintendent it was decided to leave the ekka. Two coats belonging to the two constables had been spread on the ekka, and the four men had sat on them, the two prisoners unhandcuffed, sitting between the constables. When the coats were removed from the ekka, three ornaments, two being basi-bunds and therefore of some size were found concealed beneath. The evidence of finding was hopelessly contradictory. *Held* : accused's costume was such that concealment of these articles must have been difficult. It must also have been difficult to put them under the coats upon which the four men were sitting. (*Walsh, J.*) KHETAL *v.* EMPEROR. **21 A. L. J. 143 : 45 A. 300 : 73 I. C. 62 : L. R. 4 A. 13 (Cr.) : 24 Cr. L. J. 526 : A. I. R. 1923 All. 352.**

———*Circumstantial evidence—To sustain conviction, no explanation except accused's guilt should be possible.*

In order to sustain a conviction on purely circumstantial evidence, such evidence should not be compatible with any hypothesis other than that of the guilt of the accused. (*Shadi Lal, C. J. and Jai Lal, J.*) MAJHI *v.* EMPEROR. **7 Lah. L. J. 48 : 86 I. C. 344 : 26 Cr. L. J. 760 : A. I. R. 1925 Lah. 323 (2).**

———*Circumstantial evidence.*

Where there was no eye-witness of the affair and circumstantial evidence was that the victim was seen lying wounded on a charpoy with accused No. 1 standing near him and accused No. 2 standing in the doorway of the *Kotha*, the scene of murder, that accused No. 1 was at that time wearing a *chadar* and a *Kurta* both of which bore marks of blood and he had blood stains also on his feet and calves, that his brother accused No. 2's *chadar* and feet were stained with blood, and that the deceased had been paying attentions to their sister, and that this conduct on his part was resented by the brothers, *held* that the evidence

is wholly inadequate to bring the charge home to accused No. 2 and that he be acquitted. (*Shadi Lal, C. J. and Campbell, J.*) MAHOMED YAR *v.* EMPEROR. **5 Lah. L. J. 40 : A. I. R. 1924 Lah. 62.**

———*Circumstantial evidence.*

On the night of the 11th September 1922 at about 11-30 p.m. one Bhagwana was found by the police on duty wandering about in a peculiar condition at the Jahazgarh fair ; he was examined cursorily by the Sub-Assistant Surgeon in charge and thence he was taken to the thana where he spent the night. At 6 a.m. he is recorded as having made a statement to the police and then to have pointed out the place where he and his companions had camped. At this place were found Chajju and Chunna and Ram Gopal, his companions. The police were informed that of two *neolis* or money bags placed beneath the bedding on which Bhagwana had been seen sitting when his companions went to sleep the night before, one containing Rs. 190 was missing. The whole party was taken to the thana. They were searched and Rs. 209 were found on Ram Gopal, appellant. Bhagwana was sent back to the dispensary and exhibited symptoms of dhatura poisoning. On the 13th September, the Sub-Assistant Surgeon gave him a purgative and the resultant stools were found to contain dhatura. Some *laddus* and *mathris* which had been found on the person of Ram Gopal, the appellant, were also sent and were reported to have shown no traces of dhatura. There was nothing wrong with Chunna and Chhajju. Ram Gopal was sent up for trial and was convicted of an offence under section 328, Penal Code, and sentenced to five years' rigorous imprisonment : *Held* that the circumstantial evidence is not sufficient to justify the conviction. (*Campbell, J.*) RAM GOPAL *v.* EMPEROR. **A. I. R. 1923 Lah. 687.**

———*Circumstantial evidence—Punjab Canals and Drainage Act (VIII of 1873), S. 70 (12).*

The mere fact that the fields were irrigated by the accused is not sufficient to hold that they were guilty of opening an outlet of water which had been closed under the orders of the Canal authorities. (*Moti Sagar, J.*) SHEO RAM *v.* EMPEROR. **A. I. R. 1923 Lah. 603.**

———*Circumstantial evidence—Nature to justify conviction.*

A conviction cannot be based on circumstantial evidence unless and until all the inferences to be drawn from the whole history of the case points so strongly to the commission of the crime that the defence theory appears on the face of it impossible or highly improbable. 16 P. W. R. 1911 Foll. (*Abdul Raoof, J.*) BAHALI *v.* EMPEROR. **75 I. C. 781 : A. I. R. 1923 Lah. 488.**

———*Circumstantial evidence—Discovery of knife and ornaments are not sufficient for conviction.*

The discovery of jewels worn by the deceased in an obvious place close to the corpse and of a knife at a cattle-shed in an unconcealed state are not sufficient to connect the accused with the alleged crime. (*Shadi Lal and Wilberforce, JJ.*) AISHAN *v.* EMPEROR. **5 Lah. L. J. 78.**

———*Circumstantial evidence—Production of ornaments—Delay.*

If a person is found shortly after a murder in possession of ornaments belonging to the murdered person a very grave suspicion must rest upon him that he was concerned in the murder. When the ornaments were not produced until nearly two months after the murder the suspicion is not nearly so strong, especially where during most of the period the accused was detained by the police and in his absence some one else could have

placed the ornaments where they were found. (*Scott-Smith and Abdul Qadir, JJ.*) SUNDER SINGH *v.* EMPEROR. **23 Cr. L. J. 251 : 66 I. C. 187 : 4 Lah. L. J. 284.**

———*Circumstantial evidence.*

To justify an inference of guilt from circumstantial evidence the inculpatory facts must be incompatible with innocence, and the innocence of the accused must be incapable of explanation upon any reasonable hypothesis other than that of his guilt. The fouler the crime, the clearer and plainer the proof ought to be, though it cannot be laid down as a proposition of law that the quantum or value of evidence must be proportionate to the enormity of the crime or the consequences which may follow from convictions. (*Jwala Prasad and Sultan Ahmad, JJ.*) RAGHUNANDAN KOERI *v.* EMPEROR. **22 Cr. L. J. 154 : 59 I. C. 858 : 1 Pat. L. T. 684.**

———*Circumstantial evidence—Disposing of corpse.*

A murderer has the strongest reasons for concealing the trace of his crime and so evidence that a person has disposed of the corpse of a murdered person is strong circumstantial evidence that he was the murderer. (*Kennedy, J. C. and Raymond, A. J. C.*) ANDAL SHAH *v.* EMPEROR. **86 I. C. 973 (2) : 26 Cr. L. J. 909 (2) : 18 S. L. R. 185 : A. I. R. 1925 Sind 306.**

Civil Dispute.

———*Civil dispute—More appropriate remedy open in civil Court—Criminal case must be disallowed.*

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court, and the tendency on the part of litigants to do so should be checked by Criminal Courts who should be on their guard against lending their aid to such procedure. The complainant mortgaged certain lands to the accused in pursuance of the agreement between the parties in satisfaction of a decree which the accused held against the complainant. But the accused in spite of this proceeded to execute the decree against the complainant. The complainant thereupon prosecuted the accused alleging that he (the complainant) had been cheated over the mortgage. *Held* : the proceedings must be quashed. (*Campbell, J.*) LADHA SINGH *v.* ZAMAN ALI. **84 I. C. 351 : 26 Cr. L. J. 287 : A. I. R. 1925 Lah. 289 (2).**

———*Civil dispute—Case of a civil nature.*

The parties should not be put to a lot of trouble in the Criminal Courts when the case is really one of a civil nature. (*Scott-Smith, J.*) KARAM CHAND *v.* MATHRA DAS. **24 Cr. L. J. 369 : 72 I. C. 369 : A. I. R. 1923 Lah 329 (2).**

———*Civil dispute—Prosecution due to spite.*

That a prosecution is not launched in public interest is no ground for quashing proceedings but is ground for staying them pending Civil Proceedings between the parties. (*Venkatasubba Rao, J.*) RAMANATHAN CHETTIAR *v.* SIVARAMA SUBRAMANIA AIYAR. **47 Mad. 722 : 20 L. W. 234 : 35 M. L. T. 77 : (1924) M. W. N. 556 : 81 I.C. 785 : 25 Cr. L. J. 1009 : A. I. R. 1925 Mad. 39 : 47 M. L. J. 373.**

———*Civil dispute—Damages awarded in a Civil suit—Criminal trial not justified.*

It is undesirable that an accused should again be put on his trial in a Criminal Court for a compoundable offence, after he has purged his offence in the Civil Court in the form of damages. (*Spencer, J.*) THIRUVENGADACHARIAR *v.* CHOCKALINGAM CHETTY. **18 L. W. 167 : 76 I. C. 234 : 25 Cr. L J. 138 :**

CRIMINAL TRIAL—Confession.

A. I. R. 1924 Mad. 31.

———*Confession—Retraction of—Jury not warned against using it against co-accused—Prejudice.*

Where one of several accused made a confession but at the trial retracted the same, the Judge must warn the Jury against considering it as regards the guilt of the other accused. Failure to do this is a clear misdirection and vitiates the trial. (*Newbould and B. B. Ghose, JJ.*) IBRAHIM, *In re.*

88 I. C. 458 : 26 Cr. L. J. 1146 : 42 C. L. J. 496.

———*Conspiracy—Acquittal of some of the accused—Effect on others.*

So far as the acquittal of a conspirator in a subsequent trial is concerned, it is now settled that it forms the ground of a reversal of conviction of one tried before ; on the other hand, the conviction of the latter is a perfectly good one at the time that the judgment is pronounced against him, and all the legal consequences of a valid conviction follow from it. As for the principle relating to the acquittal of a conspirator following from the acquittal of the other when the conspiracy is alleged only amongst the two, and in a joint trial held in respect of both, it is based upon rule of practice and procedure which under the English law appears to be well-settled, that repugnancy or contradiction on the face of the record is a ground for arresting judgment or annulling a conviction and is a ground on which the accused can claim an acquittal. In an ordinary appeal from an order based on the verdict of the Jury, the High Court is bound by the provisions of S. 423 (2) and the provisions of S. 449, Cr. P. Code. Repugancy in the verdict of the Jury is not by itself a sufficient ground for quashing a conviction, and there is no provision in the Code justifying interference with a conviction on the ground of repugnancy in the record. Consequently the acquittal of one conspirator has no legal effect so far as the other conspirator convicted at the earlier trial is concerned beyond suggesting that the evidence was found unworthy of credit. (*Suhrawardy and Mukerjee, JJ.*) I. G. SINGLETON *v.* EMPEROR.

29 C. W. N. 260 : 41 C. L. J. 87 : 86 I. C. 38 : 26 Cr. L. J. 662 : A. I. R. 1925 Cal. 501.

———*Conviction by first class Magistrate under S. 30, Cr. P. Code—Enhancement of sentence in revision—Legality of.*

Where a first class Magistrate acting under S. 30, Cr. P. Code, convicted the accused under S. 304, I. P. C., and an application was made to the High Court for enhancement of sentence, and it was found that the Magistrate had inflicted the maximum sentence he could inflict, *held*, that the High Court had no power while hearing an appeal as a Court of Revision to enhance a sentence, when the maximum sentence had been inflicted by the Magistrate. (*Scott-Smith and Martineau, JJ.*) DALIP SINGH *v.* EMPEROR.

7 L. L. J. 44 : 86 I. C. 341 : 26 Cr. L. J. 757 : A. I. R. 1925 Lah. 318.

———*Conviction for offence not charged.*

Where an accused is convicted of an entirely different offence from that charged by the Magistrate, it would be impossible to postulate that he was not prejudiced thereby. The conviction in such a case cannot be sustained. (*Findlay, O. J. C.*) AKBAR HUSSAIN *v.* EMPEROR. **8 N. L. J. 87 : 89 I. C. 398 : 26 Cr. L. J, 1358 : A. I. R. 1925 Nag. 294**

Costs.

———*Costs—Acquittal.*

Having got instances in which specific power is given by Cr. P. Code to grant costs the maxim *express uniquest exclusio alterious* applies, where in specific instances a statute gives a Court power to grant costs

CRIMINAL TRIAL—Counter-cases.

and the same statute gives the Court its whole criminal jurisdiction, the proper rule of interpretation is that expressed in the maxim quoted above with the result that, as the Code gives a specific right of granting costs, it excludes any other right of granting costs. 33 I.C. 824, Foll. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) SANKARALINGA MUDALIAR *v.* NARAYANA MUDALIAR. **45 Mad. 913: 16 L. W. 413 : (1922) M. W. N. 579 : 31 M. L. T. 342 : 68 I. C. 615 : 23 Cr. L. J. 583 : A. I. R. 1922 Mad. 502 : 43 M. L. J. 369 (F. B).**

Counter-Cases.

———*Counter-cases—Which case is to be tried first or both are to be tried simultaneously is to be decided according to circumstances of each case.*

As regards trial of cross-cases, each case has to be decided according to its requirements. In a trial of cross-cases of rioting, after some witnesses were examined in the case against the petitioner he prayed that the case in which he was complainant might be adjourned till the disposal of the case against him. *Held*, that for the ends of justice, the case against the petitioner should be disposed, of first and then the petitioner's case, if he so wished, be taken up since it is not fair to force a person in the position of an accused person to throw himself open to cross-examination by the other side. (*Suhrawardy and Panton, JJ.*) MAKHAN MAPA *v.* MONINDRA NATH BISWAS.

42 C. L. J. 83 : 90 I. C. 719 : A. I. R. 1925 Cal. 1260.

———*Counter-cases—Simultaneous trial—Procedure improper.*

As a result of a fight between two parties, both of them instituted criminal cases in Court, having made reports at the Police Station soon after the occurrence on 21-11-'22. The Police sent in two reports on the two complaints and the parties were asked to prove their respective versions of the two cases. The hearing of the two cases was taken up simultaneously by the Magistrate and the evidence adduced in one case was considered in dealing with the case brought by the other party. One of the cases was dismissed under S. 204, Cr. P. Code, and in the other a charge was framed. *Held*, that the procedure was irregular. The case should not have been heard at one and the same time and the Magistrate was wrong in considering the evidence in one case for the purpose of coming to a conclusion in the other. The order passed under S. 403, Cr. P. Code, must be set aside and the Magistrate should first finish the case in which a charge had been framed and after that case is finished, he should pass orders in the other. (*Ghose and Cuming, JJ.*) GARIBULLA AKANDA *v.* SADAR AKANDA.

25 Cr. L. J. 941 : 81 I. C. 557 : 39 C. L. J. 331 : A. I. R. 1924 Cal 813.

———*Counter-cases—Complaint case cannot be postponed because of cross police challan—Each case is to be dealt separately and if possible judgment is to be given after close of both cases.*

Postponement of a cross complaint case owing to a police challan is illegal as it is not justified under the provisions of S. 344. The accused in either case cannot be hampered to prove their case on oath. Simultaneous and contemporaneous trial is the proper course though each case must be dealt with wholly separately from the other and each case must be decided on its own merits upon the facts and circumstances appearing therein and judgments in both the cases should be if possible delivered after both the trials are finished. (*Page and Mukerjee, JJ.*) BAHATAR *v.* NOBADALI.

28 C. W. N. 487 : 26 Cr. L. J. 65 :

CRIMINAL TRIAL—Counter-cases.

83 I. C. 625 : A. I. R. 1924 Cal. 634.

———*Counter-cases—Stay of trial in one—Legality of.*

Where there are two counter-cases of rioting arising out of the same occurrence. the proceedings in one cannot be stayed pending the trial and disposal of the other on the ground that after the disposal of that case it may not be necessary to dispose of the counter. (*Newbould and Suhrawardy, JJ.*) RAJENDRANATH GHOSH *v.* AMRITALAL CHAKRAVARTI.

24 Cr. L. J. 233 : 71 I. C. 697 : A. I. R. 1924 Cal. 529 (1).

———*Counter-cases—To be tried by same Magistrate.*

It is always desirable that counter-cases arising out of the same occurrence should be tried by one and the same Court. (*Newbould and Suhrawardy, JJ.*) JUDISTHIR GOPE *v.* SHEIKH SAMIR.

27 C. W. N. 700 : 75 I. C. 364 : 37 C. L. J. 410 : 24 Cr. L. J. 940 : A. I. R. 1923 Cal. 644.

———*Counter-cases—Prosecution evidence in each treated as defence evidence in the other.*

The procedure consisting of hearing two cross complaints the prosecution evidence in one being the defence evidence in the other is bad. (*Broadway and Fforde, JJ.*) ALLU *v.* EMPEROR.

4 Lah. 376 : 75 I. C 980 : 25 Cr. L. J. 68 : 6 L. L. J. 103 : A. I. R. 1924 Lah. 104.

———*Counter-cases— Simultaneous trial of, is not illegal in itself.*

There is no prohibition in law for simultaneous trials of counter-cases, but if the accused can show any prejudice on account of the simultaneous trial of two cases then he will be entitled to a setting aside of the conviction (if he has been convicted). (*Kulwant Sahay, J.*) RAMSARAN SINGH *v* NIKHAD NARAIN SINGH. **6 P. L. T. 477 : 88 I. C. 603 : 3 Pat. L. R. (Cr.) 134 : A. I. R. 1925 Pat. 619.**

———*Counter-cases—Trial of not bad.*

The simultaneous but separate trials of two cross-cases of rioting is not bad unless the accused are prejudiced. (*Kulwant Sahay, J.*) SHABAYET KHAN *v.* EMPEROR. **25 Cr. L. J. 1018 : 81 I. C. 794 : A. I. R. 1925 Pat. 152.**

Court's duty.

———*Court's duty—Sureties cannot be rejected on police report.*

When sureties are offered it is the duty of the Court to accept them unless it is satisfied that they are not proper persons. They should not be rejected on police report. (*Ryves, J.*) GOPI KHATIK *v.* EMPEROR. **20 A. L. J. 760 : 23 Cr. L. J. 499 : L. R. 3 A. 140 (Cr.) : 68 I. C. 35 : A. I. R. 1922 All. 541.**

———*Court's duty—On a capital charge—Plea of guilty before the Trial Court.*

When an accused is on his trial on a capital charge, it is not expedient that the Court should convict him even upon a plea of guilty entered before the Trial Court itself. As a matter of practice, the Court should, in its discretion, put such a plea on one side and proceed to record and consider the evidence in order to satisfy itself, not merely of the guilt of the accused, but of the precise nature of the offence committed and the appropriate punishment for the same. (*Piggott and Walsh, JJ.*) SUKHIA *v.* EMPEROR.

20 A. L. J. 669 : 73 I. C. 497 : 24 Cr. L. J. 609 : A. I. R. 1922 All. 266.

———*Court's duty—Difference between a civil and criminal case.*

CRIMINAL TRIAL—Court's duty.

In civil cases, it is the duty of the parties to place before the Court their case as they think best, and in criminal cases, the Court must try to get all relevant evidence before it and see that justice is done. (*Tudball and Walsh, JJ.*) EMPEROR *v.* JANKI PRASAD.

43 All. 283 : 22 Cr. L. J. 210 : L. R. 2 A. (Cr.) 6 : 60 I. C. 322 : 19 A. L. J. 196.

———*Court's duty—Charge should be clear.*

A charge which is not reasonably sufficient to give the accused notice of the matter, with which he is charged, is bad. (*Ghose and Cuming, JJ.*) OATES *v.* EMPEROR. **38 C.L.J. 163 : 76 I. C. 417 : 25 Cr. L. J. 177 : A. I. R. 1924 Cal, 104.**

———*Court's duty—Civil dispute.*

Where a criminal case is launched on the basis of a civil dispute between the parties it would be proper for the Magistrate to consider whether or not the case was of a civil nature and if he came to the conclusion that only a civil wrong had been committed, he should have said so and dealt with the case accordingly. If, on the other hand, he was of opinion, that a criminal offence had been committed, though he might refer to the evidence in a manner equally appropriate to civil proceedings he should not have lost sight of this fact that he was dealing with a criminal prosecution and ultimately he should have disposed of the case purely from the standpoint of the criminal law. Where the judgment of the Magistrate is neither the one nor the other, it is liable to interference in revision. (*Buckland and Cuming, JJ.*) BHABANI PROSAD MOITRA *v.* HARI CHARAN BHATTACHARJEE.

24 Cr. L. J. 714 : 73 I. C. 938 : 38 C. L. J. 7.

———*Court's duty—Executive considerations must be eliminated.*

A Court should keep judicial and executive considerations separate. Where the Court practically held that the accused had been wrongly convicted but that as the situation at the place was likely to cause an embarrassing situation for the executive authorities, it was necessary that they should be offered up as victims to avert such calamity. *Held*, that such a course was a travesty of justice. (*Fforde, J.*) KHEM CHAND *v.* EMPEROR. **26 Cr. L. J. 1339 : 89 I. C. 315 : A. I. R. 1925 Lah. 625.**

———*Court's duty—Trial of an accused—Conflict between technicalities and legal rights of the accused.*

If any conflict arises between the technicalities and the legal rights of an accused person the latter must prevail. (*Wallace, J.*) VENKATARAMA AIYAR *v.* SUNDARAM PILLAI. **17 L. W. 229 : 72 I. C. 885 : 24 Cr. L. J. 469 : A. I. R. 1923 Mad. 439 : 44 M. L. J. 119.**

———*Court's duty—Judge should hear all evidence.*

It is a general rule that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty. Any exception to this rule must be strictly construed as S. 349, Cr. P. Code, creates one of such exceptions. (*Kotval, A. J. C.*) BABA *v.* EMPEROR. **24 Cr. L. J. 738 : 74 I. C. 66 : A. I. R. 1924 Nag. 37.**

———*Court's duty—Judgment—Day fixed for hearing of pleader not obligatory.*

Where a Magistrate has fixed a day for delivery of judgment and is ready with the judgment on that day it is not obligatory upon him to hear the pleader for the accused before delivering judgment. (*Prideaux, A. J. C.*) NYAU KHAN *v.* EMPEROR.

23 Cr. L. J. 752 : 69 I. C. 640 : A.I.R. 1923 Nag. 208.

———*Court's duty—Approver's evidence.*

CRIMINAL TRIAL—Court's duty.

A Judge must direct himself to treat the evidence of approver with the greatest caution and suspicion, but nevertheless to act on his evidence if he believes it. A conscientious jury must treat the advice of the Judge with the greatest respect, but must nevertheless give a decision in accordance with their conscience. (*Hallifax and Macnair, A. J. Cs.*) GOVINDA *v.* EMPEROR. **69 I. C. 257 : 23 Cr. L. J. 673 : 17 N. L. R. 113.**

———*Court's duty.*

A Judge ought not to take the role of a prosecutor. (*Wazir Hasan, A. J. C.*) SARJU SINGH *v.* EMPEROR. **26 Cr. L. J. 1236 : 88 I. C. 852 : A. I. R. 1925 Oudh 726.**

———*Court's duty—Court must hear arguments offered.*

It is the duty of the Court to hear any arguments that may be offered in every criminal trial or proceeding. (*Dalal, A. J. C.*) BAIJ NATH SAH *v.* EMPEROR. **27 O. C. 323 : 25 Cr. L. J. 1380 : 83 I. C. 340 : A. I. R. 1925 Oudh 228.**

———*Court's duty—Travelling allowance of witness ordered to be deposited—Amount should be specified—Cr. P. Code, S. 257.*

A Court ordering a party to deposit the travelling allowance of a witness should state the amount of the travelling allowance to be deposited. (*Kulwant Sahay, J.*) GOURI SHANKAR *v.* COLLECTOR OF MUZAFFERPUR. **6 P. L. T. 215 : 3 Pat. L. R. (Cr.) 127 : 87 I. C. 421 : 26 Cr. L J. 965 ; A. I. R. 1925 Pat. 553.**

——— *Court's duty.*

Where there is considerable divergence between the case for the prosecution and the case for the accused in a case of rioting and there were several accused it is the duty of the Trial Court as well as the Appellate Judge to examine the evidence carefully so as to show that he was fully convinced upon the consideration of the *pros* and *cons* of the case that the prosecution story was true. It is the duty of the Appellate Court to go into evidence and to refer to it with reference to the individual case of each of the accused. (*Jwala Prasad and Coutts, JJ*) JIWANRAUT *v.* EMPEROR. **1 Pat. L. R. (Cr.) 55 : 72 I. C. 519 : 24 Cr. L. J. 407 : 4 Pat. L. T. 502 : A. I. R. 1924 Pat. 380.**

——— *Court's duty—Acquittal—Adverse remarks—Propriety of—Police manual—Compliance with.*

A Magistrate exercising judicial functions has to divest himself of his executive powers and his judicial pronouncements should not be disfigured by an entry as required under the Police Manual, particularly as it is based upon the Magistrate's personal impressions drawn from irrelevant matters which the accused has no opportunity to meet. Where a Magistrate acquits the accused holding the prosecution case to be false, he has no power to add in the judgment "Enter true" which is wholly inconsistent with his express finding as to the falsity of the case and the said remark together with the reasons for the same should be deleted for the judgment as the accused may be gravely prejudiced by it. (*Jwala Prasad, J.*) BIRNARAYAN *v.* EMPEROR. **3 Pat. L. T. 239 : 67 I. C. 195 : 23 Cr. L. J. 371 : A. I. R. 1922 Pat. 97.**

———*Court's duty—Cruelty to animals.*

Honorary Magistrates should deal severely with cases of great cruelty to animals. (*Heald, J.*) EMPEROR *v.* BEJAI. **3 Bur. L. J. 155 : A. I. R. 1924 Rang. 373 (1).**

——— *Court's duty—Conviction for less serious offence.*

Per *Robinson, C. J.*—The general rule which should guide the Courts is to convict of and punish for the most serious offence that is established provided, of course, that the accused has been charged with and has had an opportunity of meeting the charge of that offence. There is no ground for holding that the Legislature meant to confine the Court to that offence when the facts proved, amount to another and more serious offence. (*Robinson, C. J. and Macgregor, J.*) NGA SHAN *v.* EMPEROR. **1 Bur. L. J. 179 : 11 L. B. R. 422 : 73 I. C. 145 : 24 Cr. L. J. 529 : A. I. R. 1923 Rang. 37.**

CRIMINAL TRIAL—Defence.

——— *Court's duty—Plea of guilty.*

Independent evidence should be taken by Court notwithstanding accused's plea of guilty. (*Kennedy, J. C. and Raymond, A. J. C.*) EMPEROR *v.* KASIM WALAD MOHAMAD SAFFER. **17 S. L. R. 268 : 26 Cr. L. J. 177 : 83 I. C. 887 : A. I. R. 1925 Sind 188.**

——— *Court's duty—Directions of superior executive authority when need not be cared for.*

It is the duty of a trying magistrate to ignore extrajudicial directions given by a superior authority as to the disposal of the case. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) BASSARMAL AWATMAL *v.* EMPEROR. **23 Cr. L. J. 31 : 64 I. C. 511 : 15 S. L. R. 149.**

Death of Complainant.

———*Death of complainant—Abatement.*

A criminal prosecution under S. 323, I. P. Code, does not abate by reason of the death of the person injured. 44 M. 417, Ref. (*Dalal, J.*) MUSA *v.* EMPEROR. **22 A. L. J. 520 : L. R. 5 A. 96 (Cr.) : 81 I. C. 719 (1) : 25 Cr. L. J. 1007 (1) : A. I. R. 1924 All. 666 (2).**

———*Death of complainant—Abatement.*

The death of the complainant or the person injured does not terminate or cause to abate criminal proceedings once legally instituted, whether upon a complaint or otherwise. (*Chevis and Scott-Smith, JJ.*) HAZARA SINGH *v.* EMPEROR. **2 Lah. 27 : 59 I. C. 918 : 22 Cr. L. J. 166 : A.I.R. 1922 Lah. 227.**

Defence.

———*Defence witness produced by one accused cannot be used by prosecution against others.*

The evidence of a defence witness produced by one accused cannot be treated as prosecution evidence against other accused. (*Mukerjee, J.*) BAHORU *v.* EMPEROR. **26 Cr. L. J. 1018 : 87 I. C. 842 : A. I. R. 1925 All. 769.**

———*Defence—Conviction for rioting—Plea of self-defence raised for first time in appeal—Court should examine the plea.*

Where the accused were convicted of the offence of rioting and in appeal they raised the plea of self-defence for the first time in the whole proceedings, *held*, that they were entitled to have the plea examined by the Court. (*Mears, C. J. and Sulaiman, J.*) AJUDHIA PRASAD *v.* EMPEROR. **L. R. 6 A. 81 Cr. : 26 Cr. L. J. 997 : 87 I. C 597 : A.I.R. 1925 All. 664.**

———*Defence—Accused wishing to examine certain witness for defence—Non-examination—Conviction is bad.*

Where the accused wanted to examine a witness in his own defence but the witness was not examined, *held*, that the accused was deprived of a right which he had by law and that his conviction was bad. (*Walsh, J.*) BHAGWAN DAS *v.* SADDIQ AHMAD. **23 A. L. J. 73 : 86 I. C. 79 : 26 Cr. L. J. 703 : L. R. 6 A. 101 (Cr.) : A. I. R. 1925 All. 318 (1).**

———*Defence—In cases involving question of intention, if the facts are such as would cause a man of ordinary prudence and ability to infer a guilty intent, the accused should rebut such inference.*

CRIMINAL TRIAL—Defence.

Case which involves a question of intention really rests upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused it is for the accused to rebut that guilty intention: and if he does not so rebut it, the guilty intent is as much found against him as his physical acts. 37 All. 395, Foll. (*Boys, J.*) MANNI *v.* EMPEROR.

L. R. 5 A. 127 (Cr.): A. I. R. 1924 All. 764.

———*Defence—Inconsistent defence must be allowed.*

By setting up on inconsistent defence there can be no doubt that the case for the accused becomes considerably weaker than if he settled his best line of defence and set up that defence only. But there is nothing illegal in setting up an alternative and inconsistent defence. (*Newbould and Suhrawardy, JJ.*) NAGENDRA CHANDRA *v.* EMPEROR.

38 C. L. J. 203 : 27 C. W. N. 820 : A. I. R. 1923 Cal. 717.

———*Defence—Private defence—Duty of Court to give effect to defence.*

If on the record a right of private defence can be clearly raised the Court would give effect to it, even though not pleaded by the person accused. (*Broadway, J.*) WARYAM SINGH *v.* EMPEROR.

24 Cr. L. J. 451 : 72 I. C. 611 : A. I. R. 1922 Lah. 394 (2).

———*Defence—Self-defence plea is not available where there is general fight between parties.*

The defence of self-defence which must be specific and individual in every case cannot be relied on where there is good evidence to hold that there was a general fight between two parties. (*Odgers and Wallace, JJ.*) B. PEDA SOMADU *v.* N. APPIGADU. **47 M. 232 : 18 L. W. 705 : 33 M. L. T. 159 : 81 I. C. 203 : 25 Cr. L. J. 715 : A. I. R. 1924 Mad. 379 : 45 M. L. J. 602.**

———*Defence—Sessions trial—Defence having a counter-case should give evidence and should not rely on the discrepancies in prosecution evidence.*

It is advisable that when persons who are accused of serious charges in the Sessions Court have a counter-case and have also to give some substantive evidence in support of it, they should produce that evidence and not rely on the chance of finding discrepancies and loopholes in the prosecution evidence. (*Mullick and Jwala Prasad, JJ.*) PERSHAD TEWARI *v.* EMPEROR. **26 Cr. L. J. 1589 : 90 I.C. 661 : A. I. R. 1926 Pat. 5.**

Duty of prosecution.

———*Duty of prosecution—Evidence after closing of the case by prosecution is not allowed.*

An accused is entitled to know what the evidence against him is before he is called upon for a defence at all, and the closing of the case for the prosecution is no mere form but with certain exceptions, closes the door to any further evidence against the accused. Further the prosecutor cannot re-open his case and make additions to it except such voluntary additions as the accused may make himself. The only thing that an accused person has to meet in a criminal trial is the case for the prosecution, and such additions thereto as he may have voluntarily added by his own statement and those of witnesses whom he calls in his defence. (*Walsh, J.*) MAHADEO PRASAD *v.* EMPEROR.

45 All. 323 : 21 A. L. J. 179 : L. R 4 A. 57 (Cr.) : A. I. R. 1923 All. 322.

———*Duty of prosecution—Sessions—All witnesses to be tendered for cross examination except false ones.*

CRIMINAL TRIAL—Duty of Prosecution.

Where ten witnesses were examined before the committing Magistrate on behalf of the prosecution and of these seven were not examined in the Sessions Court nor were they tendered for cross-examination although an application was made on behalf of the accused that this should be allowed and it was not suggested that these witnesses were discarded by the Public Prosecutor on the ground that if examined they would not tell the truth. *Held*: the accused was entitled to have them put in the box for cross-examination. (*Newbould and Suhrawardy, JJ.*) NAGENDRA CHANDRA *v.* EMPEROR.

38 C. L. J. 203 : 27 C. W. N. 820 : A. I. R. 1923 Cal. 717.

———*Duty of prosecution—Omission to examine a large number of witnesses examined before Committing Magistrate—Inconsistent defences.*

Ten witnesses were examined before the Committing Magistrate on behalf of the prosecution. Of these seven were not examined in the Sessions Court nor were they tendered for cross-examination although an application was made on behalf of the accused that this should be allowed. It was not suggested that these witnesses were discarded by the Public Prosecutor on the ground that if examined they would not tell the truth. *Held*, the accused was entitled to have them put in the box for cross-examination. *Held* further that the Sessions Judge erred in holding that the accused could not set up an alternative defence which was inconsistent with the first defence set up by him. By setting up an inconsistent defence there can be no doubt that the case for the accused becomes considerably weaker than if he settled his best line of defence and set up that defence only. But there is nothing illegal in setting up an alternative and inconsistent defence and the accused's pleader should be allowed to argue the alternative defence before the jury. (*Newbould and Suhrawardy, JJ.*) NAGENDRA CHANDRA DHAR *v.* EMPEROR.

27 C. W. N. 820 : 38 C. L. J. 203 : 25 Cr. L. J. 190 : 76 I. C. 430 : A. I. R. 1923 Cal. 717.

———*Duty of prosecution to adduce all available evidence.*

It is the duty of the prosecution to put all the evidence before the Court and the only valid excuse for not examining these witnesses would be that no reliance could be placed on their evidence. (*Newbould and Suhrawardy, JJ.*) MAHOMED YOUNUS *v.* EMPEROR. **25 Cr. L. J. 467 (2) : 77 I. C. 619 : 50 Cal. 318 : A. I. R. 1923 Cal. 517.**

———*Duty of prosecution—Witness—Omission to call.*

Where the prosecution has reason to believe that the inmates of the house of the accused, if examined, would not tell the truth not being inclined to help the prosecution, that is sufficient cause for omitting to call them. (*Newbould and Suhrawardy, JJ.*) EMPEROR *v.* BALARAM DAS. **49 Cal. 358 : 71 I. C. 685 : 24 Cr. L. J. 221 : A. I. R. 1922 Cal. 382 (2).**

———*Duty of prosecution—Duty to prove charge.*

Where the prosecution case is false on the whole the accused must be acquitted whether his defence be true or false. (*Newbould and Suhrawardy, JJ.*) GOURI NARAIN *v.* TILHIKRAM.

65 I. C. 1004 : 23 Cr. L. J. 220 : 25 C. W. N. 838.

———*Duty of prosecution—Charge—Date and place of occurrence to be proved.*

In a case of assault where the charge mentions a certain date and place at which it occurred, the prosecution must prove the same. It is not open to the judge to convict the accused for an assault which took place at a different place or time. (*Broadway, J.*) JALA-

CRIMINAL TRIAL—Duty of Prosecution.

LUDDIN *v.* EMPEROR. **25 Cr. L. J. 471 : 77 I. C. 823 : 6 Lah. L. J. 572 : A. I. R. 1924 Lah. 616.**

——Duty of prosecution—Prosecution must call all witnesses who prove their connection with the transaction unless it thinks that they will tell a lie or they are not necessary.

All witnesses who prove their connection with the transaction, connected with the prosecution, should be called, unless the prosecution is under the *bona fide* belief that such witnesses would not speak the truth, but the Public Prosecutor is not bound to call as witnesses for the Crown any person whose evidence in his opinion is unnecessary. 8 Cal. 121, Appr. ; 42 Cal. 422, Dist ; 15 All. 84 ; 49 Cal. 277, Foll. (*Odgers, J.*) DORAISWAMI UDAYAN *v.* EMPEROR.

33 M. L T. 213 (H. C.) : (1923) M. W. N. 782 : 25 Cr. L. J. 75 : 75 I. C. 987 : A I. R. 1924 Mad. 239 : 45 M. L. J. 846.

——Duty of prosecution—Witnesses, hostile—Procedure.

Held, the duty of the prosecutor was to have hostile witnesses in attendance so that they could be examined by the defence, if necessary, though he is not bound to produce witnesses who were considered by the prosecution to be false. The Court cannot allow the prosecutor to put them in and at once begin to cross-examine them. (*Scott-Smith and Broadway, JJ.*) MAHANT NARAIN DAS *v.* EMPEROR.

3 Lah. 144 : 23 Cr. L. J. 513 : 68 I. C. 113 : 9 P. W. R. 1922 (Cr.) : 4 Lah. L. J. 91 : A. I. R. 1922 Lah. 1.

——Duty of prosecution—Public Prosecutor—Duty of.

There should be on the part of the Public Prosecutor no unseemly eagerness for or grasping at conviction. He is not to aggravate the case against the prisoner but has to perform his duties with that calmness and impartiality which should ever characterise the Public Prosecutor. He has to aid the Court in discovering the truth and also in the discharge of its duty to do justice as between the Crown and the accused. (*Kinkhede, A. J. C.*) ANANT WASUDEO *v.* EMPEROR.

7 N. L. J. 155 : A. I. R. 1924 Nag. 243.

——Duty of prosecution—Weakness of defence cannot help prosecution which must prove guilt beyond reasonable doubt.

The weakness of the defence must not be allowed to bolster up a weak case, for the prosecution has not only to establish the guilt of the accused but it must establish it beyond any reasonable doubt. (*Wazir Hasan and Neave, A J. Cs.*) HIRA LAL *v.* EMPEROR. **27 O. C. 188 : 26 Cr. L. J. 225 : 84 I. C. 49 : A. I. R. 1925 Oudh 78.**

——Duty of prosecution — Aggravation of — With false story—Risk to prosecution.

When the prosecution comes to Court with a false story in order to aggravate the offence they must take the risk of failing to prove the crime which was really committed. (*Dalal, J. C.*) HAR PRASAD *v.* EMPEROR. **1 O. W. N. 859.**

——Duty of prosecution—Non-production of material witnesses.

The non-production of material witnesses like the investigation officers and the failure to explain it are serious omissions which cannot but throw suspicion on the whole prosecution case. (*Coutts and Adami, JJ.*) NIRU BHAGAT *v.* EMPEROR. **1 P. 630 : 71 I. C. 219: 24 Cr.L. J. 91 : 4 P. L. T. 76 : A. I. R. 1922 Pat. 582.**

Evidence.

Admissibility.

CRIMINAL TRIAL—Evidence—Admissibility.

Credibility.
Doubtful.
Expert evidence.
Failure to examine witness.
Identification.
Maps and plans.
Motive.
Procedure.
Quantum of.
Retracted statements and confessions.
Value of.
Miscellaneous.

Evidence—Admissibility.

——Evidence—Admissibility.

Matters tendered in evidence by the prosecution must be dealt with summarily and instantly by the judge at the trial when they are tendered. He ought to guard very carefully against allowing a discussion in Court, or the reading of a document in Court in the presence of assessors when it is inadmissible. The benefit of a reasonable doubt ought to be given by the Bench even to the admission of evidence. particularly documentary evidence, during the trial. (*Walsh and Sulaiman, JJ.*) LAIJAM SINGH *v.* EMPEROR.

L. R. 6 A. 73 (Cr.) : 86 I. C. 817 : 26 Cr. L. J. 881 : A. I, R. 1925 All. 405.

——Evidence—Admissibility.

Question of admissibility must be answered prior to appreciation of evidence. (*Mears, C. J. and Piggott, J.*) EMPEROR *v.* HARPRASAD BHARGAVA.

45 All. 226 : 21 A. L. J. 42 : L. R 4 A. 19 (Cr) : A I. R 1923 All. 91.

——Evidence—Admissibility—Discovery of ornaments of deceased is not evidence against accused.

The discovery of the ornaments of the deceased in a place belonging to somebody else and without being pointed out by anybody, is no evidence against the accused. (*Piggott and Walsh, JJ.*) MT. SUKHIA *v.* EMPEROR. **20 A. L. J. 669 : 24 Cr. L. J. 609 : 73 I. C. 497 : L. R. 3 A. 101 (Cr.) : A. I. R 1922 All. 266.**

——Evidence—Admissibility—Prejudice.

Where in a criminal trial a document is admitted in evidence though it is really inadmissible, it does not vitiate the trial, unless the accused has been prejudiced thereby. (*Greaves and Panton, JJ.*) KALIA *v.* EMPEROR. **26 Cr. L. J. 579 : 85 I. C: 723 : A- I. R. 1925 Cal. 959.**

——Evidence — Admissibility— Inadmissible evidence admitted—Accused prejudiced—Trial is vitiated.

Where evidence of bad character, complicity in other crimes, confessional statements made to the Police and pure hearsay evidence which on the face of it deserved to be excluded were admitted. *Held*, that the admission of such evidence could not but have resulted in prejudice to the accused and a verdict based on such inadmissible evidence can never be upheld. (*Walmsley and Mukerjee, JJ.*) SHEIKH ABDUL *v.* EMPEROR. **85 I. C. 830 : 26 Cr. L. J. 606 : A. I. R. 1925 Cal. 887.**

——Evidence—Admissibility—Depositions in one case copied in another—Illegality.

It is illegal for a Magistrate trying a criminal case to take the depositions in one case and have them copied and used in another case. (*Sanderson, C. J. and Chotzner, J.*) MAZAHAR ALI *v.* EMPEROR.

50 Cal. 223 : 24 Cr. L. J. 198 : 27 C. W. N. 99 : 71 I. C. 662 : 36 C. L. J. 417 : A. I.R. 1923 Cal. 196.

——Evidence—Admissibility.

Where admittedly there is enmity beween the

CRIMINAL TRIAL—Evidence—Admissibility.

parties and the prosecution have implicated wholly innocent persons their evidence cannot be fully relied upon without some strong independent corroboration The fact the accused made an effort to concoct false evidence of an *alibi* does not go to prove that he committed the offence charged. (*Scott-Smith, J.*) TABRI *v.* EMPEROR. **6 Lah. L. J. 326 : 84 I. C. 937 : 26 Cr. L. J. 393 : A. I. R. 1925 Lah. 42.**

———*Evidence—Admissibility—Practice.*

Where a witness merely referred to certain documents in which he stated his evidence was to be found and the documents were put on the record as evidence.

Held, that the course was illegal. (*Broadway and Fforde, JJ.*) LAL SINGH *v.* EMPEROR. **5 Lah. 396 : A. I. R. 1925 Lah. 19.**

———*Evidence—Admissibility—Police diary may be used for accused.*

Statements embodied in police diaries can be used in favour of an accused person. but not against him. (*Zafar Ali, J.*) RAJINDAR SINGH *v.* EMPEROR. **A. I. R. 1923 Lah. 516.**

———*Evidence—Admissibility—Fact of accused having been thought of as an approver—Statement made to Police is not admissible.*

The fact that a subordinate Police Officer took the accused along with the approver to the Superintendent of Police as she was a confessing prisoner and it was necessary to decide which of them should be selected as the approver in the case cannot be admitted in evidence and must be ignored. (*Chevis and Abdul Qadir, JJ.*) SHWA DIN *v.* EMPEROR. **5 Lah. L. J. 128.**

———*Evidence—Admissibility—Production of libel in original is essential*

In case of written defamation the Court should insist on the production of the original and should not easily admit certified copies. (*Odgers and Hughes, JJ.*) K. BURKE *v.* T. C. W. SKIPP. **18 L. W. 718 : 33 M. L. T. 168 : (1923) M. W. N. 913 ; 25 Cr. L. J. 641 : 81 I. C. 129 : A. I R. 1924 Mad. 340 : 45 M. L. J. 754.**

———*Evidence—Admissibility—Evidence before one Magistrate is not evidence before another Magistrate.*

Evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so. Mere consent of parties will not do. (*Krishnan, J.*) CHINA VENKA, *In re.* **17 L. W. 247 : 72 I. C. 525 : 24 Cr. L. J. 413 : A. I. R. 1923 Mad. 327.**

———*Evidence—Admissibility—Deposition of witnesses taken in a previous trial—Conviction.*

The accused and his father were placed together on trial but after the trial proceeded for some time, it was decided to hold two separate trials and the Judge then began the trial of the accused and exhibited the evidence already given at the joint trial. Then that judge ceased to hold office and his successor decided to hold trial *de novo* but exhibited the depositions of witnesses in the previous trial without examining them *de novo*. *Held* that in doing so there was an irregularity in the procedure which would vitiate the proceedings and that the consent of the accused would not cure such irregularity. 12 C. W. N. 140, Foll. In such a case the appellate Court has not plenary discretion to decide whether the accused has been prejudiced by the irregularity. 39 M. 449, Ref. (*Oldfield and Ramesam, JJ.*) KOTTAMMAL K.

CRIMINAL TRIAL—Evidence—Credibility.

UMMAR HAJEE, *In re.* **46 M. 117 : 69 I. C. 636 : (1922) M. W. N. 644 : 16 L. W. 697 : 23 Cr. L. J. 748 : A. I. R. 1923 Mad. 32: 43 M. L. J. 659.**

———*Evidence—Admissibility—Signed statement of persons before monegar—If substantive evidence against the accused.*

Where two persons made a statement before the monegar shortly after the commission of an offence and signed the same, but at the trial deposed differently, *held*, that the statements cannot be used as substantive evidence against the accused, as it was not a statement recorded on oath in the presence of the accused by a Magistrate empowered to take down evidence. It can only be used to corroborate or contradict statements made on oath at trial. (*Spencer and Kumaraswami Sastri, JJ.*) MALAYA GOUNDAN, *In re.* **(1921) M. W. N. 872 : 14 L. W. 612 : 66 I. C. 326 : 23 Cr. L. J. 262 : A. I. R. 1922 Mad. 303 : 42 M. L. J. 278.**

———*Evidence—Admissibility—Hearsay evidence in India is generallly not reliable.*

In India, it is most dangerous to accept vague statements of hearsay information. Often what a man hears he believes that he saw it himself. (*Dalal, A. J. C.*) RAGHUDATT *v.* EMPEROR. **24 Cr. L. J. 791 : 74 I. C. 535 : A.I.R. 1924 Oudh 187.**

———*Evidence—Admissibility—First information—Statement made to police.*

A statement casually made to a Sub-Inspector of Police is not first information and cannot be relied on as such. (*Coutts and Das, JJ.*) DASRATH SINGH *v.* EMPEROR. **1 Pat. L. R. (Cr.) 192 : 67 I. C. 502 : 23 Cr. L. J. 406 · A. I. R. 1923 Pat. 158.**

———*Evidence—Admissibility—Evidence of previous conviction may vitiate trial where Magistrate is influenced by it in his decision.*

The trial is vitiated by the admission of the evidence of previous conviction prior to the accused's entering upon his defence, where it was clear that the Magistrate was influenced by his knowledge of bad character of the petitioner.

Held (Per *May Oung, J.*) It is not perhaps easy to keep the mind entirely free from prejudice when the record and the police papers show that the prisoner in the dock is an ex-convict. But the provisions of S. 310 of the Code of Criminal Procedure, whereby in sessions trials, all knowledge of previous conviction is rightly withheld from jurors and assessors until after the accused has either pleaded, or been found guilty, indicate the importance of the complete exclusion of such knowledge when weighing the evidence as to the truth or otherwise of the main charge. The principle underlying the legal provision may also be seen in S. 54 of the Indian Evidence Act under which a previous conviction is declared inadmissible against an accused person, except where evidence of bad character is relevant. A. I. R. 1923 Cal. 707, Dist. (*May Oung, J.*) MAUNG E GYI *v.* CROWN. **1 R. 520 : A. I. R 1924 Rang. 91.**

———*Evidence—Comparing evidence with statement of witness before police—Propriety of.*

The practice of comparing in criminal trials statements made by witnesses in court under oath with statements which they are alleged to have made to the Police during the investigation should be condemned. (*Shadi Lal, C. J. and Fforde, J.*) MOHAMMAD *v.* EMPEROR. **89 I. C. 252 : 26 Cr. L. J. 1308 (Lah.).**

Evidence—Credibility.

———*Evidence—Credibility—Rejection of evidence—Evidence Act, S. 118.*

CRIMINAL TRIAL--Evidence—Credibility.

Rejection of evidence on the ground of a relation of the witness belonging to the same village as the wife of a near relation of the accused was held to be bad. (*Scott-Smith and Fforde, JJ.*) BAGH SINGH *v.* EMPEROR. **25 Cr. L. J. 625 : 81 I. C. 113 : A I. R. 1925 Lah. 49.**

———*Evidence—Credibility.*

Where admittedly there is enmity between the parties and the prosecution have implicated wholly innocent persons their evidence cannot be fully relied upon without some strong independent corroboration. The fact that the accused made an effort to concoct false evidence of an *alibi* does not go to prove that he committed the offence charged. (*Scott-Smith, J.*) TABRI *v.* CROWN. **6 L. L. J. 326 : 84 I. C. 937 : A. I. R. 1925 Lah. 42.**

———*Evidence— Credibility — Witnesses— Stock witnesses—Penal Code, S. 124-A.*

Where in a case under S. 124-A some of the witnesses produced are Zaildars and Lambardars who have admittedly appeared as witnesses on behalf of the police in a large number of political or semi-political cases. *Held*, that little reliance should be placed on evidence of such stock witnesses, and as to the police constables and Sub-Inspectors of Police. *Held*, that where they have given a highly coloured and exaggerated statement with regard to the whole affair, it is impossible to sustain the convictions on their oral evidence alone where it is contradicted by their own police diaries. (*Moti Sagar, J.*) KISHAN SINGH *v.* EMPEROR. **25 Cr. L. J. 279 : 76 I. C. 871 : A. I. R. 1923 Lah. 333.**

———*Evidence—Credibility— Uncorroborated and interested testimony.*

It would be unsafe to base a conviction upon an uncorroborated and interested testimony. (*Martineau, J.*) NURA *v.* EMPEROR. **3 L. L. J. 482 : 67 I. C. 591 : 23 Cr. L. J. 431 : A. I. R. 1922 Lah. 456.**

———*Evidence—Credibility.*

To discredit witnesses merely because they are Police men is impossible. (*Scott Smith and Broadway, JJ.*) MAHANT NARAIN DAS *v.* EMPEROR **3 Lah. 144 : 23 Cr. L. J. 513 : 9 P. W. R. 1922 (Cr.) : 4 Lah. L. J. 91 : 68 I. C. 113 : A I. R. 1922 Lah. 1.**

———*Evidence—Credibility—Evidence partly unreliable is worthless.*

The evidence of a witness disbelieved in respect of one accused should not be relied upon in respect of all. When a witness admits that he disclosed his knowledge to the police at a very late date without any explanation of the delay his evidence is almost worthless. (*Shadi Lal, C. J. and Le Rossignol, J.*) KEHRI *v.* EMPEROR. **3 Lah. L. J. 147**

———*Evidence—Credibility of oral evidence—High Court must be mainly guided by trial Court.*

The High Court must be guided as regards the credibility of oral evidence mainly by the Court that heard it. (*Simpson and Gokaran Nath Misra, A. J. Cs.*) SHEO NARAIN *v.* EMPEROR. **12 O. L. J. 429 : 89 I. C. 261 : 26 Cr. L. J. 1317 : A. I. R. 1925 Oudh 715.**

———*Evidence—Credibility*

The principle *falsus in uno falsus in omnibus* cannot be universally applied in India. (*Pullan, A. J, C.*) PRAG *v.* EMPEROR. **11 O. L. J. 693 : 82 I. C. 33 : 25 Cr. L. J. 1169 : A. I. R. 1925 Oudh 65.**

———*Evidence—Credibility.*

The evidence of a person who made two inconsistent statements is not reliable. (*Jwala Prasad, J.*) SHEOBHAJAN AHIR *v.* EMPEROR. **2 Pat. L. T. 125.**

CRIMINAL TRIAL—Evidence—Expert Evidence.

Evidence—Doubtful.

———*Evidence—Doubtful—Conviction not safe.*

Where the inference suggested by what happened at the interview is equivocal and where the explanation put forward by the accused is reasonably possible, the theory of innocence cannot be said to have been sufficiently negatived by the prosecution. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* AMIRUDDIN. **24 Bom. L. R. 534 : 23 Cr. L. J. 466 : 67 I. C. 818 : A. I. R. 1923 Bom. 44 (2).**

———*Evidence—Doubtful—Search witnesses.*

Two of the witnesses present at the search stated that the articles produced, *viz.*, silver *bank* and *band* were produced from a *tind*, but a third witness stated that the *tind* contained a silver *bank* and made no mention of the other articles. No explanation was even suggested as to how the other article came to be there: *Held*, that the circumstances under which these things were produced were not altogether beyond suspicion. (*Fforde, J.*) SAUDAGAR SINGH *v.* EMPEROR. **5 Lah. L. J. 572 : A. I. R. 1923 Lah. 683.**

———*Evidence—Doubtful—Suspicion if amounts to proof.*

Suspicion cannot be a substitute for proof. (*Shadi Lal, C. J. and Zafar Ali, J.*) SURAT SINGH *v.* EMPEROR. **A. I. R. 1923 Lah. 42.**

———*Evidence—Doubtful—Re-trial is not necessary.*

When the evidence in the case is of a doubtful character re-trial is unnecessary. (*Kumaraswami Sastry, J.*) RAMASWAMI THEVAN, *In re.* **14 L. W. 588 : 69 I. C. 380 (1) : 23 Cr. L. J. 700 : 30 M. L. T. 18.**

———*Evidence—Doubtful—Appreciation of—Police investigation unfair and tainted—Effect of.*

When a police investigation with respect to any particular accused person is tainted, a Court will have great hesitation in believing the prosecution evidence as it is very difficult to know where an investigating officer who has been detected in fabricating false evidence will stop in such fabrication. (*Dalal, J. C.*) HASNUKHAN *v.* EMPEROR. **89 I. C. 241 (2) : 10 O. & A. L. R. 1133.**

———*Evidence—Doubtful—Conviction is unsafe.*

Where the whole prosecution evidence in regard to the actual occurrence has been disbelieved except the evidence of the complainant himself, and it is found that there is serious enmity between the accused and the complainant, it is unsafe to convict the petitioner. (*Coutts and Dass, JJ.*) BHANGI DUBEY *v.* EMPEROR. **4 Pat. L. T. 503 : 1 Pat. L. R. (Cr.) 151 : 72 I. C. 360 (2) : 24 Cr. L. J. 360 (2) : A. I. R. 1923 Pat. 519.**

———*Evidence—Doubtful—Injury—Mark not seen*

The absence of any external mark of injury is not necessarily destructive of the case that the injury was caused by a brick. It is possible that a blow in the abdomen is less likely to leave a mark than one on a less elastic and resilient part of the anatomy. (*Mullick and Kulwant Sahay, JJ.*) RAMJIT AHIR *v.* EMPEROR. **2 Pat. 309 : 1 Pat. L. R. 236 Cr. : 74 I. C. 705 : 24 Cr. L. J. 801 : A. I. R. 1923 Pat. 413.**

Evidence—Expert Evidence.

———*Evidence—Expert evidence.*

Where accused pleads not guilty, Court doctor's report alone is not sufficient to justify conviction. (*Newbould and Chakravarti, JJ.*) BUDHU KOIRI *v.* EMPEROR. **40 C. L. J. 563 : A. I. R. 1925 Cal. 538 (1).**

CRIMINAL TRIAL—Evidence—Expert Evidence.

———*Evidence — Expert evidence—Chemical examiner's report—Weight due to.*

Where in a trial for murder there was strong direct evidence of the place of a certain murder but no blood was detected by the chemical examination of the earth, leaves and grass taken from alleged place of occurrence. *Held*, that the value of the report of the Chemical Examiner was merely negative and it was not sufficient to rebut the strong direct evidence as to the place of occurrence (*Newbould and Ghose, JJ.*) HASSENULLA SHEIKH *v.* EMPEROR

28 C. W. N. 561 : A. I. R. 1924 Cal. 625.

———*Evidence—Expert evidence — Conflict in—Conviction bad.*

Where the medical evidence conflicted with the story given by the eye-witnesses, who were also relations of the deceased, *held*, the conviction based on their evidence is untenable. (*Martineau, J.*) SHER KHAN *v.* EMPEROR. **5 L. L. J. 124 : A. I. R. 1924 Lah. 59.**

———*Evidence—Expert evidence—Forgery—Conviction merely on basis of expert's evidence is bad.*

A Court ought not to accept blindly the evidence of a hand-writing expert and should usually require substantial corroboration before making it the basis of conviction. (*Daniels, J. C.*) GIRDHARI LAL *v.* EMPEROR. **12 O. L. J. 194 : 2 O. W. N. 174 : 86 I. C. 993 : 26 Cr. L. J. 929 : A. I. R. 1925 Oudh 413.**

———*Evidence — Expert evidence—Not always formal.*

It cannot be said as a general rule that medical evidence is always formal. (*Das and Adami, JJ.*) RAMESWAR SINGH *v.* EMPEROR.

2 P. L. T. 741 : A. I. R. 1922 Pat. 299 (1)

Evidence—Failure to examine witness.

———*Evidence—Failure to examine witness—Witness deaf but literate.*

Failure to examine witness who though deaf could read and write is a material irregularity which vitiates a trial. (*Ghose and Cuming, JJ.*) GANODA DASSYA *v.* SRIMANTA GHOSH. **73 I. C. 784 : 24 Cr. L. J. 688 : A. I. R. 1924 Cal. 541 (1).**

———*Evidence— Failure to examine witness — Witness not in attendance though summoned—Adjournment.*

On the date fixed for hearing of a criminal case one of the witnesses for the defence did not attend and the accused informed the Court that the witness was ill and asked for a postponement in order to enable him to produce the witness. The application was refused on the ground that the petitioner had not produced a medical certificate to show that the witness was actually ill. *Held*, that the Magistrate, having once issued process against the defence witness, was bound to enforce his attendance. If he did not believe the story of the accused that the witness was ill he should have issued a warrant to enforce his attendance. The accused having obtained summons from the Court against this witness was entitled to have his attendance enforced. (*Newbould and Suhrawardy, JJ.*) MIHIR LAL ROY *v.* EMPEROR.

24 Cr. L. J. 370 : 72 I. C. 370 : A. I. R. 1924 Cal. 534.

———*Evidence—Failure to examine witness—Duty of prosecution—Non-production of some of the prosecution witnesses—Credibility of other prosecution witnesses is not affected.*

The mere fact of the non-production by prosecution of some of their witnesses cannot in any way affect the credibility of the witnesses that have been produced. (*Scott-Smith and Moti Sagar, JJ.*) INDOR SINGH *v.* EMPEROR. **5 L. L. J. 524 : 73 I. C. 932 : A. I. R. 1924 Lah. 241.**

CRIMINAL TRIAL—Evidence—Identification.

Evidence—Identification.

———*Evidence — Identification must be immediate otherwise loss in value.*

In no dacoity case a Court would convict a person who was not identified in the jail or before a proper authority, immediately after the arrest, simply on the strength of identification conducted in the Court of the Committing Magistrate or the Sessions Judge. Where the safeguard of an *earlier identification* is non-existent the Court is bound to insist on something being said by a prosecution witness to indicate why and how he happens to remember the faces long after the event. (*Mukerji, J.*) EMPEROR *v.* KISHEN LAL.

22 A. L. J. 501 : L. R. 5 A 177 (Cr.) : A. I. R. 1924 All. 645.

———*Evidence— Identification by co-accused—Secondary evidence is not admissible—Highly contradictory—Finding of articles after search — Witness's failure to identify is no ground for rejecting.*

An accused cannot give evidence while on his trial ; secondary evidence of identification by him is clearly inadmissible. Evidence by an official witness of an identification is only admissible, if the identifying witness is called to support his identification on oath. Accused when pointed out in bazaar by his co-accused was not searched. This was a piece of gross negligence. He was driven on the ekka to the Deputy Superintendent's, where he was searched, and nothing incriminating was found. When the party came away from the Deputy Superintendent it was decided to leave the ekka. Two coats belonging to the two constables had been spread on the ekka, and the four men had sat on them, the two prisoners, unhandcuffed sitting between the constables. When the coats were removed from the ekka, three ornaments, two being *basibunds*, and therefore of some size, were found concealed beneath. The evidence of finding was hopelessly contradictory. *Held*, accused's costume was such that concealment of these articles must have been difficult. It must also have been difficult to put them under the coats upon which the four men were sitting. The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. It is, indeed, strong evidence, that he has not been coached by the police, but is merely an enthusiast who is not to be trusted in recognising faces seen under such circumstances as a raid of dacoits. (*Walsh, J.*) KHETAL *v.* EMPEROR.

45 All. 300 : 21 A. L. J. 143 : L. R. 4 A. 13 (Cr.) : 24 Cr. L. J. 526 : 73 I. C. 62 : A. I. R. 1923 All 352.

———*Evidence— Identification— Witnesses giving no description previous to identification—Evidence is unreliable.*

Where identification evidence is given, the evidence cannot be relied upon if the witness who identified the accused had not previously given some description of the persons which coincided with the actual facts. (*Zafar Ali, J.*) MAULA DAD *v.* EMPEROR.

26 Cr. L. J. 693 : 86 I. C. 69 : A. I. R. 1925 Lah. 426.

———*Evidence—Identification evidence cannot be accepted unless witness had picked out some person in identification parade.*

Unless a witness identified the same person whom he had previously marked out in the identification parade in the jail, his evidence of identification given in Court should not be accepted. (*Scott-Smith, J.*)

CRIMINAL TRIAL—Evidence—Identification.

MAHNI *v.* EMPEROR. **25 Cr. L. J. 1242 : 82 I. C. 280 : A. I. R. 1925 Lah. 137 (2).**

———*Evidence—Identification evidence—Mere picking out an accused person from the crowd is not enough—Evidence as to how and under what circumstances the witness came to pick out a particular person and the details of the part that the accused took in the crime are necessary.*

The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean that the witness happens to know that accused person. The principal evidence of identification is the evidence of a witness given in Court as to how and under what circumstance he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court ; but otherwise, the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight. (*Broadway and Fforde, JJ.*) LAL SINGH v. EMPEROR. **5 Lah. 396 : A. I. R. 1925 Lah. 19.**

———*Evidence—Identification.*

Where it appeared that it was only in answer to questions put by the Court that witness deposed to his being able to identify accused. *Held*, the danger of accepting such a testimony is apparent, since witness had ample opportunity to see the accused during the committal proceedings. (*Broadway, J.*) REHMAN *v.* EMPEROR. **5 Lah. L. J. 477 : A. I. R. 1923 Lah. 662.**

———*Evidence—Identification—Doubt as to—Benefit of the doubt.*

In case of the gravest doubt as to whether the two prisoners were in fact identified as having participated in the crime in question, the benefit of the doubt must be given to both the prisoners. (*Fforde, J.*) CHUHAR SINGH *v.* EMPEROR. **5 Lah. L. J. 317.**

———*Evidence—Identification parades require most careful scrutiny.*

Identification parades do require the most careful scrutiny, because if a witness has, before the parade, seen the person that he is going to identify, it does not matter in what order you put this person, for such a witness will no doubt identify that man. (*Schwabe, C. J. and Wallace, J.*) NANNI KUDUMBAN *v.* CROWN. **45 M. L. J. 406 : 18 L. W. 482 : (1923) M. W. N. 695 : 25 Cr. L. J. 145 : 76 I. C. 289 : A. I. R. 1924 Mad. 232.**

———*Evidence—Identification in jail is not substantive evidence.*

Identification in jail is not substantive evidence. It may only be used as corroborative of identification made at the trial in the presence of the Judge. (*Wazir Hasan, A. J. C.*) SARJU SINGH *v.* EMPEROR. **26 Cr. L. J. 1236 : 88 I. C. 852 : A. I. R. 1925 Oudh 726.**

———*Evidence—Identification evidence is always uncertain.*

Identification evidence by itself is a very unsafe basis for conviction. A mistake due to confusion of ideas is quite possible and persons present at the time of the occurrence may mix up two situations in their mind and come to think that a face familiar elsewhere was seen by them during the occurrence. Such a mistake may be quite honest but has to be guarded against all the same. (*Dalal, J. C.*) DIN DAYAL *v.* EMPEROR. **10 O. L. J. 347 : 25 Cr. L. J. 1125 : 81 I. C. 949 : A. I. R. 1924 Oudh 295 (2).**

CRIMINAL TRIAL—Evidence—Procedure.

———*Evidence—Identification—Test identification note—Admissibility.*

A test identification note made by a Magistrate is not admissible in evidence as evidence of identification without examining the Magistrate as witness. (*Kulwant Sahay, J.*) BHAGAWAT JHA *v.* EMPEROR, **81 I. C. 45 : 25 Cr. L. J. 557 : 6 P. L. T. 310 : A. I. R. 1925 Pat. 158.**

Evidence—Maps and Plans.

———*Evidence—Maps and plans—Preparation of maps—Nothing that the man preparing the map does not see himself must be placed on it.*

A person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto. (*Sanderson, C.J. and Panton, J.*) EMPEROR *v.* MOFIZAL PENDA. **29 C. W. N. 342 : A. I. R. 1925 Cal. 909.**

———*Evidence—Map—Preparation of—For use in a criminal trial—Precautions, necessary for.*

A person who prepares a map for use in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto. (*Sanderson, C. J. and Chotzner, J.*) EMPEROR *v.* ABINASH CHANDRA BOSE. **52 Cal. 172 : 28 C.W.N. 995 : A.I.R. 1924 Cal 1029.**

Evidence—Motive.

———*Evidence—Motive does not matter.*

A clear case made out by the prosecution cannot be disbelieved, merely because the evidence of motive is not clear. (*Newbould and Suhrawardy, JJ.*) EMPEROR v. BALARAM DAS. **49 Cal. 358 : 71 I. C. 685 : 24 Cr. L. J. 221 : A. I. R. 1922 Cal. 382 (2).**

———*Evidence—Motive is not corroborative factor of accomplice evidence.*

The evidence of the accomplices is not sufficiently corroborated by the mere fact that there existed an animosity in the mind of the accused against the deceased which might have provided some motive for a crime. (*Das and Bucknill, JJ.*) DHANNU BELDAR *v.* EMPEROR. **2 Pat. L. T. 757.**

Evidence—Procedure.

———*Evidence—Procedure—Witness.*

A Magistrate is not empowered to order that a party should produce a certain witness and that, in default, the party shall lose his case. (*Shadi Lal, C. J.*) SANTA SINGH *v.* EMPEROR. **A. I. R. 1924 Lah. 617.**

———*Evidence—Procedure—Exclusion of witnesses from Court-room—Rule does not apply to pleader.*

Where, in a criminal trial, the counsel for the accused is cited as a witness for the prosecution he should not be excluded from the Court-room as other witnesses, but should be allowed to appear and plead the case of the accused. (*Wallis, C. J. and Krishnan, J.*) VEMUKEDDI BABUREDDI, *In re.* **44 Mad. 916 : 13 L. W. 702 : 62 I. C. 828 : 22 Cr. L. J. 588 : (1921) M. W. N. 440 : 41 M. L. J. 158.**

———*Evidence—Procedure—Leading question.*

A leading question to the prosecution witness by the prosecution cannot be allowed nor can the reply be used. (*Coutts and Adami, JJ.*) NIR BHAGAT *v.* EMPEROR. **4 P. L. T. 76 :**

CRIMINAL TRIAL—Evidence—Procedure.

1 P. 630 : A. I. R. 1922 Pat. 582.

——*Evidence—Procedure—Examination on commission in a serious trial is to be deprecated.*

The issue of a commission for the examination of an important witness in a serious criminal trial is a procedure which is much to be deprecated and which should never be adopted except for the most cogent reasons. (*Coutts and Ross, JJ.*) LACHHMI LAL *v.* EMPEROR.

3 Pat. L. T. 398 : 1922 P. H. C. C. 159 : 65 I. C. 1002 : 23 Cr. L. J. 218 : A.I.R. 1922 Pat. 40.

Evidence—Quantum of.

——*Evidence—Quantum of—Prosecution evidence tainted as to one accused—Court should hesitate to accept the evidence as to others also.*

When a Police investigation with respect to any particular accused person is tainted, a Court will have great hesitation in believing the prosecution evidence as it is very difficult to know where an Investigating Officer who has been detected in fabricating false evidence will stop in such fabrication. (*Dalal, J. C.*) HASNU KHAN *v.* EMPEROR. **89 I.C. 241 : 26 Cr. L. J. 1297 : A. I. R. 1926 Oudh 26.**

——*Evidence—Quantum of—Number of P. W's. larger than D. W.'s—Accused is not necessarily liable.*

Where a number of respectable witnesses have given evidence in favour of the accused, the Court should not reject their evidence and decide against the accused simply because the prosecution have produced a larger number of respectable witnesses. (*Dalal, J. C.*) BAHADUR v. EMPEROR.

27 O. C. 327 : 85 I. C. 370 : 26 Cr. L. J. 530 : A. I. R. 1925 Oudh 501.

——*Evidence—Quantum of—Number of defendant's witnesses.*

The accused is not necessarily entitled to be discharged because he produces a large number of witnesses. (*Daniels, J. C.*) RAMESHWAR BAKSH SINGH v, EMPEROR. **24 O. C. 286 : 64 I.C. 286 : 22 Cr. L. J. 766 : 9 O. L. J. 28 : A. I. R. 1923 Oudh 44 (2).**

——*Evidence—Quantum of.*

The quantum of evidence does not depend upon the enormity of the crime but still it is safer to follow the rule that "the fouler the crime the clearer and the plainer the proof ought to be." (*Jwala Prasad and Sultan Ahmed, JJ.*) RAGHUNANDAN KOERI v. EMPEROR. **22 Cr. L. J. 154 : 59 I. C. 858 : 1 Pat. L. T. 684.**

Evidence—Retracted Statements and Confessions.

——*Evidence—Retracted statements — Murder case.*

In a case of murder, the evidences of witnesses who have resiled from their previous statements should not be relied upon. (*Devadoss and Wallace, JJ.*) AYYAMPERUMAL PILLAI *v.* EMPEROR.

(1925) M. W. N. 319 : A. I. R. 1925 Mad. 879.

——*Evidence—Retracted confession—Proof of.*

Where a confession is retracted both before the Committing Magistrate and at the sessions trial, it cannot be used unless the Court is otherwise satisfied of its truth and voluntary character. (*Krishnan and Wallace, JJ.*) BASIREDDI NARIAPPA *v.* EMPEROR.

(1923) M. W. N. 697 : 18 L. W. 606 : 76 I. C. 642 : 33 M. L. T. 77 and 156 : 25 Cr. L. J. 210 : A. I. R. 1924 Mad. 391 : 45 M. L. J. 613.

——*Evidence—Retracted statements.*

A statement made by a witness to the Police but subsequently retracted is not safe to rely on in a criminal trial. (*Kinkhede, A. J. C.*) GANPAT *v.* EMPEROR. **25 Cr. L. J. 356 : 77 I. C. 292 :**

CRIMINAL TRIAL—Evidence—Value of.

A. I. R. 1924 Nag. 281.

——*Evidence—Retracted confession can legally be basis of conviction but that depends on circumstances.*

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of his guilt without independent corroborative evidence; but the weight to be given to such a confession must depend upon the circumstances in which the confession was originally made and the circumstances in which it was afterwards withdrawn. The credibility of a confession is in each case a matter to be decided by the Court in the light of the circumstances of every particular case. (*Wazir Hasan, A. J. C.*) MANNA LAL *v.* EMPEROR. **27 O. C. 40 : 25 Cr. L. J. 49 : 75 I. C. 753 : A. I. R. 1925 Oudh 1.**

——*Evidence — Retracted statements — Value of evidence before the Committing Magistrate—Subsequent retraction of statements in the Sessions Court—Validity of conviction based on former statements as evidence.*

Unless there is clearly present besides the evidence given before the Magistrate evidence which will show, that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge the evidence given before the Magistrate cannot be utilized to support a conviction. (*Adami and Bucknill, JJ.*) JEHAL TALI *v.* EMPEROR. **6 P.L.T. 53 : 3 Pat. 781 : A.I.R. 1925 Pat. 51.**

——*Evidence—Retracted confession—Confession how tested.*

It is the universal practice of the Patna High Court not to rely or act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true. This procedure will practically effect the same result as a rule requiring proof of the voluntary character of a confession, inasmuch as though these decisions require evidence of the truth of the confession and not of its voluntary character, the truth of voluntariness may not unreasonably, though not necessarily, be inferred where the truth of the confession is established. There is no rule or law which compels the Court to raise an inference of improper inducement from the mere fact that a confession is retracted; but as a rule of prudence, the Courts in this country have consistently declined to act on a retracted confession, unless the confession is corroborated by credible independent evidence. In the case of admission or confession, Courts cannot ignore a portion of such admission or confession and act upon what remains of that admission or confession. It is settled law that an admission or confession must be taken and considered as a whole. (*Das and Adami, JJ.*) EMPEROR *v.* DEWAN KHAR. **4 Pat L. T. 186 : 24 Cr. L. J. 497 : 72 I. C. 961 : A. I. R. 1923 Pat. 13.**

Evidence—Value of.

——*Evidence—Value of—Statement of accused—Does not take away presumption of innocence.*

The subsequent conduct or statement of an accused may affect his credibility but it does not deprive him of presumption of innocence until his guilt is established beyond reasonable doubt. (*Walsh, J.*) UMED SINGH *v.* EMPEROR. **21 A. L. J. 765 : L. R. 4 A. 221 (Cr.) : A. I. R. 1924 All. 299.**

——*Evidence—Value of—Statement by accused—Probation value.*

A person accused of a crime is not bound to speak the truth and cannot be pinned to any particular statement he may have made. (*Broadway and*

CRIMINAL TRIAL—Evidence—Value of.

Campbell, JJ.) KAKAR SINGH *v.* EMPEROR.
25 Cr. L. J. 733 : 81 I. C. 717 (2) · 6 L. L. J 575 : A. I. R. 1924 Lah. 733.

——*—Evidence—Value of.*

Mere pointing of the dead body of the person murdered in absence of explanation of source of knowledge, has no evidentiary value as to convict him under the charge of murder. (*Chevis, A. C. J. and Le Rossignol, J.*) BHAI KHAN *v.* CROWN.
4 L. L. J. 225 : 68 I. C. 841 : 23 Cr. L. J. 119 : A. I. R. 1922 Lah. 189.

——*—Evidence—Value of—Police coercion.*

The statements of the witnesses extorted by the police under threats of implication in the crime detract from the value of their evidence and this is especially the case when none of them had any reason for refraining from deposing against the culprit. (*Shadi Lal, C. J. and Wilberforce, J.*) SUNDER SINGH *v.* EMPEROR. **66 I. C. 187 : 23 Cr. L. J. 251 : 4 Lah. L. J. 284.**

——*—Evidence— Value of—Conviction based on finger-prints is not bad.*

Where finger-prints are clear, an argument by way of deduction can be as sure a foundation for a conclusion as any based on direct evidence. It is not always the case that conviction based on finger-prints is absolutely unsafe. (*Oldfield and Ramesam, JJ.*) EMPEROR *v.* VIRAMMAL. **46 Mad. 715 : 16 L. W. 663 : (1922) M.W.N. 642 : 31 M.L. T. 427 : A. I. R. 1923 Mad. 178.**

——*—Evidence—Value of—Conduct of accused.*

The evidence of conduct of an accused person, unless it is incompatible with his innocence, is in fact a make weight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperament, surroundings, and other circumstances as to how a man would act in a particular situation, and all these combine to form a most fallacious basis for assured conclusions. (*Das and Adami, JJ.*) EMPEROR *v.* DEWAN KAHAR.
4 Pat. L. T. 186 : 72 I. C. 961 : 24 Cr. L. J. 497 : A. I. R. 1923 Pat. 13.

——*—Evidence—Value of—Penal Code, S.* 302.

When the story of confession was not told by the witness until after a fortnight of the occurrence, the evidence is unreliable. (*Coutts and Adami, JJ.*) NIRU BHAGAT *v.* EMPEROR. **1 Pat. 630 : 4 Pat. L. T. 76 : 71 I. C. 219 : 24 Cr. L. J. 91 : A. I. R. 1922 Pat. 582.**

——*—Evidence—Value of.*

Where the word of a respectable person is against the word of a witness, who is merely a servant and not what might be called a particularly respectable witness, the statement of the former is preferable, and it would be in the highest degree unsafe to accept the evidence of the latter type of witness without corroboration. No inference of complicity in crime can be drawn from the fact of friendship between accused who are co-villagers, and because of their being co-villagers, it was quite natural that they should know each other (*Coutts and Ross, JJ.*) AJODYA PRASAD *v.* EMPEROR. **A. I. R. 1922 Pat. 88.**

Evidence—Miscellaneous.

——*—Evidence—Possession.*

Where cocaine was found in certain pots containing grain in a Bania's shop where the accused who were brothers were serving habitually in the shop. *Held*, that they must have been daily handling the pots in question and that therefore the finding that both of them must have been aware of the existence of the cocaine in the pot is justifiable. 20 A. L. J. 162 ; 77 I. C. 447, Dist. (*Boys, J.*) GANESH *v.* EMPEROR.
L. R. 5 A. 136 (Cr.) : 83 I. C. 892 : A. I. R. 1924 All. 776.

——*—Evidence, if weak, no ground for finding accused guilty—Weakness of defence.*

Because the defence evidence is all untrue, it cannot be assumed that the accused is a dishonest person, and therefore he had dishonest intention in receiving stolen property. It is the duty of the prosecution to establish by its own evidence that the accused is guilty. The weakness of the defence evidence is no ground for finding the accused guilty. (*Krishnan, J.*) RAMUDU IYER, *In re.* **17 L.W. 370 : 72 I. C. 538 : 32 M. L. T. 318 : 24 Cr. L J. 426 : A. I. R. 1923 Mad. 365 : 44 M. L. J. 243.**

——*—Evidence of* alibi—*Explanation of the occurrence must be given by accused.*

Where the reason for the acquittal of the accused by the learned Sessions Judge was certain inconsistencies and improbabilities in the evidence of the prosecution story and the difficulty of finding any explanation justifying the rejection of the *alibi*. *Held*, that if the prosecution is to be rejected in substance there must be some other explanation of the facts that actually occurred. Failing any such explanation it is not permissible to reject the prosecution evidence owing to immaterial discrepancies or improbabilities. (*Lyle and Ashworth, A. J. Cs.*) EMPEROR v. NAROTAM. **10 O. L. J. 68 : 74 I. C. 434 : 24 Cr. L. J. 770 : A. I. R. 1923 Oudh 217.**

——*—Evidence—Showing different offence from that charged.*

The accused are not prejudiced because the charge stated that they committed an offence in September whilst the evidence showed that the offence was completed before. (*Brown, J.*) U. PATHADA *v.* EMPEROR. **3 Bur. L. J. 178 : 84 I. C. 245 : A. I. R. 1924 Rang. 371.**

First information.

——*—First information—Conviction based on first information report alone, illegal — Evidence Act, S.* 155—*Cr. P. Code. S.* 161.

First information report is not substantive evidence of the facts recorded in them and a conviction cannot be based on such reports. They can be used to corroborate the witnesses who made them and are of value as showing that they told the same story at the first possible occasion. If they tell a different story in Court, the report can be used to contradict them or discredit their testimony. But it is not legitimate for a Court, when witnesses tell a different story in the witness-box and contradict the report made by them to discard the evidence given on oath and to rely on the report. (*Ryves, J.*) JAMALUDDIN *v.* EMPEROR. **74 I. C. 716 : 24 Cr. L. J. 812 : A. I. R. 1924 All. 164.**

——*—First information report—Delay in making—Discrepancies between first report and complaint—Suspicious circumstances.*

Where, after a police investigation, the Superintendent of Police had come to the conclusion that there were grave doubts as to the truth of the prosecution story and withdrew the case for want of sufficient proof, the complainant filed a complaint against the same person under S. 363, I. P. C., adding some more persons in the complaint, who were not implicated in the first information report. The issue to be tried in the case was whether the accused persons had forcibly taken away the girls committing an offence under S.363, I. P. C., or whether the girls had gone away willingly of their own accord and the complainant finding that the girls had disappeared, had falsely brought the charge

CRIMINAL TRIAL—First information.

against the accused. *Held*, the discrepancies in the first information report, in the complaint, and in the challan make the case very suspicious, and that no motive was even suggested in the first report, and there were grave doubts as to the correctness of the prosecution story. (*Abdul Raoof, J.*) HASHMAT HUSSAIN *v.* EMPEROR. **7 Lah. L. J. 96.**

———*First information—Statement made to police.*

A statement casually made to a Sub-Inspector of Police is not first information and cannot be relied on as such. (*Coutts and Das, J.*) DASRATH SINGH *v.* EMPEROR. **23 Cr. L. J. 406 : 1 Pat. L. R. 192 (Cr.) : 67 I. C. 502 : A. I. R. 1923 Pat. 158.**

———*First information—Earlier information not recorded—Effect.*

In a trial for murder, the evidence disclosed that prior to what was recorded as first information, a report had been made to the police about the murder, but a record was not made of this nor the informant examined as a witness in the case. *Held*, the failure to record the earlier report entailed the discarding of the so-called first information, and the non-production of the person who gave the first report to the police deprived the accused of the valuable right of cross-examining a material witness. (*Coutts and Ross, JJ.*) CHANDRIKA RAM KAHAR *v.* EMPEROR **1 P. 401 : 3 P. L. T. 771 : 1923 P. H. C. C. 26 : 24 Cr. L. J. 129 : 71 I. C. 353 : 1 Pat. L. R. (Cr.) 77 : A. I. R. 1922 Pat. 535.**

Further inquiry.

———*Further inquiry, when to be directed.*

An order of discharge should not be interfered with by directing a further inquiry where no fresh evidence is forthcoming and the circumstances are such that two different Courts might take a different view of the evidence. (*Gokul Prasad, J.*) BINDESHRI DUBE *v.* EMPEROR. **18 A. L. J. 1135 : 2 U. P. L. R. (All.) 374 : 59 I. C. 193 (1) : 22 Cr. L. J. 49.**

———*Further inquiry—Retrial on setting aside acquittal is not in the province of High Court.*

When the order of acquittal by the Lower Court is set aside for non-compliance with the mandatory provisions of S. 342, it is not within the province of the High Court to determine whether the accused should be retried. (*Suhrawardy and Graham, JJ.*) REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* SATISH CHANDRA ROY. **51 Cal. 924 : 39 C. L. J. 411 : 83 I. C. 495 : 26 Cr. L. J. 15 : A. I. R. 1924 Cal. 975.**

———*Further inquiry—Perfunctory cross-examination of prosecution witness is a good ground.*

Where cross-examination of prosecution witnesses was perfunctory owing to Counsel's inaptitude and facts were not ascertained before the sentence for an offence under S. 302 read with S. 34 was determined. *Held*, that re-trial should be ordered. (*Mookerjee, Richardson, C. C. Ghose, Cuming and Page, JJ.*) EMPEROR *v.* BARENDRA KUMAR GHOSE. **28 C. W. N. 170 : 38 C. L. J. 411 : 81 I. C. 353 : 25 Cr. L. J. 817 : A. I. R. 1924 Cal. 257 (F.B.).**

———*Further inquiry—Change of Magistrate—New trial, accused is entitled to.*

Where after the charge had been framed, the Magistrate was transferred and the case was taken up by a new Magistrate the accused is entitled to a *de novo* trial if he applies for it. A general allegation that an application was made but rejected, without specifying the date or the person who made it, is not entitled to much weight. (*Sanderson, C. J. and Panton, J.*) SHAIKH AZIZ MANDAL *v.* GIRSH CHANDRA CHOUDHURY. **23 Cr. L. J. 502 : 68 I. C. 38 : A. I. R. 1923 Cal. 320**

CRIMINAL TRIAL—Grounds for conviction.

Grounds for conviction.

———*Grounds for conviction—Credibility of accused—Subsequent trial—Conduct.*

The subsequent conduct or statement of an accused may affect his credibility but there exists ground for presumption of innocence until his guilt is established beyond reasonable doubt. (*Walsh, J.*) UMED SINGH *v.* EMPEROR. **L. R. 4 A. 221 (Cr.) : 46 All. 64 : 21 A. L. J. 765 : A. I. R. 1924 All. 299.**

———*Grounds for conviction—Duty of Court.*

As a general rule conviction under a section which provides a penalty for a variety of acts done in contravention of the statute is bad for duplicity where the section contains a variety of inconsistent alternatives. Conviction should state the act of which the accused is found guilty and the particular breach of the rule established against him by his act so found. (*Walsh, J.*) MUNSHI LAL *v.* EMPEROR. **20 A. L. J. 198 : 23 Cr. L J. 248 : 66 I. C. 184 : L. R. 3 A. 34 (Cr.) : A. I. R. 1922 All. 21.**

———*Grounds for conviction—Conviction should be based on affirmative proof by prosecution and not on the absence or weakness of accused's explanation.*

In a charge of rioting where the common object of the unlawful assembly as specified in the charge is twofold, the prosecution case would be much weakened in the absence of evidence as to both the objects. Where two of the complainant party were said to have been severely injured and detained in hospital for about 25 days: *Held*, that the absence of medical evidence was a serious defect in the case for the prosecution. The evidence must show that the incident alleged happened at the time, in the place and under the precise circumstances narrated on behalf of the prosecution. (*Mukerjee and Chatterjee, JJ.*) MAMFRU CHAUDHURY *v.* EMPEROR. **51 Cal. 418 : 38 C. L. J. 397 : A. I. R. 1924 Cal. 323.**

———*Grounds for conviction—Evidence sufficient to base conviction—Motive need not be proved.*

It is unnecessary to prove motive when there is clear evidence that a person has committed an offence. (*Scott-Smith and Martineau, JJ.*) MOHNA *v.* THE CROWN. **7 L. L. J. 59 : 86 I. C. 406 : 26 Cr. L. J. 774 : A. I. R. 1925 Lah. 328.**

———*Grounds for conviction—Conviction on single witness's evidence—Evidence must be free from all doubt.*

It is not illegal to convict an accused person on the statement of only one witness. But the evidence relied upon must be free from all doubt. (*Scott-Smith, J.*) AZIZ *v.* EMPEROR. **84 I. C. 436 : 26 Cr. L. J. 292 : A I. R 1925 Lah. 295 (2).**

———*Grounds for conviction.*

A conviction must stand or fall on the strength of the prosecution and not on the weakness of the defence. (*Broadway and Zafar Ali, JJ.*) NATHA SINGH *v.* EMPEROR. **6 L. L. J. 579 : A. I. R. 1925 Lah. 282**

———*Grounds for conviction — Extra judicial knowledge.*

Personal knowledge ought not to be imported in deciding a case. (*Scott-Smith, J.*) WALI MUHAMMAD KHAN *v.* EMPEROR. **81 I. C. 344 : 25 Cr. L. J. 808 : A. I. R. 1925 Lah. 166.**

———*Grounds for conviction— Accused insane—Degree of insanity.*

The medical and the legal standards of sanity are not identical. From the medical point of view it is probably correct to say that every man at the time

when he commits a murder is insane, that is, he is not in a sound, healthy, normal condition, but from the legal point of view, a man must be held to be sane so long as he is able to distinguish between right and wrong, so long as he knows that the offence he is committing is a wrong thing to do, so long as he has a guilty mind. (*Shadi Lal, C. J. and Le Rossignol, J.*) SHER SINGH *v.* EMPEROR. **A. I. R. 1923 Lah. 508.**

——— *Grounds for conviction—Evidence.*

An accused person must be convicted upon evidence which is on the record and not on what would have been deposed had the prosection witnesses been not won over. (*Harrison, J.*) MURAD *v.* EMPEROR. **23 Cr. L. J. 606 : 68 I. C. 830 : A. I. R. 1923 Lah. 128.**

——— *Grounds for conviction—Suspicion is not a substitute for proof.*

(*Shadi Lal, C. J. and Zafar Ali, J.*) SURAT SINGH *v.* EMPEROR. **A. I. R. 1923 Lah. 42.**

——— *Grounds for conviction—Prosecution evidence not believed as to main portions—Conviction on the rest-*

Where, in a criminal trial, the prosecution evidence is disbelieved in the main, it is unsafe to base a conviction or to rely upon portions of the same or reconstruct a story out of the balance which is not disbelieved. (*Foster, J.*) JOHARMAL MARWARI *v.* EMPEROR. **5 Pat. L. T. 635 : 25 Cr. L. J. 724 : 81 I. C. 212 : A. I. R. 1924 Pat. 813.**

——— *Grounds for conviction.*

Where of the several accused some were acquitted, *held*, the conviction of the other accused cannot be based upon evidence and features in the case which are common to all of them. (*Das and Bucknill, JJ.*) DHANNU BELDAR *v.* EMPEROR. **2 Pat. L. T. 757.**

——— *Grounds for conviction—Prosecution case disbelieved—Absence of notice of the charge.*

If the prosecution case is disbelieved in essential particulars, it is unsafe to convict the accused on the remaining admissible evidence. So also an accused should not be convicted in the Appellate Court of a charge of which he had no notice and which he was not called upon to answer in the Trial Court. (*Jwala Prasad and Ross, JJ.*) MAYADHAR MAHANTY *v.* JANARDAN KUND. **22 Cr. L. J. 485 : 62 I. C. 181 : 2 P. L. T. 243.**

High Court.

——— *High Court—Same relief obtainable from Subordinate Court—High Court will not interfere—Cr. P. Code, S. 528 (2).*

The High Court will not ordinarily entertain an application for a relief which could equally be granted by a Subordinate Court until recourse has first been had to the Court. (*Daniels. J.*) RAVI CHANDER *v.* SUNDER SINGH. **6 L.R. A. (Cr.) 87 : 26 Cr. L. J. 960 : 87 I. C. 112 : A. I.R. 1925 All. 640.**

——— *High Court—Remand after acquittal.*

Held, that it was not competent to the High Court on appeal to alter the charge and convict the accused with the help of S. 34, I.P. Code on the ground that the blow was struck by some other person in pursuance of a common intention. To send the case back for retrial on an amended charge under Ss. 34 and 325, I.P. Code would mean inviting the Court below to believe on the amended charge the very witnesses whom the Court in effect held to have committed perjury (*Boys, J.*) CHEDA SINGH *v.* EMPEROR. **L. R. 5 A. 133 (Cr.) : A. I. R. 1924 All. 766.**

——— *High Court—Power to quash proceedings.*

Though the High Court has power to quash a Criminal proceeding in its early stages before evidence

is recorded, the High Court would exercise this power only very sparingly in exceptional cases. (*Newbould, Ghose and Cuming, JJ.*) NRIPENDRA BHUSAN RAY *v.* GOBINDA BANDHU MAJUMDAR. **39 C. L. J. 236 : 82 I. C. 266 : 25 Cr. L. J. 1258 : A. I. R. 1924 Cal. 1018.**

——— *High Court has inherent pawer to interfere.*

Inherent power exists in the High Court even in criminal cases to interfere with proceedings in a lower court without jurisdiction. (*Mukerjee, A. C. J., Fletcher, N. R. Chatterjee, Richardson and Ghose, JJ.*) ALI MAHOMED MANDOL *v.* PIGGOTT. **22 Cr. L. J. 213 : 60 I. C.325 : 32 C. L. J. 270 (S. B.).**

Identification.

——— *Identification of moveable property—Ornaments, identification of—Assessors, opinion of, value of*

In a case of identification of moveable property like ornaments, the opinion of the assessors is of considerable value as they are well-acquainted with the ways and habits of men of the complainant's and the accused's standing. (*Dalal, J. C.*) BEHARI *v.* EMPEROR. **12 O. L. J. 339 : 2 O. W. N. 330 : 89 I. C. 155 : 26 Cr. L. J. 1291 : A. I. R. 1925 Oudh 452.**

——— *Identification—Strain and terror—Effect—Conviction.*

It is not safe to convict a person upon his identification by one individual under circumstances of strain and terror accompanying violent crime. (*Bucknill and Ross, JJ.*) GOLAM MUHAMMAD KHAN *v.* EMPEROR. **4 Pat. 327 : 6 Pat. L. T. 598 : 86 I. C. 814 : 26 Cr. L. J. 878 : A. I. R. 1925 Pat. 536.**

Irregular Procedure.

——— *Irregular Procedure—Rule against minimising offence applies only where the object is to gain jurisdiction where originality there is none—Accused can't object to trial under S. 182 where offence falls under S. 211.*

The rule against minimising offences is only intended to cover cases where a Court secures a jurisdiction thereby which it would otherwise not have and thereby prejudices the accused. Where the accused was tried and convicted under Penal Code, S.182, he could not object that his case really fell under S. 211. (*Boys, J.*) GANGA SAHAI *v.* EMPEROR. **5 L. R. A. (Cr.) 124 : 83 I. C. 692 : A. I. R. 1924 All. 763.**

——— *Irregular procedure—Prosecution witnesses not examined—Magistrate calling upon accused to be ready with his evidence before a certain date—Acts illegally.*

Where before completing the examination of the witnesses for the prosecution the Court passed an order requiring the accused to be ready with his witnesses for the defence on a certain date. *Held*, that the order was improper. (*Lindsay, J.*) KASHAB DEO *v.* EMPEROR. **L. R 4 A. 124 (Cr.) : A. I. R. 1924 All. 320.**

——— *Irregular procedure—Money deposited by surety—Cannot be taken for fine.*

Fine cannot be recovered from the money deposited by a surety for the appearance of the accused even if the surety and the accused are brothers and even if they are members of a joint Hindu family. (*Wallach, J.*) GIRDHARI LAL *v.* EMPEROR. **22 Cr. L. J. 744 : 64 I. C. 136 : 19 A. L. J. 887.**

——— *Irregular procedure—Conviction for offence read with S. 114, Penal Code, is legal though charge did not refer to S. 114.*

Obiter : A man charged with a substantive offence can be convicted of that offence read with S. 114 of the Penal Code although not charged with. (*Marten and Kincaid, JJ.*) EMPEROR *v.* RANCHOD SURSANG

CRIMINAL TRIAL—Irregular procedure.

49 Bom. 84 : 26 Bom. L. R. 954 : A. I. R. 1924 Bom. 502.

——*Irregular procedure — Conviction for different offences.*

Conviction of accused under S. 307 read with S. 34 or 114 is legal though they were charged only with offences under S. 304, 148 and 149 of the Penal Code. Case law discussed. (*Marten and Kincaid, JJ.*) EMPEROR *v.* RANCHOD SURSANG. **49 Bom. 84 : 26 Bom. L. R. 954 : A. I. R. 1924 Bom. 502.**

——*Irregular procedure—Conviction for offence constituted by some only of particulars composing offence charged is legal*

Where an accused person has been charged with one offence consisting of several particulars a combination of some of which only constitutes a complete offence and such combination is proved but the remaining particulars are not proved and he is convicted of such offence although not charged with it, he cannot be said to have been misled in his defence by an error in the charge nor can it be said that such an error in the charge occasioned a failure of justice. (*Marten and Kincaid, JJ.*) EMPEROR *v.* RANCHOD SURSANG. **49 Bom. 84 : 26 Bom. L. R 954 : A. I. R. 1924 Bom. 502.**

——*Irregular procedure — Amendment.*

An amendment in criminal proceedings without notice to the party affected does not bind the party. (*Greaves and Panten, JJ.*) JANKI NATH KUNDU PAL *v.* MANMOHAN DE. **25 Cr. L. J. 674 : 81 I. C 162 : A. I. R. 1925 Cal. 263 (2).**

——*Irregular procedure—Conviction of a discharged co-accused on his own evidence as a prosecution witness is improper.*

Two persons *K* and *P* were sent up for trial. *P* was discharged and cited as a witness for the prosecution and examined against *K*. After the prosecution had closed their case the Magistrate of his own motion took cognizance of the case against *P* and ordered a fresh enquiry into the case against both. *Held*, that such a course was contrary to the traditions of justice in Criminal Courts. (*C. C. Ghose and Cuming, JJ.*) EASATULLA MIAH, *In the matter of.* **25 Cr. L. J. 311 : 76 I. C. 1031 : A. I. R 1925 Cal. 104.**

——*Irregular procedure—Order directing detention of property of stranger is not proper.*

Criminal proceedings to which a person is not a party ought not to be made use of for detaining in Court the property of such person, even though the offence under trial had something to do with that object. (*Buckland and Cuming, JJ.*) KEDAR NATH DEY *v.* MAHOMED SIDDICK. **24 Cr. L. J. 695 : 73 I. C, 807 : A. I. R. 1924 Cal. 455.**

——*Irregular procedure—Questions put by Judge to the Jury in private chambers and not in open Court.*

After the Jury had retired to consider their verdict in a criminal case they saw the Judge in his chamber and asked him for direction on a point of law. The Judge and the Jury both went into the Court room and the Jury in presence of the pleaders put certain questions to the Judge and the answers thereto were recorded. *Held*, that the mere fact that a question was put by the Jury to the Judge not in open Court but in Chambers did not vitiate the trial and it was at best a mere irregularity. (*Newbould and Suhrawardy, JJ.*) BILASCHANDRA BANERJEA *v.* EMPEROR. **27 C. W. N. 626 : A. I. R. 1923 Cal. 647.**

——*Irregular procedure — Cross complaints—Simultaneous trial in different Courts bad.*

The simultaneous trial of the two cases before two different Courts over one and the same occurrence is undesirable and unsatisfactory ; the proper course is that both cases should be tried by one Magistrate one after the other. (*Newbould and Suhrawardy, JJ.*) SHEIKH SAMIR *v.* BENI MADHAB. **37 Cal. L. J. 410: 27 C.W.N. 700 : 75 I.C. 364 : 24 Cr. L. J. 940 : A. I. R. 1923 Cal. 644.**

——*Irregular procedure—Depositions in one case copied in another—Illegality.*

It is illegal for a Magistrate trying a criminal case to take the depositions in one case and have them copied and used in another case. (*Sanderson, C. J. and Chotzner, J.*) MOZAHUR ALI *v.* EMPEROR. **50 Cal. 223 : 27 C. W. N. 99 : 24 Cr. L. J. 198 : 71 I. C. 662 : 36 C. L. J. 417 : A. I. R 1923 Cal. 196.**

——*Irregular procedure—Party applying for copy of order—Magistrate cannot compel him to pay for and take copies also of order not applied for.*

It is for the litigant, and not for the Magistrate, to decide what copies he should have in order to move the superior Court and the Magistrate has no jurisdiction to thrust upon a party copies which he does not want and to make him pay for them. When a party applies for the copy of a particular order the Magistrate cannot force him to pay for and take copies of other orders also. (*Shadi Lal, C. J.*) AMAR SINGH *v.* SADHU SINGH. **7 L.L.J 241 : 86 I. C. 709 : 26 Cr. L. J. 853 : 6 Lah. 396 : A. I. R. 1925 Lah. 361.**

——*Irregular procedure—Separate trials—Common witness not examined in each case but their evidence read over—No prejudice caused—Trial is not invalidated.*

Several cases were tried separately but the evidence of such witnesses as were common to all the cases was not recorded separately in all the cases. It was only read out by them and admitted by them to be correct. This procedure was followed with the consent of the counsel for the accused. It was, however, clear that no prejudice was caused for the accused. *Held*, that the procedure adopted was irregular, but it did not affect the validity of the trial as no prejudice was caused. 10 Cal. 405 ; 8 P.R. 1915 (Cr.) Ref. 9 P. R. 1912 (Cr.) Dist. (*Scott-Smith*) NARAYAN SINGH *v.* EMPEROR. **24 Cr. L. J. 415 : 72 I. C. 527 : A. I. R. 1924 Lah. 228.**

——*Irregular procedure—Mutual consent of accused or counsel—Effect.*

A criminal trial which takes place under a procedure which is not authorised by law, will not be valid on account of mutual consent. (*Broadway and Fforde, JJ.*) ALLU *v.* EMPEROR. **4 Lah. 376 : 6 L. L. J. 103 : 25 Cr. L. J. 68 : 75 I. C. 980 : A. I. R. 1924 Lah. 104.**

——*Irregular procedure—General Clauses Act, S. 26—No two punishments for the same Act.*

Where either of the two offences under the two different Acts are constituted by the same acts, the offender cannot be punished for both. (*Zafar Ali, J.*) BAHADUR SINGH *v.* EMPEROR. **A. I. R. 1923 Lah. 342.**

——*Irregular procedure—One Magistrate not hearing the entire evidence.*

The trial by a Bench of Magistrates one of whom did not hear the entire evidence is bad in law, and the conviction by such Bench is not sustainable. (*Moti Sagar, J.*) ABDUL GHANI *v.* EMPEROR. **22 Cr. L. J. 511 : 62 I. C. 335 (Lah.).**

——*Irregular procedure—Calling pleader engaged for accused as prosecution witness in the middle of case is reprehensible—Trial is vitiated whether accused is prejudiced or not.*

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If the prosecution wants to call the counsel for the defence as a witness on its side sufficient notice ought to be given to the accused to engage a competent counsel. It is very reprehensible to call a counsel who is actually defending an accused person as a prosecution witness, in the course of the proceeding. Such a course not only affects the proper conduct of the defence, but it gives a handle to the prosecution to prevent a counsel who is well acquainted with the facts of the case from conducting the defence. (*Devadoss, J.*) MANNARGAN *v.* EMPEROR.
(1925) M. W. N. 702 : A. I. R. 1925 Mad. 1153 : 49 M. L. J. 95.

———*Irregular procedure—Examination of witnesses—Right of accused to cross-examine prosecution witnesses before charge.*

No Magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses, before charge is framed, and where the Magistrate refused to allow the accused to do so, his procedure is most irregular and in contravention of law. (*Wallace, J.*) MUTHIA CHETTY, *In re.* **19 L. W. 391 : 25 Cr L. J. 556 : 81 I. C. 44 (1) : A. I. R. 1924 Mad. 735.**

———*Irregular procedure—Consent cannot cure.*

Where in a trial *de novo* the depositions of witnesses examined at the previous trial were exhibited without the witnesses being examined *de novo*, *Held*, there has been a deviation from the normal course of procedure which would ordinarily vitiate the proceeding and the consent of the accused will not cure the irregularity. (*Oldfield and Ramesam, JJ.*) UMAR HAJI, *In re.* **46 Mad. 117 : 16 L. W. 697 : 69 I. C. 636 . (1922) M. W. N. 644 : 23 Cr. L. J. 748 : A. I. R. 1923 Mad. 32 : 43 M. L. J. 659.**

———*Irregular procedure—Complaint — Offence under S. 211, I.P.C.—Conviction under S. 500 I.P.C.*

A conviction under S. 500, I. P. C., where the complaint and charge were under S. 211, I. P. C., is illegal. 18 P. R. 1889 Ref. (*Simpson, A.J.C.*) GAYA BARHAI *v.* EMPEROR. **9 O. L. J. 342 : 4 U. P. L. R. (O.) 81 : 69 I. C. 81 : 23 Cr. L. J. 641 : 26 O. C. 44 : A. I. R 1923 Oudh 4.**

———*Irregular procedure—Witness—Costs of summoning—Party if can be ordered to pay.*

All criminal proceedings being at the instance of the Crown, expenses of summoning witnesses must beborne by the Crown. It is open to a Court to refuse to summon a witness on the ground the application to summon him was frivolous or vexatious, but having once decided to summon him the Court has no power to direct the applicant to deposit into Court the expenses. (*Kulwant Sahay, J.*) NAND KISHORE MISRA *v.* KALKA MISRA. **1924 P. H. C. C. 196 : 77 I. C. 810 : 5 Pat. L. J. 487 : 5 Cr. L. J. 458 : A. I. R. 1924 Pat. 695.**

———*Irregular procedure—New offence under statute—Indictment under general law.*

Per *Das, J.*—Where a statute creates a new offence which was not an offence at common law and imposes a penalty in respect of such offence a person committing such an offence can only be proceeded against under the statute which creates the offence and cannot be indicted under the general law. (*Mullick, Coutts and Das, JJ.*) EMPEROR *v.* ABDUL HAMID.
2 Pat. 134 : 3 Pat. L. T. 585 : 1 Pat. L. R. (Cr.) 199 : 68 I. C. 945: 23 Cr. L. J. 625 : 4 U.P.L.R. (Pat.) 79 : 1922 P. H. C. C. 274 : A. I. R. 1923 Pat. 1 (S. B.).

———*Irregular procedure—Disallowing application for inspection of diary.*

There is nothing in the law which entitles the defence to an inspection of anything more than

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that portion of the police diary from which the witness refreshed his memory and there is no illegality or irregularity in the procedure of the Magistrate who disallows the application for the inspection of the whole diary. (*Coutts and Das, JJ.*) LACHMI SINGH *v.* EMPEROR. **2 Pat. 74 : 68 I. C. 623 : 23 Cr. L. J. 591 : 3 Pat. L. T. 562 : A. I. R. 1922 Pat. 562 (1).**

———*Irregular procedure—Sanction—Trial held without sanction cannot be validated by adding a charge requiring no sanction.*

Where a Court holds a trial of an offence requiring sanction of the Local Government, the trial is without jurisdiction and the proceedings cannot be validated by subsequently adding charges which require no sanction. (*Robinson, C. J. and Godfrey, J.*) ABDUL RAHIMAN *v.* EMPEROR. **89 I. C. 305: 3 Rang. 95 : A. I R. 1925 Rang. 296.**

———*Irregular procedure — Reference to High Court—Where the High Court sets aside on a reference by a S. J. the conviction by a Magistrate of an accused and directs his committal to sessions, it is unnecessary for the magistrate to open new proceedings and take all evidence again.*

Where the accused was first tried by a Magistrate and on a reference by the S. J. the High Court set aside the conviction and sentence and directed that the accused be committed to Sessions ; and the magistrate—the successor of the original magistrate—then opened a new proceeding and took all the evidence again, ending up by writing a committal order of over four pages of typescript: *Held*, that all this was quite unnecessary. All that he should have done was to re-open the original proceedings, frame a fresh charge and explain it to the accused, require him to give in his list of witnesses for Sessions. examine (if he thought fit) any of those witnesses who had not already been examined, and then write a short formal order of committal as under the orders of the High Court. (*Carr, J.*) NGA MYAING *v.* EMPEROR.
2 Rang. 447 : A. I. R. 1925 Rang. 82.

Joint Trial.

———*Joint trial—Plea of misjoinder can be taken for the first time in revision—Cr P. Code, Ss.439, 537.*

An accused can take the point of misjoinder in revision when the joint trial is bad, even though the point was not taken in the Courts below. No question of prejudice arises in such a case. (*Greaves and Chotzner, JJ.*) DALSUK ROY AGARWALA *v.* EMPEROR.
25 Cr. L. J. 807 : 81 I. C. 343 : A. I. R. 1925 Cal. 248.

———*Joint trial—Evidence taken in one used in another.*

There were three separate trials of the accused. A witness was examined in the first case. All three of the accused had been present during the course of the examination of this witness. Counsel for the three accused agreed that the statement of the witness be read over in the connected cases as well. They agreed that their clients would not be in any way prejudiced in this way and it would be a great saving of time. The Court accordingly had the statements of the witness in the previous case read out in the subsequent case. *Held*, that the procedure adopted of reading out the statements of witnesses recorded in the first case was irregular, but it was quite clear that no prejudice has been caused to any of the appellants. (*Scott-Smith, J.*) NARAIN SINGH *v.* EMPEROR.
72 I. C. 527 : 24 Cr. L. J. 415 : A. I. R. 1924 Lah. 228.

———*Joint trial—Several accused—Withdrawal against same—Effect of.*

The withdrawal of a complaint against one of sever-

al accused has not the effect of withdrawing the complaint against the rest of the accused as well. 9 O.L.J. 54. *Fol.* (*Wazir Hasan, J. C.*) NANDA *v.* EMPEROR.
10 O. & A. L. R. 357 : 10. W. N. 120.

———*Joint trial—Legality depends upon accusation —Joint trial in conspiracy cases may be held.*

The legality of the joint trial depends on the accusation, and not on the result of the trial, and the discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in conspiracy cases 1922 Cal. 107 Foll. (*Robinson, C. J. and Godfrey, J.*) ABDUL RAHMAN *v.* EMPEROR.
3 Rang 95 : 89 I. C. 305 : A. I. R. 1925 Rang 296.

Judgment.

———*Judgment—Using knowledge of one case in another is wrong where accused are different.*

A Magistrate trying a security case as well as an assault case used his knowledge of the one in delivering judgement in the other while the accused was not the same in both cases. *Held*, that the judgment was wholly irregular. (*Walsh, J.*) DIN DAYAL *v.* EMPEROR.
23 A. L. J. 300 : 87 I. C. 517 : A. I. R. 1925 All 443.

———*Judgment—Opinion of Judge.*

The personal view of the Judge is the ultimate view that is to prevail until law makes the verdict of the Jury or the opinion of the Assessors final and conclusive. (*Walsh and Ryves, JJ.*) LAKHAN *v.* EMPEROR. **5 L. R. A. (Cr.) 101 : A. I. R. 1924 All 511.**

———*Judgment—Statement of accused, value of.*

In this case contradictory statements of accused were taken into consideration against the accused. (*Stuart and Ryves, JJ.*) DEO DUTT *v.* EMPEROR.
45 A. 166 : 20 A. L. J. 915 : 71 I. C. 54 : 24 Cr. L. J. 6 : L. R. 3 A. 191 (Cr.) : A. I. R. 1923 All. 90.

———*Judgment—Day fixed for—Hearing of pleader not obligatory.*

Where a Magistrate has fixed a day for delivery of judgment and is ready with the judgement on that day it is not obligatory upon him to hear the pleader for the accused before delivering judgment. (*Prideaux, A. J. C.*) NAYAN KHAN *v.* EMPEROR.
23 Cr. L. J. 752 : 69 I. C. 640 : A. I. R 1923 Nag. 208.

———*Judgment—Dismissal for default—Appeal —Appellant absent.*

Petitioner stated in his petition that he was not aware that his appeal was transferred and on the date, the Court to which the appeal had been transferred called out the case and dismissed and on petitioner's pleader's coming to know of this, he asked the Court to hear him in support of the appeal but was refused. Judgment of the Appellate Court was to the effect that the appellant was absent and unrepresented ; that he had been through the judgment and the whole record and the petition of appeal and could see no substance in any of the grounds of appeal *Held*, if this judgment was signed by the Magistrate before the pleader appeared, the Magistrate could not have done any thing in the matter. (*Ross, J.*) KABIR SHAH *v.* EMPEROR. **1 Pat. L. R. (Cr.) 174 : 1923 P. H. C. C. 237 : A. I. R. 1923 Pat. 297 (2).**

———*Judgment.*

On the fact, that the prosecution case is somewhat vague and the findings of the Sessions Judge are not as clear as they might be as to the time when the alleged offences had been committed, the accused would be entitled to succeed. (*Coutts and Ross, JJ.*) AJODHYA PRASAD *v.* EMPEROR. **A. I. R. 1922 Pat. 88.**

———*Judgment—Dacoity case.*

In a dacoity trial involving several accused, the Court should first give a general outline of the case, the course of investigation and the arrest and then the case of each should be dealt with in detail. (*May Oung, J.*) NGA MU *v.* EMPEROR.
2 Bur. L. J. 199 : A. I. R. 1924 Rang. 67.

Jury.

———*Jury—Trial by jury—Judge should avoid miscarriage of justice.*

In introducing evidence in a trial with the aid of a jury the Judge must be very careful in order to avoid miscarriage of justice. (*Chatterjea and B. B. Ghose JJ.*) KERAMAT MANDAL *v.* EMPEROR.
42 C. L. J. 528 : A. I. R. 1926 Cal 147.

———*Jury trial—Misdirection—Presumption as to guilt when accused is in possession of stolen goods—* Onus.

In a case where the evidence of the guilt of the accused rests entirely upon the discovery of stolen property from his possession, and the learned Judge in his charge to the Jury stated that if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is the duty of the accused to prove his innocence. The presumption raised under the law cannot be rebutted by mere denial. *Held*, that the explanation of the law was not correct and amounted to a misdirection which vitiated the charge. *Held*, further, that the proper course is to direct that the jury are entitled to take the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be proved. If he states the circumstances under which he obtained it, the Jury may accept it, and in that case, it will be their duty to acquit the accused. 24 C. W. N. 619 foll. (*Suhrawardy and Panton, JJ.*) KABATULLA *v.* EMPEROR. **42 C. L. J. 212 : 26 Cr. L. J. 1582 : 90 I. C. 542 : A. I. R. 1925 Cal. 1241.**

———*Jury—Verdict of—Inadmissible evidence—Prejudice.*

Where in a trial before a jury, a mass of inadmissible evidence is let in and commented on in the charge to the jury, it could not but have prejudiced the accused and a verdict based on such evidence and misdirection can never be upheld. (*Walmsley and Mukerji, JJ.*) SHEIKH ABDUL *v.* EMPEROR. **26 Cr. L. J. 606 : 85 I. C. 830 : A. I. R. 1925 Cal. 887.**

———*Jury—Misconduct of—Court's inherent power to discharge.*

An inherent power in a Court to discharge a jury on the ground of misconduct or necessity has been recognised in 25 C. W. N. 240 and 51 C. 418. (*Newbould and Mukerji, JJ.*) JESSARAT v. EMPEROR.
29 C. W. N. 526 : 26 Cr. L. J. 1009 : 87 I. C. 833 : A. I. R. 1925 Cal. 729.

———*Jury—Evidence fully oral—Opinion of jury who heard the case should be held final.*

Where a case rests entirely on oral evidence, those who saw the witnesses and heard them *i e.*, the jury are the most competent to judge as to the value of what was said by the witnesses and therefore effect should be given to their verdict. (*Walmsley and Mukerjee JJ.*) EMPEROR *v.* FARATULLA MANDAL.
40 C. L. J. 592 : A. I. R. 1925 Cal. 394.

———*Jury—Functions of Judge and Jury—Sessions Judge expressing opinion on fact—Whether misdirection.*

There is no harm in the Trial Judge expressing his opinion on the fact and in fact it is his duty to assist the Jury provided that he is careful to express his opinion in such a way as not in any way to interfere with the duties of the Jury to finally decide according to their view on the facts. (*Newbould and B. B.*

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Ghose, JJ.) FAZARUDDIN *v.* EMPEROR.
26 Cr. L. J. 1553 : 90 I. C. 443 : 42 C. L. J. 111.

——*Jury—Verdict—Repugnancy.*

Mere repugnancy in the verdict of a jury is not by itself sufficient to ensure the quashing of a conviction. (*Newbould and B. B Ghose, JJ.*) UMADASI DASI *v.* EMPEROR. **52 Cal. 112 : 40 C. L. J. 143 : 28 C. W. N. 1046 : 83 I. C. 491 : A I. R. 1924 Cal. 1031.**

——*Jury—Verdict—Silence about one charge does not amount to acquittal of that charge.*

Where an accused was tried under Ss. 364, 120-B read with S. 302 and the Jury found him guilty under Ss. 120-B and 364 but was silent about the charge of murder. *Held*, that the verdict of the Jury under S. 120-B read with S. 302 did not by itself negative the charge of murder and hence re-trial for a charge under S. 302 could be ordered. (*Sanderson, C. J and Cuming, J.*) EMPEROR *v.* OSMAN SARDAR.
39 C. L. J 264 : 25 Cr. L. J. 1048 : 81 I. C. 824 : A. I. R. 1224 Cal 809.

——*Jury—Weight due to prosecution witness—Factions—Effect of.*

The Jury are entitled to discount the evidence which has been given by the prosecution witnesses because of the fact that the witnesses who have come and deposed on the side of the prosecution are witnesses who are admitted by adherents of a party opposed to that of the accused. The fact that merely all the witnesses had been at some time or other, concerned in criminal cases either started by them or started against them, is a circumstance so important that the jury can hardly be blamed if they took that into their consideration and came to the conclusion that the evidence on the side of the prosecution was one which they could not accept. (*Ghose and Chotzner, JJ.*) EMPEROR *v.* NARITYA GOPAL ROY. **75 I. C. 145 : 24 Cr. L J. 897 : 38 C. L. J. 1 : A. I. R 1924 Cal 317.**

——*Jury—Trial by—Sessions trial—Juror giving intimation of his opinion.*

In a Sessions trial, just before the Sessions Judge had summed up the case to the Jury one of the Jurors in a room occupied by Pleaders' clerks, in an answer to a certain question put to him, intimated that he had formed an opinion that the accused was guilty, *held*, that a fresh trial by a fresh Jury should be held. (*Teunon and Pearson, JJ.*) EMPEROR *v.* NASIR ALI BEG. **33 C. L. J. 122 : 22 Cr. L. J. 510 : 62 I. C. 334 : 25 C. W. N. 240.**

——*Jury—Trial by is substantive right and not a mere matter of procedure.*

The right of trial by a jury vested in the accused by the Code of Criminal Procedure of 1898, is a substantive right and not a mere matter of procedure and therefore where the commitment was made prior to the coming into force of the new Code of 1923, but the trial in the Sessions Court was held after its coming into force. *Held*, that the accused's right of trial by jury was not lost. (*Scott-Smith and Zafar Ali, JJ.*) EMPEROR *v.* FITZMAURICE. **6 Lah. 262 : A. I. R. 1925 Lah. 446.**

——*Jury—Confession inadmissible included in a charge.*

Where an inadmissible confession was read out by the Public Prosecutor in the course of the trial, *held*, that the trial was vitiated though the Judge tried to remove the effect thereof from the minds of the Jury. (*Das and Bucknill, JJ.*) DAMODAR RAM *v.* EMPEROR. **3 Pat. L. T. 52 : 23 Cr. L. J. 141: 1 Pat. L. R. 171 : (Cr.) 65 I. C. 573: A I. R. 1923 P. 142.**

——*Jury—Trial by—Death sentence—Confirmation by High Court—Power of interference.*

A High Court in confirmation of death sentences has power of interference with the unanimous finding of the Jury. (*Kennedy, Kemp and Madgaonker, JJ.*) GUL LOUNG *v.* EMPEROR. **64 I. C. 657 : 23 Cr. L. J. 33: 15 S. L. R. 103 (F. B.)**

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Local Inquiry or Inspection.

——*Local inspection.*

The Magistrate viewed the *locus in quo* at the request of both parties and in presence of pleaders who were representing the respective parties. The Magistrate made and used inspection solely for the purpose of enabling him to understand the evidence which had been already given. *Held*, it was legitimate for him to do so and there was no ground for suspecting that the judgment was influenced by the local inspection. (*Sanderson, C. J. and Panton, J.*) AZIZ MANDAL *v.* GIRISH CHANDRA. **68 I. C. 38: 23 Cr. L. J. 502: A. I. R 1923 Cal. 320.**

——*Local inspection—Absence of record relating to—Effect on conviction.*

In a case against 4 accused under S. 457, I. P. Code, the Magistrate in order to test the accuracy of the defence put up took them to the locality alleged in defence and made them point out in turn the place. *Held*, the conduct verged dangerously near cross-examining the accused. *Held also*, there being no record at all as to what happened at the inspection, and the Magistrate himself not having gone into the witness-box, a conviction based on the Magistrate's own knowledge of what took place is bad. (*Harrison, J.*) NURA *v.* EMPEROR. **67 I. C. 591: 3 Lah. L. J. 482 : 23 Cr. L. J. 431 : A. I. R. 1922 Lah. 456.**

——*Local inspection for testing the witnesses is legal.*

It is open to a Magistrate to use the evidence of his own eyes, *i.e.*, the local inspection to test the truth of what the witnesses have deposed to 2 Weir Cr. 728. Foll. (*Ayling and Odgers, JJ.*) THACHROTH HYDROSS, *In re.* **18 L. W. 113 : (1923) M. W. N. 860 : 75 I. C. 695 : 25 Cr. L. J. 7 : A. I. R. 1923 Mad. 694 : 45 M. L. J. 279.**

Private Prosecution.

——*Private prosecution—Parties may engage one to represent their case.*

In a criminal case started at the instance of private persons the persons may engage a counsel to represent their view of the case where there is no representation on behalf of the Crown. (*Mukerjee, J.*) TUFAIL AHMAD *v.* EMPEROR. **23 A. L J. 5: 6 L. R. A. (Cr.) 55 : 86 I. C. 222 : 26 (Cr.) L. J. 734 : A. I. R. 1925 All. 301 (2)**

——*Private prosecution*—Locus standi.

In prosecutions for cognisable offences, the private prosecutor has no position at all in the litigation and the Crown being the sole prosecutor and custodian of the public place. (*Mullick and Macpherson, JJ.*) GULLI BHAGAT *v.* NARAIN SINGH. **2 Pat. 708 : 5 Pat. L. T. 404 : 1 Pat. L. R. 165 (Cr.) : 2 Pat. L. R. 187 (Cr.) : 25 Cr. L. J. 446: 77 I. C. 734 : A. I. R. 1924 Pat. 283.**

Procedure.

——*Procedure—Magistrate is not bound to wait for decision of arbitrators, but if he waits, the award is tantamount to compounding of compoundable offence.*

A criminal case is not a matter between parties as a civil case is. A Magistrate is not bound to recognize a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do

so. If he does not choose to wait he will not be doing anything illegal. But if he chooses to wait and then there is an award that award may amouut to a compounding of the offence in question, and if it is an offence compoundable under S. 345 effect will be given to such compounding. But till the actual compounding takes place the Magistrate is not bound at all to stay his hands but may go on with the trial of the case himself. (*Krishnan, J.*) RAMALINGA AIYAR *v.* B. VARADARAJULU AIYAR. **49 M. L. J. 544 : 22 L. W. 390 : 1925 M. W. N. 753 : 90 I.C. 666 : A. I. R. 1925 Mad. 1211.**

——*Procedure—Person committing two offences in two separate transactions can be convicted of both.*

If a man commits two offences he can certainly be convicted of them both, more especially when they are separate transactions and the commission of one does not necessarily involve the commission of the other. (*Hallifax, A. J. C.*) GAJANAN SAKHARAM *v.* EMPEROR. **25 Cr. L. J. 473 : 77 I. C. 825 : A. I. R. 1924 Nag. 162 (1).**

——*Procedure—Matters irrelevant to charge against accused should be eliminated.*

An important principle of Criminal law is that the guilt should not only be proved beyond any reasonable doubt but that it should be proved strictly in accordance with law. The accused is on his trial in respect of a particular charge and to import matters into the trial not relevant to that charge is equivalent to trying him as to matters on which he has no opportunity to defend himself. 1925 Oudh. 1 Ref. (*Wazir Hasan, A. J. C.*) BISHAMBHAR NATH *v* EMPEROR. **26 Cr. L. J. 1042: 87 I. C. 962 : A. I. R. 1925 Oudh. 676.**

——*Procedure—Substantial justice is not sufficient. Legal forms must be strictly conformed to.*

"In a criminal proceeding the question is not alone whether a substantial justice has been done according to law. All proceedings in *Poenam* are *Strictissimi juris.* (*Wazir Hasan, A. J. C.*) MANNA LAL *v.* EMPEROR. **27 O. C. 40 : 25 Cr. L J. 49: 75 I.C. 753 : A. I. R. 1925 Oudh. 1.**

Sentence.

——*Sentence — Setting fire—Disproportionate punishment.*

Setting fire to a thatch must be seriously viewed. A sentence of ten years' imprisonment is wholly disproportionate to any possible aspect of the crime from a moral point of view provided that that part of their misconduct namely the setting of fire is reasonably included in and taken to aggravate the general lawless conduct of which the accused have been convicted under S. 147 and 325. (*Walsh A. J. C. and Ryves, J.*) KHANJAN *v.* EMPEROR. **L R 5 A. (Cr.) 140 : 82 I. C. 54: 25 Cr. L. J. 1190: A I. R. 1924 All. 781.**

——*Sentence—Conviction under two sections—Concurrent sentences.*

Where a Magistrate convicts under two sections and intends to pass concurrent sentences, it is a very common though somewhat slovenly method of expressing the conviction to say, "I pass sentence under Ss. 326 and 148" or whatever the sections may be. Such a sentence must be interpreted as meaning that the Magistrate passed concurrent sentences under each section. (*Daniels, J.*) SOHAN AHIR *v.* EMPEROR. **22 A. L. J. 263: L. R. 5 A. 88(Cr.): 25 Cr. L. J. 992. 81 I. C. 640: A. I. R. 1924 All. 492.**

——*Sentence—Murder case—Political agitation—Ignorant victims—Lesser sentence enough.*

The accused were illiterate farmers. They were guilty under Ss. 149 and 302 of the Penal Code. They were induced to commit these offences by absurd promises of the age of golden happiness. By whose order they set to work they believed him to be a worker of miracles. Taking into consideration all these circumstances it was deemed that transportation for life was a proper sentence than the sentence of death. (*Mears, C.J. and Piggott, J.*) ABDULLAH *v.* EMPEROR. **L. R. 4 A. 145 (Cr.): A. I. R. 1924 All. 233.**

——*Sentence--Severity of sentence should be lessened because of service to Crown.*

Where the accused has rendered service to crown in giving evidence against some members of his gang which evidence resulted in their conviction, his conviction was altered from one of death to that of transportation for life. (*Piggott, Lindsay and Sulaiman, JJ.*) SARDAR *v.* EMPEROR. **22 A. L. J. 85: L. R. 5 A. (Cr.) 25: A. I. R. 1924 All. 220 (F.B.).**

——*Sentence—Fine should not be inflicted in technical offences.*

Penalties must be provided and penalty sections must be used for bad cases where the individual has been contumacious and has palpably acted *mala fide.* But the penalty is only intended *in terrorem* and not to be used vindictively for technical offences. (*Walsh, J.*) NIHAL M HAMMAD *v.* EMPEROR. **21 A L.J. 774: 4 L. R. A. 226 Cr. : A. I. R. 1924 All. 200.**

——*Sentence—Alleviating circumstances.*

The hirer of an article (a motor car) under a hire-purchase agreement sold it as his own before he had paid up all the instalments. He however paid the insurance, he paid the expenses of the Motor Traders, Ltd, representative, and he paid in the uncertain way, in which these people always pay, instalments from time to time, and he went on paying even after he had sold. The payments were accepted by the Motor Traders Ltd. They, because they failed to get their money, launched the prosecution: *held* the circumstances justified a reduction of sentence. (*Walsh, J.*) CADD *v.* EMPEROR. **45 All. 588: 21 A. L. J. 510 : L.R. 4 A. 118Cr. : 24 Cr. L. J. 620: 73 I. C. 508: A. I. R. 1923 All. 598.**

——*Sentence—Whipping—When to be inflicted.*

When a person inflicts pain upon another and when the offence is one which permits of the penalty of whipping, it is a good thing to inflict that penalty. There are, of course, circumstances in which the actual hurt caused is very slight and that is a circumstance to which attention has to be paid. (*Meors, C. J. and Banerjee, J.*) BADRI PRASAD *v.* EMPEROR. **44 All. 538 : 20 A. L. J. 388: 66 I. C. 418 : 23 Cr. L. J. 274 : A.I.R.. 1922 All. 245.**

——*Sentence—Fine—Surety for appearanceof accused—Money deposited by surety—Fine*

When the accused is fined the money deposited by a surety for the appearance of the accused cannot be attached in lieu of fine even if the surety and the accused are brothers and even if they are members of a joint Hindu family. (*Wallach, J.*) GIRDHARI LAL *v.* EMPEROR. **19 A. L. J. 887 : 64 I. C. 136 : 22 Cr. L. J. 744.**

——*Sentence—Accused mere tools—Fine only is sufficient—Penal Code, S. 441.*

Where it was found that the accused while committing the offence of criminal trespass were mere tools in the hands of other persons, *held*, that a sentence of fine would be sufficient. (*Tudball, J.*) HARAKH NARAIN *v.* EMPEROR. **19 A. L. J. 310 : L. R. 2 A. (Cr.) 38 : 62 I. C. 408 : 22 Cr. L. J. 520.**

——*Sentence--Murder—Sentence of transportation by Sessions Judge — High Court's interference.*

It is only in very rare cases that a High Court will

CRIMINAL TRIAL—Sentence.

interfere with the order of a Sessions Judge, sentencing a man convicted for murder to transportation for life because the circumstances of the case appeared to him not to demand the sentence of death. (*Macleod, C. J. and Crump, J.*) MANGAL NARAIN *v.* EMPEROR. **49 Bom. 450 : 27 Bom. L. R. 356 : 97 I. C. 424 : 26 Cr. L. J. 968 : A. I. R. 1925 Bom. 268.**

——— *Sentence—Previous convictions—Effect of.*

Greater discretion should be exercised by the mofusil courts in making the penalty fit the crime and the practice of committing petty offenders to the Sessions Court after three or four convictions should cease. Even if such persons are committed there is no necessity for the Sessions Judge to inflict a vindictive sentence. A sentence of five years rigorous imprisonment for stealing purse containing Rs. 1-2-0 is highly excessive. (*Macleod, C.J. and Shah, J.*) EMPEROR *v.* GALA MANA. **26 Bom. L. R. 434 : A.I. R. 1924 Bom. 453.**

——— *Sentence— Several accused—Evidence same against all.*

In the case of a number of accused persons, where the evidence is the same against all, the sentences against each shall be the same. (*Greaves and Panton, JJ.*) ABDUL *v.* EMPEROR. **84 I. C. 708 : 26 Cr. L. J. 356 : A.I.R. 1925 Cal. 581.**

——— *Sentence — At separate trials by separate Judges and juries, uniformity of conviction and sentence cannot be maintained.*

The principle of uniformity in convictions and punishments cannot be maintained in all cases where there are two trials—one original and the other supplementary—one batch of prisoners being tried by one Judge and one jury and the other batch by a different Judge and different jury. (*Walmsley and Suhrawardy, JJ.*) MOFEZUDDI *v.* EMPEROR. **72 I. C. 65 : 24 Cr. L. J. 305 : A. I. R. 1924 Cal. 435.**

——— *Sentence—Court's duty—Delay to be avoided.*

However guilty an accused person may be, it is most undesirable that he should be subjected to the strain and anxiety of prolonged proceedings unless it is absolutely unavoidable. The length of the proceedings is material on the question of sentence The strain, anxiety and mental suffering to which the accused must have been subject during a long time, is a matter which may legitimately be taken into consideration in passing sentence. (*Sanderson, C. J, and Richardson, J.*) BILLINGHURST *v.* EMPEROR. **27 C. W. N. 821 : A. I. R. 1924 Cal. 18.**

——— *Sentence—Separate trials— Sentences cannot run concurrently.*

Where trials on two charges purported to have been separate, *held*: that the sentences could not be made to run concurrently. (*Scott-Smith, J.*) BATAN SINGH *v.* EMPEROR. **7 L. L. J. 39:86 I. C. 219 : 26 Cr. L. J. 731 : A. I. R. 1925 Lah. 334.**

——— *Sentence—Fine—Extent of.*

A sentence of fine should not be imposed which it is wholly impossible for the accused person to pay without ruining himself and without inflicting great hardship upon his family. The maximum fine to be imposed upon any individual should depend in every case upon his position in life: If the offence is of an aggravated type a sentence of imprisonment is obviously more suitable than fine. (*Harrison, J.*) ABDULLA *v.* EMPEROR **5 Lah. L. J. 271 : 24 Cr. L. J. 278 : 71 I. C. 998 : A. I.R. 1924 Lah. 81.**

——— *Sentence—Reduction of—Grounds.*

In view of the fact that the accused also was injured and of the possibility that he merely exceeded the right of private defence, his sentence was reduced. (*Campbell, J.*) MALLA SINGH *v.* THE CROWN. **5 L. L. J. 121 : A. I. R. 1924 Lah. 61.**

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——— *Sentence—Detention as under-trial prisoner.*

A Magistrate, in awarding a sentence has no jurisdiction to direct that any portion of the period during which the accused has been detained in custody as an under-trial prisoner, should be counted as part of the sentence. (*Brasher, J.*) DANGER KHAN *v.* EMPEROR. **5 L. L. J. 224 : 23 Cr. L. J. 593 : 68 I. C. 817 : A. I. R. 1923 Lah. 104.**

——— *Sentence— Enhancement of—When unnecessary.*

In a case where injuries are inflicted in a sudden quarrel and the weapon was picked up there and then, there is no sufficient reason to enhance the sentence whereas it stands it is substantial enough. (*Abdul Quadir, J.*) ATTAR KHAN *v.* CROWN. **A. I. R. 1922 Lah. 28.**

——— *Sentence —Enhancement— Prisoner having undergone sentence—Youth of offender.*

The Chief Court refused to enhance even the lenient sentence of three months for the infliction of grievous hurt having regard to the fact that the offender was a young man who had recently come out of jail after undergoing the sentence already imposed. (*Shadi Lal, J.*) EMPEROR *v.* DULI CHAND. **4 Lah. L. J. 403 : 2 P. W. R. 1922 (Cr.).**

——— *Sentence—Continuing fine until accused complies is illegal.*

Since no person can be punished for a thing he has not done but may possibly do in the future or is even likely to do it in future a daily fine until the accused complies with the order passed against him is illegal. (*Hallifax, A. J. C.*) BABURAO *v.* MUNICIPAL COMMITTEE, NAGPUR. **72 I. C. 782 : A. I. R. 1924 Nag. 66.**

——— *Sentence—Reduction—Plea of repentance.*

There is no particular merit in confessing a crime committed openly in broad daylight, of which there was at least one eye-witness, confession may indicate repentance, but that can only effect reduction of that part of the sentence that is purely reformative, and that factor has disappeared from the capital sentence, leaving only the exemplary factor.

Where the appellant constituted himself a tribunal which decided that the making of a charge of paternity against him was an offence punishable with death he appointed himself the executioner and carried out the sentence. *Held*, that the lesser penalty provided for the offence of murder would not be proper in the circumstances. (*Battan, J. C. and Hallifax, A. J. C.*) MANJOO v. EMPEROR. **73 I. C. 266 : 24 Cr. L. J. 570 : A. I. R. 1923 Nag. 251.**

——— *Sentence.*

Where the girl kidnapped was not imposed upon, *held*, the sentence of 7 years was too severe. (*Dalal, J. C.*) INDU *v.* EMPEROR. **27 O. C. 32 : 81 I. C. 529 : 25 Cr. L. J. 913 : A. I. R 1924 Oudh 335.**

——— *Sentence—Motive.*

The motive for the crime should be considered in inflicting the sentence. (*Wazir Hasan, A. J. C.*) CHINTAMAN *v.* EMPEROR. **10 O. L. J. 54 : A. I. R. 1923 Oudh 180.**

——— *Sentence— Continuing offence—Daily fine for future offence is illegal.*

It is not permissible in law to enforce a daily fine in anticipation of a commission of an offence. (*Kulwant Sahay, J.*) PANCHAM SAO *v.* EMPEROR. **6 P. L. T. 204 : 25 Cr. L. J. 1357 : 82 I. C. 717 : A. I. R. 1925 P. 322.**

——— *Sentence—Punishments—Deterrent— Principles.*

It is of some importance that the theory of deterrent punishment should not be loosely put into prac-

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tice and that the principles upon which alone a deterrent penalty should as a rule be inflicted clearly comprehended. Deterrent punishments are now regarded only as of utility under exceptional circumstances. When waves of imitative crime such as, for example, garoting, gang-robbery, (or dacoity as it is called, here, and forgery of counterfeit coin or notes commence to sweep over a state, judicious and increasing severity may properly be utilised to check and deter such an inundation again in times of public tumult when there is a danger of wide breach of the public peace or security : or where a highly organised or what one may call semi-professional association of persons engineer series of offences such as swindling or burglary deterrent punishments may be with caution advantageously inflicted. Such a category is naturally not exhaustive but illustrative only ; and sound knowledge, experience and a proper sense of perspective are alone the guides which can safely be followed in concluding whether the use of such an aid to the maintenance of the order and tranquillity of a locality is properly permissible and desirable. To adjust the punishments so as to make it appropriate and to balance it, so that it justly fits the gravity of the offence but does not shock the public conscience and thus wrap and dull the public's social sense and appreciation of crime as evil, should be the aim. (*Bucknill, J.*) GOSSAIN MISSER *v.* EMPEROR.

1922 P. H. C. C. 14 : 63 I. C. 615 : 22 Cr. L. J. 679 : 2 Pat. L. T. 596 : A. I. R. 1922 Pat. 267.

———*Sentence—Plea of guilty.*

Where "Plea of guilty" by accused persons is considered, from the habits of Indian criminals, as due to hope, reasonable or otherwise, of leniency of punishment ; it is not proper to enhance the punishment as it might attach suspicion of perfidy to the judiciary. (*Kennedy, J. C. and Raymond, A. J. C.*) EMPEROR *v.* KASIM WALAD MAHOMED SAFFAR.

17 S. L. R. 268 : 26 Cr. L. J. 177 : 83 I. C. 887 : A. I. R. 1925 Sind. 188.

Sessions Cases.

———*Sessions Cases Shorthand notes of proceedings.*

It is desirable that shorthand notes of proceedings of Sessions Court should be as full and accurate as possible. (*Mukerjee, Richardson, Ghose, Cuming and Page, JJ.*) EMPEROR *v.* BARENDRA KUMAR GHOSE.

28 C. W. N. 170 : 38 C. L. J. 411 : 25 Cr. L. J. 817 : 81 I. C. 353 : A. I. R. 1924 Cal. 257 (F. B.).

Stay of.

———*Stay of—Criminal proceedings— Appeal — Sessions Judge against conviction—Charge found to be false by District Magistrate on inquiry—Procedure—Instructions to Government Pleader not to support conviction valid.*

The District Magistrate becomes aware on enquiry while an appeal against conviction was proceeding that the charge was false. It was held that the right procedure was to allow the appeals to proceed but to ask the Government Prosecutor not to speak in favour of convictions. (*Stuart, J.*) BHAGWAN *v.* BHULLAN.

L. R. 3 A. 2 (Cr.)

———*Stay of—Charge of cheating—Pendency of civil litigation.*

Where a civil suit is pending against the complainant is respect of a charge of cheating preferred by the latter, the criminal trial might well be stayed pending the decision of the civil case, though the civil suit was instituted after the police report. 21 P. W. R. 1912 (Cr) ; 33 P. R. 1910 ; 44 P. W. R. 1911. Ref. (*Campbell, J.*) JANKI DAS v. EMPEROR.

38 P. L. R. 1922 : 68 I. C. 819 : 23 Cr. L. J. 595 : 4 Lah. L. J. 409 : A. I. R. 1922 Lah. 424.

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———*Stay of—Civil suit no bar.*

In case of rioting civil suit to declare title was held not to bar trial. (*Spencer, J.*) NAMBIA PILLAI *v.* SUDALAIMUTHU NADAN.

17 L. W. 570 : 32 M. L. T. 191 (H. C.) : 1923 M W. N. 276 : A. I. R. 1993 Mad. 595 : 44 M. L. J 642.

———*Stay—Should be ordered where matter is in issue, in a civil suit filed before the complaint.*

Where the matter to be decided in a criminal case is identical with an issue which has to be decided in a Civil Court between the parties which was instituted prior to the complaint in the criminal cases *Held*, stay should be ordered. (*Adami, J.*) BANAMBAR CHHOTRA *v.* NATA BEHRA.

2 Pat. L R. 201 (Cr.) : 6 P. L.T. 248: 26 Cr. L. J. 286 : 84 I. C. 350 : A. I. R. 1925 Pat. 193 (1).

———*Stay of—Pending civil proceedings.*

The accused, a lady, denied the execution of a sale deed before a Sub-Registrar, and on appeal, the Dist. Registrar registered thesale deed and ordered prosecution under S. 82 (*a*) of the Registration Act. The accused then sued in Civil Court for a declaration that the sale deed was forged and moved the High Court for stay of the criminal proceedings. *Held*, the main issue being the same in both cases, the criminal case ought to be stayed and the civil suit should be expedited. (*Jwala Prasad, J.*) PHULESHRA KUER *v.* EMPEROR.

62 I. C. 85 : 22 Cr. L. J. 489 : 1 Pat. L. T. 697.

Miscellaneous.

———*Successor in Court is same Court as his predecessor.*

A successor in a Court is the same Court as his predecessor in that Court. It therefore necessarily follows that the predecessor who has departed to another Court can no longer be held to be a presiding officer of the first Court. (*Boys, J.*) EMPEROR *v.* BALDEO PRASAD.

22 A. L. J. 772 : 5 L. R. A. (Cr.) 121 : 82 I. C. 285 : 25 Cr. L. J. 1277: 46 All. 851 : A. I. R. 1924 All. 770.

———*Promissory note—Presumption as to passing of consideration.*

The presumption of law contained in the Negotiable Instruments Act that a promissory note was passed for consideration is not applicable to a criminal trial. *Gokul Prasad, J.*) SAKHWAT HAIDAR *v.* EMPEROR.

22 Cr. L. J. 54 : 59 I. C. 198 : 18 A. L. J. 1151.

———*Criminal Trial—Revival of proceeding cannot be made in a pending proceeding.*

An application or order for revival can only be made on the supposition that the case is over and not pending. (*Newbould and Mukerjee, JJ.*) RASH BEHARI *v.* CORPORATION OF CALCUTTA.

26 Cr. L. J. 1050 : 87 I. C. 970 : A. I. R. 1926 Cal. 102.

———*Charge P. C. S. 221—Charge must not be vague.*

It is not proper to frame a charge that the accused did a certain act with a view to commit a certain offenceor any other offencepunishable with imprisonment. The reason is that the accused must know the specific offence charged against him. (*Greaves and Duval, JJ.*) BALARAM KUNDU *v.* EMPEROR.

25 Cr. L. J. 1186 : 82 I. C. 50: A. I. R. 1925 Cal. 160.

———*Names not mentioned in F. I. R. cited as eye-witnesses—And their evidence contradicted by other prosecution witnesses—Conviction whether sustainable.*

It will not be safe to convict a person on the evidence of persons not mentioned in the first Information Report as eye witnesses, especially when their evidence is contradicted by other prosecution witnesses. (*Jail*

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Lal, J.) PALI *v.* EMPEROR.
7 Lah. L.J. 256 : 26 Punj. L. R. 816.

———*Murder—Blood stained exhibits—Proof of—Parcels despatched to Chemical Examiner.*

In a trial for murder, where part of the prosecution story is that blood-stained clothes were recovered and sent to the Chemical Examiner, it is essential for the prosecution to prove that ordinary diligence was exercised in despatching the goods without delay. There must also be evidence connecting the parcels which reached the Chemical Examiner with those which were despatched by the Assistant Surgeon or rather to show they were despatched. This is not a mere technical defect. (*Shadi Lal, C. J. and Harrison, J.*) MUHAMMAD DIN *v.* EMPEROR.
26 Cr. L. J. 1420 : 89 I. C. 844 : 26 Punj. L. R. 748.

———*Evidence by reference—Not proper.*

Where a Magistrate in recording the evidence of a medical witness, instead of taking down his statement simply recorded that the injuries on the accused were fully detailed in the medical certificate, the procedure was held to be improper. (*Broadway and Jai Lal, JJ.*) BHAG SINGH *v.* EMPEROR.
26 Punj. L. R. 343.

———*Notice served on mother of party—Validity.*

Notice of a criminal trial served on the mother of the party for whom it is intended is not warranted by the Cr. P. Code. (*Fforde, J.*) SAWAN SINGH *v.* CROWN. **89 I. C. 705 : 26 Cr. L. J. 1393 : 26 Punj. L. R. 291.**

———*Revision — Proceedings in the absence of accused—Legality of.*

A trial of an absconder from police custody held in his absence is wholly illegal and the conviction must be set aside on revision. (*Shadi Lal, C. J.*) ABDULLAH *v.* EMPEROR, **26 Punj. L. R. 239.**

———*Murder—Conviction when basable on circumstantial evidence—Property stolen from deceased—Possession of—Presumption.*

Where in a murder trial the evidence is purely circumstantial, in order to justify the inference of guilt the incriminating facts found must be incompatible with their innocence and incapable of explanation upon any other reasonable hypothesis than that of their guilt.

From the mere fact that an accused was found in possession of property belonging to the deceased soon after the murder it would be an unsafe inference to draw that he committed the murder. There must be other evidence to fortify such a conclusion. (*Wadegaonkar, A. J. C.*) RAGHUNATH *v.* EMPEROR. **26 Cr. L. J. 1380 (2) : 89 I. C. 516 (2).**

———*Evidence—Motive, question as to, is important where manipulation in evidence is easy.*

Where the broad features of the story for the prosecution as to the act alleged to be committed by the accused may be true and manipulation in the personnel of the actors extremely easy to make and extremely difficult to refute, the question of motive is of supreme importance. (*Wazir Hasan, J. C. and Simpson and Ashworth, A. J. Cs.*) SITLA BAKHSH SINGH *v.* EMPEROR. **2 O.W.N. 931 : A. I. R. 1926 Oudh 120.**

———*Contributory negligence—Principle is alien to Criminal Law.*

The plea of contributory negligence has a distinct and recognised place in the law of Torts, but finds no place in an indictment for criminal negligence. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) F. C. WOODWARD *v.* CROWN. **A. I. R. 1925 Sind 233.**

CRIMINAL TRIBES ACT (III of 1911).

———**S. 22**—*Conviction under—Solitary confinement if can be ordered.*

A person having been convicted under the Criminal Tribes Act, the Court cannot order a portion of the punishment to be solitary confinement, as S. 73, I. P. C. allows it only in cases of convictions under the Penal Code. (*Sulaiman, J.*) EMPEROR *v.* BIDHA.
21 A. L. J. 914 : L. R. 5 A. 19 (Cr.) : 46 All. 114 : A. I. R. 1924 All. 319.

———**S. 23**—*Second and third convictions.*

The second conviction as under S. 23 (1) (*a*), need not be second conviction under the Act, nor should it be second in fact. Taking all convictions prior to the Act as one, the first after the Act is the second and the second after the Act is the third. (*Shah and Crump, JJ.*) EMPEROR *v.* TUKA NANA RAMOSHI.
45 Bom. 1082 : 22 Cr. L. J. 317 : 60 I. C. 1005 : 23 Bom. L. R. 347.

———**(VI of 1924).**

———**S. 23—(1) (*a*)**—*Second conviction can be only after registration of accused as member of Criminal Tribe.*

The proviso to S. 23, indicates that all convictions before the coming into force of the Criminal Tribes Act (III of 1911) shall count as one and not more than one and the second conviction is to be reckoned on the basis that the accused at the time of this second conviction, must be a member of a Criminal tribe, that is, that the second conviction must be, after registration of the accused as such member. (*Wallace and Madhavan Nair, JJ.*) S. KUSUNGADU, *In re.* **21 L. W. 37 : 86 I. C. 715 : 26 Cr. L. J. 859 : A.I.R. 1925 Mad. 466**

CROSS-CLAIMS.

See C. P. CODE, O. 8, R. 6 ; O. 21, R. 19.

CROSS-COMPLAINTS.

See CRIMINAL TRIAL.

CROSS-DECREE.

See C. P. CODE, O. 21, R. 18.

CROSS-EXAMINATION.

See (1) CR. P. CODE, Ss.256-257.
(2) EVIDENCE ACT, Ss. 137 TO 161.

CROSS-OBJECTIONS.

See C. P. CODE, O. 41, R. 22.

CROWN.

———*Who is—Officers of state.*

The Crown is not bound by any Act unless expressly or by necessary implication referred to therein and for this purpose the Crown not only means King but also Officers of State in discharge of their executive duties. The Bom. Rent Act therefore, does not affect the powers of the Government and their officers under the Land Acqn. Act (*Setalwad, J.*) BOMBAY MUNICIPALITY *v.* M. DAMODAR BROS. **45 Bom. 725 : 60 I. C. 571 : 23 Bom. L. R. 35.**

———*Canning's Proclamation* (1858)—*Effect of confiscation of property by Government and consequent divesting of title.*

The effect of Lord Canning's Proclamation of 15th March, 1858, was to divest all the landed property from the proprietors in Oudh and to transfer it and vest it in the Crown. L. R. 6. I. A. 63, Foll. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) RANI INDER KOER *v.* NAND RANI KOER. **10 O. & A.L.R. 1424 : A.I.R. 1925 Oudh 273.**

———*Escheat—Land does not escheat to Crown unless it is a permanent interest—Otherwise it reverts to the landlords.*

There can be an escheat only of an absolute hereditary *mokarrari* tenure. (*Dawson Miller, C. J. and Mullick, J.*) SRI KANT PRASAD *v.* JAG SAH.
6 P. L. T. 237 : 3 Pat. 818 : 84 I. C. 293 :

CROWN.

A.I.R. 1925 Pat. 57.

———*Crown debts—Priority of.*

In competing claims against moveables of a debtor, Crown debts have a priority. (*Dalal, J. C.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BISHAN NARAIN BHARGAVA. **90 I. C. 524 : A. I. R. 1926 Oudh 44.**

CROWN GRANTS.

See CROWN GRANTS ACT.

CROWN GRANTS ACT (XV OF 1895).

———S. 3—*Custom Grant Provisions—Previous customs.*

Where with regard to the question of custom as to succession the decision of the Judicial Commissioners was on certain instances in which the members of a certain family were succeeded by their widows, but all these instances with one exception, occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the Sanad under which the succession was governed by primogeniture but full rights of alienation were preserved to the grantee, *Held*, the instances in which widows succeeded cannot be used to set up a rule of succession directly contrary to the terms of the Sanad under which the estate is now held. 32 I. A. 203, Foll. (*Viscount Cave.*) BADRI NARAIN SINGH *v.* THAKURAIN HARNAM KUAR. **44 All. 449 : 9 O. L. J. 428 : 31 M. L. T. 195 : 49 I. A. 276 : 27 C. W. N. 129: 68 I. C. 1000 : 21 A. L. J. 13 : 25 O. C. 313 : A. I. R. 1922 P. C. 289 : 44 M. L. J. 337 (P. C.).**

———S. 3—*Lease of Government land in Malabar—Ejectment suit—Compensation for improvements by tenant.*

Where a Crown grant consists of a lease of land in the Malabar district containing a reservation of the right to terminate the tenancy on six months' notice and the lessee expressly covenanted to surrender, *Held*, that under S. 3, the lease must take effect according to its tenor and the Government is entitled to a decree for ejectment without paying for improvements. (*Wallis, C. J. and Krishnan, J.*) ULLATTUTHODI CHOYI *v.* THE SECRETARY OF STATE. **14 L. W. 386 : 69 I. C. 475 : (1921) M. W. N. 694 : 41 M. L. J. 494.**

CRUELTY. *See* RESTITUTION OF CONJUGAL RIGHTS.

CULPABLE HOMICIDE. *See* PENAL CODE, SS. 299-304.

CUMULATIVE SENTENCE.

See (1) CR. P. CODE, S. 35
(2) PENAL CODE, S. 71.

CURRENT ACCOUNT.

See (1) ACCOUNTS.
(2) BANKER AND CUSTOMER.

CURRENCY NOTE. *See* PAPER CURRENCY ACT.

CUSTODIA LEGIS. *See* C. P. CODE, O. 40, R. 1.

CUSTODY.

See (1) GUARDIAN.
(2) GUARDIAN AND WARD.
(3) LUNACY ACT.
(4) MINOR.
(5) POSSESSION.

CUSTOMARY EASEMENT. *See* EASEMENTS ACT.

CUSTOMARY RIGHT. *See* EASEMENTS ACT.

CUSTOM (GENERAL). *See also* HINDU LAW—CUSTOM.

Adoption.
Applicability.
Burden of proof.
Burial.
Communal Custom.
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Essentials of validity.
Evidence of.
Family Custom.
Immoral and Illegal.
Landlord and Tenant.
Local Custom.
Mercantile Usage.
Proof.
Succession.
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CUSTOM (GENERAL)—Adoption.

Adoption.

———*Adoption—Kashmiri Brahmans*—Upanayanam *performed—Validity.*

Kashmiri Brahmins in Amritsar are governed in matters of adoption by custom and not by Hindu Law. The adoption of a boy of 15 or 16 whose *upanayanam* had been performed is valid. Evidence to show that the community had recognized the validity of the adoption for 15 years and that the boy had performed the funeral of his adoptive parents is admissible to prove its validity. (*Sir John Edge.*) DURGA DEVI *v.* SHAMBHU NATH. **51 I. A. 182 : 22 A. L. J. 394 : 26 Bom. L. R. 557 : 5 Lah. 200 : L. R. 5 P. C. 83 : 34 M. L. T. 93 : 80 I. C. 965 : 29 C. W. N. 106 : (1924) M. W. N. 434 : 20 L. W. 216 : A. I. R. 1924 P.C. 113: 46 M. L. J. 661 (P. C.).**

———*Adoption—Gift to adopted son—Who can challenge.*

Where a person makes a gift in favour of another alleging him to be his adopted son, a declaration made at the time of mutation and also at the time of suit by collaterals to impeach the alienation is sufficient proof of adoption. If the gift is declared invalid in such suit, the donor alone can appeal against the decree. (*Chevis, J.*) TOTA *v.* MUKHA. **60 I. C. 448 : 3 Lah. L. J. 89.**

———*Adoption—Daughter's sons—Hindu Jats of Mauza Liddar, Tahsil and District Jullundur.*

Held, that it was not proved by any custom among Hindu Jats of Mauza Liddar, Tahsil and District Jullundur, that the gift of ancestral property to daughter's sons is valid. (*Leslie Jones and Abdul Raoof, JJ.*) KHUSHAL SINGH *v.* KANDA. **5 Lah. L. J. 63 : 56 I. C. 931 : 2 U. P. L. R. (L.) 110.**

———*Alienation—Ancestral land—Necessity when to be proved.*

In the case of alienation of ancestral land by a male proprietor, the payment of a just debt is a necessary purpose and the alienee has not to show that the alienor could not have paid off the debt otherwise than by alienating the land. (*Campbell, J.*) PARS RAM *v.* TEHU. **89 I. C. 960.**

———*Ancestral property—Property allotted to a family by Settlement Officer settling a dispute—If become "ancestral" in the family.*

The plaintiffs had the original title by long occupation ; the defendants had ousted them to a considerable extent and had undertaken some liabilities in respect of the payment of revenue, etc. The Settlement Officer, therefore, came to the conclusion that it would be equitable to settle half of the lands with the plaintiffs in the proceedings and give the other half to the defendants. *Held*, that the property did not become "ancestral" property in the respective families. (*Mr. Ameer Ali.*) AHMAD KHAN *v.* MT. CHANNI BIBI. **6 Lah. 502 : 3 O. W. N. 93 : 52 I. A. 379 : L. R. 6 P. C. 190 : A. I. R. 1925 P. C. 267 (P.C.).**

CUSTOM (GENERAL)—Applicability.

Applicability.

———*Applicability—High class Hindus are presumed to be governed by Hindu Law.*

The initial presumption in the case of high caste Hindus is that they are governed by their personal law. (*Broadway and Moti Sagar, JJ.*) ANANT RAM *v.* RAM RATTAN. **5 Lah. 547 : 85 I. C. 437 : A. I. R. 1925 Lah. 247.**

———*Applicability—Personal law—When to apply.*

Among parties generally following customary law, if no definite rule of custom can be discovered on a given point, the gap can be filled up as a last resort by falling back on the personal law. (*Abdul Raoof and Campbell, JJ.*) MT. TABI *v.* SAUDAGAR SINGH. **A. I. R. 1924 Lah. 698.**

———*Applicability—Custom as to ownership of wall in Brahmin villages applies though site is vacant.*

The custom prevailing in a Brahmin village, according to which the eastern wall of a house belongs to the owner of the site to the east of that house applies even where the eastern site is vacant. (*Devadoss, J.*) MEENAKSHI AMMAL *v.* KRISHNA SASTRIGAL. **20 L. W. 952 : A. I. R. 1925 Mad. 344.**

———*Applicability of—Hindu Law—Law of joint family applicable equally with the law of inheritance.*

Cutchi Memons in Madras Presidency are governed by Hindu Law in matters of succession. A member of a Cutchi Memon family cannot bequeath by will his share in the property. (*Kumaraswami Sastri, J.*) SIDDICK HAJEE ABOOBUCKER SAIB *v.* EBRAHIM HAJEE ABOOBUCKER SAIB. **31 M. L. T. 183 (H. C.).**

———*Applicability.*

Custom must be sufficiently defined for its application to the facts of the case to be clear and undoubted. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* THAKUR NIRMAN PRASAD SINGH. **9 O.L.J. 552 : A.I.R. 1923 Oudh 61.**

Burden of proof.

———*Burden of proof—Jains—Adoption of orphan.*

The *onus* of proving the antiquity and the invariability of a custom contrary to the normal law is on the party averring its existence. The adoption of an orphan boy is valid by custom among Jains. (*Macleod, C. J. and Fawcett, J.*) PARSHOTTAM GANPAT *v.* VENICHAND GANPAT. **45 Bom. 754 : 61 I. C. 492 : 23 Bom. L. R. 227.**

———*Burden of proof—Brahmins in Gujarat District.*

Brahmins are essentially Hindus and the burden of proving that they have in any particular departed from their personal law and adopted rules prevailing among the agricultural neighbours rests upon those who assert it. The initial presumption in the case of Brahmins is that they are governed by their personal law and the mere fact that a family or tribe has departed from its personal law in one respect does not necessarily lead to the conclusion that it has adopted agricultural custom in other respects. (*Abdul Raoof and Addison, JJ.*) KHAZAN CHAND *v.* PARAS RAM. **26 Punj. L. R. 627 : 90 I. C. 1045 : 7 Lah. L. J. 459 : 6 Lah. 524 : A. I. R. 1925 Lah. 646 (2).**

———*Burden of Proof—Alienation—Ancestral property—Burden of proof on those seeking to set aside alienation.*

The plaintiff respondents sued for a declaration that a gift of certain land, dated 22nd July 1918, by Mussammat Subhi, widow of Kaula, to her daughter Mussammat Bishni, should not affect the reversionary rights of the plaintiff.

In the *kaiffiyat deh* of 1888 the proprietors of Patti Sudh Singh where the land in suit is situated, stated

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that Kuman, Sukhia and Dhuman were their ancestors, and that Dhuman's branch held one plough and Kuman and Sukhia half a plough each. Kaula was the descendant of Sukhia and the plaintiffs were the descendants of Kuman and Dhuman.

The *kaiffiyat deh* showed that Phanu was another proprietor in this Patti and that his share in the land was proportionate to two and a half ploughs. *Held*, that it was not legitimate from these facts to draw the inference that the father of Kuman, Sukhia and Dhuman must have held the land. (*Scott Smith and Fforde, JJ.*) MT. BASANTI *v.* KABUL SINGH. **6 Lah. L. J. 127 : 80 I. C. 329 : A.I.R. 1924 Lah. 465.**

———*Burden of proof—Opposition to Hindu law and agricultural custom.*

In Punjab *onus* of proof of a custom which is contrary both to the Hindu Law and the agricultural custom of the province is on a litigant who sets it up. (*Abdul Raoof and Campbell, JJ.*) RAM NARAIN *v.* MT. HAR NARINJAN KAUR. **4 Lah. 297 : A. I. R. 1924 Lah. 116.**

———*Burden of proof—Caste—Rajput—Mohal.*

There are no persons in the Punjab who have any real right to be described as Mohals except Rajputs and some Jats who rightly or wrongly claim that they are really of a Rajput origin. *Held*, that plff. had failed to prove that he was a Rajput by caste. (*Chevis and Scott-Smith, JJ.*) SECRETARY OF STATE *v.* GHULAM RASUL KHAN. **4 Lah. L. J. 79 : A. I. R. 1922 Lah. 323.**

———*Burden of proof—Custom at variance with law*—Onus.

The person who sets up a custom must establish it to the whole length of abrogating the law under which the opposite party claims title and if this is not done the general law must prevail. Possible inferences or probable implications cannot uphold a custom. (*Simpson and Wazir Hasan, A. J. Cs.*) BALBHADDAR PRASAD *v.* NARAYAN DAS. **9 O. L. J. 518 : A. I. R. 1923 Oudh 102.**

Burial.

———*Burial—Right to bury dead in another's land—If can be acquired.*

Burial right is a customary one and must be proved if it is sought to be enforced by a Court. (*Po Han, J.*) MG. SHWE KYE *v.* MG. PO THA. **2 Bur. L. J. 186: 1 Rang. 702 : A. I. R. 1924 Rang. 61.**

Communal Custom.

———*Communal custom (Malabar)*—Illom—*Absence of re-admission into caste, of* Nambudri *sent to jail for crime, disqualifies him from managing properties.*

Convictions for a criminal offence and absence of re-admission into caste after return from jail, disqualifies a Nambudri for the right of management of *illom* properties. The continuance in caste of a person chosen as an *uralan* of a *devaswom* because he is a Nambudri is essential for his continuing as *uralan.* (*Krishnan, J.*) HARIHARA AIYAR *v.* UKKANDAN VARIAR. **81 I. C. 498 : A. I. R. 1925 Mad. 207.**

———*Communal custom*—Gosais *in Bombay Deccan—Succession to* guru.

Among Gosais, a set of religious mendicants in Bombay Deccan, a custom exists that private property passes from *guru* to *chela.* (*Kincaid and Raymond, A. J. Cs.*) GOVERDHAN GIR *v.* VISHIN GIR. **63 I. C. 370 : 15 S. L. R. 38.**

Duty of Court.

———*Duty of Court—Deductions not permissible.*

Custom is not always logical and the Courts should guard against the danger of seeking to extend custom

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by logical processes, *e. g.*, by analogy. (*Broadway and Campbell, JJ.*) NAJMUDDIN *v.* ABDUL HAMID. **A. I. R. 1923 Lah. 175.**

——*Duty of Court.*

"Custom" implies, not that in a given contingency a certain course would probably be followed, but that that contingency has arisen in the past and that a certain course has been followed, and it is not at all within the province of Courts to extend custom by the process of deduction from the principles which seem to underlie customs which have been definitely established. (*Shadi Lal, C.J. and Le Rossignol, J.*) DALIPA *v.* DALLU. **4 Lah. L. J. 336.**

Essentials of Validity.

——*Essentials of validity—Rights of passage by boat—Legality of custom.*

The essential characteristics of custom are that it must be of immemorial existence, it must be reasonable, it must be certain and it must be continuous. Every custom must have been in existence preceding the memory of man and if the proof was carried back as far as living memory would go it should be presumed that the right claimed had existed from time of legal memory. Want of continuity or interruption or disturbance raises a strong presumption as to its non-existence. The reasonableness of custom is so very necessary that if it be against reason, it has no force in law. The commencement must be based on a reasonable cause for if an alleged custom is unreasonable in its origin, no usage or continuance can make it good; but by this, all that is meant is that it is sufficient if no good legal reason can be assigned against it. As to the element of certainty not only should its nature be certain, but there should be certainty in respect of the locality where it exists and also in respect of the persons affected by it. A customary right of boat passage may exist over the water of another by virtue of a custom. Such rights existing by custom are to be distinguished from public rights of boat passage which arise from dedication or grant and from private rights of boat passage which are easements properly so-called. A customary right of boat passage is one which may be enjoyed by any member of a body or class of persons, or may exist only for the benefit of a limited section of the public and it cannot be used under a claim of right by any person who is not a member of that body or class in whose favour it exists. Such customary rights may exist in favour of the inhabitants of one particular village or more villages than one sufficiently well-defined.(*Mukerjee, J.*) KRISHNA KUMAR DEB *v.* ATUL CHANDRA GHOSE. **39 C. L. J. 612 : A. I. R. 1924 Cal. 998.**

——*Essentials of validity—Custom and prescription—Limitation.*

A custom must be immemorial,reasonable continuous and certain in its nature and in its locality. Custom differs from prescription in that prescription is the making of a right while the custom is the making of a law. (*Mookerjee and Panton, JJ.*) GOPALAKRISHNA *v.* ABDUL. **66 I. C. 640 : 34 C. L. J. 319.**

——*Essentials of validity—Family custom.*

A custom to be legally binding, must be ancient, certain and invariable and a family custom at variance with a general custom, requires stronger evidence than a general custom. (*Chevis and Le Rossignol, JJ.*) CHARANGIT SINGH *v.* AMIR ALI. **64 I. C. 892 : 2 Lah. 243.**

Evidence of.

——*Evidence of*—Wajib-ul-arz—*Ambiguous statement—Evidentiary value.*

CUSTOM (GENERAL)—Evidence o .

A custom is not established by an ambiguous statement of it in a *Wajib-ul-arz*. But when it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *Wazib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. (*Sir John Edge.*) BALGOBIND *v.* BADRI PRASAD. **26 O. C. 217 : 45 A. 413 : 38 C. L. J. 302 : 33 M. L. T. 317 : 29 C. W. N. 465 : (1923) M. W. N. 799 : 9 O. & A. L. R. 581 : 10 O. L. J. 368 : 50 I. A. 196 : 21 A. L. J. 578 : A. I. R. 1923 P. C. 70 : 45 M. L. J. 289 (P. C.).**

——*Evidence of—Custom in derogation of Hindu or Mahomedan law.*

It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. (*Sir Lawrence Jenkins.*) MAHOMED IBRAHIM ROWTHER *v.* SHAIK IBRAHIM ROWTHER. **45 Mad. 308 : (1922) M. W. N. 470 : 36 C. L. J. 64 : 24 Bom. L. R. 944 : L. R. 3 P. C. 149 : 26 C. W. N. 793 : 30 M. L. T. 85 : 67 I C. 115 : 15 L. W. 354 : 49 I. A. 119 : A. I. R. 1922 P. C. 59 : 43 M. L. J. 69 (P. C.).**

——*Evidence of—Existence should not be accepted unless proved by sufficient evidence—No statutory period is provided for customary right to come into existence—Easements Act, S. 2.*

A Court should not decide that a local custom exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it has been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned. 17 A. 87, Foll. Per *Kanhaiya Lal, J.* There is no statutory period of enjoyment provided, during which, in order to establish a local custom, it must be proved that the right, claimed to have been enjoyed by local custom, has been so enjoyed. (*Lindsay and Kanhaiya Lal, JJ.*) CHANNU DUTTA VYAS *v.* SWAMI GYANNANDJI. **90 I. C. 976 : A. I. R. 1926 All. 130.**

——*Evidence of—Proof—Mere fact of defendant confessing judgment does not detract from value of a decree as an instance of recognition of custom.*

The mere fact that the vendor in a suit to recover *haq chacharam* had confessed judgment and the vendee allowed the case to be decreed without contest, doe not establish that the judgment is of no weight as ans instance of the recognition of the existence of the right to recover *haq chacharam*. If the existence of a custom is well-known the vendor and the vendee may very well not think it worth their while to contest the case. (*Sulaiman and Mukerjee, JJ.*) SRILAL GOAIKA *v.* KESHO DAS. **87 I. C. 368 : A. I. R. 1926 All. 83.**

——*Evidence of—Transferability of houses in zamindari village—Large number of instances of unobjected transfers proved—Party relying on custom of transferability need not prove that transfers were without zamindar's consent.*

CUSTOM (GENERAL)—Evidence of.

Where a large number of instances of transfers of houses in a zamindari village are proved, and it is found that the zamindar has not objected to them, the Court can presume the existence of a custom of transferability. The party relying on the custom need not show that the transfers were without the zamindar's consent. But they will have to show this, if the instances they can prove are few in number. (*Mears, C. J. and Sulaiman, J.*) SYED TAJAMMUL HASAIN *v.* BANWARI LAL. **23 A. L. J. 932: 88 I. C. 752 : A. I. R. 1926 All. 43.**

——*Evidence of*—Wajib-ul-arz, *entry in—If a record of custom.*

Where there is an entry of a single proprietor of a *Mahal* in *Wazib-ul-arz*, there can be no custom of pre-emption. Even if the custom existed, it came to an end, when the *Mahal* vested in a single proprietor. (*Tudball and Sulaiman, JJ.*) KARIMULLAH *v.* ATMA RAM. **63 I. C. 295 : 19 A. L. J. 614.**

——*Evidence of—Personal law—Conflict.*

Where custom conflicts with the personal law of the parties it is not advisable to extend the custom unless there is evidence to show that the custom has been adopted. (*Macleod, C. J. and Fawcett, J.*) JAGJIVAN *v.* KALIDAS **45 Bom. 604 : 60 I. C. 901 : 23 Bom. L. R. 81 (1).**

——*Evidence of—Two recent instances cannot prove custom.*

One or two instances of custom, specially of recent dates, cannot prove a custom. (*N. R. Chatterjee and Panton, JJ.*) PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **42 C. L. J. 280 : A. I. R. 1926 Cal. 1.**

——*Evidence of—Custom overriding personal law—Proof must be clear and definite and of all elements of valid custom.*

Where a custom has been set up in derogation of the personal law of the parties, which overrides the provisions of the personal law, it must be strictly proved by very clear and definite evidence, and such evidence must establish all the elements of a valid custom. (*Greaves and Chuckerbutty, JJ.*) ASIRUDDIN MONDAL *v.* LATIFUNNISSA BIBI. **85 I. C. 763 : A. I. R. 1925 Cal. 1176.**

——*Evidence of—Court's duty.*

In cases where a custom is alleged, a duty is imposed on the Court to endeavour to ascertain the existence and nature of that custom. (*Broadway and Zafar Ali, JJ.*) MT. DIYAN *v.* HIRA NAND. **4 Lah. 202 : A. I. R. 1923 Lah. 448.**

——*Evidence of.*

Proof of custom is not confined to judicial precedents alone and the fact that no contest has taken place in the past may well raise a presumption that the custom was so well recognised that no one thought of contesting it. Custom is not a matter of inference but of proof, and it is the evidence adduced in support of the custom set up that can, and must, alone be looked to to ascertain whether or not it has been proved to exist. 29 C. 433 (P. C.), Foll. and 77 P.R. 1904, Foll. (*Broadway and Campbell, JJ.*) NAJIM-UD-DIN *v.* ABDUL HAMID. **A. I. R. 1923 Lah. 175.**

——*Evidence of*—Riwaj-i-am.

Statements in *riwaj-i-am* contradicting a custom and unsupported by instances are of very little weight. (*Scott-Smith and Abdul Qadir, JJ.*) MANOHAR v. NANHI. **66 I. C. 399 : 2 L. 366 : A. I. R. 1922 Lah. 320 (2).**

——*Evidence of.*

Custom must be proved by evidence and Courts cannot deduce the existence of one custom from that of another. It is not the function of a Court to say what a custom ought to be, but its duty is confined to enforcing such customs as are known to exist. (*Chevis and Campbell, JJ.*) DHANNU *v.* BHAGWAN. **67 I. C. 555 (Lah.).**

CUSTOM (GENERAL)—Family custom.

——*Evidence of—Impartibility.*

Evidence of witnesses to the effect that they had never known a case of partition does not afford in law sufficient proof of a valid custom of impartibility. (*Schwabe, C. J. and Wallace, J.*) VAZHAYIL PARKUM THATTAM KUNHI KUTTY *v.* RAMAN. **46 Mad. 597 : (1923) M. W. N. 173 : 18 L. W. 525 : A. I. R. 1923 Mad. 452 : 44 M. L. J. 274.**

——*Evidence of—Impartibility—Proof.*

The fact that for a number of generations a particular estate has remained undivided, though other properties of the family have been divided would not by itself show the existence of a family custom or a custom attaching to a tenure of the estate. (*Dhobley, A. J. C.*) KRISHNAJI *v.* NILKANTH. **18 N. L. R 163 : 5 N. L. J. 25 : A. I. R. 1922 Nag. 52.**

——*Evidence of—Entries in* Wajib-ul-arz—*Evidentiary value of.*

Wajib-ul-arz is a record of custom. The evidentiary value of the entries made in a *wajib-ul-arz* is not in any manner minimised by the fact that the person relying upon the custom has not supported the entries by proof of instances of succession in accordance with the entries. It has never been the rule of evidence in cases of a similar nature decided by the Court that the occurrence of instances in accordance with an alleged custom was a necessary part of the proof of the custom and that in the absence of such instances the plea of a custom must fail in spite of over-whelming evidence of a different nature. (*Dalal, and Wazir Hasan, A. J. Cs.*) BAIJ NATH SINGH v. RAJJU SINGH. **12 O. L. J. 571 : L. R. 6 Oudh 101 (Rev.) : 2 O. W. N. 872.**

——*Evidence of—Proof must be given apart from cases in dispute.*

A custom must be established independently of and apart from cases in dispute. (*Kulwant Sahay, J.*) CHAKAURI LAL *v.* DEO CHAND MAHTON. **90 I. C. 273 : A. I. R. 1926 Pat. 61.**

——*Evidence of—Custom set up to be precisely proved—Proof of different custom.*

Evidence to prove a custom must not only be consistent with the custom which is alleged but must also prove a custom which is not wider than that alleged. If the evidence tends to prove a custom wider than that which is alleged, the party seeking to establish the custom is not at liberty to adopt part only of the evidence and to reject the rest. But this does not necessarily establish the converse, namely, that if a broad custom is pleaded the existence of a lesser custom could not if proved be found. The defendants alleged a custom which they failed to prove; but from evidence given on behalf of the plaintiff to rebut the evidence given on behalf of the defendants, the Courts considered that it was apparent that a custom had been proved, of the same type as that which the defendants had alleged but of a narrower compass. *Held*, that in modern times a Court could have little hesitation in finding that although the entire custom alleged by the defendant did not exist but a material part of it did. (*Bucknill and Ross, JJ.*) NATHUNI RAI *v.* MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR. **1 Pat. L. R. 289 : A. I. R. 1924 Pat. 147.**

Family Custom.

——*Family custom—English and Indian Law.*

In proving family customs in India, the rules of

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English Law as to particular customs are inapplicable. 12 M. I. A. 91 ; 45 I. A. 14, Ref. to. (*Sir John Edge.*) MT. DURGA DEVI *v.* SHAMBHU NATH.
5 Lah. 200 : L. R. 5 P. C. 83 : 51 I. A. 182 : 22 A. L. J. 394 : 26 B. L. R. 557 : (1924) M. W. N. 434 : 20 L. W. 216 : 34 M. L. T. 93 : 29 C. W. N. 106 : 1 O. W. N. 569 : A. I. R. 1924 P. C. 113 : 46 M. L J. 661 (P. C.).

———*Family custom—Maintenance—Hindu keeping Muhammadan concubines—Illegitimate children.*

Where the Muhammadan concubines of a Hindu and their illegitimate children claimed maintenance from the legitimate son of the Hindu after his death, under a family custom, *held*, that no such custom was proved. (*Chevis and Le Rossignol, JJ.*) CHARANJIT SINGH *v.* AMIR ALI. **64 I. C. 892 : 2 Lah. 243.**

———*Family custom—Evidence of*

Where a custom prevails in some branches of a family, it is a good evidence to show the probability of a similar custom in other branches of the family. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MUHAMMAD ALI KHAN *v.* GHAZANFOR ALI KHAN.
60 I. C. 147 : 7 O. L. J. 474.

———*House sites—Agricultural village—Rights of auction-purchaser.*

In an agricultural village in U.P. a tenant of a right has no right to sell more than the materials of the house. But this plea is open only to the landlord and hence as against a trespasser, an auction purchaser gets whatever is conferred on him by the sale certificate. (*Pullan, A. J. C.*) BHAGAN *v.* SUKHDEO SINGH. **89 I. C. 662 (1).**

Immoral and Illegal.

———*Immoral and Illegal—Body of persons engaged to perform temple duties—Custom that those present also represent the absent—Agreement.*

Where seven persons were employed by a person, to recite *mantrams* in a temple, but some of them did not attend on certain days and pleaded a custom by which the recitation of any one or more (less than seven) was to be treated as valid and pleaded also an agreement that any one of them present should represent all those that were absent, *held*, that the custom pleaded was immoral and opposed to public policy. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA AIYANGAR *v.* RAMAN CHETTIAR. **69 I. C. 469 : 14 L. W. 329.**

Landlord and Tenant.

———*Landlord and tenant—Burden of proof.*

A tenant setting up a claim in derogation of general law must prove it. An allegation in a plaint that the plaintiff landlord is claiming only half share of the timber, though he is entitled to the whole, because his predecessors were getting only half, is an admission in defendant tenant's favour and does not amount to setting up a new custom. (*Ross, J.*) JANKI KUAR *v.* USMAN SAIN. **62 I. C. 417 (P.).**

Local Custom.

———*Local and family custom—Difference—Former must be pleaded with particulars as to area.—Custom not to be extended by analogy.*

A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent and so forth. It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area. Except so far as analogy may serve to explain anything that is in itself obscure, the custom of other localities are not

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relevant. 1 Cal. 186 ; 9 B. L. R. 274 and *Marquis of Anglesey* v. *Lord Hatherton*, 10 M. and W. 218, Ref. (*Lord Sumner.*) SATYA NARAIN SINGH *v.* SATYA NIRANJAN CHAKRAVARTHI. **3 Pat. 183 : 28 C. W. N. 351 : 34 M. L. T. 27 : 5 Pat. L. T. 171 : 79 I. C. 825 : 51 I. A. 37: A. I. R. 1924 P. C. 5 (P. C.).**

———*Local custom—Proof—*Helat dehi *is valuable evidence as to* haq chacharam *in Benares District.*

In Benares District an entry in a *helat dehi* that *haq chacharam* was realised on sales of houses is of considerable importance. (*Sulaiman and Mukerjee, JJ.*) SRILAL GOAIKA *v.* KESHO DAS.
L. R. 6 A. 93 (Rev.) : 87 I. C. 368 : A. I. R. 1926 All. 83.

———*Local custom—Alienation of house and site—Residents in Pandauli though not co-sharers can alienate.*

Ordinarily in a purely agricultural village, the zamindar is the owner of every bit of land in the village and whoever asserts that a mere resident in the village, not being a co-sharer, is entitled to sell the site of his house must prove his case by weighty evidence. In the village Pandauli, District Gazipur, the occupiers of the village are entitled to sell the houses as they stand, *viz.*, the material and the site. (*Mukerjee, J.*) RAFIQ *v.* SHANKAR LAL. **L. R. 6 A. 109 (Rev.) : 87 I. C. 749 : A. I. R. 1925 All 718.**

———*Local custom —* Haq-i-chaharum-*Zamindar's right to recover—Vendee's liability.*

A zamindar claimed a right to a fourth share in the sale proceeds of a house built on a site belonging to him, by virtue of a long-established custom : *Held*, if the right is based on custom then it is the duty of the vendee to see that *haqi-chaharum* is paid to the zamindar. The vendee cannot get rid of his liability by merely proving that he has paid the whole consideration of the vendor. (*Stuart and Sulaiman, JJ.*) KEDAR NATH *v.* DATTA PRASAD SINGH.
4 U. P. L. R. (A.) 197 : 44 All. 739 : 20 A. L. J. 646 : A. I. R. 1922 All. 370.

———*Local custom—Ryots of Tissa — Tahsil Muzaffarnagar, District Meerut—Transfer of house with right of residence is valid.*

The custom that the ryots of Tissa in Muzaffarnagar,in the Meerut District can validly transfer houses with a right of residence, exists and is recognized by law and should be given effect to. (*Rafique and Piggott, JJ.*) FIYAZ ALI *v.* REKHAB DAS.
61 I. C. 24 : 19 A. L. J. 104

———*Local custom—Proof of—Right of way—Antiquity—Open user.*

A Court should not find a local custom unless it is satisfied of its reasonableness and its certainty as to extent and application and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or force and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things with which it is concerned. The evidence must be sufficient to show that the right has been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become customary law of the locality. The doctrine of lost grant is applicable to private rights claimed by prescription. It is inapplicable to a right claimed on the basis of immemorial custom. The question of legal origin is only of importance where it is suggested that the right claimed might have originated within the time of memory, whatever that time may be. In the case of a custom its legality depends

on such considerations as its reasonableness and its certainty. As to the length of user or enjoyment which must be proved before a local custom may justifiably be inferred no definite rule can be laid down. But if the existence of the custom depends on oral evidence, and the user of enjoyment is taken back as far as living memory can be expected to go, then in the absence of rebutting evidence it is not unreasonable to say, *presumintur retro* or to infer an immemorial enjoyment of the right, or say, in Bengal, an enjoyment from the time of the Permanent Settlement. (*Richardson and Suhrawardy, JJ.*) ALI MAHOMED *v.* SHEIKH KATU. **36 C. L. J. 280 : A. I. R. 1923 Cal. 200.**

——*Local custom—Contract to purchase silver—There is no custom among Bombay merchants extending time fixed for taking delivery.*

An alleged custom among Bombay merchants whereby time fixed for delivery in case of a contract for purchase of silver if falling Pournami day was extended by 8 days was held to be not proved. (*Phillips, J.*) BALARAM PARAMSUKHDAS FIRM *v.* G. GOVINDA CHETTY. **A. I. R. 1925 Mad. 1232 : 49 M. L. J. 200.**

——*Local custom—South Canara—Tenant, rights of.*

Under the Customary Law of South Canara a tenant is entitled to the value of improvements effected by him on ejectment by the landlord. (*Ayling and Coutts-Trotter, JJ.*) RAMAPPA *v.* ABDULLA. **69 I. C. 282 : 41 M. L. J. 127.**

——*Local custom—Oudh—Succession* Gaddi Nashini.

In Oudh *Gaddi Nashini* imports entirely the idea of inheritance by a male and not by a female. (*Kendall and Pullan, A. J. Cs.*) ALADI BEGAM *v.* MIRZA AHMAD MIRZA BEG. **11 O L. J. 757 : 82 I. C. 691 : A. I. R. 1925 Oudh 190.**

——*Local custom*—Riwaj-i-am, *weight of.*

A local custom binds all the families of the class indicated who reside in the locality where the custom prevails. It is not necessary to prove that the custom applies to the particular family under consideration. (*Lindsay, A. J. C.*) JAGDEO *v.* BHAWANI. **61 I. C. 920 : 8 O. L. J. 116.**

Mercantile Usage.

——*Mercantile usage—Unreasonable—Not to be recognised.*

A trade custom to be recognised by a Court of Law must be universal as well as reasonable. A custom allowing an agent to turn himself into a principal and thereby profit himself at the expense of the principal, is unreasonable, and cannot be implied in a contract of agency. (*Piggott and Walsh, JJ.*) KISHORI LAL *v.* JIWAN LAL. **4 U. P. L. R. (A.) 59: A.I.R. 1923 All. 242.**

——*Mercantile Usage—Proof—Oral evidence.*

Usage is proved by the oral evidence of persons who must become cognizant of its existence by reason of their occupation in the particular trade or business, and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove a usage in a particular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in and that everybody acknowledged it in the trade and knew of it or might know of it if he cared to enquire. (*Greaves, J.*) WITTENBAKER v. J. C. GALSTAUN. **63 I. C. 11 : 36 C. L. J. 256.**

——*Mercantile usage—Karachi sugar merchants—Plaintiff first purchasing from defendants some tons—Then selling some tons to defendants—Plaintiff held not under obligation to take delivery of tons sold back by him.*

Defendants agreed to sell to plaintiffs 50 tons of January 1924 shipment, 50 tons of February shipment and 50 tons of March shipment at a certain rate. Subsequently the defendants on various dates purchased from the plaintiffs various quantities of these shipments at higher rates than what they had agreed to sell for. *Held*, that under the custom of trade the plaintiffs were discharged from their obligation to take delivery of the tons which they subsequently sold to the defendants. (*Rupchand Bilaram, A. J. C.*) FIRM OF BRIJLAL JAGANNATH *v.* FIRM OF ALLAH DITTA. **86 I. C. 393 : A. I. R. 1925 Sind 242.**

Proof.

——*Proof—Immemorial—Evidence as to, is as a rule hearsay.*

After the existence of a custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule. (*Lord Sumner.*) RAJENDRA NARAIN DHANJ DEO *v* KUMAR GANGANANDA SINGH. **52 I.A. 279 : (1925) M. W. N. 549 : A. I. R. 1925 P. C. 213 (P.C.).**

——*Proof—Three instances 25 years old were held sufficient to prove that custom was ancient.*

A custom was held valid and ancient though only seven main instances in support of it were held proved, three out of which were about 25 years old, and the remaining four were only of two to nine years before the suit was brought. The Court has not only to consider in such cases only the number of instances but also the likelihood of there being any large number of instances. (*Marten and Fawcett, JJ.*) RATI LAL NATHALAL *v.* MOTI LAL SANKALCHAND. **27 B. L. R. 880 : A. I. R. 1925 Bom. 380.**

——*Proof.*

A rule of custom may be established and held to be of binding force even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour. (*Abdul Raoof and Abdul Qadir, JJ.*) MT. CHANNI BIBI *v.* AHMAD KHAN. **69 I.C. 331 : A. I. R. 1924 Lah. 265.**

——*Proof.*

A few instances or instances of a recent date cannot establish a custom. (*Baker, J. C.*) MT. BASHIRBI *v.* ABDUL SATTAR. **82 I. C. 815 : A. I. R. 1925 Nag. 179.**

——*Proof—Numerous instances before Courts—Further proof—Judicial decisions.*

Where a custom or usage is repeatedly brought to the notice of the Courts of a country, the latter may hold that it has been introduced into the law without the necessity of proof in each individual case. Judicial decisions recognising the existence of a disputed custom in a particular community of one place are relevant as evidence of its existence among the same community at another place. (*Baker, O. J. C.*) MT. SANO *v.* PURAN SINGH. **78 I. C. 461 : A. I. R. 1925 Nag. 174.**

——*Proof* — Wajib-ul-arz—*Entries in—Value of.*

The record of custom in a *Wajib-ul-arz* is a very valuable piece of evidence. (*Wazir Hasan, A. J. C.*) JAMNA PERSHAD *v.* RAMLAL. **90 I. C. 327.**

——*Proof—Question of law—Second Appeal—Adequacy or inadequacy of evidence—Interference by High Court.*

The question whether in any given instance the

evidence led to prove the existence of the attributes essential for a valid custom is adequate or inadequate proof of what the law requires is a question of law which can be discussed in Second Appeal. (1923) 26 O. C 386 ; (1918) 21 O. C. 334 and (1914) 17 O. C. 1, relied on. (1923) 26 O.C. 217 ; (1910) 13 O.C. 163 : (1915) 2 O. L. J. 388 ; and (1919) 6 O. L. J. 349, Ref. to. (*Dalal, J. C.*) RAZA HUSAIN KHAN *v.* SUBHANI. **90 I. C. 525 : 2 O. W. N. 838.**

———*Proof of — Thakurs Oudh—Exclusion of daughter and her issue.*

A long course of decisions in the Oudh Court has recognised the existence of a custom of the exclusion of a daughter and her issue amongst the Thakurs of Oudh. (*Dalal and Wazir Hasan, A. J. Cs.*) BAIJ NATH SINGH *v.* RAJJU SINGH. **2 O. W. N. 872 : 12 O. L. J. 571 : L. R. 6 Oudh 101 (Rev.).**

———*Proof—Immemorial user.*

The length of time during which user or enjoyment of rights alleged to exist by custom, that is to say, the existence of a custom must be shown, depends upon the circumstances of each case. General proof of the existence of a custom, as far back as living witnesses can remember, is treated in the absence of any sufficient rebutting evidence as proving the existence of the custom from time immemorial. Evidence of the existence of an alleged custom for a period of 20 years may be sufficient to warrant a Court in finding as to the existence of the custom from time immemorial. (*Dalal, J. C.*) MANNA LAL *v.* THAKUR JAI INDAR BAHADUR SINGH. **26 O. C. 386 : 76 I. C. 774 : A. I. R. 1924 Oudh 157.**

———*Proof—Variation — Evidence of—Judicial decisions.*

Although a custom must be sufficiently defined for its application to the facts of the particular case in which that custom is pleaded, so that it may be clear and undoubted, yet the party pleading the custom can be allowed to prove the same in a sense narrower than that stated in the pleadings. Decisions by courts on questions of custom afford valuable evidence as to the existence of the custom. 45 C. 450 ; 49 I. A. 119, Ref. A usage of recent date cannot be regarded as a custom. A custom must be proved by clear and unambiguous evidence to be ancient and invariable. In this respect there is no difference between a family custom and local custom. 14 M. I. A. 570 ; 45 C. 450, 461 ; 3 C. W. N. 21, Ref. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* THAKUR NIRMAN PRASAD SINGH. **9 O. L. J. 552 : A. I. R. 1923 Oudh 61.**

———*Proof—Time for which existence should be proved cannot be fixed.*

It would be very dangerous and improper to lay down any fixed time for which it is necessary to adduce evidence to show that a custom exists. (*Dawson Miller, C. J. and Mullick, J.*) RAMESHWAR SINGH *v.* WAIZUL HAQ. **6 P.L. T. 611 : 86 I. C. 948 : 3 Pat. L. R. 1 : A. I. R. 1925 Pat. 356.**

———*Proof—Custom cannot override law unless immemorial, reasonable, continuous, certain and proved by clear evidence. Mere opinion of leading members of caste is not enough—Particular instances are necessary —Instances of non-taking will not prove custom of exclusion of women from inheritance but it can be proved only by absence of instances of taking and instances of being disallowed to take.*

Custom which is put forward as superseding the ordinary law must be proved by clear and unambiguous evidence. In order to be valid it must be immemorial, reasonable, continuous, uninterrupted and certain. The oral evidence emanating from persons

who are highly interested in the proceedings isof very, very little value. Merely the opinion of leading members of the community or the caste as the case may be is not enough to prop an assertion of special custom. But instances must be established in which the custom in question has been proved fully. Per *Kennedy, J. C.* Any number of instances of women not inheriting will not be enough to prove that there is a custom requiring that they must be excluded from inheritance. In such a case it is necessary to prove that the women desired to take their share of inheritance and were refused because of custom. It must also be shown that there were no instances in which women did take the inheritance. The exclusion of females from inheritance cannot be established unless it is proved that some of the females asserted their rights as heirs and were denied their rights. To prove merely their passive acceptance of their position in cases where their male relations give them all that is necessary for their every day life and their not actively asserting their rights to any share in property is not enough. In order to establish the exclusion of females who are dependent on their male relations and subservient to their control from inheritance, it must be proved beyond a shadow of doubt that their exclusion by reason of custom having the force of law was known to them. (*Kennedy, J. C. and Raymond, A. J. C.*) USMAN *v.* ASAT. **78 I. C. 23 18 S. L.R. 149 : A. I. R. 1925 Sind 207.**

Succession.

———*Succession—Grant—Special rule of devolution —Burden of proof.*

On a question arising as regards the succession to certain paikan lands (lands granted for the maintenance of paiks in a temple) *held* that the burden of proving that the daughters were excluded from inheritance was on the person alleging such custom. (*Chatterjee and Pearson, JJ.*) SRIMAT DHARINI KALITANI *v.* SISURAM KALITA. **39 C. L. J. 100 : A. I. R. 1924 Cal. 530.**

———*Succession—Aroras of Amritsar—Principle of representation—Son of predeceased daughter cannot succeed along with daughters of the propositus.*

High Caste Hindus living in a town and working as traders are presumably governed by the Hindu Law and those who allege a special custom at variance with that law must prove it. Aroras of Amritsar town are ordinarily governed by the Hindu Law and among them a son of predeceased daughter does not succeed, along with the daughters of the propositus, to his mother's father's property by the principle of representation unless a special custom to that effect is proved. 4 Lah. 236 and 4 Lah. L. J. 336 Foll. (*Abdul Raoof and Jai Lal, JJ.*) MT. LORANDI *v.* MT. NIHAL DEVI. **6 Lah. 124 : 26 Punj L. R. 759 : A. I. R. 1925 Lah. 403.**

———*Succession—Mahomedan Law.*

If a custom as to succession is found to prevail among a sect of Mahomedans and is valid in other respects, the court will give effect to it although it differs from the rules laid down in the Koran. (*Kumaraswami Sastri, J.*) SIDDICK HAJEE ABOOBUCKER SAIT *v.* EBRAHIM HAJEE ABOOBUCKER SAIT. **70 I. C. 715 : 31 M. L. T. 183.**

———*Succession—Proof.*

Where a special custom is set up as regards succession, it must be proved by strong evidence. A custom can be inferred from analogous instances, when the similarity between the classes of cases justifies the inference. (*Oldfield and Hughes, JJ.*) KARUPPATI

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YAL K. P. RAMAN v. RAMULATHA PARUKKAL V. MUTHU. **13 L. W. 218 : 62 I. C. 534 : (1921) M. W. N. 233 : 40 M. L. J. 301.**

———*Succession —Wajib-ul-arz —Interpretation — Widow specifically made successor to husband—Restraint imposed on alienation—Widow was held to be owner of property and not merely entitled to usufruct.*

The material portion of the wajib-ul-arz ran as follows : "The widow is entitled to share of her husband." Then it narrated that she would be entitled to this share whether the husband was separate from his brother or joint. Then the wajib-ul-arz went on to state that the widow shall not have any right of transfer. Rules were then laid down as to the right of an owner of the property to adopt a son which right was not given to the widow. There was then the clause : "The share of the deceased will be obtained by that person who will be nearer in degree." In the presence of male issue the female was debarred from succession and finally a right of maintenance was given to wives not duly married and their children. *Held* : that as the widow was specially made a successor to her husband and it was not stated that she would only have the usufruct, the proper interpretation ought to be that she was made full owner and then certain restraints were put on her rights of ownership. While she was in possession and as owner nothing remained over to be vested in any other person. Succession to the husband's estate opened only after the widow's death and the relation of the husband who at the death of the widow was nearest in degree excluded others. (*Dalal, J. C.*) SHARFUDDIN *v.* NIAMAT ALI. **87 I. C. 8 : A. I. R. 1925 Oudh 688.**

———*Succession—Widow, holding under custom, life-estate without power of alienation-Succession opens only on widow's death and not on husband's death.*

Where a widow under a custom holds a life-estate without power of alienation it does not follow that upon the widow's death the estate would go not to the reversioners as they exist at the date of the widow's death but to the heirs of the husband (or their successors-in interest) as they existed at the date of the husband's death.A.I.R. 1922 P. C. 403 Foll. (*Dalal, J. C. and Ashworth, A. J. C.*) GHAFOOR KHAN *v.* MEHDI HASAN KHAN. **12 O. L. J. 253 : 87 I. C. 3 6 : A. I. R. 1925 Oudh 523.**

———*Succession--Belkhari Thakurs of Oudh—Custom of exclusion of daughters from inheritance applies to an ex-proprietary holding.*

The custom prevailing in the families of the Belkhari Thakurs of Oudh, by which daughters are excluded from inheritance applies also in respect of an ex-proprietary holding. (*Dalal, A. J. C.*) MT. RAM DALARI *v.* RAMPAL SINGH. **2 O. W. N. 455 : 12 O. L. J. 518 : A. I. R. 1925 Oudh 522.**

———*Succession—Mahomedan Law—Exclusion.*

Ordinarily in a Mahomedan family, where a custom of exclusion of females prevails, the entire female line is excluded and not only the female on account of her sex admitting her male line to succession. (*Dalal, J. C. and Neave, A. J. C.*) SYED MD. HASAN *v.* SYED ALI HAIDER. **12 O. L. J. 1 : 28 O. C. 8 : 85 I. C. 509 : A. I. R. 1925 Oudh 337.**

———*Succession — Proof by inference —Custom regulating succession by sapindas to a male's property, whether can be held to regulate succession to stridhan property of a widow—Custom, incidents of—Instances —Family custom when admissible in proof of a tribal custom—Bachgoti thakurs.*

Per *Raza, J* :—The custom of brothers and nephew of a deceased man succeeding together does not lead to a necessary inference that a custom exists to this

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effect also that on the death of a childless widow her and her husband's properties are inherited according to their respective stocks by the persons descending from the same ancestor as her husband, but without any regard to the nearness and remoteness of the persons taking the properties. The latter custom is a different custom and is strictly to be proved. If a party relies upon the special custom of a family to take the succession out of the ordinary Hindu Law, such custom must be proved to be ancient, continuous certain and reasonable and being in derogation of the general rule of law must be construed strictly. A custom must be satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom. One instance or even four modern instances are not sufficient to prove a custom. (1905) 8 O. C. 94 (100) referred to.

Per *Ashworth, J.*—Since the *stridhan* of an issueless woman devolves first on her husband and then on his *sapindas* a custom regulating succession by *sapindas* to a male's property must also be held to regulate succession by the *sapindas* of the husband to the *stridhan* property of his widow. (1908) 11 O. C. 1 and (1913) 17 O. C. 1 distinguished. A custom must be unequivocally stated and proved but it does not follow that it cannot be proved by inference. Inference is one of the methods of proof and in the case of custom there is no reason to reject a clearly logical inference against which no consideration prevails. (*Ashworth and Raza, JJ.*) RAMPAL SINGH *v.* BAJRANG SIN **3 O. W. N 73.**

———*Succession—Estate not absolutely owned.*

It is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever exist. 36 Cal. 590 (598) Foll. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* THAKUR NIRMAN PRASAD SINGH. **9 O. L. J. 552 : A. I. R. 1923 Oudh 61.**

———*Succession—Exclusion from—Exclusion of daughters—Scope of the rule.*

A custom of exclusion of daughters and their issue from inheriting their father's or maternal grandfather's property does not necessarily lead to the inference that they are excluded from inheriting to their mother's or maternal grandmother's property. (*Wazir Hasan, A. J. C.*) BIJAI BAHADUR SINGH *v.* MATHURA SINGH. **9 O. L. J. 327 : 4 U. P. L. R. (O. C.) 66 : 25 O. C. 345 : A. I. R. 1922 Oudh 278.**

———*Succession—Exclusion—Female heirs—Daughters—Sisters and sisters' sons.*

Where under a family custom daughters are excluded from inheritance, there is a presumption that sisters and sisters' sons are also excluded from the category of heirs. So held in the case of a family of Saraura in Oudh. (*Dalal and Wazir Hasan, A.J.Cs.*) DILDAR HUSAIN *v.* FATEH BAHADUR. **8 O. L. J. 554 : A. I. R. 1922 Oudh 105.**

———*Succession — Sisters —Exclusion—Wajib-ul-arz.*

Held, on a construction of the wajib-ul-arz in the case that a custom was established whereby a brother excluded his sister and step-sister from succession to property. (*Daniels, J. C. and Dalal, A. J. C.*) MUMTAZUNNISSA BEGAM *v.* WAZIR ALI. **65 I. C. 308 : 8 O. L. J. 569.**

———*Succession—Muhammadan Law—Widow getting possession for life.*

A custom, if proved, supersedes the general law and all customs must be proved by clear and unambiguous evidence. A custom exists among certain Muhammadans, whereby on the death of a proprietor without

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issue, his widow gets possession of the estate during her lifetime and succession by the heirs opens only on her death. (*Lindsay, J. C.*) FARZAND ALI *v.* KARIM BAKSH. **61 I. C. 964 : 8 O. L. J. 138.**

Usage.

———*Usage—Evidence of, when admissible.*

In order to import a commercial usage into a contract, the usage must be so well-known and acquiesced in that it may reasonably be presumed to have been an ingredient tacitly imported by parties into their contract. Though evidence of known usage is receivable to supplement the provisions of the written agreement on the hypothesis that the contract is in truth partly expressed and in writing and partly implied or understood or unwritten, the evidence cannot be admitted to contradict the positive stipulations in the written contract. (*Mookerjee and Rankin, JJ.*) CHANDANMULL BENGANEY *v.* NATIONAL BANK OF INDIA, LTD. **51 Cal. 43 : 79 I.C. 757 : A. I. R. 1924 Cal. 552.**

———*Usage—Shamilat—Exclusive user by one co-sharer—Injunction.*

It is a well-established custom that no individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of the partition and the plaintiffs who came into Court to restrain such individual without any delay are not obliged to show material and substantial injury. 1 Lah. 249 Foll. (*Campbell, J.*) BHISHMA *v.* SAPURAN SINGH. **6 Lah. L. J. 548 : 84 I. C. 917 : A. I. R. 1925 Lah. 287.**

———*Usage—Difference.*

Usage should never be used as synonym for custom. It has two distinct legitimate meanings but neither of them should be confused with custom. It is used to denote what is done by people uniformly and consistently. Used in this sense usage has not the force of law. It would only obtain the force of law when it is proved to be reasonable, invariable, ancient, etc., in which case it becomes what is known as custom. It is also used to denote what is done uniformly and has been so done in a certain locality or by a certain trade or profession, etc., for a period sufficient to make it probable that people in their contract and in their contractual relationships adopt it as an implied term or condition. Where this is the case, a court which has to put a construction upon a contract, the trade or local usage, (here again usage has not the force of law nor will it be sanctioned by the courts if it is contrary to positive law, where a well established recent usage is proved and the proof is carried back for a period which may be regarded as covering the period of living memory), a presumption is thereby raised that this usage is in reality the exercise of an ancient and valid custom. If there is no rebutting evidence a decision in favour of the custom may be based on this evidence alone. If the presumption raised by recent usage is rebutted by proof that an ancient custom could not have come into existence then the usage fails to possess any legal effect. A family custom is not likely to be as the Hindu or Mahomedan Law it supersedes. There is no sound authority for holding that custom in India need not be proved to be ancient. Special usages modifying the ordinary law of succession should be established by clear and unambiguous evidence to be ancient and invariable. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* THAKUR NIRMAN PRASAD SINGH. **9 O. L. J. 552 : A. I. R. 1923 Oudh 61.**

CUSTOM (PUNJAB)—Adoption—Eligibility.

Validity.

———*Validity—Question whether tenant in village can alienate land and house involves question of title.*

A custom as to whether tenants in a village can alienate land and house involves a title and no question of the reasonableness or unreasonableness of the custom can arise. 19 A. L. J. 104, Foll. (*Mukerjee, J.*) RAFIQ *v.* SHANKAR LAL. **87 I. C. 749 : L. R. 6 A. 109 (Rev.) : A. I. R. 1925 All. 718.**

———*Validity—Right of privacy.*

The existence of the right of privacy does not depend on the caste or creed of the person owning it or on the fact that it was used by the ladies. It is a custom of country and has, as such, to be protected. 10 All. 358 and 13 A. L. J. R. 361 Ref. (*Gokul Prasad, J.*) BOHRA TARA CHAND *v.* MUST. RAYAZI BEGUM. **A.I.R. 1923 All. 404 (1).**

———*Validity—Reasonableness—Right to pass over land to worship tree or idol.*

Whether a particular custom is reasonable or not must be ascertained at the time of its inception. A custom setting up a right to pass over a land to worship a tree and idol, is not unreasonable or invalid. (*Das and Adami, JJ.*) MANGREE MIAN *v.* BEHARI LAL. **6 P. L. J. 11 : 61 I. C. 132 : 2 P. L. T. 160.**

———*Wajib-ul-arz—Ambiguous statement—Evidentiary value.*

A custom is not established by an ambiguous statement of it in a Wajib-ul-arz. But when it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a Wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. (*Sir John Edge.*) BALGOBIND *v.* BADRI PRASAD. **29 C. W. N. 465 : A. I. R. 1923 P.C. 70 (P. C.).**

CUSTOM (PUNJAB). *See also* RIWAJ-I-AM.

Adoption.
Alienation.
Applicability.
Gift. *See also* ALIENATION.
Marriage.
Partition.
Succession.
Village community.
Widow.
Adoption.
Ceremonies.
Eligibility.
Evidence of.
Rights of Adoptee.
Right to Adopt.
Right to Contest.

Adoption—Ceremonies.

———*Adoption—Ceremonies for—Rights of son to proceed to collaterals.*

In the Punjab no specific ceremonies or formalities are provided under the customary law for adoption. The validity will depend on whether it was intended that the adopted boy should be altogether taken out of his natural family and introduced into the adoptive family as son. If there was a complete adoption the right of collateral succession will be presumed till the contrary is shown. (*Abdul Raoof and Martineau, JJ.*) WARYAMAN *v.* KANSHI RAM. **3 Lah. 17 : A. I. R. 1922 Lah. 105.**

Adoption—Eligibility.

———*Adoption—Eligibility — Hindu Jats of Chunni Khurd—Adoption of daughter's son is not*

CUSTOM (PUNJAB)—Adoption—Eligibility.

valid in the presence of collaterals of fifth degree.

An adoption of a daughter's son, by a sonless Hindu Jat proprietor of the village Chunni Khurd, tahsil Kharer, district Ambala, is not valid by custom, in the presence of collaterals of the fifth degree. (*Campbell and Zafar Ali, JJ.*) HARI SINGH *v.* RATTAN SINGH. **5 Lah. 519 : 85 I. C. 412 : A. I. R. 1925 Lah. 243.**

———*Adoption—Eligibility.*

Adoption of a sister's son in the presence of distant agnates of the ninth degree is valid by custom among jats of village *Lakhraya*, Tahsil Jhajjor in the Rohtak District. (*Harrison and Campbell, JJ.*) HIRA *v.* SHIBBU. **6 Lah. L. J. 442 : 6 Lah. 52 : 84 I. C. 1 : A. I. R. 1925 Lah. 163.**

———*Adoption—Eligibility—Daughter's son.*

An adoption of the daughter's son is valid although the theory no doubt exists that to qualify for adoption a man must be the son of a woman, whom the adoptive father could have married. In this part of the Punjab, which adjoins the United Provinces the nomination of an heir on lines resembling the Kritrima Hindu adoption is unknown ; that is to say even amongst people governed by agricultural custom the adoption that takes place is the full Hindu adoption by which a man is transplanted from his natural family to his new family and is entirely cut off from his past. (*Harrison and Zafar Ali, JJ.*) KIRPA *v.* RABI DATT. **5 Lah. 134 : 78 I. C. 74 : 6 Lah. L. J. 35 · A. I. R. 1924 Lah. 457.**

———*Adoption— Eligibility—Rai Brahmins of Mohra Bhattan—Adoption of uncle's daughter's son.*

In the Punjab, the Hindu Law of adoption is in many respects modified by custom. Among the Rai Brahmins of *Mohra Bhattan Tahsil*, the adoption of uncle's daughter's son is recognized as valid. (*Martineau and Moti Sagar, JJ.*) BASHU RAM *v.* PIARA CHAND. **4 Lah. 434 75 I. C. 938 : A. I. R. 1924 Lah. 365**

———*Adoption — Eligibility — Brother's son—Punjab.*

A sonless proprietor has power to adopt his brother's son under the customary law governing the Mahomedan Bhatti Rajput Jats of Dasuya Tahsil in the Hoshiarpur district. (*Harrison, J.*) AMIR *v.* WAZIR. **26 P. W. R. 1923 : A. I. R. 1924 Lah. 192.**

———*Adoption—Eligibility—Sister's son—Hindu Jats—Hoshiarpur District.*

Having regard to the fact that the *riwaj-i-am* of the Hoshiarpur District prepared in 1884 and 1915 declared that the adoption of a sister's son had the sanction of custom and that the entry was supported by instances, the Court held that the burden of proving that such an adoption was not valid lay on the plaintiff and that they had failed to discharge the same. 50 P. R. 1893 ; 84 P. R. 1895 ; 94 P. L. R. 1911 ; 84 P. R. 1917 ; 45 P. R. 1917, Foll. (*Scott-Smith and Zafar Ali, JJ.*) NAMAN *v.* BATAN SINGH. **4 Lah. 102 : 5 Lah. L. J. 203 : A. I. R. 1924 Lah. 37.**

———*Adoption— Eligibility — Daughter's son—Dhanoi Jats.*

Among Dhanoi Jats of Tahsil Khar ar the adoption of a daughter's son is valid. 68 P R. 1888, Foll. ; 50 P. R. 1893 (F. B.) Ref. (*Le Rossignol and Campbell, JJ.*) GURBAKHSH SINGH *v.* MT. PRATAPO. **2 Lah. 346 : A. I. R. 1922 Lah. 234.**

———*Adoption—Eligibility—Brother's grandson—Naru Rajputs of Hoshiarpur.*

Under the customary law prevalent among Naru Rajputs of the Hoshiarpur Tahsil, the adoption of a brother's grandson is valid, the term *baradarzada qariti* being wide enough to include a brother's grandson. (*Chevis and Campbell, JJ.*) RAHMAT KHAN *v.* NAZIR AHMAD. **67 I. C. 374 : 57 P. L. R. 1922.**

CUSTOM (PUNJAB)—Adoption—Rights of adoptee.

———*Adoption—Eligibility—Daughter's son.*

A Manj Rajput of the Nakodar Tahsil in Jullundur district can adopt his daughter's son who is also an agnate. (*Leslie Jones and Moti Sagar, JJ.*) SAMAND KHAN *v.* KHAWAJE KHAN. **64 I. C. 17 : 2 Lah. 193.**

Adoption Evidence of.

———*Adoption—Evidence of.*

In a case where the power of customary adoption by a sonless proprietor is not disputed all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention is the execution and registration of a deed of adoption coupled with a clear declaration in court and subsequent treatment as adopted son. The proof of such subsequent treatment cannot, however, be reasonably demanded in a case where very soon after the execution of the deed of adoption the reversioners of the adoptive father sue for a declaration that the adoption did not in fact take place. (*Scott-Smith and Fforde, JJ.*) MEHAN SINGH *v.* KEHAR SINGH. **6 Lah. L. J. 39 : 75 I. C. 317 : A. I. R. 1923 Lah. 523.**

———*Adoption—Evidence of*—Onus—*Jats of Gurgaon District.*

The *onus* of establishing an adoption is on the person who claims to establish his status as an adopted son. An adoption among the Jats of Gurgaon District is presumed to be a formal one. Customary adoption is unknown in the territory forming part of old Delhi (*Shadi Lal, C. J. and Wilberforce, J.*) GIASU *v.* HAR DIAL. **59 I. C. 82 : 6 P. W. R. 1921**

Adoption—Rights of Adoptee.

———*Adoption—Rights of adoptee in natural family.*

The ordinary rule under the customary law is that an adopted son does not lose the right of succeeding in his natural family. The mere appointment of an heir would not have the effect of depriving the appointed heir of his right to succeed in the natural family. 16 I. C. 712, Foll. (*Abdul Raoof, J.*) NUR DIN *v.* ROSHAN DIN. **A. I. R. 1924 Lah. 300.**

———*Adoption—Rights of adoptee—Muhammadan Rajputs of Hoshiarpur Tahsil—Rights of appointee's heirs.*

In the absence of a special custom among the Jats of Hoshiarpur Tahsil that, in the presence of descendants of the appointee's (adopted) son's natural father, the descendants of the appointee are excluded from inheritance in his natural father's family simply because he has succeeded to the property of his adoptive father, it must be held that the tie of kinship with the natural family was not dissolved and the fiction of blood relationship with the members of the new family has no application to the appointed (adopted) heir and that the descendants of an adopted son can succeed to the estate of the adopted son's natural family, in the presence of the defendants in the natural family. (*Moti Sagar, J.*) ISHER *v.* HUKUM SINGH. **A. I. R. 1923 Lah. 485.**

———*Adoption—Rights of adoptee — Succession—*Onus.

A valid custom exists among the Ross of Sutana in the Panipat Tahsil of the Karnal District by which a widow can adopt a son and that son can succeed collaterally. The *onus* is upon the adoptee to prove the custom. (*Broadway, J.*) KANKAYA *v.* NAURANG. **A. I. R. 1923 Lah. 374.**

CUSTOM (PUNJAB)—Adoption—Right to adopt

Adoption—Right to adopt.

*——Adoption—Right to adopt—Recognised by custom in Punjab—*Onus *of proving exception in particular communities is on party alleging the exception.*

The primary *onus* of proving that no custom of adoption exists amongst the Hindu Rajputs of the Saloharghot or Mauza Saloh in the Una Tahsil of the Hoshiarpur District is on the party setting up the custom. This is because the adoption of an agnate is allowed by Hindu Law as well as by the custom that obtains generally among the Hindus of the Punjab. A statement made in the *Riwaj-i-am*, unsupported by instances, contrary to general custom, inconsistent with previous *Riwaj-i-am*, and inconsistent with another answer in the same *Riwaj-i-am* in which the statement was made, was held to be of no value and to have no effect in shifting the *onus* of proof to the other party. 84 P. R. 1917 ; 1922 Lah. 32 ; 1923 Lah. 401, Ref to. (*Martineau and Moti Sagar, JJ.*) POLPO *v.* NANWARDHAN. **5 Lah. 409 : 84 I. C. 507 : A. I. R. 1925 Lah. 206.**

——Adoption— Right to adopt— Proof—Granddaughter's son.

The burden of proving the validity of an adoption of a non agnate like a son's daughter's son when near agnates are existing, is on the person setting up the adoption. There is no custom validating such an adoption among the Jats of Lehli Khurd, in the Hoshiarpur District. (*Shadi Lal, C. J. and Lumsden, J.*) BURSINGH *v.* DALIP SINGH. **A. I. R. 1924 Lah. 532.**

——Adoption—Right to adopt — Riwaj-i-am—*Adoption of a stranger.*

The burden of proof is thrown by an entry in the *Riwaj i-am* that *Shastras* are followed in the matter of adoption on the party alleging that an adoption of a stranger with reference to a collateral is invalid as according to the Hindu Law it is quite valid. A custom making the adoption invalid is extremely unlikely. (*Leslie Jones and Broadway, JJ.*) GANESH DAS *v.* KANSHI BAI. **3 Lah. L. J. 461.**

Adoption—Right to contest.

*——Adoption—Right to contest—*Onus *of proof.*

A party asserting that land is ancestral and therefore an adoption is bad is required to prove his assertion and conjectures cannot be accepted as a substitute for proof. (*Broadway and Abdul Qadir, JJ.*) MUNSHA SINGH *v.* UTTAM SINGH. **4 Lah. L. J. 31 : 4 U. P. L. R. 18 : A. I. R. 1922 Lah. 65.**

——Alienation.

Ancestral property.
Burden of proof.
Exchange.
Father's power.
Gift.
Law governing.
Necessity.
Proof.
Reversioner.
Right to contest.
Widow.
Will.

Alienation—Ancestral Property.

——Alienation— Ancestral property — Property allotted to a family by Settlement Officer settling a dispute does not become "ancestral" in the family.

The plaintiffs had the original title by long occupation ; the defendants had ousted them to a considerable extent and had undertaken some liabilities in respect of the payment of revenue, etc. The Settlement Officer, therefore, came to the conclusion that it would be equitable to settle half the lands with the

CUSTOM (PUNJAB)—Alienation—Ancestral Property.

plaintiffs in the proceedings, and give the other half to the defendants. *Held*, that the property did not become "ancestral" property in the respective families. (*Mr. Ameer Ali.*) AHMAD KHAN *v.* CHANNI BIBI. **6 Lah. 502 : 3 O. W. N. 93 : 52 I. A. 379 : L. R. 6 P. C. 190 : A. I. R. 1925 P. C. 267.**

——Alienation—Ancestral property—Land is not ancestral unless got by descent only.

If a person purchases land from a collateral, notwithstanding that the land is ancestral in the hands of the collateral vendor, it ceases to be such in the hands of the vendee. The reason for this is that land to be ancestral must come into the hands of the owner by descent or merely by reason of his connection with the common ancestor. (*Broadway, J.*) GHANIA *v.* PHUMAN SINGH. **79 I. C. 170 : A. I. R. 1925 Lah. 245.**

——Alienation—Ancestral property.

Tiwanas of Shahpur District have an unrestricted right of disposing of their ancestral property. (*Abdul Raoof and Moti Sagar, JJ.*) SHER MUHAMMAD KHAN *v.* DOST MUHAMMAD KHAN. **78 I. C. 451 : A. I. R. 1925 Lah. 231.**

——Alienation—Ancestral property.

Custom forbids a Rajput of Guna Chaur in the Nawashahr Tahsil of the Jullundur District to bequeath ancestral land in favour of a distant collateral in the presence of nearer collaterals. (*Martineau and Moti Sagar, JJ.*) KYAS MUHAMMAD *v.* BANNA. **78 I. C. 183 : A. I. R. 1925 Lah. 110.**

——Alienation—Ancestral property—Property inherited from maternal grandfather.

Land inherited through a daughter is regarded by custom, as ancestral property in the hands of the daughter's son so that his sons may control his disposition of that property. 32 P. R. 1895, Foll. *Rossignol, J.*—The principle underlying the Punjab custom of agnatic succession is the retention of the land first in the family and then in the tribe. In the case of endogamous tribes, the postulates are satisfied whether the succession is through a male or female for in either case the land remains if not in the family at any rate, within the tribe, and it is especially among such tribes that a daughter is allowed to succeed as an heir even in the presence of agnates. In such cases a daughter and her heirs cannot be conceded wider powers of disposal than lineal heirs in the male line. (*Shadi Lal, C. J., Scott-Smith, Le Rossignol, Broadway and Abdul Raoof, JJ.*) MT. ATTAR KUAR *v.* NIKKOO. **6 Lah. L. J. 216 : 5 Lah. 356 : 80 I. C. 534 : A. I. R. 1924 Lah. 538 (F. B.).**

——Alienation—Ancestral property—Presumption—Self-acquisition to be proved.

The evidence in a case showed that the village was originally founded by the common ancestor of the parties. *Held*, unless it could be shown the lands went out of the hands of the family and again later acquired by one of the claimants or his predecessor-in-title, it must be presumed to be ancestral land. (*Abdul Raoof, J.*) MAULA DAD *v.* ALI. **5 Lah. L. J. 449 : 76 I. C. 147 : A. I. R. 1924 Lah. 263 (1).**

——Alienation—Ancestral property—Sonless proprietor in Rohtak.

A sonless proprietor of the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation in respect of ancestral land. (*Martineau and Moti Sagar, JJ.*) KALA *v.* MAM CHAND. **4 Lah. 282 : 5 Lah. L. J. 404 : A. I. R. 1924 Lah. 102.**

——Alienation—Ancestral property.

Sale by non-proprietor of standing house, *i.e.*, materials of house is ordinarily allowed by custom,

CUSTOM (PUNJAB)—Alienation—Ancestral Property.

(*Martineau, J.*) SARDAR DIN *v.* MT. AJAH BIBI. **A. I. R. 1923 Lah. 394 (2).**

——*Alienation—Ancestral property—Son's right.*

If a father *bona fide* and without collusion or intention to injure the reversioners gives consent to an alienation by a female in possession of property, such consent is binding upon his son in a suit for a declaration that the alienation shall not affect his reversionary rights. But in the case of non-ancestral land to which his father is heir, he has no such right. (*Scott-Smith and Zafar Ali, JJ.*) MT. JASWANT KUAR *v.* WASAWA SINGH. **5 Lah. L. J. 347 : A. I. R. 1923 Lah. 353.**

——*Alienation — Ancestral property — Property acquired by pre-emption.*

Property acquired by pre-emption is not ancestral property in the hands of the acquirer even though the property had at one time belonged to an ancestor of the acquirer. 59 P. R. 1909, Foll. (*Martineau, J.*) PHUI *v.* DEVATIA. **A. I. R. 1923 Lah. 210.**

——*Alienation—Ancestral property—Sonless proprietor.*

In respect of alienation of ancestral land in the Rohtak Tahsil, Rohtak District, a sonless proprietor has unrestricted powers. 45 P. R. 1917, Ref. ; 73 P. R. 1895, Dist. (*Campbell, J.*) UGGAR SAIN *v.* TELU. **4 Lah. 113 : A. I. R. 1923 Lah. 193.**

——*Alienation—Ancestral property—Mortgage by agriculturist—Money borrowed for trade.*

Where the mortgage was for trading purposes, *held* : this would not justify an alienation of ancestral land by an agriculturist. The previous mortgage (the money on which had also been borrowed for trading purposes) cannot be considered as an antecedent debt because it was in favour of the same mortgagee and was effected only a few days before the mortgage in dispute and the two mortgages formed practically one transaction. 19 P. R. 1915, Foll. (*Broadway and Brasher, JJ.*) MD. USMAN KHAN *v.* ATA MOHI-UD-DIN. **5 Lah. L. J. 304 : A. I. R. 1923 Lah. 142.**

——*Alienation—Ancestral property—Purchase by a co-sharer if self-acquired property.*

Where a person purchased from his second cousin his share of ancestral property, *held* : the property thus purchased becomes self-acquired property of the purchaser. (*Broadway and Abdul Qadir, JJ.*) GURDIT SINGH *v.* MT. ISHAR KUAR. **3 L. 257 : A. I. R. 1922 Lah. 392.**

——*Alienation—Ancestral property — Proprietor and non-proprietor, rights of.*

Under the general customary law of the Punjab, non-proprietors have no power of alienation of site in villages and there is no special custom to the contrary in mauza khanan in Jullundur District. The acquiescence of some of the proprietors of the alienations of sites of houses does not imply an abandonment of their right to the site. 13 P. R. 1889; 50 P. R. 1889; 85 P. R. 1882, Foll. The mere fact that there are number of houses, shops and wells in a village with a population of three thousand inhabitants and that it is also a place full of artisans whose wares were sold outside and there were Khatri Brahmins and other non-agricultural tribes as part of the population do not constitute the village into a town. (*Chevis and Campbell, JJ.*) RAM LOK *v.* BHAGWAN SINGH. **13 P. W. R. 1922 : A. I. R. 1922 Lah. 158.**

——*Alienation—Ancestral property.*

Where a Government lessee died without fulfilling certain conditions of his lease but subsequently the Government decided to grant and granted proprietary rights in the land to the son of the deceased. *Held*, that the land was not ancestral in the hands of the son

CUSTOM (PUNJAB)—Alienation—Gift.

(*Leslie Jones and Moti Sagar, JJ.*) HARJI *v.* CHANNAN MAL. **63 I.C. 908 : 2 Lah. 195.**

Alienation—Burden of Proof.

——*Alienation—Burden of proof—Vendee must prove necessity for debts due to him and other persons where he knows alienor is addicted to drinking and is a spendthrift.*

Where the alienor is a man of bad character addicted to *sulfa*, opium and drinking and the vendee lives in the same village, it is the duty of the vendee to prove the debts due to him as also the debts due to other persons. (*Abdul Raoof, J.*) NATHU RAM *v.* KARTA RAM. **6 L. L. J. 462 : 83 I. C. 1053 : A. I. R. 1925 Lah. 132 (1).**

——*Alienation—Burden of proof—Even when alienation is challenged by reversioners in the seventh degree burden is on alienee.*

The burden is on the alienee to justify the alienation of ancestral land even when the persons challenging it are collaterals in the seventh degree. There is no presumption against the *locus standi* of agnates beyond a definite degree of relationship to challenge an alienation. 34 P. R. 1891 ; 118 P. R. 189 ; 130 P. R. 1893 ; 75 P. R. 1898 ; 35 P. R. 1906, Foll. (*Martineau and Moti Sagar, JJ.*) KYAS MUHAMMAD *v.* BANNA. **78 I. C. 183 : A. I. R. 1925 Lah. 110.**

——*Alienation—Burden of proof—Gakhars of Malpur—Gift by soneless proprietor*—Riwaj-i-am.

Where the *Riwaj-i-am* contains an entry that among gakhars a sonless proprietor can alienate ancestral property as he liked, the *onus* is on the person who contests the validity of such a gift to prove it *Held*, also on the other evidence in the case, such a right in the sonless proprietor was in accordance with the custom of the land. (*Martineau and Harrison, JJ.*) MT. SARDAR KHANAM *v.* AMIR ZAMAN KHAN. **3 Lah. 392 : A. I. R. 1923 Lah. 125.**

——*Alienation—Collateral—Right to contest.*

A collateral whose chance of succession is only after the lines of six nearer collaterals have become extinct cannot contest the validity of an alienation. (*Martineau and Moti Sagar, JJ.*) MOHAMMAD ALI *v.* GULAB. **89 I.C. 403 : A. I. R. 1925 Lah. 639 (2).**

Alienation—Exchange.

——*Alienation—Exchange — Suit to set aside—Burden of proof.*

Where ancestral land is given in exchange for other land by a male proprietor and the transaction is challenged by a reversioner, though the initial *onus* is on the transferee to show that the transaction was a prudent one the *onus* is easily discharged if the surrounding circumstances show that the transaction was beneficial. (*Shadi Lal, C. J. and Brasher, J.*) NAGINA SINGH *v.* MOTA SINGH. **A. I. R. 1924 Lah. 335 (2).**

Alienation—Father's Power.

——*Alienation—Father's power.*

A Court cannot assume that a dependent son is owner of the household property which belongs to the father, the head of the house. The old age of the father cannot deprive him of his property even though he may have acquired it through the labours of his son who is dependent on him and who owns no separate property. (*Shadi Lal, C. J.*) SANTA SINGH *v.* EMPEROR. **A. I. R. 1924 Lah. 617.**

Alienation—Gift.

——*Alienation—Gift—Kahuts of Tahsil Chakwal Jhelum District—Gift of ancestral land to sister's son does not affect reversionary rights of collaterals in third degree.*

A gift by a Kahut of tahsil Chakwal in the Jhelum District of the whole of his ancestral land to his sister's son who is related to the donor also on the male

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side in the fourth degree, does not affect the reversionary rights of collaterals in the third degree. (*Le Rossignol and Fforde, JJ.*) FATEH *v.* ALAYAR.
6 Lah. 352 : A. I. R. 1925 Lah. 530.

———*Alienation—Gift—Jats living by cultivation—Gift of ancestral land to collateral is not valid unless proved to be valid by custom.*

Among Jats who have been living for generations by cultivation, a gift of ancestral land to a collateral is not valid unless it is shown to be valid by custom. (*Martineau, J.*) SARDAR KHAN *v.* HIDAYAT.
7 L. L. J. 234 : A. I. R. 1925 Lah. 451.

———*Alienation—Gift—Gift to daughter by sonless Gujar in Hoshiarpur Tahsil is valid.*

A gift of a portion of ancestral property by a sonless Gujar of Hoshiarpur Tahsil in favour of his daughter in return for services rendered is permitted by custom. (*Shadi Lal, C.J. and Malan, J.*) UMRA *v.* MT. RAJI.
5 Lah. 473 : 6 L. L. J 601 : A. I. R. 1925 Lah. 222 (2).

———*Alienation—Gift — Hoshiarpur District—Among* Mutti *Jats a gift of occupancy rights to a remoter agnate is valid.*

Among *Mutti* Jats of the Hoshiarpur District, a gift of occupancy rights is valid by custom. (*Martineau, J.*) POHLO *v.* DALIP SINGH. **78 I. C. 995 : A. I. R. 1925 Lah. 179.**

———*Alienation—Gift—Awans of Talgang Tahsil—Power of disposal over ancestral property by gift or will.*

Ancestral property can be gifted without any restriction by sonless Awans of the Talagang Tahsil: consequently it can also be willed away. Such a presumption was, however, rebutted by an entry in the *riwaj-i-am* of 1901. (*Shadi Lal, C. J. and Le Rossignol, J.*) MT. RAGHI *v.* BAZA. **5 Lah. 34 : A. I. R. 1924 Lah. 452.**

———*Alienation—Gift—Gift to two donees without defining shares—Tenants-in common.*

Among the Mahomedan agriculturists of the Punjab a gift in favour of two or more persons without defining their shares creates a tenancy-in-common and not a joint tenancy among the donees without benefit of survivorship. (*Abdul Qadir, J.*) MUSA *v.* GUL MAHOMED. **A. I. R. 1924 Lah. 289.**

——— *Alienation—Gift—Sister and collaterels—Jats of Issan mahar.*

It is open to a male sonless proprietor among the Makwal Jats of Issan mahar Tahsil and District Muzaffargarh to make a gift of the property to a sister or sister's son in the presence of collaterals. (*Broadway, J.*) HAYAT *v.* ALI MAHOMED.
A. I. R. 1924 Lah. 195.

———*Alienation—Gift—Sonless proprietor—Ancestral land—Khulshra Jats—Hoshiarpur Dt.*

Among the Khulshra Jats, Tahsil Garhshanker, Hoshiarpur Dt there is no custom by which a sonless proprietor could give away his ancestral land to his paternal aunt's grandson in the presence of collaterals. (*Scott-Smith and Abdul Raoof, JJ.*) NATHU *v.* BANNA. **3 Lah. 344 : A. I. R. 1922 Lah. 426.**

———*Alienation—Gift—Family arrangement — Effect of.*

Where as a result of a family arrangement effected with a sole object of preventing disputes between the sons and grandsons of a proprietor, certain properties are allotted to them, presumption could not be that the latter were ultimately intended to get more than the share they would be entitled to by succession according to custom. (*Leslie Jones and Wilberforce, JJ.*) AHMAD DIN *v.* MUHAMMAD TUFAIL.
4 Lah. L. J. 376.

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———*Alienation—Gift—*Aroras *of Taunsa.*

A sweeping provision in the *riwaj-i-am* that a gift cannot be made in favour of a daughter when there are near collaterals relating to all the Hindus was not intended to govern the Hindus of high caste or trading classes residing in towns. Plffs. had not succeeded in proving that the *aroras* of Taunsa are governed in the matter of alienation by agricultural custom. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND *v.* ROSHINI BAI. **68 I. C. 92 : 2 L. L. J. 178.**

———*Alienation—Gift—Daughter's sons—Hindu Jats of Mauza Liddar Tahsil and District Jullundur.*

Held, that it was not proved in the case that by custom among Hindu Jats of Mauza Liddar Tahsil and District Jullundur the gift of ancestral property to daughter's sons is valid. 50 P.R. 1893: 94 P. R. 1913; 1 Lah. 15 Ref. (*Leslie Jones and Abdul Raoof, JJ.*) KHUSHAL SINGH *v.* KANDA. **5 Lah. L. J. 63 : 56 I. C. 931 : 2 U. P. L. R. (L.) 110.**

Alienation—Law Governing.

———*Alienation—Law Governing—Remote collateral's right to contest, when there are near collaterals, is only speculative.*

Where a remote collateral has only a speculative and remote chance to succeed to the estate of an alienor only after the lines of other several near collaterals become extinct the former's suit to contest the alienation is not maintainable. (*Martineau and Moti Sagar, JJ.*) MAHOMED ALI *v.* GULAB.
89 I. C 403 : A. I. R. 1925 Lah. 639 (2).

———*Alienation—Law Governing—Tarkhans of Hassan Abdal, District Attock are not governed by custom.*

Tarkhans of Hassan Abdal, Attock District are not governed in matters of alienation by custom but are governed by their personal law. (*Abdul Raoof and Fforde, JJ.*) LACHMI NARAIN *v.* MAHAMMAD JI.
6 Lah. 294 : A I. R. 1925 Lah. 525.

———*Alienation—Law Governing — Pre-emption custom in the town does not necessarily exist in quarters outside the town.*

There is no custom of pre-emption in a business quarter of recent growth which lies outside the walls of the town of Gujranwala. Evidence of its existence in certain parts of the old town is not sufficient to show that the custom exists also in the particular quarter. 87 P. R. 1890; 70 P. R. 1898; 84 P. R. 1910, Foll. (*Abdul Raoof and Martineau, JJ.*) GOPAL SINGH *v.* MOOL RAJ. **5 Lah. 312 : 84 I. C. 583 : 6 L. L. J. 588 : A. I. R. 1924 Lah. 557.**

———*Alienation — Law Governing—*Lohars *of Jagadhari—Powers of male proprietors.*

The male proprietors among the *Lohars* of Jagadhari are not governed by agricultural custom and, in the absence of proof to the contrary, have unlimited powers of alienation. (*Martineau, J.*) GHULAM SABIR *v.* TABA HUSSAIN. **A. I. R. 1924 Lah. 552.**

———*Alienation—Law Governing—Brahmins of Gokalgarh—Ambala District—Hindu Law.*

The Brahmans of Gokalgarh in the Ambala District are not governed in the matter of alienation by agricultural custom but by Hindu Law. (*Shadi Lal, C. J. and Zafar Ali, J.*) SALIG RAM *v.* BADHAWA.
4 Lah. 254 : 5 Lah. L. J. 471 : A. I. R. 1923 Lah. 501.

———*Alienation — Law Governing — Residential houses, transfer of.*

The custom as to transfer of tenancy without the consent of landlord was held to be not proved in this case with the following observation. There is a tendency in this province to set up in villages, customs which are subversive of the rights of property, as, for

example, in the present case a custom which, in fact takes from the zamindar the right to the site of a tenant's holding on the determination of the tenancy. The claim of a tenant to transfer a right of residence really amounts to this, for it means that the tenant, may, by assignment, transfer to a stranger a right of residence without the consent of the zamindar to force upon the latter a tenant who may be distasteful to him. It prevents the landlord from resuming the occupation of his land when a tenant selected and approved of by him, chooses to give it up. It is the change of a right of a tenancy into a right of permanent occupancy. (*Abdul Raoof and Moti Sagar, JJ.*) SEWA SINGH *v.* GHULAM. **A. I. R. 1923 Lah. 467.**

——— *Alienation—Law Governing—Rohtak Tahsil* —Riwaj-i-am.

In the Rohtak tahsil a proprietor has very wide powers of alienation and an alienation by him can be challenged only on grounds valid under Hindu Law. A very large part of the customary law regarding restrictions on alienation is purely case-made law and the law primarily applicable to Hindus is Hindu Law modified by custom. 20 I. C. 373 Appr. In the Rohtak tahsil the *riwaj-i-am* places upon the plff. the *onus* of proving that he has a right to attack the alienation. (*Le Rossignol, J.*) GIANI *v.* TEK CHAND. **11 P. L. R. 1922 : A. I. R. 1922 Lah. 69.**

———*Alienation — Law Governing — Aroras of Taunsatown—Powers of alienation.*

Where the deceased belonged to a mercantile community and was a resident of a town he would be presumed to be governed by his personal law in the matter of alienation and the persons who claim to the contrary must establish the existence of custom overriding the personal Law. The *Riwaj-i-am* contains merely an expression of opinion. It cannot be raised to the dignity of a custom unless followed in practice for a sufficiently long period and recognised as binding by the members of the particular community. A provision in the *Riwaj-i-am* that a gift cannot be made in favour of a daughter in the presence of near collaterals is too sweeping to govern all Hindus residing in towns. Aroras of Taunsa are not governed in the matter of alienation by agricultural custom. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND *v.* MT. ROSHNI BAI. **68 I. C. 92 : 2 L. L. J. 178.**

———*Alienation—Law Governing—Gujrat—Khatris of Golpur.*

Khatris of Golpur, Tahsil Pind Dadan Khan, District Jhelum, are governed by agricultural custom in matters of alienation. Having regard to the facts (1) that the Khatris of Golpur formed a compact village community and (2) that all with very few exceptions earn their living by agriculture, tilling the soil with their own hands and that this has been the occupation of the Khatris of the village from the time when the village was founded, the *onus* is on those who allege that the Khatris of Golpur are not governed by agricultural custom to prove the assertion. 50 P. R. 1895 ; 51 P. R. 1901 ; 16 P. R. 1906 ; 23 P. R. 1914 ; 63 P. R. 1910 ; 107 P. R. 1901 ; 5 P. R. 1906 ; 12 P. R. 1906 ; 59 P. R. 1908 Ref. (*Martineau, J.*) HIRA NAND *v.* HAYAT MOHAMMAD. **64 I. C. 180 : 4 U. P. L. R. (Lah.) 6.**

Alienation—Necessity.

———*Alienation—Necessity—Alienation by father of ancestral land—Payment of just debt is necessity—Where alienor is male, alienee need not show that alienor's income was sufficient to pay off such debt.*

The payment of a just debt by a male proprietor is a necessity for which he can validly as against the reversioners, alienate ancestral land. It is only in the case

of an alienation by a woman that the alienee is required to show that the alienor's income was insufficient to provide the money required for the purpose for which the sale was made. When the alienor is a man, the only question for consideration is whether the purpose for which the alienation was effected was a necessary purpose. 40 Cal. 288 (P.C.) Foll. (*Campbell, J.*) PARS RAM *v.* TEHU. **89 I. C. 960 : A. I. R. 1926 Lah. 23.**

———*Alienation—Necessity—Migration expenses.*

In a suit to set aside an alienation, it was found that three-fourths of the consideration was for necessity and the balance for emigrating to another country. For 12 years the alienaiion was not questioned. *Held*, in the circumstances, the alienation was good. (*Shadi Lal, C. J. and Le Rossignol, J.*) JAI SINGH *v.* DARBARA SINGH. **6 Lah. 137 : 26 Punj. L. R. 329 : 89 I. C. 302 : 7 L. L. J. 354 : A. I. R. 1925 Lah. 396.**

———*Alienation—Necessity — Proper enquiry by alienee as to necessity not proved—Alienation cannot stand.*

If alienee cannot prove that he made proper enquiry as to the existence of a necessity for the sale, the sale cannot be held as valid. (*Broadway and Abdul Qadir, JJ.*) SAUDAGAR KHAN *v.* SAMAND KHAN. **6 L. L. J. 518 : 84 I. C. 926 : A. I. R. 1925 Lah. 248**

———*Alienation—Necessity—Widow—Possession of means.*

A mortgagee from a widow has to prove necessity for the alienation. If she is in possession of property, the income of which is sufficient to pay off debts a mortgage is not valid. (*Harrison, J.*) RUR SINGH *v.* NAZAR SINGH. **26 Punj. L. R. 15.**

———*Alienation—Necessity—Brahmins—Borrowing money for trade.*

In the case of the Punjab Brahmins who have taken to agriculture only recently and not a sole source of living, there is no rule which prohibits an alienation of ancestral land for raising funds to carry on a trade. The case of Jats is different. (*Martineau, J.*) RAM KISHEN *v.* KHIALI. **6 L. L. J. 313 : A. I. R. 1924 Lah. 685.**

———*Alienation—Necessity—Marriage of daughter —Reasonable expenditure—Scale of.*

It is a well-recognized custom that a daughter should be given some jewellery on the occasion of her marriage, and it is also necessary that the guests who come to the bride's house on that occasion should be properly feasted and entertained. As to what would be a reasonable expenditure by a widow, one test is to consider what would be reasonable for a marriage if the husband were living. The same amount would be reasonable on the part of the widow after death if the circumstances of the estate remained the same. (*Moti Sagar, J.*) MUNSHI *v.* GHANAYA. **6 L. L. J. 133 : 80 I. C. 332 : A. I R. 1924 Lah. 500.**

———*Alienation—Necessity—Money borrowed for the purposes of subsistence.*

Where a Saiyed agriculturist alienates a serai for the purposes of his subsistence and he has no other means of livelihood, the alienation is justified by legal necessity. (*Scott-Smith and Moti Sagar, JJ.*) MAHOMED HASSAN-UD-DIN *v.* SAIF ALI SHAH. **4 Lah. 122 : 5 Lah. L. J. 246 : A. I. R. 1924 Lah. 41.**

———*Alienation—Necessity—Agreement to sell—Failure of consideration—Mortgage—Validity.*

Where the vendor agrees to sell and receives part payment and there is failure of the consideration the sale not being completed the mortgage in favour of the vendee in consideration of the part payment is not a mortgage in lieu of a debt voluntarily incurred. (*Abdul Raoof and Moti Sagar, JJ.*) AZAD KHAN *v.*

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——*Alienation—Necessity.*

It is not the duty of the alienee to see to the application of the money or to find out if the whole of the money due to the antecedent creditor was actually paid; if a decree was in existence the payment of that decree constitutes a valid necessity. The fact that the decree-holder subsequently accepted only a portion of the amount due and gave up the rest of his claim is of no consequence and does not in any way affect the validity of the debtor of the alienation. When the amount of consideration for a sale of this kind which is found to be without necessity represents only a small portion of the entire consideration, it is not necessary to convert the sale into a mortgage. (*Moti Sagar, J.*) BALBIR SINGH *v.* GOBIND. **A. I. R. 1923 Lah. 532.**

——*Alienation—Necessity—Payment of antecedent debts.*

There is no authority for the proposition that a male holder of land both ancestral and acquired, must charge his just antecedent debts on the non-ancestral land Custom permits the alienation of ancestral land for the purpose of paying just antecedent debts and a provision that this cannot be done, if there is self-acquired land to alienate for that purpose would give the reversionary heirs a control over self-acquired property to which they are not entitled. A person has a perfect right to gift his self-acquired land to his daughter's son and to charge the ancestral land with debt. (*Campbell, J.*) ARJUN *v.* JUG LAL. **A. I. R. 1923 Lah. 422.**

——*Alienation—Necessity—Sale of portion beyond legal share.*

Where the vendor transferred without legal necessity properly beyond the share that would fall to him on partition. *Held*, the other reversioners can claim joint possession. (*Campbell, J.*) RAM NATH *v.* RAM SARUP. **A. I. R. 1923 Lah. 395.**

——*Alienation—Necessity—Presumption.*

The mere lapse of time does not remove the need for proving necessity. Although it may render the quantum of proof comparatively small, it certainly cannot be presumed. (*Broadway, J.*) WALI MAHAMMAD *v.* FATEH KHAN.

A. I. R. 1923 Lah. 307.

——*Alienation—Necessity.*

A widow can alienate her husband's land after his death to pay off his just debts. Every person having an interest in property whether absolute or as a life tenant, *e. g.*, widow, can sell or mortgage such property for a necessary purpose. (*Scott-Smith and Brasher, JJ.*) HASSAN MAHOMED *v.* MAHANDA.

5 Lah. L. J. 292 : A. I. R. 1923 Lah. 245.

——*Alienation—Necessity— Consideration*—Bona fide *payment—Question of fact.*

Where there are several items of consideration for an alienation, a finding regarding their genuineness and the necessity for them is one of fact and not open to question on second appeal. Where the alienee has made a *bona fide* payment to a previous mortgagee in order to obtain possession of the land he is entitled to credit for this amount. (*Le Rossignol and Wilberforce, JJ.*) HAKUMAT RAI *v.* WADINHAWA SINGH.

4 Lah. L. J. 243 : A. I. R. 1922 Lah. 398.

——*Alienation—Necessity—Small debt—Lapse of time.*

Where it is necessary to purchase food and clothing and pay for it subsequently and such payment becomes technically necessity, it is equally regular to borrow the sum necessary to purchase such supplies and it is not absolutely essential that a man should first come into debt and then borrow to pay his debts. Considering the smallness of the sum taken, the fact that it was recited that it was taken on account of scarcity, that it was not shown that the vendor had any land beyond the small area which he sold and the long interval that had elapsed after the alienation without any objection being taken by the other collaterals, the Court held that the alienation was supported by necessity. (*Harrison, J.*) RAMU LAL *v.* RAM SARUP. **48 P. L. R. 1922 : A. I. R. 1922 Lah. 368.**

——*Alienation—Necessity—Sale of judgment-debtor's property—Reversioners of judgment-debtor cannot get the sale declared invalid for want of necessity.*

Where an alienee, who is an outsider, finds that the alienor's debt is a decretal debt, he need not make any further inquiry and the reversioners will not be allowed to go behind the decree. The rule is, however, not applicable where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances or where it is proved that he actually had knowledge of the bad faith of the decretal transanction. 21 P. L. R. 1922, Foll. (*Chevis and Campbell, JJ.*) RAN SINGH *v.* RULLIA.

3 L. 139 : A. I. R. 1922 Lah. 299.

——*Alienation-- Necessity—Proof of—Duty of alienee.*

"It is not the duty of an alienee to see to the application of the money, but an alienee who deals with a person with a limited power of alienation, must satisfy himself that if money was required for the liquidation of an alleged debt, there was in fact such a debt in existence." In the first instance it is on the vendee to prove that the debts mentioned in the sale deed actually did exist and that there was necessity for the sale, 65 P. R. 1906 ; 104 P. R. 1887 Foll. (*Abdul Raoof J.*) SAHIB DIN *v.* RAJA.

A. I. R. 1922 Lah. 257.

——*Alienation—Necessity—Major portion supported by rights of presumptive reversioner.*

Where the debts to discharge which an alienation was effected were antecedent debts and except to a trifling extent the alienation was supported by necessity the alienation should be upheld ; the intervening holder being young and may have sons, is not a reason for refusing the next male reversioners a decree that an alienation is invalid and not being for necessity or consideration. (*Chevis and Scott-Smith, JJ.*) MUS SAMAT JOWALI *v.* NAND SINGH. **4 Lah. L. J. 351.**

——*Alienation—Necessity—Male proprietor.*

Under the Customary Law of the Punjab, the position of a male proprietor as regards ancestral property is similar to that of a widow and he has no power to alienate the property in anticipation of future necessity. 67 P. R. 1884 ; 11 P. R. 1885 Ref. (*Scott-Smith and Martineau, JJ.*) KHAZAN SINGH *v.* SUHEL,

4 Lah. L. J. 305.

——*Alienation—Necessity—Antecedent debt.*

Held, that an antecedent debt cannot legally be allowed without proof of necessity a debt given by the mortgagee with the knowledge that the mortgagor is of immoral character and spendthrift is not for necessity. (*Le Rossignol, J.*) JAGIR SINGH *v.* PAHARA SINGH. **37 P. W. R. 1921.**

——*Alienation—Necessity—Decree—Effect of.*

That a decree especially *ex parte* has been obtained, does not amount to legal necessity for alienation. (*Leslie Jones and Abdul Raoof, JJ.*) BARIAM SINGH *v.* BHAGGU MAL. **5 L. L. J. 90 : 79 I. C. 506 (1).**

——*Alienation—Necessity—Proof of—Old alienation*—Onus—*Ancestral property.*

The plff. has to prove the invalidity of alienation purporting to have been made for necessity and challenged a very long time afterwards. Property inherited through a female may be ancestral. 65 P. R. 1900 ;

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18 I. C. 114 ; 101 P. R. 1916 ; 32 P. R. 1895, Rel. (*Abdul Raoof and Beven Petman, JJ.*) SUHAWA *v.* DEBI DIAL. **70 I. C. 1002 : 4 L. L. J. 516.**

——Alienation—Necessity.

An agriculturist governed by the Customary Law has no power to alienate his ancestral land for the purpose of trading capital where the borrower was a man of bad character and had squandered a large amount and had ample property for all his means the *onus* lies on the alienee to prove strictly the legal necessity even though the borrower wanted money for payment of revenue and for purchase of capital and for other needs of the alienor. (*Scott-Smith and Abdul Raoof, JJ.*) KABUL SINGH *v.* KALA SINGH. **67 I. C. 737 : 3 L. L. J. 259.**

——Alienation—Necessity—Small portion of consideration not found necessary—Form of decree.

When the amount of the consideration for a sale of ancestral property that is found to be without necessity represents only a small portion of the entire consideration and the sale itself is one entered into as an act of good management, the sale should be upheld. 8 P. R. 1908 ; 79 P. L. R. 1914 ; 130 P. R. 1906, Foll. (*Broadway, J.*) BIRU *v.* SAMANDA. **67 I. C. 276 : 2 L. L. J. 669.**

——Alienation — Necessity— Sale by limited owner—Small portion of consideration not paid.

A vendee should not be penalized simply because he puts as part consideration a certain item which may possibly wholly or in part be fictitious when that item is only a small fraction of the consideration and when the sale would be unobjectionable to the item that was left out of account. 27 P. R. 1909, Criticised (*Chevis, J.*) GULAM MAHOMMED *v.* MAHOMMED SHAH. **66 I. C. 898 : 3 L. L. J. 8.**

——Alienation—Necessity—Part-payment of consideration.

If, after the vendor's death, the vendee sues for possession of the property and only, a part of the consideration is proved to be paid for necessity, he can get possession with a charge for that portion of the purchase money only, which has been proved for necessity. (*Abdul Raoof and Martineau, JJ.*) CHANAN KHAN *v.* RAJA. **63 I. C. 139 (L.)**

——Alienation—Necessity—Fictitious items entered in sale deed—Effect of.

Fictitious items are generally entered in sale-deeds but not necessarily for fraudulent purposes. They are generally resorted to for frightening pre-emptors or for enhancing the value of the bargain, (*Le Rossignol and Abdul Raoof, JJ.*) PUNJAB SINGH *v.* ARJUN. **2 Lah. 22 : 59 I. C. 776 : 27 P. W. R. 1921.**

——Alienation—Necessity.

In a suit by reversioner to contest a sale, if the amount found to be not for necessity is only a small part of the total consideration the sale should be upheld. Where the sale took place over 40 years ago, *held*, that the long silence of the plaintiff may be taken into account and strict proof of necessity should not be expected and is not necessary. (*Broadway, J.*) GHAMANDI *v.* BUTA. **3 U. P. L. R. (Lah.) 1 : 59 I. C. 592 : 30 P. W. R. 1921.**

Alienation—Proof.

——Alienation—Proof of necessity—Recitals consistent with probabilities should not lightly be set aside.

Where a sale deed effected in 1899 was sought to be set aside in 1920 for absence of necessity and consideration, *held*, that though recitals in deeds cannot by themselves be relied upon for the purpose of proving

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the assertions of fact which they contain yet when a long period has elapsed between the alienation and the suit to set it aside, and when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. 44 C. 186 P. C., Foll. (*Moti Sagar, J.*) TARA CHAND *v.* RAHMAN SHAH **A.I.R. 1924 Lah. 689.**

Alienation—Reversioner.

——Alienation— Reversioner—Female deriving title by virtue of marriage is not a reversioner of deceased.

A female heir who derives her title by virtue by her marriage in the family of the deceased holder of the estate is not a reversioner of the deceased. 39 P. R. 1915 ; 12 P. R. 1918, Appr. (*Jai Lal, J.*) DHANPAT RAI *v.* GOPAL KUAR. **26 P. L. R. 735 : 90 I.C. 1052 : A. I. R. 1926 Lah. 7.**

——Alienation—Reversioner — Attachment does not affect reversionary rights—Suit for declaring attachment not to affect reversionary right is not maintainable.

The reversioner's interest is only a contingent one and mere attachment does not in any way affect injuriously his reversionary rights and therefore a suit for declaration that the attachment shall not affect the reversioner's rights is not maintainable. (*Broadway and Zafar Ali, JJ.*) SHIB DEO SINGH *v.* UTTAM SINGH. **78 I. C. 926 : A. I. R. 1925 Lah. 84.**

——Alienation—Reversioner—Consent of—Sons of reversioners when bound.

The assent of the plaintiff's father to the alienation by a female in possession, if made *bona fide* without collusion or intention to injure the reversioners, is binding upon the plaintiff in a suit for a declaration that the alienation shall not affect his reversionary rights. (*Abdul Raoof, J.*) MAKHAN SINGH *v.* KISHEN SINGH. **A. I. R. 1924 Lah. 213.**

——Alienation—Reversioner.

Grandfather's brother's sons cannot seek a declaration as reversioners in the presence of uncle. No one can ask for a declaration of a non-existing right but of a *spes successionis*, *i.e.*, the chance or possibility of acquiring a right in the future. It will be open no doubt to him when succession opens out to sue for possession of the property if possession is denied him. (*Abdul Raoof and Moti Sagar, JJ.*) LALU *v.* FAZIL DIN. **4 Lah 106 : A. I. R. 1923 Lah. 403.**

——Alienation—Reversioner—Declaratory suit—Alienation by widow—Daughter.

Even a remote reversioner is entitled to maintain a declaratory suit regarding a widow's alienation in the lifetime of the daughter. A gift to a son-in-law, by any widow (whether the wife or mother of the last male holder) is not sanctioned by custom. 149 P. R. 1908 ; 4 P. R 1890, Foll. (*Campbell, J.*) LUDDAR *v.* MT. RANSI. **A. I. R. 1923 Lah 28.**

——Alienation—Reversioner—Occupancy rights—Consent of landlord—Status of reversioners to challenge alienation.

It is competent to the reversionary heir of an occupancy tenant to dispute the validity of its alienation in favour of a stranger of his ancestor's occupancy rights although such alienation had received the assent of his landlords. It is not necessary for plff. in such a case to prove that the common ancestor held the land as an occupancy tenant. All that they have to prove

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is that they are reversionary heirs of the alienor and that if the land had been the ancestral property of the plffs. they could have contested the alienation. 98 P. R. 1907 (F. B.), Foll. ; 12 P.R. 1904 ; 115 P. R. 1901, Ref. (*Scott-Smith and Harrison, JJ.*) BAGGU *v.* MT. DANI. **3 Lah. 69 : A. I. R. 1922 Lah. 278.**

———*Alienation—Reversioner — Setting aside—Form of decree.*

Where in a suit by a reversioner to set aside an alienation or for declaration that the sale is not effective against the plaintiff's reversionary interest, the Court finds that the alienor had full power of alienation, the Court could not declare the sale to be not binding on the plaintiffs merely because a portion of the consideration for the sale had not been paid. (*Wilberforce and Martineau, JJ.*) KHULLU *v.* LIKAL.
4 Lah. L. J. 22 : A. I. R. 1922 Lah. 117.

———*Alienation—Reversioner— Consent of—Consent given beforehand—Effect of.*

A consent given to a contemplated alienation by a sonless proprietor is as binding and as valid as a consent given to a completed transfer and the assent of the nearest reversioner makes the alienation good against the world. 59 P.R. 1904 ; 7 P.R. 1905 ; 78 P. R. 1908, Foll. The *onus* of proving bad faith on the part of the reversioner lies on these alleging it. An undertaking given by a reversioner not to contest an alienation which a sonless proprietor might make in the future does not require registration. (*Scott-Smith and Harrison, JJ.*) GULAB *v.* MEHNDI.
3 Lah. 112 : 4 Lah. L. J. 52 : A. I. R. 1922 Lah. 95.

———*Alienation—Reversioner.*

The sons of the daughters of the collarerals in the 5th degree of the last male holder are *bandhus* and heirs when there are no agnate collaterals and will succeed to an absolute estate and can restrict the enjoyment of an intervening limited owner within proper limits. (*Leslie Jones and Broadway, JJ.*) DIYAL KUAR *v.* MAHTAP SINGH.
3 Lah. L. J. 458.

———*Alienation—Reversioner—Right to get declaration.*

Where ancestral property has been alienated by a proprietor a reversioner's right to obtain a declaratory decree is dependent on the vested rights on his alienated property and on the probability of the inheritance opening in his favour. Where the alienor is appointed an heir to a distant collateral he has a right to possession superior to that of the nearer collaterals. (*Leslie Jones and Wilberforce, JJ.*) PADAM NATH *v.* KANSHI RAM. **66 I. C. 913 : 3 Lah. L. J. 20.**

———*Alienation—Reversioner—Decree obtained—Death of decree-holder pending appeal—Widow—Legal representative.*

Where a reversioner obtains a decree for possession of land and dies pending an appeal therefrom, his widow is entitled to the benefit of the decree and represents her husband to that extent. (*Abdul Raoof and Martineau, JJ.*) RAM KOUR *v.* JIWAN SINGH.
63 I.C. 540 : 2 Lah. 189.

Alienation—Right to contest.

———*Alienation—Right to contest—Status of males and females is distinct—Alienations by males cannot be contested by females.*

The status of a female heir in the Punjab is quite different to that of male proprietors ; one important difference is that females are not ordinarily entitled to contest alienations made by males. (*Jai Lal, J.*) DHANPAT RAI *v.* GOPAL KUAR.

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26 P. L. R 735 : 90 I. C. 1052 : A. I. R. 1926 Lah. 7.

———*Alienation—Remote collateral's right to contest, when there are near collaterals, is only speculative.*

Where a remote collateral has only a speculative and remote chance to succeed to the estate of an alienor only after the lines of the other several near collaterals become extinct the former's suit to contest the alienation is not maintainable. (*Martineau and Moti Sagar, JJ.*) MAHOMED ALI *v.* GULAB.
89 I. C 403 : A. I. R. 1925 Lah. 639 (2).

———*Alienation—Right to contest—Sale by non-proprietors to non-proprietors—Suit for joint possession by members of proprietary body—Decree should be for joint possession with other co-sharers as against vendees with direction to latter to remove within reasonable period.*

The non-proprietors of a certain Mauza sold their residential house and site to two other non-proprietors and an action was raised by the plaintiffs who were two members of the proprietary body, for joint possession of the site along with the remaining members of the proprietary body.

Held, that the proper decree to be passed in such a case would be a decree for possession of the site to the plaintiffs jointly with the other co-sharers in the village as against vendees together with an injunction to these latter to remove their materials within a reasonable period. (*Le Rossignol and Fforde, JJ.*) JHANDU MAL *v.* SINGH RAM. **7 Lah. L.J. 139: 87 I. C. 123 : 26 Punj. L. R. 171 : A.I.R. 1925 Lah. 380 (1).**

———*Alienation—Right to contest—Alienation of occupancy rights can be challenged by collateral if he is next heir and if he could sue in the event of land being proprietary.*

A collateral of an occupancy tenant impeaching an alienation by the latter of his occupancy rights must prove two things ; (1) that he is entitled to succeed to the occupancy rights on the death of the occupancy tenant and (2) that had the subject-matter of the alienation been proprietary instead of occupancy rights, he could have maintained the suit. (*Shadi Lal, C.J. and Lumsden, J.*) MT. SARDHI *v.* RALLA.
76 I. C. 48 : A.I.R. 1925 Lah. 157 (1).

———*Alienation—Right to contest—Suit by minor—Punjab Limitation Act (I of 1920).*

Suit by minor reversioner to contest unnecessary alienation, brought at a time, when if brought by minor's father it would be barred under Punjab Limitation Act, I of 1920, is also barred. (*Martineau and Moti Sagar, JJ.*) DAD *v.* LAL. **5 Lah. 389 : 6 Lah. L. J. 334 : 82 I. C. 626 : A. I. R. 1925 Lah. 24.**

———*Alienation—Right to contest—Remoter reversioners.*

Where a male proprietor who has alienated ancestral land has adult sons living it is not open to the remote reversioner to sue to challenge the alienation in the absence of proof that the adult sons of the alienor waived their right to impeach the alienation. 84 P. R. 1918, Ref. (*Abdul Qadir, J.*) SUBA SINGH *v.* GOPAL SINGH. **A. I. R. 1924 Lah. 386.**

———*Alienation—Right to contest—Son unborn at the time.*

A son has powers to challenge an alienation made by his father before his death, if at the time of the alienation there were heirs who could challenge it and the transaction was not satisfied before his birth. (*Moti Sagar, J.*) BHUP SINGH *v.* PREM SINGH.
5 Lah L. J. 384 : A. I. R. 1924 Lah. 362.

———*Alienation—Right to contest—Proprietors—Consent of—Necessity for.*

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Held on the evidence that in Mauza Raja Jang, Tahsil Kasur, District Lahore, which was a village and not a town, non-proprietors had no right to transfer their right of residence without the consent of the proprietors. Acquiescence of the proprietors in past sales does not mean that they are precluded from objecting to future sales. (*Campbell, J.*) MAHOMED DIN *v.* LABH SINGH. **A. I. R. 1924 Lah. 246.**

———*Alienation — Right to contest—Rights of grazing.*

According to the *Wajib-ul-arz* the area in question was specially set apart for the sole use of the Labanas it being clearly laid down that they and they alone could exercise these rights. The proprietors even appear to have been excluded from using this land for grazing purposes, *Held*, this amounted to an easement and speaking broadly, easements are generally inalienable apart from the property to which they are appurtenant. As the right to graze, etc., in these lands was specifically given to a definite set of persons every member of that set has a right to defend his rights against any infringements of them. The plaintiffs are vitally interested in maintaining the exclusive right of Labanas to exercise these rights and have therefore a *locus standi* to sue in respect of such infringement. The right to use the land for grazing purposes cannot be alienated by one of the owners of the right, for by doing so he introduces (as in the present case) a foreign element in the class of persons to whom the right was specifically restricted. (*Broadway, J.*) KIRPA *v.* GULABA. **5 Lah. L. J 546 : 80 I. C. 503 : A. I. R. 1924 Lah. 223 (2).**

———*Alienation—Right to contest—Reversioner—Limited owner.*

The alienation of a female limited owner can be challenged by another female who is the next reversioner. (*Le Rossignol and Martineau, JJ.*) MAWAZ KHAN *v.* MT. ZOHRA JAN. **6 Lah. L. J. 460 : A.I.R. 1924 Lah. 187.**

———*Alienation—Right to contest—Suit by collateral challenging.*

A collateral governed by the Customary Law of the Punjab does not derive his right to sue from or through his father but from or through the common ancestor who owned the land. (*Scott-Smith and Fforde, JJ.*) SARUP SINGH *v.* PAL SINGH. **A. I. R. 1923 Lah. 642.**

———*Alienation—Right to contest—Collaterals—Sale in execution of decree.*

Under the Customary Law of the Punjab it is open to a collateral to challenge a sale *invitum, e.g.*, a sale in execution of a decree. 18 P. R. 1908, Rel. (*Abdul Raoof, J.*) GHANYA *v.* HAZARA SINGH. **A. I. R. 1922 Lah. 224 (2).**

———*Alienation—Right to contest.*

Persons who are heirs to an estate are entitled to challenge alienations effected by females who are holding on life tenure under custom. Para. 23 of Rattigan's Digest of Customary Law runs counter to the principle of Hindu Law and custom does not exclude a daughter's son from inheritance on the ground of his mother having pre-deceased her father or grandmother. Under the Hindu Law a female takes only a life interest in the property inherited by her from a male and the nature of her interest does not depend upon the existence or otherwise of persons having a right to succeed to the property after her death. An estate of a widow under the customary law is subject to the same restriction as that of a widow under Hindu Law. Where the persons contesting the alienations are males whose right to inherit the estate is beyond dispute there is no custom which prevents them from impugning such alienations, they are entitled to contest. C. A. No. 128 or 1917, Ref. Where there is no custom applicable to a case the plaintiffs can fall back on their personal law. (*Shadi Lal, C. J. and Martineau, J.*) GOBINDA *v.* NANDU. **3 Lah. L. J. 465 : A. I. R. 1922 Lah. 217.**

CUSTOM (PUNJAB)—Alienation—Widow.

———*Alienation—Right to contest—Daughter's son, if can control alienation by females—Onus of proof.*

Among Ghirths of Kangra District, a daughter's son has no *locus standi* to control alienations by the female heirs of the last male holder. As a rule the right to such control only extends to agnatic heirs of the last male holder and the burden of proving any extension of this right beyond the agnatic heirs lies on the person asserting it. (*Scott-Smith, J.*) GOBINDA *v.* NANDU. **3 Lah. L. J. 465 : A. I. R. 1922 Lah. 217.**

———*Alienation — Right to contest—Religious endowment—Dohli tenure.*

The dohli tenure is a peculiar kind of tenure to be found in the south-eastern districts of the Punjab. It is a rent-free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine or to a person for religious purposes. In the Revenue records the proprietary body are recorded as the owners of the property and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose for which the grant is made is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office, the proprietors can eject him and put in some one else under a like tenure. Such a tenure cannot be sold or mortgaged and there can be little doubt such an alienation made by the dohlidar is absolutely void and can be challenged by his successor. (*Shadi Lal, C.J. and Harrison, J.*) SEWA RAM *v.* UDEGIR. **2 Lah 313 : 25 P. L. R. 1922 : A. I. R. 1922 Lah. 126.**

———*Alienation—Right to contest—Date of alienation.*

A sale of the reversionary rights during the lifetime of the widow is no more than a mere agreement to sell which takes effect immediately on the death of the widow. The date of the alienation is therefore the date of the death of the widow. (*Shadi Lal, C.J. and Wilberforce, J.*) BUTA SINGH *v.* JHANDU. **3 Lah. L. J. 211 : 61 I. C. 375 : 3 U. P. L. R. (Lah.) 49.**

———*Alienation—Right to contest—Harrals of Dt. Shahpur.*

Male proprietors have an unrestricted power of alienation among Harrals of Dt. Shahpur. (*Scott-Smith and Leslie Jones, JJ.*) BAHADURI *v.* QUADU. **60 I. C. 526 : 3 Lah. L. J. 150.**

Alienation—Widow.

———*Alienation—Widow—Power to question.*

Even a widow who succeeds to a life estate can impeach an alienation made by a prior life estate holder. (*Shadi Lal, C. J. and Le Rossignol, J.*) MT. SURJO *v.* MT. DALELO. **26 Punj. L. R. 269 : 87 I. C. 937 : 7 Lah. L. J. 474 : A. I. R. 1925 Lah. 573.**

———*Alienation—Widow—Suit to contest—Who can maintain.*

Under the customary law a remote reversioner can sue challenging an alienation by a limited owner when the immediate reversioners are also holders of life estates. (*Le Rossignol, J.*) JAWAHARA *v.* DATTA RAM. **79 I. C. 497 : A. I. R. 1925 Lah. 156.**

———*Alienation—Widow—Consent of reversioners—Effect.*

CUSTOM (PUNJAB)—Alienation—Widow.

Where a widow alienates ancestral property with the consent of a near reversioner it does not preclude a more remote reversioner from challenging the alienation, as he does not derive his right from the nearer reversioner. (*Le Rossignol and Harrison, JJ.*) SINGH RAM *v.* BHAGWANA. **A. I. R. 1924 Lah. 656.**

———*Alienation—Widow—Necessity—Debts of husband—Future maintenance.*

A widow in possession of ancestral property inherited from her husband has only a limited right therein and she cannot alienate the estate in anticipation of future expenses. Where the debts of her husband are not charged on ancestral property the widow is not justified in alienating the property for the discharge of such debts. Nor is the widow justified in alienating the property for raising money for her future maintenance. 4 P. R. 1913; 17 P. R. 1919, Foll. (*Broadway, J.*) SUCHA SINGH *v.* PAL SINGH. **A. I. R. 1924 Lah. 298.**

———*Alienation—Widow.*

The powers of a widow in possession of her husband's property to make an alienation by way of gift is not wider under the customary law of the Punjab than under the Hindu Law. (*Abdul Raoof, J.*) MT. DURGO *v.* PREM SINGH. **A. I. R. 1924 Lah. 196.**

———*Alienation—Widow—Gift to daughter and son-in-law.*

Under the Customary Law it is not competent to a widow to make a gift of her husband's non-ancestral land in favour of her daughter and son-in-law jointly. (*Le Rossignol and Martineau, JJ.*) SANDHI *v.* BUDHA SINGH. **5 Lah. L. J. 178 : A. I. R. 1924 Lah. 25.**

———*Alienation—Widow—Tarar Jats of Chakwal—Sisters if entitled to question alienation*—Riwaj-i-am, *entries in.*

Among the Tarar Jats of Chakwal, sisters are heirs in the absence of collaterals and are entitled to contest the validity of an alienation made by the widow. An entry in the *Riwaj-i-am* which is not opposed to general custom is a strong piece of evidence. (*Scott-Smith and Harrison, JJ.*) AHMAD *v.* MT. BANO. **3 Lah. 40 : A. I. R. 1922 Lah. 114.**

———*Alienation—Widow—Gift of portion of estate to nearest reversioner—Effect of.*

The rule of Hindu Law that a widow cannot make a valid gift of a portion of the estate i favour of the next male reversioner is not applicable to cases governed by Customary Law. 50 I. C. 498, Dist. (*Scott-Smith and Dundas, JJ.*) JAGGA *v.* BHAG MAL. **4 Lah. L. J. 432.**

———*Alienation—Widow.*

A widow who holds a life interest in an estate under custom has no wider powers of alienation than a widow who holds a similar estate under Hindu Law and the limited nature of her life interest can never alter even though there be a complete want of heirs. (*Leslie Jones and Broadway, JJ.*) DIAL KAUR *v.* MEHTAB KAUR. **74 I. C. 639 : 3 L. L. J. 458.**

Alienation—Will.

———*Alienation—Will.*

Among Kahuts of Mauza Korehasham, Tahsil Chikwal, District Jhelum, a male proprietor cannot bequeath by Will a portion of his ancestral property in favour of his daughters in the presence of his sons. (*Martineau and Moti Sagar, JJ.*) GHULAM HUSSAIN *v.* NUR. **76 I. C. 123 : A. I. R. 1925 Lah. 71.**

———*Alienation—Will—Construction.*

Where the testator bestowed absolute estate upon his brother and daughter and a portion of the estate upon his widows and to propitiate his brother for this bestowal of absolute estate upon the widow, bestowed upon him a greater portion of his estate upon which the brother consented to the will, held the estate bestowed upon the widow was absolute estate. 27 P.R. 1914, 21 Bom. 376 and 33 Mad. 91, Foll. (*Martineau and Zafar Ali, JJ.*) MT. SHERA KHATUN *v.* MUHAMMAD ALI SHAH. **A. I. R. 1923 Lah. 559.**

CUSTOM (PUNJAB)—Alienation—Applicability.

———*Alienation—Will by sonless proprietor—Khot Sarang of Talagang Tahsil, Attock District.*

A sonless *awan* of Khot Sarang, Tahsil Talagang, has not a free power to dispose of his ancestral property by Will. (*Broadway, J.*) MT. RAKSHI *v.* BAZA. **A. I. R. 1923 Lah. 305.**

———*Alienation—Will—Gift of reversion to daughter—Gift by mother to daughter—Marriage of daughter with khatri.*

A jatti daughter marrying subsequently with a khatri is not deprived of her rights under her father's will giving the reversion after the death of his wife in favour of his daughter. (*Le Rossignol and Wilberforce, JJ.*) NARAIN SINGH *v.* MT. DIAL KAUR. **4 Lah. L. J. 469.**

———*Alienation—Will—Sonless proprietor—Mair minhas, Chakwal Tahsil, Jhelum District—Bequest to daughter—Suit by reversioner—Decision—Value of as evidence.*

Among Mair Minhas, Chakwal Tahsil, Jhelum District, a sonless proprietor can bequeath his properties by Will absolutely in favour of the daughter. The daughter can in her return will sway the property. A proprietor bequeathed his lands and house to his daughter and she in her turn made a Will in 1886 leaving the property to the defendant, her sister's son, and son-in-law. The daughter died and the plaintiff, collateral of the deceased male owner, sued for possession of his property contending that it reverted to them and that the daughter had no power to make a Will in favour of the defendant. It was found that in a prior suit to contest the Will instituted by the brother of the last male owner, the Will was found to be valid and that the daughter had full powers of alienation. There was no appeal against that decision which became final. *Held*, in the present suit that though the prior decision did not operate as *res judicata* it was very strong evidence in favour of the Will and that the daughter took an absolute estate under its terms. (*Shadi Lal and Martineau, JJ.*) ANWAR KHAN *v.* NUR KHAN. **67 I.C. 272 : 2 Lah. L. J. 666.**

Applicability.

———*Applicability — Dat Brahmans of Damun Chak are governed by Hindu Law in matters of succession and not by custom.*

Dat Brahmans of the village Damun Chak, tahsil Kharian, district Gujrat, are governed in matters of succession by their personal law, namely, Hindu Law, and not by custom prevailing among their agriculturist neighbours. (*Abdul Raoof and Addison, JJ.*) KHAZAN CHAND *v.* PARS RAM. **7 Lah. L. J. 459 : 90 I. C. 1045 : A. I. R. 1925 Lah. 646 (2).**

———*Applicability—Evidence—Evidence regarding a custom in one caste by men of other caste will have no weight.*

The opinion of respectable persons belonging to the same tribe and village would carry a certain amount of weight to prove the existence of a custom but the opinion of a Rajput and a jat on questions relating to custom so far as Brahmans are concerned cannot carry any weight. The mere fact that a certain custom prevails among Brahmans in one district would not establihs that a similar custom was in force in another district.

CUSTOM (PUNJAB)—Applicability.

(*Broadway and Moti Sagar, JJ.*) ANANT RAM *v.* RAM RATTAN. **5 Lah. 547: 85 I. C. 431 : A. I. R. 1925 Lah. 247.**

———*Applicability*—Wajib-ul-arz.

An entry in a *Wajib-ul-arz* recording custom is the most valuable evidence in support of it. (*Adbul Raoof and Moti Sagar, JJ.*) SHER MUHAMMAD KHAN *v.* DOST MUHAMMAD KHAN. **78 I. C. 451 : A. I. R, 1925 Lah. 231.**

———*Applicability*—Riwaj-i-am—*Statements in*

Statement in a *Riwaj-i-am* when opposed to general custom can carry very little weight unless supported by instances. (*Scott-Smith and Harrison, JJ.*) GURDIT SINGH *v.* MT. MALAN. **5 Lah. 364 : 84 I. C. 171 : A. I. R. 1925 Lah. 35.**

———*Applicability—Presumption—Multan City.*

The custom of a pre-emption does obtain in the sub-division Husain Agabi of the City of Multan. 24 & 57 P. R. 1906, Ref. (*Harrison and Jafar Ali, JJ.*) AHMAD SHAH *v.* THE CHURCH MISSIONARY TRUST ASSOCIATION, LONDON. **A. I. R. 1924 Lah. 700.**

———*Applicability—Agricultural community—Law governing—Hindu Law—Burden of proof.*

In the case of a community like the Rai Brahmans whose occupation is agriculture the presumption is that they are governed by custom the *onus* lies upon the party asserting that they are governed by Hindu Law to prove the same. (*Martineau and Moti Sagar, JJ.*) BASHU RAM *v.* PIARA RAM. **4 Lah. 434 : A. I. R. 1924 Lah. 365.**

———*Applicability — Kureshis — Personal law governs them.*

Where Kureshis, though they originally belonged to Chiniot, have now been living in the town of Lahore for a large number of years, and the property in dispute is also situate in Lahore and are not agriculturists and have been carrying on the profession of masonry for more than one generation. *Held* they are governed by their personal law. The rule of law is that if auy custom is shown to govern the parties, that custom must be held applicable, but if no custom is shown to apply then the personal law of the parties governs the case. 175 P. R. 1883, Foll.; P. R. 92 of 1901, and P. R. 5 of 1906, Appr. (*Abdul Raoof and Moti Sagar, JJ.*) MT. ZENAR-UN-NISA *v* DUNICHAND. **A. I. R. 1923 Lah. 368.**

———*Applicability—Deductions not permissible.*

Custom is not always logical and the Courts should guard against the danger of seeking to extend custom by logical processes, *e.g.*, by analogy. (*Broadway and Campbell, JJ.*) NAJIM-UD-DIN *v.* ABDUL HAMID. **A. I. R. 1923 Lah. 175.**

———*Applicability—Khatris of mauza Salima, Taksil Moga, Ferozepore Dt.*

The initial presumption in the case of Khatris is that they followed the Hindu Law and the *onus* of displacing it is on those alleging they are governed by custom. A custom without instances is inconceivable. (*Abdul Raoof and Campbell, JJ.*) SUNDAR SINGH v. SUNDAR SINGH. **A. I. R. 1922 Lah. 431.**

———*Applicability—Koreshis—Law governing.*

In a suit between members of the Koreshi tribe, when neither party proves any custom affirmatively, recourse should be had to Mahomedan Law. (*Abdul Raoof and Campbell, JJ.*) MT. GHULAM ZOHRA v. NUR HASAN. **3 Lah. 278: A. I. R. 1922 Lah. 406.**

———*Applicability—Sodhies—Debts of ancestor—Liability for.*

Sodhies are governed by customary law in matters of alienation and in respect of the liability of sons for debts contracted by their father. (*Broadway and Harrison, JJ.*) LABH SINGH *v.* THE FIRM RUR CHAND, TULSI RAM. **4 Lah. L. J. 64 : A. I. R. 1922 Lah. 122 (2).**

CUSTOM (PUNJAB)—Gift.

———*Applicability — Maintenance — Illegitimate children of—Mahomedan concubine by Hindu father.*

The plaintiffs, the two Mahomedan concubines and their illegitimate sons by a deceased Hindu gentleman, brought a suit against the legitimate son of the latter for arrears of maintenance. *Held*, that plaintiffs had failed to prove any claim to maintenance by family custom. The plaintiffs could not appeal to Hindu Law, nor could the case be decided upon general considerations of equity merely because Hindu Law is silent as to the claims of illegitimate Mahomedan progeny of a Hindu. (*Chevis and Le Rossignol, JJ.*) CHARANJIT SINGH *v.* AMIR ALI KHAN. **64 I. C. 892 : 2 Lah. 243.**

———*Applicability of—Khatris—Presumption.*

The initial presumption in the case of a khatri is that they follow Hindu Law. (*Broadway, J.*) LACHMAN DAS *v.* GANGA RAM. **64 I. C. 264 (L.).**

———*Applicability—Personal law when applied.*

If in a case, a custom is not established, personal law should be applied although the parties rely upon custom. (*Le Rossignol and Wilberforce, JJ.*) FATIMA BIBI *v.* SHAH NAWAZ. **2 Lah. 98 : 60 I. C. 509 : 3 Lah. L. J. 152.**

Gift.

———*Gift—Collateral allowed to take land without consent of other collaterals—On extinction of donee's line land reverts to donor's family.*

The collaterals of a deceased proprietor permitted one of themselves to take possession of the land belonging to the deceased, without receiving any consideration.

Held, that the transaction must be regarded as a gift by the collaterals in favour of the person permitted to take possession and, that on the extinction of the latter's line the property must revert to heirs of donors. (*Shadi Lal, C. J. and Harrison, J.*) HARPHUL *v.* BHAG MAL. **A. I. R. 1925 Lah. 596 (1).**

———*Gift by male proprietor to collaterals—Gilatar Jats of Jhang District.*

Among the *Gilatar Jats* of the Jhang District there is a custom by which a male proprietor is empowered to make a gift in favour of a collateral. (*Broadway and Moti Sagar, JJ.*) SAMAIL *v.* AHMADA. **4 Lah. 189 : A. I. R. 1923 Lah. 517.**

———*Gift—Khanadamad—Mussalman Gujars of Kharar Tahsil, Ambala Dt.*

It is not competent to a proprietor belonging to the sect of Mussalman Gujars of Kharar Tahsil in Ambala Dt. to make a gift of ancestral land in favour of a *Khanadamad* in the presence of collaterals. (*Le Rossignol, J.*) CHANAN *v.* NUR DIN. **12 P. W. R. 1922 : A. I. R. 1922 Lah. 121.**

———*Gift in favour of daughter—Jats of Jhelum District—Validity of.*

A gift or bequest by a sonless *Jat* of the *Jhelum District* of ancestral property in favour of a *Khanadamad*, in the presence of collaterals, is valid by custom. (*Martineau, J*) ALAM DIN *v.* SARDAR BIBI. **63 I. C. 675 (L).**

———*Gift—Gift to daughter—Kahuts of Adharwal.*

A kahut sonless proprietor in Taluk Chakwal, District Jhelum, can gift away his property to his daughter even in presence of brothers and other collaterals. (*Leslie Jones and Wilberforce, JJ.*) MAHOMED KHAN *v.* KHESRAM. **2 Lah. 170 : 62 I. C. 841 : 3 Lah. L. J. 475.**

CUSTOM (PUNJAB)—Gift.

——Gift—Sials of Muzaffargarh — Doctrine of Mushaa—Delivery of possession—Gift over—Validity.

Sials of Muzaffargarh have, by custom, unlimited powers of alienation by gift in respect of ancestral property. Females are not competent to object to an alienation by a male proprietor. Where a Tribal Custom says that the consent of heirs is required it can only refer to those heirs, who according to custom are entitled to grant or withhold consent. The doctrine of Mushaa has no application to gifts in the Muzaffargarh District. Where the donor supports a gift and the person disputing it claims adversely to both the donor and the donee, the gift is not invalid for the mere reason that the donor has not delivered possession. A gift over is not invalid under Customary Law (*Leslie Jones and Broadway, JJ.*) RAHIM BAKSH KHAN *v.* GHULAM NABI KHAN.
61 I.C. 395 : 3 U. P. L. R. 55 (Lah.).

Marriage.

——Marriage—Chadar and Dasi.

The legitimacy of the issue of the marriage cannot be denied by the near collaterals if they led by their action as Hindu Sikh *Jat* to believe that they would recognize his offspring by a Mahomedan woman by *Chadar* and *Dasi* marriage performed according to the Hindu rites. (*Leslie Jones and Broadway, JJ.*) LACHMAN SINGH *v.* PARTAB SINGH.
67 I. C. 937 : 3 Lah. L. J. 366.

Partition.

——Partition—Widow's right—Jullundur District—Entry in Riwaj-i-am*—Burden of proof.*

Where the *Riwaj-i-am* of the Jullundur District is in favour of the widow's right to ask for partition of the joint estate of her husband the *onus* is on the person who denies it to prove that she is not entitled to partition. (*Le Rossignol and Abdul Qadir, JJ.*) SHADI *v.* MT. JEONI.
3 Lah. 236 : A. I. R. 1922 Lah. 362.

*——Partition—*Abadi *— Suit for ejectment — Failure to prove exclusive title.*

A decree for joint possession of joint property can be given where plaintiffs alleged but failed to prove exclusive title to certain fraction of the joint estate and where the defendants asserted their exclusive title but it was found that they have no such exclusive title. 29 P. R. 1918, Dist. The question whether a co-sharer occupying a portion of the joint land without denying the joint character thereof should be allowed to retain it until partition in the case of *abadi* land when that land has been reduced to a minimum area barely sufficient for the common purposes of the village was raised but was not decided. The highest Court of Appeal may allow an amendment of the plaint. (*Shadi Lal, C. J. and Leslie Jones, J.*) MAUJI ASHAQ ALI *v.* GHULAM MAHOMED. **3 Lah. L. J. 75.**

——Partition—Widow of deceased — Co-parcener has right to claim.

It is within the rights of a widow of a deceased co-parcener to demand a partition of the joint holding and though she once agreed to take a certain sum as maintenance from the co-sharers of the deceased she is not debarred thereby from claiming partition of the holding. (*Abdul Raoof and Martineau, JJ.*) MT. THAKRI *v.* SADHU SINGH.
67 I. C. 356 (1) : 54 P. L. R. 1922.

——Partition—Descendants of one branch if can succeed to estate of member of another.

The descendants of one brother who had separated himself by partition from his other three brothers are not debarred from taking their share in the estate of another brother out of the three, who died subsequent to the partition. (*Abdul Raoof, J.*) KARTAR SINGH *v.* LAL SINGH. **11 P. L. R. 1921 : 59 I. C. 238 : 9 P. W. R. 1921.**

CUSTOM (PUNJAB)—Succession—Ancestral Property.

——Shamilat land—Erection of building by one co-sharer—Rights of other shares.

Where on common land, one co-sharer erects a building without the consent of the others, the other co-sharers are not entitled, unless they prove material or substantial injury, to have building removed. (*Moti Sagar, J.*) AHMAD GUL *v.* RAHIM KHAN.
89 I. C. 831 (L).

——Succession.
Agnates.
Ancestral Property.
Chandawand or Pagwand.
Collaterals.
Daughter.
Escheat
Females.
Half and Full Blood.
Immoveable Property.
Law Governing.
Mother.
Sister.
Son.
Special Custom.
Widow.

Succession—Agnates.

——Succession—Agnates—Persons of the same caste and Got*—Inference.*

The mere fact that plaintiff is of the same caste and *Got* as the alienor does not necessarily lead to the inference, that he is descended from the same common ancestor and is his heir. (*Moti Sagar, J.*) KIRPA *v.* MT. CHINTI. **A. I. R. 1923 Lah. 530.**

Succession—Ancestral Property.

——Succession—Ancestral property — Ancestral nature is not lost by a female intervening in line of succession.

The ancestral nature of the land is not affected by the facts that a female heir intervenes in the line of succession. (*Abdul Raoof and Harrison, JJ.*) MAHTAB SHAH *v.* ALI HAIDAR SHAH
6 Lah. 338 : 7 L. L. J. 190 : A. I. R. 1925 Lah. 429.

——Succession—Kambohs of Amritsar—Rights of daughters is against collaterals.

Amongst Kambohs of the Amritsar District, daughters do not succeed in preference to collaterals to non-ancestral property. (*Scott-Smith and Fforde, JJ.*) MT. NARAINI *v.* JOWAHIR SINGH. **89 I.C. 724 (Lah.)**

——Succession—Arains of Lahore—Half sister—Mother's father's brother.

Among the Arains of Lahore, a half sister is entitled to succeed in preference to a mother's father's brother. (*Martineau, J.*) M. MEHTAB BIBI *v.* DIN MOHAMMAD. **89 I. C. 351 (Lah.).**

——Succession—Ancestral property.

When a person holds ancestral land and a house in the same village, such house must be considered as an appanage to the land. 33 P.R. 1905, Foll. (*Martineau and Moti Sagar, JJ.*) KYAS MUHAMMAD *v.* BANNA.
78 I. C. 183 : A. I. R. 1925 Lah. 110.

——Succession — Ancestral property — Descent through females—If alters nature of.

The fact that ancestral property descends through a female such as a daughter does not alter the nature of the property. It remains still ancestral in the hands of her descendants. (*Shadi Lal, C. J. and Lumsden, J.*) MT. HUSAIN BIBI *v.* HAYAT.
A. I. R. 1924 Lah. 565.

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CUSTOM (PUNJAB)—Succession—Ancestral Property.

———*Succession—Ancestral property—Proof of.*

Where it was clearly established by the production of the complete pedigree-table that the common ancestor of the parties had founded the village, that the land in dispute was held at one time by the grandfather of the alienor. *Held*, that unless it could be shown that the land had, at any time, gone out of the hands of the family and had been re-acquired by the alienor himself or some of his ancestors, the presumption is irresistible that the property must have come to them as descendants and therefore must be taken to be ancestral. (*Abdul Raoof, J.*) MAULA DAD *v.* ALI. **5 Lah. L. J. 449 : 76 I. C. 147 : A. I. R. 1924 Lah. 263 (1).**

———*Succession—Ancestral property—Presumption—Equal shares.*

Where two branches of a family were found holding equal areas of property, while some were still joint, the presumption is that the properties was originally ancestral. This is also probabilised by the fact that a pedigree-table mentions a common ancestor to whom the properties must have belonged. (*Shadi Lal, C. J. and Fforde, J.*) MT. MARYAM BIBI *v.* GHULAM MAHOMED. **5 L. L. J. 446 : A. I. R. 1924 Lah. 175.**

Succession—Chandawand or Pagwand.

———*Succession— Chandawand and Pagwand — Partitioned estate follows its own system of law.*

When a separate entity created by division or partition, comes into being, the full range of the succession to that entity is determined by whatever system is in fact proved to be in operation in that simple family. But where partition was a definite, an accomplished and a long recognised fact, it cannot be ignored. And accordingly the ambit of that system is confined to searching for the full-blood and half-blood within the divided and separated area. In that search it is not permissible to undo the distribution and search for the collaterals as if under the succession to the owner of the undivided property That the portion allotted to a group should belong as an entirety to the members who, for the time being, form or represent the group until the group is extinct, is no departure from the ordinary rule as to the devolution of shares. As to the re-distribution of the portion, and devolution of the shares intowhich the portion is re-distributed among the members of a group, that is a matter which concerns them alone, until the group is extinct, exactly as in the case of the share of an individual and his descendants *qua* other sharers and their descendants. On this view there is not really, at any time, a competition between half-blood and whole-blood, for the sons have been separated once for all, at the original distribution, into several groups, such that all members of each are related *inter se* by the whole-blood, and so far, each group resembles a single family. It is quite intelligible that when by reason of matters subsequent to a pagwand distribution the sons of several wives have arrived at a condition not distinguishable from the result of a chandawand distribution among groups of sons, the same customary rule should apply in cases of collateral succession, as applies when there has been a chandawand distribution. But the basis of the preference of the whole-blood, when it exists in such a case, clearly is the association of the uterine brothers into distinct groups, the pagwand distribution notwithstanding. (*Lord Shaw.*) NABI BAKSH *v.* AHMAD KHAN. **(1924) M. W. N. 425 : 51 I. A. 199 : 34 M. L. T. 106 : 5 Lah. 278 : 20 L. W. 599 : 80 I. C. 158 : A. I. R. 1924 P. C. 117 (P. C.).**

CUSTOM (PUNJAB)— Succession—Collaterals.

———*Succession—Chandawand and Pagwand.*

In matter of inheritance the Gakhars of Bara Gowah village follow the rule of *Chandawand*. (*Scott-Smith, J.*) SAKHI MAHOMED KHAN *v.* MAIZ ALI KHAN. **A. I. R. 1923 Lah. 604.**

———*Succession — Chandawand and Pagwand — Whole-blood and half-blood.*

In cases of collateral succession arising under the customary law of the Punjab, where the dispute is as regards the property of a common ancestor of the deceased and of the claimants,if the *Chandawand* rule of distribution prevails the whole-blood excludes the half-blood ; if the *Pagwand* rule prevails both succeed together. (*Abdul Raoof, J.*) RIZK RAM *v.* SANWAT. **A. I. R. 1923 Lah. 65.**

———*Succession—Chandawand and Pagwand*—Per capita *or* per stirpes—*Jats of Mauza Gurdaspur.*

The normal custom in the Punjab undoubtedly prescribes a division according to the *Pagwand* rule, and the *onus* lies heavily upon the person who relies upon the *Chandawand* rule, *i.e.*, division *per stirpes*. Not only is there a general presumption in favour of the division of property *per capita* but there are judgments relating to the Jats of Gurdaspur Tahsil in which the rule *Chandawand* was held not to be proved and the rule of *Pagwand* was followed in the matter of inheritance. *Held* also defendent failed to prove a family custom or to discharge the *onus*. (*Shadi Lal, C. J. and Abdul Qadir, J.*) SHANKAR *v.* BAHADUR. **5 L. L. J. 212 : A. I. R. 1923 Lah. 37.**

———*Succession —Chandawand or Pagwand—Jaswal Rajputs—Test.*

In deciding whether Jaswal Rajputs observe the *Pagwand* or *Chandawand* rule of succession, the safest guide is the rule which is proved to have been observed in the family of the parties. (*Le Rossignol, J.*) NANAK CHAND *v.* MUNSHI RAM. **A. I. R. 1922 Lah. 452 (1).**

Succession—Collaterals.

———*Succession—Collaterals—Succession to adopted son—Adoption deed should be construed according to circumstances of each case—Sometimes the executant's intention may only be the appointment of an heir—On appointed heir's death, daughter does not succeed in preference to collaterals when property is ancestral and the appointer as restricted power of alienation.*

In each case a deed of adoption must be construed according to its language and in the light of attendant circumstances and no hard and fast rule can be laid down on the subject. In some cases a deed of adoption may well be construed as a deed of gift while in others a gift *inter vivos* may not be contemplated, and the adoptive father's intention may simply be confined to the appointment of the adopted son as his heir, who would, as such heir, succeed to his property after his death,

On the death of an appointed heir his male issue succeeds, and in default of such issue his widow takes his estate on the usual life-interest, and if he leaves no widow the property goes to the male collaterals of the appointer if the estate consists of property over which the latter had only a restricted power. (*Scott-Smith and Fforde, JJ.*) NATHAL *v.* DHAN KAUR. **79 I. C. 115 : A. I. R. 1925 Lah. 184.**

———*Succession—Collaterals—Agnates of a land owner.*

Prima facie agnates of a deceased person are entitled to a share in his estate even though they live in another village and own no land in the village in which the land in dispute is situated. 47 P. R. 1917, Foll.

CUSTOM (PUNJAB)—Succession—Collaterals.

An entry in the *Riwaj-i-am* is a strong piece of evidence in support of the custom mentioned therein. (*Scott-Smith and Fforde, JJ.*) MT. SANT KAUR *v.* SHER SING. **4 Lah. 392 : A. I. R. 1923 Lah. 476.**

——— *Succession—Collaterals if exclude daughters.*

Among the agricultural tribes of the Sialkot District the collaterals of a sonless proprietor do not exclude daughters from succession in the case of self-acquired property. (*Scott-Smith and Zafar Ali, JJ.*) BUDHA *v.* MT. FATIMA BIBI.
4 Lah. 99 : A.I.R 1923 Lah. 401.

——— *Succession —Collaterals —Reversion—Descendants of donee alive.*

There is no reversion to the collaterals of the donor so long as the descendants of the donee, whether male or female, are existing. 100 P. R. 1917 and 82 P. R. 1918, Foll. (*Shadi Lal, C. J. and Brasher, J.*) MT. CHHOTO *v.* MT. SONA DEVI.
A. I. R. 1923 Lah. 11 (2).

——— *Succession—Collaterals—Daughter and daughter's son—*Beri *sub caste of Khatris—Hindu Law.*

Hindu Law is applicable to *Khatri Beris*, according to which the daughter and daughter's son excludes collaterals. *Held*, plaintiff's collaterals failed to prove that there was a custom among *Beris* (and specially the particular family) that the collaterals excluded daughter or her son. A single instance, however valuable, is inconclusive. (*Broadway and Harrison, JJ.*) BAL MUKAND *v.* MT. KISHEN DEVI.
A. I. R. 1923 Lah. 6.

——— *Succession—Collaterals—*Abadi.

A first cousin twice removed is a near collateral and succeeds to an *abadi* in preference to the landlords. 116 P. R. 1918 ; 106 P. R. 1919, Rel. (*Shadi Lal, C. J. and Campbell, J.*) HARJAS *v.* HARKE.
46 P. L. R. 1922 : A. I. R. 1922 Lah. 366.

——— *Succession—Collaterals — Exclusion—Collateral's daughter—Evidence of custom—*Riwaj-i-am *—Entries in—Value of—Meaning of, extent of.*

The *onus* of proving that by custom among Gaur Brahmans of Mauza Chhapri in the Thaneswar Tahsil of the Kamal District collaterals in the ninth degree excluded daughters in succession to non-ancestral property rests on those alleging the custom. Entries in the *Riwaj-i-am* opposed to all principles of customary law and unsupported by instances do not operate to shift the *onus* of proof. 5 P. R. 1908 : 86 P. R. 1908 ; 84 P. R. 1917 ; 13 P. R. 1917, Rel. The existence of entries in the *riwaj-i-am* was not a sufficient reason for depriving successive party of his cost. Near male collateral means a collateral not more remote than the 5th or 6th degree. (*Scott Smith and Abdul Qadir, JJ.*) MANOHAR *v.* NANHI.
66 I. C. 399 : 2 L. 366 : A. I. R. 1922 Lah. 320 (2).

——— *Succession—Collaterals—Janjuhas of Shadia Tahsil and District Meanwali.*

In case of collateral succession among Janjuhas of Shadia Tahsil and District Meanwali half blood is wholly excluded by the full-blood. (*Le Rossignol and Abdul Qadir, JJ.*) KHUDAYAR *v.* AMIR.
A. I. R. 1922 Lah. 169.

——— *Succession—Collaterals—Rights of.*

Among the Jats of the Punjab who have migrated to Meerut, reversioners irrespective of degree succeed equally to the last land-holder, and each branch takes its share *per stirpes*. (*Rafique and Lindsay, JJ.*) DHARAM SINGH *v.* HIRA. **44 All. 390 : 20 A. L. J. 221 : L. R. 3. A. 148 : A. I. R. 1922 All. 141.**

——— *Succession—Collaterals of fourth degree—*Onus.

Where the question is one of succession to a non-proprietor, remote collaterals are excluded and a collateral in the fourth degree has the *onus* upon him to prove that by custom he is entitled to succeed. (*Abdul Raoof and Martineau, JJ.*) SHER JANG *v.* MUNSHI RAM. **3 Lah 33 : 22 P. W. R. 1922 : A. I. R. 1922 Lah. 115 (1).**

——— *Succession—Collaterals of seventh degree—Daughters—Ancestral property—Preference—*Onus.

The burden of proof as to whether remote collaterals, such as of the sixth degree, exclude daughters, rests on the party who asserts its existence. 86 P. R. 1908, Foll. *Held*, on the evidence that among Bain Jats of Khera, Garshankar Tahsil, District Hoshiarpur, daughters can succeed to the ancestral property in the absence of collaterals of the fifth degree. Case-law discussed. (*Wilberforce and Abdul Qadir, JJ.*) MUSSAMMAT MANO *v.* BASANT SINGH.
64 I. C. 243 (2) : 3 Lah. L. J. 547.

Succession—Daughter.

Collaterals.
Exclusion of.
Married and unmarried Daughter.
Rights of.

Succession—Daughter—Collaterals.

——— *Succession—Daughter—Collaterals—Sandhu Jats of Amritsar District—Self-acquired property, succession to—Collaterals exclude daughters.*

By the custom prevailing among Sandhu Jats of the Amritsar District daughters are ousted by collaterals of the last male owner in the matter of succession to self-acquired property. (*Scott-Smith and Fforde, JJ.*) NADHAN SINGH *v.* MT. RAJO.
85 I. C. 783 : A. I. R. 1925 Lah. 556.

——— *Succession —Daughter—Collaterals—Ancestral property—Jats of Ambala District—Collaterals in sixth degree do not exclude daughters.*

Collaterals in the sixth degree do not exclude daughters amongst Jats of the Ambala district in regard to succession to ancestral property.(*Harrison and Zafar Ali, JJ.*) GANGA RAM v. MT. INDI.
6 Lah. 193 : 88 I. C 902 : A. I.R. 1925 Lah. 444.

——— *Succession—Daughter—Collaterals—Customary Law published by Government—*Onus *of proving exception is on party setting up.*

The entry in the Customary Law of the district published by Government was to the effect that "the commonly received custom for all tribes except Sayads and some Rains was to exclude the daughter wherever collaterals could be traced up to the great-great-grandfather." *Held*, that the *onus* of proof that collaterals of the sixth degree excluded the daughters in the particular tribe to which the parties belonged was on the party setting up the contention. (*Harrison and Zafar Ali, JJ.*) GANGA RAM *v.* MT. INDI.
6 Lah. 193 : 88 I. C. 902 : A. I. R. 1925 Lah. 444.

——— *Succession—Daughter — Collaterals—Arains of Hoshiarpur Dt.—Self-acquired property—Collaterals do not exclude daughters.*

Among the Arains of the Hoshiarpur District, collaterals do not exclude the daughters with respect to the self-acquired property of the propositus. (*Harrison and Campbell, JJ.*) PIR BUKSH *v.* MT. ABO.
6 Lah. 332 : 88 I. C. 71 : 26 Punj. L R. 688 : A. I. R. 1925 Lah. 306.

——— *Succession— Daughter— Collaterals—Daughters are not executed among Joshi Brahmins of Saila Kalan.*

No custom is established among Joshi Brahmans of Mauza Saila Kalan to the effect that daughters

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are excluded by collaterals in the succession to ancestral property. (*Broadway and Moti Sagar, JJ.*) ANANT RAM *v.* RAM RATTAN. **5 Lah. 547 : 85 I. C. 431 : A. I. R. 1925 Lah. 247.**

———*Succession—Daughters—Collaterals—Onus is on Reversioners beyond fifth degree, to prove that they exclude daughters, regarding ancestral property of the propositus.*

The *onus* is on the collaterals more distantly related than the fifth, or at least the seventh degree, to prove that they exclude daughters from succession even to the ancestral property of their father. Where plaintiffs were reversioners in the tenth degree. *Held*, a very heavy *onus* lay upon them to prove that they excluded the daughter. (*Scott-Smith and Harrison, JJ.*) GURDIT SINGH *v.* MT. MALAN.
5 Lah. 364 : 84 I. C. 171 : A. I. R. 1925 Lah. 35.

———*Succession—Daughter—Collaterals—Rajputs of Rohtak District—Self-acquisitions.*

Though under the customary law of the Punjab a daughter succeeds to the self-acquisitions of the father in preference to the collaterals, among the Rajputs of Rohtak District the reverse is the case. The *onus* is on the collaterals to show the general custom did not apply, but the entries in the *Riwaj-i-am* shifted the burden of proof. (*Broadway and Abdul Qadir, JJ.*) NANDOO SINGH *v.* BALJIT SINGH.
5 Lah. L. J. 203 : A. I. R. 1924 Lah. 93.

———*Succession—Daughter—Collaterals.*

A daughter excludes collaterals in the succession to self-acquired property according to the customary law of the Punjab unless a custom is proved as opposed to the customary law of the Province. (*Broadway and Abdul Qadir, JJ.*) GURDIT SINGH *v.* MT. ISHAR KAUR. **3 Lah. 257 : A.I.R. 1922 Lah. 392.**

———*Succession—Daughter—Collaterals of sixth degree exclude daughters.*

Collaterals of sixth degree exclude daughters from succession among the Hindu Jats of Ludhiana Dt. In the case of collaterals remoter than the fifth degree the initial burden of proof is on them to show that they exclude the daughter. The more remote the collateral heavier is the *onus*. 86 P. R. 1908 ; 41 P. R. 1914, Rel. An entry in the *riwaj-i-am* that collaterals of the sixth degree succeed in preference to daughters shifts the *onus*. 45 P. R. 1917, Foll. (*Scott-Smith and Broadway, JJ.*) MT. DHAN KAUR *v.* SUNDER.
3 Lah. 184 : A. I. R. 1922 Lah. 387.

———*Succession—Daughters—Collaterals.*

According to the general custom in Punjab daughters are usually preferred to collaterals so distantly related as the 6th degree even in regard to ancestral property ; while in the case of self-acquired property daughters usually exclude even nearer collaterals. It is quite opposed to all the principles of customary law that collaterals so distantly related as the 9th degree should exclude daughters in the case of property which is non-ancestral and therefore the mere entry in the *riwaj-i-am* unsupported by instances that daughters can in no circumstances inherit their father's property, is of very little weight and it is quite insufficient to shift the *onus* on to the daughters. (*Scott-Smith and Abdul Qadir, JJ.*) MANOHAR *v.* NANHI. **66 I.C. 399 : 2 L. 366: A. I. R. 1922 Lah. 320 (2).**

———*Succession—Daughter—Collaterals Self-acquired property—Jats of Lahore District.*

Among *Jats* of the Lahore District a daughter succeeds to the non-ancestral property of her father in preference to collaterals of the sixth degree. (*Chevis and Scott-Smith, JJ.*) BUTA SINGH *v.* SEWAN.
3 L.L. J. 458 : 61 I. C. 388 : 3 U. P. L. R. (Lah.) 51.

CUSTOM (PUNJAB)—Succession—Daughter—Rights of.

———*Succession—Daughter—Collaterals in 7th degree—Birk Jats of Phillore Tahsil.*

Collaterals in the 7th degree must prove a custom among Birk Jats of the Phillore Tahsil excluding the daughters from succession to ancestral property where the *riwaj-i-am* was against them. (*Chevis and Dundas, JJ.*) BHOLA SINGH *v.* BABU
1 Lah. 464 : 59 I. C. 503 : 2 L. L. J. 431.

Succession—Daughter—Exclusion of.

———*Succession—Daughter—Exclusion of—Among Jats, daughter loses right of succession to father by marrying in another family.*

A daughter who has married outside her own family loses whatever right she might have had to succeed to her father's estate 104 P. R. 1914, Dist.; 25 P. R. 1895, Foll. (*Martineau and Moti Sagar, JJ.*) ALLAH WASAYA *v.* MT. ZAHRAN. **5 Lah. 535 : 85 I. C. 436: A. I. R. 1925 Lah 258 (2).**

———*Succession—Daughter Exclusion of, by collaterals—Kalwan Jats.*

According to the custom obtaining among Kalwan Jats of Mauza Wazirpur, Sialkot District, a collateral of the 6th degree does not exclude a daughter in her succession to her father's ancestral property. (*Moti Sagar, J.*) MT. JIWAN *v.* WADHAWA.
A. I. R. 1924 Lah. 537.

———*Succession—Daughters—Exclusion of Joshi Brahmans of Hoshiarpur.*

There is no custom among the Joshi Brahmans of Hoshiarpur District, under which the widow and daughter of a predeceased son are entitled to succeed in preference to the daughters of the deceased. (*Martineau and Zafar Ali, JJ.*) MT. BAL KUAR *v.* DEOKI.
4 Lah. 236 : 6 Lah. L. J. 69: 75 I. C. 109 : A. I. R. 1923 Lah. 579.

Succession—Daughter—Married and unmarried Daughter.

———*Succession—Daughter Married daughters—Non-ancestral property—Among* Sayyads *of Shahpur collaterals exclude married daughters.*

Married daughters of Sayyads in Shahpur do not succeed to the immoveable property of their father in the presence of collaterals, even though the common ancestor did not hold possession of the land. (*Le Rossignol and Fforde, JJ.*) JAWAYA SHAH *v.* MT. FATIMA. **6 Lah. 356: 7 Lah.L.J. 295 : A.I.R. 1925 Lah. 482.**

Succession—Daughter—Rights of.

———*Succession—Daughter—Rights of—Representation of father's claim by child—Evidence—Similar instances need not refer to particular relation in question.*

If there be a rule of custom that entitled an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anamolous and arbitrary to withhold from a brother's daughter the same right though there may be no instance proved in which the brother's daughter represented her father for purposes of inheritance. (*Sir Lawrence Jenkins*). HASHMAT ALI *v.* MT. NARSIB-UL-NISSA.
52 I. A. 172 : 6 Lah 117 : 26 Punj. L. R. 192 : 88 I. C. 114 : A. I. R 1925P. C. 99 (P. C.)

———*Succession—Daughter—Rights of—Brother—Preference.*

Under the Customary Law prevailing among the agriculturists of the Punjab the daughter takes the self-acquired property of a deceased in preference to the brother. (*Chevis and Harrison, JJ.*) WAZIRI MAL *v.* GANGA RAM. **A. I. R. 1924 Lah. 370.**

CUSTOM (PUNJAB)—Succession—Daughter—Rights of.

———*Succession—Daughters—Rights of—Shaikh converts from Bahal Khatris.*

Among sheikhs who are converts from Bahal Khatris sons exclude daughters from succeeding to their father's estate. Sons exclude daughters from succession to their maternal estates. Brothers exclude sisters from succession to a childless brother's estate. (*Broadway and Campbell, JJ.*) NAJM-UD DIN *v.* ABDUL HAMID. **A. I. R. 1923 Lah. 175.**

Succession—Daughter—Rights of—Salar Sayads of District Rohtak.

In matters of succession, the Sayads do not strictly follow Mahomedan Law but are governed by family custom and in the absence of a son, a daughter succeeds just as if she were a son, and takes the share which her father could have taken. (*Scott-Smith and Wilberforce, JJ.*) AHMED UL-NISSA *v.* NASIB-UL NISSA. **62 I. C. 740 : 62 P. W. R. 1929.**

Succession—Escheat.

———*Succession—Escheat—Superior and inferior holder*—Ala *and* Adna Maliks.

In the case of the *Ala Malik* of Mauza Shalna in the Ludhiana Tahsil of the same district *held* that on the death of an *Adna Malik*, who has died heirless, the land held by him does not revert to the *Ala Malik* free of all encumbrances created by the former, if any. (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN. **A. I. R. 1923 Lah. 626.**

———*Succession—Escheat—Reversion on death of donee.*

The rule of reversion to the donor's line on death of the donee without lineal heirs under customary law is not applicable where the donee is a stranger to the donor. (*Martineau and Abdul Qadir, JJ.*) MULA SINGH *v.* AMIR CHAND. **2 Lah. 284—64 I C 161.**

Succession on Females.

Succession—Females—Sikh Jats—Paternal uncle and grand mother

Under the customary law, among the Sikh jats of Lahore District, a paternal uncle has priority over the grandmother for purposes of inheritance.(*Abdul Raoof and Campbell, JJ.*) MT TABI *v.* SAUDAGAR SINGH. **78 I. C. 932 : A. I. R 1924 Lah. 698.**

——— *Succession—Females—Brother's daughter—Sister—Rights of descendants.*

On a consideration of entire evidence it was held that plffs. have failed to prove a custom among Lanin, Rajputs of Tahsil Nurpur District Kangra, that a brother's daughter and a sister and their descendants have a right of succession in the absence of all male collaterals. (*Shadi Lal, C. J. and Le Rossignol, J.*) DALIPA *v.* DALLU. **4 Lah. L J. 336.**

Succession—Females—Sayads of Khakhanda—Rhotak *District—Females—Right of representation.*

Though generally the Saiyads of Khakhanda, *Rhohak* Dt. have for a long time followed custom in matters of succession they have recognised widely the right of females in accordance with their personal Law 60 P. R. 1878 ; 82 P. R. 1887 ; 173 P R 1889 : 46 P. R. 1890 ; 14. P. R. 1893 ; 120 P. R. 1909 : 143 P. W. R. 1910, Foll. Both under the Hindu Law and custom the whole estate of the last male owner vests in his widow and the husband's life is assumed to continue in her person. Succession to the husband opens at the date of the widow's death. Among Saiyads of Khakhanda the right of representation exists in favour of females, at any rate in the absence of near male heirs. 82 P.R. 1887 ; 143 P. W. R. 1910 ; 120 P. W. R. 1909, Foll. A daughter who succeeds by right of representation has in every way the right of a male including the right to contest alienations made by the widow. 135 P. R. 1908, Foll. (*Wilberforce and Martineau, J.*) MT. NASIB-UN-NISSA *v.* MUSSAMMAT AHMADI UN-NISSA. **66 I. C. 494 (2) : 2 Lah. 383.**

Succession—Females—Vighmal Khojas *of Shahdara.*

There is no initial presumption that a family belonging to a non-agricultural tribe, is governed by custom. Among *Vighmal Khojas* of Shahdara, females are excluded from succession by custom. (*Le Rossignol and Abdul Raoof, JJ.*) UMDA BEGAM *v.* ZAIB UL-NISA. **3 L. L. J. 91 : 59 I. C. 694 : 29 P. W. R. 1921.**

Succession—Half and Full Blood.

———*Succession—Half or full blood—Awans of Manza Nammal, Mianwali Dt.—Murderer if entitled to succeed to property as heir.*

In the case of collateral succession in a contest among the whole blood and the half blood, the Court may presume until the contrary is proved, that when the property of the common ancestor was distributed *per capita* (*pagvand*) the whole blood and half blood succeed together but where brothers of the whole blood subsequently form separate groups and so regulate succession among themselves as to alter the original rule of distribution, the presumption will cease to operate. *Held* that the presumption had not been rebutted among the Awans of Nammal, Mianwali Dt. It is contrary to public policy to allow a murderer to derive from his crime the benefit of succeeding to the property of his victim or to allow a murderer to oust a mere distant heir from possession of property to which his victim, if alive, would have succeeded 74 P. R. 1900 ; 3 Lah. 103 ; 3 Lah. 242, Ref. (*Abdul Raoof and Campbell, JJ.*) SHER KHAN *v.* MUHAMMAD KHAN. **5 Lah. 117 : A. I. R. 1924 Lah. 505.**

———*Succession—Half and full blood—Jats.*

Among Jats of Shadia full brothers exclude half brothers by custom. (*Le Rossignol and Abdul Qadir, JJ.*) KHUDAYAR *v.* AMIR. **A. I. R. 1922 Lah. 169.**

Succession on—Immoveable Property.

———*Succession—Immoveable property.*

In the villages in which the *adna maliks* are the real proprietors and the *ala malik* is merely a talukdar receiving a certain percentage on the revenue, the latter does not succeed to the *adna malkiat* when the *adna malik's* line becomes extinct, when there is no provision to that effect in *wajib-ul arz* or any other evidence to prove such a custom. (*Martineau and Moti Sagar, JJ.*) KHURSHAID ALAM *v.* PHANGU. **5 Lah. 382 : 79 I. C. 91 : A.I.R. 1925 Lah. 34.**

Succession on—Law Governing.

———*Succession—Law governing — Julahas of Ichhra near Lahore are not governed by agricultural custom.*

Mere ownership of land with a share in the shamilat since a generation before the 1856 settlement and the living partly by agriculture and partly by other means does not establish a presumption in favour of the Julahas of Ichhra near Lahore that they follow agricultural custom in the matter of succession. (*Campbell, J.*) KARAM DIN *v.* MEHR DIN. **7 L. L. J. 185: 90 I. C. 161 : 26 Punj. L. R. 512 : A. I. R. 1925 Lah. 409.**

———*Succession—Law governing—Pathans of village Kutal, Karnal district—Value of Government notification including a tribe as agricultural.*

CUSTOM (PUNJAB)—Succession—Law governing.

In matters of inheritance, Pathans of the village of Kutal in the Tashil and district of Karnal are governed by Mahomadan law and not by custom. A notification by Government that a particular tribe is an agricultural tribe does not raise any presumption that it is governed by custom and not by personal law. 16 P. R. 1905, Folld. (*Zafar Ali, J.*) KHAN MOHAMAD KHAN *v.* MT. NURJAHAN BEGAM. **6 Lah. L. J. 340 : 82 I C. 609 : A. I. R. 1924 Lah. 731.**

———*Succession—Law governing—Partly Muhammadan Law and partly Custom.*

Although an heir may get inheritance according to Muhammadan Law his estate may be governed by custom. (*Martineau, J.*) RASUL KHAN *v.* MT. HAWASI. **A. I. R. 1923 Lah. 284 (2).**

———*Succession—Law governing—Kassabs of Dera Babi Nanak in Gurdaspur District Adoption.*

Kassabs of Dera Baba Nanak in Gurdaspur District follow Mahomedan Law and not custom in matters of succession, and no custom of adoption is recognised in the Kassab tribe. (*Martineau and Campbell, JJ.*) BARKAT ALI KHAN *v.* MUSSAMMAT KARAM BIBI. **A. I. R. 1923 Lah. 225.**

———*Succession—Law governing—Zargars of Batala.*

The Zargars of Batala are non-agriculturists and *prima facie* they would follow Mahomedan and not agricultural custom The *onus* is on the party who wants to set up succession by custom to show it. (*Broadway and Abdul Qadir, JJ.*) ABDUL KARIM *v.* MT. AMAT UL-HABIB. **3 Lah. 397 : A. I. R. 1923 Lah. 121.**

———*Succession—Law governing—Jats of Raowal—Son and daughter-in-law—Entry in* Riwaj-i-am—Onus *of proof.*

Where the entry in the Riwaj-i-am showed that among the Jats of Raowal in Tahsil Jagraon in the Ludhiana District a daughter-in law succeeded along with a son, *held*, it was sufficient to throw the *onus* of proof on the son, if he wants to prove the daughter-in-law is excluded. (*Broadway and Martineau, JJ.*) JAGIR SINGH *v.* MT. SANTI. **3 Lah. 181 : A I. R. 1922 Lah. 389.**

———*Succession—Law governing—Murderer and his son if excluded—Public policy.*

Where a person has been murdered with the sole object of securing his property, the murderer along with his son is excluded from inheriting the property of the deceased, in spite of the fact that the property is ancestral property, as their succession would be opposed to public policy. The murderer's right in such a case is swept away and with it is carried away the right of every one who claims through and not merely from him. In such a case the vesting of the succession is not prevented but what was vested in accordance with the law is wrested away on the grounds of justice and equity. 41 P. R. 1906; 27 Mad. 591, 600; 18 P. R. 1908 (F. B.) Dist. (*Broadway and Martineau, JJ.*) MT. JIND KUAR *v.* INDAR SINGH. **3 Lah. 103 : 23 P. W. R. 1922 : A. I. R. 1922 Lah. 293.**

———*Succession—Law governing—Koreshis of Taragarh*—Onus *of proof.*

Where Koreshis of Taragarh claimed to be governed in matters of inheritance by the general custom of Punjab agriculturists and not by Mahomedan Law, the onus of proof is upon them to establish it. (*Abdul Raoof and Campbell, JJ.*) NUR HASAN *v.* GHULAM ZOHRA. **3 Lah. 274 : A. I. R. 1922 Lah. 222.**

———*Succession—Law governing—Awans of Tauns.*

CUSTOM (PUNJAB)—Succession—Sister.

The deceased having belonged to a mercantile community and a resident of town the presumption is that he though possessed of some ancestral landed estate was governed by his personal law in the matter of alienation law. The burden of proving the existence of custom overridings personal law lies on the plff. (*Shadi Lal and Wilberforce, JJ.*) ASANAND *v.* MT. ROSANI RAI. **68 I. C. 92 : 2 L. L. J. 178.**

———*Succession—Law governing—Hindu Sikh—Marriage with a Muslim convert to Sikhism—Legitimacy of issues Subsequent denial of.*

Where a Sikh land owner obtains the consent of his collaterals before contracting a chadar andazi in accordance with Hindu doctrines with an Arain convert to Sikhism and the issue of such union is recognised as legitimate by all the near collaterals they cannot deny his legitimacy on the death of the landowner, when the question of succession arises. (*Jones and Broadway, JJ.*) LACHHMAN SINGH *v.* PARTAP SINGH. **67 I. C. 937 : 3 L. L. J. 366.**

Succession—Mother.

———*Succession—Mother Stepmother—Rights of, as against sons* Riwaj-i-am—*Burden of Proof.*

On a question of custom as regards succession among Gujars of the Jeelam District the entry in the *Riwaj-i-am* was to the effect that a step mother would succeed equally with a son. *Held*, that the burden lay upon the son to prove that this was not the custom and that he had not discharged the *onus*. It lies upon the plaintiff to dislodge the presumption arising in favour of such a custom by citing instances to the contrary. (*Abdul Raoof and Moti Sagar, JJ.*) MAULA BUX *v.* MT. TILLO. **5 Lah. 274 : A. I. R. 1924 Lah. 556.**

———*Succession—Mother—Aroras of Montgomery District—Presumption.*

There is no agricultural custom among the Aroras of Montgomery District by which a step mother succeeds to her step-son. The fact that the tribe to which the parties belong have in many matters adopted agricultural custom is no doubt a fact to be considered in deciding whether or not the said tribe have adopted the particular custom set up by the plaintiff. But the fact by itself does not afford basis for the deduction that in the said tribe a custom exists by which a step mother succeeds to her step son (*Broadway and Zafar Ali, JJ.*) MT. DIYAN *v.* HIRA NAND. **4 Lah. 202 : A. I. R. 1923 Lah. 448.**

Succession—Sister.

———*Succession—Sister—Contest between sisters and cousins*—Onus.

Where the contest is between the sisters of the deceased landowner on the one hand and the uncle and cousins on the other, the *onus* lies on the sisters to prove that they have a better claim to succeed to the property in dispute than the uncle or cousins. (*Scott-Smith and Fforde, JJ.*) MT. SANT KUAR *v.* SHER SINGH. **4 Lah. 392 : A. I. R. 1923 Lah. 476.**

———*Succession—Sister—Collaterals—Competition—Preference—Khots of Pind Dadan Khan, Jhelum District.*

As between collaterals of the eighth degree and sisters the burden of proving that the sister has a preferential right is on her especially when the entry in the *Rawaj-i-am* is against their contention. So held in a case of succession to non-ancestral property among the Khots of Tahsil Pind Dadan Khan, Jhelum District. (*Abdul Raoof and Abdul Qadir, JJ.*) HAYAT *v.* AHMUN. **A. I. R. 1924 Lah. 321.**

CUSTOM (PUNJAB)—Succession—Sister.

——— *Succession—Sister—Khattars of Attock District.*

The sister of a childless male owner among the Khattars of Attock District is entitled to succeed to his non-ancestral property in preference to the collaterals of her father. (*Abdul Raoof and Abdul Qadir, JJ.*) MT. CHANDI BIBI *v.* AHMAD KHAN.
A. I. R. 1924 Lah. 265.

——— *Succession—Sisters—Collaterals.*

The position of females generally, as has been established in many decisions, is very much stronger in the Western Punjab than elsewhere. According to the Customary Law of the Muzaffargarh District a sister or sister's son of a deceased Jat excludes his collaterals of the third degree in the matter of succession to the estate. (*Harrison, J.*) KADIR BAKHSH *v.* ALLAH DITTA. **A. I. R. 1924 Lah. 232.**

——— *Succession—Sister—Makwal Jats of Isanmahar, Muzaffargarh District.*

All the tribes of the Muzaffargarh District recognise that on a man dying without male lineal descendant and leaving neither widow nor daughters nor daughter's sons the property passes to his (1) father, (2) brothers or their descendants, and (3) sisters, or their descendants. The position of a sister, therefore, in this District in matters of succession is a strong one. (*Broadway, J.*) HAYAT *v.* ALI MAHOMED.
A. I. R. 1924 Lah. 195.

——— *Succession—Sister.*

In case of succession, the sisters have right to inherit in the absence of collaterals. (*Scott-Smith and Harrison, JJ.*) AHMAD *v.* MT. BANO. **3 Lah. 40 : A. I. R. 1922 Lah. 114.**

——— *Succession—Sister—Mahomedan Jats of Jhelum District.*

Among Mahomadan *Jats* of Jhelum District there is no custom of succession to the acquired property of the last male holder when the contest is between sisters and collaterals of the ninth degree. (*Le Rossignol and Wilberforce, JJ.*) FATIMA BIBI *v.* SHAH NAWAZ. **2 Lah. 98 : 60 I. C. 509 : 3 Lah. L. J. 152.**

Succession—Son.

——— *Succession—Son—Grandson of first cousin.*

The grandson of a first cousin has no right to succeed under the Customary Law of the Punjab. (*Chevis, J.*) SHER DIL *v.* GULAB.
A. I. R. 1922 Lah. 471.

——— *Succession—Son of appointed heir.*

The son of an appointed heir who predeceased the appointer cannot succeed to the appointer's property in the absence of a special custom to that effect. (*Shadi Lal, C. J., Scott-Smith and Harrison, JJ.*) MELA SINGH *v.* GURDAS.
3 Lah. 362 : A. I. R. 1922 Lah. 433 (F. B.)

——— *Succession—Son—Adopted son—Rights of.*

Where the adoption is complete, the right of adopted son to inherit to collaterals is presumed. (*Abdur Raoof, J.*) WARYAMAN *v.* KAUSHI RAM.
3 Lah. 17 : A. I. R. 1922 Lah. 105.

Succession—Special custom.

——— Succession—Special custom—Aroras of town of Kasur—Daughter-in-law does not exclude reversioners. (*Martineau and Campbell, JJ.*) GOKAL CHAND *v.* MT. NIHAL DEVI. **87 I. C. 3 : A. I. R. 1925 Lah. 593.**

CUSTOM (PUNJAB)—Succession—Widow.

——— *Succession—Special custom—Sonless proprietor—Appointment of heir.*

According to the customary law, a sonless proprietor has the power to appoint one of his kinsmen to succeed him as his heir. The appointment in order to be valid must be made in some unequivocaland customary manner and the execution of a deed coupled with a long course of treatment has always been recognised as one of the modes of manifesting such an appointment. 9 P. R. 1893 ; 4 P. R. 1892 ; 94 P. R. 1893 ; 3 P. R. 1901, and 40 P. R. 1905, Foll. (*Broadway and Moti Sagar, JJ.*) BAJ SINGH *v.* PARTAB SINGH.
A. I. R. 1923 Lah. 497 (2.)

——— *Succession — Special custom—Qureshis of Multan.*

Plaintiffs asserted a special custom according to which daughters in the family of the parties did not in the presence of the sons, succeed to the agricultural land, although, as regards suburban immoveable property, they took their share according to Mahomedan Law. The evidence on record did not show that a daughter or widow claimed her share but was refused. *Held*, that the special custom was not proved. *See* MAH. LAW JUSTICE AND PARTIES. (*Le Rossignol and Zafar Ali, JJ.*) MT. HAZRA BIBI *v.* MT. JANAT BIBI. **4 Lah. 85 : A. I. R. 1923 Lah. 184.**

Succession—Widow.

——— *Succession — Widows succeed jointly—Unchastity therefore does not affect succession on death of one.*

Widows of a childless male proprietor succeed as joint tenants and on the death of one the other merely absorbs her share by virtue of her survivorship. There is no succession in such cases and the question of the unchastity of the surviving widow does not arise. (*Le Rossignal and Harrison, JJ.*) MT. BHOTI *v.* RIJHU.
5 Lah. 237 : 81 I. C. 568 : 6 Lah. L. J. 546 : A. I. R. 1924 Lah. 584.

——— *Succession—Widow can succeed collaterally in the district of Lahore.*

In the district of Lahore the widows among all tribes do possess the right of succeeding collaterally. 68 P. R. 1912. Foll. (*Abdul Raoof, J.*) MAKHAN SINGH *v.* KISHEN SINGH.
A. I. R. 1924 Lah. 213 (2).

——— *Succession Widows Sodhis Rights of widows.*

Custom does not prevail among the Sodhis of Anandpur whereby widows get no rights of inheritance but can only get maintenance. (*Abdul Raoof and Campbell, JJ.*) RAM NARAIN *v* MT. HAR NARINJAN KUAR. **4 Lah. 297 : A. I. R. 1924 Lah. 116.**

——— *Succession— Widow — Nature of estate—Rights of reversioner.*

A widow succeeding to a limited interest in her husband's estate is treated equally as a widow holding a limited estate under the Hindu Law. In either case, the next heir has a right to protect the inheritance by challenging unauthorised alienations made by her. 135 P. R. 1908, Foll. (*Shadi Lal, C. J. and Le Rossignol, J.*) DALIPA *v.* DALU. **4 Lah. L. J. 336.**

——— *Succession—Widow—Widow by remarriage in the same family does not forfeit her rights in deceased husband's estate — Hindu Widows Remarriage Act applies to Sikh Jats in the Punjab.*

Among the Sikh Jats in the Punjab a widow does not forfeit her life estate in her deceased husband's property by reason of her remarriage in Rarewa form with her husband's brother whether he be the sole

CUSTOM (PUNJAB)—Village Community.

surviving brother or there are other brothers, as well of the deceased. The custom would appear to be founded on the just and equitable notion that by the marriage with the deceased husband's brother a widow still continues to be a member of the same family. She is considered to have done the right and proper thing in a community where the notion of polyandry prevails and the widow is theoretically recognised not only as the wife of her deceased husband but as the wife of all his brothers (86 P. R. 1901. Ref.) Widow marriage was recognised by custom in the Jat community before Act XV of 1856 (Hindu Widows Remarriage Act, and the custom was also prevalent in this community before this Act that the widow by marrying the brother of her deceased husband did not forfeit her right to the estate she inherited from the latter and provisions of Act XV of 1856 could not be taken to override this custom by virtue of S.7 of the Act IV of 1872 (Punjab Laws Act,) (*Kennedy, J. C. and Raymond, A. J. C.*) SANT SINGH *v.* RARIBAI. **17 S. L. R. 206 : A. I. R. 1924 Sindh 17.**

Village Community.

——*Village* abadi—Thakia—*Cannot be converted into a mosque.*

Where a *thakia* is used by all the sections of the community and is not a mosque. a small section of the community have no right to appropriate it entirely. Others have a right to object to such appropriation. A *thakia* cannot be converted into a mosque as it is likely to deprive a considerable section of the community of its use for which it is converted. (*Dundas, J.*) MAULA BAKSH *v.* DASONDHI. **3 Lah. L. J. 17.**

——*Village custom is irrelevant for town custom.*

Evidence of custom in villages is of no use when custom in a town is in question. (*Martineau and Campbell, JJ.*) GOKAL CHAND *v.* MT. NIHAL DEVI. **87 I. C. 3 : A. I. R. 1925 Lah. 593.**

——*Village community—Applicability of agricultural custom.*

One of the most important tests to be applied in determining whether a particular caste is oris not governed by agricultural custom is to ascertain whether or not they form a compact village community or, at least a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. This presumption in favour of custom has been applied even in cases of Brahmins, and must be still stronger when applied to a tribe whose religious and social status is much inferior. Where the caste concerned forms a compact section of the village community there is a strong presumption in favour of custom. (*Scott-Smith and Fforde, JJ,*) PREM SINGH *v.* DARBARA SINGH. **A. I. R. 1923 Lah. 557.**

Widow.

——*Widow of co-sharer can claim partition—Party denying the right should prove special custom.*

A widow of a deceased co-sharer in a joint holding hasa statutory right to demand partition and, although a suit for a declaration that she is not so entitled is competent in a Civil Court, the plaintiff can only succeed by proving a custom by which widows are restrained from claiming partition, and no consideration of desirability or undesirability should have any weight with the Court. 70 P. R. 1912, Foll; 4 P. R. (Rev.) 1917, and 219 P. L. R. 1913, Diss. (*Scott-Smith and Fforde, JJ.*) AMIR HAMZA *v.* MT. MURAD BIB I. **6 Lah. 196 : A. I. R. 1925 Lah. 458.**

CYPRES.

——*Widow holding land in her name takes for maintenance only.*

Widow step mother holding portion of husband's land in her name during lifetime of her step son who holds the other portion should be considered as holding in lieu of maintenance. (*Abdul Raoof and Abdul, Qadir, JJ.*) MT. CHANNI BIBI *v.* AHMAD KHAN. **A. I. R 1924 Lah. 265.**

——*Widow—Right of partition—Burden of proof.*

A widow of a deceased co-sharer has a statutory right to demand partition and the *onus* lies on the party who disputes such right to prove that it does not exist. (*Martineau and Moti Sagar, JJ.*) GHANSHAM *v.* RAMJI LAL. **4 Lah 344 : 5 Lah. L. J. 444 : A. I. R. 1923 Lah. 625.**

——*Widow—Re-marriage — Manjh Rajputs—Offspring, whether illegitimate.*

The custom among Manjh Rajputs of the Jagraod Tahsil, prohibiting re-marriage of widows being opposed to natural justice, equity, and public policy cannot be upheld and the offspring be ng otherwise legitimate are entitled to inherit their father's property. (*Le-Rossignol aud Harrison, JJ.*) MAULA BAKSH *v.* FATEH JANG. **A. I. R. 1922 Lah. 358 (1).**

——*Widow—Acts affecting estate—Reversioners, if bound.*

Any act of a widow prejudicing the estate will not bind the reversioners except for the life of the widow. They need not contest the acts during her lifetime. The creation of occupancy rights being an alienation can be challenged by the heirs in accordance with the well recognised principles of customary law. (*Scott-Smith and Dundas, JJ.*) NAND SINGH *v.* MT. DHAN KAUR. **68 I. C. 299 : 2 Lah. L. J. 573.**

——*Widow—Re-marriage—Ahirs.*

The re-marriage of a widow is allowed by custom among 'Ahirs.' (*Kanhaiya Lal A. J. C.*) NARPAT *v.* JANAKA. **61 I. C. 303 : 24 O. C. 11.**

——*Widow—Gift by.*

A widow cannot, in the absence of a custom to the contrary, make a gift of land at all. She can ordinarily alienate only for necessity. (*Martineau, J.*) NIZAM DIN *v.* SHADI. **59 I. C. 580 : 3 Lah. L. J. 172.**

CUSTOMARY EASEMENT—*See* EASEMENTS.

CUTCHI MEMONS—*See also* KHOJAS AND KUTCHI-MEMONS.

——*Joint family—Hindu Law of joint family does not apply—Hindu Law—Applicability.*

Cutchi Menons have never adopted as part of their customary law the Hindu Law of joint family or the distinction existing in that law between ancestral family, joint family and ancestral property they are subject by custom to the Hindu Law of succession and inheritance only. The presumption of Hindu Law that the money came from joint funds is not applicable to Muhammadans There is no such thing as joint family property under the Muhammadan Law. (*Raymond, A. J. C.*) YUSIF MAHOMED *v.* ABU-BACKER IBRAHIM. **78 I. C. 817 : A. I. R. 1925 Sind 26.**

CYPRES—*See also.*

(1) C. P. CODE. S. 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) MAHOMMEDAN LAW—WAQF.

——*Surplus income remaining after satisfying prescribed objects of trust—Author of trust consenting to extension of objects of trust—Court can extend the objects on cy-pres principle.*

CYPRES.

Where after satisfying the prescribed objects of a certain public charitable trust there remained a surplus income of the charitable fund which it was impracticable to apply to the prescribed objects of the fund, and where the author of the trust consented to the extension of the objects of the trust, *Held*, that the Court had power to apply the surplus to such purposes (other than the prescribed objects of the trust) as it might deem proper upon *cypres* principle. *Chamberlayne* v. *Brockett*, (1872) L.R. 8 Ch. App. 211, Foll. (*C. C. Ghose, J.*) ADVOCATE GENERAL OF BENGAL *v.* S. WERB-JOHNSON. **52 Cal. 508 : 29 C. W N 793 : A. I. R. 1925 Cal. 797.**

CYPRES.

———*Applicability of doctrine.*

Where there is vagueness and uncertainty in a charitable bequest the doctrine of cypres should be extended as much as possible. (*Abaul Raoof and Campbell, JJ.*) SUNDAR LAL *v.* KULLU RAM. **65 I. C. 820. (Lah.).**

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